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The European Court of Human Rights as a Bordering Actor: Culpability and Collective Expulsion in the Era of Externalisation

RESEARCH ARTICLES

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ABSTRACT

This article reconceptualises the European Court of Human Rights (ECtHR) as a bordering actor within the contemporary regime of migration control. Focusing on the Court's jurisprudence under Article 4 of Protocol No. 4 ECHR, it advances a combined doctrinal and critical migration-and-border-studies analysis of the 'own culpable conduct' exception introduced in *N.D. and N.T. v. Spain*. Tracing its evolution from *Khlaifia and Others v. Italy*, through *N.D. and N.T.*, to *A.A. and Others v. North Macedonia*, the article demonstrates how considerations of migrant conduct in the context of contestation against the border have evolved from being a peripheral consideration to being a central, and increasingly presumptive, basis for limiting procedural protection against collective expulsion. Drawing on critical border scholarship, the article argues that this development constitutes a form of interpretive bordering practice. In conflating so-called 'irregular' entry with culpability and conditioning access to rights on compliant, passive imaginaries of subjectivity, the Court reproduces and legitimises broader externalised bordering practices. While recent case law suggests a more progressive turn, this shift is better understood as an instance of selective inclusion within a continuum of differential (in)exclusion. The article concludes that, rather than meaningfully contesting externalisation, the ECtHR's reasoning legitimises the operation of externalisation by co-constructing the discursive and legal bordering practices that enact it, raising questions about the limits of strategic litigation and the structural capacity of international human rights law to unsettle contemporary border regimes.

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1. INTRODUCTION

In an effort to deter migrants from accessing Europe, Western states have increasingly implemented border externalisation practices aimed at managing and restricting the movements of persons deemed the unwanted 'other'.[1] While not a recent development, following the 'Summer of Migration',[2] they have become a systematic and default response to the perceived 'permacrisis' that migrants represent.[3] These practices enforce the border beyond the state's recognised territorial boundary, and, in turn, delegate creation and management of the border to non-state and third-state actors.[4] Such measures and practices range from pushbacks at land and sea to third-country processing agreements, and 'contactless control'.[5] In Europe, border enforcement authorities and coast guards have long been involved in pushback practices at their own territorial borders; nonetheless, externalisation has increasingly come to encompass the funding, training, and bolstering of capacity and surveillance in Global South countries, with the aim of intercepting anyone presumed to be seeking access to Europe at any stage of their journey.[6] European states often present externalisation as a necessary or pragmatic reaction,[7] aimed at easing the burden on domestic systems, restraining 'illegalised' migration flows, curbing people smuggling, [8] and addressing the 'root causes' of migration in Global North countries by generating investment and opportunity.[9] It should be noted that the term 'illegal', here and throughout this article, is used not to describe the condition of migrants; to do so would contribute harmful and dehumanising discourse that treats 'illegality' as a fact about a person or people, rather than a status imposed upon them. Rather, following De Genova and other critical scholars, the term is used in the critical sense: migrant 'illegality' and 'illegalisation' are understood as 'legal production[s]' that should be treated and studied as a theoretical 'epistemological, methodological and political problem'.[10] In reality, externalised bordering practices are

1 Moritz Jesse, *European Societies, Migration, and the Law: The 'Others' amongst 'Us'* (Cambridge University Press 2020); Alexandra Bousiou, 'Peripheralisation and Externalisation of the EU Asylum Regime: Implications for the Right to Seek Asylum on the Southeastern EU Border Islands' (2022) 48 Journal of Ethnic and Migration Studies 4586 <https://doi.org/10.1080/1369183X.2022.2097063>; David Cantor and others, 'Externalisation, Access to Territorial Asylum, and International Law' (2022) 34 International Journal of Refugee Law 120 <https://doi.org/10.1093/ijrl/eeac023>; Thomas Spijkerboer, 'The Global Mobility Infrastructure: Reconceptualising the Externalisation of Migration Control' (2018) 20 European Journal of Migration and Law 452 <https://doi.org/10.1163/15718166-12340038>.

2 Bernd Kasparek and Marc Speer first introduced the term 'long summer of migration' in their article: 'Of Hope. Hungary and the Long Summer of Migration | Bordermonitoring.Eu' <https://bordermonitoring.eu/ungarn/2015/09/of-hope-en/> accessed 26 July 2026. The term 'Summer of Migration' is used here in lieu of 'Refugee' or 'Migration Crisis' to refer to the mass and visible movement of refugees and other migrants in the mid-2010s, through the Mediterranean and Balkans, towards the other European Union states such as Austria, Germany or Sweden. It is used to avoid reinforcing binary crisis narratives that have been mobilised to dehumanise, vilify or negate agency of people on the move.

3 Carlos O Miranda, 'Haiti and the United States During the 1980s and 1990s: Refugees, Immigration, and Foreign Policy' (1995) 32 San Diego L. Rev 673; Ayşe Bala Akal, 'Third Country Processing Regimes and the Violation of the Principle of Non-Refoulement: A Case Study of Australia's Pacific Solution' (2023) 24 Journal of International Migration and Integration 231.

4 Cantor and others (n 1).

5 Violeta Moreno-Lax, 'Meta-Borders and the Rule of Law: From Externalisation to "Responsibilisation" in Systems of Contactless Control' (2024) 71 Netherlands International Law Review 21.

6 Marina Mancini, 'Italy's New Migration Control Policy: Stemming the Flow of Migrants From Libya Without Regard for Their Human Rights' (Social Science Research Network, 2017) <https://papers.ssrn.com/abstract=3287078> accessed 28 August 2025; Amanda Bisong, 'Rethinking Externalization of Migration Governance in Europe–Africa Relations: Future Research Directions in a Changing Geopolitical Landscape' [2025] International Migration Review 01979183251409750; Emilie McDonnell, 'Challenging Externalisation Through the Lens of the Human Right to Leave' (2024) 71 Netherlands International Law Review 119.

7 Violeta Moreno-Lax, 'Crisis as (Asylum) Governance: The Evolving Normalisation of Non-Access to Protection in the EU' (2024) 9 European papers (Online. periodico) 179 <https://doi.org/10.15166/2499-8249/752>; Nandita Sharma, 'Anti-Trafficking Rhetoric and the Making of a Global Apartheid' (2005) 17 NWSA Journal 88.

8 Agnese Pacciardi, 'A European Narrative of Border Externalisation: The European Trust Fund for Africa Story' (2025) 34 European Security 65 <https://doi.org/10.1080/09662839.2024.2304723>; Anna Casaglia and Agnese Pacciardi, 'A Close Look at the EU–Turkey Deal: The Language of Border Externalisation' (2022) 40 Environment and Planning C: Politics and Space 1659 <https://doi.org/10.1177/23996544221100149>.

9 Henriette Ruhrmann and David FitzGerald, 'The Externalization of Europe's Borders in the Refugee Crisis, 2015–2016' <https://escholarship.org/uc/item/2bb8x619> accessed 29 April 2026.

10 Nicholas De Genova, 'Spectacles of Migrant "Illegality": The Scene of Exclusion, the Obscene of Inclusion' (2013) 36 Ethnic and Racial Studies 1180, 1180. <https://doi.org/10.1080/01419870.2013.783710>.

characterised by physical and epistemic violence,[11] targeting racialised migrants from the Global South.[12] They seek to displace state responsibility for upholding obligations under international human rights law (IHRL) and refugee law, taking advantage of accountability gaps and jurisdictional grey zones.[13] At the same time, externalised bordering practices are necessarily met with resistance and contestation.

At the juridical centre of this contestation is the European Court of Human Rights (ECtHR), often regarded as one of the most effective and extensive regional systems of human rights protection.[14] In particular, pushbacks and pullbacks (various state measures that seek to force migrants out of or into their territory, respectively, while denying access to legal and procedural frameworks) are almost always litigated under Article 4 of Protocol 4 (Art. 4 Prot. 4) to the European Convention on Human Rights (ECHR), which prohibits the collective expulsion of aliens. Since pushbacks forcefully preclude individualised assessment of legal claims, the provision has been regarded as a key mechanism for strategic litigation through which migrants can contest such treatment. Collective expulsion entails 'any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group.'[15] In doctrinal terms, Art. 4 Prot. 4 operates as a procedural safeguard, closely tied to effective access to international protection. In principle, it prevents arbitrary expulsion by ensuring the opportunity to present arguments against it, with a full and proper examination of each individual case, applying irrespective of the applicants' status as 'regular' or 'irregular'. In doing so, the provision guarantees protection against *refoulement* and violations of Article 3 of the Convention. By nature, this necessitates the broader scope of protection: at the moment of expulsion, prior to any engagement with legal or procedural frameworks, it is near-impossible to differentiate between those who will later be found to be refugees and those who will not.[16]

The developments of the Court's jurisprudence on collective expulsion have, however, dispelled any notion that Art. 4 Prot. 4 offers a *de facto* blanket procedural safeguard to migrants and has, in turn, cast doubt over the Court's capacity to meaningfully contest externalised bordering practices.[17] In the now much-decried case of *N.D. and N.T. v. Spain,* the Grand

11 Tazreena Sajjad, 'Strategic Cruelty: Legitimizing Violence in the European Union's Border Regime' (2022) 2 Global Studies Quarterly ksac008 <https://doi.org/10.1093/isagsq/ksac008>; Thom Davies, Arshad Isakjee and Jelena Obradovic-Wochnik, 'Epistemic Borderwork: Violent Pushbacks, Refugees, and the Politics of Knowledge at the EU Border' (2023) 113 Annals of the American Association of Geographers 169 <https://doi.org/10.1080/24694452.2022.2077167>; 'Human Costs of Border Control' <https://www.borderdeaths.org/> accessed 29 April 2026.

12 Thomas Spijkerboer, 'Moving Migrants, States, and Rights Human Rights and Border Deaths' (2013) 7 The Law & Ethics of Human Rights 213; Spijkerboer, 'The Global Mobility Infrastructure' (n 1); E Tendayi Achiume, 'Racial Borders' (2022) 110 The Georgetown Law Journal 445; Sebastian Cobarrubias and others, 'Interventions on the Concept of Externalisation in Migration and Border Studies' (2023) 105 Political Geography 102911; Céline Hocquet, 'Tracking the Civilising Mission's Continuities in Externalised Migration Controls: A Critical Analysis of EU Cooperation with Third Countries' (2024) 12 London Review of International Law 181.

13 Cathryn Costello and Itamar Mann, 'Border Justice: Migration and Accountability for Human Rights Violations' (2020) 21 German Law Journal 311 <https://doi.org/10.1017/glj.2020.27>; Annick Pijnenburg, 'Externalisation of Migration Control: Impunity or Accountability for Human Rights Violations?' (2024) 71 Netherlands International Law Review 59 <https://doi.org/10.1007/s40802-024-00250-y>; Sara Dehm, 'International Law at the Border: Refugee Deaths, the Necropolitical State and Sovereign Accountability' *Routledge Handbook of International Law and the Humanities* (1st edn, Routledge 2021) <https://doi.org/10.4324/9781003170914-32>; Itamar Mann, 'Maritime Legal Black Holes: Migration and Rightlessness in International Law' (2018) 29 European Journal of International Law 347 <https://doi.org/10.1093/ejil/chy029>.

14 Francesca Tammone, 'Challenging Externalization by Means of Article 4 ECHR: Towards New Avenues of Litigation for Victims of Human Trafficking?' (2024) 71 Netherlands International Law Review 89 <https://doi.org/10.1007/s40802-024-00254-8>.

15 Protocol no. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms 1963, ETS no. 46.

16 Dana Schmalz, 'Enlarging the Hole in the Fence of Migrants' Rights' [2022] Verfassungsblog <https://doi.org/10.17176/20220406-131305-0> accessed 29 April 2026.

17 Alex Geraki-Trimi and Eleni Karageorgiou, 'Tales of Agency and Exclusion: Deconstructing the "Own Culpable Conduct" Requirement in the ECtHR Migration-Related Jurisprudence' [2025] European Journal of International Law chaf049 <https://doi.org/10.1093/ejil/chaf049>; Schmalz (n 15); Clara Bosch March, 'The ECtHR Jurisprudence on the Prohibition of Collective Expulsion of Aliens at Land Borders in the Aftermath of N.D. and N.T. v Spain: Between Deference and Discipline' (2025) 43 Netherlands Quarterly of Human Rights 172 <https://doi.org/10.1177/09240519251365115>; Lena Riemer, 'Law at the Border or New Borders of Law? The Role of the European Court of Human Rights in the Context of European Border Policy' (2023) 7 Zeitschrift für Flüchtlingsforschung 15 <https://doi.org/10.5771/2509-9485-2023-1-15>; Itamar Mann, 'A Lost Opportunity for Border Justice at the European Court of Human Rights' (*EJIL: Talk!*, 3 February 2022) <https://www.ejiltalk.org/a-lost-opportunity-for-border-justice-at-the-european-court-of-human-rights/> accessed 5 May 2026; Guest Blogger, 'N.D. and N.T. v. Spain: Defining Strasbourg's Position on Push Backs at Land Borders?' (*Strasbourg Observers*, 26 March 2020) <https://strasbourgobservers.com/2020/03/26/n-d-and-n-t-v-spain-defining-strasbourgs-position-on-push-backs-at-land-borders/> accessed 10 October 2025.

Chamber introduced the novel exclusionary 'own culpable conduct' test.[18] The Court held that the applicants' cumulative conduct, crossing a land border in an unauthorised manner, 'deliberately tak[ing] advantage of their large numbers and us[ing] force, [was] such as to create a clearly disruptive situation which … endanger[ed] public safety', was relevant to the scope of protection afforded by the prohibition of collective expulsions.[19] While initially it was hoped the test would be applied sparingly, confined to the specific and exceptional circumstances of *N.D. and N.T.*,[20] it was subsequently broadened in *A.A. v. North Macedonia*, such that unauthorised entry, largely irrespective of circumstantial considerations, could suffice to trigger the conduct-based first limb of the test.[21]

Following *A.A.,* the current position of the Court is based upon conditionality and a set of cumulative requirements. First, irregular entry is defined in *N.D. and N.T.* as the crossing of a land border 'in an unauthorised manner',[22] failing to 'make use of the official entry procedures',[23] or attempting to enter territory 'at an unauthorised location'.[24] *N.D. and N.T.* additionally emphasise the contextual requirement of aggravating circumstances, this being a) making use of a large group[25]; b) use of force;[26] c) creation of a disruptive situation[27]; d) endangerment of public safety;[28] e) external support and planning.[29] However, *A.A.* suggests that irregular entry alone may suffice.[30] Thereafter, the Court applies the two-stage test, requiring that the respondent State provide 'genuine and effective access'[31] to legal means of entry, and that such means were not used without 'cogent reasons'.[32] Where both conditions are met, an expulsion carried out without an individualised assessment will not be considered a violation of Art. 4 Prot. 4.[33] Finally, although not expressly framed as a separate condition, the absence of risk in the country of return appears to inform the Court's assessment, with the Grand Chamber in *N.D. and N.T.* emphasising that the applicants' removal to Morocco did not expose them to a real risk of ill-treatment.[34] As such, it appears that the Court also requires the country of return to be considered 'safe' for those who are expelled without an individual examination.

Existing socio-legal literature situates the Court's recent jurisprudence within a broader, more restrictive turn in its migration case law, attributable in part to compounding political and financial pressures.[35] Moreover, scholarship on border externalisation has extensively examined

18 ECtHR, *N.D. and N.T. v. Spain*, Appl. nos 675/15 and 8697/15, Judgment of 13 February 2020.

19 ibid, para. 213.

20 Annick Pijnenburg, 'Is N.D. and N.T. v. Spain the New Hirsi?' (*EJIL: Talk!*, 17 October 2017) <https://www.ejiltalk.org/is-n-d-and-n-t-v-spain-the-new-hirsi/> accessed 29 April 2026.

21 ECtHR, *A.A. and Others v. North Macedonia*, Appl. nos 55798/16 *et al*., Judgment of 5 April 2022.

22 ECtHR, *N.D. and N.T. v. Spain*, Appl. nos 8675/15 and 8697/15, Judgment of 3 October 2017 paras 166, 201, 206, 211.

23 ibid para 231.

24 ibid para 242.

25 ibid paras 166, 201, 206, 210, 211, 231, 242.

26 ibid paras 201, 210, 211, 231.

27 ibid para 201.

28 ibid.

29 ibid para 206.

30 *A.A. and Others v. North Macedonia*, para 114.

31 *N.D. and N.T. v. Spain,* para 210) (§201, similarly §§210, 211, 231, 242

32 ibid paras 201, 210, 211.

33 ibid.

34 ibid para 230.

35 Mikael Rask Madsen, 'The Narrowing of the European Court of Human Rights? Legal Diplomacy, Situational Self-Restraint, and the New Vision for the Court' <https://doi.org/10.1163/26663236-bja10023> accessed 10 October 2025; Mikael Rask Madsen, 'Resistance to the European Court of Human Rights: The Institutional and Sociological Consequences of Principled Resistance' in Marten Breuer (ed), *Principled Resistance to ECtHR Judgments – A New Paradigm?* (Springer 2019) <https://doi.org/10.1007/978-3-662-58986-1_2> accessed 28 November 2025; Mikael Rask Madsen, 'Two-Level Politics and the Backlash against International Courts: Evidence from the Politicisation of the European Court of Human Rights' (2020) 22 The British Journal of Politics and International Relations 728 <https://doi.org/10.1177/1369148120948180>.

the ways in which states shift responsibility for international obligations.[36] Initially, the dynamic between states and IHRL was characterised as a 'cat and mouse game',[37] Courts such as the ECtHR reactively litigate on state human rights violations rather than anticipating new types of practices that evade accountability; however, what has become apparent is that this characterisation risks obscuring the more complex interaction between the judiciary, states, and migrants. Critical work on the ECtHR has begun to examine its own role in reinforcing border regimes, including through the production of jurisdictional black holes that limit access to legal protection.[38] Yet a clear conceptual account of the Court itself as a bordering actor remains underdeveloped. Likewise, critical migration and border studies tend to treat IHRL as peripheral, despite a simultaneous reliance on the language of rights and violations, and with scepticism over its capacity to structurally unsettle the power relations that shape bordering practices.[39] This raises the article's central question: does the ECtHR's collective expulsion jurisprudence meaningfully contest externalised bordering practices, or does the Court's own doctrinal reasoning function as a bordering practice that reproduces and legitimises externalisation?

This article addresses this gap by advancing a combined doctrinal and critical bordering analysis of the ECtHR's jurisprudence on collective expulsion, paying particular attention to the evolution of the conduct element of the 'own-culpable conduct' exception. In the first section, the article is contextualised theoretically in the field of critical migration and border studies. First, it reviews scholarship that compels us to redefine notions of the border by drawing attention to performative bordering practices that constitute externalisation (legal and discursive) and enact differential (in)exclusion from human rights protection. It also builds on accounts of the border as a site of contestation and negotiation among multiple actors, situating the position of the ECtHR against this backdrop. Thereafter, the article examines the Court's evolving collective expulsion jurisprudence through a critical bordering lens, looking at three landmark cases of the Court: *Khlaifia and Others v. Italy, N.D. and N.T. v. Spain,* and *A.A. and Others v. North Macedonia.* It traces how considerations of irregular or unauthorised conduct shift from a peripheral consideration to a presumptive basis for granting differential access to human rights protection. In doing so, it exhibits how the exception has evolved into an interpretive tool through which bordering is performed. The article argues that the Court has evolved from an ambivalent site of resistance to one that increasingly performs bordering practices through doctrinal reasoning. This is made possible by interpretive choices that, while certainly not inevitable, are enabled by a static territorial imaginary of the border, which enables the disaggregated bordering practices of the state. In turn, these bordering practices differentially (in)exclude migrants from human rights protection and shape the possibilities for contesting bordering practices.

2. RETHINKING EXTERNALISATION: BORDERING BEYOND TERRITORY

2.1. FROM BORDERS TO BORDERING PRACTICES

This article follows the perspective of critical border scholarship, which has long called to abandon the conventional understanding of the border as a static line, rudimentarily depicted

36 Costello and Mann (n 12); Pijnenburg (n 12); T Gammeltoft-Hansen, 'The Externalisation Of European Migration Control And The Reach Of International Refugee Law' in Elspeth Guild and Paul Minderhoud (eds), *The First Decade of EU Migration and Asylum Law* (Brill | Nijhoff 2011) <https://doi.org/10.1163/ej.9789004212039.i-485.71> accessed 10 October 2025; Thomas Gammeltoft-Hansen and James Hathaway, 'Non-Refoulement in a World of Cooperative Deterrence' [2015] Articles <https://repository.law.umich.edu/articles/1485>.

37 Lavenex.

38 Geraki-Trimi and Karageorgiou (n 16); Jens T Theilen, 'Framing Migration in Human Rights: How the Reasoning of the European Court of Human Rights Legitimises Border Regimes' <https://doi.org/10.1163/15718166-12340195> accessed 11 October 2025; Grażyna Baranowska, 'Exposing Covert Border Enforcement: Why Failing to Shift the Burden of Proof in Pushback Cases Is Wrong' (2023) 4 European Convention on Human Rights Law Review, The 473 <https://doi.org/10.1163/26663236-bja10070>; Jill Alpes, 'Pushbacks and Expulsions from Cyprus and Lebanon: The Risks of (Chain) Refoulement to Syria' <https://doi.org/10.13140/RG.2.2.36122.72643> accessed 28 November 2025; Maybritt Jill Alpes and Grażyna Baranowska, 'The Politics of Legal Facts: The Erasure of Pushback Evidence from the European Court of Human Rights' (2025) 50 Law & Social Inquiry 225 <https://doi.org/10.1017/lsi.2024.27>.

39 See discussion of Bigo in Sandro Mezzadra and Brett Neilson, *Border as Method, or the Multiplication of Labor* (Duke University Press 2013) <https://doi.org/10.2307/j.ctv1131cvw> accessed 10 October 2025.

on maps to demarcate sovereignty and reinforce a binary of the inside and outside.[40] As Vaughan-Williams observes, the metaphor of the line 'belies the thickness of the border in its contemporary multiform complexity', overlooking the heterogeneity of actors and processes through which borders are enacted.[41] While imposing any singular definition risks countering this call, Mezzadra and Neilson instead propose approaching the border as an epistemological device at work 'whenever a distinction is drawn between a subject and an object'.[42]

From this perspective, the border is not merely divisive but also productive: it intensifies and multiplies hierarchies and relations of power, while also being a site of resistance through which alternative subjectivities and imaginaries are produced.[43] Accordingly, within critical border scholarship, the focus has shifted from the study of the border as an object to bordering practices, drawing on the imaginary of performance and its effects.[44] Bordering practices give meaning to borders by 'constituting, sustaining, or modifying [them]', whereby 'controls over mobility are attempted and enacted.'[45] In turn, these practices enact differential (in)exclusion, subjecting persons to 'varying degrees of subordination, rule, discrimination, and segmentation'[46] through 'several processes of uneven, differential state treatment'.[47] The notion of differential (in)exclusion, first coined by Mezzadra and Neilson, captures how bordering practices operate not simply by denying access to territory, but by filtering, classifying, and admitting persons into society along a continuum through spatial, legal, and temporal mechanisms; the conditions of which continuously shift.[48] For instance, migrants are assigned fragmented, tiered legal identities and subjectivities, such as 'illegalised worker' or 'asylum seeker', the stipulations of which are subject to constant revision, placing them in positions of economic and legal precarity, and rendering their inclusion conditional and unstable. Within this understanding, migration is not peripheral to the border, but co-constitutive of it.[49] The tension between state attempts to manage mobility and the persistent practices of resistance and struggle by migrants themselves forms what is often conceptualised as the border regime.[50]

2.2. INTERSECTING EXTRATERRITORIAL BORDERING PRACTICES

Externalisation, the enacting of bordering practices beyond conventional territorial borders, which is frequently transgressed and challenged by migrants, can be viewed as quintessentially constitutive of the border regime. In this context, interconnected and mutually reinforcing bordering practices work concurrently to produce differential (in)exclusion.[51] Physical practices of externalisation such as pushbacks and pullbacks that take place across Europe, Asia and Africa, are sustained by the creation of legal borders within and outside state territories. Law is employed as a bordering tool to limit rights and remedies to certain populations.[52] In particular, States enshrine distinctions between 'legal' forms of migration, which permit entry and inclusion, and so-called 'irregular migration', which is used to justify denying asylum or

40 Mark B Salter, 'Theory of the/: The Suture and Critical Border Studies' (2012) 17 Geopolitics 734 <https://doi.org/10.1080/14650045.2012.660580>; Noel Parker and Nick Vaughan-Williams, 'Critical Border Studies: Broadening and Deepening the 'Lines in the Sand' Agenda' (2012) 17 Geopolitics 727 <https://doi.org/10.1080/14650045.2012.706111>; Mezzadra and Neilson (n 38).

41 Parker and Vaughan-Williams, 728–729 (n 25).

42 Mezzadra and Neilson (n 38) 16.

43 Mezzadra and Neilson (n 38).

44 Parker and Vaughan-Williams (n 39).

45 ibid 729.

46 Casas-Cortes and others, 25 (n 11).

47 Maayan Ravid, 'On Inclusion, Exclusion, and Racial Differentiation: Foregrounding Racism across Borderscapes' (2025) 30 Geopolitics 1978, 1980 <https://doi.org/10.1080/14650045.2025.2468776>.

48 Sandro Mezzadra and Brett Neilson, *Border as Method, or, the Multiplication of Labor* (Duke University Press 2013) <https://doi.org/10.2307/j.ctv1131cvw> accessed 10 October 2025.

49 Mezzadra and Neilson (n 38); Casas-Cortes and others (n 45); Chiara Brambilla, 'Exploring the Critical Potential of the Borderscapes Concept' (2015) 20 Geopolitics 14 <https://doi.org/10.1080/14650045.2014.884561>.

50 Casas-Cortes and others (n 45); Mezzadra and Neilson (n 38).

51 Berfin Nur Osso, 'Unpacking the Safe Third Country Concept in the European Union: B/Orders, Legal Spaces, and Asylum in the Shadow of Externalization' (2023) 35 International Journal of Refugee Law 272 <https://doi.org/10.1093/ijrl/eead028>.

52 ibid.

access to other rights, and to facilitate removal from national territory.[53] In doing so, states construct certain rules for certain categories of people[54] through differentiated legal regimes, (in)excluding access to rights for different people in the same spaces.[55]

Externalisation agreements such as the EU-Turkey Statement and Italy-Libya Memorandum of Understanding are enforced through legal and quasi-legal regulations that categorise migration into permissible and so-called 'illegal' or 'irregular' forms of movement. In turn, they are sustained by discursive bordering practices that frame and legitimise these legal distinctions.[56] Discursively, externalisation is premised upon narratives of emergency, crisis and sovereignty.[57] Such narratives construct certain types of mobility as an exceptional threat requiring urgent and extraordinary responses, thereby normalising measures that would otherwise be politically or legally untenable.[58] Simultaneously, they distance blame from the state for systemic issues and assume political consent for whatever means is necessary to achieve the proposed solution.[59] This filtering assigns categories of mobility as advantageous or sinister, for instance through the categories of 'genuine refugees' against 'economic migrants' or 'bogus asylum seekers'.[60] Where migrants are perceived to exercise agency in ways construed as ungrateful, strategic, or transgressive, they are understood to deviate from normative expectations of passive subjectivity and consequently forfeit recognition as deserving subjects.[61] This concurrently provides the normative foundation through which restrictive migration controls are rendered acceptable and even required, while obscuring counternarratives and subjectivities of migrants themselves.[62]

The framing of the 2015 'migrant crisis', later termed the 'refugee crisis', is exemplary of this dynamic. Vaughan-Williams argues that, in 2015, state actors constructed the 'problem' of

53 Nathalie Mae Peutz, Nicholas De Genova and Project Muse (eds), *The Deportation Regime: Sovereignty, Space, and the Freedom of Movement* (Duke University Press 2010); Nicholas De Genova, 'Spectacles of Migrant "Illegality": The Scene of Exclusion, the Obscene of Inclusion' (2013) 36 Ethnic and Racial Studies 1180 <https://doi.org/10.1080/01419870.2013.783710>; Nicholas P De Genova, 'Migrant "Illegality" and Deportability in Everyday Life' (2002) 31 Annual Review of Anthropology 419.

54 Heaven Crawley and Dimitris Skleparis, 'Refugees, Migrants, Neither, Both: Categorical Fetishism and the Politics of Bounding in Europe's "Migration Crisis"' (2018) 44 Journal of Ethnic and Migration Studies 48 <https://doi.org/10.1080/1369183X.2017.1348224>.

55 Caterina Molinari, 'The Borders of the Law: Legal Fictions, Elusive Borders, Migrants' Rights' (2022) 10 Politics and Governance 239.

56 Noel Parker and Rebecca Adler-Nissen, 'Picking and Choosing the "Sovereign" Border: A Theory of Changing State Bordering Practices' *Critical Border Studies* (Routledge 2014); Mateusz Krępa, 'Split Personality of the Sovereign: The Interplay of Power within Bordering Practices of Exclusion at the Polish-Belarusian Border' [2022] Sprawy Narodowościowe. Seria nowa <https://doi.org/10.11649/sn.2800> accessed 10 October 2025.

57 Arantza Gomez Arana and Scarlett McArdle, 'Chapter 15: The EU and the Migration Crisis: Reinforcing a Security-Based Approach to Migration?' (2019) <https://www.elgaronline.com/edcollchap/edcoll/9781788972475/9781788972475.00023.xml> accessed 28 August 2025; Vicki Squire and others, 'Narratives of "Crisis"' (2021) <https://www.manchesterhive.com/display/9781526144829/9781526144829.00005.xml> accessed 18 September 2025; Nina Perkowski, Maurice Stierl and Andrew Burridge, 'The Evolution of European Border Governance through Crisis: Frontex and the Interplay of Protracted and Acute Crisis Narratives' (2023) 41 Environment and Planning D: Society and Space 110 <https://doi.org/10.1177/02637758231152478>; Nick Vaughan-Williams, 'Exceptional Times, Emergency Borders: (De)Constructing Europe's "Migration Crisis"' in Nick Vaughan-Williams (ed), *Vernacular Border Security: Citizens' Narratives of Europe's 'Migration Crisis'* (Oxford University Press 2021) <https://doi.org/10.1093/oso/9780198855538.003.0002> accessed 18 September 2025; Prof Violeta Moreno-Lax, 'The "Crisification" of Migration Law: Insights from the EU External Border' (Social Science Research Network, 15 September 2023) <https://papers.ssrn.com/abstract=4577364> accessed 28 August 2025; Casaglia and Pacciardi (n 8); Pacciardi (n 8); Peutz, De Genova and Project Muse (n 51).

58 Moreno-Lax, 'The "Crisification" of Migration Law' (n 55).

59 Perkowski, Stierl and Burridge (n 55).; Christina Boswell and others, 'The Emergence, Uses and Impacts of Narratives on Migration'. Boswell, Christina, Saskia Smellie, Marcello Maneri, Andrea Pogliano, Blanca Garcés, Verónica Benet-Martínez, and Berta Güell. 2021.

60 Steve Kirkwood and others, 'Who Counts as an Asylum-Seeker or Refugee?' in Steve Kirkwood and others (eds), *The Language of Asylum: Refugees and Discourse* (Palgrave Macmillan UK 2016) <https://doi.org/10.1007/978-1-137-46116-2_6> accessed 5 May 2026.

61 Eleanor Paynter, 'Border Crises and Migrant Deservingness: How the Refugee/Economic Migrant Binary Racializes Asylum and Affects Migrants' Navigation of Reception' (2022) 20 Journal of Immigrant & Refugee Studies 293 <https://doi.org/10.1080/15562948.2021.1980172>; Sal Clark, Ashleigh Haw and Laurel Mackenzie, 'The "Good Refugee" Ideal: How Discourses of Deservingness Permeate Australia's Refugee and Asylum Seeker Narratives' (2024) 59 Australian Journal of Social Issues 148 <https://doi.org/10.1002/ajs4.255>; Chiara Marchetti, '(Un)Deserving Refugees: Contested Access to the "Community of Value" in Italy' *Europe and the Refugee Response* (Routledge 2020).

62 Vicki Squire and others, *Reclaiming Migration: Voices from Europe's 'Migrant Crisis'* (Manchester University Press 2021).

arrivals to Europe as a 'credible, imminent, and existential "threat" to European societies, economies, and public safety'.[63] In turn, this justified and legitimised increasingly securitised and biopolitical 'solutions' through which people on the move were exposed to 'unprecedented levels of … violence and death'.[64] This narrative was paradoxically framed as both a response to criminality and a humanitarian effort to save lives.[65] It perpetuates a distinctly Eurocentric perspective that obscures the reality of global migratory trends. The number of arrivals to the EU in 2015 was equivalent to just 0.5 per cent of the entire population.[66] The effect of perpetuating this European exceptionalism exteriorised the 'threat' of migration as a 'problem' originating outside the territory of the EU.[67] Not only did this reinforce notions of 'us' and 'them',[68] it homogenised the complex and changing conditions that may motivate people to leave their home countries.[69] These discursive constructions continue to be utilised by states, but do not remain external to IHRL case law. Instead, they are internalised within it. As this article will examine, the production of 'illegalised' migration as a threat becomes the basis upon which the ECtHR attributes blameworthiness to migrants' conduct. Considered together, these intersecting practices demonstrate that externalisation operates not merely through the physical displacement of border control, but through the production of differentiated discursive and legal regimes of mobility.

2.3. THE ECTHR AS A SITE OF CONTESTATION AND BORDERING

It is against this backdrop that the jurisprudence of the ECtHR can be situated. In the principal cases examined – *Khlaifia, N.D. and N.T., and A.A.,* the applicants visibly resisted and transgressed territorial borders through some form of collective protest prior to their being violently pushed back. As will be discussed, this transgression was engendered by bordering practices that generated conditions of exclusion, immobility, and precarity. Their cases, taken up at the ECtHR, can be viewed in part as the excess of this interaction, as an attempt at transformative contestation against these conditions and state pushbacks.[70] The excess, here, refers to that which escapes, resists, and overflows state attempts to control, categorise, and survey human mobility: the product of the interaction between states' attempted impositions of power through violent bordering practices; and the relational resistance and struggle of migrants against them.[71] Nonetheless, while IHRL is often presented as a limitation on externalisation, its operation is nevertheless shaped by the same power relations that enable it. In particular, it remains anchored to conceptions of territoriality that fail to capture the heterogenous and complex nature of contemporary bordering practices.[72] Territoriality is enduringly regarded as a 'self-evident and innocent' organising principle of the international legal order, intrinsic to the protection of human rights.[73] Yet, externalisation challenges such a conception by dispersing bordering practices across multiple spaces, beyond the formal jurisdiction of the state.

As Mezzadra and Neilson state, quoting Teubner, this makes any 'attempt to confront the human rights problem using the resources of law' an impossible project. The 'justice of human rights can… at best be formulated negatively' as it is aimed at dismantling unjust situations rather than constructing just ones.[74] This observation was laid bare in the landmark *Hirsi* case.

63 ibid, 26.

64 Ibid.

65 Vaughan-Williams (n 55).

66 Bridget Anderson, 'Towards a New Politics of Migration?' (2017) 40 Ethnic and Racial Studies 1527, 1529.

67 Vaughan-Williams (n 83) 49.

68 Ibid, 49.

69 Squire and others (n 60).

70 Casas-Cortes and others (n 45); Chiara Brambilla and Reece Jones, 'Rethinking Borders, Violence, and Conflict: From Sovereign Power to Borderscapes as Sites of Struggles' (2020) 38 Environment and Planning D: Society and Space 287 <https://doi.org/10.1177/0263775819856352>.

71 Michel Foucault and others, *Power, Knowledge: Selected Interviews and Other Writings 1972–1977* (Harvester Wheatsheaf 1980).

72 Peutz, De Genova and Project Muse (n 51); De Genova (n 51).

73 Galina Cornelisse, *Immigration Detention, Territoriality and Human Rights: Towards Destabilization of Sovereignty's Territorial Frame* (European University Institute 2007).

74 Mezzadra and Neilson (n 38) 187.

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The case was celebrated for affirming 'once and again that making States accountable for grave breaches of human rights committed beyond borders…is a protection imperative'.[75] Yet, others cautioned that the seemingly progressive case would, by defining the limits of human rights jurisdiction, serve as a blueprint to enable state violence at sea by generating a jurisdictional black hole where no *de jure* or *de facto* control could be clearly established.[76] As predicted, states have subsequently sought to weaken the jurisdictional link by focusing on pre-entry controls such as financing 'pull-backs', surveillance, capacity building, detention camps, and pre-emptive rescue at sea.[77]

However, when human rights actors, including international human rights courts, engage in legal and discursive bordering that differentiates between genuine asylum seekers and 'illegalised' migrants, excusing states from their responsibilities, they move beyond this negative function. The connection between constructed 'illegality' and culpability in collective expulsion jurisprudence is emblematic of this. In advancing the concept of culpability from an outlying consideration to a presumption, the Court has created unjust situations, participating in the co-construction of bordering practices it is called upon to scrutinise.[78] The analysis will now turn to this position in more detail. As it will demonstrate, the Court's approach to so-called 'illegality' and culpability, latent from the outset, but increasingly consolidated, reveals how its reasoning does not merely respond to externalisation, but is implicated in its practice.

3. CULPABILITY AS BORDERING: THE EVOLUTION OF COLLECTIVE EXPULSION JURISPRUDENCE

3.1. KHLAIFIA V. ITALY: SOWING THE SEEDS OF CULPABLE CONDUCT

While *N.D. and N.T.* is often treated as a critical juncture in collective expulsion jurisprudence, this section argues that it consolidated a nascent trajectory already visible in earlier case law. *Čonka v. Belgium* marked the ECtHR's first finding of a violation of Art. 4 Prot. 4.[79] Uncontroversially, the case affirmed the necessity of genuine individualised assessment, reinforcing the minimum procedural guarantee of the provision.[80] From *Čonka* through to the landmark *Hirsi* case, the Court appeared to articulate an increasingly protective reading of the provision centred on the requirement of individualised assessment.[81] Nevertheless, as with all migration case law at the ECtHR, this protection remained firmly wedded to an understanding that states' 'difficulties in coping with the increasing influx of migrants and asylum-seekers'[82] place a 'burden and pressure on states'.[83] This position is archetypal of what has come to be known as the 'Strasbourg Reversal', whereby the Court begins its analysis in migration case law by affirming a state's right to control its territory, placing the individual's right below that of the state, putting the behaviour of the applicant under scrutiny,[84] therefore leaving the protection under the provision implicitly vulnerable to reinterpretation in politically volatile contexts shaped by externalised border control.[85]

75 Mariagiulia Giuffré, 'WATERED-DOWN RIGHTS ON THE HIGH SEAS: HIRSI JAMAA AND OTHERS V ITALY (2012)' (2012) 61 International & Comparative Law Quarterly 728 <https://doi.org/10.1017/S0020589312000231>.

76 Mann (n 12).

77 'The Raise of Consensual Containment: From "Contactless Control" to "Contactless Responsibility" for Forced Migration Flows' (*UNHCR*) <https://www.unhcr.org/media/raise-consensual-containment-contactless-control-contactless-responsibility-forced-migration> accessed 30 April 2026.

78 Didier Bigo, 'Security and Immigration: Toward a Critique of the Governmentality of Unease' (2002) 27 Alternatives 63, 79 <https://doi.org/10.1177/03043754020270S105>.

79 ECtHR, *Čonka v. Belgium*, Appl. No. 51564/99, 5 February 2002.

80 Ibid.

81 For a full assessment of Article 4 of Protocol no. 4 see Riemer, 'The Prohibition of Collective Expulsions in Public International Law' (2020) (PhD thesis on file at Freien Universitat Berlin).

82 *Hirsi*, para 122.

83 ibid.

84 Marie-Bénédicte Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* (First edition, Oxford University Press 2015).

85 *Hirsi* para 122; see also *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, para 223, ECHR 2011.

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This vulnerability was recognised in the Grand Chamber judgement of *Khlaifia and Others v. Italy,* where a demonstrably deferential approach to states was first taken.[86] The judgement concerned three Tunisian nationals intercepted by the Italian coastguard and transferred to the island of Lampedusa. There, they were detained in the early reception and aid centre (Centro di Primo Soccorso e Accoglienza – CPSA) of Contrada Imbriacola. Following violent unrest and a demonstration against the conditions at the centre, they were transferred to Palermo and held for several days on moored military ships before being deported to Tunisia. Their removal was carried out under a fast-track procedure introduced through a bilateral agreement in response to increased migration during the Arab Spring. Notably, the expulsion orders for the hundreds of individuals involved were almost identical.

In line with previous case law, the initial Second Chamber judgement determined that the absence of individual interviews, together with the failure of the removal orders to address the applicants' personal circumstances, was sufficient to characterise the expulsion as collective in nature.[87] The Grand Chamber, however, adopted a different line of reasoning. Departing from *Čonka,* the Court held that the fact the applicants were issued with similar decisions did not inherently render the expulsion collective, because the mere 'opportunity to put arguments against [their] expulsion [...] on an individual basis was sufficient', thus rejecting the applicant's argument that this necessitated an individualised interview.[88] While the Court still found violations of Art. 5 § 2, 5 § 4, and 13 together with 3, the case demonstrated deliberate interpretive choices to dilute the minimum procedural guarantee of the provision.

At the evidentiary level, an 'opportunity' is considerably easier for a responding state to substantiate than an individualised assessment. Both civil society submissions to the ECtHR and contemporaneous reporting suggested that it was highly unlikely that any such opportunity was afforded to the applicants.[89] As observed by Judge Serghides in his dissenting opinion, the Government 'deduced no evidence that personal interviews had been conducted, but only raised general, vague, unproven and unconvincing allegations.'[90] Despite this, the Court was satisfied that there was no reason to assume the Italian authorities 'would have remained unreceptive in response to the submission of other legitimate and legally arguable impediments to their removal.'[91] Such esteem for the account of the Italian state is reflective of the centrality of good faith in the convention system, which is considered a practical position to evade criticism on the basis of judicial overreach.[92]

Yet, as stated by Alpes and Baranowska, 'this default position is problematic... when ECtHR judges disregard evidence of states' bad faith.[93] Asymmetrical evidentiary burdens do epistemic borderwork when situated against compounding practices of authorities engaged in pushbacks and pullbacks, who seek to systematically destroy or suppress evidence to conceal border violence.[94] Various sources of documentation show that states involved in pushbacks routinely deny such practices, mis-record or misidentify arrivals, and confiscate or destroy mobile phones that might otherwise document violations.[95] These bordering practices seek to create "unknowable spaces" by undermining the credibility of migrants, permitting violence to occur

86 *Khlaifia and Others v. Italy*, Appl. no. 16483/12, Judgment of 15 December 2016.

87 *Khlaifia and Others v. Italy* ECtHR, [Chamber], Appl. No. 16483/12, 1 September 2015.

88 Ibid para 154; *Khlaifia and Others v. Italy*, Appl. no. 16483/12, Judgment of 15 December 2016, para 239.

89 *Khlaifia and Others v. Italy*, Appl. no. 16483/12, Judgment of 15 December 2016, para 50; 'Italy: Beatings and Unlawful Expulsions amid EU Push to Get Tough on Refugees and Migrants' (*Amnesty International*, 3 November 2016) <https://www.amnesty.org/en/latest/press-release/2016/11/italy-beatings-and-unlawful-expulsions-amid-eu-push-to-get-tough-on-refugees-and-migrants/> accessed 29 April 2026.

90 *Khlaifia and Others v. Italy*, Appl. no. 16483/12, Judgment of 15 December 2016, para 14, Partly Dissenting Opinion of Judge Serghides.

91 *Khlaifia and Others v. Italy*, Appl. no. 16483/12, Judgment of 15 December 2016, para 247.

92 Deirdre Conlon, 'The Spectacle of Invisibility: Vanishing Points and the Spatialised Legal Violence of the UK's Expanding Quasi-Carceral Geography of Immigration Control' (2026) 31 Geopolitics 586 <https://doi.org/10.1080/14650045.2024.2411328>.

93 Alpes and Baranowska (n 37).

94 ibid.

95 Davies, Isakjee and Obradovic-Wochnik (n 10); Martina Tazzioli, *The Making of Migration: The Biopolitics of Mobility at Europe's Borders* (SAGE Publications, Inc 2020) <https://doi.org/10.4135/9781526492920> accessed 29 April 2026.

without accountability. To presume the good faith of a state, when overwhelming evidence is adduced to the contrary, is therefore erroneous.[96] More than this, to do so reifies the bordering practices of the state, as it entrenches its knowledge claims as truth and stifles the ability of migrants to draw attention to their own exploitation,[97] thus conditioning access to protection on navigating evidentiary thresholds that are themselves shaped by border violence.

At the same time, *Khlaifia* reflects an early move toward discursive bordering, through which the Court begins to associate the applicants' conduct prior to the alleged violation with 'illegality' and reduced access to protection – something explicitly articulated in subsequent judgments. In their judgement, the Grand Chamber attributed the absence of individualised assessment, not to the conduct of the state, but to the applicants' manner of entry.[98] They reasoned that the 'relatively simple and standardised nature' of the removal orders could be explained not by the third-country removal order in place, but by the applicants, as they had not produced valid travel documents or alleged ill-treatment, and had 'unlawfully crossed the Italian border'.[99] Foreshadowing *N.D. and N.T.,* the case introduced a problematic relevance of an individual's conduct, choice, and means of entry, to the level of protection afforded, something which sits uneasily with the provision's underlying purpose of procedural safeguarding for citizens and non-citizens alike. More specifically, it imposes a distinction between those who enter via 'regular' channels and those who do not.

As discussed, such discursive differentiations are central to both the political legitimacy and legal enforcement of externalisation. In this instance, they obscured the realities of the hotspot approach implemented by Italian authorities at the time, whereby migrants would be identified and separated into asylum-seekers and economic migrants. Within this framework, migrants from North Africa, particularly those from Tunisia, who arrived in Italy via the Mediterranean were subject to differential treatment. They were more frequently labelled as 'economic migrants', placed in detention, issued rejection orders without sufficient justification, and ultimately repatriated.[100] Access to the asylum procedure was effectively prohibited, with the dichotomy between 'genuine asylum seekers' and 'voluntary economic migrants' legitimising such an approach.[101] This framing necessarily overlooks the complex, intersecting, and often contingent conditions of migration, reducing them to matters of individual choice.[102] The reasoning of the Court, by imposing so-called 'illegal' and 'irregular' subjectivity onto the applicants, ultimately entrenches bordering practices that manifest differential access to rights via a hierarchy of deservingness.

While *Khlaifia* did not yet formally condition protection on migrant conduct, it hints at the Court's willingness to make such a move, albeit from an ambivalent position. By lowering the procedural threshold and attributing deficiencies in individualised assessment to the applicants' behaviour, the Court introduces a latent logic through which access to protection is later conditioned. At this stage, the Court's contribution to externalised bordering practices remains subtle, a drift towards a pattern of interpretive thinking rather than overt doctrinal design. It is this implicit logic that is rendered explicit and formally consolidated in *N.D. and N.T. v. Spain*.

3.2. N.D. AND N.T. V. SPAIN: CONSTRUCTING CULPABILITY

In *N.D. and N.T*. The previously latent association between unauthorised entry and 'illegalised' entry is formally reconstituted as culpable behaviour, and this culpability is then used to justify exclusion from procedural protection.

96 Alpes and Baranowska (n 37).

97 Davies, Isakjee and Obradovic-Wochnik (n 10); 'Spivak, G. C. (1988). Can the Subaltern Speak In C. Nelson, & L. Grossberg (Eds.), Marxism and the Interpretation of Culture. Urbana/Chicago University of Illinois Press. – References – Scientific Research Publishing' <https://www.scirp.org/reference/referencespapers?referenceid=2877144> accessed 30 April 2026.

98 *Khlaifia and Others v. Italy*, Appl. no. 16483/12, Judgment of 15 December 2016, 251.

99 *Khlaifia and Others v. Italy*, Appl. no. 16483/12, Judgment of 15 December 2016, 251.

100 Ferruccio Pastore and Emanuela Roman, 'IMPLEMENTING SELECTIVE PROTECTION A Comparative Review of the Implementation of Asylum Policies at National Level Focusing on the Treatment of Mixed Migration Flows at EU's Southern Maritime Borders'.

101 'The Differentiated and Repressive Treatment of Irregular Tunisian Migrants in Italy | Oxford Law Blogs' (8 February 2023) <https://blogs.law.ox.ac.uk/border-criminologies-blog/blog-post/2023/02/differentiated-andB repressive-treatment-irregular> accessed 30 April 2026.

102 Squire and others (n 60).

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The facts of the case involved two applicants who attempted two crossings at the border between the Spanish enclave of Melilla and Morocco. During the crossings, involving 600 black African migrants, the Spanish Guardia Civil apprehended them and 70 other individuals who attempted to climb the border fence structure. They were immediately pushed back to Morocco, after which Spanish authorities then allowed the Moroccan security forces into Spanish territory to 'take back' those on the fence. Footage from the day shows that the migrants were then hit and kicked by the Moroccan forces while the Guardia civil looked on, before they were pushed back through a gate. The practice, otherwise known as 'hot returns', had been in place since 2005, relying upon an internal 'operational border concept' of the Guardia Civil in Ceuta and Melilla.[103] Yet, instead of focussing on the violent bordering practices of the state, the Court made the interpretive choice to deem the applicant's conduct as a relevant consideration in applying the provision.

Although the underlying logic is foreshadowed in *Khlaifia,* prior to *N.D. and N.T.* the concept of culpable conduct occupied only a peripheral position in the Court's collective expulsion jurisprudence. In *Hirsi Jamaa v. Italy,* the Court stressed that 'there is no violation of Article 4 of Protocol No. 4 if the lack of an expulsion decision made on an individual basis is the consequence of the applicants' own culpable conduct', referencing *Berisha and Haljiti* and *Dritsas*.[104] However, the matter was confined to the general principles section and was not determinative to the findings of the case. Crucially, in both cases relied upon, the absence of individual removal decisions stemmed directly from the applicants' conduct in the context of their removal, specifically the inexistence of formal expulsion documents. Conduct preceding or accompanying entry was not subject to scrutiny.[105]

Likewise, in *N.D. and N.T.,* the Grand Chamber acknowledged that the applicants' conduct 'is a relevant factor in assessing the protection to be afforded under Art. 4 of Prot. No. 4.'[106] They further held, by referring to 'well-established case law',[107] that 'there is no violation of Article 4 of Protocol No. 4 if the lack of an individual expulsion decision can be attributed to the applicant's own conduct'.[108] Where the Court departed from prior reasoning was the applicability of the principle to the case. It concluded that where unauthorised entry and the circumvention of legal routes are established, a number of circumstances should be used to ascertain whether entry amounts to culpable conduct that can excuse a state from responsibility for a violation. These being a) crossing as a large number; b) use of force; c) creation of a disruptive situation; d) endangerment of the public; and e) external support and planning.[109] Therefore, for the first time, the applicants' conduct before and during entry to Spain was pivotal to the Court's finding of no violation.[110] In fact, as Geraki-Trimi and Karageorgiou highlight, the association between 'culpable conduct' and 'irregular entry' originated in state submissions, most notably by Spain and the intervening French government, and was later absorbed into the Court's reasoning without acknowledgment or critical examination.[111] Thus, despite the assertion by the Court of a 'well-established' body of case law from which the test was born, tracing its development reveals little support for this claim, suggesting it instead to be a novel interpretive construction of considerable consequence.

Not only does the test find little support in prior case law, but it also lacks a clear basis in the object and purpose of Art. 4 Prot. 4. There was broad consensus prior to the case, among the judiciary and scholars alike, that Art. 4 Prot. No. 4 is absolute in character. Rietiker has stated

103 'A Cold Shower for Spain-Hot Returns from Melilla to Morocco: N.D. and N.T. v Spain ECtHR, 3 October 2017 – EU Immigration and Asylum Law and Policy' <https://eumigrationlawblog.eu/a-cold-shower-for-spain-hot-returns-from-melilla-to-morocco-n-d-and-n-t-v-spain-ecthr-3-october-2017/> accessed 29 April 2026.

104 Hirsi Jamaa and Others v. Italy ECtHR, [GC], para. 184; Berisha and Haljiti v. the former Yugoslav Republic of Macedonia ECtHR, Appl. No. 18670/03, 16 June 2005; Theodoros Dritsas v. Italy ECtHR, Appl. No. 2344/02, 1 February 2011. Only available in French.

105 Riemer, 'The Prohibition of Collective Expulsions in Public International Law' (2020) (PhD thesis on file at Freien Universitat Berlin), at 167, 248; Sardo, 'Border Walls, Pushbacks, and the Prohibition of Collective Expulsions: The case of N.D. and N.T.', 23 *European Journal of Migration Law* (*EJML*) (2021) 308, at 324.

106 *N.D. and N.T. v. Spain ECtHR*, [GC], para. 200.

107 The Court referred to *Khlaifia and Others v. Italy; Hirsi Jamaa and Others v. Italy; M.A. v. Cyprus; Berisha and Haljiti v. Macedonia.*

108 *Hirsi Jamaa and Others v. Italy ECtHR*, [GC], para 200.

109 ibid para 201.

110 Riemer (n.75).

111 Geraki-Trimi and Karageorgiou (n 16).

that in its connection to Art. 3, the protection 'embodies an absolute guarantee which is not subjected to restrictions'.[112] Likewise, Chetail has contended that Art. 4 Prot. 4 is an absolute prohibition that should apply to 'any non-nationals who are within the jurisdiction of a state'.[113] Hakiki also asserts that the provision was drafted as an absolute prohibition, as confirmed by both the Working Party and Preparatory Work of Protocol No. 4.[114] Indeed, the commentary of the Explanatory Report to Art. 4 Prot. 4 reiterates that the provision should apply whether the applicants are 'refugees or entered the country on their own initiative'.[115] Such an interpretation was consistently reflected in the ECtHR's case law, reinforcing that the protective remit of the ECHR cannot be determined by the rules of states on where and when legal entry occurs, thereby preventing them from evading responsibility. From a broader doctrinal perspective, conditioning protection on the manner of entry is particularly problematic. It is anathema to Art. 31 of the Refugee Convention, which stipulates that contracting state parties should not penalise on account of 'illegal' or unauthorised entry or presence.[116] As such, to impose any penalties without regard to the merits of a claim undermines the Convention,[117] not only risking procedural rights, but also the absolute substantive right of 'non-refoulement'.[118] Taken together, it is evident that the Court took an analytical approach that is incongruous with both its own logic and the wording and object of the relevant provision.

Against this context, the internal tension in the Court's reasoning in *N.D. and N.T.* is telling. In para 185, the Grand Chamber states that the term expulsion, refers to 'any forcible removal of an alien…irrespective of the lawfulness of a person's stay, the length of time he or she has spent in the territory, the location in which he or she was apprehended, his or her status as a migrant or an asylum-seeker and his or her conduct when crossing the border.'[119] Yet, at para 242, the Grand Chamber goes on to state that the applicants 'placed themselves in an unlawful situation…[choosing] not to use the legal procedures which existed…to enter Spanish territory lawfully', thereby cementing 'illegality', and notions of choice, as a pertinent point of deliberation.[120] In doing so, the Court undermines its earlier assertion that such factors are irrelevant to the applicability of Art. 4 Prot. 4.

The exception's tenuous legal soundness is reflected in the inconsistency of its subsequent application. In *Asady* and *Others v. Slovakia*,[121] the Court found no violation of Art. 4 Prot. 4 determining that the procedural element of the exception, genuine and effective access to legal entry, was satisfied. Therefore, there was no direct examination of culpable conduct. Nonetheless, the discussion in the dissenting opinion of Judges Lemmens, Keller and Schembri Orland offers insight into any would-be line of reasoning. They distinguished the case from *N.D. and N.T.,* considering that the 32 persons taking part in the crossing neither used force nor amounted to a large group.[122] However, by the applicants' own admission, they attempted to cross the border at night, covertly in a truck, which would have necessitated some prior arrangement and negotiation, arguably more so than the storming of the fence at Melilla. To

112 D Rietiker, 'Collective Expulsion of Aliens: The European Court of Human Rights (Strasbourg) as the Island of Hope in Stormy Times?' (2016) 39(3) *Suffolk Transnational Law Review* 651, 655.

113 V Chetail, 'The Global Compact for Safe, Orderly and Regular Migration: A Kaleidoscope of International Law' (2020) 16 *International Journal of Law in Context* 253, 262.

114 Hanaa Hakiki, 'The ECtHR's Jurisprudence on the Prohibition of Collective Expulsions in Cases of Pushbacks at European Borders: A Critical Perspective' in Stephanie Schiedermair, Alexander Schwarz and Dominik Steiger (eds), *Theory and Practice of the European Convention on Human Rights* (Nomos Verlagsgesellschaft mbH & Co KG 2022) 134 <https://doi.org/10.5771/9783748923503-133> accessed 30 April 2026.

115 Article 4 of the final Committee draft, 505, para 34.

116 Article 31(1) of the Convention Relating to the Status of Refugees (Refugee Convention) 1951, 189 UNTS 150.

117 'Guy S. Goodwin-Gill, Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention, and Protection, Cambridge University Press (CUP), June 2003, https://www.refworld.org/reference/research/cup/2003/77935 [accessed 29 April 2026].

118 See ECtHR, *Sharifi and Others v. Italy and Greece*, Appl. no. 16643/09, Judgment of 21 October 2014, para. 211; Sardo, 'Border Walls, Pushbacks, and the Prohibition of Collective Expulsions: The case of N.D. and N.T.', 23 *European Journal of Migration Law* (*EJML*) (2021) 308, at 324; Riemer, 'The Prohibition of Collective Expulsions in Public International Law' (2020) (PhD thesis on file at Freien Universitat Berlin), at 167, 248;

119 *N.D. and N.T. v. Spain ECtHR*, [GC].

120 ibid.

121 *Asady and Others*, Appl. no. 24917/15, Judgment of 24 March 2020.

122 Ibid, Joint Dissenting Opinion of Judges Lemmens, Keller and Schembri Orland paras 18 – 19.

play devil's advocate, by the Court's own standards laid out in *N.D. and N.T.*, this could plausibly satisfy the requirement of 'external support and planning'. Yet the Court, by omission, regarded the circumstances as irrelevant. That they did not engage with these factors underscores the discretionary and selective nature of the test. Albeit *obiter dicta,* this raises further questions over the clarity of the Court's reasoning. At the same time, the Court's reluctance to characterise acts of coordination or negotiation as inherently threatening suggests a degree of ambivalence in its approach.[123] Nonetheless, this ultimately suggests that the 'culpable conduct' exception is best understood not as anchored in 'well-established' case law, but as an interpretive choice, deployed variably to justify differential outcomes.

When viewed through a critical bordering lens, the construction of the 'culpable conduct' exception reveals deeper implications, particularly considering how the Court treats contestation of bordering practices. The Court's reasoning implies that there is a correct time and place by which a person can cross a border. In correlating receipt of protection to the time and space of 'lawful' entry, the Court reproduces a static, territorial conception of the border that is at odds with the multiplicity of exclusionary practices that interact with migratory experiences, particularly in the context of border externalisation.[124] Instead, critical border scholarship implores us to conceptualise the border as a heterogenous site of simultaneous struggle and contestation.[125] In *N.D. and N.T.,* this struggle was made visible. The bordering practices of Spain and Morocco were openly challenged, resisted and transgressed by the applicants, disrupting the mechanism of border externalisation.[126] An ephemeral claim of presence was made, despite the threat of deportation and forcible expulsion from the space and state.[127] However, this struggle cannot be understood as an expression of unconstrained choice. Rather than a transformative political project, while not reducible to it, such acts are more plausibly read as tactical responses to structurally produced conditions of exclusion.[128] The case, therefore, is exemplary of the European border regime. It exists because of the border's attempted closures and migrant resistance to them, a tension whose excess is, in this instance, carried further still, no longer confined to the Melilla fence, but litigated, and thereby extended, into the Court itself. At the same time, this move into the courtroom presents the Court with the opportunity to reinforce the state's power relations by turning the very act of contestation into a further site for constructing legal unaccountability.

Contemporaneous reporting of UNHCR and an Amnesty International Report published in November 2024 make it clear that the increasing number of attempts to jump border fences in the region was connected to the numerous hurdles, particularly for Sub-Saharan African migrants, in lodging an asylum application at Spain's borders.[129] This is illustrated by data published by the government showing that persons from sub-Saharan countries are underrepresented among the nationalities of asylum seekers at Melilla's border.[130] Far from responding to sudden or exceptional threats, Spanish authorities have systematically intensified border control infrastructure over the past two decades. Following renovations at the Melilla and Ceuta fences in 2019, various organisations have reported that the height of the fences was increased by 30%, further risking the safety of those who attempt to scale the fence.[131] In

123 Ċetta Mainwaring, 'Migrant Agency: Negotiating Borders and Migration Controls' (2016) 4 Migration Studies 289 <https://doi.org/10.1093/migration/mnw013>.

124 Ruben Andersson, 'Time and the Migrant Other: European Border Controls and the Temporal Economics of Illegality' (2014) 116 American Anthropologist 795 <https://doi.org/10.1111/aman.12148>.

125 Casas-Cortes and others (n 45).

126 Corey Johnson and others, 'Interventions on Rethinking "the Border" in Border Studies' (2011) 30 Political Geography 61, 66–67 <https://doi.org/10.1016/j.polgeo.2011.01.002>; Chris Rumford, 'Theorizing Borders' (2006) 9 European Journal of Social Theory 155 <https://doi.org/10.1177/1368431006063330>; Casas-Cortes and others (n 45); Brambilla (n 47); Brambilla and Jones (n 68).

127 Nicholas De Genova, 'On Standby… at the Borders of "Europe" Standby: Organizing Modes of Inactivity' (2021) 21 ephemera.

128 Loren B Landau, 'Countering Containment: Chronoscopy and Resistance in an Era of Externalisation' (2025) 30 Geopolitics 144 <https://doi.org/10.1080/14650045.2024.2415881>.

129 'Access to the Territory and Push Backs' (*Asylum Information Database | European Council on Refugees and Exiles*) <https://asylumineurope.org/reports/country/spain/asylum-procedure/access-procedure-and-registration/access-territory-and-push-backs/> accessed 29 April 2026.

130 ibid.

131 'Irregular Migration: Spain to Increase Height of Border Fence in Ceuta' <https://www.moroccoworldnews.com/2019/02/82614/irregular-migration-spain-ceuta-morocco/> accessed 29 April 2026.

2020, the Government announced a budget of €138,000 to enlarge the asylum post at the Melilla border.[132] As of March 2026, the Ministry of the Interior announced an investment of over €1.5 million to further reinforce the border perimeter around the former *Barrio Chino* land border post in Melilla.[133] Against these circumstances, it is clear that the applicants' scaling of the fence was, at least in part, engendered by the very externalised bordering practices that excluded them from taking an 'authorised' route into Spain.

Yet the Court's reasoning purposefully obfuscates this context, thus lending legitimacy to externalised bordering practices. In their assessment of the applicants' conduct, the Court entirely disregarded the relevance of racial profiling by the Moroccan authorities, stating that it could not be suggested that the 'Spanish government was in any way responsible'.[134] They also failed to substantively engage with the entrenched practice of 'hot returns'. In doing so, the Court treated the applicants' scaling of the fence as an unwarranted, deviant violation of some legal or normative order, rather than a situated, tactical response to bordering practices. More broadly, this framing contributes to the de-politicisation and de-historicisation of migrant struggles.[135] In particular, it obscures the extent to which the mobility of the vast majority of people from formerly colonised countries to Europe is structurally constrained through differential regimes of (in)exclusion within the global mobility infrastructure, including restrictive visa regimes and limited access to safe and lawful travel routes[136] that necessarily give rise to the circumventing of authorised pathways. As such, resistance, albeit under structural constraint, is tempered and distorted by the ECtHR's own ideological assumptions; it shifts attention away from the role of state practices in producing the forms of contestation the Court then relies on to justify exclusion from human rights protection.[137] In turn, this erases the asymmetry of power relations that shapes migrant encounters with the border, presenting it as an interaction of equivalent actors.

By portraying resistance as something to be punished, the Court also engages in bordering on a discursive level by implicitly delineating who is and who is not deserving of human rights protection. The Grand Chamber frames the scaling of the border wall as a dangerous exercise of free will.[138] The Court's omission of any individualised assessment of the reasons compelling the applicants to circumvent legal entry routes allows it to attribute a collective, and implicitly violent, intention to the group, characterised as posing a threat to public order and safety.[139] As contended, this reproduces securitarian political narratives predicated upon racial stereotypes of violent migrants from the Global South seeking to invade the EU, distorting accounts of resistance in the process.[140] In turn, this reinforces hierarchies of migrant deservingness, whereby

132 'The Asylum Office in Beni Enzar Will Have Two Floors to Expand Its Facilities.' <https://elfarodemelilla.es/oficina--beni-enzar-tendra-dos-plantas-ampliar-dependencias/> accessed 29 April 2026.

133 Raúl Mozos Maroto, 'Interior prevé "reforzar" la valla del paso de Barrio Chino en Melilla, mientras Amnistía Internacional critica el "blindaje" de fronteras' (*RTVE.es*, 27 March 2026) <https://www.rtve.es/noticias/20260327/interior-reforzar-valla-paso-barrio-chino-melilla-amnistia-internacional-blindaje-fronteras/17001212.shtml> accessed 30 July 2026.

134 *N.D. and N.T. v. Spain ECtHR*, [GC] para 218.

135 Vaughan-Williams (n 55).

136 Thomas Spijkerboer, 'The Global Mobility Infrastructure: Reconceptualising the Externalisation of Migration Control' <https://doi.org/10.1163/15718166-12340038> accessed 28 August 2025; Spijkerboer, 'Moving Migrants, States, and Rights Human Rights and Border Deaths' (n 11); Thomas Spijkerboer, 'Migration Management Clientelism: Europe's Migration Funds as a Global Political Project' (2022) 48 Journal of Ethnic and Migration Studies 2892 <https://doi.org/10.1080/1369183X.2021.1972567>.

137 Witold Klaus and Magdalena Kmak, 'ECtHR Jurisprudence amid Political Shifts: Rolling Back the Protection against Pushbacks' (2025) 0 The International Journal of Human Rights 1 <https://doi.org/10.1080/13642987.2025.2552950>.

138 Geraki-Trimi and Karageorgiou (n 16).

139 ibid.

140 *The Borders of 'Europe': Autonomy of Migration, Tactics of Bordering* (Duke University Press 2017) <https://doi.org/10.2307/j.ctv11smr05> accessed 29 April 2026; Gabriella Lazaridis and Khursheed Wadia (eds), *The Securitisation of Migration in the EU* (Palgrave Macmillan UK 2015) <https://doi.org/10.1057/9781137480583> accessed 11 October 2025; Molly Andrews, Catarina Kinnvall and Kristen Monroe, 'Narratives of (In)Security: Nationhood, Culture, Religion, and Gender: Introduction to the Special Issue' (2015) 36 Political Psychology 141 <https://doi.org/10.1111/pops.12224>; Valeria Bello, 'The Spiralling of the Securitisation of Migration in the EU: From the Management of a "Crisis" to a Governance of Human Mobility?' (2022) 48 Journal of Ethnic and Migration Studies 1327 <https://doi.org/10.1080/1369183X.2020.1851464>; Didier Bigo, 'Security and Immigration: Toward a Critique of the Governmentality of Unease' (2002) 27 Alternatives: Global, Local, Political 63 <https://doi.org/10.1177/03043754020270S105>.

protection and inclusion are conditional upon performing arbitrary social expectations.[141] Those unable to exhibit grateful and passive subjectivity exercise their agency dangerously and thus warrant exclusion from the remit of protection.[142] Where *Khlaifia* left the Court's role latent, *N.D. and N.T.* renders it explicit; culpability becomes a formally reasoned basis for narrowing protection, and the Court's interpretive choices actively, rather than incidentally, reproduce the logic of externalisation and legitimise its practice.

3.3. *A.A. AND OTHERS V NORTH MACEDONIA:* CONSOLIDATING "ILLEGALITY" AS CULPABILITY AND BROADENING EXCLUSION

Initially, it was hoped that the 'own culpable conduct' exception would be applied narrowly to the specific circumstances of *N.D. and N.T.* Indeed, it was not relied upon in the subsequent Chamber judgments of *Moustahi v France* and *Asady v Slovakia*.[143] In *Asady*, the dissenting opinion explicitly cautioned against any expansion of the exception, underscoring that it should be 'confined to its proper context in order to avoid depriving the right secured by Art. 4 of Prot. No. 4 of its very essence'.[144] Similarly, in *M.K. v. Poland,* the Court excluded the applicability of the test.[145] Likewise, in *Shahzad v Hungary* and *M.H. and Others v Croatia*, the Court referred to the exception only in *obiter*, again signalling a restrictive approach to its applicability.[146] However, in *A.A. and Others v. North Macedonia,* the Court broadened the exception, in doing so reconfiguring the continuum of differential (in)exclusion.

The case arose following what later became known as the 'March of Hope'.[147] In March 2016, a group of migrants stranded at the Idomeni camp at the Greek-North Macedonian border undertook a collective journey into North Macedonia in protest against conditions at the camp. After travelling several kilometres on foot, crossing a river, and entering North Macedonian territory near Moin, they were intercepted by armed military personnel, surrounded, threatened, and subsequently transported back to the border. There, they were forced to crawl beneath a fence into Greece. Several applicants, originating from Syria, Iraq, and Afghanistan, brought claims before the Court, alleging violations of Art. 4 Prot. 4 and Art. 13 ECHR.

As with all other cases following *N.D. and N.T.,* the Court distinguished the facts of the case noting 'no use of force' by the applicants.[148] However, they went on to state that they would 'nevertheless proceed to examine whether, by crossing the border irregularly, the applicants circumvented an effective procedure for legal entry'.[149] In doing so, the Court departed from its own cumulative conditions for applicability, predicating its findings exclusively on the unauthorised nature of the crossing as sufficient satisfaction of the test. This is a decisive interpretive choice by the Court. As it stands, conduct that attracts punitive consequences is no longer tied to circumstantial requirements, but to the mere 'unauthorised' transgression of a territorial border and circumvention of 'legal' routes. The determination relies solely upon the precedent of *N.D. and N.T.,* offering no justification for the narrowing of scope. Given the *de facto* lack of access to legal routes for most, this assumes culpability as the default rather than the exception.[150]

From a theoretical perspective, this development is a consolidation of the Court's bordering practices. The increasing centrality of 'unauthorised entry', and its conflation with so-called

141 De Genova (n 51).

142 PETER NYERS, 'The Accidental Citizen: Acts of Sovereignty and (Un)Making Citizenship' *Securitizations of Citizenship* (Routledge 2009).

143 *Moustahi v. France* Appl. No. 9347/14; *Asady and Others v. Slovakia* ECtHR, Appl. No. 24917/15, 24 March 2020.

144 *Asady and Others*, Appl. no. 24917/15, Judgment of 24 March 2020 para 7.

145 ibid para 207.

146 *Shahzad v. Hungary,* ECtHR, Appl. No. 12625/17, Judgment 8 October 2021 para 64; *M.H. and Others v. Croatia* ECtHR, Appl. Nos. 15670/18 and 43115/18 para 297.

147 'Statewatch |' <https://www.statewatch.org/news/2016/march/macedonia-greece-march-of-hope-the-aftermath-15-3-16/> accessed 29 April 2026.

148 *A.A. and Others v. North Macedonia*, Appl. nos 55798/16 *et al.*, Judgment of 5 April 2022, para 114.

149 ibid.

150 'Expanding Exceptions? AA and Others v North Macedonia, Systematic Pushbacks and the Fiction of Legal Pathways – EU Immigration and Asylum Law and Policy' <https://eumigrationlawblog.eu/expanding-exceptions-aa-and-others-v-north-macedonia-systematic-pushbacks-and-the-fiction-of-legal-pathways/> accessed 29 April 2026.

'illegality', is indicative of the Court's decreasing tolerance for any perceived defiance at the border. No longer contingent on exceptional or aggravated circumstances, the mere fact of unauthorised entry is sufficient to trigger a presumption of culpability. As a result, bordering is routinely routed through judicial interpretation of conduct, operating as a default mechanism for differentially restricting access to protection. In both *A.A. and others and N.D. and N.T.,* the terms 'unauthorised' and 'illegal' are used interchangeably in reference to migrants.[151] As Wreidt points out, the term 'illegal' is repeated 51 times throughout the *A.A.* judgement, applied only in relation to migrants and their conduct, never to the practice of pushbacks.[152]

Yet, irregularity and 'illegality' are not objective categories of migration, but legal, political and social constructions. It was not until the late nineteenth and early twentieth centuries that passports and visa regimes were developed by colonising nations to impose racial exclusions on mobility without explicitly excluding on the basis of race.[153] As De Genova argues, 'the law defines the parameters of its own operations, engendering the conditions for "legal" as well as "illegal" practices.'[154] Those who fall outside the scope of 'legality' are rendered presumptively undeserving of protection, and disposable, while the parameters for those eligible for conditional inclusion are diminished. Despite this, so-called 'illegality' is deemed an intrinsic consequence of the applicants' transgression of territorial borders. This assumption is reflected when the Court states that the applicants had 'opted for illegally crossing',[155] placing 'themselves in jeopardy by participating in the illegal entry'.[156] Such reasoning implies that 'illegality' is the product of individual choice, rather than the outcome of exclusionary border regimes that seek to impose 'illegalised' subjectivity for political purposes. The Court, by reinforcing this, co-constructs bordering practices by embedding these diminishing parameters into its reasoning, creating conditions in which human rights may be denied on the basis of ascribed legal status.

The effect of the Court's interpretive bordering is to alter the continuum of differential (in) exclusion, raising the threshold even higher for access to protection under Art. 4 Prot. 4. Like *N.D. and N.T.,* the facts of *A.A.* are illustrative of bordering practices engendering migrant struggle. The 'March of Hope', in which the applicants participated, must be situated against the materially degrading conditions of the Idomeni camp. Reports at the time documented individuals sleeping in flooded tents, exposure to severe weather, inadequate sanitation, and deaths during attempts to cross nearby rivers.[157] Amnesty International described the conditions as 'squalid' and 'appalling',[158] while UNHCR characterised them as 'abysmal'.[159] The march sought to subvert the invisibility of their circumstances. Despite this, the Court determined that collective struggle, even without use of force, warrants punitive treatment. This suggests that any attempt to modify, challenge, or interrupt the configuration of power at the border can be recast as deviant and blameworthy. For the Court, powerlessness and lack of agency are now preconditions for access to human rights protection.[160]

Lowering the benchmark from conduct assumed to be violent and disruptive to 'illegalised' conduct aligns the Court more closely with the political discourses underpinning externalisation.

151 Franck Düvell, 'Paths into Irregularity: The Legal and Political Construction of Irregular Migration' (2011) 13 European Journal of Migration and Law 275 <https://doi.org/10.1163/157181611X587856>.

152 'Expanding Exceptions? AA and Others v North Macedonia, Systematic Pushbacks and the Fiction of Legal Pathways – EU Immigration and Asylum Law and Policy' (n 146).

153 For a detailed discussion on the relationship between colonialism and passports and visa regimes see Achiume (n 11).

154 Genova (n 51).

155 *Asady and Others*, Appl. no. 24917/15, Judgment of 24 March 2020 para 121.

156 *Asady and Others*, Appl. no. 24917/15, Judgment of 24 March 2020 para 123.

157 'Greece: Europe Must Shoulder the Burden for 46,000 Refugees and Migrants Trapped in Squalor' (*European Institutions Office*, 17 April 2016) <https://www.amnesty.eu/news/greece-europe-must-shoulder-the-burden-for-46-000-refugees-and-migrants-trapped-in-squalor-0974/> accessed 30 April 2026.

158 ibid.

159 Tania Karas, 'UNHCR Flags Concerns over Refugee Sites in Northern Greece' (*UNHCR*) <https://www.unhcr.org/news/stories/unhcr-flags-concerns-over-refugee-sites-northern-greece> accessed 4 May 2026.

160 Jouni Häkli and Noora Peltonen, 'The European Union as a Humanitarian Border: The Production of Vulnerability in the New Pact on Migration and Asylum' (2026) 0 Space and Polity 1 <https://doi.org/10.1080/13562576.2026.2635505>; William Walters, 'Foucault and Frontiers: Notes on the Birth of the Humanitarian Border' in Ulrich Bröckling, Susanne Krasmann and Thomas Lemke (eds), *Governmentality: current issues and future challenges* (Routledge 2011).

Border management agreements between the EU and North Macedonia in place at the time of the case were said by former EU Commissioner for Home Affairs Ylva Johansson to '[prevent] cross-border crime, in particular smuggling and trafficking of human beings, and ensuring the security of the citizens of North Macedonia and the European Union, reinforcing a securitarian rhetoric.'[161] More broadly, as reflected in the discourse on the so-called 'small boats crisis' in the United Kingdom, there has been a discernible shift toward treating irregular migration itself as indicative of wrongdoing, irrespective of an individual's meeting of the legal category of refugee.[162] While these discourses continue to rely upon binary dichotomies, they seek to spectacularise journeys and impute that those crossing 'irregularly' could never be 'genuine asylum seekers' simply by virtue of their means of arrival.[163] This position is entrenched by legal bordering tools such as the Illegal Migration Act, which ensures that differential access to legal status is granted on the basis of means of entry.[164] By positioning its reasoning this way, the Court shifts scrutiny away from the legal and political processes that construct conditions of illegality and precarity, attempting to assign migrant agency as inherently suspect and sanctionable. In doing so, it further contributes to the construction of migrants as deportable subjects, now presumptively undeserving of protection.[165] Not only does this exhibit the Court's more obvious attempts to impose or reinforce political and legal subjectivity, but it raises questions over the risks of asserting any contested presence in front of the ECtHR.

The notion that the Court is a bordering actor is further consolidated by its converse practice of interpretive debordering. *M.A. and Z.R.* was hoped to signal a more progressive approach and reinforce procedural obligations.[166] Yet, a comparison of *N.D. and N.T.* and *A.A.* reveals that access to protection in collective expulsion jurisprudence continues to be mediated through shifting binary constructions of migrants and their conduct. In *N.D. and N.T.*, the applicants were framed as economic migrants; in *A.A.*, more ambiguously as persons in 'transit'. In contrast, the fact that the applicants in *M.A. and Z.R. v.* Cyprus were considered asylum seekers appeared determinative in the Court's finding of a violation. Distinguishing the case from *N.D. and N.T.*, the Court emphasised that 'the nature of an entry visa, subject to financial and other requirements, could not constitute a genuine and effective possibility for the present applicants to submit their reasons (asylum) against expulsion',[167] whereas in *N.D. and N.T.* a working visa was deemed to be a sufficient and valid means of legal entry.[168]

Read through the lens of critical border scholarship, this distinction can be understood as a form of interpretive debordering. The Court selectively grants access to procedural protections to some, while enacting bordering practices for others. At first glance, this differential treatment appears to hinge on the applicants' ability to formally substantiate their 'legal' subjectivity as asylum seekers. However, through a close reading, it becomes apparent that a display of passivity, aligned with the expectations of this legal subjectivity is equally determinative in the findings of a violation. In *M.A. and Z.R.,* the applicants were stressed to have been 'confined' to the boat and to 'cooperate with the authorities',[169] as opposed to the more visible acts of scaling a border wall (as in *N.D. and N.T.)* or taking part in a peaceful protest (as in *A.A.)*. The Court's reasoning thus deepens the distinction between the collective expulsion of asylum seekers and

161 'EU Signs an Agreement with North Macedonia on European Border' (*European Commission – European Commission*) <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_6417> accessed 30 April 2026.

162 Jan Dobbernack, 'The Spectacular Politics of the United Kingdom's "Small Boats Crisis"' (2025) 19 International Political Sociology olaf003 <https://doi.org/10.1093/ips/olaf003>; 'Rishi Sunak – 2022 Speech on Illegal Immigration – UKPOL.CO.UK' <https://www.ukpol.co.uk/rishi-sunak-2022-speech-on-illegal-immigration/> accessed 1 May 2026.

163 Dobbernack (n 158) 4.

164 Since the Labour government won the UK general election, the Illegal Migration Act has been partially repealed. However, it is being replaced by the Border Security, Asylum and Immigration Bill 2025 whereby those arriving via small boat may be prosecuted.

165 Genova (n 51).

166 Strasbourg Observers, 'Evidently Unlawful, yet Difficult to Evidence: M.A. and Z.R. v. Cyprus Advances Strasbourg's Case Law on Pushbacks' (*Strasbourg Observers*, 22 October 2024) <https://strasbourgobservers.com/2024/10/22/evidently-unlawful-yet-difficult-to-evidence-m-a-and-z-r-v-cyprus-advances-strasbourgs-case-law-on-pushbacks/> accessed 5 May 2026.

167 Para 118.

168 Para 228.

169 Para 117.

that of other migrants by reinforcing conditional, discursive constructions of victimhood. As contended by Mainwaring,

'[m]igrants are also only portrayed as victims within limited physical and temporal spaces. In the Mediterranean, migrants are rendered victims at sea, during rescues, and in death, where they can be pitied, rescued, and mourned as 'good' migrants; however, once ashore on EU territory, they quickly become risky, securitized bodies, possible villains, who must be detained.'[170]

Accordingly, the marginally progressive turn in cases such as *M.A. and Z.R.* does not signal a genuine contestation of bordering practices. Rather, it reflects the shifting continuum of differential (in)exclusion. The scope of protection is progressively narrowed, while access becomes increasingly conditional upon conformity with the imagined subjectivity of the 'passive refugee'. This serves to legitimise the narrowing scope of appropriate policy responses to migrants that oscillate between selective humanitarian paternalism and securitarian frameworks.[171]

In its coalescence, the trajectory of the Court's line of reasoning likely has implications for how future strategic litigation cases will be taken up before the ECtHR. Collective expulsion cases inevitably condense complex encounters at the border, rendering visible moments of tension, resistance, and transgression. Yet it is precisely this visibility that risks reinforcing the spectacle of the border, in which border control must be performatively seen as effective in order to deter future migratory attempts.[172] As has been noted, 'making the clandestine visible … can prove a pyrrhic victory' when such visibility ultimately facilitates further exclusionary practices.[173] In all three cases, *Khlaifia, N.D. and N.T.* and *A.A.*, the Court progressively 'flattened' the applicants' counter-narratives of struggle by reinforcing tropes of the disorderly nature of people from the 'global south'.[174] This deviance is then discursively mobilised as a threat,[175] even where violence or use of force is not alleged. The evolution of reasoning on conduct, therefore, not only feeds into the narratives which justify exclusionary bordering practices but also highlights the risks of strategic litigation in a system that can at best remedy individualised instances of harm. While expecting the Court to produce transformative structural change capable of unsettling border regimes may be a Sisyphean pursuit, its active role in producing unjust conditions must continually be interrogated. Considering this trajectory, from the latent bordering of *Khlaifia*, through the formal reasoning of *N.D. and N.T.*, to the routinised presumption of *A.A.*, the Court's jurisprudence shows a progressive shift from ambivalence to active participation in externalisation, rather than a meaningful check upon it."

4. CONCLUSION

This article has argued that in the context of border externalisation, the ECtHR should be understood not merely as an adjudicator of the excess of the border regime, but as a bordering actor in its own right. Through a combined doctrinal and critical border analysis of its collective expulsion jurisprudence, it has demonstrated that the Court's reasoning, particularly through the development of the 'own culpable conduct' exception, functions as an interpretive bordering practice that actively produces differential (in)exclusion to human rights protection. Through the foregoing analysis, the article has made the conceptual link between the ECtHR, externalisation, and bordering practices. Following the evolution from *Khlaifia* through *N.D. and N.T.* to *A.A.*, this article has shown a considered series of interpretive choices, from the implicit consideration of migrant conduct to its consolidation as a selective exclusionary device, and ultimately to its normalisation as a default basis for exclusion. In this progression, unauthorised entry is increasingly conflated with culpability, and culpability with diminished entitlement to human rights protection.

170 Mainwaring (n 120) 290.

171 Ruben Andersson, *Illegality, Inc: Clandestine Migration and the Business of Bordering Europe* (University of California Press 2014).

172 Bridget Anderson, 'Illegal immigrant": Victim or Villain?'.

173 Landau (n 125); Ida Marie Savio Vammen, '"When Migrants Become Messengers": Affective Borderwork and Aspiration Management in Senegal' (2022) 27 Geopolitics 1410 <https://doi.org/10.1080/14650045.2021.1913408>.

174 'Movement and the Ordering of Freedom: On Liberal Governances of Mobility' <https://www.dukeupress.edu/movement-and-the-ordering-of-freedom> accessed 29 April 2026.

175 Ibid.

In particular, viewing this progression through the lens of critical migration and border studies, it has highlighted the extent to which the Court participates in the co-construction of the border regime. By reproducing distinctions of legal and moral subjectivity between migrants, attributing blameworthiness to acts of resistance, and selectively recognising deserving subjects, the Court embeds within its jurisprudence the discursive and legal bordering practices that underpin externalisation. In doing so, it obscures the structural conditions that necessitate "irregular" migration and reframes situated, tactical acts of resistance as conduct warranting exclusion from protection. As such, the Court has provided interpretive bordering tools through which differential (in)exclusion can continue to be enacted by legal bordering actors.

More broadly, the analysis underscores the structural limitations of IHRL in addressing harms arising from externalised bordering. Anchored in a territorial imaginary that fails to capture the dispersed, heterogeneous, and performative nature of contemporary borders, the law remains ill-equipped to meaningfully challenge bordering across jurisdictions, actors, and spaces. Instead, the Court's jurisprudence illustrates how, rather than transcending these constraints, legal reasoning can reproduce them.

Critical scholarship has been indispensable to exposing the structural limits of the IHRL framework in addressing human rights violations enacted through the border regime.[176] This article has sought to extend such approaches by situating the Court not only as a site of contestation, but as an active participant in bordering practices. This, in turn, calls for closer scrutiny of the Court's role in legitimising the border regime through its own interpretative practices. Future research would benefit from methodological approaches such as Critical Discourse Analysis, narrative analysis, and empirical, bottom-up approaches, which are particularly well placed to foreground the counter-narratives of resistance and meaningfully work towards this call.

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