

IMMIGRATION AND ASYLUM LAW AND POLICY IN EUROPE

Aliens before the European Court of Human Rights

Ensuring Minimum Standards of
Human Rights Protection

Edited by David Moya and Georgios Milios

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Immigration and Asylum Law and Policy in Europe

Edited by

Elsbeth Guild
Valsamis Mitsilegas

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Preface

Europe has recently faced various challenges, which had a direct or indirect impact on migrants and refugees present or willing to enter to the European territory. The economic crisis, which started in 2008, had an important impact on decision-making in the field of migration in many European countries, whereas it also affected the dynamics and legislative procedures in international organisations such as the European Union. At the same time, many European countries experienced the rise of political parties with xenophobic rhetoric and legislation in various fields of migration took a restrictive turn in recent years. A similar situation at times also observed in the case law of domestic or international courts which interpreted several provisions of migration law in a controveering manner. The so-called refugee crisis of 2015 challenged the already tense political situation in this area even further. Reception conditions for asylum seekers were often inappropriate or degrading whereas in the years following 2015, the restrictive policies already experienced in the field of migration were also present in the area of asylum and refugee law. Asylum seekers were faced with various obstacles such as closed borders or detentions, whereas rights such as the right to family reunification were postponed or directly denied.

In this controversial context, the need to talk about human rights protection in this field became imperative. Indeed, the above-mentioned situation in Europe placed human rights at the centre of scholarly and academic attention, while both public authorities' actions and legislative reforms were questioned from a human rights perspective. This volume aims to become a piece of this human rights-oriented approach to reality, dealing with immigrants' and refugees' rights in the European Convention on Human Rights (ECHR) and the case law of the European Court of Human Rights (ECtHR). In recent decades, the ECtHR has developed an important case law on migration and refugee cases, while more recently, several cases directly affected by the circumstances listed above reached the ECtHR. Indeed, while in the earlier years of Strasbourg case law, migration cases primarily concerned protection of the principle of non-refoulement through Article 3 of the ECHR or the right to family life under Article 8, the ECtHR progressively developed an extensive case law on migration and asylum in relation to almost all ECHR rights. In view of this development, there is a need to systematise this case law in a volume regarding aliens' rights under the ECHR, offering readers the chance to familiarise themselves with or gain deeper insight into the main principles the Strasbourg court applies in its case law regarding aliens.

This volume conducts an in-depth analysis of the ECtHR's case law as regards the most relevant rights of the ECHR, exploring the role of this court in this area of law. Each chapter deals with the case law on one specific ECHR article. In addition, the volume is enriched by two additional studies which deal with issues that the editors believe should be treated in a transversal manner, namely vulnerability and the margin of appreciation. The former is a particularly relevant topic in the field of migration and a recently emerging one among scholars. The latter is a familiar issue that has been present in the Court's case law since its very beginning.

More particularly, in the first Chapter Margarite Helena Zoeteweij-Turhan explores the notions of jurisdiction and (extra-)territoriality as applicable under the ECHR. Article 1 of the ECHR delimits the obligations of states to secure the rights of everyone within the jurisdiction of the Contracting States. The author is thus analysing both the definition of right holders of the ECHR and the way jurisdiction is understood by the ECtHR. In the last part of her chapter, the author focuses on issues related to expulsion of aliens, reaching conclusions regarding the extraterritorial application of the ECHR in both migration and asylum cases.

In Chapter 2, Juan Ruiz Ramos focuses on Article 2 and the right to life. The chapter follows three different situations where the life of migrants and refugees may be at risk: in the country of origin, during the journey to Europe and in the host Contracting States, thus dealing with the issue from both a positive and negative obligations perspective. Not least, the author dedicates part of his analysis on the practice of the Court to deal with expulsion cases, where aliens would face risks to their life in the country of origin under Article 3 instead of Article 2 of the ECHR, presenting the main problematics regarding this consideration.

In Chapter 3, Meltem Ineli-Ciger focuses on Article 3 of the ECHR, which prohibits torture and inhuman and degrading treatment. After dealing with the definition of the notions of torture and inhuman and degrading treatment, the author delves deeper into the case law of the ECtHR. From one side, the author considers expulsions of aliens and the way this Convention article protects the principle of non-refoulement, analysing all relevant case law from leading cases such as *Soering* up to more recent ones. From the other side, in view of the popularity of migration detention as well as the poor residence conditions that many aliens, especially in the field of international protection face, the chapter focuses on the safeguards that Article 3 of the ECHR may provide in such cases.

In Chapter 4, Celia Díaz Morgado deals with the prohibition of slavery and forced labour with a special focus on human trafficking cases that often entail

the element of migration as well. In that respect the author examines both negative and positive obligations that may derive from Article 4 of the ECHR and argues that beyond the substantial progress in the case law of the court, there are still open questions to be answered as regards, for instance, the potential protection under Article 4 of expulsion cases of aliens with a real risk of being re-trafficked in the country of origin.

The prohibition of arbitrary detentions is the object of Chapter 5 of the volume. Sofia Pinto deals with the controversial issue of migration detentions, starting with a conceptual approach to the term detention, distinguishing among airport transit zone, reception centre and border transit zone detentions. The author then focuses on the distinction followed by the ECtHR regarding the motive of the detention, namely detentions in order to prevent unauthorised entry and those made with a view to deportation. The chapter finalises with a reference to the Court's approach on procedural safeguards, such as the right to be informed and the judicial appeal of the detention. The content of Chapter 6 is extremely relevant in migration case law on procedural rights. Diego Boza combines case law on two different provisions of the ECHR (article 6 and 13) in his study, analysing the right to a fair trial and the right to effective remedy and their applicability in migration cases. The question of whether immigration measures are included in the scope of Article 6 ECHR, the subsidiary character of Article 13 and the definition of the concept 'effective remedy' in migration cases are some of the main issues with which the author deals.

The right to family and private life (Article 8) – one of the ECHR rights which attracts a particularly important number of migration cases – is dealt with in Chapter 7. Georgios Milius explores the three main kinds of migration cases that reach the ECtHR (family reunification, regularisation and expulsion), highlighting the different principles applied by the ECtHR in each one and questioning their relevance to the notion of family life. Political and social rights are examined in the following two chapters (8 and 9) by Reuven (Ruvi) Ziegler and Natalia Caicedo, respectively. In Chapter 8, the author deals with several political or participation rights such as the freedom of expression and the freedom of association but also with the scope of Article 16 ECHR that explicitly refers to the imposition of restrictions on the political activity of aliens. From her side, Natalia Caicedo critically examines the rationale of economic limitations in order to justify interference in migrants' social rights followed by the Court and the rationale of economic contribution as the criteria that settles migrants in an equality position.

A key provision for migration cases is undoubtedly the prohibition of discrimination – the topic of Chapter 10. Maria Mousmouti deals with Article 14

ECHR and analyses the way the ECtHR has applied its ‘non-discrimination test’ in different areas such as the freedom of movement, the right to marry or the right to family life, citing leading case law in this field (among others, *Abdulaziz, Hode and Abdi* and *Biao*). The author furthers tackles the potential of the general prohibition of discrimination in Article 1, Protocol 12 in the field of migration. Filippo Scutto concentrates on another Protocol of the ECHR (Article 4, Protocol 4) in Chapter 11, dealing with the prohibition of collective expulsions. The author provides a comprehensive analysis of the extent of this prohibition while special emphasis is put on the transfers under the EU Dublin Regulation which includes an analytical approach of widely known case law such as the case M.S.S.

As mentioned above, the volume closes with two transversal studies on the margin of appreciation and vulnerability elaborated by Benedita Mac Crorie and Giulia Santomauro and Andrea Romano, respectively. The first one (Chapter 12) entails a detailed study on the role of the margin of appreciation in the case law of the ECtHR. The authors make a reference to different rights of the ECHR, dividing their chapter in two main parts. The first is dedicated to the general principles applied by the Court when using this ‘methodological tool’ while the second part focuses on the margin of appreciation in migration cases. From this point of view, the authors pay special attention to three different cases, the ones involving absolute rights, the right to respect for private and family life and, finally, the freedom of conscience, thought and religion under Article 9 of the ECHR. Vulnerability as a relevant element in the Court’s reasoning is examined in Andrea Romano’s contribution in the context of Dublin transfers, in expulsion and detention cases and as far as irregular migration is concerned. The author closes his chapter with an interesting comparative study with the case law of the CJEU, reaching the conclusion that the two courts have not for the moment addressed vulnerability in similar terms.

The editors wish to thank the authors for their contributions and commitment to this project. Not least, the authors would like to thank the Observatory on Public Law (IDP) of the University of Barcelona and the Research Centre CER-Migracions of the Autonomous University of Barcelona for their meaningful support in the coordination and elaboration of this volume.

Barcelona, December 2020
The editors.

State Jurisdiction and the Scope of the ECHR's Protection (Article 1 ECHR)

*Margarite Helena Zoeteweij-Turhan**

1 Introduction

In advance of the following chapters, which analyse the substantive rights and freedoms as recognised by the European Convention on Human Rights (ECHR), this chapter invites the reader to momentarily dwell on the notions of jurisdiction and (extra-)territoriality as applicable under the ECHR, as well as the substantive and personal scope of the responsibility of the signatory states as per Article 1 ECHR. Article 1 sets off by imposing a positive and universal¹ obligation on the Contracting Parties to 'secure' the enjoyment of and the access to rights and freedoms as defined in Section 1 of the ECHR to all, to consequently limit this obligation with the jurisdiction of the same Contracting Parties. In this sense, the notion of jurisdiction is pivotal to understanding who the right-holders and the duty-bearers of ECHR rights are.² Therefore, in order to fully grasp the extent of the obligation of the States Parties as explored in detail in the next chapters, it is vital to first elaborate on the scope of these obligations as defined in Article 1 ECHR. This chapter starts with an analysis of the substantive and personal scope, whereas the primary focus is on jurisdiction and extraterritoriality.

2 Substantive Scope: Which Rights?

According to Article 1 ECHR, States Parties are obliged to secure for everyone within their jurisdiction the rights and freedoms defined in Section 1 of

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¹ Lambert, 'The position of aliens in relation to the European Convention on Human Rights' Human rights files, Application no. 8, 2007.

² Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to' (2012) 25 Leiden Journal of International Law 860.

the ECHR. Therefore, the Contracting Parties' obligation to protect stretches beyond the substantive rights determined in Articles 2 to 14 of the Convention, and also covers Articles 15 to 18 which are provisions that define the limits to derogation in times of emergency, restrictions on political activity of aliens, the prohibition of abuse of rights and the restriction of the substantive rights. Furthermore, in accordance with the text of the Protocols,³ the substantive rights annexed to the ECHR through its Protocols, depending on whether a State Party has ratified the Protocol, are to be regarded as additional articles to the Convention and all the provisions of the Convention – including Article 1 – therefore apply accordingly.⁴ Finally, Article 1 imposes a negative duty on the States Parties to refrain from violating the rights and freedoms defined in Section 1 of the Convention, and also the positive obligation to take all necessary steps to ensure the enjoyment of and access to the same.⁵

3 Personal Scope: Who Is Bound? Who Can Benefit?

3.1 *Obligors*

The Convention is a particular instrument of international law, in that it does not create obligations between Contracting Parties reciprocally,⁶ but

3 Article 5 of Protocol 1 (the right to peaceful enjoyment of property, the right to education and the right to free elections by secret ballot), Article 6 of Protocol 4 (no deprivation of liberty for non-fulfilment of contractual obligations, right to liberty of movement and freedom to choose one's residence, prohibition of a State's expulsion of a national, prohibition of collective expulsion of aliens) as amended by Protocol Application no. 11, Article 6 of Protocol 6 (abolition of the death penalty), Article 7 of Protocol 7 (the right of aliens to procedural guarantees in the event of expulsion from the territory of a State, the right of a person convicted of a criminal offence to have the conviction of sentence reviewed by a higher tribunal, the right to compensation in the event of a miscarriage of justice, the right not to be tried or punished in criminal proceedings for an offence for which one has already been acquitted or convicted (*ne bis in idem*) as amended by Protocol 11, Article 3 of Protocol 12 (general prohibition of discrimination) and Article 5 of Protocol 13 (banning the death penalty in all circumstances), which all determine the relationship between the Protocols and the Convention.

4 Schabas, *The European Convention on Human Rights: A Commentary* (Oxford University Press, 2014, p. 88); Grabenwarter, *European Convention on Human Rights – Commentary* (Beck Verlag, 2014, p. 2).

5 Joseph and Mcbeth (eds), *Research Handbook on International Human Rights Law* (Edward Elgar, 2011, pp. 73–74). The ECtHR first held that (Article 8 of) the ECHR inherently contains a positive obligation in *Marckx v Belgium*, Application no. 6833/74 (ECtHR, 13 June 1979), para 31. In subsequent decisions, the Court has found most Convention rights to impose positive obligations on the State.

6 Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press, 2005, p. 193).

rather between Contracting Parties and all persons – or, in the wording of the Convention, ‘everyone’ – within their jurisdiction.⁷ Furthermore, the obligations are binding on all state organs – whether the organ exercises legislative, executive, judicial or any other functions,⁸ and likewise also on private entities or individuals endowed with and exercising state authority.⁹

At present, only the States that are Members of the Council of Europe are parties to the Convention. As all Member States of the European Union (EU) are also Member States of the Council of Europe, whereas the EU is not, the European Court of Human Rights (ECtHR) could not hold the EU accountable for binding provisions of EU law that cause EU Member States to violate the ECHR. In *Matthews v the United Kingdom*,¹⁰ the Court held that, though the Convention did not exclude the transfer of competences to international organisations by Member States to the Council of Europe, these Member States remained responsible for the securement of the Convention rights. Even though the same Court subsequently held in *Bosphorus Airways v Ireland*¹¹ that it considered the EU to protect fundamental rights in a manner which can be considered at least equivalent to that for which the Convention provides, and that Member States’ implementation of binding EU law is therefore compatible with the ECHR, it also warned that its finding in ‘Bosphorus’ is not final and susceptible to review. Therefore, any divergences between EU law and the ECHR became liabilities for the EU Member States.

Even though Protocol 14 to the Convention opened the way for the accession of the European Union (EU) to the ECHR in 2004,¹² and the EU’s own Treaty on European Union (TEU) as amended by the 2007 Treaty of Lisbon requires the accession of the EU to the ECHR, the negative opinion of the Court of Justice of the European Union of 2014¹³ temporarily put the accession process on

⁷ Lambert, cit, p. 8.

⁸ *Wille v Liechtenstein*, Application no. 28396/95 (ECtHR, 28 October 1999), which is consistent with the views of the International Law Commission (ILC) on the responsibility of states, *Yearbook of the International Law Commission* (Vol II, Part Two, 2001, 40).

⁹ See, for example, for the liability of a Contracting State for state actions under private law or by private individuals: *Swedish Engine Drivers’ Union v Sweden*, Application no. 5614/72 (ECtHR, 6 February 1976); *Costello-Roberts v the United Kingdom*, Application no. 13134/87 (ECtHR, 25 March 1993).

¹⁰ *Matthew v the United Kingdom*, Application no. 24833/94 (ECtHR, 18 February 1999).

¹¹ *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v Ireland*, Application no. 45036/98 (ECtHR, 30 June 2005), especially under para 155.

¹² Article 17 of Protocol 14 added a new para 2 to Article 59 of the Convention, which now reads that ‘The European union may accede to this Convention’.

¹³ Court of Justice of the European Union (CJEU), Opinion 2/13, ECLI:EU:C:2014:2454. This Opinion should not be confused with Opinion 2/94 of the CJEU, in which the negative

hold. The Draft Accession Agreement, the result of lengthy negotiations by the Council of Europe and the EU Commission, was deemed to be incompatible with EU law because it did not take into account specific characteristics of EU law with regard to, among others, fixed human rights standards in areas of law that have been fully harmonised by the EU, the application of ‘mutual trust’ in Justice and Home Affairs matters, and the monopoly of the jurisdiction of the Court of Justice of the European Union (CJEU) on the interpretation and validity of EU law.

More than four years later, after the Commission and the Council of Europe publicly announced that they have addressed all issues, it is expected that a revised Accession Agreement will soon be put forward.¹⁴ Meanwhile, breaches of EU law can already lead to liability under the ECHR.¹⁵

Other international organisations cannot accede to the ECHR according to Article 59(1) of the Convention. However, case law developed with regard to the liability of Contracting States for actions implementing a commitment under international law is applicable in relation to the EU as well as to other international organisations. This case law¹⁶ of the ECtHR provides that delegation of state authority to an international organisation does not exempt a state party to the ECHR from its obligations under the Convention; case law that is now even codified in the International Law Commission’s draft Articles on Responsibility of International Organisations.¹⁷ This does not, however, mean that any action attributable to Convention States participating in operations of

opinion of the Court was based on the (then) EC lacking competence to accede to the ECHR under EU law as it stood at the time of the opinion. See CJEU, Opinion 2/94, ECLI:EU:C:1996:140.

¹⁴ See, European Parliament <<http://www.europarl.europa.eu/legislative-train/theme-area-of-justice-and-fundamental-rights/file-completion-of-eu-accession-to-the-echr>> last visited on 18 February 2019.

¹⁵ Ehlers refers to the refusal of a domestic court of an EU Member State Contracting Party to refer a case to the CJEU for a preliminary ruling under Article 267 TFEU, which the ECtHR has found to infringe the right to a fair trial under Article 6(1) of the ECHR, see *Coëme ea v Belgium*, Application no. 32492/96 (ECtHR, 22 June 2000), and *Desmots v France*, Application no. 41358/98 (ECtHR, 2 July 2002); Ehlers (ed), *European Fundamental Rights and Freedoms* (De Gruyter, 2007, p. 42).

¹⁶ *Matthews v the United Kingdom*, cit; and *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v Ireland*, cit.

¹⁷ Grabenwarter and Pabel, *Europäische Menschenrechtskonvention: ein Studienbuch* (Beck, 2016); also Kälin and Künzli, *The Law of International Human Rights Protection* (Oxford University Press, 2019, p. 92), on the International Law Commission’s Article 28 of the draft Articles on Responsibility of International Organisations.

international organisations falls under the scrutiny of the ECtHR.¹⁸ Especially in relation to United Nations activities, the ECtHR attributed the actions to the UN itself and has *ratione personae* declined its jurisdiction.¹⁹

3.2 *Beneficiaries*

As already mentioned above, Article 1 ECHR provides that the rights enshrined in the Convention must be secured to 'everyone' within the jurisdiction of the Contracting Parties. The text of the Article clearly does not call for the prior existence of any link, such as nationality or legal residence,²⁰ between the State Parties and a person for this person to fall under its scope. This does not only include all natural persons from the moment of birth²¹ to the moment of death,²² but according to Article 34 of the Convention²³ also legal persons – as long as they are sufficiently independent from the States Parties. The Court

¹⁸ See the joint cases of *Behrami and Behrami v France and Saramati v France, Germany and Norway*, Application no. 71412/01 and Application no. 78166/01, Admissibility Decision, (2 May 2007) 45 EHRR SE10. See also *Boivin v France*, Application no. 73250/01 (ECtHR 9 September 2008), in which the Court declined its competence in a civil service law dispute against Eurocontrol, another international organisation.

¹⁹ For a critical review of the Court's decision, see Sari, 'Jurisdiction and International Responsibility in Peace Support Operations: The Behrami and Saramati Cases' (2008) 8 Human Rights Law Review 151. Furthermore, for a critical appraisal of the liability of international organisations, see Orakhelashvili, 'Jurisdictional immunity of international organizations: from abstract functionality to absolute immunity', in Orakhelashvili (ed), *Research Handbook on Jurisdiction and Immunities in International Law* (Edward Elgar, 2015, pp. 497 ff).

²⁰ The original text of the Convention as prepared by the Assembly proposed that the rights of the Convention would merely be extended to 'all persons resident within the territories of the signatory States'. Through interference of the Legal Experts the liability of the States Parties was extended to all persons within their jurisdiction; See *Travaux Préparatoires*, Vol. IV, p. 20, referred to by Bates, *The Evolution of the European Convention on Human Rights: From its Inception to the Creation of a Permanent Court of Human Rights* (Oxford University Press, 2010, p. 84). See also Den Heijer, *Europe and Extraterritorial Asylum* (Hart, 2012, p. 24).

²¹ Under Article 2 ECHR the question of whether an embryo or a foetus are entitled to fundamental rights is left to the discretion of the State Party; see *Vo v France*, Application no. 53924/00 (ECtHR, 8 July 2004), paras 82–84, and also *A, B and C v Ireland*, Application no. 25579/05 (ECtHR, 16 December 2010), para 237. However, dissenting is Joseph, *Human Rights and the Unborn Child* (Brill, 2009, pp. 193 ff).

²² Without including a right to end life, see *Pretty v the United Kingdom*, Application no. 2346/02 (ECtHR, 29 April 2002).

²³ Article 34 of the Convention provides that 'the Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto.'

has found in case of legal entities under direct government control that a State Party cannot both be applicant and respondent party.²⁴ (Independent) legal persons may also file an application on behalf of its members even though in principle Article 34 provides for the right of individual petition.²⁵

Furthermore, the clear wording of Article 1 ECHR means that the rights and freedoms recognised by the ECHR are universally available to all individuals, including aliens, independently of their nationality (or lack of nationality in case of statelessness), residence title or domicile, as long as they are within the jurisdiction of the Contracting Parties.²⁶

4 The Definition of Jurisdiction in Instruments of International Human Rights Treaties

As Article 1 ECHR provides that ‘everyone within the jurisdiction [of the Contracting Parties]’ falls under the protective scope of the Convention, the decisive link between the obligors and the beneficiaries – or ‘threshold criterion’ for the application of the Convention²⁷ – is the existence of jurisdiction. Jurisdiction in regular public international law conditions the exercise of sovereign state power on the existence of a territorial or personal connection, justifying the imposition of a state’s authority.²⁸ In this sense, jurisdiction ‘cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention’.²⁹ Thus seen, jurisdiction is a delimitation of the regulatory power of states, primarily to its own territory, vetoing the encroachment upon the sovereignty of other states. Applying this interpretation under public international law to the ECHR strictly, the term ‘jurisdiction’ of Article 1 seems to have the purpose of

²⁴ *Islamic Republic of Iran Shipping Lines v Turkey*, Application no. 40998/98 (ECtHR, 13 December 2007), para 81, in Ichim, *Just Satisfaction under the European Convention on Human Rights* (Cambridge University Press, 2014, pp. 84–85).

²⁵ *Metropolitan Church of Bessarabia and Others v Moldova*, Application no. 45701/99 (ECtHR, 13 December 2001); also Gomien, *Short Guide to the European Convention on Human Rights* (Council of Europe, 2005, p. 167).

²⁶ Lambert, cit, p. 9.

²⁷ Besson, cit, p. 859.

²⁸ Mills, ‘Rethinking Jurisdiction in International Law’ (2014) 84(1) British Yearbook of International Law 194; also Ryngaert, ‘The concept of jurisdiction in international law’ in Orakhelashvili, cit, pp. 50–51.

²⁹ Permanent Court of International Justice (PCIJ), ‘SS Lotus’ (*France v Turkey*), PCIJ 7 September 1927, PCIJ Series A Application no. 10, p. 19.

restricting the individuals to whom signatory states owe their human rights obligations.³⁰ Such an interpretation would however disregard the particular characteristics of international human rights law.

It is recalled here that international human rights treaties stand out from general international law, in that they impose obligations on the state with regard to their dealings with individuals. Whereas jurisdiction in public international law thus seeks to *limit* assertions of state jurisdiction to minimalise the potential for clashes between states, instruments of international human rights law seek to bring individuals under the protection of a state by *expanding* the scope of the jurisdiction of the state.³¹ 'Jurisdiction' in international human rights instruments thus merely is a word that describes, but certainly does not limit, state responsibility.³² Not all international human rights instruments use the same language to describe state responsibility.³³ Whereas some, such as the Universal Declaration of Human Rights (UDHR) have no jurisdiction clause at all, the nature of the Declaration and its concept make a limitation of State responsibility superfluous.³⁴ Others, such as the International covenant on Civil and Political Rights (ICCPR) extend protection to all individuals within the state's territory *and* subject to the state's jurisdiction, which explicitly confirms that the jurisdiction of a state under the ICCPR goes beyond the state's territory.

³⁰ King, 'The Extraterritorial Human Rights Obligations of States' (2009) 9(4) *Human Rights Law Review* 523.

³¹ Ryngaert, *Jurisdiction in International Law* (2nd ed., Oxford University Press, 2015, pp. 23–24).

³² Scheinin, 'Just another word?: Jurisdiction in the roadmaps of state responsibility and human rights', in Langford, Vandenhove, Scheinin and Van Genugten (eds), *Global justice, state duties: the extraterritorial scope of economic, social, and cultural rights in international law* (Cambridge University Press, 2013, p. 214).

³³ See, for example, Moreno-Lax and Costello, 'Reflections on the EU Charter of Fundamental Rights – Extraterritorial Application' in Peers, Hervey, Kenner and Ward (eds), *The EU Charter of Fundamental Rights: A Commentary* (Beck, 2014, pp. 1668 ff) for an overview of (the lack of) a notion of jurisdiction in international human rights instruments.

³⁴ Other international human rights instruments without jurisdiction clause are the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the scope of application of which is for this reason held to be broad (cf. Larocque, Torture, jurisdiction and immunity: theories and practices in search of one another, in Orakhelashvili, cit, pp. 435–436, whereas the International Covenant on Economic, Social and Cultural Rights (ICESCR) does not have a jurisdiction clause either but its scope is interpreted narrowly. It is therefore not possible to conclude that, if an instrument of international human rights law does not have a jurisdiction clause its scope should be interpreted to be broad or universal.

5 Jurisdiction under Article 1 ECHR

5.1 (*More Than*) State Territory

While the draft ECHR initially also limited its application to all persons residing within the territories of the Contracting States,³⁵ it was thought that this could seriously restrict the states' liability for actions (the effects of which would become apparent) outside their territories. Therefore, the words 'residing within the territories' were replaced with 'within its jurisdiction' in a later draft, and included in the final wording of the Convention as entered into force in 1953.³⁶ While it was therefore evident from the onset that the term 'jurisdiction' in Article 1 ECHR covers more than just the territory of the Contracting States,³⁷ what its scope would be in practice was however unclear.

That the jurisdiction of the Contracting Parties may be extended beyond their own territories is explicitly provided for in Article 56 ECHR.³⁸ The first and fourth paragraph of this Article permit any of the Contracting Parties to notify the Council of Europe that its jurisdiction is extended to all or any of the territories for whose international relations it is responsible, and declare also on behalf of these territories that it accepts the competence of the Court as per Article 34 of the Convention. Wherever a State Party has made a declaration under Article 56 ECHR, any person within the extended territory falls within the jurisdiction of that State in the meaning of Article 1 ECHR.³⁹ However, such

³⁵ Travaux Préparatoires, part II, p. 276.

³⁶ See fn 16.

³⁷ It led to the Finnish delegate to the UN proposing the same wording for the definition of the scope of obligations under the UN Convention on the Rights of the Child, as referring to 'jurisdiction' would cover every possible solution; Detrick, 'The United Nations Convention on the Rights of the Child: A Guide to the "Travaux Préparatoires"' in Den Heijer, cit, p. 25.

³⁸ This Article was included in the Convention for historical reasons, and is sometimes called the 'colonial clause', see Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy* (Oxford University Press, 2011, p. 129), who believes that the Court's ruling in Al-Skeini and especially paragraph 140 of the judgment makes the Article obsolete.

³⁹ Few Contracting States have made use of Article 56 ECHR. The United Kingdom has extended the application of the Convention for Anguilla, Bermuda, British Virgin Islands, Cayman Islands, Falkland Islands, Gibraltar, the Bailiwick of Guernsey, the Isle of Man, the Bailiwick of Jersey, Montserrat, St Helena, Ascension and Tristan da Cunha, South Georgia and South Sandwich Islands, Sovereign Base Areas in Cyprus, and the Turks and Caicos Islands. Though more territories were formerly covered, some of them have since gained independence. Furthermore, the Netherlands has formerly extended application to Surinam, Netherlands Antilles and Aruba; the Federal Republic of Germany before the unification assumed responsibility for West Berlin, Denmark assumed liability for Greenland in 1953, whereas Belgium did not avail itself of the possibility to notify the

an extension of the application of the ECHR is not the same as exercising effective control over an area *outside* the national territory of the state in the classical sense of extra-territorial jurisdiction.⁴⁰ Therefore, Article 56 ECHR confirms the view that 'a State's jurisdiction' under Article 1 ECHR is primarily territorial, and the presumption that a State has jurisdiction over all its territory.⁴¹

Territorial jurisdiction remains, even in cases where a State temporarily ceases to effectively control part of its territory. In *Ilașcu and Others v Moldova and Russia*, Moldova had lost effective control over the part of its territory in which a separatist regime, supported by Russia, had established itself. After a while, Moldova gave up military operations to regain control over the region, though it maintained control over issues like customs and civil documentation. In this case, the Court held that Moldova's jurisdiction had not ceased to exist with regard to the separatist territory: *Moldova still has a positive obligation under Article 1 of the Convention to ... secure to the applicants the rights guaranteed by the Convention*'.⁴² However, in the same case the Court also held that the scope of the obligation of the State, in cases such as these where a state is prevented from exercising its authority, the scope of its jurisdiction may be limited, with the limitation being offset by another State assuming extraterritorial jurisdiction through the effective control of part of the territory.⁴³

5.2 Extra-Territoriality Stricto Sensu before and after Banković

The first case in which the Court relied on the criterion of the exercise of effective control of an area outside a State's own territory for the establishment of that State's liability was the case of *Loizidou v Turkey* (Preliminary Objections).⁴⁴ In this and similar cases,⁴⁵ the Court established that Contracting Parties'

Council of an extension of the application of the Convention to Congo (*X ea v Belgium*, Application no. 1065/61 (ECtHR, 30 May 1961)). See Hallo De Wolf, 'Benign Territorial Human Rights Colonialism? The Application of Human Rights Treaties in Overseas Countries and Territories' in Kochenov, *EU Law of the Overseas: Outermost Regions, Associated Overseas Countries and Territories, Territories Sui Generis* (Wolters Kluwer, 2011, pp. 327 ff) for an overview of the application of Article 56 ECHR.

⁴⁰ Fripp, Moffatt and Wilford (eds), *The Law and Practice of Expulsion and Exclusion from the United Kingdom; Deportation, Removal, Exclusion and Deprivation of Citizenship* (Hart, 2011, p. 118).

⁴¹ *Assanidze v Georgia*, Application no. 71503/01 (ECtHR, 8 April 2004), paras 137 and 139.

⁴² *Ilașcu and Others v Moldova and Russia*, Application no. 48787/99 (ECtHR, 8 July 2004), paras 333 and 334.

⁴³ Idem, para 392.

⁴⁴ *Loizidou v Turkey*, Application no. 15318/89 (ECtHR, 18 December 1996) (prel. Obj.), para 62.

⁴⁵ *Cyprus v Turkey*, Application no. 25781/94 (ECtHR, 12 May 2014), para.76; *Alexandrou v Turkey*, Application no. 16162/90, (ECtHR, 28 July 2009) para 20; *Solomonides v Turkey*,

responsibility arises when as a consequence of military action it exercises effective control of an area outside its national territory. Such control then gives rise to the obligation to secure in the controlled area the rights and freedoms set out in the ECHR.⁴⁶

Extraterritorial jurisdiction has also been acknowledged by the Court in cases, not involving the occupation of foreign territory. The Court's ruling in *Soering* showed that jurisdiction remains intact in cases of extradition or expulsion of a person by a Contracting State, where the infringement of the extradited or expelled person's Convention rights would be at the hands of the receiving state but where the extraditing Contracting State would be liable under the ECHR.⁴⁷ In *Drozd*, where two burglars convicted by an Andorran Court which consisted of, amongst others, a French and a Spanish judge, the Court explicitly stated that '... "jurisdiction" is not limited to the national territory of the High Contracting Parties; their responsibility can be involved because of acts of their authorities producing effects outside their own territory'.⁴⁸ In the early decision of *X v the Federal Republic of Germany*,⁴⁹ in which the applicant alleged that the German Consul had defamed him by advising his wife-to-be against marrying him, the Court agreed that acts of diplomatic and consular agents, who are present on foreign territory in accordance with provisions of international law, may amount to an exercise of jurisdiction. The Court also recognises so-called flag state jurisdiction as defined in Article 92 of the UN Convention on the Law of the Sea of 1982, which establishes state jurisdiction on board an aircraft or vessel, flying the flag of that state.⁵⁰ All of these instances indicate a willingness on the side of the Court to interpret the notion of 'jurisdiction' of Article 1 ECHR broadly.

The Court's ruling in *Banković* in 2001 therefore came as a surprise.⁵¹ The applicants in this case, relatives of five persons who lost their lives as the

Application no. 16161/90 (ECtHR, 27 July 2010), para 24; *Orphanides v Turkey*, Application no. 36705/97 (ECtHR, 22 June 2010), para 23.

⁴⁶ *Loizidou v Turkey*, cit, para 62.

⁴⁷ *Soering v The United Kingdom*, Application no. 14038/88 (ECtHR, 7 July 1989); *Vilvarajah and others v the United Kingdom*, Application Nos. 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87 (ECtHR, 30 October 1991).

⁴⁸ *Drozd and Janousek v France and Spain*, Application no. 12747/87 (ECtHR, 26 June 1992), para 91.

⁴⁹ *X v the Federal Republic of Germany*, Application no. 1611/62 (ECtHR, 25 September 1965).

⁵⁰ *Banković and Others v Belgium and Others* (Decision as to Admissibility), Application no. 52207/99 (ECtHR, 12 December 2001), para 73.

⁵¹ Orekhelashvili, 'Restrictive Interpretation of Human Rights Treaties in the Recent Case law of the European Court of Human Rights' (2003) 14 European Journal of International Law 568. Also, Milanović, *From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties* (2008) 8 Human Rights Law Review 411.

result of the 1999 aerial NATO bombardment of the Serbian radio/television station (RTS) in Belgrade, together with one survivor of the bombardment, argued that 'anyone adversely affected by an act imputable to a Contracting State, wherever in the world that act may have been committed or its consequences felt, is thereby brought within the jurisdiction of that State'.⁵² The applicants argued further that denying admissibility of the case on the basis of a lack of jurisdiction would leave a regrettable vacuum in the Convention system of human rights' protection. The Court rejects this claim, stating '... the Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States. Accordingly, the desirability of avoiding a gap or vacuum in human rights' protection has so far been relied on by the Court in favour of establishing jurisdiction only when the territory in question was one that, but for the specific circumstances, would normally be covered by the Convention'.⁵³ The strong formulation of the principle of territorial jurisdiction, and the exhaustive detailed list of exceptional circumstances in which extraterritorial jurisdiction might be accepted by the Court caused many to fear that after *Banković* the Court would only in very few cases keep a Contracting State liable for actions outside of its own sovereign territory.⁵⁴ Fortunately, recent case law shows a different picture.

The facts in *Öcalan v Turkey*,⁵⁵ a case filed in the same year as *Banković*, did not fit in any of the four categories of circumstances that could lead to extraterritorial application of the ECHR as listed in the *Banković* ruling. This case involved the irregular extradition process of Öcalan, a Turkish citizen of Kurdish origin considered a terrorist by the Turkish authorities, while Öcalan was in Kenya. Though Kenyan officials worked together with Turkish officers to capture Öcalan while at Nairobi airport, this did not constitute Turkey having effective control over Kenyan territory. However, the ECtHR's Grand Chamber asserted jurisdiction, as it found that 'directly after being handed over to the Turkish officials by the Kenyan officials, the applicant was under effective Turkish authority and therefore within the "jurisdiction" of that State for the purposes of Art 1 of the Convention, even though in this instance Turkey exercised its authority outside its territory'.⁵⁶

⁵² Idem, para 75.

⁵³ Idem, para 80.

⁵⁴ Miller, 'Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the European Convention' (2009) 20(4) *The European Journal of International Law* 1229.

⁵⁵ *Öcalan v Turkey* (Grand Chamber), Application no. 46221/99 (ECtHR, 12 May 2005).

⁵⁶ *Öcalan v Turkey*, cit, para 91.

Thus, these two seemingly contradictory rulings of the Court in the same year produced uncertainty with regard to the boundaries of extraterritorial jurisdiction.⁵⁷ However, it is possible to reconcile the two by arguing that *Banković* confirmed extra-territorial jurisdiction of Contracting States, listing four examples of exceptional cases in which the particular circumstances of the case justify extra-territorial jurisdiction under Article 1 ECHR,⁵⁸ whereas *Öcalan* adds a fifth category of circumstances in which the Court may decide to accept extraterritorial jurisdiction: in a situation in which the authorities of a State Party exercise temporary '*effective control over persons outside their sovereign territory*, the obligation on the state to respect the rights and freedoms as defined in the ECHR may apply.

That *Öcalan* was not a one-off decision became clear in the more recent case of *Al-Skeini*, where the Court was asked to establish whether the applicants that were killed by British troops either in custody in a United Kingdom prison in Iraq or while on patrol in the city of Basra fell within the jurisdiction of the United Kingdom. Contrary to what the House of Lords had previously decided in the same case, basing itself on the case law of the ECtHR on jurisdiction under Article 1 ECHR, the Court deemed jurisdiction not to arise from 'control over the building, aircraft or ship in which the individual were held ... [but from] the exercise of physical power and control over the person in question'.⁵⁹ In this case, the United Kingdom had exercised public powers on the territory of a state (Iraq) that consented to its presence, powers that would normally be exercised by the territorial state.⁶⁰ Therefore, in *Al-Skeini* the Court could rely on a legal entitlement to exercise public powers on the territory of another state.⁶¹ Thus, even though not *all use of physical force* by a State Party outside its own territory could lead to a violation of its obligations under the ECHR (which would completely overturn *Banković*), the Court in *Al-Skeini* did acknowledge once more that a Contracting State is bound by its obligations under the ECHR when it is invited to exercise public powers outside its own territory. Even though the judgment of the Court in *Al-Skeini* thus seemed to restrict the scope of the fifth category of circumstances in which

⁵⁷ Lord Rodger of Earlsferry in his judgment in *Al-Skeini v Secretary of State for Defence* [2007] UKHL 26, lamented that 'the judgments and decisions of the European Court do not speak with one voice' and that the case law of the Court presented 'considerable difficulties for national courts which have to try to follow the case law'.

⁵⁸ *Banković and Others v Belgium and Others*, cit, para 61.

⁵⁹ *Al-Skeini ea v the United Kingdom*, Application no. 55721/07 (ECtHR, 7 July 2011), para 136.

⁶⁰ Idem, para 135.

⁶¹ Chetall and Bauloz, *Research Handbook on International Law and Migration* (Edward Elgar, 2014, pp. 124–125).

extraterritorial jurisdiction may arise, the significance of the Court's ruling even in times of armed conflict has already been proved in subsequent cases before the European Court,⁶² and also before national courts.⁶³

5.3 *Extraterritoriality and the Expulsion of Aliens*

As established earlier on in this chapter, aliens can principally rely on the rights and freedoms as provided by the ECHR, to the extent provided for by the relevant Articles of the Convention,⁶⁴ provided they are within the jurisdiction of the Contracting Parties. The establishment of jurisdiction over aliens is therefore of particular importance. The previous analysis of the jurisdiction under Article 1 ECHR has shown that the jurisdiction of the Contracting States is not limited to the territory of these states. This is the more significant where states seek to limit their responsibility for aliens by ensuring that these aliens cannot reach the state territory. It is here that case law generated in decisions like *Öcalan* and *Al-Skeini* are particularly relevant.

According to international customary law, the sovereignty of a state implies its control over the entry and residence of aliens.⁶⁵ Even though a number of instruments of international law provide for the freedom of movement of aliens,⁶⁶ the scope of this freedom is limited and does not provide aliens with a right to immigrate or a right to be granted asylum.⁶⁷ Thus, in principle, a state may in principle *keep away or remove aliens* from their territory, as a result of their territorial sovereignty.

The sovereignty of states can nevertheless be limited by instruments of international law.⁶⁸ Nowadays, the number of treaties, conventions, declarations and other instruments of international law has grown to such an

62 *Hassan v the United Kingdom*, Application. Application no. 29750/09 (ECtHR, 16 September 2014).

63 *Al-Saadoon & Ors v Secretary of State for Defence* [2015] EWHC 715.

64 The ECHR and its Protocols contain several articles that either limit or extend the scope of application of particular rights and freedoms to aliens, e.g. Article 5(1)f and Article 16, Article 1 of Protocol 1, and Article 1 of Protocol 7 limit the non-discrimination clause, whereas Article 4 of Protocol 4 explicitly protects aliens against collective expulsion.

65 Kelsen, *Principles of International Law* (The Lawbook Exchange, 2003, p. 315).

66 See, for example, Article 2 of Protocol Application no. 4 to the ECHR, and also Article 12 of the ICCPR.

67 Lambert, cit, p. 16.

68 See for early international case law on the limits of sovereignty the decisions of the permanent Court of International Justice (PCIJ) in the Nationality Decrees Case (1923), in which the French case rested on French territorial sovereignty, and the British case rested on treaty obligations between France and the United Kingdom; and the Lotus Case (1927), concerning the exercise of jurisdiction by Turkey over foreign ships on the high seas.

extent that despite the principle of territorial sovereignty a state is rarely free to expel an alien from its territory.⁶⁹ With regard to the sovereignty of states, a Member of the Council of Europe, the ECHR has played a central role in limiting their freedom pertaining to the treatment of aliens, as will be explored per relevant Article throughout this volume. Thus, the Court has interpreted Article 1 ECHR to cover also actions of a Contracting State's military while on the high seas, thereby bringing extraterritorial actions preventing the access to territory of a Contracting State within the jurisdiction of that State. In its ruling in *Hirsi Jamaa*,⁷⁰ the Court held that the taking on board of aliens at sea by Italian military ships – and thus the *exercise of a continuous and effective control over the persons concerned by Italian authorities*⁷¹ – did indeed trigger the extraterritorial jurisdiction of Italy. Consequently, after jurisdiction being established, the fact that the Italian military had returned these aliens, including asylum seekers, without subjecting them to identification or refugee determination procedures, could be assessed in the light of Articles 3 and 13 ECHR and Article 4 of Protocol Application no.4 to the ECHR. The case of *Hirsi Jamaa* has thus become the copingstone of the Court's jurisprudence on the extraterritorial jurisdiction of Contracting States under the ECHR.

6 Conclusion

Understanding Article 1 ECHR is essential to the proper interpretation and application of the Convention, in that the Article does not only define the right-holders and duty-bearers of the Convention, but also stipulates to whom the duty-bearers are obliged to guarantee the rights and freedoms as defined in the Convention. Article 1 ECHR is therefore the starting point of each and every case in which the applicants rely on the Convention, in that it answers the question of whether the Convention can indeed be invoked. Central to answering this question is the issue of jurisdiction. This contribution has analysed the

⁶⁹ Goodwin-Gill, *International law and the movement of persons between states* (Clarendon Press, 1978, pp. 194 ff).

⁷⁰ *Hirsi Jamaa ea v Italy*, Application no. 27765/09 (ECtHR, 23 February 2012).

⁷¹ Coppens, 'Interception of Alien Boats at Sea', in Moreno-Lax and Papastavridis (eds), *Boat Refugees' and Aliens at Sea: A Comprehensive Approach: Integrating Maritime Security with Human Rights* (Brill, 2017, p. 219).

development of the relevant jurisprudence of the Court, concluding that, even though jurisdiction was interpreted first and foremost as territorially limited, it should be clear that also extraterritorial exertions of state authority cannot escape the scrutiny of the Court.

The Right to Life of Migrants and Refugees under Article 2 ECHR

Outside, Inside and Along the Way

Juan Ruiz Ramos*

1 Introduction

In international human rights law, the right to life has been described as the 'supreme right'.¹ Yet irregular migrants, asylum seekers and refugees are often aware of what it means to see this crucial right at risk. Some of them have been threatened with death in their countries of origin – a threat which, in refugee law, is often the most straightforward example of persecution.² Others have lost their loved ones during dangerous journeys on treacherous seas or across solitary deserts. A smaller number of them arguably also face a risk to their lives because of their vulnerable state of health in the destination country and the conditions of destitution in which they live. Many displaced people have endured a combination of these risks. How does the European Convention on Human Rights (ECHR) protect migrants from these appalling situations?

This chapter aims to answer this question by scrutinising the recent case law of the European Court of Human Rights (ECtHR or the Court) on Article 2 ECHR: the right to life. It will start by analysing how the Court uses Article 2 as a way to protect migrants at risk of expulsion from facing death in their countries of origin. Outside the specific context of the death penalty, non-refoulement cases in which the Court considers the risk to life under Article 2 have received scant attention.³ This can be explained by the centrality of

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¹ Human Rights Committee (HRC), General Comment 6: Article 6 (Right to Life) 30 April 1982, 1.

² Hathaway and Foster, *The Law of Refugee Status* (Cambridge University Press, 2014, p. 208).

³ Fanny De Weck only quotes some of these cases in the Introduction to her book *Non-refoulement under the European Convention on Human Rights and the UN Convention against torture* (Brill Nijhoff, 2016, p. 23). For its part, the UN High Commissioner for Refugees mentions in passing the case law under Article 2 'beyond the specific issue of the death penalty' in

Article 3 (prohibition of torture, inhuman and degrading treatment) in protecting migrants not only from ill-treatment, but also from death in their countries of origin and third countries.

Nonetheless, the second section of this chapter will demonstrate that the principle of non-refoulement deriving from Article 2 may be gaining momentum in the Court's case law. This will be done by considering the findings of 32 migration-related judgments rendered between 2011 and 2020, in which Article 2 has been alleged in combination with Article 3.⁴ Leading cases in this area will also be highlighted throughout the section.

The third section will argue that Article 2(1) has always prohibited states from expelling refugees (in the sense of the Refugee Convention)⁵ to a place where they could be subject to the death penalty, even before the death penalty exception foreseen in that provision was emptied of legal effect. Finally, the last section will address the positive obligations that derive from Article 2 to protect migrants' lives both within European states and during the migration journey, through the analysis of existing case law, recent litigation before the Court and academic proposals.

2 The Prohibition to Expel Migrants under Article 2 ECHR: A Provision Overshadowed by Article 3?

2.1 Article 2 as a Bar for Expelling Migrants and Prosecuted Foreigners

The principle of non-refoulement, as developed by the ECtHR since its landmark case *Soering v the United Kingdom*, sets out an absolute prohibition under Article 3 ECHR to expel individuals to countries where there are substantial grounds for believing that the person concerned faces a real risk of being subjected to ill-treatment.⁶ According to the Court, the obligation of states to

the report *The Case Law of the European Regional Courts: the Court of Justice of the European Union and the European Court of Human Rights. Refugees, asylum-seekers, and stateless persons* (UNHCR, 2015, p. 211).

4 The great majority of the cases have been found through a joint search in the European Database of Asylum Law (EDAL) <<https://www.asylumlawdatabase.eu/en/case-law-search>> (filters: ECtHR case law, Article 2) and in HUDOC <<https://hudoc.echr.coe.int/>> (filter: Article 2-expulsion). As a curiosity, 15 of these judgments originated from applications against the Swedish state, which might be an indication that Swedish lawyers are more prone to relying on Article 2 together with Article 3 than human rights lawyers in other states.

5 Convention relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S. 137, entered into force 22 April 1954 and Protocol, 31 January 1967, 606 U.N.T.S. 267, entered into force 4 October 1967.

6 *Soering v the United Kingdom* (1989) Series A no 161. The non-refoulement case law under Article 3 is extensively reviewed in Chapter 3 of this book.

prevent a breach of Article 3 in a foreign territory derives from the fundamental importance of this provision in European societies and from its drafting in absolute terms.⁷ Article 2 also fulfils these criteria. On the one hand, together with Article 3, it enshrines one of the basic values of the democratic societies making up the Council of Europe.⁸ On the other hand, as will be explained in Section 3, the only relevant exception to the right to life which may play a role in extradition cases (the execution of a lawfully imposed death penalty by another state) has been deprived of legal effect since the 2010 judgment *Al-Saadoon and Mufdhi v the United Kingdom*.⁹ Article 2 is thus also to be read in absolute terms in the context of expulsion and extradition.¹⁰

For these reasons, the Court has also developed the principle of non-refoulement under Article 2. From a human rights perspective, it would arguably have been difficult for the Court to do so otherwise. The positioning of Article 2 as the first provision of the Convention shows that the right to life is 'basic to all human rights'.¹¹ As one of the core rights of the Convention, Article 2 was destined to protect the dignity of foreigners facing expulsion just as much as Article 3.¹² In particular with regard to refugees, prohibiting states from expelling them to places where they may face torture but allowing them to do so when they may face a risk of being killed would have left a large gap in the European complementary protection regime which the Court has established over time.¹³

⁷ *Soering v the United Kingdom*, cit, para 88.

⁸ *McCann and others v the United Kingdom* [GC] (1995) Series A no 324, para 147. The relevance of Article 2 within the Convention can be observed in its non-derogable nature (Article 15 ECHR) and the strict requirement of 'absolute necessity' for the exceptions established in Article 2(2).

⁹ *Al-Saadoon and Mufdhi v the United Kingdom* App no. 61498/08 (ECtHR, 2 March 2010).

¹⁰ See *F.G. v Sweden* Application no. 43611/11 (ECtHR, 23 March 2016), para 127, a case in which the Court refers to 'the absolute nature of the rights guaranteed under Articles 2 and 3 of the Convention'.

¹¹ This has been recognised at the universal level by the HRC in its General Comment no. 14: Article 6 (Right to Life) Nuclear Weapons and the Right to Life, 9 November 1984, 1.

¹² For an analysis of the concept of human dignity in the context of migration in Europe, see Cornelisse, 'Protecting human dignity across and within borders: The legal regulation of international migration in Europe' in Gunnarsson, Mürbe and Weiß (eds), *The Human Right to a Dignified Existence in an International Context* (Nomos/Hart Publishing, 2019). The Preamble of Protocol no. 13 to the ECHR (3 May 2002, E.T.S. 187) also links the right to life and the abolition of the death penalty to the 'full recognition of the inherent dignity of all human beings' (see no. 62).

¹³ Mcadam, *Complementary Protection in International Law* (OUP, 2007). See Chapter 3 (Section 3.2) of this book for further explanation.

However, in non-refoulement cases the Court has decided to mainly position cases in which the right to life is in question under the auspices of Article 3 – thus relegating Article 2 to the background. This has led to a situation in which applicants facing a risk to their lives in case of expulsion never rely on Article 2 alone; rather, they use a combination of both Article 2 and 3 to further their case. Moreover, it is often the case that the risk the applicant faces in his country of origin is a direct risk to his life – and not at all a risk of ill-treatment. Yet still, the applicant only alleges a violation of Article 3.¹⁴

When applicants do rely on both provisions, the Court approaches the case in two different ways: it either analyses Articles 2 and 3 in a joint manner (sometimes justifying this choice in the fact that the issues under Article 3 and 2 are ‘indissociable’) or, as is the case in a smaller number of examples, it assesses the full case on the basis of Article 3 and decides that there is no need to deal with the complaint under Article 2. The former approach will be referred to as ‘the joint approach’ and the latter will be referred to as ‘the exclusive approach’.

This section will delve into the recent case law of the Court in order to understand the origins and evolution of the blurring of the boundaries between the prohibition of ill-treatment and the right to life, in an attempt to identify certain jurisprudential patterns. Such patterns may in turn explain the choices of the Court with regard to the application of Article 2 in non-refoulement cases.

2.2 Borrowing the Principles from Article 3

In most cases in which the Court decides to jointly assess Article 2 and Article 3, it restates the principles of Article 3 in the context of non-refoulement and adds that ‘the above principles apply also in regard to Article 2 of the Convention’.¹⁵ This is unsurprising, since the Court has also underlined the ‘converging principles’ deriving from both provisions in cases concerning nationals of Member States.¹⁶

Though the principles under Article 3 in expulsion cases will be explained in Chapter 3 of this book, it suffices to say that Article 2 borrows both the material principles of the prohibition of ill-treatment (e.g. that there must be a *real*

¹⁴ See, for example, *M.Y.H. and Others v Sweden* Application no. 50859/10 (ECtHR, 27 June 2013), para 9, in which the applicant alleged that threatening messages such as ‘Christians are to be killed’ and ‘Your blood should be spilled’ had been written on his house’s walls, and yet he only claimed a breach of Article 3.

¹⁵ See, for instance, *D.N.W. v Sweden* Application no. 29946/10 (ECtHR, 6 December 2012), para 37; *T.K.H. v Sweden* Application no. 1231/11 (ECtHR, 19 December 2013), para 45; *Tatar v Switzerland* Application no. 65692/12 (ECtHR, 14 April 2015), para 44.

¹⁶ *Mocanu and Others v Romania [GC]* Application nos 10865/09, 45886/07 and 32431/08 (ECtHR, 17 September 2014), para 314.

risk of being subjected to a life-threatening situation covered by Article 2 in the other country) and the procedural principles (e.g. that it is often necessary to give the asylum seeker the benefit of the doubt in the credibility assessment).¹⁷ It is interesting to note that in some cases the Court appears to forget to add the paragraph stating that the principles under Article 3 are also applicable to Article 2, but, on the facts, assesses the case under both articles in a joint manner.¹⁸ This shows the slippery nature of Article 2 in expulsion cases.

However, there is one principle which the Court applies by analogy to Article 3, which is, in fact, not pertinent to Article 2: the requirement that ill-treatment must attain a ‘minimum level of severity’ if it is to fall within the scope of Article 3.¹⁹ While suffering ill-treatment is a gradual experience which depends on a range of factors, life and death are, by definition, of a binary nature. No ‘minimum level of severity’ of a killing may be required for Article 2 to apply.²⁰ It is highly unlikely that the Court suggests that a minimum level of severity is required for Article 2 to apply. Nevertheless, this consideration serves to show the ambiguities which may arise from directly applying the principles of one provision to another.

A final issue concerning the principles under Articles 2 and 3 relates to cases where the applicant is at risk of being sent to a country immersed in an armed conflict. There are some specific principles under Article 3 that apply to these cases, which were set for the first time in *N.A. v the United Kingdom*.²¹ In subsequent judgments, the Court has left the issue as to whether these specific principles also apply to the prohibition of refoulement under Article 2 unclear.²²

¹⁷ The procedural principles are summarised in detail in *F.G. v Sweden*, cit, paras 119–127.

¹⁸ This was the case in *S.A. v Sweden* Application no. 66523/10 (ECtHR 27 June 2013). However, in a very similar judgment rendered the same day, namely *D.N.M. v Sweden* Application no. 28379/11 (ECtHR 27 June 2013), the Court does add this paragraph (para 48).

¹⁹ *T.A. v Sweden* Application no. 48866/10 (ECtHR 19 December 2013), paras 34 and 37. For a recent development in the Court’s case law regarding this concept see Mavronicola, ‘Bouyid v Belgium: The ‘minimum level of severity’ and Human Dignity’s Role in Article 3 ECHR’ (2020) 1 European Convention on Human Rights Law Review 105. In that case, the Court found that one single slap inflicted on two men in custody amounted to a breach of Article 3. However, as argued by Cornelisse, the threshold for applying Article 3 in cases of expulsion of migrants is higher than in cases concerning nationals of Member States. See Cornelisse, cit.

²⁰ Such a consideration would only play a role in determining criminal responsibility, but it is not relevant to human rights law.

²¹ *N.A. v the United Kingdom*, Application no. 25904/07 (ECtHR, 17 July 2008). These principles state that general violence in a country will only amount to ill-treatment for *any* returned individual in the most extreme cases.

²² This is so because the Court states that ‘the above principles [those of Article 3] apply also in regard to Article 2’, and *only then* does it recall the principles that pertain to situations of general violence. See *T.K.H. v Sweden*, cit; *T.A. v Sweden*, cit; *N.A.N.S. v Sweden*

At first glance, this could lead to the assumption that Article 2 does not protect migrants at risk of being expelled to a situation of indiscriminate violence. However, the judgment *K.A.B. v Sweden* clarifies such doubts by applying, for the first time, the principles established in *N.A. v the United Kingdom* under Article 3 specifically to claims under Article 2.²³

2.3 *Leading Judgments of the Two Approaches: D. v the United Kingdom and Kaboulov v Ukraine*

There are very few judgments before 2010 in which migrants or asylum seekers alleged Article 2 in the context of non-refoulement.²⁴ Nonetheless, one of these cases has set the foundations of the exclusive approach, whereby the risk to the person's life is only analysed under Article 3 and not under Article 2. The first of these judgments is the famous *D. v the United Kingdom*, rendered in 1997, which is also the first case in which the Court found a violation of Article 3 on account of the deportation of an ill person.²⁵ In view of this finding, the Court considered that it was not necessary to examine his complaint under Article 2. This was despite the Court's recognition that this expulsion would subject him to acute mental and physical suffering *and* further reduce his already limited life expectancy.²⁶ It could thus have been a good opportunity for the Court to stress that the non-refoulement obligation can also be derived from Article 2. In this way, the Court *de facto* included the right to life into the third provision of the Convention.

The Court put forward two reasons for choosing the exclusive approach. First, it 'share[d] the views of the Government and the Commission that the complaints (...) under Article 2 are indissociable from the substance of his complaint under Article 3', although it did not explain why this was the case. Secondly, it 'note[d] in this respect that the applicant stated before the Court

Application no. 68411/10 (ECtHR, 27 June 2013); *N.M.Y. v Sweden* Application no. 72686/10 (ECtHR, 27 June 2013).

²³ *K.A.B. v Sweden* Application no. 886/11 (ECtHR, 5 September 2013), paras 72 and 73.

²⁴ Indeed, if one applies the filter '(Article 2) Expulsion' in the advanced search of HODOC, the oldest judgment that appears in the results dates from 2012 – although there are in fact some previous relevant cases, as shown in this chapter.

²⁵ *D. v the United Kingdom* Application no. 30240/96 (ECtHR, 2 May 1997). The leading nature of this case can be observed in the frequency with which the Court cites it in later judgments where the exclusive approach is taken: see *Said v Netherlands* Application no. 2345/02 (ECtHR, 5 October 2004); *N.A. v the United Kingdom*, cit, para 95; *Sufi and Elmi* Application nos 8319/07 and 11449/07 (ECtHR, 28 June 2011), para 199; *H. and B. v the United Kingdom*, Application nos 70073/10 and 44539/11 (ECtHR, 9 April 2013), para 64 (in which *D.* is indirectly quoted).

²⁶ *D. v the United Kingdom*, cit, para 52.

that he was content to base his case under Article 3'. It appears that the opinion of the Government, the Commission and the applicant himself strongly influenced the Court's ultimate decision to exclude Article 2 from its analysis. One may wonder whether the conclusion would have been different had the applicant insisted on claiming a violation of Article 2 in the oral hearing, or had the Commission departed from the Government's position. With regard to the United Kingdom Government, it seems logical for it to have preferred the exclusive approach, since the finding of two Convention violations may have a stronger negative political impact on states than the finding of one violation. Such a negative impact is all the more overt if the second violation found is a breach of 'the supreme right' under Article 2.

On the other hand, the 2009 judgment *Kaboulov v Ukraine* is the leading case of the joint approach, whereby the Court chooses to jointly assess the applications under Articles 2 and 3.²⁷ Moreover, *Kaboulov* was the first case in which the Court explicitly declared the general non-refoulement obligation flowing from Article 2, in the following terms:

[I]f an extraditing State knowingly puts the person concerned at such high risk of losing his life as for the outcome to be near certainty, such an extradition may be regarded as 'intentional deprivation of life', prohibited by Article 2 of the Convention.²⁸

Many years before *Kaboulov*, the European Commission (predecessor to the ECtHR) had considered that a 'real risk' – within the meaning of the case law concerning Article 3 – of loss of life would not, as such, necessarily suffice to make expulsion an 'intentional deprivation of life' as prohibited by Article 2; although it would amount to inhuman treatment within the meaning of Article 3.²⁹ Thus, for the Commission, the threshold required to trigger a

²⁷ *Kaboulov v Ukraine*, Application no. 41015/04 (ECtHR, 19 November 2009). *Kaboulov* is quoted in 11 migration-related judgments between 2012 and 2016 in which the Court takes the joint approach. The most recent example is the Grand Chamber judgment *F.G. v Sweden*, cit, para 110. However, it may be said that *Kaboulov* is actually an example of a 'separate approach', since the Court assesses the violation of Articles 2 and 3 separately (Article 2 in paras 95–103 and Article 3 in paras 104–115). This is the only judgment in which the Court does this. Furthermore, in *Kaboulov* the Court found a violation of Article 3 but not one of Article 2. In all subsequent cases in which Article 2 is included in the Court's analysis, the Court makes one single assessment of the facts under Articles 2 and 3, and finds a concomitant (non-) violation of both provisions.

²⁸ *Kaboulov v Ukraine*, cit, para 99.

²⁹ *Shammsuddin Bahaddar v the Netherlands* Application no. 25894/94 (Commission Report, 13 September 1996), para 78.

non-refoulement obligation under Article 2 was higher than that under Article 3. However, the Court has not developed this notion of a separate threshold for Article 2 and, in fact, has always applied the principles of Article 3 (including the ‘real risk’ test) when deciding on violations under Articles 2 and 3, as shown in Section 2.2.

Finally, it is relevant to note that *Kaboulov* concerned the extradition of an individual who was facing the death penalty in Ukraine for allegedly committing murder. This shows the importance that extradition cases have had for the protection of asylum seekers in Europe. In the same way that *Soering*, a case about the extradition of a man charged for murder to the United States, set the stage for the protection of asylum seekers in subsequent cases under Article 3,³⁰ *Kaboulov* has served as a basis for the Court to establish a complementary protection mechanism for asylum seekers under Article 2.

2.4 The Prominence of Article 2 in Different Types of Refoulement Cases

2.4.1 Persecution by Non-State Actors

In the time frame of this case law review (2011–2020), the Court rendered eight judgments in which the applicant had alleged a risk to his life under Articles 2 and 3 because of persecution by non-state actors.

In the 2012 case *H. and B. v the United Kingdom*, one of the Afghan applicants alleged that, if returned, his relatives would forcibly recruit him into an Islamist paramilitary group, and that he would thus face ill-treatment. He had also claimed to have received death threats from the Taliban, and therefore alleged that his life was at risk. The two different claims were identifiable and could have led the Court to analyse the issues respectively under Articles 3 and 2. The Court, however, found it ‘more appropriate to deal with the second applicant’s complaint under Article 2 in the context of its examination of his related complaint under Article 3’.³¹ As in *D. v the United Kingdom*, the Court did not explain why it was more appropriate to deal with an alleged violation of the right to life under a provision which does not literally contain such a right.

In subsequent cases of this kind, however, the Court appears to have abandoned the exclusive approach taken in *H. and B.* Most of these judgments were rendered in 2013, and all of the allegations made by the applicants related to a

³⁰ Dembour has questioned why the Court chose Mr Soering’s application to produce a leading case instead of selecting the application of several rejected asylum seekers (*Mr Vilvarajah and others*), which was lodged half a year earlier and was more representative of the type of returns that were generating applications before the Court. See Dembour, *When Humans Become Migrants* (OUP, 2015, Ch. 7, pp. 232–233).

³¹ *H. and B. v the United Kingdom*, cit, para 64.

direct risk to life. For instance, in *T.K.H. v Sweden* the asylum seeker had previously been injured by a bomb explosion outside his home,³² and in *N.M.Y. v Sweden* the applicant's house in Iraq had been vandalised with a message containing death threats.³³ In two other cases, the applicants claimed that they were at risk of becoming victims of an honour-related crime upon expulsion.³⁴ The Court found no violation of Articles 2 or 3 in either of these cases; however, it analysed both provisions jointly, thus implicitly recognising that the applicants' claims could not be solely covered by the scope of Article 3.

In one recent case, namely *N.A. v Finland*, the Court did find a violation of Articles 2 and 3.³⁵ The facts of the case are unusual in that the asylum seeker (the applicant's father) had already been deported to Iraq and had been killed. His death had allegedly been caused by an Islamist group who had an interest in him due to the investigations he had conducted against members of that group. The Court concluded that there had been a *procedural* breach of Articles 2 and 3, based on 'the unimpressive quality of the national authorities' assessment conducted in the father's asylum application'.³⁶ This judgment thus exemplifies how procedural non-refoulement obligations also flow from Article 2.

2.4.2 Situations of Extreme General Violence

In the first case concerning a possible risk to life due to the expulsion of a person to a situation of general conflict (*N.A. v the United Kingdom*), the Court held that 'no separate issue [arose] under Article 2 of the Convention'.³⁷ In the ensuing case *Sufi and Elmi v the United Kingdom*, the Court also took the exclusive approach. It found that the conflict in Mogadishu was so extreme that anyone in the city would be at risk of ill-treatment, and thus the United Kingdom would breach Article 3 (but not Article 2) if it were to expel the applicant to

³² *T.K.H.*, cit. A similar case was *T.A. v Sweden*, cit, in which the applicant's house had been destroyed.

³³ *N.M.Y.*, cit. In a similar case, *N.A.N.S. v Sweden*, cit, the applicant's parents had been killed.

³⁴ *D.N.M. v Sweden*, cit, and *s.A. v Sweden*, cit.

³⁵ *N.A. v Finland*, Application no. 25244/18 (ECtHR, 14 November 2019).

³⁶ Nieminen and Pekkarinen, 'N.A. v Finland – On the quality of the national authorities' risk assessment and what the authorities should learn from the case' (EJIL Talk, 17 December 2019) <www.ejiltalk.org/n-a-v-finland-on-the-quality-of-the-national-authorities-risk-assessment-and-what-the-authorities-should-learn-from-the-case/> last visited on 14 June 2020.

³⁷ *N.A. v the United Kingdom*, cit, holding no. 3. This was the only judgment analysed in this study, together with *D. v the United Kingdom*, cit, in which the Court explicitly referred to the exclusion of Article 2 in the verdict.

Somalia. Article 2 was excluded despite the fact that the Court explicitly considered ‘the number of civilians killed’ to be one of the factors in the assessment of the intensity of the violence in Mogadishu.³⁸

Subsequent judgments have reversed the Court’s apparent initial trend to choose the exclusive approach in situations of general violence. The first case of this type after *Sufi and Elmi* was the 2013 judgment *K.A.B. v Sweden*, in which the Court analysed both provisions in a joint manner and concluded that sending the applicant back to Mogadishu would not be in breach of Articles 2 or 3, as the situation in the city had improved since its ruling in *Sufi and Elmi*.³⁹

The three judgments that followed are particularly relevant from the perspective of international protection, since they concern the expulsion of asylum seekers to Syria, a major source country of refugees worldwide.⁴⁰ Indeed, the judgments *L.M. and Others v Russia*, *s.K. v Russia* and *o.D. v Bulgaria* show that the highest human rights court in Europe considers the Syrian conflict to be of such intensity that anyone’s life and/or physical integrity may be threatened by his or her mere presence *in any part of the country* – and not just in one city, as in *Sufi and Elmi*.⁴¹ The Court’s position has remained consistent from 2015 to 2019. The judgments are also relevant from the standpoint of the non-refoulement principle enshrined in Article 2, since the Court found a *material* violation of that provision, together with Article 3, in all of them.

Finally, these judgments also demonstrate a change in how the Court understands the term ‘indissociable’. While in previous cases like *D. v the United Kingdom* and *N.A. v the United Kingdom*, the Court uses this expression to exclude Article 2 from its analysis,⁴² in *K.A.B. v Sweden* and subsequent judgments relating to general violence, the Court affirms that ‘in the present case,

³⁸ *Sufi and Elmi*, cit, para 241. In this judgment (para 199) the Court also decided to deal with the complaint under Article 8 (right to family life) in the context of its examination of the Article 3 complaint. This is rather striking since the right to family life relates to an issue which is very distant from the fundamental threat to the person’s physical integrity. Moreover, the principles that apply to Article 3 are very different from those of Article 8 (see Chapter 7 of this book). It is also noticeable that the national authorities in *Sufi and Elmi* (paras 15 and 23) did consider the applicant’s allegations under Articles 2 and 3 on the one hand and those under Article 8 on the other.

³⁹ *K.A.B. v Sweden*, cit, para 97.

⁴⁰ UN High Commissioner for Refugees, *Global Trends. Forced Displacement in 2018* (UNHCR, 2019) <www.unhcr.org/statistics/unhcrstats/5d08d7ee7/unhcr-global-trends-2018.html> last visited on 14 June 2020.

⁴¹ *L.M. v Russia* Application nos 40081/14, 40088/14 and 40127/14 (ECtHR, 15 October 2015); *s.K. v Russia* Application no. 52722/15 (ECtHR, 14 February 2017); *o.D. v Bulgaria* App. no. 34016/18 (ECtHR, 10 October 2019).

⁴² See section 2.3.

the issues under Articles 2 and 3 (...) are indissociable and the Court will therefore examine them together'.⁴³ This seems a reasonable choice, since a general armed conflict involves, by its indiscriminate nature, a situation where individuals are at risk of being ill-treated (e.g. through physical and psychological trauma and sexual violence)⁴⁴ and/or killed.

2.4.3 Persecution by State Actors

In the cases analysed in which the alleged risk to life was derived from persecution by state actors, a tendency to use the joint approach more often can also be observed, which may point to an increasing relevance of Article 2 in non-refoulement jurisprudence relating to state persecution.

From the nine cases of this type reviewed in this chapter, the Court only excluded the application of Article 2 twice. The first case (*I. v Sweden*) concerned Chechen asylum seekers who fled persecution by the Russian Security Service (the FSB). The Court considered it more appropriate to deal with the complaint exclusively under Article 3 – and found a violation of this provision – even though the FSB had put a price on the first applicant's head and the second applicant had by chance survived an extra-judicial killing.⁴⁵

The second case (*M.A. v Switzerland*) is significant because the Court did not assess the claim under Article 2 'in the context of the claim under Article 3', but actually declared the claim under Article 2 inadmissible. The applicant alleged that he would be exposed to a prison sentence of seven years and 70 lashes if returned to Iran. While the Court found a breach of Article 3, it declared the complaint under Article 2 inadmissible because 'he did not provide any specific arguments as to how the Swiss authorities had violated th[is] right(...):'⁴⁶ This judgment thus sheds light onto the conditions for the non-refoulement complaint under Article 2 to be admitted: the applicant has to specifically claim that, if returned, he will be at risk of death. It is not sufficient that he claims to be at risk of ill-treatment. In the present case, for instance, it appears that M.A. would have had to argue that the extreme punishment he was facing would put him at risk of death in order for the Court to admit his claim under Article 2.

⁴³ *K.A.B.*, cit, para 67; *L.M.*, cit, para 108; *S.K.*, cit, para 77 (quoting *L.M.*); *O.D.*, cit, para 43.

⁴⁴ On the effects of recent armed conflicts on specific population groups, see Njita, *Sexual Violence Against Women in Situation of Armed Conflict* (Lambert Academic Publishing, 2010); Kadir and Others, 'The Effects of Armed Conflict on Children' (2018) 142(6) *Pediatrics* 1.

⁴⁵ *I. v Sweden* Application no. 61204/09 (ECtHR, 5 September 2013), para 6.

⁴⁶ *M.A. v Switzerland* Application no. 52589/13 (ECtHR, 18 November 2014), para 73.

Regarding the other seven cases of this type in which the Court did choose the joint approach, the Court has found a violation of Articles 2 and 3 in three of them in recent years.⁴⁷ In 2016, the Grand Chamber found a procedural violation of Articles 2 and 3 in *F.G. v Sweden*. The applicant, an Iranian asylum seeker, had converted to Christianity in Sweden. Since conversion from Islam is punishable by death in Iran, the Court found that the Swedish authorities had failed to assess of their own motion whether the applicant's return would entail a violation of Articles 2 and 3. In 2017, the Court found a material violation of Articles 2 and 3 in *A.I. v Switzerland*, in which the applicant was an opponent of the Sudanese regime. The practice of torturing members of rebel groups, as well as the situation of armed conflict in Darfur, would put the applicant at risk of ill-treatment *and* of being killed. Finally, in February 2020 the Court released the judgment *M.A. and Others v Bulgaria*, in which it had to decide on a politically sensitive issue: the organised mass detention of Uighurs (a Muslim minority) by the Chinese authorities in Xinjiang.⁴⁸ The Court found that, upon return, the applicants would be at risk of arbitrary imprisonment, ill-treatment *and even death*, and accordingly concluded that their removal to China would be in breach of Articles 2 and 3.⁴⁹

2.4.4 Health-Related Cases and Indirect Refoulement

There are two final sets of cases in which, unlike the previous judgments analysed, the exclusive approach seems to prevail. The first of these groups concerns judgments in which the applicants claimed that expulsion would put their lives at risk due to their critical health condition. It has already been shown that the founding judgment of the exclusive approach was a health-related case (*D. v the United Kingdom*). The same approach was taken in the

⁴⁷ The other cases in which the joint approach was taken but no violation of Articles 3 or 2 was found are: *H.N. v Sweden* Application no. 30720/09 (ECtHR, 15 May 2012); *D.N.W. v Sweden*, cit; *N.A. v Switzerland* Application no. 50364/14 (ECtHR, 30 May 2017); *D. and Others v Romania* Application no. 75953/16 (ECtHR, 14 January 2020).

⁴⁸ In November 2019, several leaked files provided more evidence of the practice of detaining Uighurs in 'political re-education centres'. See Ramzy and Buckley, 'Absolutely No Mercy: Leaked Files Expose How China Organized Mass Detentions of Muslims' (The New York Times, 16 November 2019) <www.nytimes.com/interactive/2019/11/16/world/asia/china-xinjiang-documents.html> last visited on 14 June 2020. The European Parliament passed a resolution condemning this practice: European Parliament, *Resolution on the Situation of the Uighurs in China* (2019/2945(RSP), 17 December 2019) <www.europarl.europa.eu/doceo/document/RC-9-2019-0246_EN.html> last visited on 14 June 2020.

⁴⁹ *M.A. and Others v Bulgaria* Application no. 5115/18 (ECtHR, 20 February 2020), paras 77 and 84.

2011 judgment *Yoh-Ekale Mwanje v Belgium*. Yoh-Ekale was a Cameroonian national who was undergoing HIV treatment in Belgium. She claimed that deporting her to Cameroon would violate her rights under Article 3, as she would no longer have access to the necessary anti-retroviral drugs. She further submitted that expulsion would lead her to premature death, in contravention of Article 2. The Court found that her expulsion would not be in breach of Article 3. In view of this conclusion ‘and the circumstances of the case’, the Court deemed it unnecessary to examine the complaint under Article 2.⁵⁰

In two later judgments, the Court seemed to be embracing the joint approach in health-related cases as well. In the 2013 judgment *T.K.H. v Sweden*, the Court considered that the applicant’s injuries – caused by a bomb explosion – were not of such a serious nature that his deportation would give rise to a breach of Articles 2 or 3.⁵¹ Two years later the Court found in another case (*Tatar v Switzerland*) that the applicant’s schizophrenia could be treated in Turkey and, as such, deportation would not violate Articles 2 or 3.⁵²

However, in the much-awaited Grand Chamber case *Paposhvili v Belgium* of 2016, the Court returned to its origins in *D.* and chose the exclusive approach. The Court underlined that the applicant’s life expectancy would have been less than six months if he had been returned to Georgia.⁵³ Despite explicitly emphasising the risk to Paposhvili’s life, the Court found a breach of Article 3 and decided not to examine the complaint under Article 2. A reason for choosing the exclusive approach might have been the controversial nature of health-related cases, since states are reluctant to recognise an obligation to protect

⁵⁰ *Yoh-Ekale Mwanje v Belgium* Application no. 10486/10 (ECtHR, 20 December 2011), para 86.

⁵¹ *T.K.H. v Sweden*, cit, paras 51–52. See also Section 2.3.1.

⁵² *Tatar v Switzerland*, cit, paras 47–50 and 54. In October 2019, the Court decided on a very similar case (concerning only an Article 3 allegation). This has been the first case in which the Court has found a violation of Article 3 on account of a risk to a migrant’s mental health. See Klaasen, A New Chapter on the Deportation of Ill Persons and Article 3 ECHR: the European Court of Human Rights judgment in *Savran v Denmark* (Strasbourg Observers, 17 October 2019) <<https://strasbourgobservers.com/2019/10/17/a-new-chapter-on-the-deportation-of-ill-persons-and-article-3-echr-the-european-court-of-human-rights-judgment-in-savran-v-denmark/>> last visited on 7 June 2020. The case was referred to the Grand Chamber on 27 January 2020.

⁵³ *Paposhvili v Belgium* [GC] Application no. 41738/10 (ECtHR, 13 December 2016), para 195 (the third conditional has been used in this sentence due to the fact that the applicant died while the case was still pending before the Grand Chamber). On the exclusion of an ‘imminence requirement’ by the Court in Paposhvili, see Anderson, ‘Comment on Paposhvili v Belgium and the Temporal Scope of Risk Assessment’ (EJIL Talk, 21 February 2017) <www.ejiltalk.org/comment-on-paposhvili-v-belgium-and-the-temporal-scope-of-risk-assessment/> last visited on 7 June 2020.

migrants whose claims have ‘no connection with the rationale of international protection’.⁵⁴ Though in *Paposhvili* the Grand Chamber lowered the threshold for a violation of Article 3 in this type of case, it might have wanted to avoid finding a second Convention breach under Article 2. Given the importance of Grand Chamber cases for guiding the case law, it is likely that, in future health-related cases in which Article 2 is alleged, the Court will also choose the exclusive approach.⁵⁵

A second group of cases in which the exclusive approach seems to prevail are those of indirect refoulement. In *M.s.s. v Belgium and Greece*, the Grand Chamber found that the applicant’s transfer by Belgium to Greece gave rise to a violation of Article 3 for exposing the applicant to the deficiencies in the Greek asylum procedure, but did not decide on the complaint under Article 2.⁵⁶ A parallel conclusion was reached by the Second Chamber in *Sharifi and Others v Italy and Greece*.⁵⁷ In these cases, it might be the remoteness of the actual refoulement that led the Court to consider that it is sufficient to find a violation under Article 3, thus not deeming it necessary to consider in addition the alleged risk to life under Article 2.

As a last remark, it is interesting to note that health-related cases and cases about indirect refoulement are the only judgments in which the Court excludes the application of Article 2 *after* having found a (non-)violation of Article 3. In all the other cases in which the exclusive approach is chosen, the Court takes the decision to exclude the assessment of Article 2 before proceeding to the analysis of the alleged violation.⁵⁸

2.5 *The Right to an Effective Remedy under Article 13 in Conjunction with Article 2*

Allegations of a breach of Articles 2 and 3 before the ECtHR in the context of non-refoulement are often accompanied by a claim that the state did not provide the applicant with an effective remedy at the national level (Article

⁵⁴ These were the words of the Court of Justice of the European Union (CJEU) in *M'Bodj*, referring to cases in which migrants allege a risk to their health upon expulsion. See Judgment of 18 December 2014, *M'Bodj*, C-542/13, EU:C:2014:2452, para 44.

⁵⁵ For an empirical analysis of how the ECtHR cites its own case law, see Lupu and Voeten, ‘Precedent in International Courts: A Network Analysis of Case Citations by the European Court of Human Rights’ (2011) 42 British Journal of Political Science 413.

⁵⁶ *M.s.s. v Belgium and Greece* Application no. 30696/09 (ECtHR, 21 January 2011), para 361.

⁵⁷ *Sharifi and Others v Italy and Greece* Application no. 16643/09 (ECtHR, 21 October 2014), para 235.

⁵⁸ *N.A. v the United Kingdom*, cit, para 95; *H. and B. v the United Kingdom*, cit, para 64; *Sufi and Elmi*, cit, para 199; *I. v Sweden*, cit, para 6.

13 ECHR).⁵⁹ In this field, too, certain patterns can be observed as to when the Court chooses to examine the allegation under Article 13 in connection to Article 3 alone or in connection with Articles 2 and 3. Most notably, in the last decade, the Court has only taken the exclusive approach with regard to Article 13 in health-related cases and in cases about indirect refoulement.⁶⁰

In the majority of cases (six out of ten) the Court has chosen the joint approach. Moreover, it has found a violation of Article 13 in conjunction with Articles 2 and 3 in all of them – three of which are quite recent (2017, 2019 and 2020).⁶¹ Therefore, in the case law about effective remedies against non-refoulement, the Court also appears to have abandoned the exclusive approach, with the aforementioned exception of health-related and indirect refoulement cases.

3 The Jurisprudential Abolition of the Death Penalty and Its (Lack of) Impact on Asylum Seekers

On paper, Article 2(1) ECHR allows States to intentionally deprive individuals of their life ‘in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law’. However, thanks to the ratification of Protocols 6 and 13 to the ECHR⁶² and to the jurisprudence of the Court, this exception to the right to life has become obsolete.

At several points in time, academics have closely followed the case law of the Court regarding the abolition of the death penalty,⁶³ which evolved in

59 For an analysis of Article 13 ECHR in migration-related cases, see Chapter 6 of this book.

60 *Yoh-Ekale Mwanje v Belgium*, cit; *M.S.S. v Belgium and Greece*, cit; *Sharifi and Others v Italy and Greece*, cit; *V.M. and Others v Belgium*, Application no.60125/11 (ECtHR, 7 July 2015). For instance, in *V.M.* (para 221) the Court found the claims of indirect refoulement under Articles 2 and 3 to be ‘arguable’ for the purpose of Article 13, yet only declared a violation of Article 13 in connection to Article 3.

61 *M.A. v Cyprus* Application no 41872/10 (ECtHR, 23 July 2013); *A.C. and Others v Spain* Application no 6528/11 (ECtHR, 24 April 2014); *A.D. and Others v Turkey* Application no 22681/09 (ECtHR, 22 July 2014); *S.K. v Russia*, cit; *O.D. v Bulgaria*, cit; *D and Others v Romania*, cit.

62 Protocol no. 6 to the ECHR concerning the Abolition of the Death Penalty, 28 April 1983, E.T.S. no. 114, *entered into force* 1 March 1985; Protocol no. 13 to the ECHR, concerning the Abolition of the Death Penalty in All Circumstances, 3 May 2002 E.T.S. no. 187, *entered into force* 1 July 2003.

63 Harris, ‘The Right to Life under the European Convention on Human Rights’ (1994) 1(2) Maastricht Journal of European and Comparative Law 122; Fionnuala, ‘The Evolving Jurisprudence of the European Convention concerning the Right to Life’ (2001) 19 Netherlands Quarterly of Human Rights 21; Schabas, *The Abolition of the Death Penalty*

parallel to the ratification of European States of the two Protocols and ultimately resulted in the recognition in 2010 that 'Article 2 has been amended so as to prohibit the death penalty in all circumstances'.⁶⁴ The line of case law in which the Court evaluated whether the Convention still allowed for the imposition of the death penalty generally concerned cases in which the applicant was a foreign national⁶⁵ who had committed a serious crime and was at risk of being expelled to a country where he or she allegedly faced death penalty.

The most prominent judgments in this regard are *Soering v the United Kingdom* –in which the Grand Chamber stated that Article 3 could not be read as prohibiting death penalty as such⁶⁶–, *Öcalan v Turkey* –in which the Grand Chamber affirmed that Article 3 only prohibited death penalty after an unfair trial⁶⁷– and *Al-Saadoon and Mufdhi* –in which the Court finally declared that death penalty qualifies, in itself, as inhuman treatment.⁶⁸ With respect to Article 2 case law, the key judgment is the aforementioned *Kaboulov v Ukraine*, in which the Court concluded that carrying out an extradition in circumstances where there are substantial grounds to believe that the person will face a risk of being liable to capital punishment would be a breach of Article 2.⁶⁹

Due to its close relationship with the principle of non-refoulement, the question of the gradual abolition of the death penalty often appears in commentaries on the rights of asylum seekers.⁷⁰ One may speculate, however, as to whether Article 2(1) ECHR has ever, in fact, allowed for the expulsion of asylum seekers and refugees who faced the death penalty in their country of origin for one of the reasons in Article 1 of the Refugee Convention. It is quite plausible to suggest that the discussion around whether Article 2(1) permitted capital punishment applied only to cases in which the individual had committed a serious crime. Not, quite remarkably, to those in which the death penalty was

⁶⁴ *in International Law* (Cambridge University Press, 2002, pp. 259–310); Yorke, 'Inhuman Punishment and Abolition of the Death Penalty in the Council of Europe' (2010) 16 European Public Law 77; De Weck, cit, pp. 157–160.

⁶⁵ *Al-Saadoon and Mufdhi v the United Kingdom*, cit, para 120.

⁶⁶ A notable exception is *Öcalan v Turkey* [GC] Application no. 46221/99 (ECtHR, 12 May 2005), in which the applicant was a Turkish national.

⁶⁷ *Soering v the United Kingdom*, cit, para 103.

⁶⁸ *Öcalan v Turkey*, cit, paras 168–169.

⁶⁹ *Al-Saadoon and Mufdhi v the United Kingdom*, cit, para 120.

⁷⁰ *Kaboulov v Ukraine*, cit, para 99.

⁷⁰ Mole and Meredith, *Asylum and the European Convention on Human Rights* (Council of Europe Publishing, 2010, pp. 88–92); UNHCR, *The Case Law of the European Courts*, cit, pp. 208–212.

an instrument for persecution. Although this question has never been tackled by the Court, there are several elements which support this hypothesis.

First of all, even if, on its face, Article 2(1) permits the death penalty for any ‘crime’ as long as it is provided by law, the principle of proportionality must apply. Consequently, even before the jurisprudential amendment of this provision, the death penalty was only permissible for the gravest of crimes.⁷¹ In fact, in *Soering* the Grand Chamber affirmed that ‘a disproportionality to the gravity of the crime committed’ was a reason for the implementation of the death penalty to amount to inhuman treatment.⁷² It becomes evident that facing the death penalty as a punishment for the ‘crime of apostasy’ in Iran or for homosexual conduct in Mauritania and other countries is a blatant breach of the principle of proportionality.⁷³

Secondly, Article 6(2) of the International Covenant on Civil and Political Rights (ICCPR) forbids the imposition of the death penalty for reasons ‘contrary to the provisions of the (...) Covenant’.⁷⁴ While Article 2 ECHR does not contain such limitation, the Court in *Soering* left open the possibility that the limitations found in Article 6 ICCPR are inherent in the language of Article 2, given that this instrument ‘ha[d] been ratified by a large number of States Parties to the European Convention’.⁷⁵ This led the legal scholars to contend that the limits concerning the death penalty as per Article 6 ICCPR are implicit within Article 2(1) of the Convention.⁷⁶ Therefore, the imposition of the death penalty in the above examples would not be allowed by Article 2(1), as it would be in breach of, *inter alia*, Article 8 (right to private and family life) and Article 9 (freedom of religion).⁷⁷

⁷¹ Harris, cit, 131. Schabas also drew attention to the fact that the requirement that capital punishment be imposed only for the ‘most serious crimes’ was recognised in documents of the Organisation for Security and Cooperation in Europe (OSCE). See Schabas, cit, 267.

⁷² *Soering v The United Kingdom*, cit, para 104.

⁷³ States that maintain the death penalty as punishment for same-sex conduct are: Brunei, Iran, Mauritania, Qatar, Saudi Arabia, Sudan and Yemen. Afghanistan, Brunei, Iran and Mauritania are amongst the states that maintain it for the crime of apostasy. See HUMAN RIGHTS WATCH, *Outlawed. The Love that Dare Not Speak its Name* (HRW 2019) <http://internap.hrw.org/features/features/lgbt_laws/#_ftn3> last visited on 14 June 2020; Goitom, *Laws Criminalizing Apostasy* (Law Library of Congress 2014) <www.loc.gov/law/help/apostasy/index.php#_ftnref30> last visited on 14 June 2020.

⁷⁴ International Covenant on Civil and Political Rights, 16 December 1966, 999 U.N.T.S. 171 and 1057 U.N.T.S. 407, entered into force 23 March 1976.

⁷⁵ *Soering v the United Kingdom*, cit, para 108.

⁷⁶ Shabas, cit, p. 267.

⁷⁷ See, *mutatis mutandi*, Hathaway, cit, pp. 208–209.

Finally, Article 2(1) provides that the death penalty may be imposed as a ‘sentence of a court following [a] conviction for a crime for which this penalty is provided by law’. The term ‘court’ must be read as implying ‘a body independent of the executive branch of government and offering the guarantees of a judicial procedure’.⁷⁸ Moreover, as already noted, the Grand Chamber in *Öcalan* considered that a death sentence on a person after an unfair trial would be in breach of Article 3.⁷⁹ It is hard to imagine that the judicial system of a country that imposes the capital punishment on individuals for their beliefs, political opinion or their sexual orientation would comply with the standards of lawfulness, judicial independence and/or procedural fairness required by Articles 2 and 3.⁸⁰

An analysis of some of the ECtHR cases relating to the expulsion of refugees facing the death penalty in their countries of origin appears to support this conclusion. In the years 2000, 2009 and 2016, the Court adjudicated in cases in which the applicant was a refugee or asylum seeker fleeing the death penalty due to, respectively, her gender,⁸¹ his political opinion⁸² and his religious convictions.⁸³ In none of these cases did the Court examine whether the text of Article 2(1) allows for capital punishment. Instead, it directly assessed whether there was a real risk that the death penalty would be imposed upon return in order to determine whether the Convention had been breached.⁸⁴ On the contrary, in most judgments relating to the extradition of persons being prosecuted for the commission of a serious crime, the Court built upon its line of case law regarding the abolition of the death penalty.⁸⁵

78 Shabas, cit, p. 267.

79 *Öcalan v Turkey*, cit, paras 168–169.

80 For instance, death penalty for apostasy in Iran is not provided by law, but the courts can hand down that punishment, and have done so in previous years, based on their interpretation of Sharia'a law and *fatwas*. See Goitom, cit. In Saudi Arabia, the authorities generally fail to abide by the standards of fair trial and safeguards for defendants in capital cases. See AMNESTY INTERNATIONAL, *Report Saudi Arabia* (AI 2019) <www.amnesty.org/en/countries/middle-east-and-north-africa/saudi-arabia/report-saudi-arabia/> last visited on 14 June 2020. See also the deficient rule of law standards in Iran, Mauritania and Afghanistan in WORLD JUSTICE PROJECT, *Rule of Law Index* (WJP 2019) <<https://worldjusticeproject.org/sites/default/files/documents/ROLI-2019-Reduced.pdf>> last visited on 14 June 2020.

81 *Jabari v Turkey* Application no. 40035/98 (ECtHR, 11 July 2000).

82 *F.H. v Sweden* Application no. 32621/06 (ECtHR, 20 January 2009).

83 *F.G. v Sweden*, cit.

84 *Jabari v Turkey*, cit, para 41; *F.H. v Sweden*, cit, para 99; *F.G. v Sweden*, cit, para 156.

85 The Court still recalls this line of case law in recent judgments concerning extradition of persons prosecuted for serious crimes. See *A.L. (X.W.) v Russia*, Application no. 44095/14 (ECtHR, 29 October 2015), para 62. Compare to the aforementioned asylum-related case

For these reasons, it is arguable that the gradual prohibition of the death penalty in the Council of Europe is a discussion which has not tangibly affected refugees, who have always been protected by the principle of non-refoulement under the ECHR (since its inception in *Soering*) read in connection with the limitations to the imposition of capital punishment enshrined (explicitly and implicitly) in Article 2(1) of the Convention.

4 The Right to Life of Migrants within the Destination State and during the Migration Journey

When migrants and asylum seekers fear a risk to their lives in their country of origin, Article 2 imposes a *negative obligation* on states not to expel the individual to that situation.⁸⁶ However, when that risk is present during the migratory journey or inside the destination country, Article 2 establishes certain *positive obligations* to prevent the migrant's death and to carry out an official investigation if the fatality has already taken place. While the Court's case law in this field is scarce, the few judgments rendered so far serve to delineate the core of these positive obligations towards migrants. Moreover, recent litigation before the Court, as well as the work of legal commentators, are indicative of how the future jurisprudence might expand the content of such obligations.

4.1 *The Right to Life of Vulnerable Migrants within the European State*

The protection of the right to life of migrants and asylum seekers within European states under Article 2 does not present obvious differences vis-à-vis the right to life of nationals. That said, however, the often precarious situation in which irregular migrants find themselves,⁸⁷ as well as the inadequate conditions in which asylum seekers are accommodated in some European countries,⁸⁸ are factors which may put a migrant's life at a particular risk

F.G. v Sweden, cit, released only a few months after A.L. (x.w.), in which the Court did not refer to this discussion.

86 Dembour however points out that in the *Soering* case law regarding non-refoulement, the Court implicitly relies on a view of human rights made of positive obligations, because it uses a relativist language which is more often found in the context of positive obligations than in that of absolute negative obligations. See Dembour, *Who Believes in Human Rights?* (Cambridge University Press, 2006, pp. 85–87).

87 Vonk, 'Access to Social Protection for Non-Citizen Migrants: The Position of Irregular Immigrants' in Plender (ed), *Issues in International Migration Law* (Brill, 2015).

88 For instance, for some time Hungary did not provide food to asylum seekers held in the Hungarian transit zones at the border with Serbia whose application had been rejected. See EUROPEAN COMMISSION, *Hungary: Commission takes next step in the*

– especially if that person is in a weak state of health. When certain conditions are complied with, this risk may trigger the positive obligation under Article 2 to prevent death. This obligation will be explained through the judgment *v.M. and Others v Belgium*,⁸⁹ which shows that, in certain circumstances, leaving vulnerable migrants in destitution within the states' territory may violate the right to life.

The applicants in *v.M. and Others* were a Serbian family that applied for asylum in Belgium. They also applied for a residence permit on medical grounds, given that the eldest daughter suffered from several pathologies. After their applications were rejected, they were expelled from the reception centre where they had been staying, as they were no longer eligible for state support. Consequently, the family remained for three weeks in miserable conditions in a railway station before returning to Serbia with the help of a local charity. Two months after their return to Serbia, the eldest daughter died of a lung infection. The applicants claimed, *inter alia*, that their daughter would not have died if the Belgian authorities had not exposed her to conditions of material destitution.

The Court recalled the two types of positive obligations which derive from Article 2: the obligation to investigate deaths – which will be dealt with in section 4.2 – and the obligation to take preventive operational measures to protect an individual whose life is at risk. In relation to the second obligation, in *v.M.* the Court only referred to the risks which derive from the criminal acts of one person against another individual. However, this positive duty also applies to circumstances where the source of the risk is not a particular person, as well as when the individual at risk is not clearly identified.⁹⁰ The decisive factor is whether the authorities knew or ought to have known at the time

infringement procedure for non-provision of food in transit zones (Press Release, 10 October 2019) <https://ec.europa.eu/commission/presscorner/detail/en/IP_19_5994> last visited on 14 June 2020. On a different note, the Court in *M.s.s. v Belgium and Greece*, cit, found a violation of Article 3 on the part of Greece for the inadequate reception conditions of asylum seekers.

⁸⁹ *v.M. and Others v Belgium* Application no. 60125/11 (ECtHR, 7 July 2015). See also no. 60.

⁹⁰ *Öneryildiz v Turkey* Application no. 48939/99 (ECtHR, 30 November 2004), para 89; *Budayeva and Others v Russia*, Application nos 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02 (ECtHR, 20 March 2008), paras 128–129. Thomas Spijkerboer and Vladislava Stoyanova have stressed the flexibility of the Court in establishing the requirements regarding the source of the risk and the identification of the person or persons at risk. See Spijkerboer, 'Are European States Accountable for Border Deaths?' in Juss (ed), *Research Companion to Migration Law and Theory* (Ashgate, 2013, p. 68); Stoyanova, 'The Right to Life Under the EU Charter and Cooperation with Third States to Combat Human Smuggling' (2020) 21 German Law Journal 436.

of the existence of a real and immediate risk to life,⁹¹ and whether causation between the omission and the fatality can be established.⁹² Importantly, the duty to prevent may not impose an ‘impossible or disproportionate burden’ on the authorities. Rather, it has to be assessed on a case-by-case basis whether the state took all the measures which, judged reasonably, it might have been expected to take in order to avoid that risk.⁹³

In the present case, the Court concluded that, while the state was aware of the fact that the eldest daughter suffered from several pathologies, the medical certificate presented to the authorities in support of the application for a residence permit made no mention of the degree of seriousness of those pathologies. Moreover, the Court found that the most relevant factor that had caused the girl’s death was not the conditions of destitution in Belgium but the fact that the applicants lived for several weeks in unhealthy conditions after returning to Serbia. The elements of knowledge and causation were thus not present, and Belgium had not breached Article 2.⁹⁴

Even though no violation was found in the particular case, one may derive from the reasoning of the Court that a state’s knowledge of the grave state of health of a migrant or asylum seeker within its territory may trigger an obligation to prevent death under Article 2.⁹⁵ If the authorities do not take the reasonable measures that can be expected from them (e.g. taking the person to a hospital) and the migrant dies, the state would be in breach of Article 2, provided that a causal link between the refusal to provide health care and the migrant’s death can be proven.

It is true, however, that with regard to positive obligations to provide health care, the Court has so far only found violations of Article 2 in cases in which medical errors had been made or where the provision of medicines had been

⁹¹ *v.M. and Others v Belgium*, cit, para 168.

⁹² Ibid, para 170.

⁹³ Ibid, para 168.

⁹⁴ The Court did however find a violation under Article 3 on account of the conditions of destitution to which the applicants were exposed. See NICOLOSI, *v.M. and Others v Belgium: The asylum law discourse reloaded* (Strasbourg Observers, 21 July 2015) <<https://strasbourgobservers.com/2015/07/21/v-m-and-others-v-belgium-the-asylum-law-discourse-reloaded/>> last visited on 14 June 2020.

⁹⁵ This knowledge will be present, for instance, when the migrant submits a medical certificate when applying for a residence permit – as in *v.M.* – or when the migrant or asylum seeker is staying in a publicly-run reception centre. See, *mutatis mutandi*, the case *Dodov v Bulgaria*, Application no. 59548/00 (ECtHR, 17 January 2008), in which the Court held that Article 2 imposes an obligation on states to protect the life and health of people housed in nursing homes.

denied contrary to domestic law and domestic court decisions.⁹⁶ Moreover, the Court takes into account whether the state has actively denied the health care, as well as whether that health care is generally available to the population.⁹⁷ Consequently, the threshold for finding a violation of Article 2 when the risk of the migrant's life derives from his or her state of health – in combination with conditions of destitution – is not easily reached.

4.2 *The Right to Life of Migrants during the Journey to Europe*

Hundreds of people die each year at the borders of Europe.⁹⁸ This phenomenon has been coined as 'border deaths', a term that describes the premature deaths of persons whose movement or presence has been unauthorised and irregularised as they interact with state boundaries.⁹⁹ This section will examine not only the existing case law of the ECtHR regarding this issue, but also the recent litigation before the Court and relevant academic contributions which provide an insight into how future case law might evolve.

4.2.1 The Obligation to Investigate Border Deaths

The first case relating to the obligation to investigate border deaths was *Xhavara and Others v Italy and Albania*.¹⁰⁰ The applicants were a group of Albanian migrants who had tried to clandestinely reach Italy by sea in 1997. An Italian naval vessel, in an attempt to prevent the disembarkation of the migrants on the Italian coast, collided with it and caused it to overturn. Fifty-eight persons died as a result, including the applicants' families. While the Court was not convinced that the Italian authorities had 'intentionally caused' the shipwreck (thus ruling out a breach of a *negative obligation* under Article 2), it did recall that Article 2(1) imposed upon the state a *positive obligation* to protect the lives of persons within their jurisdiction. When the actions of public officials result in the death of a human being – as was the case at hand – Article 2 required

96 Slingenberg, 'Social Security in the Case Law of the European Court of Human Rights' in Pennings and Vonk (eds), *Research Handbook on European Social Security Law* (Edward Elgar Publishing, 2015, p. 82).

97 Ibid, 79–80.

98 Last and Others, 'Deaths at the border database: evidence of deceased migrants' bodies found along the southern external borders of the European Union' (2017) 43 Journal of Ethnic and Migration Studies 693.

99 Last, 'Introduction: A State-of-the-Art Exposition on Border Deaths' in Cuttitta and Last (eds), *Border Deaths: Causes, Dynamics and Consequences of Migration-related Mortality* (Amsterdam University Press, 2020).

100 *Xhavara and Fifteen Others v Italy and Albania* Application no. 39473/98 (ECtHR, 11 January 2001).

the state to carry out an investigation that was ‘official, effective, independent and public’. On the facts, however, the Court declared the application inadmissible because Italy was already conducting such an investigation, and thus the applicants had failed to exhaust domestic remedies.

The *Xhavara* finding that states have to investigate the deaths caused by their agents was not ground-breaking.¹⁰¹ However, it is relevant in the light of recent events, such as the confrontations between Greek officials and migrants in February/March 2020 after Turkey decided to stop controlling the exit of migrants intending to enter Greece. Greek coastguards were urged to reinforce border control operations, and at least two migrants died as a result.¹⁰² Following *Xhavara*, the Greek state has a duty under Article 2 to investigate the responsibility of its officials in the reported deaths.

The second case, *Randelović and others v Montenegro*,¹⁰³ concerned the shipwreck of a migrant dinghy close to the Montenegrin coast, which a large group of persons of Serbian nationality had boarded with the intention of reaching Italy. Subsequently, thirty-five bodies were found in the sea. The Court reiterated that Article 2 imposes a procedural obligation upon the state to investigate deaths, not only when they occur at the hands of state agents (as in *Xhavara*), but also at the hands of private or unknown individuals. That investigation must be directed towards establishing the circumstances of an individual’s death and the person(s) responsible. It must also be carried out with due diligence and promptness. In this particular case, the authorities of Montenegro had identified some of the bodies of the deceased, had contacted their families and prosecuted (though later acquitted) several individuals for having committed ‘reckless endangerment’. However, the proceedings were still ongoing after seventeen years, which led the Court to conclude that Montenegro had not complied with the requirements of promptness and efficiency. Their actions, therefore, were in breach of Article 2.

Though this case concerned the responsibility of the state of departure, the same obligation applies to states who find a migrant’s body on their coasts or in other spaces. By analogy with *Randelović*, Article 2 entails an obligation

¹⁰¹ A particularly relevant case defining this obligation was *Osman v the United Kingdom* [GC] Application no. 23452/94 (ECtHR, 28 October 1998), para 115.

¹⁰² AMNESTY INTERNATIONAL, *Greece/Turkey: Asylum-seekers and migrants killed and abused at borders* (3 April 2020) <www.amnesty.org/en/latest/news/2020/04/greece-turkey-asylum-seekers-and-migrants-killed-and-abused-at-borders/> last visited on 10 June 2020. See also HUMAN RIGHTS WATCH, *Greece: Violence Against Asylum Seekers at Border* (17 March 2020) <www.hrw.org/news/2020/03/17/greece-violence-against-asylum-seekers-border> last visited on 14 June 2020.

¹⁰³ *Randelović and Others v Montenegro* Application no. 66641/10 (ECtHR, 19 October 2017).

to open an investigation with the purpose of identifying the body, contacting relatives and locating and punishing those responsible (usually migrant smugglers).¹⁰⁴ The first two tasks present many challenges, amongst others, because those who migrate irregularly often do not carry an identification document with them.¹⁰⁵ However, the obligation to investigate is an obligation of means, not of result,¹⁰⁶ and there are several initiatives, such as the International Commission on Missing Persons,¹⁰⁷ with whom the state could collaborate so as to comply with the requirement of using 'all means at its disposal'.¹⁰⁸ The investigation ought to be carried out with due diligence, in particular to avoid 'prolong[ing] the ordeal for members of the family'.¹⁰⁹ As to the location and punishment of the migrant smugglers, there is no absolute obligation under Article 2 to prosecute them under criminal law or for the prosecution to result in conviction, but 'national courts should not under any circumstances be prepared to allow life-endangering offences to go unpunished'.¹¹⁰

4.2.2 The Obligation to Prevent Border Deaths

A third application before the ECtHR in the context of the migration journey, *Rackete and Others v Italy*, only resulted in a decision to reject a request for an interim measure.¹¹¹ However, certain conclusions relating to the obligation to prevent migrants' deaths may be derived from it. The applicants were the well-known German captain of the ship *Sea-Watch 3*, Carola Rackete, and forty sub-Saharan migrants. They were stranded on board that ship outside Italian territorial waters after the non-governmental organisation (NGO) Sea-Watch

¹⁰⁴ It is to be noted, nonetheless, that the responsible persons for migrants' deaths are not necessarily the 'captains' of migrants' dinghies. It is often the case that these captains are migrants or asylum seekers themselves, and are forced to steer or navigate the boat. In these cases, it is arguable that Article 2 imposes an obligation to prosecute not the captain of the dinghy but the person(s) who forced that migrant to work as a smuggler. See Patañé and Others, 'Asylum-Seekers Prosecuted for Human Smuggling: A Case Study of Scafisti in Italy' (2020) 39 Refugee Survey Quarterly 1.

¹⁰⁵ M'charek and Black, 'Engaging Bodies as Matters of Care' in Cuttitta and Last (eds), *Border Deaths: Causes, Dynamics and Consequences of Migration-related Mortality* (Amsterdam University Press, 2020, pp. 90–93).

¹⁰⁶ *Randelović and Others v Montenegro*, cit, para 123.

¹⁰⁷ M'charek and Black, cit, p. 95.

¹⁰⁸ *Öneryıldız v Turkey*, cit, para 91.

¹⁰⁹ *Randelović and Others v Montenegro*, cit, para 130.

¹¹⁰ Ibid, para 123.

¹¹¹ Registrar of the ECtHR, 'The Court Decides not to Indicate an Interim Measure Requiring that the Applicants be Authorised to Disembark in Italy from the Ship Sea-Watch 3' (Press Release ECHR 240(2019), 25 June 2019).

had rescued the migrants from a shipwreck. Since Italy had forbidden the *Sea-Watch 3* from entering territorial waters, the applicants argued that Articles 2 and 3 ECHR entitled them to disembark on Italian coasts in order to be able to apply for international protection or, at least, to be taken to a safe place. From the text of the Press Release – including the questions posed to the parties – it is evident that the Court strongly based its decision to reject the request for an interim measure on the fact that Italy had allowed the most vulnerable migrants on board the ship to disembark. In fact, the Court stated that ‘it was relying on the Italian authorities to *continue to provide* all necessary assistance to those persons on board (...) in a situation of vulnerability as a result of their age or state of health’.¹¹²

It is thus likely that, in future cases similar to *Rackete*, the Court will issue interim measures requiring states to allow for the disembarkation of vulnerable migrants on board of rescue ships if the authorities have not already done so. It is also possible that, if the state fails to comply with the interim measure and one or several vulnerable migrants die as a result (because of their state of health and the lack of medical resources in the boat), the Court will find a violation of Article 2, as long as the elements of knowledge and causation are present (see Section 4.1). On the other hand, it is also apparent from *Rackete* that Articles 2 and 3 do not impose a general obligation upon states to allow for the disembarkation of NGO rescue boats.

Beyond the issue of NGO rescue ships, Article 2 ECHR arguably imposes positive obligations on states to rescue migrants whose life is at risk during the migration journey, be it during a shipwreck on the Mediterranean Sea or in a situation of distress on the Western Balkan route.¹¹³ In *Furdik*, a judgment unrelated to migration, the Court considered that the duty to safeguard the right to life ‘also extends to the provision of emergency services where it has been brought to the notice of the authorities that the life or health of an individual is at risk on account of injuries sustained as a result of an accident’. Importantly, the duty to prevent the loss of lives ‘includes the provision of air-mountain or air-sea rescue facilities to assist those in distress’.¹¹⁴ In an in-depth

¹¹² Ibid, 2.

¹¹³ For a regularly updated map of the main migration routes to Europe, see Frontex, *Migratory Map* <<https://frontex.europa.eu/along-eu-borders/migratory-map/>> last visited on 11 June 2020. For data on the numbers and location of recently occurred ‘border deaths’ in and around Europe, see ORGANIZATION FOR MIGRATION, *Missing Migrants project* <<https://missingmigrants.iom.int/region/europe>> last visited on 11 June 2020.

¹¹⁴ *Furdik v Slovakia* (dec.) Application no. 42994/05 (ECtHR, 2 December 2008) (emphasis added).

study of the issue of migrants in distress at sea, Komp has come to the conclusion that the case law of the ECtHR under Article 2, together with the duty to assist persons in distress that derives from maritime law, prohibits states from returning migrant boats to the high seas.¹¹⁵

The main problem that arises with regard to the positive obligation to save migrant's lives during their migration journey is not whether such an obligation exists, but whether the state exercises jurisdiction over those persons in the sense of Article 1 ECHR. This is even more problematic in the context of externalisation practices.¹¹⁶ The issue will have to be addressed by the Court in the pending case *s.s. and Others v Italy*, filed by a group of migrants that survived a shipwreck close to the Libyan coast after being rescued by *Sea Watch 3*.¹¹⁷ Among other complaints, the applicants argue that the Libyan coastguard patrol vessel, which also arrived at the scene, caused strong turbulence which led to the death of at least twenty people who had fallen from the sinking migrant dinghy. Moreover, the patrol vessel attempted to obstruct the rescue operation that *Sea Watch 3* was simultaneously carrying out. Italy played an important role in this unfortunate event, since they made it possible for the Libyan authorities to carry out the operation through financial and practical means. If the Court decides that Italy exercised jurisdiction,¹¹⁸ it is very likely that it will find a breach of the positive obligation under Article 2 to protect the migrants' lives.

More generally, Spijkerboer has argued that European migration policies *themselves* may trigger positive obligations under Article 2, insofar as one of the effects of the externalisation of border controls is that migrants take up more dangerous travel routes, leading to an increase in the number of border

¹¹⁵ Komp, 'The Duty to Assist Persons in Distress: An Alternative Source of Protection against the Return of Migrants and Asylum Seekers to the High Seas?' in Moreno-Lax and Papastavridis (eds) *'Boat Refugees' and Aliens at Sea: A Comprehensive Approach: Integrating Maritime Security with Human Rights* (Brill/Nijhoff, 2017, p. 237). See also Abrisketa, *Rescates en el Mar, Desembarco en un Puerto Seguro y Conexión con el Reglamento Dublín III* (Thomson Aranzadi, 2020).

¹¹⁶ For an example of an externalisation practice – which is, as for now, *lege ferenda* – see Calvo Mariscal, 'Cooperation Between the European Union and Libya as Regards to Migration and Asylum: The Eventual Creation of Disembarkation Platforms' (2019) 23(1) Spanish Yearbook of International Law 294.

¹¹⁷ *s.s. and Others v Italy* Application no. 21660/18, introduced 3 May 2018, communicated 26 June 2019.

¹¹⁸ For an analysis of whether Italy exercised jurisdiction in this particular case, see De Leo, *s.s. and Others v Italy: Sharing Responsibility for Migrants' Abuses in Libya* <www.publicinternationallawandpolicygroup.org/lawyering-justice-blog/2020/4/23/ss-and-others-v-italy-sharing-responsibility-for-migrants-abuses-in-libya> last visited on 14 June 2020.

deaths.¹¹⁹ Since states are not unaware of these effects, they are under a positive obligation to adapt their policies so as to minimise this unintended and undesirable side-effect. While Spijkerboer suggests concrete steps that the states should take in order to align their policies with the requirements of Article 2, Stoyanova recalls that states enjoy discretion as to how they comply with positive obligations, and it is thus difficult to make the argument that a concrete measure is the positive obligation that corresponds to migrants' right to life.¹²⁰

Whether the Court will ever transform these academic contributions into actual case law remains to be seen. In the light of the recent inadmissibility decision *M.N. and Others v Belgium*, it appears unlikely that the Court will infer an obligation under Article 2 to issue humanitarian visas at states' embassies in order to guarantee asylum seekers a safe pathway to Europe.¹²¹ However, there may be other specific obligations to prevent border deaths deriving from Article 2 – and the case *s.s. v Italy* will be of particular importance in this regard.¹²²

5 Conclusions

This chapter began by explaining three different situations in which the life of migrants and refugees may be at risk: in their country of origin, during the migration journey and in the destination state. In order to explore how the

¹¹⁹ Spijkerboer, cit. Furthermore, in June 2019 a complaint was deposited at the Office of the Prosecutor of the International Criminal Court (ICC) concerning, *inter alia*, the responsibility of EU officials for border deaths. See Shatz and Others, 'EU Migration Policies in the Central Mediterranean and Libya 2014–2019' (Communication to the Office of the Prosecutor of the ICC, 3 June 2019).

¹²⁰ Stoyanova, cit, p. 458.

¹²¹ *M.N. and Others [GC]* (dec.) Application no. 3599/18 (ECtHR, 5 May 2020) was another politically sensitive case in which the Court held that Belgium did not exercise jurisdiction over a family of Syrian asylum seekers who applied for a humanitarian visa at the Belgian embassy in Lebanon. For an analysis of this judgment in a comparative perspective, see De Leo and Ruiz Ramos, 'Comparing the Inter-American Court Opinion on Diplomatic Asylum Applications with M.N. and Others v Belgium before the ECtHR' (EU Migration Law Blog, 13 May 2020) <<http://eumigrationlawblog.eu/comparing-the-inter-american-court-opinion-on-diplomatic-asylum-applications-with-m-n-and-others-v-belgium-before-the-ecthr/>> last visited on 11 June 2020.

¹²² Baumgärtel, 'High Risk, High Reward: Taking the Question of Italy's Involvement in Libyan 'Pullback' Policies to the European Court of Human Rights' (EJIL: Talk!, 14 May 2018) < <https://www.ejiltalk.org/high-risk-high-reward-taking-the-question-of-italys-involvement-in-libyan-pullback-policies-to-the-european-court-of-human-rights/>> last visited on 14 June 2020.

European Convention system protects these persons from each type of risk to their lives, it analysed recent judgments of the ECtHR concerning Article 2 ECHR in these three distinct – yet intertwined – contexts.

The main focus of the chapter has been on non-refoulement, given that the jurisprudence of the Court in this area under Article 2 is more abundant (section 2). It has been shown that, although the Court sometimes decides to analyse the risk to the applicants' lives exclusively under Article 3 (a choice for which the Court gives no explanation), there is a general tendency in recent years to also include Article 2 in the risk assessment. Thus, with some exceptions such as health-related cases and cases about indirect refoulement, Article 2 is becoming more prominent in situations where the migrant fears a direct risk to life upon return.

This seems a sensible approach, given that, unlike Article 3, the second provision of the Convention specifically protects the right to life.¹²³ Not taking Article 2 into account in these cases would appear to undermine the importance of this provision with respect to Article 3, in spite of the Court's understanding that 'together with Article 3, [Article 2] enshrines one of the basic values of the democratic societies (...).'¹²⁴ Moreover, by finding a violation of both Articles 2 and 3, the 'blaming and shaming' effect of the Court's judgments in non-refoulement might be stronger. In a different vein, although the Court does not award non-pecuniary damages when it finds a violation of Article 3 and the migrant has not yet been expelled, it does so when the expulsion has already taken place.¹²⁵ Arguably, if a migrant dies as a result of expulsion and the Court finds a violation of Article 3 *and* 2, it might award higher non-pecuniary damages to the family than if it finds a breach exclusively under

¹²³ Some authors have argued in favour of granting Article 2 a more relevant position in non-refoulement cases. Already in 1994, Harris submitted that the *Soering* principles developed under Article 3 should also apply so as to engage the returning state's responsibility for possible breaches of Article 2. He stated that these principles apply to a real risk of any breach of Article 2 following deportation or extradition, not just one involving the death penalty. See Harris, cit, 130. In the specific context of extradition to face the death penalty, Frumer criticised that the Court in *Al-Saaddon and Mufdhi*, cit, focused only on Article 3, arguing that in future similar cases 'it would also be logical for the Court to rule on the violation of Article 2'. See Frumer, 'Le transfert de détenus dans le cadre d'opérations militaires multinationales – la peine de mort dans le collimateur de la Cour Européenne des droits de l'homme' (2010) 84 Revue trimestrielle des Droites de l'Homme 959, p. 985. Finally, De Weck has affirmed that 'the Court's approach with regard to Art. 2 ECHR in the context of refoulement is not fully convincing since the scopes of Art. 2 and Art. 3 ECHR are not congruent'. See De Weck, cit, p. 23.

¹²⁴ *McCann and others v the United Kingdom*, cit, para 147.

¹²⁵ De Weck, cit, p. 76.

Article 3.¹²⁶ Finally, EU law also makes a distinction in its subsidiary protection regime between serious harm in the form of death penalty or execution and serious harm in the form of ill-treatment.¹²⁷

The chapter has also explained how the case law of the Court gradually established that a person may not under any circumstances be extradited to a country where he or she would risk facing the death penalty, even if the literal text of Article 2(1) still foresees the death penalty exception to the right to life. However, it has also been argued that this provision has, in fact, *always* protected refugees from being expelled to face the death penalty, even before the Court considered capital punishment to be entirely forbidden (Section 3).

As regards the positive obligations flowing from Article 2 once the migrant has reached the destination state, the chapter has shown that, on the one hand, Article 2 may provide protection to vulnerable migrants who, due to their state of health and conditions of destitution, are at risk of death. On the other hand, however, the case law of the Court is cautious in recognising obligations to provide health care, and thus the circumstances surrounding such a risk to life will have to be very particular in order for the Court to find a violation of Article 2 (Section 4.1.).

Finally, the case law of the Court regarding ‘border deaths’ (Section 4.2), while scarce, imposes a clear obligation on states to open official investigations when human bodies are found at the states’ borders, as well as to locate

¹²⁶ Though the amount awarded will generally depend on the victim’s request, there have been cases in which the Court has awarded damages without such a request, especially in decisions concerning Articles 2 and 3. See Fikfak, ‘Changing State Behaviour: Damages before the European Court of Human Rights’ (2019) 29(4) European Journal of International Law 1091, p. 1120. Interestingly, in *M.S.s. v. N.A.*, in which the applicant only alleged a breach of non-roulement under Article 3 after having been expelled, he requested EUR 24,900 in respect of non-pecuniary damage; while in *N.A. v. Finland* the family of N.A. claimed a breach of both Articles 2 and 3 on account of N.A.’s death upon expulsion and yet they only requested EUR 20,000 in respect of such damage. It is arguable that N.A. could have claimed a higher amount than M.S.s. due to their allegation of a breach of two provisions of the Convention.

¹²⁷ Articles 15(a) and 15(b) of Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted. While Article 15(a) derives from Protocol 6 ECHR – thus indirectly deriving from Article 2 – subsidiary protection under Article 15(b) is directly inspired from Article 3, as shown in Durieux, ‘Salah Sheekh is a Refugee. New Insights into Primary and Subsidiary Forms of Protection’ (2008) Refugee Studies Centre Working Paper 49, p. 15 <www.rsc.ox.ac.uk/files/files-1/wp49-salah-sheekh-refugee-2008.pdf> last visited on 14 June 2020.

and punish migrant smugglers. The obligation to prevent border deaths is less clear, yet core obligations to save the lives of migrants in distress (either in an NGO ship unable to disembark or on sinking migrant dinghies) may be derived from the Court jurisprudence. Furthermore, Article 2 may eventually force states to readapt their migration policies so as to prevent border deaths, as argued by some legal commentators.

Already in *Soering*, Judge De Meyer submitted a concurring opinion affirming that the Court should have, ‘also and above all’, found a violation of Article 2.¹²⁸ Since then –perhaps because of judicial inertia – Article 3 has been the main provision through which the lives of migrants and refugees has been protected. Nonetheless, the first right enshrined in the Convention is beginning to gain more relevance in non-refoulement, and both the analysis of the Court’s case law and legal doctrine demonstrate the great potential of Article 2 to hold states accountable for migrants’ deaths. Only time will tell whether De Meyer’s emphasis on the predominance of Article 2 will become mainstream in the migration-related case law of the Court.

¹²⁸ *Soering v the United Kingdom, cit*, Concurring Opinion of Judge De Meyer, para 1.

Protecting Aliens with Article 3 of the ECHR

An Analysis with a Focus on Refugees and Migrants

*Meltem Ineli-Ciger**

1 Introduction

Today, torture is prohibited by a peremptory norm of international law.¹ Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms² (ECHR) provides, 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'. As affirmed countless times by the European Court of Human Rights (ECtHR), Article 3 enshrines one of the most fundamental values of democratic society.³ The prohibition provided under Article 3 is absolute.⁴ Article 3 cannot be derogated in time of war or any other emergency and there are no exceptions to the prohibition of torture and inhuman or degrading treatment or punishment.⁵

Article 3 of ECHR is a popular research subject; accordingly, there is plenty of literature analysing the article⁶ and focusing on protection of migrants under Article 3.⁷ This chapter seeks to contribute to the existing literature by focusing

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¹ De Wet, 'The prohibition of torture as an international norm of jus cogens and its implications for national and customary law' (2004) 15(1) European Journal of International Law 97, p. 98.

² COE 'Convention for the Protection of Human Rights and Fundamental Freedoms' (signed 4 November 1950, entered into force 3 September 1953) 213 UNTS 221.

³ *Soering v the United Kingdom*, Application no. 14038/88 (ECtHR, 7 July 1989), para 88; *Chahal v the United Kingdom*, Application no. 22414/93 (ECtHR, 15 November 1996), para 204.

⁴ See Article 15 of the ECHR; *Chahal v the United Kingdom*, cit, para 80.

⁵ Harris, O'boyle, Bates and Buckley, *Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights* (3rd edn, OUP, 2014); Mowbray, *Cases, Materials, and Commentary on the European Convention on Human Rights* (3rd edn, OUP, 2012, p. 235).

⁶ See Harris et al, cit; Mowbray, cit.

⁷ See Costello, *The Human Rights of Migrants in European Law* (OUP, 2016); Mcadam, *Complementary Protection in International Law* (OUP, 2007); Lauterpacht and Bethlehem, 'The Scope and Content of the Principle of Non-refoulement' in Feller, Türk, and Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (CUP, 2003, p. 78); Duffy, 'Expulsion to Face Torture?

on protection of aliens within the scope of Article 3 and providing an up-to-date review of state obligations towards refugees and migrants under this article. The first part of the article introduces the chapter by defining torture and inhuman and degrading treatment and identifying state obligations, which stem from Article 3 with no special focus on aliens, refugees and migrants. Whereas, the second part discusses the removal, residence and detention of aliens under Article 3 in light of the recent case law of the ECtHR. Building on these two parts, the third part identifies obligations of states towards aliens under Article 3 and discusses the reason that Article 3 is quite relevant today for the protection of refugees and migrants in Europe.

2 Article 3 of the ECHR, an Overview

2.1 Defining Key Terms in Article 3 of the ECHR

In order to truly grasp the relevance of Article 3 of the ECHR for the protection of refugees and migrants in Europe, it is crucial to understand the meaning of torture, inhuman treatment and degrading treatment. Not all ill-treatment cases fall within the scope of Article 3: according to the ECtHR's well-established case law, ill-treatment must attain a minimum level of severity.⁸ The assessment of this level is relative and depends on all the circumstances of the case such as: the duration of the treatment, its physical or mental effects and the sex, age and state of health of the victim.⁹ While assessing the level of severity of ill-treatment, the Court also takes into account the motivation and intention behind the ill-treatment, the context in which the ill-treatment was inflicted and the degree of vulnerability of the applicant.¹⁰ The severity of the ill-treatment, the difference in the intensity of the suffering inflicted and

Non-refoulement in International Law' (2008) 20(3) International Journal of Refugee Law 373; Den Heijer, 'Whose Rights and Which Rights? the Continuing Story of Non-refoulement under the European Convention on Human Rights' (2008) 10(3) European Journal of Migration and Law 277; Moreno-Lax, 'Hirsia Jamaa and Others v Italy or the Strasbourg Court v Extraterritorial Migration Control?' (2012) 12(3) Human Rights Law Review 574; Clayton, 'Asylum Seekers in Europe: MSS v Belgium and Greece' (2011) 11(4) Human Rights Law Review 758; see also *ECHR, Guide on the case law of the European Convention on Human Rights Fact Sheet*, Immigration, 30 April 2000 <https://www.echr.coe.int/Documents/Guide_Immigration_ENG.pdf> last visited on 1 May 2020.

⁸ *Ireland v the United Kingdom*, Application no. 5310/71 (ECtHR, 18 January 1978), para 162; *Khlaifia and Others v Italy* [GC], Application no. 16483/12, 15 December 2016, para 159.

⁹ *Khlaifia and Others v Italy*, cit, para 159.

¹⁰ *ibid*, para 160.

sometimes intention behind the ill-treatment mark the difference between torture and inhuman treatment or degrading treatment.¹¹

2.1.1 Torture

The Court defines torture as 'deliberate inhuman treatment causing very serious and cruel suffering'.¹² Different from inhuman treatment and degrading treatment, torture carries a special stigma; moreover, for a certain act to be classified as torture an intentional infliction of severe pain or suffering with a certain objective is required.¹³ In *Ireland v the United Kingdom*, the European Commission of Human Rights held that the application of a combination of 'five interrogation techniques' consisting of wall-standing, hooding, subjection to noise, deprivation of sleep pending interrogation and deprivation of food and drink to interrogate suspected terrorists amounted to torture and inhuman treatment whereas the Court decided that this amounted to only inhuman and degrading treatment but not torture.¹⁴ The Court has justified its decision by noting, application of a combination of 'five interrogation techniques' did not occasion suffering of the particular intensity and cruelty implied by the word torture.¹⁵ This was a very strict reading of the term torture and has changed over time into a more flexible one.

Torture involves the infliction of severe pain and suffering: in the Greek case, the Commission concluded that *falaka*¹⁶ and severe beating of all parts of the body of political detainees to extract confession by the Greek police amounted to torture.¹⁷ In *Aksoy v Turkey*, the applicant being subjected to 'Palestinian hanging', electric shocks, beating, slapping and verbal abuse with the aim of obtaining admissions or information was considered to be torture.¹⁸ Similar to these judgments, in *Selmouni v France* the Court categorised the repeated assaults, sexual abuse and the applicant being threatened with a blow lamp in custody, considering the deliberate maltreatment element as torture.¹⁹

¹¹ *Ireland v the United Kingdom*, cit, para 167.

¹² *ibid*, para 167; Harris et al, cit, p. 238.

¹³ *Crino and Renne v Italy*, Application no. 2539/13 and 4705/13 (ECtHR, 26 October 2017), paras 73–74.

¹⁴ *Ireland v the United Kingdom*, cit, para 165.

¹⁵ *ibid*, paras 167, 168.

¹⁶ *Falaka* means beating of the feet causing excruciating pain and leaving no marks. See Harris et al, cit, p. 238.

¹⁷ *Denmark, Norway, Sweden and the Netherlands v Greece* ('Greek Case') (1969) Yearbook XII, 186; Harris et al, cit, p. 238.

¹⁸ *Aksoy v Turkey*, Application no. 21987/93 (ECtHR, 18 December 1996), paras 60–64.

¹⁹ *Selmouni v France*, Application no. 25803/94 (ECtHR, 28 July 1999); Mowbray, cit, p. 166.

Rape may also amount to torture: for instance in *Aydin v Turkey* the Court decided that rape of a 17-year-old girl and her being subjected to a series of particularly terrifying and humiliating experiences while in custody amounted to torture.²⁰ Whereas, in *Zontul v Greece*, which concerned ill-treatment of an irregular migrant in detention following his interception by the Greek coast-guards, the Court held that forced penetration of a male detainee's anus by a truncheon was rape and this was torture.²¹ In these two cases, the Court affirmed that the rape of a detainee by a state official was an especially grave and abhorrent form of ill-treatment and amounts to torture.²²

Notably, in *Gäfgen v Germany*, the Court affirmed that 'a threat of torture can amount to torture'.²³ Other acts which were categorised by the Court as torture include 'mock execution', 'forced feeding of a mentally competent prisoner who was engaging in hunger strike with no medical necessity' and 'fear of execution while waiting on death row'.²⁴ This brief review provides that torture involves the most severe form of ill-treatment and is reserved for relatively rare cases, whereas inhuman treatment and degrading treatment involve a lesser degree of suffering inflicted.²⁵

2.1.2 Inhuman Treatment and Degrading Treatment

In *Kudla v Poland*, the Court noted that a treatment was inhuman when it is 'premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical or mental suffering'.²⁶ Different from torture, inhuman treatment can occur without a particular intention to inflict suffering.²⁷ According to Cassese, inhuman treatment has at least three elements: the intent to ill-treat, a severe suffering and the absence of justification.²⁸

²⁰ The applicant was beaten, stripped, sprayed with cold water from high-pressure jets while being spun in a tyre. See *Aydin v Turkey*, Application no. 23178/94 (ECtHR, 25 September 1997), paras 83, 84.

²¹ *Zontul v Greece*, Application no. 12294/07 (ECtHR, 17 January 2012); Harris et al, cit, p. 239.

²² *Aydin v Turkey*, cit, para 83; Harris et al, cit, p. 239.

²³ *Gäfgen v Germany*, Application no. 22978/05 (ECtHR, 1 June 2010), para 108.

²⁴ See *Nevmerzhitsky v Ukraine*, Application no. 54825/00 (ECtHR, 5 April 2005), paras 94–99; Mowbay, cit, pp. 170, 171.

²⁵ Mowbay, cit, p. 145.

²⁶ *Kudla v Poland* (2002) 35 EHRR 198, para 92.

²⁷ Harris et al, cit, p. 241.

²⁸ Cassese, 'Prohibition of Torture and Inhuman or Degrading Treatment or Punishment' in Macdonald, Matscher, and Petzold (eds), *The European System for the Protection of Human Rights* (Martinus Nijhoff, 1993, p. 229); Arai-Yokoi, 'Grading Scale of Degradation: Identifying the Threshold of Degrading Treatment or Punishment under Article 3 ECHR' (2003) 21(3) Netherlands Quarterly of Human Rights 385, p. 390.

Ill-treatment can take forms of assault or mental suffering. Cases of assaults including gunshot wounds, a broken jaw and other facial injuries were determined by the Court as inhuman treatment.²⁹ In *Tomasi v France*, the Court held that the applicant being slapped, kicked, punched, deprived of food, forced to stand naked behind the window and being spit upon by government agents had been identified as inhuman treatment.³⁰ According to Mowbray, the *Tomasi v France* judgment provides that ‘the infliction of significant physical violence on a detainee by state officials, even where no serious long-term injuries are caused, will be classified as inhuman treatment’.³¹ Whereas, in *Ribitsch v Austria*, the Court categorised the applicant being punched in the head, kidneys and on the arm, his hair being pulled and his head being banged on the floor by the police as inhuman treatment.³²

Not just assault but also mental suffering can amount to inhuman treatment: in *Ireland v the United Kingdom*, the Court found that the deliberate infliction of intense physical and mental suffering by applying a combination of ‘five interrogation techniques’ as inhuman treatment.³³ Going one step further, the Court noted in *Gäfgen v Germany* that the real and immediate threats of torture against a child killer for the purpose of extracting information from him about the kidnapped child’s whereabouts was also inhuman treatment.³⁴ The Court elaborated its view by noting ‘the classification of whether a given threat of physical torture amounted to psychological torture or to inhuman or degrading treatment depends upon all the circumstances of a given case, including, notably, the severity of the pressure exerted and the intensity of the mental suffering caused’.³⁵ The ECtHR has also classified not informing the family members of a person’s whereabouts/fate for many years who has disappeared after being taken custody as inhuman treatment.³⁶

Degrading treatment is defined by the Court as a treatment such as to arouse in its victims feelings of fear, anguish or inferiority capable of breaking an individual’s moral and physical resistance.³⁷ Even in the absence of actual bodily injury or intense physical or mental suffering, where the treatment humiliates

²⁹ *Sambor v Poland*, Application no. 15579/05 (ECtHR, 1 February 2011).

³⁰ *Tomasi v France* (1993) 15 EHRR 1; Mowbay, cit, p. 172.

³¹ Mowbay, cit, p. 174.

³² *Ribitsch v Austria* (1996) 21 EHRR 573 para 39; Mowbay, cit, p. 175.

³³ Mowbay, cit, p. 176.

³⁴ *Gäfgen v Germany*, cit, para 108.

³⁵ *ibid*, para 108.

³⁶ See *Kurt v Turkey*, Application no. 24276/94 (ECtHR, 25 May 1998); *Çakici v Turkey* (2001) 31 EHRR 5; Mowbay, cit, pp. 176–179.

³⁷ *Soering v The United Kingdom*, cit, para 100; *Kudla v Poland*, cit, para 92.

or debases an individual, this can be characterised as degrading.³⁸ The Court has decided in a number of cases that poor detention conditions, such as overcrowded cells with no privacy and lack of sanitary conditions in detention, as degrading treatment.³⁹ The Court also found that ill-treatment of persons in detention or conducting strip searches without a legitimate reason or lack of adequate medical treatment in prison also amounted to degrading treatment.⁴⁰ In cases relating to detention, to find a violation of Article 3 the Court requires the suffering and humiliation involved in any event to go beyond that inevitable element of suffering and humiliation connected with detention.⁴¹

2.2 *General Obligations of States under Article 3 of the ECHR*

Article 1 of the ECHR establishes that 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention.' The issue of jurisdiction is examined in another chapter⁴² hence, will not be discussed here in detail but suffice to say when a state exercises *de jure* or *de facto* control over a person, this engages state responsibility under the ECHR. Complying with Article 3 of the ECHR involves both substantive and procedural duties. As for substantive duties, states, first and foremost, must not subject a person to torture or inhuman or degrading treatment or punishment and this is a negative obligation.⁴³ States also have a number of positive obligations arising from Article 3: states must take measures designed to ensure that individuals within their jurisdiction, nationals and aliens alike, are not subjected to torture or inhuman or degrading treatment or punishment.⁴⁴ These measures include introducing national laws and policies to deter, prevent and punish treatment prohibited under Article 3 by government agents as well as private persons.⁴⁵ For instance, the Court made

38 *Idalov v Russia*, Application no. 5826/03 (ECtHR, 22 May 2012), para 41.

39 *ibid; Modarca v Moldova*, Application no. 14437/05 (ECtHR, 10 May 2007); *Hummatov v Azerbaijan*, Application no. 9852/03 and 13413/04 (ECtHR, 29 November 2017); Harris et al, cit, pp. 261–270.

40 *Idalov v Russia*, cit; *Modarca v Moldova*, cit; *Hummatov v Azerbaijan*, cit; Harris et al, cit, pp. 261–270.

41 *Kudla v Poland*, cit, paras 92–94.

42 See Chapter 1 of this book.

43 Harris et al, cit, p. 274.

44 *A. v the United Kingdom*, Application no. 100/1997/884/1096 (ECtHR, 23 September 1998); Akandji-Kombe, *Positive obligations under the European Convention on Human Rights*, Council of Europe, Human Rights Handbooks, Application no. 7 <<https://rm.coe.int/168007ff4d>> last visited on 1 May 2020, 28.

45 Harris et al, cit, p. 274.

it clear that states need to have laws to deter and prevent rape and domestic violence by private persons.⁴⁶

States also need to take measures to ensure detention and prison conditions and the treatment in detention and prison are in line with Article 3. As the Court affirmed many times: states must ensure that a person is detained in humane conditions and ‘the manner and method of the execution of the measure do not subject him or her to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his or her health and well-being are adequately secured’.⁴⁷ Moreover, states must make sure the detention conditions are appropriate for vulnerable persons including persons with disabilities.⁴⁸

Aside from these substantive duties, states also have procedural obligations to conduct a thorough and effective investigation where an individual makes an arguable claim of ill treatment by government officials or private parties in breach of Article 3.⁴⁹ The objective of this is to make sure that it is possible to bring a prosecution or engage in the necessary judicial proceedings where Article 3 is violated.⁵⁰ In line with this objective, the investigation should be ‘capable of leading to the identification and punishment of those responsible’.⁵¹ It should also be expedient, conducted diligently and reasons must be provided when a complaint is dismissed.⁵²

Besides the outlined general obligations, states also have certain obligations relating to the expulsion, residence and detention of aliens under Article 3 and these are examined in the following section.

⁴⁶ See *ibid*, pp. 274, 275; *Opuz v Turkey*, Application no. 33401/02 (ECtHR, 9 June 2009).

⁴⁷ *Kudla v Poland*, paras 92–94; *Idalov v Russia*, para 93.

⁴⁸ *Price v the United Kingdom*, Application no. 33394/96 (ECtHR, 10 July 2001), para 30; Mowbray, cit, p. 217.

⁴⁹ *Gäfgen v Germany*, cit, para 117; Harris et al, cit, p. 276; Mowbray, cit, p. 156.

⁵⁰ Akandji-Kombe, cit, pp. 33 and 34.

⁵¹ *Gäfgen v Germany*, cit, para 116; Harris et al, cit, p. 276.

⁵² Harris et al, cit, p. 277.

3 The Expulsion, Residence and Detention of Aliens and Article 3 of the ECHR

3.1 The Expulsion of Aliens and Article 3 of the ECHR

3.1.1 The Principle of Non-Refoulement and Article 3 of the ECHR

Article 3 of the ECHR does not contain an express provision prohibiting removal to face torture.⁵³ In various judgments, the ECtHR has noted that: ‘Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations, including the Convention, to control the entry, residence and expulsion of aliens.’⁵⁴ However, the Court has established, states must observe Article 3 in exercising their right to expel aliens, irrespective of the victim’s conduct, however undesirable or dangerous.⁵⁵

*Soering v the United Kingdom*⁵⁶ was the first case where the non-refoulement character of Article 3 of the ECHR was established.⁵⁷ The ECtHR established in *Soering* that:

the decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3, and hence engage the responsibility of that state under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country.⁵⁸

This principle established in *Soering* is extended to other acts of removal including deportation and expulsion of aliens in *Cruz Varas v Sweden*⁵⁹ and

53 Costello, cit, p. 180.

54 *Chahal v the United Kingdom*, cit, para 73; *Vilvarajah and Others v the United Kingdom*, Application no. 13163/87, 13164/87, 13165/87, 13447/87, 13448/87 (ECtHR, 30 October 1991), para 102; *Hirsi Jamaa and Others v Italy [GC]*, Application no. 27765/09 (ECtHR, 23 February 2012), para 113.

55 *Salah Sheek v the Netherlands*, Application no. 1948/04 (ECtHR, 11 January 2007), para 135; see also for an analysis on Article 3 and the principle of non-refoulement Harvey, ‘The International Protection of Refugees and Asylum Seekers: the Role of Article 3 of the European Convention on Human Rights’ in Abass and Ippolito (eds), *Regional Approaches to the Protection of Asylum Seekers: An International Legal Perspective* (Routledge, 2016, pp. 171–191).

56 *Soering v the United Kingdom* (1989) 11 EHRR 439.

57 Lauterpacht and Bethlehem, cit, p. 155.

58 *Soering v the United Kingdom*, cit, para 91.

59 *Cruz Varas v Sweden* (1991) 14 EHRR 1, para 70; Mowbray, cit, p. 202.

Vilvarajah and Others v the United Kingdom.⁶⁰ It should be mentioned that the obligation of states not to remove a person arises when the threat of torture or inhuman or degrading treatment emanates from state authorities as well as private actors.⁶¹

The case law of the ECtHR has become key in protecting persons fleeing non-international armed conflict and violence.⁶² The ECtHR, in one of its early judgments, *Vilvarajah and Others v the United Kingdom* considered the application of Sri Lankan citizens of Tamil origin under Article 3 of the ECHR and concluded that mere membership of a minority group caught up in a civil conflict is not itself enough to satisfy the *Soering* criteria and engage Article 3 of the ECHR.⁶³ Following the comparative approach when evaluating the risk of serious harm, the ECtHR held that ‘an applicant must show that their personal position was worse than the generality of other members of the Tamil community’.⁶⁴ The Court’s approach in *Vilvarajah* was criticised due to its overly restrictive and individualised approach to the real risk requirement.⁶⁵ The Court has gradually dropped this approach.⁶⁶ Reflecting this change, the ECtHR found a risk of inhumane treatment contrary to Article 3 in a case concerning the return of a failed asylum seeker who was a member of a minority clan in Mogadishu from the Netherlands to Somalia in *Salah Sheekh v the Netherlands*.⁶⁷ The Court noted, ‘it cannot be required from the applicant that he establishes that further special distinguishing features, concerning him personally, exist in order to show that he was, and continues to be, personally at risk’.⁶⁸

Similar to the *Salah Sheekh*, the departure from the comparative approach was also evident in *NA v the United Kingdom*, in which the Court reviewed application of victims of generalized violence in Sri Lanka and held that when there is a general situation of violence in the state that has reached a sufficient level of intensity, any removal to that state may violate Article 3.⁶⁹ In line

60 Harvey, cit, pp. 171–174.

61 *Ahmed v Austria*, Application no. 25964/94 (ECtHR, 17 December 1996); Costello, cit, p. 185.

62 See further Chapter 2 of Ineli-Ciger, *Temporary Protection in Law and Practice* (Brill/Nijhoff, 2018).

63 *Vilvarajah and Others v the United Kingdom*; Mowbray, cit, p. 203.

64 *ibid*, para 111; UNHCR, *Safe at Last? Law and Practice in Selected EU Member States with Respect to Asylum-Seekers Fleeing Indiscriminate Violence* (UNHCR 2011) 13.

65 Hurwitz, *The Collective Responsibility of States to Protect Refugees* (OUP, 2009, p. 187).

66 *ibid*, p. 193.

67 *Salah Sheekh v the Netherlands*, paras 9–15, 139–150.

68 *ibid*, para 148.

69 *NA v the United Kingdom*, Application no. 25904/07 (ECtHR, 17 July 2008), paras 114, 115.

with this decision, the Court noted in *Sufi and Elmi v Netherlands* that anyone in Mogadishu would be in a real risk of ill-treatment contrary to Article 3 since the high level of violence in Mogadishu reached a sufficient intensity.⁷⁰ These judgments demonstrate that the ECtHR gradually left the comparative approach and recognised that a person can be in risk of torture or inhuman or degrading treatment for just being a member of a certain group or living in a certain place where the level of violence is high.

Article 3 has also become a very important protection ground for refugees and migrants who have been attempting to reach the European shores by sea. One of the landmark judgments with regard to protection of potential asylum seekers and interception at high seas was *Hirsi and Others v Italy* adopted in 2012: the Court considered applications of a number of Eritreans and Somalians who had tried to reach Italy by boats but were interdicted by Italian Customs and Coast Guard vessels on the high seas and forcibly sent back to Libya in 2009.⁷¹ The applicants claimed they had been victims of refoulement since they were neither given any chance by Italian forces to lodge a claim of international protection nor had they been afforded the opportunity to challenge their return to Libya.⁷² The applicants also argued that, ‘they had been returned to a country where there were sufficient reasons to believe that they would be subjected to treatment in breach of the ECHR provisions.’⁷³

Hirsi is a landmark decision due to three main reasons. Firstly, it proved that interception of vessels carrying migrants and refugees on the high seas including those that are categorised by states as search and rescue operations clearly falls within the scope of the ECHR.⁷⁴ While reaching this decision, the Grand Chamber took into account that the interception took place entirely on board of ships of the Italian armed forces, the crews of which were composed exclusively of Italian military personnel.⁷⁵ As Moreno-Lax rightly notes, *Hirsi* judgment established extraterritoriality does not preclude the application of the ECHR in the context of border surveillance and migration control operations.⁷⁶

⁷⁰ *Sufi and Elmi v the United Kingdom*, Application no. 8319/07 and 11449/07 (ECtHR, 28 June 2011), para 250.

⁷¹ *Hirsi Jamaa and Others*, cit, paras 9–15.

⁷² *ibid*, para 85.

⁷³ *ibid*, para 88.

⁷⁴ *ibid*, paras 79–81; Moreno-Lax, cit, pp. 579–582; Den Heijer, ‘Reflections on Refoulement and Collective Expulsion in the Hirsi Case’ (2013) 25(2) International Journal of Refugee Law 265, p. 273.

⁷⁵ *ibid*, para 81.

⁷⁶ Moreno-Lax, cit, p. 595.

The Court in *Hirsi* held that Italy had violated Article 3 on the basis that ‘there were substantial grounds for believing that there was a real risk that the applicants would be subjected to treatment in Libya contrary to Article 3’ in view of various reports ‘painting a disturbing picture of the treatment meted out to clandestine immigrants in Libya at the material time’.⁷⁷ Den Heijer points out that while reaching this decision, the Court examined the standards of treatment of not just asylum seekers or refugees in Libya but all migrants.⁷⁸ The Court also found a violation of Article 3 on the basis of indirect refoulement and noted, ‘the situation in Somalia and Eritrea posed and continued to pose widespread serious problems of insecurity’ thus, ‘the Italian authorities *knew or should have known* that there were insufficient guarantees protecting the parties concerned from the risk of being arbitrarily returned to their countries of origin’.⁷⁹ In view of this, secondly, the *Hirsi* judgment clarified that interception of potential asylum seekers on the high seas and their return to states where they would be in a risk of torture or inhuman or degrading treatment or punishment as well as indirect refoulement violates Article 3. Thirdly, the *Hirsi* judgment clearly affirmed that states need to evaluate the situation in the state that the person is to be returned following an interception practice in light of Article 3.⁸⁰ Such an assessment must be made *propriomotu*⁸¹: states are expected to consider the consequences of their removal or pushback practices before engaging in any act that has the potential to constitute breaches of the ECHR including the possibility of indirect refoulement.⁸²

Another notable case was *m.s.s. v Greece v Belgium*⁸³ in which Belgium (aside from Greece) was held responsible for violating Article 3 since it transferred the applicant to Greece under the Dublin Regulations⁸⁴ where he was exposed to risks arising from the deficiencies of the Greek asylum system as well as very poor detention and living conditions in Greece.⁸⁵ This is quite important since the Court established that removal of asylum seekers and other vulnerable

77 *Hirsi Jamaa and Others*, cit, paras 122–138.

78 Den Heijer, cit, p. 277.

79 Emphasis added. *Hirsi Jamaa and Others*, cit, paras 146–158.

80 Moreno-Lax, cit, p. 583.

81 *ibid*, p. 583.

82 *ibid*, p. 585.

83 See *m.s.s. v Belgium and Greece*, Application no. 30696/09, 21 January 2011.

84 Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), OJ L 180/31-180/59, 29 June 2013 (Dublin III Regulation).

85 European Legal Network on Asylum Information Note, *Dublin transfers post-Tarakhel: Update on European case law and practice* (2015) <<https://www.ecre.org/wp-content/uploads/2016/05/Dublin-transfers-post-Tarakhel-final29.10.pdf>> last visited on 1 May 2020, para 8.

persons to states where they would face extreme poverty and very poor detention and reception conditions amount to degrading treatment.⁸⁶ In a similar decision, *Sharifi and Others v Italy and Greece*, the Court considered the application of 32 Afghan nationals, two Sudanese nationals and one Eritrean national, who claimed that they had entered Italy illegally from Greece and been returned to that country immediately, with the fear of subsequent deportation to their respective countries of origin, where they faced the risk of death, torture or inhuman or degrading treatment.⁸⁷ The Court held that Greece violated Article 3 on the basis that there was a lack of access to asylum procedures in Greece and a real risk that the applicants would be deported to Afghanistan.⁸⁸ It also held that Italy violated Article 3 of the ECHR since its authorities failed to examine the claims of each applicant individually and verify how the Greek authorities applied their asylum legislation before returning them to Greece.⁸⁹

As to the safe third-country practices, the Court decided in *Ilias and Ahmed v Hungary* that although states are not prohibited from removing an asylum seeker to a so called 'safe third country' without examining the merits of his/her asylum application, before removal they need to make sure that the receiving third country's asylum procedure affords sufficient guarantees to avoid the asylum-seeker being removed, directly or indirectly, to his country of origin.⁹⁰ To confirm whether this rule is respected, the Court examines whether the authorities of the removing state had taken into account the available general information about the receiving third country and its asylum system in an adequate manner and of their own initiative; and whether an applicant had been given a sufficient opportunity to demonstrate that the receiving state was not a safe third country in their particular case.⁹¹ This means, although safe third-country practices are not prohibited under Article 3, states should investigate

86 *M.s.s. v Belgium and Greece*, para 233; See also Section 2.2.

87 *Sharifi and Others v Italy and Greece*, Application no. 16643/09 (ECtHR, 21 October 2014); ECHR, *Indiscriminate Collective Expulsion by the Italian Authorities of Afghan Migrants, Who Were then Deprived of Access to the Asylum Procedure in Greece* Press Release 21 October 2014, <http://www.airecentre.org/data/files/Judgment_Sharifi_v._Italy_and_Greece_Expulsion_of_Afghan_migrants_from_Italy_to_Greece.pdf> last visited on 1 May 2020.

88 *ibid*, 4, 6.

89 *ibid*, 6.

90 *Ilias and Ahmed v Hungary* [GC], Application no. 47287/15 (ECtHR, 21 November 2019), paras 128–138.

91 *ibid*, para 167.

whether the receiving third country's asylum procedure affords sufficient guarantees against refoulement for the said asylum seeker before removing him/her.

Internal flight alternative should also be mentioned here. According to the Court, states are not prohibited from removing a person by relying on the existence of an internal flight alternative.⁹² However, for this act to be in line with Article 3 certain guarantees must exist such as the person to be expelled must be able to travel to the area concerned, gain admittance and settle there.⁹³ When the Court examines availability of the outlined guarantees in existence, it conducts an *ex nunc* evaluation.⁹⁴ If such guarantees do not exist and the person removed ends up in a part of the country of origin where he may be subjected to ill-treatment, this violates Article 3.

The prohibited treatment under Article 3 includes not just inhuman and degrading treatment but also inhuman and degrading punishment. The Court concluded that return of an Iranian national from Turkey to Iran where she will be subjected to stoning to death because she has committed adultery under Iranian law would violate Article 3 in *Jabari v Turkey*.⁹⁵ In another judgment, *D and Others v Turkey*, deportation of a married woman to Iran where she had been sentenced to 100 lashes for fornication was also considered as an inhumane punishment and a breach of Article 3.⁹⁶ In *Said v the Netherlands*, the Court noted that the removal of an army deserter to Ethiopia, who would be tied up and left exposed under high temperatures as a punishment there, is considered to be a violation of Article 3.⁹⁷ A review of the Court's jurisprudence relating to Article 3 reveals that when a person is at risk of being subjected to death by stoning or corporal punishment in the state to which they are to be removed, this violates Article 3.⁹⁸ The Court, *Al-Saadoon and Mufdi v the United Kingdom* concluded that return of individuals to face the death penalty regardless of manner of execution and proportionality was inhuman punishment and would violate Article 3.⁹⁹ Article 3 may also be violated when

⁹² *Salah Sheekh v the Netherlands*, cit, para 141; *Chahal v the United Kingdom*, cit, para 98.

⁹³ *Salah Sheekh v the Netherlands*, cit, para 141; *J.K. and Others v Sweden* [GC], no 59166/12, 23 August 2016, paras 88, 89.

⁹⁴ *J.K. and Others v Sweden*, cit, paras 83, 88, 89.

⁹⁵ *Jabari v Turkey*, Application no. 40035/98 (ECtHR, 11 July 2000), para 42.

⁹⁶ *D and Others v Turkey*, Application no 242245/03 (ECtHR, 22 June 2006); Mowbray, cit, p. 210.

⁹⁷ *Said v the Netherlands*, Application no. 2345/02 (ECtHR, 25 July 2005); Costello, cit, p. 184.

⁹⁸ Costello, cit, p. 184.

⁹⁹ See *Al-Saadoon and Mufdi v the United Kingdom*, Application no. 61498/08 (ECtHR, 2 March 2010), paras 120, 123 and 143; Harris et al, cit, pp. 252–259.

a state transfers an individual to a state where she/he faces a whole life sentence without a *de facto* or *de jure* possibility of release.¹⁰⁰

This review provided that Article 3 of the ECHR expanded the scope of the principle of non-refoulement and reinforced obligations of states towards refugees and migrants. Moreover, the Court's jurisprudence clarified, to an extent, how states should implement safe third-country and internal flight alternative practices.

3.1.2 Protection of Aliens with Serious Health Problems under Article 3 of the ECHR

Article 3 is relevant for the protection of persons who if returned to another state, would be deprived of medical treatment which is essential for their survival. The Court, in principle, does not recognise the right of aliens to remain in the territory of a state to continue to benefit from medical, social or other forms of assistance and services.¹⁰¹ Nevertheless, the Court acknowledges:

The decision to remove an alien who is suffering from a serious mental or physical illness to a country where the facilities for the treatment of that illness are inferior to those available in the Contracting State may raise an issue under Article 3, but only in a very exceptional case, where the humanitarian grounds against the removal are compelling.¹⁰²

This begs the question: 'what does qualify as an exceptional case?' The first case which needs to be mentioned here is *D v the United Kingdom*,¹⁰³ which concerned deportation of an ex-convict in the terminal stages of AIDS from the United Kingdom to St Kitts.¹⁰⁴ The applicant has argued if returned to St Kitts he would be condemned to an even earlier death in conditions of destitution.¹⁰⁵ In view of the fact that the applicant was in the final terminal stages of AIDS, he was being treated and cared for in the United Kingdom and he had no family in St Kitts, the Court identified D's case as exceptional and decided that his return to St Kitts would amount to inhuman treatment and breach Article 3.¹⁰⁶ In cases relating to aliens with serious health problems, the Court does

¹⁰⁰ *Babar Ahmad and Others v the United Kingdom*, Application nos. 24027/07, 11949/08, 36742/08, 6691/09 and 67354/09 (ECtHR, 24 September 2012).

¹⁰¹ *N v the United Kingdom* [GC], Application no. 26565/05 (ECtHR, 27 May 2008), para 42.

¹⁰² *Ibid*, para 42. Emphasis added.

¹⁰³ *D v the United Kingdom*, Application no. 30240/96 (ECtHR, 2 May 1997).

¹⁰⁴ *ibid*; Mowbray, cit, p. 206.

¹⁰⁵ Mowbray, cit, p. 206.

¹⁰⁶ *ibid*, p. 206; *D v the United Kingdom*, cit, paras 50–54.

not require the source of the prohibited treatment in the receiving state to be public authorities or non-state actors; instead, the Court examines the level of treatment available in the state to which the person is to be removed.¹⁰⁷ Therefore, absence of treatment in the receiving state does not necessarily have to originate from deliberate acts of omissions of public authorities or non-state actors; it might simply emanate from lack of sufficient sources in the receiving state.¹⁰⁸ Nevertheless, the Court requires a high threshold for identifying a case as exceptional: this approach was evident in *N v the United Kingdom*.¹⁰⁹

In *N v the United Kingdom*, the applicant was a Uganda national with AIDS who had been receiving treatment for HIV in the United Kingdom for 9 years.¹¹⁰ The applicant claimed that the hospital in her home town in Uganda was not qualified to provide adequate treatment for AIDS, the treatment would be costly and she would not be able to afford it and if returned, she would quickly relapse into very poor health.¹¹¹ On these grounds, she argued that her return to Uganda would breach Article 3.¹¹² The Court adopted a narrow approach in *N v the United Kingdom* noting that there would be no violation of Article 3 if the applicant was to be returned to Uganda.¹¹³ The Court reached this decision despite the information provided by the World Health Organisation that ‘antiretroviral medication is available in Uganda, although through lack of resources it is received by only half of those in need’.¹¹⁴ The Court held that the applicant’s case did not qualify as *exceptional* despite acknowledging that the quality of her life, and her life expectancy, would be affected if she were returned to Uganda.¹¹⁵ Moreover, the Court held that Article 3 does not provide an obligation on states to alleviate social and economic differences with others through provision of free and unlimited health care to all aliens without a right to stay in their territories.¹¹⁶

¹⁰⁷ Greenman, ‘A Castle Built on Sand? Article 3 ECHR and the Source of Risk in *Non-Refoulement* Obligations in International Law’ (2015) 27(2) International Journal of Refugee Law 264, p. 268.

¹⁰⁸ *ibid*, p. 268; *N v the United Kingdom*, cit, paras 42–44.

¹⁰⁹ *N v the United Kingdom*, cit, para 43; See also for other cases where the Court did not find the circumstances exceptional. *Paposhvili v Belgium* [GC], Application no. 41738/10 (ECtHR, 13 December 2016), para 179; Costello, cit, pp. 185–186.

¹¹⁰ *N v the United Kingdom*, cit, para 49.

¹¹¹ *ibid*, para 27.

¹¹² *ibid*, para 27.

¹¹³ *ibid*, para 51.

¹¹⁴ *ibid*, para 48.

¹¹⁵ *ibid*, para 50.

¹¹⁶ *ibid*, paras 42–44; Greenman, cit, p. 269.

The very restrictive approach taken by the Court in *N v the United Kingdom* was severely criticised.¹¹⁷ Raising an important point, Bauloz argues that the exceptionality test applied in medical cases, especially the one pursued in *N v the United Kingdom* is problematic since it requires states not to remove a person only if his/her death is imminent.¹¹⁸ Following *N v the United Kingdom*, it became really difficult for a person to resist removal on health grounds; a series of the United Kingdom Court of Appeal decisions adopted following *N v the United Kingdom* demonstrates the negative impact of this decision on persons with serious health issues that are to be removed.¹¹⁹

Changing its restrictive approach, to an extent, in *N v the United Kingdom*, the Court found a violation in *Paposhvili v Belgium* in which the applicant was a Georgian national suffering from chronic lymphocytic leukaemia who claimed his removal from Belgium to Georgia would infringe his rights under Article 3.¹²⁰ The ECtHR held:

(t)he ‘other very exceptional cases’ within the meaning of the judgment in *N. v the United Kingdom* which may raise an issue under Article 3 should be understood to refer to situations involving the removal of a seriously ill person in which substantial grounds have been shown for believing that he or she, *although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy.*¹²¹

With this judgment, it became clear that the Court no longer requires the person with a serious illness to be on the verge of death to found a breach of Article 3. This means, the Court no longer requires persons to be on their death bed to allow them to remain in a state where they receive crucial medical treatment. This is why the *Paposhvili* judgment is a turning point in the

¹¹⁷ See Joint Dissenting Opinion of Judges Tulkens, Bonello and Spielmann in *N. v the United Kingdom*; Bauloz, ‘Foreigners: Wanted Dead or Alive? Medical Cases before European Courts and the Need for an Integrated Approach to Non-refoulement’ (2016) 18 European Journal of Migration and Law 409, p. 412.

¹¹⁸ Bauloz, cit, pp. 417–419.

¹¹⁹ *gs India and others* [2015] EWCA Civ 40; Clayton, *Textbook on Immigration and Asylum Law* (OUP, 2016, p. 157).

¹²⁰ *Paposhvili v Belgium*, cit, para 3.

¹²¹ *ibid*, para 183. Emphasis added.

ECtHR's jurisprudence on removal of seriously ill persons.¹²² Having said that, it must be admitted that the test in *Paposhvili* is not easy to satisfy. According to Stoyanova, the Court's approach in *Paposhvili* requires a two-tier test: in the absence of medical treatment first, serious, rapid and irreversible decline in a person's state of health is required and second, the decline of the migrant's health needs to cause intense suffering or significant reduction in life expectancy.¹²³ It should be noted that there is room for further clarification of the concepts of 'exceptional circumstances' and 'intense suffering or to a significant reduction in life expectancy' by the Court.

The review of the case law above affirms McAdam's argument that the protection which Article 3 offers against deprivation of socio-economic rights in removal context is much lesser than the protection that this provision offers against removal to face torture or inhuman or degrading treatment or punishment.¹²⁴

3.2 *The Residence and Detention of Aliens and Article 3 of the ECHR*

With the increasing number of judgments interpreting and applying the prohibition of torture and inhuman or degrading treatment, Article 3 has become an important basis for limiting discretion of states to regulate detention and residence of aliens. As a rule, states retain their sovereign right to control aliens' residence in their territory. However, this right ought to be exercised in accordance with Article 3.¹²⁵ This means: Article 3 sets some certain limits to this right; these limits are explored under two headings: detention and living conditions of aliens.

¹²² Peroni, *Paposhvili v Belgium*: Memorable Grand Chamber Judgment Reshapes Article 3 Case Law on Expulsion of Seriously Ill Persons (Strasbourg Observers, 15 December 2016) <<https://strasbourgobservers.com/2016/12/15/paposhvili-v-belgium-memorable-grand-chamber-judgment-reshapes-article-3-case-law-on-expulsion-of-seriously-ill-persons/>> last visited on 1 May 2020; See also Anderson, 'Comment on Paposhvili v Belgium and the Temporal Scope of Risk Assessment' (EJIL Talk, 21 February 2017)<<https://www.ejiltalk.org/comment-on-paposhvili-v-belgium-and-the-temporal-scope-of-risk-assessment/>> last visited on 1 May 2020.

¹²³ Stoyanova, 'How Exceptional must 'very exceptional' be? Non-refoulement, Socio-economic Deprivation and *Paposhvili v Belgium*' (2017) 29(4) International Journal of Refugee Law 580, p. 584.

¹²⁴ Mcadam, cit, p. 168; Greenman, cit, p. 270.

¹²⁵ *Khlaifia and Others v Italy*, cit, paras 162 and 163.

3.2.1 Detention of Aliens and Article 3 of the ECHR

Claims relating to ill-treatment of aliens in detention and poor detention conditions fall into the category of Article 3.¹²⁶ In view of the popularity of immigration detention policies as tools to deter new arrivals of irregular migrants and refugees to Europe, Article 3 becomes a crucial provision obliging states to provide at least dignified treatment and humane conditions in detention.

The ECtHR made clear in *Amuur v France* that states' legitimate concern to foil the increasingly frequent attempts to circumvent immigration restrictions must not deprive asylum seekers of the protection afforded by the Convention relating to the Status of Refugees¹²⁷ (the 1951 Convention) and the ECHR.¹²⁸ In other words, the confinement of aliens to prevent unlawful immigration is acceptable though it needs to be accompanied by suitable safeguards for the persons concerned so as not to breach Article 3 of the ECHR in addition to Article 5 of the ECHR, which secures the right to liberty and security.¹²⁹ To assess compatibility of a detention policy with Article 3, treatment of aliens in detention should be examined together with detention conditions.

As for detention conditions, the Court takes into account the duration of detention, the possibilities for outdoor exercise and the detainee's physical and mental condition while assessing Article 3 claims.¹³⁰ The Court attaches a significant importance to the space available to each individual in detention: the Court has affirmed in a number of cases that when a detainee is allocated a personal space of less than three square metres in a multi-occupancy accommodation, this strongly indicates a violation of Article 3.¹³¹ When a detainee is allocated a personal space between three and four square metres or more, then the Court explores how adequate other physical detention conditions are.¹³² These conditions include: access of detainees to outdoor exercise, natural light or air, availability of ventilation, adequacy of heating arrangements, the possibility of using the toilet in private, and compliance of the detention conditions with basic sanitary and hygienic requirements.¹³³

¹²⁶ Akandji-Kombe, cit, p. 29; see for an analysis of detention cases decided under Article 5 of the ECHR in Chapter 5 of this book.

¹²⁷ Convention relating to the Status of Refugees (signed 28 July 1951, entered into force 22 April 1954) 189 UNTS 150.

¹²⁸ *Amuur v France*, Application no. 19776/92 (ECtHR, 25 June 1996); *M.s.s. v Belgium v Greece*, cit, para 216.

¹²⁹ *Khlaifia and Others v Italy*, cit, para 163.

¹³⁰ See *Mursic v Croatia*, Application no. 7334/13 (ECtHR, 20 October 2016), paras 103 and 110.

¹³¹ *ibid*, paras 103–110.

¹³² *Orchowski v Poland*, Application no. 17885/04 (ECtHR, 29 October 2009), para 122; *Ananyev and Others*, Application no. 42525/07 (ECtHR, 10 January 2012), para 149.

¹³³ *Mursic v Croatia*, cit, para 106.

In light of the outlined criteria, the Court has found in a number of cases relating to detention of aliens in particular asylum seekers that Article 3 is violated when the detention conditions are poor: for instance, in *s.D. v Greece* the confinement of an asylum seeker to a cabin for two months in poor hygiene conditions without the possibility of going outdoors or communicating with the outside world was categorised as degrading treatment.¹³⁴ In line with this judgment, the Court also noted in *Tabesh v Greece* that the detention of an asylum seeker for three months on police premises with no access to any recreational activities and without proper meals was degrading treatment.¹³⁵ While assessing the applicants' claims on detention conditions, the Court takes into account reports by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) and human rights NGOs such as Amnesty International.¹³⁶

Poor detention conditions accompanied by abusive treatment of detainees by government officials are likely to violate Article 3.¹³⁷ The ECtHR noted 'in respect of a person deprived of his liberty, any recourse to physical violence which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3 of the Convention.'¹³⁸ This also applies to immigration detention; hence, when migrants and refugees suffer from physical violence which has not been made strictly necessary by their own conduct in immigration detention this violates Article 3. Nevertheless, the Court requires the alleged ill treatment to be supported by appropriate evidence.¹³⁹

In *mss v Greece v Belgium* the Court, among others claims relating to Article 3, considered whether the detention of an Afghan asylum seeker at Athens international airport for four days in June 2009 and for one week in August 2009 violated Article 3.¹⁴⁰ The applicant alleged that upon his arrival to Greece

¹³⁴ *s.D. v Greece*, Application no. 53541/07 (ECtHR, 11 June 2009), paras 49–54; *mss v Greece v Belgium*, cit, para 222.

¹³⁵ *Tabesh v Greece*, Application no. 8256/07 (ECtHR, 26 November 2009,) paras 38–44, 26; *mss v Greece v Belgium*, cit, para 222.

¹³⁶ *mss v Greece v Belgium*, cit, paras 223–234; *Khlaifia and Others v Italy*, cit, para 171.

¹³⁷ See Psychogiopoulou, 'Does Compliance with the Jurisprudence of the European Court of Human Rights Improve State Treatment of Migrants and Asylum Seekers? A Critical Appraisal of Aliens' Rights in Greece' (2015) 16(3) Journal of International Migration and Integration 819, p. 822.

¹³⁸ *Ribitsch v Austria*, cit, para 38; *Kudla v Poland*, cit, para 94; *M.S.S. v Belgium v Greece*, cit, para 221.

¹³⁹ *Khlaifia and Others v Italy*, cit, para 168.

¹⁴⁰ *M.S.S. v Belgium and Greece*, cit, paras 1, 3.

he ‘had immediately been placed in detention in a building next to the airport, where he was locked up in a small space with twenty other detainees, had access to the toilets only at the discretion of the guards, was not allowed out into the open air, was given very little to eat and had to sleep on a dirty mattress or on the bare floor.’¹⁴¹ He also alleged that during his second period of detention he had been beaten and insulted by the Greek agents.¹⁴² It is notable that while assessing the applicant’s claims regarding detention conditions, the Court has rejected taking into consideration the disproportionate number of asylum seekers that Greece received at the time compared to other EU members and affirmed the absoluteness of Article 3.¹⁴³ The Court noted that the detention conditions in *MSS* constituted degrading treatment and violated Article 3.¹⁴⁴ It is also notable that while reaching this decision, the Court took into account that ‘the applicant, being an asylum seeker, was particularly vulnerable because of everything he had been through during his migration and the traumatic experiences he was likely to have endured previously’.¹⁴⁵

Vulnerability is an important criterion that the Court takes into account while determining the compatibility of a detention policy with Article 3.¹⁴⁶ When the detainee is a minor, a single parent, a family with children, elderly, stateless, LGBTI, an asylum seeker or a refugee, a person with a past trauma, or a person suffering from a medical condition including mental illness this requires states to adopt some additional measures to accommodate the needs of these vulnerable persons in detention.¹⁴⁷

In a recent judgment *Khlaifia and Others v Italy*, the applicants claimed that they had sustained inhuman and degrading treatment during their detention in the ships, *Vincent* and *Audace* moored in Palermo harbour and Early Reception and Aid Centre in Lampedusa.¹⁴⁸ The Grand Chamber found no violation of Article 3 relating to detention of the applicants in Lampedusa and on

¹⁴¹ *ibid*, para 34.

¹⁴² *ibid*, para 206.

¹⁴³ *ibid*, para 223.

¹⁴⁴ *ibid*, paras 232–234.

¹⁴⁵ *ibid*, para 232.

¹⁴⁶ See *Salman v Turkey* [GC], Application no. 21986/93 (ECtHR, 27 June 2000), para 99; See Chapter 13 of this Book.

¹⁴⁷ *Rahimi v Greece*, Application no. 8687/08 (ECtHR, 5 April 2011); *A.B. and Others v France*, Application no. 11593/12 (ECtHR, 12 July 2016); *Muskhadzhieva and Others v Belgium*, Application no. 41442/07 (ECtHR, 19 January 2010); *Kanagaratnam v Belgium*, Application no. 15297/09 (ECtHR, 13 December 2011); *Khlaifia and Others v Italy*, cit, para 136. Since the issue of vulnerability is examined in depth in Chapter 13 of this book, it will not be discussed in this chapter in detail.

¹⁴⁸ *Khlaifia and Others v Italy*, cit, para 136.

the ships. The Court noted that the applicants were not vulnerable, contrary to the Chamber's ruling, on the basis that the applicants were not asylum seekers, minor or elderly and they were not suffering from any particular medical condition.¹⁴⁹ The Court also noted that the applicants were not deliberately ill-treated by the authorities in the Early Reception and Aid Centre, they were given enough food and water and the fact that they slept outside did not affect them negatively due to climate (temperatures at the time of reception).¹⁵⁰ Moreover, the Grand Chamber took into account the sudden large-scale irregular arrival of refugees and migrants to Lampedusa at the time when deciding that there is no violation of Article 3.

The Court defined the significant increase in the number of migrants arriving by sea from North African countries on the Italian islands to the south of Sicily in 2011 as an emergency situation.¹⁵¹ Moreover the Grand Chamber noted:

While the constraints inherent in such a crisis cannot, in themselves, be used to justify a breach of Article 3, the Court is of the view that it would certainly be artificial to examine the facts of the case without considering the general context in which those facts arose. In its assessment, the Court will thus bear in mind, together with other factors, that the undeniable difficulties and inconveniences endured by the applicants stemmed to a significant extent from the situation of extreme difficulty confronting the Italian authorities at the relevant time.¹⁵²

Though the Court has paid lip service to the *mss* judgment and noted that an increasing influx of migrants cannot absolve a state of its obligations under Article 3,¹⁵³ it is clear that *Khlaifia* marks a departure from the approach in *mss*. In *Khlaifia* the Court clearly accepted that the more the situation can be defined as a migrant emergency the more it is acceptable to provide poor detention and reception conditions. This is quite problematic since this approach contradicts with absoluteness of the prohibition of torture and inhuman or degrading treatment or punishment. It is also very difficult not to agree

¹⁴⁹ *ibid*, para 197; Venturi, 'The Grand Chamber's ruling in *Khlaifia and Others v Italy*: one step forward, one step back?' (Strasbourg Observers, 10 January 2017) <<https://strasbourgobservers.com/2017/01/10/the-grand-chambers-ruling-in-khlaifia-and-others-v-italy-one-step-forward-one-step-back/#more-3466>> last visited on 1 May 2020.

¹⁵⁰ *ibid*, para 198.

¹⁵¹ *ibid*, para 180.

¹⁵² *ibid*, para 185.

¹⁵³ *ibid*, para 184.

with Venturi who questions ‘whether such precarious situation was totally independent of Italy’s actions or inactions, and, most importantly, whether mass arrivals were totally impossible to predict and, thus, likely to preclude a proper organisation.’¹⁵⁴

It is to be seen whether the Court will continue to regard migrant emergencies characterised by the sudden arrival of large number of migrants or asylum seekers as a factor to legitimise poor detention and reception conditions in future cases. Nevertheless, in view of the growing popularity of immigration detention policies in Europe, Article 3 together with Article 5 of the ECHR provide a much-needed legality check and enable refugees and migrants to access at least dignified treatment and humane conditions in detention.

3.2.2 Living Conditions of Aliens and Article 3 of the ECHR

The Court has many times affirmed that ‘Article 3 cannot be interpreted as obliging the High Contracting Parties to provide everyone within their jurisdiction with a home. Nor does Article 3 entail any general obligation to give refugees financial assistance to enable them to maintain a certain standard of living’.¹⁵⁵ However, the Court with the adoption of *MSS v Greece v Belgium* introduced an exception to this rule.

In *MSS*, the applicant, who was an Afghan asylum seeker, claimed that he had lived in extreme poverty since he arrived in Greece and this amounted to inhuman and degrading treatment within the meaning of Article 3.¹⁵⁶ The applicant argued that without means of subsistence and food, he lived in a park in central Athens for many months.¹⁵⁷ The Court noted that, due to the fact that the applicant was an asylum seeker, he was a member of the ‘underprivileged and vulnerable population group in need of special protection’ and Greece failed to offer such protection.¹⁵⁸

The Court in *MSS* found a violation of Article 3 on the grounds that Greece’s inaction, ‘for the situation in which the applicant has found himself for several months, living in the street, with no resources or access to sanitary facilities,

¹⁵⁴ Venturi, cit.

¹⁵⁵ *M.S.S. v Belgium and Greece*, cit, para 249; *Muslim v Turkey*, Application no. 53566/99 (ECtHR, 26 April 2005), para 85.

¹⁵⁶ *M.S.S. v Belgium and Greece*, cit, para 235.

¹⁵⁷ *ibid*, paras 236–239.

¹⁵⁸ *ibid*, para 251. According to Costello, the Court in *MSS* designated asylum seekers to be a vulnerable category such as to render the state responsible for their inhuman and degrading living conditions. Costello, cit, p. 184; Clayton, ‘Asylum Seekers in Europe: *MSS v Belgium and Greece*’ (2011) 11(4) Human Rights Law Review 758, p. 767.

and without any means of providing for his essential needs.¹⁵⁹ The *mss* judgment was ground-breaking in a sense that an asylum seeker's living conditions in the host state in particular absence of available accommodation and subsistence is found to be degrading treatment by the Court.¹⁶⁰ Therefore, it can be argued that with adoption of the *mss* judgment the Court acknowledged that states have a duty to provide access to some form of housing and subsistence so that vulnerable groups such as asylum seekers can survive and not fall into destitution.¹⁶¹

In the *mss* judgment, Belgium was also held responsible under Article 3 since it transferred the applicant to Greece under the Dublin Regulations where he faced extreme poverty.¹⁶² This is quite important since the Court established that removal of asylum seekers and other vulnerable groups to states where they will face absolute poverty and very poor living conditions can also lead to violations of Article 3.¹⁶³ Hence, the *mss* judgment expanded the scope of the prohibition of removal under Article 3 of the ECHR as well as the principle of non-refoulement.

Another important judgment relating to residence of aliens was *Tarakhel v Switzerland* in which the applicants, who were eight Afghan nationals, argued that if they were returned to Italy from Switzerland under the Dublin Rules they would be subjected to inhuman and degrading treatment linked to the existence of 'systemic deficiencies' in the reception arrangements for asylum seekers in Italy.¹⁶⁴ In relation to this, the Court noted, 'the possibility that a significant number of asylum seekers may be left without accommodation or accommodated in overcrowded facilities without any privacy, or even in insalubrious or violent conditions, cannot be dismissed as unfounded.'¹⁶⁵ The Court also noted that different from the *mss* judgment, the applicants were a family with six children, thus: Switzerland should have obtained individual guarantees from the Italian authorities that the applicants will be taken charge of in a manner suitable for families with children; doing otherwise would violate Article 3.¹⁶⁶

¹⁵⁹ *M.s.s. v Belgium and Greece*, cit, para 253; *Budina v Russia*, Application no. 45603/05 (ECtHR, 18 June 2009).

¹⁶⁰ *Budina v Russia*, cit; Clayton, cit, p. 765.

¹⁶¹ *M.s.s. v Belgium and Greece*, cit, para 250; Clayton, cit, p. 766; Costello, cit, p. 188.

¹⁶² Clayton, cit, p. 766.

¹⁶³ *ibid*, 769.

¹⁶⁴ *Tarakhel v Switzerland* [GC], Application no. 29217/12 (ECtHR, 4 November 2014), para 93–122.

¹⁶⁵ *ibid*, para 115.

¹⁶⁶ *ibid*, paras 120–122.

In a recent case, *Hunde v Netherlands*, the Court, similar to the *mss* judgment, had to examine whether a state has a positive obligation under Article 3 to provide emergency social assistance to the applicant who was a rejected asylum-seeker.¹⁶⁷ The Court differentiated this case from the *mss* judgment on the following grounds: first, unlike the applicant in *mss* who was an asylum seeker, in *Hunde* the applicant was a failed asylum seeker under a legal obligation to leave the territory of the Netherlands.¹⁶⁸ Second, the Court noted that unlike *mss*, the applicant in *Hunde* did not live in a state of the most extreme poverty (lack of food, hygiene and a place to live), and in fear of being attacked and robbed together with the fact that there had been no prospect of improvement.¹⁶⁹ Third, the Court noted that unlike Greece, the Netherlands assessed the applicant's asylum claim and refused it hence, it cannot be said that the Dutch authorities have shown ignorance or inaction towards the applicant's situation.¹⁷⁰

The differences in the Court's line of reasoning in the outlined cases provide us the following conclusions. First, the Court will only identify very poor living conditions which amount to the most extreme poverty that leaves aliens unable to cater for their most basic needs such as food, hygiene and a place to live as a treatment proscribed by Article 3. Second, for the Court to find a violation of Article 3 in cases concerning living conditions of an alien, he/she must be vulnerable.¹⁷¹ In relation to the living conditions, states also have a duty to conduct effective investigation when an alien, in particular an asylum seeker, alleges that he/she is ill-treated.

Section 1.2 explored the duty of states to conduct an effective investigation where a person makes an arguable claim that he/she has been subjected to serious ill treatment contrary to Article 3 by public agents or private parties. Not conducting effective investigation especially when the alleged treatment is done with a racist motivation leads to a violation of Article 3.¹⁷² This is evident in *Sakir v Greece*, which concerned an assault against an Afghan asylum seeker in the centre of Athens which led to his hospitalisation in 2009.¹⁷³ The

¹⁶⁷ *Hunde v the Netherlands*, Application no. 17931/16 (ECtHR, 5 July 2016), para 49.

¹⁶⁸ *ibid*, para 55.

¹⁶⁹ *ibid*, paras 55–56.

¹⁷⁰ *ibid*, para 56.

¹⁷¹ See Chapter 11 of Slingenberg, *The Reception of Asylum Seekers under International Law* (Hart Publishing, 2014).

¹⁷² Mowbray, cit, p. 157.

¹⁷³ *Sakir v Greece*, Application no. 48475/09 (ECtHR, 24 March 2016); CoE, *Overview of the case-law of the European Court of Human Rights 2016* (Wolf Legal Publishers, 2016) <http://www.echr.coe.int/Documents/Short_Survey_2016_ENG.pdf> last visited on 1 May 2020, p. 26.

applicant alleged that the Greek police had failed to comply with their obligation to carry out an effective investigation into the attack. The Court having reviewed NGO reports regarding racial attacks in Athens at the time and the fact that the Greek authorities failed to conduct an effective criminal investigation found a breach of Article 3.¹⁷⁴ The Court in particular emphasised the necessity to conduct effective investigation in cases regarding racial violence and ill-treatment of aliens.¹⁷⁵

This Section examined the expulsion, residence and detention of aliens under Article 3 of the ECHR. Building on the present section, positive and negative obligations of states towards aliens are identified and the reason that Article 3 of the ECHR has become a key provision for the protection of refugees and migrants is discussed in the next one.

4 Protecting Aliens with Article 3 of the ECHR

4.1 *Positive and Negative Obligations of States towards Aliens under Article 3 of the ECHR, with a Focus on Refugees and Migrants*

States have both positive and negative obligations under Article 3 of the ECHR. A positive obligation can be defined as an obligation which requires positive intervention by the state whereas a negative obligation requires the state to refrain from interference.¹⁷⁶ A state must not subject a person to torture or to inhuman or degrading treatment or punishment and this is a negative obligation, whilst states are also required to take appropriate measures to protect persons from ill-treatment or punishment proscribed by Article 3 and this is a positive obligation.¹⁷⁷

As for the principle of non-refoulement and Article 3, following conclusions are reached in Section 2.1.1. States are required not to return an alien to a state where substantial grounds have been shown for believing that the person concerned, if removed, would face a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the receiving state. This is clearly a negative obligation. The acts of removal include expulsion, extradition, deportation and return of a person to another state in any manner. Moreover, interception of boats carrying aliens on the high seas and forcible return of the intercepted migrants to another state also falls within the scope

¹⁷⁴ *Ibid*, p. 26.

¹⁷⁵ *ibid*, p. 26.

¹⁷⁶ Akandji-Kombe, cit, p. 8.

¹⁷⁷ Harris et al, cit, p. 274.

of Article 3. Before removing an alien, in particular an asylum seeker, states need to examine clearly 'whether effective guarantees exist that protect the applicant against arbitrary refoulement, be it direct or indirect, to the country from which he or she has fled' in the state to be returned.¹⁷⁸ States are also required to assess whether the reception and detention conditions in the state to which an alien is to be removed amount to inhuman or degrading treatment.

The analysis in Section 2.1.2 provided that Article 3 prohibits the removal of a person with serious illness who might not otherwise access medical treatment crucial for her/his survival. This prohibition only applies in very exceptional circumstances. Although in *Paposhvili v Belgium* the Court has clarified the meaning of 'exceptional circumstances' to a certain extent, there is still room for further clarification. It is noteworthy that the Court has framed the duty of states not to expose persons to a risk of ill-treatment proscribed by Article 3 by returning them to another state where no sufficient medical treatment that is essential for one's survival exists as a negative obligation.¹⁷⁹ While assessing whether the absence of availability of medical treatment in a state would constitute ill-treatment as proscribed by Article 3, states are required to make an assessment by comparing a seriously ill person's state of health prior to removal and how it would evolve after transfer to the receiving state.¹⁸⁰ In view of the reviewed case law of the ECtHR, it can be concluded that despite the Court's slight change of approach to exceptional circumstances in *Paposhvili v Belgium*, it is very reluctant to deem absence of medical treatment in the receiving state as a ground prohibiting removal of aliens.

Section 2.1 examined detention of aliens under Article 3. The Court affirmed that states need to ensure that detention conditions are compatible with respect for human dignity.¹⁸¹ To ensure that detention conditions are compatible with Article 3: states need to first ensure that the detained aliens are not subjected to torture or to inhuman or degrading treatment by government officials as well as other detained persons. Moreover, states need to take reasonable measures to prevent ill-treatment of which the authorities have or ought to have knowledge.¹⁸² Second, states need to at least provide each detainee more than of three square metres of floor surface in multi-occupancy accommodation. States should also make sure the detainees have access to toilets and can use them with respect to privacy, the detention conditions comply

¹⁷⁸ *J.K. and Others v Sweden*, cit, para 78.

¹⁷⁹ *Paposhvili v Belgium*, cit, para 188; Stoyanova, cit, p. 585.

¹⁸⁰ *Paposhvili v Belgium*, cit, para 188.

¹⁸¹ *Kudla v Poland*, cit, para 94.

¹⁸² *Khalfia and Others v Italy*, para 161.

with basic hygiene requirements and detention places have adequate natural air and light, heating and ventilation.¹⁸³ Moreover, detention conditions and treatment of the detainees should be tailored and made appropriate for vulnerable persons.

Section 2.2 explored living conditions of aliens. It is noted that states have no obligation to provide refugees and migrants in their territories with access to accommodation or financial aid under the ECHR. However, when vulnerable persons such as asylum seekers or migrants travelling with children face the most extreme form of poverty and have no means of accessing accommodation; this could lead to degrading treatment. Therefore, states have a duty to provide some form of accommodation and subsistence to vulnerable aliens so that they would not be subjected to the situations of most extreme poverty.¹⁸⁴ Furthermore, when an alien makes an arguable claim, he/she has been subjected to serious ill-treatment by public agents or private individuals, states need to conduct an effective investigation especially if the alleged treatment is racially motivated.

In view of the outlined obligations, the next section will explore the reason that Article 3 is very important for the protection of refugees and migrants in Europe.

4.2 *Why is Article 3 of the ECHR a Key Provision for the Protection of Refugees and Migrants in Europe?*

The 1951 Convention became the cornerstone of universal refugee protection once the temporal and geographical restrictions in the refugee definition were abolished by the 1967 Protocol relating to the Status of Refugees.¹⁸⁵ The principle of non-refoulement, which is established in Article 33 of the 1951 Convention, is one of the most important safeguards that the 1951 Convention provides to refugees. Despite its centrality for the protection of refugees from being returned to the frontiers of states where their life or freedom would be threatened, Article 33 of the 1951 Convention does not address all challenges relating to the removal of forced migrants.¹⁸⁶ Article 3 of the ECHR as interpreted and applied by the ECtHR is particularly important for the protection of refugees and migrants because of its ability to complement and enforce the

¹⁸³ *ibid*, paras 163–169; *M.s.s. v Belgium and Greece*, cit, para 222.

¹⁸⁴ *M.s.s. v Belgium and Greece*, cit, para 250; *Hunde v the Netherlands*, cit, para 59.

¹⁸⁵ Protocol relating to the Status of Refugees (signed 31 January 1967, entered into force 4 October 1967) 606 UNTS 267.

¹⁸⁶ Ineli-Ciger, ‘Protection Gaps and Temporary Protection’ (2016) 20 Max Planck Yearbook of United Nations Law 408, pp. 418–423.

principle of non-refoulement and to address many recent challenges relating to forced migrants in Europe. Here, this point is further illustrated thorough a comparison between Article 33 of the 1951 Convention and Article 3 of the ECHR.

The absence of permissible limitations, exceptions or derogations provides a sufficient basis for a prohibition to be deemed as absolute.¹⁸⁷ In view of this definition, the prohibition of torture and inhuman or degrading treatment or punishment provided under Article 3 is absolute. As a result of this Article 3 of the ECHR has no exceptions whereas Article 33(2) sets forth exceptions to the principle of non-refoulement. Similarly, Article 3 of the ECHR applies and cannot be derogated in mass influx situations and in times of war whereas it is not crystal clear whether states can derogate from the 1951 Convention provisions including Article 33 of the 1951 Convention in times of war and in mass influx situations.¹⁸⁸

Article 3 of the ECHR applies to everyone within the jurisdiction of a member of Council of Europe. An alien's conduct as such whether he/she is undesirable, a terrorist, a murderer or simply a forcibly displaced person is irrelevant in an assessment of a claim relating to Article 3 of the ECHR.¹⁸⁹ Unlike Article 33 of the 1951 Convention, Article 3 of the ECHR applies to persons who are not refugees as defined by Article 1 A 2 of the 1951 Convention, to those who are excluded from being refugees under Article 1 F of the 1951 Convention, to persons whose status has ceased under Article 1 C or to those who fall within the scope of Article 33(2) of the 1951 Convention. Owing to this feature, Article 3 of the ECHR serves as an alternative protection venue for asylum seekers who failed in their asylum applications and those who are excluded from the scope of international protection because they are regarded as risks to the national security of the host state.¹⁹⁰ Mainly because of this feature, Article 3 of the ECHR is one of the provisions that constitute the legal basis of complementary protection regimes.¹⁹¹

There is no international body to oversee implementation of the 1951 Convention; as a result, there is no functional way to challenge states violating

¹⁸⁷ Addo and Grief, 'Does Article 3 of the European Convention on Human Rights enshrine absolute rights?' (1998) 9(3) European Journal of International Law 510, p. 513.

¹⁸⁸ Article 15(2) of the ECHR; Article 8 of the 1951 Convention.

¹⁸⁹ See *Saadi v Italy*, Application no. 37201/06 (ECtHR, 28 February 2008).

¹⁹⁰ Goodwin-Gill and Mcadam, *The Refugee in International Law* (3rd edn, OUP, 2007, p. 296); Durieux, *Salah Sheekh is a Refugee: New Insights into Primary and Subsidiary Forms of Protection* (Refugee Studies Centre, 2008, p. 8).

¹⁹¹ Goodwin-Gill and Mcadam, cit, pp. 296–297.

the 1951 Convention. Unlike the 1951 Convention, application of the ECHR is monitored by ECtHR; decisions of the ECHR are binding on the signatory states thus, the ECHR has a direct and visible impact on the protection of refugees and migrants in Europe.¹⁹² Similar to the absence of an enforcement mechanism, there is also no international body to give authoritative interpretations of the 1951 Convention provisions.¹⁹³ Owing to this and the fact that there is no explicit reference to admission or rejection at the frontier in Article 33 of the 1951 Convention, there is a disagreement on whether Article 33 applies extraterritorially or to the acts of rejection at the frontier.¹⁹⁴ There is no functional international body to interpret Article 33 of the 1951 Convention and to condemn violations of Article 33 under a judicial capacity. As a result of this, there are significant discrepancies in the ways in which parties to the 1951 Convention interpret and apply Article 33 of the 1951 Convention.¹⁹⁵

By interpreting Article 3 of the ECHR as a living instrument, the Court redefines the scope of Article 3 in each case and strengthens the protection that Article 3 provides against refoulement. For instance, though there is no agreement on whether Article 33 of the 1951 Convention applies extraterritorially and to the interception practices on the high seas, the ECtHR clarified that Article 3 applies to the interception practices on the high seas in the *Hirsi* judgment. Thus, Article 3 of the ECHR became a much-needed legal ground to assess whether an interception practice is in line with the prohibition of torture or inhuman or degrading treatment or punishment.

Today, more and more European states implement strict entry controls; interception practices, offshore border controls as well as safe third country and first country of asylum practices.¹⁹⁶ This makes Article 3 of the ECHR even more relevant for determining whether new forms of non-entrée policies, deterrence measures and migration cooperation arrangements such as the

¹⁹² *ibid*, pp. 310–311.

¹⁹³ Article 38 of the 1951 Convention provides that, 'Any state party may legitimately take up concerns regarding non-compliance directly with any other state party, and may in most cases require the noncompliant state to answer to the International Court of Justice'. However, this mechanism has never been used See Hathaway, *The Right of Refugees under International Law* (CUP, 2005, p. 994).

¹⁹⁴ See for different views *Sale v Haitian Centers Council* [1993] 509 U.S. 155, 187; Grahl Madsen, *The Status of Refugees in International Law* (Vol 1, A. W. Sijthoff- Leiden, 1966, p. 116); Caroni, Kälin and Heim, 'Article 33 para 1' in Zimmermann, Machts and Dorschner (eds), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (OUP, 2011, p. 1370).

¹⁹⁵ See Türk and Dowd, 'Protection Gaps' in Qasmiyah, Loescher, Long, and Sigona (eds), *The Oxford Handbook of Refugee and Forced Migration Studies* (OUP, 2014, p. 278).

¹⁹⁶ *ibid*, pp. 281, 282.

EU–Turkey Statement of March 2016¹⁹⁷ are in line with prohibition of torture and inhuman or degrading treatment or punishment.

5 Conclusion

Analysing protection of aliens under Article 3 of the ECHR is no easy task: not just due to the vast and constantly growing case law of the ECtHR but also due to the increasing relevance of Article 3 for the protection of refugees and migrants in Europe. Despite these challenges, this chapter attempted to provide a comprehensive overview of Article 3 and clarify obligations of states towards refugees and migrants which stem from Article 3.

The analysis of the Court's jurisprudence clearly demonstrated that Article 3 has become a very important protection basis for aliens who, if removed, would be at risk of torture or inhuman or degrading treatment or punishment. Thus, Article 3 provides refugees and migrants a solid legal ground for resisting removal with good reason. In view of the popularity of immigration detention policies, Article 3 provides a much-needed safeguard for aliens to access dignified treatment and humane conditions in detention. Moreover, interpreting the article not restrictively, the ECtHR has expanded the protection that Article 3 provides to aliens, in particular refugees and migrants: today, states are required to provide some form of accommodation and subsistence to vulnerable aliens so that they would not be subjected to the situations of most extreme poverty. Furthermore, Article 3 protects persons who if returned to another state, would be deprived of medical treatment which is essential for their survival, though only in very exceptional circumstances.

Article 3 of the ECHR limits states' discretion to regulate the entry, expulsion, detention and residence of aliens. Moreover, Article 3 of the ECHR as interpreted and applied by the ECtHR as a *living* provision addresses some very important forced migration challenges, complements Article 33 of the 1951 Convention and contributes considerably to the protection of refugees and migrants in Europe.

¹⁹⁷ European Commission, EU–Turkey Statement, 18 March 2016 <<http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/>> last visited on 1 May 2020 (EU–Turkey Statement).

Prohibition of Slavery and Forced Labour (Article 4)

Human Trafficking

*Celia Díaz Morgado**

1 Introduction

The prohibition of slavery, servitude and forced labour has been enshrined in numerous international treaties, and Article 4 of the European Convention on Human Rights (ECHR) is the focus of this chapter. Slavery and servitude, as well as forced labour, are considered abhorrent practices that must be eradicated because they represent not only an attack on people's right to freedom, but also entail the absolute denial of human dignity by treating people like commodities or objectifying them.

In similar terms to the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, Article 4 of the ECHR enshrines one of the fundamental values of democratic societies by proclaiming that: 'No one shall be held in slavery or servitude' (Article 4.1, ECHR) and 'no one shall be required to perform forced or compulsory labour' (Article 4.2, ECHR). After this prohibition of forced labour, the precept specifies a series of cases that are not considered forced or compulsory labour for the purposes of the ECHR. In particular, the following is not understood as forced or compulsory labour:

- a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;
- b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;
- c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;
- d) any work or service which forms part of normal civic obligations.

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The structure of Article 4 of the ECHR leads us to note that two, clearly differentiated, prohibitions are included in the text. Universally recognised subjective rights – to which all people are entitled regardless of their situation – are derived from these prohibitions, but with a varying scope. On one hand, the right to not be subject to slavery or servitude is clearly an absolute right and does not allow for exceptions or limitations of any type, nor can any derogation be made by states under any circumstance, even in a situation of war or another danger that could threaten the life of the nation (Article 15.2, ECHR).¹ This absolute prohibition is not surprising if we consider slavery to be an international peremptory norm (*ius cogens*). On the other hand, the second section includes the right not to be compelled to carry out forced labour, although, in this case, exemption, limitation or derogation could apply in the event of special circumstances of risk for the state (Article 15.1, ECHR).

Despite the undeniable relevance of the prohibitions recognised in Article 4 of the ECHR, and the rights derived from them, the European Court of Human Rights (ECtHR) has not been particularly active, until relatively recently, in its judgments.² It was not until the now famous case *Siliadin v France*³ in which the ECtHR condemned a European country for the first time for violating Article 4 of the ECHR, that it embarked upon a detailed analysis of the scope and content of Article 4 of the ECHR, in real and potential terms.

In this respect, it should be highlighted that the ECHR does not contain a definition of slavery, servitude or forced labour, making it essential to refer to international treaties signed extensively by States Parties on this subject, in order to define the different categories to which the ECHR text refers.

¹ *Siliadin v France*, Application no 73316/01 (ECtHR, 26 July 2005), para 112; *Rantsev v Cyprus and Russia*, Application no 25965/04 (ECtHR, 7 January 2010), para 283; *C.N. v The United Kingdom*, Application no. 4239/08 (ECtHR, 13 November 2012), para 65; *J. and Others v Austria*, Application no 58216/12 (ECtHR, 17 January 2017), para 103.

² Ten States Parties in the Council of Europe have been condemned for violation of Article 4 of the ECHR between 1959 and 2019. Vid. <https://www.echr.coe.int/Documents/Stats_violation_1959_2019_ENG.pdf>.

³ *Siliadin v France*, cit.

2 Prohibition of Slavery or Servitude

The prohibition of slavery or servitude has become a subjective right of all people not to be enslaved and not to be subjected to servitude. As previously mentioned, this right is absolute, no type of limitation can be applied, even in a situation of emergency for the state (Article 15.2, ECHR), and it is one of the essential values of European democratic societies.

To understand what we mean when we speak of slavery or servitude, it is necessary to refer to the international treaties that have enshrined the prohibition of slavery since the beginning of the twentieth century. Here, it should be highlighted that the Slavery Convention of 25 September 1926, modified by the Protocol signed on 7 December 1953, defines slavery as 'the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised' (Article 1.1).⁴

Slavery, therefore, implies the exercise of the characteristics, or any one of them, of the right of ownership over a person, as though this person is another asset in their patrimony. Slavery enables a person to use and control all areas of another person's life, enjoying the returns generated, as though these are their own, and ceding or selling the other person, amongst other aspects. The exercise of these characteristics, or any one of them, involves a complete annihilation of a person's freedom and absolute control over them, implying the total negation of their condition as a person, and as a legal person.

Ownership is the key element in the definition of slavery, as made clear by the ECtHR, which reaffirms the idea of 'ownership', as an element inherent to slavery.⁵ Here, it is necessary to highlight that, since the beginning, the ECtHR has maintained its classic concept of slavery, characterised by its restrictive definition, focused on patrimony, requiring not only that the person be deprived of their autonomy or free will, but that a genuine legal right of ownership is exercised over the person, reducing him/her to the status of an 'object'.⁶ The ECtHR has opted, at least for the moment, not to extend the classic concept of slavery, and avoids including new forms of slavery, which do not involve the person becoming somebody else's legal property, but could imply *de facto* ownership or possession of the person. This enables us to understand the reason why, in

⁴ Similarly, human trafficking is defined as all 'acts involved in the capture, acquisition or disposal of a person with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves'.

⁵ *Siliadin v France*, cit, para 122.

⁶ *Siliadin v France*, cit, para 122.

the area of the ECtHR, no court judgment concludes that a situation of slavery exists. For a legal order that formally recognises human rights and guarantees them effectively, and in which slavery is abolished and denounced legally, it is difficult for a genuine situation of slavery to occur that involves the legal exercise (*de jure*) of the right of ownership over another person.

In the regulatory field, the classic definition of slavery provided in the Slavery Convention (1926), and fully adopted by the ECtHR, soon demonstrated its lack of practical form, and made it necessary to adopt a new international treaty aimed at overcoming the limitations inherent in this classic concept. Therefore, the Supplementary Convention on the abolition of slavery, the slave trade, and institutions and practices similar to slavery of 1956 included a series of institutions and practices that, without being classified as slavery, involved the exercise of certain powers of control by one person over another and resembled slavery.

Here, the Supplementary Convention refers first to servitude, but does not define it as such, identifying, instead, two types of servitude. This includes, on one hand, 'debt servitude', understood as: 'the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined'. On the other hand, it encompasses 'serfdom', in which the person is 'by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his status'.

However, the Supplementary Convention does not only refer to these two types of servitude, but also identifies another series of institutions that must be considered similar to slavery, and which affect mainly women and minors. A practice is similar to slavery when a 'woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group' or when 'the husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or when the extreme situation is reached whereby a woman on the death of her husband is liable to be inherited by another person'. Similarly, minors are expressly referred to in these practices that are similar to slavery, whereby 'a child or young person under the age of 18 years, is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour'.

The absence of a generic definition for servitude in the Supplementary Convention has obliged the ECtHR to undertake significant interpretative work aimed at identifying the elements characterising servitude and its delimitation with slavery and forced labour. The ECtHR has reiterated that servitude implies a negation of freedom, which is especially serious,⁷ and refers to it as the ‘obligation to provide one’s services that is imposed by the use of coercion’⁸ and specifies a series of elements inherent to servitude, such as ‘... the obligation for the “serf” to live on another person’s property and the impossibility of altering his condition’.⁹ This impossibility of altering his/her condition, does not imply that the situation is truly unalterable, but that the circumstances of each case must take into account ‘the victim’s feeling that their condition is permanent and that the situation is unlikely to change’.¹⁰ The introduction of this subjective element, regarding the victim’s sentiment or belief, cannot prevent objectivity, or this would leave it to the victim to determine the existence or non-existence of a situation of servitude. In *c.N. v France*, this sentiment of inalterability of the situation of exploitation, within the category of servitude, was observed in the circumstances, and evidenced by a certain level of stability within the situation, which had lasted for years, and the difficulty of getting out of the situation in the future: the minor was in an irregular administrative situation, with a lack of schooling and a lack of training, to be able to find remunerated work in another field. This was combined with restricted movement and restricted freedom, preventing the minor from contacting third parties who could help her.¹¹

It is true that all the terms used in Article 4 of the ECHR are inter-related and, in all of these cases, we find practices of exploitation that affect human dignity. The difference between them has been identified by the ECtHR in terms of the degree or intensity of the infringement. This scale is evident from the point at which servitude has been qualified, expressly by the Court itself, as an aggravated form of forced labour.¹² Consequently, servitude would always imply the existence of forced labour, and other factors would need to be in place aimed

7 *Van Droogenbroeck v Belgium*, (Commission decision), Application no. 7906/77 (ECtHR, 5 July 1979), para 58; *Siliadin v France*, cit, para 123.

8 *Siliadin v France*, cit, para 124; *c.N. and V.C v France*, Application no. 67724/09 (ECtHR, 11 October 2012), para 89.

9 *Van Droogenbroeck v Belgium*, cit, para 78–80; *Siliadin v France*, cit, para 123; *c.N. and V.C v France*, cit, para 90.

10 *c.N. and V.C v France*, cit, para 91.

11 *c.N. and V.C v France*, cit, para 92.

12 *c.N. and V.C v France*, cit, para 91; *Chowdury and Others v Greece*, Application no. 21884/15 (ECtHR, 30 March 2017), para 98.

at limiting a person's freedom, such as the person living in their 'owner's' home and the inalterability of the situation. In the same way, servitude would be classified as slavery when the level of control over another person is at its highest expression, involving the exercise of the right of ownership. This greater or lesser intensity enables us to see clearly that not all forced labour would be slavery or servitude, but can also lead to some distortion. Thus, it is clear that, at least conceptually, servitude – or practices similar to slavery – and slavery do not always require the provision of services or work to be carried out. In this respect, the Supplementary Convention qualified the following example as similar to slavery, in which a woman is given in marriage, without the right to refuse, on payment of a consideration to her parents, guardian, etc. This practice is considered similar to slavery, without the need, at least in principle, for it to be carried out for the purpose of exploitation of a person's labour or for them to provide services.

3 Prohibition of Forced or Compulsory Labour

3.1 *Definition of Forced or Compulsory Labour*

Forced labour is a situation of exploitation, which involves the infringement of a person's freedom, but to a lesser extent than slavery and servitude. As in the previous cases, the ECHR does not define the term 'forced or compulsory labour'. Therefore, to conceptualise the term, as in the early sentence *Van der Mussele v Belgium*,¹³ it refers to Convention no. 29 on forced or compulsory labour by the International Labour Organisation (ILO) in 1930,¹⁴ with which the ECHR has a great similarity. In this way, forced labour is understood as 'work or service which is exacted from any person under the threat of a penalty and for which the person has not offered himself or herself voluntarily'.

This definition includes two basic elements that characterise forced labour: work carried out under the threat of a penalty and the absence of consent from the person to carrying out the work.¹⁵

On one hand, the work or service must be carried out under the threat of a penalty. The ECtHR, like the ILO, has developed a broad and flexible concept of penalty, which is not understood as a criminal, administrative or legal penalty, but may include the threat of physical or psychological violence against

¹³ *Van der Mussele v Belgium*, Application no. 8919/80 (ECtHR, 23 November 1983), para 32.

¹⁴ In addition to ILO Convention no 105 on the abolition of forced labour of 1957, which supplements Convention no. 29.

¹⁵ *Van der Mussele v Belgium*, cit, para 34; *c.n. and V.C v France*, cit, para 71.

the suppressed person or their family members, threats of reporting them to the police if they are in an irregular administrative situation in the territory, or even denying them their rights and privileges. In *Siliadin v France*,¹⁶ a broadening of the term ‘penalty’ was timidly envisaged, as it was considered that the minor had not been threatened with any specific penalty, but was in an equivalent situation in terms of the seriousness of the context, especially taking into account that the victim was a minor and in an irregular administrative situation. The ECtHR has integrated penalty in more subtle forms, regardless of the victim’s age, such as the threat of being reported to the authorities, combined with the risk of being expelled from the territory.¹⁷

On the other hand, forced labour must take place without the worker’s consent, either because the consent initially given must be qualified as irrelevant or because subsequent reversal is impossible, and the person finds themselves ordered to continue to provide the services.¹⁸ The person, therefore, has not offered to carry out the work voluntarily.

These elements make it possible to differentiate between situations of forced labour in which the provision of services occurs in precarious working conditions or in exchange for a low salary, which can also be qualified as exploitation of a person’s labour, but are not included in the protection provided for by Article 4 of the ECHR. Thus, the first adjective ‘forced’ refers to physical or psychological coercion, while the second adjective ‘compulsory’ is more than a general legal obligation. In this respect, if the worker has a real option to leave their job, even if he/she does not leave the job due to economic hardship or a lack of options for better work, it is not considered to be forced labour. The mere risk or threat of dismissal, in the case of a breach of contract, cannot be considered as a threat of a penalty susceptible to limit personal freedom.¹⁹

However, in addition to these two defining elements of forced labour, the ECHtR has introduced a further element, which alters the consensus achieved in this regard. In *Van der Mussele v Belgium*, the Commission stated that: ‘not only must the labour be performed by the person against his or her will, but either the obligation to carry it out must be ‘unjust’ or ‘oppressive’ or its performance must constitute ‘an avoidable hardship’; in other words be ‘needlessly

¹⁶ *Siliadin v France*, cit, para 118.

¹⁷ *Van der Mussele v Belgium*, cit, para 35; *c.n. and V.C v France*, cit, para 78.

¹⁸ *Van der Mussele v Belgium*, cit; *Siliadin v France*, cit; *Grazianni-Weiss v Austria*, Application no. 31950/06 (ECtHR, 18 October 2011), para 41.

¹⁹ *Tibet Menteş and Others v Turkey* Application no. 57818, 57822 and 57825/10 (ECtHR, 24 October 2017), paras 67–68; *Ali Adıgüzel v Turkey*, Application no. 7442/08 (ECtHR, 6 February 2018), paras 30–35.

'distressing' or 'somewhat harassing'.²⁰ This introduced a new qualitative element related to the work to be carried out and the volume of work. The required oppression, excess or injustice, linked to forced labour, may be defined in terms of proportionality – with 'normal limits' or 'an excessive burden' – which restrict the term 'forced labour', beyond the exceptions provided for in Section 3. Thus, not only is it necessary for forced labour to be involuntary and carried out under threat of a penalty, but it must also, to a certain extent, be unjust or disproportionate. This additional element is not included in the ILO Convention on the topic, and not only restricts the concept of 'forced labour', but can also increase the aforementioned distortion if, to prove the existence of servitude, it is first necessary to prove that a situation of forced labour is occurring. The idea of proportionality has also been used by the ECtHR in the area of Section 3 of the ECHR, seeking, in these cases, a restrictive interpretation of the exceptions outlined in the section, which would involve a violation of Article 4.2 ECHR, if they were disproportionate.

3.2 *Exceptions to the Consideration of Forced or Compulsory Labour*

Once the concept of forced or compulsory labour has been identified, it should be noted that not all labour carried out against the worker's will and under threat of a penalty involves the violation of Article 4 of the ECHR. Section 3, Article 4 of the ECHR outlines a series of situations that, for the purposes of the Convention, are not considered to be forced or compulsory labour.

In the words of the ECtHR, Section 3, Article 4 of the ECHR does not limit the exercise of the acknowledged right to not be compelled into forced labour. The list of cases outlined aims to delimit the content of this acknowledged right, identifying situations that could be forced labour, but should not be included under the term 'forced or compulsory labour'. This makes it necessary to interpret both sections – 4.2 and 4.3 of the ECHR – together, in order to identify which situations are, and which are not, forced labour. Despite the variety of cases outlined in the section, all of them can be attributed to 'the general interest, social solidarity and what is normal in the ordinary course of affairs'.²¹

²⁰ *Van der Mussele v Belgium*, cit, para 37.

²¹ *Van der Mussele v Belgium*, cit, para 38; *Wilde, Ooms and Versyp ("Vagrancy") v Belgium*, Application no. 2832/66, 2835/66 and 2899/66 (ECtHR, 18 June 1971), para 90; *Zhelyazkov v Bulgaria*, Application no. 11332/04 (ECtHR, 9 October 2012), para 65; *Meier v Switzerland*, Application no. 10109/14 (ECtHR, 9 February 2016), para 65; *Van Droogenbroeck v Belgium*, cit, para 59; *Graziani-Weiss v Austria*, cit, para 37; *Karlheinz Schmidt v Germany*, Application no. 13580/88 (ECtHR, 18 July 1994), para 22; *Stummer v Austria [gc]*, Application no. 37452/02 (ECtHR, 7 July 2011), para 120.

In times when the Court had the opportunity to pass judgment on these cases, it has highlighted the nature of the work exacted, in its analysis, from a quantitative and qualitative perspective.²² Between prohibition, with the corresponding violation of Article 4.2 of the ECHR, and the complete inclusion of a situation as one of the exceptions outlined in Section 3, the proportionality of the work required, based on the nature and volume of work, is the essential element for it to be assessed specifically.

While there are no clear judgments on the ‘service exacted in case of an emergency or calamity threatening the life or well-being of the community’ (Article 4.3. c) of the ECHR,²³ the Court has had the opportunity to pass judgment on the remaining situations in Section 3.

Firstly, judgments have been made on prison work and its conditions,²⁴ but not in the area of imposed work in a situation of conditional release from detention, referred to in Section 3. a) of Article 4 of the ECHR, relating to the work exacted from a person ‘in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention’. In *Zhelyazkov v Bulgaria*, judgment was passed on the non-remuneration of work imposed during the fulfilment of a sentence, and concluded that this absence of remuneration does not involve violation of Article 4 of the ECHR *per se*, and it should be taken into account that, if the work is within the limits of what is normal, meaning that it does not involve an excessive burden, and that its purpose is to rehabilitate the detainee.²⁵ The same conclusion was reached in the case of *Stummer v Austria*, relating to the non-payment of social security contributions towards retirement for work carried out in prison²⁶ and, more recently, in *Meier v Switzerland*, which confirmed that the obligation imposed on a detainee, who had already reached retirement age, to provide service in prison under threat of sanctions,

²² *Iversen v Norway* (decision), Application no. 1468/62 (ECtHR, 17 December 1963), paras 327–329; *Van der Mussele v Belgium*, cit, paras 35 and 38.

²³ *Iversen v Norway* (decision) cit. In this decision, two members of the Commission maintained that the obligation imposed to provide intermittent services for a period of time in the public dental service in Norway was a reasonable demand in an emergency situation. However, this case seems to respond more to the literal content of Article 4.3. d) of the ECHR than to an emergency case or calamity.

²⁴ Amongst others, *Wilde, Ooms and Versyp (“Vagrancy”) v Belgium*, cit; *Meier v Switzerland*, cit; *Zhelyazkov v Bulgaria*, cit; *Stummer v Austria*, cit; *Floroiu v Romania*, Application no. 15303/10 (ECtHR, 12 March 2013).

²⁵ *Zhelyazkov v Bulgaria*, cit, paras 36–37; In the same respect, *Twenty-one detained persons v Germany*, (Commission decision), Application no. 3134/67 and more (ECtHR, 6 April 1968), paras 97–116.

²⁶ *Stummer v Austria*, cit, paras 130–131.

did comply with the ECHR, as long as the work was appropriate in its nature, extent and manner in which it was to be performed, and in accordance with the person's physical condition and health.²⁷

In the cases analysed on working conditions in prison, the ECtHR referred to the Execution of Sentences Act (Law no. 275) on 4 July 2006, as an interpretative standard for this specific case, but did not incorporate it fully. On one hand, the Court observes not only its non-binding nature, but also the lack of European consensus on the treatment and regulation of certain aspects of prison work. Therefore, broad discretion is recognised in this field for states to regulate prison work, but the way is also open for the European Prison Rules to be incorporated in the future, essentially, in terms of paid work in prison.²⁸

There are also judgments in which the Court refers, directly or indirectly, to work that can be understood as 'normal civic obligations'.²⁹ Thus, the Court has passed judgment on obligations imposed legally or statutorily on some professionals – mainly lawyers – to provide their professional services to defend clients free-of-charge, as legal assistance, under threat of disciplinary sanction, but also in relation to other obligations imposed by states on citizens – including, amongst others, the obligation to participate in compulsory jury service,³⁰ the obligatory provision of fire services or financial contribution payable in lieu of services,³¹ participation in public emergency services,³² and also co-operation work within a family group or a group of people living together³³ – and concluding that, in reality, the work is voluntary in some cases, and, in others, the 'burden' represented by the work should be taken into account.

In *w.x.y. and Z v the United Kingdom*³⁴ and *Chitos v Greece*,³⁵ the ECtHR had the opportunity to pass judgment on the scope of the term 'service of a military character' in Section 4.3. b) of the ECHR. It did this very differently. While the

27 *Meier v Switzerland*, cit, paras 72–73.

28 *Floroiu v Romania*, cit, paras 34–35, in which it is considered that a reduction in prison sentence as a result of the work carried out in prison is a form of remuneration.

29 *Karlheinz Schmidt v Germany*, cit; *Van der Mussele v Belgium*, cit; *Graziani-Weiss v Austria*, cit; *Steindel v Germany* (decision), Application no. 29878/07 (ECtHR, 14 September 2010).

30 *Zarb Adami v Malta*, Application no. 17209/02 (ECtHR, 20 June 2006).

31 *Karlheinz Schmidt v Germany*, cit. In this case, it was considered that a violation of Article 14 of the ECHR had occurred in relation to Article 4.3.d) of the ECHR, because any unjustified discrimination between men and women in the imposition of a civic obligation is in breach of Article 14 in conjunction with Article 4 of the Convention.

32 *Steindel v Germany* (decision), cit.

33 *c.n. and V.C v France*, cit.

34 *w.x.y. and Z v the United Kingdom*, Application no. 3435/67, 3436/67, 3437/67 and 3438/67 (ECtHR, 17 December 1963).

35 *Chitos v Greece*, Application no. 51637/12 (ECtHR, 4 June 2015), para 83.

Commission on *w.x.y.* and *Z*, considered that this expression included all military service, encompassing both compulsory military service and voluntary enlistment, in *Chitos v Greece*, the term was restricted, and limited to only compulsory military service, due to the need to conduct a comprehensive interpretation of Article 4.3. b) of the ECHR, as only in this way can the reference to conscientious objectors and compulsory military service, referred to at the end of the section, be understood. In *Chitos v Greece*, states gained legitimacy for the establishment of obligatory periods of service for army officers after their studies, as well as for payment of compensation in case of early resignation, in order to recover the costs associated with their education. However, it was considered that there is a violation of Article 4.2 of the ECHR by requiring officers to pay disproportionate compensation for early resignation.

4 The New Scope of Article 4 of the ECtHR: Human Trafficking

As we have seen, Article 4 of the ECHR enshrines one of the fundamental values of the democratic societies forming the Council of Europe. In the nineteenth century, the abolition of slavery and forced labour was already one of the priorities of the international community. However, slavery practices and slavery-like practices have been evolving and adapting to the new characteristics of modern societies. Aware of this reality, the ECtHR has interpreted the scope of Article 4 of the ECHR, precisely in light of this new reality, on current living conditions and the greater level of requirement to protect human rights, thereby extending its scope of application. The ECtHR has demonstrated the capacity of the Convention to evolve, through the evolutive interpretation of Article 4 of the ECHR, by considering the Convention as a living instrument, as expressed in *Tyrrer v the United Kingdom*.³⁶

In *Rantsev v Cyprus and Russia*³⁷ the Court carried out an extensive analysis of the context, objective and purpose of the ECHR and referred to the international conventions signed in the struggle against human trafficking, to conclude that human trafficking itself is incompatible with a democratic society and contrary to the spirit and purpose of Article 4 of the ECHR. On the basis of these arguments, the scope of the prohibition of forced labour, servitude and slavery was broadened to include human trafficking within its area of protection, despite the article not mentioning this new phenomenon expressly. From

³⁶ *Tyrrer v the United Kingdom*, Application no. 5856/72 (ECtHR, 25 April 1978), para 31; also, in *Siliadin v France*, cit, para 121.

³⁷ *Rantsev v Cyprus and Russia*, cit.

this moment, the Court has considered that human trafficking is included *ratione materiae* in Article 4 of the ECHR.³⁸

Despite not being included expressly in Article 4 of the ECHR, human trafficking has been the subject of numerous international conventions and its comparison with slavery is a constant in literature, where it is described as a new form of slavery. In its judgments, the ECtHR acknowledges the agreed definitions on human trafficking established in the international arena. Primarily, it refers to the Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations Convention against transnational organised crime (also known as the Palermo Protocol) and the Council of Europe Convention on Action against Human Trafficking (also known as the Warsaw Convention). According to these treaties and, especially, the Council of Europe Convention, human trafficking should be understood as:

The recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

In accordance with the Warsaw Convention, and the previous Palermo Protocol, the ECtHR has sustained that, due to its very nature and objectives, human trafficking is closely linked to slavery as it involves the exercise 'of powers to control another person or the characteristics of ownership', treating people as goods to be bought and sold. The close relationship that exists between slavery and human trafficking was already suggested in *Silidian v France*, but it was necessary to wait for *Rantsev v Cyprus and Russia* for it to be acknowledged expressly. However, the ECtHR, considering it unnecessary, opted to not specify to which type of prohibited behaviour – slavery, servitude or forced labour – the victim had been subjected, qualifying the situation directly as

³⁸ *Rantsev v Cyprus and Russia*, cit, paras 272–282; *Chowdury and Others v Greece*, cit, para 93.

human trafficking, without linking it directly to any of the practices expressly provided for in Article 4 of the ECHR.³⁹

The Court refers to human trafficking as a modern form of slavery, which, through its defining characteristics and elements involves an attack on human dignity that is incompatible with the democratic values of European states. However, despite this close link between slavery and trafficking, the acknowledgement by the Court of a classic concept of slavery makes it difficult for situations of trafficking to be qualified as slavery, as these are more likely to be *de facto* situations of slavery than *de jure*. For this reason, the Court does not omit the relationship between trafficking and servitude and with forced labour, and concludes that it encompasses the three categories.⁴⁰ In the end, the very definition of trafficking, in terms of its purpose to exploit, refers equally to slavery, servitude and forced labour, and can be understood as a practice, like a means-to-an-end relationship, aimed at subjecting a person to some of the situations prohibited by the ECHR. However, it is also true that, given the legal configuration, not all situations of trafficking effectively become a situation of exploitation, whether slavery, servitude or forced labour, or that these are the only purposes related to trafficking.

Reality shows us that certain conducts susceptible to be qualified as trafficking can be identified with practices considered similar to slavery, such as debt servitude. A usual *modus operandi* of traffickers is to create debt, often defined as the cost of transporting the victim, to be paid off through his/her labour, although, subsequently, the debt amount is artificially increased by applying abusive interest rates, fines for bad behaviour (going out without authorisation, not providing a service ...), accommodation and living costs, which make the 'debt' indeterminate, and the victim finds themselves heading towards endless working hours, and a salary that does not correspond to the market value, in order to pay off a debt that becomes impossible to pay.

However, there is also a significant link between forced labour as a form of exploitation sought by traffickers,⁴¹ to the extent that this comes under the definition of human trafficking. Specifically, in *Chowdury and Others v Greece*, the ECtHR reproached the national courts for their restrictive interpretation of trafficking, by equating it with servitude,⁴² which had led to inadequate

³⁹ *Rantsev v Cyprus and Russia*, cit, para 282; *s.M. v Croatia*, Application no. 60561/14 (ECtHR, 19 July 2018), para 56; *J. and Others v Austria*, cit, para 104.

⁴⁰ *Rantsev v Cyprus and Russia*, cit, paras 279–282.

⁴¹ *Rantsev v Cyprus and Russia*, cit, paras 93 and 281; *M. and Others v Italy and Bulgaria*, Application no. 40020/03 (ECtHR, 31 July 2012), para 151.

⁴² *Chowdury and Others v Greece*, cit, para 100.

protection for victims. Trafficking should not be confused with servitude and, in classifying the situation in which seasonal workers found themselves when they filed against human trafficking and forced labour (therefore, including the situation defined in the area of 4.2 of the ECHR),⁴³ their status as seasonal workers lacked the necessary element required to define the situation as servitude: the victim's sentiment that the situation was permanent or with little possibility for change.⁴⁴

5 State Obligations Derived from Article 4 of the ECHR

Article 4 of the ECHR enshrines one of the fundamental values of democratic societies. Therefore, its scope cannot be limited to a negative obligation, aimed at preventing direct actions by states that could involve a violation of the relevant prohibitions. Instead, important positive obligations for states are derived from these prohibitions, so as not to leave the right without content.⁴⁵

In addition, article 4 of the ECHR obliges states to abstain from imposing measures or adopting actions that could entail submission to slavery, servitude or forced labour, but also to guarantee that no one under their jurisdiction is placed in a situation that allows this submission by a third-party state, and therefore, an obligation to avoid re-victimisation. This aspect of the obligations has not yet been developed by the Court, although some cases have come to its knowledge. Thus, in *o.g.o. v the United Kingdom*⁴⁶ and *L.R. v the United Kingdom*,⁴⁷ the claimants alleged that being expelled to their countries of origin (Nigeria and Albania respectively) exposed them to the risk of being recruited again by trafficking networks, as their countries of origin could not offer adequate protection. They were at risk, therefore, of being re-trafficked if they were expelled. The Court could not pass judgment on the merits of the matter because, prior to the Court judgment, the claimants saw their refugee status recognised and their non-expulsion from the territory guaranteed (Article 37.1 of the ECHR). While in *v.F. v France*⁴⁸ and *Idemugia v France*,⁴⁹ the Court refused to accept the demands, it accepted that, to the extent that these

43 *Chowdury and Others v Greece*, cit, para 101.

44 *Chowdury and Others v Greece*, cit, para 98.

45 *Siliadin v France*, cit; *c.N. and v.C. v France*, cit, para 104.

46 *o.g.o. v the United Kingdom* (decision), Application no. 13950/12 (ECtHR, 18 February 2014).

47 *L.R. v the United Kingdom* (decision), Application no. 49113/09 (ECtHR, 14 June 2011).

48 *v.F. v France* (decision), Application no. 7196/10 (ECtHR, 29 November 2011).

49 *Idemugia v France* (decision), Application no. 4125/11 (ECtHR, 27 March 2012).

are absolute rights, it is possible to raise the question of the extraterritorial application of Article 4 of the ECHR.

Regarding the positive obligations, the Court has identified that they include: a) the obligation to establish an appropriate legislative and administrative framework to prohibit and sanction prohibited conduct; b) the obligation to adopt operational measures to protect victims,⁵⁰ which should include the obligation to provide training to police and immigration officials;⁵¹ c) the procedural obligation to thoroughly and effectively investigate a suspected violation of Article 4 of the ECHR.⁵²

In the area of human trafficking, the ECtHR has expressly stated that the guidelines for the fulfilment and development of these positive obligations can be found in the Council of Europe Convention on Action against Trafficking in Human Beings, and its interpretation carried out by the Group of Experts on Action against Trafficking in Human Beings (GRETA).⁵³ With this express acknowledgement, Article 4 of the ECHR incorporates the Council of Europe Convention on Action Against Trafficking, as well as the experience and acquired knowledge of GRETA, subjecting this international treaty to a jurisdictional and interpretative monitoring that it lacked initially. In accordance with this Convention, an integrated approach should be adopted, encompassing the different areas, such as prevention, the protection of victims and investigation, as well as its classification as a crime, and the effective elimination of any act aimed at maintaining a person, from which obligations arise for States in the area of Article 4 of the ECHR.

5.1 *The Positive Obligation to Put in Place an Appropriate Legislative and Administrative Framework*

The first of the obligations on states is to guarantee the existence of an appropriate legislative and administrative framework to prohibit and sanction forced labour, servitude and slavery, as well as human trafficking.⁵⁴ This obligation implies that states must not only ratify or sign international treaties on

⁵⁰ *Rantsev v Cyprus and Russia*, cit, para 285; *L.E. v Greece*, Application no. 71545/12 (ECtHR, 21 January 2016), para 66.

⁵¹ *Rantsev v Cyprus and Russia*, cit, para 287.

⁵² *J. and Others v Austria*, cit, para 104; *C.N. v The United Kingdom*, cit, para 69.

⁵³ *Chowdury and Others v Greece*, cit, para 104.

⁵⁴ *Siliadin v France*, cit, paras 89 and 112; *c.n. and v.c. v France*, cit, para 105; *c.n. v the United Kingdom*, cit, para 66; *Rantsev v Cyprus and Russia*, cit, para 285; *L.E. v Greece*, cit, paras 70–72; *Chowdury and Others v Greece*, cit, para 105.

the topic, but also incorporate all the measures contained in these instruments into their legal system.

These measures include all those provisions of criminal law aimed at appropriately classifying and sanctioning the crimes of slavery, servitude, forced labour,⁵⁵ as well as human trafficking⁵⁶ and even, forced prostitution.⁵⁷ The absence of appropriate legislation derived from a lack of foresight into the crime of slavery and servitude in the legal system was the main reason why France, in *Siliadin* and years later in *c.N. and V.*⁵⁸ and the United Kingdom, in *C. N.*,⁵⁹ were condemned by the Court. Poor criminal regulation, due to a lack of provision against human trafficking as an independent crime, facilitated the alleged offences and was the reason for condemning Greece in *T.I. v Greece*.⁶⁰

In addition, states are required to ensure that this legislative and administrative framework is consistent with the objective pursued, and must, therefore, adopt and modify any measures that do not appear to be connected directly, but may be counterproductive to achieving the objective pursued. This includes paying special attention to the businesses and sectors often used as a cover for trafficking, and to immigration legislation. Thus, in *Rantsev v Greece*, despite the Court recognising the existence of a general legislative framework in accordance with the international provisions against trafficking and sexual exploitation, it concluded that, in Cyprus, the regime of artist visas did not provide adequate protection for victims,⁶¹ which gave rise to a violation of Article 4 of the ECHR.

5.2 *The Positive Obligation to Take Operational Measures*

The ECtHR has recognised that states have the obligation to adopt specific measures to prevent human trafficking, slavery, servitude and forced labour, as well as to protect real and potential victims from treatment that is incompatible with Article 4 of the ECHR.⁶²

The operational measures for prevention include the institutional co-operation of the different organisations acting in this field, including the public prosecutor, police and judges, amongst others, as well as measures aimed at

55 *Siliadin v France*, cit, paras 130–149; *c.N. and v.c. v France*, cit, para 105.

56 *Chowdury and Others v Greece*, cit, paras 107–109.

57 *s.M. v Croatia*, cit, para 58.

58 *Siliadin v France*, cit, paras 130–149; *c.N. and v.c. v France*, cit, para 107.

59 *c.N. v the United Kingdom*, cit, para 76.

60 *T.I. and others v Greece*, Application no. 40311/10 (ECtHR, 18 July 2019), paras 143–144.

61 *Rantsev v Cyprus and Russia*, cit, paras 284, 287 and 293.

62 *Rantsev v Cyprus and Russia*, cit, para 286; *c.N. v the United Kingdom*, cit, para 67.

discouraging demand and acting in sectors where exploitation is more susceptible to occur, in addition to border controls in order to detect cases of trafficking. Measures to protect victims include all those aimed at identifying and providing assistance for physical, psychological and social recovery,⁶³ as well as compensation for victims. It is not sufficient for these measures to be planned. They must be effective and adopted quickly. In *L.E. v Greece*, Greece was condemned because the claimant, a victim of trafficking and sexual exploitation, had to wait months for her status as a victim to be recognised; the Court considered that the amount of time was sufficient to justify that Greece had violated its obligations.⁶⁴

Regarding the protection of victims, the Court clarified that this obligation to adopt operational measures arises when the state has reasonable suspicion that a person is in real and immediate danger of being trafficked or exploited. In these cases, if the authorities do not adopt the appropriate protection measures, they would be in breach of their obligations.⁶⁵ This obligation must be interpreted so that it does not imply a burden that is impossible for states to fulfil, and it does not oblige them to prevent all types of violence from occurring in the territory.⁶⁶

5.3 *The Procedural Obligation to Investigate*

The obligations imposed by Article 4 of the ECHR include the procedural obligation to investigate. Based on this obligation, authorities are obliged to investigate any situation of slavery, servitude, forced labour or human trafficking. The police and judicial authorities, in these cases, must act on their own account and obligatorily from the moment at which they have knowledge of a situation that is incompatible with Article 4 of the ECHR,⁶⁷ and the investigation must not depend on it being reported beforehand by the victim, to whom ways should be provided for him/her to participate in the procedure.⁶⁸ To meet the standards of the ECtHR, the investigation will not be sufficient unless it is exhaustive and effective, meaning that it must be appropriate to achieve the identification and punishment of those responsible.⁶⁹ In *s.M. v Croatia*, the

63 *Chowdury and Others v Greece*, cit, para 110.

64 *L.E. v Greece*, cit, paras 77, 78–86.

65 *Rantsev v Cyprus and Russia*, cit, para 286; *L.E. v Greece*, cit, para 66; *Chowdury and Others v Greece*, cit, para 111–115; *T.I. and others v Greece*, cit, para 136.

66 *L.E. v Greece*, cit, para 67; *T.I. and Others v Greece*, cit, para 137.

67 *C.N. v the United Kingdom*, cit, para 69. *Chowdury and Others v Greece*, cit, para 119.

68 *L.E. v Greece*, cit, para 68; *T.I. and Others v Greece*, cit, para 138.

69 *Chowdury and Others v Greece*, cit, para 116; *s.M. v Croatia*, cit.

Court condemns the state for non-fulfilment of this procedural obligation by not having conducted a sufficiently exhaustive police and judicial inquiry, by not taking statements from all those people who may have had knowledge, directly or indirectly, of the incidents reported by the claimant, and who could have endorsed the claimant's judicial declaration, all of which made it difficult to potentially sentence the person responsible for the incidents.⁷⁰ However, as it could not be otherwise, it is clarified that this is an obligation of means, not an obligation of result,⁷¹ as the circumstances of each case will determine the future and final result of the investigation, and it is not required that all procedures end with a sentence.

The investigation must be carried out quickly in all cases, but when the victim needs to be removed from a situation that violates his/her rights, it must be carried out with the urgency required for that situation.⁷²

In addition, and due to the sometimes transnational nature of human trafficking,⁷³ the Court has reminded member states that, not only do they have the obligation to investigate and prosecute situations of trafficking when they occur on their territory, regardless of whether the exploitation or other phases of the trafficking happened in other states, but, furthermore, they are obliged to co-operate with the authorities in other states where incidents related to the trafficking may have been carried out, providing co-operation and the necessary legal assistance.⁷⁴ However, there is no obligation for states to investigate and pursue crimes of human trafficking that may have been perpetrated anywhere in the world, or by anyone, as states are not required to provide international jurisdiction in the area of criminal human trafficking.⁷⁵ The Warsaw Convention only attributes jurisdiction to national courts based on the classic principle of territoriality – acts committed in the territory of the state – as well as the complementary principles of active personality – acts committed

70 *s.m. v Croatia*, cit, para 59.

71 *Rantsev v Cyprus and Russia*, cit, para 288; *Chowdury and Others v Greece*, cit, para 116; *L.E. v Greece*, cit, para 67; *s.m. v Croatia*, cit, para 59; *Chowdury and Others v Greece*, cit, paras 122 and 127; *s.m. v Croatia*, cit, para 59.

72 *Rantsev v Cyprus and Russia*, cit, para 288.

73 Human trafficking does not require the crossing of an international border. Yet, internationally, the definition 'internal trafficking' has been accepted as trafficking that takes place within the borders of a single state. However, this does not prevent the usual practice of the different phases of trafficking – recruitment, harbouring or receipt of people – from taking place in different territories.

74 *Rantsev v Cyprus and Russia*, cit, para 289; *M. and Others v Italy and Bulgaria*, cit, paras 167 and 169.

75 *J. and Others v Austria*, cit, para 114.

by a national of the state – and passive personality – the victim of the crime is a national of the state. Consequently, when the crime of trafficking is perpetrated entirely abroad and by foreigners, the state in which the victim is located will not be in breach of its obligation to investigate if it does not initiate a judicial inquiry into the events, notwithstanding that it does have the obligation to adopt measures to protect the victim.

In this way, when faced with a complaint from a victim or a third party, if adequate investigation is not undertaken to clarify the facts, it would be a violation of Article 4 of the ECHR. This has been concluded by the ECtHR in many cases.⁷⁶

6 Conclusions

The case law analysis of the ECtHR on Article 4 of the ECHR demonstrates that the number of judgments on the scope of rights contained within the ECHR is on the increase and, particularly, after the famous case *Siliadin v France*. It should be highlighted that not only has the number of decisions increased, but also the number of sentences, raising standards of protection. These sentences should have led, in some states at least, to a review of criminal law so as not to incur breaches of the Convention, through gaps in categorising the terms, which could irremediably lead to a state being condemned if a case is brought to its attention. I am referring, in particular, to the Spanish case, in which the criminal legal system lacks an independent definition of slavery, servitude and forced services, although it has included human trafficking independently.

The ECtHR has maintained, since the beginning, a restrictive definition of slavery, which is closely linked to the exercise of a genuine legal right of ownership over another person, and considering them as patrimony. This restrictive interpretation has an impact on judicial decisions, as it is not possible to identify any cases in which the situation has been described as slavery. Linking slavery with a situation of legal submission, therefore, makes it difficult to apply the term today. Nonetheless, this limited definition does facilitate the differentiation between servitude and slavery without the need to distort the characteristics of classic slavery.

The ECtHR has carried out important interpretative work to delimit the concepts of forced labour and servitude, establishing a scale, from a lesser to a greater level of seriousness, and bringing them into the same category with

76 *Rantsev v Cyprus and Russia*, cit, para 288.

a difference in level of seriousness. However, this could give rise to certain difficulties if we assume that, at least conceptually, it would be possible to conceive of a situation of servitude without the existence of forced labour. This distortion could be even greater if the concept of forced labour is restricted by introducing an element that is not included in the ILO conventions, but is linked to injustice, oppression and the disproportionate nature of the work exacted. This aspect could, in contrast, be extremely useful to restrict the scope of Section 3, Article 4 of the ECHR, by requiring proportionality in labour obligations that can be imposed by states – as in the case of prison work or civic obligations, amongst others.

Similarly, in line with the interpretative guidelines of other international organisations, the ECtHR maintains a flexible interpretation of certain defining elements of forced labour, such as the threat of a penalty, to include not only clear ‘penalties’ but also those that are more subtle, and related, in part, to the victim’s specific circumstances.

The ECHR has demonstrated once again, in the field of Article 4 of the ECHR on this occasion, its ability to extend the scope and area of protection, regarding the ECHR as a living instrument that must be updated to reflect current circumstances, and seeking the effective protection of the rights guaranteed in the text. This dynamic aspect of the Convention is a key element to achieve genuine rights in Europe, but must be compatible with state sovereignty and the search for a consensus amongst Party States. The area of Article 4 of the ECHR contains examples of this search for balance.

On one hand, the scope of protection has been extended to include the practice of exploitation and an attack on dignity, such as human trafficking, which is not even referred to specifically in the text of the Convention. This is based on the existence of a series of international instruments, the Palermo Protocol and the Palermo Convention, extensively agreed in the international Community and ratified by Party States in the Council of Europe, and so much so that the Warsaw Convention represents the specific interpretative guidelines for Article 4 of the ECHR, from which a multitude of positive obligations for states are derived.

On the other hand, prison labour and its specific regulation is one of the areas in which the ECtHR still has not taken a definitive step, thereby acknowledging the broad discretionary power of states, while waiting to achieve the consensus required to enable the European Prison Rules 2006 to have greater impact.

Other essential work of the Court has been to acknowledge and develop the positive obligations derived from Article 4 of the ECHR, which require an integrated, consistent treatment in the regulatory, judicial, police and victim

protection systems. It is precisely by including human trafficking in the scope of Article 4 of the ECHR that the Court has had the opportunity to introduce an entire series of obligations related to effective and appropriate protection for real and potential victims of trafficking, but which can also be extended, to a greater or lesser extent, to the victims of slavery, servitude and forced labour.

Beyond the substantial progress that has taken place in the protection of rights, the Court is yet to openly pass judgment on some of these questions, such as the non-refoulement or non-expulsion of people, when there is a real risk of the victim being re-trafficked, whether this is in relation to a potential violation of Article 4, or of Article 3 of the ECHR, which prohibits a person being subjected to inhuman or degrading treatment.

Aliens' Protection against Arbitrary Detention (Article 5 ECHR)

*Andreia Sofia Pinto Oliveira**

1 Introduction

Detention of foreigners seeking to enter a state without the necessary documents and authorisations or detention as a preliminary step to the expulsion or extradition of aliens, aimed at facilitating the execution of the deportation order, are state practices taken into consideration by the European Convention of Human Rights.¹ Article 5 of the Convention, guaranteeing the right to liberty and security, does not prohibit the detention of non-nationals based on their migratory status. According to Article 5/1/(f), ‘the lawful arrest or detention of a person to prevent his affecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition’ is a possible exception to the right of liberty, among other grounds for detention, provided under sub-paragraphs (a)–(e).² Paragraphs 2–4 also provide guarantees for detainees to be promptly informed on the reasons for detention and to be given the opportunity to challenge the lawfulness of the detention before a court; and ensures, in paragraph 5, a right to compensation in case of detention contrary to the Convention. These provisions are to be understood to minimise the risk of arbitrariness.

The Council of Europe developed an important work on the issue of detention in the context of migration, especially focusing on alternatives to detention. In 2015, the Committee of Ministers mandated the Steering Committee for Human Rights (CDDH) to carry out the following work for the biennium 2016–2017: ‘in light of the Court’s relevant jurisprudence and other Council of

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¹ In 1891, by statute, the United States admitted detention for brief periods as ancillary to border control. For an overview of the evolution of law and practice regarding immigration detention, Wilsher, *Immigration Detention: Law, History, Politics* (Cambridge University Press, 2012).

² State obligations derived from Article 5 can be derogated in case of a public emergency threatening the life of the nation, like war, according to Article 15 of the Convention.

Europe instruments, conduct an analysis of the legal and practical aspects of specific migration-related human rights issues, in particular effective alternatives to detention, and explore the need for further work in the field by the CDDH.³ In 2017, the Steering Committee published a thorough analysis on the issue, *Legal and practical aspects of effective alternatives to detention in the context of migration* and, in 2019, adopted *Practical Guidance on Alternatives to Immigration Detention: Fostering Effective Results*.⁴

The case law of the European Court of Human Rights regarding the detention of aliens has also grown in volume and importance in recent years, because of the adoption of detention of irregular migrants as a common practice by the European states.⁵ Case law regarding asylum seekers is particularly abundant. Important and well-known cases of detention – like *MSS v Belgium and Greece*⁶ – however, were not considered under Article 5, but under Article 3 of the Convention. According to the Court, the decision to detain and to maintain in detention must be dealt with as an interference of the right to liberty, provided by Article 5. The conditions of detention raise issues relevant for an assessment under Article 3. For this reason, the subject of detention conditions will not be addressed in this chapter.

The very decision to detain a person based on her/his migratory status is scrutinised by the Court under Article 5 and the case law on the right of liberty of migrants and asylum-seekers is criticised by a significant part of the doctrine for two major reasons: first, because the Court does not conduct a full and proper test of proportionality – suitability, necessity and proportionality in the

³ Terms of reference of the CDDH and its subordinate bodies for the biennium 2016–2017 (as adopted by the Committee of Ministers at their 1241st meeting, 24–26 November 2015).

⁴ *Human Rights and Migration – Legal and practical aspects of effective alternatives to detention in the context of migration* – Analysis of the Steering Committee for Human Rights (CDDH), adopted on 7 December 2017. In 2019, the same Committee adopted *Practical Guidance on Alternatives to Immigration Detention: Fostering Effective Results*, both available at <<https://www.coe.int/en/web/portal/home>>.

⁵ This is, in fact, not just a European trend. On United States' Immigration Law, Stephen Legomsky wrote a very interesting essay on the issue, referring to the 'importation' of the 'Criminal Enforcement Model' in Immigration Law and identifying 'five ports of entry': attaching criminal consequences to immigration violations; attaching immigration consequences to criminal convictions; prioritising criminal enforcement in Immigration Law; importing strategies of criminal law enforcement and using the same players. Legomsky, 'The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms' (2007) 64 Washington & Lee Law Review 469. From the same author, 'The Detention of Aliens: Theories, Rules, and Discretion' (1999) 30 University of Miami Inter-American Law Review 531.

⁶ *MSS v Belgium and Greece*, Application no. 30696/09 (ECtHR, 21 January 2011).

narrow sense – of the detention measures;⁷ second, because the approach adopted considers that detention is a “necessary adjunct” to the sovereign state’s “undeniable right of control” over its territory;⁸ the states create legal frameworks that produce ‘reasons to detain, and by doing so creates detainable subjects, migrants’.⁹

In this article, we will address this issue in three steps: first, we will focus on the concept of detention relevant for Article 5 and how the concept has been shaped in the case law of the Court; in a second step, we will review the general requirements provided in Article 5 to assess if the detention is applied in the compliance with Convention standards and the specific requirements provided by Article 5/1/(f) regarding the detention of non-nationals linked to their migratory status; the third step focuses on specific procedural safeguards of non-national detainees: the right to be informed and the right to challenge the detention before a Court in a speedy procedure, as provided by Article 5/2 and 4.

2 The Concept of Detention

Before starting the analysis of the requirements currently provided by the Convention and their application by the Court, we must pay attention to the concept itself. The European Court has already faced cases where the very concept of detention was at stake.

The right to liberty exists together with the right of free movement, provided by Article 2, Protocol 4, for the majority of the States Parties to the Convention, except Greece, Switzerland, Turkey, and the United Kingdom, who did not ratify the Fourth Protocol. Article 5 applies only when deprivation of liberty, detention or confinement occurs. As the Court stated, the ‘difference between deprivation and restriction of liberty is one of degree or intensity, and not one of nature or substance’.¹⁰ To distinguish both, the Court used to apply

⁷ Among others, Carlier, ‘L'accès au territoire et la détention de l'étranger demandeur d'asile’ (2009) 79(3) *Revue Trimestrielle des Droits de l'Homme* 795.

⁸ Cornelisse, *Immigration Detention and Human Rights – Rethinking Territorial Sovereignty* (Martinus Nijhoff, 2010, p. 310): considering that the ‘deep cause for the substandard level of human rights protection for immigration detainees’ is the Court’s ‘perception of territorialised sovereignty as a natural and innocent concept’.

⁹ Costello, ‘Immigration Detention: The Grounds Beneath Our Feet’ (2015) 68 *Current Legal Problems* 143.

¹⁰ *Illias and Ahmed v Hungary*, [GC]Application no. 47287/15 (ECtHR, 21 November 2019), para 212. The same is recognised since 1980, *Guzzardi v Italy*, Application no. 7367/76 (ECtHR, 6 November 1980), para 93.

four factors, that should not be taken individually, but cumulatively and combined to assess if the measure was under the scope of Article 5: ‘nature, duration, effects, and manner of execution of the penalty or measure in question’.¹¹ These four factors, applied for more than four decades, were partially replaced recently, in the Grand Chamber judgments in the cases *Illias and Ahmed v Hungary*¹² and *z.A. v Russia*¹³ by these:

- i) the applicants’ individual situation and their choices, ii) the applicable legal regime of the respective country and its purpose, iii) the relevant duration, especially in the light of the purpose and the procedural protection enjoyed by applicants pending the events, and iv) the nature and degree of the actual restrictions imposed on or experienced by the applicants.¹⁴

The interpretation of the previous set of factors was not easy, but in our opinion, the two newcomers – the relevance of individual choices and the purposes of the applicable legal regime of the country – do not add clarity to the distinction. Moreover, if the previous set of factors applied to all detention measures, the new set is tailored for a particular purpose: ‘determining the distinction between a restriction on the liberty of movement and deprivation of liberty in the context of confinement of foreigners in airport transit zones and reception centres for the identification and registration of migrants’.¹⁵

The rule of individual choices is now assumed as part of the concept of detention. It is not a new factor, in the previous case law the idea was already there for very exceptional cases, but the visibility of the factor is now intensified. The approach is the following: confinement of those wanting to enter the territory is not, like in other cases, a decision of the state but of the individual,

¹¹ *Engel and Others v Netherlands*, Application no. 5100/71 (ECtHR, 8 June 1976), para 59. About these factors, see also *Guzzardi v Italy*, Application no. 7367/76 (ECtHR, 6 November 1980), para 93, *Amuur v France*, Application no. 19776/92 (ECtHR, 25 June 1996), para 42 and Harris et al, *Harris, O’Boyle and Warbrick, Law of the European Convention on Human Rights* (3rd edn, Oxford University Press, 2014, pp. 259–294).

¹² *Illias and Ahmed v Hungary*, cit, ruled that Article 5 did not apply to the case, after a first judgment of 2017, where the Court had ruled that there was a ‘*de facto* deprivation of liberty (...). Article 5 para 1 of the Convention therefore applies’.

¹³ *z.A. v Russia* [GC], Application no. 61411/15 (ECtHR, 21 November 2019), after a first judgment of 21 March 2017.

¹⁴ *Illias and Ahmed v Hungary*, cit, para 217.

¹⁵ *Illias and Ahmed v Hungary*, cit, para 217.

who insists on being admitted. This approach is particularly problematic regarding asylum seekers.

The second factor, the applicable legal regime and its purpose, is also controversial. The legal regime is crucial to appreciate the lawfulness of the detention, but not to determine if there is a situation of confinement. Considering that:

absent other significant factors, the situation of an individual applying for entry and waiting for a short period for the verification of his or her right to enter cannot be described as deprivation of liberty imputable to the state, since in such cases the state authorities have undertaken vis-à-vis the individual no other steps than reacting to his or her wish to enter by carrying out the necessary verification.¹⁶

The above causes a confusion between detention itself and lawfulness of the detention and is a *petitio in principle*. Lawful detention is detention, which, under the Convention standards, does not violate human rights.

Regarding non-nationals, the most difficult situations are those arising in cases involving airport transit zones, reception centres and border transit zones.

2.1 Airport Transit Zones and Reception Centres

In *Amuur v France*,¹⁷ Somali nationals saw their entry in France refused at Orly airport, because their passports were false, and were held at a hotel. Part of the Hotel premises were let to the Ministry of the Interior, converted for use as a waiting area for the Airport. Sixteen days after arrival, they applied for asylum. According to the French government, the applicants' stay in the transit zone and in the hotel was not comparable to detention, because it was due to 'their obstinacy in seeking to enter French territory despite being refused leave to enter'.¹⁸ The government argued that 'although the transit zone is "closed on

¹⁶ *Illias and Ahmed v Hungary*, cit, para 225.

¹⁷ *Amuur v France*, cit.

¹⁸ According to the Government: 'The original reason why they were held and for the length of time they were held had been their obstinacy in seeking to enter French territory despite being refused leave to enter' – *Amuur v France*, cit, para 39. Similar arguments continue to be used today. See case *z.A. v Russia* [GC], cit, para 64: 'The Government submitted that the transit zone of Sheremetyevo Airport was not the territory of the Russian Federation. The applicants had not crossed the Russian border and had thus been outside the jurisdiction of the respondent State. The fact that the applicants had applied for refugee status in Russia did not suffice, in the Government's submission, for them to be considered as persons falling within Russian jurisdiction.'

the French side”, it remains “open to the outside”.¹⁹ The Court concluded that holding the applicants in such conditions was equivalent, given the restrictions suffered, to a deprivation of liberty, because the possibility of leaving the country ‘becomes theoretical if no other country offering protection comparable to the protection they expect to find in the country where they are seeking asylum is inclined or prepared to take them in’.²⁰ Article 5 was therefore applicable to the case. The concrete situation of Mr Amuur, placed under ‘strict and constant police surveillance’ without legal and social assistance for more than two weeks, led the Court to the conclusion that there was a deprivation of liberty and not a ‘mere restriction on liberty – inevitable to organise the practical details of the alien’s repatriation or, where he has requested asylum, while his application for leave to enter the territory for that purpose is considered’.²¹

After the *Amuur* case, the Court had to assess frequently similar cases and to distinguish means of restriction on the liberty of movement from situations of deprivation of liberty, having maintained its position in cases of *Riad and Idiab v Belgium*²² and in case *Rashed v Czech Republic*,²³ for instance. In the case *Mahid and Haddar v Austria*, the Court using the same criteria – type, duration, effects and manner of implementation of the measure – considered that in this case, the detention at the airport transit area was a mere restriction on the liberty of movement. The case involved four applicants, who arrived at Vienna Airport and asked for asylum, claiming that they had fled Algeria because of political persecution and that in Tunisia they risked deportation to Algeria. They were served with a negative decision after three days and informed that they would be deported to Tunisia and that if the deportation could not occur, the applicants were to remain in the transit zone of the airport. The deportation was tried three times, but the applicants did not comply with the orders to board the flight and the authorities refused to employ force. The Court considered that the state detained them the minimum time necessary for carrying out the steps required to verify their right to entry and there was no constant police control²⁴ and rejected the applicants’ arguments that their situation was in practice comparable with or equivalent to the situation of persons

¹⁹ *Amuur v France*, cit, para 46.

²⁰ *Amuur v France*, cit, para 49.

²¹ *Amuur v France*, cit, para 43.

²² *Riad and Idiab v Belgium*, Application no. 29787/03 (ECtHR, 24 January 2008), para 68: ‘the mere fact that it was possible for the applicants to leave voluntarily cannot rule out an infringement of the right to liberty (...). The Court concludes that the applicants’ confinement in the transit zone of the airport amounted to a *de facto* deprivation of liberty.’

²³ *Rashed v Czech Republic*, Application no. 298/07 (ECtHR, 27 November 2008), para 70.

²⁴ Cornelisse, cit, p. 282.

in detention.²⁵ The short timeframe of the detention imposed and the 'free choice' of the applicants, preferring detention to deportation was crucial for the Court and the fact that they were seeking asylum and refused deportation because of their fear of being persecuted was not sufficient to consider that there was a situation of detention at the airport.

In the case *z.A. and Others v Russia*, the applicants, who were asylum seekers, stayed in the transit zone of Sheremetyevo Airport in Moscow, for more than seven months, under constant police control and without any practical and real possibility of leaving the airport zone. Although the Court applied the new set of factors, stressing the relevance of individual choices, the *Amuur* jurisprudence was reinforced:

[I]n this particular case leaving the Sheremetyevo airport transit zone would have required planning, contacting aviation companies, purchasing tickets and possibly applying for a visa depending on the destination. The Court considers that the Government [has] failed to substantiate their assertion that despite these obstacles 'the applicants were free to leave Russia at any time and go wherever they wished'.²⁶

In the case, there is:

no indication that the applicants in the present case failed to comply with the legal regulations in place or did not act in good faith at any time during their confinement in the transit zone or at any stage of the domestic legal proceedings by, for instance, complicating the examination of their asylum cases (see, by contrast, *Mahdid and Haddar*, (...), where the applicants remained in the international zone of an airport after the rejection of their request for asylum and destroyed their documents in an attempt to force the Austrian authorities to accept them).²⁷

²⁵ According to the Court, 'the applicants refused to go to another country and destroyed their passports in an attempt to force the Austrian authorities to accept them by confronting them with *a fait accompli*. This was their own free choice for which the Contracting State cannot in any way be held responsible and which, in itself, does not entail any obligation to assist them to enter Austrian territory'. *Mahdid and Haddar v Austria*, (dec.), Application no. 74762/01 (ECtHR, 8 December 2005).

²⁶ *z.A. v Russia* [GC], Application no. 61411/15 (ECtHR, 21 November 2019), paras 153–154.

²⁷ *z.A. v Russia*, cit, para 144.

The relevance of individuals' choices remains, apparently, exceptional when airport transit zones are at stake.

Regarding reception centres, aimed at the identification and registration of migrants, the Court takes a similar approach. If they have a regime that is closed, this attracts the applicability of Article 5.²⁸ In the case *J.R. v Greece*, regarding a reception centre (the Vial Hotspot) on the Greek island of Chios, which was converted into a semi-open centre during the stay of the applicants, being free to go and stay during the day, the Court considered that, after this conversion, there is not a deprivation of liberty anymore, but a mere restriction on the freedom of movement.²⁹

2.2 Border Transit Zones

The case *Illias and Ahmed v Hungary* put a peripherical reality centre stage: the border transit zones, to be more concrete, the Röszke transit zone defined as 'a compound with mobile containers and a narrow open-air area surrounded by approximately four-metre-high fencing with barbed wire on the top. The entire zone was guarded by police officers and armed security guards'.³⁰ Those staying in the area could 'not leave the zone for the remaining territory of Hungary. It appears that they could leave it for Serbia, but the parties are in dispute as to the legal and practical consequences of such a move'.³¹

In 2017, the Court delivered a first judgment, considering that the applicants were in a situation of *de facto* deprivation of liberty, because to 'hold otherwise [that is to say to conclude that Article 5 was inapplicable] would void the protection afforded by Article 5 of the Convention by compelling the applicants to choose between liberty and the pursuit of a procedure ultimately aimed to shelter them from the risk of exposure to treatment in breach of Article 3 of the Convention'.³²

In November 2019, the Grand Chamber, applying the set of factors described above, considered that the applicants were not under detention:

In contrast to, for example, persons confined to an airport transit zone (...), those placed in a land border transit zone, as the applicants in the

²⁸ *o.M. v Hungary*, Application no. 9912/15 (ECtHR, 5 July 2016), para 53; *Elmi and Abubakar v Malta*, Application no. 25794/13 (ECtHR, 22 November 2016), para 102 and *Khlaifia and Others v Italy* [cc], Application no. 16483/12 (ECtHR, 15 December 2016), paras 65–72.

²⁹ *J.R. and Others v Greece*, Application no. 22696/16 (ECtHR, 25 January 2018).

³⁰ *Illias and Ahmed v Hungary*, cit, para 15.

³¹ *Illias and Ahmed v Hungary*, cit, para 19.

³² *Illias and Ahmed v Hungary*, Application no. 47287/15 (ECtHR, 14 March 2017), para 56.

present case, do not need to board an airplane in order to return to the country from which they came. The applicants came from Serbia, the territory of which was immediately adjacent to the transit zone area. In practical terms, therefore, the possibility for them to leave the Röszke land border transit zone was not only theoretical but realistic.³³

The applicants could 'walk to the border and cross into Serbia'.³⁴

The easiness of such a statement contrasts with the description of the situation in the transit centre in several parts of the Court's reasoning: when describing the material operation of expulsion of the transit zone, being the applicants confronted with the option 'return or appeal' (para 40), the 'real risks' of such a return (para 158), were not properly assessed (para 163) and addressed by the Hungarian authorities (para 161). According to the Court, the legal and practical consequences of a move to Serbia were not clear (paras 8 and 37).

Even though the Court concluded that there was not a *de facto* deprivation of liberty.

As stressed by two dissenters, legal considerations (the capacity of Serbia to provide adequate protection to the applicants) were weaker than practical aspects (accessibility and means of transport), concluding that the Grand Chamber's decision 'turns the clock back many years' on the interpretation of Article 5.³⁵

3 Lawfulness of Detention

Article 5 of the Convention is inspired by Articles 3 and 9 of the Universal Declaration of Human Rights. The first draft proposal reflected this affiliation and was centred in a general assertion of protection from arbitrary arrest. The final wording of Article 5 of the Convention was shaped through the influence of the parallel drafting of the International Convention on Human Rights prepared by the United Nations Commission on Human Rights, where some states argued this article could not be worded in vague and imprecise terms.³⁶

³³ *Illias and Ahmed v Hungary*, cit, para 236.

³⁴ *Illias and Ahmed v Hungary*, cit, para 241.

³⁵ *Illias and Ahmed v Hungary*, cit, dissenting opinion of Bianku, joined by Judge Vucinic.

³⁶ Australia, Denmark, France, Lebanon and the United Kingdom. See the *Travaux Préparatoires*, available at <https://www.echr.coe.int/Documents/Library_TravPrep_Table_ENG.pdf>.

General formulations like ‘arbitrary’ or ‘as established by law’ were unable to provide effective protection because ‘any dictator’ was prepared to accept them as requirements. The current wording is a result of a common effort to have precise and detailed substantial and procedural requirements, allowing the Court to scrutinise in an effective manner any concrete deprivation of liberty.

The general notion of lawfulness to be addressed here is based on the introductory wording of Article 5: ‘No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law.’

The lawfulness of the detention depends not just on the general requirement of lawfulness, but also on the observation of the specific provisions of subparagraphs (a) to (f) of Article 5/1. This list of possible justifications for detention is exhaustive³⁷ and each individual ground should be narrowly interpreted.³⁸ Concerned with detention for migratory issues, subparagraph (f) provides two justifications: detention to prevent unauthorised entry and detention with a view to deportation.

If a deprivation of liberty is not in compliance with these general requirements, one has to conclude that the detention is arbitrary.

We can divide up the requirement of lawfulness into four obligations.

First, any deprivation of liberty must be ‘in accordance with a procedure prescribed by law’. To assess this requirement, the Court must review the compliance of the state action with relevant domestic law.³⁹ Lawfulness implies legality in the stricter sense.

³⁷ *AlJedda v the United Kingdom*, Application no. 27021/08 (ECtHR, 7 July 2011), para 99: Sub-paragraphs (a) to (f) of Article 5 para 1 contain an exhaustive list of permissible grounds on which persons may be deprived of their liberty. No deprivation of liberty will be compatible with Article 5 para 1 unless it falls within one of those grounds or unless it is provided for by a lawful derogation under Article 15 of the Convention, which allows for a state ‘in time of war or other public emergency threatening the life of the nation’ to take measures derogating from its obligations under Article 5 ‘to the extent strictly required by the exigencies of the situation’. The United Kingdom argued that the detention of an Iraqi national, between 2004 and 2007, was due to the obligations created by United Nations Security Council Resolution 1546 and the UN Resolution should take preference over Article 5, paragraph 1. The Court did not accept the argument and considered that internment or preventive detention with no clear intention to bring criminal charges is contrary to the Convention.

³⁸ *Medvedyev and Others v France*, Application no. 3394/03 (ECtHR, 29 March 2010), para 78.

³⁹ In some cases, the supervision of the legal basis involves attention to international legal standards and to EU Law. When the international legal basis for detention is at stake, the Court exercises the supervisory role in a more intensive way, as can be observed in case *Medvedyev and Others v France*, cit, paras 39–41.

Second, the Court must take further supervision on the compliance of national law requirement: Lawfulness affords not just the very existence of previous law, but also accessibility, precision, and foreseeability of the legal standards.⁴⁰ Lawfulness implies 'quality of the law'.

Third, the Court must assess generally if the purpose of detention is one of the grounds covered by subparagraphs of Article 5/1 and if there are not elements of bad faith on the part of the authorities. The Court states that detention has to be intricately connected to the purpose pursued by detention. In my view this a different wording for a suitability test. The question to be put is if the detention is suitable, i.e., capable of realising the aim.

Fourth, the Court has to assess if detention is a measure of last resort or not. Detention is arbitrary if it is unnecessary to achieve the stated aim, if there are alternative and effective⁴¹ measures that represent less-intrusive means to achieve the aim stated.

The Court accomplishes the first three in a systematic manner for all the detention measures provided in the subparagraphs of Article 5, imposing the burden on the state to prove that detention was provided by adequate national rules and procedural requirements were fully respected.

For the States Parties that are also EU Member States detention of immigrants and asylum seekers is regulated by European rules. Therefore, national law requirements need to be compatible with EU Law.⁴² However, the European Court of Human Rights does not include compliance with EU Law as

⁴⁰ *Medvedyev and Others v France*, cit, para 80: 'It is therefore essential that the conditions for deprivation of liberty under domestic and/or international law be clearly defined and that the law itself be foreseeable in its application, so that it meets the standard of "lawfulness" set by the Convention, a standard which requires that all law be sufficiently precise to avoid all risk of arbitrariness and to allow the citizen – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances of the case, the consequences which a given action may entail.' See the dissenting opinion of Judges Costa, Casadevall, Bîrsan, Garlicki, Hajiiev, Šikuta and Nicolaou.

⁴¹ On the difference between the test of suitability and test of effectiveness, Gerards, 'How to improve the necessity test of the European Court of Human Rights' (2013) 11(2) International Journal of Constitutional Law 473.

⁴² For a long time, EU law did not provide any specific rules concerning the detention of migrants and asylum seekers. In 2008, the Return Directive created rules on the detention of irregular immigrants, Directive 2008/115/EC. The first Asylum Directives of 2003–2005 had very few provisions on detention. In the second stage of the Common European Asylum System, 2011–2013, EU Law went forward, and, in 2013, the new Directive 2013/33/EU, laying down standards for the reception of applicants for international protection (Reception Conditions Directive), brought a closer regulation of detention. The Court of Justice of the European Union developed since then important jurisprudence on the detention of immigrants, for purposes of expulsion, and detention of asylum-seekers.

a condition for a valid legal basis for detention. In this context, the Strasbourg Court shows more deference and self-constraint, refusing ‘to condemn the detention as unlawful even though it appeared to violate the EU measures’.⁴³

Regarding the last criterium, the Court does not comply equally with all detention measures. The ‘stricter approach’, including these tests, is taken for subparagraphs (b), (d) and (e),^{44, 45} but not for other detention measures, like detention related to migratory issues, provided under subparagraph (f).

This was explicitly stated in the Grand Chamber decision *Saadi v the United Kingdom*: ‘the notion of arbitrariness in the context of Article 5 varies to a certain extent depending on the type of detention involved’.⁴⁶

Being the leading case concerning the interpretation of this exceptional justification for deprivation of liberty provided in subparagraph (f), the case

⁴³ Costello, *The Human Rights of Migrants and Refugees in European Law* (Oxford University Press, 2016). In the case *Lokpo & Touré v Hungary*, the Court assessed the lawfulness of the detention only by confronting Hungarian law and the European Convention and ignored possible conflicts with the Asylum Procedures Directive of 2005. According to the Hungarian Asylum Act, if the refugee authority proceeds to the substantive examination of the application and the applicant is detained by order of the immigration authority, the immigration authority shall release the applicant at the initiative of the refugee authority. This means that the release of the asylum-seeker was not immediate and automatic, but dependent on an initiative of the refugee authority. The Court considered that the possibility of deprivation of liberty *by virtue of the mere silence of an authority* is a case of arbitrariness. The same refusal to evaluate the compatibility of the detention measures with the requirement of the EU Directives (in case, the Reception Conditions Directive – 2013/33/EU) was reaffirmed in case *Thimothawes v Belgium*, where the Court explicitly states that the correct implementation of EU Directives and the interpretation of national law in conformity with EU law is a task of the national courts and the (European Court of Justice), the Strasbourg Court reserves the intervention to situations of ‘arbitrary or unreasonable interpretation’. *Lokpo & Touré v Hungary*, Application no. 10816/10, 20 September 2011, para 24. *Thimothawes v Belgium*, Application no. 39061/11 (ECtHR, 4 April 2017), para 71.

⁴⁴ In the case of *Enhorn v Sweden*, the applicant, an HIV-infected homosexual, who had transmitted HIV to persons through sexual contacts, was deprived of his liberty in order to avoid the further spreading of the disease: ‘an essential element of the “lawfulness” of a detention within the meaning of Article 5 para 1 (e) is the absence of arbitrariness (...). The detention of an individual is such a serious measure that it is only justified where other, less severe measures have been considered and found to be insufficient to safeguard the individual or the public interest which might require that the person concerned be detained. That means that it does not suffice that the deprivation of liberty is in conformity with national law, it must also be necessary in the circumstances’ – *Enhorn v Sweden*, Application no. 56529/00 (ECtHR, 25 January 2005), para 36.

⁴⁵ See Harris et al, cit, p. 305.

⁴⁶ *Saadi v the United Kingdom* [GC], Application no. 13229/03 (ECtHR, 29 January 2008), para 67.

Saadi v the United Kingdom deserves more attention.⁴⁷ The application was lodged by an Iraqi national, who arrived at Heathrow Airport and immediately claimed asylum. The applicant was granted 'temporary admission' to stay at a hotel of his choice and return to the airport the following morning. He reported as required and was again granted temporary admission until the following day. When the applicant again reported as required, he was, for the third time, granted temporary admission the following day. On this occasion, he was detained and was held for seven days.

The Court considered that this detention was not arbitrary. Providing a precise meaning for 'arbitrary' regarding the first limb of Article 5/1(f), the Grand Chamber stated:

To avoid being branded as arbitrary, therefore, such detention must be carried out in good faith; it must be closely connected to the purpose of preventing unauthorised entry of the person to the country; the place and conditions of detention should be appropriate, bearing in mind that the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country (...); and the length of the detention should not exceed that reasonably required for the purpose pursued.⁴⁸

These criteria exclude a necessity test, the need to consider viable alternatives and to apply detention just as a last resort measure. The Court does not impose on states the consideration of all possible measures, such as reporting obligations, applying detention just when all the possible alternatives could not be effective in the individual case. The absence of such a test motivated a dissenting opinion of six Judges.⁴⁹

Recent documents adopted by the Council of Europe admit that this approach defines a standard that is less demanding than the one adopted by the United Nations⁵⁰ and the one applied by the European Court of

⁴⁷ *Saadi v the United Kingdom*, cit. On the judgment of the Grand Chamber, Moreno-Lax, 'Beyond Saadi v the United Kingdom: Why the Unnecessary Detention of Asylum Seekers is inadmissible under EU Law' (2011) 5 Human Rights & International Legal Discourse 166 and O'nions, 'Exposing Flaws in the Detention of Asylum Seekers: A Critique of Saadi' (2008) 17(2) Nottingham Law Journal 34.

⁴⁸ *Saadi v the United Kingdom*, cit, para 74.

⁴⁹ See the dissenting opinion of Judges Rozakis, Tulkens, Kovler, Hajiyev, Spielmann and Hirvelä in *Saadi v the United Kingdom*, cit.

⁵⁰ *Human Rights and Migration – Legal and practical aspects of effective alternatives to detention in the context of migration – Analysis of the Steering Committee for Human Rights*

Justice.⁵¹ This is, in my view, the most flagrant shortcoming of the jurisprudence of the Strasbourg Court.

According to the Court, detention as a measure of last resort is to be strictly scrutinised only when minors are the detainees. The existence of double standards is clear in the *Popov* case, regarding the detention of a family (parents and two children), where the Court considered that there was a violation of Article 5 of the Convention only in respect of the children, on account of their administrative detention.⁵²

3.1 Detention to Prevent Unauthorised Entry

Regarding detention related to migratory issues, the European Convention of Human Rights distinguishes between the first limb – detention to prevent unauthorised entry – and the second limb – detention with a view to deportation.

The Strasbourg Court stresses that having the sovereign power to exercise control over borders,⁵³ this includes the power to detain those non-nationals who are not authorised to entry, a ‘necessary adjunct’, in the wording of the Court. In the *Saadi* case, the Court made clear that ‘until a state has “authorized” entry to the country, any entry is “unauthorized”’.⁵⁴

In its case law, the Court systematically ignores the relevance of the particular circumstances of asylum seekers.⁵⁵

(CDDH), adopted on 7 December 2017, available at <<https://www.coe.int/en/web/portal/home>>.

⁵¹ See decision of the Court of Justice of the European Union in the case *El-Dridi*: ‘It follows from the foregoing that the order in which the stages of the return procedure established by Directive 2008/115 are to take place corresponds to a gradation of the measures to be taken in order to enforce the return decision, a gradation which goes from the measure which allows the person concerned the most liberty, namely granting a period for his voluntary departure, to measures which restrict that liberty the most, namely detention in a specialised facility; the principle of proportionality must be observed throughout those stages.’ – Judgment of the Court in case C-61/11 PPU, *El Dridi*, 28 April 2011, para 41.

⁵² *Popov v France*, Application no. 39472/07 (ECtHR, 19 January 2012), paras 119–120. See the same approach in case *A.B. and Others v France*, Application no. 11593/12 (ECtHR, 12 July 2016).

⁵³ In the Court’s wording: States enjoy an ‘undeniable sovereign right to control aliens’ entry into and residence in their territory’ – *Amuur v France*, cit, para 41 and *Saadi v the United Kingdom*, cit, para 64.

⁵⁴ *Saadi v the United Kingdom*, cit, para 65.

⁵⁵ *Saadi v the United Kingdom*, cit, dissenting opinion of Judges Rozakis, Tulkens, Kovler, Hajiyev, Spielmann and Hirvelä. See also dissenting opinion of Judge Paulo Pinto de Albuquerque in case *Elmi and Abubakar v Malta*, Application no. 25794/13 (ECtHR, 22 November 2016).

This approach raises a question of conformity with International Refugee Law standards, particularly regarding Article 31 of the Geneva Convention on Refugee Status.⁵⁶ Given the international and EU standards provided for asylum seekers, Cathryn Costello is also assertive and vigorous in this respect: 'if asylum seekers are authorized in their stay (either under national or EU law), then there is no lawful basis for their detention under Article 5(1)(f) (...). If my reading is correct, asylum seekers should not be regarded as "effectuating unauthorized entry" once they have entered the asylum process'.⁵⁷

In the case *Suso Malta v Malta*, the Court rejected that 'as soon as an asylum seeker had surrendered himself to the immigration authorities, he was seeking to effect an "authorized" entry, with the result that detention could not be justified under the first limb of Article 5 para. 1 (f) (...). Going further, the Court stated that such an interpretation 'would, moreover, be inconsistent with Conclusion no. 44 of the Executive Committee of the United Nations High Commissioner for Refugees' Program, the UNHCR's Guidelines and the Committee of Ministers' Recommendation (...), all of which envisaged the detention of asylum seekers in certain circumstances'.⁵⁸

3.2 Detention with a View to Deportation

The criteria applied to assess if detention with a view to deportations are almost the same applying to the cases of illegal entry, expressed in the *Saadi* case cited above and also present in the previous case *Chahal v the United Kingdom*.⁵⁹ A necessity test is also not imposed by the Court. According to the *Chahal* case: 'Article 5 para. 1 (f) does not demand that the detention of a person against whom action is being taken with a view to deportation be reasonably considered necessary, for example, to prevent his committing an offense or fleeing; in this respect Article 5 para. 1 (f) provides a different level of protection from Article 5 para. 1 (c)'.⁶⁰

There is one extra requirement to be considered in cases of confinement pending expulsion or extradition: the detention 'will be justified only for as long as deportation proceedings are in progress. If such proceedings are not carried out with due diligence, the detention will cease to be permissible under

⁵⁶ On the issue, Hailbronner, 'Detention of Asylum Seekers' (2007) 9(2) European Journal of Migration and Law 162.

⁵⁷ Costello, cit, p. 290.

⁵⁸ *Suso Malta v Malta*, Application no. 42337/12 (ECtHR, 23 July 2013), para 90.

⁵⁹ *Chahal v the United Kingdom*, Application no. 22414/93 (ECtHR, 15 November 1996).

⁶⁰ *Chahal v the United Kingdom*, cit, para 112.

Article 5 paragraph 1(f).⁶¹ It will become arbitrary: to be maintained, detention requires ‘realistic prospects of expulsion’.⁶²

In the case *s.k. v Russia*,⁶³ a Syrian national arrived in Russia in October 2011 and was object of a removal order issued in February 2015. The Court considered that since the removal was not practicable, detention was therefore arbitrary.⁶⁴ This decision, which follows some previous cases concerning Greece,⁶⁵ represents an important change in the Strasbourg case law, refused to accept that when deportation was not acceptable under ECtHR’s standards, detention was necessarily arbitrary. The previous understanding of the Court is visible in the *Chahal* case: ‘It is therefore immaterial, for the purposes of Article 5 para. 1 (f), whether the underlying decision to expel can be justified under national or Convention law’.⁶⁶

In the case *Louled Massoud v Malta*, the Court stated as an *obiter dictum* that it was ‘hard to conceive that on a small island like Malta, where escape by sea without endangering one’s life is unlikely and fleeing by air is subject to strict control, the authorities could not have had at their disposal measures other than the applicant’s protracted detention to secure an eventual removal’,⁶⁷ showing some openness to a necessity test verifying if the detention is effectively necessary. This, however, was not decisive to the judgment of the Court.

3.3 Detention of Migrants and Asylum Seekers for Other Reasons

The European Convention does not allow detention on the sole basis of irregular stay in the territory. The wording of Article 5/1/(f) excludes this possibility.

However, the criminalisation of irregular immigration in Europe, that is now attaching criminal sanctions (including imprisonment) to immigration violations, includes not only illegal entry and facilitating irregular entry, but also irregular stay and assistance of irregular stay as criminal offenses.⁶⁸ Are

61 *Chahal v the United Kingdom*, cit, para.113.

62 *Mikolenko v Estonia*, Application no. 10664/05 (ECtHR, 8 October 2009), para 68.

63 *s.k. v Russia*, Application no. 52722/15 (ECtHR, 14 February 2017).

64 *s.k. v Russia*, cit, para 115: ‘It should have been sufficiently evident for the national authorities already in February and March 2015 that the applicant’s removal was not practicable and would remain unlikely in view of the worsening conflict in Syria (...). In these circumstances, it was incumbent on the domestic authorities to consider alternative measures that could be taken in respect of the applicant.’

65 For instance, *s.d. v Greece*, Application no. 53541/07 (ECtHR, 11 June 2009), and *R.U. v Greece*, Application no. 2237/08 (ECtHR, 7 June 2011).

66 *Chahal v the United Kingdom*, cit, para 112.

67 *Louled Massoud v Malta*, Application no. 24340/0 (ECtHR 8, 27 July 2010), para 68.

68 According to a study published in 2015, at least three countries provided criminal sanctions for irregular stay – Netherlands and the United Kingdom (providing sentences of six

these legal provisions incompatible with the European Convention – particularly with Article 5/1/(f)?

One could argue that this is a case to be considered under Article 5/1/(a). States can decide to criminalise certain conducts, but the Court has the competence to review state legal provisions that criminalise, in an excessive or disproportionate way, certain conducts.⁶⁹ It is arguable that the European Convention prohibits, at least, custody sentences based on illegal stay.

Article 5/1/(b), regarding detention for ‘securing the fulfillment of an obligation prescribed by law’ may also be relevant in this context. Could detention be ordered for reasons concerning the migratory status of the detainee under this paragraph?

These possibilities undermine Article 5/1/(f) of the European Convention because they create additional grounds for detention in a list that should be of an exhaustive nature.

In the case *Mallah v France*⁷⁰ the Court had to assess if the French provisions that created the crime of facilitation of entry, movement and stay of

months), and Germany (providing the longest custodial sentence at one year). Provera, ‘The Criminalisation of Irregular Migration in the European Union’ (2015) CEPS Paper in Liberty and Security in Europe, no. 80.

⁶⁹ See the cases *A.D.T. v the United Kingdom*, Application no. 35765/97 (ECtHR, 31 July 2000), private homosexual acts between consenting adults; *s.l. v Austria*, Application no. 45330/99 (ECtHR, 9 January 2003), homosexual acts of adult men with consenting adolescents between 14 and 18 years of age; *Altug Taner Akçam v Turkey*, Application no. 27520/07 (ECtHR, 25 October 2011), insulting Turkishness; *Akgöl and Göl v Turkey*, Application no. 28495/06 (ECtHR, 17 May 2011), participation in an unlawful but peaceful demonstration; *Stübing v Germany*, Application no. 43547/08 (ECtHR, 12 April 2012), incest.

⁷⁰ *Mallah v France*, Application no. 29681/08 (ECtHR, 10 November 2011), para 40 (available just in French): ‘La Cour constate qu'en créant le délit d'aide à l'entrée, à la circulation et au séjour irréguliers d'un étranger en France, l'objectif du législateur était de lutter contre l'immigration clandestine et les réseaux organisés tels que les passeurs qui aident, en contrepartie de sommes importantes, les étrangers à entrer ou à se maintenir illégalement sur le territoire (voir paragraphe 23 ci-dessus). Elle note qu'un mécanisme d'impuissance légale a été prévu pour les membres de la famille les plus proches de l'étranger en situation irrégulière, à savoir les descendants de l'étranger, ses descendants, ses frères et sœurs, ainsi que son conjoint ou la personne qui vit notoirement en situation maritale avec lui (voir paragraphe 22 ci-dessus). Toutefois, en l'espèce, il faut constater qu'en dépit du lien familial qui l'unit à son gendre, le requérant n'entrait pas dans la catégorie des personnes fixée par la loi et ne pouvait donc bénéficier de l'immunité pénale. A l'instar du Gouvernement, la Cour relève que le délit étant constitué au regard de la loi, qui est au demeurant suffisamment claire et prévisible, les juridictions internes ne pouvaient que statuer dans le sens de la responsabilité pénale du requérant. Cependant, tenant compte des circonstances particulières de l'espèce et du comportement du requérant qui n'avait été dicté uniquement par la générosité, les juridictions ont assorti la déclaration de culpabilité d'une dispense de peine, par application de l'article 132–59 du code pénal. Le

immigrants were compatible with the Convention. The case was brought before the Court by a Moroccan national, punished for having helped his son-in-law to stay in France, who challenged the compatibility of French law and Article 8 of the Convention. The possible arbitrariness of detention was not the issue.⁷¹

4 Procedural Safeguards

Article 5 provides procedural safeguards for detainees under paragraphs 2 and 4: reasons for detention should be given promptly and speedy remedies to challenge the lawfulness of the detention should be provided. These are essential human rights and, given the circumstances of aliens' detention – language and cultural barriers, difficult access to information and legal support – procedural guarantees gain importance. Given the fragilities of substantial scrutiny of detention measures under Article 5/1(f), the Court conducts a more demanding procedural scrutiny. Both are interlinked, but in the reasoning of the Court, they appear sometimes tangled. For instance, in the case *Louled Massoud v Malta*, while assessing if there was a violation of Article 5/1 of the Convention, the Court considered that the Maltese legal system did not provide for adequate procedural safeguards and concluded *therefore* that there has been an arbitrary detention.⁷²

4.1 The Right to Be Informed

A right to be informed promptly, in a language that he/she understands, of the reasons for detention is provided in Article 5/2. The information must include the legal and factual reasons for detention and must inform the detainees on their rights and obligations.⁷³

procureur de la République avait décidé le classement sans suite de l'affaire (voir paragraphe 14 ci-dessus). Dès lors, la Cour estime que les autorités ont ménagé un juste équilibre entre les divers intérêts en présence, à savoir la nécessité de préserver l'ordre public et de prévenir les infractions pénales d'une part, et de protéger le droit du requérant au respect de sa vie familiale, d'autre part. (para 41). Partant, la mesure prise à l'égard du requérant n'a pas porté une atteinte disproportionnée à son droit au respect de sa vie familiale. De surcroît, elle n'a eu que des conséquences limitées sur son casier judiciaire.'

⁷¹ Regarding the Court of Justice of the European Union, see the judgments of the Court in case C-61/11 PPU, *El Dridi*, 28 April 2011, in case C-329/11, *Achughabian*, 6 December 2011 and in case C-47/15, *Affum*, 7 June 2016.

⁷² *Louled Massoud v Malta*, cit, paras 70–74.

⁷³ EU law demands that the detention of immigrants be ordered in writing, according to Article 15 of Directive 2008/115/CE. See CJEU, case C-146/14 PPU, *Mahdi*, 5 June 2014.

Sometimes these obligations are not fulfilled or, at least, not in a proper way. In the case of *J.R. v Greece*, the applicants were arrested the day after the EU–Turkey Statement, and they were served with a brochure with general information on the situation. The Court considered that the information contained in the leaflets distributed was not sufficiently clear, detailed, and understandable for Afghan detainees. It was therefore incapable of informing the applicants on their legal situation.⁷⁴

The information should also be given promptly. The Court has not defined in general terms what 'prompt' means in this context. The information has not to be provided at the very moment of the arrest. The specific context of detention can be determinant to the concretisation of this requirement. However, in the case *Khlaifia and Others v Italy*, the Court considered ten days excessive.⁷⁵ In the case *Shamayev and Others v Georgia and Russia*, related to detention pending extradition, the Court considered that 'an interval of four days must be deemed incompatible with the constraints of time imposed by the notion of promptness in Article 5 para. 2'.⁷⁶

4.2 *The Judicial Appeal of a Detention*

Article 5/4 of the Convention grants a *habeas corpus* procedure. Those deprived of their liberty have the right to challenge before a court the lawfulness of the detention.

This general safeguard can be analysed in four key procedural guarantees: first, a speedy procedure;⁷⁷ secondly, by an independent and impartial body; thirdly, in accordance with the principles of a due process, especially as far as equality of arms and the adversarial principle are concerned; and, fourthly, it has to be effective: a release should be ordered if the detention is not lawful.⁷⁸

The mere provision of legal means to review the detention order is necessary,⁷⁹ but not sufficient. Its effectiveness must be proved. To be effective this

74 *J.R. and Others v Greece*, cit, paras 122–124.

75 *Khlaifia and Others v Italy*, cit, para 115.

76 *Shamayev and Others v Georgia and Russia*, Application no. 36378/02 (ECtHR, 12 April 2005), para 416.

77 In the case *Salyev v Russia*, Application no. 39093/13 (ECtHR, 17 April 2014), paras 77–81, the Court considered that forty-seven days for a first review of the detention and fifty-one days to examine the appeal in a second instance were excessive delays not compatible with the Convention requirement of speediness, taking into account that Russia did not give evidence that the delays could be attributable to the conduct of the applicant.

78 Chetail, *International Migration Law* (Oxford University Press, 2019, p. 137).

79 Regarding Russia, the Court stated in the case *s.k. v Russia*: 'the absence of any domestic legal provision which could have allowed an applicant to bring proceedings for judicial

right depends on adequate information on the available remedies (as stressed in case *Čonka v Belgium*)⁸⁰ and on the legal or factual basis for the applicants' detention. Violation of the right to due information, provided in paragraph 2, implies necessarily a violation of an effective right to appeal, provided in paragraph 4, because it undermines the adversarial principle and the due process requirements.⁸¹

In *Suso Malta v Malta*, the Court made clear what is the standard regarding paragraph 4:

[a] mechanism which allows individuals taking proceedings to determine the lawfulness of their detention to obtain a determination of their claim within Convention-compatible time-limits, but which nevertheless maintains the relevant procedural safeguards. The Court reiterates that although it is not always necessary that an Article 5 para. 4 procedure be attended by the same guarantees as those required under Article 6 for criminal or civil litigation, it must have a judicial character and provide guarantees appropriate to the type of deprivation of liberty in question.⁸²

There is a set of similar cases regarding Greece where the Court affirms and reaffirms the standards that have to be respected on this subject.⁸³

As stressed by the Court, in 2002, in the case *Čonka v Belgium*, the Convention 'is intended to guarantee rights that are not theoretical or illusory, but practical and effective (...)', meaning that it is important to ensure that there is a 'realistic possibility of using the remedy'.⁸⁴

5 Conclusion

The case law of the European Court of Human Rights regarding the detention of non-nationals is a labyrinth of advances and setbacks, regarding the very concept of lawfulness, appreciated in general terms, compliance with specific

review of his or her detention pending expulsion' (s.k. *v Russia*, cit, para 108). See also case *Azimov v Russia*, Application no. 67474/11 (ECtHR, 18 April 2013).

⁸⁰ *Čonka v Belgium*, Application no. 51564/99 (ECtHR, 5 February 2002), para 44.

⁸¹ *Kaak and Others v Greece*, Application no. 34215/16 (ECtHR, 3 October 2019), paras 122–124.

⁸² *Suso Malta v Malta*, cit, para 122.

⁸³ *s.d. v Greece*, cit, para 72, and *s.z. v Greece*, Application no. 66702/13 (ECtHR, 21 June 2018), paras 68–73.

⁸⁴ *Čonka v Belgium*, cit, para 46.

requirements regarding the migratory status of non-nationals and the distinction between substantial and procedural safeguards. As Judge Paulo Pinto de Albuquerque referred in a dissenting opinion in 2016: 'The Grand Chamber's interpretation of Article 5 (1) (f) of the Convention must be reviewed for the sake of bringing coherence to the Court's messy case law and aligning it with international human rights and refugee law'.⁸⁵ In 2019, the Court contributed to increasing the problem by changing the approach on the concept of detention and restricting the scope of Article 5/1/(f) with vague criteria like the applicant's choices. This was a step in the wrong direction.

A new, clear, and coherent framework is needed for a more adequate scrutiny of detention decisions. States who ratified the European Convention are allowed to detain based on the migratory status of the person concerned but are not allowed to detain when there are suitable and alternative measures that make confinement unnecessary. The relevance and the urgency of the task are inescapable.

85 See dissenting Opinion of Judge Paulo Pinto de Albuquerque in case *Elmi and Abubakar v Malta*, cit.

Procedural Rights Protecting Immigrants

Right to a Fair Trial (Article 6) and Right to an Effective Remedy (Article 13)

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1 Introduction

The work of the ECtHR protecting aliens was based on a broad interpretation of the substantive rights of the Convention. At its beginning, the ECHR did not contain any stipulation concerning aliens. However, the ECtHR interpreted some articles of the Convention to benefit them in a special way.¹ In fact, the ECtHR's first steps building this protection were focused on Article 3, Article 8 and, in lesser measure, Article 2. Despite the fact that the ECHR also contains procedural rights, the ECtHR's early decisions on aliens did not apply those rights.

However, ECtHR case law evolved and its decisions gave greater emphasis to procedural rights. In fact, it happened in two ways. On the one hand, the ECtHR defined a procedural component of each substantial right or freedom guaranteed under the ECHR. On the other hand, it started to take into account the violation of procedural rights. Among these procedural rights, right to fair trial (Article 6) and right to an effective remedy (Article 13) can be highlighted. In 1988, Protocol 7 entered into force. Its Article 1 established procedural safeguards relating to expulsion of aliens. ECtHR restricted its interpretation of Article 6 considering that right to fair trial cannot be applied to decisions concerning entry, settlement or expulsion. Consequently, Article 13 became the main provision to guarantee certain procedural safeguards to aliens.²

This chapter addresses the ECtHR case law on general procedural rights about aliens. In this regard, it starts analysing Article 6 and the reasons why it was not considered to protect immigration decisions. Later, it approaches the key role of Article 13 in this matter. This last section opens exploring the

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¹ Lambert, *The position of aliens in relation to the European Convention on Human Rights* (Council of Europe, 2007).

² *Ibidem*, p. 14.

general content of Article 13 and closes studying the main three areas in which the ECtHR has interpreted Article 13 in relation to aliens.

2 Right to a Fair Trial

Article 6 has a broad content. Its third paragraph recognises the guarantees on criminal proceedings. Among them, presumption of innocence, because of its transcendence, deserves a single paragraph, the second one. Its first paragraph, likewise, enshrines right to a fair trial. In the context of this chapter, we will focus on this point and examine the content of Article 6(1). In fact, Article 6(1) contains a broader procedural right than Article 13 because it refers to civil rights and obligations whereas Article 13 only mentions rights and freedoms protected by the ECHR. The magnitude of both rights is also different. Article 6(1) recognises right to a fair trial which implies '*a fair and public hearing (...) by an independent and impartial tribunal established by law*', in other words, access to court. However, the effective remedy, contained in Article 13, has a more general aspect and does not require a judicial body.

Nevertheless, the main issue to be discussed in this chapter is that ECtHR has rejected the application of Article 6(1) and its right to a fair trial to immigration decisions, namely admission, expulsion and extradition procedures. There is also a relevant consideration in this field related to recent trends of the case law of the Court pondering right to a fair trial in the extraterritorial context as a limit to deportation. Lastly, I will offer a brief comment about the right to an interpreter, recognised in Article 6(3)(e).

2.1 Scope of Article 6(1)

The three paragraphs of Article 6 refer to proceedings concerning criminal charges. However, paragraph 1 goes beyond and applies also to proceedings for the determination of 'civil rights and obligations'. The sense of the terms 'criminal charges' and 'civil rights and obligations' has been really problematic. Related to 'criminal charges', the first analysis is linked to the legal definition in the domestic law. If the case is under domestic Criminal Law the criminal character of the proceedings seems to be clear. Problems arise in grey areas, such as, disciplinary procedures and administrative sanctions.

In this regard, the ECtHR has preferred the analysis of the scope of the norm and purpose of the penalty. If the norm only addresses a specific group, this norm is not considered belonging to the criminal system. The purpose of the penalty allows distinguishing between criminal sanctions and reparatory or compensatory sanctions. Lastly, the Court takes the severity and the nature

of the sanction in consideration to differentiate between criminal and administrative sanctions. On the other hand, the meaning of the terms 'civil rights and obligations' is also rather vague and leaves wide range for 'creative' interpretation.³ In fact, from the very beginning of its work, ECtHR has underlined the prominent place of right to a fair trial in a democratic society.⁴ This status inhibits a restrictive interpretation of this Article.

In this context, the Court has pointed out the autonomous meaning of this concept. In other words, the consideration of a civil right or obligation is not bound by the legal classification under the domestic law of the State concerned. The adjective 'civil' includes every issue under private law⁵ but it does not mean the inability to consider matters governed by public law.⁶ Even if a public authority is involved as a part in the proceedings, this does not bar the applicability of Article 6 para. 1.⁷

The right to access to a court is linked to the existence of a legal dispute whose resolution should affect the determination of civil rights or obligations. It is not necessary that the proceeding has as main point that determination. It is enough if the resolution of the proceedings may relate to the determination of the right or the obligation, their exercise or their fulfilment. In this sense, a request for a provisional measure does not result in a determination of civil rights or obligations and, in consequence, Article 6 cannot be applied.

2.2 Right to a Fair Trial and Immigration Proceedings

Despite having expressed its will to apply a broad interpretation to concepts of Article 6(1), ECtHR has stated that immigration measures could not be considered criminal proceedings nor determination of civil rights. In the Maaouia case⁸ the ECtHR addressed, for the first time, that issue.⁹ In fact, Mr Maaouia alleged that the length of the proceedings for rescission of the exclusion order

³ Van Dijk, Van Hoof, Van Rijn, Zwaak, (eds), *Theory and Practice of the European Convention on Human Rights* (Intersentia, 2006, p. 514).

⁴ *Delcourt v Belgium*, Application no. 2689/65 (ECtHR, 17 January 1970), para 25.

⁵ *Rasmussen v Denmark*, Application no. 8777/79 (ECtHR, 28 November 1984), para 32.

⁶ *König v Germany*, Application no. 6232/73 (ECtHR, 28 June 1978), para 94.

⁷ *Ringeisen v Austria*, Application no. 2614/65 (ECtHR, 16 July 1971), para 94.

⁸ *Maaouia v France*, Application no. 39652/98 (ECtHR, 5 October 2000).

⁹ Previous cases were rejected by the European Commission of Human Rights, the body that did the admissibility test before the reform made in 1998. See, for example, *Uppal and Singh v the United Kingdom*, Application no. 8244/78 (Commission decision, 2 May 1979), Decisions and Reports (DR) 17, p. 149; *Bozano v France*, Application no. 9990/82 (Commission decision, 15 May 1984), DR 39, p. 119; *Urrutikoetxea v France*, Application no. 31113/96 (Commission decision, 5 December 1996), DR 87-B, p. 151; and *Kareem v Sweden*, Application no. 32025/96 (Commission decision, 25 October 1996), DR 87-A, p. 173.

against him had been unreasonable, violating Article 6(1) of the Convention. The Court rejected the application arguing that Article 6(1) did not protect procedures for the expulsion of aliens.

The Court considered that the existence of Article 1 of the Protocol 7th, ratified by France and which ensures certain guarantees in the expulsion proceedings, implied that those guarantees were not ensured before by the Convention. Consequently, Article 6(1) could not be applied to this kind of proceedings. In the Court's words '*The Court therefore considers that by adopting Article 1 of Protocol Application no. 7 containing guarantees specifically concerning proceedings for the expulsion of aliens, the States clearly intimated their intention not to include such proceedings within the scope of Article 6 para. 1 of the Convention*'.¹⁰

This particular argument did not analyse the complexity of the situation or the nature of the proceedings.¹¹ Besides, it was not fair for three reasons. First, it forgot that Article 6(1) was adopted before Protocol Application no. 7. Then, the intention of including something or not in Article 6(1) could not be linked to this Protocol. Second, the case that the Court studied referred to France, but there were (and there are) some states that had not ratified Protocol 7th. The Court's arguments mean that Article 6(1) could be applied to expulsion proceedings from countries that did not ratify Protocol 7th. And third, as is explained in other chapters of this book, Article 1 of Protocol 7th, only affects legal immigrants – in other words, immigrants with legal residence in the country. Consequently, according to this interpretation of Article 6(1), expulsion proceedings against irregular immigrants were not protected by the guarantees from Article 1 of Protocol 7th, nor by Article 6(1).

The Court also rejected the argument that excluding aliens from a state territory could concern the determination of a criminal charge despite being imposed in criminal proceedings. Although the ECtHR had declared that the autonomy of the interpretation of 'criminal charge' was a one-way autonomy,¹² in the Maaouia case the Court forgot its own case law. In fact, in that case, the ECtHR underlined that most of the states considered exclusion orders administrative penalties and constituted '*a special preventive measure for the purposes of immigration control and do not concern the determination of a criminal charge against the applicant*'. Consequently, Article 6(1) could not be applied

¹⁰ *Maaouia v France*, cit, para 37.

¹¹ Against the position of the Court, see Dissenting opinion of Judge Loucaides joined by Judge Traja.

¹² *Engel and Others v the Netherlands*, Application no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72 (ECtHR, 8 June 1976), para 81.

to exclusion orders in this way either. The Court maintained its conclusion, considering Article 6(1) not applicable to immigration proceedings, in further decisions, also related to asylum proceedings.¹³

2.3 *Right to a Fair Trial in the Extraterritorial Context: Othman Case*

Despite this narrow interpretation of Article 6(1) rejecting its application to immigration proceedings, the Court has begun to develop a new case law concerning Article 6(1) as a limit to expulsion. This extraterritorial approach was alleged for the first time in the Soering case,¹⁴ but, in practice, it was not taken into consideration. In fact, the first affirmative decision on this issue arrived in 2012.

The extraterritorial application of Article 6 requires the 'flagrant denial of justice' test.¹⁵ It is a stringent test of unfairness. A flagrant denial of justice means a breach of the principles of fair trial guaranteed by Article 6 in a transcendental way to reach a nullification, or destruction of the very essence, of the right guaranteed by that Article.¹⁶ The exceptionality of this extraterritorial approach entails the concurrence of another parameter of gravity. In fact, the Court demands another requirement: the trial affected by this 'flagrant denial of justice' would have serious consequences for the applicant.

Although the Court established this approach in 1989 and studied it a few times, it was in the Othman case (2012) when the ECtHR condemned a state for the first time on the basis of this interpretation of Article 6. Mr Othman applied against the order to deport him to Jordan. He alleged that, in Jordan, he would be at real risk of ill-treatment, contrary to Article 3 of the Convention, and a denial of justice, contrary to Article 6. In fact, Jordan wanted him to be judged on the basis of different serious charges. Some years before, Jordan asked the United Kingdom for his deportation but he was not deported. In fact, Mr Othman has been condemned *in absentia*.

The applicant would be subjected to a retrial in which evidences obtained by torture would be accepted. This breach of one of the most fundamental norms of international criminal justice, the prohibition of the use of evidence

¹³ *Taheri Kandomabadi v the Netherlands*, Application no. 6276/03 and 6122/04 (Admissibility Decision, 29 June 2004).

¹⁴ *Soering v the United Kingdom*, Application no. 14038/88 (ECtHR, 7 July 1989), para 112 et seq.

¹⁵ *Drozd and Janousek v France and Spain*, Application no. 12757/87 (ECtHR, 26 June 1992), paras 34–35.

¹⁶ *Mamatkulov and Askarov v Turkey*, Application no. 46827/99 and 46951/99 (ECtHR, 17 January 2012), para 259.

obtained by torture, was considered by the Court to deeply represent a ‘flagrant denial of justice’. In fact, the Court did not study another applicant’s complaints as to the absence of a lawyer during interrogation, the prejudicial consequences of his notoriety or the composition of the State Security Court. In relation to the second requirement, the imprisonment he would face if convicted fulfilled the ‘serious consequences’ condition to apply Article 6 in its extraterritorial approach and avoid the applicant’s deportation.

2.4 Right to an Interpreter

Among the rights enshrined by Article 6(3) in the context of criminal cases, paragraph (e) recognises the right to have the free assistance of an interpreter if the language used in the court cannot be understood or spoken. Theoretically, there is no link between this right and migration but, in practice, in most cases, this is a right protecting non-nationals.

This guarantee is recognised only for criminal cases, because it is one of the minimum rights protecting ‘everyone charged with a criminal offence’. However, the concept of fair trial, as it has been defined by the ECtHR, contains at its heart the capacity of the parts to explain their positions and to understand the procedure. So, it can be affirmed that right to an interpreter can be also required on cases determining ‘civil rights and obligations’, according to Article 6(1).¹⁷ Nevertheless, the ECtHR’s judgments identifying violations of Article 6(1) on the basis of the lack of an interpreter in civil cases cannot be referred.

In criminal cases, to which Article 6(3)(e) refers, right to an interpreter is not limited to the trial, but also applies to the pre-trial investigations, because it ‘signifies that an accused who cannot understand or speak the language used in court has the right to the free assistance of an interpreter for the translation or interpretation of all those documents or statements in the proceedings instituted against him which it is necessary for him to understand in order to have the benefit of a fair trial’.¹⁸ In fact, it is very close to Article 6(3)(a) and the guarantee ‘to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him’. However, it does not require translating each official document or each piece of evidence. In fact, according to the ECtHR, the ‘interpretation assistance provided should be such as to enable the defendant to have knowledge of the case against him

¹⁷ Van Dijk, Van Hoof, Van Rijn, Zwaak, cit, p. 649.

¹⁸ *Luedicke, Belkacem and Koç v Germany*, Application nos. 6210/73, 6877/75, 7132/75 (ECtHR, 28 November 1978), para 48.

and to defend himself, notably by being able to put before the court his version of the events'.¹⁹

Nonetheless, the main feature of this right to the free assistance of an interpreter is that it cannot be alleged in immigration cases as the rights protected in Article 6 are not applicable to immigration proceedings. According to the ECtHR interpretation, the right to an interpreter in a case regarding the expulsion of a person is not a fundamental guarantee for that person. At least, it is not a guarantee that can be alleged on the basis of Article 6 ECHR.

In sum, Article 6 has been used once as a limit to an expulsion but has not been applied to immigration proceedings because of a narrow interpretation of the terms 'civil rights' and 'criminal charges' from the Court. However, this vacuum has been filled by Article 13.

3 Right to an Effective Remedy

One of the main trends of recent ECtHR case law about aliens is giving a more transcendent role to Article 13. This happened in spite of having been considered 'one of the most obscure clauses in the Convention'.²⁰ It could be related to the shown case law avoiding the application of Article 6(1) to immigration proceedings. But this is not the only explanation. In fact, as described above, the dimension of both articles is rather different. Article 13 enshrines the right to an effective remedy against any decision violating the Convention. The remedy must be effective but it is not bound to be a judicial one. Also, instead of a general guarantee of an effective remedy, Article 13 refers exclusively to cases in which the alleged violation concerns one of the rights and freedoms of the Convention. It is differentiated from the terms used in Article 6, that is, civil rights and obligations or criminal charges. The sphere of cases in which Article 13 could be applied seems to be smaller than Article 6. However, the ECtHR has considered Article 13 applicable to decisions concerning entry, settlement or expulsion, contrary to Article 6 – but not to any decision, unless it allegedly violates a Convention right.²¹

This section starts by examining the general contents of Article 13, namely, its ancillary character, the concept of remedy and the notion of effectivity.

¹⁹ *Kamasisnksi v Austria*, Application no. 9783/1982 (ECtHR, 19 December 1989), para 74.

²⁰ Partially dissenting Opinion of Judge Matscher and Pinheiro Farinha in *Malone v the United Kingdom*, Application no. 8691/79 (ECtHR, 2 August 1984).

²¹ Lambert, cit.

Then, it addresses the application of Article 13 in aliens' cases, distinguishing among three categories of cases on the basis of the Article applied.

3.1 Complementarity of Article 13

The first thing to be addressed in the study of Article 13 is its complementarity. In fact, Article 13 recognises the right to an effective remedy for '[e]veryone whose rights and freedoms as set forth in this Convention are violated'. The words used seem to denote that a violation of a substantive right or freedom of the Convention has occurred or has been established. However, such interpretation would limit the meaning of Article 13 and would make it useless.²² Because of that, in the *Klass* case,²³ the Court established that this phrase should be interpreted as 'guaranteeing an effective remedy before a national authority to everyone who claims that his rights and freedoms under the convention have been violated'.²⁴

In this sense, the complementarity of Article 13 prevents alleging it alone. In fact, every allegation of Article 13 must be made together with another article. However, this does not mean that the Court finds a violation of Article 13 when it has considered a breach of the substantive right. Even when the Court has not found a violation of a substantive right, the state duty to provide an effective remedy for the examination of the alleged violation remains.²⁵

The interpretation developed by the Court shows a practical problem. If it is necessary to allege Article 13 in conjunction with a substantive right but it is not necessary to find a violation of this substantive right to find a breach of Article 13, how can the Court determine if the applicant's claim of a violation of the 'rights and freedoms as set forth' in the Convention is able to deserve an effective remedy before a national authority. To answer this question, the Court introduced the concept of 'arguable' claim. The test of arguability represents a kind of admissibility test related to Article 13. It is a case-by-case test²⁶ and requires that a claim raises 'serious questions of fact and law requiring examination on the merits'.²⁷

²² Van Dijk, Van Hoof, Van Rijn, Zwaak (eds), cit, p. 1000.

²³ *Klass and others v Germany*, Application no. 5029/71 (ECtHR, 6 September 1978).

²⁴ Ibidem, para 64.

²⁵ Van Dijk, Van Hoof, Van Rijn, Zwaak (eds.), cit, p. 1000.

²⁶ *Silver and others v The United Kingdom*, Application no. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75, 7136/75 (ECtHR, 25 March 1983), para 113.

²⁷ *Khlaifia and others v Italy*, Application no. 16483/12 (ECtHR, 15 December 2016), para 269.

The Court made great efforts to establish that arguability is not the same as manifest ill-foundedness.²⁸ However, it recognised very soon the difficulty to conceive how a claim that is manifestly ill-founded can nevertheless be arguable and vice versa.²⁹ In fact, since the new supervisory system has come into force the Court has recognised the narrow relationship between the two concepts. When a claim under a substantive right is considered manifestly ill-founded, the Court does not accept the arguability of that claim under Article 13.

To sum up, the application of Article 13 needs the allegation of a substantive right. This allegation must represent an arguable claim of the violation of it and determines the field of application of Article 13. Only against an arguable claim of a violation of a right or a freedom of the Convention is the right to an effective remedy recognised before a national authority.

3.2 *Concept of 'Effective Remedy'*

The core of Article 13 is the right to an effective remedy. In this sense, the interpretation of the terms 'effective remedy' determines the content of the right. The object of Article 13 is to provide a means whereby individuals can obtain relief at national level for violations of their Convention rights before having to set in motion the international machinery of complaint before the Court.³⁰

It is clear that the effectiveness of a remedy in the sense of Article 13 does not depend on the certainty of a favourable outcome for an applicant,³¹ but the effect of this Article is thus to require the provision of a domestic remedy allowing the competent national authority both to deal with an 'arguable complaint' under the Convention and to grant appropriate relief. In this sense, the Court has identified some relevant factors to determine the effectiveness of a remedy. In fact, the remedy required by Article 13 must be available in practice as well as in law and must be adequate.

3.2.1 A Remedy Available in Practice as Well as in Law

Obviously, the first requisite for a remedy to be effective is to exist. The Strasbourg Court has considered the concept of remedy in a broad sense. Even if a single remedy did not, by itself, entirely satisfy the requirements of Article

²⁸ *Boyle and Rice v The United Kingdom*, Application no. 9659/82, 9658/82 (ECtHR, 27 April 1988), para 54.

²⁹ *Airey v Ireland*, Application no. 6289/73 (ECtHR, 9 October 1979), para 18.

³⁰ *Kudla v Poland*, Application no. 30210/96 (ECtHR, 26 October 2000), para 152.

³¹ *Vilvarajah and Others v the United Kingdom*, Application no. 13163/87; 13164/87; 13165/87; 13447/87; 13448/87 (ECtHR, 30 October 1991).

13, the Court has accepted, in certain circumstances, that the aggregate of remedies provided under domestic law may satisfy these requirements.³²

The remedy, even the remedies, must be available in law, that is, regulated at the domestic level. This remedy should allow the applicant to challenge the decision which he considered was violating the Convention before a national authority. In this sense, the 'authority' referred to in Article 13 does not necessarily have to be a judicial authority. This is a notorious difference from Article 6. However, when the 'authority' is not a judicial one, the Court scrutinises its powers and the guarantees to determine whether the remedy before it is effective.³³ Authorities without the power to render binding decisions to redress are considered not satisfying the requests of Article 13. Additionally, the authority must be independent and impartial. In this sense, the Court has considered that those authorities involved in the originally concerned decision violate Article 13.³⁴

Besides, the remedy should be available in practice as well as in law. In this sense, the exercise of the domestic remedy must not be unjustifiably hindered by acts or omissions of the authorities of the State.³⁵ Consequently, the Court requires that the applicant was able to invoke the national remedy, beyond what it was provided for in law. In fact, the remedy, or the aggregate of remedies, must be regulated in the domestic legal system. However, this is not enough. The applicant should be in a condition to pursue any specific legal avenue whereby they could complain of a violation of the Convention without *de facto* obstructions.³⁶ Furthermore, the remedy should be adequate to the applicant's claims.

3.2.2 An Adequate Remedy

The second factor dealt with by the Court to determinate the effectiveness of a remedy is its adequacy. In this sense, the mere existence of a remedy before a national authority does not accomplish the requirements of Article 13. The nature of the remedy must be adequate to the applicant's claim, that is, 'to deal with the substance' of his complaint under the Convention 'and to grant appropriate relief'. In this sense, the adequacy test requires two elements. First, the

³² *Jabari v Turkey*, Application no. 40035/98 (ECtHR, 11 July 2000), para 58; *De Souza Ribeiro v France*, Application no. 22689/2007 (ECtHR, 13 December 2012), para 79.

³³ *Doran v Ireland*, Application no. 50389/2009 (ECtHR, 31 July 2003), para 58.

³⁴ *Silver and Others v the United Kingdom*, cit, para 115.

³⁵ *Aksay v Turkey*, Application no. 21987/93 (ECtHR, 18 December 1996), para 95.

³⁶ *Sharifi and Others v Italy and Greece*, Application no. 16643/09 (ECtHR, 21 October 2014), para 242.

ability of the national authority to examine the applicant's arguments about the domestic decision's failure to comply with the Convention.³⁷ The domestic remedy should be appropriate to analyse a claim about the application of the Convention. The existence of remedies analysing only domestic complaints does not observe Article 13.³⁸

The adequacy is also related to the effects of the remedy. As has been stated, the effectiveness of a remedy within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant. However, to be effective, the successful exercise of the remedy should be capable of preventing the alleged violation or its continuation, or to provide adequate redress for any violation that had already occurred. The remedy may prevent the execution of measures that are contrary to the Convention.³⁹ In addition, particular attention should be paid to the speediness of the remedial action itself, it not being excluded that the adequate nature of the remedy can be undermined by its excessive duration.⁴⁰

The notion of effectiveness in general and of adequacy in particular is very related to the content of the substantial article in conjunction with Article 13 which has been invoked. In fact, as the Court said, 'the scope of the Contracting States' obligations under Article 13 varies depending on the nature of the applicant's complaint'.⁴¹ Consequently, to review the profiles of Article 13 in the case law of the ECtHR about immigrants it is necessary to review the application of Article 13 together with each article alleged in this field.

Nevertheless, before developing this detailed analysis, it should be noted that Article 13 is very closely related to Article 35(1), which sets out the rule on exhaustion of domestic remedies. Both articles sharpen the subsidiary character of the Convention. Their close affinity, as the Court stated,⁴² has practical consequences. In fact, the concept 'remedies' under Article 35 is also guided by the principles of accessibility and effectiveness. If a remedy is not accessible and effective its exhaustion is not binding for the applicant. In other words, when a state has not accomplished the requirement to guarantee an effective remedy according Article 13, its preliminary objection concerning non-exhaustion of domestic remedies will be dismissed.⁴³

³⁷ *Ćonka v Belgium*, Application no. 51564/99 (ECtHR, 5 February 2002), para 82.

³⁸ *Silver and Others v the United Kingdom*, cit, para 118.

³⁹ *Ćonka v Belgium*, cit, para 79.

⁴⁰ *Doran v Ireland*, cit, para 57.

⁴¹ *s.k. v Russia*, Application no. 52722/15 (ECtHR, 14 February 2017), para 74.

⁴² *Kudla v Poland*, cit, para 152.

⁴³ Bamforth, 'Articles 13 and 35(1), Subsidiarity, and the Effective Protection of European Convention Rights in National Law' (2016) 5 European Human Rights Law Review 501.

Consequently, as will be shown in the following subsections, in cases of absolute lack of effective remedy, the applicant can directly address the Court. In immigration subjects, this was very evident in cases alleging a breach of Article 4 of Protocol Application no. 4 together with Article 13. In fact, in these cases the Court has chosen to join the examination of the objection of failure to exhaust domestic remedies and the merits of the complaints under Article 13.⁴⁴

3.3 Article 13 and Immigrants

The content of positive obligations for the state in relation to Article 13 depends strongly on the nature of the substantive rights invoked in conjunction. Thus, our approximation to Article 13 and immigrants should be necessarily individualised on the different substantive articles alleged. In fact, three main areas of the ECtHR activity on this matter can be identified. First, Article 13 taken in conjunction with Article 2 or 3, when the deportation of an immigrant could represent a risk to his life or security. Also, Article 13 and Article 8, in the cases in which deportation could suppose a violation of right to family life. Third, Article 13 in conjunction with Article 4 from Protocol 4 on collective deportations. Finally, I will comment on the case law of the ECtHR about Article 13 and deprivation of liberty of immigrants.

It is important to note that the first decision condemning a Contracting Party because of a breach of Article 13 to immigrants did not individualise the substantive right together with Article 13 that had been invoked. It was in the Abdulaziz, Cabales and Balkandali case,⁴⁵ in which the Court condemned the United Kingdom for violation of Article 13 taken in conjunction with Articles 3, 6 and 8. The Court did not delve deeper into the reasons because it considered, in general, that the lack of incorporation of the Convention into its domestic law led to a breach of Article 13 together with the three articles. Later, in the Chahal case⁴⁶ (1996), the Court started its case law on Article 13 taken in conjunction with Article 3. In 2002, the Court rendered its judgment in the Čonka case,⁴⁷ condemning a Contracting Party for violating Article 13 in tandem with Article 4 of Protocol Application no. 4. However, it was in 2007 when the first

⁴⁴ *Hirsi Jamaa and others v Italy*, Application no. 27765/09 (ECtHR, 23 February 2012), para 196.

⁴⁵ *Abdulaziz, Cabales and Balkandali v the United Kingdom*, Application nos. 9214/80, 9473/81, 9474/81 (ECtHR, 28 May 1985).

⁴⁶ *Chahal v the United Kingdom*, Application no. 22414/93 (ECtHR, 15 November 1996).

⁴⁷ *Čonka v Belgium*, cit.

judgment for violating Article 13 together with Article 8 in an immigration issue arrived. It was the case, *Bashir and Others*.⁴⁸

3.3.1 Article 13 and Articles 2 or 3: Lack of Suspensive Effect Makes a Remedy Non-Effective

Article 13 develops its highest intensity taken in conjunction with Article 2 or Article 3. The non-derogable nature of the rights enshrined in these articles has been interpreted by the Court as binding to guarantee the broadest sense of the effective remedies. In this field, Article 13 in conjunction with Article 2 or 3 used to be invoked because of lack of effective investigations in cases of alleged killing, disappearance or ill-treatment, mainly by state bodies.⁴⁹ There have been some cases involving aliens in this area.⁵⁰ However, the Strasbourg organs did not consider the position of aliens in relation to these situations.

In contrast, the most interesting cases for this analysis are related to deportations to a country where substantial grounds have been shown for believing that the applicant would face a real risk of being subjected to ill-treatment, even death. These cases constituted the starting point for the Court case law protecting aliens' rights on the basis of Article 2 and 3. However, there has been a recent trend to invoke Article 2 or 3 on the basis of the risk of death or ill-treatment and Article 13 in conjunction with the foregoing due to the absence of effective remedies to avoid these deportations. Since the late 1990s, the Court has developed a well-established case law regarding the application of Article 13, in tandem with Article 2 or 3 of the Convention, to the expulsion of aliens, and particularly potential or unsuccessful asylum-seekers.

In fact, this argument was already exposed before the Court in the Soering case,⁵¹ but then the Court did not consider the breach of Article 13 taken in conjunction with Article 3. Inconsistently with its later case law, the Court did not regard the lack of automatic suspensive effect of the judicial review as a reason to hold the violation of Article 13. The Court accepted a kind of suspensive effect 'in practice' that it would refuse years later. After Soering, the Court maintained a similar position in the Vilvarajah case.⁵² In both cases, the question was that the English courts could not scrutinise the facts to determine whether substantial grounds had been shown for belief in the existence of a real risk of ill-treatment in the receiving state, but could only determine

⁴⁸ *Bashir and others v Bulgaria*, Application no. 65028/01 (ECtHR, 14 June 2007).

⁴⁹ Van Dijk, Van Hoof, Van Rijn, Zwaak (eds), cit, pp. 1011–1016.

⁵⁰ *Selmouni v France*, Application no. 25803/94 (ECtHR, 28 July 1999).

⁵¹ *Soering v the United Kingdom*, cit.

⁵² *Vilvarajah and others v the United Kingdom*, cit.

whether the Secretary of State's decision as to the existence of such a risk was reasonable according to the 'Wednesbury' principles. The Court considered that these limited powers of the English courts did not constitute a breach of Article 13. The Court emphasised the capability of the domestic courts to quash a challenged decision to send a fugitive to a country where it was established that there was a serious risk of inhuman or degrading treatment.

However, in the Chahal case,⁵³ the Court modified its case law lightly. In fact, the starting point of this case was similar. Mr Chahal, an Indian citizen from the Sikh minority, was detained for the purposes of deportation. His asylum application was refused and he alleged before the ECtHR that the English courts could not evaluate his allegations of the potential risk he could suffer if being deported to India. In that case there was a significant difference from Soering and Vilvarajah. The judicial review was even more limited due to the fact that deportation was ordered on national security grounds. The Court declared that the principle 'as effective as can be' was not appropriate in respect of a complaint that a person's deportation would expose him or her to a real risk of treatment in breach of Article 3.⁵⁴

The Court opened its later case law stating:

In such cases, given the irreversible nature of the harm that might occur if the risk of ill-treatment materialised and the importance the Court attaches to Article 3 (art. 3), the notion of an effective remedy under Article 13 (art. 13) requires independent scrutiny of the claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 (art. 3). This scrutiny must be carried out without regard to what the person may have done to warrant expulsion or to any perceived threat to the national security of the expelling State.⁵⁵

The Court has developed its case law about Article 13 in tandem with Article 3 (or Article 2), following these principles. The non-derogable character of Article 2 and Article 3 and the irreversible nature of the harm that the applicant is exposed to determines special requirements for the domestic remedies.

The importance and seriousness of the rights concerned imperatively requires a close scrutiny by a national authority.⁵⁶ The Court requires that

⁵³ *Chahal v the United Kingdom*, Application no. 22414/93 (ECtHR, 15 November 1996).

⁵⁴ Ibidem, para 150.

⁵⁵ Ibidem, para 151.

⁵⁶ *M.S.S. v Belgium and Greece*, Application no. 30696/09 (ECtHR, 21 January 2011), para 387.

On this Judgment, see Morgades, 'El funcionamiento efectivo de la política europea de

the body must be able to examine the substance of the complaint and afford proper reparation.⁵⁷ It did not accept remedies from domestic bodies with unbinding powers.⁵⁸ In the Court's words: 'In view of the importance which the Court attaches to Article 3 of the Convention and the irreversible nature of the damage which may result if the risk of torture or ill-treatment materializes, the available remedies must provide guarantees of accessibility, quality, speed and suspensive effect'.⁵⁹

Regarding effectiveness, the pertinent nature of the remedy is essential for the Court. In this sense, the Court also reviews the arguments used by the national authority to deny the application. If at the national level questions about the content of Article 2 or Article 3 were not evaluated, the Court considered that the national remedy was not pertinent and it did not accomplish the requirements of Article 13.⁶⁰ It is particularly transcendent in cases in which domestic authorities refused to consider the applicant's request for non-respect of procedural requirements.⁶¹

The speed of the remedy is evaluated in a double sense. The Court compels the states to examine the complaints under Article 3 – or Article 2 – before expelling the concerned individual, and requires a reasonable promptness.⁶² On the other hand, the Court considers that extremely urgent procedures can affect the rights of the defence and the examination of the case.⁶³ If it is reduced to a minimum the remedy cannot be satisfactory in the sense of Article 13 together with Article 3.

In this sense, the lack of suspensive effect of the remedy implies, in itself, the breach of Article 13 and Article 3 in these cases.⁶⁴ As an example, the A.C. case⁶⁵ can be referred. In that case, 30 people from Western Sahara had applied

asilo ante la garantía del derecho a no sufrir tratos inhumanos o degradantes del CEDH' (2012) 41 Revista de Derecho Comunitario Europeo 183.

57 Ibidem, para 388.

58 *Chahal v the United Kingdom*, cit, para 154.

59 *v.M. and others v Belgium*, Application no. 60125/11 (ECtHR, 7 July 2015), para 198.

60 *s.k. v Russia*, cit, para 98.

61 *Jabari v Turkey*, cit, para 49.

62 *s.k. v Russia*, cit, para 74.

63 *M.S.S. v Belgium and Greece*, cit, para 389; *I.M. v France*, Application no. 9152/09 (ECtHR, 02 February 2012), para 155. Vid. Reneman, 'Speedy Asylum Procedures in the EU: Striking a Fair Balance Between the Need to Process Asylum Cases Efficiently and the Asylum Applicant's EU Right to an Effective Remedy' (2013) 25(4) International Journal of Refugee Law 717.

64 *o.D. v Bulgaria*, Application no. 34016/18 (ECtHR, 10 October 2019); *D. and others v Romania*, Application no. 75953/16 (ECtHR, 14 January 2020).

65 *A.C. and others v Spain*, Application no. 6528/11 (ECtHR, 22 April 2014).

for international protection in Spain alleging the risk of possible reprisal from Morocco because of their political activity supporting the Sahrawi Republic. Their application for international protection was rejected and they appealed to the competent Spanish Court (Audiencia Nacional). This Court denied the suspension of the expulsion and that was the basis for appealing to the ECtHR.

The applicants invoked the violation of the substantial rights (Article 2 and 3) and Article 13 taken in conjunction with those rights. But the ECtHR did not afford the violation of the substantial rights because the procedure before the Spanish Court had not finished yet. However, the Court reiterated that when an applicant alleged that a deportation could expose him to ill-treatment in the sense of Article 3, a remedy without suspensive effect was not an effective remedy. In consequence, the applicant was not bound to exhaust this remedy before appealing to the ECtHR. The Court's conclusion was that the lack of automatic suspensive effect of the Spanish system was in breach of Article 13 taken in conjunction with Articles 2 and 3.

The suspensive effect must be determined by law. In spite of having accepted it in its first judgments about these issues,⁶⁶ later the Court rejected remedies with 'suspensive effect in practice'.⁶⁷ In that regard, the Court stressed in particular that 'the requirements of Article 13, and of the other provisions of the Convention, take the form of a guarantee and not of a mere statement of intent or a practical arrangement. That is one of the consequences of the rule of law, one of the fundamental principles of a democratic society, which is inherent in all the Articles of the Convention'.⁶⁸

To end this subsection, it must be referred to another field about immigration measures in which Article 13 in conjunction with Article 3 has been applied. It is related to the conditions of deprivation of liberty in detention centres. The lack of remedies to appeal against these conditions is also considered a violation of Article 13 together with Article 3.⁶⁹ Those remedies would allow putting an end to the detention. Otherwise, those remedies will not satisfy the requests of Article 13.⁷⁰ In this sense, the requirements are consistent with the general principles interpreting Article 13 defined above.

⁶⁶ See *Soering v the United Kingdom*, cit, or *Vilvarajah and others v the United Kingdom*, cit.

⁶⁷ *Gebremedhin [Gaberamadhien] v France*, Application no. 25389/05 (ECtHR, 26 April 2007), para 66.

⁶⁸ *Ćonka v Belgium*, cit, para 83.

⁶⁹ See, recently, *Ilias and Ahmed v Hungary*, Application no. 47287/15 (ECtHR, 14 March 2017), regarding the conditions at the Röszke Border Transit Zone.

⁷⁰ *G.B. and others v Turkey*, Application no. 4633/15 (ECtHR, 17 October 2019).

3.3.2 Article 13 Together with Article 8: An Ever-Broadening Concept of Effectiveness

Besides non-derogable rights under Articles 2 and 3, or due process rights under Articles 5 and 6, the Court also developed case law regarding the allegation of Article 13 taken in conjunction with any other right or freedom enshrined in the Convention. In this sense, the conjunction between Article 13 and Article 8 represents the main field of this case law and there are some interesting judgments about immigration issues on this topic.

However, the Court's case law on this subject has been criticised because of its inconsistency and lack of general principles.⁷¹ In fact, the proper separate examination of the allegations about the breach of Article 13 has been disputed. In its first judgments on this topic, the Court refused to rule on the alleged breach of Article 13.⁷²

In immigration issues, from the very beginning,⁷³ the Court accepted – theoretically – the hypothesis of a breach of Article 13 together with Article 8. In fact, in *Abdulaziz, Cabales and Balkandali*, the United Kingdom was found responsible for violating Article 13 taken in conjunction with Articles 3, 8 and 14 but the Court did not study specifically any argument related to Article 13 in tandem with Article 8.⁷⁴

The main field of application of Article 13 together with Article 8 has been similar to the above mentioned one regarding Article 13 in tandem with Article 3 or Article 2, that is, cases of expulsion of aliens. Here, there was an arguable claim that such an expulsion may infringe the foreigner's right to respect for family life.⁷⁵ The derogable character of Article 8 implies, for the Court, less strict requirements about the effectiveness of the domestic remedies, in comparison with those regarding Article 3.⁷⁶ In fact, when Article 13 is alleged together with Article 8, the Court accepted that the remedy is 'as effective as it can be', a principle expressly refused in cases related to Article 3.⁷⁷ However,

⁷¹ Van Dijk, Van Hoof, Van Rijn, Zwaak (eds), cit, p. 1023.

⁷² See *Malone v the United Kingdom*, cit, *X and Y v the Netherlands*, Application no. 8978/80 (ECtHR, 26 March 1985), or *Herczegfalvy c. Austria*, Application no. 10533/83 (ECtHR, 24 September 1992).

⁷³ *Abdulaziz, Cabales and Balkandali v the United Kingdom*, cit.

⁷⁴ Ibidem, paras 92 et seq.

⁷⁵ *Al-Nashif v Bulgaria*, Application no. 50963/99 (ECtHR, 20 June 2002), para 133; *Bashir and Others v Bulgaria*, cit, para 48.

⁷⁶ In cases in which the applicant alleged the breach of Article 13 together with Article 3 and Article 8, the Court focused its study on Article 3 and barely took into consideration Article 8. See, for example, *M. and Others v Bulgaria*, Application no. 41416/08 (ECtHR, 26 July 2011).

⁷⁷ *Chahal v the United Kingdom*, cit, para 150.

the Court requires that states make available, to the individual concerned, the effective possibility of challenging the deportation or refusal-of-residence order and of having the relevant issues examined with sufficient procedural safeguards and thoroughness by an appropriate domestic forum, offering adequate guarantees of independence and impartiality. This is applied even in cases where an allegation of a threat to national security is made.

For the Court, the authority must be competent to reject the assertion that there is a threat to national security where it finds it arbitrary or unreasonable. There must be some form of adversarial proceedings. Furthermore, the question whether the impugned measure would interfere with the individual's right to respect for family life and, if so, whether a fair balance is struck between the public interest involved and the individual's rights must be examined.⁷⁸ In this sense, the Court has required the independence of the body before whom the appeal is lodged. Expressly, it has refused the hierarchical appeal as an effective remedy in the sense of Article 13 together with Article 8.⁷⁹ It did not satisfy the requirements of independence and impartiality. The main difference between these cases and cases related to Article 13 in tandem with non-derogable rights is linked to the suspensive effect of the remedy. In fact, the Court has stated that where expulsions are challenged on the basis of alleged interference with private and family life, it is not imperative, in order for a remedy to be effective, to have automatic suspensive effect.⁸⁰

However, the Court has gone further in recent cases and compelled states to allow applicants to apply against a removal order before its enforcement. In this sense, the De Souza Ribeiro case represents a milestone. In fact, Mr De Souza Ribeiro, a young Brazilian, living together with his family in French Guiana, was detained and deported the same day. In spite of the fact that the applicant applied for a judicial review of the removal order, alleging a breach of Article 8 of the Convention, the order was enforced one hour after having challenged it. The Court considers that the domestic court did not have the opportunity to examine the applicant's argument and could not decide on the application for interim measures. In sum, before he was deported, the applicant had no chance of having the lawfulness of the removal order examined sufficiently thoroughly by a national authority offering the requisite procedural guarantees.⁸¹

78 *Al Nashif v Bulgaria*, cit, para 197.

79 *Bashir and others v Bulgaria*, cit, para 50.

80 *De Souza Ribeiro v France*, cit, para 83.

81 *Ibidem*, para 96.

Consequently, the Court has broadened the concept of effectiveness of a remedy regarding Article 13 together with Article 8. It did not require an automatic suspensive effect, but it has demanded the opportunity for the domestic courts to examine the arguments about a breach of Article 8 before enforcing the removal order.

3.3.3 Article 13 and Article 4 of Protocol Application No. 4

The interpretation of the ECtHR about the relationship between Article 13 and Article 4 of Protocol Application no. 4 has not been consistent. Some radical changes can be identified.

As a starting point, it can be stated that both articles have very similar content. The Court has expressed this consideration. In fact, it has admitted that Article 13 and Article 4 of Protocol Application no. 4 were so linked that ‘the finding of a violation of Article 4 of Protocol Application no. 4 (...) in itself means that there was a lack of effective and accessible remedies’.⁸² In fact, since collective expulsion has been understood as ‘any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group’,⁸³ the absence of an examination of the circumstances of each individual implies the impossibility of challenging the decision before a national authority. Thus, when a collective expulsion is found, the lack of an effective remedy is implicit.

However, the Court did not always extract the same consequences from this close link. In the Čonka case, the Court considered the breach of Article 4 of Protocol Application no. 4 and also analysed the infringement of Article 13 taken in conjunction with that article. In fact, the Court also held the violation of Article 13 together with Article 4 of Protocol Application no. 4, considering that effective remedy under Article 13 required that the remedy may prevent the execution of measures that are contrary to the Convention and whose effects were potentially irreversible.⁸⁴ Also, in the Hirsi Jamaa case⁸⁵ and the Sharifi case,⁸⁶ the Court separately examined the allegations regarding Article 4 of Protocol Application no. 4 and those on Article 13 together with this Article. However, in those cases the applicants alleged the violation of

⁸² *Georgia v Russia* (1), Application no. 13255/07 (ECtHR, 3 July 2014), para 212.

⁸³ *Čonka v Belgium*, cit, para 59.

⁸⁴ Ibidem, para 79.

⁸⁵ *Hirsi Jamaa v Italy*, cit.

⁸⁶ *Sharifi and others v Italy and Greece*, cit.

Article 3 together with Article 13 as well and the ECtHR evaluated jointly both references to Article 13.

On the contrary, in *Georgia v Russia* (1) the Court established that this link meant that there was no need to separately examine the allegations about Article 4 of Protocol Application no. 4 and those regarding this article together with Article 13.⁸⁷ In consequence, it held that it was not necessary to examine the complaints made by Georgia under Article 13 of the Convention taken in conjunction with Article 4 of Protocol Application no. 4.

In N.D. and N.T. case,⁸⁸ a Chamber of the Third Section held that the applicants' *de facto* removal, without access to an interpreter or any state official, implied a breach of Article 4 of Protocol Application no. 4 in isolation and together with Article 13. In this case, the Court studied the situation of the Mellilla fence and the Spanish '*devoluciones en caliente*', that is, deportations without any procedural guarantee at the terrestrial border between Spain and Morocco. However, in a recent decision, the Grand Chamber revised this view and stated that 'the lack of an individualised procedure for their removal was the consequence of the applicants' own conduct in attempting to gain unauthorised entry (...), it cannot hold the respondent state responsible for not making available there a legal remedy against that same removal'.⁸⁹ The Grand Chamber concluded that there was no violation of Article 4 of Protocol Application no. 4 neither Article 13 taken in conjunction with Article 4 of Protocol Application no. 4. This interpretation could significantly affect the application of Article 4 of Protocol Application no. 4 and of Article 13 together with it because it implies it is not possible to apply these articles to immigrants entering by illegal means. However, this consideration is not so linked to Article 13 as to Article 4 of Protocol Application no. 4, studied in another chapter of this book. In fact, in the N.D. and N.T. case the Grand Chamber maintained the close link between both articles and the non-violation of Article 4 of Protocol Application no. 4 led to the non-violation of Article 13.⁹⁰

Regarding the effectiveness of the remedy in cases claiming the violation of Article 13 together with Article 4 of Protocol Application no. 4, there have also

⁸⁷ *Georgia v Russia* (1), cit, para 212.

⁸⁸ *N.D. and N.T. v Spain*, Application no. 8675/15 and 8679/15 (ECtHR, 3 October 2017).

⁸⁹ *N.D. and N.T. v Spain*, Application no. 8675/15 and 8679/15 (ECtHR, 13 February 2020), para 242.

⁹⁰ In *Asady and others v Slovakia*, Application no. 24917/15 (ECtHR, 24 March 2020), para 74, as the majority of the section considered that the expulsion was not collective, according to Article 4 of Protocol Application no. 4, they established that Article 13 taken in conjunction with Article 4 of Protocol Application no. 4 was not arguable.

been some differences in the Court's case law. In the Čonka case, the Court seemed to require a suspensive effect of the remedy to be considered effective in cases of collective expulsions. One of the arguments exposed by the Court to consider the breach of Article 13 together with Article 4 of Protocol Application no. 4 was that the procedure available for the applicant did not imply suspension of the execution of the deportation order while the application was pending.⁹¹ A similar point of view was adopted in the Hirsi Jamaa case where the Court required the rigorous assessment of the applicants' requests 'before the removal measure was enforced'.⁹² It was on the De Souza Ribeiro case that the Court stated specifically that 'the requirement that a remedy should have automatic suspensive effect has been confirmed for complaints under Article 4 of Protocol Application no. 4'.⁹³

A Chamber of the Second Section of the Court employed this quote to consider that there was a breach of Article 13 together with Article 4 of Protocol Application no. 4 in the Khlaifia case.⁹⁴ Despite the fact that the Court had held that there was no violation of Article 3, it stated that the lack of automatic suspensive effect of the domestic remedy constituted, in itself, the breach of these articles. However, this position was revised by the Grand Chamber. In its December 2016 judgment, the Court held that the suspensive effect is only compulsory for the domestic remedies when 'the person concerned alleges that the enforcement of the expulsion would expose him or her to a real risk of ill-treatment in breach of Article 3 of the Convention or of a violation of his or her right to life under Article 2, on account of the irreversible nature of the harm that might occur if the risk of torture or ill-treatment materialized'.⁹⁵

The Grand Chamber considered that, in those cases, the requirements of Article 13 were proximate to those considered for derogable rights as Article 8 than for non-derogable rights as Article 2 or 3. Consequently, 'when an applicant alleges that the expulsion procedure was "collective" in nature, without claiming at the same time that it had exposed him or her to a risk of irreversible harm in the form of a violation of Articles 2 or 3 of the Convention', the Convention does not impose an absolute obligation on a state to guarantee an automatically suspensive remedy.

If the Court, in the Čonka case, indicated that 'the notion of an effective remedy under Article 13 requires that the remedy may prevent the execution

91 *Čonka v Belgium*, cit, para 83.

92 *Hirsi Jamaa and Others v Italy*, cit, para 205.

93 *De Souza Ribeiro v France*, cit, para 83.

94 *Khlaifia and Others v Italy*, cit.

95 *Khlaifia and Others v Italy*, cit, para 276.

of measures that are contrary to the Convention and whose effects are potentially irreversible,⁹⁶ in the Khlaifia case it has nuanced this concept of irreversibility, considering that collective expulsions do not have potentially irreversible effects when the applicant does not claim a risk of treatment contrary to Article 3.

3.3.4 Article 13 and Deprivation of Liberty. The Preeminence of Article 5(4)

Concluding this chapter, some considerations about Article 13 and detentions should be made. In immigration issues, it was usual to apply before the ECtHR alleging unlawfulness of the detention pending a deportation as violating Article 5. Sometimes, this allegation is linked to the consideration of a breach of Article 13 together with Article 5. The reasons are related to the lack of remedies to release the person.

In this sense, it must be noted that Article 5(4) enshrines the right to appeal against a detention and Article 5(5) entails a proper compensation to victims of unlawful arrest or detention. The content of these articles matches with the requirements of Article 13. In fact, as has been said above, the Court links to Article 13 the possibility of challenging a decision violating the Convention and the successful exercise of the remedy should be capable of preventing the alleged violation or its continuation, or to provide adequate redress for any violation that had already occurred. Because of that, the Court has asserted that in the case of deprivation of liberty and compensation for unlawful detention, paragraphs 4 and 5 of Article 5 constitute a *lex specialis* in relation to the more general requirements of Article 13.⁹⁷

The more common approximation for the Court is declaring that there is no need to separately examine the complaint of a violation of Article 13 of the Convention taken in conjunction with Article 5(1) or (2) because the allegations are identical to those examined under Article 5(4). In fact, the Court has asserted that the finding of a violation of Article 5(4) in itself means that there was a lack of effective and accessible remedies. This general position was broken by the Court in the *Georgia v Russia* (1) case. There, the Court concluded there had been a violation of Article 13 taken in conjunction with Article 5(1), in spite of having declared the breach of Article 5(4).⁹⁸ However, this new line of case law has not been followed.

96 *Čonka v Belgium*, cit, para 79.

97 *Khlaifia and Others v Italy*, cit, para 266.

98 *Georgia v Russia* (1), cit.

4 Conclusion

Immigration measures have been excluded from the application of the procedural guarantees deriving from Article 6. A strict interpretation of the concept of ‘civil rights and obligations’ and ‘criminal charges’ has deprived immigrants and asylum seekers of these guarantees. On the contrary, the ECtHR has developed an increasingly broader interpretation of Article 13 on immigration issues. In fact, in just twenty years, the Court has extended the application of Article 13 in proceedings about deportations, protecting immigrants and asylum seekers. Some of the leading cases of the ECtHR’s case law, such as M.S.S. or Hirsi Jamaa, are related to this Article.⁹⁹

Thus, in cases in which the deportation could represent a risk to the applicant’s life or security, the Court has required a very strict study of the applicant’s allegations by an independent and impartial body. Furthermore, to be effective, the domestic remedy must have an automatic suspensive effect. In cases in which the deportation could affect the right to private or family life of the applicant, the requirements are not so stringent. However, in recent cases, the Court has demanded the domestic study of the applicant’s allegation about Article 8 before the enforcement of the removal order in order to avoid the breach of Article 3. Finally, in cases of collective deportations, the Court has changed its case law. Recent judgments do not demand automatic suspensive effect when Article 4 of Protocol Application no. 4 is involved.

99 Viljanen and Heiskanen, ‘The European Court of Human Rights: A Guardian of Minimum Standards in the Context of Immigration’ (2016) 34(2) Netherlands Quarterly of Human Rights 174.

The Right to Family and Private Life in Migration and Asylum Cases (Article 8)

*Georgios Milios**

1 Introduction

The rights guaranteed by the European Convention on Human Rights (hereinafter, ‘the ECHR’ or ‘the Convention’) do not aim at protecting merely the nationals of the Contracting States but the people within their jurisdiction, regardless of whether they have the nationality of that state, they are nationals of another state or they are stateless. The immigration status of these persons is also in principle irrelevant as regards the application of the Convention. Even though, as it becomes clear in this book, immigration and asylum cases raise issues under almost all of the Convention articles,¹ Article 8 of the ECHR which protects the right to family and private life, attracts a notable number of cases which involve aliens. Discussing an immigration case under the ECHR has always been a controversial issue as it involves the interference of an international convention to a field which in principle remains the competence of national legislators and public authorities. Generally speaking, the view of the European Court of Human Rights (hereinafter, ‘the ECtHR’ or ‘the Court’) is that in immigration cases, the Contracting States enjoy a certain margin of appreciation.²

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¹ See, for instance, Articles 3, 5, 13, Article 4 of Protocol 4 and Article 1 of Protocol 7.

² The ECtHR in the majority of the cases uses as a starting point the following principles: ‘(...) the Court cannot ignore that the present case is concerned not only with “family life” but also with immigration and that, as a matter of well-established international law and subject to its treaty obligations, a state has the right to control the entry of non-nationals into its territory’ (see, among others, *Abdulaziz, Cabales and Balkandali v the United Kingdom*, Application nos. 9214/80, 9473/81, 9474/81 (ECtHR, 28 May 1985), para 67, Series A Application no. 94), ‘The Convention does not guarantee the right of a foreign national to enter or to reside in a particular country’ (see, among others, *Nunez v Norway*, Application no. 55597/09 (ECtHR, 28 June 2011), para 66) and ‘Where immigration is concerned, Article 8 cannot be considered to impose on a State a general obligation to respect a married couple’s choice of country for their matrimonial residence

The present chapter³ examines the relevant immigration and asylum case law of the ECtHR under Article 8, identifying the criteria that the Court uses in order to decide whether there has been a violation or not, and arguing that the applicable criteria present, for different reasons, certain problematics as regards their relevance to the nature of the right to family life. The present chapter is structured on the basis of the order that the Court usually follows in order to find if there has been a violation of Article 8 of the ECHR. This unofficial ‘Article 8 test’ applied by the ECtHR has two phases. The first one concerns Article 8(1) and the second one, the justifications of Article 8(2). Under Article 8(1), the Court examines whether the applicant enjoys ‘family life’ and whether the situation of the case requires ‘respect’ from the immigration authorities. Under Article 8(2), the Court examines whether there has been an ‘interference’ and if so, whether the interference is ‘in accordance with the law’, in pursuit of a legitimate aim and ‘necessary in a democratic society’. The present chapter will deal with three different types of cases, namely cases of reunification, regularisation and expulsion.

2 The Concept of ‘Family’ for the Purposes of Article 8

2.1 *The Main Relationships That Are Considered as ‘Family Life’*

The ECtHR has adopted a substance-oriented approach regarding the notion of ‘family life’ of Article 8. The formal element may also be important in some cases but in general, the family protected by Article 8 of the ECHR is a *de facto* rather than a *de jure* family. The definition of family adopted by the Court is more flexible than the one provided for by other legal instruments such as the EU Family Reunification Directive or national legislations in different EU countries.⁴ In any event, as it becomes clear by the case law that is cited right below, the main relationships that form ‘family life’ within the case law of the ECtHR are those of parent and minor child and husband and wife (‘core family’).⁵

or to authorise family reunification on its territory’ (see, among others, *Jeunesse v the Netherlands* [GC], Application no. 12738/10 (ECtHR, 3 October 2014), para 107).

³ The present chapter builds on an article written by the same author. See Milios, ‘The Immigrants and Refugees Right to ‘Family Life’: How Relevant are the Principles Applied by the European Court of Human Rights?’ (2018) 25(3) International Journal of Minority and Group Rights 401.

⁴ See, for instance, Article 1 of Greek immigration Law 4251/2014 and Articles 30 and 32 of the German Residence Act.

⁵ For the definition and the scope of ‘family life’ under the ECHR see also: Harris, O’Boyle and Warbrick, *Law of the European Convention on Human Rights* (4th edn, Oxford University Press, 2018); Jacobs, White and Ovey, *The European Convention on Human Rights* (7th

According to the *Berrehab v the Netherlands*⁶ judgment, the relationship created between the spouses by a lawful and genuine marriage is regarded as ‘family life’. In addition, ‘(...) a child born of such a union is *ipso jure* part of that relationship; hence, from the moment of the child’s birth and by the very fact of it, there exists between him and his parents a bond amounting to “family life”’.⁷ Those main relationships might not however constitute ‘family life’ in the view of the ECtHR in cases of separation where the parent has lost contact with his or her child. In the above-mentioned case, the ECtHR accepted the existence of a ‘family life’ between Mr. Berrehab and his daughter not unconditionally but only after finding that the family ties had not been broken after the divorce of Mr Berrehab with his wife. The fact that he was seeing his daughter four times a week for several hours at a time convinced the ECtHR that they had maintained the ties of ‘family life’. However, certain situations may break those ties.

At the same time, the *Berrehab* case⁸ indicates that cohabitation is not an essential element for the existence of ‘family life’ in a relationship between a parent and his or her minor child. In paragraph 21, the ECtHR clearly states that ‘family life’ between a child and a parent exists even if the parents are not living together. In these cases, family ties between the minor child and the parent who in an immigration case might be expelled, do not necessarily break. Respectively, cohabitation is not a condition for the ECtHR to accept ‘family life’ in the case of spouses. In *Abdulaziz, Cabales and Balkandali v the United Kingdom*,⁹ the ECtHR stated that the concept of ‘family’ could include the relationship arising from a lawful and genuine marriage even if ‘family life’ has not been fully established.¹⁰ Indeed, the ECtHR found that there was a ‘family life’ between the applicants and their husbands even though they were not living together.

2.2 *The Concept of ‘Family’ in Non-Migration Cases*

Some family relationships have so far been discussed by the ECtHR solely in non-migration cases. Even though the present chapter is limited to immigration

edn, Oxford University Press, 2017); Van Hoof, Van Dijk, Van Rijn and Zwaak, *Theory and Practice of the European Convention on Human Rights* (5th edn, Intersentia, 2018).

6 *Berrehab v the Netherlands*, Application no. 10730/84 (ECtHR, 21 June 1988), Series A Application no. 138.

7 *Berrehab v the Netherlands*, cit, para 21.

8 *Berrehab v the Netherlands*, cit.

9 *Abdulaziz, Cabales and Balkandali v the United Kingdom*, cit.

10 *Abdulaziz, Cabales and Balkandali v the United Kingdom*, cit, para 62.

and asylum cases, the Court's approach in non-migration Article 8 cases is important in order to have a clear picture on how far the Court is willing to go defining 'family'. In particular, the ECtHR has accepted the existence of family ties in cases of a relationship outside marriage. In *Keegan v Ireland*,¹¹ the ECtHR found that 'the notion of the family in this provision is not confined solely to marriage-based relationships and may encompass other *de facto* family ties where the parties are living together outside of marriage'.¹² Consequently, a marriage of form only, is likely to fall outside the scope of Article 8 (1) when informal relationships of certain stability may constitute 'family life'. Similar concerns bring the issue of single mothers and their children. The ECtHR has found in *Marckx v Belgium*¹³ that a relationship between an unmarried mother and her child constitutes 'family life'.

As regards same-sex relationships, the ECtHR's initial approach was to consider them as part of the individual's 'private life'.¹⁴ It should be mentioned that the ECtHR had also stated that national legislations which treat differently heterosexual spouses or cohabiting partners and same-sex partners are not contrary to Article 14 of the ECHR.¹⁵ However, the Court's approach on this issue has more recently changed significantly. In *Schalk and Kopf v Austria*,¹⁶ the ECtHR took into consideration that many Contracting States have adapted their legislation in order to afford legal recognition to same-sex couples and therefore considered that 'a cohabiting same-sex couple living in a stable *de facto* partnership, falls within the notion of "family life", just as the relationship of a different-sex couple in the same situation would'.¹⁷ It should also be mentioned that in case *Vallianatos and Others v Greece*,¹⁸ the ECtHR held that

¹¹ *Keegan v Ireland*, Application no. 16969/90 (ECtHR, 26 May 1994), Series A Application no. 290.

¹² *Keegan v Ireland*, cit, para 44.

¹³ *Marckx v Belgium*, Application no. 6833/74 (ECtHR, 13 June 1979), para 21, Series A Application no. 31.

¹⁴ See *Kerkhoven v the Netherlands*, Application no. 15666/89 (ECHR, 19 May 1992); *Norris v Ireland*, Application no. 10581/83 (ECtHR, 26 October 1988), Series A Application no. 142; *Dudgeon v the United Kingdom*, Application no. 7525/76 (ECtHR, 22 October 1981), Series A Application no. 45.

¹⁵ For the relation between the homosexuals' right to 'private life' and the principle of non-discrimination see Moreham, 'The Right to Respect for Private Life in the European Convention on Human Rights: A Re-Examination' (2008) 1 European Human Rights Law Review 44.

¹⁶ *Schalk and Kopf v Austria*, Application no. 30141/04 (ECtHR, 24 June 2010).

¹⁷ *Schalk and Kopf v Austria*, cit, para 94.

¹⁸ *Vallianatos and Others v Greece* [GC], Application nos. 29381/09 and 32684/09, (ECtHR, 7 November 2013).

Contracting States which provide a registered partnership for different-sex partners, without giving the same option to same-sex partners violate Article 8 of the ECHR.

Furthermore, the ECtHR determined the existence of 'family life' between a female to male transsexual and the child of his partner in the *X, Y and Z v the United Kingdom*¹⁹ case. In the present case, X had undergone gender reassignment surgery but was still regarded as a female according to domestic law, as a complete change of sex was not medically possible. The ECtHR recalled that the notion 'family life' does not only refer to families based on marriage but also to *de facto* relationships and that when deciding whether a relationship can be said to amount to 'family life', a number of factors may be relevant, including whether the couple live together, the length of their relationship and whether they have demonstrated their commitment to each other by having children together or by any other means.²⁰ It concluded that there were family ties between the three applicants as the couple applied jointly for treatment by artificial insemination by donor (AID) to allow Y to have a child and X was involved throughout that process and had acted as a 'father' in every respect since Z's birth.²¹ On the contrary, the Court has found that there is no 'family life' between a sperm donor for artificial insemination and the recipient mother or child²² in case the mother intends to rear the child with someone else, neither between the child and the partner of the recipient mother in a lesbian relationship.²³

The notion of 'family life' covers adopted children as well, as adoptive parents are treated as biological parents²⁴ as well as relationships between grandparents and grandchildren²⁵ and between uncles and nephews.²⁶

¹⁹ *X, Y and Z v the United Kingdom*, Application no. 21830/93 (ECtHR, 22 April 1997).

²⁰ *X, Y and Z v the United Kingdom*, cit, para 36.

²¹ *X, Y and Z v the United Kingdom*, cit, para 37.

²² See Liddy, 'The Concept of Family Life under the ECHR' (1998) 1 European Human Rights Law Review 15.

²³ *Kerkhoven v the Netherlands*, cit.

²⁴ See *Emonet and Others v Switzerland*, Application no. 39051/03 (ECtHR, 13 December 2007).

²⁵ See *Vermeire v Belgium*, Application no. 12849/87 (ECtHR, 29 November 1991), Series A Application no. 214-C and *Marckx v Belgium*, cit.

²⁶ See *Boyle v the United Kingdom*, Application no. 16580/90 (ECtHR, 28 February 1994), Series A Application no. 282-B.

2.3 Relationships Outside the Notion of 'Core Family' in Migration Cases: Part of the Immigrant's Family or Private Life?

The issue of the existence of 'family life' outside the limits of 'core family' is detected in immigration cases as well. It should be highlighted that in 2016 the ECtHR ruled on same-sex partners in a family reunification context as well,²⁷ finding that a legislation which allows for family reunification for different-sex but not for same-sex *de facto* partners infringes Articles 8 and 14 of the ECHR. Similar conclusions have been drawn in *Taddeucci and McCall v Italy*²⁸ where the Court found that the relevant Italian law on family reunification violates Article 8 and 14, taking into account that same-sex partners do not have access to marriage, a fact which makes their situation 'significantly different' than different-sex couples.

In addition, the ECtHR has on several other occasions dealt with the issue of family relationships outside the 'core family' notion in immigration cases, taking into consideration the relationship of adult immigrants with their parents or siblings. The ECtHR was then criticised²⁹ for having adopted a 'hidden agenda' for treating integrated immigrants who had not created their own family in the host state as *de facto* citizens, which means that their expulsion could hardly ever be justified. Therefore, many integrated immigrants were granted the protection of 'family life' of Article 8, even though they did not have any family ties with members of the 'core family'.

In *Moustaquim v Belgium*,³⁰ the applicant arrived in Belgium at the age of one, he committed theft and robbery as a minor and was expelled from Belgium after he had reached the age of adulthood. The ECtHR considered the relationship that Moustaquim had with his parents and siblings, three of which had been born in Belgium and one had also acquired the nationality of the host country and found that there was a violation of the applicant's right to respect for 'family life'. This approach was criticised by members of the ECtHR for expanding excessively the notion of 'family life'. In his concurring opinion in *Beldjoudi v France*,³¹ Judge Martens stated that the ECtHR should focus more on the notion of 'private' than 'family life' in cases that the immigrant does not

²⁷ See *Pajić v Croatia*, Application no. 68453/13 (ECtHR, 23 February 2016).

²⁸ *Taddeucci and McCall v Italy*, Application no. 51362/09 (ECtHR, 30 June 2016).

²⁹ See Cholewinski, 'Strasbourg's "Hidden Agenda": The Protection of Second-Generation Migrants from Expulsion under Article 8 of the European Convention on Human Rights' (1994) 12 Netherlands Quarterly of Human Rights 287.

³⁰ *Moustaquim v Belgium*, Application no. 12313/86 (ECtHR, 18 February 1991), Series A Application no. 193.

³¹ *Beldjoudi v France*, Application no. 12083/86 (ECtHR, 26 March 1992), Series A Application no. 234-A.

have his or her own family in the Contracting State. The Judge considers that although not all of the settled immigrants are married, they all have a private life and therefore their case should be discussed under ‘private life’ of Article 8. This view implies a stricter conception of ‘family life’ than the one adopted by the ECtHR at that period in several immigration cases and suggests that the notion of ‘family life’ should include only the ‘core family’ while the rest of the relationships should form part of the immigrant’s ‘private life’.

In its subsequent case law, the ECtHR modified its view focusing again on the ‘core family’.³² In *Slivenko v Latvia*,³³ where a family was expelled collectively from Latvia, the ECtHR considered the issue of whether the expulsion measure interfered with the applicants’ ‘family’ or ‘private life’, stating that ‘the existence of “family life” could not be relied on by the applicants in relation to the first applicant’s elderly parents, adults who did not belong to the “core family” and who have not been shown to have been dependent members of the applicants’ family’.³⁴ The ECtHR could have examined the present case under the notion of ‘family life’, as it did with the *Moustaquim* case³⁵ which was discussed above. Instead, it focused on the ‘private life’ that the family had in Latvia,³⁶ explaining that in order for ‘family life’ to be established outside the limits of the ‘core family’, an additional element of ‘dependence’ is required.

This reasoning has been followed in a number of more recent cases as well. In *Onur v the United Kingdom*,³⁷ ‘[t]he Court does not find, however, that the applicant enjoyed “family life” with his mother and siblings as he has not demonstrated the additional element of “dependence” normally required to establish “family life” between adult parents and adult children’.³⁸ In addition, in the same case the ECtHR observed that despite the fact that a settled immigrant enjoys or not ‘family life’ in the Contracting State, an expulsion order constitutes an interference with his or her right to respect for ‘private life’.³⁹

³² For this turn in the Court’s case law, see also Lambert, ‘Family unity in migration law: the evolution of a more unified approach in Europe’ in Chetail and Bauloz, *Research Handbook on International Law and Migration* (Edward Elgar, 2014).

³³ *Slivenko v Latvia* [GC], Application no. 48321/99 (ECtHR, 9 October 2013), ECHR 2003-X.

³⁴ *Slivenko v Latvia*, cit, para 97.

³⁵ *Moustaquim v Belgium*, cit.

³⁶ Part of the doctrine has expressed the view that the concept of ‘private life’ is broad enough to cover situations related to family but not solely concerned with the family unity. See Ronen, ‘The Ties that Bind: Family and Private Life as Bars to the Deportation of Immigrants’ (2012) 8(2) International Journal of Law in Context 283.

³⁷ *Onur v the United Kingdom*, Application no. 27319/07 (ECtHR, 17 February 2009).

³⁸ *Onur v the United Kingdom*, cit, para 45.

³⁹ In the present case, however, the ECtHR found that there was ‘family life’ between the applicant and his current partner and child.

Furthermore, in *A.w. Khan v the United Kingdom*,⁴⁰ the ECtHR found that the relationship between the 34-year old applicant and his mother and siblings did not constitute ‘family life’, although he was living with them and they suffered from different health problems.⁴¹ Therefore, it can be concluded that the prevailing approach of the ECtHR in its recent case law is to discuss the issue of adult settled immigrants under ‘private life’ except if there is an element of ‘dependence’⁴² other than normal emotional ties on some of the members of their family.

Regardless of this turn on the Court’s jurisprudence, the ECtHR has in some cases appeared somewhat more flexible accepting the existence of ‘family life’ between young adults who do not have their own family and their parents. In *Maslov v Austria*,⁴³ the ECtHR stated that the relationship between an 18-year-old person who has not founded his/her own family with his parents constitutes ‘family life’ in the sense of Article 8.⁴⁴ A similar approach, although probably not expressed that unconditionally, has been adopted in *A.A. v the United Kingdom*,⁴⁵ where the ECtHR stated that [a]n examination of the Court’s case law would tend to suggest that the applicant, a young adult of 24 years old, who resides with his mother and has not yet founded a family of his own, can be regarded as having “family life”. Lastly, the same finding is confirmed in *Bousarra v France*.⁴⁶

It can be argued that as long as both ‘family’ and ‘private life’ are equally protected under Article 8, the discussion concerning the limits between them is merely academic. The ECtHR has in some cases adopted an approach which seems to leave ‘open’ the issue of whether the applicant enjoys ‘family’ or ‘private life’ in the Contracting State. In *A.A. v the United Kingdom*,⁴⁷ for instance, although as mentioned above the ECtHR accepted that the relationship between an adult child who has not created his/her own family may constitute ‘family life’, it, finally, decided to leave the issue of whether ‘family’ or ‘private life’ was concerned open.⁴⁸ Despite all of the above, it is worth highlighting that according to part of the

⁴⁰ *A.w. Khan v the United Kingdom*, Application no. 47486/06 (ECtHR, 12 January 2010).

⁴¹ See also *A.A. v the United Kingdom*, Application no. 8000/08 (ECtHR, 20 September 2011).

⁴² See also *Balogun v the United Kingdom*, Application no. 60286/09 (ECtHR, 10 April 2012).

⁴³ *Maslov v Austria* [GC], Application no. 1638/03 (ECtHR, 22 March 2007).

⁴⁴ *Maslov v Austria*, cit, paras 62 and 64.

⁴⁵ *A.A. v the United Kingdom*, cit.

⁴⁶ *Bousarra v France*, Application no. 25672/07 (ECtHR, 23 September 2010).

⁴⁷ *A.A. v the United Kingdom*, cit.

⁴⁸ *A.A. v the United Kingdom*, cit, para 49.

doctrine,⁴⁹ ‘family life’ should be protected by Article 8 independently of the length of its existence while ‘private life’ is protected only after a certain period passes and gains weight the longer a person has lived in a country.

Next, dependency is not only a necessary element in case adult children invoke their relationship with their parents but also when parents wish to rely on their relationship with their adult children in order to be afforded protection under Article 8. This becomes evident in the recently decided *Senchishak v Finland*,⁵⁰ where the ECtHR reaffirmed that in relationships that fall outside the ‘core family’, additional factors of dependence other than normal emotional ties should be proven to exist. In the present case, the applicant was a Russian national who had suffered a stroke which resulted in her right side being paralysed. The applicant’s husband died and one of her two daughters went missing and is probably dead. The ECtHR found that the relationship between the applicant and her daughter did not constitute ‘family life’ in the sense of Article 8 as although the applicant suffered health problems, she was not necessarily dependent on her daughter nor was her care only possible in Finland. In the ECtHR’s view, the applicant could be cared for in a private or public hospital in Russia being financially supported by her daughter. It should be noted that in addition to these arguments, the ECtHR based its finding on the fact that the applicant and her daughter had only lived together for the last five years, after an interruption in their family life of at least twenty years.

3 Family Reunification Cases

3.1 *The Court’s Conception of the Notion of ‘Respect’ and Its Case Law on Reunification Cases*

The states have argued that the notion of ‘respect’ implies a merely negative obligation which means that the public authorities should not interfere arbitrarily with the right to respect for ‘family life’ of the individuals. The ECtHR has stated that this is a narrow reading of Article 8 and that the Contracting States are also obliged to adopt measures in order to guarantee respect for family life (positive obligation).⁵¹

⁴⁹ Thym, ‘Respect for Private and Family Life under Article 8 ECHR in Immigration Cases: A Human Right to Regularize Illegal Stay?’ (2008) 57(1) International and Comparative Law Quarterly 87.

⁵⁰ *Senchishak v Finland*, Application no. 5049/12 (ECtHR, 18 November 2014).

⁵¹ See, among others, *Marckx v Belgium*, cit.

One of these positive obligations is to permit family reunification in their territories. The ECtHR discusses family reunification cases under Article 8 (1) and not under the second paragraph of the same article. This means that the Court's main consideration is to find out whether the situation deserves 'respect' of the authorities within the meaning of Article 8.1. The Court's conception of the notion 'respect' in a case of admission of a non-national is probably one of the most complex issues concerning Article 8. The leading case in the field of admission for the purposes of family reunification is the *Abdulaziz, Cabales and Balkandali v the United Kingdom*.⁵² It constitutes as well the first of the Article 8 cases which was also concerned with immigration. In *Abdulaziz*, the applicants were lawfully settled in the United Kingdom and they were denied reunification with their husbands. They challenged Article 8 and claimed as well that they had been victims of discrimination on grounds of sex, race and birth (Article 14). At first, the ECtHR decided to determine whether there is a violation of Article 8 taken alone. In its view: 'The duty imposed by Article 8 cannot be considered as extending to a general obligation on the part of a Contracting State to respect the choice by married couples of the country of their matrimonial residence and to accept the non-national spouses for settlement in that country'.⁵³

The statement implies the application of the so-called 'elsewhere test'. If there is no obligation of a state to respect the choice of country of the matrimonial residence of a couple and in case 'family life' can be enjoyed somewhere else, a refusal to accept a non-national in the Contracting State does not constitute a failure to 'respect' for 'family life'. In the present case, the applicants had not shown that there was any special reason why they would not be able to join their husbands in their husbands' home countries or that there was any reason why this could not be expected from them. In addition, the ECtHR found that they were all three of them, aware of their husbands' unstable legal position and therefore concluded that there was no violation of Article 8 taken alone. However, it did find a violation of Article 8 taken together with Article 14 which the applicants also challenged. Discussing the issue of discrimination, the ECtHR noticed that it would have been easier for the applicants to achieve reunification with their partners if they had been males and therefore found that there was a violation of Article 8 taken together with Article 14.

The *Abdulaziz* judgment reflects the ECtHR's traditional view towards 'respect' in family reunification cases. According to this, a wide margin of

52 *Abdulaziz, Cabales and Balkandali v the United Kingdom*, cit.

53 *Abdulaziz, Cabales and Balkandali v the United Kingdom*, cit, para 68.

appreciation is given to the states when determining the steps to be taken to ensure compliance with the ECtHR as far as a positive obligation is concerned. In paragraph 67, the ECtHR mentions that especially in a positive obligation case, the notion of 'respect' is not clear-cut and that the notion's requirements will vary considerably from case to case. It should be underlined that Judge Martens in his *Gül* dissenting opinion⁵⁴ criticised this approach claiming that one of the main objections on the aforementioned doctrine is that in the context of positive obligations, the margin of appreciation might already come into play at the stage of determining the existence of the obligation, while in the context of negative obligations it only plays a role at the stage of determining whether a breach of the obligation is justified.

In *Gül v Switzerland*,⁵⁵ Mr and Mrs Güл, after having established a stable legal status in Switzerland, tried to reunify with their son left behind in Turkey. It is noteworthy that the applicants did not have a permanent right of residence but simply a residence permit on humanitarian grounds, which did not give them a right to family reunification. The ECtHR accepted that in view of the length of time Mr and Mrs Güл had lived in Switzerland, it would definitely not be easy for them to return to Turkey, but there were, strictly speaking, no real obstacles preventing them from developing 'family life' there. The ECtHR found no violation of Article 8 as family reunification could have taken place in the country of origin. However, the ECtHR seems to adopt, at least on a theoretical level, a different approach as far as the margin of appreciation is concerned compared to the *Abdulaziz* judgment. It states that the boundaries between the state's positive and negative obligations under this provision (Art. 8) do not lend themselves to precise definition. The applicable principles are similar and in both contexts a fair balance has to be struck between the interests of the individual and of the community. In addition, in both contexts the state enjoys a certain margin of appreciation.⁵⁶

In his dissenting opinion,⁵⁷ Judge Martens mentioned that the approach of the ECtHR should be exactly the same both in a positive and in a negative obligation case and highlighted the difficulty in distinguishing between the two types of obligation. In his view, in a family reunification case, the refusal of the public authorities to let spouses or parents and children be reunified might be seen as an action which they should have avoided or it could be viewed as

⁵⁴ Judge Marten's dissenting opinion in *Gül v Switzerland*, Application no. 23218/94 (ECtHR, 19 February 1996), para 8, *Reports of Judgments and Decisions* 1996-1.

⁵⁵ *Gül v Switzerland*, cit.

⁵⁶ *Gül v Switzerland*, cit, para 38.

⁵⁷ The dissenting opinion was approved by Judge Russo.

a failure to take an action to make family reunification possible. For this reason he concluded that: '[t]hese and other difficulties in distinguishing between cases where positive and cases where negative obligations are at stake would be immaterial if both kinds of obligation were treated alike'.⁵⁸

The *Ahmut v the Netherlands* case⁵⁹ concerns a Moroccan minor who was refused a residence permit that would have allowed him to reunify with his father, who had dual Moroccan and Dutch nationality and was living in the Netherlands. The ECtHR applied the 'elsewhere test' and concluded that there was no obstacle for the father to return to Morocco and that by sending his son to boarding-school, Mr Ahmut had arranged for him to be cared for in Morocco. The ECtHR concluded that the Dutch authorities had not failed to strike a fair balance between the interests of the applicants and the interest of the community in controlling immigration and therefore there was no violation of Article 8.

In *Sen v the Netherlands*,⁶⁰ the applicants complained that the refusal of the Dutch authorities to accept their daughter in the Netherlands constituted an infringement of their right to respect for 'family life' of Article 8 of the ECHR. The ECtHR considered the strong linguistic and cultural ties that the daughter had with Turkey but found that in the present case, there was a major obstacle for the rest of the family to relocate to Turkey. In reaching this conclusion, the ECtHR took into account that the two applicants had lived for many years in the Netherlands, where they had two other children who had spent their entire lives there and had few ties with the country of origin. Likewise, special consideration was given to the fact that the daughter was nine years old at the time of the application for family reunification. It is worth mentioning that the ECtHR found a violation of Article 8 even though the legal status that Sen held in the Netherlands was not better than the one Ahmut enjoyed in Switzerland (that of the nationality of the state). This may be seen as an evolution with regard to the ECtHR's position that the same principles should apply in the two types of obligation but even in *Sen*, the threshold of 'respect' for the admission cases is still set high and leaves little space to the second paragraph of Article 8 to apply.⁶¹

⁵⁸ *Gül v Switzerland*, cit, para 8.

⁵⁹ *Ahmut v the Netherlands*, Application no. 21702/93 (ECtHR, 28 November 1996), para 67, *Reports of Judgments and Decisions* 1996-vi.

⁶⁰ *Sen v the Netherlands*, Application no. 31465/96 (ECtHR, 21 December 2001).

⁶¹ Blake and Husain, *Immigration, Asylum and Human Rights* (Oxford University Press, 2003).

A similar approach has been adopted by the ECtHR in *Tuquabo-Tekle and Others v the Netherlands*.⁶² In the present case, the ECtHR considered whether the Dutch authorities were under a duty to allow a daughter to reside in the Netherlands in order to reunify with her mother, stepfather and siblings. The ECtHR took into consideration factors such as the ties that the daughter had with the country of origin, as well as the existence of 'dependence' between the daughter and the mother. It concluded that unlike in usual cases, her age made her even more dependent on her mother, as she had reached marriageable age and the grandmother had taken her out of school and wanted to marry her off so that she would no longer be responsible for taking care of her. Having regard to the above, the ECtHR found that there was a positive obligation from the Dutch authorities to allow 'family life' to be established in the Netherlands and their refusal constituted a violation of Article 8. In *Benamar v the Netherlands*,⁶³ the ECtHR stated that there were no indications that there were objective obstacles for the family life to be developed in Morocco, since the mother and her spouse, who requested family reunification, were Moroccans. Furthermore, the ECtHR considered that the four children, who were 12, 14, 16 and 18 years old, had spent their entire lives in Morocco and maintained strong ties to that country.

More recently, in *Berisha v Switzerland*,⁶⁴ the ECtHR held that the parents could maintain the 17- and 19-year-old children at a distance and visit or settle in Kosovo with the third child, who was younger. The Court reached this conclusion despite the fact that the father had lived for 15 years in Switzerland and the couple had another son who was born in the host country. It noted that Article 8 does not guarantee the right to choose the most suitable place to develop family life. Similarly, in *I.A.A. v the United Kingdom*,⁶⁵ the ECtHR stated that the refusal to admit the five children, who were between 13 and 21 years old, did not violate Article 8. The Court considered that all the applicants had grown up in the cultural and linguistic environment of the country of origin, for the past nine years, they had lived together in Ethiopia and the older children cared for the younger ones. Furthermore, none of them had been in the United Kingdom and they had not lived together with their mother for more than 11 years. Despite the conclusion reached, it is important to notice that the ECtHR began its analysis by pointing out that in family reunification

62 *Tuquabo-Tekle and Others v the Netherlands*, Application no. 60665/00 (ECtHR, 1 December 2005).

63 *Benamar v the Netherlands*, Application no. 43786/04 (ECtHR, 5 April 2005).

64 *Berisha v Switzerland*, Application no. 948/12 (ECtHR, 30 July 2013).

65 *I.A.A. v the United Kingdom*, Application no. 25960/13 (ECtHR, 8 March 2016).

cases, the best interests of the children and the extent to which they depend on their parents should be taken into account.

3.2 *Comments on the Court's Approach in Family Reunification Cases*

As far as the notion of 'respect' and the fact that family reunification cases are discussed under Article 8.1 are concerned, the following observations should be made. There would be no obstacle for the states to invoke one of the justifications of Article 8 (2) for their refusal to admit a third-country national in their territory in case the ECtHR decided to discuss admission cases under Article 8 (2). The protection of the rights and freedoms of others, as well as the economic well-being of the country could admittedly apply to a situation where the public authorities have denied entrance to a third-country national. The ECtHR however does not seem to intend to lower the threshold of 'respect' in family reunification cases so as for the justifications of the second paragraph to become applicable. One explanation could be that the ECtHR presumes that there is a classification among the justification grounds of Article 8 (2) and undoubtedly the 'public security' which applies to a 'regular' expulsion case would appear as more considerable in comparison to any of the applicable justification grounds of an admission case. Thus, if the ECtHR adopts the same approach towards an admission and an expulsion case with regards to 'respect' (Article 8 (1)), it will be harder to accept a justification in an admission rather than in an expulsion case (Article 8 (2)). Observing this argument in reverse, we could assume that the ECtHR intends to be more protective towards 'family life' in a case of an expulsion rather than in a case of an admission, implying the existence of a 'formal' family and the existence of a 'substantial' family which is attached with greater importance.

An additional argument in favour of the aforementioned opinion is that even though in both paragraphs the ECtHR has to strike a fair balance between the interests of the individual and the public interest in order to find whether there is a violation of Article 8 or not, Article 8 (1) is more favourable for the states than Article 8 (2).⁶⁶ In the second paragraph, the ECtHR has to apply a proportionality test between the individual's right, on the one hand, and the interests of the community explicitly referred to in the same paragraph, on the other. On the contrary, in the first paragraph there is no such restriction and the ECtHR can invoke any interest of the state and in particular the control of immigration which does not appear to be one of the legitimate aims of the second paragraph. It is true that, as mentioned above, Article 8 (2) contains

66 See Warbrick, 'The Structure of Article 8' (1998) 1 European Human Rights Law Review 32.

some justification grounds that may be relevant in admission cases, such as the economic well-being of the country but in this case the state would be required to prove that the admission of a family member to its territory would directly affect the economic well-being of the country in concrete and not general terms. On the contrary, the control of migration as justification ground does not require additional argumentation.

It can be assumed that the ECtHR tends to be more protective towards 'family life' in an expulsion case taking into account that the third-country national has spent a longer period in the territory of the Contracting State at issue and enjoys therefore a higher level of integration than a person who intends to enter a Contracting State for the first time. For this reason, the wide margin of appreciation and the 'elsewhere' test in an admission case come into play already in the framework of Article 8 (1), as analysed above. However, such an approach is erroneous as it takes into account elements which fall outside the scope of 'family life' such as the possibility of a person to move and establish 'family life' in another country, which in addition is incompatible with the freedom of residence of a lawful citizen guaranteed by several Constitutions of the Contracting States, as well as international conventions.

Part of the doctrine suggests that the ECtHR should accept that the mere fact that a settled immigrant is denied reunification with his or her child would interfere of itself with the duty to respect for family life owed by the state to the parent.⁶⁷ This view seems reasonable but unjustifiably limited to the relationship between parents and children. It seems more coherent to suggest that the ECtHR should adopt the aforementioned approach with regards to all relationships that constitute 'family' in the sense of Article 8 (1). This approach will allow the justifications to find their proper place in Article 8 (2).⁶⁸ It will also pave the way for criteria more relevant to family life to become applicable to reunification cases, as is argued in this chapter.

The adoption of the above-mentioned view may be combined with what several commentators have already named the 'connections approach', as opposed to the 'elsewhere approach' which is currently followed by the ECtHR. In particular, part of the doctrine⁶⁹ has long ago proposed that the ECtHR

67 Blake and Husain, cit, p. 186.

68 See also Rogers, 'Immigration and the European Convention on Human Rights: Are New Principles Emerging?' (2003) 1 European Human Rights Law Review 53.

69 See, for example, Lambert, 'The European Court of Human Rights and the Rights of Refugees and Other Persons in Need of Protection to Family Reunion' (1999) 11(3) International Journal of Refugee Law, 427; Anderfuhrer-Wayne, 'Family Unity in Immigration and Refugee Matters: United States and European Approaches' (1996) 8(3) International Journal of Refugee Law 347.

should consider the ties that the family has developed with the host country and allow reunification in case the family's connections are so strong that they cannot be expected to move to the country of origin in order to reunify with the persons left behind. This approach is likely to promote family reunification of migrants who normally do not have real obstacles in returning to the country of origin and in the vast majority of the cases are likely to fail the 'elsewhere test'. On the contrary, the 'connections approach' is likely to harm refugees and persons in need of protection who might fail to prove that they have developed strong ties in the host country and who are the only ones 'benefiting' from the 'elsewhere approach' due to the circumstance that have urged them to flee from their host country that do not allow for family life to be enjoyed there. Therefore, it is suggested that the ECtHR should discuss admission cases under Article 8 (2) applying both an 'elsewhere' and a 'connections approach'⁷⁰ depending on the circumstances of each case.

4 Regularisation Cases

In recent years, the ECtHR has examined another aspect of the positive obligations derived from Article 8 that is related to irregular migrants who argue that the Contracting States have to regularise their situation in order to respect their right to family life. These types of cases are added to those of family reunification that have been previously analysed and to those of expulsions that are discussed within the framework of the negative obligations derived from article 8, analysed later. It should be noted that so far these cases are also discussed under the notion of 'respect' of Article 8.1. Similarly, the applicable principles are particularly restrictive. As a starting point, the Court notes that Contracting States have the right to require foreigners who wish to reside in their territory to make the corresponding application from the country of origin and that they are not obliged to allow them to wait for the outcome of the proceedings in their territory. According to the ECtHR, when family life has been established without the corresponding residence permits, and family members were aware of the precarious situation of any of them, the refusal to regularise the precarious situation constitutes a violation of Article 8 only in exceptional circumstances.

⁷⁰ See also Edwards, 'Human Rights, Refugees, and the Right "to Enjoy" Asylum' (2005) 17(2) International Journal of Refugee Law 293.

In *Rodrigues da Silva and Hoogkamer v the Netherlands*,⁷¹ the applicant, Mrs Rodrigues, a Brazilian national, entered the Netherlands and settled with her partner, Mr Hoogkamer, who was a Dutch citizen. Her daughter, who was born a couple of years later, was recognised by Mr Hoogkamer and, as a consequence, acquired Dutch nationality. Mrs Rodrigues had been living and working in the Netherlands irregularly and after her separation from her partner, she lost custody of the daughter, which was given to the father. Subsequently, she attempted to obtain a residence permit, but without success, as the Dutch authorities argued that the interests of the country's economic welfare prevailed over Mrs Rodrigues da Silva's right to reside in the Netherlands.

The ECtHR considered that the expulsion of Mrs Rodrigues da Silva would have made it impossible for her and her daughter to maintain regular contact. Furthermore, the Court noted that, although Mrs Rodrigues da Silva had lost custody of the daughter, she continued to contribute to her education while staying with her during the weekends. Family life between the applicant and her daughter could not have been established in Brazil because the custody of the daughter was attributed to the father, who did not consent to her transfer to the mother's country of origin. It should be noted that although Mrs Rodrigues da Silva had at no time been in a regular situation in the Netherlands, she had never committed any crimes. Taking all of the above into account, the ECtHR concluded that the circumstances of the case were exceptional and that the refusal to grant a residence permit and the expulsion of Ms Rodrigues from the Netherlands would constitute a violation of Article 8. The Dutch authorities did not strike a fair balance between the applicant's right to family life, on the one hand, and the community's interest in the economic well-being of the country, on the other.

The analysis of *Jeunesse v the Netherlands*⁷² can shed more light on the circumstances under which a denial of a residence permit for family reasons to a person who is in an irregular situation in the territory of a state may violate Article 8 of the ECHR. In particular, the applicant had never had a residence permit issued by the Dutch authorities and, therefore, her administrative situation was completely precarious when she created family relations in the Netherlands. The ECtHR took particular account of the fact that all of the applicant's relatives had acquired Dutch nationality. The applicant herself had Dutch nationality at birth, but later lost it when Suriname became independent. Furthermore, she had resided in the Netherlands for over 16 years without

⁷¹ *Rodrigues da Silva and Hoogkamer v the Netherlands*, Application no. 50435/99 (ECtHR, 31 January 2006).

⁷² *Jeunesse v the Netherlands* [GC], cit.

a criminal record. Furthermore, the Court admitted that the applicant and her family would face certain difficulties if they were forced to return to the country of origin as the children had no direct links to Suriname, a country they had never visited. Taking these factors into account, the ECtHR stated that the circumstances of the case were exceptional and that the authorities' denial of the applicant's residence in the Netherlands constituted a violation of her right to family life.

In the same judgment, the ECtHR held that, while the case does not concern an established foreigner who is facing an expulsion order, but a foreigner who despite having lived for many years in the host country had never regularised his or her administrative situation, the criteria normally applicable in an expulsion case cannot be applied automatically. That being said, the ECtHR determined what criteria should be taken into account in this context: the extent to which family life would effectively be ruptured, the extent of the ties in the Contracting State, whether there are insurmountable obstacles in the way of the family living in the country of origin of the alien concerned, whether there are factors of immigration control (for example, a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion, whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host state would from the outset be precarious and the best interests of the child – which must be given significant weight, although it is not in itself decisive.⁷³

More recently, the ECtHR had the opportunity to address the same issue in *Ejimson v Germany*.⁷⁴ The applicant, who was a Nigerian national, entered Germany and began a relationship with a citizen of the country, with whom he had a daughter who acquired German nationality. After two years, the applicant was sentenced to an eight-year prison sentence for drug trafficking. In 2009, he was released from prison and, although his relationship with his former partner had been interrupted, he maintained regular contact with his daughter. Meanwhile, he faced an expulsion order, which could not be executed because he did not have a valid passport. As a consequence, he was allowed to remain in Germany in a situation of 'tolerance', known in the German legal system as 'Duldung'. It should be noted that this legal status did not properly authorise him to work. The applicant unsuccessfully attempted to obtain a residence permit based on his relationship with his daughter, who

73 *Jeunesse v the Netherlands*, cit, paras 107–109.

74 *Ejimson v Germany*, Application no. 58681/12 (ECtHR, 1 March 2018).

was still a minor, and subsequently filed a complaint with the ECtHR alleging that the German authorities' refusal to grant him a residence permit violated Article 8 of the ECHR.

The Court reaffirmed that the criteria applicable in this case would be those previously established in the *Jeunesse* case and admitted that, if the applicant were expelled, his daughter, who lived with her mother, who had the custody, could not accompany him to the country of origin. However, the Court held that she would have the option to remain in contact with his father electronically and through short visits that he would be entitled to make in Germany. Likewise, the Court affirmed that the applicant could even continue the relationship with his daughter in person, since the expulsion order could not finally be executed. The Court noted that the applicant could challenge the revocation of his exceptional permission to stay in Germany, or the refusal to renew said permission before the German administrative courts arguing that his expulsion had become impossible due to his rights under Article 8 of the ECHR. In this case, the national authorities would have to examine these arguments. Taking the above into account, the ECHR held that there was no violation of Article 8 of the ECHR.

The cases analysed above reaffirm that the ECtHR is probably opening another chapter of ambiguous criteria and terms open to interpretation, such as the 'exceptional circumstances' that must be met in order for a refusal to grant a residence permit to a foreigner who is already present in the territory to be contrary to Article 8 of the ECHR. From the reduced number of cases that the ECHR have dealt with, it can be deduced that the commission of crimes weighs against the applicant and that the nationalities of the people involved is a factor that is taken into special consideration. The same is true in relation to the duration of stay in the host country. On the other hand, it has been argued that what has been 'exceptional' in the *Jeunesse* and *Rodrigues da Silva* cases has not been some particular circumstance, but the accumulation of different factors that concurred at the same time and made the ECtHR affirm that there was a violation of Article 8.⁷⁵ On the contrary, in the *Ejimson* case it is possible that the Court took into account the possibility of the applicant to remain in a situation of 'tolerance' offered by the 'Duldung'. If this is the case,

75 See Peroni, 'Jeunesse v the Netherlands: Quiet Shifts in Migration and Family Life Jurisprudence?', (*Strasbourg Observers*, 30 October 2014) <<https://strasbourgobservers.com>>. Other authors have noticed that, from the Court's argument, it is not clear how much importance was given to each of the factors that concur. See Klaassen, 'Between facts and norms: Testing compliance with Article 8 ECHR in immigration cases' (2019) 37(2) *Netherlands Quarterly of Human Rights* 157.

the ECtHR would be contradicting its own jurisprudence, because in *B.A.C v Greece*⁷⁶ the Court noted that the mere fact that the applicant's asylum application had taken fifteen years to be resolved, leaving him in a precarious and uncertain situation, not different than the one offered by the 'tolerance' situation in Germany, constituted a violation of his right to private life also recognised by Article 8 of the ECHR.

5 **Expulsion Cases**

5.1 *The Notion of 'Respect' in Expulsion Cases*

The issue of 'respect' in an expulsion case appears less thorny than in a positive obligation case as the position of the ECtHR is to accept that an expulsion measure constitutes an interference with the right to respect for 'family life'. Expulsion cases are discussed under Article 8.2 of the ECHR. The issue of whether 'family life' can be enjoyed 'elsewhere' does exist but it may be considered under the proportionality test that the ECtHR applies to eventually find if there is a violation of Article 8. In order for interference with 'family life' to be justified and, therefore, in accordance with Article 8, it must meet the requirements referred to in the second paragraph of Article 8, that is, it must be 'in accordance with the law', in pursuit of a legitimate aim and 'necessary in a democratic society'.

5.2 *In Accordance with the Law'*

In accordance with Article 8.2, the interference should first be 'in accordance with the law'. Even though this has appeared to be an easy consideration in most of the immigration cases, there are cases which have caught the ECtHR's attention regarding this issue. In *c.g. v Bulgaria*,⁷⁷ a Turkish national was expelled from Bulgaria where he had been living with his wife and daughter, both Bulgarian nationals. The ECtHR found that the interference was not in 'accordance with the law' and therefore violated Article 8, as the decision to expel the applicant did not indicate the factual grounds on which it was made but simply mentioned that he 'presented a serious threat to national security' and therefore he should be expelled. Lacking particular information of the facts which constituted a basis for this decision, the applicant could not present his case adequately in the judicial review proceedings. It should be noted

76 *B.A.C. v Greece*, Application no. 11981/15 (ECtHR, 13 October 2016).

77 *c.g. and Others v Bulgaria*, Application no. 1365/07 (ECtHR, 24 April 2008).

that the ECtHR did not consider the rest of the requirements referred to in Article 8 (2) after finding that the first one was not fulfilled and concluded that the interference was not justified.

In addition, according to the same case, ‘in accordance with the law’ does not merely mean that the interference should have a basis in domestic law, but also relates to the quality of that law, requiring it to be compatible with the rule of law. Therefore, the law should be accessible and foreseeable, in the sense of being sufficiently clear in its terms to give individuals an adequate indication as to the circumstances in which and the conditions on which the authorities are entitled to resort to measures affecting their rights under the ECHR. There should also be a certain degree of legal protection against arbitrary interference⁷⁸ by the authorities so that the legal discretion is not being expressed in terms of unfettered power.⁷⁹ This was discussed in *Liu v Russia*,⁸⁰ where the ECtHR found that the law did not comply with the requirement of being ‘in accordance with the law’, as it was giving to the authorities the choice between an expulsion procedure which involved procedural safeguards and another one which did not.

5.3 *In Pursuit of a Legitimate Aim*

After finding that the interference with the right to respect for ‘family life’ is ‘in accordance with the law’, the ECtHR examines whether it pursues one of the legitimate aims mentioned in the second paragraph of Article 8. Those are the national security, public safety or the economic well-being of the country, the prevention of disorder or crime, the protection of health or morals and the protection of the rights and freedoms of others. In any case, it is for the governments to convince the ECtHR that the interference had one of the above-mentioned legitimate aims and so far this has not caused them significant problems. The states have relied on different legitimate aims for justifying an interference with the protected rights of Article 8 (1), depending on the particular circumstances of each case.

As far as the immigration cases are concerned, the governments tend to apply similar reasoning in order to convince the ECtHR that the interference has been in pursuit of a legitimate aim. In a typical expulsion case, the legitimate aim will be the prevention of disorder or crime or national security or public safety as in the majority of those cases, the expulsion of an immigrant has been a result of a criminal conviction. In cases that the third-country

⁷⁸ See also *Al-Nashif v Bulgaria*, Application no. 50963/99 (ECtHR, 20 June 2002).

⁷⁹ See *c.g. and Others v Bulgaria*, cit, para 39.

⁸⁰ *Liu v Russia*, Application no. 42086/05 (ECtHR, 6 December 2007).

national was expelled for reasons other than criminal behaviour, the states have relied on other legitimate aims such as the economic well-being of the country or the interests of the others. This would be the case when the applicant automatically loses the right to reside in the territory of the Contracting State after his or her divorce with the spouse who is settled in that country. In *Berrehab*,⁸¹ the ECtHR accepted that the expulsion of Mr. Berrehab pursued the legitimate aim of the preservation of the country's economic well-being within the meaning of Article 8 (2) rather than the prevention of disorder as the government was in fact concerned to regulate the labour market.⁸²

5.4 *Necessary in a Democratic Society'*

5.4.1 The Application of the Proportionality Test

The notion of 'necessary in a democratic society' has been dealt with by the ECtHR in the majority of the expulsion cases, as it appears to be the crucial factor for deciding whether there exists a violation of Article 8. The ECtHR has given an interpretation of the term, trying to deepen the rather vague wording of the ECHR. According to the case law, 'necessary in a democratic society' means that there is a 'pressing social need'⁸³ which justifies the interference with the protected right and that the interfering measure is proportionate to the aim of responding to that need. In other words, in order for the ECtHR to decide whether there is a violation of Article 8, it has to apply a proportionality test and strike a fair balance between the interests of the community and in particular those mentioned in Article 8 (2) and the interest of the individual, which is the right to respect for his or her 'family life'.

The ECtHR has applied the proportionality test in various ways throughout its Article 8 case law. For the purposes of this introductory section, reference should be made to the *Berrehab* case⁸⁴ as a representative example of how the proportionality test is being carried out by the ECtHR. In this case, the ECtHR stated that '[i]n determining whether an interference was "necessary in a democratic society", the Court makes allowance for the margin of appreciation that is left to the Contracting States'.⁸⁵ However, the ECtHR aimed at examining the present case not solely from an immigration point of view but

⁸¹ *Berrehab v the Netherlands*, cit.

⁸² *Berrehab v the Netherlands*, cit, paras 25–26.

⁸³ See among others *Nasri v France*, Application no. 19465/92 (ECtHR, 13 July 1995), Series A Application no. 320-B; *Boughanemi v France*, Application no. 22070/93 (ECtHR, 24 April 1996), *Reports of Judgments and Decisions* 1996-II; *Balogun v the United Kingdom*, cit.

⁸⁴ *Berrehab v the Netherlands*, cit.

⁸⁵ *Berrehab v the Netherlands*, cit, para 28.

also taking into consideration the interest of the applicants in continuing their relations. Therefore, the legitimate aim pursued had to be weighed against the seriousness of the interference with the applicants' right to respect for their 'family life'. In doing so the ECtHR considered that Mr Berrehab was not seeking to enter the Netherlands for the first time but had already resided there lawfully for many years and that the Dutch authorities did not claim to have any complaint against him. In addition, the ECtHR found that his daughter needed to stay in contact with him as she was of a very young age and therefore concluded that a proper balance had not been achieved between the interests involved and that there was a disproportion between the means employed and the legitimate aim pursued.⁸⁶

The ECtHR's case law concerning immigration cases and family life becomes more intense after the *Berrehab* judgment, when the ECtHR considered the issue of expulsion of second-generation immigrants. The term second-generation immigrants refers to immigrants who were born in the territory of the Contracting State or arrived there at a very early age. It should be noted that the ECtHR does not consider as second-generation, immigrants that arrived in the Contracting State as children but at an older age. In *Keles v Germany*,⁸⁷ the ECtHR stated that '(...) the applicant is not a so-called "second generation immigrant" as he first entered Germany at the age of ten'.⁸⁸ However, in those relatively young ages, the ECtHR assesses the necessity of the interference by applying criteria which are similar to those it usually applies to cases of second-generation immigrants. As already analysed above, what makes the cases concerning second-generation immigrants remarkable is that the ECtHR presumes that a certain degree of integration already exists and therefore the application of an expulsion measure causes a variety of problems.

In *Moustaquim v Belgium*,⁸⁹ the ECtHR focused on the fact that Moustaquim had received all his schooling in French, he had returned to his country of origin only twice for holidays, his parents and all of his brothers and sisters lived in Belgium and he had arrived in the host state at the age of one. Taking those factors into consideration, the ECtHR concluded that there had not been achieved a fair balance and that the expulsion was not 'necessary in a democratic society', despite the large number of offences of which Moustaquim was accused. In the *Beldjoudi v France*⁹⁰ case the ECtHR followed a similar reasoning. Even

86 *Berrehab v the Netherlands*, cit, para 29.

87 *Keles v Germany*, Application no. 32231/02 (ECtHR, 27 October 2005).

88 *Keles v Germany*, cit, para 56.

89 *Moustaquim v Belgium*, cit.

90 *Beldjoudi v France*, cit.

though Beldjoudi's criminal record was worse than Moustaqim's, the ECtHR took into account the fact that he had spent his whole life – over forty years – in France, he was educated in French, he appeared not to know Arabic and he did not seem to have any ties with Algeria apart from that of nationality, and concluded that a fair balance had not been achieved and therefore there was a violation of Article 8 of the ECHR.

Nevertheless, the ECtHR has not always applied the proportionality test in favour of a second-generation immigrant. In *Bouchelkia v France*,⁹¹ even though the applicant arrived in France at the age of two, the ECtHR found no violation of Article 8, as the applicant had committed rape and the ECtHR attached great importance to the seriousness of the criminal offence. Similarly, in *El Boujaïdi v France*,⁹² the ECtHR noted that Mr Boujaïdi did not claim that he did not know Arabic or that he had never returned to Morocco before the exclusion order was enforced and he had never shown any desire to acquire French nationality. Additionally, even though most of his family and social ties were in France, it had not been established that he had lost all links with the country of origin. In *Boujlifa v France*,⁹³ the applicant was a Moroccan national who entered France when he was five, spent all of his life afterwards there and also received his schooling there. He committed robbery at the age of 20. His parents together with his eight brothers and sisters lived lawfully in France. The ECtHR did not find the adopted measure disproportionate and concluded that there was no violation of Article 8 as the criminal offences were counting heavily against the applicant, along with the fact that he had never attempted to acquire French nationality.

5.4.2 The 'Boultif Criteria'

The ECtHR has always been criticised for being ambiguous in its case law concerning Article 8 and especially with regards to the notion of 'necessary in a democratic society' and the application of the proportionality test.⁹⁴ As

⁹¹ *Bouchelkia v France*, Application no. 23078/93 (ECtHR, 29 January 1997), *Reports of Judgments and Decisions* 1997-I.

⁹² *El Boujaïdi v France*, Application no. 25613/94 (ECtHR, 26 September 1997), *Reports of Judgments and Decisions* 1997-VI.

⁹³ *Boujlifa v France*, Application no. 25404/94 (ECtHR, 21 October 1997), *Reports of Judgments and Decisions* 1997-VI.

⁹⁴ For concerns about uncertainty see Sherlock, 'Deportation of Aliens and Article 8 ECHR' (1998) 23(1) European Law Review 62. There has been a criticism from members of the ECtHR as well. In his dissenting opinion in *Boughanemi* case (supra note 88), Judge Martens mentions that the case law of the ECtHR has been so vague concerning Article 8 that it leads to a lack of legal certainty: 'National administrations and national courts are unable to predict whether expulsion of an integrated alien will be found acceptable or

a response to this criticism, the ECtHR provided in the *Boultif v Switzerland*⁹⁵ case a set of guiding principles which should be taken into consideration in expulsion cases. It stated:

In assessing the relevant criteria in such a case, the Court will consider the nature and seriousness of the offence committed by the applicant; the duration of the applicant's stay in the country from which he is going to be expelled; the time which has elapsed since the commission of the offence and the applicant's conduct during that period; the nationalities of the various persons concerned; the applicant's family situation, such as the length of the marriage; other factors revealing whether the couple lead a real and genuine family life; whether the spouse knew about the offence at the time when he or she entered into a family relationship; and whether there are children in the marriage and, if so, their age. Not least, the Court will also consider the seriousness of the difficulties which the spouse would be likely to encounter in the applicant's country of origin, although the mere fact that a person might face certain difficulties in accompanying her or his spouse cannot in itself preclude expulsion.⁹⁶

The Boultif criteria were later enriched with two additional principles:⁹⁷ 1) the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled and 2) the solidity of social, cultural and family ties with the host country and with the country of destination. It should be noted that the ECtHR applies only the first three criteria in the cases that the applicant does not have his or her own family in the Contracting State,⁹⁸ as well as the fact that the Boultif principles apply equally to second-generation immigrants and immigrants that have arrived in the host country as adults.⁹⁹

In particular, in *Boultif*, the ECtHR considers whether by refusing to renew the applicant's residence permit public authorities had struck a fair balance

not. The majority's case-by-case approach is a lottery for national authorities and a source of embarrassment for the Court'.

95 *Boultif v Switzerland*, Application no. 54273/00 (ECHR, 2 August 2001).

96 *Boultif v Switzerland*, cit, see para 48.

97 See *Onur v The United Kingdom*, cit.

98 See *Maslov v Austria*, cit.

99 See *Balogun v the United Kingdom*, cit, para 45: 'These criteria are relevant, where applicable, regardless of the age of the person concerned or their length of residence in the expelling State'.

between the applicant's right to respect for his 'family life', on one hand, and the prevention of disorder or crime, on the other. In doing so, the ECtHR considered if there was a possibility of establishing 'family life' elsewhere and in particular in Algeria, the applicant's country of origin or in Italy, the place where the applicant was unlawfully residing at the time the case was discussed. It concluded that although his wife spoke French, she did not have any ties with Algeria and therefore she could not be expected to follow her husband to his country of origin, nor could they both obtain authorisation to live in Italy. Therefore, the ECtHR found a violation of Article 8, as it concluded that it was practically impossible for the applicant to live his 'family life' outside Switzerland and that when the Swiss authorities decided to refuse his stay in Switzerland, he presented only a comparatively limited danger to public order.

In its more recent case law, the ECtHR keeps on applying the Boultif principles in order to find whether the interference was 'necessary in a democratic society'. In *Onur v the United Kingdom*, a Turkish national of Kurdish origin had been convicted for burglary and robbery and other more minor offences and was therefore expelled from the United Kingdom. He complained that the expulsion measure constituted a violation of his right to 'family life' under Article 8. The ECtHR noted that the applicant had spent a long period in the United Kingdom, he had never returned to Turkey during the nineteen years he lived in the host state and although he spoke Turkish at the time of his expulsion, he no longer had any social, cultural or family ties to Turkey. In addition, his partner and his three children lived in the United Kingdom and they had British nationality. However, in the present case, the ECtHR focused on the possibility of the family to relocate to Turkey, given that there were no circumstances that would preclude the applicant's wife from living in Turkey and that the children were at an adaptable age and as British nationals they could return to the United Kingdom on a regular basis in order to visit other family members living there.¹⁰⁰ Therefore, it concluded that a fair balance was struck in this case and that the applicant's expulsion from the United Kingdom was proportionate to the aims pursued and therefore 'necessary in a democratic society'.¹⁰¹

We end up this section with a rather striking case that reaffirms the strict position of the ECtHR in relation to the commission of crimes, especially related to drug trafficking. In *Ndidi v the United Kingdom*,¹⁰² the ECtHR considered that the expulsion of a person who arrived in the host country at the

¹⁰⁰ *Balogun v the United Kingdom*, cit, para 60.

¹⁰¹ *Balogun v the United Kingdom*, cit, para 62.

¹⁰² *Ndidi v the United Kingdom*, Application no. 41215/14 (ECtHR, 14 September 2017).

age of two and did not commit crimes again in almost ten years since the last commission did not violate Article 8 of the ECHR. The applicant, being a minor, was found guilty of crimes of robbery and assault. In 2008, at the age of majority, he was found guilty of drug-related offenses and was sentenced to seven years in prison. He was released in 2011 and at the same time he received an expulsion order. It should be noted that since his release he had not committed any further crime. In addition, he had a son, and his siblings and mother acquired United Kingdom citizenship. The ECtHR held that the facts of the case required careful examination, given the length of the applicant's residence in the United Kingdom, his relationship with his son and other family members there, and his limited ties to his country of origin. However, given his long history of offenses that continued beyond reaching the age of majority, the ECtHR considered that there was no reason for the decision of the national authorities to be revised.

5.4.3 Comments on the 'Boultif Criteria'

The positive aspect of the *Boultif* judgment is that it provides a concrete list of relevant principles which should be taken into consideration for the assessment of 'necessary in a democratic society', limiting to a certain extent the legal uncertainty that had been caused by the ECtHR's previous case law. It is true that before the *Boultif* case, the judgments of the ECtHR did not seem to follow a concrete line of reasoning and this had often led to contradictory or unexpected decisions. The situation has not changed entirely even after *Boultif* but the ECtHR has surely made progress as regards the categorisation of the factors which are taken into account in an Article 8 immigration case.

Nevertheless, the established principles can be criticised as having little to do with the actual notion 'family life'. In particular, the duration of the applicant's stay in the host country, the nationalities of the various persons concerned, the seriousness of the difficulties which the spouse would be likely to encounter in the applicant's country of origin ('elsewhere test') and the solidity of social and cultural ties with the host country and with the country of destination do not answer the question of whether the third-country national has an effective and genuine 'family life' which should be protected under 'family life' of Article 8. On the contrary, the majority of those factors and above all, the ECtHR's persistence in the social, cultural and linguistic ties with both the country of origin and the host country demonstrate the degree of social integration that the immigrant enjoys in the Contracting State.

In several cases the ECtHR attached great importance to the above-mentioned factors in order to decide whether there was a breach of the right to respect for 'family life'. In particular, the context of 'social and cultural ties'

includes the place where the applicant has received his or her schooling,¹⁰³ whether he or she tried to acquire the nationality of the host state, whether he or she speaks the language of that state¹⁰⁴ and the age in which he or she arrived into it.¹⁰⁵ In *El Boujaïdi v France* for instance, the fact that the applicant had not tried to acquire French nationality appeared as a crucial factor for the ECtHR to decide that the interference by the national authorities had been justified. Additionally, in a number of cases the ECtHR considered whether the applicants, nationals of French colonies, had made a declaration recognising French nationality following the independence of their country.¹⁰⁶ It could be argued that the fact that an immigrant attempts to acquire the nationality of a state might imply a desire to obtain a more stable legal status in order to protect his or her 'family life' there. However, this is a far-fetched argument and in general the attempt to acquire the nationality of a state should fall under a balancing test which 'measures' the immigrant's integration in the hosting country.

Given that the *Boultif* principles are applicable both in 'family' and in 'private life' cases,¹⁰⁷ we suggest that in the cases where the applicant has been found to enjoy 'family life', the ECtHR should focus more on the criteria that relate to the immigrant's family situation, such as the length of the marriage, factors revealing whether the couple lead a real and genuine family life, whether there are children in the marriage and, if so, their age and the best interests and well-being of the children. This approach would be more coherent with the actual content of the protected right as it will involve principles which are more related to the 'family life' of the persons involved. On the contrary, it seems reasonable to suggest that the rest of the principles, which have been identified before more as 'integration principles' should be more considered in cases where the immigrant enjoys 'private life' in the Contracting State. Furthermore, it is proposed that the ECtHR should limit the application of the 'elsewhere test', as the criticism on this issue, already made above, becomes relevant in relation to the proportionality test as well.

Despite the above critique on the relevance of the *Boultif* principles to the concept of family life, the Court seems to go even further applying considerations that seem to move away from the actual notion of family life even more. In *Palanci v Switzerland*,¹⁰⁸ the applicant was a Turkish national who entered

¹⁰³ See *Radovanovic v Austria*, Application no. 42703/98 (ECtHR, 22 April 2004).

¹⁰⁴ See *Amrollahi v Denmark*, Application no. 56811/00 (ECtHR, 11 July 2002).

¹⁰⁵ See *A.W. Khan v the United Kingdom*, cit.

¹⁰⁶ See *Beldjoudi v France*, cit.

¹⁰⁷ See, among others, *A.A. v the United Kingdom*, cit.

¹⁰⁸ *Palanci v Switzerland*, Application no. 2607/08 (ECtHR, 25 March 2014).

Switzerland in 1989 in order to seek asylum, and later on married his wife, a Turkish national with a residence permit for Switzerland, and had three children with her. The applicant was convicted of numerous criminal offences, most of them minor ones, and facing an expulsion, he left Switzerland and returned to Turkey. It should be noted that when the Swiss authorities decided the expulsion they took into consideration that he had accumulated debts. According to the government's arguments, the total debt of the applicant amounted to EUR 296,816.

In resolving the case, the Court applied the '*Boultif* principles', stating that the eighteen years that the applicant had spent in Switzerland was certainly a long enough period for the applicant to have established strong ties with Switzerland. Nevertheless, the Court also noticed that the applicant's immigration status remained uncertain for seven years, and therefore his situation was not comparable to a person who would have spent the same amount of years in a country with a valid residence permit. As regards the rest of the applicable criteria, the Court noticed that the applicant arrived in Switzerland at the age of eighteen and had spent his childhood in Turkey, where he received his education, and has retained social, cultural and linguistic ties with Turkey. Not least, the Court stated that there were no obstacles for the family to accompany him to Turkey and that the children were at an adaptable age and they spoke Turkish. As regards the criminal offences, the Court acknowledged that the majority of the offences were rather minor, except for the conviction for domestic violence, which was a serious one. Nevertheless, apart from the criminal convictions, the Court found it relevant to analyse the financial situation of the applicant, stating the following:¹⁰⁹

Apart from his criminal convictions, the Court observes that the applicant's continuously growing debts and his failure to pay his family maintenance were pertinent for the domestic authorities' decision when deciding on the immigration measures. In this regard, they had considered that despite the immigration authorities' repeated warnings, the applicant's financial situation had continuously deteriorated because of his unsuccessful attempts to establish a business of his own. The Court therefore agrees with the domestic authorities that the applicant lacked the necessary diligence and responsibility in financial and professional

¹⁰⁹ See also Burgers, 'Financial considerations in an expulsion case?' (Strasbourg Observers, 8 May 2014) <<https://strasbourgobservers.com>>.

matters, with the result that the number of debts increased and he and his family were dependent on social welfare until September 2004.¹¹⁰

The Court found that there was no violation of Article 8. Even though one cannot be certain on what the outcome of the case would have been had the Court not taken into consideration the debt situation of the applicant, previous case law of the Court shows that logically the Court considers that minor offences do not count heavily against the applicant. In *Keles v Germany*,¹¹¹ for instance, the ECtHR stated that the numerous traffic offences that the applicant had committed did not constitute an influential factor for the outcome of the case. In any event, the reference of the Court to the financial situation of the applicant demonstrates that increasingly more criteria that are not inherent to the nature of the right to family life come into play in the proportionality test that is applied by the Court in Article 8 expulsion cases.

6 Conclusions

One of the most positive contributions of the ECtHR case law in Article 8 cases is the *de facto* approach taken in relation to the definition of family. The same is true as regards the Court's recent case law on family reunification laws that have been declared discriminatory for excluding same-sex couples from their scope. These judgments are not only welcome, but should also have a direct impact on same-sex couples requesting family reunification in one of the ECHR Contracting States.

On the other hand, it should be borne in mind that the ECHR does not establish a genuine right to family reunification for foreigners. Despite the fact that some judgments appear to adopt a more flexible approach, the threshold of protection remains particularly low and can mainly benefit people in need of international protection due to the application of the 'elsewhere test'. Regarding the family reunification of migrants, the Court normally does not accept that there are insurmountable obstacles that prevent them from returning to the country of origin and reunifying with their family members there. However, the age of the children and their degree of dependency on their parents are factors that could lead to a favourable resolution. Speaking of positive obligations, it should not be overlooked that the cases of regularisation of

¹¹⁰ *Palanci v Switzerland*, cit, para 58.

¹¹¹ *Keles v Germany*, cit.

foreigners with family ties in the host country is another line of the ECHR that deserves to be further developed, as it could have an impact on certain cases of irregular migrants.

As regards expulsion cases, even though the Court appears to be more protective towards family life, the main problem still concerns the nature of the principles that are applied by the Court in these cases. It is evident that the '*Boultif* criteria' now constitute established principles of the Court in such cases. Nevertheless, not all of these criteria have, or should have, the same importance in speaking about the immigrants and refugees' right to family life. Certain of those criteria are integration-oriented and would probably fit better into the notion of 'private life' whereas more recent case law of the Court makes one fear that criteria even more remote from the notion of family life are starting to play a role in the Court's judgments. In that respect, the Court should reconsider its approach and weigh more deeply the criteria that demonstrate the existence or not of family life, which is what is actually meant to be protected under 'family life' in Article 8.

Political Rights of Aliens

Articles 10, 11 and 16 of the ECHR and Article 3 of Additional Protocol I

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1 Introduction and Context

The European Court of Human Rights (ECtHR) proclaims that '[d]emocracy is without doubt a fundamental feature of the European public order'.¹ The Preamble to the European Convention on Human Rights (ECHR) enunciates that 'the maintenance and further realisation of human rights and fundamental freedoms are best ensured on the one hand by an effective political democracy and on the other by a common understanding and observance of human rights'.²

Democracy, however, does not exist in a vacuum. It is premised on the existence of a polity with members – the *demos* – by whom (and for whom?) democratic discourse with its many variants takes place.³ Hence, the determination that democracy is the only Convention-compatible system of governance does not in and of itself resolve the tension between, on the one hand, limitations of participation in democratic self-governance, deemed to be 'fundamental to the definition of a political community'⁴ and critical for newly created polities⁵ and, on the other hand, the demands of (universal) human rights.⁶ In turn, the

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¹ *United Communist Party of Turkey and Others v Turkey*, Application no. 19392/92 (ECtHR, 30 January 1998), para 45.

² Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, ETS no. 5 (entered into force 3 September 1953).

³ Weiler, 'To Be a European Citizen – Eros and Civilization' (1997) 4 Journal of European Public Policy 495, p. 503.

⁴ Johnstone, 'Outside Influence' (2014) 13 Election Law Journal 117, p. 120.

⁵ Ziegler, Shaw and Bauböck (eds), *Independence Referendums: Who Should Vote and Who Should be Offered Citizenship?* (Robert Schuman Centre for Advanced Studies EUI, 2014).

⁶ For a general discussion see Pildes, 'Supranational Courts and the Law of Democracy: The European Court of Human Rights' (2017) Journal of Dispute Settlement 1.

ECHR is silent on citizenship criteria,⁷ reserving it to the state's domain,⁸ notwithstanding its profound implications for political participation.

The tension presents itself in respect of two interdependent aspects of political participation in a self-governing polity: *political communication rights* (freedoms of expression, assembly, and association, enunciated in Articles 10 and 11 of the ECHR, respectively) and *electoral rights* (pursuant to Article 3 of Additional Protocol 1, A3P1).⁹ Member States' general undertaking in Article 1 of the ECHR to 'secure to everyone within their jurisdiction the [Convention] rights and freedoms' is linguistically qualified in respect of Articles 10 and 11 by Article 16 ('Restrictions on Political Activities of Aliens'), and in respect of A3P1 by the stipulation that elections should be held 'under conditions which ensure the free expression of the opinion of *the people* ...' (emphasis added). Notably, despite its 'institutional' language, Convention organs have consistently held that A3P1 entails *individual* rights to vote and to be elected (the 'passive' and 'active' elements thereof, respectively).¹⁰

At this heart of this chapter's analysis lies the function of, and relationship between, political communication rights and electoral rights; through an appraisal of ECHR jurisprudence, it considers the extent to which resident aliens should enjoy access to their Member State of residence's Arendtian political space, where one's opinions are significant and actions effective.¹¹ If Council of Europe Member States are permitted to apply a citizenship qualification to participation in some or all of its electoral processes (predicated on a restrictive interpretation of 'the people' in A3P1), does that weaken or strengthen aliens' claim to enjoy without discrimination political communication rights which fall short of decision-making?

In Section 2, the chapter considers the potential effect (or lack thereof) of Article 16 of the ECHR as a 'stop-gap', permitting states to impose restrictions

⁷ But see Council of Europe, European Convention on Nationality, Strasbourg, 6 November 1997, ETS No 166, (entered into force 3 March 2000) esp. Art 6 (Acquisition of Nationality) (21 ratifications; 8 signatures).

⁸ Day and Shaw, 'European Union Electoral Rights and the Political Participation of Migrants in Host Polities' (2002) 8 International Journal of Human Geography 183, p. 187.

⁹ Protocol No 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 20 March 1952, ETS No 9 (entered into force 18 May 1954). The undertaking to 'hold free elections at reasonable intervals by secret ballot' *ipso facto* imposes positive obligations on the state. See e.g. O'Connell, 'Realising political equality: the European Court of Human Rights and positive obligations in a democracy' (2010) 61 Northern Ireland Legal Quarterly 263.

¹⁰ The leading case being *Mathieu-Mohin v Belgium*, Application no. 9267/81 (ECtHR, 2 March 1987), paras 48–52.

¹¹ Arendt, *The Origins of Totalitarianism* (Harcourt, 1950, p. 296).

on aliens that are not mandated by Articles 10 and 11's limitation clauses. It is suggested that Article 16 has fallen into desuetude, absent a single case where Convention organs *applied* it, with states generally choosing no longer to invoke its application to justify restrictions on Articles 10 and 11. Nevertheless, the limited case law where the provision has been analysed suggests that citizens of the European Union (EU) residing in another EU Member State (referred to in EU law as Second Country Nationals) are differently situated than other resident aliens as per their 'alien' designation, not least due to protection (pursuant to the EU legal order) of their electoral rights in local government (municipal) elections.

In Section 3, the chapter investigates the reference to 'the choice of the people' in A3P1, noting the terminological difference between its stipulation and references to electoral rights of citizen(s) in *international* human rights treaties. The ECtHR has held that clauses that permit interference with Convention rights must be interpreted restrictively.¹² However, in appraising electoral exclusions of citizens, the ECtHR has not applied rigorous scrutiny to the identification of legitimate aims, absent a prescribed list; the Court has also extended a wide 'margin of appreciation' to Member States on questions of electoral *eligibility*.¹³ Critically for the purposes of this chapter, hitherto, the ECtHR has neither heard challenges to the near-universal exclusion of aliens from participation in *national* elections¹⁴ (the United Kingdom and Portugal have *selective* nationality-based enfranchisement regimes) nor to widespread exclusion of aliens from participation in *sub-national* elections. Should such

¹² See e.g. *Stoll v Switzerland*, Application no. 69698/01 (ECtHR, 10 December 2017), para 61. See also Schabas, *The European Convention on Human Rights: A Commentary* (OUP, 2015, p. 509), noting that the ancestor of the restrictions and limitations clauses appears to be Article 29(2) of the Universal Declaration on Human Rights, GA Res 217 A (III) (10 December 1948) (UDHR), which stipulates (in respect of the entire Declaration) that '[i]n the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.'

¹³ For critique of ECtHR jurisprudence regarding convicts and non-residents, see Ziegler, 'Voting Eligibility: Strasbourg's Timidity' in Ziegler, Wicks and Hodson (eds), *The United Kingdom and European Human Rights: A Strained Relationship?* (Hart, 2015, p. 165). Cf. Sejdić and Finci v Bosnia and Herzegovina, Application nos. 27996/06 and 34836/06 (ECtHR, 22 December 2009), violation of A3P1 in conjunction with Article 14 ECHR in respect of Roma and Jewish BiH citizens who were not permitted to stand as candidate for the House of Peoples and the Presidency of BiH pursuant to the definition of the 'constituent peoples' of BiH.

¹⁴ Beckman, 'Citizenship and Voting Rights: Should Resident Aliens Vote?' (2006) 10 Citizenship Studies 153, p. 153.

challenges arise, the rationale for selective enfranchisement will have to be properly scrutinised.

Finally, in Section 4, the chapter appraises aliens' political communication rights, pursuant to Articles 10 and 11 ECHR. In light of sections 2 and 3, above, it is contended that across the Council of Europe (a) *most* aliens are denied *most* electoral rights; (b) restrictions on 'political activities of aliens' which fall *short of electoral rights* require independent justifications that meet the proportionality tests under those provisions, rather than by reliance on Article 16; and (c) *prima facie* prescribed limitations in Articles 10 and 11 do not distinguish between citizens and aliens (or indeed between different aliens).¹⁵ Absent a *vote*, should aliens' *voice* be limited, too, given its (intended) effects on voters? it could be argued that those political communication rights that are 'related' to democratic self-governance should be subject to similar eligibility criteria.¹⁶ Conversely, for aliens, their exclusion from decision-making, coupled with their (non)security of residence, entails vulnerabilities which political communication rights *may* (partially) mitigate. It is also arguably important for citizens to be exposed to the full spectrum of views in order to facilitate informed decision-making.

2 Article 16: Stop-Gap?

ARTICLE 16

Nothing in Articles 10, 11, and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens.

2.1 The Potential Scope of Article 16

The *effet utile* (effectiveness) principle suggests that, Article 16 operates as an *additional* limitation to paragraph 2 of Articles 10 and 11; *a contrario*, it could serve to strengthen the claim that the latter clauses in and of themselves do not

¹⁵ Similarly, the Human Rights Committee (HRC), notes in respect of the International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (ICCPR) that '*the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party*'. General Comment no. 31, *The nature of the general legal obligations imposed on states parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13 [10].

¹⁶ Compare: *Bluman v Federal Election Comission*, 800 F. Supp. 2d 281, 283 (D.C. Cir. 2011); 132 S. Ct. 1087 (2012).

distinguish between citizens and aliens, *pace* Article 1 above. Article 16 refers to Article 14 (non-discrimination) without explicitly confining its application to restrictions imposed on aliens under Articles 10 and 11. Notably, Article 14 is not a free-standing right: for a discrimination claim to be invoked, an issue must fall within the ambit of a Convention right.

Article 16 was characterised by Schabas in his Commentary as an *admissibility* test, pursuant to which a CoE MS could object to an application on the grounds that the individual concerned is an ‘alien’.¹⁷ The provision does not refer to A3P1, given its later adoption, notwithstanding the *a fortiori* logical extension thereto.

2.2 *Are Second-Country Nationals ‘Aliens’ in Their Country of Residence?*

In *Piermont v France*,¹⁸ the majority *ratio* has effectively taken the view that Article 16 ECHR may *not* be invoked where a citizen of the Union seeks to exercise their rights under the Convention. France has prevented the applicant, Dorothée Piermont, a German national and a Member of the European Parliament (MEP), from re-entering French overseas territories in the South Pacific after she took part in demonstrations against the government in French Polynesia. France alleged that, the applicant was an alien within the meaning of Article 16 ECHR, and therefore could not rely on the protections of Article 10.

The Court considered that, while *citizenship of the Union* as such could not be relied on ‘since the Community treaties did not at the time [1986] recognise any such citizenship’, the ‘possession of the nationality of a Member State of the EU and (...) her status as an MEP do not allow Article 16 (...) to be raised against her, especially as the people of the overseas territories take part in European Parliament elections’.¹⁹ Based on this reasoning, in 2018, post-Maastricht, SCNs are not considered ‘aliens’ for the purposes of Article 16.²⁰ Judges Ryssdal, Matscher, Sir John Freeland and Jungwiert, in a joint partly dissenting opinion, argued that Article 16 should have been regarded as having at least some relevance, since the applicant was clearly an alien in the eyes of French law, and therefore in the sense of Article 16.²¹

¹⁷ Commentary (above no. 12) p. 606.

¹⁸ *Piermont v France*, Application nos. 15773/89 and 15774/89 (ECtHR, 27 April 1995).

¹⁹ Id [64].

²⁰ See also *Perincek v Switzerland*, Application no. 27510/08 (ECtHR, 15 October 2015), noting *pace Piermont* that Article 16 could not be raised against a citizen of another EU Member State, but that it could not provide a justification for the interference in that case.

²¹ *Piermont v France*, cit, para 4. The dissenting judges proceed to clarify that, even if Article 16 is relevant, it does not entail unfettered discretion of the host state to restrict on the political activity of an alien without contravention of Article 10. Id [5].

In accordance with the principle of non-discrimination in EU law,²² EU citizens should enjoy municipal electoral rights under the same conditions as nationals of the Member State where they reside.²³ Consequently, Second Country Nationals must be able to fully take part in the political life of their Member State of residence. Moreover, the nature of elections to the European Parliament means that, for effective democratic participation, political activities of Second Country Nationals both in their Member State of residence and in their Member State of nationality are critical on matters of common concern.²⁴ Notions of ‘us’ and ‘them’ in respect of Second Country Nationals are accordingly redefined.²⁵

Notably, the European Union’s Long-Term Residents Directive,²⁶ amended in 2011 to extend its scope to eligible Beneficiaries of International Protection (persons granted refugee or subsidiary protection status, previously excluded therefrom)²⁷ maintains the distinction between SCNs and Third Country Nationals regarding municipal electoral rights. A link was thus made between the EU ‘*demos*’ and the state of residence, not just for the purposes of citizen participation in the ‘democratic life of the Union’,²⁸ where its applicability seems mandated, but also for participation in municipal elections, wherever they reside in the Union.

²² Treaty of the Functioning of the European Union, OJ C 115/47 (29 May 2008) (TFEU) Article 18 (stipulating that ‘[w]ithin the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited (...).’).

²³ Treaty on the Functioning of the European Union, Article 20.2(b); Directive 93/109/EC of 6 December 1993, OJ L329/34 as amended by Council Directive 2013/1/EU of 20 December 2012, OJ L26/27; Directive 94/80/EC of 19 December 1994, OJ L368/38. See also Explanations relating to the Charter of Fundamental Rights OJ 303/17 (14 December 2007) (noting, regarding Article 52 thereof, that ‘[c]itizens of the European Union may not be considered as aliens in the scope of the application of Union law, because of the prohibition of any discrimination on grounds of nationality. The limitations provided for by Article 16 of the ECHR as regards the rights of aliens therefore do not apply to them in this context.’).

²⁴ *Cox v Turkey*, Application no. 2933/03 (ECtHR, 20 May 2010), where the court held that in questions of common European concern, the extent of political freedoms granted to a state’s own nationals and to other Europeans must be the same.

²⁵ Finck, ‘Towards an Ever Closer Union between Residents and Citizens?’ (2015) 11 European Constitutional Law Review 78, p. 86.

²⁶ Council Directive 2003/109/EC of 25 November 2003 Concerning the Status of Third-Country Nationals who are Long-Term Residents, OJ L16 (23 January 2004).

²⁷ Directive 2011/51/EU of the European Parliament and of the Council of 11 May 2011, OJ L132 (19 May 2011).

²⁸ Treaty on European Union, OJ C 326 (26 October 2012) Article 10(3).

2.3 Desuetude?

In *Piermont*, the Commission stated that ‘those who drafted [Article 16] were subscribing to a concept that was then prevalent in international law, under which a general, unlimited restriction of political activities of aliens was thought legitimate’.²⁹ Indeed, Article 16 dates to a time when it was considered legitimate to restrict the political activities of aliens generally. The underlying rationale was that these activities were apt to disrupt a state’s external relations. However, subsequent human rights treaties, such as the ICCPR,³⁰ to which all Council of Europe Member States are parties,³¹ the American Convention on Human Rights,³² the African Charter of Human and Peoples’ Rights,³³ and indeed the Charter of Fundamental Rights of the EU³⁴ do not include similar provisions.

It is also noteworthy that, Article 53 of the ECHR stipulates that ‘[n]othing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party’. Given the absence of an Article 16 equivalent in the ICCPR, it is hardly surprising that the provision has never been applied by the (former) Commission or the ECtHR and has arguably fallen into desuetude. Over four decades ago, the Parliamentary Assembly of the Council of Europe (PACE) called for proposals for repealing Article 16,³⁵ though to-date its repeal has not materialised.

It is instructive to consider cases where invocation of Article 16 could have been anticipated, such as the forced evacuation of the Saint-Bernard church in Paris ‘occupied’ by irregular migrants and their supporters;³⁶ or the confiscation by Swiss authorities of an Algerian national’s means of communication in order to prevent him from spreading information about the pro-Algerian opposition party *Front Islamique du Salut*.³⁷ A Greek court interpreting Article

²⁹ *Piermont v France*, cit, (citing Commission Report A 314 (20 March 1995), para 58).

³⁰ Above no. 15.

³¹ See, <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en>.

³² 22 November 1969 (entered into force 18 July 1978).

³³ 27 June 1981, 21 ILM 58 (1982).

³⁴ OJ C 326 (26 October 2012).

³⁵ PACE, Recommendation No 799 (15 January 1977) on the Political Rights and Position of ‘Aliens’ [10]. It also advocated the ‘the establishment, where appropriate, of consultative councils to represent the views of aliens at the level of local authorities’.

³⁶ *Cissé v France*, Application no. 51346/99 (ECtHR, 9 April 2002).

³⁷ *Zaoui v Switzerland*, Application no. 41615/98 (ECtHR, 18 January 2001).

16 noted that, the establishment of aliens' associations should be allowed even if they relate to aliens' political activity.³⁸ In an English High Court case, an entry ban imposed by the Home Office on Louis Farrakhan, the American leader of the religious group 'Nation of Islam' was upheld as satisfying Article 10(2) proportionality between the aim of the prevention of disorder and freedom of expression. The Court dismissed Article 16 as 'something of an anachronism half a century after the agreement of the Convention'.³⁹ In *Cox v Turkey*, the ECtHR left a narrow window for future reference to Article 16. It held that, since the right to freedom of expression was guaranteed by Article 10(1) 'regardless of frontiers', no distinction could be drawn between its exercise by nationals and foreigners; hence, Article 16 should be construed as only capable of authorising restrictions on 'activities' that directly affect the 'political' process.⁴⁰

Given the above, *direct* reliance on Article 16 in future appears unlikely. However, this does not necessarily mean that the provision has lost its broader currency, as an implicit (background) consideration for states, facilitated by its retention in the Convention text and the inexact (open-ended?) nature of several limitation grounds in Articles 10(2) and 11(2).

3 Article 3 Additional Protocol 1

ARTICLE 3

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

3.1 'The Opinion of the People'

Article 25 of the ICCPR proclaims that 'every citizen' shall have the 'right to vote and to be elected by genuine periodic elections',⁴¹ permitting (though

³⁸ Mavrodi, 'The Impact of the European Convention of Human Rights and the European Court of Human Rights on the Rights of Third Country Nationals in Greece' (2008) 22 *Journal of Immigration Asylum and Nationality Law* 45, text next to notes 48–51.

³⁹ *R (on the application of Farrakhan) v Secretary of State for the Home Department* [2002] EWHC Civ 606.

⁴⁰ *Cox v Turkey*, cit, para 31.

⁴¹ See also American Convention on Human Rights (22 November 1969) Article 2 African Charter on Human and Peoples' Rights, 27 June 1981, 21 ILM 1982 (entered into force 21 October 1986) Article 12.

by no means requiring) states to apply citizenship voting qualifications.⁴² In its General Comment No 25,⁴³ the Human Rights Committee (HRC) contrasted ‘the right to participate in public affairs’ with ‘other rights and freedoms recognised by the Covenant (which are ensured to all individuals within the territory and subject to the jurisdiction of the state)’, noting the explicit reference to ‘citizen’.⁴⁴ As noted above, the Treaty on the Functioning of the EU similarly refers to citizens’ electoral rights regarding the European Parliament.

In contradistinction, the (earlier and non-binding) UDHR stipulates in Article 21 that ‘[e]veryone has the right to take part in the government of his country, directly or through freely chosen representatives’. The same terminology appears in the ICCPR in respect of ‘the right to enter his own country’,⁴⁵ which the HRC has interpreted as ‘not limited to nationality in a formal sense, that is, nationality acquired at birth or by conferral; it embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien’.⁴⁶

Could the reference in A3P1 to the ‘the opinion of the people’ rather than to citizens facilitate inquiry, in appropriate cases, into exclusion of (some or all) aliens from participation in (some or all) electoral processes? In respect of deportations, the court has accepted that the ‘preferential treatment’ of citizens of other EU Member States is based on an objective and reasonable justification, ‘given that the Member States of the European Union form a special legal order, which has, in addition, established its own citizenship’.⁴⁷ Would the ECtHR accept a similar rationale in respect of the electoral exclusion of Third Country Nationals from electoral participation, were it be challenged on the basis that ‘the people’ in such Council of Europe Member States appear to include (some) non-citizens?

⁴² For discussion of citizenship voting qualifications, see Ziegler, *Voting Rights of Refugees* (Cambridge University Press, 2017, ch 2).

⁴³ General Comment no. 25: *The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service* (Art. 25) (57th session, 12 July 1995).

⁴⁴ Id [3].

⁴⁵ ICCPR (above no. 15) art 12(4).

⁴⁶ General Comment Application no. 27: *Freedom of movement* (Art. 12) (2 November 1999), CCPR/C/21/Rev.1/Add.9 [20].

⁴⁷ *C. (Chorfi) v Belgium*, Application no. 21794/93 (ECtHR, 7 August 1996), para 38; see also *Moustaquim v Belgium*, Application no. 12313/86 (ECtHR, 18 February 1991), para 49.

3.2 *Enfranchisement of (Some) Aliens in Sub-National (Local) Elections*

In a resolution prior to the Maastricht treaty,⁴⁸ the European Parliament noted that '[t]he cornerstone of democracy is the right of voters to elect the decision-making bodies of political assemblies at regular intervals. If the right to vote is to be truly universal, it must be granted to all residents of the territory concerned (...) universality, in the original sense of the word, would imply that all residents irrespective of nationality are included in the electorate'.⁴⁹

In parallel to the enfranchisement of Second Country Nationals in municipal elections in their EU Member State of residence *pace* Maastricht, 1992 saw several Council of Europe Member States ratifying the Convention on Participation of Foreigners in Public Life at the Local Level.⁵⁰ The professed aim of this treaty is 'to improve integration of foreign residents into the local community (...) by enhancing the possibilities for them to participate in local public affairs'.⁵¹ Contracting Parties undertake to grant to 'every foreign resident' who has been a habitual and lawful resident for five years preceding the date of the election 'the right to vote and to stand in local authority elections'.⁵²

In 2001, PACE recommended that Council of Europe Member States 'grant the right to vote and stand in local elections to all migrants legally established for at least three years irrespective of their origin' as well as 'promote the action of migrants' organisations and associations and encourage the networking of their activities'. It also called on them to ratify the abovementioned treaty.⁵³ A 2005 PACE resolution stipulated that '[t]he right to vote and to stand as candidates in local elections should therefore be granted to all legal residents having lived long enough in the country, regardless of their nationality or ethnic origin'.⁵⁴ Nevertheless, despite the passage of time, and notwithstanding the consequences of Maastricht, only a minority of Council of Europe Member States have ratified the treaty,⁵⁵ and many EU Member States retain selective enfranchisement that meet (just) their EU law obligations.

⁴⁸ Treaty on European Union (Consolidated version), Treaty of Maastricht, 7 February 1992, OJ C 191 (29 July 1992).

⁴⁹ European Parliament, *Voting Rights in Local Elections for Community Nationals Residing in Member States other than their own*, COM(86)487 final at 11.

⁵⁰ Strasbourg, 5 February 1992, ETS no. 144 (entered into force 1 May 1997).

⁵¹ Id, Preamble.

⁵² Id Art. 6.

⁵³ See e.g. PACE Recommendation 1500 (26 January 2001), *Participation of immigrants and foreign residents in political life in the Council of Europe member states* [11].

⁵⁴ PACE, Resolution 1459 (2005) Abolition of restrictions on the right to vote [5].

⁵⁵ Ratifications: Albania, the Czech Republic, Denmark, Finland, Iceland, Italy, the Netherlands, Norway, Sweden. Signatures: Cyprus, Lithuania, Slovenia, and the United Kingdom.

It is instructive to compare the position under the Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, which entered into force in 2002.⁵⁶ Migrant workers and members of their families 'shall have the right to participate in public affairs of their State of origin and to vote and to be elected at elections of that State'.⁵⁷ In contradistinction, they 'may enjoy political rights in the State of employment if that State, in the exercise of its sovereignty, grants them such rights'.⁵⁸ The stipulation does not distinguish between levels of governance, emphasising whilst international human rights law does not generally require states to enfranchise aliens, they are permitted (perhaps even encouraged) to do so.

3.3 *Can Electoral Exclusion of Aliens Be Challenged in Future ECtHR Case Law?*

In addition to national elections, the ECtHR has considered elections to the devolved administrations in the United Kingdom (the Scottish Parliament, the Welsh Assembly, and the Northern Irish Assembly) to fall within the ambit of A3P1 *qua* 'the choice of the legislature'⁵⁹ given their law-making powers. The ECtHR has similarly applied A3P1 scrutiny to the franchise in EP elections.⁶⁰ In contrast, referendums generally fall outside of the ambit of the provision.⁶¹

Given that the UK left the EU on 31 January 2020, EU Member States are no longer required by EU law to enfranchise their resident United Kingdom citizens *qua* their 'relegation' to Third Country Nationals status. Nevertheless, persons who have been exercising both 'passive' and 'active' electoral rights prior to the UK's departure may challenge their disenfranchisement, given that exclusion and non-inclusion are distinguishable.⁶² Such challenges may be

56 General Assembly resolution 45/158 of 18 December 1990 (entered into force 1 July 2003).

57 Id Art. 41.

58 Id Art. 42(3).

59 See e.g. *McHugh and others v the United Kingdom*, Application no. 51987/08 (ECtHR, 10 February 2015).

60 See e.g. *Matthews v the United Kingdom*, Application no. 24833/94 (ECtHR, 18 February 1999) [52–54] (describing the European Parliament as '*represent[ing] the principal form of democratic, political accountability in the Community system*', deriving '*democratic legitimisation from the direct elections by universal suffrage*').

61 *Mclean and Cole v the United Kingdom*, Application nos. 12626/13 and 2522/12 (ECtHR, 26 June 2013).

62 See Ziegler, 'Written evidence' (UK House of Lords' EU (Justice) sub-committee 'Brexit: citizens' rights inquiry', 24 November 2017); available at: <<https://tinyurl.com/kacnbtxm>>. See also 'Mini-symposium on EU Citizenship in the Shadow of Brexit' (European Law Blog, 19 December 2018); available at: <<https://europeanlawblog.eu/2018/12/19/part-iii-mini-symposium-on-eu-citizenship-in-the-shadow-of-brexit-the-right-of-uk-nationals-to-vote-in-european-parliament-elections-in-the-eu-27/>>.

reviewed subject to the general standard that the ECtHR has applied to restrictions or limitations on the right to vote, namely that they 'do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate'.⁶³

4 Articles 10 & 11: Political Communication Rights

ARTICLE 10

1. *Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*
2. *The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.*

ARTICLE 11

1. *Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.*
2. *No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.*

63 *Hirst (no. 2) v the United Kingdom*, Application no. 74025/01 (ECtHR, 6 October 2005), para 62.

4.1 *The Mutually Reinforcing Political Dimension of Articles 10 and 11*

The ECtHR has held that 'freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual's self-fulfilment'.⁶⁴ In turn, protection of opinions and the freedom to express them within the meaning of Article 10 of the Convention is one of the objectives of the freedoms of assembly and association enshrined in Article 11.⁶⁵ Article 11 protects peaceful assembly and association, which share the objective of allowing individuals to come together for the expression and protection of their common interests. The ECtHR held that 'participation of citizens in the democratic process is to a large extent achieved through belonging to associations in which they may integrate with each other and pursue common objectives collectively'.⁶⁶ Therefore, the function of Article 11 freedoms is central to the effective working of the democratic system. It is hardly surprising that Article 11 has been interpreted in conjunction with Article 10,⁶⁷ and vice versa.⁶⁸

The court has interpreted political rights to include positive obligations to 'guarantee rights that are not theoretical or illusory, but practical and effective'⁶⁹ not least given the observation that the rights enshrined in Articles 10 and 11 are essential for effective exercise of electoral rights. Such positive obligations are 'of particular importance for persons holding unpopular views or belonging to minorities, because they are more vulnerable to victimisation'.⁷⁰

As per the ECtHR's jurisprudential practice, it places the initial onus on the applicant to demonstrate that one or more of the rights in Articles 10 and 11 has been infringed. It then proceeds to query the State's justifications, namely whether the limitation is pursuant to one or more of the prescribed grounds, and whether it is 'necessary in a democratic society'. The ECtHR held that, in determining necessity in respect of political activities (generally), Council of

64 *Rekvényi v Hungary*, Application no. 25390/94 (ECtHR, 20 May 1999), para 42.

65 e.g. *Parti Nationaliste Basque– Organisation Regionale D'Iparralde v France*, Application no. 71251/01 (ECtHR, 7 June 2007), para 33.

66 *Alekseyev et al v Russia*, Applications nos. 4916/07, 25924/08, and 14599/09 (ECtHR, 21 October 2010), para 62.

67 e.g. in respect of political parties, where the ECtHR held that '*the protection of opinions and the freedom to express them is one of the objectives of the freedom of association as enshrined in Article 11*'. *Ouranio Toxo and Ors v Greece*, Application no. 74989/01 (ECtHR, 20 October 2005), para 35 (concerning a party constituted to defend the interests of the Macedonian minority living in Greece).

68 See e.g. *Szima v Hungary*, Application no. 29723/11 (ECtHR, 9 October 2012), para 13.

69 *United Communist Party of Turkey and Ors v Turkey*, cit, para 33.

70 See e.g. *Bączkowski and ors v Poland*, Application no. 1543/06 (ECtHR, 3 May 2007), para 64.

Europe Member States have a limited margin of appreciation,⁷¹ which goes hand in hand with rigorous European supervision,⁷² and narrow scope for subsidiarity.⁷³

None of the prescribed grounds in both provisions address themselves specifically to aliens. Indeed, notably, Articles 10 and 11 do not distinguish between transient non-citizens, long-term residents, and permanent residents; or between asylum-seekers, recognised refugees, and other migrants. Hence, distinctions *between* non-citizens must be objectively justified, rather than assumed.⁷⁴ Would the distinction drawn above between SCNS and other aliens in those Council of Europe Member States that are also EU Member States also justify differential treatment in respect of Articles 10 and 11 rights? Does the (political) predicament of recognised refugees uniquely situate them as persons requiring (political communication) remedies?

The HRC's approach in General Comment Application no. 15⁷⁵ provides a helpful context. The HRC asserts that '[a]liens (...) have the right to (...) hold opinions and to express them. Aliens receive the benefit of the right of peaceful assembly and of freedom of association (...) [t]here shall be no discrimination between aliens and citizens in the application of these rights.'⁷⁶ The following sections query the applicability of this (unqualified) statement.

4.2 *A (Political) Voice without a Vote?*

The right to vote plays both expressive (manifestation of non-domination and self-governance) and instrumental (as a means for protecting individual interests and expressing preferences) roles.⁷⁷ If aliens are excluded from electoral participation, the question is whether the state may restrict their engagement

⁷¹ Cf *Plattform Ärzte für das Leben v Austria*, Application no. 10126/82 (ECtHR, 21 June 1988), para 34 (wide discretion in the exercise of reasonable and appropriate measures to enable lawful demonstrations to proceed peacefully).

⁷² Id [46].

⁷³ Mahoney, 'Universality v Diversity in the Strasbourg case law on free speech: explaining some recent judgments' (1997) 4 European Human Rights Law Review 364, p. 379 (contrasting it with cultural or artistic speech).

⁷⁴ See 'Aliens' right not to be discriminated against', Chapter 10 in this volume.

⁷⁵ HRC, General Comment No 15: *The Position of Aliens under the Covenant* (27th session, 11 April 1986).

⁷⁶ Id [7].

⁷⁷ For discussion, see Ziegler, *Voting Rights of Refugees*, cit, ch. 3 (considering four grounds for regarding the right to vote as fundamental for individuals: enhancement of human agency and autonomy; the expressive character of voting; human dignity; and enjoyment of equal worth, concern and respect). Regarding aliens' participation, see Zapata-Barrero, *The Political Participation of Immigrants in Host Countries* (MPC EUI, 2013).

in *other* political activities to try to persuade citizens how to use *their* voting power, given that such restrictions aggravate the expressive effects of disenfranchisement. As the HRC states in its General Comment no. 34, '[f]reedom of opinion and freedom of expression are indispensable conditions for the full development of the person and constitute the foundation stone for every free and democratic society.'⁷⁸

Lardy argues that the restriction on the free speech of 'aliens' is related to the goal of limiting the active participation of non-citizens in political life, the same aim which underlies the denial of the right to vote.⁷⁹ In the United States, Congress banned 'a contribution or donation of money or other thing of value in connection with a Federal, State, or local election' to election campaigns by non-citizens⁸⁰ except when made by lawful permanent residents.⁸¹ The ban was upheld by the Federal District Court in Washington D.C., which analogised participation in electoral campaigns to other activities that may be limited to American citizens, such as voting, serving on a jury, working as a police officer, or being a teacher in a public (state-maintained) school.⁸² The Court held that, while the U.S. 'does not bar foreign nationals from issue advocacy'⁸³ it 'has a compelling interest (...) in limiting the participation of foreign citizens in activities of American democratic self-government'.⁸⁴

In contrast, it could be argued that freedoms of expression, assembly, and association function within liberal democracies to address deficiencies within the functioning of the democratic processes. Those rights serve to protect the political freedoms of individuals against the potential incursions of electoral majorities and their chosen governors. They mitigate those features of the electoral system which tend to place certain groups – and the corresponding electoral minorities – under threat. If aliens are denied a vote, at least they can try to persuade voters. As Aleinikoff puts it, '[A]re not those in the outer rings

⁷⁸ HRC, General Comment Application no. 34: *Article 19: Freedom of Opinion and Expression* (102nd session, 12 September 2011) [1].

⁷⁹ Lardy, 'Is there a right not to vote?' (2004), 24(2) Oxford Journal of Legal Studies 303, p. 310.

⁸⁰ 2 U.S.C. para 441(a).

⁸¹ Id. para 441e(b).

⁸² *Bluman v Federal Election Commission*, 800 F. Supp. 2d. 281, 283 (D.D.C. 2011); 132 S.Ct. 1087 (2012) (without decision (referring to *United States v Verdugo-Urquidez*, 494 U.S. 259, 265 (1990) stipulating that '[T]he people in the U.S. Constitution refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community').

⁸³ Id 284.

⁸⁴ Id 288.

of membership arguably in need of greater protection because they are not permitted to participate in the political process and traditionally have been the subjects of discriminatory legislation.⁸⁵ While other voters can advocate on their behalf, such advocacy is more abstract and reinforces a power hierarchy, privileging one person while stripping the person who is directly affected of his or her voice.⁸⁶

Council of Europe Member States that are signatories to the Convention on the Participation of Foreigners in Public Life at the Local Level undertake to guarantee the right to freedom of expression and the right to freedom of peaceful assembly and to freedom of association with others to foreigners *on the same terms as to nationals*.⁸⁷ Aliens also have the right to form local associations of their own for purposes of mutual assistance, maintenance and expression of their cultural identity or defence of their interests. Consider the role performed by EU27 citizens in the United Kingdom in discussions concerning the protection of their rights following the outcome of the 23rd June 2016 referendum on the United Kingdom's EU membership, notwithstanding the fact that most EU27 citizens were excluded from the referendum franchise and, indeed, remain excluded from the general election franchise.⁸⁸ Such political activities involve establishing pressure groups,⁸⁹ documenting anxiety and uncertainty with a view to influencing decision-makers,⁹⁰ and making appearances in Parliamentary committees.⁹¹

The ECtHR found a violation of the right to peaceful assembly in Article 11 arising from repeated denial of travel authorisation to a Turkish Cypriot

⁸⁵ Aleinikoff, 'Aliens, Due Process and "Community Ties"' (1983) 44 University of Pittsburgh Law Review 237, p. 264. An analogy may be made with the reference in *United States v Caroline Products Co*, 304 US 144, 152 n 4 (1938) to 'discrete and insular minorities' in respect of judicial review.

⁸⁶ Kagan, 'When Immigrants Speak' (2015) 6 California law Review 84, p. 96.

⁸⁷ Above no. 50 Art. 3.

⁸⁸ EU24 citizens (citizens of EU Member States other than Malta, Cyprus, and Ireland, resident in the United Kingdom) were excluded from participation in the 23 June 2016 referendum. For analysis, see Ziegler, 'The Referendum of the UK's EU Membership: No Legal Salve for its Disenfranchised Non-resident Citizens', (Verfassungsblog on Matters Constitutional, 21 June 2016); Ziegler, 'The "Brexit" Referendum: We Need to Talk about the (General Election) Franchise', (Verfassungsblog on Matters Constitutional, 7 October 2015).

⁸⁹ See e.g. <<https://www.the3million.org.uk/>>.

⁹⁰ See e.g. Remigi, *In Limbo* (Byline Books, 2017).

⁹¹ See e.g. *Brexit: reciprocal healthcare Oral Evidence session*, EU (Home Affairs) Committee (18 October 2017); available at: <<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-home-affairs-subcommittee/brexit-reciprocal-healthcare/oral/71903.html>>.

wishing to cross into southern Cyprus, impeding his participation in bi-communal meetings with Greek Cypriots, and ‘preventing him from engaging in peaceful assembly with people from both communities’.⁹²

4.3 *The Effect of Aliens’ Political Activities on Citizens Qua Voters*

It could be argued that, ‘voters must be free to obtain information from diverse sources in order to determine how to cast their votes’.⁹³ Seen from this perspective, political communication rights of aliens are instrumental – *for citizens*. Indeed, the abovementioned activities of EU27 citizens (and of the TRNC national) arguably serve a dual function. In a democracy, it is essential that voters hear directly from (all) those affected by a public policy.

Compare *Bluman* with French legislation prohibiting the French ‘branch’ of the Basque party from receiving funding from its Spanish counterpart. The ECtHR held that, prohibition on the funding of political parties by foreign political parties may have a significant impact on an association’s financial resources and hence *its* ability to engage fully *in its political activities*.⁹⁴ On the merits, the ECtHR noted that, the Committee of Ministers of the Council of Europe⁹⁵ had expressed support for prohibitions on funding of political parties by foreign sources, and that there was no European consensus on this matter; hence, it held that the prohibition was not in and of itself incompatible with Article 11.⁹⁶ It noted that ‘a certain degree of “intrusion” by such parties into the political life of other EU Member States may appear consistent with the logic of European integration ...’ but held that ‘it is not for the Court to interfere in matters relating to the compatibility of a member State’s domestic law with the EU project’.⁹⁷

4.4 *Voice and Exit*

Typically, concern about free speech focuses on forms of prior restraint before speech, or criminal punishment or civil liability after expressive activity. But, as Kagan notes, aliens have a unique vulnerability that does not affect citizens: they lack permanent security of residence. Ultimately, the state reserves the right to control the entry, residence and expulsion of aliens.⁹⁸ The potential

⁹² *Djavit An v Turkey*, Application no. 20652/92 (ECtHR, 20 February 2003), para 61.

⁹³ *Citizens United v Federal Elections Commission*, 1558 u.s. 310 (2010).

⁹⁴ *Parti Nationaliste Basque– Organisation Regionale D’Iparralde v France*, cit.

⁹⁵ Rec (2003)4 of 8 April 2003 Art. 7.

⁹⁶ Id [47].

⁹⁷ Id [48]. Judge Rozakis, dissenting, would have considered funding from elsewhere in the EU differently.

⁹⁸ See e.g. *Mousaquiim v Belgium*, cit, para 43.

threat of deportation may have a chilling effect on aliens' speech, especially when it critiques state authorities, even when, *prima facie*, the law does not limit their political communication rights.⁹⁹

Elsewhere,¹⁰⁰ I argue that recognised refugees¹⁰¹ are a special category of non-citizen residents in need of (full) membership in a political community for an indeterminate *ex ante* unknown period of time; and that it is therefore desirable (*de lege ferenda*) that they be treated by their states of asylum as if they were their citizens in respect of entitlements which, under international law, *may* be subject to a citizenship qualification – including the right to vote.

The normative case that I make for enfranchisement applies *a fortiori* to other political activities of refugees.¹⁰² It may be hoped that, in 2021, Arendt's dim observation that refugees 'never banded together, as the minorities had done temporarily, to defend common interests'¹⁰³ requires qualification. Yet, the practical challenges for refugees wanting to undertake political activities in their state of asylum are considerable. Even though 'recognition of (...) refugee status does not (...) make [a person] a refugee but declares him to be one',¹⁰⁴ the decision on which persons come within the ambit of international protection is made by a state, not the refugee – and so is the decision to cease refugee status.¹⁰⁵

Refugees may be deterred from voicing their grievances, fearing backlash or vindication of local population fears. Indeed, while in terms of vulnerability caused by high 'exit' costs, the predicament of refugees is far greater than

⁹⁹ Kagan, cit, 90.

¹⁰⁰ Ziegler, *Voting Rights of Refugees*, cit, ch 8. See also Behrman, 'Legal subjectivity and the refugee' (2014) 26(1) International Journal of Refugee Law 1, p. 15 (arguing that the right to mobilise and agitate would allow the refugee to reclaim some of their political subjectivity lost in their flight from their home country).

¹⁰¹ Convention relating to the Status of Refugees, 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954).

¹⁰² See also Ziegler, *Voting Rights of Refugees*, cit, ch 2, where I consider the ramifications of Article 15 ('[a]s regards non-political and non-profit-making associations and trade unions the Contracting States shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country, in the same circumstances') in light of Article 7(1), according to which the default position under the Convention the treatment accorded to aliens generally in the same circumstances. Critically, Article 5 stipulates that '[n]othing ... shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention' (including the ECHR and, indeed, the ICCPR).

¹⁰³ Arendt, *The Origins of Totalitarianism* (Harcourt, 1950, p. 282).

¹⁰⁴ UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* (revised 2011) [28].

¹⁰⁵ 1951 Refugee Convention (above no. 101) Article 1C.

that of, for instance, a citizen of one EU member State residing in another EU Member State, the ability of the latter to make use of political communication rights is facilitated by security of residence.

5 Conclusion

This chapter explored how Article 16 of the ECHR, designed in post-war Europe to facilitate restrictions on political communication rights of 'aliens', has fallen into desuetude. While the Court has decided voting eligibility cases regarding, *inter alia*, convicts, non-resident citizens, and persons with mental disabilities, it has not considered the (arguable) anomalies arising from divergent eligibility practices in respect of aliens across the Council of Europe and their (in) compatibility with the phrase 'the people' in A3P1. Meanwhile, in Article 16's jurisprudential absence, the Court does not appear to have explicitly dealt with two substantive queries regarding the application of Articles 10 and 11: first, the extent to which it would be justified to *distinguish between different political communication rights*, based on the extent to which they affect and/or are related to democratic self-governance. Second, the extent to which it would be justified to *distinguish between aliens* based on their immigration status. It is hoped that further exploration of such questions will be undertaken in jurisprudence and scholarship.

Social Rights and Migrants before the European Court of Human Rights

Natalia Caicedo Camacho*

1 Introduction

The European Convention on Human Rights (ECHR) was drafted by the Council of Europe in 1950 with the aim of creating the most effective system of international protection of human rights.¹ By establishing a judicial mechanism, the European states sought to develop and guarantee a minimum standard of protection for all citizens and to prevent future events that might undermine human rights.² Further, in 1961, the European Charter of Social Rights (ECSR) was adopted with the purpose of complementing the ECHR and promoting the protection of social rights in the European territory.³

The rights laid down in the ECHR respond to those described by scholars as civil rights, the protection of which involves a negative or non-interventionist approach on the part of the states. In contrast, social rights, which implicitly require an active approach, are left to the ECSR as a means of complementing or extending Europe's system of human rights. Thus, it seemed that Strasbourg had opted to deal with disputes concerning the rights recognised in the liberal revolution, while social rights would be promoted through the state reporting procedure before the ECSR. However, in an early statement, the ECtHR stated that the artificial or historical division between civil, political and social rights should not be a decisive factor for interpreting the Convention and held that there was no watertight division separating social and economic rights from the field covered by the Convention (*Airey v Ireland*, 1979).

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1 Bates (ed), *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights* (Oxford University Press, 2011); Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press, 2007).

2 Christoffersen and Madsen, *The European Court of Human Rights between Law and Politics* (Oxford University Press, 2011).

3 Ewing, 'The Case for Social Rights' in Cambell, Goldsworthy and Stone (eds), *Protecting Human Rights: Instruments and Institutions* (Oxford University Press, 2003).

Since then, the ECtHR has developed a concept of positive obligations of states arising out of the rights laid down in the Convention.⁴ It has developed an indivisible approach to rights and built an interrelated system in which a breach of the Convention may result from different categories of rights being read in conjunction.⁵ So liberal and social rights are no longer two isolated areas; rather, the ECtHR has introduced an original perspective that links social rights to the Convention thus ending the artificial categorisation of liberal, social and political rights.⁶ This approach affected the entitlement of non-nationals to benefits in 1996 in the case of *Gaygusuz v Austria*, in which the ECtHR used Article 1 of Protocol no. 1 as a bridge to rule on the meaning of the nationality clause in relation to non-contributory benefits and to subject the differential treatment of non-nationals' social entitlements to strict scrutiny.

In parallel, in 1998 the Council of Europe introduced a new procedure with the aim of strengthening the enforcement of social and economic rights and complementing the ECSR's reporting procedure. The Additional Protocol to the ECSR established a quasi-judicial procedure that allows specific trade unions and NGOs to present collective complaints regarding violations of the Social Charter before the Committee of Social Rights.⁷ The Committee is made

⁴ Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Oxford University Press, 2004); Koch, *Human Rights as indivisible rights: the protection of socio-economic demands under the ECHR* (Martinus Nijhoff Publishers, 2009); Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford University Press, 2009); Council of Europe, Social security as a human right: The protection afforded by the European Convention on Human Rights. Human Rights files, n° 23, Council of Europe Publishing.

⁵ Simmons and Clements, 'European Court of Human Rights' in Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press, 2009 pp. 409–427). Thus, housing rights have been linked to the right to a private and family life (Art. 8) and the right to property (Art. 1 Protocol no. 1); health care has been linked to the right to life (Art. 2), the prohibition of degrading treatment (Art. 3) and the right to family life (Art. 8). In the fields of social security and social care the ECtHR has considered the right to property (Art. 1 Protocol no. 1); the right to a fair trial (Art. 6) and the right to family life (Art. 8).

⁶ Some authors argue that, with the exception of the right to education, what the Convention protects are economic and social aspects of explicit Convention rights, but not economic or social rights. Warbrick, 'Economic and Social Interests and the European Convention on Human Rights', in Baderin and Mccorquodale (eds), *Economic, Social and Cultural Rights in Action* (Oxford University Press, 2007, pp. 242–255).

⁷ Brillat, 'The Supervisory Machinery of the European Social Charter: Recent Developments and their Impact' in De Burca, De Witte and Ogertschnig (eds), *Social Rights in Europe* (Oxford University Press, 2005); Cullen, 'The Collective Complaints System of the European Social Charter: Interpretative Methods of the European Committee of Social Rights' (2009) 9(1) Human Rights Law Review 61.

up of scholars who are responsible for drafting a Report assessing the violation of the Charter. The Committee of Ministers subsequently adopts a resolution closing the procedure on the basis of the report submitted by the Committee of Social Rights. Should the Committee of Social Rights conclude that the Charter has been violated, it adopts a recommendation addressed to the State Party concerned.

The Appendix to the Social Charter restricts the scope of protection afforded to lawful migrants and excludes unlawful immigrants.⁸ Nevertheless, the Committee considers the Charter a living instrument and in *FIDH v France* (2003)⁹ held that the restriction of rights is to be read in such a manner as to preserve intact the essence of the rights. So, together with the implementation of the Collective Complaints Procedure, the Committee has extended the protection envisaged in the Charter to irregular immigrants in those cases in which their human dignity is at stake.

2 The Roll of Nationality and Migration for Allocating Social Rights

2.1 *Nationality as a Suspect Clause in the Framework of the Equality Principle*

Gaygusuz v Austria (1999)¹⁰ is the first case in which the ECHR is called to rule on the scope of Art. 14 ECHR and the denial of social rights to migrants. In this case a Turkish national, legally resident in Austria, applied for an advance on his pension in the form of emergency assistance. The Employment Agency rejected Mr Gaygusuz's petition because he did not have Austrian nationality. *Gaygusuz* raises two questions to the Court. The first refers to the rights *ratione materiae* protected by the Convention, asking if social assistance falls within the framework of such protection. The second refers to the consent to States Members to establish different treatment in access to social benefits based on nationality. On the first issue, the Austrian Government argued that the application was inadmissible because the social emergency aid was not a right included in the European Convention. However, following an open interpretation of the Convention, the ECHR declares that the right to social assistance is a pecuniary right and, as such, falls inside the right to property laid on Art.

⁸ See Appendix to the European Social Charter (revised), Scope of the European Social Charter (revised) in terms of persons protected.

⁹ *International Federation of Human Rights Leagues (FIDH) v France* (Complaint no. 14/2003) Decision on the Merits. September 2004 at [27–29].

¹⁰ *Gaygusuz v Austria*, Application no. 17371/90 (ECtHR, 16 September 1996).

1 of Protocol 1 regarding. *Gaygusuz* was the way by which aid from the welfare system was incorporated into the rights protected by the Convention.

Once allegations on the inadmissibility are solved, the second question that must be answered by the Court is whether denials of social assistance based on nationality entails a break with Art. 14 ECHR.¹¹ In this regard, it should be noted that, within the framework of the discriminatory clauses of Art. 14 ECHR, nationality is expressly included, although the Court had not ruled on its scope for social rights. In the reply to the applicant's allegations concerning discriminatory treatment and benefits refusal, the ECHR declared that the difference based on nationality established by the Unemployment Insurance Act lacks objective and reasonable justification. Mr Gaygusuz had paid his contributions to the unemployment fund and, therefore, he was in the same position as the workers with Austrian nationality. In addition, in this case, the Court goes a step further and decides to extend the criterion of strict scrutiny to differences based on nationality. In this sense, in *Gaygusuz* the Court held that ‘(...) very weighty reasons would have to be put forward before the Court could regard a difference of treatment based exclusively on the ground of nationality as compatible with the Convention’.¹² That is, the differences in access to social assistance based on nationality required a reasonableness justification but also, these differences are suspected of being discriminatory. Thus, objective and reasonable justifications provided by states with the aim of removing doubts about a discriminatory treatment are not enough; compelling reasons are also necessary.

Gaygusuz is a decision with a brief argumentation, which does not seem to be a candidate to become a leading case. In fact, the argumentation is short and the Court kept silence about the Austrian government's justification for allocation social rights giving priority to its own nationals. In any case, it can be said that *Gaygusuz* is a key decision regarding the universalisation of social rights and the transformation of the link between nationality and social rights. This is because, for the first time, the Court brings into play the strict scrutiny which involves a more rigorous examination of the allegations given by states regarding this. Scholars such as Marie-Bénédicte Dembour argue that, in *Gaygusuz*, the Court extrapolates to the field of nationality the formula developed in case *A.B.C v the United Kingdom* on gender-based differences, so that differential

¹¹ In *Gaygusuz*, the Austrian Government justified its decision not to pay emergency assistance to Mr Gaygusuz, responding to the special responsibility that national authorities have for their own nationals. From the Government's point of view, 'the essential needs of Austrian citizens in terms of access to social benefits were being given a logical priority'. Idem, para 45.

¹² Idem, para 42.

treatment for reasons of nationality is also reduced to strict control of reasonableness. The statement '*very weighty reasons*' has to be presented before the Court to justify a difference of treatment of the nationality represented by the most important assertions of the ECHR in the field of social rights.

This statement has been reiterated in following cases in *Koua Poirrez v France* (2003).¹³ The ECtHR dealt with the refusal to award an allowance for disabled adults (non-contributory benefit) to an Ivory Coast national, legally resident in France, with an 80% disability rating. The authorities rejected his application on the grounds that he was neither a French national nor a national of a country that had signed a reciprocity agreement with France in respect of the allowance for disabled adults. The Court held that the difference in treatment regarding entitlement to social benefits between French nationals and other foreign nationals was not based on any objective and reasonable justification. It also confirmed that inside the non-contributory social scheme '*very weighty reasons*' would have to be forwarded before it could regard a difference of treatment based exclusively on the ground of nationality as compatible with the Convention. Thus, the Court found France to be in violation of the Convention (Article 1 of Protocol no. 1 in conjunction with Article 14 of the Convention). Later on, in *Weller v Hungary* (2009)¹⁴ the Hungarian authorities refused to pay maternity benefit to a Romanian citizen legally resident in Hungary and married to a Hungarian national, because under Hungarian law only mothers with Hungarian citizenship were entitled to apply for this benefit. The Hungarian government submitted that the Contracting States enjoy a wide margin of appreciation in respect of welfare policy and claimed that the applicants were abusing the Hungarian welfare system.¹⁵ The Court held that entitlement to family allowance could not depend on the citizenship of the mother and found the state's submission unconvincing. Based on these considerations, the Court concluded that the Hungarian authorities had violated Article 8 of the Convention read in conjunction with Article 14.

In *Fawsie v Greece* (2010)¹⁶ and *Saoudin v Greece*, (2010),¹⁷ a mother of six children with recognised refugee status was denied an allowance paid to

¹³ *Koua Poirrez v France*, Application no. 40892/98 (ECtHR, 30 September 2003).

¹⁴ *Weller v Hungary*, Application no. 444399/05 (ECtHR, 31 March 2009).

¹⁵ The Hungarian Government argued before the Court that, with respect to social benefits, states enjoyed a wide margin of appreciation and claimed that the applicants were abusing the Hungarian welfare system. In this case, the Court also stated that the Hungarian law breaks the prohibition of discrimination on grounds of sex since it did not allow the aid to be requested by fathers.

¹⁶ *Fawsie v Greece*, Application no. 40080/07 (ECtHR, 28 October 2010).

¹⁷ *Saidoun v Greece*, Application no. 40083/07 (ECtHR, 28 October 2010).

mothers of large families since neither she nor her children had Greek nationality or nationality of one of the member states of the European Union. The Court recalls that only *very weighty reasons* can lead to consider a difference of treatment based on nationality compatible with the Convention and declare a violation of Art. 14 in conjunction with Art. 8. Similar conclusions were drawn by the Court in *Dhabai v Italy* (2014)¹⁸ regarding the refusal of family aid to a Tunisian national with residence and work authorisation.

After 20 years of statements of the ECtHR, the criterion according to which states cannot establish differences in access to social rights or assistance benefits based solely on nationality is a settled rule. In all cases the Court has observed that there is no duty under the Convention to provide social rights, but where the Contracting State decides to do so, it must do so in a manner that is compliant with the non-discrimination principle. For the ECtHR, weighty reasons would have to be forwarded for it to consider differential treatment based exclusively on the grounds of nationality as compatible with the Convention.

Untying nationality and access to social benefits is a relevant step forward for modifying the principle on which social rights are conceived. A reductionist view of the social principle argues that social rights are built on the basis of national solidarity and the host society is only willing to share the goods and rights of the welfare system with those with whom it has been previously linked.¹⁹ Justifying refusal to social rights entitlements following the idea of a national solidarity closed by nature entails defining social rights as privileges that only could be enjoyed by citizens who possess the same nationality and share a certain cultural identity. The distributive justice theory proposed by Michael Walzer starts by defining the members of the community in which the goods and rights should be distributed. He argues that redistribution can only take place in communities that are closed by nature, but the closed scope of solidarity cannot exclude those people with whom the territory is shared. Doing so, supposes a form of tyranny: 'Indeed, the rule of citizens over

¹⁸ *Dhabai v Italy*, Application no. 17120/09 (ECtHR, 8 April 2014).

¹⁹ Hans Entzinger argues that welfare states are destined to operate under closed systems: welfare states can only function correctly when the dividing line between those inside and those outside is clear because all those who contribute are also potential beneficiaries, and vice versa. In addition, the welfare state has been designed to redistribute scarce resources between individuals, between generations and sometimes also between regions. These transfers always take place between those who are better off and those who are in worse conditions within society and within the same system. Entzinger, 'Open Borders and Welfare States' in Pécoud and Guchteneire (eds), *Migration without Borders: Essays on the Free Movement of People* (Berhan, 2007).

non-citizens, of members over strangers, is probably the most common form of Tyranny in human history'.²⁰ So, once migrants reside within the political community, they must be treated as full members of that community's right.²¹ It is true that Walzer's proposal argues that distribution can only be developed between closed communities, when solidarity as a basic principle of human relations cannot be both authentic and exclusive. In any case, for Walzer the fact of being part of a social and political body is a permeable process that must include all people present in the community. In this sense, as authors such as Yasemin Soysal argue, there is nothing inherent about the logic of the welfare state that excludes the inclusion of migrants into the system.²²

Gaygusuz introduced a concept of solidarity beyond national links and, by this, the Court leaves aside arguments related to solidarity as a closed concept limited to those who belong to a legitimate and original community. According to the Court, in the same way as the sex clause,²³ differences based on nationality must have an objective and reasonable justification. Otherwise, the difference will be declared discriminatory and will entail a break of the Convention. According to the Court, in the same way as differences of treatment based on sex, those based on nationality must also have an objective and reasonable justification; otherwise, the difference will be declared discriminatory and contrary to the Convention.

The Court's rule on nationality as a suspect clause is a positive ruling but it resolves only one part of the challenges emerging from the migratory flows. The role of immigration status within the non-discrimination clause remains unclear since for the majority of cases adjudication and denegation of social rights are related to the migratory statutes. For the purposes of this article, it is relevant to reveal the role of the migratory statutes as a valve that closes and opens enjoyment of social rights.

²⁰ Walzer, *Sphere of Justice. A defence of Pluralism and Equality* (Basic Books, United States of America, 1983, pp. 62–63).

²¹ '[t]he theory of distributive justice begins, then, with an account of membership rights. It must vindicate at one and the same time the (limited) right of closure without which there could be no communities at all, and the political inclusiveness of the existing communities.' The author even goes so far as to describe imperialist membership as the persistent fear that foreigners face as a result of deportation policies. *Idem*, p. 63.

²² Soysal, *Limits of Citizenship, Migrants and Postnational Membership in Europe* (University of Chicago, 1994, p. 138).

²³ The strict judgment of reasonableness has also extended to differences based on race. *D.H. and Others Against the Czech Republic*, Application no. 57325/00 (ECtHR, 13 November 2007), para 175; *Case of Timishev v Russia*, Application no. 55762/00 and 55974/00 (ECtHR, 13 March 2006), para 56; *Orsus and Others v Croatia*, Application no. 15766/03 (ECtHR, 16 March 2010), para 149.

2.2 Migratory Statutes and the Non-Discrimination Clause

One of the main transformations that migratory processes had incorporated into the basis of the states is the modification of nationality as the exclusive link for belonging to a political and social body. The presence and residence of non-nationals within the territory establishes the criterion of nationality as the only link from which rights and freedoms emanate. The enforcement of democratic principle in the field of immigration has given birth to other kinds of relationships between individuals or groups and the state. In fact, the permeability of migrations in social and political structures generates new ways for entitlements to civil, political and social rights.²⁴ From the legal point of view, this transformation is reflected by the implementation of the migratory statutes, which means an intermediate category based on residence (whether legal or not). So rights and freedoms are derived from those categories.²⁵

This reconfiguration undoubtedly supposes a fundamental break of nationality with its link to rights, but, at the same time, it also means the implementation of a parallel system from nationality based on immigration status. In this new context, rights are linked to the residence that the State has granted or denied to the migrant. As Linda Bosniak maintains, this process involves dividing citizenship through the construction of a devalued citizenship that

²⁴ The literature about the reconfiguration of nationality as a result of migration processes is extensive. In this regard, Yasemin Soysal proposes the creation of post-national citizenship in which belonging to a political community depends not on their place of birth, but where they live and where they should enjoy their rights (Soysal, cit, p. 138). Kymlicka proposed multicultural citizenship as a way to adapt liberal citizenship to the challenges of national and cultural diversity; Kymlicka, *Multicultural Citizenship A liberal theory of minority rights* (Oxford University Press, 1996). Seyla Benhabib proposes interpreting citizenship from the theory of open global justice that allows respect for democratic demands of cultural diversity, while reinforcing the commitments of the norms of a justice like politics; Benhabib, *The Rights of Other Foreigners, Residents and Citizens* (Cambridge University Press, 2004). Linda Bosniak suggests the formation of a citizenship based on territorial ethics as a way of deriving rights from the presence of people in the territory; Bosniak, 'Be here: Ethical territoriality and the rights of immigrants' (2007) 8(2) Theoretical Inquiries in Law 389. Iris Marion Young proposes differentiated citizenship as a way to reestablish imbalances in the terms of wealth, status and power generated by the false universalism of citizenship and proposes the participation and inclusion of all people as a form of inclusive progression, proposing a form of ideal universal citizenship; Young, 'Polity and Group difference: A Critique of the ideal of Universal Citizenship' (1989) 99(2) Ethics 250.

²⁵ Hammar, *Democracy and the Nation State: Aliens, Denizens and Citizens in a World of International Migration* (Avebury, 1990); Brubaker, *Citizenship and Nationhood in France and Germany* (Harvard University Press, 1992); Bosniak, cit.

is based on the extension of national borders controls within the territory.²⁶ Under this second-class citizenship entitlements are based on the following ideas. The first one is the link between rights and the labor market since obtaining residence happens in most cases by obtaining a job. The second one is progressivity; so that the closer or farther away the status of the migrant is from the nationality, the set of rights and freedoms recognized will be greater or lesser.²⁷ Therefore, the configuration of the rights of others is constructed (under immigration laws) by a complex system of statutes based on different types of state authorisations. In this model, rights are subordinated to the specific legal category that each person has within the migratory system or to the absence of it. Also, migratory statutes are the basis that leads to levels of inclusion and exclusion.

Returning to the ECtHR jurisprudence on social rights matters, *Okpisz v Germany* (2005) and *Niedzwiecki v Germany* (2005) show that restrictions on social rights are directly related to the fragmentation of migratory status. In *Niedzwiecki v Germany* (2005)²⁸ a Polish national and holder of a residence permit for exceptional purposes was denied child benefits because he was not in possession of an unlimited residence permit. The Court ruled it unjustifiable that non-nationals in possession of a stable residence permit were entitled to claim child benefits, whilst those who were legally resident but holders of a different category of permit were not. Thus, the Court ruled that there had been a violation of Article 8 in conjunction with Article 14. In *Okpisz v Germany* (2005), the ECtHR, following identical reasoning, reached the same conclusion.²⁹ In *Timishev v Russia* (2006)³⁰ the Court held that conditioning the exercise of the right to education by children on the registration of their parents' residence constitutes a violation of the Convention and its Protocols. In *Mosser v Austria* (2004) the Court was called upon to decide whether the irregular status of the applicant in Austria was the reason that led to denial of a child support benefit, but, once again, the Court decided not to enter into this debate. In any case, the option of not to rule on the (in)compatibility between the non-discrimination rule of Art. 14 ECHR and denials of rights based on immigration status begins to change from *Anakomaba Yula v Belgium* (2009); *Ponomaryovic v Bulgaria* (2011) and *Bah v the United Kingdom* (2011).

²⁶ Bosniak, *The Citizen and the Alien. Dilemmas of Contemporary Membership* (Princeton University Press, 2008).

²⁷ Morris, *Managing Migration. Civic stratification and migrant's rights* (Routledge, 2002).

²⁸ *Niedzwiecki v Germany*, Application no. 58453/00 (ECtHR, 25 October 2005).

²⁹ *Okpisz v Germany*, Application no. 59140/00 (ECtHR, 25 October 2005).

³⁰ *Timishev v Russia*, cit.

3 The Limits to Migrants' Social Rights: Protection of the Economic System and Individual Contributions to the State Coffers

According to the jurisprudence of the ECtHR, Art. 14 ECHR does not prohibit any difference in treatment, but rather those differences that lack an objective and reasonable justification. The non-discrimination test declares that a difference of treatment is discriminatory within the meaning of Art. 14 if it has no objective and reasonable justification; that is if it does not propose a legitimate aim or if there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised.³¹ Then, not all different treatment involves a break from the non-discrimination principle, but a treatment that does not pass the test of equality is a discriminatory treatment.

If we apply this analysis to the field of immigration, we find out that the states have justified the different treatment of the migrant population in its access to social rights, for purposes related to the priority of nationals or migrants with residence, the control of migratory flows and/or budgetary restrictions. In this scenario, then, the question arises as to what are the legitimate purposes to which the states, in the use of their sovereignty, can impose restrictions on the rights of migrants, and when should this capacity be constrained by principles such as equity and non-discrimination?

In the case *Andrejeva v Latvia* (2009) the ECtHR ruled on a claim about the refusal of the Latvian government to include in the pension calculations part of the contributions made by the applicant in Russia during the period of the USSR. The applicant worked and paid contributions to the USSR Social Security for 20 years, then she moved to Latvia where she continued contributing. After independence, the Latvian authorities granted the applicant a permanent residence, but at the time of her retirement they refused to include the periods paid in Russia. In this case, the Court indicated that regarding access to social rights, states could establish systems in which individuals or certain groups were treated differently, due to the fact such measures had the purpose of protecting the country's economic system. Therefore, restriction of public spending is a legitimate aim which broadens the margin of appreciation given to the states when it comes to the denial of access to social rights to certain groups. Explicitly, in paragraph 83, the Court affirms that:

(...) the provisions of the Convention do not prevent Contracting States from introducing general policy schemes by way of legislative measures

³¹ This interpretation is followed since the Belgian Linguistic Judgment of 23 July 1968.

whereby a certain category or group of individuals is treated differently from others, provided that the interference with the rights of the statutory category or group as a whole can be justified under the Convention. (...) The Court accepts that the difference in treatment complained of pursues at least one legitimate aim that is broadly compatible with the general objectives of the Convention, namely the protection of the country's economic system.³²

According to the ECtHR, 'national authorities are better placed than international judges to assess what is in the public interest on social or economic grounds'. As a general rule, the political option adopted by national authorities is assessed in accordance with the Convention, except when it is 'manifestly without reasonable foundation'. Therefore, regarding the limits on migrant's social rights, the Court applied the same reasoning developed in previous cases regarding social and economic rights in general: when priorities have to be taken in a context of limited resources, states enjoy a wide margin of appreciation in the planning public policies on social rights. In this framework, regarding social rights, states can reasonably configure differentiated access to certain groups.

Later, in *Ponomaryovi v Bulgaria* (2011) the Court attached the contribution to public funds as the valid criterion for deciding which groups or individuals can be legitimately recognised or denied in social programs or given access to public aid programs. In *Ponomaryovi v Bulgaria* (2011)³³ two Russian nationals who had been residing lawfully in Bulgaria on the basis of their mother's permanent residence permit lost this entitlement when they reached the age of eighteen. As they were in secondary school at that time, the authorities asked them to pay the school fees owed as aliens without permanent residence permits if they wanted to continue attending classes and to graduate. The ECtHR held that a state may have legitimate reasons for curtailing the use of resource-hungry public services by short-term and illegal immigrants, who, as a rule do not contribute to their funding. It may also, in certain circumstances, justifiably differentiate between categories of aliens residing in its territory. In this case, the specific considerations and the importance of secondary education militated in favour of the Court's applying stricter scrutiny to the assessment of the proportionality of the measure affecting the applicants. After assessing the particular circumstances (the lack of intention on the part of the applicants

32 *Andrejeva c. Letonia*, Application no. 55707/00, (ECtHR, 18 February 2009), paras 83–86.

33 *Ponomaryov v Bulgaria*, Application no. 53335/05 (ECtHR, 21 June 2011).

to abuse the Bulgarian welfare system and their high level of integration), the Court ruled that the requirement to pay school fees on the grounds of their nationality and migratory status was not justified.

In its response, the ECHR recalls the principle it had previously stated in Andrejeva: 'economic objectives justify the policies that differentiate certain groups or individuals in the regime of enjoyment of rights'. However, Ponomaryovi also incorporates the idea that the migrant's economic contribution to state funds is the criterion that places them (or not) as a legitimate recipient of social solidarity (welfare state programs, public benefits and health) and at the same time social contribution protects them against the difference of treatments: 'a State may have legitimate reasons for curtailing the use of resource-hungry public services – such as welfare programs, public benefits and health care – by short-term and illegal immigrants, who, as a rule, do not contribute to their funding'.³⁴

The argument of the contribution to public funds as a criterion that places the migrant in a comparable position with respect to nationals is confirmed in *Bah v the United Kingdom* (2010). In this case, the Court affirms that the UK authorities had not broken the Convention in denying priority access to housing assistance to a Sierra Leonean woman and her minor child since they were not within the group of people who contributed to public funds, despite the fact that the applicant had permanent residence. In *Dhahbi v Italy* (2014) on access to family benefits for a permanent resident, the Court confirms that states must provide strong reasons for differences in treatment on access to family assistance based on nationality in order to not to be declared contrary to Art. 14 ECHR. And it also confirms that short-term migrants and those who have violated immigration legislation (undocumented migrants) are collectives that as a general rule do not contribute to the general financing of public services and, therefore, the state may have legitimate reasons to exclude them from basic services such as social security, public aid or health. Once again, the Court ratifies the link between the guarantee of social rights under equal conditions and the contribution that individual migrants make to public funds.

It is true, as Spencer and Pobjoy had indicated, that the Court has declared that under certain circumstances, migrants are considered in an equal position with respect to nationals in application of Art. 14 ECHR. In this framework, the Court has paid special attention to any circumstance that links the individual with the state, even in situations of migrants who were in an irregular situation. In Ponomaryovi, once the applicants reached adulthood, they lost their

34 *Ponomaryov v Bulgaria*, cit, para 54.

residence permit. However, the specific circumstances of the applicants: the high level of integration and the non-intention to abuse the welfare state, as well as the importance of education led the Court to declare that the Bulgarian state had violated Art. 2 of Protocol 1 in conjunction with Art. 14 ECHR. In *Anakomba Yula v Belgium* (2009) the Belgian authorities denied free legal assistance in a paternity suit to a Congolese national who lived in Belgium because he was in an irregular situation. Here the Court developed the idea that 'the restriction of judicial assistance to irregular migrants pursue[s] the legitimate objective of reserving public resources for immigrants with a certain degree of integration in the territory'. However, it declared a violation of Art. 6 ECHR after assessing the costs of legal assistance and the particular circumstances of the applicant.

As a general rule, it can be said that regarding social policies, the Court grants a wide margin of appreciation to states since they are in better position to assess how resources are distributed, how budget is spent and the economic cost of social rights. In any case, when migratory status is valued within this framework, the consequence is the introduction of a new factor that links the individual economic contribution of migrants to public funds with the right to benefit from social policies. That is, the criterion that places migrants in an equality position to nationals or other migratory statutes is their contribution in terms of taxes and contribution to the social security system. So, these contributions are the element that gives the migrant the protection of Art. 14 ECHR.

Following the Court's argument, the economic limitation of rights is a criterion that applies only to social rights. However, scholars have demonstrated that the economic cost of rights is a general characteristic also of civil liberties and political rights.³⁵ In addition, the economic contribution to the system (not being a short-term migrant, nor being in an irregular situation) is placed as a preponderant value over any other legitimate interest, such as the personal or needy situation of the applicants. In a case like Bah, the applicant was forced to sleep on the street with her minor child. However, the refusal of economic aid in the matter of housing was justified since her son had arrived in the United Kingdom a few months ago and his residence status expressly excluded access to any type of public aid. The reasoning of the Court that legitimises the exclusion of social rights to migrants who have been in the territory for a short time and to those who are in an irregular situation means that migrant

³⁵ Fabre, *Social Rights Under the Constitution: Government and the Decent Life* (Oxford University Press, 2002); Holmes and Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes* (W. W. Norton & Co., 1999).

groups that are in a situation of greater need or even vulnerability are left out of the protection system. The logic of profitability that values contributions to society only in terms of contribution or non-contribution opens a dangerous path because only those who contribute to the Social Security system would be entitled to claim benefits and, as a result, many migrants living in situations of vulnerability would be deprived of all protection.

On the other hand, the purposes linked to public savings or the distribution of scarce resources can easily hide discriminatory treatment, especially when the migratory status is based precisely on categories such as nationality, race or ethnicity, characteristics that have been identified as suspicious criteria to support discriminatory treatment.³⁶ So, if economic interests justify the denial of the social and economic rights of migrants, there is a potential risk that states use this argument to support any differential treatment between groups. This is so, because the reduction of potential beneficiaries of social rights will have the same effect in terms of budgetary savings. In fact, in all the cases presented states put forward the ECtHR arguments linked to rational distribution of budgetary funds. Consequently, through economic reasoning, a migrant's exclusion can easily be justified and any assessment about a potential discriminatory treatment easily erased. In addition, the argument regarding financial decisions is overly ambiguous and it is practically impossible to determine to what extent the restriction responds to a criterion of reasonable public savings and to what extent the objective is to exclude a certain group of migrants.

In the analysis of the relationship between inclusion or exclusion and social rights, Diane Sainsbury concludes that the social rights of immigrants tend to follow the vicissitudes of the expansion and containment of the welfare state. From a general point of view, immigrants have benefited from the growth of rights, while they have been disproportionately affected in times of economic crisis and social restrictions.³⁷

Therefore, within the framework of the reforms to the welfare system, there is a greater predisposition of the states to restrict migrants' social rights.

Undoubtedly, efficient management of public resources is a goal that not only legitimises governments' actions and policies, but is also a principle required by all public authorities. The problematic aspect is that efficiency is exclusively measured as reducing public spending. However, denying social rights and reduction in public social spending cannot be described as an efficient management of public resources. A social protection system that excludes

36 Fredman, *Discrimination Law* (Oxford University Press, 2002).

37 Sainsbury, *Welfare States and Immigrant Rights, The politics of inclusion and exclusion* (Oxford University Press, 2002, p.281).

a part of the population placed in a vulnerable situation from the system is a non-efficient system. Withdrawn social rights reduce people's autonomy making it more difficult or reducing the possibilities of overcoming exclusion.

But, even admitting that preservation of public resources is placed as a legitimate aim to restrict social rights, it cannot be placed as a fundamental value that has preeminence in all situations. The cost-benefit scheme applied by the Court assesses, at the macro level advantages that restrictions can bring to public expenditure and savings and, at the micro level, contributions that each migrant individually makes to public funds, but it omits the advantages that general access to social rights brings to social cohesion and integration. There is a compensatory interest in public policy to ensure that migrants are not treated unfavorably because of their personal characteristics or immigration status, elements that are beyond their immediate control.³⁸ Therefore, public expenditure understood as a legitimate objective cannot be used as a basis for restricting the benefits aimed at responding to the social needs of groups or persons in vulnerable situation. This is because the advantages obtained by restricting public spending do not compensate for the break that it represents to the right to life and physical integrity and also the advantages of inclusion and recognition. Likewise, we must bear in mind the recognition of social rights that contribute to rebalancing the inequitable relations in terms of power, status and wealth that lies behind the migratory legal status.

It is true that the ECtHR has taken a step towards the universality of rights, since differences of treatment based on nationality are subject to strict scrutiny. However, it cannot be affirmed that the link between access to social rights and the guarantee of the principle of equality for the population of migrants has been built from the perspective of universality. This is because, the element that places migrants in an equal position with respect to nationals and between the migrants themselves is the economic contribution that each individual makes to the system.

³⁸ Saul, 'Migrating to Australia with Disabilities: Non-Discrimination and the Convention on the Rights of Persons with Disabilities' (2010) 16 Australian Journal of Human Rights 63; Spencer and Pobjoy, 'Equality for All? The Relationship between Immigration status and the Allocation of Rights in the United Kingdom' (2012) 2 European Human Rights Law Review 160.

4 When Immigration Status Comes into Play in the Study of Discriminatory Treatment

Another issue regarding the non-discrimination principle in the area of social rights and immigration is revealing the role – no longer based on national origin – that the migratory statutes play within the framework of Art. 14 ECHR. The final paragraph of Art. 14 ECHR provides an open clause of ‘any other situation’ that allows for the introduction of other discriminatory grounds different from those expressly included by the Convention. So, the question that must be analysed is whether migratory status can become part of the discriminatory clauses of Art. 14 ECHR.

The *Gaygusuz*, *Koua Porriez*, *Dhabai* and *Fawsie* cases were analysed in the light of the nationality clause, among other reasons because the basis for the exclusion of welfare benefits in social legislation was nationality. Differences of treatment based on migration status began to be visible from the *Niedzwiecki* and *Okpisz* cases, but as already indicated above, the Court expressly refused to analyse this issue. In *Mosser and Anakomba*, the applicants were in an irregular situation and the basis of the exclusion was precisely the irregularity of their stay. However, the Court did not evaluate the status of the irregularity and its role in the framework of Art. 14 ECHR.

The role of immigration status in the framework of the study of the principle of equality and non-discrimination is addressed in two cases resolved in 2011. The first is *Ponomaryovi v Bulgaria* (2011) when, as explained above, the Court develops the idea that ‘States may have legitimate reason for curtailing the use of resource-hungry public services – such as welfare programs, public benefits and health care – by short- term and illegal immigrants, who, as a rule, do not contribute to their funding’.

Two months after *Ponomaryovi*, the ECtHR decided to address the analysis of immigration status in *Bah v the United Kingdom* (2011). In this case, a woman from Sierra Leone with permanent residence in the United Kingdom was denied priority access to housing services on the basis of her son’s migration status (family reunification). According to UK legislation, people who came to the United Kingdom in the framework of family reunification were subject to a clause of no access to welfare state aid. The applicant claimed the violation of Art. 8 ECHR in conjunction with Art. 14 ECHR. The first question for Court to resolve were the allegations of the government of the United Kingdom regarding inadmissibility. According to the allegations the case should be analysed from the point of view of Art. 8 ECHR, but not of Art. 14 ECHR because immigration status is a legal category and not a personal characteristic. On this point, the Court affirmed that:

The Court does not agree with the Government that immigration status cannot amount to a ground of distinction for the purposes of Article 14, since it is a legal rather than a personal status. (...) the fact that immigration status is a status conferred by law, rather than one which is inherent to the individual, does not preclude it from amounting to an 'other status' for the purposes of Article 14.³⁹

Inclusion of immigration status within the scope of Article 14 ECHR is a significant development. In the first place, because as Linda Bosniak and Sarah Spencer indicate for the case of migration, the study of discrimination tends to lead to the criterion of nationality, while the migratory statutes are often ignored, even though it is through the use of this category that the law denies or restricts the full enjoyment of social, political and civil rights.⁴⁰ Secondly, because it is precisely through the fragmentation and stratification of the statutes that national legislations and courts expand or reduce, with great discretion, the access of migrants to rights linked to the welfare state.

However, Bah also indicates that the inclusion of migratory status within the scope of Art. 14 ECHR does not mean providing the same level of protection as granted to the other suspected clauses. In cases in which the difference of treatment originates in some of the clauses such as nationality, sex or ethnicity, analysis of the discrimination means attributing to them the category of suspicion. In the words of the Court: 'very weighty reasons would have to be put forward before the Court could regard a difference of treatment based exclusively on the ground of nationality as compatible with the Convention'.⁴¹ However, in cases in which the difference in treatment originates in the migratory status, the ECHR decided to incorporate a criterion that allows reducing or diminishing the level of justification required of the states and, therefore, the margin of appreciation is greater.

According to the ECHR, the fact that the migratory status is a status conferred by the law, instead of one inherent to the person, is not an impediment from its incorporation in the clause of 'another social condition' of Art. 14 ECHR. However, to this statement should be added the idea that the level of protection against discrimination should be lower because mobility within the framework of migration processes is voluntary or chosen. In Bah the Court affirms that: '[g]iven the element of choice involved in immigration

³⁹ *Bah v the United Kingdom*, Application no. 56328/07 (ECtHR, 27 December 2011), paras 45–46.

⁴⁰ Bosniak, cit, p. 4; Spencer and Pobjoy, cit.

⁴¹ *Gaygusuz v Austria*, cit, para 42.

status, therefore, while differential treatment based on this ground must still be objectively and reasonable justifiable, the justification required will not be as weighty as in the case of a distinction based, for example, on nationality'.⁴²

While the difference in access to social rights based on nationality is clearly suspect, a different treatment based on the administrative situation does not attract the same suspicion.⁴³ In the opinion of the Court, the intrinsic voluntariness that is inferred from the migratory processes is the basis that attenuates the examination of reasonableness, so that differences in treatment over social assistance based on immigration status require a less rigorous justification by the states.

This reasoning was later confirmed in *Hode and Abdi v the United Kingdom* (2012) where the restrictions on family reunification of refugees are assessed. Under United Kingdom immigration legislation, the family reunification of the spouse of a refugee requires the marriage to be concluded before the refugee had left the country of origin or arrived in the United Kingdom. In case the marriage took place after the arrival of the person, then the couple could not be reunified. In this case, the Court reaffirms that 'the fact that the immigration status is a status conferred by law, instead of one inherent in the person, does not exclude him from being part of the clause of' other status 'of Art. 14 ECHR'. But, at the same time, it develops the idea that 'the argument about the inclusion of refugee status under the "other status" clause is stronger because, unlike immigration status, refugee status does not incorporate the element of choice'. In the specific case, the Court considered that refugees who marry after leaving their country of origin or arriving in the United Kingdom were in a similar situation to those who had married before starting the trip. Therefore, it declares the violation of Art. 8 ECHR in conjunction with Art. 14 ECHR.

The Bah and Hode and Abdi cases draw a line between forced migration, that is, people who have been granted asylum or refugee status, and voluntary migration, that is, economic migrants. However, it is not entirely clear that the line that marks the division between the two legal statutes can be drawn in a clear way.

The voluntariness that is deduced from the migratory process is the argument used by the ECHR to affirm that differences based on immigration status is a category less suspicious of being discriminatory. However, migrations as processes of human mobility cannot be classified entirely as voluntary processes. Undoubtedly there is an individual motive in the decision of economic

⁴² *Bah v the United Kingdom*, cit, para 47.

⁴³ Dembour, 'Gaygusuz Revisited: The Limits of the European Court of Human Rights' Equality Agenda' (2012) 12(4) Human Rights Law Review 689.

migrants to move to another country, but this decision is framed within a set of global policies that promote the international movement of workers. The receiving states of migrant population elaborate policies of selection of the migratory flows with the objective that the internal labour market can meet the labour demand with the offer ‘surplus’ existing in the rest of the planet.

However, even understanding migration processes solely and exclusively as a result of individual decisions, this does not make them more or less available to discriminatory treatment. In this regard, it should be noted that other suspicious categories such as religion or political ideology also have a clear basis of choice or of voluntarily wanting to belong to a certain group. In fact, in the analysis of discriminatory clauses it is difficult to determine when the traits that place a group in a disadvantaged position are immutable and when these traits are chosen, that is, socially or voluntarily acquired. Is religion a choice? Can one voluntarily stop belonging to an ethnic group? Is gender an unchanging or social category?⁴⁴ The analysis of discrimination cannot have as a guiding principle the difference between belonging to a subordinate group in the framework of the free development of their personality and belonging by an immutable characteristic such as colour. In this sense, as the Court states, an acquired characteristic is not a valid reason to exclude it from the scope of application of Art. 14 ECHR.

It is difficult to know the reasons that led the Court to locate migratory status within the framework of Art. 14 ECHR as a category of ‘little’ suspicion, when precisely the purpose of including it as a clause in Art. 14 ECHR is to increase the degree of justification required by the states in relation to different types of treatment. This position could be interpreted as a declaration that seeks to reassure states’ concerns and reduce pressure in controversial areas such as migration and welfare.⁴⁵ In fact, after *Gaygusuz*, some scholars claimed that the Court had gone too far⁴⁶ and, therefore, Bah can be seen as an attempt by the Court to exercise a certain degree of self-control. It has also been argued that Bah is the withdrawal of an ambitious social protection program.⁴⁷ Whatever the reason, the approach taken by the Court parts from the strengthening of

⁴⁴ Timmer, *Bah. v. UK*: on migration, discrimination and worrisome reasoning (Strasbourg Observers, 12 October 2011).

⁴⁵ Tolley, ‘Judicialization of Politics in Europe: Keeping pace with Strasbourg’ (2012) 11(1) Journal of Human Rights 68; Bratza, ‘The relationship between UK Courts and Strasbourg’ (2011) 5 European Human Rights Law Review 505.

⁴⁶ Bossuyt, ‘Should the Strasbourg Court exercise more self-restraint? On the extension of the jurisdiction of the European Court of Human Rights to social security regulations’ (2007) 17(9–12) Human Rights Law Journal 321.

⁴⁷ Dembour, cit.

the non-discrimination principle that has gradually been reduced in favor of less suspicious, more flexible control.

5 Conclusions

In the past two decades there has been great progress regarding migrants' social rights and their assessment under the non-discrimination principle. The ECtHR has included differences based on nationality as a suspected clause, so states have very few possibilities of recognising social rights for nationals while this access is denied to migrants. This has supposed a substantial limit on the margin of appreciation of the states and advances in the protection of the rights of migrants. However, the difference in treatment based on immigration status has not had the same interpretation as nationality.

States can lay down differentiated treatment based on immigration status without this being assessed as a treatment liable to be discriminatory. This position of the Court leads to prioritising aims linked to migration control, but in detriment of a broader recognition of rights. Among all the immigration statutes, irregular migration is the status that has made the least progress regarding the principle of non-discrimination.

Aliens' Right Not to Be Discriminated Against (Article 14 and Protocol 12 ECHR)

*Maria Mousmouti**

1 The Prohibition of Discrimination in the ECHR: Scope and Content

In a densely populated legislative framework of international, national and European rules on equality and non-discrimination, Article 14 of the European Convention of Human Rights holds a unique place.

For one matter, Article 14 comes into play only in conjunction with the other rights and freedoms consolidated in the Convention. It becomes applicable if the facts of a case fall 'within the ambit' of another substantive provision of the Convention¹ although a violation of a substantive right is not a prerequisite. In practice, applicants often claim that interference with their rights did not only fail to meet the standards required by the substantive provision violated but that it was also discriminatory, as those in a comparable situation did not face a similar disadvantage.

Secondly, Article 14 has an open-ended scope. It does not prohibit all differences in treatment, but only those based on an identifiable, objective or personal characteristic that distinguishes individuals or groups from one another. Specific grounds which constitute 'status' include sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth. The list is illustrative rather than exhaustive, as the Convention refers to 'any ground *such as*', and leaves open the possibility to include additional grounds, under the reference to 'any other status'. These 'elastic' words have been given a wide meaning by the case law and have expanded the scope of Article 14 not only to personal, innate or

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¹ *Clift v the United Kingdom*, Application no. 7205/07 (ECtHR, 13 July 2010), para 41; *Kafkaris v Cyprus [GC]*, Application no. 21906/04 (ECtHR, 12 February 2008), para 159; *Case 'relating to certain aspects of the laws on the use of languages in education in Belgium'* (merits), pp. 33–34, para 9, Series A Application no. 6).

inherent characteristics of individuals² but also to distinctions like those based on military rank,³ on the status of a landlord,⁴ the kind of paternity,⁵ the type of sentence imposed,⁶ nationality or immigration status.⁷

Last but not least, Article 14 does not define discrimination. The Court defined it as ‘the distinct treatment of persons being in identical or relevantly similar situations, without an objective and reasonable justification’.⁸ The ‘traditional’ understanding of discrimination (when a person or group is treated, without proper justification, less favourably than another)⁹ has been extended to include the positive obligation of states to accommodate different situations:¹⁰ ‘The right not to be discriminated against ... is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different’ and measures that have disproportionate prejudicial effects on specific groups ‘notwithstanding that it is not specifically aimed or directed at that group’¹¹ thus encompassing also indirect discrimination. Also Article 14 does not prohibit Contracting Parties from treating groups differently in order to correct ‘factual inequalities’ between them. Indeed, in certain circumstances a failure to correct inequality through different treatment may, without an objective and reasonable justification, give rise to a breach.¹² The Court’s understanding of discrimination has evolved over the years beyond the equal treatment doctrine recognising that in some contexts, legal inequalities might be necessary to correct factual inequalities.

² *Clift v the United Kingdom*, cit, paras 56–58; *Carson and Others v the United Kingdom* [GC], Application no. 42184/05 (ECtHR, 16 March 2010), paras 61 and 70; and *Kjeldsen, Busk Madsen and Pedersen v Denmark*, Application no. 5095/71, 5920/72, 5926/72 (ECtHR, 7 December 1976), para 56, Series A Application no. 23.

³ *Engel and Others v the Netherlands*, Series A Application no. 22.

⁴ *Larkos v Cyprus* [GC], Application no. 29515/95 (ECtHR, 18 February 1999).

⁵ *Paulík v Slovakia*, Application no. 10699/05 (ECtHR, 10 October 2006) (extracts).

⁶ *Clift v the United Kingdom*, cit.

⁷ *Bah v the United Kingdom*, Application no. 56328/07 (ECtHR, 27 September 2011).

⁸ *Willis v the United Kingdom*, Application no. 36042/97, (ECtHR, 11 June 2002), para 48.

⁹ *Abdulaziz, Cabales and Balkandali*, Application no. 9214/80; 9473/81 and 9474/81 (ECtHR, 28 May 1985), para 82; *Vallianatos and Others v Greece* [GC], Application nos. 29381/09 and 32684/09, (ECtHR, 7 November 2013), para 76 (extracts); *Biao v Denmark* [GC], Application no. 38590/10 (ECtHR, 24 May 2016), para 90.

¹⁰ *Thlimmenos v Greece* [GC], Application no. 34369/97 (ECtHR, 6 April 2000), para 44.

¹¹ *Hugh Jordan v the United Kingdom*, no. 24746/94, 4 May 2001.

¹² *Case relating to certain aspects of the laws on the use of languages in education in Belgium*, cit, para 10; *Thlimmenos v Greece* [GC], cit; and *D.H. and Others v the Czech Republic* [GC], Application no. 57325/00 (ECtHR, 13 November 2007), para 175.

Article 14 does not prohibit every differential treatment but only unjustified differential treatment. This is ascertained on the basis of a ‘discrimination test’ that the Court has devised over the years. The test starts from the identification of a difference in treatment, moves on to the examination of whether a person or group are in an analogous or relevantly similar situation with others, examines whether the identified difference in treatment has an *objective and reasonable justification* and, if a justification is in place, whether there is a relationship of proportionality between the means employed and the aims to be achieved. In this process, the Court follows a classic proportionality doctrine: ‘A difference in treatment in the exercise of a Convention right must not only pursue a legitimate aim. Article 14 is also violated when there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised’.¹³

Much weight in the discrimination test falls on justification and proportionality. Article 14 is essentially a balancing exercise between differential treatment and the margin of appreciation of states in determining policy aims, allocating funds, benefits and controlling immigration and access of immigrants and refugees to national territory and other benefits. This margin, no matter how wide, is not absolute. The Court has repeatedly held that it accepts as justifications only *particularly serious reasons* to justify a difference in treatment based on one of the prohibited grounds. General references to traditions or social attitudes cannot, by themselves justify a difference in treatment, any more than stereotypes based on race, origin, colour or sexual orientation.¹⁴ As to the burden of proof, once the applicant has demonstrated a difference in treatment, it is for the Government to show that it was justified.¹⁵

In essence, the ‘vision’ of Article 14 is that all rights and freedoms set out in it must be protected, applied and enjoyed without discrimination. Hence, characteristics such as race, gender, age, sexual orientation should not play any role in the enjoyment of substantive rights and if they do, there should be a clear and reasonable justification for this while any restriction or deviation should be proportional to the (reasonable) aims to be achieved. What kind of cases have come before the Court and how has this protection been applied?

¹³ Case ‘relating to certain aspects of the laws on the use of languages in education in Belgium’, cit, para 10.

¹⁴ *Konstantin Markin*, cited above, para 127; *X and Others v Austria* [GC], Application no. 19010/07 (ECtHR, 19 February 2013), para 99; *Vallianatos and Others*, cit, para 77; and *Hämäläinen v Finland* [GC], Application no. 37359/09 (ECtHR, 16 July 2014), para 109.

¹⁵ *Biao v Denmark* [GC], cit, para 92; and *D.H. and Others*, cit, para 177.

How effective has Article 14 been with relation to the rights of aliens, migrants and refugees?

This chapter takes a closer look at the case law around Article 14 especially in relation to characteristics like race, ethnic origin, nationality, colour, religion and language and their impact on the protection of the rights of aliens, migrants and refugees. The next section examines the case law related to core rights of the Convention, like the right to life, respect for private and family life, property etc. while Section 3 synthesises the findings of this analysis.

2 The Prohibition of Discrimination and Aliens in the ECtHR Case Law

Taking a closer look at the case law, one observes that Article 14 has been associated with a significant number of substantive rights protected by the Convention, including the right to life and the prohibition of torture, slavery and forced labour, the right to liberty and security, the protection of property, the freedom of movement, the right to education, the protection of private and family life, the right to marry and, more recently the general prohibition of discrimination under Protocol 12. Although this section is far from exhaustive its purpose is to discuss how Article 14 interacts with these substantive rights and what the result is from the perspective of aliens, migrants and refugees.

2.1 *Discrimination and the Right to Life, Prohibition of Torture, Slavery and Forced Labour*

Articles 2 and 3 of the Convention enshrine ‘core’ values of the Council of Europe.¹⁶ Article 2 contains the general obligation to protect by law the right to life; the prohibition of intentional deprivation of life, subject to a list of exceptions, and the procedural obligation to carry out an effective investigation into alleged breaches of its substantive limb. Article 3 prohibits torture or inhuman or degrading treatment or punishment in absolute terms, irrespective of the circumstances.¹⁷ No derogation is permissible even in extreme circumstances.¹⁸ Ill treatment includes physical ill-treatment, psychological suffering,¹⁹ the threat

¹⁶ *Giuliani and Gaggio v Italy* [GC], Application no. 23458/02 (ECtHR, 24 March 2011), para 174.

¹⁷ *Kudla v Poland* [GC], Application no. 30210/96 (ECtHR, 26 October 2000), para 90; and *Bouyid v Belgium* [GC], Application no. 23380/09 (ECtHR, 28 September 2015), para 81.

¹⁸ *Bouyid v Belgium* [GC], cit, para 81.

¹⁹ *R.B. v Hungary*, Application no. 64602/12 (ECtHR, 12 April 2016), para 45.

of torture,²⁰ the fear of future assaults²¹ or threats.²² It involves bodily injury or intense physical or mental suffering but it can be degrading if it humiliates or debases an individual or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance.²³ Several cases of police violence and detention conditions where physical force was not strictly necessary have been considered to infringe Article 3.

Both articles have a procedural limb. This requires an effective official investigation,²⁴ which is adequate,²⁵ capable of leading to the establishment of facts, the identification and punishment of perpetrators.²⁶ An effective investigation is about the means employed, and not the results achieved²⁷ and the minimum threshold of effectiveness depends on the circumstances of the case and cannot be reduced to a bare check-list of acts of investigation or other simplified criteria.²⁸ Under article 3, it is an obligation of the state to provide for an official investigation which is *prompt* and *thorough*, *involves all reasonable steps to secure evidence*, including, eyewitness testimony and forensic evidence.²⁹

The Court has been particularly vocal in condemning discrimination on the grounds of ethnic origin in relation to Articles 2 and 3. It views discrimination on account of a person's ethnic origin as a 'particularly egregious' form of racial discrimination and requires from the authorities 'special vigilance and a vigorous reaction' that reinforces 'democracy's vision of a society in which diversity is not perceived as a threat but as a source of its enrichment'.³⁰

²⁰ *Gäfgen v Germany* [GC], Application no. 22978/05 (ECtHR, 1 June 2010), para 108.

²¹ *Eremia v the Republic of Moldova*, Application no. 3564/11 (ECtHR, 28 May 2013), para 54.

²² *Hristovi v Bulgaria*, Application no. 42697/05 (ECtHR, 11 October 2011), para 80.

²³ *Bouyid v Belgium* [GC], cit, paras 86 and 87.

²⁴ *Nachova and Others v Bulgaria* [GC], Application nos. 43577/98 and 43579/98 (ECtHR, 6 July 2005), para 110.

²⁵ *Ramsahai and Others v the Netherlands* [GC], Application no. 52391/99 (ECtHR, 15 May 2007), para 324.

²⁶ *Paul and Audrey Edwards v the United Kingdom*, Application no. 46477/99 (ECtHR, 14 March 2002), para 71; *Rantsev v Cyprus and Russia*, Application no. 25965/04 (ECtHR, 7 January 2010), para 233 (extracts); and *M. and M. v Croatia*, Application no. 10161/13 (ECtHR, 3 September 2015), para 148 (extracts).

²⁷ *Nachova and Others*, cit, para 160, and *Mižigárová v Slovakia*, Application no. 74832/01 (ECtHR, 14 December 2010), para 93.

²⁸ *Tanrikulu v Turkey* [GC], Application no. 23763/94 (ECtHR, 8 July 1999) paras 101–110; and *Velikova v Bulgaria*, Application no. 41488/98 (ECtHR, 18 May 2000), para 80.

²⁹ *El-Masri v the former Yugoslav Republic of Macedonia* [GC], Application no. 39630/09 (ECtHR, 13 December 2012), paras 183 and 184.

³⁰ *Nachova and Others v Bulgaria* [GC], cit, para 145; and *Timishev v Russia*, Application no. 55762/00 and 55974/00 (ECtHR, 13 December 2005), para 56.

The additional protective layer that Article 14 adds to the substantive and procedural obligations of Articles 2 and 3 concerns the potential racist motives of violence or inhuman and degrading treatment. *In Nachova and Others v Bulgaria* the court has made some powerful statements around the obligation of authorities to use all available means to combat racism. Where a difference in treatment is based on race or ethnicity, the notion of objective and reasonable justification must be interpreted as strictly as possible.³¹ Further, no difference in treatment based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures.³²

This means that states are not only obliged to conduct vigorous and impartial investigations, reasserting the condemnation of racism but have the *additional* duty to take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have played a role in the events. This obligation is not absolute. Authorities must do what is reasonable under the specific circumstances to collect and secure evidence, explore all practical means of discovering the truth and deliver fully reasoned, impartial and objective decisions, without omitting suspicious facts that may be indicative of a racially induced violence.³³ The authorities' duty to investigate the existence of a possible link between racist attitudes and an act of violence is an aspect of their procedural obligations arising under Article 2 of the Convention, but also implicit in their responsibilities under Article 14 of the Convention in conjunction with Article 2.

Treating racially induced violence and brutality on an equal footing with cases that have no racist overtones would be to turn a blind eye to the specific nature of acts which are particularly destructive of fundamental rights. A failure to make a distinction in the way in which situations that are essentially different are handled may constitute unjustified treatment irreconcilable with Article 14 of the Convention.³⁴ Difficult though the proof of racial motivation may be, the state is under the obligation to use best endeavours to investigate possible racist overtones to a violent act,³⁵ do what is reasonable, given the

³¹ *D.H. and Others v the Czech Republic*, cit, para 196.

³² *Ibid*, para 176.

³³ *Nachova and Others*, cit, para 158–159, and *Bekos and Koutropoulos v Greece*, Application no. 15250/02 (ECtHR, 13 December 2005), para 69 (extracts).

³⁴ *Nachova and Others*, cit, para 160; *Bekos and Koutropoulos v Greece*, cit, para 70 (extracts); *Šećić v Croatia*, Application no. 40116/02 (ECtHR, 31 May 2007), para 66; *Fedorchenko and Lozenko*, Application no. 387/03 (ECtHR, 20 September 2012), para 65; *Ciorcan and Others v Romania*, nos. 29414/09 and 44841/09 (ECtHR, 17 January 2017), para 158.

³⁵ *Šećić v Croatia*, cit, para 66.

circumstances³⁶ to collect and secure the evidence, explore all practical means of discovering the truth and deliver fully reasoned, impartial and objective decisions, without omitting suspicious facts that may be indicative of racially induced violence.³⁷

In *Grigoryan and Sergeyeva v Ukraine* the Court examined separately the complaint that ethnic prejudice was a motive for the ill-treatment and concluded that authorities' failure to take reasonable steps to uncover potential racial or ethnic motives behind the treatment of the applicant was sufficient to establish a violation of Article 14 in conjunction with Article 3³⁸ despite the fact that there was not sufficient evidence to establish that the ill-treatment was actually motivated by ethnic prejudice. A 'general and discriminatory judicial passivity [of the police] creating a climate that was conducive to domestic violence' amounted to a violation of Article 14 of the Convention.³⁹ The failure of the authorities to take reasonable steps to reveal possible racial or ethnic motives does not need to be intentional and occurs also through a repeated condoning of violence.⁴⁰ In *Talpis v Italy* the fact that the authorities did not carry out any investigation and did not implement any measure of protection despite being aware of the assaults suffered by the applicant shows that, by underestimating, through their complacency, the seriousness of the violent acts the authorities in effect condoned them, breaching Article 14 together with Articles 2 and 3.⁴¹ In *B.S. v Spain* the racist remarks addressed by the police to a Nigerian prostitute were not examined by the courts dealing with the case. According to the Court, they failed to take account of the applicant's particular vulnerability inherent in her position as an African woman working as a prostitute and failed to comply with their duty under Article 14 in conjunction with Article 3 to take all possible steps to ascertain whether or not a discriminatory attitude might have played a role in the events.⁴²

Several cases involve citizens of Roma origin, the use of violence or force against them and the diligence of authorities in investigating potential racial prejudice. In *Ciorcan and Other v Romania*⁴³ the Court found no plausible

36 *Fedorchenko and Lozenko*, cit, para 66.

37 *Bekos and Koutropoulos*, cit, para 69, and *Balázs v Hungary*, Application no. 15529/12 (ECtHR, 20 October 2015), para 52.

38 *Grigoryan and Sergeyeva v Ukraine*, Application no. 63409/11 (ECtHR, 28 March 2017).

39 *Talpis c. Italie*, Application no. 41237/14 (ECtHR, 2 March 2017).

40 *Eremia v the Republic of Moldova*, cit, para 89.

41 *T.M. and c.M. v the Republic of Moldova*, Application no. 26608/11 (ECtHR, 28 January 2014) para 62; *Eremia v the Republic of Moldova*, cit, para 98; and *Mudric v the Republic of Moldova*, Application no. 74839/10 (ECtHR, 16 July 2013), para 63; *Talpis c. Italie*, cit.

42 *B.S. v Spain*, Application no. 47159/08 (ECtHR, 24 July 2012).

43 *Ciorcan and Others v Romania*, cit.

justification for the failure of the authorities to investigate whether or not discrimination and racial prejudice played a role in the violent events that had taken place. In *Lakatosova and Lakatos v Slovakia*⁴⁴ the Court ascertained that the mere existence of protective legal mechanisms is not sufficient under the Convention. The fact that investigators and prosecutors failed to investigate possible racist overtones, despite the evidence to alert them in that direction, amounted to a violation of Article 14 read in conjunction with Article 2 of the Convention. In *Škorjanec v Croatia*⁴⁵ the failure to effectively investigate racial motivation was linked to the fact that the prosecuting authorities failed to investigate the link between racist attitudes and acts of violence based on a victim's actual or presumed association or affiliation with another person who actually or presumably possessed a particular status or protected characteristic.⁴⁶ A failure of the authorities' duty to take all possible steps to investigate whether or not discrimination may have played a role in events includes when they make no genuine effort to establish a chronology of the incident, address the applicant's grievance and secure objective and sufficient evidence to corroborate the alleged fact.⁴⁷ It includes as well the failure to take measures *to protect* from a pogrom, the lack of objective reason for inaction, the appearance of official endorsement of the attack generated by the presence and passivity of the police at the scene of the attack the overall attitude and complicity of the authorities.⁴⁸

Articles 2 and 3 are core rights of the Convention. In conjunction with Article 14 however their scope is broadened to encompass also situations where racist motives lie behind threats to life or torture. The Court has used Article 14 to send a powerful message about the unacceptability of certain practices and the obligations of states to respond to them.

2.2 *Discrimination, Liberty and Security*

Article 5 of the Convention protects physical liberty. Any deprivation of liberty is unlawful unless it falls under the exhaustive exceptions listed in subparagraphs (a) to (f) of Article 5 para 1. What Article 14 adds to the protection of Article 5 is that even acceptable exceptions cannot rely on discriminatory grounds.

⁴⁴ *Lakatasova and Lakatos v Slovakia*, Application no. 655/16 (ECtHR, 11 December 2018).

⁴⁵ *Škorjanec v Croatia*, Application no. 25536/14 (ECtHR, 28 March 2017), para 62.

⁴⁶ *Škorjanec v Croatia*, cit, para 66.

⁴⁷ *M.F. v Hungary*, Application no. 45855/12 (ECtHR, 31 October 2017).

⁴⁸ *Burlya and others v Ukraine*, Application no. 3289/10 (ECtHR, 6 November 2018).

The Court has found that the administrative practice of arresting, detaining and expelling foreign nationals when arbitrary can amount to a breach of Article 5 para 1 of the Convention,⁴⁹ especially when coupled with real and practical obstacles in the review of the 'lawfulness' of detention.⁵⁰ However, the placement in detention centres for foreigners, transfers to other detention centres for the purpose of deportation are not per se arbitrary or discriminatory.⁵¹

Even within settings of deprivation of liberty, aliens need to be treated in a non-discriminatory way. The court found that the treatment of a convict of Bulgarian origin held in a German prison who had been denied a social therapy or relaxations in the conditions of his detention was discriminatory.⁵² The Court found the applicant to be in an analogous situation to other prisoners of German nationality against whom a preventive detention order was ordered, found a difference in treatment in the fact that the applicant had not been offered the only therapy considered suitable by the psychiatric expert consulted as well as relaxations in the conditions of his detention in view of the final expulsion order, which he could only be subject to as a foreign national. Unlike German nationals in his situation, the applicant was denied a chance to complete such a therapy, and to prove reliable during relaxations in detention conditions and thus to fulfil preconditions for the domestic courts to conclude that the execution of the preventive detention order against him could be suspended. And although the aims pursued (to prevent absconding and to secure the execution of the expulsion order) may be legitimate, they were not proportional to the extent that they were not compensated by offers of different therapies or other measures. Lacking objective justification, the difference of treatment violated Article 14 taken together with Article 5 of the Convention.

2.3 *Discrimination and Property Rights*

Article 1 of Protocol Application no. 1 guarantees the right to property. It does not create a right to become the owner of property⁵³ or any benefits. If however a pecuniary interest falling within the ambit of Article 1 of Protocol Application no. 1 is in place,⁵⁴ it needs to be provided in a non-discriminatory

⁴⁹ *Georgia v Russia (I)*, Application no. 13255/07 (ECtHR, 3 July 2014), para 187.

⁵⁰ *Berdzenishvili and Others v Russia*, Application no. 14594/07, 14597/07, 14976/07, 14978/07, 15221/07, 16369/07 and 16706/07 (ECtHR, 26 March 2019).

⁵¹ *Moras and Others v Greece*, Application no. 20/13 (ECtHR, 20 January 2015).

⁵² *Rangelov v Germany*, Application no. 5123/07 (ECtHR, 22 March 2012).

⁵³ *Van der Mussele v Belgium*, para 48, Series A Application no. 70; *Slivenko v Latvia* (dec.) [GC], Application no. 48321/99 (ECtHR, 9 October 2013), para 121; and *Kopecký v Slovakia* [GC], Application no. 44912/98 (ECtHR, 28 September 2004), para 35 (b).

⁵⁴ *Stummer v Austria* [GC], Application no. 37452/02 (ECtHR, 7 July 2011), para 82.

manner. The test that Article 14 adds to the protection of property is whether, but for the discriminatory ground in question, for example nationality, race or language, an individual would have had a right, enforceable under domestic law, in respect of a specific asset.⁵⁵

Nationality is an element of personal status that is often used to determine entitlement to benefits, pensions or other schemes and is 'suspect' from the perspective of discrimination. In the leading case *Andrejeva v Latvia*⁵⁶ a distinction on the basis of nationality in the Latvian courts' refusal to grant the applicant a retirement pension in respect of her years of employment in the former Soviet Union prior to 1991 on the ground that she did not have Latvian nationality was found to be in violation of Article 14 in conjunction with Article 1 of Protocol Application no. 1. The Court deducted that the applicant has been discriminated against on the grounds of nationality and that there was no relationship of proportionality between the aim of protecting the country's economic system and the difference in treatment. In *Gaygusuz v Austria*⁵⁷ the applicant was denied emergency social assistance on the ground that he did not hold Austrian nationality. The Court found that the refusal to grant emergency assistance was based exclusively on the fact that the applicant did not have Austrian nationality as he satisfied all other statutory conditions. He was therefore in a like situation to Austrian nationals as regards entitlement and there was no objective and reasonable justification for a difference in treatment on the basis of nationality. Very strong or weighty reasons or particularly weighty reasons have to be put forward to justify the use of nationality as a sole criterion for differential treatment.⁵⁸

Residence is another aspect of personal status⁵⁹ that might conceal discriminatory treatment. Residence is often a criterion of eligibility for social policies or benefits and it is not necessarily an unacceptable one. The Court has repeatedly admitted that considerations of social policy fall within the margin of appreciation of states and can justify differences in treatment subject to proportionality. In *Pichkur v Ukraine*,⁶⁰ the payment of the applicant's pension was terminated on the ground that he resided permanently abroad. The Court found that the difference in treatment was dependent on the applicant's place

⁵⁵ *Fabris v France* [GC], Application no. 16574/08 (ECtHR, 7 February 2013), para 52; *Ribac v Slovenia*, Application no. 57101/10 (ECtHR, 5 December 2017).

⁵⁶ *Andrejeva v Latvia* [GC], Application no 55707/00 (ECtHR, 18 February 2009), para 88.

⁵⁷ *Gaygusuz v Austria*, para 42, Reports 1996-IV.

⁵⁸ *Sahin v Germany*, Application 30943/96 (ECtHR, 8 July 2003).

⁵⁹ *Carson and Others v the United Kingdom* [GC], cit, paras 70 and 71.

⁶⁰ *Pichkur v Ukraine*, Application no. 10441/06 (ECtHR, 7 November 2013).

of residence, resulting in a situation in which the applicant, having worked for many years and having contributed to the pension scheme, was deprived of it altogether, on the sole ground that he no longer lived in Ukraine. This was different from the case *Carson and Others v the United Kingdom* where the difference in treatment concerned the lack of indexation of existing pensions for those residing in foreign states, while entitlement to the pension as such was not questioned.⁶¹ In *Koua Poirrez v France*⁶² the refusal to award an allowance for disabled adults was discriminatory because the applicant was in a like situation to that of French nationals or nationals of a country that had signed a reciprocity agreement as regards the right to receive the benefit and the difference in treatment lacked any objective and reasonable justification. However, in *Efe v Austria*,⁶³ the Court did not consider that the applicant, whose children lived outside Austria, was in a relevantly similar position to persons claiming family allowance for children living in Austria and found no violation of Article 14 in conjunction with Article 1 of Protocol No 1. Conditions of residence might conceal a condition of disguised nationality and are thoroughly examined by the Court.

When it comes to the use of residence as a criterion, considerations of social policy can justify differences in treatment. In *Si Amer v France*⁶⁴ a claim to an additional insurance with a French supplementary fund absorbed by the Algerian general regime after Algeria gained independence was not found discriminatory despite the fact that it was rejected on the ground that the applicant was not residing in France at the time it was formulated. The Court acknowledged the broad margin of discretion of states to make decisions in economic and social matters, acknowledged the difference in treatment and the analogous situation of the applicant to people with identical or similar professional careers though different residence, but decided that the difference in treatment responded to a legitimate aim and thus was not discriminatory.

While Article 1 of Protocol 1 plays an important role in protecting property, Article 14 requires that the (broad) powers that states have are not exercised in a discriminatory manner. Conditions of nationality and residence are not a priori unacceptable but subject to excessive scrutiny. Even when used as a sole criterion, there need to be particularly important reasons to justify this. The Court has made a strong case in this direction. Suspect criteria related to

61 *Carson and Others v the United Kingdom* [GC], cit, paras 85 and 86.

62 *Koua Poirrez v France*, Application no. 40892/98 (ECtHR, 30 September 2003), paras 47–50.

63 *Efe v Austria*, Application no. 9134/06 (ECtHR, 8 January 2013), paras 51–53.

64 *Si Amer v France*, no. 29137/06 (ECtHR, 29 October 2009), paras 43–47.

nationality and residence need to be used with extreme caution and be duly justified.

2.4 *Discrimination and Freedom of Movement*

Article 2 of Protocol 4 provides that everyone lawfully within the territory of a state has the right to liberty of movement and freedom to choose their residence, including the freedom to leave. Restrictions can only be provided for in accordance with the law and in the interests of national security or public safety, for the maintenance of public order, the prevention of crime, the protection of health or morals, or the protection of the rights and freedoms of others. Seen together with Article 14 any restrictions cannot rely on discriminatory grounds.

In *Timishev v Russia*⁶⁵ the applicant complained about discriminatory restriction of his liberty of movement by police officers because the restriction was conditional on his Chechen ethnic origin. The Court found that the applicant was in the same situation as other persons wishing to cross the administrative border while the police order was not to admit 'Chechens'. Since ethnic origin was not listed in Russian identity documents, the order impacted not only those who actually were of Chechen ethnicity, but also those perceived as belonging to that ethnic group resulting in a clear inequality of treatment in the enjoyment of the right to liberty of movement on account of one's ethnic origin. The difference in treatment was not justified and hence the restriction of the right to liberty of movement on the ground of ethnic origin constituted racial discrimination within the meaning of Article 14 in conjunction with Article 2 of Protocol Application no. 4 to the Convention.

2.5 *Discrimination and Education*

Article 2 of Protocol Application no. 1 guarantees an individual right to education. It does not create a positive obligation for states to create a public education system or to subsidise private schools. Instead, states cannot deny the right to education in the educational institutions they have set up. The right to education is not absolute, it might be limited and authorities enjoy a certain margin of appreciation in this respect. Restrictions cannot however curtail the right to such an extent as to impair its essence and deprive it of its effectiveness. Permitted restrictions are not exhaustive and limitations are acceptable

65 *Timishev v Russia*, cit, paras 58–59.

only if there is a reasonable relationship of proportionality between means and aims.⁶⁶

Discrimination in access to education exists when a state applies different treatment in the implementation of its obligations under Article 2 of Protocol No 1. Language, nationality, ethnic origin and religion are once again ‘suspect’ criteria that may place specific national or ethnic groups at disadvantage.

In the landmark case on *Belgian linguistics*⁶⁷ the Court addressed the question of the inability for children with French as their mother tongue, living in a Dutch-speaking region, to follow classes in French whereas Dutch-speaking children living in the French-language region could follow classes in Dutch. The measure in question was found to be discriminatory because it was not imposed in the interest of schools for administrative or financial reasons, but proceeded solely from considerations relating to language.⁶⁸ The Court held that the Act of 2 August 1963 was not compliant with the requirements of Article 14 in conjunction with the first sentence of Article 2 of Protocol 1, insofar as it prevented certain children, solely on the basis of the residence of their parents, from having access to the French-language schools existing in the six communes on the periphery of Brussels invested with a special status. The Court also noted that Article 14 does not prohibit Contracting Parties from treating groups differently in order to correct ‘factual inequalities’ between them. Indeed, in certain circumstances a failure to attempt to correct inequality through different treatment may, without an objective and reasonable justification, give rise to a breach.⁶⁹ With regard to tertiary education, changes to the access to university were discriminatory even though their aim was the improvement of the quality of higher education because of their unforeseeability and the lack of corrective measures.⁷⁰

Administrative status and nationality are suspect conditions affecting aliens in particular. In *Ponomaryovi v Bulgaria*,⁷¹ the Court found that the requirement for the two pupils to pay fees for their secondary education on account of their nationality and immigration status constituted a violation of Article 14 of the Convention read in conjunction with Article 2 of Protocol Application no. 1.

66 *Leyla Şahin v Turkey* [GC], Application no. 44774/98 (ECtHR, 10 November 2005), paras 154 et seq.

67 *Case ‘Relating to certain aspects of the Laws on the Use of Languages in education in Belgium’ v Belgium*, cit.

68 *Ibid*, para 32 of ‘the Law’ part.

69 *Case ‘relating to certain aspects of the laws on the use of languages in education in Belgium’*, cit, para 10; *Thlimmenos v Greece* [GC], cit, para 44; and *D. H. and Others*, cit, para 175.

70 *Altinay v Turkey*, Application no. 37222/04 (ECtHR, 9 July 2013), para 60.

71 *Ponomaryovi v Bulgaria*, Application no. 5335/05 (ECtHR, 21 June 2011) paras 59–63.

Discrimination in education on the grounds of ethnic origin has been scrutinised in a number of cases in relation to the education of Roma children.⁷² The Court affirmed the obligation of the state to take into account the needs of Roma children,⁷³ to make transparent decisions that do not rely only on ethnic origin⁷⁴ and the obligation to take positive measures against segregation.⁷⁵

2.6 *Discrimination and Respect for Private and Family Life*

Article 8 protects private and family life, home and correspondence. No interference by a public authority is accepted in the exercise of this right except when lawful and necessary in terms of national security, public safety or economic well-being, prevention of disorder or crime, protection of health or morals, or for protection of the rights and freedoms of others. The relevant principles have been set out by the Court in a number of cases.⁷⁶ Under article 8, the notion of ‘family’ goes beyond marriage-based relationships to encompass *de facto* ‘family’ ties and partnerships.⁷⁷ The concept of private life includes physical and psychological integrity,⁷⁸ ethnic identity⁷⁹ and the social ties between settled migrants and their community.⁸⁰ The concept of ‘home’ is also broad and goes beyond those lawfully occupied or established.⁸¹

72 *D.H. and Others v the Czech Republic* [GC], cit, para 205.

73 *Ibid*, para 207; *Sampanis and Others v Greece*, Application no. 32526/05 (ECtHR, 5 June 2008), para 103.

74 *Oršuš and Others v Croatia* [GC], Application no. 15766/03 (ECtHR, 16 March 2010), para 182.

75 *Layida and Others v Greece*, Application no. 15766/03 (ECtHR, 16 March 2010), para 73.

76 *Aksu v Turkey* [GC], Application nos. 4149/04 and 41029/04 (ECtHR, 15 March 2012), paras 58–59; *Sandra Janković v Croatia*, Application no. 38478/05 (ECtHR, 5 March 2009), paras 44–46; and *R.B. v Hungary*, Application no. 64602/12, para 78 and paras 81–84; *Nachova and Others v Bulgaria* [GC], cit, para 145; *Aksu v Turkey*, cit, paras 43–44; *Šečić v Croatia*, cit, paras 66–67.

77 *Schalk and Kopf v Austria*, Application no. 30141/04 (ECtHR, 24 June 2010), para 94; *K. and T. v Finland* [GC], Application no. 25702/94 (ECtHR, 12 July 2001), para 150; and *Marckx v Belgium*, para 31, Series A Application no. 31.

78 *Von Hannover v Germany*, Application no. 59320/00 (ECtHR, 24 June 2004), para 50.

79 *S. and Marper v the United Kingdom* [GC], Application nos. 30562/04 and 30566/04 (ECtHR, 4 December 2008), para 66; and *Ciubotaru v Moldova*, Application no. 27138/04 (ECtHR, 27 April 2010), para 49.

80 *Üner v the Netherlands* [GC], Application no. 46410/99 (ECtHR, 18 October 2006), para 59; and *Maslov v Austria* [GC], Application no. 1638/03 (ECtHR, 23 June 2008), para 63.

81 *Gillow v the United Kingdom*, judgment of 24 November 1986, Series A Application no. 109, para 46; and *Prokopovich v Russia*, Application no. 58255/00 (ECtHR, 18 November 2004), paras 36–39 (extracts).

On many occasions, Article 8 has been read in conjunction with Article 14. Relevant cases concern same-sex couples,⁸² gender-based discrimination, prevailing social attitudes,⁸³ stereotyping⁸⁴ difference in treatment on the grounds of birth out of or within wedlock.⁸⁵ While the Convention does not guarantee specific aspects of family life, like the right to adoption, if a state chooses to convey such a right it needs to do so in a non discriminatory manner.

Violations of Article 14 in conjunction with Article 8 have been addressed in cases where nationality or ethnic origin plays an important role as a criterion for authorities' decisions. Examples include a refusal to let a binational couple keep their surnames after marriage,⁸⁶ a ban on adoption of Russian children by US nationals. In this latter case of *A.H. and Other v Russia*⁸⁷ a ban on the adoption of Russian children by US nationals was found to be discriminatory. Although the right to adopt was not guaranteed by the ECHR, where a state had created such a right in its domestic law, it could not take discriminatory measures in applying it. According to the Court, the applicants' right to apply for adoption, and to have their applications considered fairly, falls within the scope of private life under Article 8. Withdrawal of parental authority based on a distinction deriving from religious considerations was also in violation of Article 8 in conjunction with Article 14.⁸⁸

Article 8 has been invoked in relation to nationality law. In *Genovese v Malta*⁸⁹ the Court found that access to nationality falls under the scope of protection of Article 8 as part of a person's social identity, which forms part of a person's private life. The applicant was in an analogous situation to other children with a father of Maltese nationality and a mother of foreign nationality and the only distinguishing factor, which rendered him ineligible to acquire citizenship, was the fact that he had been born out of wedlock. The Court

⁸² *Oliari and Others v Italy*, Application nos. 18766/11 and 36030/11 (ECtHR, 21 July 2015), paras 178 and 180–185; *Schalk and Kopf v Austria*, cit, para 108.

⁸³ *Ünal Tekeli v Turkey*, Application no. 29865/96 (ECtHR, 16 November 2004), para 63 b.

⁸⁴ *Carvalho Pinto de Sousa Moraes v Portugal*, Application no. 17484/15 (ECtHR, 25 July 2017), para 46.

⁸⁵ *Sahin v Germany* [GC], cit, para 94; *Mazurek v France*, Application no. 34406/97 (ECtHR, 1 February 2000), para 49; *Camp and Bourimi v the Netherlands*, Application no. 28369/95 (ECtHR, 3 October 2000), paras 37–38.

⁸⁶ *Losonci Rose and Rose v Switzerland*, Application no. 664/06 (ECtHR, 9 November 2010), para 26.

⁸⁷ *A.H. and Others v Russia*, Application nos 6033/13, 8927/13, 10549/13, 12275/13, 23890/13, 26309/13, 27161/13, 29197/13, 32224/13, 32331/13, 32351/13, 32368/13, 37173/13, 38490/13, 42340/13 and 42403/13 (ECtHR, 17 January 2017).

⁸⁸ *Hoffmann v Austria*, Application no. 12875/87 (ECtHR, 23 June 1993), para 36.

⁸⁹ *Genovese v Malta*, no. 53124/09 (ECtHR, 11 October 2011).

found that no reasonable or objective grounds were in place to justify this difference of treatment resulting in a violation of Article 14 of the Convention in conjunction with Article 8. In *Kuric and others v Slovenia*⁹⁰ the Court considered the complaint that the applicants had been arbitrarily deprived of the possibility of acquiring Slovenian citizenship and/or of preserving their status as permanent residents after independence in 1991 and were 'erased' from the Register of Permanent Residents. The applicants argued that they had been treated less favourably than 'real' aliens who had lived in Slovenia since before independence. The Court identified a difference in treatment based on the national origin of the persons concerned that was discriminatory to the extent that it did not pursue a legitimate aim and lacked an objective and reasonable justification. The Grand Chamber acknowledged that erasure interfered with the applicants 'private or family life' or both and while independence pursued a legitimate aim, it failed to achieve a fair balance between the individual's rights protected by the Convention and the community's interests, and created adverse consequences and disproportionate repercussions on the private or family life, or both, of the individuals concerned. Once again, the Court noted that Article 14 does not prohibit Contracting Parties from treating groups differently in order to correct 'factual inequalities'. Actually, in certain circumstances a failure to correct inequality through different treatment may result in a breach of article 14.⁹¹ Further, a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory notwithstanding that it is not specifically aimed at that group.⁹² So beyond abstaining from interference, there can be positive obligations inherent in effective 'respect' for private or family life or both, in particular in the case of long-term migrants such as the applicants.⁹³

An area where discriminatory practices appear to be thriving is that of rules around family reunification. In this area, direct and indirect discriminatory practices have been blatantly rejected by the Court. In *Abdulaziz, Cabales and Balkandali v the United Kingdom*,⁹⁴ a violation of Articles 14 and 8 on the ground of sex was found, as it was easier for a man settled in the United Kingdom to

⁹⁰ *Kuric and others v Slovenia* [GC], Application no. 26828/0 (ECtHR, 26 June 2012).

⁹¹ *Thlimmenos v Greece* [GC], cit, para 44; and *Sejdic and Finci v Bosnia and Herzegovina* [GC], Application nos. 27996/06 and 34836/06 (ECtHR, 22 December 2009), para 44.

⁹² *D.H. and Others v the Czech Republic*, cit, para 175.

⁹³ *Gül v Switzerland*, Application no. 23218/94 (ECtHR, 19 February 1996), para 38, Reports 1996-I; *Ahmut v the Netherlands*, Application no. 21702/93 (ECtHR, 28 November 1996), para 67, Reports 1996-VI; and *Mehemi v France* (Application no. 2), Application no. 53470/99 (ECtHR, 10 April 2003), para 45.

⁹⁴ *Abdulaziz, Cabales and Balkandali v the United Kingdom*, cit.

obtain permission for his spouse to enter or remain in the country. However, although the reasoning behind the difference in treatment was considered legitimate (labour market concerns), it was not proportional: equality of sexes would require more convincing reasons to justify a discriminatory difference of treatment. In *Pajic v Croatia*⁹⁵ the Court confirmed the need for 'particularly convincing and weighty reasons' as justification of differences in treatment on the grounds of sexual orientation,⁹⁶ while it noted the unacceptability of differences based *solely* on such considerations. The applicant was refused a residence permit in Croatia for family reunification with her partner. The Court ascertained a difference in treatment as the Croatian legal system recognised extramarital relationships of different and same-sex couples, but the Aliens Act expressly reserved the possibility for family reunification residence permits to different-sex couples, whether married or unmarried. The relationship of a cohabiting same-sex couple in a stable *de facto* partnership falls within the notion of 'private life' and 'family life'⁹⁷ and found no acceptable justification for a blanket exclusion of persons in a same-sex relationship from the possibility of obtaining family reunification.

In *Tadeucci and McCall*⁹⁸ the Court examined the case of a same-sex couple that settled in Italy in 2003. McCall, a New Zealand resident, was refused a residence permit for family reasons and after a negative judgment from the Court of Cassation, the couple left Italy and moved to the Netherlands, where McCall was issued with a five-year residence permit as a *de facto* partner in a long-term relationship with an EU national. In 2010 the couple married. The applicants alleged that the refusal to grant a residence permit for family reasons prevented them from continuing to live together in Italy. The Court noted that while Article 8 does not impose a general obligation on a state to respect the choice by a family of a country of residence and to accept non-national partners for settlement, decisions in the immigration sphere can interfere with private and family life, in particular when personal or family ties are in place and are affected by a measure.⁹⁹ In the case in question, the refusal to grant McCall a residence permit meant that he was legally obliged to leave Italy,

95 *Pajic v Croatia*, Application no. 68453/13 (ECtHR, 23 February 2016) (FINAL 23/05/2016).

96 *Kozak v Poland*, Application no. 13102/02, para 92 (ECtHR, 2 March 2010).

97 *E.B. v France*, Application no. 43546/02 (ECtHR, 22 January 2008), para 50; and *Vallianatos and Others*, para 77.

98 *Taddeucci and McCall v Italy*, Application no. 51362/09 (ECtHR, 30 June 2016).

99 *Moustaquim v Belgium*, 18 February 1991, para 36, Series A Application no. 193; *Dalia v France*, 19 February 1998, para 52, *Reports of Judgments and Decisions* 1998-1; and *Hamidovic v Italy*, Application no. 31956/05 (ECtHR, 4 December 2012), para 37.

and the couple was prevented from continuing to live together in Italy, hence interfering with an essential aspect of their 'family life'. In the case in question, discrimination arose from the fact that an unmarried homosexual couple was treated in the same way as persons in a significantly different situation from theirs, namely, heterosexual partners who had decided not to regularise their situation. However, the lack of any possibility for homosexual couples to legally recognise their relationship, placed them in a different situation from that of unmarried heterosexual couples. The justification of protecting the traditional family, while an overall legitimate aim, does not qualify however as a 'particularly convincing and weighty' reason capable of justifying discrimination on grounds of sexual orientation. Hence, the Court found an infringement of the right not to be discriminated against on grounds of sexual orientation in the enjoyment of the right to private and family life.

In *Hode and Abdi v the United Kingdom*¹⁰⁰ the Court accepted that there is no obligation for states under Article 8 to accept non-national spouses for settlement. However, if such a right is conferred to certain categories of immigrants, it must be non-discriminatory. The Court found that immigration rules affect the home and family life of immigrants and their children and their ability to set up home together and enjoy family life together and fall within the ambit of Article 8. Further, although immigration status is not personal status, it is conferred by law and can amount to 'other status' for the purposes of Article 14.¹⁰¹ In the present case, the applicants complained that Immigration Rules did not permit refugees to be joined in the United Kingdom by spouses when the marriage took place after the refugee had left the country of permanent residence. The Court considered that refugees who married before leaving their country of permanent residence were in an analogous position but the only relevant difference was the time at which the marriage took place. And while incentives to certain groups of immigrants may be a legitimate aim for the purposes of Article 14 this 'justification' was not advanced in the domestic cases where the Upper Tribunal (Asylum and Immigration) found no justification for the particularly disadvantageous position that refugees had found themselves when compared to students and workers. In light of the above, the Court did not find the difference in treatment between the applicants, students and workers, objectively and reasonably justified. Furthermore, the Court saw no justification for treating refugees who married post-flight differently from those who married pre-flight.

¹⁰⁰ *Hode and Abdi v the United Kingdom*, Application no 22341/09 (ECtHR, 6 November 2012).

¹⁰¹ *Bah v the United Kingdom*, cit.

*Biao v Denmark*¹⁰² involved a complaint from Mr Ousmane Biao, a Danish national, and his wife, a Ghanaian national, against the refusal by the Danish authorities to grant them family reunion in Denmark. The case evolved around the attachment requirement (proving ties to Denmark against attachment to other countries) and the so-called ‘28-year rule’, a rule that lifted the attachment requirement for persons who held Danish citizenship for at least twenty-eight years. The applicants complained that this rule had an indirect discriminatory effect as it favoured nationals of Danish ethnic origin and placed at a disadvantage or had a disproportionately prejudicial effect on persons who acquired Danish nationality later in life and were of distinct ethnic origin. The Court found that the applicants were in a similar situation to couples in which a Danish national and a foreign national seek family reunification in Denmark and did not accept the Government’s claim that the difference in treatment was linked solely to the length of nationality. Aliens could benefit from the 28-year rule, but that did not alter the indirect effect of favouring Danish nationals of Danish ethnic origin, and placing at a disadvantage or having a disproportionately prejudicial effect on persons who acquired Danish nationality later in life and who were of an ethnic origin other than Danish. Immigration-control measures, while compatible with Article 8 para. 2, including with the legitimate-aim requirement, may nevertheless amount to unjustified discrimination. The Court considered the justification of the Government speculative, especially in relation to the length of time required to demonstrate strong ties with Denmark. In the Court’s view this does not depend solely on the length of nationality and this line of reasoning overlooks other factors like years of previous residence, linguistic proficiency, knowledge of Danish society, and self-support. In conclusion, the Court found that there were no compelling or very weighty reasons unrelated to ethnic origin to justify the indirect discriminatory effect of the 28-year rule and found a violation of Article 14 in conjunction with Article 8.

Discrimination in private or family life is also present in entitlement to family allowances and benefits. The cases of *Fawsie*¹⁰³ and *Saidoun* concerned allowances for large families. The Court found a violation based on the fact that the applicants and the members of their families had been granted political refugee status and that the criterion chosen by the Government to determine eligibility for the allowance did not appear relevant to the aim pursued (which was to deal with the country’s demographic situation). In *Dhahbi v Italy*,¹⁰⁴ the

¹⁰² *Biao v Denmark*, cit.

¹⁰³ *Fawsie v Greece*, Application no. 40080/07 (ECtHR, 28 October 2010).

¹⁰⁴ *Dhahbi v Italy*, Application no. 17120/09 (ECtHR, 8 April 2014).

applicant claimed to have been discriminated against based on his nationality as his entitlement to a family allowance was rejected. The Court found that the applicant was treated differently compared to workers who were nationals of the European Union and who had large families and that the refusal to grant the allowance was based exclusively on nationality. And while the protection of the state's budgetary interests constitutes a legitimate aim, it cannot by itself justify the difference in treatment. The Court pointed out that when nationality is the sole criterion for a distinction, *very weighty reasons would have to be put forward* to be compatible with the Convention. A reasonable relationship of proportionality was not in place resulting in a violation of Article 14 in conjunction with Article 8 of the Convention.

Further, similarly to articles 2 and 3, Article 8 involves a responsibility from the authorities to investigate the existence of a possible link between racist attitudes and acts of violence.¹⁰⁵ In *Alkovic v Montenegro*¹⁰⁶ the applicant (a Roma and a Muslim) complained regarding the failure of the authorities to effectively investigate a series of ethnically and/or religiously motivated attacks against him. The Court found that the manner in which the criminal-law mechanisms were implemented by the judicial authorities was defective with regard to uncovering possible racist motives¹⁰⁷ and violated Article 8 of the Convention in conjunction with Article 14.

When it comes to the protection of 'home' within the meaning of Article 8 however, changes in the conditions of tenancy such as an increase in rent or a requirement to pay for accommodation were not considered to be a discriminatory interference with the right to respect for home.¹⁰⁸ The change in the conditions of tenancy offered to the applicant pursued a legitimate aim, namely the efficient running of the public system of social housing and was not disproportionate, since non-exemption from paying full rent does not constitute arbitrariness on the part of authorities.

There are several ways in which discriminatory treatment can come into play with regard to private and family life. The Court has been clear in noting that the status of nationality and ethnic origin, among others, cannot be used without weighty reasons. And while in socio-economic matters such as

¹⁰⁵ *Nachova and Others*, cit, para 161; with respect to Article 14 in conjunction with Article 3, *Šečić v Croatia*, cit, para 66, and *Abdu v Bulgaria*, Application no. 26827/08 (ECtHR, 11 March 2014), para 44; and with respect to Article 14 in conjunction with Article 8, *R.B. v Hungary*, cit, para 84.

¹⁰⁶ *Alkovic v Montenegro*, Application no. 66895/10 (ECtHR, 5 December 2017).

¹⁰⁷ *Balázs v Hungary*, cit, para 61.

¹⁰⁸ *Dzharageti v Russia*, Application no. 8459/03 (ECtHR, 9 November 2006).

housing the margin of appreciation available to the state is necessarily a wide one, a relationship of proportionality needs to be in place to justify any difference in treatment.

2.7 *Discrimination and Right to Marry*

Article 12 protects the fundamental right to marry and found a family. The exercise of this right gives rise to social, personal and legal consequences and is subject to national laws in all Contracting States. However, any limitations introduced must not restrict or reduce the right in a way or to such an extent that its essence is impaired.¹⁰⁹

Limitations on the right to marry are common in national laws and can comprise formal rules on publicity, solemnisation of marriage or substantive provisions based on general considerations of public interest, in particular concerning capacity, consent, prohibited degrees of affinity or the prevention of bigamy. In the context of immigration laws, states may be entitled to prevent marriages of convenience, entered solely for the purpose of securing an immigration advantage. However, any limitations cannot deprive a person or a category of persons of full legal capacity of the right to marry with the partners of their choice.¹¹⁰ Article 12 does not include permissible grounds for interference by the state, so the Court's task is to determine whether, with regard to the state's margin of appreciation, the impugned interference is arbitrary or disproportionate.¹¹¹

In *O'Donoghue and Others v the United Kingdom*¹¹² the Court dealt with the complaint of an Irish and British national and their Nigerian spouse who were denied a Certificate of Approval scheme to allow them to marry. The Court made it clear that a Contracting State may impose reasonable conditions on the right of a third-country national to marry in order to ascertain whether the marriage is one of convenience. Consequently, it is not necessarily a violation of Article 12 to subject marriages involving foreign nationals to scrutiny,

¹⁰⁹ *Rees v the United Kingdom*, 17 October 1986, para 50, Series A Application no. 106; *F. v Switzerland*, Series A Application no. 128, para 32; *B. and L. v the United Kingdom*, Application no. 36536/02 (ECtHR, 13 September 2005), para 34.

¹¹⁰ *Hamer v the United Kingdom*, Application no. 7114/75, Comm. Rep., D.R. 24, pp. 12 et seq., paras 55 et seq.; *Draper v the United Kingdom*, Application no. 8186/78, Comm. Rep., 10 July 1980, D.R. 24, para 49; *Sanders v France*, Application no. 31401/96, Com. Dec., 16 October 1996, D.R. Application no. 160, p. 163; *F. v Switzerland*, cit; and *B. and L. v the United Kingdom*, cit, paras 36 et seq.

¹¹¹ *Frasik v Poland*, Application no. 22933/02 (ECtHR, 5 January 2010), para 90 (extracts).

¹¹² *O'Donoghue and Others v the United Kingdom*, Application no. 34848/07 (ECtHR, 14 December 2010).

requiring notification of intended marriages and the submission of information on immigration status and the genuineness of the marriage.¹¹³ So a requirement for a certificate of capacity prior to a non-national marrying is not necessarily in violation of Article 12.¹¹⁴ The Court came up with valuable observations with regard to the exercise of this 'controlling' function by states. Firstly, a decision to grant approval that is not based solely on the genuineness of the proposed marriage is not compatible with the Convention. Secondly, blanket prohibitions on the exercise of the right to marry on all persons in a specified category, regardless of whether the proposed marriage was one of convenience or not, are not acceptable. Any general, automatic and indiscriminate restriction on a vitally important Convention right falls outside any acceptable margin of appreciation, however wide.¹¹⁵ Thirdly, the existence of a fee that a needy applicant could not afford impairs the essence of the right to marry¹¹⁶ and the system of refunding is not an effective means of removing the impairment. Hence, the very essence of the applicants' right to marry was impaired.

2.8 General Protection of Discrimination

Protocol 12 is a more recent addition to the artillery of rights under the ECHR. It was opened for signature in Rome on 4 November 2000 as part of the commitment to 'take further steps to promote the equality of all persons' and entered into force on 1 April 2005. It includes a general prohibition of discrimination in relation to 'any right set forth by law' (not only those in the Convention) and the prohibited grounds include any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. Articles 1 and 2 of this Protocol are regarded as additional articles to the Convention.

In *Sejdic and Finci v Bosnia and Herzegovina*¹¹⁷ the Court applied Protocol 12 for the first time to resolve the complaint of the applicants complaining about their ineligibility to stand for election to the House of Peoples and the Presidency on the grounds of their Roma and Jewish origin. They relied on Article 14 of the Convention, Article 3 of Protocol Application no. 1 and Article

¹¹³ *Klip and Krüger v the Netherlands*, Application no. 33257/96 (ECtHR, 3 December 1997); *Sanders v France*, cit; *Frasik v Poland*, cit, para 89.

¹¹⁴ *Sanders v France*, cit.

¹¹⁵ *Hirst v the United Kingdom* (Application no. 2) [GC], Application no. 74025/01 (ECtHR, 6 October 2005), para 82.

¹¹⁶ *Kreuz v Poland*, Application no. 28249/95 (ECtHR, 19 June 2001), para 60.

¹¹⁷ *Sejdic and Finci v Bosnia and Herzegovina*, cit.

1 of Protocol Application no. 12. The Court noted that the meaning of discrimination in Article 1 of Protocol Application no. 12 was intended to be identical to that in Article 14 and saw no reason to depart from its interpretation. It found that the lack of a declaration of affiliation by the applicants with a ‘constituent people’ rendered them ineligible to stand for election to the Presidency. An identical constitutional precondition has been found to amount to a discriminatory difference in treatment in breach of Article 14 as regards the House of Peoples. It follows that the constitutional provisions which render the applicants ineligible for election to the Presidency must also be considered discriminatory and a breach of Article 1 of Protocol Application no. 12, since the Court saw no pertinent distinction to be drawn in this regard between the House of Peoples and the Presidency of Bosnia and Herzegovina. The impugned precondition for eligibility for election to the Presidency constitutes a violation of Article 1 of Protocol Application no. 12.

The Protocol, although it still has to demonstrate its full potential, extends the protection offered by Article 14 to additional areas and rights established in law.

3 What Protection against Discrimination for Aliens?

There is no doubt that aliens, migrants and refugees are often subjected to rights violations due to stereotypes or privileges linked to race, nationality or ethnic origin. How useful has Article 14 of the European Convention on Human Rights been in bringing these breaches to light and in addressing them?

The previous sections show that Article 14, despite its ‘parasitic’ nature, has played a valuable role firstly in bringing discriminatory treatment into the spotlight and secondly in sending out – at least occasionally – strong messages about what is admissible. Its most remarkable achievement however is the fact that it has highlighted measures which might be in conformity with a substantive article of the Convention but are discriminatory, and hence unacceptable, if seen through the lens of Article 14. Article 14 is particularly effective in capturing breaches that take place at the intersection of rights and this appears to be its most significant contribution.

Further, Article 14 has ‘broadened’ the protective scope of substantive rights. It has strengthened the procedural aspects of articles 2 and 3, adding a protective layer in relation to racist motives and the obligation of states to separately investigate their existence; it has acted as a ‘leveler’ for rights like personal liberty to determine the justified nature and proportionality of restrictions to the right, both in law or administrative practice. In respect of most other rights,

like the right to property, education, private and family life and the right to marry, Article 14 essentially scrutinises the use of suspect criteria in the exercise of legitimate policy functions and the margin of appreciation of states in their exercise.

Last but not least, the Court has used Article 14 to send out an ambivalent – yet strong – message about the vision of enjoyment of rights without discrimination. Article 14 has been used to condemn or strike down discriminatory criteria in legislation, in policy making, in administrative practice and in the operation of law enforcement and judicial apparatuses – and to impose positive obligations. It has also been used to highlight that ethnic origin, nationality, sex, sexual orientation, as statuses inherently linked to stereotypes and racism, are almost entirely unacceptable criteria in decision making, especially when used on their own. Similarly, all other criteria linked to nationality require high standards of scrutiny and robust justifications to pass the test of proportionality.

Article 14 has emerged from the shadows to offer solutions to differential treatment and has evolved into a useful tool for aliens, migrants and refugees whose rights are violated.

Expulsion and Prohibition of Collective Expulsion of Migrants and Asylum Seekers

The Level of the ECtHR's Protection

*Filippo Scuto**

1 Opening Considerations on ECtHR's Approach

Over the course of the last decades, the European Court of Human Right's (ECtHR) jurisprudence has extended the protection of immigrants' rights by means of a flexible interpretation of the European Convention of Human Rights (ECHR). It did so by appealing to the universal dimension of these norms – i.e. referring to any person, even though not directly aimed at regulating the condition of immigrants themselves.¹ In particular, the ECtHR has outlined a juridical base to protect irregular immigrants from expulsion at the presence of given circumstances which actually extend the safeguards provided by immigration laws. Even though the ECtHR's jurisprudence follows the international praxis, which acknowledges state's prerogatives to control aliens' admission – and with it the right to reject and expel immigrants – it has nonetheless limited the range of discretion of the High Contracting Parties. This is for instance the case when the return decision threatens the right to life (Article 2), does not guarantee compliance with the prohibition of torture (Article 3), does not secure the right to respect for private and family life (Article 8) or the right to an effective remedy (Article 13) of a third country's citizen.²

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1 See Nascimbene, 'Protocollo 4 – Artt. 3 e 4' in Bartole, Conforti, Raimondi, *Commentario alla Convenzione europea per la tutela dei diritti dell'uomo e delle libertà fondamentali* (Cedam, 2001); Stancati, 'Le libertà civili del non cittadino: attitudine conformativa della legge, assetti irriducibili di garanzia, peculiarità degli apporti del parametro internazionale' in AA.VV., *Lo statuto costituzionale del non cittadino – Atti del XXIV Convegno annuale 2009, Associazione Italiana dei Costituzionalisti* (Jovene, 2010, pp. 107 ss.); Randazzo, 'Lo straniero nella giurisprudenza della Corte europea dei diritti dell'uomo. Quaderno predisposto in occasione dell'incontro trilaterale delle Corti costituzionali italiana, spagnola e portoghese', in <www.cortecostituzionale.it> (studi e ricerche), 2008.

2 See Nascimbene, cit, pp. 891 ss.

While the recourse to Article 2 of the ECHR did not produce a significant jurisprudence,³ Article 3, enclosing the prohibition of torture and inhuman or degrading treatment, has often allowed the Strasburg Court to protect the rights of immigrants. In this way, the Court guarantees compliance with the principle of non-refoulement, that is the prohibition of expulsion or extradition towards countries wherein there is a serious risk that a person would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.⁴ The *Soering* case⁵ is the first example of such jurisprudence, whereby immigrants are provided indirect protection within the ECHR's scope. Following the same line of reasoning, the Court has extended the protection provided by Article 3 also to cases of expulsions of immigrants involved in international terrorism from Italy.⁶

3 Under Article 2, 'Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law'.

4 The principle of non-refoulement is one of the most important guarantees of the immigrants in case of decisions of return adopted by Member States. See Nascimbene, *Lo straniero nel diritto internazionale* (Cedam, 2013); D'Ignazio and Gambino, *Immigrazione e diritti fondamentali. Fra costituzioni nazionali, Unione europea e diritto internazionale* (Giuffre, 2010); Scuto, *I diritti fondamentali della persona quale limite al contrasto dell'immigrazione irregolare* (Giuffre, 2012); Hurwitz, *The collective responsibility of States to protect refugees* (Oxford Monographs in International Law, 2009).

5 *Soering v the United Kingdom*, Application no. 14038/88 (ECtHR, 7 July 1989). The applicant was a German national; he was charged with capital crime and was serving a sentence in the UK. An order for the applicant's extradition to Virginia in the United States was issued. Therefore, he faced a possible death sentence in Virginia and exposure to death row. The ECHR found a violation of Article 3, thereby recognising the extra-territorial effect of the ECHR. The Court held that Article 3 could not be interpreted as prohibiting, in itself, capital punishment. However, the conditions of execution of the punishment (exposure to 'death row' syndrome) would expose the applicant to a real risk of treatment going beyond the threshold set by Article 3. On the jurisprudence under Article 3, see Chapter 3 of this book.

6 See the case *Saadi v Italy*, Application no. 37201/06 (ECtHR, 28 February 2008); *Ben Salah v Italy*, Application no. 38128/06 (ECtHR, 24 March 2009) and other judgments of 2009 against Italy under violation of Article 3. The Court underlined that state action relating to expulsion is restrained by the absolute nature of Article 3 and the positive obligation not to send individuals to a state where they are at real risk of prohibited treatment also in the case of terrorism. The absolute nature of the prohibition on torture, inhuman and degrading treatment or punishment 'enshrines one of the fundamental values of democratic societies' and must therefore be maintained, even in times of emergency or war. Notwithstanding the fact that states face 'immense difficulties' in combating the contemporary international terrorist threat, one's suspected involvement in terrorist activity does not take away from the absolute nature of their rights under Article 3. See Sileoni, 'La CEDU e l'espulsione di immigrati stranieri: il caso Saadi c. Italia' (2009) 3 *Quaderni costituzionali* 719.

The Strasburg Court has then established that the ECHR prevents Member States from expelling an immigrant, even if 'irregular', when there is a serious risk that she or he could be subject to inhuman treatments in the country of destination. The Court also specified the conditions under which existence of the aforementioned risk should be assessed. On the one hand, the immigrant has the burden of proving the risk envisaged in case of expulsion. On the other hand, the state has a duty to verify the conditions in the country of destination in order to avoid violation of Article 3 in case of expulsion.

2 The Extension of the Guarantees beyond the Prohibition of Refoulement

Interestingly, by intervening in cases of expulsion this jurisprudence has progressively extended the guarantees for immigrants also beyond the prohibition of refoulement.

As a matter of fact, the ECtHR, which remains entrenched in the field of aliens' expulsion, has strengthened the principle of non-refoulement by establishing a series of procedural guarantees in order to protect the immigrant from a possible denial of the right to an effective remedy provided by Article 13 of the Convention. In a 2002 pronouncement, the Court stated that an immigrant's appeal against an expulsion decision cannot be regarded as 'effective' if the judge did not reach a decision before the expulsion took place.⁷ In the same judgment, the Court also intervened on the matter of the amount of time at irregular immigrants' disposal to present an asylum application before the expulsion decision is issued, and found that an extremely short deadline (five days in the specific case) amounts to a violation of Article 13. The importance of these provisions is not to be overlooked. As a matter of fact, they tackle some vital issues of the European discipline on expulsions, like the deadline for issuing an appeal and the temporary suspension of expulsion decisions.

⁷ Case *Conka v Belgium*, Application no. 51564/99 (ECtHR, 5 May 2002). The Court considered that 'the notion of an effective remedy under Article 13 requires that the remedy may prevent the execution of measures that are contrary to the Convention and whose effects are potentially irreversible (see, *mutatis mutandis*, *Jabari*, cited above, para 50). Consequently, it is inconsistent with Article 13 for such measures to be executed before the national authorities have examined whether they are compatible with the Convention, although Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision (para 79).

A further procedural safeguard for immigrants was provided by another judgment of the Court in 2005.⁸ Citing Article 6 of the Convention, which recognises the right to a fair trial,⁹ the ECtHR condemned Italy for failing to provide a translation of the proceedings at matter to a Tunisian citizen. This omission prevented him from participating in a trial in which he was involved, notwithstanding his expressed will to intervene.

On this point, it has also to be noted that the ECHR noticeably limits the irregular immigrant's right to a fair trial when a decision of expulsion is issued. As a matter of fact, protocol number 7 of the Convention outlines a number of procedural safeguards in cases of expulsion only for legally resident immigrants.¹⁰ Therefore, the ECtHR jurisprudence normally excludes procedural safeguards for irregular immigrants. As testified by some 2009 decisions,¹¹ despite the fact that Article 6 of the Convention applies to every person, the Court found that the provisions of said article cannot be applied to the irregular immigrant in cases of expulsion.

With regard to the cases of expulsion of third-country nationals, the ECtHR has also intervened in order to guarantee the right to health of aliens being expelled. The Court ruled that Member States shall always verify the health conditions of aliens to be returned because returns in cases of diseases that cannot be properly recovered in the country of destination amount to violation of the ban of torture sanctioned in Article 3. Nonetheless, in the ECtHR's jurisprudence, the prohibition of expulsion due to healthcare concerns is limited to exceptional cases, namely to particularly serious diseases that demand humanitarian considerations. Under this perspective, in two cases the Court prevented Member States from returning aliens affected with HIV.¹² The

⁸ See Case *Hermi v Italy*, Application no. 18114/02 (ECtHR, 28 June 2005).

⁹ Article 6 of ECHR provided for the right to a fair trial.

¹⁰ See Article 1 of the Protocol n. 7, 'Procedural safeguards relating to expulsion of aliens': an alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed: (a) to submit reasons against his expulsion, (b) to have his case reviewed, and (c) to be represented for these purposes before the competent authority or a person or persons designated by that authority. An alien may be expelled before the exercise of his rights under paragraph 1 (a), (b) and (c) of this Article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security.

¹¹ See Case *Ben Salah v Italy*, Application no. 38128/06 (ECtHR, 24 March 2009); case *Sellem v Italy*, Application no. 12584/08 (ECtHR, 5 May 2009); case *Maaouia v France*, Application no. 39652/98 (ECtHR, 5 October 2000).

¹² See Case *D. v the United Kingdom*, Application no. 30240/96 (ECtHR, 2 May 1997), paras 51–53; Case *B.B. v France*, Application no. 5335/06 (ECtHR, 28 June 2005). In that specific case, the Court did not find any violation of Article 3: 'it appears, however, that as regards Article 3 of the Convention the measure reflects, through its continuity and

reasoning of the Court was that the protection of fundamental rights shall prevail over other interests by virtue of which the provision of expulsion is issued, in the event of an immediate risk of death and in other very exceptional cases. In a recent decision, the Court has clarified that these 'other very exceptional cases' should be understood as referring to situations involving the removal of a seriously ill person in which substantial grounds have been shown for believing that he or she, although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or the impossibility of accessing such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health, resulting in severe suffering or a significant reduction in life expectancy.¹³ In such cases, it is the applicant's responsibility to disclose evidence capable of demonstrating that there are substantial grounds for believing that, if the measure of expulsion were to be implemented, they would be exposed to a real risk of being subjected to treatment contrary to Article 3. Where such evidence exists, it is the expelling state's responsibility, in the context of domestic procedures, to dispel any doubts raised by it. The risk that is alleged must be subjected to close scrutiny and shall take into account not only the availability of medical treatments in the destination country, but also whether the alien would actually have access to these specific treatments and facilities in the state of destination.

With regard to Article 5 of the ECHR, which allows restrictions on aliens' right to liberty when it comes to preventing them from illegally entering a Member State, or in cases in which they are subjected to procedures of expulsion or extradition,¹⁴ the Court has also ruled on measures that limit immigrants' personal liberty.¹⁵ With the 2008 *Saadi* pronouncement,¹⁶ the ECtHR specified the criteria according to which a restriction of an irregular immigrant's personal

duration, the French authorities' intention to allow Mr B.B. to receive the treatment his present condition requires and to guarantee him, for the time being, the right to remain in France. In that connection, it should be noted that in their memorial of 16 July 1998 the Government indicated that they '[had] not shown any intention of actually deporting Mr. B.B.' (para 37). See also Case *N. v the United Kingdom*, Application no. 26565/05 (ECtHR, 27 May 2008).

¹³ See case *Paposhvili v Belgium*, Application 41738/10 (ECtHR, 13 December 2016).

¹⁴ Article 5, c. 1, lett. f) of the Convention.

¹⁵ On the jurisprudence of the Court on Article 5, lett. f), starting from the sentence Amuur, see Chapter 5 of this book and Pisani, 'Article 5 – Diritto alla libertà e alla sicurezza' in Bartole, Conforti and Raimondi, *Commentario alla Convenzione europea per la tutela dei diritti dell'uomo e delle libertà fondamentali*, cit, pp. 127 ss.

¹⁶ *Saadi v the United Kingdom*, Application no. 13229/03 (ECtHR, 29 January 2008).

liberty is not to be considered a violation of the Convention. Among these, it is worth mentioning the principle of proportionality – i.e. the need to strike a balance between the importance of securing the immediate fulfillment of the obligation in question in a democratic society, and the importance of the right to liberty – with regard to the duration of the detention and the need that the conditions of detention should be appropriate, thus allowing a decent stay.¹⁷

Moving from Article 5, ECtHR's jurisprudence has then introduced some criteria directed at limiting the discretion of national authorities in favor of the alien's basic rights and liberties, even when he or her is subjected to an expulsion decision. In this sense, Article 5 has allowed the Court, with a 2011 decision, to declare the illegality of custody in an Italian detention centre. A Bosnian citizen irregularly present in Italy gave birth to a baby, which died shortly after, and was then taken to a detention centre waiting for the enactment of the expulsion decision. Since Italian law prohibits expulsion for the six months following childbirth,¹⁸ the Court found the expulsion decision illegal and the Bosnian citizen was released.

3 The Prohibition of Collective Expulsions of Aliens

With its decisions, the Strasbourg Court has also intervened on aliens' right not to undergo collective expulsions. Differently from the cases examined thus far, in this case the protection of aliens' rights laid down by the Court is not indirect but rather directly provided by Article 4 of the Protocol 4 of the Convention, that provides the prohibition of collective expulsion of aliens.¹⁹ This Article openly rules the aforementioned prohibition in reason of Member States' duty to take decisions about aliens' expulsions on a case-by-case basis. Since its first decision²⁰ on an expulsion decided by the Danish Government

¹⁷ In *Saadi*, The Court fixed some criteria about detention: 'to avoid being branded as arbitrary, such detention must be carried out in good faith; it must be closely connected to the purpose of preventing unauthorised entry of the person to the country; the place and conditions of detention should be appropriate, bearing in mind that 'the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country' (see *Amuur*, cit, para 43); and the length of the detention should not exceed that reasonably required for the purpose pursued' (*Saadi*, paras 70–90). See also *A. and Others v the United Kingdom*, ECtHR 19 February 2009.

¹⁸ Article 19, Italian 'Testo Unico sull'immigrazione'.

¹⁹ The Protocol was signed in Strasburg on September 16th 1963.

²⁰ Case *Becker v Denmark*, Application no. 7011/75 (ECtHR, 3 October 1975).

for 199 South Vietnamese children, the ECtHR has excluded the occurrence of collective expulsion if such a measure is taken after, and on the basis of, a reasonable and objective examination of the particular case of each individual belonging to the group. In the case in point, the Court eventually declared the claim of a violation of Protocol 4 inadmissible, and this interpretation was later confirmed by further decisions.²¹ In fact, applications on the basis of alleged violations of the prohibition of collective expulsions were rejected on many occasions. An exception to this trend can nonetheless be found in the aforementioned 2002 ECtHR decision, *Conka v Belgium*. On that occasion the Court ascertained the occurrence of a collective expulsion due to the fact that little attention had been paid to the individual cases while formulating the expulsion decision of the group.²² A second exception occurred in the 2014 *Georgia* case, which involved a decision on expulsion directed towards several thousand Georgian citizens residing (both lawfully and irregularly) in Russia. Even though each case proved to have been separately considered by the judiciary, the Court nonetheless found that these expulsion decisions amounted to a violation of Protocol 4 since the high number of decisions, combined with the short span of time in which these were taken, actually prevented the competent authority from conducting a reasonable and objective examination of each individual case.²³ In the same year, the Court found a further violation of Article 4 of Protocol 4 by Italy – along with a violation of Articles 3 and 13 of the Convention by both Italy and Greece. In the case *Sharifi and others*, four immigrants had been intercepted by the Italian border police while disembarking from a ship coming from Greece and were immediately returned there. It must also be noted that this practice of ‘summary’ returns was in clear violation of the 1999 bilateral agreements between Italy and Greece but nonetheless seemed to have become a common practice in time. For the Court, the lack of a communication of their rights to the aliens, especially the right to apply for asylum – in a way that allows an effective access to said rights (e.g. by recurring to a translator), combined with the violation of the bilateral agreements, amounted to a violation of both the right to a fair trial and the rights protected by Article 3 of the Convention. As far as Italy was concerned, the violation of

²¹ See case *Alibaks and Others v the Netherlands*, Application no. 14209/88 (ECtHR, 16 December 1988); case *A. v the Netherlands*, Application no. 11618/85 (ECtHR, 6 May 1986); case *Andric v Sweden*, Application no. 45917/99 (ECtHR, 23 February 1999); case *Sultani v France*, Application no. 45223/05 (ECtHR, 20 September 2007).

²² See again *Conka v Belgium*, cit.

²³ Case *Georgia v Russia (I)*, Application no. 13255/07 (ECtHR, 3 July 2014).

article 4 of Protocol 4 was acknowledged inasmuch as the border authorities enacted an indiscriminate expulsion of the four applicants.²⁴

As far as the prohibition of collective expulsion is concerned, the most important case recently adjudicated by the Court is, undoubtedly, that of *Khlaifa and Others*. The framework of the incident was that of the ‘refugee crisis’, which is the massive increase in the migratory flows toward Europe – and particularly Italy – as a consequence of the so-called Arab Spring. In this case, three Tunisian citizens illegally arrived in Lampedusa and were thereafter detained in two ships at the port of Palermo, and were later expelled according to the simplified procedure provided by a 2011 bilateral agreement between Italy and Tunisia. On this occasion, the *Grand Chambre* intervened by clarifying the effective scope of Article 4 of Protocol 4. According to its decision, Article 4 of Protocol 4 does not provide to each alien the right to an individual interview. Rather, the content of the aforementioned rule is said to be respected when each alien has effectively had a real possibility of providing arguments against their expulsion, and these arguments are effectively considered by state authorities.²⁵ In the case in point, the applicants had twice been subjected to the identification procedure, their nationality was ascertained and they had been provided the possibility of presenting their arguments in order to clarify their individual situation. In the same line, the Court has clarified that Article 13 of the Convention, taken together with Article 4 of Protocol 4, does not impose an absolute obligation on a state to guarantee an automatically suspensive remedy to the expulsion decision. For the Court, when an alien alleges that the expulsion procedure was ‘collective’ in nature, without claiming at the same time that it had exposed him or her to a risk of irreversible harm in the form of a violation of Articles 2 or 3 of the Convention, his or her rights are guaranteed if he or she is provided with an effective possibility of challenging the expulsion decision by having a sufficiently thorough examination of his or her complaints carried out by an independent and impartial domestic forum. This decision could betray the Court’s concerns for the situation of emergency represented by an unprecedented boost in immigration flows that some European countries were facing at the time of its decision. In fact, the ECtHR has justified a narrower interpretation of aliens’ rights (particularly against expulsion decisions) to accommodate the states’ needs to control the migration flows by means of an elastic (and in some ways political) use of the doctrine of the margin of appreciation which has allowed to

²⁴ *Sharifi and Others v Italy and Greece*, Application no. 16643/09 (ECtHR, 21 October 2014).

²⁵ *Khlaifa and Others v Italy*, Application no. 16483/12 (ECtHR, 15 December 2016).

take into account the reasons of efficiency that the aforementioned situation required to be adequately addressed.

4 The Importance of the 2012 Hirsi Jamaa Judgment

As far the jurisprudence of the Court on the subject of aliens' expulsion is concerned, this 2012 decision is of particular relevance. Here, the Court has stressed the importance of compliance with the principle of non-refoulement in the context of operations carried out on the high sea by signatory states. In the case in point, the Court has condemned Italy for intercepting irregular immigrants on the high sea and transferring them to Libya, since this practice violates Articles 3, 13 of the Convention and 4 of Protocol 4. This pronouncement can be regarded as the *fil rouge* of the ECtHR's jurisprudence on the protection of irregular immigrants' rights inasmuch as it refers to the prohibition of torture or inhuman and degrading treatment – out of which, as previously stated, stems the principle of non-refoulement – to the right to an effective remedy and to the prohibition of collective expulsions of aliens. At the same time, this unprecedented judgment paved the way for future interventions by the ECtHR aimed at a broader protection of irregular aliens' rights and guarantees. For these reasons, the UNHCR has qualified this pronouncement as 'historic'.

As already mentioned, with the *Hirsi Jamaa judgment* of 23 February 2012,²⁶ the Court has condemned Italy for the group expulsion towards Libya of Somali and Eritrean citizens that occurred in May 2009.²⁷

Firstly, in this case the Court has recognised a violation of Article 3 of the ECHR, which prohibits inhuman or degrading treatments. In line with its jurisprudence that connects the principle of non-refoulement to Article 3, while adjudicating on this point the Court had to ascertain the conditions of the aliens' country of provenience as well as those of the country of destination of the transfers operated by Italy – namely Somalia, Eritrea and Libya. By so doing, the ECtHR has established that the transfers towards Libya were illegitimate,

²⁶ *Hirsi Jamaa and others v Italy*, Application no. 27765/09 (ECtHR, 23 February 2012).

²⁷ The Applicants were 11 Somali and Eritrean migrants, part of a group of about two hundred individuals, who left Libya in 2009 aboard three vessels with the aim of reaching the Italian coast. On 6 May 2009, when the vessels were within the Maltese Search and Rescue region of responsibility, they were intercepted by ships from the Italian Revenue Police and the Coastguard. The occupants of the intercepted vessels were transferred onto Italian military ships and returned to Tripoli.

and amounted to a twofold violation of Article 3. First, the Libyan authorities failed to provide Italy with sufficient guarantees in relation to the effective protection of refugees. Second, the transfer of the applicants to Libya exposed them to the risk of arbitrary repatriation – i.e. towards their home countries, in which the general situation similarly posed serious and widespread problems of insecurity – by Libyan state authorities. On the one hand, neither Somalia nor Eritrea had ratified the Geneva Convention on Refugee Status and individuals forcibly repatriated to Eritrea faced the serious risk of being tortured and detained in inhuman conditions merely for having left the country irregularly. On the other hand, a 2010 report drafted by the Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, revealed a systematic violation of irregular aliens' guarantees and rights in Libya²⁸ – among which the forced returns of irregular migrants, including asylum-seekers and refugees, to high-risk countries.

In addition, for the very first time in its jurisprudence, the Court has also adjudicated on the prohibition of collective expulsions of aliens carried out outside the national territory of the signatory state involved.²⁹ The rationale provided by the Court for this intervention is that the removal of aliens carried out in the context of interceptions on the high seas by the authorities of a state in the exercise of their sovereign authority, the effect of which is to prevent migrants from reaching the borders of the state or even to push them back to another state, constitutes an exercise of jurisdiction within the meaning of Article 1 of the Convention, which engages the responsibility of the state in question under Article 4 of Protocol 4. Therefore, the transfer of the applicants to Libya – carried out without any form of examination of each applicant's individual situation and in the absence of interpreters or legal advisers on board – was deemed to instantiate a case of collective expulsion and, hence, a violation of Article 4 of Protocol 4. This acknowledgment is also particularly relevant due to the fact that up to that moment the Court had recognised such violation in only one occasion.³⁰

To conclude, the Court has also adjudicated on the alleged violations of Article 13 of the ECHR concerning the right to an effective remedy. For the Court, these practices of aliens' expulsion violated Article 13 of the Convention if said article is read in conjunction with Article 4 of Protocol 4 and with the principle of non-refoulement. As a matter of fact, the applicants were deprived of any remedy which would have enabled them to lodge their complaints

²⁸ Report of 28 April 2010.

²⁹ Article 4 of Protocol no. 4 of the ECHR.

³⁰ See again *Conka v Belgium*, cit.

under Article 3 of the Convention and Article 4 of Protocol Application no. 4 with a competent authority and to obtain a thorough and rigorous assessment of their requests before the removal measure was enforced, nor had they the opportunity (both factual and legal) of applying before the Italian criminal courts upon their arrival in Libya.

The reasons why this sentence has rightly been considered ‘historical’ are manifold. First, the judge downplayed the principle of territoriality in favor of aliens’ fundamental rights. As already seen, the Court introduced in its jurisprudence the principle according to which the Contracting States shall abide by the prohibition of refoulement and collective expulsions in the exercise of their jurisdiction regardless of where this exercise takes place. In substance, the Court has introduced extraterritorial guarantees that do not allow for ‘protection-less zones’. Not even on the high seas. Furthermore, the Court has provided for a broad interpretation of the ECHR in that the definition of ‘collective expulsions’ is also extended to operations resulting in the transfer of aliens. As emerges from the Court’s assessment, this choice was not obvious. Indeed, a narrower interpretation of the norms there considered would have limited the prohibition of collective expulsions only to cases of expulsion or transfer carried out by a Member State towards aliens irregularly present in the territory of the aforementioned Member State, thus rendering it inapplicable to cases of interception of migrants on the high seas and their removal to countries of transit or origin.

The ECtHR’s intervention has therefore considerably increased the safeguards for irregular immigrants subjected to refoulement decisions by entrusting them further guarantees that Signatory States shall now take into account when enacting refoulement measures of aliens. Thanks to this judgment then, the high sea interception and removal of aliens is no longer a viable option for controlling irregular migration. Hence, new and other means need to be found. In so doing, a balance is to be struck between the Signatory States’s need to cope with the continued intensification of the migratory flows and the safeguard of aliens. This new course, which has no shortcuts, shall not but pass through a greater cooperation at the European level based on a fairer sharing of responsibilities among the Member States.

5 The ECtHR’s Pronouncement upon the ‘Dublin System’ on Matters of Expulsions and Asylum Seekers

It is known that the EU law, in the form of the Dublin Regulation, which establishes the criteria and mechanisms for determining the Member State

responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, has created a net imbalance among EU states in that a vast majority of asylum applications occurring within EU boundaries is eventually examined by only a few Member States. This asymmetry has then generated considerable pressure upon the asylum systems of EU countries looking out onto the Mediterranean Sea, namely Italy and Greece. As a consequence, some national asylum systems, such as the Greek one, collapsed, and this led to an overall deterioration in the protection of basic rights in the European space. Despite the clear inadequacy of the Dublin System's mechanisms to develop a common European asylum system and a common policy on asylum, immigration and external border control, based on solidarity and fair sharing of responsibilities between Member States – as provided for by the Lisbon treaty itself (see Articles 67 and 80 of the TFEU) – national egoisms effectively prevailed for years. In the aphasia of the European legislator, the first attempts at redefining this corpus of norms came from the ECtHR and from the Court of Justice of the European Union (CJEU).

Indeed, an extensive jurisprudence, particularly of the ECtHR, has put under question the Dublin System through judgments that found that some transfer decisions of asylum seekers taken on the basis of the Dublin Regulation's norm as illegitimate were illegal: providing that an applicant has irregularly crossed the border into a Member State by land, sea or air having come from a third country, the Member State thus entered shall be responsible for examining the application for international protection³¹ (Article 13). In point of fact, two 2011 judgments are worth recalling. In both cases, the ECtHR and the CJEU found transfer decisions of asylum seekers from the United Kingdom and Belgium towards Greece to be illegitimate: the transfers were based on the argument that Greece was the European country where the asylum seekers entered first.³² Drawing on the principle of solidarity and fair sharing of

³¹ See article 13 of the REGULATION (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.

³² Court of Justice of the European Union, 21 December 2011, C-411/10 and C-493/10. *M.s.s. v Belgium and Greece*, Application no. 30696/09 (ECtHR, 21 January 2011). The facts of the *M.s.s.* case concerned an Afghan asylum seeker who fled Kabul in 2008, entered the European Union through Greece and travelled on to Belgium where he applied for asylum. According to the Dublin Rules, Greece was held to be the responsible Member State for the examination of his asylum application. Therefore, the Belgian authorities transferred him there in June 2009 where he faced detention in insalubrious conditions before living on the streets without any material support. The Court found a violation of Article

responsibility, both the ECtHR and CJEU have established that Member States shall not transfer asylum seekers towards other Member States – even if the transfer is formally in compliance with Dublin II – as they cannot ignore the systemic shortcomings in the asylum procedures as a consequence of unparalleled migratory flows that, by provoking a drop in the standards of asylum seekers' protection, may expose them to inhuman or degrading treatment, as the situation in Greece instantiates.

As mentioned above, building on an already consolidated jurisprudence,³³ the ECtHR has repeatedly condemned aliens' transfers between Member States. With regard to Italy, this has also entailed the prohibition of immigrants' transfer from the Adriatic ports to Greece based on a 2004 bilateral readmission agreement between the two countries. With the *Sharifi* judgment of 2014,³⁴ the Court has condemned Italy due to the fact that the aforementioned transfers, which were automatically enacted, hence preventing aliens from access to asylum procedure at the port of Ancona, subjected potential asylum seekers to an effective risk in view of the apparent and serious inefficiencies of the Greek asylum system.

6 Concluding Remarks

Even though the ECHR contains some provisions which narrow the guarantees of irregular immigrants subjected to an expulsion decision,³⁵ the ECtHR's evolving jurisprudence has nevertheless provided for an essential level of

³³ by Belgium for exposing the asylum seeker to the risks arising from the deficiencies in the asylum procedure in Greece.

³⁴ There is a large number of 'Dublin Cases' in the jurisprudence of the ECtHR starting from 2000. See case *T.I. v the United Kingdom*, Application no. 43844/98 (ECtHR, 7 March 2000); case *K.R.S. v the United Kingdom*, Application no. 32733/08 (ECtHR, 2 December 2008); case *M.S.S. v Belgium and Greece*, cit; case *Mohammed Hussein v the Netherlands and Italy*, Application no. 27725/10 (ECtHR, 2 April 2013); case *Halimi v Austria and Italy*, Application no. 53852/11 (ECtHR, 18 June 2013); case *Abubeker v Austria and Italy*, Application no. 73874/11 (ECtHR, 18 June 2013); case *Mohammed v Austria*, Application no. 2283/12 (ECtHR, 6 June 2013); case *Sharifi v Austria*, Application no. 60104/08 (ECtHR, 5 December 2013); case *Mohammadi v Austria*, Application no. 71932/12 (ECtHR, 3 July 2014); *Sharifi and others v Italy and Greece*, cit; case *Tarakhel v Switzerland [GC]*, Application no. 29217/12 (ECtHR, 4 November 2014); case *A.M.E. v the Netherlands*, Application no. 51428/10 (ECtHR, 13 January 2015); case *A.S. v Switzerland*, Application no. 39350/13 (ECtHR, 30 June 2015).

³⁵ Case *Sharifi and Others v Italy and Greece*, cit. The Court found a violation of article 3 and article 4 of Protocol n. 4 of the ECHR.

³⁶ See the above-mentioned Article 5.1, lett. f) and Article 1, Protocol no. 7 of the ECHR. The first permits limitations of right to liberty and detention of an alien to prevent his

protection in those cases. The activity of the Court of Strasbourg deserves to be particularly appreciated inasmuch as the Convention does not provide a significant and explicit protection system for aliens. This jurisprudence becomes particularly relevant with reference to the broad scope that it attributes to Article 3 on the prohibition of torture, which translates into an increase in the guarantees for immigrants subjected to a decision of expulsion. From the scrutiny of the ECtHR's jurisprudence, the Court's commitment to ensuring a minimum level of protection also to irregular immigrants subjected to expulsion decisions clearly emerges. Beyond the merits examined thus far, some aspects are worth noticing in conclusion of this essay.

First, over these years this jurisprudence has enlightened Member States' shortcomings on their, albeit legitimate, action of border control and contrast of irregular immigration. In this sense, the Court has established an essential level of aliens' protection, also in cases of expulsion, by basing it on the rights provided by the ECHR.

Second, in times characterised by policies fighting irregular immigration both at the national and at the EU level, the ECtHR's jurisprudence – in some cases jointly with that of national Constitutional Courts³⁶ – has had a prominent role in re-striking a balance between Member States and the EU's need to control migratory flows and contrast illegal immigration and the need to guarantee the respect of fundamental human rights. As far as this aspect is concerned, the ECtHR's intervention against policies of collective expulsions and high-sea refoulement – which represented extremely problematic tools of intervention against irregular immigration in terms of protection of fundamental rights – has been particularly prominent.

Third, the more recent jurisprudence of the Court might provide a basis for a rational approach to the refugee crisis of our time. On the one hand, the acknowledgement of the problems that Member States are facing in the management of migratory flows (see the *Sharifi* case). On the other hand, the effort – together with the CJEU – at enacting the principles of solidarity and fair sharing of responsibilities among the Member States provided by Article 67 and 80 of the TFEU. These two might become the 'pillars' of a new migration policy that is more rational vis-à-vis the current situation, as well as in full compliance with aliens' rights.

effecting an unauthorised entry into the country. The second article provides some procedural safeguards relating to expulsion of aliens lawfully resident.

³⁶ For the case of Italy, see Scuto, *I diritti fondamentali della persona quale limite al contrasto dell'immigrazione irregolare*, cit.

The Margin of Appreciation of States in the European Convention on Human Rights and Additional Protocol No. 15

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1 Introduction

The margin of appreciation is a ‘methodological tool’¹ used by the European Court of Human Rights (ECtHR) to determine the intensity of its scrutiny and refers to ‘the room for manoeuvre the Strasbourg institutions are prepared to accord national authorities in fulfilling their obligations under the European Convention on Human Rights (ECHR).’² This margin is also seen as a useful instrument for the delicate task of weighing the sovereignty of States Parties against their obligations under the Convention.³

Although widely invoked in the Court’s case law, the margin of discretion was not expressly enshrined in the Convention until the adoption of Protocol 15, which has not yet entered into force. This Protocol, which is a consequence of the Brighton Declaration, introduces into the Preamble of the Convention a reference to the principle of subsidiarity and the doctrine of the margin of appreciation.⁴ As the Explanatory Report shows, this introduction was

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1 Yourow, ‘The margin of appreciation doctrine in the dynamics of European Human Rights Jurisprudence’ (1987) 3(1) Connecticut Journal of International Law 238.

2 Greer, *The Margin of Appreciation: Interpretation and discretion under the European Convention on Human Rights (Human Rights files Application no. 17)* (Council of Europe Publishing, 2000, p. 5).

3 Macdonald, ‘The margin of appreciation’ in Macdonald, Matscher and Petzold (eds), *The European System for the Protection of Human Rights* (Martinus Nijhoff, 1993, p. 83).

4 Although the doctrine of the margin of appreciation is more developed in the system of the Convention, it also finds expression in the Inter-American system, as well as in the United Nations Human Rights Committee. See Legg, ‘Human Rights, the Margin of Appreciation, and the International Rule of Law’, in Kanetake and Nollkaemper (eds), *The Rule of Law at the National and International Levels, Contestations and Deference* (Hart Publishing, 2016, p. 253).

'intended to enhance the transparency and accessibility of these features in the conventional system and to be consistent with the doctrine of the margin of appreciation as developed by the ECtHR in its case law'.⁵ There are, however, other, more political reasons for the Declaration, such as the dissatisfaction of some states, particularly the United Kingdom, with the Court's case law.

The doctrine of the margin of appreciation was first affirmed by the European Commission in the *Greece v the United Kingdom* case, No 176/56 (ECtHR, 14 December 1959), on emergency situations (Article 15 ECHR), although in that decision the Commission used the term 'discretion' instead of margin of appreciation.⁶ This doctrine emerges as a response to the concern expressed by states that their internal security could be threatened by international policies. This explains its reference in the context of derogations from obligations under the Convention.⁷

The Court explicitly invoked the margin in the *De Wilde, Ooms and Versyp v Belgium* case [G.C.], Application no. 2832/66, Application no. 2835/66, Application no. 2899/66, para. 93 (ECtHR, 18 June 1971), even if using the expression 'power' of appreciation instead of margin. In previous cases, however, the ECtHR had already implicitly conferred a certain margin upon states.⁸

The margin of appreciation is considered a corollary of the principle of subsidiarity. The European Court of Human Rights, as an international mechanism for the protection of human rights, should only act as a 'subsidiary' to national law, which means that it should only intervene when states are unable or unwilling to do so. It is this subsidiarity that also justifies the discretion given by the Court to states in implementing the Convention.⁹ As the Court stated in the *Handyside v the United Kingdom* case [G.C.], no. 5493/72, para

⁵ See, <https://www.echr.coe.int/Documents/Protocol_15_explanatory_report_ENG.pdf>.

⁶ Bakircioglu, 'The Application of the Margin of Appreciation Doctrine in Freedom of Expression and Public Morality Cases' (2007) 8(7) German Law Journal 713.

⁷ Benvenisti, 'Margin of appreciation, Consensus and Universal Standards' (1999) 31 International Law and Politics 845.

⁸ In *Lawless v Ireland* (dec.), Application no. 332/57 (ECtHR, 1 July 1961); the *Wemhoff v Germany* case (dec.), Application no. 2122/64 (ECtHR, 27 June 1968); the *Delcourt v Belgium* case (dec.), Application no. 2689/65 (ECtHR, 17 January 1970); and the *Belgian Linguistics v Belgium* case (dec.), Application no. 474/62, 1677/62, 1691/62, 1769/63, 1994/63, 2126/64 (ECtHR, 23 July 1968). See Brems, *The margin of Appreciation in the Case-Law of the European Court of Human Rights*, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 56, 1996, pp. 242 and 243.

⁹ Lugato, 'The "margin of appreciation" and freedom of religion: between treaty interpretation and subsidiarity' (2013) 52 Journal of Catholic Legal Studies, 65; Smet, 'Where Human Rights Clash in "the Age of Subsidiarity"', in Agha (ed), *Human Rights between Law and Politics. The margin of appreciation in post-national contexts* (Hart Publishing, 2017, p. 58).

50 (ECtHR, 7 December 1976), the role of the Court is not to replace the competent national authorities but to review the decisions they have taken in the exercise of their discretion.

The original text of the Convention made also no reference to the principle of subsidiarity, nor was it mentioned in its preparatory work. The Court based this principle on articles 1, 13 and 35(1) of the ECHR. For example, in the *Kudla v Poland* case [G.C.], Application no. 30210/96, para 152 (ECtHR, 26 October 2000), the Court stated that under Article 1 of the Convention, national authorities are primarily responsible for implementing and enforcing the rights and freedoms provided for in the Convention. The Court also pointed out that this subsidiary nature derives from Articles 13 and 35(1) of the ECHR. The purpose of Article 35(1), which establishes the rule of prior exhaustion of domestic remedies, is to give states the opportunity to prevent or remedy violations against them before the ECtHR is called upon to rule. Article 13, closely related to Article 35(1), is based on the presumption, reflected in that Article, that there will be an effective internal mechanism available to assess the alleged violation of the Convention.¹⁰

Anyway, the Court has emphasised that the margin of appreciation, when attributed, is not absolute. Even in situations where the ECtHR gives states a wide margin, it can still consider that they have exceeded that margin.¹¹ In the *Handyside v the United Kingdom* case, already cited, para 49, the Court stated that the states' margin of discretion 'goes hand in hand with the European supervision' and that 'such supervision concerns both the aim of the measure challenged and its "necessity"'. On the other hand, it 'covers not only the basic legislation but also the decision applying it, even one given by an independent court'.

With regard to the rights in question, in addition to Article 15 (the derogation clause), the doctrine of the margin of appreciation has also been applied to other rights under the Convention. The doctrine has been often used in cases concerning certain rights (such as the property right in Article 1 of Protocol 1, the prohibition of discrimination in Article 14, or the personal freedoms enshrined in Articles 8 to 11) and less used in relation to others. Consequently, it has been discussed whether the margin applies to all ECHR rights or whether there are certain provisions which exclude it.¹² This would be the case, for example, of

¹⁰ Mowbray, 'Subsidiarity and the European Convention on Human Rights' (2015) 15 *Human Rights Law Review* 319.

¹¹ McGoldrick, 'A defence of the margin of appreciation and an argument for its application by the Human Rights Committee' (2016) 65 *International and Comparative Law Quarterly* 25.

¹² Greer, cit, pp. 5 and 6.

the prohibition of torture and inhuman and degrading treatment, provided for in Article 3 of the Convention as an absolute prohibition, not allowing any restriction or suspension, even in a state of emergency.

Nevertheless, the margin of appreciation is not completely excluded in cases involving this article. Even if it is not permitted to weigh the prohibition laid down in the provision for national security reasons, when what is at stake is the use of torture or inhuman or degrading treatment by the state itself,¹³ in the *Valiulienė v Lithuania* case (dec.), Application no. 33234/07, para 85 (ECtHR, 26 March 2013), the Court established that the choice of means to ensure compliance with Article 3 of the Convention in relations between individuals is, in principle, a matter which falls within the margin of discretion of the national authorities, provided that the victim has criminal law mechanisms at her disposal.¹⁴ It seems, therefore, that this margin has extended to the interpretation of all the rights enshrined in the Convention.¹⁵

The margin of appreciation has been defended on the basis that, in a multi-level system of human rights protection, some degree of deference is inevitable because of the interactions established between different competent bodies.¹⁶ On the other hand, it is also considered important because it allows the coexistence of human rights protection with different national traditions and cultural diversity.¹⁷ Finally, it is also argued that, even at internal level, separation of powers requires some self-restraint on the part of the judiciary when it scrutinises the actions of legislative bodies.¹⁸

¹³ In the *Chahal v the United Kingdom* case [G.C.], Application no. 22414/93 (ECtHR, 15 November 1996), the Court goes even further. In this case the United Kingdom considered that the expulsion of Chahal, an Indian citizen suspected of being involved in separatism-related terrorist activities, had been necessary for reasons of national security, even at the risk of inhumane treatment. The Court rejected this argument, reaffirming that the prohibition laid down in Article 3 is absolute, also in expulsion cases.

¹⁴ Pinto Oliveira, *National security cases: a wide margin of appreciation justified?*, Presentation at the ICON-s Conference, Copenhagen, 2017.

¹⁵ McGoldrick, cit, p. 23.

¹⁶ Hilf and Salomon, 'Margin of appreciation revisited: the balancing pole of multilevel governance', in Cremona et al (ed), *Reflections on the Constitutionalisation of International Economic Law. Liber Amicorum for Ernst-Ulrich Petersmann* (Martinus Nijhoff Publishers, 2014, p. 48).

¹⁷ Gerards, 'Pluralism, deference and the margin of appreciation doctrine' (2011) 17(1) European Law Journal 104.

¹⁸ Schokkenbroeck, 'The Basis, Nature and Application of the Margin of Appreciation Doctrine in the Case Law of the European Court of Human Rights' (1998) 19 Human Rights Law Journal 30.

On the contrary, the margin of appreciation has been criticised for representing a subservient position of the Court, aimed at avoiding confrontation with states in order to maintain their accession to the Convention and its jurisdiction. This margin has also been criticised for, instead of enhancing cultural diversity, allowing 'preferential treatment of the state and majorities to the detriment of the protection of the individual and minorities'.¹⁹ Therefore, some authors argue that the margin can only be justified in relation to certain issues 'that affect the general population of a given society', and that it 'is inappropriate when conflicts between majorities and minorities are examined'. In such situations there should be 'no deference to national institutions'.²⁰

Moreover, the margin of appreciation has been contested for implying a 'non-uniform, subjectivist or relativist' application of the rights under the ECHR.²¹ The dissenting vote of Judge De Meyer in the *Z v Finland* case (dec.), Application no. 22009/93 (ECtHR, 25 February 1997), draws the attention to these risks. In his perspective, there should be no room for discretion in human rights matters to allow states to decide 'what is acceptable and what is not'. Consequently, he defends that the Court should depart from this concept in its reasoning.²² This 'abolitionist approach' to the margin of appreciation does not, however, appear to correspond to the will of the states, taken into consideration the explicit enshrinement of the margin in Protocol 15.²³

¹⁹ Lugato, cit, p. 53.

²⁰ Benvenisti, cit, p. 847.

²¹ McGoldrick, cit, p. 38. Considering that this doctrine is not consistent with the universality of human rights, see Benvenisti, cit, p. 844. Legg, cit, p. 264, considers, on the contrary, that universality is not called into question by the use of the margin of appreciation doctrine, because he defends that universal human rights depend on social factors for their realisation and expression and that these inevitably differ from place to place as well as over time. Also Greer, 'Universalism and Relativism in Human Rights Protection' in Agha (ed), *Human Rights between Law and Politics. The margin of appreciation in post-national contexts* (Hart Publishing, 2017, p. 35), argues that human rights are universal in some senses, particularly as abstract individual rights, and relative in others, as regards the specific implications they have for concrete national circumstances. The most urgent issue is therefore to identify how universals can legitimately be applied differently in different contexts and which institutions should be responsible for deciding how and when this should be the case.

²² In this sense, see also Agha, 'Introduction' in Agha (ed), *Human Rights between Law and Politics. The margin of appreciation in post-national contexts* (Hart Publishing, 2017, pp. 1–2).

²³ Distinguishing between an abolitionist approach and a consistent margin of appreciation approach, see Van Hoof, 'The stubbornness of the European Court of Human Rights' Margin of Appreciation Doctrine', in Haeck et al, *The realization of Human Rights: when theory meets practice. Studies in Honour of Leo Zwaak* (Intersentia, 2014, p. 126).

The margin has also been criticised because of the way it has been applied, with the argument that the 'lack of clarity' in its use makes the Court's decisions unpredictable and calls the principle of legal certainty into question.²⁴ Inconsistent application of rights in similar cases because of the different margin conceded may lead to double judicial standards.²⁵ We will, therefore, see what criteria the Court has been using for the determination of the scope of the margin.

2 Relevant Criteria for the Determination of the Margin of Appreciation

There are three main factors which the Court considers relevant for determining the scope of the margin of appreciation: the 'better placed' argument, the existence of consensus between states and the nature of the right or interest at stake.²⁶ Let us look at each of these criteria separately.

2.1 The 'Better Placed' Criterion

The 'better placed' argument has to do with the fact that the assessment that has to be done by the Court often presupposes knowledge of the national circumstances and the terms in which the discussion was carried out internally. For this reason, the Court considers that, in such situations, the national authorities are better placed to make such an assessment.²⁷

In the *Ireland v the United Kingdom* case [G.C.], Application no. 5310/71, para 207 (ECtHR, 18 January 1978), the Court justified the doctrine of the margin of appreciation precisely by relying on that argument, considering that, 'by

²⁴ McGoldrick, cit, p. 38; Kratochvíl, 'The Inflation of the Margin of Appreciation by the European Court of Human Rights' (2011) 29(3) Netherlands Quarterly of Human Rights 352.

²⁵ Benvenisti, cit, p. 844.

²⁶ Here we follow the categorisation carried out by Gerards, cit, pp. 107 ss. The author states that many other criteria have been pointed out, such as the character and weight of the purposes to be pursued, the character of state obligations, the gravity of the interference and the context of the interference. However, in her view, these additional factors are closely related to the three main factors already mentioned. For example, the Court usually combines the factor of the nature or seriousness of the interference with the importance of the right in question. Gerards, cit, pp. 107 ss. Also, Botelho, 'Quo Vadis Margin of Appreciation Doctrine? The International Protection of Human Rights in the Context of the Globalization of Constitutional Justice' (2011) 1 Studies dedicated to Prof. Doctor Luís Alberto de Carvalho Fernandes, Universidade Católica Editora, Porto, 352.

²⁷ Gerards, cit, p. 85.

reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it'.

Thus, on certain issues, the ECtHR considers that the states are in a better position to strike a balance between conflicting public rights or interests. As the Court has stated, that is the case of the derogation clause, provided for in Article 15, but also of some of the grounds that allow the restriction of rights under the second paragraph of Articles 8 to 11.²⁸ The margin of appreciation is very often applied in this context. For example, where the reason for limitation under the second paragraph of Articles 8 to 11 is the protection of morals, the Court has found that the margin increases.

This widening of the margin is visible, for example, in the *Handyside* case mentioned above, para 48, where the Court found that, since there is no uniform European concept of morality, national authorities are in principle better placed than the international judge to give an opinion on the exact content of the requirements arising from it. This was also the position taken by the Court in the *Müller and Others v Switzerland* case (dec.), Application no. 41202/98 (ECtHR, 24 May 1988) and *Otto-Preminger-Institut v Austria* case (dec.), Application no. 13470/87 (ECtHR, 20 September 1994), both associated with freedom of artistic expression.

The margin of appreciation has also been often invoked on bioethical issues.²⁹ For example, in the *Evans v the United Kingdom* case [G.C.], Application no. 6339/05, para. 81 (ECtHR, 10 April 2007), the Court stated that, given that the use of *in vitro* fertilisation techniques raises 'sensitive moral and ethical issues', in this area, the margin of discretion to be granted to the state must be wide.

The Court has also considered that the margin of appreciation is wider in cases where national security considerations are at stake. Where the reason for the limitation in accordance with paragraph 2 of Articles 8 to 11 is national security, the margin increases.³⁰ In the *Klass v Germany* case [G.C.],

²⁸ Brems, cit, p. 256.

²⁹ See, among many others, the *Vo v France* case [G.C.], Application no. 53924/00 (ECtHR, 8 July 2004); *Pretty v the United Kingdom* case (dec.), Application no. 2346/02 (ECtHR, 29 April 2002); *Haas v Switzerland* case (dec.), Application no. 31322/07 (ECtHR, 20 January 2011); *S.H. and Others v Austria* case, Application no. 57813/00 (ECtHR, 3 November 2011); *Lambert and Others v France* case, [G.C.], Application no. 46043/14 (ECtHR, 5 June 2015).

³⁰ Arai, 'The Margin of Appreciation Doctrine in the Jurisprudence of Article 8 of the European Convention on Human Rights' (1998) 16(1) Netherlands Quarterly of Human Rights 56.

Application no. 5029/71 para 49 (ECtHR, 06 September 1978), for example, the ECtHR decided that it is not for the Court to replace the assessment made by national authorities as to which policy is the best in this area. That doesn't mean, however, that states enjoy 'unlimited discretion to subject persons under their jurisdiction to secret surveillance'.

This 'better placed' argument has also been invoked by the Court when measures requiring complex political, social or economic assessments are involved. In the *James and Others v the United Kingdom* case [G.C.], No 8793/73, para 46 (ECtHR, 21 February 1986), the Court stated that, due to their direct knowledge of society and its needs, the national authorities are in principle better placed than the international judge to evaluate whether there is a public interest justifying measures of deprivation of property and how best to compensate for that deprivation, so that it is for them, in the first instance, to make that assessment.³¹

The same applies to health care, health-related social benefits or the establishment of social security systems, where the ECtHR also considered that the states are better placed to make decisions on public expenditure.³² For example, in the *Sentges v the Netherlands* case (dec.), Application no. 27677/02 (ECtHR, 8 July 2003), in which the Court declared the complaint inadmissible, it stated that the margin of appreciation is even greater when the issues involve the allocation of state resources that are scarce. Given its awareness of the demands of the health care system and the funds needed to meet those demands, the ECtHR defended that national bodies are in a better position to make such an assessment.

Also in situations of conflicts of rights³³ the Court has taken the view that states are better placed to make that evaluation. In the *Chassagnou and Others v France* case, nos. 25088/94, 28331/95 and 28443/95, para 113 (ECtHR, 29 April 1999), for example, the Court established that the balancing of individual

³¹ Other examples are the *Mellacher and Others v Austria* case [G.C.], Nos. 10522/83, 11011/84, 11070/84, para 45 (ECtHR, 19 December 1989); the *Buckley v the United Kingdom* case (dec.), Application no. 20348/92, para 74 (ECtHR, 29 September 1996); the *Connors c. the United Kingdom* case (dec.), Application no. 66746/01, para 82 (ECtHR, 27 May 2004); the *Jahn and Others v Germany* case, [G.C.], nos. 46720/01, 72203/01, 72552/01, para 91 (ECtHR, 30 June 2005); the *Burden v the United Kingdom* case [G.C.], Application no. 13378/05, para 60 (ECtHR, 29 April 2008). Gerards, cit, p. 110.

³² Binder, 'The Concept of Margin of Appreciation' (2015) 23 Journal für Rechtspolitik 62.

³³ Gerards, cit, pp. 110–111. Criticising the automatic allocation of a wide margin of appreciation in situations of conflict of rights see, Smet, cit, although he considers that in reality, even assuming this wide margin, the Court's scrutiny in these cases is often more intense, pp. 62 ff.

interests, protected by human rights, which may conflict is a difficult task and States Parties must have a wide margin of appreciation in this regard, ‘since the national authorities are in principle better placed than the European Court to assess whether or not there is a “pressing social need” capable of justifying interference with one of the rights guaranteed by the Convention’.

On the other hand, as the Court has progressively increased the scope of the Convention, defining it as a ‘living instrument’ and consequently recognising that positive and procedural obligations derive from it, the national authorities are also considered to be in a better position on those matters and the margin is often invoked.³⁴ Regarding migration legislation and policy, in the *Abdulaziz, Cabales and Balkandali v the United Kingdom* case [G.C.], Application no. 9214/80; 9473/81; 9474/81, para. 67 (ECtHR, 28 May 1985), for example, the Court held that ‘although the essential object of Article 8 (Art. 8) is to protect the individual against arbitrary interference by the public authorities’, positive obligations may also arise for an effective respect for family life. However, the ECtHR considers that, with regard to these positive obligations, given the diversity of practices followed and the different situations of the States Parties, the requirements deriving from them ‘will vary considerably from case to case. Accordingly, this is an area in which the Contracting Parties enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals (...).’

Finally, the Court has also understood that national authorities are primarily responsible for the creation and application of domestic law, which means that the Court will give states a margin ‘if a case primarily relates to questions of interpretation, fact-finding or the valuation of evidence’.³⁵ In the *Winterwerp v the Netherlands* case (dec.), Application no. 6301/73, para 46 (ECtHR, 24 October 1979), for example, the Court stated that the reasoning of the safeguard system established by the Convention sets limits to the scope of its review. National authorities, particularly the courts, are primarily responsible for interpreting and applying national law.³⁶

2.2 *The Consensus Criterion*

The second relevant criterion for determining the margin is, as we have seen, the existence or absence of consensus among states, meaning that the Court

³⁴ Mcgoldrick, cit, p. 23.

³⁵ Gerards, cit, p. 111.

³⁶ See also the *Pla and Puncernau v Andorra* case (dec.), Application no. 69498/01, para 46 (ECtHR, 13 July 2004).

gives a wider margin if there is no consensus on the issue at stake. In the *Rasmussen v Denmark* case (dec), Application no. 8777/79, para 40 (ECtHR, 28 April 2009), the Court states that '(t)he scope of the margin of appreciation will vary according to the circumstances, the subject-matter and its background; in this respect, one of the relevant factors may be the existence or non-existence of common ground between the laws of the Contracting States (...)'.

This factor is closely related to the better placed argument. Indeed, it is, for example, on sensitive or moral issues that the Court has considered that the national authorities should enjoy a wider margin, since on such matters there is normally no consensus between the different states.³⁷

The use of this European consensus criterion has raised doubts, both in doctrine and in case law. First of all, it is not clear how many states have to agree with a particular practice in order for it to be considered consensual, and the Court sometimes questionably refers to states that are not parties to the Convention when seeking such a consensus.³⁸ In some cases, the ECtHR considered that 'no complete unanimity is required, but that 'clear and uncontested evidence of a continuing international trend' will suffice to narrow the margin of appreciation'.³⁹ In the *Christine Goodwin v the United Kingdom* case [G.C.], Application no. 28957/95, para 85 (ECtHR, 11 July 2002), for example, the Court narrowed the margin thanks to 'clear and uncontested evidence of a continuing international trend in favour not only of greater social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals'. In other cases, however, the ECtHR has been more demanding, considering that the existence of a trend is not sufficient to narrow the margin, as was the case, for example, in the *McElhinney v Ireland* case [G.C.] Application no. 31253/96, para 38 (ECtHR, 21 November 2001). Consequently, this criterion has been interpreted in different ways, in accordance with the results that the ECtHR wants to achieve.⁴⁰

On the other hand, the terms in which the issue is formulated may also be decisive in recognising the existence or absence of a consensus.⁴¹

37 Gerards, cit, p. 111.

38 McGoldrick, cit, p. 38.

39 Gerards, cit, p. 109.

40 Gerards, cit, pp. 109–110.

41 See, for example, the *Leyla Sahin v Turkey* case [G.C.], Application no. 30943/96 (ECtHR, 11 October 2001, where the issue at stake was the regulation of the wearing of an Islamic veil by a student in university. There was no European consensus on the meaning of religion in society or on the use of religious symbols in educational institutions, but it could be said that there was a virtual consensus on the question of whether adult women could wear religious clothing in universities, since apart from Turkey only two other states

Finally, it is also considered that this factor threatens human rights, since human rights must be protected regardless of the existence of a consensus.⁴² Consensus is inversely related to the doctrine of the margin of appreciation: the less the ECtHR is able to identify a European consensus on a given issue, the greater the margin it is willing to confer to national authorities. It is understood that minority values, hardly reflected in national policies, are the real losers of this approach. By resorting to the margin, 'the Court eschews responsibility for its decisions' and 'relinquishes its duty to set universal standards from its unique position as a collective supranational voice of reason and morality'.⁴³

Thus, it is argued that 'the diversity or uniformity of state practices, or the lack of a uniform conception of morality, should not be a relevant consideration in enforcing (universal) human rights. Not enforcing human rights because of a lack of consensus (because the majority does not lead the lifestyle of the applicant or does not suffer her problems) is contrary to the principle of equality (...)'⁴⁴

2.3 *The Importance of the Right in Question*

Finally, the last determining criterion is the importance of the right in question. This means that the nature of the right and its importance for the individual must be taken into account when the Court decides the extent of the margin. On the other hand, the margin granted must be narrowed if the nuclear content of the right is at stake. In the *Evans v the United Kingdom* case, para 77, for example, the Court stated that in situations 'where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the state must be restricted'.⁴⁵

prohibited this practice. The Court has opted for the first formulation, which has conditioned the margin to be given to the state. McGoldrick, cit, pp. 38–39.

⁴² Brauch, 'The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law' (2005) 11 Columbia Journal of European Law 146.

⁴³ Benvenisti, cit, p. 852.

⁴⁴ Radacic, 'The Margin of Appreciation, Consensus, Morality and the Rights of the Vulnerable Groups' (2010) 31 Zbornik Pravnog fakulteta Sveučilišta u Rijeci 612. He therefore argues that the Court should attach less significance to the existence or absence of consensus and look at international human rights instruments or developments in comparative jurisprudence on the subject, as these are usually more sensitive to the disadvantages of vulnerable groups.

⁴⁵ In that sense, see also the *Dickson v the United Kingdom* case, Application no. 44362/04, para 78 (ECtHR, 4 December 2007) and the *S. and Marper v the United Kingdom* case, nos. 30562/04, 30566/04, para 102 (ECtHR, 4 December 2008).

The closer a particular aspect of the right in question relates to the maintenance and promotion of the ideals and values of a democratic society, human dignity or freedom, the more important should it be considered.⁴⁶ According to the Court, there is a clear link between an effective political democracy and respect for minorities and the protection of human rights and fundamental freedoms. In the case of *Baczkowski and Others v Poland* (dec.), Application no. 1543/06, para 61 (ECtHR, 3 May 2007), the Court stated that ‘not only is democracy a fundamental feature of the European public order, but the Convention was designed to promote and maintain the ideals and values of a democratic society’.

For example, given the importance of freedom of expression for a democratic society, the Court has understood that the margin is narrower when this right is at stake. Consequently, it is not surprising that the ECtHR is more demanding when it assesses the restrictions imposed on it. In the *Sunday Times v the United Kingdom* case, [G.C.], at 6538/74, para 65 (ECtHR, 26 April 1979), the Court stated precisely that the admitted exceptions to freedom of expression must be ‘narrowly interpreted’.⁴⁷

However, where the core content of the right is not affected, the Court has widened the margin, which has happened, for example, in cases related to sensationalist press. In the *Von Hannover v Germany* case (dec.), Application no. 59320/00, paras 65 and 66 (ECtHR, 24 June 2004), for example, the Court held that the publication of photos and articles regarding the private life of the applicant for the sole purpose of satisfying the curiosity of a certain public cannot be seen as contributing to any debate of general interest, even though the applicant is known to the public. The ECtHR has therefore taken the view that, in such circumstances, freedom of expression should be interpreted more restrictively.⁴⁸

Also regarding freedom of association, in the *Ouranio Toxo and Others v Greece* case (dec.), Application no. 74989/01, para 36 (ECtHR, 20 October 2005),

⁴⁶ Gerards, cit, p. 112.

⁴⁷ See also the *Observer and Guardian v the United Kingdom* case [G.C.], Application no. 13585/88, para 59 (ECtHR, 26 November 1991); the *Incal v Turkey* case [G.C.], Application no. 22678/93, para 46 (ECtHR, 9 June 1998); the *Jerusalem v Austria* case (dec.), Application no. 26958/95, para 36 (ECtHR, 27 February, 2001); the *Vajnai v Hungary* case (dec.), Application no. 33629/06, para 51 (ECtHR, 8 July 2008); the *Társágág A Szabadságjogokért v Hungary* case (dec.), Application no. 37374/05, para 26 (ECtHR, 14 April 2009). Gerards, cit, pp. 112–113.

⁴⁸ See also the *Société Prisma Presse v France* case (dec.), Nos 66910/02 and 71612/01 (ECtHR, 1 July 2003) and the *Hachette Filipacchi Associés ('Ici Paris') v France* case (dec.), Application no. 12268/03, para 40 (ECtHR, 23 July 2009). Gerards, cit, p. 113.

the Court held that ‘there must be convincing and compelling reasons to justify such interference with this freedom’, given its relevance for democratic societies.⁴⁹

Likewise, the margin narrows down when personal autonomy or dignity are involved. When a measure affects a particularly intimate aspect of private life, such as sexuality or identity, for example, there must be particularly relevant reasons to justify interference by public authorities.⁵⁰

In the *Dudgeon v the United Kingdom* case [G.C.] Application no. 7525/76, para 52 (ECtHR, 22 October 1981), the Court stated that, since the case concerns a very intimate aspect of private life, the sexuality of the applicant, ‘there must exist particularly serious reasons before interferences on the part of the public authorities can be legitimate (...).’⁵¹ Paradoxically, in the *Laskey, Jaggard and Brown v the United Kingdom* case (dec.), nos. 21627/93, 21628/93, 21974/93, para 42 ss (ECtHR, 19 February 1997),⁵² the Court held that the prosecution of the applicants for sado-masochistic sexual activities was justified for the protection of health and morals, even though this case also concerned a particularly intimate aspect of private life, sexual life.⁵³ In the *K.A. and A.D. v Belgium* case (dec.), nos. 42758/98 and 45558/99, para 83 ss (ECtHR, 17 February 2005), however, the Court recognised that the right to have sexual relations, even with violence, is included in the right to dispose of one’s own body, an integral part of the concept of individual autonomy.

Finally, as regards identity, in the *Jäggi v Switzerland* case (dec.), Application no. 58757/00, para 37 (ECtHR, 13 July 2006), the ECtHR decided that ‘the right to an identity, which includes the right to know one’s parentage, is an integral part of the notion of private life. In such cases, particularly rigorous scrutiny is called for in weighing up the competing interests’.

⁴⁹ See also the *Makhmudov v Russia* case (dec.), Application no. 35082/04, paras 63 and 64 (ECtHR, 26 July 2007). Gerards, cit, p. 113.

⁵⁰ Gerards, cit, p. 113.

⁵¹ See also the *Smith and Grady v the United Kingdom* case (dec.), nos. 33985/96, 33986/96, para 89 (ECtHR, 27 September 1999); the *Schlumpf v Switzerland* case (dec.), Application no. 29002/06, para 104 (ECtHR, 8 January 2009). Gerards, cit, p. 113; Brauch, cit, p. 127.

⁵² For a critical analysis of this decision, see Mac Crorie, *Os limites da renúncia a direitos fundamentais nas relações entre partes* (Almedina, 2013, pp. 300 ff).

⁵³ Radacic, cit, pp. 609 ff. Whereas it is not clear what distinguishes the consensual practice of sado-masochistic sex from the private practice of sex between homosexuals discussed in the *Dudgeon* case, see Bamforth, ‘Social Sensitivity, Consensus and the Margin of Appreciation’ in Agha (ed), *Human Rights between Law and Politics. The margin of appreciation in post-national contexts* (Hart Publishing, 2017, pp. 134–135).

Thus, to conclude, despite the criticism that the use of these criteria by the Court has generated, they have been decisive in its jurisprudence for the determination of the extent of the margin. More recently, the ECtHR has also given some discretion to states when it considers that the national decision-making process has been sufficiently transparent and has taken into account the divergent interests at stake.⁵⁴ Thus, ‘the quality of the domestic process underlying the interference’ is now also a tool used by the Court in determining the scope of the margin.⁵⁵

3 Margin of Appreciation and the Intensity of the Court’s Scrutiny

When, after analysing the circumstances of the case, the Court attributes a wide margin, this means that it will only assess the proportionality of the state’s measure superficially and in fairly general terms, evaluating whether the result is evidently unreasonable or disproportionate. When this is the case, the burden of proof shall lie with the applicant. On the other hand, the ECtHR’s scrutiny will be more intense when a narrower margin is determined. In such situations the Court decides what is the fair balance between conflicting interests and it is for the states to prove that the limitation of the right was reasonable.⁵⁶

The fact is, however, that there is not always such a clear correspondence between the allocation of a margin and a certain intensity of scrutiny by the judge. The Court often determines the margin that should be left to the state, but in fact does not draw the necessary consequences regarding the revision standards. Thus, in practice it may happen that the margin attributed and the intensity of scrutiny differ. Sometimes the Court confers a wide margin but the control of the measure is intense,⁵⁷ and in other cases the Court decides that the margin to be granted is narrow, but in reality the control it exercises is rather permissive.⁵⁸

54 McGoldrick, cit, pp. 24–25.

55 Saul, ‘Structuring evaluations of parliamentary processes by the European Court of Human Rights’ (2016) 20(8) *The International Journal of Human Rights* 1078.

56 Gerards, cit, pp. 105–106.

57 For example, see the *Lashmankin and Others v Russia* case (dec.), nos. 57818/09 et al (ECtHR, 7 February 2017).

58 Gerards, cit, p. 106. As an example see the *Animal Defenders International v the United Kingdom* case [G.C.], Application no. 48876/08 (ECtHR, 22 April 2013), where such inconsistency was criticised by the dissenting vote of five judges (Judge Ziemele and others: ‘Since, as observed in paragraph 104 of the majority judgment, “the margin of appreciation to be accorded to the State in the present context is, in principle, a narrow

Furthermore, the Court does not always clearly define the scope of the margin of appreciation. That happens, for example, when it states ‘that there is a certain margin without explaining the reasons for this,⁵⁹ where it mentions the margin without specifying its scope’,⁶⁰ or when it establishes that in the case law on a given matter the margin has become narrower, without explaining the consequences of that narrowing for the situation under analysis.⁶¹

It may also happen that the Court considers that the case is about a particularly important right, justifying a narrower margin, but at the same time gives some reasons justifying a wider margin, and it is therefore up to the reader to decide whether the margin to be given is a narrow, wide, or intermediate one.⁶²

On the other hand, the Court doesn’t usually take into account all the ‘intensity-determining factors’. Sometimes it merely refers to one of them, without mentioning the others.⁶³ Focusing on a limited number of factors can create the impression that the Court is not completely impartial when deciding the intensity of its review. But even when referring to the different intensity factors, it is not clear what happens when those factors pull in different directions and the case law of the Court has proved contradictory in this respect.⁶⁴ Consequently, it seems essential that the Court, in its decisions, gives more precise guidance on how these factors should interact in case of conflict, so that the margin the states enjoy and the intensity of the Court’s scrutiny becomes clearer.⁶⁵

one”, it should follow, at least in our view, that nothing justifies a departure from the well-established methodology of proportionality analysis where one starts with the analysis of the nature of the right, which analysis is decisive for effective human rights protection. In our understanding of the principles established in earlier case law, an assumption of existing public interest is neither to be equated with, nor to be necessarily seen as sufficient to establish, the pressing social need justifying restrictions to freedom of expression as guaranteed by Article 10.'

59 For example, see the *Enver Aydemir v Turkey* case (dec.), Application no. 26012/11 (ECtHR, 7 June 2016).

60 For an example, see the *M.s. v Germany* case (dec.), Application no. 33696/11 (ECtHR, 6 October 2016).

61 Gerards, ‘Margin of Appreciation, Incrementalism and the European Court of Human Rights’ (2018) 18(3) *Human Rights Law Review* 8. See, for example, the *Polyakova and Others v Russia* case (dec.), nos. 35090/09 et al (ECtHR, 7 March 2017).

62 Gerards, cit, pp. 8–9. For an example, see the *Fürst-Pfeifer v Austria* case, nos. 33677/10 and 52340/10 (ECtHR, 17 May 2016).

63 For example, see *Chabauty v France* [G.C.], Application no. 57412/08 (ECtHR, 4 October 2012).

64 Gerards, cit, pp. 107 ff.

65 Gerards, cit, pp. 9–10.

4 The Margin of Appreciation in Immigration Related Cases

The use of the margin of appreciation poses several questions when the effective guarantee of the universal human rights enshrined by the Convention must take into account the states' autonomy to handle the phenomenon of immigration. Although the attempts to create a common asylum system in the context of the European Union have surely mitigated some differences in terms of migration policies, a grade of divergence among the laws and the interests of the member states still persists even within this legal framework.⁶⁶ That implies that it can be hard to find a shared consensus, especially since national authorities are usually 'better placed' to settle a dispute on a such sensitive matter, being more informed about the specific circumstances of the domestic cases, the needs of the whole community and the reasons behind the political strategies chosen to manage legal and illegal migration flows.⁶⁷

Therefore, the only concrete possibility whereby immigration cases may be successfully referred to the ECtHR by an applicant is if the States employ internal measures that would affect the human rights of the alien concerned, so that they exceed the margin. In this sense, the presence of a degree of discretion in the area would be primarily justified because of the indirect relationship that relies between the Convention and the national immigration laws.⁶⁸ Indeed, this would contribute to the failing of a systemic approach of the ECtHR in the application of the margin in the immigration case law, since there are not precise normative parameters in order to set the limits of the states' discretion, thereby causing uncertainty and flexibility.⁶⁹

In order to better understand on what basis the Court allows more or less margin to the states in migration cases, then we need to focus on the nature of the right or interest at stake. In this perspective, albeit theoretically there is no limit to the rights of the ECHR to which the margin could be applied, most scholarship suggests that in practice it is rarely invoked by the Court at least for

⁶⁶ On the progresses and the shortages of the Common European Asylum System see, among many others, Chetail, De Bruycker and Maiani (eds), *Reforming the common European asylum system: The new European refugee law* (Brill, 2016).

⁶⁷ Gerards, 'The Margin of Appreciation Doctrine, the Very Weighty Reasons Test and Grounds of Discrimination' in Balboni (ed), *The principle of discrimination and the European Convention of Human Rights* (Editoriale Scientifica, 2017, p. 7).

⁶⁸ Thym, 'Respect for private and family life under article 8 ECHR in immigration cases: a human right to regularize illegal stay?' (2008) 57(1) International and Comparative Law Quarterly 96.

⁶⁹ Saccucci, 'The protection from removal to unsafe countries under the ECHR: not all that glitters is gold' (2014) 5 Question of International Law 24.

the so-called ‘non-derogable rights’ of individuals.⁷⁰ More in detail, it is important to note that in the judgments on ‘absolute rights’, above all on Article 3, the margin is very poor, even if, as we already observed, it is not totally absent. Specifically, it may be involved in some specific circumstances that regard the manner in which the domestic authorities can decide how to conform to the obligations under Article 3.⁷¹ Instead, in cases on ‘other rights’, especially Article 8 and Article 9 of the Convention, the margin is normally enjoyed by the Contracting Parties. In particular, the latter two provisions are probably those most often examined by the Court when the tool of the margin is applied in the field of immigration and multiculturalism. In fact, the right to respect for private and family life and the freedom of thought, conscience and religion ‘naturally’ call for a wide extent of appreciation by the states.⁷²

4.1 Margin of Appreciation on Cases Involving ‘Absolute Rights’

The Court grants very little room for manoeuvre to the immigration controls of the Contracting States when the rights of the Convention that are defined as non-derogable are in danger. In other words, the margin of appreciation would be ‘virtually nonexistent’ in the event that internal immigration laws violate the purpose of four ‘absolute’ provisions,⁷³ that are the right to life (Art. 2), the prohibition of torture (Art. 3), the prohibition of slavery and forced labour (Art. 4) and the right not to be guilty of any criminal offence in the absence of a national or international law at the time of the commission of the act (Art. 7). In this sense, the analyses of the Court on the above rights are based on an independent establishment and assessment of the facts.⁷⁴ Hence, the ECtHR is inclined to assume humanitarian elements as more decisive than sovereign factors, at least in the cases of expulsion, deportation or return that may cause documented ill-treatment of aliens.⁷⁵

⁷⁰ Callewaert, ‘Is There a Margin of Appreciation in the Application of Articles 2, 3 and 4 of the Convention?’ (1998) 19 Human Rights Law Journal 6; Greer, *cit.*, p. 6.

⁷¹ On that regard, see the *Valiulienė v Lithuania* case, *supra* section 1.

⁷² Tulkens and Donnay, ‘L’usage de la marge d’appreciation par la Cour européenne des droits de l’homme. Paravent juridique superflu ou mécanisme indispensable par nature?’ (2006) 1 Revue de science criminelle et de droit pénal compare 7.

⁷³ Spielmann, ‘Allowing the Right Margin: The European Court of Human Rights and The National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?’ (2012) 14 Cambridge Yearbook of European Legal Studies 395.

⁷⁴ Callewaert, *cit.*, p. 6.

⁷⁵ Arai, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia, 2002, p. 206).

In this regard, it is common that removal cases concerning Article 2, in view of the possibility that asylum seekers are subjected to the death penalty, raise issues also on Article 3, given the close link of the substantive aspects of these two provisions.⁷⁶ Moreover, the Court established the mandatory essence of Article 3 even on expulsion cases of seriously ill aliens, often in conjunction with Article 8. This occurred, for instance, in the *D. v the United Kingdom* case, Application no. 30240/96 (ECtHR, 2 May 1997), where the ECtHR stated that the proposed removal to St Kitts of an applicant, who was imprisoned due to drug trafficking, but who had AIDS and required to remain in the host state for receiving vital medical treatments that were unavailable in his country of origin, disclosed a breach of both Article 3 and Article 8.

Therefore, the judgments involving Article 3 in particular would justify the lack of margin of discretion of states in immigration case law, also because, as is well known, from the obligation not to extradite or expel any person who would run the real risk of being victim of inhuman and degrading treatment it follows the duty of non-refoulement under the customary international law.⁷⁷ In this perspective, despite governments frequently stressing the importance of reconfiguring the 'balance' between the individuals rights under Article 3 and the community's best interest in greater favour of the latter,⁷⁸ the decisions of the Court seem to exclude any opening toward the use of the margin on removal cases to the country from which the foreign citizen has fled for being subjected to human rights violations. Indeed, the ECtHR has repeatedly affirmed that the absolute nature of Article 3 implies that it is not possible to weigh the risk of torture against the threat to national security for justifying the expulsion of aliens.⁷⁹

The judgments relating to the counter-terrorism matter whereby Article 3 is invoked are illustrative on this aspect. The Court endorsed the mandatory rule

⁷⁶ On this aspect, see *F.G. v Sweden*, [G.c.], Application no. 43611/11, para 110 (ECtHR, 23 March 2016); *L.M. and Others v Russia*, nos. 40081/14, 40088/14 and 40127/14, para 108 (ECtHR, 15 October 2015).

⁷⁷ On cases involving the principle of non-refoulement under the ECHR, see, for example, De Weck, *Non-Refoulement under the European Convention on Human Rights and the UN Convention against Torture: The Assessment of Individual Complaints by the European Court of Human Rights under Article 3 ECHR and the United Nations Committee against Torture under Article 3 CAT* (Brill, 2016).

⁷⁸ Smith, 'The Margin of Appreciation and Human Rights Protection in the 'War on Terror': Have the Rules Changed before the European Court of Human Rights?' (2011) 8(1) Essex Human Rights Review 150.

⁷⁹ In that respect, see the *Guide on the case-law of the European Convention on Human Rights. Immigration*, available online, last update: 31 August 2019, p. 18.

of Article 3, for example, in the *Saadi v Italy* case [G.C.], Application no. 37201/06, para 125, 138 (ECtHR, 28 February 2008), underlining that the prospect of the dangerousness of the conduct of the applicant to the community does not diminish in any way the seriousness of his exposure to be subjected to ill-treatment if deported. Thus, the type of offense allegedly committed by an individual cannot affect the human rights boundaries set for the expulsion procedures even if there may be risks to national security.⁸⁰

Similarly, the Court found that in the presence of strong levels of immigration, the states cannot be absolved from the respect of the unconditional character of the rights secured by Article 3.⁸¹ This is solemnly stated in the *Hirsi Jamaa and Others v Italy* case [GC], Application no. 27765/09, para 122 (ECtHR, 23 February 2012), in which the Court confirms that the immigration pressure experienced by the states which form the external borders of the European Union cannot provoke a refoulement of people in need, as set forth in Article 3.⁸² The Court reiterates that an increasing influx of migrants cannot *per se* exonerate a state of its obligations under Article 3 again in the well-known *Khlaifia and Others* judgment,⁸³ referring to the detention conditions of foreign nationals in the reception centres. However, in this case, the Grand Chamber's ruling, differently from the previous Chamber's decision,⁸⁴ was that the conditions denounced by the applicants did not infringe Article 3 and that the situation complained of had to be evaluated, together with other factors, also in the light of the undeniable problems reported by Italy during the time of the humanitarian emergency due to the Arab Spring in which the events had taken place.⁸⁵

In fact, the absolute prohibition of torture does not preclude the ECtHR from considering the circumstances of the case in question to assess the minimum level of severity that must fall within the scope of Article 3, as underlined

⁸⁰ In the first place, this principle was stated in the *Chahal v the United Kingdom* judgment [G.C.], cit, paras 79–80, *supra* note 13. Later on, see also the *Othman (Abu Qatada) v the United Kingdom* case, Application no. 8139/09, para 185 (ECtHR, 17 January 2012).

⁸¹ Füglistaler, *The principle of subsidiarity and the margin of appreciation doctrine in the European Court of Human Rights' post-2011 jurisprudence* (Institut de hautes études en administration publique Université de Lausanne, 2016, p. 75).

⁸² See also the *M.M.S. v Belgium and Greece* case [G.C.], Application no. 30696/09, para 223 (ECtHR, 21 January 2011), concerning the issue of controls in the case of transfer of asylum seekers between European Union countries according to the EU Dublin Regulation.

⁸³ See *Khlaifia and others v Italy* [G.C.], Application no. 16483/12, para 184 (ECtHR, 15 December 2016).

⁸⁴ See *Khlaifia and others v Italy*, Application no. 16483/12 (ECtHR, 1 September 2015).

⁸⁵ *Khlaifia and others v Italy* [G.C.], cit, paras 178–185.

in the *Soering v the United Kingdom* landmark case, Application no. 14038/88, para 89 (ECtHR, 7 July 1989). More specifically, on the one hand, the ECtHR's case law on expulsions shows that the distribution of the burden of proof in the assessment of whether the person in question, if deported, would face a real risk of being subjected to violations contrary to Article 3, is a shared duty of an asylum-seeker and the national authorities.⁸⁶ On the other hand, the Court recognises that the key role of the guarantees afforded by Article 3 does not allow a higher standard of proof to be required⁸⁷ and acknowledges the difficulties that may be encountered by an asylum seeker in collecting reliable evidence within a short time.⁸⁸

4.2 Margin of Appreciation on Cases Involving the Right to Respect for Private and Family Life under Article 8 ECHR

In most immigration cases whereby the right to respect for private and family life is tested, there is a crucial starting point emphasised by the ECtHR. This consists in the assumption that states must be free to determine their immigration policies and to protect their borders, but in a manner, which complies with the Convention guarantees.⁸⁹ In fact, the power to authorise who and in which circumstances is admitted on the national territory belongs to the states 'as a matter of well-established international law and subject to their treaty obligations'.⁹⁰ The corollary of that is 'the duty of aliens such as the applicant to submit to immigration controls and procedures and leave the territory of the State when so ordered if they are lawfully denied entry or residence'.⁹¹

86 See *J.K. and others v Sweden*, Application no. 59166/12 (ECtHR, 23 August 2016), paras 91 *et seq.*

87 See *Saadi v Italy* [G.C.], para 140, *supra* section 4.1.

88 See *F.G. v Sweden* [G.C.], cit, para 127, in which the Court specifies that, having regard of the position of vulnerability of asylum seekers may find themselves, the national authorities have to carry out the assessment of the risk of violation of Article 3 of their own motion, especially if they 'have been made aware of the fact that the asylum-seeker may plausibly be a member of a group systematically exposed to practice of ill-treatment and there are serious reasons to believe in the existence of the practice in question and in his or her membership of the group concerned'.

89 This formulation was originally stated in the case of *Abdulaziz, Cabales and Balkandali v the United Kingdom*, cit, *supra* section 2.1.

90 This standard formula was used for the first time in the *Moustaquim v Belgium* case, no. 12313/86, para 43 (ECtHR, 18 February 1991). Then, it is maintained, for example, in the *Boujlifa v France* case, Application no. 25404/94, para 42 (ECtHR, 21 October 1997), and in the *Nunez v Norway* case, Application no. 55597/09, para 66 (ECtHR, 28 June 2011).

91 For instance, see the case of *Jeunesse v the Netherlands* [G.C.], Application no. 12738/10, para 100 (ECtHR, 3 October 2014).

However, a core principle that drives the decisions of the Court can be individuated in ‘the fair balance that has to be struck between the competing interest of the individual and of the community as a whole; and in both contexts the state enjoys a certain margin of appreciation’.⁹²

With reference to the states’ duties, although there is not a sharp distinction between the negative and the positive obligations of the states under Article 8,⁹³ since the final goal would consist in the achievement of a ‘fair balance’ between the competing interests involved,⁹⁴ the application of the margin may also vary according to this differentiation.

The negative obligations refer to the event of an expulsion of a ‘settled foreign national’ who may have terminated his or her lawful right to reside or be guilty of a criminal conviction, implying a refrain from the states in arbitrary interfering with the right to respect for private and family life that already exists in the receiving country. Indeed, the ECtHR commonly pays more attention to the third-country nationals that have spent a longer period in the territory of the Contracting States than to a person who desires to enter for the first time.⁹⁵ Therefore, in expulsion cases the level of protection of Article 8 is surely higher and the Court grants narrow discretion to the arguments of the national authorities.⁹⁶

Moreover, it is important to note that, first of all, the interference must find a legal basis in the states’ national provisions that need to meet the Convention requirements of lawfulness.⁹⁷ Only then, the margin is defined on the grounds of the exceptions that may legitimate a restriction of the right by the Parties, as exhaustively listed in Article 8 (2). These are: ‘the interests of national security, public safety or the economic well-being of the country, for the prevention

⁹² See *Gül v Switzerland* case, Application no. 23218/94, para 38 (ECtHR, 19 February 1996).

⁹³ Thus, there may be ‘hybrid cases’, for example when there has been an illegal entry or there has been a legal entry, but the visa is over-stayed. On that regard, see Klaassen, *The right to family unification: between migration control and human rights* (Meijers-reeks, 2015, p. 62); Klassen, ‘Between facts and norms: testing compliance with article 8 ECHR in immigration cases’ (2019) 37(2) Netherlands Quarterly of Human Rights 159.

⁹⁴ On this point, in addition to the *Gül v Switzerland* case, cit, para 38 (*supra* note 92), also see *Tuquabo-Tekle v the Netherlands*, Application no. 60665/00 (ECtHR, 1 December 2005).

⁹⁵ About the notion of ‘respect’ for family life from the public authorities in expulsion cases, see, for example, the *Berrehab v the Netherlands* case, Application no. 10730/84 (ECtHR, 21 June 1988).

⁹⁶ Milios, ‘The immigrants’ and refugee’s right to “family life”: how relevant are the principles applied by the European Court of Human Rights?’ (2018) 25(3) International Journal on Minority and Group Rights 17.

⁹⁷ See, for instance, *Al-Nashif v Bulgaria*, Application no. 50963/99 (ECtHR, 20 June 2002), para 128.

of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others'. Thus, apparently the states have a large spectrum of reasons to validly reduce the private and family life right. Typically, among the most common legitimate aims concerning cases on expulsion of aliens, there is the prevention of disorder or crime for maintaining public order.

Secondly, the margin of appreciation must be seen as a tool that is 'necessary in a democratic society', in the sense that the measure interfering with the rights guaranteed under Article 8 (1) has to be taken 'in order to respond to a pressing social need and if the means employed are proportionate to the aims pursued'.⁹⁸ Still, the ECtHR has been strongly criticised for its confusing interpretation of this concept and its incoherent methodology to qualify the proportionality of the interference.⁹⁹ On this point, the Court tried to shed some light in the leading *Boultif* case, in which it identified relevant criteria to assess whether the expulsion of foreigners is compatible with Article 8 or not.¹⁰⁰ Further criteria have been then added in the *Üner* case.¹⁰¹ In addition, the ECtHR has usually put under severe scrutiny the cases of expulsion of

⁹⁸ See the *Slivenko v Latvia* judgment [G.C.], no. 4831/99 (ECtHR, 9 October 2003), para 113. See also, among others, the case of *Boughanemi v France*, Application no. 2207/93 (ECtHR, 24 April 1996).

⁹⁹ Mcharg, 'Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights' (1999) 62(5) *The Modern Law Review* 687. In the ECtHR's case law, a representative judgment where the proportionality test is applied is *Berrehab v the Netherlands*, cit, para 28, *supra* note 95.

¹⁰⁰ These criteria are: 'the nature and seriousness of the offence committed by the applicant; the duration of the applicant's stay in the country from which he is going to be expelled; the time which has elapsed since the commission of the offence and the applicant's conduct during that period; the nationalities of the various persons concerned; the applicant's family situation, such as the length of the marriage; other factors revealing whether the couple lead a real and genuine family life; whether the spouse knew about the offence at the time when he or she entered into a family relationship; and whether there are children in the marriage and, if so, their age. Not least, the Court will also consider the seriousness of the difficulties which the spouse would be likely to encounter in the applicant's country of origin, although the mere fact that a person might face certain difficulties in accompanying her or his spouse cannot in itself preclude expulsion'. See *Boultif v Switzerland*, Application no. 54273/00 (ECtHR, 2 August 2001), para 48.

¹⁰¹ The Court added two criteria which may already be implicit in those identified in the *Boultif* case. These are: 'the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and the solidity of social, cultural and family ties with the host country and with the country of destination'. See *Üner v the Netherlands* [G.C.], Application no. 46410/99, para 58 (ECtHR, 18 October 2006).

those migrants who have spent his or her childhood or youth in a host country, especially if these involved second-generation foreign nationals who did not commit a very serious offence.¹⁰² This tendency in the jurisprudence of the Court is also linked to the fact that the Contracting States would have the responsibility to educate and integrate these persons into their societies.¹⁰³ Nonetheless, these guidelines are not always interpreted and applied in the same way by the ECtHR and the national courts, which may deem the factors concerned, such as the seriousness of the offence, differently.¹⁰⁴

Conversely, the positive obligations under Article 8 (1) in the immigration related cases may occur when a foreign national who lives in another country applies for the entry in the state where her or his family resides for the purpose of reunification.¹⁰⁵ The presumption which the Court holds is that there would be no interference with the respect for family life by refusing the entry of an applicant, given that admission decisions fall under the sovereign right of the states to control immigration. This entails that the Parties have an increased margin when determining the steps to be taken to ensure compliance with the Convention and that individuals cannot claim any right to choose the country of residence deriving from Article 8 (1).¹⁰⁶

The consequence of the above statement is the performance of the so-called 'elsewhere test' by the judges in Strasbourg.¹⁰⁷ This means that a refusal to accept a foreign national in a Contracting State will be qualified as a failure of Article 8 (1) if the exercise of the right of family life cannot be enjoyed 'elsewhere', presumably in the country of origin of the applicant. However, the ECtHR found a violation of Article 8 in conjunction with Article 14, for example, in the case of *Hode and Abdi v the United Kingdom*, Application no. 22341/09 (ECtHR, 6 November 2012), because the state decided to enact legislation conferring the right to certain categories of immigrants to be joined

¹⁰² A confirmation of this approach adopted by the ECtHR can be found in the case of *Maslov v Austria* [G.C.], Application no. 1638/03 (ECtHR, 23 June 2008).

¹⁰³ Bascherini, 'Immigrants' Family Life in the Rulings of the European Supranational Courts' in Repetto (ed), *The Constitutional Relevance of the ECHR in Domestic and European Law. An Italian Perspective* (Intersentia, 2013, p. 194).

¹⁰⁴ In this respect, see, for instance, the *Maslov v Austria* judgment [G.C.], cit.

¹⁰⁵ The first case in which Article 8 has been applied in the field of admission of aliens for the purpose of family reunification is *Abdulaziz, Cabales and Balkandali v the United Kingdom*, cit, *supra* section 2.1.

¹⁰⁶ In that regard, see, among others, *Jeunesse v the Netherlands* [G.C.], cit, para 107, in which the Court stated that 'Where immigration is concerned, Article 8 cannot be considered to impose on a State a general obligation to respect a married couple's choice of country for their matrimonial residence or to authorise family reunification on its territory'.

¹⁰⁷ Milios, cit, p. 13.

by their spouses in a manner that was not compatible with the principle of non-discrimination.¹⁰⁸

Anyway, the Court admits that the family reunification procedures have to be conceived as flexible and assessed on case-by-case grounds.¹⁰⁹ Doing so, the approach of the ECtHR in verifying the compliance of states under Article 8 within their margin of appreciation in immigration cases confirms some shortages with regard to the consistency of the tests used, thus creating more legal ambiguity for both Contracting States and individuals.¹¹⁰ In this way, we believe that the Court may miss the opportunity to efficiently secure the right to respect for private and family life of the individuals concerned in order to excessively privilege the public interest that generally characterizes immigration law.¹¹¹

4.3 Margin of Appreciation on Cases Involving Individual Freedom of Thought, Conscience and Religion under Article 9 ECHR

The recognition of a wide margin of appreciation by the ECtHR in immigration cases with regard to freedom of thought, conscience and religion is fairly straightforward and mainly based on the idea that, in the absence of a uniform conception among states on such delicate questions, the Contracting Parties must be allowed to regulate and to restrict these rights when appropriate. Consequently, broadly speaking, the scrutiny of the Court on potential violations of the Convention will be less strict in this area,¹¹² even if the discretion conferred on the states is not unlimited and has to satisfy the criterion of proportionality.¹¹³

In particular, when the cases of exposure of religious symbols or wearing of religious clothing are examined in the context of the states' educational institutions, the Court emphasised the necessity to leave the Parties free to establish national rules in line with their traditions and domestic background.¹¹⁴

¹⁰⁸ In more detail, the Court stated that the United Kingdom violated both Article 8 and Article 14 because one applicant, who was the post-flight spouse of the other applicant, a recognised refugee, was not allowed to join him in the respondent state. Differently, refugees married prior to the flight and immigrants with temporary residence status could be joined by their spouses.

¹⁰⁹ See the *Guide on the case-law of the European Convention on Human Rights. Immigration*, available online, last update: 31 August 2019, p. 8.

¹¹⁰ Klassen, cit, p. 159.

¹¹¹ Thym, cit, p. 98.

¹¹² McGoldrick, cit, p. 26.

¹¹³ Lugato, cit, p. 4.

¹¹⁴ See the *Leyla Sahin v Turkey* case, cit, *supra* note 41.

With reference to religious symbols, the so-called *Lautsi II* case¹¹⁵ is emblematic concerning the display of crucifixes in state school classrooms, since it is almost entirely grounded on the doctrine of the margin of appreciation.¹¹⁶ More specifically, the Court argued that the crucifix is an 'essentially passive symbol' that according to the Italian Government corresponds to a tradition which the society as a whole considers important to perpetuate¹¹⁷ and thus does not involve either an indoctrination policy or a violation of the diverse conviction of the pupils' parents.¹¹⁸

But, on the contrary, in cases where teachers claimed the right to manifest his or her religion, the Court stated that a duty to refrain from any ostentation in the expression of their belief would be necessary in order to avoid possible proselytising effects on the students. For instance, in the *Dahlab v Switzerland* case (dec.), Application no. 42393/98 (ECtHR, 15 February 2001), the Court found that the Geneva authorities did not exceed their margin of appreciation prohibiting a state primary school teacher from wearing an Islamic head-scarf, since this was a 'powerful external symbol' that could have considerable influence on her pupils, especially at a tender age. Similarly, in the *Kurtulmuş v Turkey* case (dec.), Application no. 655500/01 (ECtHR, 24 January 2006), the Strasbourg judges validated the disciplinary sanction imposed by the Contracting Party on an associate professor at a state university for wearing the Islamic headscarf while she was teaching because a democratic country is entitled to require its public servants to be loyal to the constitutional values on which it is founded, such as secularism for the Turkish State.

In fact, under Article 9 (2) the states are justified in interfering with an individual's manifestation of religion or belief 'in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others'. Nevertheless, the vagueness of these concepts would contribute to enlarge the discretion of the Parties in interpreting their

¹¹⁵ See *Lautsi v Italy* [G.C.], Application no. 30814/06 (ECtHR, 18 March 2011).

¹¹⁶ For examinations of the use of the margin of appreciation in the case of the display of crucifixes in classrooms, see Itzcovich, 'One, None and One Hundred Thousand Margins of Appreciations: The Lautsi Case' (2013) 13(2) *Human Rights Law Review* 287; Ruggiu, 'The Crucifix and the Margin of Appreciation', in Repetto (ed), *The Constitutional Relevance of the ECHR in Domestic and European Law. An Italian Perspective* (Intersentia, 2013, pp. 149–158).

¹¹⁷ See *Lautsi v Italy* [G.C.], paras 68, 72, cit.

¹¹⁸ Differently from the Great Chamber's decision, in the so-called *Lautsi I* case, it was held unanimously that there had been a violation of Article 2 of Protocol Application no. 1 taken together with Article 9 of the Convention. See *Lautsi v Italy*, Application no. 30814/06 (ECtHR, 3 November 2009).

legitimate aims. For example, in the *s.A.s.* case,¹¹⁹ the Court did not consider the French law prohibiting to wear the full-face veil in public spaces as a violation of the freedom to manifest one's religion because it accepted the government's reasoning that linked 'the minimum requirement of life within French society' and the 'living together' to a valid scope for that restriction, that is 'the rights and freedoms of others'.¹²⁰

Therefore, one could say that, despite the Convention promoting the values of pluralism and tolerance on paper, given the very extensive margin of appreciation enjoyed by the states in questions regarding the freedom of religious minorities, the Court's jurisprudence tends to uncritically privilege integration and neutrality arguments of the Parties over the fundamental rights of individuals with a migrant background.¹²¹

5 Conclusion

The doctrine of the margin of appreciation, used by the ECtHR to define the intensity of its scrutiny, has, as we have seen, been subject to various criticisms. These criticisms are directed not only at the margin itself, but also at its application by the Court. In fact, what characterises the ECtHR's case law on the use of this doctrine is unpredictability. Unpredictability as to the margin the state will confer in the specific case and unpredictability as to the consequences the state will draw from the margin it has attributed, as regards the intensity of its scrutiny.

Even if we can identify three main factors that the Court considers relevant for determining the scope of the margin, that doesn't completely dispel the doubts that the use of this doctrine raises. First, it is not evident in which situations the state should be considered better placed to assess the case. Also, the role to be played by the consensus criterion is questionable.¹²² Finally, recognition of the importance of the right at stake has not always been decisive to determine the intensity of the Court's scrutiny.

¹¹⁹ See *s.A.s. v France* [G.C.], Application no. 43835/11 (ECtHR, 1 July 2014).

¹²⁰ See the *s.A.s. v France* case [G.C.], cit, paras 157–159, 161–162.

¹²¹ Henrard, 'Integration Reasoning at the ECtHR: Challenging the Boundaries of Minorities' Citizenship' (2020) 20(10) Netherlands Quarterly of Human Rights 19.

¹²² Helfer, 'Consensus, Coherence and the European Convention on Human Rights' (1993) 26 Cornell International Law Journal 135.

On the other hand, the very link between these different factors raises many doubts, and it often seems that the margin granted is not determined *a priori*, but serves to justify the solution the Court wants to reach in the specific case.

All these weaknesses are also present in the immigration case law in which the margin of appreciation is normally invoked. Predictably, the fact that immigration policies fall under the sovereignty of the states implies that the Court has to allow a wide margin of discretion for the majority of the cases involving the fundamental rights enjoyed by foreign nationals. Indeed, despite there being some provisions that are qualified as non-derogable, such as Article 3 ECHR, the line between the 'absolute rights' and 'other rights' may become finer when the Court rules on the means by which the Parties comply with the obligations under the Convention.

Nevertheless, it is possible to make a sort of differentiation concerning the importance of the right in question when we refer to the use of the margin in immigration judgments.

In that regard, we observed that any degree of discretion is excluded in expulsion cases of persons that would risk being subjected to inhumane and degrading treatment in their country of origin, regardless of the offence committed by the alien concerned, the potential threat to national security or the amount of migrant flows at a given moment.

Hence, the major uncertainties occur when the application of the margin interferes with the 'other rights', as we have observed in the cases concerning Articles 8 and 9 ECHR. In these judgments, the margin is often justified by the Court in the light of the states' arguments that such limitations 'are necessary in a democratic society', especially 'in the interests of public safety, for the protection of public order' or 'for the protection of the rights and freedoms of others'. Since these are very fluid concepts, it is crucial to fix criteria that help to avoid legal ambiguities and to ensure a satisfactory level of proportionality between the competing interests involved. However, even if some guidelines have been established, for example for the expulsion cases of settled migrants who invoke the right to respect for private and family life,¹²³ the interpretation of this right is still inconsistent both in the ECtHR's case law and if comparing the jurisprudence of the Strasbourg Court with the decisions made by the national courts. The lack of a clear determination of the margin is even more evident on cases that relate to the display of religious symbols or wearing of religious clothing in the context of educational institutions and public spaces, wherein restrictions to the individual freedom of religion have often been

¹²³ See the so-called *Boultif* criteria, *supra* note 100.

legitimated by the need to safeguard the democratic values cherished by the Contracting States. We consider that such an approach adopted by the ECtHR may discourage national policies oriented at multiculturalism and may run the risk of not reaching the so-called ‘fair balance’ between the rights of the individuals belonging to minority groups and the interests of the Parties, because it excessively favours the latter.

We therefore believe that it is essential for the judges in Strasbourg to reach agreement on the role of the doctrine, the situations in which its use is actually justified, the criteria by which it operates and how they articulate with each other.

Vulnerability Assessment as an Instrument to Enhance Human Rights?

A First Balance of the ECtHR'S Approach in the Field of Migration and Asylum

*Andrea Romano**

1 Introduction

Similar to other international jurisdictions the concept of vulnerability has acquired a high relevance in the context of the European Court of Human Rights. Since the *Chapman* case¹ the Strasbourg Court has embodied within its judgments considerations regarding the vulnerability of the applicants. However, the Court consciously avoided encapsulating the concept of vulnerability, eschewing a definition. Whereas this approach potentially undermines the coherence of its reasoning and jurisprudence, it has allowed the Court to maintain a flexible stance, being able to model that concept on the circumstances at stake. Furthermore, scholars have also found that the ECtHR's approach to vulnerability is mainly group-centred,² i.e. the Court tends to apply a vulnerability assessment to the applicants insofar as they fall within one of the groups identified as vulnerable by the Court. Be that as it may, one has to bear in mind that the identification of a group as vulnerable is subject to contestation within the Court itself, and it is not unusual to read dissenting or concurring opinions on that subject.³ Another relevant finding is that vulnerability is often deemed a double-edged sword in that it can either strengthen or enhance the rights and liberties of migrants.⁴ Perhaps this aspect has not been

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¹ *Chapman v the United Kingdom*, Application no. 27238/95 (ECtHR, 18 January 2001).

² Brandl and Czech, 'General and Specific Vulnerability of Protection Seekers in the EU: is there an Adequate Response to their Needs?' in Ippolito and Iglesias (eds), *Protecting Vulnerable Groups* (Hart Publishing, 2015 pp. 247–270).

³ Arguably the most striking case is the dissenting opinion of judge Sajó in the case *M.s.s. v Belgium and Greece*, Application no. 30696/09 (ECtHR, 21 January 2011).

⁴ See Da Lomba, 'Vulnerability, Irregular Migrants' Health-Related Rights and the European Court of Human Rights' (2014) 21(4) European Journal of Health Law 339 from a different perspective arguing that 'the vulnerable group can also stigmatise and stereotype populations'. More generally on the risks implied in the vulnerability discourse see Butler,

sufficiently addressed, but the potential exclusionary nature of vulnerability should also be carefully investigated.⁵

Alongside the recognition of vulnerability in the cases of the Roma minority, people living with HIV or applicants with mental disabilities⁶ – *inter alia* – the Court has also begun to tackle vulnerability in the context of migration and asylum. This runs parallel to the increasing acknowledgment of the vulnerable condition of migrants and asylum seekers in the international domain – exemplified by the UNHCR contribution to define a number of vulnerable criteria⁷ – and more recently also in the context of the EU as well as national law.⁸ The Court has had the opportunity to consider vulnerability of migrants and asylum seekers in a great deal of cases, covering several areas such as Dublin transfers, expulsion, detention and forced labour. In addition, it has defined the whole category of asylum seekers as a vulnerable group,⁹ and it has acknowledged the specific vulnerable situation of certain non-citizen applicants, such as children, LGBTI asylum seekers, or migrants with illnesses. Besides this, unlike other international Courts,¹⁰ it has so far declined to consider irregular migrants as a vulnerable group but has attached a certain degree of relevance to the fragile condition that the status of undocumented migrants may produce in the case of servitude and forced labour.

The discourse on the nexus between vulnerability and migration-related cases has to be framed within the widest attitude of the Court to give special relevance to the objective and subjective elements that are relevant in the case to be adjudicated. From this perspective, on the one hand, the Court considers

⁵ ‘Rethinking Vulnerability and Resistance’ in ID et al (ed), *Vulnerability in resistance* (Duke University Press, 2016).

⁶ This is for instance the case of the ECtHR in *Khlaifia and others v Italy*, Application no. 16483/12 (ECtHR, 15 December 2016), where the non-inclusion of the applicant within a vulnerable group leads the Court to dismiss his pleas.

⁷ For the ECtHR’s case law on vulnerability see Timmer, ‘A Quiet Revolution: Vulnerability in the European Court of Human Rights’ in Fineman and Gear (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Ashgate, 2013, pp. 147–170).

⁸ UNHCR Resettlement Handbook. The UNHCR identifies several categories of people that may be resettled, including people with legal or physical protection needs, medical needs, women and girls at risk, children and adolescents at risk, family reunification, those with a lack of foreseeable alternative durable solutions. See also UNHCR Vulnerability screening tool.

⁹ Cf Directive 2013/32/UE, Article 21 defining vulnerability and Directive 2013/33/UE. See also the Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece on relocation.

¹⁰ *M.S.S. v Belgium and Greece*, cit.

¹⁰ See for instance the Inter-American Court of Human Rights (IACtHR), *Vélez Loor v Panamá*, 23 November 2010.

how the state's (positive or negative) conduct has reached a certain degree of seriousness; on the other hand, it assesses how such conduct interacts with the personal conditions of the applicants.¹¹ This *in concreto* approach allowed the Court to embrace a comprehensive assessment of the situation of the applicants and to adopt a strict scrutiny on potential automatic and abstract clauses that are common in migration and asylum legislation of Contracting States. Vulnerability seems to add a further step in this direction, insofar as it obliges the Court to carry out an in-depth analysis of the concrete condition of the applicant aimed at recognising its potential fragility or special exposure to risk and rights violation.

Nevertheless, which are the specific features of the consideration of vulnerability in alien cases? Why has it become that relevant in the most recent case law of the Court? And what are the functions of a vulnerable assessment? If the Court is reluctant to define vulnerability, this Chapter is aimed at illustrating the specific functions and the legal consequences that a vulnerability assessment has entailed so far in the judgments of the Court dealing with migration and asylum cases. In particular, we will select some key areas where a vulnerable-based assessment of the Court has been more frequent and we will try to illustrate which consequences have been implied for the Court to carry out an assessment of the vulnerability of the applicant. For each area (e.g. Dublin 'cases', detention, etc.), we will explore the relevance that the vulnerable condition of the applicant (e.g. minors, illness migrants) has represented for the Court to adjudicate the case. This will reveal the manner in which the adoption of a 'vulnerability test' has led the Court to constrain the national margin of appreciation and it will acknowledge that the threshold required for the violation of a given ECHR's provision has been reached. From this perspective, it may be said that this analysis highlights that a vulnerability-based assessment may be conceived as a sort of 'wedge' between the national margin of appreciation, on the one hand, and the liberty or equality of migrants and asylum seekers, on the other hand.

2 The Origins of the Court's Approach on Vulnerability in Migration-Related Cases: The 'Dublin' Saga

The relationship between the ECHR and Dublin transfer decisions¹² constitutes the natural point of departure for analysing the Court's approach on

¹¹ See *Kudla v Poland* [GC], Application no. 30210/96 (ECtHR, 26 October 2000), para 91.

¹² i.e. decisions adopted by Member States under Art. 29 ff. of the Dublin Regulation.

the nexus between vulnerability and aliens. As a matter of fact, the landmark decision in this context was adopted when the Court acknowledged that the transfer of asylum seekers from Belgium to Greece in application of the Dublin Regulation breached Article 3 of the Convention, due to the systemic deficiencies of Greece as far as reception conditions of asylum seekers were concerned (*M.s.S v Belgium and Greece*).¹³ In particular, the Court reached that decision basing its reasoning on the vulnerability of asylum seekers, which therefore played a crucial role: ‘The Court attaches considerable importance to the applicant’s status as an asylum-seeker and, as such, a member of a particularly underprivileged and vulnerable population group in need of special protection’.¹⁴ Following that case, the Court had the opportunity to specify its approach on the matter in a case involving the potential transfer under Dublin rules of a family from Switzerland to Italy. Again, a vulnerability-related assessment was essential in order to exclude the lawfulness of the transfer: unlike in *M.s.s.* the Court did not qualify the Italian system as structurally deficient; yet, this did not impede the Court from considering that the transfer of the applicants had to be considered lawful *iuris et de iure*. In actual fact, the specific vulnerability of the applicants (a family with several children) implied that the Swiss government should have acquired specific guarantees from the Italian authorities in order to concretely assess how they would have taken charge of such applicants, and exclude that the reception conditions in Italy would have caused a harm amounting to a degrading or inhuman treatment.¹⁵

Yet, it does not seem that the Court has consistently followed the application of such a vulnerable assessment in Dublin cases. In *A.M.E. v the Netherlands*¹⁶ the Court did not find a violation of Article 3 in a case concerning a Somali asylum seeker subject to a transfer procedure from the Netherlands to Italy under the Dublin criteria. On the one hand, the Court reiterated what was affirmed in *M.s.s. v Belgium and Greece* by stating that as an asylum seeker he belonged to a particularly unprivileged and vulnerable population group: however, in consideration of the treatment received by the applicant upon his arrival in Italy and with the asylum reception conditions in that country being incomparable with those existing in Greece, the Court found no reason to consider that

¹³ *M.s.s. v Belgium and Greece*, cit. Note however that this was not the first decision on the Dublin transfers, the Court having already ruled on that issue in *T.I. v the United Kingdom*, Application no. 43844/98 (ECtHR, 7 March 2000); *K.R.S. v the United Kingdom*, Application no. 32733/08 (ECtHR, 2 December 2008).

¹⁴ Ibidem, para 263.

¹⁵ *Tarakhel v Switzerland [GC]*, Application no. 29217/12 (ECtHR, 4 November 2014).

¹⁶ *A.M.E. v the Netherlands*, Application no. 51428/10 (ECtHR, 13 January 2015).

the threshold required to consider Article 3 breached was actually reached. Nonetheless, having excluded the applicability of the doctrine of *M.s.s. v Belgium and Greece* to the case at stake, the possibility remained for the applicant of relying on the *Tarakhel's* approach. However, the Court rejected the application of the same scrutiny applied in that judgment for the reason that 'unlike the applicants in the case of *Tarakhel* ... the applicant is an able young man with no dependents'. The way in which such reasoning is formulated appears problematic, as it cannot be taken for granted that the transfer under Dublin rules of an 'able young man with no dependents' excludes the violation of Article 3 because of its personal conditions. Lack of protection, fragility and exposure to hardship may well affect an applicant with that profile, notwithstanding its condition ('able'), age ('young'), gender ('man') or family status ('no dependents'). A more cautious definition of the condition of the applicant should have been formulated; otherwise, this kind of statement may confirm the implied risks of adopting a vulnerability test, insofar as they entail the possibility of lowering rather than strengthening the standards of human rights protection.

Also in *A.S. v Switzerland*¹⁷ the coherence of the Court as regards the interpretation of vulnerability in this area has somehow been challenged. Again, the case concerned a Dublin transfer to Italy and the Court excluded the violation of Article 3. Unlike the previous case, the applicant was affected by both physical and serious mental disorders. This notwithstanding, the Court found no arguments to deem that he would not have received an appropriate treatment once transferred to Italy. As for the previous case, the vulnerable position of the applicant did not reach the 'degree' of vulnerability required by the Court in order to find a violation of Article 3. This is likewise problematic as it introduces a sort of 'vulnerable-but-not-enough' approach that may lead to an incoherent case law and to arbitrary adjudication.

3 Vulnerability and the Expulsion of Undocumented Migrants

Some of the findings identified in the context of Dublin 'cases' might also be examined in the context of aliens' expulsions, where the intensity of the scrutiny has varied consistently according to the personal conditions of the applicants at stake and particularly to their degree of vulnerability. In this regard a first problem to be addressed is that when the Court considers the vulnerable

¹⁷ *A.S. v Switzerland*, Application no. 39350/13 (ECtHR, 30 June 2015).

condition of the applicants, it attaches particular relevance to their credibility, as the situation of vulnerability needs to be substantiated in order to prevent a removal to the country of origin. The relevance of this problem is particularly evident by comparing *N. v Sweden*¹⁸ and *Samina v Sweden*,¹⁹ both dealing with a similar problem, i.e. the lack of family members or social ties in order to support or protect the applicants in case of removal to their country of origin. Whereas in the first case the removal of an Afghan woman was considered unlawful on the grounds of – *inter alia* – the vulnerable situation of unaccompanied women in Afghanistan, in the second case the vulnerability of a Pakistani woman stating that she was unable to rely on the support of any family member was considered unsubstantiated. A possible interpretation of this different solution is, again, the group-oriented approach to vulnerability that leads the Courts' case law, as stated above. As a matter of fact, in the second case the Court had to assess the individual allegation of the applicant stating its vulnerability.²⁰ By contrast, in the first case the Court relied on a report of UNHCR, which considers unaccompanied women in Afghanistan a particular vulnerable group; thus, this helped the applicant to 'objectivise' its statement, i.e. to highlight that the same situation was suffered by other people being in his same condition.

Another area where the relationship between expulsion and vulnerability is particularly frequent concerns the so-called 'medical cases'.²¹ As in national and other international jurisdictions, the Strasbourg Court has also been faced with the claim of suspending or declaring an expulsion order void on the grounds that the healthcare of migrants would be at risk in the case of returning him or her to the country of origin. The standards and quality of the health-care system in migrant-producing countries may be particularly deficient, and should the life or health of the applicant depend on medical treatment that is unavailable in the country of origin an expulsion order may amount to a degrading and inhuman treatment. Yet, the Court has only scarcely recognised that the expulsion of a migrant with illness in a country that is not part of the Convention entails a risk of violating Article 3. In *D. v the United Kingdom* the

¹⁸ *N. v Sweden*, Application no. 23505/09 (ECtHR, 20 July 2010).

¹⁹ *Samina v Sweden*, Application no. 55463/09 (ECtHR, 20 October 2011).

²⁰ 'In any event the applicant has failed to substantiate that she would be in such a vulnerable situation upon return to Pakistan or face such various cumulative risks of reprisals that would fall within the high threshold set by Article 3 of the Convention.'

²¹ See recently *Paposhvili v Belgium*, Application 41738/10 (ECtHR, 13 December 2016). For the earlier case law see *N. v the United Kingdom*, Application no. 26565/05 (ECtHR, 27 May 2008) and *D. v the United Kingdom*, Application no. 30240/96 (ECtHR, 2 May 1997).

Court declared for the first time that the expulsion of someone with a terminal HIV illness to the island of St Kitts breached Article 3.²² In that judgment the Court made clear that differences in healthcare treatment and structures between the country of removal and the one of destination do not amount in themselves to a violation of Article 3. In the case at stake, the Court found that what represented a risk of breaching Article 3 was represented by the risk for the applicant of dying under distressing circumstances. He did indeed have a terminal illness which was in need of specialist medical treatment unavailable in the country of origin. Since then, there has been no other judgment where the Court found a violation of Article 3 for similar reasons until the case *Paposhvili v Belgium*.²³ The reason for this is probably due to the fact that the Court decided to apply a strict scrutiny to the so-called medical cases favourable to the margin of appreciation, acknowledging the violation of Article 3 only in 'exceptional circumstances'.

Nonetheless, the application of such a strict scrutiny has been disputed within the Court itself, as the dissenting opinion of judge Lemmens in the case *Tatar v Switzerland* illustrates:²⁴ the applicant was affected by schizophrenia and the judge expressed a dissenting opinion affirming that 'once back in his country of origin, the applicant will be completely helpless and unable to seek the necessary medical assistance' (para 3). The dissent is interesting for it shows the somehow discretionary or disputable nature of the 'exceptional circumstances' scrutiny applied by the Court in 'medical cases'. What is more, in order to dispute the presence of such exceptional circumstances for the dissenting judge, vulnerability was the crucial argument: 'the applicant as a person suffering from severe schizophrenia and unable to live on his own, *must be considered extremely vulnerable*'.²⁵

Paposhvili v Belgium is the last judgment of this saga and it represents a more favourable interpretation for people facing severe risk of reducing their life expectancy in the case of removal to their country of origin. Such an evolving approach is not surprising as nowadays, vulnerability assessment plays a different role from when the Court adjudicated earlier cases. Far from being a coincidence, whilst no reference is made to the vulnerability of the applicant

²² *D. v the United Kingdom*, cit.

²³ *W.H. v Sweden*, Application no. 49341/10 (ECtHR, 8 April 2015). The Court excluded the violation of Article 3 in the case the repatriation of the migrant is carried out within an area of the country where the applicant will not suffer from a risk of inhuman and degrading treatment.

²⁴ *Tatar v Switzerland*, Application no. 65692/12 (ECtHR, 14 April 2015).

²⁵ Ibidem, partly dissenting opinion of Judge Lemmens, para 3, emphasis added.

in *N. v the United Kingdom*, in *Paposhvili* the Court reiterated that cases where an assessment based on vulnerability – such as *M.s.s. v Greece and Belgium* or *Tarakhel* – had been crucial. This is probably also confirmed by the conclusion of the Court where it is stated that violation of Article 3 follows from the fact that internal authorities did not conduct a proper assessment and did not rely upon sufficient information in order to prevent a risk of ill-treatment in the case of return of the applicant to Georgia. This is *mutadis mutandis* the same conclusion the Court reached in *Tarakhel* where vulnerability also played a major role. It follows that the precarious health conditions of the applicant in *Paposhvili* led the Court to acknowledge a violation of Article 3.

4 The Multifaceted Approach of the Court on Detention of Asylum Seekers

Detention is a further privileged perspective to explore how the Court applies its vulnerability test in migration or asylum-related cases. Again, there is no fixed rule, and the Court has either recognised that detention does not violate the Convention because the situation of the applicant did not reach the threshold of vulnerability required by the Court (i.e. the applicants were not vulnerable enough),²⁶ or it has reached the same conclusion despite the condition of vulnerability of the applicants.²⁷

To begin with, the Court has acknowledged the power of states to detain asylum seekers, under Article 5, 1, (f).²⁸ In particular, it has decided not to apply the control of necessity, being that the detention of asylum seekers is only subjected to a scrutiny of non-arbitrariness. Yet, this power is not unlimited, and

²⁶ See *Khlaifia and others v Italy*, cit, para 194: ‘As the Chamber rightly pointed out, when they were held at the Lampedusa CSPA, the applicants were weakened physically and psychologically because they had just made a dangerous crossing of the Mediterranean. Nevertheless, the applicants, who were not asylum-seekers, did not have the specific vulnerability inherent in that status, and did not claim to have endured traumatic experiences in their country of origin (contrast *M.s.s. v Belgium and Greece*, cited above, para 232). In addition, they belonged neither to the category of elderly persons nor to that of minors (on the subject of which, see, among other authorities, *Popov v France*, nos. 39472/07 and 39474/07, para 90–103, 19 January 2012). At the time of the events they were aged between 23 and 28 and did not claim to be suffering from any particular medical condition. Nor did they complain of any lack of medical care in the centre’. See recently also *Ilias and Ahmed v Hungary*, no. 47287/15, 14 March 2017, where the Court affirmed that ‘the applicants in the present case were not more vulnerable than any other adult asylum-seeker detained at the time’.

²⁷ *Thimothawes v Belgium*, Application no. 39061/11 (ECtHR, 4 April 2017).

²⁸ *Saadi v the United Kingdom*, Application no. 13229/03 (ECtHR, 29 January 2008), para 6.4.

the Court has applied a strict scrutiny in cases concerning particularly vulnerable groups: this is particularly the case of children²⁹ and LGBTI asylum seekers.³⁰ As for the first group, given that many Contracting States allow for detention of children, it does not come as a surprise if the Court has limited the margin of appreciation of states in this respect in a number of cases. The Court unanimously found a 'flagrant' violation of Article 3 in a case concerning the detention and subsequent removal of a five-year old minor, on the grounds that she did not have the necessary documentation to enter the country. In that case, vulnerability played a major role as it emerges from the following paragraph of the judgment: the applicant 'was thus in an extremely vulnerable situation. In view of the absolute nature of the protection afforded by Article 3 of the Convention, it is important to bear in mind that this is the decisive factor and it takes precedence over considerations relating to the second applicant's status as an illegal immigrant'.³¹ Thereafter, the Court has repeatedly found a violation of the Convention under Article 3 and 5 for the detention of minors,³² establishing that it can only occur within specific detention facilities and as a measure of last resort.³³ Furthermore, states must take into account the minor's age and other circumstances when they decide to place children in detention. This jurisprudence clarifies two aspects. On the one hand, the same measure (in this case: detention) may lead either to a violation or to a non-violation of the Convention according to the degree of vulnerability of the applicant. From this perspective, in a case involving the detention of a mother with her children, the Court found that Article 5 had been breached only as regards the detention of the children, being that the detention of the mother was lawful; at the same time the age of the child and his personal circumstances may lead the Court to find a violation of the Convention.³⁴ On the other hand, detention of minors is not unlawful *per se*. Nevertheless, as some EU states prohibit detention (and expulsion) of minors and as the Court repeatedly qualifies them as 'extremely vulnerable' it may be asked whether the Court could have further narrowed the national margin of appreciation by establishing an absolute prohibition on detaining children, apart from the

²⁹ *Mubilanzila Mayeka et Kaniki Mitunga c. Belgique*, Application no. 13178/03 (ECtHR, 12 October 2006); *Rahimi v Greece*, Application no. 8687/08 (ECtHR, 5 April 2011).

³⁰ *o.M. v Hungary*, Application no. 9912/15 (ECtHR, 5 July 2016).

³¹ *Ibidem*, para 55.

³² See *Muskhadzhieva and Others v Belgium*, Application no. 41442/07 (ECtHR, 19 January 2010). Also see recently *s.f. and Others v Bulgaria*, Application no. 8138/16 (ECtHR, 7 December 2017).

³³ *Popov v France*, Application no. 39472/07 and 39474/07 (ECtHR, 19 January 2002), para 119.

³⁴ *Muskhadzhieva and others v Belgium*, cit.

cases where the necessity of ensuring their best interest may legitimate the deprivation of their liberty.

As for the relationship between detention and LGBTI cases, the Court has recently ruled on that issue, qualifying the decision of the convened state to place the applicant in detention as arbitrary for its inadequate consideration of the vulnerability at stake. Again, that is not to say that LGBTI asylum seekers may not be detained in absolute terms but that their vulnerability is an aspect to be taken into account when national authorities have to make a decision over their possible detention. In particular, this is crucial ‘in order to avoid situations which may reproduce the plight that forced these persons to flee in the first place’.³⁵ At the time of writing, this is an isolated case. Thus, it remains to be seen how the Court will consolidate its jurisprudence in the following years and – above all – whether and how the Contracting States will take into account the principles established by the Court in this judgment.

5 Tackling the Nexus between Vulnerability and Undocumented Migrants: The Prohibition of Slavery and Forced Labour

As aforementioned, irregular migrants do not represent a vulnerable category *per se* in the ECtHR’s case law. However, in some judgments the Court has emphasised the particular vulnerability of undocumented migrants and has consequently recognised a violation of Article 4 for breaching the positive obligations arising from it. The Court recognised a violation of the prohibition of Article 4 only in four cases and, interestingly, all of them concerned domestic females and undocumented workers.³⁶

The first case was *Siliadin v France*³⁷ related to a Togolese woman working in an irregular condition – but with the promise that her status would have been regularised – deprived of her passport and being forced to carry out unpaid work for many hours per day without any day off. In the light of such circumstances, the Court relied on the positive obligation arising from Article 4 that ‘must be seen as requiring the penalisation and effective prosecution of any act aimed at maintaining a person in such situation’ (para 112). In order

35 *O.M. v Hungary*, cit, para 53.

36 So Timmer, ‘*C.N. v the United Kingdom*: the Court addresses domestic servitude’ (Strasbourg Observers, 20 November 2012).

37 *Siliadin v France*, Application no. 73316/01 (ECtHR, 26 July 2005).

to recognise such a violation, the Court had to clarify whether the notion of forced labour or servitude fit within the situation of the applicant and whether French criminal law offered sufficient protection. On the one hand, the Court recognised not only that the treatment suffered from the applicant amounted to the notion of forced labour but that also the notion of servitude was applicable to the situation at stake: in particular, the Court observed the need to reinterpret that notion 'in the light of present-day conditions' (para 121). Should it have adopted what the Court defines as the 'classic' notion of slavery, as provided by the 1927 Convention on slavery, the situation of the applicant would have fallen out of the scope of the ECHR. By contrast, the Court opted for an updated notion of servitude interpreting it as 'an obligation to provide one's services that is imposed by the use of coercion' (para 124). As the applicant was 'vulnerable and isolated', at the complete mercy of her 'employers', under the constant fear of being arrested for being undocumented, she faced what Article 4 defines as servitude. On the other hand, the Court also found that servitude is not a criminal offence under French criminal law and other criminal provisions of French legislation did not ensure the effective protection of the rights guaranteed under Article 4 of the Convention, as it is demonstrated from the fact that French jurisdiction failed to acknowledge criminal responsibility for the offender and only condemned him to civil sanctions: therefore, the Court concluded that French legislation was not able to afford effective protection for the applicant and a violation of positive obligations under Article 4 was found.

After that judgment the Court also found a violation of Article 4 in *Rantsev v Cyprus and Russia*.³⁸ This judgment is remarkable for it recognised for the first time that trafficking in human beings falls within the scope of Article 4, regardless of whether such a provision makes mention of it. This follows from the obligation of the Court to 'interpret the Convention in the light of present-day conditions' which implies the attachment of special relevance to the 'increasing recognition at the international level of the prevalence of trafficking and the need for measures to combat it'. From this perspective the Court refers to the main instruments in the area of trafficking in human beings, namely the Palermo Protocol of 2000 and the Anti-trafficking Convention of 2005. This line of reasoning illustrates that the international legal framework already in force to combat trafficking in human beings has played a crucial role in the contextual interpretation of the Court. What is more, the conclusion of the Court, according to which victims of trafficking may rely on Article 4 of the

³⁸ *Rantsev v Cyprus and Russia*, Application no. 25965/04 (ECtHR, 7 January 2010).

Convention, widens the range of legal instruments provided for in the context of the Council of Europe; it also adds a new layer of protection in this legal system apart from the 2005 Warsaw Convention,³⁹ which is directed at enhancing victim protection and monitoring States Parties anti-trafficking systems by virtue of the GRETA activities.⁴⁰ In particular, in *Rantsev* the Court recognised the existence of specific positive obligations that states have to adopt in order to comply with Article 4.⁴¹ Following *Rantsev* the Court recognised the importance for states to have adequate measures to combat trafficking in a number of judgments.

For the purpose of this section – focused on emphasising the growing awareness of the Court on the vulnerability attached to the status of undocumented migrants – *c.n. v the United Kingdom* has to be highlighted for the Court's reliance on the difficult situation of (migrant) domestic workers, which is demonstrated by a number of references to that condition throughout the judgment and particularly from the following paragraph: 'domestic servitude is a specific offence, distinct from trafficking and exploitation, *which involves a complex set of dynamics, involving both overt and more subtle forms of coercion, to force compliance*' (para 80).

Whereas Article 4 has been predominantly tackled in the context of female domestic work, a recent judgment dealt with it in a different situation; in *Chowdury and others v Greece*⁴² the Court considered a case involving 42 Bangladeshi nationals with undocumented status working in Greece in unbearable working conditions that were known by the authorities of the respondent state. The judgment is again remarkable for the emphasis put on the nexus between vulnerability and the irregular condition:

In the present case the Court notes that the applicants began working at a time when they were in a situation of vulnerability as irregular migrants without resources and at risk of being arrested, detained and deported. The applicants probably realised that if they stopped

³⁹ Council of Europe Convention on Action against Trafficking in Human Beings was adopted by the Committee of Ministers of the Council of Europe on 3 May 2005 and entered into force on 1 February 2008.

⁴⁰ See, <<https://www.coe.int/en/web/anti-human-trafficking/about-the-convention>>.

⁴¹ The Court elaborated a three-pronged test, according to which states have to put in place an appropriate legislative and administrative framework, to take operational measures and have a procedural obligation to investigate.

⁴² *Chowdury and others v Greece*, Application no. 218845/15 (ECtHR, 30 March 2017).

working they would never receive their overdue wages, the amount of which was constantly accruing as the days passed. Even assuming that, at the time of their recruitment, the applicants had offered themselves for work voluntarily and believed in good faith that they would receive their wages, the situation subsequently changed as a result of their employers' conduct.⁴³

In this case, the Court recognised once again that the state failed to comply with its positive obligations arising under Article 4, qualifying the working conditions of the Bangladeshi nationals as human trafficking and forced labour. In the light of the legal reasoning of the Court that elaborates on the vulnerable situation of undocumented migrants and the 'chilling effect' that this condition may imply for the exercise of their labour rights, this case opens up interesting perspectives on the possibility for the Court to apply a vulnerability-related assessment in cases involving undocumented migrants. Whereas the far-reaching conclusions reached by the Interamerican Court may be out of sight for the Strasbourg Court, Article 4 case law may form the basis for making ECHR an instrument of guarantee for a particularly unprivileged and unprotected category of migrants. As per the interpretation of Article 4 another chapter that will probably be addressed in the future concerns the nexus between the international protection and the anti-trafficking system. So far, the Court has not entered into the merits, limiting itself to consider a number of cases as inadmissible.

6 Vulnerability and the Judicial Dialogue: Comparative Remarks on the Jurisprudence of the CJEU and the ECtHR

Judicial dialogue between the ECtHR and the CJEU has accompanied and shaped the evolution of the EU migration and asylum law. The Strasbourg Court has often anticipated the outcome of the Luxembourg Court as far as the rights of migrants and asylum seekers are concerned.⁴⁴ Therefore, this chapter would be incomplete without a reference to the CJEU's approach on vulnerability. Does the Luxembourg Court follow the ECtHR's approach on vulnerability? Are there similarities between both Courts when they assess vulnerability in the context of asylum and migration legislation? Having analysed the ECtHR's

43 Ibidem, para 96.

44 Lambert, 'Transnational Judicial Dialogue, Harmonization and the Common European Asylum System' (2009) 58 International & Comparative Law Quarterly 519.

approach on vulnerability this final section will be focused on the relationship between the ECtHR and the CJEU on vulnerability and on the potential impact that the former could have on the latter in the near future.

The CJEU has so far scarcely embodied a vulnerability assessment within its judgments,⁴⁵ and that may be due to the sporadic and in any case recent reference to that concept in EU legislation.⁴⁶ Whereas the Court has sometimes considered vulnerability in other areas of EU law – especially labour law⁴⁷ or children involved in criminal proceedings⁴⁸ – it seems that it is rather reluctant to reach outcomes comparable to the ECtHR in the field of migration and asylum, notwithstanding the specific references on the vulnerability of migrants and asylum seekers embodied within EU law.⁴⁹ This is particularly evident in some judgments where vulnerability was the core concern of the ECtHR. Take for instance *M.s.s. v Belgium and Greece* where the consideration of the Court of asylum seekers as a vulnerable group was a central piece of the reasoning that led the Strasbourg Court to decide that Art. 3 ECHR had been breached by the Dublin transfer. By contrast, the Court in *n.s. M.E.* that followed the Strasbourg case avoided identifying asylum seekers as a vulnerable group. This probably reflects the general reluctance of the CJEU to adopt the concept of vulnerable group, which is nevertheless widely considered by the ECtHR.

This notwithstanding, a vulnerability assessment is not completely absent in the CJEU judgments.⁵⁰ In the case of sexual orientation, for instance, the Court based its reasoning on the particular vulnerability of LGBTI asylum seekers in order to strengthen their sphere of liberty, for instance admitting that a late disclosure of the grounds of persecution

⁴⁵ See for a critical appraisal of the CJEU's approach in the field of elderly, Seatzu, 'Reshaping EU Old Age Law in the Light of the Normative Standards in International Human Rights Law in Relation to Older Persons' in Ippolito and Iglesias (eds), *Protecting Vulnerable Groups* (Hart Publishing, 2015, p.67) affirming that the CJEU failed so far to enhance the protection of older persons '*and in fighting against their vulnerability*'.

⁴⁶ Apart from the areas of migration and asylum, relevant exceptions are Directive 2016/800 on procedural safeguards for children who are suspects or accused persons in criminal proceedings (see recitals 25 and 36); Directive 2004/81 on victims of trafficking in human beings (see recitals 5 and 12 and Article 7).

⁴⁷ See C-411/96, Boyle, stating that 'pregnant workers and workers who have recently given birth or who are breastfeeding are in an especially vulnerable situation which makes it necessary for the right to maternity leave to be granted to them but which, particularly during that leave, cannot be compared to that of a man or a woman on sick leave.'

⁴⁸ See C-105/03, *Pupino*, paras 52–56.

⁴⁹ See fn 8.

⁵⁰ See for a somehow different opinion Brandl and Czech, cit.

linked to the sexual orientation does not undermine their credibility.⁵¹ Furthermore, in the context of humanitarian visas, AG Mengozzi made reference to the vulnerability of the Syrian children belonging to the family that applied for a LTV visa in order to further motivate the need for states to issue humanitarian visas.⁵²

Lastly, the Court included a quick reference to vulnerability in the recent *M. v Minister for Justice and Equality* on asylum seekers' right to be heard, where the Court affirmed that 'An interview must also be arranged if it is apparent – in the light of the personal or general circumstances in which the application for subsidiary protection has been made, *in particular any specific vulnerability of the applicant, due for example to his age, his state of health or the fact that he has been subjected to serious forms of violence* – that one is necessary in order to allow him to comment in full and coherently on the elements capable of substantiating that application.' (para 51).⁵³ In sum, the CJEU and the ECtHR do not seem to have addressed vulnerability in similar terms. Yet, it will have to be verified whether in the future the above-mentioned case law of the Strasbourg Court will influence the Court of Justice to enhance its reliance on vulnerability.

7 Conclusion

This chapter has attempted to create a discussion of areas and cases that illustrate some of the problems related to the interpretation of vulnerability in the field of migration and asylum. Due to its growing salience, it is likely that the Court will have to assess the application of vulnerability in other areas concerned with migrants and asylum seekers in the future. As for the current jurisprudence, whereas a number of principles may be inferred from the Court's case law, some critical issues or contradictions may equally be detected.

On the one hand, vulnerability has emerged as a crucial instrument that has allowed the Court to find that states have breached a given provision that would have been otherwise deemed as non-breached in the case of the lack of

⁵¹ See *A, B, C v Staatssecretaris van Veiligheid en Justitie*, C-148/13 to C-150/13.

⁵² See C-638/16, PPU, AG Mengozzi, para 137.

⁵³ C-560/14, 9 February 2017.

a vulnerability-related scrutiny.⁵⁴ The consequence is that vulnerability works as a 'lift' that allows the applicant to reach the threshold required by the Court in order to find a violation of the Convention. Accordingly, this leads to the constraint of the national margin of appreciation. Be that is may, this is not always the case and a vulnerability test may equally be considered as ancillary or non-essential in order to recognise the violation of the ECHR. Furthermore, the analysis of the Court's judgments reveals that the application of vulnerability criteria is a matter of debate among Strasbourg judges: as previously highlighted, in a number of cases judges have filed their dissenting or concurring opinions either to disagree on the qualification of a group as vulnerable⁵⁵ or – on the contrary – to require the Court to take into account the vulnerable conditions of the applicant.⁵⁶ This probably mirrors the recent approach of the Court on vulnerability and is the natural consequence of the lack of a definition of that concept. From the above referred case law it also emerges that within the broader consideration of asylum seekers as a vulnerable group, the Court attaches special protection to certain vulnerable groups and it may be said that the intensity of such protection varies from one group to another; from this perspective, children are probably the main beneficiaries of the group-centred approach adopted by the Court, as from the areas analysed it results that the intrinsic vulnerability of minors leads the Court to find the alleged provision of the Convention breached.⁵⁷ Adjudication on other vulnerable groups seems to have determined so far a less coherent jurisprudence, as illustrated by the case law on illness of migrants.

On the other hand, a number of questions remain unanswered so far. For instance, a relevant cross-cutting issue is what has been called in this chapter the 'vulnerable-but-not-enough criterion'⁵⁸; in some judgments despite the explicit recognition that the applicant was in fact vulnerable, due to them belonging to a vulnerable group, the Court declined to find a violation of the Convention adopting unclear criteria. This is directly

⁵⁴ See Besson, 'La vulnérabilité et la structure des droits de l'homme. L'exemple de la jurisprudence de la Cour européenne des droits de l'homme', in Burgorgue-Larsen (ed), *La vulnérabilité saisie par les juges* (Bruylants, 2014, pp. 59–85).

⁵⁵ See the dissenting opinion of judge Sajo in the *M.s.s. v Belgium and Greece* where he considered asylum seekers as a vulnerable group but agreed that Belgium should not have deported the applicant to Greece.

⁵⁶ See infra the dissenting opinion of the judge Lemmens.

⁵⁷ This without prejudice of what has been said as regards the necessity for the Court to adopt a stricter scrutiny as for the detention of minors.

⁵⁸ See *Khlaifia and others v Italy*, cit, or *A.S. v Switzerland*, cit; *Bah v the United Kingdom*, Application no. 56328/07 (ECtHR, 27 September 2011), cit.

linked to the casuistic approach of the Court and reveals the need for the Court to identify more convincing elements on which it may rely in order to explain why the consideration of vulnerability leads to different solution in very similar cases. On the contrary, the adoption of a somehow specular ‘non-vulnerable-applicant criterion’⁵⁹ seems likewise problematic: on several occasions the Court has failed to recognise the applicants’ argument for they lacked the elements to be considered as vulnerable. Those judgments, however, seem to be characterised by an over-simplistic approach based on a stereotyped conception of vulnerability. A more cautious stance would be preferable then; as it has been remarked, vulnerability ‘should not be misused and misunderstood as a tick-box exercise, with individuals who do not meet the requisite number of criteria being excluded from protection’.⁶⁰

Finally, an unresolved issue concerns the underestimation of the nexus between vulnerability and irregularity. While the undocumented condition of the applicant has in some cases led the Court to adjudicate a violation of the Convention, the Court has been very cautious in this regard and it has so far failed to define irregularity as an element that generates vulnerability. Yet, this approach differs from that adopted by other international Courts, particularly by the Inter-American Court of Human Rights: in the famous *Vélez Loor* case the ICtHR defined undocumented migrants as a vulnerable group, and that assumption was crucial in order to establish that the detention of a migrant in an irregular situation for the violation of an entry ban was in breach of Article 5 of the Inter-American Convention.⁶¹ It is unlikely that the Court will adopt a similar far-reaching approach. Nonetheless, this seems one of the weakest aspects of its jurisprudence on vulnerability which is worth highlighting; as it has been stressed by the Special Rapporteur of the Economic and Social

59 See *A.M.E. v the Netherlands*, cit.

60 Beduschi, ‘Vulnerability on Trial Protection of Migrant Children’s Rights in the Jurisprudence of International Human Rights Courts’ (2018) 36 Boston University International Law Journal 55. See in particular *A.M.E. v the Netherlands*, cit.

61 Vélez Loor. The Court reflected on the cultural prejudices about irregular migrants that lead to establishing a nexus between irregularity and criminality, and the likely impunity in case of their human rights violations. Those negative implications of irregularity highlighted by the Inter-American Court might be seriously taken into account by European and national legislators for (at least) two grounds: on the one hand, the Court’s remarks on the equation between undocumented migrants and criminals and its ‘stigma’ effect suggests the importance of reducing differentiated criminal treatment; on the other hand, it might represent a strong argument with a view to reducing irregularity by means of regularisation initiatives conducted on an individual basis by Member States or even in the EU’s framework.

Council, migrants in an irregular situation are ‘the most vulnerable to potential or actual violation of their human rights and because of their situation they suffer a greater lack of protection of their rights’ (para 98).⁶²

62 UN Commission on Human Rights, Report submitted by Ms Gabriela Rodríguez Pizarro, Special Rapporteur on the human rights of migrants, 4 February 2005, E/CN.4/2005/85/Add.1, available at: <<http://www.refworld.org/docid/42d66e690.html>>. See also the Guidelines of the Committee of Ministers. In its Resolution 1509 (2006) on the human rights of irregular migrants, the Parliamentary Assembly stated: ‘international human rights instruments are applicable to all persons regardless of their nationality or status. Irregular migrants, as they are often in a vulnerable situation, have a particular need for the protection of their human rights, including basic civil, political, economic and social rights.’

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