



EMN Norway Occasional Papers

Human Rights and Migration

A critical analysis of the jurisprudence of the European court of Human Rights

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The European Migration Network (EMN)

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EMN Norway Occasional papers

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Executive Summary

In their paper “Sustainable Migration Framework” (EMN Norway Occasional Papers, 2018) Alexander Betts and Paul Collier listed “broad democratic support” as a basic requirement for sustainable migration policies. This paper discusses the extent to which decisions by the European Court of Human Rights (ECtHR) may undermine the necessary democratic grounding of sound migration policies. In this paper some of the most important decisions by the ECtHR regarding migration are analysed from a critical perspective.

When decisions are made about the European Convention on Human Rights (ECHR) and immigration, the issues are sometimes not only sensitive but potentially politically explosive. For the decisions of the Court to remain legitimate, constant critical scrutiny is required. The ECtHR should strive to be a model of the moderate and wise application of human rights conventions. It appears that many ECtHR judges believe that more is more. However, the opposite may be true: less is more.

The Convention is seventy years old. To be relevant, it needs to be interpreted in line with present conditions. Yet the Court has gone much further and at times applied the Convention in a manner that no original party to the Convention can have foreseen. The appointed judiciary may therefore start to act as an elected legislature, in conflict with the basic democratic division of labour between courts and the parliaments.

The decisions of the ECtHR are not a substitute for a poll, but the Court often refers to a European consensus as part of its reasoning. Its composition in individual cases does not necessarily reflect such a consensus.

The problem is that even when a court like the ECtHR is establishing new rules, it works under the fiction or pretence that it is simply applying the law as it is. When the Court in reality creates new law, it is still not expected carefully to consider the economic and political consequences of its “new legislation”. Formally, this is no fault of the Court, as the Court is expected to apply the law as it is.

Recently, the ECtHR has decided some cases that may be categorised under the heading “health immigration”. Thus far these decisions have not received the attention they deserve. The term health immigration is in itself new, and the Court itself does not use it; the expression is intended to underscore that this is new territory for the Court.

The *Paposhvili* case concerned very expensive medication. The Grand Chamber concluded that deportation could not take place, because Georgia – Paposhvili’s home country – might be unable or unwilling to offer the same treatment, which cost hundreds of thousands of euros. As the prohibition against inhuman and degrading treatment is absolute and forbidden even if the life of the nation is at risk, the state cannot muster economic or budgetary arguments or any principle of proportionality in its defence of reducing very expensive medication.

The decision that may have had the strongest impact on European migration policies and the unfortunate fate of many migrants is *Hirsi Jamaa* from 2012. An unanimous Grand Chamber ruled that the extraterritorial exercise of jurisdiction might encompass a vessel belonging to the coastguard or revenue authorities of a state. The important implication was the clear extension of a state's jurisdictional authority and responsibility by the Court, acting under the understanding of merely applying the Convention.

As the migrants in the *Hirsi Jamaa* case were judged to be under Italian jurisdiction, they were liable to an effective remedy under Article 13 of the Convention. Consequently, their applications for entry into Italy had to be given an individual assessment, with a right to legal assistance and interpretation, and a right to appeal. The predictable result of the *Hirsi Jamaa* decisions has been a hazardous gamble, involving cynical human smugglers and thousands of migrants risking and losing their lives in vulnerable vessels and hoping to be rescued by the Italian authorities.

In a 2020 decision in a case concerning the Spanish enclave of Melilla in Morocco the Grand Chamber ruled that rolling back the organised storming of a border might be regarded as a prohibited collective expulsion. The Court nevertheless held in favour of Spain, presupposing somewhat naively that the migrants in question might have been able to apply for legal entry at the Spanish border stations. The tumultuous conditions surrounding Southern European Borders means the Grand Chamber's definition of collective expulsion is important, with possible consequences on which the Court did not deliberate.

The doctrines of dynamic interpretation and the Convention as a living instrument make it difficult to predict the conclusions the Court may reach when confronted with new factual situations. If cases regarding the repatriation of Islamic State (IS) members, their children, and even spouses reach the Court, from a democratic perspective one might hope that it will allow for a wide national margin of appreciation. There is clearly no European consensus on these questions.

Decisions by the ECtHR concerning which prison conditions may be degrading and inhuman have also proved to restrict deportations of criminals in ways that may be considered controversial.

Human rights law is based on the basic premise that all human beings share the same human dignity. Many people, at least in a European context, will agree to the principle that one should not be treated in a discriminatory manner due to traits for which one bears no responsibility. It may be more controversial that in relation to the prohibition against inhuman and degrading treatment in ECHR Article 3, ref. Article 15, the Court has established a strict demand for equality in judgement also when an individual has committed or may commit grave crimes.

A non-citizen responsible for the most heinous crimes may not be deported to any country where he may be subject to any inhuman or degrading treatment. The result may be provocative, considering the wide definitions the Court has applied to the

terms “inhuman” and “degrading”. The most awful criminal or terrorist may not be deported to any country where they might risk being subjected to imprisonment in cells providing less than approximately three square metres per inmate, slapped with a flat hand by a policeman (Bouyid), or threatened to avoid their murderous actions being realised (Gäfgen).

“Rights” are often used to trump other interests. If an interest is defined as a legal right, and even more so a human right, it will be exempt from a budgetary balancing of competing interests.

The legal paradigm or model for human rights, the individual vs the state, is formally and judicially correct, but unrealistic and therefore not useful for understanding how the human rights of immigrants, for example, may be so controversial. For the state to pay out, someone must pay in (or have their resources limited). The correct model is the individual vs the individual. As a slogan or headline, one might say that behind every human right there is a taxpayer.

In the broader perspective human rights often regulate the distribution of resources between the wider community and specific groups. That many human rights questions also concern the distribution of resources between groups and parts of society may explain why the discussions are occasionally intense and controversial.

The procedures for recruiting judges to the ECtHR may possess dynamics that strengthen an application of the Convention that threatens its legitimacy and sustainability. There are several cases of judges who reason and act more as “activists” than legal experts, and thereby contribute strongly to the more unfortunate dynamics and widening interpretations of the ECHR.

Natural rights and human rights are not to be found in nature. They are a human idea or construct. There is no natural or innate guarantee that the humanity and protection currently offered by human rights will exist in the future.

More moderate and wiser judgements are required to secure human rights and the Strasbourg Court for the future. They must be more in tune with the sense of justice in European countries. The Court needs to consider the implications of its judgements with regard to costs and policy consequences.

1 Introduction: Critical perspectives

1.1 The Strasbourg Court: The most important migration court in Europe

This paper discusses some important decisions by the European Court of Human Rights (ECtHR) relating to migration. The decisions by the ECtHR, which is located in Strasbourg, are not always adhered to by the forty-seven member states of the Council of Europe, encompassing a population of 830 million. Concerning immigration, it may still be regarded as the highest European legal authority on the limitations the relevant forty-seven European states may impose on immigration, and the criteria that may be applied for expulsions.

Migration, with climate change and pandemic control, may be regarded as the most important political issue not only in Europe but in many other parts of the world in the early twenty-first century. The questions of migration are challenging and in a kind of constant flux. The factual conditions, number of migrants, their origins in countries of conflict, need and lack of opportunities, routes, and so on are continuously changing. There is a need to balance pragmatic approaches with some more absolute humanitarily grounded limits to what governments might do. New rules originating in the judiciary may have unforeseen and unfortunate consequences if the implications of new rules have not been sufficiently deliberated. Such an important decision maker as the Strasbourg Court should be subject to continuous critical scrutiny.

Regarding migration policies, international law – and especially human rights law – imposes limitations on what national politicians may decide. For Europe, and therefore Norway, the Convention and the decisions reached by the Strasbourg Court are especially important in this respect.

At a meeting on 8 December 2017 arranged by the Norwegian National Human Rights Institution about the ECtHR and democracy, the Norwegian judge at the Court at the time said it was important not to “talk the Court down”. This warning may be turned upside down: for the Strasbourg Court to remain legitimate, it must indeed be part of the public debate that can provide a democratic and critical adjustment of the Court’s progressive development. This is integral to democracy and the freedom of expression that is a core element of the European Convention on Human Rights (ECHR). This paper seeks to contribute to this effect – that is, to provide a critical perspective on ECtHR interpretative practice with the hope that this will strengthen the Strasbourg Court in the long run.

The format of this paper is limited. We cannot refer to or discuss all or most of the jurisprudence of the Strasbourg Court regarding immigration and expulsions. On 31 August 2019 the Jurisconsult (secretariat) of the Court published a fairly comprehensive guide to the Court’s case law regarding immigration.¹ This paper will

¹ European Court of Human Rights: Guide on the case-law of the European Convention on Human Rights. Strasbourg, 31 August 2019.

focus on a limited number of decisions the author regards as important, illustrative, and challenging. Some may object that these are some of the more controversial decisions and thus not representative of the Court, which decides a huge number of cases every year that result in no controversy. This is misguided. It is the potential consequences of the decisions that are important. One ruling with many potentially unfortunate results will not be balanced by any number of insignificant decisions.

The primary audience of this Occasional Paper are not legal experts but policymakers, government servants, researchers, and intellectuals working with or interested in migration. In order that the non-legally trained may also benefit, the paper has aimed to select some of the Court's most far-reaching immigration rulings and present their facts and consequences as comprehensibly as possible.

1.2 Migration, democracy, and human rights

There is no universal agreement concerning the definition of democracy. However, in discussing sustainable migration, it suffices, as a starting point, to refer to democracy as majority voting, reflecting principles like minority safeguards, the balancing of interests, compromises, and deliberations. In the long run migration policies must be at least accepted or tolerated by the majority of voters and perceived as consistent with basic democratic dimensions – if not enthusiastically approved.

Migration policies are currently highly politicised and contentious. In their paper *Sustainable Migration Framework* (EMN Norway Occasional Papers, 2018) Alexander Betts and Paul Collier listed “broad democratic support” as a basic requirement for sustainable migration policies.² In the words of Betts and Collier liberal migration policies grounded in good intentions may result in a “political backlash” and the “policy of panic” as experienced, for example, in Germany and Sweden during the 2015 migration crises.

The following questions therefore inform this paper's critical analysis. Are the interpretations of the ECHR applied by the Strasbourg Court in immigration cases sufficiently sensitive to the sense of justice and political opinions among the population of Europe and their policymakers to be democratically sustainable? Do the decisions of the Court in any way undermine the required “broad democratic support” for migration policies and practices as seen by the European population and their policymakers?

Of course, courts are supposed to make their decisions based on the law, not on the public's prevailing sentiments at any time. They are courts of law, not courts of public opinion. This is even more the case for a court established to uphold a convention on human rights with the ambition to be universally valid for everyone, everywhere. Nevertheless, the Strasbourg Court needs to balance its independence

² The two other basic requirements were meeting basic ethical conditions and not luring people into decisions they would come to regret.

while remaining sensitive to what most people over time find reasonable and in accordance with their prevailing sense of justice.

1.3 Dynamic and widening interpretation

The Strasbourg Court has for many years applied a doctrine of dynamic interpretation of the Convention as a living instrument that must be adapted to present circumstances. Everyone will agree that any law may need to be applied to conditions not envisaged by the original parties to the document. If a human rights treaty is to remain relevant, it must be understood in ways that take an ever-changing world into account. Adopted in 1950 as a rather short text in its material and important provisions, seventy years later the Convention needs to be interpreted flexibly and dynamically if its role is to be fulfilled. Some concepts in the Convention evolve over time in accordance with our collective values and understanding. The threshold for considering an act “torture” or “inhuman” is lower today than it was several decades ago. This is a natural and predictable development of the law.

Another matter concerns the interpretation of a treaty in a manner that no original party foresaw, and possibly in a manner with which the original parties would probably disagree. As Lord Sumption argues in his new book *Trials of the State*:³ “It is fair to say that some development of the text is unavoidable when applying an abstract statement of principle to concrete cases. In addition, some concepts in the Convention, such as the notion of ‘inhuman or degrading treatment’, plainly evolve over time with changes in our collective values. But the Strasbourg Court has gone much further than that” (p. 57). At some point the Court may go beyond the treaty, and then the appointed judiciary may start acting as an elected legislature, *de facto* enacting new laws that conflict with the basic democratic division of labour between the courts and the parliament. Naturally, it is difficult or impossible to draw a precise line between the Court’s application of the law and its enactment of new law. Obviously, however, this is a distinction that makes for a serious difference.

The Strasbourg Court is not the only international court exhibiting an activist attitude and applying dynamic interpretations that result in tension with national legislatures. In answering a parliamentary question regarding the activist interpretations by the European Court of Justice of the European Union (ECJ), the Danish Minister of Justice clearly stated that he regarded the ECJ as activist, listing several decisions where this had been the case.⁴

There is a vast literature regarding the inherent tensions between international non-elected judicial bodies and elected national legislatures. Some of the possible tensions between law and politics relating to the Strasbourg Court are discussed by

³ Jonathan Sumption: *Trials of the State: Law and the Decline of Politics*. Profile Books 2020.

⁴ Question No. 46 on 30 August 2019, answered on 21 October 2019 by Minister of Justice Nick Hækkerup.

the head of the Danish National Human Rights Institution, Jonas Christoffersen, in two books with many further references.⁵

1.4 The ECtHR: above correction by democratic bodies

In practice, the Strasbourg Court is above or beyond being corrected by democratically elected bodies. In the debate about the Court it has been emphasised “that it is particularly dangerous for an international court to create new norms, since there is no political body which may correct and control the court”.⁶

The Court itself is not strictly bound by precedent and may over time change its own jurisprudence. Therefore, in theory, if a decision meets with much open disapproval among many member states, the Court might later change its interpretation. But it does not often do so, and it would have to wait until a similar case were brought before the Court.

New rules may be added to the Convention by means of protocols that do not necessitate unanimous agreement by the Convention parties, but that approach is unfeasible if member states find it necessary to change the Convention to overrule an interpretation by the Court. It has been pointed out that any decision of the Strasbourg Court “is in practice incapable of being reversed by legislation, short of withdrawing from the Convention altogether”.⁷

For member states to change an article of the Convention that the Court has interpreted in a way the majority finds unacceptable is therefore nearly impossible. The process differs from what may happen if a national supreme court delivers opinions that the majority of the national legislature finds unacceptable. Then the parliamentary majority may quite simply enact new law, or more challengingly, but still possibly, amend the constitution. A change to the Convention requires the approval of all member states. It is much easier to establish a coalition that constitutes a majority or qualified majority in a national parliament than to reach a consensus among all forty-seven member states of the Council of Europe. The forty-seven parties to the Convention are highly diverse. Many are not used to collaborating, and some may exploit any kind of negotiation to push for special interests. During the seventy-year history of the Convention protocols have been added, but the Convention itself has never been changed.

The lack of mechanisms for democratically elected bodies to correct the Court might arguably have as its consequence that the Court should impose a kind of restraint on itself. It might be argued that the Court has not done so, but has instead,

⁵ See Jonas Christoffersen: *Menneskeret – en demokratisk udfordring*. Hans Reitzels Forlag 2014, and Jonas Christoffersen and Mikael Rask Madsen (eds): *The European Court of Human Rights between Law and Politics*. Oxford University Press 2013 – with further references.

⁶ Jan Helgesen: What Are the Limits to the Evolutive Interpretation of the European Convention on Human Rights? *Human Rights Law Journal*. Vol. 31, nos. 7–12 (2012), p. 277.

⁷ Lord Sumption: Limits of Law. The 27th Sultan Azlan Shah Lecture, 20 November 2013.

as many commentators have seen, used its de facto freedom to elaborate a doctrine of wide and activist interpretations of the Convention that would probably not have been accepted if put to a vote by the parties to the Convention. Lord Sumption has observed that the Court has recognised “some rights which the signatories do not appear to have granted, and some which we know from the negotiation documents that they positively intended not to grant”.⁸

That the jurisprudence of national courts may be subject to revisions by way of new legislation does not normally challenge courts’ basic independence. Pointing out that the Strasbourg Court has more freedom than national courts and should bear this freedom with a kind of self-constraint is not to imply a desire that the Court should be less independent.

The emotion of the day is one thing; what voters may view as acceptable solutions in the long run is another. The democratic support for migration policies may appear vulnerable if voters cannot see any practical way, even in the long term, to express their disagreement with the development of the Strasbourg Court’s jurisprudence. One result may be a general scepticism towards new human rights. As one commentator points out, “we have left the governments behind, we have lost them. It is disturbing today to see how governments are reluctant to enter into new human rights commitments.”⁹

1.5 Non-proportional composition of the Court

The Strasbourg Court often refers to a European consensus as part of its reasoning, but the Court’s composition in individual cases will not necessarily be representative of the states that belong to its jurisdiction.

The Strasbourg Court has one judge from each of the forty-seven member states constituting the members of the Council of Europe, encompassing 830 million inhabitants. One democratic challenge is the enormous gap between the number of people behind each judge. Russia (144 million inhabitants) and Turkey (81 million) have one judge each, the same as Liechtenstein (37,000) and San Marino (30,000).

Some decisions by the Court may be taken by one judge alone. Consequently, one judge from a country of 37,000 people may in theory refuse to hear a case that may have legal consequences for all forty-seven countries. Some cases considered fairly non-controversial may be decided by a panel of three judges. Cases being heard will normally be decided by a chamber of seven judges. If a chamber decision is appealed, it is tried by the Grand Chamber, consisting of seventeen judges.

Regardless of the importance of the case, one will never have a decision by all forty-seven judges. As the Court has no qualified voting conditions, rulings by a

⁸ Lord Sumption: Limits of Law. The 27th Sultan Azlan Shah Lecture, 20 November 2013.

⁹ Jan Helgesen: What Are the Limits to the Evolutive Interpretation of the European Convention on Human Rights? *Human Rights Law Journal*. Vol. 31, nos. 7–12 (2012), p. 279.

chamber may be handed down four to one, and by the Grand Chamber nine to eight. There is no way to discover if a majority or qualified majority of all forty-seven judges agrees with a controversial decision. The Court has a Grand Chamber, but there is no Plenary Chamber.

There have been important decisions where the chamber unanimously or with the dissent of only one judge has reached one conclusion, while the Grand Chamber has reached the opposite conclusion, typically with some dissenting opinions.¹⁰ In one recent important migration case (to be discussed later) the chamber unanimously held against the state. The Grand Chamber then unanimously ruled in favour of the state (with one judge dissenting with regard to the reasons given).¹¹ Such a voting pattern makes the law appear subjective or arbitrary.

Frequently, the judges constituting an ordinary chamber or the Grand Chamber may only represent a tiny minority of the total population of the forty-seven member states. A state that is accused of violating the Convention will normally be represented in the panel hearing the case, but this constitutes no guarantee that the ruling will reflect or be sensitive to the opinions of the majority of voters in the judge's country, nor the majority in the forty-seven member states.

2 Democratic balancing of interests vs. non-derogatory and inflated provisions

2.1 Democracy as compromise

As Winston Churchill famously said, "Democracy is the worst form of Government except for all those other forms that have been tried from time to time". As democracy represents a compromise, it is based on finding some common ground among many diverse interests and principles of proportionality.

The Nuremberg trials and the legal and binding implementation of human rights institutions after WWII made clear that there should be some absolute limits to the powers of government, even when the ruling parties represent the majority. There can be no compromise with genocide, ethnic cleansing, slavery, or discrimination that threatens the identities of minorities. A challenge to the democratic principles of balancing of interests and proportionality may arise if these absolute limits to the rule of the majority are inflated. If the boundaries to the behaviour of the majority are to be accepted, they must, at least in the long run, appear reasonable and grounded in a basic or intuitively acceptable ethics.

¹⁰ In e.g. the important Paposhvili case, no. 41738/10, 13 December 2016, GC, discussed later, the Chamber found against the complainant 6–1, while a unanimous Grand Chamber held against the state.

¹¹ N.D. and N.T. vs Spain, nos. 8675/15 and 8697/15, 13 February 2020.

2.2 An immigration crisis threatening the life of the nation: no derogation

ECHR Article 3 is headed “Prohibition of torture”. It states that “No one shall be subjected to torture or to inhuman or degrading treatment or punishment”. In Article 15 these prohibitions are made absolute. Even in the case of “war or other emergency threatening the life of the nation” there may be no derogation from Article 3. Concerning Article 3, the jurisprudence of the Strasbourg Court does not allow for any compromise or the application of any principle of proportionality.

The (in)famous Gäfgen case¹² makes the absoluteness of the prohibition quite clear. The facts of the case are dramatic, aptly illustrating one of this paper’s basic arguments, although the case does not concern migration. Jacob, an innocent eleven-year-old boy is invited by the young lawyer Magnus Gäfgen to come home with him to fetch a coat that Gäfgen says Jacob’s sister has forgotten. On entering the apartment, Gäfgen kills Jacob by strangling him with tape. Jacob’s parents are then asked to pay a ransom, having been told Jacob has been kidnapped. On picking up the money, Gäfgen is filmed by the police and subsequently arrested.

The police fear Jacob is in a life-threatening situation and that they must find him very quickly. However, Gäfgen refuses to inform the police of Jacob’s location. To obtain the necessary information, the officers threaten Gäfgen with hard treatment. He yields, and the police find the dead boy under a pontoon bridge.

Summing up what for this paper is the principal legal point, the Grand Chamber unanimously ruled against Germany and the actions of the police officers handling the case. The law laid down was that the police could not threaten an identified kidnapper in spite of the fact that from the wording of the judgement it is quite clear that everyone would agree that the police were in a desperate situation with seemingly very limited time to find and save the life of the kidnapped boy. The police did not torture the kidnapper, nor did they physically harm him. But threatening him represented degrading treatment, which is absolutely forbidden under Articles 3 and 15. The Grand Chamber made clear that irrespective of the circumstances there was no opening for any principle of opportunity or any compromise under Articles 3 and 15. Non-derogatory means non-derogatory, whether the possible loss is one boy or a thousand. The police may not use threats to obtain information regarding highly probable terrorist attacks on a metropolis.

The dramatic facts of the Gäfgen case clarifies the absoluteness of Article 3. If Article 3 is invoked, the government will not be excused in principle, even if the immigration situation may threaten to cause absolute chaos or an unlimited apocalypse. This lack of proportionality in relation to the consequences of the judgement may very well go against a general sense of justice and indeed represent a democratic challenge. In this connection it is important to note that the Strasbourg Court, as we shall soon see, has widened the application of what constitutes inhuman and degrading in Article 3 far beyond what many people might find

¹² Gäfgen vs Germany, no. 22978/05, Grand Chamber, 1 June 2010.

appropriate and the natural meaning of the text and the presumed intention of the drafters, especially considering the absoluteness of the prohibition.

2.3 Non-refoulement and an inflated ECHR Article 3

The Strasbourg Court has interpreted the Convention as upholding the principle of non-refoulement: no person may be denied entry into a country or be expelled if this might expose the person to torture, or inhuman or degrading treatment. The Court has held the ECHR sets more limits to what a government may do than Article 33 of the UN Convention of Refugees, which allows for expulsion if the person represents a threat to national security because of the crimes they have committed.

The Court's interpretation of the Convention as upholding the principle of non-refoulement seems well in line with the prevailing sense of justice in European countries. However, the application of the principle is more demanding. In this respect it may be noteworthy that almost all the eleven European states that signed the ECHR in Rome on 4 November 1950 participated in the final drafting of the Refugee Convention in Geneva in July 1951, agreeing that refugees should not benefit from absolute protection against refoulement. It seems unlikely that the signatory states had intended to give such a right to every foreign citizen through the ECHR when they were unwilling to give it to refugees. Given this background, the dynamic and widening interpretation of Article 3 may be regarded as even more problematic: The Strasbourg Court has applied the principle of non-refoulement to encompass situations in which there is only a risk of maltreatment: "[F]or a planned forcible expulsion to be in breach of the Convention it is necessary – and sufficient – for substantial grounds to have been shown for believing that there is a real risk that the person concerned will be subjected in the receiving country to treatment prohibited by Article 3".¹³ You do have a right to protection even if it is uncertain or probable that you will be mistreated on your return. The Court has explicitly rejected that it should be necessary to prove that such treatment is "more likely than not".¹⁴

The jurisprudence of the Strasbourg Court states that the risk of any treatment contrary to Article 3 of the ECHR invokes the principle of non-refoulement and an absolute prohibition against denial of entry or extradition.

As in many decisions the ECtHR has widened the understanding of the terms inhuman and degrading treatment in ECHR Article 3, the Court has not explicitly considered the consequences in relation to Article 15 and the principle of non-refoulement. Most will agree to an absolute prohibition against torture, and inhuman and degrading treatment. What they may not support is the dynamic and widening interpretation of what the Strasbourg Court has regarded as inhuman and degrading

¹³ See e.g. Saadi vs Italy, no. 37201/06 Grand Chamber, 28 February 2008, para 140.

¹⁴ Saadi vs Italy para. 140.

treatment, especially when the consequence is that any removal and denial of entry is then made impossible.

In the Bouyid Grand Chamber case¹⁵ a minority of three judges criticised the majority for not considering these potentially far-reaching consequences of their decision. In a Belgian police station, an unruly and ill-behaved teenager with a long history of harassing the local police force provoked one of the police officers so much that he “allegedly slapped [the boy] on the face with his right hand”. The facts of the case were somewhat disputed, but central to the Court’s reasoning was the “bruising that had resulted from a slap inflicted by a police officer”. The majority stated that “any conduct by law-enforcement officers *vis-à-vis* an individual which diminishes human dignity constitutes a violation of Article 3 of the Convention. That applies in particular to their use of physical force against an individual where it is not made strictly necessary by his conduct, whatever the impact on the person in question.” There may be no doubt that the officer losing his temper behaved unprofessionally and should face some kind of disciplinary action. However, the minority was critical of the majority because it had failed to clarify what the consequences of these “trivializing findings of a violation of Article 3” would be. One might wonder if the minority was concerned that Norway, for example, would not be allowed under the principle of non-refoulement to expel persons to Belgium, because there they might risk encountering public authorities acting as the policeman in the Bouyid case did. One might also suggest, as indicated above, that the contracting parties to the Convention had never foreseen that this was the kind of behaviour that would be absolutely forbidden by the Convention.

2.4 Forbidden to expel criminals to other member states with crowded prisons?

2.4.1 Less than three square metres per person

The Strasbourg Court has often had to decide whether prison conditions are in breach of the prohibition against inhuman and degrading treatment in Article 3 of the Convention. In its decision of 31 May 2017, the Danish Supreme Court held that three criminals who were citizens of Romania could not be expelled. Prison conditions in Romania were of such a standard that they might constitute a violation of the prohibition of inhuman or degrading treatment. Consequently, the non-refoulement principle invalidated the expulsion decision. The Danish Supreme Court referred to several rulings by the ECtHR, especially the verdict by the Grand Chamber in the Mursic case.¹⁶

Briefly stated, in its Mursic decision the Grand Chamber held that a cell for more than one person allowing less than approximately three square metres per person constituted inhuman or degrading treatment under ECHR Article 3. The three-

¹⁵ Bouyid vs Belgium, no. 23380/09 28 September 2015, Grand Chamber.

¹⁶ Mursic vs Croatia, no. 7334/13, 20 October 2016, Grand Chamber.

square-metre criterion is not absolute, but the Grand Chamber held that twenty-seven days in cells averaging 2.62 square metres per person constituted a violation.

What is lacking in the decision by the Strasbourg Court and the subsequent ruling by the Danish Supreme Court is an analysis of or deliberation concerning the consequences of the decision for migration policies. Romania has harsher prison conditions than Denmark. Yet this is also the case with many other members of the Council of Europe. Of course, this is regrettable. For example, a rule that no criminal may be expelled from the Nordic countries with their exceptionally well-equipped prisons to any of the other (forty-seven) member states that do not meet the three-square-metre standard is quite another matter.

2.4.2 No public scrutiny of the consequences

The three-square-metre standard has not been subject to any public debate or scrutiny by any elected bodies. It is not well known and may easily offer a limit to migration policies to which many people may object considering the consequences. The square-metre limit construed by the Strasbourg Court may represent an absolute hindrance to expulsion. Such a rule would probably not have been introduced by a democratically elected legislative assembly without an enumeration of some of the countries to which expulsion would or would not be allowed under the new rule.

A democratic government proposing or enacting far-reaching legislation will normally initiate public deliberation processes as part of the democratic process. The public will have the opportunity to voice their concerns through civil society organisations and various media forms. Such processes may also initiate closer scrutiny regarding the proposals' consequences. No such process or public debate is institutionalised as part of the litigation before the Strasbourg Court.

2.4.3 Inside vs outside the Council of Europe

The prison conditions in the United States are known to be demanding, with often overcrowded cells. In many developing countries prison conditions and overcrowding may be even worse. The harsh incarceration environment in many countries in South America and South Africa are well known from movies and documentaries.

However, it is unclear if the Strasbourg Court will require the same standards of prisons in countries outside the Council of Europe as they have of member states.¹⁷ Without such a distinction the extradition of criminals to serve time in prisons of states outside the Council of Europe would often be prohibited under the principle of non-refoulement because of the far-reaching interpretation of ECHR Article 3.

¹⁷ *The Guidance Note on Prisoner Rights* published by the ECtHR, paragraphs 328–329.

2.4.3 Isolation regimes

In prison notorious criminals may need to be isolated, both to protect them from the rest of the prison population and prevent them from instigating new criminal activities. In the case concerning the Venezuelan terrorist Illich Ramirez Sánchez (known as the Jackal; a person who in interviews had stated that he had probably been actively involved in the killing of between 1,500 and 2,000 people),¹⁸ France had subjected him to a prison regime with considerable isolation. However, the restrictions were not extremely harsh, allowing for a visit by his doctor twice a week, his priest once a month, and nearly four visits a week by lawyers, including 640 visits over four years and ten months by the female French lawyer whom the Jackal married while still in prison. When decided by the Grand Chamber, a minority of five judges held that this isolation regime constituted inhuman or degrading treatment in breach of Article 3 and was therefore absolutely forbidden. The other twelve judges found that there was no breach.

In Norway the mass murderer who killed sixty-nine young people on 22 July 2011, having already killed eight others, and who injured more than three hundred others, was subject to a prison regime which Oslo City Court held violated ECHR Article 3, but which the Appeals Court and Supreme Court later found to be within the limits.¹⁹ The ECtHR later held that the murderer's appeal was inadmissible for being manifestly ill-founded.²⁰ Compared with other countries, the resources spent on the Utøya murderer to make his life in prison comfortable in spite of the isolation measures may be characterised as extraordinarily generous.

The point here is that the criteria defining isolation regimes that may violate ECHR Article 3 as interpreted by the ECtHR are very strict. Some criminals may be challenging to keep in prison. Extraditing a criminal migrant to another member state of the Council of Europe where the person might risk isolation regimes in breach of the standards set by Article 3 would not be allowed under the non-refoulement principle.

¹⁸ Ramirez Sánchez vs France 2006 59 no. 450/00 4 July 2006 Grand Chamber.

¹⁹ Oslo City Court 20 April 2016, Borgarting Appeals Court 1 March 2017, and the Supreme Court Appeals Committee 8 June 2017.

²⁰ Hansen v. Norway no. 48852/17, 21 June 2018, Committee of three judges.

3 Health immigration

3.1 Extending the Convention

3.1.1 A right to remain on the basis of health risks

Prioritising who should have access to what medical treatment is in itself a challenging and politically sensitive issue, not least considering the potentially high cost of treatment and medication. Public funds are limited. Combining health priorities with immigration makes for a delicate and possibly highly contentious mix. The Strasbourg Court has recently decided some cases of considerable significance in this regard.

Thus far decisions regarding health immigration have not received the attention they deserve. The term “health immigration” is in itself new and not used by the Court itself; it is more a term applied to underscore that this is new territory for the Convention. The cases are also well suited for a discussion of which rules should be established by the judiciary in contrast to democratically elected bodies.

Traditionally the words “torture or ... inhuman or degrading treatment” have been understood as referring to active conduct by the authorities. In the new case law regarding health risks the Court has ventured further. According to this new health jurisprudence the concept of non-refoulement not only encompasses illegitimate actions against the immigrant by the authorities in the country of origin but suffers due to shortages of material equipment, medication, or qualified personnel in the country of origin. This fact has been pointed out by the Judicial Committee of the UK’s House of Lords: “We are dealing here with a decision of the Strasbourg court which created what the Court of Appeal rightly accepted was an ‘extension of an extension’ to the article 3 obligation...”²¹

It may be noted that an explicit right for migrants to protection on medical grounds is nowhere to be found in the Convention or any other human rights treaties. Neither does such an interpretation follow naturally from the wording of Article 3. It would be difficult to argue that such health protection was intended by the drafters of the Convention. There is no reason to believe that any state signing up to the ECHR foresaw that health immigration might be regulated by these provisions or any other article in the ECHR. The jurisprudence regarding health immigration is a creation of the Court that some might see as a clear extension of the Convention.

²¹ House of Lords (Judicial Committee), *N (FC) vs Secretary of State for the Home Department*, [2005] UKHL 31, paragraph 23.

3.1.2 Paposhvili: Medication costing €300,000 a year

In *Paposhvili vs Belgium*²² a citizen of Georgia, who had travelled to Belgium with his wife and child, had two more children while living in Belgium. Both he and his wife had long criminal records. Almost as soon as they arrived in Belgium, the couple engaged in a criminal career, repeatedly being convicted, and for increasingly serious offences, including violence, organised criminal activity, fraud, and corruption. Paposhvili received two prison sentences of fourteen months and three years respectively.

In prison Paposhvili became seriously ill with hepatitis and blood cancer (chronic lymphocytic leukaemia). The Belgium medical and incarceration authorities provided him with very expensive medication at a cost of more than €300,000 per year. A question also arose concerning transplant surgery at a potential cost of €150,000.

The Belgian immigration authorities decided that as a notorious criminal Paposhvili should be deported to his country of origin, Georgia. A Chamber decision of the ECtHR held by a clear majority (6–1) that the expulsion of Paposhvili did not violate the ECHR. On appeal a unanimous Grand Chamber held against the state. “[I]f the applicant had been removed to Georgia without the Belgian authorities having assessed, in accordance with that provision, the risk faced by him in the light of the information concerning his state of health and the existence of appropriate treatment in Georgia”, this would violate ECHR Article 3 and the prohibition against inhuman and degrading treatment, and Article 8 protecting privacy and family life.²³

The Georgian government had stated that their health services would be able to render Paposhvili the necessary medical treatment. However, the Grand Chamber found that if Paposhvili were removed, he “would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy”. Deporting him to Georgia would therefore represent a violation of the absolute prohibitions of inhuman and degrading treatment in Articles 3 and 15. The Grand Chamber placed extra burdens on the country wishing to remove the immigrant in stating that a certain degree of speculation was inherent in the preventive purpose of Article 3. The applicant was not therefore required to provide clear proof of his claims regarding the risks to his health.

In both the *Paposhvili* ruling and later in the *Savran* case discussed below the Court clarified that “it is not a question of ascertaining whether the care in the receiving State would be equivalent or inferior to that provided by the health-care system in the returning State”. Neither would the immigrant have “a right to receive

²² *Paposhvili vs Belgium*, no. 41738/10, 13 December 2016, Grand Chamber.

²³ *Paposhvili* Conclusion, 1st paragraph.

specific treatment in the receiving State which is not available to the rest of the population”.²⁴

Before the Paposhvili decision an expulsion of a sick person would only violate Article 3 if the deportation presented an imminent risk of death. These criteria were sometimes summarised as a “close to death” threshold. The extent to which the Paposhvili criteria of a real risk of being exposed to a serious, rapid, and irreversible decline in his or her state health, resulting in intense suffering or significant reduction in life, may be discussed. Yet these are clearly more far-reaching than the former criteria. The Grand Chamber ruling does not explicitly acknowledge that there is any clear difference which, as we shall see, has been criticised by the UK Supreme Court.

3.1.3 Lack of clarity regarding the Paposhvili case

The British Upper Tribunal has refused to apply Paposhvili, because it represents a break with previous ECtHR jurisprudence.²⁵ However, in 2020 the UK Supreme Court ruled that the Paposhvili decision was relevant under British law.²⁶ Another conclusion may have resulted in the UK losing later cases before the Strasbourg Court concerning health immigration. The UK Supreme Court explicitly criticised the ECtHR for saying that the Paposhvili decision “clarified” the law, while the Supreme Court considered the law to have been widened.

It seems there is no agreement concerning the extent to which the ECtHR in the Paposhvili case may have substantially lowered the threshold for expulsion when health conditions are invoked. In its 2020 decision the UK Supreme Court apparently found that the Paposhvili decision widened the protection of the sick immigrant by placing additional procedural requirements on the returning state. In the Savran case from 2019 the majority (4–3) in the chamber, holding in favour of the applicant, referred to the Grand Chamber in the Paposhvili decision as upholding a “high threshold for the application of Article 3 ... in cases concerning the removal of aliens suffering from serious illness”. The strong minority of three judges referred in their opinion to the fact that the Court’s strict case law prior to Paposhvili “had, however, been the subject of debate and criticism, both within and outside the Court. Over the years, several judges of the Court had in separate opinions, whether dissenting or concurring, expressed their dissatisfaction and disagreement with the Court’s strict case-law.” The minority in the Savran case then went on to “regret, [that] the majority in the present case have not faithfully abided by and applied the recent and unanimous Paposhvili judgment to the facts of the case. On the contrary, the majority have seized the first available opportunity to further broaden the scope of Article 3 in this sensitive area, thus in practice pushing wide open the door that the Grand

²⁴ Savran vs Denmark, no. 57467/15, 1 October 2019, 4th Section, paragraph 46.

²⁵ Case Title: EA & Ors (Article 3 medical cases – Paposhvili not applicable)”.
<https://tribunalsdecisions.service.gov.uk/uti/ac/2017-ukut-445> (section 19).

²⁶ AM (Zimbabwe) vs Secretary of State, UK Supreme Court, 29 April 2020 UKSC 17, paragraphs 22 and 32.

Chamber deliberately and for sound legal and policy reasons decided only to open slightly compared to the previous strict case-law.”²⁷ As Denmark has appealed the Savran decision to the Grand Chamber, one may hope for some clarification concerning whether the Paposvhili criteria have lowered the threshold for degrading or inhuman treatment. In a ruling on 6 May 2020 the Danish Folketingets Ombudsmand (Parliamentary Ombudsman)²⁸ referred to the possibility that the Grand Chamber might clarify parts of its Paposvhili ruling in its forthcoming decision in the Savran case, discussed below.

One of the reasons for the lack of clarity may be that neither Article 3 nor Article 8 directly relates to the concrete issues at stake. As this paper has pointed out, health immigration is a new area of law created by the Strasbourg Court.

3.1.4 Right to continued treatment

There are many dilemmas related to the Paposvhili case. One is quite simply that the Strasbourg Court has ventured outside any reasonably clear wording of the Convention. The Court is at least acting outside any core area of Article 3 that should relate to deliberate actions by the state. The Convention is applied here to natural and inevitable health consequences due to the lack of resources in the home country.

The migrant in question will not base his demand to remain in his country of residence on any need for refuge, but because he is ill. The jurisprudence of the Strasbourg Court creates a right to remain for health reasons. One might ask whether this line of reasoning in relation to Article 3 of the Convention may ultimately also create a right to remain because of poverty.

In reality the Paposvhili decision provides more than a right to remain. To be meaningful, it must also imply a right to continued treatment. The right to remain would be rendered meaningless otherwise. This consequence has also been pointed out by the UK House of Lords (Judicial Committee): “There would simply be no point in not deporting her unless her treatment here were to continue.”²⁹

The wording of the Paposvhili decision only concerns the negative duty of the state not to return the appellant. In reality it obliges the state to take on the positive duty of continuing the migrant’s treatment.

²⁷ Savran minority opinion, paragraph 9.

²⁸ Folketingets Ombudsmand, 6 May 2020, j.nr. 7672-1, Dok.nr.19/05829-28/RPE.

²⁹ House of Lords (Judicial Committee), *N (FC) vs Secretary of State for the Home Department*, [2005] UKHL 31, paragraph 88.

3.2 Savran – making Denmark the world’s mental hospital?

3.2.1 Including mental health issues

In the Savran Chamber ruling³⁰ it was clearly pointed out by the minority that in its majority verdict the ECtHR was acting as a lawmaker in making new rules. Savran, a Turkish national, had committed many crimes, one of them so violent that the victim died, while in Denmark. The Danish authorities therefore decided to expel him. In a Chamber decision with a strong minority (4–3) the majority held that the expulsion violated Savran’s rights under Article 3 of the Convention, because it was degrading or inhuman “if the applicant were to be removed to Turkey without the Danish authorities having obtained, in accordance with that provision, individual and sufficient assurances that appropriate treatment would be available and accessible to the applicant upon return”. Savran suffered from mental illnesses, and Denmark had not provided sufficient evidence that he would receive the necessary medication, treatment, and care in Turkey as he would in Denmark.

On 27 January 2020 the Grand Chamber panel of five judges decided to refer the Savran case to the Grand Chamber. The comments below concern the Chamber decision, not the forthcoming Grand Chamber ruling. On 28 May 2020 the Norwegian government submitted a third party intervention concerning the Savran case.

It appears that the majority in the Savran case is widening the application of the Paposhvili decision in at least three dimensions. The Court is approaching the adoption of a criterion for comparing standards when it may be decisive that treatment in Denmark is better than in Turkey: “the Court cannot ignore that the applicant is suffering from a serious and long-term mental illness, paranoid schizophrenia, and permanently needs medical and psychiatric treatment. Returning him to Turkey, where he has no family or other social network, will unavoidably cause him additional hardship, and make it even more crucial, in the Court’s view, that he will be provided with the necessary follow-up and control in connection with intensive outpatient therapy upon return. It reiterates in this respect, *inter alia*, that according to the psychiatric reports ... the applicant has been prescribed complex treatment and the treatment plan has to be carefully followed. Antipsychotic medication must be administered on a daily basis, which was deemed to constitute a risk of pharmaceutical failure and consequently the worsening of the applicant’s psychotic symptoms and a greater risk of aggressive behaviour.” The minority pointed out that “there is simply no basis in the medical reports for arguing that the high [Paposhvili] threshold is reached in the present case”.

The Court placed much responsibility on the host country (Denmark) to assure itself of the sufficient quality of the medical treatment in the home country (Turkey). The majority said that “[i]n the Court’s view, this uncertainty raises serious doubts as to the impact of removal on the applicant. When such serious doubts persist, the

³⁰ Savran vs Denmark, no. 57467/15, 1st October 2019, 4th Section.

returning State [Denmark] must either dispel such doubts or obtain individual and sufficient assurances from the receiving State [Turkey], as a precondition for removal, that appropriate treatment will be available and accessible to the persons concerned so that they do not find themselves in a situation contrary to Article 3.”

For the minority it was important to point out that it found no sufficient basis in the Paposhvili decision that would also apply to the mentally ill instead of it being reserved for physically ill persons. It emphasised that what it regarded as a widening of Article 3 would “have significant implications for the member States in cases concerning the removal of persons suffering from mental illnesses”. The minority also pointed out “that a physical medical condition relies more on objective elements than mental illness, which can sometimes be assessed subjectively, or even wrongly, owing to symptoms being simulated”.

3.2.2 No “exceptional circumstances”

The majority decision in the Savran case makes for several dilemmas. In the Paposhvili decision the jurisprudence of the Strasbourg Court is understood to require “very exceptional circumstances” in expulsion cases raising health issues.³¹

The Savran case is not exceptional. Diagnoses like paranoid schizophrenia are not extraordinary in the modern world.

The majority is placing high demands on the health services offered in the home country. It did not suffice that the applicant would have access to medicine and hospital services. In addition, as a minimum, Denmark as the returning country would have to prove that the applicant would have a permanent and personal contact person available suitable for his or her needs: “Accordingly, in the Court’s view, the Danish authorities should have assured themselves that upon return to Turkey, a regular and personal contact person would be available, offered by the Turkish authorities, suitable to the applicant’s needs.”³²

In reality the Savran decision may result in a near absolute protection against the return or expulsion of foreigners diagnosed as suffering from paranoid schizophrenia or similar conditions from a country with an advanced public health system to a state with a less comprehensive and sophisticated health service. It is hardly realistic to expect that the typically poor countries of origin of many migrants will be able to offer qualified personal contact persons in addition to medical treatment.

The majority denies that they are comparing the health systems and treatments of Denmark and Turkey, but their judgement may be understood to imply that this is what they are doing. A pivotal argument of the majority is that it has not been proved by Denmark that the appellant will receive the same treatment in Turkey

³¹ Paposhvili GC, paragraph 177.

³² Savran case, paragraph 64.

as he is offered in Denmark and in accordance with the recommendations of the Danish physician.

3.2.3 Disregarding personal responsibility, dissimulation and drug addicts

The majority also implies that one should not expect the appellant to exercise personal responsibility regarding taking his medication as prescribed. Savran was aware of his illness and his need of medicine. If in such cases one requires a personal contact person to ensure that medication is taken and cannot expect any personal responsibility from the appellant, there may in many deportation cases be a need for a more extensive system of assistance in the home state than previously supposed.

As one dissenting judge points out, a risk of dissimulation is also related to mental illnesses. Such a diagnosis “is not straightforward, is not always based on objective criteria, often gives rise to heated discussions among experts, and above all does not exclude the possibility of error due to simulation”. It may also be much more difficult to distinguish between different kinds of mental illness.

It may also be demanding to take into account the link between self-induced conditions through the use of narcotics and psychoses. Severe drug addicts may sometimes receive a diagnosis of paranoid schizophrenia. The Savran decision may therefore have implications for the return of or denial of entry to immigrants who are long-term drug addicts.

Faithful to its institutional setting, the minority strongly recommended that the “change and further development” of the Paposhvili criteria should have been left for the Grand Chamber to decide. Denmark has appealed the chamber ruling. As of early May 2020 it has not yet been decided whether Norway will intervene.

3.3 Making new rules

The argument to be made here is that Savran – and Paposhvili – may represent new rules or legislation. In this case the new rules are made without any democratic representation or mandate. The consequences may also be far-reaching. The threshold for the expulsion of violent and sick criminals is very high, and a strict burden of proof and investigative duties are also placed on the host countries (Denmark and Belgium). Due to the limited administrative apparatus and narrow public deliberation of the cases of the court, the more far-reaching implications of the rulings have not been considered. How many people may be involved, in what countries, and what are the potential costs to the countries of incarcerating the immigrants?

Paposhvili was undergoing treatment in Belgium. The Grand Chamber offers no indication as to whether one may distinguish between removal from and entry to a country. If denying entry implies that the person may be subject to inhuman or

degrading treatment, such a denial will constitute a violation of the principle of non-refoulement and therefore be invalid. Logically, the Paposhvili reasoning should therefore apply to a person who on gaining entry to a country may avoid “being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy” because the health services in the home country do not provide the necessary medical treatment. Consequently, the Paposhvili threshold, whatever it and the procedural requirements may be, would also have to be respected not only in deportation cases but when considering the denial of access to the country, with the possible modification that denial of entry and a specific treatment should be considered less inhuman and less degrading than terminating a treatment and care regime that has already been started.

Certainly, the Paposhvili criteria may not only be applied to criminals serving prison time but to ordinary migrants who are sick.

In reaching its unanimous decision in Paposhvili, the Grand Chamber did not discuss the ramifications or possible budgetary consequences of its ruling. Among the forty-seven member states how many aliens may not be expelled because of their health conditions?

3.4 National health policy – budgetary consequences

The Paposhvili case concerned very expensive medication and may have far-reaching human rights implications apart from the concrete immigration issues at stake. The Strasbourg Court has labelled the potential consequences of being denied very expensive medication and treatment as inhuman or degrading under Article 3 of the Convention when the sick person is an immigrant. However, the prohibition against inhuman and degrading treatment is absolute and general. It should also apply to ordinary citizens – even more so for political reasons. Most people might find it difficult to accept that immigrants should have access to more expensive publicly funded medication than ordinary citizens.

As is often the case when courts make decisions, the Grand Chamber did not elaborate on the more general implications of its ruling. The wording of Article 15 of the Convention rejects the state being excused from providing very expensive medication on the grounds of economic or budgetary arguments. In all countries offering public health services there are budgetary constraints and a constant need to prioritise. Some medical companies today charge extremely high prices for new medicines. If the Paposhvili ruling is seen as relevant for such issues, the decision encroaches on core healthcare priorities without these far more general and far-reaching issues being discussed by the Grand Chamber.

The Paposhvili decision has many consequences and needs for clarification that the Grand Chamber neither foresaw nor even discussed, and that many politicians and the public have yet to discover.

4 The Strasbourg Court and the “death in the Mediterranean”

4.1 Widening the concepts of jurisdiction and expulsion

Regarding migration, the definition of jurisdiction in ECHR Article 1 is of vital importance: “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.” If a migrant qualifies as subject to the jurisdiction of a state that is a signatory to the Convention, he or she may invoke important procedural rights under Article 13 that are often costly to the state: “Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority...” As soon as the migrant is under the jurisdiction of a specific state, his or her application for entry or protest against repatriation, etc. must be given an individual assessment with a right to legal assistance and interpretation, and a right to appeal.

In this section we shall examine the *Hirsi Jamaa* decision from 2012,³³ which is part of the jurisprudence of the Strasbourg Court widening the definition of jurisdiction with far-reaching consequences. We shall also briefly mention a new case decided by the Grand Chamber on 5 May 2020 regarding the concept of jurisdiction in relation to embassies.³⁴ There are many other cases related to the concept of extraterritorial jurisdiction. As the purpose of this paper is to highlight political dilemmas related to the jurisprudence of the Court concerning immigration, we do not mention more cases than is considered strictly necessary.³⁵

ECHR Protocol 4 Article 4 states that the “[c]ollective expulsion of aliens is prohibited”. In a recent Grand Chamber ruling of February 2020³⁶ the concept of expulsion is defined in a way that the Finnish judge in a strongly voiced separate opinion found new and too broad. There is a close relationship between the controversial definition of expulsion and the wide concept of jurisprudence.

4.2 *Hirsi Jamaa*: Extraterritorial jurisdiction on board a coastguard ship

The factual background of the *Hirsi Jamaa* case is the push-back agreement entered into by the Italian prime minister Berlusconi and the Libyan dictator Gaddafi. If and when migrants tried to cross the Mediterranean, they might be picked up by an Italian coastguard ship and handed over to Libyan government representatives for return to Libya. *Hirsi Jamaa* was one of approximately two hundred migrants on board three vulnerable vessels who were picked up by three ships from the Italian Revenue Police and Coastguard and returned to Libya. The Strasbourg Court had to decide

³³ *Hirsi Jamaa et al. vs Italy*, no. 27765/09, 23rd February 2012, Grand Chamber.

³⁴ *NN vs Belgium*, 5 May 2020, no. 3599/18. The applicants have been anonymised.

³⁵ For an overview of relevant decisions by the ECtHR see *Factsheet Extra-territorial jurisdiction of State Parties to the European Convention on Human Rights*, July 2018, Press Unit ECtHR.

³⁶ *N.D. and N.T. vs Spain*, nos. 8675/15 and 8697/15, 13 February 2020.

whether the migrants were under Italian jurisdiction according to Article 1 of the Convention when they were taken on board the three Italian military vessels.

A unanimous Grand Chamber found against Italy. In its introduction the Court held that the jurisdiction of a state within the meaning of ECHR Article 1 “is essentially territorial”. Only in exceptional cases may the acts of a state outside its territory constitute an exercise of jurisdiction within the meaning of Article 1. The Grand Chamber went on to rule that such extraterritorial exercise of jurisdiction might take place “on board craft and vessels registered in, or flying the flag of, that State”. The Court held that “[w]henver the State through its agents operating outside its territory exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section I of the Convention that are relevant to the situation of that individual”.³⁷ The Court stated that where “there is control over another, this is de jure control exercised by the State in question over the individuals concerned”. The word “another” includes non-citizens, migrants, etc. The Italian Government had acknowledged “that the Revenue Police and Coastguard ships onto which the applicants were embarked were fully within Italian jurisdiction”.³⁸

The Grand Chamber explicitly stated that it was no excuse for Italy to regard the push-back operation as an effort to assist migrants whose lives were threatened and escort them to safety. Considering that Italy as a matter of fact had rescued the migrants, the language of the Court was fairly condescending: “Italy cannot circumvent its ‘jurisdiction’ under the Convention by describing the events in issue as rescue operations on the high seas.” Neither did the Court place much emphasis on the argument by the Italian state that the Italian representatives on board the coastguard ship had not exercised much control over the two hundred migrants on board: “In particular, the Court cannot subscribe to the Government’s argument that Italy was not responsible for the fate of the applicants on account of the allegedly minimal control exercised by the authorities over the parties concerned at the material time.” The Court repeated that it had paid no attention to the argument that the Italian operation might have saved the migrants from drowning: “Speculation as to the nature and purpose of the intervention of the Italian ships on the high seas would not lead the Court to any other conclusion.”

As the migrants were under Italian jurisdiction, they were liable to an effective remedy in accordance with Article 13 of the Convention. Consequently, their applications for entry into Italy had to be given an individual assessment with a right to legal assistance and interpretation, and a right to appeal. The Grand Chamber observed that there “were neither interpreters nor legal advisers among the personnel on board” the coastguard vessel.

³⁷ Hirsi Jamaa, paragraph 74.

³⁸ Hirsi Jamaa, paragraph 76.

Having a right to an individual assessment, the migrants might not be collectively returned to Libya. The Grand Chamber held that there were substantial grounds for believing that the parties concerned ran a real risk of being subjected to torture or inhuman or degrading treatment after being pushed back to Libya. Italy had therefore violated the principle of non-refoulement and Article 3 of the Convention. In the opinion of its officials Italy had conducted a rescue operation; the Strasbourg Court looked on the facts of the case as a violation of the rights of the persons being picked up and pushed back, and held that Italy should pay each migrant damages of €15,000.

4.3 The undiscussed “Hirsi gamble”

The Hirsi Jamaa decision may have significantly affected European migration policies and the unfortunate fate of many migrants. Since this decision was decided by the ECtHR in 2012 thousands of migrants have drowned trying to cross the Mediterranean. A dangerous and undignified “Hirsi gamble” has developed: traffickers or people smugglers pack migrants onto vulnerable and overfilled boats. Sometimes, when the migrants get within or close to Italian waters, it is said that they call the Italian coastguard, which, for humanitarian and political reasons, and under maritime law, must come to their rescue, because the migrants in their poor and completely overloaded vessels are in acute danger. Possibly to circumvent the Hirsi judgement, the Italian government has recently entered into agreements with the Libyan coastguard, which intercepts the migrants and returns them to Libya. Italy supposedly has made older Italian coastguard vessels, etc. available for these operations. To avoid Italy being “caught” by the Hirsi criteria, the vessels are no longer under Italian command.

The implications of the important extension of the jurisdictional authority and responsibility of a state illustrated by the Hirsi Jamaa decision have been far-reaching. It will, of course, be difficult to prove that the “death in the Mediterranean” is due to this judgement of the Strasbourg Court. The negative and almost apocalyptic scenarios were never discussed broadly and publicly as would have been the normal part of a legislative process extending the concept of extraterritorial jurisdiction. When the judiciary acts as a lawmaker, it not only violates a requirement that the electorate should be able to decide, but the process also circumvents some of the safeguards resulting from a broader discussion. We will never know, but it may be a fair guess that the Grand Chamber might not unanimously have decided against Italy if they had foreseen the Hirsi gamble and the thousands of drownings that may have been the traumatic consequence of their wide definition of extraterritorial jurisdiction.

4.4 Embassies – a new area for jurisdiction and ECHR Article 13?

On 5 May 2020 the Grand Chamber of the ECtHR decided a case raising the question of whether on entering the physical area of an embassy a migrant should be

considered under the jurisdiction of the embassy state.³⁹ The case is quite complex and may potentially involve different sets of legal reasoning. Essentially, the question was whether as soon as a migrant was within the physical area of an embassy of a member state of the European Council, he or she would have a right to apply for asylum and an effective remedy, etc. under Article 13.

The consequences of the decision against Belgium may have been unforeseen and unfortunate. For example, some embassies were downgraded to consulates (as long as a similar widening of the concept of jurisdiction in relation to Article 13 would not be applied), and access to embassies was made more difficult, etc. In spite of these consequences not being clearly outlined in the premises of the Grand Chamber, the ramifications of the case may have been somewhat clarified through the many third-party interventions.

The Grand Chamber emphasised that exceptional circumstances were required for a state to exercise jurisdiction extraterritorially. The Court found that in processing the visa applications of the applicants residing in Lebanon, the Belgian authorities had exercised public power. However, the “mere fact that decisions taken at national level had an impact on the situation of persons resident abroad is also not such as to establish the jurisdiction of the State concerned over those persons outside its territory...”⁴⁰

The case was considered very important by many governments and attracted a large number of third-party comments from states other than the state party, Belgium: Croatia, the Czech Republic, Denmark, France, Germany, Hungary, Latvia, the Netherlands, Norway, Slovakia, and the United Kingdom. The Grand Chamber found the complaint inadmissible, ruling in favour of Belgium by a “majority”. The number of judges in the majority is not indicated, a procedure that is sometimes applied in decisions of non-admissibility. As the decision is important, it is regrettable that we do not know how many judges concluded in favour of jurisdiction encompassing the grounds of an embassy. Regardless of the number of judges, the issue appears settled for the foreseeable future.

4.5 Stopping border storming = expulsions

Pictures of frustrated and agitated groups of migrants trying to storm and break through fenced or walled borders are becoming increasingly familiar. What means does a state have at its disposal in seeking to protect the integrity of its borders if the migrants succeed in forcing their way through and step onto its territory? Will the migrants then have the right to apply for asylum, individual assessment, etc. under ECHR Article 13, or can the government simply push them back across the border? These questions are addressed in the Grand Chamber decision against Spain in

³⁹ M.N. and Others vs Belgium, no. 3599/18, 5 May 2020. The applicants have been anonymised.

⁴⁰ M.N. and Others vs Belgium, paragraph 112.

February 2020.⁴¹ The Chamber had unanimously held against Spain. In a complete reversal the Grand Chamber then decided unanimously against the appellants. As strongly argued in a separate and critical partly dissenting opinion by the Finnish judge Pauline Koskelo, the way the majority applied the Convention may quite negatively affect states trying to control their borders.

Spain has two small enclaves in Morocco, Melilla and Ceuta. The case in question concerns the twelve-square-kilometre enclave of Melilla. Along the thirteen-kilometre border the Spanish authorities have built three parallel fences, up to six metres high. Groups generally comprising several hundred aliens, many from sub-Saharan Africa, regularly attempt to enter Spanish territory by storming the fences, frequently at night.

The case discussed here concerned two attempted crossings of up to six hundred people, which were organised by smuggling networks. The Moroccan police prevented most of the immigrants scaling the outer fence, but around a hundred migrants nevertheless succeeded. The Guardia Civil escorted them back to Moroccan territory. The first question is whether this push-back of an organised attempt to storm a border constitutes a “collective expulsion” that is prohibited under Protocol 4, Article 4 of the Convention. The Grand Chamber answered this question in the affirmative but acknowledged that important issues were at stake, because migrants frequently “attempt to enter a Contracting State in an unauthorized manner by taking advantage of their large numbers”.⁴²

However, the Grand Chamber pointed to the fact that the migrants did have a possibility of accessing the Spanish border posts to present their wish to apply for asylum there. The migrants were not protected by Article 4 of Protocol No. 4 when they “had the opportunity to cross a land border lawfully but did not make use of it”.⁴³ Another complication attending this decision is that not all member states of the Council of Europe have ratified Protocol 4. It may be somewhat unclear what the legal situation is for non-ratifying states.

The present author agrees to the partly dissenting opinion of the Finnish judge Koskelo that “the position taken by the majority on the interpretation of the notion of ‘expulsion’ makes the scope of application of this provision wider than is justified”. Repulsing a clearly dangerous, illegal, organised, and destructive ongoing attack on a border by hundreds of migrants should not be called an expulsion. It is difficult to see that the drafters of the ECHR intended to make such self-defence illegal, or that this would be the position of any representative of any government.

The wide interpretation of the concept of expulsion by the majority of the Grand Chamber, just as in the *Hirsi Jamaa* decision, may also provide for dangerous incentives. The storming of the border fences in Melilla is organised by traffickers and

⁴¹ N.D. and N.T. vs Spain, nos. 8675/15 and 8697/15, 13 February 2020.

⁴² N.D. and N.T. vs Spain, paragraph 78.

⁴³ N.D. and N.T. vs Spain, paragraph 165.

may involve life-threatening danger to the desperate migrants. When many people are involved, the safety of the border guards may also be at stake. There is no need to interpret the Convention so widely, and just as in *Hirsi Jamaa* these negative incentive effects are not discussed. Judge Koskelo also argued that the majority overlooked “the legitimate need for States Parties to prevent and refuse, in particular, the entry into their jurisdiction of aliens aiming to cross their external borders with known hostile intentions or posing known threats to national security”.⁴⁴

As also hinted by Judge Koskelo, one may ask why so few migrants were able to access the Spanish border posts. She pointed out that it would be difficult for the Court to clarify the extent to which access to legal entry points existed *de facto*.

5 Family immigration

5.1 Private and family life – balancing of interests

In immigration cases there are often arguments related to rights concerning respect for private and family life (ECHR Article 8) and more recently the best interests of the child (Convention on the Rights of Children – OHCHR – Article 3). The best interests of the child principle is not an explicit part of the ECHR, but the Strasbourg Court has repeatedly stated that it wishes to uphold this standard, which has become an important aspect of human rights law in general.

Unlike the Article 3 prohibition against torture and inhuman and degrading treatment, the protection of private and family life is not absolute. Infringements do not represent a violation if it is “in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others” (Article 8, paragraph 2). There may be a balancing of interests based on a principle of proportionality. In addition, depending on the case, the Court may allow the national authorities a certain margin of appreciation. Nor may the principle of the best interests of the child be characterised as absolute.

In many or most cases dealing with deportation, expulsion, removal, or denial of entry the protection of family and private life and the best interests of the child are part of the argument. In the jurisprudence of the ECHR there is no clear guidance as to how to strike a balance between the interests of the individual concerned and the state representing the collective.

⁴⁴ N.D. and N.T. vs Spain partly dissenting opinion, paragraph 25.

5.2 Danish courts – excessive interpretations of the ECHR?

In Denmark there have been many controversies concerning the deportation of criminals claiming that removal would violate their right to family and private life. On 12 May 2016 a unanimous Danish Supreme Court decided against the expulsion of Gimi Levakovic, the forty-five-year-old head of a criminal family originating in Croatia.⁴⁵ Levakovic had lived in Denmark since he was three but was not a Danish citizen. His criminal record was extensive: he had twenty-three convictions, totalling ten years' imprisonment. He had neglected the care of his two underage children, who were the responsibility of the Danish child protection services. In its premises the Danish Supreme Court referred to the jurisprudence of the Strasbourg Court.

The Danish Supreme Court's description of the attachment between Gimi Levakovi and his children in its 2016 decision may be seen as naive. The ruling of the Supreme Court was heavily criticised by Danish politicians and in the Danish media. Moreover, in its Chamber decision of 23 October 2018⁴⁶ the Strasbourg Court had upheld the expulsion of a member of the same criminal family, Jura Levakovic. The Strasbourg Court has repeatedly stated that the protection of family life and private life does not trump the wish of national authorities to expel a person with a grave and enduring criminal record.⁴⁷

In October 2017 the Danish Institute for Human Rights published an analysis of four hundred decisions by the Strasbourg Court, the Danish Supreme Court, and two Danish Courts of Appeal. The conclusion was that the Danish Courts "over-interpreted" the ECHR and applied higher thresholds for removal than the ECtHR. The Norwegian National Human Rights Institution, which fulfils the same role as the Danish Institute for Human Rights, apparently approaches its role differently. The Norwegian Institution is diligent in applying human rights decisions quite stringently and has not entered into the kind of critical analysis as in the Danish work referred to above. The same observation may be made regarding the Norwegian Centre for Human Rights at the University of Oslo, which was formerly the Norwegian national rights institution.

5.3 Islamic State (IS) families

The doctrines of dynamic interpretation and the Convention as a living instrument make it difficult to predict the conclusions the Strasbourg Court may reach when confronted with new factual situations. Before the pandemic there was much public debate in European countries regarding the possible return of IS members and their children. The discussions concern individuals who are still citizens of the countries

⁴⁵ Højesterets dom 12 May 2016, Case 258/2015.

⁴⁶ Levakovic vs Denmark, no. 7841/14, 23 October 2018, 2nd Section.

⁴⁷ See e.g. Joseph Grant vs United Kingdom, no. 10606/07, 8 January 2009, 4th Section, and Sarközi and Mahran vs Austria, no. 27945/10, 1st Section.

they left to join IS. There are many possible scenarios. A minor who is the child of an IS mother will in most cases be a citizen of the mother's country of origin.

Many human rights questions with no clear authorities or sources offer guidance. Under the best interests of the child principle should a child always be allowed to be repatriated to its country of citizenship? And if the child is repatriated, would it be necessary to include the mother in the repatriation based on the right to family life of child and mother, as well as the principle of the best interests of the child? The answers may depend on the age of the child, the criminal/terrorist record of the mother, and the danger she may represent. A related question concerns any alleged father of the child, who may not be a citizen of the country of the mother and child. Should he be allowed entry to protect the rights of the child and the mother to private and family life?

These questions are not only unresolved under the ECHR and other human rights conventions but challenging and extremely controversial. In January 2020 the repatriation of two IS children and their IS mother to Norway resulted in a parliamentary crisis, with one coalition partner leaving the cabinet, and the government losing its majority and continuing as a minority government.

If cases like these reach the Strasbourg Court, one might ask whether the Court might allow for a wide national margin of appreciation. There is clearly no European consensus about these questions. Furthermore, there are no clear numbers and therefore no solid basis to evaluate the consequences of the conclusions the Court might reach. Applying strict burdens of proof requirements to governments may make it difficult for the states to win. The situation in the Syrian territories has been chaotic, and there have been limited possibilities to collect evidence, proof, etc. Strict requirements regarding evidence concerning the crimes the parents may have committed may also complicate cases for governments.

Any IS cases reaching the Strasbourg Court may be a test not only of its willingness to protect the individuals concerned but of what it may take to uphold the respect for human rights when confronted with controversial cases.

6 An absolute principle of equality

6.1 Uncontroversial: Personality traits for which you bear no responsibility

Human rights law is based on the basic premise that all human beings share the same human dignity. Article 1 of the UN World Declaration of Human Rights proclaims that “[a]ll human beings are born free and equal in dignity and rights”. Non-discrimination clauses are a vital part of human rights conventions.

Many people, at least in a European context, will agree to the principle that one should not be treated in a discriminatory manner due to traits for which one

bears no responsibility: ethnicity, nationality, sex, religious affiliation, beliefs, language, and cultural origins. In spite of the fact that many people around the world face discrimination due to these causes, it may still be correct to assert that the prohibition against discrimination for such “innocent” characteristics is based on a universal ethical principle.

6.2 More challenging: your own actions

It may be more controversial that the Strasbourg Court has also established a strict demand for equality in treatment in relation to the prohibition against inhuman and degrading treatment in Convention Article 3, ref. Article 15, when the individual in question has committed or may commit grave crimes and harm to others. A principle of absolute non-discrimination or equality may then to a certain extent be equivalent to not bearing individual responsibility for one’s own actions.

In *Chahal vs Great Britain*⁴⁸ the Grand Chamber decided in a split opinion (12–7) that the terrorist Chahal could not be deported to India, where there was a real risk that he might be subject to torture or other inhuman treatment. For the majority it made no difference that Chahal himself had called for violence and torture. The majority was clear about the fact that the protection of an individual under Article 3 was absolute. The majority also emphasised that the ECHR in these cases offered a more absolute protection than the UN Refugee Convention 1951: “[T]he Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim’s conduct. ... The prohibition provided by Article 3 against ill-treatment is equally absolute in expulsion cases. Thus, whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 ... if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion ... In these circumstances the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration. The protection afforded by Article 3 ... is thus wider than that provided by Articles 32 and 33 of the United Nations 1951 Convention on the Status of Refugees...” The Court has repeatedly held that Article 3 is absolute, and that it is impossible to weigh the risk of ill-treatment against the reasons put forward for expulsion.

6.3 No differentiation of degrading and inhuman treatment

The UK government had also argued that the assessment of the risk that the person in question might suffer from degrading treatment after being deported should be differentiated according to the behaviour of the person. The ECtHR Grand Chamber summarised the UK reasoning thus: “...there are varying degrees of risk of ill-

⁴⁸ *Chahal vs UK*, no. 22414/93, 15 November 1996.

treatment. The greater the risk of ill-treatment, the less weight should be accorded to the threat to national security. But where there existed a substantial doubt with regard to the risk of ill-treatment, the threat to national security could weigh heavily in the balance to be struck between protecting the rights of the individual and the general interests of the community.” The arguments of the UK found no merit with the majority of the Grand Chamber.

The Strasbourg Court has said in other cases that what is inhuman or degrading may vary according to circumstances. However, when the threshold is reached, it does not matter that the person in question has subjected other people to the most horrendous actions imaginable. In immigration cases the result is that a non-citizen responsible for the most heinous crimes may not be deported to any country where he or she may be subject to any inhuman or degrading treatment. Especially when considering the wide definitions that the Strasbourg Court has applied to inhuman and degrading treatment, the results may be provocative. The most awful criminal or terrorist may not be deported to any country where he might risk being imprisoned in cells providing less than approximately three square metres per inmate, being slapped by a policeman with a flat hand (Bouyid), or threatened to avoid his terrorist threats being realised (Gäfgen). Furthermore, regardless of what crimes the person facing deportation may have committed or planned to commit, he or she should be able to remain as a patient and eligible for expensive medical treatment (Paposhvili). Some criminals may then avoid being prosecuted in their countries of origin.

It may be difficult to argue that the ECtHR has understood the consequences of its absolutist and widening interpretations of ECHR Article 3 in combination with a rigid requirement for equality in treatment. Traditionally, and in all societies and religions, one has had to face the consequences of one’s actions. Through its maximalist interpretations the Strasbourg Court has gone a long way in the opposite direction. Especially in immigration cases the jurisprudence may be so far from the ethical standards and sense of justice of many that the results are more alarming than constructive for migration policies.

7 A critical debate about human rights

7.1 Scrutiny and legitimacy

To some extent in applying a seventy-year-old relatively short human rights convention, the Strasbourg Court will have to use dynamic interpretations. The challenge is that the Court’s doctrine of dynamic and living interpretation has been stretched so far that the Court to a certain degree will enter the political arena. In making decisions about the ECHR and immigration, the issues are sometimes not only sensitive but potentially explosive. If the decisions of the Court are to remain legitimate, constant critical scrutiny is required. Criticism may help the Court maintain

its political sensitivity. The reflections de Hosson brought to bear on the European Court of Justice are also relevant to the ECtHR:

For longer periods of time, the Court was the only Community institution that made a further development of the internal market possible. Such a proactive attitude is not without risks. There is a constant threat of the Court being accused of having reached political decisions which are not supported by Member States. This argument becomes all the more cogent because, contrary to a national or truly federal context, there exists no system of 'checks and balances' within the Community context, whereby politically unacceptable decisions of the judiciary can be easily redressed through legislation. The issue touches directly on the Court's legitimacy. In this special constitutional environment, judges are required to demonstrate great sensitivity to the political support for their decisions.⁴⁹

As pointed out above, an observation that international courts like the ECJ or the ECtHR need to be politically sensitive is not to imply that they should not realise the ideal of the judiciary being independent. Yet no court operates in a vacuum. If the jurisprudence of the ECtHR is to be legitimated and implemented over the long term, it needs to be understood and accepted. It is often emphasised that national institutions are the primary guardians of the ECHR. If this mutual interaction and dependency are to work, there must be a reciprocal respect.

Evaluating a court is not an abstract exercise. A court is not its buildings (for all that the ECtHR is in a magnificent edifice in Strasbourg). The soul and essence of a court is its reasoning and decisions. Considering the specific judgements discussed in this paper, it may be difficult to question their relevance to the topic of democratic sustainability and migration. It is important that they are subject to debate.

As Betts and Collier (2018) point out, it is desirable that states should seek practical ways to ensure the most humane implementation of immigration management.⁵⁰ Human rights law is part of the guarantee of a humanitarian dimension as an aspect of immigration practice. Compromises, flexibility, adaptability, and change are elements of a democratic approach and may come into conflict with the Court's extension of the absoluteness of Convention Articles 3 and 15.

7.2 Right vs right

The most challenging aspect of human rights is often that the right of one person may conflict with that of another. The Gäfgen case, commented on earlier, is a clear example. According to the Strasbourg Court's reasoning the right of a kidnapper and murderer not to be threatened – that is, not to be treated in an inhuman or degrading

⁴⁹ De Hosson: *On the Controversial Role of the European Court in Corporate Tax Cases* (2006), p. 295, which also offers a description of the broader context.

⁵⁰ Betts and Collier p. 25.

manner according to the Court's interpretation – should be considered absolute and therefore prioritised above the right of an innocent child not to be murdered. The person first deemed to have an absolute right wins. It is difficult to see such absoluteness and absolute priorities as part of the compromise and balancing approach that is a core dimension of democratic attitudes.

In a situation involving rights against rights absolute rights are another way to define a kind of privilege. To those who see human rights as based on a universal ethic, privileges will represent a contradiction in terms, not only in relation to democratic values but also to the supposed universality of human rights. Privileges are not universal – by definition. Yet many critics have pointed to the fact that human rights as we know them from human rights conventions are not really universal.⁵¹ There are not that many really universal human rights “on the ground”. Cultures, values, and the perceptions of rights and duties indeed differ throughout history and geography.

7.3 An individual vs the state or groups vs groups

The classical and juridical human rights paradigm portrays the individual as the subject of the right, the right's holder, and the state as the subject of the duty, the duty bearer. It is reminiscent of Goliath (the powerful state) against the nearly insignificant David (e.g. the immigrant). Therefore, when discussing the right of one person, or as in the *Hirsi Jamaa* case, the rights of two hundred people, the costs for the state are often overlooked. Compared to the resources of any state, even a poor one, the costs of the right of one or a limited number of persons will seldom if ever be substantial.

However, any individual in migration cases may typify many other people who are in an identical situation or may enter into similar circumstances. Consequently, decisions relating to migration may involve costs that will be quite substantial when one considers all the people for whom any long-term decision may be relevant.

Also, in relation to other human rights the paradigm of one individual vs the state with unlimited resources may be misleading. Human rights in a wider perspective often regulate the distribution of resources between the larger community and specific groups, which may explain why discussions may be intense and controversial. The fact that the basic question in many instances relates to the distribution of resources between groups may also be hidden by a terminology that only relates to individual rights and the duties or responsibilities of the state.

⁵¹ See, for example, Chris Brown: *Universal Human Rights: A Critique. The International Journal of Human Rights*, Vol.1, no. 2, pp. 41–65. Terje Tvedt: *Det internasjonale gjennombuddet*. Dreyer 2017 p. 82 argues that in the Norwegian discourse on human rights the idea or ideal of universal human rights has been mixed with the kind of ideas or rights that may be regarded as universally accepted in practice.

The factors mentioned above may hold when discussing the civil and political rights that are usually at stake in immigration cases. Concerning economic, social, and cultural rights, the International Convention on Economic, Social and Cultural Rights (ICESC) focuses more on the state's economic resources of the state, with its requirements for the progressive implementation of rights. ICESC Article 2, Paragraph 1 obliges each state party to the convention "to take steps, individually ... to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant..."

7.4 Behind every human right is a taxpayer

In dealing with human rights, budgetary costs are often left out or trivialised. It is as if they are irrelevant or too mundane or trivial to be part of a debate about something as important and elevated as human rights. When acting as a judge or applying the law, this may be true. One cannot limit the civil and political rights of a person with reference to the costs. The same kind of reasoning will apply to all legal rights that have become part of the legal order. They have been redefined from being a matter of economics and priorities to becoming law. Yet when acting as a legislator, in deciding that an interest should become a legal, and even more so a human, right, economic considerations should be a valid part of the argument. However, they are often excluded or marginalised.

During the celebration of the bicentenary of the Constitution of 1814 the Norwegian Parliament enacted a constitutional reform whose main part related to the inclusion and widening of the chapter on human rights. The economic and budgetary consequences of this reform, including the results concerning immigration, may be of some significance. However, the Committee proposing the reforms barely touched on the economic consequences, offering this dimension of resources barely a page, containing comments with no real substance.⁵²

"Rights" are often used as a way to trump other interests. If an interest is defined as a legal right, and even more so as a human right, it will be exempt from a budgetary balancing of competing interests. Formally, a human right regarding civil or political matters is a question of law, not of economics. Arguing that some interests should qualify as a human right may be part of a strategy to avoid or trump any discussion of the distribution of resources that may be involved.

Realistically, any use of resources in fulfilling a right must be financed from the total pool of resources that any state at any time may muster. As a slogan or headline, one might say that behind each human right that implies a positive obligation for the state there is a taxpayer. For the state to pay out, someone will

⁵² See Report to Parliament (Stortingsmelding), no. 16 2011–2012 pp. 255–256.

have to pay in (or have their resources limited).⁵³ If resources are to be used on one person, the resources available for others are equally reduced. The legal paradigm or model for human rights, the individual vs the state, is formally and judicially correct, but not useful for understanding how the human rights of immigrants, for example, may be so controversial.

In deciding *Hirsi Jamaa*, the ECtHR was *apparently* only applying the law, not balancing economic interests. It was still quite clear from the outset that the ruling would have important economic and humanitarian consequences. It may have contributed to the present situation that has nearly overwhelmed Italy's immigration capacity and recently led to a more complicated, probably more costly, and diluted push-back arrangement with the new Libyan authorities.

To a certain extent one might say that the legal reasoning of human rights denies this cost aspect of the decisions. If only understood as a legal matter, the logic of human rights law may make decision making systematically blind to the financial implications for the state and the taxpayers footing the bill. The taxpayer is as a matter of fact a party to many of the decisions but is not recognised as such. In the longer run this may lead to a loss of trust and a reduced willingness to pay taxes, and to challenges for the sustainability of European welfare states.

8 Conclusions: the future of the European Court of Human Rights

8.1 The need for debate

8.1.1 Intergovernmental Conferences – the Copenhagen Declaration 2018

The expansive jurisprudence of the Strasbourg Court, its dynamic interpretations, and treatment of the Convention as a living and ever widening instrument have created much political debate. The ECtHR's at times immense backlog has been seen as part of the problem. Due much to British and lately Danish initiatives intergovernmental conferences have discussed reforms, resulting in political declarations.⁵⁴ However, no remarks in these declarations reflect the criticism of the British Supreme Court judge Lord Sumption: "In Europe, the most notable monument of this tendency to convert political questions into legal ones is the European Convention for the Protection of Human Rights and Fundamental Freedoms."⁵⁵

In the Danish discourse on the role of the ECtHR there has been much criticism regarding its application of the ECHR in decisions with consequences for

⁵³ Taxation is simplistically defined as a way of making citizens pay into the coffers of the state. A more sophisticated way of defining taxation is as a manner of limiting the purchasing power of citizens to allow space in the economy for the resources the government needs.

⁵⁴ Interlaken (19 February 2010), Izmir (27 April 2011), Brighton (20 April 2012), Brussels (27 March 2015) and Copenhagen (23 April 2018).

⁵⁵ Lord Sumption: *The Limits of Law*. The 27th Sultan Azlan Shah Lecture 20 November 2013.

immigration. Yet the final Copenhagen Declaration on 12 and 13 April 2018 contained little substantial criticism of the Strasbourg Court. In emphasising the principle of subsidiarity, the margin of appreciation of the national authorities, and that the ECtHR does not act as a court of fourth instance, the Declaration may reflect some reservations regarding the legislative role of the Court when applying its dynamic mode of interpretation. However, the Declaration did not touch on the limitations on the national authorities regarding migration policies resulting from the widening application of the absolute prohibition in ECHR Article 3 regarding inhuman and degrading treatment. This was made even more obvious in the Declaration's statement in Paragraph 29(c) that the "Court's jurisprudence on the margin of appreciation recognizes that in applying certain Convention provisions, such as Articles 8–11, there may be a range of different but legitimate solutions which could each be compatible with the Convention depending on the context". Articles 3 and 15 were not explicitly mentioned, although under the Court's jurisprudence they may pose greater challenges to democratic decision making than Articles 8 to 11. Neither were the terms "living instrument" and "dynamic interpretation", so vital to the Court's reasoning, part of the Declaration.

8.1.2 The need for dialogue and third-party interventions

Paragraphs 33–41 of the Copenhagen Declaration was headed "Interaction between the national and European level – the need for dialogue". Paragraph 33 stated that "a constructive and continuous dialogue between the States Parties and the Court on their respective roles in the implementation and development of the Convention system, including the Court's development of the rights and obligations set out in the Convention", might "anchor the development of human rights more solidly in European democracies". It also said that "Civil society should be involved in this dialogue".⁵⁶

The Copenhagen Declaration emphasised third-party interventions as a way of strengthening the dialogue between the national governments and the Court.⁵⁷ For these recommendations to render any impact on the Court, it needs to be seen that third-party interventions by states really do influence the reasoning and decisions of

⁵⁶ Normally, civil society organisations are regarded as supplementing and widening democracy and democratic institutions. Attending immigration policies, civil society organisations in their interventions or declarations regarding cases before the Strasbourg Court, appear literally always to be in favour of decisions favouring the immigrants and of widely applying the rights of the Convention. In the area of immigration it might be advisable that the prominent civil society organisations be more nuanced to be seen as representing society as a whole, and not as partisan and activist.

⁵⁷ Paragraph 39 "[e]ncourages the Court to support increased third-party interventions, in particular in cases before the Grand Chamber, by: a) appropriately giving notice in a timely manner of upcoming cases that could raise questions of principle; and b) ensuring that questions to the parties are made available at an early stage and formulated in a manner that sets out the issues of the case in a clear and focused way. [Paragraph] 40. Encourages the States Parties to increase coordination and co-operation on third-party interventions, including by building the necessary capacity to do so and by communicating more systematically through the Government Agents Network on cases of potential interest for other States Parties."

the Court. It appears to have done so in the recent 5 May decision by the Great Chamber discussed above, which states that the territory of an embassy does not constitute extraterritorial jurisdiction.⁵⁸

Nevertheless, there are few clear signs that the Strasbourg Court has reduced its willingness to widen the scope of the Convention and to apply its doctrine of dynamic interpretation. The Savran case against Denmark⁵⁹ is a clear example of a Chamber decision that controversially pushed the application of the ECHR even further. As the case has been appealed to the Grand Chamber, and third-party interventions may appear, the outcome of the appeal will be of interest to everybody following the jurisprudence of the Court.

8.7.3 Recruitment to the ECtHR

8.7.3.1 Diverse cultural backgrounds and qualifications

British lawyers and judges have been quite forthright in criticising the recruitment of judges to the Strasbourg Court, implying, among other things, that the cultural background and professional qualifications are too different. It has been pointed out that the legal education and prestige surrounding legal careers may vary widely among the member states of the European Council. The British judge Lord Hoffmann has noted: “It cannot be right that the balance we in this country strike between freedom of the press and privacy should be decided by a Slovenian judge saying of a decision of the German Constitutional Court – ‘I believe that the courts have to some extent and under American influence made a fetish of the freedom of the press...’”⁶⁰

In relation to the decisions against Norway regarding child welfare services, one might argue that there is a division between judges from the Scandinavian countries with a strong emphasis on research-based knowledge in favour of the child’s best interests and a more traditional eastern and southern European concept of a kind of parental ownership of children.⁶¹ In an international court such cultural differences will be part of the concept of “international”, but they underscore that sensitivity on the part of judges is required for their decisions to be sustainable in a democratic environment.

8.7.3.2 Human rights activists as judges of the ECtHR

According to ECHR Article 20 there are as many judges at the Strasbourg Court as there are member states of the European Council, i.e. forty-seven judges. When the

⁵⁸ M.N. and Others vs Belgium, no. 3599/18, 5 May 2020, GC.

⁵⁹ Savran vs Denmark, no. 57467/15, 1st October 2019, 4th Section, decided 4–3, commented on above.

⁶⁰ Lord Hoffmann: The Universality of Human Rights, Judicial Studies Board Annual Lecture, 19 March 2009.

⁶¹ See e.g. Strand Lobben and others vs Norway, no. 37283/13, 10 September 2019, Grand Chamber; K and V.M. vs Norway, no. 64808/16, 19 November 2019, Second Section; and Abdi Ibrahim, no. 15379/16, 17 December 2019, Second Section.

nine-year non-renewable term is completed, or the judge reaches the retirement age of seventy, the country in question nominates three candidates for the open position. After a screening procedure one of the candidates is elected by the Parliamentary Assembly of the European Council by a majority vote (ECHR Article 22). An Advisory Panel of Experts guides the Assembly in this process.⁶²

In 2020 the European Centre for Law and Justice (ECLJ) published the *NGOs and the Judges of the ECHR 2009–2019* report.⁶³ Its main findings were that “at least 22 of the 100 permanent judges who have served on the European Court of Human Rights ... between 2009 and 2019 are former officials or collaborators of seven NGOs that are highly active before the Court. Twelve judges are linked to the Open Society Foundation (OSF) network, seven to the Helsinki committees, five to the International Commission of Jurists, three to Amnesty International, and one each to Human Rights Watch, Interights and the A.I.R.E. Centre. The Open Society network is distinguished by the number of judges linked to it and by the fact that it funds the other six organizations mentioned in this report. Since 2009, there have been at least 185 cases in which at least one of these seven NGOs is officially involved in the proceedings.” The ECLJ concluded that the links between the judges and the activist NGOs might threaten the impartiality of the Court. It is difficult to make an independent assessment of the findings of the ECLJ, but they may indicate that to understand how the ECtHR is working, a discussion of its processes of recruitment and the backgrounds of its judges might be necessary.

To explain why in many legal experts’ judgement the Court is characterised by a dynamic, living, mode of widening and maximalist interpretation of the ECHR, a better understanding of the dynamics and bias inherent in the selection of judges may be required. Some concrete examples may be instructive.

One example of a member of the Strasbourg Court advocating maximalist interpretations is the Portuguese judge Paulo Pinto de Albuquerque, a former law professor. The approach of de Albuquerque to the Convention is illustrated by his many and at times quite lengthy dissenting opinions. In some of his opinions he is acting more as a political orator than a judge, thereby threatening the impartial mandate of the Court.⁶⁴ It is not easy to understand why there has apparently been

⁶² See Procedure for the election of judges to the European Court of Human Rights. Memorandum prepared by the Secretary General of the Assembly as of 15 April 2019. Information Documents. SG-AS (2019) 05, rev. 8 July 2019.

⁶³ The European Centre for Law and Justice: *NGOs and the Judges of the ECHR 2009–2019*. February 2020. Downloadable free as a pdf at <https://eclj.org/ngos-and-the-judges-of-the-echr>

⁶⁴ De Albuquerque has not hesitated to include quite extreme remarks in his minority statements. The Grand Chamber case, *S J vs Belgium*, no. 70055/10 19 March 2015, was struck out, because the case, which concerned a Nigerian woman being expelled from Belgium, was settled without a court hearing. Nevertheless, de Albuquerque included this accusatory statement in the Grand Chamber listing: “12. Six years have passed since the N. judgment. When confronted with situations similar to that of N., the Court has reaffirmed its implacable position, feigning to ignore the fact that the Grand Chamber sent N. to her death. Too much time has elapsed since N.’s unnecessary premature death and the Court has not yet remedied the wrong done.

no successful effort to limit this use of the ECtHR as a platform for voicing far-reaching positions on how the Convention should be interpreted. The result may be that the Court is seen as being more activist than it is.

Based on the selection of the latest Norwegian judge to the ECtHR, Arnfinn Bårdsen, appointed in 2019, one may speculate that the selection process may favour judges of a clearly expansionist attitude to the application of the ECHR. Bårdsen, a former associate professor of law and Norwegian Supreme court judge, is without doubt a highly qualified lawyer with a unique knowledge of human rights law. It would be difficult to mention two or three other Norwegian lawyers with a higher mastery of human rights law than his. At the same time his judgements at the Norwegian Supreme Court and his many publications on human rights law reveal that Mr Bårdsen is the most maximalist human rights judge the Norwegian Supreme Court has ever seen. He has penned some strong minority votes and in later lectures and articles has openly criticised the “other side” in decisions of the Court in which he has been involved. Such criticism is not especially common among Norwegian Supreme Court judges. Bårdsen has also been quite public in advocating an expansionist attitude to the application of human rights law.⁶⁵

In nominating candidates for the ECtHR, it may have been difficult for any Norwegian government not to include Bårdsen among the three required candidates. As has been mentioned, his legal skills and knowledge of human rights law are outstanding. Yet Mr Bårdsen’s voting record as a Supreme Court judge has been such that it may present a challenge for the ECtHR’s democratic sustainability – which is a key concern of this paper.

8.8 The future of the Strasbourg Court – the future of human rights?

8.8.1 A model to the world

Human rights have many roots. One is in the idea of natural rights. Despite their name, there is nothing nature-given about either natural or human rights. Natural rights and human rights are not to be found in nature. They are a human idea or construct. There is no natural or innate guarantee that the humanity and protection

I wonder how many N.s have been sent to death all over Europe during this period of time and how many more will have to endure the same fate until the ‘conscience of Europe’ wakes up to this brutal reality and decides to change course. Refugees, migrants and foreign nationals are the first to be singled out in a dehumanised and selfish society. Their situation is even worse when they are seriously ill. They become pariahs whom governments want to get rid of as quickly as possible. It is a sad coincidence that in the present case the Grand Chamber decided, on the World Day of the Sick, to abandon these women and men to a certain, early and painful death alone and far away. I cannot desert those sons of a lesser God who, on their forced path to death, have no one to plead for them.”

⁶⁵ For more details and references regarding the voting record and publications of Arnfinn Bårdsen see Ole Gjems-Onstad: *Menneskerettigheter – en verden uten helvete*. 2017 pp. 108–112.

offered by human rights will be there in the future. For most of our past human rights have not been part of human history.

This paper has demonstrated that the Strasbourg Court has repeatedly applied the Convention in such a way that the choices of the governments regarding ways of handling the migrant challenges are reduced, at times in ways that may appear quite controversial. Many of these limitations are not to be found by reading the ECHR but have been created through maximalist interpretations of the Convention. The view of this paper has been that the Strasbourg Court has not sufficiently deliberated the consequences of its at times wide and rigid interpretation of the Convention. The results may be far-reaching, not least for the broad acceptance of human rights. It requires sophistication to distinguish between the high moral values of the Convention and how the Strasbourg Court applies it. Resistance or scepticism towards the interpretations of the Court may therefore lead to a negative attitude to the Convention.

The European Convention on Human Rights and the European Court of Human Rights are the most sophisticated human rights instrument and institution the world has ever seen. In no other part of the world is there a judiciary with a large and highly qualified secretariat that has delivered thousands of judgements that are in principle binding. The Strasbourg Court should strive to be a model to the world of the moderate and wise application of human rights conventions.

8.8.2 Less is more

It appears that many activist judges of the Strasbourg Court believe that more is more. The opposite may currently be true: less is more. In the words of Lord Justice Laws, "human rights are like the human heart: the bigger they get, the weaker they get".⁶⁶

What is needed are moderate judgements more in tune with the views of the majority of the European peoples rather than those of the leading technical experts in human rights law. In the long run at least, that is the only way forward for a human rights court that wishes its decisions to be respected and to position itself as a guiding humanist light for European countries.

⁶⁶ Lord Justice Laws: Lecture III: The Common Law and Europe. Hamlyn Lectures 2013. 27 November 2013.