

The Confinement of Human Rights in the 21st Century within the European Space of Justice

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In response to the idea of "spatial justice" in the 21st century, I propose to share a gloomy vision of the future of "human rights", understood as the fundamental rights and freedoms of human beings¹. Wherever we look, we can see the development of legal arguments, of varying strictness, used to justify the denial of certain guarantees to certain individuals, in particular to migrants. While the proliferation of standards relating to the protection of human rights might lead one to believe that all human beings fall within the scope of one of these guarantees, we are witnessing an equal proliferation of efforts to exclude them. Let me begin by emphasising that I am not talking about a gap between the guarantees set out in the legal standards and their real-world application. My aim here is to show that the legal mechanisms themselves contain processes intended to render these standards inapplicable or to seriously diminish their scope. To put it differently, I propose to expose how the statement of human rights in instruments purporting to have so-called legal – and not only political – force, does not in fact afford protection to people at risk. Far from limiting injustices, the use of these standards may even in some cases reinforce them.

The second half of the 20th century saw the emergence and development of numerous systems for the protection of human rights, which shared the characteristic of interposing themselves into the relations between private individuals and their state. In a sense, binding states by means of instruments that guarantee rights to their subjects entails limiting the sovereignty of the former to the benefit of the latter. For example, the two treaties signed on 19 December 1966 under the aegis of the United Nations – the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights – were international treaties, with worldwide scope, which came into force in the legal orders of the states that ratified them. In parallel, instruments with regional scope were developed, and our focus in this article will be those relating to european space.

Within the Council of Europe there is, in particular, the European Convention on Human Rights of 4 November 1950, to which several protocols were subsequently added, either providing additional guarantees or revising the procedure for implementing those guarantees. Under this international treaty, it notably became possible to bring a case before the European Court of Human Rights, a tribunal presided over by judges from the different signatory states, against a state party on the grounds of its violation of the Convention, and reparation measures could be imposed on the offending state in the event of a guilty verdict. This procedure proved to be a sort of marker of state policies and sometimes a source of reform when a verdict led to a reform in national policy. Declarations of human rights are not self-fulfilling, but they act as a trigger for action, which may be crowned with varying degrees of success.² Indeed, law is understood here

1. Paper written in May 2018, before Italy blocks its ports.

2. See, for example, the reference to the condemnations of France by the European Court of Human Rights during the debate in the French National Assembly on 21 April 2018 in support of (rejected) amendments 797, 160, 581, 583, 584, 950 and 806 to the draft bill for controlled immigration, an effective right of asylum and successful integration,

not as a set of norms that impose requirements, but as a set of arrangements that prompt different societal actors to re-examine their situation, their powers, their interconnections and their interactions (Serverin, 2000, notably drawing on Weber). We see standards relating to human rights as having the capacity to identify spaces in which a form of justice is "put into words" by the law. The term "space" suggests boundaries to the applicability of a given standard; it also highlights the dynamic aspect of these standards, which function as guidelines for action and as bridges between different social groups. For example, the European Convention on Human Rights produced closer relations between the signatory states (47, including Russia and Turkey) at European scale. Among these states are some that in 1957 formed the European Economic Community, now the European Union (EU) with 28 member states. These supranational organisations create "European spaces" whose interplay is a source of complexity that will be analysed below, since the EU has developed its own corpus of human rights, embodied in its Charter of Fundamental Rights (Bergé, Robin-Olivier, 2011). Moreover, since the Amsterdam Treaty of 1997, the Union has been promulgating the creation of an "area of freedom, security and justice". In consequence, there are supranational spaces that overlap and partially incorporate the older spheres of power, the national legal orders.

Here, we examine the tensions revealed by the limits of human rights, limits that are set by standards that are neither absolute nor unconditional. More specifically, the question is whether the situations where these standards prove unable to create "an area of justice" do not undercut some of the objectives of those standards. For while the formulation of human rights has a universalist dimension in that it confers rights, guarantees or protections on "everyone", this universalist dimension is not real and to a large extent brings national legal spaces into play. In a context of globalisation, however, supranational spaces of power absorb some state prerogatives. Yet, despite the proliferation of global scale international agreements that confer such rights, the spaces of power that denote globalisation seem to escape their application. Paradoxically, although international treaties on human rights are intended to cross the frontiers of state sovereignty in order to protect different populations, they nevertheless prove incapable of serving as a basis for a discussion of justice in a globalised world. From this perspective, the internationality of the source of the legal instrument is not matched by its capacity to tackle transnational objects, i.e. relations that go beyond the frontiers of a state (M. Delmas-Marty, 2013).

When the relationship in question is not simply that between a subject and one state that has signed a treaty that guarantees human rights, it brings into play either several states, or supranational organisations. However, in these spaces where legal bonds are formed, human rights law as conceived in previous centuries seems to evaporate. At first sight, this seems easy to explain: the shift of power towards supranational organisations reflects a decline in the power of states. Insofar as the initial targets of international standards on human rights were the relations between private individuals and states, the development of spaces of power that do not espouse the contours of the state will inevitably lead to a decline in the effectiveness of those standards.

Moreover, when the persons in question are located outside the boundaries of European spaces, especially if they migrate, human rights become less applicable. In this respect, the legal

seeking to prohibit detention of minors (<http://www.assemblee-nationale.fr/15/critique/2017-2018/20180203.asp?P1250327>).

situation of refugees is alarming, to the point that – as Danièle Lochak (2017) points out – the parallel between the years preceding World War II and the current period is “unmistakable”.

“Though the reference to the past has a strange resonance, to the point that it feels as though history is stuttering, it is nevertheless surprising. Because between the 1930s and today a fundamental transformation has taken place, with the decision to place human rights in general, and the right to asylum in particular, under the protection of the international community; and while in the past states were free to act as they wished, today they are in theory bound by the obligations into which they have entered.”

So human rights as guaranteed today do not offer the expected protection. The “apparent anomaly” that the author then goes on to condemn is at the heart of the demonstration of how states or supranational organisations employ legal tools to found their refusal to apply these guarantees. To do this, they manufacture spaces within which these guarantees are inapplicable, spaces where – more precisely – the responsibility for applying these guarantees falls neither to states nor to supranational organisations. These tools create “centripetal forces” that exclude migrants from the protection of human rights. The most flagrant illustration of this is the externalisation of the borders of the EU, which has the effect of holding migrants at a distance and rendering their rights inapplicable.

More fundamentally, do not these denials of rights reflect a loss of legitimacy on the part of the legal orders, insofar as their legitimacy precisely rests on the protection of human rights? Indeed, some states or supranational organisations make the protection of human rights a marker of democratic society³, with the result that the contradictions undermine not only the standards that protect them but also the legitimacy of those legal orders⁴. As far as possible, we will attempt to adopt a positivist perspective. Our subject is not some immanent justice through which legal orders are legitimised. We simply take legal orders “at their word” to observe how they contain within themselves the destruction of their own foundations. In other words, we observe that the effect of replacing natural rights with legal standards has simply led to a change of language: instead of “demanding justice”, people today can “demand their rights”. Whichever way, they are still crying in the wilderness.

This inapplicability of human rights is apparent in two situations, which, though different in nature, can nevertheless combine. First, as we have already described, Europe is equipped with two legal spaces. And it is in the interstices between EU law and the European Convention on Human Rights that the application of human rights proves particularly weak. Second, the so-called universal field of guarantees is in fact bounded by spatial frontiers. As a result, migrations towards Europe become a test of human rights.

The attenuation of human rights in the interstices of European spaces

The superposition of the two legal spaces – the Council of Europe, on the one hand, and the EU on the other – has had the effect of reducing the scope of human rights. The European Court of Human Rights has forged a “presumption of equivalent protection” which offers *carte blanche* to the signatory states when they implement EU law (Dubout, Touzé 2010). For its part, the EU’s

3. See the preamble to the European Convention on Human Rights.

4. To extend a spatial metaphor, we could speak of a displaced rule of law, regarding which see, for example, GISTI, *Faillite de l’État de droit ? L’étranger comme symptôme, Penser l’immigration autrement*, 2017.

"area of freedom, security and justice" is based on a mechanism of "mutual recognition" which seems irreconcilable with the European Convention on Human Rights.

The superposition of two legal spaces

The period immediately after World War II on the European continent was marked by the establishment of several organisations, two of which concern us here, the EU and the Council of Europe (Bergé, Robin-Olivier, 2011). With regard to the Council of Europe, the states signed the 1950 Convention, making it the foundation of their "truly democratic political regime", as the preamble states. More than the statement of human rights, the major strength of the European Convention on Human Rights, negotiated within the Council of Europe, resides in the unprecedented access to a dispute settlement mechanism for private individuals in supranational spaces. Individuals can bring a case before the European Court of Human Rights against a state that they accuse of violating the guarantees (Renucci, 2017; Sudre, 2016). More than half a century later and after hundreds of rulings against signatory states by the European Court of Human Rights, cracks are beginning to appear in the structure linking protection of human rights with democratic political regime. The emergence of supranational spaces of justice, where the interpretation of the Convention is entrusted to a handful of judges, has itself come to raise questions about the political regimes of the European states. These doubts are all the easier to understand in the light of the significance of the creation of the other European space, the EU.

Without retracing the process of construction of the EU, we will simply recall the fact that numerous fields of policy now fall under its exclusive jurisdiction or are shared with member states. Far from being confined to the economic sphere, EU law – in particular since the Amsterdam Treaty of 1997 – encompasses whole rafts of social relations. For example, European citizenship and the area of freedom, security and justice now feature in Articles 20 and following and 67 and following of the Treaty on the Functioning of the EU. Since as far back as the 1970s, this change in the sphere of power of the member states has raised questions about the position of human rights within this legal space⁵, whose autonomy and specificity the Court of Justice seeks to protect (Bergé, Robin-Olivier, 2011). In particular, the direct transposition of European law into the legal orders of the member states gave EU law a position of dominance.

Insofar as a wide swathe of state policies were governed by EU law, should not the human rights that the states had undertaken to apply and on which their legal orders were founded, reappear within that space? Thus it was that the Court of Justice introduced fundamental rights in the guise of "general principles of law", referring in particular to the European Convention on Human Rights⁶. Rather than retracing all the stages in this development, we will go directly to the current rule of law resulting from the Treaty of Lisbon of 13 December 2007. It contains three items on human rights. First, Article 6 of the EU Treaty reiterates the Union's commitment to fundamental rights. Second, the EU Charter of Fundamental Rights now appears in the content of the treaties and has acquired the same legal force as them. Third, the EU Treaty provides for the EU's accession to the European Convention on Human Rights.

5. For a historical example, see the decision of the German Constitutional Court of 29 May 1974 (Solange I), and recently on a question asked by the Italian Constitutional Court, the response by the CJEC (Mehdi 2018).

6. CJEC, 17 December 1970, C-11/70 referring to the constitutional traditions of the member states; then to treaties such as the European Convention on Human Rights, CJEC, 14 May 1974, C- 4/73.

Nonetheless, the EU can scarcely be considered to have equipped Europe's legal space with an instrument that enhances the implementation of human rights. First, the system of oversight exercised by the two Courts (European Court of Human Rights and the Court of Justice of the EU) is differently conceived. Under EU law, a person whose human rights have been violated by a member state does not have the option of appearing directly before a supranational court to establish the liability of that state. Next, the adoption by the EU Court of Justice of the interpretation of human rights set out in the Charter of Fundamental Rights rather than in the European Convention on Human Rights suggests a certain flattening of priorities. At best, these rights are placed on the same level, if not in a position of inferiority, with respect to the other cardinal principles of EU law and in particular its effectiveness (see in particular CJEU 26 February 2013, *Melloni*, C-399/11). Finally, in opinion 2/13 of 18 December 2014, the EU Court of Justice cited the discrepancies between EU law and the European Convention on Human Rights to rule out the Union's accession to the Convention. In order to protect the primacy of EU law and the specificity of the relations between member states, the Court of Justice of the EU notably asserted that:

"When implementing EU law, the member states may, under EU law, be required to presume that fundamental rights have been observed by the other member states, so that [...] save in exceptional cases, they may not check whether that other member state has actually, in a specific case, observed the fundamental rights guaranteed by the EU."

Hence, the interstices between the European Convention on Human Rights and EU law mark a weakening in the actuality of human rights despite the proliferation of legal texts. The development of a corpus of human rights specific to the EU, interpreted through the prism of other principles, arises more from a shrinking of EU space. The impasse in the process of its accession to the European Convention, which has made it impossible to implement the Lisbon Treaty, is a flagrant illustration of this. The decline in the effectiveness of human rights is also apparent in the case law of the European Court of Human rights.

"Presumption of equivalent protection", a carte blanche for EU law?

A number of cases referred to the European Court of Human Rights concern acts in which states have quite simply applied EU law (Domenach, 2008). Now, according to Article 1 of the European Convention on Human Rights, signatory states guarantee the rights and freedoms defined by the Convention "to everyone within their jurisdiction". Does the situation governed by EU law fall within the jurisdiction of the states that are parties to the European Convention on Human Rights? An affirmative answer would place the states that are parties to the Convention and at the same time members of the EU in the particularly tricky situation of potentially being bound by irreconcilable obligations. Conversely, a negative answer would exclude a whole raft of the activities of the contracting states from the scope of the European Convention on Human Rights, since any act that arose from EU law would fall outside the range of application of the Convention. In short, the transfer of powers from the member states to the EU would seem to be accompanied by a loss of control by the Strasbourg Court over the exercise of those powers that relate to human rights.

This Court has constructed a middle way in order not to place states in a situation of potentially irreconcilable obligations nor to give them totally free rein when they act within the framework of EU law (ECHR [Grand Chamber], 30 June 2005, *Bosphorus... v. Ireland*, case 45036/98) (De Schutter, 2013). However, the middle way, a sign of compromise, is not necessarily consistent with what might be expected of a space of justice in which human rights are supposed to take precedence. When member states act under EU law, the European Court of Human Rights applies a "presumption of equivalent protection" that limits the impact of the Convention. In a subsequent ruling, having stated

that the transfers of sovereignty from states to an international organisation do not prevent the Convention being applied, the Court immediately qualifies the position:

"action taken in compliance with such obligations is justified where the relevant organisation protects fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent – that is to say not identical but "comparable" – to that for which the Convention provides (it being understood that any such finding of "equivalence" could not be final and would be susceptible to review in the light of any relevant change in fundamental rights protection). If such equivalent protection is considered to be provided by the organisation, the presumption will be that a state has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation" (ECHR, 6 December 2012, *Michaud v. France*, Case 12323/11, §103).

The presumption of equivalent protection attenuates the effects of the European Convention on Human Rights with respect to the actions of member states that arise from EU law. When this presumption applies, it is very difficult to challenge state actions before the European Court of Human Rights.

The impossibility of reconciling mutual recognition in the area of freedom, security and justice with the European Convention on Human Rights

The establishment of an "area of freedom, security and justice" between EU member states relies in particular on mutual recognition. As these terms suggest, this means that the states reciprocally confer an effect (recognition) on legal situations established in another member state. As a result, the procedural methods, together with the conditions in which the legal decisions of another member state are recognised or executed, have been harmonised in civil and commercial law, and in certain areas of family law⁷. The ease with which decisions flow from one authority to the legal order of another member state in some cases creates an "enforceable European authority", in which the ultimate constraint of state power is transferred to external foreign judgment.

The question that interests us here is how much room remains for the application of human rights in the interstices between legal spaces: what remains of the possibility or the duty of subordinating the foreign judgments to the observance of human rights? Insofar as the effects of the acts of one state authority are transferred to the legal order of another state, through the application of EU law, confusion arises in determining the role of each party in the application of human rights. This is evidenced by the difficulties encountered by the European Court of Human Rights when it rules on an application against a state that has recognised the foreign judgment. Mutual recognition combines with the presumption of equivalent protection, coupling the two European spaces whose reconciliation seems unachievable. The ruling by the European Court of Human Rights on *Avotinš v. Latvia* (23 May 2016, application no. 17502/07) highlights the paradoxes of the presumption of equivalent protection that it attributes to EU law on the assumption of the mutual recognition of judgments. This presumption is not absolute: first, it does not always apply; second, the applicants can try to rebut the presumption in the event of "manifest deficiency in the protection of fundamental rights".

The presumption of equivalent protection is indeed set aside (and therefore the normal force of the Convention restored) when the state has leeway in the application of the law derived from the supranational organisation to which it has delegated some of its powers, in this case the EU. In these circumstances, because the state authorities have exercised their discretion, they can be held responsible for the situation, with the result that the Convention can be applied without difficulty,

7. E.g. the Regulation of 27 November 2003 relating to jurisdiction, recognition and execution of decisions on marriage and on parental responsibility. For similar reasoning with regard to penal cooperation, see (Labayle, 2013).

according to the aforementioned Article 1. The presumption is confined to cases where EU law leaves no discretion to the member state, and therefore prevents the latter from implementing scrutiny of human rights. Because of this obstacle, the European Court of Human Rights, on the grounds that EU law provides equivalent protection of human rights, justifies the elimination of scrutiny by the member state in particular when, in application of mutual recognition, the latter gives effect to the decision of another state. Whatever the basis of this rationale, it leads to a paradoxical result in terms of the application of human rights. Two situations are juxtaposed: one in which cooperation provides for scrutiny of the observance of human rights, even creating the possibility of dual scrutiny (by both the signatory state and by the European Court of Human Rights); one in which scrutiny is reduced to a strict minimum (there is no scrutiny by the signatory state and scrutiny by the European Court is subject to a rebuttal of the presumption of equivalent protection). The result is paradoxical, because ultimately it is in situations where the scrutiny of human rights by states is strictly limited, or even eliminated, that the presumption of equivalent protection will apply. In other words, in situations where the capacity of EU law to guarantee human rights is reduced, the guarantees afforded by the European Court of Human Rights are also weakened, whereas it might be imagined that the latter's function would have been to compensate for this attenuation.

The European Court of Human Rights clarifies the situation as follows:

"... the mutual recognition mechanisms require the [domestic] court to presume that the observance of fundamental rights by another member state has been sufficient. The domestic court is thus deprived of its discretion in the matter, leading to automatic application of the [...] presumption of equivalence. The Court emphasises that this results, paradoxically, in a twofold limitation of the domestic court's review of the observance of fundamental rights, due to the combined effect of the presumption on which mutual recognition is founded and the presumption of equivalent protection" (§115).

The European Court of Human Rights then tries to rectify this paradoxical effect. When the presumption applies, "the Court's task is confined to ascertaining whether the protection of the rights guaranteed by the Convention was *manifestly deficient* in the present case such that this presumption is rebutted" (§112, our emphasis). According to the Court, the mutual recognition mechanisms do not provide sufficient checks on the observance of human rights as defined by the European Convention on Human Rights. True, these guarantees are similarly defined by the EU Charter of Fundamental Rights⁸, but they are not given the same priority. EU law prioritises the objectives of cooperation between member states over scrutiny of human rights. As a result, according to the European Court of Human Rights, mutual recognition is only consistent with the Convention if the member states maintain a failsafe mechanism in the event of "manifest deficiency in the rights protected by the Convention". Even where the flow of decisions from one state to another arises from the application of EU law, it should be possible to trigger a review of human rights. Although this is in theory a way to maintain the applicability of human rights, member states can nevertheless continue to presume that the decisions of the other states are consistent with human rights. The presumption could be challenged if the victim could bring proof of a "manifest deficiency in the rights protected by the Convention" before the domestic courts or before the European Court of Human Rights. However, this is a narrow breach and one that the applicant would find hard to penetrate (the case law of the European Court of Human Rights remains somewhat obscure on the matter). In all other cases, the state can argue before the European Court of Human Rights that it is applying EU law and take refuge behind the presumption of equivalent protection.

8. See article 53 of the Charter on the subject of the connection between the two documents.

The level of complexity described results from the superposition of several legal spaces (two European spaces and the domestic spaces). In particular, the confusion it generates makes it difficult to ascribe the situation to the legal order of the state. As a result, the presumption of equivalent protection considerably limits the influence of the European Convention of Human Rights in situations where EU law applies. The superposition of legal spaces leads to a multiplicity of centres of power, and in consequence to an attenuation of human rights. This attenuation becomes even more pronounced when it comes to the issue of migration.

Centripetal Forces on the Borders of European Spaces

The way in which the EU and the member states tackle the application of human rights (or rather their non-application) with respect to migration and borders constitutes a cynical game of pass the parcel between legal systems, designed to keep out migrants and deny their rights. The migration policy of the European states, which for several decades has been focused on keeping the borders closed, undermines the rights of people who are migrating or intend to migrate. This becomes flagrant in the case of the law on asylum and refugees. Indeed, the closed border policy has two consequences: on the one hand, it undermines the possibility of applying for asylum; on the other hand, when asylum becomes one of the only legal ways to remain on European territory, it is viewed through the prism of "combating illegal immigration". This is how the area of freedom, security and justice links the issues of immigration and asylum with Article 67.2 of the Treaty on the Functioning of the EU.

In fact, asylum seekers and refugees have rights that feature in the Geneva Convention of 28 July 1951, which is referred to in the EU Charter of Fundamental Rights and the Treaty on the Functioning of the EU. However, the policies of the EU and of most of the member states seek to make these rights inapplicable, by means of a "bypass" strategy (Lochak 2017). The legal mechanisms of this strategy are multiple and demand to be analysed at several levels, which we will examine one by one.

Insofar as rights – minimal as they may be – are triggered by contact with the border, the border becomes the locus not only of material access to the territory but also of access to rights. Conversely, since asylum provides access – poor as it may be – to the territory of the member states, the latter try to prevent asylum applications reaching their borders. Indeed, in order to give the right of asylum any chance of taking effect, the person seeking protection must be "placed in a relation" with the state providing protection. This means that if refugee protection is not to be an empty shell, the asylum seeker – i.e. the person seeking that protection – must enjoy guarantees before his or her status as a refugee is recognised. Moreover, to ensure that the rights of the asylum seeker are not themselves hollow, the UN Refugee Convention lays down the principle of *non-refoulement* for asylum seekers (Article 33). The fact that this principle needed to be stated demonstrates that the reality of rights is conditional, as suggested by Hannah Arendt's concept of the "right to have rights". The reality of refugee rights thus necessarily depends on border arrangements, which should guarantee the asylum seeker the minimum rights needed to be able to make his or her application, in particular the right not to be expelled.

Questions relating to entry into European territory and asylum are partly governed by EU law, which sets differential levels of distance for migrants (Delas 2017; Guild 2006). On the perimeter of Europe, external borders are reinforced as a condition for the removal of internal borders

between EU member states. However, these borders tend to become not just external but "externalised" to the territory of third countries, which can hold back migrants and thereby prevent them being "placed in a relation" with an EU member state. In a reverse process to the picture of migratory pressures converging on Europe, various systems combine to keep migrants away by exercising pressure on certain countries both within and outside Europe (Gammeltoft-Hansen 2012).

Pressures on European countries to guarantee the external borders

The first centripetal force is located within European space and is concentrated in states that are contiguous with non-EU countries and must bear the burden of reinforcing the external borders. The equation has been familiar since the creation of the Schengen area: the removal of internal borders, although marked by some notable exceptions since 2015 (Pascouau 2016), would be impossible without a reinforcement of external borders. There is a degree of complexity in this, since the Schengen area does not encompass all the member states (the United Kingdom, Ireland, Croatia, Bulgaria, Romania and Cyprus are not part of it) and includes so-called third states (Iceland, Liechtenstein, Norway and Switzerland).

With regard to asylum, the Dublin III Regulation is based on assumptions which show that protection of the person is not the central priority of the system⁹. The main rule consists in determining which state is "responsible" for examining the asylum application. It should be noted that the borders covered by this Regulation encompass all the member states of the EU, as well as additional associate countries, i.e. Iceland, Liechtenstein, Norway and Switzerland. The state "responsible" is usually identified by a geographical criterion, defined as the place where the asylum seeker *irregularly* crossed the frontiers of European space¹⁰. Thus, it must neither be possible for the asylum seeker to lodge multiple applications for asylum in different European states, nor to choose the place where they will lodge their single application. Moreover, states that are not responsible for the application can send back people who apply for asylum on their territory. This rule disregards the diversity of asylum policies practised by the states within this area. The mutual trust between states, which leads to the mutual recognition discussed above, is established to the detriment of asylum seekers. The disparities between the asylum systems of different states, the diversity of EU countries, their cultures of receptiveness and their histories relating to asylum, are treated as irrelevant to the individual trajectories of migrants. The asylum application must be maintained in the state where they entered European space, except in certain limited cases where, for example, the existence of family ties in another state may be taken into account. This rule also creates an impasse in the system as a whole, since it inevitably leads to an imbalance in asylum requests, which are concentrated in the countries where migrants cross the frontiers of Europe. Today, these crossing places are sometimes land borders, but primarily the sea borders (Greece, Italy, Malta, Spain).

For their part, arrivals by air have now become largely impossible because of restrictive visa policies coupled with measures to penalise airlines that fail to conduct adequate checks, which make it extremely difficult for people to fly to the "inner" countries. This is evidenced by the

9. Regulation (EU) No. 604/2013 of 26 June 2013 which establishes the criteria and mechanisms for determining which single state is responsible for examining an application for international protection that has been lodged in one of the member states by a third country national or a stateless person, which follows on from the Dublin Convention of 15 June 1990 incorporated into EU law with the Treaty of Amsterdam of 2 October 1997.

10. In speaking of crossing irregularly, the Dublin III Regulation fails to take into account the specific situation of the asylum seeker for whom the principle of *non-refoulement* is established.

limits placed by European states on the possibilities of stopovers in their airports, preventing applications for asylum by these means. Nationals of third countries, a list of which has been drawn up by the EU and the member states, must now obtain a "transit" visa when they are simply planning to pass through an airport in the Schengen area. The list includes countries whose nationals are likely to request and obtain asylum, such as Syria or South Sudan.

With regard to "short-term" visas, a ruling on 7 March 2017 by the European Court of Justice refused to align European harmonisation policy with the rights of asylum seekers guaranteed by European treaties (C-638/16 PPU, Parrot 2018). The case was referred to the Court by a Belgian court which had been called upon to decide on a question relating to the interpretation of a provision of the "European Visa Code". This provision allows national authorities to issue a visa "for humanitarian reasons" or "to honour international obligations" even if the requirements of the European Visa Code are not met. The particular question was whether this provision included the possibility of issuing such an exceptional visa to the members of a Syrian family which had made a successful application at the Belgian consulate in Lebanon. Refusing this visa might expose them to risks of inhuman and degrading treatment prohibited by the European Convention on Human Rights (see below) as well as to a violation of the principle of *non-refoulement* laid down in the Geneva Convention and the EU Charter of Fundamental Rights. Against the advice of the Advocate General, the Court argued that, insofar as the purpose of entering the territory was to apply for asylum, the case concerned a "long-term" visa and was therefore solely a matter of domestic law. In so doing, it precluded the use of uniform "short-term" visas to enter European space and to trigger the associated rights, in particular the right to apply for asylum. Above all, in denying the applicability of EU law, the Court freed itself of any obligation to analyse the situation from a human rights perspective¹¹. Finally, the Court had no hesitation in justifying its decision on the grounds that the alternative solution "would undermine the general structure of the system established by the [Dublin] Regulation" (§48), i.e. the attribution of responsibility for handling the asylum application to the country where the asylum seeker crossed the border. It also added that EU law concerns only "applications for international protection made in the territory, including at the border, in the territorial waters or in the transit zones of the member states, but not to requests for diplomatic or territorial asylum submitted to the representations of member states [located on the territory of a third country]" (§49). The Court of Justice has not showed any kind of resistance to the centripetal forces that keep migrants away and hinder their access to law. Shutting off the routes of access to the territory of an "interior" state in fact has the effect of forcing migrants to take the most dangerous migration routes. At best, asylum applications are concentrated in a few countries where the border crossing is by land or sea, such as Spain, Greece, Italy or Malta, which makes it impossible for them to be handled in conditions where human rights are observed.

To speak of the "general structure of the system" in these circumstances, as the Court of Justice does with regard to the designation of the member state responsible for the asylum application, is not neutral. The said structure not only places an obligation on the state where the border crossing occurred to examine the asylum application; above all, it allows the other states to send asylum seekers back to the responsible country, in accordance with the Dublin III Regulation. Despite a few proposals for change, there seems to be no challenge to this inequitable distribution on the grounds of the principle of solidarity and equitable sharing of responsibilities

11. "Since the situation at issue in the main proceedings is not, therefore, governed by EU law, the provisions of the Charter [of Fundamental Rights of the EU] referred to in the questions of the referring court, do not apply to it" (§45).

posed between member states by Article 80 of the Treaty on the Functioning of the EU (Barbou des Places, 2017; Parrot, 2018). For example, although a relocation plan was adopted in response to the influx of migrants in 2015, providing for the transfer of asylum seekers to the "inner" countries, states have been slow to implement it, despite its modest scale¹². One might also have imagined that the inability of Italy and Greece¹³ to reconcile the large migratory flows with human rights might have posed a challenge to the criteria set out in the Dublin III Regulation. However, the reference to human rights here proves inoperative. It simply constitutes an exception that now appears in Article 3.2 of the Dublin III Regulation, which states that:

"when it is impossible to transfer an applicant to the member state primarily designated as responsible because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that member state, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the EU, the determining member state shall continue to examine the criteria set out in Chapter III in order to establish whether another member state can be designated as responsible."

The European Court of Human Rights had in fact set aside the presumption of equivalent protection and taken the view that transfers by states to Greece in application of the Dublin Regulation constituted a violation of the Convention, insofar as the said Regulation contained a sovereignty clause allowing states to reintroduce a margin of appreciation (ECHR, Gr. ch. 23 February 2012, *M.S.S. v. Belgium and Greece*, Application No. 30696/09). The same reasoning was adopted by the European Court of Justice (CJEU, 21 December 2011, *NS v. Secretary of State for the Home Department*, Case. No. C-411/10), and was finally incorporated into the text by the aforementioned provision of the Regulation (transfers to Greece are nevertheless once again allowed: see the European Commission recommendation of 8 February 2016 addressed to member states concerning the resumption of transfers to Greece, C (2016) 2525 final). Admittedly, this is evidence that human rights are taken into account, but as a single and exceptional corrective mechanism, which is difficult to implement and does not tackle the keystone of the distribution system (for a recent application, see CJEU 16 February 2017, *C. K. v. Slovenia*, Case No. C-578/16 PPU). Although the Charter of Fundamental Rights and, indirectly, the Geneva Convention and, to a lesser extent, the European Convention on Human Rights, seem legally to take priority over the Dublin Regulation, this primacy is nevertheless relative, since it does not touch the core of the distribution system.

The consequence of the Dublin III Regulation, combined with numerous provisions intended particularly to close the air frontiers, is that asylum applications are concentrated in just a few EU states. The refusal of the European Court of Justice to link the applicability of the fundamental provisions of EU law on the right to asylum with uniform "short-term" visas reinforces the closed border policy, at the cost of violating human rights. In addition to these pressures on the frontier countries to guarantee the EU's external borders, there are provisions that extend those borders to the territories of third countries.

The externalisation of Europe's borders

12. Report from the Commission to the European Parliament, the European Council and the Council; Twelfth report on relocation and resettlement, 16 May 2017, COM(2017) 260 final.

13. See what has happen in confined spaces of « hotspots » e.g. (<http://www.infomigrants.net/fr/post/8838/en-grece-les-demandeurs-d-asile-sont-de-nouveau-sousmis-au-confinement-sur-les-iles>).

In order to avoid asylum seekers being “placed in a relation” with a European state, agreements have been made with third countries, either by individual states or under the aegis of the EU. The purpose of these agreements is, on the one hand, to stem the flow of migrants even beyond the boundaries of European space and, on the other hand, to facilitate the return of migrants staying illegally on the territory of a member state. Whether or not these agreements are consistent with the rights of migrants is doubtful. Some authors and organisations or NGOs (La Cimade, *Rapport d'observation Coopération UE-Afrique sur les migrations. Chronique d'un chantage*, with Loujna and Migreurop 2017), which condemn the externalisation of the frontiers, even take the view that the purpose of such agreements is precisely to avoid the applicability of human rights (Gammeltoft-Hansen, 2012). We subscribe to this reasoning, which we will follow here in its broad lineaments. We will show that despite the apparent extraterritorial scope of human rights instruments, the outcome of the externalisation of the frontiers is to prevent their application.

The first factor to stress is that human rights instruments are in fact extraterritorial in scope. For example, Article 3 of the European Convention on Human Rights, which prohibits torture and inhuman or degrading treatment or punishment, dilutes the sovereignty of states with regard to their right to control the entry, stay and departure of non-nationals (*Abdulaziz, Cabales and Balkandali v. United Kingdom*, 28 May 1985, Application No. 9214/80, §67). As a result, any measure to remove a person to a destination where they run a real risk of being subjected to treatment contrary to Article 3 is likely to engage the responsibility of the state that has adopted this measure. In the ruling on *Hirsi Jamaa v. Italy* (Gr. ch. 23 February 2012, Application No. 27765/09), the European Court of Human Rights recalls the absolute nature of this guarantee, although it states its awareness of the “difficulties related to the phenomenon of migration by sea, involving for states additional complications in controlling the borders in southern Europe” (§122). The case concerned persons who had been intercepted on the high seas by the Italian authorities, and sent back to Libya. The Court begins by noting that interception on the high seas did not exempt the state from its obligation to observe the European Convention on Human Rights. Next, the Court considers that in the light of the different reports establishing “a situation of systematic non-observance of human rights” in Libya, the disembarkation of the migrants exposed them to a real risk of undergoing treatment contrary to Article 3. Moreover, insofar as the applicants were nationals of Somalia and Eritrea, to which the Libyan authorities were likely to return them, the European Court of Human Rights stated that Italy should have made the return of these people conditional on the verification of “sufficient guarantees that the parties concerned would not be arbitrarily returned to their countries of origin, where they had an arguable claim that their repatriation would breach Article 3 of the Convention” (§148). The Court therefore ruled that Italy had violated Article 3 of the Convention not only because the applicants had been exposed “to the risk of being subjected to ill-treatment in Libya” but also “were exposed to the risk of being repatriated to Somalia and Eritrea¹⁴.”

This ruling might lead one to believe that people should no longer be sent back to countries where there is an established risk of their human rights being violated. And yet, in February 2017, Italy signed a Memorandum of Understanding on migration with one of the three Libyan governments, the Government of National Accord headed by Fayed el-Sarraj¹⁵. Provided that it is

14. Moreover, Italy was found to be in violation of Article 4 of Protocol No 4 prohibiting group expulsions.

15. Moreover, the military mission of the member states of the EU – EuNavForMed – helps train the Libyan coastguards (Prestianni, 2017).

the authorities of third states that carry out the operations to avoid a migrant's being "placed in a relation" with any European state, a state that is party to the European Convention on Human Rights may no longer be held liable for the risks (reasoning based on the early agreement between Italy and Libya, Gammeltoft-Hansen 2012). The Italian state may be said to have drawn the necessary conclusions from the verdict of the European Court of Human Rights by ensuring that it is no longer directly responsible. The legality of these agreements therefore needs to be reviewed¹⁶. However, such a review would be difficult, to say the least, as evidenced by the vicissitudes of the EU-Turkey statement.

This EU-Turkey statement of 18 March 2016 constitutes the most powerful of these centripetal forces, leading to the avoidance of any contact between migrants and the member states (H. Labayle, 2016; Teule, 2017). The aim is to ensure that migrants remain in a country of transit, even if this is not considered to be a "safe country", especially as Turkey has restricted the application of the Geneva Convention to Europeans alone. According to the statement, from 20 March 2016 all new irregular migrants (who are not seeking asylum or whose application for asylum has been judged unfounded or inadmissible) who have travelled through Turkey to the Greek islands, are sent back to Turkey. However, for every person of Syrian nationality sent back to Turkey from the Greek islands, another person of Syrian nationality is to be resettled from Turkey to the EU, up to a maximum of 72 000 people. Moreover, Turkey undertakes to take all necessary measures to prevent new irregular migration routes, whether by sea or land, opening up from its territory in the direction of the EU, and to cooperate with the neighbouring states as well as with the EU to that effect. Finally, the statement stipulates that the EU will, by the end of 2018, pay a further €3 billion into a special fund, in addition to the €3 billion previously allocated.

The consequence of this agreement, reached at the summit between the Council of Europe and Turkey and designed to close the migratory route across the Aegean Sea, is to keep migrants at a distance by means that notably expose them to serious risks of inhuman and degrading treatment, since Turkey only accords refugee status to people of European nationality in application of the Geneva Convention (UN Committee Against Torture, Concluding observations on the fourth periodic reports of Turkey, CAT/C/TUR/CO/4, 2 June 2016, §25). As a result, the legality of the EU-Turkey agreement has been challenged before the General Court by a Pakistani national who had applied for asylum in Greece. The Court examined the legal content of the agreement and concluded that it had not been adopted by the European Council as a EU institution, but by the representatives of the member states of the Union, acting in their capacity as heads of state or of government of the said member states (GC 28 February 2017, *N. F.v. European Council*, Case T-192/16). In consequence, the Court declared itself incompetent on the grounds that the case is a matter for national law (Barbou des Places 2017). An appeal against this decision is pending before the European Court of Justice. This refusal to give a ruling is

16. An appeal has been lodged with the Italian Constitutional Court by several members of Parliament, invoking the non-observance of the powers of Parliament with regard to the ratification of treaties, on the subject of the Memorandum of Understanding on cooperation in the fields of development, illegal immigration, human trafficking and contraband, and on reinforcing the security of the borders between Libya and Italy, signed in Rome on 2 February 2017 by the President of the Italian Council and the President of the Council of the Government of National Reconciliation of the State of Libya. This agreement follows on from an earlier one of 2008, but according to the appealing MPs, constitutes an international treaty that sets new priorities for the two countries. The MPs cite Article 80 of the Italian Constitution according to which agreements of a "political nature" must be submitted to Parliament for ratification.

particularly damaging at a time when the EU-Turkey statement is considered as a model for relations with other third countries that are not even parties to the European Convention on Human Rights. For example, the "Joint Way Forward on migration issues between Afghanistan and the EU" of 2 October 2016 provides for cooperation that notably includes returns to Afghanistan (Barbou des Places, 2017). The organised return of people to countries where there are risks of systematic violation of human rights is a clear demonstration of the failure of these rights to influence policies on migration.

The manoeuvres of the EU and the member states to externalise migration controls and the pressures on third states to facilitate the return of their nationals, or even the nationals of other states, entail agreements whose legal effect is rejected by the authorities themselves. The undermining of human rights by these agreements is as evident as it is difficult to sanction, since it is often impossible for the victims to bring a case before the courts and the former are little inclined to take on the sovereign power.

To conclude, there are questions to be asked about this inability of human rights to influence policy. The chain of cause and effect between the standards that implement this policy (arising from EU law or from agreements with third states) and the deprivation of people's rights beyond the frontiers of Europe, has been a topic of analysis in the political and social sciences. Nonetheless, it seems to have little success in affecting the reasoning of the courts. For example, several civil society actors have shown how closed border policies and the externalisation of the borders make the migration routes more dangerous and lead to the violation of certain rules (see the above-mentioned Cimade report; Fouteau, Carine, « Le Tribunal permanent des peuples fait le procès des politiques migratoires », Mediapart, 5 January 2018). However, the legal space within which these violations could be investigated and punished has yet to be constituted. When people suffer ill-treatment, or are exploited, or else cross the sea or the desert, it is the traffickers or people smugglers who are held responsible and the priority is placed on combating these forms of criminality. The absence of legal channels of immigration and the resulting penalties exacted on the carriers, which create the breeding ground for this traffic, are not included in the causal chain of responsibility. Indeed, regardless of the consequences of these policies for human rights, the sovereignty of states justifies control of the borders, whether by states themselves or as part of a supranational organisation like the EU. Likewise, the "general structure" of the Dublin Regulation, precluding any distribution of asylum applications, does not in itself appear open to challenge. The result is that any reference to human rights is only productive in exceptional cases. Confined to the margins of the system of closed borders, human rights reveal the limits of their scope while nevertheless asserting their existence. We might wonder what purpose this assertion serves, other than as a fig leaf of protection. Furthermore, it would appear that all the legal reasoning and expertise are directed in support of the norms whereby states dismiss the application of human rights, with the result that the underlying trend, far from contributing to the protection of the fundamental rights of individuals, would seem to reinforce the power of states.

The confinement of human rights within European legal systems would thus seem to be the outcome of the superposition of several European spatial scales, and of the dual affiliation of member states both to the EU and to the European Convention on Human Rights. It is true that each of these supranational organisations contributes to the emergence of spaces of justice in addition to those constituted by national legal orders. However, the position of human rights in these different spheres of justice, despite their proliferation in various legal instruments, remains peripheral. The strengthening of the external frontiers of Europe would seem to be a more

important objective than the implementation of human rights, especially the rights of refugees. The bonds formed with third countries, whether by the EU or by its member states, are designed to avoid the risk of any triggering of human rights relating to migration and can be interpreted as a means of bypassing the spaces of justice.

To quote this paper: Laurence SINOPOLI, "The Confinement of Human Rights in the 21st Century within the European Space of Justice", [« Le confinement des droits humains au XXI^e siècle dans l'espace de justice européen », traduction: John Crisp], *Justice spatiale | Spatial Justice*, n° 12, octobre 2018 (<http://www.jssj.org>).

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