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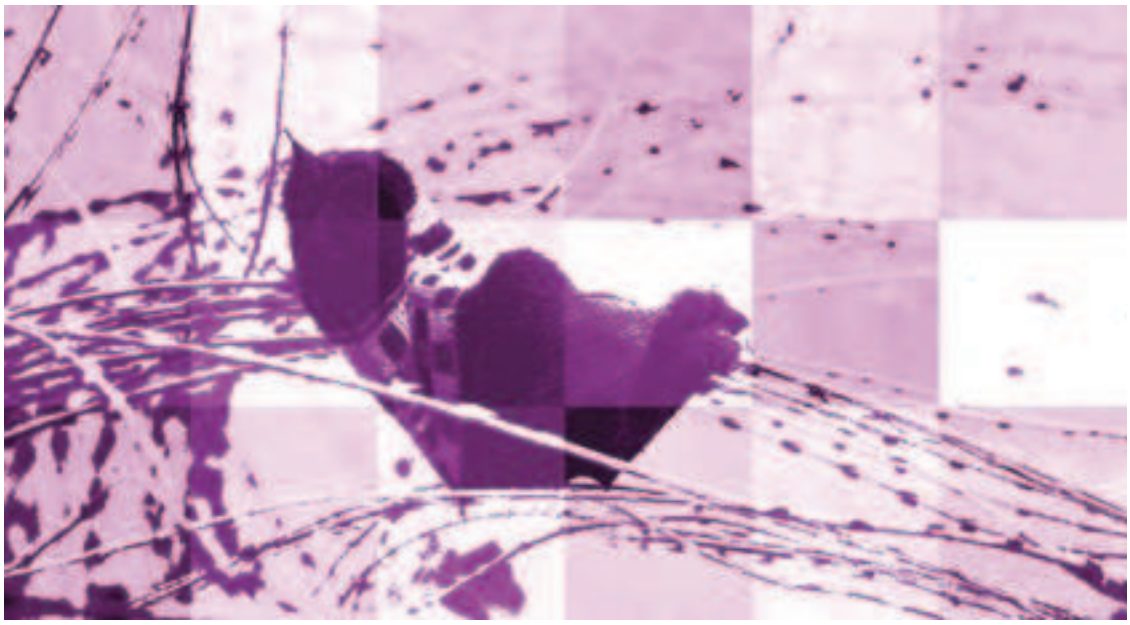
Migration and Deportation in West Africa



Developing Effective Remedies

Edited by

Sam Amadi

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OSIWA is based in Dakar, Senegal, with country offices in Nigeria, Liberia and Sierra Leone.

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Migrant Rights and Migration Control Policies in the Jurisprudence of the European Court of Human Rights: Challenges, Obstacles, and Opportunities for Litigation

Pablo Ceriani Cernadas[1]

I. Introduction

At the turn of the 21st century, the recognition and effective realization of the human rights of migrants is one of the major challenges worldwide to fully achieving universality, a key principle of international human rights law. Both by their status as non-nationals and their status as migrants, migrants have to cope with a wide range of constraints to their basic rights in the countries where they live or transit. This problem is particularly severe in the European context. Indeed, growing restrictive migration policies that have been adopted by European countries in the last decades have increasingly undermined such universal protection.

In order to face this challenge, there is a set of initiatives that main stakeholders (governments, civil society organizations – including migrants associations – UN agencies, trade unions, etc.) could and should develop or strengthen. In regard to civil society institutions, it is well known that an important tool that have been increasingly utilized to promote and protect human rights is litigating before local, national, and regional courts. There is an extensive variety of examples that evidence how litigation may improve levels or rights protection and fulfilment. On the other hand, there is an important range of information that demonstrates the extent of obstacles, problems, challenges, and even perils that human rights litigation may involve, beyond the possibility of losing the case.

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Developing litigation initiatives meant to defend migrants' rights within migration control policies of European countries may involve the necessity of evaluating a wide range of policies and practices which impact several human rights. In this sense, one matter to consider is the existing policies used to deport migrants, both at national and regional level. That is, the variety of mechanisms created by each state (e.g., expulsion, devolution, and return in Spain) and by EU bodies (EU Directive, FRONTEX joint operations, joint returning flights, etc.), as well as the diversity of rights that could be affected by such policies. In addition, the jurisprudence of a particular court or jurisdiction may be a relevant element to be taken into consideration before carrying out a litigating initiative.

In addition, these initiatives could be developed in order to prioritize litigation either before national and local courts of justice or before international human rights mechanisms. In this paper, although we are fairly aware of the extreme relevance of human rights litigation before internal courts[2], I will exclusively focus on the main regional human rights body, that is, the European Court of Human Rights (ECtHR), which jurisdiction has been recognized by all the member states of the Council of Europe. The Court rules its cases based on the European Convention of Human Rights (ECHR) and its Protocols.

The purpose of this document is to identify constraints, challenges, opportunities for litigation based on the judgements that have been adopted by the European Court regarding migrants' rights within migration control policies, particularly through detention and deportation measures. These precedents, and particularly those which have set progressive standards, may not also be relevant for future litigation initiatives before this Court, but also at national and local Courts, as well as for advocacy strategies aimed at improving migrants' rights at different levels. On the contrary, the paper will review several judgements that have set up regressive standards, including some which are far lower than precedents that have been established by other courts (national and regional) and also by the European Court itself on same issues but not regarding migrants.

Of course, the cases that will be analyzed here are not all the judgements that the Court has made on these issues. Doing that would be a huge task that would largely

2 It must be reminded that, on the one hand, courts of justice must implement international treaties in their daily judgements, as any other power of the state; on the other hand, international human rights mechanisms are usually invoked when internal remedies have not been efficient to protect these rights.

exceed the goal of this document. As a key aim is to observe how the European Court have been interpreting migration control policies, the paper is focused on cases linked strictly with human rights involved within procedures meant to sanction breaches to migration law. That is, irregular entry and remaining in the territory without residence permit or after its expiration. Therefore, these comments will not cover cases related to, for instance, deportation based on criminal offences.

As for the human rights issues to be addressed through the ECtHR jurisprudence, will examine the following: Due Process Safeguard; Right to an Effective Remedy; Prohibition of Collective Expulsions; Principle of Non Refoulement; Right to Physical Integrity; Child Rights; Right to Liberty; and Right to Family Life.

Finally, after these standards and precedents have been described (although also briefly within the analysis of those issues) I will make a few comments on litigation strategies before the European Court, as well as some of their challenges and opportunities. In particular, these comments will mainly discuss litigation possibilities regarding deportation of African migrants from European countries, and on how these aspects could be strategically considered in order to increasingly improve such precedents.

II. Migration Policies and ECHR Jurisprudence[3]

It is important to bear in mind that all the judgements that the European Court of Human Rights has made on migration policies have relied upon a key reasoning: "as a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry, residence and expulsion of non-nationals". Therefore, prior to getting into each of the sections on the ECtHR jurisprudence on migrants' rights, it is worthy to make a brief comment on this approach.

A state is formally sovereign for designing and enforcing all public policies, in every matter (health care, security, taxes, justice administration, etc.). As well, states are obliged by human rights treaties that they had ratified – regardless of the matter involved – in relation to all individuals within their jurisdiction. Yet, when other topics are under the analysis of the Court, it does not clarify that states are

3 Most of the content of the following section is an updated translation from Pablo Ceriani Cernadas (2009a), written and published in Spanish.

sovereign to define their own policy. Evidently, this different treatment evidence, on the one hand, shows that despite the fact that international migration has increasingly become a structural element of current global world,[4] it is still treated within some logics closer to the nineteenth century than to the present.

On the other hand, it highlights the extent of challenges that have to be faced when it comes to litigating for migrants' rights before the European Court. In this regard, the principle of state sovereignty has been spread through the Court's judgements related to migration and human rights, as a sort of exception – in some topics – to international human rights obligations and standards. It is true also, as it will be observed, that the European Convention and its protocols contain few articles that may have an impact on such dissimilar treatment. These circumstances, as it will be described below, have influenced the Court decisions on these matters, which in many occasions have led to worrisome restrictive standards regarding migrants' rights.

II.1. Migration Policies and Due Process of Law: Discrimination Based on Nationality and Migration Status

Due process safeguards are critical tools for the effective realization and protection of all human rights, as well as to prevent, to end or to repair its deprivation. For this reason, they have a special protection standard, which states that even under emergency situations those guarantees cannot be disrespected. A fair and impartial process developed by an independent court that respects both parts equal, which allows every person to present his/her evidences and to contradict the evidences presented by the other part, the right to be heard, to obtain a decision in a reasonable period of time, among other guarantees, represents – symbolically and materially – one of the core elements of a constitutional state in a democratic society.

As well, these guarantees have a particular relevance when it comes to the different procedures currently adopted on the field of migration policies. Especially, procedures regarding admission to the territory, obtaining a residence permit, and

4 Indeed, migration root causes are increasingly linked to structural elements of current globalization processes, including international economic and trade system. Both growing disparities among and within countries, as well as labour demand in destination countries, are intrinsically tied with such processes, which, at the same time, have been undermining state sovereignty – but strengthened when it regards to migration control and migrants' rights (see Bauman, 1999).

forced deportation to the country of origin or departure. The wide range of discretionary tactics that states have usually had on migration policies makes these guarantees even more transcendent, in order to ensure a rights-based approach in both the design and enforcement of such policies.

Due process of law within the ECHR has been recognized by article 6.1. In this regard, it has been stressed that this article is aimed at ensuring that each state will provide to everyone an effective access to the courts of justice without unjustifiable restrictions, and to obtain from them a motivated resolution through a process that assure basic guarantees in order to avoid any arbitrary decision which may impact individual rights (Esparza and Etxeberria, 2004:152). Nonetheless, as it will be described below, ECtHR standards on due process of law within migration procedures is considerably poor. Indeed, there is a profuse and polemical Court's interpretation on non application of article 6 of the ECHR within such proceedings. Mainly, this problem is based on two aspects. 1) The content of this article itself; 2) how it has been applied by the Court on migration-related cases.

Regarding the content of article 6.1 ECHR,[5] it must be highlighted that its drafting has been more restrictive than how due process guarantees have been approved in other human rights instruments, such as the Universal Declaration of Human Rights,[6] the African Charter on Human and Peoples' Rights,[7] and the American

5 "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly by the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice".

6 Article 10 UDHR: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him".

7 Article 7.1 Banjul Charter: "Every individual shall have the right to have his cause heard. This comprises: a) The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; b) The right to be presumed innocent until proved guilty by a competent court or tribunal; c) The right to defence, including the right to be defended by counsel of his choice; d) The right to be tried within a reasonable time by an impartial court or tribunal".

Convention on Human Rights.[8] It can be evidenced that while the ECHR mentions civil and criminal rights, the rest of those instruments refer to any kind of process, where human rights might be involved. Consequently, the interpretation of what the court has been doing for decades is influenced by such characteristics, as it will be analyzed further.

On the other hand, the Court has applied this restrictive interpretation to migration procedures, so all migrants might be affected by this criterion. Besides, as it will be explained below, Protocol 7 of the Convention establishes a differentiated treatment based on immigration status of each person. Then, there is also a distinct standard for migrants without legal residence.

Since the *Maaouia v. France* case,[9] the European Court of Human Rights has held that article 6 ECHR is not applicable to cases related to the entry, residence and deportation of foreigners. The Court has stressed that the provisions of the ECHR must be interpreted in the light of the entire Convention system, including the protocols. Consequently, it is understood that article 1 of the Protocol 7 contained enough procedural guarantees to be applied in cases on deportation of migrants.[10] It added that such article of the Protocol has been precisely included because states were aware that article 6.1 ECHR did not apply to that kind of procedures.[11] Afterwards, it has stated that the procedures referring to expulsion from the territory does not concern the determination of a "civil law" for the purpose of article 6.1, regardless that deportation may "incidentally" have important repercussions on private and family life of migrants, as well as on their employment prospects.[12] Finally, it has asserted that those decisions did not concern either the determina-

8 Article 8.1 ACHR: "Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labour, fiscal, or any other nature".

9 Application No. 39652/1998, Judgement 5 October 2000.

10 Article 1, Protocol 7: "An alien lawfully resident in the territory of a State shall not be expelled except in pursuance of a decision reached in accordance with law and shall be allowed: a) to submit reasons against his expulsion; b) to have his case reviewed; and c) to be represented for these purposes before the competent authority or a person or persons designated by that authority".

11 Ibid, para. 36.

12 Ibid, para. 38.

tion of a criminal charge, since in general exclusion orders not classified as "criminals" within the member states of the Council of Europe, but constituted a special preventive measure used for achieving immigration control goals.

Several issues can be raised from this judgement. First of all, as it has been highlighted by the dissenting opinions,[13] it has not been considered that reference to "civil rights" in article 6.1 was not there in opposition to civil law but to criminal law. Furthermore, as the Convention was aimed at protecting peoples rights, its application should cover all types of procedures in which human rights are involved, and particularly in those processes vis-à-vis with public administration, where guarantees of due process are crucial to protect people from discretionary powers of state authorities. Moreover, in spite of that, in most of the processes tied up with migratory questions, particularly those that decide granting residence or expulsion from the territory, we are undoubtedly dealing with the exercise or the restriction of "civil" rights (freedom of movement, family life, private life, among others), the Court drew on abstract aspects (such as the sovereignty of states) to deny the existence of civil rights in such cases, even when it is evident that those procedures can be determinants for either recognition or deprivation of those rights.

Likewise, the Court has denied the evolution experienced by its own jurisprudence on article 6.1, as well as the criterion adopted by other international tribunals (as the Interamerican Court of Human Rights[14]). In fact, in *Martinie v. France*, the ECtHR stated that "the correct approach in accordance with the object and purpose of the Convention is to adopt a restrictive interpretation of the exceptions to the safeguards afforded by Article 6.1".[15] In this sense, it could be assumed that in *Maaouia*'s case the Court has not taken into account the principle *pro homine*, as it has chosen through such a restrictive interpretation.

This criterion can also be questioned from another of the key principles of international human rights law: the principle of non discrimination, as the only people who can be affected by that doctrine are those of foreign nationality. Although it is logical that certain measures of migration policies impact migrants exclusively, what is relevant here is that the position of the Court entails a standard of due

13 Dissenting Opinion of Judges Loucaides and Traja.

14 See, for instance, Interamerican Court of Human Rights, *Juridical Condition and Rights of Undocumented Migrants*, Advisory Opinion OC-17/03, 17 September 2003.

15 Application no. 58675/00, Judgement 12 April 2006, para. 30.

process that harm specifically those people, despite the fact that article 6 does not distinguish among nationals and foreigners. It is true also that the restrictive ECtHR jurisprudence on article 6.1 exceeds the issue of migration, so other matters have been excluded from such protection. Nonetheless, when this interpretation has to deal with other issues, there is no impact on a particular social group. That is, they are on topics which may affect any person which may be involved in a particular circumstance. On the contrary, regarding migration procedures only non nationals could be affected by ECtHR jurisprudence on article 6.1.

The European Court has indicated in numerous opportunities that the ECHR must be interpreted as a "living instrument", hence it should be applied in the light of present-day conditions.[16] However, this assertion has not been appropriately considered on cases regarding due process safeguards within migration procedures. In current times of migration flows towards Europe, their quantity and diversity, as well as the influence of migrant population in European societies in every aspect (social, economic, cultural, and even political), the maintenance of such a restrictive criterion is particularly worrisome. Moreover, it should be reminded that irregular migration is closely linked to increasing restrictive measures adopted by EU countries, and in many cases, it is a decision that is taken in very vulnerable conditions. Therefore, human rights mechanisms should adapt to such challenges and needs, rather than consider them for supporting restrictive approaches.

In spite of the serious and well founded reasons that have been held in the dissenting opinion of *Maaouia* case, as well as other motives signed out above, the European Court has maintained that criterion unaltered until nowadays. In effect, that position has been reaffirmed in further cases as *Lupsa v. Romania.*[17] and *Makuc v. Slovenia.*[18] In these occasions, the ECtHR has added that the procedures that regulate "the citizenship of a person"[19] (understanding the concept of "citizenship" in a restricted form, that is, as synonym of nationality[20]) are among the areas

16 Among others, *Tyrer v. United Kingdom*, application no.5856/72, Judgement 25 April 1978, para. 31.

17 Application no. 10337/04, Judgement 8 June 2006.

18 Application no. 26828/06, Partial decision of admissibility, 31 May 2007.

19 Ibid, para. 186.

20 On the discussion about "citizenship" terminology, and particularly on why this concept should be disconnected from the notion of "nationality" (hence, migrants – at least, permanent or long-term residents - should be considered also "citizens" of the

excluded from article 6.1's scope. In the case *Chair and Brunken v. Germany,*[21] where it was sustained that an expulsion ordered alongside a criminal conviction constituted a double jeopardy (and expulsion procedure had been done without due process), the Court has upheld the same criterion. In *Mabroki v. Sweden*[22] and in *Taheri Kandomabadi v. The Netherlands*[23], the Court applied the same reasoning to asylum procedures.

In addition, as we have mentioned above, the Court have pointed out in *Maaouia* that basic safeguards in due process within migration procedures were assured through article 1 of Protocol 7, rather than article 6.1 ECHR. Nonetheless, this opinion could be questioned for several reasons:

- Article 1 of Protocol 7 refers only to deportation cases, so due process regarding admission to territory and obtaining/renewing a residence permit, would remain out of the scope of both articles;
- Protocols do not have the goal to cover aspects ignored in the ECHR, as the Court had stated, but to strengthen and complement the Convention in specific circumstances;
- This protection could only be invoked in cases that occurred in countries that had already ratified the Protocol;[24]
- Article 1 P7 could be inapplicable if the state alleges reasons of national security or public order;[25] and
- The Court has confirmed that migrants without legal residence are not protected by article 1 P7, as it will be analyzed below.

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countries where they live, work, and study, regardless their nationality), see Balibar (2003), Baübock (2004), Carens (1992), De Lucas (2004), Ferrajoli (1999), Habermas (1999), Mezzadra (2005), and Sassen (2003).

21 Decision of Admissibility, Application no. 69735/01, 14 February 2006.

22 Application no. 22556/05, decision of admissibility, 21 November 2006.

23 Applications no. 6276/03 and 6122/04, decision of admissibility, 29 June 2004.

24 So far (October 2009), four member states of the European Council have not ratified yet the Protocol 7: Belgium, Germany, The Netherlands, and Turkey. Spain has just ratified it in September 2009.

25 Article 1.2 of Protocol 7 asserts: "An alien may be expelled before the exercise of his rights under paragraph 1.a, b and c of this Article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security".

In the cases *Bolat v. Russia*[26] and *Lupsa v. Romania*[27], the Court has stated that the scope of article 1 P7 applies only to foreigners that reside "legally" in the territory of the State. That is, neither article 6.1 ECHR nor article 1 P7 would be available for migration procedures regarding irregular migrants. Hence, the standard settled by the Court for these cases is so low, or better said, so legitimately questionable, that it has been contradicted by the Committee of Ministers of the Council of Europe. Indeed, the Committee has asserted – through the opinion of a committee of experts in the matter – that the safeguards provided in article 1 P7 should be extended and be assured to all the migrants, regardless their migration status. According to the Committee, the *ratione personae* scope of this article is particularly restrictive, so it should be extensively interpreted.[28]

For these reasons, the criterion that has been set by the Court could imply that millions of people who currently live within European countries may be excluded from their territory, or a residence application may be denied, without ensuring basic due process of law safeguards in such procedures. At least, violation of such safeguards might not be invoked before the human rights regional court. Then, in this type of cases it will be the legislation and jurisprudence of every State that will decide to which extent those safeguards will be ensured. Considering the short scope provided by the court, it is reasonable to expect that national legal framework may be broader[29]. The Court standard may also impact on regressive legislation and jurisprudence.

On the other hand, this jurisprudence of the ECtHR is a significantly inferior standard as what exists in other regions, such as within the Interamerican system of human rights. There, both the Interamerican Commission and Court have expressed precisely and repeatedly that due process safeguards are fully applicable to migration procedures, regardless whether migrants were legally resident or not.[30]

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26 *Bolat v. Russia*, para. 76.

27 *Lupsa v. Romania*, para. 52.

28 Council of Europe, Committee of Ministers, Ad Hoc Committee of Experts on Legal Aspects on Territorial Asylum and Refugees, 4 May 2005, Final 20 May 2005, *Comments on the Twenty guidelines on forced return, Guideline 2, commentary*.

29 For instance, in Spain, the Constitutional Court has stated that due process safeguards must be ensured in all migration procedures, independently of the migration status of the person (see, among others, judgements STC 94/1993 and 95/2003).

30 IHR Court, Advisory Opinion OC-18/03, *para.* 121, 124–126.

Actually, while in many human rights matters the Interamerican bodies have been following standards envisaged by the European Court, regarding migration issues (both on due process and other topics), the standards established so far within the Interamerican system is appreciably higher.[31]

However, unlike the posture assumed by the European Court on this subject, the standard set up on the right to an effective remedy (art. 13 ECHR) in order to cope with an exclusion order against migrants is notably wider, as it will be shown next.

II.2. Deportation and the Right to an Effective Remedy

According to article 13 ECHR, everyone whose rights and freedoms as set forth in the Convention are violated shall have an effective remedy before a national authority. Through its jurisprudence, the European Court has recognized that all migrants, regardless of their migration status, are entitled to such right, in case that rights protected by the Convention might have been affected by a deportation order. In *Conka v. Belgium,*[32] the Court has developed the scope of this right as it covers migrants without legal residency (that is, without considering this circumstance). According to the main facts of the case, four Slovaks, who did not have legal residency status in Belgium and whose application for asylum had been refused, were arrested and subsequently expelled collectively. In its judgement, the Court stated that the goal of article 13 consists in requiring the provision of a domestic remedy that attends to the substance of a debatable demand according to the Agreement, and guaranteeing an appropriate repair. That remedy must be "effective" in practice as well as in law. Furthermore, it affirmed that the notion of an effective remedy of article 13 requires that the remedy could be able to prevent the execution of any decision that might be contrary to the Convention and whose effects were potentially irreversible.

An interesting aspect that has been raised by the Court in this case has to do with the "suspensive effect" of a remedy against a deportation order. On this, the Court has expressed that the two available remedies were not able to withhold executing the order solely on the ground that an appeal to the court had been lodged. So, the order could still be executed before the remedies had been solved (that it is

31 An extensive analysis of the jurisprudence of the Interamerican Human Rights System on migrants rights, see Ceriani Cernadas, Fava and Morales (2009).

32 Application no. 51564/1999, Judgement 5 February 2002.

precisely what happened in the case). In this regard, the Court pointed out that in order to exclude the risk in a system to stay an execution, it must be applied for since it is discretionary and may be refused wrongly, in particular if it was subsequently to transpire that the court ruling on the merits nonetheless has to quash a deportation order for failure to comply with the Convention. In those cases, the Court stressed that the remedy exercised by the plaintiff would not be effective enough for the purposes of article 13.[33]

Finally, the Court stated that the requirements of article 13 and others from the Convention take the form of a guarantee and not a mere declaration of intent or a practical arrangement. This aspect, according to the Court, is one of the consequences of the rule of law, one of the fundamental principles of a democratic society, which is inherent in all the articles of the European Convention.[34] Therefore, the Court has established that the states must organize their judicial system in such a way that the courts can fulfil its requirements. This statement of the Court would mean, regarding migrants deportation, that states must have a judicial organization, a procedural legislation, and practices meant to effectively ensure all migrants the right to have an effective remedy to question that order in case that any human right recognized in the ECHR might be involved.

The European Court has confirmed this criterion in the case *Hilal v. United Kingdom.*[35] The case was about an asylum seeker from Tanzania, whose application had been refused and as – according to the state he did not have basis to remain "legally" in the country – his expulsion was ordered. The Court has decided that there was no violation of the Convention, but has reaffirmed that any migrant, independently of his/her migration status, is entitled to an effective remedy against a deportation order.

II.3. Prohibition of Collective Expulsions

Prohibition of collective deportation is closely tied up with due process in law and the right to access to justice since this prohibition seeks that a person can only be deported from a country only as a consequence of a due process based on facts about his/her particular situation. This entails, evidently, the possibility to know

33 Ibid, para. 80–82.

34 Ibid, para. 83.

35 Application no. 45276/1999, Judgement 6 March 2001.

the reasons of such a decision and, then, the right to question that order. This prohibition operates as a safeguard against arbitrariness and gives the opportunity to challenge the decision if it is considered illegitimate (e.g., disproportionate, without legal basis, etc.). The prohibition has been incorporated to the European human rights system through article 4 of Protocol 4.

The Court has defined collective expulsion (in the sense of art. 4 of Protocol 4) as every measure that obliges some foreigners, as a group, to leave a country, except where such measure is taken on the basis of a reasonable and objective examination of the particular situation of each individual of that group. Likewise, the fact that a number of foreigners receive a similar decision does not lead to the conclusion that there is a collective expulsion, if each of those people has had the opportunity of presenting his/her arguments against the order before the competent authorities, on an individual basis (*Andric v. Sweden,*[36] *Conka v. Belgium*, and others[37]). In other regional human rights system, this prohibition has also been protected in several cases.[38]

On the other hand, in some cases the European Court has paid attention, in application of the article 39 of its Rules,[39] to requests for interim measures in favour of immigrants in irregular situation on whom there was the risk of being victims either of article 4 P4 or of violation or article 3 ECHR (see below). In

36 Application no. 45917/99, Decision of Admissibility, 23 February 1999.

37 *Majic v. Sweden* (application no. 45918/99, decision of admissibility, 23 February de 1999); *Alibaks and others v. The Netherlands* (application no. 14209/88, decision of admissibility, European Commission, 16 December 1988); *Becker v. Denmark* (application no. 7011/75, decision of admissibility, European Commission, 3 October 1975).

38 Within the African system, on the basis of article 12.5 of the African Charter on Human and Peoples' Rights, see the decisions of the Commission in cases *Rencontre Africaine pour la Défense des Droits de l'Homme v. Zambia* (Communication no. 71/92, judgement October 1997) and *Union Inter Africaine des Droits de l'Homme et autres* v. Angola (Communication no. 159/96, judgement 11 November 1997.). Within the Interamerican system, basis on article 22.9 ACHR, see the decision of the Court in the case of *Haitians and Dominicans of Haitian Origin v. Dominican Republic*, Interim Measures, 18 August 2000).

39 "1. The Chamber or, where appropriate, its President may, at the request of a party or of any other person concerned, or of its own motion, indicate to the parties any interim measure which it considers should be adopted in the interests of the parties or of the proper conduct of the proceedings before it."

May 2006 the court declared partially admissible the measures required in the facts included in the case *Hussun and others v. Italy,*[40] where it was claimed that the eventual expulsion of tens of migrants from the Italian island of Lampedusa towards Libya would constitute the violation of those articles.

This precedent is particularly relevant in current context, when externalization of European migration control policies (both countries and EU agencies, such as FRONTEX[41]) through the Mediterranean Sea, the Atlantic Ocean, and even African countries territorial waters, imply in practice the devolution of thousands of migrants that try to reach European territory. It has been highlighted that within operations there is not a legal procedure to ensure basic rights and safeguards, including the prohibition of collective expulsions, the right to asylum, and child rights, among others (Ceriani Cernadas, 2009b; Human Rights Watch, 2009; VV.AA., 2008; Weinzierl, 2008).

Anyway, there is not yet any judgement of the European Court on these kinds of circumstances, and it could take some years to have a decision on this issue. Considering the precedents of the Court regarding due process and migration policies in cases of irregular migration, it would be extremely critical how this cases are submitted to the Court, in order to avoid negative decisions and, on the contrary, improve existing standards.

II.4. The Right to Physical Integrity and the Principle of Non Refoulement within Migration Control Policies

Article 3 of the European Convention has been analyzed by the Court in numerous opportunities linked to different aspects of migration policies and, consequently, to migrants rights. In the wide majority of these cases, the facts refer to the analysis about whether the execution of a deportation order might mean the violation of the right to the physical integrity of the person in the state in which the person would eventually be deported. In this context, we will see three types of

40 Decision 11 May 2006, in applications no. 10171/05 (*Hussun and others v. Italy*), 10601/05 (*Mohamed and other v. Italy*), 11593/05 (*Salem and others v. Italy*), and 17165/05 (*Midawi v. Italy*).

41 European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, established by Council Regulation (EC) 2007/2004/ (26.10.2004, OJ L 349/25.11.2004).

cases on this debate, differentiated only by a few characteristics but points to the same standard or criterion assumed by the Court in the sense of guaranteeing the protection of this right regardless of their migration status. Thus, we will see some judgements bound exclusively to whether expulsion could imply an inhuman, cruel or degrading treatment. Afterwards, we will observe how the Court applies this opinion to cases in which the expulsion can result in an inhuman treatment due to the condition of health of the person. And then, a brief mention will be done on the possibility to adopt interim measures in these circumstances, in order to prevent the irreparable affectation of such right.

Finally, we will see a case in which the Court has examined article 3 in relation to the rights of child migrants affected by migration control policies, particularly to migration-related detention and the deportation of an unaccompanied girl-child based on her migration status.

II.4.1. The principle of non refoulement and the expulsion of migrants

Deportation of migrants and its relation with article 3 ECHR has been framed within one of the basic principles of both international humanitarian and human rights law: the principle of non refoulement. This principle, recognized in multiple treaties, forbids the deportation to another country[42] when the person could be deprived of his/her right to life and private and physical integrity in the country to which he or she is sent.

Throughout its jurisprudence, the European Court has been setting a very high standard to the protection of the rights of article 3. In this context, in migration control policy cases, it has stated that the enforcement of these policies should ensure an examination in order to verify if the measure to be adopted (e.g., expulsion, denial of entry) could evidence a problem with regard to article 3, and therefore jeopardize the responsibility of the state. These criteria have been exposed by the Court in numerous cases, such as *Chahal v. United Kingdom,*[43] *Cruz*

42 The principle applies to any kind of forced mechanism used to sending one person from one country to another. Thus, and according to the country and the facts of each case, it could be a deportation, devolution, expulsion, extradition, returning, etc.

43 Judgement 15 November 1996.

Varas v. Sweden,[44] *Vilvarajah and others v. United Kingdom,*[45] *Ahmed v. Austria,*[46] *and H.L.R. v. France,*[47] among others.[48] In Chahal v. United Kingdom, the Court has stated that the prohibition of inhuman treatment has an "absolute" character, and this character has the same validity and scope in the cases on deportation of migrants.[49]

In addition, the ECtHR has highlighted that the principle of non refoulement could also be affected in an indirect form. That is, through the expulsion of a person to a state which afterwards sends that person to a third state, in which he/she may be deprived of the rights of article 3 ECHR. In the case *T.I. v. United Kingdom,*[50] the Court has held that an indirect return to an intermediate state does not affect the responsibility of the first of the states of being assured that the person, as result of its decision of deporting him/her, will not be exposed to a treatment contrary to article 3.

This last standard is also dreadfully relevant nowadays. Some African countries (as Morocco, Libya, Senegal or Mauritania) currently are not only countries of origin of migrants, but also countries of transit and destination, particularly from sub-Saharan African countries, but also from Asia. In this regard, European countries, especially Italy and Spain, have been pushing for signing bilateral agreement with such countries (among others) in order to strengthen European migration control policy, including its goals and mechanisms.

Consequently, joint operations (African-European), organized and financed by the European side, are meant to prevent irregular migration through the Mediterranean Sea or the Atlantic Ocean. In many of these initiatives the patrol send migrants back to the country of departure. This decision is taken without

44 Judgement 20 March 1991.

45 Judgement 26 September 2001.

46 Judgement 17 December 1996.

47 Judgement 29 April 1997.

48 The Court has strengthened the same position in more recent cases, such as *Jabari v. Turkey* (judgement 11 July 2000), *Saod v. The Netherlands* (judgement 5 July 2005), *Bader v. Sweden* (application 13284/2004, judgement 8 November 2005), *N. v. Finland* (application no. 38885/2002, judgement 26 July 2005).

49 *Chahal v. UK*, cit., para. 80.

50 Application no. 43844/98, Decision of Admissibility, 7 March 2000.

any individual examination whether if a person could be subjected to any kind of inhuman treatment, both in the country where he/she is sent back and in a third country where he/she is finally returned by the second country (see, Cuttita, 2006; Human Rights Watch, 2009). It should be reminded that according to human rights treaties, including the ECHR,[51] states have to respect human right to every individual under its jurisdiction. This exceeds the territorial component of a state, so states are engaged by human rights obligations wherever their exercise their authority, which includes extraterritorial responsibility (Ceriani Cernadas, 2009b; Weinzierl, 2008).

II.4.2. The principle of non refoulement and the condition of health of migrants

The European Court has also applied the principle of non refoulement to cases which have linked the right to not being submitted to cruel, inhuman or degrading treatment with the condition of health of migrants that could be deported to the country of origin (in some cases, based on his/her migration status). In these cases, the Court has fixed some standards intended to evaluate the legitimacy of deportation decisions in cases in which the person involved claimed that considering his/her health condition the enforcement of the measures would infringe article 3 ECHR.

The first case on this question was *D. v. United Kingdom,*[52] about a St. Kitts national, facing an expulsion order from United Kingdom based on his irregular migration status and criminal background. He was living with the HIV virus in an advanced state, and then he has asserted that he would not be able to continue his medical treatment in his country of origin. The Court has decided that the expulsion would be a violation of article 3, even if he did not have a legal residence.[53] Nonetheless, the Court has remarked that the case was dealing with exceptional

51 See the decision of the European Commission of Human Rights, Case *Stocké v. Federal Republic of Germany,* ECHR Series A, no. 199, p. 24, para. 166.

52 Judgement 2 May 1997.

53 "…Regardless of whether or not he ever entered the United Kingdom in the technical sense…it is to be noted that he has been physically present there and thus within the jurisdiction of the respondent State within the meaning of Article 1 of the Convention (art. 1)… It is for the respondent State therefore to secure to the applicant the rights guaranteed under Article 3 (art. 3) irrespective of the gravity of the offence which he committed" (*D. v. UK*, cit., para. 48).

humanitarian circumstances, so the decision would not mean that foreigners that had served a prison sentence and are subject to a deportation process, could not invoke any right to remain in order to continue benefiting medical or social assistance, or of another type, provided by the state during the stay in prison.[54]

In *Bensaid v. United Kingdom*[55], the Court maintained the same criterion, although it emphasised how exceptional should be the circumstances in order to decide that an expulsion would configure a breach of article 3 ECHR. Hence, the Court has declared that there were no violation of such article, as well as it has done later in further cases.[56] The case *Ndangoya v. Sweden*[57] demonstrates how the Court standard had become restrictive. In effect, the Court has asserted that there were not reasons to contest the legitimacy of the deportation order, still when there was medical documentation that signed out the structural difficulties that the person could face in order to continue the HIV antiretroviral treatment in his country of origin (Tanzania).

Similarly, in *Amegnigan v. The Netherlands*[58] the Court decided that the expulsion was not contrary to article 3. Yet, the doctors of the claimant had indicated that the his health condition would be severely deteriorated if the antiretroviral treatment was interrupted, and that the access to this treatment was not universally fulfilled in Togo, since it requires him to have an health insurance (which was far from inexpensive). Likewise, in *N. v. United Kingdom*[59], the ECtHR has reaffirmed this restrictive standard and has rejected the application, even when among the evidence there were reports of the World Health Organization which highlighted the difficulties to effective access to antiretroviral treatment in Uganda. The same

54 Ibid, para. 51-53.

55 Application no. 44599/1998, Judgement 6 February 2001.

56 See *Arcila Henao v. The Netherlands (*application no. 13669/2003, judgement 24 June 2003), *Meho and others v. The Netherlands* (application no. 76749/2001, judgement 20 January 2004), *Salkic and others v. Sweden* (application no. 7702/2004, judgement 29 June 2004) *Karim v. Sweden* (application no. 24171/2005, judgement 4 July 2006), and *Goncharova v. Sweden* (application no. 31246/2006, judgement 3 May 2007).

57 Application no 17868/2003, Decision of Admissibility, 22 June 2004.

58 Application no. 25629/04, Judgement 25 November 2004.

59 Application no. 26565/05, Judgement 27 May 2008 (see para. 29-51, in which the Court has done a synthesis of its jurisprudence on this subject).

decision has been adopted in a case against the United Kingdom by a national from Congo with HIV.[60]

This remarkable regressive trend could be linked with current European migration policies regarding irregular migration. Therefore, it is pertinent to add to this scenario another contextual element for deeper debates on this question: in the background of these cases the root causes of migration can be identified, such as the deprivation of the right to health care to millions of people in many countries. Hence, the position of the ECHR should be examined in the light of factors that create such conditions, including decisions at local, regional, and international level (for instance, international regulations on production and distribution of medicines, including drug patents). While current disparities and asymmetries in living conditions in different countries are not fully tackled, then this kind of jurisprudence will be not only extremely restrictive, but also disconnected from critical and structural processes and, on the contrary, linked to selective policies to stop migration without coping with its causes.

For these reasons, litigation strategies regarding deportation policies in cases linked to the right to health care and article 3 ECHR could be part of broader discussions and initiatives on issues such as the universal fulfilment of the right to health care, as well as international trade and regulations on drug patent. Furthermore, strategies meant to improve this jurisprudence should emphasise some human rights principles (as *pro homine,* non discrimination, proportionality) and could also involve complementary actions (media, experts' reports, etc.).

II.4.3. Preventive measures, inhuman treatment, and deportation of migrants

In section II.3 we have seen how on certain occasions the Court has adopted interim measures meant to prevent a collective expulsion. Similarly, the Court has also analyzed whether these measures could prevent a breach of article 3. In 2004, for example, Somali asylum seekers presented an application for interim measures against the Dutch State[61], claiming that the deportation that had been dictated

60 *M. v. United Kingdom*, Application no.25087/06, Decision of Admissibility, 24 June 2008.

61 *Yuusuf Nuur* (no. 1734/04), *Salah Sheekh* (no. 1984/04), *Ali Yousef* (no. 2683/04), *Abdi Iyow* (no. 4028/04), *Warmahaye* (no. 4142/04), *Jimale* (no. 7028/04), *Noor Mohammed*

against them could infringe their right to physical integrity. The decision that was rendered by the Court resulted in the suspension of the expulsion order. In addition, the interim measures adopted by the Court in cases as *Müslüm Zade and others v. Sweden*[62]*, and Haziri and others v. Sweden*[63], were fundamental not only to stop the deportation to their countries of origin (Azerbaijan and Serbia) but for obtaining further a residence based on humanitarian grounds.

These cases could be taken into account for future litigation strategies, in order to prevent the enforcement of deportation measures. But also for developing broader strategies meant to advocate for policy reform; for instance, regarding migration control mechanisms in European southern borders, as mentioned above.

II.4.4. Migration control, child rights, and inhuman treatment

In the case of *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*[64], the European Court settled on some standards in relation to the rights of unaccompanied children without regular migration status. In this case, a five-year-old girl, national of the DR Congo, was being carried by her uncle to Canada, where she was living as an asylum seeker. In the connecting airport, Brussels, she was detained and taken to the Detention Centre, where she was held for two months.

The Court, on the one hand, stressed that the irregular migration status of the girl would indicate the extent of vulnerability of her situation, rather than an element on which to base her rights restrictions. On the other hand, regarding article 3, it has stated that her detention and deportation to the DRC afterwards, has evidenced such a lack of humanity that configured an inhuman treatment.[65]

Nonetheless, the decision of the Court does not seem to forbid children migration-related detention, as it has been recommended by the UN Committee on the

(no. 14029/04), *Hadji* (no. 15195/04), *Ali Mohammed* (no. 15204/04), *Barakat Saleh* (no. 15243/04) and *Hassan Abukar* (no. 20218/04).

62 Application no. 41983/04. The Court, once the government had suspended the deportation and has granted him a residence permit, has closed the case on 31 January 2006.

63 Application no. 37468/04, Decision 5 September 2006.

64 Application no. 13178/03, Judgement 12 October 2006.

65 Ibid, para. 58, 59.

Rights of the Child.[66] Anyway, we may have further cases in the upcoming years, as the EU Directive on Return of Irregular Migrants approved in 2008 may lead to national policies which include children detention within migration control procedures.[67] In this case, litigation strategies will have to be developed in order to obtain a clear standard on non deprivation of liberty of children within migration control policies.

II.5. The Right to Liberty in the Context of Migration Control Policies

The European Court jurisprudence on the right to personal liberty of migrants (article 5 ECHR), particularly of those in irregular migration status, has analyzed different aspects of such right. Among them is the issue of the length of detention, the competent authority to order a deprivation of liberty, the place of detention, the judicial role in such circumstances, and the situation of particular groups as asylum seekers and unaccompanied children.

Before getting into these issues, it should be highlighted that the Convention includes a particular constraint linked to migration policies. Indeed, article 5 establishes that

> "No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (…) f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition".

Therefore, the Convention would be authorizing the possibility to arrest a person in order to enforce migration control measures, particularly in the cases of irregular entry and deportation (I will return to this matter below).

One of the situations analyzed in several cases decided by the Court regards the detention carried out as consequence of the measures to control entry into the

66 See Committee on the Rights of the Child, General Observation no. 6, *Treatment of unaccompanied and separated children outside of their country of origin*, CRC/GC/2005/6, 1 September 2005.

67 *Directive 2008/115/EC of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country national*. Its article 17 regulates child detention.

territory of a state. In one matter, the Court exposed a series of argumentations on the validity of the right to liberty in the called "indirect areas" that exist in places of entry into the country – especially, in airports, and thus of the faculties and limits that states would have in such spaces. In *Amuur v. France*[68], on the arrest for twenty days of four brothers asylum-seekers from Somalia in the international area of the Paris-Orly airport (and afterwards, expelled from the country), the Court has held that there had been a violation of article 5.1. The Court stated that to

> "Holding aliens in the international zone does indeed involve a restriction upon liberty, but one which is not in every respect comparable to that which obtains in centres for the detention of aliens pending deportation. Such confinement, accompanied by suitable safeguards for the persons concerned, is acceptable only in order to enable States to prevent unlawful immigration while complying with their international obligations" (para. 43).

On the length of such detentions, the Court has indicated that they "should not be prolonged excessively, otherwise there would be a risk of it turning a mere restriction on liberty…into a deprivation of liberty".[69] This, in turn, was bound by the Court with the question of the legality and legitimacy of the decision of custody, but also with aspects related to conditions of detention and the right to defence. In this regard, it said that to examine whether 'a procedure prescribed by law' has been followed, the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules of national law, but it requires in addition that any deprivation of liberty should be in keeping with the purpose of Article 5, namely to protect the individual from arbitrariness…"[70]. More recently, in the case *Saadi v. United Kingdom*[71], the ECHR upheld the detention of an asylum seeker for 7 days in the airport detention centre in London. The ECHR considered, among other factors, the administrative problems generated by the joint arrival of large numbers of people in such conditions.

The issue of the order of arrest (along with the basis of the decision) was dealt by the Court in the case of *Shamsa v. Poland*[72], referring to the arrest of two Libyan

68 Application no. 19776/1992, Judgement 25 June 1996.

69 *Ibid*, para. 43.

70 *Ibid*, para. 50.

71 Application no. 13229/03, Judgement 29 January 2008.

72 Judgement 27 November 2003.

citizens by the border police at Warsaw airport, in the transit area reserved for those who are not authorized to enter the country. The applicants were detained for 3 months but, according to Polish legislation, in that term an expulsion order should be executed, otherwise people should be freed. However, after that term they were moved to the detention location of the transit area of the airport, where they were held for forty days. The Court expressed that, in cases of restriction of liberty, it is particularly important to respect the legal security principle and that in this case there was not a decision that had justified the applicants' arrest in the transit area and that had settled the length of such detention. Later on, the Court held that the fact that a person is detained in an area for an uncertain and unforeseen period, when such arrest is not based on either a specific legal provision or in a valid judicial decision, is contrary to legal certainty principle, as well as the Convention.[73]

II.5.1. The reasonableness of migrants detention (article 5.1.f. ECHR)

In some cases the European Court of Human Rights has ruled on the reasonableness which should have an order of detention within a process of expulsion. *Chahal v. United Kingdom* was about the detention of a citizen of India for expulsion (issued on arguments of "national security"), whose habeas corpus were rejected in all instances. In this case, the Court examined article 5.1.f of the Convention and then stated that in these cases the Convention "does not demand that the detention of a person against whom action is being taken with a view to deportation be reasonably considered necessary, for example to prevent his committing an offence or fleeing" (para. 112). According to the Court, this provision does not provide the same protection as that of article 5.1.c, as it only requires that the action is taken with a view to deportation. However, the Court pointed out that if the procedure is not carried out with due diligence, the detention is no longer justified under that provision. This same principle was reiterated in *Conka v. Belgium* and *Saadi v. United Kingdom*, above mentioned.

In *Saadi*, the Court held that the application of article 5.1.f extends to the time of the person granted formal permission for such entry. In particular, the Court has stated that "until a State has 'authorised' entry to the country, any entry is 'unauthorised' and the detention of a person who wishes to effect entry and who needs

73 *Shamsa v. Poland, cit.*, para. 48, 55, 58.

but does not yet have authorisation to do so, can be, without any distortion of language, to 'prevent his effecting an unauthorised entry'…"[74].

This decision of the ECHR is truly complex, particularly in relation to the implementation of these detention powers on people that have already come into the country and cannot prove that they have entered the country regularly. If these people do not have a deportation order against them, could the authorities detain them – without substantiating the need for such a decision – arguing the lack of "formal authorization of admission"? The obligation that mandates to interpret restrictively the restrictions on fundamental rights should lead to a negative response. Thus, the jurisprudence of the Court would apply only to detentions in entry points, in a reasonable time and until the adoption of a decision on the admission of the person. In other circumstances, it is supposed that it would only be viable as a result of an expulsion order. Anyway, as we have seen, in these cases the due process safeguards are considerably limited, especially in cases of migrants who are in an irregular situation.

Otherwise, people living in this situation (who cannot prove that they had entered regularly into the country, regardless of how and when they have done it) could be continuously detained because of an admission control policy, even though they did not hold either a detention order or a deportation process against them. This would be clearly unreasonable and far from basic human rights standards. Besides the injury to such people, also the host society and the state would be affected, as a consequence of having particular groups living with a permanent threat of being deprived of their liberty without due justification (such circumstances would be a sort of state of exception).

On the other hand, in *Saadi v. UK*, the Court has stated, with regard to article 5.2 ("Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him"), that as the person had been informed of the reasons for his detention newly seventy-six hours after being deprived of his freedom, it was incompatible with the requirement of providing such information "promptly".[75]

74 Ibid, para. 65. The dissenting opinion have disagreed with this reasoning as the applicant in this particular case.

75 Ibid, para. 84.

In another decision relating to article 5.1.f, the European Court has also addressed the issue of period of detention of a migrant, within a deportation process. In *Singh v. Czech Republic*[76] (two Indian nationals with criminal records and legal residents, who were detained for over two and a half years as part of a process of expulsion), the Court ruled that articles 5.1.f and 5.4 have been infringed since the expulsion had not been carried out with the required diligence, so the detention was no longer justified under article 5.1.f.

Anyway, we must observe which will be the position of the ECHR on the length of migrants' detention within removal proceedings, due to the entry into force in each country of the Return Directive approved in 2008 by the European Union, which establishes the possibility to detain migrants for a dreadfully long period (6 months, and it could be extended up to 18 months).[77] It is true that in many European countries that period is considerably shorter nowadays, and that a due respect of the principle of progressiveness of human rights would not allow making a regressive reform in order to extend it till the length that has been set up in the Directive. Nonetheless, Italy has recently increased the length of migrants' detention from 2 up to 6 months, precisely in order to be in line with the EU Directive[78].

In this regard, litigation strategies will have to deal with these regressive trends, in order to convince the ECtHR not only about the illegitimacy of such human rights constraints, but also about the necessity and fairness of improving its own jurisprudence.

II.5.2. The place for detention of migrants

In one case under consideration, the Court ruled – though timidly – on the question of the place of detention of migrants subject to removal proceedings, in relation to the location of persons detained for criminal reasons. The declaration of inadmissibility in the case *Zhu v. United Kingdom*[79], the Court stated that while

76 Application no. 60538/2000, Judgement 25 January 2005.

77 Article 15.

78 See *Disposizioni in materia di sicurezza pubblica*, Legge 15 luglio 2009, n. 94, art. 1, 21, l), *Gazzetta Ufficiale* n. 170, 24 luglio 2009, http://www.parlamento.it/parlam/leggi/09094l.htm.

79 Application no. 36790/1997, Decision 12 September 2000.

the claimant was arrested while he was awaiting expulsion from the country and not on criminal matters, it was undesirable for those who are awaiting deportation to be kept in the same place as those prisoners convicted of criminal offences. This comment by the Court may result in this court to undertake the internationally established standard (for example, the Convention on the Rights of Migrant Workers and Their Families[80]), in the sense that those detained on immigration charges are not located in the same facilities as those accused or convicted of committing a criminal offence.

Anyway, on this matter two comments could be made. On the one hand, that many migrant detention centres in European countries, although they are not formally prisons, function in the same way, regardless that migrants without legal residence had not committed any crime so they do not need any kind of re-socialization measure. In fact, a report required by the European Parliament has evidenced degrading conditions of these prison-like centres (STEPS Consulting Social, 2008). On the other hand, it must be taken into account that within harsher migration policy trends, some countries have criminalized irregular migration; that is, it is being sanctioned as a criminal offence (e.g., Italy[81]).

II.5.3. Detention and deportation of unaccompanied children

In *Mubilanzila v. Belgium*, cited above, the girl was detained for two months in the detention centre near Brussels Airport. The ECtHR has stated that the detention centres used for foreigners await deportation, are acceptable only when they intend to facilitate states "to combat illegal immigration"[82]. But then it has added that these facilities should comply at the same time with their international obligations,

80 Article 17.3: 3: "Any migrant worker or member of his or her family who is detained in a State of transit or in a State of employment for violation of provisions relating to migration shall be held, in so far as practicable, separately from convicted persons or persons detained pending trial".

81 See *Disposizioni in materia di sicurezza pubblica*, cit., art. 1, 21, h).

82 Para. 81. It is extremely worrying that the Court, following the inappropriate terminology utilized by European Union bodies, still refers to "illegal" migration. Even the Parliamentary Assembly of the Council of Europe has proposed avoiding this terminology (2006). Moreover, irregular migration is a multidimensional phenomenon that should not face through "combat", but through integrated and coherent solutions, including root causes, and ensuring a rights-based approach. Hence, it is on achieving solutions, rather than enforcing combats.

including those arising under the Convention for the Rights of the Child. In this sense, it has stressed that "States' interest in foiling attempts to circumvent immigration rules must not deprive aliens of the protection afforded by these conventions or deprive foreign minors, especially if unaccompanied, of the protection their status warrants. The protection of fundamental rights and the constraints imposed by a State's immigration policy must therefore be reconciled".[83]

With regard to detention, the Court has held that even when it could have been framed in article 5.1.f of the Convention, it does not necessarily mean that the decision had been legal in the meaning of that provision, while the law requires that there must be a relationship between the cause of such restriction and its place and conditions. While the girl was being held in a closed centre for "illegal immigrants" (*sic*), under the same conditions as adults, according to the Court those conditions were not adequately adapted to the extremely vulnerable position in which she was as a result of her status as unaccompanied foreign child. In these circumstances, the Court considered that the Belgian legal system at that time, as it operated in that instance, didn't protect her right to liberty.[84]

Finally, the Court examined the issue of judicial review of the detention order. In this regard, it held that article 5.4 is intended to provide individuals who are arrested the right to judicial review on the legality of such decisions. Then, remedies should be available during the arrest, so that the person quickly obtains a judicial review that could lead, if appropriate, to his/her release. In this occasion, the Court has noted that the authorities had made arrangements for the deportation of the applicant on the day after she had submitted her claim to the Council Chamber. The authorities at any time reconsidered its decision to deport her, and she was deported on the day appointed, although the period of 24 hours to appeal to the Council had not expired. Therefore, the Court has concluded that Article 5.4 had been violated.[85]

This decision reaffirms the special protection that the Court recognizes to child rights, and highlights the vulnerable condition of migrants in irregular conditions, especially unaccompanied children. As well, it provides quite precise criteria regarding the remedies available to a person undergoing a pre-deportation deten-

83 Ibid, para. 81.

84 Ibid, para. 102-104.

85 Ibid, para. 113-114.

tion and limits of the States as to how to develop the process of implementing those measures. Moreover, the Court's reference to the protection afforded by the Convention on the Rights of the Child could mean a significant precedent for expanding the scope of rights and interests of migrants by other treaties ratified by the state. In this regard, it would be relevant the ratification of the Convention on the Rights of Migrant Workers and Their Families by European countries, a step that so far has been ignored by the vast majority of states in the region.[86]

II.6. Deportation of Migrants and the Right to Family Life

When interpreting and defining the scope of article 8 of the Convention in cases involving migration policies, particularly in matters of admission, residence and deportation, the European Court has established over many decisions a number of criteria to consider in each case. Nonetheless, it is noteworthy that only in rare cases has the ECHR been issued on the implications of a removal order for a person with irregular migration status, as in most of them the facts were linked to criminal offences (a matter that, as we have said, will not be examined in this paper). In these few occasions, while the fact that an irregular migration status did not automatically lead to a justified expulsion under article 8, the Court has considered this circumstance, along others, in order to resolve each case either in favour or against the right to family life invoked by the applicant.

In 2006, the Court decided two cases regarding the right to family life of migrants that had been deported. In both cases, the special protection that child rights have within the international human rights law framework was a key element of the Court's judgement. These are the cases *Rodrigues da Silva and Hoogkamer v. The Netherlands*[87] and the – above mentioned – *Mubilanzila Mayeka v. Belgium*. In the case of the girl detained for more than two months in a detention centre in Belgium, beyond the violation of the rights to liberty and physical integrity, the Court has also taken into consideration the provision of article 8, while the arrest and subsequent expulsion of the child impeded her to meet her mother in Canada. In its ruling, the Court noted that the term "privacy" of article 8 ECHR includes

86 Of the 39 member states of the Council of Europe, so far (October 2009) only four states have ratified this Convention: Albania, Azerbaijan, Bosnia Herzegovina and Turkey. Only two other states have signed it (Montenegro and Serbia). No member state of the European Union has either signed or ratified the Convention.

87 Application no. 50435/99, Judgement 31 January 2006.

physical and mental integrity of the person. Therefore, the guarantee enshrined in this article seeks to ensure the development, without no interference, of the personality of each individual in his/her relations with other human beings. Then, the Court referred specifically to the issue of family reunification, asserting that as she was an unaccompanied child, the Belgian State was under an obligation to facilitate such reunification[88].

This Court's conclusion is relevant in a European context in which a considerable number of unaccompanied children are arriving at its borders. Anyway, it should be assessed in more detail whether the decision would be the same in similar but not identical cases. For instance: How the Court would understand the right to family life, and particularly family reunification, in the case of the arrival of unaccompanied children who reach European territory, where both or one parent is living. As discussed below, the current European Union legislation on family reunification of "third-country nationals" legally residing in Member States[89], and its confirmation by the European Court of Justice[90], would seem to contradict that obligation to facilitate family reunification. This Directive, as the one of returning of irregular migrants, also contains a set of provisions which do not look in conformity with international human rights standards (John, 2004; Oosterom-Staples, 2007).

Moreover, there is another complex case before a decision to expel or return a child to his/her country of origin. States often argue that the measure seeks to ensure family reunification as their relatives live in that country (not in a European state). If the Court follows the fundamentals of that background, such action would be legitimate if it attests that, firstly, this reunification becomes effective, and secondly, that the reunification ensures the best interests of the child (in the case of Spain, for example, reports of UN and civil society have complained that these

88 Ibid, para. 85.

89 Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification.

90 ECJ, Affaire C-540/03, European Parliament v. Council of the European Union, Commission of European Communities, and Federal Republic of Germany, Judgement 27 June 2006.

elements have not been sufficiently valued).[91] Hence, what would be the position of the ECtHR in these cases?

In *Rodriguez Da Silva v. The Netherlands*, the Court assessed the legitimacy of an expulsion of a migrant who had lived in the country without legal residence for three years and was the mother of a girl of Netherlands nationality. To do so, it examined the different circumstances that may lead to or not to such decision. In terms favourable to the applicant, the Court took into consideration the fact that she has not been convicted for any crime and that since an early age she has had a maternal role with her daughter, a Netherlands national.[92] On the contrary, the Court basically highlighted issues related to immigration control, such as the history of immigration law breaches or the fact that when the family had been created, they were aware that the immigration status of one of them was such that the persistence of family life within the state was precarious.

Similarly, the Court has noted that in three years of irregular residence the applicant had made no attempt to regularize her immigration status, and whoever does not comply with regulations regarding the residence in a country enjoys no right particular to expect but to be given a right of residence[93]. However, despite these adverse circumstances, the Court has stated that this case should be distinguished from others because of the consequences that the expulsion could generate in the applicant responsibilities as a mother, as well as her family life with her daughter. For these reasons, the Court asserted that by applying the principle of child's best interests, the applicant should remain in the Netherlands. Therefore, the Court has considered that in these circumstances, the economic welfare of the country (argument invoked by the State) could not be above the right to family life of the applicant, even when she was residing irregularly at the time of the birth of her daughter[94].

However, shortly thereafter, in the case *Omoregie and others v. Norway*, the ECtHR decided that there was no violation of article 8 due to the expulsion to Nigeria of an immigrant without regular residence that was married to a Norwegian national.

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91 Committee on the Rights of the Child (2002); Amnesty International (2006); Human Rights Watch (2002, 2008).

92 *Rodrigues da Silva v. The Netherlands*, cit., para. 42.

93 Ibid, para. 40, 43.

94 Ibid, para. 44.

Both were parents of a child that was born in Norway.[95] Among other issues, the Court stated that the ties in Norway of the applicant were not quite strong for having lived there just under five years, and because he also had relatives in his home country. In turn, the Court has contradictorily asserted that his wife would have no trouble settling in Nigeria for having lived a while in another African country (South Africa). It has not considered either the ties of their child, a Norway national. Therefore, without questioning the generic argument put forward by the sending country (the economic welfare of the host society), the Court has decided to give priority to the "right" of states to control and punish irregular migration, rather than protect the right to family life of applicants, including the right of the child to not be separated from one parent.

Based on the arguments that have led to these decisions, it seems appropriate to make some additional comments. First, it is clear that in both cases the ECtHR has expressed a negative opinion of the fact that a person is in an irregular migration status, particularly when the person can not demonstrate that he/she has make some efforts to regularize his residency in that country. According to the Court, in these circumstances there would be no right to stay, although exceptionally this could change if there were other fundamental rights at stake (family life, physical integrity, life). But while the decision can lean either way depending on the circumstances of each case, the Court has maintained such a broad discretionary coverage that sometimes can affect basic rights, as in the *Omoregie v. Norway* case. Moreover, it is striking that the Court has criticized the absence of actions intended to obtain a legal residence, without considering the very limited and complex possibilities to achieve the regularization of migration status in the vast majority of the Council of Europe member states.

In any case, it is important the debate that the Court has reflected (albeit briefly and ambiguously) in relation to either balance or conflict between the general interests and individual rights. That is, the equilibrium between the right to family life and children's rights and the reasons given by the state to regulate, control and punish irregular migration. In the field of migration policies it is very common to find multiple individual decisions (e.g. deportation) made on the basis of arguments such as "public order", "national security", the "general interest", "welfare", etc. In many of these occasions, it is possible to identify a general lack of evidence aimed at effectively demonstrating the relationship between the chosen medium

95 Application no. 265/07, Judgement 31 July 2008, para. 53–68.

(deportation) and the goal invoked (e.g. general interest), which makes the resolution unreasonable and illegitimate. In *Rodriguez Da Silva*, the Court has relied, as it should be, on the deprivation of rights in order to justify why the public interest had to be shelved. Similarly, it could have also deepened its reasoning – following the jurisprudence on the principle of reasonableness – based on the need to examine the link between these general issues and the facts alleged in each case. The absence of this evaluation may impact negatively, as in *Omoregie*, in the recognition and realization of fundamental rights.

In *Liu and Liu v. Russia*[96], the Court dismissed the state's allegation about "national security risk" for justifying the deportation of the applicant for irregular residence. The claimant was married to a Russian national, and both had two children that were born there. According to the Court, the violation of article 8 had been produced through the absence of strict review by an independent authority (the judiciary, in the case) on the arguments provided by the Executive. That is, the lack of essential due process safeguards in order to prevent an arbitrary interference on family life. Shortly thereafter, the Court reiterated this view in *CG and others v. Bulgaria*[97], which, in turn, also questioned the broad assertion that had been given by the state to the notion of "national security".

Nonetheless, in the *Y. v. Russia*[98] case, the ECtHR prioritized the state's interest in deporting a person without a residence permit, who was invoking his right to family life (Mr. Y was a Chinese national, and his wife, a Russian national). The Court noted, as on previous occasions, that when it comes to issues related to immigration, article 8 cannot be interpreted as meaning that spouses have the right to choose the country where they want to inhabit.[99] However, this argument forgets two important elements. First, that one spouse possesses the nationality of the state where they live (Russia, in this case) and therefore, it is reasonable to argue that they would have a right (not absolute) to live as a couple in one of these countries. And among both options, it would be reasonable to think that the priority would probably be the one where they had met and got married (Mr. Y had travelled repeatedly to Russia, while his wife had not been to China). Furthermore, if China followed the same way of reasoning of the Court, and then did not grant Mr. Y's

96 Application no. 42086/05, Judgement 6 December 2007.

97 Application no. 1365/07, Judgement 24 July 2008.

98 Application no. 20113/07, Judgement 4 December 2008.

99 Ibid, para. 104.

wife the residence, then the couple would not have a place to live together as a family.

Secondly, and as a consequence of previous point, the Court would be endorsing an immigration breach, or rather, lack of residence permit would be sufficient argument to warrant the deportation decision taken by the state (in the case, there was no irregular entry or other type of infringement, because Mr. Y had applied for asylum, which was not granted in Russia, and had got married during those procedures). In my opinion, the international standards that require proportionality and reasonableness (among the reasons given and the decision to adopt) have not been properly taken into account by the ECtHR, although those standards derive from its own jurisprudence. Thus is set, or rather ratified, a precedent that not only is substantially limiting, but also weakly substantiated, legitimating a wide states' discretion to either deny residency or expel migrants in a way that the right to family life may be severely affected.

Considering these precedents, it is critical to develop litigation strategies to improve the existing standard before the European Court of Human Right regarding the right to family life of migrants, regardless of their migration status.

III. Closing Remarks. The ECtHR Jurisprudence and Litigation Challenges

Throughout these pages we have tried to provide a rough idea of the key criteria set by the European Court of Human Rights in its bulky case on the implementation of human rights guaranteed by the ECHR in respect of migrants, with particular emphasis on those in an irregular migratory situation. A considerable number of judgements have not been incorporated into this analysis, and those that made it have been treated only briefly, intending just to be able to unite at least the most important elements that come from these court decisions. As has been noted, the issue of irregular migration is not taken into account by the Court as a factor which can influence the degree of protection of certain fundamental rights (right to physical integrity, the prohibition of collective expulsion, the right to an effective remedy, right to health). In return, migration conditions may be decisive either for the lack of recognition of a right (due process safeguards), for restricting its extent (family life, right to liberty) or for ensuring their protection (unaccompanied child).

In these cases, such as those referring to all migrants, the European Court has continuously passed between issues associated with what the Court has called the public interest and individual rights of migrant men and women. However, we believe that at times these two elements can be in collision and as in many other human rights issues where this happens, it seems evident that it leads to an absence of deeper analysis of the implications (causes and consequences) of migration movements. The nineteenth-century reference to certain principles on the sovereign right of a nation-state should give rise, increasingly, to a more consistent argument not only with the issue of sovereignty and migration at present, but also to the progressiveness of international human rights. In contrast, in several cases and for different rights, the Court's action has firmly set limits on state power against the rights of persons, both national and migrants, regular and irregular residents.

This ambivalent perspective from the principal human rights body at the European level regarding the rights of irregular migrants cannot be dissociated from the complexities and challenges surrounding the issue of immigration. Migratory flows to Europe mean a challenge to their states. Also, they question their society, they challenge the basis for their rule of law and the strength and breadth of its values, principles and guarantees, particularly in relation to the fundamental and universal rights of individuals. As in other regions, this scenario calls for rethinking the causes of these migration processes, specifically the living conditions in different countries, inequalities between and within them, the responsibility of the more economically developed countries regarding poverty, conflicts and other problems that constantly affect others. It also requires reviewing the policies imposed at the international level on those who have taken advantage of global economic systems and its consequences. Migration remains one of the consequences of this set of factors.

Regarding the impact of this phenomenon in the destination countries, it is clear that the deepening of the mechanisms of protecting human rights is a key to successfully meeting the changes occurring in these societies. The full recognition of the human rights of migrants, particularly those without legal residency, is a prerequisite for this. In order to achieve this goal, litigation before national and regional courts might be a key tool for improving the level of migrant rights protection in European countries. Within this challenge, improving the ECtHR jurisprudence on these matters would be critical in order to advocate for policy and legislative reform at both national and regional level. For these reasons, and regardless of the obstacles and constraints that have been evidenced through the

European Court judgements, it is definitively worth developing initiatives aimed at moving forward the approaches of the Court. In this regard, this paper will end with a set of brief notes on issues to bear in mind for discussion, designing, and implementing litigation strategies.

III.1. Brief Notes on Litigation Strategies

A main issue to discuss as regards human rights litigation, and particularly on strategic litigation, is on the goals of each case. Therefore, a set of possibilities could be debated in a case-by-case basis, such as the following:

- Is it just about gaining the case, that is, to achieve a positive decision?
- Is the case meant to obtain some kind of reparation or compensation for the victim of human rights deprivation? (e.g., health treatment and monetary compensation to a migrant mistreated in a detention centre).
- Does the case seek to impact public policies? (For instance, a case intended to influence legislative reform on deportation processes, in order to ensure free legal aid to everyone, or provision of guardian for unaccompanied children).
- Opening policy debates and discussion with government.
- Litigation as part of a broader strategy (advocacy before the parliament; social mobilization; promoting rights campaigns).
- Individual or collective litigation (e.g., class actions aimed at questioning detention conditions in migration detention centres).

In addition, some other issues should be fully discussed, both for planning a long term litigation agenda and for preparing each case to be submitted to the Court.

- Which are the current and potential allies?
  - NGOs (both in Africa and Europe)
  - Actors authorized access to detention centres
  - International UN and Regional Agencies
  - Trade Unions
  - Free attorneys on migration issues

- Faith-based associations authorities
- Media
- Allies for gathering evidence

i) NGO's in countries of origin and destination

ii) Experts as allies (e.g., medical evidence)

Discussions on strategic human rights litigation should consider the relevance of utilizing litigation as part of broader strategies meant to protect and advocate for human rights fulfilment (CELS, 2008).

- If litigation is within broader strategies, which complementary actions could be developed in each case?
  - Media
  - Advocacy meetings
  - Social support, demonstrations, etc.
  - Usage of both comparative law and Jurisprudence
  - *Amicus Curiae*
- Discussion on strengths and weaknesses in the possible judicial jurisdiction where the case should be submitted
  - Study of existing jurisprudence
  - Probabilities at national and international levels
  - Risks and opportunities

As we have analyzed through this paper, litigation on migrant rights within migration control policies before the European Court of Human Rights may involve a wide set of challenges. All in all, despite some restrictive positions of the Court which have been highlighted, there are important precedents (both in this matter and in others), as well as relevant decisions that have been taken by other Courts, that might be extremely useful in order to progressively improve these standards. Ultimately, human rights must be protected and defended by all the legal existing mechanisms and before any democratic institution – including judicial – capable and obliged to fulfil them. Universality of human rights is at stake.