Chapter 22

Migration and the ECtHR

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Abstract

European Court of Human Rights. The ECtHR's migration practice began to flourish in the early 1990s, in the context of expulsion and detention. Following the Soeringen and Abdulaziz cases, the Court rapidly adopted new and new expectations of States Parties, in particular in the wake of the refugee crisis of the 2010s. As a result of the Court's law-enforcement activities, States cannot be relieved of their legal obligations, particularly their human rights obligations, simply because they (in their view) act against a migrant outside their territory. They must now also be extremely careful when it comes to return, because they are also responsible for the practices and circumstances of the third country to which they return the applicant. A number of decisions have also been taken in relation to shorter and longer periods of detention, closed or semi-closed regimes. It cannot be ignored, however, that this tendency is counteracted by the need for sovereignty on the part of states. The study thus first points out the relationship between migration and sovereignty, and then presents the role of the ECtHR in human rights law and in the assessment of migration in general. As the ECtHR's practice has now become extremely diverse, the study focuses on border-related cases, with a focus on extraterritorial excision, border procedures, summary returns, indirect refoulement as current and challenging issues for the Eastern European states.

Keywords: migration, ECtHR, sovereignty, transit zones, asylum, territorial excision

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1. Introduction – Migration and Sovereignty

To start with a fact familiar to everyone, migration – whether it is forced or arbitrary – is a characteristic of humanity. But what varies from era to era is the *attitude* to migration.

This attitude, i.e. how communities, and ultimately the state, relate to other people and ethnic groups arriving on its territory, has traditionally been left to the sovereign decision of states. The resulting discretionary power has thus been quite wide: who to allow in, who to let resettle and how, who to consider desirable in becoming part of society and who to not – there are countless historical examples of the expulsion of groups considered alien. This discretion has made the state a fairly free-acting shaper of a process that affects its population, as it can choose to be in favour of immigration or – by controlling it – against it.

Some of these features still exist today, as (at least) in principle both EU law and the European Convention on Human Rights recognise the sovereign right of states to border control activities: to control entry to and residence in their territory.[1] At the same time, however, national specificities in relation to immigration are becoming increasingly unravelled, and more and more barriers are emerging which limit the scope for state action - and which constitute a certain degree of inertia, either against the will of the state or in excess of it.

These include the obligation to apply the principle of non-refoulement, the impact of compelling circumstances such as labour shortages, or illegal border crossing or residence -which, as we have seen through the history of many countries of destination, in many cases lead to *ex-post* legalisation of status. In the case of humanitarian obligations, the granting of asylum has been taken out of the realm of (more or less) absolute state discretion, and assumed by states (or at least some of them) as an international legal obligation – through which the granting of asylum has become a legally binding decision-making process.

In the 20th century, we have seen examples of two major regimes in the Western world in terms of their attitude to immigration. Prior to World War II, there were many examples of migration being tightly controlled and humanitarian considerations being taken poorly into account.[2] In contrast, after the Second World War – and particularly from the 1960s onwards – there was a growing emphasis on drawing lessons from the war. For example, the 1951 Geneva Refugee Convention, and the growing influence of social movements including anti-colonialism, the new left, ethnic and racial identity, and feminism.[3]

Partly as a result of these phenomena, a revolution in minority rights emerged: in the Euro-Atlantic area the prohibition of discrimination became a practically universal human right (see e.g. the UN Charter, the Universal Declaration of Human

1 Brouwer, 2010, pp. 206–207.
2 For an overview see Meyers, 2002, pp. 124–125.
3 Skretny, 2002, p. 3.

Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, etc.), which then permeated the approach to migration. Both universality and the treatment of migration within a purely legal framework created tensions, in the sense of how the ideal of human rights and immigration control as a crucial and fundamental aspect of state sovereignty balance each other.[4] The traditional efforts by states to control their national borders, and determine the numbers and types of people who can enter and remain in their territory, are no longer effective – and this has brought forth the idea that national sovereignty is now in decline.[5]

This era also saw the creation and rise of the European Court of Human Rights, whose work has helped to transform migration issues from the political sphere into a legal issue, and an increasingly universal one at that.

2. Migration and the ECtHR

A review of the rather extensive jurisprudence of the European Court of Human Rights (hereafter ECtHR) shows that, in many areas, states struggle to find a balance between their own interests and the consideration of legal and humanitarian aspects.

Under the European Convention on Human Rights (hereafter ECHR), as a general rule states have the right to control entry, residence and expulsion of non-nationals. However, there are a number of issues that could be covered by the ECHR in this context. These include travel bans, border checks, transit zones, access to asylum, family life and reunification, removal, expulsion, extradition, push-backs, immigration detention and procedural guarantees that embrace all of these questions. Some of these issues are relatively long-standing, recurring problems, while some have been brought to the fore by the various migration crises of the recent years (which is not to say that these are entirely new tactics), such as transit zones, or more broadly forms of territorial excision, or push-back solutions.

These issues are most relevant in relation to the convention's provisions on the prohibition of torture, inhuman or degrading treatment, deprivation of liberty, the right to a fair trial, the right to an effective remedy, respect for private and family life, and Article 4 of the Fourth Additional Protocol, which refers to the prohibition of collective expulsion of aliens.

In principle each of these issues requires a lengthy analysis, and the ECtHR itself has published a comprehensive summary of its immigration case-law,[6] so I have se-

4 Slingenberg, 2014, pp. 4–5.
5 Freeman, 1998, pp. 86–87.
6 Guide on the case-law of the European Convention on Human Rights. Immigration.

lected the topics of access to territory, mainly regarding the transit zones and forms of extradition, and with a view to the lessons these decisions have taught the Eastern European states that form the external border of the European Union. While Western European states have been confronted with the intersection of migration, sovereignty and human rights for many decades – and have thus tested the requirements of the ECHR through a diverse jurisprudence – in Eastern Europe these issues are still relatively new, and the answers to these questions are partly based on previous Western experiences and partly offer novel solutions. The aim is therefore to outline a framework that can be discerned from the ECtHR's practice at a given moment.

However, before addressing these issues it is worth clarifying the role that the court plays and can play in migration matters. What is the rationale behind international conventions, i.e. agreements that go beyond state sovereignty in the management of migration, and why do states entrust a supranational organisation with the task of setting limits to their potential for action?

International conventions seem to be the least controversial way to make international human rights law, though the extent to which they are then binding on states is not always obvious. Although mechanisms for the enforcement of international law in the UN system are practically non-existent, the regional systems do provide a framework for the protection of human rights. Among these, the ECHR is by far the most effective, because the member states have agreed to make their national legislation conform to the decision of the ECtHR.[7]

Péter Paczolay, a Hungarian judge at the ECtHR, briefly described how a multilevel protection of human rights was established in contemporary Europe after the Second World War. Freedoms in Europe are protected at the national level, at the Council of Europe level, and at EU level. National courts and constitutional courts defend rights based primarily on the grounds of their national constitutions, but also by international legal instruments. The Court of Justice of the European Union protects the rights embodied in the UN Charter. The ECtHR protects the freedoms and rights enshrined in the convention (i.e. the ECHR). Although formally this multilevel protection multiplies the guarantees for remedy violations of human rights, the complexity might also create difficulties.[8]

Christoph Grabenwarter also points out that the ECtHR – which was established and ratified by the states of Western Europe in the aftermath of World War II and the horrors of Nazism – has throughout its history shown that the protection of human rights is no longer an exclusive matter for national constitutions and national courts. Human rights have become an issue in European law and public international law, and the ECHR, as a charter of human rights, became a necessary element of a democratic society.[9] On the other hand, even with the universalism of human rights, we must recognise that migration is necessarily a phenomenon that affects several states

7 Nash, 2009, p. 35.
8 Paczolay, 2022, p. 134.
9 Grabenwarter, 2014, p. 101.

and requires a comprehensive and coherent legal response. This trend was already visible after the First World War, when the International Red Cross lobbied for comprehensive legislation on the situation of refugees.[10]

As already mentioned, the convention does not focus on migration issues and does not specify a right to asylum, and thus the states should have a wider scope of action in this field. The first prominent judgement of the ECtHR on migration was concerning family reunification,[11] and the strict obstacles spouses from abroad needed to face. It introduced the formula that states have – as a matter of well-established international law – the right to control the entry of non-nationals as the starting point of the human rights inquiry.[12] At the same time, it also stated that the meaning of a family must at any rate include relationships that arise from a lawful and genuine marriage – and that there was no breach of Article 8 because the applicants did not show that there were obstacles to establishing family life in their own or their husbands' home countries, or that there were special reasons why that could not be expected of them. Throughout the years, the ECtHR has developed the right to family reunification as a core value of Article 8 of the ECHR, and that guarantee now plays a major role in national immigration law throughout Europe.[13]

In another prominent case, Soering v. the United Kingdom,[14] the court held for the first time that the United Kingdom would be in violation of Article 3 of the convention if it extradited the applicant to the United States, since there he would be faced with the possibility of being sentenced to death. Thus, for the first time, it stated the responsibility of the extraditing state.[15] As such, this decision is also the basis for the decisions on chain-refoulement.

Before these decisions the ECtHR was silent regarding migration law, but the 1990s became a dividing line. "Articles 3 and 8 [of the] ECHR turned into veritable hotbeds of dynamic interpretation during an epoch that was described as the 'end of history' to illustrate the widespread expectation that globalisation would go hand in hand with a predominance of liberal constitutionalism. […] Experts in migration law who begin studying the subject today will find it difficult to grasp the sense of surprise with which the innovative early judgments were received […]. Rulings which are taken for granted nowadays were met with astonishment three decades ago. These innovations turned ECtHR judgments into an essential point of reference for anyone dealing with migration law, be it as academics or practitioners. Examples of dynamism are the human rights-based prohibition of refoulement and the transformation of the prohibition of collective expulsion into a free-standing

10 Jaeger, 2001, p. 728.
11 Abdulaziz, Cabales and Balkandali v The United Kingdom, Application nos. 9214/80; 9473/81 and 9474/81, 28 May 1985
12 Thym, 2023, p. 22.
13 Keller and Stone Sweet, 2008, p. 699.
14 Soering v. the United Kingdom, Application no. 14038/88, 07 July 1989
15 Breitenmoser and Wilms, 1990, p. 846.

procedural guarantee […]. At the same time, instances of thwarted dynamism and judicial standstill equally define the case law."[16]

3. Territorial excision and the ECtHR. Transit zones, border procedures, summary returns

One of the ways in which states have dealt with mass migration has been to redefine state borders and territories. The rationale behind this method was that, while the state must guarantee a full, meaningful range of fundamental rights to residents within its own territory, it must guarantee only a virtually discretionary part of these rights to those outside it. Territorial excision became one of these methods.

Territorial excision is practically a border control method, where the state creates new internal borders – whose existence might be enshrined in law, or simply maintained through extra-legal practice. However, the existence of these kind of borders is vulnerable to legal activism (among others by organised action by migrants and solidarity networks that can repurpose the law as an instrument to lift the frontiers of excision by exposing the incompatibility between border control and constitutional rights).[17] Excision has also been widely used as a spatial tool for territorial waters, which are considered not to be part of the territory.[18]

There are three main forms of territorial excision. The first is the operation of extraterritorial bases: these fall under the power of the state, but the state has reservations about its own jurisdiction and responsibility over them. The second form is redefining national territories' status according to state desires regarding immigration flows. Another method is to have a domestic space, where an internal excision of very specific areas can occur so as to avoid full state obligations regarding the treatment of unauthorised foreigners. The goal is to help manage the flow of refugees and illegal migrants. What we can see in Europe are cases when states have declared parts of their airports or harbours, in some cases even certain international railway stations, to be transit zones – international space where officials are not obliged to provide foreign nationals with some or all of the protections available to those officially on state territory.[19]

Thus the methods of territorial excision go hand in hand with the forms of border procedure. A border procedure is one in which the applicant for international protection is not granted entry to national territory during the time that the authorities examine their application. In general, persons whose applications for asylum are

16 Thym, 2023, pp. 130–131.
17 Gazzotti, 2023, p. 453.
18 Basaran, 2008, p. 345.
19 Davidson, 2003, p. 7, 9.

examined in a border procedure are present on the territory of the state in which an application is filed; thus that state exercises full jurisdiction over them, but through the forms of territorial excision a wide range of human rights guarantees are interpreted in a restrictive way. Border procedures are generally carried out in transit zones or international zones of airports, and during the procedure applicants for asylum are generally deprived of their liberty – either in a conventional detention centre, or because their situation legally and factually amounts to a deprivation of liberty.[20]

The ECtHR has acknowledged difficulties in regard to the reception of asylum seekers, taking into account that many states are faced with the arrival of mixed flows comprising both asylum seekers and irregular migrants at large European airports, ports and borders, and for interception and rescue at sea. The court has recognised that states have a sovereign right to control aliens' entry into and residence in their territory, and that detention is an adjunct of that right. But at the same time, it has reminded states that the provisions of the ECHR, including Article 5, must be respected – and a clear distinction should be made between asylum seekers and other migrants. [21]

These methods can be linked to the question of access to procedures and, because of the confinement, to deprivation of liberty. In one of the most well-known judgements of the ECtHR, Amuur v. France, the court stated: "Holding aliens in the international zone does indeed involve a restriction upon liberty, but one which is not in every respect comparable to that which obtains in centres for the detention of aliens pending deportation. Such confinement, accompanied by suitable safeguards for the persons concerned, is acceptable only in order to enable States to prevent unlawful immigration while complying with their international obligations, particularly under the 1951 Geneva Convention Relating to the Status of Refugees and the European Convention on Human Rights. States' legitimate concern to foil the increasingly frequent attempts to circumvent immigration restrictions must not deprive asylum-seekers of the protection afforded by these conventions. Such holding should not be prolonged excessively, otherwise there would be a risk of it turning a mere restriction on liberty – inevitable with a view to organising the practical details of the alien's repatriation or, where he has requested asylum, while his application for leave to enter the territory for that purpose is considered – into a deprivation of liberty. In that connection account should be taken of the fact that the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country."[22]

On the other hand the court also ruled about the reasoning of the French government about the zone being partially open, in the sense of the zone being open to the outside and closed only on the French side. The court noted that "the mere

20 Cornelisse, 2016, pp. 74–75.
21 Hrnčárová, 2014, p. 326.
22 Amuur v. France, Application no. 19776/92, 25 June 1996

fact that it is possible for asylum-seekers to leave voluntarily the country where they wish to take refuge cannot exclude a restriction on liberty, the right to leave any country, including one's own, being guaranteed, moreover, by Protocol No. 4 to the Convention. Furthermore, this possibility becomes theoretical if no other country offering protection comparable to the protection they expect to find in the country where they are seeking asylum is inclined or prepared to take them in."[23] It can therefore be seen that the ECtHR had clearly long ago laid the foundations that the use of transit zones is not a way of circumventing the migration requirements.

Following the case-law the ECtHR, in determining the distinction between a restriction on liberty of movement and deprivation of liberty – in the context of confinement of foreigners in transit zones and reception centres for the identification and registration of migrants – the factors taken into consideration are as follows:

- the applicants' individual situation and their choices
- the applicable legal regime of the respective country and its purpose
- the relevant duration, especially in the light of the purpose and the procedural protection enjoyed by applicants pending the events
- and the nature and degree of the actual restrictions imposed on or experienced by the applicants.[24]

Regarding this test, the Ilias and Ahmed case – where the Hungarian authorities also experimented with a partially open regime (i.e. the asylum seekers were free to leave towards Serbia) – overrules in some extent the Amuur v. France case. The Grand Chamber held that Article 5 of the ECHR was not applicable since the applicants could not be deemed in detention, based on the following elements: the applicants entered the transit zone of their own initiative, with the aim of seeking asylum; the duration of the stay was only 23 days, which is not unreasonable for the purpose of examining the asylum applications; and the applicants had a concrete and effective possibility to leave the transit zone and go back to Serbia. Regarding this reasoning, namely because of the softening of the Amuur-requirements, the decision was subject to criticism.[25] Since then, the ECtHR has followed the three factors test, among others in the cases O. M. and D. S. v. Ukraine[26], M. S. v. Slovakia and Ukraine[27], M. K. and Others v. Poland[28], in border procedures, confinement and removal.

23 Amuur v. France, Application no. 19776/92, 25 June 1996

24 This test was introduced via recent case-law, mainly in R.R. and Others v. Hungary, Application no. 36037/17, 05 July 2021, Ilias and Ahmed v. Hungary Application no. 47287/15, 21 November 2019, and Z.A. and Others v. Russia Applications nos. 61411/15, 61420/15, 61427/15 and 3028/16, 21 November 2019. See also Key Theme, Article 5. The notion of deprivation of liberty. p. 2.

25 Davio, 2021.

26 O. M. and D. S. v. Ukraine, Application no. 18603/12, 15 December 2022.

27 M. S. v. Slovakia and Ukraine, Application no. 17189/11, 11 November 2020.

28 M. K. and Others v. Poland, Applications nos. 40503/17, 42902/17 and 43643/17, 14 December 2020.

Another question of the access to territory relates to the summary return or pushback cases. Access to territory may be by air, land or sea. Pushbacks are "various measures taken by States which result in migrants, including asylum seekers, being summarily forced back to the country from where they attempted to cross or have crossed an international border without access to international protection or asylum procedures or denied of any individual assessment on their protection needs which may lead to a violation of the principle of non-refoulement. Pushback practices demonstrate a denial of State's international obligation to protect the human rights of migrants at international borders. Pushbacks result in human rights violations such as forced returns without individual assessment and often collective expulsions with high risk of refouelment, including chain refoulement."[29] The ECtHR has held on several occasions that individuals may fall within its jurisdiction when a state exercises control over them, even on the high seas. This applies even more when this happens on land.

In the Hirsi Jamaa and Others v. Italy case[30] the applicants were part of a group of about 200 migrants who had been intercepted by the Italian coastguards on the high seas. The base of the decision was an agreement – the Treaty on Friendship, Partnership and Cooperation between Italy and Libya – that aimed at preventing irregular migration to Italy. The migrants were given no opportunity to apply for asylum.

The ECtHR stated that the case falls under the jurisdiction of Italy. According to the ECtHR, the undertaking of the contracting states is to secure to everyone within their jurisdiction the rights and freedoms defined in the convention. Though the jurisdiction is presumed to be exercised normally throughout the state's territory, and the court has accepted only in exceptional cases that acts of the contracting states performed, or producing effects, outside their territories can constitute an exercise of jurisdiction, if the state exercises effective control and authority of an area outside its national territory, or an individual in this area, the state practically exercises jurisdiction over that area.[31] The events took place entirely on board ships of the Italian armed forces, the crews of which were composed exclusively of Italian military personnel - thus in the period between boarding the ships of the Italian armed forces and being handed over to the Libyan authorities, the applicants were under the continuous and exclusive *de jure* and *de facto* control of the Italian authorities. In response to the Italian authorities' claim that they were implementing an international agreement, the court ruled that this cannot be a reason for not having to comply with international human rights obligations in general.

29 Questionnaire of the Special Rapporteur on the human rights of migrants: pushback practices and their impact on the human rights of migrants.

30 Hirsi Jamaa and others v. Italy, Application no. 27765/09, 23 February 2012.

31 Loizidou v. Turkey, Application no. 15318/89, 18 December 1996; Banković and Others, Application no. 52207/99, 12 December 2001; Al-Skeini and Others v. the United Kingdom, Application no. 55721/07, 7 July 2011.

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

Regarding the summary return, the court – citing among others the Soering decision – noted that expulsion, extradition or any other measure to remove an alien may give rise to an issue under Article 3, and hence engage the responsibility of the expelling state under the convention, where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. In such circumstances, Article 3 implies an obligation not to expel the individual to that country. To decide that there is a real risk, the foreseeable consequences of the removal must be examined, taking into account the general situation in a particular country; and if the applicant alleges that they are a member of a group systematically exposed to a practice of ill-treatment, Article 3 of the convention enters into play when the applicant establishes that there are substantial grounds for believing in the existence of the practice in question and their membership of the group concerned.

The ECtHR also noted that the states which form the external borders of the EU are experiencing considerable difficulties in coping with the increasing influx of migrants and asylum-seekers. It does not underestimate the burden and pressure this situation places on the states concerned, and is particularly aware of the difficulties related to the phenomenon of migration by sea. However, this statement did not really play much of a role in the decision. At the same time, the court also has some questions left open: what if the Italian vessels had forced the migrant boats to return to Tripoli without transferring the migrants to their own vessels, or what if an Italian-Libyan joint patrol had carried out the interception?[32]

It is also an open question whether the ECtHR's statement about migrants on board ships 'registered in, or flying the flag of, that State' can be extended to other forms of de facto control – in particular when border guards are not in physical contact with migrants, taking into account e. g. the private vessels for search and rescue in the Mediterranean. However, these cases increasingly show that that States cannot avoid establishing their jurisdiction by not treating proceedings at sea, airports or in transit zones as taking place on their territory.[33]

There are some exceptions. The lack of active cooperation with the available procedure for conducting an individual examination of the applicants' circumstances leads the ECtHR to find that the authorities could not be held responsible for the fact

32 Pijnenburg, 2018, p. 402.
33 Thym, 2023, pp. 306–307.

that no such examination was carried out.[34] Also, in N. D. and N. T. v. Spain case, the court stated that in its view, the same principle must also apply to situations in which the conduct of persons who cross a land border in an unauthorised manner, deliberately take advantage of their large numbers and use force, is such as to create a clearly disruptive situation which is difficult to control and endangers public safety. At the same time, however, the court also takes into account whether the state provided genuine and effective access to means of legal entry.[35] The decision was subject to criticism for the reason that "the exception is too broad and open to abuse: in principle, the very act of crossing the border fence in more than one person might qualify as unlawful entry: for instance, the Spanish domestic law explicitly classifies as an illegal and disruptive entry the mere penetration beyond Melilla's internal fence […]. But border control measures should not frustrate the access to the most basic procedural protections of refugees, which shall not be entirely defeated by an irregular entrance in a group. The 'unless clause' grants effectiveness to the border fence *qua* tool for preventing (would be) refugees from applying for asylum."[36]

In summary, where applicants can arguably claim that there is no guarantee that their asylum applications would be seriously examined by the authorities in the neighbouring third country – and that their return to their country of origin could violate Article 3 of the convention – the respondent state is obliged to conduct a thorough examination and allow the applicants to remain within its jurisdiction until such time that their claims have been properly reviewed, and cannot deny access to its territory to persons presenting themselves at a border checkpoint who allege that they may be subjected to ill-treatment if they remain on the territory of the neighbouring state, unless adequate measures are taken to eliminate such a risk.[37]

In general, if the authorities choose to remove asylum seekers to a third country, they need to consider whether their action would expose them, directly or indirectly, to treatment contrary to Article 3.[38] The core question of removal to a third country is whether or not the individual will have access to an adequate asylum procedure in that country. The other question that needs to be examined is whether there is a risk of being subjected to treatment contrary to Article 3 in the third country. In "all cases of removal of an asylum seeker from a Contracting State to a third intermediary country without examination of the asylum requests on the merits, regardless of whether the receiving third country is an EU Member State or not or whether it is a State Party to the Convention or not, it is the duty of the removing State to examine thoroughly the question whether or not there is a real risk of the asylum

34 Berisha and Haljiti, Application no. 18670/03, 16 June 2005; Dritsas and Others, Application no. 2344/02, 01 February 2011.

35 N. D. and N. T. v. Spain, Applications nos. 8675/15 and 8697/15, 13 February 2020.

36 Sardo, 2021, p. 321.

37 M. K. and Others v. Poland, Application nos. 40503/17, 42902/17 and 43643/17), 14 December 2020.

38 M. S. S. v. Belgium and Greece, Application no. 30696/09, 21 January 2011.

seeker being denied access, in the receiving third country, to an adequate asylum procedure, protecting him or her against refoulement. If it is established that the existing guarantees in this regard are insufficient, Article 3 implies a duty that the asylum seekers should not be removed to the third country concerned."[39] The state has practically two options before removing an asylum seeker: they either examine their asylum application in merits, including the safety of the country of origin, or examine thoroughly whether the third country they remove the individual to has an adequate asylum system.

The core elements of an adequate asylum system is its accessibility and reliability.[40] It includes the need for the authorities to carry out of their own motion an up-to-date assessment of the accessibility and functioning of the receiving country's asylum system and the safeguards it affords in practice. It is the duty of the authorities to seek all relevant generally available information.[41] The expelling state cannot merely assume that the asylum seeker will be treated in the receiving third country in conformity with the convention standards but, on the contrary, must first verify how the authorities of that country apply their legislation on asylum in practice.[42]

Thus we have arrived to the question of chain refoulement, when sending individuals to countries with heavily defunct asylum systems can be contested as indirect refoulement under the ECHR. The indirect removal of an alien to an intermediary country does not affect the responsibility of the expelling contracting state to ensure that they are not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the convention.[43] Indirect refoulement also deals with the effectiveness of the third country's asylum determination system, which in turn determines the risk of refoulement to the country of origin. This principle can occur even between two EU member states: some courts have acknowledged that returning asylum seekers to Greece would violate international and human rights law through indirect refoulement, due to the ineffective asylum system. This view was confirmed by the ECtHR in the M. S. S. case. In this case, Belgian officials required asylum applicants to meet a high evidentiary threshold showing tangible information that expulsion to Greece would violate Article 3 of the convention. This practice of interstate trust exposed asylum applicants to the risk of indirect refoulement.[44]

While the concept of indirect refoulement puts a heightened pressure on states – because it establishes their responsibility not only for their own actions but for the actions of other counties too – Lehmann states there are some controversies

39 Ilias and Ahmed v. Hungary Application no. 47287/15, 21 November 2019.

40 M. S. S. v. Belgium and Greece, Application no. 30696/09, 21 January 2011.

41 F. G. v. Sweden, Application no. 43611/11, 23 March 2016; Ilias and Ahmed v. Hungary Application no. 47287/15, 21 November 2019.

42 M. S. S. v. Belgium and Greece, Application no. 30696/09, 21 January 2011.

43 T. I. v. the United Kingdom, Application no. 43844/98, 7 March 2020; Salah Sheekh v. The Netherlands, Application no. 1948/04, 11 January 2007; Sufi and Elmi v the United Kingdom, Applications nos. 8319/07 and 11449/07, 28 June 2011; Oudejans, Rijken, Pijnenburg, 2018, p. 617.

44 Sy, 2015, pp. 469, 471.; Rodenhäuser 2018.

with regard to returns to countries with a poor quality of protection, but below the threshold of indirect refoulement or an exposure to inhuman or degrading treatment in the receiving state, too. "The Convention does not compel refugees to seek protection in the first state where there is an opportunity to do so, but neither explicitly prohibits return to a place where refugees are not granted all the rights under the Convention. This void has led to numerous arrangements that can be referred to as 'protection elsewhere', such as 'first country of asylum' and 'safe third country' concepts. While it has been argued that the Convention precludes stripping refugees of acquired rights (and thus bars return to countries that disregard Convention rights), the minimum standards for 'protection elsewhere' arrangements remain contested."[45]

At the same time, there are concerns regarding the extraterritorial application of non-refoulement too. Although non-refoulement does not raise any issues under Article 1 of the ECHR, because the applicant is on the territory of the state concerned and therefore within its jurisdiction. However, while the ECtHR has formulated non-refoulement as an obligation to refrain from removal, it has not adopted a definition of what a positive obligation is. Given that "if non-refoulement is a positive obligation, it is a duty to prevent or protect against violations occurring extraterritorially, then fear that it might open the door to accusations of extraterritorial application of the ECHR offers another explanation as to why the European Court has not explicitly relied upon the theory of positive obligations in the non-refoulement context. Focusing on the act of removal as a violation of a negative duty to refrain from removal makes it easier for the European Court to deny that non-refoulement is an example of extraterritorial application of the ECHR. […] The ECHR should not require states to act as worldwide guarantors of the rights it contains, and that its proper function is not as an indirect guide for the conduct of states outside of Europe."[46]

4. Conclusions

The article mainly focused on questions on some aspects of asylum law. Naturally, there are more classical immigration law cases or cases that have connection to immigration law, including in ECtHR case-law. This includes travel bans,[47] residence

45 Lehmann, 2019, p. 10.
46 Greenman, 2015, p. 280, 285.
47 See e. g. Nada v. Switzerland, Application no. 10593/08, 12 September 2012; Stamose v. Bulgaria, Application no. 29713/05, 27 November 2012.

permits,[48] and human trafficking.[49] At the same time, however, asylum cases are more in the spotlight because they are more prone to serious violations and, on the other hand, in the fight to control irregular migration, states are constantly testing the convention's system of legal protection.

As we have seen, the approach taken by international law towards immigration changed fundamentally after the Second World War. "Human rights law has turned into an essential normative compass precisely because it rises above the inter-state paradigm. Human rights instruments usually apply to 'everyone' within the jurisdiction of a state, not only nationals of state parties; the 'right to have rights' was detached from nationality, with individuals being protected *qua* personhood. The open-ended texture of human rights means that they serve as a conceptual and doctrinal counterweight to state sovereignty, feeding the interests of migrants into decision-making. They will continue to play this role as a result of a built-in potential for dynamic interpretation.[50]

Recent migration-related jurisprudence provides a high level of protection at international level, essentially for those seeking to benefit from asylum procedures, regardless of whether they have a legitimate reason to seek such procedures or whether they are seeking to circumvent the stricter immigration admission procedure. States experiment with streamlining the procedure at the border as much as possible, avoiding substantive examination of applications, various forms of extraterritoriality, or summary returns - but this high level of protection is high precisely because it is increasingly closed. While the ECtHR has recognised and acknowledged that states are struggling with migratory pressures, it has not relaxed its practice on the question of jurisdiction or on return in any meaningful way. States must now, from the first contact, examine the merits of the applicant's application, at least as regards where they will be returned, what the circumstances there will be, and what their fate will be. In the case of chain or indirect refoulement, responsibility is not shared between the chambers, but each is individually responsible for everyone else involved in the return process.

For this reason, too, there is a growing perception that state sovereignty is declining, at least in terms of its influence on the composition of its population. While every state has the need to control the migratory movements affecting its territory and population, which can have a long-term impact on the country and the exercise of power, the discretionary nature of sovereignty is increasingly in decline. On the one hand, there is the need for states to be able to decide, not within their borders, but at the border or even outside the border, who should be subject to a substantive examination of their asylum claim and who should have recourse to other legal

48 See e. g. Hoti v. Croatia, Application no. 63311/14, 15 September 2014; Novruk and Others v. Russia, Application nos. 31039/11, 48511/11, 76810/12, 14618/13 and 13817/14, 15 June 2016.

49 See e. g. Chowdury and Others v. Greece, Application no. 21884/15, 30 March 2017; Rantsev v. Cyprus and Russia, Application no. 25965/04, 7 January 2010.

50 Thym, 2023 p. 148.

channels, i.e. the immigration regime. They should do this efficiently, using human and financial resources, not to the detriment of their own population, and taking into account security concerns. On the other hand, there are the human rights traditions which became the cornerstone of Western culture after the Second World War - and from which it is not customary, or even encouraged, to retreat. These two trends should be balanced.

The practice of the ECtHR points in the direction of an increasing extension of the responsibility of European states, which also raises the risk that, while the ECHR is the most effective human rights protection system, states will tend to refuse to comply with the court's decisions in the area of enforcement. However, if we look at migration from a historical perspective, we can always see that the attitude of the modern state towards foreigners has changed with circumstances – see the labour shortages of the industrial revolution, or various crises. We seem to be living in a period of crises now, which does not favour a positive reception of migration. However, in a more secure and prosperous future, the current imbalance may well be redressed.

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