THE DIRECT AND INDIRECT (*PAR RICOCHET*) PROTECTION OF MIGRANTS IN THE LIGHT OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS: BRIEF NOTES ON THE EVOLUTION OF THE STRASBOURG COURT'S CASE-LAW

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Abstract
In this paper, the case-law of the European Court of Human Rights on protection of migrants by the European Convention on Human Rights will be analyzed and discussed, in order to outline the main principles of decisions on cases concerning family reunion, expulsion, exclusion, detention and extradition of foreigners. In this realm, account shall be taken that there are very few provisions specially aimed at protecting human rights of migrants in the Rome Convention. The recognition of migrants' human rights has been mainly granted by an indirect or *par ricochet* way, through the protection other human rights. When assessing the control of migration flows by Member States, the European Court has been placing, in a praetorian or evolutive way, migrants under the conventional protection through the guarantee of expressly protected conventional rights, such as the right to family or private life or the prohibition of torture.
Keywords
Migrants; Human rights; European Convention on Human Rights; Case-law; Family life; Best interest of the child.
Summary

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1. INTRODUCTION

Todays' "global village" has been the scene of multiple and growing international migration flows, due to political, religious, economic, educational, or environmental causes. This scenario entails a delicate balance between, on the one hand, the defence of Sates' public interests, through the development of immigration and national security policies, as a clear manifestation of their sovereignty powers, and, on the other hand, the protection of human rights and fundamental freedoms of migrants and their families. The 2015 "migration crisis", and the challenges and problems that European countries have faced in the past few years in the management of migration flows, have demonstrated the importance of the legal analysis of the migration phenomenon.

The case-law of the Rome Convention's control bodies has played a fundamental role on carrying a fair balance between both sides of the question, by dynamically outlining the protection of human rights of migrants, and by defining the limits of the Member States' scope of action on migration cases (encompassing cases of authorization of entry, stay and expulsion or extradition of aliens).

This paper intends to make a brief *excursus* into the case-law of the European Court of Human Rights (ECtHR or Court), in order to examine the protection granted to migrants (*i.e.*, to those who are not national from Member States of the European Union[3]) by the European Convention on

[3] Since the nationals of these States exercise their right to free movement and are protected by European Union Law, namely the Directive 2004/38/EC of the European Parliament and of the Council, 29 April 2004, on the rights of the EU citizens and their family members to move and reside freely in the Member States' territory and the of the Regulation (EU) No. 492/2011, of 5 April 2011, on freedom of movement for workers within the EU. In C. v. Belgium, 7 August 1996, R96-III, and Moustaquim v. Belgium, 18 February 1991, A 193, the Court highlights this special regime and states that the difference

Human Rights (ECHR) and to outline the main principles of the Strasbourg Court's interpretation in this context.

2. SOME NOTES ON THE INTERPRETATION PRINCIPLES OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Before drawing the main principles of the ECtHR's case-law in present context, some notes shall be given on some hermeneutic methods that have been developed by this Court.

The European Convention is an international treaty and, thus, must be interpreted in accordance with the rules set out in Articles 31 to 33 of the 1969 Vienna Convention on the Law of Treaties[4], in addition to other rules of International Law[5]. Nevertheless, the special nature of the Convention has led its protective bodies to develop hermeneutic methods that go beyond the traditional rules of interpretation of treaties. Indeed, given the fact that the Rome Convention is considered a treaty for the collective guarantee of human rights and fundamental freedoms, and also, quite frequently, as an instrument of "European public order", it is understood as an instrument that sets forth "objective obligations" for the State Parties[6].

Considering this *sui generis* character, and bearing in mind the aim and the object of the European Convention, its monitoring bodies have repeatedly stated that the interpretation of this treaty must be "dynamic", implementing a "praetorian accommodation" of the original text to

in treatment between nationals of third Countries and nationals of EU Member States is justified, since this organization created a legal order with special legal status, as well as European citizenship (§ 38 and § 49, respectively)

[4] Golder v. United Kingdom, 21 February 1975, A 18, § 29.

[5] Al-Adsani v. United Kingdom, 21 November 2001, R01-XI, § 55.

[6] Sóering v. v. United Kingdom, 7 July 1989, A 161, § 87.

evolution of social values of the European societies. Nevertheless, account must be made to the fact that the ECtHR is not a constitutional court, but rather an international court created by a treaty. Therefore, its activity is developed through a constant balance between principles that demand a more effective protection of human rights – *but that can lead to "judicial activism"* – and principles that take into account its subsidiary nature as a supervisory mechanism – which may call for a *judicial self-restrain* and for the respect of *the national margin of appreciation*.

Within the methods that can lead to the so-called "judicial activism", the following are particular relevant: (i) the principle of "effectiveness of rights" (meaning that Convention is "intended to guarantee not rights that are theoretical or illusory, but rights that are practical and effective"[7]); (ii) the principle of the "evolutive interpretation" (meaning that the Convention is a "living instrument" which "must be interpreted in the light of the present-day conditions" in democratic societies[8]); (iii) the principle of the indirect protection or the protection *par ricochet* (consisting on expanding the scope of a conventional provision to the point of indirectly protecting rights that are not expressly mentioned "as such" in the Convention); (iv) the principle of the "positive obligations" (in the sense that the Court has inferred from the "negative" wording of some conventional provisions some *positive obligations* that bind contracting States "to take reasonable and appropriate measures to secure" conventional rights[9]; and (v) the "horizontal effect" (meaning that conventional provisions are also applicable to relations between private individuals)[10]. As for the methods of judicial self-restrain used by the Court, in order to respect national values

[7] Airey v. Ireland, 9 October 1979, A 32, § 24.
[8] Marckx v. Belgium, 13 June, 1979, A 31, § 41; Christine Goodwin v. United Kingdom, 11 July 2002, R02-VI, § 75.
[9] López Ostra v. Spain, 9 December 1994, A 303-C, § 51.
[10] X. and Y. v. the Netherlands, 26 March 1985, A 91, § 23.

and policy choices, as well as to keep the sovereignty of the Member States, mention should be made to: (i) the principle of subsidiarity (which recognises that the national authorities are better placed to assess the need to restrict the conventional rights, and, therefore, it is primarily their obligation to ensure the protection of these rights); (ii) the margin of appreciation (the ECtHR grants to the domestic authorities a certain level of discretion and freedom of decision in fulfilling their obligations under the Convention[11]); (iii) and the European consensus (meaning that the Court often proceeds to a comparative analysis of the level of protection of a certain right among the State Parties. If there is no *consensus communis* on the topic, the Court grants a wide margin of discretion to States and, thus, refuses to carry out a broader, evolutive or dynamic interpretation. On the other hand, if a common European standard or understanding on a certain concept is already achieved, the Court expands the Convention's interpretation, and favours an evolutive interpretation of the human right)[12].

This tension between judicial activism and judicial self-restrain movements is acutely visible in the case-law concerning the control of migration flows.

3. THE DIRECT AND INDIRECT (*PAR RICOCHET*) PROTECTION OF HUMAN RIGHTS OF MIGRANTS

The original text of the Convention does not include any specific provision that safeguards, directly and as such, human rights on migration. According to the settled case-law of the Strasbourg bodies, the Convention

11 Abdulaziz, Cabales and Balkandali v. United Kingdom, 28 May 1985, A 94, § 67.
12 On the interpretation mechanisms of the ECtHR, see, *inter alia*, MOWBRAY 2005, 57-79; SUDRE 1998.

does not guarantee "as such" the right of a person to enter, reside or remain in a country of which he/she is not a national[13], nor the right to political asylum[14], or the right not to be expelled[15] or extradited[16] from a country where the person is not a national. The supervisory mechanisms of the Convention have constantly affirmed a "well-established principle of international law", according to which the Member State has a sovereign prerogative to control the entry, residence and expulsion of non-nationals (*ius includendi et excludendi*) from its territory, which it may use with wide discretion, notwithstanding the commitments emerging from international treaties[17].

Nevertheless, Article 1 of the Rome Convention grants to everyone within the jurisdiction of the Contracting Parties the rights and freedoms enshrined in the Convention. The drafters of the Convention, thus, outlined the *principle of universality*, although "limited to the States' jurisdiction"[18]. Therefore, not only the citizens of the State Party, but also foreigners – even if they are nationals of a State that is not a member of the Convention – and stateless persons, enjoy the same protection, even though this universal formula may suffer some restrictions expressed throughout the text of the treaty or its protocols[19]. It should be noted that foreigners are considered to

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13 Abdulaziz, Cabales and Balkandali v. United Kingdom, 28 May 1985, A 94, § 59.

14 Vilvarajah and Others v. United Kingdom, 30 October 1991, A 215, § 102; Chahal v. United Kingdom, 15 November 1996, R96-V, § 73.

15 Üner v. the Netherlands, 18 Octuber 2006, R06-XII, § 57.

16 Soering v. United Kingdom, 7 July 1989, A 161, § 85.

17 Abdulaziz, Cabales and Balkandali v. United Kingdom, 28 May 1985, A 94, § 67; Berrehab v. the Netherlands, 21 June 1988, A 138, §§ 28 y 29; Moustaquim v. Belgium, 18 February 1991, A 193, § 43; Bouchelkia v. France, 29 January 1997, R97-I, § 48.

18 BOZA MARTÍNEZ 2001, 20.

19 See, for instance, Articles 5.1. *f)* and 16 of the ECHR, as well as Articles 3 and 4 of the Protocol No. 4, as the Court stressed in Lithgow and Others v. United Kingdom, 8 of July 1986, A 102, § 116. We may also add Article 1 of Protocol No. 7, which establishes a different regime for foreigners. On this weakening of the principle of universality and,

be under the jurisdiction of the State party if he or she has entered in the international zone of an airport[20] or if he or she is in extraterritorial areas where the State exercises an effective control, such as in international waters[21].

Once it was established that foreigners enjoy same conventional rights as nationals, the Strasbourg Court's case-law departed from the doctrine of non-protection of migration rights "as such" and may recognise migration rights, through the doctrine of *indirect protection* or *par ricochet* protection. For example, under Article 8, it has affirmed the migrant's "indirect" right to enter, remain or not be expelled from the territory of a State Party when the denial of entry, stay or expulsion measure violates the respect of the migrant's right to family life[22].

This praetorian methodology was also adopted in order *to derive from rights expressly covered by the Convention* (e.g., Article 3), *implicit rights* for migrants (e.g, the migrants's right not to be returned, expelled or extradited when there are reasonable reasons to assume that the applicant may be subjected, in the destination country, to torture, inhuman or degrading treatment or punishment)[23]. Accordingly, although the Convention does not expressly

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furthermore, defending that, according to the Court, the Convention does not guarantee in Article 14 a non-discrimination principle on grounds of nationality but rather a simple prohibition of arbitrariness when establishing differentiating criteria, see BOZA MARTÍNEZ 2001, 26 ff.

[20] Amuur v. France, 25 June 1996, §§ 52 and 53.

[21] When a ship is intercepted, the effective control over the ship and people on board demands the respect for the rights laid down on the Convention and Additional Protocols. See Hirsi Jamaa and Others v. Italy, 23 February 2012.

[22] It was in the 70's of the XX century that the former Commission established this link between the rights of migrants and the right to respect for family life under Article 8. In particular, it was in 1967 that the Commission declared an application admissible in the light of the respect for family life of foreigners (ECmHR, 15 July 1967, Application No. 2991/66 of Alam and Khan v. United Kingdom, *Collection* 14, 116).

[23] SUDRE 2005*,* 503.

include, in its original formula, provisions on expulsion, extradition, asylum or family reunion, if the migrant claims that the domestic measure is likely to violate the rights safeguarded in this international treaty, he or she will be covered indirectly, under certain conditions, by the conventional protection.

Nevertheless, direct protection of aliens was later included by Additional Protocols to the Convention, namely in Article 4 of Protocol No. 4, which embraces the prohibition of collective expulsion of aliens, and in Article 1 of Protocol No. 7, which sets out specific procedural guarantees applicable to the expulsion of aliens[24].

4. THE PROHIBITION OF TORTURE AND INHUMAN OR DEGRADING TREATMENTS: ARTICLE 3

Article 3 of the ECHR protects the physical and psychological integrity of persons, by prohibiting torture, inhuman or degrading treatment or punishment. This provision does not admit derogations (Article 15.2 ECHR) and the margin of appreciation doctrine is not applicable[25].

The Strasbourg bodies have extended this provision in order to guarantee a right not to be removed (*refoulement*), expelled or extradited, when there are serious reasons to believe that the expulsion or removal will lead to the risk of exposing a migrant to torture, inhuman or degrading treatment or punishment in the country of destination. Even though the former European Commission had already ruled that expulsion or extradition measures could breach Article 3, it was in fact the ECtHR that has developed this doctrine in the Soering case[26]. *In casu*, the Court held that the extradition would expose the alien to the "death row syndrome" and,

[24] To sum the case-law on this provision, see Muhammad and Muhammad v. Romania, 15 October 2020, §§ 114 ff.

[25] HARRIS, O'BOYLE and WARBRICK 2009, 70.

[26] Soering v. United Kingdom, 7 July 1989.

considering the age and mental state of the applicant, the distress of the execution of the death penalty in the country of destination would constitute a treatment that would exceed the minimum of severity set in Article 3. This reasoning was later adopted in cases of expulsion and removal of foreigners in the Cruz Varas, Vilvarajah and Chahal cases[27].

Prohibition of expulsion on the grounds of violation of Article 3 also encompasses traditional cases of *non refoulement*, as foreseen in Article 33 of the 1951 Geneva Convention on the Status of Refugees. But the ECtHR as moreover developed the concept of "double refoulement", meaning that Article 3 also requires that, when returning an asylum seeker to an intermediate country, State Parties must certify that the asylum procedure in that country offers sufficient guarantees to prevent his or her expulsion to another country where the foreigner may be subjected to ill-treatments[28]. Therefore, an arbitrary indirect return will not be in accordance with the Convention.

The scope of Article 3 also encompasses the conditions of administrative detention of migrants, implemented under the domestic legal framework, in reception centres, airport transit zones or other detention facilities, for the purposes of immigration control. In this realm, the European Judges have emphasize that migrants are a particularly vulnerable

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[27] Cruz Varas v. Sweden, 20 March 1991; Vilvarajah and Others v. United Kingdom, 30 October 1991, A 215; Chahal v. United Kingdom, 15 November 1996, R96-V. On the case-law evolution in this regard, see GIL 2017, 308 ff.; FREIXES SANJUÁN, REMOTTI CARBONELL 1997, 176 ff.

[28] T.I. v. United Kingdom, 7 March 2000; M.S.S. v. Belgium and Greece, 21 January 2011, where the Court upheld in relation to Belgium that there had been a breach of Article 3 by sending the applicant back to Greece and exposing him to risks linked to deficiencies in the asylum procedure in that State, as well as to the detention and living conditions there. For a detailed analysis of this case and its impact in the interpretation of the European Law on Asylum, see, *inter alia*, DÍAZ CREGO 2011, 523-552.

group in need of special protection[29]. Besides, to comply with Article 3, States must ensure that detention is held in "conditions that are compatible with the respect for human dignity", namely providing basic well-being, access to health care and adequate food[30]. According to the European Court, the lack of space, overcrowding, absence of light, lack of sufficient ventilation, access to toilets or to outdoor activities[31], as well the lack of access to healthcare[32] may constitute degrading treatment contrary to Article 3, irrespective of the authorities' intention to humiliate or mistreat the detainees[33]. In what concerns asylum seekers' reception conditions, the ECtHR laid down on Member States the positive obligation to protect them from conditions of extreme poverty and material deprivation, and thus provided Article 3 with a socio-economic dimension[34].

One should emphasize that, although the Court does not underestimate the burden and pressure placed on European States with the growing migration flows, it highlights that, having regard to the *absolute character of Article 3*, States cannot be absolved of their obligations under this provision[35]. Thus, the degree of protection granted under Article 3 does not

[29] Oršuš and Others v. Croatia, 16 March 2010, § 147; M.S.S. v. Belgium and Greece, 21 January 2011, § 232.

[30] Tabesh v. Greece, 26 November 2009, §§ 38-44; Z. A. and Others v. Russia, 28 March 2017, § 103.

[31] Orchowski v. Poland, 22 October 2009, § 122; M.S.S. v. Belgium and Greece, 21 January 20111, §§ 230-233; Riad and Idiab v. Belgium, 24 January 2008, §§ 103-106; Horshill v. Greece, 1 August 2013, §§ 45-48.

[32] Mouisel v. France, 14 de November 2002, § 40; A.A. v. Greece, 22 July 2010.

[33] See Asalya v. Turkey, 15 April 2014, concerning the lack of minimum conditions of a foreigners' admission and accommodation centre in Turkey to accommodate the applicant, a paraplegic, albeit for a short period of detention.

[34] M.S.S. v. Belgium and Greece, 21 January 2011, §§ 262 and 263.

[35] M.S.S. v. Belgium and Greece, 21 January 2011, § 223.

decrease even if national authorities face exceptional situations of migration flows and humanitarian crisis[36].

5. DETENTION OF MIGRANTS AND THE RIGHT TO FREEDOM AND SECURITY: ARTICLE 5

The effective control of migration flows may require the detention migrants who are trying to enter in the Member State's territory or who are under an expulsion or extradition procedure to the country of origin. Article 5 of the Convention guarantees everyone a right to liberty and security, establishing in paragraph 1 that "[n]o one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law". One of the cases in which deprivation of liberty is admissible is foreseen in Article 5.1.f ("the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition").

The Court proceeds to a thorough analysis on the legality of a detention measure in cases where a migrant complains that the State has breached Article 5. First, it assesses whether the detention decision is foreseen in the domestic law. In this context, the Court uses the "quality of law" criterion, meaning that it ascertains whether the national provision that authorizes the detention is sufficiently accessible, precise and foreseeable, in order to avoid the risk of arbitrary detention and to guarantee a minimum degree of legal certainty[37].

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[36] Khlaifia and Others v. Italy, 15 December 2016. On the Court's assessment under Article 3 in migration cases, see COUNCIL OF EUROPE 2020, 17 ff.

[37] Amuur v. France, 25 June 1996, § 50; Ryabikin v. Russia, 19 June 2008, § 127; Mokallal v. Ukraine, 10 November 2011, § 36; Khlaifia and Others v. Italy, 15 December 2016, § 92.

However, despite complying with the reading of the national law, the detention may still be "arbitrary". That is the case, for example, where it was carried out by the national authorities in bad faith. Furthermore, the measure must be necessary as well as proportionate, and the length of the detention must not exceed the reasonable time required for the purpose pursued[38]. Hence, the detention will be justified under Article 5.1.f "only for as long as deportation proceedings are in progress"[39]. Accordingly, if expulsion or extradition proceedings do not take place with due diligence, the national measure will not be compatible with the proportionality test[40]. Additionally, deprivation of liberty must be considered as an *ultima ratio measure* and it may not be deemed necessary if national authorities can use alternative actions[41]. On the other hand, the Court emphasizes that administrative detention due to immigration controls has a different nature from detention of convicted prisoners or of detainees awaiting trial. Therefore, detentions conditions and facilities shall be different in each case[42].

Article 5 also enshrines a series of procedural rights that States must guarantee to detainees, such as the right to information and the right to take proceedings on the lawfulness of the detention. Article 5.2 establishes that

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38 Saadi v. United Kingdom, 29 January 2008, § 74; A. and Others v. United Kingdom, 19 February 2009, § 164; Rahimi v. Greece, 5 April 2011, § 106; J.R. and Others v. Greece, 25 January 2018, § 110.

39 Popov v. France, 19 January 2012, § 116.

40 A. and Others v. United Kingdom, 19 February 2009, § 164; Abdolkhani and Karimnia v. Turkey, 22 September 2009, § 129. For example, in Lokpo and Touré v. Hungary, the ECtHR sustained that the asylum seekers' detention for five months was not proportional to the aim pursued by the alien administration policy (§ 22).

41 Popov v. France, 19 January 2012, § 119, where the Court condemned France for breaching Article art. 5.1.f) due to the fact that national authorities did not take into account the children's extreme vulnerability and "did not verify that the placement in administrative detention was a measure of last resort for which no alternative was available".

42 Saadi v. United Kingdom, 29 January 2008, § 69.

the detainee has the right to be promptly informed[43], in a simple, non-technical language, in an idiom which he/she understands[44], of the legal and factual grounds for his/her arrest and on the proceedings to appeal, and to challenge lawfulness of the detention[45].

Article 5.4 encompasses the right to start proceedings before a court in order to review the procedural and substantive conditions which are essential to the "lawfulness" of the detention measure[46]. Regarding migration cases, the ECtHR has underlined that the right to appeal must be real, accessible, and effective. In this sense, legal assistance and translation or interpreter may be required[47]. In addition, according to the Court, Article

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[43] Saadi v. United Kingdom, 29 January 2008, §§ 81-85; Khlaifia and Others v. Italy, 15 December 2016, § 120.

[44] The compliance with this provision may demand the presence of an interpreter. See ARRESE IRIONDO 2004, 117. For instance, in Nowak v. Ukraine, 31 March 2011, the Court found a breach of the Convention due to the fact that the deportation order of the applicant, polish citizen, was written in Ukrainian (§§63-66).

[45] Abdolkhani and Karimnia v. Turkey, 22 September 2009, §§ 136-138; Khlaifia and Others v. Italy, 15 December 2016, § 115; J.R. and Others v. Greece, 25 January 2018, § 124.

[46] S.K. v. Russia, 14 February 2017, where the Court concluded that the law applicable did not provide for a procedure that would allow the applicant to obtain a review of his detention and on the other hand there was no proceeding whereby detention would be automatically that would allow and automatic and regular review of the detention measure (§§ 104-109). See also Ilias and Ahmed v. Hungary, 14 March 2017, §§ 73-77. Furthermore, in Popov v. France, 19 January 2012, the Court considered that Article 5.4 was breached because while parents had had the opportunity to have the lawfulness of their detention examined by national authorities, the children "accompanying" their parents fell into a "legal vacuum" that did not allow them to exercise such remedy available to their parents (§§ 124 y 125).

[47] Khlaifia and Others v. Italy, 15 December 2016, § 130; Rahimi v. Greece, 5 April 2011, §§ 120 y 121, where the Court found a violation of Article 5.4 due to the fact that the applicant was unable in practice to contact a lawyer and additionally for the fact that the information brochure outlining some of the remedies available has been written in a language which he could not understand.

5.4 assures detainees have the "right to have the lawfulness of their detention reviewed «speedily» by a court, and to have their release ordered if the detention is not lawful". Even though the judicial review must be swiftly made, the domestic courts must take into account the circumstances of the case, "particularly in the light of the complexity of the case, any specificities of the domestic procedure and the applicant's behaviour in the course of the proceedings"[48].Where the national authorities decide in exceptional circumstances to detain a minor in the context of immigration controls, particular expedition and diligence are required[49].

6. PROTECTION OF MIGRANTS' FAMILY LIFE: ARTICLE 8

6.1. Main Interpretation principles of Article 8 on migrants' cases

The European Judge has established the principle that the expulsion, extradition, entry refusal or prohibition of residence of aliens by a Contracting State may give rise to a violation of the right to respect for private and family life enshrined in Article 8.1 of the ECHR[50]. Nevertheless, paragraph 2 of this provision lays down some grounds on which Member States may legitimately interfere with the enjoyment of these rights in migration cases.

Where an alien argues that the State has disrespected his or her right to private or family life for having decided one of the above-mentioned measures, the State will decide through an analysis that is developed in several stages. The first step in the Court's assessment is to check whether the facts described by the applicant fall within the concept of "family life"

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[48] Khlaifia and Others v. Italy, 15 December 2016, § 131.
[49] G.B. and Others v. Turkey, 17 October 2019, § 167.
[50] Abdulaziz, Cabales and Balkandali v. United Kingdom, 28 May 1985, A 94, § 60.

or "private life" in the light of Article 8.1. In this field, there has been a development of the Court's jurisprudence, as the Court has frequently used the concept of "private and family life", focusing in the idea of integrating the individual into the social environment and thus refusing to dissociate "private life" from "family life". This methodology was abandoned in the case Üner v. the Netherlands, 18 October 2006, where the Court ruled that the social bonds created between long-term settled immigrants and the community where they live are part of their "private life". Therefore, "[r]egardless of the existence or otherwise of a «family life», the Court considers that the expulsion of a settled migrant may represent an interference with his or her right to respect for private life"[51], since the State measure implies a break of the existing social bonds. As for the concept of "family life", in the Court's point of view, this requires that two or more family members have, on the one hand, "real and effective"[52] ties and, on the other hand, "pre-existing" bonds[53]. The effectivity of the interpersonal ties may be assessed, in the Court's opinion, by factors such as the existence of cohabitation[54], life in common[55], birth of children[56], material or economic

[51] Üner v. the Netherlands, 18 October 2006, R06-XII, § 59.

[52] Nsona v. the Netherlands, 28 November 1996, R96-V, §§ 112-114; Abdulaziz, Cabales and Balkandali v. United Kingdom, 28 May 1985, A 94, § 62. Therefore, Article 8 does not apply to a "marriage of convenience", as the Court found in ECtHR Dec. 19 September 2017, Application No. 66297/13, Schembri v. Malta.

[53] Bouchelkia v. France, 29 January 1997, R97-I, § 41; Boughanemi v. France, 24 June 1996, R96-II, § 35; Hode and Abdi v. United Kingdom, 6 November 2012, §§ 53-56.

[54] Abdulaziz, Cabales and Balkandali v. United Kingdom, 28 May 1985, A 94, § 62.

[55] Moustaquim v. Belgium, 18 February 1991, A 193, § 36; Boujlifa v. France, 21 October 1997, R97-VI, § 36.

[56] Berrehab v. the Netherlands, 21 June 1988, A 138, A 138, § 21; Dalia v. France, 19 February 1998, R98-I, § 38; Boughanemi v. France, 24 June 1996, R96-II, § 35.

dependence[57], or other forms of contact[58]. Same-sex relations also fall within the scope of "family life" under Article 8.1[59].

Once the existence of "private life" and / or "family life" has been established, the Court will determine whether there has been an interference in these rights, and whether the State's measure constitutes an "active" or "passive" interference in their scope. If the Court considers that there is, in fact, an interference, it will assess whether it is justified under Article 8.2, namely if it is "in accordance with the law"[60] , if it "pursues one of the legitimate aims" listed therein – national security, prevention of disorder or crime[61] and economic well-being of the country[62] – and, finally, if it is "necessary in a democratic society", taking into account the margin of appreciation that is recognized to Contracting States. This last requirement is related to the principle of proportionality and will be studied below.

6.2. The outline of a "right to family reunification" under the best interest and the well-being of the child

The ECtHR refuses to affirm that Member States have a general obligation to allow family reunification of foreigners in their territory. However, the denial of entry of family members or the refusal of residence permits for the purpose of family reunion can exceptionally give rise to

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57 ECtHR Dec. 3 June 2001, Application No. 47390/99, Javeed v. the Netherlands.

58 Gül c. Switzerland, 19 February 1996, R96-I, § 33; Berrehab v. the Netherlands, 21 June 1988, A 138, § 21.

59 Taddeucci and McCall v. Italy, 30 June 2016, § 48.

60 This requirement implies that there must be certain procedural guarantees against arbitrariness, mainly the sufficient participation of the applicants in the proceedings. See Al-Nashif v. Bulgaria, 20 June 2002, §§ 121-128; Lupsa v. Romenia, 8 June 2006, §§ 39-42.

61 Moustaquim v. Belgium, 18 February 1991, A 193, § 40 (committing high number of crimes); Bouchelkia v. France, 29 January 1997, R97-I, § 44 (committing crime against sexual freedom with violence); El Boujaïdi v. France, 26 September 1997, R97-VI, § 39 (consumption and trafficking narcotics).

62 Berrehab v. the Netherlands, 21 June 1988, A 138, § 26.

serious problems at the light of Article 8 of the ECHR. To determine whether these decisions disrespect Article 8, the ECHR analysis several factors, as for example: (i) whether there are "insurmountable obstacles" to the develop the family life elsewhere (ii) whether the separation between the family members was the result of a deliberately adopted decision[63]; (iii) the existing ties with the country of origin[64]; (iv) the existing ties with the host country (integration criterion) [65]; (v) the "age of the children concerned, their situation in their country of origin and the extent to which they are dependent on their parents"[66]; (vi) the criterion of the child's best interest[67] and (vii) the respect for immigration rules (for instance, the history of immigration law violations) or public order considerations[68]. According to the Court, the above cited criteria, namely the best interest of the child, must be sufficiently reflected in the reasoning of domestic decisions[69].

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63 Abdulaziz, Cabales and Balkandali v. United Kingdom, 28 May 1985, A 94, § 68; Gül v. Switzerland, 19 February de 1996, R96-I, § 41; Ahmut v. the Netherlands, 28 November 1996, R96-VI, § 70; Şen v. the Netherlands, 21 December 2001, § 39; Tuquabo-Tekle and Others c. the Netherlands, 1 December 2005, § 47.

64 Gül v. Switzerland, 19 February de 1996, R96-I, § 42; Ahmut v. the Netherlands, 28 November 1996, R96-VI, §§ 69 and 70; Şen v. the Netherlands, 21 December 2001, § 39.

65 Şen v. the Netherlands, 21 December 2001, §§ 37 and 40; Tuquabo-Tekle and Others v. the Netherlands, 1 December 2005, § 44.

66 Tuquabo-Tekle and Others v. the Netherlands, 1 December 2005, § 44.

67 Şen v. the Netherlands, 21 December 2001, § 37; Tuquabo-Tekle and Others v. the Netherlands, 1 December 2005, § 44; Mugenzi v. France, 10 June 2014, § 45; Jeunesse v. the Netherlands, 3 October 2014, §§ 109 and 120; El Ghatet v. Switzerland, 8 November 2016, §§ 46-54. In the case Jeunesse v. the Netherlands, 3 October 2014, for the first time, the best interest of the child was the *ratio decidendi* to upholding the breach of Article 8 in a case concerning the family reunion of a spouse.

68 Abdulaziz, Cabales and Balkandali v. United Kingdom, 28 May 1985, A 94, § 68; Gül v. Switzerland, 19 February de 1996, R96-I, § 42; Rodrigues da Silva and Hoogkamer v. the Netherlands, 31 January 2006, R06-I, § 39; Nunez c. Norway, 23 June 2011, § 70.

69 El Ghatet v. Swizerland, 8 november 2016, § 47.

The case-law of the ECtHR on family reunification has also suffered a significant evolution throughout the years. At first, the general interest of controlling migration, aiming the protection of the country's economic well-being, weighed more on the Court's scale[70]. However, the most recent case-law "seems to lean more on the side of the interests of the people affected than of the interest of the States in controlling migration flows and thus allows family reunion to a greater extent"[71]. This trend is – in our opinion – due to the Court's special deference to the principle of the best interests and well-being of the child who intends to be reunited, as well as of the children born in the host country and who do not have ties to the country of origin, with particular emphasis on the cases concerning the family reunion of refugees[72]. However, we should point out that the Court has also held that, although "the best interests of the child is a «paramount» consideration, it cannot be a «trump card» which requires the admission of all children who would be better off living in a Contracting State"[73].

6.3. "Family life" as a limit to the expulsion/exclusion of migrants due to administrative irregularity

The ECtHR reaffirms that the Convention does not guarantee a right of an alien to enter or reside in a particular country also in cases of protection of family and private life. However, as already pointed out, it

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[70] LAMBERT 1999, 440.

[71] ARZOZ SANTISTEBAN 2004, 309.

[72] Mugenzi v. France, 10 June 2014, where the Court stressed that national authorities should give priority to the best interest of the child when assessing the proportionality of the "interference" in the exercise of the right to family life. See also Mubilanzila Mayeka and Kaniki Mitunga v. Belgium, 12 October 2006, §§ 85, 86, 87, 90 and 91.

[73] I.A.A. and Others v. United Kingdom, 8 March 2016, § 46. For instance, in Berisha v. Switzerland, 30 July 2013, the Court found that Article 8 had not been breached even though the domestic courts accepted that it would be in the children's best interests to remain in the country of destination (§§ 61 and 62).

recognises that the expulsion of aliens who do not meet the legal conditions to regularly stay in a country, or who have been convicted for having committed a criminal act, may amount to an interference in the right to respect for their family life under Article 8[74]. Once the Court recognizes that there was an interference with Article 8, it assesses whether the expulsion was "necessary in a democratic society" at the light of Article 8.2. and, accordingly, if the Contracting State has made a proper balance between the applicant's interests and the general interest of maintaining the public order.

The analysis of the ECtHR's case-law shows that the right to respect of foreigner's private and family life is reinforced in cases of expulsion due to mere administrative irregularity[75], as it awards more weight to the protection of the aliens' fundamental rights than to the State's interests of protection legality or economic well-being[76].

6.4. Expulsion as a result of a criminal conviction

The Court often stresses that Contracting States have the power, in pursuance to their task of maintaining public safety and prevention of crime, to expel an alien convicted for criminal offences[77]. The expulsion may interfere with the right to respect the alien's private and family life, but this right tends to be weakened or even excluded if the expulsion is the result of a criminal conduct.

Regarding this latter case, proportionality control is carried out by applying the "guiding principles" established in the Boultif case[78] and

[74] Moustaquim v. Belgium, 18 February 1991, A 193, § 36; Jakupovic v. Austria, 6 February 2003, §§ 24 and 25; Üner v. the Netherlands, 18 October 2006, R06-XII, § 58.
[75] Berrehab v. the Netherlands, 21 June 1988.
[76] Berrehab v. the Netherlands, 21 June 1988; Ciliz v. the Netherlands, 11 July 2000; Osman v. Denmark, 14 June 2011.
[77] Üner v. the Netherlands, 18 October 2006, R06-XII, § 54.
[78] Boultif v. Switzerland, 2 August 2001, R01-IX, § 48.

deepened in the Üner case[79]. The ECHR takes into account, for example, the nature and seriousness of the offense committed; the length of stay in the host country; the applicant's family situation, such as the length of the marriage, whether there are children involved and, if so, their ages; and, above all, as noted in the Üner case, the interest and well-being of children and, in particular, the seriousness of the difficulties they would face in the country of destination and the solidity of social, cultural and family ties with the host country and the country of destination. However, the Strasbourg Court does not indicate the degree of relevance of each one of these criteria, stressing that the weight to be awarded to each of them will inevitably vary according to the specific characteristics of each case[80].

Regarding the "second generation migrants" or settled migrants, the protection provided by Article 8, although not absolute, is stronger, since this category of foreigners can enjoy the protection either within the concept of "family life" or the concept of "private life". In this context, the Court affirms that only "very serious reasons" can justify the expulsion of these foreigners[81].

6.5. The family's administrative detention in the light of Article 8

The family's administrative detention during an asylum proceeding may constitute an unjustified and disproportionate interference with the effective exercise of family life, as the confinement, although not implying necessarily a separation of the family members, may subject the family to living conditions typical of a custodial institution, and thus can be regarded as an interference with the effective exercise of their family life[82].

[79] Üner v. the Netherlands, 18 October 2006, R06-XII, § 58.
[80] Maslov v. Austria, 23 June 2008, § 70.
[81] Maslov v. Austria, 23 June 2008, § 75; Levakovic v. Denmark, 23 October 2018, § 45.
[82] Bistieva and Others v. Poland, 10 April 2018, § 73.

In these cases, according to the Court, the child's best interests may be seriously jeopardized, even if the family unity is preserved. The Court highlights that "the authorities have to take all the necessary steps to limit, as far as possible, the detention of families accompanied by children and effectively preserve the right to family life". Administrative detention must then be seen as a measure of last resort[83]. Furthermore, the detention of accompanied children calls for speed and diligence on the part of national authorities[84].

The refusal to allow the reunion of a parent with his or her children, who were placed in administrative detention by arbitrary association with an unrelated adult may represent a violation of Article 8, and may also raise questions concerning the respect of Article 3 of the Convention, which forbids torture, inhuman and degrading treatment[85].

7. COLLECTIVE EXPULSION

Article 4 of Protocol No. 4 forbids the collective expulsion of aliens, meaning that it prohibits any forcible removal of aliens as a group[86] from a State's territory, when there is no individual and objective examination of each individual alien belonging group, and without taking into consideration the particular circumstances of each person[87].

The main lines of reasoning regarding collective expulsion of migrants were drawn in the case Conka v. Belgium, 5 June 2002 and may be explained as follows (i) collective expulsion, within the meaning of Article 4 of Protocol No. 4, "is to be understood as any measure compelling aliens,

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[83] Bistieva and Others v. Poland, 10 April 2018, § 85; see *mutatis mutandis* Popov v. France, 19 January 2012, § 147.
[84] Bistieva and Others v. Poland, 10 April 2018, § 87.
[85] Moustahi v. France, 25 June 2020, §§ 105-115.
[86] Without distinguishing between groups on the basis of the number of their members. See Khlaifia and Others c. Italy, 15 February 2016, § 237.
[87] Khlaifia and Others c. Italy, 15 February 2016, § 238.

as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group"(§ 59); (ii) even if the expulsion decisions are individualized, they may breach the Convention, from the procedural and execution point of view, when they are solely based on a legal provision, without taking into account the migrants' personal circumstances (§61); (iii) the Court outlined a set of evidences that allows, in the procedure's assessment, to determine whether the expulsion may qualify as collective, such as, as it was in this case, "all the aliens concerned had been required to attend the police station at the same time" and "the orders served on them requiring them to leave the territory and for their arrest were couched in identical terms" (§ 62). In recent cases, the Court has also held that, in order to determine whether there had been a sufficiently individualised examination, it was necessary to regard to the particular circumstances of the expulsion and to the "general context at the material time"[88].

The interception of foreigners carried out at seas by national authorities with the aim of preventing them from reaching the State's borders or even pushing them towards another State must be treated as collective expulsions[89].

However, it must be highlighted that Article 4 of Protocol No. 4 will not be violated if the absence of an individualized expulsion decision is due to the applicant's own behaviour (for instance, due to lack of cooperation)[90]. The same can be said in situations where the conduct of migrants, deliberately taking advantage of their large numbers (*en masse)* and using force in an attempt to cross border, is such as to create a situation which is difficult to control their entry and endangers public safety. As regards these

[88] Khlaifia and Others c. Italy, 15 February 2016, § 238; Hirsi Jamaa and Others v. Italy, 23 February 2012, § 183.
[89] Hirsi Jamaa and Others v. Italy, 23 February 2012, § 180.
[90] Hirsi Jamaa and Others v. Italy, 23 February 2012, § 184.

latter hypotheses, the Court set out a two-tier test in N.D. and N.T. v. Spain, of 13 February 2020, when assessing the compliance of Article 4 of Protocol No. 4[91]. In cases where the State has proceed to a collective expulsion, it analyses: (i) whether each alien has a genuine and effective possibility of submitting for an application for protection, based on Article 3 and in harmony with international norms, and thus whether he or she has the effective possibility of submitting arguments against his or her expulsion (§ 209); (ii) whether the State provided such arrangements but aliens – including potential asylum-seekers – without cogent reasons failed to comply with such arrangements by seeking to cross border in a different location, specially by taking advantage of their large number and using force and, in consequence, the lack of individual expulsion decision can be attributed to the applicant´s own conduct (§ 210).

Finally, we should also point out important *obiter dicta* of the Court regarding these cases, namely when this organ repeatedly stresses that "problems with managing migratory flows cannot justify having recourse to practices which are not compatible with the State's obligations under the Convention"[92]. It has even stressed that the level of protection granted by the Rome Convention is not weakened during "crisis conjunctures", even though it takes "note of the «new challenges» facing European States in terms of immigration control as a result of the economic crisis, recent social and political changes which have had a particular impact on certain regions of Africa and the Middle East, and the fact that migratory flows are increasingly arriving by sea"[93].

States are obliged, under Article 3, to protect and to take charge of unaccompanied migrant children, which requires the authorities to identify them as such and to take measures to ensure their placement in adequate

[91] COUNCIL OF EUROPE 2020, 11.
[92] Hirsi Jamaa and Others v. Italy, 23 February 2012, § 179.
[93] Khlaifia and Others c. Italy, 15 February 2016, § 241.

accommodation, even if these children do not lodge an asylum application in the respondent State, but intend to do so in another State, or to join family members there (see Khan v. France, concerning the situation in a makeshift camp in Calais; and Sh.D. and Others v. Greece, Austria, Croatia, Hungary, North Macedonia, Serbia and Slovenia in respect of the situation in a makeshift camp in Idomeni; see also M.D. v. France regarding the reception of an asylum seeker who had identified himself as an unaccompanied minor, but in respect of whose actual age there were doubts). In Rahimi v. Greece (§§ 87-94), the Court also found a breach of Article 3 because the authorities did not offer the applicant, an unaccompanied asylum-seeker child, any assistance with accommodation following his release from detention.

8. CONCLUSION

The original text of the Convention of Rome of 1950 does not include any specific provision that safeguards, directly and as such, the rights of aliens in general. Nevertheless, moved by the permanent impetus of "judicial activism", the ECtHR covered migrants with the conventional protective umbrella, whenever, according to Article 1, migrants are under the Member State's jurisdiction.

In the light of Article 3, the Strasbourg Court outlined the right of foreigners not to be returned, expelled or extradited when there are reasonable reasons to assume that they may be subjected, in the destination country, to torture, inhuman or degrading treatment or punishment.

The deprivation of liberty, in the context of the control of migration flows, will only pass the scrutiny of the European Court if certain procedural and substantive conditions are met, such as being in accordance with national law (meaning that national provisions are sufficiently accessible, precise and foreseeable in its application) and detention is seen as a last resort measure, being applicable only when strictly necessary.

With regard to the migrant's family reunification, considering the general interest of the State in controlling migratory flows and the interest

of people affected by the decision, the Court now seems more receptive to leaning the Strasbourg balance in favour of the migrant's family life, especially if the best interest of the child is at stake.

Regarding the case-law concerning the expulsion of foreigners, despite its variable character attached to the particular details of the cases, it should be pointed out that the right to respect for the foreigner's private and family life is reinforced in cases of expulsion due to mere administrative irregularity, but it tends to be weakened or even excluded if the expulsion is the result of a criminal conduct.

In what concerns to the topic of collective expulsions, one can conclude that the national authorities will not pass the conventionality test if they apply a measure that obliges foreigners, as a group, to leave a country, without a reasonable and objective examination of the particular circumstances of each individual alien and, therefore, without allowing them to present their arguments against the adopted measure and, consequently, without guaranteeing that their expulsion will not lead to practices which are not in compliance with the Convention.

In short, the lines we have drawn clearly demonstrate that the evolutive interpretation carried out by the ECtHR had led to a manifest reinforcement of the protection of the human rights of migrants.

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