Delving into Extraterritorial Jurisdiction in the European Court of Human Rights' Decision on Humanitarian Visas

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ABSTRACT: The contribution analyses the long-awaited decision of the ECtHR on humanitarian visas related to the case *M.N. and Others v. Belgium*. It places the Court's reasoning within the context of its case law on extraterritorial jurisdiction (under Art. 1 ECHR) and shows how the decision seems to restrict further the possibility to generate jurisdictional links between Parties and third-countries individuals "forced to" request asylum to flee persecution, but "prevented to" reach European borders. By looking at developments occurred in the context of other human rights mechanisms, the analysis suggests that the ECtHR could – and can – reach alternative, less formalistic, readings of jurisdiction in order to achieve a better balance between the Parties' sovereign right to control the entry of aliens and individual protection needs.

KEYWORDS: Extraterritorial jurisdiction – ECHR – humanitarian visas – asylum – *non-refoulement* – right to life.

1. Introduction

A long-awaited decision of the ECtHR, one that will be discussed for long[1], has not disappointed all the European governments whose efforts have been aimed to strengthen border controls on migrants, including asylum

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[1] Initial critical views include A. REYHANI, "Expelled from Humanity. Reflections on M.N. and Others v. Belgium", *Verfassungsblog*, 6 May 2020; V. STOYANOVA, "M.N. and Others v Belgium: no ECHR protection from refoulement by issuing visas", *EJIL:Talk!*, 12 May 2020; M. BAUMGÄRTEL, "Reaching the dead-end: M.N. and others and the question of humanitarian visas", 7 May 2020. After the publication of the blogpost on which this contribution is based, the decision was analysed *ex multis* in A. RICCARDI, *Alla ricerca di una via legale di fuga. Note a margine di M.N. et al. c. Belgio di fronte alla Corte europea dei diritti umani*, in *Studi sull'integrazione europea*, 2020, p. 693 ff.; A. MUCCIONE, *Obbligo di* non-refoulement *e richieste di visti umanitari nel sistema della Cedu: la decisione della Grande Camera sul caso M. N. e altri c. Belgio*, in *Ordine internazionale e diritti umani*, 2021, p. 105 ff.; F. CAMPLONE, *La sentenza M.N. e al. c. Belgio alla luce di X e X: la conferma della prudenza delle Corti o un impulso allo sviluppo di canali di ingresso legali europei?*, in *Diritto, Immigrazione, Cittadinanza*, 2020, p. 239 ff.

claimants. With the decision in the case of *M.N. and Others v. Belgium*[2], the ECtHR has adopted a self-restraint approach that creates an additional obstacle for those asylum claimants who would rely on international human rights law (IHRL) obligations as the only possible way of avoiding dangerous, sometimes deadly, journeys in order to submit an asylum application in Europe[3]. In a nutshell, the ECtHR concluded that States Parties to the European Convention on Human Rights (ECHR) do not have any obligation to issue humanitarian visas because the ECHR does not apply in the context of proceedings initiated by individuals through diplomatic representations of a State Party, with which such individuals have no connecting ties like nationality or which does not exercise any sort of *physical* control[4]. Whereas some readers may find it unsurprising, in light of recent case law on migration issues[5] as well as the CJEU's (peculiar) findings on the same matter from an EU law perspective[6], other readers may qualify the ECtHR's approach based on the lack of jurisdiction as "formalistic" or "ineffective". This is particularly the case when the reasoning adopted by the ECtHR is compared, other than with social realities of today's migration flows, with previous favourable developments occurred not only within its case law, but also with positions adopted by universal human rights bodies attempting to

[2] ECtHR (Grand Chamber), decision on admissibility of 5 May 2020, app. no. 3599/18, *M.N. and Others v. Belgium*. In addition to what is said below, the applicants alleged also a violation of Article 6 that however, according the ECtHR's case law, does not apply to asylum/immigration related decisions (see *ibid.* para. 137).

[3] For a very initial analysis on the obligation to grant humanitarian visas to people claiming asylum at embassies under the ECHR and the CRC, G. NOLL, *Seeking Asylum at Embassies: A Right to Entry under International Law*, in *International Journal of Refugee Law*, 2005, p. 542 ff.

[4] More generally on Article 1 ECHR, see S. BESSON, *The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to*, in *Leiden Journal of International Law*, 2012, p. 857 ff.; M. MILANOVIC, *Al-Skeini and Al-Jedda in Strasbourg*, in *European Journal of International Law*, 2012, p. 121 ff.

[5] ECtHR (Grand Chamber), judgment of 13 February 2020, app. nos. 8675/15 and 8697/15, *N.D. and N.T. v. Spain*; ECtHR (Grand Chamber), judgment of 21 November 2019, app. 47287/15, *Ilias and Ahmed v. Hungary*. More generally, on the risk of regressive readings by the Court, see L.R. HELFER, E. VOETEN, *Walking Back Human Rights in Europe?*, in *European Journal of International Law*, 2020, p. 397 ff.

[6] CJEU, judgment 7 March 2017, C-638/16, *X and X v. Belgium*, where the potential application of EU law would have triggered the application of the EU Charter of Fundamental Rights, which does not include a provision like Article 1 ECHR (see Article 51 of the Charter), if the Court would have not found otherwise. On that judgment, A. DEL GUERCIO, *La sentenza X. e X. della Corte di giustizia sul rilascio del visto umanitario: analisi critica di un'occasione persa*, in *European Papers*, 2017, p. 271 ff.

expand the applicability of human rights treaties, including via a "non-formalistic" approach[7].

2. Lack of protection for lack of jurisdiction under the ECHR

When on 20 November 2018 the Court's Chamber (Second Section) relinquished jurisdiction to the Grand Chamber, there was a heightened expectation that the case *M.N. and Others v. Belgium* could be a turning point in the protection of most asylum claimants headed to Europe. The significant number of States Parties submitting third-party comments signalled an equally increased concern that, perhaps owing to the particular circumstances of the applicants, the ECtHR could really derive from the Convention another obligation to prevent – directly or indirectly – human rights violations in the "sensitive" area of migration and border control.

The applicants – a married couple and two children living in Aleppo, Syria – applied for humanitarian visas at the Belgian Embassy in Beirut in an attempt to flee the situation of «absolute emergency» created by the armed conflict in Syria[8]. These visas were specifically intended to enable them to enter and reside legally in Belgium for the period required to make a formal asylum claim, thus avoiding both dangerous routes to, and irregular entry into, Europe. According to the Belgian Aliens Office, which rejected the applicants' request, «granting a visa on humanitarian grounds to an individual who intended to apply for asylum in Belgium would [...] create a precedent which would derogate dangerously from the exceptional nature of the procedure for short-stay visas»[9]. The request was indeed made under Article 25 of the Community Code on Visas[10], which is aimed to grant visas only to people who, after entering a Member State for one of specific list of reasons, had no intention of settling there permanently. This could not be the case for the applicants who were forced to seek international protection to build a new life in Europe. Despite the adoption of subsequent (domestic) diverging decisions, with the Aliens Appeals Board ordering the Belgian

[7] For a discussed example of a non-formalist approach in sensitive cases, Committee on the Elimination of Racial Discrimination, decision on admissibility of 12 December 2019, UN Doc. CERD/C/100/5, para. 3.44.
[8] ECtHR, *M.N. and Others v. Belgium*, cit., para. 10.
[9] *Ibid.*, para. 12.
[10] Regulation (EC) No. 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code). For a comprehensive analysis in connection with asylum claimants headed to Europe, see V. MORENO-LAX, *Accessing Asylum in Europe*, Oxford, 2017.

authorities to issue visas or *laissez-passers* as confirmed by the Brussels Court of Appeals, the applicants were eventually denied legal entry in Belgium. During the range of internal proceedings, the Aliens Office gave voice to the underlying fear of "opening the flood" if a positive decision were adopted. The Belgian asylum authorities clearly stated that Article 3 ECHR cannot be interpreted as requiring States Parties to grant entry to «all persons living in catastrophic situations» because «the risk of requiring the developed countries to accept entire populations from the developing world, countries at war or those ravaged by natural disasters»[11] is too high.

The Court did not disappoint States Parties and protected them from such an (unverified) risk. It ultimately agreed with the respondent Government: the complaints of the applicants, according to which the Belgian authorities' refusal to issue humanitarian visas had exposed them to a violation of rights protected by Articles 3 and 13 ECHR, were found inadmissible. In fact, Mr. M.N. and his family did not fall within Belgium's jurisdiction for the purpose of Article 1 ECHR. In agreement with Belgium, such a case did not justify any exceptions to the general rules on States' jurisdiction that, as supported also by the *travaux préparatoires* of the Convention[12], is essentially based on a "territorial" concept. Most importantly, although a *public power* was exercised and despite the positive findings of some domestic judges, for the ECtHR it could not be said that Belgian officials had effective control or authority over the applicants. Moreover, even if the decision denying entry had an impact on their situation in Lebanon or Syria, this effect could not be sufficient to establish the jurisdiction over the claimants situated outside Belgium's territory. No other particular link, for instance in terms of nationality or pre-existing family or private ties with Belgium, was found between the applicants and the respondent State in order to fit them within the latter's jurisdiction.

The reason for this approach seems to lie primarily on its, expected but unquestioned, consequence, more than any theoretical need of clarity or "unitary" approach in the interpretation of Article 1 ECHR[13]. According to the decision in question, finding that the applicants were under Belgium's

[11] ECtHR, *M.N. and Others v. Belgium*, cit., para. 19.
[12] *Ibid*., para. 100.
[13] In addition to the literature already referred above on such territorial notion of jurisdiction, see also the discussion in R. NIGRO, *Notion of Jurisdiction in Article 1: Future Scenarios for the Extra-Territorial Application of the European Convention on Human Rights*, in *The Italian Yearbook of International Law*, 2010, p. 14 ff. and P. DE SENA, *Notion of Contracting Parties' Jurisdiction under Article 1 of the ECHR: Some Marginal Remarks on Nigro's Paper*, in *The Italian Yearbook of International Law*, 2010, p. 75 ff.

jurisdiction for the purpose of Article 1 ECHR would nullify the States' right under international law to control their borders by imposing «an unlimited obligation on the States Parties»[14] to grant entry to their territory to everyone who might be expose to torture everywhere in the world. Given the *exceptional* nature of broader interpretations of Article 1 ECHR adopted by the Court in its case law[15], as Belgium and all intervening third-party States argued, a positive finding on the matter of jurisdiction *in a migration case* involving embassies would have implied the risk of a "not agreed" sort of universal application of the ECHR.

3. A formalistic reading of Article 1 ECHR

In reaching this decision, the ECtHR distinguished the case *M.N. and Others* from its previous case law generating progressive reading of the Convention. First, according to the Court, the applicants' personal situation was different from all previous cases of expulsions that triggered the jurisdiction under Article 1 ECHR, as relevant alleged victims were already in the territory of the defendant State or at its border[16]. Second, situations where the acts of the States Parties *performing or producing effects* outside their territories were found to constitute an exercise of jurisdiction for the purpose of Article 1 ECHR[17], as an exception to the mentioned principle of territoriality, did not fit the particular condition of Mr. M.N. and his family. To underline this specific aspect of the decision, it is worth placing the Court's findings in *M.N. and Others* in the framework of the different models that have been identified to explain the Court's – controversial, or restrictive for some[18] – approach to extraterritorial jurisdiction[19].

[14] *Ibid.*, para. 124.
[15] E.g. ECtHR (Grand Chamber), judgment of 7 July 2011, app. no. 55721/07, *Al-Skeini and Others v. the United Kingdom*, and ECtHR (Grand Chamber), judgment of 20 November 2014, app. no. 47708/08, *Jaloud v. Netherlands*. In addition to literature referred above, B. MILTNER, *Revisiting Extraterritoriality after Al-Skeini: The ECHR and Its Lessons*, in *Michigan Journal of International Law*, 2012, p. 693 ff.; J.M. ROONEY, *The Relationship between Jurisdiction and Attribution after Jaloud v. Netherlands*, in *Netherlands International Law Review*, 2015, p. 407 ff.
[16] ECtHR, *M.N. and Others v. Belgium*, cit., para. 120.
[17] *Ibid.*, para. 101 ff.
[18] See e.g. W. VANDENHOLE, *The 'J' Word: Driver of Spoiler of Change in Human Rights Law?*, in S. ALLEN *et al.* (eds), *The Oxford Handbook of Jurisdiction in International Law*, Oxford, 2019, p. 417 ff.
[19] For a recap, see also ECtHR (Grand Chamber), judgment of 29 January 2019, app. no. 36925/07, *Güzelyurtlu and Others v. Cyprus and Turkey*, para. 178 and ff.

The usual distinction in this field refers to the kind of control exercised by the Parties in an extraterritorial context. There could be jurisdiction where a State exercises effective control over geographical areas abroad (*spatial model*) – *i.e.* where the fact of the case occurred – or over an individual situated abroad (*personal model*) – *i.e.* the alleged victim(s)[20]. The usual examples related to these jurisdictional links include, respectively, military occupation or coercive measures against individuals, like detention[21]. When applied to the particular circumstances of applicants, these two models were of little help to bring the applicants within Belgium's jurisdiction given the case law on which the ECtHR decided to focus on. On the one side, according to the Court, it cannot be said that Belgian authorities exercised any kind of control on Syrian or Lebanese territory where the applicants found themselves. On the other, the Court noticed that Mr. M.N. and his family were never under the authority or control, meant here as coercive power[22], of diplomatic agents at the Belgian embassy in Beirut. First, they are not Belgian nationals seeking protection from their embassy. Second, as non-citizens, they "chose" to visit the embassy and they were free to enter and leave the diplomatic facilities as they wished.

In other words, although – we can say – the applicants' needs can hardly be qualified in terms of free choice given their reasons to flee, according to the Court there was no "physical" control over the alleged victims, a criterion that seems to acquire greater emphasis with the decision at issue[23]. In fact, if combined with the finding that the exercise of sovereign powers through visa denials is not enough to bring a case within the authority of the acting State, such (unspecified) physical requirement on the nature of control is likely to restrict further the application of the mentioned personal model for the purpose of Article 1 ECHR. Given also today's technological developments, any forms of direct remote control without physical contact

[20] For an analysis connected with immigration controls, T. GAMMELTOFT-HANSEN, *Extraterritorial Migration Control and the Reach of Human Rights*, in V. CHETAIL, C. BAULOZ (eds), *Research Handbook on International Law and Migration*, Cheltenham-Northampton, 2014, p. 118 ff.

[21] E.g. ECtHR, decision of 12 December 2001, app. no. 5207/99, *Bankovic and Others v. Belgium and Others*, para. 71; *Al-Skeini and Others v. the United Kingdom*, cit., para. 136.

[22] The ECtHR recalled the case law of the then European Commission of Human Rights, including *X. v. Germany*, judgment of 25 September 1965, app. no. 1611/62, and *M. v. Denmark*, judgment of 14 October 1992, app. no. 17392/90.

[23] As subsequently confirmed in ECHR (Grand Chamber), judgment of 21 January 2021, app. no. 38263/08, *Georgia v. Russia (II)*, paras 109-175, despite the emergence of potential new elements to justify the application of the Convention on "procedural grounds" given the «special features» of a case (see *infra*).

risk falling outside Parties' jurisdiction under the ECHR as well as any cases of «extraterritorial complicity» in (potential) violations of ECHR (absolute) rights[24].

Yet, other ways to establish extraterritorial jurisdiction have been, directly or indirectly, questioned by *M.N. and Others* with broader implications for extraterritorial findings under the ECHR. First, in its previous case law, the ECtHR read Article 1 ECHR as also encompassing jurisdictional links generated by the setting up of administrative or judicial proceedings, which can be called – for the sake of consistency – *procedural model*. Although doubts still remain on its exact reach. For example, in *Güzelyurtlu and Others v. Turkey*, jurisdiction was found on the basis of the institution of a criminal investigation against suspects of a murder occurred in another State's territory[25], with subsequent implications for the procedural standards arising from Article 2 ECHR[26]. Even such a model could not support the applicants in *M.N. and Others*. In fact, as the Court emphasised, it was not Belgium that initiated the relevant (administrative and judicial) proceedings involving Mr. M.N. and his family. No jurisdictional link of a procedural nature between them and Belgium could therefore follow. Contrary to what the applicants argued, accepting such a reading of Article 1 ECHR would be tantamount to accepting that any individual could "self"-generate, at their own "choice", a connection with a Party simply by submitting an immigration-related request from anywhere around the globe[27].

Second, despite the lack of direct support in ECtHR's case law, scholars have argued that jurisdiction can be defined on the basis of a State's control over rights of alleged victims[28] (a sort of *rights model*). Again, the decision of the ECtHR in *M.N. and Others* seems to place significant obstacles for the development of such an interpretation in the ECHR context. The undisputed power and knowledge of Belgium to determine the applicants'

[24] See the interesting analysis carried out in this respect by M. JACKSON, *State Complicity in Torture and Jurisdiction*, in *The European Journal of International Law*, 2016, p. 817 ff.
[25] ECtHR (Grand Chamber), *Güzelyurtlu and Others v. Cyprus and Turkey*, cit., para. 196.
[26] This "procedural model" has been subsequently adopted in ECtHR (Grand Chamber), *Georgia v. Russia (II)*, cit., para. 328-332, as well as in ECtHR (Grand Chamber), judgment of 16 February 2021, app. no. 4871/16, *Hanan v. Germany*, para. 137 ff. in these cases, the ECtHR even found the existence of procedural obligations for events that, respectively, were expressly held not to fall within the jurisdiction of Russia or were not expressly found to fall within the jurisdiction of Germany (as the dissenting judges also criticised). See below for potential implications for the field at issue here.
[27] ECtHR, *M.N. and Others v. Belgium*, cit., para. 123.
[28] For a summary of these arguments, see V. MORENO-LAX, *The Architecture of Functional Jurisdiction: Unpacking Contactless Control – On Public Powers, S.S. and Others v. Italy, and the "Operational Model"*, in *German Law Journal*, 2020, p. 385 ff.

effective enjoyment of ECHR-protected rights through the issue of a visa was not deemed enough for the Court, *in the absence of* one of the other mentioned models' key elements, to fit the case within Belgium's jurisdiction. As a specification of such a "rights model", it also follows that the decision at issue rejects – indirectly – the idea that a jurisdictional link for the purpose of Article 1 ECHR can be established by resorting to positive obligations under Article 3 ECHR. The fact that Belgium could prevent potential violations of (absolute) rights that might occur during the applicants' subsequent attempt to submit an asylum application through non-legal avenues – *i.e.* well-known dangerous travels towards European borders[29] – found no room in the ECtHR's evaluation of the case. However, while the "immigration" concerns of the application could have played a decisive role in this reading of Article 1 ECHR, some of the Court's immigration-related case law itself could have helped to set the grounds for an alternative pathway to a significant development in this field.

4. Was an alternative approach possible?

A question indeed follows spontaneously: would a more radical approach have been possible, albeit with risks for the ECtHR to be strongly criticised by some States Parties? To use the wording of the already mentioned position adopted by the Committee on the Elimination of Racial Discrimination, sometimes «given the particular nature» of some rights, responses to ensure their observance may require a non-formalistic approach in the interpretation of human rights treaties. What would such an approach have meant for the ECtHR in *M.N. and Others*?

In brief, it would have led the Court to question the territorial notion of jurisdiction in international human rights (and, indirectly, refugee) law as a strong reflection of the structure of the international order based on sovereign States, rather than being framed around individual protection needs. This would have required the ECtHR to emphasise the obligations that States Parties have undertaken under the ECHR, even in terms of positive obligations, to protect (and prevent) against harm caused by external sources *when* they exercise authority/sovereign powers in denying entry to aliens. Such an approach would have equally stressed the particular nature of the prohibition of torture and the principle of *non-refoulement*, even in terms of peremptory norms of international law. Finally, it would have

[29] Among others, see UNHCR, *Desperate Journeys*, 2018.

meant to underline the specificity of IHRL within international law and to attribute a strong weight to its role as a human rights Court in charge of the supervision of the ECHR. All these factors considered, the justification for such an approach would have been the unquestionable fact that any other solutions, including the one actually adopted by the ECtHR, have the effect of absolving State Parties from their duty to ensure compliance with the ECHR when they *can reasonably have the power to control* the enjoyment of alleged victims' rights. As some scholars might point out[30], this more radical approach would probably create a huge gap between what is arguable under international law and what is desirable from a human rights perspective, especially if it would eventually endanger the overall «international human rights law's capacity to protect».

Yet, some room for discussion remains. It is evident that all States – directly or indirectly – participating in the case were particularly worried about the consequences of the ECtHR's decision on their sovereign power to control immigration as well as on the extension of the notion of jurisdiction beyond *physical* (spatial or personal) control. As such, strategically, in their arguments before the Court, intervening States overlooked the *specific circumstances of the applicants*. As the Court itself confirmed, they remembered that all previous exceptional positive findings on extraterritorial jurisdiction were based on grounds of the «specific factual circumstances» of each case[31]. Could the ECtHR have relied on the specific facts in *M.N. and Others* to reach a different decision for the purpose of Article 1 ECHR, given also the particular nature of the right protected through Article 3 ECHR?

Such an alternative reasoning would have been supported by some of the developments occurred in the ECtHR's case law after the well-known judgment in the *Hirsi* case[32]. The Court has often read the Convention in a way that has guaranteed rights that are *practical* and *effective*, starting from the interpretation of the notion of jurisdiction, the duty to prevent indirect violations of human rights in third States in terms of *non-refoulement* and the obligation of individualised assessments when a risk under Article 2 or 3 ECHR is raised. Being a comprehensive analysis of this case law beyond the scope of this contribution, as a minimum two useful judgments may be recalled here. Despite the above analysed attempt to distinguish *M.N. and Others* from previous migration cases, in *N.D. and N.T. v. Spain* the Grand

[30] S. BESSON, *Due Diligence and Extraterritorial Human Rights Obligations – Mind the Gap!*, in *ESIL Reflections*, 2020, para. 4.
[31] See all the case law referred to in Section 3, above.
[32] ECtHR, judgment of 23 February 2012, app. no. 27765/09, *Hirsi Jamaa and Others v. Italy*.

Chamber seemed somehow open to bring migrants, who try to pursue the legally available channels to be admitted in a State Party through its diplomatic representations, into the jurisdiction of the State in question[33]. In another interesting case, *M.A. and Others v. Lithuania*, the Court also seemed open to new facets of the notion of jurisdiction, when it decided to analyse the merits of a situation where national authorities have not admitted aliens on grounds that *decisions refusing entry* were «imputable to Lithuania and thereby fell within its jurisdiction»[34]. Although it is true that the applicants found themselves at the Lithuanian borders, the focus has been placed on the exercise of authority by the defendant State in carrying out immigration controls and in the attribution of the decisions adopted against the applicants. In other words, the defendant State was not exercising any sort of coercive power over the applicants. Significantly, by looking at the particular condition of the applicants – a family with children from Chechnya, the Court recalled that, when aliens *intend to* submit an asylum claim, States Parties bear the responsibility for protecting them also against indirect violations of Article 3 by ensuring an assessment of the relevant risks – if removed or non-admitted – especially in countries that are not Parties to the ECHR.

If these elements would have been emphasised in the evaluation of *M.N. and Others*, some "special features" of the case call for a different outcome[35]. In fact, the particular combination of the specific situation of Mr. M.N. submitting a visa request at an embassy for his family with children, the decision of non-admission subsequently adopted by national (inland) authorities as an element of governmental authority despite the risk to expose them – directly or indirectly – to treatment prohibited by Article 3 ECHR and the applicants' asylum "forced" intentions joint to the lack of individualised assessments could have been used to bring the applicants' situation within the jurisdiction of Belgium. As a result, the application of the ECHR and the full evaluation on the merits of the case would have followed.

To this end, useful insights could have come from developments occurring within other regional, *i.e.* the Inter-American[36], and universal human

[33] ECtHR, *N.D. and N.T. v. Spain*; cit., para. 212 ff.
[34] ECtHR, judgment of 11 December 2018, app. no. 59793/17, *M.A. and Others v. Lithuania*, para. 70.
[35] Although they relate to a significantly different context, the resort to such "special features" seems emphasised in subsequent case law: see ECtHR (Grand Chamber), *Georgia v. Russia (II)*, cit., and ECtHR (Grand Chamber), *Hanan v. Germany*, cit.
[36] A. De Leo, J. Ruiz Ramos, "Comparing the Inter-American Court opinion on diplomatic asylum applications with M.N. and Others v. Belgium before the ECtHR", *EU Immigration*

rights protection systems. Focusing the attention here on the latter, these developments include the interpretation of the right to life, protected by Article 6 ICCPR, as provided by the Human Rights Committee (HRC) in its General Comment no. 36[37]. The parallel is justified by the equal non-derogable nature of both the right to life, on one hand, and the prohibition of torture and the related principle of *non-refoulement*, on the other hand. As analysed elsewhere[38], in that General Comment, the HRC states that Parties may have jurisdiction on «persons located outside any territory effectively controlled by the State, whose right to life is nonetheless *impacted by* its military or *other activities in a direct and reasonably foreseeable manner*»[39]. Taking into account that, in relation to these people, the HRC refers both to the exercise of States' power (as opposed to «effective control» by the use of «or») and to «all activities» across the General Comment, the application of this reasoning in the area of asylum cannot be excluded *a priori*. In fact, as the HRC points out, the duty to protect life requires each State to ensure that «all activities» taking place «in whole or in part within their territory and in other places subject to their jurisdiction, but *having a direct and reasonably foreseeable impact* on the right to life of individuals outside their territory»[40], are consistent with Article 6 ICCPR[41]. In other words, it can be argued that, when an individual submits in a situation of *prima facie* "absolute emergency" a request for a humanitarian visa or an asylum claim at a diplomatic representation, which exercises a governmental function, the State Party in question becomes aware of a situation that may be expected to cause the individual's unnatural or premature death *unless* it intervenes to prevent such death. This «foreseeable and preventable life-terminating harm or injury» emphasised by the HRC across the entire General Comment, in combination with the exercise of power via the adoption of decisions denying entry that generates *the needed impact* over people's

and Asylum Law and Policy, 13 May 2020, in relation to Inter-American Court of Human Rights, *La institución del asilo y su reconocimiento come derecho humano en el sistema interamericano de protección*, *Opinión consultive,* OC-25/18 of 30 May 2018.

[37] HRC, *General comment No. 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life*, UN Doc. CCPR/C/GC/36 of 30 October 2018.

[38] C. DANISI, *Crossing borders between International Refugee Law and International Human Rights Law in the European context*, in *Netherlands Quarterly of Human Rights*, 2019, p. 359 ff.

[39] HRC, *General comment No. 36*, cit., para. 63 (emphasis added).

[40] *Ibid.*, para. 22. Yet, this sort of approach is not uncontested: see S. BESSON, *Due Diligence and Extraterritorial Human Rights Obligations*, cit.

[41] See the recent view of the HRC in which these principles are applied, with potential positive implications for the field at issue here: HRC, View of 4 November 2020, UN doc. CCPR/C/130/D3042/2017, *A.S. et. al. v. Italy.*

enjoyment of rights, seems to create the necessary jurisdictional link to have the ICCPR applied even in the context of visa requests *if* these may prevent a premature death.

A similar reasoning may be followed from the perspective of Article 3 ECHR. When States Parties receive a request for a humanitarian visa in their diplomatic representations, they may become aware of a foreseeable and preventable torture or inhuman or degrading treatment *if* such risk emerges *prima facie* from the *specific factual circumstances* of the applicant(s) in question. As a result, rather than leading to a "universal application" of the ECHR as it was argued in *M.N. and Others*, such a request may actually bring a situation under the jurisdiction of the States Parties in a limited range of cases. This can occur when specific personal circumstances, which may even be restricted to situations to be proved such as exposure to specific war crimes or the involvement of children in deadly contexts requiring interpretations based on their best interests, let a State Party foresee an inevitable torture or inhuman or degrading treatment as a result of its inaction. Only in such factual circumstances, which require a case-by-case analysis instead of *a priori* lack of jurisdiction, would States Parties exercise authority over (some) future asylum claimants by deciding whether or not to admit them to their territory.

Not only do HRC's recent positions support this reasoning. Other UN Committees seem to move in a similar direction. For example, having regard for the mentioned best interests of the child principle (see Article 3 of the Convention on the Rights of the Child[42]), the Committee on the right of the child (CRC) has recently found that a State Party has jurisdiction over children located in another state when it has «the capability and the power to protect the rights of children in question»[43]. Such capability must be proved given the factual circumstances of a case. In this respect, the nature of the risks in terms of irreparable harms encountered by interested children, the knowledge by the State Party of such risks and the consequences of inaction of the same State party appear to be essential factors for bringing under the

[42] M. CROCK, L.B. BENSON (eds), *Protecting Migrant Children. In Search of Best Practice*, Cheltenham-Northampton, 2018.

[43] Committee on the Rights of the Child, decision of 2 November 2020, UN Doc. CRC/C/85/D/79/2019–CRC/C/85/D/109/2019, paras. 9.6-9.7. As explained elsewhere, despite the alleged victims in these specific cases are nationals of the State Party (*i.e.* French children in a vulnerable condition in Northern Syria), a contextual reading of the principles underlying the Convention on the rights of the child (e.g. Art. 2) seems to exclude that the nationality of interested children as such may be an essential factor for finding extraterritorial jurisdiction under that Convention.

jurisdiction of a State Party children located in a territory that are not (either the children or the territory) under its control. It cannot be excluded that, in specific circumstances determined *inter alia* by the above-mentioned factors, such a capacity to act could materialise through the issue of a humanitarian visa *if* the exercise of this power by a State Party can (is the only way to?) ensure children's enjoyment of rights under the Convention on the rights of the child.

In short, by emphasising the control of a State party of a human rights treaty over the enjoyment of people's rights, the alternative approach proposed here would certainly be more in line with a reading of these treaties that pursues their primary aim, as Article 31 of the Vienna Convention on the Law of the Treaties reminds us. Within the ECHR system of protection, not only could this alternative approach benefit from tests already elaborated by the same ECtHR, for example the one developed in cases of removals of aliens close to death with no prospect of access to adequate care assistance[44]. In evaluating jurisdictional aspects in the relevant case law after *M.N. and Others v. Belgium*, the ECtHR has placed a signification attention on contextual "external" obligations binding defendant States. It cannot be excluded that more weight could be placed on obligations like those arising from the convention on the rights of the child or international refugee law in the identification of (one of) the "special features" enabling the ECtHR to find a jurisdictional link in the context at issue here[45].

5. Concluding remarks

Although there is room for a significant development in the field explored in this contribution, the position of the ECtHR and the interpretation of Article 1 ECHR that emerged in *M.N. and Others* is unlikely to be revised in the immediate future. Even the efforts dedicated into pending

[44] ECtHR, judgment of 1 October 2019, app. no. 57467/15, *Savran v. Denmark*. For an analysis of key cases, C. DANISI, *Protecting the Human Rights of People Living with HIV/AIDS: A European Approach?*, in *Groningen Journal of International Law*, 2015, p. 47 ff.

[45] See the role played by "external" obligations related to international humanitarian law in determining the jurisdictional link for the purpose of the application of the procedural obligations under article 2 ECHR in ECtHR (Grand Chamber), *Hanan v. Germany*, cit., para. 137 ff. (in relation to the criminal investigation concerning deaths which had occurred during an airstrike by German military forces in Afghanistan) and ECtHR (Grand Chamber), *Georgia v. Russia (II)*, cit. paras. 328-332 (in relation to effective investigation on war crimes by Russia committed during the active phase of the 2008 hostilities in Georgia and south Ossetia).

applications that question the compliance with the ECHR of the pull-back operations of migrants in the Mediterranean now face a significant risk of failure[46], Unless the *specific circumstances of each case* are seriously taken into account as well as the legal and practical obstacles that are put in place at "the initiative" of States Parties to submit asylum applications. Without these considerations being embedded in the ECtHR's evaluation, those pending applications may not achieve the momentous change in the understanding of extraterritorial jurisdiction, *i.e.* from one primarily based on "physical" control to one that looks at the "sovereignty-effect" nexus that is the exercise of sovereign powers having the above explored predictable extraterritorial impact on the enjoyment of protected (absolute) rights. For the sake of completeness, it is worth noting that the developments of the mentioned "procedural model" in the subsequent case law does not seem to facilitate such a change – at least – in the migration context. it is true that, in both the *Georgia v. Russia (II)* and *Hannan v. Germany* 2021 cases, the ECtHR marks a firmer distinction between procedural and substantive obligations under Article 2 ECHR also in terms of jurisdiction[47], which may facilitate the above advanced emergence of a duty to carry out a case-by-case analysis when States Parties' actions have a foreseeable impact on the enjoyment of ECHR rights in relation to people in need of a humanitarian visas to escape from immediate risks of life. Yet, just to mention one critical aspect, it is open to question whether this kind of procedural jurisdictional links may also be established for "prospective" harms to people's rights, as a case like *M.N. and Others* would require, or only to past events leading to people's deaths. To be useful in the context at issue here, some clarifications by the ECtHR as well as further research is certainly needed.

For sure and to conclude, the ECtHR's inadmissibility decision in *M.N. and Others v. Belgium* leaves open more questions than it tries to answer. It remains unclear why the ECtHR chose to focus on general considerations based on migration, rather than paying specific attention on the factual circumstances of the case *given the context* generated by that migration control. The substantial lack of safe channels *as decided* by the same State could have been of use in this respect, in line with previous findings in *N.D. and N.T.* Instead, at least indirectly, the decision strengthens immigration control policies as they stand nowadays by placing (the limited) legal avenues available

[46] E.g. ECtHR, app. no. 21660/18, *S.S. v. Italy* (pending).

[47] See, for example, the criticism expressed by some Grand Chamber's judges themselves on this interpretation of the ECHR: *Joint Partly Dissenting Opinion of Judges Grozev, Ranzoni and Eicke*, attached to ECtHR (Grand Chamber), *Hanan v. Germany*, cit.

to asylum claimants outside Parties' jurisdiction. It is equally unclear why a case-by-case analysis would have not been more effective and practical to balance, on one hand, the States Parties' interest to maintain their sovereign powers to control migration and, on the other hand, the interests of individuals to avoid human rights violations in deadly routes to Europe. This more balanced and individualised approach would have perhaps allowed the ECtHR to bring in considerations based on the principle of the best interests of the child[48], which is totally absent in its decision despite the involvement of children in the *M.N. and Others* case. Finally, it remains still unclear whether the exercise of public powers over aliens, even via the institution of inland proceedings, can never trigger jurisdiction under the ECHR unless it is not connected with any sort of essentially physical control or if such an interpretation would be sectorial, *i.e.* restricted to migration and asylum cases, which is something difficult to be justified.

In short, was this decision really a way to protect a «well-established principle of public international law» (*i.e.* the right of States Parties to control the entry, residence and expulsion of aliens[49]) or was it rather a way of saving the Court's reputation before European States increasingly interested in implementing sovereignty-based agendas? In this respect, the ECtHR certainly satisfied those who raise the irrational fear of a "flood" of requests via IHRL obligations in the area of humanitarian visas. It certainly agreed with States Parties in avoiding the risk of introducing undemonstrated «factors of disorder and instability»[50]. Asylum claimants forced to entrust their lives in the hands of smugglers, or – worse – of traffickers of human beings, will in contrast wonder what the role of the ECtHR really is. Again, for the time being, the last word on opening legal channels to access asylum procedures in Europe is therefore to be found in European Governments' political agendas, certainly not in the European (either ECHR or EU) frameworks of human rights protection.

[48] In line with the approach followed in other cases involving children, e.g. ECtHR (Grand Chamber), judgment of 3 October 2014, app. no. 12738/10, *Jeunesse v. The Netherlands*.
[49] ECtHR, *M.N. and Others v. Belgium*, cit., para. 124.
[50] *Ibid.*, para. 90.