

“Unlawful” may not mean rightless.

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Article 4 of Protocol No. 4 to the European Convention on Human Rights (ECHR) is short. Its title reads “Prohibition of collective expulsion of aliens”, its text reads: “Collective expulsion of aliens is prohibited.” It comes as a historical disappointment that the European Court of Human Rights (ECtHR) in its [decision in the case N.D. and N.T. v. Spain](#) from 13 February 2020 distorts this clear guarantee to exclude apparently “unlawful” migrants from its protection. The decision is a shock for the effective protection of rights in Europe and at its external borders. Consequently the [Guardian](#) titled that the Court is “under fire”. Reading the majority opinion is at times a puzzling experience, to say the least.

Facts of the case and chamber judgment

The case, for those who have not been following it, concerns two individuals born in 1985 and 1986 respectively, one from Mali and one from the Ivory Coast, who in 2014 tried crossing the border fences from Morocco into the Spanish Exclave Melilla. Melilla is surrounded by a complex border structure comprising three fences and serves as a long-time laboratory for the EU-border regime. The Spanish *Guardia Civil* has been conducting so-called “hot returns” of migrants coming from Morocco on a regular basis. Furthermore, Spain and the EU established a systematic externalization of border controls to third countries like Morocco, which keeps especially refugees and migrants from Sub-saharan states from claiming asylum.

The case is the first one that came before the ECtHR regarding returns at the Melilla border fence, albeit this part of “Fortress Europe” was built up for more than 20 years and has since provoked harsh criticism by human rights organisations from all over the European Union. The ECtHR [chamber judgment](#) in October 2017 had ruled that the ECHR was applicable and that Spain had violated the prohibition of collective expulsion vis-à-vis the two individuals. The case was then referred to the Grand Chamber and after the [hearing](#) in September 2018 has been pending for quite a while.

Political weight – but no legal intricacies

What seemed particular about the case was that its political weight (regarding immigration and specifically one of the two land borders between Africa and Europe) was not met at all by much legal intricacy. To the contrary, rarely has a case appeared so straightforward. Based on the previous jurisprudence of the ECtHR it was hard to even imagine another finding than the one the chamber judgment arrived. In a first step, the court had to determine if the Convention was applicable to the events. It was, as also the Grand Chamber judgment confirms. The events took place on Spanish territory, and even if they had been outside Spanish territory, N.D.

and N.T. were at the moment of apprehension and return under Spain's "effective control", which has long been established as the criterion even for [extraterritorial jurisdiction](#).

The invention of "unlawfulness" as a means to limit rights

Since the Convention was applicable the main question was whether the prohibition of collective expulsion had been violated. N.D. and N.T. had been returned in a group of around 75 to 80 persons (see [judgment](#), para. 26) without identification or opportunity to explain their individual circumstances. Firstly, this act of returning constitutes an expulsion. The court has repeatedly made clear that protection by the ECHR cannot depend on states' own rules about where legal entry occurs. Redefining the border may, in other words, not allow a state to exclude its own responsibility under the ECHR. The Grand Chamber reiterates these findings: the returning at the border also constitutes an expulsion, and this is the case "irrespective of the lawfulness of a person's stay" (see [judgment](#), para. 185).

Was the expulsion also collective? This is where the argumentation of the court begins to waver and is by all means inconsistent. Being returned in a group of 75 persons without identification appears to meet the criterion of "collective", but as the court stresses, "the applicant's own conduct is a relevant factor in assessing the protection to be afforded under Article 4 of Protocol No. 4" ([judgment](#), para. 200). The Court at this point is referring to its "well established case-law" (para. 200) and conveys the impression that there is nothing new about this requirement. But in fact, the Court is inventing completely new aspects related to the "own conduct" of the applicants. In the [former judgements](#) the "culpable conduct" meant for example the refusal to show identity papers to the police. What might make sense in the context of duties of cooperation and conducting an individual procedure here becomes a catch-all criterion for behavior deemed inappropriate: "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" (para. 201).

Subsequently, the Court asserts that the applicants were "members of a group comprising numerous individuals who attempted to enter Spanish territory by crossing a land border in an unauthorized manner, taking advantage of their large numbers and in the context of an operation that had been planned in advance" (para. 206) and "using force" (para. 211). In its [press release, the Court](#) emphasizes this as one of the most relevant points of the judgment. The Court hereby engages the highly problematic narrative of allegedly violent migrants who are planning to invade the EU by large numbers – a narrative we hear from the most authoritarian forces in Europe. Whereas the migrants are portrayed as violent, the Court passes over what is at stake in the exclave of Melilla: that Spain for more than twenty years has been building up a system of fences to deter asylum seekers from entering the territory and claim rights under the ECHR and other European law.

The Court claims that N.D. and N.T. “did not make use of the existing legal procedures for gaining lawful entry”, the “lack of individual removal decisions [...] was thus a consequence of their own conduct” (para. 231). At this point the judgement is clearly counter-factual as it is insisting that the applicants should have claim asylum at the “Beni Enzar international border crossing point“ (para. 213). Even though [UNHCR](#) was clear concerning this “possibility” (“UNCHR stated that prior to November 2014 it had not been possible to request asylum at the Beni Enzar border crossing point in Melilla or at any other location, and that there had been no system for identifying persons in need of international protection”, para. 152), the Court strictly followed the statements by the Spanish government, that there was “actual possibility to submit such applications” (para. 214).

Furthermore, it is widely known due to [reports](#) and [journalistic research](#) that Subsaharan migrants face [racial profiling](#) by Moroccan police forces. The Court only states: “However, none of these reports suggest that the Spanish Government was in any way responsible for this state of affairs” (para. 218). In fact, the whole Spanish and EU border regime relies on its [externalisation](#) to Morocco and other third countries due to readmission agreements and the funding of Moroccan police forces. This system leads to a situation in which it is not possible for migrants from Sub-saharan states to get actual access to asylum posts or embassies. The Court states in its judgment “that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective” (para. 171, 221). This important benchmark is twisted to absurdity when the Court only one sentence later states: “This does not, however, imply a general duty for a Contracting State under Article 4 Protocol No. 4 to bring persons who are under the jurisdiction of another State within its own jurisdiction” (para. 221). Actually, the applicants were under the Spanish jurisdiction at the time of the events, as it was acknowledged by the Court itself and the judgment produces precisely a situation in which rights become illusory at the European external borders.

This reasoning also fundamentally disregards the wording and position of Article 4 Protocol No. 4. It is a procedural guarantee that backs the principle of non-refoulement: only if persons are not expelled collectively, can the state prevent to return refugees to a place of danger. It applies in the situation of collective expulsion, regardless of a later recognition as a refugee in the sense of the Geneva Refugee Convention. The [explanatory report](#) (in para. 33) makes very clear that the guarantee is meant unconditionally: “It was agreed that the adoption of this article [...] could in no way be interpreted as in any way justifying measures of collective expulsion which may have been taken in the past.” One can be of the opinion that this guarantee is too far-reaching. But to invent a new criterion of “unlawfulness” to limit a clearly stated right, sets a very dangerous precedent. Imagine this was done for other procedural guarantees, for instance in criminal proceedings: using prior behavior of individuals that is deemed disagreeable to curtail rights is an attack on the rule of law.

In this case, the Court is confusing the procedural guarantees of the Convention with issues that have nothing to do with the obligations of the states. The mere “possibility” to go to another asylum post cannot exempt Spain from its obligation

to examine the individual situation of the applicants. The Court clearly breaks with its former judgments as the prohibition of collective expulsion is in this judgment, at least for the constellations of land borders, reinvented as a “right without rights”. It provides the executives with an uncontrollable margin of discretion, because Art. 4 of Protocol No. 4 from now on only provides protection if there was no alternative to an irregular entry, which can never be checked since the person subjected to push-backs have, absent an individual procedure, no possibility to explain themselves.

The separate opinions

With such a majority opinion, one could have hoped for sparks of reason in dissenting opinions. Another disappointed hope; instead the two separate opinions add insult to injury. Judge Koskelo is of the opinion that Article 4 Protocol No. 4 should not even have been deemed applicable here. The reasoning is muddled, she seems to allege that persons were not under Spain’s jurisdiction (para. 13 of the separate opinion), but also that the majority opinion stretches the interpretation of Article 4 Protocol No. 4 too far (para. 20). While the reasoning is muddled the concern is clear: that states may not be precluded from “closing their borders to aliens” (para. 17) and that “protection of territorial integrity” should be given weight in the legal analysis (para. 25). This, however, of course confuses the whole idea of individual rights guarantees. States’ concerns of sovereignty are given weight, through concepts such a proportionality principle where applicable. Yet it may not become a wild card for limiting rights wherever it appears convenient.

Even more confounding is the separate opinion by Judge Pejchal. He begins with a reference to John Rawls, which serves him to set up, under the umbrella of “fairness”, a requirement of right conduct that goes far beyond the invention of the majority opinion. Judge Pejchal quotes the [Banjul Charter](#) and suggests that N.D. and N.T. have not fulfilled their duties vis-à-vis their home country and their continent (p. 105 of the judgment). Legally, he places this idea of curtailing rights on newly invented grounds in Article 37 para. 1 c of the Convention, a procedural rule for striking out applications when “for any other reason established by the Court, it is no longer justified to continue the examination of the application.” This, yet another proposed wild card for withholding rights, Judge Pejchal calls himself a “totally different and new approach” (p. 108). Were such approach to become the norm, it would mean the end of legal guarantees an individual can rely on.

A Court without Credibility

This judgment is a shock. What is shocking is much more than the finding that no violation of Article 4 of Protocol No. 4 has occurred, although this finding is wrong. The court draws on a language of “unlawfulness” that serves, from Canberra to Washington DC, as a tool for depriving persons of rights. The judgement is a significant setback in the jurisprudence of the Court. This judgment can hardly be read other than the Court making enormous concessions to the pressure by European states, which since the summer of 2015 in the majority pursue a policy of expanding the externalization of migration control and carrying out ever more

repressive forms of push-backs at their land borders (e.g. Greece, Hungary and Croatia). A majority of the judges may have thought that the Court could lose support among the convention states, if the judgment in the case of N.D. and N.T. became a human-rights based correction of the EU border regime. Yet with this judgment, in turn, the Court lost credibility as an effective defender of human rights in times of crisis. When we allow unlawfulness to justify rightlessness, the European project is in severe danger.

