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A ubiquitous border for migrants in transit and their rights: analysis and consequences of the reintroduction of internal borders in France[1].

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Abstract:

Article 6.3 of the Return Directive 2008/115/EC allows a Member State to refrain from issuing a return decision to a third-country national staying illegally in their territory if they are taken back by another Member State under bilateral agreements between the two states. Due to a regressive interpretation of this precept, France has temporarily reinstated border controls and is summarily pushing back or even forcibly deporting undocumented migrants to Spain. This article will argue that the Return Directive does

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not repeal the obligation to follow a formal readmission procedure (which includes the recognition of a due process to the migrant) and that the French *refus d'entrée* (denial of entry) is not an adequate procedure for such cases. In other words, all rejections done without "taking charge" of the undocumented migrants are in fact violating the Return Directive. One of the main conclusions is that recent legal reforms in France have given rise to a ubiquitous border regime that considers its borders with other Member States as external borders in order to avoid the (few) guarantees provided by European Union law.

Keywords: Internal borders, Return Directive, Bilateral Readmission Agreements, European Union, France, Spain

1 Introduction

Abou is an African boy who, despite having documentation proving that he is 16 years old, was registered as an adult by the Spanish National Police at the Centre for Temporary Assistance for Foreigners (or CATE in Spanish) in Algeciras, Andalusia. He was detained there for three days in April 2019, after being rescued when he crossed by boat from Morocco. At the beginning of March, he rested for two days at the Martindozenea municipal shelter, managed by the Red Cross in the border town of Irun (Gipuzkoa), and continued his journey to France, crossing the border through Hendaye. Already in Baiona, he spent the night in Pausa, a center for migrants in transit managed by the Diakité and Atherbea collectives. The next day, after traveling 150 km into France, he was arrested at a control by the French gendarmerie near the city of Pau.

Having no travel document, he was transferred to the police station to be expedited. He immediately reported that he was a minor, but when the gendarmes consulted in the Schengen Information System (SIS), they saw that he had been registered as an adult by the Spanish police. They immediately returned him, leaving him at the Spanish border post of Somport, in the middle of the Pyrenees. With the help of several anonymous people, he was able to return to Irun for a second chance. Abou is just one of thousands of migrants in transit who are intercepted by the French police at one of their permanent controls, which are not only located near border, but also on the main roads connecting the interior of the country. The two Member States have a bilateral agreement for the readmission of irregular migrants, signed in Malaga in 2002, which establishes that migrants can be immediately returned if they are intercepted up to a maximum limit of four hours after crossing the border. However, France is applying their *refus d´entrée* procedure (refusal of entry) which, in practice, means that it returns them immediately no matter when they are intercepted, (even if the person crossed more than four hours earlier) either by public transport or by police car, even entering Spanish territory to leave migrants on the other side of the border, as when Basque public television EITB broadcasted images of this type of deportation practice.

The French philosopher Etienne Balibar has suggested that certain borders no longer have physical locations in the geographical-political-administrative sense of the term, but rather "reside wherever selective control is exercised" (2005: 84). In line with Balibar, we consider that far from eliminating borders, the system being developed seeks to be more effective in selective control, by using ethnic profile patterns and by suspending fundamental rights. In this sense, the *de facto* redefinition of the “internal border” must be studied as a paradigm of police control of mobility between and in

Member States, as it may constitute a line of development for the European Union's securitization model. A legal and empirical analysis of the police practices described in the introduction reveals how internal migration in Europe is being managed by reinstating border controls. As we shall see in the following section, the EU's objective of creating a space for free movement delimited by reinforced external borders, has given rise to an internal migration policy based on the persistence of insecurity and the establishment of various "compensatory measures" such as the Schengen Information System, cross-border police cooperation agreements and periodic evaluation mechanisms (Atger 2008). We must analyse this phenomenon from the rationale of increasing securitization of the European territory (Huysmans 2006, Guild 2009), mainly legitimized by alarm in the face of terrorism (Léonard 2015). Framing the debate in these terms gives rise to a series of questions related to the evolution/transformation of European regulations on freedom of movement and border controls (Groenendijk 2004, Guild et al 2016), especially regarding the high levels of police discretion (Van der Woude and Van der Leun 2017) and the violation/suspension of rights and guarantees of migrants who are subjected to deportation proceedings (either detention, readmission, no admission or rejection) within the European Union (Carrera and Stefan 2020). Didier Bigo refers to this as "Eurosurveillance" (2009), understood as the tension between state and EU legal systems and the rhetoric of immigration controls, where more emphasis is placed on security at the expense of procedural guarantees and the fundamental rights of migrants.

Related to our present case study, the article "The European Union never got rid of its internal controls: A case study of detention and readmission at the French-Spanish border", Barbero (2017) proposed the analysis of Spanish regulations and police

practice in this territory with respect to the people entering Spanish territory from France, mostly from Eastern European countries before they joined the EU and the Schengen agreement, and Moroccans on holiday, or during seasonal or circular transit. That article examined Spanish regulations, jurisprudence and institutional reports regarding the return procedure (58.3 Spanish Immigration Law or LOEX) and refusal of entry (60.1 LOEX), and the violation of rights that certain immediate return police practices generated. However, today the reality has changed completely. On the one hand, the trend of migrants rescued in the waters of Morocco and Southern Spain continuing on to countries in central and northern Europe has changed the underlying rationale of border control. According to data from the Spanish Ministry of Interior, 61,247 migrants arrived in Spain irregularly by land and by boat between June 2018 and April 2019. In addition, as we shall see, France has made a significant number of legislative reforms on immigration and terrorism that directly affect how police carry out internal border controls. Thus, in a somewhat similar way to what happens on the northern border of Italy (McClure 2011, Barbero and Donadio 2019), numerous migrants are repeatedly subjected to border rejection and return procedures, without being aware of their rights or having the capacity to articulate a minimum legal defence to avoid expulsion and continue their journey north. On occasion these circumstances have led to sentences handed down by the Court of Justice of the European Union, as in the Arib judgment (C 444/17), which we will return to later. Therefore, the specific objective of this article is to analyse the main legal texts that regulate these return procedures (the Schengen Borders Code, the Return Directive, the 2002 Spanish-French Readmission Agreement, the French Immigration Code or CESEDA, etc.) always contextualizing them with the constant jurisprudence generated by the European Court of Justice on this subject. The main conclusion of this article is that the practices of the

French police, as well as France's most recent regulations related to the fight against terrorism, seek to establish a *ubiquitous border control regime* (controls carried out throughout the territory) and that ultimately France, especially with regard to Spain and Italy, is seeking to present itself as the EU's external border in order to suspend the guarantees provided by European freedom of movement and the Schengen Border Controls in its territory.

With this in mind, the following section will analyse the aforementioned *refus d'entrée* procedure, which amounts to French police immediately rejecting undocumented migrants at the border and anywhere else they are intercepted, and its doubtful legality given European regulations on the return of foreign persons in an irregular situation between Member States. Because the Return Directive expressly acknowledges bilateral readmission agreements, in the third section we examine the French-Spanish agreement on readmissions, arguing that it is not being applied properly and that police practices are violating the rights of people subject to readmission. We will use official statistical data provided by France and Spain to show how migrants have been repeatedly subject to rejection and return procedures that do not comply with the EU regulations with which these Member States are unquestionably bound.

2. The regulation of the reinstatement of border controls in the EU and the specificity of the French case

Since the 1980s, with the creation of the "Schengen Area", freedom of movement and the elimination of internal borders have been fundamental legal principles in the

European Union. The approval of Regulation 562/2006 marked the culmination of the long process of building the Schengen Area. This ambitious project had been initiated in 1985 with the Schengen Agreement, followed by the Implementation Agreement of June 19, 1990, and the Treaty of Maastricht of 1992, in which the freedom of movement and residence of people in the EU became the cornerstone of the citizenship of the Union, and the Amsterdam Treaty of 1997, where Schengen was incorporated into Community law. In this regard, both Article 3.2 of the Treaty of the European Union and Article 77 of the Treaty on the Functioning of the EU (both Treaty of Lisbon 2007) enshrine the guarantee of the absence of controls on individuals, whatever their nationality, when crossing internal borders. This last milestone meant the "Lisbonisation" of the Third Pillar (Ferraro 2013), making all regulation on internal (and external) borders, police and judicial cooperation EU competences. Article 22 of Regulation (EU) 2016/399, which establishes the Schengen Borders Code (SBC), expressly states that "Internal borders may be crossed at any point without a border check on persons, irrespective of their nationality, being carried out". In this regard, in Melki and Abdeli C-188/10 and C-189/10, Adil C-278/12 or C-9/16 the Court of Justice of the European Union ruled that identity checks must be carried out in a way that is clearly differentiated from the border checks in intensity and periodicity (Illamola, 2012; Pistoia, 2018). With this regulatory landscape the general rule should be a total absence of border controls.

However, recent trends in the EU have led to a situation of permanent exceptions to these clearly stated principles. The SBC regulates three procedures that allow the temporary restoration of controls at internal borders. The first, related to "foreseeable events", is regulated by articles 25 to 27 SBC and allows the reinstatement of controls as a last resort, applicable for 30 days and renewable for up to six months, when there is a serious threat to public order or internal security. In those circumstances, the Member State must provide the reasons, territorial scope, date and duration of the restoration, as well as the measures that must be taken by other Member States. The second procedure,

regulated by Article 28 of the SBC, is planned for cases that require “immediate action”, and allows Member States to reintroduce controls at internal borders unilaterally for a period not exceeding 10 days (which can be extended for periods not exceeding 20 days, for a maximum of two months). All these measures must be notified immediately to the other Member States, as well as to the Commission. The third and final procedure, regulated by Article 29 of the SBC, can be used as an *ultima ratio* in exceptional circumstances that jeopardize the overall operation of the system due to serious and persistent deficiencies in controls at the external borders. Here there is a substantial difference with respect to the other procedures, in that the restoration initiative cannot be initiated by a Member State, it must be a decision made by the European institutions. Specifically, it is necessary for the Council, based on a Commission proposal, to recommend one or more Member States to reinstate controls at all their internal borders or in specific parts of them, for an initial period of six months, which may be extended a maximum of three times, for new periods of up to six months in case exceptional circumstances persist. Consequently, the total period may last a maximum of two years. However, the ambiguity of the terms, along with a lack of institutional control, has led to extensions that in some cases have already lasted more than 2 years, and that are anticipated to continue. In this sense, the organizations ANAFÉ (*Association nationale d'assistance aux frontières pour les étrangers*) and GISTI (Groupe d'information et de soutien des immigré.es) have repeatedly appealed to the French Conseil d´Etat the decisions of the French Government to extend the restoration of internal border controls, even up to over 3 years. The arguments put forward by these organizations were that the circumstances alleged for the restoration constituted a "new threat" (article 25 SBC), nor "exceptional circumstances" (article 29SBC); And much less a proportionated “last ratio” (article 26 SBC). However, the Conseil d'Etat in repeated pronouncements (28th of December 2017 and 16th of October 2019) has validated the position of the French government.

According to data provided by the European Commission, between 2006 and 2014, the different mechanisms for temporarily reinstating internal borders were used 35 times, mostly for high-level governmental summits (G7, NATO, and visits by the Pope or the Nobel Prize ceremony) or demonstrations by political groups (European Commission 2019). However, between 2015 and March 2020, these mechanisms have been used 117 times; in other words, in just 5 years they have been invoked more than three times more often than they were in almost ten years. It is true a the Coronavirus COVID-19 has motivated most of the short reintroductions (10 days according to article 28 SBC) during the first half of the 2020, but several states, mainly Austria, Germany, Denmark, Sweden and Norway, along 2018 and 2019 have constantly reinstalled internal border controls, invoking questions of security and public order due to supposed "unauthorized

secondary migratory movements", while others, such as France, are motivated by the threat of terrorist attacks. In view of this constant invocation of procedures for the reintroduction of border controls, in the recent Implementing Decision (EU) 2017/246 of 7 February[2] the Council explicitly encouraged Member States “to examine whether other measures alternative to border controls could be used to effectively remedy the identified threat…and decide to reintroduce border controls at the internal borders concerned only as a measure of last resort”. In the same vein, the European Commission issued a recommendation (EU) 2017/820 of 12 May 2017 "on proportionate police checks and police cooperation in the Schengen area". According to the Commission, "Such checks may prove more efficient than internal border controls, notably as they are more flexible than static border controls at specific border crossing points and can be adapted more easily to evolving risks". Furthermore, we must take into account the current legislative debate within the European institutions. On 27 September 2017, the European Commission formalized the reform proposal COM (2017) 571 final, with the aim of extending both the duration of the reintroduction of border controls at internal borders (from 6 months to one year) and of the extensions (from 30 days to 6 months), as well as a greater justification of the risk that motivates the reintroduction of controls. For its part, the European Parliament, on 29 November 2018, adopted a series of amendments which placed particular emphasis on the last resort nature of these mechanisms and the need to justify the insufficiency of alternative measures prior to the reintroduction of internal border controls, as well as the involvement of neighbouring countries in risk/problem management.

[2] COUNCIL IMPLEMENTING DECISION (EU) 2017/246 of 7 February 2017 setting out a Recommendation for prolonging temporary internal border control in exceptional circumstances putting the overall functioning of the Schengen area at risk

The specific case of France merits further analysis because in the last decade several events have been used to justify the reintroduction of border controls. First, in 2011 France set up train controls on the Ventimiglia border with Italy to stop mainly Tunisian migrants, who had been granted a temporary permit by Italy for humanitarian reasons. Subsequently, in addition to providing security for the United Nations Climate Change Conference (April 2016) and the EuroCup (June 2016), the main arguments have been the attacks against the satirical magazine Charlie Hebdo (January 2015) and against the discotheque Bataclan and in Saint Denis (November 2015). Faced with the persistent threat of future terrorist attacks, the French government of François Hollande declared a state of emergency between 13 November 2015 and 31 October 2017 (a total of 718 days and 6 extensions) on the basis of French Law 55/385 of 3 April 1955. In addition to measures such as the house arrest of individuals who could pose a security risk (754 cases), discretionary administrative search warrants (4,444 cases), access to databases to justify "non-admission" (656 cases), identity checks (5,229 cases) or the demarcation of special security zones such as Calais (59 cases) (Slama 2018), it was also decided to reinstate controls throughout the French border perimeter (controls that have been maintained after the end of the state of emergency on 1 November 2017), as well as to launch Operation Sentinel (military patrols in places considered sensitive, including borders). The G7 summit held in Biarritz in August 2019 involved the displacement of thousands of French police officers to the area and the tight closure and control of the main connecting routes around the border with Spain, including the establishment of lists of foreigners (EU and non-EU) who were considered a threat and immediately arrested and deported.

These events have been used as an argument to tighten French legislation on identity and border controls, mainly with the new reform introduced by Law 2017-1510, to strengthen internal security and the fight against terrorism (and to a lesser extent Law 2018-778, "for orderly immigration, an effective right to asylum and successful integration", henceforth the Law on Orderly Immigration). Article 19 of the new Law on strengthening internal security and combatting terrorism intensified some aspects related to controls "in border areas" regulated in Article 78-2 of the Code of Criminal Procedure and 67c of the Customs Code. Under the new regulation, the police may request documentation from individuals for the prevention and detection of cross-border crimes. The new regulation allows identity verification at the border for 12 hours (previously 6), extending the checks to the vicinity of 373 railway stations, ports and airports, as well as within a 20 km radius of the 118 border points. In this way, it is now possible to consider internal borders, not only geographical internal borders, but also more distant territories such as Toulouse, Marseille or even Paris. In this sense, France has developed a “ubiquitous internal border”.

All these measures implemented in the context of the state of emergency have led some authors (evoking Gunther Jacob´s criminal theory on the reduction of enemies´rights, Feindstrafrecht) to consider the emergence of an “administrative Law of the enemy” (Hennette-Vauchez and Slama 2017), which attributes police forces in different Member States the capacity to act in anticipation of a virtual risk based on factors such as a person’s social or family circles, activity on social networks, and, evidently, also their clothing, appearance or ethnic features. Taking into consideration the regulation of Article 23 SBC and the jurisprudence of the ECJ, we must ask ourselves, is France preparing its legislation on identity checks and documentation of aliens for a post

border-reinstatement era, in which the extension of the territorial and temporal scope of these devices would indirectly supplant border controls, creating a total and permanent border? Will this legislation be readjusted to the limits established in the SBC and by ECJ jurisprudence, as in the Melki and Abdeli judgment of 2010, once the reestablishment of border controls is over? Unlike other Member States whose argument for reinstating border controls has been "unauthorized secondary migratory movements", France has always invoked the "persistent terrorist threat" committed by French nationals or people coming from countries such as Belgium. However, according to a report by La Cimade (2018), which observed the work carried out at France's internal borders during 2017, the borders with Spain and Italy have been the object of particularly stringent controls, while the borders with Switzerland, Germany, Luxembourg and Belgium have only been sporadically controlled. The typology of these controls and the way they have been implemented (on buses and trains frequented by migrants) seem to suggest that underlying motivations are more related to the issue of migrants and the insufficiency of external border control, than to the issue of terrorism. In the following section we will analyse the French administrative police practice mentioned earlier called *refus d´entrée* that involves immediate return through a procedure so summary that it should be, in our opinion, considered null and void.

3. The *refus d´ entrée* procedure and its possible conflicts with the Return Directive

The French procedure used to return irregular migrants is *refus d´entrée*, regulated by Article L213-1 et seq. of the *Code de l'entrée et du séjour des étrangers et du droit d'asile* CESEDA. According to data provided by the PAF (*Police aux Frontieres*,

French Border Police) to the Spanish journal El País[3], in only the first nine months of 2018 almost as many returns (9,038) had been made at the Spanish-French border as in the whole previous year (9,175). Specifically, we see that the western border (French Department number 64), where the border crossings of Irun-Hendaia, and to a lesser extent Somport, are located, is not only the most active border area, but has also experienced an increase of 62% between 2017 and 2018, in the first nine months. The eastern Spanish-French border is also active with 4,411 in 2017 and 3,436 in 2018 (a decrease of 6% was experienced over the first nine months). In addition, if we look at the daily rejection averages, we see that at the western border crossings have increased from 9.6 in 2017 to 15.3 in 2018, while at the eastern border crossings remain around 9.5-10. Therefore, we can expect that further official data referring to later periods (the end of the 2018-2020) will show how these practices have persisted. We need to bear in mind that in August 2019 the G7 meeting took place in the French town of Biarritz, close to the border; and the reinforcement of border control in both sides, especially in Spain, because of the COVID-19 virus pandemic).

Specifically, Article L213-1 establishes two situations in which foreigners may be denied access to French territory: a) when their presence constitutes a threat to public order; b) when they are the subject of a judicial prohibition of the territory or of an expulsion order, due to a prohibition of returning to French territory, a prohibition of movement in French territory or an administrative prohibition of the territory. In addition, the refusal decision must be reasoned and justified in writing by the head of the police station, customs or the commander of the gendarmerie unit, and in a language that the foreigner understands, indicating that they have the possibility of communicating with a lawyer or with any person or authority of their choice (family, consulates). According to article Article L213-8-1, the decision to refuse entry to France to a foreigner who presents him/herself at the border and requests to benefit from the right of asylum can only be taken by the Minister responsible for immigration if: 1) The examination of the asylum application falls within the competence of another State in application of Regulation (EU) No 604/2013; 2) The request for asylum is inadmissible in application of article L. 723-11 (e.i. already recognised in another

[3] El País (5th November 2018) "Francia devuelve a España a 1.000 inmigrantes irregulares cada mes". https://elpais.com/politica/2018/11/02/actualidad/1541179682_837419.html

Member State); 3) Or the request for asylum is manifestly unfounded. This means that the Minister needs to send a decision.), and, of course, the administrative decision may be appealed to the courts. Obviously, there is the possibility of appealing against the decision not to enter the territory before the Administrative Court within four months of notification of the decision. Therefore, the *refus d´entrée* can only be employed when the intercepted foreigner is an adult and constitutes a threat to public order (as ambiguous and discretionary as this condition may be) or there must be a prior judicial or administrative decision justifying the rejection. In addition, there are various resources that migrants can use to defend themselves, including confer with a lawyer or any person or authority that they choose, request asylum, claim to be a minor and, of course, lodge an administrative appeal, all of which are included in Article L221-4 CESEDA. It is important to note that L213-2 states that, if the foreigner manifests so, the refusal cannot be executed before the *jour franc* expires, this means a hole day, from 0 am to 24 am after the proper notification of the decision in order to understand the procedure, call relatives, consulates or lawyers, and consider applying for asylum, especially applicable to unaccompanied minors. However, with the reform of article L213-2 of CESEDA, introduced article 18, amendment CL 900, of new Law on Orderly Immigration (2018-778), the *jour franc* has been eliminated for the overseas region of Mayotte and on land borders, thus eliminating a fundamental tool to defend the rights of those detained. Moreover, since 1 January 2019, with the new Law, Article L213-3-1 CESEDA has come into force, which provides for the possibility of refusing entry to a foreigner who, coming directly from the territory of a state party to the Schengen Convention, entered French territory by crossing an internal land border without authorization and was checked in an area between that border and a line drawn ten kilometres below it. These decisions can only be taken in case of temporary reintroduction of internal border controls.

The daily practice at internal French borders usually consists of giving the rejected person a standard form entitled "Refus d´entrée". Most of the documents we have seen during fieldwork and according to some examples provides by activists in the border, have the French and/or European flag on it, on which data are filled in related to the border crossing point at which they were intercepted, the personal data of the

intercepted person, the means of transport in which they were travelling, and the basis for refusing entry chosen from a list of reasons (although they are usually pre-filled). Although lack of valid documentation was previously the main cause, lately, according to sources from activist organizations such as *Association nationale d'assistance aux frontières pour les étrangers* (ANAFE 2019), the French police are ticking the "threat to public order" box in order to legitimize the reestablishment of border controls for security reasons. A number of CESEDA articles (L211-1, L211-3, L212-2, L213-1 and L213) are listed at the bottom of the document, but often (especially at the French-Spanish border) no specific mention is made of what rights these articles contain or how they are exercised. Moreover, according to the observations of social organizations such as CIMADE (2018) or ANAFE (2019), the French police advise migrants that it is better for them to sign the waiver of rights in order to speed up the procedure of return to Spanish territory and thus enable future attempts to cross in the hope of not being apprehended when they return. Finally, the refusal of entry document must be signed by the competent authority, specifying the signatory's identity and rank. However, those social organizations such as ANAFE or CIMADE have also noted that the police are carrying out the control themselves at both the Spanish and Italian borders (CRS, for example, despite not having competence over borders), issuing and filling out the documents, and signing them illegibly, with no indication of the rank or identity of the signatory. Therefore, there is no individualized treatment based on the circumstances of the person; it is an automatically issued, systematized procedure in which the police do not bother to carry out an exhaustive or real examination in order to execute the return as quickly as possible. We must also bear in mind that, although in application of article 20 of the Dublin Regulation (Regulation (EU) No 604/2013 of the European Parliament and of the Council, of 26 June 2013), asylum applications must be lodged with the

authorities of the first European state they enter, there is an *ad hoc* procedure for those persons to return to that first state that recognises certain rights and guarantees (GISTI 2019), so immediate return by refusal of entry is not possible.

Given that this is an express or simplified procedure in terms of the steps involved and how it is issued, we must raise the question of whether this practice is in accordance with European legislation, and specifically with Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, aka the “Return” Directive. It is true that according to Article 12.3 of the Return Directive, Member States can ignore the general rule of providing written entry bans and expulsion decisions (with explanations of the factual and legal grounds for the decision, referred in Article 12.1; and provide general information sheets explaining the main elements of the standard form in at least five languages most frequently used or understood by migrants entering the Member State concerned, Article 12.2). As reported in Commission Recommendation (EU) 2017/2338 of 16 November 2017 establishing a common "Return Manual" to be used by the competent authorities of the Member States for return related tasks, 12.3 also applies to "cases of entry of an illegally staying third-country national from another Member State in breach of the conditions of entry and stay applicable in that Member State".

However, we must refer to the recent judgement of the European Union Court of Justice of 19 March 2019, case C 444/17 (Préfet des Pyrénées-Orientales and Abdelaziz Arib) in which the French *Court de Cassation* questioned whether the reintroduction of border controls with other Member States implies considering internal borders as external

borders for the purposes of derogating from the Return Directive, especially as regards penalizing irregular crossing with imprisonment and applying the simplified return procedure provided for external borders. According to the ECJ, "the mere reintroduction of border control at the internal borders of a Member State does not mean that an illegally staying third-country national apprehended in connection with the crossing of that border, or in the immediate vicinity thereof, may be removed more swiftly or more easily from the territory of the Schengen area by being returned immediately to an external border than if he had been apprehended in connection with a police check for the purpose of Article 23(a) of the Schengen Borders Code, in the same place, without border control having been reintroduced at those borders" (Para 56). The European Court adds that Article 2(2)(a) of Directive 2008/115 consists in allowing Member States to continue to apply simplified return procedures at their external borders, without having to complete all the procedural steps laid down in that Directive, and thus be able to expel more quickly third-country nationals apprehended when they crossed those borders (Judgment of 7 June 2016, Affum, C 47/15, EU:C:2016:408, paragraph 74). In short, the Court has firmly ruled that the reintroduction of internal border checks does not imply a derogation from the Directive, and even less considers borders between Member States as an external border. "The very wording of the Schengen Borders Code therefore precludes, for the purposes of that directive, an internal border at which border control has been reintroduced under Article 25 of the code from being equated with an external border" (Para 62). In our opinion, at the very least Article 6(3) of the Directive should apply, which concerns bilateral agreements between Member States, even if such an agreement would also raise doubts as to its concordance with European Union law.

4. The readmission of foreigners under bilateral agreements between Member States

Article 6(3) of the Return Directive allows a Member State to refrain from issuing a return decision to a third-country national staying illegally in their territory if they are taken back by another Member State under bilateral agreements. The Directive adds that it will be the other Member State that has taken back the third-country national that will have to issue the return decision (6.1). From this we can deduce that the *refus d´entrée* procedure fits with the authorization not to issue a resolution referred to in the Directive if the person is returned to Spain because there is, as we shall see, a bilateral readmission agreement between the two countries. However, the language in the Directive regarding the ability to refrain from issuing a return decision does not mean that the obligation for an *ad hoc* procedure to carry out the readmission ("taking back") can be ignored. In other words, the existence of a readmission agreement should imply that a specific administrative procedure will be articulated between the two police authorities in which the persons subject to readmission have procedural guarantees. It should be remembered that two bilateral agreements on internal borders are currently in force between Spain and France: the Convention on Cross-Border Cooperation in Police and Customs Matters between Spain and France, signed in Blois on 7 July 1998, which regulates joint operations and the creation of cross-border police and customs cooperation centres (CCPAs); and the Agreement on the Readmission of Persons in an Irregular Situation between Spain and France, signed in Malaga on 26 November 2002 and entered into force on 21 December 2003, which regulates the cases, procedure and bureaucracy required for the authorities of one of the signatory states to hand over an

intercepted undocumented person to the authorities of the other, with proof that they crossed from the other state and that the crossing occurred within four hours maximum of interception (Barbero 2017). This last element regarding the time after crossing is not contained in the 1997 Chambery Bilateral Agreement, which regulates readmissions between France and Italy, which is otherwise practically identical to the Malaga Agreement (Barbero and Donadio 2019). Therefore, those persons for whom France initiated and executed a *refus d´entrée*, in compliance with the Return Directive, should necessarily be readmitted under this bilateral agreement.

However, once again, police practice, and in particular the data previously analysed, paint a picture in which not all refusals are in accordance with the law, or in this case, the Return directive since they do not do not lead to an act of readmission. More specifically, in 2017 the French authorities stated that there were 9,175 "no admissions", while the data on the implementation of the Readmission Agreement offered by the Spanish Ministry of the Interior in response to a parliamentary question (684/33397), for the same year, reported "only" 2,690 readmissions where made from France to Spain. Therefore, the difference between the two official amounts should be understood as *refus d´entrée* without formal delivery (as required by the Directive) to the Spanish authorities. This means that the readmission agreement is not applied in a very high percentage of returns. At this point, we need to conclude the breachment of the Return Directive because no formal procedure is carried out, what also implies that the person being returned lacks any legal assistance or the possibility of applying for asylum. As Interior Minister Fernando Grande-Marlaska said after meeting his French counterpart Christophe Castaner in Hendaia on 4 July 2019, "on occasion there may be a contingent, transitory, momentary dysfunction" (...) They exist in the best relations, as in ours, and of course I have no complaint about it, but quite the opposite" (ElDiario.es, July 4, 2019). In other words, this practice is known and tolerated by Spanish authorities.

In any case, we should analyse the Spanish-French readmission agreement itself in terms of the legal regulations of both Member States and the Return Directive.

Specifically, Article 5 of the agreement states that the contracting States undertake "to readmit to their territory, at the request of the other Contracting Party and without any formality, the national of a third State who does not fulfil the conditions for entry or stay applicable in the territory of the requesting Contracting Party, provided that it is proved that such person entered the territory of that Party after having resided or transited through the territory of the requested Contracting Party". It is the concept of "without any formality" that gives rise to the most problems, both in light of the domestic law of both States and of the Directive itself, since it breaks with the constitutional and administrative tradition of fundamental rights, according to which any administrative action that results in a burden, such as deportation-return, requires a lawful procedure (which provides information, defence and recourse to the person being questioned), and not merely bureaucratic, as set out in the annexes and documents attached to the Agreement.

In the Spanish Foreigners Law (or LOEx in Spanish), all forms of deportation (Denial of Entry, 60.1 LOEx; Expulsion, 57.1 LOEx; or Return, 58.3 LOEx) explicitly recognize the right to legal assistance, especially when foreigners are "in Spain" (art. 22 LOEx). In addition, according to the 6th Additional Provision of the LOEx, international agreements regulating the readmission of persons in an irregular situation shall contain clauses respecting human rights by virtue of what is established in this matter in international treaties and conventions". Similarly, in French law the various deportation measures contained in the CESEDA, such as the obligation to leave French territory (L511 et seq.), or the *refus d´entrée* (L213 et seq.), contain certain administrative procedures which always provide for legal assistance regarding specific circumstances,

such as being a minor, an asylum-seeker or a victim of human trafficking, the eliminated *jour franc*, and subsequent appeals against the expulsion decision.

In any case, a bilateral agreement between two Member States cannot be above European law. With regard to European Convention of Human Rights (ECHR) Article 1 states that all persons, regardless of their legal-administrative status, are protected by the rights and freedoms of this convention (Guiraudon 2000, Costello 2015, Ktistakis 2013); Article 6 ECHR however refers to the right to a fair trial, with legal guarantees, but only for the determination of a civil right and of a criminal charge. In this sense, the Court judged in *Maaouia v. France* (5 October 2000) that the case of expulsion of a foreigner (including the granting of asylum) is not realted to civil rights nor criminal charges; And finally Article 4 of Protocol No. 4 ECHR prohibits collective expulsions of foreigners (Lasagabaster 2009, de Castro Sánchez 2013) and Protocol No. 7 establishes that the expulsion of a foreigner can only be made in execution of a decision adopted in accordance with the law, granting the rights to make allegations against their expulsion, to have the case reviewed (administrative or judicial appeal) and to be represented before the competent authority (Urrutia 2009, Solanes 2017). All of them are contained and interpreted in the case of Hirsi Jamaa and others v. Italy (23 February 2012). The Court initially also ruled in this sense in N. D. and N. T. v. Spain (3 October 2017), However, in the appeal judgement (13 February 2020) the Grand Chamber determined that article 4 of the protocol is not applicable to this case since the plaintiffs themselves committed illegality by not using the access routes established by law. in opinion of relevant jurists and defenders of the rights of migrants (Carrera 2020, CEAR 2020, Migreurop 2020, Thym 2020), that people from Sub-Saharan Africa have *de facto* vetoed access to any formal border crossing, and especially to the asylum office located between the border crossing post Moroccan and Spanish. In any case, when considering how does this interpretation of article 4 affects to the French-Spanish border case, we need to bear in mind that since there are no formal border crossings (apprently only temporary and localized border controls), migrants´ conduct cannot be consider illegal as in N.D and N.T.

Looking specifically in the European Union normative framwork, we must focus on articles 47 and 48 of the Charter of Fundamental Rights of the European Union , which refer to due process and fair defence, in addition to the jurisprudence cited above as Melki and Abdeli. On the other hand, although many works have been published referring to the suppression of rights in Member States as a consequence of the transposition of the Return Directive into national legislation (Acosta 2009, Baldaccini 2009), it is also true that in certain cases its content may be used to substantiate claims of violations before national or European administrative and jurisdictional bodies. Thus, articles 12 to 14 in Chapter III, called "procedural guarantees", detail three facets that must be guaranteed: the return decision form, appeals and enforcement. Regarding the form, Article 12 of the Directive stipulates that return decisions and entry prohibitions must be issued in writing and stating the factual and legal grounds, as well as remedies. In general, as we have already mentioned in this article, a translation of the content of the decision (12.2) may be requested, except in cases of illegal entry, which may be replaced by a standard form accompanied by information leaflets in at least five languages (12.3). Article 13 enshrines the right to appeal against return decisions (13.1), the suspension of the decision while it is being examined by the competent authorities (13.2) and legal assistance (free of charge if applicable) (13.3). Finally, it points to a number of guarantees pending return, including family unity, healthcare, basic education for minors, and special needs for vulnerable people.

In short, there is a significant number of rights recognized in various national and international legal texts according to which anyone who is the subject of a return from a Member State to any Member State is protected by the right to a formal procedure in

which they have the rights and guarantees characteristic of democratic states governed by the rule of law. This means that any regulation, such as the bilateral readmission agreement (2002) between Spain and France, containing clauses such as "without any formality", should be immediately challenged and declared unlawful. Furthermore, police-administrative practices, whether those covered by these irregular clauses or those that constitute informal practices or de facto channels, should be considered illegal and ordered to cease immediately either by the competent administrative-government body or by a national or European court.

5 Conclusion: a ubiquitous border for all

The rationale behind the prevailing trend towards the reintroduction of internal border is far removed from the European yearning for freedom of movement. Although at the time it was presented as an *ultima ratio* closure, in the light of Commission data, we can see that a significant number of Member States without external borders (and with strong conservative and extreme right-wing parties) have opted for some of the mechanisms provided for in Articles 25 et seq. of the SBC. To this end, these Member States, including France in particular, have decided on a quasi-unilateral basis to reintroduce border controls on an almost permanent basis in order to wrest competence over this area back from European institutions.

In this respect, the European Court of Justice itself has reminded France that it cannot, for practical purposes, declare itself an external border. Although in France there has been a series of events that has genuinely motivated an extreme level of alert, by

invoking emergency regulations, such as the declaration of the state of emergency, the implementation of a true "administrative law of the enemy" has been consolidated. This is the context of the reintroduction and militarization of internal borders, as well as the proliferation of selective identity controls used on the foreign population, which we see as discriminatory. We categorically state that this migration control legislation, which was enacted as part of the latest security and counter-terrorism reforms, will encounter (or should encounter) numerous obstacles to adapt to the legality and jurisprudence of the Union currently in force when the reinstatement of internal borders ends. The notion of the ubiquitous frontier that currently prevails in French legislation collides head-on with the principles of freedom of movement enshrined in European treaties and conventions.

In any case, if we confine ourselves to the practical consequences of the direct application of this regulation, among which we have pointed out the technique of *refus d'entrée*, it must be pointed out that there are also arguments sufficiently founded in law to affirm that a very large number of returns should be null and void due to the absence of a procedure foreseen both in French legislation and in the readmission agreement between France and Spain. Precisely, one of the consequences of non-compliance with the procedure is the denial of procedural guarantees, such as an individualized resolution in which personal circumstances such as being a minor, potentially deserving protection from persecution in the country of origin, or being a victim of trafficking are taken into account.

In short, misusing legislation and police practices meant for security and counter-terrorism to manage mobility within the Schengen territory contravenes the spirit with which this area of Freedom, Security and Justice was conceived. Although the most direct consequences of the application of measures under exceptional regimes have an impact on the foreign population, both resident and in-transit, Community citizens would also be subject to immediate return practices. Therefore, the ubiquitous border concept would not be limited to questions of security and immigration, but would also permeate day-to-day mobility throughout the territory of the Union, putting an end to freedom of movement. To echo Javier de Lucas (2013), it would be the sinking of Europe.

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