THE PROHIBITION OF COLLECTIVE EXPULSION IN PUBLIC INTERNATIONAL LAW

INAUGURAL-DISSERTATION

zur
Erlangung des Grades einer Doktorin des Rechts
am Fachbereich Rechtswissenschaft

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Lena Riemer
Wissenschaftliche Mitarbeiterin in Berlin
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Erstgutachter: Professor Dr. Helmut Aust
Zweitgutachterin: Professorin Dr. Heike Krieger
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Deutsche Zusammenfassung der Doktorarbeit (German translation of the summary of the doctoral thesis)

Seit Jahrtausenden migrieren Menschen weltweit aus unterschiedlichsten Gründen. Migration bring diverse ökonomische, kulturelle und soziale Vorteile mit sich für die beteiligten MigrantInnen, die Herkunftsstaaten und Zielstaaten. Gleichzeitig birgt, insbesondere Massenmigration auch Bürden mit sich. Die zunehmende Politisierung des Diskurses um Einwanderung und das Erstarken rechter Kräfte nach der europäischen ‚Flüchtlingskrise' 2015 spiegeln dies wider. Migration ist eine der drängendsten Herausforderungen unserer Zeit.

Wie kann und sollte die Weltgemeinschaft die Herausforderung der 244 Millionen internationalen MigrantInnen weltweit angehen? Das ist die höchste Zahl an MigrantInnen in der modernen Geschichte. In den letzten Jahren haben Migrationsfragen in öffentlichen Debatten und in der (nationalen und regionalen) Rechtsprechung oftmals zu Spannungen geführt. Das sich entwickelnde Menschenrechtssystem, insbesondere auf regionaler Ebene, hat eine entscheidende Rolle beim Schutz eines Minimums an Rechten für MigrantInnen und bei der Einschränkung der absoluten Souveränität der Staaten bei der Migrationskontrolle gespielt.

Der bekannteste internationale Vertrag, welcher Fluchtbewegungen über Grenzen hinweg regelt, ist die Flüchtlingskonvention von 1951 und ihr Protokoll von 1967.

147 Staaten sind mindestens einem dieser beiden Instrumente beigetreten. Die Flüchtlingskonvention von 1951 enthält Kernprinzipien des Flüchtlingsschutzes wie das *Non-Refoulement* Prinzip (Verbot, jemanden an einen Ort zurückzuschicken, an dem sein Leben/Wohlbefinden gefährdet wäre), die Definition des Begriffs ‚Flüchtling' und das Verbot der willkürlichen Ausweisung von sich rechtmäßig aufhaltenden Flüchtlingen im Hoheitsgebiet eines Mitgliedstaates.

Der persönliche Geltungsbereich dieser Garantien ist auf die Definition des Begriffs ‚Flüchtling' in der Konvention beschränkt, wonach eine Person, die sich aufgrund von Verfolgung wegen ihrer „Rasse, Religion, Staatsangehörigkeit, politischen Überzeugung oder Zugehörigkeit zu einer bestimmten sozialen Gruppe" außerhalb ihres Herkunftslandes befindet, als ‚Flüchtling' gilt.

Binnenvertriebene, WirtschaftsmigrantInnen, Klimaflüchtlinge und alle, die vor Krieg, Bandengewalt oder sonstiger Not fliehen, fallen nicht unter den Schutz dieser Definition.

Diese Schutzlücke für MigrantInnen wurde über einige Jahrzehnte hinweg von Staaten nur marginal beachtet. So enthielt die 1950 entworfene Europäische Menschenrechtskonvention (EMRK) enthielt keine Bestimmung zum Schutz von MigrantInnen.

Die Frage der Ausweisung von AusländerInnen auf regionaler Ebene wurde erstmals in der Niederlassungskonvention von 1955 behandelt. Artikel 1 bis 3 dieser Konvention regeln die Einreise, den Aufenthalt und die Ausweisung von BürgerInnen anderer Vertragsstaaten. Art. 3, der sich auf die Flüchtlingskonvention von 1951 stützt, legt Verfahrensgarantien fest, um willkürliche Einzelausweisungen von ausländischen Staatsangehörigen anderer Mitgliedsstaaten zu verhindern. Das Verbot der Kollektivausweisung wurde nicht in den Vertrag aufgenommen und spielte nach seinen Erläuternden Bemerkungen bei der Ausarbeitung des Vertrags keine Rolle.

Erst mit der Ausarbeitung des Protokolls Nr. 4 zur EMRK im Jahr 1963 wurde die Frage der Einbeziehung der Rechte von MigrantInnen in Form des Verbots der Kollektivausweisung in der Konvention bzw. ihren Protokollen behandelt. Art. 4 Prot. 4 EMRK war die erste Kodifizierung des Verbots. Viele weitere Kodifizierungen folgten auf regionaler und internationaler Ebene. Auf globaler Ebene sind 183 Staaten durch regionale und/oder internationale Vertragsverpflichtungen gebunden, die explizit oder implizit das Verbot der Kollektivausweisung beinhalten. Diese Staaten haben entweder eine oder mehrere regionale oder internationale Konventionen ratifiziert, die dieses Prinzip enthalten.

Der Sonderberichterstatter für die ‚Ausweisung von Ausländern' der UN Völkerrechtskommission Maurice Kamto hält das Verbot der Kollektivausweisung für einen allgemeinen Grundsatz des Völkerrechts. Trotz einer so weitgehenden Anerkennung dieses Prinzips wird seine Bedeutung für den Schutz von MigrantInnen stark unterschätzt und in Theorie und Praxis oftmals ungerechtfertigterweise übersehen. Im Gegensatz zum bekannteren *Non-Refoulement* Prinzip wird das Verbot oft nur am Rande oder überhaupt nicht erwähnt, wenn Schutzmechanismen für MigrantInnen erwähnt werden.

In meiner Dissertation versuche ich dazu beizutragen, das Schattendasein des Verbots zu beenden. Dies möchte ich dadurch erreichen indem ich seine globale Bedeutung für den Schutz von MigrantInnen, Asylsuchenden und Flüchtlinge vor willkürlichen Ausweisungen hervorhebe. Ich zeige den Wert des Verbots der Kollektivausweisung gerade in Zeiten der Massenmigration auf und beleuchte seinen Anwendungsbereich und seine Entwicklung seit seiner Entstehung auf regionaler und internationaler Ebene.

Was garantiert das Verbot der Kollektivausweisung? Wer wird geschützt?

Die Kodifizierung des Verbots der Kollektivausweisung in den meisten der untersuchten Menschenrechtsabkommen besagt kurz und knapp: „Die Kollektivausweisung von Ausländern ist verboten."

Diese prägnante Formulierung wirft mehrere Folgefragen auf: Welche Verpflichtungen ergeben sich aus diesem Verbot für Staaten, die Gruppen von AusländerInnen ausweisen? Wer ist geschützt? Unter welchen Umständen? Ist der Geltungsbereich in allen regionalen und internationalen Verträgen, welche das Verbot beinhalten, gleich oder wenigstens vergleichbar?

Diese Fragen bildeten den Ausgangspunkt für meine vergleichende Beurteilung von Reichweite und Art des Kollektivausweisungsverbots.

Die meisten der untersuchten Menschenrechtsabkommen, insbesondere die regionalen Menschenrechtsverträge, enthalten generelle Verfahrensrechte zum Schutz des Einzelnen vor willkürlichen Handlungen staatlicher Behörden. Diese beinhalten zum Beispiel das Recht auf Gehör, das Recht auf Beistand und das Recht, Rechtsmittel einzulegen. Diese generellen Verfahrensrechte sind jedoch in Ausweisungsverfahren von AusländerInnen nicht anwendbar. Um allen AusländerInnen zumindest einen minimalen Verfahrensschutz gegen willkürliche Ausweisung zu gewährleisten, wurden weitere Garantien in diese Instrumente aufgenommen oder bestehende Rechte durch Auslegung weiterentwickelt. Das Verbot der Kollektivausweisung ist ein prominentes Beispiel hierfür. Dies gilt insbesondere für die regionalen Menschenrechtsverträgen in Europa, Afrika und Lateinamerika.

Im Laufe der letzten Jahrzehnte, seit der ersten Kodifizierung in den 1960er Jahren, hat der Anwendungsbereich dieses Verbots eine bemerkenswerte Entwicklung erfahren. Die interpretatorische Entwicklung des Anwendungsbereichs des Verbots der Kollektivausweisung, wurde insbesondere durch den Europäischen Gerichtshof für Menschenrechte (EGMR) vorangetrieben.

In meiner Arbeit bewerte ich zunächst diese Entwicklung innerhalb der jeweiligen regionalen und internationalen Systeme. In einem zweiten Schritt zeige ich, dass der Anwendungsbereich des Verbots zwischen den verschiedenen Kodifizierungen weitgehend kongruent ist. Dies ist besonders überraschend, da die Formulierungen der verschiedenen Konventionen - insbesondere in der Afrikanischen Menschenrechtscharta - das Gegenteil vermuten lassen. Diese Konvergenz des Anwendungsbereichs zwischen den verschiedenen Verträgen lässt sich teilweise durch einen inter-gerichtlichen ‚Dialog' erklären.

Generell ist festzustellen, dass regionale und internationale Gerichte und Spruchkörper das Verbot der Kollektivausweisung als ein Recht auf ein ordnungsgemäßes Verfahren interpretieren. Dieses Recht beinhaltet Mindestverfahrensgarantien für jede Person einer Gruppe von AusländerInnen. Jede AusländerIn der Gruppe hat das Rech ihre Ansprüche und Einwendungen gegen die Ausweisung geltend zu machen und diese von der zuständigen Behörde prüfen zu lassen. Das Verbot der Kollektivausweisung in der heute geltenden Fassung enthält somit ein Recht

auf ein faires Verfahren im Falle einer Ausweisung, sowie das Recht auf einen wirksamen Rechtsbehelf gegen die Ausweisungsentscheidung.

Was die Rechtsnatur des Verbots anbelangt, so argumentiere ich, dass insbesondere die regionale Rechtsprechung und andere Quellen zum Verbot der Kollektivausweisung in der EMRK, der EU Grundrechtecharta und der Inter-Amerikanischen Menschenrechtskonvention darauf hindeuten, dass die jeweilige Bestimmung selbst verfahrensrechtlichen Charakter hat. Dies ist der Fall, obwohl ihr Wortlaut etwas anderes vermuten lässt.

Wie oben angesprochen, konzentriert sich die Bestimmung über das Verbot der Massenausweisung in der Afrikanischen Charta offenbar eher auf den diskriminierenden Charakter der Gruppenausweisung als auf die Frage, ob der ausweisende Staat die in dem Verbot enthaltenen Verfahrensgarantien eingehalten hat.

Die Afrikanische Menschenrechtskommission hat sich jedoch von diesem ursprünglichen Verständnis des Verbots in ihrer Rechtsprechung wegbewegt und ist zu einer Auslegung übergegangen, die eher mit der anderer regionaler Gerichte übereinstimmt (insbesondere mit dem EGMR und dem Inter-Amerikanischen Gerichtshof und der Inter-Amerikanischen Menschenrechtskommission).

So kann argumentiert werden, dass das Verbot der Kollektivausweisung in allen untersuchten regionalen Menschenrechtskonventionen Verfahrensrechte enthält, die darauf abzielen, willkürliche Gruppenausweisungen zu verhindern.

Der Kern dieser Verfahrensrechte gegen willkürliche Ausweisungen ist in allen Konventionen kongruent. Das Verbot der Kollektivausweisung in allen untersuchten Konventionen und Chartas gewährleistet das Recht jeder AusländerIn der Gruppe, jegliche Ansprüche und Einwendungen gegen die Ausweisung geltend zu machen. Dieses Vorbringen muss durch eine zuständige Behörde geprüft werden. Weiterhin umfasst das Verbot der Kollektivausweisung das Recht auf Rechtsbeistand und auf die Hilfe eines Übersetzers. Das Verbot garantiert außerdem das Recht auf einen wirksamen Rechtsbehelf, welcher die aufschiebende Wirkung der Ausweisung auslöst. Das Verbot der Kollektivausweisung in der Interamerikanischen Menschenrechtskonvention geht über diese verfahrensrechtlichen Mindestgarantien hinaus und gewährt auch das Recht auf konsularischen Beistand in Fällen von Kollektivausweisungen.

Auf internationaler Ebene enthalten der Internationale Pakt über bürgerliche und politische Rechte, die UN-Wanderarbeiterkonvention und das Übereinkommen gegen Folter dieselben Mindestverfahrensgarantien im Falle von Kollektivausweisungen für alle AusländerInnen.

Jüngste Entwicklungen in der Auslegung des Verbots der Kollektivausweisung durch den EGMR lassen jedoch darauf schließen, dass je nach Art der Kollektivausweisung ein unterschiedliches Maß an Garantien

besteht. Der Gerichtshof scheint zwischen zwei Ausweisungsszenarien zu unterscheiden. Das erste Szenario stellt Ausweisungen im ‚ursprünglichen' Sinne dar. Diese umfassen Gruppenausweisungen von AusländerInnen, welche sich seit mindestens mehreren Monaten in dem ausweisenden Staat aufhalten. Für diese Gruppe von AusländerInnen gelten die Garantien des Verbots der Kollektivausweisung in vollem Umfang.

Die zweite Kategorie bezieht sich auf summarische Kollektivausweisungen. Eine summarische Ausweisung erfolgt kurz (zwischen Stunden und einigen Tagen) nach der Einreise der AusländerIn in das Hoheitsgebiet eines Staates oder wenn die Behörden den AusländerInnen die Einreise in das Hoheitsgebiet verweigern. Die im Verbot der Kollektivausweisung enthaltenen Garantien in dieser Kategorie gelten in geringerem Umfang. Das Urteil in der Rechtssache *Khlaifia und andere gegen Italien* von 2016 legt nahe, dass die Große Kammer des EGMR implizit diese Unterscheidung verlangt. Ob diese Unterscheidung von anderen Gerichten übernommen wird und ob der EGMR diese Unterscheidung in künftigen Urteilen manifestiert, bleibt abzuwarten.

Schützt das Verbot der Kollektivausweisung AusländerInnen an/außerhalb der Staatsgrenze vor einer willkürlichen Aus-/Abweisung?

Die Große Kammer des EGMR hat sich mit der Frage der extraterritorialen Anwendbarkeit des Verbots der Kollektivausweisung in den richtungsweisenden Rechtssachen *Hirsi Jamaa und andere gegen Italien* im Jahr 2012 befasst. Hier bestätigte der Gerichtshof die extraterritoriale Anwendbarkeit der Bestimmung, solange der jeweilige Staat *de jure* oder *de facto* die ausschließliche Kontrolle über die zur Rückkehr gezwungenen Personen hat.

Andere regionale und internationale Vertragsorgane wie die Interamerikanische Menschenrechtskommission und das UN-Wanderarbeiterkomitee haben sich bei der Auslegung der extraterritorialen Anwendbarkeit des Verbots der Kollektivausweisung ausdrücklich auf das *Hirsi Jamaa*-Urteil der großen Kammer des EGMR gestützt.

Das UN-Wanderarbeiterkomitee hat ausdrücklich betont, dass das Verbot der Kollektivausweisung in der UN-Wanderarbeiterkonvention extraterritoriale Anwendbarkeit genießt.

Die Krux der Frage nach der extraterritorialen Anwendbarkeit des Verbots liegt in der Definition des Begriffs ‚Ausweisung'. Die Definition dieses Elements des Prinzips stellt eine schwierigere Aufgabe dar als die anderen Elemente des Verbots der Kollektivausweisung. Die Hauptfrage dreht sich um darum, ob ‚Ausweisung' im allgemeinen Sinne als „jemanden von einem Ort vertreiben" verstanden werden sollte, wie es der EGMR in *Hirsi Jamaa und andere gegen Italien* getan hat und wie es vom UN-Wanderarbeitnehmerausschuss in seinem Allgemeinen Kommentar Nr. 2 anerkannt wurde; oder in einem engeren Sinne als „jemanden zwingen, ein Gebiet zu verlassen", wie es die UN-Völkerrechtskommission in ihrem

Entwurf der Artikel über die Ausweisung von Ausländern getan hat. Die erstgenannte, weiter gefasste Definition schließt extraterritoriale Handlungen, wie das Zurückschieben auf hoher See, ein. Letztere ist streng territorial und umfasst nur Ausweisungen von AusländerInnen, die sich physisch auf dem Staatsgebiet befanden vor ihrer Ausweisung und ggf. Rückführung vom betreffenden Staatsgebiet.

Die Auswertung der Rechtsprechung und Berichte aller relevanten Vertragsorgane und der UN-Völkerrechtskommission zeigt, dass es keine einheitliche Herangehensweise an diese Frage gibt. Die Afrikanische Menschenrechtskommission und der Afrikanische Gerichtshof, die Interamerikanische Menschenrechtskommission und der Gerichtshof haben sich bisher nicht mit der Frage der extraterritorialen Anwendbarkeit des Verbots befasst. Keines der Vertragsorgane hat in seinen Fällen und Berichten jemals den Begriff ‚Ausweisung' definiert. Daher kann keine plausible und allumfassende Bewertung ihres Verständnisses des Begriffs vorgenommen werden.

Allerdings scheint die Afrikanische Kommission den Anwendungsbereich der Afrikanischen Charta über das Territorium des Mitgliedsstaates hinaus zumindest hinsichtlich des Rechts auf Leben erweitert zu haben. In ihrem Allgemeinen Kommentar Nr. 3 hat die Kommission festgelegt, dass die Mitgliedsstaaten „die Verantwortung für jede extraterritoriale Verletzung des Rechts auf Leben" sicherstellen müssen.

Der Interamerikanische Gerichtshof für Menschenrechte stellte in seinem richtungsweisenden Gutachten 2017 zum Thema „Umwelt und Menschenrechte" klar, dass die Interamerikanische Menschenrechtskonvention auch extraterritorial anwendbar sein kann, wenn die betroffenen Personen der Jurisdiktion des handelnden Staates unterstehen. Dies ist dann der Fall, wenn ein Kausalzusammenhang zwischen dem Vorfall, der zur Verletzung der Menschenrechte geführt hat, und dem Territorium des handelnden Staates besteht.

Diese beiden Beispiele dienen jedoch nur als Indikator dafür, dass die Gerichte den Begriff ‚Ausweisung' im weiteren Sinne interpretieren könnten. Ein weiterer Indikator ist, dass sich die Afrikanische Menschenrechtskommission, der Interamerikanische Gerichtshof für Menschenrechte und die Interamerikanische Menschenrechtskommission in ihrer Rechtsprechung bezüglich des Verbots nach 2012 auf *Hirsi Jamaa* stützen. Allerdings nicht, um die Definition des Begriffs ‚Ausweisung' zu klären, sondern um die in der Bestimmung enthaltenen Verfahrensgarantien zu verdeutlichen. Der Interamerikanische Gerichtshof hat beispielsweise in seinem Fall der Kollektivausweisung von haitianischen MigrantInnen aus der Dominikanischen Republik im Jahr 2014 sowohl auf den Fall des EGMR *Hirsi Jamaa* als auch auf den Artikelentwurf der UN-Völkerrechtskonvention zur Ausweisung von AusländerInnen Bezug genommen.

Trotz dieser beiden unterschiedlichen Ansätze zur Definition von ‚Ausweisung' haben sie auch ein entscheidendes gemeinsames Element.

Beide Ansätze setzen voraus, dass die Ausweisung auf irgendeiner Form von Zwang beruht. Indirekte Kollektivausweisungen, bei denen die Gruppe von AusländerInnen das Hoheitsgebiet aufgrund irgendeiner Form von Druck verlässt, ohne dass ein den staatlichen Behörden zuzurechnender Akt vorliegt, sind nicht erfasst.

List of Abbreviations

ACHPR – African Charter on Human and Peoples' Rights (Banjul Charter)

AComHPR – African Commission on Human and Peoples' Rights

ACtHPR – African Court on Human and Peoples' Rights

AU – African Union

CAT – Committee against Torture

CEDAW – Convention on the Elimination of All Forms of Discrimination against Women

CHRC – Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms

CHRCoE – Commissioner for Human Rights of the Council of Europe

CIS – Commonwealth of Independent States

CJEU – Court of Justice of the European Union

CMW – Committee on the Protection of the Rights of All Migrant Workers and Members of their Families (Migrant Worker Committee)

CoE – Council of Europe

ComEDAW – Committee on the Elimination of Discrimination against Women

CPSI – Project Children's Protection and Security International

CRC – Committee on the Rights of the Child

ECHR – European Convention on Human Rights

ECoE – European Convention on Establishment

EComHR – European Commission of Human Rights

ECRE – European Council for Refugees and Exiles

ECtHR – European Court of Human Rights

EU – European Union

EUChFR – Charter of Fundamental Rights of the European Union

GC – Grand Chamber (of the European Court of Human Rights)

GCM, Global Compact on Migration – UN Global Compact on Safe, Orderly, and Regular Migration

HRC – Human Rights Committee

HRC CIS – Human Rights Commission of the Commonwealth of Independent States

ACHR – American Convention on Human Rights (Pact of San José)

IACHR – Inter-American Court of Human Rights

IAComHR – Inter-American Commission on Human Rights

ICCPR – International Covenant on Civil and Political Rights

ICESCR – International Covenant on Economic, Social and Cultural Rights

ICPPED – Convention for the Protection of all Persons from enforced Disappearance

IHRDA – Institute for Human Rights and Development in Africa

ILC – International Law Commission

ILC Draft Articles – International Law Commission Draft Articles on the expulsion of aliens

IOM – International Organization for Migration

MPP – Migrant Protection Protocols

OAU – Organisation of African Unity

OAU Refugee Convention – OAU Convention Governing the Specific Aspects of Refugee Problems in Africa

OHCHR – United Nations Office of the High Commissioner for Human Rights

TFEU – Treaty on the Functioning of the European Union

UNCAT – Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

UNCh – Charter of the United Nations

UNComHR – United Nations Commission on Human Rights

UNCRC – United Nations Convention on the Rights of the Child

UNCRMW – International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (UN Migrant Worker Convention)

UNGA – United Nations General Assembly

UNHCR – United Nations High Commissioner for Refugees

VCLT – Vienna Convention on the Law of Treaties

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Chapter I – Introduction

> Throughout history, people have left their homelands in search of protection, better lives and new horizons […]. While some aspects of international migration may give rise to serious logistic, humanitarian, demographic, financial or even security challenges, the phenomenon as a whole is neither a 'threat' requiring military defence, nor a global 'state of emergency' justifying derogation from the applicable normative frameworks, but is a long-standing global governance issue which must be addressed in full compliance with human rights and the rule of law.[1]

This statement by the United Nations Special Rapporteur on torture, Nils Melzer, from 2016 reflects one of the most pressing challenges of our time. How can and should the world community approach the issue of 258 million migrants, representing 3.4% of the global population? This is the highest number and percentage of people on the move in modern history.[2]

Mass migration can offer diverse economic, social, and humanitarian opportunities for migrants and host states alike. At the same time, it can pose immense challenges to national identities, political stability, laws, and government policies, and arguably has led to the 'politicization of migration issues' in public debates and in supranational jurisprudence alike. The evolving human rights system, especially on the regional level, has played a crucial role in protecting a minimum of migrants' rights and limiting states' sovereignty to control the movements of people across borders.

The most prominent international treaty governing the movement of people across borders is the *1951 Refugee Convention* and its *1967 Protocol*.[3]

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[1] UNHRC *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development* A/HRC/37/50, 26 February 2018, para. 6.
[2] International Organization for Migration *World Migration Report 2018* p. 3.
[3] UNGA *Convention Relating to the Status of Refugees*, 28 July 1951, UNTS Vol. 189, p. 137, Convention entry into force 22 April 1954. UNGA *Protocol Relating to the Status of Refugees*, 31 January 1967, UNTS Vol. 606, p. 267, Protocol entry into force 4 October 1967.

Currently, 147 states are party to at least one of these instruments. The *1951 Refugee Convention* contains core principles of refugee protection such as the *non-refoulement* principle (prohibition against returning someone to a place where their life or well-being would be at risk), the definition of 'refugee' and the prohibition of arbitrary expulsion of legally residing refugees from a state's territory. The personal scope of application of these guarantees is limited to the Convention's definition of a 'refugee' as someone who is outside her or his country of origin due to persecution linked to the person's race, religion, nationality, political opinion, or membership in a particular social group.[4] This definition does not cover internally displaced persons, economic migrants, climate refugees or anyone fleeing from war, gang violence, or hardship.[5]

This lacuna of protection for migrants remained an unaddressed issue for many years after the *1951 Refugee Convention's* adoption.[6] The *European Convention on Human Rights* (ECHR), drafted in 1950, did not include any provisions governing the protection of migrants. The *1955 Convention on Establishment* was the first to address the issue of expulsions of foreigners on a regional level,[7] but the scope of protection was limited to citizens of other member states.

Only with the drafting of Protocol 4 to the ECHR in 1963 did migrants' rights receive attention. Protocol 4 codified the prohibition of collective expulsion. Art. 4 Prot. 4 ECHR constituted the first codification of the prohibition. Many more codifications of the prohibition followed. The Special Rapporteur on the expulsion of aliens of the International Law Commission, Maurice Kamto, argues that 'it seems reasonable to suggest that there is a general principle of

[4] Article 1 (A.) (2) *1951 Refugee Convention*.
[5] Some regional and domestic laws governing asylum extent this protection to other categories of migrants. In Germany for example, people fleeing from war receive 'subsidiary protection' which constitutes a less extensive form of protection compared to the 'refugee' status.
[6] For a thorough analysis of how international migration law evolved, inter alia driven by the development of human rights law after World War II see: Chetail, Vincent *International Migration Law* (Oxford University Press 2019), pp. 59-75.
[7] Council of Europe *European Convention on Establishment and Protocol thereto*, 529 UNTS 141, ETS No. 19, opening of the treaty on 13 December 1955, entry into force 23 February 1965.

international law on this matter.'[8] Despite the acknowledgment of this principle through codification, the prohibition's relevance remains vastly overlooked by scholars and practitioners alike.[9]

This study attempts to highlight the prohibition's global importance in protecting the right of migrants, asylum seekers, and refugees to a fair expulsion process, especially in times of mass migration.

This chapter introduces the broader context of the prohibition of collective expulsion in public international law, establishing the study's framework. It first delves into a general assessment of the relationship between state sovereignty and migrants' rights (A). Then, the chapter offers a brief historical overview of the prohibition's relevance (B). The following part (C) provides a glimpse into different regional and international codifications of the prohibition, showing how its bindingness varies throughout the globe. The chapter continues by examining the similarities and differences of the terms 'mass expulsion' and 'collective expulsion', as used in different human right treaties (D). The final part of the chapter (E) explains the general structure and approach of this study.

A. The reciprocal relationship between state sovereignty and migrants' rights in public international law

One of the core principles of international law is state sovereignty, granting states the right to determine the admission and expulsion of foreigners under domestic law. Martti Koskenniemi attributes sovereignty a role in international law 'analogous to that played by "liberty" in domestic liberal discourse'.[10] He characterises sovereignty as 'the critical property an entity must possess in order to qualify as a State'.[11]

[8] Kamto, Maurice *Third report on the expulsion of aliens* UN Doc. A/CN.4/581, 19 April 2007, para. 115.
[9] For more details on this see below, section C and Chapter IV.
[10] Koskenniemi, Martti *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press reissued 2009), p. 300.
[11] Ibid.

Since the end of the Second World War, the protection of individuals has increasingly gained significance in international law, limiting state sovereignty.[12]

Thus, unsurprisingly, discussions on the topic of expulsion, asylum, and migration control, which take place across philosophy, political science, and international law, engage in some form with the apparent dichotomy between state sovereignty and migrants' rights.[13]

Certain motives recur in texts across the disciplines. Philosophers, political scientists, and international law scholars have all reflected upon diminishing state sovereignty as triggered by the evolution of migrants' rights. They examined in particular one question from different perspectives and come to different conclusions: How have migrants' rights limited a state's sovereign right to determine admission and expulsion, and how, in turn, have states reacted to (or counteracted) this change?

In philosophy, opinions on this development span from critical to welcoming states' diminishing sovereign rights and its implications.

On one side of the spectrum are scholars who criticise the diminishing right of states regarding admission and expulsion, arguing in favour of states' strong rights to control this 'bastion' of sovereignty. Moral and political philosopher John Rawls exemplifies this standpoint. He justifies this 'restrictive' approach by stipulating that a democratic society constitutes 'a complete and closed social system' that is 'self-sufficient […]. It is also closed […] in that entry into it is only by birth and exit from it is only by death.'[14] The mass movement of refugees from Kosovo and Bosnia at the time of his writing in the early 1990s may have triggered his state-centric perspective.

[12] For a detailed analysis see Chapter V. Introduction and section A.
[13] See for example: Goodwin-Gill, Guy and McAdam, Jane *The Refugee in International Law* (Oxford University Press 3rd edn. 2007), (*The Refugee in International Law*), introduction; Gammeltoft-Hansen, Thomas *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (Cambridge University Press paperback edn. 2013), pp. 11-13.
[14] Rawls, John *Political Liberalism* (Columbia University Press 1993), p. 41.

In his later work, *The Law of Peoples*, Rawls seemingly builds on his previous findings justifying his argument that a democratic society is a complete and closed social system. In the philosopher's view, individuals are members of certain peoples, of bounded communities.[15] Within this concept of *The Law of Peoples,* he argues in favour of a strong state prerogative when it comes to migration, as he views it as a government's responsibility, as the people's representatives, to control 'the size of their population.'[16]

In a footnote, he clarifies that this remark 'implies that a people has at least a qualified right to limit immigration' as a government must 'protect a people's political culture and its constitutional principles.'[17] Thus, Rawls rejects the idea of diminishing state sovereignty in the area of migration, arguing for the continuing of states' strong rights to control admission and expulsion, which reflects the word and application of present-day international law governing the movement of people across borders.

Opposing scholars reject this position, proposing, through evolving human rights law, more limits on states' sovereign rights to control migration.

Philosopher and political theorist Seyla Benhabib represents this liberal approach. She explains that '[o]ne of the cornerstones of Westphalian sovereignty, namely that states enjoy ultimate authority over all objects and subjects within their circumscribed territory, has been delegitimised through international law.'[18] However, she is, just like Rawls, sceptical about the success of this development in protecting migrants' rights. In her view, states are unwilling to give up sovereignty over migration and to adhere to certain guarantees conferred to migrants by international law. As a consequence, she concludes that this attitude shared by many states has manifested itself in states' use of detention and deportation tactics to avoid their responsibilities

[15] Rawls, John *The Principles of the Law of Peoples* (Harvard University Press 2nd edn. 2000), p. 39.
[16] Ibid.
[17] Ibid.
[18] Benhabib, Seyla *The Rights of Others: Aliens, Residents and Citizens* (Cambridge University Press 2013), (*The Rights of Others*), p. 12.

under international law' in order to counter their declining power in this area of the law.[19]

In a similar vein, philosopher Jürgen Habermas also concludes that states are reluctant to give up sovereignty over migration. His approach resembles Rawls's *The Law of Peoples* in as much as he argues that a state's role and position in migration matters have long-term effects that shape societies and the composition of peoples.[20] However, Habermas's comes to this conclusion with a different view of states' strong prerogative in this regard. He argues for more restrictions of state sovereignty over migration and an adjustment of the international law governing the movement of people across borders as, in his view, the current political system is not fit to tackle present-day migration challenges.[21]

In the field of international law, scholars have also turned to the relationship between state sovereignty over migration issues and migrants' rights. Particularly, what Benhabib has described as states' tactics in avoiding their responsibilities for migrants continues to play a major role[22].

Two important scholars in this line of scholarship, Thomas Gammeltoft-Hansen and Tanja Aalberts, argue that recent migration control trends have shown that states react to the limitation of their sovereign right to control migration by expanding their (restricted) power in the space just outside their territories.[23]

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[19] Benhabib, Seyla *Exile, Statelessness and Migration: Playing Chess with History from Hannah Arendt to Isaiah Berlin* (Princeton University Press 2018), (*Exile, Statelessness and Migration: Playing Chess with History from Hannah Arendt to Isaiah Berlin*), p. 122.
[20] Habermas, Jürgen *The European Nation-State: On the Past and Future of Sovereignty and Citizenship.* (MIT Press. Cambridge 1998), (*The European Nation-State*) and Benhabib, Seyla *The Rights of Others.*
[21] Habermas, Jürgen *The European Nation-State: On the Past and Future of Sovereignty and Citizenship.* In: *The Inclusion of the Other: Studies in Political Theory* (MIT Press. Cambridge 1998), p. 237.
[22] Benhabib, Seyla *Exile, Statelessness and Migration: Playing Chess with History from Hannah Arendt to Isaiah Berlin* p. 122.
[23] Gammeltoft-Hansen, Thomas and Aalberts, Tanja *Search and Rescue as a Geopolitics of International Law* in: Aalberts and Gammeltoft-Hansen *The Changing Practices of International Law* (Cambridge University Press 2018), (*Search and Rescue as a Geopolitics of International Law*), p. 196. The authors draw on the example of an expansion of Search and Rescue Zones outside territorial waters to highlight their point.

These authors see irregular migration as one of the main drivers for states' 'return' to sovereignty in the area of migration.[24] To illustrate this claim, they refer to the high sea, which used to be 'a space of non-sovereignty per se' but has now 'become the venue for a range of competing claims and disclaims to sovereignty and responsibility.'[25] They conclude that by moving migration control to outside a state's territory and by outsourcing it to private actors and third states, countries evade their obligations under international law while maintaining the power to regulate admission into their territories.[26]

These examples from different disciplines highlight the broad debate on the relationship of state sovereignty and migration control. As these academic discussions, governments' viewpoints and state practice shows, nation-states are continuing to insist on their right to regulate the conditions of admission and expulsion of non-citizens. Prominent examples in this regard are the *New York Declaration for Refugees and Migrants* of 2016,[27] which led to the adoption of the *Global Compact for Safe, Orderly and Regular Migration* (GCM)[28] and *the Global Compact on Refugees*[29] in 2018. All three instruments are non-binding. Nevertheless, particularly the GMC led to five states voting against its endorsement by the General Assembly and 24 states being non-voters.[30] These circumstances exemplify the unwillingness of certain states to commit to even non-binding rules governing migration and asylum.

Migration is arguably one of the 'last bastions' of strong state sovereignty in today's globalised world, exemplified by states' reluctance to subjugate themselves to binding international rules governing migration.

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[24] Gammeltoft-Hansen and Aalberts *Search and Rescue as a Geopolitics of International Law* p. 188.
[25] Ibid., p. 194.
[26] Ibid., p. 197.
[27] UNGA *New York Declaration for Refugees and Migrants* Resolution adopted by the General Assembly on 19 September 2016, A/RES/71/1 available at: http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/71/1. All online sources in this study were last accessed on 2 April 2020.
[28] Intergovernmental Conference to Adopt the Global Compact for Safe, Orderly and Regular Migration *Global Compact for Safe, Orderly and Regular Migration*, approved on 10 December 2018.
[29] UNGA *Global Compact on Refugees* Official Records Seventy-third Session Supplement No. 12, A/73/12 (Part II), approved on 10 December 2018.
[30] UNGA *Draft outcome document of the Conference* A/CONF.231/3, 30 July 2018.

The focus of this work is on the existing framework of protection for people moving across borders in international human rights law. This study examines the question of how international law, in particular due process guarantees, affects the sovereign right of states to admit and expel foreigners.

B. The historical relevance of the prohibition of collective expulsion

As inferred above, the history of collective expulsion is a narrative of political oppression, violent conflicts, and gruesome violations of human rights that have affected different marginalised groups around the globe. The following section offers a brief overview of the role expulsions have played throughout history to highlight the relevance of its current prohibition. States use(d) (collective) expulsions as a tool for nation-building, isolation, and deterrence. At the same time, collective expulsions have often gone hand in hand with xenophobia, antisemitism, and racism.

The expulsion of certain groups and individuals from a state's territory has been used as a means of nation- and state-building[31] throughout history.[32]

The emergence of new states, as in the case of Europe in the phases before and after 1919-1939,[33] was the result of the inclusion of certain peoples and the simultaneous exclusion of others.[34] Randall Hansen explains the role of mass expulsion in the process of nation-building throughout history as follows:

> Borders are basic to the construction and creation of refugee movements in both historical and contemporary contexts. In the

[31] Umut Özsu warns not to conflate the concepts of nation- and state-building. Nation-building aims at forming new identities of a people. State-building involves the founding or re-shaping of state institutions. See: Özsu, Umut *Formalizing Displacement: International Law and Population Transfer* (Oxford University Press 2015), (*Formalizing Displacement*), p. 7, fn. 24; pp. 21-44. See also: Hansen, Randall *State Control: Borders, Refugees, and Citizenship* in: Fiddian-Qasmiyeh; Loescher; Long and Sigona *The Oxford Handbook of Refugee and Forced Migration Studies* (Oxford University Press 2014), (*State Control: Borders, Refugees, and Citizenship*), p. 255.

[32] Weiner, Myron *Ethics, national sovereignty and the control of immigration* International Migration Review, Vol. 30, No. 1, 1996, (*Ethics, national sovereignty and the control of immigration*), pp. 171-197.

[33] Hansen, Randall *State Control: Borders, Refugees, and Citizenship* p. 255.

[34] Weiner, Myron *Ethics, national sovereignty and the control of immigration* pp. 171-197.

former, nation states have been built through mass flight and mass expulsions.[35]

Similarly, certain policy makers believed that population transfers, such as in the case of mass exchange of people from Greeks and Turks (or those categorised as such) in the early twentieth century would strengthen a people's identity through uprooting and exchanging large groups of people with groups deemed more fitting.[36]

Collective expulsion has a long and tragic history around the world, with hundreds of millions of nationals, foreigners, and stateless individuals expelled for various, yet often similar, reasons. One of the earliest reported practices of collective expulsion occurred in ancient Sparta. *Xenelasia*, the practice of collectively expelling foreigners deemed injurious to the public welfare, served as an instrument of social control.[37]

Similarly, in ancient Iceland, the *Alþing*, founded in 930[38] also served as an early version of a juridical system[39] and could declare guilty criminals to be 'outlaws,' leading to their loss of the right to property, hospitality, and even the right to remain within the borders of Iceland.[40] The core of this practice was not the expulsion of foreigners *en masse*, but it exemplifies the common historical and present-day practice across cultures to ban the 'unwanted', 'outlaws', and people that were not considered part of the host society but rather 'others' from a particular territory.

Another paradigm is the link between individual and group expulsions and the movement of people across borders. Throughout history, citizens and state representatives have perceived of migrants as 'strangers', 'foreigners', 'barbarians', or 'aliens'. Siep Stuurman describes this phenomenon as follows:

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[35] Hansen, Randall *State Control: Borders, Refugees, and Citizenship* p. 255.
[36] Özsu, Umut *Formalizing Displacement* p. 7.
[37] Figueira, Thomas *Xenelasia and Social Control in Classical Sparta* The Classical Quarterly, Vol. 53, No. 1, 2003, p. 44.
[38] Iceland claims it to be the longest running parliament.
[39] Government of Iceland *Alþing Information brochure* available at: https://www.althingi.is/pdf/Althingi2018_enska.pdf, p. 6.
[40] Hathaway, Oona and Shapiro, Scott *The Internationalists: How a Radical Plan to Outlaw War Remade the World* (Simon & Schuster 2017), p. 374.

> From [the] earliest times, people have crossed boundaries and frontiers. Travelers had to come to terms with the unfamiliar customs and ideas of 'other' people. People beyond the frontier could be regarded as uncouth barbarians, vile enemies, or even as barely human, but it was also thinkable to see them as fellow humans with whom it would be possible to communicate, trade and collaborate.[41]

The next chapters highlight these two sides of the coin and show that the receiving society, not only in modern days has firmly held onto the power to decide who is included. Today, the basis for this power is the principle of state sovereignty. Each society, through its representatives, decides who has the right to enter, reside, and eventually make the transformation from an 'other' to an equal member of that society.

With the global dissemination and acceptance of human rights, especially after the Second World War, states collectively and increasingly limited absolute state sovereignty regarding refugees' rights, notable examples of which include the *1951 Refugee Convention* and the codification of the prohibition of collective expulsion in the fourth protocol to the *European Convention on Human Rights* in 1963.

Especially in times of instability or crisis (real or perceived), states have turned to mass expulsion, which has constituted a means to 'strengthen' the cohesion of a society, put pressure on migrant-sending states, serve as a bargaining tool on the international stage or please some nationals' calls for removals of foreigners. As will be shown in detail in this book, the means of collective expulsions has changed throughout time. The law and the social acceptance of the forceful expulsion of groups of foreigners have evolved in parallel. Presently, international law limits the state's right to expel foreigners *en masse* arbitrarily; states now need to justify such acts of collective expulsions. Many states (in most instances) condemn such behaviour. In many recent examples of mass expulsions, states have created a legal basis for such expulsions. One example is Spain's push-back policy at the

[41] Stuurman, Siep *The Invention of Humanity Equality and Cultural Difference in World History* (Harvard University Press 2017), p. 3.

Moroccan border, which is legitimised by domestic law. States, especially in the global North, such as EU Member States, the United States, Canada, and Australia, have established an elaborate system of extraterritorialisation and outsourcing of migration control. This system allows these states to ensure that 'undesired' foreigners do not have to be expelled *per se* as they will never reach their shores in the first place. At the same time, these states offer legal pathways to only a few acknowledged refugees through resettlement programs. In the case of the USA, the Trump Administration has continuously reduced the number of available resettlement spots.[42] For fiscal year 2019 alone, the number was initially capped at 30,000.[43] In September 2019, the administration further curtailed this number to 18,000 for the following 12 months.[44]

Another example is the forceful mass expulsion of around 750,000 Palestinian Arabs from Israeli territory between 1947 and 1949. Similarly, the birth of India and Pakistan went hand in hand with the expulsion of 8 million people.[45] States like Poland and Czechoslovakia expelled 12 million Germans in the aftermath of the Second World War as part of the creation of new nation-states.[46]

It should be noted that states turn to mass expulsions not only in phases of nation-building. Expulsions are also a measure to ensure that those who are deemed not to 'belong' in a country, according to a ruling government, are forced to leave. States use mass expulsion to control their population and to remove those who are not (or no longer) wanted within their territory or in order to put pressure on other states. Historical examples of such expulsions

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[42] Kerwin, Donald *The US Refugee Resettlement Program — A Return to First Principles: How Refugees Help to Define, Strengthen, and Revitalize the United States* Journal on Migration and Human Security, 2018, Vol. 6, No. 3, p. 205.
[43] Wroughton, Lesley *U.S. to sharply limit refugee flows to 30,000 in 2019* Reuters 17 September 2018, available at: https://www.reuters.com/article/us-usa-immigration-pompeo/u-s-to-sharply-limit-refugee-flows-to-30000-in-2019-idUSKCN1LX2HS.
[44] Shear, Michael and Kanno-Youngs, Zolan *Trump Slashes Refugee Cap to 18,000, Curtailing U.S. Role as Haven* New York Times, 26 September 2019, available at: https://www.nytimes.com/2019/09/26/us/politics/trump-refugees.html?action=click&module=Top+Stories&pgtype=Homepage&fbclid=IwAR3hFxWiJdQiUswUViFLszFDodt6R_WJGKpekjD0VCm3djfqxi0ssl0ZOoo.
[45] Ibid.
[46] Ibid.

include the mass expulsion of 60,000 Iranians from Iraq in 1971, the mass expulsion of Rwandans from Uganda in the 1980s, the forceful expulsion of 72,000 Muslims from the northern province of Sri Lanka in 1990s, and the mass expulsion of undocumented migrant workers from Malaysia in 2004. One recent example is the expulsion of Qataris by Bahrain, the United Arab Emirates (UAE), and Saudi Arabia in 2017 due to political tensions between Qatar and its neighbours.[47]

The practice of expelling people *en masse* is an embodiment of state power: the ruling government decides who enters, who stays, and who has to leave. The birth and evolution of human rights has limited this sovereign right to expel foreigners, with the *non-refoulement* principle and the prohibition of collective expulsion played an especially crucial role.

Another common phenomenon linked to collective expulsions is racism and xenophobia. An early example was the mass expulsion of large groups of Jews from England in 1290.[48] Certain minority groups have been particularly affected by collective expulsion in past centuries. The members of such targeted groups possessed different common characteristics such as religion, nationality, ethnic background, statelessness, or (foreign) nationality. Jews, who were in many instances denied citizenship throughout Europe, were one of the main targets of collective expulsions leading up until the 20th century.[49]

Another often targeted and persecuted group is the Romani people. Reports on their collective expulsions date back to the 15th century[50]. In 1416, for example, groups of Roma were expelled from the Meissen region in Germany. In 1493, entire Roma families were expelled from Milan, and in 1504, France's King Louis XII banished all Roma from the state's territory. This history of persecution and expulsion reached a horrifying peak during the Nazi era. All foreign-born and stateless Roma were collective murdered

[47] *Saudi Arabia cuts off Qatar* The Economist, 10 June 2017, available at: https://www.economist.com/news/middle-east-and-africa/21723018-kingdom-raising-tensions-its-immediate-neighbours-well-iran.
[48] Korinek, Karl and Holoubek, Michael *Österreichisches Bundesverfassungsrecht* (Springer 2003), p. 2.
[49] Howley, Jacob *Unlocking the Fortress: Protocol No. 11 and the Birth of Collective Expulsion Jurisprudence in the Council of Europe System* Georgetown Immigration Law Journal, 2006, Vol. 21, Issue 111, (*Unlocking the Fortress*), p. 112.
[50] Ibid.

or expelled.[51] Collective expulsions of Romani peoples continued to occur in Europe in the 21st century, including recent examples of collective expulsions by France and Italy.[52]

In 2009, 10,000 Romani people were deported by French authorities to Romania and Bulgaria, followed in 2010 by another 8300 individuals. These expulsions were part of a government program to repatriate Romani and to take action (allegedly) against the establishment of illegal camps.[53] Many of those expelled received 300 Euro in exchange for signing an agreement to never return to French territory.[54] The *Commissioner for Human Rights of the Council of Europe* reported that French police officers confiscated the identity papers of 'voluntary returnees' until they had reached their country of origin. This act made it arguably impossible for them to change their minds.[55] For these reasons, it is doubtful if such returns were indeed voluntary and in accordance with international or EU law.[56]

The European Committee of Social Rights, in the decision *Centre on Housing Rights and Evictions v. France*, condemned these practices in 2011 as discriminatory and contrary to human rights.[57]

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[51] The Patrin Journal: Romani Culture and History *Patrin Timeline of Romani History* 1998, available at: http://www.oocities.org/patrin/timeline.htm. The journal provides a comprehensive timeline of Romani history in Europe from before 400 AD to 1998.

[52] Severance, Kristi *France's Expulsion of Roma Migrants: A Test Case for Europe* Migration Policy Institute, 21 October 2010, available at: https://www.migrationpolicy.org/article/frances-expulsion-roma-migrants-test-case-europe.

[53] Suddath, Claire *Who Are Gypsies, and Why Is France Deporting Them?* TIME magazine, 26 August 2010, available at: http://content.time.com/time/world/article/0,8599,2013917,00.html.

[54] ROMEA *France Resumes deportation of Roma people from Romania* Czech Press Agency, article of 13 April 2010, available at: http://www.romea.cz/en/news/world/france-resumes-deportation-of-roma-peple-from-Romania.

[55] European Union Agency for Fundamental Rights *The situation of Roma EU citizens moving to and settling in other EU Member States* 2009, available at: http://fra.europa.eu/en/publication/2010/situation-roma-eu-citizens-moving-and-settling-other-eu-member-states, p. 29.

[56] For a legal analysis see: Gunther, Caitlin *France's Repatriation of Roma: Violation of Fundamental Freedoms?* Cornell International Law Journal, 2012, Vol. 45, pp. 205-212. The author finds that 'France's repatriation program would likely have been found to violate its international legal obligations.'

[57] European Committee of Social Rights *Centre on Housing Rights and Evictions (COHRE) v. France* Complaint No. 63/2010, decision on the merits of 28 June 2011.

C. The application of the prohibition of collective expulsion on a global level

On a global level, the prohibition of collective expulsion binds at least 174 states through regional and international treaty law. These states have either ratified the *International Covenant on Civil and Political Rights*[58], the *UN Migrant Worker Convention*[59], the *Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms*[60], the *2004 Arab Charter on Human Rights*[61], the *European Convention on Human Rights*[62], the *EU Fundamental Rights Charter*[63], the *African Charter on Human and Peoples' Rights*[64], or the *American Convention on Human Rights*.[65]

Twenty-five states[66] have not signed or ratified any of these treaties. Examples include Myanmar, Nauru, China, and Cuba.[67] All other states having ratified any of these conventions are bound by the prohibition of collective expulsion. Some states are simultaneously bound to the prohibition's terms in several treaties.[68]

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[58] As of April 2020, 173 States are parties to the ICCPR. The Human Rights Committee in its *General Comment No. 15: The Position of Aliens Under the Covenant* 11 April 1986, (*General Comment No. 15*) determined that the prohibition can be derived from Art. 13 ICCPR, para. 10.

[59] As of April 2020, 55 States are parties to the UN Migrant Worker Convention. The prohibition of collective expulsion is codified in Art. 22 (1) of the Convention.

[60] As of April 2020, 9 States are parties to the Commonwealth of Independent States: Armenia, Azerbaijan, Belarus, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan, and Uzbekistan However, only four states are party to the CIS Human Rights Convention: Belarus, Kirgizstan, Russian Federation and Tajikistan. The prohibition of collective expulsion is codified in Art. 25 (4) of the Convention.

[61] As of April 2020, 18 States are parties to the 2004 Arab Charter on Human Rights. The prohibition of collective expulsion is codified in Art. 26 (2) of the Charter.

[62] As of April 2020, 4 States of the 47 Member States of the Council of Europe have not ratified this additional protocol (Greece, Switzerland, Turkey, and the United Kingdom).

[63] As of April 2020, all EU member states are bound by the Charter. The prohibition of collective expulsion is codified in Art. 19 (1) of the Charter.

[64] As of April 2020, 54 States have ratified the African Charter on Human and Peoples' Rights. The prohibition of 'mass' expulsion is codified in Art. 12 (5) African Charter on Human and Peoples' Rights.

[65] As of April 2020, 25 States have ratified the American Convention on Human Rights. The prohibition of collective expulsion is codified in Art. 22 (9) of the Convention.

[66] States acknowledged by the United Nations.

[67] Myanmar has neither signed, nor ratified the Covenant. China, Nauru and Cuba signed, but never ratified the Covenant.

[68] There is no comparable and binding regional Human Rights instrument for Asia governing migration. The non-binding South Asia Declaration on Refugees, adopted in January 2004 by the Eminent Persons Group, does not contain the prohibition of collective expulsion. The Declaration is available here: http://shodhganga.inflibnet.ac.in/bitstream/10603/28291/17/17_appendices.pdf.

Some states that are considered to have poor human rights records, such as Libya, Algeria, or Syria, have nonetheless ratified five human rights treaties that codify the prohibition of collective expulsion. This observation is no surprise in light of Oona Hathaway's findings on the relationship between human rights records and a state's likeliness to join human rights treaties. She found that states with adverse human rights records are more likely to join human rights treaties. Their ratification is of low cost domestically and of great benefit internationally.[69]

If one counts the states that ratified the *Convention against Torture*, then the prohibition of collective expulsion binds 183 states.[70] As argued below[71], Art. 3 of the *Convention against Torture* implicitly prohibits collective expulsion.

Special Rapporteur on the expulsion of aliens of the International Law Commission, Maurice Kamto, even describes the nature of the prohibition of collective expulsion as a general principle of international law.[72] He drew this conclusion after a 'study of treaty practice and case law, both national and international, in particular, that of regional human rights courts.'[73]

Kamto's summary of governments' reaction to the draft provision containing the prohibition of collective expulsion in his ninth report reflects the overwhelming acknowledgment of the principle as binding. France, Germany, and Switzerland explicitly welcomed the final version of the provision in their statements on the report highlighting the acknowledgement of the prohibition's current binding status.[74] Australia was seemingly the only

[69] Hathaway, Oona *Why Do Countries Commit to Human Rights Treaties?* The Journal of Conflict Resolution, (2007), Vol. 51, No. 4, pp. 588-621.
[70] The countries that are only bound by the prohibition of collective expulsion as implicitly contained in Art. 3 CAT are: Antigua and Barbados, China, Cuba, Cambodia, Holy See, Kiribati, Maldives, Nauru and Fiji. Fiji has however placed reservations limiting severely the applicability of the Convention against Torture. For a list of all member states and reservations see: United Nations Treaty Collection *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* New York, 10 December 1984, available at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV9&chapter=4&clang=_en#5.
[71] See Chapter III.
[72] Kamto, Maurice *Third report on the expulsion of aliens* A/CN.4/581, 19 April 2007, (*Third report on the expulsion of aliens*), para. 115.
[73] Ibid., para. 27.
[74] Kamto, Maurice *Ninth report on the expulsion of aliens* A/CN.4/670, 25 March 2014, (*Ninth report on the expulsion of aliens*), para. 39.

state rejecting the claim that it constituted customary law. The majority of states expressing views on the draft provision acknowledged the principle's status as binding law.[75]

As shown above, there is overwhelming agreement on the prohibition's legally binding nature.

However, neither the Special Rapporteur's reports nor the ILC *Draft Articles* and its commentary show consensus on the source of international law establishing this bindingness. The reactions of Australia and El Salvador to the reports suggest that the prohibition constitutes customary international law[76] in the sense of Art. 38 (1)(b) Statute of the International Court of Justice (ICJ Statute).[77] Maurice Kamto, in contrast, argues in his third report in favour of the prohibition's nature as a general principle of international law 'recognized by civilized nations'[78] in the sense of Art. 38 (1)(c) ICJ Statute. Germany, in its comments and observations on the ILC *Draft Articles*, seemingly related to Kamto's approach on this issue, referring to the prohibition as a 'general rule.'[79]

For the purpose of this work, the decisive point is the prohibition's binding nature, irrespective of its qualification as customary law or general principle. Furthermore, given the prohibition's vast codification in human rights instruments, and the fact that most states are bound to it by convention in the sense of Art. 38 (1)(a) ICJ Statute, it is unnecessary to precisely determine the source of the bindingness in order to achieve this study's main aim, determining the prohibition's scope of protection.

[75] Ibid.
[76] ILC *Expulsion of aliens Comments and observations received from Governments* A/CN.4/669, 21 March 2014, (*Comments and observations received from Governments*), pp. 24-25.
[77] United Nations, *Statute of the International Court of Justice*, 33 UNTS 993, 18 April 1946.
[78] Kamto, Maurice *Third report on the expulsion of aliens* para. 115.
[79] ILC *Comments and observations received from Governments* p. 25

D. Collective expulsion and mass expulsion: Two terms for the same phenomenon?

The *European Convention*, the *Inter-American Convention*, and the *2004 Arab Charter*, amongst other treaties, speak of 'collective expulsion', while its African counterpart refers instead to 'mass expulsion'. Jean-Marie Henckaerts reference work on the topic, 'Mass Expulsion in Modern International Law and Practice' uses these terms seemingly interchangeably. The question thus arises: can the two terms be used interchangeably to describe the same phenomenon?

Interestingly, according to Google Ngram data from 1800 to 2008, the term 'mass expulsion' is far more prevalent in the British and American English corpus of books than 'collective expulsion' as shown in the graph below.[80]

The graph's *y* axis illustrates the percentage of all the bigrams in the Google books samples written and published in English[81] that are 'collective expulsion' and 'mass expulsion.' Interestingly, the term 'collective expulsion' appeared in the corpus for the first time in 1906, whereas the term 'mass expulsion', according to this data, was first introduced in 1918. From 1933 on, the latter overtook the former, peaking in 1992 and then declining in prominence.

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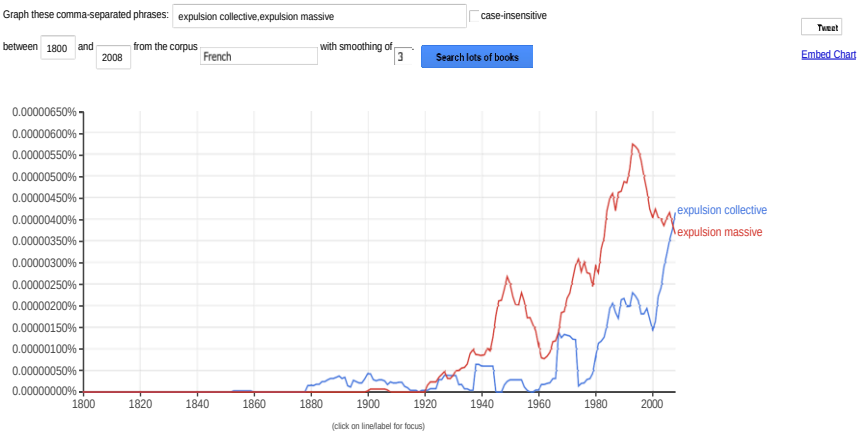
[80] Google Books Ngram Viewer, search terms: 'collective expulsion', 'mass expulsion', available at: https://books.google.com/ngrams/graph?content=collective+expulsion%2Cmass+expulsion&year_start=1800&year_end=2008&corpus=15&smoothing=3&share=&direct_url=t1%3B%2Ccollective%20expulsion%3B%2Cc0%3B.t1%3B%2Cmass%20expulsion%3B%2Cc0#t1%3B%2Ccollective%20expulsion%3B%2Cc0%3B.t1%3B%2Cmass%20expulsion%3B%2Cc0.

[81] Google Books Ngram Viewer *What does the Ngram Viewer do?*, available at: https://books.google.com/ngrams/info#.



Here, the *expulsion collective* was also used earlier than *expulsion massive*. However, in contrast to their English counterparts, *expulsion collective* overtook *expulsion massive* in 2008. This statistic, however, does not offer any answer regarding the distinction between the two terminologies.

Thus, the question remains of whether there the difference between the two terms requires careful consideration of their use.

An analysis of the literature on these issues, and of judgments and other legal documents, reveals that there is no clear universally applicable answer.

On the one hand, some call for a distinction based on the size of the group and the duration of the expulsion. The Secretariat of the International Law Commission, for example, holds the two terms to be governed by different legal regimes.[82] On the other hand, the Secretariat does not clarify which legal regimes it refers to and explains in rather vague terms that the reason for this distinction lies in the size of the group of expelled foreigners. Klaus-Dieter Deumeland, for example, argued that collective expulsions require that states expel several foreigners jointly based on their membership in a particular group.[83] In his view, collective expulsion may also refer to the expulsion of a small group of individuals as long as they share a common characteristic.[84]

[82] ILC *Expulsion of Aliens* Memorandum by the Secretariat, A /CN.4/565, 58th session, 2006, p.2.
[83] Deumeland, Klaus Dieter *Das Verbot der Xenelasie bei Ausweisung von Ausländern in der Bundesepublik Deutschland* 22 WAR 182 (1984), p. 185 cited in:
Henckaerts, Jean-Marie *Mass Expulsion in Modern International Law and Practice* p.185.
[84] Ibid.

Jean-Marie Henckaerts strongly criticises this drawing of a distinction. In his view, such differentiation would lead to the unacceptable situation of two different standards. In his perspective, it would be 'detrimental [to] the protection of human rights' if there were different levels of protection implied by the terms *collective expulsion* and *mass expulsion*.[85]

An analysis of the wording of the prohibition in different regional human rights treaties and the ruling of the respective courts and treaty bodies also speaks against such a clear distinction.

In interpreting Art. 13 ICCPR, the Human Rights Committee found in its *General Comment No. 15* that the provision contains the prohibition of both mass expulsion and collective expulsion. The Committee did not explain how it reached this conclusion. The comment states outright that 'article 13 would not be satisfied with laws or decisions providing for collective or mass expulsions.'[86] This mentioning of the principles being both incompatible with Art. 13 ICCPR suggests that the HRC may have understood them as separate concepts.

Looking solely at the wording of the various regional conventions that codify the prohibition of collective expulsion, this distinction also becomes apparent. Art. 4 Prot. 4 ECHR, Art. 19 (1) EUChFR, Art. 26 (2), s. 2 *2004 Arab Charter on Human Rights,* Art. 22 (9) ACHR, and Art. 25 (4) CHRC all speak of the absolute prohibition of *collective* expulsion. Only the *African Charter on Human and Peoples' Right* (also known as the *Banjul Charter*) in its Art. 12 (5) stipulates that 'the *mass* expulsion of non-nationals shall be prohibited [emphasis added].' Another significant distinction of the *African Charter* is its focus on mass expulsions based on discrimination, namely those 'aimed at national, racial, ethnic, or religions [*sic!*] groups.'

[85] Henckaerts, Jean-Marie *Mass Expulsion in Modern International Law and Practice* pp. 18-19.
[86] HRC *General Comment No. 15* para. 10.

Surprisingly, only the English version of the *African Charter* refers to 'mass expulsion.' The official texts of the *Charter* in French, Portuguese, and Arabic[87] use the term 'collective expulsion.'[88]

According to Art. 33 (1) VCLT, when interpreting a treaty available in several authentic language versions, 'the text is equally authoritative in each language' unless the treaty or parties agree on an exception.

Concerning the *African Charter*, the authentic texts are written in English, French, and Arabic.[89] As the translations are equally authoritative according to the *Charter*, Art. 33 (4) VCLT offers further guidance. This subparagraph stipulates that in the case of discrepancies between different versions, the interpreter shall first rely on Art. 31 and 32 of the VCLT. If uncertainty remains, 'the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.'

Such an interpretation in good faith and in accordance with the ordinary meaning of the terms is not expedient here.

It would be pure speculative to claim that either term, mass or collective, better suits the object and purpose of the *Charter*. Thus, one ought to refer to supplementary means of interpretation, such as preparatory work and the circumstances of the conclusion as requested by Art. 32 of the VCLT.

The preparatory work remains silent on the reasons for such divergences between the different translations of the texts. An Amnesty International paper of 1961 on the Organization of African Unity and Human Rights may offer some insights into this question. Here, the NGO pointed out that there 'is no entirely satisfactory text of the *African Charter* in any of the official languages of the OAU. The original text in French has minor typographical errors, and the English and Arabic texts contain translation errors.'[90] Thus,

[87] According to Art. 25, Constitutive Act of the African Union, the working languages are Arabic, English, French and Portuguese, and African languages 'if possible'.
[88] The French version, for example, uses 'l'expulsion collective' instead of the 'expulsion en masse'. The Portuguese version also refers to 'expulsão coletiva' instead of 'expulsão em massa'.
[89] African Charter on Human and Peoples' Rights UNTS 26263, front page.
[90] Amnesty International *Protecting human rights: International procedures and how to use them (A Series of Amnesty International Papers): 2. The Organization of African Unity and human rights* (1991), available at: https://www.amnesty.org/en/documents/ior63/001/1991/en/, p.6.

the English version, directly translated from the French, should have used 'collective expulsion' instead of 'mass expulsion'. A simple translation error explains this difference. The fact that that the *Charter*'s rapporteurs were French, and therefore French would have been the base language supports this finding. In addition, the English translations were of poorer quality, as the translators were not well equipped for such a task.[91] These circumstances led to discrepancies between drafts. Unfortunately, available *travaux préparatoires* of the *African Charter* are silent about this dissonance in terminology. Even after the adoption of the *Charter*, several changes were made, mainly to style, meaning, and the inclusion of missing items. Sometimes even substantive changes were made.[92]

This finding on the seemingly coincidental use of 'mass' in the African *Charter* further strengthens the argument that the terminology used in the various regional conventions is more similar than it appears at first sight.

It may even be inferred that there is no legal difference between 'mass' and 'collective' expulsion and that both terms refer to a similar size of a group.

In addition, as will be shown below, 'collective expulsions' cover expulsions of groups of foreigners of any seize. There is no minimum or maximum number required.[93] The prohibition also protects summarily expelled foreigners and long-term residents irrespective of whether officials have expelled them all at once, or over an extended period.

Furthermore, the scope of protection of the prohibition of mass expulsion in the *African Charter* is congruent to its European counterpart.[94]

The prohibition of mass expulsion and the prohibition of collective expulsion both aim at ensuring each expelled foreigner of a group receives the possibility of bringing forward her or his claims. The underlying notion of this guarantee is that the higher the number of expelled individuals, the lower the probability that every individual receives individual examination of her

[91] Ibid.
[92] I want to thank Dr. Nathaniel Rubner for these insights. He is an expert on the drafting history of the African Charter on Human and Peoples' Rights. The relevant documents are on file with the author.
[93] See Chapter II, A.
[94] For more details see Chapter II and Chapter V.

or his circumstances. Additionally, the larger the designated group, the stronger the assumption that a prohibited collective or mass expulsion has occurred.[95]

Therefore, for our purposes the two terms are interchangeable. Every mass expulsion also constitutes a collective expulsion and vice versa, as both terms refer to the same form of group expulsion. Nevertheless, it seems that 'collective expulsion' is preferred in legal contexts. This is supported by the fact that most human rights conventions (with the exception of the *African Charter*) explicitly contain the prohibition in referring to 'collective' expulsion, and that the ILC in its *Draft Articles* equally relies on this term. Conversely, 'mass expulsion' is more often used in a broader context, especially by mass media,[96] to describe the phenomenon of expelling a large number of people.

[95] For similar findings see: Pöschl, Magdalena *Artikel 4 4. ZPEMRK* in: Korinek and Holoubek *Österreichisches Bundesverfassungsrecht Textsammlung und Kommentar* (Springer 2003) para. 18; Henkaerts, Jean-Marie *Mass expulsion in Public International Law and Practice* p.14.

[96] See for example: Alon, Amir *UN human rights experts say mass expulsion violates international law* Ynetnews, 3 March 2018, available at: https://www.ynetnews.com/articles/0,7340,L-5143004,00.html; JapanTimes Myanmar to send envoys to Rohingya camps in Bangladesh to tell refugees they can go home, Japan Times Online, 2 July 2019, referring to *mass expulsion* of the Rohingya, available at: https://www.japantimes.co.jp/news/2019/07/02/asia-pacific/social-issues-asia-pacific/myanmar-send-envoys-rohingya-camps-bangladesh-tell-refugees-can-go-home/.

E. Structure and approach

Past and current global state practices show that collective expulsions occur regularly and take different forms. What rights do foreigners have when states expel them collectively? Is there a difference between the regional and international codifications of the prohibition? How can victims of collective expulsions effectively claim redress? What is the role of the courts therein?

This study aims at examining these questions by offering an analysis of the role, nature, and scope of the prohibition of collective expulsion in international law. It examines in detail the scope of protection of this prohibition in regional and international human rights instruments. In doing so, it draws on different sources ranging from case law, third-party interventions, *travaux préparatoires*, scholarly work, historical documents, grey literature, and the respective conventions as a whole.

Additionally, this work further highlights the increasing attention on this prohibition in numerous recent judgments and pending cases, especially at the ECtHR. The following five chapters will show the principle's scope, nature, interpretative evolution, and significance when it comes to the protection of migrants' rights.

In detail, Chapter II and Chapter III form a single unit, exploring questions on the scope of protection and the nature of the prohibition of collective expulsion. Chapter II first addresses the four explicitly contained material elements of the prohibition namely 'alien', 'collective', 'prohibition', and 'expulsion'. Chapter III then turns to the nature of the prohibition, examining its procedural character. The work assesses and compares the procedural scope of protection as developed through case law.

These two chapters offer a detailed overview of the explicitly and implicitly contained guarantees in the prohibition. Further, they examine the substantive and procedural congruency among the different codifications.

Chapter IV then moves from a broad view to a closer examination, dealing explicitly with the role of the prohibition of collective expulsion at the ECtHR. Art. 4 Prot. 4 ECHR not only plays a significant role in the

interpretation of the principle on the European, but also on an international level as the ECtHR's interpretation thereof serves as guidance for other regional and international monitoring bodies. Furthermore, as will be shown below, the ECtHR's interpretation of this provision is the most advanced in qualitative and quantitative terms and therefore serves as a guide for other courts and treaty bodies.

For these reasons, Chapter IV is dedicated to highlighting the exceptional role of Art. 4 Prot. 4 ECHR. The chapter assesses the specificities of bringing a violation of the prohibition to the ECtHR, such as distinct rules on the standard and burden of proof. It further examines how the prohibition's interpretation by the ECtHR has evolved over time, and possible legal and practical reasons why. In particular, the question is addressed whether recent developments in the practice of Member States such as an increasing externalisation of migration controls have influenced the Court's interpretation in the sense of Arts. 31-33 VCLT.

Chapter V turns to the broader context of the prohibition of collective expulsion within the context of human rights and particularly migrants' rights. It examines the relationship between the prohibition and other guarantees protecting migrants, such as the *non-refoulement* principle and fair trial rights in various human rights treaties. In doing so, it offers a contextual explanation for the interpretative evolution of the prohibition in the respective treaties.

Finally, Chapter VI summarises the findings of the previous chapters and offers some final remarks on migration and the prohibition of collective expulsion's present and future role.

Chapter II – The material elements of the prohibition of collective expulsion

This chapter examines the prohibition's explicitly contained material elements, *ratione personae*, *materiae*, and *loci*, in different regional and international human rights instruments. The first part of the chapter examines these elements of human rights treaties independently to analyse the respective content. It further provides a comparative analysis the elements to highlight commonalities and differences between the conventions. The second part of the chapter delves into the more theoretical question of the nature of the prohibition as an interface between individual and collective rights.

In detail, the first part of this chapter defines the terms 'alien' (A), examining the scope *ratione personae* of the prohibition. Next, the chapter turns to the 'collective' element (B). Here, the question of who constitutes a group in the sense of the prohibition and which factors are decisive for its determination are examined. This assessment is then followed by the analysis of the element 'prohibition' (C) evaluating if states may justify restrictions or derogations from the principle and, if so, under which circumstances. Next, the examination of the term 'expulsion' (D) shows that treaty bodies defined this element distinctively. This is closely connected with the question of whether 'expulsion' refers only to the *removal* of a foreigner from a state's territory or if it also includes her or his *non-admission*. To contextualise this question, this section also provides for an overview of the general debate on the extraterritorial applicability of human rights in different regimes.

The second part of the chapter then turns from the individual elements of the prohibition to assess the nature of the prohibition as an interface between individual and collective rights (E). The last part of this chapter (F) then offers conclusions on the material elements of the prohibition as codified in different regional and international human rights instruments.

A. The definition of 'alien' in the prohibition of collective expulsion

The codification of the prohibition of collective expulsion in most regional and international human rights treaties succinctly states that the collective expulsion of aliens is prohibited. Thus, it seems that the prohibition covers all foreigner *per se*.

Are collectively expelled *nationals* thus excluded from the scope of protection? Are the stateless and irregularly residing migrants covered as well? The wording of the provisions containing the prohibition of collective expulsion is silent on these questions. However, case law and other sources from courts and interpretative bodies reveal that indeed, all *foreigners*, irrespective of their citizenship or the irregularity of their stay, are covered. In most of the conventions assessed, the prohibition only protects foreigners.

The *European Convention on Human Rights* (ECHR), for example, offers two separate provisions containing guarantees against arbitrary expulsions. Art. 3 Prot. 4 ECHR covers nationals, Art. 4 Prot. 4 ECHR covers foreigners. Only the *Charter of Fundamental Rights in the European Union* (EUChFR) covers both nationals and non-nationals in one provision.

Karl Doehring explains this exclusion of *nationals* from the scope of protection by the fact that the expulsion order is usually guided towards non-citizens as most domestic systems prohibit the expulsion of nationals.[1]

The International Law Commission (ILC) came to the same conclusion in its 2014 *Draft articles on the expulsion of aliens* (*Draft Articles*).[2]

The adoption marked the provisional end of 10 years of work by the Commission on the subject. On 6 August 2004, at its 2830th meeting, the ILC decided to include the topic 'expulsion of aliens' in its current program of work. The ILC appointed Maurice Kamto as *Special Rapporteur* on the

[1] Doehring, Karl *Die Rechtsnatur der Massenausweisung unter besonderer Berücksichtigung der indirekten Ausweisung* (Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht 1985), p. 1.
[2] International Law Commission *Draft articles on the expulsion of aliens with commentaries*, adopted by the International Law Commission at its sixty-sixth session, (2014), A/69/10, *Yearbook of the International Law Commission 2011* Vol. II, Part Two, (*Draft articles on the expulsion of aliens with commentaries*), p. 1.

topic.[3] His preliminary report, presented to the Commission in 2005, offered an overview of some of the issues involved and a possible outline for further consideration of the topic. It further dealt with the question of the scope of protection of the prohibition of collective expulsion.[4]

The United Nations General Assembly endorsed the *ILC Draft Articles* in two resolutions in 2014[5] and 2017,[6] but they have not yet been turned into an international convention and thus are only binding law in as far as they represent generally accepted rules of international law.[7]

Among other things, in his reports Kamto assessed the prohibition of collective expulsion and its codification in regional and international treaty law. The *ILC Draft Articles* define in Art. 2 (b) the key term alien as 'any individual who does not have the nationality (non-nationals and Stateless persons) of the State in whose territory s/he is present.'

Art. 7 ILC Draft Articles clarifies that the articles 'are without prejudice to the rules of international law relating to stateless persons, and in particular to the rule that a State shall not expel a stateless person lawfully in its territory save on grounds of national security or public order.'

[3] International Law Commission *Yearbook 2004*, Vol. II, Part Two, A/CN.4/SER.A/2004/Add.1, para. 364.
[4] Kamto, Maurice *First report on the expulsion of aliens* A/CN.4/554, ILC Report, A/60/10, (2005), (*First report on the expulsion of aliens*), chap. VIII, paras. 245–274.
[5] UNGA Resolution 69/119 of 10 December 2014, the GA welcomed in this resolution the conclusion of the work of the International Law Commission on the expulsion of aliens and its adoption of the draft articles and a detailed commentary on the subject and decided to continue the consideration of the recommendation at the seventy-second session of the General Assembly in 2017.
[6] UNGA Resolution 72/118 of 7 December 2017. The GA took note of the articles on the expulsion of aliens presented by the International Law Commission, and acknowledged the comments expressed by Governments in the Sixth Committee at the seventy-second session of the General Assembly on the subject. Further, it decided to include in the provisional agenda of its seventy-fifth session in 2020 the item entitled 'Expulsion of aliens', with a view to examining, inter alia, the question of the form that might be given to the articles or any other appropriate action.
[7] As clarified above in Chapter I C, Article 10 of the ILC Draft Articles which contains the prohibition of collective expulsion constitutes binding international law, either as customary international law or as general principle.

I. Introduction: Alien or foreigner – a critical reflection

Examining the boundaries of the political community and political membership, Seyla Benhabib points out that they define some individuals as members and others as outsiders or aliens. Membership, she criticises, remains only valuable as long as others are kept outside.[8] The goal of states to uphold exclusive membership is deeply rooted in the concept of sovereignty. The framing and terminology used by states when drafting legislation, agreements, or conventions may create a certain notion, which in turn reflects a specific standpoint on the matter. The use of 'alien' in place of 'foreigner' exemplifies this. 'Alien' is commonly used to dehumanise and refer to a strange person, who does not belong in the society in question due to their obvious 'otherness'. Thus, if lawmakers want to avoid encourage such an interpretation, they should be careful when using the term 'alien' in laws governing migration, admission, and expulsion.

Thus, as we turn to the scope of the term 'alien', a critical comment on the terms used in international and regional conventions and in the *ILC Draft Articles* seems necessary.

Guy Goodwin-Gil, for example, criticised the use of the term 'alien' in the *ILC Draft Articles*. In his view, although historically common, the term is outdated and thus scholars should avoid it. To him, it is not only no longer an accurate term but is rather often used with prejudicial intent, loaded with negative meaning, unlike the French *étranger* or the German *Ausländer* (one from abroad).[9] Goodwin-Gil further points out that 'non-citizens are not aliens in any true sense, but ought to be seen as a member of the human race, entitled no less or more to the protection of his or her human rights.'[10]

According to Kamto's ninth report, there has been some ongoing discussion on the use of 'alien' and its implications in the *Draft Articles*. He notes that

[8] Benhabib, Seyla *The Rights of Others: Aliens, Residents and Citizens* (Cambridge University Press 2013), p. 1.
[9] Goodwin-Gil, Guy *Expulsion in Public International Law* UN lecture series, video available at: http://legal.un.org/avl/ls/Goodwin-Gill_IML_video_3.html, from 38:59 min on.
[10] Ibid.

Peru and South Africa[11] 'felt that the word "aliens" in the title of the *Draft Articles* had a negative connotation since it distracted attention from the fact that human beings were involved.'[12]

Nevertheless, the Rapporteur concluded that even though this debate 'is understandably valid, it seems pointless to dwell on this matter[,] which did not give rise to much debate.'[13]

The ILC had the opportunity to lead the way in this regard in future debate, but decided, for reasons unknown, to use the term 'alien' anyway. For the purpose of this analysis, I will use the term 'alien' only when used in the original legal source.

II. The scope of protection *ratione personae* in regional human rights instruments

The personal scope of protection of all regional human rights instruments codifying the prohibition of collective expulsion covers stateless persons, migrants, refugees, and asylum seekers. The assessed provisions do not draw a distinction among nationality, residence status, or other criteria.

1. European, African, and American human rights conventions

While Art. 4 Prot. 4 ECHR also speaks of the prohibition of collective expulsion of 'aliens', Art. 19 (1) EUChFR[14] states that 'collective expulsions are prohibited.' The latter provision corresponds to the content of Art. 4 Protocol 4 ECHR according to the explanations prepared under the authority of the EU's Praesidium of the Convention.[15] The explanations further clarify that the personal scope of protection of Art. 19 (1) EUChFR is broader than

[11] South Africa suggested to use the term 'migrant' or 'foreign national' instead, see: United Nations General Assembly *Sixty-seventh session, official records* A/C.6/67/SR.19, 4 December 2012, para. 79.
[12] Kamto, Maurice *Ninth report on the expulsion of aliens* A/CN.4/670, 2014, A/CN.4/670 ILC report, A/69/10, 2014, chap. IV, (*Ninth report on the expulsion of aliens*), para.13-16.
[13] Ibid., para. 16.
[14] Charter of Fundamental Rights in the European Union, 2000 O.J.(C 364) 1, Article 47.
[15] Praesidium of the Convention *Draft Charter of Fundamental Rights of the European Union explanations* prepared by the Praesidium, Charte 4473/00 Convent 49, (*Fundamental Rights Draft Charter explanations*), p. 21.

the scope of Art. 4 Prot. 4 ECHR and covers 'aliens' as well as nationals[16] as the scope of protection of Art. 19 (1) EUChFR is the result of the developing case law of the European Court of Human Rights (ECtHR).[17]

Neither the ECtHR nor the European Commission on Human Rights (EComHR) have ever defined 'alien' in the sense of Art. 4 Prot. 4. ECHR.[18] The ECtHR however has clarified in several cases the question of who is covered by the scope of protection, granting protection to

> all 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* [emphasis added].[19]

The term 'alien' in the English version or 'étranger' in the French version of Art. 4 Prot. 4, as well as the *Explanatory Report to the Fourth Protocol*, show that the scope of protection includes stateless.[20]

In February 2020, the Grand Chamber of the ECtHR reiterated and supplemented this statement in *N.D. and N.T. v. Spain* by stating that the prohibition of collective expulsion applies to all foreigners

> irrespective of the lawfulness of the person's stay, the length of time he or she has spent in the territory, the location in which he

[16] Ibid. '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 (see also Article 13 of the Covenant on Civil and Political Rights).'

[17] Guild, Elspeth *Art 19-Protection in the Event of Removal* in: Peers/Hervey/Kenner/Ward (eds.) *The EU Charter of Fundamental Rights A Commentary* (Hart Publishing 2014), para. 19.07.

[18] For a recent assessment of the personal scope of application of the prohibition in Art. 4 Prot. 4, its extraterritorial applicability and its collective nature see: 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: Bruno, Palombino and Di Stefano (eds.) *Migration Issues before International Courts and Tribunals* (Consiglio Nazionale delle Ricerche 2019), pp. 119-146.

[19] *Hirsi Jamaa and Others v. Italy* [GC] Appl. No. 27765/09, 23 February 2012 (*Hirsi Jamaa and Others v. Italy* [GC]), para. 174, with references to the *travaux préparatoires* of Protocol No. 4; *Georgia v. Russia (I)* [GC], (merits), Appl. No. 13255/07, 3 July 2014 (*Georgia v. Russia (I) [GC]*), para. 168.

[20] Praesidium of the Convention *Fundamental Rights Draft Charter explanations* para. 32.

> or she was apprehended, his or her status as a migrant or an asylum-seeker and his or her conduct when crossing the border.[21]

This finding by the Court is immensely significant for the interpretation of the scope of protection *ratione personae* of the prohibition of collective expulsion and the consequences of the Grand Chamber's attempted backdoor restriction thereof. In this case, the Grand Chamber deviated from the chamber's judgment, overruling the finding that Art. 4 Prot. 4 ECHR and Art. 13 in conjunction with Art. 4 Prot. 4 ECHR (right to an effective remedy in collective expulsion cases) was violated. Here, the Spanish Guardia Civil apprehended the two applicants on the case at the Spanish border and collectively and summarily returned them to Morocco. On the one hand, the Grand Chamber found that that the applicants constitute collectively expelled aliens in the sense of Art. 4 Prot. 4 ECHR. On the other hand, it concluded that the applicants forfeited their rights to an objective and individual examination before expulsion due to the applicants' culpable conduct. In the Court's view[22], this is because they entered the territory irregularly and forcefully as 'to create a clearly disruptive situation which is difficult to control and endangers public safety.'[23] Thus, the Grand Chamber found that the prohibition of collective expulsion was not violated. In case the Grand Chamber meant to apply this restriction to any irregular migrant, it would have implicitly reduced the scope to lawfully resident migrants, those that have a right to enter and stay (e.g., based on refugee status). Such a finding would not only be inconsistent with the Court's previous case law[24], but also with its own reasoning: the quotation above shows that the Court is well aware of the fact that the scope *does* apply to regular and irregular migrants alike, irrespective of the duration of their stay in the state in question. The Court's argument in this regard is however rather vague and therewith leaves room for ambiguity and interpretation.[25]

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[21] *N.D. and N.T. v. Spain* ECtHR, [GC], para. 185.
[22] Ibid., para. 200.
[23] Ibid., para. 201.
[24] In particular *Hirsi Jamaa and Others v. Italy*, *Sharifi and Others v. Italy and Greece* or *Khlaifia and Others v. Italy*.
[25] Judges Hellen Keller, Paul Lemmens and Lorraine Schembri Orland stressed that the circumstances of the *N.D. and N.T. v. Spain* Grand Chamber judgment are very limited and

Furthermore, a comparison of the wording of Art. 4 Prot. 4 ECHR and other *Convention* rights, such as the freedom of movement in Art. 2 Prot. 4 and Art. 1 Prot. 7 shows that the intention of the drafters was to establish a broad personal scope for the prohibition of collective expulsion encompassing *all* migrants.[26] Judge Pinto de Albuquerque, in his concurring opinion in *Hirsi Jamaa and Others v. Italy* acknowledges this difference in scope between the prohibition of collective expulsion and Art. 1 Prot. 7 ECHR stating that

> Article 4 of Protocol 4 and Article 1 of Protocol No. 7 are of the same nature: both are due procedure provisions, but they have *substantially different personal scope*. The due procedure provision of Article 4 of Protocol No. 4 is of much broader personal scope than the one provided for in Article 1 of Protocol No. 7, since the former *includes all aliens regardless of their legal and factual status* and the latter includes only aliens lawfully resident in the expelling State [emphasis added].[27]

Judge Pinto de Albuquerque verifies his claim on the broad scope of application *ratione personae* with reference to the case law of the Inter-American Court, the Inter-American Commission, and the African Commission.[28] This approach is remarkable, as the ECtHR had never before referred to its regional counterparts when interpreting the prohibition of collective expulsion. The African Commission and the Inter-American Court

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argue in favour of reading these requirements for forfeiting one's guarantees provided by Art. 4 Prot. 4 ECHR *cumulatively* rather than *alternatively*.
See: *Asady and Others v. Slovakia* ECtHR, Appl. No. 24917/15, 24 March 2020, Joint Dissenting Opinion of judges Keller, Lemmens and Schembri Orland, para. 24, for a more detailed analysis see also below, Chapter VI, B.

[26] In contrast to Art. 4 Prot. 4 ECHR which refers to 'aliens' in general, Art. 2 Prot. 4 speaks of the freedom of movement of persons 'lawfully within the territory of a State', and Art. 1 Prot. 7 codifies procedural safeguards for 'lawfully resident [foreigners] in the territory of a State'.

[27] Pinto de Albuquerque, Paulo *Concurring Opinion Hirsi Jamaa and Others v. Italy* at section 'the prohibition of collective expulsion'.

[28] Judge Pinto de Albuquerque refers specifically to *Inter-American Court of Human Rights*, Provisional Measures requested by the *Inter-American Commission on Human Rights* in the matter of the Dominican Republic, case of *Haitian and Dominicans of Haitian origin in the Dominican Republic*, order of the court of 18 August 2000, and African Commission on Human and Peoples' Rights, *Rencontre Africaine pour la Défense des Droits de l'Homme v. Zambia*, Communication No. 71/92, October 1996, paragraph 23, and *Union Inter-Africaine des Droits de l'Homme et al. v. Angola*, Communication No. 159/96, 11 November 1997, para. 20.

of Human Rights, in contrast, reference the interpretation of the prohibition of collective expulsion of each other and the ECtHR.[29]

An assessment of the backgrounds of the applicants in collective expulsion cases at the ECtHR reveals the extensiveness of the personal scope of application. The applicants in cases such as *Čonka v. Belgium*[30], *Sultani v. France*[31], and *Georgia v. Russia (I)*[32] were lawful residents of the expelling state before their expulsion. In contrast, the claimants in *Hirsi Jamaa and Others v. Italy*[33] and *Khlaifia and Others v. Italy*[34], and the applicants in *N.S. and N.D. v. Spain*[35] were irregular migrants and either never reached the expelling state's territory or stayed only for a brief period within the territory. In *Sharifi and Others v. Italy and Greece*, the Court expressly rejected the respondent's claim that the scope of Art. 4 Prot. 4 ECHR excludes foreigners that previously entered a Member State's territory irregularly.[36]

In conclusion, based on the assessment of the personal scope above, the prohibition of collective expulsion extends to every non-national and stateless person irrespectively of the legality of their stay and the reasons for their movement across borders. In comparison to Art. 1 Prot. 7 ECHR or Art. 32

[29] As third-party interventions have submitted reports that summarize in detail the interpretation and findings of the African Commission, the Inter-American Court, the Human Rights Committee and the International Law Commission on the prohibition of collective expulsion, the ECtHR is arguably well aware of thereof even though it does not mention these sources in its judgments. See for example: Third-party interventions by Coordination Francaise pour le droit d' asile, the Mc Gill Centre, the AIRE Centre and ECRE, *Khlaifia and Others v. Italy* ECtHR, [GC] Appl. No. 16483/12, 15 December 2016 (*Third Party Intervention Khlaifia and Others v. Italy*), paras. 230-236.

[30] *Čonka v. Belgium* ECtHR, Appl. No. 51564/99, 5 February 2002.

[31] *Sultani v. France* ECtHR, Appl. No. 45223/05, 26 September 2007.

[32] *Georgia v. Russia (I)* ECtHR, [GC]. On 31 January 2019, the Grand Chamber of the Court ruled on the question of just satisfaction in accordance with Art. 41 ECHR. By sixteen votes to one, the court ruled that Russia had to pay Georgia 10,000,000 EUR in respect of non-pecuniary damage suffered by a group of at least 1,500 Georgian nationals. The amount was ordered to be distributed to the individual victims by paying EUR 2,000 to the Georgian nationals who had been victims only of a violation of Art. 4 Prot. 4 (collective expulsion), and 10,000 EUR to 15,000 EUR to those who had also been victims of a violation of Art. 5 (1) (unlawful deprivation of liberty) and Art. 3 ECHR (inhuman and degrading conditions of detention), see para. 77.

[33] *Hirsi Jamaa and Others v. Italy* [GC].

[34] *Khlaifia and Others v. Italy* [GC].

[35] *N.D. and N.T. v. Spain* ECtHR, [GC], Appl. Nos. 8675/15 and 8697/15, 13 February 2020. Two similar cases that also deal with Spain's summary expulsion policy at the Spanish/Moroccan border are currently pending at the ECtHR: *Doumbe Nnabuchi v. Spain* Appl. No. 19420/15 and *Balde and Abel v. Spain* Appl. No. 20351/17. Both cases are pending as of April 2020.

[36] *Sharifi and Others v. Italy and Greece* ECtHR, paras. 210-213.

1951 Refugee Convention, which protect legal residents/refugees against arbitrary expulsion, Art. 4 Prot. 4 ECHR is broader in its ambit of protection *ratione personae*. This is one of several reasons why the prohibition of collective expulsion is one of the most relevant minimal protections for *all foreigners* against arbitrary treatment contained in the ECHR.

The personal scope of protection against mass expulsion in Art. 12 (5) *African Charter on Human and Peoples' Rights* as interpreted by the African Commission on Human and Peoples' Rights (AComHPR) is even more extensive than Art. 4 Prot. 4 ECHR.

As mentioned above,[37] the prohibition of mass expulsion in the *African Charter* differs in its wording from its regional counterparts. However, AComHPR has complemented the scope of protection of the prohibition in several cases, converging its scope with that of its regional counterparts.

The African Commission, together with the African Court on Human and Peoples' Rights, now named the African Court of Justice and Human Rights were created to monitor and protect the functions of the *African Charter*.[38] The Court delivered its first judgment in 2013 but, at the time of writing, had not yet examined any case of mass expulsion. Therefore, the analysis here is limited to the Commission's jurisprudence.

The AComHPR examined five cases regarding allegations of mass expulsions of non-nationals.[39] These cases assessed jointly offer insight into the African

[37] See: Chapter I, D. Collective expulsion v. mass expulsion: Two terms for the same phenomenon?

[38] The mandate of the Commission is to be found in Arts. 45 ACHPR ff., the functions of the Court are to be found in Art. 2 *Protocol on the Statute of the African Court of Justice and Human Rights*.

[39] The first case was *Organisation Mondiale Contre la Torture and Others v. Rwanda* dealt with mass expulsions of Burundian Refugees from Rwanda, ACHPR, 27/89-46/91-49/91-99/93, 1996. The Commission found Rwanda to have violated the African Charter, namely of the right to respect for one's life and integrity, the right to the respect of the dignity inherent in a human being and to the recognition of his legal status, the right to liberty and security, the right to have one's case heard, the right to seek asylum, the right to a decision before being expelled and the prohibition of mass expulsion (enshrined in Articles 4, 5, 6, 7, 12 (3) and 12 (4) and 12 (5) of the Charter) The Commission then urged the government of Rwanda to adopt measures in conformity with this decision. The second case was *Rencontre Africaine pour la Défense des Droits de l'Homme v. Zambia* AComHPR, Communication 71/92, 1996. Here, the Commission found that the expulsion of 517 West Africans from Zambia violated the prohibition of mass expulsion.
The third case was *Union Inter Africaine des Droits de l'Homme, Fédération Internationale des Ligues des Droits de l'Homme and Others v. Angola, African Commission on Human and Peoples' Rights* ACHRR, Comm. No. 159/96, 1997, (*Fédération Internationale des*

Commission's interpretation of the prohibition. This assessment reveals that the Commission interpreted the prohibition's scope of protection in Art. 12 (5) ACHPR in a manner approximating that of its regional counterparts, in particular Art. 4 Prot. 4 ECHR.

At first sight, the personal scope of Art. 12 (5) ACHPR resembles its counterpart in the EUChFR covering both nationals and foreigners. The wording of Art. 12 (5) ACHPR only explicitly refers to the prohibition of expulsion of 'non-nationals'. However, through interpretation, the African Commission expanded the scope of protection *ratione personae* to nationals and foreigners alike.[40] The Commission held in its *Rencontre Africaine pour la Défense des Droits de l'Homme v. Zambia* decision that states ought 'to secure the rights protected in the *African Charter* to all persons within their jurisdiction, nationals or non-nationals.'[41]

Another closely connected question is the list of prohibited reasons for discrimination in Art. 12 (5) ACHPR. Comparing the explicit attributes of discrimination in the general prohibition in Art. 2 and Art. 12 (5) ACHPR, the list in Art. 2 is considerably broader at first sight. Art. 2 ACHPR prohibits *inter alia* discrimination based on colour, sex, language, and political opinion. Art. 2 mentions 'all forms of discrimination' and only lists some attributes that are 'particularly' noteworthy. This finding indicates that the list is not exhaustive.

In contrast, the list in Art. 12 (5) ACHPR appears to be self-contained.[42] However, despite its narrow wording, the Commission expanded this self-contained list of grounds in *Union Inter-Africaine des Droits de l'Homme and others v. Angola*. It explicitly stipulated that Art. 12 (5) ACHPR applies to

Ligues des Droits de l'Homme v. Angola). The fourth case was *African Institute for Human Rights and Development v. Guinea* ACHPR, 2004 and the final case *Institute for Human Rights and Development in Africa v. Republic of Angola* ACHPR, Communication 292/2004 23rd and 24th Activity Reprot of the ACPR, Annex II, 2008.

[40] Olaniyan, Kolawole *Civil and Political Rights in the African Charter: Articles 8-14* in: Evans and Murray *The African Charter on Human and Peoples' Rights: The System in Practice 1986-2006* (Cambridge University Press 2008), p. 232.

[41] *Rencontre Africaine pour la Défénse des Droits de l'Homme v. Zambia* AComHPR, Communication 71/92, October 1996, para. 22.

[42] The wording of Art. 12 (5), second sentence ACHPR suggests that it only prohibits mass of foreigners based on nationality, race, ethnicity or religion. The provision reads: Mass expulsion shall be that which is aimed at national, racial, ethnic or religions [sic!] groups.

'any category of persons, whether on the basis of nationality, religion, ethnic, racial, or other considerations.'[43] This clarification combined the prohibited reasons for discrimination of Arts. 12 (5) ACHPR and Art. 2 ACHPR.

In all five cases on mass expulsion, the *African Commission* found a violation of the two provisions. In *Malawi African Association and Others v. Mauritania*, the Commission held that Art. 2 lays down a principle that is essential to the spirit of this convention, one of whose goals is the elimination of all forms of discrimination and to ensure equality amongst all human beings.'[44] The African Commission's approach to extend the list of attributes in Art. 12 (5) ACHPR in accordance with Art. 2 ACHPR reflects its commitment to protecting the *Charter*'s essential principle to prohibit any form of discrimination.

This is of particular importance as in past decades, there have been reports on mass expulsions from several African states based on unemployment, increased crime rates, and even as the result of unfavourable football matches.[45] To ensure that all possible reasons for mass expulsions of foreigners are covered by the prohibition in Art. 12 (5) ACHPR, the scope of protection ought to be as broad and flexible as in Art. 2 ACHPR.

The scope of protection *ratione personae* of the prohibition of mass expulsion in the *African Charter* is thus congruent with its regional counterparts.

The same is true regarding the personal scope of protection of the prohibition in the *American Convention on Human Rights* (ACHR) as interpreted by the Inter-American Commission and Court.

Art. 22 (9) ACHR, also known as the 'Pact of San José',[46] was adopted on 22 November 1969 in San José, Costa Rica. The provision states that 'the collective expulsion of aliens is prohibited.'[47]

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[43] *Fédération Internationale des Ligues des Droits de l'Homme v. Angola* AComHPR, para. 17.

[44] *Malawi African Association and others v. Mauritania* AComHPR Communications 54/91, 61/91, 164/97-196/97, 210/98, Thirteenth Activity Report 1999-2000, Annex V, para. 131.

[45] Umozurike, Oji *The African Charter on Human and Peoples' Rights* (Nigerian Institute of Advanced Legal Studies 1992), p. 7.

[46] UN registration on August 27, 1979, No. 17955.

[47] For a comprehensive commentary on the ACHR in Spanish see: Steiner, Christian and Uribe, Patricia (eds.) *Convención Americana sobre Derechos Humanos comentada* (Suprema

Besides this prohibition, Art. 22 ACHR also guarantees the freedom of movement and residence of 'every person'. The *Convention* entered into force only nine years after its adoption with the eleventh ratification by Grenada on 18 July 1978. As of 2020, 23 states are parties to the *Convention*. Trinidad and Tobago[48] and Venezuela[49], both former member states, have withdrawn from the instrument.[50] Others, such as the United States[51] have signed but never ratified it, while some such as Belize, Canada, and Guyana have done neither.

In contrast to its European counterpart, the prohibition in the *American Convention* has played a smaller role in the case law on violations of the Pact of San José. As of 2020, the Inter-American Court of Human Rights (*Corte Interamericana de Derechos Humanos*), also based in San José, has only dealt with the prohibition of collective expulsion in its case law in few cases.[52] The functions of the Court consist of monitoring, interpreting, and applying the ACHR. If deemed necessary, it can rule on remedies in the case of violations of the *Convention* per Art. 62 and 63 ACHR. Only member states and the Inter-American Commission on Human Rights can lodge complaints to the Court under Art. 61 (1) ACHR.

Corte de la Nación (Mexico) and Konrad Adenauer Foundation 2014). A commentary on the prohibition of collective expulsion is found therein by Rodrigo Uprimny Yepes and Luz María Sánchez Duque, pp. 550-551.

[48] Trinidad and Tobago's withdrawal became effective on 26 May 1999 over a query on the death penalty, OAS *Press release* E-056/99ie, 26 May 1999, available at: http://www.oas.org/OASpage/press2002/en/Press99/0526991.htm.

[49] Former president Hugo Chavez announced the withdrawal on the basis of the governments dissatisfaction of certain decisions of the Inter-American Court of Human Rights, see: Ku, Julian *Venezuela Formally Withdraws from American Convention on Human Rights, Blames the U.S.* OpinioJuris, 11 September 2013, available at: http://opiniojuris.org/2013/09/11/venezuela-formally-withdraws-american-convention-human-rights-blames-u-s/.

[50] List of signatures and ratifications provided by the *Inter-American Commission on Human Rights*, available here: https://www.cidh.oas.org/basicos/english/Basic4.Amer.Conv.Ratif.htm.

[51] Interestingly, the USA were part of the Conferencia Especializada Interamericana Sobre Derechos Humanos that drafted the Convention. The representative also offered observations on the Human Rights project as can be seen in the travaux préparatoires of the Convention. Organization of American States (OAS), *Conferencia Especializada Interamericana Sobre Derechos Humanos*, San José, Costa Rica, OEA/Ser.K/XVI/1.2, 7-22 November 1969, (hereafter: ACHR travaux préparatoires), pp. 92-98. The documents do not offer any indicator as to the unwillingness of the USA to become a state party in the future.

[52] Unfortunately, the official case search engine of the Corte Interamericana de Derechos Humanos, the *Jurisprudence Finder* available at: http://www.corteidh.or.cr/cf/Jurisprudencia2/index.cfm?lang=en, does not lead to these cases as it offers 0 matches for the terms 'collective expulsion' or 'expulsión colectiva'.

In contrast, individuals and groups of people can also lodge complaints to the Inter-American Commission on Human Rights[53], based in Washington, D.C., in accordance with Art. 44 ACHR. The two bodies jointly monitor member states' adherence to Art. 33 ACHR. The functions and powers of the Commission include the development of an awareness of human rights (Art. 41 a.); recommendations to the governments of the member states (Art. 41 b.); studies or reports (Art. 41 c.); requests to governments to supply it with information on measures adopted (Art. 41 d.); providing advisory services (Art. 41 e.); taking action on petitions and other communications (Art. 41 f.); and submitting an annual report to the General Assembly of the Organization of American States (Art. 41 g.).

When it comes to the personal scope of protection of the prohibition of collective expulsion, the Commission and Court explicitly followed the approach of the ECtHR in interpreting the personal scope of application of the prohibition. The Court held in *Nadege Dorzema and Others v. Dominican Republic* that the prohibition of collective expulsion must apply to *all foreigners*, irrespective of the legality of their stay.[54] The Court further highlighted that no distinction in the proceedings should be made 'on grounds of nationality, color, race, sex, language, religion, political opinion, social origin or other status.'[55]

It can be inferred from this that Art. 22 (9) ACHR protects all collectively expelled foreigners, including stateless persons, migrants, asylum seekers, and refugees, that is, individuals with and without a valid residence permit. The scope of protection *ratione personae* is thus congruent among all regional human rights instruments in as far as these groups of foreigners are covered.

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[53] See for example: IAComHR *Second Progress Report of the Rapporteurship on Migrant Workers and Members of Their Families in the Hemisphere*, para. 97.5. Also: IAComHR *Benito Tide Méndez et al. (Dominican Republic) Report on the Merits No. 64/12* Case 12.271, 29 March 2012, para. 253 and IAComHR *Annual Report of the Inter-American Commission on Human Rights 1991* OEA/Ser.L/V/II.81 Doc. 6, rev. 1, February 14, 1992. Chapter V: Situation of Haitians in the Dominican Republic. Also: IAComHR *Report on the Situation of Human Rights in the Dominican Republic* OEA/Ser.L/V/II.104 Doc. 49 rev. 1, October 7, 1999, para. 366.

[54] *Nadege Dorzema and others v. Dominican Republic Merits, Reparations and Costs* IACourtHR, Judgment of 24 October 2012, series C, No. 251, (*Nadege Dorzema v. Dominican Republic*), paras. 156-159.

[55] Ibid., para. 175.

The *African Charter* goes beyond this in its application by also covering nationals.

2. The Arab Charter on Human Rights of 2004 and the Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms

The *Arab Charter on Human Rights of 2004* (*Arab Charter*) is the most recent and arguably the most controversial regional human rights instrument.[56] The *Charter* only entered into force in 2008 after serious redrafting of the previous *Arab Charter on Human Rights of 1994*, which was never effective due to the lack of sufficient ratification.[57] As of March 2020, fourteen states are parties: Algeria, Bahrain, Iraq, Jordan, Kuwait, Lebanon, Libya, Palestine, Qatar, Syria, UAE, Yemen, Morocco, and Sudan. The 1994 version of the *Arab Charter* did not contain the prohibition of collective expulsion. The 2004 version explicitly foresees this principle in Art. 26 (2) stipulating that '[c]ollective expulsions are prohibited in all cases.' The wording suggests that the scope of protection *ratione personae* of this provision includes all foreigners, irrespective of the individual's legal residency. However, sources, such as monitoring reports or the official website that could provide clarity on this are only available in Arabic[58] and are very limited in their scope. The 2004 version established the Arab Human Rights Committee to monitor member states' adherence to the *Charter*. However, it receives neither individual nor inter-state complaints. The Committee only considers state reports submitted after one year of membership and then again every three

[56] See for example: Allam, Wael *The Arabic charter on human rights: Main features* Arab Law Quarterly, 2014, Vol. 28, No. 1, (*The Arabic charter on human rights: Main features*), pp. 57-63. Also: Osterhaus, Juliane *The Arab Human Rights System* (Deutsche Gesellschaft für Internationale Zusammenarbeit and Deutsches Institut für Menschenrechte 2017), (*The Arab Human Rights System*), pp. 2-3. Also, in 2015, the International Commission of Jurists called on member states of the Arab League of States not to ratify the Statute of the Arab Court of Human Rights unless and until it is comprehensively amended. ICJ *Arab Court of Human Rights: comprehensive amendments required before ratification* 8 April 2015, available at: https://www.icj.org/arab-court-of-human-rights-comprehensive-amendments-required-before-ratification-new-report/.

[57] Osterhaus, Juliane *The Arab Human Rights System* p. 2.

[58] The English version of the official webpage of the League of Arab States is under construction and thus also not available, see: http://www.leagueofarabstates.net/ar/Pages/default.aspx.

years.[59] A translated summary of these reports did not reveal any additional information on the personal scope of protection or any other elements of the prohibition.

Comparable challenges exist when it comes to the assessment of the *Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms* (*Commonwealth Human Rights Convention*, CHRC).[60] The CHRC, to which only four CIS states are parties as of March 2020, explicitly contains the prohibition of collective expulsion in Art. 25. (4). This provision states that the '[c]ollective expulsion of aliens shall be prohibited.'

The monitoring of the implementation of the *Convention* is in the hands of the Human Rights Commission of the Commonwealth of Independent States (HRC CIS) per Art. 34. This provision is silent on the Commission's power and on who can bring forward claims. The Commission has never officially commenced its monitoring work.[61] Publicly available information from the Commission and the *Convention* is available exclusively in Russian.[62]

Again, the wording of the provision codifying the prohibition suggests that the personal scope encompasses *all* foreigners, irrespective of the regularity of their stay in member states. An assessment of available Russian-language sources such as Commission reports does not further clarify this assumption. These sources do not provide any further information on how any other element of the prohibition is understood.

Therefore, this study is mainly limited to a thorough examination of the prohibition in other human rights instruments on which more sources are available.

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[59] Allam, Wael *The Arabic charter on human rights: Main features* pp. 62-63.
[60] I would like to thank my friend and colleague Vitaly Beloborodov for helping me translating and navigating the documents relating to the Commonwealth Convention.
[61] Huntley, Svetlana *The CIS Human Rights Court: a possible alternative to the ECHR?* ECHR and Promotion of Human Rights in Russia, 5 October 2011, available at: http://echrrussia.blogspot.com/2011/10/cis-human-rights-court-possible.html.
[62] Commonwealth of Independent States *official webpage* available at: http://cis.minsk.by/page.php?id=11326.

III. The scope of protection *ratione personae* in international human rights instruments

The scope of protection *ratione personae* of the prohibition of collective expulsion in regional human rights instruments encompasses any foreigner irrespective of her or his residence status, nationality, statelessness, ethnicity, or any other feature. This conclusion cannot simply be applied *mutatis mutandis* to the *UN Migrant Worker Convention* (UNCRMW), and the *International Covenant on Civil and Political Rights* (ICCPR). The wording of the provision governing the prohibition of collective expulsion in the *UN Migrant Worker Convention* seemingly applies to migrant workers and their families with regular and irregular residence status, excluding stateless migrants and refugees. A conclusive assessment of the ICCPR provision, relevant case law and the broader context of the human rights conventions reveals that it protects not only lawfully residing foreigners, as will be shown in the following section.

1. The personal scope of protection of Art. 22 (1) UNCRMW

Only after the economic downturn in the 1970s did states and other actors realise that international and bilateral agreements regulating employment migration were not sufficient to protect *all* migrants, regular or irregular, against abuse and discrimination.[63] The goal to protect migrants with irregular statuses turned out to be particularly contentious amongst participating states, leading to a drafting process lasting from 1980 to 1990.[64]

In December 1990, the United Nations General Assembly adopted the *United Nations International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (UNCRMW) opened for

[63] European Parliament Directorate-General for External Policies *Current Challenges in the Implementation of the UN International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families* EXPO/B/DROI/2013/05, 2013, p. 6.
[64] UNOHCHR *travaux préparatoires of Part III of the Convention* 2003, p.1.

signature by all member states. Only in July 2003 did the convention enter into force. As of April 2020, 55 states have ratified[65] the *Convention*.[66]

The personal scope of protection of the UNCRMW is established in its Art. 1 (1), which covers 'all migrant workers and members of their families without distinction of any kind.' Subparagraph two of Art. 1 clarifies that this protection applies during 'the entire migration process […], which comprises preparation for migration, departure, transit, and the entire period of stay and remunerated activity in the State of employment as well as return.'

Art. 2 (1) UNCRMW complements this broad scope by defining a 'migrant worker' as 'a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.'

In general, most guarantees in the *Convention* cover both migrants and their families in regular and irregular situations. However, certain rights such as the right to form associations and trade unions (Art. 40 UNCRMW) and migrants' right to participate in the public affairs and elections of their home state (Art. 44 UNCRMW) are limited to documented migrants and their families.

Art. 22 (1) UNCRMW, which codifies the prohibition of collective expulsion, is not limited to documented migrants but applies to *all* migrant workers and their families. The Migrant Worker Committee (CMW), the body of independent experts that monitors the implementation of the *Convention* by its member states, has acknowledged this broad scope of application.[67] It did so in *General Comment No. 2*, where it stipulates that it guarantees procedural safeguards in the case of collective expulsion to 'both regular and irregular migrant workers and members of their families'.[68]

Nevertheless, in comparison with the other analysed instruments, the chosen wording of Art. 22 (1) UNCRMW seems to be more limited in its personal

[65] UNOHCHR *Status of Ratification International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families* Interactive Dashboard, available at: http://indicators.ohchr.org/.
[66] 13 states have signed the Convention in addition to these ratifications.
[67] Art. 72 (1) UNCRMW.
[68] CMW *General comment No. 2 on the rights of migrant workers in an irregular situation and members of their families* (2013), CMW/C/GC/2, 28 August 2013, para. 49.

scope of application, referring only to 'migrant workers and their families'. Art. 3 UNCRMW, subsection (d) clarifies that 'Refugees and stateless persons, unless such application is provided for in the relevant national legislation of, or international instruments in force for, the State Party concerned' are not covered by the scope of the *Convention*. The *travaux préparatoire*s offer no guidance as to why refugees and stateless persons were excluded from the scope of protection.[69]

Assessing the question of exceptions, a strict distinction between the legal terms 'migrants', 'asylum seeker', and 'refugee' is essential in order to determine which individuals are covered by the scope of protection.

First, it is noteworthy that any individual who meets the definition of Art. 1 (A.), (2) *1951 Refugee Convention*[70] is a refugee the moment these criteria are fulfilled.[71] Thus, any individual fleeing prosecution who meets the established requirements is protected by the *Convention* even prior to the formal determination of her or his status by the respective member state. A state's granting of refugee status is only declaratory.[72] In practice however, the official recognition as refugee by the respective member states is the decisive point that avails the respective individual of the particular rights and guarantees provided by international and domestic law. The recognition or denial of refugee status is crucial to the individual's (temporary) right to stay.

It thus follows that individuals outside their country of origin do not fall under the scope of protection of the *Migrant Worker Convention* if they have left

[69] The travaux préparatoires of the Convention only stipulate that there was a lively debate about the inclusion of undocumented migrants in the scope of protection of the Convention in general. The issue of stateless and refugees is not mentioned. UNOHCHR *travaux préparatoires of Part III of the Convention* 2003, pp. 1-2.
[70] Art. 1 (A.) (2) *1951 Refugee Convention* states: For the purpose of the present Convention, the term 'refugee', shall apply to any person […] owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or unwilling to such fear, is unwilling to avail himself of the protection of that country […].
[71] United Nations High Commissioner for Refugees *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refuges* 1992 (*Handbook on Procedures*), para. 28. The Convention has 145 member states, see: UNHCR *States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol* status of current signatures and ratifications, available at: http://www.unhcr.org/en-us/protection/basic/3b73b0d63/states-parties-1951-convention-its-1967-protocol.html.
[72] UNHCR *Handbook on Procedures* para. 28.

due to persecution linked to any attribute listed in Art. 1 (A), (2) *1951 Refugee Convention*.

It seems that the drafters of the UNCRMW wanted to draw a clear distinction between migrants moving across borders for economic reasons, such as those looking for work (who are protected by the *Convention*) and those who flee from persecution (who are exempted). One reason for the clear distinction between 'refugees' and 'migrants' may be that at the time of drafting of the UNCRMW, the *1951 Refugee Convention* and its *1967 Protocol* already guaranteed refugees' right to work. Art. 17 *1951 Refugee Convention*, for example, provides for refugees' right to 'wage-earning employment'. In Art. 32, the *1951 Refugee Convention* also contains the general prohibition of expelling refugees without a decision 'reached in accordance with due process of law;' the UNCRMW does not contain a comparable guarantee. However, Art. 32 *1951 Refugee Convention* and Art. 22 (1) UNCRMW both contain guarantees against arbitrary expulsion. Thus, the *1951 Refugee Convention* and its protocol already constituted an existing and more comprehensive instrument at the time of the UNCRMW's drafting. Including rights that are more restricted for refugees in the scope of protection of the UNCRMW would have reduced these already existing standards.

Though this distinction is plausible from the point of view that the *Convention* was established to protect specifically those who migrate for economic reasons, it is difficult to categorise migrants accordingly in practice, as the reasons for migrating may be manifold and overlapping.[73]

There may be similar reasons for the exclusion of stateless persons from the scope of protection. The *1954 Convention relating to the Status of Stateless Persons*[74] and the *1961 Convention on the Reduction of Statelessness*[75] already offer rights and guarantees to individuals without nationality. Art. 17 of the *1954 Convention*, for example, provides the right to work, comparable

[73] Alan Desmond comes to a similar conclusion stating that the distinction between migrants, refugees and asylum-seekers when it comes to the scope of protection by the Migrant Worker Convention is in practice 'opaque'. See: Desmond, Alan *Shining new light on the UN Migrant Workers Convention* (Pretoria University Law Press 2017), p. 80.
[74] UNGA *Convention Relating to the Status of Stateless Persons* 28 September 1954, UNTS Vol. 360, p. 117.
[75] UNGA *Convention on the Reduction of Statelessness* 30 August 1961, UNTS Vol. 989, p. 175.

to Art. 17 *1951 Refugee Convention*. The same applies to the prohibition of expulsion of stateless, codified in Art. 31 of the *1954 Convention*.

In conclusion, the wording of the personal scope of protection of the prohibition of collective expulsion is more limited than its regional and international counterparts. Even though the personal scope of protection covers individuals with a 'regular' as well as an 'irregular' status, it explicitly excludes refugees and stateless persons.

The reason for this exclusion may be in the fact that at the time of drafting the *Migrant Worker Convention* in the 1980s, more specific regimes protecting refugees and stateless people were already in place. The *1951 Refugee Convention* and its *1967 Protocol* as well as the *1954 Convention relating to the Status of Stateless Persons* and the *1961 Convention on the Reduction of Statelessness* already offered these particular groups of migrants more exhaustive protection when it comes to the right to work compared to the *Migrant Worker Convention*.

2. The personal scope of protection in Art. 13 ICCPR

As elaborated above[76], Art. 13 ICCPR only *implicitly* contains the prohibition of collective expulsions. The Human Rights Committee (HRC), a body of eighteen independent experts that monitors the implementation of the ICCPR by its member states[77], acknowledged this fact stating that 'article 13 would not be satisfied with laws or decisions providing for collective or mass expulsions.'[78]

States parties to the ICCPR must submit reports to the HRC on measures taken to implement the rights contained in the Covenant.[79] The HRC, in turn, examines these reports and may provide its conclusions as well as general comments on specific topics or provisions.[80]

[76] See: Chapter I, D.
[77] See: Arts. 28-39 ICCPR.
[78] Human Right Committee *General Comment No. 15: The Position of Aliens Under the Covenant* 11 April 1986, (*General Comment No. 15*), para. 10.
[79] See: Art. 40 (1) ICCPR.
[80] See: Art. 40 (4) ICCPR.

The wording of Art. 13 ICCPR seemingly restricts its personal scope of protection to lawfully resident foreigners already within the territory of a state (except for circumstances where the life of the person is at risk)[81]. 'Lawfully resident' in this regard refers to individuals that have entered the state's territory in compliance with domestic legislation.[82]

Assessing this limited scope of application *ratione personae*, Sarah Joseph and Melissa Castan conclude the following:

> Article 13 is probably of little use to the many asylum-seekers who are forced to flee their home State suddenly, and traverse State borders without authorization, unless a State recognizes procedural rights for such asylum seekers in its domestic law[83]

The only possibility in these authors' view for asylum seekers not to be deported in such situations is the invocation of Art. 7 ICCPR – prohibiting the expulsion of people to a state where their life is at risk (*non-refoulement* principle).[84]

However, an overall examination of the three HRC *Concluding Observations*[85] and one *General Comment*[86] available on collective expulsion shows that the question of the personal scope of application regarding the prohibition is not as clear-cut as Joseph and Castan suggest. The HRC in its *General Comment No. 15* of 1986 on '*The Position of Aliens under the Covenant*' states on the one hand that the

> particular rights of article 13 *only protect those aliens who are lawfully in the territory of a State party*. This means that national

[81] Ibid., para. 9. For further details see analysis below section D. on the definition of 'expulsion' in the ICCPR.
[82] Carlson, Scott and Gisvold, Gregory *Practical Guide to the International Covenant on Civil and Political Rights* (Transnational Publishers 2003), (*Practical Guide to the ICCPR*), p. 99.
[83] Joseph, Sarah and Castan, Melissa *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (Oxford University Press 3rd edn. 2013), (*ICCPR: Cases, Materials and Commentary*) p. 421.
[84] Joseph, Sarah; Castan, Melissa *ICCPR: Cases, Materials and Commentary* p. 421.
[85] Human Rights Committee *Concluding Observations: Dominican Republic* (2001), CCPR/CO/71/DOM, 3 April 2001, (*Concluding Observations: Dominican Republic 2001*); *Concluding observations: Dominican Republic* (2017), CCPR/C/DOM/CO/6, 27 November 2017, (*Concluding observations: Dominican Republic 2017*); *Concluding Observations: Estonia* (2003), CCPR/CO/77/EST, 15 April 2003.
[86] HRC *General Comment No. 15.*

> law concerning the requirements for entry and stay must be taken into account in determining the scope of that protection, and that *illegal entrants and aliens who have stayed longer than the law or their permits allow*, in particular, are *not covered* by its provisions [emphasis added].[87]

On the other hand, the HRC further elucidates in the same paragraph that

> if the legality of an alien's entry or stay is in *dispute*, any decision on this point leading to his expulsion or deportation *ought to be taken in accordance with article 13*. It is for the competent authorities of the State party, in good faith and in the exercise of their powers, to apply and interpret the domestic law [emphasis added].[88]

It follows from this that state parties must take into account the guarantees contained in Art. 13 ICCPR when determining whether a foreigner is a lawful resident, in the case this determination is connected to her or his expulsion or deportation. Thus, it seems that in the event of uncertainty regarding the foreigner's lawful residency, the procedural guarantees provided for by the prohibition must be considered by the respective authorities in accordance with Art. 13 ICCPR.

Furthermore, the HRC's 2003 *Concluding Observations on the situation of the Dominican Republic* did not help clarify the provision's ambiguity regarding its personal scope of application. The report stated that

> The Committee is gravely concerned at the continuing reports of mass expulsions of ethnic Haitians, even when such persons are *nationals of the Dominican Republic*. It holds mass expulsions of non-nationals to be in breach of the Covenant since no account is taken of the situation of individuals for whom the Dominican Republic is their own country in the light of article 12, paragraph 4, nor of cases where expulsion may be contrary to article 7 given the risk of subsequent cruel, inhuman or degrading treatment, nor

[87] HRC *General Comment No. 15* para. 9.
[88] Ibid.

> yet of *cases where the legality of an individual's presence in the country is in dispute* and must be settled in proceedings that satisfy the requirements of article 13. The State party should guarantee the right of every Dominican national not to be expelled from the country and ensure that all persons facing deportation proceedings are covered by the safeguards established in the Covenant [emphasis added].[89]

This statement by the HRC is ambiguous on whether the prohibition of collective expulsion in Art. 13 ICCPR applies not only to lawful resident foreigners, but also to nationals of the expelling country.

It seems that the Committee did not provide concise attribution of the guarantees entailed in Art. 13 ICCPR to nationals. The HRC highlighted its 'grave concern' on reports of mass expulsions of nationals from the Dominican Republic instead of stating unequivocally that this action violates Art. 13 ICCPR, and thus such ambiguous language provides no further clarity.

Furthermore, in the same paragraph the HRC requested that the Dominican Republic ensured that its nationals are not arbitrarily expelled in the future, without reference to Art. 13 ICCPR.[90] This is remarkable as the Committee clearly condemned a violation of this provision in the same paragraph when it comes to the expulsion of foreigners.[91] Interestingly, the *Concluding Observation* is entirely silent on whether all of the expelled foreigners in question were lawful residents of the Dominican Republic.

Thus, contrary to the limited wording of the provision, which only speaks of 'legally residing aliens', the HRC may have attempted to expand the scope of application to nationals in the case of collective expulsion. The same may be the case regarding foreigners whose lawful residence status is in question and which may lead to her or his expulsion. In this case, it seems that the HRC wanted to extend the guarantees of Art. 13 ICCPR, namely the possibility to

[89] HRC *Concluding Observations: Dominican Republic 2001* para. 16. The same concern was raised in the most recent report by the Human Rights Committee in its *Concluding observations: Dominican Republic 2017* paras. 23-24.
[90] HRC *Concluding Observations: Dominican Republic 2001* para. 16.
[91] Ibid.

bring forward individual claims against the expulsion, to this group of foreigners. However, the HRC's statements in this regard are ambiguous. Foreigners who stay irregularly, whose status is not in question, are exempt. Thus, the scope of protection of the prohibition of collective expulsion *ratione personae* of Art. 13 ICCPR, compared to its regional counterparts, is more limited.

B. The definition of 'collective' in the prohibition of collective expulsion

The Oxford Dictionary of Current English defines 'group' as 'a number of people or things located, gathered, or classed together.'[92] This definition contains two decisive elements that serve as a starting point for the assessment of this element: the *size* of the group and the *connective element* between the individual members of the group expressed by the term 'together' in the definition.

The ambit of protection of the prohibition of collective expulsion is dependent on the definition of the term 'collective'[93] and thus on the question of if the expelled group requires a specific size to fall under the provision's scope.

Van Dijk and Van Hoof claim that every foreigner, irrespective of being expelled individually or as part of a group, ought to enjoy the same level of procedural guarantees. Otherwise, a sports team or an orchestra consisting of foreigners could enjoy protection against collective expulsion; an individual foreign athlete or musician, however, would not fall under the scope of protection of the prohibition.[94] The authors admit that this interpretation would expand the scope of the prohibition immensely, rendering its collective notion irrelevant.[95] Jean-Marie Henckaerts supports this broad interpretation of 'collectivity' and favours the extension of the procedural guarantees to all expelled individuals.[96]

However, as Henckaerts admits, the issue on how to distinguish 'group expulsions' from several simultaneously occurring individual expulsions of foreigners and the required size of such a group for a collective expulsion remains unanswered.[97]

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[92] Waite, Maurice and Stevenson, Angus *Concise Oxford English Dictionary* (Oxford University Press 12th edn. 2011).
[93] Van Dijk, Pieter and Van Hoof, Fried *Theory and Practice of the European Convention on Human Rights* (Intersentia 4th edn. 2006), (*Theory and Practice of the European Convention*), p. 676.
[94] Van Dijk, Pieter and Van Hoof, Fried *Theory and Practice of the European Convention* pp. 677-678.
[95] Ibid.
[96] Henkaerts, Jean-Marie *Mass expulsion in International Law and Practice* (Martinus Nijhoff 1995), (*Mass Expulsion in Modern International Law and Practice*), pp. 13-15.
[97] Ibid.

I. Determining factors for the collective nature of an expulsion

The following section will shed light on these questions and offer a definition of *collective* expulsion by assessing available case law of regional and international courts and treaty bodies. In doing so, several determining factors are examined: identical terms of expulsion orders, size of the group, length of the foreigners' stay within the territory of the expelling state, nationality, and ethnicity. Additionally, other factors, which do not rest on the expelled foreigner, but on the fact that the expulsion occurred without a reasonable and objective examination of individual circumstances, are also explored.

1. Identical terms of expulsion orders

In two early *European Commission of Human Rights* cases on Art. 4 Prot. 4 of 1977 and 1978, namely *K.G. v. the Federal Republic of Germany* and *O. et autres c. Luxembourg*, the Commission dismissed a violation of the prohibition of collective expulsion as the fact that the applicants' 'expulsion orders are held in identical terms is not in itself evidence that they are being expelled collectively and there is no corroboration for any such inference.'[98] This finding was reiterated years later in several judgments by the ECtHR.[99] In *Sultani v. France* for example, no violation of Art. 4 Prot. 4 ECHR was found even though the expulsion orders of the expelled were in identical in terms.[100]

In *M.A. v. Cyprus*, this finding was further clarified. The identical terms of the applicants' expulsion orders alone do not suffice to immediately trigger a violation of the prohibition. The Court held that

> the fact that the deportation orders and the corresponding letters were couched in formulaic and, therefore, identical terms and did not specifically refer to the earlier decisions regarding the asylum

[98] Council of Europe *Digest of Strasbourg Case-Law relating to the European Convention on Human Rights* Vol. 5 (Carl Heymanns Verlag 1985), p. 890.
[99] See for example the following ECtHR cases: *Čonka v. Belgium* para. 62; *Khlaifia and Others v. Italy* [Chamber], paras. 153-154; *Sultani v. France* para. 81 and *Hirsi Jamaa and Others v. Italy* [GC], para. 184.
[100] *Sultani v. France* ECtHR, para. 83.

> procedure *is not itself indicative* of a collective expulsion. What is important is that every case was looked at individually and decided on its own particular facts [emphasis added].[101]

The Court went further, finding that

> [a]lthough not expressly stated in the deportation orders and letters, the decision to deport was based on the conclusion that the person concerned *was an illegal immigrant* following the rejection of his or her asylum claim or the closure of the asylum file. *Although a mistake was made* in relation to the status of some of the persons concerned, including that of the applicant […] this, while unfortunate, *cannot be taken as showing that there was a collective expulsion* [emphasis added].[102]

Here the Court concluded that removal orders in identical terms in themselves do not automatically imply that an expulsion of a group of foreigners was collective in nature. The expulsion order does not need to refer to the individual's status determining procedure as long as it is based on a previous reasonable and objective examination – even if this assessment later turned out to be flawed. This conclusion by the Court once again illustrates the object and purpose of Art. 4 Prot. 4 ECHR, namely a fair chance for every foreigner to claim protection and have these claims assessed.

In *M.A. v. Cyprus* and cases such as *Sultani v. France*, in the Court's view applicants' claims were sufficiently assessed during their asylum application procedures and thus Art. 4 Prot. 4 ECHR was not violated. In contrast, the applicants in *Khlaifia*, whose expulsion orders were also drafted in identical terms[103], did not benefit from a comparable procedure. The Court seemingly concluded *ex post* that none of the applicants qualified for protection.[104] However, I argue that it is the national authority who should make this assessment before the expulsion, not the Court, whose role is limited to

[101] *M.A. v. Cyprus* ECtHR, para. 254.
[102] Ibid., para. 254.
[103] *Khlaifia and Others v. Italy* ECtHR, [GC], para. 213.
[104] Ibid., para. 253.

examining if a genuine and effective opportunity to file individual claims was granted.[105]

The same applies to cases pertaining to the 'original' set of expulsion scenarios, where states sought to remove a large group of foreigners from their territory. In *Georgia v. Russia (I)*, the Grand Chamber found that the expelled individuals' situation was not sufficiently and objectively examined partly because the Russian judges that were in charge of the examination of the appeals against the expulsion orders had 'used the same standard form for all the expulsion orders, merely entering the relevant names and dates, without examining the factual circumstances of each case.'[106]

Based on these judgments it is thus firmly established in the Court's case law that identical expulsion orders for all/several members of a group do not in themselves suffice to conclude that Art. 4 Prot. 4 ECHR has been violated. Nevertheless, identical expulsion orders may serve as one of several indicators that a sufficiently individual examination of each member of the group has not been conducted. This indicator can be refuted by the respondent state by proving that its authorities considered the individual circumstances of each case.

2. Size of the group

The mere number of jointly expelled foreigners is not the decisive factor for the determination of collective expulsions. This finding has been clarified by the European Court of Human Rights and by the Inter-American Court of Human Rights.

The IACtHR stated in its 2012 *Nadege Dorzema and others v. Dominican Republic* case with explicit reference to the ECtHR's *Hirsi Jamaa and Others v. Italy* judgment that 'the sheer number of aliens subject to expulsion

[105] For a critical assessment of the Grand Chamber *Khlaifia and Others v. Italy* judgment that argues that it erodes the procedural standards of the prohibition of collective expulsion established in previous case law, see: Goldenziel, Jill *Checking Rights at the Border: Migrant Detention in International and Comparative Law* Virginia Journal of International Law, 2019, Vol. 60, No. 1, pp. 209-214, in particular p. 213.

[106] *Georgia v. Russia (I)* ECtHR, [GC], para. 164.

decisions is not the essential criterion for characterizing an expulsion as collective.'[107]

In a similar vein, the African Commission on Human and Peoples' Rights did not address the size of the expelled group at all in five of its cases on the prohibition. It has focused instead on the arbitrary nature of expulsions.[108]

The object and purpose of the prohibition of collective expulsion are to protect every non-national against arbitrary expulsion when expelled with others. More precisely, it guarantees protection against arbitrary expulsion of foreigners that belong to a clearly defined group; to an undefined, only vaguely definable group; or to an inconclusively defined group of people expelled in similar circumstances. The Grand Chamber of the ECtHR acknowledges this conclusion, defining 'collective' for the first time in its 2020 *N.D. and N.T. v. Spain* judgment with reference to its previous case law and the definition thereof in Art. 9 (1) ILC Draft Articles. The Grand Chamber explained that

> when it uses the adjective "collective" to describe an expulsion, it is referring to a "group," without thereby distinguishing between groups on the basis of the number of their members […]. The group does not have to comprise a minimum number of individuals below which the collective nature of the expulsion would be called into question. Thus, the number of persons affected by a given measure is irrelevant in determining whether

[107] *Nadege Dorzema and others v. Dominican Republic Merits, Reparations and Costs* IACourtHR, Judgment of 24 October 2012. Series C, No. 251, (*Nadege Dorzema v. Dominnican Republic*), para. 172. The Court reiterated this finding in its second case relating to collective expulsion from the Dominican Republic *Case of expelled Dominicans and Haitians v. Dominican Republic Preliminary objections, merits, reparations and costs* IACourtHR, Judgment 28 August 2014. Series C No. 282, (*Expelled Dominicans and Haitians v. Dominican Republic*), para. 361. The original judgment stipulates that the fundamental criteria for the determination of collectiveness of an expulsion is not the number of expelled foreigners, but that the expulsion is not based on an objective examination of the individual circumstances of every foreigner. The original text reads: el criterio fundamental para determinar el carácter "colectivo" de una expulsión no es el número de extranjeros objeto de la decisión de expulsión, sino que la misma no se base en un análisis objetivo de las circunstancias individuales de cada extranjero.

[108] See for example: *Rencontre Africaine pour la Défense des Droits de l'Homme v. Zambia* AComHPR Communication 71/92, 1996. Here, the *African Commission* found that the expulsion of 517 West Africans from the territory of Zambia violated the prohibition of mass expulsion. This finding was not based on the number of expelled foreigners, but on the fact that they were not granted a fair procedure before being removed.

> or not there has been a violation of Article 4 of Protocol No. 4 [emphasis added].[109]

This definition reflects the Court's previous approach on implicitly defining a group in the sense of Art. 4 Prot. 4 ECHR. However, the Grand Chamber clarified here for the first time in its case law on the prohibition that the group does not need to be comprised of a certain minimum number of foreigners to be considered a group in the sense of the prohibition. Neither the European Commission on Human Rights, nor any other court or treaty body had previously come to this conclusion.

Nevertheless, the size of the expelled group did play an elevated role in all collective expulsion cases at the ECtHR and EComHR. In some cases, the size of the expelled group in question was clearly definable in other cases it was effectively impossible to define the group's size. In the case *Georgia v. Russia (I)*, for example, the Court dealt with a clearly defined group of collectively expelled individuals that all resided at least for several months in Russia before being expelled based on government policy. The Grand Chamber in the decision on just satisfaction in *Georgia v. Russia (I)* per Art. 41 ECHR estimated the number of expelled Georgians in order to calculate the sum Russia would have to pay. The Court based its calculations on a 'sufficiently precise and objectively identifiable' group of at least 1,500 Georgian nationals who were victims of a violation of Art. 4 Prot. 4 ECHR in the context of the 'coordinated policy of arresting, detaining and expelling Georgian nationals' put in place in the Russian Federation in the autumn of 2006'.[110]

The fact that all expelled individuals had received expulsion orders made the precise estimation of the size of the group possible. Even though these orders did not suffice the requirements established by Art. 4 Prot. 4 ECHR, they were proof that at least the individuals' identity was determined. In such an instance, members of an expelled group do not necessarily have to share the same attributes, such as a common nationality. The collectively expelled

[109] *N.D. and N.T. v. Spain* ECtHR, [GC], para. 194.
[110] *Georgia v. Russia (I)* (*Just Satisfaction*) ECtHR, Appl. No. 13255/07, 31 January 2019, (*Georgia v. Russia (I), Just Satisfaction*), para. 71.

individuals also do not need to know one another to form a group in the sense of Art. 4 Prot. 4 ECHR. It is sufficient to establish that they are affected by the same policy aimed at expelling a large group of individuals rapidly.

The same is true regarding groups whose size is undefined or undefinable for factual reasons. Especially in instances of 'summary' collective expulsions such as described in *N.D. and N.T. v. Spain* occurring at the Spanish–Moroccan border, defining the size of the group of expelled foreigners is not possible.[111]

This issue pertains not only to the question of the size of a group but also to the connective element between the group members addressed in the next section.

Every foreigner expelled in such a situation belongs to an ever-growing and undefinable group, which consists of the sum of all intercepted and expelled individuals in the past, present, and future. Thus, in such instances, the size of the group cannot be defined in theory or in practice.

The prohibition of collective expulsion does not require that the expelling state has removed all of those expelled simultaneously. Even in cases where the state removes only one person at a time, the prohibition unfolds its protection if this person is part of a group of foreigners collectively expelled over a more extended period.

The African Commission on Human and People's Rights also examined this question in its case *Rencontre Africaine pour la Défense des Droits de l'Homme v. Zambia.* Here, the respondent disputed the characterisation of the expulsions of foreigners as collective by pointing out that the deported were arrested over two months, at different places, and served with deportation

[111] In the case of the collective expulsions at the Spanish–Moroccan border, the common attribute the individuals share is that they are all from sub-Saharan Africa due to a racial profiling strategy conducted by Morocco which effectively deters people coming from that region to reach the border post to claim asylum. Alami, Aida *African Migrants in Morocco Tell of Abuse* New York Times, 28 November 2012, available at: https://www.nytimes.com/2012/11/29/world/middleeast/african-migrants-in-morocco-tell-of-abuse.html, issue also addressed at ECtHR Grand Chamber public hearing in case *N.D. and N.T. v. Spain*, Appl. No. 8675/15, 26 September 2018, available at: https://www.echr.coe.int/Pages/home.aspx?p=hearings&w=867515_26092018&language=en.

orders on different dates.[112] This line of argument, however, was rejected by the Commission, which found a violation of the prohibition of mass expulsion to have taken place. The mere fact that Zambia expelled 517 West Africans based on removal orders did not constitute a violation of collective expulsion. The circumstance that the group of foreigners could not contact their lawyers or appeal against the expulsion order was, however, sufficient for the collective nature of the expulsions.[113] The Commission clarified that the fact that several arrests and deportations of non-nationals took place over several months did not negate the *en masse* element of the expulsion.[114]

In conclusion, the European Court of Human Rights, the Inter-American Court, the Inter-American Commission, and the African Commission, have not defined a minimum number of individuals that make up a group regarding collective expulsion. The purpose of the 'collective' element is to grant protection to those foreigners affected by a large-scale expulsion policy. In such instances, the assumption prevails that expelling states may disregard the required procedural guarantees against arbitrary expulsions due to the sheer number of expulsions.

3. Connective element

Closely connected to the size of a group of expelled foreigners is the connective element between individual group members: Must the group be homogeneous to fulfil the 'collective' element? Is there a common denominator that all members of the group should share?

In the most recent collective expulsion case before the Grand Chamber of the European Court of Human Rights, *N.D. and N.D. v. Spain*, judge María Elósegui raised this issue in a question to the applicants' defendants. In the first instance, the Chamber concluded that Spain violated Art. 4 Prot. 4 ECHR by summarily expelling the two applicants to Morocco without having undertaken an identification procedure. In the Grand Chamber hearing on 26 September 2018, Elósegui asked the applicants' representatives to provide

[112] *Rencontre Africaine pour la Défense des Droits de l'Homme v. Zambia* ACHPR, para. 27.
[113] Ibid., paras. 27-28.
[114] Ibid., paras. 25-27.

numbers of how many individuals were expelled together with the two applicants and whether the defenders could point out any features that the expelled have in common such as nationality, race, or ethnicity.[115]
Judge Elósegui's question on the composition and size of the group remained unanswered in the hearing. Nevertheless, it reflects the prevailing notion that there ought to be some sort of homogeneity within the group of expelled foreigners in order to trigger a violation of the prohibition of collective expulsion.

a. Common nationality

The explanations for Art. 19 (1) EUChFR indicate that the nationality of the expelled members does play a decisive factor in determining whether the expulsions constituted a prohibited collective expulsion due to a lack of individual assessments. Art. 19 (1) EUChFR, which contains the prohibition of collective expulsion, corresponds to the content of Art. 4 Prot. 4 ECHR.[116]

The explanations point out that the purpose of Art. 19 (1) EUChFR '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* [emphasis added]'.[117] The explanations, however, also reveal that the expelled do not *necessarily* need to belong to a strictly defined group of people with the same nationality. They rather speak of the individual examination required before the expulsion decision *and* of the guaranteed protection against measures aimed at expelling all non-nationals based on their shared nationality.

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[115] ECtHR Grand Chamber public hearing in case *N.D. and N.T. v. Spain*, Appl. No. 8675/15, 26 September 2018, available at: https://www.echr.coe.int/Pages/home.aspx?p=hearings&w=867515_26092018&language=en, questions posed by judge Elósegui from 1:41:05 on.
[116] *Draft Charter of Fundamental Rights of the European Union explanations prepared by the Praesidium*, Charte 4473/00 Convent 49, p. 21.
[117] European Union Agency for Fundamental Rights (FRA) *Explanations relating to the Charter of Fundamental Rights* available at: https://fra.europa.eu/en/charterpedia/article/19-protection-event-removal-expulsion-or-extradition, (*Explanations to the Charter of Fundamental Rights*), p. 21. FRA points out that these explanations do not have the status of law, they are intended to serve as a tool for interpretation and shall clarify the scope and content of each provision of the Charter. The explanations were originally drafted by the Praesidium of the Convention which also was in charge of drafting the Charter itself.

Looking at the composition of the group of collectively expelled individuals in cases before the European Court of Human Rights, it becomes apparent that the homogeneity of the group is not a prerequisite for a violation of the prohibition. Regarding nationality as a connective element, an analysis of the cases before the ECtHR reveals that the expelled individuals do not necessarily need to have the same nationality in order to count as a collective.

Some cases before the Chamber and Grand Chamber have dealt with expulsions of groups in which every individual possesses the same nationality. This is the case, in *Čonka v. Belgium,* where the expelled were all Slovakian nationals, *Georgia v. Russia (I),* where all applicants were Georgians, and *Abdi Ahmed and others v. Malta*, where all 120 applicants were Somali. The Court, however, did not refer in any of these cases to the fact that all applicants shared the same nationality as a compulsory prerequisite for a violation of collective expulsion.

The fact that the applicants' nationalities differed in all other cases on the prohibition of collective expulsion supports this argument. In *Hirsi Jamaa and Others v. Italy*, the applicants were Somali and Eritrean. In *Sharifi and Others v. Italy and Greece*, the backgrounds of the applicants were even more diverse, consisting of 32 Afghan nationals, 2 Sudanese nationals, and 1 Eritrean national. In *N.D. and N.T. v. Spain*, the two applicants from Mali and the Ivory Coast were summarily and jointly expelled with a group of about 70 to 80 individuals with different, but undefined nationalities.

In none of these cases did the nationality of the expelled individuals play a crucial role in the determination of collectivity.

In *Rencontre Africaine pour la Défense des Droits de l'Homme v. Zambia* before the African Commission, Zambia argued that the expulsion of 517 individuals did not constitute 'mass expulsion'. The respondent argued that the 517 foreigners originated from Senegal, Mali, Guinea, and other West African countries, and thus, it did not act discriminatory in expelling them

jointly.[118] The *African Commission* rejected this argument by pointing out 'that simultaneous expulsion of nationals of many countries does not negate the charge of discrimination.'[119] It held further that the nationality of the expelled is not the decisive point in question, but the deprivation of a fair process and the possibility to appeal the expulsion.[120]

Similarly, in *Fédération Internationale des Ligues des Droits de l'Homme v. Angola* of 1997, the African Commission condemned Angola and other states' practice of expelling foreigners *en masse* due to poor economic conditions. The Commission stated that economic difficulties do not justify such a turn to radical measures 'aimed at protecting their nationals and their economies from non-nationals.'[121]

In conclusion, the nationality of the expelled individuals is not a decisive denominator for the determination of collectivity. Nevertheless, sharing the same nationality with all other members of the group of expelled individuals is not disadvantageous for the establishment of this element. Such circumstances may serve as an indicator of the existence of a public policy aimed at the removal of certain foreigners.

b. Common ethnicity

A similar finding applies to ethnicity as a connective element between the expelled individuals of a group. An analysis of the judgments of the European Court of Human Rights on Art. 4 Prot. 4 ECHR reveals that the ethnicity of applicants in cases regarding the prohibition only played a role in very particular circumstances.

The most prominent example in this regard is *Čonka v. Belgium.* Here, the four applicants, their spouses, and children were all of Roma ethnicity. Belgium expelled them collectively with approximately 70 other Roma individuals. Although the Roma ethnicity of the collectively expelled was

[118] *Rencontre Africaine pour la Défense des Droits de l'Homme v. Zambia* AComHPR, para. 24.
[119] Ibid., para. 25.
[120] Ibid., paras. 25-28.
[121] *Union Inter Africaine des Droits de l'Homme, Fédération Internationale des Ligues des Droits de l'Homme and Others v. Angola* AComHPR, para. 16.

mentioned five times in the judgment,[122] according to the Court, it did not play a role in the determination of collectivity. However, their shared ethnicity indicated a potential absence of an individual, reasonable, and objective examination prior to expulsion.[123] The Court found that the Roma applicants faced widespread discriminatory policies in Belgium, including the existence of a government policy aimed at expelling them on a large scale.

Here, the ECtHR made an explanatory statement on the background of expulsion procedures, which was reiterated several times in subsequent cases. It clarified that even though an expulsion of a group

> is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group […] That does not mean, however, that where the latter condition is satisfied 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.[124]

Thus, the ethnicity of the applicants did not directly serve as a requirement to determine the 'connective element' between the expelled individuals. However, the ethnicity of the expelled individuals played a role insofar as they were targeted for this reason by the government campaign to expel Roma collectively from the state's territory.

In *Andric v. Sweden*, the ethnicity of the applicant, Vedran Andric, an ethnic Croat, played a similar role. Andric argued that his ethnicity would put him at risk if he were to be expelled to his Bosnian home district, which was dominated by Muslims.[125] Even though the case was declared inadmissible as the Court found that the authorities had objectively and individually examined the applicant's claims, it illustrates that the claimant's ethnicity, despite being addressed by the court, did not play any role in determining whether or not

[122] *Čonka v. Belgium* ECtHR, Appl. No. 51564/99, 5 February 2002, paras. 7, 18, 20, 44, 56.
[123] For an assessment why these indicators are relevant for the determination of the collectivity of the expulsion, see below, B. 5. Indicators for the determination of the absence of a reasonable and objective examination.
[124] *Čonka v. Belgium* ECtHR, para. 59.
[125] *Andric v. Sweden* ECtHR, Appl. No. 45917/99, 23 February 1999, p. 3.

the expulsion was collective, as there was no policy to expel ethnic Croats from Sweden behind the applicant's particular expulsion order.
In other cases, such as *N.D. and N.T. v. Spain* or *Hirsi and Others v. Italy* (Chamber and Grand Chamber judgments) ethnicity did not play a role at all.

This is reflected in the findings of the Grand Chamber in *N.D. and N.T. v. Spain*. Here, the Court for the first time elaborated in clear terms on the collectivity element in collective expulsion cases. This definition supports the findings made above. The Grand Chamber clarified that it

> has never hitherto required that the collective nature of an expulsion should be determined by membership of a particular group or one defined by specific characteristics such as origin, nationality, beliefs or any other factor, in order for Article 4 of Protocol No. 4 to come into play [emphasis added].[126]

In the prior case *Union Inter Africaine des Droits de l'homme and Others v. Angola,* the African Commission drew similar conclusions, making the general clarifying proclamation that

> whatever the circumstances may be, however, such measures [of mass expulsion] should not be taken [to] the detriment of the enjoyment of human rights. Mass expulsions of any category of persons, whether on the basis of nationality, religion, ethnic, racial or other considerations constitute a special violation of human rights.[127]

In conclusion, in general, ethnicity does not constitute a connective element between expelled individuals as required by the prohibition of collective expulsion. Ethnicity, however, is one of several decisive factors in determining whether the background of expulsion procedures suggests that an applicant's examination was not objective and individual.

[126] *N.D. and N.T. v. Spain* ECtHR, [GC], para. 195.
[127] *Union Inter Africaine des Droits de l'Homme et al. v. Angola* AComHPR, para. 16.

c. Absence of reasonable and objective examination of individual circumstances

By defining *collectivity* as absence of a reasonable and objective examination of the applicants' circumstances in *N.D. and N.T. v. Spain*, the Grand Chamber of the ECtHR implicitly acknowledged this element's character as a gateway for procedural guarantees. Thus, when assessing whether an expulsion of a group was indeed 'collective' in nature, the Court examines whether the state in question respected the procedural guarantees implicitly contained in the prohibition.[128] *Ergo*, in the case the expelling state did not conduct a reasonable and objective examination of each foreigner of the group as required by the prohibition, the expulsion is deemed collective. As will be explained below, the level of these guarantees depends on the concrete circumstances of the expulsion, including *inter alia* whether the individuals were identified or their conduct evaluated prior to the expulsion.

As the decisive question for the determination of the collective nature of an expulsion is the absence of a reasonable, individual, and objective examination of each group member's circumstances, this section provides the indicators which the ECtHR and the EComHR relied upon to determine whether the expulsion in question was collective.

The relevance of the background to the expulsion orders became first apparent in the *Human Rights Commission*'s *Becker v. Denmark* case in 1975. In the submissions, the applicant Becker urged the Commission to consider the circumstances surrounding the return of 200 children to Vietnam. In his view, the Government could not be trusted to have conducted individual assessments as it had publicly declared that 'the majority of the children should be sent back.'[129] He further explained that 'for political reasons the Government could not afford to change their decision.'[130]

Even though the Commission did not explicitly address this background information regarding the pending expulsion of the children, such

[128] These guarantees are assessed in great detail below in Chapter III.
[129] *Becker v. Denmark* EComHR, p. 232.
[130] Ibid.

circumstances became a decisive indicator for the determination of the existence of a violation of the prohibition in subsequent cases by the Court.

In general, the Court's approach to determine the collective element of an expulsion is based on a two-step test.
First, the judges examine whether the circumstances of the case indicate that there has been an objective and individual examination of each group member' circumstances. If there is any doubt in this regard, other factors on the background to the execution of the expulsion come into play. This second part of the test may either eliminate such doubts or reinforce the notion that the expulsions were collective and thus a violation of Art. 4 Prot. 4 ECHR.

Such background factors may vary from identical terms of expulsion orders to government policies aimed at the expulsion of a particular group. Even though the ECtHR has not called it a two-step test, such an examination has been implied in several cases, starting with *Čonka v. Belgium*[131] in 2002.
In subsequent cases, such as *Hirsi Jamaa and Others v. Italy* and *N.D. and N.T. v. Spain* (in the Chamber and Grand Chamber judgment), the fact that the authorities in charge did not conduct any form of identification before the applicants' removal served as an indicator for the Court to determine the collective nature of the expulsion.[132]
However, over time, the Court has relied on different terms for the same issue. Whereas the Court spoke of 'background to the expulsion' in *Čonka v. Belgium*, it referred to a 'general context'[133] in *Georgia v. Russia (I)* , the 'same set of circumstances specific to that group' in the Chamber judgment in *N.D. and N.T. v. Spain*[134], and the 'general context' in the Grand Chamber judgment of the same case.[135]
In that judgment, the Court implicitly relied on such background indicators to determine the collective nature of the expulsion in question, stretching

[131] *Čonka v. Belgium* ECtHR, para. 59.
[132] *Hirsi Jamaa and Others v. Italy* ECtHR [GC], para. 185 and *N.D. and N.T. v. Spain* ECtHR [Chamber], para. 12.
[133] *Georgia v. Russia (I)* ECtHR, [GC], para. 171.
[134] *N.D. and N.T. v. Spain* ECtHR, [Chamber], para. 102.
[135] *N.D. and N.T. v. Spain* ECtHR, [GC], para. 197.

previous case law in this regard so far as to making the applicants' behaviour prior to the expulsion one of the main factors in this regard.

Three decisive indicators for the assessment of the absence of an individual and objective examination will be assessed in the next section. These are, first, government policies aimed at collective expulsions (a) and, second, (and the most relevant to summary collective expulsions due to the recent *N.D. and N.T.* Grand Chamber judgment) the conduct of the applicants (b). The case law of the ECtHR and the EComHR shows that the existence of government policies aimed at collective expulsions is an indicator in favour of the collective nature of the expulsion. The case law further shows that the applicant's conduct prior to the expulsion can also be relevant to the assessment of the absence of a reasonable, objective, and individual examination. This indicator received sudden significance in February 2020 with the Grand Chamber judgment in *N.D. and N.T. v. Spain* in which the Court denied the collective nature of the expulsion based on the applicants conduct (entering Spanish territory forcibly, irregularly, and *en mass*) prior to their expulsion to Morocco.

Administrative practice aimed at the expulsions of certain groups

One relevant factor that serves as an indicator for the determination of the absence of an individual and objective examination is the existence of government policies that aim at expelling a certain group of foreigners.

The method used to determine the existence of such a policy was described by the ECtHR in *Georgia v. Russia (I)*, referencing the two-element test established in 1983 by the Commission to determine such administrative practice in general.[136] In this early case of 1983, the Commission held that 'repetition of acts' and 'official tolerance' are the constitutive factors for the determination of the existence of administrative practice in all cases.[137]

[136] The Commission and the Court relied on these two elements, but never explicitly established it as a two-element test. See: *France, Norway, Denmark, Sweden and the Netherlands v. Turkey* EComHR, Appl. Nos. 9940-9944/82, 6 December 1983, para. 19.
[137] Ibid., para. 19.

The first element, 'repetition of acts' was defined in a later case as 'an accumulation of identical or analogous breaches which are sufficiently numerous and inter-connected not to amount to merely isolated incidents or exceptions but to a pattern or system.'[138]

The Commission defined the second element, the existence of 'official tolerance' in the 1983 case *France, Norway, Denmark, Sweden and the Netherlands v. Turkey* as

> the superiors of those immediately responsible, though cognisant of such acts, take no action to punish them or to prevent their repetition; or that a higher authority, in face of numerous allegations, manifests indifference by refusing any adequate investigation of their truth or falsity, or that in judicial proceedings a fair hearing of such complaints is denied.[139]

The Commission further noted that 'any action taken by the higher authority must be on a scale which is sufficient to put an end to the repetition of acts or to interrupt the pattern or system'.[140]

In *Georgian v. Russia (I)*.[141] the Court found a violation of Art. 4 Prot. 4 ECHR acknowledging that the coordinated government policy aimed at arresting, detaining, and expelling Georgian nationals from Russian territory between September 2006 to January 2007 were a decisive factor for the determination of the collective nature of the expulsions.[142]

As of 2019, *Georgia v. Russia (I)* is the only Art. 4 Prot. 4 ECHR case in which the court expressly spoke of an administrative practice of 'arresting, detaining, and expelling' foreign nationals. Interestingly in all prior similar cases such as *Čonka v. Belgium* and *Hirsi Jamaa v. Italy*, where the definition

[138] *Ireland v. the United Kingdom* EComHR, Series A no. 25,18 January 1978, para. 159.
[139] *France, Norway, Denmark, Sweden and the Netherlands v. Turkey* EcomHR, para. 19.
[140] Ibid.
[141] *Georgia v. Russia (I)* ECtHR, [GC], paras. 128-159.
[142] Ibid., para. 176.

of such an 'administrative policy' was arguably met, the Court never referred to this terminology.

In *Čonka v. Belgium*, the Court also acknowledged the existence of a policy aimed at summarily expelling a certain group of foreign nationals stating that

> the political authorities concerned had announced that there would be operations of that kind [express examinations to deter further Slovakian nationals from entering Belgium] and given instructions to the relevant authority for their implementation.[143]

The Court relied on similar language to describe such government policies in subsequent cases such as *N.D. and N.T. v. Spain* (Chamber ruling), where Spain's 'hot return' policy to Morocco fulfilled the administrative practice criteria. Here, the Court used the term *systematic policy of irregular returns*.[144]

The Court also put a special emphasis on existing government policies aimed at collective expulsions of certain groups in the *Hirsi Jamaa and Others v. Italy* case. Here, the Grand Chamber stressed that it gave

> particular weight to the statements given after the events to the Italian press and the State Senate by the Minister of the Interior, in which he explained the importance of the push-back operations on the high seas in combating clandestine immigration.[145]

These statements made by government representatives served as important indicators that the Italian government collectively expelled all arriving migrants without assessing their individual claims as such expulsions were an intentional part of the then new migration control policy. Similar language

[143] *Čonka v. Belgium* ECtHR, para. 62. The Belgian 'Director-General of the Aliens Office wrote to the Minister of the Interior and the Commissioner-General for Refugees and Stateless Persons to inform them of his intention to deal with asylum applications from Slovakian nationals rapidly in order to send a clear signal to discourage other potential applicants', para. 30.
[144] *N.D. and N.D. v. Spain* ECtHR, [Chamber], para. 67.
[145] *Hirsi Jamaa and Others v. Italy* ECtHR, [GC], para. 177.

was used in the *Khlaifia v. Italy* Chamber judgment, which was later overruled by the Grand Chamber, which found that

> the bilateral agreements with Tunisia […], which have not been made public, provided for the return of unlawful migrants through simplified procedures, on the basis of the mere identification of the person concerned by the Tunisian consular authorities.[146]

Thus, from the above it can be concluded that the administrative practice of expelling specific groups is one of several significant indicators used to determine the absence of an objective examination of each group member's circumstances. This indicator was deemed relevant by the Court in both original and summary collective expulsion cases.

The differing language the Court relied on to describe such policies varies from 'administrative practice' to 'operations of that kind', and 'general measures' to 'systematic policy of irregular returns.' In comparison to the vast and very detailed examination in the *Georgia v. Russia (I)* case, comparable cases addressed the existence of such an 'administrative practice' rather briefly and relied on varied descriptive terminology. The reasons for this variation in terms in the respective cases remain an enigma.

Nevertheless, a closer analysis of the Court's *explicit* statements on the *implicit* use of context in each case reveals that these different terms have the same implications, showing a certain consistency of the Court's case law on Art. 4 Prot. 4 ECHR.

Applicant's conduct prior to the expulsion

As noted above, the applicant's conduct prior to the expulsion is one of two important indicators for the absence of an individual examination, playing a significant role in the ECtHR's Grand Chamber judgment in *N.D. and N.T. v. Spain*. An assessment of the case law on this indicator prior to this Grand Chamber judgment shows that its purpose was to ensure that those foreigners

[146] *Khlaifia and Others v. Italy* ECtHR, [Chamber], para. 156.

who already enjoyed a reasonable, objective, and individual examination are not victims of collective expulsions in the sense of Art. 4 Prot. 4 ECHR. They are deemed to have forfeited additional protection by the prohibition for reasons, which lie in the applicant's conduct.

The Court assessed the application of this indicator in two cases, which had previously been rejected at the admissibility stage: *Dzavit Berisha and Baljie Haljiti v. the former Yugoslav Republic of Macedonia* of 2005[147] and *Theodoros Dritsas v. Italy*[148] of 2011.

In *Hirsi Jamaa v. Italy*, *Khlaifia and Others v. Italy* and *M.A. v. Cyprus*[149], the Court stressed, with reference to the *Berisha and Haljitiand* and the *Dritsas*, case that 'the Court has ruled that there is no violation of Article 4 of Protocol No. 4 if the lack of an expulsion decision made on an individual basis is the consequence of the applicants' own culpable conduct'.[150] The Court however considered this matter only in its general principles section without taking recourse to this indicator in its subsequent assessment of the applicability of these principles to the case at hand.

According to the Court, the applicants in four out of these five cases enjoyed at least the possibility of bringing forward their claims through an individual, reasonable, and objective examination of their circumstances prior to their expulsion, as they were at least identified by the expelling authorities. Therefore, the Court denied a collective nature in these cases. In *Hirsi Jamaa and Others v. Italy*, the Italian authorities pushed back the applicants without even identifying them, thus denying them the possibility of an individual examination, and hence leading to the Court's conclusion that the expulsion was collective. The conduct of the applicants prior to this summary collective expulsion did not play any role in the Court's assessment of the applicable principles to the case in question.

[147] *Berisha and Haljiti v. the former Yugoslav Republic of Macedonia* ECtHR, Appl. No. 18670/03, 16 June 2005.
[148] *Theodoros Dritsas v. Italy* ECtHR, Appl. No. 2344/02, 1 February 2011. Only available in French.
[149] *M.A. v. Cyprus* ECtHR, Appl. No. 41872/10, 23 July 2013.
[150] *Hirsi Jamaa and Others v. Italy* ECtHR, [GC], para. 184.

In the first of the two relevant cases in determining the scope of this indicator, the applicants Dzavit Berisha and Baljie Haljiti, a married couple, who were both nationals of Serbia and Montenegro and of Egyptian ethnic origin, claimed that what is now North Macedonia violated Art. 4 Prot. 4 ECHR by expelling them jointly. This claim was based on the fact that the 'authorities had issued a single decision for both without a reasonable and objective examination of the particular circumstances of each.'[151] The Chamber dismissed this argument as 'manifestly ill-founded' as 'the fact that the national authorities issued a single decision for both the applicants, as spouses, was a consequence of their own conduct. The applicants arrived in the respondent state together, lodged their asylum request jointly on the same grounds, produced the same evidence to support their allegations, and submitted joint appeals before the Government Appeal Commission and the Supreme Court. Hence, the authorities evaluated the risks associated with expulsion for both of them jointly.'[152]

The second case, *Theodoros Dritsas v. Italy* concerned a group of G8 protestors that had refused to provide the authorities with their identity papers, making it impossible for them to issue individual expulsion orders. The applicant was intercepted and questioned by Italian authorities. As he refused to identify himself, the respondent state was not able to provide individual expulsion orders containing the names of each individual claimant as evidence of their individual assessments in the ECtHR proceedings.[153]

The third case in which the applicant's conduct was explicitly assessed by the Court and not only mentioned as general principle was *N.D. and N.T. v. Spain* of February 2020.

Here, the Grand Chamber acknowledged that the applicants' conduct 'is a relevant factor in assessing the protection to be afforded under Article 4 of Protocol No. 4.'[154] The Grand Chamber, by referring to its 'well-established case law'[155] held that 'there is no violation of Article 4 of Protocol No. 4 if

[151] *Berisha and Haljiti v. the former Yugoslav Republic of Macedonia* ECtHR, para. 2.
[152] Ibid.
[153] *Theodoros Dritsas v. Italy* ECtHR, para. 8.
[154] *N.D. and N.T. v. Spain* ECtHR, [GC], para. 200.
[155] The Court referred exactly to the cases examined above: *Khlaifia and Others v. Italy; Hirsi Jamaa and Others v. Italy; M.A. v. Cyprus; Berisha and Haljiti v. Macedonia.*

the lack of an individual expulsion decision can be attributed to the applicant's own conduct'[156] and further that it

> is also notable that the protection of Art. 4 Prot. 4 ECHR does not unfold if the fact that no expulsion order was issued is based on the culpable conduct of the applicant and not on the action or omission by the respective authorities.[157]

In its assessment of the applicability of this principle to the concrete case, the Court then came to a surprising conclusion given its prior application thereof in collective expulsion cases. It concluded that

> [t]he Court notes at the outset that the applicants in the present case were members of a group comprising numerous individuals who attempted to enter Spanish territory by crossing a land border in an unauthorized manner, taking advantage of their large numbers and in the context of an operation that had been planned in advance.[158]

The Court did highlight that the applicants were not identified, and the Spanish authorities did not undertake any procedure to examine their individual claims.[159] Nevertheless, the Court dismissed the absence of a reasonable and individual examination of the applicants' circumstances in the subsequent paragraph, stressing that the applicants had 'engaged in "culpable conduct" *inter alia* by circumventing the legal procedures that existed for entry into Spain.'[160] In particular, the Court stressed that the applicants in the words of the Grand Chamber 'placed themselves in jeopardy by participating in the storming of the Melilla border fences on 13 August 2014, taking advantage of the group's large numbers and using force.' Thus, the lack of individual removal decisions is, in the Court's view, caused by the applicants conduct, namely by not using official legal pathways to enter Spain such as

[156] *N.D. and N.T. v. Spain* ECtHR, [GC], para. 200.
[157] Ibid. Referring here to *Berisha and Haljiti v. the former Yugoslav Republic of Macedonia* of 2005 and *Dritsas v. Italy*.
[158] *N.D. and N.T. v. Spain* ECtHR, [GC], para. 205.
[159] Ibid., para. 206.
[160] Ibid., paras. 207, 231.

by applying for asylum at the border, embassies and consulates and by using force to cross the border in an organized fashion as part of a large group.[161] From this judgment, it seems that the Court expanded the scope of its 'culpable conduct' indicator to include an applicant's conduct not directly connected to the removal itself. In the two previously mentioned cases, the inexistence of individual removal documents was caused directly by the applicants' conduct related to their removal, not their entry. Here, the applicants' behaviour *before* and *during* the entry into Spain was deemed decisive. Furthermore, in the cases *Berisha and Haljiti* and *Dritsas*, the authorities in question not only identified the applicants prior to their expulsion, but also examined their claims against it. In *N.D. and N.T.*, Spanish authorities did not even identify the applicants prior to summary removal to Morocco. The Court found here, for the first time and in clear deviation from its previous case law, that such circumstances do not lead to an expulsion that is collective in nature. The 'established case law' the Court refers to in order to justify this approach set a far higher threshold for situations in which applicants forfeit their right to an individual examination before their expulsion. Furthermore, the fact that the Chamber already determined that Spain had established an administrative practice of hot returns aimed at the expulsion of all irregular foreigners should have played, in my opinion, an equally important role in the determination of the absence of a reasonable and individual examination.

[161] Ibid., para. 231.

II. Conclusions on the definition of 'collective'

The 'collective' element in the prohibition neither requires a narrowly defined or definable (minimum or maximum) number of group members, nor do these individuals necessarily have to be connected by nationality or ethnicity, or classed together by physical presence.
The size of the group does not necessarily need to be definable as long as there is some connection between the claimant's expulsion and other expulsions conducted similarly and within a brief period of maximum a few weeks.

The common nationality or ethnicity is not decisive when determining the collectivity of an expulsion. The use of the term 'collective' in the provision is perhaps even misleading in this sense. The expelled individual does not need to be removed simultaneously with a precisely definable group. The provision rather guarantees protections for individuals based on the circumstances surrounding such expulsions. The higher the number of connected expulsions within a short time, the more likely the occurrence is to be considered an arbitrary collective expulsion. The prohibition of collective expulsion aims particularly at protecting foreigners expelled under such circumstances.

In several cases, the ECtHR has clarified that the shared circumstances, the background to the expulsion of several individuals, are decisive for the categorisation as 'collective'. Thus, the Court examines rather factors connected to the expulsion procedure that lay outside the group's sphere of influence rather than the group's internal factors such as their composition. In its recent judgment of February 2020, *N.D. and N.T. v. Spain*, the Court further clarified that the absence of a reasonable and objective examination of the individual circumstances of each expelled foreigner is the decisive question for the determination of collectivity in the sense of Art. 4 Prot. 4 ECHR. In doing so, it clarified that this element is key to the assessment of

whether the procedural guarantees implicitly contained in the prohibition were violated.

The ECtHR and the EComHR established two particular indicators for the determination of the absence of a reasonable, individual, and objective examination: the existence of administrative practices aimed at the expulsion of specific groups of foreigners and the applicant's conduct prior to the expulsion. In my view, the Grand Chamber expanded the scope of this latter indicator in this judgment in a manner incompatible with its previous case law. It concluded that a foreigner's entry in an irregular, forceful, organised, and *en masse* manner constituting a security risk forfeits her or his right to an individual examination or even an identification by the removing authorities under Art. 4 Prot. 4. ECHR.

The terms 'collective' or 'mass' (in the *African Charter*) in the prohibition may be misleading as one may assume that the right-bearer of the provision can only be a group of individuals. This is not the case. The prohibition protects foreigners jointly expelled with others under comparable circumstances.

According to the interpretation of the HCR, Art. 13 ICCPR, in contrast, covers both the protection against arbitrary expulsion in individual and collective cases. The provision contains explicitly procedural guarantees for foreigners lawfully in the territory of a state party.

C. The definition of 'prohibition' in the prohibition of collective expulsion

None of the assessed sources in this Chapter provide a clear definition of what constitutes 'prohibition' in the sense of the prohibition of collective expulsion.

Art. 9 ILC Draft Articles suggests that the International Law Commission understands 'prohibition' in the strict sense of allowing for *restrictions* of the prohibition of collective expulsion only in cases of emergency.[162] Art. 9 (3) stipulates that

> [a] State may expel concomitantly the members of a group of aliens, provided that the expulsion takes place after and on the basis of an assessment of the particular case of each individual member of the group in accordance with the present draft articles.

Human rights instruments may contain restrictions or limitations on certain rights. Such restrictions or limitations are distinct from the member states' possibility of derogation in the case of an emergency. Restrictions or limitations may be contained as general provisions[163] or incorporated in particular provisions.[164] The state in question must nevertheless ensure that the amended restrictions do not undermine the core of the right in question.[165]

[162] Art. 9 (4) ILC Draft Articles foresees the possibility to restrict the prohibition of collective expulsion in times of war: The present draft article is without prejudice to the rules of international law applicable to the expulsion of aliens in the event of an armed conflict involving the expelling State.
[163] See for example Art. 4 ICESCR: The states parties to the present Covenant recognise that, in the enjoyment of those rights provided by the state in conformity with the present Covenant, the state may subject such rights only to such *limitations as are determined by law* only insofar as this may be compatible with the nature of these rights and solely for the purpose of *promoting general welfare in a democratic society* [emphasis added].
[164] See for example Art. 32 (2) ACHR: The rights of each person are *limited by the rights of others*, by the *security* of all, and by the *just demands* of the *general welfare*, in a democratic society [emphasis added].
[165] See for example Art. 5 ICCPR: Nothing in the present Convention may be interpreted as implying for any state, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognised herein or at their limitation to a greater extent than is provided for in the present Covenant.

General derogation clauses in human rights treaties in the case of an emergency usually list those rights that are non-derogatory. Examples of derogation clauses are Art. 15 ECHR, Art. 27 ACHR and Art. 4 (1) ICCPR. Derogations must be exceptional, necessary, temporary, and lawful.[166]

The prohibition of collective expulsion in Art. 4 Prot. 4 ECHR does not mention derogation or limitation. A limitation of the prohibition, for example in times of a high influx of foreigners, would be incompatible with the object and purpose of Art. 4 Prot. 4 ECHR, as foreseen by the drafters of the additional protocol. An examination of the *travaux préparatoires* reveals that the Consultative Assembly of the European Convention initially wished to establish stringent conditions for lawfully residing foreigners in a member state.[167] The proposal requested expulsions being permitted only in cases of danger to national security or a violation of the *ordre public* or morality. The Committee of Experts did not follow this proposal and changed its scope from protecting lawfully residing foreigners to prohibiting collective expulsions, erasing possible derogations in the case of an emergency in its entirety.[168]

However, Art. 4 Prot. 4 ECHR falls under the general derogation clause contained in Art. 15 ECHR. This provision allows derogations in times of emergency. The threshold for such a derogation is very high, as it only allows derogations in times of war or equally dangerous emergencies for the existence of the state.[169]

The same is true for the prohibition of collective expulsion in the EUChFR (Art. 19 (1)). No limitations or restrictions are contained in the provision itself; however, the general derogation clause applies (Art. 52 (3)(1) EUChFR

[166] Hafner-Burton, Emilie; Helfer, Laurence and Farris Christopher *Emergency and Escape: Explaining Derogations from Human Rights Treaties* International Organization, 2011, Vol. 65, No. 4, p. 675.
[167] Van Dijk and Van Hoof *Theory and Practice of the European Convention on Human Rights* p. 675.
[168] Council of Europe *Explanatory Report on the Second to Fifth Protocols to the European Convention for Protection of Human Rights and Fundamental Freedoms*, submitted by the Committee of Experts to The Committee of Ministers, Doc H(71) 11, 1971, p. 11.
[169] Art. 15 (1) ECHR reads: In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

in conjunction with Art. 15 ECRH).[170] Thus, in case of an emergency threatening the existence of a member state, such exceptions may be invoked.

The *American Convention on Human Rights* also does not foresee a specific or general restriction or limitation clause for the prohibition of collective expulsion. However, the general derogation clause in Art. 27 (1) ACHR allows 'suspensions' in exceptional circumstances such as 'war, public danger, or other emergency that threatens the independence or security of a State Party.' Subsection 1 of Art. 27 clarifies that a member state

> may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin.

Subsection 2 of Art. 27 ACHR foresees a list of provisions such as the right to life or to juridical personality that are exempted from the possibility of derogation. The prohibition of collective expulsion as codified in Art. 22 (9) ACHR is not listed.

The *African Charter* contains so-called 'clawback clauses'[171] that limit rights directly in the respective *Charter* provision, rather than in general restriction clauses.[172] The fact that Art. 12 (5) ACHPR, which codifies the prohibition of collective expulsion in the *African Charter*, does not contain a 'clawback clause' signals that states cannot deviate from this principle.

Other civil and political rights guaranteed in the *Charter*, such as the right to liberty and security enshrined in Art. 6 ACHPR contain such a clause stipulating that 'no one may be deprived of his freedom *except* for reasons and conditions previously laid down by law [emphasis added].'

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[170] Guild, Elspeth *Art 19-Protection in the Event of Removal* para. 19.54.
[171] Turack, Daniel *The African Charter on Human and Peoples' Rights: Some Preliminary Thoughts* Akron Law Review, 1984, Vol. 17, No. 3, pp. 18-19.
[172] Mapuva, Loveness *Negating the Promotion of Human Rights Through "Claw-Back" Clauses in the African Charter on Human and People's Rights* International Affairs and Global Strategy, 2016, Vol. 51, p. 1.

Another example is Art. 12 (4) ACHPR, which prohibits the arbitrary expulsion of legally residing non-nationals unless there has been 'a decision taken in accordance with the law.' Thus, the fact that Art. 12 (5) ACHPR is not limited by a 'clawback clause' or by any other form of restriction underscores its relevance within the *Charter*.

Thus, on the regional level, the *African Charter* is seemingly the only human rights instrument that does not foresee any limitation/restriction or derogation of the prohibition of collective expulsion. In practice, no state party to any of the other regional human rights conventions that offers the general possibility to derogate from a certain treaty provisions in case of emergency has invoked such a limitation regarding the prohibition of collective expulsion.

On an international level, Art. 13 ICCPR contains an explicit limitation of foreigners' rights to a decision in the provision itself in case of national security.[173] The UN Commission on Human Rights (UNComHR) clarified in the 1985 *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* that national security exceptions as 'may be invoked to justify measures limiting certain rights only when they are taken to protect the existence of the nation, its territorial integrity or political independence against force or threat of force.'[174] Furthermore, the respective state must ensure that the limitations do not endanger the essence of the restricted ICCPR right.[175]

Besides limitations to the prohibition of collective expulsion in the case of a national emergency, member states can also derogate from the guarantees in Art. 13 ICCPR under the general derogation clause in Art. 4 (1) ICCPR. This provision sets a high threshold for derogation limiting it to times of public emergency that threaten the life of a nation. Here, similarly to the ECHR and ACHR, section 2 of the provision also entails a list of non-derogatory rights.

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[173] Art. 13 ICCPR reads: An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, *except where compelling reasons of national security otherwise require*, be allowed to submit the reasons against his explusion [sic!].

[174] UNComHR *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* 28 September 1984, E/CN.4/1985/4, (*Siracus Principles*), principle 29.

[175] UNComHR *Siracusa Principles* principle 2.

The prohibition of collective expulsion in Art. 22 (1) *UN Migrant Worker Convention*, in contrast, cannot be limited or derogated from under any circumstances. Art. 82 UNCRMW stipulates that the 'rights of migrant workers and members of their families provided for in the present Convention may not be renounced.'

In conclusion, 'prohibition' is understood in its generic sense as not allowing for limitations or restrictions. In all assessed regional human rights treaties, the prohibition of collective expulsion is not specifically limited or restricted. However, the ECHR, the EUChFR, and the ACHR contain general derogation clauses for cases of emergency that include the prohibition. The threshold for such a derogation is high. The provision implicitly containing the prohibition of collective expulsion in the ICCPR can be limited for national security reasons as clarified in the provision itself. In addition, member states can restrict this provision under the Covenant's general derogation clause applicable in times of emergency. In contrast, the prohibition of collective expulsion as codified in the ACHPR and the UNCRMW do not allow for any restriction, limitation, or derogation on any grounds and so the prohibition in these two conventions is absolute.

D. The definition of 'expulsion' in the prohibition of collective expulsion

Compared to all other elements of the prohibition, the definition of 'expulsion' is the most challenging and inconsistent among the different regional and international courts and treaty bodies assessed, due to the ambiguity over whether the term 'expulsion' includes non-admission or is limited to foreigners within the respective state's territory.

As early as during the first reading of the proposal of the *1951 Refugee Convention*, the Swiss representative made his colleagues aware of the fact that the terms 'expel' and 'return' were open for interpretation. In the view of the Swiss Government, which also represented Liechtenstein,[176] the 'term "expulsion" applied to a refugee who had already been admitted to the territory of a country. The term "refoulement" on the other hand, had a vaguer meaning; it could not, however, be applied to a refugee who had not yet entered the territory of a country.'[177] The Netherlands representative responded to his Swiss colleague's opinion and expressed his consensus with this interpretation of the distinction between the terms. Further, he pointed out that this finding reflected the majority opinion among the states' representatives. He substantiated this finding by noting that the representatives of Belgium, the Federal Republic of Germany, Italy, Netherlands, and Sweden had supported the Swiss interpretation' and added that from 'conversations he had had since with other representatives, he had gathered that the general consensus of opinion was in favour of the Swiss interpretation.' [178]

This discussion about the inclusion or exclusion of 'admission' in the definition of the term 'expulsion' continues to be of relevance today as human rights courts and the International Law Commission chose different approaches in this regard.

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[176] UNHCR *Convention and Protocol relating to the Status of Refugees with commentaries* 2010, p.8.
[177] Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons Summary Record of the Sixteenth Meeting A/CONF.2/SR.16, 23 November 1951, p.7.
[178] Weis, Paul *The Refugee Convention, 1951 Travaux Préparatoires analysed with a commentary* pp. 239-240.

The 2012 *Hirsi Jamaa and Others v. Italy* case before the ECtHR offered for the first time a detailed interpretation of the term 'expulsion' in the sense of the prohibition of collective expulsion. Here, the Court dealt with the so-called 'push-backs' on the high seas undertaken by Italian authorities. In a lengthy and detailed assessment, the Court defined 'expulsion' in a generic way as to 'drive someone away from a place'.[179] Thus, the ECtHR found that push-backs could constitute a violation of the prohibition of collective expulsion even though the applicants have never set foot on the member state's territory. Prior to *Hirsi Jamaa and Others v. Italy*, the Grand Chamber laid the basis for this approach for example in *Medvedyev and Others v. France*. Here, the Court highlighted that

> the special nature of the maritime environment relied upon by the Government in the instant case cannot justify an area outside the law where ships' crews are covered by no legal system capable of affording them enjoyment of the rights and guarantees protected by the Convention which the States have undertaken to secure to everyone within their jurisdiction, any more than it can provide offenders with a "safe haven".[180]

In this context, it must be stressed that the Court generally applies a territorial notion to the issue of jurisdiction, which is 'presumed to be exercised normally throughout the State's territory'.[181] The ECtHR and its predecessor have made clear in numerous cases that ECHR rights apply extraterritorially only in exceptional circumstances, requiring a specific justification.[182] These exceptions can be divided into two main categories: jurisdiction based on effective control over the person in question and overall (military) control over a specific territory.

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[179] *Hirsi Jamaa and Others v. Italy* ECtHR, [GC], para. 174.
[180] *Medvedyev and Others v. France* ECtHR [GC], Appl. No. 3394/03, 29 March 2010, para. 81.
[181] *Assanidze v. Georgia* ECtHR, [GC], Appl. No. 71503/01, 8 April 2004, para.139 and *Hirsi Hirsi Jamaa and Others* ECtHR, [GC], para. 71.
[182] See for example: *Banković and Others v. Belgium and Others* ECtHR, [GC], Appl. No. 52207/99, 12 December 2001, paras. 61, 67, 71. Also: *Catan and Others v. République de Moldova and Russia* ECtHR, [GC], Appl. Nos. 43370/04, 8252/05 and 18454/06, 19 October 2012, para. 104.

Initially, the European Commission of Human Rights took a rather extensive approach acknowledging a jurisdictional link insofar as the respective state exercised authority over the persons or property in question. This was stressed by the Commission in its 1975 *Cyprus v. Turkey* decision, among others[183]. Here, the EComHR took on the issue of the Turkish occupation of Northern Cyprus. In its decision, the Commission explained that, in general, the application of rights is limited to the national territory of the member state in question. However, it also stressed that it

> is clear from the language, in particular [from] the French text [*relevant de leur jurisdiction*], and the object of this Article, and from the purpose of the Convention as a whole, that the High Contracting Parties are bound to secure the said rights and freedoms […] whether that authority is exercised within their own territory or abroad.[184]

Years later, the ECtHR seemingly moved away from the Commission's more flexible approach, highlighting the 'territorial notion' of the ECHR in the landmark case of *Banković and Others v. Belgium and Others*[185]. However, this case did not settle the issue in question once and for all. Subsequent cases, such as *Issa v. Turkey*[186] in 2004 where the court seemed to have adopted a more flexible approach on the 'control and authority' of the perpetrating state[187], contributed to the continuing debate over what constitutes jurisdiction.[188] In the following years, several cases dealing with the extraterritorial applicability paved the way for the approach of 'continuous and exclusive control over persons' taken by the Grand Chamber in *Hirsi Jamaa and Others v. Italy*.[189]

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[183] *Cyprus v. Turkey* EComHR, Appl. Nos. 6780/74 and 6950/75, 26 May 1975.
[184] Ibid., para. 8
[185] *Banković and Others v. Belgium and Others* ECtHR, [GC].
[186] *Issa v. Turkey* ECtHR, Appl. No. 31821/96, 16 November 2004.
[187] Ibid., paras. 55, 68-82.
[188] Kim, Seunghwan *Non-Refoulement and Extraterritorial Jurisdiction: State Sovereignty and Migration Controls at Sea in the European Context* Leiden Journal of International Law, 2007, Vol. 30, pp. 54-55.
[189] These are for example: The Grand Chamber judgment in *Öcalan v. Turkey* Appl. No. 46221/99, 12 May 2005, where the Court appears to follow the *Issa v. Turkey* approach and *Al-Saadoon and Mufdhi v. the United Kingdom* Appl. No.61498/08, 30 June 2009 where jurisdiction was established based on an exclusive *de jure* and *de facto* control over the applicant by the respondent state. This approach was repeated in the above described

This approach had a far-reaching effect even beyond the scope of the *Convention*. The UN Migrant Worker Committee in *General Comment No. 2* of 2013 referred explicitly to the *Hirsi Jamaa* judgment, stipulating that the prohibition of collective expulsion in the *UN Migrant Worker Convention* is also extraterritorially applicable.

The ILC *Draft Articles* by the International Law Commission did not follow this line of argument, rather referring to a more restrictive approach, defining 'expulsion' in the narrow sense of 'compel[ling] someone to leave'. The scope of protection of the prohibition of collective expulsion in these articles does not include non-admission scenarios.
Even though the ECtHR's interpretation of 'expulsion' differs profoundly, the court acknowledged the ILC's definition of the term in its *N.D. and N.T. v. Spain* chamber judgment as another way of interpreting 'expulsion'. The Court issued this judgment three years after the adoption of the ILC *Draft Articles*.[190]

Other courts and commissions such as the African Commission and the African Court on Human and Peoples' Rights, the Inter-American Commission and Inter-American Court have not yet dealt with the question of extraterritorial applicability of the prohibition. None of these treaty bodies have ever defined 'expulsion' in their cases and reports. Thus, it is difficult to make a reasonable assessment of their understanding of the term.

However, the African Commission and the Inter-American Court both seem to have expanded the scope of application of respective human rights treaties beyond the member states' territory in general.

In *General Comment No. 3*, the Commission stipulated that the member states must ensure 'accountability for any extraterritorial violation of the right to life'.[191]

Medvedyev and Others v. France case (maritime context) and ultimately endorsed by the Grand Chamber in the landmark *Al-Skeini and Others v. the United Kingdom* case, Appl. No. 55721/07, 7 July 2011.
[190] *N.D. and N.T. v. Spain* ECtHR, [Chamber], para. 103.
[191] AComHPR *General Comment No. 3 on the African Charter on Human and Peoples' Rights The Right to Life (Article 4)* adopted during the 57th ordinary session of the Africa Commission on Human and Peoples' Rights, 4-18 November 2015, para. 18.

The Inter-American Court of Human Rights in its landmark 2017 *Advisory Opinion on the Environment and Human Rights* clarified that the ACHR might also be extraterritorially applicable if the affected persons are under the jurisdiction of the acting state. This jurisdictional link exists if there is a causal connection between the incident that led to the human rights violation and the acting state. Thus, in general, the rights in the ACHR also apply outside a member state's territory.[192]

These findings, however, only indicates that the courts *could* interpret 'expulsion' in the broader sense. Another indicator is that the African Commission, the Inter-American Court, and Inter-American Commission refer to the *Hirsi Jamaa* judgment in all their case law on the prohibition after 2012. However, the treaty bodies do so to clarify the procedural guarantees contained in the provision and not to define 'expulsion'. For example, in its 2014 Haitian expulsion case, the Inter-American Court referred to both the ECtHR *Hirsi Jamaa* case and the ILC *Draft Articles* on the expulsion of aliens.

Despite these two distinct approaches, one including non-admission, the other not, when it comes to defining 'expulsion', they have one decisive element in common: both require some form of coercion in the expulsion procedure. Indirect collective expulsions in which the group of foreigners leaves the territory due to some form of pressure without an attributable act to state authorities are not covered.

The following section addresses the differences and similarities of the approaches.

[192] *Advisory Opinion Environment and Human Rights* IACtHR, OC-23/17OF, requested by the Republic of Colombia, official summary issued by the Inter-American Court, 15 November 2017, p. 4.

I. 'To compel someone to leave': The narrow definition of expulsion by the *International Law Commission*

Art. 2 (a) ILC Draft Articles[193] stipulates that

> "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 [emphasis added].

The question of non-admission was excluded in its entirety from the scope of the ILC *Draft Articles,* as clarified in the commentary to Art. 1 of the articles.[194]

According to Special Rapporteur Maurice Kamto's second report, the

> criterion of crossing the frontier or entering the territory is important for distinguishing non-admission from expulsion in the broad sense since, in the view of the Special Rapporteur, aliens who have crossed […] immigration control barriers and are in the territory of the receiving State, outside the special zones where candidates for admission are detained, may be subject only to expulsion and no longer to non-admission.[195]

In the final ILC *Draft Articles,* Kamto summarised this limitation as 'judicious distinction' between non-admission and expulsion.[196]

It is noteworthy in this regard that the ECtHR came to a different conclusion in its recent *N.D. and N.T. v. Spain* judgment of 2020. Here, the Grand Chamber justified its understanding of 'expulsion' as referring to removal *and*

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[193] The issue of the discrepancy between the more restrictive understanding of 'expulsion' in the Draft Articles in comparison to the ECtHR's interpretation was addressed several times by ECtHR judges. In the public hearing before the Grand Chamber in *N.D. and N.T. v. Spain* of September 2018 for example, Judge Linos Alexandre Sicilianos (from 1:49:23 on), referred to the ILC's *Draft Articles on the Expulsion of Aliens*. He pointed out that these draft articles do not define 'expulsion' as encompassing non-admission scenarios of foreigners and that the prohibition of collective expulsion generally has a very limited scope. See also the joint dissenting opinion of judges Ravarani and Bošnjak in *M.A. v. Lithuania*, Appl. No. 59793/17, 11 December 2018, para. 5.

[194] ILC *Draft Articles on the Expulsion of Aliens with Commentaries* p. 3.

[195] Kamto, Maurice *Second report on the expulsion of aliens* A/CN.4/573, 20 July 2006, para. 172.

[196] ILC *Draft Articles on the expulsion of aliens, with commentaries* p. 5.

non-admission, referencing its previous case law and by taking recourse to Arts. 2 and 6[197] ILC Draft Articles stating its view that

> this approach [that expulsion covers non-admission] is confirmed by the International Law Commission's Draft Articles on the Expulsion of Aliens, which, with regard to refugees, equate their non-admission to a State's territory with their return (*refoulement*) and treat as a refugee any person who applies for international protection, while his or her application is under consideration.[198]

I am of the opinion that this finding is however not entirely accurate, as first the *Commentary to the Draft Articles* regarding the scope of Art. 6 clearly states that it deals with the obligation of *non-refoulement* and *not* collective expulsion[199], which is covered by Art. 9. Second, the commentary highlights that the ILC *Draft Articles* understand only Art. 6 to cover non-admission scenarios '[u]nlike the other provisions of the draft articles, which do not cover the situation of non-admission of an alien to the territory of a State.'[200] And third, Art. 6 (b) speaks of state's obligation to not expel or return (*refouler*) a lawful refugee. Here, the term 'return' instead of 'expel' is interpreted to encompass non-admission in the case of refugees as well.[201] Thus, the ILC did not define 'expulsion' to include 'non-admission' even witch regard to refugees. In referring to the ILC *Draft Articles* in this manner, the Court conflates the two distinct and independent principles: the prohibition of collective expulsion and *non-refoulement*[202].

What at first sight seems to be either sloppy work or accommodating its approach with international standards may also have a different, more long-term, intention behind it. Reading this section in the context of the entire

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[197] Art. 6 (b) ILC Draft Articles reads: [A] State shall not expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where the person's life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion, unless there are reasonable grounds for regarding the person as a danger to the security of the country in which he or she is, or if the person, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

[198] *N.D. and N.T. v. Spain* ECtHR, [GC], para. 186.

[199] ILC *Draft Articles on the Expulsion of Aliens with Commentaries* p. 11.

[200] Ibid.

[201] Ibid.

[202] For a more detailed analysis on the relationship between the two principles see Chapter V.

judgment, it seems that the Court may have aimed at reducing the scope of application of the prohibition only to those refugees that cannot be returned in accordance with the *non-refoulement* principle (Art. 3 ECHR).[203] Such a reading would not be in accordance with the wording of the prohibition as it covers *any* foreigner and would contradict the ECtHR's findings in the same judgment when it stressed that 'expulsion' applies to all foreigners, irrespective of the lawfulness of their stay.[204]

Irrespective of the ECtHR's intention behind this misreading of the ILC *Draft Articles* interpretation of 'collective', the ILC chose a more restrictive definition than the ECtHR and the Migrant Worker Committee by excluding non-admission from the scope of the prohibition of collective expulsion in Art. 9 Draft Articles.

II. 'To drive someone away from a place': The broader definition of expulsion

The ECtHR's interpretation of 'expulsion' in Art. 4 Prot. 4 ECHR differs from this narrow understanding. Before the adoption of the ILC *Draft Articles*, the Grand Chamber, in *Hirsi Jamaa v. Italy*, for the first time offered a more extensive interpretation of this term in great length.

In prior cases the Commission and Court dealt with, the concerned foreigners were within the respective territory before their expulsion, and thus the issue of non-admission never arose.[205] The only exception was *Xhavara and Others v. Italy and Albania*[206] of 2001. This case concerned the interception of a boat of migrants by Italian authorities in 1997 outside its territorial waters (35 nautical miles from the coast). In the course of the interception, 58 Albanians

[203] See for example *N.D. and N.T. v. Spain* ECtHR, [GC] para. 196 where the Court referred to *Hirsi Jamaa* and *Sharifi* where a violation was found of Art. 4 Prot. 4 and of Art. 3. Also, in para. 198 the Court It stressed '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' and in para. 206, where the Grand Chamber stressed that the applications under Art. 3 were rejected by the Chamber.
[204] *N.D. and N.T. v. Spain* ECtHR, [GC], para. 185.
[205] *Hirsi Jamaa and Others v. Italy* ECtHR, [GC], para. 167.
[206] *Xhavara and Others v. Italy and Albania* ECtHR, Appl. No. 39473/98, 11 January 2001.

drowned. The Court, however, rejected the applicants' claims based on incompatibility *ratione personae*. Thus, the Court neither ruled on the applicability of Art. 4 Prot. 4 ECHR[207] nor defined 'expulsion'.

In contrast, the Grand Chamber interpreted the term 'expulsion' in great detail in *Hirsi Jamaa v. Italy* in 2012. In order to do so, the Grand Chamber drew, as in a few cases before,[208] on Articles 31 to 33 of the *Vienna Convention on the Law of Treaties* (VCLT).[209]

The ECtHR had previously clarified in *Golder v. the United Kingdom* of 1975 that Articles 31 to 33 VCLT serve as a guide for interpretation as they constitute 'in essence [the] generally accepted principles of international law'.[210] The ECtHR, however, only sparingly refers to these Articles.[211] Georg Nolte explains that this paucity does not indicate that the Court deems them irrelevant. He argues that the ECtHR instead does 'not see the need in most cases to discuss its method of interpretation' and therefore 'limits its references to the VCLT to a smaller set of cases where more difficult questions of interpretation arise.'[212]

Against the backdrop of Nolte's argument, the examination of the term 'expulsion' in *Hirsi Jamaa and Others v. Italy* must have constituted one of these 'difficult questions of interpretation.' Here, the Court assessed the term for the first time in a detailed manner and in 'accordance with the ordinary meaning,' its 'context,' and in 'light of the object and purpose of the provision from which they are taken' (Art. 31 VCLT). The Court also took recourse to 'supplementary means of interpretation' under Art. 32 VCLT. In the Chamber and Grand Chamber decisions in *N.D. and N.T. v. Spain* of 2017 and 2020,

[207] *Xhavara and Others v. Italy and Albania* ECtHR, para. 4.
[208] See for example the ECtHR's reliance on Arts. 31-33 VCLT in: *Golder v. the United Kingdom*, Appl. No. 4451/70, 21 February 1975, Series A no. 18, para. 29; *Demir and Baykara v. Turkey* [GC], Appl. No. 34503/97, 2008, para. 65; *Saadi v. the United Kingdom* [GC], Appl. No. 13229/03, 2008, para. 62.
[209] *Hirsi Jamaa and Others v. Italy* ECtHR, [GC], para. 170.
[210] *Golder v. the United Kingdom* ECtHR, para. 29.
[211] Nolte, Georg *Jurisprudence Under Special Regimes Relating to Subsequent Agreements and Subsequent Practice Second Report for the ILC Study Group on Treaties over Time* in: Nolte (ed.) *Treaties and Subsequent Practice* (Oxford University Press 2013), (*Jurisprudence Under Special Regimes*), pp. 244-245.
[212] Nolte, Georg *Jurisprudence Under Special Regimes* p. 245.

once again addressing non-admission, the Court relied on this prior interpretation based on the VCLT.[213]

In *Hirsi Jamaa and Others v. Italy*, the Grand Chamber, by relying on the VCLT's tools of treaty interpretation, started with some general observations on the interpretation of 'expulsion'. The Court first relied on a contextual approach, looking at the ECHR as a whole and its object and purpose as a human rights instrument. This approach is in line with the Court's general use of tools of interpretation, as it does not see the ECHR as a 'classic kind' of international treaty.[214]

The judgment highlights

> that the provision in issue forms part of a treaty for the effective protection of human rights and that the Convention must be read as a whole and interpreted in such a way as to promote internal consistency and harmony between its various provisions.[215]

After this general statement on how to interpret the provisions in harmony and in consistency with the *Convention* as a whole, the Court went on to apply this interpretative tool to the provision at hand. In doing so, the Court came to the conclusion that

> the wording of Article 4 of Protocol No. 4 does not in itself pose an obstacle to its extraterritorial application. It must be noted that Article 4 of Protocol No. 4 contains no reference to the notion of "territory," whereas the wording of Article 3 of the same Protocol, on the contrary, specifically refers to the territorial scope of the prohibition on the expulsion of nationals. Likewise, Article 1 of Protocol No. 7 explicitly refers to the notion of territory regarding procedural safeguards relating to the expulsion of aliens lawfully resident in the territory of a State. In the Court's view, that wording cannot be ignored.[216]

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[213] *N.D. and N.T. v. Spain* ECtHR, [Chamber], para. 103 and *N.D. and N.T. v. Spain* ECtHR, [GC], para. 172.
[214] Nolte, Georg *Jurisprudence Under Special Regimes* p. 245.
[215] *Hirsi Jamaa and Others v. Italy* ECtHR [GC], para. 171.
[216] Ibid., para. 173.

Indeed, in contrast to Art. 4 Prot. 4, both Art. 3 Prot. 4 and Art. 1 Prot. 7 ECHR specifically speak of expulsions of foreigners *from* 'the territory' of a Member State. Next, the Court took recourse to supplementary sources of interpretation per Art. 32 VCLT. In general, the *travaux préparatoires* plays only a minor role in the interpretations of provisions by the ECtHR. [217] When the Court did rely on supplementary sources, it never inferred them to limit the interpretation of a term.[218]

First, an analysis of the *travaux préparatoires* revealed that the drafters of the fourth protocol understood expulsion 'in the generic meaning, in current use (to drive away from a place)' and thus concluded that they did not willingly 'preclude extraterritorial application of Article 4 of Protocol No. 4.'[219]

Contrary to the order of treaty interpretation codified in Arts. 31-33 VCLT, the judges then returned to the question of whether this interpretation is in accordance with the context, object, and purpose of the *Convention* itself.

Furthermore, the judges concluded that in order to render the guarantees of Art. 4 of Prot. 4 ECHR effective, collective expulsions *from* a Member State must be encompassed by the provision, in addition to conduct occurring *outside* such territory. Otherwise, 'a significant component of contemporary migratory patterns would not fall within the ambit of that provision.'[220] In addition, a different understanding would lead to a discrepancy in treatment between migrants arriving via land and those traveling by sea.[221]

After this detailed interpretation of 'expulsion', the judges concluded that in exceptional cases, such as the one at hand, the term might encompass the extraterritorial exercise of jurisdiction by a state.[222] The Chamber then justifies this broad interpretation by referring to the principle of interpreting every provision holistically in the overall context of the *Convention*.[223] Thus, for the first time the Court established that the prohibition of collective

[217] Nolte, Georg *Jurisprudence Under Special Regimes* p. 249.
[218] Ibid.
[219] *Hirsi Jamaa and Others v. Italy* ECtHR [GC], para. 174.
[220] Ibid., para. 177.
[221] Ibid.
[222] Ibid., para. 178.
[223] Ibid.

expulsion is also extraterritorially applicable as long as the individuals forming the group are under the exclusive *de jure* or *de facto* control[224] of a Member State.

Human rights scholars and activists mostly celebrated this landmark case.[225] Some scholars criticised the decision as hypocritical as the victims had only received financial compensation instead of a return to Italy.[226] Given the Court's case law however, it is unlikely that it would have obliged Italy to such a measure in accordance with and Art. 41[227] and Art. 46 I ECHR.[228] In *Al-Saadoon and Mufdhi v. United Kingdom*, the ECtHR found a violation of Art. 3 ECHR with respect to the applicants. The Court demanded more than financial compensation requesting the respondent state take 'all possible steps to obtain an assurance from the Iraqi authorities that they will not be subjected to the death penalty'[229]. However, the Court rejected the applicants' claims to repatriate them to the United Kingdom.[230] Having declared such repatriation as interference by the respondent state into the domestic affairs of a sovereign state in a previous case,[231] it was unlikely that the ECtHR would deviate from this standpoint in *Hirsi Jamaa and Others v. Italy*.

The Court clarified that

> where it finds a violation, the respondent State has a legal obligation under Article 46 of the Convention not just to pay those concerned any sums awarded by way of just satisfaction […], but also to select […] individual measures to be adopted in their

[224] *Hirsi Jamaa and Others v. Italy* ECtHR, [GC], para. 77.
[225] See for example: Gammeltoft-Hansen, Thomas and Aalberts, Tanja *Search and Rescue as a Geopolitics of International Law* in: Aalberts and Gammeltoft-Hansen *The Changing Practices of International Law* (Cambridge University Press 2018), p. 200.
[226] Dembour, Marie-Bénédicte *Why the European Court of Human Rights is no friend to migrants* The Conversation, 21 May 2015, available at: https://theconversation.com/why-the-european-court-of-human-rights-is-no-friend-to-migrants-42129.
[227] Art. 41 ECHR reads: If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.
[228] Art. 46 I ECHR reads: The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
[229] *Al-Saadoon and Mufdhi v. the United Kingdom* ECtHR, Appl. No. 61498/08, 2 March 2010, para. 171.
[230] Ibid., para. 168.
[231] *Iskandarov v. Russia* ECtHR, Appl. No. 17185/05, 23 September 2010, para. 167.

> domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects.[232]

Nevertheless, in retrospect, this judgment opened the door for many more cases on push-backs non-admission of migrants in Europe.

The Court's findings in *Hirsi Jamaa v. Italy* were for example reiterated two years later in *Sharifi and Others v. Italy and Greece*[233] and then once more five years later in the Chamber judgment of *N.D. and N.T. v. Spain*. Here, the Court highlighted that the question of whether the applicants were physically within Spanish territory before their expulsion was irrelevant as 'even interceptions on the high seas come within the ambit of Article 4 of Protocol No. 4 […] the same must also apply to the allegedly lawful refusal of entry to the national territory of persons arriving in Spain illegally'.[234] The Grand Chamber judgment in this case acknowledged the Chamber's understanding of the term, stressing that it continues to 'interpret the term "expulsion" in the generic meaning in current use ("to drive away from a place")' as established in *Hirsi Jamaa* and acknowledged in *Khlaifia.*[235] The Grand Chamber further and for the first time in clear terms defined 'expulsion' as

> any *forcible removal* of an alien *from a State's territory*, *irrespective of the lawfulness* of the person's *stay*, the length of time he or she has spent in the territory, the location in which he or she was apprehended, his or her status as a migrant or an asylum-seeker and his or her conduct when crossing the border [emphasis added].[236]

Despite this seemingly restrictive definition as 'removal from a state's territory', in the same judgment the Court explicitly noted that non-admission is equally covered by the term.[237]

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[232] *Al-Saadoon and Mufdhi v. the United Kingdom* ECtHR, para. 170.
[233] *Sharifi and Others v. Italy and Greece* ECtHR, paras. 210-213.
[234] *N.D. and N.T. v. Spain* ECtHR, [Chamber], para. 104.
[235] *N.D. and N.T. v. Spain* ECtHR, [GC], para. 185.
[236] Ibid.
[237] The Court stressed: 'For its part, the Court has not hitherto ruled on the distinction between the non-admission and expulsion of aliens', see *N.D. and N.T. v. Spain*, para. 184 and after a reiteration of its findings, especially in *Hirsi Jamaa* and with reference to the *ILC Draft Articles on the Expulsion of Aliens*, the Court concluded: 'Article 3 of the Convention and Article 4 of Protocol No. 4 have been found to apply to any situation coming within the

In conclusion, the ECtHR interpreted 'expulsion' to encompass not only acts conducted against individuals from *within* a state's territory but also those occurring *outside*, on the high seas or at the border.

The same applies to the prohibition of collective expulsion as enshrined in the *UN Migrant Worker Convention*. The *UN Migrant Worker Committee* noted that the prohibition 'extends to all spaces over which a State party exercises effective control, which may include vessels on the high seas.'[238]

In contrast, the issue of the extraterritorial applicability of the prohibition of collective expulsion in the ICCPR is not as clear-cut as it is in the two previously assessed conventions.

In general, Art. 2 (1) ICCPR seems to restrict the Covenant's scope of application to the territories of the member state, stating that '[e]ach 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.'[239]

However, it should be stressed that the International Court of Justice seemingly confirms that certain ICCPR rights may be extraterritorially applicable in the case the acting member state has 'effective control' over the people in question.[240]

Further, it seems that the Human Rights Committee also followed this line of argument, making some exceptions to this general territorial restriction. In its *General Comment No. 15*, the HRC acknowledged that Art. 13 ICCPR implicitly contains the prohibition of collective expulsion and the

jurisdiction of a Contracting State, including to situations or points in time where the authorities of the State in question had not yet examined the existence of grounds entitling the persons concerned to claim protection under these provisions', see: Ibid., para. 186.

[238] CMW *General Comment No. 2* para.51.

[239] Article 2(1) ICESCR in contrast does not contain the 'within its territory'-clause providing that: 'Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.'

[240] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Advisory Opinion ICJ, I.C.J. Reports 2004,* para. 112.

extraterritorial applicability of some Covenant rights under exceptional circumstances.

The Committee highlighted that

> [t]he Covenant does not recognize the right of aliens to enter or reside in the territory of a State party. It is in principle a matter for the State to decide who it will admit to its territory. However, in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise.[241]

The Committee does not refer to the prohibition of expulsion in this regard but makes a more general statement under which circumstances a provision applies extraterritorially. The prohibition of collective expulsion guarantees that the expelling state assesses every foreigner's claim against her or his expulsion. These requests can encompass, among other things, claims against deportation to a place where the individual's life would be at risk or towards family reunification. The procedural guarantees of the prohibition of collective expulsion trigger the duty of consideration of member states regarding the prohibition of inhuman treatment and respect for family life. Thus, the prohibition of collective expulsion in Art. 13 ICCPR arguably applies in non-admission scenarios. Individuals do not receive the right to entry; however, states must offer the possibility for every foreigner to bring forward their claims at the border. Hence, the Committee arguably understood 'expulsion' in Art. 13 ICCPR in the generic as driving someone away from a place.

In conclusion, the ECtHR and the UN Migrant Worker Committee interpret 'expulsion' in the broader sense of 'driving someone away from a place,' which also encompasses extraterritorial acts such as the denial/prevention of the admission of migrants and push-backs as long as the state in question exercises control over the respective persons. Despite the ICCPR's general territorial restrictions, it seems that the *Human Rights Committee* argued in

[241] HRC *General Comment No. 15* para. 5.

favour of an extraterritorial application of the right to bring forward individual claims.

III. The 'compulsion' / 'coercion' element of 'expulsion'

The ILC in its *Draft Articles* and the ECtHR in *Berdzenishvili and Others v. Russia* dealt with 'indirect,' 'constructive,' and 'disguised' collective expulsions.[242] These terms describe the same phenomenon of state authorities acting in a manner that forces foreigners coercively *en masse* to leave a state's territory.

According to the ECtHR and the International Law Commission, the state authority must have committed a 'formal act/conduct'[243] or 'measure'[244] that compelled the foreigners to leave the territory. Jean-Marie Henckaerts points out in his chapter on indirect mass expulsion that even though the term 'measure' is rather vague, it is limited by the second element of the definition, that the measure has to be committed by 'the competent authority'. Henckaerts stresses that

> [a]cts by individuals, non-government agents, are thus excluded. But situations in which the government tolerates, or even abets such indirect measures by private persons or groups, would also impose liability of a government for not having prevented a mass expulsion.[245]

The ILC clarifies in its *Draft Articles* that the 'forcible departure of an alien from a State resulting indirectly from an action or omission attributable to the

[242] The International Law Commission adopted the term 'disguised expulsion' in Art. 10 Draft Articles on the Expulsion of Aliens as 'it was difficult to find a satisfactory equivalent of the term "constructive expulsion" in other languages, particularly French, as the term might carry an undesirable positive connotation. Consequently, the Commission opted in this context for the term "disguised expulsion".' ILC *Draft Articles on the Expulsion of Aliens with Commentary* p. 16.
[243] Art. 2 a) ILC *Draft Articles on the Expulsion of Aliens*.
[244] *Becker v. Denmark*, Decision of the European Commission of Human Rights on the admissibility of Application No. 7011/75, 19 Yearbook European Convention on Human Rights 416, 1976, para. 454.
[245] Henckaerts, Jean-Marie *Mass Expulsion in Modern International Law and Practice* p. 109.

State, including where the State supports or tolerates acts committed by its nationals or other persons' satisfies this requirement'.[246]

The commentary to Art. 10 ILC Draft Articles, which addresses the prohibition of 'disguised expulsion', clarifies that an indirect expulsion ought to meet a certain threshold of compulsion to compel the foreigners to depart. Furthermore, the state must act with the intention to make the foreigners leave.[247]

The compulsion/coercion threshold for such indirect measures is high. The ILC clarified with reference to the *Eritrea-Ethiopia Claims Commission* that

> those who leave a country must have experienced dire or threatening conditions so extreme as to leave no realistic alternative to departure. These conditions must result from actions or policies of the host government, or be clearly attributable to that government.[248]

The ECtHR seemingly applied at least the first part of the ILC's approach to indirect expulsions as can be inferred from the 2016 *Berdzenishvili and Others v. Russia* case. Even though the judgment itself gained very little attention, it is significant for its understanding of the prohibition of collective expulsion as enshrined in Art. 4 Prot. No. 4 ECHR.

Here, the ECtHR made clear in a single paragraph that Art. 4 Prot. 4 ECHR only covers indirect collective expulsions if they contain a coercive element. The Court did not refer to the ILC *Draft Articles* or any other source to explain its approach or threshold. The 'intention' element was also not, directly or indirectly, addressed in the case. However, a closer analysis of the case reveals that the Court's approach to the compulsion/coercion element is comparable to the one of the ILC.

In *Berdzenishvili and Others v. Russia*, the Court found several violations of the prohibition of collective expulsion concerning the majority of the 19

[246] Art. 10 (2) ILC *Draft Articles on the Expulsion of Aliens*.
[247] ILC *Draft Articles on the Expulsion of Aliens with Commentaries* pp. 16-17.
[248] Ibid., p. 17, referring to Partial Award, Civilians Claims, Ethiopia's Claim 5, Eritrea Ethiopia Claims Commission, The Hague, 17 December 2004, paras. 91, 95, United Nations, Reports of International Arbitral Awards, Vol. XXVI, pp. 285-286.

applicants. In the case of three applicants, the Court rejected the claim that Russian authorities had violated Art. 4 Prot. 4 ECHR. Their case differed from the situation of the other applicants in as far as 'no official expulsion decisions by a court or any other Russian authority had been issued and that they left the Russian Federation by their own means.' Furthermore, the Court found that they were not 'coerced by detention officers to leave the country.'[249] Here, the Court, for the first time, addressed the relevance of the issuance of an expulsion order by the expelling authorities and indirectly clarified some indicators that meet the threshold for an indirect coercive measure in the sense of Art. 4 Prot. 4 ECHR. The Court so far did not explicitly draw such a distinction nor does it rely on the terms 'direct expulsion' or 'indirect expulsion'. However, the Court clarified that in order for an act to qualify as expulsion, the expelling state has to either issue an official expulsion order or commit a comparable coercive measure. A 'voluntary' departure, even if the person reasonably feared mistreatment and expulsion, does not fall under the scope of protection of the prohibition of collective expulsion.

The threshold for a measure to qualify as 'any other specific act by the authorities' is high. In *Berdzenishvili and Others v. Russia*, the Court considered it 'comprehensible that some Georgian nationals left the Russian Federation prior to an official expulsion order anticipating being arrested, detained and expelled'. It concluded that

> in absence of such an official expulsion order or any other specific act by the authorities the Court finds itself unable to conclude that these three applicants have been the subject of a measure compelling aliens, as a group, to leave a country.[250]

In its *Berdzenishvili* case, the ECtHR refers to the Grand Chamber judgment *Georgia v. Russia (I)* to explain the surrounding circumstances compelling the Georgians to leave Russia before being officially and forcefully expelled. The Court summarised the event as follows:

[249] *Berdzenishvili and Others v. Russia* ECtHR, Appl. Nos. 14594/07 and 6 others, 20 December 2016, para. 81
[250] Ibid., para. 81.

> [I]dentity checks of Georgian nationals were carried out in the streets, markets and other workplaces and at their homes, and they were subsequently *arrested and taken to police stations*. After a period of custody in police stations (ranging from a few hours to one or two days, according to the witness evidence), they were grouped together and taken by bus to the courts, *which summarily imposed administrative penalties* on them and gave decisions ordering their *administrative expulsion* from Russian territory. Subsequently, after sometimes undergoing a medical visit and a blood test, they were taken to detention centres for foreigners where they were detained for varying periods of time (ranging from two to fourteen days according to the witness evidence), and then taken by bus to various airports in Moscow, and expelled to Georgia by aeroplane. It should be pointed out that some of the Georgian nationals against whom expulsion orders were issued left the territory of the Russian Federation *by their own means* [emphasis added].[251]

Based on this summary on the surrounding circumstances, the Court clarified in *Berdzenishvili and Others v. Russia* that the issuing of expulsion orders or prior expulsion custody satisfies the coercion requirement. The mere existence of a policy aimed at arresting and expelling certain foreigners *en masse* does not satisfy this threshold. The Court found that Russia violated Art. 4 Prot. 4 ECHR in cases where the Georgian applicants received expulsion orders and/or where the state had detained them.[252] The other applicants that did not receive such an official expulsion order or were detained, but left the country for fear of expulsion, were not collectively expelled in the sense of Art. 4 Prot. 4 ECHR.[253] Thus, the ECtHR requires some form of 'official' act of expulsion to satisfy the requirement in question. The qualifying act needs to be more than an existing policy aimed at expelling a particular group of people from a state's territory. The respective individual

[251] *Georgia v. Russia (I)* ECtHR [GC], para. 45.
[252] *Berdzenishvili and Others v. Russia* ECtHR, para. 83.
[253] Ibid., para. 81.

ought to be targeted directly by the policies. This finding is in line with the ILC's compulsion element.

The African Commission on Human and Peoples' Rights drew similar conclusions in *Institute for Human Rights and Development in Africa v. Guinea.* This case dealt with a public speech given by Guinean President Lansana Conté in September 2000, in which he proclaimed over national state radio that Sierra Leonean refugees in Guinea should be arrested, searched, and confined to refugee camps, a process which led to widespread atrocities committed against Sierra Leonean refugees. One of these atrocities was, as the Commission put it, that 'Sierra Leonean refugees were forced to decide whether they were to be harassed, tortured and die in Guinea, or return to Sierra Leone in the midst of civil war where they would face an equally harsh fate.'[254] This forced eviction of refugees led to the African Commission's finding that mass expulsion had occurred and that Guinea had violated Art. 12 (5) ACHPR. The collective expulsion of Sierra Leonean refugees is the only example in the African Commission's case law dealing with indirect mass expulsion by which the refugees had left Guinea on their own. However, as the claimants pointed out,

> [P]resident Conté's speech not only made thousands of Sierra Leonean refugees flee Guinea and return to the dangers posed by the civil war, but it also clearly authorized the return by force of Sierra Leonean refugees. Thus, the voluntary return of refugees to Sierra Leone under these circumstances cannot be considered as voluntary but rather as a dangerous option available for the refugees.[255]

The Commission's finding shows that even indirect measures can amount to a violation of the prohibition of collective expulsion as long as the act coerces the foreigner into leaving. This threshold requires that the foreigner does not have any *real* alternative than to leave the country.

[254] *Institute for Human Rights and Development in Africa v. Guinea* AComHPR paras. 1,7.
[255] Ibid., para. 48.

E. The prohibition of collective expulsion – interface between individual and collective protection

At first sight, the explicitly chosen term 'collective' as a material element of the prohibition seemingly suggests that the right-bearer of this protective mechanism is a group of individuals. Based on this understanding, the prohibition is a collective right. Determining the nature of the prohibition of collective expulsion is a difficult task.

Two decisive questions ought to be answered to determine the nature of the prohibition as regarding individual or collective rights: Who is the right-holder of the guarantees? Second, are the two categories of rights mutually exclusive or is the prohibition a combination (some form of a hybrid)?

Whereas states and scholars have accepted individual rights in international law as a category of rights, this is not the case when it comes to collective rights.

Thinking of collective rights, the right to self-determination, to land, to biodiversity, and the right of minorities to preserve their cultural identities come to mind. However, the concept of group rights is more disputed and less clearly defined than individual rights. Nevertheless, regional and international law offer examples of codified collective rights.

One such example is the International Labour Organization's *Indigenous and Tribal Peoples Convention* of 1989,[256] which protects indigenous and tribal peoples' rights granted to the group as a whole qua its existence as a group.

On the regional level, the *African Charter on Human and Peoples' Rights,* for example, which carries the concept of group rights already in its name, contains explicit group rights. The *African Charter* contains the right of all peoples to equality (Article 19), to existence (Article 20), to wealth and natural resources (Article 21), to development (Article 22), to national and international peace and security (Article 23), and to a 'general satisfactory environment' (Article 24). During the drafting of the ACHPR between 1979

[256] International Labour Organization *Convention concerning Indigenous and Tribal Peoples in Independent Countries* Convention No. 169, entry into force on 5 September 1991, adoption in Geneva, at 76th ILC session on 27 June 1989.

and 1981, Guinea, and Madagascar, two socialist-inclined states at that time pushed for the inclusion of such rights[257], which they saw as distinct characteristics of the African human rights system.[258] As the then Senegalese president and one of the leading figures of the drafting process, Léopold Senghor, explained, collective rights in the African context are 'rights which have a particular importance [regarding] our situation [as] a developing country.'[259] Interestingly, the chapter dealing with collective rights[260] does not contain the prohibition of collective expulsion. Article 12,[261] which deals with the freedom of movement of individuals, contains the prohibition. The same applies to the prohibition of collective expulsion as codified in Article 22 (5) ACHR. The prohibition is located in Chapter II: Civil and Political Rights[262] as a subsection of the provision granting the freedom of movement and residence to individuals.

The prohibition of collective expulsion protects jointly expelled foreigners that have experienced comparable circumstances. Thus, the right holder is each foreign individual of the group who has experienced these circumstances.

It is also the individual of such a group that can claim a violation thereof in front of courts/treaty bodies. However, the affected individual, as well as the group itself, can claim a violation the prohibition of collective expulsion in front of the European Court of Human Rights under Art. 34 ECHR.[263]

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[257] The drafting process of the African Charter was not linear. It is disputed when the drafting officially started. Some scholars argue that it was January 1961 with the Lagos Conference. Others see the starting point later in February 1979 with the Mbaye background paper. The final version was adopted in 1981. For a detailed analysis of this development and the context affecting the drafting and adoption of the Charter see: Plagis, Misha and Riemer, Lena *The enigma of Article 7 ACHPR* (forthcoming, on file with author).

[258] Viljoen, Frans *The African Charter on Human and Peoples' Rights/The Travaux Préparatoires in the light of subsequent practice* Human Rights Law Journal Vol. 25, No.9-12, 2004, p. 317.

[259] Ibid.

[260] Chapter I, Articles 19-24.

[261] Article 12 (5) ACHPR reads: The mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups.

[262] American Convention on Human Rights, Articles 3-25.

[263] Art. 34 ECHR reads: Individual applications - The Court may receive applications from any person, non-governmental organisation or *group of individuals* claiming to be *the victim of a violation* by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right [emphasis added].

The *American Convention on Human Rights* contains a similar provision in Art. 44.[264]

This group application tool does not mean that the group as such has standing before the court. The court still examines each case individually and assesses if the expelling state sufficiently considered each person's particular circumstances. This finding goes hand in hand with Corsin Bisaz's conclusion that 'the systematic violation of the individual rights of members of a certain group does not change the nature of these rights.'[265]

The rights-bearer of the prohibition of collective expulsion is the collectively expelled individual foreigner. The expelled individual does not need the other individuals of the group to jointly exercise the right to an individual assessment. However, without the collective expulsion, the scope of protection of the prohibition is not triggered. Thus, the prohibition of collective expulsion does not fit entirely into one of the two categories of rights. Thus, even if the violation of the prohibition of collective expulsion is systematic, it does not change the nature of the prohibition from an individual to a group right.

The prohibition of collective expulsion is a combination of an individual's right to due process before his or her expulsion that is triggered if the material element 'collective expulsion' is fulfilled. This extraordinary combination of procedural and material elements in the prohibition turns the provision into a hybrid, a mixture of individual and collective rights that I call *interrelated individual rights*. The prohibition carries all features of an individual right as well as the material element of a particular necessary link to other individual rights violations in a similar situation. The fate of every claim of every individual of the group depends on similar violations of the rights of the other individuals in that group. Nevertheless, the prohibition remains an individual right irrespective of a group's ability to jointly allege a violation of this

[264] Art. 44 American Convention reads: Any person or *group of persons*, or any nongovernmental entity legally recognized in one or more member states of the Organization, *may lodge petitions* with the Commission containing denunciations or complaints of violation of this Convention by a State Party [emphasis added].

[265] Bisaz, Corsin *The Concept of Group Rights in International Law* (Brill/Nijhoff 2012), p. 8.

provision in the European and American context and despite the ‘collective’ element in the provision.

F. Conclusions on the material elements of the prohibition of collective expulsion

This Chapter has offered an assessment of the material elements of the prohibition of collective expulsion, namely of the terms 'alien', 'prohibition', 'collective', and 'expulsion'.

The Chapter focused on the interpretation of these terms by scholars, the International Law Commission, courts and treaty bodies such as the European Court of Human Rights, the African Commission on Human and Peoples' Rights, the Inter-American Court and Commission of Human Rights, the Human Right Committee, and the UN Migrant Worker Committee.

This assessment revealed that most elements of the prohibition are congruent in scope among the different codifications on a regional and international level. One reason for this congruency is the fact that the courts and treaty bodies seemingly draw on each other's interpretation of the prohibition and on the ILC's work on the expulsion of aliens. In particular, the African and American treaty bodies explicitly refer to each other's interpretation, as well as to the work of the ECtHR. The Inter-American Court and Commission also include the findings of the ILC in their interpretation of the scope of protection of the prohibition.

The ECtHR, on the other hand, does not refer explicitly to legal developments taking place in its regional counterparts. However, as ECtHR Judge Pinto de Albuquerque's concurring opinion reveals, at least some judges are well aware of ongoing developments in this regard. Third-party intervenors in cases to the ECtHR also regularly refer to the case law of other regional and international treaty bodies regarding the prohibition of collective expulsion. This observation suggests that the judges are probably well aware of their colleagues' work. One explicit exception is the work of the ILC on the expulsion of aliens, which was referenced by the ECtHR in the recent case on Art. 4 Prot. 4 ECHR, *N.D. and N.T. v. Spain* of February 2020.

The term 'alien' encompasses any foreigner irrespective of her or his residence status, nationality, statelessness, ethnicity, or any other feature. The

scope of protection *ratione personae* is congruent between all regional human rights instruments in as far as it covers these groups of foreigners.

The personal scope of application in the prohibition of collective expulsion as contained in the UNCRMW is more limited compared to its regional counterparts as it explicitly excludes refugees and stateless people; it covers instead migrant workers and their families with 'regular' or 'irregular' status. The reason for this narrower approach may be found in the fact that at the time of drafting the *Migrant Worker Convention* in the 1980s, more specific regimes protecting refugees and stateless people were already in place.

The provision implicitly containing the prohibition of collective expulsion in the ICCPR seemingly only applies to lawfully residing foreigners. However, an assessment of the relevant *General Comments* and *Concluding Observations* of the HRC suggests that the Committee may have attempted to expand the scope of application to nationals in the case of collective expulsion. A comparable conclusion may be drawn regarding foreigners whose lawful residence status is in question and their expulsion is pending. However, as irregularly staying foreigners, whose status is not in question, are exempted from protection, the prohibition's scope *ratione personae* in the ICCPR is more limited compared to its regional counterparts.
The *African Charter* goes beyond this in its application also protecting nationals against arbitrary expulsions.

The term '*collective*' requires neither a narrowly defined or definable (minimum or maximum) number of members, nor do these individuals have to be connected by common characteristics or classed together by physical presence. The ECtHR clarified that the absence of a reasonable, individual, and objective examination is decisive for the determination of the collective nature of an expulsion in the sense of Art. 4 Prot. 4 ECHR. In doing so, it clarified that this element of the prohibition is the gateway for the assessment of a violation of the procedural guarantees implicitly contained in the prohibition.
Two indicators for the determination of the absence of such an examination are relevant: The existence of administrative practices aimed at the expulsion of specific groups of foreigners and the applicant's own conduct prior to the

expulsion. The Grand Chamber expanded the scope of this second indicator in *N.D. and N.T. v. Spain* of February 2020. According to this interpretation, any foreigner's entry via a land border in an irregular, forceful, organised, and *en masse* manner constituting a security risk, leads to the forfeiture of their rights under Art. 4 Prot. 4. ECHR.

'Prohibition' is understood, in its generic sense, as the forbidding of limitations or restrictions on the guarantees provided by the principle. However, the ECHR, the EUChFR and the ACHR contain a general derogation clause in case of emergency, applicable to the prohibition. The prohibition of collective expulsion in the ACHPR and the UNCRMW is absolute. The provision implicitly containing the prohibition of collective expulsion in the ICCPR can be limited under the Covenant's general derogation clause.

Defining 'expulsion' constitutes a more difficult task compared to the other elements contained in the prohibition. The main issue revolves around the question of whether it should be understood in the generic sense of to 'drive someone away from a place' as done by the ECtHR in *Hirsi Jamaa and Others v. Italy* and acknowledged by the UN Migrant Worker Committee in its *General Comment No. 2* or in a narrower sense of 'compelling someone to leave a territory' as done by the ILC in its *Draft Articles*. Although these are two distinct approaches, they also share one decisive element. Both approaches require some form of coercive element in the expulsion. Indirect collective expulsions in which the group of foreigners leaves the territory due to some form of pressure without an attributable act to state authorities are not covered.

This chapter further clarified the nature of the prohibition as an 'interrelated individual right' as the prohibition contains all features of an individual right and the collectivity element, which requires a particular link to other violations of individuals in a similar situation. Nevertheless, the prohibition remains an individual right irrespective of the possibility that a group can jointly bring a violation of this provision to the European or Inter-American Court and despite the 'collective' element in the provision.

Chapter III – The nature of the prohibition of collective expulsion

Scholars agree that due process rights provide the utmost protection against violations of the rule of law.[1]

The existence of procedural rights is equally important in the domestic and international sphere. That modern international law is, in general, more procedural than substantive[2] supports this finding. When it comes to due process rights for migrants there is a common 'code of due process' guaranteeing minimum fair trial standards.[3]

Many international and regional human rights instruments, from the ICCPR to the *American Convention*, the *European Convention*, and the *African Charter*, codify due process guarantees such as the right to a fair trial and the *ne bis in idem* principle.

Given the factual implications and the definite character of a removal procedure for the expelled individual, due process guarantees are of high importance. These guarantees are especially significant in times of mass influxes of migrants and asylum seekers. Here, the upholding of due process guarantees, including the possibility of every foreigner to raise arguments against her or his expulsion, reaches practical administrative limits. As will be shown in this chapter, the prohibition of collective expulsion constitutes the core of procedural protection for migrants when it comes to group expulsions.

Given the wording of several conventions that state succinctly[4] that '[c]ollective expulsion of aliens is prohibited', the question arises as to what kind of (procedural) guarantees the prohibition entails.

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[1] Heuman, Lars and Wahlgren, Peter *Procedural Law Court Administrations* Scandinavian Studies in Law, Vol. 51 (Stockholm Institute for Scandidnavian Law 2007), foreword.
[2] Koskenniemi, Martti *The Politics of International Law*, European Journal of International Law, 1999, Vol. 1, pp. 4-32.
[3] Kotuby, Charles Jr. *General Principles of Law, International Due Process, and the Modern Role of Private International Law* Duke Journal of Comparative & International Law, 2013, Vol. 23, No. 3, pp. 425-426.
[4] See Annex to this study.

This chapter offers an analysis of the nature of the prohibition of collective expulsion as a due process right against arbitrary group expulsions.

In doing so, the chapter first addresses the minimum standard that constitutes a due process right in expulsion procedures in general (A). It then delves into an overview of the procedural guarantees contained in the prohibition in different regional and international conventions (B). The last part (C) offers a summary of the findings on the nature and the procedural scope of protection of the prohibition of collective expulsion as a due process right.

A. Minimum standard of the due process right in expulsion procedures

Every individual, foreigner or citizen, enjoys certain minimum human rights under international law, in their own country or abroad.[5] The exact content of this minimum is unclear. It contains at least the right to life and physical integrity, as well as certain fair trial rights.[6]

The question of which fair trial procedures apply to foreigners, especially in expulsion cases, has received little attention in international law scholarship. This section offers an introduction of what constitutes a due process right before turning to the procedural scope of application of the prohibition in various regional and international human rights instruments.

What makes a right a due process guarantee? The US Supreme Court case *Goldberg v. Kelly* of 1970 offers a definition for the determination of the elements of due process rights.[7] Here, the US Supreme Court established the requirements for guaranteeing procedural due process for a welfare recipient. According to the US Supreme Court, due process guarantees require a hearing, which among other things entails an impartial decision-maker, the opportunity to be heard, and reasons for the decision.[8] This definition of the

[5] Gornig, Gilbert *Menschenrechtlicher Mindeststandard* in: Schöbener (edn.) *Völkerrecht* (C.F. Müller 2014), p. 303 (*Menschenrechtlicher Mindeststandard*).
[6] Ibid., pp. 303-304.
[7] *Goldberg v. Kelly US Supreme Court* 397 U.S. 254 (1970).
[8] Ibid.

due process applicable in the domestic US context also reflects a common standard on the international level.[9]

Procedural rights in administrative, civil, or criminal law realize due process guarantees. The right to be heard or the right to an effective remedy render due process guarantees effective in judicial proceedings. They further ensure the fair, reasonable, and efficient application of the rule of law and fundamental constitutional principles in any system.[10]

The *European Convention on Human Rights*,[11] the *American Convention on Human Rights*,[12] the *African Charter on Human and Peoples' Rights*,[13] the *2004 Arab Charter on Human Rights*,[14] and the *International Covenant on Civil and Political Rights* (ICCPR)[15] contain fair trial rights and the right to effective remedy in criminal and

in civil procedures. Jointly, these principles form the basis of due process guarantees in domestic, regional, and international law.[16] Art. 47 of the *Charter of Fundamental Rights in the European Union (*EUChFR)[17] goes further and extends fair trial guarantees to 'everyone' in any proceeding and

[9] Kotuby, Charles Jr. and Sobota, Luke *General Principles of Law and International Due Process: Principles and Laws Applicable in Transnational Disputes* (Oxford University Press 2017), pp. 55-65.
[10] Grossi, Simona *Procedural Due Process* Seton Hall Circuit Review, 2017, Vol. 13, No. 2, pp. 155-202.
[11] European Convention on Human Rights, 213 U.N.T.S. 222, 1953, as amended by Protocols Nos. 11 and 14, supplemented by Protocols Nos. 1, 4, 6, 7, 12 and 13, 4 November 1950, ETS 5, Articles 6 and 13.
[12] Inter-American Convention on Human Rights, O.A.S.Treaty Series No 36, 1992, 1144 U.N.T.S. 123, *entered into force* July 18, 1978, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1, 25, Articles 8 and 25 (1).
[13] African Charter on Human and Peoples' Rights 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), Art. 7.
[14] 2004 Arab Charter on Human Rights, 22 May 2004, entry into force 15 March 2008, Arts. 12, 13. The first version of the Arab Charter was adopted in 1994, but no Arab League State had ratified it.
[15] International Covenant on Civil and Political Rights 1966, GA Res. 2200A (XXI) of 16 December 1966, 21 UN GAOR Supp. (No 16) 52, UN Doc. A/6316 (1966), 999 U.N.T.S. 171, Articles 14 (1) and 2 (3)(a).
[16] The Human Rights Committee has acknowledged in its *General Comment No. 32 on Article 14* that the fair trial guarantees in the ICCPR also apply to civil procedures. See Human Rights Committee *General Comment No. 32 Art. 14, Right to equality before courts and tribunals and to a fair trial* CCPR/C/GC/32, 23 August 2007, paras. 13, 16. The Arab Charter seemingly only contains fair trial rights in criminal proceedings.
[17] Charter of Fundamental Rights in the European Union, 2000 O.J.(C 364) 1, Article 47.

the right to remedy to anyone 'whose rights and freedoms guaranteed by the law of the Union are violated'.[18]

This extensive scope of application here is an exception among human rights conventions. Other human rights instruments limit their fair trial and effective remedy provisions to civil and criminal procedures while excluding (most) administrative procedures. Thus, these fair trial rights do not cover asylum processes and expulsion procedures on the domestic level.[19]

Which procedural safeguards should states provide to every individual to ensure a fair and effective asylum process?

This question has been highly debated for decades. Atle Grahl-Madsen notes in *Territorial Asylum* in 1980 that a minimum of process rights are desirable, such as 'the right to state [one's] position fully, orally or in writing, before a decision is taken.' He further promotes the establishment of a global safeguard that grants every migrant the right to an effective remedy.[20] In concrete terms, Grahl-Madsen suggests implementing procedural safeguards into the Draft of the United Nations Group of Experts of the Asylum Convention. His proposal went unheard. Almost 40 years later, the majority of states have not yet ratified a legally binding international convention containing such procedural safeguards for migrants.

This chapter will show that courts and treaty bodies have compensated for the lack of a globally binding convention governing the cross-border movement of people by taking extensive interpretations of the prohibition of collective expulsion.

[18] For a detailed analysis on the relationship between Art. 47 EUChFR and Art. 6 ECHR and the scope of application of Art. 6 ECHR in general see: Schabas, William *European Convention on Human Rights Commentary* (Oxford University Press 2015), pp. 264-327.
[19] For more details on the relationship between the prohibition of collective expulsion and fair trial rights in the respective human rights conventions, see below Chapter V.
[20] Grahl-Madsen, Alte *Territorial Asylum* (Oceana Publications 1980), pp. 56-57.

B. Procedural guarantees contained in the prohibition of collective expulsion

Which procedural guarantees are contained in the prohibition of collective expulsion? Is the standard comparable between the different codifications of the prohibition between the regional and international human rights instruments?

The following section first examines the procedural guarantees contained in the prohibition of collective expulsion in different regional human rights treaties to answer these questions. The section assesses the *European Convention on Human Rights* (ECHR) (I), followed by other regional conventions such as the *Charter of Fundamental Rights of the European Union* (EUChFR) (II), the *American Convention on Human Rights* (ACHR) (III), and the *African Charter on Human and Peoples' Rights* (ACHPR) (IV).

Next, the chapter provides an assessment of international conventions containing this principle. The *International Covenant on Civil and Political Rights* (ICCPR) is the starting point (V), followed by the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (*UN Migrant Worker Convention*, UNCRMW) (VI), and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (*Convention against Torture*, UNCAT) (VI).

The section then goes on to examine the different standards of guarantees in the conventions and demonstrates some of their commonalities.

I. Procedural guarantees against arbitrary collective expulsions in Art. 4 Prot. 4 *European Convention on Human Rights*

As Itamar Mann has put it, 'the European Court of Human Rights […] has in its jurisprudence on unauthorized migration developed some of its most fundamental tenets of human rights law.'[21] Mann refers to recent jurisprudence to underline this finding in which the ECtHR interpreted the prohibition of collective expulsion.[22]

One reason for the ECtHR's repeated engagement with the scope of protection of this provision is that the external migration control policy of ECHR member states has been changing since the 1990s, continuously focusing more and more on the outsourcing and extraterritorialisation of migration control measures.[23]

Since 2002, applicants have regularly invoked a violation of the prohibition in the fourth protocol in situations dealing not only with collective expulsion in the 'original' sense of resident foreigners from a state's territory. The prohibition of collective expulsion in the ECHR has also gained immense significance in non-admission scenarios and cases of immediate returns. As has been shown in Chapter II, D (see the definition of expulsion), the increasing popularity of relying on the prohibition of collective expulsion in non-admission cases can be traced back to the ECtHR's interpretation of the term 'expulsion,' including this set of expulsion scenarios into the scope of application.

The increased attention to the prohibition of collective expulsion in Art. 4 Prot. 4 ECHR in recent years has led to a set of decisions by the ECtHR that has helped clarify the scope of the provision. In its most recent Grand Chamber judgment, *N.D. and N.T. v. Spain*, the Court explicitly acknowledged the procedural character of the prohibition of collective expulsion stating that the provision

[21] Mann, Itamar *Humanity at Sea: Maritime Migration and the Foundations of International Law* (Cambridge University Press 2016), (*Humanity at Sea*), p. 3.
[22] Mann, Itamar *Humanity at Sea* p. 4.
[23] For a detailed analysis of such developments see: Gammeltoft-Hansen, Thomas *Access to Asylum* (Cambridge University Press 2011), (*Access to Asylum*).

> established a set of procedural conditions aimed at preventing States from being able to remove aliens without examining their personal circumstances and therefore without enabling them to put forward their arguments against the measure taken by the relevant authority.[24]

The Court emphasised the procedural safeguards a state must comply with when expelling individuals in groups. In the following, these procedural guarantees, contained in the prohibition of collective expulsion, will be addressed in turn, as foreseen in by the drafters of the fourth Protocol and as interpreted by the ECtHR and its predecessor.

As examined in Chapter II and as will be shown in the following, the provision contains both material elements and procedural guarantees. The ECtHR has used the 'collective' element as a gateway for reading concrete procedural guarantees into the provision. The Court defined 'collective' as the absence of an individual, reasonable, and objective examination. Thus, in order to determine the collective nature of an expulsion, the Court relies on a combination of the expulsion's background indicators[25] and an assessment of whether minimum procedural guarantees were upheld. The following section examines whether this approach of combining material and procedural elements by the Court is in line with the *travaux préparatoirs* of the *European Convention*, consistent throughout its case law, and in accordance with a systematic contextualisation of Art. 4 Prot. 4 ECHR within the *Convention* and its additional protocols.

1. Procedural guarantees in the drafting process of Art. 4 Prot. 4 ECHR

A close examination of the *Explanatory Report to Protocol No. 4* reveals that the Drafting Committee did not dismiss procedural guarantees in their entirety. The report states that '[i]t was also felt that a provision limited to guarantees of a procedural character would be *insufficient* and that it would

[24] *N.D. and N.T. v. Spain* ECtHR, [GC], para. 197.
[25] These are the existence of a government policy aimed at the expulsion of a specific group and the culpable conduct of the foreigners prior to their expulsion. See above, Chapter II.

be preferable to have no provision at all [emphasis added].'[26] It seems that the drafters kept the language purposefully vague to allow for broader interpretation in the future. The Commission dismissed a previous version of Art. 4. Prot. 4 ECHR, which suggested the possibility of restricting the provision in the case of a threat to national security. Instead the Commission offered a counterexample: today's version of the prohibition of collective expulsion.[27]

Interestingly, the procedural character of the initial proposal of the Drafting Committee resembled Art. 3 of the *1955 Convention on Establishment,* which was the first convention by the Council of Europe to include a list of guarantees for the prevention of arbitrary individual expulsions. However, the Committee decided to adopt an entirely new provision rather than copying the existing example.[28] The reason for this approach was to avoid conflict between the *Convention on Establishment* and the ECHR and to create a provision that did not limit the reasons for expulsion.[29]

Thus, the drafters of Art. 4 Prot. 4 ECHR desired a provision that offered room for interpretation, which not only contains procedural guarantees but a combination of both material and procedural elements.

2. Procedural guarantees in the case law on Art. 4 Prot. 4 ECHR

A close examination of relevant cases from *Alibaks and Others v. the Netherlands* of 1988 to the most recent decision in *N.D. and N.T. v. Spain* of 2020 reveals that the scope of Art. 4 Prot. 4 ECHR contains procedural guarantees.

[26] CoE *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 No. 46, 16 September 1963, (*Explanatory Report to Protocol No. 4*), para. 33 c).
[27] *Explanatory Report to Protocol No. 4* paras. 31-34.
[28] Henkaerts, Jean-Marie *Mass Expulsion in Modern International Law and Practice* p. 10.
[29] Ibid.

It is worth noting that the ambit of procedural guarantees in cases of collective expulsion before the ECtHR may vary depending on the specific agreements and laws the respective respondent state is bound by.

Art. 53 ECHR[30] establishes that the Court cannot interpret any provision in such a manner which would restrict the scope of any human right the respective party is bound by through other agreements.

Thus, in some instances, the applied principles do not necessarily need to stem directly from Art. 4 Prot. 4 ECHR, but can also come from specific laws applicable to the respondent state in question. The ECtHR has paid tribute to this obligation in several cases in which the respondent state was bound by EU law and other human rights agreements by interpreting the *Convention*'s rights in light of these other obligations.[31]

One example where the overlapping of EU and ECHR law in expulsion cases is of particular relevance is *N.D. and N.T. v. Spain*, which was decided by the Grand Chamber in February 2020. Here, the ECtHR mentioned *inter alia* Arts. 2 and 6 *Treaty on the European Union*[32], Arts. 18, 19, and 47 EUChFR[33], Arts. 67, 72, and 78 *Treaty on the Functioning of the European Union*[34] and several provisions of the *Schengen Border Code*[35] as relevant law for the case.[36]

Despite the possible influence of other agreements or international law obligations on the assessment of an alleged violation of the prohibition of collective expulsion by the Court, a certain minimum standard is guaranteed by Art. 4 Prot. 4 ECHR itself.

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[30] Art. 53 ECHR reads: 'Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party.'

[31] See for example in the context of migration: *M.S.S. v. Belgium and Greece* ECtHR, [GC] Appl. No. 30696/09, 21 January 2011, paras. 57-86, 250. Also: *Sufi and Elmi v.the United Kingdom* ECtHR, Appl Nos. 8319/07 and 11449/070, 28 November 2011, paras. 30-32, 219-226 and *Hirsi Jamaa and Others v. Italy* ECtHR, [GC], paras. 28-32, 135-136.

[32] EU *Consolidated version of the Treaty on European Union* 13 December 2007, 2008/C 115/01, C 115/1. Referred to in *N.D. and N.T. v. Spain* ECtHR, [GC], para. 41.

[33] *N.D. and N.T. v. Spain* ECtHR, [GC], para. 42.

[34] EU *Consolidated version of the Treaty on the Functioning of the European Union* 13 December 2007, 2008/C 115/01, OJ C 115/47. Referred to in *N.D. and N.T. v. Spain* ECtHR, [GC], para. 44.

[35] *N.D. and N.T. v. Spain* ECtHR, [GC], paras. 45-48.

[36] *N.D. and N.T. v. Spain* ECtHR [Chamber], paras. 20-32.

The European Commission of Human Rights engaged on numerous occasions with the interpretation of the prohibition of collective expulsion between 1968 and 1995. In none of these cases did the Commission find a violation of the prohibition of collective expulsion as set out in Art. 4 Prot. 4 ECHR.
Especially in the first cases, violations were ruled out immediately as the respective states had not ratified Protocol No. 4. The Commission ruled other cases as inadmissible as it could not find instances of collective expulsion as the respective state authorities had conducted objective and individual examinations.[37]

The first case in which the European Commission of Human Rights substantively examined a violation of the prohibition of collective expulsion occurred five years after the drafting of Protocol No. 4. Even though the details of the case have not been made public, one short paragraph available in the *Digest of Strasbourg Case-Law relating to the European Convention on Human Rights* reveals that Art. 4 Prot. 4 'prohibits collective expulsion of aliens but not expulsion *strictly limited* to individuals [emphasis added]'.[38]
The Commission ruled this case inadmissible as

> it clearly appears from the applicants' submissions that the decision to expel them was based on particular circumstances relating to each of the applicants as individuals; whereas, therefore, this decision concerned an expulsion strictly limited to

[37] The first published case where Art. 4 Prot. 4 ECHR was alleged was *X v. the Federal Republic of Germany*, no. 3110/67, Commission decision of 19 July 1968, see also: Dec. Adm. Comp. Ap. 3803/68, 3804/68, 4 October 1968 (unpublished); Digest of Strasbourg Case-Law relating to the European Convention on Human Rights, Vol. 5 (Carl Heymanns Verlag 1985), p. 890, *X contre la Belgique*, no. 5351/72 6579/74, Commission decision of 18 July 1974. *Becker v. Denmark* EComHR, Appl. No.7011/75, 3 October 1975, Decisions and Reports 4; *K.G. v. Germany*, no. 7704/76, Commission decision of 11 March 1977*; O. and Others v. Luxembourg*, no.7757/77, Commission decision of 3 March 1978; *Alibaks and Others v. the Netherlands*, Appl. No.14209/88, Commission decision of 16 December 1988, Decisions and Reports 59 (*Alibaks v. the Netherlands*); *Tahiri v. Sweden*, no. 25129/94, Commission decision of 11 January 1995.
[38] Dec. Adm. Comp. Ap. 3803/68, 3804/68, 4 October 1968 (unpublished), paragraph reprinted in Digest of Strasbourg Case-Law relating to the European Convention on Human Rights, Vol. 5 (Carl Heymanns Verlag 1985), (*Digest of Strasbourg Case-Law*), Article 4, Protocol IV, p. 890.

> particular individuals and the said Article is therefore not applicable.[39]

This unpublished case, from 1968, together with the Commission's findings on Art. 4 Prot. 4 ECHR in *Becker v. Denmark* of 1975, set the basis for today's understanding of the provision's scope of protection. In *Becker v. Denmark*, the Commission defined collective expulsion as

> any measure of the competent authority compelling aliens as a group to leave the country, except where such a measure is taken after and on the basis of a reasonable and objective examination of the particular cases of each individual alien of the group.[40]

The case concerned the repatriation of a group of about two hundred Vietnamese children by the Danish authorities. The claimant, Henning Becker, a journalist and the director of the Project Children's Protection and Security International (CPSI), alleged the Danish Government to have violated the *Convention* through the children's envisaged repatriation. Most of the children belonged to the ethnic Montagnard minority and had been brought to Denmark years before for reasons of safety.[41]

Here, the applicant claimed that the test the Commission should apply to determine a violation of Art. 4 Prot. 4 ECHR should be to examine whether 'a group of persons is expelled without due regard to the individual case.'[42] The Commission followed Becker's claim. Nevertheless, it did not elaborate on how the respective authorities should consider each case as it dismissed

[39] *Digest of Strasbourg Case-Law* p. 890.
[40] *Becker v. Denmark* EComHR, Appl. No. 7011/75, 3 October 1975, DR 4, p. 236. The Commission and Court referred to this finding in several cases as a source for defining collective expulsion amongst others in *K.G. v. the Federal Republic of Germany* EComHR, Appl. No. 7704/76, 11 March 1977, unreported; *O. and Others v. Luxembourg* EComHR, Appl. No. 7757/77, 3 March 1978, unreported; *A. and Others v. the Netherlands* EComHR, Appl. No. 14209/88, 16 December 1988, DR 59, p. 274; *Andric v. Sweden* ECtHR, Appl. No. 45917/99, 23 February 1999 (*Andric v. Sweden*); *Čonka v. Belgium* ECtHR; *Davydov v. Estonia* ECtHR, Appl. No. 16387/03, 31 May 2005; *Berisha and Haljiti v. "the former Yugoslav Republic of Macedonia"* ECtHR, Appl. No. 18670/03, ECHR 2005-VIII; *Sultani v. France* ECtHR, Appl. No. 45223/05, ECHR 2007-IV; *Ghulami v. France* ECtHR, Appl. No. 45302/05, 7 April 2009; and *Dritsas and Others v. Italy* ECtHR, Appl. No. 2344/02, 1 February 2011; *Hirsi Jamaa and Others v. Italy* ECtHR, [GC], para. 166.
[41] *Becker v. Denmark* EUComHR p. 217.
[42] Ibid., p. 231.

the applicant's claims in four short paragraphs as it did not find the expulsion to be collective in nature.

Even though the Commission did not find any violation of Art. 4 Prot. 4 ECHR in its case law, it interpreted the provision as implicitly containing procedural guarantees. Thus, Art. 4 Prot. 4 ECHR protects each foreigner who is not individually expelled but with others under similar circumstances. Each foreigner has the right to an objective and reasonable examination of his or her circumstances.

The relevance of the Commission's interpretation of the prohibition of collective expulsion, which laid the basis for the ECtHR's interpretation of the provision since the early 2000s, must not be underestimated. The fact that the ECtHR continues to refer to these fundamentals in its judgments substantiates this point.[43]
The Court further defined, substantively and in detail, the Commission's groundwork in 15 cases between 2002 and 2017 dealing with an alleged violation of the prohibition.

Looking at the circumstances of the alleged collective expulsions in these judgments, it becomes apparent why the more detailed interpretation of the procedural guarantees became necessary. The circumstances of collective expulsions in the cases that reached the Court became more diverse over time. Claimants alleged a violation of Art. 4 Prot. 4 ECHR in push-back scenarios on the high seas[44], non-admission scenarios[45], and immediate summary expulsions known as 'hot returns'[46]. As elaborated above,[47] it remains to be seen whether the Court has put a stop to the successful lodging of cases pertaining to this last type of expulsions *per se* in the recent Grand Chamber

[43] See for example the reference by the Court to the Commission's case *Becker v. Denmark* in *Čonka v. Belgium*, *Davydov v. Estonia, Berisha and Haljiti v. "the former Yugoslav Republic of Macedonia", Sultani v. France* or *Hirsi Jamaa and Others v. Italy*.
[44] See: *Hirsi Jamaa v. Italy* ECtHR, [GC], Appl. No. 27765/09, 23 February 2012.
[45] See: *Hirsi Jamaa and Others v. Italy* ECtHR, [GC].
[46] See: *Khlaifia and Others v. Italy* ECtHR, [GC], Appl. No. 16483/12, 15 December 2016 and most recently *N.D. and N.T. v. Spain* ECtHR, [Chamber, GC].
[47] See Chapter II, A.

judgment of *N.D. and N.T. v. Spain*.[48] Before this recent judgment, the Court had established two categories of collective expulsion scenarios that evolved through the ECtHR's interpretation of the prohibition. The first was the expulsion of foreigners from a state's territory that had already resided in the state for a 'more extended period'. The Court did not define the duration of this period. It follows from the relevant case law that it must be longer than several months. This category of expulsions is referred to as the *original* form of collective expulsion as envisioned by the drafters of the convention.

The second scenario, referred here to as *summary collective expulsion* deals with immediate group expulsions of non-nationals. State officials either expel the foreigners upon entry, prevent them from entering, or conduct hot returns. The latter are physical removals of migrants immediately after their entry and interception. This distinction becomes visible when it comes to the level of procedural guarantees for the respective foreigners.

The Grand Chamber in *N.D. and N.T. v. Spain* now seemingly deviated from this categorisation. What remained untouched by the judgment was the differentiation between original and summary collective expulsions as such, and the fact that migrants affected by the latter form of collective expulsion receive a lower level of protection.

However, the novelty of the Court's approach in this judgment lays in an apparent subdivision of categories of summary collective expulsion scenarios. It seems that the Court argues that there is a distinction between the levels of protection in this category of expulsions depending on the access path the foreigners chose.[49] In the case the expelled applicants entered by sea, then the reduced level of protection described below remains untouched

[48] For a more detailed assessment on the effects of this judgment see below, Chapter IV.

[49] See for example: *N.D. and N.T. v. Spain* ECtHR, [GC], paras. 127 and in particular 166. Here the Court stressed that 'in the present case it is called upon *for the first time* to address the issue of the *applicability of Article 4 of Protocol No. 4* to the *immediate* and *forcible return* of aliens *from a land border*'. Judge Pauliine Koskelo acknowledges this impression in her partly dissenting opinion where she criticizes that "according to the judgment, the general principles developed on the merits only concern situations at the external land borders of a State Party. While it is clear that the factual circumstances of border surveillance and controls at sea or sea borders may differ from those prevailing at land borders, in particular as the situations at sea may involve particular legal obligations relating to the rescue of the aliens concerned (reflected in the Hirsi Jamaa and Khlaifia case-law), this will not necessarily always be the case. It is not clear why the legal principles at land and sea borders should be different generally, regardless of whether the actual circumstances of a given situation differ in any significant respect." See: *N.D. and N.T. v. Spain* ECtHR, [GC], Partly Dissenting Opinion of Judge Koskelo, para. 38.

compared to the relevant case law in *Hirsi Jamaa and Others v. Italy* and *Khlaifia and Others v. Italy*. As long as the expelling state did not at least identify the applicants in question in this scenario, the prohibition is violated. While the Chamber judgment in *N.D. and N.T. v. Spain* supported the applicability of this conclusion to *all* summary collective expulsion cases, this is no longer viable given the Grand Chamber judgment in this case. The Court seemingly held that migrants in such circumstances may fortify their opportunity to bring forward arguments against their expulsion. The language of the Court is ambiguous about the relevant circumstances or conditions.[50] Given the object and purpose of the prohibition to offer a genuine and effective possibility against arbitrary expulsions and the Court's previous case law in summary collective expulsion cases such as *Hirsi Jamaa and Others v. Italy* and *Khlaifia and Others v. Italy*, this reading appears plausible. Decisions on related and currently pending cases at the Court may hopefully clarify this important matter.[51]

a. Objective and individual assessment of claims against the expulsion

An individual, reasonable, and objective examination of the circumstances of each member of the group before expulsion is the cornerstone of the prohibition of collective expulsion. This is highlighted in the *Twenty Guidelines on Forced Return* adopted by the Committee of Ministers of the Council of Europe (ComMCoE) in 2005.[52]

In accordance with Art. 15 Statue of the Council of Europe[53], the ComMCoE can make recommendations on a particular matter to the governments of the Council's member states. In turn, states shall report on the measures taken to implement such recommendations into the domestic sphere upon request by

[50] The Court seemingly found that only migrants that entered via a land border irregularly, forcefully, *en masse*, and in an organised manner lose the right to an effective possibility to bring forward their claims, see: *N.D. and N.T. v. Spain* ECtHR, [GC], paras. 201, 231.
[51] *Doumbe Nnabuchi v. Spain* ECtHR, Appl. No. 19420/15, communicated to Spain on 13 December 2015, only available in French, pending and *Balde and Abel v. Spain* ECtHR, Appl. No. 20351/17, communicated to Spain on 12 June 2017, only available in French, pending. Both cases deal with alleged collective expulsion from Spain to Morocco.
[52] CoE, Committee of Ministers *Twenty Guidelines on Forced Return* September 2005 (*Twenty Guidelines on Forced Return*).
[53] CoE *Statute of the Council of Europe* European Treaty Series No. 1, 5 May 1949.

the Committee.[54] The *Guidelines on Forced Return* fall into this category of recommendations to the member states.[55]

The guidelines' preamble highlights that the listed principles, including the prohibition of collective expulsion, reflect existing binding law and serve as a collection of best practice[56] in order to unify member states' standards on removing foreigners.[57] It is intended to serve as a practical tool for lawmakers and state officials conducting removal procedures to ensure the adherence of domestic law and removal practices with the ECHR and its protocols.[58]

Even though recommendations by the ComMCoE are non-binding, the guidelines are made up of a collection of existing binding international law.

As the ECtHR has clarified that 'the Convention cannot be interpreted in a vacuum and should in as far as possible be interpreted in harmony with other rules of international law of which it forms part'[59] (and make similar statements in several other cases), the Court can consult the recommendations when considering applicable international principles in cases dealing with collective expulsions. For example, in its *N.D. and N.T. v. Spain* Grand Chamber judgment of February 2020, it relied on these guidelines as a relevant source for the interpretation of the scope and applicability of the prohibition of collective expulsion in the case at hand.[60]

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[54] Art. 15 Statute of the Council of Europe reads: 'a On the recommendation of the Consultative Assembly or on its own initiative, the *Committee of Ministers shall consider the action required to further the aim of the Council of Europe*, including the conclusion of conventions or agreements and the *adoption by governments of a common policy* with regard to particular matters. Its conclusions shall be communicated to members by the Secretary General.
b In appropriate cases, the *conclusions* of the Committee *may take the form of recommendations to the governments of members*, and the Committee may *request the governments of members to inform* it of *the action taken* by them with regard to such recommendations [emphasis added].'

[55] CoE *Twenty Guidelines on Forced Return* Preamble, No. 1.

[56] Only the representative for the United Kingdom reserved the right of his country to 'comply or not' with specific guidelines under the Rules of Procedure for the meetings of the Ministers' Deputies, see: Council of Europe *Twenty Guidelines on Forced Return* footnote on p. 1.

[57] CoE *Twenty Guidelines on Forced Return* Preamble, p.1.

[58] Ibid.

[59] *Hassan v. the Unied Kingdom* ECtHR, [GC], Appl. No. 29750/09, 16 September 2014, para. 77 referring to *Al-Adsani v. the United Kingdom* ECtHR, [GC], Appl. No. 35763/97, 21 November 2011, para. 55

[60] *N.D. and N.T. v. Spain* ECtHR, [GC], paras. 53, 54, 177 referring to the Preamble of the Guidelines and Guideline 2 dealing with the adoption of removal orders. The Guideline is mentioned in the section 'Relevant Legal Framework and Practice' and in 'The Court's assessment' on the applicability of Art. 4 Prot. 4 ECHR in the case in question.

In the introduction to the *Twenty Guidelines on Forced Return*, the Committee emphasises member states' obligation to grant 'every person seeking international protection' due process rights such as

> the right [that] his or her application [is] treated in *a fair procedure* in line with international law, which includes access to an *effective remedy* before a decision on the removal order is issued or is executed [emphasis added].[61]

Furthermore, Guideline 3 specifically contains the prohibition of collective expulsion stipulating that

> [a] 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. The collective expulsion of aliens is prohibited.[62]

The commentary to Guideline 3 clarifies the ambit of protection of the prohibition that

> [t]his rule does not prohibit the material organisation of departures of groups of returnees, but the removal order must be based on the circumstances of the individual who is to be removed, even if the administrative situations of the members of that group are similar or if they present certain common characteristics.[63]

The Committee stated in these guidelines that member states must grant every foreigner seeking international protection due process rights. They highlighted, in particular, the right of every foreigner to bring forward her or his claims to protection and to have them examined. As the ECtHR itself cites

[61] Council of Europe *Twenty Guidelines on Forced Return* p. 7.
[62] Ibid., p. 16.
[63] Ibid., p. 17.

these Guidelines as a relevant source for its interpretation of the scope of Art. 4 Prot. 4 ECHR, the above-mentioned guarantees are of particular relevance for subsequent key questions: What exactly constitutes an objective and individual assessment in the sense of Art. 4 Prot. 4 ECHR? Does the provision guarantee, in all circumstances, an individual interview to bring forward claims?

An assessment of the relevant case law pertaining to Art. 4 Prot. 4 ECHR suggests that the answers to these questions differ depending on the previously described category of collective expulsion.

In the case of original collective expulsion cases, the expelling state satisfies the requirement to an objective and individual assessment by conducting an examination of each foreigners' circumstances in an interview or hearing. A competent authority or, if necessary, the domestic courts must conduct such an assessment.

This is not the case in summary collective expulsion scenarios. Here, as will be explained below, the possibility to bring forward any claims before the expulsion satisfies the requirement to an objective and individual assessment. The Court established in previous judgments that in case the expelling state did not identify the foreigners in question before their removal, the authorities have manifestly denied them the possibility to an objective and individual examination. Thus, expulsion procedures without an identification process necessarily constitute a violation of Art. 4 Prot. 4 ECHR.

This distinction becomes apparent when jointly assessing the ECtHR cases *Hirsi Jamaa and Others v. Italy* (Grand Chamber), *Khlaifia and Others v. Italy* (Grand Chamber), and *N.D. and N.T. v. Spain* (Chamber and Grand Chamber), which all deal with summary collective expulsions. In *Hirsi Jamaa and Others v. Italy* and *N.D and N.T. v. Spain*, the expelling authorities did not identify the applicants[64] and thus were denied the possibility to an objective and individual assessment. Thus, the respondent states in these two cases manifestly violated Art. 4 Prot. 4 ECHR. In *Khlaifia and Others v. Italy* in contrast, the applicants were identified by Italian authorities and thereby, in the Court's view, received the possibility to an objective and individual

[64] *Hirsi Jamaa and Others v. Italy* ECtHR, [GC], para. 185; *N.D. and N.T. v. Spain* ECtHR, [Chamber], para. 107; N.D. and *N.T. v. Spain* ECtHR, [GC], para. 207.

examination[65], as an individual interview was found to be not a guarantee under all circumstances.[66] Thus, Italy did not violate Art. 4 Prot. 4 ECHR in this case.

Neither the Commission nor the Court has ever explicitly stipulated that Art. 4 Prot. 4 ECHR includes the right to an individual interview in any collective expulsion case. The basis for this claim is arguably implicitly contained in the Grand Chamber's *Khlaifia and Others v. Italy* decision in 2016, before which the right to an individual interview seemed to have been implicitly clarified by the establishment of the individual examination requirement.

The applicants in *Khlaifia* brought this issue back to the table. They highlighted in their submissions 'that the key issue in the present case was whether an individual interview was necessary prior to their expulsion'[67] in accordance with Art. 4 Prot. 4 ECHR. They argued that excluding a mandatory 'individual interview would render meaningless the procedural safeguard of Article 4 of Protocol No. 4.'[68]

The finding that brought into question whether Art. 4 Prot. 4 ECHR guarantees a mandatory and individual interview was the Grand Chamber's conclusion that

> *Article 4 of Protocol No. 4 does not guarantee the right to an individual interview in all circumstances*; the requirements of this 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

[65] *Khlaifia and Others v. Italy* ECtHR, [GC], para. 246.
[66] Ibid., para. 248.
[67] Ibid., para. 220.
[68] Ibid. Denise Venturi raised a similar question in her assessment of the Khlaifia Grand Chamber judgment on the interpretation of Art. 4 Prot. 4 stating that 'the Court's conclusion on this aspect leaves several doubts and open questions behind. It appears to undermine the ECHR's guarantees applicable to expulsion; if the right to an individual interview is not provided for by Article 4 Protocol 4, how can a collective expulsion be effectively forestalled? Such interpretation restricts the scope of this provision inevitably.' *The Grand Chamber's ruling in Khlaifia and Others v Italy: one step forward, one step back?* Strasbourg Observer, 10 January 2017, available at: https://strasbourgobservers.com/2017/01/10/the-grand-chambers-ruling-in-khlaifia-and-others-v-italy-one-step-forward-one-step-back/#more-3466.

> appropriate manner by the authorities of the respondent State [emphasis added].[69]

The Court left it open to interpretation in which circumstances an interview is mandatory. However, it seems that the obligation to conduct individual interviews in original expulsion cases results from the negation of this duty in cases of collective *summary* expulsions.

An assessment of the original cases of collective expulsion from *Čonka v. Belgium* to *Georgia v. Russia (I)*, where the Court found a violation of Art. 4 Prot. 4 ECHR, supports this claim. It becomes apparent that the respective state authorities had always identified all of the applicants prior to their expulsion, but fell short of interviewing them. *Ergo*, it seems that the Court found the granting of a mere possibility (in the form of an identification procedure) was not enough to satisfy the requirements of the prohibition in these cases. What follows from this finding is that states in these cases should have provided more than a mere theoretical possibility for assessing the individual circumstances objectively. This can only be achieved through an individual interview or hearing. An alternative reading of these facts could be that the Court did deviate in *Khlaifia* entirely from its line of jurisprudence not requiring interviews even in *original* cases of collective expulsion. The Grand Chamber's statement that interviews are not guaranteed *in all circumstances* combined with the assessment of the case law on original expulsion cases speak in favour of the less restrictive of the two readings.

Following from this, in *summary* collective expulsions, the foreigners' *possibility* to bring forward claims satisfies the requirement to an individual and objective examination, as an interview is not mandatory in all circumstances. It follows from the negation of this obligation in *summary* collective expulsion cases that in *original* collective expulsion cases, where the mere possibility is not sufficient to fulfil the same requirement, only an individual interview meets this standard.

Judge Georgios Serghides, in his partly dissenting opinion in the Grand Chamber's *Khlaifia* judgment, criticises at length the Court's approach to

[69] *Khlaifia and Others v. Italy* ECtHR, [GC], para. 248.

defining the scope of protection as providing the mere 'genuine and effective possibility' to bring forward individual claims for protection. He points out that

> [t]his interpretation departs from the Court's previously established case-law, according to which the aim of Article 4 of Protocol No. 4 is invariably to prevent States from being able to proceed with collective expulsions of aliens without examining, through the procedure of a personal interview, the individual circumstances of each one. In other words, this interpretation disregards the mandatory nature of the procedural obligation of the authorities to conduct personal interviews in all cases engaging Article 4 of Protocol No. 4.[70]

The applicants in *Khlaifia and Others v. Italy* argued that Italian officials had failed to conduct personal interviews. Italy rebutted this claim arguing that each foreigner enjoyed a 'genuine individual interview, carried out in the presence of an interpreter or cultural mediator, following which the authorities had filled out an "information sheet" containing personal data and any circumstances specific to each migrant'. These sheets, however, could not be presented in Court as a fire destroyed them.[71] Assessing this discrepancy of facts, the Grand Chamber concluded that 'the [Italian] Government provided a plausible explanation to justify their inability to produce the applicants' information sheets'. The Court further pointed out that at the time in question, numerous translators, social workers, psychologists, and cultural mediators were present. This leads to the conclusion that it is 'reasonable to assume' that these people conducted individual interviews.[72]

[70] Jude Serghides Partly Dissenting Opinion in *Khlaifia and Others v. Italy* ECtHR, [GC], para. 12.
[71] *Khlaifia and Others v. Italy* ECtHR [GC], paras. 224, 245.
[72] Ibid., para. 246.

The Court has been criticised for this finding as it did not establish clear terms of how such a 'genuine and effective possibility' would look like in practice.[73]

The Grand Chamber's analysis of the case in question does not help in clarifying this uncertainty. Without mentioning the interviews again, the Court refers to the existence of the *possibility* for each applicant to raise claims against their expulsion (as claimed by Italy and rebutted by the applicants).[74]

Thus, it seems that the Court deemed the situation to be one that does not require an individual interview. Further, it seems that the Court concludes that each applicant had missed her or his opportunity to bring forward their claims against their expulsion. This finding, in turn, led to the conclusion that Art. 4 Prot. 4 was not violated. Next, the Court made a surprising statement given the broad personal scope of application of the provision encompassing every foreigner irrespective of their reasons for entering a state's territory.
Summarizing the applicants' situation at hand, the Court concluded that

> the applicants' representatives, both in their written observations and at 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 preclude their removal[75].

This *ex post* perspective seemingly contradicts the established broad scope of protection *ratione personae,* which includes every foreigner. Art. 4 Prot. 4 ECHR equally protects migrants and asylum seekers as clarified in settled ECtHR case law. Thus, it seems unlikely that the Court wanted to draw such a distinction, as it did not stipulate that individual interviews are only required in the case a foreigner brings forward substantive claims for protection.

[73] Goldenziel, Jill *Khlaifia and Others v. Italy- International Decisions* American Journal of International Law, 2018, Vol. 112, Issue 2, p. 279.
[74] *Khlaifia and Others v. Italy* ECtHR [GC], paras. 249, 250.
[75] Ibid., para. 253.

Stefano Zirulia, who represented the applicants in the proceedings before the Grand Chamber, argued that the Court established a new requirement in this paragraph. He argues that states must now conduct individual interviews 'only in the presence of risks to life or physical well-being itself.' He concludes that '[t]his interpretation, in fact, makes the provision of Article 4 of Protocol No. 4 virtually useless (*interpretatio abrogans*), assuming that the same identical result is reached by directly applying the principle of non-refoulement.'[76]

Even though Zirulia's concern regarding a devaluation of the prohibition's scope through the introduction of the possibility standard is valid given that migrants in *summary* collective expulsion cases are at least equally vulnerable to those in *original* cases, and thus should deserve the same level of protection, his argument deserves a closer examination. Despite the introduction of the distinct levels of protection depending on the situation of the expulsion, Art. 4 Prot. 4 ECHR did not lose its stand-alone value. As will be shown in more detail[77], the prohibition of collective expulsion and the *non-refoulement* principle continue to be two independent, mutually reinforcing principles that offer migrants distinct guarantees against arbitrary expulsion. The prohibition of collective expulsion continues to guarantee at least the *possibility* of bringing forward a claim against the expulsion and have it assessed. The *non-refoulement* principle, in contrast, guarantees a much narrower assessment, namely only whether a removal would constitute a risk to the individual's life or well-being. Thus, the prohibition of collective expulsion ultimately safeguards the *non-refoulement* principle in terms of procedure as it continues to guarantee that the fear of return be assessed by the respective authorities.

Hence, even though the Grand Chamber seemingly established different levels of protection for foreigners in the original and summary collective expulsion scenarios in *Khlaifia*, when it comes to the right to an interview, the Court did not devalue the prohibition in its entirety.

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[76] Zirulia, Stefano *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 January 2017, available at: http://eulawanalysis.blogspot.com/2017/01/a-template-for-protecting-human-rights.html.

[77] See in Chapter V, B.

b. Legal assistance / Assistance of a translator

One factor that is of particular relevance to collective expulsion cases is the lack of due process guarantees. In such cases, these guarantees include, among other things, the possibility to receive legal assistance and/or a translator before the expulsion.

Given the circumstances of the collective expulsion cases before the ECtHR, it seems likely that most applicants required the assistance of a translator and/or a legal representative.

It is unlikely that all migrants are aware of their rights and duties regarding how and when to bring forward their claims to the competent authorities.

The requirement is only satisfied if the individuals are informed of their rights and have a fair chance of raising their claims.

This procedural guarantee is rooted in the ECtHR's case law on Art. 4 Prot. 4 ECHR.

The ECtHR acknowledged this, for example, in the 2014 *Sharifi v. Italy and Greece* case on collective expulsions from one EU state to another based on the 'Dublin system'. The ECtHR clarified here that the Dublin system itself does not justify collective and indiscriminate returns between EU member states.[78] This finding was primarily based on the fact that the access of the affected migrants and asylum seekers to legal assistance and an interpreter depended on the goodwill of the border police. In most cases, state authorities directly returned the migrants and asylum seekers to the country of first arrival under the Dublin regulations.[79]

Furthermore, the Court had previously highlighted in *Čonka v. Belgium* that 'it was very difficult for the aliens to contact a lawyer'[80]. This circumstance was one relevant factor expressly considered by the Court to determine whether the officials had conducted a genuine, objective, and individual examination.

[78] *Sharifi and Others v. Italy and Greece* ECtHR [Chamber], paras. 214-225.
[79] Ibid., para. 215.
[80] *Čonka v. Belgium* ECtHR, para. 62.

The right to legal assistance and a translator seemingly also applies to situations of summary collective expulsions. The Court itself has never acknowledged this explicitly, but in two cases dealing with summary expulsions, it found a violation of the prohibition based *inter alia* on the fact that the applicants were deprived of the possibility to bring forward their claims assisted by lawyers and interpreters.[81] In the Chamber judgment of *N.D. and N.T. v. Spain*, the Court explicitly highlighted the importance of legal assistance in order not to establish a 'systematic policy of irregular returns which lacked any legal basis.'[82] The Grand Chamber in this case did not reiterate this finding, but referred to several sources applicable to the case at hand that explicitly stipulates this guarantee, such as the *EU Return Directive*.[83]

In contrast, in *Khlaifia and Others v. Italy* the Grand Chamber found *inter alia* no violation of the prohibition as several cultural mediators, interpreters, and other personnel were constantly present at the detention site.[84]

These three examples show that the ECtHR deems the absence or presence of legal assistance and/or a translator in summary collective expulsion scenarios to be relevant to the determination of a violation of Art. 4 Prot. 4 ECHR. *Ergo*, it seems that these rights should also be guaranteed by the prohibition in summary collective expulsion cases.

Furthermore, the Commissioner for Human Rights of the Council of Europe (Human Rights Commissioner) Nils Muižnieks stressed the relevance of such assistance in his press release on Spain's hot-return policy at the Spanish-Moroccan border fence. Here the Human Rights Commissioner highlighted the absolute necessity of such a basic standard. He summoned the Spanish authorities 'to ensure that material and human resources, including adequate numbers of trained police officers, lawyers, and interpreters, are made available' to ensure adherence to 'fundamental human rights safeguards.'[85]

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[81] *Hirsi Jamaa and Others v. Italy* ECtHR, [GC], para. 185 and *N.D. and N.T. v. Spain* ECtHR, [Chamber], para. 12.
[82] *N.D. and N.T. v. Spain* ECtHR [Chamber], para. 67.
[83] 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 (EU Return Directive), see: *N.D. and N.T. v. Spain* ECtHR, [GC], para. 47.
[84] *Khlaifia and Others v. Italy* ECtHR [GC], para. 246.
[85] *N.D. and N.T. v. Spain* ECtHR [Chamber], para. 42.

This press release, as cited by the ECtHR in *N.D. and N.T. v. Spain*,[86] highlights the urgency of the assistance of a legal counsellor and a translator not only 'original' instances of collective expulsions, but also in 'summary' collective expulsion scenarios.

In conclusion, the prohibition of collective expulsion in Art. 4 Prot. 4 ECHR guarantees the right to legal assistance and a translator. This guarantee is equally applicable in cases of expulsions of resident foreigners from a state's territory (original collective expulsion) as well as in cases of summary collective expulsion scenarios at least in cases in which the applicants did not enter via land borders and did not fortify these rights by their own previous conduct.

c. The right to an effective remedy/suspension of expulsion

The right to an effective remedy is equally essential to ensure minimum due process guarantees against arbitrary collective expulsions. This right has played a particular role in all ECtHR cases where a violation of Art. 4 Prot. 4 ECHR was alleged, including both original and summary collective expulsion cases.

The *Convention* guarantees this right in Art. 4 Prot. 4 ECHR directly[87] or Art. 4 Prot. 4 in conjunction with Art. 13 ECHR.[88] Either way, both guarantee that the foreigners in question have access to an effective remedy that prevents the execution of the expulsion as its consequences may be irreversible. The remedy must thus trigger the suspension of the expulsion.[89]

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[86] Ibid. The Court cites the press release in its 'Facts' section under heading V. Council of Europe Documents.

[87] The Court held in *Georgia v. Russia (I)* [GC] that 'the finding of *a violation of Article 4 of Protocol No. 4* and of Article 5 § 4 of the Convention *in itself* means that there was a *lack of effective and accessible remedies*. Accordingly, there is *no need to examine separately the applicant Government's complaint of a violation of Article 13* of the Convention taken in conjunction with those Articles [emphasis added]', see para. 212.

[88] See for example: *Khlaifia and Others v. Italy* ECtHR, [GC], para. 256. The applicants alleged *inter alia* a violation of their right to an effective remedy in accordance with Art. 4 Prot. 4 ECHR in conjunction with Art. 13 ECHR as they were not afforded an effective remedy before a national authority.

[89] *Čonka v. Belgium* ECtHR, para. 79.

However, it seems that the Court again differentiates between the two sets of expulsion scenarios. In situations of original collective expulsions, the remedy must necessarily trigger the suspensive effect of the expulsion.

In contrast, the Grand Chamber stressed in *Khlaifia and Others v. Italy* that the automatic suspensive effect of a remedy against an expulsion order is not an absolute obligation in summary collective expulsion cases where the *possibility* to bring forward claims satisfies the obligation to an objective examination.

The Grand Chamber clarified that only if the foreigner in question alleges that there is a real risk of a violation of her or his right to be free from inhuman or degrading treatment upon return (*non-refoulement*, Art. 3 ECHR), must the order trigger the suspensive effect.[90] The same applies in the case of an ongoing asylum claim or other protection determination procedures that trigger the suspension of the expulsion.[91]

The Grand Chamber found that if no such claims are made by the foreigner in question and no such procedure is ongoing, then 'an effective possibility of challenging the expulsion decision by having a sufficiently thorough examination […] carried out by an independent and impartial domestic forum' satisfies a fulfilment of the right to an effective remedy.[92]

In two prior cases, *Hirsi Jamaa and Others v. Italy* and *Sharifi and Others v. Italy and Greece*, the Court found that the non-existence of any domestic remedy for asylum seekers may lead to a violation of Art. 4 Prot. 4 in conjunction with Art. 13 ECHR.[93]

These findings highlight that an effective possibility to challenge the expulsion order in summary collective expulsion cases requires that the state in question at least provides remedies that may trigger the suspensive effect in certain circumstances and that the state does not prevent migrants from lodging asylum applications or domestic remedies.[94]

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[90] *Khlaifia and Others v. Italy* ECtHR, [GC], para. 281.
[91] Ibid., para. 281.
[92] Ibid., para. 279.
[93] *Hirsi Jamaa and Others v. Italy* ECtHR, [GC], paras. 201-207 and *Sharifi and Others v. Italy and Greece* ECtHR, Appl. No. 16643/09, 21 October 2014 (*Sharifi and Others v. Italy and Greece*), paras. 240-243.
[94] In *Hirsi Jamaa and Others v. Italy* ECtHR, [GC], the Court held that Italy violated the applicants' 'right to obtain sufficient information to enable them to gain effective access to the relevant procedures and to substantiate their complaints', see para. 204. In *Sharifi and Others v. Italy and Greece* the Court stressed the link between collective expulsions and the

According to the ECtHR's case law, Art. 4 Prot. 4 ECHR alone or in conjunction with Art. 13 ECHR guarantees the availability of such measures to migrants and asylum seekers alike.[95]

However, this is not applicable in cases of summary collective expulsions of foreigners that entered via land borders and forfeited their right due to their prior 'culpable conduct'. In *N.D. and N.T. v. Spain*, the Grand Chamber found no violation of Art. 13, taken in conjunction with Art. 4 Prot. 4 ECHR, reiterating its standpoint on the forfeiture of guarantees against collective expulsions, stating that

> The applicants placed themselves in an unlawful situation by deliberately attempting to enter Spain by crossing the Melilla border protection structures on 13 August 2014 as part of a large group and at an unauthorized location. […] In so far as the Court has found that the lack of an individualised procedure for their removal was the consequence of the applicants' own conduct in attempting to gain unauthorised entry at Melilla […], it cannot hold the respondent State responsible for not making available there a legal remedy against that same removal.[96]

Within the internal logic of the Grand Chamber's reasoning in this case, the denial of a violation of the right to an effective remedy with reference to the absence of a violation of Art. 4 Prot. 4 ECHR is consistent. Nevertheless, this conclusion leads to a *de facto* restriction of the right to an effective remedy to regular migrants, irregular migrants entering by sea, and irregular migrants who did not forteit their right to such remedies.[97]

In conclusion, the scope of protection of Art. 4 Prot. 4 in conjunction with Art. 13 ECHR or, alternatively, Art. 4 Prot. 4 ECHR itself, guarantees the

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intentional prevention of the lodging of asylum claims or other domestic procedures, see paras. 242-243.

[95] *Sharifi and Others v. Italy and Greece* ECtHR, paras. 242-243.

[96] *N.D. and N.T. v. Spain* ECtHR, [GC], para. 242.

[97] This could be the case if the expelling state does not provide any effective possibility to apply for asylum at the border or elsewhere or arguably, if the migrant in question did not enter the territory forcefully and by making use of a large group of other migrants to cross the border.

right to an effective remedy before domestic courts, which triggers the suspension of the expulsion.
In the case of original collective expulsion scenarios, any claim brought forward suspends the expulsion for the duration of the process. This finding is not equally applicable to summary collective expulsion scenarios, where only claims brought forward alleging a violation of the *non-refoulement* principle or the lodging of an asylum application or any other form of protection constitute a remedy triggering the suspensive effect of the expulsion.

In conclusion, the scope of application of the prohibition in Art. 4 Prot. 4 ECHR grants at least a minimum guarantee to a genuine and effective possibility to an examination (widely within the discretion of the expelling state) of the personal circumstances conducted 'anytime' before the expulsion. These guarantees are not applicable in summary expulsion cases when the applicants in question forfeited these rights by their own previous conduct, such as when crossing a land border forcefully, *en masse*, and irregularly.

Despite the lack of explicit guarantees in the wording of Art. 4 Prot. 4 ECHR, the provision entails several procedural guarantees in the case of collective expulsion, including due process rights such as the right to bring forward one's claims against expulsion or the possibility to do so, the right to legal assistance and/or access to a translator, and an effective domestic remedy. These procedural guarantees are imperative for effective protection against collective expulsion.
As will be shown in detail below, these procedural guarantees are also contained by regional and international counterparts to the prohibition of collective expulsion in Art. 4 Prot. 4 ECHR.

II. Procedural guarantees against arbitrary collective expulsions in Art. 19 (1) EUChFR

Art. 19 (1) EUChFR, which stipulates that 'collective expulsions are prohibited' is broader in its personal scope of application than most provisions codifying this prohibition. Art. 19 (1) EUChFR covers not only 'aliens' but also nationals of a member state.[98]

The structure of Art. 19 (1) EUChFR is unique. In contrast to the *European Convention*, the *African Charter*, or the *American Convention*, the EUChFR does not contain any separate provision for protection against arbitrary expulsion of lawfully residing foreigners. It contains both forms of the protection in one single provision: Art. 19 (1).[99]

According to the explanation by the Praesidium, this provision corresponds to the content of Art. 4 Protocol 4 ECHR[100]. Art. 52 (3) EUChFR even codifies this finding, stating that 'the meaning and scope of those rights shall be the same.' As a consequence, the jurisprudence of the ECtHR on Art. 4 Prot. 4 ECHR is to be consulted for the determination of the scope in Art. 19 (1) EUChFR.[101]

Comparing the scope of protection of Art. 4 Prot. 4 ECHR and Art. 19 (1) EUChFR, Elspeth Guild concludes that to 'a large extent [the prohibition is] inherent in the procedures by which states reach decisions on expulsion'.[102]

As the protection granted in Art. 19 (1) EUChFR results from the developing case law of the ECtHR[103], the provision can be seen as the advancement of the prohibition in Art. 4 Prot. 4 ECHR. Following this line of argument, the fact that there is no provision similar to Art. 1 Prot. 7 ECHR in the EUChFR

[98] Art. 4 Prot. 4 ECHR for example only covers the scope of protection of any foreigner.
[99] Brandl, Ulrike *Art 1 Prot 7* in: Pabel and Schmahl (eds.) *Internationaler Kommentar zur Europäischen Menschenrechtskonvention mit einschlägigen Texten und Dokumenten* (Carl Heymanns Verlag 2013), (*Art 1 Prot 7*), para. 51.
[100] Praesidium of the Convention *Draft Charter of Fundamental Rights of the European Union explanations prepared by the Praesidium*, Charte 4473/00 Convent 49, (*Fundamental Rights Draft Charter explanations*), p. 21.
[101] Guild, Elspeth *Art 19-Protection in the Event of Removal* in: Peers/Hervey/Kenner/Ward (eds.) *The EU Charter of Fundamental Rights A Commentary* (Hart Publishing 2014), (*Art 19-Protection in the Event of Removal*), para. 19.37.
[102] Guild, Elspeth *Art 19-Protection in the Event of Removal* para. 19.31.
[103] Ibid., para. 19.07.

may be an indicator that the line of the jurisprudence of the Strasbourg Court concerning the prohibition turned the provision implicitly into a procedural right.

The *Charter of Fundamental Rights of the European Union* also establishes procedural guarantees relevant in cases of collective expulsion that Art. 19 EUChFR does not contain explicitly and that are generally applicable to all administrative procedures. This fact distinguishes Art. 19 EUChFR from all other rights assessed here, which include the prohibition of collective expulsion and, among other things, the right to good administration, codified in Art. 41, and the right to be heard in all proceedings, in Arts. 47 and 48.

Arts. 47 and 48 of the *Charter* ensure respect for both the rights of the defence and the right to fair legal process in judicial proceedings.

The right to good administration stipulates in Art. 41 (1) EUChFR that 'every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time.' The specific guarantees covered by this provision are, amongst others, the right to an effective remedy (Art. 41 (3)); the right of every person to have access to her or his file (Art. 41 (2)); the obligation of the administration to give reasons for its decisions (Art. 41 (2)); and the right of every person to be heard (Art. 41 (2)).

The Court of Justice of the European Union (CJEU) has highlighted the importance of the right to be heard in several judgments. It has clarified that the right to be heard binds not only EU bodies and institutions, but all Member State officials when acting within the scope of EU law, as this right reflects a general principle of EU law.[104] The purpose of this right, according to the Court's case law, is to grant the addressee of an adverse decision the right to bring her or his claims before the competent authorities.[105] Furthermore, the CJEU established the member state's duty 'to pay due attention to the observations submitted by the person concerned, examining carefully and impartially all the relevant aspects of the individual case and giving a detailed

[104] *Mukarubega v Préfet de police* CJEU, paras. 45-50; *Khaled Boudjlida v Préfet des Pyrénées-Atlantiques* CJEU C-249/13, 11 December 2014, (*Boudjilida v Préfet des Pyrénées-Atlantiques*), para. 34.
[105] *Boudjlida v Préfe des Pyrénées-Atlantiques* CJEU, para. 37.

statement of reasons for their decision.'[106] The authorities are further obliged to be sufficiently specific and concrete in their statement of reasons to ensure that the addressee of the statement can easily understand the reasons for the rejection. This obligation to use specific and clear terms arises from the principle of respect for the rights of the defence.[107]

Some scholars argue that these obligations bind EU Member States in cases of collective expulsion.[108] In their views, states must pay due regard to the particular situation of the concerned foreigner before their removal.[109] These procedural obligations imposed on the authorities of EU Member States before reaching an adverse administrative decision are similar to the terms established by the ECtHR for any council of a European Member State, namely to conduct 'a reasonable and objective examination of the particular case of each individual by the relevant authorities.'[110]

Is the finding that EU Member States are bound by the right to be heard applicable *per se* in any collective expulsion cases?

What speaks against this assumption is the fact that the expulsion of non-nationals lies within the national competence of the Member States, limited by the obligations established by international and European law. The CJEU, however, clarified this matter in the *Mukarubega* case. Here, the Court found that in the case of an issue falling under the scope of national law, it is this law that is decisive,

> 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

[106] *Boudjlida v Préfe des Pyrénées-Atlantiques* CJEU, para. 38.
[107] Ibid.
[108] Carlier, Jean-Yves; Leboeuf, Luc *Collective expulsion or not? Individualisation of decision making in migration and asylum law* EU migration law blog, 8 January 2018, available at: http://eumigrationlawblog.eu/collective-expulsion-or-not-individualisation-of-decision-making-in-migration-and-asylum-law/.
[109] Ibid.
[110] *Alibaks v. the Netherland* EComHR, p. 274; reaffirmed in *Andric v Sweden* ECtHR, p. 4.

> the rights conferred by the European Union legal order (the principle of effectiveness).[111]

Thus, EU member states, when expelling groups of foreigners from their state must guarantee every individual's right to 'a fair and transparent procedure'[112] in accordance with the general principles of EU law.

The European Commission, in its proposal on common removal standards, acknowledged these guarantees, and has highlighted that the basis on which fair procedures are judged is that expulsion orders are issued.

The proposal states that 'due to the fact that Member States do not systematically issue return decisions in connection with the termination of legal stay, the proposal clarifies the need to issue a return decision immediately after a decision rejecting or terminating the legal stay is taken.'[113] Furthermore, the proposal, by referring to the case law of the European Court of Justice, highlights that the suspensive effect of the expulsion is also necessary to secure a fair process.[114]

In conclusion, the procedural guarantees contained in Art. 19 (1) EUChFR in cases of collective expulsions are equivalent to those contained in Art. 4 Prot. 4 ECHR. However, the scope of protection of Art. 19 (1) EUChFR goes beyond Art. 4 Prot. 4 ECHR as it also guarantees the right to good administration in conjunction with Art. 41 EUChFR. The prohibition of collective expulsion in Art. 19 (1) EUChFR contains the right to bring forward claims against expulsion, the right to legal assistance and/or a translator, and the right to an effective remedy and/or appeal with a suspensive effect.

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[111] *Mukurubega v Préfet de police* CJEU, para. 51.
[112] *Mukurbega v Préfet de police* CJEU, para. 61.
[113] European Commission *Proposal for a Directive of the European Parliament and the Council of common standards and procedures in Member States for returning illegally staying third-country nationals (recast) A contribution from the European Commission to the Leaders' meeting in Salzburg on 19-20 September 2018* COM(2018) 634 final, 12 September 2018, p.7.
[114] Ibid.

III. Procedural guarantees against arbitrary collective expulsions in Art. 22 (9) American Convention on Human Rights

The prohibition of collective expulsion in Art. 22 (9) ACHR contains procedural guarantees similar to those guaranteed by its European counterparts.

The Inter-American Commission on Human Rights (IAComHR) acknowledged the procedural character of the prohibition in a case dealing with the collective expulsions of Haitians and Dominican-Haitians from the Dominican Republic in the 1990s. Here the Commission drew the relevant conclusion that

> [c]ollective expulsions are a *flagrant violation of international law* that shocks the conscience of all humankind. Individual expulsions should be carried out in accordance with *procedures that offer a means of defence* that is in line with the *minimal rules of justice*, and that prevent errors and abuses [emphasis added].[115]

The IACtHR further clarified in 2012 in *Nadege Dorzema and Others v. the Dominican Republic* with reference to the ECtHR's interpretation of Art. 4 Prot. 4 ECHR that every foreigner has the right to an objective analysis of her or his circumstances before expulsion, as otherwise this act would constitute an arbitrary expulsion in violation of the provision.[116] The Court highlighted that policies aimed at collective expulsions of foreigners from a state's territory, here the Dominican Republic, must

> fully respect the prohibition of collective expulsion of aliens contained in Article 22(9) of the American Convention, and the *guarantees intrinsic to the procedures* for the expulsion or

[115] IAComHR *Report on the Situation of Human Rights in the Dominican Republic* OEA/Ser.L/V/II.104, Doc. 49 rev. 1, October 7, 1999, para. 366.
[116] *Nadege Dorzema and others v. Dominican Republic Merits, Reparations and Costs* IACtHR Judgment of 24 October 2012. Series C, No. 251, (*Nadege Dorzema v. Dominnican Republic*) para. 171.

> deportation of aliens, especially those derived from the *rights to due process* and to *judicial protection* [emphasis added].[117]

These due process rights in the case of collective expulsion must apply to all foreigners, irrespective of the legality of their stay in a state's territory, as guaranteed by Art. 22 (9) in conjunction with Art. 8 (1) ACHR, which contains fair trial rights such as 'the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law.'[118]

The Court clarified that each member state must guarantee a minimum set of procedures before expelling foreigners in groups.[119] It explains its conclusion with reference to the interpretation of the Human Rights Committee's *General Comment No. 15*, the African Commission's *Union Inter Africaine des Droits de l'homme et al v. Angola*, and the International Law Commission's *Draft Articles on the Expulsion of Aliens*.[120] The Court concludes that states should not distinguish on the grounds of 'nationality, color, race, sex, language, religion, political opinion, social origin or other status.'[121] In a later case against the Dominican Republic, in 2014, the Court repeated its previous findings on the obligation to conduct individualised assessments without discrimination in order to comply with the prohibition of collective expulsion.[122]

As will be shown below in the context of the guarantees contained in the *African Charter*, the procedural guarantees and the non-discrimination principle contained in the scope of the prohibition of collective expulsion is not a characteristic unique to Art. 22 (9) IACHR.

The Inter-American Court, in contrast to its European counterpart, has also spelt out very clearly the exact procedural guarantees contained in the prohibition of collective expulsion, as codified in the IACHR[123]: the right to

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[117] Ibid., para. 155.
[118] *Nadege Dorzema v. Dominican Republic* IACtHR, paras. 156-159.
[119] Ibid., paras. 160-163.
[120] Ibid.
[121] Ibid., para. 175.
[122] *Expelled Dominicans and Haitians v. Dominican Republic Preliminary Objections, Merits, Reparations and Costs* IACtHR, Judgment 28 August 2014. Series C No. 282, (*Expelled Dominicans and Haitians v. Dominican Republic*), para. 171.
[123] *Nadege Dorzema v. Dominican Republic* IACtHR, para. 175.

receive information on the charges and reasons for the expulsion, including information on an individual's rights; the possibility to bring forward claims against the charges; the possibility to request and receive consular assistance; legal assistance; assistance from a translator; and the right to appeal to the competent authorities.

This appeal triggers the suspensive effect of the expulsion until the appellate body reaches a reasoned decision.[124] Comparing these procedural guarantees with those in other regional instruments, it becomes apparent that the scope of protection of Art. 22 (9) ACHR is broader as it contains the additional right to consular assistance.

IV. Procedural guarantees against arbitrary collective expulsions in Art. 12 (5) African Charter on Human and Peoples' Rights

The prohibition of collective expulsion in Art. 12 (5) of the *African Charter on Human and Peoples' Rights* (also known as the *Banjul Charter*) takes a distinct approach in comparison to its regional counterparts in wording and structure. The provision states that '[t]he mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic, or religions [sic!] groups.'[125]

In the following, I will turn to the distinct structure of the prohibition in the *African Charter*, which seems to focus on the prohibited discriminatory nature of the measure rather than the lack of procedural guarantees.[126]

Most international and regional human rights instruments contain a prohibition of discrimination. Art. 14 *European Convention on Human Rights*[127], Art. 2 *Universal Declaration of Human Rights*, as well as Art. 2 (1) and Art. 2 (2) *International Covenant on Economic, Social and Cultural*

[124] Ibid.
[125] The reasons for the differing terminology 'mass' instead of 'collective' are discussed above in Chapter I.
[126] Similar argument see: Bekker, Gina *Mass expulsion of foreign nationals: A 'special violation of human rights' – Communication 292/2004 Institute for Human Rights and Development in Africa v Republic of Angola* African Human Rights Law Journal, 2009, Vol. 9, No. 1, pp. 268-269.
[127] The provision limits the application of this guarantee to the 'enjoyment of the rights and freedoms set forth in this Convention'.

Rights, Art. 2 (1) and Art. 26 *International Covenant on Civil and Political Rights*, and Art. 2 (1) *Convention on the Rights of the Child* contain this prohibition.

In *Good v. Botswana*, the African Commission on Human and People's Rights described the prohibition of discrimination as a fundamental principle of international human rights law 'whose respect is essential to the exercise and enjoyment of all human rights'[128]. This finding is worth nothing, given the fact that the previously mentioned provisions differ immensely in their scope and nature[129].

In order to understand the specific design of this prohibition and the *African Charter* as a whole, one has to keep in mind the political and cultural situation and circumstances during its drafting.[130] The prohibition of mass expulsion was included after the continent had experienced several mass expulsions of non-nationals from African countries during the 1960s and 1970s. Governments denationalised and expelled the descendants of immigrant groups *en masse*.[131] One of the most well-known examples was the collective expulsion of the vast majority of the Asian population from Uganda by the government of Idi Amin, which was triggered by racial tensions and was arguably one reason for including the prohibition into the *African Charter*.[132]

The ACHPR was adopted under the auspices of the Organisation for African Unity (OAU) now the African Union (AU). The idea was to establish a charter that specifically deals with human rights issues on the African continent and

[128] *Good v. Botswana* AComHPR, Comm. No. 313/05, (2010) 28th Activity Report, Annex IV, 2010, para. 218.
[129] Some are designed as equal-protection clauses, others are restricted to specific rights, some provisions provide a non-exhaustive list of grounds on which basis a discrimination is prohibited, others are self-contained. An example of such a self-contained provision is Art. 12 (5) African Charter prohibiting mass expulsion based on a restricted list of grounds such as nationality, religion, ethnicity, and race.
[130] The travaux préparatoires of the African Charter used for this section stem from my archival work at the United Nations Archives and the Archives of the International Labor Organization in Geneva in May 2018 together with Dr. Misha Plagis.
[131] Manby, Bronwen *Struggles for Citizenship in Africa: Mass denationalization and expulsion*, (ZED books 2009), Chapter 4, p. 1.
[132] For a detailed analysis on the correlation between the mass expulsion of Asian decendents from Uganda and the development of Art. 12(5) African Charter see: Henckaerts, Jean-Marie *Mass Expulsion in Modern International Law and Practice* pp. 22-24.

to promote and protect human rights and fundamental freedoms for all African citizens.[133]

The prohibition of collective expulsion in the *African Charter* contains procedural guarantees against arbitrary group expulsions comparable to other regional human rights instruments. This finding is surprising given the difference in the design of the prohibition in the *African Charter* as a non-discrimination obligation.

Despite the different design, the first reason for these similarities lies in the genesis of the African Charter. The drafters highlighted that they 'thought it prudent not to deviate much from the international norms solemnly adopted in various universal instruments by the different Member States of the OAU.'[134] This claim is true for many of the provisions. However, it is not the case concerning the final version of the prohibition of mass expulsion enshrined in Art. 12 (5) ACHPR, which entails a very distinct approach. Previous draft versions of the provisions strongly resembled the provision codified in the fourth additional protocol to the ECHR.[135]

Secondly, despite its distinct wording and structure compared to Art. 4 Prot. 4 ECHR, the African Commission has interpreted Art. 12 (5) ACHPR by drawing from the case law of the European Court of Human Rights and the European Commission on Human Rights. The African Commission referred explicitly to the relationship between the prohibition in the *European Convention* and the *African Charter* in *Institute for Human Rights and Development in Africa v. Angola.*

Here, the Commission held that

> [t]he African Charter is not unique in prohibiting mass expulsions. The European Convention on Human Rights provides some protection against expulsion. The fourth Protocol to the

[133] Mapuva, Loveness *Negating the Promotion of Human Rights Through "Claw-Back" Clauses in the African Charter on Human and People's Rights* International Affairs and Global Strategy, 2016, Vol. 51, p. 1.
[134] *Part II, No. 1 (a) Preliminary draft of the African Charter prepared during the Dakar Meeting of Experts at the end of 1979* CAB/LEG/67/3/Rev. 1, reprinted in Human Rights Law in Africa, 1999, Vol. 4, p. 81.
[135] Art. 12 (4) of the last draft before adoption, the Banjul draft of 1980 (CAB/LEG/67/3) red 'The collective expulsion of foreigner shall be prohibited.'

> same Convention similarly prohibits collective expulsion of aliens as well as the expulsion of nationals from their own state. Its seventh Protocol prohibits expulsion of an alien lawfully resident in a state except when a decision to that effect is taken in accordance with law. Here, the person concerned is entitled to submit reasons against the expulsion, have the case reviewed and be represented for these purposes before a competent authority.[136]

This paragraph indicates that the *African Commission* carefully observes the codifications and developments in other regional human rights systems. This drawing from other treaty bodies revealed the 'similar' scope of protection even though the wording of the provisions in the *African Charter* seems quite distinct at first sight.

The focus on the discriminatory nature of prohibited mass expulsions in Art. 12 (5) ACHPR fits within the structure of the *Charter* as a whole, and the principle of non-discrimination is mentioned several times throughout the text and its preamble. The *Charter* stresses that the members of the OAU must eliminate 'all forms of discrimination, particularly those based on race, ethnic group, colour, sex, language, religion or political opinions.' Art. 2 ACHPR repeats this notion and extends the *Charter*'s protections to everyone without distinction.

The *African Charter* is, however, not the only instrument relying on the approach of the prohibition of discrimination in expulsion procedures. The International Law Association, by attempting to denounce forced transfers of population in their (non-binding) *1986 Declarations of the Principles of International Law on Mass Expulsions*, also relied on the non-discrimination approach. The Association define expulsion as 'an act or a failure to act […] with the intended effect of forcing the departure of persons against their will […] for reason of race, nationality, membership of a particular social group or political opinion.'[137]

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[136] *Institute for Human Rights and Development in Africa v Republic of Angola* AComHPR Comm. No. 292/04, 2008, para. 70.

[137] International Law Association *Declaration of Principles of International Law on Mass Expulsion* Report of the sixty-second Conference of the International Law Association, 1986, principle 14.

One reason for the focus on the discriminatory nature of mass expulsion in the *African Charter* arguably lies in the historical and political context. Since its establishment, the OAU has focused primarily on the questions of mass movement of people across borders and the expulsion of large groups within Africa. This is supported by the fact that, in 1964, the Council of Ministers set up an ad-hoc commission consisting of representatives from 10 African states to engage with and find solutions to such issues.[138] *The United Nations High Commissioner for Refugees* (UNHCR), among others, supported this attempt. The outcome was the *OAU Convention Governing the Specific Aspects of Refugee Problems in Africa* (*OAU Convention on Refugees)*[139] in 1969.[140]

In addition to establishing the *African Charter* as an alternative concept to the European Human Rights system, African states also established the *1969 OAU Refugee Convention*, aiming to offer a protection scheme tailored to the needs of post-colonial Africa. Its distinct definition of the term 'refugee', for example, supports this finding.

Another reason for the inclusion and the distinct design of Art. 12 (5) ACHPR may have been the political circumstances in the period between the signature of the *OAU Convention on Refugees* in 1969 and the adoption of the *African Charter on Human and Peoples' Rights* in 1981.

In the decade between the two conventions, the need for such a provision on the African continent had grown as states had committed several arbitrary mass expulsions. Examples include the expulsion of the Nigerian immigrant community from Ghana in 1969,[141] the mass expulsion of all individuals of

[138] Kannyo, Edward *The Banjul Charter on Human and Peoples' Rights: Genesis and Political Background* in: Meltzer and Welch (eds.) *Human Rights and Development in Africa* (State University of New York Press 1984), (*The Banjul Charter on Human and Peoples' Rights: Genesis and Political Background*), p. 137.
[139] *Organization of African Union Convention Governing the Specific Aspects of Refugee Problems in Africa* Adopted by the Assembly of Heads of State and Government at its sixth ordinary session, UNTS No. 14691, entry into force 20 June 1974.
[140] Kannyo *The Banjul Charter on Human and Peoples' Rights: Genesis and Political Background* p. 137.
[141] For a detailed analysis of the causes and impacts of this mass expulsions see here: Olaosebikan, Aremu and Adeyin, Thesea *Expulsion of Nigerian Immigrant Community from Ghana in 1969: Causes and Impact* Developing Country Studies, 2001, Vol. 4, No.10, pp. 176-186.

Asian descent from Uganda in 1972,[142] and the expulsion of a large number of Banyarwanda in the early 1980s, also from Uganda. Another example is the mass expulsion of several hundred thousand Nigerians from Ghana in 1965 and 1970.[143] The drafts of the African Charter, including the prohibition of collective expulsion, underwent significant substantive amendments before its adoption in Banjul, the Gambia, in 1981. The drafters may have designed Art. 12 (5) ACHPR with the intent of preventing further mass expulsions, driven by xenophobic sentiments and ethnic conflicts.

An argument in favour of this finding is the different approach taken in the earliest draft, the Mbaye Draft[144], named after the former vice-president of the International Court of Justice Kéba Mbaye, which adopted verbatim the prohibition of collective expulsion as enshrined in Art. 22 ACHR and Art. 4 Prot. 4 ECHR.

This approach was entirely removed in the *Dakar Draft*[145], which followed it, the result of the 1979 Dakar Meeting of Experts.

Art. 12 (5) *Dakar Draft* stipulates in its first sentence that '[t]he mass expulsion of non-nationals shall be prohibited,' which is identical in terms to that in the final version. The second sentence, however, differs completely. The adopted provision in the *African Charter* states that 'mass expulsion shall be that which is aimed at national, racial, ethnic or religions [sic!] groups.' The *Dakar Draft*, in contrast, stipulated that 'no economic, political or other reason [can] justify such a measure.' The difference between these two approaches is significant. The final version contains a prohibition of discrimination. The earlier version relies on an approach which does not

[142] The government of Idi Amin assured by racial tensions within the country expelled almost the entire Asian population. For a detailed analysis on the correlation between the mass expulsion of Asian decedents from Uganda and the development of Art. 12 (5) African Charter see: Henckaerts, Jean-Marie *Mass Expulsion in Modern International Law and Practice* pp. 22-24.
[143] Manby, Bronwen *Struggles for Citizenship in Africa* p. 96.
[144] M'Baye, Kéba *Draft African Charter on Human and Peoples' Rights (M'Baye proposal)* prepared for the Meeting of Experts in Dakar, Senegal from 28 November to 8 December 1979, CAB/LEG/67/1.
[145] *Guiding Principle 1, No. 3 Preliminary draft of the African Charter prepared during the Dakar Meeting of Experts at the end of 1979* CAB/LEG/67/3/Rev. 1, reprinted in Human Rights Law in Africa, 1999, Vol. 4, pp. 81-91.

define what constitutes mass expulsion, but instead simply points out that no limitation of this prohibition is possible.

Scholar Gino Naldi describes this development as a weakening of the prohibition that 'appears totally to undermine the original intention since it seems that ethnic groups could be expelled on economic grounds.'[146]

Nathaniel Rubner offers a different reasoning arguing that the reason for this change may lie particularly in the drafters' desire to point out that the problem of collective expulsion in the African context stemmed from inter-African expulsions based on *inter alia* ethnic or religious grounds.[147]

Either way, this amendment, which restricted the comprehensive scope of protection of the prohibition, seems to have been compensated for through interpretation by the *African Commission* in its case law on Art. 12 (5) ACHPR. It did so by jointly applying the prohibition of mass expulsion in all its case law with the general prohibition of discrimination enshrined in Art. 2 ACHPR. This joint application led to the complementation of the prohibition's scope of protection.

The approach chosen in the *African Charter* arguably suggests that the drafters wanted to stress that every mass expulsion based on xenophobic or ethnic resentments is prohibited. It is not surprising that the drafters decided on this approach in light of the heinous crimes of mass expulsion that had occurred on a widespread level in the 1960s and 1970s throughout Africa.

In retrospect, this tool, aimed at the prevention of collective expulsions, turned out to be ineffective, even after the adoption of the *Charter* in 1981. Before the prohibition of mass expulsion became legally binding for the

[146] Naldi, Gino *The Organization of African Unity: An Analysis of its Role* (Bloomsbury Academic 1999), p. 111.

[147] Dr. Nathaniel Rubner, yet unpublished monograph. The document is on file with the author. *The African Charter on Human and Peoples' Rights: Political, Intellectual and cultural origins* (provisional title). This section builds on the research and ideas developed in Rubner's doctoral work: Rubner, Nathaniel *An Historical Investigation of the Origins of the African Charter on Human and Peoples' Rights* 2008, (*The African Charter on Human and Peoples' Rights: Political, Intellectual and cultural origins*), available at: http://archives.au.int/handle/123456789/2566.

Member States with the *Charter*'s entry into force in 1986, Nigeria expelled two million foreigners in 1983 and about 700,000 in 1985.[148]

One has to acknowledges the great importance of the prohibition of mass expulsion in the African context. Nevertheless, it is questionable if Art. 12 (5) ACHPR has achieved its aim of preventing such grave human rights violations and claims a 'relative weakness of paragraph 12 (5) in contrast to similar international instruments.'[149]

Nevertheless, Art. 12 (5) ACHPR is of particular significance in the framework of the *African Charter*. The fact that this article does not contain a 'claw-back' clause, limiting the scope of application, emphasises this finding.[150] Furthermore, the ACHPR does not contain a general derogation clause, as found in other human rights conventions.[151] The provision's unlimited application is even more significant given the fact that social, economic, and cultural rights generally prevail over civil and political rights within the charter (see for example the seventh paragraph of the preamble which stipulates that the particular focus of the *African Charter* is on economic, social, and cultural rights, which are 'a guarantee for the enjoyment of civil and political rights'). The African Commission has equally acknowledged the prevalence of social, economic and cultural rights. [152]

In *Fédération Internationale des Ligues des Droits de l'Homme v. Angola*, for example, the Commission condemned Angola's practice of expelling

[148] New York Times Nigeria Completes the Second Expulsion of Aliens The New York Times, 26 May 1985, available at: http://www.nytimes.com/1985/05/26/world/nigeria-completes-the-second-expulsion-of-aliens.html.

[149] Sorel, Jean-Marc *Article 12* in: Kamto and Collectif *La Charte africaine des droits de l'homme et des peuples et le protocole y relatif portant création de la Cour africaine des droits de l'homme : Commentaire article par article* (Emile Bruylant 2011), p. 306. The original French version reads: 'la relative faiblesse du paragraphe 5 de l'article 12 au regard des autres instruments internationaux.'

[150] Other civil and political rights guaranteed in the Charter, such as the right to liberty and security enshrined in Art. 6 of the Charter contain such a clause stipulating that 'no one may be deprived of his freedom *except for reasons and conditions* [emphasis added] previously laid down by law.' Another example can be found in Art. 12 (4) ACHPR which prohibits the arbitrary expulsion of legally residing non-nationals unless they have received 'a decision taken *in accordance with the law* [emphasis added].'

[151] Turack, Daniel *The African Charter on Human and Peoples' Rights: Some Preliminary Thoughts* Akron Law Review, 1984, Vol. 17, No. 3, pp. 365-366.

[152] Gittleman, Richard *The Banjul Charter on Human and Peoples' Rights: A legal Analysis* in: Welch and Meltzer *Human Rights and Development in Africa* (State University of New York Press 1984), pp. 154-155.

foreigners *en masse* due to tense economic conditions. The Commission pointed out that economic difficulties do not justify in any way States' use of radical measures 'aimed at protecting their nationals and their economies from non-nationals.' [153] The Commission then proclaimed that

> whatever the circumstances may be, however, such measures should not be taken at the detriment of the enjoyment of human rights. Mass expulsions of *any category of persons*, whether on the basis of nationality, religion, ethnic, racial, or *other considerations* constitute a special violation of human rights [emphasis added].[154]

After having considered the circumstances of the mass expulsion, the African Commission found *inter alia* a violation of Art. 12 (4) and (5) and of Art. 2 ACHPR, stating that in the case at hand, 'the victim[s'] rights to equality before the law were trampled on because of their origin.'[155]

This jurisprudence of the African Commission arguably signals a move away from the formal requirements established in Art. 12 (5) ACHPR. [156] It argues that its conclusion in *Institute for Human Rights and Development in Africa v Republic of Angola* shows its new approach to the prohibition. Here, the Commission found a violation of the principle, even though Angolan authorities had not discriminated against specific foreigners. It claims that this shows its move towards a reading of the provision as containing procedural guarantees.[157] By examining a violation of Art. 1 ACHPR[158], the Commission explicitly referred to the obligation of all member states to the *Charter* to grant due process rights to all non-nationals before being expelled as a group. The Commission however highlighted that 'there is nothing in the African Charter that requires member states of the African Union to guarantee for

[153] *Union Inter Africaine des Droits de l'Homme, Fédération Internationale des Ligues des Droits de l'Homme and Others v. Angola* AComHPR, Comm. No. 159/96, 1997, para.16.
[154] Ibid.
[155] Ibid., para. 18.
[156] Bekker, Gina *Mass expulsion of foreign nationals* pp. 269-270.
[157] Ibid.
[158] Art. 1 African Charter reads: The member states of the Organisation of African Unity, parties to the present Charter shall recognise the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them.

non-nationals an absolute right to enter and/or reside in their territories'.[159] On the other hand, the Commission also pointed out that this does

> 'not in any way mean that the African Charter gives member states the free hand to unnecessarily and *without due process* deal with non-nationals to such an extent that they are denied […] basic guarantees [emphasis added].'[160]

One aspect which supports this finding, is that the African Commission itself sees the prohibition of discrimination as a guarantor for due process. An indication for this finding lies in the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa* adopted by the Commission.[161] Here, the Commission defined the prerequisites for due process rights for everyone. The Commission stipulated that due process is guaranteed *inter alia* if state officials 'carry out their functions impartially and avoid all political, social, racial, ethnic, religious, cultural, sexual, gender or any other kind of discrimination'.[162] It follows that non-discrimination is a prerequisite for due process.[163]

Therefore, due process rights as enshrined in the *African Charter* require an individual and impartial decision free from discriminatory motives. Thus, Art. 12 (5) ACHPR also contains due process rights such as the right to an individual decision.

The Commission, however, does not mention whether Art. 12 (5) ACHPR also contains the right to legal assistance, an interpreter, and/or to the right to an appeal/effective remedy as guaranteed in other regional human rights instruments. However, a contextual reading of the prohibition of collective expulsion within the *African Charter* reveals that each foreigner in the case

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[159] *Institute for Human Rights and Development in Africa v Republic of Angola* AComHPR, para.84.
[160] Ibid.
[161] AComHPR *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa* adopted by the African Commission on Human and Peoples' Rights in accordance with its mandate under Article 45(c) of the African Charter on Human and Peoples' Rights 'to formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African states may base their legislation', 2003 (*Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*), C. b).
[162] Ibid., F. h); i).
[163] Ibid.

of mass expulsion enjoys these guarantees. The Commission's brief analysis consisting of only a few paragraphs in its case law on the scope of application of Art. 12 (5) ACHPR makes it challenging to assess the origins of these requirements.

In conclusion, despite its distinct approach in wording and nature, the prohibition of collective expulsion in the *African Charter* contains procedural guarantees against arbitrary expulsions for all foreigners. These guarantees include the right of every member of the group to an individual examination of her or his circumstances, to legal assistance, to an interpreter, and to an effective remedy.

V. Procedural guarantees against arbitrary collective expulsions in Art. 13 *International Covenant on Civil and Political Rights*

Art. 13 ICCPR codifies procedural guarantees for the expulsion of lawfully resident foreigners from Member States' territory. The provision guarantees that expulsions should take place 'in pursuance of a decision reached in accordance with law'. States shall provide the possibility to submit reasons against the expulsion and the right to appeal.

The prohibition of collective expulsion is implicitly contained in Art. 13 ICCPR, as confirmed by the Human Rights Committee (HRC) in its *General Comment No. 15*. The Committee noted that collective expulsion could not satisfy the procedural guarantees contained in Art. 13 ICCPR and must therefore be prohibited by the provision as well.

Sarah Joseph and Melissa Castan argue that this finding

> demonstrates how procedural guarantees import at least some degree of substantive accountability. Perhaps the prohibition of mass expulsions prohibits a State from expelling people on the basis of an immutable characteristic, such as race.[164]

[164] Joseph, Sarah and Castan, Melissa *The International Covenant on Civil and Political Rights Cases, Materials, and Commentary* (Oxford University Press 3rd edn. 2013), (*ICCPR Cases, Materials, Commentary*), p. 419.

As shown above, procedural guarantees and material non-discriminatory aspects are both contained in the prohibition of collective/mass expulsion. The prohibition ensures due process guarantees in group expulsion cases for every foreigner without discrimination. The same applies to the prohibition of collective expulsion as indirectly contained in Art. 13 ICCPR.

The implicit inclusion of the prohibition of collective expulsion in the ICCPR is more relevant than it may seem at first sight. 173 state parties are bound to the Covenant[165], including several states which are not bound to this prohibition by any other treaty such as Switzerland, the United States, Israel, Australia, Iran, Japan, and many other states.

The nature of Art. 13 ICCPR is first and foremost procedural. This provision is a due process right for foreigners facing expulsion.[166]

The Human Rights Committee clarified Art. 13 ICCPR protection of foreigners against arbitrary expulsions in its *General Comment No. 15*:

> it entitles each alien to a decision in his own case and, hence, article 13 would *not be satisfied with laws or decisions providing for collective or mass expulsions.* This understanding, in the opinion of the Committee, is confirmed by further provisions concerning the right to submit reasons against expulsion and to have the decision reviewed by and to be represented before the competent authority or someone designated by it. An alien must be given full facilities for pursuing his remedy against expulsion so that *this right* will in all the circumstances of his case be an *effective* one. The principles of article 13 relating to appeal against expulsion and the entitlement to review by a competent authority may only be departed from when "compelling reasons of national security" so require [emphasis added].[167]

[165] United Nations Human Rights Office of the High Commissioner *ICCPR Status of Ratification Dashboard*, available at: http://indicators.ohchr.org/.
[166] Guild, Elspeth *Art 19-Protection in the Event of Removal* para. 19.08.
[167] Ibid.

Over a decade after the publication of this first general comment that clarified the inclusion of the prohibition of collective expulsion in Art. 13, HRC held in 2003 in its *Concluding Observations on the Dominican Republic* that

> The Committee is gravely concerned at the continuing reports of mass expulsions of ethnic Haitians, even when such persons are nationals of the Dominican Republic. It holds *mass expulsions of non-nationals to be in breach of the Covenant since no account is taken of the situation of individuals* for whom the Dominican Republic is their own country in the light of article 12, paragraph 4, nor of cases where expulsion may be contrary to article 7 given the risk of subsequent cruel, inhuman or degrading treatment, nor yet of cases where the legality of an individual's presence in the country is in dispute and must be settled in proceedings that satisfy the requirements of article 13.
>
> The State party should guarantee the right of every Dominican national not to be expelled from the country and *ensure that all persons facing deportation proceedings* are *covered by the safeguards* established in the *Covenant* [emphasis added].[168]

The HRC emphasised the importance of an individual assessment of the circumstances of every claimant in its *2003 Concluding Observations on Estonia*. The Committee stressed that states should conduct individual asylum determination procedures before removing migrants coming from so-called 'safe countries.' The Committee expressed openly its concern that Estonia 'may deny the individual assessment of a refugee claim when the applicant is considered to come from a "safe" country.' The Committee then went on to point out that

> in order to afford effective protection […] of the Covenant, applications for refugee status should always be assessed on an *individual basis* and that a decision declaring an application

[168] HRC *Concluding Observations: Dominican Republic*, (2001), CCPR/CO/71/DOM, 3 April 2001, para. 16. The same concern was raised in the most recent report by the Human Rights Committee in its *Concluding observations on the sixth periodic report of the Dominican Republic* (2017), CCPR/C/DOM/CO/6, 27 November 2017, paras. 23, 24.

> inadmissible should not have restrictive procedural effects such as the *denial of suspensive effect of appeal* (articles 6, 7 and 13 of the Covenant) [emphasis added].[169]

In conclusion, Art. 13 ICCPR contains procedural guarantees such as the right to be heard by a competent authority, the right to a review, and the right to the assistance of a legal counsel.[170] The right to be heard by a competent authority also refers to administrative authorities. The Human Rights Committee implicitly acknowledged this in *Maroufidou v Sweden*.[171] Art. 13 ICCPR in conjunction with Arts. 6 and 7 ICCPR guarantee the suspensive effect of an appeal against an expulsion order. This list of guarantees shows more the comparability between the prohibition contained in Art. 13 ICCPR and its regional counterparts assessed above. The procedural guarantees contained in Art. 13 ICCPR encompass the right to be heard by a competent authority. Administrative procedures satisfy this obligation. Furthermore, the prohibition contains the right to review/appeal by/to a competent authority. The right to review also guarantees a suspensive effect of the expulsion proceedings (Art. 13 in conjunction with Arts. 6 and 7 ICCPR) as well as the right to the assistance of legal counsel. The prohibition of collective expulsion in the ICCPR further contains material elements prohibiting the discriminatory treatment of foreigners based on attributes such as race, religion, or nationality.

VI. Procedural guarantees against arbitrary collective expulsions in Art. 22 (1) *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*

The relevance of the procedural guarantees contained in the prohibition of collective expulsion in the *UN Migrant Worker Convention* is noteworthy for several reasons.

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[169] HRC *Concluding Observations: Estonia* (2003), CCPR/CO/77/EST, 15 April 2003, para. 13.
[170] HRC *Denmark: Concluding Observations on Denmark* (2000), CCPR/CO/70/DNK, 15 November 2000, para. 17.
[171] Joseph and Castan *ICCPR* with reference to: HRC *Maroufidou v Sweden* Communication No. R.13/58, 9 April 1981.

First, its global reach distinguishes it from its regional counterparts. As stated above, 'only' 55 states ratified the *Convention*.[172] However, states from all continents are parties to the *UN Migrant Worker Convention*[173] making it a truly international protection mechanism. However, migrant-receiving states such as the USA, Australia, France, Germany, or Great Britain have not ratified it. Migrant-sending states such as Mexico, Morocco, or the Philippines, in contrast, are parties.

Second, the personal scope of protection of most provisions of the *Convention* is quite extensive. It protects every migrant and his or her family throughout the entire migration process and thus, even before reaching the territory of another state.[174] In general, the *Convention* draws distinctions between regular and irregular migrants[175]: irregular migrants enjoy fewer rights than regular migrants. However, there is not such a distinction regarding the prohibition of collective expulsion: the UNCRMW guarantees a fair and genuine expulsion procedure, irrespective of the individual's legal status. The Committee on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW) acknowledged this finding explicitly in its *General Comment No. 2* of 2013.

Here, the CMW offered further insight into its understanding of the scope of the prohibition of collective expulsion. The Committee held that

> Article 22 of the Convention prohibits collective expulsion and provides procedural safeguards in individual expulsion

[172] 13 states have signed the Convention in addition to these ratifications.
[173] United Nations Office of the High Commissioner for Human Rights *Status of Ratification International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families* Interactive Dashboard, available at: http://indicators.ohchr.org/. In Europe only Turkey, Albania and Bosnia and Herzegovina are state parties. Serbia signed, but did not ratify the Convention. No EU member state has signed or ratified the Convention.
[174] The personal scope of protection of the UN Migrant Worker Convention is established in its Art. 1 (1) which extends the umbrella of protection that 'all migrant workers and members of their families without distinction of any kind'. Subparagraph two of Art. 1 clarifies that this protection is guaranteed during 'the entire migration process of migrant workers and members of their families, which comprises preparation for migration, departure, transit and the entire period of stay and remunerated activity in the State of employment as well as return to the State of origin or the State of habitual residence.' Art. 2 (1) UNCRMW complements this stipulation of the personal scope by defining the term "migrant worker" as 'a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.'
[175] See for example in Arts. 35-37 and Arts. 67-69.

> proceedings with respect to both regular and irregular migrant workers and members of their families.[176]

Third, the content of procedural guarantees contained in Art. 22 UNCRMW is equivalent to that of its regional counterparts. The provision provides procedural guarantees against arbitrary expulsion. In particular, it guarantees the right of every migrant of a group to bring forward a claim against the expulsion, the right to an appeal which triggers a suspensive effect, and the assistance of a legal counsellor.

ILC Special Rapporteur on the expulsion of aliens Maurice Kamto explains that 'the case of migrant workers falls within a special regime,' which he further explains as guaranteeing that

> [e]ach case of expulsion should be examined and decided individually. The procedure to be followed in cases of expulsion, which is described in minute detail, reinforces the guarantees that protect the rights of expellees, including sheltering them from mere administrative decisions. It guarantees the expellees' right to receive information, to submit arguments against their expulsion and to be compensated if a decision of expulsion that has already been executed is subsequently annulled.[177]

Art. 22 UNCRMW provides for a detailed list of guarantees against arbitrary expulsions. The provision grants the right to receive a decision from a competent authority (paragraph 2), which must be in a language the migrant understands (paragraph 3). Paragraph 4 guarantees the migrant's right to submit reasons against their expulsion and the right to an appeal which triggers the suspension of the expulsion. Lastly, the provision guarantees the right to seek compensation (paragraph 5).

As the UNCRMW's individual complaint mechanism has not yet entered into force[178], individuals cannot yet claim a violation of Art. 22 UNCRMW. The

[176] CMW *General comment No. 2 on the rights of migrant workers in an irregular situation and members of their families* CMW/C/GC/2, 28 August 2013, para. 49.
[177] Kamto, Maurice *Preliminary report on the expulsion of aliens* A/CN.4/554, 2 June 2005, para. 25.
[178] UNOHCHR *Human Rights Bodies-Complaints Procedures*, available at: http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx.

CMW is the only monitoring body with the legal authority to interpret the provision, considering member state reports on the status of implementation of the *Convention* and publishing its observations thereof.[179]

An analysis of the annual/sessional reports of the CMW from 2004 to 2018 shows that the question of collective expulsion did not seem to play a significant role. The reports from 2012 to 2018 do not address collective expulsions, the expulsion of individuals, or Art. 22 UNCRMW at all.[180] The reports from 2008 to 2012, address *individual* expulsion practices several times. Only, the 2009/2010 report also refers to situations of collective expulsions. This report explains the CMW's understanding of the prohibition of collective expulsion as enshrined in the Convention. In its considerations of Albania's state report (under Art. 74 UNCRMW[181]), the CMW found that Albania violated the prohibition by collectively expelling sub-Saharan Africans[182] and criticised Albania's unwillingness to react on 'reports alleging several cases of collective expulsion' while ensuring 'that adequate safeguards are in place against collective expulsions.'[183]

The CMW thus recommended the implementation of measures to ensure that every individual has the right to an objective examination by competent

[179] UNOHCHR Rights *Committee of Migrants Workers general information on the work of the Committee* available at: https://www.ohchr.org/EN/HRBodies/CMW/Pages/CMWIntro.aspx.

[180] All annual/sessional reports of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families from 2004 to 2018 are available on the webpage of the UN High Commissioner for Human Rights: https://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=7&DocTypeID=27

[181] Article 74 entails a detailed description of the procedure of the examination of submitted member states reports. First, the Committee examines the reports and then transmits any relevant comments to the concerned State Party. In a second step, this State Party may respond by submitting comments on the Committee's observations. Meanwhile, the Committee may request additional information from respective States Parties on issues concerning the report. The reports are then transferred to the Director-General of the International Labour Office. The Labour Office then could if required assist the Committee with expertise. Other specialized agencies can also be consulted and invited if the issues arising from the reports are within the range of their competence. It is the duty of the Committee to present an annual report to the General Assembly of the United Nations on the implementation of the present Convention. This report is then also forwarded to the Member States, as well as to the Economic and Social Council, the Commission on Human Rights of the United Nations, the Director-General of the International Labour Office and other relevant organizations.

[182] CMW *Eleventh session (12-16 October 2009), twelfth session (26-30 April 2010), General Assembly, Official Records sixty-fifth Session, supplement No. 48* (*2009/10 Committee Report*), paras. 22-34.

[183] CMW *2009/10 Committee Report* para. 22.

authorities before being expelled. This finding is in line with the case law of the regional human rights bodies as assessed above.

The CMW specifically reminded Albania that it is obliged to 'establish a legal framework which regulates expulsion/deportation procedures in accordance with Art. 22 and 23 of the Convention.'[184] Analogously to the obligations established by the European Commission of Human Rights[185], the CMW reiterated that the prohibition entails the right of every migrant to bring forward claims against her or his expulsion. It further clarified that Art. 22 UNCRMW obliges states to take 'effective measures to provide redress to the victims and to avoid such expulsions in the future.'[186]

In the 2010/2011 report, though the CMW did not address collective expulsions[187], it highlighted the relevance of Art. 22 and stipulated that member states need to consider the obligations enshrined therein when concluding readmission agreements.[188]

In the same report, the CMW also reminded state parties of their obligation to guarantee procedural safeguards to expelled migrant workers and their families such as the right 'to lodge an appeal against an expulsion order with an administrative body […] and […] [to] have the possibility to address the first instance court.'[189] The CMW further raised concerns about some states' expulsion, detention, and deportation practices, which it found to violate principles codified in Art. 22 UNCRMW.[190]

However, in order to conduct a conclusive analysis of the scope of the provision, in addition to the CMW's recommendations in its annual reports, I have also considered its *General Comments*, which offers insights into the scope of Art. 22 *Migrant Worker Convention*. The CMW released four

[184] CMW *2009/10 Committee Report* para. 23.
[185] See first case pertaining to Art. 4 Prot. 4 ECHR *X and Y v. Sweden* ECtHR on the Admissibility of Applications 3803/68 and 3804/68, 4 October 1968.
[186] Ibid., para. 23.
[187] CMW *Thirteenth session (22 November–3 December 2010), fourteenth session (4–8 April 2011)* General Assembly, Official Records, Sixty-sixth session, Supplement No. 48, A/66/48, (*2010/12 Committee Report*).
[188] CMW *2010/11 Committee Report* para. 36. In the specific case, the Committee was concerned about such agreements between Albania and several countries of origin of migrant workers and suggested to establish 'appropriate procedural guarantees for migrants'.
[189] CMW *2010/11 Committee Report* para. 23.
[190] Ibid., paras. 29, 30.

General Comments between February 2011 and October 2018, which deal with issues including migrant domestic workers[191], migrant workers in irregular situations,[192] and the human rights of children in the context of international migration.[193]

In its *General Comment No. 2*, from 2013, speaking of paragraph 1, the CMW clarified that

> Article 22 of the Convention prohibits collective expulsion and provides procedural safeguards in individual expulsion proceedings with respect to both regular and irregular migrant workers and members of their families. While Article 22 regulates only the procedure and not the substantive grounds of expulsion, its purpose is to prevent arbitrary expulsions and to provide substantive protection against expulsions in certain situations. Article 22 applies to all procedures aimed at the obligatory departure of migrant workers whether described in national law as expulsion or otherwise.[194]

This elaboration on the prohibition of collective expulsion resembles the findings drawn above on the scope of the prohibition in regional contexts.

The stipulation of the aim of preventing 'arbitrary expulsion and provid[ing] substantive protection against expulsion' reveals the close link between the prohibition of collective expulsion and the *non-refoulement* principle, both codified in Art. 22 UNCRMW.[195] The CMW describes the prohibition as a

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[191] CMW *General Comment No. 1 on migrant domestic workers* CMW/C/GC/1, 23 February 2011.
[192] CMW *General Comment No. 2 on the rights of migrant workers in an irregular situation and members of their families* CMW/C/GC/2, 28 August 2013 (*General Comment No. 2*).
[193] See two joint General comments of the Migrant Worker Committee and Committee on the Rights of the Child: *Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return* CMW/C/GC/4 and *Joint general comment No. 3 and No. 22 of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration* CMW/C/GC/3, both of 16 November 2017 (*Joint General Comment No. 3 and No. 22*).
[194] CMW *General Comment No. 2* para. 49.
[195] For a detailed assessment on the relationship between both principles see below chapter V.

due process right, which is complemented by the *non-refoulement* principle and further clarified in its *General Comment No. 2* that

> Article 22, paragraph 1, of the Convention explicitly prohibits collective expulsion and requires that each case of expulsion be examined and decided individually. States parties have an obligation to ensure that their expulsion procedures provide sufficient guarantees to ensure that the personal circumstances of each migrant worker are genuinely and individually taken into account [emphasis added].

This understanding of the provision's scope was confirmed by *General Comment No. 3* from 2017. Here, the CMW recalled that the *Migrant Worker Convention* prohibits collective expulsions and that member states must provide safeguards against arbitrary group expulsions.[196]

Thus, the safeguards against collective expulsion provided for migrants and their families in Art. 22 UNCRMW entails a set of comprehensive procedural guarantees against arbitrary expulsion.

In conclusion, in contrast to other provisions containing the prohibition of collective expulsion, Art. 22 UNCRMW spells out these procedural guarantees. These are the right to an interpreter, to legal counselling, the right to bring forward one's claims, and the right to have one's case reviewed. The level of protection guaranteed therein for migrants and their families is equivalent to that granted by the three major regional human rights conventions.

The ECHR, the ACHPR, and the ACHR provide the same level of protection against arbitrary collective expulsions for every foreigner, irrespective of the legality of their status. The reference by the CMW to the jurisprudence of the European Court of Human Rights on the prohibition of collective expulsion serves as an indicator of the global and uniform understanding of the scope and role of the prohibition of collective expulsion as a due process right.

[196] CMW *Joint General Comment No. 3 and No.* 22 para. 47.

VII. Procedural guarantees against arbitrary collective expulsions in Art. 3 *Convention against Torture*

In contrast to the *UN Migrant Worker Convention* or the *ICCPR*, the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (UNCAT) seemingly does not contain a prohibition of collective expulsion. However, the Committee against Torture (CAT) arguably reads the principle's guarantees into the *non-refoulement* principle of Art. 3 (1) UNCAT by calling it the prohibition of 'collective deportation' or 'collective return.' Generally, the term 'return' covers the removal of a foreigner from a state's territory to her or his country of origin.[197] The terms 'expulsion' and 'removal' are interchangeable.[198] 'Deportation' is understood as the removal of a foreigner that has illegally entered a state's territory.[199]

Article 3 (1) UNCAT stipulates that '[n]o 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.' The provision's wording resembles Art. 33 (1) *1951 Refugee Convention*.

Return and expulsion in the sense of Art. 3 (1) UNCAT refer to measures that physically remove any individual from a state's territory. This is also the case if non-admission leads to a risk of torture for the expelled.[200]

In 1996, the CAT set up a working group composed of three experts[201] to assess questions on Art. 3 and Art. 22[202] UNCAT, as it deemed it necessary

[197] Hamdan, Eman *The Principle of Non-Refoulement under the ECHR and the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Brill/Nijhoff 2016), (*The Principle of Non-Refoulement under the ECtHR and the CAT*), p. 106, fn. 169.
[198] European Commission *Migration and Home Affairs expulsion definition* available at: https://ec.europa.eu/home-affairs/what-we do/networks/european_migration_network/glossary_search/expulsion_en.
[199] Hamdan, Eman *The Principle of Non-Refoulement under the ECHR and the CAT* p. 106, fn. 169.
[200] Ibid., p. 105.
[201] The experts were Ms. Illiopoulos-Strangas, Mr. Pikis and Mr. Zupancic.
[202] Art. 22 UNCAT deals with the possibility of individuals to communicate violations of a provision of the UNCAT to the Committee against Torture.

to clarify the scope of protection of these provisions.[203] CAT adopted its first general comment on the implementation of Art. 3 in November 1997, ten years after the Convention's entry into force,[204] based on the findings of the working group[205]. This first general comment did not address the prohibition of collective return or deportation but focused on questions of evidence and burden of proof.

However, twenty years later, *General Comment No. 4*, from 2017, mentioned the *prohibition of collective deportation* in an implicit manner.[206] CAT explained in detail that the scope of Art. 3 (1) UNCAT entails the obligation to examine each case

> individually, impartially and independently […] through competent administrative and/or judicial authorities, in conformity with essential procedural safeguards, notably the guarantee of a prompt and transparent process, a review of the deportation decision and a suspensive effect of the appeal.[207]

Further, CAT established that the expelling state should ensure that

> [i]n each case, the person concerned should be informed of the intended deportation in a timely manner. Collective deportation, without an objective examination of the individual cases with regard to personal risk, should be considered as a violation of the principle of non-refoulement.[208]

Comparing the language and specific terms in this general comment with the language of the ECtHR and the EComHR on Art. 4 Prot. 4 ECHR, the resemblance is evident. As shown above, the two bodies interpreted the prohibition of collective expulsion to contain the safeguards the Committee

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[203] UNGAG *Report of the Committee against Torture* Supplement No. 44, A/53/44, 1998, pp. 25-26.
[204] The Convention Against Torture entered into force on 26 June 1987, in accordance with article 27 (1) UNCAT.
[205] See: CAT *Annex IX of the Report of the Committee against Torture* Supplement No. 44 A/53/44, 1998, pp. 52-53.
[206] CAT *General Comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22* (2018), CAT/C/GC/4, 4 September 2018, (*General Comment No. 4 (2017)*), para. 13.
[207] Ibid.
[208] Ibid.

highlighted in its comment. Even the terminology such as 'objective examination' and 'individual examination through competent authorities' is equivalent. There are however two significant differences.

First, the Committee refers to *collective deportation* instead of *collective expulsion*. Second, the Committee found that a violation of the prohibition of collective deportation constitutes a violation of the *non-refoulement* principle and not a violation of a separate, independent principle.

However, a closer look at this general comment reveals that the content of collective deportation and collective expulsion are the same. The relevant footnote referencing 'collective deportation' refers to the paragraph of the HRC's *General Comment No. 15* in which it clarifies that Art. 13 ICCPR contains the prohibition of collective expulsion.[209] The footnote provided for by CAT further refers to Art. 22 (1) UNCRMW, which protects migrants from 'measures of collective expulsion' and highlights that '[e]ach case of expulsion shall be examined and decided individually.' This direct reference shows that CAT is well aware of the existence and the scope of application of the prohibition of collective expulsion in international conventions. Why CAT chose the term 'collective deportation' instead of 'collective expulsion' remains unclear, as the official documents are silent on this point. A potential reason is that different terminology was deliberately chosen to highlight the Committee's distinct approach to the relationship between the prohibition of collective expulsion and the *non-refoulement* principle.

In its concluding observations on Italy from 2017, CAT mentioned for the first time the prohibition of 'collective return' as a distinct concept forming part of the guarantees protected by Art. 3 UNCAT (*non-refoulement* and collective return). The Committee expressed its concerns about allegations that Italy 'may have acted in breach of the principle of *non-refoulement* and carried out collective returns.'[210] It is unclear whether the Committee wanted to refer here to a distinct principle contained in Art. 3 UNCAT or to a phenomenon of several joint expulsions of foreigners. However, CAT urged

[209] UNOHCHR *General Comment No. 15, The Position of Aliens Under the Covenant* adopted by the HRC on 11 April 1986, para. 15.
[210] CAT *Concluding observations on the fifth and sixth periodic report of Italy* 2017, CAT/C/ITA/CO/5-6, 21 November 2017, (*Concluding observations on Italy 2017*), para. 20.

the state party to guarantee 'that all asylum seekers have the opportunity for an individual review and are protected from refoulement and collective return.'[211] This highlighting of procedural guarantees in the expulsion context with reference to the wording used by the ECtHR in cases of collective expulsions may support the assumption that the Committee did not only refer to a joint return, but also to a distinct, implicitly contained guarantee in Art. 3 UNCAT.

Similarly, in its concluding observations on Greece, in 2019, the Committee raised 'serious concerns' about ongoing situations of 'collective returns' of foreigners. The Committee referred to reports that raise

> repeated allegations of summary forced returns of asylum seekers and migrants – including Turkish nationals – intercepted at the sea and at the land border with Turkey in the northeastern Evros region, with no prior risk assessment of their personal circumstances.[212]

Based on this report, the Committee recommended that Greece ensures that every migrant has 'the opportunity for an *individual review*, with automatic suspensive effect against expulsion decisions, and are protected from refoulement *and* collective return [emphasis added].'[213] The Committee had highlighted these guarantees in prior reports on Greece without mentioning the term 'collective return'. In several reports, CAT highlighted that member states must follow established due process guarantees when expelling foreigners. These include access to legal remedies or the possibility to file for asylum, free legal aid, and effective information provided through interpretation services and the right to an effective appeal.[214]

Overall, the Committee does not use the terms 'collective deportation' and 'collective return' in a consistent manner in cases on group expulsions of

[211] CAT *Concluding observations on Italy 2017* para. 21.
[212] CAT *Concluding observations on the seventh periodic report of Greece 2019* CAT/C/SR.1779, 7 August 2019, (*Concluding observations on Greece 2019*), para. 16.
[213] Ibid., para. 17.
[214] CAT *Consideration of reports submitted by States parties under article 19 of the Convention Concluding observations of the Committee against Torture* CAT/C/GRC/CO/5-6, 27 June 2012, para. 19.

migrants without a thorough process.[215] However, in all cases in which the Committee dealt with group expulsions, the core procedural guarantees against expulsion *en mass* were highlighted.

CAT's 2005 considerations on the periodic report of Ukraine are one example. Here, the Committee expressed its concern about group removals of migrants to a place where they 'would be in danger of being subjected to torture'.[216] CAT highlighted once again that

> '[u]nder no circumstances should the State party expel, return or extradite a person to a State where there are substantial grounds for believing that the person would be in danger of being subjected to torture. When determining the applicability of its obligations under article 3 of the Convention, the State party should examine thoroughly the merits of each individual case, ensure that adequate judicial mechanisms for reviewing the decision are in place, sufficient legal defence is available for each person subject to extradition, and that effective post-return monitoring arrangements are established. [217]

General Comment No. 4 affirmed once more the procedural guarantees in Art. 3 UNCAT against arbitrary (collective) expulsions. These are the right to an individual assessment of each foreigner's circumstances by the competent authorities, the right to legal assistance, the right to a translator, and the right to effective remedy with suspensive effect. The Committee reminded state parties once more that they 'should take legislative, administrative, judicial and other preventive measures' to ensure these guarantees.[218]

In conclusion, CAT's considerations and recommendations on Art. 3 UNCAT suggest that the provision provides a combination of the *non-refoulement*

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[215] The CAT dealt with questions of expulsion in 101 cases, see: Refworld Database *UN Committee against Torture* available at: https://www.refworld.org/publisher,CAT,,,50ffbce5136,,0.html.

[216] CAT *Consideration of Reports submitted by States Parties under Article 19 of the Convention Conclusions and recommendations of the Committee against Torture: Ukraine 2007* CAT/C/UKR/CO/5, 3 August 2007, (*Consideration of Reports: Ukraine 2007*), para. 19.

[217] CAT *General Comment No. 4 (2017)* para. 18.

[218] Ibid.

principle and procedural guarantees, such as an objective examination of the individual circumstances before an expulsion (prohibition of collective expulsion). The procedural guarantees contained in Art. 3 UNCAT are comparable to those in other regional and international human rights treaties containing the prohibition of collective expulsion, namely the right of every foreigner, before a group expulsion, to an individual examination of her or his circumstances, the right to legal assistance and a translator, and the right to an appeal.

C. Conclusion on the nature of the prohibition of collective expulsion as a due process right

Due process guarantees provide the utmost protection against violations of the rule of law. Procedural rights ensure the effective implementation of these guarantees. A process right counts as due process right when it ensures a fair, balanced, impartial, reasonable, and efficient procedure. Fair trial rights in criminal and civil procedures are based on these elements. The *European Convention on Human Rights*, the *Charter of Fundamental Rights in the European Union*, the *American Convention on Human Rights*, the *African Charter on Human and Peoples' Rights*, and the *International Covenant on Civil and Political Rights* contain fair trial rights and the right to an effective remedy, at least in criminal procedures. These guarantees are, however, not applicable in administrative expulsion procedures, with the exception of the *Charter of Fundamental Rights of the European Union*. Regional and international treaty bodies thus have interpreted other treaty provisions to guarantee at least a minimum of procedural guarantees against arbitrary collective expulsion. The prohibition of collective expulsion, which provides a minimum of procedural safeguards for every individual of a group of foreigners to bring forward her or his claims against such expulsion, has served as the basis for such an interpretation.

On the regional level, case law and other sources on the prohibition of collective expulsion suggest that the respective provisions themselves contain process rights against arbitrary group expulsions.

The provision governing the prohibition of collective expulsion in the *African Charter* seemingly focuses on the discriminatory nature of the group expulsion than on procedural guarantees. However, in its case law, the African Commission has moved away from this original understanding of the prohibition towards an interpretation that is more in line with that of other human rights bodies. Thus, the prohibition of collective expulsion in all assessed regional human rights conventions contains process rights to prevent arbitrary group expulsions that allow every foreigner to bring forward claims against the expulsion, the right to legal assistance and translation, and the right to appeal which triggers the suspensive effect of the expulsion. The

prohibition of collective expulsion in the *American Convention* goes beyond these minimum procedural guarantees and also offers the right to consular assistance in collective expulsion cases.

The comparability of the scope of protection between the different human rights treaties may be explained by the fact that the respective treaty bodies drew on each other's interpretation. This mutual inspiration or judicial dialogue has led to increased standardisation of the interpretation of the scope of application of the prohibition between the different human rights instruments. Regional and international treaty bodies such as the Inter-American Commission and the UN Migrant Worker Committee have expressly relied on the *Hirsi Jamaa and Others v. Italy* judgment in their interpretation of the prohibition of collective expulsion, for example.

On an international level, the *International Covenant on Civil and Political Rights*, the *Migrant Worker Convention*, and the *Convention against Torture* contain the same minimum procedural guarantees in the case of collective expulsions: the right to bring forward one's claim against the expulsion, the right to legal assistance and a translator and the right to an effective remedy/appeal with a suspensive effect of the expulsion procedures.

The prohibition of collective expulsion in the *UN Migrant Worker Convention* provides a list with the applicable procedural guarantees in collective expulsion cases. These guarantees are equivalent in scope compared to the other conventions examined.

Art. 3 UNCAT, which codifies the *non-refoulement* principle, implicitly contains the prohibition of collective expulsion. The CAT's interpretations can be understood to mean that the provision provides a combination of the *non-refoulement* principle and procedural guarantees, such as an objective examination of the individual circumstances before an expulsion. The procedural guarantees contained in Art. 3 UNCAT are comparable to those in other regional and international human rights treaties.

Thus, the prohibition of collective expulsion is a due process right protecting migrants against arbitrary group expulsion.

Chapter IV – The prohibition of collective expulsion at the *European Court of Human Rights*

After having examined each of the material elements and procedural guarantees of the prohibition of collective expulsion in all regional and international human rights instruments that explicitly or implicitly contain the principle, this chapter will turn away from the doctrinal aspects thereof. It will turn to practical aspects of bringing alleged violations of the prohibition of collective expulsion to court. Thus, the aim of the first part of this chapter is to assess how these guarantees can be realised in practical terms, at least in the European context. A further thematic focus of this chapter is an analysis of changing ECtHR jurisprudence on the prohibition over time and its possible driving forces behind this development.

The European Court of Human Rights has served as monitor of the practical implementation of the guarantees of the prohibition of collective expulsion in past years. One reason for this role is the Court's high-profile authority, with 'de facto supreme jurisdiction over European human rights,' which has evolved progressively over time, particularly since 2000.[1]

The number of pending cases in which a violation of the prohibition is alleged[2] is evidence of the Court's authority in this matter.

Given the ECtHR's most recent restrictive approach in *Khlaifia and Others v. Italy* and *N.D. and N.T. v. Spain*, when it comes to migrants entering a state via land borders in a violent and irregular manner, it remains to be seen whether expelled migrants and their legal representatives will in the future turn to other courts and treaty bodies instead of seeking redress at the ECtHR. Either way, this chapter provides an examination of the practical effectiveness and procedural hurdles in lodging such a case at the ECtHR, showing the difficulty in realizing effective protection against collective expulsion as guaranteed in human rights instruments.

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[1] Rask Madsen, Mikael *The European Court of Human Rights From the Cold War to the Brighton Declaration and Backlash* in: Alter; Helfer and Rask *Madsen International Court Authority* (Oxford University Press 2018), (*International Court Authority*), p. 243.

[2] See for example these pending cases as of December 2019: *Doumbe Nnabuchi v. Spain* Appl. No. 19420/15; *Balde and Abel v. Spain* Appl. No. 20351/17; *W.A. and Others v. Italy* Appl. No. 18787/17; *Khurram v. Hungary* Appl. No. 12625/17; *Moustahi v. France* Appl. No. 9347/14; *D.A. and Others v. Poland* Appl. No. 51246/17; *A.A. and Others against the former Yugoslav Republic of Macedonia and 4 other applications* Appl. No. 55798/16.

As the detailed interpretation of Art. 4 Prot. 4 ECHR by the European Commission and Court of Human Rights has changed over time for different reasons, it forms a unique research subject.

This chapter will address the specific role of Art. 4 Prot. 4 ECHR in protecting migrants' rights in Europe and beyond. It first briefly examines the evolution of the provision through the interpretation of the European Commission and Court of Human Rights (A). Next, it turns to specifics relevant to bringing collective expulsion cases to the ECtHR, such as the possibility and benefit of lodging group applications (B). Then, the specific standard of review the ECtHR has applied in collective expulsion cases is examined (C). Then, we move away from procedural aspects and analyse some of the driving forces behind the ECtHR's recent more restrictive approach in interpreting the scope of Art. 4 Prot. 4 ECHR (D). Finally, conclusions are drawn on the prohibition of collective expulsion in the ECHR (E).

A. The evolution of Art. 4 Prot. 4 ECHR

In the years immediately after Protocol 4's entry into force, the European Commission on Human Rights did not find a violation of the prohibition. The same is true regarding the first two cases at the European Court of Human Rights in 2001[3] and 2003,[4] where a violation of Art. 4 Prot. 4 ECHR was alleged. The Court found both to be inadmissible. The Commission and Court did not once find a violation of the prohibition of collective expulsion between 1963 and 2002. The vague terminology of the provision and the dismissal of all early applications may partly explain why there were only nine applications admitted that claimed such a violation in the time up until 2002.

Art. 4 Prot. 4 ECHR seemed to increase in prominence starting with *Čonka v. Belgium*,[5] in 2002. Here, the Court found, for the first time, a violation of the prohibition of collective expulsion. Since then, the ECtHR has

[3] *Xhavara and Others v. Italy and Albania* ECtHR, [Chamber], Appl. No. 39473/98, 11 January 2001.
[4] *Davydov v. Estonia* ECtHR, [Chamber], Appl. No. 16387/03, 31 May 2005.
[5] *Čonka v. Belgium* ECtHR, Appl. No. 51564/99, 5 February 2002.

continuously clarified the scope of protection of the provision through interpretation. The number of pending cases before the ECtHR and filed suits awaiting admittance are a good indicator of the continued relevance of the provision, also supporting the argument that the Court's interpretation of Art. 4 Prot. 4 ECHR developed in parallel, although with timely delays, to changing internal and external migration (control) policies.

Furthermore, some of the most recent cases in which the applicants allege a violation of the prohibition of collective expulsion highlight the relevance of the provision in cases of mass movements in times of conflict. The *Khlaifia and Others v. Italy* case, taking place in the aftermath of the Arab Spring, *N.D. and N.T. v. Spain*, dealing with summary expulsions of mainly African migrants from Spanish enclaves, and most recently, *Y.F.C. and Others v. The Netherlands*, on alleged collective expulsions of Venezuelans from Curaçao (the Netherlands) in 2019[6] are just three of many examples.

As the only provision in the ECHR and its protocols to guarantee a minimum standard of procedural rights to all migrants and asylum seekers, the prohibition serves as a guarantor for minimum fair process rights against arbitrary expulsions.

Given the high number and diversity of cases in which the ECtHR has dealt with the prohibition, the Court's and Commission's interpretation over time offer a good picture of the *status quo* and the evolution of the scope of application.

From a human rights perspective, the Court's interpretation of the prohibition seemed to have followed a linear development towards a more progressive approach, covering different kinds of expulsion policies. This theory lost footing in December 2016 with the Grand Chamber *Khlaifia and Others v. Italy* judgment and in February 2020 in *N.D. and N.T. v. Spain*.
This (temporary) progressive development peaked with the acknowledgment of the extraterritorial applicability of Art. 4 Prot. 4 ECHR in the *Hirsi Jamaa*

[6] *Y.F.C. and Others v. The Netherlands* ECtHR, Appl. No. 21325/19, communicated to the parties on 25 June 2019.

and Others v. Italy judgment in 2012[7] which gave the Court the title 'Island of Hope in Stormy Times'[8]. In stark contrast to this stands the reaction of some commentators after *N.D. and N.T. v. Spain*, calling it 'shocking'[9] or arguing with reference to the limiting of the scope of Art. 4 Prot. 4 ECHR that the Court severely limited the prohibition's scope of protection and reduced its value as 'bearer of hope'.[10]

The Grand Chamber *Khlaifia and Others v. Italy*[11] judgment of 2016 was a first indicator suggesting that the Court may incrementally reverse its progressive approach. Open critique of the Court's extensive interpretation of Art. 4 Prot. 4 ECHR raised by judges Ravarani, Bošnjak, and Paczolay in their dissenting opinion in *M.A. v. Lithuania* in 2018[12] underlined this notion of ongoing restrictions of the prohibition's scope of protection.

Nevertheless, the prohibition continues to enjoy significance when it comes to the alleged violations of migrants' rights in maritime contexts at or outside a state's border. The most recent prominent case is the recent *S.S. v. Italy* of 2018, which is pending as of April 2020. The applicants allege, among other

[7] *Hirsi Jamaa and Others v. Italy* ECtHR, [GC], Appl. No. 27765/09, 23 February 2012. On 28 November 2019, the Tribunal of Rome published its judgment in case no. 5615/2016 recognizing 14 applicants' right to enter as a compensation for illegitimate collective expulsions to Libya by the Italian Coast Guard in 2009 with explicit reference to the ECtHR's *Hirsi Jamaa and Others v. Italy* judgment. Sentenza No. 22917/2019.

[8] Rietiker, Daniel *Collective Expulsion of Aliens: The European Court of Human Rights (Strasbourg) as the Island of Hope in Stormy Times* Suffolk Transnational Law Review, 2016, Vol. 39, No. 3, pp. 651-682.

[9] Schmalz, Dana and Pichl, Maximilian "*Unlawful" may not mean rightless. The shocking ECtHR Grand Chamber judgment in case N.D. and N.T.* Verfassungsblog, 14 February 2020, available at: https://verfassungsblog.de/unlawful-may-not-mean-rightless/.
Similarly questioning the judgment's reasoning, especially regarding the non-refoulement principle: Lübbe, Anna *The Elephant in the Room Effective Guarantee of Non-Refoulement after ECtHR N.D. and N.T.?* Verfassungsblog, 19 February 2020, available at: https://verfassungsblog.de/the-elephant-in-the-room/.
For a more positive reading of the judgment, highlighting that it contains ambiguous, restrictive and dynamic aspects see: Thym, Daniel *A Restrictionist Revolution? A Counter-Intuitive Reading of the ECtHR's N.D. & N.T.-Judgment on 'Hot Expulsions' at the Spanish-Moroccan Border* Verfassungsblog, 17 February 2020, available at: https://verfassungsblog.de/a-restrictionist-revolution/.

[10] Hruschka, Constantin *Hot Returns bleiben in der Praxis EMRK-widrig* Verfassungsblog, 21 February 2020, available at: https://verfassungsblog.de/hot-returns-bleiben-in-der-praxis-emrk-widrig/.

[11] *Khlaifia and Others v. Italy* ECtHR, [GC], Appl. No. 16483/12, 15 December 2016.

[12] Joint dissenting opinion of Judges Ravarani, Bošnjak and Paczolay in *M.A. and Others v. Lithuania* ECtHR, Appl. No. 59793/17, 11 December 2018.

things, that Italy's 'pull-back by proxy' policy violated Art. 4 Prot. 4 ECHR[13] based on cooperation with the Libyan coast guard.[14] By juxtaposing the analysis of the evolution of the interpretation of Art. 4 Prot. 4 ECHR by the ECtHR with the change in migration control policies since the early 2000s, the relevance of this provision in the context of protecting human rights becomes apparent. The outcome of currently pending cases[15] at the ECtHR[16] alleging violations of the prohibition in relation to such new migration control strategies will clarify the Court's approach to interpreting the principle when it comes to removing foreigners *en masse*.

Strategic litigation is also a relevant factor in the prominence of Art. 4 Prot. 4 ECHR, as seen in cases such as *Khlaifia and Others v. Italy*, *N.D. and N.T. v. Spain*,[17] and the *Idomeni* case in which the applicants' allege large-scale collective expulsions from present-day Northern Macedonia to Greece[18].
In addition, the inexistence of alternative legal remedies (on the domestic level) might also contribute to the prominence of the provision. Stefano Zirulia, one of the representatives of the applicants in *Khlaifia and Others v. Italy*, sees this lack of legal remedies as the leading cause for turning to the ECtHR.[19] Despite covering such new collective expulsion scenarios, the Court, in parallel, continues to deal with original forms of collective expulsions from a state's territory, such as in *Čonka v. Belgium*[20], *Georgia v.*

[13] For an in-depth assessment of the evolution from push-backs to pull-backs by proxy policies see: Giuffré, Mariagiulia *The Readmission of Asylum Seekers under International Law* (Hart Publishing 2020), (*The Readmission of Asylum Seekers under International Law*), pp. 327-347.
[14] *S.S. and Others v. Italy* ECtHR, Appl. No. 21660/18, communicated on 26 June 2019. On 11 November 2019, the AIRE Centre, The Dutch Refugee Council, the European Council on Refugees and Exiles and the International Commission of Jurists submitted an intervention to the Court in which the interveners address questions on jurisdiction and a violation of *the non-refoulement* principle, (*Intervener brief in S.S. and Others v. Italy*).
[15] As of April 2020.
[16] See for example pending cases as of December 2019: *Doumbe Nnabuchi v. Spain* Appl. No. 19420/15; *Balde and Abel v. Spain* Appl. No. 20351/17; *W.A. and Others v. Italy* Appl. No. 18787/17; *Khurram v. Hungary* Appl. No. 12625/17; *Moustahi v. France* Appl. No. 9347/14; *D.A. and Others v. Poland* Appl. No. 51246/17; *A.A. and Others against the former Yugoslav Republic of Macedonia and 4 other applications* Appl. No. 55798/16.
[17] *N.D. and N.T. v. Spain* ECtHR, [Chamber], Appl. Nos. 8675/15 and 8697/15, 3 October 2017.
[18] For more information on the case see here: European Center for Constitutional and Human Rights *From Idomeni to Strasbourg: Refugees demand their right to have rights at the ECtHR* available at: https://www.ecchr.eu/en/case/from-idomeni-to-strasbourg-refugees-demand-their-right-to-have-rights-at-the-ecthr/.
[19] Zirulia, Stefano, e-mail to the author 17 May 2019.
[20] *Čonka v. Belgium* ECtHR, Appl. No. 51564/99, 5 February 2002.

Russia (I)[21], *Berdzenishvili and Others v. Russia*,[22] and *Shioshvili and Others v. Russia*[23].

Furthermore, as the *Convention* itself does not contain explicit guarantees for migrants and asylum seekers, the Court turned *inter alia* to Art. 4 Prot. 4 ECHR to close this lacuna of protection. The introduction of additional protocols has only partially helped to overcome this deficit:[24] for example, not all ECHR Member States have ratified Protocol 4 and 7, which contain minimum guarantees for foreigners. The prohibition of collective expulsion and the *non-refoulement* principle remain the only principles in the ECHR and its protocols that protect regular and irregular migrants and asylum seekers and that offer them minimum procedural guarantees.

Additionally, as shown in previous chapters, the Court's jurisprudence has served as a model for other regional[25] and international treaty bodies[26] and is thus the foundation of modern-day interpretation of the prohibition of collective expulsion beyond the European context.[27]

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[21] *Georgia v. Russia (I)* ECtHR, [GC], (merits), Appl. No. 13255/07, 3 July 2014.
[22] *Berdzenishvili and Others v. Russia* ECtHR, Appl. Nos. 14594/07 and 6 others, 20 December 2016.
[23] *Shioshvili and Others v. Russia* ECtHR, Appl. No. 19356/07, 20 December 2016.
[24] For a detailed analysis of this issue see: Feihle, Prisca *Asylum and Immigration under the European Convention on Human Rights – An Exclusive Universality?* in: Aust and Demir-Gürsel (eds.) *The European Court of Human Rights: Current Challenges in Historical and Comparative Perspective* (Edward Elgar publication 2021), draft on file with the author.
[25] The African Commission referred explicitly to findings of the European Court of Human Rights with regard to mass expulsion in *Institute for Human Rights and Development in Africa v Republic of Angola* African Human Rights Law Journal, 2009, Vol. 9, No. 1, para. 70. Furthermore, Art. 19 (1) EU Charter of Fundamental Rights corresponds to the content of Art. 4 Prot. Art. 52(3) of the Charter states that the 'the meaning and scope of those rights shall be the same'. As a consequence, the jurisprudence of the ECtHR on Art. 4 Prot. 4 ECHR is to be consulted for the determination of the scope in Art. 19 (1) EUChFR.
[26] The ECtHR's jurisprudence was also referenced by the UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families in its *General Comment No. 2 on the rights of migrant workers in an irregular situation and members of their families* CMW/C/GC/2, 28 August 2013, para. 49. See also: Sub-Commission on the Promotion and Protection of Human Rights of the UN Social and Economic Council *Prevention of Discrimination – The Rights of Non-citizens* E/CN.4/Sub.2/2003/23, 26 May 2003, para. 11. The report referred to the requirement of providing 'a reasonable and objective examination of the particular case of each individual non-citizen in the group' before being expelled as established by the ECtHR in *Čonka v. Belgium*.
[27] One illustration of this is the particular attention the prohibition of collective expulsion recently gained on an international level. The *UN Global Compact on Safe, Orderly, and Regular Migration* (Global Compact on Migration) incorporated the prohibition without further explanation in principles 8 and 21. The Intergovernmental Conference to adopt the Global Compact for Safe, Orderly and Regular Migration took place in Marrakech, Morocco

on 10 and 11 December 2018. UNGA *Intergovernmental Conference to Adopt the Global Compact for Safe, Orderly and Regular Migration - Outcome of the Conference* A/CONF.231/3.

B. Possible applicants in collective expulsion cases: Individuals and groups (Art. 34 ECHR)

Art. 34 ECHR contains the criteria for the admissibility of individual applications to the European Court of Human Rights. In recent years and over several rulings, the Court has stressed the great importance of Art. 34 ECHR in implementing individuals' human rights. For example, the ECtHR defined this provision in the 1978 *Klass and Others v. Germany* case as the 'keystone in the machinery for the enforcement of the rights and freedoms set forth in the *Convention*'[28]. It further clarified in 2005 in *Mamatkulow and Askarov v. Turkey* that this provision offers 'one of the fundamental guarantees of the effectiveness of the convention system of human rights protection.'[29]

Art. 34 ECHR not only allows individual applications to the Court but it also grants this right to a 'group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto.' The mention of *groups of individuals* as applicants allows for several victims affected by the same violation to file a joint complaint. Art. 34 ECHR thus allows for class action lawsuits.[30]

This enables individual victims as well as the collectively expelled group itself to bring an individual application before the European Court of Human Rights.[31] For such a claim to be admissible, an individual or a group of individuals must claim to be the victim of a violation committed by a Member State to avoid the filing of an *actio popularis*.[32] To fulfil the requirement of victimhood in the sense of Art. 34 ECHR, the applicants 'must be directly affected by the impugned measure'.[33] The absence of a current threat in

[28] *Klass and Others v. Germany* ECtHR, Appl. No. 5029/71, 6 September 1978, para. 34.
[29] *Mamatkulow and Askarov v. Turkey* ECtHR, [GC], Appl. Nos. 46827/99 and 46951/99, 4 February 2005, para. 100.
[30] Schäfer, Patrick *Art. 34* in: Karpenstein; Mayer (eds.) *EMRK Konvention zum Schutz der Menschenrechte und Grundfreiheiten Kommentar* (C. H. Beck 2nd edn. 2015), para. 48.
[31] For the same conclusion see for example: Tretter, Hannes *Artikel 1–4 4. ZP* in: Ermacora/Nowak/Tretter *Die Europäische Menschenrechtskonvention in der Rechtsprechung der österreichischen Höchstgerichte* (Braumüller Verlag 1983), pp. 683-684.
[32] *Sejdic and Finci v. Bosnia and Herzegovina* ECtHR, [GC], Appl. No. 27996/06 and 34836/06, 22 December 2009, para. 28.
[33] *Vallianatos and Others v. Greece*, ECtHR, [GC], Appl. No. 29381/09, 2013, para. 47.

expulsion cases does not preclude the victimhood of the applicant, who still enjoys the right to remedy.[34]

The ECtHR has dealt with several cases of group applications concerning the prohibition of collective expulsion. One example is *Khlaifia and Others v. Italy*, where three Tunisian applicants applied jointly to the Court.[35] In addition, in *Hirsi Jamaa and Others v. Italy*, a group of 11 Somali and 13 Eritrean applicants lodged a joint complaint under Art. 34 ECHR.[36] The same applies to *N.D. and N.T. v. Spain*.[37] One prominent exception is the case *Georgia v. Russia (I)* where the Court found that Russia violated the prohibition of collective expulsion.[38] Here, the applicant was an ECHR Member State in accordance with Art. 33 ECHR.[39] Lodging a complaint concerning a violation of the prohibition of collective expulsion against another Member State was unprecedented.

The possibility of lodging a group application is of essential importance in cases of collective expulsions to avoid the striking out of the case according to Art. 37 ECHR. The provision guarantees that if one application is struck out, the application continues to stand in relation to the others. Through the mechanism of Art. 37 ECHR, the Court can end cases where applicants do no longer want to pursue their applications (Art. 37 I (a)), if the matter is resolved (Art. 37 I (b)), or if the examination is no longer justified (Art. 37 (I)(c) ECHR). In the event the Court strikes out a case, Art. 37 II ECHR offers a final safeguard. This subsection guarantees that an application is restored to the list if the Court 'considers that the circumstances justify such a course.'

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[34] Schabas, William *The European Convention on Human Rights A Commentary* (Oxford University Press 2015), pp. 740-741.

[35] The applicants Saber Ben Mohamed Ben Ali Khlaifia, Fakhreddine Ben Brahim Ben Mustapha Tabal and Mohamed Ben Habib Ben Jaber Sfar lodged a joint application Appl. No. 16483/12) against the Italian Republic under Article 34 on 9 March 2012. See: *Khlaifia v. Italy* ECtHR, [GC], para. 1.

[36] *Hirsi Jamaa and Others v. Italy* ECtHR, [GC], para. 1.

[37] *N.D. and N.T. v. Spain* ECtHR, [Chamber] para. 1. The two applicants, N.D., a Malian national and N.T., a national of Côte d'Ivoire jointly lodged the application in accordance with Art. 34 ECHR.

[38] *Georgia v. Russia (I)* ECtHR, para. 1. States can lodge complaints against other ECHR Member States in accordance with Art. 33 ECHR.

[39] Art. 33 ECHR reads: Any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the Protocols thereto by another High Contracting Party.

In the majority of cases lodged at the ECtHR pertaining to Art. 4 Prot. 4 ECHR, a group of foreigners have applied jointly. Nevertheless, a single individual can also submit a complaint.[40]

The circumstances in *Hussun and Others v. Italy*[41] highlight the relevance of Art. 34 ECHR and other procedural alleviations in expulsion cases. Here, the Court dealt with the application of 84 migrants who had come from Libya to the island of Lampedusa (Italy) in March 2005, among a group of about 1,200 people. The 84 applicants claimed, amongst other things, a violation of the right to an effective remedy and a violation of the prohibition of collective expulsion.

At the time of the decision, the whereabouts of 57 of the applicants were unknown. 26 applicants lost contact with their representatives. Thus, the Court stroke out 83 of the 84 applications of the list of cases.

Another example is *Abdi Ahmed and others v. Malta* of 2014. Here, the Court warned the representatives of the applicants 'that failure to reply with the relevant information concerning each applicant may lead the Court to conclude that the respective applicants are no longer interested in pursuing their application and to strike it out of its list of cases in their respect.'[42] As the representatives could not provide such information on 3 of the 12 Somali applicants, the Court concluded that this inability 'is a result of the three applicants having become untraceable, or in any event as result of a lack of contact between the mentioned three applicants and the said representatives.'[43] Thus, the Court struck the case out.[44]

[40] Brandl, Ulrike *Verbot der Kollektivausweisung von Ausländern Art 4 EMRK/Prot 4* in: Pabel/Schmahl (eds.) *Internationaler Kommentar zur Europäischen Menschenrechtskonvention mit einschlägigen Texten und Dokumenten* (Carl Heymanns Verlag 2013), para. 10.
[41] *Hussun and Others v. Italy* ECtHR, Appl. Nos. 10171/05, 10601/05, 11593/05 and 17165/05, 2010.
[42] *Abdi Ahmed and others v. Malta* ECtHR, Appl. No. 43985/13, fifth section, decision on admissibility, para. 41.
[43] Ibid., para. 43.
[44] Ibid., paras. 44-45.

Two cases of Spring 2020 help clarify the form of contact necessary between the applicant(s) and their legal representatives to satisfy the requirements under Art. 37 ECHR. In the first case, *N.D. and N.T. v. Spain* of February 2020, the applicants maintained continuous contact with their representatives through telephone and WhatsApp,[45] which satisfied this prerequisite in the Court's view.[46] In contrast, the applicants and their representatives in *Asady and Others v. Slovakia*[47] of March 2020 stayed in contact via Facebook messages and a Facebook group dedicated to maintaining communication between all applicants and the representatives[48]. The Court stressed in this regard that it 'does not lose sight of the complicated situation' of all applicants, and it is 'therefore ready to accept that they may not be able to communicate with their legal representative regularly and via traditional means'.[49] Nevertheless, the Court stressed that only *direct* contact, evidenced by copies of bilateral messages, satisfies the contact-requirement.[50] Thus, the Court stoke out all applications (10 in total) for which the representative could not provide such evidence as they only had indirect contact via the joint Facebook group.[51] Judge Hellen Keller criticized the Court for differentiating between Facebook and WhatsApp as means of communication in these two cases in her dissenting opinion to the *Asady and Others* case arguing that

> 'Facebook […] is popular as a medium for communication among young people […]. Insofar as social media platforms such as Facebook enable users to access and exchange content easily from anywhere in the world, they should not be underestimated as a means of communication between legal representatives and clients, particularly in difficult circumstances.'[52]

These two cases together show that the Court also accepts non-traditional means of communication, such as telephone, WhatsApp, or Facebook messages, to satisfy the requirements of Art. 37 ECHR, as long as the contact between the applicant(s) and representative(s) is direct and verifiable.

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[45] *N.D. and N.T. v. Spain* ECtHR, [GC], para. 69.
[46] Ibid., paras. 70-79, in particular para. 74.
[47] *Asady and Others v. Slovakia* ECtHR, Appl. No. 24917/15, 24 March 2020.
[48] Ibid., paras. 17-18 and 32.
[49] Ibid., para. 38.
[50] Ibid., para. 41.
[51] Ibid., para. 40.
[52] Ibid., dissenting opinion of judge Hellen Keller, para. 3.

In the event of the death of an applicant during ongoing proceedings, a closely related person who can show a 'legitimate interest' in continuing the case may prevent the striking out in this instance. Relatives of applicants in the Grand Chamber judgment *Léger v. France*[53] and *Hirsi Jamaa and Others v. Italy*[54] successfully made use of this possibility.
The Court introduced another pathway in *Karner v. Austria* in the case of an applicant's death.[55] Here, the ECtHR held that it could continue a case if the matter at hand is of high importance to the general protection of human rights enshrined in ECHR. It clarified that it is not crucial whether the case is easily transferable to another person.[56]

One non-procedural factor which affects the difficulty of upholding contact between applicant(s) and legal representatives in collective expulsion cases at the ECtHR is the long period between the collective expulsion itself and the declaration of the judgment. In *Georgia v. Russia (I)*, eight years had passed between the collective expulsions of Georgians from Russian territory and the judgment. In *Hussun and Others v. Italy* and *Khlaifia and Others v. Italy*, around five years passed between the events and the cases. In *Hirsi Jamaa and Others v. Italy*, the period was notably shorter: three years between the push-backs at sea and the Grand Chamber judgment.

The surrounding circumstances in these cases highlight the factual difficulties of bringing violations of collective expulsion to court. In all cases, some applicants were untraceable, lost contact with their representative, or died during the pending proceedings before the Court.

[53] *Léger v. France* ECtHR, [GC], Appl. No. 19324/02, 30 March 2009, para. 50.
[54] *Hirsi Jamaa and Others v. Italy* ECtHR, [GC], para. 57.
[55] *Karner v. Austria* ECtHR, Appl. No. 40016/98, 24 July 2003, paras. 25-26.
[56] Ibid., para. 25.

C. Standard of review in collective expulsion cases by the European Court of Human Rights

Applicants and their representative who want to lodge a case at the ECtHR alleging a violation of the prohibition of collective expulsion often face aggravated circumstances. The applicant of a collective expulsion case is usually no longer present in the state's territory, and thus, keeping contact with their representative is more complicated. The surrounding circumstances of collective expulsions often create particular hurdles for bringing alleged violations of Art. 4 Prot. 4 ECHR to court. The ECtHR recognised these circumstances and provided for special alleviations of the standard of review in cases where aggravated circumstances are at hand. In the following, I will first address how the ECtHR generally deals with questions on the standard of review before turning to specificities relating to the particular standard in collective expulsion cases.

I. Assessment of evidence and burden of proof at the ECtHR

The standard of review, including the assessment of evidence and the burden of proof, is not explicitly defined in the ECHR or its additional protocols. The *Rules of Court*[57] are also mostly silent on how the court assesses evidence and the burden of proof. Rule 44 C No. 1 Rules of Court is the only indicator of the Court's approach to the assessment of the evidence. This provision stipulates that where a party fails to adduce evidence, to provide information requested by the Court, to divulge relevant information of its own motion, or to participate effectively in the proceedings, the Court may draw such inferences as it deems appropriate and *ultima ratio* dismiss the case.

This paucity of explicitly written rules is common in international courts as these issues lay in the courts' 'prerogative to define [their] own procedures.'[58] The aim of the ECtHR and other courts' assessment of evidence is the substantiation of a claim. Legal scholarship has long criticised the ECtHR for

[57] Registry of the European Court of Human Rights *Rules of Court* edition of 19 September 2019 available at: https://www.echr.coe.int/Documents/Rules_Court_ENG.pdf.
[58] Gruszczynski, Lukasz and Wouter, Werner (eds.) *Deference in International Courts and Tribunals* (Oxford University Press 2014), p. 1.

its ambiguous practice when dealing with the law of evidence and for its practice of not itself gathering factual evidence.[59]

The main reason for the Court's restraint in assessing evidence is its deferential approach, which confers discretion over these questions to the Member States. In *Garcia Ruiz v. Spain*, the Grand Chamber of the ECtHR clarified that the *Convention* 'does not lay down any rules on the admissibility of evidence or the way it should be assessed, which are therefore primarily matters for regulation by national law and the national courts'.[60]

Interestingly, given the high practical relevance of the standard of review to parties to a case, it seems there are relatively few, especially recent, relevant scholarly publications.[61]

The terminology the court applies to questions on the standard of proof varies depending on the circumstances of the case and nature of the provision in question. The Court uses different terminology to describe the standard of review, such as 'margin of appreciation', 'standard of proof', and 'level of scrutiny'.[62] Following its deferential approach, the ECtHR has never clearly defined a general standard of proof applicable in all proceedings.[63]

In *N.D. and N.T. v. Spain*, the Court offered an explanation for its ambiguity when it comes to questions on its assessment of the evidence and facts in its case law. The Grand Chamber noted that 'the distribution of the burden of proof and the level of persuasion necessary for reaching a particular

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[59] André, Achim *Beweisführung und Beweislast im Verfahren vor dem Europäischen Gerichtshof* Kölner Schriften zum Europarecht Band 6 (Carl Heymanns Verlag KG 1966), (*Beweisführung und Beweislast im Verfahren vor dem Europäischen Gerichtshof*), p. 5.
[60] *Garcia Ruiz v. Spain* ECtHR, [GC], Appl. No. 30544/96, 21 January 1999, para. 28.
[61] Some exceptions are: André, Achim *Beweisführung und Beweislast im Verfahren vor dem Europäischen Gerichtshof*; Baumhof, Angelika *Die Beweislast im Verfahren vor dem Europäischen Gerichtshof* (Nomos 1996). More recent examples: Ambrus, Mónika *The European Court of Human Rights and Standards of Proof* in: Gruszczynski and Werner *Deference in International Courts and Tribunals* (eds.), (Oxford University Press 2014), (*The European Court of Human Rights and Standards of Proof*), pp.235-253 and with a focus on criminal procedures: McBride, Jeremy *The Case Law of the European Court of Human Rights on Evidentiary Standards in Criminal Proceedings* published as part of the European Union – Council of Europe joint project *Application of the European Convention on Human Rights and harmonisation of national legislation and judicial practice in line with European standards in Georgia* (*The Case Law of the European Court of Human Rights on Evidentiary Standards in Criminal Proceedings*).
[62] Ambrus, Mónika *Enforcement Mechanisms of the Racial Equality Directive and Minority Protection* (Eleven International Publishing 2011), pp. 34-35.
[63] McBride, Jeremy *The Case Law of the European Court of Human Rights on Evidentiary Standards in Criminal Proceedings* para. 17.

conclusion are intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake.'[64]

The Court had previously mentioned particular aspects of the standard of proof in several cases. The Court stipulated, for example, in *Ringvold v. Norway* that the level of scrutiny in criminal matters must be more exacting than in civil matters.[65] The Court justified this discrepancy based on the respective national legislation of the respondent in the case.[66]

The level of scrutiny in administrative (expulsion) procedures compared to civil or criminal matters has not been addressed by the court. However, given the severe consequences for an expelled foreigner, the argument that the level of scrutiny should be comparable to the level in criminal proceedings seems reasonable.

The Court has repeatedly established and confirmed that the standard of proof applied by the Court is high and must be 'beyond reasonable doubt'.[67] Such proof, in turn, may stem 'from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact.'[68] The standard of proof is closely linked to the question of who bears the burden of proof.

In general, the party who makes a legal, factual, or mixed claim bears the burden of proof, or in Mónika Ambrus's words the 'burden of persuasion'.[69] In general, the applicant or the group of applicants who claim a violation of a right enshrined in the *Convention* or its protocols must prove it. The respondent state can then rebut or justify the allegations.[70]

Exceptions to this rule exist in the case the respondent state has exclusive access to evidence. If this is the case, the burden of proof is on the

[64] *N.D. and N.T. v. Spain* ECtHR, [GC], para. 85.
[65] McBride, Jeremy *The Case Law of the European Court of Human Rights on Evidentiary Standards in Criminal Proceedings* para. 18 referring to *Ringvold v. Norway* ECtHR, Appl. No. 34964/97, 11 February 2003, para. 38.
[66] *Ringvold v. Norway* ECtHR, para. 38.
[67] See for example: *Avşar v. Turkey* ECtHR, Appl. No. 25657/94, 10 July 2001, para. 282 or *Stoica v. Romania* ECtHR, Appl. No. 42722, 4 March 2008, para. 63.
[68] *Stoica v. Romania* ECtHR, Appl. No. 42722, 4 March 2008, para. 63.
[69] Ambrus, Mónika *The European Court of Human Rights and Standards of Proof* p. 236.
[70] Ibid., pp. 236-237.

respondent.[71] This exception applies if the 'events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control while in custody'.[72] Thus, if the applicant is in removal detention or under any other form of permanent control of the respondent, the burden of proof lies with the respondent. This situation has frequently been the case in expulsion proceedings before the ECtHR.[73]

II. Specificities of standard and burden of proof in collective expulsion cases

The Court has never conclusively examined the question on the standard and the burden of proof in collective expulsion cases. Given the circumstances, consequences, and nature of collective expulsion, these questions are paramount to bringing alleged violations of Art. 4 Prot. 4 ECHR to the ECtHR. A profound and substantive body of evidence is necessary for a case to pass the first admissibility stage, as can be seen, for example, in *Abdi Ahmed and others v. Malta* from 2014. In this case, the questions of whether Malta had issued expulsion orders and had implemented and offered effective and genuine measures to appeal such orders were highly contested. The Court dealt with these claims with reference to introduced evidence and by determining who bears the burden of proof.[74] Even though the Court did not rule on the merits of the case, these issues were nevertheless decisive for the further progress of the proceedings. Acknowledging the importance of evidence and the practical difficulty of gathering such evidence in cases of expulsion, the Court seemingly offered procedural alleviations for bringing such cases to the ECtHR, on overview of which is provided in the following section.

[71] Ibid., p. 239.
[72] *Velikova v. Bulgaria* ECtHR, Appl. No. 41488/98, 18 May 2000, para. 70.
[73] See for example the applicants in *Hirsi Jamaa and Others v. Italy* or *Khlaifia and Others v. Italy* or *N.D. and N.T. v. Spain* [Chamber and Grand Chamber judgments].
[74] *Abdi Ahmed and others v. Malta* ECtHR, Appl. No. 43985/13, fifth section, decision on admissibility, para. 9.

1. Procedural alleviations for applicants of collective expulsion cases

The 'beyond reasonable doubt' threshold in collective expulsion cases can pose high practical hurdles for the collectively expelled foreigner. Thus, the above-described exception to the burden of proof is particularly relevant in the case the respondent state possesses all relevant evidence.
Especially in cases of summary expulsions, the expelled foreigners are disadvantaged in practical terms when it comes to submitting proof 'beyond reasonable doubt' that they were not granted the effective possibility of bringing forward their claims against expulsion.

In such instances, it seems likely that the expelling respondent state possesses evidence for the conduct of such an examination in the form of interview protocols, court records, asylum procedure documents, and other files. In contrast, if the applicants need to show that the respective state failed to provide such a possibility, they can only rely on their and other migrants' witness statements.

In *Georgia v. Russia (I)*, the Court made the highly important observation by referring to its own case law stipulating that

> the respondent Government ha[s] exclusive access to information capable of corroborating or refuting the applicant['s] […] allegations, any lack of co-operation by the Government without a satisfactory explanation may give rise to the drawing of inferences as to the well-foundedness of the applicant['s] […] allegations.[75]

The Court acknowledged in *M.A. v. Switzerland* that aggravating circumstances often went hand in hand with collective expulsion scenarios and highlighted that they ought to be considered when determining the standard of proof when the burden of proof is on the applicant.
Here, the ECtHR clarified that

[75] *Georgia v. Russia (I)* ECtHR, para. 104.

> owing to the special situation in which asylum seekers often find themselves, it is frequently necessary to give them the benefit of the doubt when it comes to assessing the credibility of their statements and the documents submitted in support thereof. However, when information is presented which gives strong reasons to question the veracity of an asylum seeker's submissions, the individual must provide a satisfactory explanation for the alleged discrepancies.[76]

Hence, the specific circumstances of the collective expulsion of foreigners may lead to a lower standard of proof, namely that of a 'satisfactory explanation' in the case of discrepancies between submitted evidence.

In collective expulsion cases, the main question spins around factual issues and particularly the question whether the expelling state offered the foreigners the possibility to bring forward their claims against their expulsion in the manner foreseen by the prohibition.[77]

In *Georgia v. Russia (I)*, the Court made some clarifications on the standard of review of evidence in collective expulsion cases.
The Court concluded that the respondent state must establish 'beyond reasonable doubt'[78] that it offered every foreigner the possibility of bringing forward claims against expulsion, the core of the Court's assessment in Art. 4 Prot. 4 ECHR cases. The burden of proof for such claims lies with the respondent state.
At the time of writing, *Georgia v. Russia (I)* is the only case one on Art. 4 Prot. 4 ECHR that explicitly addressed both the standard of evidence and the burden of proof. Thus, this section in *Georgia v. Russia (I)* deserves some closer analysis.

[76] *M.A. v. Switzerland* ECtHR, Appl. No. 52589/13, 18 November 2014, para. 55.
[77] For details on the procedural guarantees of the prohibition of collective expulsion see above, Chapter III.
[78] *Georgia v. Russia (I)* ECtHR, para. 93.

On the assessment of evidence, the Court made a general observation that serves as a guide for all other collective expulsion cases. Here the Court stipulated that

> [a]ccording to its established case-law, proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. Moreover, the level of persuasion necessary for reaching a particular conclusion and, in this connection, the distribution of the burden of proof are *intrinsically linked* to the *specificity of the facts,* the *nature of the allegation* made and the *Convention right at stake.* The Court is also attentive to the *seriousness* that attaches to a ruling that a Contracting State has *violated fundamental rights* [emphasis added].[79]

The judgment offers some generalizable findings for allegations of Art. 4 Prot. 4 ECHR. First, ECtHR judges should assess the exact circumstances of the collective expulsion including their background.

Second, when taking into account the 'nature of the allegation made and the Convention right at stake', the specific nature of Art. 4 Prot. 4 ECHR as a due process guarantee and the specific circumstances of expulsions play a crucial role.

Third, in cases of an alleged administrative practice of collective expulsion, the burden of proof is not with one particular party. Instead, the Court will study all relevant material submitted to it and will base its conclusion on an overall assessment of all evidence, including the parties' conduct towards the Court in obtaining evidence.[80]

Earlier cases like *Čonka v. Belgium* support the finding that the Court considers all evidence provided for the determination of the collective nature

[79] *Georgia v. Russia (I)* ECtHR, para. 94.
[80] Ibid., paras. 93-95.

of the expulsion in question. The context of the case indicated that the Court did assess all relevant material before concluding that Belgium had established a practice of collective expulsion.[81]

In cases after *Georgia v. Russia (I)*, such as the Chamber and Grand Chamber judgment in *Khlaifia and Others v. Italy* and *N.D. and N.T. v. Spain*, the Court was less clear on its standard of review.

In the *Khlaifia and Others v. Italy* Chamber judgment, the ECtHR concluded that the 'Government failed to produce any document capable of proving that individual interviews concerning the specific situation of each applicant had taken place prior to the issuance of the orders'[82] without addressing the standard of evidence or who bore the burden of proof.

Similarly, the Chamber concluded in *N.D. and N.T. v. Spain* first that 'it is *beyond doubt* that the applicants […] were under the continuous and exclusive control of the Spanish authorities [emphasis added]'[83] and then that 'the procedure followed is *incapable of casting doubt* on the collective nature of the expulsions complained of [emphasis added].'[84] The Grand Chamber in this case affirmed the first finding, stressing that the 'Court is in no doubt' regarding the applicability of Art. 1 ECHR in the case at hand[85] and that it was 'beyond dispute' that the Spanish officials removed the applicants against their will.[86] On the second claim, it did not rely on comparable and concise wording as it deviated from the Chamber judgment, but explained in great length why the evidence in the case in question speaks against the collective nature of the expulsion.[87] Closely linked to this question was the Court's assessment on the existence of a 'genuine and effective opportunity'[88] to lodge asylum claims at the border and at Spanish embassies. In this judgment, the affirmative answer to this question was the basis for the denial of the

[81] *Čonka v. Belgium* ECtHR, para. 62.
[82] *Khlaifia and Others v. Italy* ECtHR, [Chamber], para. 156.
[83] *N.D. and N.T. v. Spain* ECtHR, [Chamber] para. 105.
[84] Ibid., para. 107.
[85] *N.D. and N.T. v. Spain* ECtHR, [GC], para. 190.
[86] Ibid., para. 191.
[87] Ibid., paras. 202-232.
[88] Ibid., para. 208.

collective nature of the expulsion. In line with its previous jurisprudence on collective expulsions, the Court must have conducted a holistic assessment of all evidence provided by the Spanish government, the applicants, and third-party interveners.[89] However, the Court's conclusion on the existence of effective and genuine possibilities to lodge claims for protection, especially for sub-Saharan Africans, may be questioned in this regard. Given the extensive sources (including UNHCR and OHCHR) pointing to the contrary[90], it is surprising that the Grand Chamber briefly concluded that the 'general allegations' are 'insufficient to displace this conclusion.'[91] Additionally, the Court found that regardless, Spain is not responsible for any measure that prevents migrants from seeking legal entry established by third states.[92]

In conclusion, an analysis of the ECtHR's standard of review in collective expulsion cases shows that the burden of proof that individual examinations or at least identifications were conducted lies often with the respondent state. The aggravated circumstances of a collective expulsion for those impacted, the nature of the prohibition as a due process guarantee, and the fact that the respondent usually has exclusive access to relevant evidence justify this procedural alleviation for applicants. If the Court assesses the existence of a policy aimed at collective expulsion relevant to the case in question, it draws on evidence that is also provided by NGOs and other third-party interveners, not only from the parties' submissions.

[89] Ibid., paras. 212-217.
[90] For the interventions of UNHCR and OHCHR see: Ibid., paras. 152-156.
[91] Ibid., para. 217.
[92] Ibid., para. 218.

2. A distinct approach on the standard of review – The Grand Chamber judgment *Khlaifia and Others v. Italy and N.D. and N.T. v. Spain*

As described above[93], the Grand Chamber seemingly established in *Khlaifia and Others v. Italy* less strict procedural obligations in 'summary collective expulsion' cases. The three applicants in the *Khlaifia* case were all Tunisian nationals who were intercepted by the Italian coast guard in the Mediterranean Sea and brought to Lampedusa in September of 2011. As the number of arrivals in Italy from Tunisia continuously rose with the start of the Arab Spring in 2010, the two countries reached a bilateral cooperation agreement in April 2011. This agreement was never made public and served as the basis for a fast-track return procedure of intercepted individuals, all of whom were identified twice: first by the Italian authorities and then upon return by the Tunisian consulate.
The Grand Chamber concluded that as long as states identify the migrants and offer the *possibility* for every foreigner to bring forward claims, it satisfies the procedural requirements of Art. 4 Prot. 4 ECHR in summary collective expulsion cases.

As assessed above, the Grand Chamber of the ECtHR clarified in *Khlaifia and Others v. Italy* in 2016 that the prohibition of collective expulsion does not guarantee an individual interview in all circumstances. The effective possibility for the group of foreigners to bring forward their claims against the expulsion satisfies the procedural requirements contained in the provision. As will be shown in the following, this differentiation between the expulsion scenarios also seemingly affects the burden of proof from the expelling state to the expelled individual.

The Court's language is, however, ambiguous in this regard. If the has Court indeed shifted the burden of proof, it is then unclear if the *Khlaifia and Others v. Italy* Grand Chamber judgment was an exception or a starting point of a new approach to the standard of review in 'summary collective expulsion' cases.

[93] See Chapter II.

In assessing the Grand Chamber judgment, scholar Jill Goldenziel has emphasised this uncertainty stating that *Khlaifia and Others v. Italy* might be interpreted to mean that states do not have the burden of ensuring that migrants understand their procedural rights'.[94]
Judge Serghides, in his partly dissenting opinion, stressed the consequences of such a burden shift on the individual foreigner which in his opinion 'is not required by Article 4 of Protocol No. 4.'[95]

By applying this new standard in the given case, the judges seemingly took an *ex post* view of differentiating regular and irregular migrants, observing that

> [t]he applicants' representatives, both in their written observations and at 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 preclude their removal. This calls into question the usefulness of an individual interview in the present case.[96]

This approach in my view is incompatible with the object and purpose of Art. 4 Prot. 4 ECHR. The provision's aim, as highlighted in the Grand Chamber judgment itself, is to guarantee *every foreigner* without discrimination an examination of her or his circumstances. Such an examination can only be conducted without discrimination if each individual has the same chance of bringing forward a claim against the expulsion. While it may be true that the applicants in the case at hand did not have any legal grounds for staying in Italy, this is, however, *irrelevant* in the determination of a violation of Art. 4 Prot. 4 ECHR. As the consequences of an expulsion are not easily reversible, the provision grants every foreigner the right to bring forward claims before the removal. The decisive point in time for the determination of whether an effective possibility to an individualised examination was provided is any

[94] Goldenziel, Jill *Khlaifia and Others v. Italy International Decisions* American Journal of International Law, Vol. 112, Issue 2, April 2018, p. 279.
[95] Partly Dissenting Opinion of Judge Serghides *Khlaifia and Others v. Italy* ECtHR, [GC], p. 105.
[96] *Khlaifia and Others v. Italy* ECtHR, [GC], para. 253.

moment *before* the removal. Facts that are established *ex post* can only be considered by the Court to the extent that they confirm or refute the original assessment.[97] However, in neither *Khlaifia and Others v. Italy* nor in *N.D. and N.T. v. Spain* did the respective authorities conduct an individualised assessment. Hence, any subsequent evidence supporting or rebutting a violation of Art. 3 ECHR cannot have been based on facts that confirmed or refuted the original assessment as there was no examination of this question at all at the *decisive* point in time, that is, *prior* to the expulsion. In *N.D. and N.T. v. Spain*, the Grand Chamber relied on the Chamber assessment that Art. 3 ECHR was not violated as basis for its justification that the expulsion was not collective as the applicants did not claim protection prior to their irregular entry.[98] I am of the view that, in line with its previous case law[99], the Court should not have relied on *ex post* facts regarding a violation of Art. 3 ECHR in these two cases. This linking of Art. 3 ECHR and Art. 4 Prot. 4 ECHR in both cases may be indications of the Court's recent approach towards restricting the scope of the prohibition of collective expulsion to only the right of bringing forward claims for international protection instead of *any* claims that speak against an expulsion.[100]

If the Court indeed sought to create different standards of review, one for 'original' expulsions and one for 'summary' collective expulsions, then the burden of proof question would, in general, depend on the specific expulsion situation. In original expulsion scenarios, the burden of proof to establish that

[97] *Cruz Varas v. Sweden* ECtHR, Appl. No. 46/1990/237/307, 20 March 1991, para. 72. The Court made this clarification not with regard to Art. 4 Prot. 4 ECHR, but regarding an alleged violation of Art. 3 ECHR. However, it made this clarification on the question with regard to the decisive point in times during expulsion procedures.

[98] *N.D. and N.T. v. Spain* ECtHR, [GC], paras. 206, 220-222. In para 220, the Court stressed in this regard: 'As regards the applicants in the present case, in the Grand Chamber proceedings *they at first did not even allege that they had ever tried to enter Spanish territory by legal means*, referring to the aforementioned difficulties only in the abstract. In their second set of observations to the Grand Chamber *they still denied any link between their claim under Article 4 of Protocol No. 4 and a possible asylum claim*. *Only at the hearing before the Grand Chamber did they allege that they had themselves attempted to approach Beni Enzar but had been "chased by Moroccan officers"*. Quite apart from the *doubts as to the credibility of this allegation* arising from the fact that it was made at a *very late stage of the procedur*e, the Court notes that at no point did the applicants claim in this context that the obstacles allegedly encountered, should they be confirmed, were the responsibility of the Spanish authorities [emphasis added].'

[99] See in particular *Hirsi Jamaa and Others v. Italy* ECtHR, [GC].

[100] The United Nations Office of the High Commissioner for Human Rights stressed in its third-party intervention in this case that 'individuals might have reasons other than asylum for appealing against their expulsion.' See: *N.D. and N.T. v. Spain* ECtHR, [GC], para. 136.

the state conducted an individual examination generally would lie with the respondent state. In summary collective expulsion scenarios in maritime contexts, it would then, in general, be the applicant's duty to prove that the respondent state denied an examination or at least the possibility to bring forward claims against the expulsion. Given the most recent case law, it seems that the ECtHR established that in cases of summary collective expulsions at land borders, applicants bear the burden of proof that they either applied for regular entry paths prior to their expulsion or that the expelling state did not provide for genuine and effective possibilities to lodge such applications at the border or its embassies.

The outcome of pending cases related to Art. 4 Prot. 4 ECHR[101] will show whether the Court indeed intended to make such differentiations and if it aimed at establishing a lower standard of review for summary collective expulsion cases; it will also show if the Court requires necessarily a link between a violation of the prohibition of collective expulsion and the *non-refoulement* principle.

[101] For example: *S.S. and Others v. Italy*, ECtHR, Appl. No. 21660/18, communicated on 26 June 2019, pending; *Doumbe Nnabuchi v. Spain* ECtHR, Appl. No. 19420/15, communicated to Spain on 13 December 2015, only available in French, pending; *Balde and Abel v. Spain* ECtHR, Appl. No. 20351/17, communicated to Spain on 12 June 2017, only available in French, pending.

D. Possible driving forces behind the ECtHR's interpretation of the prohibition of collective expulsion

In recent decades, international law scholars[102] have analysed in great detail the evolution of migration policies in Europe and on a global level. Scholar Guy Gammeltoft-Hansen, who has explored this global trend of externalisation for several years, describes it as 'part of a globalisation process whereby migration control is simultaneously "offshored" and "outsourced".'[103]

Western states such as Australia, the USA, and EU Member States in particular have increasingly implemented *extraterritorialisation* and *externalisation* measures, moving the enforcement of migrants' admission decisions outside states' territories.[104] In the EU, the evolution of the union over recent decades has constantly altered the concepts of territory and state sovereignty, which in turn have altered migration control strategies and the management of the external border.[105] Over time, migration control strategies practiced by ECHR Member States have evolved from, direct push-backs to 'contactless' and indirect measures of migration control.[106] States have adjusted and expanded such policies in unprecedented ways in the aftermath of mass migration to Europe which began around 2015.[107]

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[102] For a thorough analysis of the evolution of migration policies in the last decades see for example: Gammeltoft-Hansen Thomas *Access to Asylum International Refugee Law and the Globalisation of Migration Control* (Cambridge University Press 2013), (*Access to Asylum*), pp. 44-100 or Mann, Itamar *Humanity at Sea: Maritime Migration and the Foundations of International Law* (Cambridge University Press 2016), (*Humanity at Sea*) or Goodwil-Gill, Guy and McAdam, Jane *The Refugee in International Law* (Oxford University Press 3rd edn. 2011), pp. 244-253 or Moreno-Lax, Violata and and Efthymios, Papastavridis (eds.) *'Boat Refugees' and Migrants at Sea: A Comprehensive Approach Integrating Maritime Security with Human Rights* (Brill 2017).

[103] Gammeltoft-Hansen, Thomas *Access to Asylum*, p. 2.

[104] Moreno-Lax, Violetta and Lemberg-Petersen, Martin *Border induced-displacement: The ethical and legal implications of distance-creation through externalization* Questions of International Law, 2019, Vol. 56, (*Border induced-displacement*), p. 5.

[105] Guild, Elspeth and Bigo, Didier *The Transformation Of European Border Controls* in: Ryan and Mitsilegas (eds.) *Extraterritorial Migration Control* (Brill/Nijhoff 2010), p. 260.

[106] Mann, Itamar *Humannity at Sea* p. 182.

[107] Papa, Maria *Externalizing EU Migration Control while Ignoring the Human Rights of Migrants: Is There Any Room for the International Responsibility of European States?* Questions of International Law, 2019, Vol. 56, pp. 1-3. See also: Endres de Oliveira, Pauline *Legaler Zugang zu internationalem Schutz – zur Gretchenfrage im Flüchtlingsrecht* Kritische Justiz, 2016, Vol. 49, No. 2, pp. 167-179, also: Markard, Nora *The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries* European Journal of International Law, 2016, Vol. 27, No. 3, (*The Right to Leave by Sea*), pp. 591-616.

The aim of such externalizing strategies is to move immigration control measures outside states' territory, where it is more difficult for courts, such as the ECtHR to establish jurisdiction.[108]

This distance creation through externalisation[109] has made it continuously more difficult for the ECtHR to establish a judicial link between acts and omissions of ECHR Member States' and the migrants affected by them.[110]

Scholars debate the role of the ECtHR when it comes to reacting to Member States' continuous reliance on new measures to reduce the number of irregular arrivals in their territories[111]. Do individual ECHR Member States externalise their migration control *because* of the ECtHR's progressive interpretation of the prohibition of collective expulsion and the *non-refoulement* principle in the 2000s and 2010s or *despite* such interpretative evolution? Has migration-related ECtHR jurisprudence limited externalisation trends, and if so, to which extent?

Scholars seemingly agree that with the upsurge of populism in Europe, the concept of national identity has increasingly become a relevant factor in elections, restricting migration (laws) as 'an instrument to formulate opposition against international or supranational court decisions.'[112] Other voices even make out the mass movement of migrants and refugees into Europe in recent years as the 'driving force behind the upsurge of populist nationalism' in the EU in recent years.[113]

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[108] Ryan, Bernard *Extraterritorial Immigration Control: What Role For Legal Guarantees?* in: Ryan and Mitsilegas (eds.) *Extraterritorial Immigration Control. Legal Challenges* (Brill/Nijhoff 2010), pp. 3-37.
[109] Moreno-Lax, Violeta and Lemberg-Pedersen, Martin *Border-induced displacement* p. 6.
[110] For details see Chapter II, the definition of 'expulsion'.
[111] See for example: The European Council on Refugees and Exiles (ECRE), an alliance of 90 organizations in 38 countries protecting refugee rights across Europe *ECRE members express concern at annual conference: Deal after deal, Europe is outsourcing its responsibilities for refugees*, 14 October 2016,
available at: https://www.ecre.org/ecre-members-express-concern-at-annual-conference-deal-after-deal-europe-is-outsourcing-its-responsibilities-for-refugees/.
[112] Krieger, Heike *Populist Governments and International Law* European Journal of International Law, 2019, Vol. 30, Issue 3, p. 982.
[113] Fukuyama, Francis *Identity: The Demand for Dignity and the Politics of Resentment* (MacMillan Publisher 2018), (*Identity: The Demand for Dignity and the Politics of Resentment*), p. 131.

How might these developments have affected the ECtHR's jurisprudence in this regard?

Scholars Øyvind Stiansen and Erik Voeten offer empirical evidence which shows a linkage between Member States' resistance against the ECtHR since around 2010 and its jurisprudence in migration-related cases.[114]

In particular, the Grand Chamber judgment in *Hirsi Jamaa v. Italy* led to a controversial debate on the case's significance and effects on migration control strategies in Europe and beyond.[115] It was also argued that the ECHR and the ECtHR have retrospectively turned out to be unsuited for complex migration control policies and that the *Hirsi* judgment 'may have left NGOs with the wrong impression that Strasbourg [European Court of Human Rights] is the primary judicial forum to seek redress' when it comes to a violation of migrants' rights.[116]

Scholar Moritz Baumgärtel argues against overstating the case's significance. He claims that the case's value is mainly symbolic as by the time it was announced by the Grand Chamber, Italy had long terminated its push-back policy.[117]

Furthermore, the scope of redress was limited because only a fraction of the affected migrants were part of the proceedings before the ECtHR.[118]

Baumgärtel's critical assessment of the effects of *Hirsi Jamaa v. Italy* may be accurate; however, from a macro and long-term perspective, this finding is

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[114] Stiansen, Øyvind and Voeten, Erik *Backlash and Judicial Restraint: Evidence From the European Court of Human Rights* SSRN, 2018, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3166110, p. 10.
[115] See for example: De Boer, Tom *Closing Legal Black Holes: The Role of Extraterritorial Jurisdiction in Refugee Rights* Protection Journal of Refugee Studies, 2014, Vol. 28, p. 118 or Pijnenburg, Annick *From Italian Pushbacks to Libyan Pullbacks: Is Hirsi 2.0 in the Making in Strasbourg?* European Journal of Migration and Law, 2018, Vol. 20, Issue 4, p. 396 or Messineo, Francesco *Yet another mala figura: Italy breached non-refoulement obligations by intercepting migrants' boats at sea, says ECtHR* EJIL:Talk!, 24 February 2012, available at: https://www.ejiltalk.org/yet-another-mala-figura-italy-breached-non-refoulement-obligations-by-intercepting-migrants-boats-at-sea-says-ecthr/.
[116] Thym, Daniel *A Restrictionist Revolution? A Counter-Intuitive Reading of the ECtHR's N.D. & N.T.-Judgment on 'Hot Expulsions' at the Spanish-Moroccan Border* Verfassungsblog, 17 February 2020, available at: https://verfassungsblog.de/a-restrictionist-revolution/.
[117] Baumgärtel, Moritz *Demanding Rights Europe's Supranational Courts and the Dilemma of Migrant Vulnerability* (Cambridge University Press 2019), pp. 81-97.
[118] Ibid.

too short-sighted. The ECtHR's interpretation of the prohibition of collective expulsion influences the interpretation of other regional and international courts and treaty bodies. The African Commission of Human and Peoples' Rights directly acknowledged and drew from *Hirsi Jamaa and Others v. Italy.*[119] The same applies to the interpretations of the Inter-American Court of Human Rights[120] and the UN Migrant Worker Committee[121]. These treaty bodies' references show that the impact of this judgment has gone far beyond the regional level and serves as a source for interpretation for other regional and international bodies. In this way, one can see how the ECtHR thereby affects the development of international law, which in turn influences the law on migrant rights at the ECtHR as the Strasbourg Court in turn draws on international law sources.[122]

This begs the related question of what influences, in turn, the interpretation of the ECtHR when it comes to the prohibition of collective expulsion.

One theory is that the ECHR Member State's recent externalisation of migration control practice have influenced the Court's interpretation. Did this evolution in state practice lead to the Court's more restrictive approach in interpreting the prohibition of collective expulsion in the Grand Chamber's *Khlaifia and Others v. Italy* judgment in 2016 and the *N.D. and N.T. v. Spain* judgment in 2020.

To assess this hypothesis, I draw on the tools of treaty interpretation under Arts. 31–33 VCLT. The recent migration-related case law of the ECtHR offers a rich resource for this assessment. The ECHR's 'specific character as a human rights instrument'[123] and as 'international treaty to be interpreted in accordance with the relevant norms and principles of public international

[119] *Institute for Human Rights and Development in Africa v Republic of Angola* AComHPR, para. 70.
[120] *Wong Ho Wing v. Peru* IACtHR, para. 205.
[121] CMW *General comment No.* para.51.
[122] The ECtHR clarified in several cases that 'the Convention cannot be interpreted in a vacuum and should in as far as possible be interpreted in harmony with other rules of international law of which it forms part', see for example: *Hassan v. the United Kingdom* ECtHR, [GC], Appl. No. 29750/09, 16 September 2014, para. 77. The CJEU stipulated in numerous cases that the EU as a subject of public international law is bound by treaty and general international law. See for example: *Anklagemyndigheden v Peter Michael Poulsen and Diva Navigation Corp.*, 24 November 1992, Case C-286/90, paras. 9-10.
[123] *N.D. and N.T. v. Spain* ECtHR, [GC], para. 172.

law'[124], and the Court's 'living instrument' approach, and a strong emphasis on an interpretation in line with the 'object and purpose' of the *Convention*[125] constitute the basis for the ECtHR's adaptability[126].

The ECtHR seems to be well aware of its role in situations where it has to balance the individual human rights of the affected migrants and asylum seekers with the interests and sovereign rights of ECHR Member States. The Court made this explicitly clear in *Hirsi Jamaa and Others v. Italy* and reiterated this standpoint in subsequent judgments[127]:

> A long time has passed since Protocol No. 4 was drafted. Since that time, migratory flows in Europe have continued to intensify, […] although the interception of migrants on the high seas and their removal to countries of transit or origin are now a means of migratory control in so far as they constitute tools for States to combat irregular immigration. The economic crisis and recent social and political changes have had a particular impact on certain regions of Africa and the Middle East, throwing up new challenges for European States in terms of immigration control.[128]

In *N.D. and N.T. v. Spain*, the Grand Chamber acknowledged the continuous existence of such 'new challenges'[129] for its Member States and of 'considerable difficulties in coping with the increasing influx of migrants and asylum-seekers'[130]. The Court further extended this line of reasoning by the argument that Schengen states with an external border, such as Spain, carry the particular responsibility of protecting the borders of all Member States.[131] Thus, the Court argued that these states' management and protection of the external borders is crucial for the entire Schengen area as it 'should help to

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[124] Ibid.
[125] Nolte, Georg *Jurisprudence Under Special Regimes* pp. 245, 252-253.
[126] The ECtHR relied on these tools for example in *Hirsi Jamaa and Others v. Italy* ECtHR, [GC], with reference to the 'living instrument' approach, para. 174.
[127] See for example: *Khlaifia and Others v. Italy* ECtHR, [GC], para. 241 or *N.D. and N.T. v. Spain* ECtHR, [Chamber], para. 101.
[128] *Hirsi Jamaa and Others v. Italy* ECtHR, [GC], para. 176. Reiterated and acknowledged in the respective situations by the Court in *Khlaifia and Others v. Italy* ECtHR, [GC], para. 241 and *N.D. and N.T. v. Spain* ECtHR, [GC], para. 169.
[129] *N.D. and N.T. v Spain* ECtHR, [GC], para. 78.
[130] Ibid., para. 105.
[131] Ibid., para. 168.

combat illegal immigration and trafficking in human beings and to prevent any threat to the Member States' internal security, public policy, public health and international relations.'[132]

In the following, the argument that ECHR Member States' migration control policies have influenced the interpretation of Art. 4 Prot. 4 ECHR in the form of subsequent state practice is assessed. First, the section examines the different forms of European state practice in migration control that have developed in recent years. In doing so, five relevant and interrelated policies that either have been addressed by the ECtHR since 2012 or have played a significant role in currently pending cases at the ECtHR, and thus may play a role in future judgments, are assessed.

I. Recent developments in the externalisation of migration control in Europe

The first recent migration control policy addressed by the ECtHR pertains to intra-EU policies regarding the distribution of migrants. In 2014, in *Sharifi and Others v. Italy and Greece*, the ECtHR halted the ongoing migration policy of transferring migrants within the Dublin system[133] without offering the individuals the possibility to bring forward their claims against their removal. The Court found that this policy violated the prohibition of collective expulsions. Here, the ECtHR highlighted that Art. 4 Prot. 4 ECHR also applies to foreigners moving between states participating in the Dublin system.[134] The ECtHR made clear that EU states cannot justify a lack of individual case assessment through the Dublin II regulations. It further noted that this system of determining the responsibility for a particular migrant does not justify collective and indiscriminate returns between EU Member States.[135] The general importance of this decision lies in the Court's

[132] *N.D. and N.T. v. Spain* ECtHR, [GC], para. 168.
[133] The purpose of the Dublin Regulation is to determine which EU Member State is responsible for examining an asylum application. Usually, it is the state where the asylum seeker in question first entered EU territory. For more information on the system see: UNHCR and ECRE *The Dublin Regulation* information sheet, available at: https://www.unhcr.org/4a9d13d59.pdf.
[134] *Sharifi and Others v. Italy and Greece* ECtHR, paras. 210-213.
[135] Ibid., paras. 214-225.

highlighting of the relevance of *each individual's right* to legal assistance and an interpreter in collective expulsion cases.[136]

The second migration control policy is the interception of migrant boats on the high seas and the subsequent push-backs to Libya conducted by Italy. In *Hirsi Jamaa and Others v. Italy,* the Chamber, as well as the Grand Chamber, found a violation of Art. 4 Prot. 4 ECHR. The Court stipulated that push-backs without any genuine and individual assessment, let alone the possibility to bring forward asylum claims, constitute a violation of the *Convention*.
The concurring opinion of Judge Pinto de Albuquerque highlights the relevance of 'the compatibility of immigration and border-control policies with international law'[137]. Judge Albuquerque concludes that this case is about the 'ultimate question' on 'how Europe should recognise that refugees have 'the right to have rights', to quote Hannah Arendt'.[138]
However, direct push-backs of boats on the high seas and return of the intercepted to third states as practiced by Italy in the early 2000s came to an end even before the Grand Chamber decision in 2012.

The third policy is the practice of summary collective expulsions. Summary collective expulsions include the removal of individuals intercepted on or outside a state's border (e.g., on top of a fence). It refers to foreigners who were physically within the state's territory for a short period before their removal, or who are pushed back outside the state's territory. Italy had implemented this summary expulsion strategy as addressed by the Court in *Khlaifia and Others v. Italy*. The policy is based on cooperation with third states (in *Khlaifia*, a secret agreement between Italy and Tunisia; in *N.D. and N.T.*, an agreement between Spain and Morocco). The Grand Chamber in *Khlaifia* dismissed the claim of a violation of Art. 4 Prot. 4 ECHR as the expelling state identified all foreigners before their removal. Thus, Italy had offered each foreigner the possibility to bring forward any claims against their expulsion, which satisfied the requirements of Art. 4 Prot. 4 ECHR.

[136] *Sharifi and Others v. Italy and Greece* ECtHR, para. 215.
[137] Concurring opinion of judge Pinto de Albuquerque in *Hirsi Jamaa and Others v. Italy* ECtHR, [GC], p. 59.
[138] Ibid.

Such *expedited removal* policies that grant recently arrived migrants fewer legal protections compared to foreigners that have resided within the country for a more extended period are not a new phenomenon. The United States has relied on such migration control policies since the late 1990s.[139] Migrants that entered the USA irregularly and that state officials intercept within two years after their arrival are also subject to a reduced level of procedural guarantees in expulsion proceedings.[140]

The *EU–Turkey Statement*, commonly known as *EU–Turkey Deal* announced in 2016[141] is another example of this policy. The central idea was to establish a system in which for every returned Syrian to Turkey from any Greek islands, another Syrian is resettled from Turkey to the EU.[142]

The statement specifically highlights that this swapping-system

> will take place in full accordance with EU and international law, thus *excluding any kind of collective expulsion*. All migrants will be protected in accordance with the relevant international standards and in respect of the principle of non-refoulement. It will be a temporary and extraordinary measure which is necessary to end the human suffering and restore public order. Migrants arriving in the Greek islands will be *duly registered* and any *application for asylum will be processed individually* by the Greek authorities in accordance with the Asylum Procedures Directive, in cooperation with UNHCR. *Migrants not applying for asylum* or whose application has been found *unfounded or*

[139] FitzGerald, David *Refuge beyond Reach: How Rich Democracies Repel Asylum Seekers* (Oxford University Press 2019), (*Refuge beyond Reach*), p. 75.
[140] Ibid., p. 76.
[141] On 18 March 2016, EU Heads of State or Government and Turkey informally agreed to establish a system to stop migrants moving from Turkey to the EU. The EU offered initially 3 billion Euro for refugee related projects and other forms of support. Turkey, in turn pledged to take 'any necessary measures to prevent new sea or land routes for illegal migration opening from Turkey to the EU, and will cooperate with neighbouring states as well as the EU to this effect.' (para. 3).
See: European Council *EU–Turkey statement, 18 March 2016* Press Release, 18 March 2016, (*EU–Turkey Statement*), available at: https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/.
[142] *EU–Turkey Statement* para. 2.

> *inadmissible* in accordance with the said directive will *be returned* to Turkey [emphasis added].[143]

Human rights organisations such as Amnesty International and Médecins Sans Frontières/Doctors Without Borders severely criticised this system for lacking effective procedures[144] for lodging asylum claims, which in turn leads to collective expulsions to Turkey[145]. This policy aims at ending the irregular movement of migrants to Europe while at the same time rapidly returning those who still reach European shores, making it another prominent example of expedited removal procedures.

Spain's practice of *devoluciones en caliente* ('hot returns'), a practice constituting a more advanced version of Italy's push-back policies, was initially deemed a violation of Art. 4 Prot. 4 ECHR by the Chamber of the ECtHR in *N.D. and N.T. v. Spain*. The Grand Chamber overruled this judgment in February 2020 finding no violation of Art. 4 Prot. 4 or of Art. 13 in conjunction with Art. 4 Prot. 4 ECHR.

In contrast to Italy's practice of summary expulsions in *Khlaifia and Others,* Spain conducts push-backs without identifying the individual foreigners. Part of this policy is the massive fortification of the Spanish enclaves Ceuta and Melilla. The construction of the border fences surrounding the enclaves puts in question whether Spain's jurisdiction is triggered when returning intercepted individuals between the several layers of fences. The intervener brief in *N.D. and N.T. v. Spain*, the *EU Fundamental Rights Agency* raised concerns about the

> legal vacuum migrants find themselves in, due to various border procedures and fences built in the EU, in particular when migrants are at the outer side of fences, such as those established in the

[143] *EU–Turkey Statement* para. 1.
[144] According to Amnesty International asylum-seekers do not have access to fair and efficient procedures for the determination of their status. See: Amnesty International *Report No safe refuge* EUR/44/3825/2016, June 2016, p.5.
[145] Statement by Marie Elisabeth Ingres, MSF's head of mission in Greece of the international medical humanitarian organization Doctors Without Borders/Médecins Sans Frontières (MSF), http://www.msf.org/article/greece-msf-ends-activities-inside-lesvos-%E2%80%9Chotspot%E2%80%9D. MSF has decided to suspend its activities linked to the Moria "hotspot" on Lesvos without further notice. The decision comes following the EU Turkey deal which will lead to the forced return of migrants and asylum seekers from the Greek Island.

> Spanish enclaves of Ceuta and Melilla, […] in Bulgaria, Greece, Hungary and Slovenia. […] [S]uch fences are *built on the EU Member State's territory*, usually with a margin of land on the outer side, which allows the authorities to undertake maintenance and repair work without having to ask the neighbouring country for access [emphasis added][146].

The Spanish government in *N.D. and N.T.* argued that the area between the fences does not constitute part of its territory as it is governed by 'exceptional jurisdiction'[147]. Thus, the ECHR does not apply, and hence state authorities can legally return groups of foreigners without an individual examination or even without identifying them.[148] The Grand Chamber rejected this argument in clear terms stating that 'the existence of a fence located some distance from the border does not authorise a State to unilaterally exclude, alter or limit its territorial jurisdiction, which begins at the line forming the border.'[149]

Creating fictitious '*internal-extraterritorial areas*' is not a new policy invention by Spain. States like the USA, Canada, and Germany have relied on such measures for decades.[150] The German Asylum Act (*Asylgesetz*) contains a legal basis for creating such areas in German airports where migrants and asylum seekers may be held for the duration of their asylum process 'without' entering the state's territory (so-called *Flughafenverfahren*).[151] In the aftermath of the 2015 'refugee crisis' in Europe, some scholars similarly argued that German state officials should treat asylum applications lodged with them on the German side of the common border with Austria should as lodged in Austrian territory.[152] Thus, it would be Austria's responsibility to assess the application's content.[153]

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[146] FRA *Intervener brief in N.D. and N.T. v. Spain* para. 8.
[147] *N.D. and N.T. v. Spain* ECtHR, [GC], para. 105.
[148] *N.D. and N.T. v. Spain* ECtHR, [Chamber], paras. 44-45.
[149] *N.D. and N.T. v. Spain* ECtHR, [GC], para. 109.
[150] FitzGerald, David *Refuge beyond Reach* pp. 99-100.
[151] See §18 a (I) Asylum Act, latest version of 26 June 1992, BGBl. I S. 1126.
[152] The scholars base this finding on the Schengen Borders Code, Regulation (EC) 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), no longer in force.
[153] See for example: Peukert, Alexander and Hillgruber, Christian and Foerste, Ulrich and Putzke, Holm *Kurzbeiträge: Die Flüchtlingskrise rechtsstaatlich bewältigen* Juristen Zeitung, 2016, Vol. 71, No. 7, pp. 347-35. Strongly disagreeing: Lübbe, Anna *Ist der*

The fourth form of recent migration control policies is the pull-back by proxy strategy.

Foreign officials bar migrants from reaching the shores of the European Union by intercepting and returning them to the country of their departure while either still in the departure state's territory or on the high seas. The most prominent example can be seen in the collaboration of Italy and Libya, which increasingly intensified after the *Valetta Summit Action Plan* in 2015[154] and which was officially formalised in a Memorandum of Understanding in 2017.[155] In the aforementioned action plan, EU Member States laid the basis for close cooperation with African states over migration control. Human Rights Watch (HRW) has strongly criticised Italy's cooperation with Libya, as it claims that the EU state fosters human rights violations by Libyan authorities by equipping and training the Libyan coast guard.[156] HRW argues that Libyan authorities prevent migrants from leaving the country, mistreat them and send them to inhuman conditions in detention centres which is not only tolerated, but promoted by certain EU states to curb the numbers of arrivals.[157]

It remains to be seen whether the Court will find a violation of the prohibition of collective expulsion in this policy. A relevant case, *S.S. and Others v. Italy* in which the applicants allege *inter alia* a violation of Art. 4 Prot. 4 ECHR via Italy's pull-back by proxy policy is pending as of the time of writing.[158]

Given the above assessed more regressive interpretation of the scope of protection of Art. 4 Prot. 4 ECHR, it seems unlikely that the Court will find

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deutsche Transit österreichisches Hoheitsgebiet? Verfassungsblog, 4 March 2016, available at: https://verfassungsblog.de/ist-der-deutsche-transit-oesterreichisches-hoheitsgebiet/.

[154] Valetta Summit on Migration *Action Plan* 11-12 November 2015, available at: https://www.consilium.europa.eu/media/21839/action_plan_en.pdf.

[155] Memorandum of Understanding between Libya and Italy signed on 2 February 2017, available at: https://www.asgi.it/wp-content/uploads/2017/02/ITALY-LIBYA-MEMORANDUM-02.02.2017.pdf.

[156] Human Rights Watch *EU: Shifting Rescue to Libya Risks Lives - Italy Should Direct Safe Rescues* 19 June 2017, available at: https://www.hrw.org/news/2017/06/19/eu-shifting-rescue-libya-risks-lives.

[157] Ibid.

[158] *S.S. and Others v. Italy* ECtHR, Appl. No. 21660/18, communicated on 26 June 2019, pending.

that Italy has violated the prohibition of collective expulsion in this specific case. First, the Court would need to establish a jurisdictional link in the sense of Art. 1 ECHR between the applicants and the respondent state. Given the Court's current approach to the *Convention*'s extraterritorial applicability, the judges would need to expand the list of established exceptions to the general territorial applicability of the *Convention.*[159] Alternatively, the judges could interpret the given exceptions more broadly. Specifically, the applicants would need to establish that the Italian authorities had continuous and exclusive *de jure* or *de facto* control over them during the pull-back procedures. As Libyan authorities conduct these pull-backs, and Italy provides for the equipment and training of these authorities, it seems unlikely that the Court will find that these circumstances meet the high threshold for establishing jurisdiction.[160]

If the Court did indeed establish such a jurisdictional link in *S.S. and Others v. Italy*, it would then also need to address the question of whether pull-backs by proxy constitute 'expulsion' in the sense of Art. 4 Prot. 4 ECHR. Relying on the previous assessment of the definition of this term here, it seems unlikely that the Court would expand its understanding to such indirect measures that aim at 'driving someone away from a place'. As shown above, for this to be true, states ought to either have issued an official expulsion order for every foreigner or have committed a comparable coercive measure. It seems unlikely that the Court will establish that equipping and training the Libyan coast guard or abstaining from rescue measures fulfil these requirements.

The fifth migration control policy is the general closure of ports of safety for private rescue vessels. Italy and Malta provide two examples of state practice in this regard.

[159] See above Chapter II on the definition of 'expulsion'.
[160] For a more optimistic view on the establishment of the jurisdictional link in this case see: The AIRE Centre, The Dutch Refugee Council, the European Council on Refugees and Exiles and the International Commission of Jurists *Intervener brief in S.S. and Others v. Italy* and Schmalz, Dana *Menschenrechte im Mittelmeer Der Fall S.S. und andere gg. Italien* Verfassungsblog, 27 November 2019, available at: https://verfassungsblog.de/menschenrechte-im-mittelmeer/.

In one instance, in which Italy denied the disembarkation of rescued migrants in January 2019, the crew and some of the rescued individuals applied to the ECtHR.[161] The applicants alleged that 'they [were] detained on board without legal basis, suffering inhuman and degrading treatment, with the risk of being returned to Libya without evaluation of their individual situation.'[162]

The case concerned 47 rescued migrants and asylum seekers and the vessel's crew, who were trapped on board the private rescue vessel *Sea Watch 3*. No harbour had allowed the ship to enter for more than 10 days. In its first response, the ECtHR took interim measures per Rule 39 of the Court's Rules. Such measures, however, do not prejudge the subsequent decisions on the admissibility or the merits of the case.

Granting only partly the applicants' requests, the Court did not order the disembarkation of the passengers but demanded from Italy 'to take all necessary measures, as soon as possible, to provide all the applicants with adequate medical care, food, water and basic supplies as necessary.' Furthermore, concerning the 15 unaccompanied minors, it held that 'the Government [is] requested to provide adequate legal assistance (e.g., legal guardianship).'[163]

It is not unlikely that the ECtHR will assess the merits of this case pertaining to this recent policy of port closure to rescue vessels in the near future.

Here again, it seems difficult to establish a jurisdictional link within the current framework of extraterritorial exceptions provided for by the Court. The establishment of expulsion, however, seems less problematic compared to the pull-back by proxy policies. The coercive measure driving the migrants away from the borders of the territorial waters could be seen in the order issued by Italian authorities not to enter directed towards the vessel or in the accompaniment of the rescue ship by Italian coast guard. Thus, unless the Court adopts a broader interpretation of the extraterritorial exceptions or

[161] The applications have been registered under nos. 5504/19 and 5604/19.

[162] Registrar of the Court *ECHR grants an interim measure in case concerning the Sea Watch 3 vessel* ECHR 043 (2019), press release, 29 January 2019, (*ECHR grants interim measures in Sea Watch 3 case*).

[163] Registrar of the Court *ECHR grants an interim measure in SeaWatch 3 case*.

expands the list of established exceptions, it seems unlikely that the ECtHR will find a violation of the prohibition of collective expulsion in such cases.

In conclusion, ECHR Member States have increasingly externalised their migration control policies in the past three decades. Given the currently prevailing more restrictive approach to interpreting the scope of protection of the prohibition of collective expulsion, it seems from today's perspective that the Court will not find that every new form of migration control strategy violates the prohibition of collective expulsion. It seems unlikely that the Court will do so in the pending 'pull-backs by proxy' case (*S.S. and Others v. Italy*) and in the cases against Italy's general closure of ports of safety.

II. The influence of changing state migration control practices on the interpretation of the prohibition of collective expulsion in the sense of Arts. 31–33 VCLT

Closely connected to the assessment of the development of these policies is the question: did these changing migration policies of ECHR Member States influence the ECtHR's interpretation of the prohibition of collective expulsion in accordance with Arts. 31 to 33 VCLT?

Arts. 31 and 32 VCLT, which apply as customary international law, determine the general rule of treaty interpretation and when to take recourse to supplementary means of interpretation.[164]

International and regional treaties can be affected by changing circumstances taken into account by treaty bodies when interpreting provisions under Art. 31 (3)(b) VCLT[165].

[164] Conclusion 2 (1.) Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, adopted by the International Law Commission at its seventieth session in 2018. See: Yearbook of the International Law Commission, 2018, Vol. II, Part Two, (*Draft Conclusions on subsequent agreements and subsequent practice*), para. 52. The General Assembly General Assembly welcomed the conclusion of the work of the International Law Commission on subsequent agreements and subsequent practice and its adoption of the draft conclusions and commentaries and encouraged their dissemination amongst states and other actors that interpret treaties in its resolution 73/202 A/CN.4/724, 20 December 2018.

[165] Art. 31 (3)(b) VCLT stipulates: There stall be taken into account together with the context: Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.

An informal working paper of the International Law Commission (ILC) highlighted the importance of the question 'whether and how far evolving circumstances can affect existing law or obligations'.[166] The paper points out the relevance of such considerations as they 'ensure a meaningful respect for the agreement of the parties and the continued fulfillment of its object and purpose.'[167]

The *ILC Draft Conclusions on subsequent agreement and subsequent practice* (*ILC Draft Conclusions*) help clarify these questions. Conclusion 4 (2) ILC Draft Conclusions defines subsequent practice in the sense of Art. 31 (3)(b) VCLT as 'conduct in the application of a treaty, after its conclusion, which establishes the agreement of the parties regarding the interpretation of the treaty.' Conclusion 5 (1) and 6 (2) further clarify that subsequent practice may take many different forms, but only legislative, executive, or judicial state actors' behaviour is relevant in this regard.

Changing migration conditions are of particular relevance to the ECtHR's interpretation of the prohibition of collective expulsion.

In *N.D. and N.T. v. Spain,* the Court stressed the relevance of the interpretation of the *Convention*'s provisions in light of the VCLT's rules on treaty interpretation, highlighting that

> the Convention is an international treaty to be interpreted in accordance with the relevant norms and principles of public international law and, in particular, in the light of the Vienna Convention on the Law of Treaties of 23 May 1969. Pursuant to the Vienna Convention, the Court must establish the ordinary meaning to be given to the terms in their context and in the light of the object and purpose of the provision from which they are taken. It must have regard to the fact that the context of the provision is a treaty for the effective protection of individual

[166] International Law Commission *Informal Working paper of the International Law Commission* reprinted in: Nolte, Georg *Introduction* in: Nolte (edn.) *Treaties and Subsequent Practice* (Oxford University Press 2013), (*Informal Working Paper*), p. 3, also: Nolte, Georg *Introductory Note to the Special Issue of ICLR on the Outcome of the ILC Work on "Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties"* International Community Law Review, 2020,Vol. 22, pp. 5.
[167] Ibid.

> human rights and that the Convention must be read as a whole, and interpreted in such a way as to promote internal consistency and harmony between its various provisions. Thus, the Court has never considered the provisions of the Convention to be the sole framework of reference for the interpretation of the rights and freedoms enshrined therein. On the contrary, it must also *take into account any relevant rules* and *principles of international law applicable in relations* [emphasis added].[168]

The Court's 'living instrument' approach and its 'interpretation in light of relevant rules of international law' are the basis for the Court's consideration of changing circumstances in the scope of Art. 4 Prot. 4 ECHR. The ECtHR applies the tools of treaty interpretation as established in Arts. 31–33 VCLT. The Court clarified in *Golder v. the United Kingdom* in 1975 that these tools serve as a guide for interpretation as they constitute 'in essence generally accepted principles of international law'.[169] The ECtHR, however, only sparingly refers explicitly to the means of Articles 31–33 VCLT.[170]

In most cases, the Court is silent on its methods of interpretation, unless it deems a thorough interpretation necessary.[171] Cases related to the prohibition of collective expulsion seem to fall into this category relatively often. The ECtHR has explicitly referred to the VCLT provisions in *Hirsi Jamaa and Others v. Italy*[172] and *N.D. and N.T. v. Spain*[173].

Two particular tools for interpreting the provisions of the ECHR are the living instrument approach[174] and the principle of effectiveness[175]. The former obliges the Court to interpret the provisions in the 'light of present-day conditions' in a way 'which renders the guarantees practical and effective and

[168] *N.D. and N.T. v. Spain* ECtHR, [GC], para. 172.
[169] *Golder v. the United Kingdom* ECtHR, Appl. No. 4451/70, 21 February 1975, para. 29.
[170] Nolte, Georg *Jurisprudence Under Special Regimes* pp. 244-245.
[171] Ibid., p. 245.
[172] *Hirsi Jamaa and Others v. Italy* ECtHR, [GC], para. 170.
[173] *N.D. and N.T. v. Spain* ECtHR, [Chamber] para. 103 and even more extensive in the Grand Chamber judgment at para. 172.
[174] The ECtHR relied on the 'living instrument approach' for example in: *Soering v. United Kingdom* ECtHR, Appl. No. 14038/88, 7 July 1989, para. 102 and *Matthews v. the United Kingdom* Appl. No. 24833/94, 18 February 1999, para. 39.
[175] *Tyrer v. the United Kingdom* ECtHR, Appl. No. 5856/72, 25 April 1978, para. 31.

not theoretical and illusory'[176]. The latter demands that the Court considers the object and purpose of the provision in question and the 'Convention as a constitutional instrument'.[177] These two methods of interpretation can be are in line with the tools for treaty interpretation in Arts. 31–33 VCLT.[178]

In *Hirsi Jamaa v. Italy*, the ECtHR put a particular emphasis on the living instrument principle.[179] Here, the Court assessed the term 'expulsion' for the first time in a detailed manner and in 'accordance with the ordinary meaning', its 'context', and in 'light of the object and purpose of the provision' (Art. 31 VCLT). The Court also took recourse to 'supplementary means of interpretation' under Art. 32 VCLT. In the later Chamber and Grand Chamber decision in *N.D. and N.T. v. Spain* of 2017, the Court once again relied on this older interpretation from *Hirsi Jamaa*.[180]

These tools of interpretation, especially the living instrument approach, have allowed the ECtHR to adjust the prohibition of collective expulsion to changing migration control patterns that otherwise would 'not fall within the ambit of that provision'.[181] This flexible approach allowed the Court to adjust the prohibition's scope of protection since its first implementation in 1963. Due to a lack of extensive procedural guarantees for migrants and asylum seekers in the ECHR, and its additional protocols, the ECtHR has had to interpret existing provisions such as Art. 4. Prot. 4 ECHR, legally based on the *non-refoulement* principle and the prohibition of collective expulsion.

At the same time, the flexible living instrument approach has also given judges leeway to restrict the ambit of protection, which seemingly occurred in *Khlaifia and Others v. Italy* (Grand Chamber). Here, the Grand Chamber deviated from the Chamber's finding that Italy violated Art. 4 Prot. 4 ECHR. The Grand Chamber took into consideration circumstances that help interpret the provision in the 'light of present-day conditions'. As it pointed out, these conditions were *inter alia* the 'major migration crisis that unfolded in 2011

[176] *Hirsi Jamaa and Others v. Italy* ECtHR, [GC], para. 175.
[177] *Tyrer v. the United Kingdom* ECtHR, para. 31.
[178] Nolte, Georg *Jurisprudence Under Special Regimes* p. 245.
[179] *Hirsi Jamaa and Others v. Italy* ECtHR, [GC], para. 175.
[180] *N.D. and N.T. v. Spain* ECtHR, [Chamber], para. 103 and Grand Chamber at para. 172.
[181] *Hirsi Jamaa and Others v. Italy* ECtHR, para. 177.

following events related to the "Arab Spring"' in Tunisia and Libya[182] and the following 'challenges facing the Italian authorities'[183]. The Court further highlighted that the situation in 2011 was 'exceptional' and thus constituted 'an excessive burden' for these authorities.[184]

After examining the relevant situation in the Italian reception centres, the Grand Chamber concluded that the assessment

> show[s] that the State was confronted with many problems as a result of the arrival of exceptionally high numbers of migrants and that during this period the Italian authorities were burdened with a large variety of tasks, as they had to ensure the welfare of both the migrants and the local people and to maintain law and order.[185]

The Court further pointed out that a mass influx of people itself does not grant an ECHR member a *carte blanche* to disregard migrants' right to protection against inhuman or degrading treatment (Art. 3 ECHR),[186] but at the same time that 'it would certainly be artificial to examine the facts of the case without considering the general context in which those facts arose.'[187] Therefore, the Grand Chamber concluded 'that the undeniable difficulties and inconveniences endured by the applicants stemmed to a significant extent from the situation of extreme difficulty confronting the Italian authorities at the relevant time.'[188]

These statements reflect the Court's balancing of rights and interests of migrants and receiving states, especially in times of mass movements of people into a state's territory. It seems that the Grand Chamber placed more value on Italy's sovereign right to migration control and the functionality of the respective migration control system in times of a mass influx of people than the individual's right to an interview before expulsion. The Court issued the judgment at a time in which migration control has become a top priority

[182] *Khlaifia and Others v. Italy* ECtHR, [GC], para. 179.
[183] Ibid., para. 180.
[184] Ibid., para. 180.
[185] Ibid., para. 183.
[186] Ibid., para. 184.
[187] Ibid., para. 185.
[188] *Khlaifia and Others v. Italy* ECtHR, [GC], para. 185.

for several European states. The European 'refugee crisis' occurred between the Chamber judgment in September 2015 and the Grand Chamber judgment in December 2016: 1.3 million migrants and asylum seekers arrived between January and December 2016.[189]

This mass influx of people led to heated debates on immigration, provided arguments for opponents of the ECtHR's interpretation of the scope of Art. 4 Prot. 4 ECHR. It maybe even contributed to an intensification of overall resistance to the ECtHR[190], and arguably to a rise in the approval of right-wing populist politics throughout Europe.

Returning to the above-introduced hypothesis: Did state practice in migration control of ECHR Member States change the interpretation of the procedural guarantees of Art. 4 Prot. 4 ECHR in accordance with Art. 31 (3)(b) VCLT?

Art. 31 (3)(b) VCLT stipulates that '[a]ny subsequent practice in the application of the treaty' shall be taken into account together with its context when interpreting a treaty. The ECtHR has invoked, mostly implicitly, subsequent practice as a means of interpretation in several cases, including *Cruz Varas v. Sweden*, *Loizidou v. Turkey*, and *Bankovic v. Belgium*.[191] Nolte argues that the 'uniform […] practice, can in principle constitute relevant subsequent practice and can have effects which go even beyond being only a means of interpretation.'[192]

This gives rise to two questions in the context at hand. Does uniform national migration control practice, as described above, exist amongst ECHR Member

[189] European Union Parliament *EU migrant crisis: facts and figures* 30 June 2017, available at: http://www.europarl.europa.eu/news/en/headlines/society/20170629STO78630/eu-migrant-crisis-facts-and-figures.

[190] Madsen, Cebulak and Wiebusch call for a differentiation of terminology between 'push-back' (influence on the future direction of a court's case-law) and 'backlash' (a critique triggering significant institutional reform or even the dismantling of tribunals) against international courts. See: Rask Madsen, Mikael; Cebulak, Pola and Wiebusch, Micha *Backlash against international courts: explaining the forms and patterns of resistance to international courts* International Journal of Law in Context No. 14, (2018), pp. 197-220. See also: Breuer, Martin (ed.) *Principled Resistance to ECtHR Judgments – A new paradigm?* (Springer 2019). The authors of this volume assess the reasons behind cases of domestic courts resisting the implementation of ECtHR judgments distinguishing between cases that are not implemented for domestic constitutional law reasons and those for other reasons.

[191] Nolte, Georg *Jurisprudence Under Special Regimes* pp. 246-247.

[192] Ibid., p. 247.

States? If so, does it constitute 'relevant' subsequent state practice in the sense of Art. 31 (3)(b) VCLT (which has influenced or modified the interpretation of Art. 4 Prot. 4 ECHR)?

Subsequent practice can have different effects on treaties, ranging from interpretation and modification to termination or suspension of a treaty.[193] For obvious reasons, I will only focus on the first two effects.

What constitutes subsequent state practice, and how can it be identified?

Conclusion 6 (1) ILC Draft Conclusions stressed that the identification of subsequent practice in accordance with Art. 31 (3) VCLT 'requires, in particular, a determination whether the parties, by an agreement or a practice, have *taken a position* [emphasis added]' on the treaty's interpretation. Furthermore, Conclusions 9 (1) and (2) stress that, among other things, the *clarity* and *specificity* of subsequent practice and the *form* and *repetition*[194] thereof are relevant to its identification.

The threshold for subsequent practice in the sense of Art. 31 (3)(b) VCLT is high as it must reflect 'a broad-based, settled and qualified form of common practice'.[195] Hence, caution is required when identifying subsequent practice. Otherwise, almost any kind of state action could be seen as practice affecting the interpretation of the treaty.[196] And thus, relevant subsequent practice is limited by the object and purpose of the treaty itself and must reflect an agreement between the parties. [197]

The commentary to the *ILC Draft Conclusions* distinguishes among different courts and treaty bodies. It clarifies with regard to the ECtHR that in general 'sufficiently strong commonalities in the national legislation' can be relevant.

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[193] Kohen, Marcelo *Keeping Subsequent Agreements and Practice in Their Right Limit* in: Nolte (edn.) *Treaties and Subsequent Practice* (Oxford University Press 2013), (*Keeping Subsequent Agreements and Practice in Their Right Limits*), pp. 35-38.

[194] The Commentary to Conclusion 9 of the ILC Draft Conclusions clarifies that '[t]his formula "whether and how it is repeated" brings in the elements of time and of the character of a repetition. It indicates, for example, that, depending on the treaty concerned, something more than just a technical or unmindful repetition of a practice may contribute to its interpretative value in the context of article 31, paragraph 3 (b)', see p. 72.

[195] ILC *Draft Conclusions on subsequent agreement and subsequent practice with commentaries* pp. 72-73.

[196] Kohen, Marcelo *Keeping Subsequent Agreements and Practice in Their Right Limits* p. 34.

[197] Ibid., p. 44.

However, depending on the character of specific rights, the court also considers 'less specific practice'.[198]

The ECtHR held in *Sigurdur A Sigurjònsson v. Iceland* that if a particular practice does not exist in the 'vast majority of the Contracting States', it devalues the claim to uniformity.[199]

According to Art. 31 (3)(b) VCLT, the practice must further be 'in the application of the treaty'. This reference applies to the treaty as a whole and is not limited to the provision in question.[200]

Uniform subsequent practice does not require that all parties share it, but all parties must 'accept the practice with respect to the underlying understanding of the treaty.'[201] Agreements, documents, national legislation, and domestic judgments serve as evidence for such practice.[202]

The above-assessed policies, which constitute state practice and which have been implemented after the entry into force of Prot. 4 to the ECHR, have several aspects in common. First, they all rely on shifting migration control measures outside the Member State's territory, on the prevention of irregular entry of foreigners, *or* on express removal in the case migrants successfully entered a state's territory.

Do these policies constitute uniform practice in the application of the ECHR and within the limits of Art. 31 VCLT?

I argue that this is not the case. First, the practice in question is not uniform or to use the language of the VCLT, it does not establish an 'agreement of the parties'. Indeed, the *vast majority* of ECHR Member States do not follow these particular migration control practices. Even though these practices all aim at the same goal of preventing the entry of foreigners or at quickly

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[198] ILC *Draft Conclusions on subsequent agreements and subsequent practice with commentarie* pp. 70-71.
[199] *Sigurdur A Sigurjònsson v. Iceland* ECtHR, Appl. No. 16130/90, 30 June 1993, para. 35.
[200] Buga, Irina *Modification of Treaties by Subsequent Practice* (Oxford University Press 2018), (*Modification of Treaties by Subsequent Practice*), p. 57.
[201] Herdegen, Matthias *Interpretation in International Law* Max Planck Encyclopedias of International Law (Oxford University Press 2013), (*Interpretation in International Law*), para. 18.
[202] Ibid., paras. 18-19.

removing them[203], their implementations are not sufficiently coherent. This is particularly the case as the threshold for an agreement of the parties requirement is high.[204]

Regarding the first policy, for example only Greece and Italy participated in the practice of transferring migrants within the Dublin system without offering any possibility for migrants to bring forward claims based on a bilateral agreement.[205] The same is true regarding the second policy, push-backs outside a state's territory. Italy has conducted such measures in the past.[206] Other states including Hungary, Croatia, North Macedonia, and Serbia are alleged to have previously or presently conducted such practices in secret.[207] The secrecy of such acts by the acting states speak against the theory of subsequent practice supported by an agreement of the parties.

The third policy, dealing with expedited expulsion procedures, often in combination with a (secret) bilateral agreements with transit states,[208] is not only practiced by Spain and Italy, but also by other CoE Member States such as Austria, Greece, Hungary, Italy, Spain, Poland, and Romania.[209] However, the concrete design of the policies differs significantly. An exemplary illustration of this policy in Spain and Hungary highlights this finding. The Spanish hot return policy foresees immediate returns of all intercepted migrants on Spanish territory without identifying them, in cooperation with this Moroccan state officials.[210] In contrast, the Hungarian policy of summary expulsion foresees a duration of the migrants' stay within the territory of up to 15 days before their expulsion, and it provides 10 grounds which trigger an

[203] With regard to the intentions behind the so-called EU–Turkey Deal see: Endres de Oliveira, Pauline *Legaler Zugang zu internationalem Schutz– zur Gretchenfrage im Flüchtlingsrecht* p. 172.
[204] Buga, Irina *Modification of Treaties by Subsequent Practice* p. 61.
[205] *Sharifi and Others v. Italy and Greece* ECtHR, paras. 83-94.
[206] See *Hirsi Jamaa and Others v. Italy* ECtHR, [GC].
[207] Belgrade Center for Human Rights, OXFAM and Macedonian Young Lawyers Association *A Dangerous 'Game' The pushback of migrants, including refugees, at Europe's borders* Joint Agency Briefing Paper, (Oxfam GB 2017), p.2.
[208] The expulsions in *Khlaifia and Others v. Italy* were conducted in cooperation with Tunisia and on the basis of a bilateral agreement between the two states. In *N.D. and N.T. v. Spain* the basis of the expulsion measures was a bilateral agreement between Morocco and Spain.
[209] For an assessment of these policies in the respective states and their legal foundation see: Carrera, Sergio and Stefan, Marco *Fundamental Rights Challenges in Border Controls and Expulsion of Irregular Immigrants in the European Union Complaint Mechanisms and Access to Justice* (Routledge/Taylor and Francis 2020).
[210] *N.D. and N.T. v. Spain* ECtHR, [GC], paras. 15-20.

accelerated expulsion procedure.[211] Thus, the Hungarian expedited expulsion procedure does not *per se* apply to all intercepted migrants. This example shows that the implementation of such expedited, summary expulsion policies are not sufficiently coherent.

Therefore, none of these summary expulsion policies is sufficiently uniform to reflect an agreement of the parties in relation to subsequent practice under Art. 31 (3)(b) VCLT.

The same is true regarding policy four, 'pull-backs by proxy' measures. Even though not only Italy, but the EU herself trains and equips the Libyan coast guard and supports the country via several political and economic channels, only the Italian support measures for Libya explicitly occur in exchange for pull-backs of migrants and are governed by several (partially unpublished) bilateral accords.[212] Thus, the high threshold for the uniformity requirement is equally not met here.

Agreement of the parties is not only attainable through explicit acknowledgement, but also through the acquiescence of other Member States[213] if the circumstances at hand 'call for some reaction'.[214] The policies assessed above have however rather raised protests by other states instead of silent acquiescence. One prominent example was the vociferous protest of France, Germany, Spain, and other ECHR Member States to Italy's pronouncement to close all ports of safety to rescue ships.[215] Thus, for this

[211] Sections 47 (2) and 51 (7) Hungarian Asylum Act. For an assessment thereof see: Asylum Information Database and European Council of Refugees and Exiles *Accelerated Procedure Hungary* available at: https://www.asylumineurope.org/reports/country/hungary/asylum-procedure/procedures/accelerated-procedure.
[212] Giuffré, Mariagiulia *The Readmission of Asylum Seekers under International Law* pp. 344-345.
[213] Ibid.
[214] ILC *Draft Conclusions on subsequent agreements and subsequent practice* Conclusion 10 (2).
[215] Oppenheim, Maya *Italy's far-right government asks EU to block refugee ships from its ports* The Independent 8 July 2018, available at: https://www.independent.co.uk/news/world/europe/italy-government-eu-block-refugee-ships-matteo-salvini-ports-a8437516.html. Also: Rieger, Bernd *France, Italy ratchet up rhetoric amid migration dispute* Deutsche Welle Online, 24 January 2019, available at: https://www.dw.com/en/france-italy-ratchet-up-rhetoric-amid-migration-dispute/a-47219037.

reason, the general closure of ports of safety policy does not constitute relevant subsequent practice in the sense of Art. 31 (3)(b) VCLT.

One prominent exception in which an agreement was arguably attained was the above-described EU–Turkey Statement of 2016 described above under policy three. Here, EU Member States and Turkey, all parties to the ECHR[216], agreed on a swapping system under the described circumstances. Thus, this policy of expedited removal meets the uniformity requirement. However, it is questionable if the state practice in this example is *in the application of the treaty*. As mentioned above, state practice must not only be explicitly or implicitly practiced or accepted by the majority of Member States, but it must also be *repeated in a specific form* and constitute *settled* common practice.[217] The EU–Turkey Statement highlights specifically that the mechanism is 'a *temporary* and *extraordinary* measure which is necessary to end the human suffering and restore public order [emphasis added].'[218] Thus, the participating states have highlighted the measure's unique character, which is not aimed at constituting a repetitive or settled practice, but an exceptional measure necessary due to specific circumstances.

Another requirement for subsequent state practice under Art. 31 (3)(b) VCLT is that it is within the limits of the treaty in question. The influence of subsequent practice ends where it goes against the object and purpose of the *Convention* as a whole. In the case at hand, those policies condemned by the ECtHR as a violation of Art. 4 Prot. 4 ECHR do not meet this requirement.

The Grand Chamber in *Hirsi Jamaa and Others v. Italy* stipulated, by relying on the VCLT's tools of treaty interpretation,

> that the provision in issue forms part of a treaty for the effective protection of human rights and that the Convention must be read as a whole and interpreted in such a way as to promote internal consistency and harmony between its various provisions.[219]

[216] However, Turkey has not ratified Protocol 4 to the ECHR which contains the prohibition of collective expulsion in its Art. 4.
[217] See Conclusions 6 and 9 ILC Draft Conclusions on subsequent agreement and subsequent practice, pp.72-74.
[218] *EU-EU–Turkey Statement* para. 1.
[219] *Hirsi Jamaa and Others v. Italy* ECtHR, [GC], para. 171.

Thus, the ECtHR explicitly referred to the principle of interpreting every term (here 'expulsion') holistically in the overall context of the *Convention* 'as a whole' when interpreting Art. 4 Prot. 4 ECHR.[220]

Furthermore, the preamble, which the courts are to consider for the contextual interpretation of a treaty per Art. 31 (2) VCLT, highlights the nature of the ECHR as a human rights instrument. The preamble points to the Member States' obligation to observe 'the maintenance and further realisation of Human Rights and Fundamental Freedoms' and to maintain them 'by an effective political democracy and […] by a common understanding and observance of the Human Rights upon which they depend'. Policies that violate the prohibition of collective expulsion and other principles in the ECHR cannot constitute subsequent practice in line with the object and purpose of the *Convention*.

This finding applies to the first policy, that of returning migrants within the Dublin system without offering procedural safeguards for the migrants,[221] and the second policy, that of push-backs outside a state's territory.[222] Furthermore, regarding the third policy, summary collective expulsions, the Grand Chamber did not find that this policy violated Art. 4 Prot. 4 ECHR in a maritime context (*Khlaifia and Others v. Italy*), but it did find this policy to violate the right to liberty and security (Art. 5 (1) ECHR), the right to be informed promptly of the reasons for deprivation of liberty (Art. 5 (2) ECHR), and the right to a speedy decision on the lawfulness of detention (Art. 5 (4) ECHR). Thus, we can see that the policy contradicts the object and purpose of the *Convention* as a whole and can thus not constitute relevant subsequent state practice. Regarding summary expulsions at land borders, the Grand Chamber did not find a violation of the prohibition of collective expulsion in *N.D. and N.T. v. Spain*. However, this finding does not make such policy permissible under all circumstances. In the case Spanish authorities summarily remove asylum seekers to an unsafe place, they arguably act in

[220] Ibid., para. 178.
[221] Condemned as a violation of the prohibition of collective expulsion by the ECtHR in *Sharifi and Others v. Italy and Greece*.
[222] Condemned as a violation of the prohibition of collective expulsion by the ECtHR in *Hirsi Jamaa and Others v. Italy* [Chamber and GC].

violation of Art. 3 ECHR.[223] As the ECtHR in the case in question had ruled an application of a violation of Art. 3 ECHR inadmissible at an early stage, the Grand Chamber did not assess this question regarding the applications of N.D. and N.T.[224]

Hence, if this is the case, then these practices do not occur *in the application* of the ECHR as they violate the *Convention*.

In conclusion, the examined policies do not constitute uniform subsequent state practice in the application of the ECHR and within the limits of Art. 31 VCLT and thus they did not modify the interpretation of the scope of protection of the prohibition of collective expulsion.

III. The influence of rising political pressure on the ECtHR on the interpretation of the prohibition of collective expulsion

Looking back from the present, it appears that growing pressure from Member States since 2010[225] may have contributed to the Grand Chamber's restrictive approach since *Khlaifia and Others v. Italy* in 2016, which was manifested recently in *N.D. and N.T. v. Spain* of 2020.

To examine this development of more restrictive interpretation of the prohibition, it is helpful to use the debate on a backlash against human rights[226] and the ECtHR since the early 2010s as a contextual framework.[227] This push back, triggered by state pressure (particularly from the United Kingdom and Russia) led to the Court's subsequent and more hesitant

[223] This follows from the Grand Chamber's reasoning pertaining to Art. 3 ECHR in *N.D. and N.T. v. Spain* ECtHR, [GC], paras. 230, 239.
[224] *N.D. et N.T. c. l'Espagne* ECtHR, [admissibility decision], Appl. Nos. 8675/15 et 8697/15, 7 July 2015.
[225] For a good overview of examples by Member States such as the Netherlands, Switzerland, Denmark and individuals putting pressure on the ECtHR in migration-related issues see: Stiansen, Øyvind and Voeten, Erik *Backlash and Judicial Restraint* pp. 10-12.
[226] See for example: Bilkova, Veronika *Populism and Human Rights* Netherlands Yearbook of International Law, 2018, pp.143-174; Roth, Kenneth *The Dangerous Rise of Populism: Global Attacks on Human Rights Values Journal of International Affairs*, 2017, The next World Order: Special 70th Anniversary Issue, pp. 79-84 or Posner, Eric *Liberal Internationalism and the Populist Backlash.* Arizona State Law Journal, 2017, Special Issue, Vol. 49, pp. 795-819.
[227] Rask Madsen, Mikael *The European Court of Human Rights From the Cold War to the Brighton Declaration and Backlash* pp. 266-271.

response, especially in contentious issues, as well as the granting of more leeway to Member States in controversial issues.[228]

The Court's previous more progressive and expansive approach may also have led to uncertainty, to an 'unsolved balance' between domestic and regional human rights law, which in turn now once again forces the ECtHR to seek support by the CoE Member States[229] and to ultimately ensure its authority[230] as the foremost European human rights court.

Against the backdrop of this general more restrictive turn, the ECtHR's approach after *Hirsi Jamaa* in 2012 to interpreting the scope of the prohibition of collective expulsion is less surprising.

A particularly significant testimony to the immense pressure the ECtHR as an institution faces when it comes to migration issues was the *Draft Copenhagen Declaration* of 2018.[231] The declaration exemplifies certain CoE Member States push for a reduction of the ECtHR's power to adjudicate highly controversial matters, and it proposed to restrain judges in asylum and migration cases.[232] According to this draft, the Court should only be allowed to interfere 'in the most exceptional circumstances' in as far as domestic procedures 'are seen to operate fairly and with respect for human rights.'[233] This attempt to restrict the Court's jurisdiction was met with severe criticism by various NGOs.[234] Member states eventually rejected the proposal to

[228] Ibid.
[229] Ibid., p. 271.
[230] Alter, Karen; Helfer, Laurence and Rask Madsen Mikael *Conclusion Context, Authority, Power* in: Alter, Helfer and Rask Madsen *International Court Authority* (Oxford University Press 2018), pp. 435-453.
[231] High Level Conference Meeting in Copenhagen on 12 and 13 April 2018 at the initiative of the Danish Chairmanship of the Committee of Ministers of the Council of Europe (The Conference) *Draft Copenhagen Declaration* 5 February 2018 (*Draft Copenhagen Declaration*), available at: https://menneskeret.dk/sites/menneskeret.dk/files/media/dokumenter/nyheder/draft_copenhagen_declaration_05.02.18.pdf.
[232] The Conference *Draft Copenhagen Declaration* para. 26.
[233] Ibid.
[234] See for example the *Joint NGO response to the Draft Copenhagen Declaration* by the AIRE Centre, Amnesty International, the European Human Rights Advocacy Centre, the European Implementation Network, Fair Trials, the International Commission of Jurists, Open Society Justice Initiative and the World Organisation Against Torture (OMCT) published on 13 February 2018, available at: https://amnesty.dk/media/3937/joint-ngo-response-to-the-copenhagen-declaration-13-february-2018-with-signatures-22feb-002.pdf, p. 6.

restrict the judges' interference in migration and asylum cases in its entirety.[235]

The Grand Chamber *Khlaifia and Others v. Italy* judgment, and even more so that of *N.D. and N.T. v. Spain*, may nevertheless be read as implicit concessions to CoE Member States' calls for more restraint by the Court and more leeway for domestic legislation in matters which lie at the core of a state's sovereign right, such as the control of its borders. Whether this concessionist approach by the ECtHR in migration-related issues contributed to a strengthening of the Court's authority in the long run is a question to be assessed on the basis of empirical evidence in the years to come.

One indication that the ECtHR wanted to shift more power and leeway to CoE Member States is the fact that the Court seemingly increasingly relies on the subsidiarity principle in migration-related cases. One can see this development in that the ECtHR has recently, for the first time in years, issued a significantly smaller number of judgments on migration issues.[236]

Scholar Martina Caroni points out that while the numbers of decided migration-related cases by the ECtHR are declining[237], the numbers of such cases brought to the other treaty bodies are rising. The Committee Against Torture, the Human Rights Committee, the Committee on the Elimination of Discrimination against Women, and most recently, the Committee on the Rights of the Child (CRC), are becoming more popular for migration-related cases.[238]

It is noteworthy, however, that the number of cases communicated by the ECtHR[239] in 2017 over an alleged violation of the prohibition of collective expulsion is the highest in recent years.[240] In 2017, the ECtHR communicated

[235] High Level Conference *Copenhagen Declaration* 12-13 April 2018. Paragraph 26 restraining the judges in migration and asylum cases was deleted in its entirety. The adopted declaration however stresses in general terms the importance of the principle of subsidiarity, see for example para. 28.
[236] Caroni, Martina *Einleitung* in: Achermann and Boillet and Caroni and Epiney and Künzli and Uebersax (eds.) *Jahrbuch für Migrationsrecht, Annuaire du droit de la migration 2017/ 2018* (Stämpfli Verlag 2018), (*Jahrbuch für Migrationsrecht 2017/2018*), p. 382.
[237] Reporting period 2017/2018.
[238] Caroni, Martina *Jahrbuch für Migrationsrecht 2017/2018* p. 382.
[239] These numbers do not include applications for interim measures.
[240] For the purpose of comparison: In 2016, no case related to Art. 4 Prot. 4 ECHR was communicated; in 2015, 4 cases were communicated.

seven of such cases,[241] in 2018 two cases[242] and in 2019 only one.[243] At present, it is too early to assess whether this peak in the 'popularity' of bringing collective expulsion-related cases to the Court around 2017 was a later effect of the mass influx of migrants to Europe and the following migration control measures, or a more permanent trend.

In this context, one case dealing with collective expulsion should not be left unmentioned: *D.D. v. Spain*, before the CRC of February 2019.[244] While the Grand Chamber judgment in *N.D. and N.T. v. Spain* was still pending; the UN Committee found that Spain's hot return policy of minor asylum seekers from Melilla to Morocco violated the *UN Convention on the Rights of the Child* (UNCRC).[245] The Committee urged Spain to revise its legal basis for such summary expulsions.[246] The UNCRC does not contain any provision comparable to Art. 4 Prot. 4 ECHR. However, the procedural guarantees against arbitrary expulsion in Art. 4 Prot. 4 ECHR are congruent with Art. 3 and Art. 20 UNCRC. The two provisions in the UNCRC offer minors in expulsion cases the right to bring forward their claims for protection and the right to assistance.

The Committee found a violation of UNCRC rights that are only applicable to minors *ratione personae.* However, the finding that these return policies violate migrants' fair trial rights is nevertheless relevant to the legality of Spain's border policy in general and the pending case before the ECtHR.

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[241] These seven cases are: *Balde and Abel v. Spain*, Appl. No. 20351/17; *W.A. and Others v. Italy*, Appl. No. 18787/17; *Khurram v. Hungary*, Appl. No. 12625/17; *H.K. v. Hungary*, Appl. No. 18531/17; *Moustahi v. France*, Appl. No. 9347/14; *D.A. and Others v. Poland*, Appl. No. 51246/17; *A.A. and Others against the former Yugoslav Republic of Macedonia and 4 other applications* Appl. No. 55798/16.

[242] *M.A. and Others v. Latvia* ECtHR, Appl. No. 25564/18 and *S.S. and Others v. Italy* ECtHR, Appl. No. 21660/18.

[243] *Y.F.C. and Others v. the Netherlands* ECtHR, Appl. No. 21325/19. As of April 2020, the ECtHR has not yet communicated any case pertaining to an alleged violation of Art. 4 Prot. 4 ECHR.

[244] *D.D. v. Spain* CRC, Communication no. 4/2016, 12 February 2019.

[245] Ibid., paras. 14.5-14.9.
The treaty body found that Spain had violated D.D.'s right to special protection and assistance as an unaccompanied minor (Art. 20 UNCRC); the right not to be subjected to torture or inhuman or degrading treatment upon return (*non-refoulement*) (Art. 37 UNCRC) and to have her or his best interest as a child considered (Art. 3 UNCRC).

[246] *D.D. v. Spain* CRC, para. 15, the text is only available in Spanish. The original reads: 'Asimismo, el Estado parte debe revisar la disposición adicional décima de dicha ley en relación con el "Régimen Especial de Ceuta y Melilla," la cual autorizaría la práctica indiscriminada del Estado parte de deportaciones automáticas en su frontera.'

Nevertheless, practitioners and scholars still see the ECtHR as the most important actor when it comes to bringing collective expulsions to court.[247]

Violeta Moreno-Lax, one of the representatives of the applicants in *S.S. and Others v. Italy*, acknowledges the continuous relevance of the ECtHR to migration-related cases. She noted that

> the ECtHR judgements are (indisputably) legally binding and create a precedent not only at IHRL but for the purposes of EU law as well - since provisions in the EU Charter of Fundamental Rights [EUChFR] that coincide with provisions in the ECHR have to be read as having the same content as scope, according to Art 52(3) CFR and the ECHR, as interpreted by the ECtHR, makes part of the General Principles of EU law, as per Art 6 TEU. So, although formally *inter partes*, the authoritative force of the judgment goes well beyond what HRC or [CAT] decisions could achieve, by creating a binding precedent that the EU and all of its MS must take into account.[248]

Carsten Gericke, one of the representatives of the applicants in the *N.D. and N.T. v. Spain* case draws similar conclusions. He rather carefully concludes that applicants in migration-related cases have shifted from the ECtHR to UN treaty bodies. Gericke also highlights the continued relevance of the ECtHR when it comes to externalisation strategies by ECHR Member States as many legal questions remain unsolved in his opinion.[249]

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[247] Başak Çalı, Cathryn Costello and Stewart Cunningham argue that it is a simplistic view that UN Treaty Bodies 'are more likely to be progressive interpreters because of their soft court status' when it comes to the *non-refoulement* principle. They demonstrate that 'across various elements of the *non-refoulement* norm, some of the UNTBs, at times, do adopt a more progressive position than their "harder" regional court counterparts but that there are also instances where they closely follow the interpretations of the regional courts and, on occasion, adopt a more restrictive position.' See: Çalı, Başak; Costello, Cathryn and Cunningham, Stewart *Hard Protection through Soft Courts? Non-Refoulement before the United Nations Treaty Bodies* German Law Journal, 2020, Vol. 21, pp. 355-384, in particular, p. 383.

[248] Moreno-Lax, Violeta in an e-mail to the author, 9 May 2019. It is noteworthy that Moreno-Lax made these comments before the Grand Chamber judgment in *N.D. and N.T. v. Spain*.

[249] Gericke, Carsten in an e-mail to the author, 18 May 2019. It is worth noting that Gericke made these comments before the Grand Chamber judgment in *N.D. and N.T. v. Spain* in February 2020.

It remains to be seen whether the Grand Chamber judgment in *N.D. and N.T. v. Spain* marked a breaking point in the Court's popularity for lodging collective expulsion-related complaints. It is possible that this judgment will, in the long run, lead to individual applicants rather turning to UN treaty bodies or lodge complaints to EU institutions such as the Committee on Petitions of the European Parliament, the European Commission, or the European Ombudsmen to receive more favourable decisions.[250]

Returning to the possible reasons for the more restrictive approach, one factor that should not be left unmentioned is internal pressure by some ECtHR judges. In December 2018, the ECtHR judges Ravarani, Bošnjak, and Paczolay criticised the Court's previous approach on Art. 4 Prot. 4 ECHR as too extensive in a joint separate opinion.[251] The judges argued that the

> Convention system makes a clear distinction between expulsion and the right to enter a territory […] The distinction between "expulsion" on one hand and "refusal of entry" or "non-admission" on the other is also well-grounded in international law, according to which the term "expulsion" applies only to aliens present on a territory of or inside a returning State.[252]

Besides these judges' dissenting opinion, judge Pinto de Albuquerque made a very extensive *obiter dictum* in the same case. Albuquerque's reflections here on the prohibition of collective expulsion and the non-admission of migrants are the judge's third instance of a legal opinion on migration policies and their compatibility with the *Convention*.[253] In all three opinions, he highlighted that states should not have a *carte blanche* when exercising control or power over persons or territory[254].

[250] Applicants could claim a violation of the prohibition of collective expulsion in Art. 19 ChFREU by the expelling state.
[251] *M.A. and Others v. Lithuania* ECtHR.
[252] Ibid., para. 53.
[253] His detailed elaborations started in his concurring opinions in the Grand Chamber *Hirsi Jamaa and Others v. Italy* [GC], followed by his opinion in *Souza Ribeiro v. France* (ECtHR, Appl. No. 22689/07, 13 December 2012) and *M.A. and Others v. Lithuania*.
[254] Concurring opinion of justice Pinto de Albuquerque in *De Souza Ribeiro v. France* ECtHR, p. 52.

In *M.A. and Others v. Lithuania,* he warns of the possible consequences of a restriction of the scope of application of the prohibition of collective expulsion for migrants' due process rights[255].

Judge Albuquerque stressed that

> the present adverse political climate in respect of asylum seekers and migrants in general and towards African migrants arriving in Europe in particular, and of the attendant mounting pressure on the Court on the part of some Governments, the Court's firmness [on interpreting the prohibition of collective expulsion] must be emphasized[256].

Given the Grand Chamber judgment in *N.D. and N.T. v. Spain,* which restricted the scope of application of the prohibition in the case of applicants entering the territory irregularly, violently, planned, and *en masse* without consulting available legal pathways, judge Albuquerque's plea seems to have remained unheard.

Here, judge Bošnjak, an avowed opponent of the ECtHR's previous approach to interpreting the scope of Art. 4 Prot. 4 ECHR[257], was part of the Grand Chamber, as well as judge Pauliine Koskelo, who, as president of Finland's Supreme Court, had previously raised concerns regarding the ECtHR's interference in contentious domestic issues.[258] Her lengthy partly dissenting opinion to the Grand Chamber judgment reveals that her approach to interpreting Art. 4 Prot. 4 ECHR is even more restrictive compared to her colleagues on the bench.[259] Judge Aleš Pejchal, also part of the Grand Chamber in *N.D. and N.T. v. Spain* went even further in his concurring opinion, raising some troubling points that go far beyond the restrictive approach taken by the majority. Referring to John Rawls' theory of justice and fairness, he suggests that the African applicants N.D. and N.T. did not

[255] Concurring opinion of justice Pinto de Albuquerque in *M.A. v. Lithuania*, para. 1.
[256] Ibid., para. 16.
[257] See his dissenting opinion in *M.A. v. Lithuania*.
[258] Rask Madsen, Mikael *The European Court of Human Rights From the Cold War to the Brighton Declaration and Backlash* p.270 and particularly fn. 245.
[259] Jude Koskelo inter alia disagrees with the majority's understanding of "expulsion". She argues in favor of a narrower interpretation in line with the dissenting opinions of Ravarani, Bošnjak, and Paczolay in *M.A. v. Lithuania*. See: *N.D. and N.T. v. Spain* ECtHR, [GC], Partly Dissenting Opinion of Judge Koskelo, paras. 1-5.

fulfil their basic duties, including fiscal ones vis-à-vis their home country, which arise from Art. 29 ACHPR .[260] Therefore, in the judge's opinion, the Grand Chamber should not have dealt with the case at all and should instead have struck it out of the list of cases.[261]

Øyvind Stiansen and Erik Voeten show, based on empirical evidence, that there is a link between Member States' resistance to the ECtHR and judicial restraint. They claim that

> public criticism coming from […] consolidated democracies has succeeded in constraining the ECtHR. As the ECtHR has faced increasingly strong resistance from consolidated democracies, the ECtHR has become more restrained when ruling on cases brought against these countries. The ECtHR's decision-making is also affected by the appointment of more restrained judges during recent years, particularly by right-wing governments. These developments have important consequences for the future of the European human rights system. At the very least, the more challenging political environment that the ECtHR currently faces restricts its ability to continue the progressive expansion of convention rights that has previously characterized its case law.[262]

The fact that the four judges opposing the ECtHR's interpretation of 'expulsion', Ravarani, Bošnjak, Paczolay, and Koskelo, were all appointed between 2015 and 2017[263] supports Stiansen's and Voeten's conclusions. Their findings are further strengthened by the turn towards a more restrictive interpretation of the scope of application of the prohibition in *Khlaifia and Others v. Italy* (Grand Chamber, 2016) and in *N.D. and N.T. v. Spain* (2020) in times of internal and external pressure on the Court, not only in migration issues,.

[260] *N.D. and N.T. v. Spain* ECtHR, [GC], Concurring Opinion of Judge Pejchal, pp. 103-106.
[261] Ibid., pp. 106-108.
[262] Stiansen, Øyvind and Voeten, Erik *Backlash and Judicial Restraint* p. 39.
[263] Judge Ravarani was appointed in 2015 for Luxembourg, his term ends in 2024; judge Bošnjak was appointed in 2016 for Slovenia, his term ends in 2025 and judge Paczolay was appointed in 2017 for Hungary. His term ends in 2026. Judge Koskelo was appointed in 2015 for Finland, her term ends in 2024. In contrast, judge Pejchal was already appointed in 2012 for the Czech Republic. His term ends in 20201.

E. Conclusions on the prohibition of collective expulsion and the *European Court of Human Rights*

Given the high number of cases in which the ECtHR has dealt with the prohibition of collective expulsion, the changing interpretations of the Court and the Human Rights Commission offer an insightful picture of the *status quo* and the evolution of the prohibition of collective expulsion's scope.

The prohibition of collective expulsion as found in Art. 4 Prot. 4 ECHR deserves special attention, as it was here first codified as such, in 1963. Furthermore, the quantity and quality of ECtHR case law on this principle is the more extensive than in all other human rights instruments. Additionally, other international and regional courts and treaty bodies have explicitly cited and drawn from the ECtHR's interpretation of the prohibition of collective expulsion.

This chapter has shown, how the guarantees contained in the prohibition can be realised in practical terms. As applicants in collective expulsion cases face specific hurdles due to the factual circumstances of such acts, the ECHR foresees specific procedural facilitations for bringing such cases to the ECtHR. One hurdle is the difficulty of maintaining contact between the expelled applicant and their representatives for the duration of the proceedings. Therefore, the possibility of lodging a group application per Art. 34 ECHR is of essential importance to avoid the striking out of the application in its entirety. Any collectively expelled individual or the group of expelled foreigners can bring allegations of a violation of Art. 4 Prot. 4 ECHR to court. Another unique factor of collective expulsion cases at the ECtHR compared to other human rights issues pertains to the standard of proof. An assessment of the Court's case law in collective expulsion cases shows that the standard depends on the concrete circumstances of the case.

In general, the standard of proof is *beyond reasonable doubt.* This standard can, according to the Court's case-law, be lower if the burden of proof is on the applicant and if he or she faced aggravating circumstances after the expulsion.

The burden of proof is linked to the specificity of facts and the nature of the prpvision allegedly being violated. In collective expulsion cases, the Court considers issues such as administrative practices of collective expulsions and the nature of the prohibition as a due process guarantee.
The burden of proof for establishing the claim that the expelling state acted following the procedural requirements of Art. 4 Prot. 4 ECHR shifts, in general, to the respondent in the case the applicants provide *prima facie* evidence. This rule is particularly relevant if the respondent government has exclusive access to evidence (such as interview protocols or expulsion orders).
If a suspected administrative practice of collective expulsion is at hand, the Court considers all available sources, including those of third parties.

There may, however, be an exception to this approach in summary collective expulsion cases. The Grand Chamber seemingly suggested in *Khlaifia and Others v. Italy* that it applies different standards of review: one for 'original' expulsion scenarios and one for 'summary' collective expulsions in maritime contexts. It seems that the Court established a new rule on the burden of proof in these two types of cases. It seemingly stipulated that once the expelling state had identified the foreigner, the burden of proof for claiming the (non-)existence of an effective possibility to submit arguments shifts to them. If the Court indeed intended to make such a distinction remains unclear as it has drafted the relevant paragraphs in somewhat ambiguous terms. The Court seemingly made another exception in summary collective expulsion cases at land borders involving irregular migrants. Here, as long as the respondent state provides evidence that it established genuine and effective possibilities to lodge claims for protection at the border and at embassies, then the burden of proof is on the applicants to show why this was either not the case or alternatively, why they could not rely on such legal pathways to establish the collective nature of the expulsion.

The analysis provided in this chapter shows that continuously linear development towards a more progressive interpretation of the scope of application of the prohibition of collective expulsion has not taken place. It

seems that progressive development peaked with the acknowledgment of the extraterritorial applicability of Art. 4 Prot. 4 ECHR in *Hirsi Jamaa and Others v. Italy* in 2012. More recent interpretative developments, particularly the Grand Chamber *Khlaifia and Others v. Italy* judgment of 2016 and the *N.D. and N.T. v. Spain* judgment of 2020, suggest that the Court has turned towards a more restrictive approach. It seems that the Grand Chamber has recently limited the scope of application by introducing a lower standard of protection for summary collective expulsion cases.

By juxtaposing the analysis of the evolution of the ECtHR's interpretation of Art. 4 Prot. 4 ECHR with changing migration control policies since the early 2000s, the relevance of this provision in the context of protecting migrants' rights becomes apparent. The outcome of several currently pending cases at the ECtHR on violations of the prohibition of collective expulsion will determine in which direction the Court will turn in the long run.

An analysis of recent migration control approaches by the ECHR Member States shows that several states have diversified and shifted their policies' focus towards outside their territories. However, given the more restrictive approach to interpreting the scope of Art. 4 Prot. 4 ECHR currently prevailing, it seems unlikely that the Court will, in any of the pending cases, find a violation of the prohibition in these new forms of migration control policies. Specifically, this most likely applies to Italy's pending 'pull-backs by proxy' case and pending cases against Italy's general closure of ports of safety. The reasons for my scepticism are to be found in the difficulty of establishing a jurisdictional link in the sense of Art. 1 ECHR and because of the need for an even more extensive interpretation of the term 'expulsion' than provided by the Court in previous case law such as *Hirsi Jamaa and Others v. Italy* or *N.D. and N.T. v. Spain*.

This chapter has assessed two alternative explanations for the more restrictive approach. First, it addressed the hypothesis that these policies constitute subsequent state practice in the sense of Art. 31 (3)(b) VCLT and have thereby modified the interpretation of Art. 4 Prot. 4 ECHR.

The chapter concludes that this is not the case. The assessed policies lack consistent state practice in the application of the ECHR. The implemented policies are not sufficiently coherent, and several ECHR Member States object to them. Certain policies that were found to violate the prohibition of collective expulsion by the ECtHR are furthermore not within the limits of Art. 31 VCLT, as they contradict the object and purpose of the provision in question and the ECHR in general.

The second explanation is that internal and external pressure on the Court has led it to take a more restrictive turn. As empirical evidence shows, the Court has made concessions to CoE Member States in recent years, such as granting them more leeway in contentious issues. Maybe, as Rask Madsen suggests, in order to ultimately preserve its authority as the European human rights court. Quantitative evidence on the correlation between pressure on the Court (such as denial of funding and political threats) and a general, more restrictive approach by the judges supports this claim.

Despite such developments, the ECtHR still plays a crucial role when it comes to the interpretation of the prohibition of collective expulsion. Given the high number of pending cases on Art. 4 Prot. 4 ECHR, and their inherent relevance to migration policies, the Court will likely continue to be a guide for other regional and international courts and treaty bodies when it comes to interpreting the prohibition of collective expulsion.

Chapter V – The role of the prohibition of collective expulsion within the human rights system

This chapter puts the role of the prohibition of collective expulsion in the broader context of human rights law. It first examines how public international law addresses (or fails to address) the protection of groups of migrants in general (A). This is followed by an assessment of the role of the prohibition of collective expulsion in conjunction with the *non-refoulement* principle as a guarantor for minimum procedural rights for migrants (B). The chapter also addresses the relationship between the two principles before turning to the relationship between the prohibition of collective expulsion and other rights in the assessed human rights conventions, showing how this interrelation affected the evolutionary interpretation of the prohibition of collective expulsion (C). This is followed by a summary and conclusions (D).

A. The protection of groups of migrants in public international law

States were traditionally the focus of international law up until far into the 20th century. Simultaneously, individuals did not play a role as subjects when several treaties introduced civil, political, economic, social, and cultural rights for individuals on an international level (first- and second-generation human rights).[1] Several international and regional human rights instruments contain comprehensive individual civil, political, economic, social, or cultural rights. The rights of collectives are part of the third generation of human rights.[2] The *International Covenant on Economic, Social and Cultural Rights*, the *African Charter on Human and Peoples' Rights*, and the *2004 Arab Charter on Human Rights* contain individual and collective rights.

How does international law and international human rights, refugee and migration law treat groups of migrants when it comes to their removal? What specific protections does international law foresee for such instances? Which role does the prohibition of collective expulsion play in this regard?

[1] Klabbers, Jan *International Law* (Cambridge University Press 2013), (*International Law*), p. 107.
[2] Ibid., pp. 115-116.

The following section will address and answer these questions, first by offering an overview of the protection of collectives in public international law before turning to the role of this principle in the protection of migrant groups and its distinctive character as an interface between individual and collective protections.

International migration law does not constitute a field of law independent of public international law. It is rather the collection of all international legal principles in treaty law and customary law that together form the framework governing the movement of people across borders.[3] This framework includes special regimes only for refugees, such as the *1951 Refugee Convention*, the *UN Migrant Worker Convention,* and international and regional human rights instruments.

Historically, the protection of individuals, and particularly of groups, has played a minor role in international law. Mass atrocities committed during the Second World War led to increased international attention on the protection of individuals and collectives, as well as to the drafting and adoption of relevant binding rules. However, before the Second World War, the *Institut de Droit International* first attempted to codify human rights with the adoption of the *New York Declaration* of 1929.[4] However, states did not immediately endorse the declaration or transform it into a binding international treaty.[5] Nevertheless, the *New York Declaration* is evidence against the popular textbook narrative[6] that international human rights protection only emerged after the end of the Second World War[7] as a counter-

[3] Kotzur, Markus *Migrationsbewegungen als Herausforderung für das Völkerrecht* in: Dethloff, Nolte and Reinisch (eds.) *Migrationsbewegungen Berichte der Deutschen Gesellschaft für Internationales Recht* Vol. 49 (C.F. Müller 2018), p. 321.
[4] Aust, Helmut *From Diplomat to Academic Activist: André Mandelstam and the History of Human Rights* European Journal of International Law, 2014, Vol. 25, No. 4, (*From Diplomat to Academic Activist*), p. 1107. The adopted New York Declaration, which contains six provisions (e.g., the right to life and the duty of states not to withdraw the nationality of their citizens) is annexed to the paper. The declaration does not foresee any provision on the protection of groups.
[5] Ibid., p. 1113.
[6] For a ctitical asseessment of this narrative see: Slotte, Pamela and Halme-Tuomisaari, Miia (eds.) *Introduction* in: Slotte and Halme-Tuomisaari *Revisiting the Origins of Human Rights* (Cambridge University Press 2015), (*Revisiting the Origins of Human Rights*), pp. 2-10.
[7] Aust, Helmut *From Diplomat to Academic Activist* p. 1107.

reaction to the Holocaust and which is visible in the adoption of the Universal Declaration of Human Rights.[8]

In the aftermath of the Second World War, states seemed to be willing to subjugate themselves to binding human rights treaties protecting groups. The drafting process of the *Convention on the Prevention and Punishment of the Crime of Genocide*[9]

reflects this. In 1948, during the United Nations General Assembly Sixth Committee debate on a draft of the *Convention*, Karim Azkoul, the representative of Lebanon, elaborated on his understanding of genocide, stating that it constituted 'a new legal category, that of collective crime.'[10]

During the debates on the drafts of the *Convention*, the definition of the terms 'group' or 'collective' were a particularly controversial topic. The representatives took a long time to come to an agreement of these terms.[11] They described them, for example, as 'an abstract concept; […] an aggregate of individuals; [with] no independent life of its own; [which] was harmed when the individuals composing it were harmed'[12]. The final version of *Genocide Convention*, Art. 2 ultimately defined genocide as 'any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group'. However, in its nineteen articles, the *Convention* remains silent on what exactly constitutes a group or collective in the sense of Art. 2.

Even though such debates did not revolve around questions of expulsions of groups, they demonstrate the difficulty of defining the term 'groups' in international law.

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[8] Slotte, Pamela and Halme-Tuomisaari, Miia *Revisiting the Origins of Human Rights* pp. 4-5.

[9] Adopted by the United Nations General Assembly on 9 December 1948, UNGA resolution 260 A (III). The Convention entered into force on 12 January 1951.

[10] UNGA, Sixth Committee 66th Mtg, UN Doc A/C.6/SR.66, para. 32. For a unconventional narrative on the genesis of the concepts genocide and crimes against humanity and the role Hirsch Lauterpacht and Raphael Lemkin played in outlawing them see: Sands, Philippe *East West Street On the Origins of Genocide and crimes Against Humanity* (Weidenfeld & Nicolson 2016).

[11] UNGA, Sixth Committee 66th Mtg, UN Doc A/C.6/SR.66, para. 9-91.

[12] Statement by Mr. Chaumont, UNGA, Sixth Committee, 73rd Mtg, UN/Doc A/C.6/SR.73, para. 91.

John Morss argues in *International Law as the Law of Collectives* that international law's primary concern is people *en masse*. States only serve as proxies of complex collectives.[13] Despite the proclaimed relevance of groups in international law, Morss concludes that international law only provides 'individualistic vocabulary'. Therefore, he calls for new more vocabulary representing people *en masse* in public international law.[14]

One explanation for this subsidiary role of groups in international law may be found in the historical evolution of human rights law.[15] During the Cold War era, Western states perceived collective, social, economic, and cultural rights as hierarchically subordinate to individual civil and political rights.[16] On an international level, this prioritisation of individual civil and political rights had already become apparent in 1966 with the division of the Universal Declaration's rights into two distinct treaties[17], the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).[18] The latter contains collective rights such as the right of all peoples to self-determination in Art. 1 (1) or the right of all peoples to 'freely dispose of their natural wealth and resources' as codified in Art. 1 (2) ICESCR.

On the regional level, the *African Charter on Human and Peoples' Rights* also explicitly contains collective rights, which are crucially important to the text. Not only does the treaty's title use collective vocabulary, but also the preamble refers to 'people' eight times. Furthermore, six provisions of the

[13] Morss, John *International Law as the Law of Collectives: Toward a Law of Peoples* (Ashgate 2013), (*International Law as the Law of Collectives*), pp. 2-3.
[14] Morss, John *International Law as the Law of Collectives: Toward a Law of Peoples*.
[15] For a historical assessment on the originas and implications of economic rights from the French Revolution onwards see: Claeys, Gregory *Socialism and the language of rights: the origins and implications of economic rights* in: Slotte and Halme-Tuomisaari (eds.) *Revisiting the Origins of Human Rights* (Cambridge University Press 2015), pp.206-236.
[16] Fredman Sandra *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford University Press 2008), pp. 1-4. See also: Lichuma, Caroline *In International Law We (Do Not) Trust: The Persistent Rejection of Economic and Social Rights as a Manifestation of Cynicism* (forthcoming, on file with author).
[17] For a more detailed analysis of this development see: Bilchitz, David *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (Oxford University Press 2007) and Fredman, Sandra *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford University Press 2008).
[18] UNGA *International Covenant on Civil and Political Rights* 16 December 1966, UNTS, Vol. 999, p. 171, and UNGA *International Covenant on Economic, Social and Cultural Rights* 16 December 1966, UNTS, Vol. 993, p. 3.

Charter (Arts. 19–24) contain collective rights. Nevertheless, in both instruments, the ICESCR and the African Charter, the collective is not defined.[19]

The *2004 Arab Charter on Human Rights* also contains several collective rights such as to self-determination (Art. 2 (1)); to economic, social, and cultural development (Art. 2 (1)); and to resist foreign occupation (Art. 2 (4)). Similarly, the *2004 Arab Charter* contains collective dimensions, which are visible in the use of the terms 'all peoples' in the respective provisions.

In international migration law, collectives do play a particularly important role. The availability of 'collective vocabulary' that Morss misses elsewhere in international law is available here. Terms such as 'Mass movement of people across borders', 'mass influx of people', 'mass migration', 'collective expulsion', and 'mass expulsion' are widely accepted and frequently used. Here too, international law does not provide a clear-cut definition of what constitutes 'mass' or 'collective'.

There is, however, one noteworthy distinction between the notion attributed to a large group of individuals in general international law and in international migration law. In general international law, collectives are subjects that deserve rights and protection. This finding is, however, not transferable when it comes to migrant collectives. Here, the situation is more ambiguous. On the one hand, there are principles in place that ensure the protection of groups of migrants such as the *non-refoulement* principle or the prohibition of collective expulsion. On the other hand, states perceive the mass influx of migrants as a threat to their sovereignty and security. Refugee law thus acknowledged security concerns connected to migrants as a justification for suspending procedural guarantees. For example, Art. 33 1951 Refugee Convention, which contains the *non-refoulement* principle, foresees an exception to this guarantee in the case individuals pose a security risk to the receiving state.

[19] For a thorough assessment of the collective rights in the *African Charter on Human and Peoples' Rights* see: Baldwin, Clive and Morel, Cynthia *Group Rights* in: Evans and Murray (eds.) *The African Charter on Human and Peoples' Rights: The System in Practice 1986-2006* (Cambridge University Press 2008), pp. 244-288.

This 'concession to national sovereignty'[20] has been utlised by state actors; for example, in the 1980s, Turkey utilised this to justify its derogation from the *non-refoulement* principle due to a mass influx of Kurdish refugees.[21]

Throughout the past, large groups of migrants have been perceived as a threat, leading to a sophisticated system dedicated to controlling and keeping large groups of migrants and asylum seekers away from a state's territory. The starting point of such systematic measures was the mass flight of European Jews from Nazi Germany and its extermination policies in the 1930s and 1940s who partially were denied refuge in states like the USA.[22] Many decades later and under very different circumstances, migrants and refugees from Syria, Afghanistan, and other countries moved in great numbers into Europe in 2015 and 2016, fleeing persecution, war, and/or economic hardship. This large influx of people led to subsequent calls for greater security measures throughout Europe by politicians and voters alike.

Even though the circumstances and causes in these two examples differ, they share the commonality that influential actors in the receiving states perceived such large groups of migrants and refugees as a threat.

The same is true in an even more recent example of mass movement. In 2018, a migrant caravan departed Central America for the United States, drawing international attention. This migrant caravan led US President Donald Trump to station 5,600 soldiers at the southern US border,[23] ostensibly to protect its 'sovereignty' against 'a foreign invasion'.[24] The stationing of thousands of soldiers at the border due to the mass influx of migrants and asylum seekers was unprecedented in the country's history. Additionally, framing of the

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[20] Gameltoft-Hansen, Thomas *Access to Asylum International Refugee Law and the Globalisation of Migration Control* (Cambridge University Press 2013), (*Access to Asylum*), p. 55.
[21] Goodwin-Gill, Guy and McAdam, Jane *The Refugee in International Law* (Cambridge University Press 3rd edn. 2007), (*The Refugee in International Law*), p. 289.
[22] Scott FitzGerald, David *Refuge Beyond Reach: How Rich Democracies Repel Asylum Seekers* (Oxford University Press 2019), (*Refuge Beyond Reach*), pp. 21-40.
[23] Gibbons-Neff, Thomas and Cooper, Helene *Deployed Inside the United States: The Military Waits for the Migrant Caravan* New York Times, 10 November 2018, available at: https://www.nytimes.com/2018/11/10/us/deployed-inside-the-united-states-the-military-waits-for-the-migrant-caravan.html.
[24] Semple, Kirk *Trump Threatens to Punish Honduras Over Immigrant Caravan* New York Times, 16 October 2018, available at: https://www.nytimes.com/2018/10/16/world/americas/trump-immigrant-caravan.html.

influx of people as an 'invasion' and 'threat against sovereignty' by the president and vice president resembles terminology used in situations of violations of the prohibition of the threat and use of force in Art. 2 (4) UN Charter. The use or threat of force in violation of a state's sovereignty by another state would trigger the right to self-defence under Art. 51 UN Charter. However, a collective of migrants and asylum seekers does not constitute a threat in the sense of Art. 2 (4) UN Charter, but rather it represents an expression of the individual right to seek protection and the need to move in groups for security reasons.

Another similar use of the term 'security risk' can be found in Hungary's reasoning for its declaration and continuous extension of a state of emergency starting in September 2015 (as of April 2020, Hungary proposed a law that will extend the state of emergency indefinitely, justified *inter alia* by the spread of the Covid-19 virus).[25] Hungary has used a 'state of crisis due to mass migration' as a justification for its restriction of asylum seekers' rights.

Since March 2016, Hungarian law offers state officials the possibility to push back any foreigner, including asylum seekers, at the state's border without ensuring that the expelled individuals can bring forward their claims against the expulsion or have the right to an effective remedy.[26] Furthermore, asylum seekers and migrants seeking any other form of protection can only submit their applications in a border transit zone, where they have to remain for the entire duration of their application process. The state-of-emergency declaration also suspends provisions in the *Hungarian Asylum Act*, which grant material support beyond basic conditions to asylum seekers and refugees.[27]

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[25] ECRE and AIDA *Country Report Hungary 2019 Update* March 2020, available at: https://www.asylumineurope.org/news/12-03-2020/aida-2019-update-hungary-1.The state of emergency was continuously extended, for example in September 2019 it was extended to March 2020, see: European Council on Refugees and Exiles (ECRE) *Hungary: Government Extends the "State of Crisis due to Mass Migration"* 13 September 2019, available at: https://www.ecre.org/hungary-government-extends-the-state-of-crisis-due-to-mass-migration/.

[26] Ibid.

[27] See for example: ECRE and AIDA *Country Report Hungary 2018 update* March 2019, available at: http://www.asylumineurope.org/sites/default/files/report-download/aida_hu_2018update.pdf, also: Commissioner for Human Rights of the Council of Europe *Dunja Mijatovic report following her visit to Hungary from 4 to 8 February 2019*.

In short, the shutdown of border crossings, the declaration of a state of emergency due to 'mass migration', and the erection of fences and border walls in Hungary, Colombia, Israel, Spain and many more exemplify the 'threatening' notion states increasingly attribute to 'masses' in international law. The 'group' is not only regarded as a collective of individuals that deserves special protection, but also as a security threat, which in some cases leads to states fortifying their borders and justifying the limitation of due process guarantees.

For the individual migrant, traveling in large groups instead of moving independently across borders has its advantages and disadvantages. It can be beneficial in the sense that traveling *en masse* offers protection against falling victim to criminals as witnessed in the 'migrant caravans' from Central America to the USA in 2018 and 2019. It can also be disadvantageous as often larger groups of migrants are met with reaction by states that lower their chance of receiving asylum/entering the state in question. Examples include Australia in the late 1990s and early 2000s, Western Europe around 2015 and 2016, and the USA, particularly in 2018 and 2019.

Another example showing that international migration law mainly describes large groups of migrants in negative terms can be found in the text used in international instruments addressing influxes of large groups. The *1951 Refugee Convention*, the *2018 Global Compact for Migration*, and the *Global Compact on Refugees* address such instances indirectly. In these instruments, large groups of migrants are passive subjects. The law focuses on the migrant-receiving states and the community of states at large. The preamble of the *1951 Refugee Convention*, for example, speaks of 'unduly heavy burdens' placed on receiving states in times of mass influx of migrants. The *2018 Global Compact for Migration*[28] and the *Global Compact on Refugees* also speak of 'burden' in the case of an influx of large groups of refugees.[29] In contrast, the *Treaty on the Functioning of the European Union* (TFEU)[30]

[28] Global Compact for Migration *Preamble*.
[29] The Global Compact on Refugees addresses "large refugee situation" in connection with "burden" and "responsibility sharing" throughout the compact. See for example: paras. 1, 16, 54, 78.
[30] EU Consolidated version of the Treaty on the Functioning of the European Union OJ C 115, 9.5.2008, pp. 76–77, entry into force 1 January 1958.

explicitly stresses the connection between the influx of migrants and the triggering of a public emergency.

Art. 78 (3) TFEU characterised 'a sudden inflow of nationals of third countries' as an 'emergency situation' which grants the Council the right to adopt provisional measures.

Another phenomenon attributable to the mass movement of people across borders is the 'asymmetry of power'[31] that their crossing creates. The migrants and the receiving states are conferred rights by international law; the state of origin is left 'powerless' or 'rightless' in this triangular relationship. At the same time, states of origin oftentimes seemingly prefer not to be involved for various reasons.[32] Groups of migrants have the right to leave their home country[33] per Art. 13 *Universal Declaration of Human Rights* or Art. 12 ICCPR. The receiving country, in contrast, has the power to deny their entry, which is limited by human rights principles such as the *non-refoulement* principle and the prohibition of collective expulsion. The country of origin is left without rights and power unless it violates international law. These states must let their citizens leave. This imbalance of power constitutes a 'certain asymmetry from an international law point of view'.[34]

In conclusion, international migration law provides limited terminology for the movement of people *en masse* across borders. The term 'collective' is either imbued with neutral or positive connotations. International human rights law offers protection for migrant groups, such as the prohibition of collective expulsion. Here, collectives are granted special protection due to their specific composition. Nevertheless, collectives are often perceived by

[31] Uepermann-Wittzack, Robert *Ordnung und Gestaltung von Migrationsbewegungen durch Völkerrecht* in: Dethloff, Nolte and Reinisch (eds.) *Migrationsbewegungen Berichte der Deutschen Gesellschaft für Internationales Recht* Vol. 49, (C.F. Müller 2018), (*Ordnung und Gestaltung von Migrationsbewegungen durch Völkerrecht*), p. 244.

[32] For example the EU and several member states repeatedly point out that the reason why most irregular migrants cannot be returned to their country of origin is to be found in the identification of the individuals and in the lack of cooperation with these states when it comes to receiving these individuals. See: European Commission *Communication from the Commission to the Council and the European Parliament on EU Return Policy* COM(2014) 199, 28 March 2014, p. 3.

[33] For an in-depth analysis of the right to leave, especially in the context of externalized migration control see: Markard, Nora *The Right to Leave by Sea* pp. 591-616.

[34] Ueppermann-Wittzack, Robert *Ordnung und Gestaltung von Migrationsbewegungen durch Völkerrecht* p. 244.

states ambiguously. This is visible in the fact that states repeatedly have invoked security exceptions to binding principles such as the *non-refoulement* principle in the case of a mass influx of people in the last decades. Even though a collective of migrants is not a subject of international law, it is powerful. Throughout recent decades, states have felt threatened by such groups and thus relied on terminology (and sometimes even measures) used usually in cases of threat and the use of force.

B. The relationship between the *non-refoulement* principle and the prohibition of collective expulsion

The principles of the prohibition of collective expulsion and *non-refoulement* form the basis for the protection for migrants, asylum seekers, and refugees when it comes to arbitrary expulsion to a place where their life and well-being would be at risk. This part assesses the relationship between the two principles in regional and international human rights treaties. First, it offers a general introduction of the nature and scope of the *non-refoulement* principle and its codification in the human rights treaties assessed in this text (I). Second, the chapter goes into detail on how the two principles relate to each other and how they jointly form the basis for minimum protection of migrants' rights in expulsion scenarios (II).

I. An introduction to the *non-refoulement* principle in international and regional human rights law

The *non-refoulement* is often described as the 'cornerstone' of international refugee law.[35]

One reason for this may be found in its codification in the *1951 Refugee Convention.* Art. 33 (1) *1951 Refugee Convention*, which reads as follows:

> No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his

[35] Gammeltoft-Hansen, Thomas *Access to Asylum* p. 44. Scholars dedicate a lot of attention to the principle, see for example: Goodwin-Gill, Guy and McAdam, Jane *The Refugee in International Law*; also: Moreno-Lax, Violeta and Papastavridis, Efthymios *Boat Refugees and Migrants at Sea: A Comprehensive Approach Integrating Maritime Security with Human Rights* (Brill/Nijhoff 2016) or Gammeltoft-Hansen, Thomas *Access to Asylum International Refugee Law and the Globalisation of Migration Control*.

> life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

When drafting the *1951 Refugee Convention*, states were reluctant to codify everyone's right 'to seek and to enjoy in other countries asylum from persecution' as guaranteed in Art. 14 (1) *Universal Declaration of Human Rights*. Thus, due to a lack of codification of the right to seek asylum, *non-refoulement* is the strongest binding principle that protects refugees' against persecution.[36]

The *1967 Protocol to the Convention* lifted the temporal and geographical restrictions implemented by the original Convention. The *1951 Refugee Convention* only offered protection against persecution having taken place within Europe and before 1951. This adjustment elevated the *Convention*, making it the most important treaty for the protection of refugees. 148 states are members of the *1951 Refugee Convention*, the *1967 Protocol to the Convention*, or both.[37]

Art. 33 *1951 Refugee Convention* only protects 'refugees' in the sense of its definition in Art. 1 (A.)(2).[38] International and regional human rights courts and monitoring bodies have expanded the personal scope of application of Art. 1 (A.)(2) over time. The scope of protection thus also applies to anyone subject to torture, cruel, inhuman, or degrading treatment or punishment, arbitrary deprivation of her or his right to life, or enforced disappearance in the case of forceful return.[39] This expansion of the principle's scope by

[36] Ibid., pp. 44-46.
[37] UNHCR *States Parties to the1951 Convention relating to the Status of Refugees and the 1967 Protocol* available at: https://www.unhcr.org/protection/basic/3b73b0d63/states-parties-1951-convention-its-1967-protocol.html.
[38] Article 1 - Definition of the term "refugee" A. For the purposes of the present Convention, the term "refugee" shall apply to any person who: […] (2) As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.
[39] Sharpe, Marina *The Regional Law of Refugee Protection in Africa* (Oxford University Press 2018), (*The Regional Law of Refugees Protection in Africa*), p. 131.

regional human rights bodies led to the situation that the regional refugee law is significantly broader compared to at the international level.[40]

International, regional, and national human rights bodies and courts also have interpreted *non-refoulement* as an 'implicit guarantee flowing from the obligations to respect, protect and fulfill human rights.'[41]

Furthermore, there is broad consensus amongst scholars, with some dissent[42], that this principle applies to *all* foreigners, and it enjoys the status of binding customary international law.[43] The United Nations High Commissioner for Refugees[44] and several United Nations General Assembly resolutions[45] support this finding.

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[40] Kotzur, Markus *Migrationsbewegungen als Herausforderung für das Völkerrecht* in: Dethloff, Nolte and Reinisch (eds.) *Migrationsbewegungen Berichte der Deutschen Gesellschaft für Internationales Recht* Vol. 49 (C.F. Müller 2018), (*Migrationsbewegungen als Herausforderung für das Völkerrecht*), p. 308.

[41] Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and Committee on the Rights of the Child *Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration* CMW/C/GC/3-CRC/C/GC/22, 16 November 2017, para. 45.

[42] James Hathaway rejects the claim that customary international law expands the personal scope of application beyond refugees referring to a lack of state practice and *opinio juris*. See: Hathaway, James *Leveraging Asylum* Texas International Law Journal, 2010, Vol. 45, No. 3, pp. 503-536.

[43] See for example: McAdam, Jane and Durieux, Jean-Francois *Non-Refoulement through Time: The Case for a Derogation Clause to the Refugee Convention in Mass Influx Emergencies* International Journal of Refugee Law, 2004, Vol. 16, Issue 1, pp. 4-24. Also: Costello, Cathryn and Foster, Michelle *Non-refoulement as custom and jus cogens? Putting the prohibition to the test* in: Heijer and van der Wilt (eds.) *Netherlands Yearbook of International Law 2015* Vol. 46, (T.M.C. Asser Press 2016), (*Non-refoulement as custom and jus cogens? Putting the prohibition to the test*), pp. 273-327 or Gameltoft-Hansen, Thomas *Access to Asylum* p. 55. As well as: Lauterpacht, Elihu and Bethlehem, Daniel *The Scope and Content of the Principle of Non-Refoulement*, in: Feller, Türk, Nicholson *UNHCR Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press 2003).
For a detailed analysis on the status of the *non-refoulement* principle as *jus cogens* see: Allain, Jean *The jus cogens Nature of non-refoulement* International Journal of Refugee Law, 2001, Vol. 13, No. 4, pp. 533-558.

[44] UNHCR *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol* 26 January 2007, para. 15. UNHCR's Advisory Opinion is a response to a request for its position on the extraterritorial application of *the non-refoulement* principle of Art. 33 of the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. UNHCR stresses that *the non-refoulement* principle as complemented by international human rights law constitutes customary international law for all persons, not only refugees in the sense of the 1951 Refugee Convention and its protocol.

[45] UNHCR *The Principle of Non-Refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93* 31 January 1994, para. 3.

Some scholars even argue that it constitutes *jus cogens* in the sense of Art. 53 Vienna Convention on the Law of Treaties.[46] The first explicit document in which states acknowledged the *jus cogens* status of this principle was the non-binding 1984 *Cartagena Declaration on Refugees* adopted by the *Colloquium on the International Protection of Refugees in Central America, Mexico and Panama*. This declaration stressed

> the importance and meaning of the principle of non-refoulement (including the prohibition of rejection at the frontier) as a corner-stone of the international protection of refugees. This principle is imperative in regard to refugees and in the present state of international law should be acknowledged and observed as a rule of *jus cogens*.[47]

A subsequent Executive Committee conclusion of 1996 of the United Nations High Commissioner for Refugees confirmed the principle's *jus cogens* character.[48]

Opponents point out the security exception to the prohibition of returning refugees in Art. 33 (2) 1951 Refugee Convention and parallel domestic laws.[49]

The *Canadian Supreme Court*, for example, referred to such an exception in the 2002 *Suresh v. Canada* judgment to justify the return of a Sri Lankan

[46] Cathryn Costello and Michelle Foster argue for example that *non-refoulement* has reached jus cogens status due to its universal and non-derogatory character. See: Costello, Cathryn and Foster, Michelle *Non-refoulement as custom and jus cogens? Putting the prohibition to the test* pp. 273-327. See also: Goodwin-Gill, Guy and McAdam, Jane *The Refugee in International Law* p. 218.

[47] Colloquium on the International Protection of Refugees in Central America, Mexico and Panama *Cartagena Declaration on Refugees*, adopted during meeting in Cartagena, Colombia between 19 - 22 November 1984, para. 5.

[48] UNHCR *EXCOM Conclusion No.79 (XLVII)* 11 October 1996. See also: Allain, Jean *The jus cogens Nature of non-refoulement* pp. 533-558 and Goodwin-Gil, Guy and McAdam, Jane *The Refugee in International Law* p. 218.

[49] Guy Goodwin-Gill and Jane McAdam do not make this claim, but demonstrate that this argument is brought forward against the categorization of the non-refoulement principle as just cogens norm. See: Goodwin-Gill, Guy and McAdam, Jane *The Refugee in International Law* pp. 218-219. For a general assessment of the relationship between *jus cogens* norms in domestic and international law regarding *refoulement* and the prohibition of torture see: De Wet, Erika *The Prohibition of Torture as an International Norm of jus cogens and Its Implications for National and Customary Law* European Journal of International Law, 2004, Vol. 15, No. 1, pp. 97-121.

citizen, deemed a security threat.[50] Another example is the above-described case of Kurdish refugees that were declared a threat to the security of the region and subsequently refouled by Turkey.[51]

Irrespective of the question of its customary law or *jus cogens* nature, the *non-refoulement* principle is explicitly or implicitly included in several international human rights instruments. Art. 3 Convention against Torture and Art. 16 (1) International Convention for the Protection of all Persons from enforced Disappearance (ICPPED)[52] contain the *non-refoulement* principle explicitly. The *International Covenant on Civil and Political Rights*,[53] the *Convention on the Rights of the Child*,[54] the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW)[55], and the *UN Migrant Worker Convention* implicitly contain the principle.[56]

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[50] Supreme Court of Canada *Suresh v. Canada (Minister of Citizenship and Immigration)* Case No. 27790, 1 S.C.R. 3, 2002 SCC 1, 11 January 2002, paras. 7, 31. The Inter-American Commission on Human Rights in turn concluded that Canada had violated Mr Suresh's rights stipulating that '[w]hile the Commission recognizes the State's right to exclude non-citizens and to protect Canadian society from persons considered to be dangerous, having regard to the foregoing considerations, the Commission finds that the State impermissibly denied Mr. Suresh the right to challenge the legality of his detention without delay […] and that the State […] fail[ed] to afford Mr. Suresh adequate or effective protection from deprivation of his basic right to liberty.' See: *Manickavasagam Suresh v. Canada* IAComHR, Report on the Merits, No. 8/16, Case 11.661, 13 April 2016, para. 83. Helmut Aust calls the Court's approach of limiting the non-refoulement principle in terrorist caes as 'highly questionable'. For his assessment see: Aust, Helmut *Complicity and the Law of State Responsibility* (Cambridge University Press 2011), pp. 398-400.

[51] Goodwin-Gill, Guy and McAdam, Jane *The Refugee in International Law* pp. 218-219.

[52] UNGA *International Convention for the Protection of all Persons from enforced Disappearance* (ICPPED), 20 December 2006, entry into force 23 December 2010.

[53] The Human Rights Committee interpreted the Covenant to implicitly contain the *non-refoulement* principle *inter alia* in its General Comment No. 20 of 1992 and No. 31 of 2004. The HRC based this principle on the prohibition of torture, cruel, inhuman and degrading treatment in Art. 7 and in the right to life in Art. 6 ICCPR. See: HRC *General comment No. 20 on Article 7 of the International Covenant on Civil and Political Rights on the Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment* 10 March 1992, para. 9 and *General Comment No. 31 on the nature of the general legal obligation imposed on State Parties to the Covenant* 26 May 2004, CCPR/C/21/Rev.1/Add.13, para. 12. See also: *General Comment No. 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life* CCPR/C/GC/36, 30 October 2018, para. 31.
For a brief, but precise overview of the *non-refoulement* principle in the ICCPR see: De Week, Fanny *Non-Refoulement under the European Convention on Human Rights and the UN Convention against Torture The Assessment of Individual Complaints by the European Court of Human Rights under Article 3 ECRR and the United Nations Committee against Torture under Article 3 CAT* (Brill/Nijhoff 2017), pp.48-55.

[54] UNGA *Convention on the Rights of the Child* (CRC), 20 November 1989, entry into force 2 September 1990.

[55] UNGA *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW), 18 December 1979, entry into force 3 September 1981.

[56] The UN Migrant Worker Committee interpreted Arts. 9 and 10 UNCRMW to implicitly contain the *non-refoulement* principle, Committee on the Protection of the Rights of All

On a regional level, the ECtHR read the principle for the first time implicitly into Art. 3 ECHR in its 1989 *Soering v. the United Kingdom* case[57]. Art. 19 ChFREU explicitly contains both principles. The *American Convention* equally contains the two principles in one provision: Art. 22 (8) ACHR explicitly anchors the *non-refoulement* principle in the right to life as well as in the prohibition of torture, cruel, and inhuman treatment.[58] The *Inter-American Court of Human Rights* further clarified in this regard that *non-refoulement* 'applies to all forms of returning a person to another State.'[59]

The *African Charter*, comparably to the ECHR, explicitly contains the prohibition of collective expulsion (Art. 12 (5) ACHPR) and implicitly the *non-refoulement* principle. The African Commission acknowledged the existence of the *non-refoulement* principle[60] for the first time in *John K Modise v Botswana* of 2000.[61] It read the principle into Art. 5 (prohibition of torture and cruel, inhuman, or degrading punishment and treatment) and Art. 18 ACHPR (protection of the family).[62]

Neither the initial nor redrafted version of the *Arab Charter on Human Rights* explicitly contain the *non-refoulement* principle, and it is not possible to reasonably state whether either implicitly contains it.[63]

Migrant Workers and Members of Their Families and Committee on the Rights of the Child *Joint general comment No. 3 (2017*) paras. 45-47. See also: González Morales, Felipe UN Special Rapporteur on the Rights of Migrants *letter to the Representative of the USA regarding the Migrant Protection Protocols (MPP)* 7 March 2019, OL USA 4/2019, p. 3.

[57] *Soering v. the UK* ECtHR, Apppl. No. 14038/88, 7 July 1989, para. 88.

[58] The Inter-American Commission on Human Rights stressed that this guarantee is not only applicable to asylum seekers and refugees but to any foreigner whose life would be at risk upon return, see: IAComHR *Human Rights of Migrants, Refugees, Stateless Persons, Victims of Human Trafficking and Internally Displaced Persons: Norms and Standards of the Inter-American Human Rights System* OEA/Ser.L/V/II.Doc. 46/15, 2015, para. 355. It further held that the deportation of a foreigner could also constitute a violation of other rights such as the prohibition of torture, the right to family life, the rights of children, and the prohibition of collective expulsion, see: Ibid., paras. 356, 375.

[59] *Wong Ho Wing v. Peru* IACtHR, judgment on reparations and costs, 26 June 2012, Series C, No. 297, para. 135. See also: *Wong Ho Wing v. Peru* IACtHR, judgment on preliminary objection, merits, reparations and costs, 30 June 2015, para. 130.

[60] The 1969 OAU Refugee Convention (in Art. 2 (3)), also contains this principle explicitly Organization of African Unity (OAU) *Convention Governing the Specific Aspects of Refugee Problems in Africa* 1001 U.N.T.S. 45, 10 September 1969, entry into force on 20 June 1974.

[61] *John K Modise v Botswana* AComHPR, Comm. No. 97/93, 10th Annual Activity Report of the African Commission on Human and Peoples' Rights, 6 November 2000, para. 92.

[62] Sharpe, Marina *The Regional Law of Refugee Protection in Africa* p. 133.

[63] Paroula Naskou-Perraki argues that the Charter does contain the non-refoulement principle which is however only applicable to recognized political refugees and thus even narrower in its scope of application than Art. 33 Refugee Convention. See: Naskou-Perraki, Paroula *The Arab Charter on Human Rights: A new start for the protection of human rights in the Arab*

As elaborated above[64], the paucity of subsidiary sources that could provide clarity are limited in their scope and only available in Arabic[65]. A summary assessment of reports by the *Arab Human Rights Committee* did not state whether the *Charter* contains the *non-refoulement* principle. However, a contextual reading of the *Arab Charter* itself reveals that the human rights instrument may at least contain a limited version of the *non-refoulement* principle in Art. 28 in conjunction with Arts. 5 and 8.

Art. 28 codifies the right of every person to 'seek political asylum in other countries to escape persecution.' This right does explicitly not apply to 'persons facing prosecution for an offense under ordinary criminal law'. The provision further clarifies that '[p]olitical refugees shall not be extraditable'. This provision seemingly acknowledges the *non-refoulement* principle, at least when it comes to political refugees.

Art. 8 2004 Arab Charter further stipulates the obligation of each member state to ensure the protection of 'every person in their territory' from being 'subjected to physical or mental torture or to cruel, inhuman or degrading treatment or punishment.' Art. 5 2004 Arab Charter codifies the right to life.

Thus, an overall contextual reading of the *2004 Arab Charter* shows that Art. 28 in conjunction with Arts. 5 and 8 contain the prohibition of returning people to a state where their life is at risk. This finding applies at least to political refugees that have not committed serious crimes. This limitation makes the *Charter* the least encompassing human rights instrument when it comes to minimum procedural guarantees for foreigners.

The *Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms* equally only explicitly contains the prohibition of collective expulsion (Art. 25. (4)), but not the prohibition of *refoulement*. The *Convention* protects the right to life in Art. 2 (1), which is not absolute as the treaty foresees the death penalty. Furthermore, Art. 3 CHRC contains the

world Άρθρο που δημοσιεύτηκε στο Revue Hellenique de Droit International, τεύχος 1,2009, pp. 117-136.

[64] See Chapter II, A II.

[65] The English version of the official webpage of the League of Arab States is under construction and thus also not available, see: http://www.leagueofarabstates.net/ar/Pages/default.aspx.

prohibition of torture or cruel, inhuman, or degrading treatment or punishment. It is next to impossible to say whether these two provisions implicitly contain the *non-refoulement* principle due to the paucity of sources on the *Convention*.

One indicator of how the *non-refoulement* principle (if indeed contained in the *Convention)* is to be interpreted is a conference declaration of CIS countries and neighbouring states in 1996 on 'the Problems of Refugees, Displaced Persons, Other Forms of Involuntary Displacement and Returnees'. Here, participating states agreed on limiting the *non-refoulement* principle to refugees in the sense of Art. 33 (1) 1951 Refugee Convention.[66]

Despite the uncertainty regarding the *Arab Charter* and the *Commonwealth Convention,* the *non-refoulement* principle is widely recognised in regional and international human rights treaties. Most of these instruments contain both the *non-refoulement* principle and the prohibition of collective expulsion. One noteworthy difference between the two principles is the fact that the latter's scope of protection between the regional and international instruments barely differs. This is not the case regarding the scope of protection of the *non-refoulement* principle. There is a significant discrepancy between the regional and international levels.[67]

Nevertheless, as described in the following section, together, they form the basis of protection for both migrants and asylum seekers against arbitrary return to a place where their lives would be at risk.

[66] Commonwealth of Independent States *Regional Conference to Address the Problems of Refugees, Displaced Persons, Other Forms of Involuntary Displacement and Returnees in the Countries of the Commonwealth of Independent States and Relevant Neighbouring States* 11 June 1996, CISCONF/1996/5, paras. 13 (c), 32, 43, 82.
[67] Kotzur, Markus *Migrationsbewegungen als Herausforderung für das Völkerrecht* p. 308.

II. The prohibition of collective expulsion and *non-refoulement*: Two independent, mutually reinforcing principles against arbitrary expulsions

As explained above,[68] the prohibition of collective expulsion and the *non-refoulement* principle are two independent principles which complement each other. The prohibition of collective expulsion contains several procedural guarantees against arbitrary expulsions, which ensures the effectiveness of the *non-refoulement* principle. Only if migrants are granted the possibility to bring forward their claims can the expelling state ensure that these migrants are not returned to an unsafe place. The *non-refoulement* principle thus materialises the prior procedural assessment.

In *Sharifi and Others v. Italy and Greece* of 2014, the ECtHR highlighted the relationship between the two principles and their interpretation in light of each other.[69]

The United Nations High Commissioner for Human Rights in an intervener brief to the ECtHR's *Hirsi et al v. Italy* case confirmed the autonomy of the prohibition of collective expulsion as an independent 'rule of general international law'. It further noted that it 'is distinguishable from the principle of *non-refoulement* in that it is inherently *a due process right* that entitles every non-national to an individualised examination of *all* arguments militating against his or her expulsion in the first place [emphasis added].' [70]

One of the reasons for the categorisation of the prohibition of collective expulsion as a due process right was the distinguishability between the *non-refoulement* principle codified in Art. 3 ECHR and the prohibition of collective expulsion. The High Commissioner believes that the prohibition of collective expulsion

> is essentially a due process requirement that must be considered in its own regard. Any State considering expulsion of a group of

[68] See Chapter III, B.
[69] *Sharifi and Others v. Italy and Greece* ECtHR, Appl. No. 16643/09, 21 October 2014, para. 211.
[70] *Hirsi and Others v. Italy* ECtHR intervener brief filed on behalf of the United Nations High Commissioner for Human Rights. Filed pursuant to leave granted by the Court on 4 May 2011, (*Intervener brief*) p. 1.

> 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.[71]

As the Court in its *Hirsi and Others v. Italy* Grand Chamber judgment noted, a second intervener brief[72] 'pointed out the importance of procedural guarantees in the area of protection of the human rights of refugees'. It further clarified that 'States were bound to examine the situation of each individual on a case-by-case basis in order to guarantee effective protection of the fundamental rights of the parties concerned and to avoid removing them while there was a risk of harm.'[73]

This second *amicus curiae* brief shares the approach of the first in that the prohibition of collective expulsion, in contrast to the *non-refoulement* principle, contains procedural guarantees.[74]

The *UN Special Rapporteur on the Human Rights of Migrants* explicitly shares the notion of the two principles being separate legal concepts in an intervention of January 2019.[75] Here, Felipe González Morales highlights the significance and independence of the two principles. In his intervention in the form of a letter to the Representative of the United States of America, he criticises the 'Remain in Mexico Policy' published in January 2019. This policy obliges migrants entering or seeking admission to the USA to return to Mexico for the duration of their asylum/immigration process. The Special

[71] UNHCHR *Intervener brief* para. 8.
[72] Columbia Law School Human Rights Clinic, African Refugee Development Center, Allard K. Lowenstein International Human Rights Clinic at Yale Law School, Center for Social Justice at Seton Hall University School of Law, Florida Coastal School of Law Immigrant Rights Clinic, Institute for Justice & Democracy in Haiti, Migrant and Refugee Rights Project of the Australian Human Rights Centre at the University of New South Wales School of Law, Physicians for Human Rights and Professors James Gathi, Tally Kritzman-Amir, Stephen H. Legomsky and Margaret L. Satterthwaite *Intervener brief in Hirsi Jamaa and Others v. Italy* ECtHR, 17 April 2010, (*2nd Intervener brief in Hirsi Jamaa*).
[73] *Hirsi et al v. Italy* ECtHR, [GC] para. 165.
[74] Columbia Law School Human Rights Clinic et. al. *2nd Intervener brief in Hirsi Jamaa* para. 22. The intervener brief referred to the codification of the prohibition of collective expulsion in U.N. Human Rights Comm., General Comment No. 15, para. 10 (noting that Article 13 of the ICCPR prohibits arbitrary expulsion and "entitles each alien to a decision in his own case").
[75] *Hirsi Jamaa and Others v. Italy* ECtHR, [GC], para. 164.

Rapporteur sees therein a violation of the prohibition of collective expulsion, which may as well violate the *non-refoulement* principle in specific cases.[76]

The prohibition of collective expulsion ultimately safeguards the *non-refoulement* principle in terms of procedure as it guarantees that the individuals' fear of being returned is assessed by the respective authorities. The *non-refoulement* principle in turn ensures the material realisation of the outcome of such an assessment in the case the authorities conclude that the foreigner cannot be returned to an unsafe place.

The International Organization for Migration (IOM) acknowledged these conclusions in a report on the general assessment of the relationship between the prohibition of collective expulsion and the *non-refoulement* principle in international migration law.[77]

The IOM highlighted the legal independence of the two principles while stressing their interdependence, stating that the 'general prohibition of collective expulsions is also related to the issue of *non-refoulement*.'[78] The IOM concluded further that the

> collective expulsion of migrants violates their rights and may support a claim against the expelling State. […] A lack of an individualized assessment of the individual's situation [as guaranteed by the prohibition of collective expulsion] prevents States from adequately verifying whether reasons exist not to expel or return a migrant in observance of the principle of *non-refoulement*.[79]

The prohibition is the precondition for the realisation of the *non-refoulement* principle. It ultimately safeguards the *non-refoulement* principle in terms of procedure as it guarantees under all circumstances that the claims regarding fear of return is assessed by the respective authorities. This right to bring

[76] González Morales, Felipe UN Special Rapporteur on the Rights of Migrants *Letter to the Representative of the USA regarding the Migrant Protection Protocols (MPP)* 7 March 2019, OL USA 4/2019, p. 1.
[77] International Migration Law Unit of the International Organization for Migration *The Principle of Non-Refoulement* April 2014.
[78] Ibid., p. 9.
[79] Ibid.

forward claims guaranteed by the prohibition however goes even further than that. *Any* claim against an expulsion may be brought forward, including claims for asylum, subsidiary protection, family reunification, and objections against the expulsion such as bad health conditions, or particular vulnerability (e.g., because they are unaccompanied minors).

The *non-refoulement* principle does not necessarily depend on the prohibition of collective expulsion as states may violate the former principle not only if they return individuals that have expressed fear for their lives, but also by taking *any* person back to an unsafe place. This situation takes place, for example, if an ECHR member state returns individuals to Libya, which is deemed as 'not a safe place' under the *non-refoulement* principle.[80] Thus, returning any migrant to Libya would violate the principle.

In contrast, when only the individual circumstances of the to-be-returned lead to such a violation, the interdependence becomes apparent. This may be the case, for example, if an ECHR member state wants to return a homosexual man from Mauritania, Saudi Arabia, Sudan, or Somalia.[81] Homosexual acts can be punished by death in these countries. Thus, for such an individual, the right to bring forward one's circumstances to the authorities is of significant relevance. The possibility to express one's situation then triggers the obligation by the receiving state not to return the individual.

However, as briefly addressed above[82], recent case law regarding 'summary' collective expulsions (*Khlaifia and Others v. Italy* of 2016 and *N.D. and N.T. v. Spain* of 2020) suggest that the ECtHR may reduce the right to bring forward any claims as guaranteed by the prohibition of collective expulsion to only claims for international protection. In both cases, the Grand Chamber justified the denial of a violation of Art. 4 Prot. 4 ECHR with reference to the fact that the applicants in question did not qualify or rely on a violation of Art. 3 ECHR.[83] This linking of the prohibition of collective expulsion with

[80] UNHCR *Position on Returns to Libya* (Update II) September 2018, pp. 20-22.
[81] Bearak, Max and Cameron, Darla *Here are the 10 countries where homosexuality may be punished by death* Washington Post, 16 June 2016, available at: https://www.washingtonpost.com/news/worldviews/wp/2016/06/13/here-are-the-10-countries-where-homosexuality-may-be-punished-by-death-2/?utm_term=.a7971178d8ab.
[82] See Chapter IV on the ECtHR's standard of review in collective expulsion cases.
[83] *Khlaifia and Others v. Italy* ECtHR, [GC], paras. 248-255, in particular para. 253. Even more so in *N.D. and N.T. v. Spain* ECtHR, [GC], paras. 206, 220-222. In para 220, the Court

the *non-refoulement* principle in these cases may indicate that the Court wants to restrict future collective expulsion cases to only those in which an expulsion *also* violated the *non-refoulement* principle. It is noteworthy that the Court itself carefully phrases its arguments when it comes to such a link, not denying that in general that other claims may be brought forward.[84] In sum, however, it only assesses claims pertaining to Art. 3 ECHR.[85] Such a restriction of the scope of protection to only the right of bringing forward claims for international protection instead of *any claims* against an expulsion would be contrary to the object and purpose of the prohibtion. The *United Nations Office of the High Commissioner for Human Rights* stressed in its third-party intervention in *N.D. and N.T. v. Spain* that 'individuals might have reasons other than asylum for appealing against their expulsion.'[86] If the ECtHR indeed restricted the possible grounds of claims covered by Art. 4 Prot. 4 ECHR, the scope of protection of the prohibition would be reduced significantly and its stand-alone value *vis-à-vis* the *non-refoulement* principle would be put into question.

In conclusion, the two principles are independent and mutually reinforcing. They protect migrants against arbitrary (group) expulsions to unsafe places. The basis for their mutual reinforcement stems from the fact that the prohibition of collective expulsion safeguards the *non-refoulement* principle in procedural terms. The prohibition of collective expulsion guarantees due process in expulsion procedures, not the right to enter or stay in a state. The *non-refoulement* principle ensures the material realisation of the outcome of

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stressed in this regard: 'As regards the applicants in the present case, in the Grand Chamber proceedings *they at first did not even allege that they had ever tried to enter Spanish territory by legal means*, referring to the aforementioned difficulties only in the abstract. In their second set of observations to the Grand Chamber *they still denied any link between their claim under Article 4 of Protocol No. 4 and a possible asylum claim*. *Only at the hearing before the Grand Chamber did they allege that they had themselves attempted to approach Beni Enzar but had been "chased by Moroccan officers"*. Quite apart from the *doubts as to the credibility of this allegation* arising from the fact that it was made at a *very late stage of the procedur*e, the Court notes that at no point did the applicants claim in this context that the obstacles allegedly encountered, should they be confirmed, were the responsibility of the Spanish authorities [emphasis added].'

[84] *N.D. and N.T. v. Spain* ECtHR, [GC], para. 211. Here the Grand Chamber states: 'The Court must therefore ascertain whether the possibilities which, in the Government's submission, were available to the applicants in order to enter Spain lawfully, *in particular with a view to claiming protection under Article 3*, existed at the material time and, if so, whether they were genuinely and effectively accessible to the applicants [emphasis added].'

[85] In particular *N.D. and N.T. v. Spain* ECtHR, [GC], para. 220.

[86] Ibid., para. 136.

an individual's assessment guaranteed by the prohibition. In the case where authorities conclude that a foreigner does not have a right to stay, but at the same time cannot be returned to an unsafe place, only the *non-refoulement* principle guarantees that an individual may remain in the receiving country.

Thus, the principles jointly play a crucial role when it comes to removal proceedings (in times of mass influx) of migrants into a state's territory, border management, and extraterritorial migration control.

C. The relationship between the prohibition of collective expulsion and fair trial rights

Different courts and treaty bodies have interpreted the prohibition of collective expulsion to contain procedural guarantees against arbitrary expulsions *en masse*. The interpretation of the ECtHR has served as a guide and role model for other courts and treaty bodies. Through this interpretative evolution, the nature of the prohibition of collective expulsion has shifted away from a mere prohibition norm (*Verbotsnorm*), obliging states to refrain from expelling *en masse* without containing individual and procedural components, towards a more complex norm. Today, the norm is still considered a prohibition norm. However, over time, it was adjusted to changing forms of collective expulsion. Courts have interpreted the scope of the prohibition as containing due process guarantees. Any collectively expelled foreigner has the right to demand these minimum guarantees before the expulsion.

The following section assesses the role of the context of the respective conventions in this evolutionary interpretation. Why have courts and treaty bodies interpreted the prohibition in this way? What is the relationship between the prohibition and other provisions in the respective conventions, such as general fair trial rights?

Furthermore, this section will explain how the relationship between the prohibition of collective expulsion and other provisions that contain process rights are connected and how this influenced the scope of the prohibition as we know it today.

Courts and treaty bodies interpreted the prohibition of collective expulsion to contain procedural guarantees against arbitrary expulsions *en masse*. Why did the courts not merely refer to general fair process guarantees that are also contained in all human rights conventions assessed, but rather evolved the scope of protection of the prohibition over time?

In the following, I also address the relationship between the prohibition of collective expulsion and general fair trial rights.

I. The rule: A mutually exclusive scope of protection

The *European Convention*,[87] the *American Convention*,[88] the *African Charter*[89], the *2004 Arab Charter on Human Rights*[90] , and the ICCPR[91] all contain fair trial rights and the right to an effective remedy for criminal procedures, and most of them for civil procedures. These rights form the basis of due process guarantees in domestic, regional, and international law.[92] Art. 47 EUChFR[93], in contrast, goes further and extends fair trial guarantees to 'everyone' in any proceeding and the right to remedy to anyone 'whose rights and freedoms guaranteed by the by the law of the [European] Union are violated'.[94]

This extensive scope of application is the exception as other human rights instruments' fair trial and effective remedy provisions are limited to civil and criminal procedures. These rights, however, do not apply to administrative procedures that govern the asylum process or to expulsion procedures on the domestic level. Art. 6 ECHR, for example, limits the scope of application to some areas of administrative law, such as road-traffic offenses or offences against social-security legislation.[95]

Thus, the scope of protection between the prohibition of collective expulsion and general fair trial rights is of mutually exclusive character in most human rights conventions.

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[87] *European Convention on Human Rights*, Articles 6 and 13.
[88] *Inter-American Convention on Human Rights*, Articles 8 and 25(1).
[89] *African Charter on Human and Peoples' Rights*, Article 7. The AComHPR also read the right to an effective remedy into Art. 7 in concjunction with Art. 1 ACHPR, see: *Groupe de Travail sur les Dossiers Judiciares Stratégiques v Democratic Republic of Congo* AComHPR, Comm. No. 259/2002, 24 July 2013, para 78. For a detailed assessment thereof see: Murray, Rachel *The African Charter on Human and Peoples' Rights: A Commentary* (Oxford University Press 2019), p. 215.
[90] *2004 Arab Charter on Human Rights*, Articles 12, 13.
[91] *International Covenant on Civil and Political Rights*, Articles 14 (1) and 2 (3)(a).
[92] The Human Rights Committee acknowledged in its *General Comment No. 32 on Article 14* that the fair trial guarantees in the ICCPR also apply to civil procedures. See: HRC *General Comment No. 32 Art. 14, Right to equality before courts and tribunals and to a fair trial* CCPR/C/GC/32, 23 August 2007, paras. 13, 16. The Arab Charter seemingly only contains fair trial rights in criminal proceedings.
[93] *Charter of Fundamental Rights in the European Union*, Article 47.
[94] For a detailed analysis on the relationship between Art. 47 EUChFR and Art. 6 ECHR and the scope of application of Art. 6 ECHR in general see: Schabas, William *European Convention on Human Rights Commentary* (Oxford University Press 2015), pp. 264-327.
[95] For details and an exhaustive list of all administrative offences covered by Art. 6 ECHR see: Council of Europe, European Court of Human Rights *Guide on Article 6of the European Convention on Human Rights Criminal Limb* 21 August 2019, para. 31.

As applicants in collective expulsion cases before the ECtHR, cannot invoke these *general* fair trial rights, they must rely on Art. 4 Prot. 4 or Art. 1 Prot. 7 ECHR. Art. 1 Prot. 7 ECHR[96] protects lawfully residing foreigners against arbitrary expulsions. The provision serves as a form of compensation for the non-applicability of fair trial rights in expulsion procedures. The scope of protection of this provision is very restricted, and the ratification of Protocol 7 by member states is limited. The *Explanatory Report to Protocol 7* stipulates that the reason for the inclusion of this provision was 'to afford minimum guarantees' to lawfully present foreigners 'in the event of expulsion from the territory of a Contracting Party.'[97] Given the limited scope of application and the limited number of expressed guarantees, Art. 1 Prot. 7 is a 'rather frugal provision'[98] when it comes to protecting foreigners against arbitrary expulsions.

Thus, this finding may also explain why the Court had to interpret the scope of protection of Art. 4 Prot. 4 ECHR to contain procedural guarantees. The *Convention* itself and previous ECtHR case law barred the application of general fair trial rights in collective expulsion cases.

Given the specific wording of the prohibition of collective expulsion in the ECHR and the lack of other provisions offering procedural guarantees against arbitrary expulsions for all foreigners, the ECtHR arguably turned to interpret the brief and vague wording of Art. 4 Prot. 4 ECHR.

The Inter-American Commission, Inter-American Court, and Migrant Worker Committee seemingly drew extensively from the ECtHR's approach.

[96] The prohibition of collective expulsion guarantees the procedural rights that are explicitly codified in Art. 1 Prot. 7 namely the right of a lawfully resident foreigner in a Member State's territory not to 'be expelled therefrom except in pursuance of a decision reached in accordance with law'. Art. 1 Prot. 7 further clarifies in its subsection one the procedural guarantees such a foreigner enjoys namely the right to submit reasons against his or her expulsion (a), to have her or his case reviewed (b) and lastly 'to be represented for these purposes before the competent authority or a person or persons designated by that authority' (c).

[97] CoE *Explanatory Report to the Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms* paras. 7,9.

[98] Villinger, Mark *Handbuch der EMRK Garantien der Zusatzprotokolle §31* (Schulthess Polygraphischer Verlag 2nd edn. 1999), para. 691. The original version reads: eher bescheidene Rechte.

In contrast, the provision governing fair process guarantees in the *African Charter* (Art. 7) not only applies in civil and criminal matters but also in expulsion cases. Thus, it is not surprising that the African Commission took a different approach compared to its regional counterparts in evolving the interpretation of the prohibition. As will be shown in the following section, the relationship between the prohibition of collective expulsion, fair trial rights, and other guarantees in the *African Charter* differs from its regional counterparts.

II. The exception: A mutually reinforcing scope of protection

In contrast to its American and European counterparts, the *African Charter* does not exclude administrative acts from its general fair process guarantees. It seems that the prohibition of collective expulsion in other human rights instruments was interpreted as a due process guarantee because the general fair process guarantees did not apply to expulsion procedures. In contrast, the prohibition of collective expulsion in the *African Charter* developed from a prohibition of discrimination towards a due process right. It underwent this evolution not independent from fair trial provisions, but in conjunction with the *Charter*'s general fair trial guarantees.

While most human rights treaties contain a provision on the right to remedies, and another on the right to a fair trial, the wording of Art. 7 (1)(a) ACHPR unifies the two types of protection in one provision.[99] The African Commission clarified this approach in *Zimbabwe Human Rights NGO Forum v. Zimbabwe* stating that 'the protection afforded by Article 7 is not limited to the protection of the rights of arrested and detained persons but encompasses the right of every individual to access the relevant judicial bodies competent to have their causes heard and be granted adequate relief.'[100]

[99] For a detailed analysis on this exceptional position of Art. 7(1)(a) see Plagis, Misha; Riemer, Lena *The Enigma of Article 7 ACHPR* (yet unpublished, on file with the author).
[100] *Zimbabwe Human Rights NGO Forum v. Zimbabwe* AComHPR, Comm. No. 245/02, 2006, para. 213.

The scope of protection of Art. 7(1)(a) ACHPR is quite extensive and entails the right to a first instance decision, to an appeal to a higher tribunal, to compensation, to access relevant factual information, and to the execution of a judgment.

The African Commission confirmed the right to the execution of a judgment in its 2005 decision *Antoine Bissangou v. Republic of Congo.* There, the Commission pointed out that it is

> of the view that the right to be heard guaranteed by Article 7 of the African Charter includes the right to the execution of a judgment […] As a result, the execution of a final judgment passed by a Tribunal or legal Court should be considered as an integral part of "the right to be heard" which is protected by Article 7.[101]

The *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa* lists the right to an effective remedy explicitly as part of Art. 7(1)(a) ACHPR.[102] The Commission adopted these principles and guidelines as it found it 'necessary to formulate and lay down principles and rules to further strengthen and supplement the provisions relating to a fair trial in the Charter and to reflect international standards.'[103] The guarantees entail the right to access justice, reparation, and access to the factual information concerning the violations. The right to access to justice includes both the right to address a matter in front of a court or similar competent organ as well as the right to an appeal to a second instance.[104]

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[101] *Antoine Bissangou v. Republic of Congo* AComHPR, Comm. No. 252/2002, 2006, para. 75.
[102] AComHPR *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa* 2003. Adopted in accordance with its mandate under Article 45(c) ACHPR 'to formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African states may base their legislation', (*Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*), para. C. b).
[103] Ibid., Preamble.
[104] Manby, Bronwen *Civil and Political Rights in the African Charter on Human and Peoples' Righs: Articles 1-7 in: Evans, Murray The African Charter on Human and Peoples' Rights The system in Practice, 1986-2006* (Cambridge University Press 2nd edn. 2008), p. 200.

The Commission held in *Zimbabwe Human Rights NGO Forum v. Zimbabwe* that Art. 7 contains both the right to a fair trial and the right to an effective remedy. Here, the African Commission stressed that

> the protection afforded by Article 7 is not limited to the protection of the rights of arrested and detained persons but encompasses the right of every individual to access the relevant judicial bodies competent to have their causes heard and be granted *adequate relief* [emphasis added].[105]

In a later case, the Commission confirmed this finding. In *Kenneth Good v. Republic of Botswana*, the African Commission dealt with the expulsion of an Australian national, teaching at the University of Botswana expelled after having written a critical article about the nature of political succession in Botswana.[106] Here, the African Commission found *inter alia* a violation of Art. 7(I)(a) ACHPR as the applicant

> was not afforded any meaningful opportunity to challenge his expulsion either by way of *hearing before* the expulsion order was made, or by way of *appeal after* the order was made. […] He was neither given *any remedy* in respect of the violations of his rights [emphasis added].[107]

This finding suggests that Art. 7(I)(a) ACHPR also contains the right a hearing, to an appeal and remedies in expulsion cases. The African Commission affirmed the inclusion of the right to an appeal into the scope of protection of Art. 7 ACHPR in several subsequent cases.[108]

The African Commission found a violation of the prohibition of collective expulsion and fair trial rights in four out of the five cases in which it has dealt with expulsion *en masse*. More specifically, the Commission referred to a

[105] *Zimbabwe Human Rights NGO Forum v. Zimbabwe* AComHPR, para. 213.
[106] *Kenneth Good v. Republic of Botswana* AComHPR, Comm. No. 313/05, 2010, paras. 2-3.
[107] *Kenneth Good v. Republic of Botswana* AComHPR, para. 116.
[108] See for example: *Egyptian Initiative for Personal Rights and Interights v. Arab Republic of Egypt* AComHPR, Comm. No. 334/06, 2011, para. 205 and *Law Office of Ghazi Suleiman v Sudan* AComHPR, Comm. No. 222/98-229/99, 2003, para. 53 and in *Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v. Nigeria* AComHPR, Comm. No. 218/98, 2001, paras. 32-33.

violation of Art. 7 (1)(a) ACHPR, the right to an appeal to competent national organs against acts of violating fundamental rights, in four out of the five cases dealing with the prohibition of collective expulsion, mentioned above.[109] The one exception is the case *Institute for Human Rights and Development in Africa v. Guinea.*[110] This case dealt with a public speech given by Guinean President Lansana Conté in September 2000, in which he proclaimed over the national radio that Sierra Leonean refugees in Guinea should be arrested, searched, and confined to refugee camps. This announcement led to widespread atrocities committed against Sierra Leonean refugees.[111] This forced eviction of refugees led to the finding of the *African Commission* that Guinea had violated Art. 12 (5) ACHPR. Why neither the applicants nor the Commission invoked Art. 7 or Art. 12 (4) ACHPR remains an enigma. None of the applicants received an expulsion order or had the right to challenge their expulsion on an individual basis. Thus, both provisions would have equally applied.

The fair trial rights enshrined in Art. 7(1)(a) ACHPR are of significance in cases of mass expulsion, as the provision grants individuals the possibility 'to plead their case before the competent national court'.[112] The scope of Art. 7 (1)(a) ACHPR is quite extensive. In entails the right to a first instance decision in the case of expulsion, to an appeal, to compensation, to relevant factual information, and to the execution of a judgment. Thus, it provides due process rights for all expelled members of a group.

In contrast to other provisions prohibiting collective expulsion, the *African Charter* takes a dual approach. Here, several provisions contain the material and procedural safeguards of the prohibition. Art. 12 (5) ACHPR (prohibition of mass expulsion) contains substantive safeguards. Art. 7 (1)(a) ACHPR contains procedural guarantees for all foreigners in the case of mass expulsion. One reason for the African Charter's different approach from that

[109] See for example: *Organisation mondiale contre la torture ets al. v. Rwanda* AComHPR, para. 34; *Rencontre africaine pour la défence des droits de l'Homme v. Zambia* AComHPR, para. 29; *Union interafricaine des droits de l'Homme et. al. v. Angola* AComHPR, para. 19; *Institute for Human Rights and Development in Africa v Angola* AComHPR, paras. 56-60.
[110] *Institute for Human Rights and Development in Africa v. Guinea* AComHPR, Comm. No. 249/02, 2004.
[111] Ibid., paras. 1, 7.
[112] *Union interafricaine des droits de l'Homme et. al. v. Angola* AComHPR, para. 20.

of the other assessed regional instruments may be found in its Art. 12 (5), which is designated as a non-discrimination rule. The wording in its regional counterparts and of the *UN Migrant Worker Convention* is broader, which has offered more leeway for interpreting the provision itself instead of combining it with other, more generally phrased rights. Another reason is the non-limitation of fair trial rights to civil and criminal matters in the *African Charter* compared to other human rights conventions.

In a manner comparable to its use of Art. 7 (1)(a) ACHPR, the African Commission also relied on other *Charter* provisions to extend the prohibition's scope of protection. These provisions are Art. 2 (prohibition of discrimination) and Art. 12 (4) ACHPR (protection against arbitrary expulsion of legally residing foreigners).

In most cases where the African Commission considered a violation of Art. 12 ACHPR, it also assessed whether Art. 2 ACHPR was violated.[113] In *Malawi African Association and Others v. Mauritania*, the Commission held that Art. 2 'lays down a principle that is essential to the spirit of this convention, one of whose goals is the elimination of all forms of discrimination and to ensure equality amongst all human beings.'[114]

Comparing the text describing the prohibition of discrimination in Art. 2 and Art. 12 (5) ACHPR, it becomes apparent that the range of attributes in Art. 2 is considerably broader. Art. 2 includes 'all forms of discrimination' and only lists some attributes that are 'particularly' noteworthy. This broad scope is especially relevant as particular African states have committed collective expulsions based on unemployment, alleged unfair competition of foreigners, increased crime rates, and even the results of unfavourable football matches in recent times.[115] To ensure that all these reasons for mass expulsions of non-nationals are covered, the scope of protection should indeed be as broad and flexible as it is in Art. 2 ACHPR.

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[113] Olaniyan, Kolawole *Civil and Political Rights in the African Charter: Articles 8-14* in: Evans and Murray *The African Charter on Human and Peoples' Rights: The System in Practice 1986–2006* (Cambridge University Press 2008), p. 232.
[114] *Malawi African Association and others v. Mauritania* Comm. Nos. 54/91, 61/91, 164/97-196/97, 210/98, Thirteenth Activity Report 1999-2000, Annex V, para. 131.
[115] Umozurike, Oji *The African Charter on Human and Peoples' Rights* (Nigerian Institute of Advanced Legal Studies 1992), p. 7.

Art. 2 ACHPR speaks of granting the 'rights recognized and guaranteed' in the Charter to 'every individual […] without any distinction'. *Ergo,* the prohibition of collective expulsion in Art. 12 (5) ACHPR also covers other forms of discrimination that go beyond the self-contained list of the provision.

This is supported by the fact that in all its judgments on mass expulsion, the African Commission has referred to the non-discrimination clause of Art. 2 ACHPR.[116]

This is further highlighted by the Commission's finding in *Fédération Internationale des Ligues des Droits de l'Homme v. Angola* of 1997, pointing out that economic difficulties do not, in any way, justify states' turn to radical measures 'aimed at protecting their nationals and their economies from non-nationals.' The Commission then proclaimed that

> whatever the circumstances may be, however, such measures should not be taken at the detriment of the enjoyment of human rights. Mass expulsions of any category of persons, whether on the basis of nationality, religion, ethnic, racial or other considerations constitute a special violation of human rights.[117]

These cases support the finding that the narrow list of attributes of prohibited discrimination in Art. 12 (5) ACHPR was extended by the Commission. To ensure a comprehensive scope of protection against arbitrary expulsions, Art. 12 (5), Art. 2 (1), Art. 7 (1)(a) and Art. 12 (4) ACHPR apply cumulatively. This finding is in line with the African Commission's approach to guarantee comprehensive protection against discrimination concerning all rights and freedoms enshrined in the *Charter*.

[116] *Organisation Mondiale Contre la Torture et. al. v. Rwanda* AComHPR; *Rencontre Africaine pour la Défense des Droits de l'Homme v. Zambia* AComHPR; *Fédération Internationale des Ligues des Droits de l'Homme v. Angola* AComHPR; *African Institute for Human Rights and Development v. Guinea* AComHPR, and *Institute for Human Rights and Development in Africa v. Republic of Angola* AComHPR.
[117] *Union Inter Africaine des Droits de l'Homme et. al. v. Angola* AComHPR, para. 16.

D. Conclusions on the role of the prohibition of collective expulsion within the human rights system

This chapter has put the role of the prohibition of collective expulsion in the broader context of human rights law.

First, the chapter offered an assessment of how international law deals with collectives. Compared to individuals or states, groups play only a minor role in international law. Except for those aimed at protecting a particular group or tribe, there are few human rights instruments which contain both collective and individual rights. The exceptions include the *International Covenant on Economic, Social and Cultural Rights*, the *African Charter on Human and Peoples' Rights*, and the *2004 Arab Charter on Human Rights.*

Despite the inclusion of collective rights in these conventions, international law lacks the necessary vocabulary to deal with groups as such. International migration law provides limited terminology for the movement of people *en masse* across borders. International human rights law offers protection for migrant groups, in particular throgh the prohibition of collective expulsion. The prohibition grants special protection due to the group's specific composition. Nevertheless, collectives are often perceived by states and policymakers ambiguously. They often characterize large groups of migrants as a threat or burden. States invoke security exceptions to binding principles such as the *non-refoulement* principle in the case of a mass influx of peoples under Art. 33 (2) 1951 Refugee Convention. The *1951 Refugee Convention*, the *2018 Global Compact for Migration*, the *Global Compact on Refugees*, and Art. 78 (3) TFEU treat large groups of migrants as passive subjects. The law focuses on the migrant-receiving state that copes with an 'unduly heavy burden' by receiving such groups.

The relationship between the principles of *non-refoulement* and the prohibition of collective expulsion was also assessed here. The two principles are independent and mutually reinforcing. The prohibition of collective expulsion safeguards the *non-refoulement* principle in procedural terms. The prohibition of collective expulsion only guarantees due process in expulsion procedures, not the right to stay. The *non-refoulement* principle ensures the material realisation of the outcome of an individual examination in

accordance with such due process guarantees. Thus, together, they form the basis for the protection for migrants, asylum seekers, and refugees when it comes to an arbitrary expulsion to a place where their life and well-being would be at risk.

The chapter then turned from the assessment of the relationship between the prohibition and the *non-refoulement* principle to the principle's relation with general fair trial rights. It specifically assessed the role the context surrounding specific human rights conventions played in the evolutionary interpretation of the prohibition.

The scope of application of the prohibition of collective expulsion and the scope of application of general fair trial rights are mutually exclusive in most human rights conventions. The scope of application of fair trial rights in most conventions is limited to civil, criminal, and certain administrative matters, and excludes expulsion procedures.

Thus, as applicants in collective expulsion cases cannot invoke fair trial rights, for example, before the ECtHR, they must rely on Art. 4 Prot. 4 ECHR or, in the case they are legal residents, also on Art. 1 Prot. 7 ECHR.

For this reason, also due to the lack of alternatives, the ECtHR interpreted the scope of protection of Art. 4 Prot. 4 ECHR to contain procedural guarantees to render the prohibition effective against arbitrary group expulsions. The *Convention* itself and previous ECtHR case law has barred the application of general fair trial rights in collective expulsion cases. Other courts and treaty bodies on regional and international levels have followed the ECtHR's interpretation, copying its procedural nature.

One exception to this finding is the *African Charter on Human and Peoples' Rights*. In contrast to its American and European counterparts, the *African Charter* does not exclude administrative acts from its general fair process guarantees. The prohibition of collective expulsion in the *African Charter* evolved from a prohibition of discrimination towards a due process right; this took place not separately, but in conjunction with fair trial guarantees (Art. 7 ACHPR) and the general prohibition of discrimination (Art. 2 ACHPR). Additionally, in interpreting the scope of the prohibition of collective expulsion, the African Commission also connected the prohibition to other

provisions of the *Charter*: the general non-discrimination clause in Art. 2 ACHPR and the prohibition of arbitrary expulsion of lawfully residing foreigners in Art. 12 (4) ACHPR. Thus, the African Commission interpreted the prohibition of collective expulsion with the 'help' of other provisions in the *African Charter*.

In contrast, the ECtHR has seemingly interpreted the prohibition of collective expulsion isolated from the prohibition of arbitrary expulsion of legally residing foreigners. Some reasons for this different approach lie in the context of the respective conventions: In the context of the ECHR, the 'weakness' of Art. 1 Prot. 7 and the 'vagueness' or Art. 4 Prot. 4 ECHR may have led to the current approach. In the African context, the framing of the prohibition of collective expulsion as a non-discrimination clause may have limited the Commission's leeway in interpreting procedural guarantees directly into the provision without referring to general fair process guarantees. At the same time, the unlimited applicability of fair process guarantees to all procedures in the *African Charter* did not make such an interpretation necessary.

The comparative assessment of the relationship of the prohibition of collective expulsion with other human rights in the respective conventions showed its close link to due process guarantees (non-refoulement, fair trial rights). This chapter further highlighted how treaty bodies on a regional and international level complemented the scope of protection of the prohibition through interpretation to provide minimum guarantees against arbitrary expulsions of foreigners en masse. Even though the result of this evolutionary interpretation between the various human rights instruments is very similar, this development evolved distinctively, depending on the treaty's specific contex.

Chapter VI – Conclusions and final remarks

This chapter provides an overview of the findings in the previous five chapters of this study (A) and subsequently offers final thoughts on the movement of people across borders in the present globalised world and on the role the prohibition of collective expulsion plays therein (B).

A. Summary of findings

1. Until the inclusion of the prohibition of collective expulsion in Art. 4 Prot. 4 ECHR, the protection of migrants had been paid little attention to in international human rights law for many years.

2. Only with its drafting in 1963 did the ECHR offer certain rights for migrants. Art. 4 Prot. 4 ECHR was the first codification of the prohibition, followed by many more on the regional and international level.

3. On a global level, regional and/or international treaty obligations bind 183 states to the prohibition. These states have either ratified one or several conventions containing this principle. The prohibition is considered not only binding treaty law, but it also constitutes customary international law or a general principle of international law.

3. Over time, the scope of application of this principle has undergone a notable interpretative evolution. The ECtHR was one of the main drivers behind this evolution.

4. The term ‘alien’ in most treaties encompasses any foreigner irrespective of her or his residence status (regular and irregular migrants), nationality (including the stateless), ethnicity, or any other feature. The scope of protection *ratione personae* is equivalent in all but one of the assessed regional human rights instruments. The *African Charter* is even broader in its scope of application, encompassing collectively expelled nationals as well. The *UN Migrant Worker Convention* and the ICCPR have a narrower personal scope. The prohibition in the UNCRMW excludes refugees and stateless people. This may be because, at the time of drafting, these groups of migrants enjoyed protections from more specific regimes. The relevant

provision in the ICCPR only explicitly includes lawfully resident foreigners. The Human Rights Committee has seemingly expanded the scope to nationals and foreigners whose lawful residence status is in question.

5. The 'collective' element of the prohibition does not require a minimum or maximum number of people. These individuals do not have to be connected by common characteristics or classed together by physical presence. The size of the group does not necessarily need to be definable. The ECtHR clarified that the absence of a reasonable, individual, and objective examination is decisive in determining the collective nature of an expulsion. 'Collective' constitutes the gateway for the assessment of a violation of the procedural guarantees implicitly contained in the prohibition.

6. Two indicators for the determination of the absence of such an examination are relevant: The existence of administrative practices aimed at expelling specific groups of foreigners and the applicant's own conduct prior to the expulsion. The Grand Chamber of the ECtHR expanded the scope of this second indicator in *N.D. and N.T. v. Spain* of March 2020. According to this interpretation, any foreigner entering in an irregular, forceful, organised, and *en masse* manner, constituting a security risk, forfeits her or his rights under Art. 4 Prot. 4. ECHR.

7. 'Prohibition' is understood, in its generic sense, as the forbidding of limitations or restrictions on the guarantees provided by the principle. The ECHR, EUChFR, and ACHR each contain a general derogation clause in case of emergency, applicable to the prohibition. The threshold for such a derogation is high. The provision in the ICCPR implicitly containing the prohibition of collective expulsion holds that the prohibition can be derogated for national security reasons, or it may be restricted under the Covenant's general derogation clause. The prohibition of collective expulsion in the ACHPR and UNCRMW is absolute.

8. Defining 'expulsion' is more difficult than other elements contained in the prohibition. The ECtHR, in *Hirsi Jamaa and Others v. Italy*, and the UN Migrant Worker Committee, in its *General Comment No. 2*, understand the term in the generic sense as to 'drive someone away from a place',

encompassing non-admission scenarios. In contrast, the International Law Commission in its *Draft Articles on the Expulsion of Aliens* defines it in a narrower sense as 'compelling someone to leave a territory'. Both understandings of the term have one decisive element in common: Some form of coercive element. Indirect collective expulsions in which the group of foreigners leaves the territory due to some form of pressure without an attributable act to state authorities are not covered. The African Commission and the Inter-American Court have not yet ruled on this issue. However, in prior cases (on non-migration matters), they have seemingly expanded the scope of application to generally apply beyond the member state's territory as long as there is a causal link between the acting state and the violation of the right in question.

9. The prohibition is neither an individual nor a collective right. It constitutes an 'interrelated individual right'. The prohibition contains all the features of an individual right as well as the 'collective' element, which demands a link to expulsions of foreigners in similar situations.

10. The prohibition of collective expulsion is a due process right. The principle contains minimum procedural safeguards for every individual of a group to bring forward claims against their expulsion and to have these claims assessed by the competent authority. It contains fair trial rights in expulsion procedures and the right to appeal the expulsion decision (right to an effective remedy).

11. The core of the procedural guarantees in the prohibition of collective expulsion is equivalent among all the conventions examined here, in every case ensuring the right of every foreigner of a group to legal assistance, and to a translator. The prohibition further guarantees the right to an effective remedy/appeal that triggers the suspensive effect of the expulsion. The prohibition in the ACHR goes beyond these minimum procedural guarantees, offering the right to consular assistance in collective expulsion cases.

12. An inter-judicial dialogue has led to the convergence of the scope of application of the prohibition of collective expulsion between different conventions. Courts and treaty bodies cite and draw on each other's interpretation of the prohibition and the ILC's work on the expulsion of

foreigners. The African and American treaty bodies *explicitly* refer to each other's interpretation, as well as to the work of the ECtHR.

13. Recent interpretative developments at the ECtHR suggest that there are different levels of guarantees depending on the nature of the expulsion. The Court in recent years distinguishes between two expulsion scenarios. The first is expulsions in the 'original' sense, which affect foreigners that have resided within a state for at least several months. Here, the prohibition's procedural guarantees apply entirely. The second is 'summary' collective expulsions, in which state officials conduct removals shortly (between a few hours and several days) after a foreigner's entry into a state's territory or outside its territory. The scope of procedural guarantees in this category is reduced compared to those in original expulsion scenarios.

14. The Grand Chamber of the ECtHR seemingly divided the second category of summary collective expulsion into sub-categories, with different levels of applicable guarantees. The first pertains to summary collective expulsions in the maritime context. Here, the rights of migrants are limited to the *possibility* to bring forward claims against the expulsion as long as the state authorities at least identified each individual of the group. Not every foreigner has the right to an individual interview before the expulsion. In these cases, migrants still enjoy the right to legal assistance, a translator, and the right to appeal. The second category pertains to expulsions of foreigners that entered via land borders. Here, procedural guarantees only apply if the expelling state did not provide for genuine and effective possibilities to apply for protection at or outside its borders. If states provide for such possibilities, migrants who do not make use of these regular entryways and enter irregularly, forcefully, and in an organised manner may forfeit their rights under the prohibition of collective expulsion.

15. Other regional monitoring bodies have not yet mentioned this reduced level of protection in summary collective expulsion scenarios (in either a maritime or a land-based context) in their case law.

16. The *Khlaifia* Grand Chamber judgment of 2016 marks a turning point in the evolutionary interpretation of the prohibition by the ECtHR as it introduced the reduced level of procedural guarantees in summary collective

expulsions in the maritime context. It reflects well the dialectic dynamics in the evolution of migrants' rights protection in the ECHR. Individual Member States, judges, activists, and migrants have sought to influence the Court's interpretation of the prohibition's scope of protection. The Grand Chamber judgment in *N.D. and N.T. v. Spain* (2020) is further evidence of this restrictive turn.

17. The prohibition of collective expulsion and the *non-refoulement* principle form the basis of protection for migrants, asylum seekers, and refugees when it comes to an arbitrary expulsion to a place where their life and well-being would be at risk. The two principles are independent and mutually reinforcing. The prohibition of collective expulsion safeguards the *non-refoulement* principle in procedural terms. The prohibition of collective expulsion only guarantees due process in expulsion procedures, not the right to stay. The *non-refoulement* principle ensures the material realisation of the outcome of an individual examination in accordance with such due process guarantees. Only if migrants are individually expelled can the state in question ensure these people are not removed to an unsafe place. Some of the most recent ECtHR jurisprudence (*Khlaifia* and *N.D. and N.T.*) suggests that the Court seeks to link the two independent principles more closely. This approach limits the scope of protection of the prohibition when it comes to bringing forward claims against expulsions dealing with issues other than *non-refoulement*.

18. Applicants in collective expulsion cases face specific hurdles due to the factual circumstances of such acts. Focusing on the ECHR as one example, a crucial issue is the standard of proof. In general, the standard of proof is 'beyond reasonable doubt'. If the burden of proof is on the collectively expelled foreigner, this threshold could be lower. Aggravated circumstances after an expulsion justify this alleviation. If the respondent government has exclusive access to evidence (interview protocols, expulsion order, etc.) the burden of proof for showing that the foreigners enjoyed an individual examination is on the state.

19. The ECtHR seemingly established an exception to this rule in summary collective expulsion cases. It appears to have stipulated that once the expelling state identified the foreigner, the burden of proof for claiming the (non)existence of an effective possibility to submit arguments, the burden shifts to the applicant(s).

20. An analysis of the prohibition's evolution shows that it has not linearly developed towards a more progressive interpretation of the scope of application. It seems that this progressive development peaked with the acknowledgment of the extraterritorial applicability of Art. 4 Prot. 4 ECHR in *Hirsi Jamaa and Others v. Italy* in 2012. More recent interpretative developments, particularly the Grand Chamber *N.D. and N.T. v. Spain* judgment of 2020, show that the Court has turned towards a restrictive approach, limiting the scope of application by introducing a lower standard of protection for summary expulsion cases.

21. Several ECHR Member States have diversified their migration control policies, shifting them outside their territory. Given the more restrictive approach to interpreting the scope of Art. 4 Prot. 4 ECHR currently prevailing, it seems unlikely that the Court will find a violation of the prohibition in pending cases on new forms of migration control policies.

22. Subsequent state practice in the sense of Art. 31 (3)(b) VCLT has not modified the interpretation of Art. 4 Prot. 4 ECHR. The assessed policies either lack consistent state practice in the application of the ECHR or are not within the limits of Art. 31 VCLT. Most implemented policies are not sufficiently coherent, and several ECHR Member States object to them.

23. The ECtHR has become more restrictive in its rulings on migration issues. One explanation is that member states have put pressure on it, especially in the aftermath of the high influx of migrants to Europe around 2015.

24. The relationship between the scope of protection between the prohibition of collective expulsion and general fair trial rights is of mutually exclusive character in most human rights conventions. The applicability of fair trial rights is, in most conventions, limited to civil, criminal, and certain

administrative matters, and excludes expulsion procedures. For this reason, treaty bodies have interpreted the scope of protection of the prohibition of collective expulsion to contain procedural guarantees.

B. Concluding remarks on migration in the present

'Make America great again!' 'Build the wall!' US President Donald Trump has used this (in)famous slogan since his election campaign in 2016, proclaiming that the only way to achieve economic growth and a prosperous US society is fortification and isolation from its southern neighbours. This campaign slogan is exemplary of recent global strategies on cross-border migration. Building walls to keep a nation's population in, as in the case of the Berlin Wall, or foreigners out, as in the case of the US–Mexican border, is not a phenomenon limited to our times, and criticism thereof is almost as old. Niccolò Machiavelli, the famous diplomat, politician, and philosopher of the Renaissance, concluded in 1531 that 'Fortresses do much more Harm than Good.'[1]

At the end of the 1940s, there were fewer than 5 border walls worldwide, but this number increased to 15 by 1989 and to almost 70 border walls in 2020, including[2] the border fences between Spain and Morocco, India and Bangladesh, and Saudi Arabia and Yemen. This increasing use of border barriers around the world may be explained states seeking to compensate for their dwindling power in an increasingly globalised world, creating 'a visual emblem of power and protection that states increasingly cannot provide'[3]. Border walls are perceived by many as symbols of power, exclusion, stability, and a measure of maintaining a nation's homogeneity while instilling an 'us versus them' mentality. Promises of excluding non-nationals by sealing off nations' borders has turned out to be an effective strategy, which can be seen in recent election results in the United States, Australia, and Germany.

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[1] Machiavelli, Niccoló *The Discourse on The First Ten Books of Tituts Livius* (Kegan Paul, Trench & Co. 1883), p. 288.
[2] Vallet, Élisabeth *Borders, Fences and Walls: State of Insecurity?* (Ashgate Publishing 2014), figure 1.
[3] Brown, Wendy *Walled States, Waning Sovereignty* (Zone Books 2nd edn. 2017), (*Walled States, Waning Sovereignty*), p. 9.

The right of states to fortify its borders, while guaranteeing legal pathways, is backed *inter alia* by the ECtHR. In its most recent case on summary collective expulsions at the Spain–Morocco border, the ECtHR highlighted the undisputed 'obligation and necessity' of states 'to protect their borders'.[4]

Fortification comes in many forms. Measures include erecting barriers, using high-tech security systems, military personnel, and 'pushing' or 'pulling' back people outside a state's territory to prevent their irregular entry.

This trend is described as a response to the declining influence of nation-states and their power to control the movement of goods, information, money, and people.[5]

However, scholars' research has shown the long-term ineffectiveness of borders and increasing fortification measures.[6] At the same time, according to the statistics of the International Organization for Migration, fortification leads to a significantly higher death toll as people on the move turn to more dangerous routes.[7]

Some forms of migration control violate international human rights law. Building barriers may prevent people from claiming asylum in violation of refugee law.[8] The *1951 Refugee Convention* permits asylum seekers to arrive at a state's border and make a claim for protection. If no border post assesses cases or if the post is unreachable for the claimants, it defeats the object and purpose of the *1951 Refugee Convention*,[9] which are to 'to give voice and force to rights for refugees, and to responsibilities for their surrogate

[4] *N.D. and N.T. v. Spain* ECtHR, [GC], para. 231.
[5] Saddiki, Said *World of walls: the structure, roles and effectiveness of separation barriers* (Open Book Publisher 2017), p. 121.
[6] See for example: Brown, Wendy *Walled States, Waning Sovereignty* and Jones, Reece *Borders and Walls: Do Barriers Deter Unauthorized Migration?* (Migration Policy Institute 2016), available at: https://www.migrationpolicy.org/article/borders-and-walls-do-barriers-deter-unauthorized-migration.
[7] International Organization for Migration *Fatal Journeys Tracking Lives Lost during Migration 2014* available at: https://publications.iom.int/system/files/pdf/fataljourneys_countingtheuncounted.pdf, p. 57.
[8] Hathaway, James *Fixing the Refugee System* ESIL lecture at the Faculty of Law of the University of Amsterdam on 13 May 2016, available at: https://www.youtube.com/watch?v=e_8AL4rVedg.
[9] Ibid.

protection'[10]. By sealing off a physical border without offering the possibility to claim asylum or other protection or by or pushing people back, states deprive asylum seekers of their right to have their claim for protection assessed.

This situation is the case, for example, at the Spain–Morocco border fence in Ceuta and Melilla.[11] The Grand Chamber of the ECtHR has arguably disregarded the reality in *N.D. and N.T. v. Spain*[12] at such border posts for many (especially sub-saharan) migrants by finding that Spain had provided sufficient, genuine, and effective measures for *all* migrants to lodge of claims for protection at its external borders or embassies.[13] The Grand Chamber unconvincingly pushed aside any evidence pointing to the contrary.[14]

As has been visible in heated debates on migration on regional and international levels, especially surrounding the 2015 refugee 'crisis' in Europe, tensions between a state's sovereign rights to control its borders and the right of migrants to protection is a recurring issue, all the more in times of high influxes of people. These tensions not only affect the evolution of migration control policies, domestic migration asylum laws, and national elections, but seemingly, they also affect the rulings of human rights courts.

When it comes to migration issues, the ECtHR and other regional and international courts are always confronted with a balancing of the rights of foreigners and the sovereign rights of their Member States. These issues are particularly delicate and contentious as those whose rights are in question and who are demanding protection from states are neither citizens nor have

[10] Feller, Erika *The Refugee Convention at 60: Still fit for its Purpose?" Protection Tools for Protection Needs* statement for Workshop on Refugees and the Refugee Convention 60 Years On: Protection and Identity, 2 May 2011, p. 4.
[11] Asylum Information Data Base and European Council on Refugees and Exiles *Access to the Territories and Push Backs: Spain* available at: https://www.asylumineurope.org/reports/country/spain/access-territory-and-push-backs.
[12] Kaleck, Wolfgang Press conference on the *N.D. and N.T. v. Spain* Grand Chamber judgment, 13 February 2020. He stated: 'Instead of condemning Spain for failing its human rights obligations, the court is ignoring evidence from all human rights institutions. The ECtHR is denying all rights to refugees and migrants. The decision completely ignores the reality at European borders, and particularly the situation of Sub-Saharan Africans at the Spanish-Moroccan frontier. Moreover, it will be perceived as a carte blanche for violent push-backs everywhere in Europe'.
[13] *N.D. and N.T. v. Spain* ECtHR, [GC], para. 217.
[14] Ibid., para. 218.

particular connections to the said states. States are reluctant to give non-citizens equal rights. This is reflected in the fact that binding rules protecting migrants' rights on an international level are few.

At the same time, it may be argued that by interpreting those few migrants' rights guaranteed by the ECHR (namely the prohibition of collective expulsion and the *non-refoulement* principle) to oblige Member States to follow certain procedures in removal settings, the Court has balanced the contradictory rights in favour of migrants for several years from *Čonka v. Belgium* to *Khlaifia and Others v. Italy* (early 2000s to 2016). This approach by the Court seemingly has shifted with the significantly greater influx of people around 2015, visible in the Grand Chamber's *Khlaifia* (2016) and *N.D. and N.T.* (2020) judgments. In times of mass migration, or what states perceive as such, the Court adjusted its balancing in favour of states' right to control their borders. This includes implementing summary collective expulsion measures without even identifying the expelled foreigners. The Court's interpretative approach on the prohibition of collective expulsion changed from an incremental approach in favour of migrants' rights to a more restrictive approach in which states' rights to control their borders receive particular significance.

In this context, the question arises: why does the ECtHR act in this manner? Did it previously overstep its boundaries by reading guarantees into the prohibition or does it do so now by restricting them for irregular migrants that entered via land borders? Closely connected is the question of the role of the *Convention* and other human rights treaties in relation to their Member States. Shall the rights they provide just constitute a 'framework' implemented by national parliaments or shall these human rights instruments go beyond that by establishing concrete legal requirements for all Member States? These questions are particularly relevant regarding the prohibition of collective expulsion.

When it comes to the interpretation of the prohibition by the ECtHR, the Court and the Commission have established a minimum standard of protection, a framework that limits states' expulsion practices in line with the

object and purpose of the principle and the *Convention* as a whole, in line with the 'living instrument' doctrine. The Court has never requested states open their borders and grant access and the right to stay and protection to all. The Court has not prohibited expedited removal procedures, but clarified that states must ensure that migrants have an opportunity to protect themselves against persecution, as guaranteed by international refugee law. The concrete implementation of such measures continued to be within the power of the domestic legislators within this broad framework.

Opponents could argue that establishing the requirement of an individual examination in summary collective expulsions, in addition to in original expulsions, has led to a *de facto* right to entry and stay for the duration of a (lengthy) examination procedure in court. According to such a view, this may also reduce the chances of removing that person in the future. Following this argumetn, many (Global North) states have implemented migration policies aiming at preventing the entry of migrants in the first place.

I am of the opinion that the inability to remove *some* individuals who do not qualify for international protection to ensure that *everyone* who meets these requirements enjoys such guarantees is a an outcome that democratic states, bound by human rights, must be able to bear. This is essential to not render the prohibition of collective expulsion, the *non-refoulement* principle, and the system of international protection ineffective. This is particularly the case when it comes to Western states that have the financial and administrative capabilities to even stem a high influx of asylum seekers. In my view, this is a mandatory prerequisite to uphold and implement effectively binding obligations arising from international human rights law, particularly international refugee law.

In the recent past, the ECtHR's Grand Chamber seems to have made substantive concessions to Member States, exemplified in particular in the 2020 *N.D. and N.T. v. Spain* judgment. The Court seemingly reduced the level of protection governing summary collective expulsions in land-border cases. In doing so, it offered Member States more leeway in implanting summary expulsion procedures without any examination if the state provides the

general possibility for asylum seekers to apply for protection at the border or outside the state's territory. It is now up to Spain and other Member States' legislatures to design their policies in accordance with international law, maintaining the effectiveness of binding principles like *non-refoulement* and the prohibition of collective expulsion.

One effect of the Grand Chamber judgment in *N.D. and N.T. v. Spain* may be a reshuffling and redistribution of roles and competencies between the European Court of Justice, the ECtHR, and domestic courts when it comes to migration issues.

Given the ECtHR's recent restraint, it is now up to domestic courts to ensure that migrants' rights are effectively protected: The pending decision of Spain's Constitutional Court on the compatibility of summary expulsions with the constitution will be one of the first practical tests. This court had temporarily suspended its judgment on the legality of 'hot returns' until the publication of the ECtHR ruling.[15] Commentators argue that it is likely that the conservative majority of the Supreme Court will now vote along the lines of the Grand Chamber judgment, legalising this policy.[16]

On the other hand, there are also examples pointing to the contrary. A few days before the Grand Chamber judgment in *N.D. and N.T. v. Spain*, the administrative court *Juzgado de Instrucción de San Bartolomé de Tirajana*, situated on the island of Gran Canaria, referred a question to the CJEU for a preliminary reference regarding Spanish border controls and asylum polices.[17] In this proceeding, the Spanish court asked for clarifications on the compatibility of several provisions of a domestic law on migration[18] with EU law. This Spanish law forms *inter alia* the basis for Spain's hot return policies

[15] As of April 2020, the Spanish Supreme Court has not yet resumed the case.
[16] Brunet, José Maria *El Constitucional cambiará su proyecto de sentencia sobre las devoluciones en caliente para permitirlas* El Pais 14 February 2020, available at: https://elpais.com/politica/2020/02/13/actualidad/1581622843_610090.html.
[17] *Ministerio Fiscal* (Autorité susceptible de recevoir une demande de protection internationale) ECJ, C-36/20 PPU, 25 January 2020, pending.
[18] Institutional Law 4/2000 of 11 January 2000 on the rights and freedoms of aliens in Spain and their social integration, BOE-A-2000-544, entry into force 12 January 2000. As modified by Ley Orgánica 2/2009 on 11 December 2009. The provisions in question are Arts. 58, 61, 62, 64.

as addressed in *N.D. and N.T. v. Spain*.[19] As individuals are barred from lodging complaints to the CJEU in the case of alleged collective expulsion policies, proceedings before domestic courts are crucial for assessing the compatibility of migration control policies with EU law.

On a macro level, the pressing question remains: Must there be a dichotomy between migrants' rights to protection and a minimum of procedural guarantees and states' right to control their borders? How can these rights be reconciled in a manner that considers both positions?

Scholars debate over solutions ranging from open borders to calling for more fortification measures. Moral values play a significant role in these debates[20] as law and politics seemed to have reached their limits.

On the one side of the spectrum, it is argued that the right of individuals to migrate should usually trump the state's sovereign right to regulate entry. This standpoint does not distinguish between the reasons for migrating and thus calls for the right to leave and enter any state's territory to be granted to everyone. This suggestion, solving the balancing of interest in favour of migrants' right to leave, enter, and reside freely wherever they desire is, given the current political climate, probably a nonstarter.[21]

The main argument against this approach is the viewpoint that a state's highest priority must be to secure the fundamental rights and needs of its citizens before those of foreigners.[22] Representatives of this view argue that, especially in the event of a high influx of people, the rights and needs of citizens always trump those of migrants. This is even the case when they are *bona fide* refugees fleeing persecution and do have a right to international protection.[23] From a moral standpoint, this approach raised the question of

[19] *N.D. and N.T. v. Spain* ECtHR, [GC], paras. 32, 33.
[20] Itamar Mann and Moritz Baumgärtel, for example, suggest a reimagination of human rights as existential, ethical commitments rather than binding law. See: Mann, Itamar *Humanity at Sea* and Baumgärtel, Moritz *Demanding Rights*.
[21] Carens, Joseph *The Ethics of Immigration* (Oxford University Press 2013), (*The Ethics of Immigration*), p. 229.
[22] Miller, David *National Responsibility and Global Justice* (Oxford University Press 2007), p. 227.
[23] Ibid.

why the right to protection and safety of refugees should be subordinate to a citizen's, here less vital, rights.[24] Despite moral arguments against it, states such as Australia and Greece, Denmark and Bangladesh have taken this stance in recent years.

Australia's detention centres in Nauru and Manus Island and the mistreatment and overcrowded migrant centres in Greece are some famous examples of when this perspective is put into practice. Recently, other states have seemingly replicated Australia's offshoring model. The Danish government introduced a new instrument in their migration deterrence strategy in December 2018. The policy offers the possibility for authorities to hold migrants without a residence permit that cannot be deported on a currently uninhabited island.[25]

The Bangladeshi government also followed Australia's tactics of banishing migrants to islands far away from its coasts: In winter of 2018, Bangladesh announced that it would transport Rohingya refugees to a silt island, a three-hour journey from its mainland.[26]

The justification for such measures was often the claim that 'the boat is full', meaning that a certain threshold for admitting refugees has been reached. A common justification for this type of denial is security, financial burden, or the fear of a loss of collective identity. This argument has been made repetitively and loudly to justify often draconian measures for stopping those who want to enter their territories in search of protection. Due to a lack of alternatives, a growing number of asylum seekers hence relies on irregular

[24] Carens, Joseph *The Ethics of Immigration* p .219.
[25] Gargiulo, Susanne and Guy, Jack *Denmark plans to isolate 'unwanted' migrants on remote island* CNN, 6 December 2018, available at: https://edition.cnn.com/2018/12/05/europe/denmark-immigrant-island-scli-intl/index.html?utm_source=Refugees+Deeply&utm_campaign=8daed2fe18-EMAIL_CAMPAIGN_2018_12_07_12_37&utm_medium=email&utm_term=0_8b056c90e2-8daed2fe18-117928793.
[26] Winn, Patrick *Rohingya survivors face a new indignity: Banishment to a half-sunken island* PRI The World, 5 December 2018, available at: https://www.pri.org/stories/2018-12-05/rohingya-survivors-face-new-indignity-banishment-half-sunken-island?utm_source=Refugees+Deeply&utm_campaign=8daed2fe18-EMAIL_CAMPAIGN_2018_12_07_12_37&utm_medium=email&utm_term=0_8b056c90e2-8daed2fe18-117928793.

and life-threatening routes.[27] The *1951 Refugee Convention* does not foresee such a justification for establishing a cap on the number of refugees. At the same time, the *Convention* does not stipulate that a refugee has the right to receive protection in any country of her or his choice. It is noteworthy in this regard that the prevailing belief behind the *Convention* is the idea of 'burden sharing' within the world community. Thus, in accordance with this notion, it is legitimate to raise doubts on certain wealthy, stable and democratic states' claims in recent years that they cannot take in more refugees or support those states who do in an adequate fashion. A lack of an effective monitoring mechanism of the *1951 Refugee Convention* may have contributed to these justification approaches.

What could constitute an alternative approach? How can and should this tension between the rights of citizens and of foreigners be balanced in a manner that upholds international human rights and does not overburden the state in question? These timely questions seem like an unsolvable conundrum, as the positions of the involved actors are seemingly irreconcilable.

A first step for all actors involved would be to acknowledge the interests of receiving states and migrants alike while weighing the most urgent rights of migrants to move across borders more heavily than less essential citizens' rights.[28] This level of urgency is reached when their life or well-being are at risk.[29] It is the role of courts, especially human rights courts like the ECtHR, to ensure that these most urgent rights of migrants are not only *de jure*, but also *de facto* protected. The prohibition of collective expulsion ensures the practical implementation thereof. The prohibition guarantees that migrants can bring forward their claims for protection and against expulsion to a place where their life is at risk. Human rights courts should ensure that these guarantees apply equally in times of a high influx of people, as in such circumstances, it is even more likely that people moving across borders do not receive minimum standards of due process and satisfaction of their basic needs as guaranteed by international refugee and migration law. To render

[27] UNHRC *report 2018* para. 8.
[28] Song, Sarah *Immigration and Democracy* (Oxford University Press 2019), pp. 189-192.
[29] Ibid.

migrants' rights effective, access to due process procedures is a basic necessity.[30]

To achieve such goals, the ECtHR could have established a binding and concise obligation on how states must equip their border posts and foreign embassies to meet the requirement that every migrant has an effective opportunity to assert her or his rights for protection or against deportation in its recent *N.D. and N.T. v. Spain* judgment of February 2020. The Grand Chamber did not do so. Instead, it deemed Spain's measures sufficient without going into detail, and it disregarded opposing reports, offering its Member States a wide margin of discretion in designing such measures. Before this judgment, it was clear that when collectively expelled migrants had not been identified and did not actively prevent their identification, Art. 4 Prot. 4 ECHR was violated. This certainty is no longer true.

The exact consequences of this judgment will only be seen in the long term.[31] At present, it is too soon to say with certainty whether ECHR Member States and states worldwide see this judgment as a *carte blanche* for implementing summary collective expulsion measures. As argued above, the role of UN Treaty Bodies, domestic courts, also in cooperation with the CJEU, may be decisive for the protection of minimum due process guarantees for all migrants against arbitrary expulsion in the years to come.

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[30] Ortiz, Loretta *Aliens* Oxford Bibliographies, 16 August 2017, available at: http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0047.xml#obo-9780199796953-0047-bibItem-0002.

[31] Matthias Lehnert argues with reference to the *N.D. and N.T. v. Spain* Grand Chamber judgment that it served as a basis for certain politicians to justify the suspension of the examination of asylum procedures by Greece in March 2020 and the harsh measures taken by border enforcement vis-à-vis migrants. He points out inter alia that the ECtHR justified the non-violation of the prohibition of collective expulsion on the basis of the possibility of a legal alternative to entry, which is not the case regarding the migrants that sought entry into Greece from Turkey in Spring of 2020. See: Lehnert, Matthias *Die Herrschaft des Rechts an der EU-Außengrenze?* Verfassungsblog, 4 March 2020, available at: https://verfassungsblog.de/die-herrschaft-des-rechts-an-der-eu-aussengrenze/.
For a legal and factual analysis of the situation, including an assessment of a possible violation of the prohibition of collective expulsion by Greece in this scenario, see: Deutsches Institut für Menschenrechte *Das Vorgehen Griechenlands und der EU an der türkisch-griechischenGrenze: Eine menschen- und flüchtlingsrechtliche Bewertung der aktuellen Situation* Factsheet, March 2020, available at: https://nbn-resolving.org/urn:nbn:de:0168-ssoar-66832-6.

Another open question is how other regional and international courts and treaty bodies will react to this recent, more restrictive approach by the ECtHR in the long term and whether the Court will remain the golden standard when it comes to interpreting the prohibition of collective expulsion. The same question applies to the effects of the judgment on cases currently pending before the ECtHR relating to the prohibition of collective expulsion, in particular, *Doumbe Nnabuchi v. Spain*[32] and *Balde and Abel v. Spain*[33]. The applicants in both cases were forcefully apprehended by the *Guardia Civil* on Spanish territory and summarily and collectively expelled without identification. The applicants in both cases also alleged a violation of Art. 3 ECHR based on the mistreatment the guards inflicted on them during the expulsion procedure. These two cases are linked with *N.D. and N.T. v. Spain* as the applicants here also entered the enclaves without applying for asylum at the border posts or at a Spanish embassy prior to their attempt to enter the state's territory. The outcome of these cases depends to a large degree on the concrete circumstances of these cases, which are not publicly available.

The *N.D. and N.T. v. Spain* judgment may also affect the *Idomeni* case (*A.A. and Others against the former Yugoslav Republic of Macedonia)* in which applicants lodged a complaint against North Macedonia for summarily and collectively expelling them back to Greece without any examination of their circumstances whatsoever. Here, similarly to the *N.D. and N.T. v. Spain* case, the applicants allege a violation of Art. 4 Prot. 4 ECHR and of Art. 13 in conjunction with Art. 4 Prot. 4 ECHR. Here, the migrants in question also crossed the border irregularly, were apprehended, and were (forcefully) returned. Two aspects that could however lead to a different outcome in this case are that the applicants are Syrian, Iraqi, and Afghan nationals who wanted to claim asylum,[34] and that the group in question did not enter the territory forcefully. The Grand Chamber had stressed these two aspects

[32] *Doumbe Nnabuchi v. Spain* ECtHR, Appl. No. 19420/15, communicated to Spain on 13 December 2015, only available in French, pending.
[33] *Balde and Abel v. Spain* ECtHR, Appl. No. 20351/17, communicated to Spain on 12 June 2017, only available in French, pending.
[34] The Grand Chamber in *N.D. and N.T. v. Spain* argued that the applicants were not asylum seekers inter alia with reference to the Chamber judgment where no violation of Art. 3 ECHR was found.

(applicants are not asylum seekers and entered forcefully) several times in the *N.D. and N.T. v. Spain* judgment as relevant justification for the restriction of their rights to an individual examination.[35] Another argument in favour of this position is the fact that the ECtHR judges Hellen Keller, Paul Lemmens and Lorraine Schembri Orland stressed the *limited applicability* of the restrictions introduced in the *N.D. and N.T.* judgment in their joint dissenting opinion to the *Asady and Others v. Slovakia* case.[36] The judges further argue that the 'Grand Chamber itself recognised this [limited applicability of the restrictions] when it stated that its reasoning was "without prejudice to the application of Articles 2 and 3" of the Convention'.[37]

The outcome of pending cases, like that described here, will help clarify the reach of the restrictions on the scope of protection of Art. 4 Prot. 4 ECHR established in the Grand Chamber's most recent case and help determine the future path of the prohibition. This case and the assessment provided in this study show that migration policies are in a state of constant flux. A universal obligation such as the prohibition of collective expulsion ensures the minimum protection of migrants' rights when faced with changing policies. The interpretative evolution of the principle by regional and international courts and treaty bodies has adjusted the prohibition based on present-day migration patterns and migration control realities. This assessment has shown that, unfortunately, from a human rights perspective, this evolution does not follow a steady path towards greater protection of migrants' rights. This work has further shown that the scope of protection of the prohibition is not fixed, but is dependent on the interpretation of the relevant courts, which in turn is affected by internal and external factors such as the composition of the judges or changing political and social circumstances.

Immanuel Kant suggested in 1795 that morality is the highest good when politics undermine human rights. He pointed out that '[f]or morality cuts through the Gordian knot that politics is unable to untie whenever the two

[35] See for example: *N.D. and N.T. v. Spain* ECtHR, [GC], paras. 166, 201, 214.
[36] *Asady and Others v. Slovakia* ECtHR, Joint Dissenting Opinion of judges Keller, Lemmens and Schembri Orland, para. 24.
[37] Ibid.

come into conflict with one another. – The rights of human-kind must be held sacred, whatever it may cost those in power.'[38] Recent developments outlined above suggest that morality is not always held as the highest good in migration-related issues. History and recent events have taught us that migration will continue, despite states' harsh measures to prevent it. It is up to current and future governments, individuals, and civil society to determine if their self-given basic human rights are not 'rendered illusory or ineffective', to use the words the ECtHR have noted in all collective expulsion cases. To ensure the effectiveness of minimum due process guarantees for migrants, the prohibition of collective expulsion must continue to play a significant role. I have no doubt that despite the current prevailing restrictive approach to interpreting the prohibition of the ECtHR, the principle will continue to guarantee a basis of protection against arbitrary expulsion to a place where the migrants' life and well-being is in danger. The reason for this positive assessment lays in the fact that the prohibition is not only binding by treaty law, but also by customary law and or a general principle. Thus, the core of the prohibition binds states either way. Furthermore, despite the most recent restrictions on the scope of the prohibition, the principle still guarantees the full set of due process rights in original collective expulsion cases and to a reduced degree in summary collective expulsion scenarios where no possibility to lodge an asylum claim is given.

[38] Kant, Immanuel *Toward Perpetual Peace: A philosophical Sketch* in: Kleingeld *Toward Perpetual Peace and Other Writings on Politics, Peace, and History* Immanuel Kant (Yale University Press 2006), p. 104.

Appendix

List of relevant treaty provisions on the prohibition of collective expulsion

1. African Charter on Human and Peoples' Rights

Article 12

1. Every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law.

2. Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or
morality.

3. Every individual shall have the right, when persecuted, to seek and obtain asylum
in other countries in accordance with laws of those countries and International
conventions.

4. A non-national legally admitted in a territory of a State Party to the present Charter, may only by expelled from it by virtue of a decision taken in accordance with the law.

5. The mass expulsion of non-nationals shall be prohibited. Mass expulsion shall
be that which is aimed at national, racial, ethnic or religions groups.

2. Arab Charter on Human Rights of 2004

Article 26

1. Every person lawfully within the territory of a State Party shall, within that territory, have the right to liberty of movement and freedom to choose his residence in accordance with applicable regulations.

2. An alien lawfully in the territory of a State Party may be expelled only in pursuance of a decision reached according to the law and shall, except where compelling reasons of national security otherwise require, be given the possibility of having his case reviewed by a competent authority. Collective expulsions are prohibited in all cases.

3. Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms

Article 25

1. No one shall he expelled, under an individual procedure or as a result of a collective measure, from the territory of the State of which he is a citizen.

2. No one shall be deprived of the right to enter the territory of the State of which he is a citizen.

3. Aliens who are lawfully in the territory of any Contracting Party may be expelled only in application of a lawful decision, and they shall have the opportunity of appealing against their expulsion.

4. Collective expulsion of aliens shall be prohibited.

4. Convention for the Protection of Human Rights and Fundamental Freedoms

Article 4 of Protocol No. 4

Collective expulsion of aliens is prohibited.

5. European Union Charter of Fundamental Rights

Article 19

1. Collective expulsions are prohibited.

2. 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.

6. Inter-American Convention on Human Rights

Article 22

1. Every person lawfully in the territory of a State Party has the right to move about in it, and to reside in it subject to the provisions of the law.

2. Every person has the right lo leave any country freely, including his own.

3. The exercise of the foregoing rights may be restricted only pursuant to a law to the extent necessary in a democratic society to prevent crime

or to protect national security, public safety, public order, public morals, public health, or the rights or freedoms of others.

4. The exercise of the rights recognized in paragraph 1 may also be restricted by law in designated zones for reasons of public interest.

5. No one can be expelled from the territory of the state of which he is a national or be deprived of the right to enter it.

6. An alien lawfully in the territory of a State Party to this Convention may be expelled from it only pursuant to a decision reached in accordance with law.

7. Every person has the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions, in the event he is being pursued for political offenses or related common crimes.

8. In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions.

9. The collective expulsion of aliens is prohibited.

7. International Covenant on Civil and Political Rights

Article 13

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

UN Human Rights Committee, General Comment No. 15 (1986)

Paragraph 10: ‘Article 13 directly regulates only the procedure and not the substantive grounds for expulsion. However, by allowing only those carried out “in pursuance of a decision reached in accordance with law”, its purpose is clearly to prevent arbitrary expulsions. On the other hand, it entitles each alien to a decision in his own case and, hence, article 13 would not be satisfied with laws or decisions providing for collective or mass expulsions. This understanding, in the opinion of the Committee, is confirmed by further provisions concerning the right to submit reasons

against expulsion and to have the decision reviewed by and to be represented before the competent authority or someone designated by it. An alien must be given full facilities for pursuing his remedy against expulsion so that this right will in all the circumstances of his case be an effective one. The principles of article 13 relating to appeal against expulsion and the entitlement to review by a competent authority may only be departed from when "compelling reasons of national security" so require. Discrimination may not be made between different categories of aliens in the application of article 13.'

8. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

Article 22

1. 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.

2. Migrant workers and members of their families may be expelled from the territory of a State Party only in pursuance of a decision taken by the competent authority in accordance with law.

3. The decision shall be communicated to them in a language they understand. Upon their request where not otherwise mandatory, the decision shall be communicated to them in writing and, save in exceptional circumstances on account of national security, the reasons for the decision likewise stated. The persons concerned shall be informed of these rights before or at the latest at the time the decision is rendered.

4. Except where a final decision is pronounced by a judicial authority, the person concerned shall have the right to submit the reason he or she should not be expelled and to have his or her case reviewed by the competent authority, unless compelling reasons of national security require otherwise. Pending such review, the person concerned shall have the right to seek a stay of the decision of expulsion.

5. If a decision of expulsion that has already been executed is subsequently annulled, the person concerned shall have the right to seek compensation according to law and the earlier decision shall not be used to prevent him or her from re-entering the State concerned.

6. In case of expulsion, the person concerned shall have a reasonable opportunity before or after departure to settle any claims for wages and other entitlements due to him or her and any pending liabilities.

7. Without prejudice to the execution of a decision of expulsion, a migrant worker or a member of his or her family who is subject to such a decision may seek entry into a State other than his or her State of origin.

8. In case of expulsion of a migrant worker or a member of his or her family the costs of expulsion shall not be borne by him or her. The person concerned may be required to pay his or her own travel costs.

9. Expulsion from the State of employment shall not in itself prejudice any rights of a migrant worker or a member of his or her family acquired in accordance with the law of that State, including the right to receive wages and other entitlements due to him or her.

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Selbstständigkeitserklärung:

Hiermit erkläre ich, Lena Riemer, dass ich die vorliegende Arbeit selbstständig verfasst habe und ich keine anderen als die angegebenen Quellen und Hilfsmittel verwendet haben.