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AWAITING THE EUROPEAN COURT OF HUMAN RIGHTS' JUDGMENT ON PUSHBACKS ON THE BORDER WITH BELARUS

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Abstract

This article reconstructs and critically assesses the evolution of the European Court of Human Rights' case law on the contemporary 'migration crisis'. It aims to predict the Court's upcoming ruling on pushbacks on the border with Belarus. The Grand Chamber, the largest adjudicating formation, will render a judgment in three applications against Poland, Lithuania and Latvia. Two previous key cases – *Khlaifia and Others v. Italy*, and *N.D. and N.T. v. Spain* – were heard first by a seven-judge Chamber and then by the Grand Chamber. The judgments reached different conclusions: the Chambers found a violation of the provisions of the European Convention on Human Rights, while the Grand Chamber found no violation. The Grand Chamber's rulings have reshaped the Convention's legal standards, particularly regarding the prohibition of collective expulsions. These standards will be applied to the three cases concerning pushbacks on the border with Belarus.

Keywords: migrants, pushbacks, European Court of Human Rights, European Convention on Human Rights, prohibition of collective expulsions

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INTRODUCTION

The situation on the Polish-Belarusian border has been stirring up emotions not only of a legal nature, although fortunately these are now less intense. The events have also led to several legal proceedings. This study will focus solely on the applications filed by several migrants to the European Court of Human Rights (hereinafter referred to as 'the Court' or 'ECtHR') under the European Convention on Human Rights (hereinafter referred to as 'the Convention').[1] Importantly, and worth emphasising, these applications were filed not only against Poland,[2] but also against Lithuania and Latvia.[3] This indicates similarity of events at the border between the three countries and Belarus, as well as the identity of the legal issues underlying the applications.

Despite this similarity, the applications filed against the three countries were not joined for simultaneous hearing.[4] However, they are being heard in parallel and, most importantly, by the Grand Chamber, the largest adjudicating formation of the Court (17 judges). The seven-member Chambers initially entrusted with the examination of the applications decided to relinquish their jurisdiction due to the emergence of a serious legal question concerning the interpretation of the Convention (Article 30). This procedural decision should be assessed unequivocally positively. Previously, in two cases crucial to shaping the Convention standard in the area of contemporary migration, judgments were first rendered by a Chamber and then – following a successful request for referral lodged by the State – the case was re-examined by the Grand Chamber.[5] These two cases, which will be reconstructed in this article, resulted in different ECtHR rulings. First, the Chambers found that the Convention had been violated, and then the Grand Chamber formations ruled in favour of the States. This difference may illustrate several issues. First, the uncertainty of the Convention legal standard, especially when that standard, in the absence of sufficiently developed earlier case law, is still being shaped. Second, one may speak of the hastiness of the first ruling (the Chamber), in which the new phenomena and circumstances accompanying contemporary migration were not adequately taken into account. Third, we may be witnessing a radical shift in the legal paradigm related to the rights and guarantees enjoyed by migrants. I will address these three issues in this paper. Furthermore, I will formulate a hypothesis

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1 ETC No. 5, as amended. The full name of the treaty is the European Convention for the Protection of Human Rights and Fundamental Freedoms.

2 *R.A. and Others v. Poland*, application no. 42120/21.

3 *C.O.C.G. and Others v. Lithuania*, application no. 17764/22, and *H.M.M. and Others v. Latvia*, application no. 42165/21, respectively.

4 It is allowed by Rule 42(1) of the Rules of the Court, which also applies to proceedings before the Grand Chamber (Rule 71(1)). However, it was decided that three cases would be heard concurrently by identical judicial panels (Rule 42(2)).

5 Under the Convention framework, there is no 'right of appeal'. However, a party to proceedings concluded by a Chamber judgment may request referral of the case to the Grand Chamber. The decision is issued by a panel of five judges of the Court and is very rarely positive. The panel accepts the referral request if the case raises a serious question affecting the interpretation or application of the Convention or a serious issue of general importance (Article 43).

regarding the likely conclusion of the Court's forthcoming ruling on pushbacks at the border with Belarus. The Grand Chamber is expected to deliver its judgments in early 2026.

In my introductory remarks, I will highlight one further issue. The fundamental legal instrument concerning migrants is the Geneva Convention of 28 July 1951 relating to the legal status of refugees (the Geneva Convention of 1951),[6] subsequently amended by the New York Protocol of 1967.[7] It refers to a specific, yet crucial, category of migrants, namely refugees, i.e. individuals residing outside their country of origin and having a well-founded fear of persecution in that country due to race, religion, nationality, membership of a particular social group, or political views. The current phenomenon of mass migration is not exclusively, or even primarily, related to individuals fleeing persecution. Most often, people move for economic reasons, escaping poverty and seeking a better life. This process of 'non-refugee migration' will intensify. Moreover, assuming negative scenarios related to climate change, it may be assumed that a new category of climate migrants (refugees) will emerge.[8]

The Court does not, of course, apply the provisions of the 1951 Geneva Convention. However, it does refer to this instrument of international law when considering applications based on the provisions of the European Convention. Certain Convention guarantees also exist for migrants who do not meet the criteria for asylum or other forms of international protection.

CASE OF *KHLAIFIA AND OTHERS V. ITALY*[9]

The application was filed by three Tunisian citizens who, following the events dubbed the 'Arab Spring', arrived on the Italian island of Lampedusa in September 2011. They were detained in a centre for foreigners that was overcrowded and lacked adequate sleeping and food facilities. Water was available only through external connections, and the toilets were neither locked nor cleaned. The centre was guarded by the police. Two days later, a riot broke out and the centre was set on fire. Following these events, the refugees were first transferred to a stadium and then to ships anchored in the roadstead of Palermo, Sicily. The applicants claimed that conditions on the ships were also poor: they could only stay in the restaurant

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[6] United Nations Treaty Series, Vol. 189, No. 2545. As many as 146 states are parties to the Convention (as of 1 September 2025).

[7] United Nations Treaty Series, Vol. 606, No. 8791. As many as 147 states are parties to the Protocol (as of 1 September 2025).

[8] On the need for a new treaty addressing not only refugees but also displaced or fleeing persons, see, for example, J.I. Goldenziel, 'Displaced: A Proposal for International Law to Protect Refugees, Migrants, and States', *Berkeley Journal of International Law*, 2017, Vol. 35, No. 1; A.I. Schoenholtz, 'The New Refugees and the Old Treaty: Persecutors and Persecuted in the Twenty-First Century', *Chicago Journal of International Law*, 2015, Vol. 16, No. 1; S. Leszczuk, 'The Definition and the Issue of Climate Refugees in the Light of International Law', *Eastern European Journal of Transnational Relations*, 2021, Vol. 5, No. 1.

[9] Application no. 16483/12, Chamber judgment of 1 September 2015, judgment of the Grand Chamber of 15 December 2016.

area, where makeshift beds were set up overnight. Long lines formed in front of the toilets. Foreigners were allowed a few minutes each day to go to the balconies. They also claimed that they were insulted by police officers. After several days, the refugees were transferred to Palermo, where the Tunisian consul identified each person. All Tunisians were then deported to their homeland. This expedited and simplified procedure was provided for in the Italian–Tunisian agreement signed on 5 April 2011. The deportees could file an appeal to the court within 60 days, but this did not suspend the immediate implementation of the decision.

In their application to the Court, the Tunisians raised several allegations. The first concerned ill-treatment both during their stay at the refugee centre in Lampedusa and on ships anchored in Palermo. In considering this allegation, the Chamber noted the exceptional situation on the small island of Lampedusa – over 55,000 people arrived there illegally in 2011. This must have placed an enormous burden on the Italian authorities, not only at the local level. However, even such exceptional circumstances do not absolve the State from fulfilling the fundamental obligation enshrined in Article 3, which prohibits ill-treatment. The conditions in the centre in Lampedusa, even though the applicants stayed there for only a few days, did not meet the standard required by the Convention, especially considering the specific situation of individuals who, exposed to numerous dangers, undertook the sea crossing. On the other hand, the refugees were provided with the required standard of care while on the ships in Palermo.

The other two allegations concerned the right to personal liberty and security (Article 5) and the prohibition of collective expulsion of aliens (Article 4 of Protocol No. 4 to the Convention).[10] The first allegation was analysed from several legal perspectives. Primarily, the applicants argued that they had been forcibly deprived of their liberty by being placed in a closed detention centre in Lampedusa and on ships in Palermo. Therefore, this was not – as the Italian authorities claimed – merely a 'transfer' after being rescued at sea to a place where the refugees were to be provided with assistance and care. In such a situation, the deprivation of liberty must meet one of the purposes expressly set out in Article 5(1) of the Convention. These include the lawful arrest or detention of an individual in order to prevent their illegal entry into the territory of a State, or deprivation of liberty when deportation or extradition proceedings are pending against the individual. The Court was prepared to accept that this purpose was applicable in the case at hand. However, in such case, individual decisions regarding deprivation of liberty are necessary. This deprivation of liberty was not short-term and was not limited to episodic identification of the individual and the provision of assistance after being intercepted at sea (in which case Article 5 would not apply to such '*ad hoc*' or 'episodic' detention), but lasted approximately 20 days in total. Such detention lacked a legal basis in Italian law. Nor did the agreement between Italy and Tunisia provide such a basis, as its content was unknown to the refugees and it

[10] Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No. 46.

did not contain the required safeguards against arbitrary action by the authorities. Therefore, there was a violation of Article 5(1).

The Court also examined whether the detained person had been informed promptly and in a language they understood of the reasons for their detention and the charges brought against them (Article 5(2)). The official documents provided to the refugees referred only to their illegal entry into Italian territory and the refusal of entry. They did not refer in any way to the reasons for their deprivation of liberty. This led to another violation of Article 5. Finally, applicable provisions state that every detained or arrested person has the right to appeal to a court in order to obtain a review of the decision taken against them and to secure their release if the deprivation of liberty is unlawful (Article 5(4)). However, since there were no individual decisions regarding deprivation of liberty, nothing could be challenged before a court. This situation therefore constituted another violation of Article 5.

The Court also had to address the allegation of a violation of the prohibition of collective expulsion of foreigners. As a rule, the adoption by State authorities of identical decisions regarding foreigners does not constitute a violation of Article 4 of Protocol No. 4, if such decisions are individual in nature and were preceded by consideration of the circumstances of each case (each person's situation). However, the procedure was limited solely to establishing the identity of individual refugees under the simplified procedure provided for in the Italian–Tunisian Agreement, with the participation of the Tunisian consul, which then served as the basis for the deportation decisions. This procedure, which did not involve obtaining information about the refugees' individual situation, did not meet the requirements of the Convention.

The Chamber further found that Italy had violated Article 13 of the Convention, which requires the existence of an effective remedy to protect the rights and freedoms guaranteed by the Convention. Such a remedy – in the context of the prohibition of ill-treatment (Article 3) and the prohibition of collective expulsion (Article 4 of Protocol No. 4) – did not exist in Italian law.

The multiple violations of the Convention found by the Court led to an award of €10,000 to each of the applicants as just satisfaction (Article 41). This is a considerable sum, but fully understandable in light of existing Strasbourg case law. If the judges find that fundamental Convention guarantees – namely the prohibition of ill-treatment and the right to personal liberty – have been violated, this entails awarding the applicants amounts that are not merely symbolic.

While the Chamber's judgment was unanimous in the part concerning the right to personal liberty (violation of Article 5 in all its aspects) and the conditions on board the ships in Palermo (no violation of Article 3), the judges were divided in their assessment of the other allegations. Two judges – András Sajó of Hungary and Nebojša Vučinić of Montenegro – disagreed with the conclusions regarding the degrading treatment of refugees resulting from the conditions at the Lampedusa detention centre (Article 3) and the violation of the prohibition of collective expulsion of foreigners. The judgment in this part was therefore delivered by a majority of five votes to two. The dissenting judges expressed their reasons for disagreement in a separate opinion appended to the judgment. They pointed out that the short-term (four days) poor conditions in Lampedusa did not reach the minimum threshold

of severity necessary to constitute degrading treatment. The applicants were young people; in the centre they had freedom of movement and access to food and sanitary facilities. It should also be noted that the Italian authorities were confronted with an exceptional and grave humanitarian crisis. This circumstance must be adequately taken into account when analysing the allegations. In the context of the prohibition of collective expulsion of foreigners, it was noted that in previously decided cases the Court had been rigorous in its analysis, which resulted in only four previous findings of a violation of Article 4 of Protocol No. 4. This rigorous approach corresponded with the position adopted in public international law. In its case law, the Court therefore linked collective expulsions of foreigners either to their national or ethnic affiliation (foreigners were deported on the basis of that affiliation)[11] or to the failure of national authorities to establish the identity of the persons subject to expulsion.[12] However, in the judgment relating to the Tunisians' allegations, the understanding of collective expulsions was broadened. Meanwhile, the Italian authorities were entitled, also due to the scale of migration, to limit themselves to establishing a person's identity, the fact of illegal entry into Italy, and that they came from a so-called safe country. A further individualised analysis of each case was therefore not necessary. Two judges also voted against awarding the applicants the just satisfaction granted by the Court; in this part of the judgment, a third judge (the Belgian Paul Lemmens) joined them, criticising what he considered to be a particularly high amount of compensation. The decision in this section was therefore reached by a narrow majority of four votes to three.

The seven-member Chamber's judgment in the *Khlaifia* case did not become final, as the Italian Government's request for referral of the case to the Grand Chamber was granted (decision of 1 February 2016). The Grand Chamber's judgment, delivered on 15 December 2016, was unanimous on almost all points.[13]

The Chamber's earlier conclusion of three violations of Article 5 was upheld, due to the lack of a legal basis in Italian law for the arrest and subsequent detention (Article 5(1)), the lack of prompt and comprehensible information on the reasons for the arrest and the charges (Article 5(2)), and the lack of a right of appeal to a court (Article 5(4)).

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[11] Judgment of the ECtHR of 5 February 2002, *Čonka v. Belgium*, application no. 51564/99, ECHR 2002-I (deportation of Roma), and judgment of the Grand Chamber of the ECtHR of 3 July 2014, *Georgia v. Russia (No. 1)*, application no. 13255/07, ECHR 2014 (deportation of Georgians).

[12] Judgment of the Grand Chamber of the ECtHR of 23 February 2012, *Hirsi Jamaa and Others v. Italy*, application no. 27765/09, ECHR 2012-II, and judgment of the ECtHR of 21 October 2014, *Sharifi and Others v. Italy and Greece*, application no. 16643/09.

[13] In a concurring opinion, Judge Dmitriy Dedov emphasised, however, that the reason for his vote in favour of finding a violation of Article 5 lay the shortcomings of Italian law. If Italy had not disputed the deprivation of personal liberty, it would have been difficult to expect that, given the mass influx of migrants, all legal procedures could be completed within a short period (48 hours), especially since the migrants themselves showed no willingness to cooperate with the competent authorities and were even ready to take violent action. The Russian judge accepted that the migrants themselves had placed themselves in an 'illegal situation' and that the State was fully entitled to take steps to defend its borders. For that reason, he subsequently voted against awarding the applicants just satisfaction.

In the section concerning the prohibition of ill-treatment (Article 3), the Grand Chamber unanimously ruled that the conditions on board the ships moored in the port of Palermo did not give rise to a finding of a violation of Article 3. The Chamber had previously assessed the situation in the same way. However, the Grand Chamber did not uphold the Chamber's conclusion that the conditions at the Lampedusa centre could be classified as degrading treatment contrary to Article 3. The Grand Chamber began by analysing the situation in Lampedusa, which in 2011 received more than 51,000 refugees. It disagreed with the applicants' position that the circumstances of the events could not be described as exceptional. The judges noted that it was understandable that persons rescued at sea were transported to the nearest place where basic care could be provided.

Although conditions at the centre were insufficient and could raise many concerns, they should be assessed in the context of the specific migration situation. The migration centre was overcrowded, and the migrants were forced to stay and sleep in rooms with many people; access to bathrooms and toilets was difficult. However, the migrants could move freely within the centre, shop, use telephones, seek medical assistance, which they received, and contact lawyers and humanitarian workers. Therefore, the conditions cannot be compared to prison conditions. Furthermore, even though the applicants had endured a difficult and dangerous sea crossing, they were young men aged between 23 and 28 who did not suffer from any illnesses or medical conditions. It should also be noted that their stay in the centre lasted three to four days. Therefore, in the judges' opinion, the circumstances of their stay in the centre did not reach the minimum threshold of severity required for a violation of Article 3.

Regarding the allegation concerning the prohibition of collective expulsion, the Italian authorities first raised a preliminary objection that the domestic procedure applied consisted of 'refusal of entry combined with removal', and therefore Article 4 of Protocol No. 4 did not apply. The Grand Chamber rejected this position, pointing out that expulsion should be understood as an act imputable to a State, consisting of the removal of an individual from the territory of that State.[14] This was the nature of the actions undertaken against the applicants. It therefore remained to be determined whether the expulsions were collective in nature.

The judges noted that the applicants (and other migrants) had been identified twice. First, they were fingerprinted and photographed during their stay at the centre and on the ships. Later, the identification was carried out by the Tunisian consul before the applicants boarded their flights to Tunisia. However, the applicants argued that Article 4 of Protocol No. 4 required something more – namely an individual interview with each migrant, during which the individual's situation and reasons for arrival would be identified and assessed. The Grand Chamber disagreed with this view. It indicated that it was sufficient for the foreigner to be provided with a 'genuine and effective' opportunity to independently (on his or

[14] In this context, reference was made to the definition of expulsion developed in 2014 by the UN International Law Commission in the Draft Articles on the Expulsion of Aliens. The text of the Draft Articles was noted by the UN General Assembly in Resolution A/RES/69/119 (10 December 2014).

her own initiative) present the reasons for remaining in the country in which they had found themselves. The applicants had this opportunity during their several-day (9–11 days) stay in Italy – they could approach numerous social workers and centre officials and could also raise their concerns during contacts with the consul.[15] The judges noted that some individuals raised asylum or international protection issues and remained in Italy. At the same time, it was of no importance to the Grand Chamber that the expulsion decisions consisted of identical formulas of only a few sentences and that a large number of people were expelled on the same day. It was indicated that this was a consequence of the migrants' failure to raise grounds relating to asylum, refugee status, or other forms of protection. No such grounds were identified during the proceedings before the Court. Only one judge out of seventeen (the Cypriot judge Georgios A. Serghides) voted that the prohibition of collective expulsion had been violated.[16]

Finally, the judgment addressed the issue of the lack of an effective remedy (Article 13), analysed in connection with allegations of ill-treatment and collective expulsion. The Court acknowledged that Italian law lacked a legal remedy available to migrants who considered that they had been subjected to degrading and inhuman treatment (such as the conditions in the detention centre in Lampedusa and on the ships in Palermo). On this point, the Grand Chamber agreed with the position adopted earlier by the Chamber. However, it disagreed with the assessment that Italian law lacked an effective remedy to defend against collective expulsion. An interlocutory appeal against a deportation decision could be lodged with a court. However, the applicants argued that Article 13 requires that such an appeal have suspensive effect on the execution of the decision. The Grand Chamber disagreed with this position. It indicated that suspensive effect is necessary when an individual alleges that deportation would expose him or her to a risk of death or ill-treatment in the country to which they are being returned, but not when an allegation of collective expulsion is made.

The violations of Articles 5 and 13 of the Convention (in conjunction with Article 3) resulted in the applicants being awarded €2,500 each in just satisfaction. They also received €15,000 for legal expenses and costs.

The *Khlaifia* judgment is crucial for defining the Convention standard relating to legal guarantees for migrants.[17] Both the Chamber and the Grand Chamber indicated that the prohibition of ill-treatment contained in Article 3 is absolute and applies in all situations, including those of a crisis or humanitarian disaster. However, unlike the Chamber, seventeen judges found that the context of mass

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[15] The Grand Chamber's reasoning largely echoes the conclusions of András Sajó and Nebojša Vučinić, the dissenting judges in the earlier Chamber judgment.

[16] See also the critical assessment of this part of the judgment by J.I. Goldenziel in her comments on the judgment published in *American Journal of International Law*, 2018, Vol. 112, No. 2. She notes that the judgment may erode procedural guarantees for individuals.

[17] Several organisations and entities joined the proceedings before the Grand Chamber (Coordination Française pour le droit d'asile, the Centre for Human Rights and Legal Pluralism of McGill University, the AIRE Centre, and the European Council on Refugees and Exiles), attempting to convince the 17 judges to uphold the protective standard of the Chamber judgment. However, the Grand Chamber decided differently.

migration has a significant impact on the assessment of the actions and omissions of public authorities. Hence, the Grand Chamber found that there had been no violation of Article 3. It also ruled, again departing from the conclusion contained in the Chamber judgment, which had established far-reaching requirements for individualised analysis at the national level before deciding to deport a foreigner, that there had been no violation of the prohibition of collective expulsions (Article 4 of Protocol No. 4).[18] Finally, there is a clear indication that an appeal to a court against a decision challenged by a foreigner as inconsistent with the prohibition of collective expulsions does not need to have suspensive effect in order to be considered an effective remedy.

CASE OF *N.D. AND N.T. V. SPAIN*[19]

The applicants were a Malian national and an Ivorian citizen who, together with a large group of other individuals, made several attempts to enter Melilla illegally, a Spanish enclave in Africa bordering Morocco. To do so, they had to overcome a multi-stage barrier constructed at the border. During one attempt (in August 2014), they managed to reach the top of the last section of the barrier adjacent to Spanish territory. After sitting on this structure for several hours, they agreed to descend to the ground using ladders provided by Spanish Guardia Civil officers. The migrants were then handed over to the Moroccan side. In late 2014, both applicants managed to reach Melilla, where they were detained. They were subsequently issued deportation orders. The first applicant was deported to Mali after the expulsion decision became final and the refusal to grant international protection had also become final. The final deportation order against the second applicant could not be enforced because he had gone into hiding after being released from the deportation centre, and his whereabouts were unknown.

The Court first had to ascertain whether, during their attempt to cross the border in August 2014, the applicants could be considered persons subject to the jurisdiction of the Spanish State within the meaning of Article 1 of the Convention. The Chamber found it unnecessary to determine whether the two migrants were expelled after entering Spanish territory or whether they were turned away at the border. Another crucial factor was that the applicants, who had come under

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[18] Another 'critical difference' in the approach of the Chamber and the Grand Chamber should also be noted. For the former, interstate agreements, such as the agreement between Italy and Tunisia establishing a simplified expulsion procedure, proved irrelevant. An individualised analysis of each person's situation was therefore essential. Had this standard later been upheld by the 17 judges, it would have had enormous consequences. At the European Council summit held on 17–18 March 2016, agreements were reached with Turkey to stem the wave of refugees flowing into the European Union. Refugees would be returned (transferred) to Turkey, where procedures would be carried out to verify whether a given individual met the refugee criteria. This relieves EU Member States of the need to conduct an individualised analysis of the situation of individual migrants. The Grand Chamber's position means that such agreements will not be challenged in Strasbourg.

[19] Applications nos. 8675/15 and 8697/15, Chamber judgment of 3 October 2017, judgment of the Grand Chamber of 13 February 2020.

the 'constant and exclusive' control of Spanish services, were removed and returned to Morocco against their will. This constituted an expulsion within the meaning of Article 4 of Protocol No. 4. It was also necessary to determine whether this expulsion could be classified as collective for the purposes of the Convention. In this context, the judges indicated that to provide a positive answer it was sufficient that the applicants had acted as part of a group of approximately 75–80 individuals, against whom the border guards had applied 'a general measure consisting in containing and repelling the migrants' attempts to cross the border illegally' (para. 107). Directing action against a group of individuals, regardless of how this action was implemented against particular individuals (discouraging migrants from approaching the barrier, stopping them on the Moroccan side of the last section of the barrier, or allowing them to descend on the Spanish side and immediately handing them over to Moroccan border guards), was sufficient for the applicants' expulsion to be regarded as collective. The collective nature of the action is determined not by its repetition, but by its context. Therefore, even if the applicants had been the only members of the group who managed to reach the top of the last section of the fence and stand on its Spanish side, the conduct of the Spanish authorities would still have been collective in nature. Since the action thus classified was not accompanied by any procedures or formal decisions, Article 4 of Protocol No. 4 was violated. The Chamber reached this conclusion unanimously. Similarly, a violation of Article 13 was found, namely the lack of an effective remedy concerning the prohibition of collective expulsions. The applicants were also awarded €5,000 each in respect of non-pecuniary damage.[20]

Spain successfully convinced the five-judge panel that the case should be referred to the Grand Chamber. Following this decision, a number of entities joined or continued to participate in the proceedings as third parties: the governments of Belgium, France, and Italy, the Council of Europe Commissioner for Human Rights, the United Nations High Commissioner for Human Rights, the Office of the United Nations High Commissioner for Refugees, the Spanish Commission for Assistance to Refugees, the Centre for Advice on Individual Rights in Europe, Amnesty International, the European Council on Refugees and Exiles, the International Commission of Jurists, and the Dutch Refugee Council.

During the Grand Chamber proceedings, Spain argued that the applicants had failed to prove that they were among the group of persons attempting to enter the Spanish enclave. In response to this preliminary objection, the Court noted that the individuals detained and immediately handed over to Moroccan border guards had not been identified in any way by the Guardia Civil officers. Therefore, other evidence corresponding to the circumstances of the incident should be used. It is sufficient that the applicants, by describing the attempted border crossing, presented *prima facie* evidence of their participation in that attempt. The fact of the collective attempt to cross the border was not disputed.

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[20] Only the Russian judge Dmitriy Dedov, in a dissenting opinion, found that the Chamber should have confined itself to finding a violation of the Convention without awarding financial compensation.

Of much greater significance for the admissibility of the application was the objection under Article 1 of the Convention. Spain argued that although the events occurred on its territory, the multi-stage barriers constituted a so-called 'operational border' and were constructed to prevent the unauthorised entry of foreigners. After introducing this border control system, Spain claimed that the scope of its 'jurisdiction' began only beyond the police line as part of 'measures against persons who [had] crossed the border illegally' within the meaning of Article 13 of the Schengen Borders Code.[21] In other words, the jurisdiction of the Spanish State was said to begin only when migrants had crossed all three fences constituting the border control system and, in addition, had passed the police line. Only from that point was Spain bound by the Convention's obligation to identify individuals and the procedural guarantees applicable to expulsion procedures. Adopting a different approach, according to Spain, would have led to a humanitarian crisis of grave proportions. The applicants maintained, however, that the events had occurred on Spanish territory, and the barriers themselves were also located there. A State's jurisdiction covers its entire territory, and there can be no exceptions or derogations from this principle.

Three states supported Spain's position. France considered that the exercise of jurisdiction presupposes a certain degree of 'effectiveness and continuity'. A form of control confined to a brief, limited intervention in the context of action to defend the country's land borders and return migrants at the border could not give rise to extraterritorial application of the Convention. The Italian Government argued similarly, emphasising the lack of stay, which alone would justify the application of the so-called Return Directive (concerning individuals who entered the country illegally).[22] Belgium emphasised that the actions of the Spanish authorities were connected exclusively with the surveillance and control of the border. It cannot be assumed that individuals who found themselves at the border are entitled to cross it illegally and that the State is obligated to admit them. The positions of the states were opposed by non-governmental organisations and UN agencies participating in the proceedings. In their opinion, the actions of the Spanish services, which consisted in preventing border crossings, should be attributed to the State, and thus the State's jurisdiction must be recognised. There is no basis for distinguishing situations in which state services prevent migrants from crossing the border at sea and even push them back from territorial waters from actions taken at the land border.

Referring to the positions of the parties and other participants in the proceedings, the Court indicated that the understanding of jurisdiction within the meaning of Article 1 of the Convention essentially covers the entire territory of the State, and only in exceptional situations is it possible to depart from this view (northern Cyprus, Transnistria, Abkhazia, and South Ossetia). It noted that the Spanish authorities had never referred to such an exceptional situation. The construction of

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[21] Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ L 77, 23.3.2016, p. 1, as amended.

[22] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348, 24.12.2008, p. 98.

protective structures on the border does not affect the scope of the State's territorial authority. Nor does the migration crisis justify departing from this position. The adoption of a different view would undermine the principle of effective protection of human rights within the borders of the State.

The issue of jurisdiction, however, was not the only one that could have led the Court to find that it lacked jurisdiction to hear the application under Article 4 of Protocol No. 4. The Spanish Government argued that the scope of this provision had been unjustifiably broadened in the Court's case law. The prohibition on collective expulsion of aliens applies only to individuals who entered a State's territory legally and 'peacefully'. A very strong argument was made here: the UN Charter recognises the right of a State to self-defence in the event of an attack on its territory (Article 51).[23] Article 4 of Protocol No. 4, on the other hand, requires that the alien find himself or herself in a dangerous situation, either as a result of persecution in the country of origin or as a result of travel by sea. In other words, the application of this provision is generally possible only in the case of individuals eligible for asylum or another form of international protection. For economic (earning) purposes, the applicants could have applied for entry and work permits by submitting appropriate applications at consular offices and at border crossings, where special reception centres had been established. Instead, they attempted to cross the border illegally. In summary, the relevant border services did not deport people but merely carried out activities aimed at preventing illegal crossings of the State's borders.

Responding to this position, the applicants pointed out that neither the *travaux préparatoires* of Article 4 of Protocol No. 4 nor the Court's case law provided a basis for distinguishing between the situations of refugees and persons not qualifying as refugees, and between legal and illegal migrants. They further argued that expulsion meant 'removal from a certain place'; therefore, the distinction suggested by Spain between expulsion, refusal of entry, and prevention of illegal entry was irrelevant. In each case, the competent authorities were obliged to issue an individual decision after considering the circumstances of the case and providing the foreigner with an opportunity to present their position.

The positions of the remaining participants in the proceedings are also noteworthy. Three countries justified their view of the inapplicability of Article 4 of Protocol No. 4 in different ways: the Spanish services protected the border, and foreigners could enter Spanish territory or submit appropriate applications at border crossings (Belgium); the foreigners had committed illegal acts, therefore the guarantees relating to the prohibition of collective expulsions, which presuppose prior legal entry into the territory of the State, did not apply to them (France); the Convention does not guarantee the right to asylum, and the response of the Spanish services was focused on protecting the State's security and sovereignty, fulfilling the obligation to control the external borders of the European Union, and combating human trafficking and illegal migration (Italy). The remaining participants (UN agencies and non-governmental organisations) argued that the Spanish practice was inconsistent with the requirements of refugee law and human rights; in

[23] United Nations Treaty Series, 1 UNTS XVI.

each case, an analysis of all the circumstances and an individual decision, while ensuring procedural guarantees for the foreigner, are necessary. The lack of practical opportunities to submit applications for asylum and international protection at existing border crossings was also pointed out.

With reference to the positions submitted, the Court noted that for the first time it was confronted with a case involving the immediate and forcible return of migrants from the border, following an attempt to enter a State's territory illegally and collectively. Although Spain invoked the right to self-defence, as enshrined in the UN Charter, it did not refer the matter to the UN Security Council, as provided for in Article 51 of the Charter. Therefore, the Court concluded that it was not necessary to address this argument. The Court's position (allowing for the hypothesis that a State may exercise its right to self-defence) does not, however, preclude the possibility of a State invoking that right; nevertheless, this would require that the migrant attack be armed or involve the use of violence. At the same time, the Court emphasised the State's right to protect its borders and to develop appropriate policies in this regard. It also recognised the threats arising from the current mass economic migration from Africa and the Middle East. The issues experienced cannot, however, justify practices that are inconsistent with the Convention guarantees.

Following this preliminary analysis, the Court moved on to address several terminological issues crucial to the case under consideration. It referred, among other things, to the Draft Articles on the Expulsion of Aliens prepared by the UN International Law Commission. According to the commentary to this document, the terms 'expulsion', 'bringing to the border', and 'refoulement' are used interchangeably. 'Expulsion' is a general term encompassing all situations referred to by the three previously mentioned terms, as well as a number of others. At the same time, the words 'refugee' and 'alien' refer to individuals who entered the territory of a foreign State both legally and illegally.

Consequently, the Court concluded that since the barriers the applicants reached were located on Spanish territory and the applicants were subsequently returned and handed over to the Moroccan authorities, an expulsion had occurred. Article 4 of Protocol No. 4 therefore applies in a case if, in addition, the expulsions carried out can be classified as collective. This latter characteristic is identified through the notion of a group. The group does not have to reach a certain minimum size, nor do its members have to share certain common characteristics, such as nationality, skin colour, or religion. However, the mere repetition of decisions by the competent authorities regarding group members does not necessarily constitute prohibited collective deportations. The decisive factor is whether individual decisions were issued, preceded by an analysis of the individual's situation, and whether the individual was provided with a genuine opportunity to present their own position and arguments against expulsion. The foreigner's conduct is also significant – whether they apply for international protection and presents legal and factual circumstances justifying their stay in the receiving country. The lack of such activity entitles public authorities to dispense with individual interviews as part of the decision-making process. In summarising this part of its own case law, the Court noted that it may be relevant to the analysis of the case that the foreign national decided to cross the border unlawfully

with other individuals in a manner that violated public order, when they could have entered the country legally through existing border crossings or obtained the required permits elsewhere. The foreign national is obliged to justify convincingly why he or she was unable or unwilling to use such legal means.

Having summarised and clarified its previous case law, the Court proceeded to analyse the circumstances of the complaint. It initially rejected the Spanish authorities' position that the expulsion could not be classified as collective, since the application had been filed by only two individuals. It indicated that the applicants were members of a larger group subjected to similar treatment by the border authorities.

The key to the analysis of the alleged violation of the prohibition of collective expulsions was the applicants' conduct, namely, their illegal border crossing, considered in the context of the possibility of lawfully arriving in Melilla. Such a possibility had to be real and effective. The Court conducted a detailed analysis of the practice at border crossings. It noted that even before the Spanish authorities established a special unit for receiving asylum applications (1 September 2014), such applications were submitted and applicants were transported to Melilla for further examination and processing. Applications could also be submitted at Spanish diplomatic and consular missions in both Morocco and the foreigners' countries of origin. At the key border crossing (Beni Enzar), 404 asylum applications were filed between 1 September 2014 and the end of the year; all of them were filed by Syrians. In subsequent years, individuals from sub-Saharan Africa, such as the applicants, either did not submit such applications at all or their numbers were negligible. Statistics regarding Spanish consular and diplomatic missions were similar.

The Court found that the applicants could realistically and effectively use the existing border crossings to submit applications for international protection and present arguments against expulsion (the latter being understood as the foreigner being sent back from the border or not being allowed to enter Melilla). Furthermore, the statistics presented during the proceedings by the Spanish authorities and the procedures used by consular and diplomatic missions to process identical applications also demonstrated the effectiveness of the existing procedures. However, the applicants chose to enter Melilla illegally. The lack of individual expulsion decisions was a consequence of their failure to use available and effective official entry procedures. Consequently, there was no violation of Article 4 of Protocol No. 4. Nor was there a violation of Article 13 of the Convention. Both conclusions were reached unanimously, which is unusual in the Grand Chamber's judicial practice.

The Spanish case is crucial for shaping the Convention standard concerning the prohibition of collective expulsions. First, the Grand Chamber departed from the rigour of the earlier Chamber judgment, which required that in every case, including illegal border crossings, the procedural guarantees derived from Article 4 of Protocol No. 4 apply to foreigners. At the same time, the Grand Chamber disagreed with the narrowing of the scope of application of the concept of expulsion. It is broadly understood as encompassing any decisions and actions resulting in the denial of residence or entry into the territory of a State. Second, the Grand Chamber linked the State's compliance with the obligations under Article 4 of Protocol No. 4 to the foreigner's conduct. As a rule, migrants must use legal channels to obtain residence

permits at border crossings and at the State's consular and diplomatic missions. The Court simultaneously verifies whether such legal channels are realistically and effectively available to foreigners. If the answer is positive, the foreigner's attempt to enter the country illegally exempts the State from the requirement to issue individual deportation decisions in a specific manner. In this context, one may ask whether, following the Spanish judgment, Article 4 of Protocol No. 4 would authorise public authorities to expel, without following certain procedures, also individuals who have already entered the country (and thus, in the Spanish case, crossed the 'police line'). If so, the Convention standard would be minimal, and 'stronger requirements' would arise only from other legal acts, e.g. the Return Directive and national legislation. Third, despite the link established between Article 4 of Protocol No. 4 and the foreigner's conduct, where real and effective opportunities exist to obtain permission for 'lawful entry', the concept of State jurisdiction, as used by the Court, broadens the circle of persons who become beneficiaries of procedural guarantees against collective expulsions. These now include all persons seeking to enter the territory of the State. Fourth, although the Grand Chamber links its analysis of the procedural guarantees of Article 4 of Protocol No. 4 to the principle of non-refoulement, it appears to broaden its justification, thus ceasing to link expulsion with the prohibition of exposing an individual to a real risk of treatment contrary to Article 2 (the right to life) and Article 3 of the Convention (the prohibition of ill-treatment). The Court links the provisions of the Convention 'systemically' with other instruments of international law, particularly the 1951 Geneva Convention, and thereby with the right to asylum or other forms of international protection.[24] The adoption of such a broader legal perspective gives rise to the considerations contained in the Grand Chamber judgment regarding the scope and effectiveness of procedures for obtaining permission to cross the border legally and receive international protection. The negative obligations arising from non-refoulement, i.e. protection against acts contrary to Articles 2 and 3 of the Convention, are replaced by expanded positive obligations of the States Parties to the Convention. This change (and the resulting legal analysis) was criticised by Judge Pauliine Koskelo in her dissenting opinion. She points to the one-sided approach adopted by the Court. The Strasbourg judges connect the systemic reading of Article 4 of Protocol No. 4 with issues relating to asylum and international protection, but omit other areas of law, particularly those concerning the rights (but also obligations) of States to control borders, ensure State security, territorial integrity, and public order. According to the Finnish judge, the material scope of application of Article 4 of Protocol No. 4 (*ratione materiae*) is limited; it should be combined only with the principle of non-refoulement, i.e. exposing an individual to acts contrary to Articles 2 and 3 of the Convention. Only to that extent would collective expulsions be prohibited. The individual would have to demonstrate and substantiate that, following deportation, their life or protection against ill-treatment would be at risk. Therefore, the Finnish

[24] On the presence of this issue in the case law of the ECtHR, see P. Domagała, 'The Migration Crisis in the Case Law of the ECHR – Some Remarks on the Obligations of Countries to Refugees and Immigrants', *Polish Review of International and European Law*, 2018, Vol. 7, No. 2, pp. 177–179.

judge concluded that, since the Chamber (and, following it, the Grand Chamber) found the complaint of a violation of Article 3 of the Convention raised by N.D. and N.T. inadmissible, the part of the application relating to Article 4 of Protocol No. 4 should also automatically be declared inadmissible.

CASES CONCERNING PUSHBACKS AT THE BORDER WITH BELARUS

Before relating the legal standard developed in the two Grand Chamber judgments to the complaints concerning pushbacks at the border with Belarus, it is worth summarising what happened in the Italian and Spanish cases.

The influx of refugees into Europe, currently massive and rightly described as a crisis or even a humanitarian catastrophe, tests the legal rules and standards stemming from the European Convention on Human Rights. The first group of considerations concerns the radical differences between the rulings adopted by the Chamber and those later adopted by the Grand Chamber. The approach of the seven-member Chambers could be described as idealistic or static. It does not sufficiently take into account the context of the specific migration situation in Europe today. The Grand Chamber conducts a more realistic analysis, leading to a finding – unlike that of the Chamber – that there was no violation of the provisions of the Convention. This shift in perspective may be attributed to the more comprehensive reflection undertaken by the largest formation of the ECtHR, but it can also be linked to the negative reaction not only of the State concerned by the Chamber judgment, but also of other States that considered the Chamber ruling a dangerous precedent. It is therefore not surprising that three States supporting Spain joined the proceedings before the Grand Chamber in the case of *N.D. and N.T.*

The second group of considerations concerns the choice of 'judicial strategy' by the Strasbourg judges. They do not wish their interpretation of the Convention to lead the Court to declare itself incompetent to hear 'migration complaints'. Hence the extremely broad interpretation of the concept of expulsion, according to which any authoritative decision by border services refusing entry into a country may be classified as expulsion, thereby giving rise to the obligation to implement the procedural guarantees derived, in the Court's case law, from Article 4 of Protocol No. 4. The Court thereby becomes competent *ratione materiae*, but issues that reflect a more realistic perspective subsequently become part of the examination of the complaint on its merits. Consequently, the conduct of the foreigner – including illegal border crossing or participation in a group attacking border installations – may lead to the conclusion that in such circumstances the procedural guarantees of Article 4 of Protocol No. 4 do not apply. However, such exclusion is conditional: there must simultaneously exist real and effective opportunities for the migrant to submit an application for asylum or other international protection at border crossings or at consular or diplomatic missions. When such opportunities do not exist, the foreigner illegally crossing the border once again becomes a beneficiary of the procedural guarantees related to the prohibition of collective expulsions.

Importantly, the Court linked real and effective procedures for obtaining entry permits to the right to submit an application for asylum or another form of

international protection. This systemic interpretation of the guarantees contained in Article 4 of Protocol No. 4 – made with due regard to the 1951 Geneva Convention – was criticised by Judge Pauliine Koskelo in her dissenting opinion appended to the Grand Chamber judgment in the Spanish case. She noted the selectivity of the systemic interpretation – the Court ignored numerous rules of international law relating to the protection of state borders, territorial integrity, and public order. Furthermore, according to the Finnish judge, the Court should link the principle of non-refoulement solely with the protection of an individual against acts constituting a violation of the right to life or the prohibition of ill-treatment (Articles 2 and 3 of the Convention). Only in these two situations – that is, when a foreigner invokes them – would the safeguards against collective expulsions (Article 4 of Protocol No. 4) be triggered.

At first glance, following the two Grand Chamber judgments, the Court appears to have the necessary tools and tests to deal with the applications concerning pushbacks at the border with Belarus. Undoubtedly, actions by State authorities aimed at preventing foreigners from crossing the border engage the State's responsibility under Article 4 of Protocol No. 4, even if the pushback concerns a single individual. Such an attempt to cross the border is one of many undertaken by foreigners, which renders the State's response 'collective'. Next, it must be examined whether the migrant had realistic opportunities to submit an application for international protection and enter the State's territory at consular offices, border crossing points, or other locations. The Chamber's decision to relinquish jurisdiction in favour of the Grand Chamber may therefore appear surprising, as it suggests the existence of a new and serious legal issue concerning the interpretation of the Convention.

I believe the Court recognised that, despite certain similarities to the Spanish case, the 'Belarusian complaints' are different. In their background there is also the active role of Belarus (and the Russian Federation) as a State facilitating – and even organising – illegal border crossings into the three neighbouring countries. This means that issues relating to border control, State security, territorial integrity, and public order gain further importance. These issues have often been neglected or downplayed in Strasbourg jurisprudence, but were emphasised as crucial in the dissenting opinion of Judge Pauliine Koskelo.

The extent of 'Koskelinisation' in the forthcoming judgments concerning events on the border with Belarus will be particularly interesting. It may be limited and consist merely in expanding the rhetoric concerning border control as a State prerogative while maintaining the conditional approach adopted in the Spanish case – namely the requirement to ensure a realistic opportunity to submit an application for international protection. Only under such circumstances would pushing back illegal migrants not constitute a violation of Article 4 of Protocol No. 4. However, taking into account the Finnish judge's perspective could lead to a deeper shift. In such a scenario, Belarus's hostile role could result in the exclusion of the Court's conditional acceptance. A country subjected to organised migration pressure might not be required to create mechanisms enabling migrants to submit applications in a genuinely effective manner; it might be sufficient that such opportunities exist – as is standard practice – at consular offices.

The Court's choice between these options will, of course, be influenced by the legal arguments and factual documentation submitted by the respondent State.

However, there is also another factor worth emphasising. A large number of entities joined the proceedings concerning pushbacks at the border with Belarus as so-called third parties. In the Spanish case, these were three countries that supported Spain and presented important comments and proposals concerning the reconstruction of Convention standards. With regard to the situation on the Belarusian border, Poland received support from 11 countries, Lithuania from 8, and Latvia from 9. At the same time, numerous public bodies and non-governmental organisations presented different legal perspectives supporting the applicants; these included, among others, the United Nations High Commissioner for Refugees, the Council of Europe Commissioner for Human Rights, the Polish Ombudsman, the Dutch Refugee Council, and the Helsinki Foundation for Human Rights.

Finally, as regards the likely outcome of the judgments concerning pushbacks at the Belarusian border, observing the ECtHR's shift from an idealistic to a more realistic approach, it may be assumed with a very high degree of probability that the Court will find no violation of Article 4 of Protocol No. 4. These rulings may even be unanimous. Moreover, in the applicants' case there were no circumstances suggesting a threat to the right to life (Article 2) or a violation of the prohibition of ill-treatment (Article 3). At the same time, however, the Court will not adopt the position advanced by Pauliine Koskelo that, in the case (in its factual circumstances), the provision prohibiting collective expulsions is not applicable at all.

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