# The European Court of Human Rights' case law concerning the entry and expulsion of non-nationals


Thematic paper

Council of Europe Division
on Migration and Refugees

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Council of Europe Division on Migration and Refugees

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Cover design and layout: Publications and Visual Identity Division (DPIV), Council of Europe

Photos: Council of Europe and Shutterstock.


Printed at the Council of Europe

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# Contents


**ABBREVIATIONS** **5**

**INTRODUCTION** **7**

**PART I – ENTRY** **9**

**CHAPTER 1 – APPLICABILITY OF THE CONVENTION AND EXTRATERRITORIAL MIGRATION CONTROLS** **11**

1.1. The protective ambit of the Convention and the evolution of the Court's case law 11

1.2. Overview of other applicable international standards and case law 16

**CHAPTER 2 – BORDER PROCEDURES AND COLLECTIVE EXPULSIONS** **19**

2.1. The protective ambit of the Convention and the evolution of the Court's case law 19

2.2. Overview of other applicable international standards and case law 22

**CHAPTER 3 – DETENTION AND RECEPTION CONDITIONS, INCLUDING IN BORDER AREAS** **25**

3.1. The protective ambit of the Convention and the evolution of the Court's case law 25

3.2. Overview of other applicable international standards and case law 29

**PART II – EXPULSION** **33**

**CHAPTER 4 – EXPULSION AND EXPOSURE TO ILL-TREATMENT (*NON-REFOULEMENT*)** **35**

4.1. The protective ambit of the Convention and the evolution of the Court's case law 35

4.2. Overview of other applicable international standards and case law 39

**CHAPTER 5 – EXPULSION AND FAMILY SEPARATION** **43**

5.1. The protective ambit of the Convention and the evolution of the Court's case law 43

5.2. Overview of other applicable international standards and case law 47

**CHAPTER 6 – EXPULSION AND SEVERE ILLNESS** **51**

6.1. The protective ambit of the Convention and the evolution of the Court's case law 51

6.2. Overview of other applicable international standards and case law 54

**CONCLUSION** **57**

# Abbreviations

| | |
|---|---|
| African Court | African Court on Human and Peoples' Rights |
| American Convention, ACHR | American Convention on Human Rights |
| CAT | Convention against Torture |
| CEDAW | Convention on the Elimination of All Forms of Discrimination Against Women |
| CRC | Convention on the Rights of the Child |
| CRPD | Convention on the Rights of Persons with Disabilities |
| European Convention, Convention | European Convention on Human Rights |
| European Court, Court | European Court of Human Rights |
| EU | European Union |
| GC | Grand Chamber |
| HRC | United Nations Human Rights Committee |
| ICCPR | International Covenant on Civil and Political Rights |
| ICESCR | International Covenant on Economic, Social and Cultural Rights |
| IACtHR | Inter-American Court of Human Rights |
| UN | United Nations |
| UNHCR | United Nations High Commissioner for Refugees |

# Introduction

Misinformation and disinformation constitute growing concerns in the Council of Europe, particularly as inaccurate accounts on migration proliferate.[1] These trends affect the portrayal of the European Convention on Human Rights and the case law of the European Court of Human Rights.[2] A study by the University of Oxford shows how news stories regarding the Convention in the UK misrepresent cases brought by non-nationals.[3] By contrast, the statistics shared by the Court clarify that only 0.1% of the total number of applications processed in the last 10 years resulted in judgments finding a violation in migration cases.[4] Against this background, the purpose of this thematic paper is to contribute to a factually precise picture.

The present thematic paper thus offers an overview of the Court's case law concerning the entry and removal of non-nationals, paying particular attention to key issues dominating the public and political debate. The first block of chapters focuses on entry. Chapter 1 considers the requirements for the applicability of the Convention, especially regarding extraterritorial migration controls. Chapter 2 focuses on border procedures and the prohibition of collective expulsion. Chapter 3 scrutinises detention and reception conditions, including in border areas. The following block of chapters centres on expulsion. Chapter 4 analyses expulsions and the potential exposure to ill-treatment they may entail. Chapter 5 examines the implications for family rights. Finally, Chapter 6 centres on severe illness. All chapters include a section overviewing other applicable international standards and case law of international courts and the UN treaty bodies to offer a comparative perspective.

Jointly, the chapters show that the European Convention imposes minimal restrictions on domestic migration policies and evince that the Court has generally been particularly mindful of state sovereignty and subsidiarity. The Convention and its Protocols grant neither a right to asylum nor a right to enter for non-nationals, while explicitly permitting their detention for purposes of migration control. Article 3 and *non-refoulement* enshrine absolute prohibitions, but the Court maintains high

1. Council of Europe Division on Migration and Refugees, Roundtable on fact-based communication on migration (summary report), Strasbourg, 7 November 2025, page 2.
2. Ibid., page 4.
3. Adelmant V., Donald A. and Çalı B. (2025), "The European Convention on Human Rights and immigration control in the UK: informing the public debate", Bonavero Report 3/2025, 4 September 2025.
4. Council of Europe Division on Migration and Refugees, "Migration and the European Court of Human Rights: frequently asked questions", February 2026.

thresholds for their applicability. Regarding qualified rights under Article 8, the Court grants domestic courts an increasingly wide margin of appreciation through process-based review. Crucially, equivalent or higher international standards bind Council of Europe member states independently from the Convention,[5] either as treaty-based obligations or as customary international law.

5. European Court of Human Rights, "The Court's case-law on immigration matters", February 2026, paragraph 7. See also Article 53 of the Convention, according to which "Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party".

# Part I – Entry

Chapter 1

# Applicability of the Convention and extraterritorial migration controls

## 1.1. The protective ambit of the Convention and the evolution of the Court's case law

This section focuses on the applicability thresholds of the Convention, as interpreted in the migration domain. The personal (1.1.1), material (1.1.2) and territorial (1.1.3) scopes of application are delineated by reference to the Court's case law on Article 1 and related provisions.

### 1.1.1. Personal scope of application

Article 1 of the Convention binds contracting states to "secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention". As underlined by the Court, the "term 'everyone' covers non-nationals in a given country, including migrants, asylum seekers and refugees".[6] The *travaux préparatoires* confirm this interpretation. During negotiations, the wording of Article 1 was changed from "citizens" or "persons residing" or "living in" the territory of contracting states to the inclusive "everyone within their jurisdiction".[7] The minutes record that this amendment aimed to "widen as far as possible the categories of persons who are to benefit by the guarantees contained in the Convention".[8]

6. European Court of Human Rights, "The Court's case-law on immigration matters", February 2026, paragraph 3.
7. Preparatory work on Article 1 of the European Convention on Human Rights, Court (77)9, 31 March 1977.
8. Ibid., page 34.

### 1.1.2. Material scope of application: substantive limitations and admissibility criteria

Although the Convention covers "everyone" within state jurisdiction, the position of non-nationals is generally more precarious than that of the contracting states' own citizens. According to the Court, "some rights protected by the Convention do not apply in an immigration context", such as full protection against detention, in light of the wording of Article 5(1)(f), or fair trial guarantees under the Court's reading of Article 6 of the Convention.[9] Under the Court's case law, migration and asylum proceedings, including entry decisions, refugee status determination and expulsion orders, are not considered to involve "the 'determination of civil rights and obligations' or a 'criminal charge', which are the necessary conditions for Article 6 to apply".[10] In addition, the Convention does not contain a right to asylum, nor does the Court review how asylum applications were decided or verify how contracting parties fulfil their obligations under the Refugee Convention.[11] It is not competent to determine compliance with other international treaties beyond the Convention,[12] but may take them into account to ensure a harmonious interpretation of international law as a whole.[13]

The starting point of any enquiry concerning migration is that "States have the right to control the entry of non-nationals into their territory".[14] The principle was first pronounced in the Abdulaziz, Cabales and Balkandali case[15] in 1985 and has been constantly reiterated thereafter,[16] which gives rise to a deferential stance vis-à-vis contracting parties in the migration domain.[17]

Moreover, the principles of subsidiarity and shared responsibility have led to a stricter interpretation of the admissibility criteria under Articles 34 and 35 of the Convention after the adoption of Protocol No. 15.[18] The Interlaken process started in 2010[19] and culminated in 2021 with Protocol No. 15 entering into force.[20] The process aimed at

9. Council of Europe Division on Migration and Refugees, "Migration and the European Court of Human Rights: frequently asked questions", February 2026, page 1.
10. European Court of Human Rights, "The Court's case-law on immigration matters", February 2026, paragraph 14.
11. *F.G. v. Sweden* [GC], Application No. 43611/11, 23 March 2016, paragraph 117; *H.A. v. the United Kingdom*, Application No. 30919/20, 5 December 2023, paragraph 41.
12. *S.S. et al. v. Italy* (dec.), Application No, 21660/18, 20 May 2025, paragraph 113.
13. European Court of Human Rights, "The Court's case-law on immigration matters", February 2026, paragraph 7.
14. Ibid., paragraph 6.
15. *Abdulaziz, Cabales and Balkandali v. the United Kingdom* [GC], Application Nos. 9214/80; 9473/81; 9474/81, 28 May 1985, paragraph 67.
16. Recently: *Mansouri v. Italy* (dec.) [GC], Application No. 63386/16, 29 April 2025, paragraph 113.
17. Yildiz E. (2023), *Between forbearance and audacity: the European Court of Human Rights and the norm against torture*, Cambridge University Press; Dembour M-B. (2015), *When humans become migrants*, Oxford University Press, page 117.
18. For an overview, see Acconciamessa L., "The notion of 'shared responsibility' and its radical impact on the relationship between the ECtHR and the domestic authorities", *Strasbourg Observers*, 12 August 2025.
19. High-Level Conference on the Future of the European Court of Human Rights, Interlaken Declaration, 19 February 2010.
20. Protocol No. 15 amending the Convention on the Protection of Human Rights and Fundamental Freedoms (2021) ECTS 213, 24.VI.2013.

improving the effectiveness of the Court in dealing with its increasing backlog by "strengthening the principle of subsidiarity" and highlighting the "shared responsibility between the States Parties and the Court".[21] This requires the Court and the national authorities, including domestic courts, to work in tandem.[22] National authorities and courts are expected to "interpret and apply the[ir] domestic law in a manner that gives full effect to the Convention".[23] The Court has, for its part, strengthened the exhaustion of the domestic remedies rule of Article 35 of the Convention,[24] considering that it is necessary to "afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Court", thereby underlining the "subsidiary character of the machinery of protection established by the Convention in relation to the national systems".[25]

The Court has generally applied the Convention "according to national circumstances, which national authorities are best placed to evaluate and decide upon".[26] The margin of appreciation doctrine entails that if "domestic courts have carefully examined the facts, applied the relevant human rights standards consistently with the Convention and its case law, and adequately balanced the individual interests against the public interest in a case, the Court would require strong reasons to substitute its view for that of the domestic courts".[27] As long as national courts "have taken into account the different factors or interests involved and taken well-explained decisions", the Court usually "will look at national decision-making processes and generally support them".[28]

### 1.1.3. Territorial scope of application

For the Convention to apply, under Article 1, the applicant must fall "within the jurisdiction" of the state concerned. Since the Grand Chamber inadmissibility decision in Banković, the term has been understood in "primarily territorial" terms.[29] Extraterritorial jurisdiction is thus considered "exceptional" and "must be determined with reference to the particular facts".[30]

21. Interlaken Declaration, 19 February 2010, page 2.
22. Copenhagen Declaration, 13 April 2018, paragraph 33.
23. *Ástráðsson v. Iceland* [GC], Application No. 26374/18, 1 December 2020, paragraph 250; *Mukhin v. Russia*, Application No. 3642/10, 14 December 2021, paragraph 139; *Grzęda v. Poland* [GC], Application No. 43572/18, 15 March 2022, paragraph 324; *Nalbant et al. v. Turkey*, Application No. 59914/16, 3 May 2022, paragraph 46.
24. *Fu Quan, s.r.o. v. the Czech Republic* [GC], Application No. 24827/14, 1 June 2023, paragraph 170; *Grosam v. the Czech Republic* [GC], Application No. 19750/13, 1 June 2023, paragraph 90.
25. *Pindo Mulla v. Spain* [GC], Application No. 15541/20, 17 September 2024, paragraph 93.
26. Council of Europe Division on Migration and Refugees, "Migration and the European Court of Human Rights: frequently asked questions", February 2026, page 2.
27. *Halet v. Luxembourg* [GC], Application No. 21884/18, 14 February 2023, paragraph 161.
28. Council of Europe Division on Migration and Refugees, "Migration and the European Court of Human Rights: frequently asked questions", February 2026, page 2.
29. *Banković et al. v. Belgium and Others* (dec.) [GC], Application No. 52207/99, 12 December 2001, paragraph 59.
30. *Al-Skeini et al. v. the United Kingdom* [GC], Application No. 55721/07, 7 July 2011, paragraph 133; *Banković et al. v. Belgium and Others* (dec.) [GC], Application No. 52207/99, 12 December 2001, paragraphs 61, 67 et seq.

The Court recognises two main models where the necessary threshold may be attained for jurisdiction to be established in extraterritorial settings: the "control over an area", or spatial model, and the "state agent authority", or personal model.[31] In both situations, the Court focuses on determining whether the state has exerted "effective control". The spatial model refers to scenarios in which the state effectively controls an area abroad,[32] either directly or through a subordinate local administration.[33] Establishing whether jurisdiction has been exercised in a human rights-relevant way is seen as a "question of fact", depending on for example the strength of the military deployment of the state concerned or the level of "decisive influence" wielded over the proxy actor through which control is maintained.[34] The more complex personal model has several variations. Acts of diplomatic and consular agents, whenever they "exert authority and control over others", are considered acts of jurisdiction.[35] Under certain conditions, acts that amount to an exercise of "public powers normally to be exercised by [the domestic] Government" may also count.[36] The most frequent modality entails the "exercise of physical power" over individuals abroad,[37] through for instance the arrest and detention,[38] abduction[39] or surrender of persons in foreign territory.[40] In exceptional situations, "isolated and specific acts of violence",[41] like "beating or shooting by State agents"[42] and the "extrajudicial targeted killing of an individual by State agents" may also qualify.[43]

In relation to "innovative solutions" or "new approaches" aiming to control migration from abroad,[44] the Court has adopted a cautious approach and few extraterritorial

31. See, generally, Milanović M. (2011), *Extraterritorial application of human rights treaties*, Oxford University Press.
32. *Cyprus v. Turkey* [GC], Application No. 25781/94, 10 May 2001; *Chiragov et al. v. Armenia* [GC], Application No. 13216/05, 16 June 2015; *Ukraine v. Russia (re Crimea)* [GC], Application Nos. 20958/14 and 38334/18, 25 June 2020; *Georgia v. Russia (II)* [GC], Application No. 38263/08, 21 January 2021; *Ukraine and the Netherlands v. Russia* [GC], Application No. 43800/14 et al., 9 July 2025.
33. *Al-Skeini et al. v. the United Kingdom* [GC], Application No. 55721/07, 7 July 2011, paragraph 138 *et seq.*
34. Ibid., paragraph 139; *Ukraine and the Netherlands v. Russia* (dec.) [GC], Application Nos. 8019/16 et al., 30 November 2022, paragraph 695.
35. *Al-Skeini et al. v. the United Kingdom* [GC], Application No. 55721/07, 7 July 2011, paragraph 134.
36. Ibid., paragraph 135; *Jaloud v. the Netherlands* [GC], Application No. 47708/08, 20 November 2014, paragraphs 139, 149 and 152.
37. *Al-Skeini et al. v. the United Kingdom* [GC], Application No. 55721/07, 7 July 2011, paragraph 136; *Georgia v. Russia (II)* [GC], Application No. 38263/08, 21 January 2021, paragraph 130; *Carter v. Russia*, Application No. 20914/07, 21 September 2021, paragraphs 126-30, 150 and 158-61.
38. *Medvedyev v. France* [GC], Application No. 3394/03, 29 March 2010.
39. *Öcalan v. Turkey* [GC], Application No. 46221/99, 12 May 2005.
40. *Al-Saadon and Mufdhi v. the United Kingdom*, Application No. 61498/08, 2 March 2010.
41. *Ukraine and the Netherlands v. Russia* (dec.) [GC], Application Nos. 8019/16 et al., 30 November 2022, paragraph 570.
42. Ibid., citing *Isaak et al. v. Turkey* (dec.), Application No. 44587/98, 28 September 2006 and *Andreou v. Turkey* (dec.), Application No. 45653/99, 3 June 2008.
43. Ibid., citing *Carter v. Russia*, Application No. 20914/07, 21 September 2021, paragraphs 129 and 130.
44. Typically, 'innovative solutions' refers to mechanisms of offshoring and outsourcing migration control to third countries. The long history of these measures is traced in Moreno-Lax V. (2017), *Accessing asylum in Europe*, Oxford University Press. Lately, this terminology has been used to refer to "return hubs" and similar mechanisms in the EU context. Instead, the Chișinău Declaration of 15 May 2026 uses the term "new approaches".

measures have been declared incompatible with the Convention. The Court has condemned maritime interdictions that include the transfer of survivors to warships flying the flag of the contracting party,[45] the use of lethal force[46] or summary returns without an opportunity to request asylum.[47] Other actions have been considered to fall outside the Convention's scope, such as the denial of humanitarian visas at embassies abroad[48] or "pullbacks" at sea performed in co-operation with third countries,[49] despite the extensive "provision of financial and technical assistance to another State's coastguard and the coordination of the … operations" by the contracting party.[50]

Recent case law seems to have introduced a distinction concerning the personal model to cover only situations where state representatives, when acting "in their official capacity", "exercise abroad their authority in respect of that State's [own] nationals".[51] By contrast, vis-à-vis non-nationals, these agents must, in addition, "exercise physical power and control" for the establishment of state jurisdiction; *de jure* authority alone no longer suffices.[52] Furthermore, the input from related sources of international law appears very limited. In the S.S. case, regarding a maritime intervention performed by the Libyan Coastguard with Italy's support and under the direction of its Rescue Co-ordination Centre, the Court considered it lacked the "authority to ensure compliance with other international treaties or with international obligations deriving from sources other than the Convention".[53] Rather than pursuing a harmonious interpretation with the "relevant provisions of the law of the sea", as it did in Hirsi,[54] the Court declared itself incompetent and "not bound by interpretations given to similar instruments by other bodies".[55]

Finally, the exhaustion of the domestic remedies rule has been applied in a very strict manner. For example, in Mansouri, concerning confinement on board a ferry during an enforced return following a refusal-of-entry order, the Court accepted Italy's non-exhaustion objection, even though no competent state authority could

45. *Hirsi Jamaa et al. v. Italy* [GC], Application No. 27765/09, 23 February 2012. For analysis, see Moreno-Lax V. (2012), "Hirsi Jamaa and Others v. Italy – or the Strasbourg Court versus extraterritorial migration control?", *Human Rights Law Review* 574.
46. *Alkhatib et al. v. Greece*, Application No. 3566/16, 16 January 2024; *Almukhlas and Al-Maliki v. Greece*, Application No. 22776/18, 25 March 2025.
47. *M.A. & Z.R. v. Cyprus*, Application No. 39090/20, 8 October 2024; *Safi et al. v. Greece*, Application No. 5418/15, 7 July 2022; *Sharifi et al. v. Italy and Greece*, Application No. 16643/09, 21 October 2014.
48. *M.N. et al. v. Belgium* [GC], Application No. 3599/18, 5 May 2020.
49. *S.S. et al. v. Italy* (dec.), Application No. 21660/18, 20 May 2025. For analysis, see Moreno-Lax V.(2025), "SS and Others v. Italy – or doubling down on Banković", *EJIL Talk!*, 19 June 2025; Moreno-Lax V. (2020), "The architecture of functional jurisdiction: unpacking contactless control – on public powers, S.S. and Others v. Italy, and the 'operational model'", *German Law Journal*, 21, 385.
50. European Court of Human Rights, "Guide on the case-law of the European Convention on Human Rights – Immigration", 28 February 2026. Cf. critical of externalised' policies of migration control: Council of Europe Commissioner for Human Rights, "Externalised asylum and migration policies and human rights law", 4 September 2025.
51. *Ukraine and the Netherlands v. Russia* (dec.) [GC], Application Nos. 8019/16 et al., 30 November 2022, paragraph 566; *M.N. et al. v. Belgium* [GC], Application No. 3599/18, 5 May 2020, paragraphs 106 and 117-19.
52. Ibid.
53. *S.S. et al. v. Italy*, paragraph 113.
54. *Hirsi Jamaa et al. v. Italy* [GC], Application No. 27765/09, 23 February 2012, paragraph 77.
55. *S.S. et al. v. Italy*, paragraph 113.

have been accessed and no effective procedures existed to contest the measure.[56] This has been considered a reversal of the principle that makes it "incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one, available in theory and in practice at the relevant time".[57]

## 1.2. Overview of other applicable international standards and case law

Besides the Convention, all Council of Europe member states are parties to – and therefore "also bound by" – the Refugee Convention, the International Covenant on Civil and Political Rights (ICCPR), the UN Convention against Torture (CAT) and the Convention on the Rights of the Child (CRC) and must also abide by customary international law.[58] This is to be considered by the Court. As the Convention's authoritative interpreter, the Court is tasked with ensuring "the observance of the engagements undertaken by the High Contracting Parties" under the treaty.[59] It must do so "in accordance with relevant principles of public international law, as codified in the Vienna Convention on the Law of Treaties",[60] adopting a "dynamic and evolutive approach".[61]

In this regard, it is relevant to review the standards endorsed by other regional human rights courts and UN treaty bodies.[62] The Inter-American Commission on Human Rights, for instance, has espoused a "causal link" model in extraterritorial scenarios. In the Alejandre case, Cuba was deemed to have exerted sufficient control (and thus jurisdiction) through the shooting down of two aircrafts flying beyond its air space because "the victims died as a consequence of direct actions of agents of the Cuban State".[63] The Inter-American Court of Human Rights has generalised this understanding, concluding that "a person is under the jurisdiction of the State … if there is a causal link between the action that occurred within its territory and the negative impact on the human rights of persons outside its territory".[64]

The UN Committee against Torture has adopted this model too. The term "jurisdiction" has been construed to refer to "any territory in which [the state party] exercises,

56. *Mansouri v. Italy* (dec.) [GC], Application No. 63386/16, 29 April 2025.
57. *Vučković et al. v. Serbia* (preliminary objection) [GC], Application Nos. 17153/11 et al, 25 March 2014, paragraph 77. For analysis, see Acconciamessa L. (2025), "The presumption of effectiveness of domestic remedies in Mansouri v. Italy. How far can subsidiarity go in this field?", *Strasbourg Observers*, 23 May 2025.
58. Council of Europe Division on Migration and Refugees, "Migration and the European Court of Human Rights: frequently asked questions", February 2026, page 2.
59. European Convention on Human Rights, Articles 19 and 32.
60. Steering Committee for Human Rights, "Possible issues for inclusion in a political declaration", CDDH(2026)1, 6 Jan 2026, paragraph 8. For a recent reference to the VCLT: *Ukraine and the Netherlands v. Russia* [GC] (Merits), Application Nos. 8019/16, 43800/14, 28525/20 and 11055/22, 9 July 2025, paragraphs 179 and 427.
61. Ibid.; *Scoppola (No. 2) v. Italy* [GC], Application No. 10249/03, 17 September 2009, paragraph 104.
62. For a full elaboration, see Moreno-Lax V. (2024), "Meta-borders and the rule of law: from externalisation to 'responsibilisation' in systems of contactless control", *Netherlands International Law Review* 21.
63. *Alejandre v. Cuba*, Case 11.589, Report No. 86/99, OEA/Ser.L/V/II 106, IAComHR (1999), paragraphs 24 and 25.
64. Environment and Human Rights, Advisory Opinion OC-23/17, Series A No. 23, paragraph 74.

directly or indirectly, in whole or in part, *de jure* or *de facto* effective control, in accordance with international law".[65] Accordingly, in a case regarding the interdiction of a migrant at sea by the Spanish authorities and his subsequent abandonment close to the Moroccan shore, the committee concluded that there had been "jurisdiction" on the basis of the "undeniable cause-effect relationship … between Mr Sonko's death and the actions of the … [state's] officers".[66]

The UN Human Rights Committee (HRC) has expanded on the cause-and-effect approach, constructing an impact-based conception of jurisdiction.[67] In relation to the right to life, it has specified that "its jurisdiction" should be construed to include "all persons over whose enjoyment of the right to life [the state party] exercises power or effective control".[68] As a result, "this includes persons located outside [its] territory … whose right to life is nonetheless impacted by its … activities in a direct and reasonably foreseeable manner".[69] Consequently, failing to adequately respond to a distress call by individuals in danger of being lost at sea may amount to an exercise of jurisdiction that violates the ICCPR. In *A.S. v. Italy*, "negligent acts and omissions in the rescue activities" of the defendant "directly affected" the situation of the individuals concerned "in a manner that was reasonably foreseeable".[70] Such conduct engaged Italy's jurisdiction and its legal responsibility under the ICCPR.

65. *J.H.A. v. Spain*, CAT/C/41/D/323/2007, CAT 2008, paragraph 8.2; General Comment No. 2, CAT/C/GC/2, CAT 2008, paragraph 16.
66. *Sonko v. Spain*, CAT/C/47/D/368/2008, CAT 2011, paragraph 10.1.
67. General Comment No. 31, CCPR/C/21/Re1/Add13, CCPR 2004, paragraph 10; *Munaf v. Romania*, CCPR/C/96/D/1539/2006, CCPR 2009, paragraph 14.2.
68. General Comment No. 36, CCPR/C/GC/36, CCPR 2018, paragraph 63.
69. Ibid.
70. *A.S. et al. v. Italy*, CCPR/C/130/D/3042/2017, CCPR 2021, paragraphs 8.2 and 7.8.

Chapter 2

# Border procedures and collective expulsions

## 2.1. The protective ambit of the Convention and the evolution of the Court's case law

This section focuses on Article 3 and Article 4 of Protocol No. 4 to the Convention in the context of border procedures and collective expulsions. The Court's case law contains important procedural and substantive guarantees (2.1.1), but recent jurisprudence narrows down protections (2.1.2) and raises evidentiary thresholds (2.1.3). Although "pushbacks" proliferate, the number of judgments confirming human rights violations remains small.

### 2.1.1. Key procedural safeguards

The 2012 Grand Chamber judgment in Hirsi found collective expulsions at sea to violate Articles 3 and 4 of Protocol No. 4 to the Convention.[71] The complaint was brought by Somali and Eritrean nationals, who were intercepted on the high seas by Italian ships and returned to Tripoli without an individual examination. The Court cited the *travaux préparatoires* to determine the scope of Article 4 of Protocol No. 4 by reference to the original intent of the contracting parties. Therein, the Committee of Experts referred to "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".[72] Moreover, the drafters intended the term "expulsion" to be interpreted "in the generic meaning, in current use (to drive away from a place)", regardless of location.[73] The link to Article 3 of the Convention served to set an absolute form of protection, rendering considerations of individual conduct irrelevant.

71. *Hirsi Jamaa et al. v. Italy* [GC], Application No. 27765/09, 23 February 2012. For analysis, see Moreno-Lax V. (2012), "*Hirsi Jamaa and Others v. Italy* or the Strasbourg Court versus extraterritorial migration control?", 12 *Human Rights Law Review* 574.
72. Ibid., paragraph 174, citing Article 4 of the final Committee draft, page 505, paragraph 34.
73. Ibid., paragraph 174.

Then, in 2019, the Grand Chamber judgment in Ilias and Ahmed set out the procedural safeguards against summary removals to third intermediary countries. The Court found a breach of Article 3 of the Convention on procedural grounds alone, holding that Hungary "failed to discharge its procedural obligation under Article 3 of the Convention to assess the risks of treatment contrary to that provision" and that "there was an insufficient basis for the Government's decision to establish a general presumption concerning Serbia as a safe third country".[74] Authorities must assess the available information on the third country "in an adequate manner and of their own initiative" and applicants must have "sufficient opportunity" to demonstrate lack of safety.[75] If the expelling state does not examine asylum claims itself, it must ensure that the third country will provide an adequate examination.[76] Otherwise, "asylum seekers facing deadly danger in their country of origin could be lawfully and summarily removed to 'unsafe' third countries", which would "render meaningless the prohibition of ill-treatment".[77] Thus, since the outcome of protection claims cannot be known in advance, it is imperative to ensure adequate procedures to examine risks upon return.

### 2.1.2. The own-culpable-conduct exception

Subsequent case law has specified and limited the protective scope of Article 4 of Protocol No. 4. The case of N.D. and N.T. was the first judgment on the applicability of the prohibition of collective expulsion to immediate removals at Europe's land borders. It introduced the own-culpable-conduct exception to collective expulsions, holding that there is no violation of Article 4 of Protocol No. 4 when the lack of individual removal decisions is due to the "conduct of persons who cross a land border in an unauthorised manner, deliberately take advantage of their large numbers and use force … creat[ing] a clearly disruptive situation which is difficult to control and endangers public safety".[78] The Court established a two-tier test. The first tier concerns the availability of genuine and effective access to means of legal entry allowing a claim for protection under Article 3 of the Convention. The second tier concerns the absence of cogent reasons for not using official entry procedures, based on objective facts for which the respondent state is responsible. In application of this test, the Grand Chamber considered that the third-party interventions describing the inaccessibility of the Beni Enzar border crossing point were "not conclusive"[79] and held that there was no violation of the prohibition of collective expulsion.[80]

Subsequent case law expanded the applicability of the own-culpable-conduct doctrine.[81] In the case of *A.A. and Others v. North Macedonia*, applicants from Afghanistan, Iraq and Syria complained against their collective expulsions from North Macedonia to Greece in March 2016, following the closure of the refugee transit

74. *Ilias and Ahmed v. Hungary* [GC], Application No. 47287/15, 21 November 2019, paragraph 163.
75. Ibid., paragraph 148.
76. Ibid., paragraph 138.
77. Ibid.
78. *N.D. and N.T. v. Spain* [GC], Application No. 8675/15 and 8697/15, 13 February 2020, paragraph 201.
79. Ibid., paragraph 218.
80. Ibid., paragraph 231.
81. Wriedt V. (2022), "*Expanding exceptions? AA and Others v. North Macedonia,* systematic pushbacks and the fiction of legal pathways", *Strasbourg Observers*, 30 May 2022.

corridor. The situation differed from N.D. and N.T. and the judgment acknowledged that the applicants' entry into North Macedonia involved "no use of force", but the Court nevertheless proceeded to examine whether the applicants "circumvented an effective procedure for legal entry" without "cogent reasons".[82] To reach its conclusion that there was no violation of Article 4 of Protocol No. 4, it re-stated a shortened version of the own-culpable-conduct list of criteria and found that the lack of individual decisions was a "consequence of their own conduct".[83]

Despite important judgments finding violations,[84] the case law has further expanded the application of the test based on unauthorised entry alone.[85] The Court found a violation in *M.H. and Others v. Croatia*, concerning a family pushed back to Serbia by Croatian police outside official border crossing points, during which their 6-year-old child was hit by a train and died. However, the Court reiterated the own-culpable-conduct test, even if the applicants had neither used force nor entered as part of a large group nor endangered public safety.[86]

### 2.1.3. High evidentiary thresholds

Collective expulsions create highly precarious situations and make it very difficult for applicants to produce evidence of a practice that is usually intended to leave no documentary trace. Nevertheless, the Court has rejected applications as inadmissible based on very high evidentiary standards or dismissed the evidence provided by applicants while accepting the state version despite contradictions. *Doumbe Nnabuchi v. Spain* concerned a complaint against a collective expulsion from Melilla to Morocco, captured on video footage showing the violence used by Spanish border guards. Yet the Court found that the applicant had "not provided prima facie evidence of his participation in the events".[87] Consequently, the application was declared inadmissible *ratione personae*.

Related cases have raised evidentiary requirements,[88] such as *G.R.J. v. Greece*, brought by an unaccompanied minor who claimed to have been pushed back from Samos to Türkiye. The Court declared the application inadmissible *ratione personae*[89] on the basis of a high threshold for prima facie evidence**,** finding that the standard of "beyond reasonable doubt" had not been reached.[90] By the Court's own appreciation, it was "extremely difficult" to provide evidence of secretive operations denied by

82. *A.A. et al. v. North Macedonia*, Application Nos. 55798/16 and 4 others, 5 April 2022, paragraph 114.
83. Ibid., paragraph 123.
84. *Shahzad v. Hungary*, Application No. 12625/17, 8 July 2021.
85. Hakiki H. and Rodrik D. (2023), "Accessing borders, accessing justice? The European Court of Human Rights' jurisprudence on pushbacks at land borders", 1 *Asyl* 3.
86. *M.H. et al. v. Croatia*, Application Nos. 15670/18 and 43115/18, 8 July 2021, paragraphs 294, 295 and 282. Cf. *O.H. et al. v. Serbia*, Application No. 57185/17, 3 February 2026.
87. *Doumbe Nnabuchi v. Spain* (dec.), Application No. 19420/15, 1 June 2021, paragraph 31.
88. Motz S. and Mulli A, (2025), "Undermining protection standards in pushbacks cases: the ECtHR in *A.R.E. v. Greece* and *G.R.J. v. Greece*", *Strasbourg Observers*, 28 March 2025.
89. *G.R.J. v. Greece* (dec.), Application No. 15067/21, 3 December 2024, paragraphs 217 and 226.
90. Ibid., paragraphs 223 and 225. For analysis, see Kienzle I. and Riemer M. (2025), "Feeble recognition of a systematic pushback practice: the latest ECtHR rulings on Greek pushback cases", *Verfassungsblog*, 30 January 2025.

the state concerned.[91] The Court acknowledged the state's "systematic practice",[92] but asked the applicant to "establish that the alleged 'pushback' was linked to this practice" by providing a "detailed, specific and consistent" account, supported by "concrete, comprehensive and concordant evidence".[93]

The Court has found violations in a small number of border procedure cases, which affirm the high thresholds making it difficult for applicants to have their claims confirmed. *M.K. and Others v. Poland* was brought by Russian nationals from Chechnya. They reached the Terespol post at the Polish-Belarusian border, but the Polish border guards refused to receive their asylum applications and returned them to Belarus. The Court found violations of Articles 3 and 4 of Protocol No. 4.[94] Yet, in *M.A. and Others v. Latvia*, concerning refusals of entry at the Indra crossing between Belarus and Latvia, the Court faulted the same applicants for not providing a copy of their asylum request, as they had managed to do in *M.K. and Others v. Poland*.[95] Although the applicants delivered a "clear, specific and coherent description of the events", it considered they had still "not provided prima facie evidence" of having applied for asylum.[96]

## 2.2. Overview of other applicable international standards and case law

Several international law instruments include explicit prohibitions of collective expulsion, namely the EU Charter of Fundamental Rights in Article 19(1), the American Convention on Human Rights in Article 22(9), the African Charter on Human and Peoples' Rights in Article 12(5) and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families in Article 22(1). In parallel, the Refugee Convention expressly prohibits *refoulement* in Article 33, alongside the penalisation of irregular entry in Article 31.[97] Express prohibitions of *refoulement* are also contained in Article 3 of the Convention against Torture, Article 16 of the International Convention for the Protection from Enforced Disappearance and Article 22(8) of the American Convention on Human Rights. In other human rights treaties, *non-refoulement* has been interpreted as an aspect of related substantive human rights obligations, as stipulated in General Comments by the UN Human Rights Committee,[98] the UN Committee on the Rights of the Child[99] and the UN

91. *G.R.J. v. Greece*, paragraph 191; *A.R.E. v. Greece*, paragraph 230.
92. *G.R.J. v. Greece*, paragraph 225; *A.R.E. v. Greece*, Application No. 15783/21, 7 January 2025, paragraph 229.
93. *G.R.J. v. Greece*, paragraph 182; *A.R.E. v. Greece*, paragraph 217.
94. *M.K. and Others v. Poland*, Application Nos. 40503/17, 42902/17 and 43643/17, 23 July 2020.
95. *M.A. and Others v. Latvia* (dec.), Application No. 25564/18, 29 March 2022, paragraph 53.
96. Ibid., paragraphs 52 and 56. Cf. *O.H. et al. v. Serbia*, Application No. 57185/17, 3 February 2026, where the Court takes support on findings of fact by the domestic courts to conclude a violation. On problematising this trend, see Kumar-Banerjee A. (2026), "*OH and Others v. Serbia:* Strasbourg's reliance on domestic judicial organs in pushbacks cases", *Strasbourg Observers*, 28 April 2026.
97. For analysis, see Costello C. and Ioffe Y. (2021), "Non-penalization and non-criminalization", in Costello C., Foster M. and McAdam J. (eds) (2021), *The Oxford handbook of international refugee law*, Oxford University Press, 917; Moreno-Lax V. (2017), *Accessing asylum in Europe*, Oxford University Press, page 351 et seq.
98. General Comment No. 31, CCPR/C/21/Rev.1/Add. 13, CCPR 2004, paragraph 12.
99. General Comment No. 6, CRC/GC/2005/6, CRC 2005, paragraph 27.

Committee on the Rights of Migrant Workers,[100] among others.[101] The prohibitions are considered absolute and applicable to pushbacks and mass influx situations. They constitute norms of customary international law, if not *jus cogens*.[102]

The UN Committee against Torture confirmed violations of the prohibition of return to torture under Article 3 of the Convention against Torture, and in relation to inhuman and degrading treatment under Article 16, applied in border expulsion cases such as *Sonko v. Spain*[103] and *Barry v. Morocco.*[104] Its General Comment No. 4 makes a direct connection between collective expulsions and the prohibition of *refoulement*, stating that "collective deportation, without an objective examination of the individual cases with regard to personal risk, should [per se] be considered as a violation of the principle of *non-refoulement".*[105] The committee further details that the prohibition of collective expulsion requires an individual, impartial and independent examination, respecting core procedural safeguards such as the guarantee of a transparent process, a review of the deportation decision and an appeal with suspensive effect.[106] Expulsions that are carried out "extremely quickly and without notice" violate *non-refoulement*.[107] The committee has consequently introduced a radical reversal of the burden of proof,[108] stipulating that "when complainants are in a situation where they cannot elaborate on their case … the burden of proof is reversed and the State party concerned must investigate the allegations and verify the information on which the communication is based".[109]

The UN Committee on the Rights of the Child has condemned collective expulsions at the Spanish-Moroccan border.[110] In the case of *D.D. v. Spain*, concerning immediate summary expulsions from Melilla to Morocco, the committee highlighted that states are obliged to "carry out a prior assessment of the risk, if any, of irreparable harm to the child and serious violations of his or her rights in the country to which he or she will be transferred or returned".[111] Failure to assess personal circumstances and conduct a risk assessment violates the procedural and substantive aspects of the prohibition of ill-treatment and *non-refoulement*.[112]

100. Joint General Comment No. 3 of the CMW and No. 22 of the CRC, CRC/C/GC/22 - CMW/C/GC/3, CRC-CMW 2017, paragraph 46.
101. CEDAW General Comment No. 32, CEDAW/C/GC/32, CEDAW 2014.
102. International Law Commission, "Report of the Seventy-first Session, Ch V. Peremptory norms of general international law (jus cogens)", A/74/10, 2019; International Organization for Migration, International Migration Law Unit information note on the principle of non-refoulement, 13 October 2023; Costello C. and Foster M. (2015), "Non-refoulement as custom and *jus cogens*? Putting the prohibition to the test", in den Heijer M. and van der Wilt H. (eds) (2015), *Netherlands yearbook of international law*: *jus cogens: quo vadis?*, T.M.C. Asser Press, 305-6.
103. *Sonko v. Spain*, CAT/C/47/D/368/2008, CAT 2011.
104. *Barry v. Morocco*, CAT/C/52/D/372/2009, CAT 2014.
105. General Comment No. 4, CAT/C/GC/4, CAT 2017, paragraph 13.
106. Ibid.
107. *Kwami Mopongo and Others v. Morocco*, CAT/C/53/D/321/2007, 7 November 2014, paragraph 11.3.
108. Çalı B., Costello C. and Cunningham S. (2020), "Hard protection through soft courts? Non-refoulement before the United Nations Treaty Bodies", 21 *German Law Journal* 355, 375.
109. General Comment No. 4, CAT/C/GC/4, CAT 2017, paragraph 38.
110. Wriedt V. (2019), "Push-backs rejected: *D.D. v. Spain* and the rights of minors at EU borders", *EU Migration Law Blog*, 29 April 2019.
111. *D.D. v. Spain*, CRC/C/80/D/4/2016, CRC 2019, paragraph 14.4.
112. Ibid., paragraph 14.6.

The UN Human Rights Committee has also denounced the denial of access to protection at borders. In *A.B. and B.D. v. Poland*, concerning rejections at the Polish-Belarusian border despite attempts to ask for asylum, the committee confirmed violations of the *non-refoulement* guarantees under the ICCPR, given the absence of access to adequate procedures.[113]

In *Nadege Dorzema et al. v. Dominican Republic*, the Inter-American Court found violations of the prohibition of collective expulsion together with violations of fair trial rights. The judgment stipulates extensive minimum guarantees, including a formal explanation of the reasons for the expulsion, information about applicable rights, access to legal assistance and translation, and the right to have the case reviewed.[114] The case of *Expelled Dominicans and Haitians v. the Dominican Republic* reaffirmed that "due process must be guaranteed to everyone, regardless of their migratory status", so that "migrants may assert their rights and defend their interests effectively and in conditions of procedural equality".[115] The Court's advisory opinions, concerning the juridical condition and rights of undocumented migrants[116] and the institution of asylum and its recognition as a human right,[117] specify further safeguards.

Similarly, the African Commission on Human and Peoples' Rights has condemned collective expulsions in decisions against Rwanda,[118] Zambia,[119] Angola[120] and Guinea.[121] The decisions denounce collective expulsions as a "special threat to human rights",[122] while underlining that neither challenges in hosting refugees[123] nor economic difficulties[124] can justify them. Moreover, these cases repeatedly confirmed violations of the prohibition of collective expulsion together with the right to a fair trial and non-discrimination.

113. *A.B. and B.D. v. Poland*, CCPR/C/135/D/3017/2017, CCPR 2023, paragraphs 9.5 and 10.
114. *Nadege Dorzema et al. v. Dominican Republic* (IACtHR), 24 October 2012, paragraph 175. On earlier cases of interdictions and returns by the USA, see *Haitian Centre for Human Rights et al. v. USA* (Commission Report), Application No. 10675, 13 March 1997.
115. *Expelled Dominicans and Haitians v. the Dominican Republic* (IACtHR), 28 August 2014, paragraph 351.
116. "Juridical condition and rights of the undocumented migrants", IACtHR Advisory Opinion OC-18/03, Series A No. 18.
117. "The institution of asylum and its recognition as a human right in the Inter-American protection system", IACtHR Advisory Opinion OC-25/18, Series A No. 25.
118. *Organisation mondiale contre la torture et al v. Rwanda* (ACmHPR), Application Nos. 27/89-46/91-49/91-99/93, 1996.
119. *Rencontre Africaine pour la Défense des Droits de l'Homme v. Zambia* (ACmHPR), Application No. 71/92, 1996.
120. *Union interafricaine des droits de l'Homme et al v. Angola* (ACmHPR), Application No. 159/96, 1997; *Institute for Human Rights and Development in Africa (on behalf of Esmaila Connateh and 13 Others) v. Angola* (ACmHPR), Application No. 292/04, 2008.
121. *Institute for Human Rights and Development in Africa (on behalf of Sierra Leonean Refugees in Guinea) v. Guinea* (ACmHPR), Application No. 249/02, 2004.
122. Union interafricaine, paragraph 15; Connateh, paragraph 68; Rencontre Africaine, paragraph 20; Sierra Leonean Refugees, paragraph 69.
123. Sierra Leonean Refugees, paragraph 67.
124. Union interafricaine, paragraph 16; Connateh paragraph 68.

Chapter 3

# Detention and reception conditions, including in border areas

## 3.1. The protective ambit of the Convention and the evolution of the Court's case law

The Convention provisions most often engaged in cases concerning the detention (3.1.1) and reception of non-nationals (3.1.2) are Articles 3, 5 and 8, respectively concerning the prohibition of ill-treatment, the right to liberty and the right to private and family life examined below.

### 3.1.1. Detention

The Convention allows the detention of non-nationals to "prevent [their] unauthorised entry" under Article 5(1)(f) and states have been accorded latitude in this regard. There are only two conditions to fulfil: the detention must be "lawful" and "non-arbitrary". This entails the obligation to comply with the relevant substantive and procedural rules of domestic law and with the general protection against arbitrariness inscribed in the Convention.[125] The detention must be: 1. undertaken in good faith; 2. closely connected to the purpose of preventing an irregular entry; 3. of a length that does not exceed what is reasonable; and 4. in a place and under conditions that are appropriate,[126] particularly bearing in mind that the measure applies "not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country".[127] In addition, where the objective is to effect a deportation, the Court requires that proceedings be undertaken with "due diligence".[128]

125. *Saadi v. the United Kingdom* [GC], Application No. 13229/03, 29 January 2008, paragraph 67 et seq. For analysis, see Moreno-Lax V. (2011), "Beyond *Saadi v. UK*: why the 'unnecessary' detention of asylum seekers is inadmissible under EU Law", 5 *Human Rights and International Legal Discourse* 166.
126. *Saadi v. the United Kingdom*, paragraphs 72-74.
127. Ibid., paragraph 74, citing *Amuur v. France*, Application No. 19776/92, 25 June 1996, paragraph 43.
128. *Chahal v. the United Kingdom* [GC], Application No. 22414/93, 15 November 1996, paragraphs 112-123.

Articles 5(2) to 5(4) of the Convention foresee a series of procedural safeguards, including the right to be informed "promptly" of the grounds for the detention and "in a language which [the person] understands". This should be communicated in simple non-technical terms that allow the person to use their right of appeal to challenge the lawfulness of the measure.[129] That the information be provided "promptly" is relative to the circumstances and need not be at the precise moment of arrest.[130] On this basis, the person can launch a judicial (*habeas corpus*) challenge of the lawfulness of the detention.[131] This right cannot be unduly obstructed by, for example, not providing information or not giving access to a lawyer.[132] It will violate the Convention if there is no effective judicial remedy available capable of declaring the illegality of the measure and of bringing it to an end, leading to the release of the applicant.[133]

The place and conditions of detention need to be "appropriate". Generally, the Court has applied the standards related to prisoners' rights as a baseline.[134] The appropriateness test requires, in addition, that authorities take account of the specific situation of the person concerned, including their state of health and any vulnerabilities. There is abundant case law regarding the detention of children.[135] The "best interests of the child" principle applies in these situations and modulates the type of measures that may be adopted. In particular, detention, in their regard, must constitute "a measure of last resort".[136]

There have been cases where the conditions of confinement have been found incompatible with the Convention and reach the threshold of an Article 3 violation. This has been the case both in airport transit zones and in land border transit zones.[137] In R.R., Hungary was found in breach of the prohibition of ill-treatment for failure to provide sufficient food to the applicant, and for the living conditions endured by his pregnant wife and minor children, all of whom had been detained in the Röszke transit zone.[138] In H.M., the state was condemned once again for having the applicant handcuffed and put on a leash while taken from the transit area to a

129. *Khlaifia et al. v. Italy* [GC], Application No. 16483/12, 15 December 2016, paragraph 115.
130. Ibid.
131. Ibid., paragraph 131. On the scope of judicial review, see *A.M. v. France*, Application No. 24587/12, 12 July 2016, paragraphs 40 and 41.
132. *Rahimi v. Greece*, Application No. 8687/08, 5 April 2011, paragraph 120; *A. et al. v. the United Kingdom* [GC], Application No. 3455/05, 19 February 2009, paragraph 203 et seq.; *Al Husin v. Bosnia and Herzegovina (no. 2)*, Application No. 10112/16, 25 June 2019.
133. *Muhammad Saqawat v. Belgium*, Application No. 54962/18, 30 June 2020; *Moustahi v. France*, Application No. 9347/14, 25 June 2020.
134. *Georgia v. Russia (I)* [GC], Application No. 13255/07, 3 July 2014, paragraphs 192-205; *Khlaifia et al. v. Italy*, paragraphs 163-167; *Sakir v. Greece*, Application No. 48475/09, 24 March 2016, paragraphs 50-53.
135. European Court of Human Rights, "Guide on the case-law of the European Convention on Human Rights – Immigration", 31 August 2025, page 20 et seq.
136. *Popov v. France*, Application Nos. 39472/07 and 39474/07, 19 January 2012, paragraph 119. Also, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, Application No. 13178/03, 12 October 2006, paragraph 58; *Rahimi v. Greece*, 8687/08, 5 April 2011, paragraphs 108-110; *A.B. et al. v. France*, Application No. 11593/12, 12 July 2016, paragraph 123; *Nikoghosyan et al. v. Poland*, Application No. 14743/17, 3 March 2022, paragraph 86.
137. *Z.A. et al. v. Russia* [GC], Application Nos. 61411/15, 61420/15, 61427/15 and 3028/16, 21 November 2019 (airport); *Riad and Idiab v. Belgium*, Application Nos. 29787/03 and 29810/03, 24 January 2008 (airport); *R.R. et al. v. Hungary*, Application No. 36037/17, 2 March 2021 (land borders).
138. *R.R. et al. v. Hungary*, Application No. 36037/17, 2 March 2021, paragraphs 48-65.

hospital to assist his pregnant wife with interpretation.[139] In A.H., Greece was found at variance with Article 3 for allegedly keeping the applicants in a sort of "cage" on arrival and subsequently accommodating them in overcrowded and insalubrious conditions.[140] In other cases, despite the severe conditions, the Court has not considered the threshold reached.[141]

### 3.1.2. Reception

Pursuant to established case law, Article 3 of the Convention does not impose an obligation to provide housing to everyone within state jurisdiction.[142] Nor does it entail a general duty to provide financial assistance to asylum seekers.[143] The only exception concerns unaccompanied children, which states are obliged to protect and take charge of, including through their placement in adequate accommodation and in conditions suitable to their educational and developmental needs.[144] Where domestic legislation introduces a right of asylum seekers to accommodation, this is considered in the Court's reasoning.[145]

In 2011, the Grand Chamber, in M.S.S., declared that asylum seekers, as a group, are "member[s] of a particularly underprivileged and vulnerable population … in need of special protection".[146] The case concerned an Afghan asylum applicant in Greece, who made his way to Belgium but was to be returned through a Dublin transfer. The conditions he endured, both in detention and upon his release, amounted to enforced destitution, "living in a state of the most extreme poverty", with difficulty finding food, no access to sanitary facilities and exposed to violence.[147] In these circumstances, the Court declared Greece had imposed "humiliating treatment".[148] Such conditions, combined with prolonged uncertainty, gave rise to an issue under Article 3 of the Convention. Thereafter, the Court has held that asylum seekers cannot be left homeless, nor without access to any material resources.[149]

In subsequent case law, situations like mental health conditions or pregnancy have not been taken to suffice for "vulnerability" to be established, nor for the attainment

139. *H.M. et al. v. Hungary*, Application No. 38967/17, 2 June 2022, paragraphs 13, 21-27.
140. *H.A. et al. v. Greece*, Application No. 4892/18 and 4920/18, 13 June 2023,
141. *Ilias and Ahmed v. Hungary* [GC], Application No. 47287/15, 21 November 2019, paragraphs 186-194; *Thiam v. Italy*, Application No. 21329/16, 30 August 2022, paragraphs 32-41.
142. *Chapman v. the United Kingdom* [GC], Application No. 27238/95, 18 January 2001, paragraph 99; *Müslim v. Turkey*, Application No. 53566/99, 26 April 2005, paragraph 85. Cf. *Budina v. Russia* (dec.), Application No. 45603/05, 18 June 2009.
143. *Tarakhel v. Switzerland* [GC], Application No. 29217/12, 4 November 2014, paragraph 95.
144. *Khan v. France*, Application No. 12267/16, 28 February 2019; *Sh.D. et al. v. Greece et al.*, Application No. 14165/16, 13 June 2019; *M.D. v. France*, Application No. 50376/13, 10 October 2019; *R.R. et al. v. Hungary*, Application No. 36037/17, 2 March 2021; *Rahimi v. Greece*, 8687/08, 5 April 2011.
145. *M.S.S. v. Belgium and Greece* [GC], Application No. 30696/09, 21 January 2011, paragraphs 250 and 251. Confirming: *M.K. et al. v. France*, Application Nos. 34349/18, 34638/18 and 35047/18, 8 December 2022; *Camara v. Belgium*, Application No. 49255/22, 18 July 2023.
146. *M.S.S. v. Belgium and Greece*, paragraph 251. For analysis, see Moreno-Lax V. (2012), "Dismantling the Dublin System: *M.S.S. v. Belgium & Greece*", 14 *European Journal of Migration and Law* 1.
147. *M.S.S. v. Belgium and Greece*, paragraph 254.
148. Ibid., paragraph 263.
149. *N.H. et al. v. France*, Application Nos. 28820/13, 75547/13 and 13114/15, 2 July 2020; *O.R. v. Greece*, Application No. 24650/19, 23 January 2024.

of the severity threshold under Article 3.[150] In Ilias and Ahmed, the two Bangladeshi adult, male applicants, confined for 23 days in very precarious conditions in the Röszke transit zone at the Hungarian-Serbian border, were not considered vulnerable, despite diagnoses of PTSD and depression. For the Court, "the psychiatrist's observations [could not] lead to the conclusion that the otherwise acceptable conditions at the Röszke transit zone were particularly ill-suited".[151] In M.H., concerning an Afghan family forced back to Serbia by the Croatian border police following the rail tracks, the fact that one of the children died, run over by a train, and the suffering it entailed was not sufficient to warrant special treatment or a conclusion that "the otherwise acceptable conditions at the Tovarnik Centre for adult applicants were particularly ill-suited to their individual circumstances",[152] thus excluding a violation of Article 3.

In the hotspots-related case law and the conditions facing applicants, the Court has condemned Italy several times for violations at the Lampedusa and Taranto hotspots. In J.A. – the pilot case to which subsequent judgments refer[153] – it considered the living/detention conditions as reaching the level of inhuman and degrading treatment. The situation of *de facto* detention also contravened Article 5.[154] The situation in the Greek hotspots has equally been condemned by the Court. Conditions in the Moria camp were deemed contrary to Articles 3 and 13.[155] Placement in a reduced and extremely overcrowded space, alongside inhuman living and detention conditions, have been considered to amount to ill-treatment, breaching both substantive and procedural safeguards.[156] Similar conditions in other hotspots, including the Samos Reception and Identification Centre, have also been declared incompatible with Article 3 of the Convention until recently.[157] However, in September 2025, the case of E.A. and H.A.A.,[158] although based on very similar facts, was considered inadmissible.

150. Problematising this tendency by reference to the UK debate: Mavranicola N. (2024), "Facilitating (Further) inhumanity: on the prospect of losing Article 3 ECHR, a vital guarantee for the under-protected", 5 *European Convention on Human Rights Law Review* 97.
151. *Ilias and Ahmed v. Hungary* [GC], Application No. 47287/15, 21 November 2019, paragraph 192.
152. *M.H. et al. v. Croatia*, Application No. 15670/18 and 43115/18, 8 July 2021, paragraph 211.
153. *J.A. et al. v. Italy*, Application No. 21329/18, 30 March 2023 (Lampedusa hotspot); *M.A. v. Italy*, Application No. 13110/18, 19 October 2023 (Lampedusa hotspot); *A.S. v. Italy*, Application No. 20860/20, 19 October 2023 (Lampedusa hotspot); *A.B. v. Italy*, Application No. 13755/18, 19 October 2023 (Lampedusa hotspot); *A.T. et al. v. Italy*, Application No. 47287/17, 23 November 2023 (Taranto hotspot). In all instances, the Court has declared a violation of Articles 3 and 5 of the Convention in both their substantive and procedural facets.
154. *J.A. et al. v. Italy*, Application No. 21329/18, 30 March 2023, paragraphs 98 and 99.
155. *H.A. et al. v. Greece*, Application Nos. 4892/18 and 4920/18, 13 June 2023 (Moria hotspot). *Cf*. earlier cases, where the Court did not find a violation of Article 3, only of Article 5, due to the lack of sufficient information regarding the reasons for detention (Article 5(2)) and the absence of judicial oversight (Article 5(4)): *J.R. et al. v. Greece*, Application No, 22696/16, 25 January 2018 (Chios hotspot) (violations of Articles 5(2) and 5(4)); and *O.S.A. et al. v. Greece*, Application No. 39065/16, 21 March 2019 (Chios hotspot) (violation of Article 5(4)).
156. *H.A. et al. v. Greece*, Application Nos. 4892/18 and 4920/18, 13 June 2023, paragraphs 41-46.
157. The list of condemnation cases of the Samos RIC filed in 2019 and 2020 comprises: *A.D. v. Greece*, Application No. 55363/19, 4 April 2023; *M.L. v. Greece*, Application No. 8386/2020, 23 November 2023; *M.B. v. Greece*, Application No. 8389/2020, 23 November 2023; *T.K. v. Greece*, Application No. 16110/2020, 18 January 2024; *W.A. v. Greece*, Application No. 21997/2020, 18 April 2024; *T.A. et al. v. Greece*, Application No. 15293/2020, 3 October 2024; *M.R. v. Greece*, Application No. 15459/20, 3 October 2024; *J.B. and H.B. v. Greece*, Application No. 15713/2020, 3 October 2024; *N.A. v. Greece*, Application No. 31830/21, 3 October 2024; *C.K. v. Greece*, Application No. 15728/2020, 3 October 2024; *A.G.D. and D.M. v. Greece*, Application No. 16094/2020, 3 October 2024; *F.J. et al. v. Greece*, Application No. 16511/2020, 3 October 2024.
158. *E.A. and H.A.A. v. Greece* (dec.), Application No. 14969/2020, 3 July 2025.

A similar evolution has been seen in other recent cases, like *Sahiti v. Belgium*, delivered in October 2025, concerning residence status.[159] Therein, the Court considered a situation of enforced and persistent "precarity and uncertainty" imposed for 15 years on a severely ill applicant, deprived of medical care and at risk of suicide, as amounting to a breach of Article 8, rather than to a violation of Article 3 of the Convention.[160]

## 3.2. Overview of other applicable international standards and case law

The Refugee Convention exonerates from penalties all "presumptive refugees"[161] that fulfil the conditions of Article 31. Those "coming directly from a territory where their life or freedom was threatened", if they "present themselves without delay to the authorities and show good cause", cannot be penalised "for their illegal entry or presence" in the country of asylum.[162] The provision, in addition, foresees that the "Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary",[163] thereby requiring compliance with the principle of proportionality. The UNHCR has accordingly recommended alternatives to detention, like reporting obligations or release on bail.[164]

The ICCPR also provides for protection against the arbitrary deprivation of liberty. Article 9 of the ICCPR has been interpreted as requiring that detention be "necessary" in each individual case.[165] This protection applies "without discrimination between citizens and aliens".[166] In relation to asylum seekers, the HRC has rejected the validity of automatic detention. *A v. Australia* established that although the detention of asylum seekers is not arbitrary per se, it remains subject to proportionality.[167] Unless it can be shown to be "necessary", it is incompatible with the ICCPR, "even if entry was illegal".[168] The HRC refuses general policy arguments based on the integrity of migration control, the swift processing of asylum claims or the facilitation of removals, requiring specific justification "particular to the author's case".[169] As confirmed in *C v. Australia*, the "determining factor is … whether the grounds for the detention are reasonable, necessary, proportionate, appropriate and justifiable in the particular

159. *Sahiti v. Belgium*, Application No. 24421/20, 9 October 2025.
160. Ibid., paragraph 78 et seq. Cf. condemning Belgium on Article 3 grounds: *M.V. et al. v. Belgium*, Application No. 52836/22, 9 April 2026.
161. *R v. Uxbridge Magistrates Court*, *ex parte Adimi* [1999] EWHC Admin 765; [2001] QB 667, per Simon Brown LJ.
162. Refugee Convention, Article 31(1).
163. Refugee Convention, Article 31(2). For analysis, see Goodwin-Gill G. S. (2003), "Article 31 of the 1951 Convention Relating to the Status of Refugees: non-penalization, detention, and protection", in Feller E., Türk V. and Nicholson F. (eds), *Refugee protection in international law: UNHCR's global consultations on international protection*, Cambridge University Press, 189.
164. UNHCR, Detention Guidelines (2012), Guideline #4, pages 15-24; UNHCR, "Beyond detention: a global strategy to support governments to end the detention of asylum-seekers and refugees (2014-2019)", August 2016. See also Council of Europe CDDH (2019), "Alternatives to immigration detention: Fostering effective results".
165. *Van Alpen v. the Netherlands*, Comm. No. 305/1988, HRC 1990, paragraph 5.8.
166. *General Comment No. 15*, HRC 1986, paragraph 2.
167. *A v. Australia*, Comm. No. 560/1993, HRC 1997, paragraph 9.2.
168. Ibid., paragraphs 9.2-9.4.
169. Ibid.

case".[170] Against this backdrop, states must demonstrate that it was not possible to achieve the same ends with less restrictive means. Compliance with migration rules may be ensured through the "imposition of reporting obligations, sureties or other conditions" that do not entail deprivation of liberty.[171] So, as a rule, the decision to detain "must take into account less invasive means of achieving the same ends".[172]

The Inter-American Court has followed the HRC. In *Vélez Loor v. Panama*, it explicitly cited *C v. Australia* in its interpretation of Article 7 of the ACHR and concluded that "migratory policies based on the mandatory detention of irregular migrants, without ordering the competent authorities to verify in each particular case and by means of an individualised evaluation, the possibility of using less restrictive measures to achieve the same ends, are arbitrary".[173]

Arbitrariness, for the HRC, can also result from the inadequacy of detention conditions. These can amount to inhuman or degrading treatment in breach of Article 7 of the ICCPR.[174] Article 10 of the ICCPR establishes a specific obligation in this regard, requiring that all detained persons "be treated with humanity and with respect for the inherent dignity of the human person". The provision has been construed as introducing a "positive obligation" of care, with which compliance is mandatory regardless of the "material resources available in the State party".[175] Accordingly, detention without provision for essential needs violates this obligation.[176]

As regards reception and living conditions, several UN treaty bodies have grappled with questions of access to social services by non-nationals. The HRC has recognised the right of migrants, including those in an irregular situation, to access healthcare, particularly when faced with a life-threatening condition.[177] According to the committee, non-citizens have "an inherent right to life" under the ICCPR that states must protect.[178] This tallies with the perspective of the European Committee of Social Rights in *FIDH v. France*.[179] In turn, the UN Committee on Economic, Social and Cultural Rights, in a case concerning an undocumented migrant and her fam-

170. *C v. Australia*, Comm. No. 900/1999, HRC 2002, paragraph 4.23; *Baban v. Australia*, Comm. No. 1014/2001, HRC 2003, paragraph 7.2; *Madafferi and Madafferi v. Australia*, Comm. No. 1011/2001, HRC 2004, paragraph 9.2; *D & E and their two children v. Australia*, Comm. No. 1050/2002, HRC 2006, paragraph 7.2; *Nystrom v. Australia*, Comm. No. 1557/2007, HRC 2011, paragraph 7.3; *Griffiths v. Australia*, Comm. No. 1973/2010, HRC 2014, paragraph 7.2; *FJ et al. v. Australia*, Comm. No. 2233/2013, HRC 2016, paragraph 10.3; *Nabhari v. Australia*, Comm. No. 3663/2019, HRC 2024, paragraph 8.7; *Tran v. Australia*, Comm. No. 3665/2019, HRC 2025, paragraph 10.3.
171. *C v. Australia*, Comm. No. 900/1999, HRC 2002, paragraph 8.2.
172. *FKAG et al. v. Australia*, Comm. No. 2094/2011, HRC 2013, paragraph 9.3; *MMM et al. v. Australia*, Comm. No. 2136/2012, HRC 2013, paragraph 10.3.
173. *Vélez Loor v. Panamá*, Series C No. 218, IACtHR 2010, paragraph 171.
174. *C v. Australia*, Comm. No. 900/1999, HRC 2002, paragraph 8.4.
175. General Comment No. 21, HRC 2004, paragraphs 3 and 4.
176. *Madafferi and Madafferi v. Australia*, Comm. No. 1011/2001, HRC 2004 (detention against medical opinion); *Parkanyi v. Hungary*, Comm. No. 410/1990, HRC 1991 (very limited daily time for personal hygiene and outdoor access); *Luyeye v. Zaire*, Comm. No. 90/1981, HRC 1983 (sleep on the floor in small cell with no family contact).
177. *Toussaint v. Canada*, Comm. No. 2348/2014, HRC 2018.
178. Ibid., paragraph 11.7; Advisory Opinion OC-18/03 on the Juridical Condition and Rights of Undocumented Migrants, ACHR 2003.
179. European Committee of Social Rights, *International Federation of Human Rights Leagues (FIDH) v. France* (Merits) Complaint No. 14/2003, 8 November 2004, paragraph 32.

ily, concluded that eviction without offering alternative housing violates the right to adequate housing under Article 11(1) of the ICESCR. For the committee, "being unlawfully present in the territory of the State party should not, in itself, be a criterion for [exclusion] … from public housing services".[180] The CRC Committee, for its part, has affirmed the right of children to schooling, on the grounds that the "State party's legitimate interest cannot entail the *de facto* exclusion from the education system … of children", even if they are in an "irregular administrative situation".[181]

180. *Infante Díaz v. Spain*, Comm. No. 134/2019, ESCR 2023, paragraph 7.6.
181. *ABA et al. v. Spain*, Comm. Nos. 116/2020, 117/2020, 118/2020, 114/2020, CRC 2022.

# Part II – Expulsion

Chapter 4

# Expulsion and exposure to ill-treatment (*non-refoulement*)

## 4.1. The protective ambit of the Convention and the evolution of the Court's case law

This section analyses the applicability of Article 3 in expulsion cases, considering the *non-refoulement* protection it entails (4.1.1), while underlining the high substantive thresholds (4.1.2) and the deference accorded to domestic asylum procedures and risk assessments (4.1.3).

### 4.1.1. Article 3 of the Convention as an absolute right prohibiting return to ill-treatment

Article 3 of the Convention codifies that "no one shall be subjected to torture or to inhuman or degrading treatment or punishment". As an absolute right, "reflective of customary international law",[182] it makes no room for exceptions or derogations under Article 15 of the Convention, even during public emergencies. It does not allow for interferences or any balancing against competing interests. The protection covers all persons without conditions and irrespective of individual conduct.[183] Adherence to its absolute character implies that it must set a "firm, and not porous, red line … without displacing the right through the back door by incorporating qualifications, conditions, or other mechanisms of displacement".[184]

The Court has extended Article 3 to provide protection against returns to ill-treatment. In the extradition case of Soering, the Court interpreted the provision as precluding removal "where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or

182. CDDH Outcome document containing elements for a political declaration as adopted by CDDH at its third extraordinary meeting 10-12 March 2026, CDDDH(2026)R3_EXTRA_Addendum, 20 March 2026, paragraph 23.
183. *Chahal v. the United Kingdom* [GC], Application No. 22414/93, 15 November 1996, paragraph 79. For an elaboration, see Moreno-Lax V. (2017), *Accessing asylum in Europe*, Oxford University Press, page 266 et seq.
184. Mavronicola N. (2026), "Article 3 ECHR and Chișinău: what are the stakes?", *ECHR Blog*, 4 February 2026.

to inhuman or degrading treatment or punishment in the requesting country".[185] The Court then applied this principle to the expulsion of rejected asylum seekers,[186] refugees stripped of their status following criminal convictions[187] and those accused of terrorism.[188] The prohibition covers ill-treatment emanating from state and non-state actors,[189] the death penalty,[190] situations of generalised violence[191] or extreme socio-economic deprivation.[192]

Any "arguable claim" that removal would expose the applicant to ill-treatment requires that there be an effective remedy at the domestic level to challenge the measure. To avoid irreparable harm, Article 13, along with Article 3 of the Convention, "imperatively requires" state authorities to engage in independent and detailed scrutiny of the case and to provide access to an effective remedy that produces an "automatic suspensive effect".[193]

### 4.1.2. High substantive thresholds

To fall within the scope of Article 3, ill-treatment must attain a minimum level of severity and the threshold is high. The assessment is "relative, depending on all the circumstances of the case".[194] The evaluation of the risks involved must be "rigorous"[195] and consider the "foreseeable consequences of removal to the country of destination, in light of the general situation there and of the applicant's personal circumstances".[196] The initial burden of proof is on the applicants,[197] who are "in principle" required to "adduce evidence capable of proving that there are substantial grounds for believing that … [they] would be exposed to a real risk of being subjected to treatment contrary to Article 3" if deportation is carried out.[198] Once such evidence is adduced, the burden shifts to the authorities of the expelling state to "dispel any doubts raised by it".[199] Applicants do not need to provide "clear proof", taking into consideration that

185. *Soering v. the United Kingdom*, Application No. 14038/88, 7 July 1989, paragraph 91.
186. *Cruz Varas and Others v. Sweden*, Application No. 15576/89, 20 March 1991, paragraph 70; *Vilvarajah and Others v. the United Kingdom*, Application Nos. 13163/87; 13164/87; 13165/87; 13447/87; 30 October 1991, paragraph 103.
187. *Ahmed v. Austria*, Application No. 71/ 1995/ 577/ 663, 17 December 1996.
188. *Chahal v. the United Kingdom*; *Saadi v. Italy* [GC], Application No. 37201/06, 28 February 2008.
189. *Salah Sheekh v. the Netherlands*, Application No. 1948/04, 11 January 2007, paragraph 163.
190. *Al-Saadoon and Mufdhi v. the United Kingdom*, Application No. 61498/08, 2 March 2010, paragraph 144.
191. *Sufi and Elmi v. the United Kingdom*, Application Nos. 8319/07 and 11449/07, 28 June 2011, paragraph 216.
192. *M.S.S. v. Belgium and Greece* [GC], Application No. 30696/09, 21 January 2011, paragraphs 252-254.
193. European Court of Human Rights, "The Court's case-law on immigration matters", February 2026, paragraph 28 and references therein.
194. *F.G. v. Sweden*, paragraph 112. Natasa Mavronicola notes the distinction between "relative" and "relativist" in "Absoluteness affirmed and absoluteness denied: how the Chișinău process is reviving the 'relatively absolute' approach to Article 3", *Strasbourg Observers*, 31 March 2026.
195. *F.G. v. Sweden* [C], Application No. 43611/11, 23 March 2016, paragraph 113.
196. Ibid., paragraph 114.
197. See also Moreno-Lax V. (2017), *Accessing asylum in Europe*, Oxford University Press, page 424 et seq.; Mavronicola N. (2021), *Torture, inhumanity and degradation under Article 3 of the ECHR*, Hart, page 184.
198. *Saadi v. Italy* [GC], Application No. 37201/06, 28 February 2008, paragraph 129; *F.G. v. Sweden*, paragraph 113.
199. *Saadi v. Italy*, paragraph 129; *F.G. v. Sweden*, paragraph 120.

a "certain degree of speculation is inherent in the preventive purpose of Article 3" and the forward-looking assessment it requires.[200]

The Court has found violations of Article 3 relating to expulsion on grounds of national security or criminal convictions in a very small number of cases.[201] As highlighted in the judgment on Harkins and Edwards, where it found no violation, the Court has been "very cautious in finding that removal from the territory of a Contracting State would be contrary to Article 3 of the Convention" and has "only rarely reached such a conclusion".[202] The judgment added that it has "even more rarely found that there would be a violation of Article 3 if an applicant were to be removed to a State which had a long history of respect for democracy, human rights and the rule of law".[203] Notably, the Court appeared to increase the level of severity in expulsion cases in contrast to domestic cases when stating that "treatment which might violate Article 3 because of an act or omission of a Contracting State might not attain the minimum level of severity which is required for there to be a violation of Article 3 in an expulsion or extradition case".[204] However, the Court abandoned this position thereafter[205] and explicitly rejected "any distinction … between the minimum level of severity required to meet the Article 3 threshold in the domestic context and the minimum level required in the extraterritorial context".[206] Yet it has also held that an "adapted approach is called for in the extradition context".[207]

The substantive threshold is also high for situations of generalised violence. These do not by themselves entail violations of Article 3 in expulsion cases and "only in the most extreme cases" would the Court find that the level of violence is sufficient per se to conclude that there is a "real risk of ill-treatment simply by virtue of the individual concerned being exposed to such violence on returning to the country in question".[208] In Sufi and Elmi, the Court exceptionally determined that the "situation of general violence in Mogadishu [was] sufficiently intense to enable it to conclude that any returnee would be at real risk of Article 3 ill-treatment solely on account of his presence there".[209] Thereafter, the Court has "rarely"[210] found a violation of Article 3

200. *Paposhvili v. Belgium* [GC], Application No. 41738/10, 13 December 2016, paragraph 186.
201. *Saadi v. Italy*; *Sufi and Elmi v. the United Kingdom*, Application Nos. 8319/07 and 11449/07, 28 June 2011; *KI v. France*, Application No. 5560/19, 15 April 2021.
202. *Harkins and Edwards v. the United Kingdom*, Application Nos. 9146/07 & 32650/07, 17 January 2012, paragraph 131.
203. Ibid., paragraph 131.
204. Ibid., paragraph 129.
205. Mavronicola N. (2026), "Absoluteness affirmed and absoluteness denied: how the Chișinău process is reviving the 'relatively absolute' approach to Article 3", *Strasbourg Observers*, 31 March 2026.
206. *Sanchez-Sanchez v. the United Kingdom* [GC], Application No. 22854/20, 3 November 2022, paragraph 99; cf. *Harkins and Edwards v. the United Kingdom*, paragraphs 124-131.
207. *Sanchez-Sanchez v. the United Kingdom*, paragraph 95.
208. *Khasanov and Rakhmanov v. Russia* [GC], Application Nos. 28492/15 and 49975/15, 29 April 2022, paragraph 96.
209. *Sufi and Elmi v. the United Kingdom*, paragraph 293.
210. *A.A. and Others v. Sweden*, Application No. 14499/09, 28 June 2012, paragraph 75.

on that ground alone. In most cases, the Court requires additional, distinguishing risk factors pertaining to the applicant's individual situation.[211]

Furthermore, protection against expulsion neither implies a right to a residence permit nor entitlements to social assistance. In Bonger, the Court underlined that "neither Article 3 nor any other provision of the Convention and its Protocols guarantees, as such, a right to a residence permit" and declared the case inadmissible. This approach has continued in subsequent case law.[212] The Court has not applied its conclusions on the destitution of asylum seekers in M.S.S. to the situation of persons excluded from refugee status.[213] Therefore, people whose expulsions are barred under Article 3, but whose refugee status was denied or withdrawn, are exposed to "rightlessness".[214]

The principle of *non-refoulement* bars expulsion, unless assurances are obtained by the state of destination of treatment in line with Article 3 upon removal. Indeed, the Court has established that "even where the existence of a risk of ill-treatment has been shown, the State wishing to remove or extradite the individual may do so after obtaining assurances from the destination State".[215] But these must be such as to guarantee "that there will be no such risk to … life or physical integrity" upon return.[216]

### 4.1.3. Deference to domestic asylum procedures and risk assessments

As already mentioned, the Convention does not contain a right to asylum, and the Court tends to show deference to the procedure conducted by member states. In cases regarding the expulsion of asylum seekers, the Court refrains from examining the actual asylum applications or verifying how states honour their obligations under the Refugee Convention.[217] As emphasised by the Grand Chamber in *F.G. v. Sweden*, when examining the existence of effective guarantees against *refoulement* in domestic law, the Court's intervention is "subsidiary to national systems" and it is "not the Court's task to substitute its own assessment of the facts for that of the domestic courts".[218] Yet, as highlighted in another thematic paper, the Court's

211. *M.D. and Others v. Russia*, Application Nos. 71321/17 and 8 others, 14 September 2021, paragraphs 104-111; *O.D. v. Bulgaria*, Application No. 34016/18, 10 October 2019, paragraphs 50-55; *A.A. v. Sweden*, Application No. 4677/20, 13 July 2023. See also European Court of Human Rights, "Guide on the case-law of the European Convention on Human Rights – Immigration", 28 February 2026.
212. *K v. the Netherlands* (dec.), Application No. 33403/ 11, 18 October 2011, paragraph 36.
213. Ginés Martín D. (2025), *When deportation fails: non-removable migrants in the European Union*, Oxford University Press, page 64.
214. Dembour M-B. (2015), *When humans become migrants*, Oxford University Press, page 442.
215. European Court of Human Rights, "The Court's case-law on immigration matters", February 2026, paragraph 18, referring to *Khasanov and Rakhmanov v. Russia* [GC], Application Nos. 28492/15 and 49975/15, 22 April 2022, paragraph 101.
216. *Khasanov and Rakhmanov v. Russia* [GC], Application Nos. 28492/15 and 49975/15, 22 April 2022, paragraph 101.
217. *F.G. v. Sweden* [GC], Application No. 33611/11, 23 March 2016, paragraph 117.
218. Ibid., paragraph 118.

deference to domestic assessments, even in cases that appear faulty, can exacerbate the vulnerability of refugees.[219]

In subsequent Chamber judgments finding no violation, the Court has continued its deference to the factual assessment of domestic authorities, reiterating that "it is not its task to substitute its own assessment of the facts for that of the domestic courts".[220] The case of H.A. was brought by a stateless Palestinian, whose asylum request in the UK had been denied. Therefore, he faced expulsion to the Ein El-Hilweh refugee camp in Lebanon, which he had fled to escape mistreatment and forced recruitment by paramilitary factions. In its judgment, the Court did not find a violation of Article 3. It concluded that none of the material before it "permits the calling into question of the conclusion" of the domestic courts that "there was no evidence of any serious harm to the applicant if returned".[221] The Court considered that the general conditions facing the applicant were indeed "poor" but did not meet the Article 3 threshold, and that he had failed to substantiate that the risk of recruitment would reach it.[222]

The 2026 judgment on D.M. constitutes one of the rare findings of an Article 3 violation against Sweden, concerning the deportation to Afghanistan of a rejected asylum seeker. The Court reiterated its principle that removals to a general situation of violence as such entail a violation of Article 3 "only in the most extreme cases".[223] The Court noted the general insecurity following the Taliban takeover and the dire situation of Hazaras, but did not consider these sufficient for confirming systematic exposure to ill-treatment attaining the level of Article 3.[224] According to the judgment, the real risk of ill-treatment was created by cumulative individual risk factors additional to the general situation in Afghanistan.[225] The Court highlighted that the domestic authorities had failed to conduct an adequate risk assessment that considered all the relevant elements, general and individual, taken together.[226]

## 4.2. Overview of other applicable international standards and case law

The right to seek and obtain asylum is contained in Article 22(7) of the American Convention, Article 12(3) of the African Charter and Article 18 of the EU Charter of Fundamental Rights. The Inter-American Court's Advisory Opinion on Asylum as a Human Right interprets the scope of the right to asylum under Article 22(7) and *non-refoulement* under Article 22(8). The advisory opinion endorses the expanded refugee definition of the Cartagena Declaration, finding that the term is "also applicable to those who have fled their countries of origin because their lives, safety, or

219. Briddick C., Costello C. and Mouzourakis M., "Ensuring a human rights-compliant end to refugeehood through integration, naturalisation or voluntary repatriation", Council of Europe Division on Migration and Refugees, Thematic Paper, March 2026, pages 33 and 34.
220. *H.A. v. UK*, Application No. 30919/20, 5 December 2023, paragraph 57.
221. Ibid., paragraph 66.
222. Ibid., paragraph 62. Cf. *H.L.R. v. France* [GC], Application No. 24573/9, 29 April 1997 (finding a violation of Article 3).
223. *D.M. v. Sweden,* Application No. 32694/23, 26 March 2026, paragraph 148.
224. Ibid., paragraphs 162, 166 and 177.
225. Ibid., paragraphs 150 and 198.
226. Ibid., paragraph 197.

freedom have been threatened by generalised violence, foreign aggression, internal conflicts, massive violations of human rights, or other circumstances which have seriously disturbed public order".[227] The advisory opinion recognises the principle of *non-refoulement* as *jus cogens*,[228] and describes how Article 22(8) provides complementary protection.[229] The Court provided a "broad and expansive"[230] interpretation thereof, linking it to a range of related rights, including fair trial guarantees.

The UN treaty bodies have also held very protective positions on *non-refoulement*. The CAT Committee reverses the burden of proof when individuals struggle to substantiate their case and makes its own factual findings without deferring to domestic courts.[231] In turn, the CRC case law adds value on the protection of children against *refoulement*,[232] including with regard to border procedures as outlined in Chapter 2. The CAT Committee also recognises the particular vulnerability of asylum seekers, along with the HRC.[233] It has even taken a stance on "disguised *refoulement*", stating that "States parties should not adopt dissuasive measures or policies … which would compel persons in need of protection … to return to their country of origin in spite of their personal risk of being subjected to torture or other [ill] treatment".[234] Moreover, the committee has recently reiterated that absolute rights preclude any form of proportionality reasoning that relativises their effect.[235]

The UN Human Rights Committee has, for its part, followed an "evolutive approach" and interpreted the scope of *non-refoulement* in a "broad fashion",[236] prohibiting returns to a "real risk of irreparable harm" in violation of the right to life under Article 6 or the prohibition of torture under Article 7 of the ICCPR.[237] The committee has upheld the absolute nature of this prohibition, emphasising that it does not allow "countervailing considerations",[238] proportionality reasoning or "balancing with considerations of national security or the type of criminal conduct".[239] In this regard, it has stressed the importance of procedural fairness, holding that "where one of the highest values protected by the Covenant, namely the right to be free

227. The Institution of Asylum and its Recognition as a Human Right in the Inter-American Protection System, IACtHR Advisory Opinion OC-25/18, 30 May 2018, Series A No. 25, paragraph 68; see also paragraph 96.
228. Ibid., paragraph 181.
229. Ibid., paragraph 186.
230. Hennebel L. and Tigroudja H., *The American Convention on Human Rights: a commentary*, Oxford University Press, page 680.
231. Çalı B., Costello C. and Cunningham S. (2020), "Hard protection through soft courts? Non-refoulement before the United Nations Treaty Bodies", 21 *German Law Journal* 355, page 381.
232. Ibid., page 382.
233. Wriedt V. (2021), "Report and analysis: *Harun v. Switzerland*, 6th December 2018, United Nations Committee Against Torture", Oxford Reports on International Law Module International Human Rights Law, 25 November 2021, A3.
234. General Comment No. 4, CAT 2017, paragraph 14.
235. "Concluding observations on the seventh periodic report of Italy", CAT/C/ITA/CO/7, 28 April 2026, paragraphs 23 and 24.
236. Çalı B., Costello C. and Cunningham S. (2020), "Hard protection through soft courts? Non-refoulement before the United Nations Treaty Bodies", 21 *German Law Journal* 355, page 367.
237. General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, adopted 29 March 2004, CCPR/C/21/Rev.1/Add. 13, paragraph 12.
238. *Ahani v. Canada*, Comm. No. 1051/2002, HRC, 29 March 2004, paragraph 10.10
239. *Maksudov et al. v. Kyrgyzstan*, Comm. Nos. 1461/2006, 1462/2006, 1476/2006, 1477/2006, HRC, 16 July 2008, paragraph 12.4.

from torture, is at stake, the closest scrutiny should be applied to the fairness of the procedure".[240] In *Ahani v. Canada*, where the applicant had been denied the full materials substantiating his removal decision on national security grounds, the committee found a violation of Article 13 along with Article 7 of the ICCPR.[241] It emphasised that states parties are required to "not only refrain from torture but take steps of due diligence to avoid a threat to an individual of torture from third parties".[242] In *Judge v. Canada*, it confirmed a violation of the right to life under Article 6 of the ICCPR regarding a deportation to a death sentence without assurances that the death penalty would not be executed.[243] Last, it has also confirmed that socio-economic deprivation can amount to *refoulement* in violation of Article 7 of the ICCPR, such as in *Jasin v. Denmark* regarding a Dublin transfer to Italy. The committee found that the state party had not adequately considered the author's detailed description of her personal experience of indigence and extreme precarity,[244] emphasising that states parties are under an obligation to undertake an individualised risk assessment rather than solely rely on general reports.[245]

240. *Ahani v. Canada*, paragraph 10.6.
241. Ibid., paragraph 10.8.
242. Ibid., paragraph 10.7.
243. *Judge v. Canada*, Comm. No. 829/1998, HRC, 5 August 2002, paragraph 10.6.
244. *Jasin v. Denmark*, Comm. No. 2360/2014, HRC, 22 July 2015, paragraph 8.8.
245. *Y.A.A. and F.H.M. v. Denmark*, Comm. No. 2681/2015, HRC, 10 March 2017, paragraph 7.9; *Jasin v. Denmark*, paragraph 8.9.

Chapter 5

# Expulsion and family separation

## 5.1. The protective ambit of the Convention and the evolution of the Court's case law

This section analyses Article 8 as a qualified right, highlighting the wide margin of appreciation granted to domestic courts for balancing competing rights and interests (5.1.1), in particular in cases allowing the expulsion of settled non-nationals following a criminal conviction (5.1.2) and the expulsion of family members with precarious legal status (5.1.3).

### 5.1.1. Article 8 as a qualified right with a narrow scope and a wide margin of appreciation

Article 8(1) codifies the right to respect for private and family life. To invoke this right, applicants must demonstrate that their claims fall within its scope. The Court adopts a narrow definition of family life in migration cases, limited to the nuclear family consisting of parents and their unmarried minor children.[246] Relationships between parents and adult children or between adult siblings are not recognised as family life unless there are "additional elements of dependence".[247] Instead, some ties between adult relatives are channelled into the private life limb,[248] but the invocation of private life as a standalone bar to expulsion remains limited to a small number of cases.[249] Notably, the Court has exceptionally extended its understanding of family life to include young adults who have not yet founded a family of their own and live with their parents.[250] The Court otherwise rejects the invocation of family ties in cases

246. Desmond A. (2018), "The private life of family matters: curtailing human rights protection for migrants under Article 8 of the ECHR?", 29 *European Journal of International Law*, 261, 262.
247. *Levakovic v. Denmark*, Application No. 7841/14, 23 October 2018, paragraphs 35 and 44 (finding no violation of Article 8); *Demirci v. Hungary*, Application No. 48302/2, 6 May 2025, paragraphs 72-74 (Article 8 inadmissible); *Savran v. Denmark* [GC], Application No. 57467/15, 7 December 2021, paragraph 174 (violation of Article 8, no violation of Article 3).
248. *Slivenko v. Latvia* [GC], Application No. 48321/99, 9 October 2003, paragraph 97; *Savran v. Denmark,* paragraph 178.
249. Desmond A. (2024), "Dubious distinctions? Calling the European Court of Human Rights to account for its differential treatment of immigrants in its Article 8 expulsion jurisprudence", *Refugee Law Initiative Blog*, 11 September 2024.
250. *Maslov v. Austria* [GC], Application No. 1638/03, 23 June 2008, paragraph 62; *Azerkane v. the Netherlands*, Application No. 3138/16, 2 June 2020, paragraph 64.

concerning the expulsion of adult relatives without high levels of dependence, such as between an elderly half-paralysed mother and her only daughter who had cared for her during five years of cohabitation.[251] Complaints considered outside the scope of Article 8 are declared inadmissible.[252] Only if the Court accepts the existence of private or family life, to which expulsion constitutes an interference, will it proceed to the proportionality assessment.

Under Article 8 of the Convention interferences may be justified as "in accordance with the law" and "necessary in a democratic society" based on one of the legitimate aims enumerated in paragraph 2, namely national security, public safety or the economic well-being of the country, the prevention of disorder or crime, the protection of health or morals, or the protection of the rights and freedoms of others.[253] In its assessment, the Court balances the applicant's rights against the interests of the state. The restriction must be proportionate to the legitimate aim pursued, but states enjoy a wide margin of appreciation.[254] In the context of migration policies, the Court accepts the prevention of crime and disorder, national security and public order as prima facie legitimate aims that do not require scrutiny, whereas the Court willingly scrutinises purported legitimate aims in other areas.[255] When assessing the justification of removal under Article 8(2), the Court employs a "multi-factor balancing test, rather than its typical mode of proportionality assessment",[256] balancing disparate factors with various degrees of importance. In expulsion cases, the test considers that states are entitled to control the entry and residence of non-nationals and have the power to expel them if convicted of criminal offences for the sake of maintaining public order.[257]

### 5.1.2. Expulsion of settled non-nationals following a criminal conviction

Under Article 8, states' entitlement to control the entry and residence of non-nationals applies "regardless of whether an alien entered the host country as an adult or at a very young age, or was perhaps even born there".[258] Therefore, although some contracting states enacted legislation to prohibit the expulsion of settled non-nationals on the basis of a criminal record if they were born there or arrived during early childhood, "such an absolute right not to be expelled cannot be derived from Article 8".[259] The

251. *Senchishak v. Finland*, Application No. 5049/12, 18 November 2014, paragraph 57.
252. *Demirci v. Hungary*, Application No. 48302/21, 6 May 2025, paragraph 76.
253. European Court of Human Rights, "Guide on Article 8 of the European Convention on Human Rights – Right to respect for private and family life", 31 August 2025, paragraphs 25 et seq.
254. Ibid., paragraphs 34 et seq.
255. Çalı B. and Cunningham S. (2021), "The European Court of Human Rights and removal of long-term migrants", in Çalı B., Bianku L. and Motoc I. (eds), *Migration and the European Convention on Human Rights*, Oxford University Press, page 163.
256. Costello C. (2015), *The human rights of migrants and refugees in European law*, Oxford University Press, page 113.
257. European Court of Human Rights, "Guide on Article 8 of the European Convention on Human Rights – Right to respect for private and family life", 31 August 2025, paragraph 331.
258. Ibid, paragraph 459.
259. Ibid.

provision allows for the expulsion of "settled migrants",[260] who lawfully spent all or most of their lives in their country of residence, if there are "very serious reasons" to do so.[261] Yet the Court has refrained from setting minimum requirements regarding the seriousness of those reasons, including the types of potential crimes,[262] resulting in the amalgamation of a wide range of offences under this umbrella.

The criteria that domestic authorities should consider when assessing the proportionality of the interference in cases concerning the expulsion of settled migrants who have committed an offence are set out in the Grand Chamber ruling in Üner.[263] The factors include the seriousness of the offence; length of stay in the country; conduct since the conviction; family situation and well-being of children; and social, cultural and family ties with the country of residence and country of destination.[264] The list is shorter when concerning the expulsion of young adults who have not yet founded a family of their own.[265] However, the Court has not stipulated the relative weight to be accorded to each criterion in the individual assessment.[266]

To heed subsidiarity, the Court uses the margin of appreciation as its functional tool and process-based review as its implementation mechanism.[267] In Ndidi, concerning the expulsion of a settled resident following criminal convictions, the Court held that strong reasons are needed to substitute its assessment for that of the national courts. Ndidi was a Nigerian national, who entered the UK aged 1 with his mother, remained there for 28 years and had a son with a British national, but was convicted of several crimes, including robbery and supplying drugs. The Court's assessment emphasises the margin of appreciation, to the effect that "where the independent and impartial domestic courts have carefully examined the facts, applying the relevant human rights standards consistently with the Convention and its case law, and adequately balanced the applicant's personal interests against the more general public interest in the case, it is not for it to substitute its own assessment of the merits (including, in particular, its own assessment of the factual details of proportionality) for that of the competent national authorities. The only exception to this is where there are shown to be strong reasons for doing so".[268] On this basis, the Court found no breach.

260. The European Court defines "settled migrants" as "foreigners who have already been formally granted a right of residence in a host country". European Court of Human Rights, "Guide on Article 8 of the European Convention on Human Rights – Right to respect for private and family life", 31 August 2025, paragraph 94.
261. Ibid.
262. *Munir Johana v. Denmark*, Application No. 56803/18, 12 January 2021, paragraph 53.
263. See also previously *Boultif v. Switzerland*, Application No. 54273/00, 2 August 2001.
264. *Üner v. the Netherlands* [GC], Application No. 46410/99, 18 October 2006, paragraphs 57-60 (no violation of Article 8).
265. *Maslov v. Austria* [GC], Application No. 1638/03, 23 June 2008, paragraph 71. See also *Savran v. Denmark*, paragraph 182.
266. *Munir Johana v. Denmark*, Application No. 56803/18, 12 January 2021, paragraph 53.
267. Spano R. (2018), "The future of the European Court of Human Rights – Subsidiarity, process-based review and the rule of law", 18 *Human Rights Law Review* 473, pages 476 and 481.
268. *Ndidi v. the United Kingdom*, Application No. 41215/14, 14 September 2017, paragraph 76.

The reasoning has been replicated in numerous subsequent cases,[269] with the "vast majority"[270] declared inadmissible or finding no violation.[271] In the 2025 judgment on Miari,[272] for instance, the Court found no violation in relation to an expulsion order with a six-year re-entry ban against a stateless Palestinian from Lebanon who had settled in Denmark and lawfully resided there for more than 34 years, since the age of 13, but was convicted of drug offences. The Court also found no violation of Article 8 in its 2021 judgment on Avci, concerning the deportation with a permanent re-entry ban of another settled resident also born in Denmark, equally convicted of serious drug offences.[273] And the 2026 ruling on V.N. held that the deportation order against a dying woman's husband, deemed a threat to public order in Sweden due to his past crimes in Azerbaijan, was within the margin of appreciation.[274]

### 5.1.3. Expulsion of family members with precarious legal status

Non-nationals who develop a family life while their legal status is precarious will only be granted protection under Article 8 in exceptional circumstances, as Omoregie demonstrates. The case concerned a rejected asylum seeker, who was expelled from Norway to Nigeria despite co-habiting with his Norwegian spouse and their child. The Court considered that when family life was created when "the immigration status of one of them was such that the persistence of that family life within the host State would from the outset be precarious … the removal of the non-national family member would be incompatible with Article 8 only in exceptional circumstances".[275] No violation was found, holding that the prohibition of re-entry for five years was "imposed as an administrative sanction, the purpose of which was to ensure that resilient immigrants do not undermine the effective implementation of rules on immigration control".[276] Yet, as highlighted by one of the dissenting opinions, "the offence in question was purely administrative and in no sense criminal",[277] meaning that the balancing of competing interests should have tipped towards the applicants.

The Court has continued to apply these principles. In Alleleh, it found no violation concerning an expulsion order with a two-year re-entry ban due to breaches of

269. *Ndidi v. the United Kingdom*, paragraph 76; *Miari v. Denmark*, Application No. 2852/24, 15 July 2025, paragraph 46; *Savran v. Denmark*, paragraph 189; *Alleleh and others v. Norway*, Application No. 569/20, 23 June 2022, paragraph 93; *Avci v. Denmark,* Application No. 40240/19, 30 November 2021, paragraph 38.

270. Ní Chinnéide H. and Sevrin E. (2025), "Restoring balance": a critical response to the open letter on migration and human rights, *Strasbourg Observers,* 17 June 2025.

271. Council of Europe Division on Migration and Refugees, "Migration and the European Court of Human Rights: frequently asked questions", February 2026, paragraph 24, referring for example to *Al-Habeeb v. Denmark*, Application No. 14171/23, 12 November 2024; *Al-Masudi v. Denmark*, Application No. 35740/21, 5 September 2023; *Munir Johana v. Denmark*, Application No. 56803/18, 12 January 2021; *Kahn v. Denmark*, Application No. 26957/19, 12 January 2021; *Assem Hassan Ali v. Denmark*, Application No. 25593/14, 23 October 2018; *Levakovic v. Denmark*, Application No. 7841/14, 23 October 2018.

272. *Miari v. Denmark*, Application No. 2852/24, 15 July 2025.

273. *Avci v. Denmark*, Application No. 40240/19, 30 November 2021.

274. *V.N. and Others v. Sweden*, Application No. 42101/23, 19 February 2026, paragraph 98.

275. *Darren Omoregie and Others v. Norway*, Application No. 265/07, 31 July 2008, paragraph 57.

276. *Darren Omoregie and Others v. Norway*, paragraph 67.

277. Ibid., dissenting opinion of Judge Malinverni joined by Judge Kovler, paragraph 12.

immigration law against a mother married to a Norwegian national with whom she had four children. The Court highlighted that the domestic authorities had to balance "weighty interests in immigration control" and "considerable difficulties" for the children but concluded that Norwegian authorities had not transgressed their margin of appreciation.[278]

By contrast, in the earlier case of Rodrigues da Silva, finding a violation, the Court had determined that the "economic well-being of the country does not outweigh the applicants' rights under Article 8, despite the fact that the first applicant was residing illegally in the Netherlands at the time of [her daughter's] birth".[279] In Jeunesse, brought by a Surinamese national, who had lived in the Netherlands with her husband and three children (all Dutch nationals) for 16 years, the Court found it "questionable whether general immigration policy considerations of themselves can be regarded as sufficient justification for refusing the applicant residence in the Netherlands".[280] It considered the applicant's circumstances "exceptional" and found a violation of Article 8 of the Convention.[281]

## 5.2. Overview of other applicable international standards and case law

Article 17 of the ICCPR stipulates that no one, whether citizens or non-nationals, shall be subjected to arbitrary or unlawful interference with their privacy or family life. The UN Human Rights Committee requires the term "family" to be given a "broad interpretation".[282] Accordingly, the committee has found numerous violations in cases concerning family separation due to deportation.[283] *Winata and Li v. Australia*, for instance, concerned the proposed expulsion of the parents of a 13-year-old minor born in Australia who had citizenship. The respondent state argued that the expulsion would not be arbitrary, because it constituted a proportionate means of achieving the legitimate aim of immigration control, emphasising that the parents arrived on short-term visas, "fully aware that they were required to leave Australia when the visas expired", but remained in Australia unlawfully.[284] At the time of their son's birth, the parents knew the risk that they would not be permitted to remain.[285] The respondent state cited Strasbourg case law to argue that the "unlawful establishment of a family in a State is a factor weighing heavily in favour of that State being able to take action which, if the family had been residing lawfully in the State, might

278. *Alleleh and Others v. Norway*, Application No. 569/20, 23 June 2022, paragraphs 105 and 106.
279. *Rodrigues da Silva and Hoogkamer v. the Netherlands*, Application No. 50435/99, 3 July 2006, paragraph 44.
280. *Jeunesse v. the Netherlands* [GC], Application No. 12738/10, 3 October 2014, paragraphs 78 and 121.
281. Ibid., paragraphs 122 and 123.
282. CCPR General Comment No. 16: Article 17 (Right to Privacy) The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation, adopted 8 April 1988, paragraph 5.
283. Taylor P. (2020), *A commentary on the International Covenant on Civil and Political Rights*, Cambridge University Press, page 483 et seq.
284. *Winata and Li v. Australia*, HRC 2001, paragraph 4.11.
285. Ibid., paragraph 4.12.

otherwise have been contrary to Article 17".[286] The committee was not convinced by these arguments and found a violation of Article 17(1) in conjunction with Articles 23 and 24(1) of the ICCPR. It emphasised the length of the applicants' stay in Australia, amounting to over 14 years for the parents and for their son to his entire life, and held that it was "incumbent on the State party to demonstrate additional factors justifying the removal of both parents that go beyond a simple enforcement of its immigration law in order to avoid a characterisation of arbitrariness".[287] In other words, it did not accept migration control per se and without more as a standalone legitimate purpose justifying expulsions resulting in family separation.

The UN Human Rights Committee has never explicitly incorporated a margin of appreciation doctrine,[288] although its case law shows deference to proper factual and legal assessments by national bodies. For its part, the African Court has neither embraced the doctrine nor adopted similar language,[289] while the Inter-American Court has rejected the margin of appreciation approach and adopted the doctrine of conventionality control instead, with judgments characterised by close scrutiny of accordance with Inter-American Convention standards rather than deference to contracting states.[290]

The Inter-American Court has thus rejected any reduction of rights in the context of a precarious migration status and instead increased states' obligations.[291] Exemplifying this stance, its Advisory Opinion on the Rights and Guarantees of Children in the Context of Migration draws on a wide range of rights, taking into consideration the right to a fair trial, rights of the family, rights of children and the right to judicial protection.[292] The advisory opinion endorses a broad conceptualisation of family life, highlighting that the "definition of family should not be restricted by the traditional notion of a couple and their children, because other relatives may also be entitled to the right to family life, such as uncles and aunts, cousins, and grandparents, to name but a few of the possible members of the extended family".[293] Notably, "in the migratory context, 'family ties' may have been established between individuals who are not necessarily family members in a legal sense",[294] as children might not always be accompanied by their parents. Moreover, the advisory opinion deprioritises migration status. It states that when children have citizenship or permanent residence in the country from which a parent might be expelled due to their irregular situation, "it is axiomatic that the child must conserve the right to continue enjoying her or his family life in said country and, as a component of this, mutual enjoyment of the cohabitation of parents and children".[295] In these situations, the "rupture of the family

286. Ibid., paragraph 4.16.
287. Ibid., paragraph 7.3.
288. Abrusci E. (2022), *Judicial convergence and fragmentation in international human rights law*, Cambridge University Press, page 208.
289. Ibid., page 212.
290. Ibid., page 203.
291. Hennebel L. and Tigroudja H. (2022), *The American Convention on Human Rights: a commentary*, Oxford University Press, page 659.
292. Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, IACtHR Advisory Opinion, OC-21/14, 19 August 2014, paragraph 263.
293. Ibid., paragraph 272.
294. Ibid., paragraph 272.
295. Ibid., paragraph 280.

unit by the expulsion of one or both parents due to a breach of immigration laws … is disproportionate … because the sacrifice inherent in the restriction of the right to family life … appears unreasonable or excessive in relation to the advantages obtained by forcing the parent to leave the territory because of an administrative offense".[296] Related case law has confirmed violations of family rights as a result of expulsions from the Dominican Republic,[297] Bolivia[298] and the USA.[299]

296. Ibid., paragraph 280.
297. *Expelled Dominicans and Haitians v. Dominican Republic*, IACtHR judgment, 24 August 2014, paragraphs 429 and 430.
298. *Familia Pacheco Tineo v. Bolivia*, IACtHR judgment, 25 November 2013.
299. *Wayne Smith, Hugo Armendariz v. United States*, Case 12.562, (IACom) Report No. 81/10, 12 July 2010, paragraph 64.

Chapter 6

# Expulsion and severe illness

## 6.1. The protective ambit of the Convention and the evolution of the Court's case law

This section addresses the situation of severely ill migrants facing expulsion under the Convention, considering the very high threshold for the applicability of Article 3 (6.1.1) and the reduced protection accorded in cases of mental illness under Article 8 (6.1.2).

### 6.1.1. High threshold for severely ill applicants

From the outset, the threshold to be achieved for Article 3 of the Convention to halt the deportation of severely ill migrants with no permission to remain in the territory of a member state has been exceptionally high in comparison to other non-medical expulsion cases.[300] Other than in deathbed scenarios, such as in *D. v. the United Kingdom*,[301] where the claimant passed away shortly after the Court's ruling in his favour, the standard of "very exceptional cases" has continuously been applied. Since *D. v. the United Kingdom*, confirmed in *N. v. the United Kingdom*,[302] for the good part of 20 years, the Court has not considered the exceptionally high threshold as being reached, so that there are virtually no examples of successful challenges on grounds of Article 3 of the Convention in these circumstances,[303] except for D. himself in 1997 and Paposhvili in 2016.[304]

300. For a problematisation of this trend, see Palmer S. (2005), "AIDS, expulsion and Article 3 of the European Convention on Human Rights", 5 *European Human Rights Law Review* 533; Bettinson V. and Jones A. (2007), "The future of claims to resist removal by non-nationals suffering from HIV/AIDS", 28 *Liverpool Law Review* 183; Mantouvalou V. (2009), "*N v. UK*: no duty to rescue the nearby needy?", 72 *Modern Law Review* 815; Webster E. (2013), "Medical-related expulsion and interpretation of Article 3 of the European Convention on Human Rights", 6 *Inter-American and European Human Rights Journal* 36; Bauloz C. (2016), "Foreigners: wanted dead or alive – Medical cases before European courts and the need for an integrated approach to *non-refoulement*", 18 *European Journal of Migration and Law* 409.
301. *D. v. the United Kingdom*, Application No. 30240/96, 2 May 1997.
302. *N. v. the United Kingdom* [GC], Application No. 26565/05, 27 May 2008.
303. Cf. *Aswat v. the United Kingdom*, Application No. 17299/12, 16 April 2013, as harbinger of Paposhvili.
304. *Paposhvili v. Belgium* [GC], Application No. 41738/10, 13 December 2016.

The very high standard applying in these cases was first formulated in the aforementioned case of D. The case concerned a foreign national condemned on drug offences, diagnosed while in prison at an advanced stage of HIV/Aids and receiving treatment at the time of proceedings. On consideration that his forcible deportation to St Kitts, where there was no available treatment and no family or social network or support infrastructure to care for him, the Court concluded that withdrawal of treatment through expulsion would entail inordinate suffering and hasten his death, exposing him to acute mental and physical pain. In light of these "compelling humanitarian considerations", D's removal to St Kitts was deemed to constitute "exceptional circumstances", "expos[ing] him to a real risk of dying under the most distressing circumstances",[305] exceptionally warranting the halt of his deportation from the UK.

In the later case of N., where the Court considered that "it should maintain the high threshold set in *D. v. UK*", because "in such cases the alleged future harm would emanate not from the intentional acts or omissions of public authorities or non-state bodies, but instead from a naturally occurring illness and the lack of sufficient resources to deal with it in the receiving country".[306] In this type of reasoning structural considerations are omitted,[307] as are the consequences for ill and/or disabled claimants who, rather than receiving Convention protection adapted to their specific conditions, see those same conditions turn against them.

Accordingly, despite recognising that the applicants in Karara,[308] S.C.C.,[309] Bensaid,[310] Karagöz,[311] Arcila Henao,[312] Amegnigan,[313] Ndagoya,[314] Dragan[315] or N. itself[316] were severely ill and that expulsion would have drastically shortened their life expectancy, the Court did not consider the exceptionally high threshold formulated in D. to have been attained.

The fact that the claimants in these cases required costly medical treatment led the Court to consider the economic implications of precluding their expulsion. Ever since D., the Court has consistently maintained that "aliens who are subject to expulsion cannot in principle claim any entitlement to remain in the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance".[317] In the Court's view, the "fact that the applicant's circumstances, including his life expectancy, would be significantly reduced if he were to be removed from

305. *D. v. the United Kingdom*, Application No. 30240/96, 2 May 1997, paragraphs 53 and 54.
306. *N. v. the United Kingdom* [GC], Application No. 26565/05, 27 May 2008, paragraph 43.
307. For a critique, see Khanna V. (2026), "Seriously ill migrants in European human rights: framing global inequalities", 30 *International Journal of Human Rights* 354.
308. *Karara v. Finland*, Application No. 40900/98, 29 May 1998.
309. *S.C.C. v. Sweden*, Application No. 46553/99, 15 February 2000.
310. *Bensaid v. the United Kingdom*, Application No. 44599/98, 6 February 2001.
311. *Karagöz v. France* (dec.), Application No. 47531/99, 15 November 2001.
312. *Arcila Henao v. the Netherlands* (dec.), Application No. 13669/03, 24 June 2003.
313. *Amegnigan v. the Netherlands* (dec.), Application No. 25629/04, 25 November 2004.
314. *Ndangoya v. Sweden* (dec.), Application No. 17868/03, 22 June 2004.
315. *Dragan et al. v. Germany* (dec.), Application No. 33743/03, 7 October 2004.
316. *N. v. the United Kingdom* [GC], Application No. 26565/05, 27 May 2008.
317. Ibid., paragraph 42.

the Contracting State is not sufficient in itself to give rise to breach of Article 3".[318] The case must be "very exceptional" to determine otherwise.[319]

The reasoning of the Court has only evolved to illuminate that, besides patients nearing impending death, "other very exceptional cases"[320] include situations involving exposure to a "serious, rapid and irreversible decline in [the applicant's] state of health resulting in intense suffering or to a significant reduction in life expectancy",[321] as clarified in Paposhvili. The move is from imminent death to other cases of certain death in foreseeable circumstances equally amounting to a "high threshold for the application of Article 3".[322] Although this second category of cases concerns individuals not understood as being, in temporal terms, "at imminent risk of dying", they are nonetheless in a materially comparable situation vis-à-vis which "substantial grounds have been shown for believing that [they] … would face a [similar] risk" in substantive terms.[323]

Significantly, what the Court also clarified in Paposhvili is that the obligation at stake is not an open-ended positive duty but a well-defined "negative obligation not to expose persons to a risk of ill-treatment".[324] For this limited purpose, "the authorities in the returning State must verify on a case-by-case basis whether the care generally available in the receiving State is sufficient and appropriate in practice for the treatment of the applicant's illness so as to prevent him or her being exposed to treatment contrary to Article 3".[325] The issue is "not one of any obligation for the returning State to alleviate the disparities between its healthcare system and the level of treatment existing in the receiving State through the provision of free and unlimited healthcare to all aliens without a right to stay within its jurisdiction".[326] The point is to assess the circumstances on the ground for the limited purpose of determining exposure to Article 3 risks for the applicant, thus "consider[ing] the extent to which the individual in question will actually have access to [the essential] care and … facilities in the receiving State", taking account of the "cost of medication and treatment, the existence of a social and family network, and the distance to be travelled in order to have access to the required care".[327]

### 6.1.2. Reduced protection in cases concerning mental illness

Conversely to physical illness, mental illness does not appear capable of reaching the "very exceptional cases" standard. The situation of mentally ill persons, considered in Savran, has reinforced the exceptionality approach, apparently excluding

318. Ibid.
319. Ibid.
320. *N. v. the United Kingdom* [GC], Application No. 26565/05, 27 May 2008, paragraph 43.
321. *Paposhvili v. Belgium* [GC], Application No. 41738/10, 13 December 2016, paragraph 183.
322. Ibid. The "relaxation" of D.'s test is attributed to developments in Belgian case law, rather than to a reassessment of the Court's standard. See Concurring Opinion of Judge Lemmens, paragraph 5. Cf. Desmet, E., Sevrin E. and Spijkerboer T. (2026), "How strict is the European Court of Human Rights in migration cases?", Expert Report, University of Ghent, 18 February 2026, page 4.
323. Ibid.
324. Ibid., paragraph 188.
325. Ibid., paragraph 189.
326. *Paposhvili v. Belgium* [GC], Application No. 41738/10, 13 December 2016, paragraph 192.
327. Ibid., paragraph 190.

the applicability of Article 3.[328] Although the Court recognised in its judgment that "admittedly, schizophrenia is a serious mental illness", it dismissed the fact that "that condition can in itself be regarded as sufficient to bring the applicant's complaint within the scope of Article 3".[329] Rather than in conjunction with other factors, in light of the consequences for the applicant, the condition was appraised in isolation and in the abstract as the key determinant of the test, deemed the main reason for the threshold not being reached.[330] The case was instead assessed under Article 8.

It was under the right of private and family life that the permanent exclusion order issued against the applicant – a long-term settled migrant living with paranoid schizophrenia leading to bouts of aggressive behaviour against others and the commission of violent offences – was assessed. As part of this assessment, the Court focused on the procedure followed by the domestic courts, examining the proportionality of the measure. The exemption from criminal liability provided for by the Danish Penal Code in this context was deemed important, as it could have "the impact of limiting the extent to which the respondent State could legitimately rely on the applicant's criminal acts as the basis for his expulsion".[331] On account of this, along with other circumstances, like the 20-year length of his stay since early childhood, the solidity of his ties to the country, the recent improvement of his condition and the fact that considerable time had elapsed since the offences were committed, the Court concluded that "the national authorities did not give sufficiently thorough and careful consideration to the Article 8 rights of the applicant … and did not carry out an appropriate balancing exercise".[332] In particular, the unlimited re-entry ban was deemed "disproportionate".[333]

## 6.2. Overview of other applicable international standards and case law

The Inter-American Commission, in a decision adopted around the same time as N. and on very similar facts, followed a different reasoning. While still referring to "the humanitarian appeal of the case", it framed the question in Mortlock as one of considering whether expulsion would equate to sending the victim to face a *de facto* death sentence.[334]

The UN Human Rights Committee has followed a similar approach. In A.H.G., it assessed the effects of the expulsion of a mentally ill individual with schizophrenia to Jamaica and concluded a violation of the prohibition of ill-treatment. The committee seized the opportunity to reiterate that the aim of that provision is "to protect both the dignity and the physical and mental integrity of the individual".[335]

328. *Savran v. Denmark* [GC], Application No. 57467/15, 7 December 2021, paragraphs 133, 137 and 139.
329. Ibid., paragraph 141 et seq.
330. Ibid., paragraphs 147 and 148.
331. Ibid., paragraph 193.
332. Ibid., paragraph 196.
333. Ibid., paragraphs 199 and 200.
334. *Mortlock v. United States* (Admissibility and Merits), Rep. 63/08, Case 12.534, IACtHR 2008, paragraph 91.
335. *A.H.G. v. Canada*, Comm. No. 2091/2011, CCPR 2015, paragraph 10.4.

And, rather than relying on the condition of the applicant to raise the threshold for *non-refoulement* protection and exclude the case from the scope of Article 7 of the ICCPR, it considered his "need of special protection" as part of the assessment to establish the violation.[336]

The UN Committee established under the Convention on the Rights of Persons with Disabilities (CRPD) has endorsed the same understanding in cases regarding chronic or long-term illness and disability – conceptualising the two as "a difference of degree and not a difference of kind".[337] In *Sherlock v. Australia*, concerning the refusal of a work visa, the CRPD Committee indicated that "the existence of a migration health requirement [in visa proceedings] … may disproportionately affect applicants with disabilities".[338] The CRPD Committee espoused a human rights-based model of disability,[339] which "requires the diversity of persons with disabilities to be taken into account together with the interaction between individuals with impairments and attitudinal and environmental barriers".[340] The point is to recognise their full subjecthood and entitlement to human rights on an equal footing with others.[341] This means that the illness or disability of individuals and the "costs" associated with any accommodations or special needs they may have cannot be dismissed as "burdens" nor as legitimate reasons to dispense unequal treatment with discriminatory effects.[342] Differential impact, thus, cannot be justified merely on "the basis of a lack of available resources".[343] What the CRPD requires, instead, is for states to actively remove the relevant barriers.[344] Costs and burdens (from the perspective of contracting states) are transformed into "barriers" to the full and effective enjoyment of rights (from the perspective of individuals) and considered the basis of CRPD duties, placing concrete obligations on CRPD parties to lift them.[345] This is why, in *Sherlock v. Australia*, the respondent's refusal to issue a visa, taken "on the sole basis" of the multiple sclerosis of the applicant and the "cost" its treatment would entail,[346] is deemed a violation of the right to "liberty of movement" under Article 18 of the CRPD.[347]

336. Ibid. For a similar approach concerning the repeated expulsion of a child with severe health problems, including a severe mental condition, see *E.B. v. Sweden*, Comm. No. 3724/2020, CCPR 2026.
337. *Sherlock v. Australia*, Comm. No. 20/2014, CRPD 2021, paragraph 8.6.
338. Ibid., paragraph 8.4.
339. Cf. Motz S. (2024), "Widening the scope of non-refoulement? The CRPD and the protection of persons with disabilities in displacement", in Rioux M. H. et al. (eds), *Handbook of disability*, Springer, 1689.
340. *Sherlock v. Australia*, Comm. No. 20/2014, CRPD 2021, paragraph 8.6.
341. Ibid., paragraph 8.5.
342. Ibid., paragraph 8.4.
343. UNCESCR, General Comment No. 20 (2009) on Non-discrimination in Economic, Social and Cultural Rights, E/C.12/GC/20, CESCR 2009, paragraph 13, cited in *Sherlock v. Australia*, Comm. No. 20/2014, CRPD 2021, paragraph 8.7.
344. *Sherlock v. Australia*, Comm. No. 20/2014, CRPD 2021, paragraph 8.6. See also UNCESCR, General Comment No. 20 (2009) on Non-discrimination in Economic, Social and Cultural Rights, E/C.12/GC/20, CESCR 2009.
345. Cf. *N. v. the United Kingdom*, Application No. 26565/05, 27 May 2008, paragraph 44.
346. *Sherlock v. Australia*, Comm. No. 20/2014, CRPD 2021, paragraph 8.7.
347. Article 18(1)(b) CRPD. Note that both the EU itself and all its member states are contracting parties.

# Conclusion

This thematic paper has traced the approach of the European Court of Human Rights to the entry and expulsion of non-nationals. It has shown the Court's very cautious approach on migration and highlighted numerous recent additional restrictions in its case law. As demonstrated in Chapter 1, the Court has excluded from the scope of the Convention salient migration control measures performed extraterritorially and sometimes in co-operation with third countries. In relation to cases regarding entry, Chapter 2 underlined the own-culpable-conduct exception introduced to the prohibition of collective expulsion, in combination with raised evidentiary requirements in border procedures. In addition, as established in Chapter 3, concerning the detention and reception conditions of non-nationals, the protection of Article 3 may be offered only when its high threshold conditions are considered to be met. On the expulsion of non-nationals, Chapter 4 noted the high threshold for the minimum level of severity to be attained under the absolute prohibition of Article 3 and the general deference to domestic risk assessments. As indicated in Chapter 5, the Court has turned to process-based review of expulsion decisions and grants an increasing margin of appreciation under Article 8 of the Convention as a qualified right. Finally, Chapter 6 emphasised the extremely high threshold confronting non-nationals who contest their expulsion on health grounds.

The paper has also delineated the protection provided by other international courts and human rights bodies. All Council of Europe member states are bound by their obligations under the Refugee Convention, the International Covenant on Civil and Political Rights, the UN Convention against Torture, the UN Convention on the Rights of the Child and the UN Convention on the Rights of Persons with Disabilities. They equally remain subject to customary law and *jus cogens*, including the prohibitions of ill-treatment, collective expulsion and *refoulement*, from which no derogation or limitation is permitted under any circumstances.

Considering that one of the core objectives of the Council of Europe is "the maintenance and further realisation of Human Rights and Fundamental Freedoms",[348] the principle of non-regression should be relied on to track and preserve current international standards. So far, the "living instrument" doctrine has buttressed a progressive reading of the Convention,[349] "in accordance with developments in international law" and in light of changing circumstances demanding increased safeguards. Rather than for reducing rights, the doctrine has served to constrain their curtailment, "in a manner which gives practical and effective protection".[350]

348. European Convention on Human Rights, Preamble.

349. *Tyrer v. the United Kingdom*, Application No. 5856/72, 25 April 1978, paragraph 31.

350. *Demir and Baykara v. Turkey*, Application No. 34503/97, 12 November 2008, paragraph 31.

As the Council of Europe's Secretary General stated: "The Convention system was not designed for easy moments".[351] The Convention was the first international treaty to give binding effect to the principles of the Universal Declaration of Human Rights. It was adopted, after the Second World War, to guarantee the equal worth of the human person, to protect individuals against abuses of state power and the potential excesses of unchecked majority rule.[352] The Court's mandate, as the guarantor of the Convention, constitutes the core baseline. Within this system, preserving human rights for the benefit of everyone should remain the top priority.

351. Alain Berset, Speech at the Informal ministerial conference – Ministers of Justice, Strasbourg, 10 December 2025.
352. Universal Declaration of Human Rights, Preamble.

This thematic paper provides an overview of case law from the European Court of Human Rights (the Court) concerning the entry and expulsion of non-nationals, with particular attention to key issues shaping public and political debate. The first part addresses entry, covering requirements for the applicability of the European Convention on Human Rights (the Convention), especially with regard to extraterritorial migration controls, border procedures and the prohibition of collective expulsion. It also examines detention and reception conditions, including those in border areas.

The second part focuses on expulsion and analyses several critical issues: the risk of ill-treatment faced by individuals subject to expulsion; implications for family rights; and concerns related to severe illness of non-nationals facing removal. Each chapter contains a section that reviews other international standards and the case law of international courts and United Nations treaty bodies, offering a valuable comparative perspective.

The paper demonstrates that the Convention imposes only minimal restrictions on domestic migration policies. The Court has generally been attentive to state sovereignty and the principle of subsidiarity. Notably, neither the Convention nor its protocols grant non-nationals a right to asylum or a right to enter, but they explicitly permit detention for migration control purposes. Article 3 (prohibition of torture) and the principle of non-refoulement establish absolute prohibitions, although the Court applies high thresholds for their applicability. Finally, regarding qualified rights under Article 8 (right to respect for private and family life), the Court provides domestic courts with a broad margin of appreciation, conducting process-based reviews.

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