



# **EQUALITY AND FAIRNESS FOR ALL?**

## **AN ANALYSIS OF RACIALIZED CONSIDERATIONS IN THE ACCESS TO REFUGEE PROTECTION BY THE ECTHR**

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# OVERVIEW

1. Introduction

2. Rights at the border: the prohibition of collective expulsion in the ECHR

3. Racialized considerations in ECtHR jurisprudence

4. A proposal: thinking non-discrimination and procedural guarantees together

5. Key Takeaways

# 1. INTRODUCTION

- 2022 “incident” at Moroccan/Spanish border, justification N.D. and N.T. v. Spain
- Stating the obvious: framing matters
- **Case law & dissenting opinions** – framing as security issue, dehumanized, distinguishes between deserving and non-deserving
- **Case study:** the prohibition of collective expulsion (Art. 4 Prot. 4 ECHR)

## 2. RIGHTS AT THE BORDER: THE PROHIBITION OF COLLECTIVE EXPULSION IN THE ECHR

- **Mantra:** balance right to control borders ↔ rights of migrants
- extensive interpretation of Art. 4 Prot. 4 → compensation for lack of procedural rights in ECHR at the border
- Offers basic procedural guarantee to bring forward claims at border, before expulsion/non-admission
- From *Khlaifia v. Italy (2016)* to *N.D. and N.T. v. Spain (2020)*, **incremental restriction**

### 3. RACIALIZED CONSIDERATIONS IN ECTHR JURISPRUDENCE

- *Khlaifia*: deserving v. non-deserving, personal scope of application restricted?
- *N.D. and N.T.*: “en masse”, violently entering territory, **weaponizing language**
- Ignoring several third-party interveners’ evidence on discrimination at the border
- **Dissenting opinion Judge Pejchal**: “if they were not satisfied with the situation of human rights protection in their home countries, [they] could bring an action before the African Court on Human and Peoples’ Rights”, (*N.D. and N.T. v. Spain*, p. 106)

#### 4. A PROPOSAL: THINKING NON-DISCRIMINATION AND PROCEDURAL GUARANTEES TOGETHER

- Art. 14 ECHR, prohibition of discrimination, completes convention rights
- Role model in Art. 12 (5) African Charter on Human and Peoples' Rights, prohibition of mass expulsion of non-nationals, aimed at national, racial, ethnic or religious groups
- Frame for strategic litigation?

## 5. KEY TAKEAWAYS

- Framing matters in media, law and policy
- ECtHR jurisprudence differentiates between deserving and non-deserving, neglects racial practices? (*N.D. and N.T. v. Spain*)
- „weaponized“ language
- Possible approach: combining procedural guarantees with prohibition of discrimination



# THANK YOU

*Questions/Comments?*

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