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THE RIGHT NOT TO BE DOMINATED: THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS ON MIGRANTS' DESTITUTION*

ABSTRACT

The European Court of Human Rights increasingly deals with migrants' complaints about destitution in their host state under Article 3 of the European Convention on Human Rights (the prohibition of inhuman and degrading treatment). This case law has been criticized for not being consistent and/or for not providing migrants with enough protection. Based on a systematic case law search, in this article, I analyse Article 3 case law on migrants' destitution from a new perspective: the concept of freedom as non-domination, as developed in (neo) republican theory. It will argue that, seen through this lens, many tendencies in the Court's case law can be explained and constructed as consistent, and it is submitted that in this way the Court does provide migrants with important protection against unfreedom. Nevertheless, I also argue in the article that the case law could be improved in a number of ways in order to provide more effective and robust protection against domination.

KEYWORDS: *inhuman and degrading treatment, positive obligations, migrants, asylum seekers, living conditions, Article 3 European Convention on Human Rights.*

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1. INTRODUCTION

Laws, when prudently framed, are by no means subversive but rather introductive of liberty.

William Blackstone[1]

Even though the European Convention on Human Rights (ECHR)[2] covers civil and political rights, the European Court of Human Rights (ECtHR) increasingly deals with complaints of a socio-economic nature.[3] This article analyses a specific line of the ECtHR's socio-economic case law: cases that deal with complaints lodged by migrants, under Article 3 of the ECHR, with reference to poor living conditions in their host country. For this review, 22 cases were identified by means of a systematic HUDOC search of the Court's case law (see below at Section 3(A)). Among these cases is the famous *M.S.S.* judgment, which received widespread attention in legal scholarship. However, it includes also less well-known cases that the Court declared manifestly ill-founded.

The line of case law under review in this article has been criticized by legal scholars as not being consistent or coherent and/or not providing claimants with sufficient protection. It has been argued that the Court should provide more 'enhanced'[4] and 'effective'[5] protection in this area. With regard to ECtHR case law on poverty and living conditions in general, Gerards observed, for example, that there are 'hardly any intrinsic reasons of principle to explain that so much protection is given to certain rights if compared to others'.[6] While she understands that the rights of prisoners are strongly protected, in her view this does 'not fully explain why so much less protection is given to the rights of free persons living in hardship and extreme need'.[7] Lavrysen calls the protection offered by the Court to persons living in poverty 'relatively modest'.[8] More specifically with regard to migrants, Dembour finds the Court's destitution case law largely consistent,[9] yet indefensible.[10] According to Da Lomba, the case law reveals the

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[1] Blackstone, `Commentaries on the Laws of England', in *The Founders' Constitution Vol 1* (1987) Chapter 3, Document 3, at 88.
[2] European Convention on Fundamental Rights and Freedoms 1950, ETS 5.
[3] See, for example, Lavrysen, 'Strengthening the Protection of Human Rights of Persons Living in Poverty under the ECHR' (2015) 33 *Netherlands Quarterly of Human Rights* 293; Leijten, *Core Socio-Economic Rights and the European Court of Human Rights* (2018); Slingenberg, 'Social Security in the Case Law of the European Court of Human Rights' in Pennings and Vonk (eds), *Research Handbook on European Social Security Law (2015)* 53.
[4] Lavrysen, supra n 3 at 308 and further.
[5] Gerards, 'The ECtHR's Response to Fundamental Rights Issues Related to Financial and Economic Difficulties: The Problem of Compartmentalisation' (2015) 33 *Netherlands Quarterly of Human Rights* 274 at 290.
[6] Ibid. at 289.
[7] Ibid. at 290.
[8] Lavrysen, supra n 3 at 308.
[9] Dembour mentions the case of *M.S.S.* as the great exception: see Dembour, *When Humans Become Migrants. Study of the European Court of Human Rights with an Inter-American Counterpoint* (2015) at 445.
[10] Ibid. at Chapter 13.

Court's resistance to developing the socio-economic dimension of the ECHR in respect of migrants with precarious immigration status.[11]

This article will analyse the 22 cases on migrants' destitution through the lens of (neo) republican theory on freedom as non-domination. In short, non-domination means not being subjected to arbitrary interferences. Even though the Court has never explicitly referred to the concept of non-domination, this article shows that the core elements of this concept can be detected in the Court's legal reasoning in *all* cases on migrants' living conditions. This article argues, therefore, that with reference to the concept of non-domination, many tendencies in this line of case law can be understood and constructed as consistent. In addition, although the limited protection provided by the Court in this field can still be criticized, the analysis in this article shows that the Court does protect a kind of freedom that, as has been argued in republican theory, is fundamental for ensuring social justice.

In addition to providing a clarifying framework for and constructing consistency in the Court's case law on migrants' living conditions, this article will also use the concept of non-domination to critique the case law under study and provide some suggestions for increasing protection against domination. Suggestions for improving the socio-economic (migration) case law have been offered in the literature on the basis of other theories, such as the 'core rights',[12] 'capability'[13] or 'vulnerability'[14] approach. Without denying the relevance and importance of these theories for understanding and improving the Court's case law, this article adds a new angle to the debate by providing an alternative theory as a basis for case law analysis and critique. By showing that key elements of the concept of non-domination are already present in all case law on migrants' living conditions, the improvements suggested in this article might, albeit more limited in scope, have a particularly firm basis.

Section 2 will introduce the republican concept of freedom as non-domination, in particular, Frank Lovett's conceptualization. This part of the article has a descriptive nature, as it serves as a basis for a critical analysis of the Court's case law on migrants' living conditions in Section 3. Section 4 summarizes the findings on the case law and suggests some improvements.

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[11] Da Lomba, 'Vulnerability, Irregular Migrants' Health-Related Rights and the European Court of Human Rights' (2014) 21 *European Journal of Health Law* 339 at 358.
[12] Gerards, supra n 5; Leijten, supra n 3; Oette, 'Austerity and the Limits of Policy-Induced Suffering: What Role for the Prohibition of Torture and Other Ill-Treatment?' (2015) 15 *Human Rights Law Review* 669.
[13] Lavrysen, supra n 3.
[14] Da Lomba, supra n 11.

2. FREEDOM AS NON-DOMINATION

A. Third Concept of Freedom

The concept of freedom as non-domination is an historical concept that has its origins in the classical republican tradition, including figures such as Machiavelli, Milton, Montesquieu, Blackstone, Jefferson and Madison. There has recently been a revival of interest in the concept of freedom as non-domination by, what is often called, 'neo-republicanism'.[15]

In general terms, freedom as non-domination can be described as the absence of dependence on the arbitrary will of others. In order to explain the concept of freedom as non-domination more clearly, it is helpful to contrast it with two other concepts of freedom: negative freedom and positive freedom.[16] One is free in a negative sense to the degree that no one interferes with one's activity and to the degree that one can act unobstructed by others (freedom as non-interference). In a positive sense, one is free to the degree that one can be one's own master, to the degree that one's life and decisions are not dependent on external forces (freedom as self-mastery). Freedom in terms of non-domination is about the absence of mastery by others and has, therefore, elements in common with both freedom as non-interference and freedom as self-mastery. Just as negative freedom, it focuses on the absence rather than the presence of something and, like positive freedom, it focuses on mastery, not on interference.[17]

In neo-republican literature, it is argued that non-domination is a primary good and, therefore, a necessary political ideal.[18] Because this article deals with case law concerning migrants, a relevant question is whether domination suffered by migrants should also be minimized. Traditionally, neo-republican theory places a lot of emphasis on citizenship, asserting that a 'free state' should promote its *citizens'* freedom from domination.[19] In contrast, Lovett argues that this obligation applies to everybody who is affected by the power of the dominator 'regardless of community membership', since it has become 'increasingly obvious' that the persons affected by a community's institutions and practices are not coextensive with the members of that community.[20] Theorists on the ethics of migration have elaborated on this issue further.[21] They have

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[15] Lovett and Pettit, 'Neorepublicanism: A Normative and Institutional Research Program' (2009) 12 *Annual Review of Political Science* 11.
[16] These concepts have their origins in the writings of Hobbes and Rousseau respectively: see Lovett, 'The History of Freedom' in Wright (ed.), *International Encyclopedia of the Social and Behavioral Sciences* (2015) and have famously been reviewed by Berlin: see Berlin, 'Two Concepts of Liberty' in *Four Essays on Liberty* (1969) at 118.
[17] Petit, *Republicanism. A Theory of Freedom and Government* (1999) at 22.
[18] Ibid. at 90-5.
[19] Lovett and Pettit, supra n 15 at 12. In Petit's work, references to 'citizens' are omnipresent: see Petit, supra n 17.
[20] Lovett, *A General Theory of Domination and Justice* (2010) at 172-3.
[21] In 2014, a special issue of the *Critical Review of International Social and Political Philosophy* was published on Domination, Migration and Non-citizens, edited and introduced by Honohan and Hovdal-Moan (volume 17(1)).

argued that non-domination theory is indeed a relevant theory to address the issue of migration, in particular the treatment of non-citizens present in the territory.[22]

B. Arbitrariness

(i) Substantive vs procedural arbitrariness

The concept of arbitrary power is a key concept in neo-republican theory. Interference only results in domination if carried out in an arbitrary or uncontrolled[23] way. With regard to the issue of what type of control is required, two different views have been put forward. In the first view, called 'democratic control', the capacity to interfere is sufficiently controlled if it is governed by the direct influence of the persons subjected to it; if it cannot be used without regard to the relevant interests of the affected parties.[24]

The second view, called 'procedural control', is mainly developed by Lovett. In this view, the ability to interfere is sufficiently controlled if it is constrained by reliable and effective rules or procedures that are common knowledge to all persons concerned. The procedural view equates republican freedom with the traditional idea of the rule of law, 'provided of course that we are willing to loosen and extend this idea considerably'.[25] In order to defend his preference for the procedural view, Lovett argues that the democratic view incorrectly denies the increase in freedom when, for example, an undemocratic regime introduces the rule of law.[26] In Lovett's view the situation would change in an important way, since the persons subjected to the regime now at least know exactly where they stand and are able to develop plans of life based on reliable expectations accordingly.[27] This does not mean, as Lovett stresses, that the new situation is perfectly fair, but not everything that is unfair also must constitute domination in his view.[28] In

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[22] For example, Hovdal-Moan, 'Unequal Residence Statuses and the Ideal of Non-Domination' (2014) 17 *Critical Review of International Social and Political Philosophy* 70; Benton, 'The Problem of Denizenship: A Non-Domination Framework' (2014) 17 *Critical Review of International Social and Political Philosophy* 49. According to Fine, non-domination theory seems particularly well placed to address issues regarding the treatment of resident non-nationals. With regard to freedom of movement, that is, the right to enter a country, this theory seems to have more difficulty: see Fine, 'Non-Domination and the Ethics of Migration' (2014) 17 *Critical Review of International Social and Political Philosophy* 10. Hoye on the other hand, argues that traditional republican theory has much to offer to the politics of the border, but that current *neo*-republican theory does not realize any of those promised insights. In fact, neo-republicanism does not afford significant insights compared with the established liberal and democratic critiques, according to Hoye: see Hoye, 'Neo-republicanism, Old Imperialism, and Migration Ethics' (2017) 24 *Constellations* 154.

[23] Lovett, 'Non-Domination' in Schmidtz and Pavel (eds), *The Oxford Handbook of Freedom* (2018) Chapter 6 at 4; Petit, *On the People's Terms. A Republican Theory and Model of Democracy* (2012) at 58.

[24] Petit, ibid.

[25] Lovett, supra n 20 at 112.

[26] In the democratic view, this would not change the level of domination since the regime is in no way compelled to track and regard the interests of the persons subjected to the newly introduced laws.

[27] Lovett, supra n 20 at 116.

[28] Ibid.

addition, the procedural view implies that also persons who cannot exercise democratic control, such as children and mentally disabled, can enjoy freedom as non-domination.[29]

Since migrants cannot usually exercise full democratic control (although they may sometimes be able to contest decisions, they usually lack the right to vote) and since a human rights court can, by its nature, better protect against procedural arbitrariness, Lovett's approach seems to be most relevant for the purposes of this article. It is, therefore, necessary to look at his conceptualization of the rule of law a little closer.

(ii) The rule of law and coercive force

Lovett defines the rule of law as 'the situation enjoyed by persons and groups to the extent that they will not be exposed to coercive force except as the consequence of their having failed to observe a legally valid prescriptive rule'.[30] This definition reveals that Lovett limits the scope of the rule of law to preventing situations in which persons are exposed to the arbitrary use or threat of *coercive force*, since the domination that results from being exposed to coercive force is particularly worrisome.[31]

Coercive force is defined by Lovett as the ability to change what somebody else 'would otherwise prefer or be able to do through the use or threat of violence, physical restraint or other like means'.[32] Since this article is concerned with case law about migrants' poor living conditions and the absence of state financed benefits, the limitation to coercive force seems to imply, at first sight, that Lovett's conceptualization of the rule of law is not very helpful. However, Lovett acknowledges that modern states do much more than overtly coerce people. Modern states are far more concerned with controlling the distribution of resources.[33] As Lovett argues, such 'service activities of the state' can coerce people *indirectly*, for example by deliberately withholding expected public goods.[34] The rule of law must, therefore, apply to every distribution of service activity of the state that has become a part of the baseline expectations of the community.[35]

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[29] Lovett, supra n 3 at 11.
[30] Lovett, *A Republic of Law* (2016) at 124 (and many other pages in this book).
[31] Ibid. at 116.
[32] Ibid. at 65.
[33] Ibid. at 200.
[34] Ibid. Lovett uses the example of cutting power and water connections to recalcitrant neighbourhoods to force the residents to move away.
[35] Ibid. at 201. Petit arrives at a similar conclusion, when he discusses the difference between invasion and vitiation. According to Petit, invaders are hindrances that are only triggered by your attempting, or by the prospect of your attempting, to satisfy your will, whereas vitiators materialize for independent reasons, such as lack of personal, natural or social resources: see Petit, supra n 23 at 37-40. With regard to the distribution of resources, Petit holds (at 73) that if the provision of certain goods comes to represent the default expectation, which sets up a pattern of one-sided reliance, 'the negative action of refusing further help can be indistinguishable from an invasion of your free choice'.

(iii) The rule of law and legal dynamics

Coercion alone is not enough to establish domination. As said, domination only occurs if coercive force is used in an arbitrary or uncontrolled way, that is, not sufficiently governed by law. The second part of Lovett's definition of the rule of law reveals that coercive force can only be used if a legally valid prescriptive rule is not being observed. From this, Lovett deduces three broad criteria:

- 1) every use of coercive force is governed by a rule (that is, not a command);
- 2) such a rule must be effective and reliable (that is, there must be a high degree of probability that it will be observed and this probability must be robust); and
- 3) it must be common knowledge what the rules are and that they are effective and reliable (that is, the rules must be published, sufficiently clear and reasonably stable).[36]

These criteria have, among others, been mentioned and discussed by many authors on the rule of law.[37] What I like about Lovett's approach, however, is that he fully appreciates the dynamic aspects of the law. The law should *not* be viewed as a complete and internally coherent system that supplies every legal question with a clear and determinate answer. This 'deeply implausible' kind of legal formalism can simply not be true, due to the inherent ambiguity, internal contradictions and incompleteness of any rule.[38] The indeterminate character of law presents, however, no serious challenge to the idea of the rule of law, as long as legal actors behave *as if* the law is reasonably clear in most cases.[39]

In addition, Lovett stresses that legal systems are not static; they are subject to both endogenous and exogenous legal change. Endogenous legal change is caused by the open-ended and indefinite character of all prescriptive rules and the need to adapt and extend these rules to new circumstances through interpretation. If the adaption and extension process is oriented toward the natural expectations of the relevant parties, it can be reconciled with the rule of law.[40]

In addition, it is important to have mechanisms for effecting deliberative legal change, such as law-making through legislative processes, delegation to administrative agencies or local governments or case law.[41] According to Lovett, this exogenous legal change can only be reconciled

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[36] Lovett, supra n 30 at 128-32.
[37] Ibid. at 131 and 132.
[38] See on this also Tamanaha, *Beyond the Formalist-Realist Divide. The Role of Politics in Judging* (2009), arguing that legal formalism is almost non-existent amongst lawyers, but an invention of politically motivated critics of the courts.
[39] In that case, the people governed by the law will largely *experience* it as an impersonal body of rules and will be able to form reliable expectations that the law will actually govern. These expectations do not have to depend on their having special insight into the private psychology of the ones in power: see Lovett, supra n 30 at 149, similar to how 'simple' social rules function: see ibid. at Chapter 2.
[40] Ibid. at 177-8 and 199.
[41] Ibid. at 189-91.

with the rule of law if the legislative authority itself is brought under the cover of law. To that end, he formulates a number of conditions of 'legislative due process':

- there must exist public and orderly procedures that legislative authorities must follow in order to change the law;
- these procedures should clearly define and limit the scope of the legislative authority and indicate the aims or goals it is meant to serve; and
- there must be some mechanism for holding the legislative authority accountable, such as through possibilities to contest discretionary rulemaking in courts or through regular elections.[42]

According to Lovett, these conditions should be met in every case of discretion to create a rule.

C. Dependency

Lovett emphasizes that domination should be understood structurally: the concept of domination must as a minimum include some level of dependency of a person or group on the social relationship. The level of dependency should be measured by taking into account the 'net expected costs (that is, expected costs less any expected gains) of exiting, or attempting to exit, a social relationship'.[43] Lovett stresses that the concept of 'exit costs' should be understood broadly: it is not limited to material costs, instead exit costs are often to some extent psychological and thus subjective.[44] For Lovett, dependency is a necessary condition for domination and the greater the dependency of the subject person is, the more severe his or her domination will be.

According to Benton, it is precisely the ability to differentiate on the basis of the concept of exit costs that makes non-domination theory powerful in its application to migrants. She submits that non-citizens have two routes to 'exit' the status of non-citizen; they can either leave the country or they can become a citizen (naturalization). The costs of leaving the status of non-national vary considerably for non-nationals, and the concept of domination allows for differentiation in this respect. For example, the level of costs depends on available social networks and employment opportunities, the living conditions and safety in the country of origin, outstanding debts with smugglers or family members, etc. Even though many non-citizens do not leave their status as non-citizen at all, the relevant question in order to establish the level of dependency is, there-

[42] Supra n 30. at 187.
[43] Lovett, supra n 20 at 39.
[44] Ibid. As an example, Lovett discusses (at 50-1) the dependency women can have on their marriage. Exit costs can be high through legal, financial and/or cultural difficulties in divorce, but also through a thorough personal convincement that a woman's highest possible calling is motherhood within a traditional relationship.

fore, whether it would be possible to leave their status and at what costs. This question can only be answered at the individual level.[45]

D. Summary

This Section has provided a framework of analysis for the case law review in this article. It has mainly drawn on Lovett's conceptualization of freedom as non-domination. In this view, for state domination to materialize, (1) the state should have some kind of coercive force over an individual, (2) that force should not be sufficiently governed by effective and reliable public rules and (3) the individual should be dependent on this relationship with the state. As argued by Lovett, coercion can also be employed with regard to the distribution of resources, which is the case if the state deliberately withholds expected public goods. The level of dependency on a social relationship can be measured by estimating the (objective and subjective) costs that must be incurred for a particular person to exit that relationship. In a situation where coercion and dependency are present, domination can be prevented if the distribution of resources is regulated by a clear, reliable and effective legal framework. In other words, in Lovett's conceptualization, coercion and dependency in the field of resource distribution only result in domination if the distribution is not governed by the rule of law. Taking into account the dynamic nature of the law, governance by the rule of law entails that the interpretation of rules should be oriented toward the natural expectations of the relevant parties and that the authority to create new rules should be in line with the 'conditions of legislative due process'. The next section will examine the case law of the ECtHR on migrants' living conditions through the lens of this concept of non-domination.

3. CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS ON MIGRANTS' LIVING CONDITIONS

A. Case Law Selection

This part of the article discusses case law from the ECtHR about migrants' living conditions in their host country in relation to Article 3 of the ECHR. It does not include case law about living conditions in migrants' country of origin or another country to which migrants are (about to be) returned or about the conditions of detention. The reason for excluding these types of cases from the analysis is threefold. First, as discussed above at Section 2(A), republican theory on non-domination is well-placed to address issues regarding the treatment of resident non-nationals, but is more difficult to apply to issues regarding entry, stay and expulsion of migrants. The hypothesis that ECtHR case law can be explained through the lens of republican theory on non-

[45] Benton, supra n 22.

domination can only be tested if the case law under analysis deals with issues that appear to fit within the scope of this theory. Secondly, this line of case law has led to a lot of criticism by legal scholars who claim that the ECtHR offers insufficient protection and/or is inconsistent. This article hopes that applying republican theory on non-domination to this type of case law will add a new angle to this area of the literature. Thirdly, on a more practical level, the limited number of cases about Article 3 of the ECHR and migrants' living conditions in their country of residence makes a *complete* analysis of *all* published case law feasible.

I carried out a systematic search in HUDOC, the ECtHR's database, to find all published[46] case law dealing with migrants' living conditions in their host country. This systematic search was carried out in May 2018, so this article does not include judgments and decisions on migrants' living conditions that were delivered after this date. On the basis of search terms,[47] 209 judgments and decisions were examined for relevance. Of these 209 cases, 29 cases actually dealt with migrants' living conditions in their country of residence.[48] Of these 29 cases, six cases were declared inadmissible by the Court for reasons not related to the merits of the case[49] and one was struck out of the list by the Grand Chamber.[50] These seven cases were excluded from the analysis. Therefore, the final sample for analysis in this part of the article consists of 22 ECtHR cases: eight judgments and 14 admissibility decisions. This article includes the admissibility decisions to give the full picture of the Court's case law with regard to migrants' living conditions and to avoid criticism that it only offers a 'truncated examination of the outputs of the Convention system'.[51]

The next sections analyse these 22 cases with reference to the concept of freedom as non-domination.

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[46] Possibly, many more complaints have been lodged about migrants' living conditions. The majority of cases are declared inadmissible by a single judge, and these decisions are not published. In 2017, for example, altogether 70,356 cases were declared inadmissible or were struck out of the list, 66,150 by a single judge: see European Court of Human Rights, *Annual Report 2017* (2018) at 156, 163.

[47] The search was narrowed by using the filter: ARTICLE (3). The following text searches were carried out: 'living conditions' AND asylum (16 February and 9 May 2018); Hunde (20 February 2018); 'conditions de vie' AND asile (14 May 2018); and 'conditions de vie' AND *réfugié* (14 May 2018). The following text searches did not deliver relevant cases that did not come up in the other searches: benefits AND migrant (16 February 2018); 'living conditions' AND migrant (16 February 2018); 'basic needs' AND refugee (9 May 2018); 'basic needs' AND migrant (9 May 2018); and 'living conditions' AND refugee (16 May 2018). The results were exported to excel and duplicates were removed. The excel file is available upon request.

[48] The majority of the 209 cases concerned complaints about expulsion and/or detention conditions.

[49] For example, for not meeting the six months deadline for lodging a complaint or for not exhausting domestic remedies.

[50] The case of *V.M. and Others v Belgium* Application No 60125/11, Strike Out, 17 November 2016 [GC]. The judgment of the Chamber (Merits and Just Satisfaction, 7 July 2015), which falls into the material scope of the article, was set aside by this Grand Chamber and no longer has any legal effect (see para 39 of the Grand Chamber judgment).

[51] Dembour, supra n 9 at 21.

B. First Judgments: Müslim and Mogoş

The oldest judgment in the sample is the case of *Müslim v Turkey.*[52] The applicant in this case was an Iraqi national who applied for asylum in Turkey. He was granted provisional refugee status. In his complaint he argued that, amongst other things, the Turkish government had violated Articles 3 and 8 of the Convention by not providing him with benefits, shelter or employment since his arrival in Turkey. Because of this, he had insufficient resources to meet his basic needs.

The Court had ruled in earlier cases that a complaint about insufficient social benefits could, in theory, raise an issue under Article 3, but held that in this case Article 3 (and Article 8) was not violated. It reasoned that the Convention does not impose a general obligation on states to provide refugees with a certain standard of living or the right to work[53] and then stated specifically:

> En l'espèce, il semble que le requérant ne se trouve pas empêché de maintenir le niveau de vie qu'il a lui-même choisi lorsqu'il s'est réfugié en Turquie et il ne paraît pas être dans un état de nécessité tel que cette solution ne soit pas viable, au point de l'acculer à quitter la Turquie …. Si la situation dénoncée constitue pour le requérant une épreuve difficile, celle-ci ne devrait assurément pas être pire que celle de l'ensemble des citoyens plus démunis que d'autres.[54]

In her analysis of this case, Dembour emphasizes the phrase that the refugee has *himself chosen* the standard of living and criticizes the Court for viewing the applicant as a liberal individual who is free to lead his life as he wishes without structural external constraints.[55] This critique in fact has much in common with a republican critique. It is, however, also possible to read this judgment differently. The phrase that the applicant is *not prevented* from choosing his own standard of living could be read as an indication that the applicant has not been subjected to state coercion. Since the Court also stresses that the applicant's situation was no worse than the poorer citizens in the host country, the provision of benefits is apparently not something that the applicant could have expected. This was also stressed by the Turkish government, by emphasiz-

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[52] Application No 53566/99, Merits, 26 April 2005.
[53] Ibid. at para 85.
[54] Ibid. at para 86. Translation in the press release: 'In the case before the Court, the applicant did not appear to have been prevented from maintaining the standard of living which he himself had chosen on seeking refuge in Turkey and his situation did not appear to be so desperate as to force him to leave Turkey because it was no longer tenable. Although difficult, it was undoubtedly no worse than that of any other citizen who was less well off than others.' See Press Release issued by the Registrar, 'Chamber judgments 26.04.05', published on 26 April 2005. It is not entirely clear whether this quote is related to Article 8, to Article 3 or to both of them. In paragraph 85, the Court mentioned only Article 8, but in the last sentence of paragraph 86 the Court concluded that the situation did not fall within the scope of Article 8 or Article 3.
[55] Dembour, supra n 9 at 454.

ing that they do not have any obligation under the Refugee Convention to provide non-European refugees with benefits.[56]

A few months later, the Court ruled again on the living conditions of non-nationals, in the case of *Mogoş v Romania*.[57] This case concerned a stateless family with three children (ages 19, 18 and 16 years). They were originally Romanian nationals, but left Romania and gave up their Romanian nationality in the 1990s. In 2002, they were forcibly deported to Romania by the German authorities. They refused to sign the necessary papers for repatriation at the Romanian border and were, therefore, transferred to the transit centre at Bucharest airport, where they were still staying at the time of the judgment. Even though these facts are about return, the complainants did not lodge a complaint against Germany, but against Romania. They complained about the poor quality of their living conditions at the transit centre, as a result of which the case fits the selection conditions of this study.[58] They claimed that they had to share a 22.5 square meters room which had inadequate furniture; did not receive humanitarian aid from the government, such as food and sanitary products; and did not have sufficient heating and warm water. The Romanian government contested these allegations. The Court started its assessment by stressing that the applicants had the opportunity to leave the transit centre at any time, but refused to do so, and that this could not be attributed to the government. The Court noted that the applicants were permitted to enter Romanian territory and that other expellees from Germany had indeed entered Romania, in order to take up residence there or to leave again to other countries. It noted the applicants' firm position in refusing to enter Romanian territory or to have any legal relation with the Romanian state.[59] After having stressed these circumstances, the Court assessed the living conditions in the transit centre. In this regard, the Court noted that the applicants did not submit any evidence about the quality of their living conditions and that information provided by the government, the airport authorities and the Committee for the Prevention of Torture contradicted the applicants' statements.[60] The Court concluded that 'in these circumstances', the living conditions were not sufficiently severe to constitute a violation of Article 3.

In this case, the Court emphasized the fact that the applicants could leave their situation but chose not to do so and that the applicants refused to enter into any legal relation with the Romanian state. This fits with the dependency condition of domination; the Court emphasized that the applicants were not dependent on the state.

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[56] Supra n 3 at para 84. Turkey has not ratified the Protocol Relating to the Status of Refugees 1967, 606 UNTS 267, which means that it has only obligations towards refugees originating from Europe. Tukey issued a declaration under Article 1(B)(1)(a) upon ratification of the Refugee Convention 1951, 189 UNTS 137.
[57] Application No 20420/02, Merits, 13 October 2005.
[58] See Section 3(A).
[59] Supra n 57 at paras 111-112.
[60] Ibid. at paras 114-118.

C. Violations: M.S.S. and More

In the case of *M.S.S. v Belgium and Greece,* the Court, for the first time, decided that there was a violation of Article 3 on the basis of poor living conditions. *M.S.S.* was an asylum seeker from Afghanistan who travelled through Greece to Belgium, where he lodged an asylum application. On the basis of the European Union (EU) Dublin Regulation,[61] Belgium sent him back to Greece, as this was the country where he first entered the EU. In his complaint against Greece, the applicant alleged, *inter alia,* that his poor living conditions there violated Article 3 of the ECHR.

The Court started by recalling the general observation in *Müslim* that there is no general obligation for states to provide refugees with financial assistance to enable them to maintain a certain standard of living.[62] But then the Court continued by stressing that

> what is at issue in the instant case cannot be considered in those terms. Unlike in the above-cited *Müslim* case …, the obligation to provide accommodation and decent material conditions to impoverished asylum-seekers has now entered into positive law and the Greek authorities are bound to comply with their own legislation, which transposes Community law, namely Council Directive 2003/9/EC laying down minimum standards for the reception of asylum-seekers in the member States. What the applicant holds against the Greek authorities in this case is that, because of their deliberate actions or omissions, it has been impossible in practice for him to avail himself of these rights and provide for his essential needs.[63]

Thus, the Court explained the difference between *Müslim* and *M.S.S.* by highlighting the fact that under Greek domestic legislation (which transposed EU law), the authorities were obliged to provide asylum seekers with decent conditions. In my view, the Court presents a clear 'rule of law' argument here. The Court stressed that by not providing the applicant with what was required under their own legislation, the Greek authorities subjected the applicant to arbitrary state power. I believe this to be a decisive element of the Court's reasoning.[64]

The Court continued by assessing whether the 'minimum level of severity' had been reached. In this regard, it noted that the applicant is an asylum seeker and 'as such, a member of a particu-

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[61] Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national [2003] OJ L 050, replaced by Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person [2013] OJ L 180.

[62] Application No 30696/09, Merits and Just Satisfaction, 21 January 2011 at para 249.

[63] Ibid. at para 250.

[64] See also Slingenberg, *The Reception of Asylum Seekers under International Law. Between Sovereignty and Equality* (2014) at 292-6.

larly underprivileged and vulnerable population group in need of special protection'.[65] Apart from indicating the existence of a broad international consensus concerning the need for special protection for asylum seekers, it did not explain why all asylum seekers should be considered to be vulnerable. If, however, vulnerability is understood to be dependency on a social relationship, it makes sense to identify all asylum seekers as vulnerable in terms of their relationship with the state, since the costs to exit this relationship are usually high: having no other state to turn to and having no resources or networks in the state of residence.[66]

The Court then observed that the situation in which the applicant had found himself was particularly serious: 'He allegedly spent months living in a state of the most extreme poverty, unable to cater for his most basic needs: food, hygiene and a place to live. Added to that was the ever-present fear of being attacked and robbed and the total lack of any likelihood of his situation improving.'[67] The Court concluded that such living conditions attain the level of severity required to fall within the scope of Article 3 of the Convention. Since the applicant found himself in these conditions 'through the fault of the authorities',[68] Article 3 had been violated.

The *M.S.S.* case has received a lot of attention in the literature. Some authors only look at the Court's statements about the minimum level of severity and do not pay attention to what the Court said about Greece's legal obligations.[69] Others do distinguish two separate steps in the Court's reasoning.[70] Oette for example distinguishes between the parts of the *M.S.S.* judgment that deal with the issue of state responsibility on the one hand and with the minimum level of severity on the other.[71] In his view, the decisive factor for state responsibility is 'the relationship between the state and the (vulnerable and dependent) person and the state's response to a particular situation in which it would be expected to take measures to counter the apparent (risk of) suffering'.[72] He does, however, not refer to the Court's reference to Greek domestic legislation.

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[65] Supra n 62 at para 251.

[66] Cf Clayton who notes the relevance of asylum seekers' vulnerability to the state: 'Even the most wealthy and resourceful asylum seeker cannot grant their own refugee status nor give themselves access in law to the host society; they are dependent on state action for this': see Clayton, 'Asylum Seekers in Europe: *M.S.S. v Belgium and Greece*' *(*2011) *11 Human Rights Law Review* at 770.

[67] Supra n 62 at para 254.

[68] Ibid. at para 264.

[69] Dembour, for example, argues that the Court concluded that Article 3 had been violated in *M.S.S.* 'because of the utmost gravity of the character of the situation in which the applicant found himself': see Dembour, supra n 9 at 454. See, likewise, Koch, 'Chapter 5: The interaction between human rights case law: Convergence or competition?' in Pennings and Vonk (eds), *Research Handbook on European Social Security Law* (2015) 106; Leijten, supra n 3 at 240 and 270.

[70] Gerards, for example, notes that the *M.S.S.* case confirmed the very high threshold of the minimum level of severity, but also mentions an element of fault at the part of the authorities to be of relevance: see Gerards, supra n 5 at 282, 285.

[71] I also made this distinction in my earlier work, see Slingenberg, supra n 3 at 287-311.

[72] Oette, supra n 12 at 685. Note that this analysis has many elements in common with Lovett's conceptualization of domination: the emphasis on being dependent on a particular social relationship and on the expectation of the provision of public goods by the state.

This element is mentioned by other authors. Some argue that the Court's reference to Greek domestic legislation and, more specifically, to the EU Reception Conditions Directive, is not critical to identifying a violation, but is seen by the Court as an aggravating factor.[73] Others argue that the fact that Greece acted in violation of its own domestic legal obligations, as well as EU law, played a decisive role in the Court's judgment and they criticize the Court for that. Da Lomba criticizes the lack of protection by the Court for irregular migrants' social rights in relying on whether the state concerned has any legal obligations to provide such rights or not.[74] Lavrysen also argues that '[t]he legality of a situation is irrelevant for determining whether or not that situation comes within the scope of Art. 3 ECHR—to hold otherwise would allow States themselves to determine the minimum level of human rights protection, which is contrary to the counter-majoritarian function of human rights'.[75]

I believe that it is possible to understand the different aspects of the *M.S.S.* judgment in a coherent way in terms of non-domination. The analysis of the *M.S.S.* judgment would then be that the Court emphasized asylum seekers' vulnerability, which can be defined in terms of dependency on the relationship with the state. Since leaving the relationship with the state is extremely costly or even impossible for asylum seekers, especially when it concerns their 'most basic needs', they are highly dependent on the state. Coercive power exercised over them, which can also consist of the deliberate withholding of goods, must then be effectively and reliably constrained by legally valid rules. The Court established in *M.S.S.* that this was not the case in Greece and, consequently, found a violation.

After *M.S.S.*, the Court found a violation of Article 3 in four other complaints against Greece about the poor living conditions of asylum seekers. In three cases, the Court dealt with the complaints rather briefly, by using almost identical language and heavily and explicitly drawing on its findings in the *M.S.S.* case: the cases of *F.H. v Greece*,[76] *AL.K. v Greece*[77] and *Amadou v Greece.*[78] In these cases, the Court mentioned the limited availability of facilities in Greece to receive and house tens of thousands of asylum seekers and also noted the practical obstacles for having access to the labour market. In *Amadou,* the Court referred again explicitly to the legal obligations of Greece under EU law;[79] in *F.H.* and *AL.K.*, the Court merely quoted a passage

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[73] Clayton, supra n 66 at 768; Costello, *The Human Rights of Migrants and Refugees in European Law* (2015) at 17–18; Peroni and Timmer, 'Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law' (2013) 11 *International Journal of Constitutional Law* 1056 at 1078. Ippolito merely notes that '[t]o what extent this new scope of Article 3 depends on the Reception Directive remains to be tested in future litigation': see Ippolito, 'A European Judicial Dialogue on Refugee Rights?' (2015) 9 *Human Rights and International Legal Discourse* 184 at 193.

[74] Da Lomba, supra n 11 at 358.

[75] Lavrysen, 'European Asylum Law and the ECHR: An Uneasy Coexistence' (2012) 4 *Goettingen Journal of International Law* 250.

[76] Application No 78456/11, Merits and Just Satisfaction, 31 July 2014.

[77] Application No 63542/11, Merits and Just Satisfaction, 11 December 2014.

[78] Application No 37991/11, Merits and Just Satisfaction, 4 February 2016.

[79] Ibid. at para 61.

from *M.S.S.* that refers to these legal obligations.[80] In addition, it noted that only a diligent examination of their asylum application could have put an end to the applicants' situation, but that, in all cases, the application, or an appeal, was still pending. Hence, the Court emphasized the applicants' dependency on the state and the difficulty of leaving the relationship with the state. In *F.H.*, the Court even noted that the applicant had sought to withdraw his asylum application in order to be able to leave for Turkey, but that this request had not been dealt with by the Greek authorities.[81] These cases, therefore, fit the analysis of the *M.S.S.* case as presented above.

The case of *Rahimi v Greece*[82] is somewhat different from the other cases as it concerned an unaccompanied minor. The applicant arrived in Greece from Afghanistan at 15 years of age and was placed in detention upon arrival on the island Lesbos. After two days in detention, he was released. He was left with no accommodation or means of transport and only received assistance from local non-governmental organisations (NGOs). A few days later, the applicant formally submitted his asylum application. The applicant complained about his poor living conditions after release from detention.

The Court started by emphasizing the applicant's vulnerability as an unaccompanied minor who was illegally present in an unfamiliar foreign country. This vulnerability was decisive in this case and prevailed over the applicant's status as an illegal migrant, according to the Court.[83] The Court looked at the period between the applicant's release and the submission of an asylum application with reference to a number of reports from human rights organizations and the Ombudsman, which indicated systematic failures in the protection of unaccompanied minors and the absence of a legal framework and policies to deal with their treatment after release from detention.[84] With regard to the period after the application for asylum was submitted, the Court noted that the Greek authorities, particularly the prosecutor responsible for minors, had not appointed a guardian for the applicant although this was a legal obligation under Greek domestic law.[85] The Court concluded that because of the Greek authorities' failure to monitor and supervise the applicant, Article 3 of the ECHR had been violated.

The Court emphasized similar elements in the *Rahimi case* as to those in *M.S.S.*: the applicant's vulnerability which can be understood in terms of dependency and the failure of the authorities to comply with their legal obligations.[86] In addition, the Court noted the absence of any kind of regulation about the living conditions of the applicant after release from detention. This clearly

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[80] Ibid. at paras 58 and 107 respectively.
[81] Supra n 76 at para 108.
[82] Application No 8687/08, Merits and Just Satisfaction, 5 April 2011.
[83] Ibid. at para 87.
[84] Ibid. at para 91.
[85] Ibid. at para 88.
[86] Also, Lavrysen argues that the Court in *Rahimi*, just as in *M.S.S.*, attributes decisive power to the legal obligations of the Greek government. Lavrysen indicates that also the obligation to appoint a guardian is an implementation of the EU Reception Conditions Directive: see Lavrysen, supra n 75 at 248-9. In my view, however, that is not relevant for the Court's finding of a violation.

fits a non-domination framework. By pointing at numerous reports of the human rights organizations, the Court made clear that the Greek government was *expected* to take care of the applicant and that by failing to meet this expectation, the authorities indirectly coerced him. The use of coercion or invasion should be controlled by effective and reliable public rules in order to prevent domination. In *Rahimi*, however, public rules were either non-existent or not complied with.

The most recent case in which the Court found a violation of Article 3 of the ECHR for migrants' poor living conditions is the case of *Shioshvili and Others v Russia*.[87] This case is about a woman who was eight months pregnant and her four children (ages 2, 6, 9 and 11 years). The applicants were Georgian nationals who were illegally present in Russia. When this was discovered, they were served with an expulsion order and took the train to leave for Georgia. Near the Russian border, the train was stopped and all Georgian nationals were ordered to leave the train. They were subsequently prevented from leaving Russia and had to wait for almost two weeks for a transit visa in the town of Derbent. During this period, they were not provided with any kind of assistance by the Russian authorities and had to live in poor circumstances in an overcrowded house. They complained that the Russian authorities had violated Article 3.

Just as in *M.S.S.* and *Rahimi*, the Court started by emphasizing the applicants' extremely vulnerable situation. The Court defined their vulnerable status by indicating the mother's pregnancy, the very young age of the children and the limited resources at their disposal. Moreover, the Court stressed in this regard the fact that they were expelled from Russia and that the Russian authorities then interrupted their travel without explanation and forced them to stay in an unfamiliar city.[88] This fits with Lovett's concept of dependency in the sense that the applicants were unable to exit their situation and were, therefore, dependent on the state for their living conditions. The Court continued by observing that

> the applicants' stay in Derbent was based on the conduct of the Russian authorities, which constituted a violation of Article 2 of Protocol No. 4 …. It also notes that the applicants were not provided with a reason for the interruption of their travels and that the duration of the stay was not foreseeable for them, but wholly dependent on the conduct of the Russian authorities.[89]

Article 2 of Protocol 4 to the ECHR contains the freedom to leave any country. This was violated by Russia since restricting the movement of the applicants was not in accordance with the law: there was no legal basis for requiring a transit visa nor for expelling the applicants from the train.[90] By exerting this type of state coercion, that was not controlled by external rules, the Russian authorities subjected the applicants to another, more indirect type of state coercion by

[87] Application No 19356/07, Merits and Just Satisfaction, 20 December 2016.
[88] Ibid. at para 83.
[89] Ibid. at para 84.
[90] Ibid. at paras 60-61.

not providing them with any kind of assistance. In its concluding remarks, the Court noted that 'the Russian authorities showed indifference towards the applicants' extremely difficult situation' and held that Article 3 was violated.[91]

Also, in this case, the Court's reasoning can be explained in terms of non-domination theory. In such a case of state coercion, which is combined with a high level of dependency, the allocation of resources should be governed by effective and reliable public rules in order to prevent domination. However, in this case, the Russian authorities showed complete 'indifference' with regard to the applicants.

D. Inadmissible Cases

Fourteen cases in my sample were declared inadmissible by the Court because they were found to be manifestly ill-founded. All these decisions concern complaints made against Italy or the Netherlands.

(i) Complaints against Italy

In a much earlier case against Italy, the Court dealt with the complaint of a family with unknown nationality about the poor living conditions in their travellers' camp in Rome. The Court declared this complaint manifestly ill-founded without much elaboration. It merely noted that the applicants lived there of their own free will and were able to leave this place.[92]

The *M.S.S.* judgment triggered many complaints from asylum seekers about poor reception conditions. Many of them were lodged against Italy.[93] Even though the Grand Chamber in its 2014 judgment in the case of *Tarakhel*[94] held that Switzerland would violate Article 3 of the ECHR if it returned a family with young children to Italy without obtaining assurances about the quality of the reception conditions. Other complaints against Italy, both before and after the *Tarakhel* judgment, have generally been declared manifestly ill-founded. In all these decisions the Court used a similar line of reasoning. In short, the Court found that it was not established that the Italian authorities had not complied with their own legislative and policy framework.

In the case of *Mohammed Hussein and Others v The Netherlands and Italy*,[95] the Court observed that the applicant, a pregnant woman from Somalia, was provided with a place in a reception

[91] Supra n 87 at para 86.
[92] *Sejdovic and Sulejmanovic v Italy* Application No 57575/00, Admissibility, 14 March 2002 at para 12.
[93] As explained above, in Section 3(A), this article only deals with complaints about living conditions in the country of residence, not about living conditions in the country to which migrants are about to be expelled. For this reason, only complaints are discussed here that are (also) directed against Italy, not complaints that are only directed against the country of expulsion.
[94] *Tarakhel v Switzerland* Application No 29217/12 Merits and Just Satisfaction, 4 November 2014.
[95] Application No 27725/10, Admissibility, 2 April 2013.

centre, 'as put into place by the Italian authorities for asylum seekers pursuant to their international and domestic legal obligations'.[96] In addition, after her request for international protection was accepted, as a pregnant woman she was eligible for priority placement in a facility for accepted refugees under Italian law.[97] Likewise, in the case of *Abubeker v Austria and Italy*,[98] the Court held that the applicant was provided with accommodation and residence papers while in Italy and that the applicant had voluntarily left this accommodation. The Court, therefore, held that 'when the applicant complains that he was homeless, had to sleep in the streets and lacked subsistence and food, the Court does not find that this situation resulted from the legal system or from a practical situation caused by the Contracting State.'[99] This was also observed by the Court in the case of *Hussein Diirshi and Others v The Netherlands and Italy* where it held that 'the Italian authorities treated the applicant in accordance with the special rules applicable to unaccompanied minor asylum seekers. The applicant voluntarily abandoned this protective scheme for which decision Italy cannot be held accountable.'[100] A similar, albeit more general, conclusion was reached by the Court in the case of *Miruts Hagos* and that of *Mohammed Hassan and Others*, in which the Court 'found no basis on which it should be held that the applicant had been unable to benefit from the available resources in Italy for asylum seekers or that, in case of difficulties, the Italian authorities would not have responded in an appropriate manner.'[101]

The Court continued this line of reasoning after the *Tarakhel* judgment, in which, as noted, it required more guarantees from the Italian authorities about the reception of families with minor children. The Italian authorities subsequently delivered guarantees in a number of circular letters. So, in *Ali and Others*, which concerned a single mother with a young child, the Court 'understands from the circular letters dated 2 February, 15 April and 8 June 2015 from the Italian Ministry of the Interior … that the first and fourth applicants would be assigned one of the places in reception facilities in Italy which have been reserved for families with minor children and has no reason to believe that none of these places would be available to them upon their arrival in Italy'.[102] Also, in *E.T. and N.T. v Switzerland and Italy*, the Court observed that 'the Italian Government confirmed that the applicants, upon their return, would be accommodated as

[96] Supra n 95 at para 72.
[97] Ibid. at para 74.
[98] Application No 73874/11, Admissibility, 18 June 2013.
[99] Ibid. at para 61.
[100] Application No 2314/10 and others, Admissibility, 10 September 2013 at para 140.
[101] Both cases were decided on the same date, and contain identical language. *Miruts Hagos v The Netherlands and Italy* Application No 9053/10, Admissibility, 27 August 2013 at para 38; *Mohammed Hassan and Others v The Netherlands and Italy* Application No 40524/10 et al., Admissibility, 27 August 2013 at para 176. The same phrase was used by the Court in the case of *Hussein Diirshi and Others v The Netherlands and Italy*, supra n 99 at para 139, and in *Ali and Others v Switzerland and Italy* Application No 30474/14, Admissibility, 4 October 2016 at para 35.
[102] Supra n 101 at para 34.

a single-parent family in a reception facility belonging to the SPRAR network'[103] and that because they are recognized as refugees, these applicants are entitled to benefits under the general schemes for social assistance, health care and housing under Italian domestic law. The Court stressed that 'it is for the applicants to assert their rights before the Italian courts'.[104]

Hence, in all these cases, the Court did not see any proof of 'deliberate withholding of expected public goods' and, thus, no indirect coercion by the state. Instead, the Court seemed to accept that in Italy the distribution of expected public goods to asylum seekers and accepted refugees has been governed by effective and reliable public rules. These applicants' unsatisfactory situation had not been caused by a lack of compliance with domestic legal obligations by the Italian authorities, but by the applicants' own actions either by choosing to leave state facilities or by failing to assert their rights. In some cases, the Court also stressed that the applicants could easily exit their unsatisfactory situation by submitting an application for asylum, which would entitle them to have access to a reception centre. If applicants choose not to file an asylum request, state responsibility 'cannot be engaged on account of the fact that the applicant did not have access to the reception schemes reserved for asylum-seekers', according to the Court.[105]

(ii) Complaints against the Netherlands

Of the five cases against the Netherlands, two were about the living conditions of migrants who were considered to be a danger to national security or who had committed serious crimes in their country of origin.[106] Although the applicants in these cases did not have lawful residence in the Netherlands, and were thus under a legal obligation to leave the Netherlands, they were not threatened with forced expulsion because they were still at risk in their country of origin. For this reason, their situation has been described as living 'in limbo': they can neither return to their country of origin nor ever gain the right to stay in the host country of residence.[107]

The case of *I.* was the first time that the Court had to deal with the question whether the living conditions of a migrant in 'limbo' (that is, not the absence of residence permit as such) violated Article 3 of the ECHR. With reference to the *M.S.S.* case, the Court quickly arrived at the conclusion that the minimum level of severity, 'either from a material, physical or psychological

[103] Application No 79480/13, Admissibility, 30 May 2017 at para 24.
[104] Ibid. at para 26.
[105] Application No 53852/11, Admissibility, 18 June 2013 at para 65. See also *Miruts Hagos v The Netherlands and Italy*, supra n 101 at para 37.
[106] There have been other cases decided against the Netherlands in which migrants in a similar situation complained about a violation of Article 3 ECHR, due to the lack of a residence permit such as *Bonger v The Netherlands* Application No 10154/04, Admissibility, 15 September 2005; *K. v The Netherlands* Application No 33403/11, Admissibility, 25 September 2012. As Dembour observes, supra n 9 at 445, these cases can (also) be approached as forming part of the residence permit case law of the ECtHR. For this article, the 'destitution case law' is indeed treated as distinctive from the 'residence permit case law' and only cases in which migrants explicitly complained about their socio-economic living conditions have been selected.
[107] Dembour, supra n 9 at 443.

perspective' had not been reached in this case.[108] Also in the case of *A.*, the Court concluded that it could not find that the applicant's predicament met the required minimum level of severity.[109] In this case, the Court added that the situation in Libya, the applicant's country of origin, had changed dramatically since it was first established that he could not return there.[110] More generally, it added that the Convention does not guarantee, 'as such', socio-economic rights and that 'aliens who are subject to expulsion cannot in principle claim any entitlement to remain in the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance and services provided by the expelling State'.[111] Hence, in this case, the Court emphasized that it was possible for the applicant to leave his unsatisfactory situation.[112]

According to Dembour, one could say that *M.S.S.* has been 'clawed back' with the decision in the case of *I.*[113] The brevity and lack of elaboration in the Court's decisions taken after the *M.S.S.* judgment is indeed striking. On the other hand, the circumstances that were decisive in the *M.S.S.* case were not present in the two decisions discussed here. The Dutch authorities were not obliged under their own domestic law or relevant EU law, to provide these migrants with benefits. In other words, the provision of benefits did not become part of the baseline expectations. Moreover, in both cases, the applicants had a spouse and children with Dutch nationality, with whom they could cohabit, which made them less dependent on the state. Read in this way, *M.S.S.* was not clawed back, but its scope is more limited than its reasoning might have suggested.

The three other decisions against the Netherlands concerned migrants who were excluded from social benefits for other reasons. In the first of these cases, *Ndikumana*, the applicant applied for asylum in the Netherlands. However, the Dutch immigration authorities considered that under the Dublin Convention, Germany was responsible for dealing with this person's asylum application. At that time, the Netherlands had a policy in place according to which asylum seekers in the applicant's position (so-called 'Dublin claimants') had no access to a State-sponsored reception centre for asylum seekers. There was an exception for those who, in the view of the immigration authorities, were in acute humanitarian need. The applicant complained that by not providing him with food, shelter and medical care, the Netherlands had violated Article 3 of the ECHR.

After repeating its findings in the case of *M.S.S.*, the Court started its assessment of the *Ndikumana* case by noting that 'pursuant to the national legislation applicable at the relevant

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[108] Application No 24147/11, Admissibility, 18 October 2011 at para 41.
[109] Application No 60538/13, Admissibility, 12 November 2013 at para 53.
[110] Ibid. at para 50.
[111] Ibid. at paras 51-52.
[112] On this issue, the Court (at paras 58-59) contradicts itself a little, since, in the same judgment it declares that there is no case for a violation of the right to respect for family life because the applicant's removal from the country is not imminent.
[113] Dembour, supra n 9 at 455.

time the applicant had no right to reception facilities … and that the respondent State was not yet under a positive obligation under the European Reception Directive to provide for asylum seekers' most basic needs'.[114] In addition, the Court found it relevant that the applicant had not availed himself of any of the official pathways to request access to the reception centre.[115] The applicant could have lodged a request for reception facilities by arguing that he found himself in a situation of acute humanitarian need. If this request had been denied, he could have lodged an objection and an appeal against the refusal.[116] For this reason, the Court decided that the authorities could only become aware of the applicant's needs once he presented himself at the gate of a reception centre. Given that the authorities offered him reception two nights later, it cannot be said that the applicant was faced with official indifference in a situation of serious deprivation or want incompatible with human dignity,[117] according to the Court.

In the case of *Hunde v The Netherlands,* the applicant was a failed asylum seeker. He was squatting in an indoor car park, together with a group of other unsuccessful asylum seekers. He complained that he was forced to live in the car park in inhuman conditions that were in violation of Article 3 of the ECHR. Just as in the *Ndikumana* case, the Court started its assessment by emphasizing that the applicant was not entitled to any social assistance in the Netherlands.[118] Subsequently, the Court noted the 'crucial differences' between the applicant's situation and the situation of the applicant in *M.S.S.*. The Court pointed out that 'unlike the applicant in *M.S.S.* who was an asylum-seeker, the applicant in the present case was at the material time a failed asylum-seeker under a legal obligation to leave the territory of the Netherlands'. The Court explained that *M.S.S.*'s suffering could have been alleviated if the Greek authorities had assessed his asylum application promptly. The Court stressed that 'by failing to do so the applicant was left in uncertainty', whereas the uncertainty that *Hunde* found himself in was 'inherently different' from *M.S.S.* in that it was not linked to the Netherlands authorities' assessment of his asylum request.[119] In addition, the Court noted that it could not be said that the authorities had shown ignorance towards Hunde's situation. He was granted a period of four-weeks' grace after the final rejection of his asylum application during which period he retained his right to reception benefits. Moreover, he had the option of applying for reception benefits at a centre where his liberty would be restricted. Finally, the Court noted that the Netherlands had set up a special scheme providing for the basic needs of irregular migrants, which was instigated, among other things, by the applicant's pursuit of domestic remedies in connection with his Article 3 claim. In these circumstances, the Court concluded that 'it cannot be said that the Netherlands

[114] Application No 4714/06, Admissibility, 6 May 2014 at para 45. The EU Reception Conditions Directive was adopted in 2003, and the implementation deadline expired in 2005. *Ndikumana* applied for asylum in the Netherlands in 2000, so before the Netherlands had any obligations under this Directive (see paras 19–20 of the decision).
[115] Ibid. at para 47.
[116] Ibid. at para 27.
[117] Ibid. at para 47.
[118] Application No 17931/16, Admissibility, 5 July 2016 at para 55.
[119] Ibid. at paras 55-56.

authorities have fallen short of their obligations under Article 3 by having remained inactive or indifferent'.[120]

In the case of *Said Good v The Netherlands*, which also concerned a failed asylum seeker, the Court referred to the relevant principles as set out in the *Hunde* decision and limited itself to assessing whether the particular circumstances of this case should lead to a different conclusion.[121] The circumstances in *Said Good,* however, did not lead to such a conclusion. The Court noted that her exclusion from reception benefits did not stand in the way of her being able to undergo two knee replacement surgeries, paid for by the State, and a rehabilitation process, that was also financed by the state.[122]

Hence, it can be deduced from the above decisions that the Court is concerned with situations of uncertainty if the uncertainty is caused by the absence, ineffectiveness or unreliability of the legal framework *and* if the migrant in question cannot influence the uncertainty, for example, by lodging an application for benefits, starting legal proceedings against a refusal, cooperating in a return procedure or by leaving the host country voluntarily.

4. CONCLUSION: (SUFFICIENT) PROTECTION AGAINST DOMINATION?

With regard to providing protection against poverty and destitution, the Court has been criticized by legal scholars for not being consistent, systematic and internally coherent enough in its case law.[123] In this article, I have tried to provide an explanation for one particular line of this 'destitution case law', that is, complaints about destitution and poor living conditions of migrants. This particular line of case law has also been criticized for not being consistent and for not providing enough protection.[124] However, I argue that seen through the lens of republican theory on non-domination, the Court's case law can be constructed as consistent and internally coherent. Seen through this lens, an explanation for the reasoning in and outcome of the cases discussed in this article is that the Court is only willing to protect against situations of destitution or poverty if these situations show evidence of individuals being dominated by the state. This means that although the Court often refers to the 'minimum level of severity', the severity of the situation (that is, the extent and length of deprivation) cannot explain the various outcomes of these cases and does not appear to be decisive.

In all cases where the Court found a violation, the high level of vulnerability of the persons concerned was noted. This vulnerability can be understood in terms of dependency related to the

[120] Supra n 118 at paras 56, 59.
[121] Application No 50613/12, Admissibility, 23 January 2018 at paras 21-22.
[122] Ibid. at para 23.
[123] Gerards, supra n 5 at 276 and 289-90; Oette, supra n 12 at 683 and 687. For a critique on the Court's case law in the socio-economic sphere more generally, see Leijten, supra n 3 at 81-3 with further references.
[124] Dembour, supra n 9 at 445, 452-6; Da Lomba, supra n 11.

inability to leave a difficult situation. In *M.S.S.* (and the cases based on *M.S.S.*, *F.H.*, *Al.K.* and *Amadou*) and *Rahimi,* this difficulty was the result of the applicants' status as an asylum seeker, whereas in *Shioshvili* this was caused by the restrictions on the applicants' freedom imposed by the government combined with their lack of resources. In addition, the Court (although not explicitly) emphasized that the provision of benefits was expected in these cases, for example, because the government was legally obliged to do so under domestic and/or EU law (*M.S.S.* and *Rahimi*), coupled with a broad consensus in reports by relevant and authoritative human rights organizations acknowledging these obligations (*Rahimi*), or because the applicants were forced into their difficult situation by the government and the government could easily have ended this (*Shioshvili*). Because the legal framework governing the action of the state was either absent/unclear (*Rahimi* and *Shioshvili*) or not complied with by the state (*M.S.S.* and, partly, *Rahimi*), the Court found a violation.

In contrast, in cases where the Court found no violation or were found to be manifestly ill-founded, the Court's arguments can be traced back to (the absence of) coercion, dependency and arbitrariness. In these cases, the Court noted that

- the state was not expected to provide benefits since there was no legal obligation for them to do so (for example, *Müslim, Hunde*, *Ndikumana*), and/or
- the applicants were not dependent on their relation with the state since they were not in a relationship with the state, as they did not formally apply for asylum, benefits or entry (for example, *Halimi*; *Miruts Hagos, Ndikumana, Mogos*) or did not convince the Court that the costs of leaving the relationship were prohibitively high, since they left accommodation by choice (for example *Abubeker, Hussein Diirshi)* or could leave for another country (*A, Hunde*), and/or
- the applicants did not convince the Court that the authorities would not comply with their legal obligations (for example, *Miruts Hagos, Mohammed Hassan, E.T. and N.T.*).

Hence, the core elements of *domination* as conceptualized by Lovett (that is, coercion, dependency and insufficient control) can be detected in the Court's legal reasoning in all cases on migrants' living conditions and can, therefore, provide a theoretical explanation for the various outcomes in this type of case law. While some of these elements have been mentioned in the literature and match well with current trends in the case law that have been observed, such as the 'procedural turn'[125] and 'vulnerability reasoning',[126] the concept of freedom as non-domination

[125] For example, Arnardóttir, 'The "procedural turn" under the European Convention on Human Rights and Presumptions of Convention Compliance' (2017) 15 *International Journal of Constitutional Law* 9; Gerards and Brems (eds), *Procedural Review in European Fundamental Rights Cases* (2017); Spano, 'The Future of the European Court of Human Rights: Subsidiarity, Process-Based Review and the Rule of Law' (2018) 18 *Human Rights Law Review* 473.

[126] For example, Timmer, 'A Quiet Revolution. Vulnerability in the European Court of Human Rights' in Fineman and Grear (eds), *Vulnerability. Reflections on a New Ethical Foundation for Law and Politics* (2013) 147; Al Tamimi, 'The Protection of Vulnerable Groups and Individuals by the European Court of Human Rights' [2016] *European Journal of Human Rights* 561.

provides an overarching theory capable of providing an explanation for these trends and relevant elements. Future research must reveal whether this conclusion can also be drawn for other lines of case law, such as other aspects of the Court's migrants' case law or all cases dealing with poverty.

It must be stressed here that I do not claim that the Court knowingly or intentionally protects against domination; my claim merely is that this line of case law can be explained more coherently in terms of the concept of non-domination. Nor do I claim that the Court *should* only provide protection against domination. Even though neo-republican theory offers a convincing account on why non-domination is a primary good and might even be a sufficient good for achieving social justice, it can be argued that the Court should (also) provide basic fairness. In addition, the question as to how the concept of non-domination fits into human rights legal theory and principles more broadly should be addressed.[127] My primary aim for this article was, however, not normative but explanatory: it seeks to understand and find consistency in the case law of the Court.

Yet, in addition to providing an explanatory framework, relying on republican theory also provides a basis to critically analyse the case law as to whether it provides *enough* protection against state domination. I believe the case law discussed in this article can be improved in three ways in order to provide better protection against the (neo) republican concept of domination. I will discuss this briefly here, but all three issues merit a more elaborate analysis in future research.

First, the concept of dependency, defined by the level of exit costs, could be used to better differentiate amongst migrants. In the case law discussed in the article, the Court uses broad legal categories of 'asylum seekers' and 'irregular migrants' and categorizes all asylum seekers as vulnerable and ignores the (more subjective) high costs of exit that irregular migrants might face when having to leave their country of residence. While it should indeed be assumed that all asylum seekers incur high exit costs in leaving a territory or the power of the state, since they might run a serious risk in their country of origin, they do not necessarily all have the same difficulties in leaving the particular relationship with the state as provider of social benefits. After all, not all asylum seekers are by definition without resources or without a social network in the country of residence. In theory at least, some of them may not be dependent on the state for meeting their basic needs. On the other hand, the Court could pay more attention to the variety of costs of leaving the country that irregular migrants might face. As Benton convincingly argued, the costs of leaving the host country vary considerably among migrants depending on, for example, ties in the country of residence, lack of viable opportunity to live elsewhere and/or the existence of debts to smugglers or family members (see Section 2(A) above). The Court does take such issues into account in its case law on Article 8 of the ECHR, with regard to the

[127] See, for a first step in this regard, Ivision, 'Republican Human Rights?' (2010) 9 *European Journal of Political Theory* 31.

question whether expulsion of a family member violates the right to respect for family life,[128] but this could also be integrated into its destitution case law under Article 3 of the ECHR.

Secondly, the Court could pay more attention to coercion by the state *via* social benefit schemes. Especially when in-kind benefits are provided in large-scale accommodation centres, asylum seekers and irregular migrants might be subjected to direct and indirect coercion by the state, for example, in the form of daily or weekly reporting duties, forced transfers, benefits being provided on the condition of actual residence in the centre or of co-operation in return procedures. If this coercion is not sufficiently governed by an effective and reliable legal framework, it affects migrants' freedom as non-domination. In cases like *Mohammed Hussein*, *Abubeker* and *Hunde*, however, the Court merely observes that the applicants were offered a place in a reception centre. Yet, in order to provide full protection against domination, the coercion employed in these reception schemes and the legal framework governing it should be more closely assessed. In order words, even though living in reception centres can be voluntary, attention should be paid to the possibility that migrants trade off their freedom as non-domination in order to be able to gain basic needs.[129] Since the Court is limited by what the applicants bring forward in their complaints, this could also be more extensively argued by the applicants themselves.

Thirdly, taking into account the importance of the rule of law in order to minimize domination as well as the legal dynamics inherent in every legal system, as analysed by Lovett, the Court could better assess the quality of the legislation. In cases like *Ali and Others* and *E.T. and N.T.*, the Court referred to Italian law and 'circular letters' and assumed that the authorities would comply. In order to better provide protection against domination, it is necessary to examine the clarity of the rules, the amount and kind of discretionary power held by the administration and to what extent the conditions of 'legislative due process' are met when rules are created. Again, in case law concerning negative obligations under Articles 8 to 11 of the ECHR, the Court does pay more elaborate attention to the existence of a legal basis and its quality,[130] but this could also be integrated in the Article 3 case law in order to better protect against domination.

If the suggestions above are implemented, the Court could provide more effective and robust protection against domination of migrants. This would *not* mean, however, that migrants would henceforth be guaranteed complete fair treatment; it would only mean that their situation would be less bad than in a situation of more domination. However, in the current European context, where the Court also needs to be concerned about its own accountability towards states and

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[128] See, for example, *Jeunesse v The Netherlands* Application No 12738/10, Merits and Just Satisfaction, 3 October 2014 at paras 116-119; *Darren Omoregie and Others v Norway* Application No 265/07, Merits, 31 July 2008 at para 66.
[129] Lovett, supra n 20 at 197-8.
[130] See, for example, *Kuric and Others v Slovenia* Application No 26828/06, Merits and Just Satisfaction, 26 June 2012 at paras 341-350; *Al-Nashif v Bulgaria* Application No 50963/99, Merits and Just Satisfaction, 20 June 2002 at paras 117-128.

where migrants' rights, particularly those with illegal or insecure status, are under threat,[131] providing migrants with effective protection against domination might ensure essential freedom for migrants, as well as practical feasibility.

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[131] European Union Agency for Fundamental Rights, 'Regular overviews of migration-related fundamental rights concerns', available at: fra.europa.eu/en/theme/asylum-migration-borders/overviews [last accessed 4 April 2019].