A brand-new exclusionary clause to the prohibition of collective expulsion of aliens: the applicant's own conduct in *N.D. and N.T. v Spain*

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1. INTRODUCTION

In its ruling of 13 February 2020 in *N.D. and N.T. v Spain*, the Grand Chamber of the European Court of Human Rights (ECtHR or 'the Court') found that pushbacks at the Spanish-Moroccan land border comply with Article 4 Protocol 4 of the European Convention on Human Rights (ECHR, or 'the Convention'), which prohibits the collective expulsion of aliens.[1] Finding that Spain had exercised jurisdiction over the events, the Grand Chamber determined that the removals at stake constituted an 'expulsion' but lacked a 'collective' nature. In reversing the previous ruling of the Chamber,[2] the Court added a novel exclusionary clause to Article 4 Protocol 4 and developed a two-step test to establish whether the responsibility of the respondent State should be excluded in cases where applicants (attempt to) enter a Country in an unauthorised manner. The first step is aimed at assessing whether the destination country provided genuine and effective access to means of legal entry into its territory and whether the applicants made use of it. Where the state provided such access, but the applicants did not avail themselves of it, the Court moves forward to the second step, which is meant to establish whether the applicants had cogent reasons not to do so. These cogent reasons must be based on objective facts for which the respondent State was responsible.[3]

The judgment of the Grand Chamber merits attention due to the Court's stance on several issues. First, the exercise of jurisdiction by Spain (Article 1 ECHR) differs from the previous finding of the Chamber. Second, the Grand Chamber provides a new interpretation of the prohibition of collective expulsion of aliens, with particular reference to the assessment of the 'collective' nature of the removal. Third, the potentially harmful implications that the re-shaped scope of Article 4 Protocol 4 could have in other litigation concerning the externalization of border control policies, such as those occurring at the Greek-Turkish land border and interception on the high seas, is worthy of

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[1] *N.D. and N.T. v Spain* [GC], Applications Nos 8675/15 and 8697/15, Merits and Just Satisfaction, 13 February 2020.

[2] *N.D. and N.T. v Spain* [Chamber], Applications Nos 8675/15 and 8697/15, Merits and Just Satisfaction, 3 October 2017.

[3] *N.D. and N.T. v Spain* [GC], supra n 1, at para. 201.

consideration. The impact of the judgment in the context of the current immigration control policies performed by European States concerns also the principle of *non-refoulement* under Article 3 ECHR. Following a summary of the proceedings before the Chamber and the Grand Chamber (Section 2), this article briefly addresses the finding on the issue of jurisdiction under Article 1 ECHR (Section 3). Section 4 considers the Grand Chamber's assessment of the merits of the complaint under Article 4 Protocol 4, namely the relevance of the applicants' own conduct in the context of pushbacks of aliens entered in an unauthorised manner and Section 5 considers the new two-step test to be applied in pushback operations. The article considers the implications of the *ND* judgment on other situations, taking into account the recent ruling in *Asady and others v Slovakia* (Section 6).[4] Brief concluding remarks are set out in Section 7.

2. THE PUSHBACK OF 13 AUGUST 2014 BEFORE THE CHAMBER AND THE GRAND CHAMBER

On the 13 August 2014, the two applicants (citizens of Mali and Côte d'Ivoire) attempted to enter Spain together with a large number of other Sub-Saharan migrants via Melilla, a Spanish enclave surrounded by Moroccan territory.[5] In order to prevent unauthorised access, the Spanish government had built three fences and had entrusted the *Guardia Civil* with the task of patrolling this border crossing.[6] Both N.D. and N.T. had reached the top of the inner fence and climbed down, assisted by Spanish officials. Once on the ground, *Guardia Civil* agents immediately handed them over to Moroccan officials. No identification checks or individual examination of their specific circumstances was performed. Refusals of entry at states' borders or immediate expulsions from countries' territory without any assessment of protection needs are usually called 'pushback'.[7]

Following the events of August 2014, N.D. and N.T. lodged an application before the ECtHR claiming violations of their right to *non-refoulement* as protected by Article 3 ECHR,[8] the prohibition of collective expulsion of aliens established by Article 4 Protocol 4,[9] and the right to an effective

[4] *Asady and Others v Slovakia*, Application No 24917/15, Judgment on Merit and Just Satisfaction, 24 March 2020.
[5] *N.D. and N.T. v Spain* [GC], supra n 1, at para 24.
[6] Ibid., paras 15-18.
[7] On the notion of pushback, see e.g. ibid, para. 59. Between October and December 2014, the applicants illegally entered Spain. Both were subsequently issued with expulsion orders, against which they submitted an appeal before Spanish courts. The judiciary upheld the expulsion orders. N.D. had also lodged an application for international protection, which had been rejected. He was expelled to Mali, while the exact location of N.T. is unknown - allegedly, he is unlawfully staying in Spain. Ibid., paras 28-30.
[8] Article 3 ECHR (Prohibition of torture): No one shall be subjected to torture or to inhuman or degrading treatment or punishment.
[9] Article 4 Protocol 4 ECHR (Prohibition of collective expulsion of aliens): Collective expulsion of aliens is prohibited.

remedy before national authorities protected by Article 13 ECHR both alone and together with the other two provisions.[10] In a decision of 7 July 2015, the Court declared the complaints under Article 3, alone and in conjunction with Article 13, inadmissible.[11]

On 3 October 2017, a Chamber found Spain had violated the prohibition of collective expulsion of aliens, alone and together with the right to an effective domestic remedy. [12] The Court did not deem it necessary to establish the exact location of the border fences and the events, since as far as the applicants climbed down they had been 'under the continuous and exclusive control, at least *de facto*' of the *Guardia Civil*, and therefore within Spanish jurisdiction for the purposes of Article 1 ECHR.[13] The Chamber further concluded that Spain had breached Article 4 Protocol 4, alone and together with Article 13: the immediate removal of the applicants had constituted a collective expulsion, [14] and had deprived them of any domestic remedy to challenge their return to Morocco.[15]

Spain referred the case to the Grand Chamber and a new judgment was delivered on 13 February 2020. As an initial point, the Grand Chamber emphasised the need to continue the examination of the application in light of the criteria set forth in Article 37(1) ECHR,[16] even if Spain had made no reference to this issue.[17] The Grand Chamber stressed that this necessity stemmed from the 'special circumstances relating to respect of human rights as defined in the Convention and the Protocols thereto'.[18] The important issues at stake concerned 'the interpretation of the scope and requirements of Article 4 Protocol 4 with regard to migrants who attempt to enter a Contracting State in an unauthorised manner by taking advantage of their large number'.[19] This matter is 'especially important in the context of the "new challenges" facing European States in terms of immigration control', hence 'the impact of the case goes beyond the particular situation of the applicants'. [20] The Court also noted the public's interest in the case, as testified by the numerous third-party interventions.[21]

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[10] Article 13 ECHR (Right to an effective remedy): Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

[11] *N.D. and N.T. v Spain*, Applications Nos 8675/15 and 8697/15, Admissibility, 7 July 2015.

[12] *N.D. and N.T. v Spain* [Chamber], supra n 2.

[13] Ibid., at paras 44-55.

[14] Ibid. at paras 103-108.

[15] Ibid., at paras 117-122.

[16] Article 37 (Striking out applications): 1. […] [T]he Court shall continue the examination of the application if respect for human rights as defined in the Convention and the Protocols thereto so requires.

[17] *N.D. and N.T. v Spain* [GC], supra n 1, at paras 69-70. Probably, the weight accorded to this issue is due to the 'doubts as to whether the Grand Chamber should have dealt with this case at all', as expressed by Judge Pejchal in his Concurring Opinion (at para 1).

[18] *N.D. and N.T. v Spain* [GC], ibid., at para 79.

[19] Ibid. at para 78.

[20] Ibid.

[21] Third party interventions were submitted by: the Commissioner of Human Rights of the Council of Europe; the Office of the United Nations High Commissioner for Refugees; the United Nations High Commissioner for Human Rights; the Spanish Commission for Assistance to Refugees; acting collectively, the Centre for Advice on Individual Rights in

The Grand Chamber found that the applicants were within the jurisdiction of Spain for the purposed of Article 1 ECHR, but that there was no violation of Article 4 Protocol 4 nor of Article 13, alone or in conjunction with Article 4 Protocol 4. As it is further addressed below, the purpose of Article 4 Protocol 4 is 'to prevent States being able to remove certain aliens without examining their personal circumstances and, consequently, without enabling them to put forward their arguments against the measure taken by the relevant authority'.[22]

In its assessment of the alleged breached of this prohibition, the Court established that the removal of the applicants amounted to an expulsion under Article 4 Protocol 4,[23] but the Grand Chamber unanimously held that the expulsion was not 'collective' in nature.

In greater details, the Court did not deny the absence of examination of the specific circumstances of each applicant. However, the Grand Chamber recalled its case-law according to which there is no violation of Article 4 Protocol 4 if the lack of an individual decision is attributable 'to the applicant's own conduct',[24] the Court went on to state that, in the context of unauthorised border crossings, it would take into account whether

> [I]n the circumstances of the particular case, the respondent State provided genuine and effective access to means of legal entry, in particular border procedures. Where the respondent State provided such access but an applicant did not make use of it, the Court will consider, in the present context and without prejudice to the application of Articles 2 and 3, whether there were cogent reasons not to do so which were based on objective facts for which the respondent State was responsible.[25]

The Grand Chamber observed that Spain had afforded several means of allowing entry to its territory lawfully, *viz* working visas and asylum applications, and that the applicants and the third interveners had failed to convincingly demonstrate that these were unavailable and inaccessible to them.[26] Furthermore, the Court considered that the applicants had no cogent reason, based on objective facts for which Spain was responsible, for failing to make use of such arrangements. [27] The Court therefore

Europe, Amnesty International, the European Council on Refugees and Exiles and the International Commission of Jurists; the Belgian, French and Italian Governments.

[22] *Hirsi Jamaa and Others v Italy,* Application No 27765/09, Merits and Just Satisfaction, 23 February 2012, at para 177, recalled in *N.D. and N.T. v Spain* [GC], supra n 1, at para 197-198.

[23] *N.D. and N.T. v Spain* [GC], ibid., at paras 190-191.

[24] Ibid., at para 200.

[25] Ibid., at para 201.

[26] Ibid., at paras 212-217, 222-228.

[27] Ibid., at para 218-221.

concluded that Spain had not breached its obligations under Article 4 Protocol 4. The lack of individual decisions was attributable to the applicants' own conduct.

The Grand Chamber further held that there was no violation of the right to effective remedies before national authorities under Article 13 ECHR, taken in conjunction with Article 4 Protocol 4. According to the Court, the respondent State was exempt from providing such remedies since N.D. and N.T. had 'placed themselves in an unlawful situation' by choosing not to abide by the relevant EU and Spanish provisions regarding border crossing.[28]

3. CROSSING CONTROLS AT LAND BORDERS: DOES 'TERRITORIAL JURISDICTION' REALLY MATTER?

This first major difference between the Chamber's judgment that of the Grand Chamber concerns the issue of jurisdiction. Generally speaking, for the purposes of Article 1 EHCR, a State's jurisdiction is exercised when it exerts control over an area or over individuals.[29] This notion is a matter of factual power, regardless of its lawfulness.[30] Where such *de facto* authority has a legal basis – i.e. where the State is legitimately entitled to exercise this power, then it coincides with *de jure* jurisdiction.[31] Jurisdiction under Article 1 ECHR is primarily territorial and is assumed to be exercised within each Contracting State's borders. However, in some exceptional cases the Court has acknowledged that States do not exercise jurisdiction over parts of their territories due to a lack of *de facto* control.[32] In other cases, the Court recognised that Contracting Parties may exercise extraterritorial jurisdiction – i.e. beyond their borders.[33]

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[28] Ibid., at para. 242.

[29] Milanovic, *Extraterritorial Application of Human Rights Treaties - Law, Principles and Policy* (2011); Milanovic, 'Jurisdiction, Attribution and Responsibility in Jaloud', *Ejil:Talk!*, 11 December 2014, available at: https://www.ejiltalk.org/jurisdiction-attribution-and-responsibility-in-jaloud/ [last accessed 24 April 2020].

[30] Milanovic, *Extraterritorial Application of Human Rights Treaties*, ibid., at 53 and 58-61. The Author also outlines the different meanings and purposes of the notion of "jurisdiction" under general international law and under human rights treaties (*id*, at 23-34).

[31] Milanovic, ibid., at 8; Papanicolopulu, 'A Response to Milanovic on Extraterritorial Application of Human Treaties: The Significance of International Law Concepts of Jurisdiction', *Ejil:Talk!*, 4 December 2011, available at: https://www.ejiltalk.org/a-response-to-milanovic-on-extraterritorial-application-of-human-treaties-the-significance-of-international-law-concepts-of-jurisdiction/ [last accessed 24 April 2020]

[32] See the case-law concerning the military occupation of Northern Cyprus by Turkish armed forces and those on the 'Moldovan Transdniestrian Republic' ('MRT'), an area within the territory of Moldova which is under the control of Russia. Remarkably, in the latter scenario the Court declared that Moldova retained jurisdiction for the purpose of Article 1 ECHR due to its sovereign title over the territory, but its responsibility was engaged solely on account of its positive obligations under the Convention – and not also in relation to its duty to refrain from wrongful conducts. For a critic of the inconsistent approach of the Court, see Milanovich, Papìc, 'The Applicability of the ECHR in Contested Territories' (2018) 67 *International and Comparative Law Quarterly* 779.

[33] For an in-depth analysis, see: Milanovic, 'Jurisdiction, Attribution and Responsibility in Jaloud', supra n 29; Moreno-Lax, *Accessing Asylum in Europe Extraterritorial Border Controls and Refugee Rights under EU Law* (2017), 272-281.

The Chamber's judgment did not engage with the question of whether Spain exercised territorial or extraterritorial jurisdiction – i.e. whether the fences were located on and the events occurred in the Spanish territory. The State's jurisdiction was established by relying on the 'continuous and exclusive control, at least *de facto*' that the *Guardia Civil* had exercised over the applicants as soon as they set foot on the ground.[34] The Grand Chamber, however, affirmed that Spain exercised territorial jurisdiction over the relevant area and on N.D. and N.T., since the barriers had been erected on its territory and the incident took place there. The Grand Chamber also dismissed the Government's challenge to the 'presumption of competence' over the relevant land due to the lack of 'constraining *de facto* situation' or 'objective facts' capable of limiting the effective exercise of the Spanish authority over that area.[35] The Court recalled its case-law according to which 'the special nature of the context as regards migration cannot justify an area outside the law', since 'the Convention cannot be selectively restricted … by an artificial reduction in the scope of territorial jurisdiction'.[36]

Contracting states, therefore, cannot limit the scope of their territorial jurisdiction according to their needs. This would result in an arbitrary hindrance to the effective protection of the rights enshrined in the ECHR.[37] In the context of management of migratory flows, this principle bars States from shielding their responsibility behind concepts such as that of 'operational borders'.

Even if the finding of the Grand Chamber represents a difference compared to the Chamber's judgment, it does not significantly influence the assessment of the exercise of jurisdiction in the context of crossing controls at land borders, including the Melilla frontiers. Since jurisdiction is a matter of factual power, it suffices for a State to exercise *de facto* control of an area or over individuals to be held responsible for any conduct attributable to it which breaches rights and freedoms enshrined in the ECHR. Thus, the precise location of the events – whether within or outside its territory – is irrelevant as long as the Contracting Party exercises authority through its border guards.

Furthermore, the conclusion of the Grand Chamber on the issue of jurisdiction are not relevant in the context of the *non-entrée* tactics that several EU Member States have recently adopted. There has been a trend towards the externalization of the management of migratory flows through bilateral

[34] *N.D. and N.T. v Spain*, [Chamber] supra n 2, paras 44-55. Pijnenburg, Is N.D. and N.T. v. Spain the new Hirsi?, *EjilTalk!* 17 October 2017, available at: https://www.ejiltalk.org/is-n-d-and-n-t-v-spain-the-new-hirsi/ [last accessed 24 April 2020]; Salvadego, 'I respingimenti sommari di migranti alle frontiere terrestri dell'*ènclave* di Melilla' (2018) 12 *Diritti umani e diritto internazionale* 199.

[35] *N.D. and N.T. v Spain* [GC], supra n 1, at paras 91-94, 104-108.

[36] Ibid., at para 110.

[37] Ibid. See also *Hirsi Jamaa and Others v Italy*, supra n 21, Concurring Opinion of Judge Pinto de Albuquerque; *M.A. and Others v Lithuania*, Application No 59793/17, Merits and Just Satisfaction, 11 December 2018, Concurring Opinion of Judge Pinto de Albuquerque, at para 4.

agreements between would-be destination Countries and States of departure (whether of origin or transit). Besides being aimed at reducing pressure on EU frontline States (especially Italy, Greece and Spain), such forms of cooperation are meant to shelter putative destination Countries from their responsibility under international human rights law – including the ECHR[38] The authorities of the departure States usually perform pre-arrival returns on their territory - *viz*, containment measures, such as interception on high sea, which are meant to avoid the arrival of foreigners on the territory of the would be destination Countries. These activities take place outside the jurisdiction of putative destination States, which are relieved from *all* their treaty obligations, including absolute provisions such as the prohibition of torture and the principle of *non-refoulement*. This practice is particularly worrying where the State of departure is not a Contracting Party to the ECHR, as in the case of Libya or Morocco, because alleged victims cannot seek redress for alleged violation of the ECHR before the ECtHR either alone or together with the putative destination Country. [39] Although Spain has not yet entrusted Moroccan authorities with similar tasks, nothing prevents it from adopting this deplorable approach in the near future.[40]

4. THE APPLICANTS' OWN CONDUCT: FROM LACK OF COOPERATION TO CROSSING A LAND BORDER IN AN UNAUTHORISED MANNER

Having ascertained that Spain exercised territorial jurisdiction under Article 1 ECHR, the majority of the Grand Chamber found that the removal of N.D. and N.T. had constituted an 'expulsion' for the purposes of Article 4 Protocol 4.[41] The judges recalled the Court's settled stance according to which this term must be interpreted 'in the generic meaning in current case ("to drive away from a place")',[42] which covers any situation coming within the jurisdiction of a Contracting Party, specifically any

[38] Moreno-Lax, Giuffré, 'The Rise of Consensual Containment: From "Contactless Control" to "Contactless Responsibility" for Forced Migration Flows', in Juss (ed) *Research Handbook on International Refugee Law* (2019) 82; Ghezelbash et al, 'Securitization of Search and Rescue at Sea: the Response to Boat Migration in the Mediterranean and Offshore Australia' (2018) 67 *International & Comparative Law Quarterly* 315.
[39] Ciliberto, 'Libya's Pull-Backs of Boat Migrants: Can Italy Be Held Accountable for Violations of International Law?' (2018) 4 *The Italian Law Journal* 481.
[40] See also below at Section 6.
[41] *N.D. and N.T. v Spain* [GC], supra n 1, at paras 164-191. The case represented the first occasion for the Court to rule on the distinction between 'expulsion' and 'non-admission' (or 'refusal of entry') of aliens who are within the jurisdiction of a State that is forcibly removing them from its territory (id, para 185). The difference is outlined in the International Law Commission's Draft Articles on Expulsion of Aliens adopted in 2014. The majority paid significant attention to the interpretation of the term 'expulsion'. The first possible reason is the internal debate following the different view of judge Koskelo, who argued that the position of the majority 'makes the scope of the application of this provision wider than is justified' (id, Partly Dissenting Opinion of Judge Koskelo, at para 1). The second, and maybe more compelling cause, relies on the Grand Chamber's concerns on the broad impact of this judgment (id, at para 78).
[42] *N.D. and N.T. v Spain* [GC], ibid., at para 185.

forcible removal of an alien from a State's territory and at its borders,[43] as well as in the context of attempts to access the Country by sea or by land.[44] The majority also stressed that Article 4 Protocol 4 applies 'irrespective of the lawfulness of the person's stay, the length of time he or she has spent in the territory … and his or her conduct when crossing the borders'.[45]

On the merits, the Court found Spain's actions complied with its obligations under Article 4 Protocol 4. The Court recalled its 'well-established case-law' to confirm that an expulsion is 'collective' if it compels foreigners, as a group, to leave a country without a prior 'reasonable and objective examination of the particular case of each individual alien of the group'.[46] This interpretation stems from the purpose of this provision, which is to prevent Contracting Parties from removing a certain number of non-nationals without assessing 'their personal circumstances and, consequently, without enabling them to put forward their arguments against the measure taken by the relevant authority'.[47] This provision is aimed at providing each member of the group with an opportunity 'to assert a risk of treatment contrary to the Convention' in the event of their removal. It also serves to ensure that national authorities exposing 'anyone who may have an arguable claim to that effect to such risk'.[48] The prohibition of collective expulsion does not entail the right to an individual interview in any circumstances. The provision may be complied with where each alien has 'a genuine and effective possibility of submitting arguments against their expulsion and where those arguments are examined in an appropriate manner'.[49] The number of persons affected by the measure or their membership to a particular group are irrelevant.[50]

For the purposes of Article 4 Protocol 4, the alien's behaviour is an element to be considered. There is no violation of the prohibition of collective expulsion if the lack of an individual decision 'can be attributed to the applicant's own conduct'.[51] This principle underlies the Court's judgment in *N.D. and N.T.* The Grand Chamber stated that the exception based on the applicant's own conduct was rooted in 'the Court's well-established case-law', according to which the applicants' 'lack of active cooperation with the available procedure for conducting an individual examination of the applicants' circumstances' excludes state responsibility for the absence of such assessment.[52] For the Grand

[43] Ibid., at paras 185-186. Contra *M.A. and Others v Lithuania*, supra n 37, Joint dissenting opinion of Judges Ravarani, Bošnjak and Paczolay, at para 5. Remarkably, Judge Bošnjak sat as a member of the Grand Chamber in *N.D. and N.T. v Spain*, but he did not contest the finding of the majority.
[44] *N.D. and N.T. v Spain* [GC], ibid., at para 187.
[45] Ibid., at para 185.
[46] Ibid., at para 193.
[47] Ibid., at para 197.
[48] Ibid., at para 198.
[49] Ibid., at para 199.
[50] Ibid., at paras 194-195.
[51] Ibid., at para 200.
[52] Ibid., at para 200.

Chamber, the same principle 'must also apply to situations in which the conduct of persons who cross a land border in an unauthorised manner, deliberately take advantage of their large numbers and use force, is such as to create a clearly disruptive situation which is difficult to control and endangers public safety'.[53]

Despite various judgments being cited to support the settled nature of these principles, the Court has only applied this criterion in two cases: *Berisha and Haljiti v the Former Yugoslav Republic of Macedoania* and *Dristas and Others v Italy*. Both applications were considered inadmissible. In the first case, the ECtHR had found that issuing a single judgment for both the applicants, as spouses, who had lodged a joint asylum application on the same grounds and had produced the same evidence to support their allegations, had not amounted to a collective expulsion.[54] In the second case the Court held the application to be inadmissible because a police officer had been unable to write the applicants' names on their expulsion orders because they had refused to show their identity papers.[55] In both cases, the lack of individual decisions was the direct effect of the applicants' conduct.

However, the invoked principle is not based on the Court's well-established case-law. First and foremost, there is no settle jurisprudence. The 'applicant's own conduct' criterion had been applied solely in two decisions, and only *Dritsas* was grounded on the 'lack of cooperation'. Secondly, even assuming the existence of a *jurisprudence constante*, the rationale of the exclusionary clause of the 'applicant's own conduct', as affirmed in *Berisha and Halijti* and *Dristas and Others*, is that of the casual relationship between the applicants' behaviour and the lack of an individual decision. In *N.D. and N.T.* the Grand Chamber did not analytically explain which was such causal relationship – *viz.* the Court did not clarify how the immediate handing over performed by the Spanish border guards could be qualified as a direct effect of the unlawful crossing of the Melilla frontier.

This notwithstanding, the Grand Chamber referred to the 'lack of cooperation with the available procedure for conducting an individual examination of the applicants' circumstances' as a principle that must apply also to situations where States immediately remove persons who have crossed a land border in an unauthorised manner.[56] In other words, despite its official line of reasoning, the Court did not apply the exclusionary principle as affirmed in *Berisha and Haljiti* and *Dristas and Others*. Instead, the Grand Chamber developed a new exception to the prohibition of collective expulsion.

5. THE TWO-STEP TEST

[53] Ibid., at para 201.
[54] *Berisha and Haljiti v the former Yugoslav Republic of Macedonia*, Application No 18670/03, Decision on the Admissibility, 16 June 2005, on the law, at para 2.
[55] *Dristas and Others v Italy*, Application No 2344/02, Decision on the Admissibility, 1 February 2011, on the law, at para 7.
[56] *N.D. and N.T. v Spain* [GC], supra n 1, at paras 200, 201 and 207.

Following the statement on the exclusionary effect of the applicant's own conduct, the judges established a two-step test to assess a complaint under Article 4 Protocol 4 in the context of unauthorised access to the territory of a Contracting Party. Firstly, the Court will consider whether, in the circumstances of the specific case, the respondent State had provided genuine and effective access to means of legal entry, in particular border procedures with a view to securing the rights protected by Articles 2 and 3 ECHR.[57] If such access was provided but the applicant did not make use of it, choosing instead to cross a frontier in an unauthorised manner (possibly taking advantage of their large numbers and using force), the Court will consider whether there were 'cogent reasons' preventing the use of these procedures which were based on objective facts for which the respondent State was responsible (without prejudice to the application of Articles 2 and 3 ECHR).[58]

The Grand Chamber affirmed that the effectiveness of Convention rights requires that Contracting Parties whose borders are also the external frontiers of the Schengen area make available means of legal entry. Procedures should allow persons to request protection under the Convention, and especially Article 3 ECHR. The Court's statement was grounded on the provision of the Schengen Borders Code which regulates the passage through the external borders of the Schengen area[59] If States establish such pathways, then they may refuse entry to aliens – including potential asylum seekers – who, without cogent reasons, do not make use of these procedures and try to cross the border in an unauthorised manner.[60]

Applying this two-stage test to the facts in *N.D. and N.T.*, the Grand Chamber took into account three means of legal entry to Spain: i) lodging an application for international protection at the Beni Enzar post at the Melilla border; ii) submitting a claim for international protection at the Spanish embassies and consulates in the applicants' Countries of origin or in States of transit; and iii) requiring a working visa to the same institutions. The Grand Chamber focused on the procedure at the Beni Enzar post and declared that this arrangement had existed at the material time and that Spain had provided genuine and effective access to it. N.D. and N.T. had no cogent reasons based on objective facts attributable to the Government for not making use of it.[61] Thus, there was no violation of Article 4 Protocol 4. The Court also examined the other two pathways.[62] The finding was the same

[57] Ibid., at para 201 and 211.
[58] Ibid.
[59] Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), in force at the time of the events.
[60] Ibid., at paras 209-210.
[61] Ibid., at paras 213-221.
[62] Ibid., at para 222.

as the one on the Beni Enzar border crossing procedure.[63] In the light of this, the judges considered that 'it was in fact the applicants who placed themselves in jeopardy by participating in the storming of the Melilla border fences on 13 August 2014, taking advantage of the group's large numbers and using force'.[64] Consequently, the Court concluded that the lack of individual expulsion decisions was attributable to N.D. and N.T. – rather than the respondent State – and was a consequence of the applicants' own conduct. Accordingly, there was no violation of Article 4 Protocol 4.[65]

The reasoning of the Grand Chamber and its conclusion are questionable on several grounds. First, as reported above, the Court recalled the Schengen Border Code and stated that the effectiveness of ECHR requires that Contracting Parties whose borders coincide with the external frontiers of the Schengen area make available genuine and effective means of legal entry. The wording of the judgment cast doubt on whether these States have a positive obligation of establishing such arrangements at their land borders.[66] This would not be the first time that the Court has intensified the standard of protection under the Convention by relying on EU law. For example, in the case *M.S.S. v Belgium and Greece* the ECtHR affirmed the obligation to provide adequate living conditions to asylum seekers by drawing upon an EU directive incorporated in the national legal system.[67] However, in *N.D. and N.T.* the Grand Chamber did not seem to endorse an analogous enhanced obligation in relation to Article 4 Protocol 4.[68] The existence of legal means of access simply represents the condition to perform the two-step test, which otherwise would not be necessary. Hence, the only way for frontline States of the Schengen area to avail themselves of the exclusionary effect of the applicants' is the establishment of such border procedures.

The other main questionable aspect concerns the nebulous application of the two phases of the test. Notably, the two-step test mirrors the admissibility criterion of the exhaustion of domestic remedies.[69] Generally speaking, the only avenues that must be pursued before turning to the Court are those that exist at the material time and are appropriate, available – both in law and practice – and

[63] Ibid., at para 223-231.
[64] Ibid., at para 231.
[65] Ibid, at para 231.
[66] See also ibid., Partly Dissenting Opinion of Judge Koskelo, at paras 18-19.
[67] *M.S.S. v Belgium and Greece*, Application No 30696/09, Merits and Just Satisfaction, 21 January 2011, at para 250. See also Bossuyt, 'The Court of Strasbourg Acting as an Asylum Court' (2012) 8 *European Constitutional Law Review* 203, at 234; Ciliberto, 'Non-refoulement in the Eyes of the Strasbourg and Luxembourg Courts: What Room for Its Absoluteness?' in Natoli, Riccardi (eds), *Borders, Legal Spaces and Territories in Contemporary International Law*, (2019) 59 at 84-7.
[68] On the same line, but on different grounds, see Thym, 'A Restrictionist Revolution? A Counter-Intuitive Reading of the ECtHR's N.D. & N.T. Judgment on "Hot Expulsions"', EU Immigration and Asylum Law and Policy, 17 February 2020, available at: http://eumigrationlawblog.eu/a-restrictionist-revolution-a-counter-intuitive-reading-of-the-ecthrs-n-d-n-t-judgment-on-hot-expulsions/ [last accessed 24 April 2020].
[69] Article 35(1) ECHR (Admissibility criteria): 'The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law […]'.

effective.[70] If more than one of such means are accessible and their purpose is the same, applicants must use only one of them.[71] The only remedy that must be exhausted are those fulfilling the following requirements: it must have a sufficiently clear legal basis, the applicants must have a realistic opportunity of using it and the avenue must provide a reasonable prospect of success.[72] Applicants are dispensed from exhausting national remedies that do not fulfil such qualities,[73] or which depend on the discretionary powers of domestic authorities,[74] or where specific circumstances exempt the pursuing of even those which are adequate and effective.[75]

Likewise, the two-step test developed in *N.D. and N.T.* requires aliens to 'exhaust' the means of legal entry to the Contracting Party. Foreigners must make use solely of the arrangements that exist at the material time and that provide genuine and effective access to the territory of the State. Non-nationals are relieved from pursuing procedures that do not meet such requirements, or where there are cogent reasons based on objective facts attributable to the putative destination Country, even the ones that offer a genuine and effective access to the territory. Albeit developed in another context and referred to a different issue, this correspondence makes the concepts underpinning the exhaustion of domestic remedies the most suitable lens through which to assess the application of the principle affirmed in *N.D. and N.T.*[76]

A. The genuine and effective access to means of legal entry

In the instant case, the Grand Chamber agreed that there were three means of genuine and effective access to legal means of entry into Spain. However, this finding is based on a dubious analysis of both their legal basis and their concrete accessibility.

First, the Grand Chamber failed to appreciate that at the material time of the events no official asylum office existed on the Beni Enzar crossing point: the bureau and the respective procedure were established in September 2014. The Court upheld the Government's argument that, even *prior* to the

[70] Harris et al., *Harris, O'Boyle, and Warbrick: Law of the European Convention on Human Rights* 4th edn (2018), at 54-5.
[71] Ibid., at 55.
[72] Ibid., at 53-4
[73] Ibid., at 53-5.
[74] Ibid., at 59-60.
[75] Ibid., at 60-2.
[76] Similarly, Hakiki refers to the notion of national 'effective remedy' under Article 13 ECHR, which is strictly linked to the admissibility criterion of the exhaustion of domestic remedies under Article 35 ECHR. See Hakiki, 'N.D. and N.T. v. Spain: defining Strasbourg's position on push backs at land borders?', *Strasbourg Observer*, Blog commenting on developments in the case law of the European Court of Human Rights, 26 March 2020, available at: https://strasbourgobservers.com/2020/03/26/n-d-and-n-t-v-spain-defining-strasbourgs-position-on-push-backs-at-land-borders/ [last accessed 24 April 2020]. On the relationship between Article 13 ECHR and Article 35 ECHR, see for example Hennebel, Tigroudja, *Traité de droit international des Droits de l'homme* (2018) at 1299-1300.

setting-up of this office, another legal avenue was available at this post – namely, there had been a real and concrete possibility to lodge asylum applications and a legal obligation to accept them.[77] In reaching this conclusion great weight was attached to statistics submitted by Spain which suggested that from January to 31 August 2014 only six asylum applications had been submitted at the informal office at Beni Enzar,[78] while in the following three years only two requests for international protection had been lodged by persons coming from sub-Saharan Countries, such as Mali and Côte d'Ivoire – i.e. the States of the applicants.[79]

The border procedure at the Beni Enzar crossing point lacked a sufficiently clear legal basis in Spanish law, which brings into question the very existence of an effective asylum process. Even assuming that the unofficial arrangement satisfied such a requirement, the very few asylum applications that had been lodged in the first month of 2014 run contrary to the Government's allegations concerning the effective and genuine accessibility to this informal pathway. The small number of requests confirms the difficulties in approaching the Melilla frontier and, hence, casts doubt on whether N.D. and N.T. would have had a realistic opportunity of using the border procedure to claim international protection.[80] Similarly, the relatively few applications lodged under the procedure in force *after* the attempted crossing is irrelevant. This procedure was not available at the time of the events. Moreover, the applicants' reasonable prospect of success is questionable as well. The idea of 'reasonable prospect of success' does not equate to obtaining leave to enter the territory, but rather the opportunity of an appropriate assessment of their personal circumstances – i.e. the notion does not entail obtaining entrance to the territory of the State, but access to an entry procedure. Notably, the Government did not submit any figures on how many of those six applications had been processed, hence it is not possible to assess the effectiveness of the unofficial border procedures.

As for the possibility of seeking asylum at the Spanish embassies and consulates, the Court rejected the applicants' argument that such procedure lacked a legal basis. The plaintiffs sustained that Law 12/2009, in force at the relevant time, fell short of implementing legislation. According to the Court, Royal Decree 203/1993, which laid down implementing measures in matters of asylum under the previous regulation, was still in force at the time of the events. This was confirmed by the circular letter of 20 November 2009 sent by the Spanish Government to all the ambassadors.[81]

This assessment is mistaken. The 2009 circular letter specifies that Royal Decree 203/1993 applies solely to cases pending the entry into force of Law 12/2009, while for new cases the instructions laid

[77] Ibid., at paras 213-214.
[78] Ibid., at para 213.
[79] Ibid., at paras 215-216.
[80] On the same line, see Thym, supra n 68; Hakiki, supra n 76.
[81] Ibid., at para 223-224.

down in the same circular letter apply until the issuing of implementing rules.[82] The absence of implementing legislation at the time of the event should have led the Grand Chamber to conclude that the procedure did not exist *de lege*.[83] Even assuming that the circular letter constitutes a sufficiently clear legal basis, Law 12/2009 confers a mere discretionary power to ambassadors to facilitate the transfer of asylum seekers for the purpose of submitting their claims. Furthermore, nationals of the State where the representation is located are excluded from this procedure.[84] Therefore, the ambassadors are not entrusted with the task of examining asylum requests. Besides, an international border must be crossed to use it. These elements question whether this procedure falls within the notion of 'means of legal entry' or, at the very least, its accessibility and effectiveness.[85] Even assuming that this procedure is an adequate legal pathway, Spain had provided figures concerning the number of applications *submitted* at its representations abroad, without any information on how many of them have been processed after the entry into force of Law 12/2009.[86] The lack of such statistics means that any assessment of this arrangement is incomplete.

The Grand Chamber later moved to the third means of legal access mentioned by Spain. The Court's evaluation of this pathway was sketchy as well. The Grand Chamber simply stated that the applicants did not dispute 'the genuine and effective possibility of applying for a visa at other Spanish embassies' and that the Government 'gave concrete figures showing that a considerable number of working visas had been issued to citizens of Mali and Côte d'Ivoire in the relevant period'[87]. The Court did not specify the any legal basis for such means of legal access, nor did it report the exact statistic concerning working visas that have been issued to citizens of Mali and Côte d'Ivoire.

B. The lack of cogent reasons based on objective facts for which the respondent State was responsible

Moving to the second stage of the test, the Grand Chamber found that N.D. and N.T. had no cogent reasons for failing to make use of the three means of legal entry provided by Spain. This conclusion is based on controversial lines of reasoning

[82] Ibid., at para 38.
[83] Hakiki, supra n 76.
[84] Ibid., at para 34.
[85] Wissing, 'Push backs of "badly behaving" migrants at Spanish border are not collective expulsions (but might still be illegal refoulements)' *Strasbourg Observer*, Blog commenting on developments in the case law of the European Court of Human Rights, 25 February 2020, available at: https://strasbourgobservers.com/2020/02/25/push-backs-of-badly-behaving-migrants-at-spanish-border-are-not-collective-expulsions-but-might-still-be-illegal-refoulements/ [last accessed 24 April 2020].
[86] Hakiki, supra n 76.
[87] *N.D. and N.T. v Spain* [GC], supra n 1, at para 228.

Several third-party interveners argued that 'physically approaching the Beni Enzar border crossing point was, in practice, impossible or very difficult for persons from sub-Saharan Africa'.[88] Moroccan authorities prevented those people from moving close to regular frontier posts and this was certainly the case in Melilla. Foreigners were consequently deprived of any possibility of legal access to Spain, mainly due to racial profiling and severe passport checks on the Moroccan side.[89] The Court affirmed that those reports were not conclusive 'as to the reasons and factual circumstances' underlying the applicants' allegations,[90] and that N.D. and N.T. referred to those difficulties 'only in the abstract'.[91] Even assuming that the alleged difficulties had existed, 'no responsibility of the respondent Government for the situation ha[d] been established before the Court'.[92] In light of this, the applicants had no cogent reasons for failing to make use of the Beni Enzar unofficial border procedure, which the Court deemed as existent at the time of the events. The Grand Chamber reached the same conclusion regarding the possibility of lodging an asylum application at the Spanish embassies and consulates abroad,[93] or to requesting a working visa.[94]

The Grand Chamber did not provide a definition of cogent reasons, which remains a nebulous notion. Moreover, the Court attached very little weight to the reliable and independent reports of third parties, which suggested there were significant difficulties in using the border procedure that allegedly existed.[95]

The second stage of the test relieves aliens from 'exhausting' genuine and effective means of legal access solely if there is a causal relationship between the State's conduct and the difficulties encountered by foreigners. Thus, not having practical access to legal means of entry due to racial profiling does not dispense aliens from 'exhausting' such arrangements since these acts are not attributable to the would-be destination State. In this manner, the Court prevents Contracting Parties from bearing the burden of a situation that cannot be directly attributed to them. Still, it is not clear why these difficulties should result in a detriment towards non-nationals, as racial profiling is not a fact for which they could be held responsible either [96] Against this background, the *N.D. and N.T. v Spain* approach results in a lose-lose situation for aliens. They could be prevented from legally accessing the territory of a Contracting Party – at least, through border procedures – by third-States'

[88] Ibid., at para 218.
[89] Ibid. See also the third-party interventions at paras 142, 152-153, 163 and the reference thereby provided.
[90] Ibid.
[91] Ibid., at para 220.
[92] Ibid., at para. 221.
[93] Ibid., at paras 225 and 227.
[94] Ibid., at para 228.
[95] Hakiki, supra n 76; Wissing, supra n 85.
[96] Hakiki, supra n 76; Papageorgopoulos, 'N.D. and N.T. v. Spain: do hot returns require cold decision-making?' *EDAL* 28 February 2020, available at: https://www.asylumlawdatabase.eu/en/journal/nd-and-nt-v-spain-do-hot-returns-require-cold-decision-making [last accessed 24 April 2020].

authorities. If they enter in an unauthorised manner, they are excluded from the protection afforded under Article 4 Protocol 4.

Once again, the previous exhaustion of domestic remedies is the most suitable benchmark for analysing the reasoning of the Grand Chamber. The Court's settled case-law exempts applicants from pursuing adequate and effective national remedies where 'specific circumstances' occur, *viz.* where making use of such pathways would have been dangerous or impossible.[97] This exemption has been rarely accepted due to its extremely high threshold. Yet, such special circumstances must not necessarily be based on facts for which the Respondent State is responsible. For example, in the case of *Sejdovic v Italy*, the Court had relieved the applicant from availing himself of the remedy submitted by the Government because of 'the objective obstacles to its use'.[98] The Grand Chamber in *N.D. and N.T. v Spain* could have relied on this case-law in developing the second step of the test. In this way the Court would have avoided the exclusion of the protection under Article 4 Protocol 4 in situations where the obstacles are neither attributable to the aliens nor to the Contracting Party. This would have not been to the detriment of States either, since the high threshold of the 'specific circumstance' criterion would have compelled aliens to demonstrate that pursuing means of legal access would have been impossible or dangerous.

6. APPLYING *N.D. AND N.T.* IN THE *NON-REFOULEMENT* CONTEXT

As affirmed by the Grand Chamber, the issue at stake in the present case concerned 'the interpretation of the scope and requirements of Article 4 Protocol 4 with regard to migrants who attempt to enter a Contracting State in an unauthorised manner'.[99] Notably, the judgment will supposedly have a wide-ranging impact in the context of the current immigration control policies performed by European States.[100]

Theoretically, this ruling is not a *carte blanche* for pushbacks at land borders under Article 4 Protocol 4. However, the novel exclusionary clause severely restricted the level of protection afforded by such rule. This limitation, in practice, could result in the legitimisation of the immediate return of groups of aliens. If so, similar applications pending before the Court could be declared manifestly unfounded

[97] Harris et al., supra n 70, at 60-2.

[98] *Sejdovic v Italy* [GC], Application No 56581/00, Merits and Just Satisfaction, 1 March 2006, at para 54-55; id., Concurring Opinion of Judge Mularoni, at para 1. See also *Isayeva, Yusupova and Bazayeva v Russia*, Application Nos 57947/00, 57948/00, 57949/00, Merits and Just Satisfaction, 24 February 2005, at para 150, where the Court used the expression 'practical difficulties', which is somehow similar to 'objective obstacles'.

[99] *N.D. and N.T. v Spain* [GC], supra n 1, at para 78.

[100] Ibid.

or adjudged in favour of the respondent State. [101]Furthermore, putative future claims could be negatively affected as well. The current situation in Evros could lead to an increasing number of complaints against Greece claiming the violation of the prohibition of collective expulsions due to the alleged summary and forcible removal of migrants to Turkey.[102] Besides and more generally, the second step of the test – both in itself and as applied in *N.D. and N.T.* – is noteworthy *vis-à-vis* the externalization policies embraced by frontline Member States of the EU which are also parties to the ECHR. As mentioned above, these Countries may entrust neighbouring States with preventing migrants from reaching their frontiers or their shores and to avail themselves of means of legal access, as border procedures.[103] In light of this, the genuine and effective establishment of such arrangements becomes irrelevant for the purpose of Article 4 Protocol 4: the Contracting Party will be relieved from the obligations stemming from the prohibition of collective expulsion wherever the Government is not directly responsible for the obstacles hindering the concrete availability of these means, as in the context of outsourcing the management of migratory flows to neighbouring States which are not bound by the Convention. Alongside the negative consequences on the effective protection granted under Article 4 Protocol 4, this approach may have adverse repercussions also on the principle of *non-refoulement*, as pointed out in the following lines.

Since *N.D. and N.T.*, the Court has already decided another application concerning alleged collective expulsion at land borders. In *Asady and Others v Slovakia*, a Chamber concluded that the expulsion of Afghan nationals from Slovakia to Ukraine did not violate Article 4 Protocol 4.[104] The judges observed that, despite the short length of the interviews by the Slovak police officers (around ten minutes) and the standardised questions, each applicant had had a genuine and effective opportunity to submit arguments against their removal.[105] Despite this chance, they had not put forward any obstacles to their transfer.[106] Besides, individual decisions on their expulsion had been issued.[107]

[101] See for example *M.H. and Others v Croatia*, Application No 15670/18, lodged on 16 April 2018, communicated on 18 May; *H.K. v Hungary*, Application No 18531/17, lodged on 3 March 2017, communicated on 13 November 2017; *M.A. and Others v Latvia*, Application No 25564/18, lodged on 23 May 2018, communicated on 10 May 2019; *M.A. and Others v Poland*, Application No 42902/17, lodged on 16 June 2017, communicated on 3 August 2017; *Mamadou Alpha Balde and Raoul Abel v Spain*, Application No 20351/17, lodged on 9 March 2017, communicated on 12 June 2017.

[102] Human Rights Watch, Greece: Violence Against Asylum Seekers at Border, 17 March 2020, available at: https://www.hrw.org/news/2020/03/17/greece-violence-against-asylum-seekers-border [last accessed 24 April 2020]. By a decision of 1 March 2020, Greece decided to suspend access to asylum: on this issue, see UNHCR statement on the situation at the Turkey-EU border, 2 March 2020, available at: https://www.unhcr.org/news/press/2020/3/5e5d08ad4/unhcr-statement-situation-turkey-eu-border.html [last accessed 24 April 2020].

[103] See above at Section 3.

[104] *Asady and Others v Slovakia*, supra n 4.

[105] Ibid., at paras 62-66.

[106] Ibid., at para 67-68.

[107] Ibid., at para 61.

Although the reasoning of this judgment is controversial as well,[108] the events are different from those of *N.D. and N.T.* The Slovak agents had identified the applicants and performed an individual examination of their personal circumstances, followed by the issuing of removal orders. None of these facts had occurred in the case under inquiry, hence *Asady and Others v Slovakia* is not a suitable benchmark to test the impact of the new exclusionary clause. This is confirmed by the dissenting opinion of the minority, which found a violation of Article 4 Protocol 4 due to the lack of a reasonable examination of the applicants' situation which was not attributable to their conduct. According to the three judges, the *N.D. and N.T.* principle was not applicable because the applicants had not used force and had not caused a disruptive situation or endangered public safety – two factors that the minority considered necessary requirements. Moreover, Slovakia had not provided sufficient access to means of legal entry.[109] The three judges concluded that the *N.D. and N.T.* approach must be applied in limited circumstances and must be confined to its proper context to avoid depriving Article 4Protocol 4 of its very essence.[110]

Although one could share the stance of the minority in *Asady and Others v Slovakia* on the need to restrict the ambit of the *N.D. and N.T.* exclusionary cause, neither the judgment nor the dissenting opinion deal with two of the major uncertainties related to its scope, namely its application to interceptions of migrants on the high seas and its influence on complaints based on the principle of *non-refoulement*.

The duty to assist people in distress at sea is enshrined in both treaty and customary provisions and stands untouched. However, once a ship flying the flag of a Contracting Party retrieves the individuals in need, the rescue vessel may summarily and forcibly transfer migrants intercepted on the high seas to a third State without breaching Article 4 Protocol 4.[111] The lack of an individual examination may be attributed to the applicants' own conduct, *viz.* the attempt to reach the shore in an unauthorised manner. As for the two-step test, the State of the flag, which is a Contracting Party to the Convention, would be in violation of the prohibition of collective expulsion solely if it did not provide genuine and effective access to means of legal entry, namely procedures for requiring international protection or working visas at its representations abroad, and if alleged obstacles in making use of such arrangements are attributable to that State. These two conditions are unlikely

[108] For example, one could argue that a 10-minute interview does not guarantee an appropriate examination of the arguments against removals, as required by the Court case-law: see for example *Khlaifia and Others v Italy*, Application No 16483/12, Merits and Just Satisfaction, 15 December 2016, at para 248. On a similar line, see ibid., Joint Dissenting Opinion of Judges Lemmens, Keller and Schembri Orland, at paras 8-14.
[109] Ibid., at paras 15-23.
[110] Ibid., at paras 7 and 24-25.
[111] Thym, supra n 68.

to be met, also considering the superficial analysis performed by the Grand Chamber in *N.D. and N.T. v Spain*.

Yet, the reduction of the standard of protection under Article 4 Protocol 4 does not release Contracting Parties from their obligation under Articles 2 and 3 of the Convention: even if the *de facto* and immediate removal of migrants attempting to enter by land or by sea in an unauthorised manner may not amount to a collective expulsion, it could still be in violation of the principle of *non-refoulement* in the events that aliens are transferred or disembarked to a State where they face a real risk of treatment contrary to such absolute provision.[112] As affirmed by the Grand Chamber, although in *N.D. and N.T. v Spain* the applicants' claim under Article 3 was declared inadmissible, the finding in the case did not call into question the obligation of Contracting Parties to manage migratory flow in compliance with this obligation.[113] Remarkably, the judges also declared that if States establish genuine and effective means of legal access, 'they may refuse entry to aliens – including potential asylum seekers – who have failed, without cogent reasons, to comply with these arrangements' by trying to cross the border in an unauthorised manner.[114]

Still, this approach is paradoxical. The only way to avoid the exposure to risks of irreparable harm upon removal entails an appropriate and reasonable examination of the personal circumstances of each member of the group by patrolling agents. In other words, the substantive guarantees under Articles 2 and 3 of the Convention can be complied with solely if the procedural safeguard under Article 4 Protocol 4 is fully respected – irrespective of the exclusionary clause rooted in the applicants' conduct and in the two-step test.[115] In this regard, the mere qualification of a State as a safe third Country does not relieve Contracting Parties from their obligations under the principle of *non-refoulement*, whose procedural aspect traditionally requires to take into account both the general level of protection of human rights in the receiving State and the particular situation of the person concerned.[116]

Acknowledging that pushbacks may be in compliance with Article 4 Protocol 4 but in violation of Articles 2 and 3 ECHR runs contrary to the purpose of the Convention, which aims at securing the effective and practical enjoyment of fundamental rights: where the principle of *non-refoulement* comes at stake, this goal is achieved solely by preventing the exposure (and

[112] Pichl, Schmalz, '"Unlawful" may not mean rightless. The shocking ECtHR Grand Chamber judgment in case N.D. and N.T.', *Verfassungsblog*, 14 February 2020, available at: https://verfassungsblog.de/unlawful-may-not-mean-rightless/ [last accessed 24 April 2020]

[113] *N.D. and N.T. v Spain* [GC], supra n 1, at para 232.

[114] Ibid., at para 210.

[115] The purpose of the prohibition of collective expulsion mirrors this intimate connection. See above at Section 4.

[116] For a comprehensive analysis, see De Weck, *Non-Refoulement under the European Convention on Human Rights and the UN Convention against Torture* (2016), at 232-450.

materialisation) of the risk of ill-treatment. – i.e. of a situation that the removing State can no longer mend,[117] and not by a subsequent finding of a breach.

7. CONCLUDING REMARKS

The judgment of the Grand Chamber in the case *N.D. and N.T. v Spain* has restricted the level of protection afforded by the procedural guarantees under Article 4 Protocol 4 by adding a novel exclusionary clause based on the applicant's conduct. The prohibition of collective expulsion of aliens applies to persons entering the territory of a Contracting Party in an unauthorised manner. However, according to the Court, this provision is not breached if the State simultaneously and forcibly removes these aliens, unless the two-step test results in favour of the applicants. This seems quite a watering down of the protection afforded under Article 4 Protocol 4, also because of the weak legal foundation of the *N.D. and N.T.* approach. This flaw stems from the lack of rigorous analysis of the rationale which justifies this further restriction.

Furthermore, the application of the two-step test in the case itself is questionable. As for the first step, the judges did not engage with an analytical assessment on whether the means of legal access submitted by Spain existed at the material time of the events and on whether the applicants would have had a realistic opportunity to pursue those pathways. Regarding the second step, the lack of definition of the term 'cogent reasons' is open to criticism, particularly given that a violation will only be found where such reasons are attributable to the respondent State shifts the balance in favour of State Parties to the detriment of non-nationals. This is especially problematic in the current context of outsourcing of migration controls.

Ultimately, the judgment did not shed a light on the interpretation and application of Article 4 Protocol 4 in the context of unauthorised entry into the territory of a Contracting Party. Rather, it nurtures doubts on the scope of the prohibition of collective expulsion *vis-à-vis* interceptions of migrants on the seas, alongside the risk of having a (negative) impact on the effective and practical protection of the safeguards underpinning the principle of *non-refoulement*. Against this backdrop, the Court's approach should be rethought. In the alternative, further clarifications and elaborations of the unresolved aspects, together with the assertion of an extremely limited scope of the application of the exclusionary clause, are necessary to foster legal certainty under the Convention system.

[117] *M.A. and Others v Lithuania*, supra n 37, Concurring Opinion of Judge Pinto De Albuquerque, at paras 21-24.