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Original research paper

# APPLICATION (AND NON - APPLICATION) OF THE DUBLIN REGULATION: WHAT CONSEQUENCES FOR THE RIGHT OF MIGRANTS?

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**Abstract**

The present article intends to underline that the Dublin Regulation is not applied, because of the abuse of the reintroduction of internal border controls to prevent secondary movements and facilitate refoulements, as well as of the abuse of informal readmission mechanisms, giving rise to serious violations of human rights that occur during the control and surveillance operations at the external borders, but also and above all in the transit areas at the internal borders. This practice mainly concerned the Balkan routes as the main gateways to the EU territory, and in particular the Hungarian cities of Tompa and Röszke, located on the border with Serbia, with detention centers for migrants and barriers with barbed wire to curb migratory flows. Through a brief examination of some judgments of the Court of Justice of the EU (CJEU) and the European Court of Human Rights (ECtHR), the article will emphasize the different approaches of two Courts concerning transit areas and detention centers along the Balkan routes and will try to highlight the present and future limits of the Dublin Regulation.

***Key words:*** CJEU, Detention centers, Dublin Regulation, ECtHR, Human rights, Pushbacks, Transit area

## 1. Introductory Remarks on Current Practice Concerning the Dublin Regulation

The Dublin Regulation[1], a key instrument of the Common European Asylum System (CEAS)[2], is intended to identify a single State competent for examining the application for international protection by third-country national or stateless persons, on the basis of predetermined criteria, without emphasizing any preferences or choices of the applicant. This State will then also be responsible for their reception and integration, or, alternatively, for the execution of the return procedure. Thus, there is a connection between the Dublin Regulation and other instruments of EU immigration policy, such as the Schengen Borders Code[3], which governs border control of persons crossing the external EU borders of the EU Member States on the basis of the absence of border control at the internal borders.

Specifically, practice has shown that States of arrival, in the attempt to avoid the difficulties of managing reception, do not register migrants arriving in Europe. On the contrary, their public authorities accompanied migrants to the border of another state, as ascertained by the Court of Justice of the European Union (CJEU) in the

[1] Regulation (EU) No 604/2013 of the European Parliament and of the Council (26 June 2013). Establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person. OJ L 180. For an overview on the Dublin System, see, among the others, Maiani, F. (2017). The Reform of the Dublin System and the Dystopia of 'Sharing People'. Maastricht Journal of European and Comparative Law, 24(5), 622-645; Hailbronner, K., & Thym, D. (2016). Legal Framework for EU Asylum Policy. In K.H., Thym (Ed.), EU Immigration and Asylum Law. Commentary (2nd edition, pp. 1023-1053); Trauner, F. (2016). Asylum Policy: the EU's 'Crises' and the Looming Policy Regime Failure. Journal of European Integration 38(3), 311- 325; Armstrong, C.E. (2016). The Limits of Communitarisation and the Legacy of Intergovernmentalism: EU Asylum Governance and the Evolution of the Dublin System; Fratzke, S. B. (2015). Not Adding Up: The Fading Promise of Europe's Dublin System; Cherubini F. (2015). Asylum Law in the European Union. Routledge; Guild, E. (2015). Enhancing the Common European Asylum System and Alternatives to Dublin. CEPS Paper no. 83; Brekke, J.P. (2014). Stuck in Transit: Secondary Migration of Asylum Seekers in Europe, National Differences and the Dublin Regulation. Journal of Refugee Studies, 28(2), 145-162; Peers, S. (2014). Reconciling the Dublin System with European Fundamental Rights and the Charter. ERA Forum 15, 485-494; Goudappel, F., & Raulus, H.S. (2011). The Future of Asylum in the European Union Problems, Proposals and Human Rights. Asser Press; Hansen, R. (2000). Asylum Policy in the European Union. Georgetown Immigration Law Journal, 14(3), 779-800.

[2] The CEAS sets minimum standards, what we can also call a common framework, for the treatment of all asylum seekers and all asylum applications in the EU. For more information, see Jakulevičienė, L. (2019). The Common European Asylum System. In EPC, From Tampere 20 to Tampere 2.0: Towards a New European Consensus on Migration (pp. 87-102); Battjes, H. (2018). The Future of the CEAS – An Analysis of Rules on Allocation. CEASEVAL Research on the Common European Asylum System no. 7; Wagner, M. & others (2016). The Implementation of the Common European Asylum System. Directorate general for internal policies – Policy Department C: Citizens' rights and constitutional affairs.

[3] Regulation (EU) 2016/399 of the European Parliament and of the Council (9 March 2016). On a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code). OJ L 77.

*Jafari* case[4]. On the other hand, many migrants who arrive in Greece or Italy want to reach other European countries that do not hesitate to send the migrants back to the countries of first arrival. Other examples show that the Dublin Regulation is not really being applied because of readmission agreements or, worse still, of informal readmission mechanisms[5]. This practice is often applied also at internal borders. Furthermore, national legislations and practices that conflict with EU law, stocked migrants in a sort of *fictio juris*, i.e., in a legal fiction of non-entry into the territory of the EU Member States.

Therefore, the Dublin Regulation is not applied, as resulted from the abuse of the reintroduction of internal border controls to prevent secondary movements and facilitate *refoulements*, as well as from the abuse of informal readmission mechanisms, giving rise to serious violations of human rights that occur during the control and surveillance operations at the external borders, but also and above all in these transit areas at the internal borders that are located along some specific routes[6]. It concerned the Balkan routes as the main gateways to the EU territory. The Hungarian cities of Tompa and Röszke, located on the border with Serbia, with detention centers for migrants and barriers with barbed wire to curb migratory flows, can also be included

[4] CJEU (Grand Chamber), Judgment (26 July 2017). Case C-646/16, *Khadija Jafari and Zainab Jafari*. About the Judgment, see Šalamon, N.K. (2017) CJEU Rulings on the Western Balkan Route: Exceptional Times Do Not Necessarily Call for Exceptional Measures. EU Immigration and Asylum Law and Policy. Retrieved from https://eumigrationlawblog.eu/cjeu-rulings-on-the-western-balkan-route-exceptional-times-do-not-necessarily-call-for-exceptional-measures/.

[5] This is what happens, for example, on the Italian-Slovenian border as a result of the conclusion of a bilateral agreement for the readmission of persons in 1996. Article 6 of the Agreement also provides for the possibility of carrying out readmissions without formalities of third-country nationals. However, these readmissions involve chain rejections in a few hours from Italy to Croatia and subsequent return of migrants outside the EU territory to Bosnia and Herzegovina, in an absolutely informal manner and without any protection for the people involved. These are practices condemned by national courts, in particular by the Court of Rome with a precautionary order of January 18, 2021, which, however, on a complaint from the Ministry of the Interior was cancelled due to lack of evidence. Nevertheless, the precautionary order underlined the violations of substantive and procedural obligations related to the implementation of the right of asylum, the Dublin regulation, the right of defense, the principle of non-*refoulement*, the prohibition of inhuman and degrading treatment pursuant to Article 3 ECHR. See Astuti, M., Bove, C., Brambilla, A., Lici, A., Lizzi, E.S., Stege, U. & Stojanova, I. (2022). «Per quanto voi vi crediate assolti siete per sempre coinvolti». I diritti umani fondamentali alla prova delle frontiere interne ed esterne dell'Unione europea. Diritto, Immigrazione e Cittadinanza, 1, 1-49.

[6] In addition, there is the conduct of the national police forces in the execution of these operations, also with the involvement of the European Border and Coast Guard Agency, namely Frontex. Regarding the *vexata quaestio* on the accountability of Frontex, see Loschi, C. Slominski, P. (2022). Frontex's Consultative Forum and Fundamental Rights Protection: Enhancing Accountability Through Dialogue?. European Papers, 7(1), 195-214; Gkliati, M., & Rosenfeldt, H. (2018). Accountability of the European Border and Coast Guard Agency: Recent Developments, Legal Standards and Existing Mechanisms. Refugee Law Initiative Working Paper 30; Pomeon, A. (2017). Frontex and the EBCGA: A Question of Accountability (1st edition). Wolf Legal Publications; Pollak, J., & Slominski, P. (2009). Experimentalist but not Accountable Governance? The Role of Frontex in Managing the EU's External Borders. West European Politics, 32, 904-924.

in the list of these places. Therefore, this work, through a brief examination of some judgments of the CJEU and the European Court of Human Rights (ECtHR), concerning transit areas and detention centers along the Balkan routes, will try to highlight the present and future limits of the Dublin Regulation.

## 2. The *fictio juris* of the Transit Zone at the Serbian-Hungarian Border and the Different Findings of the European Courts on the Detention: *Ilias and Ahmed v. FMS and Others*

As is well known, security is one of the components of the European area which should be combined with the other two elements of freedom and justice. Nevertheless, the prevalence of security issues over the other two components of freedom and justice is evident precisely in the field of the Union's immigration and asylum policy[7]. The maintenance of law and order and the safeguarding of internal security, according to Article 72 TFEU, have legitimized some Member States to adopt national legislation in contrast with EU law, in particular, creating transit areas where migrants' rights are limited or cannot be exercised. The violations that occur at the Serbian-Hungarian external border, that is to say close to the Schengen Area, have been the subject of some rulings by the CJEU and ECtHR. In particular, the approaches of the two Courts differ with regard to the placement of the applicants in the transit zones and detention centers. The ECtHR considers, in fact, that, under the domestic law, the detention of applicants has the purpose of allowing the Hungarian authorities to exercise their right to verify whether a migrant possesses the requisites for entry into the territory. Conversely, the CJEU equates it to an unjustified detention regime lacking the adequate guarantees of the relevant EU legislation.

In particular, in the case of *Ilias and Ahmed v. Hungary*[8] (no. 47287/15), the fourth section of the Court considers that there has been a violation of Article 5,

[7] See Iglesias Sánchez, S., & González Pascual, M. (Eds.). (2021). Fundamental Rights in the EU Area of Freedom, Security and Justice. Cambridge: Cambridge University Press; Stasi, A., & Rossi, L.S. (Eds.). (2020), Lo spazio di libertà sicurezza e giustizia. A vent'anni dal Consiglio Europeo di Tampere. Naples: Editoriale Scientifica; Fletcher, M., Herlin-Karnell, E., & Matera C. (Eds.). (2019) The European Union as an Area of Freedom, Security and Justice. London: Routledge; Carrera, S., Guild, E., & Eggenschwiler, A., (Eds.). (2010) The Area of Freedom, Security and Justice Ten Years on Successes and Future Challenges under the Stockholm Programme. Brussels: Centre for European Policy Studies; Walker, N. (2004). Europe's Area of Freedom, Security, and Justice. Oxford: Oxford University Press.

[8] ECtHR (Fourth Section), Judgment (14 March 2017). Application no. 47287/15, *Ilias and Ahmed v. Hungary*. This case concerns two Bangladeshi nationals who transited through Greece, the former Yugoslav Republic of Macedonia and Serbia before reaching Hungary and the Röszke transit zone where they immediately applied for asylum and were held for 23 days. See Kilibarda, P. (2017) The ECtHR's Ilias and Ahmed v. Hungary and Why It Matters. EJIL: Talk!. Retrieved from https://www.ejiltalk.org/the-ecthrs-ilias-and-ahmed-v-hungary-and-why-it-matters/;Venturi, D. (2017), The ECtHR Ruling in Ilias and Ahmed: 'Safe Third Country' Concept Put to the Test. European Database of Asylum Law. Retrieved from https://www.asylumlawdatabase.eu/en/journal/ecthr-ruling-ilias-and-ahmed-%E2%80%98safe-third-country%E2%80%99-concept-put-test.

paras. 1 and 4 because the confinement of the applicants for more than three weeks in a guarded compound which was not accessible from the outside (not even their lawyer), was de facto a deprivation of their freedom. Furthermore, the Court found that the detention did not have a precise legal basis, thus the applicants could not initiate proceedings to challenge the lawfulness of the detention. Although in the view of the ECtHR the conditions of detention were "acceptable" and did not reach the level of gravity necessary to constitute a violation under Article 3, it found a violation of Article 13 in conjunction with Article 3 since there was no remedy for the applicants to complain about the conditions of detention. Furthermore, the Court found that the procedure applied by the Hungarian authorities was not appropriate to provide the necessary protection against a real risk of inhuman and degrading treatment. In particular, they relied on a schematic reference to the Government's list of safe third countries, ignored country reports of international organizations and other evidence submitted by the applicants, and imposed an unfair and excessive burden of proof on them. Therefore, the ECtHR found a violation of Article 3 due to the lack of effective guarantees to protect the applicants from the risk of being subjected to inhuman or degrading treatment due to a possible "chain *refoulement*" towards Greece.

Unfortunately, the findings of the fourth Section were overruled by the Grand Chamber. On 14 June 2017, the Hungarian Government requested that the case be referred to the Grand Chamber, which delivered judgment on 21 November 2019[9]. Examining the applicability of Article 5 on the applicant's confinement to the transit zone, the Grand Chamber dissented from the findings of the Chamber judgment in 2017. In particular, the Court considered that in examining the space between restriction of movement and deprivation of liberty in the context of asylum, "its approach should be practical and realistic, having regard to the present-day conditions and challenges" (para. 213). The Court noted that the applicant entered the transit zone of their own initiative aiming to apply for asylum and they did not cross into the transit zone due to an immediate danger in Serbia. Furthermore, Hungary had a right to take all

[9] ECtHR (Grand Chamber), Judgment (21 November 2017). Application no. 47287/15, *Ilias and Ahmed v. Hungary*. For comments on the judgment coming from the literature, see Bombay, A., & Pieterjan, H. (2021). The ECtHR's Ilias and Ahmed and the CJEU's FMS-Case: A Difficult Reconciliation?. Sui Generis no. 255; Gatta, F.L. (2020) Diritti al confine e il confine dei diritti: La Corte EDU si esprime sulle politiche di controllo frontaliero dell'Ungheria (Parte II – Detenzione e Art. 5 CEDU). ADiM Blog, Osservatorio della Giurisprudenza; Zirulia, S. (2020) Per Lussemburgo è "detenzione", per Strasburgo no: verso un duplice volto della libertà personale dello straniero nello spazio europeo?. Sistema Penale. Retrieved from https://sistemapenale.it/it/scheda/grande-camera-corte-di-giustizia-fms-e-fnz-grande-camera-corte-di-strasburgo-ilias-e-ahmed-privazione-liberta-personale-zona-di-transito?out=print; Stoyanova, V. (2019). The Grand Chamber Judgment in Ilias and Ahmed v Hungary: Immigration Detention and the How the Ground beneath our Feet Continues to Erode. Strasbourg Observers. Retrieved from https://strasbourgobservers.com/2019/12/23/the-grand-chamber-judgment-in-ilias-and-ahmed-v-hungary-immigration-detention-and-how-the-ground-beneath-our-feet-continues-to-erodev/.

necessary measures to examine the applicants' claims before deciding to admit them (paras. 217-222). In the reasoning of the Court, a short amount of waiting time for the verification of the right to enter cannot constitute deprivation of liberty unless other factors are present (para. 225). The asylum applications had been considered quite rapidly and there was no additional action other than the ones that were necessary to verify the existence of a need for international protection in a very challenging situation of mass influx (paras. 227-230). The Court observes that other migrants detained in the transit area had left Röszke to return to Serbia (paras. 235 and 237) and that, materially, this could have taken place without the need for actions, such as boarding an aircraft, which would have required "external" cooperation from the Hungarian authorities (para. 237), thereby differentiating the case from the previous ones in which the Court had found Article 5 applicable. This led to the conclusion that "[i] n practical terms (...) the possibility for [the applicants] to leave the Röszke land border transit zone was not only theoretical but realistic" (par. 236) and that "the *de facto* possibility of them leaving the transit zone for Serbia existed, not only in theory but also in practice" (para. 237). According to the majority, these adverse consequences related to the "voluntary" return to Serbia, in the absence of a direct threat to the life or health of migrants, not affecting the material possibility of evading detention, are not such as to change the nature of the stay of the applicants in the transit area (paras. 239-248), if not at the cost of "stretch the concept of deprivation of liberty beyond its meaning intended by the Convention" (para. 243). In conclusion, the Grand Chamber found that Article 5 is not applicable, thus dismissing the complaint under this Article as inadmissible *ratione materiae*. Moreover, taking into account, in particular, the material conditions in the area, the length of stay of applicants in that area and the possibilities of human contact with other asylum seekers, United Nations High Commissioner for Refugees (UNHCR) representatives, NGOs and a lawyer, the Court considers that the complained situation had not reached the minimum level of seriousness necessary to constitute inhumane treatment within the meaning of Article 3 of the Convention. Conversely, the Grand Chamber found that the respondent State has failed to fulfil its procedural obligation under Article 3 of the Convention to assess the risks of treatment contrary to that provision before removing the applicants from Hungary. Nonetheless, the Court acknowledged that the transit area is similar to some types of "light-regime detention facilities", due to its physical conformation and the surveillance and control regime of entrances established therein (para. 232). On the other hand, the Court recognized that, even in the light of the readmission agreement between Serbia and the European Union, the applicants probably did not have the right to cross the border into Serbia (para. 237).

Delivered its judgment in the urgent preliminary ruling procedures concerning an Afghan couple (FMS and FNZ) and an Iranian father and son (SA and SA junior), all being held in the transit zone of Röszke in Hungary, the CJEU[10] adopted a stricter

[10] CJEU (Grand Chamber), Judgment (14 May 2017). Case C-924/19 PPU e C-925/19 PPU, *FMS, FNZ, SA, SA junior v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság, Országos Idegenrendészeti Főigazgatóság.*

position with regard to the placement of migrants in transit areas. In particular, the case concerned the decisions taken by Hungarian authorities rejecting their applications for asylum as inadmissible and ordering their removal, together with a prohibition on entering and remaining on Hungarian territory for a period of one year. In interpreting the rules of the Return Directive[11], the (Asylum) Procedures Directive[12] and the Reception Directive[13] in relation to Hungarian laws concerning the right of asylum, the State borders and the entry and residence of third-country nationals, the Court: confirmed that holding of asylum applicants at the external border in the transit zone is detention, clarified that such detention must be necessary and proportionate, be ordered in a formal decision and entail judicial review and must not go beyond the limits of the border procedure as defined by the Asylum Procedures Directive. It also rejected the extension of the inadmissibility grounds of the Procedure Directive, by adding the new ground of "safe transit country"[14]. The CJEU considered that the placement in the transit area would have been carried out without a reasoned decision, without an assessment of its necessity and proportionality, and without any judicial review enabling its legitimacy to be challenged. Furthermore, no national rule would limit the length of stay in the sector of the transit area reserved for third-country nationals whose asylum application has been rejected. Their departure would depend exclusively on the cooperation between the Hungarian authorities and the authorities of their countries of origin, since these applicants could not go to Serbia, as they were the subject of a return decision to their country of origin and the Serbian authorities had decided not to readmit them. Therefore, the placement of the applicants in the sector of the transit area of Röszke constituted detention that does not comply with the requirements imposed by EU law. It is of the opinion that, pursuant to Article 47 of the Charter, it should, by means of an interim measure, be able to oblige the competent authority to assign them a place located outside that area of transit, which is not a place of detention, until the closure of the administrative judicial procedure. Furthermore, the Court stated the ineffectiveness of the appeal filed against the decision by which the police authority of first instance aliens changed the country of destination mentioned in the return decisions. Indeed, that court noted, first, that the opposition to that decision is examined by the competent asylum authority although the latter is placed under the authority of the minister responsible for the police, is

[11] Directive 2008/115/EC of the European Parliament and of the Council (16 December 2008). On common standards and procedures in Member States for returning illegally staying third-country nationals. OJ L 348.

[12] Directive 2013/32/EU of the European Parliament and of the Council (26 June 2013). On common procedures for granting and withdrawing international protection. OJ L 180.

[13] Directive 2013/33/EU of the European Parliament and of the Council (26 June 2013). Laying down standards for the reception of applicants for international protection. OJ L 180.

[14] Boldizsár, N. (2020), A – Pyrrhic? – Victory Concerning Detention in Transit Zones and Procedural Rights: FMS & FMZ and the Legislation Adopted by Hungary in its Wake. EU Immigration and Asylum Law and Policy. Retrieved from https://eumigrationlawblog.eu/a-pyrrhic-victory-concerning-detention-in-transit-zones-and-procedural-rights-fms-fmz-and-the-legislation-adopted-by-hungary-in-its-wake/.

part of the executive power and not is therefore an independent and impartial body and, on the other hand, that the relevant Hungarian legislation does not allow the referring court to check the administrative decision ruling on that opposition, since the only control relating to the latter decision consists in the power of surveillance of the public prosecutor, who may, if necessary, challenge the legitimacy of an administrative decision on the matter in court.

### 3. *MH and others v. Croatia*: Some Steps to Reconcile the Approaches Taken by Both Courts in Expulsion Cases?

On November 18, 2021, the first section of the ECtHR ruled on the matter[15], and jointly examined the two appeals brought by the applicants, 14 members of an Afghan family who left their country of origin in 2016, crossing Pakistan, Iran, Turkey, Bulgaria and Serbia. The first appeal before the ECtHR originated from the *refoulement* on the night of November 21, 2017, of the mother and six of her children at the Serbo-Croatian border. Despite having expressed their willingness to seek asylum, the Croatian police ordered them to go back to Serbia by following the train tracks. The group started walking and after several minutes a train passed and hit one of the daughters in Serbian territory, about 200 meters from the border with Croatia, where she lost her life. The applicants filed complaints against the Croatian police but the investigations claimed that the applicants had never entered Croatia, that they had not had any contact with the Croatian authorities and that they had not even sought asylum. The Croatian Constitutional Court also confirmed these conclusions and considered the investigation to be effective. The second appeal was based on the applicants' attempt to cross the Serbo-Croatian border again. These were intercepted by the Croatian police and taken to the Tovarnik center in order to allow their identification. The detention, which included minors, lasted for about three months, after which the applicants were transferred to an open-type center.

This case would seem to reconcile the approach of the two Courts not only because it declared that the conditions in the detention centers are deprivation of freedom in violation of Article 5, para. 1, but also because it reaffirmed the extra-territorial jurisdiction of the Court in the application of Article 2 and clarified the evidential criteria to be applied in the causes of expulsions in compliance with Article 4 of the Protocol 4. In other words, this judgment has given the ECtHR the opportunity to take some steps in favor of legal certainty and the effectiveness of fundamental rights protection, thus approaching the findings of the Court of Justice. More specifically, although Croatia did not contest the jurisdictional competence, the Court decided to examine this question of its own motion. In particular, consolidating its earlier conclusions on the Convention's extraterritorial jurisdiction[16], the Court

[15] ECtHR (First Section), Judgment (18 November 2021). Applications nos. 15670/18 and 43115/18, *MH and others v. Croatia*.

[16] ECtHR (Grand Chamber), Judgment (29 January 2019). Application no. 36925/07, *Güzelyurtlu and Others v. Cyprus and Turkey*, para. 191.

found that there was a "jurisdictional link" between the applicants and Croatia because the death of the minor had allegedly been caused by the actions of the Croatian police undertaken within Croatian territory. Accordingly, under their domestic law, regardless of the fact that the death of a minor had occurred in the territory of Serbia, the Croatian authorities were under the obligation to conduct a criminal investigation in order to examine the liability of the Croatian police officers for her death, which they did. Lastly, the Court observes that the Croatian Constitutional Court raised no questions as to its own jurisdiction to examine the compliance of the domestic authorities with their procedural obligation under Article 2 of the Convention. Then, the ECtHR examined whether the procedural aspect of the right to life had been respected, underlining that there had been no (adequate) attempt by the GIPs to obtain thermographic video footage of the events, or any other additional GPS / location data capable of clarifying the discrepancies between the statements of the police officers involved, the doctor who pronounced the child's death at the scene and the applicants. In ruling unanimously, the Court found a procedural violation of article 2 of the Convention, considering that the Croatian authorities had not fulfilled the procedural obligation imposed by this article which requires the opening of a criminal investigation. The Court also concluded for the ineffectiveness of the investigations into the circumstances that had led to the death of the minor.

With reference to Article 3, the Court stated the violation only with regard to the minor applicants, because of the nature and duration of the detention, as well as the absence of personnel qualified to assist minors, even more in light of the fact that they were traumatized by having witnessed the death of their sister a few months earlier. On the contrary, the Court excluded the violation of Article 3 for the adult applicants, considering the conditions of detention adequate for them. Nevertheless, they were held in prison-like conditions and their appeals to obtain release from the center had been rejected both by the Croatian judicial authority and by the Constitutional Court. Furthermore, recalling its established case-law on this issue, the Court considered that confinement of migrant children in a detention facility should be avoided, and that only placement for a short period in appropriate conditions could be considered compatible with Article 5 § 1 of the Convention, provided, however, that the national authorities can establish that they resorted to this measure only after having verified that no other measure involving a lesser restriction of freedom could be implemented. Considering that the adoption of alternative measures to the administrative detention of migrants concerns not only children, but also their parents, the ECtHR found the violation of Article 5 for all of the applicants (see § 229 et seq.).

In analysing the complaint, the Court applied the test established in *N.D. and N.T. v. Spain*[17], clarifying, however, that, where no individualized treatment has occurred, it must first be assessed whether the applicants had engaged in "culpable conduct" by circumventing the legal procedures that existed for entry into Croatia. In such a case,

[17] ECtHR (Grand Chamber), Judgment (13 February 2020). Application nos. 8675/15 and 8697/15, *N.D. and N.T. v. Spain*.

the Court will consider whether the applicants had access to legal means to enter the resistant State to apply for international protection and whether the applicants had compelling reasons for entering the State illegally. When these conditions are met, the burden of proof passes to the respondent State to demonstrate compliance with the prohibition of collective expulsion. Considering that on the basis of the information provided by the Government, it was not possible to establish whether at the material time the respondent State had provided the applicants with genuine and effective access to procedures for legal entry into Croatia (§ 211), the ECtHR found a violation of Article 4 of Protocol No. 4 to the Convention.

## 4. Conclusions

The brief analysis of the case-laws has highlighted that push-backs and detentions of migrants in transit areas have become the rule, with an evident escalation of violence both at EU external and internal borders, even more due to the fact that the well-known Schengen system creates a variable and multifaceted geometry of differentiated legal situations.

Similarly, the investigation underlined that the CEAS appears in a protracted crisis, with a series of visible dysfunctions. These dysfunctions, which result in its non-application, give rise to many problems. It has never been possible to agree on a mandatory relocation scheme (based on quotas) in the face of resistance coming particularly from Eastern European States. The result is a stalemate on the criteria of "country of first entry" which does not appear proportional, given the number of legal accesses to the territory of the Union.

Indeed, there have been attempts over time to reform the Dublin *acquis*. In the first phase, the engine for the establishment of the CEAS was the European Council, starting with the famous Tampere Conclusions of 1999[18], the Hague Program of 2005[19] and the Stockholm Program of 2010[20]. Subsequently, the initiative passed to the Commission with its 2015 "Agenda for Migration"[21], but the legislative proposals have stalled, because of deep divisions between Member States. In 2020, the Council's long-attempted new guidelines have also failed. The draft guidelines are discussed at the technical level in the Council working groups but no concrete progress has been made.

The latest attempt is the Commission's "New Pact on Migration and Asylum" (2020)[22] whose negotiations are still ongoing. Among the various proposals, it

[18] Tampere European Council (15 and 16 October 1999). Presidency conclusions.
[19] The Hague Programme: strengthening freedom, security and justice in the European Union (2005). OJ C 53.
[20] The Stockholm Programme – an open and secure Europe serving and protecting citizens (2010). OJ C 115.
[21] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions (13 May 2015). A European agenda on migration, COM/2015/0240 final.
[22] Communication from the Commission to the European Parliament, the Council, the European

provides for a "pre-entry" screening that must take place on the national territory, but before the formal entry authorization, thus admitting a real "no entry" legal *fictio*[23]. The screening is designed to prepare a further decision-making process that boasts three options: 1) the initiation of a formal procedure for international protection (asylum); 2) expulsion under the Schengen Borders Code; or 3) the return decision in accordance with the Return Directive. Even if the simplification of procedures could lead to a given result in a short period of time, the overall success of the initiative would still depend on cooperation with third States, in particular in the case of the last option. The proposed regulation does not contain explicit provisions on restrictions on mobility: screening procedures will require severe restrictions on mobility, restricting migrants entering hotspots or even require detention. The proposal does not circumvent but raises the problem of hotspots, or how to ensure adequate conditions and an acceptable level of legal protection, including access to courts. In short, there are doubts as to whether the proposed regime will really drastically improve the efficiency of border measures. A real improvement would require an enhanced role for the new EU Asylum Agency, with an autonomous decision-making process which would, however, require specialized judicial competence under the responsibility of the EU.

In conclusion, as the practice showed, the *status quo* of the Dublin Regulation gives rise to the erosion of legality, illegal practices, as well as the adoption of national legislations incompatible with EU law. These affect the protection of migrants' rights and risk to disintegrate not only the CEAS, but also the Schengen area. Furthermore, this *status quo* does not seem to find convincing solutions in the disappointing reform proposals of the new Pact. On the contrary, these proposals have mainly focused on the tightening of border controls, together with a more important role for Frontex, thus continuing to legitimize the violation of fundamental rights.

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