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Collective expulsions in times of migratory crisis: Comments on the Khlaifia case of the ECHR

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On the 1st September 2015, right during the epicenter of the migration crisis in Europe, the European Court of Human Rights (ECHR) issued a striking ruling in the *Khlaifia and Others vs. Italy* case on collective expulsion. The case is striking as it demonstrates that it is extremely difficult to differentiate between a series of individual expulsions, which is allowed, and a collective expulsion, which is prohibited, when a group of several people is returned together. This is a key issue, as EU Member States claim that they will return third-country nationals who do not have the right to stay in Europe (in particular failed asylum seekers) much more often than they have done in the past. It is doubtful, however, that a "return industry" will be established due to various practical difficulties, and more fundamentally, the legal difficulties EU States would probably face in trying to implement such a policy.

At the origin of this decision was an application made by three Tunisian citizens, in March 2012, who claimed that Italy had disrespected Article 3 (prohibition of torture and inhuman and degrading treatment), Article 5 (right to liberty), Article 13 (right to an effective remedy) and Article 4 of the 4th Protocol to the European Convention on Human Rights (prohibition of collective expulsions). The facts took place in 2011: the applicants had travelled by boat through the Mediterranean Sea and, after several hours of navigation, were intercepted by the Italian coast guard. They were then taken to the island of Lampedusa, to be held in the reception center "Centro di Soccorso e Prima Accoglienza" (CSPA), in the area specifically reserved for Tunisian nationals. The applicants proved that they were held in overpopulated and dirty rooms, without any contact with the outside.

The ECHR found that there had been a breach of both Article 5 and of Article 3 regarding the conditions of detention in CSPA. The Court also considered that the applicants did not have access to an effective remedy, which was a violation of Article 13. They were not informed of the available judicial mechanisms, and such remedies were only aimed at challenging the legality of the measure and did not have suspensive effect. This latter aspect is especially important, since it was the first time that the Court required suspensive effect as a condition for *an effective remedy*, independently of risk to life or treatment contrary to Article 3.

However, the most striking finding of the ruling concerns the violation of the prohibition on collective expulsions. As in the cases of *Hirsi Jamaa* and *Sharifi and others* – in which Italy was found to be in violation of the Convention for issuing orders to return the passengers of boats arriving at the coast of Lampedusa to their countries of origin or provenance – in *Khlaifia,* the Court considered that the Italian authorities had once again carried out a collective expulsion.

The case was referred to the Grand Chamber at the request of the Italian Government. The referral was accepted by the Grand Chamber panel of five judges on the 1st February 2016. It is convenient, thus, to revisit some of its more striking findings.

A controversial approach to the concept of "Collective Expulsion"

Contrary to the aforementioned cases, which involved dozens of non-identified immigrants, *Khlaifia* only concerned three foreigners, and their identities were duly registered by the authorities. Even though, since the applicants proved successfully that the authorities did not take into account their individual situations, the Court found that there had been a disrespect of Article 4 of the 4th Protocol. It took several factors into consideration: the expulsion procedures were "summary" and were aimed at enforcing bilateral agreements negotiated with Tunisia which were not made public. There was, in consequence, a significant number of Tunisian nationals who were subjected to same type of measure. Finally, the expulsion decrees consisted of standardised documents, with no reference to the particular situation of each of the expelled persons other than their identity. The applicants also proved that they did not have the opportunity to present their cases to the authorities, nor did they have access to a lawyer.

The finding of a violation of the prohibition on collective expulsions was undoubtedly the most debatable part of the ruling, as it is shown by the partially dissenting opinion of Judges Sajó and Vucinic. According to them, in order to qualify as collective, an expulsion should concern either a group of individuals who share some identity characteristics (such as ethnic origin, religion or nationality), or a group of individuals who were not duly identified by the competent authorities (which was the case of *Hirsi Jamaa* and *Sharifi*).

This approach seems too strict. According to the developments of the ECHR case-law, an expulsion can be deemed "collective" in two different situations. Firstly, when the expulsion has a specific aim: to remove a group of individuals who share some specific personal characteristics from the territory. The prohibition of collective expulsions had its origins in such "targeted" measures, called "mass expulsions". The prohibition of such mass measures was connected to the prevention of practices related to discrimination on ethnic or racial grounds, or even genocide.

The dissenting judges remain very attached to this first type of collective expulsion, and seem

to undervalue the developments achieved by the ECHR case-law in this context. In fact, the Court has already detached this concept from its historical inspirations, in line with the Strasbourg principles of effectiveness of guaranteed rights and of the evolutive interpretation. Therefore, an expulsion can be deemed as "collective", even where not "target oriented". That is the case when the authorities proceed to expel a group of individuals, without taking into account their individual situation. This jurisprudence dates back to the case *Conka vs. Belgium*, where the Court considered that an expulsion of a family of four Slovakian nationals had been a collective measure, not only due to the willingness to remove from the territory citizens with that particular nationality, but also due to the lack of such personal assessment.That was also the case in *Hirsi Jamaa* and *Sharifi and others*, mentioned above, where the expellees only shared the circumstance of arriving in the same boat, and, therefore, their personal characteristics were not important for qualifying the measure as "collective".

The prohibition of this second type of expulsion aims to preclude "automatic" decisions, which may amount to violations of the human rights of the expellees. For example, by expelling someone without taking in due consideration their personal story, the authorities cannot know if a certain migrant may incur in ill-treatment if sent back to their country of origin. In such situations, an "individual analysis" – and not the mere "identification" – is the most important factor in evaluating whether a measure has collective nature. Contrary to what the dissenting opinions may suggest, the mere identification of the expellees is not sufficient to abandon the hypothesis of a "collective" expulsion. The simple identification of the migrants does not allow the authorities to take into account other elements, such as the risk of violation of the right to life, the risk of torture and other ill-treatment, the migrant's right to family and private life, amongst other things. Thus, an expulsion of a group of individuals, even if preceded by the identification of each of the members, may amount to a collective measure if it ignores other important elements that characterize the personal story of the individuals, which could even preclude the possibility of expelling them.

Finally, the dissenting judges point out that the applicants were not asylum seekers. However, this circumstance is not sufficient to preclude the "collective" nature of the measure. It was a collective expulsion because the authorities did not analyze whether they could be qualified as asylum seekers. Even if, *a posteriori*, the applicants appeared not to be asylum seekers, the authorities simply did not take that into account, which vitiated the whole procedure. Secondly, even where applicants are not asylum seekers, they may have other rights that shall be taken in consideration before issuing a return decision: for example, the risk of torture, inhuman or degrading treatment in the country of origin, their health and physical condition, their right to family unity, amongst other things.

We agree that the concept of "collective expulsion" should be close to the one adopted by the

ECHR in *Khlaifia.* In our opinion, such a concept must not be dependent on its historical roots or on empirical facts taken alone – such as the existence of a formal "identification". On one hand, the concept should be developed according to the final aim of the prohibition – which is to prevent the violation of the human rights of the migrants by deciding on their expulsion without taking into account their personal situation. On the other hand, identification of the expellees is just one factor – amongst others – that should be taken into account for assessing the nature of the measure.

In our opinion, the controversy around *Khlaifia* was mainly caused by the small number of expellees. However, as the Court early showed in *Conka vs. Belgium,* the qualification of the measure is not dependent on the number of persons involved. In fact, *Khlaifia* gathers the characteristics of the two types of collective expulsions. On one hand, there were proofs of official willingness to remove Tunisian nationals from Italian soil, and, on the other hand, no individual analysis of the personal situation of any of the three applicants was made. Therefore, presuming that the facts were correct, the qualification of the expulsion as "collective" does not seem arguable.

A strong message for respecting human rights in times of crisis

With the *Khlaifia* ruling, the Court highlighted that the level of protection provided by the Convention must not drop – and may even rise– during humanitarian crisis.

It is true that the facts in *Khlaifia* did not take place during the climax of the current migratory conjuncture. However, in 2011/2012, Italy was already confronted with a severe migratory pressure, which actually made the Government declare State of Humanitarian Emergency and call for solidarity amongst Member States. The Court even pointed out that it was aware of the difficulties with which the Italian authorities were faced – such as the lack of resources, and the high number of migrants -, which were aggravated, at the time of the facts, by some particular events, such as a riot caused by a group of detained foreigners. However, the Strasbourg judges expressly highlighted that these circumstances could not lead to a decrease of the level of protection afforded by the Convention, especially regarding Article 3 and its absolute nature. In some passages, it even hints that the Court considers that these crises could actually demand more from the authorities.

As the Judge Lemmens points out in his separate opinion, although the facts had taken place in 2011, the *Khlaifia* ruling is an important guide for the current migratory crisis. In the present context, one should avoid the adoption of narrow approaches on Human Rights of migrants – starting with the concept of "collective expulsion". Certainly, a stricter concept of collective expulsion would allow the States – especially EU States with external borders – to adopt more effective responses for defending their sovereignty. However, this would inevitably result in a risk of violation of human rights, by making collective expulsions easier.

On the contrary, adopting a very broad prohibition of expulsions might lead to ineffective responses from the border States willing to enforce their immigration law and policy. Thus, in times of crisis, the only correct approach should be an adequate balance between the need to respect Human Rights and the need to protect the State's – and also EU's – immigration law and policy.

Such balance is reached when all expulsions are preceded by an *individual analysis of the particular situation of the expelled person*. Nevertheless, the simple use of a standardized document does not constitute, *per se*, a sufficient proof that the expulsions carried on its basis were collective, as long as the authorities show that the individual situation of each migrant was taken in consideration. On the contrary, an automatic expulsion, even preceded by the identification of each of the members of the group, may amount to a collective expulsion when the authorities do not take into account their personal story.

The *Khlaifia* ruling sets forth a clear message: the level of protection afforded by the ECHR does not lower in times of crisis, or in times where it is more difficult for the States Parties to fully respect their human rights obligations. However, in order to allow States to effectively maintain the level guaranteed by the Convention, in times of migratory crisis, they should count on solidarity with other States, aimed at sharing both resources and burdens between the actors. Such solidarity – especially in the context of the European Union – may, in fact, become the *conditio* that would allow the Member States to fully respect the rights enshrined in the European Convention and to prevent convictions of the States faced with extraordinary migratory pressure.
