IMMIGRATION, PERSONAL LIBERTY, FUNDAMENTAL RIGHTS

edited by
MARIA GRAZIA COPPETTA

with the assistance of
LORENZO BERNARDINI

Wolters Kluwer

CEDAM

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THE GUARANTEES PROVIDED FOR FOREIGNERS WITHIN THE ECHR LEGAL FRAMEWORK

LORENZO BERNARDINI

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1. Introduction

In recent years, the management of the migration phenomenon, especially in the aftermath of the so-called European migrant crisis of 2015, which has never fully ended, [1] has become an increasingly central issue on the political agendas of European governments. Curiously, priority has often been given to the fight against irregular immigration, without the 'counterbalance' on the 'equal and opposite' issue of international protection. On closer inspection, they are two sides of the same coin.

To simplify, and using the categories sketched in the European Union (EU) legal system, [2] a foreigner who arrives on the territory of a Member State (or who is found to be already present on that territory) may alternatively hold two positions: either he/she is an 'irregular' migrant—and must therefore must be returned as soon as possible—or he/she is an applicant for international protection, in which case his/her application for protection must be examined. *Tertium non datur*. However, as a matter of fact, the two situations

[1] See, on this subject, Y. PUNDA-V. SHEVCHUK-V. VEEBEL, *Is the European migrant crisis another stage of hybrid war?*, in *Estonian Journal of Military Studies*, 2019(13), p. 116-136, and, more recently, V. VEEBEL, *Is the European Migration Crisis Caused by Russian Hybrid Warfare?*, in *J. Pol. L.* , 2020(13/2), p. 44 ff. With reference to the Russian invasion of Ukrainian territory and the migration crisis following this event, see I. GERLACH-O.RYNDZAK, *Ukrainian Migration Crisis Caused by the War*, in *Studia Europejskie – Studies in European Affairs*, 2022(2), p. 17 ff.

[2] The reference is to the well-known Directives 2008/115/EC (so-called Return Directive), 2013/32/EU (so-called Procedures Directive), 2013/33/EU (so-called Reception Directive) and Regulation (EU) No 603/2013 (so-called Dublin III).

are oftentimes intertwined: one can think of the expelled person who applies for protection while the removal procedure is pending. Similarly, one can think of the applicant whose application is definitively rejected and who *ipso facto* acquires the status of 'irregular' (and, is therefore to be expelled). Nevertheless, it is difficult to make a clear distinction between the two categories, since, to give just one example, an application for international protection may be submitted by a third-country national at any time, even in different States. The attribution of a specific status to a 'non-citizen'—which is in any case not definitive—proves to be a complex task. Yet, the due diligence of the authorities required in such an assessment should not be abdicated in the name of 'security' or 'public order'.[3] The specific analysis of the situation of the applicant for international protection must also take into account the scope of the right to asylum and the related principle of *non-refoulement*.

The very brief examination carried out so far aims to sketch out the intrinsically complex picture of the issue, which has a transnational character, based on the triangular relationship between the migrant, the State of origin and the country of destination.

There are nonetheless few common principles and rules on the matter: the entry of foreigners into national territory is, in fact, largely a matter for domestic legislation, given the reluctance of Member States to discuss the issue from a supranational perspective.[4] Although the transnational nature and current scale of migratory flows have highlighted the inadequacy of managing the phenomenon at national level,[5] as has been properly observed, it seems that 'a comprehensive framework for migration governance is still lacking'.[6]

In the absence of a unified framework to refer to, the current

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[3] On this point, see the references of L. MELICA, *Libertà e sicurezza in Europa in materia di migrazione e asilo: profili giuridici sull'immigrazione nell'ordinamento europeo*, in *Lingue e linguaggi (web)*, 2005(16), p. 509-527 and, with specific reference to the axiological opposition between "freedom" and "security" in EU asylum policies, C. KAUNERT, *Liberty versus Security? EU Asylum Policy and the European Commission*, in *Journal of Contemporary European Research*, 2009(5/2), p. 148-170. See also C. GUIDA, *L'accoglienza emergenziale. Pratiche di resistenza dei richiedenti asilo e il ruolo dell'antropologo*, in *Antropologia Urbana*, 2017(3), p. 129, who observed that there exists a 'securitarian management of asylum seekers'.

[4] F. CRÉPEAU, *Promotion and Protection of Human Rights: Human Rights Questions, including Alternative Approaches for Improving the Effective Enjoyment of Human Rights and Fundamental Freedoms*, UN General Assembly, doc. A/68/283, 7 August 2013, para. 8.

[5] Ibid., para. 27.

[6] Ibid., para. 8.

international discipline is 'fragmented' [7] into a multiplicity of normative acts that regulate specific profiles of the phenomenon, such as the protection of the human rights of migrants, the repression of illicit trafficking of migrants, the protection of refugees and asylum seekers, and the regulation of labour migration. In these areas a florid case-law has been developed by the European Court of Human Rights (ECtHR), which, based on the relevant provisions of the European Convention on Human Rights (ECHR), has outlined a list of guidelines on the fundamental rights of migrants.

The focus of this chapter will be on the analysis, in the ECHR legal order, of two specific prerogatives guranteed to foreigners: the principle of *non-refoulement* and the prohibition of collective expulsions, a direct emanation of certain sources of international law.

2. *The principle of* non-refoulement

The principle of *non-refoulement* is codified in Article 33 of the 1951 Geneva Convention, which states that no refugee may be expelled or returned to a particular country where his/her life or liberty would be threatened on account of persecution falling within the definition of 'refugee' laid down in Article 1 of the same Convention. [8]

The principle cannot, however, be invoked by a refugee who, for serious reasons, is to be considered a danger to the security of the

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[7] In this regard, S. PAMPALONI, *Il fenomeno migratorio via mare. Caratteristiche e percezione*, in S. BASTONI-F. BOCCI-P. PAMPALONI-G. QUILGHINI (Eds.), *Il contrasto all'immigrazione irregolare via mare: attività di polizia e salvaguardia della vita umana. Rapporti tra sistemi giuridici e prospettive future*, 2020, p. 19, available at the following URL: *https://scuolainterforze.interno.gov.it/wp-content/uploads/2021/02/Quaderno-2-2020.pdf.*

[8] The Convention relating to the status of refugees (Geneva, 28 July 1951) (hereinafter: Refugee Convention), leaving aside the geographical and temporal restrictions in Article 1—amended by the adoption of the Protocol Relating to the status of refugees (New York, 31st January 1967)—, set forth in Article 1(a)(2) the definition of 'refugee' – a person 'who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is out-side the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it'. The Refugee Convention does not lay down a specific procedure for determining refugee status, but requires States Parties to assess the particular situation of each asylum seeker on the basis of a series of requirements set out in the Convention, which in principle oblige the authorities of those States to recognise refugee status if these requirements are met.

country in which he or she resides or by a person who, 'having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country'. [9]

It should be added that Article 32 of the Refugee Convention expressly prohibits the expulsion of a 'refugee' (i.e. a person who has already been granted international protection) lawfully residing in the territory of State Party 'except for reasons of national security or public order'.

The importance of this principle has proved so important over time that it has been enshrined in numerous international and regional treaties (e.g., Articles 2 and 3 ECHR, [10] Article 22(8) of the Inter-American Convention on Human Rights [11]), and is now traditionally considered to be an expression of a rule of customary international law, applicable to all migrants, including 'irregular migrants', in accordance with a progressive approach. [12]

An analysis of the perspective followed by the settled ECtHR's case-law highlights the latter's driving role in guaranteeing every human being the right not to be pushed back or returned to a country where there could be a risk of serious violations of the Convention.

Although the right to political asylum as such is not expressly provided for in the Convention or its Protocols, its protection within the ECHR legal framework is unquestionably guaranteed by Article 3 ECHR. [13] According to the latter, the expulsion, extradition or any other removal measure of an alien could raise issues of violations of Article 3 ECHR—and thus involve the responsibility of the

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[9] Article 33(2), Refugee Convention.

[10] These are the right to life (Article 2 ECHR) and the absolute prohibition of torture and inhuman and degrading treatment (Article 3 ECHR).

[11] `In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions'.

[12] See, *ex multis*, INTERNATIONAL COMMITTEE OF THE RED CROSS (ICRC), *Note on immigration and the principle of* non-refoulement, in *Int'l Rev. Red Cross*, 2018, p. 1–13 and the Report of the EUROPEAN AGENCY FOR FUNDAMENTAL RIGHTS (FRA), *Scope of the principle of* non-refoulement *in contemporary border management*, in *fra.europa.eu*, 2016, p. 15 ff.

[13] *N.D. and N.T. v. Spain* [GC], App. nos. 8675/15 and 8697/15 (ECtHR, 13th February 2020), para. 188. Conversely, the right to asylum, within the EU legal framework, is expressly and autonomously protected by Article 18 of the Charter of Fundamental Rights of the European Union (CFR), which reads as follows: 'The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community'.

Contracting State under the Convention—if there are substantial grounds for believing that the person concerned, if removed, would run a real risk of being subjected to treatment contrary to the aforementioned provision in the receiving State.[14] In such circumstances, the Convention imposes a 'negative' duty on the State Party, i.e. an unconditional obligation not to remove the person to that country. This 'negative' conduct is not, however, counterbalanced by 'positive' behaviour, such as ensuring that foreigners have effective access to asylum procedures.[15]

At any rate, as regards to the specific cases of prohibition of *refoulement* addressed by the ECtHR, it should first be pointed out that the States Parties to the ECHR may not return an individual to a State where there is a real risk that he or she would be in danger of death,[16] or would be subjected to torture or inhuman or degrading treatment.[17] This indirect protection (or *par ricochet* protection)—which the ECtHR has linked to Articles 2 and 3 ECHR which enshrine rights that cannot be suspended even in emergency situations—is absolute: it also applies to persons deemed to be a threat to national security.[18]

It follows that the ECHR legal framework is violated whenever an alien is subject to an expulsion measure to a State (whether of origin or transit) where he runs the risk of being subjected to the conduct prohibited by Articles 2 and 3 ECHR. Although this *ex ante* risk assessment is inherently complex, it must be acknowledged that the ECtHR's case-law has attempted, not always with rigorous linguistic results, to outline a number of general principles to be applied to the concrete case, for example by recalling the need for the risk to have the characteristics of concreteness, personality and actuality.[19]

Should the alien suffer from a serious physical or mental illness, expulsion to a State where he or she would not be able to receive

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[14] *Ilias and Ahmed v. Hungary* [GC], App. no. 47287/15 (ECtHR, 21st November 2019), paras. 125–126.

[15] S. CARRERA, *The Strasbourg Court Judgement* N.D. and N.T. v Spain *A* Carte Blanche *to Push Backs at EU External Borders?*, in *EUI Working Papers RSCAS 2020/21*, 2020, p. 20.

[16] *Bader and Kanbor v. Sweden*, App. no. 13284/04 (ECtHR, 8th November 2005), paras. 42–43.

[17] *Soering v. the United Kingdom*, App. no. 14038/88 (ECtHR, 7th July 1989), para. 90.

[18] *Saadi v. Italy* [GC], App. no. 37201/06 (ECtHR, 28th February 2008), para. 138.

[19] On the scrutiny carried out by the ECtHR, and the terminological perplexities regarding the choices of the Court, see the considerations of F. DE WECK, Non-refoulement *under the European Convention on Human Rights and the UN Convention Against Torture*, Brill, 2016, p. 232 ff.

adequate medical treatment may—in exceptional cases based on 'considerations of humanity'—also constitute an indirect violation of the prohibition of torture and inhuman or degrading treatment. [20]

The considerations briefly outlined above paint a picture of an absolute prerogative which cannot be derogated from, even on grounds of public order or national security, and which therefore cannot be balanced against other circumstances which, *in abstracto*, would invalidate its scope (e.g. control of migratory flows or the need to serve a final sentence in the State of destination). [21]

3. The prohibiton of collective expulsions

Together with the principle of 'non-refoulement', a further guarantee for foreigners comes to the fore which is expressly provided for in the ECHR legal framework – the prohibition of collective expulsions. Article 4 of Protocol No. 4 to the ECHR, which together with Article 3 of the ECHR is one of the shortest provisions of the Convention, states laconically that 'collective expulsions of foreigners are prohibited'.

The ECHR was the first international treaty to include such a provision, based on a twofold rationale: on the one hand, to prevent States Parties from implementing expulsion measures without analysing the 'personal circumstances' of the migrants concerned; on the other hand, to enable the persons concerned to effectively defend their standpoint 'against the measure taken by the relevant authority', [22] according to the ECtHR's reading of the Convention whereby the latter aims to guarantee rights in a 'practical and effective' manner. [23]

It should be specified that the term 'collective expulsion' must be interpreted according to its common meaning and in the light of its current usage, i.e. in the (a-technical) sense of 'removal from a place'. [24] In other words, the term is to be understood as any

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[20] *D. v. United Kingdom*, App. no. 30240/96 (ECtHR, 2nd May 1997), para. 54.

[21] E. HAMDAN, *The Principle of Non-Refoulement under the ECHR and the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Brill, 2016, p. 338 ff.

[22] Among others, see *N.D. and N.T.* (note 13), para. 138, with reference to *Khlaifia and Others v. Italy* [GC], App. no. 16483/12 (ECtHR, 15th December 2016), para. 238.

[23] See, *inter alia*, *Airey v. Ireland*, App. no. 6289/73 (ECtHR, 9th October 1979), para. 24.

[24] In this sense, *Hirsi Jamaa and Others v. Italy* [GC], App. no. 27765/09 (ECtHR, 23rd February 2012), para. 174.

measure requiring aliens—as a group—to leave the territory of the State concerned, unless such a measure is adopted as a result of (and on the basis of) a reasonable and objective examination of the individual situation of each alien belonging to the group.[25] This is a 'dynamic' interpretation of the Convention, according to the majority of legal scholars, bordering on an 'evolutionary' interpretation, albeit in keeping with its purposes.[26] Indeed, it is the coercive measure taken by the State against the foreigner that is significant *in parte qua*, regardless of whether the alien—individually or as part of a group—was already present on the territory (and then subsequently expelled) or was rejected directly at the border: both measures undoubtedly fall within the normative scope of Article 4 Prot. 4 ECHR.

According to the ECtHR, this means that each member of the group must be given an effective opportunity to present his/her standpoint against expulsion, and that this must be properly examined by the competent State authorities.[27] If this condition is met, the fact that the several individuals are expelled almost simultaneously is not a sufficient condition for such an expulsion to be classified as 'collective'.[28]

It follows that, as has been observed, 'the prohibition of collective expulsions has come to take on a predominantly "procedural" dimension consisting in the obligation for States to provide sufficient guarantees attesting to an effective, differentiated and detailed examination of the individual situation of the foreigner'.[29] This characterisation of Article 4 Prot. 4 ECHR is, however, 'nuanced' by a line of reasoning that is progressively gaining ground within the ECtHR, according to which the culpable conduct of the alien could—in certain circumstances—exempt the State from taking an individual expulsion decision.[30]

Thus, some cases have been analysed by the ECtHR – it appears that the obligation to provide the usual guarantees under Article 4 Prot. 4 ECHR might suffer a clear setback. It is significant, for example, the case of two spouses who, after submitting a joint application for

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[25] *Čonka v. Belgium*, App. no. 51564/99 (ECtHR, 5th February 2022), para. 59.

[26] D. RIETIKER, *Collective Expulsion of Aliens: The European Court of Human Rights (Strasbourg) as the Island of Hope in Stormy Times*, in *Suffolk Transnat'l L. Rev.*, 2016(39/3), p. 673.

[27] *Khlaifia and Others* (note 22), para. 248.

[28] Ibid., para. 252.

[29] A. SACCUCCI, *Il divieto di espulsioni collettive di stranieri in situazioni di emergenza migratoria*, in *Dir. um. dir. int.*, 2018(1), p. 34.

[30] See, most recently, *A.A. and Others v. North Macedonia*, App. nos. 55798/16 *et al.* (ECtHR, 5th April 2022), para. 112 and case law cited therein.

international protection, received a joint rejection of the same application and, as a result, a single expulsion measure against them: in this case, the ECtHR, in rejecting the appeal of the two migrants as inadmissible, was clear in stating that this situation 'was a consequence of their own conduct'.[31] Similarly, the ECtHR declared inadmissible the application of three migrants—part of a larger group of people—who had refused to show their identity documents to the police, thus forcing the border authorities to reject them all away without being able to identify the individual migrants involved (behaviour which, the Court observed, could in no way be attributed to the defendant government).[32] In both cases, the obstructive behaviour of aliens could justify the failure of States to examine the individual situation of each alien.

But the decision that clearly pictured this securitarian approach—and which has not been wrongly labelled as a 'huge concession to States pressure'[33]—is undoubtedly the recent judgement *N.D. and N.T.*, delivered by the *Grande Chambre* of the ECtHR in 2020. In a nutshell, the ECtHR held that Article 4 Prot. 4 ECHR had not been breached by the Spanish authorities – the failure to 'further individualise' the expulsion procedures against the two applicant migrants was directly attributable to their intentional conduct, as they deliberately took advantage of the large number of people present at the border and of the use of force by the group of foreigners to which they belonged, who were attempting to cross the protective barriers in order to enter Spain. In the ECtHR's view, the aliens thus endangered public order and security at the border by deliberately and unjustifiably choosing not to make use of the procedures provided for by Spanish law.

The worrying trend underway in Strasbourg—and upheld in a recent judgment concerning the conduct of the Macedonian authorities at the border with Greece, which has already become final[34]—is that the allegedly culpable behaviour of foreigners, couped with the lack of 'cogent reasons' that might justify it, exempts States Parties from individualising expulsion procedures. An argumentative mechanism which is redolent of the well-known

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[31] *Berisha and Haljiti v. former Yugoslav Republic of Macedonia*, App. no. 18670/03 (ECtHR, 16th June 2005), para. 2 of 'The Law' part.

[32] And that, accordingly, should be attributed to the applicants. The reference is to *Dritsas and Others v. Italy* (dec.), App. no. 2344/02 (ECtHR, 1st February 2011), para. 7.

[33] M. PICHL, *"Unlawful" may not mean rightless*, in *Verfassungblog (web)*, 14th February 2020.

[34] *A.A. and Others* (note 30).

penal criterion of *versari in re illicita*, questionably applied by analogy in the situations under examination here,[35] and also unclear as to its practical profiles – 'how' and 'when' should the existence of justifying cogent reasons be examined when, in cases such as N.*D. and N.T.*, there is no prior contact with the foreigner, who is "instantly" deported?[36] Can the behaviour of those migrants who seek to enter the territory of a State Party to the Council of Europe in order to apply for international protection (arguably not slavishly following the—often inefficient—procedures laid down) be defined as "culpable"?

This line of reasoning can be further developed, in the light of paragraph 113 of a recent judgement of the ECtHR, in which the Court held that Article 4 Prot. 4 ECHR was not breached by the Macedonian Government. Due to its relevance, it is worth quoting the wording of that decision at some length: 'The Court notes that it has not been disputed by the respondent Government that the migrants were removed from the respondent State without being subjected to any identification procedure or examination of their personal situation by the authorities of North Macedonia. This should lead to the conclusion that their expulsion was of a collective nature, unless the lack of examination of their situation could be attributed to their own conduct [...]. The Court will therefore proceed to examine whether in the circumstances of the present case, and having regard to the principles developed in its case-law, in particular in its judgment in *N.D. and N.T.* [...], the lack of individual removal decisions can be justified by the applicants' own conduct'.[37]

The analysis developed by the ECtHR now seems to downplay the lack of individualisation in the expulsion procedure (the first logical-argumentative step), while emphasising—in the lack, however, of any reference to the text of Article 4 Prot. 4 ECHR—the nature of the applicants' conduct, who allegedly "illegally" crossed the border in question (second logical-argumentative step), in order to finally analyse whether, in the light of the actual existence of legal means of access to the territory of the respondent State, the migrants were able to adduce 'cogent reasons not to do so, which were based on

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[35] See L. BERNARDINI, *Respingimenti "sommari" alla frontiera e migranti "disobbedienti": dalla Corte di Strasburgo un* overruling *inaspettato nel caso* ND e NT c. Spagna, in *Cultura giuridica e diritto vivente*, 2020(7), p. 10.

[36] This is an 'unclear' point of the ruling, notes R. WISSING, *Push backs of 'badly behaving' migrants at Spanish border are not collective expulsions (but might still be illegal refoulements)*, in *Strasbourg Observers (web)*, 2020.

[37] *A.A. and Others* (note 30), para. 113.

objective facts for which the respondent State was responsible' [38] (third logical-argumentative step).

Accordingly, a securitarian conclusion is drawn by the ECtHR: '[w]here such arrangements exist and secure the right to request protection under the Convention, and in particular Article 3, in a genuine and effective manner, the Convention does not prevent States, in the fulfilment of their obligation to control borders, from requiring applications for such protection to be submitted at the existing border crossing points. Consequently, they may refuse entry to their territory to aliens, including potential asylum-seekers, who have failed, without cogent reasons, to comply with these arrangements by seeking to cross the border at a different location, especially, as happened in this case, by taking advantage of their large numbers'. [39]

What is astonishing about the latter decision is the assertion that the applicants did not actually "use force" to cross the Greek-Macedonian border, but merely took advantage of the numerical strength of the group to which they belonged; nevertheless, their conduct was deemed "culpable" due to the lack of cogent reasons for not using 'legal channels' for entry (the applicants had, moreover, provided full evidence of the actual lack of 'legal channels' in this case!). [40]

It is at this point that the short-circuit of the ECHR approach to Article 4 Prot. 4 ECHR reveals itself. In the face of a telegraphic and clear literal tenor prohibiting collective expulsions, the 'legal field' of the guarantee *de qua* has been narrowed, to the point where even "passive" conduct—consisting in the mere 'use of muscular strength to scale a fence' [41]—can be considered culpable, and therefore capable of exempting the State Party from the individualisation of removal procedures, where there are legal and effective points of access to apply for international protection, and the migrants have not put forward cogent reasons for not using them. One might wonder whether non-violent behaviour could prevent the enjoyment of an absolute guarantee such as the prohibition of collective expulsions. [42]

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[38] *A.A. and Others* (note 30), para. 114. The Court also specifies that this test must be carried out without prejudice to the guarantees provided for in Articles 2 and 3 ECHR.

[39] Ibid., para. 115.

[40] See V. VRIEDT, *Expanding exceptions? AA and Others v North Macedonia, Systematic Pushbacks and the Fiction of Legal Pathways*, in *Strasbourg Observers (web)*, 30th May 2022.

[41] H. HAKIKI, *N.D. and N.T. v. Spain: Defining Strasbourg's Position on Push Backs at Land Borders?*, in *Strasbourg Observers (web)*, 26th March 2020.

[42] See L. BERNARDINI-S. RIZZUTO FERRUZZA, *Closing eyes on collective expulsions at the border: is the ECtHR still a guarantor of foreigners' fundamental rights?*, in *ADiM Blog (web)*, 30th June 2022.

As Judge Pinto de Albuquerque had well noted in a powerful Concurring Opinion in 2018, 'to allow people to be rejected at land borders and returned without assessing their individual claims amounts to treating them like animals. Migrants are not cattle that can be driven away like this'. [43]

4. Concluding remarks

If, as has been argued, 'migration is in essence a fundamentally human phenomenon' that requires a regime that is 'strongly focused on human rights', [44] the rigour of the two guarantees briefly analysed here evidently plays a crucial role in ensuring that foreigners enjoy the prerogatives enshrined in international law and in the ECHR legal framework.

The principle of *non-refoulement* appears to have retained a robust structure in the case-law of the ECtHR, while the prohibition of collective expulsions has been weakened, almost taking a back seat to the (albeit legitimate) demands of States Parties for border control. [45]

In the absence of a highly improbable reversal in stance by national governments, it shall be incumbent upon the ECtHR to undertake the formidable responsibility of bolstering its distinctive character as a 'island of hope' for the safeguarding of foreigners' fundamental rights. [46] This endeavour necessitates safeguarding against their erosion, a regrettable development currently observable within the precincts of the ECtHR itself. [47]

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[43] *M.A. and Others v. Lithuania*, App. no. 59793/17 (ECtHR, 11th December 2018), Concurring Opinion of Judge Pinto de Albuquerque, para. 29.

[44] F. CRÉPEAU, *supra* note 4, para. 8.

[45] The ECtHR's settled case-law seems to provide a *carte blanche* to the States Parties, according to D. VITIELLO, *Il diritto di asilo in Europa e l'eterogenesi dei fini*, in *ADiM Blog (web)*, 30th April 2022. Moreover, given that the failure to analyse the migrant individually could be a 'consequence' of the latters' allegedly 'culpable' conduct, such a situation could actually lead to a *de facto* suspension of the States Parties' obligations under Article 4 Prot. 4 ECHR, according to S. PENASA, *La gestione dei confini nazionali ed europei nella più recente giurisprudenza della Corte EDU: costanti e variabili di un approccio ondivago*, in *ADiM Blog (web)*, 30th May 2022.

[46] L. RIEMER, *The ECtHR as a drowning 'Island of Hope'?' Its impending reversal of the interpretation of collective expulsion is a warning signal*, in *Verfassungsblog*, 19th February 2019.

[47] V. STOYANOVA, *The Grand Chamber Judgment in Ilias and Ahmed v Hungary: Immigration Detention and the How the Ground beneath our Feet Continues to Erode*, in *Strasbourg Observers (web)*, 23th December 2019.