Global Migration Justice: Beyond conflicting approaches to migration in international human rights law
MIGJUST

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Migration (including asylum) is one of the pressing global issues of our time. The key hypothesis of MIGJUST is that there is a fundamental conflict in human rights case law on migration between the human rights approach, adopted by the Inter-American Court and Commission of Human Rights and the African Court and Commission of Human and Peoples' Rights, and on the other hand the sovereignty approach of the European Court of Human Rights.[1] The difference is also at work in the case law of the UN human rights bodies. The two approaches are reflected in, and are in turn reinforced by, political theory on migration justice. In academic studies, the conflict has not been noted because the case law of the European Court of Human Rights is considered to constitute the most developed version in international human rights law. The conflict between the two approaches is problematic because it goes against the international character of international law and hinders international cooperation. MIGJUST will address this problem by (a) analysing the under-studied case law of the Inter-American, African and UN human rights bodies; (b) carrying out a comparative analysis of the European, Inter-American, African and UN case law in the field of migration; (c) relating the varying positions to political theory on migration justice; and (d) developing methodologies to resolve the doctrinal conflict.

Section a. State-of-the-art and objectives

Although the four human rights systems that MIGJUST will study interpret different treaties, the texts of the relevant provisions are similar. The provisions that are most pertinent for migration and asylum are the prohibition of inhuman treatment (Article 7 ICCPR, Article 5 ACHPR, Article 5(2) ACHR, Article 3 ECHR), the right to liberty (Article 9 ICCPR, Article 6 ACHPR, Article 7 ACHR, Article 5 ECHR), the right to family life (Article 17 ICCPR, Article 18 ACHPR, Article 11 ACHR, Article 8 ECHR), and equality and non-discrimination (Article 2(1) ICCPR, Article 2 ACHPR, Article 24 ACHR, Article 14 ECHR). There are differences in terminology and context, but these norms are sufficiently similar to allow for comparison of the jurisprudence of the different institutions (comp. Dembour 2015, Burgorgue-Larsen 2020). Obviously, specific prohibitions of discrimination in specialised treaties do constitute different norms (Article 2 CERD, Article 2 CEDAW, Article 2 CRC). The case law of these Committees will be taken into account as part of the UN supervisory system, although the Human Rights Committee has by far most relevant case law.

Notwithstanding the similarity of the norms to be applied, Dembour 2015 and the preliminary research on which MIGJUST is based justify the hypothesis that there are two fundamentally different approaches;. The difference has not been acknowledged in academic literature. The difference concerns two related points. (1) The basic norm: the human rights approach takes equality and non-discrimination as its starting point, while cooperationthe sovereignty approach takes the right of states to control the entry, residence and expulsion of non-nationals as its starting point. (2) The burden of justification: the human rights approach requires states to justify the interferences with human rights that come with migration control, while the sovereignty approach requires migrants to justify why they think in their case an exception to the sovereign right of states to control migration has to be made.

	Basic norm	**Burden of justification**
Human rights approach	Equality & non-discrimination	On state
Sovereignty approach	Right of states to control entry, residence and removal of non-nationals	On individual

The sovereignty approach

[1] National courts such as the US Supreme Court (USSC 1977, *Fiallo v Bell*) and the Supreme Court of Canada (SCC 1992, *Chiarelli*) have also adopted the sovereignty approach (i.a. Macklin 2020); as these are not human rights courts, they will not in themselves be included in MIGJUST.

The European Court of Human Rights begins the material part of its migration-related judgments with the consideration that "as a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry of non-nationals into its territory" (ECtHR 1985, *Abdulaziz* §67). As a consequence, it is for the individual invoking the right to, in this case, family life to establish "that there were obstacles to establishing family life in their own or their husbands' home countries or that there were special reasons why that could not be expected of them" (*Abdulaziz*, §68). Thus, unlike in any other field of human rights law, in the field of migration the European Court takes as its starting point not the right of the individual (interferences with which have to be justified by the state) but the right of states to enforce its migration legislation, the enforcement of which is *prima facie* assumed to be legitimate. In other words: the unusual sequence of argumentation has important consequences. It means that the role of human rights is limited to an inquiry whether in a particular case an exception to this right of states has to be made; are there "special reasons" to do so (*Abdulaziz*, §68)? This has been called "exclusion without justification" (Schotel 2012) and the "migration exception" (Bosniak 2008; Macklin 2020; Rubinstein and Gulasekaram 2017), or in the European context the "Strasbourg reversal" (Dembour 2015) reflecting a "sedentarist" approach (Thym 2017). The sequence (state right first; hereafter this unusual sequence will be referred to as the "Strasbourg reversal") has a material effect by shifting the burden of justification.

This shift of the burden of justification is evident in cases concerning admission such as *Abdulaziz* (Hilbrink 2017, Ismaili 2018), but is apparent in other parts of the European Court's case too. In the context of immigration detention, the European Court does not require the state to establish that detention is reasonably necessary for preventing unauthorised entry or for deportation. This is at odds with the principles of its case law on deprivation of liberty (Cornelisse 2010). The Court justifies this by pointing to the right of states to control the entry, residence and expulsion of non-nationals (Costello 2016). The Court characterises detention for the prevention of unauthorised entry as "a necessary adjunct" to "undeniable sovereign right to control aliens' entry into and residence in their territory" (*Saadi v United Kingdom*, 2008, §64). For detention with a view to deportation, it is sufficient that "action is being taken with a view to deportation" (*Chahal v United Kingdom*, 1996, §112). In the context of the externalisation of migration and asylum policies, extraterritorial application of human rights is yet another relevant issue. While in *Hirsi Jamaa v Italy* (2011) the European Court accepted extraterritorial responsibility for refoulement (which can be seen as consistent with the human rights approach, *infra*), the extraterritorial effects of the Convention in the field of migration have subsequently been minimised in later case law (*M.N. v Belgium*, 2020, and indirectly *N.D. and N.T. v Spain*, 2020, by restricting the independent significance of the prohibition of collective expulsion). In both these cases, the Court justified its position by arguing that its position follows from the right of states to control the entry, residence and expulsion of non-nationals.

There are two elements of the European Court's case law which at first sight complicate the idea that the Court puts the burden of justification on migrants. The first element is its case law concerning expulsion after legal residence. On the one hand the European Court here sticks to the assumption of the legitimacy of migration enforcement and putting the burden of justification on the individual. It has added to the sentence quoted above (concerning the well-established right of states to control the entry of non-nationals, *Abdulaziz* §67) that "(t)he Convention does not guarantee the right of an alien to enter or to reside in a particular country and, in pursuance of their task of maintaining public order, Contracting States have the power to expel an alien convicted of criminal offences" (*Üner v Netherlands*, 2006, §54; comp. *Boultif v Switzerland*, 2001, §46 and *Maslov v Austria*, 2008, §68; these are still the leading cases). This extends the "well-established principle" formulated in *Abdulaziz* to expulsion after legal residence. On the other hand, in this particular context the European Court requires the state to justify the expulsion's interference with the right to family life (*Üner*, §54). This seems to fit rather with the human rights approach (*infra*) than with the sovereignty approach. But in assessing whether the expulsion is proportionate states enjoy "a certain margin of appreciation (*Maslov*, §75-76). Putting the burden of justification on states could have allowed the European Court to adopt the human rights approach (*infra*). However, the ambiguity between putting the state power to expel aliens first (*Üner,* §54, consistent with the sovereignty approach) and requiring a justification for expulsion (*Üner,* §54, consistent with the human rights approach, *infra*) seems to have been resolved in the Court's day-to-day case law in favour of state sovereignty by means of the margin of appreciation. Çali and Cunningham (2021) conclude that the European Court recognises the primacy of state discretion in this field, and puts an emphasis on deference to domestic courts. Aarrass (2021) concludes that the Court finds a violation only under exceptional circumstances. If this is correct, this would mean that while the burden of justification is on the state, human rights still in fact function as an exception as a consequence of a wide margin of appreciation. A similar conundrum occurs in the Court's asylum case law (the second element). Expulsion is contrary to the prohibition of inhuman treatment "where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment"

(*Soering v UK*, 1989, §91; *Cruz Varas v Sweden*, 1991, §69-70). This could have led to a position which requires states to justify expulsion in light of the prohibition of inhuman treatment. In its subsequent case law however, the Court seems to have created two ways of limiting the potential impact of *Soering*. First, in a case where 5 Sri Lankan Tamils had been expelled, of whom 3 had been tortured upon return, it nonetheless found no violation of the Convention because "the existence of the risk [of inhuman treatment] must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of the expulsion" (*Vilvarajah v UK*, 1991, §107). Second, in principle it puts the burden of proof with the asylum seeker, and emphasises that, in assessing the existence of a risk at the moment of expulsion, asylum authorities have "particular knowledge and experience in evaluating [asylum] claims" and that decisions are taken "after thorough examinations" (*Cruz Varas* §81). Although this does not grant the state a margin of appreciation, it can be seen as an expression of a distanced judicial examination which *prima facie* privileges the risk assessment of the authorities. The double move of (a) focusing not on the risk of inhuman treatment, but on the risk *the expelling authorities were aware of*; and (b) privileging the assessment of that risk by those authorities, allows the European Court to reach outcomes that, a few exceptions apart (e.g. *Salah Sheekh v Netherlands*, 2011), are consistent with the sovereignty approach. Summarising on this point: when it comes to expulsion after legal residence and asylum, the European Court has constructed legal doctrine in a manner which could be consistent with the human rights approach (*infra*), but seems to steer its decision making practice to the sovereignty approach by privileging the state's assessment of the case.

Thus, it is plausible to formulate the hypothesis that the basic norm which the European Court applies is the sovereign right of states to control migration; this puts the burden of justification on individuals. The prohibition of racial discrimination in the ECHR has not played a significant role in addressing the racialised impact of international migration control (on this racialised impact Achiume 2022, Van Houtum 2010, Spijkerboer 2018a). In addition to accepting the distinction between nationals and non-nationals which is inherent in migration law, the Court has accepted distinctions between different categories of non-nationals (as well as, in the case of Commonwealth citizenship, between different categories of Commonwealth citizens) which were argued to be racialised. Between 1962 and 1981, the UK amended its nationality legislation in such a manner that, in effect, white Commonwealth Citizens had the right to enter the United Kingdom while non-white Commonwealth Citizens did not (Dembour 2015, 107-109; Dummett & Nicol 1990; El-Enany 2020, 95-132). This legislation was at the heart of the *Abdulaziz* case. While the Court described the legislative process (which had been rather explicit about its aim), it accepted a preferential treatment for "those whose link with a country stems from birth within it" (*Abdulaziz*, §88), ignoring that at birth two of the applicants had Commonwealth Citizenship with the right of access to the United Kingdom. They had been colonial subjects, had kept the right of access to the UK upon independence but had been deprived of it by the subsequent (1962-1981) UK legislation. The evident link between "birth" and race in the context of decolonisation was not acknowledged (De Vries & Spijkerboer 2021).[2] Later the Court found a differentiation between different categories of non-nationals unproblematic because European integration provides an objective and reasonable justification (*Moustaquim v Belgium*, 1991, §49). The European Court's most significant application of the prohibition of racial discrimination in migration law concerns a distinction *between* Danish nationals based on whether they were of Danish or of foreign origin (*Biao v Denmark*, 2014). As a consequence of its limited notion of racial discrimination in the context of migration, the European Court's case law allows for migration law having the above-mentioned racialised impact.

The standard phrases characteristic of the sovereignty approach are not merely a routine element of the judgments of the European Court of Human Rights. At crucial junctions, the Court invokes them to explain its choices. In addition to *Saadi* (supra), it ruled that the refusal of humanitarian visa for Syrian refugees from Aleppo did not involve the jurisdiction of the requested state, holding that the alternative would "have the effect of negating the well-established principle of public international law (…) according to which the States Parties, subject to their treaty obligations, including the Convention, have the right to control the entry, residence and expulsion of aliens" (*M.N.*, §124). In its judgment deciding that the involuntary stay of people in a "transit zone" at the Hungarian-Serbian border did not amount to detention, it stipulated that "(i)t is important in particular to recognise the States' right, subject to their international obligations, to control their borders and to take measures against foreigners circumventing restrictions on immigration" (ECtHR 2019, *Ilias & Ahmed*, §213). When it ruled that the large-scale pushbacks that take place at the Spanish exclaves of Melilla and Ceuta do not constitute collective expulsion, is stipulated: "(i)t should be stressed at the outset that as a matter of well-established international law, and subject to their treaty obligations, including those arising from the Convention, Contracting States have the right to control the entry, residence and removal of aliens"

[2] The US Supreme Court has given a similarly narrow interpretation of non-discrimination in the context of migration in *Trump v Hawaii* (2018).

(ECtHR 2020, *N.D. & N.T. v Spain*, §167). In the same argumentation, it subsumed border control under this state competence (ibid., §168). This shows that the standard phrases characteristic of the sovereignty approach is play a role at key turning points in the Court's case law. Note that the standard phrasing of the European Court has shifted over time; whereas in *Abdulaziz* (1985) it stipulated the right of states to control the *entry* of non-nationals, in *Üner* (2006) and *Saadi* (2008) it has added *residence* and recently added *expulsion* (*M.N.*, 2020) or *removal* (*N.D. & N.T.*, 2020) as well as *border control* (*Ilias & Ahmed*, 2019; *N.D. & N.T.*, 2020). This raises the question whether the Court is in the process of expanding the scope of the "Strasbourg reversal".

European/North American legal doctrine on migration and international (human rights) law has been analysed extensively. Like work of legal theory addressing migration (Bosniak 2008; Macklin 2020; Rubinstein and Gulasekaram 2017; Schotel 2012), standard works in migration law which take a global perspective do acknowledge that legal doctrine assumes the state right to control migration, without however acknowledging that (as will be established *infra*) the sovereignty approach has not been adopted in the Inter-American, African and UN human rights systems (Chetail 2019; Opeskin, Perruchoud & Redpath-Cross 2012; Hathaway & Foster 2014; Goodwin-Gill and MacAdam 2021). Hundreds of articles, books and dissertations have been written about the case law of the European Court of Human Rights in the field of migration, not merely in European journals (such as the *European Journal of Migration and Law*, the *European Journal of Human Rights* and the *European Human Rights Law Review*) but also in international journals such as the *International Journal of Refugee Law* and the *Human Rights Law Review*. However, with the exception of Dembour (2015) authors do not acknowledge that the sovereignty approach is specific for the case law of the European Court of Human Rights and has not been adopted by other human rights systems (*infra*). The European Court's case law is considered as representing the most advanced development of international law without noticing the specific position the Court has consistently taken (e.g. Chetail 2019, 125-127).

On the basis of the above, the well-known case law of the European Court of Human Rights has to be re-analysed. In its case law on admission (family reunification, asylum), expulsion and immigration detention, what role has it given the right of states to control the entry, residence and expulsion of non-nationals? In which contexts has it put the burden of justification or states or migrants, and which consequences did this have? What role has it given in this context to equality and (in particular racial) non-discrimination?

The human rights approach

The migration case law of the Inter-American, African and UN human rights systems does not open its argumentation with the state's right to control migration, but – as is usual in human rights argumentation – with the right which may be infringed. As a consequence of this sequence, the burden of justification in principle is on the state to justify the limitation of individual rights, not on the individual to substantiate why in their case the state right to control migration should cede to their interest. These institutions do, at the same time, recognise that states can legitimately formulate and enforce immigration restrictions. This section will outline this approach (the human rights approach), while the next section will outline the specific position of the UN Committees. This will result in the hypothesis that the human rights approach differs meaningfully from the sovereignty approach.

The Inter-American Court has not adopted the "Strasbourg reversal". It does not take the state right to regulate migration as its starting point, but gives a central role to non-discrimination. In its foundational Advisory Opinion 18/03 on the rights of undocumented migrants, it takes the principle of equality and non-discrimination as its starting point (§82-96). It establishes that this principle is *jus cogens* (§97-101) and finds that "the general obligation to respect and ensure human rights binds States, regardless of any circumstance or consideration, *including a person's migratory status*" (§106, emphasis added). The Court repeats that non-discrimination includes migratory status (§107, 109, 121-122, 133-134, 149, 157). It then continues to establish that migrants are vulnerable as a consequence of their legal status, and stipulates that "the international community has recognized the need to adopt special measures to ensure the protection of the human rights of migrants" (ibid, §117). Only after this does the Court stipulate that "it is licit for States to establish measures relating to the entry, residence or departure of migrants" (§169), but migration policies "must be implemented respecting and guaranteeing human rights" (§168) and "without any discrimination" (§169; comp. *Expelled Dominicans and Haitians v Dominican Republic*, 2014, §350). While the European Court equally states that the implementation of migration control is "subject to [the state's] treaty obligations" (*Abdulaziz* §67), the Inter-American Court's sequence (first non-discrimination, including on the basis of migration status, and respect for human rights; and only later the licit nature of state measures relating to entry, residence and departure) shows that the burden of justification is on states.

The Inter-American Court's has elaborated this position in subsequent case law. It applies the right to a fair trial to migrants (*Pacheco Tineo*, in contrast to ECtHR *Maaouia*). The Court's approach also has consequences for its approach to migrant children; in particular it requires a strict proportionality test for the separation of parents and children (OC 21/14, §278, in contrast to the European Court's "certain margin of appreciation", *supra*) and stipulates that "the migratory status of a person is not transmitted to the children" (*Yean & Bosico*, §156; *Haitians & Dominicans*, §232). The Court's distinctive approach is further apparent in the field of asylum, where (in addition to its emphasis on non-discrimination) it has declared non-refoulement to be customary international law and *jus cogens* (OC 28/18, §169-171) implying a positive obligation to take all necessary steps the protect persons in the event of a real risk to life, liberty or security (ibid., §197; comp. *Pacheco Tineo*). In the context of immigration detention, the Court requires that detention is "necessary and proportionate in the specific case" (*Haitians & Dominicans*, §359; comp. *Velez Loor*; in contrast to ECtHR *Chahal* and *Saadi*). Also, the Court has effectively banned immigration detention for children (OC 21/14; the European Court does not exclude it). In an opinion concerning the environment, the Court has taken a conservative position on the point of extraterritorial jurisdiction (OC 23/17, §81), only to adopt an expansive view on transboundary damage which potentially leads to broad extraterritorial responsibility: "when transboundary damage occurs that affects treaty-based rights, it is understood that the persons whose rights have been violated are under the jurisdiction of the State of origin if there is a causal link between the act that originated in its territory and the infringement of the human rights of persons outside its territory" (ibid., §101, in contrast to ECtHR *M.E. and others*).

To the limited extent Inter-American case law is referenced in academic work, it is not acknowledged that adopts the human rights, not the sovereignty approach (e.g. Opeskin and Perruchoud 2012; Hathaway and Foster 2014; Chetail 2019; Goodwin-Gill and McAdam 2021). Academic articles acknowledging the Inter-American migration and asylum case law of the are rare, overwhelmingly descriptive and do not acknowledge that they adopt the human rights, not the sovereignty approach (Arlettaz 2015, 2016; Cantor & Barichello 2016; Cardoso Squeff & Orlandini 2019; Carvalho Ramos 2018; Cavallaro 2015; Esis, Paluima & Silva 2020; García-Juan 2022; Hernandez 2018; Jubilut, Espinoza & Mezzanotti 2021; Monteleone 2022; Paoletti 2007; Torres-Marenco 2011; Zubata 2022).

The African Commission of Human and Peoples' Rights has likewise not adopted the "Strasbourg reversal". In its leading decision, it began by considering that expulsions are interferences with the right to property, the right to work, the right to education, the right to protection of the family, the right to equality, and the right to an effective remedy. Only after this, it stipulated that it "does not wish to call into question nor is it calling into question the right of any State to take legal action against illegal immigrants and deport them to their countries of origin", but that interferences need to be justified (159/96, §17-20; comp. 71/92, §31, 292/04, §63, 69, 79-80, 84). In the field of asylum, the African Commission upheld the rights of refugees from Sierra Leone in Guinea precisely in light of their massive number (decision 249/02; comp. decision joined cases 27/89, 46/91, 49/91, 99/9). The African Court of Human and Peoples' Rights has addressed migration in cases of people who had been treated as non-nationals but claimed to be nationals (*Anudo v Tanzania,* 2018; *Penessis v Tanzania,* 2019) and revocation of passports (*Gihana v Rwanda,* 2019).

While the African Commission has not elaborated its equality doctrine to the extent the Inter-American Court has, the role of non-discrimination in its case law deserves attention. The Commission has stated that non-discrimination "is essential to the spirit of the African Charter and is therefore necessary in eradicating discrimination in all its guises" and consequently qualified discriminatory expulsions as "special violations of human rights" (decision 292/04; comp. 249/02, 159/96), while in the context of equal protection the Commission invoked the emblematic US Supreme Court judgement in *Brown v Board of Education* (292/04).

The UN Committees: a site of tension between the two approaches

The UN Committees have also not adopted the "Strasbourg reversal". The first migration law decision of the UN Human Rights Committee (HRC) concerned a case similar to the one in *Abdulaziz* (discriminatory family reunion policies). Unlike the European Court, the HRC takes as its starting point not the right of states to control migration, but the right of a family to live together (comp. CMW/CRC General Comment 4/23 (2017), §29). The exclusion of a person, and even the future possibility of deportation and the precarious residence situation of spouses who may be subject to deportation, may constitute an interference which the state needs to justify (*Aumeeruddy-Cziffra v Mauritius*, 1981,§ 9.2; comp. *Madafferi v Australia*, 2004; *El-Hichou v Denmark*, 2010; *Husseini v Denmark*, 2014; comp. Klaassen 2015, 26-28). This sequence of argumentation is consistent with the human rights approach. In later decisions the Human Rights Committee has noted that "there is significant scope for States parties to enforce their immigration policy and to require departure of unlawfully present persons" (*Winata v Australia*, 2001; comp General Comment 15, §5), and that "the mere fact that one member of the family is entitled to remain in the territory of a State party does not necessarily

mean that requiring other members of the family to leave involves such interference" (*Byahuranga v. Denmark*, 2004, §11.5). The role the HRC gives to the "significant scope for states to enforce their immigration policy" is consonant more with the sovereignty approach than the human rights approach. Nonetheless, like the other UN Committees (Committee Against Torture: *Ayas v Sweden*, 1997; *K.H. v Denmark*, 2012; *B.T.M. v Switzerland*, 2022; the Committee on the Elimination of Discrimination Against Women: *Zheng v the Netherlands*, 2008; *R.S.A.A. et al v. Denmark*, 2019; the Committee on the Rights of the Child: *I.A.M. v Denmark*, 2018; *K.S. and M.S. v. Switzerland*, 2022), it has never adopted the "Strasbourg reversal". It begins its decisions with the right which is purportedly violated and requires justification of non-admission and expulsion.

It is not clear what impact this usual sequence of argumentation (begin with the right at stake, require justification of interferences) has on the positions of UN committees; it is also not clear whether the UN Committees have a common position or whether there are divergencies between them. In a joint General Comment of the Committee on the Rights of Migrant Workers and the Committee on the Rights of the Child, the Committees state that "(t)he principle of non-discrimination shall be at the centre of all migration policies and procedures", while it also stipulates that the principle of non-discrimination shall apply regardless of whether children (or their parents) are documented or undocumented. Any distinction must be justified (CMW/CRC GC 3/22 (2017), §21-22; comp. CRC General Comment 6 (2005), §18). This emphasis on non-discrimination, including on the basis of migration status, suggests that the Committees align with the Inter-American Court on this point. In the context of asylum the obligation of an in-depth examination may be more comprehensive than under the ECtHR's case law (HRC *B.B. v Sweden*, 2021; HRC GC 36, §30-31). In the context of asylum based on family violence, the protection of CEDAW exceeds that provided by the ECtHR (*R.S.A.A. v Denmark*, 2019; comp. Arbaoui 2019, 109-156). In a recent decision, the HRC indicated that climate change may trigger the non-refoulement principle, even though it dismissed the individual application because the situation in the country of origin was not yet irreversible (*Teitiota*, 2020; contrast *Sufi and Elmi v UK*, 2011, §281). The HRC has expanded the right to return to one's own country to "an individual who, because of his or her special ties to or claims in relation to a given country cannot be considered to be a mere alien". This potentially treats second generation migrants (who are the subject of the European Court's case law in *Boultif*, *Üner* and *Maslov, supra*) as de facto nationals (GC 27, 1999; the line of reasoning in this HRC General Comment was advocated in the 1990s by European Court judges, but rejected; see Martens' dissent in *Boughanemi v France*, 1996). In the context of family unity, UN committees are sceptical of separation of families for migration policy reasons alone, and explicitly align their position with that of the Inter-American Court (CMW/CRC General Comment 4/23 (2017), §29, in contrast to the European Court's *Omoregie* judgment). At the same time, the HRC seems to be closer to the ECtHR position in some of its decision, stating that "the mere fact that one member of the family is entitled to remain in the territory of a State party does not necessarily mean that requiring other members of the family to leave involves [an] interference" (*Byahuranga v. Denmark*, 2004, §11.5). The HRC does apply a strict proportionality and necessity test in the context of immigration detention (*A. v Australia*, 1997; *Baban* 2003; *Bakhtiyari*, 2003; *Saed Shams* 2007; *Danyal Shafiq* 2006; *Jalloh* 2002; *Madafferi* 2004; General Comment 35, §18; comp. Cornelisse 2010, 254-256; contrast with ECtHR *Chahal* and *Saadi*). The HRC's case law seriously restricts the use of immigration detention for children (*Ali v Norway*, 2022), while (in line with the Inter-American Court's position) the Committee on the Rights of Migrant Workers and the Committee on the Rights of the Child conclude that states "should expeditiously and completely cease or eradicate the immigration detention of children" (GC 4/23 (2017), §5). The non-adoption of the "Strasbourg reversal" also results in case law favourable to unaccompanied minors (CRC *S.E.M.A. v France* ((2023)). In a decision on a migrant shipwreck on the high seas in the Maltese Sar zone the Human Rights Committee, based on its General Comment 36(2018), reached an outcome on extraterritorial effects of human rights that is hard to imagine coming from the European Court (*A.S., D.I., O.I. and G.D. v Italy* (2021)). The Committee held that the shipwreck occurred under Italian jurisdiction because the (in)actions of Italian officials were decisive for the life or death of the people on the ship in distress. The views of the majority (mainly members from the global South) contrasted with the state sovereignty-oriented dissenting opinions of the minority (members from the global North plus South Africa).

On the basis of the above, it is plausible to formulate the hypothesis that the UN Committees have not adopted the sovereignty approach. They require states to justify interferences with human rights that come with migration control, and give a more prominent role to non-discrimination than the sovereignty approach does. At the same time, apart from a few exceptions the Committees (and the HRC, which has the most prolific case law, in particular) on key points (in particular asylum and family reunification) have usually not produced outcomes that differ significantly from those of the ECtHR. My hypothesis is that in these cases, while the human rights rights-oriented members of the committees have ensured that the Strasbourg reversal has not been adopted, the sovereignty-oriented members have ensured that the intensity of the committees' scrutiny is

not intensive. This allows states a large margin through a legal mechanism (intensity of (quasi-)judicial scrutiny) that is not very visible, hard to objectify and easily adaptable in individual cases. While this hypothesis addresses the way in which the conflict may have been submerged, in recent split decisions of the HRC (*A.S., D.I., O.I. and G.D. v. Italy,* 2021, *supra*; *Zabayo v Netherlands*, 2021, an asylum case concerning female genital mutilation; *Ali v Norway*, 2022, concerning immigration detention including children) the conflict between the human rights and the sovereignty approach seems to be becoming more explicit.

There are academic analyses addressing elements of the UN system as part of a wider argument (e.g. on refoulement in the case law of i.a. the CAT and the HRC Wouters 2009; on extraterritoriality and asylum in the case law of the i.a. HRC and the CAT Den Heijer 2012 and Gammeltoft-Hansen 2011; on the intensity of the scrutiny by i.a. the HRC and the CAT Baldinger 2013, 87-112 and 134-186), but none of these pay attention to the two main differences identified so far between the sovereignty approach and the human rights approach: the manner in which they construe the relation between human rights and the state competence to control migration, and the role given to equality and non-discrimination. Remarkably, while the 2021 HRC decision concerning the shipwreck attracted considerable academic attention (Busco 2021; Citroni 2021; Milanovic 2021a, 2021b, 2021c; Minervini & Starita 2021; Vella De Fremeaux & Attard 2021), these analyses (some of which were by themselves excellent) did not remark on the geographical pattern in the majority and minority opinions, and did not relate the opinions to the foundational issues of migration law addressed here. More generally, to the extent that academic writings do acknowledge case law of the Inter-American, African and UN human rights bodies, with the exception of Dembour (2015) and briefly Burgorgue-Larsen (2020, 336-341), the distinctive character of the human rights approach is not acknowledged.

Summing up: the 4 human rights systems

The case law of the courts, commissions and committees outlined above has been criticised for its lack of consistency (e.g. Garrett & Barrett 2022), and there are divergences between the different organs. Nonetheless, the initial review on which the above is based allows for a number of general observations.

- None of the supervisory bodies at the Inter-American, African and UN level have adopted the unusual sequence of argumentation (the "Strasbourg reversal") that characterises the case law of the European Court of Human Rights. This means that the structure of argumentation in their migration case law is as it is in other fields of application. Their standard enquiry is whether the right invoked is applicable; if so whether there is an interference; and if so whether the interference has a legal basis, has a legitimate aim, and is proportional. This means that in principle the burden of justification is on the state to legitmise the interference which migration control according to this approach implies, and not (as under the sovereignty approach) on the migrant to justify why in their case the right of states to control migration should cede to their human rights.
- The Inter-American, African and UN supervisory bodies place great emphasis on the principle of equality and non-discrimination, including in the basis of race and migration status, which plays a marginal role in the sovereignty approach (*supra*). This is most clearly the case with the Inter-American Court, which has decided the principle to be *jus cogens*, and to include non-discrimination on the basis of migration status. This position has been adopted explicitly by the Committee on the Rights of Migrant Workers and the Committee on the Rights of the Child and the CRC. The African Commission attaches great importance to non-discrimination in its case law, but has not elaborated this into an explicit legal doctrine.
- The Inter-American, African and UN supervisory bodies do accept that states have the competence to regulate the entry, residence and departure of non-nationals, but in their assessment of cases apply the usual sequence which requires the justification of state interferences with human rights.
- While on some points the contrast between the sovereignty approach and the human rights approach is quite clear, this is less so on other points. Most notably, (1) the European Court of Human Rights puts the burden of justification for expulsion after legal residence on the state, while nonetheless human rights seem to function as an exception to the sovereign state right to expel; in its asylum case law it applies doctrine that seems consistent with the human rights approach in such a manner that the results conform with the sovereignty approach, by privileging the risk assessment of the asylum authorities; (2) the Human Rights Committee has not adopted the "Strasbourg reversal", but in many (not all, e.g. *Teitiota*) individual cases seems to reach outcomes that are quite like those of the European Court. My hypothesis is that this is the result of the margin appreciation granted by these human rights bodies to states.

In the above, it has been established that it is plausible to hypothesise that there are two approaches at work in the case law of the four human rights systems under review. Under this hypothesis, the sovereignty approach

is characteristic for the European Court of Human Rights, while the human rights approach is characteristic for the Inter-American and African human rights systems, while the UN Committees are a site of tension between the two approaches. The sovereignty approach is dominant in academic work in the sense that, to the extent that case law of the other human rights bodies is acknowledged, the distinctive character of the human rights approach is not noticed.

This poses a fundamental problem. As shown above, the norms that are applied are similar to such an extent that, if international human rights law is to be international, they should not be interpreted in fundamentally different ways (comp. Burgorgue-Larsen 2020, 18-20). However, the fragmentation (Peters 2016) concerns two fundamental issues (the burden of justification, and the role of non-discrimination), and arguably leads to substantially different results in many (but not all) fields of migration law. This conflict undermines the coherence and viability of human rights law in one of its main fields of application.

The conflict between the two approaches is problematic from a point of view of *legal doctrine*; it is urgent to analyse the conflicting positions, and to move beyond them. However, MIGJUST will not only make a pathbreaking academic contribution to legal doctrine. Its academic innovation will also make a pioneering contribution to *legal practice* by making available the case law of the understudied Inter-American, African and UN human rights systems to practitioners within these systems. It will also allow practitioners to rely on legal doctrine developed in the other systems. Furthermore, the lack of familiarity with the variety of normative approaches to the regulation of migration hinders *international cooperation*, which is urgently needed in the field of migration and asylum. Acknowledging that different actors may hold conflicting normative views will help states, IOs and international NGOs to understand each other's positions, and is a key contribution to addressing the continuing crises between Europe and its neighbours – in the past years with Turkey, Libya, Tunisia, Morocco – and for the US with Mexico and other Central-American states (comp. El Qadim 2014; Ayouba Tinni et al 2023).

The importance of political theory

How is it possible that, apart from Dembour (2015) and briefly Burgorgue-Larsen (2020, 336-341), the conflicting approaches have not been identified so far? It has been widely observed that migration law is characterised by "exclusion without justification" (Schotel 2012), the "migration exception" (Bosniak 2008; Macklin 2020; Rubinstein and Gulasekaram 2017), or a "sedentarist" approach (Thym 2017). However, this approach (which MIGJUST conceptualises as *one of the two* approaches to migration and human rights law) has been considered as a *general* characteristic of migration law. Only Dembour has acknowledged the distinctive character of the Inter-American approach, and contrasted the European Court's approach with that of the Inter-American Court; Burgorgue-Larsen shares Dembour's conclusion on the point of migration law (Burgorgue-Larsen 2020, 336-341), but has not identified the African case law (while she does not cover the UN case law for methodological reasons). The impact of Dembour's work has been limited because the Inter-American Court's case law does not apply in Europe, while the US and Canada do not recognise its competence. As a result, both European and the North-American audiences did not notice the wider importance of her work, which explains the limited academic attention for the Inter-American Court's migration case law. African case law is very hard to access. The websites of the African Commission and Court do not have a well-functioning search function; the only way to find case law is to open all PDF files of decisions, and read them. The case law of the UN Committees is accessible, but there the non-adoption of the "Strasbourg reversal" is less easy to see than in, in particular, the Inter-American case law. No encompassing study of the Committees' migration case law has been undertaken so far.

Key to MIGJUST's originality is familiarity with the migration case law of all four human rights systems, as well as not simply assuming that European case law represents the most developed, advanced version of international human rights law.

However, this is not the only factor which explains that the conflict between the sovereignty approach and the human rights approach has not been acknowledged in academic work. In addition, law does not operate in a vacuum. Over the past decades, normative ideas about the regulation of migration have been developed in political theory, in parallel with the development of human rights case law. Like "restrictive" (*Vilvarajah*, *Chahal*, *N.D. and N.T.*) and "liberal" (*Berrehab*, *Hirsi Jamaa*, *Jeunesse*) judgments in the case law of the European Court of Human Rights , positions in political theory have tended to typically range from a liberal-egalitarian approach (Carens 1987, 2013) to principled defences of migration restrictions (Walzer 1983, Miller 2008), with intermediate positions reconciling human rights and *Volkssouveränität* (Habermas 1995; Benhabib 2004; Soysal 1994) as well as critical theory contributions (Honig 2001, Butler 2018, 2020). Despite differences in nuances, all these positions assume that states have a presumptive right to control migration.

They pay scant attention to colonial history and to the role that racial distinctions play in factually regulating migration.

More recently, this default position has been criticized from the Latin-American perspective (Reed-Sandoval and Díaz Cepeda 2021). Specifically, Kirloskar-Steinbach (2015) and Mendoza (2021) have criticised the debate for assuming the primacy and legitimacy of the nation state based on a European model. Arguing for non-ideal theorizing,[3] they propose to examine migration justice in its concrete effects: which states are excluding who, how does this relate to inequalities related to class, gender, race, colonial history? In addition, there is a a debate about migration justice outside the canon constituted by authors such as Carens, Walzer, Habermas. Sanni (2020) has criticised the regulation of migration in Africa for adopting "structures of strangeness" which are a remnant of colonial constructions of space. He argues for a reinvigorated version of the egalitarianism, humanism and communalism which, he states, was characteristic of the pre-colonial ethical system. El Fadl (2020) has criticised the migration policies of Arab states along similar lines, and argues for free movement as an essential element of human dignity in the Islamic tradition. One may wonder whether Sanni and El Fadl are relying on an idealised notion of precolonial African humanism and Islamic ethics respectively. However, the importance of their work lies in their efforts to formulate political theory about migration justice outside the dominant debate (Carens etc). Like the case law relying on the human rights approach, these authors formulate normative approaches to the regulation of migration which look at the same problem as the dominant authors, but they do so from a non-ideal theory perspective. They include global inequality and the historical legacy of colonialism in their analysis.

MIGJUST proposes the hypothesis that the specificity of the European Court's approach is hard to see because its case law replicates the same assumptions (specifically: about the implications of state sovereignty, and about the limited relevance of racial discrimination) as European/North American debates about migration justice. Analysing the political theory contributions outlined above will help in acknowledging the distinctness of the human rights approach, as well as contextualising the conflict between the sovereignty and the human rights approach. This will be key in transcending them (*infra*). MIGJUST proceeds on the basis of the observation that case law and political theory have developed in parallel over the past few decades. There are remarkable similarities between the universal pretensions of European case law ("it is a well-established principle of international law that …") and the European/North American political theory debate, as well as between the emphasis on existing inequalities in esp. the case law of the Inter-American Court and the work of El Fadl, Kirloskar-Steinbach, Mendoza and Sani. In addition to exploring these parallels, involving the normative approaches from political theory is essential for understanding, and subsequently transcending the conflict between the human rights and sovereignty approaches to migration and human rights law.

Objectives

The conclusion of the above is that current academic work on migration and international human rights law takes a part for the whole. If this hypothesis is correct, this would result in an unintended, but fundamental bias in academic knowledge. The sovereignty approach, which is adopted by only one of the four human rights regimes that exist in today's world, is taken for granted and considered to represent the state of international law. This is an *academic* problem, with considerable consequences for *legal practice* and for *international cooperation*.

In order to address the gap in knowledge and analysis, MIGJUST sets out to do the following:

- Produce a detailed and up to date doctrinal analysis of the case law of the Inter-American and African Courts and Commissions, and of the UN Committees;
- Provide a comparative analysis of European, Inter-American, African and UN case law in terms of the human rights approach and the sovereignty approach;
- Provide a detailed analysis of postcolonial and decolonial migration justice literature, and relate it to dominant migration justice literature;
- Develop innovative international law doctrine alternatives based both on standard doctrinal international law methodology and on non-ideal legal and political theory.

This pathbreaking approach will not only constitute an academic innovation. It will also provide essential tools for legal practice (advocates, courts) by making the legal doctrine developed in Inter-American, African and UN case law available to practitioners within those systems, as well as making this case law available to

[3] Proponents of non-ideal theory argue that conventional ways of modelling theories of justice are unable to track and change unjust practices as they abstract from practice. They insist that theories of justice be developed that can both track and change these practices; Valentini 2012.

practitioners in other systems. Thirdly, it will provide a crucial tool enabling international actors (states, international organisations, international NGOs) to cooperate, by allowing them to understand the coherence of the position of their counterparts when they rely on alternative normative views.

Section b. Methodology

'Communities of international lawyers' (Roberts 2017) in different places construct different understandings of international law. However, if international law is to be international, there is a problem if the particularities of some communities are considered to constitute international law, while those of others are either not acknowledged as being distinct or are seen as of merely local relevance. Yet, as indicated above, this is precisely what MIGJUST assumes is happening in international migration law. Adapting Roberts' terminology, it can be observed that different human rights communities have constructed fundamentally different understandings of international migration law.

The sovereignty approach is taken for granted in academic work (with very few exceptions, esp. Dembour 2015; Macklin 2020 and Schotel 2012 analyse the sovereignty approach without being aware that a different approach exists), while, as has been shown above, it is plausible that it has not been adopted by the African, Inter-American and UN human rights systems. If indeed it is the case that the sovereignty approach is particular for the European human rights system and has not been accepted in the other human rights systems, then what is accepted as international law in international academic doctrinal writings is in fact based on European understandings and approaches.[4] This points to a methodological flaw at the heart of the study of international migration law, which results in an unintended, but nonetheless fundamental bias privileging global North perspectives of the field. The problem in legal doctrine runs parallel to a similar structure of the political theory debate on migration justice, which is being criticised by in particular Latin-American academics for being conducted by a restricted group of European/North-American authors and for replicating key assumptions which are also at work in the sovereignty approach (*supra*). This situation, in which academic knowledge production is located in the global North, is beginning to be addressed in migration studies (Vargas-Silva 2019; McNally & Rahim 2020; Mayblin & Turner 2021), but is still dominant in the study of migration and refugee law (Spijkerboer 2021).

MIGJUST proposes a three-step approach to address this methodological flaw. In a first step, a comparative methodology will be deployed to explore and compare European, Inter-American, African and UN case law in the field of migration. Although Asia does not have a regional Human Rights Convention or Human Rights Court, the ASEAN Intergovernmental Commission on Human Rights will be incorporated in the comparison, but will be a minor part only because there is no case law. The reason to pay attention to ASEAN nonetheless is that the absence of supranational human rights supervision in Asia says something about perspectives on state sovereignty. In addition, the limited ASEAN positions on international human rights law and migration (Piper, Rother & Rüland 2018) can correct a preconceived notion that the global South adopts a unitary, mobility-friendly position. Evidently, the UN case law is of a different nature than that of the three regional courts as it is not binding; however, it does concern authoritative interpretations of the ICCPR and other relevant UN treaties and therefore merits inclusion.

The comparative approach will allow MIGJUST to identify commonalities and differences between the different human rights systems. This is expected to bring to light differences between the different treaty systems, but also divergent (methods of) interpretation. The comparison will be undertaken from two angles:

- thematic issues: admission (family reunion, asylum), removal, immigration detention; this is the kind of comparison Dembour (2015) has made in her analysis of the migration case law of the European and Inter-American Courts;
- doctrinal issues: interpretation methods, margin of appreciation, role of external sources; jurisdiction; this is the kind of comparison which Burgorgue-Larsen (2020) has made in her book on the European, Inter-American and African human rights courts, which however pays little attention to migration and where it does so relies on Dembour and does not address African and UN case law (Burgorgue-Larsen 2020, 336-341).

MIGJUST expects to find the fundamental difference between the sovereignty and the human rights approaches outlined above, but it is likely that more differences (also between the non-European human rights systems) will come to light.

[4] As indicated above, MIGJUST's relevance is broader than just Europe. Courts in North-America have also adopted the sovereignty approach. As these are not human rights courts, they are not included in MIGJUST for methodological reasons.

Whereas Burgorgue-Larsen situates her study in Law in Context (2020, 21-22), Dembour applies a form of legal discourse analysis (2015, 22). As shown above, political theory on migration justice is closely related to developments in case law of the regional human rights systems. Therefore, relating the migration justice debate to legal doctrine can help understanding the normative tensions underlying the various doctrinal positions. For this legal discourse analysis is a well-suited approach (Wessels 2023). MIGJUST will develop a typology of the various shapes the doctrinal argument takes (which is expected to include the sovereignty and the human rights approach), and relying on political theory will draw out the underlying normative tensions that enable the different positions. Furthermore, legal discourse analysis will enable MIGJUST to analyse how a particular approach to a legal issue gains authority. My proximity to Wessels (whom I supervised as a PhD and who also works at the ACMRL) will enable MIGJUST to cooperate in her project of further developing the methodology of legal discourse analysis in the field of migration law.

A second methodological step will be to answer the question what becomes of international law if (as is the assumed outcome of phase 1) similar human rights norms are interpreted in fundamentally different ways. The hypothesised fundamental difference in the interpretation of international norms is problematic. Obviously, in practice some variety is to be expected, but a fundamental conflict on the construction of the field (*supra*) undermines the coherence and legitimacy of international law. MIGJUST will begin by enquiring whether the conflicting positions can be reconciled by using standard doctrinal international law methodology, in particular the VCLT, Article 38 ICJ Statute and collision norms.

On the other hand, a critique of this methodology can be summarised briefly as: standard doctrinal international law methodology privileges European (or, depending on the context, global North, First World) positions and replicates precisely the marginalisation of the contributions of the Inter-American and African human rights bodies which MIGJUST problematises (i.a. Chimni 2017, 2018, 2022; Anghie 2005). This critique questions formal sovereign equality which, it argues, underpins the continuing hegemony of former colonial powers. This critique of international law is controversial, but its underpinning (the idea that formal equality may lead to sustained inequality) is in itself not at all exceptional. One may think of labour law which treats employers and employees unequally in order to compensate for their power difference. In 1905 the US Supreme Court held that a New York statute providing for maximum working hours violated the constitutional right to freedom of contract (*Lochner v New York*). It took the critique of the Legal Realists to develop legal doctrine that does allow for legislation and case law compensating for inequality. In domestic law, going beyond formal equality is commonplace, not just in labour law and housing law, but also in relations between individuals and the state (think of the specific protections of individual rights in criminal and administrative law). In fact, Legal Realism in the past, and the Anghie/Chimni critique today is a form of non-ideal theory in the context of legal doctrine. MIGJUST will explore the arguments in political and legal theory holding that migration law in its starkest form is about South-North migration, hence about global South citizens in global North states; and that formal equality obfuscates this inequality (Achiume 2019; Mendoza 2020; El Fadl 2020). To the extent that this is the case, what possibilities do political and legal theory offer to acknowledge this inequality in legal doctrine?

MIGJUST seeks not to pre-empt this debate, but proposes to conduct a standard doctrinal international law analysis, and subsequently to subject the outcomes of that analysis to the Chimni/Anghie critique so as to see whether it applies and where it may lead.

Assuming the validity of the Chimni/Anghie critique, MIGJST anticipates a third methodological step, which builds on the 'historical turn' in international law (Fassbender & Peters 2012; Craven 2016). In this way, MIGJUST seeks to go beyond the sovereignty and human rights approaches in law and political theory, and to achieve a restatement of the relation between migration and human rights. Three promising issues have been raised in literature so far:

1) Site of control: Both the human rights and the sovereignty approaches treat it as obvious that existing states are the legitimate site of control. There are proposals to rethink this. Mendoza (2021) argues that states are based on violence and conquest; and that people are not sedentary, borders are not immutable and hence populations are not homogeneous. Sanni (2020) argues that migration control relies on conceptual and emotional 'structures of strangeness' which are a consequence of the colonial project of inserting Africa in the global economy. Achiume (2019) has posited that ongoing post-colonial ties have created an interconnected sovereignty which links former colonies with former colonial empires. The idea of thinking beyond the nation-state as site of control may include supra-national (Sanni's Pan-Africanism), cross-national (as in Achiume's post-colonial community) and sub-national (Oomen & Baumgärtel 2021) sites.
2) Beyond formal equality: Achiume (2019) has argued that third world citizens who have been dispossessed by historical colonialism are entitled to migrate to imperial centres as a matter of

individual redistributive justice. Mendoza (2021) and Kirloskar-Steinbach (2015) have likewise suggested that the structural inequality resulting from global economics has to be factored in to conceptualisations of migration justice. A second issue to explore is whether migration control should be related to inequalities between states and regions resulting from post-colonial, economic and political relations, and in particular whether underdevelopment can be related to mobility rights.

3) Responsibility: Criticising the assumption that "the weakness of democracy and development" in third world countries are the 'root causes' of (forced) migration (e.g. Gortázar Rotache 2019), some have argued that countries that are responsible for human movement have an obligation to settle the migrants concerned. El Fadl (2020) has suggested a proportional obligation for states that cause forced displacement of migrants through military action, mentioning the USA, Russia, Saudi Arabia and the U.A.E., and Israel. Achiume's (2019) plea for a right of third world citizens to move to post-colonial metropoles likewise is based on the purported responsibility metropoles have for the dispossession of third world citizens. This will lead to an exploration of responsibility (in the doctrinal sense, as in the ILC Draft Articles on State Responsibility, but also in ways proposed by political theory) and migration as a form of reparations.

Therefore, in addition to the comparative (step 1) and standard doctrinal international law (that will be central in step 2) methodologies mentioned earlier, MIGJUST will develop innovative legal-doctrinal and political theory positions by relying on new ideas brought forward in political theory (Mendoza, Sanni, El Fadl, Kirloskar-Steinbach) as well as in legal theory (Achiume 2019, 2022; Chimni 1998). While these methodologies are in themselves not new, their combined application to this field will enable MIGJUST to address the hypothesised fundamental flaw in international migration law doctrine.

Step 1 and step 2 of this methodological approach are pathbreaking because (a) they fill a gap in existing knowledge about the Inter-American, African and UN human rights systems and (b) they fill a gap in existing knowledge about an unacknowledged fundamental conflict in legal doctrine. However, they are low-risk; collecting case law and conducting comparative analysis will constitute a major step forward for the field, and can certainly be implemented. Step 3 is high risk; it is not guaranteed that the methodologies to be deployed in step 1 and step 2 will actually allow MIGJUST in step 3 to go beyond the conflict between the human rights and sovereignty approaches. However, if step 3 succeeds, the gains will be high. Not only will the outcome be a restatement of migration and international human rights law that can be adapted in all human rights systems; it will also be a key contribution to international cooperation because it would provide for a shared normative framework which is currently lacking (*supra*). Two risk mitigation strategies will be adopted to limit the high risk of step 3: (1) even if step 3 fails entirely, the outcomes of step 1 and 2 constitute a breakthrough by correcting the idea that the sovereignty approach constitutes international human rights law; (2) even if the outcome of step 3 is not a full restatement, it is likely that it will lead to contributions for a restatement.

The above results in three research questions, corresponding to the three methodological steps outline above:

Research Question 1: what case law relating to the right of states to control migration, respectively the right of individuals to cross international borders, has been adopted in, respectively, the African, the Inter-American, European and the UN human rights systems? How do they compare on thematic and doctrinal issues? How are these positions related to political theory?

Research Question 2: in light of the approaches identified under RQ1, what is the result of standard doctrinal international law methods to resolve the conflicting positions? What is the result of an application of the Anghie/Chimni critique to these outcomes?

Research Question 3: based on innovative ideas formulated in political and legal theory, what possibilities for alternative normative approaches are available to move beyond the divergences and to suggest a legal framework which may be common to human rights supervisory bodies world-wide?

This results in the following division of work:

PhD 1	Inter-American human rights system
PhD 2	African human rights system; ASEAN
PhD 3	UN human rights system
Postdoc	Non-ideal political theory
PI	Re-analysing European case law; ensuring restatement of international law by the team as a whole

The Inter-American case law is well accessible, and will be analysed by a PhD candidate. The African case law is hard to access, as the African institutions do not have well-functioning search machines. As African case law is expected to be limited in quantity, the PhD focusing on Africa will probably the team member

including the sparse ASEAN sources. The UN system is well accessible but spread out over different committees. Case law will be researched by PhDs with the assistance of a student-assistant. A postdoc, preferably with a background in law as well as political theory, will analyse political theory. European case law is well explored, and its analysis is at the core of my work over the past decades; therefore, the PI will re-analyse European case law. The restatement of international law will be a joint undertaking for the team as a whole, for which the PI has primary responsibility.

Work plan

During the first half year, the PI and the postdoc will select three PhD candidates. During their first year, the PhDs, postdoc & PI will develop their research plan by writing a literature (state of the art) review and by specifying their methodology. In their second year, materials (case law and political theory, respectively) will be collected and compared. Their third year will be devoted to using standard doctrinal international law methodology so as to resolve the conflicting positions, and to explore the Anghie/Chimni critique. In year 4, PhDs & PI formulate doctrinal alternatives in the human rights system they have studied while the postdoc relates the alternatives to political theory. The PhDs will finalise their manuscripts at the end of year 4. Year 5 will see the PhD defences, and an international conference during which the project outcomes are related to ongoing academic, societal and political discussions concerning migration law and political theory.

<table>
<tr><th colspan="2">Year 1</th><th>Year 2</th><th>Year 3</th><th>Year 4</th><th>Year 5</th></tr>
<tr><td>3 PhDs</td><td></td><td rowspan="3">Literature review & methodology</td><td>Case law review (step 1)</td><td rowspan="3">Resolve conflicts; explore methodological critique (step 2)</td><td rowspan="3">Develop innovative legal-doctrinal & political theory (step 3)</td><td>Defend PhD</td></tr>
<tr><td>Postdoc</td><td rowspan="2">Set up of project; hire PhDs</td><td>Map political theory on migration</td><td rowspan="2">Conference, edited volume</td></tr>
<tr><td>PI</td><td>Case law review (step 1)</td></tr>
</table>

The international conference (year 5) will bring together people working in the courts, commissions and committees involved, lawyers (including state representatives) appearing before them, NGOs working with them, and academics studying their case law. The participation of practitioners and academics from the global South will be encouraged and facilitated. During the conference, the MIGJUST researchers will present their findings, together with papers submitted in response to an open call. Papers from this conference will be published in an open access edited volume.

In this manner, the project will produce the following deliverables:

	Year1	Year 2	Year 3	Year 4	Year 5
PdD 1, 2 & 3, PI	4 peer reviewed state of the art article on Inter-American, African, UN & European migration case law	3 peer reviewed articles + manuals Inter-American, African, UN case law; PI 1 article European case law (no manual)	4 peer reviewed articles on resolving conflict in the context of each human rights system	4 peer reviewed articles on alternative approaches	PhD defences. PI: edited volume, policy brief (with postdoc)
Postdoc	Peer reviewed article dominant theory	Peer reviewed article non-ideal migration justice theory	Peer reviewed article on relation political theory & the 4 human rights systems	Peer reviewed article on alternatives and political theory	Edited volume, policy brief (with PI)

Dissemination

MIGJUST is primarily an *academic* project. Dissemination to academic audiences will take place via peer-reviewed articles, the conference and the edited volume. All publications will be open access; funds for this have been reserved in the budget.

MIGJUST is also directly relevant for *legal practice*. However, based on previous experience, rather than publish the practice-oriented publications (in particular the manuals) on a project website, we will seek to publish these manuals on the websites of the relevant institutions as part of their institutional dissemination strategy. A project website has a life time that is limited to the funding, and it is hard to attract attention for it. The practice-oriented publications should be accessible at the places where practitioners look for their work – the websites of the institutions concerned.

MIGJUST is relevant for *international cooperation*. The final conference will bring together not only academics and people from legal practice, but also policy makers and functionaries from international (non-governmental) organisations, including key the specialised organisations UNHCR, and IOM.

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