CHAPTER III

The Practices of the Council of Europe and the European Court of Human Rights From a Central European Perspective Regarding Questions on Migration

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Abstract

Over the past decade, Europe and particularly the European Union annually receive several migrants owing to the failure to respect the principle of the 'first safe state' according to public international law, and a lack of effective measures to address the causes of migration.

In this context, the Council of Europe, as a classical, non-supranational international cooperation organisation was unable to regulate migration policies, although it aims to protect human rights on the European continent. This was largely owing to the members' reluctance regarding asylum regulations and the 'soft law' initiatives adopted by its institutions. It was not until the migration phenomenon caught the attention of the ECtHR in 1999 that the situation began to change.

The ECtHR relies on the ECHR to prevent member states from returning or expelling aliens who have entered their territory illegally, replacing the lack of anchoring of the right of asylum in positive law with the impossibility of removing people who do not fulfil the criteria for refugee status owing to substantive or procedural loopholes. In the absence of a pan-European lex specialis on migration, the ECtHR is forcing a lex generalis to oblige some 600 million Europeans to host several billion people who seek a better future in Europe, often overlooking the principle of 'safe first country'

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for those who are genuinely persecuted within the meaning of the 1951 Geneva Convention relating to the Status of Refugees.
This study reviews the powers, instruments, and means available to the Council of Europe in relation to the member states of the Council of Europe with respect to migration, dealing with the problem of the imposition of the ECHR by the ECtHR as lex generalis in the absence of lex specialis, particularly in relation to Eastern and Central European countries. Although they have no colonial past laden with 'moral debts' and are not the priority target of migration, they are unjustifiably and sometimes excessively 'condemned' by the ECtHR.

Keywords: vulnerable group, detention for extradition vs detention for deportation, accountability of member states, Special Representative for Migration and Refugees, rich imagination with soft law results, asylum seeker

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1. Introduction

The movement of people across borders/boundaries/limits is a permanent feature of European history, and the need for its regulation emerged during the Roman Empire in the form of "*jus gentium*".[1] European Christian society operated from the very beginning with the concept of inter-human "amity", and often recommended the parable of the "Good Samaritan". Chetail described the following on the topic:

> The free movement of persons was first recognised by Francisco de Vitoria (1480–1546) and Hugo Grotius (1583–1645) as a rule of international law based on the right of communication between people. In contrast, Samuel von Pufendorf (1632–1694) and Christian von Wolff (1697–1754) insisted on the discretionary power of the state to refuse the admission of foreigners as a consequence of its territorial sovereignty. However, between these two different poles – sovereignty versus hospitality – Emeric de Vattel (1714–1767) counterbalanced the sovereign power of the state with a right of entry based on necessity. Thus … the dialectic between sovereignty and hospitality offered innovative ways of rethinking migration.[2]

The peak of forced migration occurred after the Second World War and led to the global regulation of the refugee status in 1951/1967. At the beginning of the 21st century, when under the pressure of wars and revolutions in the Muslim world, certain states of the European Union (EU) became preferred targets of migration,

1 *Jus gentium* at the time of its emergence was domestic, state law, although it later conceptually covered public international law.
2 Chetail, 2017, p. 902.

which led the phenomenon to transform into a material source of emergency asylum law in this supranational organisation. At present, Chetail rightly notes that, in Europe, the control of the movement of people was driven by the two World Wars, and that although the wars are over: 'Still today, the vicious circle of armed conflicts, terrorism, and economic recession constitute influential factors for justifying immigration control'.[3]

The United Nations High Commissioner for Refugees (also known as UNHCR) estimates that the global number of people forcibly displaced owing to persecution, conflict, violence, human rights violations, and events that have seriously disrupted law and order will exceed 110 million in May 2023. In Europe at the end of 2022, 11.6 million Ukrainians remained displaced, of which 5.9 million were internally displaced and 5.7 million fled to neighbouring countries and beyond. On this, Grandi, United Nations High Commissioner for Refugees, said: 'These figures show us that some people are far too quick to rush to conflict, and way too slow to find solutions'[4]. In total, however, 281 million people (i.e. 3.6% of the world's population) currently live outside their country of origin.[5]

2. The legal nature of the Council of Europe and the competences of its bodies in the field of migration

The Council of Europe is an international intergovernmental, political, regional, open, classically cooperative (non-supranational) international organisation which in principle groups together the democratic states of Europe. This international organisation, named the Council of Europe by Winston Churchill,[6] is the result of a spontaneous manifestation of several European movements that emerged in the immediate aftermath of the end of the Second World War, when the countries held a Congress on this subject in the famous Riderzaal Hall, in The Hague, the Netherlands, on 7 May 1948.[7] The Statute of the Council of Europe would eventually be signed by 10 states (Belgium, the Netherlands, Luxembourg, France, Denmark, Ireland, Italy, England, Norway, and Sweden) in St. James's Palace, London, on 5 May 1949, and enter into force on 3 August 1949. The seat of the Council of Europe is in Strasbourg,[8] France, and from 2011–2022, it had 47 Member States. Currently, it

3 Chetail, 2017, p. 922.
4 Grandi, 2023, pp. 7–8.
5 OHCHR, no date.
6 It was Winston Churchill (1874–1965) who used the name Council of Europe for a future pan-European political organisation in 1942, in his famous speech in Zurich on 19 September 1946.
7 Ecobescu, 1999, pp. 11–13.
8 Address: Palais de l'Europe, Avenue de l'Europe, F-67075 Strasbourg Cedex, France.

has 46 Member States[9] after the Committee of Ministers decided, on 16 March 2022, to exclude the Russian Federation. Importantly, all 27 EU Member States are also members of the Council of Europe, and the countries of the former communist bloc have already been cooperating with the Council for 30 years. The aim of this international organisation, according to the Preamble and Art. 1 of its Statute,[10] is to achieve greater unity among its members, to safeguard and realise the ideals and principles which are their common heritage, and to facilitate their economic and social progress. This broadly-defined aim makes no reference to the issue of migration, and in point (d) of the same article, it is qualified by an extremely important nuance: 'Matters relating to national defence do not fall within the competence of the Council of Europe'. Thus, if a Member State considers that the phenomenon of migration is its national defence problem, it can evade the competence of this international organisation. In concrete terms, the Council of Europe currently acts de facto for a) defending human rights and a pluralist democracy (in 1950, it adopted the Convention for the Protection of Human Rights and Fundamental Freedoms, hereinafter ECHR, which to date has been supplemented by 16 protocols[11]); b) promoting awareness and appreciation of the European cultural identity and fighting against all forms of intolerance; c) seeking solutions to societal problems (e.g. against minorities, xenophobia, intolerance, environmental protection, bioethics, human immunodeficiency virus, and drugs); d) support for the countries of Eastern and Central Europe to implement and strengthen their political, legislative, and constitutional reforms through major cooperation programmes.

On its homepage, the Council of Europe states under the heading "values" that it 'promotes human rights through international conventions'.[12] I believe that this short sentence expresses the essence of the work of this Council, but would also add that this organisation, according to the principle of the useful effect (fr. "*effet utile*") and with the help of its bodies, tries to get the most out of every treaty guaranteeing respect for fundamental rights and freedoms, whether it succeeds in achieving this result directly or indirectly. The bodies of the Council also act in the field of asylum, immigration, and refugees, with the major ones being the Committee of Ministers, the Parliamentary Assembly, and the European Court of Human Rights (ECtHR). The

9 The states which have joined the founding countries are the following: Greece (1949, 1974), Iceland, Germany (1950), Turkey (1950, 1984), Austria (1956), Cyprus (1961), Switzerland (1963), Malta (1965), Portugal (1976), Spain (1977), Liechtenstein (1978), San Marino (1988), Finland (1989), Hungary (1990), Poland (1991), Bulgaria (1992), Estonia, Lithuania, Slovenia, Romania, the Czech Republic, Slovakia (1993), Andorra (1994), Latvia, Albania, North Macedonia, Moldova, Ukraine (1995), Croatia (1996), Georgia (1999), Armenia, Azerbaijan (2001), Bosnia and Herzegovina (2002), Serbia (2003), Monaco (2004), and Montenegro (2007).

10 Statute of the Council of Europe and texts of statutory character, London 5 May 1949, European Treaty Series – No. 1. Available at: https://rm.coe.int/1680a1c6b3 (Accessed: 11 August 2023).

11 For up-to-date information on the Convention and Protocols, see: https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=005 (Accessed: 11 August 2023).

12 The Council of Europe in Brief. Values: Human Rights, Democracy, Rule of Law [Online].Available at: https://www.coe.int/en/web/about-us/values (Accessed: 4 July 2023).

work of these bodies has also been supplemented since 1989 by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (also known as CPT), since 1999 by the Commissioner for Human Rights,[13] and since 2016 by the Council of Europe Special Representative on Migration and Refugees.

The Committee of Ministers, also considered the decision-making body, is the body competent to act on behalf of the Council, comprising the foreign ministers of each Member State and holding one ordinary session a year in Strasbourg and weekly sessions of the permanent representatives. The Ministers' Deputies are assisted by a Bureau, rapporteur groups, thematic coordinators, and ad hoc working parties. Its main tasks are as follows: concluding conventions; issuing recommendations to the governments of Member States; taking binding decisions on internal and organisational matters; and contributing to the execution of ECtHR judgments. Decisions of a definitive nature by the Committee of Ministers may often take the form of resolutions and, where appropriate, its conclusions may take the form of recommendations to the governments of Member States, which may be invited to inform the Committee of the measures taken to implement these recommendations. The recommendations, although not binding, are of a "soft law" nature and have a clear moral authority, considering that they represent a collective expression of the views of the Member States' governments on the issues they address.[14]

The Parliamentary Assembly is the deliberative body, composed of representatives of the national parliaments of Member States, the size of the delegation of each parliament varying according to the size of the territory, the population, and the contribution of the respective State to the budget of the Council.[15] The Assembly adopts four categories of texts, namely recommendations, resolutions, opinions, and directives. Recommendations contain proposals addressed to the Committee of Ministers, the implementation of which is the responsibility of governments. Resolutions contain the Assembly's decisions on matters on which it is empowered to regulate or on which it expresses opinions that are its sole responsibility. Opinions are mostly expressed by the Assembly on matters referred to it by the Committee of Ministers, such as the admission of new Member States to the Council of Europe, but may also concern draft conventions, budgets, the application of the European Social Charter, or the activities of the Congress of Local and Regional Authorities of Europe. Directives are usually instructions from the Assembly to its committees.

The ECtHR is a body established by the ECHR and that acquired the status of an independent judicial body by Protocol No. 11 of 1994 to the Convention. On the entry into force of the Protocol on 1 November 1999, the "new" court started/continued its work. Until that date, only less sensitive cases (i.e. which had passed

13 Resolution (99)50 on the Council of Europe Commissioner for Human Rights – adopted by the Committee of Ministers on 7 May 1999, 104th Session, Budapest.

14 Ecobescu, 1999, p. 81.

15 Fábián, 2023, p. 11.

through the political body called the European Commission of Human Rights) had been brought before the ECtHR, which was set up in 1954.

> The Convention makes a distinction between two types of application: individual applications lodged by any person, group of individuals, company or NGO having a complaint about a violation of their rights, and inter-State applications brought by one State against another.
> Cases can only be brought against one or more States that have ratified the Convention. Any applications against third States or individuals, will be declared inadmissible.
> The Convention system provides for "easy" access to the Court, enabling any individual to bring a case even if he or she lives in a remote region of a member State or is penniless. With this in mind, there are no fees for proceedings before the Court.[16]

It should be noted that the ECtHR did not adopt any judgments in the field of migration until 1985,[17] and the first judgment in favour of persons in relation to migration was adopted only in 1988.[18] Part of the literature considers that this jurisprudence/case law, characterised by judgments of inadmissibility or rejection, even today has many shortcomings.[19]

The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment was established by the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, which entered into force in 1989. This Committee is not a monitoring body but provides a non-judicial preventive tool to protect persons deprived of their liberty against torture or other forms of ill-treatment. It thus complements the legal work of the ECtHR, drawing attention through its annual report[20] to the treatment to which refugees are subjected. It does so by delegating persons to make regular visits (usually every four years) and "ad hoc" visits as necessary to any place where there may be cases of deprivation of liberty.

The Commissioner for Human Rights has been in operation since 1999, being an extra-judicial institution charged with promoting education and awareness of and respect for human rights. Its task is monitoring respect for fundamental human rights, promoting information and education, assisting Member States in this field,

16 European Court of Human Rights, 2021, p. 6.
17 ECtHR, *Abdulaziz, Cabales and Balkandali v. United Kingdom*, App. Nos. 9214/ 80, 9473/ 81, and 9474/ 81 (28 May 1985).
18 ECtHR, *Berrehab v. the Netherlands*, App. No. 10730/ 84 (21 June 1988).
19 Dembour, 2021, p. 19.
20 See for example: 'Prevention of ill-treatment of aliens deprived of their liberty in the context of forced expulsions at borders' in the 32nd GENERAL REPORT OF THE CPT 1 January–31 December 2022, pp. 23–33.

and facilitating the work of national ombudsmen.[21] The Commissioner exercises his/her functions independently, without bias, and without the possibility of lodging complaints with the ECHR or receiving complaints. After the entry into force of Protocol No. 14 to the ECHR, he/she has the possibility to submit written opinions and partake in the oral proceedings of the ECHR. However, the current Commissioner is very active in the field of migration, if we consider that he draws attention to the double standard for the treatment of refugees in Ukraine, the lack of transparency in border protection,[22] reproaches some Member States for the disappearance of underage asylum seekers on their territory,[23] and campaigns for the right of the public to know how many migrants lose their lives while trying to enter the EU.[24]

Last, the Council of Europe Special Representative for Migration and Refugees[25] was established in 2016 in response to the humanitarian crisis following various refugee and migration movements. The goal is affording immediate assistance and support to the Member States concerned, complementing the activities of other relevant Council of Europe bodies and coordinating actions with other international partners, particularly the United Nations High Commissioner for Refugees, International Organization for Migration, United Nations International Children's Emergency Fund (also known as UNICEF), EU, FRONTEX, and others. The mandate of the Special Representative include: a) to seek, collect, and analyse information, including through fact-finding missions, on the human rights situation of refugees and migrants, and to report to the Secretary General. Importantly, the Representative has already produced reports in the period 2016–2023 following fact-finding missions to all Eastern and Central European countries;[26] b) liaise and exchange information with relevant international organisations and specialised agencies, as well as with migration authorities in Member States; c) provide input to the Secretary General on how to strengthen Council of Europe assistance and advice to Member States in the treatment of refugees and migrants from a human rights perspective, as well as in the fulfilment of their obligations under the ECHR and other Council of Europe standards; d) to strengthen the Council of Europe's response, working closely with the Council of Europe Commissioner for Human Rights, the Parliamentary Assembly, the Congress, and across all relevant structures within the Organisation; e) Chair the Migration Focal Points Network, support its work by preparing its working methods, organising meetings and consultations with its members, and chair the Intersecretariat Steering Group on Migration.

21 So far, this function has been fulfilled by Álvaro Gil-Robles (1999–2006), Thomas Hammarberg (2006–2012), Nils Muižnieks (2012–2018), and Dunja Mijatović (2018–).

22 *Europarat warnt vor Zwei-Klassen-Asylpolitik*, 2022.

23 *Europarat kritisiert Österreich für Mängel bei Asyl-() und Frauenrechten*, 2022.

24 Mijatović, 2022.

25 Currently held by Leyla Kayacik.

26 Council of Europe, Country Reports (no date). Available at: https://www.coe.int/en/web/special-representative-secretary-general-migration-refugees/country-reports (Accessed: 19 July 2023).

3. The basis and mechanisms for the accountability of Member States for the commitments undertaken when establishing or acceding to the Council of Europe

First, a general commitment is derived from Art. 3 (1) and (2) of the Statute of the Council of Europe, as follows:[27] para. 1, 'Each member of the Council of Europe shall accept the principles of the rule of law and the principle that everyone within its jurisdiction should enjoy fundamental human rights and freedoms'; para. 2, 'Each member undertakes to co-operate sincerely and effectively in furthering the purposes of the Council […]'. This general commitment was complemented by Protocol No. 15 to the Convention, in force from 1 August 2021 and which recently inserted the principle of subsidiarity into the Preamble to the Convention.[28] This principle 'imposes a shared responsibility between the States Parties and the Court' as regards human rights protection, and the national authorities and courts must interpret and apply domestic law in a manner that gives full effect to the rights and freedoms defined in the Convention and the Protocols thereto.[29] Second, the Member States' obligations may derive from conventions concluded within the Council. Third, there are situations where new Member States, when joining the Council of Europe, have to assume certain individual commitments.

The first direct reference of the Council of Europe's specific legal rules to the issue of migration was made in 1963 in Protocol No. 4 to the ECHR, which, first of all, guarantees all persons (including the citizens of the Member States) the freedom to leave any country, including their own,[30] and states that: 'No one may be expelled, individually or collectively, from the territory of the State of which he is a national' and 'No one may be deprived of the right to enter the territory of the State of which he is a national'.[31] However, the regime is more restrictive with regard to aliens, and is exhausted in a single sentence: 'Collective expulsions of aliens are prohibited'.[32] As can be seen in 1963, aliens do not have guaranteed access to the territory of the Member States, but only the right to leave their territory, namely, they are not protected against individual expulsion.

The legal situation regarding the expulsion of aliens has been qualified according to the model of the obligation of "non-refoulement" in the Geneva Convention of 1950[33]

27 Council of Europe,Statute of the Council of Europe and texts of statutory character, 1949. Available at: https://rm.coe.int/1680a1c6b3 (Accessed: 16 July 2023).
28 *Guide on the case-law of the European Convention on Human Rights. Immigration*, 2022, p. 5.
29 *Case of Grzęda v. Poland* – 43572/18, Judgment 15.3.2022 [GC]. § 324.
30 Art. 2 para. 2 of Protocol No. 4.
31 Art. 3 para. 1 and 2 of Protocol No. 4.
32 Art. 4 of Protocol No. 4.
33 Convention relating to the Status of Refugees, done at Geneva on 28 July 1951.

by Protocol No. 7 of 1984, as amended by Protocol No. 11 (1998),[34] where Art. 1, entitled 'Procedural safeguards in the case of expulsion' has been inserted. It contains the following provisions:

> 1. An alien lawfully residing in the territory of a State may be expelled only in pursuance of a decision taken in accordance with law, and he must be able to:
> a. (a) give reasons against his expulsion;
> b. request an examination of his case; and
> c. request to be represented for this purpose before the competent authorities or a person or persons designated by that authority.
> 2. An alien may be expelled before exercising the rights listed in paragraph 1, point (1). (a), (b) and (c) of this Article where expulsion is necessary in the *interests of public policy or on grounds of national security.*

I draw attention a second time to the fact that invoking national security/national defence may override Council of Europe rules on refugees. At this level, the issue was the treatment of an alien legally residing in the territory of a Member State.

In the field of migration, there has been an increasing use of Art. 1 of Protocol No. 12,[35] which provides as described herein:

> The exercise of any right provided for by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Perhaps more important is para. 2, which states, 'No one shall be discriminated against by a public authority on any of the grounds referred to in paragraph 1'.

To the question of what mechanism can force Member States to comply with the above commitments if they forget the provisions of Art. 1 para. 2 of the Statute, the solution is primarily to be found in judicial proceedings before the ECtHR. According to Art. 1 of the ECHR entitled 'Obligation to respect human rights', 'The High Contracting Parties recognize to everyone within their jurisdiction the rights and freedoms defined in Title I of this Convention'[36]. According to Art. 33 of the ECHR entitled 'Inter-State Cases', 'Any High Contracting Party may submit to the Court any alleged violation of the provisions of the Convention and its Protocols by another

34 Council of Europe, Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, As Amended by Protocol No. 11. Available at: https://www.echr.coe.int/documents/d/echr/Library_Collection_P7postP11_ETS117E_ENG (Accessed: 11 August 2023).

35 European Treaty Series 177, Convention for the Protection of Human Rights (Protocol No. 12), 4 November 2000.

36 Title I of the ECHR contains 13 articles on the most important fundamental human rights, to which are added all those rights regulated in the 16 Additional Protocols.

High Contracting Party'. Furthermore, according to Art. 34 entitled 'Individual Applications':

> The Court may receive applications from any person, non- governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto […].

Thus, Member States on whose territory fundamental human rights are violated can be sued before the ECtHR not only by the other Member States but also by the individuals or groups who have suffered as a result of these violations. Moreover, according to Art. 46 of the ECHR, para. 1, 'The High Contracting Parties undertake to comply with the final judgments of the Court in disputes to which they are parties'. That is to say that:

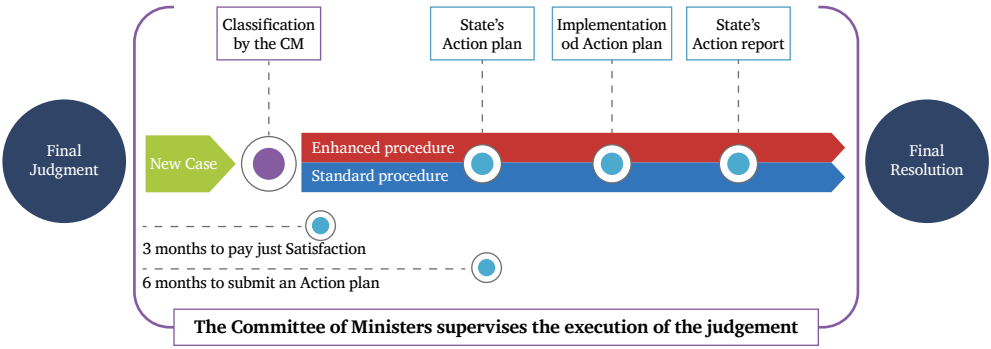
> If the Committee of Ministers considers that a High Contracting Party refuses to comply with a final judgment in a case to which it is a party, and after having put the High Contracting Party in default by a decision taken by a two-thirds majority vote of the representatives entitled to take part in the proceedings of the Committee of Ministers, it may refer the matter to the Court for a decision on whether the High Contracting Party concerned is complying with its obligations under paragraph 1. (para. 4)
> If the Court finds a violation of the provisions of paragraph 1, it shall refer the case back to the Committee of Ministers for appropriate action. If the Court finds that there has been no violation of the provisions of paragraph 1, it shall refer the case back to the Committee of Ministers, which shall decide to close the supervision of enforcement. (para. 5)

The seriousness shown in this area by the Committee of Ministers is reflected in the fact that it is assisted by the Department for the Execution of Judgments of the Court (Directorate General I of Human Rights and Rule of Law). The States have a legal obligation to remedy the violations found, but they enjoy a margin of appreciation regarding the means to be used. The measures to be taken are, in principle, identified by the State concerned while under supervision of the Committee of Ministers. The Court can assist the execution process, in particular through the pilot-judgment procedure (used in case of major structural problems). Measures to be taken may relate to the individual applicant or to be of a general nature.[37]

A summary of the procedure for the execution of ECtHR decisions is presented below:

37 Council of Europe, Presentation of the Department [Online].
Available at: https://www.coe.int/en/web/execution/presentation-of-the-department (Accessed: 16 July 2023).

Figure 1. Outline of the procedure for the enforcement of ECtHR judgments[38]



More recently, the ECtHR has published a Factsheet devoted strictly to the enforcement process of migration judgments[39]. Furthermore, a 'magic formula' for the acceptance under the ECtHR of the widest possible range of instruments of public international law is Art. 53, which states:

> Nothing in this Convention shall be interpreted as restricting or adversely affecting any human rights and fundamental freedoms which may be recognised under the laws of any Contracting Party or any other convention to which that Contracting Party is a party.

Meanwhile, Art. 55 reinforces the ECtHR's claim of exclusive jurisdiction by providing that:

> Except by special agreement, the High Contracting Parties shall refrain from invoking treaties, conventions or declarations in force between them for the purpose of submitting, by way of application, a dispute arising out of the interpretation or application of this Convention to a mode of settlement other than those provided for in the said Convention.

These two articles form the foundation of the ivory tower from which the ECtHR judges have allowed themselves to create a "praetorian law" in the field of asylum. Furthermore, "holding states accountable" or "making states responsible" takes place

38 Council of Europe, The Supervision Process [Online]. Available at: https://www.coe.int/en/web/execution/the-supervision-process (Accessed: 16 July 2023).

39 Migration and Asylum. Thematic Factsheet, November 2021. Available at: https://rm.coe.int/thematic-factsheet-migration-asylum-eng/1680a46f9b (Accessed 19 July 2023).

through the monitoring procedures established by the various conventions concluded under the umbrella of the Council of Europe.

Within the context of the United Nations, the Council of Europe is not a specialised institution, but belongs to the category of Intergovernmental Organizations, and received a standing invitation to participate as Observers in the sessions and the work of the General Assembly and not maintaining Permanent Offices at Headquarters. Therefore, as an independent regional organisation, it does not have to follow the United Nations guidelines, but must comply with "*jus cogens*" rules.

4. Analysis of conventions and treaties signed and ratified within the Council of Europe on migration

The source of general formal law used in the field of protection of the rights of migrants and refugees in Europe is the ECHR, signed in 1950 and ratified in 1953, which does not expressly provide for the right to asylum nor the right of non-refoulement. According to the official position:[40]

> The mission of the system set up by the Convention is thus to determine, in the general interest, issues of public policy, thereby raising the standards of protection of human rights and extending human rights jurisprudence throughout the community of the Convention States[41]. Indeed, the Court has emphasised the Convention's role as a "constitutional instrument of European public order" in the field of human rights.[42]

Most research in the field of protection of the rights of migrants and refugees deals only with this source of law (i.e. the Geneva Convention), overlooking the Council of Europe's own conventions, the most important of which are described below.

The first special agreement on the protection of the rights of migrants and refugees is the European Convention on Establishment and its Protocol, signed in Paris on 13 December 1955 and entered into force on 23 February 1965.[43] Art. 1 of this Convention provides that:

40 Guide on the case law of the European Convention on Human Rights. Immigration. Updated on 30 April 2022. Edited by the Council of Europe, 2022.

41 *Konstantin Markin v. Russia [GC]*, App. No. 30078/06, § 89, ECHR 2012.

42 *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland [GC]*, App. No. 45036/98, § 156, ECHR 2005-VI, and more recently, *N.D. and N.T. v. Spain [GC]*, App. Nos. 8675/15 and 8697/15, § 110 (13 February 2020).

43 European Treaty Series, No. 19. Available at: https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=019 (Accessed: 16 July 2023).

> Each Contracting Party shall facilitate the entry into its territory by nationals of the other Parties for the purpose of temporary visits and shall permit them to travel freely within its territory except when this would be contrary to order public, national security, public health or morality.

The Parties further allow long or permanent residence for their nationals and ensure that they cannot be expelled unless they endanger national security or are contrary to public policy or morality (Art. 2, 3). They also ensure the benefit of most of the rights enjoyed by nationals—that is, the avoidance of double taxation.

However, in Art. 30, the Member States have established that, 'For the purpose of this Convention, "nationals" means physical persons possessing the nationality of one of the Contracting Parties'. There are only 12 Contracting Parties in this Convention: Belgium, Denmark, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden, Turkey, and the United Kingdom.

The second agreement is the European Agreement on Regulations governing the Movement of Persons between Member States of the Council of Europe,[44] signed in Paris on 13 December 1957. This agreement is valid for the following Parties: Austria, Belgium, France, Germany, Greece, Hungary, Italy, Liechtenstein, Luxembourg, Malta, the Netherlands, Portugal, Slovenia, Spain, Switzerland, Turkey, Ukraine, and the Netherlands. With signing this document, these States agree that their nationals, irrespective of country of residence, may enter or leave the territory of another Party at all frontiers on presentation of one of the documents listed in the Treaty, provided that this is only for visits not exceeding three months in duration. Still, valid passports and visas may be required for all visits exceeding three months in duration, or whenever entering the territory of another Party for the purpose of carrying out a gainful activity.

The European Agreement on the Abolition of Visas for Refugees, signed in 1959 and entered into force in 1960,[45] is the most important act/treaty at the Council of Europe level in the field of migration. According to Art. 1 of this Agreement:

> 1. Refugees lawfully resident in the territory of a Contracting Party are exempt, subject to reciprocity, from the requirement to obtain a visa to enter or leave the territory of another Party by any frontier, provided that:
> a. hold a valid travel document issued in accordance with the Convention relating to the Status of Refugees of 28 July 1951 or the Agreement relating to the issue of a travel document to refugees of 15 October 1946 by the authorities of the Contracting Party in whose territory they are legally resident;
> b. their visit shall be for a period not exceeding three months.

44 European Treaty Series, No. 25. European Agreement on Regulations governing the Movement of Persons between Member States of the Council of Europe, Paris, 13 December 1957.

45 European Treaty Series, No. 31. European Agreement on the Abolition of Visas for Refugees Strasbourg, 20 April 1959.

The parties also agree on a visa regime for stays of more than three months, or for the purpose of taking up employment, on a mutual readmission regime; that is, they have reserved the right to prohibit the entry or stay in their territory of persons they consider undesirable. Unfortunately, this treaty has only been ratified by 24 (out of 46) Member States, which are Belgium, the Czech Republic, Denmark, Finland, France, Germany, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, the Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Spain, Sweden, Switzerland, Turkey, Ukraine, and the United Kingdom.

Another useful treaty is the European Convention on the Repatriation of Minors,[46] signed in The Hague, the Netherlands, on 28 May 1970. Still, it only entered into force in 2015:

> 1. This Convention shall apply to minors in the territory of a Contracting State whose repatriation is requested by another Contracting State for one of the following reasons:
> a. the presence of the minor in the territory of the requested State is against the will of the person or persons having parental authority in respect of him;
> b. the presence of the minor in the territory of the requested State is incompatible with a measure of protection or re-education taken in respect of him by the competent authorities of the requesting State;
> c. the presence of the minor is necessary in the territory of the requesting State because of the institution of proceedings there with a view to taking measures of protection and re-education in respect of him.
> 2. This Convention shall also apply to the repatriation of minors whose presence in its territory a Contracting State deems to be incompatible with its own interests or with the interests of the minors concerned, provided that its legislation authorises removal of the minor from its territory.

One last document worthy of mention would be the European Convention on the Legal Status of Migrant Workers (1977/1983).[47] As is clear from the literature, the European Convention on the Legal Status of Migrant Workers is one of a series of conventions drawn up within the Council of Europe regarding the treatment of foreigners in the territory of Member States of the Council. As far as it relates to the social and economic rights of workers, it complements and gives specificity to certain provisions of the European Social Charter (also known as ESC).[48] This treaty has

46 European Treaty Series, No. 71. Available at: https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=071 (Accessed 16 July 2023).

47 European Treaty Series, No. 93. European Convention on the Legal Status of Migrant Workers Strasbourg, 24 November 1977.

48 Elspeth Guild: The European Convention on the Legal Status of Migrant Workers, 1977, An Analysis of its Scope and Benefits, March 1999, University of Nijmegen, The Netherlands. Available at: https://www.coe.int/t/dg3/migration/archives/documentation/Legal_texts/CDMG%20_99_11_en.pdf (Accessed 16 July 2023).

been ratified by only 11 Member States, namely Albania, France, Italy, the Netherlands, Norway, Portugal, Moldova, Spain, Sweden, Turkey, and Ukraine.

Based on the low number of ratifications across the different agreements and documents, it is easy to see the lack of enthusiasm of Member States to regulate this area. What is more, I can reinforce my observation, as the Protocol to the European Convention on Consular Functions concerning the Protection of Refugees, signed on 11 December 1967, has not yet entered into force, although five ratifications would have been sufficient for it to enter into force.[49]

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5. Soft law sources: analysis of resolutions and recommendations adopted by the Committee of Ministers, the Parliamentary Assembly, and other sources in the field of migration

5.1. Committee of Ministers' recommendations[50]

Out of a total of 898 recommendations provided by the Committee of Ministers, 29 relate to migrants and migration. They are presented hereinafter in reverse chronological order:

CM/Rec(2022)22 of the Committee of Ministers to member states on human rights principles and guidelines on age assessment in the context of migration and its Explanatory Memorandum, adopted on 14 December 2022 at the 1452nd meeting of the Ministers' Deputies.

CM/Rec(2022)17 of the Committee of Ministers to member states on protecting the rights of migrant, refugee and asylum-seeking women and girls, adopted on 20 May 2022 at the 132nd Session of the Committee of Ministers.

CM/Rec(2022)10 of the Committee of Ministers to member states on multilevel policies and governance for intercultural integration, adopted on 6 April 2022 at the 1431st meeting of the Ministers' Deputies.

CM/Rec(2019)11 of the Committee of Ministers to member states on effective guardianship for unaccompanied and separated children in the context of migration, adopted on 11 December 2019 at the 1363rd meeting of the Ministers' Deputies.

49 European Treaty Series, No. 061A. Available at: https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=061A (Accessed 16 July 2023).

50 'In appropriate cases, the conclusions of the Committee may take the form of recommendations to the governments of members, and the Committee may request the governments of members to inform it of the action taken by them with regard to such recommendations'. Art. 15 lit. b of the Statute.

CM/Rec(2019)4 of the Committee of Ministers to member states on supporting young refugees in transition to adulthood, adopted on 24 April 2019 at the 1344th meeting of the Ministers' Deputies.

CM/Rec(2012)10 of the Committee of Ministers to member states on the protection of child and young athletes from dangers associated with migration, adopted on 19 September 2012 at the 1151st meeting of the Ministers' Deputies.

CM/Rec(2011)13 of the Committee of Ministers to member states on mobility, migration and access to health care, adopted on 16 November 2011 at the 1126th meeting of the Ministers' Deputies.

CM/Rec(2011)5 of the Committee of Ministers to member states on reducing the risk of vulnerability of elderly migrants and improving their welfare, adopted on 25 May 2011 at the 1114th meeting of the Ministers' Deputies.

CM/Rec(2011)1 of the Committee of Ministers to member states on interaction between migrants and receiving societies, adopted on 19 January 2011 at the 1103rd meeting of the Ministers' Deputies.

CM/Rec(2011)2 of the Committee of Ministers to member states on validating migrants' skills, on 19 January 2011 at the 1103rd meeting of the Ministers' Deputies.

CM/Rec(2008)10 of the Committee of Ministers to member states on improving access of migrants and persons of immigrant background to employment, adopted on 10 July 2008 at the 1032nd meeting of the Ministers' Deputies

CM/Rec(2008)4 of the Committee of Ministers to member states on strengthening the integration of children of migrants and of immigrant background, adopted on 20 February 2008 at the 1018th meeting of the Ministers' Deputies.

CM/Rec(2008)5 of the Committee of Ministers to member states on policies for Roma and/or Travellers in Europe, adopted on 20 February 2008 at the 1018th meeting of the Ministers' Deputies.

CM/Rec(2007)10 of the Committee of Ministers to member states on co-development and migrants working for development in their countries of origin, adopted on 12 July 2007 at the 1002nd meeting of the Ministers' Deputies.

CM/Rec(2007)9 of the Committee of Ministers to member states on life projects for unaccompanied migrant minors, adopted on 12 July 2007 at the 1002nd meeting of the Ministers' Deputies.

Rec(2006)10 of the Committee of Ministers to member states on better access to health care for Roma and Travellers in Europe, adopted on 12 July 2006 at the 971st meeting of the Ministers' Deputies.

Rec(2006)9 of the Committee of Ministers to member states on the admission, rights and obligations of migrant students and co-operation with countries of origin, adopted on 12 July 2006 at the 971st meeting of the Ministers' Deputies.

Rec(2005)4 of the Committee of Ministers to member states on improving the housing conditions of Roma and Travellers in Europe, adopted on 23 February 2005 at the 916th meeting of the Ministers' Deputies.

Rec(2004)14 of the Committee of Ministers to member states on the movement and encampment of Travellers in Europe, adopted on 1 December 2004 at the 907th meeting of the Ministers' Deputies.

Rec(2004)2 of the Committee of Ministers to member states on the access of non-nationals to employment in the public sector, adopted on 24 March 2004 at the 877th meeting of the Ministers' Deputies.

Rec(2000)15 of the Committee of Ministers to member states concerning the security of residence of long-term migrants, adopted on 13 September 2000 at the 720th meeting of the Ministers' Deputies.

Rec(90)14 of the Committee of Ministers to member states on the preparation of an information brochure of the social security rights and obligations of migrant workers and of their families, adopted on 18 June 1990 at the 442nd meeting of the Ministers' Deputies.

Rec(88)14 of the Committee of Ministers to member states on migrants' housing, adopted on 22 September 1988 at the 419th meeting of the Ministers' Deputies.

Rec(88)6 of the Committee of Ministers to member states on social reactions to juvenile delinquency among young people coming from migrant families, adopted on 18 April 1988 at the 416th meeting of the Ministers' Deputies.

Rec(84)18 of the Committee of Ministers to member states on the training of teachers in education for intercultural understanding, notably in a context of migration, adopted on 25 September 1984 at the 877th meeting of the Ministers' Deputies.

Rec(84)9 of the Committee of Ministers to member states on second-generation migrants, adopted on 20 March 1984 at the 368th meeting of the Ministers' Deputies.

Rec(84)7 of the Committee of Ministers to member states on the maintenance of migrants' cultural links with their countries of origin and leisure facilities, adopted on 28 February 1984 at the 367th meeting of the Ministers' Deputies.

Rec(80)14 of the Committee of Ministers to member states concerning the vocational re-integration of migrant workers who return to their countries of origin, adopted on 18 September 1980 at the 322nd meeting of the Ministers' Deputies.

Rec(79)10 of the Committee of Ministers to member states concerning women migrants, adopted on 29 May 1979 at the 305th meeting of the Ministers' Deputies.

We can see that the first recommendation of the Committee of Ministers dates back to 1979. This implies that for 30 years after the establishment of the Council of Europe, migration was not at the centre of the recommendations to Member States. From 1979 to 2000, only eight recommendations were adopted, whereas there have already been 20 recommendations since 2004. On the one hand, these recommendations target the most vulnerable points of the migration phenomenon, such as age, children, unaccompanied and separated children, young refugees (five recommendations), women, girls (two recommendations), elderly migrants (one recommendation), and Roma and travellers (four recommendations). On the other hand, 12

recommendations deal with the integration of migrants, the interaction between migrants and receiving societies, intercultural understanding, second generation migrants, and only one recommendation refers to the idea of reintegrating these people in their countries of origin. These numbers and documents reflects the fact that the political leadership of the Member States has lost the war on dealing with the reasons for migration and is looking for palliative measures in Europe for problems imported from other continents.

5.2. Parliamentary Assembly's resolutions and recommendations

The Parliamentary Assembly addresses the issues of asylum and migration in 35 resolutions and 34 recommendations. Regarding the resolutions, they are the following (Table 1):

Table 1. Parliamentary Assembly resolutions addressing asylum and migration issues

	Resolution number and date of adoption	**Topic**
1.	RES. 2503/21/06/2023	Social inclusion of migrants, refugees and internally displaced persons through sport
2.	RES. 2502/21/06/2023	Integration of migrants and refugees: benefits for all parties involved
3.	RES. 2462/2022	Pushbacks on land and sea: illegal measures of migration management
4.	RES. 2409/26/11/2021	Voluntary relocation of migrants in need of humanitarian protection and voluntary resettlement of refugees
5.	RES. 2380/28/05/2021	Humanitarian action for refugees and migrants in countries in North Africa and the Middle East
6.	RES. 2379/28/05/2021	Role of parliaments in implementing the United Nations global compacts for migrants and refugees
7.	RES. 2356/04/12/2020	Rights and obligations of NGOs assisting refugees and migrants in Europe
8.	RES. 2340/13/10/2020	Humanitarian consequences of the Covid-19 pandemic for migrants and refugees
9.	RES. 2323/30/01/2020	Concerted action against human trafficking and the smuggling of migrants

	Resolution number and date of adoption	Topic
10.	RES. 2280/11/04/2019	The situation of migrants and refugees on the Greek islands: more needs to be done
11.	RES. 2243/11/10/2018	Family reunification of refugees and migrants in the Council of Europe member States
12.	RES. 2238/10/10/2018	Radicalisation of migrants and diaspora communities in Europe
13.	RES. 2128/24/06/2016	Violence against migrants
14.	RES. 2109/20/04/2016	The situation of refugees and migrants under the EU–Turkey Agreement of 18 March 2016
15.	RES. 2108/20/04/2016	Human rights of refugees and migrants – The situation in the Western Balkans
16.	RES. 2089/27/01/2016	Organised crime and migrants
17.	RES. 2059/22/05/2015	Criminalisation of irregular migrants: a crime without a victim
18.	RES. 2006/25/06/2014	Integration of migrants in Europe: the need for a proactive, long-term and global policy
19.	RES. 1997/23/05/2014	Migrants and refugees and the fight against Aids
20.	RES. 1972/29/01/2014	Ensuring that migrants are a benefit for European host societies
21.	RES. 1889/27/06/2012	The portrayal of migrants and refugees during election campaigns
22.	RES. 1821/21/06/2011	The interception and rescue at sea of asylum seekers, refugees and irregular migrants
23.	RES. 1805/14/04/2011	The large-scale arrival of irregular migrants, asylum seekers and refugees on Europe's southern shores
24.	RES. 1788/26/01/2011	Preventing harm to refugees and migrants in extradition and expulsion cases: Rule 39 indications by the European Court of Human Rights
25.	RES. 1742/22/06/2010	Voluntary return programmes: an effective, humane and cost-effective mechanism for returning irregular migrants

	Resolution number and date of adoption	Topic
26.	RES. 1741/22/06/2010	Readmission agreements: a mechanism for returning irregular migrants
27.	RES. 1707/28/01/2010	Detention of asylum seekers and irregular migrants in Europe
28.	RES. 1618/25/06/2008	State of democracy in Europe Measures to improve the democratic participation of migrants
29.	RES. 1569/01/10/2007	Assessment of transit and processing centres as a response to mixed flows of migrants and asylum seekers
30.	RES. 1568/01/10/2007	Regularisation programmes for irregular migrants
31.	RES. 1521/05/10/2006	Mass arrival of irregular migrants on Europe's Southern shores
32.	RES. 1509/27/06/2006	Human rights of irregular migrants
33.	RES. 1429/18/03/2005	Asylum seekers and irregular migrants in Turkey
34.	RES. 1000/14/05/1993	Vietnamese migrants and asylum-seekers in Hong Kong ("boat people")
35.	RES. 631/16/09/1976	Integration of migrants into society as regards education and cultural development

Regarding the recommendations, the list is provided below (Table 2).

Table 2. Parliamentary Assembly recommendations on issues of asylum and migration

	Recommendation number and date of adoption	Topic
1.	REC. 2253/27/04/2023	Deportations and forcible transfers of Ukrainian children and other civilians to Russian Federation or to Ukrainian territories temporarily occupied: create conditions for their safe return, stop these crimes and punish the perpetrators
2.	REC. 2203/28/05/2021	Humanitarian action for refugees and migrants in countries in North Africa and the Middle East
3.	REC. 2192/04/12/2020	Rights and obligations of NGOs assisting refugees and migrants in Europe

	Recommendation number and date of adoption	Topic
4.	REC. 2171/30/01/2020	Concerted action against human trafficking and the smuggling of migrants
5.	REC. 2155/11/04/2019	The situation of migrants and refugees on the Greek islands: more needs to be done
6.	REC. 2141/11/10/2018	Family reunification of refugees and migrants in the Council of Europe member States
7.	REC. 2028/22/11/2013	Monitoring the return of irregular migrants and failed asylum seekers by land, sea and air
8.	REC. 2003/28/06/2012	Roma migrants in Europe
9.	REC. 1974/21/06/2011	The interception and rescue at sea of asylum seekers, refugees and irregular migrants
10.	REC. 1967/14/04/2011	The large-scale arrival of irregular migrants, asylum seekers and refugees on Europe's southern shores
11.	REC. 1956/26/01/2011	Preventing harm to refugees and migrants in extradition and expulsion cases: Rule 39 indications by the European Court of Human Rights
12.	REC. 1926/22/06/2010	Voluntary return programmes: an effective, humane and cost-effective mechanism for returning irregular migrants
13.	REC. 1925/22/06/2010	Readmission agreements: a mechanism for returning irregular migrants
14.	REC. 1917/30/04/2010	Migrants and refugees: a continuing challenge for the Council of Europe
15.	REC. 1900/28/01/2010	Detention of asylum seekers and irregular migrants in Europe
16.	REC. 1840/25/06/2008	State of democracy in Europe Measures to improve the democratic participation of migrants
17.	REC. 1808/01/10/2007	Assessment of transit and processing centres as a response to mixed flows of migrants and asylum seekers
18.	REC. 1807/01/10/2007	Regularisation programmes for irregular migrants
19.	REC. 1768/05/10/2006	The image of asylum-seekers, migrants and refugees in the media

	Recommendation number and date of adoption	Topic
20.	REC. 1767/05/10/2006	Mass arrival of irregular migrants on Europe's Southern shores
21.	REC. 1755/27/06/2006	Human rights of irregular migrants
22.	REC. 1619/08/09/2003	Rights of elderly migrants
23.	REC. 1618/08/09/2003	Migrants in irregular employment in the agricultural sector of southern European countries
24.	REC. 1596/31/01/2003	Situation of young migrants in Europe
25.	REC. 1544/08/11/2001	The propiska51 system applied to migrants, asylum seekers and refugees in Council of Europe member states: effects and remedies
26.	REC. 1503/14/03/2001	Health conditions of migrants and refugees in Europe
27.	REC. 1277/30/06/1995	Migrants, ethnic minorities and media
28.	REC. 1211/11/05/1993	Clandestine migration: traffickers and employers of clandestine migrants
29.	REC. 1206/04/02/1993	Integration of migrants and community relations
30.	REC. 1187/08/05/1992	Relations between migrants and trade unions
31.	REC. 1154/26/04/1991	North African migrants in Europe
32.	REC. 1070/23/03/1988	Problems of Yugoslav migrants and the development of relations between Yugoslavia and the Council of Europe
33.	REC. 915/30/01/1981	Situation of migrants workers in the host countries
34.	REC. 841/30/09/1978	Second generation migrants
35.	REC. 786/16/09/1976	Education and cultural development of migrants

A possible conclusion here is that the issue of migration has become topical only since 2001 for the Parliamentary Assembly. This is because, until this year and for 55 years of the existence of the institution, only two resolutions and nine

51 In the countries that have emerged from the former Soviet Union raises a specific concern because of their traditional use of an obligatory residence permit, *propiska*. *Propiska* has formally been outlawed in most of these countries. However, its vestiges remain in some of them, causing undue hardship to the displaced population, in particular to forced migrants and refugees.

recommendations were adopted, whereas the last 22 years saw the adoption of 59 soft law documents by the deputies delegated by the Member States. Still, the Parliamentary Assembly shows a richer content in this field than the Committee of Ministers because, in addition to addressing the classic issues I mentioned above, it deals with the migration phenomenon in a territorial context (e.g. North Africa, Middle East, Greek islands, Turkey, Western Balkans, Southern Europe's shores, and Ukraine), and considers the work of non-governmental organisations (NGOs) in the field. Accordingly, it addresses the issue of migrants' rights, including their right to their image in the media.

The Parliamentary Assembly, even if in a restrained way, also addresses the issues of migration-related crimes pertaining to human trafficking and migrant smuggling, the radicalisation of migrants and diaspora communities in Europe, violence against migrants, organised crime and migrants, criminalisation of irregular migrants (as a crime without victims), and sensitive issues such as voluntary returns, readmission agreements for irregular migrants, and failed asylum seekers.

5.3. Strategies, action plans, reports, and manuals

The activity of the Council of Europe in the field of refugees can be captured on two different main plans, namely the plan of the political–legal activity of the bodies of the respective organisation, and the jurisprudence/case law plan related to the work of the ECHR. However, between positive law/soft law and case law, the strategies, action plans, and reports with which the Council of Europe operates are interspersed as political–legal instruments. The most recent actions of the Council on this matter are the following a) Action Plan on Protecting Refugee and Migrant Children in Europe (2017–2019); b) Council of Europe Strategic Action Plan for Roma and Traveller Inclusion (2020–2025); c) Council of Europe Action Plan on Protecting Vulnerable Persons in the Context of Migration and Asylum in Europe (2021–2025).[52]

This Action Plan from point three provides a means to: (i) assist in building stronger asylum and migration systems based on a foundation of human rights and standards in the area (e.g. relevant Council of Europe conventions, Committee of Ministers' recommendations, recommendations of monitoring bodies, and recommendations and resolutions of the Council of Europe Parliamentary Assembly and Congress of Local and Regional Authorities); (ii) place migration at the heart of the transversal action of the Council of Europe and its partners; (iii) take new action together with Member States in priority areas; (iv) develop further synergies with key international partners, when appropriate.[53] The structure of the action plan reflects a total of four pillars, as described herein: I. Human rights; II. Human rights and the rule of law; III. Human rights and democracy; IV. Transversal support.

52 Council of Europe, 2021.
53 Council of Europe, 2020.

The total budget of the Action Plan on Protecting Vulnerable Persons in the Context of Migration and Asylum in Europe amounts to EUR 11 272 739.40 for 20 projects, and in order to respond to the consequences of the Russian Federation's aggression against Ukraine, a prioritisation of funding needs has been made.[54] From this field, I would also highlight a document that is in the third edition, namely the Handbook on European law relating to asylum, borders, and immigration 2020, edited from the Council of Europe together with the EU, European Union Agency for Fundamental Rights (also known as FRA), and Publications Office of the European Union.[55] This Handbook is an official publication on the common position of the Council of Europe and the EU in the field of migration.[56]

6. Case law … or how the fundamental rights guaranteed by the ECHR are used by the ECtHR as a barrier to Member States in the field of migration

The last part of my research contribution will address the case law of the ECHR in the field of immigration,[57] from the perspective of respecting certain fundamental rights relevant to the migration phenomenon. Importantly, various authors[58] have already delved into the topic, and the Council of Europe published an official, scientific publication on this subject[59] that is accessible to the general public in an official and updated format. Accordingly, my goal here is to present the case law regarding Central and Eastern European countries, after a brief review of the theoretical issues raised in the case of the application, in a migration context, of certain fundamental rights guaranteed by the ECHR.

In the terminology of the Council of Europe, the word "migrant" describes a person who moves from one place, region, or country to another. The term "asylum seeker" refers to a migrant who seeks international protection, which may take the form of refugee status or subsidiary protection in Europe. The refugee status is governed by the 1951 Geneva Convention on the Status of Refugees, and is granted by a foreign State to a person who has a well-founded fear of persecution in his/

54 Information Documents SG/Inf(2023)8 from 10 February 2023 – First Interim Report on the Implementation of the Action Plan on Protecting Vulnerable Persons in the Context of Migration and Asylum in Europe (2021-2025), pp. 23–24.

55 FRA and ECtHR, 2020, pp. 14–15.

56 Ibid.

57 European Court of Human Rights, Simplified version of selected articles from the European Convention on Human Rights and its protocols [Online]. Available at: https://echr.coe.int/Documents/Simplified_Conv_ENG.pdf (Accessed: 19 July 2023).

58 Dembour, 2015, pp. 172–187; Sinha, 2019, pp. 176–227; Mole and Meredith, 2003; Breitenmoser and Marelli, 2017, p. 169.

59 *Guide on the case-law of the European Convention on Human Rights. Immigration*, 2022.

her country of origin on the basis of race, religion, nationality, membership of a particular social group, or political opinion. If a foreign State deems that a migrant should be protected for reasons not listed in the Geneva Convention, it can decide to grant subsidiary protection instead of refugee status.[60] The ECtHR is not competent to examine the application of the Geneva Convention, and the ECHR does not provide for a right to asylum.

At this point, my analysis should end with the conclusion that the right to control the entry, stay, and expulsion of non-nationals belongs to Member States. Nonetheless, Council of Europe Member States are under the obligation to provide everyone within their jurisdiction, including migrants, with the respect of the rights guaranteed by the ECHR. On that basis, the ECtHR's case law imposes certain limitations on the right of States to turn someone away from their borders.

Key ECHR representatives[61] recognise that although the Convention does not explicitly mention refugees, important protections have emerged from the Court's case law, including in the areas of non-refoulement, family reunification, and limitation of deprivation of liberty. These representatives also point out that albeit not a new practice, Council of Europe Member States sometimes try to evade their obligations under the ECHR when it comes to the reception of refugees and migrants. For example, some Member States, while drawing up asylum and immigration policies, increasingly seem to no longer focus on compatibility with the ECHR, and attempt to use new methods to prevent the implementation of related obligations. One instance of this can be seen in pro-migrant jurisprudence being interpreted restrictively and selectively, while on the contrary, if the Court finds no violation in certain situations, Member States are more than willing to derive from this a broad justification for their practices to exclude those. Furthermore, politicians have been increasingly arguing that human rights are not an essential element of border control, but an obstacle to it.

In reality, the ECtHR is looking to the ECHR for barriers to prevent Member States from returning or expelling aliens who have entered their territory illegally, replacing the lack of anchoring to the right of asylum in positive law with the impossibility of removing people who do not qualify for refugee status because of substantive or procedural loopholes.

60 Presentation: Asylum, from the Series Human Rights Education for Legal Professionals and COURTalks/disCOURs – Bringing the Convention closer to home/La Convention a votre porte, 2016, pp. 1–2 and 7. Available at: https://www.echr.coe.int/documents/d/echr/COURTalks_Asyl_Talk_ENG (Accessed 9 July 2023).

61 Mijatović, 2020.

6.1. Arts. 2 and 3: Right to life and prohibition of torture

Art. 2 of the Convention guarantees the right to life, and Art. 3 prohibits torture, inhuman or degrading treatment, or punishment. As an introduction to this topic, and according to the Commissioner for Human Rights:

> […] since 2014, about 25,000 persons are known to have died or gone missing in the Mediterranean in attempts to reach Europe. […] In the same time span, it is estimated that about 900 persons died or went missing while moving along routes within Europe, both on land and at sea. 277 were reported missing in the Western Balkans alone – for example, in rivers in the Balkans -, while 204 are estimated to have gone missing while seeking to reach the UK through the English Channel. A significant number of migrants, and especially unaccompanied children, go missing after their arrival in Europe […] between 2018 and 2020, more than 18,000 unaccompanied child migrants have gone missing.[62]

Under the interpretation of those articles, no one can be returned to a place where there is a real risk of him/her being subjected to treatment contrary to any of those provisions. This is the principle of non-refoulement; the Court also notes that the right to political asylum is not contained in neither the Convention nor its Protocols.[63] From the point of view of Eastern and Central European states, violations of Arts. 2 and 3 of the ECHR have been found in the cases presented below, which are provided in chronological order of the adoption of the judgment.

In the case of *M.G. v. Bulgaria*[64] in 2014, the complainant was a Russian citizen of Chechen origin who, in March 2004, together with his wife and three children, entered Poland, where they were granted refugee status, while a court in Ingushetia issued an arrest warrant for M.G. for membership to an armed group. In December 2005, M.G. and his family moved to Berlin, where they were also granted refugee status on humanitarian grounds. In July 2012, M.G. was intercepted with his family during an identity check while they were crossing the Romanian-Bulgarian border by car. The Bulgarian court ordered his detention pending extradition proceedings initiated by the Russian Federation. On 14 September 2012, the Court decided, under Rule 39 of the Rules of Court (interim measures), to indicate to the Government that Mr. M.G. should not be extradited to the Russian Federation during the proceedings before the Court. Based on reports of frequent torture of detainees suspected of belonging to armed groups operating in the North Caucasus[65] in order to make con-

62 Mijatović, 2022.

63 *Vilvarajah and Others v. the United Kingdom*, 30 October 1991, § 102; *Ahmed v. Austria*, 17 December 1996, § 38.

64 *M.G. v. Bulgaria*, App. No. 59297/12, 25 March 2014, Final 25 June 2014.

65 The ECHR relied on the 2011 visit reports of the Council of Europe's Committee for the Prevention of Torture, the Council of Europe Commissioner for Human Rights, and the 2012 concluding observations of the UN Committee against Torture.

fessions, and on the general failure of the Russian authorities to conduct an effective investigation into allegations of abuse in pre-trial detention facilities in the North Caucasus, The Court ruled that, despite diplomatic assurances to the contrary, the extradition of a Chechen from Bulgaria to the Russian Federation would violate his rights under Art. 3 (prohibition of inhuman or degrading treatment) of the ECHR. Finally, the Bulgarian court was criticised by the ECHR for relying solely on diplomatic assurances from the Russian authorities and failing to take proper account of the risk of abuse to which the applicant would be subjected if extradited.

The Court noted that previous refugee status was an "important indication" that there was sufficient evidence of a risk of persecution at the time it was granted, but it only functions as a "starting point" for the ECHR's assessment of the proposed extradition. It further noted that, 'the North Caucasus, including Ingushetia [the place of extradition], continues to be an area of armed conflict, marked by violence and insecurity and serious violations of fundamental rights [. …], such as extrajudicial killings, disappearances, torture or other ill-treatment', in respect of which it found a violation of Art. 3 of the ECHR by Bulgaria.

In the *M.A. and Others v. Lithuania* case,[66] in 2018, the applicants, who had fled the Chechen Republic, attempted to cross the border between Lithuania and Belarus on three separate occasions. Although they claimed they were seeking international protection each time, they were refused entry on the grounds that they did not have the necessary travel documents. The Lithuanian border guards had not accepted their asylum applications, nor had they forwarded them to a competent authority for examination and status determination, as required by domestic law. The ECtHR found that no assessment had been carried out of whether or not it was safe to return the applicants to Belarus, a country that was not a State Party to the ECHR. The Court ruled that the failure to allow the applicants to submit their asylum applications and their removal to Belarus amounted to a violation of Art. 3 of the ECHR. In extreme cases, a removal, extradition or expulsion may also raise an issue under Art. 2 of the ECHR, which protects the right to life.[67]

The case of *Ilias and Ahmed v. Hungary*,[68] in 2019, concerned two Bangladeshi nationals who transited Greece, the former Yugoslav Republic of Macedonia, and Serbia before arriving in Hungary and the Röszke transit zone, where they immediately applied for asylum and were detained for 23 days. The asylum applications of both applicants were rejected on the grounds that Serbia was considered a "safe third country" under Government Decision No. 191/2015, and the applicants were deported to Serbia. The applicants complained, inter alia, that their expulsion to Serbia exposed them to possible "chain refoulement" to Greece. The Court held that

66 ECtHR, *M.A. and Others v. Lithuania*, App. No. 59793/17, 11 December 2018.
See also ECtHR, *M.K. and Others v. Poland*, App. Nos. 40503/17, 42902/17, and 43643/17, 23 July 2020.

67 ECtHR, *N.A. v. Finland*, App. No. 25244/18, 14 November 2019.

68 *Ilias and Ahmed v. Hungary* [GC], App. No. 47287/15, 21 November 2019.

the Hungarian authorities had not acted in accordance with their obligation to safely assess the risk that the applicants would be subjected to inhuman and degrading treatment in the event of their return to Serbia or a further return to Greece. The government argued that Serbia's inclusion on a list of safe third countries was based on a possibility offered by EU law, and that there was no evidence of Serbia's failure to comply with refugee law and the principle of non-refoulement. Meanwhile, the Court pointed out that when an application is not examined on its merits, it is not possible to know whether an Art. 3 risk exists unless a full and comprehensive legal procedure is in place to assess the existence of such a risk, including an ex officio updated assessment of the adequacy of the asylum system of the receiving State (paras. 137–141). The judges noted the creation of a list of safe third countries, and considered that the Convention does not necessarily prohibit such lists, albeit any such presumption should be accompanied by an analysis of the relevant conditions in the country concerned and its asylum system. Notwithstanding, Hungary did not provide any documentation showing that the inclusion of Serbia on the list of safe third countries was made following a thorough assessment of the situation in that country (paras. 152–154). Finally, the Court found a violation of Art. 3.

In this case, the Court did not consider the principle of non-interference in the internal affairs of other states to which Hungary was bound, nor the EU standards, nor the principle of "safe third state". Moreover, it practically urged Hungary to undertake the assessment in the future, and to monitor neighbouring states to ascertain whether they are safe or not, as trust in Serbia was based on multilateral information. Moreover, a chain return could lead all the way to Greece, which as an EU member state cannot be considered an unsafe state.

Advancing the principle of "non-refoulement in chains", there is an interesting judgment that was adopted in the case named *Sh.D. and Others v. Greece, Austria, Croatia, Hungary, North Macedonia, Serbia and Slovenia*,[69] in 2019. In it, the claimants sought not only the "condemnation" of the country where they arrived as illegal immigrants, but also of the countries that were on their route to Germany. It concerned the complaint of five Afghan nationals who entered Greece as unaccompanied migrant minors in 2016, when they were aged between 14 and 17 years. During 2016, the five complainants were detained in police stations and housed in a makeshift camp in Idomeni, on the Greek-North Macedonian border. S.M. and A.A. were granted refugee status in October 2016 and January 2017, respectively. Under Art. 3, all complainants spoke out against their living conditions in Greece. Specifically, two of the complainants objected to their living conditions at the Polykastro and Filiata police stations, where they were held in "protective custody", while four complainants criticised their living conditions in Idomeni camp. Relying on Art. 5, three of the applicants claimed that their placement in pre-trial detention at the police

69 *Sh.D. and Others v. Greece, Austria, Croatia, Hungary, North Macedonia, Serbia and Slovenia*, App. No. 14165/16, 13 June 2019, Final 13 September 2019.

stations of Polykastro, Filiata, and Aghios Stefanos was incompatible with this provision of the Convention.

The Court pointed out that the police stations had features which were likely to give detainees a sense of solitude (e.g. no access to the open air for walking or exercise, no internal catering arrangements, and no radio or television allowing contact with the outside world), and were not suitable for prolonged detention. Detention in this place was therefore likely to arouse in the persons feelings of isolation from the outside world, with potentially negative repercussions for their physical and mental well-being. Accordingly, the conditions of detention to which three of the applicants were subjected in various police stations amounted to degrading treatment, and the Court found a violation of Art. 3 of the Convention.

In relation to the Idomeni camp, the Court found that the applicants in question had spent a month in an environment unsuitable for adolescents—regarding security, accommodation, hygiene, and access to food and care—and in precarious conditions incompatible with their young age. The Court was therefore not satisfied that the authorities had done all that could reasonably be expected of them to fulfil their obligation to care for and protect the applicants in question, an obligation incumbent on the respondent State in respect of persons who were particularly vulnerable on account of their age. The Court thus found that there had been a violation of Art. 3 of the Convention regarding the living conditions of these four applicants. The Court also held that the Greek Government had not explained why the authorities had first placed three of the applicants in police stations in degrading conditions of detention, and not in alternative temporary accommodations. The applicants' detention was therefore not lawful and there was a violation of Art. 5 § 1 of the Convention.[70]

At the same time, although the applicants pointed out that the application as a whole was directed against Greece and Austria, Croatia, Hungary, Northern Macedonia, Serbia, and Slovenia (i.e. against all States on the "Balkan route"), the Court, after examining the applicants' arguments in the light of all the evidence in the file, found that the application must be declared inadmissible as manifestly ill-founded under Art. 35 §§ 1, 3, and 4 of the Convention (paras. 70 and 71).

In the case of *M.K. and Others v. Poland*,[71] from 2020, the complainants were Russian citizens of Chechen origin who, in 2017, presented themselves several times at border checkpoints between Poland and Belarus, where they wished to lodge asylum applications. Each time they tried, they were denied this possibility by border police, who refused them entry and deported them to Belarus, albeit the complainants claimed that they would not have access to a proper asylum procedure in Belarus, and that they would be subjected to torture or other forms of inhuman or degrading treatment if returned to the Russian Federation (the Chechen Republic).

70 By way of just satisfaction (Art. 41), the Court determined that Greece had to pay EUR 4 000 to one applicant, EUR 6 000 to each of the four applicants by way of non-material damage, and EUR 1 500 to the applicants jointly by way of costs and expenses.

71 *M.K. and Others v. Poland*, App. Nos. 40503/17 and 2 others, 23 July 2020, 14 December 2020.

The Court indicated interim measures under Art. 39 of the Court's Rules, but some of the applicants were nevertheless returned to Belarus, whereas the asylum applications of some of the applicants were eventually accepted by the Polish authorities. The latter were placed in a reception centre.

In determining whether or not the applicants expressed their wish to seek asylum when they presented themselves at the border checkpoints, the Court gave more weight to the applicants' version of the events at the border because they were corroborated with the statements of other witnesses. Reports from national human rights institutions have indicated the existence of a systemic practice of distorting statements made by asylum seekers in official notes drawn up by border guards at checkpoints between Poland and Belarus.

Although the Polish government argued that by refusing the applicants' entry to Poland it acted in accordance with the legal obligations of the EU, the Court stated that EU law clearly embraced the principle of non-refoulement, as guaranteed by the Geneva Convention, and also applied it to persons who were subject to border checks before being admitted to the territory of one of the Member States. Therefore, the Court noted that the contested measure taken by the Polish authorities does not fall within the scope of Poland's strict international legal obligations, and concluded that the applicants did not benefit from effective guarantees that would have protected them from being exposed to a real risk of being subjected to inhuman or degrading treatment, as well as to torture. The absence of a procedure through which the applicants' claims for international protection could be examined constituted a violation of Art. 3. Furthermore, in view of the situation in the neighbouring state, the Polish authorities, by not allowing the applicants to remain on Polish territory pending the examination of their claims, knowingly exposed them to a serious risk of refoulement and treatment, which is prohibited by Art. 3. Moreover, the Court considered that the decisions to refuse entry to Poland issued in the applicants' cases constituted a collective expulsion of foreigners, and thus there was a violation of Art. 13 in conjunction with Art. 3 of the Convention and Art. 4 of Protocol no. 4. Specifically, there was a lack of an appeal with automatic suspensive effect, and the respondent State did not fulfil its obligations under Art. 34 of the Convention as it did not comply with the provisional measures indicated by the Court under Art. 39 of the Rules of Court than with a significant delay or not at all.[72]

Even if, following the jurisprudence of the *Matthews*[73] and *Bosphorus*[74] cases, we have become accustomed to the fact that the ECtHR considers the existence of EU law, in this case it demonstrated that it even allows itself to interpret EU law to the

72 According to Art. 41, the European court awarded EUR 34 000 for each individual plaintiff and for both families of plaintiffs as moral damages.

73 ECtHR, Grand Chamber, *Denise Matthews v. the United Kingdom*, App. No. 24833/94, 18 February 1999, ECHR 1999-I, ECLI:CE:ECHR:1999:0218JUD002483394.

74 ECtHR, Grand Chamber, *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi (Bosphorus Airways) v. Ireland*, App. No. 45036/1998, 30 June 2005, CEDH 2005-VI, ECLI:CE:ECHR:2005:-0630JUD004503698.

detriment of EU Member States. At the same time, in this case against the Member States, the Court once again resorted to the absolute presumption of the "danger of return in the chain", and to the absolute relativisation of the existence of safe states outside the EU.

In the *M.H. and Others v. Croatia* case,[75] in 2021, the applicants were a family of 14 Afghan nationals comprising a man, his two wives, and their 11 children. In 2016, they left Afghanistan and travelled through Pakistan, Iran, Turkey, Bulgaria, and Serbia before reaching the Croatian border. On the night of 21 November 2017, one of the children, a six-year-old girl, died after being hit by a train in Serbia near the Croatian-Serbian border, after Croatian border guards denied them any possibility of seeking asylum and ordered them to return to Serbia by rail; on the way, M.H. was hit by a train and died. The Court noted, in particular, that the investigating authorities did not analyse the inconsistencies between the police officers' statements, and never verified their claim that there were no recordings of the disputed events. Proposals by the complainants and the Croatian Ombudsman to establish contact between the complainants and the police by inspecting the signals from their mobile phones and the GPS of the police car were ignored, and the statement by the Serbian authorities that the complainants were forced to return to Serbia was not addressed. Finally, the authorities refused to provide the complainants' lawyer with information about the investigation, and the complainants were only allowed to meet with the lawyer after a certain period. The Court concluded that the investigation into M.H.'s death was ineffective, leading to a procedural violation of Art. 2.

In the same case, it was held that four months after this tragic event, on 21 March 2018, this Afghan family illegally entered the territory of Croatia, where the police placed them in a transit centre for immigrants in Tovarnik to verify their identity. After several rejected asylum applications, they managed to leave Croatia, also illegally, after being placed in an open centre in Kutina. The Court found that although the material conditions in the Tovarnik centre were satisfactory and the applicants received medical and psychological assistance, some aspects resembled a prison (e.g. the presence of police officers, barriers in the corridors, and bars on the windows). The Court took note of the Croatian Ombudsmen's comments on the inadequacy of the centre for the accommodation of the children, along with the fact that they were in a particularly vulnerable state, considering that most of them had witnessed the death of their sister near the border. The Court also noted that these children had spent two months without any organised activity to occupy their time, which led to a violation of Art. 3 of the Convention in respect of minor children.[76] As can be deduced from the judgment, the Court did not consider either the guilt of the person who exposed his family to an unsafe journey of thousands of kilometres without choosing the first safe state, nor the obligations of an EU Member State to

75 *M.H. and Others v. Croatia*, App. Nos. 15670/18 and 43115/18, 18 November 2021.

76 The Court held that Croatia was to pay the applicants EUR 40 000 non-pecuniary damage and EUR 16 700 in respect of costs and expenses.

comply with common asylum legislation aimed at preventing illegal entry into EU territory by applying unconditionally, almost in an ideal vacuum, Art. 3.

In *D. v. Bulgaria,*[77] *in 2021*, the complainant, a former journalist by a Turkish daily newspaper in Bozova, Turkey, entered Bulgaria illegally with a trailer attached to a heavy goods vehicle. He was fleeing the persecution of journalists following the 2016 coup attempt when he was arrested on 14 October 2016 by Bulgarian border police at the Bulgarian-Romanian border. During and after his arrest, he repeatedly indicated that he wished to seek protection in Bulgaria, but the authorities who ordered his removal did not consider his explanations to amount to a request for protection, and no procedure was initiated with the authorities responsible for international protection. The Court was struck by the flagrant failure to examine the applicant's particular situation and found a violation of Art. 3, in that within 24 hours of his detention, the applicant was expelled to Turkey, his country of origin, from which he had fled, without prior examination of the risks to which he was exposed in the light of Art. 3 of the Convention and, therefore, of his application for international protection.

In the case of *S.F. and Others v. Bulgaria*,[78] in 2021, the applicants, three Iraqi minors who had fled Iraq with their parents, were intercepted by police at the Bulgarian-Serbian border and detained (together with their parents) in a border police detention centre in Vidin, Bulgaria. The complainants were detained for 30–42 hours in a filthy facility with used mattresses and bedding, rubbish, and a wet cardboard on the floor. Access to the toilet was limited, forcing them to urinate on the floor of the cell in which they were held. The authorities failed to provide the complainants with food and drink for more than 24 hours and the complainants' mother only had access to the bottle and milk of the youngest complainant, who was one and a half years old, approximately nineteen hours after they were taken into custody.

In the decision related to this case, the Court did not focus on the evaluation of the duration of placing a person in a place with degrading and inhumane conditions, but on the intensity of such treatment, showing that the combination of the aforementioned factors must have affected the applicants considerably, both physically and psychologically, and must have had particularly adverse effects on the youngest applicant, given his very young age. The European court held that, although it was true that the Member States located on the external borders of the EU had difficulties in dealing with the massive influx of migrants, it cannot be said that, at that time, Bulgaria was facing a situation of emergency of such proportions that it was practically impossible for its authorities to ensure minimally-decent conditions in the short-term detention centres where they decided to place migrant minors immediately after their interception and arrest. In any case, given the absolute nature of Art. 3, an increasing influx of migrants could not absolve a Member State of its obligations under this provision, therefore the Court found a violation of Art. 3 of the ECHR. As occurred in the case of *M.S.S. v. m./Belgium and Greece*, the Court did not

77 *D v. Bulgaria*, App. No. 29447/17, 20 July 2021.
78 *S.F. and Others v. Bulgaria*, App. No. 8138/16, 7 December 2017.

consider the special situation in which some Member States that are overwhelmed by migration waves may find themselves.

In the case of *R.R. and Others v. Hungary*,[79] in 2021, the applicants, an Iranian-Afghan family of five, arrived in Hungary from Serbia and applied for asylum in the Röszke transit zone. They remained in an isolation area owing to a hepatitis infection and complained that the services in that area were inadequate, the food was not appropriate for their age, and the police services carried out frequent invasive checks, including being present at gynaecological examinations. In addition, as the father had applied for asylum in Hungary before entering the transit zone with his family, he was assigned accommodation in this zone but was not offered free meals and had to eat his family's leftovers. Finally, following an initial rejection of their asylum application, the applicants were recognised as beneficiaries of subsidiary protection.

The lack of a food supply raised an issue under Art. 3 in relation to the first applicant, given his state of extreme poverty and total dependence on the Hungarian Government during his stay in the Röszke transit zone. The physical conditions of the container in which the family stayed, the inappropriate facilities for the children, the irregularities in the provision of medical services, and the prolonged stay in the area constituted a further violation of Art. 3 in relation to the applicant's mother and the children.[80] According to the Court, the provision of food by NGOs that do not have a legal relationship in this regard with the state cannot be a circumstance of graduation. The family's stay in the Röszke transit zone was a deprivation of liberty due, inter alia, to the absence of any domestic legal provisions setting the maximum length of the applicants' stay, the excessive length of the applicants' stay, and the conditions in the transit zone. Their deprivation of liberty was unlawful under Art. 5(1), as there was no strictly defined legal basis for the applicants' detention, and the Hungarian authorities had not issued any formal reasoned decision for detention. Here, the Court reiterated the factors set out in *Ilias and Ahmed v. Hungary*. At the same time, Art. 5(4) was also violated because the applicants had no means by which a court could have promptly decided on the lawfulness of their detention. From this ruling, it follows that the ECtHR, when it has an interest, relies on the reports and activity of NGOs, but when NGOs practically help the state in fulfilling its obligations through their activity, it ignores or minimises their contribution.

In the case of *T.K. and Others v. Lithuania*,[81] in 2022, the husband and wife applicants arrived in Lithuania, coming from Tajikistan, in January 2019 and applied for asylum, claiming that they faced a risk of persecution in their country of origin because of the first applicant's political activities, and because the second applicant was being persecuted as her and her daughters wore hijab. The Lithuanian authorities

79 *R.R. and Others v. Hungary*, App. No. 36037/17, 2 March 2021, Final 05 July 2021.

80 The Court cited the findings of the Committee for the Prevention of Torture regarding the prolonged stay of families in the Röszke transit zone.

81 *T.K. and Others v. Lithuania*, App. No. 55978/20, 22 March 2022, Final 22 June 2022.

rejected the asylum applications repeatedly lodged, finding that the applicant's accounts were not credible, perceiving that she was neither persecuted nor wanted by the Tajik authorities for her political activity, and that the restrictions on wearing the hijab did not rise to the threshold of seriousness required to constitute persecution or inhuman or degrading treatment.

On 23 December 2020, the ECtHR duty judge granted the applicants' request for an interim measure under Art. 39 of the Court's Rules, indicating to the Lithuanian government that they should not be relocated to Tajikistan during the proceedings before the Court. The Court determined that the fact that it has not been credibly established that the applicants have been ill-treated or threatened in the past in their country of origin is not determinative when assessing whether there is a real risk. The Court took inventory of the reports of the United Nations Human Rights Committee, Human Rights Watch, Amnesty International, Freedom House, and US State Department. Then, it observed that although the above mentioned reputable sources do not explicitly state that a person simply having any links to the Islamic Renaissance Party of Tajikistan, however remote, would necessarily be at risk of persecution, they described a widespread harassment of political opponents, and contained information about hundreds of members of banned political parties being arbitrarily detained and imprisoned on politically-motivated charges (e.g. thousands of members included in international search lists). Based on this general information, the Court, underlining the absolute nature of the rights guaranteed by Art. 3 of the Convention, found that there would be a violation of this provision if the applicants were moved to Tajikistan without a new assessment of their claims, and their return there would expose them to a risk of mistreatment.

In view of the above, the Court decided that, given that the national authorities had not sufficiently assessed the existence in Tajikistan of a practice of ill-treatment of persons who were in a similar situation to the applicants, their return to Tajikistan without a new assessment in this respect would violate Art. 3 of the Convention. It also indicated to the Government, pursuant to Art. 39 of the Rules of Court, that it was desirable, in the interest of the proper conduct of the proceedings, not to expel the applicants until the present time.

In this way, the ECtHR practically opened "Pandora's box" from two points of view. On the one hand, it launched an encouragement/urge to future asylum seekers to present untrue/fantasy factual situations, and turned the burden of proof into the national authorities, who cannot intervene in the internal affairs of other states. On the other hand, it overestimated the importance of reports and the monitoring carried out by NGOs and US institutions, to which the positive law of the Council of Europe or public international law in general does not reserve any role in the procedure judicial.

By consistently failing to apply positive law on "safe states" or on the conditions of entry of aliens into a country, as well as to consider the undue burden on state authorities on the frontline of migration, the ECtHR is pushing the issue and relativising the "rule of law" principle, giving the impression/encouragement that anyone

in this world who invokes an unproven ground of persecution and who has passed through 10 safe countries before arriving in a State in which he/she has lodged an asylum application will be able to count on a positive outcome to his/her application, at least by acquiring subsidiary protection status in the Western part of the European continent.

6.2. Art. 5: Right to liberty and security

There may be various obstacles to the removal of an asylum seeker coming from the risk of a flagrant violation of Arts. 5 (Right to liberty and security) or 6 (Right to a fair trial) of the Convention in the country of destination. As stated in the official ECtHR literature,[82] Art. 5(1)(f) of the Convention allows States to control the liberty of aliens in the context of immigration in two different situations. First, the initial part of this provision allows for the detention of an asylum seeker or other immigrant before the State grants authorisation for entry; second, the second part of Art. 5 § 1 gives States the right to keep a person in detention for the purpose of expulsion or extradition.

The question of when the first part of Art. 5 § 1(f) ceases to apply when the individual has been granted a formal entry or residence permit depends largely on national law. Such detention must be compatible with the general purpose and requirements of Art. 5, in particular its lawfulness, including the obligation to comply with the substantive and procedural rules of national law. However, compliance with domestic law is not sufficient, as a deprivation of liberty may be lawful as a matter of domestic law, but may still be arbitrary.[83] In the case of mass arrivals of asylum seekers at State borders, subject to the prohibition of arbitrariness, the requirement of lawfulness under Art. 5 can generally be regarded as satisfied by a domestic legal regime which provides, for example, only for the name of the authority competent to order the deprivation of liberty in a transit zone, the form of the order, the possible grounds and limits of the order, the maximum duration of detention and, as required by Art. 5 § 4, the applicable judicial remedy.[84] However, legality problems may arise where: the detention was based on an administrative circular; the legal basis was not publicly available; no maximum period of detention was laid down in the legislation.

Even if detention under Art. 5 § 1(f) is not required to be reasonably necessary in the case of adults who are not particularly vulnerable, it must not be arbitrary. Detention is not arbitrary, but carried out in good faith, if: it is closely linked to the purpose of preventing the unauthorised entry of the person into the country; the place and conditions of detention are appropriate, bearing in mind that the measure

82 *Guide on the case law of the European Convention on Human Rights. Immigration*, 2022, pp. 16/53; 38–39/53.

83 *Saadi v. United Kingdom [GC]*, § 67.

84 *Z.A. and Others v. Russia [GC]*, § 162.

does not apply to persons who have committed offences but to foreigners who, often in fear for their lives, have fled their own country; it does not exceed the period reasonably necessary for the purpose. Once an alien has received a final expulsion order, his/her presence is no longer "lawful" and he/she can no longer avail himself of the right to freedom of movement as guaranteed by Art. 2 of Protocol No. 4.[85] Furthermore, under the second part of Art. 5 § 1 (f), States have the right to keep a person in detention for the purpose of his/her expulsion or extradition. Detention cannot be arbitrary in this case either.

Meanwhile, detention will not be considered reasonably necessary, for example, to prevent the person from committing a crime or fleeing, but will only be justified while the removal or extradition proceedings are pending. In this context, it is irrelevant whether the underlying decision to expel or surrender is justified under national law or the Convention if the expulsion, extradition, or surrender proceedings are not carried out with due diligence. Since asylum seekers cannot be expelled before their asylum application has been decided, in a number of cases, the Court has found that there is no close link between the detention of an applicant who has lodged an asylum application which has not yet been decided, and the possibility of expelling him/her, nor any good faith on the part of the national authorities.

Another problematic legal situation arises when extradition overlaps with the asylum procedure following the submission of an asylum application during the extradition procedure. In the case of *Komissarov v. Czech Republic*,[86] the Court was faced with a situation where the applicant was detained pending extradition and, in the following day, lodged an asylum application, which prevented his extradition and led to a halt in the extradition process pending the asylum procedure. The latter procedure was significantly delayed and led to the applicants detention pending extradition not being "in accordance with the law". Meanwhile, detention for extradition purposes may be arbitrary from the outset because of the person's refugee status, which prohibits extradition.

Now, let us take a look into cases in Eastern and Central European countries involving judgements by the ECtHR. In the *Singh v. the Czech Republic* case,[87] in 2005, the applicants, Indian nationals, were remanded in custody on Czech territory on 11 November 1996, where they were lawfully residing. Then, on 9 April 1998, the Prague 7 District Court found the applicants guilty of committing the offence of smuggling migrants, sentencing them to 21 months' imprisonment and indefinite expulsion. On 31 July 1998, the district court decided to detain the applicants pending deportation, with effect from 11 August 1998, the day on which the applicants were to serve the prison sentence. The applicants were detained until 11 February 2001 with a view to deportation, which did not take place as it was not possible to obtain travel documents for them.

85 *Piermont v. France*, § 44.
86 The case will be treated at length in what follows.
87 *Singh v. the Czech Republic*, App. No. 60538/00, 25 January 2005.

The Court noted that the applicants' detention pending deportation began on 11 August 1998, after they had served their prison sentence, and ended on 11 February 2001 with their release. That is, it took two and a half years, for which reason the Court considered that the Czech authorities had not shown due diligence in dealing with the applicants' case, and that the period of two and a half years could not be regarded as reasonable in the present case. Therefore, it found that there had been a violation of Art. 5 § 1 (f) of the Convention. The Court also compared the present case with other cases in which it had found that the requirement of "promptness", within the meaning of Art. 5 § 4, had not been complied with, and in view of the fact that during that period the applicants had been deprived of the right to lodge fresh applications, the Court held that the provision had been breached. This entails that States must therefore make an active effort to organise an expulsion, take concrete steps, and provide evidence of the efforts made to secure admission in order to comply with the requirement of diligence, with an example being where the authorities of a receiving State are particularly slow in identifying their own nationals.

In the *Mikolenko v. Estonia* case,[88] in 2009, the Estonian authorities ordered the arrest of the applicant, a former Soviet army officer, on 29 October 2003 with a view to deportation. His immediate deportation was not possible, as he did not have valid travel and identification documents. From 4 November 2003, the applicant was detained in the Harku deportation centre, a facility with a guarded perimeter, and then kept under visual and electronic surveillance until 8 October 2007, when the Tallinn Administrative Court refused to extend the applicant's detention any further. This Administrative Court found that the length of his detention had become disproportionate and, in those circumstances, unconstitutional, ordering his release. Meanwhile, the ECtHR held that: the deprivation of liberty must be "lawful" (i.e. ordered on the basis of a "procedure prescribed by law"); concordant with the purpose of protecting the individual against arbitrariness; the place and conditions of detention must be appropriate; the duration of detention must not exceed the duration reasonably necessary for the purpose sought. The Court reiterated that deprivation of liberty under Art. 5 § 1(f) is justified only as long as the removal proceedings are pending, or in the specific case that the applicant's detention for removal was extraordinarily long. The person was detained for more than 3 years and 11 months in this case, and the expulsion of the applicant had become practically impossible, since for all practical purposes it required his cooperation, which he was unwilling to offer. The Court found a violation of Art. 5 § 1 of the Convention by holding that the applicant's detention for such a long period, even if the conditions of detention as such were adequate, could not be justified by an expected change in the legal circumstances, and that the authorities in fact had other measures at their disposal than the applicant's prolonged detention in the removal centre.[89]

88 *Mikolenko v. Estonia*, App. No. 10664/05, 8 October 2009, Final 8 January 2010.

89 At the same time, Estonia was obliged to pay the amount of EUR 2 000 as moral damage, and to pay the amount of EUR 208 as expenses.

In conclusion, for detention to comply with the second part of Art. 5 § 1 (f), there must be a realistic prospect that expulsion or extradition will take effect, and detention cannot be said to be effected with a view to the alien's expulsion if expulsion is or becomes impossible because the alien is unwilling to give his/her cooperation (i.e. because cooperation is necessary for the procedure to be undertaken).

In the case of *Longa Yonkeu v. Latvia*,[90] in 2011, the complainant, originally from Cameroon, entered the EU through Latvia in 2008 travelling via Russia Federation, without applying for asylum at the time. On 22 March 2008, he tried to cross the border into Lithuania, where he was arrested on suspicion of using false documents and convicted, but applied for asylum. At Lithuania's request, the complainant was transferred to Latvia, where he was detained in an accommodation centre for foreign detainees from 23 December 2008 until the date of his deportation to Cameroon on 9 January 2010. The Court noted that the detention of the applicant until 20 May 2009 was justified and lawful, but from 20 May 2009 and onwards, the asylum procedure concerning the applicant's first application ended; thus, the applicant no longer enjoyed the status and rights of an asylum seeker in Latvia, and under domestic law, the detention of an asylum seeker after the date of a final decision in the asylum procedure was not authorised. However, the Court held that when the applicant was detained with a view to his expulsion in the same period from 20 May 2009 to January 2010, the detention was justified.

Thus, although the Court found a violation of Art. 5 § 1 of the Convention in respect of these periods and awarded the applicant the sum of EUR 9 000 in respect of non-material damage, in the grounds of its decision, it distinguished between detention following a rejected asylum application and detention necessary to enforce a removal order. It specifically found that after the rejection of an asylum application, a person cannot be detained in a new asylum procedure or following the rejection of that application. Meanwhile, the detention imposed with a view to expulsion was justified. As can be seen, the ECtHR has not remained consistent with its practice in the *Mikolenko v. Estonia* case, as it condemned the excessive length of detention for expulsion in one case and qualified as justified the detention ordered for expulsion in another.

This inconsistency takes on new forms in the case that follows. In the case of *M and Others v. Bulgaria*,[91] in 2011, the applicants were an Afghan national, his wife (Armenian national), and their two minor children living in Bulgaria. M entered Bulgaria in 1998, where he converted to Christianity in 2001 and was granted refugee status in 2004 on the grounds that he faced religious persecution in Afghanistan. On 6 December 2005, the Director of the National Security Service, on charges of migrant smuggling, ordered M's detention for deportation to an unspecified country on the grounds that he posed a "serious threat to national security", but because the Afghan Embassy in Sofia refused to issue an identity document, he could not be

90 *Longa Yonkeu v. Latvia*, App. No. 57229/09, 15 November 2011, Final 15 February 2012.
91 *M and Others v. Bulgaria*, App. No. 41416/08, 26 July 2011, Final 26 October 2011.

deported. On 1 September 2008, the ECtHR issued an interim measure under Art. 39 of Regulation 39, requiring Bulgaria to refrain from expelling M to Afghanistan until further notice. M was released on 3 July 2009.

In the light of the above facts, the Court observed that detention pending expulsion is compatible with Art. 5(1) only if the expulsion procedure is ongoing and carried out with due diligence. The Court ruled that M's detention was not in compliance with Art. 5(1) because of (a) M's detention for more than two years, (b) the 14-month delay between the order and the first application for identity documents, (c) the 19-month delay between the first application and the second application, (d) and the uncertainty caused by two separate detention orders. The ECtHR also found a violation of Art. 5(4) because the Bulgarian courts, by requiring M to follow two separate procedures to challenge the two detention orders, did not provide an effective review of his detention. In the first procedure, the Court refused to examine his appeal, while in the second the appeal took two and a half years to be allowed and did not result in his release. The ECtHR found that the Bulgarian courts, which examined M's appeal only formally, had given the authorities too wide a margin of appreciation on grounds of national security, without there being any evidence to justify the detention order and the risk of arbitrariness resulting from this procedure was considered a violation of Art. 8 (right to respect for his private and family life). In addition, the ECHR observed that, in Bulgaria, the remedies against expulsion on grounds of national security did not have suspensive effect and were inadequate. Therefore, a violation of Art. 13 (Right to an effective remedy) was found.

Importantly, the Court noted that, in view of a number of previous cases in which similar infringements on the part of Bulgaria had been found, it was necessary to assist the Bulgarian Government in the enforcement of these judgments. The Court recommended measures including amendments to aliens legislation to improve the judicial review of expulsion orders, ensure that the country of destination is indicated in a legally binding act, and give automatic suspensive effect to expulsion appeals. As can be seen, not even national security interests or the fight against terrorism can be successfully invoked by Member States before the Court. Moreover, the Court decided to assist the Bulgarian government in adapting its legislation in this field.

In the case of *Nabil and Others v. Hungary*,[92] in 2015, three Somali nationals entered Hungary from Serbia, where they were then intercepted and arrested by police in November 2011 for deportation. On 9 November 2011, the applicants applied for asylum and their detention was extended until 24 March 2012 three times by a court, which always based its decision on section 54.1(b) of the Immigration Act,[93] under which detention of third-country nationals is possible when they refuse to leave the country or can be presumed to be delaying or preventing the enforcement of removal. Regarding the first three days of the applicants' detention, a period during which they had not yet applied for asylum, the Court was satisfied that the measure

92 *Nabil and Others v. Hungary*, App. No. 62116/12, 22 September 2015, Final 22 December 2015.
93 Law no. LXXX of 2007 regarding asylum in Hungary published in the OJ of Hungary, no. 83/2007.

served the purpose of detaining a person with a view to removal, in accordance with the second part of Art. 5(1)(f) of the Convention and Art. 54(1)(b) of the Hungarian Immigration Act. The Court also noted that the second part of Art. 5(1)(f) of the Convention was not applicable to the applicants. Regarding compliance with domestic law, the Court found that none of the four court judgments that reviewed the lawfulness of the applicants' detention between November 2011 and February 2012 effectively assessed whether the domestic legal conditions for the applicants' continued detention were met, and found a violation of Art. 5 §1 of the Convention between 8 November 2011 and 3 March 2012.

In the *O.M. v. Hungary* case,[94] in 2016, the applicant crossed the Hungarian border from Serbia in June 2014, where he was detained by a patrol of border guards as he was unable to produce supporting documents regarding his identity or his right to stay in the country. He applied for asylum, saying he fled Iran because of his homosexuality, and that criminal proceedings had been initiated against him in Iran for this reason. The competent court ordered his detention from 26 June 2014 to 22 August 2014. The complainant requested on several occasions to be released from detention or transferred to an open facility, explaining that he found it difficult to cope with asylum detention for fear of harassment because of his sexual orientation. His multiple requests were rejected. The complainant was recognised as a refugee by the Hungarian authorities on 31 October 2014. The ECtHR found that the obligation to cooperate does not require an asylum seeker to provide documentary evidence of identity and nationality, but requires cooperation with the asylum authority (e.g. to disclose the circumstances under which he fled; communicate relevant personal information; facilitate clarification of his identity, etc.). Furthermore, it can be inferred from section 5(3) of the Hungarian Asylum Act that the submission of documents is not the only option for asylum seekers to prove their identity and nationality. Therefore, the Court concluded that O.M.'s situation was not assessed in a sufficiently individualised manner as required by national law.

The ECHR also held that national authorities should pay particular attention to asylum seekers who claim to be part of a vulnerable group in their country of origin, in order to avoid situations that may reproduce the difficult situation that forced these persons to flee in the first place. In O.M.'s case, the Hungarian authorities failed to do this when they ordered his detention without considering the extent to which him, as a vulnerable person—e.g. LGBT persons such as the applicant—would be safe or not in detention among other detained persons, many of whom come from countries with widespread cultural or religious prejudices against people of different sexual orientations. The ECHR therefore found once again that the national authorities had failed to make an individualised assessment of the applicant's case and his membership of a vulnerable group by virtue of his sexuality, and in the light of all these considerations decided that the applicant's detention had been borderline arbitrary in violation of Art. 5 § 1 ECHR. It can be seen that in the Court's view,

94 *O.M. v. Hungary*, App. No. 9912/15, 5 July 2016, Final 5 October 2016.

the grounds of political persecution or those based on sexual orientation become absolutes which, in addition to not having to be proven, unconditionally justify the asylum application.

In *M.M. v. Bulgaria*,[95] in 2017, the complainant, M.M., was a stateless person of Palestinian origin born in 1991 in Damascus, who arrived in Bulgaria in 2008, and lived in Sofia. After two applications for a refugee status were rejected, the Refugee Agency granted him humanitarian status, but by an order of 13 July 2013, the National Security Agency withdrew the complainant's residence permit and ordered his expulsion, as well as a ten-year entry ban. This was on the grounds that his presence in the country posed a threat to national security. He was also held in detention from 13 July 2013 until 16 December 2014, a time during which he was in court with the Bulgarian authorities. The Court reiterated that the requirement of a "short time" must be assessed in the light of the circumstances of each case and, inter alia, the complexity of the issues to be decided; in the present case, the examination of the applicant's appeal appeared to exceed the time limits provided for under domestic law both at first instance and on appeal. The Court reiterates in this regard that it is for the Contracting States to organise their judicial systems in such a way as to enable their courts to meet the requirements of the Convention and, in particular, of Art. 5 § 4.[96] The time that elapsed since the lodging of the appeal on 30 December 2013, namely approximately nine months, could not be considered as meeting the "short period" requirement of this provision, and therefore a violation of Art. 5 § 4 occurred. The conclusion that can be drawn from this is that regardless of the national procedural provisions devised by a Member State, it is incumbent on the courts to comply with the requirement of a speedy/rapid disposal of cases involving asylum, expulsion, or even extradition.

In the case of *Al Husin v. Bosnia and Herzegovina*,[97] in 2019, the Syrian citizen Al Husin had been in the former Yugoslav state since 1983 and obtained citizenship, but his Bosnian citizenship was withdrawn in 2007 due to a criminal offence, which led him to apply for asylum. In 2008, following the rejection of his application, he was placed in an immigration centre for security reasons. Although the ECHR found, at the applicant's request, that deportation to Syria would expose him to the risk of being subjected to treatment contrary to Art. 3 of the Convention, and that his detention constituted a violation of Art. 5 § 1 of the Convention, he was held in detention for more than eight years, while 38 states appealed by Bosnia and Herzegovina rejected his removal. The Court reiterated the principle that Art. 5 § 1 (f) does not require detention to be regarded as reasonably necessary, but that it will only be justified as long as expulsion or extradition proceedings are pending and are carried out with due diligence. The Court also drew attention to the principle of legality

95 *M.M. v. Bulgaria*, App. No. 75832/13, 8 June 2017, Final 8 September 2017.

96 The just satisfaction awarded was in the amount of EUR 2 000 (non-pecuniary damage) and EUR 3 000 (costs and expenses).

97 *Al Husin v. Bosnia and Herzegovina (no. 2)*, App. No. 10112/16, 25 June 2019.

and avoidance of arbitrariness. In the present case, the reasons for the detention of the applicant did not remain valid for the entire period of eight years because, after contacting more than 40 countries with a view to expulsion, there was no realistic prospect of expulsion. In this respect, the Court found a violation of Art. 5 § 1(f) for the period from August 2014 to February 2016.

However, in the end the question arises, how should we regulate the situation of persons who constitute a danger to national security, cannot be expelled to their country of origin, and are not received by any state of the world community? We may need to wait for a 9.11-type disaster to occur before we can act reactively. In my opinion, states cannot refuse to receive their own citizens expelled from other countries without violating their own national legislation, and the prospect of returning "problem persons" to the countries from which they have fled must remain a reason for them to refrain from committing anti-social acts, regardless of their scale.

The case of *Shiksaitov v. Slovakia*,[98] in 2020, mainly concerns the alleged unlawfulness of the applicant's provisional arrest in Slovakia, when he had previously obtained refugee status in Sweden and was travelling from Sweden to Ukraine, and his subsequent detention for one year, 9 months, and 18 days with a view to extradition to the Russia Federation. As regards the applicant's detention pending extradition, the Court agreed with the national courts that such detention was not fundamentally prohibited, as the decisions of the Swedish authorities were not binding on Slovakia. Moreover, it was acceptable that the Slovak authorities had examined the applicant's case in detail, especially as the Swedish authorities had not checked his status with Interpol. In general, the detention of the applicant was justified by the need to detain him in Slovakia in order to establish whether there were any legal or factual obstacles to his extradition. In its judgment, the ECtHR unanimously found that there had been a violation of Art. 5 § 1 (Right to liberty and security) and Art. 5 § 5 (Right to compensation in case of unlawful arrest) of the ECHR. The Court found in particular that the applicant's arrest and individual detention orders were in conformity with Slovak law and the Convention. However, the total duration of the applicant's detention was too long, and the grounds for his detention ceased to be valid, thus violating his rights. The Court also found that the applicant did not have an enforceable right to compensation for the above violation.[99] It follows from this judgment that the acquisition of refugee status in a particular country does not prevent other States from carrying out extradition proceedings at the request of a third State if the refugee arrives in their territory.

In *Komissarov v. the Czech Republic*,[100] in 2022, the Court held that in situations where extradition and asylum procedures run concurrently, domestic law provides for separate time-limits for the processing of the asylum application and the rendering of a decision by the competent authorities. Still, in both cases, the decision

98 ECtHR, *Shiksaitov v. Slovakia*, App. Nos. 56751/16 and 33762/17, 10 December 2020.

99 Slovakia was ordered to pay EUR 8500 for moral damages and EUR 8000 in costs and expenses.

100 *Komissarov v. the Czech Republic*, App. No. 20611/17, 3 February 2022, Final 3 May 2022.

must be taken "without undue delay". This was unlike the present case, where the asylum procedure took almost 17 months, instead of the six months provided for under domestic law. In the Court's view, strict time-limits for examining asylum applications constitute an important safeguard against arbitrariness, so under both domestic law and the Convention, the domestic authorities had an obligation to demonstrate due diligence. Thus, as a result of the delays in the asylum procedure, the length of detention pending extradition did not comply with domestic law, constituting a violation of Art. 5 § 1 (f) of the Convention.[101]

In *Nikoghosyan and Others v. Poland*,[102] in 2022, the applicants, five Armenian citizens and members of the same family (i.e. parents and children) were caught in November 2016 while trying to illegally cross the Polish border. Although they tried to apply for international protection, they were automatically placed, as asylum seekers, in detention for six months without an individualised assessment of their specific situations and needs. While the Court acknowledged that the domestic courts had considered the alternative of imposing a less restrictive measure on the applicants, it also noted that after the domestic courts verified that the applicants had only EUR 50 on them and no address in Poland, they simply concluded that the applicants did not qualify for any alternative measure under the law. The Court concluded that the detention of both the adult and the child applicants for a period of almost six months was not a measure of last resort for which there was no alternative. Accordingly, the Court found a violation of Art. 5 § 1 (f) of the Convention, and ordered Poland to pay the sum of EUR 15 000 by way of non-material damage.

The case of *M.M. v. Hungary*,[103] in 2023, concerns the detention of an applicant pending asylum proceedings. Specifically, the applicant, after illegally crossing the border into Hungary, lodged an asylum application on 29 August 2014, on which day the asylum authority initiated the asylum procedure and ordered his detention on the basis of national law.[104] The authority referred to the need to clarify the applicant's identity, given that he had no travel documents, no resources to subsist, and there was thus a risk of absconding during the verification procedure. The Court noted that the application was similar to that in *O.M. v. Hungary*, in which the Court had found a violation of Art. 5 § 1, and where the decisions ordering and extending the applicant's detention had referred to the need to clarify his identity and prevent his escape, but where the reasoning was not sufficiently individualised to justify the measure in question, as also required by national law. Finally, the Court concluded that there had been a violation of Art. 5 § 1 of the Convention regarding the applicant's detention from 29 August to 26 November 2014, and decided to award him the sum of EUR 1 500 by way of costs.

101 The Czech Republic was ordered to pay the sum of EUR 7500 in moral damages and EUR 1600 in costs and expenses.

102 *Nikoghosyan and Others v. Poland*, App. No. 14743/17, 3 March 2022, Final 3 June 2022.

103 *M.M. v. Hungary,* App. No. 26819/15, 4 May 2023.

104 Art. 31/A paragraph (1) letters (a) and (c) of Law no. LXXX of 2007 regarding the asylum published in JO of Hungary, no. 83/2007.

In *H.N. v. Hungary*,[105] in 2023, the applicant had irregularly crossed the Hungarian border and lodged an application for asylum on 12 August 2014. On 13 August 2014, the asylum authority initiated the asylum procedure and ordered his detention on the basis of the "Asylum Act".[106] It referred to the need to clarify the applicant's identity in view of the fact that he had no travel documents, the lack of connections in the country, or resources to subsist and the resulting risk of absconding. The Court, finding that the case was similar to that in *O.M. v. Hungary*, held that there had been a violation of Art. 5 § 1 of the Convention in relation to the applicant's detention.[107]

6.3. Art. 6: Right to a fair trial

Art. 6 guarantees the right to a fair trial, namely the right of a person to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, which shall decide either on the violation of his civil rights and obligations or on the merits of any criminal charge against him/her. Forms of unfairness[108] regarding this right could include the following: conviction *in absentia*, without the possibility of a subsequent determination of the merits of the charge; a trial that is a summary in nature and conducted with total disregard for the rights of the defence; detention without any access to an independent and impartial tribunal for the legality of the detention to be reviewed; a deliberate and systematic denial of access to a lawyer, particularly for a person detained in a foreign country; the use in criminal proceedings of statements obtained as a result of torture of the accused or a third person, thus being in violation of Art. 3.

There was one case from Central and Eastern Europe in the asylum context where non-compliance with Art. 6 was raised. In *Andrejeva v. Latvia*,[109] in 2009, the applicant, Natālija Andrejeva, lived in Latvia from 1954 (age 12 years at the time) until her retirement in 1997, when she had the status of 'non-citizen with permanent residence'. When calculating her pension, the Latvian authorities did not consider the 17 years during which she worked for companies based outside Latvia, although Latvian citizens are entitled to a pension for all periods worked, including those worked outside Latvian territory and regardless of their social security contributions. On judicial review, a full bench of the Supreme Court of Justice started the hearing earlier than the time notified to the applicant, and subsequently refused the applicant's request for reconsideration. In the light of the above, the applicant submitted that the Latvian authorities had infringed Arts. 6 and 14 of the ECHR. The Court pointed out, first, that when a State chooses to establish a pension scheme,

105 *H.N. v. Hungary,* App. No. 26250/15, 4 May 2023.
106 *Ibid*.
107 The Court awarded the applicant EUR 6 500 as moral damages, and EUR 1500 as expenses.
108 *Harkins v. United Kingdom*, paras. 62–65.
109 *Andrejeva v. Latvia [GC]*, App. No. 55707/00, 18 February 2009, ECHR 2009.

the individual rights and interests arising therefrom fall within the scope of Art. 1 of Protocol No. 1,[110] irrespective of the payment of contributions and the means by which the pension scheme is financed. Second, it stated that the applicant's pecuniary claim fell within the scope of the aforementioned article, and that the applicant was refused the pension in question solely because she was not a Latvian national. The refusal of the national authorities to consider the applicant's work "outside Latvian territory" was based solely on her nationality, since it was not disputed that a Latvian national in the same situation as the applicant, who had worked in the same situation/job during the same period, would have received the disputed part of the retirement pension. The Court found that, in the applicant's case, a "reasonable relationship of proportionality" could not be justified to make the contested difference in treatment compatible with the requirements of Art. 14.

As regards Art. 6 § 1 of the Convention, the Court found that the applicant had been a party to the administrative proceedings which had been initiated at her request. Accordingly, as the main protagonist in those proceedings, she should have enjoyed all the guarantees deriving from the adversarial principle, and had the right to be present at the hearing of her case, a right which she had been unable to exercise, although she had wished to do so.[111]

6.4. Art. 8: Right of respect for private and family life

According to Art. 8, everyone has the right of respect for his/her private and family life, his/her home, and his/her correspondence, and the public authorities may interfere only in exceptional cases. These interferences are justified on grounds of national security, public safety, the economic well-being of the country, protection of the public order, prevention of criminal offences, protection of health, morals, and rights and freedom of others. In the field of migration, states often intervene in the exercise of this right on grounds of national security.

The Court set out the relevant criteria for assessing compatibility with Art. 8 of the Convention in the *Üner v. the Netherlands*[112] and *Savran v. Denmark* cases,[113] as follows: the nature and gravity of the offence committed by the applicant; the length of the applicant's stay in the country from which he/she is to be expelled; the time which has elapsed since the offence was committed and the applicant's

110 'Every natural or legal person has the right to respect for his property. No one shall be deprived of his property except in the public interest and subject to the conditions prescribed by law and by the general principles of international law. The foregoing provisions shall be without prejudice to the right of States to adopt such laws as they deem necessary to regulate the use of property in the public interest or to provide for the payment of taxes or other contributions, or fines'. Art. 1 of Protocol No. 1 to the ECHR, Protection of Property

111 The claimant was awarded EUR 5 000 for all the damage suffered, in accordance with Art. 41 of the Convention.

112 *Üner v. The Netherlands (GC)*, App. No. 46410/99, Judgment from 18 October 2006, paras. 54–60.

113 *Savran v. Denmark*, App. No. 57467/15, Judgment 1 October 2019, para. 182.

conduct during that period; the nationalities of the various persons concerned; the applicant's family situation, such as the length of the marriage and other factors expressing the effectiveness of a couple's family life; whether the husband knew of the offence at the time he entered into a family relationship; whether there are children of the marriage and, if so, their ages; the seriousness of the difficulties the spouse is likely to encounter in the country to which the applicant is to be removed; the best interests and welfare of the children, in particular the seriousness of the difficulties any children of the applicant are likely to encounter in the country to which the applicant is to be removed; the strength of social, cultural, and family ties with the host country and the country of destination; the limited or unlimited duration of the removal; medical aspects.

The related cases originating from Eastern and Central European countries are those presented hereinafter. In the *Slivenko and Others v. Latvia*[114] case, in 2003, the applicants Tatjana Slivenko (hereinafter T.S.) and her daughter Karina Slivenko (hereinafter K.S.), of Russian origin, who had been resident in Latvia since 1993, were entered into the Latvian residents' register as "former citizens of the USSR". Meanwhile, Nikolay Slivenko (hereinafter N.S.) was refused a residence permit in 1994 because he was a former Russian army officer. Following the issuance of an expulsion order in 1996, N.S. moved to Russia, while the applicants remained in Latvia, but following continued persecution by the Latvian authorities, T.S. and K.S. also moved to Russia in 1999, leaving T.S.'s elderly parents without care in Latvia and unable to return to Latvia until 2001.

The applicants alleged a violation of Art. 14 of the Convention in conjunction with Art. 8 because of the difference in legal treatment between the family members of Russian military officers who were forced to leave Latvia, and other Russian-speaking on a general finding that their removal was necessary for national security was not as such compatible with Art. 8, nor was the implementation of such a scheme without no possibility to consider the individual circumstances of the applicants T.S. and K.S., as they had already integrated into Latvian society at the time and could not be considered as endangering national security. This is because they were part of T.S.'s father's family, who had retired in 1986, remained in Latvia, and was not considered to present any such danger himself. Therefore, the Court found a violation of Art. 8 of the ECHR in respect of K.S. and T.S., indicating that there was no need to deal separately with the complaint based on Art. 14.[115]

In *Weller v. Hungary*,[116] in 2009, a mother from Romania who did not hold Hungarian nationality but lived in Hungary was refused a maternity allowance, although her husband and children had Hungarian nationality. The Court observed that, on the basis of the relevant provisions of the law, a family with children of a Hungarian mother and a foreign father is entitled to maternity benefits. However, this was not

114 *Slivenko and Others v. Latvia*, App. No. 48321/99, Judgment from 9 October 2003.
115 Latvia was also ordered to pay each claimant EUR 10000 in non-pecuniary damage.
116 *Weller v. Hungary*, App. No. 44399/05, 31 March 2009, Final 30 June 2009.

the case for the second and third applicants, as their father was Hungarian and their mother was foreign. They were therefore prevented from receiving such an allowance on the basis of that difference. The Court found that the right to an allowance due to a family cannot depend on which of the children's two biological parents is a Hungarian citizen. It then concluded that this difference in treatment amounted to discrimination, and thus violated Art. 14 of the Convention in conjunction with Art. 8 in the present case in respect of each of the applicants.[117]

In the *Bistieva and Others v. Poland* case,[118] in 2018, a Russian national and her three children were detained for almost six months in the Kętrzyn guard centre for foreigners. Originally, the applicant, Mrs. Bistieva, arrived in Poland with her husband and first two children in 2012. After their asylum application was rejected, the family fled to Germany, where Mrs. Bistieva had a third child. German authorities sent her and the children back to Poland in January 2014, where they were detained and the applicant applied for refugee status for herself and her three children. The Polish courts found that the decision to place Mrs. Bistieva in administrative detention was justified because she was an illegal alien in Poland, and had illegally crossed the German border. They were released in June 2014, eventually moving back to Germany. The applicants complained that their detention violated their rights under Arts. 5 and 8 of the ECHR.

Regarding the applicants' complaints under Art. 8 ECHR, the Court found that the applicants' detention interfered with the effective exercise of their family life, but that this interference could initially be considered justified because the family presented a clear risk of absconding. However, reiterating the need to consider other relevant instruments of international law,[119] and the broad consensus in international law on the paramount importance of the principle of the best interests of the child, the ECHR found that the Polish authorities failed to assess the impact of detention on the family and children in particular (i.e. failed to fulfil their obligation to consider family detention as a measure of last resort), and failed to consider alternative measures. Respect for the best interests of the child cannot be limited to keeping the family together, but rather includes taking all necessary measures to limit, as far as possible, the detention of families with children. The Court, therefore, concluded that, even considering the risk of the family absconding, the authorities had not provided sufficient grounds to justify the detention for almost six months, which constituted a violation of Art. 8 ECHR.[120] The ECtHR also declared the applicants' complaints under Art. 5 inadmissible, as they had not exhausted the domestic remedies available to them to challenge the lawfulness of their detention.

117 The Court ordered Hungary to pay EUR 720 in material damages, EUR 1500 in non-material damages, and EUR 950 in costs and expenses.

118 *Bistieva and Others v. Poland*, App. No. 75157/14, 10 April 2018, Final 10 July 2018.

119 In particular, the Convention on the Rights of the Child adopted by the United Nations General Assembly on 20 November 1989, which entered into force on 2 September 1990.

120 The applicant was also awarded the sum of EUR 12000 in respect of non-material damage.

In the *Hoti v. Croatia* case,[121] in 2018, the applicant was born in 1962 in the autonomous region of Kosovo in the former Yugoslavia (Socialist Federal Republic of Yugoslavia), and his parents were political refugees from Albania. In 1979, he moved to Croatia, where he has lived ever since without having the nationality of any State. In 2014, his right of residence in Croatia was no longer extended on the grounds that he could not obtain a travel document from the Kosovo authorities. The Court found that the respondent State, contrary to the principles arising from the United Nations Convention relating to the Status of Stateless Persons,[122] had failed to comply with its positive obligation to provide an effective and accessible procedure or combination of procedures enabling the applicant to obtain a decision on matters relating to his continued residence and status in Croatia, with due regard for his privacy interests. This constituted a violation of Art. 8, since this stateless immigrant had been unable to regularise his residence status following the break-up of the predecessor State, despite having been tolerated for many years.[123]

In the *Sudita Keita v. Hungary* case,[124] in 2020, the complainant was a stateless person (of Somali and Nigerian origin) who had been living in Budapest since 2002 and was unable to regularise his legal status as a refugee. When the question of his expulsion arose, the applicant, who had completed a heavy machinery operator training course in 2010 and had been living with his girlfriend, a Hungarian citizen, in Budapest since 2009, invoked in particular Art. 8 of the ECHR. The complaint related to the authorities' long-standing reluctance to regularise his situation, claiming that this had a negative impact on his access to healthcare, employment, and his right to marry. The Court found that in fact, contrary to the principles arising from the 1954 UN Convention relating to the Status of Stateless Persons, the applicant, a stateless person, was required to meet requirements which, by virtue of his status, he could not meet. The Court, in para. 41 of the judgment,[125] found a violation of Art. 8 in an extremely unconvincing formulation, saying that:

> Having regard to the combined effect of the above elements, the Court is not satisfied that, in the particular circumstances of the applicant's case, the respondent State has complied with its positive obligation to provide an effective and accessible procedure or combination of procedures enabling the applicant to obtain a decision on the question of his status in Hungary with due regard to his privacy interests under Art. 8 of the Convention.[126]

121 *Hoti v. Croatia*, App. No. 63311/14, 26 April 2018, Final 26 July 2018.
122 1954 UN Convention relating to the Status of Stateless Persons.
123 Croatia was also ordered to pay EUR 7 500 in moral damages.
124 *Sudita Keita v. Hungary*, App. No. 42321/15, 12 May 2020.
125 The Court awarded the claimant EUR 8 000 in moral damages and EUR 4 000 in costs.
126 See also *Abuhmaid v. Ukraine*, App. No. 31183/13 § 126, 12 January 2017.

6.5. Art. 13: Right to an effective remedy

Any person whose rights and freedom, as recognised by the Convention, have been violated, has the right to an effective remedy before a national court or tribunal, even when the violation is allegedly due to persons acting in an official capacity. By any person, we also mean migrants, who must have this right before they can turn to the international court, the ECHR. An effective remedy should include the following criteria:

> i. The remedy must be effective in practice as well as in law. It is not enough that remedies are available in theory; they must be accessible in practice, provide adequate redress and not be hindered by acts or omissions of state authorities, and the timeliness of complaints procedures must not take precedence over the effectiveness of the remedy.
> ii. If a single remedy does not fully meet the requirements of Art. 13 ECHR in itself, the full range of remedies available under domestic law may do so.
> iii. Where there are substantial grounds for fearing that the deportation of a person will result in a real risk of treatment contrary to Arts. 2 and 3 of the ECHR, there must be an independent and rigorous examination of any complaint made by the person concerned and of the remedy with automatic suspensive effect.[127]

In the *D v. Bulgaria* case,[128] in 2021, the Court found that, regarding procedural guarantees, the applicant was not: provided with the assistance of an interpreter or translator; provided with information on his rights as an asylum seeker (e.g. on the relevant procedures); granted access to a lawyer or a representative of specialised organisations, who would have helped him assess whether his circumstances entitled him to international protection; the Bulgarian Ombudsman was not consulted with a view to supervising the expulsion of the aliens concerned, contrary to the express legal requirement to that effect. These irregularities were for aliens was issued late and sent by e-mail to the centre, while the complainant's transfer to the border was already in progress. The order contained an annotation to the effect that the complainant refused to sign it, whereas, and contrary to the explanations provided, it is clear that the document could not have been physically handed over. The Court found that as a result of this haste and the failure to follow the relevant internal procedures, which were nevertheless designed to provide protection against the prospect of a swift removal without an examination of the individual circumstances, the applicant was in practice deprived of an assessment of the risk he allegedly faced if returned. At the same time, the expulsion order was implemented immediately, without the applicant being given the opportunity to understand its contents, and thus he was deprived of the possibility under domestic law to apply to the courts for

127 FRA. 2021, p. 2.
128 *D v. Bulgaria*, App. No. 29447/17, 20 July 2021.

a stay of execution of the order, such that the remedies available were in practice ineffective and inaccessible. Accordingly, the ECtHR found a violation of Art. 13 in relation to Art. 3, as the applicant did not have an effective remedy available to him, although domestic law provided for this.[129]

In the *Auad v. Bulgaria* case,[130] in 2012, the applicant, a stateless person of Palestinian origin, applied for asylum shortly after arriving in Bulgaria in May 2009. By a decision of October 2009, the State Refugee Agency refused him a refugee status, but granted him humanitarian protection on the grounds that there was "a real danger and risk of interference with the applicant's life and person". However, the following month, the head of the State Agency for National Security issued an order expelling the applicant, on the grounds that he was suspected of terrorism and that his presence in Bulgaria posed a serious threat to national security. The Court held that a planned expulsion would violate Art. 3 of the Convention if it was established that there were reasonable grounds for believing that there was a real risk that the person concerned would be subjected in the country of destination to treatment prohibited by Art. 3, even if it was considered to constitute a threat to national security. Therefore, any national security considerations in the applicant's case were irrelevant to the only important issue: whether his expulsion would give rise to a real risk of prohibited treatment. The Court also found a violation of Art. 13, because the Supreme Administrative Court expressly refused to address the issue of risk, even if an irreversible risk of death or ill-treatment in the receiving State was alleged, on the grounds that it was irrelevant, and the Government had not indicated any procedure by which the applicant could challenge the authorities' assessment of his claims.

At the same time, in view of the serious and irreversible nature of the consequences of expelling aliens to countries where they might face ill-treatment, and the apparent lack of sufficient safeguards in Bulgarian law in this regard, the Court determined that it appeared necessary to assist the Government in the execution of its obligations under Art. 46 § 1 of the Convention.[131]

6.6. Art. 14: Prohibition of discrimination

At first sight, Art. 14 sight simply supplements the other substantive provisions of the Convention and its Protocols, meaning that Art. 14 does not prohibit discrimination as such, but only discrimination in "the exercise of the rights and freedoms recognised by the Convention". However, the accessory character of Art. 14 does not imply, in any case, that its applicability would depend on the existence of a violation of the substantive provision.[132] This relative autonomy of Art. 14 regarding its applicability entails certain procedural consequences, since in some cases the Court first

129 The Bulgarian State was ordered to pay EUR 15000 in moral damages.
130 *Auad v. Bulgaria*, App. No. 46390/10, 11 October 2011, Final 11 January 2012.
131 EUR 3500 was also awarded as non-material damages.
132 *Carson and Others v. United Kingdom*, 2010, p. 63; *Sidabras and Džiautas v. Lithuania*, 2004, p. 38.

examined the alleged violation of the substantive provision, and then, separately, the alleged violation of Art. 14 in conjunction with the substantive provision in question. Meanwhile, in other cases, the Court found a violation of a substantive provision in conjunction with Art. 14, and did not consider it necessary to examine the violation of the substantive provision separately.[133]

Art. 1 of Protocol No. 12 extends the scope of protection against discrimination to "any right provided by law", therefore establishing a general prohibition of discrimination and an "autonomous" right not to be discriminated against.[134] According to the Court's case law, the concept of discrimination, prohibited by both Art. 14 of the Convention and Art. 1 of Protocol No. 12, must be interpreted in the same way.[135]

Discrimination has also been showcased in several Central and Eastern European cases, which are explored below. In the case of *Ponomaryov v. Bulgaria*,[136] in 2011, the applicants A. Ponomaryov and V. Ponomaryov were brothers of Russian nationality who, in 1994, settled in Bulgaria with their mother, A.P., a Russian national, who, following a divorce, remarried a Bulgarian national and was then granted a permanent residence permit on the basis of her marriage. The applicants had the right of residence in Bulgaria on the basis of their mother's permit. After completing their studies in 10 years in Bulgaria and reaching the age of 18 years, the Bulgarian authorities made the granting of a permanent residence permit and the issue of the graduation documents conditional on the payment of fees.[137] The Court first found that the complaint fell within the scope of Art. 2 of Protocol No. 1, and this was sufficient for Art. 14 of the Convention to be applicable, namely that the applicants were clearly treated less favourably than other persons in a similar relevant situation because of a personal characteristic. The Court also recalled that:

> […] discrimination means treating differently, without objective and reasonable justification, persons in similar relevant situations; in other words, there is discrimination if the distinction in question does not pursue a legitimate aim or if the means used to attain that aim are not reasonably proportionate to it.[138]

133 *Guide to Article 14 of the European Convention on Human Rights and Article 1 of Protocol No. 12 to the Convention. Prohibition of discrimination*. Updated 31 August 2021, p. 6. Available at: http://ier.gov.ro/wp-content/uploads/2018/11/Guide-Art-14_Art-1-P12_-31_08_2021_RO.pdf (Accessed 14 October 2023).

134 *Ibid*, p. 9.

135 *Sejdić and Finci v. Bosnia and Herzegovina*, 2009, paras. 55–56.

136 *Ponomaryovi v. Bulgaria*, App. No. 5335/05, ECHR 2011, Final 28 November 2011.

137 'No one shall be denied the right to education. The State, in the exercise of the functions which it assumes in the field of education and teaching, shall respect the right of parents to ensure such education and teaching in conformity with their religious and philosophical convictions'. Art. 2 of Protocol No. 1 to the ECHR.

138 See in this respect *D.H. and Others v. Czech Republic [GC]*, App. No. 57325/2000, paras. 175 and 196, ECHR 2007-IV.

Accordingly, the Court found that, in the specific circumstances, the requirement for the applicants to pay tuition fees for secondary education because of their nationality and immigration status was not justified. There had therefore been a violation of Art. 14 of the Convention in conjunction with Art. 2 of Protocol No. 1.[139]

6.7. Arts. 2 and 4 of Protocol No. 4: Freedom of movement

According to Art. 2(1) of Protocol No. 4, "Everyone lawfully within the territory of a State shall have the right to liberty of movement and freedom to choose his residence", and according to Art. 2(2) of Protocol No. 4, "Everyone is free to leave any country, including his own". However, the exercise of these rights may be restricted for reasons of national security, public safety, the maintenance of public order, the prevention of criminal offences, the protection of health or morals, or the protection of the rights and freedoms of others. Ultimately, this restriction can only be put into practice through the expulsion of aliens, but according to Art. 4 of the same Protocol No. 4, this can only be done individually, with collective expulsions of aliens being prohibited.

The term "expulsion" here refers to any forcible removal of an alien from the territory, irrespective of the legality, length of stay, place of detention, status, or conduct of the person. An expulsion is characterised as "collective" when there is no reasonable and objective examination of the particular case of each individual within a group, who must be given the opportunity to present their case to the competent authorities individually. The size of the expelled group is irrelevant, as even two individuals may be sufficient to form a group[140].

Hereinafter, ECHR case law in Eastern and Central European cases is presented. In the *Soering Stamose v. Bulgaria* case,[141] in 2013, the applicant was deported from the United States of America to his home country of Bulgaria in 2003, after accepting paid employment in violation of the conditions attached to his student visa. Upon his arrival in the country, the Bulgarian authorities imposed a two-year travel ban on the complainant, and confiscated his passport after receiving a letter from the US Embassy. An application for judicial review of the Bulgarian authorities' decisions by the applicant was rejected. The Court pointed out that a prohibition on leaving his own country imposed in connection with a violation of the immigration law of another State could be considered justified in certain compelling circumstances, but the automatic imposition of such a measure without regard to the individual circumstances of the person concerned could be characterised as unnecessary in a democratic society. Accordingly, the Court unanimously found a violation of Art. 2 of Protocol No. 4 to the Convention and Art. 13 of the Convention.

139 The ECHR awarded EUR 2000 in moral damages to the two applicants and EUR 2000 in legal costs.
140 FRA, 2020, p. 6.
141 *Soering Stamose v. Bulgaria*, App. No. 29713/05, ECHR 2012, Final 27 February 2013.

In *Shahzad v. Hungary*,[142] in 2021, the Court interpreted that the rejection of the migrant on a narrow strip of State territory on the outside of a border fence amounted to expulsion after a group of 12 Pakistani nationals, including the applicant, entered Hungary irregularly in August 2016. They cut a hole in the Hungarian-Serbian border fence, there were intercepted, detained, and escorted to the nearest border fence, and then sent by police officers through the gate on the outer side of the fence into Serbia. Importantly, the applicant was sent to the strip of land between the border fence and the actual border between Hungary and Serbia, which belongs to Hungary, formally meaning that the contested measure does not fall within the scope of this provision. However, the Court found that the applicant's move to the outer side of the border fence amounted to expulsion within the meaning of Art. 4 of Protocol No. 4, since the narrow strip of land without apparent infrastructure on the outer side of that fence served only a technical purpose related to border management, and in order to enter Hungary, the expelled migrants had to go to one of the transit areas, which normally involved crossing Serbia.[143] If only the formal status of the strip of land on the outer side of the border fence as part of Hungarian territory were to be considered and the practical realities mentioned above ignored, Art. 4 of Protocol No. 4 would be devoid of practical effectiveness in cases such as the present one, and would allow States to evade their obligations under that provision.

Accordingly, the absence of an individual expulsion decision cannot be attributed to the applicant's own conduct. In conclusion, in view of the fact that the authorities expelled the applicant without identifying him and without examining his situation, and in view of the lack of effective access to legal means of entry, his expulsion was collective in nature. Thus, in its decision, the Court unanimously held that there had been a violation of Art. 13 in conjunction with Art. 4 of Protocol No. 4 due to the lack of an effective remedy for the applicant to complain about his expulsion, and ordered Hungary to pay EUR 5 000 by way of non-pecuniary damage.

I consider that the European Court disregarded the rules of international law in this case, as it did not consider that Serbia was a safe country where the complainant could have been granted asylum, like many other countries (e.g. Turkey, Greece, North Macedonia) through which he passed. Furthermore, instead of submitting an asylum application in these countries, he preferred to fraudulently cross the border of Hungary (the first state in the compact Schengen Area). Meanwhile, the Court described the asylum procedures of a Member State as ineffective without the applicant having attempted to make use of them, disregarded the applicant's attitude to return voluntarily to the territory of Serbia, and allowed itself to interpret the notion of State territory arbitrarily, acting in unmitigated bad faith towards Hungary.

142 *Shahzad v. Hungary*, App. No. 12625/17, 8 July 2021, Final 08 October 2021.

143 In its judgment of 17 December 2020 on Hungary's compliance with Directives 2008/115/EC and 2013/32/EU, the CJEU found that migrants removed under Art. 5(1a) of the State Borders Act had no option but to leave Hungarian territory.

In the *M.H. and Others v. Croatia* case,[144] in 2021, the Court found it to be true that, on 21 November 2017, Croatian police officers returned the applicant and her 11 children to Serbia without considering their individual situation and found that their deportation to Serbia was of a collective nature, in violation of Art. 4 of Protocol No. 4 to the Convention.

In the case of *L.B. v. Lithuania*,[145] in 2022, a Russian citizen of Chechen origin came to Lithuania in 2001, in view of the ongoing war and widespread human rights violations in the Chechen Republic, and was granted subsidiary protection on several occasions between 2004 and 2008. However, since 2018, the Lithuanian authorities have rejected his applications for a passport, something based on the fact that he could obtain a travel document from the Russian authorities. This was the first case in which the Court examined the refusal to issue a travel document to a foreign national. In the Court's view, Art. 2 of Protocol No. 4 to the Convention cannot be regarded as imposing a general obligation on the Contracting States to issue to aliens residing in their territory a certain document enabling them to travel abroad, but it also pointed out that under Art. 2 para. 2 of Protocol No. 4, the right to leave any country, including one's own, was granted to "any person". The applicant was legally resident in Lithuania and had no valid identity documents other than those issued to him by the Lithuanian authorities. The Court held that it could not be considered that the applicant could move freely even within the Schengen area without the requested passport, since without a valid travel document, he could not travel to countries outside the Schengen area and outside the EU, including the United Kingdom, where his children lived. In the meantime, Lithuanian legislation recognised, albeit at a time when it was no longer of use to the applicant, that beneficiaries of subsidiary protection may have a well-founded fear of contacting their national authorities; such a fear is now considered an objective ground for not being able to obtain a travel document from these authorities. In conclusion, the Court found a violation of Art. 2 of Protocol No. 4.[146]

In the case of *A.A. and Others v. North Macedonia*,[147] in 2022, in which the applicants, who were Afghan, Iraqi, and Syrian nationals, after breaking through the fence of the refugee camp in Idomeni, Greece, in March 2016, crossed the border by forcing the border fence together with 1 500 other persons. In so doing, they fraudulently entered Macedonian territory, calling their endeavour the "March of Hope". The ECtHR gave a surprising ruling regarding this case compared to its usual case law; finding that the applicants were intercepted by soldiers shortly after the border was forced, who more or less violently ordered them to return to Greece, did not find a violation of Art. 4 of Protocol No. 4, holding that there was nothing to suggest that the potential asylum seekers were in any way prevented from approaching legitimate

144 *M.H. and Others v. Croatia*, App. Nos. 15670/18 and 43115/18, 18 November 2021.
145 *L.B. v. Lithuania*, App. No. 38121/20, 14 June 2022, Final 14 September 2022.
146 EUR 5000 was awarded to the applicant for non-material damage.
147 *A.A. and Others v. North Macedonia*, App. Nos. 55798/16, 55808/16, 55817/16, 5 April 2022.

border crossing points and lodging an asylum application, or that the applicants had attempted to apply for asylum at the border crossing point before being returned. The applicants in the present case did not even allege that they had ever attempted to enter Macedonian territory by lawful means, and were not interested in applying for asylum in North Macedonia. This solution adopted by the ECtHR should be widely invoked by all Member States exposed to the waves of migration towards their "green" borders.

In *RN v. Hungary*[148] (2023) the applicant was a Pakistani national who let himself be smuggled across the border into Hungary on 21 June 2017. He claimed before the Court that he had repeatedly been physically assaulted by members of the "field guards", after which, on the same day, he was detained by Hungarian policemen. These policemen, together with 10 other migrants, took him to the border fence and forced him to walk in the direction of Serbia, without being given a chance to apply for asylum. Importantly, at that time, the complainant was 14 years old and unaccompanied. The complainant complained to the ECtHR that he had been subjected to collective expulsion in violation of Art. 4 of Protocol No. 4 to the Convention, namely that under Art. 13 of the Convention in conjunction with Art. 4 of Protocol No. 4, no effective remedy was available to him.

The ECtHR, referring to its findings in the *Shahzad v. Hungary* case, held that the applicant's removal constituted an expulsion within the meaning of Art. 4 of Protocol No. 4 because it was carried out in the absence of any formal decision or examination of the applicant's situation. The Court also found that the only means of legal entry into Hungary—namely through the two transit zones—could not have been considered effective in the case of the applicant, who was an unaccompanied minor, given the limited access (daily quota) and the lack of any formal procedure with adequate safeguards governing the admission of individual migrants. Finally, the Court could not ignore the fact that, at the time of his removal, the applicant was an unaccompanied minor and was therefore in an extremely vulnerable situation, having the status of a migrant in an irregular situation[149], and in view of the above, the Court found that there had been a violation of Art. 4 of Protocol No. 4 to the Convention and of Art. 13 of the Convention in relation to Art. 4 of Protocol No. 4[150].

In the case of *S.S. and Others v. Hungary*,[151] in 2023, the applicants are seven Yemeni citizens and three Afghan citizens, in fact two families, who were stopped at Budapest International Airport in April 2019 and December 2019, respectively, the former arriving from Istanbul and the latter from Dubai. They tried to enter Hungary using forged travel documents, and after applying for asylum, the Hungarian authorities evacuated them to Serbia. The Court reiterated that in all cases of removal of

148 ECtHR, *R.N. v. Hungary*, App. No. 71/18, 4 May 2023.

149 For example, *Khan v. France*, App. No. 12267/16, para. 74, 28 February 2019; see also: *N.T.P. and others v. France*, App. No. 68862/13, para. 44, 24 May 2018.

150 Hungary was also ordered to pay EUR 6500 in respect of non-material damage and EUR 1500 in respect of costs.

151 *S.S. and Others v. Hungary*, App. Nos. 56417/19 and 44245/20, 12 October 2023.

an asylum seeker from a Contracting State to an intermediate third country without examination of the substance of the asylum application, whether or not the receiving third country is a State Party to the Convention, it is the duty of the State carrying out the removal to examine in detail the question whether or not there is a real risk that the asylum seeker will be denied access to an adequate asylum procedure in the receiving third country, protecting him/her against refoulement. The Court concluded that the respondent State had failed to fulfil its procedural obligation under Art. 3 of the Convention to examine whether the applicants would have access to an adequate asylum procedure in Serbia, the country to which they had been removed, and found a violation of Art. 3 of the Convention in its procedural aspect. The Court also found that the applicants had been removed to Serbia without an expulsion order, but only on the basis of a removal order, implying that they did not have an effective opportunity to present arguments against their removal, and that their removal was of a collective nature, constituting a violation of Art. 4 of Protocol No. 4[152].

In this context, the ECHR does not seem to attach any relevance to the fact that many migrants cross the borders of Council of Europe Member States illegally without being sanctioned, although according to Art. 31 of the 1951 Geneva Refugee Convention, States do not have to sanction "intruders", unless they come directly from a territory where their life or freedom has been threatened and present themselves without delay to the authorities.

6.8. Art. 1 of Protocol No. 7 to the Convention: Prohibition of arbitrary expulsion

Since 1984, under Art. 1 para. 1 of Protocol No. 7 to the Convention:

> An alien lawfully residing in the territory of a State shall not be expelled except in pursuance of a decision rendered in accordance with law, and he shall be able: a. to submit reasons against his expulsion; b. to request an examination of his case; and c. to request to be represented for this purpose before the competent authorities or one or more persons designated by the competent authorities.

According to Art. 1 para. 2, States may expel an alien before exercising the rights listed in points a, b, and c of Art. 1, where expulsion is necessary in the interests of public order or on grounds of national security. Central and Eastern European countries have resorted quite frequently to expulsions based on national security grounds, and a few cases have even reached the ECHR.

For example, the case of *C.G. and others v. Bulgaria*,[153] in 2008, concerned three Turkish nationals—two parents and a daughter—who were living in Bulgaria. The

152 The Court fixed the amount of EUR 10000 for the first to seventh claimant jointly, EUR 7000 for the eighth to tenth claimant jointly, and EUR 3000 for costs and expenses for the claimants jointly.

153 *C.G. and others v. Bulgaria*, App. No. 1365/07, 24 July 2008.

first applicant, who was granted a permanent residence permit in 1996, was ordered to be expelled on 8 June 2005 on the grounds that he posed a serious threat to national security. The day after this decision, he was deported to Turkey, without being allowed to contact his wife and daughter or a lawyer. The Court confirmed that the measures taken by the authorities against the first applicant constituted an interference with the applicants' right to respect for family life, as the decision to expel the applicant was based on the argument that he posed a threat to national security because of his involvement in illegal drug trafficking, in collaboration with several Bulgarian citizens, and based on unspecified information contained in a secret internal document. The courts examining the case did not gather additional evidence in that regard, but confined themselves to a purely formal examination of the first applicant's expulsion decision. Thus, the Court found a violation of Art. 8 of the Convention, and that the judicial review procedures were not sufficient for the applicants to claim their right to respect for family life, and did not provide an effective remedy, and therefore there was also a violation of Art. 13.

Regarding the complaint under Art. 1 of Protocol 7 to the Convention, the Court noted that, under this provision, expulsion must be in accordance with the law. Regarding the other requirements of Art. 1, the Court observed that the first applicant had not been given an opportunity to have his case reviewed, in breach of subparagraph 1(b). Still, the first applicant was able to challenge the measures against him only once outside the territory of Bulgaria. Referring to the second paragraph of Art. 1 of Protocol No. 7, the Court reiterated that the first applicant's expulsion was not based on genuine grounds of national security, and therefore did not fall within the scope of that provision. In view of the above, the Court concluded that the applicant should have been given the opportunity to exercise his rights under Art. 1(1) before being expelled from Bulgaria, and therefore found a violation of this provision.

In the *Ljatifi v. the former Yugoslav Republic of Macedonia* case,[154] in 2018, the applicant, a Serb national, fled Kosovo in 1999 at the age of 8 years, was granted asylum in 2005, and has been living legally in the Former Yugoslav Republic of Macedonia. In 2014, the Ministry of Interior revoked her asylum status, considering that she was "a risk to national security" and ordered her to leave the country within 20 days of the decision. She unsuccessfully challenged this decision before the Administrative Court and the Higher Administrative Court. In this case, the Court reiterated from its previous case law[155] that even where national security is at stake, the concepts of legality and the rule of law in a democratic society require that expulsion measures affecting fundamental human rights are subject to a form of adversarial procedure. It also concluded that the administrative courts limited themselves to a purely formal examination of the expulsion order, and wrongly accepted the general allegation that the applicant posed a risk to national security, without further details. This implies that the Macedonian courts failed to verify whether an expulsion order was

154 *Ljatifi v. the former Yugoslav Republic of Macedonia*, App. No. 19017/16, 17 May 2018.
155 *C.G. and others v. Bulgaria*, App. No. 1365/07, 24 July 2008.

issued for genuine reasons of national security, thus constituting a violation of Art. 1(1)(a) and (b) of Protocol No. 7 to the Convention.

In the *Muhammad and Muhammad v. Romania* case,[156] in 2020, the applicants, Pakistani citizens living in Romania with student visas, were expelled on grounds of national security. The relevant decision was based on classified documents. The applicants did not have access to them, nor were they provided with specific information on the facts and reasons underlying that decision. The Court has developed two guiding principles. First, the more limited the information available to the alien, the more important the safeguards will be; second, where the circumstances of a case reveal particularly significant repercussions for the alien's situation, countervailing safeguards must be strengthened accordingly. In this case, the ECtHR found that there was a significant limitation on the applicants' right to be informed of the facts submitted in support of their expulsion, and of the content of the relevant documents, and that the domestic courts did not carry out any examination of the need for such a limitation, nor did they clarify the real national security reasons in question, as domestic law did not allow them to examine such matters of their own motion. The fact that a press release issued by the Romanian Intelligence Service contained more detailed factual information than that provided to the applicants in the course of the previous proceedings contradicted the alleged need to deprive them of specific information. A mere enumeration of the number of legal provisions invoked could not suffice, even if minimally, to constitute adequate information on the allegations. Since their lawyers did not have authorisation to access the classified documents, their mere presence before the national court, without the possibility of being informed of the charges against their clients, was not capable of ensuring an effective defence for the latter. It was also not even clear whether the national courts actually had access to all the classified information, or whether they verified the credibility and veracity of the underlying facts; the nature and degree of their control was not apparent, at least briefly, from the reasoning of their decisions. Thus, the limitations were not counterbalanced in the domestic procedure so as to preserve the very essence of the rights under Art. 1 of Protocol No. 7, which was thus infringed.

6.9. Rule 39 of the Rules of Procedure: interim measures

In *D.A. and Others v. Poland*,[157] in 2021, the applicants were Syrian citizens who, between 2013 and 2015, lived and studied in Belarus. After graduation, claiming that they would be persecuted in Syria and that their visas were due to expire in Belarus, they presented themselves on three occasions between 14 and 18 July 2017 at the Polish-Belarus border crossing point at Terespol, Poland. On each occasion, they expressly expressed their wish to lodge an application for international protection,

156 *Muhammad and Muhammad v. Romania [GC]*, App. No. 80982/12, 15 October 2020.
157 *D.A. and Others v. Poland*, App. No. 51246/17, 8 July 2021, Final 22 November 2021.

which were rejected by administrative decisions. On 20 July 2017, the applicants, through their chosen lawyer, filed an application under Rule 39 of the Rules of Court, requesting the Court to prevent the applicants' deportation to Belarus. On 20 July 2017, at 10:08 AM, the Court (the duty judge) decided to apply Rule 39 of the Rules of Court, indicating to the Government that the applicants should not be expelled to Belarus until 3 August 2017. Although the Government had been informed of the interim measure before the planned time of expulsion, the applicants were returned to Belarus at 11:25 AM. In the light of this state of affairs, the Court held that the applicants had not benefited from effective safeguards, which would have protected them from exposure to a real risk of being subjected to inhuman or degrading treatment, as well as to torture. Furthermore, the fact that no procedure involving a review of the applicants' applications for international protection had been initiated on the five occasions on which the applicants had been present at Polish border crossings, and that—despite their claims of a risk of refoulement—on each of those occasions the applicants had been sent back from the Polish border to Belarus, constituted a violation of Art. 3 of the Convention.

The Court noted that the circumstances of the rendering of this decision were similar to those described in *M.K. and Others v. Poland* and found that the decisions in the applicants' cases constituted a collective expulsion of aliens in the sense prohibited by Art. 4 of Protocol No. 4, in breach also of Art. 13 of the Convention in conjunction with Arts. 3 and 4 of Protocol No. 4 to the Convention.

The Court's position on the regime of interim measures is of great importance, in which it has pointed out that the interim measures provided for in Art. 39 are indicated by the Court for the purpose of ensuring the effectiveness of the right of individual petition. Accordingly, the failure of the respondent State to comply with those measures entails a violation of the right of individual petition,[158] since a Contracting State is not in a position to substitute its own judgment for that of the Court in order to verify whether or not there was a real risk of immediate and irreparable harm to an applicant at the time when the interim measure was indicated. The Court, noting that the interim measure issued in the applicant's case has not yet been complied with and remains in force, found that Poland failed to fulfil its obligations under Art. 34 of the Convention, considering that the direction made to the Government under Rule 39 of the Rules of Court should remain in force until the present judgment becomes final, or until the Court takes a new decision on the matter. The Court disregarded the fact that the applicants had never been lawfully admitted to Polish territory.

158 *Mamatkulov and Askarov v. Turkey [GC]*, App. Nos. 46827/99 and 46951/99, § 125, ECHR 2005-I; *Paladi v. Moldova [GC]*, App. No. 39806/05, § 88, 10 March 2009; *M.K. and Others v. Poland*, App. Nos. 40503/17 and 2 others, 23 July 2020, 14 December 2020.

7. Concluding remarks

The Council of Europe, as a classical, non-supranational international cooperation organisation, was not able to decisively influence the migration phenomenon until the issue was brought to the attention of the ECtHR in 1999, and this was mostly due to the reluctance shown by its Member States in the field of asylum regulation, respectively owing to the "soft law" actions adopted by its institutions. Still, the Council aims, among other things, to protect human rights on the European continent.

The right to control the entry, stay, and expulsion of non-nationals belongs to Member States. Although the Convention does not explicitly mention refugees, important protections have emerged from the Court's case law, including in the areas of non-refoulement, family reunification, and limitation of deprivation of liberty. Furthermore, although this is no new phenomena, Council of Europe Member States sometimes try to evade their obligations under the Convention when it comes to the reception of refugees and migrants. Thus, Member States, while drawing up asylum and immigration policies, increasingly seem to no longer focus on compatibility with the Convention, instead using new methods to prevent the implementation of these obligations. In reality, the ECtHR is looking to the ECHR for barriers to prevent Member States from returning or expelling aliens who have entered their territory illegally, replacing the lack of anchoring the right of asylum in positive law with the impossibility of removing people who do not qualify for refugee status because of substantive or procedural loopholes.

One important thing to note after analysing the above theme is that only Council of Europe Member States are entitled to determine who among the asylum seekers qualifies for international protection, and the ECHR has no competence to decide on the merits of "who deserves" such protection, even if its case law ensures that Member States "do not forget" to respect human rights even in the procedure of examining asylum applications. A brief conclusion can be borrowed from Laffranque, a judge in the European Court of Human RightsECtHR:[159]

> In relation to the Court's case law, it is important to understand that finding by the Court of a violation of the Convention … is not so much a condemnation „against" the country, but it constitutes in a sense a learning lesson for democracy, rule of law, and human rights protection system. However, at the same time, it is quite natural that some of the Court's judgements are more easily accepted than others. The overall image of the Court is a mosaic of images of the Court in all respective countries of jurisdiction. Thus, the Court cannot take the risk of treating the smaller and less problematic countries as less important for the impact of the overall case law and the image of the Court: every person and every case counts. The Court's case law is a moving target: it is impossible to make any final deductions […]

159 Laffranque, 2015, pp. 4–16.

Meanwhile, the pro-person techniques applied in ECHR case law include the reversal of the presumption of state sovereignty in the field of migration, as other ECHR judges have stated in their works.[160] This position converges with the very dangerous views of globalist authors who consider that international cooperation in migration governance takes place at the international, regional, and sub-regional level. These views are motivated by the promise of high economic growth resulting from the free mobility of people and labour, and regard that sovereignty considerations often diminish adherence to international law instruments specific to international migration, thus undermining the potential effectiveness of global migration governance.[161]

Nonetheless, we can also use, as an epilogue, other findings from the literature, 'There is no international law of migration, only a patchwork of fragmented international legal regimes, alongside regional and sub-regional systems'.[162] The optimists say that in the context of the current refugee crisis in Europe, when both the Council of Europe and the EU Member States have clearly failed, the role of the two European courts ECHR and CJEU has become important because it is they who fill the gaps where individual states and European institutions are unable to prevent the countless human tragedies that have persisted for years. These two institutions are also said to ensure basic minimum guarantees under the rule of law, and it is described that their jurisprudence can constitute a precedent, a model, a minimum standard also for the rest of the world, where fragmented international migration law applies.[163] Others, along these lines, consider that the case law of the ECHR in the field of migration constitutes the "backbone" of European law in the field of asylum and migration,[164] or at least an example to be followed on other continents.[165]

In the absence of a paneuropean "*lex specialis*" in the field of migration, the ECtHR forces a *lex generalis*, obliging approximately 600 million Europeans to host several billion people who see a brighter future in changing the continent of their birth in favour of Europe. Meanwhile, the ECtHR ignores the concept of the "first safe country" for refugees for those genuinely persecuted within the meaning of the 1951 Geneva Convention relating to the Status of Refugees. However, in relation to the Central and Eastern European states, it is necessary to highlight some specificities: their approach to the situation of those persons who, either in Yugoslavia or in the former USSR, enjoyed a status, and after the break-up of these "unions", remained on the territory of the successor states without their legal status of citizenship being synchronised with the new realities.

Another specificity of the above countries is that they were not colonialist states and do not have "moral debts" to pay to the "oppressed peoples" on other continents,

160 Çalı, Bianku and Motoc, 2021, p. 3.
161 Awad, 2017, pp. 157–158.
162 Awad, 2017.
163 Breitenmoser and Marelli, 2017, pp. 190–191.
164 Labayle and De Bruycker, 2012, p. 11.
165 Beduschi, 2018, p. 55.

nor did they participate in the US efforts that in the last decade destroyed Iraq, Afghanistan, Syria, Lybia, and other states. Still, owing to their location, they ended up on land migration routes that lead precisely to the territory of the former colonialist states. This entails that they are facing this phenomenon at the front line, but if they were left to apply EU common law on visas, asylum, and migration to the letter, Europe would not be facing a visa, asylum, and migration crisis. Still, the permissiveness of the European Commission and the pressure from the Western European press and ill-favoured NGOs have turned Greece, from a migration point of view, into a lawless place from which waves of economic migrants start, instead of real refugees being legally identified and helped. It can be seen that the countries that are in the way of the waves of migrants due to Greece's inefficiency have the most unfavourable judgments from the ECtHR, namely 12 judgments regarding Hungary and nine regarding Bulgaria.

Fortunately, on the basis of the international conventions adopted within the Council of Europe, 'long-term migrants do not enjoy the status of a national minority on account of their lack of historical presence in a country'.[166] Notwithstanding, if we look at the excessive liberalism of some countries such as Sweden, where immigrants can take part in the electoral process without having citizenship, the next step will be for these groups who constantly come to European countries to claim minority or even collective rights.

Pope Francis said the following in 2021 on a visit to Cyprus:[167] 'The worst thing is that we get used to it. "Ah", it will be said, "today a boat sank, there are many missing". This habit is a bad disease! It is a very bad disease!' We are already in a situation where, as non-politicians, we suffer from the so-called "compassion fatigue" even we jurists, as instead of applying public international law to stop the sources of migration of necessity, we are analysing the flawed, overreaching jurisprudence of the ECtHR, which wants to put out fires with flammable materials or with instruments that were not invented for that purpose.

166 Cholewinski, 2005, pp. 695–716.
167 Jacobsen, 2021.

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