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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

**15th meeting of the Joint Council
on Constitutional Justice**

MINI-CONFERENCE ON

“MIGRATION”

Venice, Italy

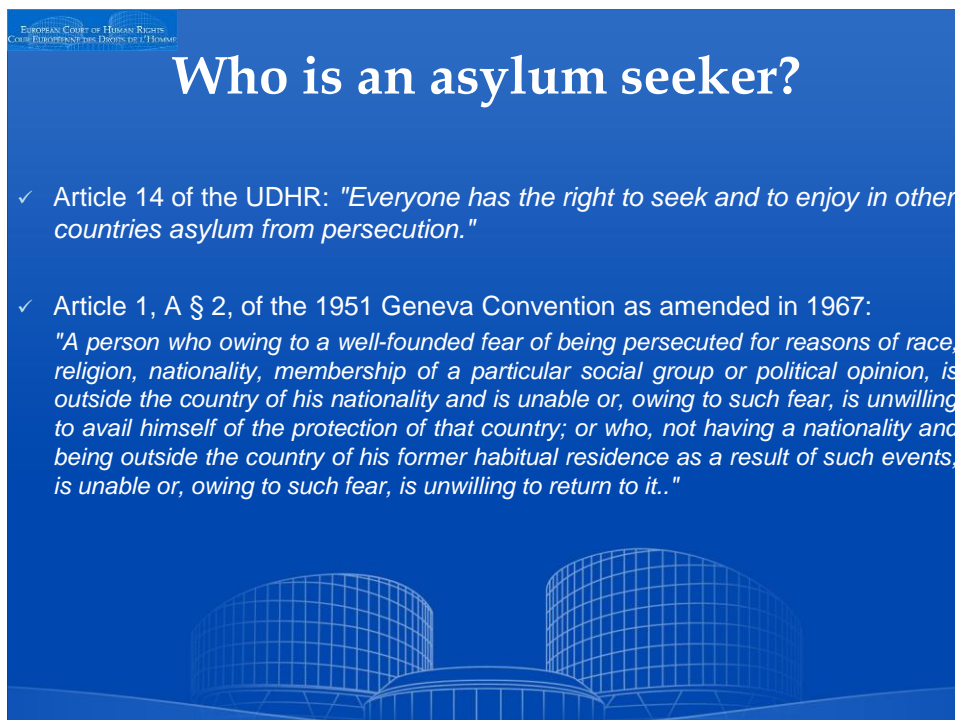
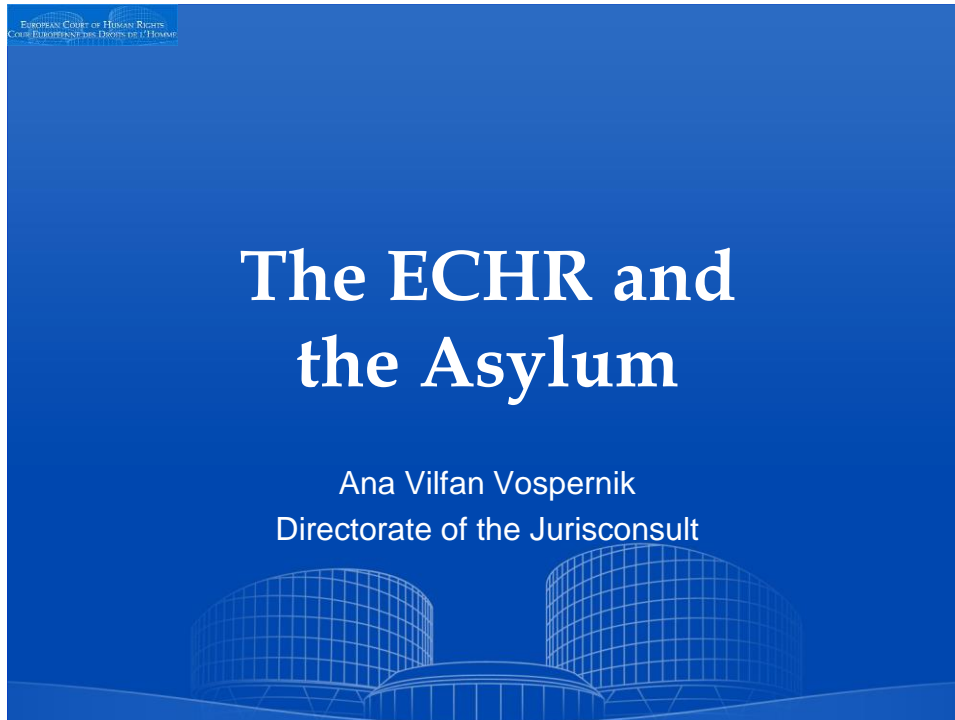
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**The European Court of Human Rights' case law
related to migration issues**

REPORT BY

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The European Court of Human Rights' case law related to migration issues



Are there any dedicated Articles of the Convention?

- **No Convention Article specifically mentions migrants, asylum seekers or refugees.**
- Very few provisions expressly mention third country nationals:
 - **Art. 16** - *Restrictions on political activity of aliens*
 - **Art. 4, Prot. 4** - *Prohibition of collective expulsion of aliens*
 - **Art. 1, Prot. 7** - *Procedural safeguards relating to expulsion of aliens*

Responsibility of States in cases of expulsion (*Hirsi Jamaa v. Italy*)

- From the basic premise...:

“113. According to the Court’s established case-law, Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations, including the Convention, to **control the entry, residence and expulsion of aliens** (see, among many other authorities, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, § 67, Series A no. 94, and *Boujlifa v. France*, 21 October 1997, § 42, Reports of Judgments and Decisions 1997-VI). The Court also notes that the **right to political asylum is not contained** in either the Convention or its Protocols (see *Vilvarajah and Others v. the United Kingdom*, 30 October 1991, § 102, Series A no. 215, and *Ahmed v. Austria*, 17 December 1996, § 38, Reports 1996-VI).”



How does the Convention enters into play?

- Principles emerging from the Convention/Court:
 - Nationality is not important – every person...
 - **Extraterritorial jurisdiction**
 - In addition to relevant Articles (procedural rights) ... the evolutive interpretation and effective-rights concept of the Convention – notions (*right to life, torture, ill-treatment, etc*) in the Court's case-law
 - ...



Development of the case law

- *Soering v. UK* (1989) – extraterritorial responsibility
- *Cruz Varas v. Sweden* (1991) – principle extended in relation to asylum cases
- *Vilvarajah v. the United Kingdom* (1991) – principle confirmed
- *Chahal v. the United Kingdom* (1996) – principle consolidated

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...to the required standard (*Hirsi Jamaa, Tarakhel* § 93)

“114. **However**, expulsion, extradition or any other measure to remove an alien may give rise to an **issue under Article 3** of the Convention, and hence **engage the responsibility of the expelling State under the Convention**, where **substantial grounds have been shown for believing** that the person in question, if expelled, would face a **real risk of being subjected to treatment contrary to Article 3 in the receiving country**. In such circumstances, **Article 3 implies an obligation not to expel the individual to that country** (see *Soering*, §§ 90-91; *Vilvarajah and Others*, § 103; *Ahmed*, § 39; *H.L.R. v. France*, 29.04. 1997, § 34; *Jabari v. Turkey*, no. 40035/98, § 38,; and *Salah Sheekh v. the Netherlands*, no. 1948/04, § 135, 11.01.2007).

115. In this type of case, the Court is therefore called upon to assess the situation in the receiving country in the light of the requirements of Article 3. In so far as any liability under the Convention is or may be incurred, it is liability incurred by the Contracting State by reason of its having taken action which has as a **direct consequence the exposure of an individual to the risk of proscribed ill-treatment** (see *Saadi v. Italy* [GC], no. 37201/06, § 126, ECHR 2008)”.

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Which Convention Article?

Asylum issues most frequently concern:

- Article 2 - Right to life;
- Article 3 - Prohibition of torture;
- Article 5 - Right to liberty and security;
- Article 6 – Right to a fair trial;
- Article 8 - Right to respect for private and family life;
- Article 9 – Right of conscience and belief;
- Article 13 - Right to an effective remedy;
- Article 14 - Prohibition of discrimination;
- Art. 4, Prot. 4 - Prohibition of collective expulsion of aliens;
- Art. 1, Prot. 7 - Procedural safeguards relating to expulsion of aliens

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Methodological questions

- ❑ Sources of information:
 - Analysis at national level
 - Additional sources (regarding political, health, economic situation, etc.)
 - Diplomatic assurances
- ❑ Analysis *ex nunc* or not?:
 - To what extent the time element is relevant in asylum cases in Strasbourg?! (*Sufi and Elmi v. UK, F.G. v. Sweden*)
- ❑ Individual risk vs. generalised risk (*Chahal, Sufi & Elmi, M.S.S., Tarakhel*)
- ❑ Strict scrutiny vs. balancing exercise (asylum seekers vs. migrants)
- ❑ Asylum seekers as vulnerable persons? (*MSS 251, Tarakhel*)

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A strategic approach in Strasbourg?! (*leading cases*)


- i. The proper assessment of *country of origin information*, in particular the weight to be attached to recommendations of the UNHCR on safety on return;
- ii. The proper interpretation and application of Article 3 of the Convention to questions of *generalized risk*;
- iii. The application of the Convention to the *Common European Asylum System*; and
- iv. The relationship between the Convention and the *1951 Refugee Convention*.

Main issues:

- I. Non-refoulement
- II. Art. 2 regime
- III. Art. 3 regime
- IV. Dublin cases



I. The principle of *non-refoulement*

- General principle provided by the 1951 Geneva Convention (Art. 33) with direct relevance to the situation of asylum seekers ... but with some relevance to the situation of the migrants in general as well:
- The direct impact – **practical impossibility for of any individual assessment**
- ... A situation which might have an impact over several rights of migrants protected by the Convention
- What does it really mean? *Khailifa v. Italy!!!*



II. Art. 2 regime

- A. Death penalty
- B. Incommunicado removals
- C. Risk of death caused for other reasons in the country of destination

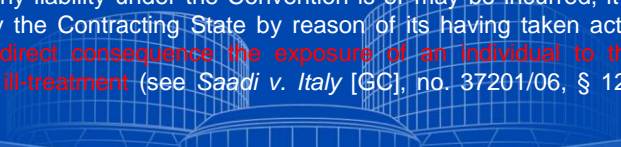


III. Art. 3

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• “




The test being applied

1. Art. 3 – absolute right – strict analysis
2. Real risk
 - personal risk v. generalised risk
3. Burden of proof
4. Reason for persecution
5. The authors of the persecution
6. Extraterritorial v. territorial responsibility
7. The source and nature of law requiring removal



1. Art. 3 – nature of the analysis

- ❑ Article 3 of the ECHR protects an absolute right – not to be subject to any proportionality analysis
 - Once the risk is established
 - Despite who is the person being removed (*Saadi, Abu Qatada*)
 - Notwithstanding the counter-interests (*Chahal*)
 - Notwithstanding other legal obligations (*Soering*)
 - ...Any removal would constitute violation of Art. 3
- ❑ Strict analysis and not a balancing exercise




3. Burden of proof

- “where substantial grounds have been shown for believing that the person concerned faces a real risk of being subjected to torture or inhuman or degrading treatment or punishment in the receiving country” – **Tarakhel § 93**
 - The applicant must first establish that he/she is under the risk of being victim of treatment contrary to Art. 3 if removed
 - If his/her allegations are credible
 - The burden then passes to the Government for dissipating these doubts



Salah Sheekh v. the Netherlands, § 147

“The existence of the obligation not to expel is not dependent on whether the source of the risk of the treatment stems from factors which involve the responsibility, direct or indirect, of the authorities of the receiving country, and Article 3 may thus also apply in situations where the danger emanates from persons or groups of persons who are not public officials”



6. Extraterritorial v. territorial responsibility

- ❖ Risk of Art. 3 violation because of:
 - Treatment contrary to Art. 3 in the country of destination (*Soering, etc.*)
 - Treatment contrary to Art. 3 while in detention pending asylum application assessment or pending removal (*Dougoz, Peers, M.S.S., Tarakhel*)
 - Treatment at large pending asylum application assessment (*M.S.S. §§ 250-253*)

7. The source of law requiring removal

- Extradition treaty (*Soering, etc*)
- EU Law – Dublin system
- *T.I. v. U.K.*

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IV. The Dublin System

Determination of the EU Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national.

T.I. v. UK (also in M.S.S.)

- *i. Removal to an intermediary Contracting State does not affect the responsibility of the sending State to ensure that the applicant is not exposed to treatment contrary to Article 3;*
- *ii. The sending State cannot rely automatically on the arrangements made in the Dublin Convention or Regulation;*
- *iii. Where States have established international organisations or agreements to pursue cooperation there could be implications for fundamental rights.*

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The Dublin cases

- ***Tarakhel v. Switzerland*** (
- Not the standard of systemic deficiencies but the notion of risk taking into account:
 - the individual circumstances of the applicant(s)
 - the general situation in the destination MS
 - Conditional violation
- ***A.M.E. v. the Netherlands***
 - Applicants personal situation different from the *Tarakhels'* one

M.S.S. v. Belgium & Greece

21 January 2011
Judge Rozakis' concurring

- *"In these circumstances, it is clear that European Union immigration policy – including the Dublin II Regulation – does not reflect the present realities, or do justice to the disproportionate burden that falls to the Greek immigration authorities. There is clearly an urgent need for a comprehensive reconsideration of the existing European legal regime, which should duly take into account the particular needs and constraints of Greece in this delicate domain of human rights protection."*

Thank you for your attention!

