

# ACROSS BORDERS: THE IMPACT OF *N.D. AND N.T.* *V SPAIN* IN EUROPE

ECRE'S ASSESSMENT OF THE LIMITED IMPACT OF THE *N.D. AND N.T. JUDGMENT*, IN LIGHT OF THE STRASBOURG COURT'S SUBSEQUENT JURISPRUDENCE ON COLLECTIVE EXPULSIONS, ITS ESTABLISHED NON-REFOULEMENT STANDARDS UNDER ARTICLE 3 ECHR AND THE GUARANTEES OF EU LAW.

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# I. INTRODUCTION

## Background

1. A year has passed since the European Court of Human Rights (ECtHR) delivered one of the most controversial judgments of recent years in *N.D. and N.T. v. Spain*<sup>1</sup>. The judgment's reasoning raised concerns that it could serve as a potential basis for summary returns of migrants by European states, particularly in relation to possible application in a variety of border scenarios beyond the one that formed the factual basis for the judgment. Numerous comments were made on this point, as academics and legal professionals employed different readings of the judgment in the months that followed its publication.
2. The judgment was considered “a green light to push-backs at the border”<sup>2</sup> and a development that makes “enormous concessions” to states in the conduct of additional types of unlawful returns at the border.<sup>3</sup> The Court was criticised for setting a negative precedent by following an excessively formalist approach and interpreting the European Convention on Human Rights (ECHR) in a restrictive and punitive way.<sup>4</sup> Criticism also addressed inconsistencies and contradictions in the judgment's legal reasoning.<sup>5</sup> Along with such concerns, discussions also covered the possibility of a narrower, or at least more case-specific, interpretation of the judgment. The particular characteristics of the *N.D. and N.T.* case have been interpreted as limiting the scope of the judgment's application,<sup>6</sup> while the Court's emphasis on the principle of *non-refoulement* was considered as restricting the relevance of the “legal channels of entry” criterion where Article 3 ECHR claims are present.<sup>7</sup>
3. Beyond academic interest, questions concerning the judgment's applicability are of practical relevance: the issue of border removals is not a new phenomenon in Europe and recent years have witnessed increasingly questionable state conduct at the continent's borders. 2020 was a particularly worrying year with reports of more frequent unlawful returns both at sea and land borders.<sup>8</sup> These reports concern borders across the European Union, including land borders in Spain and Italy, Eastern Europe, and the Balkan region, as well as sea borders in the Mediterranean Sea, the Aegean Sea, and Cyprus.<sup>9</sup> Debate on the prevalence of unlawful border practices is not limited to the conduct of Contracting States to the Convention but has also focused on the role of the European Union and those of its agencies that participate in border operations.<sup>10</sup>

## Scope of analysis

4. This note will explore the applicability of the *N.D. and N.T.* judgment in collective expulsion cases, analysing the criteria that the judgment introduced for the examination of Article 4 Protocol 4 complaints. To this end, the focus will be on a) the Court's Article 4 Protocol 4 (A4P4) jurisprudence

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1. ECtHR, *N.D. and N.T. v. Spain* [GC], Application nos. 8675/15 and 8697/15, 13 February 2020, Legal summary and judgment available at: <https://bit.ly/2PgxBcm>
  2. ECCHR, Strasbourg shamelessly gives green light to push-backs at Europe's borders, 13 February 2020, available at: <https://bit.ly/3vJcVKV>
  3. Maximilian Pichl; Dana Schmalz: “Unlawful” may not mean rightless.: The shocking ECtHR Grand Chamber judgment in case *N.D. and N.T.*, VerfBlog, 14 February 2020, available at: <https://bit.ly/314SF8a>
  4. Raimondo G., *N.D. and N.T. v Spain*: A Slippery Slope for the Protection of Irregular Migrants, 20 April 2020, available at: <https://bit.ly/314JrJp>; Carlos Oviedo Moreno, A Painful Slap from the ECtHR and an Urgent Opportunity for Spain, VerfBlog, 14 February 2020, available at: <https://bit.ly/2NJXG3c>
  5. Sergio Carrera, The Strasbourg court judgement ‘*N.D. and N.T. v Spain*’: a ‘carte blanche’ to push backs at EU external borders?, EU Working Paper RSCAS2020/21, p. 21, available at: <https://bit.ly/2Pplwkc>
  6. Nora Markard, A Hole of Unclear Dimensions: Reading *ND and NT v. Spain*, 1 April 2020, available at: <https://bit.ly/3cUz2Fm>
  7. Constantin Hruschka, Hot returns remain contrary to the ECHR: *ND & NT* before the ECHR, EU Immigration and Asylum Law and Policy, 12 March 2021, available at: <https://bit.ly/3chKxHT>
  8. UNHCR, UNHCR warns asylum under attack at Europe's borders, urges end to pushbacks and violence against refugees, Press Release, 28 January 2021, available at: <https://bit.ly/2NTPoWA>; IOM, IOM Calls for End to Pushbacks and Violence Against Migrants at EU External Borders, Press Release, 9 February 2021, available at: <https://bit.ly/3d4MUgA>
  9. Amnesty International, Submission to the United Nations (UN) Special Rapporteur on the human rights of migrants, February 2021, available at: <https://bit.ly/2P6beXI>
  10. ECRE, Frontex: Commission Calls for Urgent Meeting over Complicity in Pushbacks, Critique of 100 Million Euro Investment in Drone Surveillance, 30 October 2020, available at: <https://bit.ly/2QdTCte>; ECRE, Frontex Faces Another Investigation by the European Ombudsman and Legal Action for Not Suspending Operations on the Aegean, 19 February 2021, available at: <https://bit.ly/3oc9IjK>

following *N.D. and N.T.*, b) the elements of the Court's assessment in A4P4 cases following the principles in *N.D. and N.T.*, and (c) domestic considerations regarding the judgment's applicability. The case law analysis will cover the following Chamber judgments: *Asady and others v. Slovakia*,<sup>11</sup> *Moustahi v. France*,<sup>12</sup> and *M.K. and others v. Poland*.<sup>13</sup>

5. This note does not aim to provide an extensive overview of state practices of border removals; information on the increased use of such removal measures in 2020 and the beginning of 2021 is abundant and wide in scope.<sup>14</sup> Similarly, the note will not provide an in-depth analysis of the assessment in the A4P4 cases that have already been decided, or a critical assessment of the *N.D. and N.T.* judgment. The note will also not analyse the Court's established principles on Article 3 guarantees in expulsion cases,<sup>15</sup> including positive obligations to ensure access to protection from ill-treatment at the border.<sup>16</sup>

## II. PRELIMINARY REMARKS: THE RELATIONSHIP BETWEEN ARTICLE 3 ECHR AND ARTICLE 4 PROTOCOL 4 TO ECHR

6. The Court's caselaw on collective expulsions cannot be read in isolation from the Court's case law on expulsions, particularly that related to Article 3 ECHR. According to the Court's jurisprudence, the compliance with the principle of *non-refoulement* remains the main focus for the Court in cases of alleged collective expulsions and cannot be derogated from "[...] even in the most difficult circumstances [...]".<sup>17</sup>
7. It should be noted from the outset that the *N.D. and N.T.* judgment concerns examination criteria regarding A4P4 complaints where the alleged treatment contrary to the Convention has not been established. Where an arguable claim of *refoulement* risk is presented, expulsion cases will enjoy the protection specifically afforded by Article 3 regardless of entry circumstances, choices or personal conduct. In such cases, the absolute prohibition of treatment contrary to Article 3<sup>18</sup> makes the criteria established by *N.D. and N.T.* irrelevant. In the absence of Article 3 claims, the *N.D. and N.T.* judgment and the subsequent jurisprudence do seem to establish a two-tier test to assess A4P4 cases, which will be analysed in the following section. While the test has not yet been formulated in an unequivocal manner, emphasis is placed on how the existence of an effective opportunity to submit arguments against an expulsion is guaranteed.<sup>19</sup> In the absence of individual decisions, several elements might be examined by the Court, including the existence of legal means of entry and the applicants' own conduct.<sup>20</sup>
8. Despite the possibility to interpret the *N.D. and N.T.* test in different ways, the most recent A4P4 case

11. ECtHR, *Asady and others v. Slovakia*, Application no. 24917/15, 24 March 2020, available at: <https://bit.ly/39hzCMm>
12. ECtHR, *Moustahi v. France*, Application no. 9347/14, 25 June 2020, available at: <https://bit.ly/2QBQyXv>
13. ECtHR, *M.K. and others v. Poland*, Application nos. 40503/17 42902/17 43643/17, 23 July 2020, available at: <https://bit.ly/2QT2qVR>
14. See, Border Violence Monitoring Network, The Black Book of Pushbacks – Launch event, 18 December 2020, available at: <https://bit.ly/3lQgSZt>; Refugee Rights Europe, Pushbacks and Rights Violations at Europe's borders: the state of play in 2020, available at: <https://bit.ly/3tRRrcN>. For a detailed overview of unlawful returns in specific countries, you can consult the ECRE/AIDA reports, available at: <https://bit.ly/3lNQOyp>
15. EDAL, ECtHR, *Ilias and Ahmed v. Hungary*, Application no. 47287/15, 21 November 2019, paras. 124-127 and case law cited there, available at: <https://bit.ly/3xqWS4b>; for the assessment of such cases, see EDAL, ECtHR, *J.K. v. and Others v. Sweden*, Application No. 59166/12, 23 August 2016, available at: <https://bit.ly/3cJgvN2> and EDAL, ECtHR, *F.G. v. Sweden (no. 43611/11) (Grand Chamber)*, 23 March 2016, available at: <https://bit.ly/3xhPisG>
16. EDAL, ECtHR, *M.A. and Others v. Lithuania (no. 59793/17)*, 11 December 2018, in particular paras. 108-113, available at: <https://bit.ly/35mU7Fh>; See also, *M.K. and others*, para. 179.
17. *M.K. and others*, paras. 166-168. The ECtHR has held that non-refoulement protects 'the fundamental values of democratic societies' amongst which it has included the prohibition of torture and other cruel, inhuman or degrading treatment or punishment under Article 3, the right to life under Article 2 (*F.G. v. Sweden*, para. 101), as well as fundamental aspects of the rights to a fair trial and to liberty under Article 6 and Article 5 (*Harkins v. UK*, Application no. 71537/14, 15 June 2017, para. 62-65, available at: <https://bit.ly/3wJeCYU>).
18. *F.G. v. Sweden*, para. 127.
19. *M.K. and others*, para. 202.
20. *Idem*, para. 203.

law also confirms that the principle of *non-refoulement* has not lost its procedural importance following this judgment.<sup>21</sup> In the judgment, the Court reiterated that the findings therein do not throw into question “*the broad consensus within the international community that border arrangements should comply with the principle and the absolute nature of Article 3*”.<sup>22</sup> In *Asady*, the Court described in detail how the applicants were able to but did not raise allegations under Article 3 and how this affected their claims under A4P4. In *M.K.*, it was established that the applicants submitted claims regarding their risk of refoulement but the Polish authorities did not properly assess them. Similarly, in *Moustahi* the unaccompanied status of the children deprived them of a real opportunity to effectively raise Article 3 complaints.

9. Divergences in the interpretation of the recent A4P4 judgments and the approach of different states to it might create difficulties in securing obligations under Article 3 in cases going beyond the field of asylum. Nonetheless, as noted above, the absolute nature of the obligation binds states to secure it under any circumstances, including where there are difficulties in managing migration.<sup>23</sup> Other Council of Europe bodies have also reiterated the imperative character of *non-refoulement* obligations at land and sea borders since the publication of *N.D. and N.T.*, regardless of number and manner of arrival.<sup>24</sup>

### III. ANALYSIS

#### 1. THE PLACE OF THE N.D. AND N.T. JUDGMENT IN STRASBOURG JURISPRUDENCE

10. In the year that has passed since the judgment’s delivery, the Court has ruled on three more cases involving A4P4 claims, against Slovakia, France and Poland respectively.<sup>25</sup> The amount of case law is far from sufficient to constitute established jurisprudence but an analysis of the application of the *N.D. and N.T.* principles in those cases can clarify, to a certain extent, the procedural aspects of collective expulsion cases. The main principles of the judgment related to whether the State provided access to effective means of legal entry and whether the fact that the applicants did not make use of them could be justified by cogent reasons, or whether it was ultimately attributed to their conduct. It should be noted that out of three judgments, only two concerned expulsions at a land border and in two judgments an Article 3 violation was also found.

##### 1.1. A4P4 case law since the publication of the *N.D. and N.T.* judgment

###### *Asady and others v. Slovakia* - March 2020

11. The first A4P4 case following *N.D. and N.T.* concerned expulsion decisions issued in respect of applicants who were found in a truck near the Ukrainian border by Slovak authorities in 2014. The applicants complained that their removal to Ukraine amounted to a violation of A4P4 and Article 13 ECHR. The Court found no violation of A4P4 in respect of the applicants and dismissed the claims as manifestly ill-founded.<sup>26</sup> Despite the short interviews and standardised questions asked, the applicants were found not to have been deprived of the possibility to submit arguments against their return and it was found that an individual examination had taken place.<sup>27</sup>

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21. In both *N.D. and N.T.* and *Asady* Article 3 claims were found to be inadmissible; in the other two cases analysed here (*Moustahi/M.K.*) a violation of Article 3 was found.

22. *N.D. and N.T.*, para. 232.

23. *Hirsi Jamaa and others v. Italy*, Application no. 27765/09, para. 179, available at: <https://bit.ly/3vtIEhP>

24. Council of Europe, Commissioner for Human Rights, Letter, Greek authorities should investigate allegations of pushbacks and ill-treatment of migrants, ensure an enabling environment for NGOs and improve reception conditions, 12 May 2021, available at: <https://bit.ly/3w0vrO6>; Council of Europe, Committee for the Prevention of Torture, Report to the Greek Government on the visit to Greece carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 13 to 17 March 2020, CPT/Inf (2020) 35, 19 November 2020, paras. 58-69, available at: <https://bit.ly/3blOr1u>

25. The information in this note is up to date as of June, 2021.

26. For twelve applicants the application was struck out of the list.

27. *Asady and others*, para. 65-71.

12. As in *N.D. and N.T.*, a significant factor in this case was the absence of an examination of Article 3 claims by the Chamber. Although the applicants had initially complained under Article 3, the complaints were communicated only under A4P4.<sup>28</sup> In a more direct reference to *N.D. and N.T.*, the Court briefly mentioned the circumstances of entry, which was unauthorised, and the fact that the state provided them means of legal entry through the border procedure.<sup>29</sup> However, it limited the assessment to establishing whether the applicants were afforded an effective possibility to submit arguments against their expulsion and whether sufficient guarantees of individual assessment existed, without considering the nature of entry. It noted that the domestic expulsion decisions referred to an examination of Article 3 risks but there was no record of risk-related statements made by the applicants.<sup>30</sup> Lastly, the fact that other individuals apprehended with the same group had access to the asylum procedure indicated a procedure that was not collective and afforded genuine opportunities to assert Article 3 risks.<sup>31</sup>
13. Regarding the role of entry circumstances in assessing A4P4, the Court reiterated some of the *N.D. & N.T.* principles without making express reference to the existence of legal pathways.<sup>32</sup> However, the application of principles to the circumstances of the case suggests a two-tier test under A4P4 in the absence of arguable Article 3 claims.<sup>33</sup> According to this test, in the event of an unauthorised entry, the Court will examine whether there were any legal means of entry and whether the applicants managed to submit arguments against the removal. In *Asady*, the Court referred to the fact that the applicants arrived in an unauthorised manner but that form of entry did not have an explicit bearing on finding a non-violation. The Court simply noted the form of arrival but continued with its examination of whether the applicants had an opportunity to claim that their removal would expose them to Article 3 risks.
14. The lack of explicit consequences of the applicants' unauthorised entry indicates that this element does not compel the Court to reject the complaint of collective expulsion in every case. The Court is keener to focus on whether an effective opportunity to submit objections against removal was available and whether the applicants' used it. The absence of any statements by the applicants regarding Article 3 risks that would preclude removal seems to allow the Court to move more freely within the procedural space of A4P4. In addition, the findings in this case are largely factual and depended on elements of proof, as asylum procedures were initiated for some of the individuals in the same group and the Court found no proof that "[...] *the transcripts of the applicants' interviews did not correspond to the applicants' actual statements [...]*".<sup>34</sup>
15. The joint dissenting opinion of Judges Lemmens, Keller and Schembri Orland also supports the approach that an unauthorised entry alone will not justify non-compliance with A4P4 guarantees on behalf of the state. First, the judges reiterate that "[...] *the judgment in N.D. and N.T. v. Spain must be confined to its proper context in order to avoid depriving the right secured by Article 4 of Protocol No. 4 of its very essence.*"<sup>35</sup> Second, when examining the circumstances of entry, the judges differentiate the case from *N.D. and N.T.* due to the clearly disruptive conduct of the persons in the latter case. The opinion is of course not binding but it does attempt to ensure that the Court's case law on A4P4 remains consistent, predictable and coherent with the Court's well-established jurisprudence on Article 3.

#### Moustahi v. France - June 2020

16. The case concerns the expulsion of two children from Mayotte to the Comoros together with fifteen other individuals who arrived to Mayotte on the same makeshift boat. They complained of a violation of Article 4 Protocol 4, *inter alia*, on account of the lack of individualised assessment of their expulsion case by the authorities in Mayotte. They also complained of a violation of Article 3 regarding the manner of expulsion and the situation they would face upon return to the Comoros. Although they were unaccompanied minors, they had been arbitrarily linked with an unrelated adult to effect the return.

28. *Asady and others v. Slovakia*, Application no. 24917/15, Communicated on 26 September 2016, available at: <https://bit.ly/3gBjtVd>

29. *Asady and others*, para. 62.

30. *Idem*, para. 67.

31. *Idem*, paras. 57-69.

32. *Idem*, para. 58.

33. *Idem*, para. 62.

34. *Asady and others*, paras. 68-69.

35. *Idem*, Joint dissenting opinion of Judges Lemmens, Keller and Schembri Orland, para. 7.

17. Regarding Article 3, the Court relied on the elevated responsibility of authorities to protect unaccompanied children and examined whether the applicants had indeed been accompanied by an adult. The Court referred to the absence of documentation establishing any relationship between the children and the adult, the lack of written records examining the adult's statements, and information by third-party interveners regarding a practice in Mayotte of arbitrarily associating unaccompanied children to unrelated adults before return.<sup>36</sup> It concluded that the children were unaccompanied minors and that the French authorities did not consider the real situation of risk that they would face upon return; moreover, the conditions of return indicated a lack of humanity towards the children.<sup>37</sup> Consequently, their return constituted a violation of the state's positive obligations to take necessary precautionary measures under that article.
18. The Court's reasoning on A4P4 is rather short and does not examine the circumstances of entry at all despite the fact that it was unauthorised.<sup>38</sup> Rather, the Court focuses on whether the applicants had a real and effective opportunity, *as unaccompanied minors*, to put forward the arguments against their expulsion and whether these were adequately examined by the authorities. Looking into the relationship between the adult and the children, it noted that there was no indication that the adult was aware of their situation and there had been no action by the authorities to verify it. Consequently, the Court found that the removal of the children, whom no adult knew or assisted, was decided and implemented without giving them the guarantee of a reasonable and objective examination of their particular situation under A4P4.
19. Applying the principles set out in *N.D. and N.T.* and *Khlaifia and others v. Italy*, the Court ruled that, when determining the existence of a sufficiently individualised expulsion procedure, the circumstances of the cases should be considered, including the expulsion circumstances and the "general context at the time of the events."<sup>39</sup> Consequently, the legal status of the applicants and Article 3 circumstances, in combination with the systematic practice of linking unaccompanied children to unrelated adults, became the principal elements that led to the finding of an A4P4 violation.

#### M.K. and others v. Poland - July 2020

20. In this case, the applicants were Russian nationals of Chechen origin who attempted to make asylum applications at the Polish-Belarussian border on multiple occasions throughout 2017. Each time the applicants were refused access and were returned to Belarus despite their claims regarding the risk of a flawed asylum procedure and Rule 39 measures. Some applicants were eventually allowed to enter and submit asylum applications. The application concerns violations of Article 3 ECHR and A4P4, on their own and in conjunction with Article 13.
21. The Court found that there had been a violation of Article 3 as the applicants did not benefit from effective guarantees that would protect them from ill-treatment, including proceedings to review their asylum applications and a right to remain pending such review.<sup>40</sup> Evidence submitted by the applicants and a large number of reports from human rights organisations revealing systematic border practices helped the Court reach this conclusion.<sup>41</sup> The Court dismissed Poland's argument that EU law obliged the authorities to refuse entry and noted that *non-refoulement* guarantees are enshrined both in the Schengen Borders Code and the Asylum Procedures Directive.<sup>42</sup>
22. As in *Moustahi*, the Court reiterated that in order to determine the existence of a sufficiently individualised examination under A4P4 it is important to consider the specific situation of the individual, the particular circumstances of the expulsion, and the "general context at the material time."<sup>43</sup> It noted that in past assessments it "[...] has taken into consideration certain factors such as [...]" questions on whether the domestic authorities took into account any pending asylum applications when ordering the return, whether conditions had allowed access to legal aid and an asylum

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36. *Moustahi*, paras. 59-63.

37. *Idem*, para. 69.

38. *Idem*, paras. 133-137.

39. *Idem*, para. 130.

40. *M.K. and others*, paras. 184 and 185.

41. *Idem*, paras. 174-177.

42. *Idem*, paras. 180-182.

43. *Idem*, paras. 201.

procedure, and whether stated policies support collective procedures of removal.<sup>44</sup> Further, the Court noted that, in the absence of an individual expulsion decision, it would need to examine whether such absence is attributable to the applicants' conduct by establishing the existence of legal means of entry, a lack of active cooperation, or a resort to clearly disruptive and unauthorised means.<sup>45</sup> Where this is the case, such findings "[...] *might* [emphasis added] prompt the Court to find that the Government cannot be held responsible for the fact that the applicants' circumstances were not individually examined."

23. The language that the Court uses in this reasoning indicates that different factors will be relevant in the examination of the A4P4 complaint; the circumstances of entry "might" prompt the Court to find a non-violation but do not compel it to do so. Conversely, where legal means of entry have been used, the Court will still examine all the relevant circumstances to ensure A4P4 has been complied with. In *M.K. and others*, the applicants tried to use legal means of entry, were interviewed separately and received individual decisions. However, the Court still found a violation of A4P4 as the decisions did not reflect their statements and they had also been refused legal aid.<sup>46</sup>

## 1.2. A4P4 adjudication: elements of assessment

24. In light of the case law discussed above, the applicable test for the assessment of A4P4 complaints has been enriched with additional elements for consideration following the *N.D. and N.T.* judgment. Although the jurisprudence has not taken an unequivocal approach on the precise bearing these will have on A4P4 assessment, the scrutiny of the applicants' circumstances, and the connection of such choices with border realities, will be important elements to monitor in future A4P4 adjudication.<sup>47</sup>
25. As noted above, the *N.D. and N.T.* judgment and the subsequent jurisprudence elaborated a two-tier test to assess A4P4 cases, in particular at land borders. The starting point of this test is whether the State provided an effective opportunity for the applicants to submit arguments against their expulsion, including by providing legal means of entry. Where this opportunity was provided in an effective way but the applicants did not make use of it, the Court will take into consideration several factors to determine whether there were cogent reasons for the applicants not to use the opportunity, or whether the absence of such cogent reasons may indicate that the lack of an individualised examination is attributable to the applicants' own conduct.
26. As noted above, the assessment under this test is comprehensive and takes into consideration all relevant elements, including the overall context of the case. It is important to consider how some of these elements might be approached in future A4P4 assessments.

### Legal means of entry

27. The Court's examination of border arrangements in the cases discussed above indicates that the effectiveness and availability of legal means of entry will remain at the core of any A4P4 assessment. The Court's recent case law on A4P4, as well as its long-established Article 3 principles, emphasise the need for functioning legal procedures to ensure that arguments regarding risks of ill-treatment can be submitted and subsequently assessed in an effective manner.
28. The effectiveness of legal entry pathways may be prejudiced by irregular situations at the border. Such considerations are particularly relevant where geopolitical factors are used to deny access at the border, or where border practices create tense situations that affect the movement of forcibly displaced persons. In *M.K.*, the Court examined the extensive material describing the situation at the Terespol checkpoint before concluding that the practice revealed systematic border refusals. In *Moustahi*, a pattern of arbitrary state conduct regarding the return of unaccompanied minors contributed to the finding of violations. Similarly, in *Čonka v. Belgium*, the Court noted that the

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44. *Idem*, paras. 202.

45. *Idem*, para. 203.

46. *Idem*, para. 206.

47. A large number of A4P4 cases have been communicated by the Court and are currently pending, see the list on the Court's HUDOC website, available at: <https://bit.ly/3xHhs0D>



authorities' announcement of specific return practices reinforced the finding of an A4P4 violation.<sup>48</sup> Along these lines, evidence about country practices will have a central role in the Court's assessment in future cases, mostly as an indicator of a general practice of collective expulsions and inaccessible procedures at the borders.

### The applicants' conduct

29. Although it received a lot of attention following *N.D. and N.T.*, the "own conduct" element is not a new addition in the Court's assessment of A4P4 cases and is one of the various factors that the Court will consider.<sup>49</sup> As seen in the most recent A4P4 case law, this element may come into play where it has been established that legal means of entry were available and the applicant did not make use of them without any cogent reasons for not doing so. The judgments analysed above underline that the applicants' conduct will help the Court assess the general situation at the time of expulsion but their conduct related to the nature of entry will not be the most decisive element in this assessment.
30. More specifically, in *N.D. and N.T.*, the use of force was frequently referred to and the ensuing disruption of public order may have influenced the Court's scrutiny of Spanish practices. Generally, in the cases that were decided following *N.D. and N.T.*, the applicants did not resort to disruptive means of entry, therefore, the Court made some references to unlawful entry but did not consider this element central. In *Asady*, the applicants were given access to a border procedure, identification steps were recorded, and individuals from the same group were channeled into the asylum procedure. The reference to the applicants' unlawful entry is minimal. In *Moustahi*, the entry circumstances were not discussed at all.

### Cogent reasons for not choosing legal entry

31. Where legal means of entry existed but the applicants did not use them, the Court will assess whether cogent reasons prevented them from accessing such entry means. The absence of cogent reasons "[...] *could* [emphasis added] lead to this being regarded as the consequence of the applicants' own conduct, justifying the lack of individual identification."<sup>50</sup> *N.D. & N.T.* provides only a vague reference to the possible existence of cogent reasons for not entering lawfully.<sup>51</sup> In reality, such reasons abound in the context of forced displacement and may be similar to the ones that make existing border and Embassy avenues ineffective. Where cases concern direct removals of people with specific vulnerabilities, issues of lawfulness may arise in the absence of specific procedural guarantees, as the generally available legal means of entry may be inaccessible for such groups of people and the vulnerability could be a reason for not choosing them. Lack of safety in the country of origin, or transit, can justify urgent entry into the territory of the destination state through the use of unlawful means.<sup>52</sup> However, arguably, in these cases *non-refoulement* considerations will come into play and due to the absolute nature of *non-refoulement* under the Convention, the cogent reasons for not using the legal avenues will be immaterial.
32. The most problematic aspect of the concept is that these reasons should be somehow attributable to the state refusing entry for a violation of A4P4 to occur.<sup>53</sup> This element, if either narrowly construed or in practice applied in isolation from the Convention guarantees (in particular, those under Article 3), cannot effectively address the complex aspects of forced displacement and contribute to regional jurisprudence that remains compliant with international human rights law. This has been one of the most questionable findings in *N.D. and N.T.*, where the Court stated that, even if there had been obstacles to accessing the border point, these would not have been relevant for the assessment because they were not the responsibility of Spain.<sup>54</sup> It remains to be seen how objective reasons that

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48. *Conka v. Belgium*, Application no. 51564/1999, 5 February 2002, para. 62, available at: <https://bit.ly/3bj8LAG>

49. See ECHR, Guide on Article 4 of Protocol No. 4 – Prohibition of collective expulsion of aliens, 30 April 2021, para. 9, available at: <https://bit.ly/3zmB7EJ>

50. *Ibid.*

51. *N.D. and N.T. v. Spain*, paras. 201, 220

52. Although the A4P4 test does not seem to differ, it should be noted that a different test will apply depending on whether the person is removed to their country of origin, or to a third country. See, EDAL, ECtHR, *Ilias and Ahmed v. Hungary*, Application no. 47287/15, 21 November 2019, paras. 124-141, available at: <https://bit.ly/3xqWS4b>

53. *N.D. and N.T.*, para. 218.

54. *Idem.*, para. 221.

obstruct access to the border and are not attributable to the respondent State will be assessed by the Court. In its jurisprudence thus far, the Court has relied on its principle of individual assessment and has examined the overall circumstances of the case, as discussed above. By analogy, any assessment of whether cogent reasons affected the availability of legal means of entry should be a rigorous one, in line with the established guarantees of the Court in expulsion cases.<sup>55</sup>

33. Arguably, the concept also mirrors the Court's requirement to exhaust *effective* domestic remedies under Article 35 ECHR before turning to the Court and there are good reasons to analyse it on this basis.<sup>56</sup> The use of argumentation that is analogous to the one that applicants include in their admissibility submissions regarding the inefficacy of a remedy that they did not exhaust could contribute to the shaping of A4P4 case law in a more consistent direction. Using this approach, the Court would have to examine whether cogent reasons absolved the applicants of their obligation to use the legal means of entry and whether the State's assessment considered such reasons when acting on its duty to offer individualised procedures under A4P4. It should be noted that, in any case, the role of A4P4 is ancillary and the Court would use it following an assessment of *non-refoulement* risks, in particular, under Article 3 ECHR. Consequently, if the assessment of Article 3 risks is carried out correctly, the cogent reasons factor would not have a bearing on the prevention of treatment contrary to the Convention.
34. If this approach is followed, any requirement to prove that the obligation to use legal means of entry has been discharged due to the existence of cogent reasons should not pose a disproportionate burden on the applicants by ignoring flight and border realities. This is particularly important for people arriving at the border, as they are often found in a position of significant disadvantage, either because of flight-related factors or due to the situation at the border. A comprehensive assessment would be in line with the Court's established jurisprudence on admissibility, according to which personal circumstances, as well as the legal and political context, are all relevant when assessing the effectiveness of domestic remedies and the obligation to exhaust them.<sup>57</sup>
35. Consequently, where the A4P4 test is applied by the Court, and an assessment is conducted of whether the applicants could/should have chosen legal means of entry, evidentiary requirements should follow the approach that the Court generally takes when examining Article 3 complaints. In this sense, the Court will have to rely on the importance of considering "[...] all the difficulties which an asylum-seeker may encounter abroad when collecting evidence [...]", including the benefit of the doubt.<sup>58</sup>

## 2. THE APPLICABILITY OF THE JUDGMENT IN THE DOMESTIC CONTEXT

### 2.1. The ratification of Article 4 Protocol 4 ECHR

36. The impact of the *N.D. & N.T.* judgment is evidently not relevant in domestic contexts where Protocol 4 is not itself applicable. The Protocol has not been signed or ratified by Greece and Turkey and has not been ratified by Switzerland and the United Kingdom.<sup>59</sup>
37. Regarding the applicability of *N.D. and N.T.* to EU Member States that have not ratified Protocol 4 (Greece), the non-ratification is an important element of any discussion of the impact and applicability of the Court's conclusions in *N.D. & N.T.* As discussed above, the Court clarified that Article 3 remains applicable regardless of any A4P4 findings, and despite the absence of a right to asylum in the ECHR

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55. See, by analogy, where Article 13 is combined with Articles 2, 3 and A4P4: Sharifi and others, paras.240-243 and *Hirsi Jamaa and others*, paras. 201-207, available at: <https://bit.ly/3vtIEhP>

56. Giulia Ciliberto, A Brand-New Exclusionary Clause to the Prohibition of Collective Expulsion of Aliens: The Applicant's Own Conduct in *N.D. and N.T. v Spain*, Human Rights Law Review, 2021, 21, 203–220, pp. 216-217, available at: <https://bit.ly/33E9BDX>

57. ECHR, Practical Guide on Admissibility Criteria, February 2021, para. 107, available at: <https://bit.ly/3vUxsuK>

58. EDAL, ECtHR, *J.K. v. and Others v. Sweden*, Application No. 59166/12, 23 August 2016, para. 97, available at: <https://bit.ly/3wqMKsp>

59. Chart of signatures and ratifications of Treaty 046, Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto, Status as of 18/05/2021, available at: <https://bit.ly/2RsKwJx>

legal order.<sup>60</sup> Therefore, the situation at Greece's land borders with Turkey is governed by Article 3 ECHR and the Court's established jurisprudence, i.e., the absolute obligation to respect the principle of *non-refoulement* by providing effective opportunities to raise claims of treatment prohibited by the Convention and by conducting an individual assessment of such arguable claims regardless of any other circumstances.

## 2.2. Legal means of entry following N.D. & N.T.: the judgment of the Spanish Supreme Court

38. Although the Court stopped short of proclaiming a positive obligation for states to establish legal means of entry under A4P4, the existence of available and effective entry options played a central role in *N.D. & N.T.* Recent Spanish jurisprudence has indicated the way in which the judgment's findings may provide the basis for an interpretation that secures the availability of legal pathways.
39. In October 2020, the Spanish Supreme Court ruled in a case concerning the transfer to Spain of a third-country national who had applied for international protection at the Spanish embassy in Greece.<sup>61</sup> The applicant's daughters and wife had already been granted subsidiary protection in Spain.<sup>62</sup> In ruling that the transfer had to be made, the Supreme Court relied on the Spanish government's submissions in *N.D. & N.T.*, where the Spanish authorities reasoned that national law provides a valid legal pathway in cases where an asylum applicant's physical integrity is at risk.<sup>63</sup> According to the judgment, the *prima facie* assessment of the fulfilment of the conditions of the relevant domestic provisions must be performed by the Spanish ambassadors, who also grant the documents that allow for the transfer to Spain.

## 2.3. The guarantees of EU law

40. For Member States of the European Union, EU primary and secondary law offers significant guarantees against *refoulement*. Article 78(1) Treaty on the Functioning of the European Union (TFEU),<sup>64</sup> foresees the establishment of a Common European Asylum System (CEAS) that is based on the 1951 Geneva Convention and the principle of *non-refoulement*. The Charter of Fundamental Rights of the EU (CFREU),<sup>65</sup> applicable and binding when Member States implement the CEAS, guarantees the right to asylum and the prohibition of collective expulsion and other acts of *refoulement* under Articles 18 and 19 respectively. Article 4 CFREU also prohibits torture and inhuman or degrading treatment. More specific procedural arrangements to ensure the obligation of *non-refoulement* is observed by Member States are found in the different CEAS legal instruments<sup>66</sup> and the Return Directive (RD).<sup>67</sup>
41. When third-country nationals apply for asylum at the borders of any of the EU Member States, Member States are bound to comply with the provisions of the Asylum Procedures Directive (APD).<sup>68</sup> The Directive provides the relevant guarantees for effective access to an asylum procedure in full respect of the principle of *non-refoulement*.<sup>69</sup> Article 6 ensures effective and prompt access to asylum by establishing a broad notion of authorities that can receive requests for asylum and providing

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60. ECtHR, *N.H. and others v. France*, Application nos. 28820/13 75547/13 13114/15, 2 July 2020, para. 155 – 156, available at: <https://bit.ly/3uZRFQ2>

61. Supreme Court, Decision 1327/2020, Appeal no. 4989/2019, 15 October 2020, available at: <https://bit.ly/3bxfalG>

62. For a more extensive summary of the case, you can read the summary of judgment for the ELENA Weekly Legal Update, available at: <https://bit.ly/3yh8bNO>

63. *N.D. and N.T. v. Spain*, para. 224.

64. Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union - Consolidated version of the Treaty on the Functioning of the European Union - Protocols - Annexes - Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007 - Tables of equivalences, Official Journal C 326, 26/10/2012 P. 0001 – 0390, available at: <https://bit.ly/3yl7uDg>

65. Charter of Fundamental Rights of the European Union, available at: <https://bit.ly/3obQM4q>

66. European Commission, Common European Asylum System, available at: <https://bit.ly/3w4OUNK>

67. Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, available at: <https://bit.ly/2Rh80v>

68. Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, available at: <https://bit.ly/3tH2rcx>

69. Recital 3, APD.

specific modalities and strict time limits. The CJEU has employed a contextual interpretation of the article to emphasise that one of the objectives of the APD is to ensure “[...] access that is as straightforward as possible [...]” and that third-country nationals without a legal right of residence should be able to benefit from sufficient procedural guarantees to support their asylum case.<sup>70</sup>

42. For Schengen area countries, the Schengen Borders Code<sup>71</sup> regulates the crossing of the Union’s internal and external borders. A refusal to grant entry under the SBC has to be made in full respect of the relevant EU asylum *acquis*. Along these lines, Article 13 SBC foresees the application of specific provisions relating to asylum in the context of potential entry refusal.

## IV. CONCLUSIONS

43. The *N.D. & N.T.* judgment provoked an intense debate on the Strasbourg Court’s future stance on the rights of displaced people and on the way that governments may interpret the judgment’s findings and apply it to situations different from that assessed in the judgment. However, the *N.D. and N.T.* approach has a specific scope of application and does not deprive the Convention system of guarantees against treatment prohibited by the Convention, including under Article 3.
44. The requirement for legal means of entry remains important under A4P4 as the Contracting State will have to prove that procedural arrangements are indeed in place, they are accessible in practice, and they function properly. Where such arrangements exist, the Court employs a case-specific approach to examine how the combination of different factors can discharge an obligation under A4P4, i.e., either that of the domestic authorities to conduct individual assessments or that of the applicant to make use of legal entry options. The balance is delicate and the Court’s most recent A4P4 judgments reveal that the jurisprudence has not yet been unequivocally established.
45. Future judgments will provide more opportunities for the Court’s stance to take on a more nuanced and solid character. The *N.D. and N.T.* judgment introduced certain assessment criteria for the examination of collective expulsion cases but numerous guarantees remain applicable at every border and for every applicant:
  - » The assessment test and guarantees, in particular those under Article 3 ECHR, apply to every case related to expulsions at the border and concerning applicants with an arguable claim of treatment contrary to the Convention, regardless of their conduct. The assessment test under A4P4 is ancillary to the one under Article 3 and cannot be used to undermine the effectiveness of the latter. In jurisdictions where Protocol 4 has not been ratified, the applicable test is the one under Article 3.<sup>72</sup>
  - » The Court examined the specific circumstances of the *N.D. and N.T.* case and elaborated on criteria that are relevant for the assessment of similar cases without suggesting automatic application of the judgment in all border expulsion cases where entry is unauthorised; the subsequent A4P4 case law is consistent with this approach.
  - » The availability and effectiveness of legal means of entry remains a key procedural guarantee under A4P4. The mere existence of border crossing points or Embassy procedures cannot absolve states of their obligations under the Article to ensure that third-country nationals at the border can benefit from effective opportunities for submitting arguments against the removal.
  - » Cogent reasons for not choosing available and effective legal means of entry are an important consideration but constitute only one of the elements that the Court will consider in its assessment. Other circumstances, personal elements, and the general context at the time of the alleged

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70. CJEU, Case C-36/20 PPU VL, 25 June 2020, paras. 62-64, available at: <https://bit.ly/3ff3LhL>

71. Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), available at: <https://bit.ly/3uXeWm1>

72. It should be noted that the ECtHR has held that non-refoulement protects ‘the fundamental values of democratic societies’ amongst which it has included the prohibition of torture and other cruel, inhuman or degrading treatment or punishment under Article 3, the right to life under Article 2 (*F.G. v. Sweden*, para. 101), as well as fundamental aspects of the rights to a fair trial and to liberty under Article 6 and Article 5 (*Harkins v. UK*, Application no. 71537/14, 15 June 2017, para. 62-65, available at: <https://bit.ly/3wJeCYU>).

violations will also be included in the assessment.

- » Chaotic situations at the border, systematic practices of unlawful or violent returns including at the border, stated policies of non-entry, and circumstances of vulnerability can all affect the assessment of A4P4 complaints.
- » For third-country nationals at the external borders of EU Member States, EU primary and secondary law offers significant guarantees to access asylum regardless of entry circumstances. Although the right to asylum is not guaranteed under the Convention, it is a part of EU law under Article 18 CFREU.