WHY THE PROPOSED EU POLICY OF MASSIVE RETURNS OF MIGRANTS TO TURKEY IS INCOMPATIBLE WITH EU LAW AND INTERNATIONAL LAW

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A. Introduction

Collective expulsions are a tool as old as humanity itself. One can just think of the forced deportations in the Assyrian Empire, the expulsion of the Jews from Egypt and the subsequent expulsion of the tribes living in Palestine by the Jews. The instrument also has "proved its worth" over the past century. These include the expulsion of millions of Muslims upon the conquest by Russia of large chunks of the Caucasus, the exchange of hundreds of thousands of families between Greece and Turkey after the military victory of Mustafa Kemal, or the push-back operation by the United States of Haitian and Cuban boat people. Now that the 'old continent' has in recent months been shaken by a massive influx of asylum seekers, by including the return of all newly stranded migrants on Greek soil to Turkish soil, the European Union and the governments of the EU countries are reverting to this popular yet repugnant tool, which throughout the 20th century has been often used by undemocratic regimes.

The fact that by endorsing such action those same European countries are thereby blatantly ignoring the "prohibition of collective expulsion", which they have signed up to in their own European law and in international human rights law, is beyond shame, and will in the mid-long run undoubtedly lead to the conviction of the same EU Member States by international judges and by other international adjudicators. In turn, this will have to lead to some kind of reparation and to financial compensation.

This contribution aims will start by providing the political setting in which the EU-Turkey agreement containing massive returns of migrants to Turkey has been

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negotiated **(B)**, highlight the legal foundation of the prohibition of collective expulsion in international law **(C)**, elaborate on the content of the prohibition of collective expulsion which has been essentially developed by the European Court of Human Rights **(D)**, and end with a short conclusion on the problem and the probable way ahead **(E)**.

B. The EU-Turkey Agreement of March 2016

While in 2014, 283.500 migrants entered the EU irregularly, the EU Border Agency Frontex has indicated that a total of 1.83 million irregular border crossings were detected in 2015[2]. According to the UN Refugee Agency (UNHCR), 1.015.078 people reached Europe irregularly in 2015 by crossing the Mediterranean, while a further 3.771 are believed to have drowned attempting the same journey[3]. In January 2016 alone it is said that a further 68.671 people have crossed over from Turkey into Greece, mostly Greek islands, especially Lesbos[4], while over 440 people have drowned[5].

In an attempt to stop the irregular migration flow from mainland Turkey onto the Greek islands, on 7 March 2016 the EU heads of state or government agreed that "bold moves were needed to close down people smuggling routes, to break the business model of the smugglers, to protect [the] external borders and to end the migration crisis in Europe"[6]. In order to obtain these objectives an agreement was reached with Turkey, which will be further developed and operationalized in the next weeks and months. While the exact content of the agreement is today still being discussed, Europe's leaders agreed that one of the principles will be "to return all new irregular migrants crossing from Turkey into the Greek islands" to

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2 Frontex, Greece and Italy Continued to Face Unprecedented number of migrants in December, http://frontex.europa.eu/news/greece-and-italy-continued-to-face-unprecedented-number-of-migrants-in-december-0BbBRd

3 UNHCR, Refugee/Migrants Emergency Response-Mediterranean, http://data.unhcr.org/mediterranean/regional.php. For the latest updates on arrivals and fatalities in the Mediterranean see data from the International Organization of Migration (IOM), http://migration.iom.int/europe

4 Frontex Migratory Routes Map, http://frontex.europa.eu/trends-and-routes/migratory-routes-map

5 UNHCR, Refugee/Migrants Emergency Response-Mediterranean, http://data.unhcr.org/mediterranean/regional.php. The UNHCR updates the numbers on a regular basis.

6 Statement of the EU Heads of State or Government, 07/03/2016: http://www.consilium.europa.eu/en/press/press-releases/2016/03/07-eu-turkey-meeting-statement

Turkey. While the EU-Turkey Agreement deals with a number of other issues, inter alia, the European promise to take in and relocate a Syrian for each irregular migrant returned to Turkey, this contribution will only deal with the compulsory return of migrants to Turkey in the ambit of the present-day stance of international law on the issue of the collective expulsion.

C. The prohibition of collective expulsion in international law

1. The legal instruments

While the Universal Declaration on Human Rights (UDHR)[7] and the UN Refugee Convention (or Geneva Convention)[8], as well as the some other universal human rights treaties are silent on collective expulsion and therefore do not prohibit collective expulsion[9], other universal human rights treaties, as well as the main regional human rights treaties have stepped in to prohibit collective expulsion. Collective expulsion of aliens is outlawed by European Union law and by the European Convention on Human Rights (ECHR)[10]. The European Convention on Human Rights and the EU Charter of Fundamental Rights (EU Charter)[11] are granting foreigners explicit protection against collective expulsion, by holding that "[c]ollective expulsion of aliens is prohibited" (Article 4 Protocol n° 4 to the

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7 Universal Declaration on Human Rights, 10 December 1948, http://www.ohchr.org/EN/UDHR/Pages/UDHRIndex.aspx

8 Convention relating to the Status of Refugees, 28 July 1951, UNTS 189, http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfRefugees.aspx

9 The absence of a provision prohibiting collective expulsion in the Universal Declaration, the then draft Covenant on Civil and Political Rights and the original European Convention on Human Rights resulted from the political agreement that the victors of WWII had agreed at the Potsdam Conference in 1945: following the forced migration of millions of Germans from the new Poland, Czechoslovakia and Hungary to Germany and Polish people from Lithuania, the Ukraine and Belarus towards the newly established Polish State, as well as Italians living on the Dalmatian coast and therefore from the newly established Yugoslavia to Italy, it would have been rather cynical to include a ban on collective expulsion in these human rights instruments adopted in the 1950s.

10 Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, CETS 005, http://www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680063765

11 Charter of Fundamental Rights of the European Union, proclaimed on 7 December 2000, replaced by version as added to the Treaty of Lisbon, Official Journal C 326, 26 October 2012, p. 391-407, http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012P/TXT&from=EN

ECHR)[12] and Article 19(1) EU Charter). The same counts for the American Convention on Human Rights (Article 22(9) ACHR)[13] and the African Charter on Human and Peoples' Rights (Article 12(4) ACHHPR)[14]. While it does not contain an explicit provision of the prohibition of collective expulsion, the International Covenant on Civil and Political Rights implicitly prohibits collective expulsion (Article 13 CCPR[15])[16]. In turn, the Treaty on the Functioning of the European Union requires that the EU asylum *acquis* "should be consistent with other relevant treaties" (Article 78 (1) TFEU)[17], and therefore with the ECHR and the CCPR. According to legal doctrine, the prohibition of collective expulsion is also a norm of customary international law, whereby it is often – in our opinion correctly – held that it will violate the principle of non-discrimination, which is itself an international custom, and therefore legally binding[18]. Finally, a number of other norms of soft law also prohibit collective expulsion[19]. The article will now zoom in

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12 Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto, 16 September 1963, CETS 046, http://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168006b65c

13 American Convention on Human Rights, 22 November 1969, UNTS 1144, http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm

14 African Charter on Human and Peoples' Rights, 27 June 1981, UNTS 1520, http://www.achpr.org/instruments/achpr

15 See: Human Rights Committee, General Comment n° 15/27, 22 July 1986, § 10 and Concluding Observations on the Dominican Republic, CCPR/CO/71/Dom, 26 April 2001, § 16.

16 International Covenant on Civil and Political Rights, 16 December 1966, UNTS 999, http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx

17 Consolidated version of the Treaty on the Functioning of the European Union, Official Journal C 326, 26 October 2012, p. 47–390, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT

18 E.g., J.M. Henckaerts, *Mass Expulsions in Modern Law and Practice*, Dordrecht, Martinus Nijhoff, 1995, p. 19; J.A. Frowein en W. Peukert, *EMRK-Kommentar*, Kehl am Rhein, Engel Verlag, 1997, p. 850; R. Perruchoud, "State Sovereignty and Freedom of Movement", in B. Opeskin, R. Perruchoud, J. Redpath-Cross (eds), *Foundations of International Migration Law*, Cambridge, Cambridge University Press, 2012, p. 146; V. Chetail, "Introduction", in V. Chetail and C. Bouloz (eds.), *Research Handbook on International Law and Migration*, Camberley, Edward Elgar, 2015, p. 55. This vision seems to coincide with the text of the African Charter, which defines collective expulsion as "that which is aimed at national, racial, ethnic or religious groups".

19 E.g., Committee of Ministers of the Council of Europe, Twenty Guidelines on Forced Return, September 2005, Strasbourg, p. 16, Guideline 3, http://www.coe.int/t/dg3/migration/archives/Source/MalagaRegConf/20_Guidelines_Forced_Return_en.pdf; International Law Association, Declaration of Principles of

on the development of the prohibition of collective expulsion under the main European human rights treaties.

2. Absolute prohibition

Article 4 Protocol n° 4 to the ECHR, which forbids every form of collective expulsion of aliens and was included into the Protocol by the desire to formally ban expulsions of the kind which had taken place on the eve of, during and immediately after World War II[20], is an absolute right[21]. Consequently, it does not allow for restrictions. In contrast, Article 19(1) EU Charter is a relative right, which can – theoretically – be restricted under Article 52(1) of the Charter. However, when reading Article 19(1) EU Charter together with Article 52(3) – which holds that the meaning and scope of a right in the EU Charter is the same if the right corresponds to an ECHR right[22] – and Article 53 – which states that the Charter cannot restrict or adversely affect human rights recognized under the ECHR[23], it is clear the most protective clause must prevail, that limitations to Article 19(1) EU Charter are not allowed and that the interpretation given under Article 4 Protocol n° 4 is the guiding principle as to the prohibition of collective expulsion.

3. The international adjudicatory bodies

Over the past decades, the European Court of Human Rights (European Court or ECtHR) and the former European Commission on Human Rights have been the

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International Law on Mass Expulsion, *Refugee Survey Quarterly* (1987) 6(1), pp. 95-110.

20 Explanatory Report on the Second to Fifth Protocols to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Strasbourg, Council of Europe, Doc. H(71)11, p. 39, § 31.

21 Article 4 Protocol n° 4 is, however, a derogable right and can therefore be suspended in times of war or in another public emergency threatening the life of the nation (Article 6 Protocol n° 4). The same counts for Article 13 ICCPR (Article 3(2) ICCPR).

22 Article 52(3) states: "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention".

23 Article 53 states: "Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by (…) international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions".

main bodies at the international level which, through their case law, have developed or shaped the prohibition of collective expulsion of aliens and the former has on four occasions been willing to condemn ECHR Member States engaging in collective expulsions. The assessment of the prohibition of collective expulsion will therefore be restricted to an analysis of the case law of those two bodies.

While all convictions of ECHR Member States relate to events which occurred before the 2015-16 large influx of migrants in Europe, the judgments of the European Court establish the legally binding contours within which the ECHR States must operate today when they wish to expel people.

Today, the European Court uses a combination of a "formal-legal" and a "contextual" criterion to assess whether an expulsion of multiple persons amounts to a collective expulsion.

3.1. Primary criterion of 'individual, reasonable and objective examination'

While Article 4 protocol n° 4 forbids every form of collective expulsion of aliens, the European Court defines a collective expulsion as "(...) any measure compelling aliens, as a group to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group"[24]. The term "alien" refers to all non-nationals of a state, irrespective of whether they are residing legally within the territory[25], including stateless persons[26].

Over time it has been made clear that also attempts to prevent that people enter the territory of a state, either through intercepting them on the high seas[27] or by

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[24] ECtHR, Hirsi Jamaa and Others v. Italy, 23 February 2012, § 167; ECtHR, Conka v. Belgium, 5 February 2002, § 59; ECtHR, Georgia v. Russia (I), 3 July 2014, § 167; ECtHR, Andric v. Sweden, 23 February 1999, § 1; ECtHR, Majic v. Sweden, 23 februari 1999, § 1; ECtHR, Pavlovic v. Sweden, 23 februari 1999, § 1; ECtHR, Maric v. Sweden, 23 februari 1999, § 1; ECtHR, Andrijic v. Sweden, 23 februari 1999, § 1; ECtHR, Juric v. Sweden, 23 februari 1999, § 1; ECtHR, Pranjko v. Sweden, 23 februari 1999, § 1.

[25] ECtHR, Georgia v. Russia (I), 3 July 2014, § 170; ECommHR, Becker v. Denmark, 3 oktober 1975.

[26] Explanatory Report on the Second to Fifth Protocols to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Strasbourg, Council of Europe, Doc. H(71)11, p. 39, § 32.

[27] ECtHR, Hirsi Jamaa and Others v. Italy, 23 February 2012, § 180. See also infra.

refusing them to enter the national territory fall under the scope of Article 4 Protocol n° 4[28].

The expulsion measures must be aimed at the expulsion of aliens "as a group" for the expulsion to be collective[29] and the distinction between an individual and a collective expulsion, according to the European Court, mainly lies in the fact whether or the expulsion measure is the result of a reasonable and objective and individual examination. The term "collective" is to be interpreted in a way which implies that even the expulsion of two or three persons can be deemed to be collective, if an individual assessment is not performed[30].

Mind you, the fact that the applicant has a specific nationality (or belongs to a particular group), and that in the particular year several people with the same nationality (or from the same group) are expelled, is in itself insufficient to conclude that there is a collective expulsion[31]. And also the fact that multiple persons receive similar expulsion decisions does not imply that there is a collective expulsion when each person has had the opportunity to bring forward his arguments individually against the measure before the competent authorities[32]. There is, however, no violation of the ban on collective expulsion if the absence of an individual decision is the result of own (culpable) conduct of the persons concerned[33]. The Court has for example held that this is the case where the authorities evaluated the risks associated with expulsion for a spouse jointly in a single decision, in view of the fact the applicants were spouses, had arrived together, lodged their asylum request jointly on the same grounds, produced the same evidence to support their allegations and submitted joint appeals[34]. In another very non-asylum case where a number of young Greek citizens, arriving on a ferry from Greece in Italy to take part in a G8 summit protest, were escorted

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28 ECtHR, Sharifi and Others v. Italy and Greece, 21 October 2014, § 212. See also infra.

29 ECtHR, Conka v. Belgium, 5 February 2002, § 59; ECtHR, Andric v. Sweden, 23 February 1999, § 1.

30 See, e.g., ECtHR, Khlaifia and Others v. Italy, 1 September 2015, which concerned only three persons.

31 ECtHR, Andric v. Sweden, 23 February 1999, § 1.

32 ECtHR, Georgia v. Russia (I), 3 July 2014, § 167; ECtHR, M.A. v. Cyprus, 23 July 2013, § 246; ECtHR, Hirsi Jamaa and Others v. Italy, 23 February 2012, § 184; ECtHR, Sultani v. France, 20 September 2007, § 81; ECtHR, Khlaifia and Others v. Italy, 1 September 2015, § 154; ECommHR, Tahiri v. Sweden, 1995.

33 ECtHR, Hirsi Jamaa and Others v. Italy, 23 February 2012, § 184; ECtHR, Khlaifia and Others v. Italy, 1 September 2015, § 154; ECtHR, Berisha and Haljiti v. Macedonia, 15 June 2005, § 2; ECtHR, Dritsas v. Italy, 1 February 2011, § 7.

34 ECtHR, Berisha and Haljiti v. Macedonia, 15 June 2005, § 2.

back on to the ferry boat, were on multiple occasions unwilling to show their identity card to the police, which wanted to identify them in view of taking a measure to remove them from the territory, the Court held that in these circumstances, the absence of any individual removal order against the applicants could not in any case be attributed to Italy[35].

No special weight is given by the European Court to the fact that the expulsions have happened through a common means of transport (a so-called charter flight)[36]. Consequently, the collective repatriation of a group of aliens is not in itself incompatible with the prohibition of collective expulsion, provided that the qualitative conditions under Article 4 Protocol n° 4 are satisfied.

3.2. Secondary criterion of 'general context in which the expulsions take place'

While a reasonable and objective and individual examination is essential, European Court has said that, one may also not lose sight of "the background to the execution of the expulsion orders", or in other words, the circumstances in which the deportation orders are carried out[37]. Indeed, from start to finish the procedure followed must provide sufficient guarantees demonstrating that the personal circumstances of each of the relevant aliens is taken into account in a real and individual way.

In 2001 ECHR Member State Belgium was the first European country ever to be convicted of collective expulsion under Article 4 Protocol n° 4 in the *Conka* case[38]. The applicants, a Roma family which had fled Slovakia due to violence by skinheads, was, together with several other Slovak Roma families (about 70 people), lured by an official letter to the main Ghent police station, allegedly in order to complete their asylum application. Upon arrival they were all handed identical judicial injunctions, which ordered their detention and deportation. After their transfer to a closed center for irregular migrants, the family was shortly afterwards – and in spite of an interim measure of the European Court suspending the expulsion – deported back to Slovakia.

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35 ECtHR, Dritsas v. Italy, 1 February 2011, § 7.

36 See, e.g., ECtHR, Conka v. Belgium, 5 February 2002 and ECtHR, Khlaifia and Others v. Italy, 1 September 2015.

37 ECtHR, Conka v. Belgium, 5 February 2002, § 59. See also: ECtHR, Georgia v. Russia (I), 3 July 2014, § 167.

38 ECtHR, Conka v. Belgium, 5 February 2002.

The European Court used a combination of a *formal* element and a *contextual* element to condemn Belgium for collective expulsion:

First, the arrest and expulsion orders were "formally-legally" not based on the individual asylum assessment. The asylum applications of the Conka's were the subject of an – admittedly for them negative – individual, reasonable and objective examination, after which the applicants had ignored the decisions which are traditionally accompanied by an order to leave the territory. But the arrest and expulsion orders that were presented to them at their arrival at the Ghent police station, were based only on (new) orders to leave the territory, which in turn were only based on a legal provision that allows to provide someone with such an order to leave the territory when he overstays his so-called short stay (of maximum 3 months); that (new) order to leave the country, however, contained no reference to the asylum claims and their negative outcome, and would therefore, formally-legally not have been based on the assessment of the asylum request. In view of the foregoing and also due to the fact that the other Roma families were presented with a similar decision, the Court had doubts about the (non-)collective nature of the deportation[39].

Second, the "contextual setting" in which the expulsion had taken place, also played a role in the assessment of the Court. The aforementioned doubts about the collective nature of the deportation were in fact reinforced by a host of additional conditions, namely: the notice by Belgian political authorities that collective expulsions would soon be undertaken; the simultaneous convocation of all the aliens in one place; the fact that a group of persons of the same background suffered the same fate; the stereotypic nature of the wording of the orders to leave the territory and of the detention orders. The Conka's also had great difficulties to contact a lawyer and there was the fact that the asylum procedure had not yet been fully completed[40].

3.3. Collective expulsions are not allowed, irrespective of whether they are performed on land or at sea

The case of *Hirsi Jamaa and Others v. Italy* (2012)[41] provided the Court with the opportunity to hold that the collective expulsion ban must also be ensured outside the territory of a Member State, in particular with regard to potential

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39 ECtHR, Conka v. Belgium, 5 February 2002, §§ 60-61.

40 ECtHR, Conka v. Belgium, 5 February 2002, § 62.

41 ECtHR, Hirsi Jamaa and Others v. Italy, 23 February 2012.

asylum seekers who are intercepted in international waters. The petitioners, 11 Somalis and 13 Eritreans who were among a group of about 200 boat people were intercepted by naval vessels about 35 nautical miles off the island of Lampedusa. They were taken on board and then – under a bilateral agreement between Italy and Ghaddafi's Libya – immediately returned to Libya, where they were forced to disembark. As no attempt was made to identify the migrants, and thus an individual, reasonable and objective examination was not done, this clearly amounted to a breach of Article 4 Protocol n° 4[42]. But Italy argued that it could not have been a collective expulsion, as it merely concerned a refusal to allow people to enter Italy, since the boat migrants had indeed not been able to enter Italian territory[43]. The Court did not follow the Italian's government's argument, holding that the expulsion of aliens carried out in the context of interceptions in international waters by the authorities in the exercise of their sovereign authority, where migrants are deterred from reaching the borders of the state or even to repel them to another country (i.e., a pushback operation), is an exercise of jurisdiction (within the meaning of the ECHR) and thus entails the responsibility of the state under Article 4 Protocol n° 4[44]. Indeed, from the moment that the migrants had climbed on board and until their transfer to the Libyan government, they were under the exclusive legal and de facto jurisdiction of the Italian government[45]. Smartly the European Court added that the ECHR does not allow a State to escape its jurisdiction and responsibility by labeling the events as a rescue operation and/or to say that it only exercised minimal control over the migrants[46]. The nature and purpose of an intervention therefore play no role. The Court justified its opinion on the application of Article 4 Protocol n° 4 on interception followed by forced returns of people in international waters by indicating that if the prohibition of collective expulsion in such cases would not provide protection, the prohibition in practice would not be practical and effective, since many migrants currently travel by sea[47]. Indeed it seems logical that a State should not be allowed to escape its human rights obligations by advancing its immigration controls to the international waters.

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42 ECtHR, Hirsi Jamaa and Others v. Italy, 23 February 2012, §§ 185-186.
43 ECtHR, Hirsi Jamaa and Others v. Italy, 23 February 2012, § 160.
44 ECtHR, Hirsi Jamaa and Others v. Italy, 23 February 2012, §§ 169-182.
45 ECtHR, Hirsi Jamaa and Others v. Italy, 23 February 2012, § 81.
46 ECtHR, Hirsi Jamaa and Others v. Italy, 23 February 2012, § 79.
47 ECtHR, Hirsi Jamaa and Others v. Italy, 23 February 2012, § 177.

Shortly after, in *Sharifi et al v. Italy and Greece* (2014)[48] the Italian State was again convicted on the basis of Article 4 Protocol n° 4. This time the Italians had bluntly sent back 32 Afghans, two Sudanese and one Eritrean, who had put ashore in the port of Ancona foot without the necessary papers from Greece, (following a bilateral readmission agreement). The applicants complained about that and also feared that they would be sent back by the Greeks to their country of origin, where they would then be ill-tread and killed. Italy had also denied them the opportunity to seek asylum or to plead their case before an immigration authority, but had transferred them directly to the captains of the ferry's that would bring them back to the Greek port of Patras. Italy was then convicted. Article 4 Protocol n° 4 was first held to be violated with regard to four applicants because the transfer constituted a form of collective and indiscriminate expulsion without examining each individual case[49]. The Italian counter-argument that the EU Dublin Regulation requirement that an asylum application had to be be assessed in the first country of entry[50], was rejected by the Court, which held that no form of collective and indiscriminate expulsion can be justified by reference to the Dublin system. While states do have the sovereign right to control immigration and to fulfill the obligations of EU membership, the challenge to deal with a mass influx of migrants is not a license to violate the ECHR and its protocols, according to the European Court[51]. And secondly, Article 4 Protocol n° 4 had been infringed in connection with Article 13 ECHR, because the applicant was not given access to the asylum procedure or any other national procedure meeting the Article 13 requirements, but were immediately handed over to the ferry captains[52].

In the inter-state case of *Georgia v. Russia* (I) (2014)[53], Moscow was for the first time condemned in Strasbourg for having violated Article 4 Protocol n° 4 due to the forced return of thousands of Georgians following the outbreak of a military conflict between the two countries in 2006.

After reiterating that the prohibition of collective expulsion applied to everyone regardless of whether they were staying lawfully or unlawfully in Russia[54], the

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48 ECtHR, Sharifi and Others v. Italy and Greece, 21 October 2014.
49 ECtHR, Sharifi and Others v. Italy and Greece, 21 October 2014, § 225.
50 ECtHR, Sharifi and Others v. Italy and Greece, 21 October 2014, § 223.
51 ECtHR, Sharifi and Others v. Italy and Greece, 21 October 2014, § 224.
52 ECtHR, Sharifi and Others v. Italy and Greece, 21 October 2014, §§ 242-243.
53 ECtHR, Georgia v. Russia (I), 3 July 2014.
54 ECtHR, Georgia v. Russia (I), 3 July 2014, § 170.

Strasbourg Court the following two issues warranted this conclusion. First, although formally a court decision was made in respect of each Georgian national, the short procedure and the number of removal orders issued against Georgians made it impossible to carry out a reasonable and objective examination of the particular case of each individual and herewith nullified the Russian argument that the petitions from the Georgians were examined separately[55]. And secondly, the coordinated policy of arresting, detaining and deporting around 4.600 Georgians following the outbreak of the Georgian-Russian military conflict in 2006 proved the collective character of the expulsions[56].

The Court further referred to its established point of view in *Hirsi Jamaa and Others v. Italy*, that, while Member States have the right to establish their own immigration policies, problems with managing migratory flows cannot justify recourse to practices that are incompatible with Russia's ECHR obligations[57].

3.4. Relevance of the quality of the individual assessment, not the quantity of persons who are expelled

The case of *Khlaifia v. Italy* (2015)[58] illustrates Italy's bad track record as to collective expulsions, and is – for the time being – last case in which an ECHR State has been condemned under Article 4 Protocol n° 4. It concerned three Tunisians escaping the violent clashes in their country of origin when the Arab Spring started in 2011. They were picked up at sea and were brought to the island of Lampedusa and housed in an overcrowded detention center. After riots they were transferred to another center. Subsequently, they had participated along with many fellow migrants in a demonstration in the streets of the village of Lampedusa. During the demonstration the police had arrested them and had shipped them to Palermo where they were housed together with others in crowded, closed houseboats. A few days later they were taken to the airport and following identification by the Tunisian consul and on the basis of a bilateral agreement between Tunisia and Italy – which provided for an accelerated return of Tunisian migrants entering Italian territory without the necessary papers – they were finally put on a plane to Tunis. Before the Strasbourg Court it was argued that it concerned a collective expulsion because they were returned through a simplified procedure, whereby only their nationality was determined, and without

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55 ECtHR, Georgia v. Russia (I), 3 July 2014, § 175.
56 ECtHR, Georgia v. Russia (I), 3 July 2014, § 176.
57 ECtHR, Georgia v. Russia (I), 3 July 2014, § 177.
58 ECtHR, Khlaifia and Others v. Italy, 1 September 2015.

further examination of their personal circumstances, solely on the basis of their nationality[59]. The applicants also adduced a number of additional elements in order to demonstrate the collective expulsion, hereby referring to the *Conka and Others v. Belgium* and *Hirsi Jamaa and Others v. Italy* judgments, namely: the large number of Tunisians that suffered the same fate; a ministerial memorandum in which collective repatriations were announced in accordance with the bilateral agreement; the identical wording of the deportation orders; and the difficulty to contact a lawyer[60]. Italy tried to refute this by indicating that the expulsion orders were individually formatted documents, which had then be translated into Arabic, that the bilateral agreement contributed to the fight against human trafficking, and that the Italian police, upon their arrival on Lampedusa, had individually interviewed the applicants through an interpreter and they had also been identified through fingerprints and photographs[61]. In the eyes of the Court, however, a simple identification procedure was not sufficient to deny the existence of a collective expulsion. Besides, various elements – also raised by the complainants – also pointed to a collective expulsion, namely: the absence in the deportation orders of any reference to the individual situation of the applicants, the inability of the State to prove that individual interviews concentrating on the specific situation of each applicant had been carried out before the issuance of the deportation orders; the large number of Tunisians who had suffered the same fate; a bilateral Tunisian-Italian agreement which was not made public and provided for the repatriation of illegal migrants through a simplified procedure, based on simple identification by the Tunisian consul[62]. The foregoing was sufficient for the European Court to conclude that Italy had not taken into account the individual circumstances of each complainant[63]. Next to this, Italy was also convicted of a violation of Article 13 ECHR in conjunction with Article 4 Protocol n° 4, because the proceedings before the Italian court had no automatic suspensive effect and could therefore not avoid the deportation of the petitioners[64].

E. Will the current EU plan of mass collective expulsions fall before the Strasbourg Court?

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59 ECtHR, Khlaifia and Others v. Italy, 1 September 2015,§ 149.
60 ECtHR, Khlaifia and Others v. Italy, 1 September 2015, § 150.
61 ECtHR, Khlaifia and Others v. Italy, 1 September 2015, §§ 151-152.
62 ECtHR, Khlaifia and Others v. Italy, 1 September 2015, § 156.
63 ECtHR, Khlaifia and Others v. Italy, 1 September 2015, § 157.
64 ECtHR, Khlaifia and Others v. Italy, 1 September 2015, § 172.

The European Court has properly established the rules which ECHR Member States and therefore EU Member States must comply with when designing and implementing their migration policies. The bottom line is that collective expulsions are prohibited by international law as well as EU law (the latter because the clause in the EU Charter has to be interpreted in line with the similar provision in the protocol to the ECHR, as it is forbidden for the States to remove aliens without examining their personal circumstances, and therefore without giving them the opportunity to submit their arguments against expulsion, and that the background against which persons are expelled may also play a role and point the collective character of the expulsions. The European Court has clearly held that while states have a sovereign right to control their borders and manage migratory flows, their policies may not infringe their obligations under the ECHR. In short the topic of collective expulsions should only be discussed by historians in history books, but should not be practiced in present-day society and therefore contemporary Europe.

Last year and with some moral authority (and some pleasure) I was able to tell my students at Harvard "that the European Union would never, never ever tolerate massive, collective expulsions of the kind that a country like Australia was performing today and a country like the United States had been performing in a recent past. The cases of collective expulsions for which Western European countries had been reprimanded in Strasbourg would always remain the exceptions".

Today, however, when the EU Member States have – through the EU-Turkey agreement – decided to massively return all on Greek (and later also other) soil stranded migrants to Turkey, this does not only raise the question how I can explain my students that I was wrong about the European asylum issue, but also and especially with what moral authority the European Union, the European governments, prime ministers and ministers of foreign affairs during international negotiations or summits, will be able to spell out the need to comply with Human Rights to heads of state and government from the global South. It looks as if today, after the United States pursuant to the opening of Guantanamo Bay, had lost its moral credit worldwide, that the "old continent Europe" has also lost its last bit of moral superiority.

The only ray of sunlight at the horizon is that to the extent that Europe will implement collective expulsions, the EU master plan will in the end fall in Strasbourg. So the only logical thing to do for the EU is taking a step back,

scrapping this passage from the EU-Turkey Agreement and declaring that collective expulsions will not be implemented. As a Judge in the European Court has said[65], the ECHR serves as a compass, also for the European Union.

[65] Judge L.A. Sicilianos, "The European Court of Human Rights at a Time of Crisis in Europe", ESIL Lecture, Strasbourg, European Court of Human Rights, 16 October 2015, p. 4, http://www.echr.coe.int/Documents/Speech_Judge_Sicilianos_Lecture_ESIL_20151016_ENG.pdf