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INTERNATIONAL PROTECTION AND SOVEREIGNTY: THE COMPLICATED BALANCE BETWEEN INDIVIDUAL RIGHTS AND NATIONAL SECURITY

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Alejandro Gómez García
Captain of the Guardia Civil
Master in Operational Security Management
Law Degree
alejandrogomezg@guardiacivil.es
ORCID: https://orcid.org/0000-0003-0162-4213

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ORCID: https://orcid.org/0000-0003-0162-4213

INTERNATIONAL PROTECTION AND SOVEREIGNTY: THE COMPLICATED BALANCE BETWEEN INDIVIDUAL RIGHTS AND NATIONAL SECURITY

Abstract: The aim of this article is to analyse the current legal status of some of the most relevant concepts in the field of the protection of national borders, as well as their sociopolitical context and legal scope, with the ultimate aim of supporting and promoting the development of a doctrinal debate that is as hot in its positions as it is complex in its context: ensuring an adequate balance between the guarantee of the Fundamental Rights of individuals passing through European borders and the exercise of the sovereign powers inherent to States. Thus, first of all, a detailed examination will be made of the most important notions in the field of border security, establishing the field of study from a scientific point of view. Immediately afterwards, from a legal perspective, we will study the implications of the most important pronouncements made by the judicial bodies (fundamentally international) that have dealt with the matter, as well as the position of international doctrine and practice. And finally, in the light of the analyses presented, a series of conclusions will be offered that are coherent with the findings made.

Resumen: En el presente artículo se pretende analizar el estatus jurídico que ostentan, en la actualidad, algunos de los conceptos más relevantes dentro del ámbito de la protección de las fronteras nacionales, así como su contexto sociopolítico y su alcance jurídico, con el fin último de fundamentar e impulsar el desarrollo de un debate doctrinal tan candente en sus posturas como complejo en su contexto: Asegurar un adecuado balance entre la garantía de los Derechos Fundamentales de los individuos que transiten por las fronteras europeas y el ejercicio de las potestades soberanas consustanciales a los Estados. Así, en primer lugar, se realizará un examen pormenorizado de las nociones más importantes en el ámbito de la seguridad fronteriza, fijando el campo de estudio desde un punto de vista científico. Inmediatamente a continuación se estudiarán, desde una perspectiva jurídica, las implicaciones que han tenido los pronunciamientos más importantes efectuados por los órganos judiciales (fundamentalmente internacionales) que han entendido de la materia, así como la posición de la doctrina y la práctica internacional. Y finalmente, a la luz de los análisis expuestos, se ofrecerá una serie de conclusiones coherentes con los hallazgos efectuados.

Keywords: International Law, Asylum, Sovereignty, Borders, Immigration.

Palabras clave: Derecho Internacional, Asilo, Soberanía, Fronteras, Inmigración.

ORCID: https://orcid.org/0000-0003-0162-4213

ABBREVIATIONS

AN: Audiencia Nacional

PNA: Palestinian National Authority

CFREU: Charter of Fundamental Rights of the European Union

ECHR: European Convention on Human Rights

IMO: *International Maritime Organisation - International Maritime Organisation*

SAR: *Search and Rescue* - Search and *Rescue*

SOLAS: *Security Of Life At Sea - Safety Of Life At Sea*

ECtHR: European Court of Human Rights

ICJ: International Court of Justice

PCA: Permanent Court of Arbitration

PCIJ: Permanent Court of International Justice

EU: European Union

1. INTRODUCTION

Following the Judgment of the European Court of Human Rights (hereinafter ECHR), Third Section, of 3 October 2017, by which the Spanish State was condemned, in the context of the practice of "rejection at the border", for violation of Article 13 of the European Convention on Human Rights (hereinafter ECHR) and Article 4 of its Protocol No. 4, providing for the payment of compensation to the plaintiffs N. D. (Malian national) and N.T. (Ivorian national) in the amount of 5,000 euros each; there were many voices calling for a complete change of course in the migratory policy developed by the Kingdom of Spain and, by extension, in European migratory policy. In fact, the news made headlines in the press[1] , as well as strong pronouncements by non-governmental organisations[2] and even public law entities[3] , in a country not used to following the judicial chronicle in such detail, and even less so at the international level.

And the situation was not to be taken lightly. The growing concern about the migratory context in the European Union (hereinafter EU) had given rise, over the years, to the emergence of certain debates that, until then, had remained outside the political dynamics, which accepted as something almost anecdotal the sustained increase in the number of third-country nationals residing in the Union, whose number had risen by more than 10% in the three years prior to the aforementioned pronouncement[4] . Of course, the rise of this debate had also been fuelled by the so-called 'Refugee Crisis' of 2015, in which hundreds of thousands of displaced persons from the Middle East (mostly Syrians) had entered European territory as a result of instability and war in the region. And it would definitely not help to ease the tension in European society if some of those involved in various terrorist acts that took place during those years (for example, the Ansbach and Berlin attacks in 2016 or, of course, the Paris attacks of 2015) were subsequently identified as refugees or illegal immigrants, coming from Syria via the eastern Mediterranean route.

But, as if this were not enough, the future held a new major surprise in store that would once again turn the script of European migration policy on its head. In an unprecedented event, the same ECHR that had overturned the Spanish doctrine on border rejections would reverse its decision at first instance and, in a Grand Chamber ruling of 13 February 2020, proceeded to declare, by a majority of 16 to 1, the full legality of border rejections. Then came the pandemic. And with it came the reactivation of the Atlantic migratory route to the Canary Islands, as well as a new boom in migratory movements to the EU in general, which would rise from 125,226 illegal entries detected in 2020 (Frontex, 2021, p. 14) to 380,227 in 2023 (Frontex, 2024, p. 1). Today, immigration occupies a predominant place among the main concerns of the continent's citizens. Thus, the latest "Eurobarometer", published in November 2024, highlights immigration as the second

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[1] RTVE (3 October 2017), *The European Court of Human Rights condemns Spain for two "hot returns" in Melilla*, https://www.rtve.es/noticias/20171003/tribunal-europeo-derechos-humanos-condena-a-espana-por-dos-devoluciones-caliente-melilla/1625420.shtml.

[2] Spanish Commission for Refugee Aid (3 October 2017), *European Court of Human Rights condemns Spain for two 'hot returns'*, https://www.cear.es/noticias/tribunal-europeo-ddhh-condena-espana-dos-devoluciones-caliente-nuestra-frontera-sur/.

[3] Consejo General de la Abogacía Española (3 October 2017), *La Abogacía reitera la ilegalidad de las devoluciones en caliente, tras la condena del TEDH*, https://www.cear.es/noticias/tribunal-europeo-ddhh-condena-espana-dos-devoluciones-caliente-nuestra-frontera-sur/.

[4] Eurostat data, https://ec.europa.eu/eurostat/databrowser/view/migr_pop1ctz/default/table?lang=en.

priority in terms of areas where the EU should take action in the opinion of Europeans, a position supported by 29% of respondents (European Commission, 2024, p. 14), behind only Security and Defence.

However, although the European Commission does not hesitate to respond to these concerns by repeatedly pointing to the "progress" being made in "border management" (European Commission, 2022, p. 5), the fact is that when the factor of safeguarding fundamental rights is introduced into the equation, the situation becomes more complicated. The fact is that policies aimed at reinforcing border control, developed on the basis of the objectives of strengthening the system on which national security rests and guaranteeing the sovereignty of States, entail measures aimed at hindering illegal immigration that, by their very nature, affect the rights of the population concerned. And, in accordance with the basic rules governing the rule of law, in the event that this impact is not suitable, coherent and proportional with respect to the lawful ends pursued, it could represent an illegal intrusion into the most essential core of fundamental rights, especially when they condition key areas such as the right to asylum. This research article aims to analyse this delicate balance, revealing the points of friction between the two conflicting realities through a detailed examination of national and international jurisprudence; as well as clarifying, as far as possible, how far the legality of the actions of civil guards can go in their capacity as border guards.

2. THEORETICAL-METHODOLOGICAL ANALYSIS: STATES, BORDERS AND INTERNATIONAL PROTECTION

2.1. CONCEPTUAL MAP OF THE BORDER ENVIRONMENT

2.1.1. The border concept

The term "border" has almost as many meanings as there are branches of science that have contemplated the study of any concept derived from the intuitive notion of "boundary". From mathematics to political science, from international relations to law. Sanz Donaire (2023, p. 254) states that the term in question comes from the classical Latin term *frons*, the meaning of which would refer to "front" or "façade", and would already offer an idea of the antagonistic or distinctive context in which it would develop from its formulation, strongly linked to the military sphere, to protection against the foreign, the exterior. Indeed, borders have been linked to conflict and confrontation since the Treaty of Mesilim, considered the "oldest treaty on record" (Doebbler, 2018, pp. 374-375), which was nothing more than an agreement regulating the recognition of the boundaries between several Mesopotamian kingdoms around 2500 BC. Curzon (1907) also expressed himself in this sense at the dawn of the scientific study of International Relations, when he stated that border tensions have been the most important factor in conflicts between states (p. 4).

In any case, it is on such etymological antecedents that the current conceptions of frontier are based, among which the Dictionary of Legal Spanish stands out for its discursive power, which states the following:

"Border (Public International Law): *Line marking the outer limit of the territory of a State, understood as the land, sea and air space over which it exercises sovereignty,*

which makes it possible to speak of land, sea and air borders depending on the physical nature of the delimited space.

2.1.2. Borders and sovereignty

According to Lacan's thesis (1966), the understanding of concepts is based on the understanding of the relations that they develop with respect to those previous notions that make up their meaning, by means of a concatenation of references in what the French psychoanalyst knew as "chains of signifiers" (pp. 501-502). In this sense, and taking into account the definition set out in the previous epigraph, it seems evident that we cannot reach a satisfactory understanding of the reality under study without first studying the other technical concept that is at stake in it: that of sovereignty.

A great deal has been written about this concept. Ever since John Bodin's first approach in the sixteenth century, in which national, territorial and theological components were intrinsically linked, the notion of sovereignty has been linked to the existence of a link that goes beyond the mere physical and social extension in which power is exercised, and which in some way transcends the strictly territorial. Perhaps this is why there are not many written sources of international law that offer a crystalline and universal definition of sovereignty. One of the few texts that can give us some clue in this respect is the 1933 Montevideo Convention on the Rights and Duties of States. This treaty offers what, in practice, has ended up becoming a definition of sovereignty, by establishing, in article 1, the basic requirements for a state entity to be considered a subject of international law:

1. Permanent population.
2. Territory determined.
3. Government.
4. Ability to enter into relations with other states.

It is noteworthy that, despite the fact that formally this treaty is only applicable to the very small number of states that signed it (it was agreed at the Seventh International Conference of American States, the direct predecessor of the Organisation of American States), it "has received general adherence from the doctrinal point of view" (Infante Caffi, 2016, p. 66), with its postulates gradually extending -either by direct reference or by reference to an international custom supported by them- to a generality of international actors, including the European Union itself. 66), gradually extending its postulates - either by direct reference or by reference to an international custom based on them - to a generality of international actors, including the European Union itself[5] .

Likewise, international case law has gradually defined the concept of sovereignty, being that, in the absence of an objective title (for example, a boundary treaty signed and observed by all the States concerned), a State is considered to be sovereign over a territory

[5] See, for example, the European Council Conclusions on the Middle East Peace Process of 20 July 2015; or the European Parliament resolution on the role of the EU in the Middle East Peace Process of 10 September 2015; which promote a path towards the recognition of Palestine as a political entity ('two-state solution') on the basis of a permanent population (repeatedly referred to as the 'Palestinian population'), a permanent territory (noting its commitment to the '1967 borders'), an effective government (embodied in the 'Palestinian Authority', hereafter PNA, which is expressly cited) and an ability to enter into relations with other states (citing and recognising the agreements reached with the aforementioned PNA).

when it shows its intention to be so by means suitable for this purpose in international law (e.g., a unilateral declaration) and, at the same time, when the State is capable of exercising this authority in a practical manner, through the effective development of jurisdiction over the territory (Judgment of the Permanent Court of International Justice of April 19, 1955), a unilateral declaration) and, at the same time, when that State is capable of exercising this authority in a practical manner, through the effective development of jurisdiction over the territory (Judgment of the Permanent Court of International Justice of 5 April 1933, pp. 45-27 in fine, 46-28 in limine; Judgment of the International Court of Justice of 17 December 2002, para. 134, pp. 182-61; Award of the Permanent Court of Arbitration of 9 October 1998, para. 239, p. 268; among others).

It will be on the basis of this sovereignty that the legitimate right of states to protect their borders, usually protected under the traditional rules of customary international law and the reference to Article 51 of the United Nations Charter, will be founded; and in the European case it will transcend to the national level, in view of the international obligation that the Schengen agreement entails for its signatories.

2.2. MIGRATION AND ASYLUM

On the other hand, when dealing with concepts related to the rights held by individuals within the border area, it is not unusual for certain misunderstandings to arise (for example, with regard to the notions of "immigrant" and "refugee"), which makes it advisable to study briefly but rigorously such a legal environment, especially with regard to the content and scope of international protection.

2.2.1. The right to asylum and subsidiary protection

The term "asylum" comes from the Greek *asylon*, a word whose translation is close to that of "inviolable place". In its initial conception, it was the condition that was granted to the *hieron*, a kind of special space located within the *témenos*, areas consecrated to the gods (Harris Díez, 2011, p. 70), which were outside the jurisdiction of the state, "and could thus become a refuge for persecuted individuals, escaped slaves or politicians" (Zaidman and Schmitt-Pantel, 2002, p. 45). It was on this background that the Christian dogma of "asylum in the sacred", a status of immunity traditionally conferred on places of worship in order to protect the needy and redeem repentant criminals, was formed (Golmayo, 1866, pp. 88-89), from which in turn the modern concept of the "right of asylum" would later derive.

This modern concept of the right to asylum will be established fundamentally through the proclamation of two texts: the 1951 Geneva Convention relating to the Status of Refugees (hereinafter the Geneva Convention), which establishes the concept of refuge; and its 1967 Protocol, which generalises such protection, initially created for a very limited list of beneficiaries. By combining these two texts, a single definition can be reached which recognises as a refugee or beneficiary of asylum any person who:

"...owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or, being unreasonably situated outside the country of

his former habitual residence, is unable or, owing to such fear, is unwilling to return to it".

On the other hand, although this is the general definition, the fact is that the different models of protection of existing fundamental rights have developed a whole battery of rules that expand and clarify the content of this right. In the European Union, this work is carried out through Directive 2011/95/EU, which establishes core aspects within the process of obtaining refugee status, such as the criteria for assessing the circumstances that may be considered as persecution, while (and this is extremely relevant) introducing into Community law the so-called "subsidiary protection", a guarantee that safeguards the legal situation of those third-country nationals and stateless persons who, "without meeting the requirements for obtaining asylum, [...] there are serious grounds for believing that they are in a situation of persecution", and who "do not meet the conditions for obtaining asylum, [...] there are serious grounds for believing that they are in a situation of persecution".there are substantial grounds for believing that if they were to return to their country of origin [...] they would face a real risk" (art. 4). This subsidiary protection - which, together with the right of asylum, forms what is generically referred to in EU terminology as "international protection" - is designed to extend the indemnity of refugee status to persons at risk of being sentenced to death, subjected to torture or even suffering the consequences of a military conflict.

In any case, all the aforementioned regulations explicitly establish the inapplicability of such protection to those who may be considered perpetrators of serious international crimes (war criminals, genocides, etc.), fugitives of serious common crimes or persons who represent a danger to the security of the host country.

2.2.2. Rights applicable to beneficiaries of international protection

All international protection grants a series of minimum rights to its beneficiaries, although certain accidental aspects of these (time limits, extension, etc.) may vary slightly depending on whether the status granted is that of asylum (more protected) or subsidiary protection (less protected). Furthermore, an important part of these rights will also be exercisable not only by those who have been officially recognised as beneficiaries of any type of protection, but European regulations also recognise their applicability to mere applicants, as long as their case has not been resolved[6] . In any case, there are two basic rights that are intrinsically linked to any form of international protection -including applicants- and whose nature will be decisive in the conflict between individual rights and national security: effective judicial protection and non-refoulement.

2.2.2.1. The right to effective judicial protection

The right to effective judicial protection, understood as the guarantee that citizens have "access to the jurisdiction, the processing of the proceedings, the [reasonable] resolution of the case and the enforcement of the sentence" (Carrasco Durán, 2020, p. 20), within the framework of a fair and impartial judicial system, is not a specific guarantee of the right to asylum, but its scope is universal, and as such it is included in the Spanish Constitution (art. 24) and the Spanish Constitution (art. 24). 20) in the framework of a fair and

[6] For example, and in line with the provisions of Directive 2013/33/EU, the right to access health care (Art. 19), public support (Art. 18) or the labour market (Art. 15).

impartial judicial system, is not a specific guarantee of the right to asylum, but rather its scope is universal, and as such it is included in the Spanish Constitution (art. 24) and in the EU Charter of Fundamental Rights (art. 47), under the permanent reference to the rights to a fair trial (art. 6) and to an effective remedy (art. 13).

However, its impact in the area of the right to asylum has been notable, to the point that Directive 2013/32/EU guarantees (art. 46) access to appeal in asylum procedures, explicitly stating that it must be heard by a "judicial" body. Thus, one of the most recurrent allegations when challenging the actions of the State in the border area has been an alleged lack or precariousness of access to judicial remedies. In this sense, and within the European sphere, the ultimate jurisdictional guarantee of effective judicial protection has been channelled - prior exhaustion of national instances - through recourse to the ECtHR for violation of Article 13 of the ECHR[7] . However, the case law of this court is clear: in order to find a violation of Article 13, there must first be a plausible claim of a violation of any other of the rights guaranteed by the Convention. Although it is not necessary for such a violation to have actually occurred, it has been required that there be such an *arguable complaint* under the Convention - ECHR (Grand Chamber) judgment of 23 February 2012, *Hirsi Jamaa v. Italy*, §197, which, from a first plausible approximation, then makes it possible to compose a reliable account of the facts, given that the Convention is intended to guarantee practical and effective rights, not theoretical or illusory ones - ECHR (Grand Chamber) Judgment of 13 February 2020, Case of *N. T. and N. D. v. Spain*, §171-. It is therefore rare to find isolated violations of Article 13 where no other violation is found, although doctrinally the possibility exists, and indeed has occurred - ECHR (Grand Chamber) Judgment of 8 July 2003, *Hatton and Others v.* United *Kingdom.* Within the field of the right to asylum, this relationship has almost invariably been conveyed through the connection of the infringement with violations of Article 3 of the ECHR[8] and Article 4 of Protocol 4 of the ECHR . [9]

2.2.2.2.2. Right of non-refoulement

For its part, the right to non-refoulement (enshrined in Article 33 of the Geneva Convention and usually referred to as *non-refoulement* in international doctrine) is a basic principle of international protection that implies the guarantee that the beneficiary of protection will not be returned to his or her State of origin or to any other where he or she runs the risk of being persecuted, as long as he or she maintains his or her status. This right extends directly to applicants during the examination of their case and, at the EU level, even to those whose international protection has not been officially granted or has been withdrawn (Art. 14(6) of Directive 2011/95/EU), insofar as 'it is the de facto circumstances of a person, [and] not the official validation of those circumstances, that give rise to Convention refugee status' (Hathaway, 1995, 303-304). And, at the same time, its observance is independent of whether or not the applicant is in a legal situation in the country, a fact which - despite not being explicitly mentioned in the articles of the Convention - has been imposed by means of customary international law and, in the European case, has been established by Article 19 of the CDFUE and Article 9 of Directive 2013/32/EU,

[7] "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.
[8] "No one shall be subjected to torture or to inhuman or degrading treatment or punishment".
[9] "Collective expulsions of foreigners are prohibited".

being endorsed through a repeated and peaceful jurisprudence in this regard in the framework of the European system for the protection of human rights[10] . This means that the right to non-refoulement has been configured as part of the most essential core of refugee rights, in the logic that its systematic violation would mean, in practice, the emptying of the content of international protection.

It is noteworthy that this principle admits an exception: article 33.2 of the Geneva Convention guarantees its inapplicability in those cases in which there are "serious reasons" to consider that the beneficiary or applicant for international protection may be considered "a danger to the security of the country where he is" (art. 33.2). This provision, which reinforces the prerogatives of states in the framework of their legitimate right to protect their borders, has been endorsed, with certain nuances[11] , by international jurisprudence. A good example of this is the judgment of the ECHR (Grand Chamber) of 29 April 1997, *L.H.R. v. France, in the case of L.H.R. v. France. v. France*, in which the court endorsed the deportation of a Colombian national convicted of drug trafficking to his country of origin, on the grounds that his presence posed a "serious threat to public order", despite the applicant's warnings - shared by the now defunct European Commission for Human Rights, and even tepidly by the court itself - that the completion of his deportation could pose a danger to his life.

Finally, one last noteworthy issue is that the development of the principle of non-refoulement has given rise, over time, to the emergence of a complementary principle that has been generally taken up by the most important international legal instruments on the subject: the prohibition of collective expulsions of foreigners. This precept, which some authors such as Kamto (2007) consider (not without controversy) to be a "general principle of international law" (p. 129), has been normativised in the ECHR (Article 4 of Protocol 4) and in the CFREU (Article 19.1). Its content refers to the approach that any expulsion of foreigners must be based on non-arbitrary circumstances, and thus requires an individual assessment of the context of each foreigner.

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[10] Judgments of the ECtHR of 7 July 1989, *Soering v. the United Kingdom* and, in particular, of 15 November 1996, *Chahal v. the United Kingdom*.

[11] For example, the implementation of this precept at the European level should not mean that, by omission, it leads to the violation of Article 3 of the ECHR, which proscribes torture and inhuman or degrading treatment or punishment; A factor which, on the other hand, is applicable to the entire international community, having been considered as an argument of a *jus cogens* nature (Judgment of the International Criminal Tribunal for the former Yugoslavia of 22 February 2001, *Prosecutor v. Dragoljub Kunarac Radomir Kovac And Zoran Vukovic*, §466; or Judgment of the International Court of Justice of 20 July 2012, Questions relating to the obligation to prosecute or extradite, *Belgium v. Senegal*, §99).

3. LEGAL ANALYSIS: CONFLICTING POSITIONS AND COURT RESPONSE

3.1. *HIRSI JAMAA V. ITALY*: THE GENESIS OF A DOCTRINE

On the basis of the aforementioned legislation, successive judicial pronouncements have gradually chiselled out the final regulatory framework which, at least for the time being, governs the complicated balance between legitimate state powers and the safeguarding of fundamental rights. To this end, one judgment stands out above all others which, due to the time frame in which it was handed down and its subsequent political implications, has been an unavoidable reference when it comes to establishing the minimum criteria for action at the border: the Judgment (Grand Chamber) of the ECtHR of 23 February 2012, *Hirsi Jamaa et al. v. Italy*.

Hirsi Jamaa is the name of a Somali national who was part of a group of approximately two hundred illegal immigrants who were disembarked in the port of Tripoli between 6 and 7 May 2009. This disembarkation took place directly from the three Italian State vessels (*Guardia di Finanza* and Coast Guard) which had proceeded, a few hours earlier, to intercept and rescue the group while they were sailing in precarious boats, some 35 nautical miles south of the island of Lampedusa, in the Maltese search and rescue area (hereinafter SAR). As a result of these events, Italy was sued before the ECHR, with a total of twenty-five parties joining the case.

However, what was relevant - for its novelty - in *Hirsi Jamaa* was not so much the application of Article 3 of the ECHR in the context of a return of immigrants - a practice already consolidated in judgments such as *Chahal v. the United Kingdom* - but rather that, for the first time, the court had the opportunity to rule on the rejection of immigrants intercepted in the maritime environment at the same time as assessing the extraterritorial application of the ECHR (Alarcón Velasco, 2015, p. 4). And it did so by delivering a resounding blow to the Italian thesis, as it declared the violation of articles 3 and 13 of the ECHR, as well as article 4 of its protocol number 4, in all cases unanimously.

The core reasoning behind the court's position was as follows:

1. On a general level, the ECHR is applicable insofar as, according to Articles 92 and 94 of the United Nations Convention on the Law of the Sea, the ships on which the events took place are subject to the jurisdiction of their flag State, being a case of "extraterritorial exercise of jurisdiction [...] liable to engage the responsibility of the State".
2. With regard to Article 3, the determining factor was the impossibility of considering Libya as a "*place of safety*" for disembarkation, as the court considered that not only safety from a maritime point of view should be taken into account[12] , but also issues relating to the protection of their fundamental rights (breach of the principle of non-refoulement).

[12] The absence of risk in the concepts related to safety at sea that can be found in the international conventions on the subject (especially in the SAR and SOLAS conventions) mostly refers, by reference, to aspects related to navigational or operational safety (*safety*, safety as protection against shipwreck, against drowning, against the risks inherent in the ship's cargo, etc.). Notwithstanding the above, and in relation to the concept of "*place of* safety" existing in the SAR Convention of 1979, the International Maritime Organisation (hereinafter IMO) itself has ended up integrating nuances that complement this vision, resulting in

3. With regard to Article 4 of Protocol 4, the determining factor was the failure to individualise the expulsion of the immigrants, insofar as they were not identified and it was not assessed whether any of them might have relevant personal circumstances (violation of the prohibition of collective expulsions).
4. With regard to Article 13, the determining factor was the immigrants' inability to have access to an effective remedy against the expulsion decision (infringement of the right to effective judicial protection), a factor that could be assessed in view of the violation of Article 3.

3.2. CASE *N.D. AND N.T. V. SPAIN*: THE LIMITS TO PROTECTION

As discussed in the previous sections, the universality of the right to seek international protection does not imply that such a right can be claimed or exercised in an unlimited manner. The Judgment of the ECtHR (Grand Chamber) of 13 February 2020, in the framework of the case of *N. D. and N. T. v. Spain*, will be but one of the best examples of how nations can, on their own, establish efficient border control schemes that, in turn, are respectful of international humanitarian law, combating the abuse of rights from a guarantee perspective.

Emulating the analysis carried out in the previous section regarding *Hirsi Jamaa*, the present case involves two foreign nationals, N. D. and N. T., who, as part of a group of some 600 people, attempted to storm the border fence in the city of Melilla in the early hours of 13 August 2014. Their attempt was thwarted thanks to the action of the Guardia Civil and the Moroccan security forces, the two plaintiffs were escorted to the other side of the border, an act that will motivate the lawsuit. Subsequently, both actors would participate in two new assaults on the fence, managing to gain illegal access to Spanish territory. It is relevant that one of them would later apply for international protection, although this was denied at all procedural instances.

At this point, the interest of the ruling is twofold. On the one hand, because it was the definitive endorsement of the practice of "*rejection at the border*" (sometimes pejoratively referred to as "*hot return*"): the execution of an immediate return to Morocco of any immigrant caught trying to illegally overcome the border containment elements. And, on the other hand, because it represents a counterpoint to *Hirsi Jamaa*, since both mark the limits of legality from a different perspective: positive in *N. D. and N. T.* (what can be done), negative in *Hirsi Jamaa* (what cannot be done), thus indicating the two boundaries between which border legislation must run. All of this in the context of the existence, in this case, of a lower court ruling that contradicted Spain's arguments, which gave rise to a more detailed process of substantiation by the Grand Chamber in response to the claims of the plaintiffs, who challenged the actions of the border guards for violation of Article 3 of the ECHR and Article 4 of Protocol 4 of the ECHR, as well as Article 13 of the ECHR in relation to the two previous ones.

Thus, the core reasoning underpinning the court's position was as follows:

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texts such as Annex 34 of IMO Resolution MSC.167(78), *Guidelines on the treatment of persons rescued at sea*, in which reference is made to regulations such as the Geneva Convention of 1951.

1. With regard to Article 3, already at the same stage of admission (decision of 7 July 2015), the Court flatly rejects the admissibility of the plaintiffs' arguments regarding the possibility that the principle of non-refoulement (Article 3 ECHR) had been breached by the refusal to return the immigrants to Morocco. Although the legal reasoning is not particularly detailed, it does clearly highlight the absence of evidence to consider Morocco an unsafe place for such purposes, and does not even - as it did in the case of Hirsi Jamaa - consider it necessary to consider the issue in greater depth.
2. With regard to Article 4 of Protocol 4, the Court's position is that a collective expulsion cannot be considered to exist in the context of an action in force triggered by the applicant himself, and which causes "a clearly disruptive situation which is difficult to control and endangers public safety" (§201). This is particularly relevant if we take into account that, in the judgment of the lower court, the Chamber had directly established - without even raising a justification that would affect the merits of the case - a total parallelism of this case with Hirsi Jamaa, despite the fact that they are totally different contexts. Thus, the court provides that such an "individualised examination" to overcome the conceptual obstacle of collective expulsion must be carried out taking into account "the particular circumstances of the expulsion and the 'general context at the time of the facts'" (§197), which in turn allows assessment procedures to be simplified or omitted, especially if this context depends largely "on the applicant's own conduct" (§200) and if the State provides "available legal procedures to enter [the country]" (§208) and "guarantees the right to seek protection [...] in a real and effective manner" (§208) and "the right to seek protection [...] is guaranteed [...]" (§209).in a real and effective manner" (§208).
3. With regard to Article 13, the Court clarifies that no violation of the right to effective judicial protection can be found, also attributing the lack of judicial remedy to "the applicants' own conduct in attempting to enter Melilla without authorisation" (§242).

Finally, an interesting observation on the grounds of the judgment is that, while the Court rejects Spain's thesis regarding the limitation of jurisdiction on the basis of operational criteria -similar to those upheld by Italy in *Hirsi Jamaa*-, stating that the effective exercise of authority that Spain, through the Guardia Civil, exercises from the perimeter of the outer fence inwards (§§107-108), is undeniable, it establishes that the Spanish Government cannot be held responsible for circumstances occurring outside its sovereign territory, through the Guardia Civil from the perimeter of the outer fence inwards (§§107-108), establishes that the Spanish Government cannot be held responsible for circumstances occurring outside its sovereign territory, and in particular those carried out by agents of a third State (§218).

3.3. COMPARATIVE ANALYSIS: THE COMPATIBILITY OF A DISPARATE JURISPRUDENTIAL DOCTRINE

As we have seen, both *Hirsi Jamaa et al. v. Italy* and *N.D. and N.T. v. Spain* represent two cases in which, for a priori analogous conduct (the surrender to non-European authorities of foreigners attempting to illegally enter Community territory), the ECtHR has offered different rulings. And this is fundamentally due to the existence in the *N.D. and*

N.T. case of a common thread that was duly and opportunely claimed by Spain in the framework of the proceedings followed during the aforementioned litigation, and which articulates, from beginning to end, the judgement: the doctrine of "culpable conduct".

The corollary of this reasoning is that the State cannot be held responsible for the fact that immigrants evade legal procedures to enter the country, especially if they "deliberately take advantage of their large numbers and use force" (*N.D. and N.T. v. Spain*, §201). Thus, for this doctrine to be applicable, the reprehensible conduct attributable to the migrants must generate a serious situation, arising from wilful conduct - i.e. conscious of its illegality and possible consequences - that represents an objective danger to public safety, including that of the migrants themselves.

Indeed, the Court's interpretation transcends all the alleged breaches alleged by the applicants, even those which (a priori) are furthest removed from their individual sphere of action. Thus, with regard to the prohibition of collective expulsions of foreigners (Article 4 of Protocol 4 of the ECHR), the ECtHR will situate the differential aspect in the immigrants' possibilities of access to legal procedures for entry into European territory. Thus, in *N. D. and N. T.*, it is repeatedly stated that Spanish law offered various possibilities for the applicants to process their entry into Spain, as well as to apply for asylum[13] (§212), but that these tools were refused (culpable conduct) by the applicants (§231). The same reasoning applies in respect of the right to effective judicial protection (Article 13 ECHR), as the arguments used by the Court of Guarantees are the same (§242).

Having set out these premises, the question inevitably arises: could *the* doctrine of culpable conduct be used, *mutatis mutandis*, for expulsions taking place in the maritime sphere? And, if so, what would need to be changed in the framework of state action in order to do so? The answer to these questions is not trivial. Following *N.D. and N.T.*, the ECtHR has used this doctrine - which, moreover, was not entirely new at the time of its formulation[14] - on a few occasions[15] , although none of them have served to endorse a maritime refusal. However, what is certain is that there is no passage in *N.D. and N.T.* in which the court states that its doctrine is not valid for expulsions of immigrants intercepted at sea. Quite the contrary: the judgment stresses the need for an assessment of the "circumstances of the individual case" (§201). As a result of this, and under the principle *permissum videtur id omne quod non prohibitur*[16] , it seems logical to deduce that the admissibility of such a principle should depend only on the fulfilment of its intrinsic presuppositions; that is, on the existence of real legal tools that allow access to the State of destination and to initiate an asylum procedure before its authorities; as well as on the

[13] The possibility offered by Spanish legislation of accessing certain asylum-related procedures in embassies and consulates (Article 38 of Law 12/2009, of 30 October, regulating the right to asylum and subsidiary protection) is particularly noteworthy, both because of the Court's repeated emphasis on this possibility and because it is not a common practice in other European states (Italy, for example, does not include it in its Legislative Decree of 19 November 2007, on the recognition of international protection).

[14] The ECtHR had already used a precursor approach to this in 1996 in the case of *John Murray v. United Kingdom* - Judgment (Grand Chamber) of 8 February 1996 - when it refused protection to a man convicted of terrorism who alleged that his silence had been used against him in the context of his judicial proceedings. The court ruled that it was he who had chosen to remain silent despite being aware of the consequences that such conduct could entail, and that it was therefore he who had exposed himself to the inference that his silence was prejudicial to him (§56).

[15] Judgment of the ECtHR (Third Section) of 24 March 2020, *Asady and others v. Slovakia*.

[16] "Everything that is not prohibited is considered permitted".

finding of reprehensible conduct on the part of immigrants who, while disregarding the existence of such legal tools, defy the border control mechanisms by means of coercive action. Moreover, both prerequisites must be duly invoked by the state in the judicial process, which Italy failed to do in *Hirsi Jamaa*. None of these prerequisites seems necessarily invincible in a typical maritime scenario in which hundreds of men of unknown origin and background put themselves, their fellow travellers and European border and coast guards in manifest danger by proposing a massive, planned and coordinated departure of boats bound for an isolated territory, which has limited reception capacities, with the consequent risk of collapse - such as Lampedusa. All of this is subject to the need for the coastal state to have an adequately sized diplomatic deployment with powers granted in the field of asylum, which allows it to justify the sufficiency of mechanisms for access to asylum. In this respect, mention should also be made of the community that the EU represents in terms of migration and asylum, which would even make it possible to suggest - although perhaps for this it would be necessary to make further progress in the ever-slowing European integration process - that the existence of diplomatic delegations from other EU countries is an asset that must necessarily be valued for the purposes of adequately weighing up the possibilities of access offered by the litigant state, as it represents an inherent reinforcement of the state's own resources .[17]

And, in line with the above, it is also pertinent to bring up certain inferences regarding the problem of the factual limitations of the state in its international action. Despite the fact that certain authors such as Sánchez Tomás (2018, p. 110) or Martínez Escamilla (2021, pp. 6-7) claim territoriality as the dominant perspective in terms of determining international responsibility, the truth is that both international doctrine and practice (already referred to in point 2.1.2 of this text) point to the need for a practical exercise of territoriality in the determination of international responsibility.2 of this text) point to the need for a practical exercise of authority in that territory in order to be considered sovereign, which is why the court, in its Grand Chamber judgment, amends its ruling at first instance by eliminating or greatly softening the mentions relating to the preponderance of the layout of the border as opposed to the actual route of the fence (included in §53 of the judgment at first instance). Thus, as we have already mentioned, the rejection of the exemption from the general principle of attribution does not hinge on the territoriality of the point where the acts take place, but on the fact that the action is carried out by agents of the signatory state, regardless of where the action takes place. This will be relevant in cases (for example, the events of 24 June 2022 in Melilla) in which Spain has been held responsible for acts carried out by foreign officials in areas which, although formally within the "historical" Spanish border, in practice are located beyond the fence, and therefore no effective control is exercised over them by Spain.

Finally, we must highlight the different treatment that the court gives to the study of possible violations of Article 3 ECHR (prevention of torture and inhuman or degrading treatment) in *Hirsi Jamaa* and in *N.D. and N.T.* Despite the scant justification offered by

[17] After all, it seems obvious to think that, given the pre-existence of a common area of freedom, security and justice, in the framework of which internal borders have been abolished and which has articulated mechanisms for implementing a common immigration and asylum policy, a network made up of each and every one of its embassies and consulates provides candidates for immigration with a much greater, more diversified access platform with a greater number of procedural guarantees than that offered by a separate state. Especially if we take into account the homogeneity implied by European legislation with respect to the recognition, qualification, assessment and resolution of asylum, stay and legal residence procedures, which are common to all its member states.

the decision to reject *N.D. and N.T.* in this regard, it seems clear that the justification for this difference lies, at least for the most part, in the country of expulsion. Part of the doctrine (Del Valle Gálvez, 2018, pp. 25-49; Freedman, 2024, 204-220) has come to put forward theses that come close to a generalised questioning of what has come to be called "border externalisation policies", a concept with which it is necessary to be very cautious. Firstly, because this pejorative term has been used to define what are, in most cases, nothing more than international police cooperation policies in the area of border control, through which capacity building is promoted to strengthen law enforcement in developing countries. Thus, even the very term chosen seems rather unfortunate, since it is difficult to "outsource" border control and law enforcement tasks, which are nothing more than "obligations derived from both conventional and customary law", and therefore the object of "*ius cogens*" (Soler García, 2017, p. 41). And, on the other hand, because irrationally accepting positions tangentially contrary to these policies would jeopardise not only the application of legitimate state measures - the expression of its sovereignty in matters of national security or migration policy - but also the interests of the international community and the protection of human rights: after all, the capacity building of states of origin and transit in vital matters such as the search and rescue at sea of their own compatriots is also an essential part of this cooperation. It follows that such cooperation *per se* cannot contradict the ECHR.

And this is where the truly differential factor in *Hirsi* Jamaa comes in: Libya. In this sense, Libya's situation is certainly idiosyncratic. It is a state that has not signed the Geneva Convention, which has been repeatedly defined by different authors as a "chaos", in which "migrants expelled from Europe were often left to an uncertain fate" (Cole, 2012, p. 6). And this perfectly explains the fears expressed by the court in *Hirsi Jamaa* (§136), on the basis of various reports incorporated into the case (UNHCR, European Commission, Council of Europe, Human Rights Watch, etc., see §33-42). This situation is not comparable to that existing in practically all the states with which Spain has active and reasonably functional repatriation agreements, mainly Morocco and Algeria, states that are part of the European Neighbourhood Policy - which requires, according to Article 8 TEU, sharing the EU's democratic principles - and which have benefited greatly from it, becoming privileged economic and political partners. After all, there is a wealth of judicial pronouncements[18] that explicitly endorse their status as "safe third countries" (see SAN 1441/2018 of 15 March 2018 for the case of Morocco or SAN 3838/2016 of 17 October 2016 for the case of Algeria). And this is a point of great interest not only for the purposes of the return of irregular migrants to their countries of origin, but also in relation to the possibility (endorsed by Article 3(3) of Regulation 604/2013 on the determination of the Member State responsible for the examination of an application for international protection) of referring asylum seekers to centres located in safe third countries during the review of their application. However, this possibility could be the subject - given its

[18] Practically all of these pronouncements come from national spheres, given that the ECtHR avoids categorical pronouncements on the security of states and prioritises a case-by-case analysis, as do the Spanish high courts. On the other hand, several European countries have drawn up lists of safe third countries, including Morocco on some of them, as is the case, for example, in the Netherlands (Immigration and Naturalisation Service, 2018). This practice is gaining ground among European states and is in line with the provisions of the Migration and Asylum Pact, which has introduced this concept in the new Asylum Procedures Regulation (Regulation (EU) 2024/1348), which will start to apply as of 12 June 2026 (Section V, arts. 57 et seq.).

complexity and foreseeable controversy - of a whole separate article, with its corresponding doctrinal debate.

4. CONCLUSIONS

To conclude, we will make a brief synthesis of the doctrine reviewed in the previous chapters, offering some guidelines that describe the findings of greatest interest in the matter under analysis.

Firstly, the most general and obvious conclusion that can be drawn from the above is that numerous social phenomena converge in the border environment, which generate a high level of litigation on the protection of fundamental rights. These processes, all derived from the permanent tension between migration control policies and individual guarantees, require a balance that is often settled in the courts, putting national and international legal frameworks to the test; as well as a series of concepts handled by the doctrine - border, sovereignty, territory, asylum, etc. - which, despite being habitually used in a trivial manner, possess a content of great legal, political, social and even historical power. It is therefore essential that the security forces that provide their services at borders have sufficient knowledge of the legislation that protects them, in order to carry out their duties efficiently, but also with respect for the rights of those who pass through such environments.

On the other hand, it is noteworthy that the majority of these judicial proceedings are substantiated in relation to the violation of very specific guarantees, which are regularly repeated in the pronouncements of the judicial bodies in charge of their prosecution. These are fundamentally the transgression of the principles of non-refoulement and the right to effective judicial protection, doctrines whose safeguard, in the European framework, is enshrined in Articles 3 and 13 of the ECHR; as well as the prohibition of collective expulsions of foreigners, protected in Article 4 of Protocol 4 of the said Convention. These judicial proceedings, however, are lengthy and very complex, and their decisions are often in direct conflict with previous rulings by other courts or even by the same bodies that issue them. For these reasons, it is also essential that the bodies responsible for the representation and defence of sovereign states have a thorough knowledge of international law, and know how to make such doctrines compatible with their domestic law - even proposing the necessary legislative amendments - in order to ensure, as guarantors of the legal system, that the rulings affecting their spheres of representation are in line with international law and practice.

Finally, and in line with the above, the mutability that characterises the interpretation of the international legal order cannot be overlooked. This is not a weakness of the system in itself: the rules, especially in anarchic environments such as this one, are in a permanent process of transformation, and therefore legal operators have no choice but to adapt their positions to existing realities, something that has been done since antiquity, when there were legal figures that were unthinkable in the contemporary world. In this sense, such a volatile scenario as that which governs current world geopolitics requires - with respect for the consensuses inherent to the maintenance of international peace and security, among which is the consideration of the dignity of the individual as an inalienable source of human rights- a certain margin in the interpretation of the norms that govern the obligations of states, a position that is not new in doctrine (Koskenniemi, 2004). In

this way, adequate compliance with these is guaranteed, respecting the will of their promoters while favouring coexistence, thus deepening the development of a prosperous international environment for all its inhabitants.

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