

When Humans Become Migrants

*Study of the European Court of Human Rights
with an Inter-American Counterpoint*

MARIE-BÉNÉDICTE DEMBOUR

OXFORD
UNIVERSITY PRESS

Contents—Summary

<i>Stylistic note</i>	xxi
<i>List of Tables</i>	xxiii
<i>Table of Cases</i>	xxv
<i>List of Abbreviations</i>	xxxv

1. Introduction 1

I. FOUNDATIONS

2. The Alien in the Social Imagination of the Founding Texts 35
3. Rejecting the Legacy of Empire: Postcolonial Dereliction
(*East African Asians Case*) 62
4. Dislocating Families: The Strasbourg Reversal (*Abdulaziz, Cabales
and Balkandali*) 96
5. Not-so-Threatening Foreigners: Nationality as a Core Human
Rights Issue (Advisory Opinion 4/84) 130

II. CONSOLIDATION

6. Shattering Lives: The Normalisation of Deportation
(After *Berrehab*) 161
7. The Sleeping Beauty Awakens Late: An Absolute Prohibition
with Many Buts (Around *Soering*) 196
8. Social Protection? All are Equal, But Some More So than Others
(After *Gaygusuz*) 250
9. The Voice of the Inter-American Court: Equality as *Jus Cogens*
(Advisory Opinions 16/99 and 18/03) 282
10. Reparations are a Big Issue: Taking Human Rights One Step
Further (*Yean and Bosico*) 313

III. PROSPECTS

11. Migrants, Not Criminals: The Continual Elaboration of Strong Human Rights Norms in the Inter-American System (<i>Vélez Looz</i>)	359
12. Domestic Asylum Procedures Aside: Scrutinising Strasbourg's 'Scrutiny' (<i>M.S.S.</i>)	402
13. The Darkest Case Law: Condoning Rightlessness (<i>Bonger et alia</i>)	442
14. On the Road to Substantive Equality: Due Process and Non-discrimination at San José (<i>Nadege Dorzema and Pacheco Tineo</i>)—by Lourdes Peroni	482
15. Conclusion: The Way Forward	503
<i>Index</i>	513

Contents

<i>Stylistic note</i>	xxi
<i>List of Tables</i>	xxiii
<i>Table of Cases</i>	xxv
<i>List of Abbreviations</i>	xxxv

1. Introduction	1
I. The Strasbourg Reversal or Putting the Migrant First	1
II. Human First: The <i>Pro-Homine</i> Bias of the Inter-American Court	6
III. The Contrasting Bias of the Two Courts	8
IV. Explaining the Contrast	9
The figure of the state as guardian or villain	9
The sociological make up of the two institutions	12
The different outlooks of migration in Europe and Latin America	14
V. The Oranges and Apples of Human Rights Law	16
VI. One European Court or Several?	17
VII. Documenting the Strasbourg Undercurrents and Neglected Mainstream	19
VIII. A Dissecting Method of Analysis	22
IX. The Book's Historical Structure, European Focus, and Inter-American Counterpoint	23
X. The Scope of This Study	26
The Strasbourg and San José Courts	26
Immigration issues	27
No intersectional analysis	28
XI. The Open Borders Intuition	29
XII. Migrants First, Who Next?	31

I. FOUNDATIONS

2. The Alien in the Social Imagination of the Founding Texts	35
I. The Drafting of the ECHR: A History of Political Compromises	37
II. The Citizen-Centred Focus of the Post-1945 Human Rights Regime	41
III. Broadening the Personal Scope of the European Convention: An Italian Initiative	42
IV. The Memory of the Internment of 'Enemy Aliens'	45
V. The Appearance of the Alien Clause in European Debates	46
VI. A Largely Redundant Alien Clause Open to Reduction	49
VII. The Discriminatory Alien Clause Enters the European Convention Uncontested	50

VIII. The Entry of Special Migrant Rights in the Universal Declaration	52
IX. Migrants' Rights: A Latin American Innovation?	53
X. Migrant Rights are Expanded in the (Latin) American Convention	56
XI. Europe Chooses not to Protect the Alien in the ECHR	57
XII. The Significance of Article 16 ECHR Today	59
XIII. Conclusion	60
3. Rejecting the Legacy of Empire: Postcolonial Dereliction (<i>East African Asians Case</i>)	62
I. The Colonial Clause: At the Heart of the European Convention	66
II. An Array of Strategies for Keeping the Convention out of the Colonies	71
III. The British Response to the Potentially 'Biting Teeth' of the Convention	74
IV. The Asian Presence in East Africa	79
V. British Citizenship and the Right of Entry up to the Commonwealth Immigrants Act 1968	82
VI. Cabinet Papers Reveal the History of the Passing of the Commonwealth Immigrants Act 1968	83
VII. The European Commission: A Racially Motivated and thus Degrading Piece of Legislation	86
VIII. One Commissioner's View: The British Government was Entitled to Pass the Legislation	88
IX. Postcolonial Dereliction: BPPs Lose their Case	89
X. The East African Asians Story Continued: More Immigration Controls	92
XI. Closure of the Gates in Time of Crisis: A Paradox of Human Rights Law	93
XII. Conclusion	93
4. Dislocating Families: The Strasbourg Reversal (<i>Abdulaziz, Cabales and Balkandali</i>)	96
I. From Labour to Family Migration	99
II. Joined Applications but Distinct Fates: <i>Alam and Khan's</i> Friendly Settlement v. <i>H.S.'s</i> Inadmissibility	99
III. What Does the Human Right to Family Entail? The Migrants' Response	102
IV. The Government's Reply: The State's Right of Exclusion	105
V. From a Blank Slate to No Right to Choose One's Country of Residence	106
VI. The (Non-)Admission of Foreign Husbands: British Policy in the 1960s and 1970s	107
VII. Three Test Cases	109
VIII. No Right to Family Reunion: <i>ABC</i> sets the Tone for Strasbourg Migrant Case Law	111

IX. Sexual Discrimination under Scrutiny, but without Producing Rights	114
X. The Court Shares the States' Fear of Immigration	115
XI. A Well-Established Principle of International Law	117
XII. Putting State Sovereignty before Human Rights: The Strasbourg Reversal	118
XIII. Who are the Successful Applicants? The Exceptional <i>Tuquabo-Tekle v. the Netherlands</i>	119
XIV. Family Reunification: Why not a Right under the European Convention?	122
XV. Back to <i>ABC</i> : <i>Biao v. Denmark</i>	125
XVI. Definite Losers: The Family Patterns Prevalent in Non-Western Societies	126
XVII. Conclusion	127
5. Not-so-Threatening Foreigners: Nationality as a Core Human Rights Issue (Advisory Opinion 4/84)	130
I. A Slow Start for the Inter-American Court of Human Rights	132
II. Foreigners Perceived as Threatening: ' <i>Nicas</i> ' in Costa Rica	134
III. Advisory Opinion 4/84: Human Rights First	135
IV. The Features of the Inter-American Approach So Far: Recapitulation	140
V. Pushing the Equality Agenda Further: The Separate Opinions of Judge Piza Escalante and Judge Buergenthal	141
VI. Underdeveloped Strasbourg Case Law: The Case of the Slovenian 'Erased'	144
VII. The Prominence of Nationality Issues in Inter-American Case Law	147
VIII. Who are the Judges?	148
IX. Conclusion	153
II. CONSOLIDATION	
6. Shattering Lives: The Normalisation of Deportation (After <i>Berrehab</i>)	161
I. The First Thirty Years: The Commission Declares Expulsion Cases Inadmissible	164
II. The Court Steps In: <i>Berrehab's</i> Breakthrough	170
III. The Tip of the Iceberg	172
IV. The Human Meaning of Deportation: Shattered Lives	174
V. The Expulsion of Foreign Criminals: An Issue which Attracts Diametrically Opposed Positions	178
VI. The Absence of a Principled Approach by the Court and the Ensuing Judicial Lottery	179
VII. The Strasbourg Reversal Takes Hold	185
VIII. Taking a Stance against Expulsion: A Series of Legal Tools which Remain Unused	187
IX. The Elephant in the Room: Despicable Discrimination	190
X. Conclusion	193

7. The Sleeping Beauty Awakens Late: An Absolute Prohibition with Many Buts (Around <i>Soering</i>)	196
I. Who Remembers <i>KCL</i> ? The European Commission's Unpromising Case Law	199
II. <i>Soering</i> : The Court Finally Steps In	202
III. <i>Cruz Varas</i> ' First Seed: The Court need not Believe the Applicant	207
IV. A Seed is not the Whole Story: Conflicting Tendencies in the Strasbourg Case Law	211
V. <i>Cruz Varas</i> ' Second Seed: The Court Normally accepts the Facts as Presented by the Respondent State	213
VI. <i>Cruz Varas</i> ' Third Seed: The Court's Long Reticence at Scrutinising National Determination Procedures	217
VII. <i>Cruz Varas</i> ' Fourth Seed: The Court Examines the Article 3 Complaint <i>Ex Nunc</i>	219
VIII. <i>Cruz Varas</i> ' Fifth (but now Dead) Seed: Strasbourg Requests for the State to Stay Deportation are not Binding	221
IX. <i>Cruz Varas</i> ' Confirmations: Article 3's High Threshold, Non-Violation of Article 8 and Inadmissibility of Any Article 6 Complaint	222
X. Back to the Commission and enter <i>Kozlov</i> and <i>Varfolomejev</i> : When is Inhuman 'Inhuman'?	224
XI. <i>Vilvarajah</i> : Randomly Inflicted Ill-Treatment does not Qualify for Article 3 Protection	228
XII. An Important Aside: Why the Leading Case of <i>Soering</i> , not <i>Vilvarajah</i> ?	232
XIII. An Alternative Pro-Migrant Case Law: The Leading Case of my Imagination	233
XIV. The Court's Reluctance to Proceed to Verdicts of Violation	234
XV. Is a Return to No Medical Care Compatible with Article 3? The One-Off Case of <i>D. v. the United Kingdom</i>	238
XVI. Glass Half Full? From <i>Chahal</i> to <i>Saadi v. Italy</i> , National Security does not Dampen the Prohibition of a Return to Torture	241
XVII. Glass Half Empty? <i>Sivanathan</i>	244
XVIII. The Missing Case Law	246
XIX. Conclusion	247
8. Social Protection? All are Equal, But Some More So than Others (After <i>Gaygusuz</i>)	250
I. The Short and Straightforward <i>Gaygusuz</i>	252
II. The Anticipated Significance of <i>Gaygusuz</i>	255
III. Immigration and Welfare: A Viable Relationship	257
IV. Universalism and Closure: A Contradiction at the Heart of Liberalism	258
V. A Belated Answer to the Austrian Government: <i>Gaygusuz</i> Applies to the Legally Settled Migrant	259
VI. Reining in <i>Gaygusuz</i> : Three Cases Reaffirm Closure	261
VII. Post- <i>Gaygusuz</i> Ripples	262

VIII. What a Revolutionary Post- <i>Gaygusuz</i> Case Law would have Looked Like	264
IX. When Discrimination is not Discussed: <i>Timishev</i> and Other Non-Existent Cases on Education	265
X. Discrimination goes Unseen? From <i>Moser</i> to <i>K.A.B.</i> and <i>Zhou</i> , or When Children are Taken Away from their Parents	267
XI. A Radical Suggestion: Migrants are Discriminated Against and this Amounts to Inhuman and Degrading Treatment	270
XII. Extending <i>Gaygusuz</i> to an Irregular Migrant: <i>Anakomba Yula v. Belgium</i>	271
XIII. Immigration Status not a Criterion of Potentially Objectionable Distinction: <i>Ponomaryovi</i> 's Retreat	272
XIV. From <i>Ponomaryovi</i> to <i>Bah</i> : The Strasbourg Mainstream?	275
XV. The Court's Regrettable Minimisation Strategy: <i>Zeibek</i> and <i>Ponomaryovi</i>	278
XVI. Conclusion	280
9. The Voice of the Inter-American Court: Equality as <i>Jus Cogens</i> (Advisory Opinions 16/99 and 18/03)	282
I. Mexicans in the United States: A Brief History	284
II. The Inter-American Court Asserts its Jurisdiction to Deliver Advisory Opinion No. 16	285
III. The Inter-American Court Declares Consular Information a Human Right	288
IV. Other Courts Deny Consular Information is a Human Right: <i>LaGrand</i> , <i>Avena</i> and the Unknown <i>Kimmel</i>	292
V. Equality as <i>Jus Cogens</i> : Advisory Opinion No. 18 on the Rights of Undocumented Migrants	296
VI. The Concurring Opinions	300
VII. The State and the Individual Interests: Different Positionings	302
VIII. Inter-American Activism and European Restraint: Four Key Indicators	304
The judicial interpretation of human rights provisions	305
The normative basis of the courts' reasoning	305
The intended general or particular reach of the ruling	306
Civil society participation	307
IX. The Dangers of a Visionary Jurisprudence: Real Risks or False Alarm?	308
X. Conclusion	311
10. Reparations are a Big Issue: Taking Human Rights One Step Further (<i>Yean and Bosico</i>)	313
I. Haitians in the Dominican Republic	316
II. The Inter-American Court Orders Provisional Measures in 2000	318
III. No 'Friendly Settlement' in <i>Yean and Bosico</i>	322
IV. Friendly Settlements in the European System	323
V. <i>Yean and Bosico</i> 's Merits: Multiple Inter-Related Violations	326

VI.	The <i>Declaring</i> Role of the Strasbourg Court and the Development of the Pilot Procedure	334
VII.	The Strasbourg Court's Incursions into Execution and the <i>Hirsi Jamaa</i> Indication	337
VIII.	The Dominican Republic Digs its Heels: Did the Inter-American Court Request Too Much in <i>Yean and Bosico</i> ?	340
IX.	The European System's Not-So-Impeccable Execution Record	341
X.	'Execution' and 'Execution': A Rare Comment from the Strasbourg Court in <i>Emre (No.2)</i>	344
XI.	Judicial Restraint in the European System Not a Guarantee of State Respect	346
XII.	Provisional or Perennial Measures? The Inter-American Court Cannot Act Alone	348
XIII.	Conclusion	350

III. PROSPECTS

11.	Migrants, Not Criminals: The Continual Elaboration of Strong Human Rights Norms in the Inter-American System (<i>Vélez Looz</i>)	359
I.	Mr Vélez Looz has his Day in Court	361
II.	The Position of the State of Panama and the Rest of the Hearing	364
III.	The Question Asked in Summer 2010: What will the New Court Decide?	365
IV.	The Beginnings of a San José Reversal? The Inter-American Court Grapples with the Same Tension as the Strasbourg Court	366
V.	<i>Vélez Looz</i> 's Findings: Immigration Detention Subjected to Safeguard after Safeguard	368
VI.	Recapitulation: Immigration Detention under the American Convention	374
VIII.	A World Apart: The Strasbourg Court's Approach to Immigration Detention	375
IX.	The Source of the European and Inter-American Chasm: A Matter of Text, Context, Judges and Judicial <i>Habitus</i>	382
X.	The Realism, Humanism and Thoroughness of the Inter-American Court	384
XI.	A Lone Five-Year-Old in Detention: <i>Tabitha</i> Proves an 'Inter-American Tipping Point' for the Strasbourg Court	387
XII.	The European Court of the Rights of States? Subsequent Case Law on Children's Detention	392
XIII.	Don Jesús' Story (Continued): What Mr Vélez Looz did not get from the Inter-American Court	397
XIV.	Vulnerability rather than Equality: Where the Inter-American Court refused to go in <i>Vélez Looz</i>	399
XV.	Conclusion	400

12.	Domestic Asylum Procedures Aside: Scrutinising Strasbourg's 'Scrutiny' (<i>M.S.S.</i>)	402
I.	The Context: 'Dublin II'	404
II.	The Extraordinary <i>M.S.S.</i> : A Brief Tour of the Judgment	405
III.	The Court Distances Itself from the Respondent States	408
IV.	Embracing a Human Rights Reasoning: The Reversal of the Reversal	411
V.	How the Court Overcame its own Case Law: From <i>T.I.</i> to <i>K.R.S.</i> to <i>M.S.S.</i>	412
VI.	<i>M.S.S.</i> : An Exceptional Situation, an Exceptional Applicant, an Exceptional Lawyer, an Exceptional Judge	416
VII.	The States' Standard Arguments—And Possibly an Irritated Court	420
VIII.	Awaiting the Repetition of <i>M.S.S.</i>	422
IX.	Defective Asylum Domestic Procedures: The Strasbourg Story up to <i>M.S.S.</i>	425
X.	Paying the Price for a Lack of Scrutiny: The Rise and Fall of Rule 39 Requests	434
XI.	After <i>M.S.S.</i> : Afghan Refugees in the Strasbourg Case Law	436
XII.	When will the Court Intervene: A Matter of Documentation	438
XIII.	Conclusion	440
13.	The Darkest Case Law: Condoning Rightlessness (<i>Bonger et alia</i>)	442
I.	Rightlessness under the Convention: The <i>Bonger</i> Case Law	446
II.	At Issue in the <i>Bonger</i> Case Law: A Kafkaesque Stalemate	448
III.	How We Came to <i>Bonger, I.</i> , and <i>K.</i> : Long Established Principles and Ways of Reasoning	451
IV.	On Destitution and the Inapplicability of Article 3: Back to <i>Muslim</i> as if <i>M.S.S.</i> had Never Happened	452
V.	The Residence Permit Case Law in Three Paragraphs	456
VI.	The Implacable Logic of Inadmissibility: The Examples of <i>Solomon</i> and <i>Dremlyuga</i>	457
VII.	The Case Law Evolves: The <i>Sisojeva</i> , <i>Mendizabal</i> , and <i>Da Silva</i> 's Chambers' Verdicts of Violation	459
XIII.	Back to the Non-Violation Mainstream: The <i>Sisojeva</i> Grand Chamber Judgment	463
IX.	The Best Interests of the Child versus a <i>Fait Accompli</i> : An Inherent Tension, a Divided Court, a Lottery	464
X.	A Successful Parallel to <i>Bonger</i> : The Swiss Canton Case Law	466
XI.	Russian Case Law Paves the Way: <i>Liu (No. 2)</i> and <i>Alim</i>	469
XII.	Why did Adult Children Suddenly Count in <i>Hasanbasic</i> ?	474
XIII.	Illegal Status Aggravates a Violation by the State: <i>Polidario</i>	476
XIV.	No Right to a Particular Type of Residence Permit	478
XV.	Rightlessness: The Ultimate Discrimination	479
XVI.	Conclusion	480

14. On the Road to Substantive Equality: Due Process and Non-discrimination at San José (<i>Nadege Dorzema and Pacheco Tineo</i>)—by Lourdes Peroni	482
I. <i>Nadege Dorzema</i> : Continuing on the Road to Equality, Albeit Hesitantly	484
Joining the equality road	484
Wandering off the equality road	486
Remaining nonetheless on the equality road	489
II. <i>Pacheco Tineo</i> : Enlarging the Due Process Road	490
Specific procedural standards in migration proceedings: following the well-paved road of due process	491
The <i>Pacheco Tineo</i> contribution: adding an asylum lane onto the due process road	492
Applying the principles to the case: the absence of procedural guarantees	494
<i>Passerelle</i> to the equality road?	495
III. Migrant Children: In Search of Yet More Specific Standards for Another Sub-Group	497
IV. Conclusion	500
V. Postscript	501
 15. Conclusion: The Way Forward	 503
I. The Problem with the Strasbourg Case Law	503
II. The Substantive Contours of a Strong Strasbourg Jurisprudence: Articles 3, 6, and 14 ECHR	505
III. Thinking about Process: Expecting the Court to Act with Equanimity	506
IV. The Inter-American Experience	508
V. What Does the Future Hold?	509
VI. Equality, Open Borders and the Right to Act Humanely	510
 <i>Index</i>	 513