

Coloniality and Recent European Migration Case Law

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4.1 INTRODUCTION

Beginning with the 2014 *Khlaifia* judgement (infra), the European Court of Human Rights and the Court of Justice of the European Union have given a series of judgments that have been widely perceived as constituting a state-friendly rupture with its earlier case law promoting the human rights of migrants. Practitioners and academics consider this new turn in the case law as a response to the 2011 and 2015 migration crises in Europe.¹ However, it has been argued that these crises were not the unforeseeable consequence of external events impacting on European migration and asylum law and policy, but followed from structural shortcomings of European law and policy itself.² Also, the idea that the earlier case law of the two European courts constituted a robust protection of the human rights of migrants has been subjected to fundamental critiques.³ Taking these two analyses together, this chapter will

¹ See Louis Imbert, “Du palais des droits de l’homme au Palais Royal: Chronique d’un renoncement jurisprudentiel face à l’argument de la crise migratoire” (2019) 38 *Revue des droits et libertés fondamentaux*; Anita Sinha, “Defining Detention: The Intervention of the European Court of Human Rights in the Detention of Involuntary Migrants” (2019) 50 *Columbia Human Rights Law Review* 176; Iris Goldner-Lang, “Towards ‘Judicial Passivism’ in EU Migration and Asylum Law?” in T Čapeta, I Goldner Lang & T Perišin, *The Changing European Union: A Critical View on the Role of Law and Courts* (Hart 2020).

² Maarten den Heijer, Jorrit Rijpma and Thomas Spijkerboer, “Coercion, Prohibition and Great Expectations: The Continuing Failure of the Common European Asylum System” (2016) 53 *Common Market Law Review* 607; Daniel Thym, “The ‘Refugee Crisis’ as a Challenge of Legal Design and Institutional Legitimacy” (2016) 53 *Common Market Law Review* 1545. More broadly see Jaya Ramji-Nogales, “Migration Emergencies” (2017) 68 *Hastings Law Journal* 609; Katie Oliveiro, “The Immigration State of Emergency” (2013) 25 *Feminist Formations* 1.

³ Bas Schotel, *On the Right of Exclusion. Law, Ethics and Immigration Policy* (Routledge 2012); Marie-Bénédicte Dembour, *When Humans Become Migrants. Study of the European Court of Human Rights with an Inter-American Counter-Point* (Oxford University Press 2015); Sandra Mantu, “Alternative views on EU citizenship” in C.A. Grütters, S. Manda and P. Minderhoud

not approach European law as failing to counter the undermining of migrants' rights, but will interrogate European law as actively contributing to such undermining since its inception. This does not necessarily mean that European law *only* undermines the rights of migrants. At times social movements have successes within the overall "sedentarist"⁴ framework of European migration law, and it is conceivable that a number of such successes in the future might fundamentally transform the framework itself. From this critical perspective, the current developments in European case law may be seen not as a rupture, but as a continuation of a pre-existing characteristic – as new inflections of a more long-term tendency to privilege the interests of European states over those of migrants and of Europeans with transnational ties.

The notions of crisis and emergency are reflected in law. John Reynolds has shown that the legal notion of emergency is an elastic concept that may take on various forms. It is not an exceptional legal instrument placing a situation outside of law, but a permanent legal governance technique that was developed in the European colonies and subsequently has been absorbed into international law. The notion of emergency normalised special state powers over colonial subjects, especially when used for an extended period. Legal techniques making this possible maintain the legitimacy and legality of state action, in particular of intensified state violence against populations who are ruled through force, not consent. Emergency regimes are an element of legal techniques of subjugation of racialised and lower-class groups.⁵ The migrants whose rights are being undermined by the case law of the European courts originate from former colonised regions; they do not have a say in the policies that are enforced against them; and they have been subject to intensified forms of state violence in the form of deprivation of liberty, expulsion, and exposure to extreme living conditions.

The European Convention on Human Rights contains three options to limit rights. In addition to the limitation clauses concerning specific rights, there is the general derogation clause for public emergencies (Article 15 ECHR) as well as colonial clause (Article 56 ECHR) allowing states not to extend the Convention to their colonies or, if they choose to do so, to apply it

(eds), *Migration on the Move. Essays on the Dynamics of Migration* (Brill/Nijhoff 2017) 225. More broadly see Tendayi Achiume, "Migration as Decolonization" (2019) 71 *Stanford Law Review* 1509–1574.

⁴ Daniel Thym, "Migrationsfolgenrecht" 2017 (76) *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 169.

⁵ John Reynolds, *Empire, Emergency and International Law* (Cambridge University Press 2017); Nasser Hussain, *The Jurisprudence of Emergency. Colonialism and the Rule of Law* (University of Michigan Press 2003).

there “with due regard to local requirements”.⁶ Fawcett specified in 1969 that the concept of “local requirements refers primarily to permanent or organic characteristics of a territory and would not extend to temporary features”.⁷ A current textbook admits that the local requirements standard “may permit a lower standard of compliance with the Conventions’ requirements in dependent territories”.⁸

EU law does not have a colonial clause, but it does regulate its territorial scope of application. The 1957 EEC Treaty contained a provision stipulating that the treaty would apply to Algeria and French overseas departments for a number of issues (one of the applicable notions is that of public emergency, Article 227(2) EEC Treaty). It requires intimacy with the text of the treaty to see that free movement of persons is missing and hence does not apply to Algeria. Furthermore, it provides that for the overseas territories of the member states a special association regime applied, laid down in Article 131–136 EEC Treaty. A series of protocols detailed the status of the overseas territories upon entry into force of the Treaty. The current application of EU law to overseas territories is regulated via Article 355 TFEU. In addition, in the field of asylum Article 78(3) TFEU allows the Union to adopt provisional measures for the benefit of states that are confronted by an emergency situation characterised by a sudden influx of third country nationals

Clearly, the recent case law of the European courts does not apply Article 15 or 56 ECHR, or Article 355 TFEU. However, in this chapter this case law will be analysed as an application of the idea on which these provisions are based, namely that the physical proximity of (in this case: former) colonial subjects constitutes an emergency which requires excluding colonial subjects from the full application of the law. The hypothesis which will be examined here is that current-day migrants, being people from former European colonies, are subjected to a split form of legality that was perfected at the end of the colonial era. Article 56 ECHR and 227 EEC Treaty (currently 355 TFEU) are emblematic of this split legality. They both allow for a legal system that maintains the pretence of equality before the law while at the same time

⁶ On the relation between these three alternatives, see Reynolds, 117–137. Compare with Marco Duranti, *The Conservative Human Rights Revolution: European Identity, Transnational Politics, and the Origins of the European Convention* (Oxford University Press 2017) 197–205; A.W. Brian Simpson, *Human Rights at the End of Empire: Britain and the Genesis of the European Convention* (Oxford University Press 2001) 276–322.

⁷ J.E.S. Fawcett, *The Application of the European Convention on Human Rights* (Oxford University Press 1969) 342.

⁸ D.J. Harris, M. O’Boyle, E.P. Bates and C.M. Buckley, *Law of the European Convention on Human Rights* (Oxford University Press 2014) 101.

relegating colonial subjects to sub-standard legal protection by either excluding them from the application of these treaties altogether (*infra*, Section 4.2) or by lowering the standards (*infra*, Section 4.3). In addition to these two elements, a third legal governance technique with its origins in colonialism is the use of emergency powers themselves (*infra*, Section 4.4). Authorities have special powers at their disposal for use in case of emergency, and have considerable leeway in deciding whether there is an emergency and, if so, what it requires.

4.2 THE LAW DOES NOT APPLY

The most radical version of coloniality foreseen in European treaty law consists of not applying European legality at all. This can be seen in the EU Court of Justice's judgments about the EU-Turkey statement. A second example of non-application of European legality is the case law of both European courts in cases of Syrians applying for humanitarian visas so as to claim asylum in Europe without having to risk their lives on smuggling boats. In a third context, that of migrant detention at European external land borders, the Strasbourg court adapted its case law so as to make the ECHR inapplicable (by precisely denying that the people concerned were being detained), while the Court of Justice did not adopt that innovation and continued to apply European law to such detention.

4.2.1 *The EU-Turkey Statement*

The Court of Justice was asked to annul the 2016 EU-Turkey statement.⁹ The court developed a complicated argumentation in order to reach the conclusion that the European Union is not one of the parties to the agreement, but that it was concluded between the 28 member states of the EU and Turkey.¹⁰ The Court based this on the wording of the EU-Turkey statement. The judgment is at odds with the so-called ERTA doctrine in a quite evident

⁹ See Sergio Carrera, Leonhard den Hertog and Marco Stefan, "The EU-Turkey Deal: Reversing 'Lisbonisation' in EU Migration and Asylum Policies" Sergio Carrera et al (eds), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis* (Edward Elgar 2019) 155; Mauro Gatti and Andrea Ott, "The EU-Turkey Statement: Legal Nature and Compatibility with EU Institutional Law".

¹⁰ *N.F., N.G. and N.M. v. European Council*, Cases T-192/16, T-193/16, T-257/16, General Court 28 February 2017.

manner.¹¹ This doctrine, codified in Article 3(2) TFEU, holds that whether a decision is a decision of the EU or of the Member States is governed by European law. Contrary to what the Court argues in this case, the label that the decision itself provides is not decisive. The ERTA doctrine concerns exactly the situation at hand – ministers of all EU Member States meet – but do they meet as the council (thus representing the European Union) or as representatives of the Member States? Decisive is not the label, but whether the decision implements a common policy; whether it deals with a matter falling within EU competence; whether it has definite legal effects on a common policy. The EU-Turkey Statement has legal effects (if only because it creates considerable tension with European and international asylum law) concerning a common policy (rules on asylum and migration policy, visa policy) and therefore (in the terms of the ERTA judgment) “the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules”.¹²

Because the Court ruled that the EU was not a party to the EU-Turkey statement, it also excluded the possibility of prejudicial questions by domestic courts about the statement. An internal appeal against the judgment in the EU-Turkey statement case was lodged, but this was dismissed as being inadmissible because the Court found the appeal grounds incomprehensible.¹³ Be that as it may, it allowed the Court to leave intact an evidently problematic judgment and allowed itself not to have to pass judgment on the compatibility of the EU-Turkey statement with EU constitutional law, including the Charter on Fundamental Rights.

4.2.2 Humanitarian Visa

In October 2016, a Christian family from Aleppo (then a war zone) applied for a short-stay visa with limited territorial validity at the Belgian Embassy in Beirut, and returned to Syria the day after. They had indicated that they intended to apply for asylum in Belgium, and explained that they were forced

¹¹ Nariz Idrin, “The EU-Turkey Statement or the ‘Refugee Deal’: The Extra-Legal Deal of Extraordinary Times?” in Dina Siegel and Veronika Nagy (eds.), *The Migration Crisis?: Criminalization, Security and Survival* (Eleven Publishing 2018), 61; Antoine Guérin, “Déclaration UE-Turquie du 18 mars 2016: la CJUE ou les singes de sagesse” (2019) 16 *Revue des droits de l’homme*.

¹² *Parliament v. Council and Commission*, Joined Cases C-181/91 and C-248/91, para 17, 30 June 1993.

¹³ *N.F. and Others v. European Council*, Joined Cases C-208/17 P to C-210/17 P, 12 September 2018.

to return to Syria by the fact that they were not allowed to register as refugees in Lebanon, and were not sufficiently prosperous to be able to maintain themselves in Lebanon without such registration. The EU Court of Justice ruled that an application for a visa with the aim of applying for asylum is not an application for a visa for a stay of no longer than three months (*X & X v Belgium*, case C-638/16). Therefore, the issue was not covered by the Visa Code, which only governs short-stay visas. As the issue of visas for a stay longer than three months has not been harmonised, it was not governed by European law, but only by national (in this case Belgian) law. As a consequence, the EU Charter of Fundamental Rights does not apply. Therefore, the court did not have competence to rule on the substantive issue of whether European states may be under an obligation to issue a visa in a situation such as that of the Syrian family. The reasoning of the court is formal, but compelling. Remarkably, the Advocate General in this case had an equally compelling formal reasoning with the opposite outcome. He argued that the applicants had applied for a short-stay visa. One of the grounds for denying such a visa was the fact that there were doubts as to whether the applicant would leave after the period for which the visa had been granted. However, it was possible to grant a visa despite such doubts in humanitarian cases by making an exception to this ground for refusal. In addition, the Advocate General argued that the applicants intended to stay for no longer than three months in Belgium on the basis of their visa; after that, their stay would have been based on their status as asylum seekers. Therefore, the procedure really and actually concerned a short-stay visa. In this way, the Advocate General found the EU Visa Code and consequently the Charter of Fundamental Rights to be applicable. The Advocate General then argued that EU Member States were under an obligation to issue a visa if there are substantial grounds to believe that the refusal thereof would have as a direct consequence that the applicant would be exposed to inhuman or degrading treatment, by depriving that national of a legal route to exercise his right to seek international protection in that Member State. The relevant impending inhuman or degrading treatment consists, in the analysis of the Advocate General, both of the treatment the applicant may be exposed to in the country of origin and in the risks inherent in an irregular trip to a country of asylum to which a refusal of a visa would expose the applicants. As Rijpma has observed, the Court's decision not to adopt the position favoured by the Advocate General was motivated by its wish not to intervene in a highly sensitive area, and it was allowed to make this choice by the ambiguity of the notion of the scope of EU law.¹⁴

¹⁴ Jorrit Rijpma, "External Migration and Asylum Management: Accountability for Executive Action Outside EU-Territory" (2017) 2 *European Papers* 571, 579. I have analysed this

A similar case was brought before the European Court of Human Rights.¹⁵ Again during the siege of Aleppo, a Syrian family from that city applied for a visa at the Belgian embassy in Beirut, with a view to applying for asylum in Belgium. They argued that the refusal to issue that visa exposed them to inhuman treatment in the sense of Article 3 ECHR. The crux of the case was whether Belgium had exercised jurisdiction in the sense of Article 1 ECHR over the Syrian family. The Court has ruled that jurisdiction is primarily a territorial concept. Exceptionally, states can exercise extraterritorial jurisdiction through acts performed or producing effects outside its territory. One example of this is exercising effective control over territory or persons. Another, and one that is highly relevant for this case, is actions or omissions of its diplomatic or consular officials. Until the decision of May 2020, the Court had held that such acts constituted the exercise of jurisdiction if they were committed in an official capacity. In its new decision, the Court added to its summary of case law that acts or omissions of diplomatic or consular officials were an exercise of jurisdiction if they concern “that State’s nationals or their property”.¹⁶ In one case, jurisdiction had been exercised over non-nationals (in the Danish embassy in east Berlin), but in that case the non-nationals were physically removed from the embassy’s premises.¹⁷ Whereas previous restatements of the Court’s case law on diplomatic or consular officials had covered nationals and non-nationals of the State in question, the Court in *M.N. and Others v. Belgium* restated its case law as being about diplomatic and consular acts vis-à-vis own nationals, and physical acts vis-à-vis non-nationals. This allows the Court to assert that the case law about consular acts towards nationals and physical acts towards non-nationals is not applicable to the given case, as it is about consular acts towards non-nationals.¹⁸ Hence, the Court is not bound by precedent holding that consular acts constitute an exercise of jurisdiction. The Court ruled that it was not possible to trigger, unilaterally, jurisdiction by addressing a request to a state with whom the applicants had no prior connection, and without that state having chosen to be imposed a treaty obligation.¹⁹ The alternative, the Court adds, would amount to a near-universal application of the Convention on the basis of the unilateral choices

judgment, as well as the EU-Turkey judgment addressed above, more extensively in Thomas Spijkerboer, “Bifurcation of Mobility, Bifurcation of Law. Externalization of migration policy before the EU Court of Justice” (2018) 31 *Journal of Refugee Studies* 216.

¹⁵ *M.N. and Others v. Belgium* App no 3599/18 (ECHR GC, 5 May 2020).

¹⁶ *Ibid.*, para 106.

¹⁷ *Ibid.*, para 106.

¹⁸ *Ibid.*, para 118.

¹⁹ *Ibid.*, para 121, 122 and 123.

of any individual, irrespective of where in the world they find themselves, and therefore create an unlimited obligation on states to allow entry to individuals who might be at risk of inhuman treatment.²⁰ This would “have the effect of negating the well-established principle of public international law (...) according to which the States Parties, subject to their treaty obligations, including the Convention, have the right to control the entry, residence and expulsion of aliens”²¹ – an ironic statement because the Court is in the process of concluding that the entry of these aliens is precisely not subject to *any* treaty obligations.

4.2.3 Border Detention

Another legal issue connected to the 2015 “crisis” was also decided by both courts. It concerned the Röske “transit zone” at the Hungarian–Serbian border. Asylum seekers who wanted to enter Hungary from Serbia were stopped at the Hungarian border, which is an EU external border. They applied for asylum, which had to be done from within the Röske “transit zone”, – a closed and guarded area that people could only enter or leave with permission and cooperation by the Hungarian authorities. In *Ilias and Ahmed v. Hungary* the Hungarian authorities removed the asylum seekers to Serbia without substantive examination of their asylum claims on the ground that Serbia was a safe third country. The European Court of Human Rights found the removal of two Bangladeshi asylum seekers to Serbia to be a violation of Article 3 ECHR,²² because there was consistent general information that Serbia would send them onward to Macedonia, which would move them onward to Greece. Because return to Greece would constitute a violation of Article 3 ECHR,²³ exposing asylum seekers to such return without substantive assessment of their asylum applications constituted a violation of the procedural aspect of Article 3.²⁴ In this respect the Court followed its earlier case law,²⁵ despite invoking the right of states “to control the entry, residence and expulsion of aliens” as well as “the challenge faced by the Hungarian authorities during the relevant period in 2015, when a very large number of foreigners

²⁰ *Ibid.*, para 123.

²¹ *Ibid.*, para 124.

²² *Ilias and Ahmed v. Hungary* App no 47287/15 (ECHR GC 21 November 2019).

²³ *M.S.S v. Belgium and Greece* App no 30696/09 (ECHR GC 21 January 2011).

²⁴ *Ilias and Ahmed*, supra note 22, para 158–163.

²⁵ *M.S.S. v. Belgium and Greece*, supra note 23.

were seeking international protection or passage to western Europe at Hungary's borders".²⁶

However, it ruled that their factual situation did not amount to detention. This constituted a new turn in the Court's case law. The Court had previously held that people who were held in an airport transit zone or in a reception centre on a Mediterranean island were being held in detention.²⁷ In *Ilias and Ahmed*, however, in contrast to the Chamber judgment in the same case,²⁸ the Grand Chamber held that holding people in a "transit zone" at a land border in this case did not constitute detention, despite the fact that the people held there were under the control of the Hungarian authorities,²⁹ and despite the fact that "the size of the area and the manner in which it was controlled were such that the applicants' freedom of movement was restricted to a very significant degree, in a manner similar to that characteristic of certain types of light-regime detention facilities".³⁰ It did so by distinguishing this situation from the cases it had ruled on previously.³¹ It furthermore considered:

that in drawing the distinction between a restriction on liberty of movement and deprivation of liberty in the context of the situation of asylum seekers, its approach should be practical and realistic, having regard to the present-day conditions and challenges. It is important in particular to recognise the States' right, subject to their international obligations, to control their borders and to take measures against foreigners circumventing restrictions on immigration.³²

The reference to the right of Hungary to control its borders was repeated,³³ as was the reference to "conditions of a mass influx" and the "ensuing very significant difficulties".³⁴ The main aspect that the Court referred to so as to find that the situation was not one of detention was that the two applicants entered Hungary at their own initiative,³⁵ without being at a direct risk to life

²⁶ *Ilias and Ahmed*, supra note 22, para 125 and 155 respectively.

²⁷ *Amuur v. France* App no 19776/92 (ECHR 25 June 1996); *Khlaifia and others v. Italy* App no 16483/12 (ECHR GC 15 December 2016); *J.R. et autres c Grèce* App no 22696/16 (ECHR 25 January 2018); *Kaak et autres c Grèce*, App no 34215/16 (ECHR 3 October 2019).

²⁸ *Ilias and Ahmed v. Hungary* App no 47287/15 (ECHR 14 March 2017).

²⁹ *Ilias and Ahmed* Grand Chamber, supra note 22, para 186.

³⁰ *Ibid.*, para 232.

³¹ *Ibid.*, para 215–219.

³² *Ibid.*, para 213.

³³ *Ibid.*, para 222 and 225.

³⁴ *Ibid.*, para 228.

³⁵ *Ibid.*, para 220 and 221.

or health,³⁶ and could return to Serbia voluntarily³⁷ without a direct threat to life or health.³⁸ The Court did not find it decisive that they had no legal right to enter Serbia (and actually were returned to Serbia in circumvention of border control).³⁹ Nor did it find the length of their confinement (twenty-three days) decisive because this length was not longer than necessary for examining their asylum claim.⁴⁰ The Court consistently minimises these twenty-three days, by referring to “only”⁴¹ twenty-three days or by calling the confinement “short”.⁴² The decisive argument seems to be the voluntary nature of the applicants’ decision to enter Hungary from Serbia and their decision not to return to Serbia until they were eventually forced to do so by the Hungarian authorities.⁴³ The main problem with this is that the Court itself has held that the asylum procedure in Serbia had such deficiencies that exposing people to it amounts to a violation of Article 3 ECHR. The idea that to prefer confinement over being exposed to a real risk of inhuman treatment is a matter of free choice, is Orwellian in the sense of being evidently cynical.

In a judgment given six months after the Grand Chamber’s *Ilias and Ahmed* judgment, the EU Court of Justice clearly distanced itself from the interpretation of the term detention of the Strasbourg Court.⁴⁴ In a case concerning asylum seekers who were held in the same transit centre at Rösztke it gave a complex definition to state the obvious: detention is “a coercive measure that deprives (a person, TS) of his or her freedom of movement and isolates him or her from the rest of the population, by requiring him or her to remain permanently within a restricted and closed perimeter”.⁴⁵ It added that the fact that people “are free to leave the Rösztke transit zone to travel to Serbia cannot call into question the assessment that the placing of those applicants in that transit zone cannot be distinguished from a regime of detention”.⁴⁶ The EU Court of Justice’s refusal to go along with Strasbourg’s new exception signals that, when European case law is analysed through the lens of coloniality, one

³⁶ *Ibid.*, para 223.

³⁷ *Ibid.*, para 235 and 236.

³⁸ *Ibid.*, para 242–243.

³⁹ *Ibid.*, para 237. This creates a tension with *Salah Sheekh v. Netherlands* App no 1948/04 (ECHR11 January 2007) para 141.

⁴⁰ *Ilias and Ahmed* Grand Chamber, *supra* note 22, para 227, 228 and 233.

⁴¹ *Ibid.*, para 233.

⁴² *Ibid.*, para 192 and 225.

⁴³ *Ibid.*, para 123; the Court rejects the respondent government’s argument that their return to Hungary was not a removal but voluntary act of the applicants.

⁴⁴ Case C-924/19 PPU and C-925/19 PPU *F.M.S. and Others* [2020].

⁴⁵ *Ibid.*, para 223.

⁴⁶ *Ibid.*, para 228.

cannot assume that coloniality necessarily leads to a particular outcome. Like the Strasbourg Court, the Court of Justice was impressed by the “large numbers” arriving in Europe at the relevant time,⁴⁷ but it found it possible to apply the normal concept of detention in that situation.

4.3 DUE REGARD TO LOCAL REQUIREMENTS

The previous section provided a number of examples where, through the application of European treaty law, former colonial subjects were excluded from European legality. We will now turn to a second category of examples, where European legality is deemed applicable but where it is applied with, in the words of Article 56(3) ECHR, “due regard to local requirements” – in this case, with due regard to the fact that the people it is being applied to are former colonial subjects.

4.3.1 *Island Detention Conditions*

During the Arab Spring in 2011, nationals of North African states tried to reach Europe using smuggler boats. On 17 and 18 September 2011, three Tunisians in their twenties were intercepted by the Italian Coast Guard and detained on Lampedusa, a 20 km² island with some 5,000 inhabitants 200 kilometre south of Sicily and 110 kilometre east of Tunisia. On 20 September, a revolt broke out, the centre burnt down and the men were transferred to a sports complex. The next day, with some 1,800 others they escaped and demonstrated in the streets of Lampedusa. They were arrested, flown to Palermo, and detained on two ships. They were flown to Tunisia on 27 and 29 September 2011 on the basis of an agreement between Italy and Tunisia of 5 April 2011, the text of which remains secret.⁴⁸ In accordance with its standard case law, the European Court of Human Rights in *Khlaifia and others v. Italy* held unanimously that the right to liberty had been violated because there had been no legal basis for the detention, the detainees had not been informed of the grounds for their detention and they had no access to court (Article 5 ECHR).⁴⁹ It also held unanimously that they had not had access to an effective legal remedy (Article 13 ECHR).⁵⁰ However, in contrast to the

⁴⁷ *Ibid.*, para 242–243.

⁴⁸ *Khlaifia and others v. Italy*, App no 16483/12 (ECHR GC 15 December 2016), para 11–21 and 36–18.

⁴⁹ *Ibid.*, para 55–135.

⁵⁰ *Ibid.*, para 256–281.

Chamber judgment⁵¹ the Grand Chamber held by a majority of sixteen to one that the applicants had not been subjected to collective expulsion (Article 4 Protocol 4 ECHR),⁵² and that they had not been subjected to inhuman or degrading treatment (Article 3 ECHR) during their detention on Lampedusa and on the ships.⁵³

The difference between the Chamber and Grand Chamber judgments on the point of collective expulsion is of a rather factual nature. It turns around the issue of whether the decision-making process leading to the expulsion had or had not been sufficiently individualised. However, on the question whether the detention conditions on Lampedusa constituted inhuman or degrading treatment (hereafter for stylistic reasons: inhuman treatment), the Grand Chamber takes a new turn. According to long-standing case law, the Court uses two principles in assessing whether a treatment is to be considered as inhuman. On the one hand, the prohibition of inhuman treatment is absolute and does not allow for derogation under any circumstances. On the other hand, however, treatment must reach a minimum level of severity if it is to be characterised as inhuman treatment, and the assessment of that level “is relative and depends on all the circumstances of the case, principally the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim”. The Court also takes other factors into consideration, in particular the purpose and context of the treatment, as well as whether the individual is in a vulnerable situation.⁵⁴ The Court has developed detailed case law on the question when detention conditions amount to inhuman treatment. It uses a weighty but rebuttable presumption that a violation of Article 3 has occurred when a detainee has a personal space of less than three square metre, which is below the four square metre norm of the Committee for the Prevention of Torture. Other relevant elements are the availability of toilets and the hygienic situation.⁵⁵

The Chamber judgment cites a report of a Special Commission of the Italian Senate, which points out that a thirty square metre room in the Lampedusa detention centre was supposed to accommodate twelve persons (2.5 square metre per person) but in fact accommodated up to twenty-five people (1.2 square metre per person). Toilets and showers had no privacy, there were no taps, and the smell from the toilets was pervasive.⁵⁶ The Grand

⁵¹ *Khlaifia and others v. Italy*, App no 16483/12 (ECHR 1 September 2015).

⁵² *Khlaifia* Grand Chamber *supra* note 48, para 212–255.

⁵³ *Ibid.*, para 136–211.

⁵⁴ *Ibid.*, para 158–160.

⁵⁵ *Ibid.*, para 165–167.

⁵⁶ *Khlaifia* Chamber, para 131.

Chamber, however, begins by taking into account the context in which the events had taken place (one of the factors to be taken into consideration to assess whether the situation reaches the minimum level of severity, see above), and in passing accepts the qualification of this as a context of humanitarian emergency.⁵⁷ More specifically, it held that “(t)he arrival *en masse* of North Africa migrants undoubtedly created organisational, logistical and structural difficulties for the Italian authorities”.⁵⁸ On the actual conditions, the Court stated: “Admittedly, as noted by the Chamber, the accommodation capacity available in Lampedusa was both insufficient to receive such a large number of new arrivals and ill-suited to stays of several days.” But it then goes on to note that the revolt (which in the Court’s words included protest marches, clashes with the local community, and acts of self-harm and vandalism) “contributed to exacerbating the existing difficulties and creating a climate of heightened tension”. This culminates in the following paragraph:⁵⁹

While the constraints inherent in such a crisis cannot, in themselves, be used to justify a breach of Article 3, the Court is of the view that it would certainly be artificial to examine the facts of the case without considering the general context in which those facts arose. In its assessment, the Court will thus bear in mind, together with other factors, that the undeniable difficulties and inconveniences endured by the applicants stemmed to a significant extent from the situation of extreme difficulty confronting the Italian authorities at the relevant time.

The Court then turned to the situation in the Lampedusa detention centre. It found the report of the Special Commission of the Italian Senate irrelevant because it dates from 2009, refers to a report dating from four months before Khlaifia was detained⁶⁰ and ignores a report of Amnesty International from the same period that gives similar facts as the Italian Senate Committee two years earlier.⁶¹ After this, the Court did not mention the hygienic situation anymore. On the “alleged overcrowding” it pointed out that the government had given conflicting statements about the capacity of the detention centre as well as about the number of inmates present at the relevant moment. The Court concluded from this that the capacity of the detention facility must have been exceeded by fifteen per cent to seventy-five per cent. It did not mention that the 2.5 sq metre per person which inmates would have had if there had been

⁵⁷ *Khlaifia* Grand Chamber, para 178.

⁵⁸ *Ibid.*, para 179.

⁵⁹ *Ibid.*, para 185.

⁶⁰ *Ibid.*, para 190–191.

⁶¹ *Ibid.*, para 50 where the Amnesty International report is quoted.

no overcrowding (above) was already below the minimum established in the Court's case law. Instead, it pointed out that inmates could move around within the detention centre, make phone calls, make purchases, and could contact humanitarian organizations and lawyers. Furthermore, it pointed out that although Khlaifia and his fellow applicants had been rescued at sea, they were not asylum seekers and were not elderly nor minors, and therefore they were not vulnerable persons. Their detention lasted merely three or four days.⁶² The Court pointed to other case law where short term detention had not been held to be a violation of Article 3 despite problematic conditions, and found that the minimum level of severity had not been reached.⁶³

The Court has held in previous cases that serious socio-economic problems cannot justify detention conditions that fall below the threshold of Article 3 ECHR.⁶⁴ Nonetheless, the new logic of the *Khlaifia* judgment has been applied to the appalling detention conditions on the Greek Islands since then.⁶⁵ It has, however, not been applied in a case on migrant detention conditions in a Greek police cell in February 2016 a violation of Article 3 ECHR, where the Court did not refer to the challenges the Greek authorities were facing.⁶⁶ Like the Court of Justice judgment on the Röske detention centre, this is another indication that, even if the case law of the European courts has a colonial structure, this does not determine the outcomes. I will return to this in the concluding paragraph of this chapter.

4.3.2 *The Spanish Exclaves*

Another example of application of the Convention “with due regard to local circumstances” is the case about the Spanish exclaves. A Grand Chamber judgment of the European Court of Human Rights addressed the immediate return of two Malian and Ivoirian nationals by Spain after they had climbed the fence between Morocco and Spain in Melilla.⁶⁷ The Chamber in *N.D.*

⁶² *Ibid.*, para 192–195

⁶³ *Ibid.*, para 196–199.

⁶⁴ *Poltoratskiy v. Ukraine* [2003] V ECHR 92, No. 38812/97. On balancing as part of Article 3 ECHR, see Hemme Battjes, “In Search for a Fair Balance. The Absolute Character of the Prohibition of Refoulement under Article 3 ECHR” (2009) 22 *Leiden Journal of International Law* 583.

⁶⁵ *J.R. et autres c Grèce* App no 22696/16 (ECHR 25 January 2018); *Kaak et autres c Grèce* App no 34215/16 (ECHR, 3 October 2019).

⁶⁶ *SH. D. et autres c. Grèce, Autriche, Croatie, Hongrie, Macédoine du nord, Serbie et Slovénie*, App no 14165/16 (ECHR, 13 June 2019).

⁶⁷ *N.D. and N.T. v. Spain* App no 8675/15 and 8697/15 (ECHR Grand Chamber, 13 February 2020).

and *N.T. v. Spain* ruled that their return was not in violation of Article 3 ECHR, an issue not under review by the Grand Chamber. The Chamber did, however, conclude that their return as part of a group without individual decision or examination had been a violation of the prohibition of collective expulsion in the sense of Article 4 Protocol 4 ECHR. In agreement with the Chamber, the Grand Chamber found that the case fell within Spain's jurisdiction because Spanish state agents had forced the men to leave Spanish territory,⁶⁸ and it also accepted that their removal constituted an expulsion.⁶⁹ Contrary to the findings by the Chamber, however, the Grand Chamber did not consider that the expulsion had been a collective one, despite the absence of individual examination and decision making.⁷⁰ The Grand Chamber stated, in conformity with consistent case law, that

(i)t should be stressed at the outset that as a matter of well-established international law, and subject to their treaty obligations, including those arising from the Convention, Contracting States have the right to control the entry, residence and removal of aliens.⁷¹

By way of innovation, it then stated that states “may in principle put arrangements in place at their borders designed to allow access to their national territory only to persons who fulfil the relevant legal requirements”,⁷² and thus assimilated the right to control borders in the manner states prefer to the right of states to control migration. Subsequently, it emphasised “the challenges facing European States in terms of immigration control as a result of the economic crisis and recent social and political changes which have had a particular impact on certain regions of Africa and the Middle East”.⁷³ In a remarkable next move, the Grand Chamber then interpreted Article 4 Protocol 4 as having as its aim to maintain the possibility to make the claim that the return would violate the Convention⁷⁴ – which must mean: *another* Convention provision. This means that the prohibition of collective expulsion has little, and potentially no added value compared to the other provisions of the Convention. But is expulsion only a prohibited collective expulsion if, through the collective character of the expulsion, other Convention rights are

⁶⁸ *Ibid.*, para 109–111.

⁶⁹ *Ibid.*, para 173–192.

⁷⁰ Until now, the Court had labelled such expulsions as collective, see in particular *Hirsi Jamaa and others v. Italy* App no 27765/09 (ECHR GC, 23 February 2012).

⁷¹ *N.D. and N.T.*, supra note 67, para 167.

⁷² *Ibid.*, para 168.

⁷³ *Ibid.*, para 169.

⁷⁴ *Ibid.*, para 198.

violated too? If so, what is then the independent meaning of Article 4 Protocol 4 and its added value? The Court then stated that the applicants' own conduct "is a relevant factor in assessing the protection to be afforded under Article 4 of Protocol 4".⁷⁵ In an earlier judgment, the Court held that the state was not responsible for the fact that there had been no individual examination in a situation where that had been made impossible by the lack of cooperation of a person with the procedure for conducting an individual examination.⁷⁶ In the case of the Malian and Ivoirian men, however, the Court formulated the following exception: the prohibition of collective expulsion does not apply if people have genuine and effective access to a means of legal entry but do not make use of it, and instead cross a land border in an unauthorised manner, deliberately taking advantage of their large numbers and the use of force, and thereby create a clearly disruptive situation which is difficult to control and endangers public safety. This non-applicability of the prohibition of collective expulsion can – the Grand Chamber continued – be different if there were cogent reasons not to use this means of legal entry which are based on objective facts for which, in this case, Spain is responsible.⁷⁷

In effect, the Court holds that the expulsion of a group of people without individual examination does not constitute a collective expulsion (despite standing case law finding precisely this covered by that notion) because, as a starting point, states have the right to control migration, and can guard their borders in the manner they prefer. As long as there is a possibility for people to access the territory of a state in a legal manner for the purpose of invoking the protection of the Convention, the expulsion of a group without individual examination is not collective because the members of that group have an alternative which does allow for individual assessment. This interpretation is given in light of "the challenges facing European States in terms of immigration control", and it entails that at European land borders the notion of collective expulsion no longer has independent significance in comparison to the other provisions of the Convention.

In its reasoning in *N.D. and N.T.*, the Grand Chamber mentioned two possibilities which the men had to access Spain legally. The first was to go to a border crossing point at the Spanish–Moroccan land border. The applicants,

⁷⁵ *Ibid.*, para 200.

⁷⁶ The Court refers to *Berisha and Haljiti v. the former Yugoslav Republic of Macedonia* (dec.) App no 18670/03, ECHR 2005-VIII and *Dritsas and Others v. Italy* (dec.) App no 2344/02, 1 February 2011.

⁷⁷ *Ibid.*, para 201.

however, argued that due to brutalities from the side of Moroccan police forces it was very difficult or even impossible to approach the border crossing point. As a response, the Grand Chamber observed that there is no evidence that suggested that Spain was responsible for this, and hence dismissed the applicants' argument as irrelevant.⁷⁸ This ultimately means that since the responsibility of Spain for the actions of Moroccan police forces is hard to establish, the Court accepts the ineffectivity of Article 4 Protocol 4 not in theory (the Court does mention the possibility of Spanish responsibility) but in practice as a consequence of evidentiary requirements. There is considerable evidence of the major impact of Spanish policies on Moroccan migration policy and practice, and requiring evidence of Spanish government involvement in the Moroccan practice of preventing particular people from approaching a particular border crossing point at a particular moment makes the theoretical norm the Court formulates ineffective in practice.

The second possibility that the Court held against the two men was the possibility to invoke the protection of the Convention at a Spanish embassy or consulate, for example, by applying for a visa.⁷⁹ This reasoning is, however, incompatible with the Grand Chamber decision in *M.N. and Others v. Belgium* delivered three months after *N.D. and N.T. v. Spain*. It became clear from *M.N. and Others v. Belgium* that the refusal of a visa by an embassy or consulate abroad does not constitute an exercise of jurisdiction in the sense of Article 1 ECHR (supra). Therefore, in contrast to what the Court suggested in *N.D. and N.T. v. Spain*, approaching embassies or consulates is not a manner in which non-nationals can invoke the protection of the Convention.

Two months after *N.D. and N.T. v. Spain*, a Chamber judgment ruled that three Chechnyans rejected at the Polish-Byelorussian border were within the jurisdiction of Poland,⁸⁰ and that a refusal to examine their asylum application constituted a violation of Article 3 ECHR⁸¹ as well as a violation of the prohibition of collective expulsion.⁸² Once again, this signals that, even if one accepts the colonial structure of the Court's case law, this does not imply that the Court necessarily rules against migrants – to which we will return in the conclusion of this chapter.

⁷⁸ *Ibid.*, para 218–221.

⁷⁹ *Ibid.*, para 222–228.

⁸⁰ *M.K. and Others v. Poland* App no 40503/17, 42902/17 and 43643/17 (ECHR, 23 July 2020) para 130–131.

⁸¹ *Ibid.*, para 174–186.

⁸² *Ibid.*, para 204–211.

4.4 EMERGENCY POWERS

So far, we have seen that an emergency may lead to non-application of the law and to sub-standard application of the law. Yet another option is that an emergency may enable the state to use special powers which it cannot normally use.

4.4.1 *The EU Relocation Decision*

The use of emergency powers was at stake in the Court of Justice's judgment in *Slovak Republic and Hungary v. Council of the European Union*. On 22 September 2015, the Council adopted a decision which obliged EU member states to cooperate in relocating asylum seekers from states like Italy, Greece and Hungary (which as a consequence of the Dublin Regulation are responsible for the examination of the large majority of asylum applications in Europe) to states with less asylum seekers. This Council Decision was based on Article 78(3) TFEU, which allows for provisional measures for the benefit of states that are confronted by an emergency situation characterised by a sudden influx of third country nationals. Slovakia and Hungary asked the Court of Justice of the EU to annul the Council Decision. In its judgment, the Court dismissed their actions.⁸³ One of the issues the Court dealt with was whether the Council could use emergency competence under Article 78(3) TFEU. The Court rejected the argument that the influx was not sudden (Slovakia and Hungary argued the increase had been gradual). The Court pointed out that the Council had identified a sharp increase in a short period of time, in particular in July and August 2015, and concluded that, without making a manifest error of judgment, the Council could classify such an increase as "sudden" in the sense of Article 78(3) TFEU even though the increase was a continuation of a pre-existing pattern. In its reasoning, the Court of Justice also added that EU institutions such as the Council have broad discretion when they adopt measures in areas which entail choices, in particular of a political nature, and complex assessments.⁸⁴

Besides that gradual increase, a second argument for annulment raised by Slovakia and Hungary was that the emergency in Greece was not caused by

⁸³ *Slovak Republic and Hungary v. Council of the European Union* CoJ EU (GC) 6 September 2017, Cases C-643/2015 and C-647/2015.

⁸⁴ *Slovak Republic and Hungary v. Council of the European Union*, para 122–124.

the influx, but by the serious shortcomings of the Greek asylum system.⁸⁵ The Court admitted that there were structural shortcomings in Greece in terms of lack of reception capacity and of capacity to process asylum applications, all of which also contributed to the emergency situation. However, it held that the 2015 inflow of asylum seekers was on such a scale that it would have disrupted any asylum system, even one without structural weaknesses. Therefore, there was a sufficiently close link between the inflow and the emergency.⁸⁶ The Court therefore accepted that the Council could use the competence under Article 78(3) TFEU to take provisional measures in an emergency situation.

To sum up, the Court held that the Council could use its emergency competence in a situation where policymakers saw the presence of a number of asylum seekers as an emergency, and refused to substantively address arguments holding that the situation did not (as Article 78(3) TFEU requires) arise suddenly, or that the emergency did not arise as a result of the sudden influx but because of pre-existing shortcomings in asylum policy.

4.4.2 “Waving Through” and Dublin

Two other Grand Chamber judgments address the basic rule of the Dublin Regulation that asylum applications have to be examined by the EU member state where the applicant has entered the territory of the EU.⁸⁷ The cases concerned Afghan and Syrian asylum seekers who had entered the European Union via Turkey and Greece. They had then travelled onwards, and were transported by the Macedonian, Serbian, Croatian and Slovenian authorities northward, and subsequently applied for asylum in Austria. Under normal circumstances, Greece would have been the responsible member state because that was where they irregularly entered the EU (Article 13(1) Regulation 604/2013 (Dublin III)). However, the sub-standard nature of the Greek asylum system has made return of asylum seekers to Greece impossible since 2011.⁸⁸ Therefore, it could be argued that Croatia was responsible on the basis of Article 13(1) Dublin III. At the core of these cases was the question whether the asylum applicants had entered Croatia irregularly.⁸⁹ When they

⁸⁵ See on these shortcomings *M.S.S v. Belgium and Greece*, supra note 23; and *N.S and M.E.* C-411/10 and C-493/10 [2011].

⁸⁶ *Slovak Republic and Hungary v. Council of the European Union*, para 126–128.

⁸⁷ Case C-646/16 *Jafari* [2017] and Case C-490/16 *A.S. v. Slovenia* [2017].

⁸⁸ See *M.S.S. v. Belgium and Greece*, supra note 23, and Cases C-411/10 and C-493/10 *N.S. and M.E* [2011].

⁸⁹ I leave aside the issues of whether the Croatian wave through could be qualified as the issuance of a visa in the sense of Article 12 Dublin III, as well as whether the wave through could be

reached the Croatian border in November 2015 and February 2016 respectively, the Croatian authorities did not initiate an expulsion procedure, did not check whether they qualified for lawful entry into Croatia, but organised onward transport to Slovenia.⁹⁰ Thus, they entered Croatia with *de facto* authorisation of the Croatian authorities, while this authorisation could not be labelled either as the issuance of a visa or as visa waived entry in the sense of Article 14 Dublin III. If their entry could be labelled as based on either a visa or a visa waived entry, this would lead to Croatian responsibility on the basis of Article 12 Dublin III. If, to the contrary, this was not considered as irregular entry in the sense of Article 13 Dublin III, then Dublin's default rule (responsibility of the member state where the asylum application is lodged) was applicable (Article 3(2) *juncto.* 15 Dublin III). Underlying this very formal issue (can *de facto* authorised entry be considered as irregular entry?) was the question whether Dublin III had to be applied so as to concentrate the overwhelming majority of asylum seekers in peripheral member states, or whether the circumstances in 2015/2016 justified spreading the burden. In other words: would asylum seekers be allowed to set in motion a spontaneous intra-European solidarity mechanism, or were they to be referred back to the peripheral member states?

Advocate General Sharpston interpreted Article 13 Dublin III in such a manner that *de facto* authorised entry could not be labelled as unauthorised entry in the sense of Article 13 Dublin III. As a result, in her opinion the member state where an application had been lodged was responsible for the examination of asylum applications. While this is a strictly formal interpretation, throughout her opinion Sharpston emphasised that the situation at the time was “wholly exceptional”⁹¹ and “unprecedented”.⁹² The Court of Justice opted, however, for the opposite approach, which Sharpston labels as “the

considered as visa waived entry in the sense of Article 14 Dublin III. Including these issues into the analysis would add complications without contributing to the overall analysis.

⁹⁰ Opinion Advocate General Sharpston, Case C-490/16 and C-646/16, para 9, 71, and 86. *Jafari*, *supra* note 87, para 29; A.S. *supra* note 87, para 14.

⁹¹ Opinion Advocate General Sharpston, Case C-490/16 and C-646/16, para 18 and 242.

⁹² Opinion Advocate General Sharpston, Case C-490/16 and C-646/16, para 109 and 237. Throughout her opinion she uses such terms: “the times were anything but normal” (para 5); “extraordinarily large number of people” (para 104); “exceptional situation” (para 155); Dublin II was not conceived to deal with “a massive inflow of people” (para 171 and 238); “humanitarian crisis” (para 181–182); “the front line” (para 183); “a sudden massive inflow of third-country nationals” (para 221); border states “would have been overwhelmed” (para 231); “overburdened” (para 232); “disproportionate burden” (para 234); “one of the biggest humanitarian challenges that (Slovenia) has faced since the Second World War” (para 235); “mass inflow of people” (para 236).

strict interpretation”.⁹³ The Court used an *a contrario* construction of the term irregular crossing: any border crossing without fulfilling the conditions imposed by domestic legislation in the member states concerned must necessarily be considered irregular in the sense of Article 13 Dublin III.⁹⁴ After having reached this conclusion it continued to refer to “the arrival of an unusually large number of third country nationals”,⁹⁵ but merely to state that this “cannot affect the interpretation or application of Article 13(1) of the Dublin III Regulation”.⁹⁶

Both the Advocate General and the Court use a formal approach to interpret the meaning of “irregular crossing” in Article 13 Dublin III. Undeniably, the bigger issue (should asylum seekers be contained in peripheral states, or should they be allowed to spread out over all member states if there are many of them?) plays a role, be it not in the formal reasoning. Sharpston uses the notion of exception and crisis liberally throughout her opinion, with the effect of naturalising the outcome she proposes: making an exception to the usual Dublin system of placing the responsibility for asylum seekers with peripheral states. The Court is quite prim in its language, and even when it refers to “unusual” or “exceptional” numbers it does so without finding this to be a good reason to deviate from the conclusion it has reached through its formal approach. This underlines how formal interpretation methods do not guarantee that there is only one possible outcome, and it underlines the importance of rhetorical tools to help make the outcome of a formal interpretation plausible.

4.5 CONCLUSION

Many consider the case law of the European courts since *Khlaifia* to constitute a rupture. However, both courts themselves have not indicated that they want to break with previous case law and have emphasised the continuity with previous precedents. One may dismiss this as bad faith, or as a result of damage control efforts of liberal judges. While these hypotheses have not been

⁹³ Opinion Advocate General Sharpston, Case C-490/16 and C-646/16, para 231.

⁹⁴ CoJ 26 July 2017, Case 646/16, para 74; Case C-490/16 para 39.

⁹⁵ It sticks to this phrase, CoJ 26 July 2017, Case 646/16, para 40, 54, 58 and 59. These words are taken from the preliminary questions, para 36, question 2(a). The Court only uses other terms if they are taken from legal instruments: “mass influx”, para 97, from Article 18 Directive 2011/55, and “sudden inflow” from Article 78(3) TFEU. For unclear reasons, in Case C-490/16, the Court sticks to “an exceptionally large number of third-country nationals”, para 36, 40, 41 and 42.

⁹⁶ CoJ 26 July 2017, Case 646/16, para 93.

explored here and hence remain possible, this chapter has explored the idea that, indeed, the recent migration case law does not constitute a rupture but a new inflection of a colonial ground pattern that has been part of European migration law for a long time.⁹⁷ Indeed, three techniques of legal governance that have their origin in colonialism (not applying European treaty law; application of European treaty law with lowered standards; and the use of emergency powers) can be identified in recent migration case law of the European courts. They can also be seen at work more broadly, as in the emergency character of the EU Trust Fund for Africa (which side-lines constitutional guarantees as well as public procurement)⁹⁸ or in the widespread reintroduction of internal border controls since 2015.⁹⁹ In this understanding, the European courts always had the option of relying on these techniques, but in previous cases (on border detention¹⁰⁰ or hot returns¹⁰¹) did not use them in the way they have done since *Khlaifia*. And we have seen that since *Khlaifia* too, the Courts have not always relied on these techniques in the same way. This, as well as the differences between Chamber and Grand Chamber judgments in Strasbourg and between Advocate General opinions and judgments in Luxembourg, shows that the colonial deep structure of the Courts' migration case law does not necessarily result in outcomes that are as excluding as they have been in recent years, even when coloniality remains a structuring element. Naming and exposing this colonial deep structure may be helpful to the extent that it makes a legal and political critique possible, in addition to helping actors to navigate the field.

⁹⁷ E.g. Dembour *supra* note 3; Nadine El-Enany, *(B)ordering Britain. Law, Race and Empire* (Manchester University Press 2020).

⁹⁸ Thomas Spijkerboer and Elies Steyger, "European External Migration Funds and Public Procurement Law", (2019) 4 *European Papers* 493.

⁹⁹ European Commission, *Notifications of the Temporary Reintroduction of Border Controls*, https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control_en, accessed 4 February 2021.

¹⁰⁰ *Amuur*, *supra* note 27.

¹⁰¹ *Hirsi Jamaa*, *supra* note 70.