Challenging Strasbourg

The May 2025 Letter and the Pushback Against the European Court of Human Rights

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Since 22 May 2025, a disquieting letter has been circulating: nine leading EU politicians are calling for "a new and open-minded conversation about the interpretation of the European Convention on Human Rights," with particular reference to migration.

The signatories seek to explore whether "the Court, in some cases, has extended the scope of the Convention on Human Rights too far compared with the original intentions behind the Convention, thus shifting the balance between the interests that should be protected." At the core of their appeal lies a demand for more national discretion in deciding when to expel criminal foreign nationals.

This letter raises not only political and ethical questions but also significant legal concerns. Before examining these implications, it is important to provide a brief overview of its content.

Regular and irregular migration: what is the problem and who is to blame?

The letter begins by reaffirming the signatories' commitment to European values, the rule-based international order, democracy, and the inviolable dignity of the individual. The signatories then turn to address the so-called European migration challenge. They acknowledge that while many migrants successfully integrate and make valuable contributions to their host societies, others remain socially segregated or even engage in criminal activity. Although the latter problem concerns only a minority of immigrants, the letter argues, it risks undermining the very foundations of European societies.

Throughout the letter, the signatories refer variously to "Europe's challenges with migration," the need to "regain control of irregular migration," and problems posed by "criminal foreign nationals." While all these issues present serious challenges, they cannot be casually lumped together if meaningful solutions are to be found.

The signatories, however, seem to suggest that they have identified the main culprit behind this "polycrisis": the European Court of Human Rights (ECtHR). They appear determined to address what they see as the Court's overreach:

> *"[A]s leaders, we also believe that there is a need to look at how the European Court of Human Rights has developed its interpretation of the European Convention on Human Rights. Whether the Court, in some cases, has extended the scope of the Convention too far compared with the original intentions behind the Convention, thus shifting the balance between the interests that should be protected."*

Even the premises on which this letter is based leave the reader puzzled: Do these politicians aim to address migration as a whole, only irregular migration, or merely the problems associated with foreign nationals who engage in criminal activity? Depending on the answer, the relevance and impact of ECtHR jurisprudence on these developments (if any) will vary considerably.

The ECtHR jurisprudence on migration

The question of whether, and to what extent, the jurisprudence of the ECtHR has influenced migration into the territorial area covered by the European Convention on Human Rights (ECHR) is a complex one. The ECtHR began addressing migration issues relatively late[1] but has since issued a series of judg-

ments with significant impact on international migration law.

Among the most notable decisions is **Soering v. United Kingdom (1989)**, in which the Court declared illegal the extradition of an applicant to a country where they faced the risk of inhuman or degrading treatment In **M.S.S. v. Belgium and Greece (2011)**, the Court prohibited returning an applicant to Greece under the Dublin rules where they would face inhuman conditions and a lack of remedies.

In **Hirsi Jamaa v. Italy (2012)**, the Court found that push-back operations on the high seas, returning migrants to Libya where they faced a risk of inhuman and degrading treatment, violated the prohibition of collective expulsion and the requirement of access to effective remedies.

In **Tarakhel v. Switzerland (2014)**, the transfer of an Afghan family to Italy under the Dublin framework was found to violate Article 3 due to the absence of adequate guarantees concerning the children's age and the preservation of family unity.

More recently, in **J.A. and Others v. Italy (2023)**, the Court ruled that the prolonged stay in the Lampedusa hotspot constituted inhuman and degrading treatment.

Nevertheless, much of the scholarly literature remains critical of the ECtHR's willingness to robustly and consistently defend the human rights of migrants. [2] In contrast, the signatories of this letter seem to believe the Court has gone too far.

The questions raised

This development raises several questions: Should we abandon our understanding of the ECHR as a "living instrument"?

There can be no doubt that doing so would entail the loss of one of the Convention's most characteristic features. Moreover, the "living instrument" approach has inspired human rights protection systems across the globe. A retreat from this approach could trigger a broader global regression in human rights jurisprudence.

Even if the decision were taken to abandon this dynamic interpretative approach, a further question would immediately arise: how far back should the ECtHR jurisprudence be reversed? From which specific rulings or lines of reasoning should the Court now depart? Such a retreat could potentially compel the ECHR system to abandon some of its most important achievements.

Based on the content of the letter, it appears that the primary concern of its signatories is to curtail the Court's jurisprudence insofar as it hinders the expulsion of individuals convicted of crimes. However, this jurisprudence is intricately connected with other advances in human rights protection. To cite just one example, the "Soering jurisprudence" was developed in the context of a criminal case, but its significance extends far beyond such cases, as is well established.

Furthermore, even if it were theoretically possible to separate jurisprudence related to "severe" criminal cases from other categories – such as less severe criminal offences or civil or administrative matters – leaving the latter unaffected by the proposed reforms, this would do little to address Europe's broader migration challenges, which the letter itself identifies as a primary concern. Why then, this apparent fixation on "criminals"?

One is left with the impression that the emphasis on "criminals" serves as a pretext to question the ECtHR's jurisprudence on migration as a whole. As already mentioned, in most cases, it would be impossible to isolate a distinct body of case law that applies exclusively to severe criminal cases and to excise from it all elements introduced by the Court's "dynamic interpretative approach" that transformed the ECHR into a "living instrument". How, for instance, could the Soering jurisprudence be limited to non-criminals? Should the prohibition of torture and inhuman or degrading treatment no longer apply to (alleged) criminals? Such a move would plainly place the ECHR

[1] See Marie-Bénédicte Dembour, The Migrant Case Law of the European Court of Human Rights, in: B. Cali et al, (eds.), *Migration and the European Convention on Human Rights*, Oxford University Press 2021, pp. 19-40.
[2] Ibid. See also recently Jens T. Theilen, Framing Migration in Human Rights: How the Reasoning of the European Court of Human Rights Legitimises Border Regimes, in: 27 European Journal of Migration 2025, pp. 66-93.

system behind both the standards of the UN Human Rights system and those of comparable national and regional systems. Although the letter does not explicitly propose such outcomes, it is difficult to see how they could be avoided, despite the vague language of the letter.

Even more worryingly, some international lawyers have endorsed the initiative and interpreted it even more broadly. They argue that Article 3 ECHR has been interpreted too expansively and that it should become possible to expel "foreign criminals" who have committed "serious crimes." According to this view, such individuals have "forfeited" the right to the highest standards of fundamental rights.[3]

But can this claim be sustained? Does this mean that the Soering jurisprudence would no longer apply? Could "murderers and rapists" now be extradited to countries where they would face inhuman or degrading treatment, or even torture? Or do these international lawyers simply fail to grasp the scope of the jurisprudence, or fail to appreciate its relevance?

Even if it were possible to carve out an exception under the ECHR for migrants who have committed (or are merely accused of committing?) "serious crimes" (and who would determine what constitutes a "serious crime"?) there is a serious risk that such an exception would effectively dismantle the protection of migrants under the Convention altogether.

The letter raises numerous additional questions and concerns. If the letter was intended to have a practical impact, we must ask: to whom is it addressed? To the European Court of Human Rights itself? Do nine member states (out of 46) possess the authority to call upon the Court to revise its interpretation of the ECHR? Could even all member states acting together compel such a change? The answer is no. Neither the ECHR nor general international law attributes such powers to the member states collectively, let alone to a minority of them. Would such political interference with the activities of an independent international court be politically and legally acceptable?

The Council of Europe responded swiftly and decisively to these concerns. On 24 May 2025, Alain Berset, the Secretary General of the Council of Europe, issued a statement firmly defending the ECtHR's independence and the need to uphold the rule of law in Europe:

> *"Upholding the independence and impartiality of the Court is our bedrock. Debate is healthy, but politicizing the Court is not. In a society governed by the rule of law, no judiciary should face political pressure. Institutions that protect fundamental rights cannot bend to political cycles. If they do, we risk eroding the very stability they were built to ensure. The Court must not be weaponized — neither against governments, nor by them."*

Conclusions

Perhaps the letter of the nine was mainly intended for an internal audience. Its cautious language appears designed to preempt and mitigate anticipated criticism, as acknowledged within the letter itself:

> *"We know that this is a sensitive discussion. Although our aim is to safeguard our democracies, we will likely be accused of the opposite."*

While the initiative has prompted widespread critique, the responses from some international lawyers reveal how quickly long-standing achievements in human rights protection can be called into question.

At the same time, there is no doubt that the ECHR and its judicial machinery are indeed in urgent need of reform. The ECtHR's jurisprudence on migration is only one – arguably not even the most urgent – element warranting reassessment, ideally within the EU framework.

A more fundamental concern lies in the procedural inefficiencies of the ECHR system itself. The fact that over 95 percent of complaints are declared inadmissible is arguably the system's far more serious problem. This procedural bottleneck represents a genuine challenge to the rule of law in Europe.

[3] The following declaration has been made in this context: "Ich stehe für einen hohen Grundrechtsschutz. Bei einer schweren Straftat hat man diesen allerdings verwirkt." See „Die Presse" 24 May 2025, p. 10.

Reforming the ECHR is thus both legitimate and necessary, but it should happen within a broader framework — perhaps at a conference of states — where priorities are established based on actual needs and competences, and grounded in thorough and informed discussion.

Migration indeed poses a serious challenge for Europe, and public expectations for effective governmental responses are high. However, if national governments – either individually or through EU mechanisms –fail to find viable solutions, attacking the ECtHR is the wrong response. To undermine a judicial institution already struggling with dysfunction is incompatible with a commitment to the rule of law in Europe.

A final observation is warranted. Although the controversy sparked by the May letter – serious as it may appear – will likely prove to be a storm in a teacup, largely due to the strong counter-reaction it provoked, it should not be downplayed in terms of the danger it poses to the defense of fundamental human rights and the rule of law. This controversy once again confirms something particularly dear to this author: that the high-quality teaching of international law is more important today than at any time in history.

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