

“Children of a Lesser God”: Migrants and Refugees under the European Convention on Human Rights

Paulo PINTO DE ALBUQUERQUE

Judge at the ECtHR

Introduction

The current approach of the European Court of Human Rights (“the Court”) towards migrants and refugees has been contradictory and somewhat confusing, creating an atmosphere of uncertainty across Europe. There is currently a messy state of affairs rife with internal contradictions within the jurisprudence of the Court that is in dire need of reconsideration and clarification. A few distinct topics illustrate the challenges migrants face at the Court and the slippery slope away from protection that the Court has been on over the last few years. These topics are complex and not exhaustive, but some of the most important ones include the detention of migrants and the expulsion of terminally ill foreigners (including migrants).

I. Articles 3 and 5: Prohibition of Torture and Ill-Treatment and Right to Liberty

I will begin by discussing the plight of migrants often detained at the border or during the process of deportation.¹ Generally, the detention of migrants has posed real challenges for the Court and illustrates two competing interests at play: on the one hand, the Court must take into account a State’s right to control its borders, but on the other hand, it must protect an individual’s right not to be subject to torture or ill-treatment.

¹ There have been a number of publications highlighting the problem of detention in various European countries. See, e.g., J. Sarkin, “Respecting and Protecting the Lives of Migrants and Refugees: The Need for a Human Rights Approach to Save Lives and Find Missing Persons” (2017) 22(2) *The International Journal of Human Rights* 207–236; B. Frelick, “Pushed Back, Pushed Around Italy’s Forced Return of Boat Migrants and Asylum Seekers, Libya’s Mistreatment of Migrants and Asylum Seekers” (21 September 2009) *HRW*, www.hrw.org/report/2009/09/21/pushed-back-pushed-around/italys-forced-return-boat-migrants-and-asylum-seekers; P. Blomfield, “We Are Locking Up People Indefinitely. This Inhumane Practice Needs to End” (24 August 2017) *The Guardian (Opinion)*, www.theguardian.com/commentisfree/2017/aug/24/migrants-europe-detention-centres-time-limit.

On the one hand, it is indisputable that each State has the right to secure its borders and ensure that individuals do not attempt to circumvent immigration restrictions. When accompanied by suitable safeguards for the persons concerned, the confinement of aliens is acceptable in order to enable States to prevent unlawful immigration.² However, even in such limited circumstances, States must nevertheless ensure that they continue to abide by their international obligations, including the 1951 Geneva Convention relating to the Status of Refugees and the European Convention on Human Rights (“the Convention”).³ In other words, “[s]tates’ legitimate concern to foil the increasingly frequent attempts to circumvent immigration restrictions must not deprive asylum-seekers of the protection afforded by these conventions”.⁴

A. Detention Conditions

The Court has assessed detention conditions for migrants on a number of occasions and in several instances it found that they amounted to degrading treatment in violation of Article 3 of the Convention. For example, in *S.D. v Greece*, the Court held that confining an asylum seeker to a prefabricated cabin for two months without allowing him to go outdoors or make a telephone call, and with no clean sheets and insufficient hygiene products amounted to degrading treatment within the meaning of Article 3 of the Convention.⁵ In the same case, the Court held that a period of detention of six days, in a confined space, with no possibility of taking a walk, no leisure area, sleeping on dirty mattresses and with no free access to a toilet was unacceptable.⁶

The Court has also considered as a degrading treatment the detention of an asylum seeker for three months in police premises pending the application of an administrative measure, with no access to any recreational activities and without proper meals.⁷ In another case, the Court held that the detention of an asylum seeker for three months in an overcrowded place in appalling conditions of hygiene and cleanliness, no leisure or catering facilities, where the dilapidated state of repair of the sanitary facilities rendered them virtually unusable and where the detainees slept in extremely filthy and crowded conditions amounted to degrading treatment.⁸

More recently, however, in the Grand Chamber case of *Khlaifia and Others v Italy*,⁹ the Court ruled that the detention of migrants in a reception centre on the island

² ECtHR [GC], 21 January 2011, *M.S.S. v Belgium and Greece*, No 30696/09, § 216.

³ *Ibid.*, § 216. See also, N. Sitaropoulos, “Why International Migration Law Does Not Give a License to Discriminate” (20 May 2015) *EJIL: Talk!*, www.ejiltalk.org/why-international-migration-law-does-not-give-a-license-to-discriminate/; F. Pizzutelli, *The Human Rights of Migrants as Limitations on States’ Control Over Entry and Stay in Their Territory* (21 May 2015) *EJIL: Talk!*, www.ejiltalk.org/the-human-rights-of-migrants-as-limitations-on-states-control-over-entry-and-stay-in-their-territory/.

⁴ *Ibid.*, citing ECtHR, 25 June 1996, *Amuur v France*, No 19776/92, § 43.

⁵ ECtHR, 11 June 2009, *S.D. v Greece*, No 53541/07, §§ 49–54.

⁶ *Ibid.*, § 51.

⁷ ECtHR, 26 November 2009, *Tabesh v Greece*, No 8256/07, §§ 38–44.

⁸ ECtHR, 22 July 2010, *A.A. v Greece*, No 12186/08, §§ 57–65.

⁹ ECtHR, 15 December 2016, *Khlaifia and Others v Italy*, No 16483/12.

of Lampedusa and subsequently on ships moored in the Palermo harbour did not amount to inhuman and degrading treatment in violation of Article 3. This is an unfortunate departure from the established case law, and a setback in the protection of rights for migrants.¹⁰ The Grand Chamber overturned the Chamber’s finding and rested its conclusion on the “situation of extreme difficulty facing the Italian authorities at the relevant time”.¹¹ The abhorrent living conditions of migrants were acknowledged by the Court, but dismissed as having taken place during a particularly difficult period of influx of migrants.¹²

If the Court is willing to use influxes of migrations or difficult situations to permit States to create unsafe and unsanitary conditions in detention centres for migrants, the risk to these individuals will remain unchecked. While the Court need not dismiss the stress placed by such influx on the Italian authorities, neither should it underestimate States’ capabilities to continue to uphold the Convention’s rights during difficult times. It is especially important that the Court require States to continue to abide by their obligations during such times, when it would be so easy to dismiss the lack of protection for individuals as simply the product of a stressful and unexpected event.

It should also be noted that while the Convention does permit States to derogate from the duties embodied in the Convention under Article 15, there is a set process in place and States must give notice of their intention and need to derogate from its obligations. States may not use political difficulties, such as an unforeseen influx of migrants, to excuse actions that are incompatible with the Convention, and certainly not in relation to non-derogable obligations such as those deriving from Article 3.

B. The Rise of Crimmigration

The issue of detention of migrants as a State policy must, however, be analysed from a broader perspective, which goes beyond the material conditions of detention in individual cases. Over the past few years, as Europe has seen a surge in migration, there has also been a trend towards crimmigration, a process by which criminal law has been used to enforce immigration laws and punish immigration offences, while immigration law has often been used as a tool of criminal policy.¹³

¹⁰ For a more detailed discussion of the case and its shortcomings, see also, D. Venturi, “The Grand Chamber’s Ruling in *Khlaifia and Others v Italy*: One Step Forward, One Step Back?” (10 January 2017) *Strasbourg Observers*, <https://strasbourgobservers.com/2017/01/10/the-grand-chambers-ruling-in-khlaifia-and-others-v-italy-one-step-forward-one-step-back/>; S. Zirulia and S. Peers, “A Template for Protecting Human Rights During the ‘Refugee Crisis?’” (5 January 2017) *EU L. Analysis*, <http://eulawanalysis.blogspot.com.tr/2017/01/a-template-for-protecting-human-rights.html>.

¹¹ Separate Opinion of Judge Raimondi in *Khlaifia and Others v Italy*, § 6.

¹² In *J.R. and Others v Greece* (25 January 2018, No 22696/16), the Court again held that the conditions of detention in a centre where three Afghan nationals were held were not severe enough to be characterised as inhuman or degrading treatment. The Court based its finding, in part, on the fact that the Greek authorities faced an emergency situation after a significant number of migrants had arrived, which had created material difficulties.

¹³ For an introduction to the concept of crimmigration, see C.C. García Hernández, *Crimmigration Law* (American Bar Association, 2015); M. João Guia *et al.* (eds.), *Social Control and Justice: Crimmigration in*

What has happened is that State criminal-law machinery, including detention, has been instrumentalised for the purpose of immigration enforcement and, similarly, expulsion and deportation measures and detention are imposed as a method of crime control.¹⁴ This policy, which perceives the migrant as the new enemy, has been tinged with the ignoble legacies of racism and xenophobia of the last century and has the potential to create an atmosphere of hate and distrust towards immigrants across Europe.

There are serious issues with the crimmigration trend and its reflection in the Court's case law. The detention of migrants has been just one way to observe the fusion of criminal and immigration law. Over the past few years the number of migrants jailed has reached unprecedented levels, something the Court has not always been able (or willing) to resist or put an end to. There are several cases that illustrate the Court's failure in this regard.

In *Saadi v the United Kingdom*,¹⁵ the Court held that a State may detain a temporarily admitted asylum seeker to prevent unauthorised entry and to expedite the asylum claim.¹⁶ In that case the Court also held that it is not relevant whether detention is necessary in order to prevent that irregular entry. Although the Court in *Saadi* read into the first limb of Article 5(1)(f) a requirement of non-arbitrariness, it also took away the necessity test from this analysis. While the detention of migrants should not be arbitrary, and should be carried out in good faith as the Court suggests, it is obvious that the non-arbitrariness requirement does not provide the same degree of protection as the necessity test.

What this shows is that, in the view of the Grand Chamber, migrants can be treated worse than ordinary criminals (whose detention must be necessary), simply because efficiency trumps liberty in migration law. A detention order for the sole purpose of State bureaucratic convenience equates the targeted people to commodities. This was a misguided departure from the necessity principle, ultimately giving States a *chèque en blanc* to detain whenever they please, without assessing possible less intrusive alternatives, suited to each asylum seeker. Ultimately, the Court's decision to adopt a bad-faith criterion of the arbitrariness requirement

the Age of Fear (Eleven International Publishing, 2013); I. Majcher, "'Crimmigration' in the European Union through the Lens of Immigration Detention" (2013) *Global Detention Project Working Paper No 6*; D. Wilsher, *Immigration Detention, Law, History, Politics* (Cambridge, 2011); J.P. Stumpf, "The Crimmigration Crisis: Immigrants, Crime, and Sovereign State" (2006) 56(2) *American University L. Rev.* 367.

¹⁴ See D.A. Sklansky, "Crime, Immigration, and *Ad Hoc* Instrumentalism" (2012) 15(2) *New Criminal L. Rev.* 157–223; J.M. Chacón, "Overcriminalizing Immigration" (2012) 102(3) *Northwestern Law Journal of Criminal Law & Criminology* 613–652; C. Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law* (Cambridge University Press, 2008); J.P. Stumpf, "The Crimmigration Crisis", cited above, 367–419; A. Spina, "Iniuria Migrandi: Criminalization of Immigrants and the Basic Principles of the Criminal Law" (2014) 8(3) *Criminal Law and Philosophy* 635–657; Council of Europe, *Criminalisation of Migration in Europe: Human Rights Implications* (Strasbourg: Office of the Commissioner for Human Rights Council of Europe, 2010).

¹⁵ ECtHR [GC], 29 January 2008, *Saadi v the United Kingdom*, No 13229/03, §§ 50, 64, ECHR 2008-I.

¹⁶ For another view on the case, see F. de Londras, "*Saadi v Italy*: European Court of Human Rights Reasserts the Absolute Prohibition on *Refoulement* in Terrorism Extradition Cases" (13 May 2008) 12(9) *ASIL*; G. Gentili, "European Court of Human Rights: An Absolute Ban on Deportation of Foreign Citizens to Countries Where Torture or Ill-Treatment Is a Genuine Risk" (2010) 8(2) *Int'l J. of Const. L.* 311–322.

worsens even further the legal situation of the asylum seeker, since it leaves the asylum seeker's protection dependent on the Court's assessment of the state of mind of the detaining authorities. In most cases, State authorities will likely be in a position to argue that they acted in good faith in detaining asylum seekers.

Later on, the Grand Chamber extended the *Saadi's* arbitrariness criterion to the second limb of Article 5(1)(f) in *A. and Others v the United Kingdom*.¹⁷ In this case, the Grand Chamber admitted the applicability of the not "too narrow" *Saadi* interpretation to detention with a view to deportation or extradition.

In the landmark case *Chahal v the United Kingdom*,¹⁸ the Court had already discarded the necessity test in situations where detention was imposed to individuals facing deportation, expulsion, or extradition when they were already inside the country. The Grand Chamber in *Chahal* read Article 5(1)(f) as not demanding that detention be necessary, such as when detention would prevent the person concerned from committing an offence. Furthermore, the Court also limited the principle of proportionality and held that it applied to detention under Article 5(1)(f) only to the extent that detention should not continue for an unreasonable time. Thus, the Court held, any deprivation of liberty will only be justified "for as long as deportation proceedings are in process" and will cease to be justified if deportation is no longer feasible, even if the individual is refusing to cooperate.¹⁹ In other words, *A. and Others* updated the language of *Chahal* in the light of *Saadi*.

Within the Court, there has been a silent but growing revolt from some chambers against *Saadi* and its spillover effect on *Chahal*. In several cases, the Court has held that detention of asylum seekers and, in general, of migrants breaches Article 5(1)(f) when it is applied automatically and no other less drastic measure was sought. Some of the most prominent cases where this revolt can be witnessed include *Louled Massoud v Malta*,²⁰ *Suso Musa v Malta*,²¹ *Rahimi v Greece*,²² *Raza v Bulgaria*,²³ and *Mikolenko v Estonia*.²⁴

Louled Massoud and *Rahimi* acknowledged the primordial role of the necessity test in the application of the second limb of Article 5(1)(f) to the detention of asylum seekers, while *Raza* and *Mikolenko* did so more generally, with regard to detention of migrants. The importance of the necessity test has also been affirmed in the application of the first limb when an individual has been detained pending the asylum assessment procedure. This was the situation in *Suso Musa*.²⁵

¹⁷ ECtHR, 19 February 2009, *A. and Others v the United Kingdom*, No 3455/05, ECHR 2009. For more on this case, see also S. Shah, "From Westminster to Strasbourg: *A and others v. United Kingdom*" (2009) 9(3) *Human Rights L. Rev.* 473–488; M. Milanovic, "European Court decides *A and others v. United Kingdom*" (19 February 2009) *EJIL: Talk!*, www.ejiltalk.org/european-court-decides-a-and-others-v-united-kingdom/.

¹⁸ ECtHR, 15 November 1996, *Chahal v the United Kingdom*, No 22414/93, Reports 1996-V.

¹⁹ *Ibid.*, § 113.

²⁰ ECtHR, 27 July 2010, *Louled Massoud v Malta*, No 24340/08.

²¹ ECtHR, 23 July 2013, *Suso Musa v Malta*, No 42337/12.

²² ECtHR, 5 April 2011, *Rahimi v Greece*, No 8687/08.

²³ ECtHR, 11 February 2010, *Raza v Bulgaria*, No 31465/08.

²⁴ ECtHR, 8 October 2009, *Mikolenko v Estonia*, No 10664/05.

²⁵ ECtHR, *Suso Musa*, cited above.

In view of the silent revolt of the chambers, the challenge for the Grand Chamber is now to revisit and reverse the *Saadi* approach and finally hold that the detention of asylum seekers is, as a matter of principle, a measure of last resort and may only be applied when no less intrusive alternative is possible. This will help bring coherence to the Court's messy case law by aligning it with international human rights and refugee law. A number of international organs, organisations and instruments have repudiated the outrageous *Saadi* rationale, including the United Nations General Assembly, the European Parliament, the Court of Justice of the European Union, the Inter-American Court of Human Rights and the Inter-American Commission of Human Rights.²⁶ The Court cannot remain deaf to the worldwide call that *Saadi* must go.

In *Ilias and Ahmed v Hungary*,²⁷ the Grand Chamber further weakened Article 5 protection regarding migrant detention in the Röszke transit zone on the border between Hungary and Serbia. It is true that the Grand Chamber restated that Article 3 ECHR could only be meaningfully upheld by means of a legal procedure involving a detailed examination of the merits of asylum applications, even if later on these asylum claims prove to be unfounded. But migration detention centres were travestied in "transit zones", where Article 5 of the Convention is not applicable. The strategy to resort to double-speak such as labelling migration detention centres as "foreigners' admission and accommodation centres", "transit centres" or "guest houses" and detention as "retention" has now the full consent of the Court.²⁸

Furthermore, when assessing the detention issue, the Court concluded that Hungary had violated Article 3 due to the lack of a rigorous assessment of the real risks the applicants were facing as a result of their expulsion to Serbia, but at the same time it affirmed that the applicants were not detained by Hungary for the purposes of Article 5 and could leave for Serbia in view of the lack of real risk in this country.²⁹ By so doing, it contradicted the unanimous findings of the Court of Justice of the European Union,³⁰ the Council of Europe Committee for the Prevention of Torture³¹ and the United Nations Working Group on Arbitrary Detention,³²

²⁶ Concurring opinion of Judge Pinto de Albuquerque in ECtHR, 22 November 2016, *Abdullahi Elmi and Aweys Abubakar v Malta*, Nos 25794/13 and 28151/13, §§ 6–15.

²⁷ ECtHR [GC], 21 November 2019, *Ilias and Ahmed v Hungary*, No 47287/15. On this case, see V. Stoyanova, "The Grand Chamber Judgment in *Ilias and Ahmed v Hungary*: Immigration Detention and how the Ground beneath our Feet Continues to Erode" (23 December 2019) *Strasbourg Observers*; P. Kilibarda, "The ECtHR's *Ilias and Ahmed v Hungary* and Why It Matters" (20 March 2017) *EJIL: Talk!*.

²⁸ My opinion in *Abdullahi Elmi and Aweys Abubakar*, cited above, § 4.

²⁹ I cannot understand how the Court could formulate the evidently irreconcilable statements of paragraphs 165 and 223 of the judgment.

³⁰ CJEU, 14 May 2020, Joined Cases C-924/19 PPU and C-925/19 PPU, §§ 226–231, ruling that being held in the Röszke transit zone amounts to detention under Directive 2013/33/EU (Reception Conditions Directive) Article 2(h).

³¹ CPT/Inf (2018) 42, § 42, with its findings after the visit to the transit zones at Röszke and Tompa in 2017. As noted by the CPT, the possibility of leaving for Serbia was practically excluded (CPT/Inf (2018) 42, §§ 28 and 32).

³² United Nations Working Group on Arbitrary Detention, Opinions adopted by the Working Group on Arbitrary Detention at its eighty-seventh session, 27 April–1 May 2020, Opinion No 22/2020 concerning Saman Ahmed Hamad (Hungary), 5 June 2020, § 70.

concerning precisely the treatment of asylum seekers in the transit zone of Rözske at the EU’s Hungarian–Serbian border. This self-inflicted international isolation of the Court is incomprehensible.

More importantly, by arguing that the applicants had entered Hungary voluntarily to seek asylum and were at liberty to leave the transit zone towards Serbia, the Court not only put the blame of the situation on the complainants,³³ implicitly criticising asylum seekers for seeking to get out of their desperate situation, but also showed a great lack of sensibility for the real situation leading people to seek asylum. For the Court, Article 5 is inapplicable because the applicants can 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.³⁴ This is simply intolerable.

C. Expulsion of Terminally Ill Foreigners

2008, the year of delivery of *Saadi*, is an *annus horribilis* for the human rights of migrants also for another reason. *N. v the United Kingdom*³⁵ was pronounced that same year. In that case, the Court held fourteen to three that the expulsion of the applicant, who claimed that removing her would be contrary to the prohibition on inhuman and degrading treatment of Article 3 of the Convention, for lack of adequate HIV/AIDS health care facilities in Uganda, did not amount to a violation of that Article. The Court set out three conditions that should guide any assessment whether an expulsion of a seriously ill individual would be in breach of Article 3: (1) the seriousness and stage of the illness; (2) the availability of adequate treatment in the country of destination; (3) the availability of support by one’s relatives. The Court clarified that such expulsion would violate Article 3 only in “very exceptional case(s), where the humanitarian grounds against the removal are compelling”.³⁶

The Court had set this principle in *D. v the United Kingdom*,³⁷ where it held that “the very exceptional circumstances were that the applicant was critically ill and appeared to be close to death, could not be guaranteed any nursing or medical care in his country of origin and had no family there willing or able to care for him or provide him with even a basic level of food, shelter or social support”.³⁸ Although the Court accepted that there might be other instances where exceptional circum-

³³ ECtHR, *Ilias and Ahmed*, cited above, § 213.

³⁴ To put it in the words of the United Nations Working Group on Arbitrary Detention: “The Working Group cannot accept that an individual who must either agree to remain in the transit zones or lose the possibility of lodging an asylum application could be described as freely consenting to stay in the transit zones.” (Opinion No 22/2020, cited above, § 69).

³⁵ ECtHR, 27 May 2008, *N. v the United Kingdom*, No 26565/05. See A. Buyse, “Grand Chamber judgment in *N. v. UK*” (28 May 2008) *ECHR Blog*, http://echrblog.blogspot.fr/2008/05/grand-chamber-judgment-in-n-v-uk_28.html.

³⁶ ECtHR, *N.*, cited above, § 42.

³⁷ ECtHR, 2 May 1997, *D. v the United Kingdom*, No 30240/96. See also, R. English, “Removal of Child Following Faulty Diagnosis of Injury Breached Article 8” (2 April 2010) *UK Human Rights Blog*, <https://ukhumanrightsblog.com/2010/04/02/removal-of-child-following-faulty-diagnosis-of-injury-breached-article-8/>.

³⁸ ECtHR, *N.*, cited above, § 42.

stances prevent removal, it noted that “[any] alleged future harm would emanate not from the intentional acts or omissions of public authorities or non-State bodies, but instead from a naturally occurring illness and the lack of sufficient resources to deal with it in the receiving country”.³⁹

The majority in *N.* extrapolated a general principle from the situation relating to the expulsion of a person with an HIV and AIDS-related condition, and held that “[t]he same principles must apply in relation to the expulsion of any person afflicted with any serious, naturally occurring physical or mental illness which may cause suffering, pain and reduced life expectancy and require specialised medical treatment which may not be so readily available in the applicant’s country of origin or which may be available only at substantial cost”.⁴⁰ Finding that this “high threshold” should be applied to *N.*, who “was fit to travel”, the Court agreed to her removal from the Contracting State in spite of her poor state of health and the doubts about the possibility of her obtaining the appropriate health care in the receiving State. Unsurprisingly, *N.* died shortly after her removal to Uganda.

There are serious problems with the Court’s judgement in *N. v United Kingdom*.⁴¹ For one, the ground put forward by the majority to deny a positive obligation for the State to treat seriously ill foreign nationals is purely axiomatic. It lacks any clear legal criteria for deciding when a terminally ill person may or may not be removed, both in terms of the degree of seriousness of the illness and in terms of the quality, accessibility and cost of the treatment provided in the receiving country. Uncertainty, in this case, benefits the State. If an applicant cannot prove that treatment in the country to which he or she is deported falls short of what he or she needs, and poses a threat, the Court will weigh this uncertainty in favour of deportation. This *argumentum ad ignorantiam* contradicts a basic tenet of legal reasoning, that one should not draw conclusions from a lack of information or incomplete or insufficient sources of information. Furthermore, the Court rests its conclusions on the promise that uncertain scientific developments might one day reach the receiving country.

The Court tried to limit *N.*’s morally repugnant and legally untenable stance somewhat in a more recent case, *Paposhvili v Belgium*,⁴² but it did not formally leave the previous standard of “exceptional circumstances”. In a unanimous judgment, the Grand Chamber stated that these circumstances refer not only to cases of imminent risk of death, but also when the person would face a real risk of being exposed to a serious, rapid and irreversible decline of his or her state of health

³⁹ *Ibid.*, § 43.

⁴⁰ *Ibid.*, § 45.

⁴¹ Dissenting opinion of Judge Pinto de Albuquerque in ECtHR [GC], 19 March 2015, *S.J. v Belgium*, No 70055/10, §§ 6–11. For a critique of the Court’s opinion, see also V. Mantouvalou, “*N v UK: No Duty to Rescue the Nearby Needy?*” (2008) 20(4) *The Modern L. Rev.* 637–666. For additional comments on *N.*, and the role of the Court in protecting the rights of irregular migrants, see S. Da Lomba, “The ECHR and the Protection of Irregular Migrants in the Social Sphere” (2015) 22 *International Journal on Minority and Group Rights* 39–67.

⁴² ECtHR [GC], 13 December 2016, *Paposhvili v Belgium*, No 41738/10. See L Peroni, “*Paposhvili v Belgium*: Memorable Grand Chamber Judgment Reshapes Article 3 Case Law on Expulsion of Seriously Ill Persons” (1 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/>.

resulting in intense suffering or to a significant reduction in life expectancy, on account of absence of appropriate treatment in the receiving state or lack of access to such treatment.

In a rather elliptical, unusual approach in this type of cases, the Court formulated two procedural obligations for States confronted with such situations: to assess the above mentioned risk before removal and, if need be, to obtain individual guarantees of appropriate treatment from the receiving State. On top of being quite unrealistic, this assurances’ requirement shows that ultimately the Grand Court is willing to take the risk of sending someone to die where “serious doubts persist regarding the impact of removal on the persons concerned—on account of the general situation in the receiving country and/or their individual situation”.⁴³

This requirement is inspired in Judge Lemmens’ proposal in a separate opinion he delivered in a previous case, where he had suggested to use the *Tarakhel* type of assurances in cases of expulsion of terminally ill patients.⁴⁴ Again, like in *N.*, the doubt plays against the applicant. Furthermore, the health care needs of children (like in *Tarakhel*) and terminally ill patients cannot be equated. The underlying logic of *Paposhvili* is evidently to get rid of the terminally ill foreigner, at any cost. In fact, the paragraph of the judgment that purports to move away from the problematic standard set in *N.* is so convoluted that recently the UK Upper Tribunal considered it unworkable (“over-elastic and ill-defined” test which is “as long as the judge’s sleeve”) and that, until further clarification, *N.* remains the guiding case.⁴⁵ Subsequently, the court of appeal of England and Wales provided formal guidance, based on the *Paposhvili* judgment, to all courts and tribunals below the level of the Supreme Court on decisions regarding a suspension of removal.⁴⁶

According to the court of appeal, the Grand Chamber had regarded *N.* as rightly decided and the boundary of Article 3 protection had merely shifted from “imminence of death” to “imminence of intense suffering or death in the receiving state”.

The Court took note of this development in domestic law in *Khaksar v the United Kingdom*,⁴⁷ an inadmissibility decision due to non-exhaustion of domestic remedies. It nonetheless added that this is all “pending consideration of the Supreme Court of the impact of [the *Paposhvili* case] for the purposes of domestic law”.⁴⁸

In April 2020, the Supreme Court finally found that the test in *Paposhvili* was not compatible with that in *N.*, since the new test focuses on whether an applicant is exposed to a real risk of an imminent decline in health or to a significant reduction in life expectancy and therefore it removes the untenable distinction between those who are already dying and those whose medical condition is such that their life expectancy will be significantly reduced if removed.⁴⁹ Regarding the expelling

⁴³ *Ibid.*, § 191.

⁴⁴ Dissenting opinion of Judge Lemmens in ECtHR, 14 April 2015, *Tatar v Switzerland*, No 65692/12.

⁴⁵ EA & Ors [2017] UKUT 445 (Article 3 medical cases – Paposhvili not applicable).

⁴⁶ AM (*Zimbabwe*) & Anor v *The Secretary of State for the Home Department* [2018] EWCA Civ 64.

⁴⁷ ECtHR, First Section (Committee), 3 April 2018, *Khaksar v the United Kingdom*, No 2654/18.

⁴⁸ *Ibid.*, § 32.

⁴⁹ AM (*Zimbabwe*) v SSHD [2020] UKSC 17.

State's procedural obligations, the Supreme Court considered that they needed further clarification, in view of their obscure and novel character.

D. The Dublin Transfers

In the groundbreaking *M.S.S. v Belgium and Greece* case⁵⁰ regarding the transfer of an Afghan national from Belgium to Greece in June 2009 in accordance with the Dublin II Regulation, the Court held that the Belgian authorities must have been aware of the been issued. The Belgian authorities should not simply have assumed that the applicant would be treated in conformity with the Convention standards. Rather, they should have verified how the Greek authorities applied their asylum legislation in practice, but they had not done so. There had therefore been a violation by Belgium of the Article 3 (prohibition of inhuman and degrading treatment). As far as Belgium is concerned, the Court further found a violation of the Article 13 right to an effective remedy taken together with Article 3, because of the lack of an effective remedy against the applicant's expulsion order.

Although the Court of Justice of the European Union (CJEU) adopted a similar position to that of the European Court of Human Rights, referring explicitly to the judgment in *M.S.S. v Belgium and Greece*,⁵¹ the subsequent case law of the Strasbourg Court has been pretty much erratic. For example, faced with a similar complaint that Greece had been unable to deal properly with asylum requests and had provided inadequate conditions for asylum seekers based on a similar set of circumstances of a transfer from Austria to Greece, under the Dublin II Regulation, in October 2008, the Court held that the applicant's transfer did not violate Article 3.⁵² According to the Chamber, while the Austrian authorities must have been aware of serious deficiencies in the Greek asylum procedure and the living and detention conditions for asylum seekers, they need not have known at the time that those deficiencies reached the threshold of Article 3.

In another case,⁵³ the Court reached the same conclusion with regard to a situation of an applicant transferred from Austria to Greece during the spring of 2009, hence explicitly contradicting the *M.S.S.* judgment, which dealt with a transfer that occurred in June 2009. Yet in a subsequent case⁵⁴ the Court found no reason to depart from its findings in the judgment in *M.S.S.*, and held that it had been for

⁵⁰ For more on this case, see G. Clayton, "Asylum Seekers in Europe: *M.S.S. v Belgium and Greece*" (2011) 11(4) *Human Rights L. Rev.* 758–773; P. Mallia, "Case of *M.S.S. v Belgium and Greece*: A Catalyst in the Re-thinking of the Dublin II Regulation" (2011) 30(3) *Refugee Survey Quarterly* 107–128; T. Zuijdwijk, "*M.S.S. v Belgium and Greece* (European Court of Human Rights): The Interplay Between European Union Law and the European Convention on Human Rights in the Post-Lisbon Era" (2011) 39 *Georgia Journal of International and Comparative Law* 808–832; T. Syring, "European Court of Human Rights' Judgment on Expulsion of Asylum Seekers: *M.S.S. v Belgium & Greece*" (24 February 2011) 15(5) *ASIL*, www.asil.org/insights/volume/15/issue/5/european-court-human-rights-judgment-expulsion-asylum-seekers-mss-v.

⁵¹ See, in particular, paras 88–91 of CJEU [GC], 21 December 2011, C-411/10 and C-493/10.

⁵² ECtHR, 5 December 2013, *Sharifi v Austria*, No 60104/08, § 38.

⁵³ ECtHR, 7 May 2014, *Safaii v Austria*, No 44689/09.

⁵⁴ ECtHR, 21 October 2014, *Sharifi and Others v Italy and Greece*, No 16643/09.

the authorities, Italian in this case, to examine the applicants’ individual situations and to verify, before returning them, how the Greek authorities applied their legislation on asylum in practice. Hence, it found a violation by Italy of Article 3, as the Italian authorities, by returning these applicants to Greece, had exposed them to the risks arising from the shortcomings in that country’s asylum procedure.

Another example of this contradictory case law is the divergent assessment of the situation of the reception system in Italy. In *Tarakhel v Switzerland*,⁵⁵ the Court found a violation of Article 3 in the absence of detailed and reliable information concerning the specific facility at the destination, and the fact that the Swiss authorities did not possess sufficient assurances that, if returned to Italy, the applicants would be taken charge of in a manner adapted to the age of the children. Contrary to this finding, in *A.M.E. v the Netherlands*,⁵⁶ the Court concluded that the situation in Italy for asylum seekers could in no way be compared to the situation in Greece at the time of the *M.S.S. v Belgium and Greece* judgment and the structure and overall situation of the reception arrangements in Italy could not therefore in themselves act as a bar to all removals of asylum seekers to that country.

II. Article 8: Right to Respect for Private and Family Life

A. The Right to Family Life

The Court has previously held that, where expulsions of migrants are challenged on the basis of an Article 2 or Article 3 violation, in order for the remedy to be “effective”, it must have a suspensive effect.⁵⁷ In other words, if expulsion threatens to interfere with the individual’s right to life or may subject the individual to torture or inhuman treatment, the expulsion proceedings must be paused until the application is assessed.

Such is not the case, the Court held in *De Souza Ribeiro v France*,⁵⁸ if an expulsion is challenged on the basis of alleged interference with private and family life. Although where there is an arguable claim that expulsion threatens to interfere with the alien’s right to respect for his private and family life, States must give the individual concerned the possibility of challenging the order, without a suspensive effect, the alien may end up unable to return to his family and his home until the process is completed. This is, in fact, what happened to the applicant in *De Souza Ribeiro*, who was arrested, placed in administrative detention, and removed from French Guiana within thirty-six hours. Although the Court did find that the applicant had suffered a breach of his Convention rights, due to the brevity of the time that lapsed between the arrest and deportation, the Court did not go as far as to

⁵⁵ ECtHR, 4 November 2014, *Tarakhel v Switzerland*, No 29217/12.

⁵⁶ ECtHR, 13 January 2015, *A.M.E. v the Netherlands*, No 51428/10.

⁵⁷ See M. Reneman, *EU Asylum Procedures and the Right to an Effective Remedy* (Hart, 2014).

⁵⁸ ECtHR [GC], 13 December 2012, *De Souza Ribeiro v France*, No 22689/07. For more on this case, see N. Arajärvi, “Case Note: *De Souza Ribeiro v France*” (18 March 2013), <https://ssrn.com/abstract=2234992>.

require States to institute a suspensive mechanism in situations where applicants claim that removal would interfere with their Article 8 rights. I find this to be troubling, and made an argument for such a development in a Concurring Opinion.⁵⁹

Some international bodies have specifically called for a right to a suspensive appeal against expulsion, deportation, or removal of undocumented immigrants. For example, the Human Rights Committee examined the situation in French Guiana, the context of *De Souza Ribeiro*, and called on the State Party to “ensure that all individuals subject to deportation orders have an adequate period to prepare an asylum application, with guaranteed access to translators, and a right of appeal with suspensive effect”.⁶⁰ This is but one example of many in international human rights and international migration law that suggests these two bodies of law impose at least a twofold procedural guarantee in respect of undocumented migrants: firstly, they have the right to access to courts in the host country in order to uphold their human rights, including their family rights, and, secondly, they have the right to an automatic suspensive review of any order of expulsion, deportation, removal or any similar measure when they face the risk of alleged irreversible damage to their family lives.

The Court has already held that a remedy against expulsion, deportation, or removal or an individual is only effective if it has a suspensive effect, particularly where such measures would place the migrant in danger of irreversible damage. Usually “irreversible damage” is associated with physical damage resulting from torture and ill-treatment, generally protected under Articles 2 and 3 of the Convention. However, the Court severed the link between physical damage and the necessity of a suspensive measure in *Čonka v Belgium*,⁶¹ where the notion of irreversible damage was derived from the prohibition of the collective expulsion of aliens.⁶² Thus, the Court in that case set a principle according to which potential irreversible damage may be invoked without the simultaneous allegation of danger of torture or ill-treatment.

The separation of family members may indeed cause such irreversible damage that cannot possibly be undone. This “damage” should not be seen in any way as secondary to or less important than the physical damage caused by ill-treatment. The consistency of the Court’s jurisprudence requires that the same broad understanding of the notion of “irreversible damage” be upheld in the interpretation of Article 13. Unfortunately, in *Khlaifia and Others*⁶³ the Court went the exact opposite way, taking the view that removal from the territory of the respondent State will not expose a person to harm of a potentially irreversible nature where he or she does not allege that he or she faces violations of Articles 2 or 3 of the Convention in the destination country.

⁵⁹ Concurring opinion of Judge Pinto de Albuquerque in ECtHR [GC], *De Souza Ribeiro v France*.

⁶⁰ UN Doc. CCPR/C/FRA/CO/4, 31 July 2008, para 20.

⁶¹ ECtHR, 5 February 2002, *Čonka v Belgium*, No 51564/99, ECHR 2002-I. For a further discussion on this case, and its implications, see J. Apap, “Infringement of the European Convention on Human Rights by Belgium” (February 2002) 12 *CEPS Policy Brief*.

⁶² See also ECtHR, 26 April 2007, *Gebremedhin (Gaberamadhien) v France*, No 25389/05, § 58, ECHR 2007-II.

⁶³ ECtHR, *Khlaifia and Others v Italy*, cited above, §§ 277–281.

Indeed, the challenge for the Grand Chamber is not only to reconsider this line of case law, but more broadly the *Maaouia* principle that decisions regarding the entry, stay and deportation of aliens do not concern the determination of an applicant’s civil rights or obligations or of a criminal charge against him, within the meaning of Article 6(1) of the Convention.⁶⁴

I have serious doubts about the proposition that, on account of the alleged discretionary and public-order element of the decisions taken in these procedures, they are not to be seen as determining the civil rights of the person concerned. Firstly, these decisions will necessarily have major repercussions on the alien’s private, professional and social life. Secondly, these decisions are not discretionary at all and do have to comply with international obligations, such as those resulting from the prohibition of *non-refoulement*. Such a restrictive interpretation of the right of access to courts unfoundedly discriminates between migrants and nationals, since Article 1 of Protocol No 7 affords documented migrants (“migrants lawfully resident”) fewer procedural guarantees than those set out by Article 6 for nationals and, even worse, imposes a groundless differentiation among migrants, since it leaves undocumented migrants outside the scope of both Article 6 and Article 1 of Protocol No 7. To avoid this self-created legal gap, the Court has ingeniously provided undocumented migrants with a minimum degree of protection of their right of access to courts, based on Article 13 applied in conjunction with Articles 2, 3 or 8.⁶⁵ The same legal avenue was taken in *De Souza Ribeiro*. It is high time to put an end to this minimalist interpretation of Article 6.⁶⁶

B. The Right to Citizenship

Article 8 protects the right to privacy and included in this right is also a right to citizenship. The Court tackled this issue recently, in the case *Ramadan v Malta*.⁶⁷ In that case, the applicant, who at the time was an Egyptian national, had acquired Maltese citizenship by reason of his marriage to a Maltese national. The applicant’s marriage was annulled five years later and he subsequently remarried in Malta a Russian national with whom he had two children. In 2007, after becoming aware of the annulment of his first marriage, Maltese authorities revoked the applicant’s citizenship on the ground that he had only married his first wife for the purpose of acquiring citizenship. The applicant brought a case to the Court arguing that the order to deprive him, and subsequently his second wife, of Maltese citizenship deprived him of his Article 8 rights.

Although the Court asserted that it could not rule out that “an arbitrary denial of citizenship might in certain circumstances raise an issue under Article 8 of the

⁶⁴ With regard to the expulsion procedure, see ECtHR [GC], 5 October 2000, *Maaouia v France*, No 39652/98, ECHR 2000-X, and with regard to the asylum procedure, see ECtHR (dec.), 31 May 2001, *Katani and Others v Germany*, No 67679/01.

⁶⁵ For example, the Court has already based its assessment of the fairness of an asylum procedure on Article 3 of the Convention, ECtHR, 11 July 2000, *Jabari v Turkey*, No 40035/98, §§ 39–40, ECHR 2000-VIII.

⁶⁶ Concurring opinions of Judge Pinto de Albuquerque in *De Souza Ribeiro v France*, cited above, and in ECtHR [GC], 23 February 2012, *Hirsi Jamaa and Others v Italy*, No 27765/09.

⁶⁷ ECtHR, Fourth Section, 21 June 2016, *Ramadan v Malta*, No 76136/12.

Convention because of the impact of such a denial in the private life of the individual”,⁶⁸ in this case, the Court held there had been no violation. The Court concluded that the decision of the Maltese government had been in accordance with the law, not arbitrary, and did not lead to any real negative consequences—despite the fact that he and his wife were stripped of their Maltese nationality, the Court added that his children were not and that the applicant could continue to live and work in Malta. As to the applicant’s argument that as a result of the government’s decision he was, in effect, rendered stateless (since he had already renounced his Egyptian citizenship), the Court reasoned that “the fact that a foreigner has renounced his or her nationality of a State does not mean in principle that another State has the obligation to regularise his or her stay in the country”.⁶⁹ Given all of the above-mentioned considerations, the Court held that there had been no violation of Article 8 of the Convention.

I entertain principled reservations to the majority’s assessment of the fairness of the revocation procedure and the proportionality of the revocation order, in view of the applicant’s ensuing statelessness, the risk of his imminent expulsion from Malta and its impact on his family life. The right to citizenship is an extremely important right, and despite the fact that it was not explicitly included in the Convention, it has been identified and protected in subsequent Protocols, as well as other international instruments.⁷⁰

The Court has taken some steps to protect this right, but unfortunately the majority in the above-mentioned *Ramadan* case failed to take them into consideration when it decided the case. For example, in *Karashev v Finland*⁷¹ the Court did not exclude that an arbitrary denial of a citizenship might in certain circumstances raise an issue under Article 8 of the Convention because of the impact of such denial on the private life of the individual. There is nothing to suggest that the above principle cannot apply to cases of deprivation or loss of citizenship or to the right to renounce citizenship. The issue of arbitrary denial of citizenship can also arise under Article 3 of Protocol No 4, if the purpose of the denial is to evade the prohibition against expulsion of nationals, as was the case in *Slivenko v Latvia*,⁷² where the Court was asked to decide whether the expulsion of a Russian military officer’s wife and daughter pursuant to the Latvian–Russian treaty on the withdrawal of Russian troops violated Article 3 of Protocol No 4. The Court in that case held there had been a breach of Article 8 of the Convention as a result of the applicants’ removal from Latvia as regards their right to respect for their private life and their home.

⁶⁸ *Ibid.*, § 84, citing ECtHR (dec.), 12 January 1999, *Karashev v Finland*, No 31414/96, ECHR 1999-II; ECtHR [GC] (dec.), 23 January 2002, *Slivenko v Latvia*, No 48321/99, § 77, ECHR 2002-II; ECtHR (dec.), 11 July 2006, *Savoia and Bounegru v Italy*, No 8407/05; ECtHR, 11 October 2011, *Genovese v Malta*, No 53124/09, § 30.

⁶⁹ *Ibid.*, § 91.

⁷⁰ See concurring opinion of Judge Pinto de Albuquerque in *Ramadan v Malta*. For more on the right to citizenship and issues of nationality and statelessness, see M. Ganczer, “The Right to a Nationality as a Human Right?” in *Hungarian Yearbook of International Law and European Law* (Eleven International Publishing: 2014) 15–33; S. Mantu, “‘Terrorist’ Citizens and the Human Right to Nationality” (2018) 26(1) *Journal of Contemporary European Studies* 28–41.

⁷¹ ECtHR (dec.), *Karashev v Finland*, cited above.

⁷² ECtHR [GC] (dec.), *Slivenko v Latvia*, cited above.

What this case law suggests is that, within the Convention system, there is now a well-established prohibition of arbitrary denial or revocation of citizenship and thus, by logical implication, the existence of a right to citizenship under Article 8 of the Convention, read in conjunction with Article 3 of Protocol No 4. Thus, the manner in which States regulate matters bearing on nationality cannot today be deemed to be within the States' sole jurisdiction. States are bound by two obligations: a negative obligation not to decide on the loss of citizenship if the person would thereby become stateless, and a positive obligation to provide its citizenship for stateless persons, at least when they were born or found in their respective territories or when one of their parents is a citizen. It is time for the Court to recognise explicitly that State citizenship belongs to the core of someone's identity, which is protected by Article 8 of the Convention, and it is disappointing they failed to do so in *Ramadan v Malta*.⁷³

A more recent positive, but timid development can be perceived in *Hoti v Croatia*.⁷⁴ In it the Court found that Croatia's failure to ensure stability of residence for Mr. Hoti, who lived in Croatia for nearly forty years, amounted to a violation of his Article 8 right to private and family life. The applicant's repeated attempts to regularise his residence in Croatia were unsuccessful, aside from occasional short-term permits, which were granted and withdrawn. Mr. Hoti's statelessness played a crucial role in the judgement, in spite of the fact that it was a disputed fact between the parties. Nevertheless, this judgment is not about the applicant's right to a nationality, but about his right to stable residence, and the Court did not even reproach the State for not having a statelessness determination procedure.

III. The Prohibition of Arbitrary Expulsion and Collective Expulsion

According to the Court's well-established case law, a State is entitled to control the entry of migrants into its territory. Nevertheless, States do not have unlimited and unrestrained power to detain migrants, deny them entry, and return them back to where they came from. States continue to have duties and obligations, under both the Convention and international law more broadly, towards migrants. States must ensure that, for one, they do not deport individuals in an arbitrary manner, and when migrants are "knocking at their door" States must ensure they do not engage in collective expulsions.

⁷³ On this point, see also L. Lavrysen and C. Poppelwell-Scevak, "Ramadan v. Malta: When Will the Strasbourg Court Understand That Nationality Is a Core Human Rights Issue?" (22 July 2016) *Strasbourg Observers*, <https://strasbourgobservers.com/2016/07/22/ramadan-v-malta-when-will-the-strasbourg-court-understand-that-nationality-is-a-core-human-rights-issue/>.

⁷⁴ ECtHR, 26 April 2018, *Hoti v Croatia*, No 63311/14.

A. Arbitrary Expulsion

The Court has often deferred to national authorities in cases of expulsion, and often this has led to arbitrary expulsions that have infringed upon individuals' rights under the Convention. Let me give a striking example of this. In *Vásquez v Switzerland*,⁷⁵ the applicant complained that his expulsion from Switzerland was in breach of his Article 8 rights. In short, an administrative process in Switzerland imposed an expulsion order in excess of what the criminal courts had seen fit to give the applicant who had been convicted in the early 2000s of a sexual crime. In practical terms, the administrative authorities "punished" the applicant with a penalty that the criminal courts saw no need to apply. What's more is that the Federal Supreme Court inferred a threat to public safety from legally irrelevant facts, such as two decisions dismissing criminal charges for a lack of criminal characterisation of the facts. The arbitrariness of this presumption of risk or threat to public safety was patent.

It should also be noted that this is not the first, nor the last time the Court has failed to protect individuals from arbitrary expulsions. Similar issues arose in *Shala v Switzerland*⁷⁶ and in *Kissiwa Koffi v Switzerland*,⁷⁷ handed down by the Court on the same day in 2012.⁷⁸ These are typical cases of crimmigration, whereby the State uses administrative immigration law as a tool of criminal prevention policy.

B. Collective Expulsion

Article 4 of Protocol No 4 states clearly and unequivocally: "Collective expulsion of aliens is prohibited." Collective expulsion is "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".⁷⁹ In practical terms, this means that groups of refugees cannot be subject to a diminished status based on an "inherent" mass-influx exception to "genuine" refugee status. To provide reduced, subsidiary protection for people who arrive as part of a mass influx would be unjustified discrimination.

To date, the Court has found a violation of Article 4 of Protocol No 4 in only a handful of cases.⁸⁰ In *Čonka v Belgium*,⁸¹ measures of detention and removal had been adopted for purposes of implementing an order to leave the country, but made no reference to the applicants' asylum requests. A number of people had been simultaneously summoned to the police station, without being given an

⁷⁵ ECtHR, 26 November 2013, *Vásquez v Switzerland*, No 1785/08.

⁷⁶ ECtHR, 15 November 2012, *Shala v Switzerland*, No 52873/09.

⁷⁷ ECtHR, 15 November 2012, *Kissiwa Koffi v Switzerland*, No 38005/07.

⁷⁸ *Ibid.*

⁷⁹ ECtHR [GC], 3 July 2014, *Georgia v Russia (I)*, No 13255/07, § 167.

⁸⁰ For a discussion on the potentially positive impact of the Court's case law, see D. Rietiker, "Collective Expulsion of Aliens: The European Court of Human Rights (Strasbourg) as the Island of Hope in Stormy Times" (2016) 36 *Suffolk Transnat'l L. Rev.* 651. See also, J. Ramji-Nogales, "Prohibiting Collective Expulsion of Aliens at the European Court of Human Rights" (4 January 2016) 20(1) *ASIL*, www.asil.org/insights/volume/20/issue/1/prohibiting-collective-expulsion-aliens-european-court-human-rights.

⁸¹ ECtHR, *Čonka v Belgium*, cited above.

opportunity to contact a lawyer. The “only reference to the personal circumstances of the applicants was to the fact that their stay in Belgium had exceeded three months”, and the deportation documents made no reference to their application for asylum.⁸² The Court held that the expulsion procedure did not afford “sufficient guarantees demonstrating that the personal circumstances of each of those concerned had been genuinely and individually taken into account”,⁸³ and as such there had been a violation of Article 4 of Protocol No 4.

The Court also found a violation of Article 4 of Protocol No 4 in *Hirsi Jamaa and Others v Italy*.⁸⁴ In that case, the applicants did not undergo any identity checks and authorities merely put migrants who had been intercepted at sea onto military vessels to be taken back to the Libyan coast. But this case is not without its flaws. In my view, the Court did not go far enough, and it should have also found that the Italian government also had a positive obligation to provide applicants with practical and effective access to an asylum procedure in Italy, not merely to hold that Italy could not push back migrants on the high seas.⁸⁵

The Court again in *Georgia v Russia (I)*⁸⁶ reproached “routine expulsions” which followed a recurrent pattern, the result of a coordinated policy of arrest, detention, and expulsion of Georgians. Applicants were expelled in large groups without legal representation or individual assessment. In that case, the Court found there had been a breach of Convention rights. And in *Sharifi and Others v Italy and Greece*,⁸⁷ migrants intercepted in Adriatic ports were subjected to “automatic returns” to Greece and had been deprived of any effective possibility of seeking asylum. Once again, the Court found a violation.

Recently, the Court has, however, been more forgiving of States engaging in group deportation, and has developed a very broad definition of what “individual expulsion” is. This was evident in the already mentioned *Khlaifia v Italy* case. The facts in that case, very briefly, were as follows: the applicants, Tunisian nationals, were part of a group of migrants who had set off by boat from Tunisia to Italy. They were intercepted by the Italian coast guards and escorted to a port on the island of Lampedusa, where they were placed in an early reception centre. During a riot, the centre was gutted by fire and the applicants were then taken to ships moored in Palermo harbour, where they were then issued with refusal-of-entry orders. They were subsequently received by the Tunisian Consul, who recorded their identities,

⁸² *Ibid.*, § 61.

⁸³ *Ibid.*

⁸⁴ ECtHR [GC], 23 February 2012, *Hirsi Jamaa and Others v Italy*, No 27765/09, § 186. For more on this case, see V Moreno-Lax, “*Hirsi Jamaa and Others v Italy* or the Strasbourg Court versus Extraterritorial Migration Control?” (2012) 12(3) *Human Rights L. Rev.* 574–598; M. Giuffrè, “Watered-Down Rights on the High Seas: *Hirsi Jamaa and Others v Italy*” (2012) 61(3) *International and Comparative Law Quarterly* 728–750; and for a commentary on the impact of the case on the law of the sea, see J Coppens, “The Law of the Sea and Human Rights in the *Hirsi Jamaa and Others v. Italy* Judgment of the European Court of Human Rights” in Y. Haack and E. Brems (eds.), *Human Rights and Civil Liberties in the 21st Century* (Springer, 2013) 179–202.

⁸⁵ Concurring opinion of Judge Pinto de Albuquerque in *Hirsi Jamaa and Others*, cited above.

⁸⁶ ECtHR [GC], *Georgia v Russia (I)*, cited above.

⁸⁷ ECtHR, *Sharifi and Others v Italy and Greece*, cited above.

and put on planes bound for Tunisia. Once in Tunis they were released. The events lasted about twelve days.⁸⁸

The case was first heard by a Chamber of the Court, which found that although the applicants were returned on the basis of an individual refusal-of-entry orders, such orders were drafted in identical terms, with only the personal details varying from individual to individual. As such, even though the applicants had undergone an identification procedure that did not necessarily show that there had not been a collective expulsion. These orders also failed to contain any reference to the personal situation of the individuals. These elements led the Chamber to find that the expulsion was collective in nature, and in breach of Article 4 of Protocol No 4.

Unfortunately, the Grand Chamber did not follow this line of reasoning and failed to find that there had been a breach of the Convention. Instead the Grand Chamber noted that the applicants underwent two identification procedures, and at the time of their first identification procedure “they had an opportunity to notify the authorities of any reasons why they should remain in Italy or why they should not be returned”.⁸⁹ Although the Grand Chamber agreed with the Chamber’s observation that the refusal-of-entry orders had been drafted in comparable terms, “the relatively simple and standardised nature of the refusal-of-entry orders could be explained by the fact that the applicants did not have any valid travel documents and had not alleged either that they feared ill-treatment in the event of their return or that there were any other legal impediments to their expulsion”.⁹⁰ The State’s actions and justifications were thus not unreasonable.

The Court then went on to find that “the virtually simultaneous removal of the three applicants does not lead to the conclusion that their expulsion was ‘collective’ within the meaning of Article 4 of Protocol No. 4 to the Convention”.⁹¹ Rather, it could be explained as “the outcome of a series of individual refusal-of-entry orders”.⁹² This was a disappointing finding by the Court, and a move in the wrong direction. I agree with Judge Serghides, who dissented in that case, for many of the same reasons. Like Judge Serghides, I too find there are serious issues with the Court’s interpretation of Article 4 of Protocol No 4.

One of the main lines of disagreement between the dissent and the majority in this case is whether or not an individual interview is required, in order for a deportation to be in line with the Convention. The majority answers in the negative, and Judge Serghides disagrees. I too believe that a personal interview is necessary to guarantee an individualised evaluation of the asylum claims and individual arguments of migrants attempting to cross into the territory of a State. Without a personal interview, there is automatically a violation of Article 4 of Protocol No 4. Allowing States to proceed with collective or group deportations without con-

⁸⁸ ECtHR, Legal Summary, December 2016, *Khlaifia and Others v Italy* [GC], No 16483/12, <http://hudoc.echr.coe.int/eng?i=002-11454>.

⁸⁹ ECtHR [GC], *Khlaifia and Others v Italy*, cited above, § 247.

⁹⁰ *Ibid.*, § 251.

⁹¹ *Ibid.*, § 252.

⁹² *Ibid.*

ducting personal interviews would be a huge step back for the protection of migrants and would significantly depart from the Court’s case law. Under the Convention there is a mandatory procedural obligation to assess the individual circumstances of each migrant a State deports, and this necessarily implies an obligation on the part of States to conduct a person interview. Otherwise, the Court is effectively giving States a *carte blanche* to decide when individual circumstances matter, and when they can be ignored.⁹³

An added issue in this case was the existence of a bilateral agreement between Italy and Tunisia, which bypassed the need for an individual interview of Tunisian individuals who arrived in Italy. Under this agreement, there was “no mandatory obligation to conduct a personal interview”. I agree with Judge Serghides who argues that where “a bilateral agreement does not require mandatory personal interviews for the collective expulsion of aliens, [...] it violates the provisions of Article 4 of Protocol No. 4”.⁹⁴ Since there has not been a reservation to Article 4 of Protocol No 4 by Italy, Italy’s full obligations under the Protocol remain in force and cannot be displaced by a bilateral agreement.

In *N.D. and N.T. v Spain*,⁹⁵ the Court clarified that the Convention concept of expulsion includes non-admission border management decisions in accordance with the interpretation of the United Nations International Law Commission draft articles on expulsions of aliens, and it applies to every individual irrespective of seeking asylum or not or having a legitimate claim of international protection or not.⁹⁶ More importantly, it established that States should not excise certain parts

⁹³ See also, Venturi, “The Grand Chamber’s Ruling in *Khlaifia and Others v Italy*: One Step Forward, One Step Back?”, cited above.

⁹⁴ Dissenting Opinion of Judge Serghides in *Khlaifia and Others v Italy*, § 252.

⁹⁵ ECtHR [GC], 13 February 2020, *N.D. and N.T. v Spain*, Nos 8675/15 and 8697/15. On this case, see A. López-Sala, “Keeping up appearances: Dubious legality and migration control at the peripheral borders of Europe. The cases of Ceuta and Melilla” in S. Carrera and M. Stefan (eds), *Fundamental Rights Challenges in Border Controls and Expulsions of Irregular Immigration in the European Union: Complaint Mechanisms and Access to Justice* (Routledge, 2020) 26–42; I. Barbero and M. Illamola-Dausa, “Deportations without the right to complaint: cases from Spain” in S. Carrera and M. Stefan (eds), *idem* 43–63; N. Sinanaj, “Push backs at land borders: Asady and Others v. Slovakia and N.D and N.T v. Spain. Is the principle of non-refoulement at risk?” (10 June 2020) *Refugee law initiative*; S. Carrera, “The Strasbourg Court Judgement *N.D. and N.T. v Spain*: A *Carte Blanche* to Push Backs at EU External Borders?” (2020) 21 *EUJ Working Paper*; G. Raimondo, “N.D. and N.T. v Spain: A Slippery Slope for the Protection of Irregular Migrants” (20 April 2020) *University of Oxford Faculty of Law*, www.law.ox.ac.uk; N. Markard, “A Hole of Unclear Dimensions: Reading ND and NT v. Spain” (1 April 2020) *EU Immigration and Asylum Law and Policy*; H. Hakiki, “N.D. and N.T. v. Spain: defining Strasbourg’s position on push backs at land borders?” (26 March 2020) *Strasbourg Observers*; S. Papageorgopoulos, “N.D. and N.T. v. Spain: do hot returns require cold decision-making?” (28 February 2020) *European Database of Asylum Law*; R. Wissing, “Push backs of ‘badly behaving’ migrants at Spanish border are not collective expulsions (but might still be illegal refoulements)” (25 February 2020) *Strasbourg Observers*; M. Pichl and D. Schmalz, “‘Unlawful’ may not mean rightless. The shocking ECtHR Grand Chamber judgment in case N.D. and N.T.” (14 February 2020) *Verfassungsblog*; C. Oviedo Moreno, “A Painful Slap from the ECtHR and an Urgent Opportunity for Spain” (14 February 2020) *Verfassungsblog*; D. Thym, “A Restrictionist Revolution? A Counter-Intuitive Reading of the ECtHR’s N.D. and N.T. judgement on ‘Hot Expulsions’” (17 February 2020) *EU Immigration and Asylum Law and Policy*.

⁹⁶ As I had advocated in my separate opinion in *M.A. and Others v Lithuania* (ECtHR, 11 December 2018, No 59793/17).

of their territory through law or other means as “non-territory” to escape from their ECHR obligations and should provide “genuine and effective” access to legal entry mechanisms for purposes of asylum and a “sufficient number” of crossing points.⁹⁷ This State positive obligation is a condition *sine qua non* of a Convention compliant border management policy.

In the Melilla case, that requirement was not fulfilled, due to the abundant evidence of the lack of practical accessibility by the applicants to legal channels for admission to Spain, but the Court neglected that evidence.⁹⁸ Worse still, by focusing on the individuals’ own conduct, the Court inverted the role of the complainants and the respondent State, treating the applicants as if they were defendants accused of intentionally disruptive and aggressive behaviour and the Spanish State as the accuser. The Court’s choice to first assess whether the applicants were worthy of human rights’ protection under the ECHR was fundamentally wrong in that it assumed that the right of access to human rights is not inherent to every persecuted human being, but it is dependent on the complainant’s conduct. When the *Hirsi and Others v Italy*⁹⁹ judgment held that there would not be a violation of Article 4 of Protocol No 4 “if the lack of an expulsion decision made on an individual basis is the consequence of the person’s own culpable conduct”,¹⁰⁰ it did not mean, and cannot be read as meaning, that the guarantee of the absolute prohibition of *refoulement* would be dependent on the individual’s conduct when crossing the border. Such reading of *Hirsi Jamaa and Others* would be manifestly abusive in the light of the broad interpretation of the term “expulsion” in paragraph 174 of that judgement, reiterated in paragraph 185 of the *N.D. and N.T.* judgment, which correctly stresses the point that the term refers to “any forcible removal of an alien from a State’s territory, irrespective of the lawfulness of the person’s stay, the length of time he or she has spent in the territory, the location in which he or she was apprehended, his or her status as a migrant or an asylum-seeker and *his or her conduct when crossing the border*” (my italics). Furthermore, it is also abusive that *Berisha and Haljiti v “the former Yugoslav Republic of Macedonia”*¹⁰¹ and *Dritsas v Italy*¹⁰² are invoked

⁹⁷ ECtHR [GC], *N.D. and N.T.*, cited above, § 209.

⁹⁸ The Court simply discarded the evidence put forward by the United Nations High Commissioner for Refugees, the Office of the High Commissioner of Human Rights, the Council of Europe Commissioner for Human Rights and a group of civil society institutions, as third party interveners, concluding that the various reports were “not conclusive” (§ 218). The situation on the ground had already been analysed by J.M. Sanchez-Tomás, “Las devoluciones en caliente en el Tribunal Europeo de Derechos Humanos” (2018) 65 *Revista Española de Derecho Europeo* 101–135; L. Imbert, “Refoulements sommaires: la CEDH trace la ‘frontière des droits’ à Melilla” (28 January 2018) *La Revue des droits de l’homme*; C. Gortazar and N. Ferré, “A cold shower for Spain-hot returns from Melilla to Morocco: *N.D. and N.T. v Spain*” (20 October 2017) *EU Immigration and Asylum Law and Policy*; I. Gonzalez García, “Rechazo en las Fronteras Exteriores Europeas con Marruecos: Inmigración y Derechos Humanos en las Vallas de Ceuta y Melilla 2005-2017” (2017) 43 *Revista General de Derecho Europeo* 17–57; P. García Andrade, “Devoluciones en caliente’ de ciudadanos extranjeros a Marruecos” (2015) 67 *Revista Española de Derecho Internacional* 214–220.

⁹⁹ ECtHR [GC] *Hirsi Jamaa and Others*, cited above.

¹⁰⁰ *Ibid.*, § 184.

¹⁰¹ ECtHR (dec.), 16 June 2005, *Berisha and Haljiti v “the former Yugoslav Republic of Macedonia”*, No 18670/03, ECHR 2005-VIII.

¹⁰² ECtHR (dec.), 1 February 2011, *Dritsas v Italy*, No 2344/02.

as authorities supporting such restrictive reading when they do not relate at all to a similar situation.¹⁰³

The fallacy of the Court’s line of argument is even more blatant if one stretches it *ad absurdum* in order to deny the right of access to human rights to criminals or other “disruptive” people, whatever that might mean. Going down this road, the Court is not only practically encouraging Spain’s push back practice in Melilla and elsewhere, but it is categorising applicants as first and second-class persons, those “good” people who have and those “disruptive” people who have not the right of access to human rights and specifically the right of access to a procedure which assesses their needs for international protection. For the Court, Africans who are apprehended in Melilla, i.e. Spanish territory, after having climbed the Spanish–Morocco border fences, are second class “disruptive” persons and can therefore be immediately “pushed back” to Morocco without access to any legal procedure or protection. In the borders of Europe, people are chased away just like animals that invaded our backyard and the Court has nothing to say to that.

The most appalling aspect of this line of reasoning is its *reductio ad hitlerum*, as Leo Strauss would put it. The suggested rationale of the Court is one of guilt by association, whereby all Africans climbing the border fences in Melilla act in the same manner, share the same intention and are in the same personal situation.¹⁰⁴ In *N.D. and N.T.* the specific intentions of the applicants to disrupt and endanger public safety were never established and no evidence was ever put forward regarding any concrete violent acts committed by them or any other person crossing on that day.¹⁰⁵ When reading the majority, one gets the impression that the principle of individual responsibility has been completely obfuscated. The rule of law necessitates that the Court analyses the real situation of each applicant in Strasbourg and does not trivialise its specific characteristics. This is obvious and it is a remarkable state of affairs in Strasbourg that the point even needs to be made.

Nevertheless, beyond the obvious, there is one absolute red line that should not have been crossed, and it was. Article 31 of the Refugee Convention embodies the non-penalisation principle which requires Contracting States not to impose upon migrants “penalties, on account of their illegal entry or presence”. The Court did not care much for the absolute nature of the *non-refoulement* principle when it admitted that States “may oblige individuals to submit asylum claims only at existing border crossing points, and that they may refuse entry to their territory including *potential asylum seekers*, who have failed to comply with these arrangements” (my italics).¹⁰⁶ The opposite doctrine has been consistently sustained by the Coun-

¹⁰³ ECtHR [GC], *N.D. and N.T.*, cited above, § 200.

¹⁰⁴ The *ad hominem* language of the Court is telling: “persons who cross a land border in an unauthorised manner, deliberately take advantage of their large numbers and use force, is such as to create a clearly disruptive situation which is difficult to control and endangers public safety” (ECtHR [GC], *N.D. and N.T.*, cited above, § 200).

¹⁰⁵ The use of the word “storming” in paragraphs 201, 210, 211 and, most importantly, 231 of the judgment is equivocal, because it confuses the use of force with a mass arrival of people. Moreover, the available video of the events does not prove any use of force.

¹⁰⁶ ECtHR [GC], *N.D. and N.T.*, cited above, § 210.

cil of Europe Parliamentary Assembly,¹⁰⁷ the Commissioner for Human Rights¹⁰⁸ and the Special Representative of the Secretary General on migration and refugees,¹⁰⁹ and by all relevant United Nations bodies, such as the Office of the United Nations High Commissioner for Human Rights,¹¹⁰ the UN Committee on the rights of the child,¹¹¹ the UN Human Rights Council,¹¹² the UN Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,¹¹³ and the CEDAW.¹¹⁴ At least for the sake of international courtesy, if not of analytical rigour, the Court should have made an effort to discuss and contradict these authorities. Like in *Ilias and Ahmed*, it is highly regrettable that, instead of promoting effective convergence between its case law and international human rights law, the Court engaged in *N.D. and N.T.* on a tortuous path of fragmentation of international law.¹¹⁵

The morally and legally untenable position of the Court on the jurisdictional threshold is further compounded by its decision in *M.N. and Others v Belgium*.¹¹⁶ The worst face of the Court, indifferent to the tragic consequences of the Contracting parties' decisions on aliens outside their territories, that face so cold-bloodedly exposed in *Banković and Others v Belgium and Others*,¹¹⁷ is shown again here. The Court stated in unequivocal and uncompromising terms that "the mere fact that decisions taken at national level had an impact on the situation of persons resident abroad is also not such as to establish the jurisdiction of the State concerned over those persons outside its territory".¹¹⁸ *A fortiori*, this means that the "persons outside its territory" do not have a Convention right of access to legal

¹⁰⁷ PACE, Recommendation 2161 (2019) on "Pushback policies and practice in Council of Europe member States".

¹⁰⁸ Annual Activity Report 2015 by Nils Muižnieks, Commissioner for Human Rights of the Council of Europe, 14 March 2016, § 41.

¹⁰⁹ Special Representative of the Secretary General on migration and refugees, Report of the fact-finding mission to Spain, 18–24 March 2018, SG/Inf(2018)25, 3 September 2018.

¹¹⁰ United Nations, Report of the Office of the United Nations High Commissioner for Human Rights (OHCHR), HRC/WG.6/35/ESP/2, 18 November 2019. See also the 2014 "Recommended principles and Guidelines on Human Rights at international borders", which call States to "respect, promote and fulfil human rights wherever they exercise jurisdiction or effective control, including where they exercise authority or control extraterritorially" and "ensure that all border governance measures taken at international borders, including those aimed at addressing irregular migration [...], are in accordance with the principle of non-refoulement and the prohibition of arbitrary and collective expulsions".

¹¹¹ UN Committee on the Rights of the Child, *D.D. v Spain*, Views concerning Communication No 4/2016, 15 May 2019.

¹¹² UN Human Rights Council, Report of the Working Group on the Universal Periodic Review, Spain, HRC/29/8, 13 April 2015, §§ 131.166 and 131.182.

¹¹³ UN Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT OP), Visit to Spain undertaken from 15 to 26 October 2017: observations and recommendations addressed to the State party, 2 October 2019, CAT/OP/ESP/1, § 93.

¹¹⁴ CEDAW, Concluding observations on the 7th and 8th report of Spain, CEDAW/C/ESP/CO/7–8 (2015), §§ 36–37.

¹¹⁵ I already had the occasion to regret this in my opinion joined to ECtHR [GC], 4 April 2018, *Correia de Matos v Portugal*, No 56402/12.

¹¹⁶ ECtHR [GC] (dec.), 5 March 2020, *M.N. and Others v Belgium*, No 3599/18.

¹¹⁷ ECtHR [GC] (dec.), 12 December 2001, *Banković and Others v Belgium and Others*, No 52207/99, § 75.

¹¹⁸ ECtHR [GC] (dec.), *M.N. and Others*, cited above, § 112.

mechanisms for the purposes of claiming asylum, even when decisions taken at national level had an impact on their civil rights and freedoms.

The *M.N. and Others v Belgium* judgment and its ratio raise some delicate questions in light of the Court’s recent case law.¹¹⁹ In *N.D. and N.T. v Belgium* the Court argued that the African applicants could have applied for international protection at Spain’s diplomatic and consular representations in their countries of origin or transit,¹²⁰ in order to conclude that Spanish law afforded the applicants several possible regular means of seeking admission to the national territory and therefore to justify the “hot return” (*devoluciones en caliente*) of irregular migrants. Considering this line of argumentation exposed in *N.D. and N.T.*, how can the Court conclude in *M.N. and Others* that the regular application for a visa in a Belgium consulate in Syria does not trigger a jurisdictional link with Belgium? Furthermore, in *N.D. and N.T.*, the Court explicitly refused to excise a part of the territory for the purposes of circumventing international obligations.¹²¹ In view of this refusal, how can the Court in *M.N. and Others* be ready to excise Belgium consular and diplomatic posts where they exercised their authority in respect of aliens, taking decisions that have enduring effects on their civil rights and freedoms? These questions warrant an answer that the Grand Chamber failed to give. Such answer is even more required after the shocking refusal of the Belgian authorities to implement the initial decisions of the Aliens Appeals Board favourable to the applicants, as if Belgium were a banana republic where political interests dictate in a totally opportunistic way whether judicial decisions should be complied with or not.

The sole argument put forward by the majority is a classical *ad terrorem* fallacy: accepting jurisdiction would “enshrine a nearuniversal application of the Convention on the basis of the unilateral choices of any individual, irrespective of where in the world they find themselves, and therefore to create an unlimited obligation on the Contracting States to allow entry to an individual who might be at risk of ill-treatment contrary to the Convention outside their jurisdiction”.¹²² Ruminating

¹¹⁹ On these questions see T. Gammeltoft-Hansen, “Adjudicating old questions in refugee law: MN and Others v Belgium and the limits of extraterritorial refoulement” (26 May 2020) *EU Immigration and Asylum Law and Policy*; A. De Leo and J. Ruiz Ramos, “Comparing the Inter-American Court opinion on diplomatic asylum applications with M.N. and Others v. Belgium before the ECtHR” (13 May 2020) *EU Immigration and Asylum Law and Policy*; V. Stoyanova, “M.N. and Others v Belgium: no ECHR protection from refoulement by issuing visas” (12 May 2020) *EJIL: Talk!*; M. Baumgärtel, “Reaching the dead-end: M.N. and others and the question of humanitarian visas” (7 May 2020) *Strasbourg Observers*; A.-N. Reyhani, “Expelled from Humanity: Reflections on M.N. and Others v. Belgium” (6 May 2020) *Verfassungsblog*; D. Schmalz, “Der Staat gegen seine Richter: Eindrücke von der EGMR-Verhandlung im Fall M.N.” (2 May 2020) *Verfassungsblog*.

¹²⁰ ECtHR [GC], *N.D. and N.T.*, cited above, §§ 212, 214 and especially 228.

¹²¹ *Ibid.*, § 209.

¹²² ECtHR [GC] (dec.), *M.N. and Others*, cited above, § 123, following the most unfortunate ECtHR (dec.), 28 January 2014, *Abdul Wahab Khan v United Kingdom*, No 11987/11, § 27. The Court did not even care to consider that the appeal procedure in the *Abdul Wahab Khan* case had concerned the withdrawal of leave to remain, decided on the basis of a finding that the applicant posed a threat to national security, and the exclusively extraterritorial impact of the contested decision had not been attributable to the United Kingdom but to the applicant, on account of his activities and his decision to return to Pakistan. To sum up, this is a totally different factual case from the one of the Syrian applicants in the Belgium case.

about catastrophic, worst-case outcomes, has never been a proper way of legal reasoning.¹²³ Besides, “the principle of non-refoulement would be purely fictional if the State could prevent the application of the principle by means of push-back policies or non-admission or rejection at the border”.¹²⁴

In *M.N. and Others v Belgium*, the existence of genuine and effective access to legal entry mechanisms for purposes of asylum vanishes as a *sine qua non* condition of a Convention complaint border management policy.¹²⁵ The availability of legal pathways to protection such as asylum procedures through embassies and/or consular representations was considered by the Court to the detriment of the African applicants, because they did not use them, but it was not considered for the benefit of the Syrian applicants, who had used them. This is yet another example of the Court’s “patchwork case law” on jurisdiction, to say the least.¹²⁶ In simple words, if asylum seekers are “mean” people who jump border fences in Africa, they can be dead sure that they will not get justice from the Strasbourg Court, but if they are “good” people who try to seek asylum in an orderly fashion all the way up the consular, administrative and judicial apparatus, they can also be dead sure that will not get justice from Strasbourg either. If the Court is implacable with rebellious asylum seekers, it can be no less ruthless with law-abiding asylum seekers, like the distant, disgraced Syrian applicants of the Belgium case.

I have defended a principled interpretation of jurisdiction, according to which “immigration and border control is a primary State function and all forms of this control result in the exercise of the State’s jurisdiction”.¹²⁷ In light of that, I would have no qualms admitting the existence of a jurisdictional link with Belgium, based on the State decisions taken at national level, including the decisions of diplomatic and consular officials, that had an impact on the situation of aliens abroad, regardless of any territorial or personal physical control.¹²⁸ Furthermore, having

¹²³ This kind of apocalyptic narrative of fear of an invasion of Europe by foreigners is frequently used in the field of migration law, as was demonstrated in my opinions in *S.J. v Belgium* (ECtHR [GC], 19 March 2015, No 70055/10), *De Souza Ribeiro*, cited above, and *M.A. and Others*, cited above, § 7.

¹²⁴ See my separate opinion in *M.A. and Others*, cited above, § 7.

¹²⁵ Subsequent case law proves the point I am making. In the recent *Asady and Others v Slovakia* (ECtHR, 24 March 2020, No 24917/15), the majority do not say a word regarding the lack of legal avenues for the applicants, who entered the Slovakian territory irregularly, to ask for international protection at Slovakian diplomatic missions or consulates abroad. The violation of the applicants’ Article 4 of Protocol No 4 right is further compounded by a simulacrum of an individualised examination of the applicant’s situation by the Slovakian authorities. No genuine and effective opportunity was given to them to submit arguments against their expulsion.

¹²⁶ The expression of Judge Bonello in his separate opinion in *Al-Skeini and Others v the United Kingdom* (ECtHR [GC], 7 July 2011, No 55721/07) was already cited above.

¹²⁷ See my opinions in *Hirsi Jamaa and Others*, cited above, *De Souza Ribeiro*, cited above, and *M.A. and Others*, cited above, §§ 3–8.

¹²⁸ For the Inter-American Court of Human Rights, the acts of diplomatic officials regarding a person who enters the embassy of a foreign State to seek protection automatically fall under the jurisdiction of that State (Advisory Opinion OC-25/18 of 30 May 2018, the institution of asylum and its recognition as a human right in the inter-American system of protection (interpretation and scope of Articles 5, 22.7 and 22.8 in relation to Article 1(1) of the American Convention on Human Rights, §§ 188, 192 and 194). The Inter-American Court was inspired by the former European Commission in ECtHR (dec.), 14 October 1992, *W.M. v Denmark*, No 17392/90, and by the United Nations Human Rights Committee, *Mohammad*

overcome the jurisdictional threshold, I would reiterate that “if a person in danger of being tortured in his or her country asks for asylum in an embassy of a State bound by the Convention, a visa to enter the territory of that State has to be granted”.¹²⁹ Article 3 of the Convention enshrines the principle of *non-refoulement* as it obliges States not to reject a visa to an alien where substantial grounds have been shown for believing that the person in question, if left in his or her country, would face a real risk of being subjected to treatment contrary to that article.¹³⁰ That is why Article 4 of Protocol No 4 prohibits collective expulsions and necessarily implies an individual assessment of the alien’s needs for international protection. The State can only prevent returning “possible asylum seekers” to a place of danger if persons are not expelled collectively.

Conclusion

When it comes to the protection of migrants the Court is set on a course to limit, narrow and curb individual rights. It continues to abide by precedents that are unclear, unfair, and dated. The Court has utterly failed to extend the same fundamental rights citizens of Member States enjoy under the Convention to those individuals who often make a perilous journey to our shores. In doing so, the Court has turned its back to the most vulnerable and has failed to live up to its mission to protect human rights for all individuals. The Court has allowed itself to be involved in the politics of migration, often forgiving States for buckling under pressure, but failing to consider the individuals at the other end of those sweeping “solutions”. Politicians and politics may use excuses to limit rights when things get tough. But it is for the Court to stand strong in the face of uncertain times and unexpected world events. It is in those times that the most vulnerable in our society suffer first and suffer most. It is our job, our founding principle, as the shining light of human rights in Europe and across the world, to be the voice for the voiceless especially in trying times.

The slippery slope the Court is on will inevitably lead to more and more problems and fewer and fewer protection. Migration will not go away, and as we watch the world become increasingly more volatile, we must expect that waves of migrations will continue to bring many more vulnerable and desperate people to our shores.

Munaf v Romania, comm. No 1539/2006, UN Doc. CCPR/C/96/D/1539/2006, 21 August 2009, §§ 14.2 and 14.5. It is true that the Danish case involved acts of force over the alien, but neither the Romanian case nor the Advisory Opinion set as a condition for jurisdiction that the acts of diplomat officials must involve physical control of the alien by the diplomatic officials or other persons at the request of diplomatic officials.

¹²⁹ See my opinion in *Hirsi Jamaa and Others*, cited above.

¹³⁰ According to the Inter-American Court of Human Rights, there is an obligation to respect the principle of *non-refoulement* in diplomatic missions (§§ 192 and 194), which implies positive and negative obligations for the State, namely the obligation to carry out an assessment whether there is a real risk of *refoulement* if the person were to leave the embassy and, if such a risk is determined, the obligation to adopt all necessary diplomatic measures, including requesting the State on whose territory the diplomatic mission is located to arrange safe passage for the person (Advisory opinion OC-25/18, cited above, §§ 194–198).

The Court will have to reflect on its role in protecting individuals who have come to Europe and managed to create a life here, have a family, only to have their lives upturned by arbitrary deportations. The Court will also have to consider its role in condoning an inhuman detention policy which treats migrants as disposable commodities.

It is my view that the Court is on a wrong path: one away from protection, and towards indifference. The implications of this would be tragic, not only for individuals who have no other protection but those that are guaranteed to them by the Convention, but tragic also for the protection and development of human rights across Europe and the world.