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OUTSOURCING AND COOPERATION WITH THIRD COUNTRIES:

DECONSTRUCTING THE FORMAL AND THE INFORMAL IN MIGRATION AND ASYLUM POLICIES

Edited by

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THE CASE-LAW OF THE EU COURT OF JUSTICE ON THE 2016 EU-TURKEY STATEMENT

ANNA LIGUORI[1]

1. Introduction

On 18 March 2016, at the conclusion of a summit of the Heads of State and Government of the European Union, an EU-Turkey *Statement* was made public in a press release from the Council of the European Union[2].

This *Statement*, the legal nature of which is controversial[3] and for this reason will also be referred to here as *agreement/deal*, was welcomed with emphasis in the subsequent Communication from the Commission on the creation of a new partnership framework with third countries in the context of the European Agenda on Migration[4] – as it would establish "new ways to bring order to migratory flows and save lives" and would set up a "model" to follow for cooperation with other third countries; however, it marks a dangerous acceleration of the European Union towards externalization of border controls[5] in violation of refugees' and migrants' human rights.

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[2] *EU-Turkey Statement*, Council of the European Union, Press Release 144/16, 18 March 2016, <www.consilium.europa.eu>(10/21).

[3] See ultra para 2.3 and literature quoted therein.

[4] COM (2016) 385 of 7 June 2016.

[5] See, *ex multis,* T. Gammeltoft-Hansen, J. Vedsted-Hansen (eds.), *Human Rights and the Dark Side of Globalisation*, Routledge, London and New York, 2017 and with respect to Europe in particular: T. Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control*, Cambridge University Press, Cambridge, 2011; M. Den Heijer, *Europe and Extraterritorial Asylum*, Hart Publishing, Oxford, 2012; V. Moreno-Lax, *Accessing Asylum Europe: Extraterritorial Border Controls and Refugee Rights Under EU Law*, Oxford University Press, Oxford, 2017; A. Liguori, *Migration Law and the Externalization of Border Controls. European State Responsibility,* Routledge, London, and New York, 2019.

The idea of outsourcing border controls is not really new: over the last few decades, many States, in different parts of the world[6], have been implementing various strategies to externalize border controls. However, what is particularly worrying in the current European debate is the intensification of this practice by multiple arrangements with unsafe third countries, exposing migrants and asylum seekers to human rights violations.

The new approach, inaugurated by what is known as the EU-Turkey deal, was presented as strategic for solving the "refugee crisis" which began in 2015. In reality, as pointed out, "the refugee crisis is first and foremost, a policy crisis"[7]. Indeed, the crisis exploded not because of the number of people reaching Europe, but because of the incapability of the EU to handle this crisis in an effective and integrated manner. In fact, with respect to the solutions concerning the 'internal dimension ' envisaged by the Agenda on Migration (COM (2015) 240 final[8], the

[6] With respect to US management of migration flows, it has varied between *refoulement* (endorsed by the Supreme Court in the *Sale* judgment) and prescreening in the Naval Base of Guantanamo, in Jamaica, and Turks and Caicos, violating human rights for conditions of detention and giving rise to difficulties in accessing fair procedures and the risk of *refoulement* to unsafe countries. See, *ex multis*, H. Koh, "The 'Haiti Paradigm' in United States Human Rights Policy", *Yale Law Journal*, Vol. 103, N. 8, 1994, p. 2391 ff.; S. Legomsky, "The USA and the Caribbean Interdiction Program", *International Journal of Refugee Law*, Vol. 18, N. 3–4, 2006, p. 680. With respect to Australia see A. Hirsch, "The Borders Beyond the Border: Australia's Extraterritorial Migration Controls", *Refugee Survey Quarterly*, Vol. 36, N. 3, 2017, p. 36 ff. On the influence of the Australian practice on Europe, see, in particular, J. McAdam, "Migrating Laws? The 'Plagiaristic Dialogue' between Europe and Australia", in H. Lambert et al. (eds.), *The Global Reach of European Refugee Law*, Cambridge University Press, Cambridge, 2013, p. 25 ff.

[7] M. Den Heijer, J. Rijpma, T. Spijkerboer, "Coercion, prohibition and high expectations: the continuation failure of the common European asylum system ", *Common Market Law Review*, 2016, p. 607 ff.

[8] G. Caggiano, "Alla ricerca di un nuovo equilibrio istituzionale per la gestione degli esodi di massa: dinamiche intergovernative, condivisione delle responsabilità fra gli Stati membri e tutela dei diritti degli individui", *Studi sull'integrazione europea*, 2015, p. 459 ff.; G. Morgese, "Recenti iniziative dell'Unione europea per affrontare la crisi dei rifugiati", *Diritto immigrazione e cittadinanza*, 2015, p. 15 ff.; G. Campesi, "Seeking Asylum in Times of Crisis: Reception, Confinement, and Detention at Europe's Southern Border", *Refugee Survey Quarterly*, 2018, p. 44 ff.

final result was rather to strengthen those elements of European law and politics which had provoked the crisis in the first place, namely "coercion towards asylum seekers, prohibition of travelling from third countries to the European Union and unrealistic expectations of what border controls can achieve"[9]. As a result, the measures adopted have proved ineffective and even counterproductive.

As for the 'external dimension', the approach was more 'effective' (with respect to the aim pursued, i.e., stemming the flow of migrants), but at a high cost in terms of respect for human rights and credibility for the European Union.

The present Paper, after analysing the EU- Turkey *Statement* of 18 March 2016, will examine an application based on the shortcomings arising from the abovementioned deal, both from human rights and EU constitutional standpoints, focussing on the orders handed down by the General Court and the Court of Justice of the European Union, respectively on 28 February 2017 and 12 September 2018.

2. The EU-Turkey Statement

The deal was made public via a press release of 18 March 2016[10] under the title "EU-Turkey Statement" which, after recalling the commitments of the Action Plan of November 2015[11] and the statement of 7 March 2016,[12] states as follows:

[9] M. Den Heijer, J Rijpma, T. Spijkerboer," Coercion, prohibition, and great expectations", cit., p. 642.

[10] *Council of the European Union*, <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/>(10/21).

[11] *Council of the European Union*, <https://www.consilium.europa.eu/en/press/press-releases/2015/11/29/eu-turkey-Peemeeting-statement/> (10/21).

[12] *Council of the European Union*, <https://www.consilium.europa.eu/en/press/press-releases/2016/03/08/eu-turkey-meeting-statement/>(10/21). For an overview of the background of the Statement of 18 March 201, see S. Peers, E. Roman, "The EU, Turkey and the Refugee Crisis: What could possibly go wrong?", *EU Law Analysis*, 5 February 2016, <https://eulawanalysis.blogspot.com/2016/02/the-eu-turkey-and-refugee-crisis-what.html> (10/21).

The EU and Turkey today decided to end the irregular migration from Turkey to the EU. In order to achieve this goal, they agreed on the following additional action points:

1) All new irregular migrants crossing from Turkey into Greek islands as from 20 March 2016 will be returned to Turkey. This will take place in full accordance with EU and international law, thus excluding any kind of collective expulsion. All migrants will be protected in accordance with the relevant international standards and in respect of the principle of non-refoulement. It will be a temporary and extraordinary measure which is necessary to end the human suffering and restore public order. Migrants arriving in the Greek islands will be duly registered and any application for asylum will be processed individually by the Greek authorities in accordance with the Asylum Procedures Directive, in cooperation with UNHCR. Migrants not applying for asylum or whose application has been found unfounded or inadmissible in accordance with the said directive will be returned to Turkey. Turkey and Greece, assisted by EU institutions and agencies, will take the necessary steps and agree to any necessary bilateral arrangements, including the presence of Turkish officials on Greek islands and Greek officials in Turkey as from 20 March 2016, to ensure liaison and thereby facilitate the smooth functioning of these arrangements. The costs of the return operations of irregular migrants will be covered by the EU.

2) For every Syrian being returned to Turkey from Greek islands, another Syrian will be resettled from Turkey to the EU taking into account the UN Vulnerability Criteria. A mechanism will be established, with the assistance of the Commission, EU agencies and other Member States, as well as the UNHCR, to ensure that this principle will be implemented as from the same day the returns start. Priority will be given to migrants who have not previously entered or tried to enter the EU irregularly…

As counterpart for Turkey, the Statement provides for acceleration of the fulfilment of the visa liberalization process concerning Turkish citizens, upgrading of the Customs Union, disbursement of €3 billion (and the promise of an additional €3 billion by the end of 2018) and the commitment "to re-energize the accession process.[13]

[13] The EU-Turkey Statement, par. 8.

Many criticisms[14] have been raised since the very beginning, all based on two differing points of view: one concerning human rights issues, another based on European constitutional law, regarding *inter alia* whether it was an agreement or a non-binding political arrangement.

2.1. Criticism concerning human rights and refugee law

As pointed out[15], the first sentence of the deal "is a flagrant breach of EU and international law – but the rest of the paragraph then completely contradicts it". On the one hand, sending back 'all' persons crossing from Turkey to the Greek islands would violate the prohibition of collective expulsion provided for in the EU Charter and the European Convention on Human Rights (ECHR), as well as EU asylum legislation. On the other hand, the reference to the relevant international standards and to the principle of *non-refoulement*, together with the explicit provision for individual assessment, indicate that this should not be the case.

The *Statement* adds that "Migrants not applying for asylum or whose application has been found unfounded or inadmissible in accordance with the said directive will be returned to Turkey". This means that it will also be possible to send back people in need of protection whose claims are considered 'inadmissible' (without examination of the merits), on the grounds that Turkey is either a 'safe third country' or a 'first country of asylum'. In other words, applications "would not be rejected on the basis that the person *wasn't a genuine refugee*, but that he or she either (a) *could have* applied for protection in Turkey ['Safe third country' concept] or (b) already *had* protection there" ['First country of asylum' concept][16].

[14] Part of the arguments developed in the present paper have been previously published in Liguori, *Migration Law*, cit., p. 57-66 and 75-80.

[15] S. Peers, "The Final EU/Turkey Refugee Deal: A Legal Assessment", *EU Law Analysis*, 18 March 2016, <http://eulawanalysis.blogspot.com/2016/03/the-final-eu-turkey-refugee-deal-legal.html>(10/21).

[16] Peers, Roman, *The EU, Turkey and the Refugee Crisis*, cit. According to Article 38(1) of the Asylum Procedures Directive, a third country can be considered 'safe' for asylum seekers if in the third country concerned: (a) life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion; (b) there is no risk of serious harm as defined in Directive 2011/95/

A number of concerns have been raised[17]. First of all, we must point out that, though Turkey is a member of the Geneva Convention,

EU; (c) the principle of non-refoulement in accordance with the Geneva Convention is respected; (d) the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected; and (e) the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention. According to Article 35 a third country can be a first country of asylum in two cases: a) if the applicant has been recognized as a refugee in that country and can still avail himself or herself of that protection; or b) if the applicant otherwise enjoys sufficient protection in that country, including benefiting from the principle of *non-refoulement*.

[17] E. Roman, "L'accordo UE-Turchia: le criticità di un accordo a tutti i costi", *SIDI-Blog*, 21 March 2016, <http://www.sidiblog.org/2016/03/21/laccordo-ue-turchia-le-criticita-di-un-accordo-a-tutti-i-costi/> (10/21); M. Den Heijer, T. Spijkerboer, "Is the EU-Turkey Refugee and Migration Deal a Treaty?", *EU Law Analysis*, 7 April 2016, <http://eulawanalysis.blogspot.be/2016/04/is-eu-turkey-refugee-and-migration-deal.html>(10/21); H. Labayle, Ph. De Bruycker, "L'accord Union européenne-Turquie: faux semblant ou marché dedupes?", *Réseau Universitaire européen du droit de l'Espace de liberté, sécurité et justice*, 23 March 2016, <http://www.gdr-elsj.eu/2016/03/23/asile/laccord-union-europeenne-turquie-faux-semblant-ou-marche-de-dupes/>(10/21); C. Favilli, "La cooperazione UE-Turchia per contenere il flusso dei migranti e richiedenti asilo: obiettivo riuscito?", *Diritti umani e diritto internazionale*, Vol. 10, N. 2, 2016, p. 405 ff.; G. Fernández Arribas, "The EU-Turkey Agreement: A Controversial Attempt at Patching up a Major Problem", *European Papers*, 2016; O. Corten, M. Dony, "Accord politique ou juridique: quelle est la nature du "machin" conclu entre l'UE et la Turquie en matière d'asile?", *EU Immigration and Asylum Law and Policy*, 10 June 2016, <http://eumigrationlawblog.eu/accord-politique-ou-juridique-quelle-est-la-nature-du-machin-conclu-entre-lue-et-la-turquie-en-matiere-dasile/>(10/21); F. Cherubini, "The 'EU-Turkey Statement' of 18 March 2016: A (Umpteenth?) Celebration of Migration Outsourcing", in S. Baldin, M. Zago (eds.), *Europe of Migrations: Policies, Legal Issues and Experiences*, EUT Edizioni Università di Trieste, Trieste, 2017, p. 32 ff.; M. Marchegiani, L. Marotti, "L'accordo tra l'Unione europea e la Turchia per la gestione dei flussi migratori: cronaca di una morte annunciata", *Diritto, Immigrazione e Cittadinanza*, 2016, p. 59 ff.; A. Rizzo, "La dimensione esterna dello spazio di libertà, sicurezza e giustizia. Sviluppi recenti e sfide aperte", *Freedom, Security & Justice: European Legal Studies*, 2017, p. 147 ff., <http://www.fsjeurostudies.eu/files/2017.1.-FSJ_Rizzo_8.pdf>(10/21); F. Casolari, "La crisi siriana, l'esodo dei rifugiati e la Dichiarazione UE-Turchia", in N. Ronzitti, E. Sciso (eds.), *I conflitti in Siria e Libia: Possibili equilibri e le sfide al diritto internazionale*, Giappichelli, Torino, 2018; F. De Vittor, "Responsabilità degli Stati e dell'Unione europea nella conclusione e nell'esecuzione di 'accordi' per il controllo extraterritoriale della migrazione", *Diritti umani e diritto internazionale*, 2018, p. 5 ff.

it maintains the geographical limitation, applying the Convention only to European refugees. Non-European asylum seekers enjoy a form of temporary protection, which is stronger for Syrians, but at the time of the *Statement*, significantly less important than the one recognized under the Geneva Convention. Turkey however agreed to modify some of the most critical aspects of the protection enjoyed by Syrians and actually intervened on two crucial points of the legislation concerning Syrians, allowing those who had left Turkey not to lose protection once they were sent back to Turkey and to have access to the labour market there[18].

In light of these changes, Turkey could, in abstract, qualify as 'a first country of asylum'[19] for those Syrians who already enjoyed protection in Turkey and reached Greece. But can Turkey be considered 'a safe third country' for all the other asylum seekers? This is a much-debated question. According to Article 38 par. 1, e) "the possibility shall exist for the applicant to claim refugee status and to receive protection in accordance with the Geneva Convention". UNHCR's interpretation is that "access to refugee status and to the rights of the 1951 Convention must be ensured in law, including ratification of the 1951 Convention and/or the 1967 Protocol, and in practice"[20]. This interpretation is supported by two arguments, as convincingly argued[21]: the legislative history of the text and the *a contrario* rule. With regard to the first argument, the 2002 draft explicitly stated that the clause could apply if a State had not ratified the Convention. However, the text was later revised to its current version and the effort of some Member States to introduce the provision that alternative forms of protection were sufficient failed. With respect to the second argument, when the drafters of the Directive wanted to provide the possibility of applying for an alternative form of protection, they did so explicitly, as in Art. 35 for

[18] See COM (2016) 231 final, *First Report on the progress made in the implementation of the EU-Turkey Statement*, p. 4.

[19] See Favilli, *La cooperazione UE-Turchia*, cit., p. 415.

[20] See UNHCR Paper of 23 March 2016, *Legal considerations on the return of asylum-seekers and refugees from Greece to Turkey as part of the EU-Turkey Cooperation in Tackling the Migration Crisis under the safe third country and first country of asylum concept,* <http://www.unhcr.org/56f3ec5a9.pdf>(10/21).

[21] See Peers, Roman, *The EU, Turkey and the Refugee Crisis*, cit.

the "first country of asylum" notion.[22] However, the real problem lies in the respect of human rights in practice[23], especially because of the harsh conditions of detention and the risk of *refoulement*, at least in some cases.

Although this paper will focus primarily on the respect for asylum seekers' human rights in Turkey – which was the specific object of the claim underlying the orders of the General Court and of the Court of Justice -, we must at least include a brief overview of an indirect but foreseeable consequence of the entry into force of the EU-Turkey agreement, namely the fact that the reception conditions in Greece, already critical before the aforementioned *Statement*, worsened very seriously after the adoption of the EU-Turkey deal, especially in the hotspots located in the Greek Aegean islands[24]. As explicitly recognized in the *Statement* of 18 March 2016, an individual evaluation of each application for international protection is necessary (in the initial Statement of 7 March 2016 the lack of any reference to the need for an individual examination had indeed raised vibrant protests from the UNHCR and numerous NGOs, and consequently, an explicit provision to this effect was inserted into the text of 18 March 2016). It was therefore up to Greece, the European country of first entry for asylum seekers from Turkey, to carry out this task, although it was well-known at the time of the adoption of the EU-Turkey *Statement* that there were

[22] *Ibidem*. See also Favilli, *La cooperazione UE-Turchia*, cit., p. 415. See *contra* D. Thym, "Why the EU-Turkey Deal is Legal and a Step in the Right Direction", *Verfassungsblog*, 9 March 2016, <https://verfassungsblog.de/why-the-eu-turkey-deal-is-legal-and-a-step-in-the-right-direction/>(10/21).

[23] See *inter alia* the "DCR/ECRE desk research on application of a safe third country and a first country of asylum concepts to Turkey" of May 2016, <https://www.ecre.org/desk-research-on-the-application-of-the-safe-third-country-and-first-country-of-asylum-concepts-to-turkey/> (10/21); Report from GUE/NGL Delegation to Turkey "What Merkel, Tusk and Timmermans should have seen during their visit to Turkey", 2–4 May 2016, <www.europarl.eu>(10/21).

[24] In addition to this, Greece was accused of human rights violations as a consequence of the escalation of geopolitical tension with Turkey in March 2020: on this point see R. Cortinovis, "Pushbacks and lack of accountability at the Greek-Turkish borders", *CEPS*, n. No. 2021-01, February 2021 and A. Spagnolo, "La crisi migratoria di inizio 2020 al confine greco turco. Brevi considerazioni alla luce delle prese di posizione degli attori coinvolti", *Quaderni di SIDIblog*, 2020.

many violations in Greece with respect to reception conditions and procedural guarantees for asylum seekers – as acknowledged by the European Court of Human Rights in several judgments directly condemning Greece (for the conditions of detention and violation of the procedural rights of asylum seekers) and indirectly condemning countries that wanted to send people back there in application of the Dublin regulation[25] (from the well-known ECtHR judgment *M.S.S. v. Belgium and Greece*[26] onwards, followed by the CJEU judgment *N.S.*[27]). For this reason, the so-called Dublin transfers had been suspended and this suspension was still in effect at the time of the adoption of the EU-Turkey agreement[28].

However, the first claim, in the case *J.R. and others v. Greece*[29] concerning the circumstances and the conditions of detention of three Afghan nationals in the Greek hotspot on the island of Chios as a con-

[25] See, *ex multis*, S. Peers, "The Dublin III Regulation", in S. Peers et al. (eds.), *EU Immigration and Asylum Law*, Vol. 3, 2nd Ed., Brill–Nijhoff, Leiden/Boston, 2015, p. 345 ff.; B. Nascimbene, "Refugees, the European Union and the 'Dublin System'. The Reasons for a Crisis", *European Papers*, 2016, p. 101 ff.; M. di Filippo, "The Allocation of Competence in Asylum Procedures under EU law: The Need to Take the Dublin Bull by the Horns", *Revista de Derecho Comunitario Europeo*, April 2018, p. 41 ff.

[26] ECtHR, *M.S.S. v. Belgium and Greece*, judgment of 21 January 2011 [GC], applic. No. 30696/09.

[27] See CJEU, judgment of 21 December 2011, joined cases, *N. S. v Secretary of State for the Home Department*, case C-411/10 and *M. E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, case C-493/10.

[28] Only on 8 December 2016 did the Commission adopt a recommendation suggesting the resumption of Dublin transfers for a critical appraisal of such a recommendation see B. Gotsova, "Rules Over Rights? Legal Aspects of the European Commission Recommendation for Resumption of Dublin Transfers of Asylum Seekers to Greece ", *German Law Journal*, 2019, p. 637 ff.

[29] ECtHR, *J.R. and others v. Greece*, judgment of 25 January 2018, applic. No. 22696/16. On this case, see F. L. Gatta, "Detention of Migrants with the View to Implement the EU-Turkey Statement: the Court of Strasbourg (Un)Involved in the EU Migration Policy", *Cahiers de l'EDEM*, 2018, <https://uclouvain.be/fr/instituts-recherche/juri/cedie/actualites/judgment-of-the-european-court-of-human-rights-in-the-case-j-r-and-others-v-greece-appl-no-22696-16.html>(10/21) and A. Pijnenburg, "JR and Others v Greece: What Does the Court (Not) Say About the EU-Turkey Statement?", *Strasbourg Observer*, <https://strasbourgobservers.com/2018/02/21/jr-and-others-v-greece-what-does-the-court-not-say-about-the-eu-turkey-statement/>(10/21).

sequence of the implementation of the EU-Turkey *Statement*, was rejected by the Strasbourg Court in its judgment of 25 January 2018 with regard to the complaints lodged under Article 5 par. 1 (f) and under Article 3 ECHR (only the claim concerning Article 5 §2 was upheld, as the applicants were not accurately informed of the reasons for their deprivation of liberty nor of the available legal remedies).[30] With regard to the complaint under Article 5 par. 1 (f), the Strasbourg Court first had to decide if keeping migrants in the hotspots could be deemed 'detention', at least with respect to the first period of the applicants' stay in the centre (from 21 March to 20 April 2016), when it was a closed facility: from 21 April 2016 the Chios hotspot became a semi-open centre, where the applicants could move about during the day (while still subjected to a restriction of movement: i.e. leaving the island was forbidden).[31] On the merits, the Court affirmed that the one-month period of detention on the island of Chios could not be considered as arbitrary and unlawful as it "avait pour but de les empêcher de séjourner de façon irrégulière sur le territoire grec, de garantir leur éventuelle expulsion, et de les identifier et de les enregistrer dans le cadre de la mise en œuvre de la Déclaration UE-Turquie".[32]As pointed out, the judgment can be considered "as a sort of endorsement of the EU-Turkey *Statement* insofar as its implementation constitutes, under certain conditions, a legitimate reason for the detention of migrants"[33].

The most critical part of the decision, however, is the part that deals with the complaint as per Article 3 ECHR. As stated in the Grand Chamber judgment in the *Khlaifia* case,[34] the Court acknowledges that

[30] Indeed, the Greek government provided them with leaflets, but according to the ECtHR, the information was not sufficiently clear and comprehensible for the applicants.

[31] On the restriction of asylum seekers' freedom of movement, see C. *Ziebritzki, R. Nestler,* "Implementation of the EU-Turkey Statement: EU Hotspots and Restriction of Asylum Seekers' Freedom of Movement", *EU Immigration and Asylum Law and Policy*, 22 June 2018, <http://eumigrationlawblog.eu/implementation-of-the-eu-turkey-statement-eu-hotspots-and-restriction-of-asylum-seekers-freedom-of-movement/> (10/21).

[32] ECtHR, *J.R. and others v. Greece*, cit., par. 112.

[33] Gatta, *Detention of Migrants*, cit.

[34] ECtHR, *Khlaifia and others v. Italy,* judgment of 15 December 2016 [GC], applic. No. 16483/12.

"la Grèce a connu une augmentation exceptionnelle et brutale des flux migratoires" and comes to the conclusion that the conditions were not severe enough to be qualified as inhuman or degrading, although governmental and non-governmental organizations attest to dramatic conditions of physical violence, and lack of legal advice and adequate health care in Greek hotspots[35].

Furthermore, the reference to the migratory emergency situation as a justification for such a weakening of the absolute protection offered by art. 3 ECHR, already criticized by scholars with respect to the *Khlaifia* case[36], seems even more unacceptable in the case under consideration, because it does not derive from a cause of *force majeure* (like the situation that arose following the so-called Arab Spring, examined in Khlaifia) but from an act, the EU-Turkey agreement, directly attributable to the State defendant according to the interpretation supported by the General Court of the European Union, as we will see in the next paragraph, and indirectly endorsed by the European Court of Human Rights (see paragraph 7 of the abovementioned *J.R.* judgment, in which the Strasbourg Court refers to the Statement as an "accord sur immigration conclu… entre les États membres de l'Union européenne et la Turquie »). Indeed, it seems paradoxical for the European Court of Human Rights to balance an absolute right, such as Article 3 ECHR, on the one hand and circumstances, such as overcrowding and chaos, on the other: these circumstances were already present before - and inevitably, and predictably, destined to worsen because of the entry into

[35] Particularly interesting to this end are*, ex multis*, the Resolution adopted by the Parliamentary Assembly of the Council of Europe on 20 April 2016 (Resolution 2109 (2016), <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=22738&lang=en>(10/21) and the Preliminary observations made by the delegation of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) of the Council of Europe, issued after a visit to Greece in April 2018) <https://rm.coe.int/16808afaf6>(10/21).

[36] 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", *Rivista di diritto internazionale*, 2017, p. 555 cit. and A. Pacelli, "Khlaifia and others v. Italy: lights and shadows in the judgment of the Grand Chamber of the European Court of Human Rights", in G. Cataldi (ed.), *Migrations and Fundamental Rights: The Way Forward*, Editoriale Scientifica, Napoli, 2019, p. 53 ff. and doctrine cited there.

force of the EU-Turkey deal, as promptly pointed out *inter alia* by the UNHCR in a press release delivered on 22 March 2016, just a few days after the adoption of the *Statement*[37].

Nevertheless, the Strasbourg Court has so far reached similar conclusions also in the *O.S.A. and others v. Greece*[38] case and, even with respect to minors, in *Kaak and others v. Greece*[39]. However, all these judgments concern the first period after the entry into force of the EU-Turkey deal: unfortunately, in the following months the conditions in the Greek hotspots got worse and worse[40] and it is not inconceivable that in the future the European Court might come to a different conclusion[41].

2.2. Criticism concerning European Constitutional law

The *Statement* has also been criticized for being concluded without respecting the constitutional requirements set by the Treaty on the

[37] UNHCR Redefines Role in Greece as EU-Turkey Deal Comes into Effect, *Briefing Notes*, 22 March 2016, <https://www.unhcr.org/news/briefing/2016/3/56f10d049/unhcr-redefines-role-greece-eu-turkey-deal-comes-effect.html>(10/21): "Under the new provisions, these sites have now become detention facilities. Accordingly, and in line with our policy on opposing mandatory detention, we have suspended some of our activities at all closed centres on the islands»".

[38] ECtHR, *O.S.A. and others v, Greece*, judgment of 21 March 2019, applic. No. 39065/16.

[39] ECtHR*, Kaak and others v. Greece,* of 3 October 2019, applic. No. 34215/16. On this point see A. Liguori, "Violazioni conseguenti all'attuazione della *Dichiarazione UE-Turchia* e giurisprudenza della Corte europea dei diritti umani sugli *hotspots* greci: la sentenza *Kaak e al. c. Grecia*", *Diritti umani e diritto internazionale*, 2020, p. 246 ff.

[40] To the point that in November 2019 the Director of the European Fundamental Rights Agency declared that the condition of migrants in the Greek islands "is the single most worrying fundamental rights issue that we are confronting anywhere in the European Union" (see N. Nielsen, "Greek migrant hotspot now EU's 'worst rights issue'", *EUobserver*, 7 November 2019, <www.euobserver.com>(10/21)).

[41] Since the functioning of the hotspots also directly involves European agencies, a responsibility of the European Union is also conceivable, as correctly outlined in the legal literature (see F Casolari, "The EU's Hotspot Approach to Managing the Migration Crisis: A Blind Spot for International Responsibility?", *The Italian Yearbook of International Law*, 2016, p. 109 ff .; G. Lisi, M. Eliantonio, "The Gaps in Judicial Ac-countability of EASO in the Processing of Asylum Requests in Hotspots", *European Papers*, 2019, p. 589 ff.).

Functioning of the EU (hereafter, TFEU), in particular, for not having been submitted either to the European Parliament for approval (218(6) TFEU)[42] or to the preventive control of the Court of Justice (Article 218(11) TFEU).

Indeed, a debate arose in literature regarding the legal nature of the *Statement*, most scholars arguing that it a treaty[43]. The position of EU institutions on the matter was characterized by ambiguities and *revirements*. On 18 March 2016, the same day of the adoption of the EU-Turkey *Statement*, the President of the European Council affirmed that "Today, we have finally reached an agreement between the EU and Turkey"[44]; during a debate held within the European Parliament on 13 April 2016, both the President of the European Council and the President of the European Commission referred to the statement as a 'deal' between the European Union and Turkey[45]; on 20 April 2016, the Commission issued a press release in which it referred to the EU-Tur-

[42] The Lisbon Treaty strengthened the role of the European Parliament also in relation to EU international agreements, providing that in any case "the European Parliament shall be immediately and fully informed at all stages of the procedure" (Art. 218 para. 10) and that in a number of cases, approval is needed (Art. 218 para.6). Among these last cases, also the hypothesis of agreements "covering fields to which the ordinary legislative procedure applies", which is the case of the EU-Turkey deal.

[43] For the thesis that it is not a treaty see S. Peers, "The Draft EU/Turkey Deal on Migration and Refugees: Is It Legal?", *EU Law Analysis*, 16 March 2016, <http://eulawanalysis.blogspot.be/2016/03/the-draft-euturkey-deal-on-migration.html>(10/21). *Contra* E. Cannizzaro, "Disintegration Through Law?", *European Papers*, 2016, p. 3 ff., <http://europeanpapers.eu/en/system/files/pdf_version/EP_eJ_2016_1_2_Editorial_EC.pdf >(10/21); Spijkerboer, *Is the EU-Turkey refugee*, cit.; Corten, Dony, *Accord politique ou juridique*, cit. In this direction see also Spagnolo, *La crisi migratoria*, cit., p. 353 ff., arguing that the attitude of the actors involved in the migration crisis of March 2020 at the Greek – Turkish border confirms that the *Statement* provides legal obligations between the EU and Turkey.

[44] European Council, "Remarks by President Donald Tusk after the meeting of the EU heads of state or government with Turkey", 18 March 2016, <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18/tusk-remarks-after-euco-turkey/> (10/21).

[45] European Parliament, "Minutes of the debate of Wednesday 13 April 2016", 13 April 2016, <http://www.europarl.europa.eu/sides/getDoc.do?type=CRE&reference=20160413&secondRef=ITEM-005&language=EN> (10/21).

key *Statement* as the "*EU-Turkey Agreement*.[46] However, *revirements* occurred in the following weeks: during a debate in the European Parliament on 28 April 2016, the President-in-Office of the Council referred to it as "*a political agreement between the Member States and Turkey – between Europe and Turkey – …*"[47]; on 9 May 2016, the legal service of the European Parliament stated that the EU-Turkey *Statement* "*was nothing more than a press communiqué*"; finally, in its controversial order of 28 February 2017, which will be examined in the following paragraph, the General Court issued no decision as to whether the EU-Turkey *Statement* is a political arrangement or a legally binding treaty in the sense of Articles 216–218 TFEU and dismissed the claim for lack of jurisdiction, stating that the *Statement* was concluded by the Member States and not by the EU:

> [I]independently of whether it constitutes, as maintained by the European Council, the Council and the Commission, a political statement or, on the contrary, as the applicant submits, a measure capable of producing binding legal effects, the EU-Turkey statement, as published by means of Press Release No 144/16, cannot be regarded as a measure adopted by the European Council, or, moreover, by any other institution, body, office or agency of the European Union[48].

An appeal was lodged before the Court of Justice, which by an order of 12 September 2018, dismissed it without taking a position on this point. Before going through both orders (in the next paragraph), it is noteworthy to recall that in the above-mentioned judgment of 25 January 2018 regarding the case *J.R. and others v. Greece,* the European Court of Human rights aligned itself with the EU courts with regard to the question of attribution, but did not take a clear position on the legal nature of the *Statement*: indeed, at par. 7, it refers to the *Statement*

[46] European Commission, "Implementing the EU-Turkey Agreement – Questions and Answers", 20 April 2016, <http://europa.eu/rapid/press-release_MEMO-16-1494_en.htm> (10/21).

[47] European Parliament, "Minutes of the debate of Thursday 28 April 2016", 28 April 2016, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fTEXT%2bCRE%2b20160428%2bITEM-002%2bDOC%2bXML%2bV0%2f%2fEN&language=EN> (10/21).

[48] Order of the General Court of 28 February 2017 case T-192/16, para 71.

as "un *accord*[49] sur l'immigration conclu le 18 mars 2016 entre les États membres de l'Union européenne et la Turquie", while at par. 39, it states that "Le 18 mars 2016, les membres du Conseil européen et le gouvernement turc se sont entendus sur une *déclaration*[50] visant à lutter contre les migrations irrégulières".

The EU-Turkey *Statement* is not, however, an isolated case: also, in the EU-Afghanistan 'Joint Way Forward on migration issues', the Commission has clearly affirmed that the text is not binding although its wording is very similar to formal readmission agreements concluded so far by the European Union.[51]

3. **The case law concerning the EU-Turkey *Statement***

Both aspects (human rights concern and constitutional issues) have been the object of three applications before the General Court of the European Union, raised respectively by two Pakistani citizens and an Afghan citizen, who had reached Greece from Turkey and had requested international protection there. As they risked being repatriated to Turkey after the entry into force of the EU-Turkey deal, they decided to go to the General Court : assuming that the *Statement* constituted an international agreement between the European Union and Turkey, they therefore introduced an application for annulment under Article 263 Treaty on the Functioning of the European Union (TFEU) of the EU-Turkey deal, concerning both non-compliance with the Charter of Fundamental Rights of the European Union - invoking in particular Articles 1 (dignity), 18 (right of asylum) and 19 (prohibition of refoulement and collective expulsions), and constitutional issues (non-compliance with article 218 TFEU, concerning the conclusion of international agreements).

[49] Italics added.

[50] Italics added.

[51] L. Limone, "EU-Afghanistan 'Joint Way Forward on Migration Issues': Another 'Surrealist' EU Legal Text?", *European Area of Freedom, Security & Justice*, 11 April 2017, <https://free-group.eu/2017/04/11/euafghanistan-joint-way-forward-on-migration-issues-anothersurrealist-eu-legal-text/> (10/21).

In three orders of 28 February 2017 – *NF, NG, and NM v. European Council*[52] – the General Court dismissed the actions for annulment of the EU-Turkey *Statement* as inadmissible. Since the General Court's approach and reasoning is the same in all three cases, to simplify matters we will only refer to the *NF v. European Council* case.

The court limits its analysis to the question of whether it has jurisdiction, more specifically as to whether the *Statement* is to be attributed to the EU, concluding, by an intricate reasoning, that this is not the case.

The Court starts by remembering that

> generally, the European Union Courts have no jurisdiction to rule on the lawfulness of a measure adopted by a national authority (judgments of 3 December 1992, Oleificio Borelli v Commission, C-97/91, para. 9)…or measures adopted by the representatives of the Member States physically gathered in the grounds of one of the European Union institutions and acting, not in their capacity as members of the Council or European Council, but in their capacity as Heads of State or Government of the Member States of the European Union (judgment of 30 June 1993, Parliament v Council and Commission, C-181/91 and C-248/91, para. 12)[53]

It adds however, that

> In order to qualify a measure as a 'decision of the Member States' of the European Union, … it is still necessary to determine whether, having regard to its content and all the circumstances in which it was adopted, the measure in question is not in reality a decision of the European Council (judgment of 30 June 1993, *Parliament* v *Council and Commission*, C-181/91 and C-248/91, para. 14).[54]

The Court then stresses that the meeting of 18 March 2016 was the third of three since November 2015, and that in the two previous meetings (respectively, on 29 November 2015 and on 7 March 2016) it was the representatives of the Member States who participated in their capacity as Heads of State or Government of the Member States of the European

[52] Orders of the General Court of 28 February 2017 cases T-192/16, T-193/16, T-257/16.

[53] Para. 44.

[54] Para. 45.

Union and not as Members of the European Council. Afterwards, the Court admits that the wording of the statement, as published following the meeting of 18 March 2016 by means of Press Release No 144/16, was different from previous statements. However, it adds that this is due "to simplification of the words used for the general public in the context of a press release" and expresses regret for the ambiguity.

Finally, the Court goes on to explore a number of preparatory documents of the meeting of 18 March 2018, concluding that

> In those circumstances… the expression 'Members of the European Council' and the term 'EU', contained in the EU-Turkey statement as published by means of Press Release No 144/16, must be understood as references to the Heads of State or Government of the European Union.[55]

The order has been criticized for many reasons.[56] First of all, it appears evident that relying on the wording of the *Statement*, which employs explicit terms ('Members of the European Council' and 'EU') "would have been more straightforward, and therefore more convincing than the one adopted by the court".[57]

[55] Para. 69.

[56] E. Cannizzaro, "Denialism as the Supreme Expression of Realism. A Quick Comment on NF v. European Council", *European Papers,* 15 March 2017, p. 251 ff. <http://www.europeanpapers.eu/it/system/files/pdf_version/EP_EF_2017_I_021_Enzo_Cannizzaro_4.pdf>(10//21); L. Limone, "Today's Court (Non) Decision on the (Non) EU "deal"? with Turkey", *European Area of Freedom Security & Justice FREE Group*, 1 March 2017, <https://free-group.eu/2017/03/01/the-todays-court-non-decision-on-the-non-eu-deal-with-turkey/>(10/21); S. Carrera, L. Den Hertog, M. Stefan, "It Wasn't Me! The Luxembourg Court Orders on the EU-Turkey Refugee Deal", *CEPS Policy Insights* N. 2017, 15, April 2017, <https://www.ceps.eu/system/files/EU-Turkey%20Deal.pdf>(10/21); C. Danisi, "Taking the 'Union' out of the 'EU': The EU-Turkey Statement on the Syrian Refugee Crisis as an Agreement Between States under International Law", *European Journal of Int. Law: Talk!,* 20 April 2017, <https://www.ejiltalk.org/taking-the-union-out-of-eu-the-eu-turkey-statement-on-the-syrian-refugee-crisis-as-an-agreement-between-states-under-international-law/>(10/21); N. Idriz, "Taking the EU-Turkey Deal to Court?", *Verfassungsblog*, 20 December 2017, <https://verfassungsblog.de/taking-the-eu-turkey-deal-to-court/>(10/21).

[57] T. Spijkerboer, "Bifurcation of People, Bifurcation of Law: Externalization of Migration Policy before the EU Court of Justice", *Journal of Refugee Studies*, 2018, p. 224.

Indeed, the General Court most probably deliberately avoided such an interpretation in order to get out of a difficult alternative. If it had examined the compatibility of the EU-Turkey *Statement* with European and international asylum and refugee law, it would either have come to a conclusion of nonconformity or have opted for a narrow interpretation of asylum and refugee law[58]: both choices could have fuelled – for opposite reasons – a hot political situation.

In other words, the impression is that the Court exercised a sort of self-restraint to avoid taking a position on a sensitive issue. However, by adopting such an attitude - labelled in literature both as 'realism'[59] and "judicial passivism"[60]- the Court missed a good opportunity to authoritatively reaffirm that the EU is a legal order based on the principles of the rule of law (Art. 2 TEU) and conferred powers (Art. 5 TEU), thus setting a dangerous precedent.

First of all, the order contravenes the ERTA doctrine,[61] codified by the Lisbon Treaty in Article 3(2) TFEU, which states *inter alia* that "the Union shall also have exclusive competence for the conclusion of an international agreement in so far as its conclusion may affect common rules or alter their scope". As pointed out[62], "the Heads of State and Government of the MS do not have an unfettered power to select the capacity in which they are acting. By virtue of EU constitutional constraints, when the effect of their acts encroaches upon existing EU legislation, they lose their power to act outside the EU framework, as mere representatives of their States".

Therefore, the Court should not have investigated the 'intent' of persons wearing different hats at the same meeting, i.e., acting at times as representative of Member States, other times as part of the European Council and thus as EU. Conversely, it should have analyzed the con-

[58] *Ibidem*.

[59] Cannizzaro, *Denialism*, cit., p. 257.

[60] See I. Goldner Lang, "Towards "Judicial Passivism" in EU Migration and Asylum Law?", in T. Ćapeta, I. Goldner Lang & T. Perišin, *The Changing European Union: A Critical View on the Role of Law and Courts*, Hart Publishing (forthcoming).

[61] Court of justice, judgment of 31 March 1971, case 22/70, *Commission of the European Communities v. Council of the European Communities*, concerning the European Road Transport Agreement (ERTA).

[62] Cannizzaro, *Denialism*, cit., p.253.

tent and all the circumstances in which the *Statement* was adopted.[63] Indeed, as convincingly argued[64], the application of this test would have led to "the conclusion that an international instrument that plainly falls within the competence of the EU, negotiated by the President of the European Council and by the President of the European Commission .., adopted at a meeting of the European Council and Turkey held in the headquarters of the European Council, communicated in the form of a press release of the European Council and posted on its website, whose wording immediately conveys the idea that its consent has been agreed upon by Turkey and the EU, cannot but be attributed to the EU".

Moreover, choosing to place the EU-Turkey *Statement* outside the scope of EU law is extremely regrettable also because by doing so the Court supports (instead of opposing) the approach of Member States and of EU institutions aiming at circumventing political and judicial controls (respectively by the European Parliament and the Court of Justice) by resorting to arrangements which do not fall within the scope of Article 218 TFUE. As pointed out,[65] "This case illustrates how the checks and balances built into the system can be completely bypassed when the EU institutions collude with Member States to act outside the Treaty framework".

The order was appealed, but unfortunately the Court dismissed it

[63] See CJEU, judgment of 30 June 1993, *European Parliament v. Council of the European Communities and Commission of the European Communities*, joined cases C-181/91 and C-248/91, para. 14.

[64] See Cannizzaro, *Denialism*, p. 256. Indeed, as above mentioned, an EU-Turkey Readmission Agreement had already been signed in 2013 and had entered into force on 1 October 2014, except its provisions relating to the readmission of third country nationals: these provisions were destined to enter into effect three years after the date of entry into force of the EU-Turkey Readmission Agreement: see Article 24(3).

[65] Idriz, *Taking the EU-Turkey Deal to Court?* cit. However, as pointed out (J. Rijpma, "External Migration and Asylum Management: Accountability for Executive Action Outside EU-territory", *European Papers*, 2017, p. 595, <http://www.europeanpapers.eu/en/system/files/pdf_version/EP_eJ_2017_2_7_Article_Jorrit_J_Rijpma.pdf> (10/21), "in its implementation the Member States must still be considered as acting within the scope of EU law when declaring an asylum request inadmissible or issuing a return decision".

without examining it on the merits.[66] In fact, the Court observed that the appeals thus simply make general assertions that the General Court disregarded a certain number of principles of EU law, without indicating with the requisite degree of precision the contested elements in the orders under appeal or the legal arguments specifically advanced in support of the application for annulment[67]

and concluded that

> by their arguments, the appellants merely express their disagreement with the General Court's assessment of the facts, while requesting that those facts be assessed again, without claiming or establishing that the General Court's assessment of the facts is manifestly inaccurate, which is inadmissible in an appeal[68]

As pointed out[69], the impression is that the Court resorted to an "usage stratégique du droit procédural" to avoid taking a stand in a controversial debate.

Similarly, also in the previous judgment *X and X* of 7 March 2017[70],

[66] CJEU, order of 12 September 2018, *NF, NG and NM v. European Council*, cases C-208/17 P, C-209/17 P and C-210/17 P.

[67] Para. 16.

[68] Para. 29.

[69] See P. Van Malleghem, "C.J.U.E., Aff. jointes C-208/17 P à C-210/17 P, ordonnance du 12 septembre 2018, NF, NG et NM, ECLI:EU:C:2018:705", *Centre Charles De Visscher pour le droit international et européen*, 4 October 2018, <https://uclouvain.be/fr/instituts-recherche/juri/cedie/actualites/c-j-u-e-aff-jointes-c-208-17-p-a-c-210-17-p-ordonnance-du-12-septembre-2018-nf-ng-et-nm.html#_ftn17>(10/21); see also D. Vitiello, "Il contributo dell'Unione europea alla governance internazionale dei flussi di massa di rifugiati e migranti: spunti per una rilettura critica dei Global Compacts", *Diritto, Immigrazione e Cittadinanza*, 2018. p. 37.

[70] CJEU, judgment of 7 March 2017, *X and X* [GC], case C-638/16 PPU. On this judgment see A. Liguori, "Two Courts but a Similar Outcome -no humanitarian visas", in G. Cataldi, A. Del Guercio, A. Liguori (eds.), *Migration and Asylum Policies Systems Challenges and Perspectives*, Editoriale Scientifica, Napoli, 2020, p. 177 ff. ; E. Brouwer, "The European Court of Justice on Humanitarian Visas: Legal integrity vs. political opportunism?", *CEPS Commentary*, 16 March 2017, <https://www.ceps.eu/system/files/Visa%20Code%20CJEU%20E%20Brouwer%20CEPS%20Commentary_0.pdf > (10/21); H. De Vylder, "X and X v. Belgium: a missed opportunity for the CJEU to rule on the state's obligations to issue humanitarian visa

the Court of Justice had adopted a self-restraint decision, stating that the granting of humanitarian visas at embassies does not fall within the scope of EU law but solely within that of national law, notwithstanding the fact that Advocate General Mengozzi had convincingly suggested a different possible interpretation.

In other words, in both cases (concerning the EU-Turkey Statement on the one hand, and the granting of humanitarian visas at embassies on the other), by resorting to hyper formalistic reasoning, the Court of Luxembourg has deliberately chosen a *modus interpretandi* which passes the buck to the States, sidestepping fundamental values which are the very foundations of the European Union[71].

4. Conclusions

In conclusion, although it has shown a creative and progressive approach in dealing with national sovereign powers, also in migration

for those in need of protection", *Strasbourg Observer*, 14 April 2017, <https://strasbourgobservers.com/2017/04/14/x-and-x-v-belgium-a-missed-opportunity-for-the-cjeu-to-rule-on-the-states-obligations-to-issue-humanitarian-visa-for-those-in-need-of-protection/>(10/21); G. Raimondo, "Visti umanitari: il caso X e X contro Belgio, C-638/16 PPU", *Sidiblog*, 1 May 2017, <http://www.sidiblog.org/2017/05/01/visti-umanitari-il-caso-x-e-x-contro-belgio-c%E2%80%9163816-ppu/>(10/21); A. Del Guercio, "La sentenza X. e X. della Corte di giustizia sul rilascio del visto umanitario: analisi critica di un'occasione persa", *European Papers*, 2017, p. 271 ff.<http://www.europeanpapers.eu/en/europeanforum/la-sentenza-x-e-x-della-corte-di-giustizia-sul-rilascio-del-visto-umanitario >(10/21); C. Favilli, "Visti umanitari e protezione internazionale: così vicini così lontani", *Diritti umani e Diritto internazionale*, 2/2017, p. 553 ff.; G. Cellamare, "Sul rilascio di visti di breve durata (VTL) per ragioni umanitarie", *Studi sull'integrazione europea*, N. 3/2017, p. 527 ff.; F. Calzavara, "La sentenza della Corte di giustizia in tema di visti umanitari: quando la stretta interpretazione rischia di svilire la dignità umana", *Ordine internazionale e diritti umani,* 2017, p. 546 ff. <http://www.rivistaoidu.net/sites/default/files/5_Calzavara_0.pdf >(10/21).

[71] Notwithstanding the formal commitment of the European Union to ensure respect of the rule of law and human rights, as stated in Articles 2 and 6 (TEU) and reiterated in Article 21 TEU with specific regard to the Union's External Action.

matters in the past [72], the CJEU seems to have abdicated this role when confronting delicate issues concerning externalization.

In particular, as pointed out, the Court's "decision not to decide has enabled the EU-Turkey *Statement* to endure and for similar agreements to be concluded with third countries outside the scope of EU law and exempt from the judicial review of the CJEU"[73].

Indeed, although the EU-Turkey *Statement* was much criticised from the very beginning, on 7 June 2016 the EU Commission adopted a *Communication establishing a new Migration Partnership Framework with third countries*[74] which refers to the EU-Turkey deal as a source of inspiration and a model of effectiveness[75].

Such a preference for soft law instruments is indeed confirmed also in the *New Pact on Migration and Asylum*, a programmatic document adopted by the European Commission on 23 September 2020[76]. In this regard, the explicit reference to the possibility of 'arrangements' also with respect to cooperation on readmission, where "legal safeguards, democratic accountability and monitoring seem all the more necessary", is particularly problematic[77].

[72] See C. Costello, *The Human Rights of Migrants and Refugees in European Law*, Oxford, Oxford University Press, 2016

[73] See Goldner Lang, *Towards 'Judicial Passivism'*, cit.

[74] COM (2016) 385 final, p. 6.

[75] Ibidem, p. 3.

[76] COM (2020) 609 final. See *ex multis* S. Carrera, "Whose Pact? The Cognitive Dimensions of the New EU Pact on Migration and Asylum", *CEPS* n. 22, September 2020, <https://www.ceps.eu/wp-content/uploads/2020/09/PI2020-22-New-EU-Pact-on-Migration-and-Asylum.pdf>(10/21); D. Thym, "European Realpolitik: Legislative Uncertainties and Operational Pitfalls of the 'New' Pact on Migration and Asylum", *EU Immigration and Asylum Law and Policy*, 28 September 2020, <https://eumigrationlawblog.eu/european-realpolitik-legislative-uncertainties-und-operational-pitfalls-of-the-new-pact-on-migration-and-asylum/>(10/21); P.G. Andrade, "EU cooperation on migration with partner countries within the New Pact: new instruments for a new paradigm?", *EU Immigration and Asylum Law and Policy,* 8 December 2020, <https://eumigrationlawblog.eu/eu-cooperation-on-migration-with-partner-countries-within-the-new-pact-new-instruments-for-a-new-paradigm/>(10/21); A. Liguori, "Il nuovo Patto sulla migrazione e l'asilo e la cooperazione dell'Unione europea con i Paesi terzi: niente di nuovo sotto il sole?", *Diritti umani e diritto internazionale*, 2021, p. 67 ff.

[77] See Andrade, *EU cooperation on migration with partner countries within the New Pact*, cit.; see also A. Ott, "Informalization of EU Bilateral Instruments: Categorization, Contestation, and Challenges", *Yearbook of European Law*, Volume 39, 2020, p. 569 ff.

This aspect, added to the Pact's emphasis on cooperation with third States[78], amplified by, among other things, the provision of pre-screening procedures at the borders, which are thus intended to be considered extraterritorial zones for these purposes[79], simply push the European Union further towards externalization practices which are extremely problematic in terms of human rights[80].

Given the attitude of the CJEU vis-à- vis externalization, would the European Court of Human Rights be the appropriate international forum for an effective protection against human rights violations deriving from these practices of externalized border controls? It is difficult to predict how the ECtHR will deal with these issues, especially after its most recent case-law, i.e. the *revirements* in the *N.D. and N.T. v. Spain* and *Ilias and Ahmed v. Hungary* cases, and the inadmissibility decision in the *M.N. and others v. Belgium* case: as pointed out, these three point to "a new and more cautious direction of the Court in regard

[78] As emerges from the words of the vice-president of the Commission Margaritis Schinas, on the occasion of a press conference held on 11 September 2020. In announcing the imminent proposal of the New Pact using the image of a three-storey house, Schinas located on the first floor "a very strong external dimension with agreements with countries of origin and transit to keep people, for a better life, in their countries": <https://euobserver.com/migration/149417>(10/21).

[79] See L. Marin, "The 2020 proposals for pre-entry screening and amended border procedures: a system of revolving doors to enter (and leave) Europe?", *ADIM Blog*, November 2020; L. Jakulevičienė, "Re-decoration of existing practices? Proposed screening procedures at the EU external borders", *EU Immigration and Asylum Law and Policy*, 27 October 2020 <https://eumigrationlawblog.eu/re-decoration-of-existing-practices-proposed-screening-procedures-at-the-eu-external-borders/> (10/21); J. Vedsted-Hansen, "Border Procedure: Efficient Examination or Restricted Access to Protection?", *EU Immigration and Asylum Law and Policy*, 18 December 2020, <https://eumigrationlawblog.eu/border-procedure-efficient-examination-or-restricted-access-to-protection/> (10/21); G. Campesi, "The EU Pact on Migration and Asylum and the dangerous multiplication of 'anomalous zones' for migration management", *ASILE*, November 2020, <www.asileproject.eu>(10/21).

[80] See on this point Marin, *The 2020 proposals*, cit. See also Carrera, *Whose Pact?* cit., p. 5, arguing that, «pending the results of screening procedures, the person is presumed not to have legally entered into member states' territory. In this way, the proposed policies can be expected to encourage *de-territorialisation*, i.e., EU member states unlawfully reframing specific parts of their borders as 'non-territory'».

to migration related rights under the ECHR"[81]. The pending claims[82] concerning the outrageous violations arising from another infamous agreement, the 2017 Italy-Libya Memorandum of Understanding, will be the "Litmus test" for the Strasbourg Court to show its willingness to follow the path indicated by the landmark decision delivered in the *Hirsi* case[83] and stand as an effective bulwark against States' attempts to circumvent their international obligations by resorting to the externalization of border controls.

[81] See T. Gammeltoft-Hansen, N. F. Tan, "Adjudicating old questions in refugee law: MN and Others v Belgium and the limits of extraterritorial refoulement", *EU Immigration and Asylum Law and Policy*, 26 May 2020, <https://eumigrationlawblog.eu/adjudicating-old-questions-in-refugee-law-mn-and-others-v-belgium-and-the-limits-of-extraterritorial-refoulement/> (10/21) and literature quoted therein.

[82] As the *S.S. and Others v. Italy* case, applic. No 21660/18: on this case see V. Moreno-Lax, "The Architecture of Functional Jurisdiction: Unpacking Contactless Control—On Public Powers, S.S. and Others v. Italy, and the «Operational Model»", in *Migration And Asylum Policies Systems Challenges And Perspectives,* cit, p. 183 ff. and A. Fazzini, "Il caso S.S. and Others v. Italy nel quadro dell'esternalizzazione delle frontiere in Libia: osservazioni sui possibili scenari al vaglio della Corte di Strasburgo", *Diritto Immigrazione e Cittadinanza*, n. 2020/2, p. 87 ff.

[83] ECtHR, *Hirsi Jamaa and Others v. Italy*, judgment of 23 February 2012 [GC], applic. No. 27765/09. In this judgment, a cornerstone for the respect of migrants' and asylum seekers' human rights, the Grand Chamber of the European Court of Human Rights stigmatized externalization practices such as interceptions on the high seas when conducted under the effective control of Contracting States. On this case see: F. Messineo, "Yet Another Mala Figura: Italy Breached Non-Refoulement Obligations by Intercepting Migrants' Boats at Sea, Says ECtHR", *European Journal of Int. Law Talk!,* 24 February 2012, <https://www.ejiltalk.org/yet-another-mala-figura-italy-breached-non-refoulement-obligations-by-intercepting-migrants-boats-at-sea-says-ecthr/>(10/21); A. Liguori, "La Corte europea dei diritti dell'uomo condanna l'Italia per i respingimenti verso la Libia del 2009: il caso Hirsi", *Rivista di Diritto internazionale*, 2012, p. 415 ff.; V. Moreno-Lax, "Hirsi v. Italy or the Strasbourg Court versus Extraterritorial Migration Control?", *Human Rights Law Review*, 2012, p. 574 ff.; N. Napoletano, "La condanna dei 'respingimenti' operati dall'Italia verso la Libia da parte della Corte europea dei diritti umani: molte luci e qualche ombra", *Diritti umani e diritto internazionale*, 2012, p. 436 ff.; M. Den Heijer, "Reflections on Refoulement and Collective Expulsion in the Hirsi Case", *International Journal of Refugee Law*, 2013, p. 265 ff.