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**THE RELATIONSHIP BETWEEN THE PROHIBITION OF
REFOULEMENT AND THE PROHIBITION OF COLLECTIVE
EXPULSION IN THE CONTEXT OF ACCESS TO TERRITORY:
Standards of the European Court of Human Rights and their
relevance for the Legal System of the Republic Of Serbia****

Abstract: *This article examines the relationship between the prohibition of refoulement contained in Article 3 of the European Convention on Human Rights and the prohibition of collective expulsion of aliens guaranteed by Article 4 of Protocol No. 4. After identifying common and distinctive elements of the two provisions, the author tests the main hypothesis that the prohibition of refoulement and the prohibition of collective expulsion are separate prohibitions with an independent existence but that they are intertwined in a variety of ways in the specific context of access to territory. The analysis has led to the conclusion that, despite the open questions that remain, the linkage between the two provisions can be used for corrective purposes, particularly in light of the recent lowering of standards by the ECtHR in relation to the prohibition of collective expulsion. It is also suggested that the difference between the positive obligations contained in the two ECHR articles has no significance for the authorities acting on the ground. As the protection afforded by the two prohibitions is complementary, national authorities must ensure that both border practices at and outside the means of legal entry comply with the ECHR standards in relation to both provisions.*

Keywords: *refoulement, collective expulsion of aliens, access to territory, European Court of Human Rights, means of legal entry, border practices, Serbia.*

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1. Introduction

Article 3 of the European Convention on Human Rights (hereinafter: the ECHR, the Convention), which prohibits torture and, implicitly, *refoulement*, has long dominated cases concerning the denial of access to the territory of Contracting Parties by persons in need of international protection. More recently, however, the practice of the European Court of Human Rights (hereinafter: the ECtHR, the Court) in relation to Article 4 of Protocol No. 4 (prohibition of collective expulsion of aliens) has become increasingly important. Given that the conditions for access to the territory are not identical when the application is examined in relation to Article 3 or Article 4 of Protocol No. 4, and that the Court has often examined the existence of a violation of both provisions of the ECHR in the same case, the question arises as to their interrelationship. The Court itself stimulated the debate on the relationship between the prohibition of *refoulement* and the prohibition of collective expulsion. After briefly stating in *Sharifi* that the relationship between the interpretation of the scope of Article 4 of Protocol No. 4 and the scope of the principle of *non-refoulement* “*ne sont pas non plus dépourvus d'intérêt*”,¹ in the controversial decision of the Grand Chamber in *N. D. and N.T. v. Spain*, the European Court, in considering the violation of Article 4 of Protocol No. 4 in the context of access to the territory, considered it crucial to examine whether the means of legal entry were available, “in particular with a view to claiming the protection of Article 3” of the Convention.² Such an approach by the Court initially encouraged the judges to refer in their concurring and dissenting opinions to the question of the relationship between the principle of *non-refoulement* and the prohibition of collective expulsion, while later the doctrine timidly began to show interest in the matter. The fact that the understandings are contradictory requires a comprehensive examination of the relationship between the two provisions.

After outlining the essential differences between the principle of *non-refoulement*, as implied in the prohibition of torture, and the prohibition of collective expulsion, the study focuses on their interrelationship in the context of access to territory. On the basis of an analysis of the relevant case-law of the European Court of Human Rights, the paper examines whether the examination of the risk of *refoulement* upon entry into the territory is an obligation of the Contracting State only when the Court examines the application in the context of Article 3 of the Convention, whether such an obligation also arises from Article 4 of Protocol No. 4, and whether the existence of these risks determines the standards for access to the territory when it comes to the application of the prohibition of collective expulsion. These considerations are used to test the main hypothesis

1 *Sharifi et autres c. Italie et Grèce* [2014], § 211.

2 *N.D. and N.T. v. Spain* [2020], § 211.

on which the paper is based. It examines the claim that the prohibition of *refoulement* and the prohibition of collective expulsion are separate prohibitions with an independent existence but that, in the specific context of access to territory, they are intertwined in a variety of ways. The paper also criticizes certain standards of access to territory that have emerged in the recent practice of the Court in cases of collective expulsion, and points to the importance of the corrective role of the principle of *non-refoulement*. Finally, the last part of the paper provides an overview of the legal framework of the Republic of Serbia relevant for access to the territory and points out the importance of the identified international standards for the actions of Serbian authorities.

2. Comparison of the prohibition of *refoulement* under Article 3 ECHR and the prohibition of collective expulsion: similarities and differences

Similarities and differences between the prohibition of return (as implied in Article 3) and the prohibition of collective expulsion of aliens (as guaranteed by Article 4 of Protocol No. 4) can be identified at two different levels.

2.1. General overview

At a general level, while they have some elements in common, there are other components and features that constitute the *differentia specifica* of each of the provisions.

As far as similarities are concerned, both '*refoulement*' and 'expulsion' are interpreted in the same way and cover not only return once a person is already on the territory of a State but also non-admission to the territory, regardless of whether such measures are taken on the basis of a formal decision or through specific action by State authorities.³ Both provisions contain a negative obligation for the State not to return/not to reject a person who is exposed to a certain risk and a positive obligation to determine whether such a risk exists for the person in question. Therefore, both Articles 3 and 4 of Protocol No. 4 have a strong procedural connotation, as they require States to "ensure procedures entailing the adequate scrutiny of permissibility of expulsion (...) in light of the respective alien's individual circumstances" (Boková, Bražina, 2021: 93). They both apply territorially and extraterritorially (Kim, 2017: 51, Scuto, 2018:13).

However, the list of differences is much longer. While the prohibition on return under Article 3 applies whether a person is returned individually or in a group, and regardless of the wider political context in the expelling country, being expelled together with other aliens is a constitutive element of the prohibition

3 *N.D. and N.T. v. Spain* [2020], §§ 166-188.

on collective expulsion, whereas the circumstances of the expulsion and the existence of a general policy may play a decisive role in finding a violation of Article 4 of Protocol No. 4.⁴ The primary purpose of the two provisions is also different. The prohibition of *refoulement* contained in Article 3 is intended to protect persons from decisions and actions leading to return/non-admission to the territory where there is a risk that a person would be subjected to torture, inhuman or degrading treatment if returned or refused admission. On the other hand, Article 4 of Protocol No. 4 aims to ensure that expulsion does not take place unless there is a “reasonable and objective examination of the particular case of each individual alien of the group”.⁵ Two further distinctions can be derived from the above. First, the prohibition of *refoulement* protects only persons who are eligible for some form of international protection, whereas the prohibition of collective expulsion protects any alien, and thus any migrant, who attempts to enter the territory of the State Party. Therefore, Article 3 is usually qualified as “a form of complementary protection covering a wider category of refugees beyond the 1951 definition” (Ristik, 2017: 115; similarly: Oudejans, 2018: 616), but it should also be noted that Article 4 of Protocol No. 4 further expands the categories of persons to whom protection is granted. Second, the scope of Article 4 of Protocol No. 4 is broader than that of Article 3. While Article 3 only provides protection if a person would be subjected to ill-treatment upon return or if they are refused entry to the territory (Von Sternberg, 2014: 345), Article 4 of Protocol No. 4 is not necessarily linked to the risk of ill-treatment. Other risks, i.e. risks of violation of other rights and concerning specific categories of persons, also count, even if they do not amount to ill-treatment (Di Filippo, 2020: 486-490). In other words, the prohibition in Article 3 is concerned with the treatment to which a person would be exposed in the country of destination or neighbouring country, whereas the provision in Article 4 of Protocol No. 4 is concerned with the acts and procedures of the expulsion country (Di Filippo, 2020: 485-486). Last but not least, the two prohibitions differ in their legal nature. The absolute nature of the prohibition of *refoulement* derives from the absolute nature of the prohibition of torture. However, views on the nature of the prohibition of collective expulsion are divided. While some judges⁶ and authors do not question its absoluteness, arguing that the provision is “formulated in absolute terms” (Di

4 As rightly remarked by Carlier and Leboeuf (2020: 459), “(T)he mere fact that a group of aliens is being expelled does not imply that a collective expulsion is taking place as long as the particular situation of each member of the group was duly taken into consideration. But the control of the Court is particularly strict when expulsion are the result of discriminatory policies that specifically target a given group of aliens”.

5 See: *Andric v. Sweden* [1999], p. 4; *Čonka v Belgium* [2002], § 59.

6 See: the Partly Dissenting Opinion of Judge Serghides in the case *Khlaifia and Others v. Italy*, paras. 10-26.

Filippo, 2020: 499) and that “Article 4 is expressed as an absolute and non-derogable prohibition” (Crawford, 2013: 349-350), others point to the Court case law, which will be discussed in detail in the next section, suggesting that there are conditions that must be met for the prohibition to apply, implying that the prohibition is not absolute (Alinikula, 2021: 27). Two comments can be added to the existing doctrinal debate on this issue. First, an analogy can be drawn with the right to life, which is absolute only with regard to arbitrary deprivation of life. This means that the collective expulsion of aliens could be considered absolute only in cases of arbitrariness in the conduct of the competent authorities leading to the expulsion. Secondly, the Court has significantly departed from the high threshold established in its early case law for examining the arbitrariness of expulsion and has introduced conditions that have lowered the standards that must be met in order for the actions of the state authorities to be considered contrary to Article 4 of Protocol No. 4. Instead of its early insistence that each person in the group be given the opportunity to present arguments against his/her expulsion (Heijer, 2013: 284-285), the Court has recently provided for circumstances in which a lack of individual examination will not be considered a violation of the prohibition on the collective expulsion of aliens. Such a development does not support the claim that the prohibition is without exception.

2.2. Similarities and differences between Articles 3 and 4 of Protocol No. 4 specifically relating to access to territory

Both Articles 3 and 4 of Protocol No. 4 aim to ensure access to international protection (Kakosimou, 2017: 167) and, by extension, access to territory. In this sense, they both contain procedural safeguards that should make it possible to distinguish those in need of international protection from others who do not need protection from a foreign state. However, although due process is a common feature of both articles, they differ in the precision with which procedural safeguards are determined by the Court, as well as in the scope of positive obligations of Parties towards persons seeking to enter their territory.

As an essentially procedural provision, one would expect the procedural elements of collective expulsion of aliens to be more developed than those contained in Article 3. Nevertheless, the only element identified by the Court is an effective opportunity for each member of the group to present reasons against his/her expulsion (Scuto, 2018: 11), which seems to include an identification procedure⁷ but does not imply the right to an individual interview.⁸ It goes without saying how imprecise such a qualification can be, and how many situations can

⁷ *Hirsi Jamaa and Others v. Italy* [2012], § 185.

⁸ *Khlaifia and Others* [2016], § 248.

in reality fall between the two poles of simple identification and a thoroughly conducted interview.

On the contrary, when a case is examined under Article 3, the obligations of States are much more precise. On the basis of recent ECtHR case law, two scenarios can be distinguished. If a person expresses an intention to seek asylum at the border and/or indicates a risk of persecution and/or ill-treatment, the competent national authorities are obliged to initiate an asylum procedure in order to verify the existence of the alleged risks.⁹ However, if the person does not indicate the risks he/she would face if returned/rejected, the national authorities are obliged not only to establish *proprio motu* the reasons for which the person seeks to enter the territory but also to assume that the reason for entering the territory is the need for international protection,¹⁰ regardless of “whether the applicants had been carrying documents authorising them to cross the Polish border or whether they had been legally admitted to Polish territory on other grounds”.¹¹

However, and this seems to be the main difference, the conditions that need to be met in order for the person to have access to the territory are not the same when Article 4 of Protocol No. 4 is applied, and they differ depending on whether the access to the territory was made by legal means of entry or not. In the first case, the standards for access to the territory are exactly the same as those established by the ECtHR case law on Article 3.¹² However, and this is where the problems begin, when persons attempt to enter the territory illegally, the Contracting Party is no longer required to conduct an objective and reasonable examination of the circumstances of each member of the group; the availability of legal means of entry and cogent reasons for illegal entry thus become substitute standards (Čučković, 2022: 138-142). Although in *N.D. and N.T.* the Court limited the applicability of the new criteria to exceptional cases involving the presence of a large number of persons, the use of force, situations beyond the control of the State and a threat to public security,¹³ a year later in *Shahzad v. Hungary* the Court applied the same two criteria (the availability of means of legal entry and cogent reasons for not using them) to a case which was not exceptional in the sense that it did not involve a large number of persons, the use of force, a situation beyond the control of the State or a threat to public security.¹⁴

9 *M.A. and Others v. Lithuania* [2018], § 115.

10 *M.A. and Others v. Lithuania* [2018], §§ 107, 115, *M.K. and Others v. Poland* [2020], § 174.

11 *M.K. and Others v. Poland* [2020], § 178.

12 *M.K. and Others v. Poland* [2020], §§ 204-210.

13 *N.D. and N.T. v. Spain* [2020], §§ 206-232.

14 *Shahzad v. Hungary* [2021], § 61.

Two problems can be identified on the basis of the ECtHR case law outlined above. Firstly, it appears that the imperative of an individual decision on return/refusal of entry, taking full account of the individual circumstances of the person concerned, is being replaced by an assessment of the abstract possibility of requesting protection at the official border crossing. Secondly, procedural guarantees in case of refusal of entry no longer protect every person, but only two categories: persons who attempt to enter the territory at the official border crossing point and persons who have entered the territory illegally, but only if there were no legal means available or it is presumed that they were not effective, or if the person had compelling reasons to cross the border illegally despite the existence of legal means (Čučković, 2022: 141). Giving priority to the manner in which a person enters the territory and suppressing the relevance of the examination of individual circumstances and the risks that the person would face if not admitted seriously undermines the level of protection that Article 4 of Protocol No. 4 is supposed to guarantee and introduces radical changes in the previous perception of the essence of the prohibition of collective expulsion of aliens. In light of this lowering of previously established standards, the relationship between Article 4 of Protocol No. 4 and Article 3 seems more relevant than ever.

3. Relationship between Article 3 and Article 4 of Protocol No. 4 and its implications for States' duties

Since recent ECtHR jurisprudence appears to suggest that the fact that a person is in need of international protection is irrelevant to the examination of an application under Article 4 of Protocol No. 4, and that the examination of his/her individual circumstances, including the risks to which he/she would be exposed if returned/not admitted, should depend on the abstract criteria of “availability of legal means of entry” and “cogent reasons” for illegal entry, the next section of the paper examines the potential influence that a relationship with Article 3 ECHR may have on such an interpretation of the prohibition of collective expulsion, particularly from the standpoint of the developed positive obligations of states towards asylum seekers deriving from Article 3 (Graf, Katsoni, 2021: 160). An attempt will be made to interpret the scarce messages sent by the Court and to debate with the rare judges who have addressed the issue in their dissenting and concurring opinions, followed by an analysis of the possible consequences of examining a case from the perspective of both provisions or only one of them. Finally, a possible explanation is offered for the recent lowering of the standards of access to the territory under Article 4 of Protocol No. 4 and the potential of its relationship with Article 3 to restore those standards to an appropriate level.

3.1. *Indications provided by the Court and its judges*

After igniting the debate on the relationship between Articles 3 and 4 of Protocol No. 4 in the *Sharifi* case by simply stating that such a relationship was not devoid of interest,¹⁵ the Court linked the two provisions in the *N.D. and N.T. v. Spain* case by stating that its task in examining whether Article 4 of Protocol No. 4 had been violated was to ascertain “whether the possibilities which (...) were available to the applicants in order to enter Spain lawfully, in particular with a view to claiming protection under Article 3, existed at the time”,¹⁶ a *dictum* to which the Court has since regularly referred.¹⁷ More importantly, however, in the same judgment in *N.D. and N.T.*, the Court emphasized that this “does not call into question (...) the obligation (...) for the Contracting States to protect their borders (...) in a manner which complies with the Convention guarantees, and in particular with the obligation of *non-refoulement*” and “for the benefit of those in need of protection against *refoulement*” to have “the possibility of gaining access to the procedures laid down for that purpose”.¹⁸

In her partly dissenting opinion to the *N.D. and N.T.* Judgment, Judge Koskelo, while disagreeing with the majority of judges that Article 4 of Protocol No. 4 was applicable to the facts of the case, confirmed that there was a link between that provision and the prohibition of *refoulement*.¹⁹ However, Judge Koskelo seems to have interpreted this link in the narrowest possible sense, that Article 4 of Protocol No. 4 should only apply in situations where persons seeking access to the territory are at risk of *refoulement* if they are not admitted.²⁰ This position has three major flaws. Firstly, if Article 4 of Protocol No. 4 were to apply only to those at risk of *refoulement*, the provision would be meaningless since such protection is covered by Article 3, which sets higher standards and much more precise positive obligations on States Parties. Secondly, even if the link between the two provisions were to be interpreted in this way, it is not clear how, in today’s mixed migratory flows and cases of illegal entry into the territory of groups of persons, it would be possible and feasible for the national authorities to distinguish between those who are at risk of *refoulement* and others who are not, without an individual examination of the circumstances of each member of the group. Thirdly, the risk of *refoulement* is the most serious (but certainly not

15 *Sharifi et autres c. Italie et Grèce* [2014], § 211.

16 *N.D. and N.T. v. Spain* [2020], § 211.

17 *Assady and Others v. Slovakia* [2020], § 58; *M.H. and Others v. Croatia* [2021], §§ 295, 303; *Shahzad v. Hungary* [2021], § 62; *A.A. and Others v. North Macedonia* [2022], § 115.

18 *N.D. and N.T. v. Spain* [2020], § 232.

19 Partly Dissenting Opinion of Judge Koskelo in the case *N.D. and N.T. v. Spain*, paras. 5-7.

20 Partly Dissenting Opinion of Judge Koskelo in the case *N.D. and N.T. v. Spain*, par. 7.

the only) risk to which persons seeking to enter the territory may be exposed once their entry has been refused. This conclusion follows not only from the broader scope of Article 4 of Protocol No. 4 in relation to Article 3 in terms of risks but is also implied by the wording regularly used by the Court: “in particular with a view to claiming protection under Article 3”. In other words, the very essence of the prohibition of collective expulsion of aliens is to ensure that procedural safeguards have been properly applied with a view to giving any alien the opportunity to present the reasons why he/she should not be refused admittance to the territory, the risk of *refoulement* being one of them.

Contrary to Judge Koskelo, Judges Lemmens, Keller and Schembri Orland do not consider the risk of *refoulement* to be a necessary element of the prohibition of collective expulsion. In their joint dissenting opinion in the *Assady* case, the three judges did not limit the scope of Article 4 of Protocol No. 4 to the risk of *refoulement* but to risks that may also qualify a person for other forms of international protection, and thus not necessarily amount to a risk of ill-treatment covered by Article 3.²¹ Furthermore, and in light of the above criticism of the exceptions to the prohibition of collective expulsion as established in *N.D. and N.T.* and confirmed and further extended in the recent cases of *Shahzad v. Hungary, M.H. and others v. Croatia* and *A.A. and others v. North Macedonia*, it is worth noting that the judges considered it “vital” to respect the “limited scope” of *N.D. and N.T.* and relied on the link with the obligation of *non-refoulement* to ensure this.²²

Finally, a third line of reasoning on the relationship between Articles 3 and 4 of Protocol No. 4 is implied in the concurring opinion of Judge Turković in the *M.H.* case. While considering a violation of the prohibition of collective expulsion of aliens, Judge Turković presented the argument of the vulnerability of the members of the group as crucial, stating that their expulsion would be contrary to Article 4 of Protocol No. 4 even if Croatia provided effective means of legal entry and even if there were no cogent reasons not to use such means.²³ The reliance on the vulnerability of applicants, rather than the risk of treatment contrary to Article 3, would suggest that Article 4 of Protocol No. 4 should apply, whether or not there is a link to Article 3. This may be further confirmed by the next paragraph of the concurring opinion, which emphasizes that “the State’s obligations under Articles 3 and 13 of the Convention regarding the expulsion

21 Joint Dissenting Opinion of Judges Lemmens, Keller and Schembri Orland in the case *Assady and Others v. Slovakia*, par. 13.

22 Joint Dissenting Opinion of Judges Lemmens, Keller and Schembri Orland in *Assady and Others v. Slovakia* par. 25.

23 Concurring Opinion of Judge Turković in the case *M.H. and Others v. Croatia*, par. 10.

of asylum seekers remain intact”, regardless of whether the person entered the territory illegally or at an official border crossing point.²⁴

Thus, the Court’s insufficiently developed pronouncements on the relationship between the two provisions have led to diametrically opposed views among its judges. While some hold that the prohibition of collective expulsion necessarily includes the prohibition of *refoulement*, others either see them as completely autonomous and separate provisions or recognize some scope for their linkage. Such a divergence of views confirms the controversy over the relationship between Articles 3 and 4 of Protocol No. 4 and requires further elaboration from the perspective of litigation strategy. In other words, does the choice of the provision allegedly violated determine their relationship?

3.2. How does the litigation strategy determine the link between the prohibition of refoulement and the prohibition of collective expulsion of aliens: three possible scenarios?

Several questions arise as to the practical implications of the link between the two prohibitions. Does the examination of the existence of risks in case a person is refused access to the territory constitute an obligation on the part of the State only when the application is considered in the context of Article 3? Is such an obligation implied in Article 4 of Protocol No. 4? Does recourse to one or both of these provisions determine the content of the prohibition of collective expulsion as regards access to the territory?

Three scenarios are possible. The Court may examine the refusal of access to the territory only from the perspective of Article 3, or it may be asked to examine the violation of both provisions, or it may deal only with Article 4 of Protocol No. 4. The first option will be applied where there is no collective attempt to enter the territory and/or where the decisions to refuse entry have met the standards of an individual examination of the circumstances of each member of the group. In such cases, as noted above, the standards are higher and include a proactive role for the national authorities, since it is their duty to presume that the need for international protection is the reason for access to the territory and to find out what (if not international protection) is the reason for access to the territory.²⁵ Moreover, these obligations apply whether the person has attempted to enter the territory illegally or at an official border crossing point, but they only protect persons at risk of ill-treatment in the event of refusal of entry, not persons who may face violations of other conventional rights. The second possibility is to examine a breach of both provisions. In this case, each provision is examined

24 Concurring Opinion of Judge Turković in the case *M.H. and Others v. Croatia*, par. 11.

25 The case of *M.A. na Others v. Lithuania* may serve as an illustration of this approach.

within its traditional scope and no reference is made to any interrelationship. In other words, since the risk of *refoulement* is to be examined as an element of Article 3, there is no need to include it in the prohibition of collective expulsion of aliens. In such cases, the definition of the prohibition of collective expulsion is returned to its classical meaning as established in the early cases of *Hirsi Jamaa*²⁶ and *Sharifi*,²⁷ and is qualified as an obligation “to prevent States from being able to return a certain number of foreigners without examining their personal circumstances and therefore without enabling them to put forward their arguments against the measure taken by the relevant authority”.²⁸ The third possibility, however, is the most interesting from the point of view of the interrelationship between the two provisions. Whenever the Court examines the application only in the context of an alleged violation of Article 4 of Protocol No. 4, it formally and explicitly introduces Article 3 as an element to be taken into account. It even defines collective expulsion of aliens by reference to Article 3 in cases concerning access to the territory. In *N.D. and N.T.*, the Court held that “Article 4 of Protocol No. 4 (...) is aimed at maintaining the possibility, for each of the aliens concerned, to assert a risk of treatment which is incompatible with the Convention – and in particular with Article 3 – in the event of his or her return and, for the authorities, to avoid exposing anyone who may have an arguable claim to that effect to such a risk”.²⁹ The same reference to Article 3, when examining the application solely from the perspective of Article 4 of Protocol No. 4, was regularly made in subsequent cases.³⁰

Nevertheless, a distinction can be made between two categories of cases in which Article 4 of Protocol No. 4 was the only provision considered in relation to access to the territory. Curiously, the link with Article 3 was introduced in *N.D. and N.T.*, a case involving persons whose “complaints under Article 3 were declared inadmissible by the Chamber” as manifestly unfounded, a circumstance which the Grand Chamber cited as highly relevant to its conclusion that the available legal means of entry were effective for the purpose of claiming Article 3 protection and that the applicants had no valid reasons for not using them.³¹ In essence, the Court sought to provide arguments for the new restrictive criteria it introduced by pointing to the fact that the applicants’ Article 3 protection had been properly assessed, an argument derived from the earlier case-law such as *Sultani v. France*,

26 *Hirsi Jamaa and Others v. Italy* [2012], § 177.

27 *Sharifi et autres c. Italie et Grèce* [2014], § 210.

28 *M.K. and Others v. Poland* [2020], § 201; *D.A. and Others v. Poland* [2021], § 80.

29 *N.D. and N.T. v. Spain* [2020], § 198, 209.

30 *Assady and Others v. Slovakia* [2020], § 58; *Shahzad v. Hungary* [2021], § 62; *M.H. and Others v. Croatia* [2021], § 293, 303; *A.A. and Others v. North Macedonia* [2022], § 112, 122.

31 *N.D. and N.T. v. Spain* [2020], § 206, 226.

in which the Court found no violation of Article 4 of Protocol No. 4 because the expulsion orders had been issued after a proper assessment of the applicants' asylum claims in accordance with the standards of Article 3.³² The argument, which should have served to further emphasise the exceptional nature of the *N.D. and N.T.* criteria for the examination of a claim under Article 4 of Protocol No. 4, became an integral part of the Court's pronouncements in cases concerning access to the territory. Although the controversial criteria of availability of legal means of entry and cogent reasons for illegal entry have subsequently been extended by the Court (in our view recklessly) to cases where applicants' asylum claims have not been examined prior to their return/refusal of entry,³³ the reference to Article 3 in such cases may prove beneficial and serve to fill the gap in standards on access to territory created by the Court in *N.D. and N.T.*

3.3. Pros and cons of linking Articles 3 and 4 of Protocol No. 4 in the context of access to the territory: raising or lowering standards?

Articles 3 and 4 of Protocol No. 4 are separate prohibitions with an autonomous existence. However, in the specific circumstances of access to territory and the resulting obligations of States, the two provisions are intertwined. The link initially seemed to serve the purpose of explaining the restrictive standards for access to territory in Article 4 of Protocol No. 4 in cases of illegal entry. Fortunately, the link remained in later cases of dangerous precedents, in which the Court found no violation of the prohibition of collective expulsion of aliens in cases where applicants' asylum claims were not considered at all before expulsion. Namely, in *A.A. and Others v. North Macedonia*, the Court stated that "where such arrangements exist and secure the right to request protection under the Convention, and in particular Article 3, in a genuine and effective manner", States "may refuse entry to their territory to aliens, including potential asylum-seekers, who have failed, without cogent reasons, to comply with these arrangements by seeking to cross the border at a different location, especially, as happened in this case, by taking advantage of their large numbers".³⁴

Taking into account the restrictive, unclear and insufficiently developed standards that have evolved in the recent jurisprudence of the Court on the prohibition of collective expulsion of aliens (Čučković, 2022: 140-142), Article 3 has the potential to correct the dangerous consequences of the application of the new standards, which entail depriving persons in need of international protection of access to the territory and thus of access to protection.

32 *Sultani v. France* [2007], § 83.

33 Cases *Shahzad v. Hungary, M.H. and Others v. Croatia* and *A.A. and Others v. North Macedonia* may serve as examples.

34 *A.A. and Others v. North Macedonia* [2022], § 115.

On the one hand, as a separate prohibition, Article 3 applies to cases of illegal entry of persons in need of international protection, a category which is no longer protected by Article 4 of Protocol No. 4 in cases where legal means of entry are available and there are no cogent reasons for not using them. On the other hand, as a complementary prohibition, the possibility of claiming protection under Article 3 has become the criterion for assessing the availability and effectiveness of legal means of entry as an element of the prohibition of collective expulsion, a standard that has recently replaced the standard of individual examination of the circumstances of each member of the group. By linking the new criterion of the availability of legal means of entry to the possibility of claiming protection under Article 3, the Court has left the door open to the rigorous scrutiny which protection against ill-treatment must be applied, particularly because of its absolute nature. This does not mean that a violation of the prohibition of collective expulsion of aliens now requires “demonstration of the concerned person’s risk of suffering torture or other prohibited treatments in the destination or neighboring country” (Di Filippo, 2020: 485-486). Rather, it should be understood to mean that states’ practices at the border, especially at legal border crossings, would be rigorously scrutinized in order to meet the high threshold that “the respondent State provided the applicants with genuine and effective access to procedures for legal entry (...), in particular with a view to claiming protection under Article 3”.³⁵ States’ practices outside official border crossings, while not amounting to collective expulsion under the new standards, may still potentially violate Article 3 (Wissing, 2020: 4),³⁶ especially since Article 3 applies “irrespective of the applicants’ conduct” (Thym, 2020: 578-579) and it is a well-established principle of international refugee law that asylum seekers cannot be punished for illegal entry.

4. Serbian normative framework: relevance of international standards for the actions of competent national authorities

Access to the territory of the Republic of Serbia is regulated by three complementary legal acts, each of which has its own scope and applies to different categories of foreigners. As the umbrella act on this issue, the Border Control Act applies to all persons, both nationals and non-nationals, who attempt to

³⁵ *M.H. and Others v. Croatia* [2021], § 303.

³⁶ Ciliberto (2021: 219) finds this situation paradoxical since “the only way to avoid the exposure to risks of irreparable harm upon removal entails an appropriate and reasonable examination of the personal circumstances of each member of the group by patrolling agents. In other words, the substantive guarantees under Articles 2 and 3 of the Convention can be complied solely if the procedural safeguard under Article 4 of Protocol 4 is fully respected”.

enter the territory of the Republic of Serbia.³⁷ According to the Border Control Act, access to the territory is considered legal only when it occurs “at a border crossing point with a valid travel document or another document prescribed for crossing the state border”.³⁸ Exceptionally, it is possible to enter the territory of the Republic of Serbia outside official border crossing points with a permit issued by the Border Police³⁹ or in the event of a natural disaster.⁴⁰ The Aliens Act provides a fairly precise definition of illegal entry and specifies situations in which an alien may be refused entry.⁴¹ According to Article 14 of the Aliens Act, access to the territory of the Republic of Serbia is illegal if it occurs “(1) away from the place designated for crossing the state border; (2) by evading border control; (3) without the travel or other document required for crossing the state border; (4) by using an invalid or forged travel or other document of another person; (5) by providing false information to the border police; (6) during the period in which the protective measure of removal or the security measure of expulsion is in force or during the period of a ban on entry”. Access can also be refused on the grounds listed in Article 15(1) of the Aliens Act. Finally, the Asylum and Temporary Protection Act is the most specific of the three laws as it applies to a single category of foreigners - those who apply for international protection in Serbia.⁴² It does not explicitly regulate the issue of access to territory. However, and most importantly, it guarantees the right to express the intention to seek asylum in Serbia to “an alien who is in the territory of the Republic of Serbia”,⁴³ and provides that an alien has the right to express the intention to seek asylum regardless of whether the entry was lawful or not,⁴⁴ and, as in the case of the Aliens Act,⁴⁵ it guarantees the prohibition of *refoulement*.⁴⁶

Serbia’s legislation applicable to access to the territory is generally assessed as “solid” (Krstić, 2018: 82). However, certain border practices have been criticised by international organisations⁴⁷ and human rights bodies,⁴⁸ and have even been

37 The Border Control Act, *Official Gazette of the Republic of Serbia*, No. 24/2018.

38 Article 12 of the Border Control Act RS.

39 Article 13 of the Border Control Act RS.

40 Article 14 of the Border Control Act RS.

41 The Aliens Act, *Official Gazette RS*, Nos. 24/2018 and 31/2019.

42 The Asylum and Temporary Protection Act, *Official Gazette RS*, No. 24/2018.

43 Article 4 of the Asylum and Temporary Protection Act RS.

44 Article 8 of the Asylum and Temporary Protection Act RS.

45 Article 83 of the Aliens Act RS.

46 Article 6 of the Asylum and Temporary Protection Act RS.

47 The European Commission’s 2022 Progress Report on Serbia remarks that “effective access to the procedure” for asylum seekers needs to be improved.

48 The 2017 Concluding Observations on Serbia’s Third Periodic Report of the Human Rights Committee expressed concern about “reported cases of efforts to deny access to

qualified by the Constitutional Court of Serbia as a violation of the prohibition of collective expulsion of foreigners.⁴⁹ This requires that the aforesaid provisions of Serbian law on access to territory be interpreted and applied in accordance with international standards, as required by Article 18 of the Serbian Constitution.⁵⁰ It is true that most foreigners' attempts to enter Serbian territory outside the official border crossing points can be considered illegal and, therefore, in violation of Articles 14 and 15(1) of the Aliens Act. However, there are exceptions stemming both from other provisions in the relevant Serbian legislation and from Serbia's international obligations.

Firstly, persons in need of international protection are excluded from the application of Articles 14 and 15 of the Aliens Act. On the one hand, Article 2 provides that the Aliens Act does not apply to aliens who have applied for asylum in the Republic of Serbia, which suggests that Articles 14 and 15(1) of the Aliens Act do not apply to them. On the other hand, Article 15(3) of the Aliens Act provides that access to the territory may be granted on humanitarian grounds and "if it is required by Serbia's international obligations", despite the existence of grounds for refusal. Secondly, the exception provided for in Art. 15(3) can only be properly applied if the border police take appropriate measures to assess whether or not a person entering or attempting to enter the territory illegally is in need of international protection, in accordance not only with the standards relating to Article 4 of Protocol No. 4 but also with those established by the ECtHR in relation to Article 3. Third, the provision of Article 4 of the Asylum and Temporary Protection Act should be interpreted in accordance with international standards to include persons who are at the borders (Mole, Krstić, Papadouli, Čučković, Tidona, Valperga, 2019: 46) and not only those who are on the territory of Serbia, as the literal reading of the provision suggests. Such an interpretation of Article 4 of the Asylum and Temporary Protection Act is supported both by the case law on Article 3 and the case law on Article 4 of Protocol No. 4.

5. Conclusion

The difference between the positive obligations contained in Articles 3 and 4 of Protocol No. 4 is only relevant for legal 'acrobatics' in the sense of qualifying acts and facts as violations of the relevant provisions for the purposes of legal

Serbian territory and asylum procedures" and „collective expulsions". The 2021 Concluding Observations on Serbia's Third Periodic Report of the Committee Against Torture noted that "asylum seekers are prevented from accessing the asylum procedure and being identified at an early stage due to insufficient procedural safeguards for the assessment of claims and the granting of international protection, particularly (...) at the border entry points".

49 The Constitutional Court decision UŽ-1823/2017, 29 December 2020.

50 The Constitution of the Republic of Serbia, *Official Gazette RS*, No. 98/2006.

proceedings. It has no significance for the authorities acting on the ground. Considering the complementary nature of the protection afforded by Articles 3 and 4 of Protocol No. 4, it is therefore necessary to ensure that border practices are in line with the standards that have emerged in the Court's practice in relation to both provisions, for at least two reasons. First, this is the only way to ensure that the actions of domestic authorities, both those at the 'means of legal entry' and others that occur outside them, are in accordance with Serbia's international obligations and applicable international standards. This is implicit in the general provisions on the status of international law in the legal system of the Republic of Serbia, as well as in the provisions of the laws on border control and the status of foreigners and asylum seekers. Secondly, and most importantly, it is only through the complementary reading of the norms on the prohibition of *refoulement* and the prohibition of the collective expulsion of aliens that an adequate and complete protection against the risks that a person may face in case of refusal of entry can be ensured, in particular because of the absolute nature of Article 3.

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**ОДНОС ИЗМЕЂУ ЗАБРАНЕ ПРОТЕРИВАЊА И ЗАБРАНЕ
КОЛЕКТИВНОГ ПРОТЕРИВАЊА У КОНТЕКСТУ ПРИСТУПА
ТЕРИТОРИЈИ: СТАНДАРДИ ЕВРОПСКОГ СУДА ЗА ЉУДСКА ПРАВА
И ЊИХОВ ЗНАЧАЈ ЗА ПРАВНИ СИСТЕМ РЕПУБЛИКЕ СРБИЈЕ**

Резиме

Члан 3. ЕКЉП дуго је доминирао у случајевима који су се тицали ускраћивања приступа територији држава уговорница лицима којима је потребна међународна заштита. Међутим, последњих година је за изградњу стандарда у вези с приступом територији од све већег значаја и пракса Европског суда у вези с чланом 4 Протокола број 4. С обзиром на околност да услови за приступ територији нису истоветни када се представка разматра у вези са чланом 3. или чланом 4. Протокола бр. 4, поставља се питање њиховог међусобног односа. Ауторка је била подстакнута да испита ово питање кратком констатацијом Суда у предмету Шарифи да однос између тумачења поља примене члана 4. Протокола бр. 4 и домашаја начела *non-refoulement* није без значаја и накнадним редовним укључивањем разматрања члана 3. у контексту испитивања доступности начина легалног уласка, новог стандарда уведеног у контроверзној пресуди Великог већа у случају Н.Д. и Н.Т.. Након излагања основних и добро познатих разлика између начела *non-refoulement* и забране колективног протеривања, у раду се испитује тврдња да су забрана протеривања и забрана колективног протеривања одвојене забране које имају самостално постојање, али које су, у специфичном контексту приступа територији, међусобно вишеструко повезане. У раду се износи и критика појединих стандарда које је у вези с приступом територији изнедрила скорија пракса Суда у случајевима колективног протеривања, те указује на корективни значај начела *non-refoulement*. Такође, у раду се пружа преглед правног оквира Републике Србије релевантног за приступ територији

и указује на то како треба тумачити поједине одредбе српских прописа да би њихова примена била у складу с међународним стандардима.

Кључне речи: *протеривање, колективно протеривање странаца, приступ територији, Европски суд за људска права, начини легалног уласка, праксе на граници, Србија.*