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SYMPOSIUM ON UNSETTLING THE SOVEREIGN "RIGHT TO EXCLUDE"

REVERSE STRATEGIC LITIGATION BY GOVERNMENTS? NEGOTIATING SOVEREIGNTY AND MIGRATION CONTROL BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS

*Janna Wessels**

Embedded in mutually reinforcing processes of "humanrightization" in law, politics, and everyday practice,[1] the European Court of Human Rights in Strasbourg (ECtHR, or Strasbourg Court) has become a central actor and forum for conflicts around the inclusion and exclusion of migrants in Europe. The Strasbourg Court has derived specific protections for migrants from the originally "migration-blind" norms of the European Convention on Human Rights (ECHR), such as the prohibition of torture, and respect for family and private life, for example.[2] This extension of the ECHR to migrants means that migration control is no longer purely within the discretion of states.

The contracting states do not in principle contest this development. Open defiance of the ECHR, attempts to renegotiate, or even withdrawal, are rare, although they receive much attention when they do occur. Recent debates in the UK about leaving the Convention system due to incompatibility with its new Illegal Migration Bill constitute one such example.[3] Contracting states also push back through political declarations on the future of the European Court of Human Rights.[4] Specifically, the 2018 Copenhagen Declaration was propelled by concerns about increasing constraints in the field of migration.[5] States may also seek to undermine the constraints placed on them by the ECHR by not executing ECtHR judgments, including in relation to the expulsion or detention of foreigners, although this is a rare practice.[6]

* *Associate Professor, Amsterdam Centre for Migration and Refugee Law (ACMRL), VU University Amsterdam, Netherlands, and PI of the research project "Who Is Empowered by Strasbourg? Migrants and States Before the European Court of Human Rights" within the MeDiMi Research Group (funded by the German Research Council DFG), and of the project "Countering Human Rights from Within: Framing State Interests in Human Rights Language in Migration-Related Jurisprudence" (funded by the Netherlands Organisation for Scientific Research, NWO).*

[1] Research Group MeDiMi, *Human Rights Discourse in Migration Societies: A Research Agenda* (MeDiMi Working Paper No. 1, 2023); Jürgen Bast, *The Rise of Human Rights Limits to Migration Control – A European Perspective*, 118 AJIL Unbound 208 (2024).

[2] *See* Aliens Before the European Court of Human Rights: Ensuring Minimum Standards of Human Rights Protection (David Moya & Georgio Milios eds., 2021).

[3] Alice Donald & Philip Leach, *The UK vs the ECtHR: Anatomy of A Politically Engineered Collision Course*, Verfassungsblog (May 5, 2023).

[4] Council of Europe, Department for the Execution of Judgments of the European Court of Human Rights, *Political Declarations/Decisions of CM Sessions* (2024).

[5] As evident in initial drafts, though these concerns are not reflected in the final version, see for discussion: Lize Glas, *From Interlaken to Copenhagen: What Has Become of the Proposals Aiming to Reform the Functioning of the European Court of Human Rights?*, 20 Hum. Rts. L. Rev. 121 (2020).

[6] Fiona de Londras & Kanstantsin Dzethsiarou, *Mission Impossible? Addressing Non-execution Through Infringement Proceedings in the European Court of Human Rights*, 66 Int'l Comp. L. Q. 467 (2017).

However, I propose that in addition to these blatant forms of protest, there is a subtler but no less powerful form of "pushback"[7] by states against an expansion of human rights in the field of migration: an attempt by governments to shape human rights doctrine itself to accommodate their migration control policies. I will argue that when a migration-related case is brought before the Strasbourg Court, governments may engage in "reverse strategic litigation"; they try—and often succeed—in countering human rights *from within* the Convention's framework in order to legitimize their migration control policies under human rights law.

On this account, governments act as "doctrinal entrepreneurs."[8] As states are increasingly forced to translate and justify their migration control policies in human rights terms, they become adept at navigating and maneuvering the legal doctrinal and procedural structures when acting as respondents before the Court.

In such cases, there is a triangular relationship between the migrant claiming a human rights violation, the respondent state accused of the violation, and the ECtHR ruling on the dispute. Scholars analyzing this body of case law so far have focused on the Court and its judges, for example the influence of populism.[9] Others have also looked at the effects of strategic litigation by migrant advocacy groups and its limitations and shortcomings.[10]

However, to date, there is hardly any understanding of the (tacit) mechanisms that *governments* use to influence the Court's jurisprudence.[11] This is striking given that they are also parties to the proceedings.

Unlike (most) applicants, governments are "repeat players" before the Strasbourg Court.[12] And while the *erga omnes* effect for the judgments of the ECtHR is not expressly provided by the ECHR, there is de facto a legal obligation for the contracting states to take the full body of the Court's case law into account when performing their obligations under the Convention. For governments, engaging in litigation is therefore not just a matter of winning a particular case, but may also be a matter of aiming to shape legal doctrine, trading off tangible gains in a single case with rule gains that may lead to favorable outcomes in future proceedings.

This is a very powerful approach: if states succeed in shaping the very meaning of human rights law to better reflect their migration control interests, they can defuse and limit the potential of human rights law to place restrictions on their migration policies. In other words, under conditions of "humanrightization," engaging in the struggle over the meaning of human rights is one way for states to push back against human rights constraints on their power to control migration—within and through the legal language of human rights.[13] While adopting a more administrative approach to human rights law, this allows them to still formally present themselves as states that abide by their human rights obligations.[14] The following explores practices whereby states act as "doctrinal entrepreneurs" within the framework of the Convention.

[7] On the distinction between backlash and pushback: Mikael Rask Madsen, Pola Cebulak & Micha Wiebusch, *Backlash Against International Courts: Explaining the Forms and Patterns of Resistance to International Courts*, 14 Int'l J. L. Context 197 (2018).

[8] Cf. Cass Sunstein, who described "norm entrepreneurs" as "people interested in changing social norms." Cass R. Sunstein, *Social Norms and Social Rules*, 36 Chi. John M. Olin L. & Econ. Working Paper 1, 6 (1996).

[9] Vladislava Stoyanova, *Populism, Exceptionality and the Right to Family Life of Migrants Under the ECtHR*, 10 Eur. J. Legal Stud. 83 (2018).

[10] Nikolas Feith Tan & Thomas Gammeltoft-Hansen, *A Topographical Approach to Accountability for Human Rights Violations in Migration Control*, 21 Ger. L.J. 335 (2020).

[11] See for one exception: Moritz Baumgärtel, *"Part of the Game" Government Strategies Against European Litigation Concerning Migrant Rights*, *in* The Changing Practices of International Law (Thomas Gammeltoft-Hansen & Tanja Aalberts eds., 2018).

[12] Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & Soc'y Rev. 95, 100–01 (1974).

[13] For a theory on how interpretive legal practices generate normative content change in international law, see Nora Stappert, *Practice Theory and Change in International Law: Theorizing the Development of Legal Meaning Through the Interpretive Practices of International Criminal Courts*, 12 Int'l Theory 33 (2020).

[14] Ayelet Shachar, The Shifting Border: Legal Cartographies of Migration and Mobility (2020), reveals a similar logic of keeping formally within the boundaries of human rights law while trying to empty it out.

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Types of "Reverse Strategic Litigation" by Governments

Doctrinal entrepreneurship by governments can occur in blatantly visible ways, but also in the subtler, daily business of human rights adjudication. The more blatant forms occur when governments confront an established line of jurisprudence head-on. This can be observed in two paradigmatic Grand Chamber judgments: *Ilias and Ahmed v. Hungary* (2019) on immigration detention at the border, and *ND and NT v. Spain* (2020) on the practice of "hot returns" in the Spanish enclave on the African continent Melilla. In both cases, the responding state appealed an adverse judgment and succeeded in effecting jurisprudential change.

Ilias and Ahmed v. Hungary dealt with the question of whether the fact that the applicants were held for three weeks in a transit zone on Hungarian territory at the border with Serbia amounted to detention.[15] ECHR Article 5(1)(f) provides for detention of migrants to prevent their unauthorized entry, but comes with certain procedural and material requirements. The question here was whether the conditions the applicants found themselves in amounted to (de facto) detention, in light of the fact that Hungary did not stop them from walking back to neighboring Serbia. This was an interesting question among others because in a previous judgment, *Amuur v. France* (1996), the Court had found that holding asylum seekers in airport transit zones amounted to detention, even though they were in theory able to leave the zone toward a destination outside of France.

In *ND and NT v. Spain*, several persons had attempted to scale the border fences at the Spanish enclave Melilla, which is situated on the African continent bordering Morocco, and were returned to Morocco by Spanish border officials. The question was whether this amounted to collective expulsion, which is prohibited by ECHR Article 4, Protocol 4. Among others, this article had been found to be applicable to interceptions and returns of migrants on the high seas, in *Hirsi Jamaa v. Italy* (2012).

In each case, a chamber of seven judges of the ECtHR initially ruled unanimously in favor of the migrants—so, for Ilias and Ahmed, that they had indeed been detained, and for ND and NT, that they had indeed been collectively expelled.

The responding governments each requested a referral to the Grand Chamber, which sits in a formation of seventeen judges. The requests for referral were granted—and the governments each managed to "flip" the judgments in their favor. The Grand Chamber found no violation of the right to liberty and of the prohibition of collective expulsion respectively—unanimously in the case of *ND and NT*, and by majority of fifteen votes to two, in the case of *Ilias and Ahmed*.

Before the Grand Chamber, the governments submitted a long and detailed list of doctrinal arguments on the merits, explaining why the Chamber decision was wrong and offering their own interpretation of the law. Some of the arguments submitted by the states were quite "off-the-wall."[16] While the Court dismissed most of these, in both cases, one such argument was accepted. In *Ilias and Ahmed*, the Grand Chamber agreed with the government submissions that the situation at transit zones at land borders has to be distinguished from transit zones at airports, because the applicants entered the Röszke transit zone of their own initiative and it was practically possible for the applicants to walk to the border and cross into Serbia.

In *ND and NT*, the Grand Chamber finds that due to the applicants' own culpable conduct, there had been no breach of the prohibition of collective expulsion. This conduct consisted of irregularly scaling the fenced off border between Morocco and Melilla, with a large number of migrants attempting this simultaneously, rather than

[15] Note that there was also a claim under ECHR, Art. 3 (prohibition of torture or inhuman or degrading treatment) in this judgment, which I ignore for the purposes of this essay.

[16] On this notion, see Jack M. Balkin, Obergefell v. Hodges*: A Critical Introduction*, *in* WHAT *OBERGEFELL V. HODGES* SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S SAME-SEX MARRIAGE DECISION 7–9 (Jack M. Balkin ed., 2020).

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using the possibility of legal pathways. This argument had not figured prominently during the litigation before the Chamber, but was fully developed by Spain before the Grand Chamber.[17]

Both *Ilias and Ahmed* and *ND and NT* are thus illustrative of visible "doctrinal entrepreneurship" by governments: in both cases, they take established jurisprudence head-on, attempting to, and ultimately succeeding in, changing it. They use the strategic option to refer to the Grand Chamber and offer creative legal thinking to effect an inversion of jurisprudence.

In addition to such "high-profile" cases, however, "doctrinal entrepreneurship" can also occur in much subtler ways.

For example, governments exert quite some influence over the choice of cases in which a doctrinal question will be dealt with by making cases "disappear." Research on strategic litigation *by migrants* (and their advocacy groups) has often voiced frustration with the fact that governments frequently resort to solving or revisiting an applicant's specific claim in the context of migration—especially in their most "promising" cases—in order to trigger an inadmissibility decision or the striking out of the case, because the matter has been resolved, or because a friendly settlement has been reached.[18] In migration-related cases, where individuals often seek "concrete, particular, individual immigration measures, such as the revocation of a deportation order or the granting of a residence permit,"[19] governments can "kill" the case by granting the applicant the residence permit (or other interest) that they seek.

However, while such measures may "postpone" a judgment on the matter, they cannot "permanently diffuse" litigation. Indeed, on critical matters it is to be expected that subsequent cases will be launched on similar issues. By putting down the individual case, governments therefore cannot prevent any and all Strasbourg litigation on the subject. Moreover, governments may have something to gain from a judgment in their favor. So rather than stopping litigation entirely, they delay it for a later, better moment. Accordingly, when a suitable case does present itself, governments can "let a case through." The case of *ND and NT v. Spain* is a good illustration of this. When making its submissions to the Grand Chamber, the Spanish government waived the opportunity to argue for lack of interest on behalf of the applicants to pursue the claim and request a strike-out—even though there were indications that the applicants' lawyers had lost contact with the applicants (and the Court felt compelled to make an assessment on its own motion; not without observing twice that the government had not raised this point). The government desisted from the apparent possibility to strike out the case in order for the case to go forward. This way, they retained the possibility to develop their legal reasoning and shape jurisprudence and case law in a robust and lasting manner. A struck-out case would not have had the same effect after the adverse Chamber judgment.

Directions for Future Research

As these landmark cases show, governments may pursue strategies to try to shape human rights doctrine to accommodate their migration control practices, and they are partly successful. They do not only engage procedural means, but also act as "doctrinal entrepreneurs" over time.[20] In addition to the abrupt jurisprudential change

[17] Italy, France, and Belgium, acting as third-party interveners in support of Spain, also contributed to this argument. *See* Mónica Ávila Currás, *States Joining Forces Before the ECtHR*, 6/7 Asiel-en Migrantenrecht 291 (2023) (who analyzes state third party interventions in migration case law before the ECtHR).

[18] *See, e.g.*, Nuno Ferreira, *An Exercise in Detachment: The Council of Europe and Sexual Minority Asylum Claims*, *in* Queer Migration and Asylum in Europe 89–90 (Richard C. M. Mole ed., 2021).

[19] Marie-Bénédicte Dembour, When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint 225 (2015).

[20] *See, e.g.*, J. Klüger, *Carving Out a Right to Expel at the ECtHR*, 6/7 Asiel-en Migrantenrecht 294 (2023) (who analyzes how governments helped shape the two articles in the Convention system that protect migrants from expulsion).

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observed in the two Grand Chamber cases above, more research is needed to understand the role of "doctrinal entrepreneurship" of Contracting States in shaping migration-related case law, especially where a "watering down" of human rights standards can be observed.[21] One candidate for such analysis is the ambivalent concept of vulnerability, where scholars have noted that the Strasbourg Court has "surreptitiously reversed" the principle that asylum seekers are inherently and particularly vulnerable on account of their very situation as asylum seekers as established in earlier case law.[22] Other examples to be further examined are restrictive interpretations of the scope of "absolute rights,"[23] thin notions of positive obligations[24] or protection,[25] or the ambivalent character of proceduralization of rights, with its attendant risk of hollowing out their material core.[26]

While it is true that migration control is no longer entirely within the discretion of states in Europe, states still retain considerable influence over the scope and content of the legal constraints. The very fact of the expansion of human rights protection for migrants leads to an expansion of the contestatory potential of state interests within human rights doctrine. In other words: The expansion of human rights goes hand in hand with an increasing deflation of their revolutionary potential, within and through the means of legal doctrine.

[21] Lawrence R. Helfer & Erik Voeten, *Walking Back Human Rights in Europe?*, 31 Eur. J. Int'l L. 797 (2020).

[22] Ben Hudson, *Asylum Marginalisation Renewed: "Vulnerability Backsliding" at the European Court of Human Rights*, 20 Int'l J. L. Context 16 (2024).

[23] Ezgi Yildiz, Between Forbearance and Audacity: The European Court of Human Rights and the Norm Against Torture 169–97 (2023).

[24] Vladislava Stoyanova, *Fault, Knowledge and Risk Within the Framework of Positive Obligations Under the European Convention on Human Rights*, 33 Leiden J. Int'l L. 601 (2020).

[25] Janna Wessels, *The Boundaries of Universality: Migrant Women and Domestic Violence Before the Strasbourg Court*, 37 Netherlands Q. Hum. Rts. 336 (2019).

[26] OddnýMjöll Arnardóttir, *The "Procedural Turn" Under the European Convention on Human Rights and Presumptions of Convention Compliance*, 15 Int'l J. Const. L. 9 (2017).

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