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The Trajectory of the European Court of Human Rights in Migration Matters

Jürgen Bast • Janna Wessels

Abstract

The paper contributes to the debate on the current state of the ECtHR's case law in the field of migration. We argue that the more restrictive judgments of recent years should be seen in the context of a post-revolutionary constellation, in which the Court simultaneously activates and mitigates the Utopian potential of human rights for the interests of migrants.

We emphasize that the building-up of a migration-related jurisprudence in the long 1990s represents nothing less than a revolution. One fails to recognize the fundamental departure from the past if one describes the case law of the ECtHR as merely paying lip service to human rights or, in the language of the Book of Revelation, it being a Laodicean court.

We also do not share the view that the ECtHR has reached an endpoint of ever-increasing expansion of the rights of migrants. Ever since the initial transformation, there was rather a typical back-and-forth between 'progressive' and 'restrictive' judgments and lines of reasoning. The Court has opened up space for contesting migration control in the name human rights – a space between Utopia and Laodicea which its jurisprudence navigates without a destination.

1. How to interpret the development of the migration-related jurisprudence?

In a challenging political climate, the current state and future directions of the Strasbourg case law in the field of migration is subject to ongoing discussion in legal scholarship.[1] The debate was fuelled by two rulings of 2020: the Grand Chamber judgment in *N.D. and N.T. v. Spain,* condoning 'hot returns' at the Spanish-Moroccan border,[2] and its decision in *M.N. v. Belgium* which denied jurisdiction to rule on asylum visas at embassies.[3] Commentators noted a more

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1 See, e.g., Schlegel, 'Does International Human Rights Protection Trigger a Copernican Revolution for Immigration Law?', in T. Sakurai and M. Zambone (eds.), *Can Human Rights and National Sovereignty Coexist?* (2023) 186; Farahat, 'Human Rights and the Political: Assessing the Allegation of Human Rights Overreach in Migration Matters', 40 *Netherlands Quarterly of Human Rights (NQHR)* (2020) 180; for stocktaking, see B. Çalı, L. Bianku and I. Motoc (eds.), Migration and the European Convention on Human Rights (2021). See also D. Anagnostou, *The European Convention of Human Rights Regime: Reform of Immigration and Minority Policies from Afar* (2023).

2 ECtHR, *N.D. and N.T. v. Spain*, Appl. nos. 8675/15 and 8697/15, Judgment (Grand Chamber) of 13 February 2020. All ECtHR judgments are available at http://hudoc.echr.coe.int/.

3 ECtHR, *M.N. and Others v. Belgium*, Appl. no. 3599/18, Decision (Grand Chamber) of 5 May 2020.

restrictive approach in the Court's jurisprudence and highlighted the parallel with a broader trend in migration policies.[4] While these high-level cases concern the visible 'border spectacle', the debate extends beyond asylum and access to territory. Another contentious issue is whether the Court will act with greater restraint in cases of expulsion and family reunification, in that the 'proceduralization' of substantive obligations entails a dilution of the level of protection for migrants.[5]

While some of the literature responds to individual cases and makes only cautious observations about general trends or patterns in the development of the Court, many colleagues place their analysis in broader context, either explicitly or implicitly by referring to loaded terms such as 'backlash'. Within the multitude of voices contributing to the debate, we have observed two main lines of interpretation emerging, which at times produce strange bedfellows. We group them according to two 'narratives', knowing full well that we cannot do justice to the individual arguments put forward.

According to the first narrative, the recent cases signal a watershed moment – a rupture with the past.[6] We call it the 'endpoint narrative'. In this line of interpretation, authors emphasize, with varying degrees of confidence, the moment of discontinuity, especially in comparison to previous judgments such as *M.S.S. v. Belgium and Greece* (of 2011, on intra-European transfers of asylum seekers)[7] and *Hirsi Jamaa v Italy* (of 2012, on rescue at sea).[8] Many of them criticize the Court for 'rolling back' human rights protection and 'backsliding' from its approach in the earlier period, during which it substantially expanded the human rights of migrants.[9] The *Hirsi*

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4 Schmalz, 'The Disparate State of Refugee Protection in the European Union', 82 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV)* 82 (2022), 529; Alonso Sanz, 'Deconstructing *Hirsi*: The Return of Hot Returns', 17 *European Constitutional Law Review (EuConst)* (2021) 335; M. Pichl, *Rechtskämpfe: Eine Analyse der Rechtsverfahren nach dem Sommer der Migration* (2021), at 97–181; Farahat and Kießling, 'Von der staatlichen Souveränität zu den Menschenrechten – und zurück?' 85 *ZaöRV* (2025) 363.

5 G. Santomauro, 'European Court of Human Rights Jurisprudence and National Migration Policies: Exploring the Hermeneutic Tools of "Proceduralisation" and Margin of Appreciation', in M. G. Rodomonte and L. Durst (ed.), *Judicial Review, Fundamental Rights and Rule of Law* (2024) 183; Feihle, 'Asylum and Immigration under the European Convention on Human Rights', in H. Ph. Aust and E. Demir-Gürsel (eds.), *The European Court of Human Rights: Current Challenges in Historical Perspective* (2021) 133, at 153–155; Stoyanova, 'Populism, Exceptionality, and the Right to Family of Migrants under the European Convention on Human Rights', 10(2) *European Journal of Legal Studies (EJLS)* (2018), 120.

6 Thym, 'The End of Human Rights Dynamism? Judgments of the ECtHR on "Hot Returns" and Humanitarian Visas as a Focal Point of Contemporary European Asylum Law and Policy', 32 *International Journal of Refugee Law (IJRL)* (2020) 569; Bosch March, 'Backsliding on the Protection of Migrants' Rights? The Evolutive Interpretation of the Prohibition of Collective Expulsion by the European Court of Human Rights', 35 *Journal of Immigration, Asylum and Nationality Law* (2021) 315.

7 ECtHR, *M.S.S. v. Belgium and Greece*, Appl. no. 30696/09, Judgment (Grand Chamber) of 21 January 2011.

8 ECtHR, *Hirsi Jamaa and Others v. Italy*, Appl. no. 22765/09, Judgment (Grand Chamber) of 23 January 2012.

9 Klaus and Kmak, 'ECtHR Jurisprudence Amid Political Shifts: Rolling Back the Protection against Pushbacks' , *The International Journal of Human Rights* (2025, preprint); Bosch March, 'The Backsliding on the Interpretation of Article 4 of Protocol No. 4 ECHR in "Pushback" Cases: A Questionable Attempt to Redress the Hirsi "Overstretch"?', 4 *European Human Rights Law Review (EHRLR)* (2024) 279; Hudson, 'Asylum Marginalisation Renewed: "Vulnerability Backsliding" at the European Court of Human Rights', 20 *International Journal of Law*

judgment, a product of strategic litigation efforts,[10] stands out as a high point in this reading; civil society's hopes of achieving structural change through legal mobilization now appear to have been dashed.[11] Others interpret the observed U-turn in the context of an overreach hypothesis,[12] considering it a welcome attempt by the Court to recalibrate its case law in a changed political context.[13] Either way, this strand of literature tends to converge on the idea that the Court's engagement with migrants' rights has peaked: As Daniel Thym put it, recent judgments indicate 'the provisional endpoint of three decades of dynamic human rights jurisprudence'.[14]

The second interpretation offers a fundamentally different view: one that can be labelled as the 'no-progress narrative'. Scholars in this tradition have never shared the notion that there was a significant judicial expansion of migrants' rights in the first place. They draw a flat line of continuity from the very first migration case decided by the Court in *Abdulaziz, Cabales and Balkandali v. the UK* to the present day.[15] Inspired by Dembour's seminal monograph, it is generally considered that the ECtHR prioritizes the interests of States and shows deference to governments.[16] According to this narrative, even supposedly 'progressive' judgments such as *Hirsi* have merely functioned as a 'blueprint', providing guidance to the Parties on how to design migration policies that are consistent with the Convention's standards, without abandoning exclusionary goals.[17] More recently, this view increasingly aligns with postcolonial and anti-racist critiques, which hold that the Court merely 'maintains the pretence of equality before the law'[18] and legitimizes the border regime that inherently produces rights violations.[19]

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in Context (2024) 16; Helfer and Voeten, 'Walking Back Human Rights in Europe?' 31 *European Journal of International Law (EJIL)* (2020) 797.

10 See, in detail, S. Buckel, *"Welcome to Europe": Die Grenzen des europäischen Migrationsrechts* (2013), at 289–311.

11 Cf. Pijnenburg and van der Pas, 'Strategic Litigation against European Migration Control Policies: The Legal Battleground of the Central Mediterranean Migration Route', 24(3) *European Journal of Migration and Law (EJML)* (2022) 401.

12 See, critically, Farahat, supra note 1.

13 See, e.g., Thym, *Migration steuern* (2025), at 104–106.

14 Thym, 'The End of Human Rights Dynamism?', supra note 6, at 589.

15 ECtHR, *Abdulaziz, Cabales and Balkandali v. United Kingdom*, Appl. no. 9214/80, 9473/81 and 9474/81, Judgment (Plenary) of 28 May 1985.

16 Dembour coined the term 'Strasbourg reversal' for this observation: M.-B. Dembour, *When Humans Become Migrants* (2015), at 118–119, 186–187 et passim; Costello speaks of a 'statist assumption', see C. Costello, *The Human Rights of Migrants and Refugees in European Law* (2016), at 10–11 and 316–319.

17 Mann, 'Maritime Legal Black Holes: Migration and Rightlessness in International Law', 29 *EJIL* (2018) 347; Wilde, 'The Unintended Consequences of Expanding Migrant Rights Protections', 111 *AJIL Unbound* (2017) 487.

18 Spijkerboer, 'Coloniality and Recent European Migration Case Law', in V. Stoyanova and S. Smet (eds.), *Migrants' Rights, Populism and Legal Resilience in Europe* (2022) 117, at 119.

19 Theilen, 'Framing Migration in Human Rights: How the Reasoning of the European Court of Human Rights Legitimises Border Regimes', 27 *EJML* (2025) 66; see also de Vries and Spijkerboer, 'Race and the Regulation of International Migration: The Ongoing Impact of Colonialism in the Case Law of the European Court of Human Rights', 39 *NQHR* (2021) 291.

The common denominator in this strand is that the Strasbourg Court is paying mere lip service to the human rights of migrants and has never placed meaningful constraints on migration control. Or in a formulation by Alan Desmond: The Court has yet to rebut the allegation that it is 'a human rights court that is at pains not to upset states when delivering judgment on complaints brought by migrant applicants'.[20]

The aim of this paper is to critically engage with both narratives. While recognizing to some extent their complementary merits in understanding the ECtHR's approach to migrants' human rights, we present our own account of the Court's 'history of the present'. We offer an interpretation on the broad lines of case law without claiming exclusivity, in the sense that other interpretative approaches would necessarily be wrong or meaningless.

Doing so, we will use two *topoi* (in Greek: places) as hermeneutical tools to organize the legal material: Utopia and Laodicea. The concept of Utopia (literally, a non-place) does not need much explanation. In various philosophical and literary traditions, Utopia denotes the horizon of a radically transformed social order. It signals the hope for, and anticipation of, a qualitatively different, just world.

Laodicea was an ancient Hellenistic city in the Roman empire. Its early Christian community became famous for the sharp admonition in the Book of Revelation, also known as the Apocalypse of John. The author has the resurrected Jesus say: 'I know your works; you are neither cold nor hot. I wish that you were either cold or hot.' (Rev. 3:15).[21] Historical exegesis explains that this is probably a sarcastic allusion to the thermal springs that contributed to the city's wealth, to which the inhabitants apparently attached greater importance than preparing for the coming kingdom, despite their lip service to the new faith: 'So, because you are lukewarm, and neither cold nor hot, I am about to spit you out of my mouth. For you say, "I am rich, I have prospered, and I need nothing." You do not realize that you are wretched, pitiable, poor, blind, and naked.' (Rev. 3:16–17). From here, the pejorative meaning of 'lukewarm' passed into common usage. Metaphorically, Laodicean indicates half-heartedness, a moral and spiritual indecision, which is why it is used as a rebuke rather than a neutral observation.[22]

Although we want to make a legal argument here and not a theological one, we find this to be a powerful allegory in the context of human rights. Laodicea embodies a critical *topos* deeply rooted in our religious and cultural history, suggesting that the lukewarm deeds of those who

[20] Desmond, 'The Private Life of Family Matters: Curtailing Human Rights Protection for Migrants under Article 8 of the ECHR?', 29 *EJIL* (2018) 261, at 279.

[21] Quoted from the New Revised Standard Version (NRSV).

[22] On the eschatological Utopianism of early Christianity from which the Book of Revelation originates, see Ch. Rowland, *The Open Heaven: A Study of Apocalyptic in Judaism and Early Christianity* (2002); classically, A. Schweitzer, *The Quest of the Historical Jesus* (2005, first publ. 1910), at 415 et passim; E. Bloch, *The Principle of Hope*, vol. 2 (1986, first publ. 1959), at 496–502.

preach the gospel – in our case, the ECtHR that of human rights – deserve harsher criticism than those of the pagans. We consider it a more apt opponent to 'Utopia' than the frequently used 'realism', which connotes an unjustified claim to reasonableness and moderation.[23]

Of course, we are aware that Martti Koskenniemi has employed a similar pair of concepts in his seminal *From Apology to Utopia*, inspiring many scholars of international law. He used them to show how the structure of international legal argument is vulnerable to the contrasting criticisms of being either an irrelevant moralist Utopia or a manipulable facade for State interests.[24] Although his terms are closely related to ours, for the purpose of this study we have chosen 'Laodicean' as the allegoric antithesis of 'Utopian', without, however, intending to elevate this difference to a theoretical controversy. Our argument does not concern the normativity of international law per se or its supposed inherent indeterminacy, but rather the poles of the concrete field of tension in which the migration-related case law of the ECtHR operates.[25] In this context, we find it appealing to view the 'apologetic' element of its jurisprudence from the critical perspective of those who believe in the Utopian promise rather than from the perspective of the powers that be.

The remainder of this contribution is organized as follows: In section 2 we will discuss the essential thrust of the no-progress narrative that the Strasburg Court has always been Laodicean in respect of the rights of migrants. Based on a longitudinal view of the development of migration law and its intersection with human rights law, we argue that a revolutionary transformation took place in the long 1990s, and explain in what sense a Utopian element has been inherent in the case law ever since. In section 3, we discuss the endpoint narrative and make the case that the Court's case law after the foundational period has exhibited a characteristic back-and-forth movement between progressive and restrictive elements, both within and across judgments – wavering between Utopia and Laodicea, as it were. In section 4, we conclude that the Court has opened up – and maintains – a discursive space for making far-reaching claims for the inclusion of migrants within the framework of the recognized rules of legal argumentation. The Court has created a space of possibilities, which its jurisprudence navigates without offering closure or finality.

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23 For example, Thym, 'The End of Human Rights Dynamism?', supra note 6, at 593.

24 Koskenniemi, *From Apology to Utopia* (2006, first publ. 1989), at 17.

25 Writing before the heydays of the human rights revolution in the 1990s, Koskenniemi did not develop his argument with a view to human rights law. Later, he occasionally addressed the field, see eg Koskenniemi, 'Human Rights, Politics and Love', 19(4) *Mennesker og Rettigheter* (2001) 33; id., 'Human Rights Mainstreaming as a Strategy for Institutional Power', 1 *Humanity* (2010) 47. Others have explicitly applied his concepts of Apology and Utopia to human rights law, see Megret, 'The Apology of Utopia: Some Thoughts on Koskenniemian Themes, with Particular Emphasis on Massively Institutionalized International Human Rights Law', 27 Temp. Int'l & Comp. L.J. (2013) 455, arguing that human rights law becomes an indispensable help in retaining the law's normative character whilst sustaining its claim to change.

2. The revolution: Discovering the human rights of migrants in the long 1990s

In this section, we confront the view that the Strasbourg Court has always been Laodicean when it comes to the rights of migrants (the no-progress narrative). We argue that a fundamental transformation has taken place over the course of the long 1990s. This transition amounts to a legal and cultural revolution in the way societies and their laws perceive the relationship between authorities and persons who are subject to migration control.[26]

A The *ancien régime*

As children of our time, socialized in the post-revolutionary constellation in Europe – academically, politically, and culturally – we tend to take this transformation for granted. It is instructive here to reflect briefly on the legacy of 'immigration law', the body of law which is now universally applied by states of the Global North to regulate the cross-border mobility of persons who are not their own nationals.[27]

The assertion of the state monopoly on the legitimate means of mobility[28] dates back to the transition from the 19th to the 20th century on the threshold of the interventionist welfare state. World War I forms the watershed for the introduction of systematic mobility and migration controls by European states.[29] These policies mark the culmination of a tendency whose ultimate goals were the state's comprehensive management of migration processes and the strict distinction between its own and foreign nationals.[30] This distinction became even more pronounced as the 'subjects' of the state gradually turned into 'citizens' who can derive rights from this status.[31] The legal instruments used to govern non-citizens were those of 'immigration law', an adapted version of police law. It consists of systematic border controls, pre-entry eligibility checks of foreign nationals, and stipulations on the conditions of their presence on the territory, including with regard to employment (their 'migration status').[32]

From today's perspective, it is remarkable how few legal limits to the power of migration control existed in the practice of the new and old nation states, both in domestic law and at the international level. The following quote from a contemporary reflects this collective experience in the interwar period: '[T]he national state's sovereign power … is nowhere greater than in

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[26] An earlier, shorter version of this section has been published in Bast, 'The Rise of Human Rights Limits to Migration Control. A European Perspective, 118(6) *AJIL Unbound* (2024) 208.

[27] V. Chetail, *International Migration Law* (2019), at 46 et seq.

[28] J. Torpey, *The Invention of the Passport* (2000), at 6, referring to Weber's definition of the state monopoly on the use of force.

[29] L. Lucassen, 'The Great War and the Origins of Migration Control in Western Europe and the United States', in A. Böcker et al. (eds.), *Regulation of Migration* (1998) 45; St. Mau et al., *Liberal States and the Freedom of Movement* (2012), at 20 et seq.

[30] Torpey, supra note 28, at 111–121.

[31] A. Fahrmeir, *Citizens and Aliens* (2000), at 26–31, 187–196.

[32] J. Bast, *Aufenthaltsrecht und Migrationssteuerung* (2011), at 25–28.

matters of emigration, naturalization, nationality, and expulsion.'[33] The constellation that emerged is one of unrestricted executive power over the individual, in which he or she appears not as the bearer of rights but as the object of discretionary policies. This pattern also proved to be largely immune to the cautious advance of liberal ideas in police law and to the constraints on state powers in the context of constitutionalism – a phenomenon for which the term 'immigration exceptionalism' has become commonplace. It is this old world that the ECtHR implicitly refers to when it states, ever since *Abdulaziz*, that a State has 'the right to control the entry, residence and expulsion of aliens' before discussing the limits of these powers arising from the Convention.[34]

The invention of human rights in the 1940s and their legal institutionalization in the ECHR in the 1950s did not change much – at least initially. That the Convention would evolve into a document that migrants could rely on to defend their interests and contest measures of migration control was anything but predetermined. Drafted by former and current colonial powers, the ECHR contained several safeguards to prevent non-European subjects from challenging migration policies.[35] None of the provisions of the Universal Declaration of 1948 that explicitly address human mobility, notably the right to seek and to enjoy asylum (Article 14 UDHR), made it into the original body of the Convention. And, indeed, in the first three decades of the Strasbourg bodies' activity, the rare cases in which measures of migration control were at issue left the applicants empty-handed.[36] This assessment includes the 1970s, as the Court became increasingly assertive in defending the rights of other marginalized groups.[37]

However, in the late 1980s a development began which, in hindsight, marks the beginning of a new era in the case law of the Court. Over the course of little more than a decade – a fairly short period when talking about judge-made law – the Court transformed several migration-blind provisions of the Convention into core guarantees for migrants. The relevant doctrines are summarized below, in broad terms, with regard to two articles of the Convention: Articles 3 and 8. They are the cornerstones of the transformation upon which a complex superstructure of case law has been built.[38]

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[33] Preuss, 'International Law and Deprivation of Nationality', 23 Georgetown L.J. (1935) 250; quote taken from M. Siegelberg, S*tatelessness: A Modern History* (2020), at 186; according to Siegelberg, he was one of the sources of Arendt's theory on the right to nationality as the only meaningful right to have rights.

[34] Cf. *Abdulaziz et al. v. UK*, supra note 15, para. 67.

[35] Feihle, supra note 5, at 136–147.

[36] This is rightly emphasized by Dembour, supra note 16, at 2.

[37] A. von Bogdandy, *The Emergence of European Society through Public Law* (OUP 2024) at 209–201. On the almost complete absence of framing migration-related conflicts of the 1970s in the language of human rights, see Bast, supra note 26, at 209–210. See also Grant, 'The Recognition of Migrants' Rights within the UN Human Rights System', in M.-B. Dembour and T. Kelly (eds.), *Are Human Rights for Migrants?* (2011) 25, at 32 et seq.

[38] For an overview, see D. Moya and G. Milios (eds.), *Aliens before the European Court of Human Rights* (2021); on the state of case law two decades earlier, see Lambert, 'The European Convention on Human Rights and the Protection of Refugees: Limits and Opportunities', 24 *Refugee Survey Quarterly* (2005) 39.

The doctrinal arguments we present pertain to Court's jurisprudence on migration in cases involving non-refoulement, expulsion, family reunification, and settlement. However, we would expect our general findings to apply also to other areas of migration-related jurisprudence, such as on collective expulsion and immigration detention, which we do not analyse here. For historiographical interest, we conducted a comprehensive review of all published judgments and decisions concerning Articles 3 and 8 up to 2009 (the first forty years of practice of the Strasbourg bodies), complemented by archive material from the library of the Max Planck Institute in Heidelberg. For the period thereafter, we have been more selective in our reading, for capacity reasons and in view of our interest in legal developments, and have adhered to standard practice in legal scholarship. Our analysis is based on all Grand Chamber and key Chamber judgments, which were selected after a thorough examination of case reports, legal literature, and the Court's own references. The methods used to analyse the cases follow established paths of doctrinal constructivism, albeit of a post-positivist variety that contextualizes legal knowledge with findings from historiography, social sciences, and cultural studies.[39]

B Discovering the right to asylum

The first provision to be mentioned is Article 3 ECHR ('No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'). The foundational judgment is *Soering v. UK*, decided in 1989.[40] The case concerned a request for extradition of a German national from the UK to the USA, where Mr Soering was charged with murder and potentially facing the death penalty. The Court found for the first time that Article 3 ECHR implies a prohibition of exposing a person to the risk of ill-treatment in a third country that would be contrary to Article 3 (in this case, being on death row).

Instead of remaining within the realm of international criminal law and an issue of the (then still disputed) ban on the death penalty under the Convention, this concept was soon transferred to immigration law. In the course of the 1990s, it became settled case law that Article 3 ECHR enshrines the principle of non-refoulement, that is, the right not to be subjected to grave human rights violations due to measures of migration control.[41] In 1996, the Grand Chamber confirmed the unconditional ('absolute') nature of this right also in its application to migration-related cases. This precludes any balancing between public and private interests.[42] The judge-

[39] von Bogdandy, 'The Past and Promise of Doctrinal Constructivism: A Strategy for Responding to the Challenges Facing Constitutional Scholarship in Europe, 7 *International Journal of Constitutional Law* (2009) 364.

[40] ECtHR, *Soering v. United Kingdom*, Appl. no. 14038/88, Judgment of 7 July 1989.

[41] ECtHR, *Cruz Varas and Others v. Sweden*, Appl. no. 15576/89, Judgment (Plenary) of 20 March 1991; *Vilvarajah and Others v. United Kingdom*, Appl. no. 13163/87 et al., Judgment of 30 October 1991.

[42] ECtHR, *Chahal v. United Kingdom*, Appl. no. 22414/93, Judgment (Grand Chamber) of 15 November 1996, para. 80.

made principle of non-refoulement entails a right to remain for as long as the risk persists,[43] including when the harm is posed by private actors[44] and in cases of looming indirect ('chain') refoulement.[45] These rights are accompanied by procedural guarantees, also derived from Article 3 in addition to other provisions of the Convention.[46]

Subsequent case law since the turn of the century dealt with various implications of the non-refoulement principle, which, of course, were and are not completely predetermined by these doctrinal foundations. Notable expansions of the scope of migrants' rights include that Article 3 entails a right to provisional admission for the purpose of conducting a proper asylum procedure.[47] Accordingly, under the ECHR any 'pushbacks' of protection-seeking migrants in border situations are illegal, provided that they fall within the jurisdiction of the State. The Court also derived a number of minimum social rights to which asylum seekers are entitled from Article 3 ECHR.[48] Other cases have been decided more restrictively, including those mentioned in the introduction. However, none of them have removed the foundations laid in the decade after *Soering*.

The doctrinal shift crystallized in *Soering* was enabled by developments in both political and intellectual contexts. Politically, it followed the definitive failure of efforts to codify a right to territorial asylum. Decades of negotiations – within both the UN and the Council of Europe – had aimed at complementing the 1951 Refugee Convention with a binding instrument guaranteeing the right to asylum and allocating asylum jurisdiction, but without success.[49]

At the intellectual plane, the interplay of academic advocacy and the interpretive efforts of international expert bodies gradually developed the conceptual tools that allowed for a reinterpretation of existing human rights norms to fill that gap.[50] In the early 1960s, the European Commission of Human Rights (EComHR), which served as a filter to the ECtHR from 1953 to

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43 ECtHR, *Ahmed v. Austria*, Appl. no. 25964/94, Judgment of 17 December 1996; *D. v. United Kingdom*, Appl. no. 30240/96, Judgment of 2 May 1997; *Jabari v. Turkey*, Appl. no. 40035/98, Judgment of 11 July 2000.

44 ECtHR, *H.L.R. v. France*, Appl. no. 24573/94, Judgment (Grand Chamber) of 29 April 1997, para. 40.

45 ECtHR, *T.I. v. United Kingdom*, Appl. no. 43844/98, Decision of 7 March 2000.

46 ECtHR, *Bahaddar v. the Netherlands*, Appl. no. 25894/94, Judgment of 19 February 1998, para. 45; *Jabari v. Turkey* (n 43), para. 39–40. On these other sources, including Article 4 of Protocol No. 4 to the ECHR, see J. Bast, F. von Harbou and Janna Wessels, *Human Rights Challenges to European Migration Policy: The REMAP Study* (2022), at 124–128.

47 ECtHR, *Hirsi Jamaa and Others v. Italy*, supra note 8, para. 113 et seq.; *M.K. and Others v. Poland*, Appl. no. 40503/17, 42902/17 and 43643/17, Judgment of 23 July 2020, para. 179. In *D. v. United Kingdom*, supra note 43, para. 48, the Court already held that the principle of non-refoulement applies 'regardless of whether or not [the applicant] ever entered [the respondent State] in the technical sense'. See also, in the context of Article 5 ECHR, *Amuur v. France*, Appl. no. 19776/92, Judgment of 25 June 1996, para. 43.

48 ECtHR, *M.S.S. v. Belgium and Greece*, supra note 7, para. 216–222, 249 et seq.; see Slingenberg, 'European Case Law on Migrants' Social and Mobility Rights', 40 *NQHR* (2022) 98.

49 J. Schönhagen, *Geschichte der Flüchtlingspolitik 1945–1975* (2023), 228–233; A. Hurwitz, *The Collective Responsibility of States to Protect Refugees* (2009), ch. 1.

50 On this pattern in the making of a human right, see Arden, 'Intersecting Enforced Disappearance and Migration: The Creation of a New Legal Tool against Pushbacks within WGEID and CED', 43 *NQHR* (2025) 238.

1998, began to construe Article 3 ECHR to encompass non-refoulement 'in exceptional circumstances',[51] although the relevant cases were either declared inadmissible or later struck out.[52] Academic pioneers anticipated the jurisprudential development and helped popularizing the notion in international law circles.[53]

A tipping point was reached in the mid-1980s, as political developments and prior intellectual efforts converged. The adoption of the Convention against Torture in 1984, with its explicit prohibition of refoulement in case of torture, signalled a maturing international consensus and coincided with growing human rights consciousness in civil society. This encouraged the Strasbourg Court to position itself as articulating that consensus, eventually cutting the Gordian knot of the missing right to territorial asylum, at least in the European legal space.[54]

Against this background, *Soering's* conceptual breakthrough can hardly be overestimated. The Court has revolutionized the understanding of how the two legal concepts – asylum and non-refoulement – are connected, which is clouded by the fact that the Court carefully avoids speaking of asylum at all. According to the traditional understanding, the (discretionary) granting of asylum was considered a prerequisite for the prohibition on refoulement to apply.[55] *Soering* literally 'revolutionized' the order: The prohibition of refoulement gives rise to the obligation to provide protection on the territory of the Convention State, unless the person can obtain such protection elsewhere. For whatever else the concept of asylum entails in terms of legal status, the right to reside on the territory of a State other than one's own in order to be protected from serious harm is the very essence of the right to asylum.[56] In the cases from *Soering* (1989) to *T.I.* and *Jabari* (2000), the Court has created exactly that: an enforceable right to asylum on a human rights basis.

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51 EComHR, *X. v. Belgium*, Appl. no. 984/61, Decision of 29 May 1961, 6 *Collection of Decisions of the European Commission of Human Rights (Coll. Dec.)* 39; *X. v. Germany*, Appl. no. 1465/62, Decision of 6. October 1962, 5 *Yearbook of the European Convention on Human Rights* (1962) 256; *X. v. Germany*, Appl. no. 1802/62, Decision of 26 March 1963, 6 *Yearbook ECHR* (1963) 462, at 481.

52 See, e.g., EComHR, *X. (Baouya) v. Germany,* Appl. no. 2396/65, Report of 19 December 1969, 13 *Yearbook ECHR* (1970) 1094; *Amekrane v. United Kingdom,* Appl. no. 5961/72, Decision of 11 October 1973, 16 *Yearbook ECHR* (1973) 356; *Altun v. Germany,* Appl. no. 10308/83, Decision of 3 May 1983.

53 W. Kälin, *Das Prinzip des non-refoulement: Das Verbot der Zurückweisung, Ausweisung und Auslieferung von Flüchtlingen in den Verfolgerstaat und im schweizerischen Landesrecht* (1982), at 167–188; Nance, 'The Individual Right to Asylum under Article 3 of the European Convention on Human Rights', 3 *Michigan Journal of International Law* (1982) 477.

54 On the development, see J. McAdam, *Complementary Protection in International Refugee Law* (2007), at 136–138.

55 Chetail, 'Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law', in R. Rubio-Marín (ed.), *Human Rights and Immigration* (2014) 19, at 33 et seq.

56 K. Wouters, *International Standards for the Protection from Refoulement* (2009), at 24, 527 and 569.

C Discovering the right to sojourn

In parallel, the Court carried out a reconstruction of Article 8 ECHR ('Everyone has the right to respect for his private and family life, …'). The foundational judgment is *Berrehab v. the Netherlands* of June 1988, a little more than three years after the significantly more restrictive *Abdulaziz*.[57] Mr Berrehab, a Moroccan national, claimed that the non-renewal of his residence permit violated Article 8 of the Convention. Since he was forced to leave the country, he could not maintain the ties of 'family life' with his daughter, who was born out of the marriage with his divorced Dutch wife. The ECtHR ruled for the first time that the interests of migrants to have a normal family life can outweigh the public interests served by means of migration control.

A number of similar cases had previously been brought before the EComHR.[58] Some of these complaints were deemed admissible due to a possible violation of Article 8 ECHR, though they did not lead to judgments by the Court.[59] In addition to this preparatory work in terms of doctrine,[60] pioneers of civil society activism also played a role. They turned against increasingly restrictive migration policies in the 1980s and discovered Strasbourg as a forum for their struggles.[61]

Like *Soering*, *Berrehab* would not remain a one-off. Over the course of the 1990s, the Court developed a rich case law on non-expulsion of second-generation and other 'settled' migrants,[62] and on claims to admit members of a migrant family living abroad.[63] Expulsion or

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57 ECtHR, *Berrehab v. the Netherlands*, Appl. no. 10730/84, Judgment of 21 June 1988.

58 See Storey, 'The Right to Family Life and Immigration Case Law at Strasbourg', 39 *International and Comparative Law Quarterly (ICLQ)* (1990) 328 (visionary on page 344, expressing the hope that '*Berrehab* will prove to be a firm foothold for a creative "fourth decade"' at the Strasbourg bodies).

59 EComHR, *Alam and Others v. United Kingdom*, Appl. no. 2991/66 and 2992/66, Decision of 15 July 1967, 24 *Coll. Dec.* 116; *Patel and Others v. United Kingdom (East African Asians I)*, Appl. no. 4403/70 et al., Decision of 10 October 1970, 36 *Coll. Dec.* 92, at 120 et seq.; *Patel and Others v. United Kingdom (East African Asians II)*, Appl. no. 4501/70, Decision of 18 December 1970, 36 *Coll. Dec.* 127.

60 Cf. the matured structure of the Article 8 test in EComHR, *X v. United Kingdom*, Appl. no. 9088/80, Decision of 6 March 1982, 28 *Decisions and Reports (D.R.)* (1982) 160, at 162–163.

61 On the pre-history of *Berrehab*, see in detail W. Hommes, *The Convention and the Kingdom: How the Netherlands Received the European Convention on Human Rights* (2025), 236–245. On France, see L. Kawar, *Contesting Immigration Policy in Court* (2015), at 146–150; Kawar, 'Legal Mobilization on the Terrain of the State: Creating a Field of Immigrant Rights Lawyering in France and the United States', 36 *Law & Social Inquiry* (2011) 354, at 372 et seq.

62 ECtHR, *Moustaquim v. Belgium*, Appl. no. 12313/86, Judgment of 18 February 1991; *Beldjoudi v. France*, Appl. no. 12083/86, Judgment of 26 March 1992; *Boughanemi v. France*, Appl. no. 22070/93, Judgment of 24 April 1996.

63 ECtHR, *Gül v. Switzerland*, Appl. no. 23218/94, Judgment of 19 February 1996; *Ahmut v. the Netherlands*, Appl. no. 21702/93, Judgment of 28 November 1996. The first well-founded complaint was filed in Case *Sen v. the Netherlands*, Appl. no. 31465/96, Judgment of 21 December 2001, followed by *Tuquabo-Tekle and Others v. the Netherlands*, Appl. no. 60665/00, Judgment of 1 December 2005.

non-admission of such a family member is lawful only if a 'fair balance' has been struck between the private and public interests involved and due consideration was given to all relevant circumstances of the individual case.[64]

Based on a broad reading of the term 'private life', this rationale was extended to the protection of other social ties developed at the place of residence.[65] The Court considers the entire network of personal, social, and economic relations to be relevant in this context. Accordingly, the totality of social ties between migrants and the community in which they are living constitutes part of the concept of 'private life'.[66] Thus, the interest of any migrant in staying in the country where such ties exist is protected by Article 8 ECHR. The Convention provides for a right to sojourn in all but name, albeit a conditional one.[67]

The arc of cases from *Berrehab* (1988) to *Boultif* and *Sen* (2001) shows a remarkedly similar trajectory to the Article 3 jurisprudence. Subsequent cases have confirmed the above doctrines and further spelled out consequences, for example that Article 8 ECHR excludes any schemes of automatic expulsion following a criminal conviction or unlimited re-entry bans.[68] In exceptional circumstances, Article 8 ECHR may even give rise to a right to regularization,[69] as will be discussed in more detail below (see 3.B). On the other hand, the Court has never decided to establish an absolute right to entry or stay for certain categories of migrants. The rationale of its jurisprudence has remained the same since its foundation in the 1990s: States are under the two-fold obligation to conduct an individual assessment and to arrive at a substantially 'fair' decision that recognizes migrants' social ties within the host society.

D Legalizing Utopian claims

To come back to the initial question about the merits of the no-progress narrative, our review has revealed that within just over a decade, interpretations of the Convention have become settled case law that establish human rights constraints in key areas of migration control. The Court has developed the Convention into a source of denizenship (right to sojourn) and inter-

64 The criteria are summarized in ECtHR, *Boultif v. Switzerland*, Appl. no. 54273/00, Judgment of 2 August 2001, para. 48; detailed in *Üner v. the Netherlands*, Appl. no. 46410/99, Judgment (Grand Chamber) of 18 October 2006, para. 57–58. For an analysis of the *Boultif-Üner* criteria, see e.g. Desmond, 'Friend, Foe and Foil: The Many Uses of Time by the European Court of Human Rights in Expulsion Cases', 2 *EHRLR* (2021), 418.

65 ECtHR, *C. v. Belgium*, Appl. no. 21794/93, Judgment of 7 August 1996, para. 25; confirmed in *Slivenko v. Latvia*, Appl. no. 48321/99, Judgment (Grand Chamber) of 9 October 2003, para. 96.

66 Cf. ECtHR, *Osman v. Denmark*, Appl. no. 38058/09, Judgment of 14 June 2011, para. 55.

67 Cf. Thym, 'Residence as De Facto Citizenship? Protection of Long-term Residence under Article 8 ECHR', in Rubio-Marín, supra note 55, 106.

68 See e.g. ECtHR, *Maslov v. Austria*, Appl. no. 1638/03, Judgment (Grand Chamber) of 23 June 2008; see also *Nunez v. Norway*, Appl. no. 55597/09, Judgment of 28 September 2011.

69 See ECtHR; *Rodrigues da Silva and Hoogkamer v. the Netherlands*, Appl. No. 50435/99, Judgment of 31 January 2006.

national protection (right to asylum). Against the historical backdrop of unfettered state discretion and the legacy of immigration exceptionalism, we consider this to be a revolutionary change, both in terms of legal doctrine and discursively.[70]

Doctrinally, the reconstructed Convention provides a legal basis for making the two most fundamental types of claims in the context of migration policy. These are 'humanity claims' and 'belonging claims', as Hiroshi Motomura has convincingly explained; they shape the entire discourse about migration.[71] In post-revolutionary Europe, such moral and political claims can be framed in the language of law and thus benefit from its authority. This process of legalization fundamentally changes the power map of migration. The human rights juridification of claims made by non-citizens and their kin empowers voices of people who have often been ignored or silenced, even if this does not mean that these voices always win the legal argument.[72]

Discursively, it is highly significant that it is precisely the universalist semantics of human rights that the Court has made available to migrants for the assertion of humanity claims and belonging claims. Human rights law is not like any other body of law. Human rights provide a potentially powerful normative resource in migration-related conflicts in law, politics, and the everyday.[73] When the lexicon of human rights is used to formulate a legal argument, an archive of emancipatory struggles and experiences of injustice is referenced that 'supercharges' the argument with additional moral and affective qualities emerging from collective 'human rights consciousness'. The invocation of human rights norms enables actors to make very ambitious, 'maximalist' demands that push beyond existing law and, tacitly or explicitly, challenge the power structures of migration societies.[74] In a social field inherently characterized by domination and inequality between citizens and different classes of non-citizens, human rights provide a universal language of justice that invokes a Utopian promise of just borders, or no borders at all. In discovering the human rights of migrants, the ECtHR could not help but unleash the 'concrete Utopia'[75] of a society in which all human beings, including migrants, are free and equal in dignity and rights.

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70 We agree with Stefan Schlegel who has called it a 'Copernican revolution': supra note 1.

71 H. Motomura, *Borders and Belonging: Towards a Fair Immigration Policy* (2025), at 9, 19–21 et passim.

72 Motomura, supra note 71, at 10. Cf. von Bogdandy, supra note 37, at 208.

73 Research Group MeDiMi, 'Human Rights Discourse in Migration Societies: A Research Agenda', MeDiMi Working Paper No. 1 (2023), http://dx.doi.org/10.22029/jlupub-17813.

74 On 'minimalist' and 'maximalist' understandings of human rights law, see Bast, von Harbou and Wessels, supra note 46, at 18–19. See also Ch. Menke and F. Raimondi, *Revolution der Menschenrechte* (2011), emphasizing a transformative political understanding of human rights.

75 W. Kaleck, *Concrete Utopia: Looking Back into the Future of Human Rights* (2024); in the context of migration policies, see Pichl, 'Zwischen Utopie und Retrotopia', 44 *Zeitschrift für Ausländerrecht (ZAR)* (2024) 363. See also Motomura, supra note 71, at 9 ('realistic utopia').

3. Post-revolutionary dynamics: Navigating between Utopia and Laodicea

Having demonstrated that the Court has laid the groundwork for a revolutionary new understanding of the Convention, we are now confronting the second narrative, viz. that the Court's migration-related jurisprudence has reached an endpoint after three decades of continuous expansion. In this section we argue that both characterizations on which this narrative is based are unpersuasive after all. According to our analysis, the case law of the Court over the last two decades has not led to an ever-higher level of protection for migrants and, accordingly, its latest rulings do not represent a rupture. Rather, a constellation has emerged in the wake of the 1990s in which the Court is grappling with the consequences of its own revolution. It does so by oscillating between 'progressive' and 'restrictive' elements of its jurisprudence – without, however, endorsing a return to the *ancien régime*.

We approach this section slightly differently than the previous one. We will support our argument with an exemplary discussion of two Grand Chamber judgments from the 2010s, one that is usually regarded as progressive (*Jeunesse v. the Netherlands* of 2014[76]) and one that is famous for its restrictive outcome (*Ilias and Ahmed v. Hungary* of 2019[77]). At first glance, the cases seem perfectly consistent with the endpoint narrative, with the later judgment indicating a mounting backlash in Strasbourg after 2016.[78] We have also chosen these two cases because they concern a highly relevant doctrinal point on Articles 3 and 8 ECHR respectively. They deal with core instruments of migration control, namely, the obligation to obtain a provisional residence visa from abroad in the context of family reunification (*Jeunesse*) and the concept of 'safe third country' in the context of asylum (*Ilias and Ahmed*).

While these cases were deliberately selected, we do not make a claim of representativeness strictly speaking. Rather, the two cases serve to illustrate the more general argument on how the case law on Articles 3 and 8 ECHR should be understood in the relevant period. In this sense, we remain at the same level of doctrinal abstraction as in the previous section. Other landmark cases on instruments of migration control could serve to make the same point: that the Court is torn between the promise of Utopia and the pretence of Laodicea, sometimes drawn more to one place, sometimes to the other. We see a general pattern in this: The Court sanctions and shields these practices – and at the same time creates and upholds a space of possibilities for contesting them.

A The case *Ilias and Ahmed v. Hungary*

The Grand Chamber judgment in *Ilias and Ahmed* is well-known for reversing the Chamber's unanimous finding that the applicants were subject to *de facto* detention during the Hungarian

[76] ECtHR, *Jeunesse v. the Netherlands*, Appl. no. 12738/10, Judgment (Grand Chamber) of 3 October 2014.

[77] ECtHR, *Ilias and Ahmed v. Hungary*, Appl. no. 47287/15, Judgment (Grand Chamber) of 21 November 2019.

[78] Cf. Klaus and Kmak, 'ECtHR Jurisprudence Amid Political Shifts', supra note 9, sub 1.

border procedures.[79] This finding received a lot of attention, also because the CJEU came to a different conclusion shortly thereafter.[80] The Grand Chamber judgment also made important statements on the use of the safe third country concept.

The case concerned two Bangladeshi nationals who transited through Greece, the Former Yugoslav Republic of Macedonia, and Serbia before reaching Hungary and the Röszke transit zone where they applied for asylum and were held for 23 days. The Hungarian asylum authority rejected the applicants' claims on grounds that Serbia was considered to be a 'safe third country'. The applicants were subsequently escorted to the Serbian border by Hungarian officers and 'pushed back' to enter Serbian territory irregularly. The applicants brought the case before the ECtHR, where they complained, among others, that their expulsion to Serbia had exposed them to a risk under Article 3 ECHR. The case ultimately reached the Grand Chamber.

1 Expulsion to a 'safe third country' under the Convention?

Removals of asylum seekers to third countries without prior assessment of their claims have long been a feature of migration control.[81] The absence of an international system of asylum responsibility, even among State Parties to the Refugee Convention, remains a structural Achilles heel of the international protection regime, giving rise to the phenomenon of 'refugees in orbit'. The logic of a right to asylum grounded in the principle of non-refoulement presupposes that no alternative protection is available. States therefore may invoke the presumed general safety of a third country, relying on overall conditions to justify a unilateral declaration of non-responsibility for an asylum claim. By appealing to the humanitarian concept of a country of first asylum, States can mobilize a rationale supporting externalization strategies designed to establish a *cordon sanitaire* around their territory.[82]

The model has become especially prominent in European migration governance since the 1990s, following the end of the Cold War and the resulting increase in asylum applications from Central and Eastern Europe.[83] These developments coincided with the gradual construction of the Common European Asylum System (CEAS), which partly resolved the issue through a European system of allocating asylum jurisdiction among its Members (the so-called Dublin

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79 ECtHR, *Ilias and Ahmed v. Hungary*, Appl. no. 47287/15, Judgment (Chamber) of 14 March 2017; see e.g. Ruíz Ramos, 'The Right to Liberty of Asylum-Seekers and the European Court of Human Rights in the Aftermath of the 2015 Refugee Crisis', *Revista Española de Estudios Internacionales* (2020), No. 39.

80 CJEU, *FMS*, Joined Cases C-924/19 PPU and C-925/19 PPU, ECLI:EU:C:2020:367; see Bast, von Harbou and Wessels, supra note 46, at 95–100.

81 See Moreno-Lax, 'The Legality of the "Safe Third Country" Notion Contested: Insights from the Law of Treaties', in G. S. Goodwin-Gill and P. Weckel (eds.), *Migration and Refugee Protection in the 21st Century* (2015) 665; Osso, 'Unpacking the Safe Third Country Concept in the European Union: B/orders, Legal Spaces, and Asylum in the Shadow of Externalization', 35 *IJRL* (2023) 272.

82 S. Lavenex, *The Europeanisation of Refugee Policies* (2001), at 80–82, 94–98.

83 Byrne and Shacknove, 'The Safe Country Notion in European Asylum Law', 9 *Harvard Human Rights Journal* (1996) 185.

system), which outlawed unilateral declarations of non-responsibility. In parallel, however, the EU also codified the safe third country concept in respect of non-Dublin States in the Asylum Procedures Directive, even if it has not yet been widely used.[84]

The 'safe third country' approach rests on the assumption that the duty of protection under Article 3 ECHR may be fulfilled through 'delegation' to another state. For the expelling state, generalized assessments of the situation in the receiving third state take the place of individual assessments of asylum claims. The risk inherent in this model is twofold. First, even a bona fide general assessment can prove to be wrong in individual cases. Second, a State may be tempted to base its assessment on counterfactual assumptions, i.e., that the third country concerned *ought* to be willing to grant protection. In both instances, the receiving third state does not take responsibility for the individual's asylum claim. This may result in chain refoulement where asylum seekers are successively expelled through multiple countries without any State taking responsibility for examining their protection needs, ultimately risking ill-treatment in violation of Article 3 ECHR.

2 'Yes, but': From Laodicea towards Utopia

When the Court was facing the evaluation of the Hungarian 'safe third country' model, therefore, the right to asylum under the Convention was at stake. The Grand Chamber ultimately refrained from striking down safe third country removals altogether (para. 152). The Convention, as interpreted, does not entail a duty to grant asylum if the asylum seeker can be expelled to another State without violating the Convention. Rather than dismantling it, the ruling thus validates the structural integrity of this externalization strategy. In this sense, the judgment confirms the notion of a Court turned Laodicean, defusing the Utopian potential of the right to asylum that was activated with the jurisprudence following *Soering*.

Yet upon closer examination, Utopia flickers in at least three elements in the Courts reasoning that contradict a one-sided Laodicean reading. In a quasi-legislative manner, the Grand Chamber sets out guidelines that are meant to apply to all future cases of 'safe third country' policies. The combined effect of these elements is that the Court did find a violation with respect to the removal of the applicants in the present case.

First, the Court insists that Hungary has own duties stemming from the absolute nature of the provision. The absolute nature of Article 3 ECHR is reaffirmed in strong words as 'one of the most fundamental values', 'closely bound up with human dignity', and 'part of the very essence of the Convention' (para. 124). Hungary cannot evade its duties by referring to other States, regardless of their obligations under the Convention or international law more broadly. This

[84] See Costello, 'The Asylum Procedures Directive and the Proliferation of Safe Country Practices', 7 *EJML* (2005) 35; H. Battjes, *European Asylum Law and International Law* (2006), ch. 7.

aligns with the original Utopian vision that led the Court to derive the non-refoulement principle from the prohibition of torture and other serious ill-treatment.

Second, these obligations entail that the Convention State has to ensure that every single asylum claim is assessed on the merits, either by conducting the assessment itself or by guaranteeing that the receiving third State will do so (para. 131, 137). A normative presumption of safety, grounded in the general conditions of the third country, is not sufficient; the third country must be safe for the individual applicant whose claim must be heard and examined. By implication, the Court excludes any expulsion to a transit country that applies a 'safe third country' concept itself (para. 134). This applies even if the expelling State considers a claim to be unfounded or not to be arguable, because 'it is only by means of a legal procedure resulting in a legal decision' that it can be known whether a person risks ill-treatment (para. 136–137).

Third, the Grand Chamber specifies a detailed catalogue of procedural obligations for such expulsions. The expelling State must verify, in an up-to-date ex officio assessment based on all relevant and generally available information, whether there is a functioning asylum procedure that is accessible and reliable (para. 139–141). The authorities must also verify the safeguards the asylum system in the receiving State affords in practice, as well as adequate reception conditions (para. 136). If existing guarantees are insufficient, the State must not remove the asylum seeker to that third country (para. 134). Thus, expulsions to safe third countries are largely contained by individualized procedural obligations. Simplified rejection of asylum applications based on generic country assessments is virtually undermined – and Utopia reasserts itself.

In sum, although the judgment uses the terminology of 'expulsion', what emerges is, in substance, a review of the proposed 'transfer' to the responsible asylum state. The Court effectively articulates a human rights-based pre-transfer procedure, reminiscent of the standards developed under the Dublin system. The judgment essentially establishes a protection guarantee under the Convention: Access to an asylum procedure must be ensured – either in the transferring or the receiving State. The door to completely hollowing out the right to asylum is thus (almost) closed.

3 Struggling to find a passage

The overall picture of the judgment is thus difficult to draw. The Court visibly struggles to reconcile irreconcilable positions: upholding the absolute nature of the principle of non-refoulement while at the same time allowing States not to comprehensively assess the individual risk. As a consequence, the substantive and procedural obligations that third country schemes must fulfil in order to comply with the Convention are far from clear. The notion of 'sufficient guarantees' is applied inconsistently; whether guarantees must be general or personal remains unresolved. At times, general country information suffices (para. 139), though the standard for

assessing it remains vague. Hungary relied on relevant sources, yet the Court found its conclusions lacking (paras 158–160). Elsewhere in the judgment, individualized guarantees appear necessary (para. 161), without clarifying when they are required. It seems that there is no obligation to obtain an individual assurance that the person will receive an asylum procedure in the receiving State – not a Dublin system, after all. At the same time, the Court quietly moves away from earlier case law that tied Article 3 protection to the existence of an 'arguable claim' based on partial merits assessments (paras 146–147) – a logic that risked reducing safeguards for weaker claims. Ultimately, the Court seems to hold both that there is *no* right to asylum in a particular Convention State and that there *is* such a right under the Convention framework.

B The case *Jeunesse v. the Netherlands*

When Ms Jeunesse, a Surinamese national, lodged her complaint with the ECtHR, she had already been living in the Netherlands for 13 years (more than 17 at the time of the Court's judgment). During this time, she married a person of Surinamese origin and gave birth to three children, all of whom have Dutch nationality. Apart from the initial period when she held a tourist visa, she never held a residence permit legalizing her stay. She filed several applications to this end and initiated various court proceedings, all of which were unsuccessful. The Dutch authorities, for their part, never made a serious attempt to enforce her obligation to leave the country.[85] Ms Jeunesse claimed that the Dutch authorities violated Article 8 ECHR by failing to end her illegal status through the granting of a regular residence permit.

1 A right to regularization under the Convention?

Regularizations (also called legalization) of this kind are part of the normal arsenal of modern immigration law, whether in the form of individual decisions or amnesties for groups of migrants.[86] However, such measures are almost always at the discretion of the authorities and are not individual entitlements.[87] The mere possibility that the ECHR gives rise to a right to regularization represents in itself a remarkable advance of human rights in migration law.[88]

The Dutch authorities did not dispute that Ms Jeunesse has a family life worthy of protection and that her admission would not pose any specific risks to the public interests recognized in Article 8(2) ECHR. Only the fact that Ms Jeunesse was asserting her claim from within the Netherlands after years of illegal stay prevented her from obtaining a residence permit. The Dutch authorities insisted that authorization could only be considered after leaving the country and undergoing a visa procedure at a diplomatic mission abroad (the judgment is not entirely clear

85 For the full story, read *Jeunesse v. the Netherlands*, supra note 76, para. 8–42.

86 K. F. Hinterberger, *Regularisations of Irregularly Staying Migrants in the EU* (2023), at 76 et seq.; Motomura, supra note 71, at 90–100.

87 Lutz, 'Non-removable Returnees under Union Law, 20 *EJML* (2018) 50, at 46.

88 For a discussion in the context of other cases, see Bast, von Harbou and Wessels, supra note 46, at 197–203.

as to whether this would actually have resulted in a visa being granted or whether her violations of immigration rules would be held against her). In essence, the question was whether such obligation to obtain a provisional residence visa from abroad can be overridden by invoking the human right to family unity.

What sounds like a purely procedural requirement is actually a key element of modern immigration law. The first systematic use of this procedure was by the USA in order to implement the system of ethnic immigration quotas introduced after the World War I. The US migration scholar Aristide Zolberg has recognized this 'remote border control' as a significant innovation in the administrative practice of migration governance.[89] This innovation was soon adopted by other countries and is now part of the established arsenal of immigration law, even after the substitution of racial by economic selection criteria.[90] The practice of issuing visa, which was originally designed solely for the purpose of administering cross-border mobility, has thus taken on a key role in checking residence rights in advance.[91] Block exemptions from the rule that a residence permit must not be applied for during a stay in the country are themselves used as an instrument for managing immigration, by selectively granting this privilege to certain nationals or classes of migrants.[92]

2 'Yes, but': From Utopia towards Laodicea

What was at stake in *Jeunesse* was therefore nothing less than invalidating these control instruments through 'immigration from within' based on human rights.[93] And indeed: The Grand Chamber of the ECtHR ultimately set aside all reservations against such a regularization claim and found a violation of Article 8. There was a positive obligation to issue a residence permit directly, i.e. without first carrying out a visa procedure (para. 122). The ruling thus fits seamlessly into the continuity of the line of jurisprudence established by *Berrehab* and actualizes, even radicalizes, its Utopian potential.

On closer analysis, however, this interpretation of the judgment is too one-sided and overlooks the many efforts made by the ECtHR to limit the impact of its ruling. In at least three respects, there are contrary, Laodicean elements in the legal substance of the judgment, which the final outcome cannot conceal.

First, the State's right to migration control is affirmed in strong terms, and not only with the usual formula. The ECtHR expressly confirms that under the Convention, States 'have the right

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89 Zolberg, 'The Great Wall against China', in J. Lucassen and L. Lucassen (eds.), *Migration, Migration History, History* (2nd ed. 2005) 291; Zolberg, 'Matters of State', in Ch. Hirschman, Ph. Kasinitz and J. Dewind (eds.), *The Handbook of International Migration: The American Experience* (1999) 71, at 75–76.

90 A. M. McKeown, *Melancholy Order: Asian Migration and the Globalization of Borders* (2008), at 318 et seq.

91 Groß, 'Entwicklungsetappen des Visums als Grenzinfrastruktur', 44 *ZAR* (2024), 187.

92 See Bast, *Aufenthaltsrecht*, supra note 32, at 230 et seq.

93 Hinterberger, supra note 86, at 356–359.

to require aliens seeking residence on their territory to make the appropriate request from abroad' (para. 101), even if there is a potentially valid claim to family unity. What is remarkable here is the complete lack of justification as to why the territorial sovereignty of states necessarily includes the rigid enforcement of an administrative system based on preventive admission controls. The enforcement of the duty to await the outcome of the administrative proceedings abroad mutates into an end in itself, which does not require any link to a specific protected interest (cf. para. 121: 'the public order interests of the respondent Government in controlling immigration'). This is as Laodicean as it gets.

Second, the Court extensively explains why even a long-term stay of a person without legal status that has been de facto tolerated by the authorities does not lead to the application of the criteria developed for the expulsion of 'settled migrants'. Instead, in order to determine whether a 'fair balance' between public and private interests has been struck, the standards developed for aliens seeking admission should be applied (para. 104–105).[94] In doctrinal terms, migrants like Ms Jeunesse, who have strong family, social, and cultural ties in the country, are treated as if they were seeking first-time access to the territory. Here, too, the reasoning is confusing: The present case 'concerns not only family life but also immigration' (para. 105), as if this qualification did not apply equally to the expulsion of members of an immigrant family who previously had legal status.[95]

A third Laodicean element, apparently intended to limit the scope of the decision, is the repeated emphasis on the 'exceptional circumstances' under which regularization without a visa procedure could be considered (para. 108, 114), which the Court finds to exist under the 'particular circumstances' of this case (para. 121–122). Both at the level of the applicable standards and their application to the present case, the potential of the decision to become a precedent for a large number of future cases was to be minimized.

3 Struggling to find a passage

The various facets of this decision are difficult to combine into a coherent whole.[96] On the one hand, the Court rhetorically emphasizes the obligation of illegal migrants to leave the country as a corollary of its territorial sovereignty, only to then measure the enforcement of this obligation against the standard of Article 8 ECHR and ultimately find a violation. The sharp distinction between the right of 'settled migrants' to defend themselves against 'arbitrary action by

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94 The rationale that 'settled migrants' form a distinct class was introduced in ECtHR, *Butt v. Norway*, Appl. no. 47017/09, Judgment of 4 December 2012, para. 78, in the context of deportation following criminal conviction.

95 The formula is known from *Abdulaziz*, supra note 15, para. 67, and is occasionally invoked when it pleases the Court.

96 Cf. Joined Dissenting Opinion of Judges Villinger, Mahoney and Silvis, para. 1: '[u]nderstanding the judgment … in the context of the Court's case-law is not an easy task'.

the public authorities' and positive obligations vis-à-vis 'aliens seeking admission' fades completely in the end, in that – in line with previous case law – a fair balance must be found in both constellations, which are in any case only in theory clearly distinguishable. Finally, it is ultimately not clear what the particular circumstances of the case are that qualify them as 'exceptional'. Anyone familiar with the post-colonial history of the Surinamese community in the Netherlands and the toleration practices of Dutch authorities will tend to agree with the opposite assessment of the Dutch government (para. 90), which saw a typical case at hand here.

C The Court's indeterminate course of action – within defined parameters

If we take a combined look at the two judgments, remarkable similarities become apparent. The Court seems to be driven by conflicting objectives in dealing with the well-established instruments of migration control at issue here. One the one hand, it sanctions these practices, reassuring States that these instruments are still available to them in the age of human rights – the Laodicean element. On the other hand, the violations found in the specific case do not merely concern an atypical individual case. Rather, the judgments follow a *ratio decidendi* that significantly restricts the discretion of States in migration policy in the name of human rights, defending essential innovations of the new era – the Utopian element. The precise contours of these restrictions remain unclear, however. The Court seeks to shield States against the challenges posed by migrants and at the same time enable migrants to do just that.

With all due caution, we believe that these findings can be generalized. We suggest that the ambiguity reflected in these judgments can also explain the back-and-forth *between* judgments, in which the Court sometimes leans more towards one side and sometimes more towards the other. Individual judgments can end up closer to Utopia, such as *Hirsi Jamaa*, or closer to Laodicea, such as *N.D. and N.T.,* while elements of both can be reflected in a single judgment, as we have shown by way of example.

What sets this observation of the Court's indeterminacy apart from similar classifications is its grounding in a specific historical constellation.[97] For the time being, the Court's back-and-forth in migration case law has remained within the parameters of the post-revolutionary constellation that emerged during the long 1990s. Viewed from a greater historical distance, the more restrictive (or non-expansionist) judgments of recent years appear qualitatively no different from those of 10 or 20 years ago. For as long as the Court does not sanction a return to the *ancien régime* that existed before the revolutionary 'discovery' of human rights for migrants, the Court's jurisprudence is destined to fluctuate between two poles: ensuring that migration control instruments remain intact *and* allowing them to be contested.

[97] See e.g. Marie-Bénédicte Dembour, 'Following the Movement of a Pendulum: Between Universalism and Relativism' in Jane K. Cowan, Marie-Bénédicte Dembour and Richard A. Wilson (eds), *Culture and Rights: Anthropological Perspectives* (2001) 56.

Summarizing, as explained in the previous section, the no-progress narrative misses the revolution, the fundamental change that human rights constraints on migration policy represent. In this section, we have provided exemplary evidence that the endpoint narrative fails to capture the dynamics of the post-revolutionary period. Rather than a dynamic expansion followed by a turnaround, we observed an indeterminate course of action by the ECtHR, but within defined parameters. The model of a back-and-forth between progressive and restrictive elements in the Court's judgments and lines of reasoning arguably better explains the dynamics of the case law than any story of rise and fall (or, for that matter, of overreach and prudent retreat). In the post-revolutionary era of its jurisprudence, the Court simultaneously activates and mitigates the revolutionary potential of human rights for the interests of migrants – oscillating between Laodicea and Utopia.

4. The legacy of the revolution: Space for contesting migration control

In conclusion, we summarize our understanding of the Court's trajectory and offer some reflections on the historical and theoretical context.

The scholarly argument is essentially about continuity and change in the history of the ECtHR's migration-related jurisprudence. We submit that in order to understand the present case law, it is crucial to recognize that it unfolds under conditions of a constellation that came into being during the fourth decade of the existence of the Strasburg bodies. We refer to this period of transformation as 'the long 1990s'. It begins with foundational judgments in the late 1980s and ends at a less clearly defined point after the turn of the century, when the new doctrines had consolidated.

We argue that this *Sattelzeit* remains key to explaining the migration-related case law of the ECtHR to this day. Both the preceding and subsequent phases can be read from the perspective of this revolutionary period. With the benefit of hindsight, we can point to pioneering expert findings, creative academic writing, and civil society activity that made the transformation at the Court more likely in the political and cultural climate of the late 1980s and the 1990s. Subsequently, once essential doctrines had matured into 'settled case law', they served as a reference point in a multitude of situations and led to a growing number of cases. While the specifics of the jurisprudence are constantly evolving, the doctrinal foundations of the new, post-revolutionary era have remained remarkably stable over time.

In social theory, such relatively stable social arrangements have been conceptualized as 'conditions of possibility'.[98] They are structures that facilitate certain practices without causing them, by providing a social space that makes such practices 'more possible'. In the instance of

[98] See, e.g., W. E. Connolly, *Identity/Difference: Democratic Negotiations of Political Paradox* (1991), passim.

the ECtHR, its judicial revolution has created a body of legal doctrines that functions as a 'condition of possibility' for human rights claims in migration-related conflicts. These doctrines provide a relatively stable legal arrangement that enables the contestation of migration control measures through recourse to human rights and thus facilitate iterative practices of legal mobilization.[99] Socio-legal research suggests that these legal struggles over the meaning of human rights have 'radiating effects' beyond the legal realm,[100] contributing to the humanrightization of discourse in migration societies at large.[101]

In sum, the Court's jurisprudence opened up space for actors to make human rights arguments in migration-related conflicts. One should not confuse, however, the empirical expansion of references to human rights within the new discursive space with a progressive realization of migrants' human rights. The Court's revolution has established the possibility to contest measures of migration control within the framework of the recognized rules of legal argumentation. These claims continue to clash with counterclaims made by other actors, including governments – with unpredictable outcomes.[102] Our research does not suggest that the Court consistently takes sides in these conflicts, but rather that it adopts an indeterminate stance, moving back and forth between contradicting goals. This, then, is the lasting legacy of the revolution: The Court has created and defended a space for contesting migration control in the name of human rights – a space between Utopia and Laodicea which its jurisprudence navigates without a destination.

[99] It is beyond the scope of this paper to substantiate the argument that this legal infrastructure created during the 1990s interacts with other 'conditions of possibility' that have developed in parallel with human rights law, in particular a network of civil society organizations (human rights movements) and the collective perception of migrants as subjects of rights (human rights consciousness). See Coordination Unit of the Research Group MeDiMi, 'Humanrightization: Theses on a Theory of Discursive Practice in Migration Societies', MeDiMi Working Paper No. 2 (2025), https://doi.org/10.22029/jlupub-20079.

[100] Kawar, *Contesting Immigration Policy*, supra note 61, at 153 et seq.

[101] Buckley-Zistel, Bast and Holderied, 'Humanrightization of Migration Discourses: A Conceptual Framework', 18 *Journal of Human Rights Practice* (2026) (forthcoming).

[102] On governments as doctrinal entrepreneurs, see Wessels, 'Reverse Strategic Litigation by Governments? Negotiating Sovereignty and Migration Control before the European Court of Human Rights', 118 *AJIL Unbound* (2024) 214.

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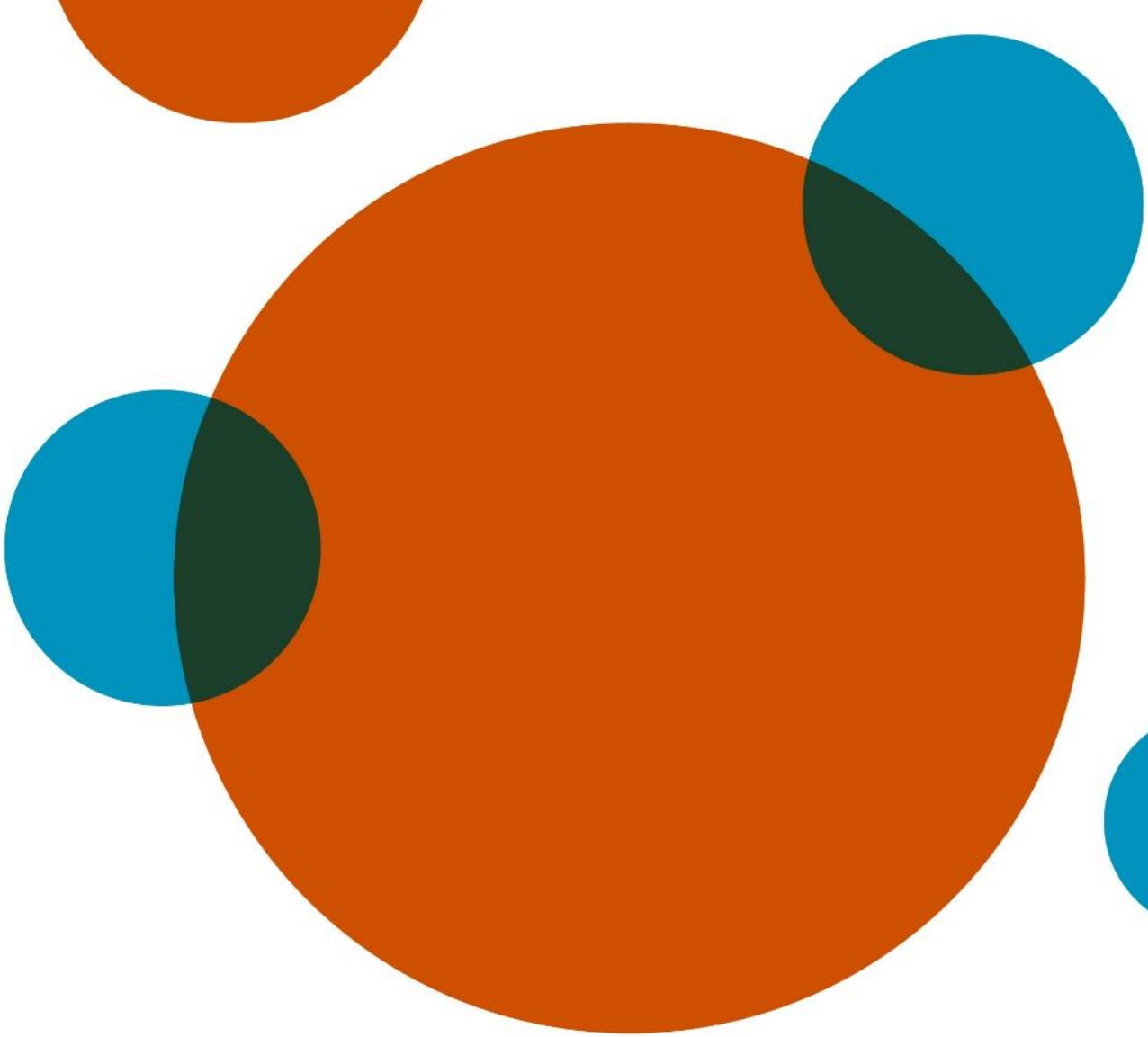

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