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focus op rechtspraak

Mónica Ávila Currás

# States joining forces before the ECtHR

**What could be driving some European States to intervene in other States' ECtHR migration cases? And to not intervene? Do some States tend to act together under certain circumstances? What is their impact?**

**THE TRAJECTORY**
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## 1. Introduction

On February 13th, 2020, the Grand Chamber judgment on *N.D. & N.T. v. Spain* over the 'rejections at the border' general practice in Melilla (Spain) was published. Contrary to the previous judgment from the Third Chamber, now no violation of ECHR's Article 4 Protocol 4 – prohibition of executing collective expulsions – was found. On that day, all migration and asylum practitioners read in astonishment the Grand Chamber's argumentation, only to find that the most controversial aspects of the case – such as the jurisdiction, or the consideration of the matter as an 'expulsion' and not 'denial at the border' – were actually confirming the previous judgment. It was something else: the contested aspect was the collective nature of the expulsion.[1] For the Third Chamber, the application of the definition of 'collective' set in the Čonka judgment implied checking whether the expulsion takes into consideration the specific situation of the individuals concerned. The Court analysed the issue at stake and found that the individuals 'were made subject to a general measure consisting in containing and repelling the migrants' attempts to cross the border illegally'. The Grand Chamber decided differently, changing the definition of 'collective' to include a new requirement: that there is no 'culpable conduct' from the applicants. In this case, they considered that the applicants had had the opportunity to use other 'legal ways of entry' for applying for asylum in Spain, and that, by not using them, they were falling into culpable conduct. That different definition of the concept of 'collective' was the key finding a no-violation Article 4 Protocol 4 ECHR.

The reference to 'legal ways' to enter the territory – that later derives in the 'culpable conduct' argument – was already raised in the Third Chamber by the respondent State,[2] but the Court's assessment ignored this argument: the definition of 'collective' used had nothing to do with it. The connection between the existing legal ways to enter the territory, the 'culpable conduct', and how that should somehow lower the protection of the applicants, was made by the respondent State and by the third-party interveners – France, Belgium, and Italy – before the Grand Chamber.

Most interestingly, the three of them contributed somehow to that winning horse argument. In the summary of the submissions included in the judgment, we can see how France referred to *Khlaifia and Others v. Italy* case, and how 'the lack of an individual expulsion decision [could] be attributed to the culpable conduct of the person concerned',[3] citing also *Berisha and Haljiti v. the former Yugoslav Republic of Macedonia*, and *Dritsas and Others v. Italy* cases.
France said – again, summarized by the Court – that:

> 'there had been nothing to prevent the applicants from making use of the avenues that were available to them in law and in practice in order to obtain individualized consideration of their circumstances by the competent Spanish authorities', concluding that 'the applicants had placed themselves in an unlawful situation resulting in the present proceedings and in the fact that no decisions could be taken.'[4]

Italy referred also indirectly to this 'culpable conduct' by saying that:

> 'The present case concerned an attempt by third-country nationals to enter Spanish territory illegally despite having the option of applying for international protection, and therefore came within

1 *N.D. & N.T. v. Spain*, nos. 8675/15 and 8697/15, §§ 102-108, 3 October 2017; and *N.D. & N.T. v. Spain* [GC], nos. 8675/15 and 8697/15, §§ 193-195, 13 February 2020.
2 *N.D. & N.T. v. Spain*, nos. 8675/15 and 8697/15, §71 and §74, 3 October 2017.
3 *N.D. & N.T. v. Spain* [GC], nos. 8675/15 and 8697/15, § 147, 13 February 2020.
4 Vid note 3, § 148.

> the sphere of the security policy and sovereignty of States and of Europe as a whole.‘[5]

Belgium's submission summary reflects on it as well:

> ‘allowing persons who circumvented the rules on crossing borders to enter the territory, when they did not report to an authorized crossing point and did not have the necessary documents to enter and remain in the country, would be wholly contrary to the European rules on border controls and the crossing of borders (...) Persons attempting to cross the border in this way had to be intercepted and handed over, if necessary using coercive means, to the authorities of the State from whose territory they had attempted to cross illegally.‘[6]

When comparing the summary of the respondent State (Spain)'s submissions to the Third Chamber and to the Grand Chamber, we can see how, in the Third Chamber's, the full argument was not that clear – ‘culpable conduct' was never mentioned. Whilst in the Grand Chamber's, the aforementioned argumentations by France, Belgium and Italy were somehow there as well, and even the same case law mentioned by France is referred to by Spain.[7]

It is not possible to know if there was any communication between the respondent party and the third-party interveners before the submissions, and if there was any explicit ‘peer mobilization‘[8] among the Governments in this concrete case, or if it was a mere coincidence. But in any case the convergence between the four States to the same argumentation before the Grand Chamber is, to say the least, curious. Knowing the impact that *N.D. & N.T.* case has had in the ECtHR's case law on pushbacks, how was precisely this shared line of reasoning between France, Italy, Belgium and Spain the key for the non-violation? And how surprising this argument was: could the use of this practice be somehow related to some of the most unpredictable changes in the case law that practitioners could not foresee and were not prepared for? If so, how?

It is interesting to mention at this point that only one case of all the cases brought before the ECtHR against Spain in its history has had third-party interventions by other European States, and it was in 1993. Since then, no other case has brought the attention of any European State enough to submit an intervention until *N.D. & N.T.* case in 2020. Why did this concrete case bring the attention of France, Italy, and Belgium? What could be driving some European States to intervene in other States' ECtHR cases? And to not intervene? Do some States tend to act together under certain circumstances? What is their impact?

## 2. When do third-party States intervene before the ECtHR?

Third-party interventions before the ECtHR from States have received less attention from the Academia than third-party interventions submitted by ngo's and international organizations. It is a more recent phenomenon – while the latter started in the eighties and have been a growing practice since the nineties, States' interventions have become a less marginal praxis only at the beginning of the 2000's.[9] They are usually raised before the Grand Chamber and, contrary to the rest, States' 'interventions are rare and even a phenomenon that a certain proportion of the states has never encountered'.[10]

Being such a rare practice for European States, it makes it very special when it is used, and some cases over some concrete matters receive more third-party interventions from States than others: those concerning states' powers[11], those considered as concerning 'sensitive matters'[12] or for the ‘promotion of restraint ideologies',[13] and migration and national security cases[14] – concretely deportation and Dublin cases.[15]

## Could the States' intervention as third parties be somehow related to some of the most unpredictable changes in the case law that practitioners could not foresee and were not prepared for?

While some of the matters seem to be spread into highly politically motivated – such as those concerning the States' powers – or somehow emotionally driven – those considered ‘sensitive' – migration refers to a whole field of the law that is not any of that *per se*. The implications of having such a special and new praxis in this field have not yet been analysed: does this over-implication of other European States in migration cases before the ECtHR impact the case-law of the field somehow? If so, it would be a very specific response in a very concrete scenario that has to be analysed thoroughly, as I intend to do. I will analyse all judgments and decisions in migration cases issued by the ECtHR – by a Chamber or the Grand Chamber – that have had a third party intervention by a State.

The first part of the present research will gravitate towards analyzing the scenario: the behavior of States concerning this practice before the European Court of Human Rights in migration cases, mostly when they intervene, studying them as agents with their own interests, but also as functional elements that interact with each other in an organic body as is the Council of Europe, and checking the differences in each State's behaviours. It will shed light on the dynamics between States that can be observed, and how these have evolved through time. This analysis is key to understanding the context of the interventions. For example, in *N.D. & N.T. v. Spain*, do Italy, France and Belgium intervene often in pushback matters? Or supporting Spain? Have they always done so? Have the three of them or two of them intervened in other matters? Do they usually support each other?

## 3. Untangling arguments

The doctrinal framework this project departs from is the theory developed by Martti Koskenniemi, who argued that human rights as abstracts become always political[16] choices when applied to a concrete matter, or when interpreted.[17] Human rights are not

5 Vid note 3, § 151.
6 Vid note 3, § 145.
7 Vid note 3, § 134.
8 Term used by Baumgärtel (2018), ‘"Part of the Game": Government Strategies against European Litigation Concerning Migrant Rights', in Thomas Gammeltoft-Hansen and Tanja Aalberts (eds), *The Changing Practices of International Law*, Cambridge: Cambridge University Press, p. 119.
9 Until 2013, NGOs and international organizations had intervened in 237 cases, while by 2015, European States intervened in only 59 – Glas, L. R. (2016). ‘State Third-Party Interventions before the European Court of Human Rights: The "What" and "How" of Intervening', *Journal Européen Des Droits de l'Homme = European Journal of Human Rights*, p. 543.
10 Ibidem, p. 545.
11 Bürli (2017). *Third-Party interventions before the European Court of Human Rights: Amicus Curiae, Member-State and Third-Party Interventions*, Intersentia. p. 146 to 150
12 Vid. note 10 p. 547.
13 Vid. note 11 p. 150.
14 Vid. note 11 p. 143.
15 Vid. note 10, p. 546-547.
16 In Koskenniemi, M. (2009), ‘The politics of international law 20 years later', *European Journal of International Law*, 20(1), p.8, the author explains he talked about ‘politics ', referring to ‘the kind of issues that lawyers had always pointed to when they discussed the use of "discretion" in the law.'
17 I.e in Koskenniemi, M (2001) ‘Human Rights, Politics and Love', 19 *Mennesker og Rettigheter* 33 p.35: ‘meaning of rights is exhausted by the content of legal rights, by the institutional politics that give them meaning and applicability. From a condition or limit of politics, they turn into an effect of politics'.

pre-political, or a universal given,[18] which would situate them as a mere language, a 'legal grammar': a way to justify a chosen decision, or a 'reality'. Human rights are spoken and defined in the ECtHR context by presenting each party's definitions, which are necessarily different 'because we experience the world in contrasting ways, we project different meanings on the words we use to describe it.'[19] From this perspective, for my project I will understand the *arguments* as the framing of the concepts' *definitions*; and each human right will be considered as a concept that is defined in a certain way entailing a concrete standpoint.

Hence, in the second part of the project, I will examine the arguments raised by the third-party States' interventions, and categorize them to see which State uses what kind of argument and the frequency of its use by each one of them. That way, the different definitions – visions – of human rights and migration will be displayed. Taking again *N.D. & N.T.* as an example, the interventions from France, Italy and Belgium seemed to imply a similar understanding of the article 4 Protocol 4 that entails a concrete definition on some concepts like 'security' and 'border', but it is worth a closer look. In the summary of Belgium's submission, the following is said:

> 'Persons attempting to cross the border in this way had to be intercepted and handed over, if necessary using coercive means, to the authorities of the State from whose territory they had attempted to cross illegally'.

That is an apparently small addition to the definition – only one sentence – but a sharp one that makes this way of thinking about the borders quite explicit. Does it entail a substantially different perspective? It is not possible to tell only by reading this summary of the submission in one particular case, but a further analysis of all Belgium's interventions and a peek at the submissions will give us a hint.

I will then examine the impact of these arguments in the reasoning of the ECtHR in the same case they were raised. In *N.D. & N.T.*, for example, we would say that the argumentation of culpable conduct raised explicitly by France and implicitly by Italy and Belgium did have an impact in the judgment. After this analysis over all interventions, we'll be able to see how the argumentation of each State is considered by the ECtHR when they appear in a case as third-party interveners.

Depending on the findings, the third part of the project will try to find plausible explanations of what ties up the States that act together, and if the impact of each category of arguments through time can be linked to a concrete intervener or to a group of interveners.

## 4. What do I expect to learn from this project?

Are third-party interventions by States in migration cases impacting the case law of the ECtHR? If so, who, how, and since when? My aim in the present project is not to provide a 'better' way to achieve fairness, justice, effectiveness or even validity-legitimacy,[20] but simply to provide a better understanding of the system where human rights are being constantly redefined in a crucial and meaningful way, in line with the empirical work done in the field of international courts analysis, to even open it to further debate. As said by Koskenniemi, 'Rights, like any institutions, can be used for good and bad purposes. And it is precisely for this reason that they cannot be detached from political debate about such purposes.'[21] ◄

18 Ibidem.
19 Koskenniemi, M. (2016) 'What is Critical Research in International Law? Celebrating Structuralism', *Leiden Journal of International Law*, 29, p. 733.

20 Ibidem, p. 730, he attributed the good reception of his latter productions on law practitioners to the fact that 'they do not carry the pretense that what is needed are more rules or policies but a better understanding of what goes on under the façade of rule application or policy-implementation, especially in places conventionally thought of as "legal institutions".'
21 Vid. note 17, p.40