

# Is the outsourcing of the European migration policy judicially challengeable?

*"In a global context where refugees and migrants are demonised and where their movements are assimilated to criminal offences, several countries have elaborated policies based on deterrence, militarisation and extra-territoriality which, implicitly or explicitly, can amount to as much as tolerating the risk that migrants would die for the sake of the efficiency of the control of their entry on the territory."*

Agnès Callamard, UN special rapporteur on extrajudicial, summary or arbitrary executions' report, transmitted to the UN General assembly, August 15<sup>th</sup>, 2017.

*"The European Union thus appears to be attempting to ensure that foreign nationals never in fact reach European Union territory, or, if they do so, are immediately returned. This is particularly troubling as it means that the responsibility for migration control is shifted to countries outside the European Union and that, consequently, the recourse of those migrants to human rights mechanisms within the European Union becomes legally restricted or practically impossible. Moreover, the externalization process seems to aim at placing the migrants within the firm control of non-European Union countries, without the European Union providing commensurate financial and technical support for human rights mechanisms in such countries thereby allowing the European Union to wash its hands of its responsibility to guarantee the human rights of those persons attempting to reach its territory. This worrying shift of border control to other States is not accompanied by appropriate human rights guarantees."*

UN General Assembly, Human rights council, Report of the Special Rapporteur on the human rights of migrants, François Crépeau, Regional study: management of the external borders of the European Union and its impact on the human rights of migrants

Amongst the many ways in which the European Union (EU) and its member states may externalise their immigration and asylum policies (see Migreurop, advocacy note “the externalisation of EU immigration and asylum policies, July 2019), outsourcing ranks in the top of the list. It consists in associating non-European countries of origin or of transit to their migration policies, either to prevent people from entering Europe, or to be able to send back those who may have succeeded in entering the European territory<sup>1</sup>.

In its first stage, this outsourcing mostly took the form of agreements (readmission agreements, readmission clauses, integrated in commercial, economic<sup>2</sup> or cooperation treaties or agreements). As a counterpart, the ‘partner’ countries are offered financial assistance via various European funding<sup>3</sup> instruments and, sometimes, a softer regulation of visa requirements to enter the EU for their nationals, all the way to total exemption, in some cases. Since 2002, no less than seventeen agreements were passed between the EU and non-European countries, which add up with numerous other bilateral agreements entered by single member states.

But this outsourcing increasingly follows a less formal framework: the EU now talks about “declarations”, “deals”, “readmission dispositives” containing “detailed operational dispositions”, in the asserted goal to seek “practical solutions to migration issues<sup>4</sup>”. There are currently six such “dispositives” between the European Union and Afghanistan<sup>5</sup>, Guinea, Bangladesh, Ethiopia, Gambia, and Ivory Coast.

This outsourcing policy has preoccupying consequences in terms of migrants’ fundamental rights – first and foremost their right to life, but also, for instance, on asylum rights—as many observers, including the United Nations, have pointed out.

On one hand, this policy carries with it, and encourages the commission, out of sight, of violations of those rights, which have now been widely documented (like *refoulement*, arbitrary detention, risks of exposure to inhuman and degrading treatment and torture). On the second hand, it enables the EU and its member states to escape their international obligations with full impunity since, by externalising migratory controls, they strip the victims of the consequences of such controls of any possibility to seek redress.

Litigation was initiated to have this EU practice of migratory policy outsourcing in the context of the fight against illegal migration in the central and oriental Mediterranean condemned. These cases reveal the EU and its member States’ strategy of “organised unaccountability”.

<sup>1</sup> Migreurop, Readmission agreements, Using « cooperation » to deport migrants, Migreurop Notes, December 2012, p. 1

<sup>2</sup> See Euro-Mediterranean Association Agreements

<sup>3</sup> Louis Imbert, « La coopération sans le(s) droit(s) : le foisonnement des accords « injusticiables » avec les pays tiers », *Plein droit*, n°114, octobre 2017.

<sup>4</sup> Communication from the commission to the European Parliament, the European Council and the Council Managing migration in all its aspects: progress under the European agenda on migration. Brussels, 4.12.2018 COM(2018) 798 final

<sup>5</sup> The EU-Afghanistan Joint Way Forward on Migration Issues », October 2016 [https://eeas.europa.eu/sites/eeas/files/eu\\_afghanistan\\_joint\\_way\\_forward\\_on\\_migration\\_issues.pdf](https://eeas.europa.eu/sites/eeas/files/eu_afghanistan_joint_way_forward_on_migration_issues.pdf)

## I - Legal scrutiny by EU jurisdictions:

The legal scrutiny of acts, recommendations and notices by the Unions institutions with effect on third parties can be triggered by a claim for annulment. Article 263 of the Treaty on the Functioning of the European Union provides that member States, the Commission, the European Parliament and the EU Council, but also any physical or moral persons who consider that the implementation of an agreement between the EU and a third country has a negative impact on them may seek justice from European jurisdictions.

However, the European judges are not inclined to use their power of scrutiny when it comes to the consequences of the externalisation of the migration policy, as the EU-Turkey deal case highlighted.

### CONTEXT

The EU-Turkey deal, presented as a “joint declaration” adopted on March 18 2016<sup>6</sup>, is one of the most emblematic examples of migratory control externalisation. It planned that any migrant who reached the Greek Islands after March 20th 2016 and who was not granted international protection would be sent back to Turkey and that, for each Syrian sent back to Turkey from those Greek islands<sup>7</sup>, another Syrian would be relocated on European territory. In exchange, the EU committed to pay Turkey<sup>8</sup> 6 billions euros, to boost Turkey’s EU joining process, and to liberalise the short-stay visas scheme for Turkish nationals<sup>9</sup>.

This deal is another footstep in the externalisation of migratory and asylum policy by the European Union, since it allows for people to be sent back to the territory of a non member State, despite them having sought asylum on European soil, by reference to notions such as “first country of asylum” and “safe third country”, and although the internal political situation of Turkey is degrading by the day<sup>10</sup>. Only a few months after the EU-Turkey deal was implemented, the European Commission proudly announced that it had “dried out the flows of oriental Mediterranean crossings” and offered to work on a similar basis with other countries of provenance of migrant people.

It is a fact that the EU-Turkey deal, in addition with Frontex operated controls, NATO’s Aegean mission and with the closing of the Syrian-Turkish border, did reduce the number of crossings by sea between Turkey and the Aegean sea Greek island to less than 50 in spring 2017<sup>11</sup>.

But this triumphalist account fails to take the deal’s consequences on the fate of those who were stopped from entering Europe or sent back to Turkey into account. According to the United Nations High Commissioner for Refugees (UNHCR), about 80% of the persons who arrived on Greek shores at the time when the deal was made came from countries at war, and among them many Syrians. People who could have obtained an international protection in Europe were thus blocked in Turkey, or under the threat of being sent back there, although many of them, namely Afghans and Syrians, are not granted refugee status in Turkey, and face risks of deportation to their country of origin. According to Amnesty International, after the deal was signed, “the ink wasn’t even dry yet” as tens of Afghans who had been pushed back from Greece to Turkey were forcibly deported to Kabul without any access to a real asylum procedure. By December 31 2018, 1,806 people, according to HCR figures, had been sent back to Turkey from Greece.

<sup>6</sup> <https://www.consilium.europa.eu/fr/press/press-releases/2016/03/18/eu-turkey-statement/>

<sup>7</sup> European Council, EU-Turkey Declaration, Op. cit. para 1 and 2.

<sup>8</sup> European Commission « EU Facility for Refugees in Turkey: solid progress in supporting refugees » Brussels, May 17 2019. [europa.eu/rapid/press-release\\_IP-19-2552\\_en.pdf](https://ec.europa.eu/rapid/press-release_IP-19-2552_en.pdf)

<sup>9</sup> European Council, EU-Turkey Declaration, Op. cit. para 5.

<sup>10</sup> Pierre François Laval, « L’instrumentalisation de l’Etat tiers : vers un dévoiement de la coopération européenne en matière d’asile », Revue de l’Union européenne, 2016.

<sup>11</sup> Catherine Teule, « Accord UE-Turquie : le troc indigne », *Plein droit*, n° 114, octobre 2017

## PROCEEDINGS

Three non EU citizens, two Pakistanis and one Afghani, who had arrived on the Greek Islands in March 2016, where they had filed an asylum application, challenged the legality of the UE-Turkey deal before the Court of the European Union, on the basis that it provided for their forced return to Turkey, in case of rejection of their asylum claim. They submitted that the deal's adoption hadn't respected the appropriate procedure for the conclusion of international agreements under article 218 of the Ground Treaty of the EU (which provides, amongst other requirements, that the European parliament should be fully informed and consulted at all stages of the adoption process).

The question asked to the Court was *"whether the EU-Turkey statement, as published by means of that press release, reveals the existence of a measure attributable to the institution concerned in the present case, namely, the European Council, and whether, by that measure, that institution concluded an international agreement, which the applicant describes as the 'challenged agreement', adopted in disregard of Article 218 TFEU and corresponding to the contested measure."*<sup>12</sup>

Several elements evidence that this Declaration is a product of EU action, such as documents emanating from national institutions of States parties to the Declaration (France<sup>13</sup>, Spain<sup>14</sup>, Turkey<sup>15</sup>), which describe the declaration as born out of European action. Furthermore, the counterparts for the Declaration impact solely burden upon the Union, and not upon the member states individually: financial counterparts<sup>16</sup>, loosening the common visa scheme, re-launching the negotiations on Turkey's accession process, and resettling Syrian refugees on its territory. Finally, it is the EU who is in charge of monitoring the implementation of this agreement, as President Jean-Claude Juncker openly declared: *"the Commission will coordinate and organise together with Member States and Agencies the necessary support structures to implement it effectively."*<sup>17</sup> In fact, the commission has regularly published reports on the "improvements" brought by the entry into force of the agreement<sup>18</sup>.

Despite the fact that the Court acknowledged that the press release n°144/16 which made the EU-Turkey Declaration official contained the European Council's logo, and that the Declaration had been adopted in attendance of the President of the Council's, on the same day and in the same offices where the Council's session was being held, it nonetheless considered that the Declaration emanated from distinct meeting between heads of state or governments from the member States and their Turkish counterpart. As a consequence, the Declaration could not be assimilated to an agreement concluded by the EU as such.

<sup>12</sup> Court of the European Union, Order. February 28 2017, case T-192/16 para 47.

<sup>13</sup> Rapport d'information n°38, Sénat de la République française, enregistré à la Présidence du Sénat le 14/10/2016, consultable à : <https://www.senat.fr/notice-rapport/2016/r16-038-notice.html>

<sup>14</sup> Ministerio de la Presidencia, nota de prensa, « Declaración UE-Turquía », 18 de marzo de 2016 <https://www.lamoncloa.gob.es/presidente/actividades/Documents/2016/Declaraci%C3%B3n%20UE.pdf>

<sup>15</sup> Implementation of Turkey-EU Agreement of 18 March 2016, Republic of Turkey, Ministry of Foreign Affairs, consultable à [http://www.mfa.gov.tr/implementation-of-turkey\\_eu-agreement-of-18-march-2016.en.mfa](http://www.mfa.gov.tr/implementation-of-turkey_eu-agreement-of-18-march-2016.en.mfa)

<sup>16</sup> See the dedicated webpage on the European Commission website "The EU Facility for Refugees in Turkey": [https://ec.europa.eu/neighbourhood-enlargement/news\\_corner/migration\\_en](https://ec.europa.eu/neighbourhood-enlargement/news_corner/migration_en) and "Communication de la Commission au Parlement européen et au Conseil. Troisième rapport annuel sur la facilité en faveur des réfugiés de Turquie", Bruxelles, le 10 avril 2019, COM (2019) 174 final

<sup>17</sup> President Juncker appoints EU Coordinator to organise operational implementation in Greece, press release March 18 2016, IP/16/942, [https://europa.eu/rapid/press-release\\_IP-16-942\\_en.htm](https://europa.eu/rapid/press-release_IP-16-942_en.htm)

<sup>18</sup> European Commission: 7th report on the advancement of the implementation of the EU-Turkey declaration, 6.9.2017 COM (2017) 470 final.

## RULING

In its ruling on February 28 2018, the Court concluded that: *“independently of whether it constitutes, as maintained by the European Council, the Council and the Commission, a political statement or, on the contrary, as the applicant submits, a measure capable of producing binding legal effects, the EU-Turkey statement, as published by means of Press Release No 144/16, cannot be regarded as a measure adopted by the European Council, or, moreover, by any other institution, body, office or agency of the European Union, or as revealing the existence of such a measure that corresponds to the contested measure.”*<sup>19</sup> and rejected the claim, based on its on lack of jurisdiction to rule the case.

On appeal, the Court of Justice of the EU, without taking any stand on the issue raised in first instance (namely: *“does the EU-Turkey Declaration have the legal status of an agreement under article 218 of the EUFT?”*), and even less on the context in which the procedure had been activated, dismissed the appeal as inadmissible, on the grounds that the presented arguments *“were not sufficiently clear and precise to enable to court to exercise its control on the legality of the ruling”*.

The CJEU limited itself to criticizing the first instance claim and the appeal for their lack of coherence, and concluded that *“an appeal with such characteristics cannot be the subject of a legal assessment which would allow the Court of Justice to exercise its function in the area under examination and to carry out its review of legality”*<sup>19</sup>.

Many commentators read this decision as a deliberate refusal by the ECJ to take a position on the scope of the EU-Turkey agreement: *“The question of a likely strategic behaviour by the judges can legitimately be asked. An appeal before the Court will leave an ample rhetorical margin to judges who would like to represent a case as insufficiently structured or not detailed enough, or to represent it alternatively as sufficiently substantiated to be admissible. Given the social and political interests at stake in this case, one can easily imagine that the conservative wing of the Court could have tried to avoid to question the agreement between the EU and Turkey, and that the strategy which would attract least attention at the end of this summer was a procedural way out. One can hence consider that the Court’s procedural rules offer vast resources for various legal ploys, rather than a clear and well-defined regulatory frame.”*<sup>21</sup>

## II - Legal scrutiny by national courts

Since the European judge refused to exercise his scrutiny, several attempts were made to bring cases before national courts, to highlight the actual consequences of externalisation when carried out- be it via formal or informal agreements, or through plain political decisions which resulted in outsourcing migration control or management to non European authorities.

<sup>19</sup> Court of the EU, order. February 28 2017 case T-192/16 para 71

<sup>20</sup> ECJ, ORDER OF THE COURT (First Chamber), In Joined Cases C208/17 P to C210/17 P, NF, NG, NM v. European Council, para 17.

<sup>21</sup> Pieter-Augustijn Van Malleghem, « La Cour de justice refuse de revisiter la légalité de l'accord UE-Turquie », Centre Charles De Visscher pour le droit international européen, 4 octobre 2018

# 1. THE CASE OF ITALY

## CONTEXT

According to several reports from international and European organisations, Libyan coast guards who operate at sea are responsible for a certain number of life-threatening incidents, which engendered the lives of migrants and refugees and of the crew on board of NGO rescue boats. Amnesty international collected testimonies from migrants and refugees, who indicated that they had suffered abuses committed by Libyan coast guards, in particular during interception operations at sea<sup>22</sup>. Other reports show that in some cases, Libyan coast guards perpetrated grave threats against migrants and refugees who were on board of vessels in distress, with gun shots in the air or in the water; in other cases, they severely beat up their victims<sup>23</sup>. The United Nations High Commissioner for Refugees even reported that during rescue/interception operations at sea, those very coast guards had been involved in violations of the fundamental rights of refugees, asylum seekers and migrants, including the deliberate shipwreck of boats by gun fire<sup>24</sup>. This series of events caused the death toll at sea to triple between 2017 and 2018<sup>25</sup>.

On December 11 2016, the Italian government adopted a law on the State budget for the year 2017 and a multi-year budget for the 2017-2019 period. Its article 1, paragraph 621, provided for the creation, within the budget of the Ministry for Foreign Affairs and for international cooperation, of a 200 million euros fund for the year 2017, the goal of which would be to “re-launch the dialogue and the cooperation with African countries”, identified as priority targets on the migration grounds (departure or transit countries).

This minister’s decree n° 4110/27 taken on August 28 2017<sup>26</sup> allocated 2,5 million euros to the ministry for home affairs’ technical assistance to Libyan authorities in charge of improving border management, including fighting against migrants’ smuggling and search and rescue activities. This assistance implied the restoration and the transportation of Italian speedboats, delivered to Libya for them to accomplish the missions assigned in the decree.

## PROCEEDINGS

ASGI, a non-profit organisation, filed a case before the Latium administrative court against this decree on November 14 2017. The organisation considers that the use of 2,5 millions for the restoration of the Libyan surveillance speedboats constitutes an excess of power by the Minister. Indeed, the December 2016 framework law makes clear that the funds money must be allocated to “dialogue and cooperation” with African countries. ASGI considers that the funds were misused since Italian authorities aimed at externalising border control by funding the Libyan military apparatus.

<sup>22</sup> Amnesty International. Libya’s dark web of collusion. Abuses against Europe-bound refugees and migrants. <https://www.amnesty.org/download/Documents/MDE1975612017ENGLISH.PDF>

<sup>23</sup> <https://www.ohchr.org/Documents/Countries/LY/LibyaMigrationReport.pdf>, p. 36

<sup>24</sup> UN Security Council, Letter of the Group of Experts on Libya, June 2017, June 1st 2017 [https://digitallibrary.un.org/record/1288668/files/S\\_2017\\_466-EN.pdf](https://digitallibrary.un.org/record/1288668/files/S_2017_466-EN.pdf), paras 104-105

<sup>25</sup> “Already this year, more than 1,500 people have drowned or gone missing on the Mediterranean. On the Central Mediterranean route in particular, the rate of lives being lost has increased threefold, and now stands at one death for every 17 people who attempt to cross compared to one in 43 during the same period last year.”

UNHCR welcomes Aquarius resolution, but stresses need for more predictable approach to disembarkation. <https://www.unhcr.org/news/press/2018/8/5b73d04f4/unhcr-welcomes-aquarius-resolution-stresses-need-predictable-approach-disembarkation.html>

<sup>26</sup> Ministero degli Affari Esteri e della Cooperazione Internazionale, Direzione Generale per gli Italiani all’Estero e le Politiche Migratorie, Decreto 4110/27, 28 agosto 2017 [https://www.asgi.it/wpcontent/uploads/2017/11/Allegato\\_2.pdf](https://www.asgi.it/wpcontent/uploads/2017/11/Allegato_2.pdf)

Moreover, supporting control operations carried out by Libyan coast guards equals, for Italy, to carry out pushbacks by proxy, in violation of articles 2 and 3 of the European Convention for Human Rights. For ASGI, Italy is an accomplice to pushbacks committed by Libyan coast guards, in violation of article 3 of the ECHR, in reference to the European Court of human rights decision in *Hirsi Jamaa and others against Italy* in 2012<sup>27</sup>. In this judgement, the Court condemned “the transfer of the applicants to Libya was carried out by the Italian authorities with the intention of preventing the irregular migrants disembarking on Italian soil”<sup>28</sup>. In its application, the claimant NGO established a parallel between the pushbacks carried out pursuant to the Berlusconi-Kaddafi deal under scrutiny in the *Hirsi Jamaa* case and the pushbacks carried out by the Libyan coast guards following the February 2<sup>nd</sup> 2017 Italy-Libyan Memorandum. Indeed, this memorandum concerns the *cooperation in the areas of development, the fight against irregular immigration, human trafficking, smuggling and reinforcement of border security*.

## RULING

The administrative court rejected the case on January 7 2019. It considered that, although it did not range amongst the category of Acts of State<sup>29</sup>, Italy’s intervention in Libya should be submitted to mere limited scrutiny by the court since the government enjoys a wide discretionary power in this area. It furthermore observes that the Italian administration limited itself to promoting a support operation to reinforce the control on migration routes with its only possible interlocutor: the Libyan State, who directly and exclusively controls territorial waters and the African coast from where illegal migrants’ smuggling and other criminal activities initiate. The court added that funding the intervention did not seem to be in contradiction with the aims of the emergency financial fund (FFU) for Africa, despite what ASGI presented.

Thus ruling out any causal link between the Italian support and the now notorious abuses committed by the Libyan coast guards, the Court furthermore considered that the material support provided by Italy to the Libyan military was not contrary to European law’s restrictions since those rules only forbid military supply and assistance, whereas the speedboats and the assistance planned by Italy regarded only civilian troops, and for non belligerent purposes. The court even added that reinforcing the Libyan public apparatus could probably contribute to eradicating the unlawful traffics and the institutional chaos prevailing in Libya, which it considered as a main factor for the humanitarian emergency migrants are plunged in there. The refurbishment of the Libyan surveillance speedboats would satisfy the goal of reinforcing the maritime border control capacities foreseen in the framework of the Italy/Libya Memorandum and in the Malta Declaration.<sup>30</sup>.

For the Latium administrative court, this lack of abuse of power cannot be found in this case, for public power was exercised in conformity with Italian laws, Italy’s binding international instruments, and with public interest.

<sup>27</sup> CEDH, *affaire Hirsi Jamaa et autres c. Italie*, arrêt 23 février 2012, Requête n°27765/09..

<sup>28</sup> *Ibid*, para 181

<sup>29</sup> The French administrative judges consider, on their part, that the decision to supply boats to the Libyan authorities does indeed qualify as an act of state, thus escaping justiciability (see 2. The case of France).

<sup>30</sup> European Council informal meeting of heads of states or governments of the EU, Malta, 03.02.2011, <https://www.consilium.europa.eu/fr/meetings/european-council/2017/02/03/>

## 2. THE CASE OF FRANCE

### CONTEXT

After the dramatic reduction of migrants' passages via the oriental Mediterranean, as a consequence of the EU-Turkey deal, the central Mediterranean route has focused European authorities' efforts since 2017. Those efforts are reflected in a growing cooperation between the European Union and Libya, who then became the main source of arrival to Europe by sea.

In parallel with the obstacles they put against NGOs rescue operations in the central Mediterranean, European state actors dedicated their efforts to funding, supplying and training the Libyan coast guards. In June 2018, with the consent of the International Maritime Organisation, they supported the creation of the "SAR" (Search and Rescue) zone in Libyan waters and of a new maritime rescue coordination centre, the JRCC, based on Tripoli airport.<sup>31</sup>

This scheme allows for any person intercepted by those Libyan coast guards to be sent back to Libya, in plain violation of international maritime laws, amongst which the duty to disembark in a "safe haven". Since, as aforementioned, the facts clearly demonstrate that Libya is by far not a safe place for migrant persons.<sup>32</sup>

It is in this context that France decided to supply, free of charge, six "1200-Rafale" type semi-rigid inflatable boats to the Libyan navy.

Unlike Italy, France had passed no agreement with the Libyan authorities. The French army minister on a press briefing on February 21 2019 announced this unilateral decision, where she specified that the boats were aimed at dealing with "the problem of illegal immigration".

### PROCEEDINGS

Eight non-profit organisations<sup>33</sup> filed a request for annulment of the defence minister's decision before the Paris administrative Court on April 25 2019. They also filed a request for emergency measures, asking the administrative judge to suspend the execution of the decision until the court should decide on the merits of the case. They argued that the Minister's decision violated several European and international norms.

On one hand, France breached its international commitments such as the Treaty on arms trade and the European Union's common position 2008/944/PESC, which make it unlawful to transfer military apparel to countries where they may be used to commit or facilitate grave human rights violations.

<sup>31</sup> Migrants en Méditerranée : le casse-tête du redécoupage des eaux », Arianna Poletti et Camille Lafrance, Jeune Afrique, 17 décembre 2018 <https://www.jeuneafrique.com/685062/societe/migrants-en-mediterranee-le-casse-tete-du-redecoupage-des-eaux-territoriales/>

<sup>32</sup> Méditerranée centrale : une hécatombe sourde et muette, désormais à l'abri de (presque) tous les regards, Cimade, 16 novembre 2018, <https://www.lacimade.org/mediterranee-centrale-une-hecatombe-sourde-et-muette-desormais-a-labri-de-presque-tous-les-regards/>

<sup>33</sup> Amnesty International France, GISTI, Médecins sans Frontières, Migreurop, ASGI, Cimade, Ligue française pour la défense des droits de l'Homme et du citoyen (LDH) and Avocats sans frontières France

On the other hand, by purchasing six boats for the Libyan coast guards, France participated in the cycle of human rights violations committed in Libya against refugees and migrants, by giving logistic means to intensify those violations. The claim filed by the NGOs recalls that Libyan coast guards have on many occasions deliberately put at risk the lives of the very migrants and refugees they were supposed to rescue: by pushing back people in distress into the water, by threatening them with their weapons, by firing shots. The case provides testimonies of cases of thefts committed by coast guard on rescued victims, as well as cases of threats against NGO crews, who were committed to rescue operations.

Moreover, the case puts forwards that France's responsibility is all the more important that most persons currently detained in detention centres in Libya have been intercepted at sea by Libyan coast guards. But we know that refugees and migrants are systematically transferred to detention centres where they are kept in inhuman conditions and that they are exposed to rapes, torture, extrajudicial executions, forced labour and slavery and other forms of extreme violence in this country.

## RULING

By an order rendered on Mai 10 2019, the summary judgement magistrate of the administrative court of Paris refused to suspend France's decision to supply boats to the Libyan coast guards, on the grounds that this decision "cannot be severed from France's international relations"<sup>34</sup>. He concluded that "the main case, for annulment of this decision, does not fall within the jurisdiction of the administrative court". The judge thus resorted to the notion of Act of State to make the government's action evade judicial scrutiny.

A few days after this order was pronounced, the same judge rejected the main case, this time with an inadmissibility order, that is without any public hearing, and, as a consequence, without any contradictory debate. He simply reused the Act of State argument made in the Mai 10 2019 order.

In august 2019, the claimant NGOs appealed this latter inadmissibility order. They claim that, under article 13 of the European convention on human rights, which guarantees the right to an effective remedy, a decision by a public authority cannot escape judicial scrutiny if it violates fundamental rights protected by the convention.

<sup>34</sup> Paris administrative court, Order May 10 2019, case n° 1908601/9

### III - Can externalisation go on with total impunity?

The three cases mentioned are enlightening with several regards: first, they illustrate the various forms, more or less formalised, or out-sourcing by European and national authorities in the management of migrants movements at their borders, and, with them, their responsibilities towards those persons. Second, they prove the judges' reluctance to take position on the facts put forward by the claimants, namely the consequences of this out-sourcing on fundamental rights. In the case before the European judge, this reluctance took the form of hiding behind his lack of jurisdiction and behind procedural arguments. In the Italian and French cases, the judges managed to avoid having to examine the facts by invoking the government's discretionary power to conclude agreements or to make decisions within the realm of its diplomatic activity.

In a context where, from all sides, testimonies and documented facts highlight the obvious acceleration and the worsening of migrants' human rights abuses as consequences of border control externalisation, those judicial decisions reinforce the impression that those decide for such externalisations, and their accomplices, enjoy a full impunity.

Some convictions by the European court of human rights may "correct" this impression. In the aforementioned Hirsi case, Italy was condemned in 2012 for exposing the victims to risks of inhuman and degrading treatment by virtue of the pushback they had sustained. A few cases brought by some asylum seekers who were trapped in the Greek hotspots in inhuman conditions, directly linked with the entry into force of the EU-Turkey agreement, have indeed led to emergency measures being issued by the Court against the Greek government. But those cases remain exceptional compared to the thousands of persons whose rights are daily violated in the Mediterranean as a result of externalisation. And mostly, even if those judgements can relieve the fate of a very narrow number of those victims, they however fail to challenge the very mechanism of out-sourcing, which underlies those violations.

In her report, communicated to the United Nations General Assembly on August 15 2017, the Human Rights Council Special Rapporteur on extrajudicial, summary or arbitrary executions, Agnès Callamard, did not hesitate to denounce "a quasi-generalised impunity regime", given the massive losses of human lives of refugees and migrants who were fleeing their countries. The UN working group on Enforced or Involuntary Disappearances, within the UN Human rights High Commissioner mandate, made the same finding in their September 2017 report on enforced disappearances in the context of migration: *"Despite the large number of serious crimes and human rights violations committed in the context of migration, including in large movements, inter alia enforced disappearances, the Working Group has not documented any instances in which States or non-State actors have been held accountable. This situation creates a favourable context for the perpetuation of these crimes and violations."*<sup>35</sup>

One must acknowledge that the European Union judge and national jurisdiction, with their rulings, confirm those findings.

<sup>35</sup> Report of the Working Group on Enforced or Involuntary Disappearances in the context of migration, A/HRC/36/39 Add 2, September 2017, para 50