



## Research Article

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Received: 24 January 2022 / Accepted: 19 March 2022 / Published: 5 May 2022

# The Principle of "Non-Refoulement" and its Evolution in the Jurisprudence of the European Court of Human Rights

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DOI: <https://doi.org/10.36941/ajis-2022-0071>

## Abstract

The principle of non-refoulement provided for by Article 33 of the Geneva Convention constitutes a principle of international law with a significant role in the protection of human rights. This principle has been confirmed by the European Court of Human Rights, which has affirmed the state's responsibility for returning an asylum-seeker to a country where he risks being subjected to inhuman and degrading treatment or torture, in breach of Article 3 of the European Convention on Human Rights. Considering this reasoning, in the case of *Hirsi Jamaa and others v. Italy*, the European Court of Human Rights found the Italian State responsible for violating Article 4 of Protocol No. 4 for the collective refoulement of migrants without a procedure for assessing their individual situation in a state where they could face inhuman and degrading treatment, as well as for violating Article 13 of the European Convention on Human Rights, as the applicants had been denied the opportunity to appeal before the expulsion measure was carried out. Recently, the European Court of Human Rights' orientation has changed since, in the case of *N.D. and N.T. v. Spain*, the Court excluded the violation of both Article 4 of the 4th Protocol and Article 13 of the European Convention on Human Rights, stating that the collective rejections were due to the "applicants' own conduct". This decision entails many perplexities regarding the protection of human rights.

**Keywords:** Principle of non-refoulement, international law, human rights, inhuman and degrading treatment, state responsibility

## 1. Introduction

The migratory flows towards the European continent that have been occurring for years have prompted the several Member States of the European Union to undertake various measures to combat this phenomenon. Beyond the Libyan route through the Mediterranean Sea, the Balkan route is also arousing concern. Poland and Hungary have decided to erect walls on their respective external borders to curb the migratory phenomenon. Subsequently, ten other Member States joined their

proposal, asking to build fences with European funds (*"Migranti"*, 2021).

This funding request has been refused by the European Commission, however, not rejecting the idea of the construction of barriers with the Member States' funds (*"Migranti"*, 2021). It is also worrying that some third countries try to use migratory flows as a means of diplomatic pressure against the European Union, such as Turkey in not remote times and recently Belarus, against which the Union has sanctioned the violation of human rights.

Another delicate issue is the health condition determined by the global pandemic of the COVID-19 virus. The situation is worrying from two points of view: on the one hand, the health situation of migrants and the lack of minimum sanitation conditions; on the other, their representation as virus spreaders by those who want more incisive measures to counter migratory flows, causing panic among the people.

In this context, it is necessary to highlight the very current problem affecting the European continent concerning the practices of *refoulement* at sea or on land borders of groups of migrants, carried out indiscriminately by the authorities of a state.

Our research focuses on the principle of *non-refoulement* as a principle of international law and customary international law that prohibits states from returning asylum-seekers to countries where they could be exposed to torture, cruel, inhuman, or degrading treatment or punishment, which requires a case-by-case analysis of the particular situation of each of the migrants.

In these circumstances, it is necessary to analyse the legal framework of the principle of *non-refoulement* and its interpretative evolution by the jurisprudence of the European Court of Human Rights.

## 2. Literature Review

The obligation of *non-refoulement* arose at the end of World War II, intending to address the situation of refugees caused by the conflict, mainly from Eastern Europe. This obligation was reaffirmed by the Geneva Convention of 1951<sup>1</sup> (Sarti, 2010, p. 27), ratified by 144 states. This is the first multilateral treaty that defines the status of "refugee" in all its aspects and prescribes the obligation to set minimum standards for their treatment. The Convention introduces the concept of refugee (See Pitto & Zuppa, 2020, p. 34; D'Antonio, 2017, p. 534; Lauterpacht & Bethlehem, 2001, p. 116; Benvenuti, 2006, p. 168; Camarada, 2007) and identifies all the criteria for the recognition of this status. It also includes a list of the factors that prevent such recognition, as well as the types of protection that States Parties must provide to refugees (Sarti, 2010, p. 27). The provision requiring state parties to guarantee refugees a minimum level of treatment equal to that of aliens legally resident in their territory is particularly significant. It also requires refugees to respect the laws and rules of the country that gives them protection.

The Geneva Convention governs the circumstances in which refugee status can be denied (UNHCR, 2005) or revoked for subjective or objective reasons that lead to its termination (Article 2, letter f, Geneva Convention).

The Convention provided for limited applicability and introduced a temporal clause, as it was created to cope with the post-war events of the Second World War (Giuffrida, 2019, pp. 78 et seq.). The text stated very clearly that refugee status (Salamone, 2011, pp. 74 et seq.) was recognised for people only for events that occurred before January 1, 1951, but also after that date only if the reason for the escape was objectively attributable to events that occurred before that date. Because of the need to broaden the scope of applicability of the Convention, the time limit was gradually removed.

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<sup>1</sup>The Convention on the Status of Refugees, signed in Geneva on July 28, 1951, entered into force on April 22, 1954. Ratified by Italy on November 15, 1954, in GU, no. 294 of December 23, 1954.

For this reason, the Convention was integrated by the New York Protocol of January 31, 1967<sup>2</sup>, which eliminated the time limit.

An issue much debated in doctrine is the concept of a "third safe country". In this regard, it is necessary to refer to the various doctrinal orientations on the topic. Part of the doctrine, based on a literal interpretation of Article 31.1 of the Geneva Convention, argues that if an asylum seeker does not come straight from his country, he can be sent back to one of the nations he travelled through, where his life or freedom is not threatened (Chetail, 2001, p. 30). On the other hand, the part of the doctrine that opposes the literary interpretation of the Convention claims that the article has a specific goal: to prohibit the criminal punishment of refugees.

The literature considered in this research refers to an analysis of the different ideas proposed by the doctrine on the topic. It is essential to notice the significant role played by the European Court of Human Rights in expanding the scope of the Convention to matters not expressly provided for in it, through protection "*par ricochet*", beginning with the famous Soering case in 1989 (Julien-Laferriere, 2006, pp. 141 et seq.). The European Court of Human Rights has constantly affirmed the state's responsibility for the collective *refoulement* of aliens to countries where they could face one of the ECHR's prohibited treatments. The recent decision of the Grand Chamber of the European Court of Human Rights in the case of N.D. and N.T. v. Spain has caused great perplexity regarding the protection of human rights (Mussi, 2020; Carrera, 2020; Wissing, 2020). In this case, the Court declared inadmissible the violation of Article 4 of Protocol No. 4 and Article 13 of the Convention, considering that the *refoulement* of aliens was a consequence of their "*own conduct*" as they attempted to enter illegally into Spanish territory. This decision has been the subject of various criticisms by the doctrine.

### 3. Research Method

This research is focused on an analysis of the various doctrinal and jurisprudential orientations on the issue. This elaboration is composed of two parts: the first examines the Geneva Convention on the Status of Refugees, international practice, and the major doctrinal orientations on the issue. The second carries out an in-depth analysis of the historical evolution of the European Court of Human Rights jurisprudence. The analysis of the regulatory framework and the jurisprudential orientation makes it possible to understand the scope of the principle of *non-refoulement* and its application.

This elaboration uses qualitative research methods to analyse the principle of *non-refoulement* as a principle of international law with *jus cogens* nature. Furthermore, we hope to highlight the European Court of Human Rights' essential contribution in affirming the principle of *non-refoulement*, even though it is not directly stated in the European Convention on Human Rights. This mechanism represents an instrument of significant protection for human rights.

### 4. The Principle of *non-Refoulement* in the Geneva Convention

The obligation of *non-refoulement* is enshrined in Article 33 of the Geneva Convention, which states:

1. "No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."

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<sup>2</sup> Adopted in New York on January 31, 1967, it entered into force on October 4, 1967. It is enforceable in Italy under Law no. 95 of February 14, 1970, in GU no. 79 of March 28, 1970.

This Article sets out the principle of *non-refoulement* (See Salamone, 2019, pp. 154 et seq.; Mori, 2014, p. 127; Quadri, 2018, pp. 53 et seq.; Stenberg, 1989; Goodwin-Gill, 1996, pp. 167 et seq.; Allain, 2001, pp. 533-558; Gianelli, 2008, pp. 363 et seq.; Trevisanut, 2014, pp. 661 et seq.; Castrogiovanni, 1994, pp. 474 et seq.) as an absolute obligation for the state of refuge. The *non-refoulement* principle represents an integral principle of international law, human rights, and customary international law (Goodwin-Gill & McAdam, 2007, p. 346). This rule clearly states the individual's right to immigrate under certain conditions, but it must comply with the legislation of the host states. A prohibition on expulsion is recognized for states when the conditions provided for by the Convention are met. This prohibition extends to all forms of the forced relocation of people with refugee status, as well as non-admission at the border. Article 33, paragraph 2 provides for an exception to this obligation in the case of danger to the security of the country or a serious threat to the community. The second paragraph shows the *ratio* of the law, which aims to strike a balance between the safeguarding of human rights and the safeguarding of state security.

Since national security is a concept that falls entirely within the sphere of national sovereignty of the States, to prevent the latter from resorting to this concept to avoid the obligation of *non-refoulement* indiscriminately, the Convention has tried to balance the two legal values, placing on the State the obligation to demonstrate that there are well-founded reasons to believe that the subject is a danger to his national security. Consequently, to prove this situation, the state will have to assess the nature of the offence attributable to the subject, the reasons that led to such conduct, and the individual behavior of the refugee (Goodwin-Gill & McAdam, 2007, p. 239). Since the concept of security is not directly applicable, the refugee must be able to demonstrate why this concept is not applicable in his specific case (Goodwin-Gill & McAdam, 2007, p. 239).

Considering the Geneva Convention, refugee status is a fact and, as such, does not require recognition by an authority but is a consequence of the well-founded fear of being persecuted in the event of *refoulement* for several reasons (De Andrede, 2008, p. 114). The Convention, in defining the concept of refugee, does not include people fleeing armed conflict, natural disasters, or poverty, which constitute the vast majority of illegal immigrants (Scovazzi, 2016, pp. 70 et seq.). The same is also recognized in the "Handbook of the United Nations High Commissioner for Refugees" of January 2005, which states that: "*economic migrants are subjects motivated by economic considerations and cannot be considered refugees according to the Geneva Convention of July 28, 1951, relating to the status of refugees, supplemented by the New York Protocol of January 31, 1967*" (Turco Bulgherini, 2008, p. 1859; Turco Bulgherini, 2018, p. 161).

Regarding the issue under consideration, it is crucial to remember that the Convention attributes refugee status to the person who, having satisfied the other required conditions, is outside his state (Goodwin-Gill, 2011, p. 443). Therefore, the person has the right to apply for asylum and to have it examined adequately and efficiently and not be rejected.

Equally much debated in doctrine is the concept of a "*third safe country*". The Geneva Convention, in its article 31.1, states:

*"The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence" (Article 31.1, Geneva Convention).*

In this regard, it is necessary to refer to the various doctrinal orientations on the subject. Part of the doctrine, based on a literal interpretation of the article, argues that when the asylum seeker does not arrive directly from his country, he can be sent back to one of the countries he passed through, in which his life or freedom is not threatened (Chetail, 2001, p. 30). The part of the doctrine that, on the other hand, is contrary to the literary interpretation of the Convention argues that the article has a very specific object, which is that criminal sanctions are not to be applied to refugees. According to

them, the wording "directly from the country where their life or freedom was threatened" must refer only to this article and not extend to the others, as it would risk distorting the meaning of the whole Convention (Chetail, 2001, p. 26). It is now peacefully admitted that the prohibition of *non-refoulement* also applies in cases where the return is made to third countries, which could send the person back to a country where he could be exposed to the danger of the treatments prohibited by the Convention (Salamone, 2011, pp. 110 et seq.).

In this sense, of particular importance is the issue related to the practice of redirection by coastal states, which consists of forcing a ship to change course and return to international waters when that ship is violating its emigration laws. This practice of the coastal state, even if legitimate, could, if there are people on board in need of international protection, make it responsible for violating the principle of *non-refoulement* (Trevisanut, 2011, pp. 251 et seq.). This is because the right to asylum is an individual right, which therefore requires a case-by-case examination of the legal situation of the persons present on the ship to which the route is diverted, as there may be asylum seekers on board (Trevisanut, 2011, pp. 251 et seq.).

The issue arose again in 2009 in the case of the first rejections made by Italy to Libya because of the agreement reached by the two states, causing considerable criticism regarding their legitimacy (Salamone, 2011, p. 112). In this case, Italy was accused of a violation of Article 33 of the Geneva Convention because it had rejected potential refugees in a country where they could be subjected to inhuman and degrading treatment since Libya had not signed the Geneva Convention (Salamone, 2011, p. 111). Part of the doctrine has highlighted the fact that all the practices of pushing back at sea against a group of migrants, carried out indistinctly, especially when they occur in territorial waters, are to be considered in violation of the prohibition of *non-refoulement* (Paleologo, 2007, p. 25).

In this sense, it is interesting to refer to the decision of the Italian Court of Cassation, which in 2021 affirmed the configuration of the legitimate defence: "*in the case of resistance to the public official of the migrant, who, after having been rescued on the high seas, opposes the return to the Libyan state*"<sup>3</sup> based on the principle of *non-refoulement*.

According to the UNHCR, the principle of *non-refoulement* does not imply any geographical limitation. This obligation extends to all government agents acting in an official capacity, inside or outside the state territory (UNHCR, June 9, 2000). This implies that in the case that asylum seekers are intercepted at sea, the agents of the state parties are obliged not to reject the person and accept the request. Given the impossibility of identifying people and evaluating asylum requests on the board of a ship, the intercepting state is obliged to disembark the potential refugee in a safe place where he can exercise the right to apply for asylum and to have it examined fairly and efficiently, which is usually located in the very territory of the intercepting state (Scovazzi, 2016, p. 73).

The same opinion also seems to be part of the doctrine which affirms that the principle operates not only on the territory of the state and its borders, including marine ones but in every situation in which the state organs exercise acts of empire against people, including the high seas (Goodwin-Gill, 1998, pp. 167 et seq.; Salamone, 2011, pp. 118 et seq.).

All this does not imply that all activities of interdiction or refusal of entry into one's territorial waters involve a violation of the principle of *non-refoulement* by the coastal state, but only in cases of an effective accompaniment to a state where there is a risk of persecutory treatment or when this state carries out *refoulement* towards a territory where this could happen (Hathaway, 2005, pp. 336 et seq.). Consequently, it can be said that *refoulement* is considered acceptable if the receiving state provides adequate guarantees regarding respect for human rights (Salamone, 2011, pp. 119 et seq.).

As previously mentioned, the obligation of *non-refoulement* is an absolute obligation for the State and is now an integral principle of international law, human rights, and customary international law (Cf. Goodwin-Gill & McAdam, 2007, p. 346; Lauterpacht & Bethlehem, 2001, pp. 87 et seq.;

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<sup>3</sup> Italian Court of Cassation, Sez. IV, Decision no. 12, December 16, 2021.

Trevisanut, 2008, pp. 205 et seq.; Allain, 2001, pp. 533 et seq.; Farmer, 2008, pp. 1 et seq.). Therefore, it can also be considered binding for States that have not formally signed the Conventions that provide for it (Di Filippo, 2007, pp. 237-264; Salamone, 2011, pp. 119 et seq.).

## 5. The Principle of *non-Refoulement* in the Jurisprudence of the European Court of Human Rights

The principle of *non-refoulement* is now a consolidated principle of international law, and the Geneva Convention is the most complete international instrument from the point of view of its enunciation. A complementary instrument to the Geneva Convention, as regards the obligation of *non-refoulement*, is represented by the European Convention on Human Rights<sup>4</sup> (hereinafter "ECHR"), signed in Rome on November 4, 1950, within the Council of Europe and its additional protocols. Until today, the Convention has been ratified by all 47 members of the Council of Europe; the last was Montenegro in 2007. 27 of the member states of the Council of Europe are also members of the European Union.

To constitute a real instrument for the protection of human rights, the ECHR provided for the constitution of the European Court of Human Rights (hereinafter "ECtHR" or "the Court") situated in Strasbourg. The Court, over time, through its case-law, has played an important role in verifying violations of the ECHR and modifying it by extending the sphere of rights protected by the same.

The ECHR does not expressly provide for a prohibition of *non-refoulement* (Zanghi, 2011, pp. 827 et seq.; Cellamare, 2012, pp. 491 et seq.; Puma, 2013, p. 256). However, it was the ECtHR's jurisprudence through protection "*par ricochet*" that expanded the scope of the Convention, including matters not expressly provided for in it, beginning with the famous Soering case in 1989 (Julien-Laferriere, 2006, pp. 141 et seq.). The ECtHR affirms the responsibility of the extradition state if it exposes the person to one of the treatments prohibited by the ECHR<sup>5</sup>.

The protection "*par ricochet*" allows the ECHR to be applied more broadly, both materially and territorially. In the first case, it protects rights not expressly provided for in it, and in the second, it protects individual rights even from violations by states not part of it<sup>6</sup> (Quadri, 2018, pp. 39 et seq.; Di Pascale, 2012, pp. 85 et seq.; Graziani & Leanza, 2014, pp. 163 et seq.; Scovazzi, 2014, pp. 1456 et seq.; Julien-Laferriere, 2006, pp. 141 et seq.; Liguori, 2012, p. 418; Papanicolopulu, 2013, pp. 417 et seq.; Giuffrè, 2012, pp. 692 et seq.; Cellamare, 2012, pp. 491 et seq.; Marchesi, 2012, p. 282; Lenzerini, 2012, p. 721). It does not need the violation to be proven by the complainant as it has a preventive effect, but only that there are serious reasons to believe that the risk of such a violation is real (Julien-Laferriere, 2006, pp. 148 et seq.).

The prohibition of *refoulement* has been related by the ECtHR's case-law, primarily to violations of Article 3 of the ECHR, which prohibits torture and cruel or degrading treatment or punishment.

State parties are bound not to return a person to a country where such treatment is possible. In this way, the Court introduces, through its case-law relating to the violation of Article 3, also the ascertainment of its "*potential violation*" (Zanghi, 2006, pp. 259 et seq.). This occurs if a state decides to extradite or expel a person, and there are serious and well-founded reasons to believe that in the requesting state, he will be subjected to the treatments provided for by Article 3. However, there is no violation if the requesting state or the state to which he is expelled provides guarantees that such treatments will not be applied (Zanghi, 2006, pp. 259 et seq.; Tellarini, 2020; Puma, 2013, pp. 263 et seq.; Terrasi, 2009, pp. 597 et seq.; Liguori, 2012, pp. 426 et seq.).

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<sup>4</sup>European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 1950.

<sup>5</sup>ECtHR, case of Soering v. the United Kingdom, Application no. 14038/88, Judgment of 7 July 1989, para. 91, in www.hudoc.echr.coe.int.

<sup>6</sup>ECtHR, case of Hirsi Jamma and others v. Italy, Application no. 27765/09, Judgment of 22 February 2012, in www.hudoc.echr.coe.int.

The protection of Article 3 has an absolute and mandatory nature<sup>7</sup> (Quadri, 2018, p. 54; Gianelli, 2008, pp. 449 et seq.; Gianelli, 2012, pp. 2358 et seq.; Mirate, 2013, pp. 454 et seq.; Pitto & Zuppa, 2020, p. 36) in the sense that exceptions are not allowed, even if the person represents a risk to the internal security of the state (Saccucci, 2011, p. 169).

As can be seen, the protection of the ECHR with regard to the obligation of *non-refoulement* is more extensive than that of the Geneva Convention. While the latter associates it with the concept of persecution and, thus, with asylum-seeker, the ECHR extends it to any person who risks being subjected to the treatments provided for in Article 3 through protection "*par ricochet*".

Concerning the obligation of *non-refoulement*, the protection "*par ricochet*" has been expressed by the case-law of the ECtHR, significantly even in relation to the violation of Articles 2, 6, and 8 of the ECHR.

Article 2 of the ECHR establishes the right to life, and consequently, this right is considered violated if a person is expelled by a state party to a state that has convicted him of a crime for which the death penalty is foreseen<sup>8</sup>. Necessarily, this Article must also be taken into consideration with Article 1 of Additional Protocol No. 13, which abolishes the death penalty. This is because, before the adoption of the latter in 2002, the death penalty could never have raised a question regarding the violation of Articles 3 and 2 of the ECHR. And it was the ECtHR that, in the Soering case cited above, considered a violation of Article 3, the "*corridor of death*" syndrome, and not the death sentence itself (ECtHR, Soering v. the United Kingdom).

One of the innovative aspects introduced by the ECtHR case-law is the protection "*par ricochet*" from violations of Article 6 of the ECHR, which establishes the right to a fair trial. Regarding the obligation of *non-refoulement*, this aspect constitutes an element of great protection (Saccucci, 2011, p. 169). The Court in the Soering case had already given hints of openness in this sense, highlighting the problems related to the violation of Article 6, but it was with the Al Moayad case<sup>9</sup> in 2007 that took a clear position in this direction.

Article 8 of the ECHR protects the right to private family life and has a relative nature as the values protected by it must be balanced with the values protected by the legal system of the state, such as national security and public order. Whenever a violation of Article 8 occurs, the values involved must be balanced from time to time according to the characteristics of the specific case. As regards the obligation of *non-refoulement*, the protection "*par ricochet*" relating to the violation of Article 3 has an absolute and mandatory nature. As a result, when a violation of Article 3 is discovered in addition to a violation of Article 8, the ECtHR will not be required to rule on the violation of Article 8, as the absolute nature of Article 3 also renders a ruling on the violation of Article 8 superfluous and the expulsion will be declared illegal (ECtHR, Chahal v. the United Kingdom).

Regarding the obligation of *non-refoulement*, Protocols 4 and 7 of the ECHR are of great importance.

Additional Protocol No. 4, signed in Strasbourg on September 16, 1963, in its article 4, provides for the prohibition of collective expulsion of aliens. According to the ECtHR's case-law<sup>10</sup>, collective expulsion refers to a group of aliens being forced to leave the country by state authorities. Expulsion as a measure taken at the end of a process of analysing the particular circumstances of each person making up the group, which must be effective and differentiated for each person, does not constitute a breach of this Article (See ECtHR, Conka v. Belgium, para. 63; Zanghi, 2006, p. 300).

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<sup>7</sup> See ECtHR, case of Chahal v. the United Kingdom, Application no. 22414/93, Judgment of 15 November 1996, para. 139, in [www.hudoc.echr.coe.int](http://www.hudoc.echr.coe.int).

<sup>8</sup> ECtHR, case of F. G. v. Sweden, Application no. 43611/11, Judgment of 23 March 2016, in [www.hudoc.echr.coe.int](http://www.hudoc.echr.coe.int).

<sup>9</sup> ECtHR, case of Al Moayad v. Germany, Application no. 35865/03, Judgment of 20 February 2007, in [www.hudoc.echr.coe.int](http://www.hudoc.echr.coe.int).

<sup>10</sup> ECtHR, case of Conka v. Belgium, Application no. 51564/99, Judgment of 05 February 2002, para. 59, in [www.hudoc.echr.coe.int](http://www.hudoc.echr.coe.int).

Article 1 of Additional Protocol No. 7, which entered into force on November 22, 1984, deals with the protection of aliens legally residing in the state's territory in the event of expulsion measures. The Protocol's Article 1 safeguards the alien and guarantees that he cannot be expelled unless it is done in accordance with the law.

The expulsion measure of an alien legally resident in the territory of the state must be legally valid. As a result, the alien must be guaranteed the possibility to exercise his or her rights under Article 6 of the ECHR, which concerns a fair trial (Zanghi, 2006, p. 298). However, the protection offered by this article is relative because, in its second paragraph, it is provided that the alien may be expelled even before being able to exercise the rights set out above for reasons of national security or in the interest of public order of the expelling state.

## 6. From the Case of *Hirsi Jamma and Others v. Italy* to the Case of *N.D. and N.T v. Spain*

The case of *Hirsi Jamma and others v. Italy* (see ECtHR, *Hirsi Jamma and others v. Italy*; Marchesi, 2012, pp. 243 et seq.; Liguori, 2012, p. 415) deserves special attention because the ECtHR, on this occasion, changed its orientation regarding the intervening state's jurisdiction, extending protection outside its territory in the specific case in international waters.

The violations alleged against Italy concern the events of May 6, 2009, when three boats in a state of danger were intercepted in international waters bound for Italy with 200 people on board. State ships intercepted boats in the Maltese SAR zone and provided rescue. Once on board, the migrants were forcibly directed and handed over to the Libyan authorities as required by the bilateral agreement between Italy and Libya of February 2009 (De Vittor, 2009, p. 800).

The appeal to the ECtHR was filed by 11 Somalis and 13 Eritreans who were present on board and who accused Italy of the violation of various provisions of the ECHR, but the most serious concerning Articles 3 and 4 of Additional Protocol No. 4<sup>11</sup> (see Scovazzi, 2016, pp. 74 et seq.) in combination with Article 13 (Liguori, 2012, pp. 415 et seq.). The applicants claimed that they were not informed about the fact that they were being taken to Libya, which they considered an unsafe country, and when they understood the destination, they expressed their willingness to be taken to Italy. They also contested the fact that they were not identified on board and therefore could not formalize their asylum request.

Italy responded to the accusation by stating that the rejections were made in compliance with the bilateral agreements concluded with Libya in December 2007 and February 2009, which were in harmony with European policies for the control of migratory flows in the Mediterranean. Italy also added that the identification procedures for migrants were not necessary as they had been intercepted on the high seas, where the regime of freedom of navigation is in force. For this reason, Italy believed that the operation carried out by the state ships could not be defined as an expulsion operation as the migrants were in international waters.

The ECtHR, in its judgment, clarifies that the ECHR must also be applied on the high seas as the peculiar nature of the maritime environment cannot justify an area outside the law, where individuals cannot enjoy the rights guaranteed by the same, rights that States Parties must protect in their jurisdiction (ECtHR, *Hirsi Jamma and others v. Italy*, para. 178). It is also specified that interception operations on the high seas of migrants must be carried out following the ECHR (Scovazzi, 2016, p. 75). If the state authorities, in the exercise of their powers, act imperiously towards people (Goodwin-Gill, 1998, pp. 167 et seq.) to prevent migrants from reaching the borders of the state, this constitutes an exercise of state jurisdiction as provided for by Article 1 of the Convention and therefore makes the state responsible for the violation of Article 4 of Protocol No. 4 (ECtHR, *Hirsi Jamma and others v. Italy*, para. 180), or rather the group expulsion of migrants without a procedure for assessing the

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<sup>11</sup> *Additional Protocol No. 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Strasbourg on September 16, 1963, which entered into force on May 2, 1968.*



individual situation.

The justification of the Italian State that the migrants were not in its territory was not taken into consideration by the Court since, according to it, the word territory is not present in Article 4, thus showing due attention to migrants who have risked their lives at sea (Scovazzi, 2016, p. 77). Otherwise, there would be a risk that migrants travelling by sea, unable to arrive in the state territory because intercepted before, wouldn't be able to have a procedure for assessing the individual situation before their expulsion (ECtHR, Hirsi Jamma and others v. Italy, para. 177).

According to the Court, the bilateral treaties that Italy had signed with Libya could not be taken into consideration as an excuse for the violation of the obligations deriving from the ECHR. As a result, the fact that the migrants were rejected in Libya exposed them to the risk of torture, inhuman or degrading treatment, and deportation to their country of origin (Hirsi Jamaa and others v. Italy, para. 129; see also Scovazzi, 2016, p. 75). This is because, according to the Court (Hirsi Jamaa and others v. Italy, para. 125), during the period in question in Libya, no legislation was in force for the protection of refugees, as Libya was not a party to the Geneva Convention (Salamone, 2011, pp. 111 et seq.). Consequently, any person entering Libyan territory irregularly was condemned to remain illegal without any distinction from irregular immigrants. The risk of being subjected to the treatments prohibited by Article 3, according to the Court, was concrete as such behaviour by the Libyan authorities had been highlighted by several sources. The Court took into consideration reports from UNHCR, Human Rights Watch, and Amnesty International delegations, which had described the situation of asylum seekers in Libya as degrading and inhuman (Cellamare, 2012, p. 491). They had encountered many cases of torture as well as poor sanitary conditions. They also reported cases of forced return to their home countries, where they were held in inhuman conditions and tortured by local authorities (ECtHR, Hirsi Jamma and others v. Italy, para. 150).

The responsibility of Italy, in this case, lay in the fact that the authorities of the latter were aware of the violation of human rights in Libya or, in any case, could easily verify it. For this reason, Italy was obliged not to return migrants to Libya, even if they had not applied for asylum (Scovazzi, 2016, p. 76).

The Court also found a violation of Article 13 of the ECHR since the applicants had been deprived of the possibility to appeal before the *refoulement* measure was carried out. According to the Court, the conduct of the Italian authorities prevented migrants from applying for asylum and prevented them from appealing against violations of the ECHR (Scovazzi, 2016, p. 77).

Thanks to the protection *par ricochet* carried out in the past by the ECtHR, the protection of human rights guaranteed by the ECHR has undergone a very significant extension, as is demonstrated by the Hirsi Jamaa case. However, there has been no lack of criticism in this regard, as this mechanism is susceptible to infinite changes over time, also given the cultural differences of the members of the Court, as they come from different countries, which also directly affect the interpretative techniques used in relation to rights protected by the ECHR at the time of application (Sudre, 2006, pp. 8 et seq.).

This is also evident in the ECtHR's most recent orientation, which seems to be heading in a direction diametrically opposite to that previously expressed. A clear change of direction took place with the recent decision of the Grand Chamber on February 13, 2020<sup>12</sup>, in a case concerning the collective push-back of migrants by the Spanish civil guard stationed in Melilla<sup>13</sup>, Morocco (See

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<sup>12</sup> ECtHR, Grand Chambre, case of N.D. and N.T. v. Spain, Applications nos. 8675/15 and 8697/15, 13 February 2020.

<sup>13</sup> Melilla is a Spanish enclave located in Morocco. The Spanish authorities, with the aim of preventing the illegal entry of migrants into Spanish territory, have built a barrier of about 13 km long which separates Melilla from Morocco. The barrier consists of a concave fence about six meters high, followed by a second fence three meters high and another fence six meters high. The fences are built with a sophisticated infrared camera system and motion sensors. There are four crossing points between Morocco and Spain located on the fence. In the Spanish part, the passages are guarded by the Spanish Civil Guard, which has the task of patrolling the border and supervising

Wissing, 2020).

In the present case, the applicants were part of a group of about eighty people who crossed the internal border fence in the Spanish enclave of Melilla and were stopped by the Spanish civil guard and immediately repatriated to Morocco without undergoing the identification procedure, linguistic or legal assistance, and without having the opportunity to explain their personal reasons. The two applicants, one of Malian nationality and the other Ivorian, filed two appeals before the Strasbourg Court for violations of the prohibition of collective rejections and the right to an effective remedy, guaranteed by Article 4 of Protocol No. 4, Article 13 of the ECHR in combination with Article 3 of the ECHR.

The practice of forced repatriation was used regularly along the Melilla border and was not denied by the Spanish authorities, who, following the events of 2014, quickly changed the institutional law relating to the rights and freedoms of aliens (ECtHR, *N.D. and N.T. v. Spain*, para. 87).

In its first decision on October 3, 2017, the Strasbourg Court found the exercise of jurisdiction of the Spanish state, considering that the jurisdiction is mainly territorial and that any state that exercises a judicial act can be held liable under the Convention. In the case in question, the events took place in Spanish territory, given that, as admitted, the fences are in Spanish territory (ECtHR, *N.D. and N.T. v. Spain*, paras. 107-108). In the opinion of the Strasbourg Court, Spain carried out collective rejections without considering the personal circumstances of each of the migrants and without resorting to a decision-making process (ECtHR, *N.D. and N.T. v. Spain*, para. 124), declaring the violation of Article 4 of Protocol No. 4 (Cellamare, 2018, p. 161) and Article 13 of the ECHR but declaring inadmissible the violation of Article 3 of the ECHR. Up to this point, the ruling reflects the Strasbourg Court's position on previous collective rejections. However, the orientation changes with the decision of the Grand Chamber.

Spain excludes the applicability of Article 4 of Protocol No. 4 since, in the present case, no expulsions were carried out, but the entry of migrants who attempted illegal entry into Spanish territory was refused. According to the Spanish government, to carry out an expulsion, the alien must first enter the state territory (ECtHR, *N.D. and N.T. v. Spain*, para. 132). Spain, on the other hand, believes that Article 3 of the Convention is inapplicable since the principle of *non-refoulement* applies in circumstances where persons are in danger of being subjected to inhuman and degrading treatment or torture under international law (ECtHR, *N.D. and N.T. v. Spain*, para. 128).

Firstly, the Grand Chamber stresses the importance of the state's role in protecting external borders, such as combating illegal immigration and trafficking in human beings, particularly as regards states located on the external borders of the Schengen Area, like Spain. For this reason, in the opinion of the Grand Chamber, states have the possibility of concluding agreements establishing how people can enter their national territory (ECtHR, *N.D. and N.T. v. Spain*, para. 168). Nonetheless, domestic legislation cannot violate international legislation in this regard, regarding Article 3 of the ECHR and Article 4 of Protocol No. 4.

The Court holds that the applicability of Article 3 of the Convention and Article 4 of Protocol No. 4 prohibits the return of an alien who is under the jurisdiction of one of the States parties to a state where he can be subjected to inhuman and degrading treatment or torture (ECtHR, *N.D. and N.T. v. Spain*, para. 188). In the present case, the applicants have not shown that they were in danger of inhuman and degrading treatment in Morocco, and consequently, the claim under Article 3 of the ECHR was declared inadmissible in line with the first decision of the Chamber of the ECHR.

However, the Court notes that the *refoulement* was a consequence of the applicants' "own conduct" (ECtHR, *N.D. and N.T. v. Spain*, para. 242; Santomauro, 2020, p. 596; Wissing, 2020), as the applicants attempted to enter Spanish territory illegally and without having tried to apply for asylum

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*irregular entry. See European Court of Human Rights, Grand Chamber, case of N.D. and N.T. v. Spain, Applications nos. 8675/15 and 8697/15, 13 February 2020.*

using regular entry at the Beni Enzar border or the Spanish embassy in Rabat, Morocco (ECtHR, N.D. and N.T. v. Spain, para. 204), or that of neighbouring countries. In the case in question, the Court did not take into consideration the reports from several sources on the limited accessibility or effectiveness of these procedures<sup>14</sup> and declared unanimously inadmissible the violation of Article 4 of Protocol No. 4 (ECtHR, N.D. and N.T. v. Spain, para. 231). Based on this reasoning, the Court also declared inadmissible the violation of Article 13 of the Convention in conjunction with Article 4 of Protocol No. 4 (ECtHR, N.D. and N.T. v. Spain, para. 244).

In this sense, contrary to the Court's previous position, it is outlined that if there is the possibility of requesting protection in diplomatic offices or at external border crossing points, persons in need of international protection who attempt to enter illegally the Member States' territory can be expelled as guilty of "*culpable conduct*" without even considering their request for international protection.

## 7. Final Considerations

The principle of *non-refoulement* is now a consolidated principle of international law, and the Geneva Convention is the most complete international instrument from the point of view of its enunciation. A complementary instrument to the Geneva Convention, as regards the obligation of *non-refoulement*, is represented by the European Convention on Human Rights.

This principle has evolved significantly over time due to the European Court of Human Rights' jurisprudence and its protection "*par ricochet*", which has expanded the area of applicability of the Convention to rights not expressly provided for by it. The case-law of the Court has played a significant role in affirming the principle of *non-refoulement*. Nevertheless, as noted above, this mechanism is subject to infinite changes over time, particularly in consideration of the cultural differences between the members of the Court who come from different countries, which directly affects the interpretative techniques used in cases involving rights protected by the ECHR (Sudre, 2006, pp. 8 et seq.). This is clear in the latest decision of the European Court of Human Rights, in the case of N.D. and N.T. v. Spain, which is one of the most contentious and highly debated rulings because it leads to a change of direction in the Strasbourg Court's orientation on the protection of migrants' rights (Mussi, 2020; Carrera, 2020; Wissing, 2020).

In particular, the criticisms regarding this decision concern the concept of "*applicants' own conduct*" by the ECtHR (Wissing, 2020). A concept that authorizes states to conduct collective *refoulements* of migrants at external borders under certain conditions without first examining each participant's personal situation and, as a result, without allowing them to seek asylum (Mussi, 2020; Wissing, 2020, p. 4). On the other hand, this decision constitutes a jurisprudential precedent that risks justifying collective rejections at external borders (See Raimondo, 2020), particularly in light of the current situation in which Schengen area countries such as Italy, Spain, Greece, Poland, and Hungary are dealing with continuous migratory flows.

## 8. Acknowledgement

This paper has been financially supported by the University of Shkodra "Luigi Gurakuqi".

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<sup>14</sup>The High Commissioner for Human Rights and the UNCHR reported that access to the border crossing points of Beni Enzar and Mellila was impossible for people from sub-Saharan Africa as they were prevented from reaching the border. See ECtHR, Grand Chambre, case N.D. and N.T. v. Spain, Applications nos. 8675/15 and 8697/15, 13 February 2020, paras. 143 and 155.

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