Instrumentalised Migration or an Instrumentalised Court?

The Chișinău Declaration Frames Summary Expulsions as Militant Democracy

Camelia-Claudia Muresan

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Amid pending proceedings before the European Court of Human Rights (ECtHR) concerning summary expulsions and arbitrary detentions, in a context marked by over 120,000 documented push-backs on the Belarusian border, the Chișinău Declaration seeks to influence the legal framework within which the Court assesses such practices. In the Declaration, the Committee of Ministers of the Council of Europe (CoE) called for the limitation, perhaps even the exclusion, of human rights protection in the context of migration, when the latter is instrumentalised by a third hostile state or other actor to endanger their security (paras 37-40). It further emphasises the fundamental duty of states to protect their borders and maintain national security in the context of instrumentalisation of migration, drawing on "democracy capable of defending itself" (para 39). The introduction of the militant democracy in this context has been critically flagged by several scholars (Glas, Istrefi, Buyse, and Heri; Donald and Forde). In this contribution, I argue that the ECtHR should not follow this approach as it is not a task for the Court to carve its decisions based on geopolitical circumstances. Moreover, this would present a significant blow to the protection of human rights in the area of migration.

Background

The Chișinău Declaration is a reaction by the member states of the CoE to the migration crisis in Europe. As indicated by Steininger, this crisis has been aggravated by new challenges such as the instrumentalisation of migration, which has also led to states expressing a need for guidelines on how to move forward. In the European context, the instrumentalisation of migration has become highly relevant as Belarus has used this tool since 2021 to retaliate against EU sanctions and to destabilise its neighbouring states.

In the absence of established case law of the ECtHR or other guidelines on the matter, CoE member states have responded by pushing these migrants back to Belarus. According to a report from 9 NGOs in 2024, over 120,000 such push-backs were recorded at the EU border. What is troubling is that they were allegedly implemented through summary expulsions, and accompanied by arbitrary detentions and torture, which have crystallised into applications coming before the ECtHR on the matter. On 12 February 2025, the Grand Chamber heard proceedings in the cases of *H.M.M. and Others v. Latvia*, *C.O.C.G. and Others v. Lithuania*, and *R.A. and Others v. Poland*, which are waiting to be decided, with possibly more cases to follow.

Against this background, the Declaration outlines that the concept of a "'democracy capable of defending itself', as developed in the case law of the Court," can have relevance where migratory movements are deliberately facilitated, encouraged, or exploited (para 39). Further, it stipulates that "a hostile state or other actor cannot be allowed to undermine European democracies and the values on which the Convention is founded and to abuse the system that it was established to protect" (ibid).

Developments in the Court's Case Law

What does this mean in practice? The paragraph, read as a whole, suggests that migrants that are instrumentalised by Belarus are undermining democracy and the values of the European Convention (Donald and

Forde). Worryingly, the Declaration goes a step further to suggest that migrants are abusing the Convention system. As implied by the deliberate terminology, such as "undermining … [or] abus[ing] … [of] values", the Committee of Ministers essentially calls for a militant democracy response to the issue of instrumentalisation.

Although the Court has never used the term militant democracy in its case law analysis, it has measures at its disposal to combat anti-democratic behaviour within the understanding of Karl Loewenstein's theory of militant democracy. At the Convention level, if an individual submits an application advocating for something which is contrary to one of the basic values underlying the Convention, this contributes to the undermining or even destruction of Convention values. As the Court iterated in *Kühnen v. Germany*, pointing to the Convention's preamble, such behaviours attract the response of an "effective political democracy". Presented in this way, it is imperative to answer two preliminary questions: what behaviours are contrary to the basic values underlying the Convention; and what does the Court consider as an effective democratic response?

In the Court's jurisprudence, there are few behaviours that are considered contrary to the basic values of the Convention. To name a few, the Court limited human rights protection as a result of these behaviours when individuals: expressed hate speech and incited violence towards LGBTQ+ individuals, promoted Nazi propaganda and revisionism, ran for office while being previously aligned to the communist party, or called for an armed civil conflict within the country. From these examples, and the wider case law, it can be extrapolated that the promotion of totalitarian ideologies, hate speech, incitement to violence, and activities that are contrary to territorial integrity, are generally considered contrary to the Convention's values.

Depending on the type of behaviour and context, the Court limits human rights protection accordingly. The most extreme response is the complete exclusion of human rights protection if the Court considers that an individual abused their right to application under Article 17 of the Convention. This occurs when they rely on the rights of the Convention or its Protocols with the intention to destroy them. As a response, the Court thereafter declares the application inadmissible. For example, in *Lenis v. Greece*, the applicant had a clear intention to incite violence and extreme hate against the LGBTQ+ community, stating that "homosexuality is a deviation from the laws of nature" and that people should "spit on them[,] condemn them [and] blacken them out" (para. 5). Following a conviction for the incitement to hatred and violence, and a sentence of imprisonment from the national courts, the applicant complained before the ECtHR under Article 10 (freedom of expression). Consequently, the Court declared his application inadmissible due to the abuse of rights.

If a clear intention to undermine the Convention system is not evident, the Court limits, but does not exclude, human rights protection, using the concept of a "democracy capable of defending itself". In the cases at hand, the Court adopts a defensive role to protect the rights and values of the Convention system against individuals that attempt to undermine them (*Vogt v. Germany*, para. 51). The ECtHR examines the application on the merits, balancing the rights of the individual against the state's need to defend democratic society. Notably, in this type of analysis, the Court uses principles from Article 17, without rendering the application inadmissible. In *Ždanoka v. Latvia* [GC], a case concerning the restriction of a parliamentarian to run for office due to being previously aligned with the communist party, the Court considered the rights of the applicant to stand for election against the general context of the case. Even though the applicant had no clear intention to undermine the Convention system, as there was no information about her current communist aspirations, the Court considered the wider context of Latvia, influenced by Russia's invasion of Ukraine, and its history as part of the Soviet Union. The Court concluded that the applicant could pose a threat to the democratic order of Latvia and that the state had a legitimate aim to limit human rights protection in this case. Therefore, no violation was found of Article 3 of Protocol 1 (right to free elections).

Between a Rock and a Hard Place

The Declaration compellingly mentions that migrants instrumentalised by Belarus are undermining and abusing the Convention system, implying that both militant approaches at the Court's disposal could be effective. However, while a previous draft of the Human Rights Steering Committee included Article 17 specifically, in the final version Article 17 was replaced with the concept of a "democracy capable of defending itself". Therefore, the Committee of Ministers were arguably not proposing the Court to adopt an Article 17 approach in the context of instrumentalisation of migration.

Nevertheless, the proposal in the final Declaration is still dangerous. Although it is preferable to Article 17, as it does not have the same chilling effect, the effect of applying the concept of a "democracy capable of defending itself" only softens the blow to human rights protection that the states are about to deliver. In particular, the Court uses the principles in Article 17 to analyse the application on the merits. As pointed out by Donald and Forde, the wording of the Declaration still suggests that migrants alleging violations of their human rights before the ECtHR are attempting to undermine the Convention system by cooperating with the hostile actor.

Adopting this position ignores the power imbalance between these individuals and the state, placing the blame on the individual instead of on the hostile state, which, in this case, is Belarus. The acts of migrants who are victims of the phenomenon of instrumentalisation cannot be merely reduced to an exercise of abuse as such. Amnesty International notes that the migrants come from vulnerable backgrounds and are promised safe entry and residence in the EU by Belarus. They experience brutality from the Belarusian authorities who repeatedly force them to cross the EU border, and they are then pushed back and suffer human rights abuses at the hands of EU member states. What is unsettling is to imply that these migrants – who were coerced and lied to by Belarus – are abusing the Convention system by presenting allegations of human rights violations. Moreover, Ancite-Jepifánova points out that this instrumentalisation narrative cannot be adequately supported in all cases, as many migrants are indeed fleeing from war, political persecution, and have real aims of seeking asylum in Europe for a better life. Therefore, the position proposed places the blame on a vulnerable individual that is stuck between a rock and a hard place.

Concluding Remarks

Given these considerations, the solution to the instrumentalisation of migrants should not be to limit human rights protection through the militant democracy mechanisms of the ECtHR. This would be at the expense of migrants, who, at face value, are not displaying intentions to undermine rights and values of the Convention system. There is no reason that the Court cannot analyse these applications and potentially limit human rights protection, if applicable, by undertaking a traditional balancing exercise which analyses the legitimate aim in light of necessity and proportionality, but without adopting a militant approach.

What is perhaps the key frustration of the CoE is that Belarus, the main culprit, is not a member of the CoE, and therefore it cannot be held accountable for its clear aim to destabilise European democracies through the use of instrumentalised migration. Irrespective of this context, the Court should remain a shield that protects human rights and not an agent that is instrumentalised to solve geopolitical problems.

ABOUT THE AUTHOR

Camelia-Claudia Muresan

Camelia-Claudia Muresan is a Research Fellow at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg.Camelia-Claudia Muresan is a Research Fellow at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg.

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