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# 'Part of the Game'

## Government Strategies against European Litigation Concerning Migrant Rights

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### 5.1 Introduction

Even in times of changing legal practices, the courtroom remains symbolically the ultimate place for states to 'encounter' international law. The rise of 'new-style' international courts with expanded and compulsory jurisdictions has been one of the driving forces behind the legalization of world politics.[1] Rather than simply offering venues for the peaceful settlement of disputes, they are increasingly becoming the assertive guardians of their respective legal instruments. The European Court of Human Rights (ECtHR) in Strasbourg for instance continuously develops the 1951 European Convention on Human Rights (ECHR),[2] to which it famously referred to as 'an instrument of European public order'.[3] From a traditional legal-theoretical viewpoint, such confidence is not necessarily to be expected. States as the original 'masters of the treaty' were long assumed to hold sufficient power to override and even dismantle international courts

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[1] Karen J. Alter, *The New Terrain of International Law: Courts, Politics, Rights* (Princeton, NJ: Princeton University Press, 2014).

[2] European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 222.

[3] *Loizidou v. Turkey*, European Court of Human Rights, Application no. 15318/89, 23 March 1995, para. 93.

if they deemed so necessary.[4] As so often the case, reality turns out to be more complicated. Although more frequently lacking direct control over courts, states and their governments are developing ways to manage the influence of even the most independent ones like the Court of Justice of the EU (CJEU).[5] Achieving greater 'sovereign manoeuvrability' in the European legal order(s) is hereby particularly important where politically sensitive questions such as migration are concerned. As one government official has stated, international courts are now simply 'part of the game' in the intricate process of policymaking in such domains.[6]

This chapter explores the strategies that governments have used to contain the influence of fundamental rights jurisprudence of the two aforementioned European courts in cases concerning migrants and asylum seekers. Over the last two decades, growing migration flows and right-wing political climates in many European countries have created a difficult situation in which governments have enacted legally questionable policies. This, in turn, has led to a rise in litigation before European courts. But despite this increased 'legalization' as reflected in an expanded jurisdiction of the CJEU and the strong involvement of the ECtHR, the degree and the type of their influence remains unclear. This chapter argues that government strategies play an essential factor in this context, as they influence the effectiveness with which the European courts can protect migrant rights. In the domain of migration, four such strategies appear to be particularly prominent: *legal argumentation* concerning the scope of the relevant instruments, policy implications and procedural requirements; *anticipatory measures* aiming to strike out cases or to dampen public reactions to adverse rulings; *peer mobilization* exerting collective pressure on the courts; and *post-judgment positioning* vis-à-vis the judgment or the court in question. To prove the existence and relevance of these practices, this chapter relies amongst others on original research in the form of interviews that were conducted with persons involved in litigation before the European courts, including lawyers, NGO representatives and government officials.[7] The primary focus will be on those politically charged

[4] Eric A. Posner and John C. Yoo, 'Judicial Independence in International Tribunals' (2005) 93 *California Law Review* 1–74.

[5] See Lisa J. Conant, *Justice Contained: Law and Politics in the European Union* (Ithaca, NY: Cornell University Press, 2002) and Andreas J. Obermaier, *The End of Territoriality? The Impact of ECJ Rulings on British, German and French Social Policy* (Aldershot, UK: Ashgate, 2009).

[6] Interview with government official, August 2014.

[7] Twenty-two semi-structured interviews were conducted in Belgium, Luxembourg, the Netherlands, Spain and the UK in the period of August 2014 to May 2015.

migration cases in which governments had a heightened interest in acting strategically.

The chapter is divided into five parts. The first section describes the judicialization of migration policy in Europe and summarizes the most important legal interventions of the two European courts. The following four sections each address in greater detail one strategy in the following order: legal argumentation, anticipatory measures, peer mobilization and post-judgment positioning. The conclusion sums up the findings and places them into the general context of the changing practices in international law.

## 5.2 The European Courts and the Question of Migrant Rights

While both the ECtHR and CJEU have recently become more involved in matters relating to the human rights of migrants and asylum seekers,[8] their interventions remain firmly based on distinct legal frameworks. On the one hand, the ECtHR relies on human rights law in the form of the ECHR, and especially on article 3 (prohibition of torture and inhumane and degrading treatment) and article 8 (right to family life). The CJEU, on the other hand, in applying EU law, deals with questions of both asylum and immigration law and the EU Charter of Fundamental Rights.[9] One important similarity shared by both legal frameworks is, however, that they impose clear limits on the judicial control of migration policy. The ECtHR has thus continuously recognized 'the Contracting States' concern to maintain public order, in particular in exercising their right, as a matter of well-established international law [ . . . ] to control the entry, residence and expulsion of aliens', although 'subject to their treaty obligations'.[10] And while the CJEU now has jurisdiction over EU asylum and immigration law,[11] it does not have the competence to regulate the central aspect of immigration of workers which, according to article 79(5) of the 2007

[8] In this chapter, the expression 'migrants' does not refer to citizens of other EU Member States who under EU law, and especially due to the principle of the freedom of movement, enjoy far greater protection than so-called 'third-country nationals'.

[9] Charter of Fundamental Rights of the European Union (OJ 2012 no. C 326/391, 26 October 2012).

[10] *Moustaquim v. Belgium*, European Court of Human Rights, Application no. 12313/86, 9 February 1991, para. 43. See also *Abdulaziz, Cabales and Balkandali v. United Kingdom*, European Court of Human Rights, Application nos 9214/80, 9473/81, 9474/81, 28 May 1985, para. 67.

[11] States expanded the jurisdiction of the CJEU to also cover asylum and migration law with the signing of the Treaty of Amsterdam in October 1997.

Treaty on the Functioning of the EU,[12] remains a competence of the Member States.[13] Some authors thus conclude provocatively that in the EU legal framework, 'the flow and volume of migration is left to the autonomy and control of Member States, but once the migrants are within EU borders, EU law regulates residence and expulsion'.[14]

The mandate limitations set on both courts have significant repercussions. Saroléa claims that the departing principle of the ECtHR functions as 'a limit of the judicial control that will be exercised and a standard presented as higher than the human rights whose protection is required'.[15] What is more, the situation highlights that migration policy is usually regarded as a *domaine réservé* area which states do not want to concede to international courts.[16] Still, both European courts have witnessed a notable rise in their caseloads relating to migrants and their rights, with a small but growing number of NGOs and specialized lawyers even engaging in strategic litigation.[17] One of the reasons for this expansion has been the reinforcement of the already strong institutional positions of the European courts in recent decades. On the one hand, Protocol 11

[12] Consolidated version of the Treaty on the Functioning of the European Union (OJ 2012 no. C 326/391, 26 October 2012.

[13] Art. 79(5) reads: 'This Article shall not affect the right of Member States to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed'.

[14] Sonia Morano-Foadi and Stelios Andreadakis, 'The Convergence of the European Legal System in the Treatment of Third Country Nationals in Europe: The ECJ and ECtHR Jurisprudence' (2011) 22 *European Journal of International Law* 1071–88, at 1084. Evidently, the latter will have a substantive impact on the former, rendering the conclusion somewhat simplistic. The authors are still correct in highlighting the problem that fundamental aspects of migration policy remain outside the scope of EU law.

[15] Sylvie Saroléa, 'From Protection of the Migrant to the Rights of the Migrant Person: Free the Migrant from His Legal Exile . . . ', in Jean-Christophe Merle (ed.), *Spheres of Global Justice* (Dordrecht: Springer, 2013), 357. A similar argument is presented and elaborated upon in Marie-Bénédicte Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* (Oxford: Oxford University Press, 2015).

[16] Whether or not the unwillingness of states effectively prevents legalization has been questioned in research focusing on the influence of EU law on social and taxation policy, especially with a view to ensuring long-term compliance. See Diana Panke, 'Socil and Taxation Policies – Domaine Réservé Fields? Member States Non-Compliance with Sensitive European Secondary Law' (2009) 31 *European Integration* 489–509.

[17] Interviews with several lawyers and NGO representatives, November 2014 to February 2015. For a more detailed discussion, see Moritz Baumgärtel, 'From Deficit to Dilemma: An Evaluation of the Contribution of Europe's Supranational Courts to the Promotion of the Rights of Vulnerable Migrants', unpublished PhD thesis, Université libre de Bruxelles (2016), 84–89.

to the ECHR of 1994 facilitated direct individual access to the ECtHR. The resulting high number of petitions even threatened, at some point, to make the Court the 'victim of its own success'. On the other hand, states have expanded the jurisdiction of the CJEU to cover asylum and migration law with the signing of the Treaty of Amsterdam in October 1997. Taken together, these institutional and political developments have brought the European courts to the very heart of migration controversies in Europe.

At this point, several important legal interventions can be highlighted without covering all the details of this sometimes technical jurisprudence. Firstly, the European courts have, on several occasions, expanded the conditions under which groups of persons are eligible for residency. Especially significant are the decisions regarding the scope of the *non-refoulement* principle, which the European courts found to be applicable when asylum seekers are not personally targeted, but threatened by generally or cumulatively high risks of mistreatment upon return.[18] Moreover, the CJEU has held that persons could not be expected to hide or restrain their religious convictions or their sexual orientation to 'avoid' persecution.[19] In the latter case, states are also barred from subjecting asylum seekers to certain types of credibility assessments such as a detailed questioning of sexual practices.[20] A quite different but also expanding ground for residency is derived from the right to a family life.[21] The ECtHR ruled in this context that even persons who had lived in a country without a valid permit for a long time could have their presence regularized if this was in the best interest of their children.[22] The CJEU went even further in

[18] The Strasbourg Court in particular has gradually extended the scope of the principle under Art. 3 of the ECHR. See most notably *Salah Sheekh v. the Netherlands*, European Court of Human Rights, Application no. 1948/04, 11 January 2007, para. 148, *N.A. v. the United Kingdom*, European Court of Human Rights, Application no. 25904/07, 17 July 2008, para. 147 and *Sufi and Elmi v. the United Kingdom*, European Court of Human Rights, Application nos 8319/07 and 11449/07, 28 June 2011, para. 293. The CJEU has come to a similar conclusion in looking at the scope of subsidiary protection as established in the Qualification Directive 2004/83/EC, and more specifically Art. 15(c). See Case C-465/07, *Meki Elgafaji, Noor Elgafaji v. Staatssecretaris van Justitie*, [2009] ECR I-921, para. 35.

[19] Joined Cases C-71/11 and C-99/11, *Bundesrepublik Deutschland v. Y and Z*, ECLI:EU:C:2012:518, paras 78–79, and Joined Cases C-199/12 to C-201/12, *Minister voor Immigratie en Asiel v. X, Y, and Z*, ECLI:EU:C:2013:720, para. 71.

[20] Joined Cases C-148/13 to C-150/13, *A, B, and C, v. Staatssecretaris van Veiligheid en Justitie*, EU:C:2014:2406.

[21] See Daniel Thym, 'Respect for Private and Family Fife under Art. 8 ECHR in Immigration Cases: a Human Right to Regularize Illegal Stay?' (2008) 57 *International and Comparative Law Quarterly* 87–112.

[22] *Rodrigues Da Silva & Hoogkamer v. the Netherlands* European Court of Human Rights, Application no. 50435/99, 31 January 2006, para. 44, and more recently *Jeunesse v. the*

stating that non-EU parents could remain in Europe solely by virtue of their dependent child holding European citizenship.[23] On another occasion it held that EU law did not permit decisions about family reunification to be determined based on the point in time (that is, before or after immigration of the 'sponsor') when the relationship was formed.[24]

Some of the most crucial judgments concern the question of state responsibility. Indeed, extra-territorialization and 'outsourcing' of migration control to private actors are two principal methods by which states try to circumvent international obligations in human rights and refugee law.[25] The ECtHR in particular has addressed these practices with some force. In *Hirsi*, the Court decided that Italy had violated several human rights obligations by intercepting and 'pushing back' a vessel with around 200 migrants on board on the high seas.[26] It has also handed down a number of decisions that deal with the EU's Dublin Regulation,[27] which establishes the principle that asylum seekers have to submit their application in the country in which they first entered the Union. Reversing its initially cautious approach towards this principle,[28] the Court held in *M.S.S. v. Belgium and Greece* that Belgium had violated the Convention by returning an asylum seeker to Greece because it 'knew or ought to have known that he had no guarantee that his asylum application would be seriously examined by the Greek authorities'.[29] States cannot therefore deny legal

*Netherlands*, European Court of Human Rights, Application no. 12738/10, 3 October 2014, paras 120–122.

[23] Case C-34/09, *Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm)*, [2011] ECR I-1177, para. 45. The fact that this judgment is primarily based on the rights derived from EU citizenship arguably constitutes a decisive difference in comparison to other 'pure' immigration cases related to the right to family life.

[24] Case C-578/08, *Rhimou Chakroun v. Minister van Buitenlandse Zaken*, [2010] ECR I-1839, paras 59–66.

[25] See Thomas Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (Cambridge: Cambridge University Press, 2011).

[26] *Hirsi Jamaa and Others v. Italy*, European Court of Human Rights, Application no. 27765/09, 23 February 2012.

[27] The most recent version ('Dublin III') of which is 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 (recast) (OJ 2013 no. L 180/30, 29 June 2013).

[28] See *T.I. v. the United Kingdom*, European Court of Human Rights, Application no. 43844/98 (admissibility), and *K.R.S. v. the United Kingdom*, European Court of Human Rights, Application no. 32733/08 (admissibility), 2 December 2008.

[29] *M.S.S. v. Belgium and Greece*, European Court of Human Rights, Application no. 30696/09, 21 January 2011, para. 385.

responsibility solely on the grounds that they were implementing the Dublin regulation. Subsequent rulings further lowered the threshold for rebutting the presumption that another EU Member State was complying with its obligations under the ECHR.[30] The CJEU has by and large followed this approach,[31] though not using the opportunity to clarify whether EU Member States had further obligations under the EU Charter of Fundamental Rights.[32]

Finally, the ECtHR has, on several occasions, found that asylum seekers had been deprived of their right to an effective remedy – a recurrent problem in some countries, such as, for example, Belgium.[33] In *M.S.S.*, the Court concluded that Belgium and Greece had violated the right to an effective remedy under the ECHR. To qualify as effective under Article 13, a remedy has to be accessible 'in practice', as ensured, amongst others, by a timely and functioning system of communication of decisions and a realistic prospect of obtaining legal aid.[34] It also has to consider the vulnerability of certain groups of asylum seekers such as mothers with underage children.[35] In the context of asylum procedures, an effective remedy is also required to have suspensive effect, which would preclude a measure of return to be executed during appeal.[36] In contrast to this, the CJEU has been somewhat more cautious on this specific aspect.[37]

[30] *Tarakhel v. Switzerland*, European Court of Human Rights, Application no. 29217/12, 4 November 2014, and *Sharifi and others v. Italy and Greece*, European Court of Human Rights, Application no. 16643/09, 21 October 2014.

[31] Joined Cases C-411/10 and C-493/10, *N. S. v. Secretary of State for the Home Department and M. E. and Others v. Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, [2011] ECR I-13905.

[32] More specifically, the CJEU could have addressed the obligations under Arts 1 (human dignity) and 18 (right to asylum) of the Charter. The decision not to do so was received critically by those involved in the case, as several lawyers and NGO representatives stated during the interviews (November 2014 to February 2015).

[33] Sarah Ganty and Moritz Baumgärtel, 'Effective Remedies as Capabilities: Towards a User Perspective to Human Rights of Migrants in Belgium' (2014) 8 *Human Rights & International Legal Discourse* 215–34.

[34] *M.S.S.*, paras 318–19.

[35] *S.J. v. Belgium*, European Court of Human Rights, Application no. 70055/10, 27 February 2014, paras 103–4.

[36] *Gebremedhin [Gaberamadhien] v. France*, European Court of Human Rights, Application no. 25389/05, 26 April 2007, para. 66.

[37] According to Basilien-Gainche, the CJEU apparently considers restrictions of 'the right to be heard' a legitimate policy tool in the fight against illegal migration. See Marie-Laure Basilien-Gainche, 'Immigration Detention under the Return Directive: The CJEU Shadowed Lights' (2015) 17 *European Journal of Migration and Law* 104–26, at 122.

The growing involvement of the two European courts has been generally welcomed. In some cases, it has even been hailed as 'a beacon for protecting the rights of migrants'.[38] Yet, considering the hypothesis of this volume, the courts' practical influence may well be influenced (that is, diminished) by the changing and increasingly strategic approach of states in dealing with international law. In this context, obligations concerning the human rights of migrants are no exception.[39] The following sections describe and analyze some of the strategies that governments have used to manage and contain the impact of some of the most important judgments. To perform this analysis, this work relies on first-hand accounts of individuals who were directly involved in the litigation process before the European courts.

## 5.3 Legal Arguments and Strategies in Court

The first aspect that needs to be considered is the strategies employed by governments *in* the European courts as opposed to in the domestic sphere or vis-à-vis the claimant. Most obviously, in-court strategies include attempts of 'interpretive framing' of rules which, as Gammeltoft-Hansen and Aalberts point out, are widespread and even 'inherent in the operation of (international) law'.[40] While courts are generally the forum *par excellence* for the deployment of such practices, interpretative framing can be particularly effective when new or unclear provisions offer the litigating parties the chance to advance their own readings. This, in fact, is frequently the case regarding the human rights of migrants and asylum seekers. EU law on migration and asylum remains arguably 'a legislative patchwork'[41] and a 'bric-à-brac' system,[42] in which the relationship between various parts is often unclear. Moreover, international obligations regarding, for example, the prohibition of *refoulement* are at the same time

[38] Maarten Den Heijer, 'Reflections on Refoulement and Collective Expulsion in the Hirsi Case' (2013) 25 *International Journal of Refugee Law* 265–90, at 265.

[39] Gammeltoft-Hansen, *Access to Asylum*, and Itamar Mann, 'Dialectic of Transnationalism: Unauthorized Migration and Human Rights, 1993–2013' (2013) 54 *Harvard International Law Journal* 315–523.

[40] See Chapter 1, this volume, p. 14.

[41] Kees Groenendijk, 'Recent Developments in EU Law on Migration: The Legislative Patchwork and the Court's Approach' (2014) 16 *European Journal of Migration and Law* 313–35.

[42] Vincent Chetail, 'The Common European Asylum System: Bric-à-Brac or System?', in Vincent Chetail, Philippe De Bruycker and Francesco Maiani (eds), *Reforming the Common European Asylum System: The New European Refugee Law* (Leiden: Martinus Nijhoff, 2016).

subject to constant reinterpretation due to evolving state practice such as the establishment of external border controls.[43] Another example, which is discussed in greater detail in this section, are governments' frequent contestations of the scope of various relevant legal instruments. Yet, in-court strategies can go beyond the interpretive framing of obligations and into the terrain of 'regime and treaty shopping'. This is most notably the case when governments propose arguments regarding policy implications or procedural requirements, which will be discussed thereafter.

Considering the aforementioned state of the law in the migration domain, it is unsurprising that governments frequently try to put their stamp on the interpretation of the scope of protective provisions. Especially the CJEU has dealt with many questions regarding the application of certain provisions and the scope of EU law. In *N.S./M.E.*, the respondent and intervening governments argued that they were not bound by European law in exercising their discretionary right to assume responsibility for an asylum seeker as established in the Dublin regulation.[44] Being outside this scope would also have implied the non-applicability of the EU Charter of Fundamental Rights – a view that the CJEU rejected. In *Zambrano*, a total of seven governments contested the application of EU law, arguing that European citizens, including minor children, would have to have crossed EU internal borders for their non-EU family members to be able to claim residency on the grounds of their European citizenship.[45] The CJEU did not share this view to the strong dismay of the involved governments.[46] However, in some cases governments have successfully impacted the development of EU law, for example in *X, Y and Z* where they opposed the applicants' claim that criminalizing homosexual activities alone constituted an act of persecution according to the EU Qualifications Directive.[47]

[43] Gammeltoft-Hansen, *Access to Asylum*, 94–96.

[44] *N.S./M.E.*, para. 61. [45] *Zambrano*, para. 37.

[46] Interviews with lawyers, NGO representatives and government officials, August to December 2014. It is however worth noting that the argument was accepted by the Court in later cases, which did not include minor children. See for instance Case C-434/09, *Shirley McCarthy v. Secretary of State for the Home Department*, [2011] ECR I-3375. In fact, the Court 'fine-tuned' its decision in *Zambrano*, which therefore represents somewhat of an exception. See Susanne K. Schmidt, 'Judicial Europeanisation: The Case of Zambrano in Ireland' (2014) 37 *West European Politics* 769–85, at 774–6.

[47] See *X, Y and Z*, as well as the opinion of Advocate-General Eleanor Sharpston, delivered on 11 July 2013, paras 40–45. The most recent version of the instrument is Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries

While narrowing interpretations about the scope of protection are routinely proposed, in-court strategies take a more creative shape when they feature a reference to the jurisdiction of the other European court. In this context, governments seek to engage in 'regime or treaty shopping', highlighting its close link to legal argumentation and the fact that the latter may be attempted not only prior but also during judicial proceedings.[48] For instance, the UK government, when appearing before the European courts, has repeatedly sought to benefit from the co-existence of the two European legal frameworks dealing with the human rights of migrants. In *N.S./M.E.*, it suggested that a restrictive interpretation of the scope of EU law did not mean that there would be no human rights protection because the ECHR and the 1951 UN Refugee Convention would still have to be considered.[49] The non-application of EU law was thus presented as unproblematic in human rights terms. At the same time, in some ECtHR cases the UK used precisely the reverse argument. Regarding the scope of the *non-refoulement* principle under the ECHR, the UK argued that the EU Qualifications Directive offered 'a higher level of protection than that provided for by the Convention'.[50] In *Sufi and Elmi*, it stated even more explicitly that the adoption of the Directive 'clearly chose a wider scope than that of the Convention', thus warning the ECtHR not to equate the protection frameworks 'in the absence of the express agreement of the Contracting States'.[51] The flexible and strategic way of construing the relationship between the two legal regimes is further illustrated by the fact that the UK government claimed before the CJEU in *Elgafaji* that the EU legislature 'did not intend to burden the Member States with new obligations . . . concerning the right to asylum'.[52] The arguments in these cases did not persuade either European court, both of which retained a focus on their own instruments.

of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (OJ 2011 no. L 337/9, 20 December 2011).

[48] Chapter 1, this volume. In relation to immigration, treaty shopping may similarly be observed in relation to public international law, notably the law of the sea, see Chapter 8, this volume.

[49] *N.S./M.E.*, para. 61. [50] *N.A.*, para. 105. [51] *Sufi and Elmi*, para. 223.

[52] See *Elgafaji*, Opinion of Advocate-General Poiares Maduro, delivered on 9 September 2008, para. 27. The Advocate-General was highly critical of this stance, claiming that the position of the UK (and the Netherlands) 'play down, if not evade, the reference made by recital 25 to other international and European instruments for protection of human rights and practices existing in Member States'.

A less frequent and arguably more surprising strategy used during proceedings has been to appeal to the possible policy consequences of an expansive judgment. In *Zambrano*, for example, several governments drew attention to the consequences of granting non-EU parents a right to remain on Union territory on the basis of the EU citizenship of their children. According to Advocate-General Sharpston, the Irish authorities, in particular, proposed a 'floodgates' argument, drawing 'a dramatic picture of the wave of immigration by third country nationals' that would lead to '"unmanageable" results'.[53] An interview with two persons present at the hearing suggests that the governments of Germany and the UK made equally strong appeals on the same basis.[54] A different type of claim concerning possible policy consequences was advanced by Belgium, Italy and Poland in *N.S./M.E.* regarding the lack of 'instruments necessary to assess compliance with fundamental rights by the Member State responsible and, therefore, the risks to which the asylum seeker would be exposed were he to be transferred to that Member State'.[55] Although the arguments did not succeed in these specific cases, these propositions are generally not unrealistic regarding the CJEU's modes of interpretation. In fact, the Court itself has frequently relied on consequentialist arguments, though normally with precisely the opposite intention, namely trying to expand the scope and application of EU law and to further European integration.[56]

Finally, in the case of the ECtHR, another very common and effective practice for governments has been to challenge applications regarding the rights of asylum seekers on procedural grounds. Legal arguments about procedure are in fact only seemingly formal and often turn out to imply important substantive questions for the Court, particularly where they can influence decisions about returns of asylum seekers.[57] This pertains for example to Article 35 of the ECHR about the necessity to exhaust

[53] *Zambrano*, Opinion of Advocate-General Eleanor Sharpston, delivered on 30 September 2010, paras 112 and 114. Interestingly, Schmidt finds the reaction of the Irish government to *Zambrano* ruling to be more proactive than would have been strictly necessary since the CJEU subsequently 'fine-tuned' (that is, qualified) its stance. One of the explanations provided for such unexpected behaviour is the change in government, which occurred around the time. See Schmidt 2014.

[54] Interview with lawyers, December 2014.

[55] *N.S./M.E.*, para. 91.

[56] Gerard Conway, *The Limits of Legal Reasoning and the European Court of Justice* (Cambridge: Cambridge University Press, 2012).

[57] Thomas Spijkerboer, 'Subsidiarity and "Arguability": The European Court of Human Rights' Case Law on Judicial Review in Asylum Cases' (2009) 21 *International Journal of Refugee Law* 48–74, at 57–58.

domestic remedies at the time of application, which is in practical terms a submission that 'responding governments will frequently raise, wherever possible'.[58] A cursory look at some of the migration-related cases before Strasbourg confirms the general trend.[59] More recent and forceful, however, are attempts of governments to rely on Article 37 of the ECHR according to which the Court may strike out an application when 'the matter has been resolved' or when 'for any other reason . . . it is no longer justified to continue the examination of the application', for example when defending lawyer have difficulties to maintain regular contact with their migrant clients.[60] In practice, the ECtHR has used this and other reasons to invoke this article and to thereby reduce its caseload, also encouraging friendly settlements and (more problematically) unilateral declarations of governments accepting allegations of violations together with commitments to provide adequate redress.[61] In *Salah Sheekh*, the Dutch government invoked the article, claiming that the applicant had already obtained protection covering a certain category of people (namely Somalis).[62] The Court disagreed.[63] The Dutch government was consequently taken by surprise, having considered the matter to be settled.[64] The Belgian authorities were luckier in the Grand Chamber case of *S.J.*, where they reached a friendly settlement with an HIV-positive applicant with children who demanded a leave to remain on medical grounds.[65] In a burning

[58] Philip Leach, *Taking a Case to the European Court of Human Rights* (Oxford: Oxford University Press, 2011), 126.

[59] One of the earliest occasions at which the Court was confronted with the argument in this context was *Bahaddar v. the Netherlands*, European Court of Human Rights, Application no. 25894/94, 19 February 1998, para. 38. But see also, amongst others, *Salah Sheekh*, para. 119, *N.A.*, para. 86, *M.S.S.*, para. 283, and *Hirsi*, paras 60–61.

[60] This can be the case when vulnerable migrant clients are in hiding, difficult to trace, or when they have lost confidence in the legal system, including in their own lawyers. Two high-profile cases that problematically were struck down for this reason are *Hussun and others v. Italy*, European Court of Human Rights, Application no. 10171/05, 19 January 2010, and more recently *V.M. and others v. Belgium*, European Court of Human Rights, Application no. 60125/11, 17 November 2016.

[61] For a more detailed analysis of the effects of this provision, see Lize R. Glas, 'Changes in the Procedural Practice of the European Court of Human Rights: Consequences for the Convention System and Lessons to Be Drawn' (2014) 14 *Human Rights Law Review* 671–99, at 677–78.

[62] *Salah Sheekh*, para. 115.

[63] More specifically, it held that it could not see the matter as settled since the reconsideration of this temporary protection policy had explicitly been related to the Court making a decision on the merits of a case regarding a Somali national. Ibid., para. 117.

[64] Interview with government official, February 2015.

[65] *S.J. v. Belgium*, European Court of Human Rights, Application no. 70055/10, 19 March 2015 (striking out).

dissenting opinion, Judge Pinto de Albuquerque stressed that in this case a substantive decision would have been 'necessary for the sake of decent protection of the human rights of seriously ill persons in Europe'.[66] In his opinion, reliance on Article 37 enabled the government to 'resolv[e] the situation of the present applicant in order to remain free 'to do business as usual' with all other foreign nationals in a similar situation'.

### 5.4 Anticipatory Measures

The dissenting opinion of Judge Pinto de Albuquerque in *S.J.* draws attention to a wider governmental 'cost-benefit strategy consisting in "buying" a strike-out decision'.[67] In his view, governments seek friendly settlements in order to limit the impact of the Strasbourg Court in particular cases. However, such a strategy requires the taking of steps outside the (European) courtrooms. In the case of *S.J.*, the Belgian government proposed to grant the applicant a residence permit on the basis of 'strong humanitarian considerations'.[68] The applicant posed additional conditions, including unconditional and indefinite leave for her and her children to remain in Belgium and compensation of 7000 euros for 'the suffering undergone . . . as a result of the Belgian State's decision'.[69] The government accepted, thereby avoiding further proceedings and even the hearing before the Grand Chamber, which would, however, come to pronounce itself on the issue in *Paposhvili* two years later.[70]

Empirical evidence shows that the strategy in *S.J.*, although heavily criticized by one of the Court's own judges, is by no means atypical. In fact, governments frequently adopt what one could call anticipatory measures, which pursue the goal of limiting the influence of European courts as much as possible, mostly in cases where the factual situation is about to lead to an undesirable judgment such as the finding of a violation. From a governmental viewpoint, the complete strike-out of a case will represent the optimal result. More specifically, preventing a decision on the principles will allow governments to maintain interpretative flexibility in the future, thereby maximizing 'sovereign manoeuvrability'. To achieve this goal before the Strasbourg Court, they must, in principle, acknowledge the violation and offer some redress, meaning that it is insufficient simply

[66] *S.J.*, 19 March 2015, Dissenting Opinion of Judge Pinto de Albuquerque, para. 1.
[67] Ibid., para. 1, note 3. [68] *S.J.*, 19 March 2015, para. 56. [69] Ibid., para. 57.
[70] *Paposhvili v. Belgium*, European Court of Human Rights, Application no. 41738/10, 13 December 2016.

to prove that the situation of the applicant now complies with the Convention's provisions, as for instance argued by France in *Gebremedhin*.[71] In practice, however, states manage to strike off a substantive number of cases, at times even without an explicit acknowledgment of a violation.[72] In fact, the latter is frequently not 'worth its price', which is why governments will try to avoid it wherever possible. Anticipatory measures thus take different forms, depending on the 'stakes in the case'[73] and the procedural possibilities in the proceedings before the two European courts.

In proceedings before the CJEU, national courts have the right to withdraw the reference for a preliminary ruling that they have submitted earlier.[74] Governments can consequently try to reach a settlement and prevent the CJEU from handing down a ruling.[75] This has been tried in some important instances, although the generally lower number of cases before the CJEU also translates into fewer such attempts when compared to the ECtHR.[76] For example, the Belgian government granted a temporary residence permit for the duration of the national proceedings in *Zambrano*, most likely in the hope that the Court would not hand down a judgment regarding the right to stay.[77] According to one of the involved lawyers, the Court decided to address the question only because the applicant's claim to unemployment benefits concerned the period not covered by this permit. In another instance, the strategy proved at least temporarily

[71] *Gebremedhin*, para. 56.

[72] Dembour, for example, mentions that there were around fifteen 'Dutch hidden cases' with similar facts to *Salah Sheekh*, where the granting of residence permits led to the cases being struck off. Dembour, *When Humans Become Migrants*, 324.

[73] As Galanter pointed out in a seminal article, repeat players (such as European governments in the present context) will 'trade off' tangible gains in a single case to 'rule gains' that may lead to favourable outcomes in future proceedings. See Marc Galanter, 'Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change' (1974) 9 *Law and Society Review* 95–160, at 100–101.

[74] Rules of Procedure of the Court of Justice of 25 September 2012 (OJ 2012 no. L265, 29 September 2012), as amended on 18 June 2013 (OJ 2013 no. L173, 26 June 2013).

[75] However, Art. 100(1) also states that '[t]he withdrawal of a request may be taken into account until notice of the date of delivery of the judgment', which has been interpreted as meaning that the Court may after this date hand down a decision even if a case has been withdrawn. See Morten Broberg and Niels Fenger, *Preliminary References to the European Court of Justice* (Oxford: Oxford University Press, 2014), 324.

[76] One can also assume that given there is still a significant backlog of cases, the ECtHR will still be open to accepting a wide variety of settlements in order to reduce its caseload. This assessment is also in line with the conclusions drawn in Helen Keller, Magdalena Forowicz and Lorenz Engi, *Friendly Settlements before the European Court of Human Rights: Theory and Practice* (Oxford: Oxford University Press, 2010).

[77] Interviews with various lawyers, November and December 2014.

successful. In the *Imran* case, the Court found that a ruling was 'not necessary' after the Dutch government had granted a provisional visa to the spouse of the applicant.[78] The case concerned the highly pertinent question of whether the application for family reunification could be rejected solely on the grounds that a spouse had not passed a civic integration examination. A similar case in Germany was not even referred to the CJEU for the same reason, leading Block and Bonjour to state defiantly that the 'covert strategy of selective lenience [ . . . ] may postpone an EU Court decision, but it cannot permanently diffuse the "liberal constraint" emanating from the EU judiciary'.[79] The fact that the question finally re-emerged in the case of *K and A* confirms their assessment.[80] Seeking a 'removal' of cases appears thus to be a less profitable strategy before the CJEU as compared to the ECtHR, although it has been tried there with some limited success.

Besides offering individual remedies, another way for governments to anticipate a ruling of the CJEU has been to enact partial legislative changes. This practice is reflected in a number of recent Dutch cases, in which asylum was claimed on the grounds of persecution due to sexual orientation. In *X, Y and Z*, the question referred to the Court was whether foreign nationals could be expected to conceal their orientation after returning to their country in order to avoid persecution.[81] As argued not only by the Court, but before the judgment also by Advocate-General Sharpston and scholars,[82] this view was not compatible with legal obligations. According to Sharpston, 'a requirement that applicants should conceal their sexual orientation might be regarded as constituting an act of persecution in itself'.[83] However, interviews with members of NGOs

[78] Case C-155/11 PPU, *Bibi Mohammad Imran v. Minister van Buitenlandse Zaken*, [2011] ECR I-5095, para. 22.

[79] Laura Block and Saskia Bonjour, 'Fortress Europe or Europe of Rights? The Europeanisation of Family Migration Policies in France, Germany and the Netherlands' (2013) 15 *European Journal of Migration and Law* 203–224, at 221.

[80] The CJEU held in this case that civic integration exams should not make it excessively difficult or impossible for families to reunite, for instance regarding the fees required to prepare and participate in such an examination. See Case C-153/14, *Minister van Buitenlandse Zaken v. K and A*, ECLI:EU:C:2015:453.

[81] *X, Y and Z*, para. 37.

[82] See e.g. Sabine Jansen, 'Introduction: Fleeing Homophobia, Asylum Claims Related to Sexual Orientation and Gender Identity in Europe', in Thomas Spijkerboer (ed.), *Fleeing Homophobia: Sexual Orientation, Gender Identity and Asylum* (London: Routledge, 2013), 1–31.

[83] *X, Y and Z*, Opinion of Advocate-General Eleanor Sharpston, delivered on 11 July 2013, para. 64.

revealed that the Dutch government had been quite aware of this fact. It responded quickly to the reference and adjusted its practices already prior to the judgment by shifting towards a stricter assessment of the credibility of the applicants. Since these aspects were not covered in the questions posed in *X, Y and Z*, they had to be addressed in the subsequent case of *A, B and C*, where the CJEU held that assessments could not be based on stereotyped questions, detailed questions about sexual practices or the performance (or offering evidence thereof) of homosexual acts.[84] Again, interviewees suggested that the government took action already prior to the delivery of the judgment after having seen the questions that were referred to the Court.[85] While these quick reactions were beneficial for the asylum seekers making such claims, they also had downsides. As one NGO representative points out, the problem is that the resulting judgments represent 'a more difficult story to spin'. Governments are able to downplay the failings of their former restrictive policies and agendas:

> *[T]hey will say, 'Well . . . that's what they said and that's what we're doing! What do they want us to change?', which makes the position of those criticizing the government beforehand a little bit difficult, because then we have to say, 'Well, they already adjusted their behaviour'.*[86]

The interviewee stressed with some frustration the practical problems that this strategy causes for post-judgment mobilization and lobbying as the story becomes 'not that sexy to sell for papers, for news, and then it doesn't get the attention it should because there was a big issue about the Netherlands'.[87] A similar effect was also achieved in the *Elgafaji* case, where the government had introduced a temporary policy of protecting certain categories of persons (*categoriaal beschermingsbeleid*), namely those originating from central Iraq. This measure, which was granted by the State Secretary for Justice on a discretionary basis 'protected' the applicant at least for a temporary period during the proceedings and – according to the Dutch government – regardless of the protection eventually offered under EU law.[88]

[84] *A, B and C*, para. 72. [85] Interview with civil society representative, February 2015.
[86] Ibid. [87] Ibid.
[88] The national and discretionary nature of this kind of protection (former art. 29(1)(d) of the Dutch Aliens Law of 2000, which no longer exists in this form) was of paramount legal importance to this case. More specifically, the applicant was covered by this measure at the time of the hearing before the Court on 8 July 2008, though it was officially abolished for migrants from Central Iraq already on 22 November 2008 (thus before the final judgment of 17 February 2009). Having granted this kind of protection, the government argued that it did not amount to a type of 'subsidiary protection' in the meaning of the EU Qualifications

While anticipatory measures against European court judgments can be employed in different domains, they are particularly effective in cases dealing with migration and asylum. Especially asylum seekers are satisfied when litigation achieves 'concrete, particular, individual immigration measures, such as the revocation of a deportation order or the granting of a residence permit'[89] due to their vulnerable position and a fear of being returned. The interviews revealed that lawyers and civil society organizations across countries face a difficult dilemma between accepting settlements beneficial for their clients and pursuing promising cases with a potential strategic value for persons with similar interests.[90] Where it is not possible to pursue both goals, interviewees stated a strong preference for the former. However, the examples of *Imran* and *S.J.* both show that it is unclear whether the strategy can indeed secure 'sovereign manoeuvrability' in the long term. Where large numbers of persons are affected, it is likely that legal challenges will continue to be filed, especially as lawyers and civil society organizations are also increasingly driven by a strategic approach to litigation. Hypothetically, the launching of subsequent cases could even lead to a 'complete surrender' by a government on a certain point if only enough applications are filed – a question that needs to be addressed in future research.[91]

## 5.5 International Cooperation: Peer Mobilization

In the past, International Relations scholars claimed that the power of international courts was strongly constrained by their mandate providers, especially states.[92] However, by the end of the Cold War, this view had been heavily challenged and qualified in mainstream theory: rather than

Directive (and more specifically Art. 15(c)). This would leave the discretionary nature of the provision intact while possibly convincing the Court that persons in a similar situation like the applicant were in principle protected under Dutch law. The final ruling in *Elgafaji* thus represents a success for the Dutch government since it did not address the question of whether national legislation offered sufficient protection for such persons under EU law, providing instead a general interpretation and status of Art. 15(c) of the Directive.

89 Dembour, *When Humans Become Migrants*, 324.

90 Even strategically oriented lawyers and organizations are therefore forced to act like 'one shotters', while the governments enjoy the position of 'repeat players' before the European courts. The asymmetry of these two positions is well known in scholarship, having been elaborated upon in Galanter, 'Why the "Haves" Come Out Ahead'.

91 I thank Shai Dothan for drawing my attention to this point.

92 See most notably Geoffrey Garrett and Barry Weingast, 'Ideas, Interests, and Institutions: Constructing the EC's Internal Market', in Judith Goldstein and Robert Keohane (eds), *Ideas and Foreign Policy* (Ithaca, NY: Cornell University Press, 1993), 173–206.

Table 5.1 *Number of Third-Party Interventions by Governments before the CJEU and the ECtHR*

| CJEU | | | ECtHR | | |
|---|---|---|---|---|---|
| Name | Case no. | Appl. no. | Name | Case no. | Appl. no. |
| *N.S. and M.E.* | C-411/10 | 13 | *Tarakhel* | 29217/12 | 5 |
| *Elgafaji* | C-465/07 | 7 | *Ramzy* | 25424/05 | 4 |
| *Zambrano* | C-34/09 | 7 | *M.S.S.* | 30696/09 | 2 |
| *O and B* | C-456/12 | 7 | *Saadi* | 37201/06 | 1 |
| *Abdullahi* | C-394/12 | 6 | *Slivenko* | 48321/99 | 1 |

*Note:* As can be found in EUR-Lex (available at http://eur-lex.europa.eu) and HUDOC (available at http://hudoc.echr.coe.int) databases.

being mere 'agents' of state power, international courts were argued to represent 'trustees'. As a consequence, states would rarely find themselves in a position of using heavy-handed 'recontracting powers' and institutional sanctions to influence international courts.[93] While this observation holds particularly true for the relatively independent European courts, it would be a mistake to ignore the persistent desire of states to defend their legal and political status as 'principals' vis-à-vis the European courts.[94] One effective way of doing this is through peer mobilization. The concept refers to the collective intervention of a multitude of contracting states before European courts (or any other international court for that matter) in order to demarcate a *domaine réservé* and to stress the high political stakes of a case. As such, it can be classified as a special type of 'international cooperation' through which governments attempt to shape (rather than circumvent) the 'constraints' imposed by international legal obligations.[95] While it is difficult to gather reliable data about this practice, a few observations can still be made.

Firstly, one has to consider the frequency of its usage. Table 5.1 illustrates the five 'most popular' migration-related cases before each

[93] Karen J. Alter, 'Agents or Trustees? International Courts in Their Political Context' (2008) 14 *European Journal of International Relations* 33–63.

[94] On this same basis, compelling arguments have recently been made to privilege the perspective of mandate providers (especially states) in the evaluation of the effectiveness of international courts. See Yuval Shany, *Assessing the Effectiveness of International Courts* (Oxford: Oxford University Press, 2014).

[95] See Chapter 1, this volume.

European court, with CJEU cases shown on the left and ECtHR ones on the right. More concretely, the table displays the five instances in which governments submitted the most third-party interventions (TPIs).[96] Peer mobilization appears to be more common before the CJEU than the ECtHR. One state agent to the latter explained this fact by referring to the more limited resources that are available for regular interventions in Strasbourg.[97] Still, the *Tarakhel* ruling (delivered in November 2014) possibly indicates a change in practice in very salient Strasbourg cases, as it sets a new record regarding the number of government TPIs. In contrast, Member States routinely file TPIs before the CJEU. Like *Tarakhel*, the case with the most TPIs by governments in Luxembourg (*N.S. and M.E.*) concerned the application of the Dublin regulation. As previously mentioned, in two of the 'popular' CJEU cases – *N.S. and M.E.* and *Zambrano* – intervening governments drew particularly gloomy scenarios regarding the consequences of rights-confirming judgments. Regarding *Zambrano*, the 2011 annual report of the Dutch Ministry of Foreign Affairs on the jurisprudence of the CJEU actually underlines that the Court 'diverged from the point of view of the Commission and all intervening EU States, including the Netherlands'.[98]

The idea of peer mobilization implies that states will encourage and coordinate their TPIs. Several interviewees suggested that this is indeed the case, although degrees of coordination and formality vary. With governments intervening more rarely in Strasbourg, connections between states remain mostly informal. Peer mobilization is consequently ad hoc, with agents asking their colleagues for support only when cases are particularly salient.[99] One interesting (although somewhat atypical) example in this context is the case of *Ramzy v. the Netherlands*, where the UK used its Presidency of the Council of the EU to inform other EU Member States about 'the possibility for the European Court of Human Rights of revisiting an earlier Court decision in the 1996 Chahal case'.[100] Lithuania, Portugal and Slovakia joined the UK as interveners, arguing that the ECtHR should reconsider the extent to which Article 3 of the ECHR was to be

[96] The number of interventions is indicated on the official judgments and thus publicly available on the InfoCuria and the HUDOC database.

[97] Interview with government representative, February 2015.

[98] Ministerie van Buitenlandse Zaken, *Jaarbericht 2011: Procesvertegenwoordiging Hof van Justitie van de EU* (Den Haag: Het ministerie van Buitenlandse Zaken, 2012), 21 (own translation).

[99] Interview with government representative, February 2015.

[100] Council of the European Union, Press Release 2683rd Council Meeting Justice and Home Affairs, Luxembourg, 12 October 2005, 12645/05 (Presse 247), 12.

applied in expulsion cases, especially where an applicant was suspected of terrorist activities, thus posing a risk to national security.[101] Peer mobilization was therefore combined with an argument regarding policy consequences, as discussed above.

Arrangements seem to be more standardized in some of the CJEU cases. For instance, some governments promised to submit TPIs whenever a certain issue was at stake.[102] In both courts, TPIs were especially made in the 'Dublin cases', probably because many governments faced similar situations with sometimes hundreds of appeals pending. Yet, peer mobilization is more subtle and uncoordinated in other cases. As one government official notes, submissions of more powerful states might embolden the smaller ones to follow suit or, where they are the respondents, to pick a fight when they usually would not.[103] However, states do not always adopt the same points of view. The judgment in *N.S. and M.E.* shows that the thirteen intervening governments proposed quite different arguments. But even in this instance, there were groups of states which shared and defended the same position.

As with other factors, the confidentiality of judicial deliberations in European courts makes it difficult to estimate the impact of peer mobilization on specific judgments. Cases like *Zambrano* prove, on the one hand, that even the intervention of a large number of governments with similar points of view does not necessarily bring about the outcome they desire. On the other hand, interviewees argued that European courts do not ignore such efforts. As one CJEU judge stated, 'the general tendency is to take very serious[ly] what the Member States are saying, particularly in [a] situation where . . . a large number are intervening'.[104] One government official argued with regard to the ECtHR that by increasing the pressure, they can at least postpone undesired rulings in some cases.[105] NGO members, therefore, stress the need to rally multiple civil society organizations

[101] See *Ramzy v. the Netherlands*, European Court of Human Rights, Application no. 25424/05, 27 May 2008 (admissibility), paras 125–30. The case was eventually struck off the list before being considered on the merits as the Court concluded that the applicant had lost interest in his application, not having been in contact with his lawyers for over two years.

[102] As one interviewee suggested, at some point three major EU Member States agreed to submit supporting TPIs in all cases concerning the Turkish Association agreements to stress the political relevance of the issue to the CJEU. Interview with former government representative, August 2014.

[103] Interview with government representative, December 2014.

[104] Interview with CJEU judge, June 2014.

[105] Interview with government representative, December 2014.

as a counterweight to governments.[106] Given the growing number of government TPIs in migration cases before the ECtHR, it is not far-fetched to hypothesize a sort of 'judicial arms race'. As the political deadlock forces a growing number of lawyers and support groups to take their struggle to the European courts, peer mobilization might become an essential tool for governments to defend their primacy in this policy domain.

While peer mobilization is both strategically sensible and corroborated by some evidence from qualitative interviews, further research is certainly needed to clarify the spread of this practice and the circumstances of its usage. Particularly interesting is the question of whether efforts have become more coordinated in recent years.

### 5.6 Post-Judgment Positioning

Finally, a strategic approach of governments can sometimes also be identified in the follow-up to judgments. More concretely, where other in-court or litigation strategies have not been employed or where these have failed to prevent an adverse decision, governments might try to attach a narrative to a certain judgment. While simply refraining from offering any reaction in some cases, they adopt deliberate and even surprising positions in others. The goal is generally to contain the impact of adverse European court rulings, although precise objectives vary depending on the case and the political affiliation of a government. Such post-judgment positioning in the migration context highlights that practices of interpretative framing often do not end at the moment when a judgment has been handed down. Rather, they also appear afterwards, in the 'tribunal of public opinion', where they frequently take on an overtly political character. At times, post-judgment positioning even challenges the authority of a European court as an institution rather than merely dealing with the concrete policy questions at stake in a certain case.

Confronted with adverse decisions in migration cases, the most common position is to seek an alignment with the European court while downplaying the gravity of the violation and the political significance of a case. For example, the Swiss authorities took 'interested notice' of the *Tarakhel* judgment, pledging analysis and verification of measures required for compliance.[107] At the same time, they seemed to convey the impression

[106] Interview with civil society representative, February 2015.

[107] Bundesamt für Justiz, 'EGMR verlangt Garantien vor der Überstellung einer afghanischen Familie nach Italien', Schweizerische Bundeskanzlei, 2014, www.news.admin.ch/message/index.html?lang=de&msg-id=55075 (accessed 28 May 2015) (own translation).

that this 'individual case' did not cast doubt on the Dublin system.[108] In *Hirsi*, most Italian government officials expressed their respect for the ECtHR as a supreme judicial organ, promising to examine the situation and to establish a 'clear, transparent and fair immigration policy'.[109] But seemingly in contradiction to this attitude, the Ministry of Foreign Affairs also stated that 'the treatment of rescued migrants and refugees has always been in line with international obligations'.[110] Such deflections can be particularly effective where anticipatory measures have created a temporarily acceptable human rights situation. Migrant supporters are then unable to direct attention to specific questionable practices. However, short-term compliance after or at the time of a ruling might not at all be indicative of the longer-term approach. While not performing overt 'pushbacks' after the *Hirsi* judgment, Italy continued to engage in policies that are dubious from a human rights standpoint even after the judgment. Only the death of around 300 migrants in a shipwreck close to the Italian island of Lampedusa in 2013 led to a more humanitarian approach in the form of search-and-rescue operations such as *Mare Nostrum*. However, according to a 2014 report by Amnesty International, the authorities still closely cooperated with Libya in questions of migration control while falling short of offering effective asylum procedures in the context of its operations in the Mediterranean.[111] In spring 2015, the government introduced a new proposal at the EU level, focusing especially on the creation of detention centres and the stepping up of coastal guard capabilities in countries like Tunisia and Egypt.[112]

The second and more confrontational approach consists of highlighting one's dissatisfaction with judicial outcomes and shifting the blame to other

[108] Carlos Hanimann, 'Ein Urteil gegen die Gleichgültigkeit', Die Wochenzeitung, no. 45/2014, 6 November 2014, www.woz.ch/-5665 (accessed 29 May 2015) (own translation).

[109] Polchi, Vladimiro, 'Strasburgo, l'Italia condannata per i respingimenti verso la Libia', La Repubblica, 23 February 2012, www.repubblica.it/solidarieta/immigrazione/2012/02/23/news/l_italia_condannata_per_i_respingimenti-30366965/ (accessed 29 May 2015) (own translation).

[110] Ibid.

[111] Amnesty International, 'Submission to the Council of Europe Committee of Ministers: Hirsi Jamaa and Others v. Italy (Application no. 27765/09)', Amnesty International, 2014, www.amnesty.eu/content/assets/Doc2014/B1525_-_second_submission_Hirsi_-_11_Feb_2014.pdf (accessed 30 May 2015).

[112] Manasi Gopalakrishnan, 'The EU's Plan to Restrain Migrants in North Africa Worries Rights Groups', Deutsche Welle, 26 March 2015, www.dw.com/en/the-eus-plan-to-restrain-migrants-in-north-africa-worries-rights-groups/a-18342598?maca=en-rss-en-eu-2092-rdf (accessed 10 July 2015).

actors. For instance, in the aftermath of *M.S.S.*, the Belgian State Secretary of Asylum and Migration overtly criticized Greece, stating that he 'cannot accept that a country like Belgium is being condemned by the European Court of Human Rights because another country does not respect Community law'.[113] More often, however, governments will oppose the position taken by the court in question. This is particularly true for the Strasbourg Court, which is increasingly confronted with strong criticism directly challenging its institutional legitimacy.[114] The strategy is then used to rally the conservative and nationalist parts of the electorate, which are usually opposed to both immigration and interferences of the European courts in domestic politics. As Myjer points out, '[t]he political message is a simple one: blame the Court, emphasize that the State should take care of its 'own' people first, and the last word on immigration matters should not be given to international judges'.[115] In *Hirsi*, for example, some (former) Italian officials displayed such defiant behaviour, going as far as challenging the legality of the judgment. Indeed, the Italian defence attorney declared that the Court had formulated 'an ideological manifesto against Italy and its policies' and that this was 'not the place to debate this matter'.[116] Roberto Maroni, though 'only' the former Minister for the Interior at that time, lamented 'an incomprehensible blow by hypocritical do-gooders'.[117] The *Hirsi* case illustrates that post-judgment positions might differ according to the political affiliation of governments or even individual officials, possibly resulting in a multitude of government positions. Still, where this diversity of views successfully caters to various political interest groups at once (as for example Europhiles and Eurosceptics), it

[113] Pascal Martin, 'Asile: Dresser des murs ne résoudra rien', Le Soir, 29 March 2011, www.lesoir.be/archives?url=/actualite/belgique/2011–03–29/asile-dresser-des-murs-ne-resoudra-rien-831147.php (accessed 30 May 2015) (own translation).

[114] See Barbara M. Oomen, 'A Serious Case of Strasbourg-Bashing? An Evaluation of the Debates on the Legitimacy of the European Court of Human Rights in the Netherlands' (2016) 20 *The International Journal of Human Rights* 407–25 and Spyridōn I. Phlogaitēs, Tom Zwart and Julie Fraser (eds), *The European Court of Human Rights and Its Discontents: Turning Criticism into Strength* (Cheltenham, UK: Edward Elgar, 2013).

[115] Egbert Myjer, 'Why Much of the Criticism of the European Court of Human Rights is Unfounded', in Phlogaitēs, Zwart and Fraser (eds), *The European Court of Human Rights and Its Discontents*, 41.

[116] Arnd Riekmann, 'Italy Told Not to Send Back Intercepted Refugees', Deutsche Welle, 24 February 2012, www.dw.de/italy-told-not-to-send-back-intercepted-refugees/a-15765553 (accessed 30 May 2015).

[117] Polchi, 'Strasburgo, l'Italia condannata per i respingimenti verso la Libia' (own translation).

might end up benefiting the popularity of a government despite apparent inconsistencies.

Finally, some interviewees made the interesting point that governments may, at times, seek a confrontation with the European courts. One government official explained, for instance, that at one point the election of a right-wing government brought about a strategy of pushing the boundaries of European law with particularly narrow interpretations to, 'in the end, have the Court . . . tell you that it is not possible what you are doing'.[118] The result would either be the approval of the policy or a new opportunity to contest the authority of the European court in question. According to an NGO representative from the same country, governments can thus shift political blame in a way that is usually not possible with domestic courts.[119] Put more simply, when unassertive domestic judiciaries force the European courts to be active in the enforcement of migrant rights, governments might successfully combine highly restrictive migration policies with a confrontational post-judgment positioning. To borrow a concept that has been developed with regard to judicial strategies,[120] governments are able 'to walk on the brink of noncompliance' with human rights obligations while risking very little given the critical attitude of their electorates. While future research needs to inquire into the spread of such tactics among right-wing governments, this plausible scenario shows the potential import of post-judgment positioning into EC litigation on migrant rights.

## 5.7 Conclusion

Focusing on cases dealing with the human rights of migrants and asylum seekers, this chapter has sought to identify and explain a number of government strategies aimed at managing the influence of the European courts and maximizing their 'sovereign manoeuvrability' in the European legal order(s). While the varying political impact of international courts has recently come under closer scrutiny in scholarship, such practices of political contestation in legal engagement have so far remained underresearched. Based on original research and some general observations, this chapter has tried to elucidate four particular strategies, namely legal

[118] Interview with former government representative, August 2014.
[119] Interview with civil society representative, February 2015.
[120] See Shai Dothan, *Reputation and Judicial Tactics: A Theory of National and International Courts* (Cambridge: Cambridge University Press, 2014), 117–22.

argumentation in court, anticipatory measures, peer mobilization and post-judgment positioning. The first aspect refers to the practice of trying to persuade the European courts during the proceedings of the application or the interpretation of legal provisions, especially where they relate to the scope of legal instruments, policy implications and the 'correct' application of procedural requirements. The adoption of anticipatory measures such as the granting of temporary residence permits or partial legislative changes are meant to remove cases from the courts or to temper public reactions to imminent adverse judgments. Moreover, states are found to mobilize their peers to intervene alongside them in particularly politically salient cases, thus increasing the pressure on the European courts to respect the preferences of contracting states. Finally, governments may adopt different positions in the aftermath of negative rulings in migration-related cases, trying either to show respect and alignment with the European court or to directly confront judicial authority.

To be sure, governments do not always act in strategically optimal ways. For instance, the UK arguably 'lost' the case of *Sufi and Elmi* by submitting a report of poor quality about the human rights situation in Somalia at that time.[121] The ECtHR consequently concluded that a return of asylum seekers is not permissible under the Convention. However, the increasing reliance on the European courts by organizations and lawyers supporting migrants is likely to inspire more calculated, resourceful and coordinated government strategies in the future. This trend is already visible in the growing number of TPIs by governments, especially in cases relating to the Dublin regulation. As the most significant judicial interventions in the migration area are quite recent, it is not unlikely that actors will engage in a sort of 'judicial arms race' before the European courts for at least as long as the political platforms remain deadlocked.

The examples discussed in this chapter illustrate how governments employ various strategies before, during and after European courts litigation. This finding confirms the general observation in this volume that the practices in international law are changing as governments act increasingly strategically to maximize their political room for manoeuver. However, having focused only on the European courts and the migration area, it needs to be seen how this trend plays out across international courts and other policy areas. The strategies identified here are generic in the sense of being transferable to other domains even if the adoption of anticipatory measures, for example, seems particularly 'promising' in the context

[121] Interview with civil society representative, January 2015.

of migration. But the motivations for the application of various measures might differ, with governments either trying to retain control over certain particularly salient policy areas or simply being afraid of general reputational costs. Furthermore, the chapter illustrates that it is difficult to assess the actual effectiveness of these strategies. The fact that governments had to accept negative outcomes in many of the examples cited here does not disprove their value. The question is rather: what would the courts have decided in their absence? The analysis thus finally highlights the ambiguity of judicial outcomes. Even the reinforcement of a legal regime by a strong and assertive international court does not necessarily lead to its promotion. More clarity about the prevalence and effectiveness of government strategies will be necessary for a differentiated evaluation of the influence of the growing number of international courts on the changing practices of international law.