IMMIGRATION, PERSONAL LIBERTY, FUNDAMENTAL RIGHTS

edited by
MARIA GRAZIA COPPETTA

with the assistance of
LORENZO BERNARDINI

Wolters Kluwer

CEDAM

M.G. Coppetta (Ed.), *Immigration, personal liberty, fundamental rights*

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THE PROTECTION OF THE FUNDAMENTAL RIGHTS OF MIGRANTS WITHIN THE ECHR LEGAL FRAMEWORK. FROM UNIVERSALISM OF GUARANTEES TO LEGAL PARTICULARISM.

LORENZO BERNARDINI

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1. Foreigners and the ECHR

Despite the fact that the legal status of foreigners is strongly influenced by 'the incidence of international and supranational sources',[1] the text of the European Convention on Human Rights (ECHR) does not reveal a specific *animus* aimed at regulating the *status* of 'foreigners', i.e. those persons whose *status civitatis* is not tied to a State Party to the Council of Europe. Indeed, the wording of the Convention does not make it possible to identify any provision that mentions "non-citizens", "aliens", "migrants", within its Section 1, entitled 'Rights and Freedoms'. This is supported not only by the *travaux préparatoires* of the document, but also by the fact that the legal regulation of foreigners was not a particularly relevant issue for the drafters of this text.[2]

Therefore, the ECHR system does not follow the approach of citizenship as a demarcation line for the enjoyment of certain rights, unlike what has happened within the EU legal system (where the concept of EU citizenship is functional in identifying a certain category of individuals—namely, "EU citizens"—who have a

[1] M.C. LOCCHI, *I diritti degli stranieri*, Carocci, 2011, p. 224.

[2] G. CLAYTON, *'The Right to Have Rights': the European Convention on Human Rights and the Procedural Rights of Asylum Seekers*, in A. ABBAS-F. IPPOLITO (Eds.), *Regional Approaches to the Protection of Asylum Seekers. An International Perspective*, Routledge, 2014, p. 191.

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privileged *status* in many areas compared to non-EU migrant-citizens, generally defined as 'third-country nationals'). [3]

However, if we move away from the conceptual level, there are in fact numerous provisions of the Convention that deal with aliens, albeit contained in Additional Protocols: Article 2 Prot. 4 ECHR (on the freedom of movement of migrants legally present in the territory), Article 4 Prot. 4 ECHR (on the prohibition of collective expulsions) and Article 1 Prot. 7 ECHR (on the procedural guarantees to be granted to the expelled person). These norms grant certain prerogatives to non-citizens by virtue of his or her *status*, thereby blurring the halo of universalism that characterises the Convention. On closer inspection, however, citizenship here becomes a criterion for extending the protection of a given subject in the *espace juridique* promoted by the Council of Europe: [4] *ad hoc* measures have been added, with the aim of enhancing the situation of the persons concerned—disengaged from the national community in which they reside—, with particular attention to their *status*.

Conceived as a 'universal legal tool', [5] in contrast to the international instruments in force at the time of its drafting, [6] the

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[3] For instance, EU citizens cannot be subject to the return procedures under Directive 2008/115/EU of 16 December 2008 of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals [OJ L 348, 24.12. 2008, p. 98-107] (so-called Return Directive).

On the contrary, the restriction of the EU citizens' freedom of movement (and possibly the expulsion from the territory of a Member State) can only take place in the event of a threat to 'public order, public security or public health' (Article 27(1), Directive 2004/38/EC of 29 April 2004 of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [OJ L 158, 30.4.2004, p. 77-123]), with strict compliance with the principle of proportionality in relation to the measure that may be imposed (Article 27(2) Directive 2004/38/EC) and should a very specific circumstance occur: 'the personal conduct must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society' (Article 27(3), Directive 2004/38/EC). The formulas used by the EU legislator outline a system that is much more guaranteeing for European citizens than for third-country nationals (the latter being subject, *inter alia,* to expulsion procedures from the territory of the Member State in which they are located on much more general grounds, e.g. in case of 'risk of absconding', as provided for in Article 15(1), Directive 2008/115/EC).

[4] On the process of 'shaping rights' by the Strasbourg Court, see E. BREMS-J. GERARDS, *Introduction*, in E. BREMS-J. GERARDS (Eds.), *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights*, Cambridge University Press, 2013, p. 4 ff.

[5] On this point, see D. LOPRIENO, *"Trattenere e punire". La detenzione amministrativa dello straniero,* Editoriale Scientifica, 2018, p. 67 ff.

[6] The reference is to the International Covenant on Civil and Political Rights

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Convention embarks on an unprecedented path: it strongly affirms the primacy of jurisdiction over citizenship, to the point that nationality, residence or domicile become irrelevant factors in establishing a violation of a right enshrined in the Convention. [7] In other words, what becomes central in the dogmatic approach promoted by the ECHR is the position of the individual (citizen or alien) who is within the jurisdiction of a State Party: it is only because of this that the individual at stake becomes the holder of the rights set out in the Convention. The *status civitatis*, so important in the past, is relegated to the background.

2. *Jurisdiction*

As noted above, the 'jurisdiction test' [8] contrasts with the concept of citizenship as a distinction for the enjoyment of certain fundamental rights. The notion of 'jurisdiction' is found in Article 1 ECHR which succinctly sets forth that State Parties shall ensure to all persons within their jurisdiction the enjoyment of the rights and freedoms enshrined in the Convention. In this way, jurisdiction becomes a criterion for allocating responsibility to national authorities; indeed, it becomes a 'necessary condition'—or '*conditio sine qua non*' [9]—for attributing to a State Party a breach of its obligations under the Convention itself. [10] In other words, for States, 'jurisdiction' means 'responsibility' in Strasbourg vocabulary. [11]

Literally speaking, however, there is no clear definition of that

(ICCPR), which entered into force in 1976. In a 1986 General Comment, the UN Human Rights Committee stated that while the rights enshrined in the ICCPR shall be guaranteed without any discrimination between citizens and aliens, 'exceptionally some of the rights recognised in the Covenant are expressly applicable only to citizens' (HUMAN RIGHTS COMMITTEE, *CCPR General Comment No. 15: The Position of Aliens Under the Covenant*, 11th April 1986, available at the following URL: *https://www.refworld.org/docid/45139acfc.html*).

[7] H. LAMBERT, *The position of aliens in relation to the European Convention on Human Rights,* Council of Europe Publishing, 2001, p. 7.

[8] The expression is retrieved from I. MOTOC-J.J. VASEL, *The ECHR and Responsibility of the State: Moving Towards Judicial Integration: A View from the Bench*, in A. VAN AAKEN-I. MOTOC (Eds.), *The European Convention on Human Rights and General International Law*, Oxford University Press, 2018, p. 204.

[9] *Güzelyurtlu and Others v. Cyprus and Turkey* [GC], App. no. 36925/07 (ECtHR, 29th January 2019), para. 178.

[10] *Ilascu and Others v. Moldova and Russia* [GC], App. no. 48787/99 (ECtHR, 8th July 2004), para. 311.

[11] M. MILANOVIC, *Jurisdiction and Responsibility: Trends in the Jurisprudence of the Strasbourg Court*, in A. VAN AAKEN-I. MOTOC (Eds.), *The European Convention on Human Rights and General International Law,* Oxford University Press, 2018, p. 97 ff.

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concept; the Convention is silent on this point.[12] Nevertheless, since the notion of 'jurisdiction' is the backbone of each State Party's obligation to protect and guarantee the prerogatives contained in the ECHR, it is necessary to define the boundaries of such a concept.

The European Court of Human Rights (ECtHR) has therefore pointed out that the concept of 'jurisdiction' must be recovered from public international law.[13] The starting point is the undeniable fact that each State routinely exercises its coercive power over its own territory:[14] individuals located there are, in principle, subject to the jurisdiction of that State[15] and, as such, must enjoy the rights and freedoms provided for in the Convention. The Court has thus, in a first stage, adopted a territorial approach[16], provided that such a geographical area constitutes a space in which the national authorities are *presumed* to exercise exclusive jurisdiction.[17]

However, the Strasbourg Court has gradually amended its approach and embraced a more dynamic notion of jurisdiction: the so-called 'functional jurisdiction'.[18] It took the form of a strictly defined exception to the presumption that national authorities exercise their coercive powers exclusively within their own borders.

Without prejudice to the latter—which continues to embody the ordinary exercise of jurisdiction by States Parties—the ECtHR held that, in certain situations, national authorities may exercise their 'power' or 'control' over an individual also outside their territory.[19] This was the case, for instance, of the well-known *Hirsi Jamaa and Others* judgement, which concerned the *refoulement* of migrants to Libya, carried out by the Italian authorities in international waters south of Lampedusa. In that case, Italian jurisdiction against the foreigners involved in the operation was held to exist as they had

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[12] K.U. GALKA, *The Jurisdiction Criterion in Article 1 of the ECHR and a Territorial State*, in *International Community Law Review*, 2015(17/4-5), p. 478.

[13] See, for all, *Banković and Others v. Belgium and 16 Others* [GC] (dec.), App. no. 52207/99 (ECtHR, 12th December 2001), paras. 59–61.

[14] *Assanidze v. Georgia* [GC], App. no. 71503/018 (ECtHR, 8th April 2004), para. 139.

[15] *M.N. and Others v. Belgium* [GC] (dec.), App. no. 3599/18 (ECtHR, 5th May 2020), paras. 96–109 and case-law cited therein.

[16] See, *inter alia*, *Al-Skeini and Others v. the United Kingdom* [GC], App. no. 55721/07 (ECtHR, 7th July 2011), para. 131.

[17] There exists a 'territorial presumption', as per *Hirsi Jamaa and Others v. Italy* [GC], App. no. 27765/09 (ECtHR, 23rd January 2012), para. 71.

[18] For a reconstruction of the concept of functional jurisdiction see, for all, V. MORENO-LAX, *The Architecture of Functional Jurisdiction: Unpacking Contactless Control-On Public Powers,* S.S. and Others v. Italy*, and the 'Operational Model'*, in *German Law Journal*, 2020(21/3), p. 385 ff.

[19] The two terms were used, *inter alia,* in *M.N. and Others* (note 15), para. 112.

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been under the 'continuous and exclusive *de jure* and *de facto* control of the Italian authorities'.[20]

Similarly, the Court has held that a State Party holds jurisdiction even in circumstances where it exercises *de facto* effective control (or, in the words of the ECtHR, its 'full authority') over a given territory, despite an alleged emergency situation at the border: this was the well-known case of *N.D. and N.T. and Others*, whose *thema decidendum* concerned the *refoulement* of foreigners attempting to cross the border between Morocco and the Spanish enclave of Melilla, in North Africa.[21]

By virtue of the evolutionary jurisprudence briefly recalled here, the concept of 'functional jurisdiction' has proved to be a valuable tool for defining the situation of certain foreigners who may find themselves at the borders of States Partiesand seek to enter their territory for a variety of reasons (e.g. to seek international protection). Notably, with regard to migrants rejected at the border—whether by land or sea—the assessment of a State Party's jurisdiction should be understood as a 'normative threshold and practical condition for [the recognition of] fundamental rights'.[22]

The numerous cases brought before the ECtHR by aliens—in different situations such as international waters,[23] border areas[24] or airport transit zones[25]—unequivocally show that the Court has based its decisions on the degree of intensity of the control actually exercised by the State authorities over the 'non-citizen', to the point that jurisdiction—in keeping with the universalist structure that characterises the Convention–– has been considered to exist whenever the migrant (*rectius*: the individual) comes into contact, in any way, with the authorities of a State Party.

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[20] *Hirsi Jamaa and Others* (note 17), para. 81. Moreover, the Court notes that the disputed events had indeed taken place in international waters, but on board of military vessels flying the Italian flag (para. 76).

[21] *N.D. and N.T. v. Spain* [GC], App. no. 8675/15 and 8697/15 (ECtHR, 13th February 2020). For a comment see L. Bernardini, *Respingimenti "sommari" alla frontiera e migranti "disobbedienti": dalla Corte di Strasburgo un* overruling *inaspettato nel caso* ND e NT c. Spagna, in *Cultura giuridica e diritto vivente*, 2020, pp. 1–13.

[22] In these terms, see S. Besson, *The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to*, in *Leiden Journal of International Law*, 2012(25/4), p. 863.

[23] See, for instance, *Medvedyev and Others v. France* [GC], App. no. 3394/03 (ECtHR, 29th March 2010), paras. 62–67.

[24] Recently, *A.A. and Others v. North Macedonia*, App. no. 55798/16 *et al.* (ECtHR, 5th April 2022), paras. 57–64.

[25] *Amuur v. France*, App. no. 19776/92 (ECtHR, 25th June 1996), para. 52.

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3. Territorial control

The analysis carried out so far concerns the 'point of view' of the migrant, i.e. the person who typically complains about having his or her fundamental rights breached by the allegedly unlawful conduct of the State concerned. The migrant claims jurisdiction, as a means of enforcing the ECHR guarantees in his or her favour. However, as can be easily understood, this claim is not considered "absolute".

As a matter of fact, States Parties typically seek to avoid being brought before the ECtHR to answer for the conduct of their own authorities towards 'non-citizens', who are deemed alien to the national community. With regard to the latter, States usually claim the right to control and protect their own territory from 'external' interference, a concept that is tailored to the situation of migrants.[26] The ECtHR has therefore been able to develop extensive case-law on this issue.

As can be inferred *ictu oculi*, the claims of the migrants and those of the States Parties are equivalent and conflicting: they are the concrete manifestation of the clash—which has never ceased and which today is gradually returning to the centre of the doctrinal debate—between the nature of fundamental rights (the so-called "universalism of rights") and "national sovereignty". The latter is the ideological 'hard core' and the ontological basis of the State's authority, through which coercive power is exercised on the territory, *a fortiori vis-à-vis* those who do not belong to the community of *cives*.[27] Against the backdrop of this contrast, it is possible to accept Zaccaria's observations: 'tying rights strictly to the State and making them dependent on the set of public institutions inevitably entails the loss of universality [...] If one wants to establish which rights are and can be considered truly fundamental, one can only refer to an anthropology of the person that sees in the dignity of the latter an inalienable, inviolable and unavailable character'.[28]

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[26] This is a 'prominent manifestation of their sovereignty', according to M. PICHOU, *'Crimmigration' and Human Rights: Immigration Detention at the European Court of Human Rights*, in V. FRANSSEN-C. HARDING (Eds.), *Criminal and Quasi-criminal Enforcement Mechanisms in Europe: Origins, Concepts, Future,* Hart Publishing, 2022, p. 251.

[27] See, M. FLYNN, *Immigration Detention and Proportionality*, Global Detention Project Working Paper No. 4, 2011, p. 10 ff. and, for an interdisciplinary perspective, M. INGHILLERI, *National Sovereignty versus Universal Rights: Interpreting Justice in a Global Context*, in *Social Semiotics*, 2007(17/2), p. 195–212. Notably, 'universality' represents a 'challenge' for the affirmation of fundamental rights according to A. ALGOSTINO, *I diritti umani e la sfida dell'universalità*, in *Rev. do Direito*, 2016(49/2), p. 4–21.

[28] G. ZACCARIA, *Universalità e particolarismo dei diritti fondamentali*, in *Persona y Derecho*, 2018(79/2), p. 149.

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At the heart of the problem, therefore, is the claim by national authorities to the right to control their own territory, from which the right to take criminal or administrative measures against foreigners would be derived. Can such a claim undermine the universal nature of fundamental rights? In answering to this *vexata quaestio*, the Strasbourg Court has adopted a 'balancing' approach, recognising the sovereignty aspirations of the Contracting States while firmly reaffirming the binding nature of the guarantees enshrined in the Convention.

Firstly, within the ECHR legal framework, it cannot be 'underestimated the Contracting State's concern to maintain public order, in particular in exercising their right [...] to control the entry, residence and expulsion of aliens'.[29] This is '*un principe de droit international bien établi*',[30] which in the view of the ECtHR, seems to be linked to the need to maintain public order in each State.[31] A few years later, the Court defined the State's prerogative as an 'undeniable sovereign right to control aliens' entry into and residence in their territory'.[32] The adjective 'undeniable' reinforces the idea that, within this *champ juridique*, the State enjoys a wide margin of manoeuvre, as the Strasbourg Court itself would later state *expressis verbis* in a 2019 decision: the sovereign prerogative can be exercised by states 'at their discretion' (*sic*!).[33] More specifically, it should be recalled that the States' prerogative to control its territory incorporates the 'right of States to establish their own immigration policies, potentially in the context of bilateral cooperation or in accordance with their obligations stemming from membership of the European Union'.[34] Moreover, the entitlement to take 'measures'—it is not specified what kind of tool (criminal or administrative, for

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[29] *Moustaquim v. Belgium*, App. no. 12313/86 (ECtHR, 18th February 1991), para. 43.

[30] *Abdulaziz, Cabales and Balkandali v.* the *United Kingdom*, App. no. 9214/80 *et al.* (ECtHR, 28th May 1985), para. 67. The consolidation of this principle in public international law has been emphasised several times in the ECtHR case-law (see, for instance, 27 May 2008, *N. v. United Kingdom* [GC], App. no. 26565/05 (ECtHR, 27th May 2008) para. 30. and *Hirsi Jamaa and Others* (note 17), para. 113).

[31] Indeed, in *Moustaquim* (note 29), para. 43, the Court had emphasised this fact, which would serve as a teleological basis for the sovereign prerogative of territorial control. See, most recently, *Zakharchuk v. Russia*, App. no. 2967/12 (ECtHR, 17th December 2019), para. 46.

[32] *Amuur* (note 25), para. 41.

[33] *G.B. and others v. Turkey*, App. no. 4633/15 (ECtHR, 17th October 2019), para. 146.

[34] See *N.D. and N.T.* (note 21), para. 167, which recalls, by analogy, *Sharifi and Others v. Italy and Greece*, App. no. 16643/09 (ECtHR, 21st October 2014), para. 224: '*Sans remettre en cause ni le droit dont disposent les États d'établir souverainement*

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example)—against migrants who circumvent the entry restrictions imposed by a Contracting State[35] should also be regarded as established.

As mentioned above, this is only one side of the coin of the ECtHR case-law on territorial control. Yet, it is a side that is particularly "weighty" in the overall analysis of the issue, as it is the expression of a solid normative framework in favour of the sovereign prerogative to control its borders, through measures aimed at controlling the entry, stay and expulsion of foreigners.

Nevertheless, the Strasbourg Court has repeatedly pointed out that States can only exercise this power '*sans préjudice des engagements découlant pour eux de traités, y compris la* Convention'.[36] In this regard, it has been rightly observed that the '*déférence de la Cour à l'égard du principe de souveraineté nationale est néanmoins tempérée par le fait qu'il existe au bénéfice de tous les êtres humains, y compris les irréguliers, un certain nombre de droits intangibles*'.[37] As a matter of fact, such rights are enshrined in the Convention—which acts as a limit to the exercise of sovereign prerogatives—but also in relevant international treaties, such as the 1951 Geneva Convention on the Status of Refugees. Thus, the guarantees deriving from these normative texts constitute '*important limitations*' to the possible abuse of States' prerogatives.[38] For instance, reference can be made to the peremptory prohibition of collective expulsions—provided for by Article 4 Prot. 4 ECHR, Article 19(1) of the EU Charter of Fundamental Rights and Article 22(1) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families—or the principle of *non-refoulement*, as defined in Article 33(1) of the Geneva Convention.[39]

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leur politique en matière d'immigration, éventuellement dans le cadre de la coopération bilatérale, ni les obligations découlant de leur appartenance à l'Union européenne [...]'.

[35] *Ilias and Ahmed v. Hungary* [GC], App. no. 47287/15 (ECtHR, 21st November 2019), para. 213 *in fine*.

[36] The statement—first made in *Abdulaziz, Cabales and Balkandali* (note 30), para. 67—has since been echoed in subsequent case-law (see, for instance, *N.* (note 30), para. 30 and *N.D. and N.T.* (note 21), para. 167).

[37] S. SLAMA-K. PARROT, *Étrangers malades: l'attitude de Ponce Pilate de la Cour européenne des droits de l'Homme*, in *Plein Droit*, 2014(101/2), p. I.

[38] L.S. BOSNIAK, *Human Rights, State Sovereignty and the Protection of Undocumented Migrants under the International Migrant Workers Convention*, in *The Int'l Migr. Rev.*, 1991(25/4), p. 743.

[39] See *infra* Part IV, L. BERNARDINI, *The guarantees provided for the foreigners in the European Convention on Human Rights legal framework.*

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4. Ad hoc measures (referral)

It is in this context that a final rather fundamental aspect of the complex relationship between the guarantees protected by the Convention and the *status of* foreigners comes to the fore. In fact, the 'counter-limits' to the exercise of the national prerogatives mentioned above have not, however, prevented the Contracting States from exercising their sovereignty by imposing deprivation of liberty measures against 'non-citizens'; indeed, the use of detention measures against 'irregulars' has typically been considered a '*complementary aspect of that sovereign* power'. [40]

Notably, this approach has proved to be influential in relation to the European Union (EU) law in this area. The current regime and forthcoming reforms relating to administrative detention measures, together with a comparative reference to the ECH, will be the subject of further specific analysis. [41]

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[40] M. PICHOU, *supra* note 26, p. 251.

[41] See *infra* Part II, L. BERNARDINI, *Detained, criminalised and then (perhaps) returned: the future of administrative detention in European Union law*, with specific regard to detention for the purpose of return.

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