MASTER'S THESIS IN INTERNATIONAL LAW AND HUMAN RIGHTS

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MIGRANTS AT THE BORDERS OF EUROPE: THE EUROPEAN FRAMEWORK FOR PROTECTION AGAINST PUSHBACKS AND COLLECTIVE EXPULSIONS

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Abstract for Master´s Thesis

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Abstract:

Practices of pushbacks and collective expulsions have become an increasingly worrying trend at the external borders of European countries. While several states have been dealing with an increased migratory pressure, reports by international organizations have revealed that migrants are being immediately returned at borders and denied access to asylum. These reports have concerned actions taken particularly at the borders of EU Member states. Pushbacks can be described as referring broadly to the informal expulsion (without due process) of an individual or group to another country. Notably, the immediate rejection and removal of migrants at borders make it impossible for the authorities to assess the protection needs of migrants and to assure that migrants enjoy their human rights and fundamental freedoms. One of the highest risks attached to pushbacks and collective expulsions is the violation of the non-refoulement principle, which prohibits expulsion if there is a real risk that the person concerned would be subject to ill-treatment in the country of destination. Evidently, the absence of the risk of refoulement can only be assured through examining the individual situation.

Article 4 of Protocol No. 4 to the European Convention on Human Rights (ECHR) and Article 19 (1) of the EU Charter of Fundamental Rights (EU Charter) explicitly prohibit the collective expulsion of aliens. The definition of a "*collective* expulsion", as provided by the European Court of Human Rights (ECtHR), indicates "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". Two aspects are thus of relevance; first, that the individual in question is expelled together with other persons, as a group, and secondly, the fact that his/her situation was not examined individually by the national authorities. Despite Protocol No. 4 having been established already in 1963, the ECtHR has ruled a violation of Article 4 of Protocol No. 4 in only eight cases. In addition, the Court of Justice of the European Union (CJEU) has never been asked to interpret Article 19 (1). Thus, several questions remain open regarding the prohibition of collective expulsion and how this applies to an individual who forms part of a group. As the case law of the ECtHR concerning collective expulsions have increased rapidly over the recent years, judges of the Court have been compelled to assess these questions.

In the present thesis, the aim is to provide an answer to some of the most pressing legal issues that have emerged in the case law of the Court concerning the prohibition of collective expulsion. Notably, the purpose is to provide valuable guidance in assessing when an expulsion has been of a collective nature, particularly in relation to situations of pushbacks at borders. The analysis will be done first by analysing the relevant case law of the ECtHR and second, by examining the relevant EU law and the case law of the CJEU. As the

prohibition of collective expulsion is highly interlinked with the need for procedural safeguards and legitimate reasons justifying expulsion, this thesis focuses particularly on the procedural guarantees which can be derived from the prohibition. Since the most crucial part of the prohibition entails the right to an individual and objective examination of the particular case of each alien of the group, the purpose will be to clarify the level of individual examination which is required under the prohibition.

As this thesis will show, specific guidelines are in place to determine when an expulsion has been of a collective nature. The case law of the ECtHR establishes effective procedural guarantees under Article 4 of Protocol No. 4 to prevent collective expulsions. Similar procedural guarantees can be deduced from the case law of the CJEU, although these have not been explicitly interpreted under Article 19 (1) of the EU Charter. Thus, while effective procedural guarantees are in place in Europe to prevent collective expulsions at borders, as will be demonstrated, these procedural guarantees are not necessarily applied in practice in pushback-situations. A particular concern is the widespread silence on the EU level on the issues of pushbacks and collective expulsions of migrants. Further, as the case-law on Article 4 of Protocol No. 4 has only recently been increasing, clarification of the specific content of the prohibition is needed. As pushbacks and collective expulsions continue to be a serious issue at the bordering countries of Europe, the case law on Article 4 of Protocol No. 4 is destined to increase and the forthcoming judgments will give the Court an opportunity to further reflect and clarify the legal issues identified in this thesis.

Key words: Prohibition of collective expulsion of aliens, Pushbacks, Border control, Migration, European Convention on Human Rights, Charter of Fundamental Rights of the European Union

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List of abbreviations

CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CJEU	The Court of Justice of the European Union
CPT	The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
ECHR	The European Convention on Human Rights
ECtHR	The European Court of Human Rights
EU	The European Union
EU Charter	The Charter of Fundamental Rights of the European Union
FRA	The European Union Agency for Fundamental Rights
ICCPR	International Covenant on Civil and Political Rights
TEU	Treaty of the European Union
TFEU	Treaty on the Functioning of the European Union
UNHCR	The United Nations High Commissioner for Refugees
UNHCHR	The United Nations High Commissioner for Human Rights

1. Introduction

1.1. Background

Throughout history, people have left, or have been forced to leave their home countries. Forced migration has led to people searching for shelter in a country other than their country of origin. In response to the growing migratory pressure, several states have reacted by developing policies preventing migrants from arriving in their territory. The practice of pushbacks and collective expulsions of migrants is not a recent phenomenon and has often been the unacceptable result of states' border management in times of crisis and instability. Practices and policies of pushbacks and collective expulsions present a flagrant denial of human rights and have widespread consequences on the individuals affected by such practices.[1] The immediate rejection of migrants at borders has led to denying them the opportunity to lodge an asylum application and to receive a full and fair examination of their claims.[2] As a result of the pushbacks, migrants are not in the country anymore, thus leaving them unaware of which procedural steps to take.[3]

The resulting state liability for human rights breaches during immigration and border control operations can be described as one of the most burning issues in Europe today.[4] The issue with the collective expulsion and pushbacks of migrants has become an increasingly worrying trend at the borders of European states, and this has been reflected in an increased number of decisions issued by the European Court of Human Rights (ECtHR or "the Court") on this matter. While the focus of discussions surrounding the European borders is often directed towards the European Union (EU) and specifically the Dublin system, the ECtHR has actively decided on cases concerning migrants and refugees and has an important role in upholding the basic human rights of individuals entering borders of Member States of the Council of Europe. As is well-established universally, states have the right to decide whether to allow foreign nationals in their territory or to expel them. Essentially, this is one of the most strongly protected principles of international law,[5] and has been characterized as an inherent attribute

[1] Strik, 2020, pp. 234–258, 251.
[2] Written Submission by the Office of the United Nations High Commissioner for Refugees in the Case of *Sharifi and others v. Italy and Greece,* (16643/09), 21.10.2014.
[3] Strik, 2020, pp. 234–258, 252.
[4] Concurring opinion of Judge Pinto de Albuquerque in *M.A. and Others v. Lithuania,* (59793/17), 11.12.2018.
[5] Pirjola, 2007, pp. 639–660, 643.

of the sovereignty of every state.[6] However, international human rights law provides for some important limitations on a state's sovereign freedom to remove a foreign national from its territory.[7] The most important among these are the principle of non-refoulement and the prohibition of collective expulsion, which can both be found in the European Convention on Human Rights (ECHR or "the Convention") and the EU Charter of Fundamental Rights (EU Charter).

The principle of non-refoulement is an important element of the legal regime applicable to states' border management and prohibits return if a person is at risk of being subject to torture or other inhuman or degrading treatment in the country where the person is sent back.[8] The prohibition of collective expulsions, however, aims to ensure that each person in a group of non-nationals is not being removed without a prior reasonable and objective examination of the particular circumstances of that particular individual's case. In Europe, this due process right can be found in Article 4 of Protocol No. 4 to the ECHR and Article 19 (1) of the EU Charter, which both provide that "collective expulsions of aliens is prohibited".[9] While short in formulation, the ECtHR has provided for a definition of "collective expulsion" in its case law, defining it 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".[10]

Despite Protocol No. 4 to the ECHR having been established already in 1963, for decades, all cases concerning Article 4 of the protocol were declared inadmissible. It was not until in 2002 that the Court found the first breach of this guarantee, in the case of *Čonka v. Belgium.* Recently, this provision has been invoked more often and the prohibition of collective expulsion has especially gained importance in the jurisprudence of the ECtHR after the

[6] International Law Commission, Fifty-eighth session, Geneva, 2006, "Expulsion of aliens", Memorandum by the Secretariat, § 185, available at: http://legal.un.org/ilc/documentation/english/a_cn4_565.pdf [accessed 3.11.2020].
[7] Mauro, Maria Rosaria, Detention and Expulsion of Migrants: The Khlaifia v. Italy Case, 25 Italian Y.B. Int'l L. 85, 2015.
[8] Trevisanut, Seline, The Principle of Non-Refoulement And the De-Territorialization of Border Control at Sea, *Leiden Journal of International Law*, 2014.
[9] Council of Europe, Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain Rights and Freedoms other than those already included in the Convention and in the First Protocol thereto (*Protocol 4 to the ECHR*), 16 September 1963, ETS 46, Article 4.
[10] Council of Europe: European Court of Human Rights, *Fact sheet - Collective expulsions of aliens*, November 2013, available at: https://www.refworld.org/docid/539eb0b84.html [accessed 3.11.2020].

evolution of European border policies.[11] While the Court has previously dealt with border practices aimed at tackling maritime migratory flows,[12] recently it has assessed the compatibility with the Convention of those conducted at land borders, including so-called pushbacks.[13] The prohibition of collective expulsion of aliens can be seen as an important procedural safeguard for the protection of, *inter alia*, the principle of non-refoulement. As the Council of Europe Commissioner for Human Rights has stated, collective expulsions or pushbacks of migrants make it impossible for the authorities to assess the protection needs of migrants and to assure, that migrants enjoy their human rights and fundamental freedoms, including the protection against torture or other forms of ill-treatment as well as their right to life.[14] Article 4 of Protocol No. 4 has established a strong link between the prohibition of collective expulsion of aliens, on the one hand, and the need for procedural safeguards and legitimate reasons justifying expulsion, on the other hand.[15] It has proved to be vital for the protection of irregular migrants, as it extends to every foreigner.

As explained above, the prohibition of collective expulsion used to be relatively discreet in the case-law of the ECtHR. To date, the Court has found violations of this article in only eight cases.[16] While the international community has previously witnessed a lack of clarity and precision as concerns the rules of international law relating to the collective expulsions,[17] this still appears to be the case, even in respect of the jurisprudence of the Court. The Court of Justice of the European Union (CJEU) has been even more silent on the issue and has to date never been asked to interpret Article 19 (1) of the EU Charter prohibiting collective expulsions. Thus, several questions remain open regarding the prohibition of collective expulsion and how this applies to an individual who forms part of a group; What exactly distinguishes a collective expulsion of a group of people from a series of individual expulsions and which procedural

[11] Jan-Yves Carlier, Luc Leboef, Collective expulsion or not? Individualisation of decision making in migration and asylum law, EU Immigration and Asylum Law and Policy, 8.1.2018.
[12] See, *Hirsi Jamaa and Others v. Italy,* 23.2.2012, (27765/09).
[13] Gatta, Francesco Luigi, 'Tell me your story, but hurry up because I have to expel you' – Asady and Others v. Slovakia: how to (quickly) conduct individual interviews and (not) apply the ND & NT "own culpable conduct" test to collective expulsions, Strasbourg Observers, 2020; See also, *N.D. and N.T. v. Spain,* 13.2.2020, (8675/15 and 8697/15).
[14] Third party intervention by the Council of Europe Commissioner for Human Rights in *N.D. v. Spain and N.T. v. Spain*, 22 March 2018, CommDH(2018)11.
[15] Rietiker, 2016, p. 656.
[16] These cases are *Čonka v. Belgium, Georgia v. Russia (I)* [GC], *Shioshvili and Others v. Russia* and *Berdzenishvili and Others v. Russia, Hirsi Jamaa and Others v. Italy* [GC], *Sharifi and Others v. Italy and Greece*, *Moustahi v. France* and *M.K. and Others v. Poland.*
[17] International Law Commission, Fifty-eighth session, Geneva, 2006, "Expulsion of aliens", Memorandum by the Secretariat, § 985, available at: http://legal.un.org/ilc/documentation/english/a_cn4_565.pdf [accessed 3.11.2020].

guarantees can be deduced from the prohibition? As the case law of the ECtHR concerning collective expulsions has increased recently, the judges of the Court have been compelled to assess these questions. As this thesis will show, specific guidelines are in place to determine when an expulsion has been of a collective nature. Further, both the case law of the ECtHR and the CJEU establishes effective procedural guarantees to prevent individuals from being collectively expelled. Nevertheless, as the thesis will also demonstrate, in many ways, the argumentation still remains inconsistent, particularly relating to the level of individual examination required under the prohibition of collective expulsions.

1.2. Research questions and structure

In light of the above, the aim of the present thesis is to study and analyze the scope and content of the prohibition of collective expulsions in the context of pushbacks at European borders. The primary focus will be the approach taken by the ECtHR in expulsion cases concerning Article 4 of Protocol No. 4, providing for the prohibition of collective expulsion of aliens. Other relevant provisions of the ECHR will also be discussed, which have a strong link with the aforementioned article.[18] Further, the thesis aims to provide for some clarification over the relevant provisions in EU law protecting migrants from being collectively expelled at borders of EU Member States. Here, it will be necessary to analyze the case law from the CJEU. In the author's view, although extensive research has been carried out in the field of expulsion in international law, not enough has been done in relation to collective expulsion and pushbacks of migrants at borders. This thesis aims at specifying legal issues and questions relating to collective expulsions in the context of pushbacks at borders. The topic will be analyzed in light of two main research questions:

> *1) What is the scope and content of the prohibition of collective expulsion? In particular, which procedural guarantees can be deduced from the prohibition?*
>
> *2) What is the required level of individual examination under the prohibition?*

The reason for examining the research questions in the aforementioned order is that, in order to understand what level of individual examination will be required prior to expulsion, it is first important to grasp which procedural guarantees underlie the prohibition. In order to answer the first question, the author will look into the basic principles which the Court has applied in its

[18] These are, in particular, Article 3 and Article 13 of the ECHR.

previous case law concerning Article 4 of Protocol No. 4 and further examine Article 19 (1) of the EU Charter. In connection to the scope and content of the prohibition, the main focus will be the definition as well as the territorial applicability and jurisdiction of the prohibition of collective expulsion. In order to clarify which procedural guarantees can be deduced from the prohibition of collective expulsion, the author will look into relevant case law from both the ECtHR and the CJEU. Finally, in assessing the second research question, the author will aim at making some concluding remarks over the previous findings in order to clarify the level of individual examination which is required under the prohibition.

This thesis is divided into five main chapters. After the introduction, in Chapter 2, the author will outline the main issues with pushbacks and clarify the current legal framework for the protection of migrants against arbitrary expulsion. The applicability of the ECHR to expulsion cases will be discussed, whereafter an overview of the role of the EU will be provided, including relevant EU law for the protection against arbitrary expulsion. Here, it will be necessary to clarify the relationship between the ECHR and EU law. The focus of the third chapter will be the scope and content of the prohibition of collective expulsion, both under the ECHR and the EU Charter. In Chapter 4, the author will first seek to clarify the procedural guarantees which the Court has developed in its case law concerning Article 4 of Protocol 4 ECHR and the extent as to which these should be assured by the state. Further, a reflection over relevant procedural guarantees in EU law will be provided, which are of relevance in protecting migrants against collective expulsions. A particular focus will be the right to be heard, which forms a general principle of the EU legal order. In light of the aforementioned, the author will conclude Chapter 4 by way of examining the level of individual examination required prior to expulsion. In Chapter 5, the author will reflect on future prospects as regards the subject matter and finally, in Chapter 6, a summary will be provided of the main findings of this thesis.

1.3. Method, sources and limitations

This research will be based on a legal doctrinal method, in which applicable law is interpreted with respect to the legal problem. The aim is to answer the research questions by way of examining the sources of international law, as set forth by Article 38 (1) of the Statute of the International Court of Justice.[19] These are:

[19] United Nations, Statute of the International Court of Justice, 24 October 1945, 33 UNTS 993.

a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
b) international custom, as evidence of a general practice accepted as law;
c) the general principles of law recognized by civilized nations;
d) judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law

The author refers to "the European framework for protection" as indicating the protection provided by both the ECHR and EU law. The ECHR and its protocols as well as the EU Charter will be used as primary sources throughout the thesis. The author has decided to focus particularly on these two sources, since both provide for an explicit prohibition of collective expulsion and can be used as powerful tools to prevent pushbacks and collective expulsions at borders. In addition to the aforementioned instruments, other relevant international conventions and EU secondary law sources will be discussed, which are of relevance in discussing the subject matter.[20] Lately, the ECtHR has been particularly active in interpreting and developing the scope and content of the prohibition of collective expulsion and the amount of cases relating to collective expulsions have increased significantly over the recent years.[21] Thus, analysis will largely be based on the case law of the ECtHR. In addition to this, relevant case law from the CJEU will be added, providing necessary interpretation for sources and general principles of EU law.

Soft law instruments will be used throughout the thesis, which provide valuable analysis into the discussion of collective expulsions. International organizations and NGO:s have had a particularly active role as third party interveners in judgments concerning collective expulsions and consequently, these will be reflected in the thesis. The judges of the ECtHR have provided some important reflections in concurring and dissenting opinions, which will additionally be included in the discussions. Finally, relevant legal literature and statements made by appropriate international organizations and NGO:s will be included, in order to support the findings. While legally non-binding, these are nevertheless crucial in order to understand the

[20] Considering EU secondary law, a particular focus will be the Directive 2008/115/EC of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (Returns Directive).
[21] Only this year, the Court has ruled upon a violation of Art. 4 of Prot. 4 ECHR already twice, with several cases still pending before the Court. See, Council of Europe: Fact Sheet - Collective expulsion of aliens (July 2020), available at: https://www.echr.coe.int/Documents/FS_Collective_expulsions_ENG.pdf [accessed 8.1.2021].

legal issues of collective expulsions and the general interpretation of the prohibition of collective expulsion.

The term "pushback" will be used throughout the thesis as referring broadly to the informal expulsion (without due process) of an individual or group to another country.[22] While lacking a legal definition, the term "pushback" is very descriptive to the core problem at hand, which is why the author has decided to use this term. The term has also been largely used by UN High Commissioner for Refugees (UNHCR) and the Council of Europe in order to explain the phenomenon of informal expulsions (without due process) at borders. The primary focus of this thesis will be collective expulsions occurring at the borders of European states, *i.e.,* in pushback-situations. However, other cases will also be discussed, where the arbitrary expulsion of migrants have been of a collective nature, since these provide necessary interpretation to the prohibition of collective expulsion.

[22] See, among others, Border Violence Monitoring Network, Pusbbacks and Police Violence - Legal Framework, available at: https://www.borderviolence.eu/legal-framework/ [accessed 14.12.2020].

2. Pushbacks of migrants: The protection against arbitrary expulsion

2.1. The issue with pushbacks at borders and the principle of *non-refoulement*

Practices of pushbacks are an increasing phenomenon at European borders.[23] In several states, reports have been submitted of migrants being immediately returned at borders and denied access to asylum. Through pushback activities, a range of human rights are being violated, such as the access to information, due process and legal assistance.[24] As Tineke Strik formulates it, "pushback activities can be regarded as an ultimate instrument of deterrence policies, which, unlike other deterrent measures, doesn't even pretend to comply with international law".[25] Reported pushbacks have concerned actions both towards migrants who find themselves already on the territory and towards migrants who are present near or at the border, attempting to cross it.[26]

While European states have been dealing with an increased migratory pressure on their external borders, several international organizations have announced their concern regarding pushbacks and collective expulsions of migrants.[27] These concerns have largely related to practices conducted by the national authorities of EU Member States. Reports by the EU Fundamental Rights Agency (FRA) have revealed how an increased number of states have returned migrants without a possibility of accessing the asylum procedure.[28] FRA has witnessed a growing intolerance in EU Member States towards migrants.[29] Several states, such as Italy, Greece and Spain, have cooperated and concluded specific bilateral agreements with third countries in order to better control the migratory flows and facilitate repatriation. This has not been without problems. A large number of pushbacks have, for instance, been witnessed at the Greek-Turkish border, being one of the most popular routes for accessing the territory of the EU. The controversial EU-Turkey deal, which was launched in 2016, paved the way for migrants to be returned from Greek islands to Turkey. This led to an increase of pushbacks,[30] linked with

[23] Parliamentary Assembly of the Council of Europe, Pushback policies and practice in the Council of Europe member States, Resolution 2299, 2019.
[24] Strik, 2020, pp. 234-258, 251.
[25] *Ibid.*, pp. 234-258, 251.
[26] Parliamentary Assembly, Pushback policies and practice in the Council of Europe member States, Resolution 2299 (2019), § 7.
[27] For instance, in June 2020, the International Organization for Migration (IOM) expressed its deep concern in a press release about persistent reports of pushbacks and collective expulsions of migrants, in some cases violent, at the European Union (EU) border between Greece and Turkey. Available at: https://www.iom.int/news/iom-alarmed-over-reports-pushbacks-greece-eu-border-turkey [accessed 3.11.2020].
[28] See, *e.g.,* FRA, Periodic data collection on the migration situation in the EU: March Highlights, 2018.
[29] *Ibid.*
[30] See, e.g., Drakopoulou, Konstantinou, Koros, 2020, p. 181.

grave fundamental rights violations.[31] Recently, the UN Special Rapporteur on the human rights of migrants González Morales expressed his concern over the violent pushbacks at the Greek-Turkish border and reiterated that the right to an individual assessment is a cornerstone of human rights and cannot be put on hold.[32] Similarly, the UNHCR has continuously expressed its concern over the situation at the Greek border. According to the UNHCR, the allegations that several groups of people may have been summarily returned have increased since the beginning of 2020.[33]

The practice of pushbacks has become all the more widespread and, in some countries, it has even been witnessed as having a structural and systematic character, being a part of broader national policies of migration regulation.[34] The structural character indicates that these pushbacks are not merely random conducts based on incidental actions, but stem from the higher decision makers of national authorities. An increasing number of states have had to explain themselves before the ECtHR because of pushbacks and reported summary returns of migrants and asylum seekers at the borders of their territory. What is deeply concerning, is that migrants are not only facing refusal to enter the territory of the state at the border, but evidence shows that states and their agencies are using violence and depriving migrants of food and basic services.[35] The practice of pushbacks is closely linked to the phenomenon called "pullback". Instead of informal expulsions or pushbacks of migrants, pullbacks aim at retaining migrants on one side through agreements between states.[36] In 2017, Italy and Libya concluded a new Memorandum of Understanding on Cooperation on Development, Combatting Illegal Immigration, Human Trafficking and Smuggling, and on Strengthening border Security.[37] Under this agreement, Italy is providing support for the Libyan Coast Guard which intercepts migrant boats trying to reach Italy from Libya, and returns the migrants to Libya.[38]

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[31] Drakopoulou, Konstantinou, Koros, 2020, p. 175.
[32] UN News, *UN expert raises alarm over migrant, asylum seeker 'pushbacks' at Turkey-Greece border,* 23.3.2020, available at: https://news.un.org/en/story/2020/03/10599982 [accessed 6.10.2020].
[33] UNHCR, *UNHCR calls on Greece to investigate pushbacks at sea and land borders with Turkey,* 12.6.2020, available at: https://www.unhcr.org/news/briefing/2020/6/5ee33a6f4/unhcr-calls-greece-investigate-pushbacks-sea-land-borders-turkey.html [accessed 6.10.2020].
[34] Strik, 2020, pp. 234-258, 234.
[35] Strik, 2019, p.6.
[36] Strik, 2020, pp. 234-258, 235.
[37] Memorandum of Understanding on Cooperation on Development, *Combatting Illegal Immigration, Human Trafficking and Smuggling, and on Strengthening Border Security* (Torino: ASGI, 2 February 2017), unofficial translation available at http://www.asgi.it/wp-content/uploads/2017/02/ITALY-LIBYA-MEMORANDUM-02.02.2017.pdf
[38] Pijnenburg, 2018, pp. 396-426, 397.

One of the highest risks attached to pushbacks is the violation of the right to seek asylum and the non-refoulement principle.[39] The obligation not to expel or return (*'refouler'*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened is a principle set out in Article 33 of the 1951 Convention Relating to the Status of Refugees (the 1951 Convention).[40] The principle of non-refoulement is one of the most fundamental principles protecting refugees and is often described as the cornerstone of international refugee law. The French term *refouler* covers everything from removal, transfer and rejection to expulsion and refusal of admission of a person.[41] As a matter of international law, "refoulement is not justifiable no matter how debilitating a sudden influx of refugees might be on a State's resources, economy or political situation".[42] Notably, "from the perspective of the people applying for protection, the content given to non-refoulement can be a question of life and death".[43] Today, the principle of non-refoulement is increasingly recognized as part of customary international law, thus having a binding effect on all states, irrespective of having ratified the relevant conventions.[44]

Unlike other provisions provided in the 1951 Convention, the application of the principle of non-refoulement is not dependent on the lawful residence of a refugee in the territory of a Contracting State. However, an important limitation to Article 33(1) is that it applies only to so-called "statutory refugees", *i.e*., those who qualify as refugees according to the definition provided in Article 1 of the convention, as modified by the 1967 Protocol relating to the Status of Refugees (the 1967 Protocol). According to Article 1 of the 1951 Convention, the term 'refugee' can apply to "someone who is unable or unwilling to return to their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political group".[45] However, the protection from refoulement does not depend on the formal recognition of a refugee. Instead, they are treated on the assumption that they may be refugees and therefore must be effectively protected.[46]

[39] Strik, 2020, pp. 234-258, 234.
[40] According to Article 33 (1) of the 1951 Convention "no Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.".
[41] Alland and Teitgen-Colly, Traité du droit d'asile, Paris, 2002, p. 229
[42] Goodwin-Gill & McAdam, 2007, p. 333.
[43] Pirjola, 2007, pp. 639-660, 656.
[44] Goodwin-Gill & McAdam, 2007, p. 354.
[45] UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, available at: https://www.refworld.org/docid/3be01b964.html [accessed 3 September 2020]
[46] UN doc. A/AC.96/815 1993, paragraph 11.

As already noted above, the principle of non-refoulement provided in the 1951 Convention is not absolute and has some important limitations. The 1951 Convention recognizes certain cases in which an exception to the principle of non-refoulement can legitimately be made. Article 33(2) of the 1951 Convention provides that:

> The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.[47]

Such an exception is not included in other instruments, that is either universal or regional human rights conventions. According to the UNHCR, considering that a refugee might be returned to a country where he is in danger of persecution, the exception provided for in Article 33(2) should be applied with the greatest caution.[48] Before reaching a decision on expulsion or return on the basis of safeguarding the national security and protecting the population, the circumstances of the case should be taken fully into account.[49]

The principle of *non-refoulement* can also be found in Article 7 of the International Covenant on Civil and Political Rights (ICCPR) as well as Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). Similarly to the ECHR, which will be discussed below, the ICCPR and the CAT goes beyond the scope of Article 33 of the 1951 Refugee Convention. Article 3 of the CAT provides that "no State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture".[50] Unlike the 1951 Convention, this is a non-derogable provision and permits no exceptions to the principle of non-refoulement.[51] Article 7 of the ICCPR provides that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation".[52] The scope of

[47] UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, Article 33(2).
[48] UNHCR, *Note on Non-refoulement (Submitted by the High Commissioner),* EC/SCP/2, 23 August 1977.
[49] *Ibid*.
[50] UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, available at: https://www.refworld.org/docid/3ae6b3a94.html [accessed 9 September 2020]
[51] Goodwin-Gill & McAdam, 2007, p. 301.
[52] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, available at: https://www.refworld.org/docid/3ae6b3aa0.html [accessed 9 September 2020]

Article 7 of the ICCPR is wider than Article 3 of the CAT since it extends to cruel, inhuman or degrading treatment or punishment as well.

2.2. Protection against expulsion and the European Convention on Human Rights

2.2.1. The application of the Convention to expulsion cases

Expulsion and extradition cases are among the most important and most frequent cases of the ECtHR.[53] Through its extensive case law, the ECtHR has elaborated the conditions and limitations for the expulsion of aliens, ultimately enhancing the protection of migrants against State's border practices.[54] As the Court has reiterated on many occasions, states have the right, as a matter of well-established international law, to control the entry, residence and expulsion of aliens.[55] However, this cannot be done in a manner that would violate the core articles of the ECHR. Thus, the task of the Court is not to examine the actual asylum application or verify how States honor their obligations under the 1951 Convention, but rather to ensure that effective guarantees exist that protect the applicant against arbitrary *refoulement*.[56]

While the ECHR does not contain an explicit right to asylum, any asylum seeker under the jurisdiction of a Contracting State is entitled to the rights provided by the ECHR. In reality, the applicability of ECHR extends much further than the protection provided by the 1951 Convention. Since the ECHR is a human rights convention, it applies to "everyone," not merely those who qualify as a refugee according to the definition provided in the 1951 Convention.[57]

Article 3 of the ECHR provides that "no one shall be subjected to torture or to inhuman or degrading treatment or punishment". While the principle of *non-refoulement* is not explicitly mentioned in the ECHR, it is seen as inherent to Article 3. In *Soering v. the United Kingdom* (1989) the Court held for the first time that Article 3 would prohibit expulsion if there was a real risk that the person concerned would be subject to ill-treatment in the country of

[53] Rietiker, 2016, p. 652.
[54] Gatta, Francesco Luigi, *The Problematic Management of Migratory Flows in Europe and its Impact on Human Rights: the Prohibition of Collective Expulsion of Aliens in the Case-law of the European Court of Human Rights,* in Migration Issues before International Courts and Tribunals, Bruno, Palombino, Di Stefano (eds.), 2019, pp. 119-146, 2019.
[55] See, for example, *Hirsi Jamaa and Others v. Italy* [GC], (27765/09), 23.2.2012, § 113 and *F.G. v. Sweden* [GC], (43611/11), 23.3.2016, § 111.
[56] *F.G. v. Sweden* [GC], (43611/11), 23.3.2016, § 117.
[57] According to Article 1(1) of the 1951 Convention, a refugee is defined as someone who is unable or unwilling to return to their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion.

destination.[58] The case concerned the potential extradition of a Mr. Jens Soering, a German national, to the USA by the UK to face trial in Virginia on murder charge. If convicted of murder in Virginia, Soering could have faced death sentence and death row in Virginia. Soering applied to the ECtHR alleging a breach of Article 3 of the ECHR, among others. The Court found a violation of Article 3 which confirmed the absolute nature of the provision. Additionally, it confirmed that actions of Article 3 can impose liability on a Contracting State for acts which occur outside its jurisdiction.

According to the well-established case law of the Court, ill-treatment must reach a minimum level of severity in order to engage responsibility of the expelling state.[59] The prohibition under Article 3 is absolute in nature, meaning that no interests can serve as ground for limiting or derogating from this right.[60] While Article 33 (2) of the 1951 Convention states that a refugee might lose its protection if there are reasonable grounds for regarding him as a danger to the security of the country,[61] no such limitation is thus accorded by Article 3. As the Court has held, Article 3 is absolute, preventing removal no matter how 'undesirable and dangerous' the individual's conduct.[62] Further, neither the absence of an explicit request for asylum nor the lack of substantiation of the asylum application with sufficient evidence may absolve the State concerned of the non-refoulement obligation.[63]As regards States' border controls, it has been recognized that "non-refoulement applies to the moment at which asylum seekers present themselves for entry either within a State or at its border".[64]

It is not uncommon that migrants are returned to so-called "safe third countries", that is, a state other than the one where the individual claims to be at risk of prohibited treatment.[65] This has been a common practice by European states, especially regarding the co-operation between Member States of the EU. The Court has considered in *T.I. v. the United Kingdom* that returning an asylum seeker to a third country could raise an issue of state responsibility if there was a

[58] *Soering v. the United Kingdom*, (14038/88), 7.7.1989.
[59] Spijkerboer, 2009, p. 58.
[60] Hemme, 2009, p. 584; Under Article 15 of the ECHR, states can derogate from various provisions of the ECHR, but no derogation are possible from Articles 2 (right to life) and 3 (prohibition of torture, inhuman or degrading treatment or punishment). The protection from refoulement is therefore absolute.
[61] The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, September 2011, § 33 (2).
[62] *Chahal v. The United Kingdom*, (70/1995/576/662), 15.11.1996, § 80.
[63] Concurring Opinion by Judge Pinto De Albuquerque in *Hirsi Jamaa and Others v. Italy,* 23.2.2012, (27765/09), p. 66.
[64] Goodwin-Gill & McAdam, 2007, p. 208.
[65] Mole, 2007, p. 45.

real risk that the applicant could be sent on to a third country where he faced treatment contrary to Article 3.[66] The risk here is the process of indirect or *chain* refoulement, where the asylum seeker is being expelled from one country to another only to be returned back to his or her country of origin without having had the possibility for an individual examination of his/her claim.[67]

The ECHR thus prohibits expulsion to states which do not have necessary guarantees to protect individuals from onward expulsion.[68] In *Ilias and Ahmed v. Hungary*, the Grand Chamber specified the different procedural obligations that States encounter when deciding to expel asylum seekers. In cases of return to the country of origin (*direct* refoulement) the obligation of the expelling authorities is to examine whether the asylum claim is well founded and thus, it deals with the alleged risks in the country of origin.[69] Meanwhile, in the situation where a Contracting State seeks to remove the asylum seeker to a third country (*indirect* refoulement) the main issue is whether or not the individual will have access to an adequate asylum procedure in the receiving third country.[70] The most important task for the Contracting State is thus to assure that the individual will have access to an asylum procedure. In cases where the "safe third country" is not a Contracting Party to the ECHR, the proper assessment so as to avoid chain refoulement is even more important.[71] In the UNHCR's view, "a reliable assessment of the risk of 'chain refoulement' must be undertaken in each individual case, prior to removal to a third country, including pursuant to a readmission agreement".[72] Chain refoulement continues to be a serious issue when it comes to the practice of pushbacks of migrants at European borders and is particularly relevant in discussing the issue of collective expulsions, as it is only through examining each individual case that the authorities can assure the absence of the risk of chain refoulement.[73] The UNHCR has further considered that the denial of access to asylum procedures at airports, refoulement from 'safe third countries' and

[66] *T.I. v. the United Kingdom,* (43844/98), 7.3.2000.
[67] Compare with *direct* refoulement, where an individual is being directly expelled to a country where he/she can be subjected to the risk of torture or inhuman treatment.
[68] Mole, 2000, p. 30.
[69] *Ilias and Ahmed v. Hungary*, (47287/15), 21.11.2019, §§ 130-131
[70] *Ibid*.
[71] See *Hirsi Jamaa and Others v. Italy*, (27765/09), 23.2.2012, § 147.
[72] UNHCR, Written Submission by the Office of the United Nations High Commissioner for Refugees in the Case of Sharifi and others v Italy and Greece (Application No. 16643/09).
[73] See, section 2.2.4 and Chapter 3.

the extradition of foreigners without examining any asylum claims, all represent examples of violations of the principle of non-refoulement.[74]

While expulsion of asylum seekers raises most frequently an issue under Article 3, it is not in any way the only provision relevant to asylum questions under the ECHR.[75] Article 2, *inter alia,* might come into question in expulsion cases if a violation of the right to life is risked in the country of destination.[76] However, removal cases concerning Article 2 typically raise issues also under Article 3, and thus, the Court frequently assesses cases both in light of Article 2 and 3.[77] Article 3 has, additionally, served as the primary tool for elaborating and developing the Courts case law concerning the protection of migrants against expulsion.[78] This is the main reason why the author has decided to include a more in depth discussion on this provision in the thesis. In addition to the "core" articles of ECHR, relevant provisions for the protection of arbitrary expulsion can also be found in Article 1 of Protocol No. 7, which provides minimum procedural rights for aliens lawfully within a Contracting State, who are confronted with expulsion. An important remark, however, is that not all Contracting Parties to the ECHR are parties to Protocol No. 7. Another important limitation for the applicability of the provision is that the presence of the person in the territory must be considered "lawful".

While the expulsion of an individual can be permitted in certain situations, when it is in compliance with certain substantive and procedural requirements and where there is no risk that the person will face treatment incompatible with the principle of non-refoulement, to the contrary, the collective expulsion of a group of individuals is always prohibited.[79] This has been confirmed in the United Nations Memorandum on Expulsion of Aliens which provides that:

[74] Goodwin-Gill & McAdam, 2007, p. 222.
[75] See den Heijer, pp. 277-314. Expulsion cases have raised issues under, *inter alia*, the right to life (Article 2), the right to a fair trial (Article 6), the right to respect for private and family life (Article 8) and the right to an effective remedy (Article 13).
[76] See, for example, *Bader and Bader v. Sweden*, (13284/04), 8.11.2005.
[77] The European Court of Human Rights: Guide on the case-law of the European Convention on Human Rights, Immigration, p. 16.
[78] Gatta, Francesco Luigi, *The Problematic Management of Migratory Flows in Europe and its Impact on Human Rights: The Prohibition of Collective Expulsion of Aliens in the Case-law of the European Court of Human Rights,* in Migration Issues before International Courts and Tribunals, Bruno, Palombino, Di Stefano (eds.), 2019, pp. 119-146, p. 124.
[79] Gatta, Francesco Luigi, Migration and the Rule of (Human Rights) Law: Two 'Crises' Looking in the Same Mirror', 15 CYELP 99, 2019, p. 122.

> A State has a broad discretionary right to expel aliens from its territory [...]. In contrast, the collective expulsion of a group of aliens as such (even a small group) is contrary to the very notion of the human rights of individuals and is therefore prohibited. The collective expulsion of a group of aliens does not take into account the consequences of the presence, the grounds and other factors affecting the expulsion, the procedural requirements for the expulsion or the rules relating to the implementation of the expulsion decision with respect to a single one of these aliens. The decision concerning expulsion is made with respect to the group of aliens as a whole.[80]

Article 4 of Protocol No. 4 to the ECHR, which is the main focus of this thesis, explicitly prohibits the collective expulsions of aliens. As the article suggests, the prohibition does not apply to expulsion strictly limited to individuals. Rather, its core purpose is to prevent states from being able to remove a certain number of aliens, as a group, without examining their personal circumstances and without enabling them to put forward their arguments against the expulsion measures.[81] The prohibition of collective expulsion forms an important safeguard, protecting individuals, as a group, from arbitrary expulsion. The prohibition of collective expulsion will be examined in depth in the next chapters of this thesis.

2.2.3. Extraterritorial scope of the convention

A frequently debated question is whether and when a state can be held responsible for an extraterritorial state act, *i.e.,* conduct performed outside the sovereign borders of the state. There is no general consensus as regards this question on the international level and some states, such as the US, are frequently contesting the idea of the extraterritorial applicability of human rights treaties. Notably, however, the ECHR is often said to be one of the strongest human rights instruments in its ability to effectively secure compliance and this is widely due to the extraterritorial applicability of the convention.[82] Article 1 of the ECHR provides that "the High Contracting Parties shall secure to everyone *within their jurisdiction* the rights and freedoms defined in Section I of this Convention". However, this provision does not limit the jurisdiction to the territory of the state, as is the case, for instance, with the ICCPR.[83] While the notion of jurisdiction in Article 1 of the ECHR should primarily be considered as territorial, in some exceptional cases the state's conduct performed outside the national territory can

[80] International Law Commission, Fifty-eighth session, Geneva, 2006, "Expulsion of aliens", Memorandum by the Secretariat, UN Doc. Doc. A/CN.4/565 (2006) 2.
[81] see *Hirsi Jamaa and Others*, (27765/09), 23.2.2012, § 177, and *Sharifi and Others v. Italy and Greece*, (16643/09), 21.10.2014, § 210
[82] Milanovic, 2011, p. 4.
[83] Article 2(1) ICCPR provides that "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals *within its territory and subject to its jurisdiction* the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status" (emphasis added)

constitute an exercise of jurisdiction.[84] The extraterritorial scope is particularly relevant in the field of migration and border management.[85] For instance, the principle of non-refoulement will apply to the conduct of state officials or those acting on behalf of the state *wherever this occurs*, whether occurring beyond the national territory of the state, at border posts or other points of entry.[86]

Extraterritorial application implies that, at the moment of the alleged violation of a person's human right/s, the individual concerned is not physically located in the territory of the state party in question.[87] In the context of immigration and border controls, as long as the border control is performed on behalf of the Contracting Party, it is immaterial whether it takes place on the land or maritime territory of a state, its diplomatic missions, warships or even another state.[88] The Court established for the first time in *Hirsi Jamaa and Others v. Italy* (hereinafter *Hirsi v. Italy*), that the prohibition of collective expulsion is also extraterritorially applicable as long as the individuals forming the group are under the exclusive *de jure* or *de facto* control of the Contracting Party.[89] This clarification is particularly important considering protection provided by the ECHR in pushbacks-situations occurring outside the territorial borders and on the high seas. This will be further discussed in section 3.1.3.

2.3 The role of the European Union

2.3.1 Pushbacks in the context of the European Union

As mentioned above, pushbacks have taken place in particular at the borders of EU Member States. This has partly been the consequence of the several weaknesses in the Dublin system,[90] failing at sharing properly the responsibility between EU Member States.[91] The Dublin system (and thus, the Dublin regulation) determines the Member State responsible for examining the asylum application made in the EU.[92] It allows in certain situations and under certain

[84] Gatta, Francesco Luigi, *The Problematic Management of Migratory Flows in Europe and its Impact on Human Rights: The Prohibition of Collective Expulsion of Aliens in the Case-law of the European Court of Human Rights,* in Migration Issues before International Courts and Tribunals, Bruno, Palombino, Di Stefano (eds.), 2019, pp. 119-146, p. 126.
[85] *Ibid*., pp. 119-146, 126-127.
[86] Cambridge University Press, *The Scope and Content of the Principle of Non-Refoulement: Opinion*, June 2003, § 67, available at: https://www.refworld.org/docid/470a33af0.html [accessed 1.12.2020].
[87] Milanovic, 2011, p. 8.
[88] Lauterpacht & Bethlehem, 2003, s. 111.
[89] *Hirsi Jamaa and Others v. Italy* [GC], 23.2.2012, (27765/09), § 77.
[90] The Dublin system aims to determine which European Union Member State is responsible for examining an asylum application lodged in one of the Member States by a third-country national.
[91] Strik, 2020, pp. 234-258, 234.
[92] This is, generally, the State where the asylum seeker first entered in the EU.

requirements a Member State to request another Member State to "take care" of the asylum application, if that particular state has the primary responsibility over this (so called 'Dublin transfers').[93]

One of the biggest challenges, as a consequence of the Dublin system, has concerned the relocation of migrants. This has led to an increasing pressure on Europe's bordering countries. Notably, pushbacks and collective expulsions of migrants have been the unacceptable result of an unfair responsibility-sharing between EU Member States. Since the EU is undoubtedly the institution having the most influence on how policies are framed at its Member States' borders, it carries in many ways a particular responsibility in this matter. What is alarming, however, is the widespread silence on the EU level on the issues of pushbacks and collective expulsions of migrants.[94] Despite several attempts, human rights advocates have said to have struggled to bring attention to the issue within the EU.[95] Similarly, the CJEU has proven to be rather lacking in the protection of migrants at the borders and outside Europe, even when the treatment of migrants is prompted by the flaws of the EU's migration policy.[96]

The Council of Europe has undoubtedly taken a much more active role in reiterating the basic human rights obligations which states are bound to respect at their borders. The challenges faced by EU Member States as a consequence of the weaknesses in the Dublin system have also been enshrined in the case law of the ECtHR. In its judgments, the ECtHR has reiterated that states have the right to establish their own immigration policies in accordance with their obligations stemming from membership of the EU.[97] However, in *Sharifi and others v. Italy and Greece* the Court found a violation of Article 4 of Protocol No. 4 and held that the Dublin system must be applied in a manner compatible with the Convention. According to the Court, no form of collective and indiscriminate returns can be justified by reference to the Dublin

[93] By making use of the "sovereignty clause" enshrined in Article 3.2 of that Regulation, Member States are however allowed to examine an asylum application even if such application is not its responsibility under the other criteria laid down in that Regulation.
[94] See, for example, Strik, 2020, p. 251 where Strik points out the silence on the EU level as regards pushbacks conducted by Spanish authorities to Morocco.
[95] See, among others, The New Humanitarian, An open secret: Refugee pushbacks across the Turkey-Greece border, 8.10.2018, available at: https://www.thenewhumanitarian.org/special-report/2018/10/08/refugee-pushbacks-across-turkey-greece-border-Evros [accessed 1.12.2020].
[96] Gatta, Francesco Luigi, 'Migration and the Rule of (Human Rights) Law: Two 'Crises' Looking in the Same Mirror', 15 CYELP 99, 2019, p. 132.
[97] *Georgia v. Russia (I)* [GC], (13255/07), 3.7.2014, § 177; *Sharifi and Others v. Italy and Greece,* (16643/09), 21.10.2014, § 224; *Khlaifia and Others v. Italy* [GC], (16483/12), 15.1.2016, § 241.

system or to migratory pressure.[98] The Court's judgment from 2011 in *M.S.S. v. Belgium* is significant in this regard, since it explicitly interpreted the compatibility of the Dublin Regulation with the ECHR regarding transfers to Greece under the Dublin system. In this case, the Court held that Belgium had violated Article 3 by transferring the applicant, under the Dublin regulation, back to Greece and exposing him to risks linked to the deficiencies in the asylum procedure in that State.[99] The Court established that EU Member States should not "systematically" apply this regulation without seeking to examine the situation in the country where the applicant will be transferred.[100]

Finally, the role of the European Border and Coast Guard Agency (Frontex) in border management is crucial when discussing the issue of collective expulsions in the context of pushbacks at borders.[101] The main task of Frontex is to promote, coordinate and develop European border management in line with, *inter alia*, the EU Charter.[102] However, in some cases, Frontex has been criticized as facilitating pushbacks or refraining from interventions in pushbacks by EU Member States.[103] The Council of Europe has on several occasions expressed its concern about the absence of adequate guarantees for the respect of fundamental rights in the framework of joint coordination by Frontex.[104]

2.3.2 The relationship between the EU and the ECHR and relevant EU law for the protection against arbitrary expulsion

Both the ECHR and the EU provides binding rules in relation to migration law, which apply in Europe. Therefore, the relationship between these two legal frameworks needs to be further addressed. Arguably, the biggest difference between the ECHR and the EU is that, while the ECHR is a treaty binding on the Contracting States, EU has its own legal order which prevails

[98] *Sharifi and Others v. Italy and Greece,* (16643/09), 21.10.2014, § 225.
[99] *M.S.S. v. Belgium and Greece* [GC], (30696/09), 21.1.2011.
[100] The CJEU issued a similar judgment later the same year in *N. S. and Others*, C-411/10 and C-493/10, 21.1.2011, EU:C:2011:865.
[101] While the author has decided not to examine the role of the Frontex more in depth in this thesis, it could provide a sufficient basis for future research.
[102] Frontex, Origin & tasks, available at: https://frontex.europa.eu/about-frontex/origin-tasks/ [accessed 27.11.2020].
[103] Strik, 2020, pp. 234-258, 240.; Recently, Ylva Johansson, the European Commissioner for Home Affairs has called on Frontex to clarify accusations of involvement in pushback activities. See in this regard, Liboreiro, Jorge, EU migration chief urges Frontex to clarify pushback allegations, 22.1.2021, Euronews, available at: https://www.euronews.com/2021/01/20/eu-migration-chief-urges-frontex-to-clarify-pushback-allegations [accessed 29.1.2021].
[104] Parliamentary Assembly of the Council of Europe, Resolution 1821 (2011), included in the judgment of *Hirsi Jamaa and Others v. Italy* [GC], (27765/09), 23.2.2012.

national legislation.[105] Another significant difference is that, from the perspective of the individual, the ECtHR has the advantage of being able to address individual cases as long as the local remedies have been exhausted, while the CJEU cannot address an individual case but rather, national courts may ask for preliminary rulings of the court.[106] Thus, the judicial review in EU law is largely a matter for the national courts and judges, while the CJEU plays an important supervisory role in this regard.[107] Finally, it is worth mentioning that, unlike the ECtHR, the CJEU is not *per se* a human rights court and this has even been reiterated by the former president of the CJEU Vassolios Skouris, who held that "the Court of Justice is not a human rights court: it is the Supreme Court of the European Union".[108]

The legal link between the ECHR and the EU can be found in the Treaty of the European Union (TEU). According to Article 6 (3) of TEU, fundamental rights provided in the ECHR constitute general principles of EU law.[109] The EU Charter, which provides for the most important fundamental rights, was adopted in 2000 and became legally binding after the entry into force of the Treaty of Lisbon, in December 2009.[110] According to Article 6 (1) of the TEU, the Union recognizes the rights, freedoms and principles set out in the Charter, which shall have the same legal value as the Treaties. The relationship between the EU Charter and the ECHR is settled in Article 52 (3) of the Charter where it is stipulated that "in so far as this Charter contains rights which correspond to rights guaranteed by the [ECHR], the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.".[111] As the Article sets forth, the ECHR provides for minimum standards which should be guaranteed by all EU Member States. The purpose is to guarantee that the protection under the EU Charter "is no less than the protection granted by the ECHR".[112] In light of this, CJEU refers frequently to the rights enshrined in the ECHR and takes into account the case law of the ECtHR.[113] Ultimately,

[105] Boeles et al., 2014, p. 24; Today, all 28 EU Member States are Contracting Parties to the ECHR.
[106] *Ibid*., p. 24.
[107] *Ibid*., pp. 411-412.
[108] Besselink, Leonard, The ECJ as the European "Supreme Court": Setting Aside Citizens' Rights for EU Law Supremacy, *Verfassungsblog,* 2014.
[109] According to Article 6 (3) of the TEU "Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law".
[110] The Treaty of Lisbon amended both the TEU and the TFEU.
[111] European Union: Council of the European Union, *Charter of Fundamental Rights of the European Union (2007/C 303/01)*, 14 December 2007, C 303/1, § 52 (3).
[112] Advocate General Trstenjak's Opinion in Joined Cases C-411/10 and C-493/10 N.S. and M.E, 2011, § 145.
[113] Lenart, 2012, pp. 4-19, 7.

migrants may pursue two avenues in relation to invoking fundamental rights in an individual case before national authorities; either the Charter, the ECHR or both.[114]

Today, the fundamental rights framework of the EU places an increasing focus on human rights perspectives and in many ways, EU law extends further than the ECHR in protecting migrants from arbitrary expulsion. The EU Charter contains an explicit prohibition of collective expulsions in its Article 19 (1). In addition, Article 19 (2) enshrines the principle of non-refoulement,[115] while Article 18 contains, as the sole provision at the European level, an explicit right to asylum.[116] Notably, however, the provisions set forth in the EU Charter are only applicable to the Member States when implementing Union law.[117] In other words, there has to be a provision or a principle of EU primary or secondary law which becomes relevant to the case. If the case falls outside EU law, the EU Charter will consequently not apply.[118] However, since most cases relating to migration, asylum and border management relate directly to existing EU law, national asylum law will commonly be regarded as implementing EU law.[119]

Considering EU secondary legislation, the Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (*Returns Directive*) is the most immediately engaged by the EU Charter when discussing collective expulsions in the context of pushbacks.[120] The Returns Directive provides conditions for the return of illegally staying third country nationals, which must be applied in full compliance with the EU Charter.[121] The Directive applies to third-country nationals both present in the territory and those who have

[114] Boeles, den Heijer, Lodder, Wouters (Boeles et al.), 2014, p. 44.
[115] According to Article 19 (2) of the EU Charter of Fundamental Rights "No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment." ; Article 78 of the Treaty on the Functioning of the European Union (TFEU) stipulates similarly that the EU must provide a policy for asylum, subsidiary protection and temporary protection, "ensuring compliance with the principle of non-refoulement".
[116] In this regard, see Articles 78 and 79 of TFEU providing the legal basis of EU competences on immigration policy, setting the legal basis for developing a common policy on asylum and giving the EU the competence to harmonise asylum law.
[117] Article 51 (1) of the EU Charter of Fundamental Rights.
[118] Rosas, 2012, pp. 1269–1288, 1277.
[119] ECRE, The application of the EU Charter of Fundamental Rights to asylum procedural law, 2014, p. 19.
[120] Guild, 2014, pp. 543–562, 549, 551.
[121] *Ibid*., pp. 543–562, 549; European Parliament and Council, Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals, 16 December 2008 (*Returns Directive*).

been refused entry at the border.[122] However, as the title suggests, the Directive does not apply to *e.g.* asylum-seekers, who cannot be considered illegally-staying. Illegal stay, as indicated in the Returns Directive, means the presence of a third-country national who does not fulfil or no longer fulfills the conditions of entry into the territory of Member States, as established in Article 5 of the Schengen Borders Code.[123] The Returns Directive provides a central function for the "return decision", without which no entry ban or expulsion decision may be issued.[124] Notably also, a period for voluntary return must be granted before forced removal can take place.[125] In its Article 5, the Returns Directive provides obligations for Member States to respect, including the principle of non-refoulement. The obligations under Article 5 derive from, *inter alia*, the ECHR, which must be respected when applying the Directive. Article 9 (1)(a) of the Returns Directive provides further that Member States are obliged to postpone the removal if it would violate the principle of non-refoulement. The directive contains additional rules in relation to *e.g.* timeframes for return procedures, procedural safeguards and guidelines on voluntary departure.

Importantly, however, Member States may decide not to apply the Returns Directive to third-country nationals who are subjected to refusal of entry orders, or who are "apprehended or intercepted by the competent authorities in connection with the irregular crossing by land, sea or air of the external border of a Member State and who have not subsequently obtained an authorization or a right to stay in that Member State".[126] While this provides for a quite significant limitation to the scope of the directive, it shall nevertheless be without prejudice to the obligation to respect fundamental guarantees, such as the principle of non-refoulement.[127]

The European Commission has clarified that other safeguards under the EU asylum acquis, such as access to asylum procedure, does still apply even though a Member State decides not to apply the Returns Directive.[128] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (*Asylum Procedures Directive*) sets out detailed rules on common procedures for granting and withdrawing international protection and obliges Member States to inform third

[122] Boeles, den Heijer, Lodder, Wouters (Boeles et al.), 2009, p. 412.
[123] Peers, 2012, p. 492.
[124] Article 6 of the Returns Directive, in Boeles et al., 2014, p. 386.
[125] Article 7 of the Returns Directive, in Boeles et al., 2014, p. 426.
[126] Article 2(2)(a) of the Returns Directive.
[127] Article 4 of the Returns Directive.
[128] European Commission, Return Handbook, 2017, p. 17.

country nationals who may wish to make an application for international protection on the possibility to do so.[129] The Asylum Procedures Directive applies to asylum claims made in the territory of EU Member States, including at borders, in territorial waters and in transit zones.[130] According to the directive, the migrant has the status of an asylum seeker as soon as the application for international protection has been submitted.[131] Additionally, the 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 (*Qualification Directive)* is noteworthy. The Qualification Directive aims to harmonize the criteria by which Member States define who qualifies as a refugee, as well as other forms of protection for persons who face serious risks in their country of origin (*i.e.* subsidiary protection).[132] The 1951 Refugee Convention is of particular relevance for this directive. Finally, the Regulation No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (*Schengen Borders Code*) is of importance, since it provides that border management activities must respect the principle of non-refoulement.[133]

[129] Article 8 of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (*Asylum Procedures Directive*).
[130] Article 3 of the Asylum Procedures Directive.
[131] Article 3 (1) of the Asylum Procedures Directive.
[132] 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 (*Qualification Directive)*; See, The Qualification Directive, Asylum in Europe, ECRE, UNHCR, available at: https://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=4aa508692 [accessed 1.12.2020]
[133] see, Recital 20 and Article 3(b) of Regulation No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (*Schengen Borders Code*).

3. The prohibition of collective expulsion of aliens

3.1 Article 4 of Protocol No. 4 to the ECHR

3.1.1 Adoption of Protocol No. 4

Article 4 of Protocol No. 4 to the ECHR provides that "collective expulsion of aliens is prohibited".[134] Protocol No. 4 was adopted already in 1963 and became the first international treaty to address the collective expulsion.[135] As of 1 February 2021, Protocol No. 4 has been ratified by all but four Member States of the Council of Europe.[136] The United Kingdom and Turkey have both signed but not ratified the protocol. Furthermore, Switzerland and Greece have neither signed nor ratified the protocol.

The main purpose in the adoption of the prohibition of collective expulsion was to prevent horrific mass expulsions that had taken place not long before the adoption of Protocol 4.[137] The explanatory report to the protocol revealed that the main purpose was to prohibit "collective expulsions of aliens of the kind which was a matter of recent history".[138] Thus, collective expulsions of the kind which had already taken place were formally prohibited and this referred especially to the expulsion of Germans and others during World War Two.[139] The Consultative Assembly wished to make the expulsion of aliens in this article subject to stringent conditions. According to its draft, expulsion of an alien lawfully residing in a Contracting State would be permitted only on the ground of danger to national security or violation of the *ordre public* or

[134] The prohibition of collective expulsion of aliens is also foreseen in Article 19 (1) of the Charter of Fundamental Rights of the European Union, Article 12 (5) of the African Charter on Human and People's Rights, Article 22 (9) of the American Convention on Human Rights, Article 26 (2) of the Arab Charter on Human Rights, Article 25 (4) of the Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms and Article 22 (1) of the International Convention on the Protection of the Rights of All Migrants Workers and Members of Their Families.
[135] ECtHR, Guide on Article 4 Protocol No. 4 to the European Convention on Human Rights – Prohibition of collective expulsion of aliens, Updated 31 December 2020, p. 5, available at: https://www.echr.coe.int/Documents/Guide_Art_4_Protocol_4_ENG.pdf [accessed 28.1.2020].
[136] Council of Europe Portal, Treaty Office, Chart of signatures and ratifications of Treaty 046, available at: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/046/signatures?p_auth=MYXarGX0 [accessed 1.2.2021].
[137] Durán Alba, 2012, pp. 629-633, 630; The terms "collective expulsion" and "mass expulsion" are often used interchangeably, although the former emphasises non-individualisation, while the latter refers to the scale of the expulsion. See International Law Commission, fifty-eighth session, Geneva, 2006, "Expulsion of aliens", Memorandum by the Secretariat, § 985, available at: http://legal.un.org/ilc/documentation/english/a_cn4_565.pdf [accessed 1.12.2020].
[138] Council of Europe, Explanatory Reports on the Second to Fifth Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms, submitted by the Committee of Experts to the Committee of Ministers, H(71)11 (1971), in Guide on Article 4 Protocol No. 4 to the European Convention on Human Rights – Prohibition of collective expulsion of aliens, Updated 31 December 2020, p. 5, available at: https://www.echr.coe.int/Documents/Guide_Art_4_Protocol_4_ENG.pdf [accessed 28.1.2020]
[139] Henckaerts, 1995, p. 11.

morality.[140] The Committee of Ministers decided, however, not to adopt this draft and instead they proposed a completely new provision devoted exclusively to collective expulsions.[141]

Despite the protocol having been established already in 1963, for decades, all cases concerning Article 4 of Protocol No. 4 were declared inadmissible as manifestly ill-founded, first by the former European Commission of Human Rights (the former Commission) and later by the Court. In the first inadmissible decision in 1965, the former Commission clarified that, while Article 4 of Protocol No. 4 prohibits collective expulsions of aliens, it does not apply to expulsion strictly limited to individuals. Thus, if a decision to expel would be based on particular circumstances relating to the applicant as an individual, the article would not be applicable.[142]

It was not until in 2002 that the Court found the first breach of this guarantee, in the case of *Čonka v. Belgium*. The judgment is far from uncontroversial, which can partly be explained by the two dissenting opinions concluded in the final judgment.[143] The applicants, Slovakian nationals of Roma origin, requested political asylum in Belgium on the grounds that they had been violently assaulted by skinheads in Slovakia. The Belgian police sent a notice to the applicants requiring their presence at the police station. The notice stated that their attendance was required to enable the files concerning their applications for asylum to be completed. At the station, they were served with an order to leave the territory, accompanied by a decision for their removal to Slovakia and their detention for that purpose. On 5 October 1999 they and other refugees of Roma origin, whose request for asylum had also been turned down, were taken to the airport and put on a plane for Slovakia. According to the Court, "at no stage in the period between the service of the notice on the aliens to attend the police station and their expulsion did the procedure afford sufficient guarantees demonstrating that the personal circumstances of each of those concerned had been genuinely and individually taken into

[140] Explanatory Report to Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto, ETS 46, Strasbourg, 16.IX.1963, p. 11.
[141] *Ibid.*
[142] Decision of the European Commission of Human Rights as to the Admissibility of Applications 3803/68 and 3804/68, X and Y v. Sweden, 4.10.1968 (unpublished), reprinted in Council of Europe, 5 Digest of Strasbourg Case-Law Relating to the European Convention on Human Rights 890 (1985), in Henckaerts, 1995, p. 11.
[143] Durán Alba, 2012, pp. 629-633, 632.

account".[144] Thus, the Court held by four votes to three that there had a violation of Article 4 of Protocol No. 4.[145]

The purpose of Article 4 of Protocol No. 4 is to prevent states from removing migrants without assessing their personal and individual circumstances, which makes it impossible to put forward arguments against expulsion measures.[146] The article has established a strong link between the prohibition of collective expulsion of aliens and the need for procedural safeguards and legitimate reasons justifying expulsion.[147] It has proved to be vital for the protection of irregular migrants at borders, as it extends to every foreigner. Recently, the Court has held that:

> Article 4 of Protocol No. 4 is aimed at maintaining the possibility, for each of the aliens concerned, to assert a risk of treatment which is incompatible with the Convention – and in particular with Article 3 – in the event of his or her return and, for the authorities, to avoid exposing anyone who may have an arguable claim to that effect to such a risk.[148]

Thus, the prohibition of collective expulsion forms an important safeguard for the principle of non-refoulement. Importantly, however, a violation of Article 4 of Protocol No. 4 does not require demonstration of the risk of ill-treatment in case of expulsion. The prohibition of collective expulsion is rather related to the activities and actions taken by the expelling state and the procedural features.[149] As will be seen in the forthcoming sections of this thesis, however, the principle of non-refoulement inherent in Article 3 has played a significant role in the Court's assessment on cases concerning collective expulsions especially relating to pushback-situations.

What is easily distinguishable, is that the formulation of Article 4 of Protocol No. 4 remains short and relatively vague. It seems that the provision does not permit any possible limitations or restrictions, having an absolute character similar to Article 3 of the ECHR.[150] Admittedly, the Court has made clear that there can be no exception to the prohibition of collective expulsion, as it would defeat the objective of the prohibition.[151] However, as will be discussed

[144] *Čonka v. Belgium,* (51564/99), 5.2.2002, § 63.
[145] *Ibid.*, p. 28.
[146] see *Hirsi Jamaa and Others* [GC], (27765/09), 23.2.2012, § 177 and *Sharifi and Others v. Italy and Greece*, (16643/09), 21.10.2014, § 210
[147] Rietiker, 2016, p. 656.
[148] see *N.D. and N.T. v. Spain* [GC], (8675/15 and 8697/15), 13.2.2020, § 198.
[149] Di Filippo, 2020, p. 7.
[150] Rietiker, 2016, p. 655.
[151] Guild, 2014, pp. 543–562, 559–560.

in the upcoming sections of this thesis, in some cases the Court has taken a particularly restrictive approach towards the prohibition of collective expulsion.

To date, the Court has found a violation of the prohibition of collective expulsion in only eight cases. Arguably, therefore, it remains relatively rare for the Court to find a violation of Article 4 of Protocol No. 4. However, recently, this provision has been invoked more often and the prohibition of collective expulsion has especially gained importance in the jurisprudence of the ECtHR after the evolution of European border policies.[152] While the Court has commonly found violations of the prohibition of collective expulsion in situations where the expulsion has been purely based on membership of that group,[153] increasingly, violations have concerned situations of pushbacks, where a group is collectively expelled at the border without any consideration of individual circumstances.[154]

As has been established above, the prohibition of collective expulsion of aliens is enshrined in several regional instruments.[155] However, it remains relatively absent on the international level and while it has been argued that some international conventions prohibit implicitly the collective expulsion of aliens, neither the 1951 Convention nor the CAT provides explicitly for such a prohibition.[156] Some scholars have argued that there is in fact a large gap in international law, which has led to the expulsion of migrants in mass influx situations to countries where they may fear persecution or torture.[157] Notably, however, the prohibition of collective expulsions can be found in Article 9 of the Draft Articles on the Expulsion of Aliens, adopted by the International Law Commission (ILC) at its sixty-sixth session in 2014.[158] It may therefore be observed that the prohibition of collective expulsions constitutes, at least to a

[152] Carlier, Jan-Yves & Leboef, Luc, Collective expulsion or not? Individualisation of decision making in migration and asylum law, EU Immigration and Asylum Law and Policy, 2018.
[153] See, *Čonka v. Belgium,* (51564/99), 5.2.2002*, Georgia v. Russia (I)* [GC], (13255/07)*,* 3.7.2014, *Shioshvili and Others v. Russia,* and *Berdzenishvili and Others v. Russia.*
[154] See, among others, *Hirsi Jamaa and Others v. Italy* [GC], (27765/09), 23.2.2012, *Sharifi and Others v. Italy and Greece,* (16643/09), 21.10.2014*, M.K. and Others v. Poland,* (40503/17, 42902/17 and 43643/17), 23.7.2020.
[155] See, supra note 134.
[156] At the universal level, Article 22 (1) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families expressly prohibits the collective expulsion and provides that "Migrant workers and members of their families shall not be subject to measures of collective expulsion. Each case of expulsion shall be examined and decided individually".
[157] Ramji-Nogale, Jaya, Rights in exile - Prohibiting collective expulsion of aliens at European Court of Human Rights in *The international refugee rights initiatives refugee legal aid newsletter*, 2016.
[158] United Nations, Draft articles on the Expulsion of Aliens, with commentaries, 2014. Draft Article 9 (2) Paragraph 2 sets out the prohibition of the collective expulsion of aliens.

certain extent, a principle of general international law.[159] As noted above, there has been an increased attention as regards the prohibition of collective expulsion in Article 4 of Protocol No. 4 which has led to a number of decisions by the Court on this matter. These decisions have certainly helped and will continue to help clarify the content and scope of the provision. In the next sections of this chapter, the author will first aim at clarifying the definition of "collective expulsion of aliens" and the territorial applicability and jurisdictional matters of Article 4 of Protocol No. 4. Further, the relationship between the prohibition and certain other provisions in ECHR will be examined, which are closely linked to Article 4 of Protocol No. 4. The author will finally go on to examine the prohibition of collective expulsion as enshrined in Article 19 (1) of the EU Charter.

3.1.2. The definition of "collective expulsion of aliens"

The collective character of a group of aliens as such is the essential element of the prohibition of collective expulsion.[160] The definition of a "*collective* expulsion", as provided by the ECtHR, indicates "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".[161] Two essential aspects are thus of particular significance in order to define an expulsion as "collective" ; first, that the individual in question is expelled together with other persons, as a group, and secondly, the fact that his/her situation was not examined individually by the national authorities.[162]

The ILC, informed by the case-law of the ECtHR, has provided that collective expulsion is understood to mean the expulsion of aliens "as a group".[163] An important question which needs to be further addressed is the meaning of "a group". Is there, for instance, a requirement for a minimum number of persons in order to be considered "a group" in accordance with Article 4 of Protocol No. 4? Inevitably, to be characterized as "collective", it requires the involvement

[159] See, among others, Office of the High Commissioner for Human Rights, 'Discussion Paper on the Expulsion of Aliens', September 2006, available at: https://www2.ohchr.org/english/issues/migration/taskforce/docs/Discussion-paper-expulsions.pdf
[160] International Law Commission, Fifty-eighth session, Geneva, 2006, "Expulsion of aliens", Memorandum by the Secretariat, § 985, available at: http://legal.un.org/ilc/documentation/english/a_cn4_565.pdf [accessed 8.1.2021]
[161] European Court of Human Rights: Collective expulsion of aliens, factsheet, November 2013, available at: https://www.refworld.org/pdfid/539eb0b84.pdf [accessed 31.1.2021].
[162] Gatta, Francesco Luigi, *The Problematic Management of Migratory Flows in Europe and its Impact on Human Rights: The Prohibition of Collective Expulsion of Aliens in the Case-law of the European Court of Human Rights,* in Migration Issues before International Courts and Tribunals, Bruno, Palombino, Di Stefano (eds.), 2019, pp. 119–146, 138.
[163] United Nations, Draft articles on the Expulsion of Aliens, 10 December 2014.

of a certain number of persons. However, as has been demonstrated by the Chamber judgment of *N.D. and N.T. v. Spain,* even the number of two could, in practice, be sufficient in order to find a violation of the prohibition of collective expulsion.[164] Importantly, the Court has held that, for an expulsion to be "collective" in nature, there are no requirements such as a minimum number of persons affected or membership of a particular group.[165] The Court has consequently not established any requirements on constitutive criteria for migrants who have been subjected to collective expulsion. This distinguishes the ECHR from the African Charter on Human and Peoples' Rights, which prohibits "mass expulsion", defined as "that which is aimed at national, racial, ethnic or religious groups".[166] In other words, a decisive criterion for the application of Article 4 should not be the number of which the group consists of nor the link knitting together the members of that group, but rather the procedure followed the expulsion.[167] Thus, "if a person is expelled along with others without his case having deceived individual treatment, his expulsion is a case of collective expulsion".[168] The Court's assessment on what constitutes as "collective" is always made on a case by case basis, *in casu.*

In order to determine whether Article 4 of Protocol No. 4 is applicable, the Court must first determine whether the case concerns an "expulsion" within the meaning of that provision.[169] The ILC provides a definition of the meaning of "expulsion" in its Draft Articles on the Expulsion of Aliens. According to Draft Article 2(a), "'expulsion' means a formal act or conduct attributable to a State, by which an alien is compelled to leave the territory of that state; it does not include extradition to another State, surrender to an international criminal court or tribunal, or the non- admission of an alien to a state". [170]

In several judgements, the Court has referred to the definition provided by the ILC and thus, it can be considered as largely applicable to the meaning of the prohibition of collective expulsion as well.[171] The drafting history of Article 4 of Protocol No. 4 does not provide for an explicit clarification as regards the term "expulsion" in the context of the present provision.[172] In its

[164] See, *N.D. and N.T. v. Spain*, Chamber judgment, (8675/15 and 8697/15), 3.10.2017. The case was later referred to the Grand Chamber (see footnote 165).
[165] *N.D. and N.T. v. Spain* [GC], (8675/15 and 8697/15), 13.2.2020, §§ 193–199.
[166] African Charter on Human and Peoples' Rights ("Banjul Charter"), Organization of African Unity (OAU), 27 June 1981, Article 12 (5).
[167] van Dijk, van Hoof, 1998, p. 676.
[168] *Ibid.*, pp. 676-677.
[169] See, among others, *N.D. and N.T. v. Spain* [GC], (8675/15 and 8697/15), 13.2.2020, § 164.
[170] United Nations, Draft articles on the Expulsion of Aliens, with commentaries, 10 December 2014.
[171] See, among others, *Khlaifia and Others v. Italy* [GC], (16483/12), 15.1.2016, § 243.
[172] Rietiker, 2016, p. 655.

case-law, the Court has meanwhile explained that the notion of expulsion should not be interpreted in the generic meaning in current use and should apply "to all measures that may be characterized as constituting a formal act or conduct attributable to a state by which a foreigner is compelled to leave the territory of the state (...)".[173] This applies irrespective of the state's domestic law. In its Concurring Opinion in *Hirsi Jamaa and Others v. Italy,* Judge Pinto De Albuquerque elaborates further that the notion of expulsion should be interpreted widely so as to include any collective operation, be it extradition, removal, transfer, rejection or refusal of admission.[174] Considering pushbacks at land borders, the Court has recently held that the existence of an expulsion "is even more evident (...) in a situation in which the aliens present themselves at a land border and are returned from there to the neighbouring country.[175]

Finally, the prohibition of collective expulsions in Article 4 of Protocol No. 4 explicitly refers to "aliens". The provision applies regardless of how the person reached the country concerned and irrespective of whether the person arrived legally or not. According to the Committee's final draft, the provision is not limited only to those lawfully residing within the territory, but also to "those who have no actual right to nationality in a State, whether they are merely passing through a country or reside or are domiciled in it, whether they are refugees or entered the country on their own initiative, or whether they are stateless or possess another nationality".[176] This differs from Article 1 of Protocol No. 7, which provides for a constraint on the discretionary power of a State to expel aliens present in its territory and is only applicable to those persons who are lawfully resident there.[177] Similarly, according to Article 2 (b) of the ILC Draft Articles on the Expulsion of Aliens, the word "alien" means an individual who does not have the nationality of the State in whose territory that individual is present. According to the Explanatory Report of Protocol No. 4, the provision of Article 4 refers to collective

[173] *M.K. and Others v. Poland,* (40503/17, 42902/17 and 43643/17), 23.7.2020.
[174] Concurring Opinion by Judge Pinto De Albuquerque in *Hirsi Jamaa and Others v. Italy* [GC], (27765/09), 23.2.2012, p. 78. ; See, in contrary, United Nations, Draft articles on the Expulsion of Aliens, with commentaries, 2014, Draft Article 2 (a) providing that "expulsion" should not include extradition to another state.
[175] *M.K. and Others v. Poland,* (40503/17, 42902/17 and 43643/17), 23.7.2020, § 204.
[176] Article 4 of the Committee's final draft, DH/Exp/Misc (62) 11, 9 March 1962, p. 505, § 34
[177] McBride, 2009, p. 99.

expulsion of aliens, including stateless persons.[178] However, as regards the collective expulsion of nationals, these are protected under Article 3 (1) of Protocol No. 4.[179]

According to the Court, the wording of "aliens" is to be interpreted in a broad meaning, applying to a plurality of individuals.[180] Cases of alleged collective expulsions, where Article 4 of Protocol No. 4 has been applicable, have concerned a variety of individuals, such as asylum seekers, migrants who did not apply for asylum and persons belonging to a particular nationality.[181] Further, the provision has been applicable both to persons who were already residing within the territory of a state and persons who arrived at the territory and were "pushed back" to the originating state.[182]

3.1.3 The territorial applicability and jurisdiction

An important question in assessing the scope of the applicability of the prohibition is to what extent and under which conditions persons affected by collective expulsions can be considered as under the jurisdiction of the state authorizing it.[183] Before, a vast majority of cases relating to Article 4 of Protocol No. 4 concerned persons who were already on the territory of the state concerned. No question of territorial applicability arose, wherefore it was not either discussed in depth in the judgments.[184] However, recently, states have contested the applicability of Article 4 of Protocol No. 4. to cases concerning pushbacks, holding that the persons were not within the jurisdiction of the state for the purposes of Article 1 of the ECHR.[185]

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[178] Explanatory Report to Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto, European Treaty Series - No. 46, Strasbourg, 16.IX.1963, § 32.
[179] Article 3 (1) of Protocol No. 4 to the ECHR provides that "No one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national".
[180] Gatta, Francesco Luigi, *The Problematic Management of Migratory Flows in Europe and its Impact on Human Rights: The Prohibition of Collective Expulsion of Aliens in the Case-law of the European Court of Human Rights,* in Migration Issues before International Courts and Tribunals, Bruno, Palombino, Di Stefano (eds.), 2019, pp. 119-146, 132.
[181] *Ibid*.
[182] While the migrants in *Čonka v. Belgium, Sultani v. France* and *Georgia v. Russia (I)* were already on the territory of the respondent State, in *Hirsi Jamaa and Others v. Italy* and *N.D and N.T. v. Spain* the applicants arrived at the territory and were "pushed back" to the originating State.
[183] den Heijer, 2013, p. 271.
[184] See, for example, *KG v Germany*, (7704/76), 11.3.1977, European Commission of Human Rights; *Andric v Sweden,* (45917/99), 23.2.1999; *Čonka v Belgium*, (51564/99), 5.2.2002.
[185] ECtHR, Guide on Article 4 of Protocol No. 4 – Prohibition of collective expulsion of aliens, updated 31.12.2020, p. 5, available at: https://echr.coe.int/Documents/Guide_Art_4_Protocol_4_ENG.pdf [accessed 28.1.2021].

Here, it will be necessary to examine the case of *Hirsi v. Italy,* which represents the first judgment delivered by the Court regarding the situation of interception at sea. *Hirsi v. Italy* has been considered a landmark case in the protection of migrants who attempt to cross the sea in search of a better life elsewhere.[186] Further, the judgment clarifies the protection offered by the ECHR to individuals affected by pushbacks. The applicants in this case were a part of a group of about 200 individuals who left Libya in 2009 aboard three vessels with the aim of reaching the coast of Italy. On 6 May 2009, as they were within the Maltese Search and Rescue Region of responsibility, they were intercepted at high seas by the Italian police and coastguard, transferred onto Italian military ships and later handed over to Libyan authorities under an agreement concluded between Italy and Libya. The applicants were given no opportunity to apply for asylum and the authorities did not attempt to assess their individual cases. The applicants claimed that they had been exposed to a risk of torture or inhuman or degrading treatment in Libya and in their respective countries of origin, namely, Eritrea and Somalia, as a result of having been returned.[187] Because of the lack of an individual assessment, the applicants had been given no opportunity to challenge their return to Libya. Thus, the applicants held that they had been victims of arbitrary *refoulement* in violation of Article 3 of the ECHR.

The Government contested the jurisdiction and denied that the Italian authorities had exercised "absolute and exclusive control" over the applicants. The Court rejected this argument and held that the alleged violations fell within Italy's jurisdiction within the meaning of Article 1 of the Convention. As regards Article 3, the Court held that the Italian authorities knew, or should have known, that the applicants, when returned to Libya as irregular migrants, would be exposed to treatment in breach of the ECHR. Thus, the Court found a violation of Article 3 in this respect. Further, the Court found a violation of Article 3 on account of the fact that the applicants were exposed to the risk of arbitrary repatriation to Eritrea and Somalia. *Hirsi v. Italy* is thus also the first judgment which deals with the possible *chain* refoulement through a state that is not party to the ECHR.[188]

The applicants stated further that they had been the subject of a collective expulsion, relying on Article 4 of Protocol No. 4.[189] Their return to Libya, carried out with no prior identification

[186] den Heijer, 2013, p. 265.
[187] *Hirsi Jamaa and Others v. Italy* [GC], (27765/09), 23.2.2012, § 83.
[188] den Heijer, 2013, p. 278.
[189] *Hirsi Jamaa and Others v. Italy* [GC], (27765/09), 23.2.2012, § 159.

and no examination of the personal circumstances of each applicant, had, according to the applicants, constituted a removal measure that was, in substance, "collective".[190] The Government held that the article was not applicable in the instant case, since it applied only in the event of the expulsion of a person on the territory of a state or who had crossed the national border illegally.[191] The Court acknowledged that a majority of cases concerning Article 4 of Protocol No. 4 involved persons who were on the territory of the state. Thus, the Court had to examine for the first time whether Article 4 of Protocol No. 4 would be applicable to a case involving the removal of aliens to a third state that was carried out outside the national territory. The Court stated that the wording of Article 4 of Protocol No. 4 did not itself pose an obstacle to its extraterritorial application, i.e. it did not have a territorial limitation. Further, the Court reiterated that the Convention is a living instrument which must be interpreted in light of present-day conditions and in a manner, which renders the guarantees concrete and effective instead of theoretical and illusory.[192] Most importantly, the Court was of the view that:

> If, therefore, Article 4 of Protocol No. 4 were to apply only to collective expulsions from the national territory of the States Parties to the Convention, a significant component of contemporary migratory patterns would not fall within the ambit of that provision, notwithstanding the fact that the conduct it is intended to prohibit can occur outside national territory and in particular, as in the instant case, on the high seas.[193]

Thus, the Court concluded that Article 4 of Protocol No. 4 was applicable in the instant case. Considering the merits, the Italian authorities had neither subjected the applicants to any form of an identification procedure nor carried out any form of examination of each applicant's individual situation before returning them to Libya. In addition, the personnel aboard the military ship were not trained to conduct individual interviews and were not assisted by interpreters or legal advisers. These facts were sufficient for the Court to conclude that the removal of the applicants had been of a collective nature, in breach of Article 4 of Protocol No. 4.[194]

The judgment of *Hirsi v. Italy* is especially significant since it is the first time that the ECtHR has extended the application of the prohibition of collective expulsion to situations involving the removal of aliens to a third state carried out outside the national territory. The judgement enshrines the application of the effective and dynamic interpretation of the ECHR. At the same

[190] *Ibid.*, § 163.
[191] *Ibid.*, § 160.
[192] *Ibid.*, § 175.
[193] *Ibid.*, § 177.
[194] *Ibid.*, §§ 185–186.

time, *Hirsi v. Italy* demonstrates the clear tension between state sovereignty and state's obligations under international law in the context of migratory flows and border management.[195] While countries are entitled to control their territory and are entitled to expel aliens, these rights are not absolute and have to be in accordance with international law. Conclusively, the Court clarified in its judgment of *Hirsi v. Italy* that the provision of Article 4 of Protocol No. 4 is applicable in situations where persons are being intercepted on the high seas while trying to reach the territory of a State and are stopped and returned to the originating state. The same approach was taken a few years later in the judgment of *Sharifi and Others v. Greece and Italy,* which concerned the deportation to Greece of migrants who had boarded vessels for Italy.[196]

Recently, the Court has established the applicability of Article 4 of Protocol No. 4 to situations where individuals are being apprehended in an attempt to cross a national border by land and immediately removed from a State's territory by border guards.[197] In *N.D. and N.T. v. Spain*, the Government contested the jurisdiction arguing that the applicants were not on Spanish territory. The Court disagreed with the Government's view and held that the moment the two applicants got off the fence they were "under the ongoing and exclusive control, at least *de facto*, of the Spanish authorities".[198] Consequently, Article 4 of Protocol No. 4 applies to pushback operations, both on the high seas and on land. The duration of time spent on the territory is also immaterial when assessing whether or not a State has jurisdiction within the meaning of Article 1 of the ECHR. In *M.K. and Others v. Poland*, the Government invoked the inadmissibility of applications due to issues of jurisdiction linked to Article 1 on the ground that the applicants "had been on Polish territory only briefly".[199] The ECtHR rejected this argument and held that states cannot circumvent jurisdiction based on the short duration of time spent on the national territory.[200]

3.1.4 The relationship between Article 4 of Protocol No. 4 and other provisions inherent in the ECHR

In several cases, where the Court has assessed the prohibition of collective expulsions, the applicants have additionally alleged a violation of Article 3 and the principle of non-

[195] Ciliberto, 2018, p. 491.
[196] *Sharifi and Others v Italy and Greece,* (16643/09), 21.10.2014.
[197] *N.D. and N.T. v. Spain* [GC], (8675/15 and 8697/15), 13.2.2020, §187. The Grand Chamber judgment will be further discussed in section 4.2.2.
[198] *N.D. and N.T.* v. Spain, Chamber judgment, (8675/15 and 8697/15), 3.10.2017, § 4.
[199] *M.K. and Others v. Poland,* (40503/17, 42902/17 and 43643/17), 23.7.2020, § 120.
[200] *Ibid.*, § 131.

refoulement.[201] Moreover, in most of the cases where the Court has found a violation of the prohibition of collective expulsion, a violation of Article 3 has also taken place.[202] Arguably, therefore, the prohibition of collective expulsions is closely linked to the scope of the principle of non-refoulement and this has been emphasized both by the Court and the UNHCR. Therefore, the author finds it necessary to examine more closely the relationship between these two provisions.

In *N.D. and N.T. v. Spain*, the Court held that the domestic rules governing border controls should not render ineffective the rights guaranteed by the ECHR and in particular by Article 3 of the ECHR and Article 4 of Protocol No. 4 to the ECHR.[203] Essentially, the principle on non-refoulement and the prohibition of collective expulsion of aliens are highly intertwined in that both provide for a procedural requirement of an individual assessment of each case. As Judge Pinto De Albuquerque provides in the Concurring Opinion in *Hirsi v. Italy*, discharging the non-refoulement obligation requires an evaluation of the personal risk of harm, which can only take place if aliens have access to a fair and effective procedure by which their cases are considered individually.[204] He continues in the same vein in the Concurring Opinion in *M.A. and Others v. Lithuania* by stating that "the principle of non-refoulement would be purely fictional if the state could prevent the application of the principle by means of pushback policies and non-admission or rejection at the border".[205]

In the Partly Dissenting Opinion in *N.D. and N.T. v. Spain,* Judge Koskelo emphasized similarly the strong link between the scope of Article 4 of Protocol No. 4 and the obligation of non-refoulement in the context of entry of aliens and held that this link should not be lost.[206] According to Koskelo, the need to ensure effective procedural protection for substantive Convention rights arising under Article 3 was manifestly absent in the present case. Koskelo held in conclusion that, because of the strong link between Article 4 of Protocol No. 4 and the

[201] See, among others, *Hirsi Jamaa and others v. Italy* [GC], (27765/09), 23.2.2012; *Sharifi and others v. Italy and Greece* (16643/09), 21.10.2014; *Moustahi v. France* (9347/14), 25.6.2020; *M.K. and Others v. Poland,* (40503/17, 42902/17 and 43643/17), 23.7.2020.
[202] *Ibid.*
[203] *N.D. and N.T. v. Spain* [GC], (8675/15 and 8697/15), 13.2.2020, § 171.
[204] Concurring Opinion by Judge Pinto De Albuquerque in *Hirsi Jamaa and Others v. Italy* [GC], (27765/09), 23.2.2012, p. 75.
[205] Concurring Opinion by Judge Pinto De Albuquerque in *M.A. and Others v. Lithuania*, (59793/17), 11.12.2018, p. 38.
[206] Partly Dissenting Opinion by Judge Koskelo in *N.D. and N.T.* v. Spain [GC], (8675715 and 8697/15), 13.2.2020, § 7.

obligation of non-refoulement, Article 4 of Protocol No. 4 should not be applicable to cases which do not concern Article 3 of the ECHR. Koskelo suggests a rather radical limitation to the scope of Article 4 Protocol No. 4. However, her view is not completely surprising, taking into account the recent judgments issued by the Court. As will be discussed in the forthcoming sections of this thesis, in several judgments, such as *Khlaifia v. Italy* and *Asady and Others v. Slovakia,* the Court has "lowered" the procedural safeguards under Article 4 Protocol No. 4 because of the absence of a risk of refoulement in case of expulsion.

Nevertheless, the view expressed by Koskelo is in many ways problematic. Linking the scope of Article 4 Protocol No. 4 exclusively to cases concerning the principle of non-refoulement would, first of all, reduce many situations where this provision could otherwise be applicable. Secondly, the provision would render virtually useless (*interpretatio abrogans*) since an identical result would be reached by the protection provided in Article 2 and 3, applying the principle of non-refoulement.[207] Arguably, the prohibition of collective expulsion should concern only the procedure and not the substantive grounds for expulsion, as is the case with the principle of non-refoulement.[208] Therefore, the prohibition of collective expulsion is to be regarded as a guarantee independent from the non-refoulement principle; an autonomous guarantee applicable to cases where Article 3 is not deemed relevant.[209] This is especially important in relation to collective expulsions in pushback-situations. Here, the conduct itself should be deemed unlawful, in breach of the ECHR, and this assessment should not depend on the potential risk of ill-treatment in the country of origin.

This view has been shared by the UN High Commissioner for Human Rights (UNHCHR), who has provided that the prohibition of collective expulsions is essentially a due process requirement that should be considered in its own regard. According to the UNHCHR, "any state considering expulsion of a group of non-nationals is required to consider, with due diligence and in good faith, the full range of individual circumstances that may militate against the expulsion of each particular individual in the group".[210] The UNHCHR sees the risk of

[207] Zirulia & Peers, A template for protecting human rights during the 'refugee crisis'? Immigration detention and the expulsion of migrants in a recent ECtHR Grand Chamber ruling, EU Law Analysis, 5.1.2017, available at: http://eulawanalysis.blogspot.com/2017/01/a-template-for-protecting-human-rights.html [accessed 1.12.2020]
[208] See, partly dissenting opinion by Judge Serghides, in *Khlaifia and Others v. Italy* [GC], (16483/12), 15.1.2016, § 22.
[209] Di Filippo, 2020, p. 7.
[210] Third party intervention by the United Nations High Commissioner for Human Rights in *Hirsi Jamaa and Others v. Italy* [GC], (27765/09), 23.2.2012, p. 3.

refoulement as constituting "one such consideration among others".[211] Since the lack of an individualised assessment of each individual's situation prevents states from adequately verifying whether a risk of refoulement exists, in a way, the prohibition of collective expulsion presents a precondition for the realization of the principle non-refoulement.[212]

Article 13 is also closely linked to the prohibition of collective expulsions and requires effective remedies in case of violations of rights inherent in the ECHR. Undoubtedly, the practice of immediate expulsions and pushbacks deprive migrants of any possibility to challenge the legality of the expulsion decision.[213] According to the Court, the notion of effective remedy under Article 13 requires that the remedy may prevent the execution of measures that are contrary to the ECHR and whose effects might be irreversible.[214] Further, the absence of any domestic procedure to enable potential asylum-seekers to lodge their Convention-based complaints may also lead to a violation of Article 13.[215] However, since the lack of effective remedies is also examined under Article 4 of Protocol No. 4, it will not always be necessary for the Court to examine Article 13 separately.[216]

3.2 Article 19 (1) in the EU Charter of Fundamental Rights

Under EU law, the EU Charter, as a source of primary law in the EU legal order, prohibits collective expulsions in its Article 19 (1). Thus, while Greece has not ratified Protocol No. 4 to the ECHR, they are nevertheless bound by the prohibition of collective expulsion when implementing EU law. Article 19 (1) is almost identical with Article 4 of Protocol No. 4 and raises similarly the issue about the right to an individual consideration of personal circumstances before expulsion.[217] The Explanations relating to the EU Charter establishes similarly that:

> Paragraph 1 of this Article has the same meaning and scope as Article 4 of Protocol No 4 to the ECHR concerning collective expulsion. Its purpose is to guarantee that every decision is based on a specific examination and that no single measure can be taken to expel all persons having the nationality of a particular State.[218]

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[211] *Ibid*.
[212] Riemer, 2020, p. 250.
[213] Third-party intervention by the Council of Europe Commissioner for Human Rights at CJEU proceedings concerning cases of N.D. v. Spain (8675/15) and N.T. v. Spain. (8697/15), 22.3.2018, COMDH(2018)11.
[214] *Čonka v. Belgium,* (51564/99), 5.2.2002, § 79.
[215] *Hirsi Jamaa v. Italy* [GC]*,* (27765/09), 23.2.2012, §§ 201-207*; Sharifi and Others v. Italy and Greece,* (16643/09), 21.10.2014, §§ 240-243.
[216] *Georgia v. Russia (I)* [GC], (13255/07)*,* 3.7.2014, § 212.
[217] Guild, 2014, pp. 543–562, 549.
[218] Official Journal of the European Union, Explanations relating to the EU Charter of Fundamental Rights, 14.12.2007, (2007/C 303/02), Explanation on Article 19.

In light of Article 52 (3) of the Charter, the jurisprudence of the ECtHR in matters concerning Article 4 of Protocol No. 4 is determinant as regards Article 19 (1). Therefore, the interpretation of the two provisions is largely the same.[219] However, in contrast to the prohibition of collective expulsion in Protocol No. 4 to the ECHR, Article 19 (1) of the EU Charter applies to everyone. Thus, the provision is not limited to third country nationals.

Considering the applicability of EU law in matters concerning pushbacks and collective expulsions, several NGOs have highlighted a crucial judgment issued by the Slovenian Administrative Court on 17 July 2020. In its judgment, the Administrative Court found that the Republic of Slovenia had violated the applicant's right to asylum (Article 18 of the EU Charter), the prohibition of collective expulsions (Article 19 (1) of the EU Charter) and the principle of non-refoulement (Article 19 (2) of the EU Charter). The applicant, a member of a persecuted English-speaking minority from Cameroon, wanted to apply for asylum in Slovenia, but had instead been readmitted to Croatia and further chain refouled to Bosnia-Herzegovina. The Republic of Slovenia was found to have breached the prohibition of collective expulsion since the applicant had not been informed about his asylum rights, was not issued with a removal order at any time, had no access to a translator or legal aid and as regards the chain refoulement, there were "sufficient reliable reports on possible risks from the point of view of Article 3 of ECHR" in both Croatia and Bosnia-Herzegovina.[220] This case is crucial considering that the case law on collective expulsions has so far been relatively modest.[221] Notably, the CJEU has to date never been asked to interpret Article 19 (1) of the Charter. This inherently implies that national courts do not appear to rely on the prohibition of collective expulsion on a regular basis.[222]

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[219] According to Article 52 (3) of the EU Charter, the provision shall not prevent Union law providing more extensive protection. Thus, it provides for the minimum level of protection which shall be the same as that of the ECHR.

[220] Border Violence Monitoring Network, Press Release: Court find Slovenian state guilty of chain pushback to Bosnia-Herzegovina, 20.7.2020, available at: https://www.borderviolence.eu/wp-content/uploads/Press-Release_Slovenian-Court-Ruling.pdf; Border Violence Monitoring Network, InfoKolpa: Press Kit for Foreign Media, available at: https://www.borderviolence.eu/wp-content/uploads/PRESS-KIT-FOR-INTERNATIONAL-MEDIA.pdf; Refugee Rights Europe, Pushbacks and Rights Violations at European Borders: A Summary of Key News Coverage and Evidence 17 July to 24 July 2020, available at: https://refugee-rights.eu/wp-content/uploads/2020/07/Pushbacks-News-Roundup-17-July-to-24-July-2020.pdf.pdf

[221] Gatta, Francesco Luigi, *The Problematic Management of Migratory Flows in Europe and its Impact on Human Rights: The Prohibition of Collective Expulsion of Aliens in the Case-law of the European Court of Human Rights,* in Migration Issues before International Courts and Tribunals, Bruno, Palombino, Di Stefano (eds.), 2019, pp. 119–146, 131.

[222] Carlier & Leboeuf, 2020, pp. 455–473, p. 456. The case law of the CJEU has rather focused on Article 19 (2) of the EU Charter, which established the principle of non-refoulement.

4. Procedural guarantees preventing the collective expulsion

4.1 Procedural guarantees in Article 4 of Protocol No. 4

4.1.1 The right to an individual and objective examination

A crucial part of the prohibition of collective expulsion entails the right to a reasonable and objective examination of the particular case of each individual alien of the group. This procedural guarantee can be deduced from the case law of the ECtHR on Article 4 of Protocol No. 4. The Committee of Ministers of the Council of Europe specified in its Twenty Guidelines on Forced Return that the "removal order shall only be issued on the basis of a reasonable and objective examination of the particular case of each individual person concerned, and it shall take into account the circumstances specific to each case".[223] The individualisation requirement is also inherent in the definition of the prohibition of collective expulsion of aliens, provided in the case law of the Court. Put in simple terms, the definition, as discussed in Chapter 3, implies that where an expulsion decision is made on the basis of a reasonable and objective examination of the particular case of each individual alien of the group, no collective expulsion has taken place.[224] While the Court does not define what a "reasonable and objective examination of the particular case" amounts to, in *Hirsi v. Italy* the Court highlighted certain crucial elements, such as an identification procedure, individual interviews by qualified personnel and the assistance of interpreters and legal advisers.[225] The Court does not, however, imply where these procedures must be carried out.

An important element in order to fulfill the requirement of an objective and individual examination is the identification of the person concerned. This is particularly important, bearing in mind the unlawful actions of pushbacks, where migrants are immediately returned without any identification. In *M.A. v. Cyprus,* the ECtHR did not find a violation of Article 4 of Protocol No. 4 on the basis that "the authorities had carried out a background check with regard to each person before issuing the orders and separate deportation and detention orders were issued in respect of each person".[226] Meanwhile, in *Hirsi v. Italy* and *Sharifi v. Italy and Greece*, the ECtHR condemned that the immediate rejection at the border was done without

[223] Committee of Ministers, *Twenty Guidelines of Forced Return*, September 2005, Guideline 3.
[224] However, the background to the execution of the expulsion orders plays a role in determining whether there has been compliance with Article 4 of Protocol No. 4.
[225] *Hirsi Jamaa and Others v. Italy* [GC], (27765/09), 23.2.2012, § 185.
[226] *MA v. Cyprus*, (41872/10), 23.7.2013, § 254.

prior identification of the individuals concerned. Another critical element in order for the requirement of "objective and reasonable" to be met, is that the individualised examination should be real, and not merely formal.[227] This was established in the first inadmissible decision by the former Commission in case *Becker v. Denmark,* where the former Commission indicated that a pure formality is not enough for evading Article 4. This requirement is largely interlinked with the ECHR intending to guarantee rights which are not theoretical and illusory, but rather practical and effective.[228] Thus, when the applicants put forward arguments against their expulsion, these arguments should be reasonably and objectively examined by the national authorities before deciding on the removal decision.[229] The objective assessment can require, *inter alia*, that reasonable weighing takes place between the interests of each individual and the interest envisaged by the authorities with the expulsion.[230]

Building on the standards implemented by the Court as regards the individualised examination, the UNHCHR has complemented the Court's assessment by providing that;

> an individualized examination must be able to appreciate the full range of arguments that weigh against the expulsion of a particular individual; adequately trained on relevant standards of national and international law; and, in a position to corroborate relevant elements, where necessary. Furthermore, the procedure applied has to be gender sensitive and special measures have to be put in place to allow unaccompanied minors and persons with special needs the opportunity to have their case properly appreciated.[231]

The Court has held that, in order to assess whether there has been a sufficiently individualised examination it will be necessary to consider the circumstances of the case and to verify whether the specific situation of the individuals concerned where taken into consideration.[232] Furthermore, it will be necessary to look into the particular circumstances of the expulsion and the "general context at the material time".[233] The Court, therefore, finds it best to approach this assessment from a holistic point of view, taking into account all relevant facts which will have an impact on the assessment of Article 4 of Protocol No. 4. In the judgment of *Čonka v. Belgium*, for instance, the majority's doubts stemmed from "a series of circumstances"

[227] *Becker v. Denmark*, (7011/75), 3.10.1975, in van Dijk, van Hoof, 1998, p. 677.
[228] See, among many others, *N.D. and N.T.* v. Spain [GC], § 171; *Hirsi Jamaa and Others v. Italy* [GC], (27765/09), 23.2.2012, § 175.
[229] den Heijer, 2013, p. 285.
[230] van Dijk, van Hoof, 1998, p. 677.
[231] Third party intervention by the United Nations High Commissioner for Human Rights in *Hirsi Jamaa and Others v. Italy,* 23.2.2012, (27765/09), § 46.
[232] See, *Khlaifia and Others v. Italy* [GC], (16483/12), 15.1.2016, § 238; *Hirsi Jamaa and Others v. Italy*, § 183.
[233] *Georgia v. Russia* (I) [GC], (13255/07), 3.7.2014, § 171.

concerning the forcible removal of the applicant.[234] In the judgment of *M.K. and Others v. Poland,* the Court saw it necessary to emphasize that the applicants' cases constituted "an exemplification of a wider state policy of refusing entry to foreigners coming from Belarus".[235] This, once again, enshrines the holistic approach taken by the Court.

A stereotyped motivation for an expulsion order will not itself lead to a violation of Article 4 of Protocol No. 4.[236] The Court has held that the fact that a number of aliens are subject to similar decisions does not in itself suffice to conclude that there is a collective expulsion if each person has been given the opportunity to put arguments against his or her expulsion.[237] That does not mean, however, that where there has been a reasonable and objective examination of the particular case of each individual "the background to the execution of the expulsion orders plays no further role in determining whether there has been compliance with Article 4 of Protocol No. 4".[238] In *M.A. v. Cyprus,* despite the fact that the letters were drafted in identical terms, the Court found no violation of Article 4 of Protocol No. 4 establishing that "what is important is that every case was looked at individually and decided on its own particular facts".[239] In *Čonka v. Belgium*, meanwhile, the stereotyped motivation of expulsion order was of particular relevance in order for the Court to find a violation of the prohibition.

In several cases concerning collective expulsions, the applicants have alleged that they were not interviewed individually by the state authorities. Issues have been linked with, *inter alia*, the lack of an interview, the length of the interview, overlapping interviews and the quality of the questions asked by the authorities. The question of individual interviews is in many ways controversial and finds no common ground in the case law of the Court. In 2016, the Court established a restrictive approach on this matter, in its Grand Chamber judgment of *Khlaifia v. Italy.*[240] Recently, the Court issued its ruling in *Asady and Others v. Slovakia,* which continued largely in the same manner as that of *Khlaifia v. Italy*.[241] Despite several concerning facts, the Court concluded in both cases that no violation of Article 4 Protocol No. 4. had taken place. These cases have given rise to discussions and controversy regarding the interpretation of the

[234] *Čonka v. Belgium*, (51564/99), 5.2.2002, § 62.
[235] *M.K. and Others v. Poland,* (40503/17, 42902/17 and 43643/17), 23.7.2020, § 207.
[236] Carlier & Leboeuf, 2020, pp. 455-473, p. 458.
[237] see, among others, *Sultani v. France,* (45223/05), 20.9.2007, § 81; *Hirsi Jamaa and Others v. Italy* [GC], (27765/09), 23.2.2012, § 184.
[238] *Čonka v. Belgium,* (51564/99), 5.2.2002, § 59.
[239] *M.A. v. Cyprus,* (41872/10), 23.7.2013, § 254.
[240] *Khlaifia and Others v. Italy* [GC], (16483/12), 15.12.2016.
[241] *Asady and Others v. Slovakia*, (24917/15), 24.3.2020.

procedural guarantees under Article 4 of Protocol No. 4. This will be discussed more in depth in section 4.2.1.

The fact that the judges of the Court have on several occasions been unable to agree on the question whether or not there has been an objective and individual assessment of claims against the expulsion order represents the difficulties that the judges face in the assessment of Article 4 of Protocol No. 4. Already in the judgment of *Čonka v. Belgium*, being the first case where the Court found a breach of the prohibition of collective expulsions, two dissenting opinions were submitted against the view of the majority. Judge Valears did not share the doubts of the majority on whether there was a reasonable and objective examination of the applicants' individual situation. The judge criticized the purely formal element into the definition of the concept of "collective expulsion". According to Judge Valears, the majority should have followed the decision in *Andric v. Sweden,* in which the Court held that the fact that a number of aliens received similar decisions did not automatically imply that there was a collective expulsion if "each person had been given the opportunity to put arguments against his expulsion to the competent authorities on an individual basis".[242] Judge Jungwiert, joined by Judge Kuris, continued in the same manner and held that he could not agree with the opinion of the majority about a violation of Article 4 of Protocol No. 4 since the personal circumstances of each expelled alien were examined on three separate occasions. Judge Jungwiert agreed with the opinion expressed in the decision in *Andric*[243] and held further that the provision did not, in his view, prevent states from grouping together "for reasons of economy or efficiency, people who, at the end of similar proceedings, are to be expelled to the same country".[244]

4.1.2 The right to legal aid and access to information

Both legal assistance and the access to information can be regarded as important procedural safeguards in the prohibition of collective expulsion. The ECtHR has previously ruled a violation of Article 4 of Protocol No. 4 in cases where there has been clear evidence that the applicants were not afforded legal assistance and/or access to information about their asylum procedure. In *Sharifi and Others v. Italy and Greece* the Court found a violation of Article 4 Protocol No. 4 as regards one of the applicants who, at the time of the identity check, had not

[242] *Andric v. Sweden,* (45917/99), 23.2.1999, § 58
[243] *Ibid*.
[244] Partly dissenting opinion of Judge Jungwiert, joined by Judge Kuris in *Čonka v. Belgium,* (51564/99), 5.2.2002.

been provided an interpreter or a legal advisor, which were considered crucial for a successful interview.[245]

Providing legal assistance is essential in order to ensure that the foreign national is well informed and will be able to effectively exercise the right to appeal. However, there might be various reasons why legal assistance is not made accessible; It can be a cause of the remote places of pushbacks, insufficient capacity and funding of legal aid and/or restricted access for legal aid organisations.[246] In conducting pushback policies, states are often aiming at rapid actions. Providing legal assistance can produce certain delays, which may be the main reason for a state to make legal aid inaccessible to individuals. Access to legal aid can also be hindered through limiting the possibility of obtaining free legal assistance at borders.[247] In *M.S.S. v. Belgium and Greece* the Court held that the applicant lacked the practical means to pay a lawyer in Greece and did not receive information concerning access to organisations offering legal advice. Further, there was a shortage of legal aid lawyers, which rendered the whole Greek legal aid system ineffective in practice.[248] This represents a series of different factors which, taken either separately or cumulatively, can have a direct effect on the actual access to legal assistance.

The right to legal aid is an important factor in assessing the compatibility of the provision under Article 4 of Protocol No. 4 and is significant in order for the Court to determine whether or not a collective expulsion has taken place. However, it is rather unlikely for the Court to find a breach of Article 4 of Protocol No. 4 only on the basis of the lack or absence of legal aid. Rather, it is usually one of several concerning facts that, taken together, is sufficient in order for the Court to find a violation of the prohibition of collective expulsions. Recently, in *M.K. and Others v. Poland,* the Court held that the applicants were not allowed lawyers and were denied access to them, even when, in respect of two of the applicants, the lawyers were at the border checkpoint and demanded to be allowed to meet with their clients.[249] In its judgment, the Court concluded that a violation of Article 4 Protocol No. 4 had taken place. The fact that

[245] *Sharifi and Others v. Italy and Greece,* (16643/09), 21.10.2014; See also, *Khlaifia and Others v. Italy* [GC], (16483/12), 15.12.2016, § 220.
[246] Strik, 2020, pp. 234-258, 252.
[247] Lysenia, 2020, pp. 87-106, 89.
[248] *M.S.S. v. Belgium and Greece* [GC], (30696/09), 21.1.2011, § 319. See also, Council of Europe and FRA, Handbook on European Law relating to asylum, borders and immigration, 2015, p. 112
[249] *M.K. and Others v. Poland,* (40503/17, 42902/17 and 43643/17), 23.7.2020, § 206.

the applicants had not been allowed lawyers played a pivotal role in order for the Court to come to this conclusion.

Access to information is crucial in order for the migrants to be aware of their asylum procedure, their rights, which steps to take and in order to obtain remedy for human rights violations. As Tineke Strik writes, "the absence of adequate and comprehensive information about the asylum procedure makes [irregular migrants] vulnerable for poorly trained local border officials".[250] The ECtHR has also established the lack of access to information as "a major obstacle in accessing asylum procedures".[251] Several NGOs have expressed their particular concern about the lack of information about asylum procedures. In its third party intervention in *Khlaifia v. Italy*, Amnesty International held that the foreign nationals had not been given proper information about access to asylum procedures and in many cases had been given no information about their situation at all.[252] Recently, the Court reiterated once again the important procedural guarantee of access to information in its judgement of *Muhammad and Muhammad v. Romania.* Although the case did not explicitly concern Article 4 of Protocol No. 4, it nevertheless provided valuable interpretation highlighting the procedural guarantees which should be guaranteed prior to expulsion. Notably, the Court was of the view that "failure to provide the applicants with information about the conduct of the domestic proceedings in the Court of Appeal and the rights that they should have enjoyed, combined with the rapidity of the procedure, had the effect of negating the procedural safeguards to which the applicants were entitled before that court".[253]

The access to information is closely linked to the right to access an interpreter or translator, since without it, it will ultimately be impossible to understand the information provided as regards the asylum procedure. Access to an interpreter or translator is pivotal in order for the individual to be able to put forward relevant arguments against the measures as well as challenge the legal grounds for the expulsion. In their joint dissenting opinion in *Khlaifia v. Italy,* Judges Lemmens, Keller and Schembri Orland saw it important to highlight the troubling fact that, while the applicants' interviews had been overlapping, there had meanwhile only been

[250] Strik, 2020, pp. 234–258, 252.
[251] *Hirsi Jamaa and Others v. Italy* [GC], (27765/09), 23.2.2012, § 204; *M.S.S. v. Belgium and Greece* [GC], (30696/09), 21.1.2011, § 304.
[252] Third party intervention by Amnesty International in *Khlaifia and Others v. Italy* [GC], (16483/12), 15.1.2016.
[253] *Muhammad and Muhammad v. Romania* [GC], (80982/12), 15.10.2020, § 182.

one single interpreter present at that time.[254] Thus, the applicants lacked access to an interpreter since it was essentially impossible for the interpreter to be present in every interview conducted over that time. The Court has given particular importance to the right to access a translator/interpreter and this, although not sufficient alone, has been an important element in order for the Court to find a violation of Article 4 of Protocol No. 4.

4.2 A restrictive approach taken by the Grand Chamber

4.2.1 The conditions of the individual interview

The much criticised Grand Chamber ruling in *Khlaifia v. Italy* clarified that Article 4 of Protocol No. 4 does not guarantee the right to an individual interview in all circumstances. Rather, the requirements of the provision may be satisfied where "each alien has a genuine and effective possibility of submitting arguments against his or her expulsion, and where those arguments are examined in an appropriate manner by the authorities of the respondent State".[255]

The facts of the case in *Khlaifia v. Italy* occurred during the Arab Spring and concerned three nationals from Tunisia who left with others on board vessels heading for the Italian coast. After being intercepted by the Italian coastguard, they were transferred to a reception centre (CSPA) in Lampedusa. According to the applicants, they were held in an overcrowded area with inadequate space to sleep and no contact with the outside world. After violent demonstrations, the applicants were transferred to Palermo and were placed on ships that were moored in the harbour. After a few days staying in overcrowded areas, the applicants were taken to Palermo airport where they were identified by the Tunisian consul and deported to Tunisia on the basis of a bilateral agreement between the two States.

Before the Court, the applicants held, first of all, that they had had no oral contract with authorities and had at no point been interviewed. Secondly, they had not been able to receive assistance from a lawyer.[256] The refusal-of-entry orders were almost identical, very standardised and did not mention anything about personal circumstances. In its Chamber judgment, the judges held that there had been a violation of Article 4 Protocol No. 4 as well as Article 13 taken in conjunction with Article 4 of Protocol No. 4. According to the Chamber,

[254] Joint dissenting opinion of judges Lemmens, Keller and Schembri Orland in the judgment of *Khlaifia and Others v. Italy,* [GC], (16483/12), 15.12.2016, para. 10.
[255] *Khlaifia and Others v. Italy* [GC], (16483/12), 15.12.2016, § 248.
[256] *Ibid.*, § 214.

the refusal-of-entry orders did not contain any reference to the personal situations of the applicants concerned. The Chamber was of the view that the Government "had failed to produce any document capable of proving that individual interviews concerning the specific situation of each applicant had taken place".[257] Further, the Chamber acknowledged the fact that "a large number of individuals of the same origin, around the time of the events at issue, had been subjected to the same outcome as the applicants".[258]

The case was later referred to the Grand Chamber. On 15 December 2016 the Grand Chamber gave its judgment, taking a new stand on the issue and reversing the ruling previously given by the Chamber. The Grand Chamber confirmed that Article 4 of Protocol No. 4 requires that a state provides every migrant with a genuine and effective possibility of giving reasoning against expulsion. However, while the Chamber was of the view that a personal interview was crucial in order for the requirement of an objective and individual assessment to be met, the Grand Chamber departed from the Court's previously established case-law, and held that Article 4 of Protocol No. 4 did not guarantee the right to an individual interview in all circumstances.[259] Instead, the Grand Chamber held the applicants underwent two identification procedures during which they had the possibility of explaining to the national authorities any circumstance that might have affected their status and entitled them to remain in Italy.[260]

In its Grand Chamber judgment, the judges observed that "the applicants representatives both in their written observations and the public hearing [...], were unable to indicate the slightest factual or legal ground which, under international or national law, could have justified their clients' presence on Italian territory and precluded their removal".[261] This led to the judges contesting the usefulness of an individual interview in the present case.[262] The fact that the refusal-of-entry orders had been drafted in almost comparable terms could also partly be explained by the fact that the applicants had not alleged that they feared ill-treatment in the event of return.[263] This calls into question whether the procedural guarantee of an individual interview inherent in Article 4 of Protocol No. 4 will only become relevant in case there is a real risk that the applicants might be subjected to treatment contrary to articles 2 and/or 3. In

[257] *Ibid.*, § 213.
[258] *Ibid,*
[259] *Ibid.*, § 248.
[260] *Ibid.*, § 249, 254.
[261] *Ibid.*, § 253.
[262] *Ibid.*
[263] *Ibid.*, § 251.

its partly dissenting opinion, Judge Serghides also sees this as a way of shifting the burden of proof from the state to the individual. Where it has previously been clear that it is for the state to ascertain the individual and objective assessment of each case, the reasoning in this case demonstrates otherwise, shifting the burden of proof to the individual "to prove that he or she would have a genuine and effective possibility of obtaining international or other legal protection".[264] Further, if the procedural safeguards inherent in the prohibition of collective expulsion would only apply effectively in the presence of the risk to life or ill-treatment, it could essentially make the provision of Article 4 Protocol No. 4 virtually useless since an identical result would be reached by the protection provided in articles 2 and 3, applying the principle of non-refoulement.[265]

The Grand Chamber's ruling in *Khlaifia v. Italy* has been said as weakening the content of the prohibition of collective expulsion and undermining the concrete due process rights and overall, the protection for migrants against arbitrary expulsion.[266] The recent judgment in *Asady and Others v. Slovakia* continued largely in the same manner, focusing on the conditions of the individual interview.[267] In this case, the Court held controversially by four votes to three that there had been no violation of Article 4 Protocol No. 4. The case concerned the expulsion to Ukraine of a group of Afghan nationals who had attempted to enter Slovakia irregularly in 2014. The applicants held that their expulsion had been of a collective nature since the expulsion had been carried out without a proper individual examination of their cases. According to the applicants, they had not been interviewed separately, the interviews were carried out under extreme time pressure and their interviews overlapped in several cases.

The Court reiterated that Article 4 of Protocol No. 4 does not guarantee the right to an individual interview in all circumstances. Instead, "what matters is whether the applicants had

[264] Partly dissenting opinion of Judge Serghides in *Khlaifia and Others v. Italy* [GC], (16483/12), 15.1.2016, § 12 (b).
[265] Zirulia & Peers, A template for protecting human rights during the 'refugee crisis'? Immigration detention and the expulsion of migrants in a recent ECtHR Grand Chamber ruling, EU Law Analysis, 5.1.2017, available at: http://eulawanalysis.blogspot.com/2017/01/a-template-for-protecting-human-rights.html [accessed 1.12.2020].; See also, section 3.1.4 on the the relationship between Article 4 of Protocol No. 4 and other provisions inherent in the ECHR.
[266] See, among others, Vengoechea & Cox, Case Watch: Europe's Human Rights Court Delivers Mixed Ruling on Migrant Rights (Part one), Open Society Justice Initiative, 13.1.2017, available at: https://www.justiceinitiative.org/voices/case-watch-europe-s-human-rights-court-delivers-mixed-ruling-migrant-rights-part-one [accessed 29.10.2020]
[267] *Asady and Others v. Slovakia*, (24917/15), 24.3.2020.

a genuine and effective opportunity to submit arguments against their expulsion".[268] The Court noted that interviews had overlapped and held that the Government's explanation that there could have been some errors in the recording of those interview was not entirely plausible. However, "this was not in itself sufficient to justify the applicant's view that the interviews were not conducted on an individual basis".[269] As to the content of the interviews, the Court was of the view that, even if the applicants were asked standardised questions, it was not a problem "so far as those questions were aimed at establishing the factors that had led to applicants to leave their country of origin".[270] Meanwhile, the practice of standardised questions have been strongly discouraged by, *inter alia*, the UNHCR.[271] Further, the fact that the answers had been very similar could in the Court's view be explained through the fact that the details of the applicants' journey might have been similar.[272] This approach has been criticized since it roughly ignores the fact that, even if the applicants' journey was the same, the reasons to leave Afghanistan were not necessarily the same.[273]

As to the duration of the interviews, the applicants held that they were under extreme time pressure, since the interviews lasted for only ten minutes. The Court held that the short interviews "may be a consequence of the applicants not stating anything that would require a more thorough examination" and clarified that the applicants had not asserted any risk of being subjected to ill-treatment if returned back (the similar approach was taken in *Khlaifia v. Italy*).[274] Judges Lemmens, Keller and Schembri Orland issued a joint dissenting opinion in this case and held that, in their view, the applicants had indeed been subjected to a collective expulsion, particularly on the basis that no individual interview had taken place. According to these judges, the fact that the individual interviews were conducted in ten minutes did not provide enough time to explain and investigate the process, let alone identify a person and assess whether he or she was persecuted and required international protection.[275]

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[268] *Ibid.*, §§ 64-65.
[269] *Ibid.*, § 64.
[270] *Ibid.*, § 66.
[271] See, Gatta, Francesco Luigi 'Tell me your story, but hurry up because I have to expel you' – Asady and Others v. Slovakia: how to (quickly) conduct individual interviews and (not) apply the ND & NT "own culpable conduct" test to collective expulsions, Strasbourg Observers, 2020.
[272] *Asady and Others v. Slovakia,* (24917/15), 24.3.2020, § 66.
[273] Gatta, Francesco Luigi 'Tell me your story, but hurry up because I have to expel you' – Asady and Others v. Slovakia: how to (quickly) conduct individual interviews and (not) apply the ND & NT "own culpable conduct" test to collective expulsions, Strasbourg Observers, 2020.
[274] *Asady and Others v. Slovakia,* (24917/15), 24.3.2020, §§ 66-67.
[275] Joint dissenting opinion of judges Lemmens, Keller and Schembri Orland in the judgment of *Asady and Others v. Slovakia,* (24917/15), 24.3.2020, § 13.

4.2.2 The exception of the "own culpable conduct"

The judgment by the Grand Chamber of the Court in case *N.D. and N.T. v. Spain* reflects, once again, the difficulty in defining the scope of Article 4 of Protocol No. 4. The judgment has been criticized as a major setback for refugee protection,[276] ignoring the reality at European borders.[277] On 13th of February 2020, the Grand Chamber of the ECtHR continued the trend of overturning the Chamber's judgments by rejecting the complaint of two migrants who had been pushed back by Spanish authorities at the border of the Melilla enclave, between Spain and Morocco. While the Chamber had earlier, in 2017, held that Spain had violated the prohibition of collective expulsion, to the contrary, the Grand Chamber concluded that there had been no violation, and this was purely the consequence of the applicants "own culpable conduct".

The case is particularly significant for the purpose of this thesis, since it concerns explicitly the activity of pushing back irregular migrants at the external borders. The applicants, nationals of Mali and Côte d'Ivoire, fled from their countries of origin and arrived in Morocco independently from one another. The autonomous city of Melilla is a Spanish enclave located on the north coast of Africa and surrounded by Moroccan territory. The border between Melilla and Morocco is an external border of the Schengen area and thus provides access to the EU. There are four land border crossing points between Morocco and Spain, located along a triple fence. The border is guarded by the Spanish *Guardia Civil,* who has been accused of conducting pushbacks of migrants coming from Morocco on a regular basis.[278] After a visit to Melilla, Nils Muižnieks, the former Council of Europe Commissioner for Human Rights, expressed his concern after having received consistent information on pushbacks, in some cases accompanied by excessive use of force, carried out by the Spanish Guardia Civil.[279]

On 13th of August 2014, the Spanish police prevented around 500 migrants from scaling the outer fence, but around a hundred migrants nevertheless succeeded, among them the applicants.

[276] ECCHR, N.D. and N.T. v. Spain - A Major Setback for Refugee Protection: ECtHR dismisses complaint against Spain, available at: https://www.ecchr.eu/en/case/nd-and-nt-v-spain/ [accessed 24.11.2020].
[277] Jones, Sam, *European Courts under fire for backing up Spain's express deportations*, The Guardian, 13.2.2020, available at: https://www.theguardian.com/world/2020/feb/13/european-court-under-fire-backing-spain-express-deportations [accessed 29.1.2021].
[278] Schmalz & Pichl, "Unlawful" may not mean rightless. The shocking ECtHR Grand Chamber judgment in case N.D: and N.T, *Verfassungsblog*, 14.2.2020.
[279] Council of Europe, Spain: Legislation and practice on immigration and asylum must adhere to human rights standards, press release issued at the end of the Commissioner's visit to Spain (Melilla and Madrid) from 13-16 January 2015, 16.1.2015.

The Spanish border guards helped the migrants on the border fence down and immediately handed them over to the Moroccan authorities. The applicants alleged that they had not undergone any identification procedure and had had no opportunity to explain their personal circumstances or to be assisted by lawyers or interpreters.[280] They complained that they were subject to a collective expulsion contrary to Article 4 of Protocol No. 4. In their view, this reflected a systematic policy of irregular returns which lacked any legal basis.[281] In addition, the applicants alleged a violation of Article 3 and Article 13, of those taken together and lastly of Article 13 taken together with Article 4 Protocol No. 4 that they had no access to an effective remedy with suspensive effect by which to challenge their immediate return. The Court held unanimously in its Chamber judgment that Spain had violated Article 4 of Protocol No. 4 and Article 13 in conjunction with Article 4 of Protocol No. 4. However, the alleged complaints under Article 3 were declared inadmissible.

On 14 December 2017 the Government requested the referral of the case to the Grand Chamber under Article 43 of the ECHR. On 29th of January 2018 the panel of the Grand Chamber granted the request.[282] In its judgment, the Grand Chamber held that the decisive criterion in order for an expulsion to be characterised as "collective" is the absence of "a reasonable and objective examination of the particular case of each individual alien of the group".[283] The Court noted that no individual examination was ever made.[284] However, the Court held that the applicant's own conduct is a relevant factor in assessing the protection to be afforded under Article 4 of Protocol No. 4.[285]

It needed thus to be assessed whether the collective expulsion was attributable to the applicants' own conduct, in which case Article 4 of Protocol No. 4 would not be violated. Here, the Grand Chamber identified two situations, in which the collective expulsion was attributable to the applicant's own conduct. First of all, "the lack of active cooperation with the available procedure for conducting an individual examination" and secondly, "the conduct of 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

[280] *N.D. and N.T.* v. Spain, Chamber judgment, (8675/15 and 8697/15), 3.10.2017, § 64.
[281] *Ibid.*, § 67.
[282] *N.D. and N.T.* v. Spain [GC], (8675/15 and 8697/15), 13.2.2020, § 9.
[283] *Ibid.,* § 195.
[284] In the authors view, this should have been sufficient in order to conclude that Spain had violated Article 4 of Protocol No. 4 to the ECHR.
[285] *N.D. and N.T.* v. Spain, [GC], (8675/15 and 8697/15), 13.2.2020, § 200.

control and endangers public safety".[286] In previous judgments, the "own culpable conduct" concept has been referred to the first situation, where the own conduct has been attributed to, *inter alia,* the refusal to show identity papers to the police[287] or the consequence of filing a joint application tendering the same evidence.[288] However, in *N.D. and N.T. v. Spain* the Court referred to the second situation, introducing a completely new aspect to the "own culpable conduct" exception. What distinguishes the first situation from the second, is that, in the first, there has been an attempt of the authorities to assess the applicant's cases, while in the second, the individuals have been pushed back as a consequence of the authorities' unwillingness to carry out the examination of individual circumstances.[289]

The Grand Chamber was of the view that "the applicants had in fact placed themselves in an unlawful situation where they had deliberately attempted to enter Spain on 13 August 2014 by crossing the Melilla border protection structures as part of a large group and at an unauthorised location, taking advantage of the group's large number and using force".[290] Because of this, the Grand Chamber concluded that there had been no violation of Article 4 of Protocol No. 4, as a consequence of the applicants "own culpable conduct".

The reasoning of the Court in the Grand Chamber's decision has been heavily criticized by, *inter alia*, NGO:s, international organizations and scholars. It has been suggested that, through this "bad behaviour" exception, the Court "*de facto* introduces an interpretative derogation to Convention right formulated in absolute terms".[291] One source of criticism has been the question whether jumping off a fence could be identified as a violent act, and whether a violent act can justify the abandoning of principles that guarantee the rights of foreigners.[292] The Court referred to the "use of force", which usually indicates a violent act. Yet, no evidence demonstrated that the migrants, and in particular the applicants, had used any force or acted violently. Controversially, evidence showed that the authorities had used disproportionate

[286] *Ibid.*, §§ 200–201.
[287] Inadmissibility decision in *Dritsas and Others v. Italy*, (2344/02), 1.2.2011.
[288] Inadmissibility decision in *Berisha and Haljiti v. Former Yugoslav Republic of Macedonia*, (18670/03), 16.6.2005.
[289] Hakiki, Hanaa, N.D. and N.T. v. Spain: Defining Strasbourg's position on push backs at land?, *Strasbourg Observers*, 26.3.2020.
[290] ECtHR, Spain did not breach the Convention in returning migrants to Morocco who had attempted to cross the fences of the Melilla enclave, Press Release, ECHR 063 (2020), 13.2.2020.
[291] Di Filippo, 2020, p. 18.
[292] Barbero & Illamola-Dausà, 2020, pp. 43-63, 50

violence to prevent the migrants from entering Spain.[293] This establishes, once again, the "problematic narrative of allegedly violent migrants who are planning to invade the EU in large numbers".[294]

The Grand Chamber held in *N.D. and N.T. v. Spain* that the applicants "did not make use of the existing legal procedures for gaining lawful entry".[295] According to the Court, the applicants had been afforded genuine and effective access to Spanish territory at the Beni Enzar border crossing point.[296] Meanwhile, the UNHCR, among others, had clearly held that it had not been possible to request asylum at the Beni Enzar border crossing.[297] The Court also noted several reports, issued by e.g. the UNHCR, the European Committee for the Prevention of Torture (CPT) and the Council of Europe Commissioner for Human Rights, indicating that Sub-saharan migrants faced racial profiling by Moroccan police forces, making it impossible for them to request asylum at the border crossing.[298] Here, the Court stated merely that, in their view, the Spanish Government was not in any way responsible for this state of affairs.[299] Thus, the Court decided not to address this concerning issue.

It seems that many scholars have agreed that this judgment sets a dangerous precedent to future cases, since it subordinates the fundamental procedural guarantees underlying the prohibition of collective expulsion to the requirement of legal entry.[300] Further, Judges Lemmens, Keller and Schembri Orland have held that "an overly broad interpretation of the judgment of *N.D. and N.T. v. Spain* could damage the broad consensus within the international community" concerning compliance with "the Convention guarantees and in particular […] the obligation of non-refoulement".[301] While the Chamber decided to take a strong stance on migration control, the Grand Chamber continued the trend of overturning decisions, showing an

[293] Hakiki, Hanaa, N.D. and N.T. v. Spain: Defining Strasbourg's position on push backs at land?, *Strasbourg Observers*, 26.3.2020.
[294] Schmalz, & Pichl, "Unlawful" may not mean rightless. The shocking ECtHR Grand Chamber judgment in case N.D: and N.T, *Verfassungsblog*, 14.2.2020.
[295] *N.D. and N.T.* v. Spain [GC], (8675/15 and 8697/15), 13.2.2020, § 231.
[296] *Ibid.*, § 222.
[297] *Ibid.*, § 152.
[298] *N.D. and N.T.* v. Spain [GC], (8675/15 and 8697/15), 13.2.2020, (CPT, §58; UNHCR, §155; Council of Europe's Commissioner for Human Rights, §143) in Hakiki, Hanaa, N.D. and N.T. v. Spain: Defining Strasbourg's position on push backs at land?, *Strasbourg Observers*, 26.3.2020.
[299] *N.D. and N.T.* v. Spain [GC], (8675/15 and 8697/15), 13.2.2020, § 218.
[300] Raimondo, Giulia, N.D. and N.T. v Spain: A Slippery Slope for the Protection of Irregular Migrant, Oxford Faculty of Law, 20.4.2020.
[301] Joint Dissenting Opinion of Judges Lemmens, Keller and Schembri Orland in *Asady and Others v. Slovakia,* 24.3.2020, (24917/15), § 25.

unwillingness of providing such a strong protection for migrants at borders. Meanwhile, as several third party interveners argue, there was in reality no possibility for the applicants to access the border legally and thus be able to access the asylum procedure. This left the applicants without any other option then to climb over the fence. It seems as if the Grand Chamber decided not to approach these underlying and troubling issues leading to the applicants' irregular entry, which then justified the lack of an individual removal decision and the expulsion of the applicants. This renders the judgment very controversial and speculative.

Interestingly, in neither the judgment of *Asady and Others v. Slovakia* nor *Moustahi v. France* did the Court give any particular weight to the exception of "own culpable conduct" which dominated the judgment of *N.D. and N.T. v. Spain.*[302] It was not until the judgment of *M.K. and Others v. Poland* where the Court decided, again, to focus on the analysis of the applicants' conduct, concluding that the applicants had behaved in an orderly manner. Thus, the exception did not apply wherefore Poland was not exempted from its liability under Article 4 of Protocol No. 4.

Considering that the Court adopted this new dimension to the "own culpable conduct" test quite recently, it will remain to be seen how the Court will continue to assess this exception in the upcoming cases concerning the prohibition of collective expulsion. Judges Lemmens, Keller and Schembri Orland introduce two critical questions in order for the Court to assess whether a collective expulsion has taken place;

1. Did the applicants each receive a reasonable and objective examination of their respective cases?
2. If the applicants' individual cases were not reasonably and objectively examined, should this be attributed to their own conduct?[303]

The second question should further be assessed taking into account, *inter alia,* the number of individuals involved, the possible use of force or endangerment of public safety and the effective access to means of legal entry.[304] These elements could provide sufficient guidance in order for the Court to assess the "own culpable conduct" test in future cases. Thus, there is

[302] In *Moustahi v. France* this exception was not mentioned at all.
[303] Joint dissenting opinion of Judges Lemmens, Keller and Schembri Orland in *Asady and Others v. Slovakia,* (24917/15), 24.3.2020.
[304] *Ibid*.

a clear need for systematization in applying this exception to cases of collective expulsions. Importantly also, the Court needs to assess the potential damage that this exception could have in future cases of collective expulsions. An overly broad interpretation of the "own culpable conduct" could ultimately lead to the Court finding all cases of arbitrary expulsions of irregular migrants as attributable to their own conduct. Consequently, Article 4 of Protocol No. 4. would become virtually inapplicable to cases of pushbacks at borders, which is why the exception needs to be carefully assessed, bearing in mind the "broad consensus within the international community".[305] When drafting Article 4 of Protocol No. 4, the intention was to apply the prohibition of collective expulsion to "all those who have no actual right to nationality in a State (…), whether they are refugees or entered the country on their own initiative, (…)".[306] Thus, while the ECHR is a living instrument which should be interpreted in light of present-day conditions, it is nevertheless crucial for the judges to interpret this exception in light of the main intentions of the drafters of Article 4 Protocol No. 4.

4.3 Procedural guarantees in EU Law

4.3.1 The right to an individual and objective examination

As established above, according to well-established case law of the ECtHR, the prohibition of collective expulsions guarantees the right to an individual and objective examination of each individual's situation prior to a potential removal decision. This right can also be deduced from Article 19 (1) of the EU Charter, following the principle of equivalent protection established by Article 52 (3) of the EU Charter.[307] The substance of the right to an individual and objective examination is additionally provided by other rights inherent in the EU Charter, establishing similar procedural guarantees as those established in the case law of ECtHR. Arguably, the most important among these are the right to good administration (Article 41),[308] the right to effective remedy and to a fair trial (Article 47) and presumption of innocence and right of defence (Article 48).

[305] *Ibid*., § 25.
[306] See, Article 4 of the Committee's final draft, DH/Exp/Misc (62) 11, 9 March 1962, p. 505, § 34, in Hakiki, Hanaa, N.D. and N.T. v. Spain: Defining Strasbourg's position on push backs at land?, *Strasbourg Observers*, 26.3.2020.
[307] Carlier & Leboeuf, 2020, pp. 455-473, 467.
[308] However, an important limitation to Article 41 is that it is addressed to institutions, bodies, offices and agencies of the EU instead of Member States, (see, judgment in *Cicala*, C 482/10, EU:C:2011:868, paragraph 28).

As regards EU secondary law, the individualisation requirement can be deduced from *e.g.* the Qualification Directive and the Asylum Procedures Directive, which both require that the assessment of applications is carried out on an individual basis and decisions taken individually.[309] The individualisation requirement can similarly be deduced from the very core of the Returns Directive, given that removal can only take place after a return decision has been issued, *i.e.* after it has been duly established that the person concerned has no right to stay.[310] Moreover, Chapter III of the Returns Directive provides for some important procedural guarantees granted to third-country nationals regarding return decisions, which are meant to "guarantee effective protection of the interests of the individuals concerned".[311] Recital 6 in the preamble to the Returns Directive enshrines the individualisation requirement by providing that "Member States should ensure that the ending of illegal stay of third-country nationals is carried out through a fair and transparent procedure".[312] Further, "according to general principles of EU law, decisions taken under this Directive should be adopted on a case-by-case basis and based on objective criteria, (...)".[313] In Article 9, the Returns Directive provides for the obligation to postpone removal in case of a risk of non-refoulement, or for as long as a suspensory effect is granted in accordance with Article 13(2). This essentially requires an assessment of the risk of refoulement prior to the issuance of a return decision, thus preventing immediate refusals and pushbacks at borders. Further, Member States are allowed to postpone removal in case of e.g. failure of the removal due to lack of identification.[314] Article 12 of the Returns Directive introduces Chapter III and summarizes the most essential procedural guarantees relevant to third country nationals at borders. The article provides that return decisions must be issued in writing, give reasons in fact and in law as well as information about available legal remedies.[315] Notably, this provision supports both the objectivity and individualisation in decision-making.

Article 19 of the EU Charter is closely related to Article 47 of the EU Charter, which guarantees an effective remedy against any alleged breach of a Charter right.[316] Similarly to Article 13 of the ECHR, which secures an effective remedy for everyone whose rights set forth in the ECHR

[309] Article 4 of Qualification Directive 2011/95/EU; Article 10 (3) of the Asylum Procedures Directive 2013/32/EU.
[310] Boeles et al., 2014, p. 426.
[311] Recital 11 in the preamble to the Returns Directive.
[312] Recital 6 in the preamble to the Returns Directive.
[313] *Ibid.*
[314] Article 9(2)(b) of the Returns Directive.
[315] Article 12 (1) of the Returns Directive.
[316] Guild, 2014, pp. 543–562, 545.

are violated, Article 47 applies to its full extent in all cases falling within the scope of EU law, including in the context of border checks and return procedures.[317] Considering the access to legal aid and assistance, the accessibility element is provided in Article 47, which requires that free legal aid be provided when necessary to ensure effective access to justice.[318] Article 13 of the Returns Directive provides, in more detail, the right of a third-country national to have an effective remedy against all types of decisions adopted during the return procedure. The CJEU has held that appeals against refusal of entry include a right to challenge the way in which border checks are conducted.[319] According to Article 13 (3) of the Returns Directive "the third-country national concerned shall have the possibility to obtain legal advice, representation and, where necessary, linguistic assistance".[320] Further, "Member States shall ensure that the necessary legal assistance and/or representation is granted on request free of charge in accordance with relevant national legislation or rules regarding legal aid (...)".[321] The Asylum Procedures Directive provides further that Member States shall ensure that free legal assistance and representation is granted on request in the appeals procedures.[322]

As regards the right to access information, the CJEU has specified that the obligation to give reasons requires the national authorities to "state reasons for a decision which are sufficiently specific and concrete to allow the person to understand why the application is being rejected".[323] However, according to the Returns Directive, restrictions of the right to information are permitted "in order to safeguard national security, defence, public security and for the prevention, investigation, detection and prosecution of criminal offences".[324] Nevertheless, according to the CJEU, these restrictions must be applied proportionally and approached individually.[325] The Asylum Procedures Directive emphasizes similarly the right to information, providing that "in order to facilitate access to the examination procedure at border crossing points and in detention facilities, information should be made available on the

[317] Reneman, Marcelle, EU Asylum Procedures and the Right to an Effective Remedy, Oxford:Hart, 2014.; Carrera & Stefan, 2020, pp. 259-288, 264.
[318] Article 47 (3) of the EU Charter.
[319] *Mohamad Zakaria*, case C-23/12, 17.1.2013, ECLI:EU:C:2013:24.
[320] Article 13(3) of the Returns Directive.
[321] Article 13(4) of the Returns Directive. See also, the conditions as set out in Article 15(3) to (6) of Directive 2005/85/EC.
[322] see, Recital 23 and Article 22 of the Asylum Procedures Directive.
[323] *M.M. v. Minister for Justice, Equality and Law Reform, Ireland, Attorney General*, case C–277/11, 22.11.2012, ECLI:EU:C:2012:744, § 88.
[324] Article 12 of the Returns Directive.
[325] See, *Z. Zh. and I. O v. Staatssecretaris van Veiligheid en Justitie,* case C-554/13, 11.6.2015, ECLI:EU:C:2015:377, § 50; Ilareva, 2020, pp. 351- 368, p. 362.

possibility to apply for international protection".[326] The right to access documents is a fundamental principle of EU law, which has been confirmed in the case law of CJEU.[327] This plays additionally a crucial role when discussing the right to access information.

With regard to the right to translation and interpretation, EU law also provides for some important provisions requiring an interpreter to be present during the hearing of a third-country national in the context of return proceedings or asylum procedures. Article 12 (2) of the Return Directive requires as a minimum standard from Member Stats to provide, upon request, a written or oral translation of the main elements of decisions related to return, including information on the available legal remedies, in a language the third-country national understands or may reasonably be presumed to understand. Member States may decide to give return decisions in a standard form, in case the third country national has entered illegally the territory and has not obtained an authorization to stay in that Member State. However, states are obliged to publish information sheets at least in the five most common languages for migrant groups specific to a Member State.[328] Further, Article 13 of the Return Directive, providing for the remedies, ascertains that an individual has the right to linguistic assistance. This implies, importantly, the obligation to make available assistance by an interpreter in order for the individual to exercise the procedural rights under Article 13.[329] Finally, the Asylum Procedure Directive offers similar protection concerning translation and interpretation providing that "basic communication necessary to enable the competent authorities to understand if persons declare their wish to apply for international protection should be ensured through interpretation arrangements".[330]

4.3.2. The right to be heard

The right to be heard, which has its origin in the *audi alteram partem* principle (from Latin, 'hear the other party'), is a fundamental right within the EU legal order and forms an integral part of procedural safeguards granted to third country nationals. This right has particularly gained importance in the jurisprudence of the CJEU, which has further been enshrined in the case law of the ECtHR concerning the prohibition of collective expulsion. In *Khlaifia v. Italy*

[326] Recital 28 in the preamble to the Asylum Procedures Directive. See also, Article 8 of the Asylum Procedures Directive.
[327] *G and R v Staatssecretaris van Veiligheid en Justitie (G and R)*, case C-383/13 PPU, 10.9.2013, ECLI:EU:C:2013:533, § 33.
[328] Article 12 (3) of the Returns Directive.
[329] European Commission, Return Handbook, 2017, p. 72.
[330] Recital 28 of the Asylum Procedures Directive. See also, Article 8 of the Directive.

both the applicants as well as third party intervenors acknowledged that the right of a migrant to be heard and to make known his or her views effectively before the adoption of an expulsion decision had been upheld by the CJEU in, *inter alia*, the judgments of *Boudjlida* and *Mukarubega*.[331] When interpreting the Returns Directive, the CJEU held that an individual is entitled, before an expulsion decision is adopted, to express his or her view on the legality of his or her stay, and that, in spite of the lack of express provision for the right to be heard in the Return Directive, this right applies as a fundamental principle of EU law, relating especially to Article 41, 47 and 48 of the EU Charter.[332] Additionally, the right to be heard in all proceedings forms an integral part of the right of the defence, which is a general principle of EU law enshrined in Article 48 of the EU Charter.[333]

In the judgments of *Boudjlida* and *Mukarubega,* the CJEU clarified that the right to be heard:

> (a) guaranteed to every person the opportunity to make known his or her views effectively during an administrative procedure and before the adoption of any decision liable to affect his or her interests adversely[334]; and
>
> (b) enabled the competent authority effectively to take into account all relevant information, to pay due attention to the observations submitted by the person concerned, and thus to give a detailed statement of reasons for its decision.[335]

Consequently, the right to be heard contains important procedural elements to prevent collective expulsions in pushback-situations. The principle forms an important basis for the individualisation requirement by assuring that each individual has the right to express his or her view on the legality of his or her stay and has the right to put forward arguments against an expulsion measure.[336] The individual must also be able "to correct an error or submit such information relating to his or her personal circumstances as will argue in favor of the adoption or non-adoption of the decision, or in favor of its having a specific content".[337] National authorities are required to take into account all the relevant information and to give a detailed statement of reasons for its decision. The CJEU has clarified that the obligation "to take into account all relevant information" include the requirement to properly take into account the

[331] *Khlaifia and Others v. Italy* [GC], (16483/12), 15.1.2016, § 235.
[332] See, in particular, *Khaled Boudjlida v. Préfet des Pyrénées-Atlantiques* (*Boudjlida)*, case C-249/13, 11.12.2014, ECLI:EU:C:2014:2431, §§ 28-35; *Sophie Mukarubega v. Préfet de police et Préfet de la Seine-Saint-Denis* (*Mukarubega)*, case C-166/13, 5.11.2014, ECLI:EU:C:2014:2336, §§ 42-45.
[333] *Mukarubega,* § 45; *G and R*, § 32.
[334] *Boudjlida*, § 36, and *Mukarubega*, § 46.
[335] *Boudjlida*, §§ 37–38.
[336] *Ibid.*, §§ 47, 55.
[337] *Ibid.,* § 37.

fundamental rights of the person concerned.[338] The obligation to state reasons for a decision, which is provided in the judgments of *Boudjlida* and *Mukarubega*, is an important corollary of the principle of respect for the rights of defence and, in particular, the right to be heard, since it allows a person concerned to understand why his/her application is being rejected.[339] The CJEU has held that, among the positive obligations stemming from the right to be heard, is the obligation for national authorities to give a detailed statement of reasons for decision.[340] This obligation supports, in particular, the foreseeability of decision-making. The element of foreseeability has been elaborated by, *inter alia*, the ECtHR in *Al Nashif v. Bulgaria,* where the Court held that "a rule's effects are "foreseeable" if it is formulated with sufficient precision to enable any individual - if need be with appropriate advice - to regulate his conduct".[341] The obligation to state reasons for the decision is assured in*, inter alia,* Article 12 of the Returns Directive, given that return decisions must be issued in writing and give reasons in fact and in law. The written decision is the cornerstone of the procedural safeguards provided for in the Return Directive and an obligation which cannot be waived.[342]

Considering the right to be heard in asylum procedures, this right is set by Article 14 of the Asylum Procedures Directive providing for an explicit right to a personal interview before a decision is taken by the determining authority. The article goes even further to address that "if a large number of third-country nationals make it impossible in practice for the determining authority to conduct timely interviews (...), Member States may provide that the personnel of another authority be temporarily involved in conducting such interviews".[343] Thus, the Directive aims to provide an answer to the difficulties faced by national authorities in situations of large numbers of third-country nationals.

According to the CJEU, the right to be heard should be applied broadly to all proceedings which can culminate in a measure affecting a person's interests adversely.[344] In light of this,

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[338] *Z. Zh. and I. O v. Staatssecretaris van Veiligheid en Justitie,* case C-554/13, 11.6.2015, ECLI:EU:C:2015:377, § 69.
[339] *M.M. v. Minister for Justice, Equality and Law Reform, Ireland, Attorney General*, case C–277/11, 22.11.2012, ECLI:EU:C:2012:744, § 88.
[340] *Sopropé - Organizações de Calçado Lda v Fazenda Pública*, case C-349/07, 18.12.2008, ECLI:EU:C:2008:746, § 50
[341] *Al Nashif v. Bulgaria*, 2.6.2002, (50963/99), § 119.
[342] European Commission, Return Handbook, 2017, p. 68.
[343] Article 14 (1) of the Asylum Procedures Directive (2013/32/EU).
[344] See, *inter alia*, *Dieter Krombach v André Bamberski,* case C-7/98, 28.3.2000, ECLI:EU:C:2000:164, § 42; *Sopropé - Organizações de Calçado Lda v Fazenda Pública*, case C-349/07, 18.12.2008, ECLI:EU:C:2008:746, § 36.

the CJEU established in the judgment of *Mukarubega* that "observance of the right to be heard is required even where the applicable legislation does not expressly provide for such a procedural requirement".[345] This was also declared in an Opinion in judgment *Ispas* where Advocate General Bobek held that "EU law does not always determine or establish specific procedural rules. Rather, it concentrates on the substantive side of the right or obligation. However, procedural rights are necessary to ensure the effectiveness of EU law".[346] Consequently, the applicability of the right to be heard does not require an explicit legislation. Further, in order to effectively ensure the genuine exercise of the right to be heard, procedural guarantees are needed.

4.4. The required level of individual examination prior to expulsion

An essential question, given the purpose of this thesis, is the following: In which situations can a state be held responsible for expulsion measures at borders in breach of the prohibition of collective expulsion? In order to understand which situations of border practices amount to a "collective expulsion", it is important to distinguish between a series of individual expulsions, which are allowed, and a collective expulsion, which is prohibited.[347] In the case law of the ECtHR, this has arguably appeared as a difficult task.[348] To determine whether or not an expulsion measure has been of a collective nature, it is first important to distinguish the relevant procedural safeguards which should be ensured migrants at borders and further identify the level of individual examination which is required prior to expulsion. Considering the latter, in this section, the author will aim to provide for some clarification over this matter while further suggesting additional guidelines which could support the assessment of whether or not a collective expulsion has taken place.

Notably, Article 4 of Protocol No. 4 to the ECHR and Article 19 (1) of the EU Charter are procedural guarantees, assuring that migrants are not being expelled as a group without an objective and reasonable examination of individual circumstances.[349] Importantly, therefore,

[345] *Mukarubega,* § 49.
[346] *Teodor Ispas and Anduta Ispas v. Direcția Generală a Finanțelor Publice Cluj,* case C-298/16, Opinion of AG Bobek, 7.9.2017, ECLI:EU:C:2017:650, § 51.
[347] Joint partly dissenting opinion of judges Sajó and Vucinic in the Chamber judgment of *Khlaifia and Others v. Italy* [GC], (16483/12), 1.9.2015, § 10.
[348] Gil, Ana Rita, Collective expulsions in times of migratory crisis: Comments on the Khlaifia case of the ECHR, *EU Immigration and Asylum Law and Policy*, 2016.
[349] In light of Article 52 (3) of the EU Charter, the jurisprudence of the ECtHR in matters concerning Article 4 of Protocol No. 4 is determinant as regards Article 19 (1).

one needs to assess the level of individual examination required. As has been established above, the assessment is always done on a case by case basis. In its assessment, the ECtHR has acknowledged and taken into consideration several facts which have been of relevance for the assessment of whether or not an expulsion measure has been of a collective nature.[350]

The Court has held that the fact that a number of aliens are subject to similar decisions is not itself sufficient to conclude that there is a collective expulsion, if each person has been given the opportunity to put arguments against his or her expulsion.[351] That does not mean, however, that where the authorities claim to have made such an individual examination, the background to the execution of the expulsion order plays no further role in determining whether there has been a collective expulsion.[352] As has been discussed above, the prohibition of collective expulsion does not guarantee the explicit right to an individual interview in all circumstances. What is necessary, however, is that each alien has a genuine and effective possibility of submitting arguments against his or her expulsion.[353] Further, these arguments should be examined in an appropriate manner by the authorities of the respondent state.[354] In case an interview takes place, what matters is not the quantity, but rather the quality. Standardised questions and a short duration of interviews are, in principle, not prohibited and will not, in any case, be decisive in the determination of whether or not a prohibition has taken place. [355] It would be desirable for the Court to further clarify the doubts surrounding the conditions of the individual interview. Although interviews are not necessary in all circumstances, further clarification is needed regarding the way in which they should be conducted, in order to assure that the individual examination is real and not merely formal.[356] As became clear through the judgement of *Asady and Others v. Slovakia*, several ambiguities remain as to this matter, including, *inter alia*, the duration of an individual interview and the content of the questions asked during an interview.[357] Nevertheless, having examined both cases of *Khlaifia v. Italy* and

[350] *Čonka v. Belgium,* (51564/99), 5.2.2002, §§ 60-63; *Sharifi and Others v. Italy and Greece,* (16643/09), 21.10.2014, §§ 214-225; *M.K. and Others v. Poland,* (40503/17, 42902/17 and 43643/17), 23.7.2020, § 202.
[351] see, among others, *Sultani v. France*, (45223/05), 20.9.2007, § 81; *Hirsi Jamaa and Others v. Italy*, (27765/09), 23.2.2012, § 184.
[352] *Čonka v. Belgium,* (51564/99), 5.2.2002, § 59.
[353] *Khlaifia and Others v. Italy* [GC], (16483/12), 15.12.2016, § 248.
[354] *Ibid*.
[355] Gatta, Francesco Luigi, Systematic push back of 'well behaving' asylum seekers at the Polish border: M.K. and Others v. Poland, *Strasbourg Observers*, 7.10.2020.
[356] *Ibid*.
[357] Joint dissenting opinion of judges Lemmens, Keller and Schembri Orland in the judgment of *Asady and Others v. Slovakia* demonstrates the fact that so far, the judges of the Court have not been able to find a common ground on these matters.

Asady and Others v. Slovakia, what seems to be rather clear is that, when individuals may be able to indicate a legal or factual ground which would preclude their removal under international or national law, an interview will be necessary and required.[358]

Already as early as in the judgment *Čonka v. Belgium,* the Court concluded that, having taken into account all relevant facts of the case, a breach of Article 4 Protocol No. 4 had taken place because the procedure followed by the authorities "did not enable it to eliminate all doubt that the expulsion might have been collective".[359] Similarly, in the Chamber judgment of *N.D. and N.T. v. Spain,* having taken all circumstances into consideration, the Court considered that the procedure followed was "incapable of casting doubt on the collective nature of the expulsions complained of".[360] This should be the standard point in the assessment of whether or not a breach has taken place. In other words, if the Court has even the slightest reason to doubt that the expulsion might have been collective, the conclusion should be that the state has violated the prohibition of collective expulsion.

In case of children involved in the summary return, the Court has clarified that "where a child is accompanied by a relative or the like, the requirements of Article 4 of Protocol No. 4 could be met if that adult is in a position to submit, meaningfully and effectively, arguments against the expulsion on behalf of the child".[361] In the case of *Moustahi v. France*, which concerned the removal of children who were at a very young age (five and three at the time), the children were not assisted by any accompanying adult and no reasonable and objective examination of the children's situation had taken place before the removal.[362] This resulted in a breach of Article 4 of Protocol No. 4.

Finally, in assessing whether or not a state has acted in breach of Article 4 of Protocol No. 4 it seems that the Court has given particular weight to whether or not, in case of expulsion, the applicants would *de facto* be in a risk of being subjected to treatment incompatible with the

[358] Joint dissenting opinion of judges Lemmens, Keller and Schembri Orland in the judgment of *Asady and Others v. Slovakia,* (24917/15), 24.3.2020, § 13; *Khlaifia and Others v. Italy* [GC], (16483/12), 15.12.2016, § 253.
[359] *Čonka v. Belgium,* (51564/99), 5.2.2002, § 61. Judges Lemmens, Keller and Schembri Orland referred to this in their joint dissenting opinion in the judgment of *Asady and Others v. Slovakia,* (24917/15), 24.3.2020, § 14.
[360] Chamber judgment of *N.D and N.T v. Spain,* (8675/15 and 8697/15), 3.10.2017, § 107. Referred to the Grand Chamber on 29.1.2018.
[361] ECtHR, "Administrative detention followed by hasty removal of two children having unlawfully entered Mayotte from the Comoros: several violations of the Convention", ECHR 192 (2020), Press Release, 25.6.2020
[362] *Moustahi v. France,* (9347/14), 25.6.2020.

Convention and especially Article 3.[363] Although the Court has not established this as being *per se* a requirement for finding a breach of the prohibition of collective expulsions, existing case law shows that the extent of applicable procedural guarantees differs depending on whether the migrant is entitled to additional protection under Article 3.[364] In *N.D. and N.T. v. Spain*, for example, the Grand Chamber makes an explicit comparison between cases *Hirsi v. Italy* and *Sharifi v. Italy and Greece*, on the one hand, and *Khlaifia v. Italy,* on the other hand, on the basis that in the latter, the applicants did not allege a violation of Article 3 on account of their expulsion.

With reference to the applicable EU law providing for effective procedural guarantees to prevent collective expulsions at borders, as has been established above, EU Charter contains important provisions in addition to Article 19 (1), which are of significance. These are, in particular, Articles 41, 47 and 48 of the EU Charter. Importantly, the right to be heard, which forms a general principle of EU law, is contained in all of the aforementioned articles.[365] Following the status of a general principle of EU law, the principle becomes binding not only on EU agencies, but also on Member States when acting within the scope of EU law. The judgment of CJEU in *Mukarubega* highlighted the binding character of the right to be heard, where it was held that the question of illegally staying third-country nationals fell within the scope of national law,

> provided that the rules adopted to that effect are the same as those to which individuals in comparable situations under national law are subject (the principle of equivalence) and that they do not make it impossible in practice or excessively difficult to exercise the rights conferred by the European Union legal order (the principle of effectiveness)[366]

In light of the principles of equivalence and effectiveness and following the judgements provided by the CJEU, general principles established in EU law, such as the right to be heard, should always be respected in relation to return related decisions.[367] Notably, activities of pushbacks prevent the effective realization of the right to be heard and cannot be permitted under any circumstances. Further, in examining the application of the right to be heard to cases of collective expulsions, Lena Riemer has importantly concluded that "EU member states, when expelling groups of foreigners from their state must guarantee every individual's right to

[363] See, among others, *Asady and Others v. Slovakia,* (24917/15), 24.3.2020, § 67, *Khlaifia and Others v. Italy* [GC], (16483/12), 15.1.2016.
[364] Carlier & Leboeuf, 2020, pp. 455-473, p. 465.
[365] See, in this regard, *Mukarubega*, § 43.
[366] *Ibid.*, § 51.
[367] *Mukarubega, Boudjlida, G and R.*

'a fair and transparent procedure' in accordance with the general principles of EU law".[368]

As the CJEU has established, EU Member States are, as a rule, obliged to observe the right to be heard in cases where decisions might significantly affect individuals' interest.[369] Importantly, however, the CJEU has acknowledged that the non-respect of the right to be heard renders a decision invalid only if the outcome of the procedure might have been different if the right was respected.[370] Thus, the right to be heard is not absolute and the limitation established by the CJEU arguably resembles the restrictive approach taken by the Grand Chamber. In light of this, the CJEU has established a requirement for national courts, where it considers that a procedural irregularity affecting the right to be heard has occurred, "to assess whether in the light of the factual and legal circumstances of the case, the outcome of the administrative procedure at issue could have been different if the third-country nationals in question had been able to put forward information which might show that their detention should be brought to an end".[371]

[368] Riemer, 2020, p. 138.
[369] *G and R,* § 35.
[370] *Ibid.*, § 38. See also, European Commission, Return Handbook, 2017, p. 65.
[371] *Ibid.*, § 40.

5. Future prospects

As has been reiterated on many occasions, the ECtHR has been playing a decisive role in outlining the scope and content of the main features of the prohibition of collective expulsion.[372] The Court's assessment of the prohibition of collective expulsion has largely influenced the work by, *inter alia*, the ILC and this has been enshrined in the final result of the Draft Articles on the Expulsion of Aliens.[373] While the prohibition of collective expulsion is provided in several other regional human rights treaties, many ambiguities have remained as to the definition and scope of the prohibition. In this regard, the interpretation given by the ECtHR has been particularly meaningful and welcomed. The Court will certainly continue to have a fundamental role in setting a precedent for future cases concerning pushbacks and collective returns at borders.

What will be of crucial importance, however, is the position which the EU will be willing to take to combat the issues relating to border policies conducted by its Member States. Recently, the European Commission has revealed its proposal for a new Pact on Asylum and Migration, which is intended to replace the Dublin regulation, with the aim of addressing the imbalances in EU Member States burdens related to migrants' arrivals. This new pact will be an opportunity for the EU to improve its asylum system and thus enhance the treatment of migrants at borders of frontline EU states.[374]

Undoubtedly, border practices adopted by the EU Member States have had direct consequences on migrants' human rights and this has been enshrined in the case law of the ECtHR concerning collective expulsions.[375] An important issue in relation to border surveillance and violations of human rights at borders is that, from the perspective of the third-country national who is the potential victim of pushbacks, the increased fragmentation of border management makes it

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[372] Gatta, Francesco Luigi, *The Problematic Management of Migratory Flows in Europe and its Impact on Human Rights: The Prohibition of Collective Expulsion of Aliens in the Case-law of the European Court of Human Rights,* in Migration Issues before International Courts and Tribunals, Bruno, Palombino, Di Stefano (eds.), 2019, pp. 119–146, 131.

[373] see, United Nations, Draft Articles on the Expulsion of Aliens with commentaries, 2014, commentary to Draft Article 9.

[374] European Commission, A fresh start on migration: Building confidence and striking a new balance between responsibility and solidarity, Press Release, 23.9.2020, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1706 [accessed 3.12.2020].

[375] Gatta, Francesco Luigi, *The Problematic Management of Migratory Flows in Europe and its Impact on Human Rights: The Prohibition of Collective Expulsion of Aliens in the Case-law of the European Court of Human Rights,* in Migration Issues before International Courts and Tribunals, Bruno, Palombino, Di Stefano (eds.), 2019, pp. 119–146, 120.

more difficult for the individual to understand who is responsible for these actions.[376] This is largely linked to the increased externalization of border management and cooperation between the EU and authorities from third countries in matters relating to border surveillance and expulsion orders.[377] While the cooperation with third countries is ultimately necessary for the EU in order to manage migratory flows, this has a direct effect on the individual seeking refuge in another country as it increases the fragmentation of border management, making it easier for these authorities to escape their responsibilities and procedural requirements under, *inter alia*, Article 4 Protocol No. 4. Another concern is that the more attention is directed on the border surveillance of Member States to assess how these comply with human rights standards, the more increases the risk that EU Member States aim to avoid international responsibility by distancing themselves from this politically divisive issue.[378] This leads to an increase of EU's externalization policies aiming at reducing the number of migrants entering Europe, which is exactly what is happening with the so-called "pullbacks", where states aim at retaining migrants on one side through bilateral agreements. Notably, the cooperation with third states in the migration management has had significant consequences on the rights of migrants. An important reason behind this is that not all states have the same human rights standards or institutions upholding them. At the same time, migrants are facing difficulties in holding the EU or the Council of Europe Member States responsible for possible human rights violations, leaving them in a so-called "legal limbo".[379]

Thus, what is all the more important is to introduce a fair balance between state sovereignty, on the one hand, and international human rights standards that states are bound to respect, on the other hand. While having the right to control the entry, residence and expulsion of aliens, states should assure that their border management does not lead to arbitrary expulsions violating the principle of non-refoulement and/or the prohibition of collective expulsion.[380] Ultimately, an individual assessment will be necessary in order to avoid arbitrariness.[381] As has been indicated by Goodwin-Gill, "expelling States are formally obliged to balance their own interests against those of the individuals liable to be affected, taking account of their acquired

[376] Carrera & Stefan (eds.), 2020, pp. 259–288, 268.
[377] *Ibid*.
[378] Strik, 2018, p. 1.
[379] *Ibid*., p. 3.
[380] See, among others, OHCHR, Recommended principles and Guidelines on Human Rights at international borders, available at: https://www.ohchr.org/Documents/Issues/Migration/OHCHR_Recommended_Principles_Guidelines.pdf [accessed 28.1.2021].
[381] Boeles et al., 2014, p. 428.

rights and legitimate expectations and aiming to achieve a *reasonable relationship of proportionality* between the end and the means".[382] An adequate balance is also necessary in the Court's assessment as regards the prohibition of collective expulsion. As Ana Rita Gil has provided, while a more strict concept of the collective expulsion will most likely allow states to adopt policies defending their sovereignty to an even higher extent, which might lead to an increase of collective expulsions, adopting a very broad approach on the prohibition might result in the ineffectiveness of bordering states in enforcing immigration policies.[383] Notably, the Court has in several judgments decided to emphasize "the challenges facing European States in terms of immigration control as a result of the economic crisis and recent social and political changes which have had a particular impact on certain regions of Africa and the Middle East".[384] However, as formulated by the Court, the problems with managing migratory flows cannot justify State's practices which are not compatible with its obligations under the Convention or the Protocols thereto.[385] The Court thereby acknowledges both the challenges faced by European states in terms of immigration control and migrants' human rights which have to be respected even in times of crisis and instability.[386]

The EU's new pact on Migration and Asylum will have a fundamental role in resolving the challenges faced by the Dublin Regulation, most importantly, with introducing a fair responsibility-sharing. This is also of utmost importance in order for Member States to fully respect the rights enshrined in the ECHR. To date, although the EU sets its rules in the field of asylum and migration, its Member States still remain accountable under international human rights treaties to which they are State Parties.[387] In light of this, the forthcoming accession of the EU to the ECHR, which is currently under negotiation, will most certainly have a strengthening impact on the protection of migrants against pushbacks and collective expulsions.[388] According to a joint statement on behalf of the Council of Europe and the European Commission concerning the resumption of negotiations on the EU's accession to the

[382] Goodwin-Gill, 1984, at 7.
[383] Gil, Ana Rita, Collective expulsions in times of migratory crisis: Comments on the Khlaifia case of the ECHR, *EU Immigration and Asylum Law and Policy*, 2016.
[384] *M.S.S. v. Belgium and Greece* [GC], (30696/09), 21.1.2011, § 223; *Hirsi Jamaa and Others v. Italy* [GC], (27765/09), 23.2.2012, §§ 122 and 176; and *Khlaifia and Others v. Italy* [GC], (16483/12), 15.1.2016, § 241
[385] See, among others, *Hirsi Jamaa and others v. Italy,* [GC], (27765/09), 23.2.2012, § 179; *Georgia v. Russia* (I) [GC], (13255/07)*,* 3.7.2014, § 177.
[386] Lingaas, 2019, pp. 1-24, 13.
[387] Lenart, 2012, pp. 4-19, 6.
[388] The CJEU has frequently underlined that, as long as the EU has not acceded to the ECHR, the ECHR is not legally binding on the EU as a distinct legal entity. See, *e.g.,* Case C-617/10, *Åklagaren v. Hans Åkerberg Fransson*, 26 February 2013, EU:C:2013:105, para. 44; Case C-398/13 P, *Inuit Tapiriit Kanatami and Others v. Commission*, 3 September 2015, EU:C:2015:535, para. 45.

ECHR on the 29th of September 2020, the accession, which is a legal requirement under the TEU, "will help to guarantee the coherence and consistency between EU law and the Convention system".[389] Through the accession, citizens will be able to challenge the actions taken by the EU's institutions before the ECtHR and the EU will also be able to join its Member States in the Court's proceedings concerning alleged violations resulting from EU law. The accession of the EU to the ECHR has been subject to discussion for decades already and has been prolonged as a consequence of several legal issues. Thus, it remains to be seen when this accession will occur.[390]

Finally, what remains to be seen is the approach which the ECtHR will take in upcoming cases concerning the prohibition of collective expulsion. Recently, multiple international organizations and NGOs have highlighted the worrying trend of pushbacks and collective expulsions conducted by Eastern European countries.[391] While some EU frontline countries, such as Italy and Spain, have already been involved in cases concerning collective expulsions, currently, several cases are pending at the Court, lodged against Hungary, Croatia, Latvia and North Macedonia, among others, with regard to their border control practices and alleged collective expulsions.[392] The case law concerning Article 4 of Protocol No. 4 is thus destined to increase and the forthcoming judgments will give the Court an opportunity to further reflect and clarify the scope and content of the prohibition of collective expulsions and the various issues which have been identified in this thesis.

[389] Council of Europe, Joint statement on behalf of the Council of Europe and the European Commission, Newsroom, 29.9.2020, available at: https://www.coe.int/en/web/portal/-/the-eu-s-accession-to-the-european-convention-on-human-rights [accessed 28.1.2021].
[390] See in this regard, CJEU, Opinion 2/13 of the Court (Full Court), 18 December 2014, where the CJEU held that the draft accession agreement was incompatible with Article 6 (2) of the TEU.
[391] See, among others, Statement issued by the Council of Europe Commissioner for Human Rights, "Croatian authorities must stop pushbacks and border violence, and end impunity", 21.10.2020, available at: https://www.coe.int/en/web/commissioner/-/croatian-authorities-must-stop-pushbacks-and-border-violence-and-end-impunity [accessed 28.1.2021].
[392] see, *M.H. and Others v. Croatia*, (15670/1) communicated to the Croatian Government on 11 May 2018; *H.K. v. Hungary*, (18531/17) and *Khurram v. Hungary*, (12625/17) both communicated to the Hungarian Government on 13 November 2017; *A.A. and Others v. North Macedonia* and four other applications (55798/16, 55808/16, 55817/16, 55820/16 and 55823/16) communicated to the Government on 23 January 2017; *M.A. and Others v. Latvia* (25564/18) communicated to the Latvian Government on 10 May 2019.

6. Conclusion

The present thesis has examined the European framework for protection against collective expulsions in pushback-situations at borders. Attention has particularly been drawn to the scope and content of the prohibition of collective expulsion, procedural guarantees inherent to the prohibition as well as the level of individual examination required prior to expulsion. While there has been an increased attention as regards collective expulsions in the jurisprudence of the ECtHR, little research has been conducted in this field. As has been established above, several inconsistencies have appeared in the argumentation by the judges of the Court. In the present thesis, the author has therefore aimed at providing an answer to some of the most pressing legal issues that have emerged in the case law of the Court concerning the prohibition of collective expulsion. Notably, the purpose is to provide valuable guidance in assessing when an expulsion has been of a collective nature.

In the second chapter of this thesis, the issue of pushbacks at European borders was outlined as well as the relevant legal framework for the protection against arbitrary expulsion. Here, it was stressed that, while the practice of pushbacks has become all the more widespread, in some countries, it has even been witnessed as having a structural and systematic character. In many ways, pushbacks and collective expulsions of migrants have been the unacceptable result of an unfair responsibility-sharing between EU Member States. In addition, a particular concern has been the widespread silence on the EU level on the issues of pushbacks and collective expulsions of migrants. This has been demonstrated by the fact that the CJEU has to date never been asked to interpret Article 19 (1) of the EU Charter, providing for the prohibition of collective expulsion.

In the third chapter, the author sought to clarify the scope and content of the prohibition of collective expulsion. This was done first by focusing on the assessment made by the ECtHR, and secondly by examining more closely the prohibition as provided in the EU Charter. According to the ECtHR, a collective expulsion indicates "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".[393] Two essential elements are thus of particular significance; first, that the individual in question is

[393] European Court of Human Rights: Collective expulsion of aliens, factsheet, November 2013, available at: https://www.refworld.org/pdfid/539eb0b84.pdf [accessed 31.1.2021].

expelled together with other persons, as a group, and secondly, that his/her situation was not examined individually by the national authorities.[394] Inevitably, to be characterized as "collective", it requires the involvement of a certain number of persons. However, there are no requirements such as a minimum number of persons affected or membership of a particular group. In other words, a decisive criterion for the application of Article 4 should not be the number of which the group consists of nor the link knitting together the members of that group, but rather the procedure followed the expulsion.[395] As has been noted, the provision applies broadly to every third country national. However, as regards the collective expulsion of nationals, these are protected under Article 3 (1) of Protocol No. 4. In examining the territorial applicability, it was established that the prohibition of collective expulsion of aliens is not limited to the territory of the State and can apply extraterritorially. Importantly, therefore, as has been established in judgments of *Hirsi v. Italy* and *N.D. and N.T. v. Spain,* Article 4 of Protocol No. 4 applies to pushback operations, both on the high seas and at land borders.

Second, the author saw the need to clarify the relationship between the prohibition of collective expulsion and the principle of non-refoulement. Notably, the provisions are highly intertwined in that both provide for a procedural requirement of an individual assessment of each case. It was nevertheless stressed that these two provisions should be seen as autonomous, so that a violation of Article 4 Protocol 4 does not require demonstration of the risk of ill-treatment in case of expulsion. With this in mind, it was crucially held that the prohibition of collective expulsion should concern only the procedure and not the substantive grounds for expulsion, as is the case with the principle of non-refoulement. Nevertheless, in many ways, the prohibition of collective expulsion presents a prerequisite for the realisation of the principle of non-refoulement, since it is only through examining the individual situation that the authorities can assure the absence of the risk of refoulement.

With an aim to clarify the scope and content of the prohibition of collective expulsion as enshrined in Article 19 (1) of the EU Charter, it was established that paragraph 1 of the Article has the same meaning and scope as Article 4 of Protocol No 4 to the ECHR. Thus, its purpose is similarly to guarantee that every decision is based on a specific examination and that no

[394] Gatta, Francesco Luigi, *The Problematic Management of Migratory Flows in Europe and its Impact on Human Rights: The Prohibition of Collective Expulsion of Aliens in the Case-law of the European Court of Human Rights,* in Migration Issues before International Courts and Tribunals, Bruno, Palombino, Di Stefano (eds.), 2019, pp. 119–146, 138.
[395] van Dijk, van Hoof, 1998, p. 676.

single measure can be taken to expel all persons having the nationality of a particular State. Importantly, however, the main difference is that the prohibition, as enshrined in Article 19 (1) of the EU Charter, applies to everyone. Hence, the EU Charter does not limit the scope of the prohibition to third country nationals.

In an attempt to clarify the substance of the prohibition, in the fourth chapter, attention was drawn to the procedural guarantees inherent in the prohibition. Although not explicitly mentioned in neither Article 4 of Protocol No. 4 to the ECHR nor Article 19 (1) of the EU Charter, the ECtHR has established several procedural guarantees in its case-law, which have been examined in the present thesis. As has been established, the most crucial part of the prohibition of collective expulsion entails the right to an individual and objective examination. While the Court does not explicitly provide for a clarification of what constitutes an individual and objective examination, important elements have nevertheless been identified, which are of particular relevance in order to realise this right. Of importance is, first of all, whether the person concerned has been identified, and secondly, whether the examination has been real and not merely formal. In light of this, the Court has particularly stressed the need for a holistic approach, where all the relevant facts are taken into account as well as the general context at the material time. Most crucially, what is important, is that every case is looked at individually and decided on its own particular facts. Arguably, the aforementioned elements remain relatively vague and are open for interpretation. Thus, the judges of the Court have on several occasions been unable to agree on whether or not an objective and individual examination has taken place.

Further, the right to legal assistance and the access to information can be regarded as important procedural safeguards in the prohibition of collective expulsion. The ECtHR has previously ruled a violation of Article 4 of Protocol No. 4 in cases where there has been clear evidence that the applicants were not afforded legal assistance and/or access to information about their asylum procedure. These procedural guarantees are pivotal in order for migrants to be aware of their asylum procedure, their rights, which steps to take and in order to obtain remedy for human rights violations. Access to a translator or interpreter is moreover an important prerequisite for the effective realisation of the right to legal assistance and the access to information. While the aforementioned procedural guarantees are unlikely to suffice alone in order for the Court to find a violation of Article 4 of Protocol No. 4, the Court has nevertheless decided to highlight these as important elements in the prohibition of collective expulsion.

As the Grand Chamber has clarified in its latest judgments concerning collective expulsions and the right to an individual examination, the Court seems to be unwilling to impose very strict procedural requirements for states, such as the obligation to provide for an individual interview in every case. Since the entry, stay and expulsion of aliens is so central to state's sovereignty, it may be that the Court has consciously decided to provide for a more substantial discretionary power for states to enforce their immigration legislation.[396] The Grand Chamber has moreover held that the applicant's own conduct is a relevant factor in assessing the protection to be afforded under Article 4 of Protocol No. 4. According to the Court, no violation of Article 4 of Protocol No. 4 will be found if the lack of an individual examination is the consequence of an applicant's own culpable conduct. In *N.D. and N.T. v. Spain,* the applicant's own culpable conduct led to the Court finding no violation of the prohibition of collective expulsion on behalf of Spain, while in *M.K. and Others v. Poland,* it appeared that the applicants had acted orderly and in a legal manner, wherefore the exception of the "culpable conduct" did not apply. Ultimately, migrants behaviour may therefore be the decisive factor in the assessment of whether or not a breach of the prohibition of collective expulsion has taken place. In light of this, it was stressed that the exception sets a dangerous precedent for future cases. An overly broad interpretation of the "own culpable conduct" could ultimately lead to the Court finding all cases of arbitrary expulsions of irregular migrants as attributable to their own conduct. Thus, the exception of the "own culpable conduct" has the potential of making Article 4 of Protocol No. 4. virtually inapplicable to cases of pushbacks at borders, which is why the author finds it necessary for the Court to carefully assess the potential damage that the newly introduced exception could have.

Finally, the author sought to examine procedural guarantees in EU law, which are of relevance in cases of collective expulsions. Importantly, following the principle of equivalent protection established by Article 52 (3) of the EU Charter, the content of Article 19 (1) of the EU Charter corresponds to that of Article 4 of Protocol No. 4. Moreover, the EU Charter provides for important procedural guarantees relevant in cases of collective expulsions. These are, in particular, the right to good administration (Article 41), the right to effective remedy and to a fair trial (Article 47) and presumption of innocence and right of defence (Article 48).

[396] See, Boeles et al., 2014, p. 437.

The right to be heard, which forms a general principle of EU law, is contained in all of the aforementioned articles. In the author's view, the principle forms a crucial basis for the individualisation requirement by assuring, first of all, that each individual has the right to express his or her view on the legality of his or her stay and has the right to put forward arguments against an expulsion measure, and secondly, by imposing on the national authorities a positive obligation to take into account all the relevant information and to give a detailed statement of reasons for its decision. Notably, the right to be heard establishes an important constraint to the discretionary power of Member States to expel migrants. Similarly to the prohibition of collective expulsion, the procedural guarantees are an essential condition for the genuine exercise of the right to be heard and in this regard, the standards established by the ECtHR and CJEU complement each other. Moreover, this right, unlike Article 19 (1) of the EU Charter, has particularly gained importance in the jurisprudence of the CJEU. Thus, the right to be heard could be instrumental in offering the desired consistency between the EU and the ECHR in protecting migrants at borders of Europe against pushbacks and collective expulsions.

As regards EU secondary legislation, the procedural guarantees in Chapter III of the Returns Directive resemble to a great extent those provided by the ECtHR concerning the prohibition of collective expulsion and thus, the directive is not without significance. Importantly, it has been noted that, under the Returns Directive, removal can take place only after a return decision has been issued, which essentially requires an examination of whether or not the person concerned has a right to stay. While the Returns Directive provides for some valuable procedural guarantees supporting the individualisation requirement, the fact that Member States may choose not to apply this directive to those "who are apprehended or intercepted by the competent authorities in connection with the irregular crossing by land, sea or air" significantly limits the scope of the directive and paves the way for states to remove third country nationals without the necessary individual and objective assessment. Thus, it is questionable whether the Returns Directive provides any real added value to situations of pushbacks at borders. Importantly however, the Returns Directive still obliges every EU Member State to refrain from returning migrants in case of a risk of non-refoulement and this essentially requires an individual assessment to a certain degree.

Based on the findings, it can be noted that effective procedural guarantees are in place in Europe to prevent migrants from being collectively expelled at borders. However, as has been

demonstrated, these procedural guarantees are not necessarily applied in practice in pushback-situations. As the case-law on Article 4 of Protocol No. 4 has only recently been increasing, clarification of the specific content of the prohibition is needed. Arguably, the engagement of third party interveners in cases concerning collective expulsions has demonstrated the complexity of the issue. As pushbacks and collective expulsions continue to be a serious issue at the bordering countries of Europe, the case law on Article 4 of Protocol No. 4 is destined to increase and the forthcoming judgments will give the Court an opportunity to further reflect and clarify the legal issues identified in this thesis. Eventually, the EU will also have to better address the issue of pushbacks conducted at borders of EU Member States. As individuals are sometimes compelled to enter the EU in an irregular manner (as was the case with the applicants in *N.D. and N.T. v. Spain*) the irregularity is not itself sufficient in order to justify an arbitrary expulsion. Here, the CJEU could provide more room for engaging with elements established by the ECtHR in cases concerning collective expulsions.

Bibliography

MONOGRAPHS AND ARTICLES

Alland and Teitgen-Colly, Traité du droit d'asile, Paris, 2002.

Barbero, Iker & Illamola-Dausà, Mariona, *Deportation without the right to complaint* in Fundamental Rights Challenges in Border Controls and Expulsion of Irregular Immigrants in the European Union, Carrera, Sergio & Stefan, Marco (eds.), *Routledge Studies in Human Rights,* 2020

Besselink, Leonard, The ECJ as the European "Supreme Court": Setting Aside Citizens' Rights for EU Law Supremacy, *Verfassungsblog,* 2014.

Boeles, Pieter; den Heijer, Maarten; Lodder, Gerrie; Wouters, Kees, European Migration Law, Insentia, 2009.

Boeles, Pieter; den Heijer, Maarten; Lodder, Gerrie; Wouters, Kees, European Migration Law, Insentia, 2nd Edition, 2014.

Carlier, Jean-Yves & Leboeuf, Luc, *The Prohibition of Collective Expulsion as an Individualisation Requirement*, in Law and judicial dialogue on the return of irregular migrants from the European Union, Moraru, Madeline; Cornelisse, Galina; De Bruycker, Philippe (eds.), Oxford:Hart, pp. 455-473, 2020.

Carlier, Jan-Yves & Leboef, Luc, Collective expulsion or not? Individualisation of decision making in migration and asylum law, EU Immigration and Asylum Law and Policy, 2018.

Carrera, Sergio & Stefan, Marco, *Human rights complaints at international borders or during expulsions procedures,* in Fundamental Rights Challenges in Border Controls and Expulsion of Irregular Immigrants in the European Union, Carrera, Sergio & Stefan, Marco (eds.), Routledge Studies in Human Rights, pp. 259-288, 2020.

Ciliberto, Giulia, Libya's Pull-Backs of Boat Migrants: Can Italy Be Held Accountable for Violations of International Law?, *The Italian Law Journal,* Vol. 4, No. 2, 2018.

Council of Europe, Spain: Legislation and practice on immigration and asylum must adhere to human rights standards, Press Release, issued at the end of the Commissioner's visit to Spain (Melilla and Madrid) from 13-16 January 2015, 16.1.2015.

Den Heijer, Maarten, Reflections on Refoulement and Collective Expulsion in the Hirsi Case, International Journal of Refugee Law Vol. 25 No. 2, 2013.

Di Filippo, Marcello, Walking the (barbed) wire of the prohibition of collective expulsion: An assessment of the Strasbourg case law, *Diritti umani e diritto internazionale*, 15, issue no. 2, forthcoming, 2020.

Drakopoulou, Aikaterini; Konstantinou, Alexandros; Koros, Dimitris, *Border management at the external Schengen Borders: Border controls, return operations, and obstacles to effective remedies in Greece* in Fundamental Rights Challenges in Border Controls and Expulsion of Irregular Immigrants in the European Union, Carrera, Sergio & Stefan, Marco (eds.), Routledge Studies in Human Rights, pp. 175-196, 2020.

Durán Alba, Juan Fernando, *Prohibition on the collective expulsion of aliens (Article 4 of Protocol 4)*, in Europe of Rights: A Compendium on the European Convention of Human Rights, pp. 629-633, 2012.

Gatta, Francesco Luigi 'Tell me your story, but hurry up because I have to expel you' – Asady and Others v. Slovakia: how to (quickly) conduct individual interviews and (not) apply the ND & NT "own culpable conduct" test to collective expulsions, Strasbourg Observers, 2020.

Gatta, Francesco Luigi, Systematic push back of 'well behaving' asylum seekers at the Polish border: M.K. and Others v. Poland, Strasbourg Observers, 2020.

Gatta, Francesco Luigi, Migration and the Rule of (Human Rights) Law: Two 'Crises' Looking in the Same Mirror', 15 CYELP 99, 2019.

Gatta, Francesco Luigi, *The Problematic Management of Migratory Flows in Europe and its Impact on Human Rights: The Prohibition of Collective Expulsion of Aliens in the Case Law of the European Court of Human Rights* in, Migration Issues before International Courts and Tribunals, Bruno, Giovanni Carlo; Palombino, Fulvio Maria; Di Stefano, Adriana (eds.) Consiglio Nazionale delle Ricerche, pp. 119-146, 2019.

Gil, Ana Rita, Collective expulsions in times of migratory crisis: Comments on the Khlaifia case of the ECHR, EU Immigration and Asylum Law and Policy, 2016.

Guild, Elspeth, *Article 19 - Protection in the Event of Removal, Expulsion or Extradition*, in The EU Charter of Fundamental Rights: A Commentary, Peers, Steve; Hervey, Tamara; Kenner, Jeff; Ward, Angela (eds.), London: Hart Publishing, Bloomsbury Collections, pp. 543–562, 2014.

Goodwin-Gill, Guy S. & Mc Adam, Jane: The refugee in international law, New York: Oxford University Press, 3 ed., 2007.

Goodwin-Gill, Guy S., Mass Expulsion: Legal Aspects, mimeographed paper written for the Independent Commission on International Humanitarian Issues, 1984.

Hakiki, Hanaa, N.D. and N.T. v. Spain: Defining Strasbourg's position on push backs at land?, *Strasbourg Observers*, 2020.

Hemme, Battjes, In search for a fair balance. The absolute character of the prohibition of refoulement under Article 3 ECHR, *Leiden Journal of International law*, *22*(3), 2009.

Henckaerts, Jean-Marie, Mass expulsion in modern international law and practice, Martinus Nijhoff Publishers, 1995.

Ilareva, Valeria, *The Right to be Heard: The Underestimated Condition for Effective Returns and Human Rights Considerations*, in Law and judicial dialogue on the return of irregular migrants from the European Union, Moraru, Madeline; Cornelisse, Galina; De Bruycker, Philippe (eds.), Oxford:Hart, 2017, pp. 351- 368.

Lauterpacht, Sir Elihu & Bethlehem, Daniel, The Scope and Content of the Principle of Non-Refoulement: Opinion, *Cambridge University Press*, 2003.

Lenart, Joanna, 'Fortress Europe': Compliance of the Dublin II Regulation with the European Convention for the Protection of Human Rights and Fundamental Freedoms, Merko*urios,* Volume 28/Issue 75, pp. 4-19, 2012.

Lingaas, Carola, Judicial Responses to the Migration Crisis: The Role of Courts in the Creation of a European Identity, in Migration Issues before International Courts and Tribunals, Bruno, Giovanni Carlo; Palombino, Fulvio Maria; Di Stefano, Adriana (eds.), *Consiglio Nazionale delle Ricerche*, pp. 1-24, 2019.

Lysenia, Maja, *Access to effective remedies for foreigners affected by decisions, actions and inactions of the Polish Border Guard* in Fundamental Rights Challenges in Border Controls and Expulsion of Irregular Immigrants in the European Union, Carrera, Sergio & Stefan, Marco (eds.), *Routledge Studies in Human Rights*, 2020.

Mauro, Maria Rosaria, Detention and Expulsion of Migrants: The Khlaifia v. Italy Case, 25 Italian Y.B. Int'l L. 85, 2015.

McBride, Jeremy, Access to justice - for migrants and asylum seekers in Europe, Council of Europe Publishing, 2009.

Milanovic, Marko, Extraterritorial application of human rights treaties : Law, principles, and policy, *Oxford Monographs in International Law*, 2011.

Mole, Nuala, Asylum and the European Convention on Human Rights, *Fourth Edition,* Council of Europe Publishing, 2007.

Mole, Nuala, Asylum and the European Convention on Human Rights, *Third Edition,* Council of Europe Publishing, 2000.

Moraru, Madalina & Renaudiere, Géraldine, European Synthesis Report on the Judicial Implementation of Chapter III of the Return Directive - Procedural Guarantees, REDIAL Research Report 2016/03, 2016.

Peers, Steve, EU Immigration and Asylum Law : Text and Commentary. Vol. 2nd rev. ed, Brill | Nijhoff, 2012.

Pijnenburg, Annick, From Italian Pushbacks to Libyan Pullbacks: Is Hirsi 2.0 in the Making in Strasbourg?, *European Journal of Migration and Law 20*, pp. 396-426, 2018.

Pirjola, Jari, Shadows in Paradise – Exploring *Non-Refoulement* as an Open Concept, *International Journal of Refugee Law,* Vol. 19, Issue 4, 2007, pp. 639-660, 2007.

Raimondo, Giulia, N.D. and N.T. v Spain: A Slippery Slope for the Protection of Irregular Migrant, Oxford Faculty of Law, 2020.

Ramji-Nogale, Jaya, Rights in exile - Prohibiting collective expulsion of aliens at European Court of Human Rights in *The international refugee rights initiatives refugee legal aid newsletter,* 2016.

Reneman, Marcelle, EU Asylum Procedures and the Right to an Effective Remedy, Oxford:Hart, 2014.

Riemer, Lena, The Prohibition of Collective Expulsion in Public International Law, Doctoral Dissertation, Freien Universität Berlin, 2020.

Rietiker, Daniel, Collective Expulsion of Aliens: The European Court of Human Rights (Strasbourg) as the Island of Hope in Stormy Times, *39 Suffolk Transnational Law Rev. 651*, 2016.

Rosas, Allan, When Is The EU Charter of Fundamental Rights Applicable at National Level?, *Jurisprudence*, 19 (4), pp. 1269–1288, 2012.

Schmalz, Dana & Pichl, Mazimilian, "Unlawful" may not mean rightless. The shocking ECtHR Grand Chamber judgment in case N.D: and N.T, *Verfassungsblog*, 14.2.2020.

Spijkerboer, Thomas, Subsidiarity and 'Arguability': The European Court of Human Rights' Case Law on Judicial Review in Asylum Cases, *International Journal of Refugee Law*, Vol. 21, Issue 1, pp. 48-74, 2009.

Strik, Tineke, *Mechanisms to prevent pushbacks,* in Fundamental Rights Challenges in Border Controls and Expulsion of Irregular Immigrants in the European Union, Carrera, Sergio & Stefan, Marco (eds.), *Routledge Studies in Human Rights,* pp. 234-258, 2020.

Strik, Tineke, Pushback politices and practise in the Council of Europe Member States, Parliamentary Assembly of the Council of Europe, Doc. 14645, Reference 4414, 2019.

Strik, Tineke, Human rights impact of the "external dimension" of European Union asylum and migration policy: out of sight, out of rights?, Parliamentary Assembly of the Council of Europe, Report, Doc. 14575, 2018.

Trevisanut, Seline, The Principle of Non-Refoulement And the De-Territorialization of Border Control at Sea, *Leiden Journal of International Law*, 2014.

Van Dijk, Pieter & Van Hoof, G.J.H, Theory and practice of the European Convention of Human Rights, Martinus Nijhoff Publishers, 1998.

Zirulia, Stefano & Peers, Steve, A template for protecting human rights during the 'refugee crisis'? Immigration detention and the expulsion of migrants in a recent ECtHR Grand Chamber ruling, *EU Law Analysis*, 2017.

TREATIES AND STATUTES

2012 Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, Official Journal of the European Union, C 326.

2000 Charter of Fundamental Rights of the European Union, concluded 7 December 2000, entered into force 1 December 2009, 2000/C 364/01, European Union.

1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, concluded 18 December 1990, entered into force 1 July 2003, UNTS vol. 2220

1987 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, concluded 10 December 1984, entered into force 26 June 1987, UNTS vol. 1465.

1981 African Charter on Human and Peoples' Rights ("Banjul Charter"), Organization of African Unity (OAU), adopted 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58, entered into force 21 October 1986.

1969 American Convention on Human Rights "Pact of San Jose, Costa Rica" (B-32), Organization of American States (OAS), concluded 22 November 1969, entered into force 18 July 1978.

1966 United Nations, International Covenant on Civil and Political Rights, opened for signature 16 December 1966, entered into force 23 March 1976, UNTS vol. 171.

1951 United Nations, Convention Relating to the Status of Refugees, concluded 28 July 1951, entered into force 22 April 1954, UNTS vol. 189.

1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols 11 and 14, concluded 4 November 1950, entered into force 3 September 1953, ETS No.5

1945 United Nations, Statute of the International Court of Justice, 24 October 1945, 33 UNTS vol. 993.

REGULATIONS AND DIRECTIVES

Directive 2011/95/EU of the European Parliament and of the Council 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 (recast), Official Journal of the European Union, 20.12.2011, L 337/9.

Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast). Official Journal of the European Union, 29.6.2013, L 180/60.

Directive 2008/115/EU of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, Official Journal of the European Union, 16.12.2008, L 348/98

Regulation No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders.

INTERNATIONAL CASE LAW

European Court of Human Rights

Al Nashif v. Bulgaria, 2 June 2002, App. no. 50963/99.

Andric v. Sweden, 23 February 1999, App. no. 45917/99.

Asady and Others v. Slovakia, 24 March 2020, App. no. 24917/15.

Bader and Bader v. Sweden, 8 November 2005, App. no. 13284/04.

Berisha and Haljiti v. Former Yugoslav Republic of Macedonia, 16 June 2005, App. no. 18670/03.

Berdzenishvili and Others v. Russia, 20 March 2017, App. nos. 14594/07, 14597/07, 14976/07, 14978/07, 15221/07, 16369/07 and 16706/07.

Čonka v. Belgium, 5 February 2002, App. no. 51564/99.

Chahal v. The United Kingdom, 15 December 1996, App. no. 70/1995/576/662.

Dritsas and Others v. Italy, 1 February 2011, App. no. 2344/02.

F.G. v. Sweden, Grand Chamber Judgement, 23 March 2016, App. no. 43611/11.

Georgia v. Russia (I), Grand Chamber Judgement, 3 July 2014, App. no. 13255/07.

Hirsi Jamaa and Others v. Italy, Grand Chamber Judgement, 23 February 2012, App. no. 27765/09.

Ilias and Ahmed v. Hungary, 21 November 2019, App. no. 47287/15.

Khlaifia and Others v. Italy, Grand Chamber Judgement, 15 December 2016, App. no. 16483/12.

M.K. and others v. Poland, 23 July 2020, App. nos. 40503/17, 42902/17 and 43643/17.

European Commission on Human Rights

The Court of Justice of the European Union

C-166/13, Judgment of 5 November 2014.

2012 *M.M. v. Minister for Justice, Equality and Law Reform and Others*, case C-277/11, Judgment of 22 November 2012.

2013 *G and R v. Staatssecretaris van Veiligheid en Justitie,* case C-383/13 PPU, Judgment of 10 September 2013.

2013 *Åklagaren v. Hans Åkerberg Fransson,* case C-617/10, Judgement of 26 February 2013.

2013 *Mohamad Zakaria*, case C-23/12, Judgment of 17 January 2013,

2011 *Teresa Cicala v. Regione Siciliana,* case C 482/10, Judgment of 21 December 2011.

2011 *N. S. v. Secretary of State for the Home Department* and *M.E. and Others v. Refugee Applications Commissioner ja Minister for Justice, Equality and Law Reform,* joined cases C-411/10 and C-493/10, Judgement of 21 December 2011

2008 *Sopropé - Organizações de Calçado Lda v Fazenda Pública*, case C-349/07, Judgment of 18 December 2008.

2000 *Dieter Krombach v André Bamberski,* case C-7/98, Judgment of 28 March 2000.

INTERNET SOURCES

Border Violence Monitoring Network, Pushbacks and Police Violence - Legal Framework, available at: https://www.borderviolence.eu/legal-framework/ [last accessed 31.1.2021].

Border Violence Monitoring Network, Press Release: Court find Slovenian state guilty of chain pushback to Bosnia-Herzegovina, 20.7.2020, available at: https://www.borderviolence.eu/wp-content/uploads/Press-Release_Slovenian-Court-Ruling.pdf [last accessed 31.1.2021].

Border Violence Monitoring Network, InfoKolpa: Press Kit for Foreign Media, available at: https://www.borderviolence.eu/wp-content/uploads/PRESS-KIT-FOR-INTERNATIONAL-MEDIA.pdf [last accessed 31.1.2021].

Council of Europe Portal, Treaty Office, Chart of signatures and ratifications of Treaty 046, available at: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/046/signatures?p_auth=MYXarGX0 [last accessed 31.1.2021].

ECCHR, N.D. and N.T. v. Spain - A Major Setback for Refugee Protection: ECtHR dismisses complaint against Spain, available at: https://www.ecchr.eu/en/case/nd-and-nt-v-spain/ [last accessed 3.12.2020].

Frontex, Origin & tasks, available at: https://frontex.europa.eu/about-frontex/origin-tasks/ [last accessed 3.12.2020]

Jones, Sam, European Courts under fire for backing up Spain's express deportations, The Guardian, 13.2.2020, available at: https://www.theguardian.com/world/2020/feb/13/european-court-under-fire-backing-spain-express-deportations [last accessed 29.1.2021].

Liboreiro, Jorge, EU migration chief urges Frontex to clarify pushback allegations, 22.1.2021, Euronews, available at: https://www.euronews.com/2021/01/20/eu-migration-chief-urges-frontex-to-clarify-pushback-allegations [last accessed 29.1.2021].

Refugee Rights Europe, Pushbacks and Rights Violations at European Borders: A Summary of Key News Coverage and Evidence 17 July to 24 July 2020, available at: https://refugee-rights.eu/wp-content/uploads/2020/07/Pushbacks-News-Roundup-17-July-to-24-July-2020.pdf.pdf [last accessed 31.1.2021].

The New Humanitarian, An open secret: Refugee pushbacks across the Turkey-Greece border, 8.10.2018, available at: https://www.thenewhumanitarian.org/special-report/2018/10/08/refugee-pushbacks-across-turkey-greece-border-Evros [last accessed 3.12.2020].

UN News, UN expert raises alarm over migrant, asylum seeker 'pushbacks' at Turkey-Greece border, 23.3.2020, available at: https://news.un.org/en/story/2020/03/1059992 [last accessed 3.12.2020].

UNHCR, UNHCR calls on Greece to investigate pushbacks at sea and land borders with Turkey, 12.6.2020, available at: https://www.unhcr.org/news/briefing/2020/6/5ee33a6f4/unhcr-calls-greece-investigate-pushbacks-sea-land-borders-turkey.html [last accessed 3.12.2020].

Vengoechea, Juliana & Cox, Simon, Case Watch: Europe's Human Rights Court Delivers Mixed Ruling on Migrant Rights (Part one), Open Society Justice Initiative, 13.1.2017, available at: https://www.justiceinitiative.org/voices/case-watch-europe-s-human-rights-court-delivers-mixed-ruling-migrant-rights-part-one [last accessed 3.12.2020].

OTHER DOCUMENTS

Council of Europe, Committee's final draft, DH/Exp/Misc (62) 11, 9 March 1962.

Council of Europe: Committee of Ministers, *Twenty Guidelines of Forced Return*, Adopted on 4 May 2005 at the 925th meeting of the Ministers' Deputies.

Council of Europe, Guide on Article 4 Protocol No. 4 to the European Convention on Human Rights – Prohibition of collective expulsion of aliens, 30 April 2020, available at: https://www.echr.coe.int/Documents/Guide_Art_4_Protocol_4_ENG.pdf [last accessed 3.12.2020]

Council of Europe, Explanatory Reports on the Second to Fifth Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms, submitted by the Committee of Experts to the Committee of Ministers, H(71)11, 1971.

Council of Europe, Explanatory Report to Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto, European Treaty Series - No. 46, Strasbourg, 16.IX.1963.

Council of Europe and FRA, Handbook on European Law relating to asylum, borders and immigration, 2015.

Court of Justice of the European Union, Opinion 2/13 of the Court (Full Court), 18 December 2014.

ECRE, The application of the EU Charter of Fundamental Rights to asylum procedural law, 2014.

European Commission, Return Handbook, 2017, available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/return_handbook_en.pdf [last accessed 8.12.2020].

European Court of Human Rights, Factsheet - Derogation in time of emergency, September 2020, available at: https://www.echr.coe.int/documents/fs_derogation_eng.pdf [last accessed 14.12.2020].

European Court of Human Rights, Guide on the case-law of the European Convention on Human Rights, Immigration, Last update: 31.8.2020, available at: https://rm.coe.int/court-case-law-guide-immigration-eng/16809f1556 [last accessed 3.12.2020].

European Court of Human Rights, "Administrative detention followed by hasty removal of two children having unlawfully entered Mayotte from the Comoros: several violations of the Convention", ECHR 192 (2020), Press Release, 25.6.2020.

European Court of Human Rights, Spain did not breach the Convention in returning migrants to Morocco who had attempted to cross the fences of the Melilla enclave, Press Release, 13.2.2020.

European Court of Human Rights, Collective expulsion of aliens, factsheet, November 2013, available at: https://www.refworld.org/pdfid/539eb0b84.pdf [last accessed 3.12.2020]

European Union Agency for Fundamental Rights (FRA), Periodic data collection on the migration situation in the EU: March Highlights, 2018, available at: https://fra.europa.eu/en/news/2018/migrant-pushbacks-growing-concern-some-member-states [last accessed 9.12.2020].

International Law Commission, Fifty-eighth session, Geneva, 2006, "Expulsion of aliens", Memorandum by the Secretariat, UN Doc. Doc. A/CN.4/565 (2006) 2.

Memorandum of Understanding on Cooperation on Development, *Combatting Illegal Immigration, Human Trafficking and Smuggling, and on Strengthening Border Security* (Torino: ASGI, 2 February 2017), unofficial translation available at http://www.asgi.it/wp-content/uploads/2017/02/ITALY-LIBYA-MEMORANDUM-02.02.2017.pdf [last accessed 28.1.2021]

Office of the High Commissioner for Human Rights, 'Discussion Paper on the Expulsion of Aliens', September 2006, available at: https://www2.ohchr.org/english/issues/migration/taskforce/docs/Discussion-paper-expulsions.pdf [last accessed 28.1.2021].

Office of the High Commissioner for Human Rights, Recommended principles and Guidelines on Human Rights at international borders, available at: https://www.ohchr.org/Documents/Issues/Migration/OHCHR_Recommended_Principles_Guidelines.pdf [last accessed 28.1.2021].

Official Journal of the European Union, Explanations relating to the EU Charter of Fundamental Rights, (2007/C 303/02), 14.12.2007.

Parliamentary Assembly of the Council of Europe, Pushback policies and practice in the Council of Europe member States, Resolution 2299, 2019.

Parliamentary Assembly of the Council of Europe, Resolution 1821, 2011.

Third-party intervention by the Council of Europe Commissioner for Human Rights at CJEU proceedings concerning cases of N.D. v. Spain (No. 8675/15) and N.T. v. Spain. (No. 8697/15), COMDH(2018)11, 22 March 2018.

UN High Commissioner for Refugees (UNHCR), Note on International Protection (submitted by the High Commissioner), A/AC.96/815, 31 August 1993.

United Nations, Draft articles on the Expulsion of Aliens, with commentaries, 2014.

UNHCR, Note on Non-refoulement (Submitted by the High Commissioner), EC/SCP/2, 23 August 1977.

United Nations General Assembly, Expulsion of aliens: Memorandum by the Secretariat, International Law Commission Fifty-eight session, 10.7.2006.