



# Migration and Citizenship in Europe – Does 'Illiberalism' Matter?

## Eurowhiteness Solidarity from the EU and Hungary to the UK

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Elena Basheska

Dimitry V. Kochenov

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**Authors**

**Elena Basheska***

e.basheska@gmail.com

**Dimitry V. Kochenov****

d.kochenov@gmail.com


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* Rule of Law Research Group, CEU Democracy Institute, Budapest.
** Rule of Law Research Group, CEU Democracy Institute, Budapest; CEU Department of Legal Studies, Vienna; Malyi Fellow, The University of Chicago Law School.
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## Abstract

In this paper we bridge the liberalism / illiberalism divide, using the EU, Hungary and the UK as case-studies to demonstrate what many migration and citizenship scholars suspected all along: the spheres of citizenship and migration emerge in contemporary Europe as areas outwith the liberalism-illiberalism divide, where almost absolute de facto solidarity across the political spectrum and levels of governance prevails. We call this solidarity, following Kundnani, 'Eurowhiteness solidarity'. It consists in attacking migration, especially non-white migration, via legal and illegal means and reinforcing the absolute nature of state sovereignty over citizenship, be it in relation to ethno-nationalist blood-ties as a ground of acquisition of the status, or the growing rates of denaturalization. Citizenship and migration are thus the issues so charged that neither the imperatives of national, European and international law – nor of political change make a difference. The death toll of mass violence seemingly placed outside the realm of law and politics is rising steeply, with dozens of thousands drowned since the continent-wide policy-change and thousands more to die soon. This solidarity materialised as a strong continent-wide preference, which brought about criminal results and is not at all problematized, since the countless dead and those denaturalized are 'not like us'. Most importantly, this consensus showcases a new unforeseen function of the EU as a body adding the necessary complexity to water down accountability to facilitate migration policies in breach of national and international law put in place by the Member states, liberal and illiberal alike.

**Contents**

## Introduction: The Eurowhiteness solidarity

Migration is one of the most divisive issues in Europe and elsewhere in the Western world. Above other topics, migration questions came to dominate political debates and have significant impact on the outcomes of elections. The renewed concern over migration has become increasingly evident in the recent years. From refugee bodies washing up on Europe's shores,[1] many more never retrieved or searched for,[2] to illegal EU pushbacks,[3] building walls to contain so-called irregular migration,[4] and creating a hostile environment and labelling and abusing migrants to make them feel unwelcome,[5] to introducing plans to send asylum seekers to Africa,[6] Europe is

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[1] Lorenzo Tondo and Marta Bellingreri, 'Tunisian cemeteries fill up as hundreds of dead refugees wash up on coast', *The Guardian* (30 April 2023), available at: <https://www.theguardian.com/world/2023/apr/30/tunisian-cemeteries-fill-up-as-hundreds-of-dead-refugees-wash-up-on-coast> accessed 9 November 2023. *See* also Lorenzo Tondo, 'Children's bodies wash up on Libyan beach after migrant boats sink', *The Guardian* (25 May 2021), available at: <https://www.theguardian.com/world/2021/may/25/childrens-bodies-wash-up-on-libyan-beach-after-migrant-boats-sink> accessed 9 November 2023; Helena Smith, 'Shocking images of drowned Syrian boy show tragic plight of refugees', *The Guardian* (2 September 2015), available at: <https://www.theguardian.com/world/2015/sep/02/shocking-image-of-drowned-syrian-boy-shows-tragic-plight-of-refugees> accessed 9 November 2023; Angela Giuffrida, 'Ten years after tragedy, tiny Lampedusa at centre of migration crisis again', *The Guardian* (20 September 2023), available at: <https://www.theguardian.com/world/2023/sep/20/ten-years-after-tragedy-tiny-lampedusa-at-centre-of-migration-crisis-again> accessed 9 November 2023.

[2] Alexis Okeowo, 'The Crisis of Missing Migrants: What Has Become of the Tens of Thousands of People Who Have Disappeared on Their Way to Europe?', *New Yorker* (9 January 2023), available at: <https://www.newyorker.com/magazine/2023/01/16/the-crisis-of-missing-migrants> accessed 9 November 2023.

[3] Case C-808/18, *European Commission* v *Hungary*, ECLI:EU:C:2020:1029; *M. H.* v *Croatia*, App Nos. 15670/18 and 43115/18 (ECtHR, 18 November 2021); *See* also *Shazad* v *Hungary*, App. No. 12625/17 (ECtHR 8 July 2021. *See* Dimitry Kochenov and Sarah Ganty, 'EU Lawlessness Law: Europe's Passport Apartheid from Indifference to Torture and Killing', Jean Monnet Working Paper 2/22, available at: <https://jeanmonnetprogram.org/wp-content/uploads/JMWP-02_Kochenov_Ganty-2.pdf> accessed 9 November 2023. *See* also European Parliament, 'Addressing pushbacks at the EU's external borders' (Briefing), available at: <https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/738191/EPRS_BRI(2022)738191_EN.pdf> accessed 9 November 2023; Lydia Gall, 'EU Should Stop Illegal Migrant Pushbacks at its Borders', *Human Rights Watch* (8 December 2022), available at: <https://www.hrw.org/news/2022/12/08/eu-should-stop-illegal-migrant-pushbacks-its-borders> accessed 9 November 2023; Lorenzo Tondo, 'Revealed: 2,000 refugee deaths linked to illegal EU pushbacks', *The Guardian* (5 May 2021) available at: <https://www.theguardian.com/global-development/2021/may/05/revealed-2000-refugee-deaths-linked-to-eu-pushbacks> accessed 9 November 2023.

[4] Sarah Ganty, Aleksandra Jolkina and Dimitry Kochenov, 'EU Lawlessness Law at the EU – Belarusian Border' (2023) MOBILE Working Paper (University of Copenhagen); María Martín, Silvia Ayuso, Yolanda Clemente, 'The fences dividing Europe: how the EU uses walls to contain irregular migration', *El País* (9 April 2023) available at: <https://english.elpais.com/international/2023-04-08/the-fences-dividing-europe-how-the-eu-uses-walls-to-contain-irregular-migration.html> accessed 9 November 2023.

[5] *See* Melanie Griffiths and Colin Yeo, 'The UK's hostile environment: Deputising immigration control' (2021) 41(4) Critical Social Policy 521-544; Frances Webber, 'On the creation of the UK's "hostile environment"' (2019) 60(4) Race & Class 76-87.

[6] *See* section 3.2.2 of this paper.

facing a deep political crisis around migration which has systemic implications for the continent's constitutional essentials.[7]

The EU is at the forefront of attacks on the migrants from the poorest spaces in the global south to make their journeys as unsafe as possible and ensure that their rights to seek protection and asylum do not exist in practice. In breaching own law, the EU is no different from the (former) EU Member States – both 'liberal' and 'illiberal'.[8] The racialization of borders works along the same lines in all the corners of the Western world, as Tendayi Achiume theorised:[9] the victims of citizenship – those, whose citizenship statuses only bring with them bitter liabilities, rather than rights[10] – see abuse in all the liminal boundary spaces at the gates of the global north.[11] Passport apartheid *is the law* in the world where opportunities and rights are distributed based on the aristocracy principle and the majority of the population, who are the losers of the proverbial 'birthright lottery' are harshly suppressed by national, supranational and international law worldwide.[12]

The passport apartheid is not on the side of the losers of citizenship[13] and Europe as an integration project is at the forefront of the destruction of non-citizens' rights, prompting Étienne Balibar to refer to the Union as a system of *apartheid européen*.[14] The victimization, which the non-citizens of the Union coming from the global south experience, is obviously racialized, especially in the forests and waters surrounding 'fortress Europe'. More and more new research

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[7] Barbara Grabowska-Moroz and Dimitry Kochenov, 'The Loss of Face for All Those Concerned: EU Rule of Law in the Context of the "Migration Crisis"' in Vladislava Stoyanova and Stijn Smet (eds), *Migrants' Rights, Populism and Legal Resilience in Europe* (Cambridge, 2022) 187.
[8] Laurent Pech and Kim Lane Scheppele, 'Illiberalism within: Rule of Law backsliding in the EU' (2017) 19 Cambridge Yearbook of European Legal Studies, 3-47.
[9] Tendayi Achiume, 'Racial Borders' (2022) 110(3) Georgetown Law Journal 445-508.
[10] Dimitry Kochenov, 'The Victims of Citizenship' in Dimitry Kochenov and Kristin Surak (eds), *Citizenship and Residence Sales: Rethinking the Boundaries of Belonging* (CUP, Cambridge 2023) 70-108.
[11] Audrey Macklin, 'Liminal Rights: Sovereignty, Constitutions, and Borders', in Mark Tushnet and Dimitry Kochenov (eds), *Research Handbook on the Politics of Constitutional Law* (Edward Elgar, Cheltenham 2023) 105-127.
[12] Ayelet Shachar, *The Birthright Lottery: Citizenship and Global Inequality* (Harvard University Press, Cambridge, Mass. 2009).
[13] Dimitry Kochenov, 'Ending the passport apartheid. The alternative to citizenship is no citizenship—A reply' (2021) I-CON 1-5; Manuela Boatcă, 'Unequal Institutions in the Longue-durée: Citizenship through a Southern Lens' in Kochenov and Surak (eds), *Citizenship and Residence Sales* 259-283; James Tully, *On Global Citizenship: James Tully in Dialogue* (Bloomsbury Publishing, London/New York 2014).
[14] Étienne Balibar, *Nous, citoyens d'Europe ?: les frontières, l'État, le peuple* (La Découverte, Paris 2001) 192. For the current state of the apartheid legal framework, see, in detail, Kochenov and Ganty, 'EU Lawlessness Law'.

zooms on the colonial essence of the European integration project in the past,[15] which finds its modern reflection in what Hans Kundnani aptly terms 'Eurowhiteness': the EU is not as much a cosmopolitan as a supranational ethno-nationalist project.[16]

Eurowhiteness powerfully emerges as one of the core aspects of Europe's 21st century DNA. As such, it then directly affects policies and is immune, it appears, to the nature of the concrete political regimes in place: a non-state of quite limited democratic credentials[17] – the EU – is thus in full solidarity with its Member States, such as Hungary, Malta, Italy or the Baltic States, as well as former Member States, such as the UK, on the importance of making sure that the rights of the victims of citizenship at Europe's borders remain as ephemeral as possible. With death toll almost at 30.000 over the last 8 years, it could be the race of the victims combined with the growing Eurowhiteness populism, in apt Ferrajoli's suggestion, that ensures general acceptance of the mass 'massacres in the Mediterranean'.[18] EU law, just as national law throughout the continent, even if restating grand ideals at every turn, always seems to be functioning in the same way, usually whitewashing abuse of the law as long as the passport poor are kept out of the continent. This is what we term 'Eurowhiteness solidarity': an unlawful phenomenon bridging the liberalism-illiberalism divide, which allows the hidden face of the European political project to emerge on the graveyard of dozens of thousands of tortured and killed victims of citizenship.

A broader insight is equally crucial for us: the EU helps both liberal and illiberal Member States in achieving Eurowhiteness through the victimisation and the loss of lives, while the regime type is of little relevance here. The attempts of the UK Government to deter arrivals of irregular migrants at the expense of Rule of Law in the country, confirms that while 'the EU's migration mentality remains firmly lodged in British policy'.[19] The Eurowhiteness ideal informing citizenship and migration in Europe – not the regime type – is what matters.

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[15] Peo Hansen and S Jonsson, *Eurafrica: The Untold Story of European Integration and Colonialism* (Bloomsbury, London 2014).
[16] Hans Kundnani, *Eurowhiteness: Culture, Empire and Race in the European Project* (Hurst, London 2023).
[17] J.H.H. Weiler, 'The Political and Legal Culture of European Integration: An Exploratory Essay' (2011) 9(3-4) International Journal of Constitutional Law 678-694; Michael A. Wilkinson, *Authoritarian Liberalism and the Transformation of Modern Europe* (OUP, Oxford 2021); Michael A Wilkinson, 'Politicising Europe's Justice Deficit: Some Preliminaries' in Dimitry Kochenov, Gráinne de Búrca, and Andrew Williams (eds), *Europe's Justice Deficit?* (Hart, Oxford 2015) 111-136; Jiří Přibáň, 'Contingency of Political Justice and Depoliticized Governance in the EU' in Kochenov, de Búrca, and Williams (eds), *Europe's Justice Deficit?* (Hart, Oxford 2015).
[18] Luigi Ferrajoli, 'The New Populism is Responsible for the Massacres in the Mediterranean', *VerfBlog* (13 March 2023).
[19] Kenan Malik, 'The EU pays Africa's brutal militias to lock up migrants. Britain wants to follow suit', *The Observer* (4 June 2023), available at: < https://www.theguardian.com/commentisfree/2023/jun/04/eu-pays-

In making this argument we proceed as follows: in the second section we turn to the EU as a background for a handful of essential starting observations, only to switch to Hungary as an archtypical example of an 'illiberal' Member State and the UK as a 'liberal' former Member State, all the three fully aligned in their attacks on the proclaimed rights of the passport poor from the former colonies. Following a brief sketch of the EU's death machine whitewashed by law and taking thousands of innocent lives each year, the third section turns to assessing the policies of exclusion, but also of preferential inclusion in relation to migration, focusing, in particular, on Hungary and the UK. While the level of democracy differs in the two selected countries, the rhetoric of deterrence of immigration is equally observable in both countries. That being said, however, political regimes do shape migration policies of states as demonstrated through the examples of Hungary and the UK. Important differences emerge depending on which boundary is considered: the migration boundary or the citizenship boundary, i.e. slightly different stories emerge depending on the focus: the territory of the state is not the same as the body of the sovereign – the *demos*.

This being said, the general trend observable in two countries in relation to migration may be summarised as openness of Hungary to white migrants only (EU membership with the necessary free movement helps) and closure of the UK, which chose to liquidate the majority of rights of EU citizens following Brexit as well as of its own citizens following Brexit by shrinking the territory of rights associated with British citizenship by more than 30 times.[20] The trend observable in relation to citizenship reflects openness of Hungary and rather restrictive citizenship rules in the UK.

The fourth section focuses on the citizenship policies of the two chosen states. While in the case of Hungary, a tendency of increasing citizenry though preferential treatment of perceived kin-minorities abroad is evidenced, such tendency is not characteristic for the UK which has not only toughened the citizenship criteria throughout the years but also eased the conditions for deprivation of citizenship. The fifth and the final section will present the general conclusions of the paper.

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africas-brutal-militias-to-lock-up-migrants-britain-wants-to-follow-suit> accessed 7 February 2024. The UK contributed to the 'Trust Fund for Africa', deployed by the European Commission, inter alia, to organize the kidnappings of migrants by the lawless criminals on the Libyan side of the Mediterranean, whom the EU has equipped.

[20] Dimitry Kochenov, 'EU Citizenship and Withdrawals from the Union: How Inevitable Is the Radical Downgrading of Rights?' in Carlos Closa (ed.), *Troubled Membership: Dealing with Secessions from a Member State and Withdrawals from the Union* (CUP, Cambridge 2017) 257–287. For the theorization of the territory of rights, see: Dimitry Kochenov, 'Interlegality – Citizenship – Intercitizenship', in Jan Klabbers and Gianluigi Palombella (eds), *The Challenge of Interlegality* (CUP, Cambridge 2019), 133–155.

The conclusion is unquestionable: Eurowhiteness today is the true solidarity among EU powers at both national and supranational level as well as the UK. The EU, acting in full solidarity with the Member States aimed at sidestepping migrants' rights and protections is the main killing machine on the continent today with over 28.000 dead or disappeared in the Mediterranean and counting over the last 10 years, lavishly funding the hunt for migrants in the Mediterranean and at the Eastern boundary of the Union. Any moves by the Union to criticise Hungary for its migration policies are misplaced in the face of the mass atrocities the Union in committing.[21]

It goes without saying that what is at play is the loss of face for all those concerned, including virtually all the Member States as well as the Union and the UK, as Barbara Grabowska-Moroz and one of the present authors suggested elsewhere:[22] all the crucial developments in the field of migration management in Europe over the last years are in steep contradiction of the most fundamental principles of our law. This, essentially, renders the law on the matter 'lawless',[23] whether you call it 'evil', following Anna Lukina,[24] or an 'agreement with Hell', following Jack Balkin.[25] Today Eurowhiteness solidarity kills and these killings are legal: the EU helps delude responsibility for the mass crimes at the border.[26] In failing to put a stop to the policy which is so obviously a denial of all what the EU and national constitutional law officially preaches, there is no room for the liberalism / illiberalism divide on the issue of citizenship and migration in Europe, it appears.

## The EU side of the story: Solidarity in perfecting the killing machine

The EU, acting together with the majority of the Member States has designed a powerful system of outsourcing death and violence against the victims of citizenship by equipping criminal gangs

[21] Omer Shatz and Juan Branco, 'Communication to the Office of the Prosecutor of the International Criminal Court Pursuant to Article 15 of the Rome Statute on EU Migration Policies in the Central Mediterranean and Libya (2014–2019)', available at <www.statewatch.org/news/2019/jun/eu-icc-case-EU-Migration-Policies.pdf> accessed 11 November 2023.
[22] Grabowska-Moroz and Kochenov, 'The Loss of Face for All Those Concerned', 187.
[23] Kochenov and Ganty, 'EU Lawlessness Law'.
[24] Anna Lukina, 'The Paradox of Evil Law', in M Tushnet and D Kochenov (eds), *Research Handbook on the Politics of Constitutional Law* (Edward Elgar, Cheltenham 2023).
[25] Jack Balkin, 'Agreements with Hell and Other Objects of Our Faith' (1997) 65(4) Fordham Law Review 1703-1738.
[26] Thomas Spijkerboer, 'Bifurcation of People, Bifurcation of Law: Externalization of Migration Policy before the EU Court of Justice' (2017) 31(2) J Refugee Stud 216–239, 232.

on the other side of the Mediterranean with arms, boats and intelligence[27] to help these gangs acting on EU's behalf to kidnap non-white migrants from the sea under the pretext of saving their lives and put them indefinitely in EU-funded prisons and torture centres to extract ransoms or sell these people into slavery.[28] The European Border and Coast Guard Agency (FRONTEX) is at the heart of the operation that aims to make the crossing to Europe as dangerous as possible and turn all migrants' rights – including the right to life – into fiction.[29] Without FRONTEX drone intelligence all the thugs, who are equipped by the Union and the Member States to kill and enslave by proxy, sit in port. They are the agents of the Union, which reveals its new face as a killing machine,[30] in a context where all the actions taken by the EU and its agencies with the sole purpose of breaking the law are constantly deemed legal: 'EU lawlessness law' is born, which has claimed more than 28.000 lives over the last 10 years – more than three times the number of civilians killed by Putin in the criminal war against Ukraine.[31]

In 2021, numerous activists, captains of rescue ships and human rights organisations launched a campaign against FRONTEX.[32] In an open letter to the EU Member States and EU institutions, the campaign coalition demanded '[a]bolishment (of) Frontex and the system it spearheads',[33]

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[27] Shatz and Branco, 'Communication to the Office of the Prosecutor'.
[28] Ian Urbina, 'The secretive prisons that keep migrants out of Europe', *New Yorker* (28 November 2021), available at: <https://www.newyorker.com/magazine/2021/12/06/the-secretive-libyan-prisons-that-keep-migrants-out-of-europe> accessed 11 November 2023; Okeowo, 'The Crisis of Missing Migrants'.
[29] Melanie Fink, *FRONTEX and human rights: responsibility in 'multi-actor situations' under the ECHR and EU Public Liability Law* (Oxford University Press, 2019) 3-4, discusses at length the question of responsibility of multi-actor situation involving FRONTEX (the joint operations more specifically). *See* also Roberta Mugianu, *FRONTEX and Non-Refoulement. The International Responsibility of the EU* (CUP, New York 2016); Jori Pascal Kalkman, 'FRONTEX: A Literature Review' (2021) 59(1) International Migration 165-181; *See* also the contributions in the Verfassungsblog's debate on FRONTEX and the Rule of Law, available at <https://verfassungsblog.de/category/debates/FRONTEX-and-the-rule-of-law-debates/> accessed 11 November 2023; Mariana Gkliati and Jane Kilpatrick, 'Crying Wolf Too Many Times: The Impact of the Emergency Narrative on Transparency in FRONTEX Joint Operations' (2021) 17(4) Utrecht Law Review 57-72.
[30] Dimitry Kochenov and Sarah Ganty, 'The Death Machine: EU Lawlessness Law that Rules' in Adam Łazowski (ed.), Liber Amicorum *Eleanor Sharpston* (Hart Publishing, Oxford 2024); Kochenov and Ganty, 'EU Lawlessness Law'.
[31] As of 25 September 2023, the civilian death toll in Ukraine stands at 9,146 victims, as verified by OHCHR, data available at: <https://www.ohchr.org/en/news/2023/09/ukraine-civilian-casualty-update-24-september-2023> accessed 12 November 2023. This is more than three times less than the number of those who lost their lives/disappeared in the Mediterranean: 28,217 as of 12 November 2023, according to Missing Migrant Project, data available at <https://missingmigrants.iom.int/region/mediterranean> accessed 12 November 2023..
[32] Lorenzo Tondo, 'EU "has blood on its hands", say activists calling for border agency's abolition', *The Guardian* (18 June 2021), available at: <https://www.theguardian.com/global-development/2021/jun/18/eu-has-blood-on-its-hands-say-activists-calling-for-frontex-border-agencys-abolition> accessed 4 December 2023.
[33] The letter is available at: <https://progressive.international/wire/2021-06-09-abolish-frontex-end-the-eu-border-regime/en> accessed 4 December 2023 (*Progressive International letter*).

highlighting the inhuman practices of the EU's border agency and 'lives lost because of the European Union's obsession with reinforcing borders instead of protecting people'.[34] As noted by the coalition, '[t]he policies of Fortress Europe (which) have killed over 40,555 people since 1993'[35] are not designed to protect lives, but 'fuel the rise of the far-right across Europe, reinforce racism, and build on centuries of colonialism, oppression and exploitation'.[36] The allegations of the coalition campaign about the human rights violations by FRONTEX have been confirmed by the leaked report of the European Anti-Fraud Office (OLAF report)[37] which exposed numerous cover-ups of serious human rights violations. What is more concerning, however, is the fact that except for the resignation of the former FRONTEX Executive Director, Fabrice Leggeri, 'very little has changed in the aftermath of the OLAF investigation'.[38]

In its most recent judgment in *WS & Others v Frontex*, the EU's General Court dismissed the action of a number of Syrian refugees for 'compensation for the damage allegedly suffered by them following the failure of the European Border and Coast Guard Agency (Frontex) to comply with its obligations',[39] finding that 'the applicants have not adduced evidence of a sufficiently direct causal link between the damage invoked and the conduct of which Frontex is accused'[40] and ordering them to pay their own costs and the costs incurred by FRONTEX. The case has been seen by scholars as a lost opportunity for the court to rule on the obligations of FRONTEX with regard to fundamental rights:

> 'Unfortunately, but not surprisingly, the General Court dismissed the matter and failed to effectively examine Frontex's actions, proving once again that it escapes any judicial review. This further enhances the already existing lack of accountability and transparency of Frontex and shows that an agency can simply hide behind a Member State'.[41]

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[34] *Progressive International letter*.
[35] *Progressive International letter*.
[36] *Progressive International letter*.
[37] OLAF, Final Report on FRONTEX, Olaf.03(2021)21088, available at: <https://fragdenstaat.de/dokumente/233972-olaf-final-report-on-frontex/> accessed 4 December 2023.
[38] Luisa Izuzquiza, Vera Deleja-Hotko and Arne Semsrott, 'Revealed: The OLAF report on Frontex', *FragDenStaat* (13 October 2022), available at: <https://fragdenstaat.de/en/blog/2022/10/13/frontex-olaf-report-leaked/> accessed 4 December 2023.
[39] Case T-600/21, *WS and Others v European Border and Coast Guard Agency (Frontex)*, ECLI:EU:T:2023:492, para. 1.
[40] *WS and Others v European Border and Coast Guard Agency (Frontex)*, para. 71.
[41] Sarah Tas, 'Frontex above the law – a missed opportunity for a landmark judgment on Frontex's responsibility with regards fundamental rights violations: WS and Others v Frontex (T-600/21)', *EU Law Live* (20 September 2023), available at: <https://eulawlive.com/op-ed-frontex-above-the-law-a-missed-

As analysed by one of us in detail with Sarah Ganty,[42] EU lawlessness law includes, inter alia, 'soft' agreements with the most hopeless regimes in the world to deprive migrants of rights with no legal protection, deluding responsibility for other international agreements with far-reaching human rights implications, such as the EU-Turkey deal, and pumping billions into criminal thugs at the border as well as FRONTEX to cooperate with these thugs and turn rights into fiction.[43] All this is legal in EU law – and naturally tests the outer-limits of tolerance of the national constitutional systems and the European human rights protection regime, with which the Court of Justice of the EU, while whitewashing deeply questionable practices, has been in deep tension, as of late.[44]

With the Court ducking, while the Commission apparently views its role as the facilitator in the Member States' assaults on the rights of the racialized migrants, the EU is far removed not only from the ethical and moral, but also from the minimal legal ideals of Rule of Law and human rights protection, emerging as a killing machine denying the racialized others any humanity by default.[45] The policy, which emerges from criminal collusion between the EU and the Member States seems to consist of recurrent attempts to deter people mostly from the former colonies on which the Empires preyed, from coming to Europe by threatening to kill them – either directly, or by proxies. The EU today is very much about EU-sponsored war on the racialized victims of

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opportunity-for-a-landmark-judgment-on-frontexs-responsibility-with-regards-fundamental-rights-violations-ws-and-others-v-frontex-t-600-21/> accessed 4 December 2023.

[42] Kochenov and Ganty, 'EU Lawlessness Law'.

[43] *See* also the European Commission, 'Memorandum of Understanding on a strategic and global partnership between the European Union and Tunisia', 16 July 2023 (Press Release), available at: <https://ec.europa.eu/commission/presscorner/detail/en/ip_23_3887> accessed 5 February 2024. In particular, *see* the enquiry of the European Ombudsman, 'Strategic initiative SI/5/2023/MHZ on how the European Commission intends to guarantee respect for human rights in the context of the EU-Tunisia Memorandum of Understanding' (13 September 2023), available at: <https://www.ombudsman.europa.eu/en/opening-summary/en/175102> accessed 5 February 2024; and Amnesty International, 'EU/Tunisia: Agreement on migration 'makes EU complicit' in abuses against asylum seekers, refugees and migrants' (17 July 2023), available at: <https://www.amnesty.org/en/latest/news/2023/07/eu-tunisia-agreement-on-migration-makes-eu-complicit-in-abuses-against-asylum-seekers-refugees-and-migrants/> accessed 4 December 2023.

[44] Dimitry Kochenov and Petra Bárd, 'Kirchberg Salami Lost in Bosphorus: The Multiplication of Judicial Independence Standards and the Future of the Rule of Law in Europe' (2022) 60 Journal of Common Market Studies, 150-165; Dimitry Kochenov, 'Restoring the Dialogical Rule of Law in the EU: Janus in the Mirror' (2023) 25 Cambridge Yearbook of European Legal Studies (early view).

[45] The racist spill-over touches EU citizens, we learn, *see* Renata Brito, 'From Turkish jail, French woman accuses Greece of "pushback"', (2022) *AP News*, available at: <https://apnews.com/article/middle-east-france-prisons-greece-europe-1c58212ff10310deebae2b769d31e386> accessed 12 November 2023. The Turkish ethnicity of the victim is an important part of the story showcasing the racialized nature of the crime.

citizenship[46] (no reports on white people dying in the Mediterranean among dozens of thousands of Asians and Africans are known). From the Mediterranean to the Belarusian forest the EU has been steadily solidifying its place among the most notable enemies of human rights in the world, while the Commission's propaganda goes out of the way to rehearse the Rule of Law and rights narrative about the EU.

Accountability chains are long and murky, money is grey and there is no legal or democratic oversight. The Member States use the EU in a rare show of unheard-of total solidarity around the idea that the former colonials should better be dead than on our shores. Accountability is such a complex matter, we are told, people essentially drown by themselves, the Institutions submit, and the geopolitical times are complex, one hears, from those willing to present an EU-designed mass death campaign as a unique accident in history not to pay too much attention too. Yet, the law – including EU law – usually works as deigned.[47] Just as the mass casualties in Ukraine cheered as a success by Putin's admirers, unfortunate drownings, en masse, in which the EU invests so heavily do not happen as of themselves. The issue, in the EU, goes deeper than the relatively recent transformation of the Union into a mass killer. The harsh enforcement of Eurowhiteness solidarity is thus EU's newly-found purpose. In this the Union acts in complete solidarity with the Member States governments to sidestep EU's own, as well as ECHR and Member States' own law. The echo of Eurowhiteness has reached EU citizenship field as well. From a 'Market citizenship', however oxymoronic, it is now being remodelled by the Commission into a strictly bloodlines citizenship: the feudal aristocracy principle has reached the core of the internal market.[48]

The EU integration process started as a transboundary security project and has further 'promoted inter-state security through a system of cross-border networks (turning) external security relations among Member States [...] into "domestic" EU policies and law'.[49] In achieving their first and principal goal of re-establishing peace and security, Member States have built a multinational integration scheme by framing their common interests and creating real solidarity between each other. Eurowhiteness did not come on an empty spot: the Union and the Member States are

[46] The holders of the worst nationalities in the world are not entitled to a right to life either in the Mediterranean or back home. Dimitry Kochenov, 'The Victims of Citizenship: Feudal Statuses for Sale in the Hypocrisy Republic' in Kochenov and Surak (eds.), *Citizenship and Residence Sales*.
[47] Lukina, 'The Paradox of Evil Law'.
[48] Dimitry Kochenov and Elena Basheska, 'It's All about the Blood, Baby! The European Commission's Ongoing Attack against Investment Migration in the Context of EU Law and International Law', *COMPAS Working Paper* (University of Oxford) No. 22-161, 2022.
[49] This analysis is based on a more detailed research in Elena Basheska, *The Principle of Good Neighbourliness in International Law and EU Law* (Hart Publishing, Oxford forthcoming).

bound by the principles of loyal cooperation and solidarity. The principle of loyal cooperation is enshrined in Article 4(3) TEU, which establishes the basis for all compliance procedures.[50] In particular, Article 4(3) TEU stipulates an obligation on the Union and the Member States to cooperate 'in full mutual respect, assist[ing] each other in carrying out tasks which flow from the Treaties'.[51] The Member States 'shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union'.[52] The ECJ has confirmed that the general duty to cooperate under the establishing Treaties also addresses the EU institutions.[53]

This principle testifies to the strong bond between the Member States within the supranational framework, which largely transcends national borders, and the spheres of interest of individual states. While not precisely defined at Treaty level, the notion of solidarity has been used in various legal contexts including as solidarity between the Member States in respect to the EU's common policy on asylum, migration and external borders control[54] or even as financial solidarity between nationals of the EU Member States, as referred to by the ECJ.[55] Drawing on the Treaty provisions,

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[50] *E.g.* Marise Cremona, 'Introduction' in Marise Cremona (ed.), *Compliance and the Enforcement of EU Law* (OUP, Oxford 2012) xl. *See* also John Temple Lang, 'Article 10 EC – The Most Important 'General Principle' of Community Law' in Ulf Bernitz et al. (eds), *General Principles of EC Law in a Process of Development* (Kluwer Law Int'l, The Hague 2008) 75-113, 77 (italics in original), in respect to Article 10 EC Treaty, which was replaced by Article 4(3) of the Treaty on European Union, Consolidated version of the Treaty on European Union and the Treaty on the Functioning of the European Union [2012] OJ C115/13 (TEU).

[51] Article 4(3) TEU.

[52] Article 4(3) TEU.

[53] *See*, for instance, Case 230/81 *Grand Duchy of Luxembourg* v *European Parliament*, ECLI:EU:C:1983:32, para. 37; Case C–2/88 Imm. *JJ Zwartveld and others*, ECLI:EU:C:1990:440, para. 17; Case C–94/00 *Roquette Frères SA* v *Directeur général de la concurrence, de la consommation et de la répression des fraudes, and Commission of the European Communities*, ECLI:EU:C:2002:603, para. 31; Case C–275/00 *European Community, represented by the Commission of the European Communities* v *First NV and Franex NV*, ECLI:EU:C:2002:711, para. 49; Case C–339/00 *Ireland* v *Commission of the European Communities*, ECLI:EU:C:2003:545, para. 71; Case C–45/07, *Commission of the European Communities* v *Hellenic Republic*, ECLI:EU:C:2009:81, para. 25.

[54] Article 67(2) Consolidated version on the Functioning of the European Union [2012] OJ C115/47 (TFEU). In accordance with Article 80 TFEU, policies on border checks, asylum and immigration, is governed 'by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States'.

[55] In Case C–184/99, *Rudy Grzelczyk* v *Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, [ECLI:EU:C:2001:458 (*Grzelczyk*), para. 44, the ECJ noted that 'Directive 93/96, like Directives 90/364 and 90/365, [...] accepts a certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States, particularly if the difficulties which a beneficiary of the right of residence encounters are temporary'. *See* also Case C–413/99, *Baumbast and R* v *Secretary of State for the Home* Department, ECLI:EU:C:2002:493 (*Baumbast*), paras 91–93; Case C–209/03, *The Queen, on the application of Dany Bidar* v *London Borough of Ealing and Secretary of State for Education and Skills*, ECLI:EU:C:2005:169, para. 56, Case C–456/02 *Michel Trojani* v *Centre public d'aide sociale de Bruxelles* (*CPAS*) [2004], ECLI:EU:C:2004:488, paras 34 and 45.

the principle of solidarity generally requires that all the Member States and the Union take each other's interests into account: 'international democracy' in the words of Philip Allott.[56]

Moreover, the Schengen cooperation provided for the abolition of border checks between the participating states and the creation of a single external border for the Schengen area, for which common migration procedures apply.[57] Regular passport controls are no longer maintained, while travelling from one Schengen state to another is handled as a domestic trip.[58] The lack of controls at the internal borders has been substituted by the transfer and reinforcement of these controls at the 'external borders', which are often seen as being designed to protect the almost borderless Union, while building up a 'defensive wall' towards third states.[59] This advanced EU model of interstate relations based on loyal cooperation and solidarity usually ends where foreign policy or national interests begins. The most innovative aspect of solidarity, however, is most Member States acting *together* with the institutions of the Union to abuse the rights of migrants and EU citizens[60] and whitewash this abuse by distilling national and ECHR rights through the lawlessness law apparatus of the EU. In a Union drifting away from the idea of human rights protection,[61] where the complexity of the multi-layered legal system is used as an argument *against* rule of law scrutiny from the national or ECHR/ international level a powerful valueless

[56] Philip Allott, 'The European Community is not the True European Community' (1991) 100 Yale L.J., 2485–2500.
[57] The core provision is Article 77(1) TFEU, providing that there should be no border controls at internal borders, and requiring efficient ones at external borders. The system on border checks is regulated in detail by the Schengen Borders Code Regulation (EC) No 562/2006 of the European Parliament and of the European Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) [2006] OJ L 105/1 (as amended).
[58] As exception, in accordance with Article 23 of the Schengen Borders Code, a Member State can reintroduce border control at its internal borders for only a limited period and only in exceptional cases, *i.e.* where there is a serious threat to public policy or internal security.
[59] *E.g.* Tassilo Herrschel, *Borders in Post-Socialist Europe: Territory, Scale, Society* (Ashgate, Farnham 2011) 50. *See* along similar lines George Petrakos and Lefteris Topaloglou, 'Economic Geography and European Integration: The Effects on the EU's External Border Regions' (2008) 3 Int'l J. Public Policy No. 3/4, 146–162; Lefteris Topaloglou et al., 'A Border Regions Typology in the Enlarged European Union' (2005) 20 J. Borderlands Studies No. 2, 67–90; Andrew Geddes, *Immigration and European Integration: Towards Fortress Europe* (2nd edn Manchester UP, Manchester 2008).
[60] Petra Bárd, 'Canaries in a Coal Mine: Rule of Law Deficiencies and Mutual Trust' (2021) Pravni zapisi 371-395; Petra Bárd and Dimitry Kochenov, 'What Article 7 is *Not*: The European Arrest Warrant and the *de Facto* Presumption of Guilt – Protecting EU Budget Better than Human Rights?', in Adam Łazowski and Valsamis Mitsilegas (eds) *The Arrest Warrant at Twenty* (Hart Publishing, Oxford 2024).
[61] Bruno de Witte and Šejla Imamović, 'Opinion 2/13 on accession to the ECHR. Defending the EU legal order against a foreign Human Rights Court' (2015) 40 (5) ELRev 683-705; Dimitry Kochenov 'EU Law without the Rule of Law: Is the veneration of autonomy worth it?' (2015) 34 Yearbook of European Law 74–96; Piet Eeckhout, 'Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue – Autonomy or Autarky?' (2015) 38(4) Fordham International Law Journal 954-992.

system of impunity is being born, empowered and reinforced by the key procedural principles of EU law.[62]

At the starting point of the disturbing current problems was a simple discovery: loyal cooperation and solidarity between Member States proved difficult to achieve in times of perceived crisis. Indeed, Hungary, for instance, has been opposing EU migration reform persistently, while leading the illiberal turn in the EU at the same time.[63] Coincidently, there is a widespread opinion that illiberal regimes have more restrictive migration policies than liberal democracies.[64] This is not, however, always necessarily the case.

Migration and citizenship are sensitive fields used for political gains unsparingly by both liberal democracies and illiberal regimes. EU law helps both types of regimes, we argue, to abuse the rights of the most vulnerable. It is unquestionable, of course, that political regimes do shape migration policies – only Europe shows a surprising overlap in preferences between democracies and autocracies in terms of what kind of migrant to demonize. Thus, whatever the regime type and in the presence of the same potential supranational and international legal constraints, democracies and autocracies choose to do the same thing in Europe. As analysed by Katharina Natter,

> 'Empirical evidence suggests that the substance of immigration policy change — in terms of openness or restrictiveness — does not significantly differ between democracies and autocracies. However, political regimes shape immigration policy dynamics, with autocracies having more leeway than democracies to open (or restrict) immigration according to their economic, geopolitical, or domestic priorities. Autocracies can more easily enact open immigration policy reforms

[62] Kochenov, 'The Smoke of Constitutionalism on the Altar of Supremacy'.
[63] Poland has been also opposing the EU migration reform. Preparing for its most recent general elections, Poland placed the migration questions at the heart of the process. Building its campaign on the claim that 'illegal immigration' would destroy Poland, the Prime Minister, Mateusz Morawiecki, used footage of riots to show to the voters 'what is happening on the streets of western Europe: rapes, murders, arson, destruction' – *see* Dan Davison and Ewa Pospieszyńska, 'On Migration, the Polish Left Has All But Given Up', *Novara Media* (2 October 2023), available at: <https://novaramedia.com/2023/10/02/on-migration-the-polish-left-has-all-but-given-up/> accessed 10 November 2023.
[64] Katharina Natter, 'Autocratic immigration policymaking: The illiberal paradox hypothesis', IMIn Working Papers Series 2018, No. 14, available at: <https://www.migrationinstitute.org/publications/autocratic-immigration-policymaking-the-illiberal-paradox-hypothesis> accessed 10 November 2023.

> compared to democracies if they wish to do so, a dynamic I call the 'illiberal paradox'.[65]

The same applies to citizenship policies, as the research of one of us with Justin Lindeboom demonstrates: the illusion of control at the national level in a space where discrimination on the basis of nationality is outlawed by EU law and the borders are always open to EU citizens produces national policies committed to sticking to the idea of national sovereignty in citizenship matters however absurd the idea could obviously be in a legal system where a Member State is *de facto* unfree to chart the boundaries of own peoples.[66] Regime type does not affect this policy evolution in Europe. Indeed, while both liberal democracies and illiberal regimes may be attracted to illiberal measures if the need arises, particularly in the times of Eurowhiteness crisis – what we witnessed when non-white people, viewed as 'problematic' 'flooded' Europe, as opposed to millions of white Ukrainians coming on the basis of a specifically enacted protection regime.[67]

The main difference between 'liberal' and 'illiberal' lies in the fact that the process of enactment of immigration policies in democracies is much more scrutinised than in illiberal regimes, i.e. 'democracies are bound by existing legal frameworks, and enacting policy changes is subject to (lengthy) negotiations among different stakeholders and institutions'.[68] Contrary to that, there are fewer legal constraints in illiberal regimes empowering political leaders to enact migration policy changes without too many obstacles. The EU, with its lawlessness law and billions of euros invested in generating a huge death-tall in a way that was not scrutinised by the European Parliament is an ideal example of such an illiberal regime in action. This explains the Eurowhiteness solidarity: EU Member States – both liberal and illiberal – use the EU to enhance the persecution of the racialized other at the borders and whitewash the breaches of the law

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[65] Natter, 'Autocratic immigration policymaking', 2.
[66] Dimitry Kochenov and Justin Lindeboom, 'Pluralism through Its Denial: The Success of EU Citizenship', in Gareth Davies and Matej Avbelj (eds), *Research Handbook on Legal Pluralism and EU Law* (Edward Elgar, Cheltenham 2018) 179–198.
[67] H. Deniz Genç and Nedime Aslı Şirin, 'Why not Activated? The Temporary Protection Directive and the Mystery of Temporary Protection in the European Union' (2019) 7 International Journal of Political Science & Urban Studies 1-18; Hanne Beirens et al., 'Study on the Temporary Protection Directive' (European Commission, Directorate-General for Migration and Home Affairs, 2016), available at: <https://home-affairs.ec.europa.eu/system/files/2020-09/final_report_evaluation_tpd_en.pdf> accessed 13 November 2023; UNHCR, 'The EU Temporary Protection Directive in Practice 2022' (16 June 2022), available at: <https://reliefweb.int/report/world/eu-temporary-protection-directive-practice-2022> accessed 13 November 2023.
[68] Natter, 'Autocratic immigration policymaking', 15.

occurring in the process, while facing – in the case of the liberal Member States – no electoral responsibility for the on-going slaughter.

In fact, the exclusion of migrants overlaps with the politics of citizenship of course.[69] Within the EU, the concept of EU citizenship, which goes beyond the economic activities of individuals either as employees or as providers of services was introduced in addition to national citizenship.[70] This new concept emphasised that any national of a Member State is also an EU citizen enjoying a number of specific rights, including essentially the right to move and reside freely throughout the Union.[71] Put differently, citizenship protects the rights of Member State nationals which are not granted by their states but by the Union itself, transcending national jurisdictions and state borders.[72] Citizenship of the Union is intended to be 'the fundamental status of nationals of the Member States'.[73] That being said, it is for the EU Member States to regulate who qualifies as their national and the variety of the national rules is such that the astonishing richness of regulation does not at all correlate with the regime types on the ground.[74]

Upon a closer analysis, however, the supranational citizenship does not, as such, enjoy a straightforward relationship with the national democratic ideals, as its main function is to remove the holders falling within the scope of EU law from the purview of national democratic politics in a large array of circumstances where EU law would apply, what has been called in the literature 'humiliation of the state as a constitutional tactic'.[75] This is all a good thing – who would not like

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[69] In general: Dimitry Kochenov, *Citizenship* (MIT Press, Cambridge, Massachusetts 2019).
[70] At the Treaty level, the EU citizenship is regulated separately from the internal market, being primarily confined to articles 20–25 TFEU. For a detailed analysis of the relationship between EU citizenship and the internal market *see* Dimitry Kochenov, '*Ius Tractum* of Many Faces: European Citizenship and the Difficult Relationship Between Status and Rights' (2009) 15(2) Colum.J.Eur.L. 169–237.
[71] Article 20 TFEU. Gareth Davies, (2005) 11 'Any Place I Hang My Hat?' or: Residence is the New Nationality' 43-56.
[72] *See* in this context the analysis of Gareth T. Davies, 'The Humiliation of the State as a Constitutional Tactic' in Amtenbrink F and van den Berg PAJ (eds), *The Constitutional Integrity of the European Union* (T.M.C. Asser Press, The Hague 2010) 147-174.
[73] Case C–135/08 *Janko Rottman* v *Freistaat Bayern*, ECLI:EU:C:2010:104, para. 43; *Grzelczyk*, para. 31; *Baumbast*, para. 82.
[74] Dimitry Kochenov, 'Member State Nationalities and the Internal Market: Illusions and Reality' in Niamh Níc Shuibhne and Laurence W. Gormley (eds.), *From Single Market to Economic Union: Essays in Memory of John A. Usher* (OUP, Oxford 2012) 241-264.
[75] Gareth Davies, 'The Humiliation of the State as a Constitutional Tactic' in Fabian Amtenbrink and PAJ van den Berg (eds), *The Constitutional Integrity of the European Union* (TMC Asser Press, The Hague 2010) 147-174; Dimitry Kochenov, 'EU Citizenship: Some Systemic Constitutional Implications' in Nathan Cambien, Dimitry Kochenov and Elise Muir (eds), *European Citizenship under Stress: Social Justice, Brexit, and Other Challenges* (Brill-Nijhoff, Leiden/Boston 2020), 11-27.

to make sure that the authority is properly questioned?[76] – but the point of view changes once the EU's missing ability to replace the Member State structures in this role is scrutinised: democracy means a lot and the supranational one does not allow the citizens – either national, or supranational, to leave the realm of the pre-set objectives,[77] let alone to 'throw the scoundrels out'.[78]

EU citizenship aside, making a citizen is an ideology-inspired legal exercise, implying a choice among the available bodies who could be useful or not for the achievement of the goals of the authority at any given time, whatever these are.[79] While the absolute majority of citizens are created by *ius sanguinis*: they are the sons and daughters of citizens (*de facto* this is the case even in all the polities, where *ius soli* is the key vehicle, officially, of the status's distribution), it is the inherent right of states to decide who their citizens are. As already mentioned, EU Member States know hundreds of ways of conferring citizenship on foreigners and requirements always vary depending on the class of those who wish to naturalize as well as the jurisdiction in question:[80] an granddaughter of an Italian lady from Argentina only needs the birth certificates, a person with Greater-Hungary-born ancestry needs to demonstrate the minimal knowledge of Hungarian and someone who found a remote Greek family member will have to demonstrate that the relationship is via the male line, as women do not make Greeks (until quite recently). The situation outside the Union is not much different – those bodies which are less useful are simply excluded and do not exist in the eyes of citizenship law – they are proclaimed non-citizens. Exclusions can run along any lines: geography of origin, race, religion, education, language, time. You name it – and a legal-historical example will be found.

Exclusion and equality among citizens are not mutually exclusive with the opposite features of citizenship – inclusion and discrimination among citizens. Indeed, citizenship has not only served

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[76] Mattias Kumm, 'Institutionalising Socratic Contestation: The Rationalist Human Rights Paradigm, Legitimate Authority and the Point of Judicial Review' (1999) 1(2) EJLS 1-32; Mattias Kumm, 'The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review' (2010) 4(2) Law and Ethics of Human Rights 142-175.
[77] Gareth Davies, 'Social legitimacy and purposive power: The end, the means and the consent of the people', in Kochenov, de Búrca and Williams (eds.), *Europe's Justice Deficit?* (Hart Publishing, Oxford 2015).
[78] JHH Weiler, 'The Selling of Europe: The Discourse on the European Citizenship in the 1996 IGC', Jean Monnet Working Paper No. 03/96 (Harvard Law School, Cambridge, Mass. 1996).
[79] Refugee Council, 'Illegal Migration Bill - Assessment of impact of inadmissibility, removals, detention, accommodation and safe routes' (Briefing), available at: <https://www.refugeecouncil.org.uk/wp-content/uploads/2023/03/Refugee-Council-Asylum-Bill-impact-assessement.pdf> accessed 10 November 2023.
[80] The best resource on this issue in Europe is the EUDO Citizenship Database of the European University Institute in Florence.

the purpose of excluding foreigners but also of nation-building and inclusion of new citizens through preferential treatment of kin-minorities living in other states.[81] This practice (as well as fighting it[82]) has been particularly popular among post-communist states in Europe.[83] Hungary is one of the examples where over one million new citizens have been added in that way. Such practice has been also exercised by Italy, Ireland, Greece, the Baltic States, and other EU nations and is, therefore, not exclusive to illiberalism. Particularly so in the case of the EU, where accessions put halt on the naturalisations of large masses of the citizens of the new Member States residing in the other Member States of the Union: no one is a full: when free movement is the core right of the newly-upgraded post-accession citizenship one holds, naturalising elsewhere in the Union makes no to very little sense.[84] The fact that it is still practiced could be counted among the failures of the EU, as it shows the practical limitations of the principle of non-discrimination on the basis of nationality.

## (Il)liberal regimes and migration

While liberalism has been widely discussed among scholars, there is no single definition that frames the term for all uses. As noted by Bell,

> '[a]cross and within scholarly discourses, it is construed in manifold and contradictory ways: as an embattled vanguard project and constitutive of modernity itself, a fine grained normative political philosophy and a hegemonic mode of governmentality, the justificatory ideology of unrestrained capitalism and the richest ideological resource for its limitation'.[85]

Notwithstanding various interpretations, liberalism, as a political philosophy, is based on the assumption that people should be free in order to develop fully.[86] Individual rights and freedoms

[81] Szabolcs Pogonyi, 'Europeanization of Kin-Citizenship and the Dynamics of Kin-Minority Claim-Making: The Case of Hungary' (2017) 64(5) Problems of Post-Communism 242–256.
[82] José-María Arraiza, 'Good Neighbourliness as a Limit to Extraterritorial Citizenship: The Case of Hungary and Slovakia' in Dimitry Kochenov and Elena Basheska, *Good Neighbourliness in the European Legal Context*
(Brill/Nijhoff, Leiden/Boston 2015)114-135; Dimitry Kochenov and Aleksejs Dimitrovs, 'EU Citizenship for Latvian "Non-Citizens": A Concrete Proposal' (2016) 38 Houston Journal of International Law 1-40.
[83] Pogonyi, 'Europeanization of Kin-Citizenship'.
[84] For a very curious example of a citizen who failed to understand this, see the sad case of *JY* with absurd facts all around – an Estonian lady naturalising (!) in Austria and losing it all, until EU law comes to the rescue: Dimitry Kochenov and David de Groot, 'Helpful, Convoluted, and Ignorant in Principle: EU Citizenship in the Hand of the Grand Chamber in *JY*' (2022) 47(5) European Law Review 699-709.
[85] Duncan Bell, 'What is Libearlism' (2014) 42(6) Political Theory 682-715.
[86] Hubert H. Humphrey, 'Liberalism' (1955) 24(4) The American Scholar 419-433.

are recognised and protected in a liberal democracy, while the rule of law limits the exercise of political power.[87] Contrary to that, the term 'illiberalism' has been used 'to describe ideologies and practices that diverge from liberalism'.[88] Illiberalism, as noted by Marlene Laruelle, sits in between democracy and non-democracy.[89] While there are many forms of illiberal democracies, they appear in general when '[d]emocratically elected regimes, often ones that have been re-elected or reaffirmed through referenda, are routinely ignoring constitutional limits on their power and depriving their citizens of basic rights and freedoms'.[90] In other words, illegal democracies 'hid(e) their nondemocratic practices behind formally democratic institutions and procedures'.[91]

An example for liberal democracy is the United Kingdom, for instance, being classified as a full democracy in the EIU Democracy Index.[92] Freedom House classified the country as free despite putting a remark about the change of three prime ministers in a short period of time, the new restrictions on strikes and plans of the government to send certain asylum seekers to Rwanda.[93] Contrary to that, Hungary is an example for illiberal democracy. Indeed, the Hungarian Prime Minster, Victor Orbán, challenged the concept of liberal democracy, if not arguing somewhat in favour of illiberal democracy.[94]

> '[The] Hungarian nation is not a simple sum of individuals, but a community that needs to be organized, strengthened and developed, and in this sense, the new state that we are building is an illiberal state, a non-liberal state. It does not deny foundational values of liberalism, as freedom, etc. But it does not make this

[87] André Munro, *Encyclopaedia Britannica*, available at: <https://www.britannica.com/topic/liberal-democracy> accessed 10 November 2023.
[88] Marlene Laruelle, 'Illiberalism: a conceptual introduction' (2022) 38(2) East European Politics 303–327, 303.
[89] Laruelle, 'Illiberalism'.
[90] The term was introduced by Fareed Zakaria, 'The Rise of Illiberal Democracy' 1997 (76) Foreign Affairs 22-43, 22.
[91] Lluis Bonet and Mariano Martín Zamorano, 'Cultural policies in illiberal democracies: a conceptual framework based on the Polish and Hungarian governing experiences' (2021) 27(5) International Journal of Cultural Policy 559–573, 561.
[92] Available at: <https://www.eiu.com/n/campaigns/democracy-index-2022/> accessed 10 November 2023.
[93] *See* Yana Gorokhovskaia, Adrian Shahbaz, and Amy Slipowitz, 'Marking 50 Years in the Struggle for Democracy' (Freedom in the World, March 2023) <https://freedomhouse.org/sites/default/files/2023-03/FIW_World_2023_DigtalPDF.pdf> 31, accessed 10 November 2023.
[94] Marc F. Plattner, 'Illiberal Democracy and the Struggle on the Right' (2019) 30 Journal of Democracy 5-19, 9.

> ideology a central element of state organization, but applies a specific, national, particular approach in its stead'.[95]

In the classification of the EIU Democracy Index, Hungary has been classified as a flawed democracy, i.e. a system which:

> 'have free and fair elections and, even if there are problems (such as infringements on media freedom), basic civil liberties are respected. However, there are significant weaknesses in other aspects of democracy, including problems in governance, an underdeveloped political culture and low levels of political participation'.[96]

According to Freedom House, Hungary is partly free with Viktor Orbán's Fidesz party achieving victory at the latest parliamentarian elections by undermining the independence of the judiciary throughout the preceding decade, as well as opposition groups, the media, and the NGO sector.[97] The European Parliament declared that Hungary is no longer a democracy, but a 'hybrid regime of electoral autocracy'.[98]

### 3.1 The case of Hungary

The so-called migrant crisis which started in 2015, when 1.3 million people claimed asylum in Europe,[99] as well as 2021, when several times more Ukrainians came,[100] were both tests for the

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[95] Full text of Viktor Orbán's speech at Băile Tuşnad (Tusnádfürdő) of 26 July 2014, available at: <https://freedomhouse.org/sites/default/files/2023-03/FIW_World_2023_DigtalPDF.pdf> 6, accessed 10 November 2023.
[96] Available at: <https://www.eiu.com/n/wp-content/uploads/2023/02/Democracy-Index-2022_FV2.pdf?li_fat_id=f1fbad7e-a282-4b9e-9f8f-6a6d5a9fe6b8> 67, accessed 10 November 2023.
[97] Gorokhovskaia, Shahbaz, and Slipowitz, 'Marking 50 Years in the Struggle for Democracy' 6. Cf. Democracy Perception Index 2023, available at: <https://6389062.fs1.hubspotusercontent-na1.net/hubfs/6389062/Canva%20images/Democracy%20Perception%20Index%202023.pdf> accessed 10 November 2023.
[98] Gwendoline Delbos-Corfield, 'Interim Report on the proposal for a Council decision determining, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded' (Committee on Civil Liberties, Justice and Home Affairs, 25 July 2022), para.2, available at: <https://www.europarl.europa.eu/doceo/document/A-9-2022-0217_EN.html> accessed 10 November 2023.
[99] Pew Research Center, 'Number of Refugees to Europe Surges to Record 1.3 Million in 2015' (2 August 2016), available at: <https://www.pewresearch.org/global/2016/08/02/number-of-refugees-to-europe-surges-to-record-1-3-million-in-2015/#:~:text=A%20record%201.3%20million%20migrants%20applied%20for%20asylum,data%20from%20Eurostat%2C%20the%20European%20Union%E2%80%99s%20statistical%20agency> accessed 10 November 2023.
[100] As verified by Statista (an online platform specialized in data gathering), since the beginning of the large-scale Russian invasion in February 2022, approximately 6 million Ukrainian refugees have been

practical application of the pledged loyal cooperation and solidarity between the Member States and also between the EU and the Member States in difficult times and circumstances.

The 2015 arrivals prompted a joint response by the EU. Building on previous proposals, in 2020, the Commission tabled a new EU pact on asylum and migration.[101] The EU pact – on which the European Parliament and Council reached a political agreement most recently[102] – – envisages shared burden and responsibility between EU Member States. The new framework provides a possibility for Member States to adjust certain rules in situations of crisis including 'instrumentalisation' of migration, and force majeure in the field of migration and asylum, and also, to request solidarity and support from other Member States and from the Union. In particular, in a crisis situation, a Member State may request from other Member States to contribute to overcoming the situation by: a) accepting relocation of asylum seekers or beneficiaries of international protection from the Member State in crisis to their territory; b) supporting the Member State in crisis by taking responsibility for examining asylum claims; c) financial contributions or alternative solidarity measures.[103] =

The new EU migration framework has been severely criticized in particular with regard to the proposed Crisis and Force Majeure Regulation and the Instrumentalisation Regulation which 'pose severe concerns for human rights and the right to asylum in Europe'.[104] As noted by the Director of Amnesty International's EU office, Eve Geddie:

> '[i]f adopted, the proposed Crisis Regulation would further normalise the use of emergency provisions in Europe to deal with arrivals. It would weaken the coherence of the common European asylum system, while failing to prevent 'crisis' situations from arising in the future'.[105]

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registered across Europe as of September 2023. The majority of the refugees fled Ukraine through Poland, followed by Russia, Hungary, and Romania.

[101] European Commission, 'New Pact on Migration and Asylum' (Communication) COM (2020) 609 final.

[102] Directorate-General for Migration and Home Affairs, 'Historic agreement reached today by the European Parliament and Council on the Pact on Migration and Asylum' (20 December 2023), available at: <https://home-affairs.ec.europa.eu/news/historic-agreement-reached-today-european-parliament-and-council-pact-migration-and-asylum-2023-12-20_en> accessed 4 February 2024.

[103] Council of the European Union, 'Proposal for a Regulation of the European Parliament and of the Council addressing situations of crisis and force majeure in the field of migration and asylum' 13800/23 (Brussels, 4 October 2023), Annex, para 20a.

[104] Amnesty International, 'EU: New migration agreement 'dangerous and disproportionate' (4 October 2023), available at: <https://www.amnesty.org/en/latest/news/2023/10/eu-new-migration-agreement-dangerous-and-disproportionate/> accessed 4 December 2023.

[105] Amnesty International, 'EU: New migration agreement 'dangerous and disproportionate'.

Indeed, it is the protection of EU borders rather than the protection of human lives that is primarily in the focus of EU policies. As rightly pointed out by the coalition campaign:

> 'Europe has now built over 1,000 kilometres of border walls and fences. The EU's militarised borders are sustained by intense and invasive surveillance and connected by databases full of personal – biometric – information. To stop people from even reaching European soil, third countries are put under heavy pressure to act as outpost border guards'.[106]

The political agreement between the European Parliament and Council on the EU Pact was preceded by a joint letter of more than 55 civil society organisations who called on the EU institutions to stop the Pact, arguing that '[i]n its current form, the Pact greenlights detention, pushbacks, and racial profiling, effectively undermining the fundamental human right to seek safety'.[107] In the words of Geddie, the agreement will:

> 'set back European asylum law for decades to come. Its likely outcome is a surge in suffering on every step of a person's journey to seek asylum in the EU. From the way they are treated by countries outside the EU, their access to asylum and legal support at Europe's border, to their reception within the EU, this agreement is designed to make it harder for people to access safety'.[108]

Contrary to this, Ukrainian refugees received virtually instant protection from the EU and the Member States. In response to the humanitarian crisis caused by the war, the EU activated for the first time the Temporary Protection Directive, ensuring that Ukrainian refugees had access to food, shelter, and healthcare.[109] Ukrainian refugees fleeing the war have the right to an EU residence permit, are allowed to work, and can enrol their children in schools. As of October 2023,

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[106] *Progressive International letter*.
[107] ENAR, 'Joint letter on the EU migration pact: No compromise on human beings' (18 December 2023), available at: <https://www.enar-eu.org/joint-letter-on-the-eu-migration-pact-no-compromise-on-human-rights/> accessed 4 February 2024.
[108] Amnesty International, 'EU: Migration Pact agreement will lead to a "surge in suffering"' (20 December 2023), available at: <https://www.amnesty.org/en/latest/news/2023/12/eu-migration-pact-agreement-will-lead-to-a-surge-in-suffering/> accessed 4 February 2024.
[109] Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection' OJ L 71/1 (4 March 2022), (Council Implementing Decision (EU) 2022/382).

approximately 4.1 million people benefitted from temporary protection in the EU and the temporary protection has been extended until 4 March 2025.[110]

The unanimous approval in the Council was not problematic for activating the Temporary Protection Directive for welcoming the Ukrainian refugees. The Council moved with the speed of light to assist Ukrainian refugees fleeing the country: on the day of the Russian invasion, 24 February 2022, the European Council held a special meeting where heads of states or government expressed their solidarity with Ukraine;[111] three days later, on 27 February the Justice and Home Affairs ministers expressed their support for activating the Temporary Protection Directive;[112] on 2 March the Commission proposed to grant temporary protection to people fleeing from Ukraine to the EU ;[113] and on 4 March already the Justice and Home Affairs Council adopted unanimously the implementing decision introducing temporary protection.[114] Put differently, unanimity and activating the Temporary Protection Directive in record eight days from the beginning of the war in Ukraine to assist fleeing white European refugees from Ukraine has never been an issue. This is not the case, however, with providing assistance to non-European people of colour crossing the Mediterranean and risking their live on a daily basis to reach European shores. This remains the case even if the migrants flee the countries, which the European nations *themselves* have unsuccessfully invaded alongside the US over the recent decades, such as Iraq and Afghanistan, for instance. While none of the EU Member States is particularly welcoming of these migrants, Hungary has certainly been a leader among EU Member States in deterring them from arriving in the country by introducing draconian laws and opposing to the EU's migration policies in general and sharing responsibility for arriving asylum seekers across all EU Member States in particular, opposing strongly to admission of asylum seekers: 'Only those we want to come to Hungary or allow to come and stay here can come (…) We reject this migration pact, we will not let anyone in against our will',[115] stressed the Hungarian

[110] Council Implementing Decision (EU) 2023/2409 of 19 October 2023 OJ L 24 October 2023 extending temporary protection as introduced by Implementing Decision (EU) 2022/382.
[111] European Council conclusions, 24 February 2022 (Press Release), available at: <https://www.consilium.europa.eu/en/press/press-releases/2022/02/24/european-council-conclusions-24-february-2022/> accessed 12 November 2023.
[112] Extraordinary Justice and Home Affairs Council, 27 February 2022, main results available at: <https://www.consilium.europa.eu/en/meetings/jha/2022/02/27/> accessed 12 November 2023.
[113] European Commission, Proposal for a COUNCIL IMPLEMENTING DECISION establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Council Directive 2001/55/EC of 20 July 2001, and having the effect of introducing temporary protection, COM/2022/91 final.
[114] Council Implementing Decision (EU) 2022/382.
[115] 'Government Rejects EU Migration Pact due to Mandatory Admission of Asylum Seekers', *Hungary Today* (21 December 2023), available at: <https://hungarytoday.hu/government-rejects-eu-migration-pact-due-to-mandatory-admission-of-asylum-seekers/> accessed 4 February 2024.

Foreign Minister, Péter Szijjártó, following the political agreement of the European Parliament and Council.*3.1.1 Managing migration through deterrence: legal framework*

Hungarian government has taken a hard line on migration from the beginning of the migration crisis. Numerous laws were adopted to prevent irregular migration. As assessed by Kriszta Kovács and Boldizsár Nagy, '[t]he Asylum Act has been amended twenty-one times between January 2013 and August 2020, its implementing regulation twenty-three times'.[116] Thorough analysis of asylum-related law amendments in Hungary goes beyond the scope of this paper which focuses on drawing the bigger picture of the all-encompassing attitude towards migration. That being said, some of the most striking changes to the law intended to show irregular migrants that they are not welcome in the country deserve a mention.

Most of these amendments were introduced in 2015, when 161.000 people – mostly from Afghanistan, Iraq and Syria – claimed asylum in the country in the first eight months of the year. These included amendments to the Asylum Act allowing for accelerated processing of cases where the asylum seeker transited though a 'safe country', including Serbia which has been designated by Hungary as such[117] and through which almost all asylum seekers have entered the country.[118] On 14 September 2015, the construction of a razor wire fence on the border with Serbia was finished. The next day already new amendments to the Asylum Act came into force allowing for a 'border procedure' where admissibility of asylum claims had to be decided within eight days in transit zones.[119] Simultaneously, amendments to the Hungarian Criminal Code were introduced to criminalise crossing of a closed border, causing damage to a closed border, and obstructing construction of a border fence.[120] Further amendments were introduced to the Criminal Procedure Act, allowing special rules to these crimes such as priority of related criminal proceedings, arrests of defendant and pre-trial detention.[121] Later that month, amendments to the Police Act and the Act on National Defence were passed to extend the powers of the police to take measures in 'crisis caused by mass immigration' which has been declared earlier that

[116] Kriszta Kovács and Boldizsár Nagy, 'In the Hands of a Populist Authoritarian The Agony of the Hungarian Asylum System and the Possible' in Stoyanova and Smet (eds.), Migrants' Rights, 211-235, 222 (footnotes omitted).
[117] 'Government Decree 191/2015 (VII.21) on national designation of safe countries of origin and safe third countries'.
[118] Krisztina Juhász, 'Assessing Hungary's Stance on Migration and Asylum in Light of the European and Hungarian Migration Strategies' (2017) 13 Politics in Central Europe 35-54.
[119] Act LXXX of 2007 on Asylum, as amended.
[120] Act C/2012 on the Criminal Code, as amended.
[121] Act XIX of 1998 on Criminal Procedure, as amended.

month.[122] The new measures provided also for deployment of the army to assist the police in securing the borders. Further amendments to the Asylum Act allowing the police to 'escort through the gate', i.e. push back third-country nationals apprehended 'within an 8 kilometre strip from the border line or border sign of the external border'[123] to make them 'submit their application for protection from outside, by approaching the transit zone from the external side—i.e. from the Serbian green border'.[124] In 2017 the list of cases in which a crisis situation could be declared was expanded.[125]

In 2018, Hungary passed more amendments to laws (so called 'Stop Soros Act Package') in order 'to prevent Hungary from becoming a migrant country'.[126] The new package introduced more restrictive measures against irregular migration by adding a further ground of inadmissibility of asylum applications and criminalising organising actions for providing assistance in respect of making or lodging of an application for asylum in Hungary where such application could not be accepted under the law.[127] According to activists, the Act was introduced to 'threaten those who use lawful means to help refugees and asylum-seekers, one of the most vulnerable groups in Hungary'.[128] Finally, in 2020, a new asylum system ('Embassy procedure') was introduced – initially as response to COVID-19 but then extended until 31 December 2023 –, allowing for asylum applications only where declaration of intent has been made in a Hungarian Embassy in Belgrade, Serbia or Kyiv, Ukraine, with an exception of certain categories of people who do not need to follow that procedure.[129]

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[122] Government Decree No. 269/2015 (IX. 15) announcing a crisis situation caused by mass immigration and establishing the rules related to the declaration, maintenance and termination of the crisis situation.
[123] Act no. XCIV of 2016, entry into force on July 6, 2016, para. 71/A.
[124] Boldizsár Nagy, 'Hungarian Asylum Law and Policy in 2015–2016: Securitization Instead of Loyal Cooperation', (2016) 17(6) German Law Journal, 1033-1082, 1051.
[125] Law n. XX of 2017 amending certain laws related to the strengthening of the procedure conducted in the guarded border area, Magyar Közlöny 2017/39.
[126] Bill No. T/333 amending certain laws relating to measures to combat illegal immigration, general reasoning (Bill No. T/333). *See* also Bill number T/332 Seventh amendment of the Basic Law of Hungary (Bill No. T/332).
[127] Bill No. T/333, sections 7 and 11.
[128] Attila Mraz for CIVICUS Monitor, '"Stop Soros" Laws Followed by Restrictive New Protest Law', available at: <https://monitor.civicus.org/explore/Stop-Soros-Laws-Passed-by-Hungarian-Parliament/> accessed 10 November 2023.
[129] *See* Government Decree 233/2020. (V. 26.) on the rules of the asylum procedure during the state of danger declared for the prevention of the human epidemic endangering life and property and causing massive disease outbreaks, and for the protection of the health and lives of Hungarian citizens. The new system was later included in the Transitional Act, available at: <https://ip-documents.info/2020/IP/HUN/20_4136_00_x.pdf> (in Hungarian) accessed 11 November 2023. Categories of people to whom the mew measures do not apply are enumerated in Section 271 (1) of the Transitional Act: beneficiaries of subsidiary protection residing in Hungary; family members of recognised refugees and

### *3.1.2 (In)effectiveness of legal repercussions*

Hungary has been certainly successful in reducing the numbers of asylum seekers through its restrictive laws and unwelcoming treatment of migrants. The 'Embassy procedure' severely limiting access to asylum in the country with 'only a handful of people hav[ing] successfully used this process'[130] even three years after its introduction.

The Hungarian draconian laws did not go unnoticed with the European Commission, which has lodged numerous infringement procedures against Hungary in relation to its asylum practices. The CJEU judgments on incompatibility of the laws of Hungary on the rules and procedures in the transit zones with the EU law,[131] for: incompatibility of the 'Soros Law' with the EU law,[132] and incompatibility of the new asylum system (Embassy procedure) with the EU law,[133] had little effect on the attitude of the Hungary's attitude towards migration. Indeed, closing the transit zones but toughening the rules with the Embassy procedure, which is also incompatible with the EU law, can hardly be seen as genuine compliance with the CJEU judgments,[134] let alone abiding by the principles of solidarity and loyal cooperation. The Government has openly expressed its intentions not to comply with a CJEU judgment in the past:

> 'The government decided that we will not do anything to change the system of border protection. (…) We will maintain the existing regime, even if the European court ordered us to change it. (…) We will not change it and will not let anyone in'.[135]

Migration remained the central issue in Hungarian politics and one of the dominant questions in the Hungarian elections. In 2022, PM Orbán even discussed openly that Hungarians did not want to become 'people of mixed race', justifying his claim later with cultural differences: '[i]t happens

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beneficiaries of subsidiary protection as defined in Asylum Act who were staying in Hungary at the time of the submission of the asylum application; and persons subject to a coercive measure or measures restricting personal liberty, unless they irregularly crossed the border of Hungary.

[130] UNHCR, 'Three years after the introduction of the "embassy procedure," access to territory and asylum in Hungary remains curtailed' (26 May 2023), available at: <https://www.unhcr.org/ceu/49141-three-years-after-the-introduction-of-the-embassy-procedure-access-to-territory-and-asylum-in-hungary-remains-curtailed.html> accessed 12 November 2023.

[131] Case C-808/18, *European Commission* v *Hungary*, ECLI:EU:C:2020:1029.

[132] Case C-821/19, *European Commission* v *Hungary*, ECLI:EU:C:2021:930, para. 166.

[133] Case C-823/21, *European Commission* v *Hungary*, ECLI:EU:C:2023:504.

[134] *See* Hungarian Helsinki Committee, 'Access to the Territory and Push Backs' (9 April 2023), available at: <https://asylumineurope.org/reports/country/hungary/asylum-procedure/access-procedure-and-registration/access-territory-and-push-backs/#_ftn77> accessed 11 November 2023.

[135] Gergely Szakacs and Krisztina Than, 'Hungary to defy EU court ruling over migration policy, Orban says', *Reuters* (21 December 2021) <https://www.reuters.com/world/europe/hungary-defy-eu-court-ruling-over-migration-policy-orban-says-2021-12-21/> accessed 10 November 2023.

sometimes that I say something in a way that can be misunderstood but …the position I stand for, is a cultural, civilisation (based) stance'.[136] He further noted: 'I am the only politician in the EU who stands for an openly anti-migration policy'.[137] Most recently, PM Orbán accused EU of 'rape' while discussing migrant quotas imposed on Hungary:

> 'The agreement on migration, politically, it's impossible – not today or generally speaking for the next years. (…)
>
> Because legally we are, how to say it, we are raped. So if you are raped legally, forced to accept something you don't like, how would you like to have a compromise?'[138]

The anti-migration practices of Hungary do not only shape the policy of that country, but slow down the progress of the EU migration policy, putting into question the loyal cooperation and solidarity between Member States as well as between the Member States and the Union. That being said, Hungary is far from lonely in its attitude towards 'irregular' migrants even if other EU Member States are not opposing the EU migration policy to which astonishing cruelty at other land borders testifies. Indeed, in 2021, Poland constructed razor-wire fences on parts of its border with Belarus and imposed a state of emergency within two miles of the border 'blocking all access to that area for journalists, civil society organizations, volunteers, and others'.[139] The country also passed a law allowing border guards to expel without any delay migrants who cross the border immediately.[140]

Human Rights Watch documented numerous abuses by Polish border officials, including use of force in pushing migrants and asylum seekers back to Belarus.[141] Similarly, the Council of Europe

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[136] Krisztina Than, 'Hungary's Orban says his anti-immigration stance not rooted in racism after backlash', *Reuters* (28 July 2022) <https://www.reuters.com/world/europe/hungarys-orban-says-his-anti-immigration-stance-not-rooted-racism-after-backlash-2022-07-28/> accessed 10 November 2023.
[137] Than, 'Hungary's Orban'.
[138] Joe Barnes, 'EU "raping" Hungary with migrant quotas, says Viktor Orban', *The Telegraph* (6 October 2023) <https://www.telegraph.co.uk/world-news/2023/10/06/viktor-orban-eu-raping-hungary-poland-migrant-quotas/> accessed 10 November 2023.
[139] Human Rights Watch, '"Die Here or Go to Poland" Belarus' and Poland's Shared Responsibility for Border Abuses' (24 November 2021), available at: <https://www.hrw.org/report/2021/11/24/die-here-or-go-poland/belarus-and-polands-shared-responsibility-border-abuses> accessed 12 November 2023 (HRW Report).
[140] *See* in greater detail Grażyna Baranowska, 'Pushbacks in Poland: Grounding the Practice in Domestic Law in 2021' (2021) 41 Polish Yearbook of International Law 193-211.
[141] Human Rights Watch, '"Die Here or Go to Poland"'.

anti-torture Committee reported of systematic police abuses in Croatia at country's borders.[142] Latvia declared a state of emergency at the Belarus border in August 2021, prohibiting people from seeking asylum and legalising pushbacks. As well documented by Amnesty International, the powers stemming from the state of emergency were largely abused by authorities escalating into 'acts constituting torture and other ill-treatment, arbitrary detention, and the use of intimidation and violence to force people to return "voluntarily"'.[143] Contrary to that, the country welcomed thousands Ukrainian refugees since the beginning of the war in Ukraine.[144] Other Baltic countries behaved in a similar vein – with both Estonia and Latvia legalising migrant pushbacks at borders in a direct violation of EU and ECHR law. [145] More recently, Italy concluded Memorandum of understanding with Albania envisaging extraterritorial migration and asylum management, including detention and asylum processing, in Albania. The deal between the two countries, as noted by the Council of Europe Commissioner for Human Rights, Dunja Mijatović, 'raises several human rights concerns and adds to a worrying European trend towards the externalisation of asylum responsibilities'.[146] Amnesty International has called the agreement 'illegal and unworkable',[147] noting that the 'agreement is about refoulement, a practice which is banned under international and European law, and for which Italy has already been condemned by the European Court of Human Rights'.[148] In the meantime, the idea is being explored by other Member States – Germany and Austria, in particular, while Denmark already passed a law to allow the processing asylum seekers applications in a country outside of Europe.[149]

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[142] Council of Europe, 'Report to the Croatian Government on the visit to Croatia carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 10 to 14 August 2020' (3 December 2021) <https://rm.coe.int/1680a4c199> accessed 4 February 2024.

[143] Amnesty International, 'Latvia: Return Home or Never Leave the Woods: Refugees and Migrants Arbitrarily Detained, Beaten and Coerced into "Voluntary" Returns' (2022), available at: <https://www.amnesty.org/en/documents/eur52/5913/2022/en/> accessed 12 November 2023, 67.

[144] Amnesty International, 'Latvia: Return Home or Never Leave the Woods'.

[145] Case C-808/18, *European Commission* v *Hungary*; *M. H.* v *Croatia*; *See* also *Shazad* v *Hungary*.

[146] Council of Europe, 'Italy-Albania agreement adds to worrying European trend towards externalising asylum procedures' (13 November 2023), available at: <https://www.coe.int/en/web/commissioner/-/italy-albania-agreement-adds-to-worrying-european-trend-towards-externalising-asylum-procedures> accessed 5 December 2023.

[147] Amnesty International, 'Italy: Deal to detain refugees and migrants offshore in Albania "illegal and unworkable"' (7 November 2023), available at: <https://www.amnesty.org/en/latest/news/2023/11/italy-plan-to-offshore-refugees-and-migrants-in-albania-illegal-and-unworkable/> accessed 5 December 2023.

[148] Amnesty International, 'Italy: Deal to detain refugees and migrants offshore in Albania "illegal and unworkable"'.

[149] Euronews Albania, 'EC studies Italy-Albania agreement, experts: It does not comply with EU laws', available at: <https://euronews.al/en/ec-studies-italy-albania-agreement-experts-it-does-not-comply-with-eu-laws/> accessed 5 December 2023.

Last but not least, the EU's strategy of trying to persuade the home country to take back the asylum seeker that has been rejected by the EU Member States is somewhat aligned with the hostile practices of peripheral EU Member States which are at the front line of common borders. The reaction of the EU to the massive breaches of EU and ECHR law by the 'liberal' and 'illiberal' counties has been markedly different: the 'liberal' Baltic states face no Commission-initiated court cases for killing racialized migrants in a frozen forest in front of a barbed wire fence they constructed, deserving praise for the breach of the law from the Commission instead.[150] The highly controversial Memorandum of Understanding between Italy and Albania falls outside the EU law and, therefore, does not violate EU law, according to the EU migration Commissioner Ylva Johansson[151] - an assessment that 'is legally unsound, political-driven in nature, and therefore running contrary to the Commission's duty to enforce EU law and act as guarantor of the Treaties'.[152] In other words, the illegal mistreatment of migrants by liberal and illiberal countries can be absolutely the same, while the reactions to the breaches of the law are sometimes different – and it is only then, at the level of the reactions – that the regime type starts to matter in the EU, not when the killings are committed and rights are denied.[153]

### 3.2 The case of the UK

Migration has always been a sensitive issue in the UK. The question of migration has not only been a major reason for calling a referendum on to ask the electorate whether the country should remain an EU Member State or leave the Union, but was also a key to the Brexit vote.[154] The Brexit campaign overlapped with the migrant crisis in Europe, although the UK saw a relatively small number of asylum seekers compared to other European countries due to its geographical

[150] Nikolaj Nielsen, 'EU Commission defends Baltic states accused of pushbacks' *EU Observer* (5 September 2023), available at: < https://euobserver.com/migration/157385> accessed 13 November 2023.
[151] Jorge Liboreiro, 'Italy-Albania migration deal falls 'outside' EU law, says Commissioner Ylva Johansson', *Euronews* (15 November 2023), available at: <https://www.euronews.com/my-europe/2023/11/15/italy-albania-migration-deal-falls-outside-eu-law-says-commissioner-ylva-johansson> accessed 5 December 2023.
[152] Sergio Carrera, Giuseppe Campesi and Davide Colombi, 'The 2023 Italy – Albania Protocol on Extraterritorial Migration Management': A worst practice in migration and asylum policies' (2023) CEPS, 5.
[153] Greece, responsible for the biggest bulk of migration-related atrocities is the case in point. When FRONTEX – an agency plenty of experts would consider directly implicated in murdering migrants in the Mediterranean sea – withdraws from Hungary but continues operating elsewhere the problematic nature of EU's response to legally orchestrated rights violations becomes obvious: *see* Question for written answer E-000546/2021 by Sira Rego, available at<https://www.europarl.europa.eu/doceo/document/E-9-2021-000546_EN.html> accessed 13 November 2023.
[154] Jonathan Portes, 'Immigration between the referendum and Brexit', available at: <https://ukandeu.ac.uk/long-read/immigration-between-the-referendum-and-brexit/> accessed 10 November 2023.

position.[155] That being said, 'Britain's opposition to accepting refugees was some of the most vocal in Europe'.[156] This, however, is not surprising since the UK had high levels of immigration which have substantially increased with the EU enlargements in 2004 and 2007.[157]

The legal immigration from the EU Member States and irregular migration in the country were not necessarily treated differently for the purposes of the 'leave' campaign. To the contrary – both the legal immigration from EU Member States, and particularly from Eastern European Member States, and irregular immigration have been used to boost the Leave campaign. The slogan 'take back control of our borders' was widely used among 'leave' supporters.[158] The media rhetoric on the negative impact of 'immigration on jobs, wages, housing or the crowding out of public services'[159] has helped further in building anti-immigrant sentiment which finally resulted in a 'leave' vote. The vote was 'followed by an increase in hate crimes linked to migration issues and, subsequently, a media apparatus of toxic discourse and fear of the criminal "Other".'[160] Even the murderer of Joanne Cox, a Member of the Parliament and a 'passionate defender of immigration and the Remain Campaign'[161] has been linked to the anti-migration sentiments of the murderer.[162]

### 3.2.1 Post-Brexit migration saga

The UK's withdrawal from the Union did not solve the issue with the high numbers of immigration. To the contrary – three years after Brexit, net migration in the country has more

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[155] Ammanda Garrett, 'The Refugee Crisis, Brexit, and the Reframing of Immigration in Britain', available at: <https://www.europenowjournal.org/2019/09/09/the-refugee-crisis-brexit-and-the-reframing-of-immigration-in-britain/> accessed 10 November 2023.
[156] Garrett, 'The Refugee Crisis'.
[157] Office for National Statistics, Migration Statistics Quarterly Report: May 2015 Immigration to the UK and emigration from the UK, including net migration (the difference between immigration and emigration), available at: <https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/internationalmigration/bulletins/migrationstatisticsquarterlyreport/2015-05-21> accessed 10 November 2023.
[158] Simon Goodman, '"Take Back Control of Our Borders": The Role of Arguments about Controlling Immigration in the Brexit Debate' (2017) 15(3) Yearbook of the Institute of East-Central Europe 35-53.
[159] According to Jonathan Wadsworth, (2015) Immigration and UK Labour Market (CEP 2015 election analyses series). LSE Centre for Economic Performance, Paper EA019, 1, there was 'no evidence of an overall negative impact of immigration on jobs, wages, housing or the crowding out of public services (…) [o]ne of the largest impacts of immigration seems to be on public perceptions'.
[160] Marta Martins, 'News media representation on EU immigration before Brexit: the 'Euro-Ripper' case' (2021) 8(11) Humanities and Social Sciences Communications 1- 8, 1.
[161] Ian Cobain, Nazia Parveen and Matthew Taylor, 'The slow-burning hatred that led Thomas Mair to murder Jo Cox' *The Guardian* (23 November 2016) <https://web.archive.org/web/20161123172231/https:/www.theguardian.com/uk-news/2016/nov/23/thomas-mair-slow-burning-hatred-led-to-jo-cox-murder> accessed 10 November 2023.
[162] Cobain, Parveen and Taylor, 'The slow-burning hatred'.

than doubled compared to pre-Brexit levels, reaching record 745,000.[163] The rise in numbers comes after the Immigration Bill with a different points-based system replaced free movement of people.[164] The great number of Europeans coming mainly from EU Member States was replaced by even greater number of immigrants coming mainly from Asia and Africa. That said, the number of immigrants also includes people fleeing Ukraine and Hong Kong.[165] Furthermore, irregular migration, particularly small boat arrivals, increased significantly post-Brexit, reaching the highest number in 2022 when 44,666 small boats arrived and 40,302 people claimed asylum. As a comparison, from 2018 until 2022, there were 83,236 small boat arrivals and 76,134 asylum applications.[166]

### 3.2.2 Rwanda asylum plan

In 2022, the 'UK and Rwanda Migration and Economic Development Partnership' (Rwanda asylum plan)[167] was announced, being set to see some asylum seekers being relocated to Rwanda for processing, asylum and resettlement. According to the plan, after considering their applications, Rwanda would either allow them to stay in the country or would send them back to their country of origin. In any case, they would not be allowed to return to the UK. The Rwanda asylum plan has been primarily intended to inadmissible irregular migrants, i.e. 'to people who pass through or have a connection with a safe country, including people who make irregular

[163] Net migration is the difference between the number of immigrants and emigrants. Official data is provided for by the UK Office for National Statistics at: <https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/internationalmigration/datasets/longterminternationalimmigrationemigrationandnetmigrationflowsprovisional> accessed 3 February 2024.

[164] Matt Honey-Foster, '3 years after Brexit, UK net migration has never been higher' Politico (25 May 2023), available at: <https://www.politico.eu/article/three-years-after-britain-left-eu-net-migration-never-been-higher-brexit/> accessed 10 November 2023.. With regard to the point-system *see* the Policy Paper of the Home Office on 'The UK's points-based immigration system: policy statement Published 19 February 2020' (19 February 2020), available at: <https://www.gov.uk/government/publications/the-uks-points-based-immigration-system-policy-statement/the-uks-points-based-immigration-system-policy-statement> accessed 10 November 2023.

[165] Matt Honey-Foster, '3 years after Brexit'.

[166] *See* the official statistics of the Home Office, 'Irregular migration to the UK, year ending December 2022' (23 February 2023), available at: <https://www.gov.uk/government/statistics/irregular-migration-to-the-uk-year-ending-december-2022/irregular-migration-to-the-uk-year-ending-december-2022> accessed 10 November 2023.

[167] See the Policy Paper of the Home Office on 'Memorandum of Understanding between the government of the United Kingdom of Great Britain and Northern Ireland and the government of the Republic of Rwanda for the provision of an asylum partnership arrangement' (6 April 2023), available at: <https://www.gov.uk/government/publications/memorandum-of-understanding-mou-between-the-uk-and-rwanda/memorandum-of-understanding-between-the-government-of-the-united-kingdom-of-great-britain-and-northern-ireland-and-the-government-of-the-republic-of-r> accessed 10 November 2023.

journeys across the English Channel'.[168] Individuals to be sent to Rwanda would be identified on a case-by-case basis upon their arrival in the UK.[169]

The Rwanda asylum plan has certainly raised a few eyebrows, with '[c]ritics (highlighting) concerns about the policy's legality, practicality, morality, efficacy and expense',[170] while international organisations have been questioning the compatibility of the plan with UK's obligations under international law. Indeed, on 14 June 2022, ECtHR injunction saw the first planned flight to Rwanda that received legal clearance from the High Court, cancelled 'minutes before take-off'.[171] In particular, the ECtHR granted urgent interim measure with regard to one of the migrants, an Iraqi national, who was set to be sent to Rwanda 'to prevent the applicant's removal until the domestic courts have had the opportunity to first consider those issues'.[172] The ECtHR issued the interim measure by assessing that the Iraqi national was 'fac[ing] a real risk of irreversible harm'[173]:

> 'In light of the resulting risk of treatment contrary to the applicant's Convention rights as well as the fact that Rwanda is outside the Convention legal space (and is therefore not bound by the European Convention on Human Rights) and the absence of any legally enforceable mechanism for the applicant's return to the United Kingdom in the event of a successful merits challenge before the domestic courts, the Court has decided to grant this interim measure to prevent the applicant's removal until the domestic courts have had the opportunity to first consider those issues'.[174]

On 29 June 2023, the Court of Appeal ruled that the Rwanda asylum plan is unlawful, stressing that Rwanda is not a 'safe third country':

> 'the deficiencies in the asylum system in Rwanda are such that there are substantial grounds for believing that there is a real risk that persons sent to

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[168] UK Parliament, Research Briefing, 'UK-Rwanda Migration and Economic Development Partnership' (20 December 2022) available at: <https://commonslibrary.parliament.uk/research-briefings/cbp-9568/> accessed 10 November 2023.
[169] UK Parliament, Research Briefing, 'UK-Rwanda Migration'.
[170] UK Parliament, Research Briefing, 'UK-Rwanda Migration'.
[171] Joseph Lee and Doug Faulkner, 'Rwanda asylum flight cancelled after legal action' (15 June 2022) available at: <https://www.bbc.com/news/uk-61806383> accessed 10 November 2023.
[172] ECtHR, 'The European Court grants urgent interim measure in case concerning asylum seeker's imminent removal from the UK to Rwanda' (Press Release), ECHR 197 (2022).
[173] ECtHR, 'The European Court grants urgent interim measure'.
[174] ECtHR, 'The European Court grants urgent interim measure'.

> Rwanda will be returned to their home countries where they faced persecution or other inhumane treatment, when, in fact, they have a good claim for asylum. In that sense Rwanda is not a "safe third country". That conclusion is founded on the evidence which was before the High Court that Rwanda's system for deciding asylum claims was, in the period up to the conclusion of the Rwanda agreement, inadequate'.[175]

The UK Supreme Court upheld the Court of Appeal's judgement, deciding that the Agreement was unlawful on the basis that Rwanda is not a safe third-country for asylum seekers and that there is risk that the principle of non-refoulement will not be respected there.[176]

Despite the above judgments, the Government is strongly determined to make the policy work even at the expense of its longstanding commitment to the Rule of Law. Shortly after the judgment of the Supreme Court, the UK Government introduced the 'UK-Rwanda treaty: provision of an asylum partnership'.[177] The UK-Rwanda treaty, however, has hardly addressed the concerns of the Supreme Court. Indeed, the signing of a treaty does not change the evidence-based finding of the Court that Rwanda is not a safe country for asylum seekers.[178] The implementation of the UK-Rwanda treaty is supported by a Safety of Rwanda (Asylum and Immigration) Bill, which was introduced a couple of days later. The Safety of Rwanda Bill dictates decision makers to treat Rwanda as a safe country, contrary to the Supreme Court judgment:

> 'Every decision-maker must conclusively treat the Republic of Rwanda as a safe country. (2) A decision-maker means— (a) the Secretary of State or an immigration officer when making a decision relating to the removal of a person to the Republic

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[175] *AAA and others* v. *The Secretary of State for the Home Department* (Judgment Summary) [2023] EWCA Civ 745 (29 December 2023), para. 11.
[176] *R and others v Secretary of State for the Home Department*, [2023] UKSC 42 (15 November 2023), para. 149, available at: <https://www.supremecourt.uk/cases/docs/uksc-2023-0093-etc-judgment.pdf> accessed 5 December 2023. *See* also Iris Goldner Lang and Boldizsár Nagy, External Border Control Techniques in the EU as a Challenge to the Principle of Non-Refoulement, (2021) 17 (3) European Constitutional Law Review 442-470.
[177] Published by the Home Office, 'UK-Rwanda treaty: provision of an asylum partnership' (5 December 2023), available at: <https://www.gov.uk/government/publications/uk-rwanda-treaty-provision-of-an-asylum-partnership/uk-rwanda-treaty-provision-of-an-asylum-partnership-accessible> accessed 5 February 2024.
[178] The Law Society, 'Parliamentary briefing UK-Rwanda treaty: provision of an asylum partnership' (December 2023), available at: <file:///C:/Users/ebash/Downloads/parliamentary-briefing-uk-rwanda-treaty-dec-2023.pdf> accessed 5 February 2024.

> of Rwanda under any provision of, or made under, the Immigration Acts; (b) a court or tribunal when considering a decision of the Secretary'.[179]

In other words, the Safety of Rwanda Bill is intended to overturn the evidence-based finding of UK courts and prevent them from questioning the safety of Rwanda in the future. As such the Safety of Rwanda Bill 'poses a grave threat to the rule of law and human rights, setting a dangerous legal and constitutional precedent that seeks to elevate the government above the rule of law'.[180] Indeed, as rightly observed by Lord Clarke:

> 'Parliament, claiming the sovereignty of Parliament, could claim that the colour black is the same as the colour white, that all dogs are cats or, more seriously, that someone who has been acquitted of a criminal charge is guilty of that criminal charge and should be returned to the courts for sentence.'[181]

The Safety of Rwanda Bill is with the House of Lords at the time of writing and its future is not known yet. Should the UK Government succeed in overturning the judgment of the Supreme Court, liberalism in the country would be under serious threat.

### 3.2.3 Illegal Migration Act 2023

In March 2023, the then Secretary of State for the Home Department, Suella Braverman, introduced the Illegal Migration Act 2023 in response to the increased immigration.[182] The main aim of the new legislation is to reduce or prevent irregular migration, primarily small boat arrivals across the English Channel by detaining, removing and blocking migrants from returning to the country. The purpose of the Act and the ways in which such purpose is advanced are explained in the introductory part of the document:

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[179] Para. 2, Safety of Rwanda (Asylum and Immigration) Bill, available at: <https://assets.publishing.service.gov.uk/media/65709c317391350013b03c36/Rwanda_Bill_as_introduced.p> accessed 5 February 2024.

[180] Yasmine Ahmed and Emilie McDonnell, 'UK Should Abandon Dangerous, Authoritarian Rwanda Bill Bill Seeks to Place UK Government Above the Law', *Human Rights Watch* (30 January 2024), available at: <https://www.hrw.org/news/2024/01/30/uk-should-abandon-dangerous-authoritarian-rwanda-bill#:~:text=The%20Safety%20of%20Rwanda%20%28Asylum%20and%20Immigration%29%20Bill,Court%20ruled%20that%20Rwanda%20cannot%20be%20considered%20safe.> accessed 5 February 2024.

[181] 'House of Lords votes against blocking the Safety of Rwanda (Asylum and Immigration) Bill', *EIN* (29 January 2024), available at: <https://www.ein.org.uk/news/house-lords-votes-against-blocking-safety-rwanda-asylum-and-immigration-bill> accessed 5 February 2024.

[182] The Illegal Migration Act 2023 received Royal Assent on 20 July 2023.

1) The purpose of this Act is to prevent and deter unlawful migration, and in particular migration by unsafe and illegal routes, by requiring the removal from the United Kingdom of certain persons who enter or arrive in the United Kingdom in breach of immigration control.
2) To advance that purpose, this Act—
    a) places a duty on the Secretary of State to make arrangements for the removal of certain persons who enter or arrive in the United Kingdom in breach of immigration control as soon as is reasonably practicable after their entry or arrival, subject only to the exceptions specified by or under this Act;
    b) provides for protection claims and certain human rights claims made by persons who meet the conditions for removal under this Act to be inadmissible;
    c) provides for the detention of persons who are subject to removal under this Act;
    d) provides for protections and entitlements to assistance and support which are available to victims of modern slavery or human trafficking not to apply to persons who are subject to removal under this Act;
    e) prevents persons who meet the conditions for removal under this Act from being given leave to enter or remain in the United Kingdom;
    f) prevents persons who meet the conditions for removal under this Act from settling in the United Kingdom or obtaining citizenship;
    g) provides a procedure for persons who are subject to removal under this Act to challenge their removal by means of a suspensive claim (as defined in section 38);
    h) has the effect that all other legal challenges to the removal of persons under this Act do not suspend the duty to make arrangements for their removal.[183]

In other words, and as boldly put by PM Rishi Sunak, '[i]f you come [in the UK] illegally, you can't claim asylum. You can't benefit from [UK's] modern slavery protections. You can't make spurious human rights claims and you can't stay'.[184] Indeed, the new legislation effectively removes the right of irregular migrants to claim asylum in the country. The reasons for such changes of the law have been stated in a policy paper of the Home Office: an increase in small boat arrivals which are very dangerous and unnecessary given that migrants are passing through safe countries, notably France, where they could claim asylum; manipulations by smugglers; unfair exploitation

[183] Illegal Migration Act 2023, c. 37, Introduction.
[184] Quoted in Rebecca Stevenson, 'Illegal Migration Bill: a compassionate approach?' *CARE* (10 March 2023), available at:<https://care.org.uk/news/2023/03/illegal-migration-bill-a-compassionate-approach> accessed 10 November 2023.

of the asylum system by economic migrants; high costs of the asylum system which is unfair on the British taxpayer; and high pressures on the UK's health, housing, educational and welfare services.[185]

The UK asylum system has been indeed largely exploited by irregular migrants whose lives might not be genuinely at risk. Thus, in 2022, the largest number (28%) of irregular migrants arriving on small boats through the English Channel came from Albania – a safe NATO and EU candidate country,[186] where asylum seekers that arrive to Italy are about to be sent, should the Agreement between the two countries be implemented. Albanian smugglers and/or intermediaries have publicly advertised arrangements for crossing the English Channel,[187] offering discounted 'Black Friday'[188] prices and '3 for 2' deals.[189] That being said, however, not all irregular migrants are economic migrants and this is the main problematic aspect of the Illegal Migration Act 2023 – while manipulations of the asylum system exist, taking the asylum right from genuine irregular migrants whose lives are at risk might be 'pushing the boundaries of international law'.[190] Indeed, most of the asylum seekers arrive in the country irregularly due to lack of sufficient safe and legal entry routes.[191] Removing the right to claim asylum to irregular migrants may, therefore, have a disproportionately adverse impact on the most vulnerable notwithstanding the promises of the

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[185] *See* the Policy Paper of the Home Office on 'Illegal Migration Bill: overarching factsheet' (20 July 2023), available at: <https://www.gov.uk/government/publications/illegal-migration-bill-factsheets/illegal-migration-bill-overarching-factsheet> accessed 13 November 2023.
[186] *See* Official Statistics of the Home Office, 'Irregular migration to the UK, year ending December 2022' (23 February 2023), available at: <https://www.gov.uk/government/statistics/irregular-migration-to-the-uk-year-ending-december-2022/irregular-migration-to-the-uk-year-ending-december-2022> accessed 10 November 2023.
[187] Charles Hymas, 'Albanian people smugglers offering "3-for-2" deals for families trying to cross Channel' *Telegraph* (31 August 2022), available at: <https://www.telegraph.co.uk/news/2022/08/31/albanian-people-smugglers-offering-3-for-2-deals-families-dangerous/> accessed 10 November 2023.
[188] Charles Hymas, 'Albanian migrants offered "TikTok Black Friday" Channel crossing deals', *The Telegraph* (26 August 2022), available at: <https://www.telegraph.co.uk/news/2022/08/26/albanian-migrants-offered-tiktok-black-friday-channel-crossing/> accessed 4 February 2024.
[189] Charles Hymas, 'Albanian people smugglers offering "3-for-2" deals for families trying to cross Channel', *The Telegraph* (31 August 2022), available at: <https://www.telegraph.co.uk/news/2022/08/31/albanian-people-smugglers-offering-3-for-2-deals-families-dangerous/> accessed 10 November 2023.
[190] AP, 'UK ready to "push boundaries of international law" with new bill to stop Channel migrants' *Le Monde* (10 November 2023), available at: < https://www.lemonde.fr/en/united-kingdom/article/2023/03/07/uk-ready-to-push-boundaries-of-international-law-with-new-bill-to-to-stop-channel-migrants_6018488_135.html> accessed 7 March 2023.
[191] That being said, the UK has accepted 481,804 people via safe and legal entry routes between 2015 and 2022: *see* the Policy paper of the Home Office on 'Safe and legal routes' (20 July 2023) <https://www.gov.uk/government/publications/illegal-migration-bill-factsheets/safe-and-legal-routes> accessed 10 November 2023.

UK Government to create more safe and legal routes.[192] As put by Consterdine, '[t]he illegal migration bill is the most extreme piece of immigration legislation to date, and amounts to a ban on asylum.[193]

## Citizenship matters and (il)liberalism

The totality of our rights depends on the status of citizenship we hold and since these statuses of totalitarian blood distribution of privilege are deeply unequal,[194] the nature of citizenship as one of the core instruments of preservation and reinforcement of global inequality is deeply consequential,[195] splitting the population of the world into the global aristocracy – the super citizens of Western democracies – and the citizenship poor, who are the victims of citizenship.[196] The blood paradigm is only broken by naturalizations, which amount, roughly, to less than 2% of citizenship acquisitions around the world.[197] Although 98% of the world's population never undergoes a change of citizenship status once initially assigned, acquisition of citizenship by naturalisation is usually more frequently in the stoplight. Importantly, naturalisations and the change of nationality are both legally recognised reality.[198] Agreeing with Johannes Chan, at present 'there seems to be a general consensus that everyone is entitled to change his nationality'.[199] The toleration of multiple nationalities, as wonderfully documented by Peter Spiro,

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[192] See the Policy Paper of the Home Office on 'Illegal Migration Bill: overarching factsheet' (20 July 2023), available at: <https://www.gov.uk/government/publications/illegal-migration-bill-factsheets/illegal-migration-bill-overarching-factsheet> accessed 10 November 2023.

[193] Erica Consterdine, 'The government passed a major immigration law last year – so why is it trying to pass another one?' *The Conversation* (13 July 2023).

[194] Cf. Dimitry Kochenov and Justin Lindeboom, 'Empirical Assessment of the Quality of Nationalities' (2017) 4 European Journal of Law and Governance 314–336; Dimitry Kochenov and Justin Lindeboom (eds), *Kälin and Kochenov's Quality of Nationality Index* (Hart Publishing, Oxford 2020).

[195] Branko Milanović, *Global Inequality: A New Approach for the Age of Globalization*, (Harvard University Press, 2016).

[196] Dimitry Kochenov, 'The Victims of Citizenship: Feudal Statuses for Sale in the Hypocrisy Republic' in Kochenov and Surak (eds.), *Citizenship and Residence Sales*. To reflect the distinction between the bodies of rights different citizenships bring with them Branko Milanović speaks of 'citizenship rents': Branko Milanović, *Capitalism, Alone: The Future of the System that Rules the World*, (Harvard University Press, 2019).

[197] Cf. Kochenov, *Citizenship*.

[198] The legal attitudes towards dual nationality are becoming less hostile: *see* eg European Convention on Nationality, (1997) ETS 166. In Art 14 the Convention allows double nationality in some cases. In the US, dual nationality became possible *de jure* after the Supreme Court ruling in *Afroyim v Rusk*, 387 US 253; 87 SCt 1660; 18 L, Ed, 2d 757; 1967. Cf Patrick Weil, *The Sovereign Citizen: Denaturalization and the Origins of the American Republic* (University of Pennsylvania Press, Philadelphia 2012). Also in the EU, the majority of the Member States do not prohibit double nationality: Dimitry Kochenov, 'Dual Nationality in the EU: An Argument for Tolerance' (2011) 17(3) ELJ 323-343; David AJG de Groot, 'Free Movement of Dual EU Citizens' (2018) 3(3) Eur Papers 1075-1113.

[199] Johannes MM Chan, 'The Right to a Nationality as a Human Right: The Current Trend Towards Recognition' (1991) 12 (1-2) HRLJ 1-14, 8.

is *the* norm in the current international relations.[200] That being said, however, equal treatment of dual citizens in law has been in some instances affected by security consideration, as shown through the example of UK citizenship legislation.[201]

Most importantly, in the context where only less than a half of the world's population lives in a democracy, while citizenship is a global approach of drawing the (often racialised) lines of separation implicating *all* the population of the world, democracy – liberal or illiberal, is *not* what citizenship is about.[202] More still: in a world where the aristocracy principle and blood-lines is the only distributor of rights globally, which is strictly policed – either directly, or indirectly – by international and national law the world over, regime type in a particular country cannot play a significant role either nationally or globally in altering the unjust passport apartheid status quo:[203] global law is firmly on the side of the pre-modern principles, which pre-date in theory and also in practice, the birth of liberal democracy and the idea of equality before the law.

What is crucial about citizenship is that, mostly due to its importance in relation to the legal status of every individual, it is generally viewed as a key element of state sovereignty: this is where the picture changes, but the angle, of course is deceptive: an unjust global blood-based distribution of liabilities cannot be whitewashed by failing to see the bigger picture. This being said, citizenship remains of particular importance nationally, as citizenship law holds the key to one of the crucial elements of statehood and democracy: the population and the *demos*. As a consequence, the current system of neo-feudal blood-based distribution of rights and liabilities globally which turns on citizenship as the foundational status is the sacred cow of international law. In particular, the principle on this the edifice is based is permissive: international law allows states themselves to establish who their citizens are.[204] The 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws is unequivocally clear on who is in charge: 'it is for each state to determine under its own law who are its nationals'.[205] Thus, nationality can

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[200] Peter Spiro, *At Home in Two Countries: The Past and Future of Dual Citizenship* (NYU Press 2016).
[201] David A.J.G. de Groot, 'Free Movement of Dual EU Citizens' in Dimitry Kochenov, Elise Muir and Nathan Cambien (eds), *European Citizenship under Stress* (Brill/Nijhoff, Leiden/Boston 2020) 67-109.
[202] Kochenov, *Citizenship*.
[203] Dimitry Kochenov, 'Ending the passport apartheid. The alternative to citizenship is no citizenship—A reply' (2020) 18 *International Journal of Constitutional Law* 1525–1530; Shachar, *The Birthright Lottery*.
[204] Alice Sironi, 'Nationality of Individuals in Public International Law' in Serena Forlati and Alessandra Annoni (eds), The Changing Role of Nationality in International Law' (Routledge, London/NY 2014) 54-75 (and the literature cited therein).
[205] LN Doc. C 24 M. 13.1931.V., Art 1. See also Art 2 of the Convention: 'Any question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of that State'. For a representative list of international documents regulating citizenship status and the obligations of

only be conferred by national law – international law as it stands today can only hypothetically influence such State decisions.[206] It certainly cannot separately confer nationality on individuals. Even the famous *dictum* of the Permanent Court of International Justice (PCIJ) in the *Tunis and Morocco Nationality Decrees* case, where the PCIJ opined that in the future the role played by international law in the sphere of conferral of citizenship rights will increase,[207] did not alter the reality of national dominance in the citizenship domain.

The picture becomes more complicated once the rules on the recognition of nationality under international law are taken into account. Following the International Court of Justice (ICJ) decision in *Nottebohm* case, states are not obliged to recognise the nationality lawfully conferred on an individual by another state even if the said individual does not have any other. The approach to the framing of citizenship adopted in the international legal documents thus begs for an extremely cautious reading. While States are free to determine who their citizens are, this determination does not always work at the international plane and, as a consequence, can have a purely internal effect and deprive people of any access to justice.[208] The European Union aside, which dismissed this absurd perspective as an excursion, in the words of Advocate General Tesauro, into the 'romantic period of international law',[209] at present all attempts to regulate citizenship issues at the international level have been far from successful. Even worse: international rules often created obstacles to effective regulation of citizenship as they attempted very hard – and unsuccessfully – to perfect the Westphalian model of absolute sovereignty, which cannot possibly work in this area, due to the basic historical approaches to how citizenships are granted, passed on, and revoked.

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citizens, *see* Kim Rubinstein and Daniel Adler, 'International Citizenship: The Future of Nationality in a Globalized World' (2000) 7(2) Ind J Global Legal Studies 519-548, 525 and note 32.

[206] *See* in this regard *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, Advisory Opinion OC-4/84, Inter-American Court of Human Rights Series A No 4 (19 January 1984).

[207] *Nationality Decrees Issued in Tunis and Morocco* (Advisory Opinion) [1923] PCIJ Rep Series B No 4, 24.

[208] *Nottebohm* (Judgment) [1955] ICJ Rep 4. The citizenship of Lichtenstein held by Mr Nottebohm was not recognised by Guatemala, the latter state treating Mr Nottebohm as a German citizen – a status he did not hold. The ICJ agreed with such a restrictive vision, ruling that nationality is a 'legal bond having as its basis a social fact of attachment, a genuine connection of experience, interests and sentiments, together with the existence of reciprocal rights and duties'. ICJ failed to mention, however, that in the absence of any other nationality but that of Liechtenstein and with 'genuine connection' only to Guatemala, precisely the state aggressing him, Mr Nottebohm was deprived of any remedy as a result of the controversial decision, even if limited only to the recognition of nationality for the purposes of diplomatic protection. To see the incoherence of the judgment, see the Dissenting Opinion of Judge Klæstad and the dissenting opinion of Judge Read. For analysis see the literature recommended in Albert Bleckmann, 'The Personal Jurisdiction of the European Community' (1980) 17(4) CML Rev 467-485, 477 and note 16.

[209] Case C–369/90 *Mario Vicente Micheletti and others* v *Delegación del Gobierno en Cantabria*, ECLI:EU:C:1992:295, para 5.

Directly from the principle of sovereignty flows that any state can only regulate what happens within its realm. As a result, it takes another state's willingness to claim someone as a citizen and the neatness of the Westphalian presentation is gone: beautiful complexity of the real world appears. The rules are truly diverse and the examples of this diversity are countless: what is taken for granted as best practice in one country can seem almost outrageous in another. States competence in the field of citizenship matters is only limited by binding rules of international law. Yet, the one and only rule that has been recognised as such is the element of voluntariness on the part of the individual acquiring the citizenship, which precludes non-consensual naturalisation. Furthermore, different treatment of persons in similar situations is always prohibited under the principles of international law, except where it is reasonably justified and the measures taken are proportionate to a legitimate aim. In line with Article 5 of the UN Convention on the Elimination of All Forms of Racial Discrimination[210] and Article 5 of the European Convention on Nationality, conferral of citizenship cannot discriminate on the grounds of, *inter alia*, national or ethnic origin. That being said, the non-discrimination rules are too ambiguous to cover all types of preferential treatment practiced by states in citizenship matters. For instance, Article 1(3) of the UN Convention on the Elimination of All Forms of Racial Discrimination stipulates that:

> Nothing in [the] Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality.

The Explanatory Report of the European Convention on Nationality goes even further, clarifying that the preferential treatment on the basis of ethnic and other grounds does not amount to discrimination:

> However, the very nature of the attribution of nationality requires States to fix certain criteria to determine their own nationals. These criteria could result, in given cases, in more preferential treatment in the field of nationality. Common examples of justified grounds for differentiation or preferential treatment are the requirement of knowledge of the national language in order to be naturalised and the facilitated acquisition of nationality due to descent or place of birth. The

[210] Article 5, International Convention on the Elimination of All Forms of Racial Discrimination, UNGA Res 2106 (XX) (21 December 1965).

> Convention itself, under Article 6, paragraph 4, provides for the facilitation of the acquisition of nationality in certain cases.
>
> States Parties can give more favourable treatment to nationals of certain other States. For example, a member State of the European Union can require a shorter period of habitual residence for naturalisation of nationals of other European Union States than is required as a general rule. This would constitute preferential treatment on the basis of nationality and not discrimination on the ground of national origin.[211]

While other requirements have been also often discussed in the context of possible constraints to state sovereignty in the field of citizenship, none of them developed into binding international law which may affect states' competence in citizenship matters. In other words, international law can hardly influence citizenship criteria and preferences of states over their future citizens. The rules on avoiding statelessness could be cited as one possible exception to this, yet, their effectiveness is not always observable, while their meticulous implementation also results in depriving people of rights:[212] viewing the lack of citizenship as a problem, rather than a bad citizenship, this rules are by themselves problematic if scrutinised from the perspective of human rights: finding a UK-born child an ancestral Bangladeshi nationality and using it as a pretext to strip her of Britishness – a real example at play in *Shamima Begum* case[213] – is a clear example of the anti-rights gist of such norms.

The situation is not much different with the rules of EU law with regard to acquisition of citizenship. The competence is clearly with Member States and the EU case law preserves that, with the only exception of instances where it is necessary to ensure effective and uniform protection of rights of EU citizens.[214] Thus, the EU has normally interfered in nationality matters where Member States have enacted measures that restrict rights of EU citizens rather than where

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[211] Council of Europe, Explanatory Report to the European Convention on Nationality ETS No 166 (6 November 1997), paras 40 and 41.
[212] Katja J. Swider, *A Rigths-based Approach to Statelessness* (PhD thesis, UvA, University of Amsterdam, 2018).
[213] *See* in more detail Ayesha Riaz, 'Increasing the Powers of the Secretary of State for the Home Department to Strip Individuals of their British Citizenship: *R (on the application of Begum) v SSHD*' (2023) MLR 1-14.
[214] Daniel Sarmiento and Martijn van den Brink, 'EU Competence and Investor Migration' in Kochenov and Surak (eds), Citizenship and Residence Sales, 183-206.

such rights are to be enjoyed by new citizens as primarily attested to by the *Rottman* case.[215] Such interference of the Union might have contributed to more cautious approach by Member States in instances of stripping individuals of citizenship, even though EU law does not outlaw the practice, even in full knowledge of the fact that it is essentially racist, since in combination with international law on the prohibition of statelessness mostly Europeans coming from families with migration background are threatened by such rules – stripping white people of EU citizenship is thus much more difficult in practice that racialised Europeans.[216] That being said, however, the practice has shown that states are sceptical to any external influence on their national criteria for acquisition and loss of citizenship.

### 4.1 Hungary's preferences

In 2001, the Hungarian Parliament adopted the 'Act LXII of 2001 on Hungarians Living in Neighbouring Countries: Status Law' which provided a number of benefits to persons of Hungarian origin living in neighbouring countries and holding foreign nationality.[217] The Status Law provided for benefits in six major areas: culture and science; education; social security provisions and health services; travelling; employment; and public media and assistance to organisations operating abroad. In line with Article 1(1–2), the Status Law applied to: (1) persons declaring themselves to be of Hungarian nationality who are not Hungarian citizens and who have their residence in the Republic of Croatia, the Federal Republic of Yugoslavia, the Republic of Slovenia, the Slovak Republic or the Ukraine, and who a) have lost their Hungarian citizenship for reasons other than voluntary renunciation and b) are not in possession of a permit for permanent stay in Hungary; (2) the spouse living together with the person identified in paragraph (1) and to the children of minor age being raised in their common household even if these persons are not of Hungarian nationality.[218]

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[215] *See* e.g. *Rottman*, para. 60; *Gerardo Ruiz Zambrano* v *Office national de l'emploi (ONEm)*, ECLI:EU:C:2011:124, para. 45.
[216] Kochenov and de Groot, 'Helpful, Convoluted, and Ignorant in Principle'; Katja Swider, 'Legitimising Precarity of EU Citizenship: *Tjebbes*' (2020) 57 *CMLRev* 1163-1182; Dimitry Kochenov, 'The *Tjebbes* Fail' (2019) 4 *European Papers* 319-336.
[217] Act LXII of 2001 on Hungarians Living in Neighbouring Countries: Status Law (adopted on 19 June 2001, entered into force on 1 January 2002) 40 ILM 1242 (*Status Law*). For more detail on the Status Law, *see* Sergiu Constantin, 'The Hungarian "Status Law" on Hungarians Living in Neighboring Countries' (2001) 1(2) Eur.YB Minority Issues, 593-622. As summarized by Marten Breuer, 'The Act on Hungarians Living in Neighbouring Countries Challenging Hungary's Obligations under Public International Law and European Community Law' (2002) 2 Zeitschrift für Europarechtliche Studien, 255-297, 262,
[218] Act LXII of 2001on Hungarians living in neighbouring countries (adopted 19 June 2001).

On 21 June 2001, Adrian Năstase, the Romanian Prime Minister as he then was, required the Venice Commission to examine the compatibility of the Status Law with the 'European standards and the norms and principles of contemporary public international law'.[219] Soon after, the Hungarian government requested the Venice Commission to carry out a comparative study with respect to the ongoing European legislative trends concerning the preferential treatment of national minorities living outside the borders of their countries of citizenship. The aim of the study was to establish whether such treatment is compatible with the standards of the Council of Europe (CoE) and with the principles of international law.

The Report of the Venice Commission[220] clarified important aspects regarding the status of kin minorities[221] in interstate relations, which were then restated in the Bolzano Recommendations[222] and closely followed by the EU. The two documents provide a fairly clear explanation as to the treatment of national minorities.[223] In particular, the Venice Commission made it unambiguously clear that the respect for and the protection of the rights of minorities is primarily a function of the home state.[224] As also clearly outlined in a statement of the OSCE HCNM:

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[219] The European Commission for Democracy Though Law, 'Report on the Preferential Treatment of National Minorities by Their Kin-State', adopted by the Venice Commission at its 48th Plenary Commission (19–20 October, 2001, Venice), (Report of the Venice Commission).
[220] Report of the Venice Commission.
[221] The concept 'kin' is a contested one and lacks scientific or legal definition, as clearly noted by the OSCE HCNM in the introductory part of the The 'Bolzano/Bozen Recommendations on National Minorities in Inter-State Relations' (Bolzano Recommendations) of the OSCE High Commissioner on National Minorities (June, 2008), <https://www.osce.org/hcnm/bolzano-bozen-recommendations> accessed 11 November 2023 (Bolzano Recommendations). As pointed out by Francesco Palermo, 'National Minorities in Inter-State Relations: Filling the Legal Vacuum?' in Francesco Palermo and Natalie Sabanadze (eds), *National Minorities in Inter-State Relations* (Martinus Nijhoff, Leiden 2011) 3–27, 5, it remains uncertain whether a common history, culture or language are sufficient elements for 'kinship' where the ethnic link is missing, highlighting that some states define kinship 'in terms of blood ties and common ancestry, other in terms of a common culture, language or history or former citizenship'. Notwithstanding this, it is widely accepted that the term 'kin state' is used for a state which has a national minority living in another country (home-state), while a person belonging to a 'kin-minority' refers to a citizen of the home state with the ethnic origin of a kin-state: *see* in this respect the Report of the Venice Commission.
[222] Bolzano Recommendations.
[223] The Bolzano Recommendations use the term 'national minorities' to include 'religious, linguistic and cultural as well as ethnic minorities, regardless of whether these groups are recognized as such by the States where they reside and irrespective of the denomination under which they are recognized'.
[224] Section A, para.2 of the Report of the Venice Commission notes that 'the pertinent international agreements entrust home-States with the task of securing to everybody within their jurisdiction the enjoyment of fundamental human rights, including minority rights', concluding firmly at the end (section E, para.1) that '[r]esponsibility for minority protection lies primarily with the home-States'. The same acknowledgments are found in the *OSCE HCNM Statement* and amongst the general principles summarised in the Bolzano Recommendations which assert that the obligation for protection of minorities results from sovereignty of states.

> [p]rotection of minority rights is the obligation of the State where the minority resides. History shows that when States take unilateral steps on the basis of national kinship to protect national minorities living outside of the jurisdiction of the State, this sometimes leads to tensions and frictions, even violent conflict.[225]

In the view of the Venice Commission, the adoption of unilateral measures by states granting benefits to kin minorities which 'does not have sufficient *diuturnitas* to have become international custom'[226] is legitimate if a number of principles are respected: the principle of the territorial sovereignty of states, *pacta sunt servanda*, friendly interstate relations and respect for human rights and in particular the prohibition of discrimination.[227] National state legislation must be based on the above four principles. Yet, the adoption of legislation which addresses foreign citizens does not necessarily infringe the principle of territorial sovereignty. This is particularly true when 'the effects of these laws or regulations are to take place within its borders only'.[228]

In contrast, the legitimacy of a state's measures that are capable of impacting on foreign citizens in other countries was viewed by the Venice Commission as less straightforward. In cases where the legislation adopted can have effects in other states, '[i]t is not conceivable, in fact, that the home-State of the individuals concerned should not have a word to say on the matter'.[229] Exceptionally, a state may legitimately exercise jurisdiction over such persons in another state if it gets consent for its actions from the home country or if its actions are in fields where an international custom exists, such as education and culture, in which case the consent of the home country is presumed.[230] Areas which have been demonstrably pre-empted by bilateral treaties should not be touched upon by the unilateral measures on preferential treatment of kin-minorities 'without the express consent or the implicit but unambiguous acceptance of the home-State'.[231] If disputes arise regarding the interpretation or implementation of these

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[225] Rolf Ekéus, OSCE HCNM, 'Sovereignty, Responsibility, and National Minorities: Statement by OSCE Minorities Commissioner' (26 October 2001, The Hague). The statement is available at: <https://www.osce.org/hcnm/53936> accessed 7 February 2024.
[225] Section I, Bolzano Recommendations.
[226] Section E Report of the Venice Commission.
[227] Section E Report of the Venice Commission.
[228] Section D(a)(i) Report of the Venice Commission.
[229] Section D(a)(i) Report of the Venice Commission.
[230] Section D(a)(i) Report of the Venice Commission.
[231] Section E Report of the Venice Commission.

agreements, unilateral measures can be only taken by the kin-state after all existing procedures which have been applied in good faith have proved ineffective.[232]

In the view of the Venice Commission, kin-states should consult with home states over the issuance of documents able to create a political bond with their kin minorities. In particular, the Bolzano Recommendations consider the practice of conferring citizenship *en masse* even where the state of residence allows for dual citizenship.[233] Such practice 'could fuel separatist tendencies and have a weakening or fragmenting effect in the States where the foreigners reside, violates the principles of sovereignty and friendly relations between states'.[234] Therefore, while recognising the fact that the conferral of citizenship falls generally under the domestic jurisdiction of individual states and that the same can be based on linguistic competences, cultural, historical or family ties, the Bolzano Recommendations emphasise that this issue can be highly sensitive when it involves persons residing abroad.

The Venice Commission further emphasised that states are bound to respect human rights and fundamental freedoms in general, and the principle of non-discrimination in particular, as embodied in the international agreements to which they are parties. In particular, in accordance with the ECHR, states need to secure non-discriminatory enjoyment of the protected rights to everyone on their territory and are also accountable for their acts with extraterritorial effect.[235] Different treatment of persons in similar situations is always prohibited under the principles of international law, except where it is reasonably justified and the measures taken are proportionate to a legitimate aim.[236] In that context, the Venice Commission distinguished between benefits related to education and culture and other benefits granted by the kin-state. It has established that the differential treatment engendered by benefits in the field of education and culture can be justified by the legitimate aim of fostering cultural links between the kin minority and the kin state, in which case the benefits granted must be genuinely linked to the culture of the state and to be proportionate to the legitimate aim pursued.[237] In other areas, where it can be shown that the preferential treatment is genuinely aimed to maintaining links between

[232] Section E Report of the Venice Commission.
[233] Recommendation 11 Bolzano Recommendations.
[234] Explanation to Recommendation 10 Bolzano Recommendations.
[235] Section D(d) Report of the Venice Commission.
[236] Section D(d) Report of the Venice Commission.
[237] Section D(d) Report of the Venice Commission.

kin minorities and the kin state and that this is proportionate to the aim, preferential treatment can only exceptionally be allowed.[238]

The EU followed the conclusions of the Venice Commission closely in its approach to the protection of kin minorities.[239] In its assessment of the compatibility of the Status Law with the *acquis*, the European Commission concluded that the contested Act ran contrary to the principle of non-discrimination embodied in the EU Treaties.[240] Subsequently, the Status Law was amended in line with the conclusions of the Venice Commission and of the Union shortly after its enactment.[241]

However, the implementation of the amended Status Law did not resolve all the issues between neighbouring states. In particular, the Status Law did not resolve the main concern with regard to the acceptance of the Schengen requirements, which impinged upon and threatened to sever the ties between the Hungarian minorities and their homeland. The problem was particularly acute for Hungarian minorities living in non-EU countries or countries which were not as near to EU accession. [242] As a result, a discussion has started in Hungary about the possibility of granting a dual Hungarian citizenship to ethnic Hungarians living in neighbouring countries. This initiative,

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[238] Section D(d) Report of the Venice Commission.
[239] The EU published its opinion on the Status Law because its relations with Hungary at that time were governed by the 'Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Hungary, of the other part', OJ L347, 31 December 1993, 2. After the adoption of the Status Law and in the course of the accession negotiations with Hungary, the European Parliament called upon the European Commission to evaluate its compatibility with the *acquis* and with the 'spirit of good neighbourhood and cooperation amongst states' – *see* European Parliament Resolution on Hungary's application for membership of the European Union and the state of negotiations, COM (2000) 705 – C5–0605/2000 – 1997/2175 (COS).
[240] Commission of the European Communities, '2001 Regular Report on Hungary's Progress Towards Accession', SEC (2001)1748 (Brussels, 13 November 2001) 91.
[241] Hungary negotiated modifications of the Status Law with Romania and later on with Slovakia. For a number of changes regarding the implementation of the Status Law, *see e.g.* Myra A Waterbury, *Between State and Nation: Diaspora Politics and Kin-state Nationalism in Hungary* (Palgrave Macmillan, NY 2010) 113–114. *See* also Dagmar Kusá, 'The Slovak Questions and the Slovak Answer: Citizenship During the Quest for National Self-Determination and After' in Rainer Bauböck et al. (eds), *Citizenship Policies in the New Europe: Expanded and Updated Edition* (Amsterdam UP, Amsterdam 2009) 275–303, 290. According to some authors, *e.g.* Sasse Gwendolyn, 'National Minorities and EU Enlargement: External or Domestic Incentives for Accommodation' in John McGarry and Michael Keating (eds), *European Integration and the Nationalities Questions* (Routledge, Oxon 2006) 64–84,78, the amendments introduced by the Romanian-Hungarian Agreement of 2003 and with the Slovak-Hungarian Agreement of 2003, introduced significant changes, 'effectively reduc[ing] the original law to a mutual declaration of support for cultural and linguistic activities for the Hungarians in Romania and Slovakia and the Romanians and Slovaks in Hungary'.
[242] As described by Myra A Waterbury, *Between State and Nation: Diaspora Politics and Kin-state Nationalism in Hungary* (Palgrave Macmillan, NY 2010) 96, '[i]n the diaspora communities a "Schengen panic" arose, bringing fears of a "different kind of Iron Curtain" that would cut off ethnic Hungarians in Romania, former Yugoslavia, and the Ukraine from the homeland' (footnotes omitted).

however, failed to pass at a referendum held on 5 December 2004, due to the low voter turnout (37.5 %).[243] On 26 May 2010, changes to the Hungarian Citizenship Law were adopted, which allowed for ethnic Hungarians living in other states to gain Hungarian citizenship.[244] Reportedly, 1.1 million people have become Hungarian citizens on the basis of the new citizenship law.[245]

In response to the Hungarian Citizenship Law, Slovakia amended its citizenship law to remove the option of dual citizenship possibility for Slovak citizens who voluntarily acquire citizenship from another country.[246] Such measure, as pointed out by José-María Arraiza, is problematic,

> The measure, in itself considerably harmful and anachronistic, was controversial as it countered a European trend towards toleration of dual nationality and potentially hindered integration of ethnic Hungarians in the Slovak Republic by disenfranchising them from political participation and other rights in their own home state.[247]

Indeed, the draconian measure introduced by Slovakia, which threatened to strip thousands of EU citizens of their citizenship undermines the whole rationale of cooperation and solidarity underlying the EU integration project, even if Hungary failed to consult with its neighbour about the amendments in its citizenship law intended *inter alia* to its kin-minorities living in the country. Slovak citizens who could show a 'real link' to another country, such as permanent residence or family ties, were later exempted from these rules,[248] and so are, from more recently,

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[243] *See* in this respect Kusá, 'The Slovak Questions and the Slovak Answer', 302.
[244] For more details *see* Judit Tóth, 'Changes to the Hungarian Citizenship Law July 2010', available at: <https://cadmus.eui.eu/bitstream/handle/1814/19616/Hungary.pdf?sequence=1> accessed 11 November 2023. *See* also Andras Bozoki, 'Access to Electoral Rights: Hungary', available at: <https://cadmus.eui.eu/handle/1814/29814> accessed 11 November 2023.
[245] *See* 'Gulyás: Government bears responsibility for each and every Hungarian' *News in Brief* (13 March 2023), available at: <https://abouthungary.hu/news-in-brief/gulyas-government-bears-responsibility-for-each-and-every-hungarian> accessed 11 November 2023.
[246] *See* Act no. 40/1993 Coll. on Nationality of the Slovak Republic, as amended.
[247] Arraiza, 'Good Neighbourliness as a Limit to Extraterritorial Citizenship', 116.
[248] *see* 'New rules lead few to seek dual citizenship' *The Slovak Spectator* (27 June 2011), <http://spectator.sme.sk/articles/view/43104/2/new_rules_lead_ few_to_seek_dual_citizenship.html> accessed 11 November 2023. In *István Fehér and Erzsébet Dolník* v *Slovakia*, App. Nos 14927/12 and 30415/12 (ECtHR, 21 May 2013), the ECtHR found that the Slovak law providing for loss of Slovak citizenship upon acquiring a citizenship from another country does not amount to a violation of human rights *ipso facto*. The effects of the Slovak law, however, which was, first and foremost, introduced in response to the Hungarian law on dual citizenship, has affected Hungarian minorities in Slovakia much less than other citizens.

Slovak citizens who live abroad when acquiring foreign citizenship.[249] Moreover, the recent amendments to the Slovak Citizenship Act paved the way for descendants of Slovaks abroad to apply for Slovak citizenship – a practice not much different to that of Hungary.[250]

Indeed, in the citizenship world, Hungarian approach is not an exception but the rule in giving preferential treatment to Hungarian kin-minorities. Other European countries have adopted the same practice.[251] While such practice is perfectly legal, it may certainly create or aggravate tensions between states, as in the case of Hungary and Slovakia. As observed by Kusá regarding the relations between Hungary and Slovakia, the main problem was not in the law itself, but in Slovak suspicion at Hungary's 'attempts to recreate the Hungary of the times of the Hungarian kingdom on a psychological level, and of lurking historic revisionism among the Hungarian minorities themselves'.[252] It is not the 'illiberal' Hungary, thus, which was in breach, but the (then) 'liberal' Slovakia.

### 4.2 Deprivation of UK citizenship is back

Unlike Hungary and other countries with developed kin-citizenship practices, the UK has adopted rather restrictive criteria for acquisition of citizenship by descent as British citizenship is not passed down to multiple generations born abroad. Moreover, the colonial history of the UK is marked by differentiation in rights of citizens and holders of various forms of statuses. The British subject status, for instance, comes with no rights in the UK.[253] Other UK-issued statuses offer various possibilities[254] – from little or no rights whatsoever to full rights in the UK. Thus, British Nationals (Overseas),[255] British overseas citizens[256] and British Protected Persons[257] have no automatic right to settle or work in the UK and were also not considered EU citizens while the UK

[249] See in greater detail Veronika Michalíková, 'Acquisition of citizenship of another state without losing Slovak citizenship (dual citizenship)', available at: <https://www.akmv.sk/en/acquisition-of-slovak-citizenship-by-descendants-and-other-changes-and-amendments/> accessed 11 November 2023.
[250] Michalíková, 'Acquisition of citizenship'.
[251] *See* Pogonyi, 'Europeanization of Kin-Citizenship' 244.
[252] Kusá, 'The Slovak Questions and the Slovak Answer', 200.
[253] *See* the official website of the British Government available at: <www.gov.uk/types-of-british-nationality/british-subject> accessed 11 November 2023.
[254] For comprehensive overview, *see* Kochenov and Lindeboom (eds), *Kälin and Kochenov's Quality of Nationality Index*.
[255] *See* the official website of the British Government available at: <www.gov.uk/types-of-british-nationality/british-national-overseas> accessed 11 November 2023.
[256] *See* the official website of the British Government available at: <https://www.gov.uk/types-of-british-nationality/british-overseas-citizen> accessed 11 November 2023.
[257] *See* the official website of the British Government available at: <www.gov.uk/types-of-british-nationality/british-protected-person> accessed 11 November 2023.

was still an EU Member State.[258] In general, the same holds for the British Overseas Territories (BOT) citizens except for Gibraltarians who were EU citizens with full rights in the UK through their BOT citizenship since the accession of the UK to the EU until its exit, and Falkland Islanders who are full British citizens since the British Nationality (Falkland Islands) Act 1983.[259]

Other BOT citizens, except for BOT citizens by virtue only of a connection with the Sovereign Base Areas of Akrotiri and Dhekelia,[260] can in principle register also as UK citizens.[261] That said, BOT citizens do not have an automatic right of abode in BOTs or anywhere else in the world. A separate 'belonger status' on each respective island has to be acquired. Put differently, citizenship does not equal a 'belonger status' of an overseas territory and comes *per se* without a right to settle and work even on the island issuing the passport. Such status is in most BOTs in accordance with the local legislation with 'belongers' generally falling into two categories: belongers by operation of law being regarded as such due to their indigenousness and belongers who have acquired the status through a legal procedure.[262]

The varieties of British citizenship come also with different packages of rights. Thus, while the UK was still part of the EU, British citizenship acquired in connection with the Channel Islands and the Isle of Man did not provide for unconditional right of settlement and work in other EU Member

[258] *See* Gina Clayton et al., Textbook on Immigration and Asylum Law (5th ed., Oxford University Press 2012) 63–94. See also Andrew C Evans, 'Nationality Law and the Free Movement of Persons in the EEC: With Special Reference to the British Nationality Act 1981' (1982) 2 Yearbook of European Law 174; Dirk F Edens and Schelto Patijn, 'The Scope of the EEC System of Free Movement of Workers' (1972) 9 Common Market Law Review 322-328; In C-192/99 *The Queen* v *Secretary of State for the Home Department*, *ex parte: Manjit Kaur, intervener: Justice* ECLI:EU:C:2001:106, the ECJ reconfirmed that it was for Member States, having due regard to EU law, to determine who their citizens are (para. 19). The unilateral declaration of the UK must be taken into account 'for determining the scope of the Treaty ratione personae' (para 24).
[259] British Nationality (Falkland Islands) Act 1983 (1983 c. 6).
[260] The British Overseas Territories Bill, available at: <https://publications.parliament.uk/pa/cm200102/cmbills/040/2002040.pdf> accessed 11 November 2023. *See* also 'Automatic Acquisition: BOTC' (Brochure, Home Office Staff UK), available at: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/633075/automatic-acquisition-BOTC-v1.0.pdf> accessed 11 November 2023.
[261] 'Automatic Acquisition: BOTC'.
[262] For detailed analysis of BOTs law, *see* Ian Hendry and Susan Dickson, *British Overseas Territories Law* (2nd edn., Hart Publishing, Oxford 2018).

States[263] but the UK before the holder of such status had spent five years in the UK.[264] Other examples include the Overseas Countries and Territories (OCTs) which have special relations with the UK and were not associated with the EU.[265]

Moreover, there is a substantial difference between British citizens who only hold or have access to one (British) citizenship and those citizens who hold or have access to more than one nationality. British dual citizens or citizens who have access to second citizenship can be stripped of their citizenship for a number of reasons. Contrary to that, British citizens who hold or have access to one citizenship cannot lose their citizenship. Such difference in rights affects primarily citizens with other ethnic background than British.[266] It is a direct outcome of the human rights-blind approach to statelessness adopted in international law, as masterfully explained by Katja Swider.[267]

The British Nationality Act 1981 – an amended version of which is currently in force – provided for revoking citizenship from naturalised citizens for disloyalty or assisting an enemy in war. In 2002, i.e. following the 9/11 terrorist attack, grounds of disloyalty were replaced by actions of citizens that are 'seriously prejudicial to vital interests of the United Kingdom or a British Overseas territory',[268] while deprivation was extended to citizens by birth providing that such deprivation does not lead to statelessness. At the same time, however, the right to appeal a citizenship

[263] The status of Jersey, Guernsey and the Isle of Man vis-à-vis the EU is governed by Article 299(6)(c) of the Treaty establishing the European Economic Community and Protocol 3 of the United Kingdom's Act of Accession to the same EEC in 1972. Today, these three SNIJs are not members of the EU, but are part of the EU customs territory; and so, common customs tariffs, levies and other agricultural import measures apply to trade between these islands and non-EU member countries. There is free movement of industrial and agricultural products between the three SNIJs and the EU; but no free movement of services, capital or persons. Such a customized, à la carte relationship is quite unique within the EU. See in greater detail Kenneth R Simmonds, 'The British Islands and the Community: III' (Guernsey) (1971) 8(4) CMLRew 475, 480–482; Kenneth R Simmonds, 'The British Islands and the Community: II (The Isle of Man)' (1970) 7(4) CMLRev 454-465, 462–463; Kenneth R Simmonds, 'The British Islands and the Community: II' (Jersey) (1969) 6(2) Common Market Law Review 156-169, 167–169. See also Dimitry Kochenov, 'A Summary of Contradictions: An Outline of the EU's Main Internal and External Approaches to Ethnic Minority Protection' (2008) 31 Boston College International and Competition Law Review 1-51, 15–18, including the literature and the case law cited.

[264] Article 6, Protocol No 3, 1972 Act of Accession [1972] OJ L 73/164.

[265] Article 355(2) of the TFEU provides for special arrangements for association set out in Part IV TFEU to apply to the OCTs listed in Annex II. For a detailed analysis and also with regard to the legal history, *see* Dimitry Kochenov, 'The Application of EU Law in the EU's Overseas Regions, Countries, and Territories after the Entry into Force of the Treaty of Lisbon' (2012) 20(3) Michigan State International Law Review 669–743.

[266] *See* primarily, Frances Webber, The racialisation of British citizenship, 64(2) Race & Class 75-93.

[267] Katja Swider, 'A Rights-based Approach to Statelessness', Doctoral Thesis (Universiteit van Amsterdam, 2018)

[268] Nationality, Immigration and Asylum Act 2002, c. 41, s. 40.

deprivation order was introduced.[269] In 2004 already, the suspensive right of appeal has been removed, which made deprivation order immediately effective even for individuals staying abroad at the time,[270] and allowing concurrent deportation of the (then) deprived third-country national. The next toughening of the Act 2005 followed the London bombings, even though the proposal was introduced before the attacks. Thus, in 2006 the threshold for deprivation lowered to 'conducive to the public good'[271] In 2014, the law was amended in response to the *Al-Jedda* case – where the decision of the Secretary of State to deprive an Iraqi refugee of British citizenship, rendering him stateless, was successfully challenged,[272] – to allow deprivation of naturalised citizens where they acted in a manner 'seriously prejudicial to the vital interests of the UK'[273] even if deprivation would make the citizen stateless if there are 'reasonable grounds' to believe that the person can become a citizen of another country, i.e. has access to another citizenship.[274] Finally, the 2021 Nationality and Borders Bill[275] further weakened the rights of those to be deprived of citizenship by allowing deprivation without notification.[276]

As observed by Amal de Chickera, the British citizenship law as it stands creates different tiers of citizenship and categories of citizens. The top tier, to which British-born citizens with no other nationality or access to such nationality belong, is most secure as citizens cannot be deprived of their citizenship under any circumstances. The next tier – to which British born or naturalised citizens, who also have another nationality belong – is less secure as citizens of that tier may be stripped of citizenship if such measure is 'conductive to public' but does not leave former British citizens stateless. Finally, the last tier – to which naturalised British citizens with no other nationality belong – is the least secure as stripping of citizens may leave the affected person stateless. Such distinction puts the citizens of the second and the third tier in a subordinate position making them effectively second or third class citizens contrary to the principle of non-

[269] Nationality, Immigration and Asylum Act 2002, c. 41, s. 40 A(6).
[270] Alice K Ross and Patrick Galey, 'Rise in citizenship-stripping as government cracks down on UK fighters in Syria', available at: <https://www.thebureauinvestigates.com/stories/2013-12-23/rise-in-citizenship-stripping-as-government-cracks-down-on-uk-fighters-in-syria> accessed 11 November 2023.
[271] Nationality, Immigration and Asylum Act 2006, c. 13, s. 56.
[272] *See* in greater detail Grace Capel, 'Case Comment: Al Jedda v SSHD [2013] UKSC 62' (17 December 2013), available at: <http://ukscblog.com/case-comment-al-jedda-v-sshd-2013-uksc-62/> accessed 11 November 2023.
[273] Immigration Act 2014, c. 22, s. 66.
[274] *See*, however, C3, C4, C7 v Secretary of State for the Home Department; and E3 & Ors v Secretary of State for the Home Department [2022] EWHC 1133 (Admin) (13 May 2022) (26 May 2022).
[275] As rightly noted by Consterdine, 'The government passed a major immigration law last year', the Illegal Immigration Act makes much of the Nationality and Borders Act redundant.
[276] *See R (D4)* v *Secretary of State for the Home Department* [2022] EWCA Civ 33 (26 January 2022).

discrimination among citizens.[277] Indeed, to agree with Philip Hensher, '[t]here cannot be different grades of Britishness in the eyes of the law. You are either British, or you are not'.[278]

The number of citizenship deprivations has significantly increased in the last eighteen years. While the last time known deprivation of citizenship happened before 2006 was in 1973, from 2006 until 2020, there were at least 464 deprivations,[279] while from 2010 until 2022 over 1000 citizenship deprivation orders were made.[280] In 2013, the Home Office adopted the position that '[c]itizenship is a privilege, not a right'.[281] Such position, however, is problematic as citizenship is indeed a human right protected by international legal instruments to which the UK is party.[282] Furthermore, deprivation of citizenship has been equated to avoiding responsibility for prosecuting criminals. As noted by the Australian Institute of International Affairs, 'when countries act to block the return of their criminals they are effectively engaging in illegal dumping on their neighbour's property'.[283] The practice takes different forms in different legal systems from an absolute prohibition in the US and France to a permissive approach in the UK.[284] In such case, '[o]ne state's authority to deem the bad citizen a non-citizen presupposes another state lacking

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[277] Amal de Chickera, 'Patel's citizenship-stripping bill would accelerate UK race to the bottom' (26 November 2021), available at: <https://www.opendemocracy.net/en/opendemocracyuk/patels-citizenship-stripping-bill-would-accelerate-uk-race-to-the-bottom/> accessed 11 November 2023.
[278] Philip Hensher, 'It's wrong to strip Abu Hamza of his citizenship', *Independent* (3 April 2003), available at: < https://www.independent.co.uk/voices/commentators/philip-hensher/it-s-wrong-to-strip-abu-hamza-of-his-citizenship-113481.html> accessed 11 November 2023.
[279] Luuk van der Baaren et al., 'Instrumentalising Citizenship in the Fight Against Terrorism', Institute on Statelessness and Inclusion and Global Citizenship Observatory (March 2022), 10, available at: <https://files.institutesi.org/Instrumentalising_Citizenship_Global_Trends_Report.pdf> accessed 11 November 2023; *see* also CJ McKinney, 'How many people have been stripped of their British citizenship?', available at: <https://freemovement.org.uk/how-many-people-have-been-stripped-of-their-british-citizenship-home-office-deprivation/> accessed 11 November 2013.
[280] UK Parliament, 'Deprivation of British citizenship and withdrawal of passports' (Briefing), available at: < https://commonslibrary.parliament.uk/research-briefings/sn06820/> accessed 11 November 2023.
[281] Immigration Minister Mark Harper has been quoted saying: '"Citizenship is a privilege, not a right. These proposals will strengthen the Home Secretary's powers to ensure that very dangerous individuals can be excluded if it is in the public interest to do so': 'Immigration Bill Fact Sheet: Deprivation of Citizenship (clause 60)' available at: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/277578/Factsheet_15_Deprivation.pdf> accessed 11 November 2023.
[282] Numerous international instruments recognise the right to nationality, *see* the official UN website on 'International standards relating to nationality and statelessness OHCHR and the right to a nationality', available at: <https://www.ohchr.org/en/nationality-and-statelessness/international-standards-relating-nationality-and-statelessness> accessed 11 November 2023.
[283] David Malet, 'ISIS Foreign Fighters: Keep Your Enemies Closer', available at: <https://www.internationalaffairs.org.au/australianoutlook/isis-foreign-fighters-keep-enemies-closer/> accessed 11 November 2023.
[284] Peter J. Spiro, 'Expatriating Terrorists' (2014) 82(5) FLR 2169-2187; Weil, *The Sovereign Citizen*.

that same authority'.[285] Thus, Canada expressed its disappointment in UK's decision to strip a dual (British and Canadian) citizen of his British citizenship: 'Terrorism knows no borders, so countries need to work together to keep each other safe (…) Canada is disappointed that the United Kingdom has taken this unilateral action to offload their responsibilities'.[286] The US government found citizenship deprivation to be 'a dangerous denial of responsibility for your own nationals'.[287] It is notable in this context that also on this issue the liberal-illiberal divide seems to play no role: while some dictatorships with as Uruguay or the USSR would practice banishment, so do liberal democracies, like the UK. In fact, the UK with its instrumental racist approach to citizenship throughout the 20th century is probably among the global leaders on this count, stripping of citizenship hundreds of thousands of 'non-patrial' (i.e. non-white[288]) Brits during the long fall of the Empire.[289]

That being said, stripping terror suspects of citizenship is not necessarily infringing the guaranteed human rights of the affected individual. Thus, in *K2* v *United Kingdom*, ECtHR decided that the UK was entitled to strip a dual citizen of UK citizenship on suspicion that he took part in terrorism-related activities in Somalia.[290] The applicant complained to the ECtHR under Articles 8 (right to respect for private and family life) and 14 (prohibition of discrimination) of the European Convention on Human Rights. ECtHR found the applicant's complaints manifestly ill-founded and declared the application inadmissible.

The Court addressed two issues: whether the revocation was arbitrary and what were the consequences for the applicant. With regard to the first issue, ECtHR concluded that 'the decision to deprive the applicant of his citizenship was anything other than "in accordance with the law"',[291] the State Secretary acted 'diligently and swiftly in deciding to deprive the applicant of his citizenship',[292] and the procedural safeguards were adequate notwithstanding the fact that it was

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[285] Audrey Macklin, 'The Return of Banishment: Do the New Denationalisation Policies Weaken Citizenship?,' in Rainer Bauböck (eds), *Debating Transformations of National Citizenship* (Springer, Cham 2018) 163-172.
[286] *See* 'Canada 'disappointed' after U.K. reportedly strips Jihadi Jack of citizenship' *CBC News* (18 August 2019), available at: <https://www.cbc.ca/news/world/jihadi-jack-citizenship-uk-canada-1.5251437> accessed 11 November 2023.
[287] Haroon Siddique, 'New bill quietly gives powers to remove British citizenship without notice' *The Guardian* (17 November 2021), available at: <https://www.theguardian.com/politics/2021/nov/17/new-bill-quietly-gives-powers-to-remove-british-citizenship-without-notice> accessed 11 November 2023.
[288] East African Asians (British protected persons) v The United Kingdom, App. Nos. 4715/70, 4783/71, 4827/71 (ECtHR, Commission (Plenary) - Decision - 6 March 1978).
[289] Lord Anthony Lester, 'Thirty Years on: The East African Case Revisited' (2002) 47 Public Law 52.
[290] *K2* v *the United Kingdom*, App. No. 42387/13 (ECtHR, 7 February 2017).
[291] *K2* v *the United Kingdom*, para 52.
[292] *K2* v *the United Kingdom*, para 53.

an out of country appeal.[293] While noting that the standard of 'arbitrariness' must be applied in assessing the decision to deprive the applicant of his citizenship, ECtHR also stressed that '[it] does not accept that an out-of-country appeal necessarily renders a decision to revoke citizenship "arbitrary" within the meaning of Article 8 of the Convention'.[294] Accepting that in some instances revocation of citizenship may raise issues under Article 8 ECHR, the Court further noted that 'Article 8 cannot be interpreted so as to impose a positive obligation on Contracting States to facilitate the return of every person deprived of citizenship while outside the jurisdiction in order to pursue an appeal against that decision'.[295]

The applicant also complained that he has been discriminated compared to British citizens with no second nationality, who have been considered a threat to national security and non-national residents alike. With regard to the alleged difference with British citizens with no second nationality, the ECtHR rejected the claim for failure to exhaust domestic remedies. With regard to the alleged difference with non-national residents, the ECtHR noted that '[a] non-national resident who had his leave to remain cancelled while out of the country would also not be permitted to return for the purposes of an appeal'.[296] In other words, depriving an individual of his citizenship when he is outside of the country and not allowing him to return for the appeal process does necessarily infringe the rights of the affected individual where the deprivation of citizenship is not arbitrary, i.e. where the process has been conducted in accordance with the law, where the authorities acted diligently and swiftly and the procedural safeguards were adequate.

*K2* v *United Kingdom* is not an exception to the practice of revoking citizenship in absentia.[297] In the case of *Shamima Begum*, the UK Supreme Court went even further to conclude that the right to a fair hearing does not prevail over the requirements of national security: 'the Court of Appeal mistakenly believed that, when an individual's right to have a fair hearing of an appeal came into conflict with the requirements of national security, her right to a fair hearing must prevail'.[298] With regard to the inability of Ms Begum to take part in her case from within the camp in Syria where she stays, the Court went on to suggest that the case should be paused 'until Ms Begum is in a position to play an effective part in it without the safety of the public being

[293] *K2* v *the United Kingdom*, paras 54-60.
[294] *K2* v *the United Kingdom*, para 57.
[295] *K2* v *the United Kingdom*, para 57.
[296] *K2* v *the United Kingdom*, para 71.
[297] *See* Riaz, 'Increasing the Powers of the Secretary of State'.
[298] *R (on the application of Begum) (Appellant)* v *Special Immigration Appeals Commission (Respondent)* [2021] UKSC 7 (26 February 2021), para. 135.

compromised'.[299] While security considerations certainly justify the caution of the Court, its approach towards the right to a fair hearing raised concerns among experts with regard to the compliance of the country with its obligations under the 1961 Statelessness Convention, which provides for fair hearing by a court or another independent body in the process of deprivation of citizenship.[300] Such concerns have been strengthened with the 2021 Nationality and Borders Bill provides for deprivation of citizenship without notification of the affected individual by the Secretary of States for the Home Department. Before the 2021 Nationality and Borders Bill there was an obligation to send a written notice to the affected individual before depriving him of his citizenship, even if an example of a deprivation without notification from that period is known.[301]

Last but not least, EU case-law has not been particularly impactful with regard to securing rights of British (and previously EU) citizens in the light of the (then) Member State's power of deprivation of citizenship. Indeed, '[n]either *Rottmann* nor – in particular – *Ruiz Zambrano* have been met with unalloyed enthusiasm at the national level'.[302] The issue has been discussed in UK courts. In *G1* v *SSHD*, the Court of Appeal rejected the *Rottmann* reasoning, noting that Member States have power to set up their conditions for acquisition and loss of citizenship as a matter of international law and commenting in that respect the following:

> 'Upon what principled basis, therefore, should the grant or withdrawal of State citizenship be qualified by an obligation to "have due regard" to the law of the European Union? It must somehow depend upon the fact that since the entry into force of the Maastricht Treaty in 1993 EU citizenship has been an incident of national citizenship, and "citizenship of the Union is intended to be the fundamental status of nationals of the Member States" (…)'.[303]

The Court of Appeal found the connection between the national and EU citizenship problematic stressing the 'parasitic' attachment of the latter which could not of itself give competence to the Union on acquisition or loss of citizenship or subject the matter to the jurisdiction of the Court of Justice.[304] The Court of Appeal, therefore, concluded that 'the *Rottmann* decision has to be read

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[299] *R (on the application of Begum) (Appellant)* v *Special Immigration Appeals Commission (Respondent)*, para. 135.
[300] Riaz, 'Increasing the Powers of the Secretary of State'.
[301] *See D4* v *Secretary of State for the Home Department*, [2021] EWHC 2179 (30 July 2021).
[302] Jo Shaw, 'Deprivation of Citizenship: Is There an Issue of EU Law?' in Bauböck (ed.), *Debating Transformations of National Citizenship*, 233-238, 236.
[303] *G1* v *Secretary of State for the Home Department* [2012] EWCA Civ 867 (4 July 2012), para. 38.
[304] *G1* v *Secretary of State for the Home Department*, para. 39.

and applied with a degree of caution'[305] and it cannot 'be applied so as to require that in a case such as this the adjudication of a decision to deprive an individual of citizenship must be conducted subject to any rules of law of the European Union'.[306]

## Conclusion

Migration and citizenship are sensitive and divisive issues which have been unsparingly used for political gains in national scenes in both liberal democracies and illiberal regimes as demonstrated in this paper. To agree with Ammanda Garrett, '[t]here has always been an intersection between populist politics and media discourse, and there is strong evidence that fear-based messages appear during important political and electoral markers, like elections, in liberal nations'.[307]

The European Union has played an important role in facilitating assaults on migrants' rights through its lawlessness law, where the so-called 'problem of many hands' helps Member States not willing to comply with national or international human rights standards in migration to escape any responsibility, which the EU, by its own law, is not facing anyway. This set-up resulted in a murderous system of powerful outsourcing of violence, where migrants suffer in the hands of EU agencies, foreign proxies and the Member States alike, but no one is responsible for torture, enslavement and the loss of lives. Such system is deeply racialized, as the absolute majority of the victims of citizenship in the world are not white. Eurowhiteness solidarity is the core of EU's DNA as no official protests are heard from the Member States' capitals of from London. The contrary is true: the Member States support the system financially and otherwise, in the belief that killings deter future arrivals. As we have seen, liberal and illiberal states alike are involved. Only the reaction from the institutions differ: while Hungarian border fences cause a rebuke from the Commission, a Lithuanian fence and deaths in front of it earn EU Commissioner a state decoration. Welcoming 6 million Ukrainians in an orderly and lawful fashion the EU still calls the arrival of 1.3 million Iraqis, Syrians and Afghanis, who were immediately placed outwith the law, a 'migration crisis'. It is not about 'liberal' or 'illiberal': it is about how to delude the responsibility of abusing someone's rights at the border and the skin colour and citizenship of the person

[305] *G1* v *Secretary of State for the Home Department*, para. 41.
[306] *See* also *Pham v Home Secretary* [2015] UKSC 19 (25 March 2015) with regard to proportionality.
[307] Garrett, 'The Refugee Crisis', references omitted.

concerned. The same is true for both countries we surveyed in both areas of interested to us: citizenship and migration.

The migration and citizenship policies of the UK show that the widespread opinion of liberal democracies as less restrictive than illiberal regimes is not necessarily correct. Indeed while both liberal democracies and illiberal regimes may prefer restrictive measures to reduce migration, the enactment of migration policies in liberal democracies is much more scrutinised than in illiberal regimes, the ECtHR injunction saw the first flight to Rwanda immediately cancelled, while the Court of Appeal ruled that the Rwanda asylum plan is unlawful. The UK government has strong record of complying with court judgments and decisions of judicial bodies. There lies the difference with illiberal regimes. Should the UK government, however, be successful in overturning the Supreme Court Judgment and preventing decision makers to provide legal insight on safety in Rwanda, liberalism in the country would be under grave threat.

Unlike the UK, the Hungarian government has not only failed to comply with CJEU judgments but openly admitted that it had no intention to do that in the future. Other EU Member States, have followed suit, although more quietly. All three Baltic States and Poland amended their laws to allow illegal pushbacks, Austria and Germany are already looking at the Rwanda-style asylum model, while Italy already adopted it, and Denmark passed a law to allow the processing asylum seekers applications in a country outside of Europe. Yet, the uniform regime for the EU external border control and the abolition of the internal borders has become an important aspect in the creation of mutual trust and solidarity between Member States.[308] This is in particular the case with the border checks performed by peripheral states as well as with the sharing of the financial and operational burden between all states.[309] Hungary's opposition to the EU migration reform could be viewed as jeopardising the achievements of the entire Union if not undermining the principles of loyal cooperation and solidarity through which the Union and its Member States work towards common vital interests.[310] Yet, given the EU's own track-record in migration until

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[308] In that sense, as noted by Dimitry Kochenov and Benedikt Pirker, 'Deporting the Citizens Within the European Union: A Counterintuitive Trend' (2013) 19(2) Colum.J.Eur.L., 341–362, 344, the deportation of EU citizens from one Member State to another does not make much sense – 'since the Union is not safer if a criminal is moved from one Member State to another'.

[309] Article 80 TFEU provides that 'the politics of the Union in the field of borders management, asylum and immigration (Articles 77 to 79) shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implication, between the member states such measures are necessary'.

[310] Sven Biscop (ed.), 'The Value of Power, the Power of Values: A Call for an EU Grand Strategy' (2009) Egmont Paper No 33, 16. The text clearly distinguishes between two terms: 'to have an interest' and 'being interested'. Notwithstanding the many overlapping vital interests, EU Member States can be certainly

now, including absolute lack of accountability and a swiftly growing death-toll, all based on the *solidarity* with the liberal as well as illiberal Member States, supporting the reform could actually result in lower protection of migrants' rights.

The citizenship policies of Hungary and the UK are yet another story of shaping citizenry through national needs and preferences. Hungary prefers Hungarians who live in other countries over migrants who live in the country and, therefore, allows them preferential treatment for acquisition of citizenship. The country added over one million citizens through naturalisation of Hungarians living in other countries. Legally speaking, there is nothing wrong with the kin-citizenship policy of Hungary although such policy has been characterised as potentially divisive – being seen by Slovaks as a nationalistic project of Hungary.[311]

Unlike Hungary, the UK has adopted restrictive citizenship criteria as British citizenship is not passed down to multiple generations born outside of the UK. The long colonial history of the country led to differentiation of rights of citizens and holders of various forms of statuses. Moreover, rules on deprivation of citizenship have created different tiers of citizenship and categories of citizens. The top tier is reserved for British-born citizens with no other nationality, who cannot be deprived of their citizenship under any circumstances. The second tier is reserved for British born or naturalised citizens, who also have another nationality who may be deprived of their UK citizenship if such measure is 'conductive to public'. The third tier is reserved for naturalised British citizens with no other nationality belong who may be deprived of their citizenship for the same reasons as the second group but in such case they would become stateless. While extreme times call for extreme measures and law offenders should unquestionably face justice, different treatment of citizens sends the wrong message of various levels of Britishness.

Liberalism or illiberalism is not the key distinction to understand what is going on at the boundaries of fortress Europe. Eurowhiteness solidarity applied to both types of regimes and is facilitated by supranational institutions and the law which help both liberal and illiberal Member States deprive racialized victims of citizenship of any rights and secure the climate of absolute lack of accountability at any level of the law, for the dozens of thousands of lives lost in the process.

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interested, to varying degrees, in different things. Thus, 'Belgium may be more interested in Central Africa and Poland in Ukraine, but objectively the stability of both is equally important to, and thus equally in the interest of both Brussels and Warsaw'.

[311] Kusá, 'The Slovak Questions and the Slovak Answer', 200.

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The **Centre on Migration, Policy and Society** (COMPAS)
**University of Oxford**
58 Banbury Road, Oxford, OX2 6QS
e: info@compas.ox.ac.uk