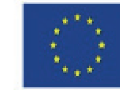
MIGRATION AND ASYLUM POLICIES SYSTEMS



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MIGRATION AND ASYLUM POLICIES SYSTEMS

CHALLENGES AND PERSPECTIVES

edited by

GIUSEPPE CATALDI
ADELE DEL GUERCIO   ANNA LIGUORI

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ANNA FAZZINI*

1. Introduction

The *N.D. and N.T.* judgment of February 13th 2020[1], in which the Grand Chamber of the European Court of Human Rights (henceforth ECtHR) ruled for the first time on the so-called "hot returns" implemented at Melilla's land borders, was met with great dismay by the academic world[2]. The Court, indeed, overturning what the Third Section had stated in 2017[3], concluded that there was no violation of

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[1] European Court of Human Rights (Grand Chamber), *N.D. and N.T. v. Spain* Judgment of 13 February 2020, Application No. 8675/15 and 8697/15.

[2] See, *inter alia*, M. Pichl, D. Schmalz, "Unlawful may not mean rightless", *Verfassunblog*, 14 February 2020, <https://verfassungsblog.de/unlawful-may-not-mean-rightless/> (7/20); C. Oviedo Moreno, "A Painful Slap from the ECtHR and an Urgent Opportunity for Spain", *Verfassunblog*, 14 February 2020, <https://verfassungsblog.de/a-painful-slap-from-the-ecthr-and-an-urgent-opportunity-for-spain/> (7/20).

[3] European Court of Human Rights (from now on ECtHR), *N.D. and N.T. v. Spain*, Application No. 8675/15 and 8697/15, Judgment of 3rd October 2017. For comments on the case, see G. Cellamare, "Note in margine alla sentenza della Corte europea dei diritti dell'uomo nell'affare N.D. e N.T. c. Spagna", *Studi sull'integrazione europea,* 1-2018, XIII, pp. 153-164; <https://www.academia.edu/36343861/Note....N.D._e_N.T._c._Spagna.pdf> (7/20); L. Salvadego, "I respingimenti sommari di migranti alle frontiere terrestri dell'énclave di Melilla", *Diritti Umani e Diritto Internazionale*, 12, 2018, no. 1, pp. 199-206; A. Pijnenburg, "Is N.D. and N.T. v. Spain the new Hirsi?", *Ejil:Talk!,* 2017, <https://www.ejiltalk.org/is-n-d-and-n-t-v-spain-the-new-hirsi/> (7/20); D. Moya, "Judgment N.D. and N.T. v Spain: on the legality of police 'push-backs' at the borders and, again, on the prohibition of collective expulsions", *Strasbourg Observers*, 2017, <https://strasbourgobservers.com/2017/10/16/judgement-nd-and-nt-v-spain-on-the-legality-of-police-push-backs-at-the-borders-and-again-on-the-prohibition-of-collective-expulsions/> (7/20).

the prohibition of collective expulsions and of the right to an effective remedy in relation to the immediate return of two migrants to Morocco, N.D. and N.T, who had attempted to cross the border irregularly. In the present case, according to the Court's judgment, the absence of individual expulsion orders against the two migrants is not imputable to the Spanish State, but to the applicants themselves, on the basis of their "culpable conduct". Such conduct is determined by the fact that they voluntarily placed themselves in an illegal situation, attempting to cross the border irregularly and exploiting group dynamics, when it was possible to resort to legal access routes, which the Spanish authorities had made available.

The reasoning developed by the Court, in fact, presents a complex argument, which is not exempt from contradictory and questionable aspects.

Indeed, if on the one hand the Court stands in view of the progressive strengthening of the protection guaranteed by the Article 4 of Protocol no. 4 (henceforth art. 4 Prot. n. 4) to the European Convention of Human Rights (henceforth ECHR), subject to all the cornerstones of its own jurisprudence, on the other hand the Court reduces the scope of the provision, by introducing a highly controversial exception to the rule, which in fact exempts the States from complying with their obligations in some cases.

In this regard, it is important to note that the interpretation of the prohibition of collective expulsions developed in the jurisprudence of the Court has not been subverted and its general structure remains intact[4]. The Court reaffirms the general principles on the matter, recalling, in particular, that the prohibition of collective expulsions applies to all foreigners and not to particular categories of foreigners, such as those who fall within the scope of art. 3 ECHR, that is to say those who would run the risk of suffering torture and inhuman and

[4] See D. Thym, "A Restrictionist Revolution? A Counter-Intuitive Reading of the ECtHR's N.D. & N.T. Judgment on 'Hot Expulsions'", *EU Migration Law Blog*, 17 February 2020, <http://eumigrationlawblog.eu/a-restrictionist-revolution-a-counter-intuitive-reading-of-the-ecthrs-n-d-n-t-judgment-on-hot-expulsions/> (7/20); R. Wissing, "Push backs of 'badly behaving' migrants at Spanish border are not collective expulsions (but might still be illegal refoulements)", *Strasbourg Observers*, 25 February 2020, <https://strasbourgobservers.com/2020/02/25/push-backs-of-badly-behaving-migrants-at-spanish-border-are-not-collective-expulsions-but-might-still-be-illegal-refoulements/> (7/20).

degrading treatment once sent back to their countries of origin or transit.

However, the argument developed later by the Court "nullifies" those same principles: by relating factual issues, such as the irregular entry and the "possibility" of accessing legal channels, with the State obligations under the ECHR and in particular under art. 4 Prot. n. 4, which should exist regardless, the Court *de facto* excludes the application of the safeguards provided by the prohibition of collective expulsions if special circumstances arise[5].

Indeed, the Court seems to attempt a not perfectly successful "test of equilibrium" between the maintenance of consolidated safeguards and new restrictions. The effect is to produce a "confused" picture of the protection provided by art. 4 Prot. n. 4, inconsistencies between purely formalistic safeguards and effective safeguards and new uncertainties and contradictions.

In this article, after having looked into the meaning of the prohibition of collective expulsions, the "heart" of the judgment in question, I will analyze the case *N.D. and N.T.*, highlighting the most questionable aspects of the Court's reasoning from a legal point of view, with particular reference to the notion of "culpable conduct" and to the standard of "legal pathways" within the context of art. 4 Prot. n. 4. Finally, the relationship emerging between the prohibition of collective expulsions and the principle of *non-refoulement*, which is equally ambiguous, will be deepened.

2. The protection of migrants against collective expulsions

The expulsion of a foreigner from the territory of a State represents the "paradigm of the classic tension between sovereignty and the protection of human rights in the field of migration"[6]. In fact,

[5] F. Mussi, "La sentenza N.D. e N.T. della Corte europea dei diritti umani: uno schiaffo ai diritti dei migranti alle frontiere terrestri?", *SIDIBlog*, 19 March 2020, <http://www.sidiblog.org/2020/03/19/la-sentenza-n-d-e-n-t-della-corte-europea-dei-diritti-umani-uno-schiaffo-ai-diritti-dei-migranti-alle-frontiere-terrestri/> (7/20).

[6] F.L. Gatta, "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 Giovanni Carlo Bruno, Fulvio Maria Palombino et Adriana Di Stefano (eds.), *Migration Issues before International*

States have the sovereign right to control the entry and stay of foreigners in their territory and to decide on their admission or expulsion, as repeatedly affirmed by the ECtHR's jurisprudence[7]. However, these sovereign prerogatives must be exercised in compliance with the obligations under international human rights law towards foreigners and migrants. This assumption is reflected in the international framework relating to the expulsion of foreigners. In fact, it is the premise of the "Memorandum by the Secretariat on Expulsion of Aliens"[8] of 2006, which states that "every State has the right to expel aliens", but that, however, "this right is subject to general limitations as well as specific substantive and procedural requirements"[9], and of the "Draft Articles on the Expulsion of Aliens"[10], adopted in 2014 within the International Law Commission, which is the point of arrival of the codification process on the matter.

Within this framework, it is also clear that, unlike individual expulsions, which are allowed in compliance with certain substantive and procedural guarantees, collective expulsions are firmly prohibited, as "contrary to the very notion of the human rights of individuals"[11].

Within the ECHR system, the prohibition of collective expulsions, sanctioned by art 4 of Protocol no. 4 of the Convention[12], has been the subject of an evolutionary interpretation by the ECtHR, which played an essential role in clarifying the fundamental aspects of the rule, such

Courts and Tribunals, Consiglio Nazionale delle Ricerche Edizioni, Rome, 2019, p. 121.

[7] The "undeniable" right of the States to control the entry and stay of foreigners in their territory has been more recently affirmed in ECtHR (Chamber), *Khlaifia and Others v. Italy*, Application No. 16483/12, Judgment of 1st September 2015, para. 119.

[8] International Law Commission (from now on ILC), *Memorandum by the Secretariat, Expulsion of Aliens*, UN Doc. A/CN.4/565 of 10 July 2006.

[9] Ivi, p. 1.

[10] ILC, *Draft Articles on the Expulsion of Aliens, with Commentaries*, in Yearbook of the International Law Commission, UN Doc. A/69/10, 2014.

[11] ILC, *Memorandum*, cit., p. 2; the "Draft Articles on the Expulsion of Aliens" states that collective expulsions are forbidden in art. 9.

[12] Protocol no. 4 to ECHR, adopted in 1963, is the first international text to have codified the prohibition of collective expulsions. Other regional instruments that provide for such a prohibition are: the American Convention on Human Rights (Art. 22. 9), the Arab Charter on Human Rights (Art. 26. 2) and the African Charter on Human and Peoples' Rights (Art. 12. 5).

as its scope, the notion of expulsion and its "collective" character[13]. Indeed, by adopting a broad and dynamic interpretative approach in its jurisprudential path, the Court of Strasbourg has strengthened the protection of migrants' rights in this matter, limiting the sovereign prerogatives of the States.

As is known, the first ruling in which the Court ascertains the violation of the prohibition of collective expulsions is the *Čonka*[14] case, relating to the expulsion of a group of foreigners of Roma origin from the Belgian territory. It should be noted, in this regard, how the Court immediately identified the crucial element for ascertaining the violation of the provision in the lack of an individualized examination of the situation of each foreigner. The Court affirmed in the judgment that art. 4 Prot. n. 4 applies "to 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 case of each individual alien of the group"[15].

However, if the first pronouncements in which art. 4 Prot. n. 4 finds application concern cases of expulsion of foreigners who were already in the territory of the State (often, as in the aforementioned case, as a consequence of discriminatory measures[16]), it is in the last decade that the violation of the prohibition of collective expulsions is found also in cases of push-backs at the European external borders, together with the increase of the control and interception practices of the migratory flows in the Mediterranean Sea promoted by the European States.

[13] For more details on the interpretative evolution of the standard, see F.L. Gatta, *The Problematic Management*, cit. pp. 131-146.

[14] ECtHR, *Čonka v. Belgium*, Application No. 51564/99, Judgment of 5 February 2002

[15] Ivi, para 59

[16] It should be noted that the discriminatory character is not a requirement for ascertaining the "collective" character of the expulsion, but it may represent an additional circumstance which, in certain cases, reinforces the suspicion of the existence of a collective expulsion, see Gatta, *The Problematic Management*, cit. p. 142 ff. Several cases, in which the violation of the provision was ascertained, were about discriminatory measures based on ethnicity or nationality: besides the Čonka case, see ECtHR (Grand Chamber) *Georgia v. Russia* (I), Application No. 13255/07, Judgment of 3 July 2014

In particular, it is with the *Hirsi*[17] ruling that the protection guaranteed by art. 4 Prot. n. 4 is significantly extended, with particular reference to the territorial scope of the rule and to the evolutionary interpretation of the term "expulsion"[18].

With regard to the first aspect, in fact, the Court affirms the extraterritorial scope of the rule, which for the first time finds application in the context of rejections that occurred on the high seas. According to the Court, in fact, similarly to the notion of jurisdiction under the ECHR, art. 4 Prot. n. 4 has a primarily territorial character and most often finds application in removals from the territory of a State. However, it can also be applied in extraterritorial contexts. If this were not the case, it would result in "a discrepancy between the scope of application of the Convention as such and that of Article 4 of Protocol No. 4"[19].

The notion of "expulsion", on the other hand, in the light of the *travaux préparatoires* of Protocol no. 4, must be understood "in the generic meaning, in current use (to drive away from a place)"[20]. Therefore, it includes not only actions that imply expulsion in the strict sense (removal from the territory), but also actions and practices that take place without the foreigners necessarily having reached the territory of the State. So, the notion includes interception on the high seas, push-back operations and other practices aimed at preventing the landing of migrants on the territory of a State.

The Court also adopts a similar approach in the subsequent *Sharifi*[21], which is about the immediate return to Greece of asylum seekers who had landed in Italian and Greek ports. These judgments actually complete the evolutionary trajectory of the prohibition of collective expulsions, which is therefore consolidated as "une

[17] ECtHR (Grand Chamber), *Hirsi Jamaa and Others v. Italy,* Application No. 27765/09, Judgment of 23 February 2012; for a comment on the case, see A. Liguori, "La Corte Europea Condanna L'Italia Per I Respingimenti Verso La Libia Nel 2009: Il Caso Hirsi", *Rivista di diritto internazionale*, 2, 2012, pp. 415-443.

[18] M. Di Filippo, "Walking the (barbed) wire of the prohibition of collective expulsions: an assessment of the Strasbourg case law", *Diritti umani e Diritto internazionale*, 2, 2010 (forthcoming).

[19] ECtHR (Grand Chamber), *Hirsi,* para. 178.

[20] Ibid., para. 174.

[21] ECtHR, *Sharifi e and Others v. Italy and Greece,* Application No. 16643/09, Judgment of 21 October 2014.

obligation plus générale d'opérer an examen individualisé de la situation d'un étranger avant de procéder à son expulsion"[22].

However, the Court subsequently preferred not to infer specific procedural guarantees from this general obligation. In the *Khlaifia*[23] case, relating to the detention and then the return of three Tunisian citizens, the Grand Chamber affirmed that the prohibition of collective expulsions does not in any circumstances imply a real right to an individual interview, but it is sufficient that the foreigner "has a genuine and effective possibility of submitting arguments against his or her expulsion, and where those arguments are examined in an appropriate manner by the authorities of the respondent State"[24]. These conclusions reduce the procedural guarantees under art. 4 Prot. n. 4, the content of which appears rather uncertain, being able to "vary" depending on the examined situation. They also seem to contrast with the framework outlined in *Hirsi* and *Sharifi*, where the Court had highlighted the need to ensure a detailed examination of the situations of individuals for the purpose of compliance with the provision. In these rulings, in fact, it should be noted the importance given to some elements for the purpose of ascertaining the violation: the presence of staff members who were not adequately trained to

[22] L. Leboeuf, "Interdiction des expulsions collectives et mesures d'expulsions immédiates et systématiques : la Cour européenne des droits de l'homme entre équilibrisme et contorsions", *CeDIE*, 1 April 2020, <https://uclouvain.be/fr/instituts-recherche/juri/cedie/actualites/cour-eur-d-h-13-fevrier-2020-n-d-et-n-t-c-espagne-req-nos-8675-15-et-8697-15.html#_ftn6> (7/20).

[23] ECtHR (Grand Chamber), *Khlaifia and Others v. Italy*, cit. The second section had instead affirmed the violation of art. 4 Prot. n. 4, noting that the rejection measures in question were completely identical to each other and the Government had not provided evidence that individual talks had been conducted with respect to the specific situation of each applicant. Furthermore, the same treatment had been reserved to many other citizens who had the same nationality, on the basis of an agreement between Italy and Tunisia. This element supported the suspicion that the Italian practice had the purpose of determining simplified procedures for the expulsion of Tunisian citizens. See A. Giliberto, "The judgment of the Grand Chamber of the ECtHR on the detentions (and consequent rejections) of Lampedusa in 2011", *Diritto Penale Contemporaneo*, 23 December 2016; <https://archiviodpc.dirittopenaleuomo.org/d/5123-la-pronuncia-della-grande-camera-della-corte-edu-sui-trattenimenti-e-i-conseguenti-respingimenti-di> (7/20).

[24] Ivi, para. 248.

conduct individual interviews and the absence of interpreters or legal advisors in such circumstances[25].

Khlaifia, in fact, represents the first case that stops the evolutionary path of art. 4 Prot. n. 4, in favor of a "new" restrictive trend, aimed at compressing the qualitative standard of the procedural guarantees under the prohibition of collective expulsions[26].

3. The *N.D. and N.T.* case and the Court's assessment

As anticipated, the case *N.D. and N.T.* is based on facts that occurred in August 2014, when the two applicants, N.D. and N.T., respectively from Mali and the Ivory Coast, attempted to irregularly cross the border of Melilla, a Spanish enclave located in Moroccan territory, after having stayed several months in Morocco[27]. In particular, the two applicants, together with about eighty people, attempted to climb over the fences placed at the border, which were several kilometers long and characterized by multiple levels of height. Arriving at the highest point of the fence at different times, the Civil Guard made them climb down and immediately returned them to Morocco, without identifying them or subjecting them to any

[25] See in particular *Hirsi*, para. 185, but also the *Sharifi* judgment para. 217, in which the Court deemed the presence of an interpreter fundamental.

[26] For a critical reading of the judgment, see, *inter alia*, A.I. Matonti, "Garanzie procedurali derivanti dall'art. 4 del Protocollo n. 4 CEDU: il caso Khlaifia", *Diritti umani e diritto internazionale* 2017, p. 523 ff .; A. Saccucci, "I 'ripensamenti' della Corte europea sul caso *Khlaifia*: il divieto di trattamenti inumani e degradanti e il divieto di espulsioni collettive «alla prova» delle situazioni di emergenza migratoria", *Rivista di diritto internazionale* 2017, p. 552 ff.; A. Pacelli, "Khlaifia and others v. Italy: lights and shadows in the judgment of the Great Chamber of the European Court of the Human Rights", in Giuseppe Cataldi, Michele Corleto, Marianna Pace (eds), *Migrations And Fundamental Rights: The Way Forward*, Editoriale Scientifica, Napoli, 2019.

[27] The story of the two applicants does not represent an isolated case, but falls within the controversial practice of "devoluciones en caliente" that has been carried out by Spain in the enclaves of Ceuta and Melilla in recent decades. Following the numerous protests by civil society and NGOs, the Spanish government modified the "Ley Orgánica 4/2000 sobre derechos y libertades de los extranjeros en España y su integración social" into the "Ley Orgánica 4 / 2015 de Protección de la Seguridad Ciudadana", introducing a new and controversial provision that converts "rejections" into legitimate "rechazos en frontera". The Spanish Constitutional Court will rule on the law in the near future.

individual examination of their situations. After several months, finally, they managed to cross the border and entered Spanish territory, where they were subjected to a new expulsion measure.

In February 2015, N.D. and N.T. addressed the European Court of Human Rights, in relation to the facts of the first crossing, complaining a violation of art. 3 of the ECHR, art. 4 of Protocol n. 4 and art. 13 of the ECHR in conjunction with art. 4 Prot. n. 4.

In October 2017, the ECtHR (Third Section), ruled against Spain for the violation of art. 4 Prot. n. 4 and art. 13 ECHR, since the applicants had been subjected to a forced removal without any individual examination of their situation. The complaint relating to art. 3 ECHR, instead, had been previously declared inadmissible, as the Court did not find the risk that the applicants could suffer torture or inhuman and degrading treatments in Morocco.

At the request of the Spanish government, the case was referred back to the Grand Chamber, that, with a final and unappealable judgment, ruled on February 13th 2020 and reached opposite conclusions.

In the judgment in question, the Court focuses primarily on the possibility of asserting the Spanish jurisdiction in relation to the events that had occurred. The Court recalls its case law (in particular *Banković*[28] and *Ilaşcu*[29]), stating that, although essentially territorial, jurisdiction under the ECHR can also be established in extraterritorial contexts, in particular where the State exercises effective control over an area. After unquestionably placing the facts in question in Spanish territory[30], the Court rejects the preliminary objection of the defendant government, which had invoked an exception to the exercise of jurisdiction on the basis of the difficulties encountered in the management of migratory pressure and in particular of the assault suffered at the borders of Melilla. The Court states in a passage that, although in previous cases it had found that the enormous difficulties faced by States, due to the strong migratory pressure at the external borders of the Schengen area, represent a peculiarity in the current political context, this does not constitute a valid element to exclude

[28] ECtHR, *Bankovic and Others v. Belgium,* Application No. 52207/99, Decision of 28 October 1999.

[29] ECtHR, *Ilascu and Others v. Moldova and Russia,* Application No. 48787/99, Judgment of 8 July 2004.

[30] ECtHR (Grand Chamber), *N.D. and N.T. v. Spain*, para. 104.

the exercise of jurisdiction. The Convention – the Court states – "cannot be selectively restricted to only parts of the territory of a State by means of an artificial reduction in the scope of its territorial jurisdiction"[31]. The Court also does not fail to note the full authority exercised by the Guardia Civil on the facts in question and the absence of other authorities operating in the area.

Therefore, the Court proceeds with the examination of the complaint relating to art. 4 of Prot. n. 4, by analyzing whether the removal of the applicants could constitute "expulsion" within the meaning of the provision and, in this case, whether it could be defined as "collective" in nature.

With regard to the first point, the Court refers to its case law (in particular *Khlaifia*) and the aforementioned "Draft articles on the expulsion of aliens", stating that "expulsion" means any measure of forced removal from the territory of a State (and exceptionally also in extraterritorial contexts), regardless of the circumstances of the case, of the legal or irregular stay of the foreigner and of the conduct assumed during the crossing[32]. This way the argument of the defendant government regarding the possibility of excluding the "non-admission to borders" from the notion of expulsion is rejected.

Once it is established that the removal of N.D. and N.T. constitutes "expulsion", the Court examines whether it can be considered of "collective" nature. In this regard, the Court recalls that "collective character" means an expulsion of foreigners not carried out on the basis of an individual examination of the circumstances[33]. With respect to the case in question, however, the Court states that, in the light of its established case law (the Court cites the *Berisha and Haljiti*[34] and *Dritsas*[35] cases), in certain circumstances the lack of an individual examination can be attributed to a "culpable conduct" of the applicants. Therefore, in the first place, the Court found that the applicants voluntarily placed themselves in an illegal situation, taking advantage of the numerical dynamics in order to create a situation of

[31] Ibid., para. 110.

[32] Ibid., para. 173-187.

[33] Ibid., para. 193.

[34] ECtHR, *Berisha and Haljiti v. the former Yugoslav Republic of Macedonia*, Application No. 18670/03, Decision of 10 April 2007.

[35] ECtHR, *Dritsas and Others v. Italy*, Application No. 2344/02, Decision of 1 February 2011.

danger to public safety. In the second place, the Court checked whether the Spanish State had made authorized access points available along the border, at which it was possible to apply for international protection, and whether the applicants had had cogent reasons not to use these channels. By applying the reasoning to the present case, the Court concludes for the non-violation of art. 4 Prot. n. 4. From the Court's assessment, in fact, it emerges that the Spanish State guaranteed effective legal entry channels (in particular the border crossing point of Beni-Enzar, which was not far away from the applicants' crossing point, but also the embassies present in the countries of origin and transit) and that there were no valid reasons on the part of the applicants for not using these channels (reasons which were, in the Court's opinion, mostly of a practical nature).

4. Main critical issues: the exception of "culpable conduct" and the "legal pathways" requirement

The exception to the protection afforded by art. 4 Prot. n. 4, thus outlined by the Court, represents one of the main weaknesses of its reasoning, as well as a "hole of unclear dimensions"[36].

In the first place, it is questionable that the focus of the Court's assessment is the "own conduct" of the applicants and not the conduct of the Spanish State. In fact, the Court does not evaluate to what extent the State had observed or not its obligations under the ECHR and, therefore, violated or not human rights, but rather to what extent individuals can access the protection guaranteed by the Convention, in relation to their "behavior". This type of approach is at odds with the function of the Court, which, as enshrined in art. 19 ECHR, was established to ensure that the "High Contracting Parties" respect the commitments under the ECHR and its Protocols and more generally the mandate of the Convention itself, that is focused on the person and aimed at safeguarding their human rights in interactions with States[37].

[36] See N. Markard, "A Hole of Unclear Dimensions; Reading N.D. and N.T. v. Spain", *EU Migration Law Blog,* 1 April 2020, <http://eumigrationlawblog.eu/a-hole-of-unclear-dimensions-reading-nd-and-nt-v-spain/> (7/20).

[37] See S. Carrera, *The Strasbourg Court Judgement N.D. and N.T. v Spain A Carte Blanche to Push Backs at EU External Borders?*, EUI Working Papers RSCAS n° 2020/21, pp. 8-10,

Furthermore, the argument proposed by the Court is questionable. It claims to be based on a consolidated definition of "culpable conduct" by making references to its precedents (the aforementioned *Berisha and Haljiti* and *Dritsas*), which however do not appear to be legally relevant. In fact, in them the culpable conduct was found in the context of the obligations to cooperate with the State authorities (for example in case of the refusal to show ones' documents and the consequent impossibility for the authorities to formalize individual expulsion orders). This case is completely different, since N.D. and N.T. had not posed obstacles for the Spanish authorities to examine their situations individually. In N.D. and N.T., it rather appears that a new "culpable conduct" test has been introduced, which acts as a general criterion for identifying behaviours suitable to exclude the operability of the prohibition on collective expulsions[38].

Secondly, the assessment regarding the "effective availability" of the legal entry channels, the other key element in ascertaining the violation of art. 4 Prot. n. 4, appears to be very deficient.

In fact, the Court fully accepts the government's argument, which affirms the existence of an access channel at the Beni-Enzar border crossing, even before the actual establishment of an office in September 2014. This argument was validated by the fact that, from January to August 2014, 21 asylum applications had been sent to Melilla and 6 of them were from this same crossing[39]. The Court therefore does not seem to take into consideration what was stated by the intervening third parties[40], who had highlighted the absence of a realistic possibility for Sub-Saharan Africans to access such channels: the Beni-Enzar crossing could only be reached by Syrian refugees, since Sub-Saharan migrants were discriminated and subjected to racial profiling and much stricter controls by the Moroccan authorities[41].

<https://cadmus.eui.eu/bitstream/handle/1814/66629/RSCAS%202020_21.pdf?sequence=1> (7/20).

[38] Mussi, *La sentenza N.D. e N.T.,* cit.

[39] ECtHR (Grand Chamber), *N.D. and N.T. v. Spain,* para. 212-213.

[40] In particular, the intervention of the Commissioner for Human Rights of the Council of Europe and the United Nations High Commissioner for Refugees. Other parties involved were OHCHR, AIRE Center, Amnesty International, ECRE, International Commission of Jurists and the Dutch Council for Refugees.

[41] The reports of the intervening third parties also testify to a very small number of asylum applications lodged in Melilla by Sub-Saharan citizens over the past few years. These data are also reflected in the statistics relating to the issue of work visas

Furthermore, the Court notes (raising further doubts) that "even assuming that difficulties existed in physically approaching this border crossing point on the Moroccan side, no responsibility of the respondent Government for this situation has been established before the Court"[42].

Therefore, Spanish practice seems to be assessed in rather abstract terms, while the control over the effectiveness of the legal pathways for entry would seem quite formalistic or at least superficial. This is at odds with the claim that "the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective"[43].

Finally, the legal implications relating to the introduction of the standard of "legal pathways" within the context of art. 4 Prot. n. 4 add to the criticism. In this regard, the Court states that "the effectiveness of Convention rights requires that ... States make available genuine and effective access to means of legal entry" and that these means must allow people "to submit an application for protection, based in particular on Article 3 of the Convention"[44].

In this regard, in fact, it is not clear whether the Court introduced a positive obligation for States to provide effective legal access routes under art. 3 ECHR, a completely new obligation, which would lead the Court to move away from its own jurisprudence on the matter, or if it only expressed complementary considerations to the assessment of the applicants' culpable conduct[45]. In fact, the meaning of the standard of legal pathways within the context of art. 4 Prot. n. 4 remains completely vague and imprecise and, together with the nebulous and formalistic evaluation of the effectiveness of the Spanish practice, it rather seems to constitute "an illusory judicial revolution"[46].

by the Spanish authorities. There is a clear preference for visa applications made by North African citizens, in particular those from Morocco, Tunisia, Algeria and Egypt. For an in-depth picture about these data, see Carrera, *The Strasbourg Court Judgement N.D. and N.T. v Spain*, cit.

[42] ECtHR (Grand Chamber), *N.D. and N.T. v. Spain,* para. 221.

[43] *Ibidem*.

[44] *Ibidem*, para. 209.

[45] D. Thym, *A Restrictionist Revolution?,* cit.

[46] *Ibidem.*

5. The relationship between art. 4 of Protocol no. 4 and the principle of *non-refoulement*

With respect to the applicability of art. 4 Prot. n. 4, the Court – as anticipated – stated that the notion of expulsion refers to all foreigners, "irrespective of ... his or her status as migrant or as asylum seeker and his or her conduct when crossing the border"[47].

This represents the main point of disagreement with Judge Koskelo, who, in her partially dissenting opinion, maintains that such a broad notion of expulsion makes the scope of art 4 Prot. n. 4 unlimited and indefinite. Indeed, the judge argues that an individual examination of the circumstances of each foreigner should be guaranteed only in the presence of the risk of *non-refoulement*, by virtue of a restrictive interpretation of art. 4 Prot. n. 4, to be read in close connection with art. 3 ECHR. Therefore, unlike the majority, Judge Koskelo believes that the Court should have ruled for the non-applicability of art. 4 Prot. n. 4, since a violation of art. 3 ECHR had already been excluded[48].

The judge's position is questionable in several respects[49], although it was also appreciated by those[50] who pointed out that this differentiation would have been a valid alternative to the "Court's baffling proposition that those entering irregularly cannot rely on the Convention"[51]. It should be noted in this regard that judge Koskelo herself considers the approach adopted by the majority "paradoxical", since they do not set "limits" to the scope of art. 4 Prot. n. 4 and then "develop a "carve-out" in the assessment of whether there has been a

[47] ECtHR (Grand Chamber), *N.D. and N.T. v. Spain,* para. 185.

[48] ECtHR (Grand Chamber), *N.D. and N.T. v. Spain,* (partly dissenting opinion), para. 44.

[49] The essence of the prohibition of collective expulsions, as an independent and autonomous provision with respect to art. 3 ECHR, consists in preventing the arbitrariness of State authorities in their border policies and in ensuring a set of guarantees for each individual, not only for those who apply for asylum: e.g. fair trial guarantees, access to effective remedies for forcibly returned persons who had not received an individual assessment of their situation, access to complaint mechanisms, essential in the event of violence or ill-treatment. This approach also aims to ensure access to essential protections such as: legal representation, interpretative assistance, medical and psychological assistance, respect for the best interests of the child. See Carrera, *The Strasbourg Court Judgement N.D. and N.T. v Spain*, cit. p.2 ff.

[50] See in particular Thym, *A Restrictionist Revolution?*, cit.

[51] *Ibidem.*

violation of that provision"[52]. This way, in her opinion, the majority determined a shift of focus from the notion of *non-refoulement* and its safeguards to that of "own conduct", as elaborated in the judgment, which is based on new and problematic application criteria[53].

In any case, rejecting the restrictive interpretation of Judge Koskelo, the Court has, on a theoretical level, preserved the autonomous scope of the prohibition of collective expulsions, from which guarantees derive that are additional and independent from the principle of *non-refoulement*.

However, at the same time, in assessing the compliance with art. 4 Prot. n. 4, the Court does not seem to "detach" from evaluating a potential violation of art. 3 ECHR, thus providing a confused and inconsistent picture.

In fact, the Court, due to the fact that art. 4 Prot. n. 4 applies to all foreigners without any distinction, seems to resort to a certain flexibility in assessing the compliance with the provision, which would justify a more superficial individual examination, as already happened in *Khlaifia* (the absence of an individual interview) and now in *N.D. and N.T.* (absence of an individual examination in certain circumstances of "culpable conduct"), when the applicants do not fall within the scope of application of art. 3 ECHR[54].

Actually in *N.D. and N.T.*, the Court repeatedly observes that the case in question does not concern a violation of art. 3 ECHR and points out that the two applicants, after the events in question, had not obtained the refugee status (N.T. had not even requested it). The absolute character of the principle of *non-refoulement*, which the State authorities must nevertheless respect when "protecting" their borders, is also reiterated[55].

[52] ECtHR (Grand Chamber), *N.D. and N.T. v. Spain,* (partly dissenting opinion), para. 33.

[53] Ivi, para. 34-36 and 43.

[54] See L. Leboeuf, *Interdiction des expulsions collectives,* cit.

[55] ECtHR (Grand Chamber), *N.D. and N.T. v. Spain,* para. 232. In any case, the argument proposed by the Court in para. 210 raises perplexity. Here the Court states that ECHR does not prevent States from requesting that asylum applications be presented at existing border crossings and that, consequently, States can refuse entry into their territory of foreigners, including potential asylum seekers, who did not comply with these provisions. It is in fact questionable how this argument is compatible with the absolute and mandatory nature of the principle of *non-*

Therefore, if the restriction introduced to the prohibition of collective expulsions does not affect the principle of *non-refoulement*, one can reasonably assume that, if in *N.D. and N.T.* the admissibility of art. 3 ECHR had remained outstanding, the Court would have developed different arguments.

In any case, by restricting the scope of art. 4 Prot. n. 4, when in some way it is a *gateway* to the protection of art. 3 ECHR[56], a contradiction is generated[57].

By downsizing the scope of the prohibition of collective expulsions and assuming that the absence of an individual examination does not *a priori* violate the ECHR, is there no risk of compromising the absolute protection of the principle of *non-refoulement* itself, since such an examination is necessary to ascertain its violation?[58] In other words, is it possible to legitimize collective expulsions in particular circumstances and, at the same time, to keep ensuring that no one is sent back to countries where there is a risk of treatments contrary to art. 3 ECHR?

In this regard, in the recent *Ilias and Ahmed*[59] judgment, the Grand Chamber stated that it is only through the examination of asylum applications that it can be assessed whether the applicant runs the risk of undergoing treatments contrary to art. 3 in his/her country of origin. The *post-factum* finding that the applicant did not take such a risk cannot absolve the State of this procedural duty, otherwise it

refoulement, see Carrera, *The Strasbourg Court Judgement N.D. and N.T. v Spain.*, cit., pp. 5-6.

[56] The Court affirms in the judgment that the prohibition of collective expulsions "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 - ", para. 198.

[57] See Leboeuf, *Interdiction des expulsions collectives,* cit., A. Fazzini, "La sentenza N.D. e N.T. e il divieto di espulsioni collettive: una prova di equilibrismo tra flessibilità, restrizioni e più di una contraddizione", *ADiM Blog*, Osservatorio della Giurisprudenza, April 2020, <http://www.adimblog.com/2020/04/30/la-sentenza-n-d-e-n-t-e-il-divieto-di-espulsioni-collettive-una-prova-di-equilibrismo-tra-flessibilita-restrizioni-e-piu-di-una-contraddizione/> (7/20).

[58] *Ibidem;* See also A. Lübbe, "The Elephant in the Room: Effective Guarantee of Non-Refoulement after ECtHR N.D. and N.T.?", *Verfassunblog*, 19 febbraio 2020, <https://verfassungsblog.de/the-elephant-in-the-room/> (7/20), in which the author refers to this contradiction by using the expression "The elephant in the room".

[59] ECtHR (Grand Chamber), *Ilias and Ahmed v. Hungary,* Application No. 47287/15, Judgment of 21 November 2019.

would risk to render "meaningless the prohibition of ill-treatment in cases of expulsion of asylum seekers"[60].

In conclusion, the interaction between art. 4 Prot. n. 4 and art. 3 ECHR seems to be the result of a failed test of equilibrium between elements of dynamism and restriction, which in fact produces some contortions[61]. Preserving the dynamism of art. 4 Prot. n. 4, in the scope of which *all the aliens* fall, and restricting its scope, while considering it *instrumental* to art. 3 ECHR, may cause the risk of decreasing the safeguards provided by the same art. 3.

6. Conclusions

The analysis carried out so far has attempted to prove that, although in the present case the Court did not intend to authorize collective expulsions at the borders, it did in fact elaborate an highly controversial exception to the rule, which allows to exclude from its scope of application those who cross land borders irregularly while being able to access effective channels to request international protection. The emerging picture poses many uncertainties, with regard to both the effective protection of migrants against collective expulsions, and the obligations for the States under art. 4 Prot. 4.

As we have seen, the Court's reasoning raises concerns in several respects. Issues such as the irregular border crossing and the possibility of using legal access channels should not in fact constitute arguments that can discharge Spain from the compliance with the procedural guarantees under art. 4 Prot. n. 4, since these guarantees should instead exist regardless. Furthermore, the same argument that led to the elaboration of the notion of "culpable conduct" is debatable and the assessment of the effective availability of the legal access routes is ascertained in formalistic and not very rigorous way. Finally, this same notion is not exempt from further legal implications, because

[60] Ivi, para. 137; for more information see F.L. Gatta, "Diritti al confine e il confine dei diritti: La Corte Edu si esprime sulle politiche di controllo frontaliero dell'Ungheria (Parte I – espulsione e Art. 3 CEDU)", *ADiM Blog*, December 2019, <http://www.adimblog.com/2019/12/23/corte-europea-dei-diritti-delluomo-grande-sezione-sentenza-del-21-novembre-2019-ilias-e-ahmed-c-ungheria-ric-n-47287-15/> (7/20).

[61] See Leboeuf, *Interdiction des expulsions collectives,* cit., Fazzini, *La sentenza N.D. e N.T. e il divieto di espulsioni collettive,* cit.

it is not clear whether the Court intended to establish a positive obligation for the States parties pursuant to art. 3 ECHR to provide for effective legal access routes, thus creating an even more nebulous picture.

These uncertainties actually risk to reduce the scope of the safeguards provided by ECHR as well as the effectiveness of the principle of *non-refoulement* itself. In fact, it has been noticed how, by reducing the scope of art. 4 of Prot. n. 4, which is the "access door" to the protection under art. 3 ECHR, there is the risk of causing a reduction in the safeguards provided by art. 3 itself.

Several authors have observed how these legal conclusions, together with the "worrying" language used by the Court (that repeatedly uses expressions such as "assault on borders", "use of force"), can represent a concession to the pressure of States that are increasingly inclined to take repressive measures in the management of migratory flows[62]. The concern is also justified by the most recent jurisprudence of the Court of Strasbourg: the *Asady* [63] case, immediately following the judgment under examination, confirms the tendency of the Court to reduce the qualitative standard of the guarantees under the prohibition of collective expulsions started with *Khlaifia*, and feeds the indeterminacy that surrounds the obligations of the States in this matter[64].

There is no shortage of those who, however, hope for a "change of course" by the Court of Strasbourg, and appeal for the consolidation of a restrictive interpretation of the "culpable conduct" exception,

[62] See, *inter alia*, Mussi, *La sentenza N.D. e N.T.*, cit., Carrera, *The Strasbourg Court Judgement N.D. and N.T. v Spain,* cit.

[63] ECtHR, *Asady e altri c. Slovakia*, Application No. 24917/15, Judgment of 24 March 2020.

[64] In the *Asady* case, several Afghan citizens were expelled from Slovakia after being identified and interviewed for about ten minutes each, with completely identical questions. The Court did not find the breach of art. 4 Prot. n. 4. Also in this case, it is possible to highlight a weak reconstruction of the facts in question by the Court and the use of an approach which is marked by an empty formalism rather than the evaluation of the effective possibility for the applicants to assert their arguments against expulsion, see A. Bufalini, "L'insostenibile incertezza sul contenuto degli obblighi degli Stati derivanti dal divieto di espulsioni collettive", *ADiM Blog*, Osservatorio della Giurisprudenza, April 2020, <http://www.adimblog.com/2020/04/30/linsostenibile-incertezza-sul-contenuto-degli-obblighi-degli-stati-derivanti-dal-divieto-di-espulsioni-collettive/> (7/20).

which the Court will have, in the near future, several opportunities to "perfect"[65].

If this were not the case, after decades of revolutionary judgments, the credibility of the Court of Strasbourg, as a fundamental stronghold for the protection of human rights, would risk to be seriously compromised, together with the very foundations of the European project.

[65] Di Filippo, *Walking the (barbed) wire of the prohibition of collective expulsions.* cit.