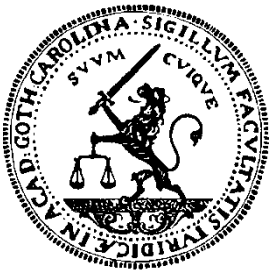

FACULTY OF LAW

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The Protection of Asylum-Seekers through the Prohibition of Collective Expulsion under the European Convention on Human Rights

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Summary

Mass migrations are a phenomenon of all times. Notably, following the Second World War, there have been huge migration movements and decolonisation processes, particularly by the Germans and the Jews, but also by Roma and other groups. Parallel to that, in 1963, Protocol No. 4 to the Convention was signed, with Article 4 prohibiting the collective expulsion of aliens. In 2020, 3,6% of the population were international migrants, with 26.4 million refugees and 4.1 million asylum-seekers.[1] In Europe, in 2023, there were over 1 million first-time asylum applicants for international protection in countries of the EU.[2] The protection of asylum-seekers by the European Court of Human Rights (”ECtHR”) has mostly been observed under Article 3 of the European Convention on Human Rights (”ECHR”), prohibiting torture or inhuman or degrading treatment or punishment. This thesis aims to understand to what extent Article 4 of Protocol No. 4 (”A4P4”) to the Convention also protects asylum-seekers. To do so, it will analyse the case law of the ECtHR from the creation of Article 4 of Protocol No. 4 until today. This study will be complemented by a critical analysis based on the work of different scholars.

The findings of this thesis will show that through the interpretation of the ECtHR, A4P4 was developed to offer procedural safeguards to asylum-seekers. Furthermore, the European Court widened the protection provided by the Article by applying it extraterritorially when the jurisdictional threshold is passed, notably for asylum-seekers intercepted at sea. However, in recent years, the Court has restricted the protection, by refusing to find a violation when migrants crossed the border irregularly and *en masse*. Therefore, while the scope of protection seems to have been widened, asylum-seekers who are irregular migrants are now seemingly excluded from it. Finally, this thesis has highlighted the differences and similarities between the protection offered to asylum-seekers by Article 3 ECHR, through the non-refoulement principle, and that provided by A4P4. The conclusion is that A4P4 is a procedural pathway for asylum-seekers to bring their claim for international protection. Ultimately, this thesis found that throughout the years, the ECtHR has interpreted A4P4 towards a certain protection of asylum-seekers. However, to continue to protect asylum-seekers effectively, the Court must be careful not to let itself get carried away by the pressure of European States and the weight of political and economic considerations.

[1] McAuliffe M. and Triandafyllidou A., *World Migration Report 2022*, International Organisation for Migration (IOM), Geneva (2022)

[2] EUROSTAT, *Asylum applications – annual statistics* (2024), available at https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Asylum_statistics&oldid=558844#Over_1_million_first-time_asylum_applicants_in_2023

Preface

In a world where questions related to migration are at the heart of the debate, it can become difficult and harder for people in need of international protection to have their rights vindicated. According to UNHCR data, in 2022, there were 5 442 319 asylum-seekers worldwide. In 2023, 292,985 migrants arrived in Europe, and 4,064 died or went missing. My interest in the study of the Law of the European Court of Human Rights made me want to delve into the protection offered to asylum-seekers in the European region under the European Convention on Human Rights. While countless scholars have written on the prohibition of refoulement under the prohibition of torture or inhuman or degrading treatment under Article 3 of the Convention, the debate around the prohibition of collective expulsion of aliens – enshrined in Article 4 of Protocol No. 4 to the Convention – is less extensive. This Article was not drafted with the intention to protect asylum-seekers, and it was published more than 60 years ago. Therefore, I was intrigued to explore, through the analysis of the evolution of the interpretation of this Article, how the European Court of Human Rights can adapt to its time and contemporary circumstances, and to the different challenges and pressure it faces.

I express my gratitude to Lund University for granting me the opportunity to pursue the Masters Programme in International Human Rights Law and to write a thesis on a subject close to my heart. I extend my gratitude to Trinity College Dublin, which introduced me to Refugee and Immigration Law and the Law of the European Court and inspired me to continue my studies in this field. I also would like to thank my classmates and professors, who allowed me to study in a safe, tolerant, and stimulating learning environment. Special thanks are due to Vladislava Stoyanova for her invaluable guidance and support throughout my writing process, and to Victoria Heisler, who was always there to help me find relevant literature. Finally, I am profoundly thankful to my parents for their unwavering support throughout my academic journey, and to my friends whose encouragement has been a constant source of motivation.

Abbreviations

A4P4	Article 4 of Protocol No. 4 to the Convention
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EU	European Union
UDHR	Universal Declaration of Human Rights
EUCFR	Charter of Fundamental Rights of the European Union
UNHCR	United Nations High Commissioner for Refugees
VCLT	Vienna Convention on the Law of Treaties

The non-citizen is not an alien in any true sense, but he or she is one of us, a member of the human race, entitled no less or more to the protection of his or her human rights[3]

[3] Guy S. Goodwin-Gill, *Expulsion in Public International Law* UN Lecture Series (2014), available at: http://legal.un.org/avl/ls/Goodwin-Gill_IML_video_3.html

1 Introduction

1.1 Contextualisation and Determination of the Scope of the Thesis

The mass displacement of people is a challenge of all times. As will be shown throughout this thesis, migration patterns have evolved over time and new challenges have arisen. According to Jean-Jacques Roche, since the end of the Cold War, more than 26,000 kilometres of borders have been established throughout the world.[4] By the late 1940s, there were less than 5 border walls in the world. There were nearly 70 by 2020.[5] This illustrates the tendency of States towards the association of the questions of migration and security.[6] The European Court of Human Rights (ECtHR) has acknowledged and emphasised the challenges that European States are facing when it comes to migration controls. It has underlined the economic crisis and social and political changes in the world, notably in Africa and the Middle East.[7] Furthermore, it has acknowledged tha*t "migration flows are increasingly arriving by sea"*.[8] Fernando Arlettaz underlines this migratory pressure stemming from political crises in North Africa.[9] The European Court has emphasised the "*considerable difficulties in coping with the increasing influx of migrants and asylum-seekers*".[10] Hanaa Hakiki argues that it was "*foreseeable that the intensification of European policies of border externalisation would lead to a greater relevance of the prohibition of collective expulsions in front of [the European Court of Human Rights]*".[11] He further argues that "*in the last two decades European states have*

[4] Jean-Jacques Roche in Vallet, E. *Borders, Fences and Walls: State of Insecurity?* (1st ed.). Routledge (2014)

[5] Vallet, E. *Borders, Fences and Walls: State of Insecurity?* (1st ed.). Routledge (2014) and Lena Riemer *The Prohibition of Collective Expulsion in Public International Law* (der Freien Universität Berlin, 2020)

[6] Squire, Vicki and Huysmans, Jef. (2016), *Migration and Security*, Routledge Handbook of Security Studies (Second edition)

[7] *N.D. and N.T. v. Spain*, Apps. No. 8675/15 and 8697/15 (ECtHR [GC], 2020), § 169 and § 78. See also for example *Khlaifia and Others v. Italy*, App. No. 16483/12 (ECtHR [GC], 2016), § 241 ; *M.S.S. v. Belgium and Greece*, App. No. 30696/09 (ECtHR, 2011), § 223 ; *Hirsi Jamaa and Others v. Italy*, App No. 27765/09 (ECtHR [GC], 2012), §§ 122 and 176

[8] *N.D. and N.T. v. Spain* (2020), § 169. See also for example *Khlaifia and Others v. Italy* (2016), § 241 ; *M.S.S. v. Belgium and Greece* (2011), § 223 ; *Hirsi Jamaa and Others v. Italy* (2012), §§ 122 and 176 ; *N.D. and N.T. v. Spain* (2020), § 78

[9] Fernando Arlettaz, *Expulsions collectives: définition et portée de leur interdiction dans la jurisprudence de la Cour européenne des droits de l'homme* (2019) 56 Canadian Yearbook of international Law/Annuaire canadien de droit international 58

[10] *N.D. and N.T. v. Spain*, Apps. No. 8675/15 and 8697/15 (ECtHR [GC], 2020), § 106

[11] Hanaa Hakiki, *The ECtHR's Jurisprudence on the Prohibition of Collective Expulsions in Cases of Pushbacks at European Borders: A Critical Perspective' Perspective* in Stephanie Schiedermair, Alexander Schwarz and Dominik Steiger (eds), *Theory and Practice of the European Convention on Human Rights* (Nomos Verlagsgesellschaft mbH & Co KG 2022)

attempted to escape their legal obligation vis à vis *refugees on the one hand and the systematic use of irregular, summary and violent expulsions on the other hand*".[12] It is in this context that this thesis will try to analyse the evolution of the protection received by asylum-seekers under the Convention for the Protection on Human Rights and Fundamental Freedoms (or the "European Convention on Human Rights" or "ECHR"). Particularly, this thesis will focus on the protection offered by Article 4 of the Protocol No. 4 of the Convention ("A4P4"), prohibiting the collective expulsion of aliens.

Under international law, there exist different types of displaced people. A major distinction is made by the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, which defines a refugee as "

> any person who […] 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.[13]

This definition excludes the rest of the displaced people, such as economic or environmental migrants, internally displaced persons, or persons fleeing for other reasons than persecution (such as escaping war for example). The Council of Europe seems to adopt the definition of "refugee" set forward in the 1951 Convention for its own purposes.[14] The Council of Europe, founded in 1949 by France, the United Kingdom, Italy, Belgium, the Netherlands, Sweden, Denmark, Norway and Luxembourg, is an international organisation composed of 46 Member States that aims at promoting democracy, human rights, and the rule of law.[15] Throughout the years of its existence, it developed a framework for the protection of refugees. In her article on the role of the Council of Europe in the protection of refugees' rights, Yuliya M. Hryshyna[16] provides for a list of instruments put forward by the Council of Europe to protect refugees rights, including the European Agreement on the Abolition of Visas for Refugees (1959), Recommendation 773 on the situation of de facto refugees (1976), the Declaration on Territorial Asylum (1977), Recommendation 817 on Certain Aspect of the Right to Asylum (1977), the European Agreement on Transfer of Responsibility for Refugees

[12] Hanaa Hakiki (2022)

[13] Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) Art. 1

[14] See for example Article 1 of the European Agreement on Transfer of Responsibility for Refugees (1980)

[15] Bond, M. *The Council of Europe: Structure, history and issues in European politics*. London: Taylor & Francis. (2013)

[16] Yuliya M Hryshyna and others, *The Role of Council of Europe Law and ECtHR Practice in the Protection of Refugee Rights* (2023) 13 Juridical Tribune

(1980), Recommendation on the Harmonisation of National Procedures Relating to Asylum (1981) and Recommendation on the Protection of Persons Satisfying the Criteria in the Geneva Convention who are not formally recognised as Refugees (1984). Moreover, the adoption of the European Convention on Human Rights in 1950 brought substantive and procedural rights, applicable to everyone in the jurisdiction of a Contracting Party to the Convention[17], to the fore. Particularly, Article 34 of the Convention allows any person to apply before it when an alleged violation of a right guaranteed under the Convention or its Protocols has occurred. Therefore, the European Convention on Human Rights brought forth a possibility for refugees within the jurisdiction of Contracting Parties to the Convention to vindicate their rights. However, there is no right to asylum secured by the Convention or its Protocols.[18] Nonetheless, there are some rights secured in the ECHR that can protect asylum-seekers' interests. The ECtHR (established in 1959) developed throughout its case law a jurisprudence that protects refugees on the basis of the provisions contained in the Convention and its Protocols. The most well-known example is the application of the principle of non-refoulement, which consists of prohibiting the removal of individuals to a country where they risk facing ill-treatment[19], based on Article 3 of the Convention which prohibits torture and inhuman or degrading treatment or punishment.[20] Furthermore, Mariagiulia Guiffré notes that "*as early as 2000, the ECHR was identified as providing 'a rather impressive inherent right to access [asylum procedures]*".[21]

The prohibition of collective expulsions of aliens is protected by Article 4 of Protocol 4 of the Convention.[22] It states as follows: "*Collective expulsion of aliens is prohibited*". In 2024, Protocol No. 4 to the Convention is signed by

[17] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5 (European Convention on Human Rights), Art. 1

[18] *Vilvarajah and Others v. The United Kingdom*, App no. 13163/87; 13164/87; 13165/87; 13447/87; 13448/87 (ECtHR, 1991), § 102 ; see also *N.D. and N.T. v. Spain* (2020) § 188 ; or *Salah Sheekh v. the Netherlands*, App. No. 1948/04 (ECtHR, 2007), § 135. As opposed to Article 14 of the Universal Declaration of Human Rights (right to "seek asylum from persecution") and Article 18 of the EU Charter of Fundamental Rights ("right to asylum")

[19] Hamdan, E. *The principle of non-refoulement under the ECHR and the UN Convention against torture and other cruel, inhuman or degrading treatment or punishment*. Leiden: Brill Nijhoff. (2016)

[20] See for example the cases of *Soering v. the United Kingdom*, App No. 14038/88 (ECtHR, 1989) and *Chahal v. the United Kingdom*, App No. 22414/93 (ECtHR [GC], 1996). For more on this, see Chapter V of this thesis

[21] Mariagiulia Guiffré '*Access to Asylum at Sea? Non-Refoulement and a Comprehensive Approach to Extraterritorial Human Rights Obligations*' in Violeta Moreno-Lax and Efthymios Papastavridis (eds) *'Boat Refugees' and Migrants at Sea: A Comprehensive Approach* (Brill | Nijhoff 2017) and G Noll, *Negotiating Asylum: The EU Acquis, Extraterritorial Protection and the Common Market of Deflection* (Martinus Nijhoff, 2000) 454

[22] Council of Europe, *Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain Rights and Freedoms other than those already included in the Convention and in the First Protocol thereto*, 16 September 1963, ETS 46

44 Member States and ratified by 42 of them. The Russian Federation denounced the treaty on the 16th of March 2022. Turkey and the United Kingdom signed but did not ratify, and Greece and Switzerland did not sign.[23] There are to date thirty decisions of the ECtHR on cases concerning Article 4 of Protocol No. 4 to the Convention. Among these cases, three have been rendered by the Grand Chamber, and seventeen violations have been found.[24] Hanaa Hakiki[25] points out that "*from the very first cases invoking this provision, the greatest majority of article 4 protocol 4 ECHR claims arise in pure immigration cases*".

To clarify the scope of this thesis, a few definitions need to be set out. Because this thesis aims to study the impact of a provision of the ECHR, the definitions adopted by the Strasbourg Court will be used. Thus, an *asylum-seeker* is a migrant, i.e. a person moving from one place to another, who seeks international protection.[26] International protection can be granted in various forms, the most known being refugee status.[27] In my thesis, I will use the term "*asylum-seeker*", which includes refugees and irregular migrants who claim asylum.

The term *expulsion* will be defined more in-depth in Chapter III of this thesis. It can however be summarised as follows: "*any measure [...] compelling aliens [...] to leave the country*".[28] It does not matter how the national authorities qualify their action. Hanaa Hakiki indeed affirms that "*whether the act is labelled by national authorities as an expulsion, a removal, a return, a refusal of entry, a denial of admission or a rescue operation, it will still constitute an expulsion for the purposes of article 4 protocol 4 ECHR*".[29] In this thesis, the term *collective expulsion* will be used. It should however be noted that this term can be compared with the term *mass expulsion*. It is not clear what the difference is between the two[30], therefore, I chose to stick to the term used in the prohibition enshrined in A4P4.

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[23] Chart of signatures and ratifications of Treaty 046, available at https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=046

[24] See HUDOC database, at https://hudoc.echr.coe.int/fre#{%22article%22:[%22P4-4%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22]}

[25] Hanaa Hakiki (2022)

[26] Council of Europe / European Court of Human Rights, 2016, *Asylum*, HELP (Human Rights Education for Legal Professionals)

[27] Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) Art. 1

[28] See for example *Becker v. Denmark*, App. No 7011/75 (European Commission of Human Rights, 1975) at 235 ; *Andric v. Sweden*, App. No. 45917/99 (ECtHR, 1999) §1 and *Khlaifia and Others v. Italy* (2016), § 237 ; Hanaa Hakiki (2020)

[29] *See* Hanaa Hakiki (2022). See also Partly Dissenting Opinion of Judge Serghides, § 1, in *Khlaifia and Others v. Italy* (2016) and *N.D. and N.T. v. Spain* (2020), § 176

[30] See Henckaerts, J. *Mass Expulsion in Modern International Law and Practice*, Leiden, The Netherlands: Brill | Nijhoff. (2021)

Likewise, this thesis will employ the term *alien*, because this is the term used in the prohibition of collective expulsion contained in A4P4. However, it is worth recalling that this term can be met with some criticisms. For example, Guy S. Goodwin Gill denounces that this term is "*loaded with negative meaning*" and "*used in practice with pejorative and prejudicial intent*".[31] Instead, one could use the term "*foreigner*" for example. The definition of the term *alien* by the ECtHR will be studied more in-depth in Chapter III of the thesis.

While asylum-seekers might rely on other articles of the Convention to protect their rights[32], this thesis will only focus on Article 4 of Protocol No. 4 of the Convention — with reference to Article 3 of the Convention as well — as the aim of this thesis is to determine its relevance in the protection of asylum-seekers, including access to asylum procedures.

It is important to note here that while it is clear that the political situation and the economic reality may be factors playing a role in migration and refugees issues, this thesis will only focus on the legal aspect of collective expulsions. While political, economic, and moral factors may be of influence for the prohibition of collective expulsion of asylum-seekers and be relevant in its study, this thesis will only focus on the legal aspect, namely through the study of the law of the European Court of Human Rights.

1.2 Research Question Statement and Explanation of the Choice of Methodology

The objective of this thesis is to determine to what extent the rights of asylum-seekers are protected by the prohibition of collective expulsion of aliens of Article 4 of Protocol No. 4 to the European Convention on Human Rights, as interpreted by the European Court of Human Rights. To do so, this thesis will follow a legal doctrinal analysis approach, mostly assessing case law of the European Court of Human Rights. A critical analysis approach will also be used in certain chapters, to complement the legal doctrinal analysis.

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[31] Guy S. Goodwin-Gill, *Expulsion in Public International Law* UN Lecture Series (2014), available at: http://legal.un.org/avl/ls/Goodwin-Gill_IML_video_3.html

[32] Such as Articles 2 (right to life), 3 (prohibition of torture), 4 (prohibition of slavery and forced labour), 5 (right to liberty and security), 6 (right to a fair trial), 7 (no punishment without law), 8 (right to respect for private and family life), 9 (freedom of thought, conscience and religion), 10 (freedom of expression), 11 (freedom of assembly and association), 14 (prohibition of discrimination), Article 1 of Protocol 7 (procedural safeguards relating to expulsion of aliens) (however, this article only protects lawfully residing foreigners, so does not apply to asylum-seekers or refugees when they are asking for their statute to be determined, and the ratification of Protocol 7 by member states is limited), Article 1 of Protocol 12 (general prohibition of discrimination), Article 3 of Protocol No. 7 (prohibition on double jeopardy). See also Rule 39 of the Rules of the Court (requests of interim measures). See Mole, Nuala; Meredith, Catherine, Human rights files, No. 9: *Asylum and the European Convention on Human Rights*, Council of Europe, 15 December 2011

1.3 Thesis Outline

The first chapter will recall the general principles governing the decisions of the European Court of Human Rights to understand what may influence the protection offered by A4P4 to asylum-seekers. A second chapter will briefly underline the dichotomy between the right of States to control the entry, residence, and expulsion of non-nationals from their territory and the rights of asylum-seekers in the context of expulsions. The third chapter will study the development of A4P4 through the context of its adoption, the travaux préparatoires, and the definitions established by the European Court of Human Rights. This chapter will also present the different guarantees offered by A4P4. A fourth chapter will analyse the evolution of the prohibition of collective expulsion through the case law of the European Court of Human Rights, in order to determine whether asylum-seekers benefit from a lesser or greater protection by the Article today than when it was established in 1963. Finally, the last chapter will study the differences and similarities between the prohibition of collective expulsion enshrined in A4P4 and the prohibition of refoulement established by Article 3 ECHR when it comes to the protection of asylum-seekers. The conclusion of the thesis will summarise all the findings.

2 Chapter I – General Principles of the European Court of Human Rights when deciding a Case

As underlined by Janneke Gerards,[33] the ECtHR has a double role within the Convention system. First, it enables individuals to seek redress when a right contained in the Convention or its Protocols has been violated.[34] Second, it interprets the rights contained in the Convention in order to clarify their meaning, standards, and scope of protection. As further explained in *Ireland v. The United Kingdom*,[35] the task of the Court is "*not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention*". In order to analyse the development of the protection offered to asylum-seekers through the prohibition of collective expulsions enshrined in the provision of A4P4, it is necessary to first come back to the different principles the Court has developed through its case law when interpreting a provision.

This chapter provides a brief overview of the methods of interpretation the Court has developed through its case law and used in the context of A4P4. The interpretation of Article 4 of Protocol No. 4 to the Convention by the European Court of Human Rights, to determine whether rights of asylum-seekers can be protected under this provision, is the aim of this thesis. Therefore, throughout the whole thesis, the methods of interpretation presented in this chapter will be used to understand the scope of the prohibition of collective expulsion of aliens.

The first section will give an overview of the rules of interpretation binding the European Court. The second will mention an important rule followed by the European Court, namely the necessity for the protection of the rights contained in the Convention to be effective. Finally, the third section will briefly mention two important principles of the ECtHR: the principle of subsidiarity and the margin of appreciation.

[33] Gerards Janneke, *General Principles of the European Convention on Human Rights* (CUP 2023)

[34] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, ETS 5*, 4 November 1950, Article 34

[35] *Ireland v. The United Kingdom*, App. No. 5310/71 (ECtHR, 1978)

2.1 Rules of Interpretation of the European Convention on Human Rights

The ECHR, as an international treaty, requires its norms, particularly those written in generic terms, to be interpreted. The principles governing the interpretation of international treaties are found in the 1969 Vienna Convention on the Law of Treaties[36] (VCLT), particularly in Articles 31 to 33. The European Court of Human Rights, while not necessarily referring explicitly to these articles, has on several occasions used these provisions to interpret the Convention and its Protocol, i.e. to determine the content and scope[37] of its provisions.[38] These rules of interpretation will be of particular use regarding the definition of the scope of the prohibition of collective expulsion of aliens and to determine whether such protection actually benefits asylum-seekers.

2.1.1 Rules of Interpretation in International Law: Articles 31 to 33 of the Vienna Convention on the Law of Treaties

Article 31 of the VCLT provides for the general rules of interpretation of a treaty, Article 32 for supplementary means of interpretation when the meaning resulting from the application of Article 31 is ambiguous, obscure, manifestly absurd, or unreasonable, and finally, Article 33 deals with the interpretation of treaties that have been authenticated in two or more languages.

Article 31 VCLT starts by stating that "*a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*". Accordingly, when interpreting a right contained in the Convention or its Protocol, the Court starts by studying the ordinary meaning of the terms.[39] This tool of interpretation has helped the Court in determining the definition of the term expulsion, as it will be shown in Chapter III. The ordinary meaning of the terms is to be apprehended in the context of the Convention, and the aim, object, and purpose of the treaty and the provision must be considered.[40] In

[36] United Nations, *Vienna Convention on the Law of Treaties*, United Nations, Treaty Series, vol. 1155, p. 331, 23 May 1969

[37] Villiger, M.E. and Spanó, R.R. (2023) *Handbook on the European Convention on Human Rights*. Leiden: Brill Nijhoff, p. 180

[38] See for example *Golder v. the United Kingdom*, App. No. 4451/70 (ECtHR, 1975), § 29: "*The Court is prepared to consider [...] that it should be guided by Articles 31 to 33 of the Vienna Convention of 23 May 1969 on the Law of Treaties*", or *Demir and Baykara v. Turkey*, App. No. 34503/97 (ECtHR [GC], 2008), § 65: "*In order to determine the meaning of the terms and phrases used in the Convention, the Court is guided mainly by the rules of interpretation provided for in Articles 31 to 33 of the Vienna Convention*"

[39] See for example *Witold Litwa v. Poland*, App. No. 26629 (ECtHR, 2000), § 58 and 59: "*[The process of discovering and ascertaining the true meaning of the terms of the treaty] must start from ascertaining the ordinary meaning of the terms*".

[40] See for example *Tyrer v. the United Kingdom*, App. No. 5856/72 (ECtHR, 1978), § 31

that regard, the Strasbourg Court has frequently reaffirmed the need for the Convention to be interpreted as a whole, and with regard to other international law instruments.[41] In the case of *Soering v. the United Kingdom*[42] for example, the Court recalled that when it interprets the Convention, "*regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms*." The Court went on by stating that "*any interpretation of the rights and freedoms guaranteed has to be consistent with 'the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society'*". The duty of States to perform treaty commitments in good faith in compliance with the object and purpose of the treaty itself is recalled by Violeta Moreno-Lax[43] when she assesses the right to access asylum procedures before removal.

As proclaimed in Article 32 of the VCLT, recourse to the preparatory work of the treaty and the circumstances of its conclusion may be had as a supplementary means of interpretation. The Court will use this tool of interpretation, notably in the case of *Hirsi Jamaa and Others v. Spain,*[44] to define the scope of protection of the prohibition of collective expulsion of aliens. A section analysing the travaux préparatoires can be found in Chapter III of this thesis.

2.1.2 Applied by the European Court of Human Rights in the context of Article 4 of Protocol No. 4

A reference to the Vienna Convention was explicitly made in the case of *N.D. and N.T. v. Spain* concerning an alleged violation of A4P4 by Spain, in which two migrants claimed that they had not been able to seek asylum in the country. In paragraph 172 of the Grand Chamber judgement, the Court declared: "*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*".[45] In this case, the Court underlined the Convention's "*special character as a human rights instrument*".[46] This has been confirmed in another case concerning an alleged violation of A4P4, *Hirsi Jamaa and others v. Spain*, where the Court stated that "*in interpreting the provisions of the Convention, the Court draws on Articles 31 to 33 of the Vienna Convention on the Law of Treaties*"[47] before confirming that

[41] See for example *Hassan v. the United Kingdom*, App. No. 29750/09 (ECtHR [GC], 2014), § 77: "*The Convention cannot be interpreted in a vacuum and should so far as possible be interpreted in harmony with other rules of international law of which it forms part*"

[42] *Soering v. the United Kingdom*, App No. 14038/88 (ECtHR, 1989), § 87

[43] Violeta Moreno-Lax and Efthymios Papastavridis (eds) (2017)

[44] *Hirsi Jamaa and Others v. Italy* (2012), § 174

[45] *N.D. and N.T. v. Spain* (2020) § 172

[46] *N.D. and N.T. v. Spain* (2020) § 172

[47] *Hirsi Jamaa and Others v. Italy* (2012), § 170

> pursuant to the Vienna Convention on the Law of Treaties, 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 take account of the fact 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".[48]

Therefore, it is clear that in cases of alleged violation of Article 4 of Protocol No. 4 to the Convention, the Court refers to the methods of interpretation imposed by the Vienna Convention on the Law of Treaties.

An important rule of interpretation emerging from the fact that the treaty must be read considering its aim and purpose has been developed to assert that the rights and freedoms contained in the Convention and its Protocols must be effectively protected.

2.2 The Effective Protection of Fundamental Rights

Throughout its case law, the ECtHR has asserted the need for an effective protection of the rights guaranteed in the Convention and its Protocols.[49] In the context of A4P4, this principle has contributed to extending the scope of protection of the provision and to interpreting the prohibition of collective expulsion as a provision offering procedural guarantees. Indeed, as underlined by Lena Riemer, this tool has enabled the ECtHR to interpret the scope of protection of the Article to contain procedural guarantees to render the prohibition "*effective against arbitrary group expulsions*".[50] This principle is reflected in the interpretation of the Convention as a living instrument, which will encourage the Court to adapt its decisions to contemporary situations.

2.2.1 Rights that are not Theoretical or Illusory but Practical and Effective

In the case of *Belgian Linguistics v. Belgium*,[51] the Court affirmed that "*the general aim set for themselves by the Contracting Parties through the medium of the European Convention on Human Rights, was to provide effective protection of fundamental human rights;"* The fact that the Convention must be

[48] *Hirsi Jamaa and Others v. Italy* (2012), § 171

[49] Villiger, M.E. and Spanó, R.R. (2023) p. 196

[50] Lena Riemer, *The Prohibition of Collective Expulsion in Public International Law* (der Freien Universität Berlin, 2020)

[51] *Case "relating to certain aspects of the laws on the use of languages in education in Belgium"* (ECtHR, 1968), § 5

interpreted in a way that renders the rights protected effective has been asserted in the first judgement of the European Court explicitly referring to the *non-refoulement* principle[52], and has been confirmed in a recent judgement of the Strasbourg Court deciding on a violation of A4P4. Indeed, in *N.D. and N.T. v. Spain*[53], the Court reiterated a rule repeatedly stated in its case law that "*the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective*".[54] As it will be shown in the second part of this section and in chapter IV of the thesis, this rule allowed the Court to extend the scope of protection of the prohibition of collective expulsions of aliens to migrants that are outside of the territory of a Member State.[55] Thus, this requirement that the rights protected are effective has been very important in cases concerning refoulement or expulsion of aliens. Moreover, still in the case of *N.D. and N.T. v. Spain*, the Court mentioned the necessity to keep rights effective by referring to the response of States to irregular migration. It stated: "*States' legitimate concern to foil the increasingly frequent attempts to circumvent immigration restrictions cannot go so far as to render ineffective the protection afforded by the Convention*"[56].

To render the rights guaranteed by the Convention effective, the Convention's reading and interpretation must be consistent, and the Convention must be read with regard to the other provisions of the treaty. This has been confirmed in the judgement of *Hirsi Jamaa and others v. Spain*, concerning a group of migrants that have been returned to Libya by the State of Italy.[57] The Grand Chamber stated that

> the provision in issue [A4P4] forms part of a treaty for the effective protection of human rights and 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.[58]

This analysis will be important, notably when considering the reading of the prohibition of collective expulsion of aliens together with the principle of non-refoulement. Moreover, article 53 of the ECHR confirms this obligation to consider the Convention as a whole when interpreting a provision, by stating that the Court cannot interpret any provision in a way that would limit the

[52] *Soering v. the United Kingdom*, (1989), § 87 "*The object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective*"

[53] *N.D. and N.T. v. Spain* (2020), § 171

[54] See for example *Airey v. Ireland*, App. No. 6289/73 (ECtHR, 1979), § 24 and *Hirsi Jamaa and Others v. Italy* (2012), § 175

[55] See also *Hirsi Jamaa and Others v. Italy* (2012)

[56] *N.D. and N.T. v. Spain* (2020), § 95

[57] *Hirsi Jamaa and Others v. Italy* (2012), §3

[58] *Hirsi Jamaa and Others v. Italy* (2012), § 171. See also § 178

scope or derogate from any human right the respective party is obligated to uphold under other agreements.[59]

2.2.2 The European Court of Human Rights as a Living Instrument

> It is not European society in 1950, when the Convention was adopted, which is decisive for interpreting the Convention and its Protocols, but rather today's environment. Indeed, it would be absurd if the Convention were to continue to be interpreted in relation to 1950, when the death penalty was still being carried out in many European states and homosexuality was punished.[60]

The fact that the European Convention must be read as a living instrument has been affirmed repeatedly in the Court's case law.[61] For example, in the case of *Hirsi Jamaa and Others v. Italy*, the Court mentioned previous case law, on different topics such as the non-refoulement principle[62], to affirm that "*the Convention is a living instrument which must be interpreted in the light of the present-day conditions*".[63] This has been described as an evolutive method of interpretation of the Convention.[64] As explained by Linos-Alexander Sicilianos, Judge and former President of the ECtHR, this method of interpretation is "*in line with the presumed intention of the contracting states, which are also living entities*" and prevents the need for the Convention to be constantly amended.[65] Thus, the interpretation of the Convention must adapt to its time. Indeed, this dynamic interpretation of the Convention enables its provision to apply to situations that were totally unforeseeable and unimaginable at the time of the writing of the Convention.[66] This method of interpretation is of particular use when provisions have been written in generic terms. This is notably the case of the Article studied in this thesis, which only states that "*[c]ollective expulsion of aliens is prohibited*." As it will be explored in-depth in Chapter III, this statement gives room for a lot of interpretation.

In the context of expulsion of aliens, and particularly expulsion of asylum-seekers, this means of interpretation of the Convention permits the Court to

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[59] Lena Riemer (2020)

[60] Villiger, M.E. and Spanó, R.R. (2023) p. 196

[61] *See* for example *Tyrer v. the United Kingdom*, App. No. 5856/72 (ECtHR, 1978), § 31 and *Matthews v. the United Kingdom* App. No. 24833/94 (ECtHR, 1999), § 39.

[62] *Soering v. the United Kingdom* (1989), § 102

[63] *Hirsi Jamaa and Others v. Italy* (2012), § 175

[64] Sicilianos, L.A., *Interpretation of the European Convention on Human Rights: Remarks on the Court's Approach* (Seminar on the margins of the 59th CAHDI meeting in Prague, 2020)

[65] Sicilianos, L.A. (2020)

[66] Council of Europe, ECtHR, *The European Convention on Human Rights, A living instrument*, (September 2022), available at https://www.echr.coe.int/documents/d/echr/Convention_Instrument_ENG

adapt to the changing migratory patterns. Indeed, as it will be discussed in Chapter III, it allowed the Court to develop the procedural guarantees contained in the provision of Article 4, but also to extend the scope[67] of protection of the prohibition of collective expulsion of aliens as guaranteed by Article 4 Protocol No. 4 to the ECHR.[68]

2.3 The Principle of Subsidiarity and the Margin of Appreciation

These two principles, enshrined in the Preamble of the Convention,[69] ensure that the Member States are the primary responsible for the protection of the fundamental rights within their jurisdiction, and give them a certain margin when applying the standards of the Convention.

2.3.1 Principle of Subsidiarity

One of the major principles governing the rights of the Convention is the principle of subsidiarity. This principle means that the protection of fundamental rights is to be ensured by the national systems, and the protection offered by the Convention is only subsidiary to this protection.[70] This has been established notably in the case of *Belgian Linguistics v. Belgium*, where the Court stated that *"it cannot assume the rôle of the competent national authorities […]. The national authorities remain free to choose the measures which they consider appropriate in those matters which are governed by the Convention"*[71] and confirmed in *Handyside v. the United Kingdom*, where the Court recalled that

> the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights. [...] The Convention leaves to each Contracting State, in the first place, the task of securing the rights and liberties it enshrines.[72]

[67] *Hirsi Jamaa and Others v. Italy* (2012), particularly § 177

[68] *See* chapter IV

[69] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, ETS 5, 4 November 1950: "*Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention*"

[70] Villiger, M.E. and Spanó, R.R. (2023) p. 193

[71] *Case "relating to certain aspects of the laws on the use of languages in education in Belgium"* (1968), § 10

[72] *Handyside v. the United Kingdom*, App. No. 5493/72 (ECtHR, 1976), § 48.

According to Janneke Gerards, the principle of subsidiary protection by the European Court is reflected in the fact that the Member States have some leeway to regulate and restrict the exercise of Convention rights in the way they think is best suited to national views and traditions.[73]
An analysis of this principle leads to the conclusion that the Court provides a definition of a minimum level of fundamental rights protection that must be guaranteed in all the States of the Council of Europe, a "*European minimum standard*".[74]

Another tool of interpretation developed by the ECtHR through its case law in the concept of margin of appreciation.

2.3.2 Margin of Appreciation Principle

This principle enables the different Member States to have a certain leeway when applying the rights contained in the Convention and its Protocol. The Court established it in its case law, notably in the case of *Handyside v. the United Kingdom*,[75] where it underlined, concerning the application of Article 10 on the right to freedom of expression, that it "*is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals*" and that "*consequently, [the Article] leaves to Contracting States a margin of appreciation.*" In the case of *Rasmussen v. Denmark*[76], the Court affirmed that "*the scope of appreciation will vary according to the circumstances, the subject-matter and its background; in this respect, one of the relevant factors may be the existence or non-existence of common ground between the laws of the Contracting States*." The degree of appreciation conferred to the Member States usually depends on whether or not there is a European consensus on the topic. While the Court's case law shows that the margin of appreciation principle has been mostly used in non-derogatory rights cases, it is important to wonder whether this principle can be used in the cases concerning Article 4 of Protocol No. 4 to the Convention.

In the context of protection of asylum-seekers, it is difficult to determine whether the Court has decided in favour of a wide, or limited, margin of appreciation. This will depend on the Article concerned. For example, concerning Article 8 of the Convention, which protects the right to respect for private and family life, Adel-Naim Reyhani and Gloria Golmohammadi found that the Court "*de facto applies a wide margin for justifying inaction towards asylum seekers*."[77] Similarly, Idil Atak has asserted that

[73] Gerards Janneke (2023)
[74] Villiger, M.E. and Spanó, R.R. (2023) p. 194
[75] *Handyside v. the United Kingdom* (1976), § 48
[76] *Rasmussen v. Denmark*, App. No. 8777/79 (ECtHR, 1984), § 40
[77] Reyhani, A.-N. and Golmohammadi, G. *The limits of static interests: Appreciating asylum seekers' contributions to a country's economy in Article 8 ECHR adjudication on Expulsion* International Journal of Refugee Law, 33(1), pp. 3–27. (2021)

> irregular migrants do not enjoy effective protection of their rights and freedoms in Europe because, apart from the security considerations that are at the heart of migration controls, while States are obliged to respect human rights, the margin of appreciation and exceptions provided for by case law can serve as a loophole in the application of their international obligations".[78]

It is worth noting here that the margin of appreciation may vary, and as it will be expressed in Chapter II, it is worth wondering to what extent the political aspect of migration issues can play a role in it.[79]

As it will be shown in Chapter IV, the margin of appreciation has, at least to some extent, been used in the context of A4P4. For example, as underlined by Lena Riemer, in the case of *N.D. and N.T. v. Spain,* the Grand Chamber gave Spain a certain margin of discretion in determining which measures would be deemed sufficient to ascertain that there has been a genuine and effective opportunity of submitting reasons against their handover to the Moroccan authorities[80] and a possibility to legally seek admission to the national territory.[81] Indeed, the Court noted in its assessment that "*[the] findings suffices for the Court to conclude that there has been no violation of Article 4 of Protocol No. 4. [...]. The Court notes the Government's submission to the effect that, in addition to being afforded genuine and effective access to Spanish territory at the Beni Enzar border crossing point, the applicants also had access to Spanish embassies and consulates where, under Spanish law, anyone could submit a claim for international protection*".[82] The Commission, before the Court, also used the margin of appreciation doctrine, without necessary referring to it. As underlined by Jacob D. Howley, "*the Commission applied the standard loosely and deferred broadly to national authorities' assurances of due process*".[83]

Therefore, the margin of appreciation doctrine is a doctrine that the Court uses regularly and it is interesting to grasp the extent of its use in collective expulsion cases, even if it is not explicitly mentioned by the Court.

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[78] Atak, I. *L' européanisation de la lutte contre la migration irréguliere et le droit humains des migrants: Une étude des politiques de renvois forcé en France, au Royaume-Uni et en Turquie*. Bruxelles: Bruylant. (2011) and Dilettoso, C. *La Cour européenne des droits de l'homme et les droits des migrants: approche protectice ou prudente?*, Global Studies Institute de l'Université de Genève, Vol. 95-2018 (2017)

[79] See Chapter II and Lena Riemer, *The Prohibition of Collective Expulsion in Public International Law* (der Freien Universität Berlin, 2020), pp. 195-219.

[80] *N.D. and N.T. v. Spain* (2020), § 208

[81] *N.D. and N.T. v. Spain* (2020), § 212

[82] *N.D. and N.T. v. Spain* (2020), § 222

[83] Jacob D. Howley, *Unlocking the Fortress: Protocol No. 11 and the Birth of Collective Expulsion Jurisprudence in the Council of Europe System* (2006) 21 Geo Immigr LJ 111

2.4 Conclusion

In this chapter, the principal methods of interpretation of the ECHR by the ECtHR have been set out. The ECHR is a human rights treaty that must be read in such a way that the rights contained therein are practical and effective and not theoretical and illusory. Throughout its case law, the Court has affirmed the principle of subsidiary and the margin of appreciation doctrine, two well-known principles governing the ECHR that can be used in different cases to provide the Member States with some leeway when applying the rights contained in the Convention.

An important method of interpretation in the context of the protection of asylum-seekers through the prohibition of collective expulsion is the living instrument approach. Following this method, which stems from the need to make the rights protected – and in the context of this thesis, the right guaranteed under A4P4 – effective, the Court has extended the protection of aliens outside the territory of Member States. This, in turn, facilitates persons in need of international protection to have access to a procedure for seeking asylum.

3 Chapter II – The Dichotomy between State Sovereignty and Asylum-Seekers' Rights in the Context of Expulsion

This chapter aims to place the provision of A4P4 in its overarching context and follows Chapter I's interpretation principles. In his book on *European Migration Law*, Daniel Thym highlights "*the tension between state sovereignty and human rights*" especially in "*the evolution of European migration law*" and asserts that "*human rights serve as a counterpoint to state sovereignty in contemporary Europe*".[84] On the one hand, it is a general principle of international law that State sovereignty provides the State the right to control its territory, including who flows in it. On the other hand, human rights considerations and principles have limited this right in certain situations, including when it comes to protecting asylum-seekers at risk of torture or degrading or inhuman treatment or punishment. Emiliya Bratanova Van Harten asserts that "*the main function of human rights law is to protect the individual from State arbitrariness*".[85]

3.1 The Right of States to Control the Entry, Residence, and Expulsion of Non-Nationals

The ECtHR has repeatedly affirmed in its case law – on A4P4 but not only – that Member States "*have the right to control the entry, residence and removal of aliens*".[86] The Court has also underlined the right of States "*to establish their own immigration policies, potentially in the context of bilateral cooperation or in accordance with their obligations stemming from membership of the European Union*".[87] Moreover, the Grand Chamber has noted that "*the Contracting States may in principle put arrangements in place at their borders designed to allow access to their national territory only to persons who fulfil the relevant legal requirements*."[88] Furthermore, as underlined by Lena Riemer, the ECtHR backs the right of States to fortify their borders,

[84] Daniel Thym, *Human Rights and State Sovereignty*, in Daniel Thym, *European Migration Law* (1st edn, Oxford University PressOxford, 2023)

[85] Emiliya Bratanova Van Harten, *Complementary Pathways as "Genuine and Effective Access to Means of Legal Entry" in the Reasoning of the European Court of Human Rights: Legal and Practical Implications* (2023) 25 European Journal of Migration and Law 200.

[86] See for example *N.D. and N.T. v. Spain* (2020), § 167: "*as a matter of well-established international law, and subject to their treaty obligations, including those arising from the Convention, Contracting States have the right to control the entry, residence and removal of aliens*", referring to its own case law

[87] *N.D. and N.T. v. Spain* (2020), § 167 ; *Georgia v. Russia (I)*, App. No. 13255/07 (ECtHR [GC], 2014), § 177 ; *Sharifi and Others v. Italy and Greece*, App. No. 16643/09 (ECtHR, 2014), § 224 ; *Khlaifia and Others v. Italy* (2016), § 241

[88] *N.D. and N.T. v. Spain* (2020), § 168

while guaranteeing legal pathways.[89] Indeed, in paragraph 232 of the judgement in *N.D. and N.T. v. Spain*, the Grand Chamber underlines the "*obligation and necessity for the Contracting States to protect their borders*".[90]

This right to control the entry, residence, and expulsion of aliens has been recognised by several bodies in many documents. For example, the Committee of Ministers of the Council of Europe published in 2005 a document entitled *Twenty Guidelines on Forced Return*, which has been adopted "*as a practical tool for use by both governments in the drafting of national laws and regulations on the subject and all those directly or indirectly involved in forced return operations*".[91] In these guidelines, it is reiterated that "*member states have the right, as a matter of well-established international law and subject to their treaty obligations, to control the entry and residence of aliens in their territory*".[92] It follows by stating that "*in exercising this right, member states may find it necessary to forcibly return illegal residents within their territory*".

At the international level, some scholars have also underlined this right. For example, Fernando Arlettaz[93] underlines the fact that this principle was already mentioned in the *International Rules on the Admission and Expulsion of Aliens* adopted by the Institute of International Law in 1892.[94] Indeed, in the preamble of these Rules, it is affirmed that "*for each state, the right to admit or not to admit foreigners to its territory, or to admit them only conditionally, or to expel them, is a logical and necessary consequence of its sovereignty and independence*".[95]

Therefore, the right of States to control the entry, residence, and expulsion of aliens is a well-established principle of international law, acknowledged in the law of the European Court of Human Rights as well. However, this right is not without limits.

3.2 The Limitations to the Right of States to Control the Entry, Residence, and Expulsion of Non-Nationals

From the *Twenty Guidelines on Forced Return* cited above, it is clear that the forced return of people creates concerns about the risk of violation of

[89] Lena Riemer (2020)

[90] *N.D. and N.T. v. Spain* (2020), § 232

[91] Council of Europe, Committee of Ministers, *Twenty Guidelines on Forced Return* (September 2005), Preamble

[92] Ibid

[93] Fernando Arlettaz (2019)

[94] MM. L.-J.-D. Féraud-Giraud et Ludwig von Bar, *Règles internationales sur l'admission et l'expulsion des étrangers*, Institut de Droit International (1892) Geneva

[95] MM. L.-J.-D. Féraud-Giraud et Ludwig von Bar (1892) Preamble

fundamental rights and freedoms.[96] The Committee of Ministers recalls that "*every person seeking international protection has the right for his or her application to be treated in a fair procedure in line with international law*".[97]

In a number of cases, the ECtHR has clarified this right of States to control the entry, residence, and expulsion of non-nationals by establishing the limits that some protections contained in the ECHR entail. Particularly, the right of States to control the entry, residence, and expulsion of non-nationals is restricted by the obligation not to return an individual who is at risk of torture or inhuman and degrading treatment, an obligation established under Article 3 of the ECHR.[98] Indeed, it has been acknowledged in a document published by the Council of Europe on *Asylum* that

> in exercising control of their borders, States must act in conformity with the ECHR standards and with the principles derived from the vast body of the Court's case law in order to guarantee the respect of asylum seekers' human rights.[99]

The Court also recalled in a number of cases that "*having regard to the absolute character of Article 3, an increasing influx of migrants cannot absolve a State of its obligations under that provision*."[100] Therefore, the fact that migrants are arriving *en masse* should not have weight when it comes to the protection of asylum-seekers escaping torture or degrading and inhuman treatment.

In the case of *Khlaifia and Others v. Italy* concerning two Tunisian nationals trying to reach Italy and being removed to Tunisia after having been placed in a reception centre, the Court emphasised that while States have the right to set immigration policies and manage migratory flows and the reception of asylum-seekers, these policies must be compatible with the European Convention and its protocols.[101] The Court stressed that practices contrary to the Convention cannot be justified by migration management challenges. In the case of *N.D. and N.T. v. Spain*, the Court emphasised that domestic regulations cannot "*render inoperative or ineffective*" the rights protected by the Convention and its Protocols, especially those enshrined in Article 3 ECHR

[96] Council of Europe, Committee of Ministers, *Twenty Guidelines on Forced Return* (September 2005), Preamble

[97] Council of Europe, Committee of Ministers, *Twenty Guidelines on Forced Return* (September 2005), Preamble

[98] See Chapter V

[99] Council of Europe/European Court of Human Rights, *Asylum*, HELP (2016)

[100] *M.S.S. v. Belgium and Greece*, App. No. 30696/09 (ECtHR [GC], 2011), see also *Hirsi Jamaa and Others v. Italy* (2012), § 122 and *Khlaifia and Others v. Italy* (2016), § 184 for example

[101] *Khlaifia and Others v. Italy* (2016), § 241. See also *Sharifi and Others v. Italy and Greece*, App. No. 16643/09 (ECtHR, 2014), § 224 ; *N.D. and N.T. v. Spain* (2020), § 170 ; or *Hirsi Jamaa and Others v. Italy* (2012), § 179

and Article 4 of Protocol No. 4.[102] The Grand Chamber reiterated this idea in paragraph 232 of the same case, by stating that

> it should be specified that [the finding of the case] does not call into question the broad consensus within the international community regarding the obligation and necessity for the Contracting States to protect their borders – either their own borders or the external borders of the Schengen Area, as the case may be – in a manner which complies with the Convention guarantees, and in particular with the obligation of non-refoulement.[103]

The Court in *Hirsi Jamaa and Others v. Italy* "*reiterates [...] that the provisions of treaties must be interpreted in good faith in the light of the object and purpose of the treaty and in accordance with the principle of effectiveness*"[104] – as it has been discussed in Chapter I, to justify this necessity to manage migration flows while still complying with the obligations of the Convention and its Protocols.

It should be noted that Judges of the ECtHR have also underlined these limitations to States' sovereignty in their concurring or dissenting opinions in cases related to migration. For example, in the case of *De Souza Ribeiro v. France*, in their concurring opinion, Judge Pinto De Albuquerque and Judge Vučinić stated that "*there should not be any carte blanche for States to 'excise' a part of their territory from their international obligations under the Convention*". They explained that

> [w]ere the Court to accept this situation, it would place itself at odds not only with its own jurisprudence but also with the actual standard of international human rights law and international migration law, creating a legal black hole in a territory where the Convention should be fully applied but is not."[105]

In the case of *M.A. and Others v. Lithuania*, Judge Pinto de Albuquerque affirms that

> [i]n the system of human-rights protection established by the Convention, "States' legitimate concern to foil the increasingly frequent attempts to circumvent immigration restrictions must not deprive asylum-seekers of the protection afforded by [the

[102] *N.D. and N.T. v. Spain* (2020), § 171

[103] *N.D. and N.T. v. Spain* (2020), § 232

[104] *Hirsi Jamaa and Others v. Italy* (2012), § 179. See also *Mamatkulov and Askarov v. Turkey*, Apps. No. 46827/99 and 46951/99 (ECtHR [GC], 2005), § 123, cited by the Court

[105] *De Souza Ribeiro v. France*, App. No. 22689/07 (ECtHR [GC], 2012)

European Convention on Human Rights and the Geneva Convention].[106]

Finally, when examining how the Court weights the rights and interests of migrants and those of receiving countries, Lena Riemer uses the example of the *Khlaifia and Others v. Italy* case to argue that the Court has prioritised Italy's sovereign authority in managing migration and ensuring the effectiveness of its migration control system during periods of mass migration over the individual's right to undergo an interview before being expelled.[107] As underlined by Ana Rita Gil, the judgement of *Khlaifia and Others v. Italy* has been rendered in the context of the 2015 "migration crisis".[108] Therefore, it is relevant to wonder whether the limitations imposed on State sovereignty aiming at ensuring better safeguards of migrants' – and thus asylum-seekers and refugees – rights are dependent on the context at the time, and in particular the political context. Is the margin of appreciation offered to Member States wider in times of "crisis"? Alan Desmond indeed argues that "*migration crisis may facilitate a resurgence of state sovereignty in the EU*".[109] For example, in the case of *Khlaifia and Others v. Italy*, the "*humanitarian emergency*" was considered in the decision. Indeed, the Grand Chamber acknowledged that the large influx of North African migrants posed significant challenges for Italian authorities[110] and recalled the "*significant number of factors, whether political, economic or social, which gave rise to such a major migration crisis"*.[111]

Thus, over time, there has been an evolution of the protection of individual rights, including asylum-seekers' rights, that limit the sovereignty of States. It remains to be seen to what extent this sovereignty is limited by the European Court on Human Rights in its interpretation of Article 4 of Protocol No. 4 to the Convention to better safeguard asylum-seekers' rights.

[106] *M.A. and Others v. Lithuania*, App. No. 59793/17 (ECtHR, 2018), Dissenting opinion of Judge Pinto de Albuquerque, § 19. See also *Amuur v. France*, App. No. 19776/92 (ECtHR, 1996) or *M.S.S. v. Belgium and Greece*, App. No. 30696/09 (ECtHR [GC], 2011), § 216

[107] Lena Riemer (2020)

[108] Ana Rita Gil, *Collective expulsions in times of migratory crisis: Comments on the Khlaifia case of the ECHR* (Universidade Nova de Lisboa, 2016)

[109] Alan Desmond, *From Migration Crisis to Migrants' Rights Crisis: The Centrality of Sovereignty in the EU Approach to the Protection of Migrants' Rights* (2023) 36 Leiden Journal of International Law 313.

[110] *Khlaifia and Others v. Italy* (2016), § 179

[111] *Khlaifia and Others v. Italy* (2016), § 180

4 Chapter III – The Development of Article 4 of Protocol No. 4 to the European Convention on Human Rights

The prohibition of collective expulsion is enshrined in Protocol No. 4 to the European Convention. This Protocol was drafted by a Committee of Experts on Human Rights and was opened for signature on 16 September 1963.[112] It entered into force on 02 May 1968. Article 4 of the Protocol is the first article in an international treaty addressing collective expulsions.[113] This Chapter aims at analysing the development of the prohibition of collective expulsion of aliens to determine whether asylum-seekers may be protected by the provision of A4P4. First, it will analyse the background of the adoption of the Article, to understand whether asylum-seekers were taken into account during the drafting process, and then, an analysis of the case law of the ECtHR will help understand what the protection actually entails, specifically for asylum-seekers.

4.1 Background to the Adoption of Protocol No. 4

4.1.1 Context of the Adoption

According to the Registry of the European Court of Human Rights, referring to the drafting process of Article 4 of Protocol No. 4 to the Convention, "*the purpose of Article 4 was to formally prohibit 'collective expulsions of aliens of the kind which was a matter of recent history*'".[114] In the same way as the ECtHR was established in the aftermath of the Second World War to prevent more human rights violations such as the Nazi atrocities to happen[115], Protocol No. 4 to the Convention – and more specifically Article 4 of this Protocol – was drafted with the aim of preventing arbitrary collective expulsions from

[112] Council of Europe, *Explanatory Report to Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto, Strasbourg*, 16 September 1963

[113] European Court of Human Rights Registry, *Guide on Article 4 of Protocol No. 4 to the European Convention on Human Rights, Prohibition of collective expulsions of aliens* (2022)

[114] European Court of Human Rights Registry, *Guide on Article 4 of Protocol No. 4 to the European Convention on Human Rights, Prohibition of collective expulsions of aliens* (2022) §1

[115] Nussberger Angelika, *The Court Over Sixty Years* in Nussberger Angelika, The European Court of Human Rights (Oxford University Press 2020)

happening again.[116] This takes place in a context of different mass expulsions of people from Europe, such as the expulsion of Romani people, which "*reached a horrifying peak during the Nazi era*"[117], or of the Jewish population. As underlined by Jacob D. Howley, up until the mid-twentieth century, European expulsions often targeted Jews, with sovereigns rarely granting them citizenship rights.[118] Another example of mass expulsion at this time is the expulsion of Germans, as underlined by Lena Riemer, "*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*".[119] Indeed, she explains that "*states use(d) (collective) expulsions as a tool for nation-building, isolation, and deterrence*".[120] Likewise, Randall Hansen argues that mass expulsions have had a role in the process of nation-building, giving the example of Europe's interwar period.[121] Considering this background, as Jacob D. Howley argues, *"the legislative history of Protocol No. 4 suggests that its drafters associated it with the relatively clear-cut mass expulsions of ethnic Germans and Eastern Europeans after World War II*".[122] This argument follows Henckaerts's argument which argues that the wording "*collective expulsions of aliens of the kind which have already taken place*" mentioned in the Committee of Experts' Explanatory Report to the Protocol refers to the expulsion of Germans and other groups following World War II ("WWII"), as well as the enforced displacement of populations in Europe during the Interbellum era.[123] Moreover, Juan Fernando Durán Alba underlines that there was at this time a necessity to prevent mass expulsions "*stemming from migratory movements and decolonisation processes in the post WWII period*."[124]

Therefore, while the drafters of the Article and the Court never really clarified the meaning of the expression "*collective expulsions of aliens of the kind which was a matter of recent history*", the context seems to allude to the expulsion of Germans, Jews, and Roma, particularly during and in the aftermath of the WWII. Thus, the Article was not necessarily drafted with the purpose of protecting asylum-seekers, but rather different groups of people that suffered arbitrary expulsion following the Second World War.

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[116] European Convention for the Protection of Human Rights and Fundamental Freedoms, Collected Edition of the "Travaux Préparatoires" of Protocol No. 4 to the Convention (1976), at 442, §38

[117] Lena Riemer (2020)

[118] Jacob D. Howley (2006)

[119] Lena Riemer (2020)

[120] Lena Riemer (2020)

[121] Hansen, Randall, *State Controls: Borders, Refugees, and Citizenship*, in Elena Fiddian-Qasmiyeh, and others (eds), *The Oxford Handbook of Refugee and Forced Migration Studies* (2014; online edn, Oxford Academic, 4 Aug. 2014)

[122] Jacob D. Howley (2006)

[123] Jean-Marie Henckaerts, *Mass Expulsion in Modern International Law and Practice* Volume 41 International Studies in Human Rights Martinus Nijhoff Publishers (1995).

[124] Juan Fernando Durán Alba, *Prohibition on the Collective Expulsion of Aliens (Article 4 of Protocol 4)* in Javier García Roca and Pablo Santolaya (eds), Europe of Rights: A Compendium on the European Convention of Human Rights (Brill | Nijhoff 2012)

4.1.2 Travaux Préparatoires

An analysis of the travaux préparatoires of Protocol No. 4 to the Convention enables us to understand the origin and aim of Article 4 of the Protocol. The *collected edition of the "travaux préparatoires" of Protocol No. 4 to the Convention, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto* of 1976 reveals that Protocol 4 to the Convention has been drafted by the Consultative Assembly of the Council of Europe, a Committee of Experts on Human Rights, and the Committee of Ministers.[125]

In the Assembly Draft of the Protocol, the preamble starts by recalling the role of the Convention, namely the '*first step(s) for the collective enforcement of certain of the Rights stated in the Universal Declaration*'.[126] It goes on by affirming that the Convention needs to be completed by other stages of drafting. The preamble adopted by the Committee does not mention this. However, this previous version of the protocol indicates the purpose of its drafting, namely the extension of (political) rights guaranteed under the Convention.

When Article 4 was drafted by the Assembly, it was composed of three paragraphs, while the final version contains only one sentence. Indeed, while the proposed version had a part aiming at protecting individuals against individual expulsions, only the prohibition of collective expulsions remains in the final version. The Committee of Experts deemed that the Article should not keep the paragraphs specifying the legitimate grounds for expulsion of an alien lawfully residing in the territory of a Member State.[127]

The Committee of Experts decided, in paragraph 3 of its version of the Article, to include a provision prohibiting collective expulsions.[128] It proposed different alternatives for this provision[129], including the following: "*in no circumstances shall a measure of collective expulsion be taken*", "*decisions of expulsion shall only be taken in individual cases*", and finally "*decisions of expulsion shall only be taken in individual cases; collective expulsion shall not, in any circumstances, be permitted*". Finally, the last version adopted by

[125] European Convention for the Protection of Human Rights and Fundamental Freedoms, *Collected Edition of the "Travaux Préparatoires" of Protocol No. 4 to the Convention* (1976)

[126] Explanatory Report to Protocol No. 4 (1963)

[127] Lochak, D., in Pettiti, L.-E., Decaux, E. and Imbert, P.-H., *La Convention Européenne des Droits de l'Homme,* Economica, Paris (1999)

[128] *Collected Edition of the "Travaux Préparatoires" of Protocol No. 4 to the Convention* (1976), at 442, §53

[129] *Collected Edition of the "Travaux Préparatoires" of Protocol No. 4 to the Convention* (1976), at 429-30

the Committee of Ministers only states: "*Collective expulsion of aliens is prohibited*".[130]

The Consultative Assembly version did not mention collective expulsions, and referred only to aliens "*lawfully residing in the territory of a High Contracting Party*".[131] It can be understood by reading the travaux préparatoires of Protocol No. 4 that Article 4 was not aiming at the protection of refugees or asylum-seekers. However, the Committee of Experts did not explain the reason for this exclusion. First, the Committee of Experts wanted to ensure the protection of the article only to "*aliens lawfully residing in the territory of the Contracting States*".[132] The Consultative Assembly decided in paragraph 2 of the first version of Article 4 that

> an alien residing lawfully in the territory of a State should not be expelled without first being allowed to submit reasons against his expulsion and to have his case examined by and be represented, if he so wishes, for the purpose of this examination, before a competent authority or a person or persons designed by the said authority.[133]

Looking at the travaux préparatoires, Daniel Rietiker affirms that it

> reveals the close link that exists between the prohibition of collective expulsion of aliens on the one hand, and the need for procedural safeguards and legitimate reasons that justify the individual expulsions of lawful resident aliens, on the other hand.

Rietiker highlights thus the lawful residency of the aliens that are protected by the provision. This is in line with the first draft of the article. However, as it will be studied in this thesis, the Article's interpretation developed to protect all kinds of aliens.

The Committee decided not to include a provision mentioning the guarantee of procedural rights.[134] Reading the commentaries, it is clear that the Committee did not intend to limit the rights guaranteed by the Article, but rather to leave it open to a broad interpretation, and to ensure the effective protection

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[130] *Collected Edition of the "Travaux Préparatoires" of Protocol No. 4 to the Convention* (1976), at 710

[131] Explanatory Report to Protocol No. 4 (1963)

[132] *Collected Edition of the "Travaux Préparatoires" of Protocol No. 4 to the Convention* (1976), at 442, §39

[133] *Collected Edition of the "Travaux Préparatoires" of Protocol No. 4 to the Convention* (1976), at 442, §42

[134] Explanatory Report to Protocol No. 4 (1963), § 34

of the right.[135] It is worth noting that the Committee also referred to the right of an effective remedy (article 13) under this discussion on Article 4.[136]

Therefore, it appears that the object and purpose of the Article is to protect aliens who are at risk of being expelled without an opportunity to claim protection, *inter alia*, and to have their claims assessed.[137] The idea behind the provision is to offer each individual who is expelled an individual assessment. While the term "*alien*" encompassed at the beginning only "*lawful resident aliens*" and thus not necessarily asylum-seekers that have not received a decision yet, it will be shown in this thesis that the provision ended up protecting all kinds of aliens, i.e. every non-national individual subjected to an expulsion. This had been developed through the case law of the ECtHR.

4.2 Relevant Definitions

Four terms arise from the provision contained in Article 4 of Protocol No. 4. This section will analyse the definitions given by the Court to the terms "*collective*" and "*expulsion*". Next section will deal with the personal scope of the prohibition, to determine whether asylum-seekers are protected under the Article, thus understanding the term "*alien*". The following section will deal with the term "*prohibition*", to determine its nature. The last section will briefly examine the question of the evidence, to understand how the quest for asylum is to be taken into consideration in cases involving A4P4.

The definition of the term "*collective expulsion*" was first given by the Commission, in 1975, in the very first decision relating to A4P4.[138] However, the first violation of this Article was only found, by the Court, in the case of *Čonka v. Belgium*[139], in 2002, 39 years after the adoption of the Protocol. In its case law, the Court has repeatedly defined the term "*collective expulsion*" as "*any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group.*"[140] Two terms in particular resonate in this definition: first, the term expulsion includes "*any measure compelling aliens [...] to leave a country*" and second, the term "collective" requires "*a reasonable and objective examination of the particular case of each individual*."

[135] Explanatory Report to Protocol No. 4 (1963), § 34

[136] *Collected Edition of the "Travaux Préparatoires" of Protocol No. 4 to the Convention* (1976), at 442, §49

[137] Lena Riemer (2020)

[138] *Becker v. Denmark*, App. No. 7011/75, (ECtHR,1975) at 215, 235.

[139] *Čonka v. Belgium*, App No. 51564/99 (ECtHR, 2002)

[140] See for example *Andric v. Sweden*, App No. 45917/99 (ECtHR, 1999) and *Čonka v. Belgium*, App No. 51564/99 (ECtHR, 2002)

4.2.1 The meaning of the term Expulsion

The Grand Chamber has asserted that the term "*expulsion*" should be interpreted "*in the generic meaning, in current use*", which means to drive away from a place.[141] This has been confirmed in the case of *N.D. and N.T. v. Spain*.[142] In this judgement, the Grand Chamber affirmed that

> Article 4 of Protocol No. 4 [has] been found to apply to any situation coming within 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 [...][143].

In this case, the Court referred to the International Law Commission's Draft Articles on the Expulsion of Aliens[144] "*which, with regard to refugees, equate their non-admission to a State's territory with their return (refoulement)*"[145]. These reflections lead the Court to decide that the term "*expulsion*" refers both to the situations of removal from the territory of a Member State and of non-admission to a territory of a Member State.[146] Indeed, in the case of *N.D. and N.T. v. Spain*, the Court declared that it "*has not hitherto ruled on the distinction between the non-admission and expulsion of aliens, and in particular of migrants or asylum-seekers, who are within the jurisdiction of a State that is forcibly removing them from its territory"*.[147] Moreover, in the case of *Khlaifia and Others v. Italy*, the Court underlines once again the "*generic meaning, in current use (to drive away from a place) definition of expulsion*" to assert that applicants removed from the Italian territory and returned to Tunisia were subjected to an expulsion.[148] Thus, the Court determined that "*refusal of entry with removal*" constitutes an expulsion, providing a wider scope of protection to aliens expelled, including asylum-seekers, than just expulsions *stricto sensu*.

Another aspect of the term "*expulsion*" is its coercive character. Lena Riemer underlines the fact that the term expulsion "*requires some form of coercion in the expulsion procedure*".[149] Indeed, this can be found in the definition itself given by the Court of collective expulsion: it requires a measure, taken by the competent authority, compelling aliens as a group to leave the

[141] *Hirsi Jamaa and Others v. Italy* (2012) § 174
[142] *N.D. and N.T. v. Spain* (2020), § 185
[143] *N.D. and N.T. v. Spain* (2020), § 185
[144] International Law Commission, *Draft articles on the expulsion of aliens*, 2014
[145] *N.D. and N.T. v. Spain* (2020), § 186
[146] Fernando Arlettaz (2019)
[147] *N.D. and N.T. v. Spain* (2020), § 184
[148] *Khlaifia and Others v. Italy* (2016), §§ 243-244. See also *N.D. and N.T. v. Spain* (2020), § 137
[149] Lena Riemer (2020)

country.[150] This requirement has been affirmed in the case of *Berdzenishvili and Others v. Russia* for example, concerning the expulsion of 19 Georgian nationals by the Russian Federation.[151] The Court declared that "*no official expulsion decisions by a court or any other Russian authority has been issued*" and pointed out the fact that the applicants "*left the Russian Federation by their own means*". It decided that "*in absence of such an official expulsion order or any other specific act by the authorities"*[152], the Court could not find a violation of Article 4 of Protocol No. 4 to the Convention. Jean-Marie Henckaerts however underlines the fact that "*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*".[153] Therefore, this means that in the situation of asylum-seekers being expelled, the authorities must have acted towards their expulsion in order for them to be protected under the provision.

The scope of the term "*expulsion*" will be studied more in-depth in Chapter IV, when analysing the extension of the protection offered by A4P4 to migrants in the high seas and trying to cross borders at land.[154] In *Hirsi Jamaa and Others v. Spain*[155], the Court established that push-backs could constitute a violation of the prohibition of collective expulsion, even if the individuals involved had not physically entered the territory of the Member State.[156] This, in turn, leads to a greater protection of asylum-seekers.

4.2.2 The meaning of the term Collective

The Court, and the Commission[157] before it, has repeatedly affirmed in its case law that an expulsion of aliens, as part of a group, is collective *"except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group*".[158] Therefore, the term "*collective*" reflects the requirement of an individual assessment.[159] The Court has developed several factors to take into account to

[150] See for example *Becker v. Denmark* (1975)

[151] *Berdzenishvili and Others v. Russia*, App. No. 14594/07 and others (ECtHR, 2016), § 1 and 3

[152] *Berdzenishvili and Others v. Russia* (2016), § 81 and 82

[153] Jean-Marie Henckaerts (1995). It should be specified however that in this chapter, Henckaerts refers to indirect expulsions in international law in general, not specifically under the ECHR.

[154] For this, see particularly the case *Hirsi Jamaa and Others v. Italy* (2012)

[155] *Hirsi Jamaa and Others v. Italy* (2012) § 174

[156] Lena Riemer (2020)

[157] *Becker v. Denmark*, (1975) at 235.

[158] See *Andric v. Sweden*, App. No. 45917 (ECtHR, 1999), § 1 ; *Čonka v. Belgium* (2002), § 56 ; *Khlaifia and Others v. Italy* (2016), § 237 or *N.D. and N.T. v. Spain* (2020), § 193 for example.

[159] As pointed out by Hanaa Hakiki, in the case of *Shahzad v. Hungary* for example the Court reiterated the fact that "*the decisive criterion in order for an expulsion to be characterised as "collective" is the absence of a "reasonable and objective examination of the*

determine whether the individual requirement has been met. To analyse to what extent asylum-seekers are protected by the prohibition of collective expulsion, one needs to analyse the meaning of a "*reasonable and objective examination of the particular case of each individual alien of the group*". This section will be completed with a section below on the nature of the prohibition of collective expulsion, enumerating the safeguards that the prohibition offers.

The *Becker*[160] case shows that the test to be applied to determine a violation of the prohibition of collective expulsion of aliens protected by A4P4 "*should be to examine whether 'a group' of persons is expelled without due regard to the individual case*". In this case, the Commission found that the respondent Government had allowed each case to be examined individually and therefore found that no issue of collective expulsion arose.[161] In the case of *N.D. and N.T. v. Spain*, the Court affirmed that "*the number of persons affected by a given measure is irrelevant in determining whether or not there has been a violation of Article 4 of Protocol No. 4*".[162] Thus, as underlined by Lena Riemer, even if the State chooses to remove individuals one at a time, the prohibition applies when those individuals are part of a larger group of individuals collectively expelled over a prolonged period.[163] The collective requirement of the prohibition does not require a particular membership of a particular group.[164] Furthermore, the case of *Hirsi Jamaa and Others v. Italy*[165], *inter alia*[166], affirms that the existence of similar decisions affecting multiple individuals does not automatically constitute a collective expulsion if each person has had the opportunity to contest their expulsion individually before the competent authorities. This principle has been previously stated by the Commission[167] and has been affirmed in *M.A. v. Cyprus*[168] for example. The Court indeed stated that

> the fact that the deportation orders and the corresponding letters were couched in formulaic and, therefore, identical terms and did

particular case of each individual alien of the group", thus defining collective as a lack of individual assessment. (Hanaa Hakiki (2022) and *Shahzad v. Hungary*, App. No. 12625/17 (ECtHR, 2021), § 58)

[160] *Becker v. Denmark,* (1975) at 231

[161] *Becker v. Denmark* (1975) at 235

[162] *N.D. and N.T. v. Spain* (2020), § 176

[163] Lena Riemer (2020)

[164] *N.D. and N.T. v. Spain* (2020), § 195

[165] *Hirsi Jamaa and Others v. Italy* (2012), § 184

[166] See also *Sultani v. France,* App. No. 45223/05 (ECtHR, 2007), § 81 or *Andric v. Sweden* (1999) § 1 for example

[167] See for example *K.G. v. the Federal Republic of Germany,* App. No. 7704/76 (European Commission of Human Rights, 1977), p. 6: "*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*". See Council of Europe Digest of Strasbourg Case-Law relating to the European Convention on Human Rights Vol. 5 (Carl Heymanns Verlag 1985), p. 890.

[168] *M.A. v. Cyprus*, App. No. 41872/10 (ECtHR, 2013)

> not specifically refer to the earlier decisions regarding the asylum 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.

This case concerned a Syrian national who made an unsuccessful claim for asylum in Cyprus. He had been issued a deportation order, together with 43 individuals, after a protest that was being staged against the Government's asylum policy. Through these decisions, the Court thus explains that while the "*collective*" term of the prohibition reflects the need for an individual evaluation, it does not mean that identical decisions automatically violate the provision, although it may often be an indicator.

The case of *Khlaifia and Others v. Italy* clarifies that "*in order to determine whether there had been a sufficiently individualised examination, it was necessary to have regard to the particular circumstances of the expulsion and to the 'general context at the material time'*".[169] This case, as stated before, concerned two Tunisian nationals trying to reach Italy from Tunisia with a group of other migrants on a boat. Their boat had been intercepted by the Italian Coastguard which escorted them to the island of Lampedusa, where the applicants were issued with refusal-of-entry orders.[170] In this case, the Court pointed out the existence of a humanitarian emergency and more generally the "*major migration crisis that unfolded in 2011 following events related to the 'Arab Spring'*".[171] Lena Riemer points out that the background to the expulsion orders, or the "*general context at the material time*"[172] is very relevant[173]. Indeed, some indicators related to the background of the expulsion may be of relevance to determine the collectiveness of the expulsion: for example, when the authorities in charge did not conduct any form of identification procedure before deciding to expel individuals, it is likely that the expulsion can be found to be collective.[174] Moreover, when there exists a policy of the government aiming at expelling a particular group[175], it is generally an indicator of the existence of a collective expulsion.[176] This has been the case in *Čonka v. Belgium*, where the Court implicitly recognised the existence of such policy by underlining the applicants' argument that "*the Director-General of the Aliens Office to the Minister of the Interior [...] had announced that requests for asylum by Slovakian nationals would be dealt with rapidly in order to send a clear signal to discourage other potential applicants*" and reference to a "*note providing general guidance on overall policy in*

[169] *Khlaifia and Others v. Italy* (2016), § 238

[170] *Khlaifia and Others v. Italy* (2016), Information Note on the Court's case law 202

[171] *Khlaifia and Others v. Italy* (2016), § 178 and 179

[172] *N.D. and N.T. v. Spain* (2020), § 197

[173] See for example *Čonka v. Belgium* (2002), § 59

[174] See for example *Hirsi Jamaa and Others v. Italy* (2012), § 185

[175] Lena Riemer (2020) "*administrative practice aimed at the expulsions of certain groups*"

[176] Lena Riemer (2020)

immigration matters".[177] This has also been the case in *N.D. and N.T. v. Spain*, where the Court referred to the applicants' argument that there has been a "*systemic policy of irregular returns*"[178] or in *Hirsi Jamaa and Others v. Italy*, where the Grand Chamber considered that

> the operation resulting in the transfer of the applicants to Libya was carried out by the Italian authorities with the intention of preventing the irregular migrants disembarking on Italian soil. In that connection, it attaches 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".[179]

Therefore, this analysis shows that aliens, including asylum-seekers, should not be expelled as a result of a general policy. Their case must be examined individually, allowing them to bring forward their asylum claims.

Furthermore, in the case of *Georgia v. Russia*, concerning the expulsion of thousands of Georgians from Russia, the Court held that given the number of expulsion orders issued in a short period of time, it has been "*impossible to carry out a reasonable and objective examination of the particular case of each individual*".[180] Consequently, the more people are excluded in a short period of time, the more likely the expulsion will be found to have been collective.

To conclude, there exist some indicators that help the Court to decide whether the expulsion was collective. Among them are the background of the expulsion, the similarities of the documents issuing the expulsion order, and the number of persons expelled. Each factor individually does not automatically mean that the expulsion has been collective, however, these factors help the Court to determine the existence or not of the collective element of the expulsion.

4.3 Personal Scope of the Prohibition

As seen before, Article 4 of Protocol No. 4 to the Convention states that "*collective expulsion of aliens is prohibited*". An analysis of the interpretation of the term "*aliens*" by the ECtHR, but also with reference to the travaux

[177] *Čonka v. Belgium* (2002), § 56

[178] *N.D. and N.T. v. Spain*, Apps. No. 8675/15 and 8697/15 (ECtHR [Chamber], 2017), § 67

[179] *Hirsi Jamaa and Others v. Italy* (2012), § 181

[180] *Georgia v. Russia (I)* (2014), § 175

préparatoires, will help to understand whether asylum-seekers are meant to enjoy this protection.

In the *travaux préparatoires*, the Committee of Experts on Human Rights decided that

> the term 'aliens' shall here be taken to mean all those who have no actual right to nationality in a State, whether they are 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.[181]

Thus, in its Explanatory Report, the Committee of Experts asserted that the provision of A4P4 includes the collective expulsion of every alien, including asylum-seekers and stateless persons.

This willingness to include every non-national in the protection of this Article has been echoed in several decisions of the European Court or the Commission. The inclusion of every non-national protects by definition people in need of international protection. It thus becomes possible for asylum-seekers to resort to A4P4 to bring their asylum claims. In *M. v. Denmark*[182] for example, a German national from the German Democratic Republic (GDR) invoked the provision while seeking to enter the Federal Republic of Germany through the Danish Embassy. He claimed that he was, together with his 17 friends, collectively expelled, after the Danish ambassador decided to request the GDR police to remove the applicant and his 17 friends from the Embassy.[183] In this case, however, the Commission found that Article 4 of Protocol No. 4 to the Convention did not apply.[184]

In *Hirsi Jamaa and Others v. Italy*, the Court adopted the terms used by the Committee of Experts to affirm that "*the aliens to whom the Article refers are not only those lawfully resident on the territory*."[185] This had already been underlined in the case of *Georgia v. Russia (I)*, where the Grand Chamber asserted that "*with regard to the scope of application of Article 4 of Protocol No. 4, the Court notes that the wording of the provision does not refer to the legal situation of the persons concerned*"[186], hence including asylum-seekers, with regular or irregular status, under the protection. Furthermore, in the judgement of *N.D. and N.T. v. Spain*, a case concerning migrants from sub-Saharan Africa trying to reach Spain through the fences surrounding the city

[181] Collected Edition of the "Travaux Préparatoires" of Protocol No. 4 to the Convention (1976), at 505, § 34

[182] *M. v. Denmark*, App. No. 17392/90, (European Commission of Human Rights, 1992)

[183] See *M. v. Denmark* (1992) and Hanaa Hakiki (2022) "*issue of non-nationals' access to protection at borders*"

[184] *M. v. Denmark* (1992), § 2

[185] *Hirsi Jamaa and Others v. Italy* (2012), § 174

[186] *Georgia v. Russia (I)* (2014), § 168

of Melilla, and who were allegedly in need of international protection[187], the Grand Chamber confirmed that

> 'expulsion' [refers to] 'any forcible removal of an alien from a State's territory, irrespective of the lawfulness of the person's stay, the length of time he or she has spent in the territory, the location in which he or she was apprehended, his or her status as a migrant or an asylum-seeker and his or her conduct when crossing the border.'[188]

Moreover, it is worth noting that in this judgement, the Court refers to EU law and the right to asylum and to international protection, as well as to the Return Directive which governs the return of third-country nationals who are staying illegally on the territory of a member State (of the EU).[189]

In sum, the term "*aliens*" covers every non-national individual, as opposed to nationals of the Member States.[190] Therefore, the protection of Article 4 of Protocol No. 4 is not dependent on the status, way of entry, or reasons for one's presence in a territory.[191] Hence, asylum-seekers are protected by the provision. As a matter of fact, Judge Serghides asserts in its dissenting opinion on the case of *Khlaifia and Others v. Italy* that Article 4 of Protocol No. 4 "*applies mainly to the case of expulsion of persons who are not lawfully resident in the territory of a State, for example, groups of would-be or failed asylum seekers [...]*.[192]

4.4 Nature of the Prohibition

Three questions arise under this section. First, to understand the term "*prohibition*", one must determine whether it is an absolute (or non-derogable) or derogable prohibition. This question will, however, be answered in Chapter V of this thesis, on the differences between the prohibition of collective expulsion under A4P4 and the non-refoulement principle enshrined in Article 3 ECHR. Second, it is useful in the context of asylum-seekers' protection to understand whether the prohibition of collective expulsion is an individual or a collective right. Third, one must understand what is actually protected under this prohibition.

[187] *N.D. and N.T. v. Spain* (2020), § 22 and 29

[188] *N.D. and N.T. v. Spain* (2020), § 185

[189] *N.D. and N.T. v. Spain* (2020), § 182

[190] *See* Council of Europe, *Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain Rights and Freedoms other than those already included in the Convention and in the First Protocol thereto*, ETS 46, 16 September 1963, Article 3, for the protection of nationals against expulsion

[191] Hanaa Hakiki (2022)

[192] *Khlaifia and Others v. Italy* (2016), Dissenting Opinion of Judge Serghides, § 59

4.4.1 An Absolute Protection?

This issue will be determined in Chapter IV of this thesis.

4.4.2 An Individual or a Collective Right?

A question that arises when analysing the provision of Article 4 of Protocol No. 4 regarding the protection of asylum-seekers is to determine who is the right bearer of the guarantees offered. While Lena Riemer argues that it is an "*interrelated individual right*", emphasising that it is neither an individual nor a collective right[193], it is fair to argue that it is mostly an individual right. Indeed, while a group can apply to the ECtHR, as a group, under Article 34 ECHR,[194] the Court still has to evaluate each case on its own merits, ensuring that the expelling State has adequately considered the unique circumstances of each individual involved. Therefore, one sole individual may invoke the violation of A4P4, as long as his or her expulsion has taken place together with other individuals. As summarised by Lena Riemer, "*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*".[195]

4.4.3 The Protection of Procedural Guarantees

4.4.3.1 The Procedural Guarantees Offered to Asylum-Seekers by Article 4 of Protocol No. 4 to the Convention

The prohibition of collective expulsion of aliens provides to every alien a right to bring forward their claims against their expulsion. It protects aliens from arbitrary expulsion. To understand how asylum-seekers may benefit from this protection, one should determine what guarantees it actually protects. As the study of the preparatory work of the Article and the case law show, the term "*collective*" is used as a guarantee to take expulsion measures on the basis of an individual examination. Thus, as underlined by Hanaa Hakiki[196], the qualification of "*collective*" implies a procedural approach. Indeed, in the case of *Khlaifia and Others v. Italy*[197], also cited in *N.D. and N.T. v. Spain*[198], the Grand Chamber explained that

> Article 4 of Protocol No. 4 established a set of procedural conditions aimed at preventing States from being able to remove aliens

[193] Lena Riemer (2020)

[194] Article 34 of the Convention reads as follows: "*The Court may receive applications from any [...] group of individuals claiming to be the victim of a violation [...]*". It has been the case for example in *Khlaifia v. Italy*, App (2016) §1, *Hirsi Jamaa and Others v. Italy (2012*) §1. and *N.D. and N.T. v. Spain* (2020) §1.

[195] Lena Riemer (2020)

[196] Hanaa Hakiki (2022)

[197] *Khlaifia and Others v. Italy* (2016), § 238

[198] *N.D. and N.T. v. Spain* (2020), § 197

> without examining their personal circumstances and therefore without enabling them to put forward their arguments against the measure taken by the relevant authority.

Furthermore, in the case of *Hirsi Jamaa and Others v. Italy*[199], the Court required the "*existence of sufficient guarantees ensuring that the individual circumstances of each of those concerned were actually the subject of a detailed examination*".[200] But what are these guarantees?

According to the Grand Chamber in *Khlaifia and Others v. Italy*, each alien must have a "*genuine and effective possibility of submitting arguments against his or her expulsion*", and those arguments must be "*examined in an appropriate manner by the authorities of the respondent State*".[201] In this case, the Court notes however that the prohibition of collective expulsion does not necessarily guarantee an individual interview.[202]

In the case of *Čonka v. Belgium*, concerning Slovakian nationals of Romani origin who sought asylum in Belgium, the applicants, after receiving decisions refusing them permission to remain in the territory and an order to leave the territory, were sent a notice by the police requiring the four applicants to attend the police station, stating that their attendance was required to enable the files concerning their applications for asylum to be completed. There, they received a document, written in identical terms, stating their removal to Slovakia and their detention for that purpose.[203] The Court found that "*the procedure had not afforded sufficient guarantees demonstrating that the personal circumstances of each of those concerned had been genuinely and individually taken into account*".[204]

Moreover, in the case of *Sultani v. France*, the applicant, an Afghan national who sought asylum in France, alleged a violation of Article 3 of the Convention and Article 4 of Protocol No. 4 to the Convention because of the risks he would run if he were returned to Afghanistan and of the conditions of his deportation.[205] He was arrested together with other Afghan nationals in France, and alleged that the French police conducted selective arrests based on nationality, intending to arrange a collective deportation flight for them.[206] The Court found that "*the applicant's situation was indeed examined individually and provided sufficient grounds for the contested expulsion*"[207], as opposed to the case of *Čonka* for example, and thus found no violation of Article

[199] *Hirsi Jamaa and Others v. Italy* (2012), § 185
[200] See also *Sharifi and Others v. Italy and Greece* (2014), § 214
[201] *Khlaifia and Others v. Italy* (2016), § 248
[202] *Khlaifia and Others v. Italy* (2016), § 248
[203] *Čonka v. Belgium* (2002), §§18-23
[204] *Čonka v. Belgium* (2002), § 63
[205] *Sultani v. France* (2007) § 3
[206] *Sultani v. France* (2007), § 15
[207] *Sultani v. France* (2007) § 83

4 Protocol No. 4. As pointed out by Juan Fernando Durán Alba[208], "*the Court can judge the "quality" of the examination made by the corresponding administrative authorities of the grounds alleged by the alien during the expulsion procedure*"[209]. Further, he affirms that *"the Court can hold there has been no breach when there has been a detailed individual and personalised examination of the applicant's situation including the risks he might run in the event of return to his country of origin*". Thus, the Court in its case law supports the fact that the prohibition of collective expulsion should be read with careful consideration of the prohibition of refoulement.[210]

Finally, the cases of *Hirsi Jamaa and Others v. Italy* and *N.D. and N.T. v. Spain* for example show that failure to conduct an identification process before initiating expulsion procedures inevitably amounts to a breach of Article 4 of Protocol 4.[211] This protection is a first step to affording asylum-seekers the possibility to bring their claim for protection forward. Furthermore, to fulfil their obligations under A4P4, Member States must provide legal assistance and assistance of a translator. This has been stated in *Sharifi v. Italy and Greece*[212] and *Hirsi Jamaa and Others v. Italy* for example, where the Court denounced that "*the personnel aboard the military ships were not trained to conduct individual interviews were assisted by interpreters or legal advisers*".[213]

4.4.3.2 The Relation between the Protection of Article 4 of Protocol No. 4 to the Convention and Article 13 of the European Convention on Human Rights

As explained by Lena Riemer, "*the prohibition of collective expulsion is a due process right [that] contains fair trial rights in expulsion procedures and the right to appeal the expulsion decision (right to an effective remedy)*".[214] Due process rights contain the right to a fair trial as well as the right to an effective remedy. Under the Convention, these rights are protected under Article 6 and Article 13. However, Article 6 has been deemed not to apply to asylum disputes.[215] Indeed, the Court itself stated in the case of *Maaouia v.*

[208] Juan Fernando Durán Alba (2012)

[209] See for example *D.A. and Others v. Poland*, App No. 51246/17 (ECtHR, 2021), § 82

[210] More on that in chapter V

[211] *Hirsi Jamaa and Others v. Italy* (2012), § 185 and *N.D. and N.T. v. Spain* (2020), § 207

[212] *Sharifi and Others v. Italy and Greece* (2014), § 217

[213] *Hirsi Jamaa and Others v. Italy* (2012), § 185. See also *Čonka v. Belgium* (2002), § 62 "it was very difficult for the aliens to contact a lawyer" and *N.D. and N.T. v. Spain* (2017), § 12 "*they had no opportunity to explain their personal circumstances or to be assisted by lawyers, interpreters or medical personnel*" and § 67 "*absence of legal assistance*"

[214] Lena Riemer (2020). See also M Den Heijer, *Reflections on Refoulement and Collective Expulsion in the Hirsi Case* (2013) 25 International Journal of Refugee Law 265

[215] See [1] Emma Borland, *Fair Enough? The UK's Reluctance to Find Article 6 ECHR Engaged in Asylum Disputes and the Transformative Potential of EU Law* in Céline Bauloz and others (eds), *Seeking Asylum in the European Union* (Brill | Nijhoff 2015) and Marcelle

France[216] that Article 6§1 does "*not apply to procedures for the expulsion of aliens*". As a matter of fact, the right to a fair trial is limited to civil and criminal procedures, excluding administrative procedures, among them asylum processes and expulsion procedures.[217]

The Court developed throughout its case law a right to effective remedy directly under Article 4 of Protocol No. 4. Indeed, in *Georgia v. Russia (I)*, the Grand Chamber stated that:

> the finding of a violation of Article 4 of Protocol No. 4 [...] 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 [this Article][218]

This shows the willingness of the Court to include due process rights directly under the provision of Article 4 of Protocol No. 4.

It should be noted nonetheless that, in some cases, the Court did find a violation of Article 13 of the Convention taken in conjunction with Article 4 of Protocol No. 4.[219] In such cases, the Court clarified that "*the notion of an effective remedy under Article 13 requires that the remedy may prevent the execution of measures that are contrary to the Convention and whose effects are potentially irreversible*".[220] Thus, when it comes to the protection offered by A4P4, it is fair to assert that Article 13 may offer supplementary protection to asylum-seekers – compared to "simple" aliens who do not have an arguable complaint under Article 2 or 3 in respect of risks they faced upon their removal[221] – victims of collective expulsion, to have their case examined to be in line with the Convention. It should be noted that the suspensive effect of a remedy is however not necessarily required under A4P4. For example, in *Khlaifia and Others v. Italy*, the Court did not find a violation of Article 13 of the Convention taken together with Article 4 of Protocol No. 4, because the applicants, in this case, did not risk irreversible harm in the form of a violation of Articles 2 or 3 of the Convention.[222] It is interesting here to note the dissenting opinion of Judge Serghides, who advocates for the

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Reneman, *Access to an Effective Remedy in European Asylum* Procedures (2008) 1 Amsterdam LF 65

[216] *Maaouia v. France*, App. No. 39652/98 (ECtHR, 2000), § 36

[217] Lena Riemer (2020)

[218] *Georgia v. Russia (I)* (2014), § 212

[219] See for example *Čonka v. Belgium* (2002), *Hirsi Jamaa and Others v. Italy* (2012), § 207, *M.K. and. Others v. Poland*, App. Nos. 40503/17, 42902/17 and 43643/17 (ECtHR, 2020), § 220, *Sharifi and Others v. Italy and Greece* (2014), § 243 or *D.A. and Others v. Poland*, App. No. 51246/17 (ECtHR, 2021), § 90

[220] *Čonka v. Belgium* (2002), § 79

[221] European Court of Human Rights Registry, *Guide on Article 4 of Protocol No. 4 to the European Convention on Human Rights, Prohibition of collective expulsions of aliens* (2022)

[222] *Khlaifia and Others v. Italy* (2016), § 279

mandatoriness of the conduct of an individual interview and claims that the lack of suspensive effect of a removal decision, pending an appeal, constitutes a violation of Article 13.[223] In sum, it appears that the Court uses Article 4 of Protocol 4 to the Convention in a way that tries to provide better safeguards to people in need of protection than to aliens not threatened under Article 2 or 3 of the Convention.

To conclude, the prohibition of collective expulsion provides for procedural guarantees that prevent arbitrary group expulsions. The analysis of the Court's case law shows that procedural safeguards guaranteed by the prohibition of collective expulsion include the right to an identification procedure, to submit claims and to have these claims examined, the right for legal assistance, and for assistance of a translator. Every individual should be able to bring his or her claims against an expulsion procedure, and among these claims, asylum-seekers may bring their claim for international protection.[224] Finally, A4P4 provides supplementary protection to asylum-seekers when it comes to due process rights, together with Article 13 ECHR. This will also be discussed in Chapter V, when comparing Article 4 of Protocol No. 4 and Article 3 ECHR.

4.5 Evidence

A final part of the section on the definition of the prohibition of collective expulsion of aliens as protected by Article 4 of Protocol No. 4 must mention the question of evidence. However, as there is no clear answer from the Court, this will be a brief section presenting the different approaches. As underlined in the case of *N.D. and N.T. v. Spain*, "*the distribution of the burden of proof and the level of persuasion necessary for reaching a particular conclusion are intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake.*"[225]

4.5.1 Burden of Proof

To determine whether the protection is effective and practical for asylum-seekers, one must determine who has the burden of proof for cases on the prohibition of collective expulsion of aliens. In the case of *N.D. and N.T. v. Spain*, the Court stated that it "*will seek to ascertain whether the applicants have furnished prima facie evidence in support of their version of events. If that is the case, the burden of proof should shift to the Government.*"[226] Hanaa Hakiki however underlined the fact that in the case of *Khlaifia and Others v. Italy*, the Court has developed a two-fold test which entailed that the burden of proof has shifted from the State Parties having to demonstrate that they have ensured adequate safeguards for individual examination to the

[223] *Khlaifia and Others v. Italy* (2016), Partly Dissenting Opinion of Judge Serghides, § 72

[224] Lena Riemer (2020)

[225] *N.D. and N.T. v. Spain* (2020), § 85. See also *Georgia v. Russia (I)* (2014), § 94

[226] *N.D. and N.T. v. Spain* (2020), § 85

applicants having to prove that they did not have any opportunity to contest their expulsion.[227] The Court requires first that there is a possibility to submit arguments, and second that these arguments are examined in an appropriate manner. This has been criticised by Judge Serghides in a dissenting opinion.[228] Lena Riemer denounces an "*ex post view of differentiating regular and irregular migrants*"[229], which seems to be in contradiction with the willingness of the European Court to protect every non-nationals under the provision of A4P4.[230]

The Court has also established that

> where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, [t]he burden of proof is then on the Government to provide a satisfactory and convincing explanation by producing evidence establishing facts which cast doubt on the account of events given by the victim.[231]

In this case, the Court also took up the applicant's argument that when the applicant finds himself or herself in an isolated and inaccessible place, it is for the Government to provide evidence.[232] The Court noted that

> when [...] the respondent Government have exclusive access to information capable of corroborating or refuting the applicant's allegations, any lack of cooperation 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.[233]

This has however been decided in the context of Article 3, and it remains to be seen whether this applies in the context of Article 4 of Protocol No. 4 alone.

4.5.2 Standard of Proof

In his chapter on the prohibition of the collective expulsion of aliens[234], Juan Alba announces the different kinds of evidence that are taken into account by the Court when assessing whether there has been a breach of A4P4. Among them is the consideration of "*whether the proceedings on asylum, initiated beforehand, had not concluded"*. For example, in the case of *Čonka v. Belgium*, the Court denounced that *"the [deportation order] document made no reference to their application for asylum*".[235] Thus, it is important here to note

[227] Hanaa Hakiki (2022)
[228] *Khlaifia and Others v. Italy* (2016), Partly Dissenting Opinion of Judge Serghides, § 12 (b)
[229] Lena Riemer (2020)
[230] See section on the personal scope of the article, 4.2.2.
[231] *Khlaifia and Others v. Italy* (2016), § 205
[232] *Khlaifia and Others v. Italy* (2016), § 204
[233] *Georgia v. Russia (I)* (2014), § 104
[234] Juan Fernando Durán Alba (2012)
[235] *Čonka v. Belgium* (2002), § 61

that in cases related to Article 4 of Protocol No. 4, the fact of seeking asylum may be considered a factor when determining whether a violation occurred.

In the case of *Georgia v. Russia (I)*, the Court asserted that "*in assessing evidence the Court has adopted the standard of proof 'beyond reasonable doubt'*".[236] It continued by stating that "*according to its established case-law, proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumption of fact*".[237] In this case, the Court affirmed that in cases of an alleged administrative practice of collective expulsion, the burden of proof does not exclusively fall on one party.[238] Rather, the Court will analyse all pertinent materials presented to it and will reach its conclusion based on a comprehensive evaluation of all evidence, which includes assessing the conduct of the parties toward the Court in gathering evidence.[239]

In the case of *M.A. v. Switzerland*, concerning an Iranian national who fled to Switzerland to seek asylum based on his political opinion[240], the Court underlined that

> 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.[241]

Thus, the standard of proof in case of risk of ill-treatment can be lowered. Lena Riemer notes that "*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*".[242]

Therefore, the analysis of the different case laws rendered by the Court concerning evidence in collective expulsion cases shows that the determination of the burden and standard of proof usually depends on the concrete circumstances of the case.[243] Reading from the case law concerning Article 3 of the Convention, it appears that the Court is often more lenient regarding the requirements for asylum-seekers and that in cases concerning Article 3 of the Convention, the standard is generally low. A question remains whether the same standard can be applied in cases of Article 4 of Protocol No. 4 when it comes to asylum-seekers.

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[236] *Georgia v. Russia (I)* (2014), § 93
[237] *Georgia v. Russia (I)* (2014), § 94
[238] Lena Riemer (2020)
[239] Lena Riemer (2020). See *Georgia v. Russia (I)* (2014), §§ 93-95
[240] *M.A. v. Switzerland*, App. No. 52589/13 (ECtHR, 2014), § 7
[241] *M.A. v. Switzerland* (2014), § 55
[242] Lena Riemer (2020)
[243] Lena Riemer (2020)

5 Chapter IV – The Evolution of the Prohibition – Towards a More Restrictive Approach for the Protection of Asylum-Seekers?

This chapter aims to understand how the Court, over time, adapted its interpretation of Article 4 of Protocol No. 4 to the context of the time[244], *inter alia*. This will in turn help to understand how asylum-seekers are protected to a bigger or lesser extent by the Article. First, a section will study the extension of the scope of protection of the prohibition of collective expulsion of aliens to expulsions that take place outside the territory of a Member State. The main case studied in this section will be the case of *Hirsi Jamaa and Others v. Italy*.[245] This case concerned Somali and Eritrean citizens who tried to reach Italy from Libya by sea. During their travel, their boats were intercepted by Italian guard-coasts and the applicants returned to Tripoli. The applicants claimed that the Italian authorities did not inform them of their destination and took no steps to identify them.

Second, another section will study the meaning of the individual's "own culpable conduct", cited by the Court, to understand how the Court seems to have evolved towards a more restrictive approach to protection in recent years. For this section, the main case studied will be that of *N.D. and N.T. v. Spain*, which concerns the attempts of hundreds of migrants from sub-Saharan Africa to enter Spanish territory in Melilla, a Spanish enclave on the northern coast of Africa.[246] To attempt to reach the territory, the applicants crossed the border fence, a 13 km long barrier separating Melilla from Morocco aiming at preventing irregular migrants from accessing Spanish territory.[247] The applicants were apprehended by members of the Guardia Civil, who took them back to the other side of the border.[248] The applicants claimed that they did not undergo any identification procedure and had no opportunity to explain their personal circumstances.[249] Subsequently, they managed to enter Spanish territory and were issued expulsion orders. An applicant lodged an asylum application which was dismissed.[250]

As stated by Mariaguilia Guiffré,

[244] See for more information on this Lena Riemer (2020), under the Title "Possible driving forces behind the ECtHRt's interpretation of the prohibition", p. 194

[245] *Hirsi Jamaa and Others v. Italy* (2012)

[246] *N.D. and N.T. v. Spain* (2020), § 15

[247] *N.D. and N.T. v. Spain* (2020), § 16

[248] *N.D. and N.T. v. Spain* (2020), Information Note on the Court's case law 237

[249] *N.D. and N.T. v. Spain* (2020), Information Note on the Court's case law 237

[250] *N.D. and N.T. v. Spain* (2020), Information Note on the Court's case law 237

> there is an increasing consensus among human rights scholars that international human rights law can provide a wider and more generous protection to asylum seekers than international refugee law taken in isolation, even when the violation is likely to occur outside the territory of the host country, including at sea.[251]

This chapter will try to highlight to what extent this "*generous protection to asylum-seekers*" actually operates.

5.1 The Extension of the Scope of Protection - Extraterritoriality

5.1.1 Contextualisation

As seen in Chapter I of this thesis, the Convention must be read as a living instrument in order for the rights protected by it to be effective and practical. Therefore, the interpretation of its provisions must adapt to the context and circumstances of the time. As underlined by Lena Riemer, in the context of collective expulsions, the circumstances became more diverse over time.[252] Particularly two patterns seem to have appeared in the context of migration: first, migrants are increasingly arriving by sea. Indeed, for example, according to the Operational Data Portal of the UNHCR, in 2015, 1,032,48 refugees and migrants arrived in Europe, including 1,015,078[253] by sea, of which 221,721 during the sole month of October.[254] Every year, new arrivals are observed, the last two years of 2022 and 2023 counting respectively 160,070 and 270,180 arrivals.[255] Thus, it is clear that in recent times, migrants, including asylum-seekers, tend to arrive a lot by the sea. Second, Member States of the EU tend to extend their migration policy outside of their territory, and thus State Parties increasingly carry out border control operations outside of their territory.[256] Since the 1990s, the external migration control policies of ECHR Member States have undergone a steady evolution, increasingly emphasising the delegation of control measures to external entities and the extension of such measures beyond national borders.[257] This has been the case for example of the bilateral agreements concluded between Libya and Italy cited in the case of *Hirsi Jamaa and Others v. Italy*.[258] This has been underlined by Violetta Moreno-Lax and Lemberg-Petersen who explain that the extra-territorialisation and externalisation of migration management measures by EU Member States shifted the implementation of migrants' admission decisions

[251] Violeta Moreno-Lax and Efthymios Papastavridis (2017)
[252] Lena Riemer (2020)
[253] Violeta Moreno-Lax and Efthymios Papastavridis (2017)
[254] UNHCR 2015, available at https://data.unhcr.org/en/situations/mediterranean
[255] UNHCR 2022 and 2023, available at https://data.unhcr.org/en/situations/mediterranean
[256] Hanaa Hakiki (2022)
[257] Lena Riemer (2020)
[258] *Hirsi Jamaa and Others v. Italy* (2012), § 13 and § 19

beyond the borders of States.[259] Lena Riemer denounces these "externalising strategies", arguing that it renders it more difficult for courts, such as the ECtHR, to establish jurisdiction.[260] She argues that "*over time, migration control strategies practiced by ECHR Member States have evolved from direct push-backs to 'contactless' and indirect measures of migration control*."[261] Notably, the "migration crisis" of 2015 resulted in a number of States strengthening the controls at their borders.[262] As underlined by Dana Schmalz and Maximilian Pichl, the case of *N.D. and N.T. v. Spain* takes place in a context where the Spanish Guardia Civil has been consistently carrying out "hot returns" of migrants arriving from Morocco. Additionally, Spain and the EU have instituted a systematic approach to externalise border controls to third countries such as Morocco, effectively preventing refugees and migrants from Sub-Saharan states, in particular, from seeking asylum.[263]

The Court itself has acknowledged the challenges that migration management can face. Indeed, first, it has repeatedly acknowledged that the States that form the external borders of the Schengen Area are encountering significant challenges in managing the growing influx of migrants and asylum-seekers.[264] Moreover, it has stated in several judgments that

> a long time has passed since Protocol No. 4 was drafted. Since that time, migratory flows in Europe have continued to intensify, with increasing use being made of the sea, 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.[265]

Therefore, considering these new challenges, one must wonder whether the Court has adapted its interpretation to effectively protect asylum-seekers under the right contained in Article 4 of Protocol No. 4 prohibiting collective

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[259] Moreno-Lax, Violetta and Lemberg-Pedersen, Martin *Border induced-displacement: The ethical and legal implications of distance-creation through externalization* Questions of International Law, 2019, Vol. 56 and Lena Riemer (2020)

[260] Lena Riemer (2020)

[261] Lena Riemer (2020)

[262] Stefania Panebianco (2016) *The Mediterranean migration crisis: border control versus humanitarian approaches*, Global Affairs, 2:4, 441-445

[263] Pichl, Maximilian; Schmalz, Dana: *"Unlawful" may not mean rightless.: The shocking ECtHR Grand Chamber judgment in case N.D. and N.T., VerfBlog,* 2020/2/14, https://verfassungsblog.de/unlawful-may-not-mean-rightless/

[264] See for example *N.D. and N.T. v. Spain* (2020), § 106 ; *M.S.S. v. Belgium and Greece* (2011), § 223 ; or *Hirsi Jamaa and Others v. Italy* (2012), § 122

[265] *Hirsi Jamaa and Others v. Italy* (2012), § 176. See also *Khlaifia and Others v. Italy*, (2016), § 241 and *N.D. and N.T. v. Spain* (2020), § 169

expulsion. It is consequently important to determine the jurisdiction of Member States when it comes to this Article.

5.1.2 Questions of Jurisdiction

5.1.2.1 Territorial Jurisdiction

Article 1 of the European Convention on Human Rights states that "*[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention*." Thus, the protection of the prohibition of collective expulsion as enshrined under A4P4 applies to aliens who are present within the jurisdiction of a Member State. Consequently, one must determine what is the meaning of "*within the jurisdiction*" to understand who may be protected by the provision.

It should be noted that the question of jurisdiction is an important one when it comes to the protection of asylum-seekers. Indeed, the fundamental rights and freedoms protected by the Convention protect not only the nationals of the Member States but also everyone, even non-Europeans, who are within their jurisdiction.[266] Therefore, the finding of the jurisdiction of a State will considerably impact asylum-seekers in need of protection. Moreover, the case of *Al Saadoon and Mufdhi v. the UK* clarifies that

> a Contracting Party is responsible under Article 1 of the Convention for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations. Article 1 makes no distinction as to the type of rule or measure concerned and does not exclude any part of a Contracting Party's "jurisdiction" from scrutiny under the Convention.[267]

Thus, it confers strong protection to everyone within the jurisdiction.

The Court has repeatedly affirmed the territoriality principle of jurisdiction. For example, in *Bankovic and Others v. Belgium* and Others, it affirms that "*as to the "ordinary meaning" of the relevant term in Article 1 of the Convention, the Court is satisfied that, from the standpoint of public international law, the jurisdictional competence of a State is primarily territorial*".[268]

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[266] Council of Europe, ECtHR, *The European Convention on Human Rights, A living instrument*, (September 2022)

[267] *Al-Saadoon and Mufdhi v. the United Kingdom*, App. No. 61498/08 (ECtHR, 2010), § 128

[268] *Banković and Others v. Belgium and Others*, App. No. 52207/99 (ECtHR [GC], 2001) § 59. See also *Assanidzé v. Georgia*, App. No. 71503/01 (ECtHR [GC], 2004); *Hirsi Jamaa and Others v. Italy* (2012), § 71 "*the jurisdiction of a State, within the meaning of Article 1,*

5.1.2.2 Extraterritorial Jurisdiction

Over time, the Court developed the concept of an extraterritorial jurisdiction. Already in the case of *Cyprus v. Turkey*, the Commission on Human Rights declared that

> it is clear from the language, in particular [from] the French text [relevant de leur juridiction], 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[269].

In the case of *Medvedyev and Others v. France*, the Grand Chamber assured that "*the special nature of the maritime environment [...] cannot justify an area outside of law*".[270] In 2011, the Grand Chamber mentioned the Divisional Court's argument that "*essentially, jurisdiction under Article 1 of the Convention was territorial, although there were exceptions. One exception applied where a State Party had effective control of an area outside its own territory*".[271] Therefore, the Court recognises extraterritorial jurisdiction in cases of exceptional circumstances. In *Banković and Others v. Belgium and Others*, it stated that "*Article 1 of the Convention must be considered to reflect this ordinary and essentially territorial notion of jurisdiction, other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case*".[272] Emiliya Bratanova van Harten underlines that these "*exceptional circumstances*" include "*situations where a State Party is exercising effective control over a certain area or authority or de facto control over a person*".[273] For example, in the maritime context, the Court found in *Medvedyev and Others v. France* that France had exercised *"full and exclusive control over the Winner and its crew, at least de facto, from the time of its interception, in a continuous and uninterrupted manner until they were tried in France"* and thus that *"the applicants were effectively within France's jurisdiction for the purposes of Article 1 of the Convention"*.[274]

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is essentially territorial"; or *H.F. and Others v. France*, Apps. No. 24384 (ECtHR [GC], 2022), § 185 "*a State's jurisdictional competence is primarily territorial*"

[269] *Cyprus v. Turkey*, App. Nos. 6780/74 and 6950/75 (European Commission on Human Rights, 1975), § 8

[270] *Medvedyev and Others v. France*, App. No. 3394/03 (ECtHR [GC], 2010), § 81

[271] *Al-Skeini and Others v. the United Kingdom*, App. No. 55721/07 (ECtHR [GC], 2011), § 74

[272] *Banković and Others v. Belgium and Others*, App. No. 52207/99 (ECtHR [GC], 2001), § 61. See also §§ 67 and 71, or *Catan and Others v. République de Moldova and Russia*, App. Nos. 43370/04, 8252/05 and 18454/06 (ECtHR [GC], 2012), § 104

[273] Emiliya Bratanova Van Harten, *Complementary Pathways as "Genuine and Effective Access to Means of Legal Entry" in the Reasoning of the European Court of Human Rights: Legal and Practical Implications* (2023) 25 European Journal of Migration and Law 200.

[274] *Medvedyev and Others v. France*, App. No. 3394/03 (ECtHR [GC], 2010), § 67

In sum, the question to be asked is whether the particular circumstances of cases coming under Article 4 of Protocol No. 4 to the Convention justify an exception to the territorial notion of jurisdiction and therefore, imply an extraterritorial jurisdiction. Emiliya Bratanova van Harten argues that in these cases, "*the jurisdictional link is […] established with an individual who has managed to reach the jurisdiction of a State Party by irregular means*"[275], which, as it will be shown below, might prevent the individual from being protected under the provision of A4P4.[276]

5.1.3 The Extraterritorial Applicability of Article 4 of Protocol No. 4

5.1.3.1 The Extraterritorial Applicability of Article 4 of Protocol No. 4 to the Convention in the High Seas

It is in the case of *Hirsi Jamaa and Others v. Italy* that the Strasbourg Court first extended the jurisdiction of A4P4 outside of the territory of a Member State. The Court used the wording of other articles of the Convention – such as Article 3 of Protocol 4 or Article 1 of Protocol 7 which explicitly refers to the notion of territory – to come to the conclusion that the wording of Article 4 does not explicitly limit its application to territorial boundaries.[277] Once again, the Court also considered the travaux préparatoires of the Article to assure that it does not preclude extraterritorial application of Article 4 of Protocol No. 4.[278] It further argued that contemporary migration patterns, particularly increasing sea migrations, necessitate such an interpretation to ensure the protection of individuals' rights, even when they are intercepted or pushed back at sea and once again referred to the principle of effectiveness.[279] The Court concluded that

> the removal of aliens carried out in the context of interceptions on the high seas by the authorities of a State in the exercise of their sovereign authority, the effect of which is to prevent migrants from reaching the borders of the State or even to push them back to another State, constitutes an exercise of jurisdiction within the meaning of Article 1 of the Convention which engages the responsibility of the State in question under Article 4 of Protocol No. 4.[280]

The Court reiterated the law governing vessels on the high seas to assert the extraterritorial exercise of the jurisdiction of a State "*in cases concerning acts carried out on board vessels flying [that] State's flag".* It reiterated that *"where there is control over another, this is de jure control exercised by the*

[275] Emilya Bratanova Van Harten (2023)
[276] *See section 5.2.*
[277] *Hirsi Jamaa and Others v. Italy* (2012), § 173
[278] *Hirsi Jamaa and Others v. Italy* (2012), § 174
[279] *Hirsi Jamaa and Others v. Italy* (2012), § 177
[280] *Hirsi Jamaa and Others v. Italy* (2012), § 180

State in question over the individuals concerned"[281], it stated that in this case, "*the applicants were under the continuous and exclusive de jure and de facto control of the Italian authorities*"[282] and therefore, decided that the "*events giving rise to the alleged violations fall within Italy's "jurisdiction" within the meaning of Article 1 of the Convention*."[283] Likewise, in the case of *Sharifi and Others v. Italy and Greece*, the Court decided that the Italian border authorities' practice of automatically returning individuals arriving by boat at ports in the Adriatic Sea, in this case, the port of Ancona, to Greece[284] was a "*collective and indiscriminate expulsion*", thereby violating Article 4 of Protocol No. 4.[285] As underlined by Maarten Den Heijer, the case of *Hirsi Jamaa and Others v. Italy* conveys "*an acknowledgement that transfers at sea must always be based on individual decisions*".[286] Hanaa Hakiki underlines the interpretative principles of good faith and effectiveness that have driven the Court to understand the term "*expulsion*" to include an act of driving away from the high sea, in the context mentioned in part 5.1.1. of this thesis. In the case of *Hirsi Jamaa and Others v. Italy*, the Court affirmed the

> importance of guaranteeing anyone subject to a removal measure, the consequences of which are potentially irreversible, the right to obtain sufficient information to enable them to gain effective access to the relevant procedures [including asylum procedures] and to substantiate their complaints.[287]

Thus, the case of *Hirsi Jamaa and Others v. Italy* affirms the duty of States to provide "boat refugees" and migrants with comprehensive information about their rights while at sea, guarantee access to asylum procedures and to effective remedies, and evaluate the safety of the third country to which they may be returned.[288] The Court has recognised the extraterritorial jurisdiction of Member States when it comes to migrants at sea. This constitutes a substantial protection for asylum-seekers trying to reach a safe territory by sea. It is important to recall in this context the clear link that exists between A4P4 to the Convention and Article 3 ECHR, as will be discussed in the last chapter of this thesis.

5.1.3.2 The Extraterritorial Applicability of Article 4 of Protocol No. 4 to the Convention at Land Borders

In the case of *N.D. and N.T. v. Spain*, the Court noted that a State cannot unilaterally exclude, alter, or limit its territorial jurisdiction, even with the

[281] *Hirsi Jamaa and Others v. Italy* (2012), § 77
[282] *Hirsi Jamaa and Others v. Italy* (2012), § 81
[283] *Hirsi Jamaa and Others v. Italy* (2012), § 82
[284] *Sharifi and Others v. Italy and Greece* (2014), Information Note on the Court's case law and Violeta Moreno-Lax and Efthymios Papastavridis (2017)
[285] *Sharifi and Others v. Italy and Greece* (2014), § 225
[286] Maarten Den Heijer (2013)
[287] *Hirsi Jamaa and Others v. Italy* (2012), § 204
[288] Violeta Moreno-Lax and Efthymios Papastavridis (2017)

presence of a fence away from the border[289] to assert that "*the events giving rise to the alleged violations fall within Spain's "jurisdiction" within the meaning of Article 1 of the Convention*."[290] In this case, the Court addressed the question of the applicability of A4P4 to the immediate and forcible return of migrants attempting unauthorised border crossings *en masse*.[291] The Court stated that there was

> no reason to adopt a different interpretation [compared to applicants attempting to enter a State's territory by sea] of the term "*expulsion*" with regard to forcible removals from a State's territory in the context of an attempt to cross a national border by land.[292]

In this case, the Court (Chamber) also emphasised that

> if interceptions on the high seas came within the ambit of Article 4 of Protocol No. 4 [as it has found before], the same must also apply to the refusal of entry to the national territory in respect of persons arriving in Spain illegally.[293]

Recently, the ECtHR decided on several cases concerning the expulsions of persons seeking asylum at land border crossings.[294] In the case of *M.K. and Others v. Poland*, the Court decided that the refusal of border guards to receive asylum applications and summary removal to a third country – in this case, Belarus, with a risk of refoulement to an ill-treatment in the country, constituted a violation of Article 4 of Protocol No. 4.[295] Moreover, in the case of *Shahzad v. Hungary*, the Court found a violation of Article 4 of Protocol No. 4[296] concerning the removal of the applicant, a Pakistani citizen, without an individual decision, after irregular entry. In this case, the applicant had entered Hungary irregularly by cutting a hole in the border fence between Hungary and Serbia.[297] Furthermore, in the case of *D.A. and Others v. Poland*, the Court found a violation of Article 4 of Protocol No. 4 concerning Syrian nationals crossing the border between Belarus and Poland allegedly victims of a general policy of the Polish authorities aiming at reducing the number of asylum applications in Poland.[298] Therefore, the extension of the jurisdiction by the Court applies also to land borders.

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[289] *N.D. and N.T. v. Spain* (2020), § 109
[290] *N.D. and N.T. v. Spain* (2020), § 111
[291] *N.D. and N.T. v. Spain* (2020), § 166
[292] *N.D. and N.T. v. Spain* (2020), § 187
[293] *N.D. and N.T. v. Spain* (2020), § 124
[294] See for example *Asady and Others v. Slovakia*, App. No. 24917/15 (ECtHR, 2020) (no violation of Article 4 of Protocol No. 4)
[295] *M.K. and Others v. Poland*, App. Nos. 40503/17, 42902/17, 43643/17 (ECtHR, 2020) § 211
[296] *Shahzad v. Hungary*, App. No. 12625/17 (ECtHR, 2021), § 68
[297] *Shahzad v. Hungary* (2021), § 8
[298] *D.A. and. Others v. Poland*, App. No. 51246/17 (ECtHR, 2021), § 1 and 5

Thus, since the *Hirsi Jamaa and Others v. Italy* case, it appears that asylum-seekers may claim asylum even when they are not on the territory of a Member State. This seems to therefore increase their protection. Indeed, Mariagiulia Giuffré's analysis suggests that the Grand Chamber aimed to enhance and clarify the obligations of States regarding the protection of asylum-seekers beyond their own territories.[299] It is now time to analyse the recent case law of the Court to determine whether this protection still applies today.

5.2 A Restriction of the Protection? The Evolution of the Individual's Culpable Conduct Exclusionary Clause

In its case law concerning the application of A4P4, the Court has come to the conclusion that when a reasonable and objective examination of an individual was rendered impossible by the applicant's own conduct, the expulsion could not be deemed to be collective.[300] However, over time, the Court extended this exception to the way migrants are entering the territory of a State, thus restricting the protection of the prohibition of collective expulsion only to legal migrants.

5.2.1 The "original" "own culpable conduct" cases

In the case of *Berisha and Halji v. The former Yugoslav Republic of Macedonia*, the Court declared that the fact that the applicants had arrived together in the former Yugoslav Republic of Macedonia, lodged their asylum request jointly, produced the same evidence, and submitted joint appeals justified the fact that they were provided with the same decision. The Court indeed stated that "*the fact that the national authorities issued a single decision for both the applicants, as spouses, was a consequence of their own conduct*".[301] In 2011, the Court explained that "*the absence of any individual deportation decision against the applicants can in no way be attributed to the respondent government*", thus deciding that A4P4 could not be applicable in a situation where the applicants did not comply with the police's requests to show their identity documents.[302] The Court has confirmed that "*there will be 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 an applicant's own culpable conduct*".[303] In these cases, the "culpable conduct" of the individual is directly connected to his or her conduct during the removal process. However, the Court has extended this line of reasoning to a 'culpable conduct' in the way

[299] Mariagiulia Giuffré in Violeta Moreno-Lax and Efthymios Papastavridis (2017)

[300] See for example *Hirsi Jamaa and Others v. Italy* (2012), § 184

[301] *Dzavit Berisha and Baljie Haljiti v. the former Yugoslav Republic of Macedonia*, App. No. 18670/03 (ECtHR, 2005), § 2 under "THE LAW"

[302] *Theodoros Drtisas v. Italy*, App. No. 2344/02 (ECtHR, 2011), § 7

[303] See for example *M.A. v. Cyprus*, App. No. 41872 (ECtHR, 2013), § 247 ; *Khlaifia and Others v. Italy* (2016), § 240 ; *Hirsi Jamaa and Others v. Italy* (2012), § 184

migrants are entering a territory, thus rendering the protection of irregular migrants in need of protection compromised.

5.2.2 Towards a More Restrictive Approach to the Protection of the Prohibition of Collective Expulsion

In the case of *N.D. and N.T. v. Spain*, the Court took up the "own culpable conduct" exclusionary clause to the prohibition of collective expulsion of aliens to assert that the way migrants crossed the border affected the outcome of the decision regarding the collective nature of an expulsion. Indeed, according to paragraph 200 of the case *N.D. and N.T v. Spain*, "*the applicant's own conduct is a relevant factor in assessing the protection to be afforded under Article 4 of Protocol No. 4*".[304] The Court refers to the "*lack of active cooperation with the available procedure for conducting an individual examination of the applicants' circumstances*"[305] and asserts that in

> situations in which the conduct of persons who cross a land border in an unauthorised manner, deliberately take advantage of their large number and use force, is such as to create a clearly disruptive situation which is difficult to control and endangers public safety[306],

there is no violation of Article 4 of Protocol No. 4. This exception to the application of A4P4 has a limit: the respondent State must have provided, in the circumstances of the particular case, "*genuine and effective access to means of legal entry, in particular border procedures*".[307] The Court thus decided that when an alien enters a territory through a land border in an irregular, forceful, organised, and *en masse* manner, and constitutes a risk for security, he or she loses his or her right to the prohibition of collective expulsion as enshrined in Article 4 of Protocol No. 4 to the Convention.[308] Therefore, it appears that individuals enjoy the protection of A4P4 only in cases where there has been no alternative to an irregular entry. However, this condition can never be truly verified, given that individuals subjected to push-backs lack the opportunity to present their case in the absence of an individualised procedure.[309] Indeed, in this case, none of the requirements set forward in Chapter III of this thesis has been respected by the Spanish authorities but it still did not lead to the finding of a violation of A4P4. The applicants were expelled without having the opportunity to explain their personal circumstances.[310] Therefore, as underlined by the Spanish lawyer Carlos Oviedo

[304] *N.D. and N.T. v. Spain* (2020)
[305] *N.D. and N.T. v. Spain* (2020) § 200
[306] *N.D. and N.T. v. Spain* (2020) § 201
[307] *N.D. and N.T. v. Spain* (2020) § 201
[308] Lena Riemer (2020)
[309] Pichl, Maximilian; Schmalz, Dana (2020)
[310] *N.D. and N.T. v. Spain* (2020), § 25

Moreno, the question of whether the migrants were escaping from a particular threat, or indeed if they needed protection, did not matter in the decision.[311] In a 2021 publication, Hanaa Hakiki summarised the conditions of applicability of this "own culpable conduct exception".[312] In any case, this decision appears like the starting point of a slippery slope towards a less comprehensive protection of asylum-seekers crossing European borders irregularly to seek protection.

This reasoning of the Court has been confirmed for example in the case of *A.A. and Others v. North Macedonia*. In this case, migrants coming from Greece crossed the border to enter the territory of North Macedonia in an unauthorised manner.[313] The migrants had been removed from the respondent State without being subjected to any identification procedure or examination of their personal situation by the authorities of North Macedonia. The Court noted that *"this should lead to the conclusion that their expulsion was of a collective nature, unless the lack of examination of their situation could be attributed to their own conduct*"[314], by notably referring to the case of *N.D. and N.T. v. Spain*. Consequently, the Court found no violation esteeming that it had been the "*applicants who placed themselves in jeopardy by participating in the illegal entry onto Macedonian territory [...], taking advantage of the group's large numbers*".[315] Therefore, the Court seems to now follow this reasoning in cases concerning Article 4 of Protocol No. 4.[316]

It should be noted that before the judgement of the Grand Chamber, a Chamber of the Court actually found a violation of A4P4.[317] Also, in the case of *Sharifi and Others v. Italy and Greece*, the Court noted in paragraph 212 that

> the Court does not consider it necessary to establish [...] whether the applicants were expelled after entering Italian territory or whether they were returned before they could do so. [...] The same can only be said of the refusal of admission to the national territory to which, according to the Italian Government's argument, persons who have arrived in Italy illegally are legally subject.[318]

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[311] Oviedo Moreno, Carlos *A Painful Slap from the ECtHR and an Urgent Opportunity for Spain, VerfBlog*, 2020/2/14, https://verfassungsblog.de/a-painful-slap-from-the-ecthr-and-an-urgent-opportunity-for-spain/

[312] See Hanaa Hakiki (2022), p 144 for an analysis more in depth. See also Bratanova Van Harten (2023)

[313] *A.A. and Others v. North Macedonia*, App. Nos. 55798/16 and 4 others (ECtHR, 2022), § 9

[314] *A.A. and Others v. North Macedonia* (2022), § 113

[315] *A.A. and Others v. North Macedonia* (2022), § 123

[316] In some similar cases, the Court did not however decide the case on the merits, see for example *Doumbe Nnabuchi v. Spain*, App. No. 19420/15 (ECtHR, 2012), because of a lack of evidence

[317] *N.D. and N.T. v. Spain* (2017), § 108

[318] *Sharifi and Others v. Italy and Greece* (2014), § 212, translated from French

Thus, the fact that an individual had entered a Member State's territory irregularly did not hinder the protection of A4P4.[319] In the case of *Shahzad v. Hungary*, the Court also mentioned the irregular way of entry of the migrants[320], but still found a violation of Article 4 of Protocol No. 4.[321] Therefore, not every migrant crossing a border illegally will be refused the protection of the prohibition of collective expulsion.

As Dana Schmalz and Maximilian Pichl argue in their article *"Unlawful" may not mean rightless*, the argumentation of the Court in *N.D. and N.T. v. Spain* is inconsistent in that it is based upon "well-established case-law"[322], while the case law mentioned used the term "own conduct" in a totally other way. Indeed, the mentioned case law referred for example to the "*refusal to show identity papers to the police*", as shown earlier in this section. This is obviously not the same kind of conduct that is referred to. While one touches upon the "*duty of cooperation*" of the concerned persons to conduct an individual assessment, the other relates directly to the way in which the migrants are entering or trying to enter the territory.[323] Following the judgement of *N.D. and N.T. v. Spain*, the ECtHR decision received a lot of criticism, notably from legal scholars. This will be discussed in the following section.

5.2.3 The Criticisms

The judgement of *N.D. and N.T. v. Spain* received strong criticisms.

First, there is a strong criticism concerning the lack of individual assessment in the case. As underlined by Hanaa Hakiki, Judge Pinto de Albuquerque denounced in a later judgement that "*when reading the judgement, one gets the impression that the principle of individual responsibility has been completely obfuscated*", explaining that "*the specific intentions of the applicants to disrupt and endanger public safety were never established and no evidence was ever put forward regarding any concrete violent acts committed by them or any other person crossing that day*".[324] The Grand Chamber seems not to have given an important weight either to the finding of the Chamber that there existed an administrative practice of 'hot returns' aiming at the expulsion of all irregular migrants[325], which is contrary to its willingness to consider the background of the expulsion in collective expulsion cases.[326]

Moreover, in the judgement, the Court decided that the own culpable conduct approach applied because the applicants could have genuine and effective

[319] Lena Riemer (2020)
[320] *Shazad v. Hungary*, App. No. 12625/17 (ECtHR, 2021), § 61
[321] *Shazad v. Hungary* (2021), § 79
[322] *N.D. and N.T. v. Spain* (2020) § 200
[323] Pichl, Maximilian; Schmalz, Dana (2020)
[324] *Georgia v. Russia (II)*, App. No. 38263/08 (ECtHR [GC], 2021), Partly dissenting opinion of Judge Pinto de Albuquerque, § 20
[325] Lena Riemer (2020)
[326] See chapter III

access to means of legal entry, pointing out the possibility of applying for international protection at border crossing points and applying for visas at embassies and consular representations.[327] However, in its analysis of the terms 'genuine and effective', Hanaa Hakiki uses the case law of the Court that relates to other articles to underline that there is a need for "*a realistic opportunity*" and "*a concrete and effective way*", by referring to the case of *R.D. v. Poland*[328] for example. She observes that the terms "genuine and effective" imply a "*proactive position of the State*" which entails a positive obligation.[329] Therefore, one question to ask concerning the protection of asylum seekers by A4P4 is whether the applicants indeed had "genuine and effective" access to means of legal entry, in line with the jurisprudence of the Court. Unfortunately, the answer seems to be no.[330] Lena Riemer argues that

> 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.[331]

She further argues that the decision of the Grand Chamber seems incompatible with the object and purpose of Article 4 of Protocol No. 4, by affirming that

> 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 Article 4 of Protocol No. 4.[332]

Dana Schmalz and Maximilian Pichl denounce the decision *of N.D. and N.T. v. Spain* by stating that it "*distorts this clear guarantee to exclude apparently "unlawful" migrants from [the protection of Article 4 of Protocol No. 4]*".[333] Moreover, they argue that the Court goes against its principles of interpretation by rendering the rights protected merely illusory at the European external borders.[334] Hanaa Hakiki denounces the fact that "*the judgement as it stands is an invitation to push refugees and migrants back*". He argues that "*the*

[327] *N.D. and N.T. v. Spain* (2020), § 212

[328] *R.D. v. Poland*, App. No. 29692/96 and 34612/97 (ECtHR, 2001), § 51, concerning Article 6 ECHR

[329] Hanaa Hakiki (2022)

[330] See for example Oviedo Moreno, Carlos: *A Painful Slap from the ECtHR and an Urgent Opportunity for Spain, VerfBlog*, 2020/2/14, https://verfassungsblog.de/a-painful-slap-from-the-ecthr-and-an-urgent-opportunity-for-spain/, "*the argumentation that people attempting to illegally cross the border have other options to reach Spain and effectively access an international protection or migration procedure is a statement as incoherent as it is false*"

[331] Lena Riemer (2020)

[332] Lena Riemer (2020)

[333] Pichl, Maximilian; Schmalz, Dana (2020)

[334] Pichl, Maximilian; Schmalz, Dana (2020) and *N.D. and N.T. v. Spain* (2020)

jurisprudence of the Court is now no longer in line with international human rights law",[335] and Dana Schmalz and Maximilian Pichl conclude that "*the Court lost credibility as an effective defender of human rights in times of crisis*".[336] Anna Lübbe argues that the Court has introduced "*a protection worthiness test for the purpose of more effective border protection*".[337] Indeed, the decision, in turn, prevents asylum-seekers from claiming protection and rights, as has been seen in the enclave of Melilla.[338]

A further question, which is linked to Chapter II of this thesis on the margin of appreciation granted to Member States, is to what extent political considerations may play a role in the decisions of the ECtHR. While this thesis focuses on the legal aspect of the interpretation of A4P4, it is important to note that these considerations may influence the outcome of a judgement. For example, Dana Schmalz and Maximilian Pichl criticise the decision of *N.D. and N.T. v. Spain*: "*the Court hereby engages the highly problematic narrative of allegedly violent migrants who are planning to invade the EU by large numbers - a narrative we hear from the most authoritarian forces in Europe*".[339] Hanaa Hakiki denounces a "*politically conservative approach*".[340] Furthermore, Dana Schmalz and Maximilian Pichl argue that

> this judgement can hardly be read other than the Court making enormous concessions to the pressure by European states which since the summer of 2015 in the majority pursue a policy of expanding the externalisation of migration control and carrying out ever more repressive forms of push-backs at their land borders.[341]

Indeed, in their study on backlash and judicial restraint, Øyvind Stiansen and Erik Voeten argue that since the 2000's, even consolidated democracies began to question the legitimacy of the Strasbourg Court[342] and show "*a linkage between Member States' resistance against the ECtHR since around 2010 and its jurisprudence in migration-related cases*".[343] It is also interesting noting Lena Riemer's argument that "*the Court's interpretation of A4P4 developed […] dependent on the composition of judges*".[344]

Therefore, while it appears that until 2017, the Court has rather extended the scope of the protection of the prohibition of collective expulsion of aliens,

[335] Hanaa Hakiki (2022)

[336] Pichl, Maximilian; Schmalz, Dana (2020)

[337] Lübbe, Anna: *The Elephant in the Room: Effective Guarantee of Non-Refoulement after ECtHR N.D. and N.T.?, VerfBlog,* 2020/2/19, https://verfassungsblog.de/the-elephant-in-the-room/

[338] Pichl, Maximilian; Schmalz, Dana (2020)

[339] Pichl, Maximilian; Schmalz, Dana (2020)

[340] Hanaa Hakiki (2022)

[341] Pichl, Maximilian; Schmalz, Dana (2020)

[342] Stiansen, Øyvind and Voeten, Erik, *Backlash and Judicial Restraint: Evidence From the European Court of Human Rights* (2020). International Studies Quarterly

[343] Lena Riemer (2020)

[344] Lena Riemer (2020)

recently, it has rendered decisions that risk endangering the protection of certain types of migrants, namely irregular migrants. Indeed, while the Court has extended the scope of jurisdiction to extraterritorial jurisdiction, which provides more protection for asylum-seekers at sea or outside the territory of a Member State, it seems to have restricted the scope of persons protected under it, which seems contrary to the purpose of Article 4 and endangers the protection of people in need of international protection that are irregular migrants. It should be noted that in decisions rendered after *N.D. and N.T. v. Spain*, the Court did find violations of Article 4. of Protocol No. 4, except for the *A.A. and Others v. North Macedonia*, cited earlier, and *Asady and Others v. Slovakia*, but this case did not concern the same facts.[345] However, these decisions did not concern the same facts or context.[346] Thus, it is difficult to assert whether the Court has decided to keep its reasoning or to go back to a larger protection of all migrants.

As underlined by Guilia Ciliberto, "*the substantive guarantees under Articles 2 and 3 of the Convention can be complied with solely if the procedural safeguard under Article 4 Protocol 4 is fully respected*"[347]. Therefore, the restriction of the protection offered by Article 4 of Protocol No. 4 to the Convention may in turn weaken the effective protection of asylum-seekers through the principle of non-refoulement. An analysis of the relationship between the non-refoulement principle, a major principle in the protection of asylum-seekers, and the prohibition of collective expulsion will be done in the next Chapter.

[345] *Asady and Others v. Slovakia*, App. No. 24917/15 (ECtHR, 2020), § 62 "*although the applicants had crossed the Slovak border in an unauthorised manner, they were intercepted in the territory of Slovakia and the State provided them access to means of legal entry through the appropriate border procedure*"

[346] See for example *A.B. and Others v. Poland*, App. No. 42907/17 (ECtHR, 2022) or *M.H. and Others v. Croatia*, App. No. 43115/18 (ECtHR, 2021)

[347] Giulia Ciliberto, *A Brand-New Exclusionary Clause to the Prohibition of Collective Expulsion of Aliens: The Applicant's Own Conduct in* N.D. and N.T. v Spain (2021) 21 Human Rights Law Review 203.

6 Chapter V – Prohibition of Collective Expulsion and Non-Refoulement: Do We Need Both?

The prohibition of refoulement is one of the first protections guaranteed to asylum-seekers that the ECtHR developed throughout its case law.[348] It prohibits the return of an individual to a country where he or she is at risk of receiving inhuman or degrading treatment. Indeed, the Court decided in *Soering v. the United Kingdom*[349] that Article 3 of the ECHR contained protection – in this case, against extradition – in case the individual in question would face in the receiving State a real risk of exposure to inhuman or degrading treatment or punishment. The non-refoulement principle under the European Convention of Human Rights is greater than the protection offered under the 1951 Refugee Convention[350], as it is absolute and protects from torture, inhumane and degrading treatment or punishment[351], and not only from persecution.[352] The case of *Sharifi and Others v. Italy* and Greece provides for a clear definition of the non-refoulement principle under the ECHR in paragraph 52.[353]

As underlined by Lena Riemer, "*the prohibition of collective expulsion and the non-refoulement principle form the basis of protection of 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*".[354] This chapter aims to determine what are the similarities and differences between the protection of asylum seekers under Article 3 of the Convention and their protection under the prohibition of collective expulsion guaranteed under A4P4. Dana Schmalz and Maximilian Pichl argue that *"[Article 4 of Protocol No. 4] is a procedural guarantee that backs the principle of non-refoulement*".[355] The first section of this chapter will underline the similarities between the two provisions, the second chapter will analyse the differences between them, and the third section will explore the link that bonds them.

[348] Jelena Ristik, *The Right to Asylum and the Principle of Non- Refoulement Under the European Convention on Human Rights* (2017) 13 European Scientific Journal, ESJ 108

[349] *Soering v. the United Kingdom*, App No. 14038/88 (ECtHR, 1989), § 88

[350] UN General Assembly, *Convention Relating to the Status of Refugees*, United Nations, Treaty Series, vol. 189, p. 137, 28 July 1951, Article 33

[351] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, ETS 5, 4 November 1950, Article 3

[352] UN General Assembly, *Convention Relating to the Status of Refugees*, United Nations, Treaty Series, vol. 189, p. 137, 28 July 1951, Article 33

[353] *Sharifi and Others v. Italy and Greece*, App. No. 16643/09 (ECtHR, 2014), § 52

[354] Lena Riemer (2020)

[355] Pichl, Maximilian; Schmalz, Dana (2020)

6.1 The Similarities of the Provisions

First of all, it is clear that both provisions aim at protecting, *inter alia*, asylum-seekers and refugees, although not in the same way and through the same protection. As shown above[356], both provisions protect asylum-seekers on the territory of Member States, but also extraterritorially when the jurisdictional threshold is passed.[357] Moreover, they both provide for procedural safeguards, although once again, these are not the same.[358] Furthermore, as underlined by Bojana Čučković, the two provisions (Article 3 ECHR and A4P4) require the Member State in question to evaluate the situation of the individual, Article 3 to ensure that there is no risk of torture or inhuman or degrading treatment, and A4P4 to guarantee an individualised examination.[359] Finally, it appears that the Court has found that both provisions had the same understanding of the term "*expulsion*". Indeed, in the case of *N.D. and N.T. v. Spain*, the Court underlines that

> Article 3 of the Convention and Article 4 of Protocol No. 4 have been found to apply to any situation coming within 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.[360]

Therefore, both provisions apply to expulsions *stricto sensu* and non-admission to a territory.

6.2 The Distinctions between the Provisions

While it has been seen that the two provisions have some similarities, and while some argue that Article 4 of Protocol No. 4 does not add any value to the protection of asylum-seekers under the ECHR,[361] this section will highlight the differences between the two provisions.

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[356] See Chapter IV

[357] See Chapter IV

[358] For the procedural safeguards under A4P4, see chapter III. For the procedural safeguards under Article 3, see Bojana Čučković, *The relationship between the prohibition of refoulement and the prohibition of collective expulsion in the context of access to territory: Standards of the ECtHR and their relevance for the legal system of the Republic of Serbia* (2023) (as it is not the object of this thesis, they will not be presented in detail here)

[359] Bojana Čučković (2023)

[360] *N.D. and N.T. v. Spain* (2020), § 186

[361] See for example 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, argues that the interpretation adopted in the case of *Khlaifia and Others v. Italy* (namely, the fact that the

First, the adoption of Protocol 4 dates from 1963 while the first recognition of non-refoulement under Article 3 ECHR dates from 1983, in the case of *Soering v. the United Kingdom*. Therefore, historically, the prohibition of collective expulsion could have offered protection to asylum-seekers before the recognition of the non-refoulement principle was acknowledged by the ECtHR. However, as seen above, the first violation under A4P4 was only found in 2002, so it is indeed the non-refoulement principle that has protected asylum-seekers before the prohibition of collective expulsion.

Second, the scope of A4P4 is broader than that of Article 3 ECHR, as it is not necessarily linked to a risk of ill-treatment[362], but covers every kind of expulsion, for different reasons (such as aliens migrating to member states for family reunification for example). Indeed, as seen in Chapter III, the prohibition of collective expulsion is a protection available to any alien, i.e. every non-national individual of a Member State. Some authors, such as Lena Riemer, argue that

> [i]f the ECtHR indeed restricted the possible grounds of claims covered by Art. 4 Prot. 4 ECHR [to only the right of bringing forward claims for international protection instead of any claims against an expulsion], 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.[363]

However, even in this case, the prohibition of collective expulsion would bring more procedural safeguards to asylum seekers than Article 3 ECHR alone, as it has been demonstrated before that A4P4 enables the evaluation of a violation of Article 3 ECHR through a procedural approach. Indeed, Lena Riemer herself explains that "*the prohibition of collective expulsion safeguards the non-refoulement principle in procedural terms*." Therefore, *"the prohibition is the precondition for the realisation of the non-refoulement principle*"[364], as it will be seen in the third section of this chapter.

Third, the prohibition of collective expulsion and the non-refoulement principle differ in their degree of protection. While the prohibition of collective expulsion seems to be derogable, the non-refoulement principle is not. Indeed, it is established that Article 3 ECHR is an absolute protection (and thus non-derogable).[365] Reading the preparatory work of Article 4 Protocol No 4 to the Convention, it appears that the drafters of the provision unanimously

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"*obligation to conduct individual interviews exists only in the presence of risks to life or physical well being*") "*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*"

[362] Bojana Čučković (2023)

[363] Lena Riemer (2020)

[364] Lena Riemer (2020)

[365] See for example *Chahal v. the United Kingdom* (1996), § 79

agreed that the prohibition of collective expulsion would be absolute.[366] Indeed, the Committee of Experts decided to exclude the reasons that would have permitted the carrying out of expulsion in case of "*imperative considerations of national security*".[367] However, as underlined by Stavros Papageorgopoulos, "*the low number of judgements concerning an A4P4 violation suggests a continued reluctance, and certainly a level of caution, in framing this particular prohibition in absolute terms*".[368] It should also be noted that Article 4 of Protocol No. 4 is not cited in paragraph 2 of Article 15 of the ECHR which states the non-derogable rights under the Convention. Therefore, A4P4 seems to be a derogable right in times of emergency. Nonetheless, it is useful to underline the remark of Lena Riemer on this question: she argues that

> a limitation of the prohibition [contained in A4P4], 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.[369]

Fourth, the two provisions differ in their nature. Lena Riemer rightly observes that "*the prohibition of collective expulsion only guarantees due process in expulsion procedures, not the right to stay*".[370] This perfectly explains the differences between the two rights contained in the Convention: while one protects procedural rights, the other protects a substantive right. The prohibition of collective expulsion does not guarantee an individual the right to enter or stay in a Member State.[371] It permits this individual to claim this right by bringing forward his or her claim through an individualised procedure. On the other hand, the non-refoulement principle implies a right to stay in the absence of an alternative solution that avoids the risk of torture or degrading or inhuman treatment or punishment. As underlined by Bojana Čučković, Article 3 of the Convention focuses on the treatment individuals might face in their destination or neighbouring country, while Article 4 of Protocol No. 4 deals with the acts and procedures of the country carrying out the expulsion.[372] Another distinction concerns the material element constitutive of the protection offered: indeed, while the non-refoulement principle may apply to any individual independently of whether this individual is alone or not, the prohibition of collective expulsion requires that at least two individuals have

[366] Collected Edition of the "Travaux Préparatoires" of Protocol No. 4 to the Convention, at 428

[367] Council of Europe, *Explanatory Report to Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto*, Strasbourg, 16 September 1963

[368] Stavros Papageorgopoulos, *N.D. and N.T. v. Spain: do hot returns require cold decision-making?* (2020), European Database of Asylum Law https://www.asylumlawdatabase.eu/en/journal/nd-and-nt-v-spain-do-hot-returns-require-cold-decision-making.

[369] Lena Riemer (2020)

[370] Lena Riemer (2020)

[371] Lena Riemer (2020)

[372] Bojana Čučković (2023)

been expelled together.[373] This difference is in line with the fact that the prohibition of collective expulsion is a procedural guarantee.

Finally, Mariagiulia Giuffré argues that "*refugees should [...] be informed that their irregular position would not affect the outcome of their protection claims*", when it comes to the principle of non-refoulement.[374] Indeed, the Court established in the case of *Salah Sheekh v. the Netherlands* that Article 3 applies "*irrespective of the victim's conduct, however undesirable or dangerous*".[375] However, as seen in the previous Chapter, concerning the prohibition of collective expulsion, the irregular way of entry of an alien may indeed affect the outcome of the decision of whether A4P4 has been violated.

6.3 The Link between the Two Provisions

Now that the similarities and differences between the two provisions have been highlighted, it is important to analyse the link between them to determine the level of protection offered to asylum-seekers under the provisions.

6.3.1 Substantive Link

In the case of *N.D. and N.T. v. Spain*, the Court emphasised "*the link between the scope of Article 4 of Protocol No. 4 as defined by the Grand Chamber, and that of the Geneva Convention and the principle of non-refoulement*".[376] This link is also underlined in the partly dissenting opinion of Judge Koskelo on this case.[377] It should be noted that, analysing the case law of the Strasbourg Court, it is clear that the Court, at least implicitly, acknowledges a link between A4P4 and Article 3 of the Convention. For example, in the case of *Khlaifia and Others v. Italy*, the Court did not find a violation of Article 4 of Protocol No. 4, inter alia, because of the "*absence of any of the [following] situations [...]: political asylum, granting of refugee status or the adoption of temporary protection measures on humanitarian grounds*".[378] Furthermore, in the case of *N.D. and N.T. v. Spain*, the Court explicitly referred to the inadmissibility of Article 3 of the ECHR in its reasoning leading to the finding of a non-violation of A4P4.[379] It explicitly referred to the case of *Khlaifia and Others v. Italy*, stating that "*in the proceedings before the Court, [the applicants] did not allege a violation of Article 3 on account of that expulsion*".[380] Moreover, it underlined that the applicants "*denied any link between their claim under Article 4 of Protocol No. 4 and a possible asylum claim*".[381] The

[373] Bojana Čučković (2023)

[374] Violeta Moreno-Lax and Efthymios Papastavridis (2017)

[375] *Salah Sheekh v. the Netherlands*, App. No. 1948/04 (ECtHR, 2007), § 135

[376] *N.D. and N.T. v. Spain* (2020), § 171

[377] *N.D. and N.T. v. Spain* (2020), Partly dissenting opinion of Judge Koskelo, §§ 6, 7 and 10

[378] *Khlaifia and Others v. Italy* (2016), § 251 and § 253

[379] *N.D. and N.T. v. Spain* (2020), § 206

[380] *N.D. and N.T. v. Spain* (2020), § 197

[381] *N.D. and N.T. v. Spain* (2020), § 220 See also *M.A. and Others v. Latvia*, App. No. 25564/18 (ECtHR, 2022), § 56 for example

Court concluded that the applicants could have asked for international protection if they had wanted to[382] and that there had therefore been no violation of Article 4 of Protocol No. 4 to the Convention.[383] Indeed, the Court clarified in paragraph 211 that

> the Court must [...] 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".[384]

Moreover, the Court affirms in the case that the exception set out in *N.D. and N.T. v. Spain* applies "*without prejudice to the application of Articles 2 and 3*".[385] The cases of *Hirsi Jamaa and Others* and *Sharifi and Others* also highlight this link between the prohibition of collective expulsion and the non-refoulement principle, as underlined in the case of *N.D. and N.T. v. Spain*.[386] In its decision, the Court underlined the fact that the applicants have been "*deprived of any effective possibility of seeking asylum*" and that "*[i]n both cases, many of the applicants were asylum-seekers whose complaint concerning the respondent State, under Article 3 of the Convention, was that they had not been afforded an effective possibility of challenging their return*".[387] Finally, in the case of *Sharifi and Others v. Spain*, the Court underlines the "*clear link between the collective expulsions to which the applicants were subjected in the port of Ancona and the fact that they were effectively prevented from applying for asylum or accessing any other national procedure*."[388] In this case, the Court underlines that "*the relationship between the Grand Chamber's interpretation of the scope of Article 4 of Protocol No. 4 and the scope of the principle of non-refoulement, as presented by the UNHCR (paragraph 52), is not devoid of interest.*"[389]

Hanaa Hakiki affirms that both principles are distinct, but "*intimately linked*".[390] Indeed, he affirms that in the examination of the applicability of A4P4 in the case of *N.D. and N.T. v. Spain*, the Court heavily relied on Article 3 "*thus blurring the line between the two*"[391], as underlined above. Furthermore, he explains that

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[382] *N.D. and N.T. v. Spain* (2020), § 222
[383] *N.D. and N.T. v. Spain* (2020), 231
[384] *N.D. and N.T. v. Spain* (2020), § 211
[385] *N.D. and N.T. v. Spain* (2020), § 201
[386] *N.D. and N.T. v. Spain* (2020), § 196
[387] *N.D. and N.T. v. Spain* (2020), § 196
[388] *Sharifi and Others v. Italy and Greece* (2014), § 242
[389] *Sharifi and Others v. Italy and Greece* (2014), § 211, translated from French ("*pas dépourvus d'intérêt*")
[390] Hanaa Hakiki (2022)
[391] Hanaa Hakiki (2022)

> in practice, the Court has not yet found a violation of Article 4 of Protocol No. 4 to the ECHR in cases where it considered that there was no substantial protection need and/or no related claim under Article 3 of the ECHR.[392]

Similarly, Emiliya Bratanova van Harten affirms that there is no case in the context of A4P4 where the Court has found a violation of Article 3 and not a violation of A4P4.[393] Lena Riemer denounces that

> this linkage of Article 3 ECHR and Article 4 of Protocol No. 4 to the 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.[394]

However, Hanaa Hakiki affirms that "*if only applied to cases also presenting a claim under Article 3 ECHR, Article 4 of Protocol No. 4 ECHR becomes utterly superfluous*."[395]

The main relationship between Article 3 and A4P4 lies in the fact that A4P4 provides for procedural guarantees which, in turn, permit the examination of a non-refoulement claim.

6.3.2 A Link between Procedural Guarantees (A4P4) and Substantive Rights (Article 3)

Anna Lübbe argues that the provision of A4P4 aims to ensure that States do not violate the principle of non-refoulement.[396] This is what the Court affirmed in the case of *N.D. and N.T. v. Spain*, stating 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.*"[397] This has also been asserted by the United Nations High Commissioner for Human Rights in an Intervener Brief on the case of *Hirsi Jamaa and Others v. Spain*. In the brief, it is stated that the prohibition of collective expulsion is "*distinguishable from the principle of non-refoulement in that it is inherently a due process right that entitles*

[392] Hanaa Hakiki (2022)

[393] Bratanova Van Harten (2023), unless a claim under A4P4 has not been alleged by the applicants.

[394] Lena Riemer (2020)

[395] Hanaa Hakiki (2022)

[396] Lübbe, Anna (2020)

[397] *N.D. and N.T. v. Spain* (2020), § 198. See also *Khlaifia and Others v. Italy* (2016), § 238 ; *Hirsi Jamaa and Others v. Italy* (2012), § 177 ; or *Sharifi and Others v. Italy and Greece* (2014), § 210

every non-national to an individualised examination of all arguments militating against his or her expulsion in the first place".[398]

Mariagulia Guiffré explains that

> the principle of non-refoulement should be read to imply a positive obligation to grant refugees access to the territory of the State, at least on a temporary basis, in order to submit the protection claim to a competent authority in charge of ascertaining whether any risk of serious harm upon return can be excluded.[399]

She argues that "*the essential corollary to the principle of non-refoulement is the right to access asylum procedures before either return or refusal of entry*"[400]. Therefore, the non-refoulement principle protects asylum-seekers. Indeed, in the case of *Gebremedhin v. France*[401], the Court noted that "*a decision to refuse leave to enter the country acts as a bar to lodging an asylum application*", and thus explained the link between non-expulsion, asylum seeking and non-refoulement.[402] As demonstrated in this chapter, the prohibition of collective expulsion is a procedural safeguard that permits the non-refoulement principle to be applied properly. Thus, the prohibition of collective expulsion facilitates the protection of asylum-seekers through the insurance of the good application of the non-refoulement principle.

Finally, in the case of *Khlaifia and Others v. Italy*, the Court argued that

> the lack of suspensive effect of a removal decision does not in itself constitute a violation of Article 13 of the Convention where, as in the present case, the applicants do not allege that there is a real risk of a violation of the rights guaranteed by Articles 2 or 3 in the destination country.[403]

This means that asylum-seekers who have a claim under, notably, Article 3 of the ECHR, are to be ensured a suspensive effect of their expulsion. As seen in Chapter III of this thesis, the suspensive effect of an expulsion is not mandatory in cases of A4P4. Therefore, the fact that Article 3 is at stake in a case concerning Article 4 of Protocol No. 4 offers stronger protection to the applicants.

Therefore, the prohibition of collective expulsion and the non-refoulement principle are two complementary rights. The prohibition of collective

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[398] UN Office of the High Commissioner for Human Rights (OHCHR), *OHCHR intervention before the European Court of Human Rights in the case of Hirsi et al. v. Italy*, Application No. 27765/09, 5 May 2011

[399] Violeta Moreno-Lax and Efthymios Papastavridis (2017)

[400] Violeta Moreno-Lax and Efthymios Papastavridis (2017)

[401] *Gebremedhin [Gaberamadhien] v. France*, App. No. 25389/05 (ECtHR, 2007)

[402] Violeta Moreno-Lax and Efthymios Papastavridis (2017)

[403] *Khlaifia and Others v. Italy*, (2016), § 281

expulsion ensures procedural rights that will in turn serve to exercise the non-refoulement principle. Throughout its case law, the European Court of Human Rights has often considered the two articles together. Ultimately, the application of both articles together provides for a greater safeguard of the rights of asylum-seekers who are at risk of torture, inhumane and degrading treatment in the country where they are about to be expelled.

7 Conclusion

To conclude, it appears that the protection of asylum-seekers by the prohibition of collective expulsions as enshrined in A4P4 has evolved over time. While the study of the travaux préparatoires began by suggesting that asylum-seekers were not the target group of the provision, the different methods of interpretation of the ECtHR led to an extension of the scope of protection. Notably, it has been shown that the protection applies now to asylum-seekers at sea and land borders, thus extending the protection outside of the territory of Member States. However, in recent years, the Court seems to have worked under the pressure of the political and economic environment, which led to an apparent restriction of the protection. Notably, the case of *N.D. and N.T. v. Spain* seems to have blocked the protection when it comes to irregular migrants arriving *en masse* and ”using force”, which in turn may prevent a significant number of people in need of international protection from seeking asylum. Ultimately, it remains to be seen whether the ECtHR will follow its recent line of reasoning or whether it will come back to a wider protection for asylum-seekers, including irregular migrants, under the provision.

The study of A4P4 also highlighted the procedural safeguards offered to asylum-seekers being expelled collectively. Before being expelled, asylum-seekers, like any alien, must benefit from a reasonable and objective examination of their case. Procedural safeguards include, among other things, an identification process, genuine and effective possibility of submitting arguments against expulsion – including arguments regarding their need for international protection, the right to legal assistance and to assistance of a translator. Moreover, this thesis has shown that asylum-seekers may benefit from a greater protection when it comes to the right to an effective remedy taken in conjunction with A4P4.

Finally, this thesis has highlighted the link between the protection offered to asylum-seekers by A4P4 and that offered under Article 3 of the Convention. It highlighted that these provisions mark a limit to State sovereignty when it comes to protecting asylum-seekers whose life is threatened under Article 2 or 3 of the ECHR, and came to the conclusion that both provisions (Article 3 ECHR and A4P4) are interrelated, in that A4P4 establishes procedural guarantees which in turn will permit asylum-seekers to have their claims under Article 3 ECHR examined.

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