EUROPEAN YEARBOOK ON HUMAN RIGHTS

2025

Edited by Philip Czech, Lisa Heschl, Karin Lukas,
Manfred Nowak, Gerd Oberleitner and Hannes Tretter



BRILL | NIJHOFF

European Yearbook on Human Rights 2025

European Yearbook on Human Rights 2025

Edited by

Philip Czech, Lisa Heschl, Karin Lukas,
Manfred Nowak, Gerd Oberleitner and Hannes Tretter



BRILL | NIJHOFF

LEIDEN | BOSTON



This is an open access title distributed under the terms of the CC-BY-NC-ND 4.0 license, which permits any non-commercial use, distribution, and reproduction in any medium, provided the original author(s) and source are credited. Further information and the complete license text can be found at https://creativecommons.org/licenses/by-nc-nd/4.0/

The terms of the CC license apply only to the original material. The use of material from other sources (indicated by a reference) such as diagrams, illustrations, photos and text samples may require further permission from the respective copyright holder.

This Open Access publication is co-funded by the University of Graz, the Paris Lodron University Salzburg, the Central European University, the Vienna Forum for Democracy and Human Rights, the Global Campus of Human Rights and the European Union.

The Library of Congress Cataloging-in-Publication Data is available online at https://catalog.loc.gov
LC record available at https://lccn.loc.gov/2025045416

Typeface for the Latin, Greek, and Cyrillic scripts: "Brill". See and download: brill.com/brill-typeface.

ISSN 2566-137X
ISBN 978-90-04-74771-5 (hardback)
ISBN 978-90-04-75102-6 (e-book)
DOI 10.1163/9789004751026

Copyright 2026 by Lisa Heschl, Philip Czech, Karin Lukas, Manfred Nowak, Gerd Oberleitner and Hannes Tretter. Published by Koninklijke Brill BV, Plantijnstraat 2, 2321 JC Leiden, The Netherlands.
Koninklijke Brill BV incorporates the imprints Brill, Brill Nijhoff, Brill Schöningh, Brill Fink, Brill mentis, Brill Wageningen Academic, Vandenhoeck & Ruprecht, Böhlau and V&R unipress.
Koninklijke Brill BV reserves the right to protect this publication against unauthorized use.
For more information: info@brill.com.

This book is printed on acid-free paper and produced in a sustainable manner.

Contents

Preface IX
Abbreviations XII
Notes on Contributors XVI

Hannes Tretter: In Memoriam 1
Manfred Nowak

PART 1
***The Council of Europe* (*CoE*)**

The Council of Europe and Human Rights: An Overview 7
Manfred Nowak

The Influence of the European Court on Human Rights on the African Court on Human and Peoples' Rights 32
Patient Mpunga-Biayi

Territorial and Material Jurisdiction of the European Court of Human Rights: How Flexible Has the 'Living Instrument' Been Thus Far? 62
Ivan Levy

Stereotyped Narratives as Mechanisms of Discrimination: The Evolution of the ECtHR Approach in Protecting Migrants' Rights 96
Elena Ghidoni, Encarnación La Spina and Dolores Morondo Taramundi

The Evolving Role of the European Convention on Human Rights in Preventing, Protecting against and Punishing Domestic Abuse 126
Stevie Martin

Human Rights in Motion and People on the Move: Navigating Individual and Collective Claims amidst Climate Change 158
Irene Sacchetti and Carla Field

The ECHR and Human Rights Protection in Immigration and Asylum Law: From a Catalyst Role to a Constitutional Task 188
Bahija Aarrass

The Contribution of the European Court of Human Rights to End-of-Life Law and Practice: Looking Back to Look Forward 217
Nataly Papadopoulou and Elizabeth Wicks

From Helsinki to Strasbourg: Synergies and Tensions in the Multi-layered European Minority Rights Regime 247
Aristoteles Constantinides

Defending Democracy or Subverting Rights? The Role of 'Militant Democracy' in Baltic States Cases before the ECtHR 279
Donatas Murauskas

Effective Investigation as a Mechanism of Transitional Justice: Romania at the European Court of Human Rights 307
Sabina-Andreea Grigore

Current Challenges to the Execution of ECtHR Judgments and the Role of the Parliamentary Assembly of the Council of Europe 338
Agnieszka Szklanna

PART 2
European Union (EU)

The European Union and Human Rights: An Overview 371
Wolfgang Benedek

Restriction of Movement and Deprivation of Liberty under the New Pact 384
Sian Donkers

The EU AI Act and Human Rights by Design Obligations 411
Akanksha Bisoyi

The Right to Be Forgotten in the Age of Artificial Intelligence 451
Nidal Askar

PART 3
Organization for Security and Co-operation in Europe (OSCE)

Very Unfinished Business: The OSCE and Human Rights, 50 Years On 483
Christian Strohal

From Co-operation to Negation: The Uneven Legacy of the Helsinki Final Act in Russia 498
Anna Weininger

The Role of OSCE at the Eurasian Border: Towards a Legal Clash? 521
Patricio Ignacio Barbirotto

PART 4
Jurisprudence by the European Courts

The Case Law of the ECtHR in 2024: The ECHR and the Contemporary Global Challenges for the International Community 549
Lorenzo Acconciamessa

The Court of Justice of the European Union and Human Rights in 2024 600
Eva Maria Molinari

Index 633

Preface

As we gather to commemorate the interconnected legacies of three decisive moments in European history – the 75th anniversary of the European Convention on Human Rights (ECHR), the 50th anniversary of the Helsinki Final Act of the Organisation for Security and Co-operation in Europe (OSCE), and the 75th anniversary of the Schuman Declaration – we are reminded of the enduring significance of the three European institutions promoting and protecting fundamental and human rights. All three have not only shaped the landscape of human rights, security and European integration but have also laid the groundwork for a more just and equitable society.

In an era marked by profound challenges, the relevance of human rights is more pressing than ever. The world is currently grappling with a multitude of crises: ongoing wars that devastate communities, the rise of populism that threatens the very fabric of democratic institutions and societies, and a troubling trend towards democratic backsliding that undermines the principles of governance and accountability. These issues serve as stark reminders of the fragility of the rights and freedoms we often take for granted.

The EU, the CoE and the OSCE were born out of a desire to foster peace, cooperation and respect for human dignity. They represent a collective commitment to uphold the values of democracy, the rule of law and human rights across Europe and beyond. Yet, as we reflect on the aforementioned legacies, we must also confront the reality that human rights are under siege. The rise of authoritarianism, the erosion of civil liberties, and the increasing polarisation of societies pose significant threats to the progress we have made.

This special issue of the *European Yearbook on Human Rights* seeks to explore the profound and lasting impact of the three institutions and the human rights instruments adopted and mechanisms established under their umbrella while critically examining the current challenges they face. It is an important signal that academic work remains vital for the advancement of human rights. Through rigorous analysis and thoughtful discourse, we can better understand the complexities of our present circumstances and identify pathways to reinforce the foundations of our democratic societies. As scholars, practitioners and advocates, we have a responsibility to engage with these issues and contribute to the ongoing dialogue surrounding human rights. The insights presented in this issue will therefore not only honour the legacies of the ECHR, the Helsinki Final Act and relevant EU instruments but will also serve as a call to action. We must remain vigilant and

proactive in defending the rights and freedoms that are essential to our shared humanity.

In closing, let us remember that the fight for human rights is a collective endeavour. The legacies we celebrate today will inspire us to confront the challenges of tomorrow with renewed determination and solidarity. Together, we can work towards a future where the principles enshrined in these foundational documents are not only upheld but also expanded on to ensure justice, security and dignity for all.

Philip Czech, Lisa Heschl, Karin Lukas, Manfred Nowak and Gerd Oberleitner

This publication is supported by















Abbreviations

ACFC	Advisory Committee to the Framework Convention on the Protection of National Minorities
AI	Artificial Intelligence
AMMR	Asylum and Migration Management Regulation
AP	Additional Protocol
APR	Asylum Procedures Regulation
AU	African Union
CAHAI	Ad hoc Committee on Artificial Intelligence
CAI	Committee on Artificial Intelligence
CAS	Court of Arbitration for Sports
CCAC	Closed Controlled Access Centres
CCTV	Closed-Circuit Television
CEAS	Common European Asylum System
CERV	Citizens, Equality, Rights and Values Program
CFR	Charter of Fundamental Rights of the European Union
CFREU	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the EU
CLAHR	Committee on Legal Affairs and Human Rights
CM (CoM)	Committee of Ministers
CoE	Council of Europe
COHOM	EU Working Party on Human Rights
CPT	European Committee for the Prevention of Torture
CSCE	Conference on Security and Cooperation in Europe
CSDDD	Corporate Sustainability Due Diligence Directive
CSR	Corporate Social Responsibility
CST	Collective Security Treaty
CSTO	Collective Security Treaty Organisation
DH	Documents concerning Human Rights
DP	Differential Privacy
DPIA	Data Protection Impact Assessment
DROI	EU Human Rights Sub-Committee of the Foreign Affairs Committee
EAEU	Eurasian Economic Union
EC	European Commission
EC/DA	European Conservatives Group and Democratic Alliance
ECHR	European Convention on Human Rights
EComHR	European Commission of Human Rights

ECPT	European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
ECRI	European Commission against Racism and Intolerance
ECtHR	European Court of Human Rights
EDPB	European Data Protection Board
EDPS	European Data Protection Supervisor
EEAS	EU External Action Service
EED	European Endowment for Democracy
ENEMO	European Network of Election Monitoring Organizations
ENISA	European Union Agency for Cybersecurity
EP	European Parliament
EPP/CD	European People's Party/Christian Democrats
ESC	European Social Charter
EUAA	EU Agency for Asylum
EUSR	EU Special Representative
FCNM	Framework Convention on the Protection of National Minorities
FRA	Fundamental Rights Agency
FRANET	Network of National Correspondents of the Fundamental Rights Agency
FREMP	Working Group on Fundamental Rights, Citizen Rights and Free Movement of Persons
FRIA	Fundamental Rights Impact Assessment
FRY	Federal Republic of Yugoslavia
FSC	Forum for Security Co-operation
GAI	Generative Artificial Intelligence
GDPR	General Data Protection Regulation
GPAI	General Purpose Artificial Intelligence
GRC	Geneva Refugee Convention
GRECO	Group of States against Corruption
GRETA	Group of Experts on Action against Trafficking in Human Beings
GREVIO	Group of Experts on Action against Violence against Women and Domestic Violence
GSP	Generalized System of Preferences
HCNM	High Commissioner on National Minorities
HLEG	High-Level Expert Group
HRC	Human Rights Committee
HSK	Hâkimler ve Savcılar Kurulu (The Council of Judges and Proseutors of Turkey)
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights

ICSID	International Centre for Settlement of Investment Disputes
ICT	Information and Communication Technology
ILO	International Labour Organisation
IPCC	Intergovernmental Panel on Climate Change
LIBE	Committee on Civil Liberties of the European Parliament
LL.M.	Large Language Model
MHG	Moscow Helsinki Group
ML	Machine Learning
MS	Member State
NATO	North Atlantic Treaty Organization
NPM	National Preventive Mechanism
OAS	Organization American States
OAU	Organization of African Unity
OECD	Organisation for Economic Co-operation and Development
OPCAT	Optional Protocol to the Convention against Torture
OSCE	Organisation of Security and Co-operation in Europe
PACE	Parliamentary Assembly of the CoE
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
PKK	Worker's Party of Kurdistan
PPML	Privacy-Preserving Machine Learning
PTSD	Post-traumatic Stress Disorder
R2HE	The Right to a Clean, Healthy, and Sustainable Environment
RBPR	Return Border Procedure Regulation
RCD	Reception Conditions Directive
RD	Return Directive
REE	Rare Earth Elements
RTBF	Right to Be Forgotten
SFSC	International Association of Athletics Federations
SISA	Sharded, Isolated, Sliced, and Aggregated Training
SOC	Socialists, Democrats and Greens Group
SPT	UN Subcommittee on Prevention
TEAEU	Treaty on the Eurasian Economic Union
TRNC	Turkish Republic of Northern Cyprus administration
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNDP	United Nations Development Programme
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNEP	United Nations Environment Programme
UNGA	United Nations General Assembly

VCLT	Vienna Convention on the Law of Treaties
VPN	Virtual Private Network
WHO	World Health Organisation
WMO	World Meteorological Organization

Notes on Contributors

Bahija Aarrass
is an Assistant Professor at the Department of Constitutional and Administrative Law at the VU University of Amsterdam. Her research interests are European human rights law, migration and asylum law and European public law. She teaches several courses on constitutional law and human rights law). She is a member of the Meijers Committee (State Advisory Committee on International migration, European and criminal law) and a substitute member of the Dutch Human Rights Institute. She is also a member of the editorial board of *EHRC Updates* and the Steering Committee of the Netherlands Network for Human Rights Research.

Lorenzo Acconciamessa
is an Assistant Professor of International Law at the University of Palermo (Italy) where he previously obtained his Ph.D. in 'Human Rights: Evolution, Protection and Limits', jointly with the Ph.D. in International and European Law at the *Ecole doctorale de la Sorbonne* of the *Université Paris 1, Panthéon-Sorbonne*. Between January 2022 and December 2024, he served as an Assistant Lawyer at the Registry of the European Court of Human Rights. His main research interests include international human rights law, the relationships between domestic law and international law, and the law of international adjudication. He is also a practicing lawyer and legal consultant and regularly trains lawyers and judges in the field of human rights law.

Nidal Askar
currently serves in the Digital Development – Artificial Intelligence Unit of the Council of Europe and is a Ph.D. candidate in law at the Centre for European and International Studies, University of Strasbourg. Her research examines the intersection of artificial intelligence and fundamental rights, with particular emphasis on the GDPR and the EU AI Act. She holds dual master's degrees – one in International Relations from Boğaziçi University and another in EU Law from the College of Europe – and completed her legal studies at the francophone Galatasaray University.

Wolfgang Benedek
is Professor (ret.) of international law and former director of the Institute of International Law and International Relations and of the European Training and Research Centre for Human Rights and Democracy (ETC) of the Univer-

sity of Graz. He is a lecturer at several institutions and in numerous international programmes including the Vienna Diplomatic Academy, University of Ljubljana and the European Master Programme on Democracy and Human Rights in Sarajevo. He has been the founder and Co-editor of the European Yearbook on Human Rights (2009–2028) and has been involved in several research projects funded by the EU and other sources (e.g. cluster leader in the FP 7 Research Project 'Fostering Human Rights among European (External and Internal) Policies' (2013–2016). He has acted as an expert for several international organisations including the UN, the Council of Europe and the EU and has been appointed as OSCE rapporteur under the Moscow Mechanism on Chechnya (2018), Belarus (2020) and Ukraine (2022).

Patricio Ignacio Barbirotto
is a post-doctoral research fellow in international law at Ca' Foscari University of Venice (Italy). He holds a Ph.D. in international law ('Law, Market, and Person' Ph.D. Programme) from the same university and a Ph.D. in regional governance from Astrakhan State University (Russia). His research interests include international law in the former Soviet space, the interaction between public and private subjects, and regional integration law. In addition to his academic work, he provides consultation to public institutions and private enterprises.

Akanksha Bisoyi
works as a postdoctoral researcher at the Professorship of Law, Science and Technology, Technical University of Munich. She holds a doctorate in law from the Technical University of Munich. Her research focuses on the intersection of international law and emerging technologies, including blockchain, AI and the metaverse. She aims to design and develop legal models and interactive platforms to explore these relationships.

Aristoteles Constantinides
is Associate Professor of International Law and Human Rights at the Department of Law of the University of Cyprus. He is a member of the Council of Europe's Steering Committee for Human Rights in the fields of Biomedicine and Health (CDBIO). He was the author of the draft National Human Rights Strategy of Cyprus and was advisor to the President of the Republic of Cyprus in the talks for the settlement of the Cyprus problem (2014–2021). His research interests and publications include international human rights law, particularly social rights and the rights of disadvantaged groups, the law of the United Nations, statehood and recognition, and the Cyprus problem.

Philip Czech
is a Senior Scientist at the Austrian Institute for Human Rights, a department of Salzburg University. He holds Ph.D. degrees in law and history. His main fields of interest are the case law of the ECtHR and its transposition in Austria, children's rights, asylum and migration law, as well as human rights in the penitentiary system. Besides of that he also does research in Austrian legal history. He is the editor of the *Newsletter Menschenrechte*, a periodical reporting in German on the current case law of the European Court of Human Rights.

Sian Donkers
is a Ph.D. candidate at the Scuola Superiore Sant'Anna, Italy, in the Ph.D. programme Human Rights, Global Politics and Sustainability: Legal and Philosophical Perspectives at the Institute of Law, Politics and Development. In her research she focuses on the EU's legal accountability for the restriction of effective access to international protection through the use of Integrated Border Management in the Western Balkans. She is an OISC registered lawyer, with years of legal practice in immigration and asylum law in the UK. She graduated of M.Phil. from Trinity College Dublin in Conflict Resolution and Reconciliation, and was awarded with Distinction. She is furthermore a recent graduate of the LL.M. in International and European Law from the National and Kapodistrian University of Athens, and was again awarded with Distinction.

Carla Field
is a graduate teaching assistant and Ph.D. candidate at the University of Leicester. Her research focuses on the protections available to individuals facing cross-border environmental displacement. She has contributed to publications with a practice-based focus on climate-related displacement, including through her work with the Refugee Law Initiative (see 'International Protection, Disasters and Climate Change', *International Journal of Refugee Law* (2024) 36 (1)). However, her individual research focus is more theoretical, as is the focus of her doctoral thesis. As a graduate teaching assistant, she has taught on aspects of core European law for two years. In her wider professional life, she has worked within the charity sector as a refugee caseworker for the British Red Cross, holds an LL.M. degree specialising in International Human Rights Law and a BA degree in English, both from the University of Leicester.

Elena Ghidoni
is a legal researchers at the Pedro Arrupe Human Rights Institute of the University of Deusto and members of the R+D+i RESEST Project: 'Resilience of

Anti-discrimination Law to Biases and Stereotypes: Challenges and Proposals for Intervention', ref. PID2021-123171OB-I00, funded by the Ministry of Science and Innovation of Spain. She is a postdoctoral researcher involved in national and European research projects in the field of gender equality laws and policies; her publications and dissemination activities focus on feminist legal theory, intersectionality, and stereotyping in human rights law.

Sabina Andreea Grigore
is a recent alumna of the M.Sc. International Crimes, Conflict and Criminology at the Vrije Universiteit Amsterdam, where her research focused on the role and contributions of civil society organisations in the work of the International Criminal Court, exploring how non-state actors contribute to investigations and the pursuit of accountability for international crimes. She also holds a Double Degree in Liberal Arts and Sciences from the University College Freiburg in Germany and the University College Maastricht in the Netherlands. Her current research focuses on the study of international criminal justice, particularly examining how legal institutions function in practice and how evidence is produced, assessed and utilised in trials for atrocity crimes.

Lisa Heschl
is Senior Scientist at the European Training and Research Centre on Human Rights and Democracy at the University of Graz (Uni-ETC). She received her Ph.D. in law from the University of Graz and holds a European Master's Degree in Human Rights and Democratisation (E.MA). Her research focuses on the European migration and asylum policy and legislation, the extraterritorial application of international and European refugee and human rights law and its relationship with European border policies.

Encarnación La Spina
is a legal researchers at the Pedro Arrupe Human Rights Institute of the University of Deusto and members of the R+D+i RESEST Project: 'Resilience of Anti-discrimination Law to Biases and Stereotypes: Challenges and Proposals for Intervention' (ref. PID2021-123171OB-I00), funded by the Ministry of Science and Innovation of Spain. She has conducted academic activities (publications, research projects, and conferences) about migrant rights, refugee reception conditions, vulnerability, discrimination, and integration policies in the framework of highly competitive, internationally renowned post-doctoral scholarships.

Ivan Levy
works as an international practitioner with focus in the areas of international arbitration and human rights. He is a Lecturer at Bucerius Law School, a Year in Review Reporter for the Yearbook of International Environmental Law (Oxford University Press), and a Review Board Member of the Foreign Direct Investment Moot. He holds an LL.M. from Columbia Law School and a J.D. from the University of Buenos Aires.

Karin Lukas
is Professor of Legal Studies at the Central European University (CEU). She is an expert on the interactions between different human rights systems and institutions with a focus on the wider Europe as well as in the translation of human rights standards into activities of business, trade, development cooperation and climate change. She has acted as a consultant for various national and international organisations such as the UN Development Programme, MIGA (World Bank Group) the Austrian Ministry for Foreign Affairs and companies in various sectors, and was appointed a member of the European Committee of Social Rights of the Council of Europe in 2011 (until 2022).

Stevie Martin
is a College Lecturer in Law, Fitzwilliam College (University of Cambridge). Her research expertise is in human rights law, with a particular focus on European human rights law, and English public law. She has taught across a range of papers at both the undergraduate and graduate levels, including human rights law, tort law and law and information. She is joint General Editor of the *European Human Rights Law Review*.

Eva Maria Molinari
is a senior researcher, post-doctoral fellow and lecturer at the University of Basel, where she teaches constitutional and fundamental rights law and constitutional theory. Before joining the University of Basel, she was Professor at the Department of Social Work of the Bern University of Applied Science, where she continues to teach as lecturer. She is an experienced attorney with practice in national and international litigation with a renowned business law firm. She holds a doctorate from the University of Fribourg (Switzerland) on comparative constitutional and fundamental rights law awarded with distinction and prizes. Her research focuses on constitutional law, the legal and theoretical frameworks of digital transformation, and social law.

Dolores Morondo
is a legal researchers at the Pedro Arrupe Human Rights Institute of the University of Deusto and members of the R+D+i RESEST Project: 'Resilience of Anti-discrimination Law to Biases and Stereotypes: Challenges and Proposals for Intervention' (ref. PID2021-123171OB-I00), funded by the Ministry of Science and Innovation of Spain. She is an antidiscrimination law scholar and her research and publications deal with theoretical and jurisprudential issues regarding intersectionality, vulnerability and structural inequality.

Patient Mpunga-Biayi
is a Ph.D. candidate in law and a lecturer at Université Laval (Québec, Canada). He is a Vanier Canada Graduate Scholar, a Research Analyst at the National School of Public Administration of Quebec and Deputy Editor-in-Chief of the *Quebec Journal of International Law*.

Donatas Murauskas
is an Associate Professor at Vilnius University Law Faculty. His research focuses on legal argumentation in courts, the implementation of human rights and comparative constitutional law. He is also an experienced lawyer, focusing on litigation in human rights fields. He represented clients (including *pro bono*) before the European Court of Human Rights and national courts. Prior to entering private practice, he served as the head of the Representation Division for the Government of Lithuania at the European Court of Human Rights and the United Nations Human Rights Committee. Currently, he also serves as the head of the U.S. Law Centre at Vilnius University. In 2019–2020, he was a Fulbright Research Scholar at Wake Forest Law School. He holds an LL.M. in Law and Economics.

Manfred Nowak
is Professor of International Law and Human Rights and Scientific Director of the Vienna Master of Arts in Applied Human Rights at the University of Applied Arts in Vienna as well as Secretary General of the Global Campus of Human Rights in Venice. He has acted as an independent expert for various institutions including the UN (e.g. as UN Independent Expert leading the UN Global Study on Children Deprived of Liberty, UN expert on enforced disappearances, UN Special Rapporteur on Torture), the EU (e.g. Vice-Chair of the EU Fundamental Rights Agency in Vienna) and the Council of Europe (e.g.

International Judge at the Human Rights Chamber for Bosnia and Herzegovina in Sarajevo). He was director of the Netherlands Institute of Human Rights at the University of Utrecht, founder and co-director of the Ludwig Boltzmann Institute of Human Rights at the University of Vienna, and has held visiting chairs at the University of Lund, the Graduate Institute in Geneva and Stanford University.

Gerd Oberleitner
is UNESCO Chair in Human Rights and Human Security at the Faculty of Law, University of Graz, and Director of the European Training and Research Centre for Human Rights and Democracy at the University of Graz. He has been a Lecturer at the Centre for the Study of Human Rights of the London School of Economics and Political Science and Visiting Professor at the European Inter-University Centre, Venice, the Université du Quebéc à Montréal, the Universities of Ljubljana and Bochum and Rutgers University. He teaches in the Global Campus of Human Rights.

Nataly Papadopoulou
is a Lecturer in Law (Assistant Professor) at Leicester Law School, University of Leicester. Her research explores the law and practice at the end-of-life, especially the regulation and practice of assisted death from a comparative, contextual and cross-disciplinary perspective. She is currently leading the establishment of a European Network on End-of-Life following a Brocher grant. At the University of Leicester, she also established and currently leads the work of the interdisciplinary group 'Deliberate Dying'. She has co-edited (with Liz Wicks) *Research Handbook on Human Rights Law and Health* (Elgar, 2025 forthcoming). She has published on human rights and the end-of-life in leading journals, including the *Medical Law Review*, *Medical Law International* and the *Journal of the Royal Society of Medicine*. She is also co-founder of LeicSurvey (incorporated), a survey tool that has been created in collaboration with hospices to improve the quality and quality of feedback received by hospice teams.

Irene Sacchetti
is a Ph.D. Candidate in Climate Change and Refugee Law at Nottingham Trent University where she teaches Immigration and Asylum Law and European Union Law. Her project invites you to rethink climate-induced (im)mobilities from a decolonial and ecofeminist perspective. She graduated *cum laude* with an integrated LL.M. from the University of Bologna (Italy); Irene is a former Research Fellow at the Potsdam Institute of Advanced Sustainability Studies.

She previously worked for the Centre for Climate Law and Sustainability Studies, Czech Academy of Sciences and for the Geneva International Centre for Justice. Irene's research interests sit at the intersection between human rights law, climate change law, and decoloniality and the law.

Anna Weininger
is a Ph.D. candidate and doctoral researcher in international and European human rights law at the Academy for European Human Rights Protection at the University of Cologne. She further holds a lectureship in constitutional law at the University of Cologne. Her research is situated within the broader field of human rights law, with a particular regional emphasis on Russia and Eastern Europe. Her doctoral project investigates the contemporary human rights narrative in the Russian Federation, with a focus on the historical continuities from Tsarist Russia and the Soviet era. It critically examines how these legacies form the present-day conceptualisation and articulation of human rights in Russia, contributing to a distinctively Russian discourse on human rights. In 2022, she completed the First State Examination in Law at the University of Cologne, with a specialisation in European and Public International Law.

Christian Strohal
is an Austrian diplomat with a long career in multilateral work: most recently, after having served as Permanent Representative of Austria to the Organization for Security and Cooperation in Europe (OSCE) in Vienna, he was Special Representative of Austria's OSCE Chairperson-in-Office. Previously, he represented Austria at the UN in Geneva where he held, i.a., the positions of Chairman of the Governing Bodies of the IOM, Vice-President of the Human Rights Council and president of the Compensation Commission of the UN Security Council. Between 2007 and 2012, he also served as Austria's independent adj. member of the Management Board of the European Union Fundamental Rights Agency. From 2003 to 2008, he was Director of the Office for Democratic Institutions and Human Rights (ODIHR) of the OSCE. Earlier functions include director for human rights at the Austrian MFA, and Ambassador to Luxemburg. In 1992–1993 he was Austria's Ambassador for the Vienna World Conference on Human Rights. He has been educated in Vienna, London and Geneva and received his Dr.iur. from the University of Vienna in 1975. He has been teaching at different institutions and published a number of articles. He has been involved with the Bertelsmann Foundation and is on the boards of the Austria Institute for European and Security Policy and the Austrian Centre for Peace, and is a non-resident

Fellow at LISD at Princeton University. For his commitment to human rights, he was awarded the 2008 Felix Ermacora Human Rights Award and the Pro Merito Medal of the European Commission for Democracy through Law from the Venice Commission.

Agnieszka Szklanna
has been Secretary to the Monitoring Committee of the Parliamentary Assembly of the Council of Europe (PACE) (since March 2023 onwards). Between 2009 and 2023, she had been Secretary to the Committee on Legal Affairs and Human Rights (CLAHR). Before joining the PACE Secretariat, she had worked as a lawyer in the Polish division of the Registry of the European Court for Human Rights (ECtHR) (2003–2004) and the Department for the Execution of Judgments of the ECtHR (2004–2009). Earlier, she had worked as a trainee barrister in a law firm in Warsaw (Poland) and joined the Warsaw Bar Association in 2004. She holds three master's (in applied linguistics and law from the Warsaw University and in European studies from the College of Europe – Natolin) and a Ph.D. in public international law (Warsaw University). She is now a visiting professor at the Social Sciences, Economics and Law Faculty of the Paris Catholic Institute and had previously lectured at the Faculty of Law, Warsaw University; Political Studies Institute, Strasbourg University; and the Law Department, Paris Dauphine University. She regularly publishes on issues of ECtHR system, legal protection of aliens and relations between the European Union and the Council of Europe.

Hannes Tretter
was an Austrian lawyer and human rights expert. He was Professor of Fundamental and Human Rights at the University of Vienna, Director of the Ludwig Boltzmann Institute of Human Rights, which he cofounded with Felix Ermacora and Manfred Nowak in 1992, and co-founder of the Vienna Forum for Democracy and Human Rights. He acted as expert with the OSCE, the CoE, the EU (e.g. FRA) and many others. Hannes Tretter passed away on 7 March 2025, at the age of 73.

Elizabeth Wicks
is Professor of Human Rights Law and Co-Director of the Centre for Rights and Equality in Health Law (CREHL) at the University of Leicester. Her main research expertise is human rights in health care, bodily autonomy and the right to life. She has written a number of books in this area including *The Right to Life and Conflicting Interests* (OUP, 2010), *The State and the Body: Legal*

Regulation of Bodily Autonomy (Hart, 2016) and *Suicide and the Law* (Hart/Bloomsbury, 2023). She has recently co-edited (with Nataly Papadopoulou) a *Research Handbook on Human Rights Law and Health* (Elgar, 2025 forthcoming). She is co-director of a research centre on rights and equality in health law, and part of an interdisciplinary group working on 'deliberate dying'.

Hannes Tretter: In Memoriam

Manfred Nowak, on behalf of the Vienna Forum and the co-editors of the EYHR

For almost half a century, Hannes Tretter was my closest professional colleague and friend. In the 1970s and 1980s, we both worked as assistant professors under Felix Ermacora at the Institute of Constitutional and Administrative Law at the University of Vienna. Together with him, in 1992 we founded the Ludwig Boltzmann Institute of Human Rights (BIM), which Hannes and I co-directed as scientific directors until 2019. We were regarded as such a close team that, upon our departure from the institute, our two administrative directors, Fiona Steinert and Patricia Hladschik, dedicated a joint book in our honour entitled *Making Human Rights Work*. In 2019, the four of us also decided to continue parts of the work of BIM, including the Austrian Centre for Citizenship Education in Schools (POLIS – Politik Lernen in der Schule), by establishing the Vienna Forum for Democracy and Human Rights. Moving our library and other personal 'BIM belongings' was fairly easy, as the premises of both institutes are located in the same courtyard of the prestigious Schottenstift in the city centre. From his beautiful office, Hannes could see the windows of the Boltzmann Institute as well as the windows of his own apartment in the same courtyard.

The Vienna Forum became the centre of his academic life until his far-too-early passing. With the active support of Christoph Liebscher, representative of the Hermann and Marianne Straniak Foundation, and in tandem with Marion Wisinger, Hannes started many new and ambitious research projects and inspired a steadily growing team of young researchers focused on democracy, human rights and environmental protection. During our board meetings in the Schottenstift, I was always impressed by the multitude of innovative projects that Hannes proudly presented to us.

Hannes' sudden death feels as if I have lost a twin brother. He was the stabilising force in our relationship, while I was the restless one. Despite many expert functions for the Council of Europe, the European Union or the Fundamental Rights Agency, he remained Professor of Fundamental and Human Rights at the Vienna Law Faculty until his retirement. At the Boltzmann Institute, Hannes characterised our division of labour as one between Ministers of Internal and External Affairs. When I represented the institute at countless conferences and ensured that in 2000 we became one of the seven founding members of the Association of Human Rights Institutes (AHRI),

© MANFRED NOWAK, 2026 | DOI:10.1163/9789004751026_002
This is an open access chapter distributed under the terms of the CC-BY-NC-ND 4.0 license.

Hannes ensured the financial stability of our institute and quickly developed it into the largest Austrian human rights research and documentation centre, with up to 50 staff members. This was very important, as we were the only Boltzmann Institute that survived the restructuring of the Boltzmann Society in the early 2000s without having to merge with another institute. One of his most sustainable achievements was the 'Twinning accreditation', which enabled him successfully to acquire and lead many interesting 'EU Twinning projects' aimed at developing human rights, democracy and the rule of law in Turkey and various Central and Eastern European countries. In times of fiscal austerity and increasing competition for external funding, EU projects accounted for more than 80 per cent of our total budget.

BIM was much more than a highly respected and successful academic research and documentation centre. It became the home and training centre for many ambitious and committed young people who worked autonomously in an atmosphere of friendship under Hannes's prudent guidance, produced outstanding academic publications and later became expert members of various human rights monitoring bodies of the Council of Europe or the EU. Working at BIM for many was a stepping stone to an international human rights career.

We organised many retreats and social events for our 'BIM family'. While I was responsible for annual skiing weekends, Hannes trained BIM staff in sailing at the Alte Donau in Vienna and invited all of us to his second home in Murtar, where his beloved sailing boat, 'Solitär', was already waiting in the marina. As an experienced skipper, he took all of us to the Kornati Islands to learn the basics of the art of sailing and enjoy the Adriatic Sea. Later, he invited us to teach at his 'Straniak Academy' in beautiful seaside resorts in Montenegro and Albania. The Adriatic Sea, stretching from Italy through the former Yugoslavia to Greece, with countless beautiful islands that he knew very well from his sailing trips, was his main passion. As per his explicit wish, his family scattered his ashes into the Adriatic Sea.

Hannes was not only an excellent professor and human rights defender; he was a great human being, a loyal friend, modest and ambitious at the same time. He also knew how to enjoy life, whether with his friends on board the 'Solitär' or as a connoisseur of excellent restaurants and good glasses of wine. He led by example and motivated countless students and collaborators. In addition to his family, he leaves behind a great number of friends and colleagues who, like me, cannot really grasp that he is no longer among us. During the last years of his life, he increasingly worried about the disintegration of our rule-based international order, the destruction of our planet, and the lives of our children and future generations. One of his last projects concerned the

phenomenon of plastic waste in his beloved Adriatic Sea. We decided that we would jointly present the results of this impressive research project at the Global Campus of Human Rights in Venice, where he visited me repeatedly using his 'Solitär'. Recently, the 'Good Council' of Marlene Engelhorn selected the Vienna Forum for Democracy and Human Rights as one of the recipients of a substantive financial donation from her heritage, which is a significant recognition of Hannes and all the innovative projects he implemented at there. Despite his illness, Hannes utilised these funds with admirable energy to prepare and start what would become his final project: 'Notfall Demokratie' (Emergency Democracy). He had also recently joined the *European Yearbook on Human Rights* (EYBHR) as co-editor.

Dear Hannes, we miss you deeply and, with your spirit in mind, will continue your ambitious and dedicated work for human rights, democracy, sustainability and a better world.

PART 1

The Council of Europe (*CoE*)



The Council of Europe and Human Rights: An Overview

Manfred Nowak

1 Introduction and Overview[1]

The Council of Europe is the oldest of three organisations that were founded with the aim of establishing peace in Europe and are covered in a comparative perspective in this anniversary edition of the EYHR.

The three European Communities were established during the 1950s to foster economic cooperation as a means to prevent another war between European states. As they were placed under the roof of the European Union with the Maastricht Treaty of 1992, human rights and its various elements, such as human dignity, freedom, equality, democracy, the rule of law, minority protection, non-discrimination, tolerance and solidarity, were laid down as founding values of the EU. The Charter of Fundamental Rights of the EU, which, since the entry into force of the Lisbon Treaty in December 2009, has formed part of EU primary law, can be regarded as a further development and refinement of the European Convention of Human Rights, the flagship of the Council of Europe, by explicitly going beyond the civil and political rights of the European Convention and also incorporating other rights, above all economic, social and cultural rights, the right to asylum, environmental protection and rights of special groups, such as children, the elderly and persons with disabilities. With its 27 members, the EU is the smallest of the three organisations mentioned above, but as a supranational organisation with its headquarters in Brussels is by far the most powerful one in enforcing its decisions, including human rights-related judgments of the Court of Justice in Luxembourg.

The largest and least powerful of the three organisations is the Organisation for Security and Cooperation in Europe (OSCE) with its seat in Vienna and 57 participating states, including all European states, the US and Canada as well as the five Central Asian republics and Mongolia. It was established 50 years ago with the Helsinki Final Act of 1975 as a Conference on Security and Coop-

1 This overview of the evolution of the Council of Europe as pioneering human rights organisation in Europe and beyond is built on a lecture delivered in German on 11 November 2024 at the University Innsbruck, AT.

© MANFRED NOWAK, 2026 | DOI:10.1163/9789004751026_003
This is an open access chapter distributed under the terms of the CC-BY-NC-ND 4.0 license.

eration in Europe (CSCE) as a means of *détente* during the Cold War between all member states of NATO and the Warsaw Pact as well as neutral and non-aligned states in Europe (with the sole exception of Albania). The Helsinki Final Act established three baskets: military security, economic and environmental cooperation and the so-called 'human dimension', which included humanitarian cooperation and human rights. The 'Helsinki Committees' and similar civil society organisations created in accordance with the human dimension basket, and the third follow-up conference held in Vienna between 1986 and 1989 played an important role in the peaceful revolutions which led in 1989 to the fall of the Iron Curtain and the end of the Cold War. Although the OSCE, which was officially established at the Budapest Summit of 1994, is not based on any legally binding treaties, human rights, above all the protection of minorities and the freedom of the media, play an important role as an inherent element of the collective security concept of the OSCE. The Russian Federation, which was excluded from the Council of Europe after its invasion of Ukraine in 2022, remains a participating state of the OSCE and uses the consensus principle to block major decisions. On the other hand, the weekly meetings of the Permanent Council in Vienna provide an important opportunity for regular diplomatic exchanges even during times of war between participating states.

The oldest of the three organisations, the Council of Europe (CoE), was founded on 5 May 1949 in London by ten states: Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden and the United Kingdom. Germany joined in 1951, Austria in 1956. According to Article 1 of its Statute, the aim of the CoE is to 'achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage'. These ideals and principles are the rule of law and the enjoyment of human rights and fundamental freedoms as laid down in Article 3. Although the principle of 'genuine democracy' is mentioned only in the Preamble, it was clear from the outset that human rights, pluralist democracy and the rule of law were the three pillars of this Western European organisation. This meant that both the Communist states in Central and Eastern Europe and fascist states, such as Spain and Portugal, were excluded from joining the CoE. Article 8 of the Statute even determines that a member state which has 'seriously violated Article 3' may be suspended from and requested to withdraw or even be expelled from the CoE. This happened for the first time in 1970, when the Greek military junta was *de facto* expelled after the European Commission of Human Rights in the 'Greek Case' had established gross and systematic violations of the European Convention on Human Rights. Only a few days after the Russian Federation had launched its

war of aggression against Ukraine in February 2022, it became the second state ever to be expelled from the CoE.

Until 1989, the CoE was comprised of 23 Western European democracies. After the fall of the Iron Curtain, the CoE played an important role in inviting the former Communist states of Central and Eastern Europe to join this organisation and assisting them in their transition to liberal democracies based upon human rights and the rule of law. This rapid expansion meant that until 2005 the membership of the CoE had more than doubled to comprise all 47 European states, including all successor states to the former Soviet Union (with the exception of Belarus and the five Central Asian republics) and the former Yugoslavia. Following the expulsion of the Russian Federation in 2022, there are currently 46 member states.

According to Article 11 of its Statute, the seat of the CoE is at Strasbourg, and Article 10 established the Committee of Ministers and the Consultative Assembly (in 1974 renamed the Parliamentary Assembly) as the only two organs of the CoE, assisted by the Secretariat. The highest decision-making body is the Committee of Ministers, which meets once a year at the level of the Ministers of Foreign Affairs and on a weekly basis at that of their Permanent Representatives in Strasbourg. It decides upon membership of the CoE, has adopted more than 200 legally binding treaties, above all many human rights treaties, makes recommendations to member states, including on their compliance with human rights obligations under the relevant treaties, and supervises the execution of judgments of the European Court of Human Rights.

The Parliamentary Assembly of the CoE (PACE) is currently composed of 306 representatives and 306 deputies who are elected by the national parliaments from among their members in accordance with the principle of gradually decreasing proportionality: the five largest member states (Germany, France, Italy, Turkey and the UK) elect 18 members each; the four smallest States (Andorra, Liechtenstein, Monaco and San Marino) elect two members. Austria and Switzerland are represented by six parliamentarians. Like the directly elected members of the European Parliament of the EU, the members of PACE form political alliances, such as the European People's Party, the Social Democrats, Liberals, Greens, far left and far right-wing parties. The Parliamentary Assembly has important rights in electing the Secretary General of the CoE (since 2024 the former Swiss Federal President, Alain Berset), the Human Rights Commissioner (since 2024 the former Director of the EU Fundamental Rights Agency, Michael O'Flaherty, from Ireland) and the judges of the European Court of Human Rights. PACE also played an important role in the entire process leading to the accession of new member states during the

1990s and early 2000s and in monitoring their respective commitments and compliance with the three pillars of genuine democracy, the rule of law and human rights. After the annexation of the Crimean Peninsula and the invasion of the Donbas region of Ukraine by the Russian Federation in 2014, PACE suspended some of the voting rights of its Russian members, which led to the withholding of Russian membership dues and a long-lasting conflict between the Russian Federation and the CoE, which was finally resolved by the expulsion of the Russian Federation after its invasion of Ukraine in 2022. As an organ composed of members of national parliaments, PACE is, of course, a highly political body which engages in political dialogue and adopts resolutions on major political issues, including human rights violations by member states and abroad.

The Statute of the CoE does not provide for summit meetings of Heads of State and Government. Nevertheless, after the end of the Cold War, the first Summit Meeting took place in Vienna in 1993 to steer the policies of the organisation in view of the opportunities and challenges of the post-Cold War era: the accession of new member states, the protection of national minorities, rising racism and xenophobia, the violent dissolution of the former Yugoslavia, etc. It paved the way for the establishment of the Congress of Local and Regional Authorities as well as of the European Commission against Racism and Intolerance (ECRI). Most importantly, the adoption of the 11th Additional Protocol to the European Convention on Human Rights was agreed upon and led to the establishment of a single, permanent and full-time European Court of Human Rights in 1998. During the Second Summit held in Strasbourg in 1997, decisions were made to create a Human Rights Commissioner and a Group of States against Corruption (GRECO) and to adopt the Oviedo Convention on Human Rights and Biomedicine. The Third Summit was held in Warsaw in 2005 and paved the way for the Convention on Action against Trafficking in Human Beings, the Istanbul Convention on Action against Violence against Women and Domestic Violence and the Lanzarote Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse. Finally, the Fourth Summit was held in Reykjavik in 2023 in the light of the new challenges caused by the Russian war of aggression against Ukraine, the backlash against democracy, the rule of law and human rights, as well as the triple planetary crisis and the challenges caused by digitalisation and artificial intelligence. The Heads of State and Government adopted the Reykjavik Declaration to strengthen the CoE and its important work in the fields of human rights, democracy and the rule of law, decided to establish a Register of Damage caused by the Russian war of aggression against Ukraine with its seat in the Hague as a first step towards an international compensation mechanism,

offered the CoE's support for the establishment of a special tribunal for the crime of aggression and called for support for the Ukrainian authorities to ensure the immediate return of children unlawfully abducted, transferred or deported by Russian forces to the Russian Federation and Belarus. In addition, the Summit called for the political recognition of a right to a clean, healthy and sustainable environment as a human right and paved the way for the recent adoption of a CoE Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law.

2 European Convention and Court of Human Rights

Only a year after its founding, the Council of Europe adopted the 'Convention for the Protection of Human Rights and Fundamental Freedoms', usually called the European Convention on Human Rights (ECHR). It is the flagship of the CoE and served as model for the adoption of similar regional human rights treaties, such as the American Convention on Human Rights 1969, the African Charter of Human and Peoples' Rights 1981 and the Arab Charter on Human Rights 2004. The ECHR was adopted on 4 November 1950 and entered into force on 3 September 1953. It contains only civil and political rights and is accompanied by 16 substantive and procedural Additional Protocols (AP) which added further rights contained in the International Covenant on Civil and Political Rights 1966 and strengthened the monitoring and implementation procedure. In substantive terms, most important are the 6th and 13th AP, which eradicated the death penalty, first only in times of peace later also in terms of war. Europe is, therefore, the first world region which has abolished capital punishment, and this was also made a condition for the accession of new member states after the end of the Cold War. In procedural terms, the 11th AP is the most important as it established the first full-time human rights court in the world.

In the beginning, the only mandatory procedure for monitoring compliance with the provisions of the ECHR was the launching of an inter-state application by one state party against another before the European Commission of Human Rights. The acceptance of the individual application procedure before the Commission and the jurisdiction of the European Court of Human Rights was optional and dependent on respective declarations by the individual states parties. If states, such as Greece and Turkey, had not made any declaration, they could be held accountable only by means of an inter-state case before the European Commission and the Committee of Ministers as the final body deciding on a human rights violation by a two-thirds majority vote.

After a military *coup d'etat* in Greece in 1967, Denmark, the Netherlands, Norway and Sweden, as the countries with the highest human rights standards in Europe, jointly launched an inter-state application against it in 1967, the well-known 'Greek Case'.[2] The European Commission of Human Rights, which consisted of independent experts from all the states parties, sent a fact-finding mission to Greece to investigate gross and systematic violations committed by the military junta, such as arbitrary detention, torture, enforced disappearances and summary executions. On the basis of this fact-finding report by the Commission, the Committee of Ministers in December 1969 found serious violations of the ECHR[3] and was to adopt a resolution aimed at expelling Greece from the CoE when the Greek Government decided to denounce the Convention and leave the organisation. Greece returned to the CoE after its democratic transition in 1974. After a similar military coup in Turkey in 1980, the same four states and France launched another inter-state application against Turkey in 1982 (the Turkish Case).[4] Since the Turkish Government was willing to improve the situation, the Commission in 1985 adopted a friendly settlement in which the Government, *inter alia*, promised to accept by means of optional declarations the individual application procedure and the jurisdiction of the European Court of Human Rights. This is the reason why the first judgments of the Court against Turkey were adopted only during the 1990s. The first inter-state case that had reached the Court was *Ireland v. UK* (the 'Northern Ireland Case'),[5] in which the European Commission had found in 1976 that the five combined deep interrogation methods applied by the British security forces against IRA suspects amounted to torture. Although the European Court also found a violation of Article 3 ECHR by the UK, it qualified the methods used 'only' as inhuman treatment.

These few inter-state cases were selected only to demonstrate that the original system of the monitoring of compliance with the ECHR was very state-centred and reflected the widely held view that individual complaints before an independent human rights court would infringe the principle of state sovereignty. Nevertheless, in the course of the following years, most member states of the CoE ratified the ECHR and also gradually accepted the individual complaints system and the jurisdiction of the Court. However, individual

2 European Commission on Human Rights, *Denmark et al. v Greek* (*The Greek Case*), nos 3321/67, 3322/67, 3323/67, 3344/67, 24.01.1968 and 31.05.1968.

3 Committee of Ministers, The Greek Case, Resolution (69) 51 of 12 December 1969.

4 European Commission on Human Rights, *France et al. v Turkey, no* 9940/82, 9942/82, 9944/82, 9941/82, 9943/82, 06.12.1983.

5 ECtHR, *Ireland v The United Kingdom*, no 5310/71, 18.01.1978.

applicants had no right to bring their cases before the Court as this right was restricted to the state concerned (which usually had no interest in involving the Court as the Committee of Ministers still needed a two-thirds majority to find a violation) and to the Commission (which only reluctantly adopted the policy of submitting more important cases to the Court). This is the reason why, during the first years of the existence of the Court in the 1960s and 1970s, only very few individual applications had been decided by the Court. During the 40 years between 1959 and 1988, a total of 837 cases had been decided by the Court, which means on average 40 cases per year. Moreover, the two-instance procedure before the Commission (admissibility procedure, fact-finding and report) and the Court (final and binding judgment on the basis of the Commission's report and pleadings by both parties) on average took more than six years.

These were the reasons for the adoption of the 11th AP to the ECHR, which entered into force in 1998. It aimed at the modernisation and speeding-up of the procedure. All optional clauses had already been eliminated. The Commission and the decision-making function of the Committee of Ministers, the highest political body of the CoE, was dissolved. The part-time European Court of Human Rights was replaced by a single, permanent and full-time 'new' European Court of Human Rights. With this far-reaching reform, the CoE once more proved its pioneering role in the protection of human rights, as even today both the Inter-American and the African systems continue with the two-tier system of a Commission and a Court. This also means that the number of cases dealt with in these three regional systems differs widely. While the Inter-American Court of Human Rights in San José (Costa Rica) and the African Court on Human and People's Rights in Arusha (Tanzania) are still part-time courts and have decided a few hundred cases altogether, the European Court decides thousands of cases every year, while roughly 70,000 cases remain pending. Most importantly, all individuals living in the 46 member states of the CoE have the right, after exhaustion of domestic remedies, to lodge an individual complaint against 'their' government directly before an independent international human rights court. Such a right is unique and exists only in Europe, not in other regions or at the level of the United Nations, which have not yet established a World Court of Human Rights.

One often hears that the European Court of Human Rights is the 'victim of its own success'. Since the number of individual applications dramatically increased after 1998, the Committee of Ministers adopted the 14th AP to the ECHR in 2004 to speed up the procedure. It introduced the possibility of single judges deciding cases and broadened the possibility of the Court declaring applications inadmissible. Currently, single judges may declare individual

applications inadmissible or strike them from the list of cases. Committees of three judges can unanimously declare individual applications inadmissible or strike them from the list of cases, but they can also declare them admissible and deliver a unanimous judgment on the basis of the well-established case law of the Court. Inter-state cases and individual applications not dealt with by single judges or committees of three judges are decided on the admissibility and merits by Chambers of seven judges. If a case raises a serious question affecting the interpretation of the ECHR or might change the established case law of the Court, the Chamber may relinquish jurisdiction in favour of the Grand Chamber of 17 judges. In exceptional cases, a party to a case before a Chamber may also request that the case be referred to the Grand Chamber, but there is no right to appeal. All judgments of the Court, whether by a Committee, a Chamber or a Grand Chamber, are final and binding, and the Committee of Ministers is entrusted to supervise the execution of judgments by the states concerned.

The Court consists of a number of judges equal to that of the states parties to the ECHR. The judges are elected by the Parliamentary Assembly for a non-renewable term of nine years from a list of three candidates nominated by the state parties. The 46 judges of the Plenary Court elect their President, Vice-Presidents and Presidents of the Chambers. The current President is the French judge, Mattias Guyomar. Of the 68,450 applications pending before the Court in January 2024, the majority concerned cases against Turkey, the Russian Federation and Ukraine. An increasing number of judgments find serious violations of the ECHR including violations of the rights to life, the prohibition of torture, the right to personal liberty and a fair trial before an independent court.

3 Other Major Human Rights Treaties

3.1 *The European Social Charter*

Economic, social and cultural rights are much less well protected in the CoE than civil and political rights. The European Social Charter (ESC) was adopted only in 1961 and entered into force in 1965. The rights enshrined therein are formulated more as state obligations than as subjective rights to be enforced by litigation before the courts. When ratifying the ESC, a state party undertakes only the obligation under Article 20 'to consider itself bound by at least five' of seven core provisions regulating the rights to work, to organise, to bargain collectively, to social security, social and medical assistance as well as the right of the family to social, legal and economic protection and the right

of migrant workers and their families to protection and assistance. In addition, it may select other economic, social and cultural rights to the extent that it is bound by 'not less than 10 articles or 45 numbered paragraphs'. This system of *á la carte* ratification seems to be unique in international human rights law. Usually, states may make a reservation with respect to a particular provision of a treaty to the extent that domestic law is not in conformity with such provision, but they must ensure that reservations are not of a general character and do not run counter to the object and purpose of the treaty concerned. Under the ESC, they can simply select the Articles under which they are bound.

Since many rights contained in the International Covenant on Economic, Social and Cultural Rights were not included in the ESC, the CoE adopted a Revised Social Charter in 1996 which entered into force in 1999. It contains additional rights, such as the right of elderly persons to social protection, the right to protection in the event of termination of employment, the right to dignity at work including the prevention of sexual harassment in the workplace, the right to protection against poverty and social exclusion or the right to housing.

Compliance with the obligations under the ESC and the Revised ESC is monitored by the European Social Committee consisting of 15 independent experts elected by the Committee of Ministers for a renewable period of six years. The Committee examines state reports and, in respect of states that have ratified an Additional Protocol of 1995, collective complaints submitted by national and international organisations of employers and trade unions as well as a selected list of non-governmental organisations which have consultative status with the CoE. All decisions and recommendations of the European Social Committee are subject to supervision by the Committee of Ministers, which may adopt recommendations to states parties by a two-thirds majority of votes. The current President of the Committee is the Irish expert, Aoife Nolan.

While member states of the CoE are obliged to ratify the ECHR, this is not the case with the ESC. Twenty-seven states have ratified the ESC, 35 the Revised ESC and only 16 states have accepted the collective complaints system.

3.2 *The European Convention for the Prevention of Torture*

The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ECPT) was adopted in 1987 and entered into force in 1989. It supplements the absolute prohibition of torture, inhuman or degrading treatment or punishment in Article 3 ECHR by providing for unannounced and preventive visits by an independent European Committee for the Prevention of Torture (CPT) to all places where persons are deprived of

their liberty by a public authority. Although the regular and *ad hoc* missions to states need to be prepared in cooperation with the state concerned, the visits to the places of detention, such as police lock-ups, pre-trial detention facilities, prisons, psychiatric hospitals, migration detention centres and special facilities for children, the elderly or persons with disabilities are to be unannounced in order to have preventive effect. During such visits, the CPT by means of confidential interviews with detainees, witnesses and guards examines the treatment of persons deprived of their liberty, including cases of torture and other forms of ill-treatment, and assesses the general conditions of detention.

The CPT consists of a number of members equal to that of the states parties. Since the Parliamentary Assembly made the ratification of the ECPT a condition for the accession of new member states, all 46 members of the CoE are parties to the ECPT. The First Protocol to the ECPT of 1993 opened this treaty also to non-member states of the CoE. Since the Russian Federation has not denounced the ECPT in accordance with Article 22, it still figures as a 47th state party, but no further visit of the CPT has been carried out since the expulsion of the Russian Federation in 2022. The last visit to the Russian Federation took place in September/October 2021. Usually, the CPT organises between 15 and 20 regular and *ad hoc* visits per year. After each visit, the CPT draws up a report on the facts found during it and with recommendations addressed to the state party in question. This report remains confidential unless the state concerned requests the Committee to publish it. Since Austria, which was the first country visited by the CPT in 1990, asked the CPT to publish its report, this became the common practice of all states parties with the only exception of the Russian Federation. However, if the state party fails to cooperate or refuses to improve the situation, the CPT, by a majority of two-thirds of its members, has the right under Article 10(2) ECPT to make a public statement, which was usually done after visits to the Russian Federation.

With the adoption of the ECPT in 1989, the CoE created a new model of preventing gross violations of human rights which at that time was considered a strong interference with state sovereignty. This explains the strong requirements of confidentiality in the ECPT. The United Nations in 2002 followed with the adoption of the Optional Protocol to the Convention against Torture (OPCAT). In addition to authorising the UN Subcommittee on Prevention (SPT) to carry out preventive visits similar to those of the CPT, OPCAT also requires states parties to establish independent National Preventive Mechanisms (NPMs), i.e. national visiting bodies consisting of independent experts with different professional backgrounds, including doctors, psychologists,

social workers and lawyers. In practice, the preventive visits of the CPT, SPT and NPMs have had a major impact on improving conditions of detention and preventing torture and other forms of ill-treatment. The current President of the CPT is the British expert, Alan Mitchell.

3.3 *The European Charter for Regional or Minority Languages*

After the end of the Cold War, racial discrimination and minority conflicts became a major problem, above all in Central and Eastern Europe. While the OSCE reacted with the establishment of the High Commissioner on National Minorities in 1992 as a conflict prevention mechanism acting with quiet diplomacy, the CoE enacted the first binding treaties for the protection of national, ethnic, religious and linguistic minorities in addition to Article 27 of the International Covenant on Civil and Political Rights. The European Charter for Regional or Minority Languages, which was adopted in 1992 and entered into force in 1998, requires states parties to promote the use of regional or minority languages in all spheres of public life, such as education, before judicial and administrative authorities, in the media, in cultural activities, economic and social life.

Compliance with the Charter is monitored by a Committee of Experts composed of one member per state party, which examines periodic state reports and carries out on-the-spot visits to the country concerned. Following a reform in 2018, each of the 25 states parties must submit a full report every five years and in between a mid-cycle document containing information on recommendations for immediate action. The Committee adopts an evaluation report, which may be made public, together with recommendations, by the Committee of Ministers. The CoE may also decide to organise a round table with government representatives and associations of minorities on the implementation of the Charter in the state party concerned. The Chair of the Committee is the Polish expert, Aleksandra Oszmianska-Pagett.

3.4 *The Framework Convention for the Protection of National Minorities*

The second CoE treaty is the Framework Convention on the Protection of National Minorities (FCNM), which was adopted in 1994 and also entered into force in 1998. While the European Charter for Regional or Minority Languages was ratified by only 25 member states, the Framework Convention is binding on 38 states. It protects the rights of individuals belonging to national minorities to express their ethnic, cultural, linguistic and religious identities freely, to participate in cultural, social and economic life without discrimination, to promote intercultural dialogue, to preserve and develop minority cultures, religions and languages.

The implementation of the Framework Convention is monitored by the Committee of Ministers on the basis of evaluating periodic state reports. It is assisted by an Advisory Committee consisting of 18 independent experts. Its President is the Slovenian expert, Petra Roter. The Advisory Committee adopts detailed country-specific opinions on the basis of evaluating the state reports and on-the-spot meetings with relevant government officials and representatives of national minorities.

3.5 *The Convention on Human Rights and Biomedicine* (*Oviedo Convention*)

The Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine was adopted in 1997 an entered into force in 1999. It aims at protecting the dignity and identity of all human beings in view of new developments in the field of biomedicine. According to Article 2, the 'interests and welfare of the human being shall prevail over the sole interest of society or science'. The Convention provides for the rights of patients to information, informed consent, privacy and dignity. It regulates interventions on the human genome, organ and tissue transplantation, and prohibits techniques for choosing a future child's sex. Article 21 stipulates that the 'human body and its parts shall not, as such, give rise to financial gain'.

The Oviedo Convention has been ratified by 30 member states of the CoE, but not, for example, by Austria, Belgium, Germany, Ireland, Italy, Liechtenstein, the Netherlands, Poland, Sweden or the UK. It has been supplemented by four Additional Protocols on the Prohibition of Cloning Human Beings, concerning Transplantations of Organs and Tissues of Human Origin, concerning Biomedical Research and concerning Genetic Testing for Health Purposes.

3.6 *The Convention on Action against Trafficking in Human Beings*

While the Palermo Protocol to Prevent, Suppress and Punish Trafficking in Persons supplementing the UN Convention on Organised Crime 2000 deals with human trafficking only as a matter of criminal law, the European Convention on Action against Trafficking in Human Beings adopts a human rights-based approach by considering victims of trafficking as victims of a human rights violation. It was adopted in 2005, entered into force in 2008 and has been ratified by all 46 members of the CoE as well as Belarus and Israel as non-CoE member states. The Convention creates a framework of legally binding norms for all forms of human trafficking and requires states parties to take comprehensive measures to prevent human trafficking, punish the perpetrators and protect the victims.

Compliance by states parties to the Anti-Trafficking Convention is monitored by the Group of Experts on Action against Trafficking in Human Beings (GRETA), consisting of 18 independent experts, and the Committee of the Parties composed of representatives of all 48 states parties. GRETA evaluates the situation of each state party periodically in four year cycles. This evaluation differs from the state reporting procedure insofar as GRETA first sends a questionnaire to the authorities of the state concerned and to non-governmental organisations. It also conducts on-site visits to discuss the practical implementation with many different stakeholders. On the basis of GRETA's evaluation report, the Committee of the Parties addresses recommendations to the state concerned. If GRETA receives reliable information indicating a situation in which problems require immediate attention, it may also address an urgent request for information to any state party and carry out a special investigation. This urgent procedure was, for example, applied in relation to Italy and Hungary. The current President of GRETA is the Dutch expert, Conny Rijken.

3.7 *Convention on Protection of Children against Sexual Exploitation and Sexual Abuse* (*Lanzarote Convention*)

The Lanzarote Convention, which was adopted in 2007, entered into force in 2010 and has been ratified by all 46 member states of the CoE as well as the Russian Federation and Tunisia, requires the criminalisation of all kinds of sexual offences against children, including child prostitution and pornography. States parties are obliged to prevent the sexual exploitation and abuse of children, to punish the perpetrators and to protect and assist child victims. The Lanzarote Convention contains detailed obligations on preventive measures, such as awareness-raising of persons working in contact with children and education for children, assistance to child victims including helplines, intervention programmes, substantive and procedural criminal law, recording and storing of data and international cooperation.

Compliance with the Lanzarote Convention is not entrusted to a committee of independent experts, but to a Committee of the Parties consisting of representatives of all 48 states parties. On the basis of questionnaires, the Lanzarote Committee conducts comparative evaluation rounds for all states parties, analyses best practices, adopts opinions and organises capacity-building activities.

3.8 *The Convention on Preventing and Combating Violence against Women and Domestic Violence* (*Istanbul Convention*)

The Istanbul Convention was adopted in 2011, entered into force in 2014 and has been ratified by 39 member states and the EU. Turkey denounced it in 2021. The Convention aims at protecting women against any form of violence

by measures of prevention, above all education, awareness-raising and the training of professionals, measures of assistance to the victims by specialist support services, shelters and telephone hotlines, and the criminalisation of all forms of violence including physical, sexual and psychological violence, stalking, forced marriage, female genital mutilation, forced abortion, forced sterilisation and sexual harassment.

Compliance with the Istanbul Convention is monitored by a Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO) consisting of 15 independent experts. Its President is the Greek expert, Maria-Andriani Kostopoulou. On the basis of a questionnaire on the baseline evaluation procedure of 2016, GREVIO aims to provide a comprehensive overview of the level of implementation by all states parties and publishes respective reports. In cases where action is required to prevent a serious, massive or persistent pattern of any acts of violence, GREVIO may initiate a special inquiry procedure. It may also adopt general recommendations on themes and concepts of the Convention.

3.9 *The Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law*

This Framework Convention, adopted on 5 September 2024, is the first international treaty aiming to ensure that activities within the life-cycle of artificial intelligence (AI) systems are fully consistent with human rights, democracy and the rule of law, while being conducive to technological progress and innovation. In 2019, an *ad hoc* Committee on Artificial Intelligence (CAHAI) was tasked with examining the feasibility of such an instrument. It was succeeded in 2022 by the Committee on Artificial Intelligence (CAI) which drafted and negotiated the text of the Framework Convention. In addition to member states of the CoE, many observer states (for example, Canada, Japan, Mexico and the USA), the EU and a significant number of other states (for example, Australia, Argentina, Costa Rica, Israel, Peru and Uruguay) as well as representatives from civil society, academia and the corporate sector actively participated in the development of the Framework Convention.

An AI system is defined in Article 2 as a 'machine-based system that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs, such as predictions, content, recommendations or decisions that may influence physical or virtual environments'. The Convention covers the activities of AI systems undertaken by public authorities and private actors that have the potential to interfere with human rights, democracy and the rule of law. Matters relating to national defence, national security interests or research and development activities not yet made available to use are

excluded from the application of this Convention. The principles related to activities within the life-cycle of AI systems include human dignity and individual autonomy, transparency and oversight, accountability and responsibility, equality and non-discrimination, privacy and personal data protection, reliability and safe innovation. States parties are required to ensure the availability of accessible and effective remedies and procedural safeguards, including the notification that persons are interacting with AI systems rather than with a human. Most importantly, states parties shall adopt or maintain measures for the identification, assessment, prevention and mitigation of risks posed by AI systems. Such measures shall be graduated and differentiated. According to Article 16(4), each state party shall 'assess the need for a moratorium or ban or other appropriate measures in respect of certain uses of AI systems where it considers such uses incompatible with the respect for human rights, the functioning of democracy or the rule of law'.

The Framework Convention is an open treaty that may be ratified by all member states of the CoE, the EU and non-member states that have participated in its elaboration. In addition to member states, the Convention has already been signed by the United States, Israel and the EU. It corresponds to the AI Act adopted by the EU on 1 August 2024. Each state party shall provide a report to the Conference of the Parties within two years after becoming a Party and shall establish or designate one or more effective mechanisms to oversee compliance with the obligations in this Convention.

4 Other Important Bodies for the Protection of Human Rights

4.1 *The European Commission for Democracy through Law* (*Venice Commission*)

The Venice Commission is an advisory body of the CoE, consisting of independent experts in the field of constitutional and international law, which was created in 1990 at the initiative of Italy with the aim of assisting the former Communist states in Central and Eastern Europe in their transition to sustainable democracies within a constitutional framework based on the rule of law. After the Committee of Ministers had approved the creation of the Venice Commission as a partial agreement at a session in Venice in January 1990, it was formally established by ministers from 18 CoE member states who adopted its Statute in May 1990. The other old and new member states of the CoE joined soon thereafter, and since 2002 membership of the Venice Commission has been open to other states and international organisations. Currently, the Venice Commission consists of 61 states, i.e. the 46 member

states of the CoE and 15 other states in Europe (Kosovo), Asia (Israel, Kazakhstan, Kyrgyzstan, South Korea), North Africa (Morocco, Algeria and Tunisia), North America (the USA and Canada) and Latin America (Brazil, Chile, Costa Rica, Mexico and Peru), as well as four observer states and five international organisations, including the EU, the OSCE and the Organisation of American States (OAS). The member states appoint the individual members and substitute members of the Venice Commission, who are usually well-known professors in the fields of constitutional, administrative and international law and/or current or former judges at constitutional and other high courts. The secretariat is located at the headquarters of the CoE in Strasbourg, but plenary sessions of the Commission are held four times a year in the Scuola Grande di San Giovanni Evangelista in Venice. The current President is Claire Bazy-Malaurie, a former member of the Constitutional Council of France.

The Venice Commission provides legal advice to member states in all matters relating to constitutional law, the rule of law, democracy and human rights. At the request of its member states and international organisations or of organs of the CoE, it issues legal opinions, studies and reports on draft constitutions, draft legislation and judicial reform proposals, monitors elections and referenda, cooperates with constitutional courts, issues a Newsletter and other publications and organises conferences and workshops on controversial legal issues. The legal opinions of the Venice Commission enjoy a high reputation and are usually followed and implemented by member states.

4.2 *The European Commission against Racism and Intolerance* (*ECRI*)

The ECRI was established at the first Summit of Heads of State and Government 1993 in Vienna as a reaction to growing racism and intolerance after the fall of the Iron Curtain. Although it is not based on a human rights treaty, the ECRI is an independent expert body with quite far-reaching competences to monitor action against racism, discrimination (on grounds of 'race', skin colour, ethnic or national background, citizenship, religion, language, sexual orientation, gender identity and sex characteristics) and intolerance in all 46 member states of the CoE. Each member state appoints one independent expert to serve on the Commission. The current Chair of ECRI is the Swiss expert, Bertil Cottier.

The ECRI's most important function is country monitoring. Delegations of the ECRI visit all member states in monitoring cycles of about five years, interact with governmental authorities, equality and anti-racism bodies, civil society, academia and other stakeholders and publishes critical reports with recommendations respective to the governments concerned. Two years after

publishing these reports a process of interim follow-up takes place focusing on two recommendations requiring priority implementation.

The Commission also addresses thematic General Policy Recommendations to all member states on issues of general concern, such as on anti-Muslim racism, antisemitism, discrimination against Roma or hate speech. It further publishes opinions on relevant definitions and terminology, such as 'racialisation', and statements on the impact of the Covid-19 pandemic or on the consequences of the aggression of the Russian Federation against Ukraine. Finally, the ECRI organises Round Tables, annual seminars and other thematic meetings, often in close cooperation with civil society and equality bodies. The activities and recommendations of the ECRI usually have a visible impact on member states.

4.3 *The Commissioner for Human Rights*

The Commissioner was established on the initiative of the Second Summit of Heads of State and Government of the CoE, held in Strasbourg in 1997, as an independent and impartial non-judicial institution with a broad mandate to promote awareness of and respect for human rights in all 46 member states of the CoE. The Commissioner is elected by the Parliamentary Assembly from a list of three candidates, drawn up by the Committee of Ministers, and serves a non-renewable term of six years. The current Commissioner is the Irish expert, Michael O'Flaherty (elected in 2024), who served before as Director of the EU Fundamental Rights Agency in Vienna. Former Commissioners were Dunja Mijatovic (Bosnia and Herzegovina, 2018–2024), Nils Muiznieks (Latvia, 2012–2018), Thomas Hammarberg (Sweden, 2006–2012) and Alvaro Gil-Robles (Spain, 1999–2006).

The Commissioner is mandated to assist member states in the implementation of European human rights standards, to promote education in and awareness of human rights, to identify shortcomings in the law and practice of human rights, to facilitate the activities of national ombudspersons and human rights institutions and to provide advice. The Commissioner carries out country missions at the highest level to monitor and evaluate human rights situations, including visits to places of detention, releases thematic opinions and reports, organises seminars and events, engages in dialogue with governments, civil society, educational institutions, media, international organisations and human rights defenders. Like that of the UN High Commissioner for Human Rights, who is the most prominent authority on international human rights matters, the CoE Commissioner's voice on European human rights issues carries great weight and functions as the non-judicial

counterpart to the European Court of Human Rights as the flagship of human rights protection in Europe.

5 Assessment

5.1 *The Council of Europe as Pioneer in International Human Rights Protection*

The European Convention on Human Rights is the first general human rights treaty worldwide, which was adopted in 1950, only one year after the founding of the CoE. It took the United Nations almost 20 years until the rights of the Universal Declaration of Human Rights of 1948 were codified in the two legally binding Covenants of 1966. The Organisation of American States (OAS) followed in 1969 with the American Convention on Human Rights, the Organisation of African Unity (OAU) (predecessor to the African Union (AU)) adopted the African Charter on Human and Peoples' Rights only in 1981. Both regional human rights treaties are built upon the model of their European counterpart by establishing inter-state and individual complaints mechanisms before an independent regional commission and, under specific conditions, before a regional human rights court. With the entry into force of the 11th AP in 1998, the CoE again demonstrated leadership by abolishing this two-tier procedure and creating the first and to this day only full-time professional human rights court which hands down final and legally binding judgments on thousands of human rights applications which can be lodged, after exhaustion of domestic remedies, by any individual in any of the 46 member states of the CoE.

With the adoption of the 6th and 13th APS to the ECHR in 1983 and 2002 respectively, the CoE acted again as international pioneer regarding the abolition of capital punishment. The OAS and the United Nations followed in 1990 with the adoption of the Protocol on the American Convention on Human Rights to Abolish the Death Penalty and the Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty. The 6th AP has been ratified by all 46 member states, the 13th AP by all member states with the sole exception of Azerbaijan. However, since the abolition of capital punishment was declared as a condition for accession of new member states, including the Russian Federation which joined the CoE in 1998, no execution had been carried out in any CoE member state since 1997. The respective protocols to the OAS and UN have not been ratified by all members of the organisations in question, although Latin America is the second world region in which the death penalty has been abolished to a considerable extent.

There are many further examples to illustrate the pioneering role of the CoE in the protection of human rights. The CPT is the first international body which has been empowered by a binding treaty to carry out missions to member states and unannounced visits to all places of detention. When the CPT started its missions in 1990, this was still revolutionary, as country missions and visits to places of detention without an explicit invitation and consent by the state concerned were widely regarded as undue interference with state sovereignty. The CPT broke the ice, and many more bodies, including the ECRI, followed with a mandate to carry out fact-finding missions. The Venice Commission is a unique body of experts which delivers legal opinions on many issues of constitutional and international law far beyond CoE member states, which are usually followed and implemented by the states concerned. The Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law is the first international treaty aiming to ensure that activities within the life-cycle of artificial intelligence systems are fully consistent with human rights and is an open treaty that has been drafted and will be ratified and implemented by many states outside the CoE. Other human rights treaties that clearly show the pioneering role of the CoE relate to the protection of minorities, to the dangers of the misuse of biomedicine as well as a human rights approach to trafficking in human beings.

Another example, where the CoE showed courage in standing behind its own values even in the most difficult situations, is its willingness to expel member states as a final sanction for gross and systematic violations of human rights, democracy and the rule of law. This was applied in 1969 to Greece which was under the rule of a brutal military junta, and in 2022 to the Russian Federation in reaction to its war of aggression against Ukraine. Other organisations, including the EU, the OSCE and the United Nations, have far greater difficulties and obstacles in expelling or suspending member states which grossly violate the basic values these organisations stand for.

5.2 *Weaknesses, Problems and Challenges*

The main shortcoming of the Council of Europe is its neglect of economic, social and cultural rights. As an organisation of Western liberal democracies, the CoE reduced the rights in the ECHR, which were from the very beginning to be monitored by an individual complaints system before an independent expert body, the European Commission of Human Rights, to civil and political rights. Like the United States, which hitherto do not recognise economic, social and cultural rights and have refused, as the only major member state of the United Nations, to ratify the International Covenant on Economic, Social and Cultural Rights, most Western European states have maintained

the peculiar view that economic, social and cultural rights were not 'real' human rights and in any case not 'justiciable' human rights. This explains the adoption of the much weaker European Social Charter (ESC) 1961 with an *à-la-carte* system of ratification and only a state-reporting system. The ESC is even weaker as its counterpart in the United Nations, the International Covenant on Economic, Social and Cultural Rights of 1966, which at least formulates these rights as real rights and not as mere state obligations. In 1993, the United Nations World Conference on Human Rights in Vienna solemnly declared the universality, equality, interdependence and indivisibility of all human rights, which prompted the UN, albeit with long delays because of Western opposition, in 2008 to adopt an Optional Protocol on individual complaints before the UN Committee on Economic, Social and Cultural Rights. The CoE, on the other hand, introduced only a collective complaints system and, thus, even today deprives individuals of their right to lodge individual complaints to the European Social Committee alleging a violation of their economic, social and cultural rights.

This means that the CoE, which is a true pioneer in the international protection of civil and political rights before an independent and full-time European Court of Human Rights, ranks behind the United Nations, the OAS or the African Union in its protection of economic, social and cultural rights. This is highly peculiar as, during the time of the Cold War, Western Europe was proud of having developed and implemented the European Social Welfare State with social security and social insurance, a well-functioning public health and free public education system, high labour standards and powerful trade unions, low unemployment and relatively low economic inequality thanks to the model of redistribution developed by the British economist, John Maynard Keynes. What is even more astonishing is the fact that this model of the European Social Welfare State was not dependent on party politics and was pursued by social democratic governments in the UK and Sweden as it was celebrated as '*soziale Marktwirtschaft*' by conservative governments in Germany. It remains one of the mysteries why governments with high standards of social welfare and social justice were so afraid of incorporating economic, social and cultural rights on an equal footing in their national constitutions and preventing their people from raising violations of such rights before domestic courts or international monitoring bodies. Austria is an excellent example of such irrational and paradoxical policies. Thanks to its social partners closely linked to the two leading parties during the time of the Cold War, the Christian-Social Peoples Party and the Social Democrats, Austria had developed very high standards of social welfare and had maintained a low level of economic (income) inequality. But Austrian politicians

were and still are among the most stubborn advocates of the 'non-justiciability' of economic, social and cultural rights and refuse even today to ratify the CoE AP to the ESC Providing for a System of Collective Complaints or the ratification of the OP to the International Covenant on Economic, Social and Cultural Rights providing for individual complaints. Even strong recommendations by many Western and other states to ratify these instruments during the Universal Periodic Review before the UN Human Rights Council could not change this stubborn and anachronistic policy.

With the rise of neoliberal economic policies of deregulation, privatisation and minimising the role of the state in the UK and the USA during the 1980s and in the EU and other European states after 1989, the European Social Welfare State has been gradually dismantled. The lack of a proper framework of economic, social and cultural rights with effective complaints mechanisms on the domestic and European level most probably contributed to this development. If the European Court of Human Rights had had the mandate to deliver binding judgments also in the field of economic, social and cultural rights, many of the negative effects of these neoliberal policies could have been prevented.

Another weakness of CoE politics is the dominant role of the Committee of Ministers in decisions on the merits of violations of human rights. In the 'old' system of the ECHR, most individual and inter-state complaints had been decided on the merits by a two-thirds majority of the Committee of Ministers. If only 60 per cent of the Foreign Ministers or their deputies in Strasbourg had voted for a violation, the official outcome was: non-violation. This was simply absurd. Ministers and Ambassadors are politicians and not independent experts. Their decisions are always motivated by political and diplomatic considerations which often overrule independent legal analysis. It took quite some time before this fundamental flaw in the monitoring system of the ECHR was eliminated by the 11th AP to the ECHR in 1998. Since then, the Committee of Ministers has been reduced to its proper function, namely the political pressure on governments fully to implement judgments of the European Court of Human Rights.

One would expect that this realisation that politicians are not the most objective decision-makers on the merits of the question whether certain behaviour of a public authority in a member state constitutes a violation of a particular human right guaranteed in a CoE human rights treaty would also be applied to other human rights treaties. However, this is unfortunately not the case. To this day, the Committee of Ministers or the Committee of states parties play a dominant role in the final decision-making and in addressing recommendations to states parties even if the main task of investigating alleged

human rights violations is usually carried out by independent expert bodies. This is the case, for example, with the European Social Charter, the European Charter for Regional or Minority Languages and the Framework Convention for the Protection of National Minorities. In the case of the Convention on Action against Trafficking in Human Beings, the Lanzarote Convention on Protection of Children against Sexual Exploitation and Sexual Abuse and the Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law it is the Committee of the Parties which has the final say about violations of human rights. The Committee of the Parties is like the Committee of Ministers composed of the Ministers of Foreign Affairs of the states parties which ratified the treaties concerned.

Another controversial and possibly counterproductive policy of the CoE was the (all too?) quick opening of membership of the CoE to the former Communist states in Central and Eastern Europe. The main argument in favour of quick accession was that new members would be required to abolish the death penalty and ratify the ECHR and the ECPT and would thereby be made subject to the supervision of the European Court of Human Rights and the preventive visits by the CPT. On the other hand, this policy did not always comply with the requirements of Articles 3 and 4 of the Statute of the CoE which stipulates that only states with a genuine democracy based on the rule of law and human rights should be invited to join the CoE. Critical voices, such as of the then Deputy Secretary General of the CoE, the Austrian human rights expert, Peter Leuprecht, maintained that the accession of the Russian Federation in 1998 was premature, as this country had not yet developed the essential criteria of a genuine democracy based on human rights and the rule of law. Another example is Bosnia and Herzegovina which joined the CoE in 2002, i.e. at a time when it was not yet a fully independent state but subject to decisions of the High Representative and other international bodies established under the Dayton Peace Agreement 1995. More recent developments, such as the wars between the Russian Federation and Georgia, between the Russian Federation and Ukraine and between Azerbaijan and Armenia, as well as authoritarian regimes in countries like Hungary and Serbia or frozen conflicts in Georgia, Moldova, Bosnia and Herzegovina (Republika Srpska) and Serbia with respect to Kosovo illustrate that Peter Leuprecht perhaps had a point in warning against a too-quick accession of Central and Eastern European states. On the other hand, membership of the CoE also opened the door to membership of the EU, and the respective monitoring and safeguard mechanisms of both organisations prevent an even further backlash against human rights, democracy and the rule of law in Europe.

The European Court of Human Rights is certainly a huge success story, but the Court is also often called the 'victim of its own success'. These critical voices refer to the extraordinary high number of individual complaints being lodged directly with the Court. The huge backlog of pending cases has led to various measures, above all the adoption of the 14th AP to the ECHR, which introduced the single judge formation, extended the competences of the Committees of three judges and tightened the admissibility criteria. The high percentage of individual applications declared admissible by single judges or Committees of three judges has, of course, a deterrent effect on persons wishing to file a complaint with the Court, and reduces direct access to the Court or at least the chances to be heard by the Court. Even if applicants and their lawyers feel that they are presenting a strong case to the Court they have difficulties in assessing the real chances of successfully passing the admissibility stage.

Another problem for the Court is the growing number of cases that deal with gross and systematic violations of human rights. In the 'old days' of the Cold War, when the jurisdiction of the 'old' European Court applied only to Western liberal democracies, it had to deal only in exceptional cases with serious violations of the prohibition of torture or the right to life. Most cases concerned the right to a fair trial before an independent court, the rights to privacy, freedom of expression or personal liberty. Today, a high percentage of judgments finding violations of the ECHR concern summary executions, torture, enforced disappearances or arbitrary detention in countries like the Russian Federation, Turkey, Ukraine and Moldova. In the 'old days', judgments of the European Court of Human Rights, even when they demanded constitutional reforms (as happened twice in Austria), were usually implemented by member states, not least because of the strong pressure applied by the Committee of Ministers as the supervising body. Today, an increasing number of governments, which include not only the Russian Federation and Turkey but even the UK Government, openly refuse to implement certain judgments. The infamous *Kavala* case against Turkey, in which even the emergency procedure under Article 46(4) ECHR did not lead to the release of the successful applicant, is only the tip of the iceberg. This illustrates that a highly successful system of human rights monitoring and implementation, such as the one created by the ECHR, reaches its limits if member states feel no longer bound by the European *ordre public* of abiding by human rights, democracy and the rule of law, the three pillars on which the CoE has been founded and grounded.

6 Conclusions

This short summary of the achievements of the Council of Europe during the last 75 years confirms the important pioneering role of this European organisation for the promotion and protection of human rights. The European Court of Human Rights in Strasbourg, the flagship of the CoE, is the only international full-time human rights court in the world which provides all individuals living in the 46 member states with the right to lodge a complaint against 'their' own government for alleged human rights violations. The death penalty has been outlawed in Europe thanks to the pioneering activities of the CoE. Against all considerations of national sovereignty, the CPT was the first international monitoring body mandated to carry out unannounced visits to all places of detention. Since then, monitoring human rights on the ground became the norm rather than the exception in Europe, as in other regions of the world. Despite certain difficulties and fall backs, the opening of the CoE to the former Communist states in Central and Eastern Europe ensured a rapid transition to well-functioning democracies based on the rule of law and human rights. With its ground-breaking and well respected legal opinions, the Venice Commission became a pioneer in assisting states in Europe and beyond during their difficult transition to democracy, the rule of law and human rights. If necessary, as in response to the Russian war of aggression against Ukraine, the CoE has also shown its willingness to expel member states for systematically violating its core values.

These impressive achievements relate, however, exclusively to civil and political rights. Even after the 1993 Vienna World Conference of Human Rights, which clearly established a compromise between the universality of all human rights on the one hand and the equality, interdependence and indivisibility of all human rights on the other, the CoE continued its policy of neglecting economic, social and cultural rights. With the only exception of the European Social Charter, all major human rights treaties and mechanisms, including the European Convention and Court of Human Rights, the CPT, minority treaties, the Oviedo, Lanzarote and Istanbul Conventions, the Framework Convention on AI, GRETA, GREVIO, ECRI and the Venice Commission, are limited to civil and political rights. And the European Social Charter, with its weak definition of rights, its system of *á la carte* ratification, collective complaints mechanism and supervision by the Committee of Ministers is far too weak to prevent or even only slow down the erosion of the rights to social security, health care, education, housing, water, sanitation and other elements of an adequate standard of living and achievements of European Social Welfare States by neoliberal economic policies of deregulation, privatisation and

minimising the role of the state. By neglecting economic, social and cultural rights, the CoE overlooks the interdependence of all human rights. Neoliberal economic policies not only hollow out the European Social Welfare State, of which Europeans were rightly proud during the time of the Cold War; they also lead to an enormous economic inequality (of income and wealth), which undermines the social fabric and democratic coherence of our societies. The phenomena of populism, radicalisation and polarisation, which can quickly lead even well-functioning European and other democracies towards 'illiberal democracies' and autocracies, are to a considerable extent the result of economic inequality and the neglect of economic, social and cultural rights.

Like other international organisations, the CoE is today confronted with major problems and a crisis of multilateralism. Wars, frozen conflicts, authoritarianism, migration and the 'triple planetary crisis' have, also in Europe, led to gross and systematic violations of human rights, to deliberate non-compliance with recommendations by CoE bodies and even binding judgments of the European Court of Human Rights and to the recent expulsion of a member state. In the Reykjavik Declaration '[u]nited around our values', the Heads of State and Government of CoE member states decided in 2023 on far-reaching measures to strengthen its important work in the fields of human rights, democracy and the rule of law. These include the call for the adoption of a Framework Convention on Artificial Intelligence, which was achieved in 2024, and the recognition of a right to a clean, healthy and sustainable environment. This shows that the CoE is willing to extend its activities beyond the narrow focus on civil and political rights. Should these developments also lead to stronger recognition of economic, social and cultural rights as equal human rights, the CoE might also address some of the root causes of the current crisis of democracy, human rights and the rule of law in Europe.

The Influence of the European Court on Human Rights on the African Court on Human and Peoples' Rights

Patient Mpunga-Biayi

Abstract

The systematic references to the European Court of Human Rights (ECtHR) in the judgments of the African Court on Human and Peoples' Rights (ACtHPR) attest to its clear influence. However, this influence goes beyond mere transposition; it stems from a deliberate assimilation. The ACtHPR draws on the well-established experience of the ECtHR to enrich its regional legal framework. Nevertheless, the African Court does not mechanically import the European model. Rather, it harmonises it with local realities by integrating the cultural, social and legal specificities of the African continent. This contextualisation of European jurisprudence reflects the ACtHPR's commitment to shaping a jurisprudential evolution that balances both rigour and flexibility. It illustrates a process of maturation: while the ACtHPR initially relied heavily on the ECtHR to develop its case law, it now tends towards a more autonomous interpretation of human rights. European influence, though still present, now operates within a framework of complementarity rather than strict dependence. This dynamic has fostered a strengthened institutional dialogue, notably through initiatives such as the San José Declaration, which formalised the creation of a Permanent Forum for Institutional Dialogue between the three regional human rights courts, as well as the annual publication of a Joint Law Report, which compiles and analyses key decisions issued by each court over the past year.

1 Introduction

Seventy-five years ago, Europe made the bold gamble of a revolution by adopting the European Convention on Human Rights (hereinafter the European Convention), a visionary initiative that elevated human dignity and fundamental freedoms to the status of inviolable principles. This pivotal moment marked the beginning of a new legal order, in which the protection of individual rights was ensured through a binding treaty, at a time when the international landscape was fragmented by ideological tensions between the capitalist and communist blocs. In a world deprived of a universal consensus on

© PATIENT MPUNGA-BIAYI, 2026 | DOI:10.1163/9789004751026_004
This is an open access chapter distributed under the terms of the CC-BY-NC-ND 4.0 license.

human rights protection, the European Convention provided a glimmer of hope, paving the way for an era in which justice could be envisaged as a right accessible to all. The significance of this treaty lies not only in its content but also in the establishment of the European Court of Human Rights (hereinafter the ECtHR). This revolutionary institution was conceived to offer European citizens the opportunity – initially optional but made automatic since 1998 – to bring their grievances before a supranational body capable of issuing binding judgments and ensuring compliance with the standards enshrined in the European Convention. The very notion that justice could transcend national borders and directly intervene to uphold individual rights generated an unprecedented wave of optimism, transforming the dream of universal protection into a tangible reality. This model, built on dialogue between states and the guarantee of an effective judicial remedy, has since become a global benchmark for the protection of human rights.

With 75 years of formal existence, the ECtHR embodies remarkable maturity, the result of a long journey marked by innovations and successfully overcoming challenges. This venerable age is not merely a symbol of stability; it also illustrates the Court's capacity to adapt to social and political transformations while remaining faithful to its founding ideals. Far from being static, the ECtHR has evolved within an ever-changing European landscape, responding with agility to political and social developments that have reshaped the contours of democracy and fundamental rights. Driven by the momentum of major historical shifts, the ECtHR has undertaken bold initiatives to address emerging challenges while strengthening the foundation of inalienable freedoms. This dynamism is fuelled both by external factors – reflecting society's ongoing quest for justice and equity – and internal ones, such as procedural innovations and the critical thinking that animates its members. As a true laboratory of legal thought, the ECtHR has, over time, become a hub of ideas and initiatives, combining constant renewal with adaptation to contemporary realities. It is through this synergy of external and internal forces that the ECtHR has continuously reinvented itself, ensuring the longevity and effectiveness of its mission to protect human rights across Europe. This evolution has made the Court a universal benchmark and a model of resilience, one that has endured across the ages without ever losing its brilliance.

Like a lighthouse guiding lost sailors through the night, the ECtHR has illuminated the path of human rights protection on an international scale, exerting a profound influence far beyond Europe's borders. Its jurisprudence, both rich and innovative, has become an indispensable reference for numerous jurisdictions – most notably the more recently established regional

courts, such as the African Court on Human and Peoples' Rights (ACtHPR) and the Inter-American Court of Human Rights (IACtHR) – which, when confronted with similar interpretative challenges, draw upon its normative and methodological tools to refine their understanding of foundational texts and to enhance the protection of individual rights and freedoms. This influence also extends to sub-regional courts established within regional economic communities, such as the ECOWAS Court of Justice, the CEMAC Court of Justice, and, in its original form, the SADC Tribunal. These bodies have gradually incorporated human rights adjudication into their mandates. Although their approaches are often more pragmatic and their visibility more limited, these courts nonetheless rely on the standards developed by the ECtHR when addressing allegations of human rights violations. Moreover, the impact of European jurisprudence is also evident in the work of international human rights bodies, beginning with the United Nations treaty bodies – such as the Human Rights Committee, the Committee against Torture and the Committee on the Elimination of Racial Discrimination – which frequently invoke ECtHR principles to strengthen the coherence and persuasiveness of their legal reasoning. The same holds true for quasi-judicial institutions such as the Inter-American Commission on Human Rights and the African Commission on Human and Peoples' Rights, whose interpretative approaches are regularly informed by European standards while remaining adapted to their respective regional contexts.

The influence of the ECtHR on the ACtHPR unfolds as a continuous and fluid process, reflecting a significant transformation in the way human rights are interpreted and protected across the African continent. Drawing on the tested experience of the ECtHR, the ACtHPR has engaged in a dynamic – albeit currently unidirectional – jurisprudential dialogue that positions it as a bridge between two continents, from Strasbourg to Arusha, translating selected elements of European human rights law into practical interpretative tools for strengthening fundamental guarantees. However, this influence should not be understood as a mere transposition, let alone as submission to the European model. The ACtHPR does not simply import the standards developed by the ECtHR; rather, it adapts, reinterprets and reconfigures them in line with the specific normative imperatives of the African context. These imperatives are rooted in the African Charter itself, which constitutes both the source and the foundation of this contextual specificity. Through its structure, deliberate silences and normative innovations, the Charter calls for an interpretive approach grounded in the social, cultural and historical realities of the continent. Several key features of the African normative framework – such as the recognition of collective rights, the central place accorded

to economic, social and cultural rights, and the right to development – have no direct counterpart within the Council of Europe system. The latter addresses socio-economic rights through a separate legal instrument, chiefly the European Social Charter, while peoples' rights and individual duties – central to the African Charter – are absent from its normative architecture. This relative gap in the European framework has led the ACtHPR to broaden its sources of inspiration. In areas where the ECtHR's case law proves limited or ill-adapted, the African Court turns readily to other sources, notably the jurisprudence of the ICtHR, whose more integrated and substantive approach to economic, social and collective rights resonates more fully with African legal priorities. The ACtHPR also draws on the interpretative guidance of United Nations treaty bodies, such as the Human Rights Committee and the Committee on Economic, Social and Cultural Rights, whose General Comments provide valuable interpretative tools to address the silences of the African Charter and to clarify its meaning. Accordingly, the ECtHR's case law constitutes one methodological resource among others for the ACtHPR – one that enriches its reasoning without eclipsing the historical, social and cultural specificities of the African continent.

Analysing the influence of the ECtHR on the ACtHPR requires, as a preliminary step, a reflection on the normative framework that enables genuine interjudicial dialogue. Such dialogue does not arise spontaneously; rather, it is shaped by a constellation of textual, institutional and interpretive factors that determine the conditions under which legal reasoning may circulate between these two regional courts. Foremost among these factors is the wording of the relevant legal instruments. The European Convention is characterised by a high degree of normativity, precise provisions and prescriptive language that together facilitate the development of a dense, structured and doctrinally coherent body of jurisprudence. By contrast, the African Charter adopts a more general – at times elliptical – drafting style, in which the formulation of rights is often open-ended and where rights and duties coexist within a non-hierarchical normative logic. This textual asymmetry endows the jurisprudence of the ECtHR with a particular function: it serves as a reservoir of interpretive techniques, offering hermeneutic tools – such as the principles of proportionality, necessity and the margin of appreciation – which the ACtHPR may draw upon to fill normative gaps or elucidate the general provisions of the Charter. This textual asymmetry is compounded by a fundamental divergence in the institutional role played by each court within its regional framework. The ECtHR occupies a central position within the architecture of the Council of Europe: it is both the principal judicial organ for the protection of human rights and the authoritative interpreter of the European Conven-

tion. It benefits from compulsory and direct individual access and adjudicates on a substantial number of applications each year, thereby reinforcing its jurisprudential legitimacy through a combination of visibility and consistency. This central position confers upon it a robust interpretive authority, not only within the European legal space but also more broadly across the field of international human rights law.

By contrast, the ACtHPR operates within a more fragmented institutional landscape, coexisting with the African Commission on Human and Peoples' Rights and the African Committee of Experts on the Rights and Welfare of the Child, alongside several sub-regional courts – such as the ECOWAS Court of Justice, the CEMAC Court of Justice and the (former) SADC Tribunal – which all, to varying degrees, claim competence in the protection of human rights. This proliferation of judicial bodies generates a form of normative and institutional competition that may dilute the centrality of the ACtHPR within the African judicial architecture. This is further compounded by structural constraints on access to the Court: only individual or NGO petitions against states having ratified the optional declaration under Article 34(6) of the Protocol are admissible, significantly narrowing the Court's effective jurisdiction. In the absence of generalised access and in the context of competing institutions, the ACtHPR struggles to assert an interpretive authority equivalent to that of the ECtHR. In this context, recourse to European jurisprudence may serve as a source of legitimation within a regional system still in the process of consolidation.

Another fundamental parameter of inter-judicial dialogue lies in the interpretive techniques employed by the ECtHR and the ACtHPR. The ECtHR has developed a distinctive method grounded in the 'living instrument' doctrine, which allows the scope of protected rights to evolve in the light of changing social, cultural and technological realities in contemporary European societies. The ACtHPR likewise adopts an evolutive approach, though with a distinct orientation: it seeks to contextualise international human rights law within the sociopolitical and cultural realities of the African continent, pursuing a logic of 'Africanisation' of universal norms. This process entails a double tension: on the one hand, maintaining fidelity to international standards; on the other, reconfiguring them to reflect regional specificities and continental aspirations. From this perspective, the interpretive approach of the ECtHR does not constitute a normative model to be mimetically reproduced, but rather a methodological repertoire from which the ACtHPR draws in structuring its own reasoning. Reliance on European interpretive principles – such as *effet utile*, proportionality or teleological interpretation – enables the African Court to enhance the density of its reasoning, reinforce its internal coherence

and bolster its credibility within the broader field of international adjudication. This influence, far from reflecting subordination, reveals a form of creative harmonisation whereby the ACtHPR appropriates external jurisprudential resources to strengthen its own authority without compromising its normative identity.

Finally, all of these parameters are traversed by persistent asymmetries in recognition and normative authority. The ECtHR enjoys a widely consolidated transnational legitimacy: its influence extends well beyond the European context, its jurisprudence informs a vast body of legal scholarship, and its decisions resonate even within non-European domestic legal systems. The ACtHPR, by contrast, remains marginalised on the international stage. Its authority is undermined by the limited dissemination of its judgments, by states' reluctance to comply with its decisions, and by internal institutional fragilities. In this context, recourse to European jurisprudence may also be understood as a strategy of jurisprudential affirmation. By anchoring its reasoning in a body of law that already carries significant normative weight, the ACtHPR seeks to enhance the persuasive force of its rulings, align itself with a broader transregional interpretive continuum, and ultimately construct its own normative authority. This referential gesture, though shaped by asymmetrical visibility, contributes to a differentiated yet potentially fruitful dialogue between regional courts, in which methodological borrowing becomes a vehicle for institutional consolidation.

2 From Strasbourg to Arusha: Influence in Action

It is a truism to say that the shadow of Strasbourg looms over Arusha, and this metaphor takes on its full meaning when one closely examines the jurisprudence of the ACtHPR. Indeed, the influence of European case law is evident in numerous judgments, in both substance and form. A meticulous analysis reveals that in several decisions, the contribution of European judges is not merely referenced sporadically by the ACtHPR; rather, direct quotations and explicit references to ECtHR rulings frequently appear, whether in the body of the text[1]

1 See ACtHPR, *Akwasi Boateng and 351 Others v Republic of Ghana*, no 059/2016, 27.11.2020, para. 56; ACtHPR, *Evodius Rutechura@ Theobard Nestory v United Republic of Tanzania*, no 004/2016, 26.02.2021, para. 73; ACtHPR, *Lucien Ikili Rashidi v United Republic of Tanzania,* no 009/2015, paras. 89 and 98; ACtHPR, *Benedicto Daniel Mallya v United Republic of Tanzania,* no 018/2015, 26.09.2019, para. 61; ACtHPR, *Ally Rajabu & others v United Republic of Tanza-*

or in footnotes.[2] The fact that references to the ECtHR systematically appear in the judgments of the ACtHPR reflects a process of assimilation that, far from being mere imitation, demonstrates a deliberate effort to draw on international legal expertise to enrich regional practice. This approach not only strengthens the coherence and rigour of the ACtHPR's decisions but also contributes to the harmonisation of international human rights protection standards.

The fundamental similarity between the European Convention and the African Charter forms the foundation upon which the influence of the ECtHR on the ACtHPR is built. Although drafted in distinct geopolitical, historical and institutional contexts, both instruments are direct extensions of the Universal Declaration of Human Rights, reflecting its core values within legally binding regional frameworks. This normative proximity is evidenced by the recognition of comparable rights, such as the right to life, the prohibition of torture, freedom of expression, the right to a fair trial and the principle of non-discrimination. The shared catalogue of guarantees provides a common ground for interpretation, where similarities in both language and purpose facilitate cross-referencing and argumentative borrowings between the two systems. In this light, the convergence of protected rights is not merely a favourable condition for the emergence of judicial dialogue between the two courts; rather, it is the very foundation of that dialogue. It enables interpretive exchanges to be grounded in a shared normative core, thus transcending regional specificities in favour of a mutually enriching jurisprudential interaction.

In matters of procedural guarantees, for instance, the ACtHPR has referred to the cases of *Colozza v Italy*[3] and *Stanford v the United Kingdom*,[4] in which the ECtHR held that the absence of defendants from their own trial – without

---

nia, 28.11.2019, no 007/2015, para. 149; ACtHPR, *APDF & IHRDA v Republic of Mali*, no 046/2016, 11.05.2018, para. 51; ACtHPR, *The African Commission on Human and Peoples' Rights v Libya*, no 002/2013, 03.06.2016, para. 95.

2 See ACtHRP, *Sébastien Germain Marie Aikoué Ajavon v Republic of Benin*, no 027/2020, 01.04.2021, para. 21; ACtHPR, *Ali Ben Hassen Ben Houcef Ben Abdlhafid v Republic of Tunisia*, no 033/2018, 25.06.2021, para. 61; ACtHPR, *Komi Koutché v Republic of Benin*, 25.06.2021, para. 49; ACtHPR, *Chrizostom Benyoma v United Republic of Tanzania*, no 001/2016, 30.09.2021, para. 98; ACtHPR, *XYZ v Republic of Benin*, no 010/2020, 27.11.2020, para. 63; ACtHPR, *Elie Sandiwidi and The Burkinabe movement for human and peoples' rights v Burkina Faso and three other States*, nos 014/2020 and 017/2020, 25.09.2020, para. 52; ACtHPR, *Boubakar Sissoko and 74 others v Republic of Mali*, no 037/2017, 25.09.2020, para. 73; ACtHPR, *Yacouba Traore v Republic of Mali*, no 010/2018, 25.09.2020, para. 41.

3 ECtHR, *Colozza v Italy*, no 9024/80, 12.02.1985, para. 27.

4 ECtHR, *Stanford v United Kingdom*, no 16757/90, 23.02.1994, para. 26.

the possibility of defending themselves or being effectively represented – constitutes a violation of the right to a fair trial. By adopting this reasoning, the ACtHPR does not merely acknowledge the importance of this principle;[5] it also justifies its reliance on the ECtHR's jurisprudence by highlighting the textual similarity between Article 6 of the European Convention and Article 7 of the African Charter.[6] While both provisions enshrine the right to a fair trial, neither explicitly requires the presence of the accused at their trial, creating a common ground between the two systems. This textual similarity serves as a foundation upon which the ACtHPR builds its reasoning, drawing extensively from the ECtHR's case law. The ACtHPR leverages this formal correspondence to apply principles and interpretative methods derived from the European model in similar contexts. For instance, in finding that a national judicial decision lacked sufficient reasoning, the ACtHPR underscored that, in similar circumstances, the ECtHR had concluded that an inadequately reasoned judgment constituted a violation of the right to a well-founded decision under the corresponding provisions of the European Convention.[7] Furthermore, the ACtHPR explicitly affirms that it finds support in the ECtHR's decisions, recognising the latter as a court whose human rights jurisdiction closely aligns with its own.[8] This functional similarity allows the ACtHPR to draw upon well-established jurisprudence to inform its own analyses, ensuring consistency in the application of human rights. This approach not only enhances the legitimacy of its decisions but also promotes a gradual harmonisation of human rights practices on both sides of the Mediterranean.

Beyond the textual similarity of the civil and political rights guaranteed by both the European Convention and the African Charter – bearing in mind that the former does not encompass economic and social rights, peoples' rights or human duties – the transmission of European jurisprudence into African case law also rests on the similarity of the contentious situations brought before the two courts. This transposition is particularly evident when the respondent state before the ACtHPR shares the same legal system as the respondent state before the ECtHR. Indeed, at the time of independence, several African states inherited legal systems directly derived from European legal traditions, which had been transplanted by colonial powers into the territories they governed. These legal orders were, to a large extent, retained and adapted by the newly independent states, thereby extending the influence of European legal tradi-

5 ACtHPR, *Massoud Rajabu v United Republic of Tanzania*, no 008/2016, 25.06.2021, para. 79.
6 ACtHPR, *Alex Thomas v United Republic of Tanzania*, no 005/2013, 20.11.2015, para. 97.
7 ACtHPR, *Fidèle Mulindahabi v Republic of Rwanda*, no 004/2017, 26.06.2020, para. 63.
8 ACtHPR, *Alex Thomas v United Republic of Tanzania*, *supra* note 6, paras. 95 and 116.

tions well beyond the colonial period. This structural kinship creates common ground conducive to the transposition of the reasoning and principles developed by the ECtHR. When similar cases arise in comparable legal contexts, the ECtHR's reasoning appears particularly relevant and applicable. However, this transfer is not automatic; it occurs in a coherent and contextualised manner, taking into account the institutional and procedural realities of African states, which in many respects mirror those of European states. The example of appeals before a court of cassation illustrates this transposition perfectly. In several cases, the question has arisen whether this domestic remedy, which is limited to points of law and does not allow for a re-examination of factual findings, must be exhausted before a case can be brought before a regional court. The ECtHR has ruled that although a cassation appeal is confined to legal arguments, it constitutes a necessary step to ensure the consistency between the facts established by lower courts and the conclusions they reach. This principle, based on the idea that courts of cassation play an essential role in ensuring the uniformity of judicial decisions, guarantees a rigorous application of the law before a regional court intervenes.[9] In *Zongo and others v Burkina Faso*,[10] the ACtHPR adopted this same reasoning, relying on *Civet v France*[11] and *Yahiaoui v France*,[12] in which the ECtHR held that a cassation appeal is an effective and mandatory domestic remedy in France that must be exhausted before a case can be brought before a regional jurisdiction. The ACtHPR further emphasised that, despite their geographical distance, France and Burkina Faso share a common legal affiliation – the Romano-Germanic legal system. This similarity in judicial organisation and the functioning of their highest courts justifies assigning a comparable role to the cassation appeal in both systems, thereby legitimising the application of European reasoning to the African context.[13] This process of transposition highlights how the shared legal norms and procedural practices of states belonging to the same legal tradition serve as a key vehicle for the ECtHR's influence on the ACtHPR. Thus, the similarity of adjudicated cases in analogous legal contexts fosters a hybridisation of legal reasoning.

9 ECtHR, *Civet v France*, no 29340/95, 28.11.1999, paras. 43–44; ECtHR, *Remli v France*, no 16839/90, 23.04.1996, para. 42; ECtHR, *Omar v France*, no 24767/94 [GC], 29.07.1998, para. 41; ECtHR, *Guérin v France*, no 25201/94, 29.07.1998, para. 44.

10 ACtHPR, *The beneficiaries of the late Norbert: Zongo Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise IIboudo v Burkina Faso*, no 013/2011, 24.06.2014.

11 ECtHR, *Civet v France*, *supra* note 9, paras. 43–44.

12 ECtHR, *Yahiaoui v France*, no 30962/96, 20.01.2000, paras. 31–32.

13 ACtHPR, *The beneficiaries of the late Norbert: Zongo Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise IIboudo v Burkina Faso*, *supra* note 10, para. 70.

The ACtHPR's reference to ECtHR jurisprudence constitutes a central rational element in its reasoning, reinforcing the scope of its judicial interpretations. By invoking decisions from the ECtHR, the ACtHPR establishes an argumentative parallel aimed at demonstrating the existence of a common international practice from which it cannot legitimately diverge. A compelling example of this approach lies in the broad interpretation of the prohibition of torture, as well as cruel, inhuman and degrading punishment or treatment. Like the ECtHR, the ACtHPR seeks to encompass all forms of physical and mental abuse, relying on an expansive interpretation of the right to humane treatment. To illustrate this point, the ACtHPR[14] referred to *Tyrer v the United Kingdom*,[15] in which the ECtHR ruled that corporal punishment imposed by the justice system constitutes institutionalised violence – i.e., violence authorised by law, ordered by state judicial authorities and executed by state law enforcement. By relying on this jurisprudence, the ACtHPR upholds the principle that corporal punishment is incompatible with the prohibition of cruel, inhuman and degrading treatment. Following its European counterpart, it concludes that the existence of laws permitting corporal punishment is contrary to the African Charter.[16] This reliance on ECtHR case law provides the ACtHPR with a solid framework to justify its reforms in an African context where certain traditional and religious practices still tolerate corporal punishment. By building a bridge between different legal systems, the ACtHPR transcends cultural differences and demonstrates that certain fundamental rights, universally recognised, are imperative as international norms. This strategy of universalisation enables the ACtHPR to legitimise its decisions in sensitive cases, framing its reforms not as an infringement on local culture but as the recognition of universal principles to which all states have committed.

The same dynamic can be observed in the realm of the right to a fair trial, particularly when interpreting complex notions such as judicial independence and impartiality, the rights of the defence or the right to be tried within a reasonable time. Accordingly, the ACtHPR has interpreted Article 7(1)(c) of the African Charter[17] in the light of various international sources, including

14 ACtHPR, *Yassini Rashid Maige v United Republic of Tanzania*, no 018/2017, 05.09.2023, para. 138.

15 ECtHR, *Tyrer v The United Kingdom*, no 5856/72, 25.04.1978, para. 33.

16 ACtHPR, *Yassini Rashid Maige v United Republic of Tanzania*, *supra* note 14, para. 143.

17 Article 7(1)(c) of the African Charter states that 'Every individual shall have the right to have his cause heard. This comprises:... the right to defense, including the right to be defended by counsel of his choice'.

the jurisprudence of the ECtHR, which has been extensively relied upon to support the view that, although the regional provision does not explicitly guarantee the right to legal aid, such a right is implicitly embedded in the broader guarantee of a fair trial.[18] The ACtHPR clarifies that 'as repeatedly affirmed by the European Court of Human Rights, the right to be informed of one's right to a lawyer is critical to the respect for one's right to defence'.[19] In practice, the ACtHPR adopts the analytical framework developed by the ECtHR, which assesses the necessity of legal assistance based on the gravity of the offence, the severity of the sentence, the complexity of the case, and the personal and social situation of the defendant.[20] Referring to *Salduz v Turkey*,[21] the ACtHPR acknowledges that legal assistance must be granted to individuals accused or suspected of a crime, particularly when the crime is serious and carries a severe legal penalty.[22] In a more detailed approach, the ACtHPR also refers to ECtHR jurisprudence to clarify the scope of the right to free legal aid, noting that 'as established in the jurisprudence of the European Court of Human Rights, the right to be defended by counsel of one's choice is not absolute when the counsel is provided through a free legal assistance scheme'.[23] To demonstrate that the guarantee of a fair trial primarily depends on the quality of the assistance provided – rather than a mere procedural formality – the ACtHPR invokes landmark cases such as *Lagerblom v Sweden*[24] and *Kamasin-*

18 ACtHPR, *Alex Thomas v United Republic of Tanzania*, *supra* note 6, paras. 118–119; ACtHPR, *Hassan Bundala Swaga v United Republic of Tanzania*, no 014/2017, 7.11.2023, paras. 83–86; ACtHPR, *Kenedy Ivan v United Republic of Tanzania*, no 025/2016, 28.03.2019, para. 81; ACtHPR, *Oscar Josiah v United Republic of Tanzania*, no 053/2016, 28.03.2019, para. 66; ACtHPR, *Reuben Juma v United Republic of Tanzania*, no 015/2017 and 011/2018, 5.09.2023, para. 91.

19 ACtHPR, *Jibu Amir @ Mussa and Saidi Ally @ Mangaya v United Republic of Tanzania*, no 014/2015, 28.11.2019, para. 86.

20 ECtHR, *Benham v United Kingdom*, no 19380/92, 10.06.1996, paras. 60–61; ECtHR, *Quaranta v Switzerland*, no 12744/87, 24.05.1991, paras. 33–34; ECtHR *Prežec v Croatia*, no 8185/07, 15.10.2009, para. 29; ECtHR, *Biba v Greece*, no 33170/96, 26.09.2000, para. 29; ACtHPR, *Mhina Zuberi v United Republic of Tanzania*, no 054/2016, 26.02.2021, para. 63.

21 ECtHR, *Salduz v Turkey*, no 36391/02 [GC], 27.11.2008.

22 ACtHPR, *Alex Thomas v United Republic of Tanzania*, *supra* note 6, para. 119; ACtHPR, *Kalebi Elisamehe v United Republic of Tanzania*, no 028/2015, 26.11.2020, para. 55; ACtHPR, *James Wanjara & others v United Republic of Tanzania*, no 033/2015, 25.09.2020, para. 66.

23 ACtHPR, *Cosma Faustin v United Republic of Tanzania*, no 018/2016, 30.09.2021, para. 107. In support of its statement, the ACtHPR cites the following judgments: ECtHR, *Croissant v Germany,* no 13611/89, 25.09.1992, para. 29; ECtHR, *Kamasinski v Austria,* nos 9783/82, 19.123.1989, para. 65.

24 ECtHR, *Lagerblom v Sweden*, no 26891/95, 14.04.2003, paras. 54 à 56.

ski v Austria,[25] emphasising that in this context, the right to legal assistance is measured by the effectiveness of the aid provided to the accused.[26]

The influence of the ECtHR on the ACtHPR is particularly pronounced in the area of restrictions on the exercise of human rights. The ACtHPR aligns with the ECtHR in affirming that limitations on the enjoyment of rights must not only be necessary in a democratic society but also reasonably proportionate to the legitimate objective pursued.[27] Relying on the authority of ECtHR jurisprudence, the ACtHPR[28] interprets these conditions by referring to landmark cases such as *Gillow v the United Kingdom*,[29] *Olsson v Sweden*[30] and *Sporrong and Lönnroth v Sweden*.[31] Aware of the challenges involved in balancing public interest with the protection of individual rights, the ACtHPR has also adopted the margin of appreciation doctrine,[32] a concept central to ECtHR case law.[33] Under this principle, states are responsible for determining the concrete measures to implement the rights enshrined in the African Charter, while the ACtHPR retains the competence to evaluate and assess the mechanisms and measures adopted.[34] This hybrid approach ensures proportionality control while respecting state sovereignty. In this regard, the ACtHPR has ruled that a constitutional provision prohibiting courts from reviewing the election of a presidential candidate after the winner's announcement by the electoral commission is discriminatory.[35] It has also held that banning independent candidacies in presidential, legislative and local elections constitutes

25 ECtHR, *Kamasinski v Austria, supra* note, para. 65.

26 ACtHPR, *Cosma Faustin v United Republic of Tanzania*, *supra* note 23, paras. 107–108.

27 ACtHPR, *Tanganyika Law Society, The Legal and Human Rights Centre and Reverend Christopher R. Mtikila v United Republic of Tanzania*, nos 009/2011 and 011/2011, 14.06.2013, para. 106.1 and 107.1.

28 Ibid., paras. 106.2–106.4.

29 ECtHR, *Gillow v The United Kingdom*, no 9063/80, 24.11.1986, para. 55.

30 ECtHR, *Olsson v Sweden*, no 10465/83, 24.03.188, para. 68.

31 ECtHR, *Sporrong and Lonnroth v Sweden*, nos 7151/75 and 7152/75, 23.09.1982.

32 ACtHPR, *Jebra Kambole v United Republic of Tanzania*, no 018/2018, 15.07.2020, para. 79. For an application of the doctrine of the national margin of appreciation regarding evidence, see ACtHPR, *Benard Balele v United Republic of Tanzania*, no 026/2016, 30.09.2021, para. 87; ACtHPR, *Kijiji Isiaga v United Republic of Tanzania*, no 032/2015, 21.03.2018, para. 65; ACtHPR, *Mohamed Selemani Marwa v United Republic of Tanzania*, no 014/2016, 02.12.2021, para. 87.

33 See ECtHR, *Handyside v The United Kingdom*, no 5493/72, 7.12.1976; ECtHR, *Lawless c. Ireland* (*no 1*), no 332/57, 14.11.1960; ECtHR, *Ireland v The United Kingdom*, no 5310/71, 20.03.2018.

34 ACtHPR, *Jebra Kambole v United Republic of Tanzania*, *supra* note 32, para. 81.

35 Ibid., para. 82.

a violation of citizens' right freely to participate in public affairs.[36] Similarly, the ACtHPR found that a national electoral commission composed of eight members from the ruling party and only four from the opposition lacked the necessary guarantees of independence and impartiality.[37] In order to legitimise its approach within an African context marked by unconsolidated democratic governance, the ACtHPR draws upon a jurisprudential convergence, noting that the ECtHR has reached a similar conclusion in its interpretation of the right to free elections.[38] This reference to European case law is not invoked as an external authority *per se*, but rather as a methodological anchor that enables the African Court to strengthen the credibility of its analysis and to justify its intervention in a particularly sensitive area – electoral regulation – without appearing to encroach upon state sovereignty. By relying on the principles of necessity and proportionality as developed in the ECtHR's jurisprudence, the ACtHPR affirms that judicial scrutiny of electoral legislation should be viewed not as unwarranted interference, but rather as a structural safeguard essential to the holding of free and democratic elections.

Beyond electoral matters, the influence of the ECtHR on the ACtHPR is also evident in their shared approach to freedom of expression. Like the ECtHR, which recognises this right as fundamental and essential in a democratic society, the ACtHPR asserts, with equal incisiveness, the crucial importance of freedom of expression. This convergence is particularly reflected in how the ACtHPR conceptualises the scope of this right. The ECtHR has clearly established that freedom of expression is not limited to information or opinions that are favourably received or deemed harmless, but also protects those who offend, shock or disturb, thus ensuring the pluralism, tolerance and openness essential to any democratic society.[39] The ACtHPR directly adopts this position in *Ingabire v Rwanda*,[40] explicitly relying on the ECtHR's rulings in *Handyside v the United Kingdom*[41] and *Gündüz v Turkey*.[42] Moreover, the ACtHPR explicitly refers to ECtHR jurisprudence, citing no fewer than ten

36 ACtHPR, *Tanganyika Law Society, The Legal and Human Rights Centre and Reverend Christopher R. Mtikila v United Republic of Tanzania*, *supra* note 27, para. 111.

37 ACtHPR, *APDH v Republic of Cote d'Ivoire*, no 001/2014, 28.11.2016, paras. 126–136.

38 Ibid., paras. 64 and 148.

39 ECtHR, *Open Door and Dublin Well Woman v Ireland*, nos 14234/88 and 14235/88, 29.10.1992, para.t 71; ECHR (Grand Chamber), *Vogt v Germany*, no 17851/91 [GC], 26.09.1995, para. 52.

40 ACtHPR, *Ingabire Victoire Umuhoza v Republic of Rwanda*, no 003/2014, 24.11.2017, para. 143.

41 ECtHR, *Handyside v The United Kingdom*, *supra* note 33, para. 49.

42 ECHR, *Gündüz v Turkey*, no 35071/97, 4.12.2003, para. 37.

cases,[43] to establish that criminal defamation laws should be used only as a last resort, and only when there is a serious threat to the enjoyment of other human rights – particularly in cases involving hate speech and incitement to violence.[44] By grounding its reasoning in these European decisions, the ACtHPR enhances the legitimacy of its interpretations in a continent where criticism of public authorities remains particularly sensitive. This shared approach is also evident in how the ACtHPR defines the permissible limitations on freedom of expression. Borrowing the language of the ECtHR,[45] the ACtHPR holds that a state may impose restrictions on this right, provided that such limitations are prescribed by law, pursue a legitimate aim, and are necessary and proportionate in a democratic society.[46] These conditions, interpreted in the light of ECtHR jurisprudence, provide equivalent protective guarantees under both the African Charter and the European Convention. Furthermore, the ACtHPR adopts a nuanced approach to restricting freedom of expression, adapting its reasoning depending on the status of the individual concerned. Mirroring its European counterpart,[47] the ACtHPR considers that interference with the exercise of this right should be more limited when it involves public debates on political figures or matters of public interest.[48] This position reflects a commitment to balancing the protection of freedom of expression with the preservation of democratic order. Ultimately, the influence of the ECtHR on the ACtHPR regarding freedom of expression is not only evident but also foundational. It profoundly shapes how the ACtHPR interprets and applies human rights while structuring its legal methodology and institutional positioning.

The influence of the ECtHR on the ACtHPR manifests itself both explicitly and subtly, embedding itself in a normative continuity that spans both courts without always being explicitly referenced. In several rulings, the imprint of European interpretative principles appears not through direct citations but rather through their silent integration into reasoning and the selection of

43 *See* ECtHR, *Gavrilovici v Moldova*, no 25464/05, 15.12.2009, para. 60; ECHR, *Cumpănă and Mazăre v Romania*, no 33348/96 [GC], 17.12.2004, para. 115; ECtHR, *Radio France and Others v France*, no 53984/00, 30.03.2004, para. 40.

44 ACtHPR, *Lohé Issa Konate v Burkina Faso*, no 004/2013, 5.12.2014, para. 158.

45 ECtHR, *Cangı v Turkey*, no 24973/15, 29.01.2019, para. 38; ECtHR, *Perinçek v Switzerland*, no 27510/08 [GC], 15.10.2015, para. 124.

46 ACtHPR, *Sébastien Germain Marie Aïkoue Ajavon v Republic of Bénin*, no 062/2019, 4.12.2020, para. 119.

47 ECtHR, *Wingrove v The United Kingdom*, no 17419/90, 25.11.1996, para. 58; ECtHR, *Sürek v Turkey* (*n°4*), no 24762/94 [GC], 08.07.1999, para. 57.

48 ACtHPR, *Lohé Issa Konate v Burkina Faso*, *supra* note 44, para. 155.

jurisprudential criteria. A striking example of this influence is found in the analysis of the legality of the death penalty in relation to the right to life and the prohibition of cruel, inhuman and degrading treatment. Before the adoption of Protocol No. 13, which abolished capital punishment in all circumstances, the ECtHR ruled that, in isolation, the death penalty could not be considered a violation of the right to life or inherently cruel, inhuman or degrading treatment.[49] In 2005, the ECtHR emphasised that the absence of ratification of Protocol No. 13 by a significant number of states prevented the establishment of a uniform practice recognising capital punishment as systematically inhumane and degrading in all circumstances. However, it did not disregard the abolitionist trend initiated by Protocol No. 6, which abolished the death penalty in peacetime while allowing its application in wartime. The Court acknowledged that this evolution was not inconsistent with the notion that Article 2, which enshrines the right to life, had historically been formulated to permit the application of capital punishment under specific conditions in peacetime.[50] It was only as ratifications of Protocol No. 13 became widespread (with Russia remaining an exception) and as several states, including Russia, adopted moratoriums that the ECtHR was able to assert definitively that capital punishment constitutes inhumane treatment and that the right to life must be interpreted as prohibiting its application.[51] Drawing inspiration from this nuanced reasoning, the ACtHPR addresses the issue of the death penalty by affirming the sanctity of the right to life while acknowledging its application under strictly regulated conditions.[52] To ensure the legitimacy of capital punishment, the ACtHPR establishes three essential criteria: the existence of a legal basis, the pronouncement of the sentence by a competent court, and the regularity of the procedure leading to the conviction.[53] Moreover, in

49 ECtHR, *Soering v The United Kigndom*, no 14038/88, 07.07.1989, paras. 101–103.

50 ECtHR, *Öcalan v Turkey*, no 46221/99 [GC], 05.05.2005, paras. 164–165.

51 ECtHR, *Al Saadoon and Mufdhi v The United Kigndom*, no 61498/08, 02.03.2010, para. 120.

52 ACtHPR, *Ghati Mwita v United Republic of Tanzania*, no 012/2019, 01.12.2022, para. 66; ACtHPR, *Kachukura Nshekanabo Kakobeka v United Republic of Tanzania*, no 029/2016, 04.12.2023, paras. 73; ACtHPR, *Ally Rajabu and others v United Republic of Tanzania*, no 007/2015, 28.11.2019, paras. 102 and 109–111; ACtHPR, *Marthine Christian @ Msuguri c. République unie de Tanzanie*, requête n°052/2016, 01.12.2022, paras. 77–78; ACtHPR, *Nzigiyimana Zabron v United Republic of Tanzania*, no 051/2016, 04.06.2024, para. 141; ACtHPR, *Dominick Damian v United Republic of Tanzania*, no 048/2016, 04.06.2024, para. 129.

53 ACtHPR, *Crospery Gabriel and Ernest Mutakyawa v United Republic of Tanzania*, no 050/2016, 13.02.2024, para. 91; *Romward William v United Republic of Tanzania*, no 030/2016, 13.02.2024, para. 61; ACtHPR, *Makungu Misalaba v United Republic of Tanzania*, no 033/2016, 07.11.2023, para. 134.

assessing the progress made and highlighting the obstacles to abolition, the ACtHPR refers to the Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR).[54] This instrument is not invoked to glorify an abolitionist trend, but rather to underscore the remaining challenges in achieving an international consensus.[55] Thus, both the ECtHR – in a context where capital punishment has largely been eradicated due to Protocol No. 13 – and the ACtHPR, in its effort to regulate and modulate the application of this sanction, seek a delicate balance between pragmatism, legality and universal respect for human rights. Their shared approach acknowledges that the right to life warrants absolute protection while requiring a rigorous evaluation of national and international contexts to evolve gradually towards more humane and dignity-respecting standards. This reasoning, which highlights both progress and persistent challenges, conveys a common message: the legal framework governing the death penalty remains in constant evolution, and continued efforts are necessary to achieve an international consensus on its abolition. Although the European influence remains discreet, it is perceptible in the ACtHPR's practice, reflecting a mutual enrichment of human rights protection systems. This approach allows the ACtHPR to enhance the coherence of its decisions and strengthen its judicial practice without compromising its interpretative independence. By asserting its autonomy, the ACtHPR positions itself as a distinct judicial body that, while drawing from the decisions and jurisprudential developments of the ECtHR, avoids appearing to be a mere replica of the Strasbourg model.

The consolidation of the continental normative framework has profoundly transformed the way the ACtHPR integrates external influences, particularly those stemming from ECtHR jurisprudence. This evolution is part of a broader process of structuring the African human rights protection system, marked by the adoption of regional instruments that reflect both

54 The African Court notes that '[t]he death penalty remains on the statute books of some states and that no treaty, on the abolition of the death penalty has gained universal ratification. Presently, the Second Optional Protocol to the ICCPR, the Court notes, has ninety (90) State Parties out of the one hundred and seventy three (173) States Parties to the ICCPR': ACtHPR, *Ghati Mwita v United Republic of Tanzania*, *supra* note 52, para. 64; ACtHPR, *Ibrahim Yusuph Calist Bonge, Rajabu Mohammed Salum Msolongoni and Simba Aloyce Simba Hatibu v United Republic of Tanzania*, no 036/2016, 04.12.2023, para. 76.

55 For the ACtHPR, 'despite a global trend towards the abolition of the death penalty, including the adoption of the Second option Protocol to the international covenant on civil and political Rights, the prohibition of the death sentence in international law is still not absolute': ACtHPR, *John Lazaro v United Republic of Tanzania*, no 003/2016, 07.11.2023, para. 76.

the continent's concerns and its specificities. Thus, the Maputo Protocol on Women's Rights, the African Charter on the Rights and Welfare of the Child and the African Charter on Democracy, Elections, and Governance play a crucial role by providing responses tailored to African realities and strengthening the continent's normative framework. The progressive adoption of these regional instruments has gradually reduced the ACtHPR's reliance on ECtHR jurisprudence. However, this trend towards greater autonomy does not amount to a rejection of ECtHR references. The ACtHPR continues to invoke them, albeit in a more selective manner, adapting these principles to the specific realities of the African context. When regional instruments remain silent or vague on certain issues, the ACtHPR does not hesitate to draw on ECtHR jurisprudence to fill these gaps, while ensuring that its application is properly contextualised. This approach reflects a genuine normative hybridisation, in which the European contribution is adjusted based on African needs and specificities. Thus, the ACtHPR does not merely import legal solutions from the European system, but instead adapts them to ensure their compatibility with the continent's legal, cultural and institutional dynamics.

3 Adapting European Influence to the African Context

The ACtHPR adopts a distinctive approach by integrating the influence of ECtHR jurisprudence while adapting it to the historical, cultural and socio-economic specificities of African states. Rather than mechanically replicating the European model, the ACtHPR undertakes a thorough contextualisation, allowing it to draw from a well-established international framework to strengthen and tailor its own normative corpus. The Court incorporates ECtHR reasoning only when it aligns with a logic of complementarity, ensuring that European influence does not undermine the originality of the African human rights system. By adopting this measured approach, the ACtHPR leverages European inspiration as an interpretative tool to enhance the protection of fundamental rights on the continent while maintaining the autonomy of its legal responses. This judicious interplay between international principles and local realities ensures that the adopted norms remain relevant within a specific socio-economic context while reinforcing the identity and effectiveness of the African legal system.

The issue of the public pronouncement of judicial decisions exemplifies this dynamic of adaptation. Noting that the African Charter remains silent on this principle, the ACtHPR turns to ECtHR jurisprudence to define its

scope.[56] Accordingly, the ACtHPR refers to *Lorenzetti v Italy*,[57] in which the ECtHR assessed with flexibility and pragmatism whether a judgment had been publicly pronounced. This precedent provides an analytical framework that the ACtHPR deems appropriate to adapt on a case-by-case basis, taking into account the national specificities of each state concerned. Beyond a mere transposition, the ACtHPR contextualises the European solution by applying it to the socio-economic specificities of African states. In a case involving a state with inadequate judicial infrastructure, the ACtHPR ruled that the lack of proper courtrooms constituted a valid reason to adopt a flexible approach regarding the obligation to pronounce judgments in open court. It emphasised that, under such circumstances, delivering rulings in judges' offices – a common practice out of necessity – should be considered equivalent to a public pronouncement, provided that the public is aware of this reality.[58] This decision reflects a pragmatic consideration of Africa's social and economic realities in the protection of human rights. By drawing on European experience without systematically adopting its modalities, the ACtHPR successfully combines international legal insights with local necessities. This approach strengthens the legitimacy and coherence of its own interpretations, demonstrating that European influence, when modulated and contextualised, can enrich an autonomous legal system genuinely tailored to Africa's specific challenges.

This approach illustrates not only the ACtHPR's willingness to draw inspiration from European standards but also its commitment to the coherence of its own legal framework. Following the ECtHR, which has recognised that the protection of the specific identity of minorities includes safeguarding their

56 ACtHPR, *Mohamed Abubakari v United Republic of Tanzania*, no 007/2013, 04.06.2016, para. 224.

57 ECtHR, *Lorenzetti v Italy*, no 32075/09, 10.04.2012.

58 ACtHPR, *Mohamed Abubakari v United Republic of Tanzania, supra* note 56, paras. 226–227. The African Court's approach, which allows for judgments to be pronounced in locations other than formal courtrooms, demonstrates a pragmatic recognition that ensuring the publicity of judicial decisions does not necessarily require a traditional courtroom infrastructure. According to the Court, publicity is sufficiently ensured if a judgment is delivered in a location or open space accessible to the public, provided the public has been adequately informed. This pragmatic approach underscores the Court's acknowledgment that international standards of justice must be adaptable to local realities, highlighting that effective protection of human rights can be maintained even in the absence of ideal judicial infrastructure. By aligning international justice standards with local realities, the Court effectively illustrates how human rights protection can be upheld through practical solutions adapted to local circumstances.

traditional ways of life,[59] the ACtHPR has ruled that protecting minority groups requires respect for and preservation of their cultural heritage, an essential element of their identity.[60] In this perspective, the ACtHPR does not merely adapt the European model. Rather, it enriches it through a distinctly African interpretative framework, applying the principles of the Charter in a manner that reflects the communal nature of African societies. While the ECtHR primarily approaches minority rights protection through the lens of the right to private and family life,[61] the ACtHPR expands this framework by situating it within the broader right to internal self-determination. This positioning is particularly justified, given the continent's unique history – marked by colonialism, slavery, apartheid and the struggle against foreign domination – which has shaped a collective identity and reinforced the need to protect the cultural and identity-based specificities of each community.[62] For the ACtHPR, the culture of an ethnic minority encompasses a broad range of dimensions, from language and symbols to dress codes, economic practices, rituals, conflict resolution methods and shared values that structure the group's identity. The ACtHPR thus emphasises that these components, far from being peripheral, form the foundation of communities' identities and must be safeguarded against any form of forced assimilation.[63] By autonomously integrating selected influences from European jurisprudence, the ACtHPR articulates universal values of human rights protection with the specific needs of African societies, while remaining faithful to the normative framework established by the African Charter. This hybrid model – combining enrichment through established references and the assertion of interpretative independence – demonstrates the ACtHPR's ability to evolve while remaining faithful to its regional identity. By adapting and incorporating European legal insights, the ACtHPR strengthens the protection of cultural and identity rights, contributing to the emergence of a regional human rights framework that is both rigorous and respectful of African legal traditions, in line with the vision of the Charter's drafters.

The ACtHPR demonstrates a remarkable ability to contextualise principles derived from ECtHR jurisprudence, adapting these legal insights to the specific

59 ECtHR, *Chapman v The United Kingdom*, no 27238/95 [GC], 18.01.2001, paras. 73 and 96.

60 ACtHPR, *The African Commission on Human and Peoples' Rights v Republic of Kenya*, no 006/2012, 26.05.2017, para. 179.

61 ECHR, *Buckley v United Kingdom*, no 20348/92, 25.09.1996.

62 ACtHPR, *Bernard Anbataayela Mornah v Republic of Benin and others*, no 028/2018, 22.09.2022, para. 290.

63 ACtHPR, *The African Commission on Human and Peoples' Rights v Republic of Kenya*, *supra* note 60, paras. 110–112 and 179.

context of African states, whose historical trajectories differ significantly from those of European states. The criminalisation of historical negationism serves as a compelling illustration of this approach. The ECtHR considers that the pursuit of historical truth is an integral part of freedom of expression in a democratic society, emphasising that it is not within its mandate to settle fundamental historical debates that remain the subject of public discourse.[64] According to this approach, a criminal sanction for questioning a historical fact can be justified only if the statements in question incite hatred or violence.[65] For example, Holocaust denial, which goes beyond mere contestation of facts, constitutes racial defamation and undermines fundamental values in the fight against racism and antisemitism.[66] Outside such situations, the denial of painful events in collective memory may be tolerated, particularly when the passage of time mitigates their repercussions, fostering open and peaceful debate on national history.[67] However, the ACtHPR nuances this approach by considering the complexity and fragility of African societies. In contexts marked by collective trauma – such as genocides or other devastating conflicts – protection is not limited to individual rights but also seeks to safeguard social cohesion and communal harmony. For the ACtHPR, the denial of historical facts, particularly those that have profoundly shaped a state's collective memory, cannot be tolerated. Thus, the ACtHPR holds that laws criminalising the denial of historical facts, such as genocide, are essential to preventing the resurgence of destructive identity-based ideologies and ensuring social stability.[68] The case of Rwanda exemplifies this dynamic. While acknowledging the principles articulated by the ECtHR,[69] the ACtHPR places particular emphasis

64 ECtHR, *Monnat v Switzerland*, no 73604/01, 21.09.2006, para. 57; ECtHPR, *Altuğ Taner Akçam v Turkey*, no 27520/07, 25.10.2011; ECtHR, *Chauvy and Others v France*, no 64915/01, 29.06.2004, para. 69.

65 ECtHR, *Perinçek v Switzerland*, no 27510/08 [GC], 15 october 2015, paras. 231–232; ECtHR, *Kızılyaprak v Turkey*, no 27528/95, 2.10.2003, para. 40; ECtHR, *Dink v Turkeye*, nos 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09, 14.10.2010, para. 134.

66 ECtHR, *Roger Garaudy v France*, no 65831/01, 24.06.2003.

67 ECtHR, *Lehideux and Isorni v France*, nos 55/1997 and 839/1045, 23.09.1998, para. 55; ECtHR, *Orban and others v France*, no 20985/05,15.01.2009, para. 52; ECtHR, *Smolorz v Poland*, no 17446/07, 16.10.2012, para. 38; ECtHR, *Plon v France*, no 58148/00, 18.05.2004, para. 53.

68 ACtHPR, *Ingabire Victoire Umuhoza v Republic of Rwanda*, *supra* note 40, para. 158.

69 The ECtHR has held that, while controversial statements may indeed provoke debate, such polemical remarks about sensitive issues are nonetheless protected speech. According to the Court, although these statements may be divisive, freedom of expression requires tolerance for contentious views. Therefore, restrictions on freedom of expression in such contexts must be interpreted particularly narrowly: ECtHR, *Güçlü*

on Rwanda's national reconciliation efforts. Accordingly, it accepts and justifies the criminalisation of negationism not only as a necessary measure against hate speech but also as an obligation to protect national unity and prevent the resurgence of narratives that could reignite historical divisions.[70] Ultimately, whereas the ECtHR prioritises freedom of expression with a focus on preventing incitement to hatred or violence, the ACtHPR adopts a stricter position that incorporates the historical and cultural considerations specific to African societies. In doing so, the ACtHPR adapts and enriches European principles better to address local challenges, ensuring a human rights protection framework that is both effective and respectful of social cohesion. This approach generates jurisprudence that is legitimate, coherent and independent.

As these examples illustrate, the influence of the ECtHR on the ACtHPR is not merely a matter of transplantation but rather a process of appropriation that enriches African legal practices by aligning them with international standards. European jurisprudence serves as a tool for modernisation, complementing and reinforcing existing norms on the continent while respecting the cultural and historical specificities of the regional system. This integration enables the convergence of universal human rights values with local realities and provides the ACtHPR with a safeguard against criticisms of excessive dependence on external influences. By adopting a nuanced approach, the ACtHPR asserts its autonomy by modernising the African Charter while preserving its fundamental values, thereby facilitating a smooth transition towards a legal model that incorporates European advancements while remaining faithful to Africa's own aspirations. It is largely through this pluralistic strategy that the Court has strengthened its legitimacy. However, recent jurisprudence reveals an evolution – from an initially pronounced European influence to a more measured approach – allowing the ACtHPR to develop its own regional perspective on human rights without conflicting with the European framework.

4 From the ECtHR to the ACtHPR: An Evolving Influence

The influence exerted by the ECtHR on the ACtHPR is neither constant nor linear, as the Arusha-based court retains significant discretion to adapt European principles to the specific realities of the African continent. Although the

v Turkey, no 27690/03, 10.02.2009, paras. 33–42; ECtHR, *Giniewski v France*, no 64016/00, 31.01.2006, para. 51; ECtHR, *Vajnai v Hungary*, no 33629/06, 08.07.2008, para. 47.

70 ACtHPR, *Ingabire Victoire Umuhoza v Republic of Rwanda*, *supra* note 40, para. 147.

European Convention and the African Charter share the same objective of protecting human rights, the ACtHPR is gradually distancing itself from ECtHR influence by taking into account the distinct social, cultural and political contexts of African states. Several political and legal factors – including the complexity of national legal systems, state sovereignty concerns and shifting regional power dynamics – have encouraged the ACtHPR to develop an autonomous and pragmatic approach. This approach allows it to interpret international norms in a way that effectively addresses local challenges. The ACtHPR thus engages in a form of critical dialogue, integrating European contributions when they align with its legal framework while diverging from them when European solutions do not correspond to African specificities. Far from being a matter of systematic imitation, the influence of European jurisprudence forms part of an evolving interpretative process aimed at ensuring concrete and effective rights within a distinct legal and cultural environment.

The nuanced interpretation of the admissibility requirements by the ACtHPR clearly demonstrates that it does not merely replicate the ECtHR model. This divergence in approach stems from the recognition that, despite identical objectives, the conditions for filing cases cannot be universal. As the ACtHPR itself states, 'although human rights courts have a common mission to protect human rights, they do not share the same requirements, particularly with respect to questions of admissibility'.[71] This observation underscores the importance of not automatically transposing European solutions but rather adapting them to institutional contexts and legal practices specific to Africa. By adopting this stance, the ACtHPR asserts its institutional autonomy. It positions itself as a judicial body capable of recontextualising ECtHR influence to optimise access to justice for African citizens. This approach – favouring norm adaptation over mere imitation – ensures that admissibility conditions remain aligned with the realities of the continent while maintaining a strong commitment to the effective protection of human rights.

Firstly, the interpretation of the rule on the exhaustion of domestic remedies highlights the ECtHR's limited influence on the ACtHPR. For the ECtHR, the rule of exhaustion must be applied with a degree of flexibility and without excessive formalism, taking due account of the specific circumstances of each case.[72] The ECtHR explicitly acknowledges that 'the rule of exhaustion is nei-

71 ACtHPR, *Sébastien Germain Marie Aïkoue Ajavon v Republic of Benin*, *supra* note 46, para. 76.

72 ECtHR, *Răzvan Mihai Gherghina v Romania*, no 42219/07 [GC], 09.07.2015, para. 87; ECtHR, *Ringeisen v Austria*, no 2614/65, 16.07.1971, para. 89; ECtHR, *Akdivar and others v Turkey*, no 21893/93 [GC], 16.09.1996, para. 69.

ther absolute nor capable of being applied automatically; in monitoring compliance with this rule, it is essential to have regard to the circumstances of the individual case'.[73] This flexible approach allows the ECtHR to grant states some discretion in the application of the exhaustion requirement. For the ECtHR, there is no obstacle to states waiving the benefit of this rule, given that its primary purpose is to protect their national legal order.[74] More specifically, the Court has ruled that when a government does not raise a preliminary objection based on the non-exhaustion of domestic remedies, the Court cannot examine such an objection of its own motion. In other words, for the inadmissibility exception on the grounds of non-exhaustion to be considered, it is incumbent upon the government to raise it explicitly and before any defence on the merits.[75] This flexible approach ensures effective access to justice by preventing the automatic application of the rule that could, in some cases, be detrimental to litigants. By contrast, the ACtHPR has adopted a significantly more stringent approach to the exhaustion of domestic remedies. For the Court, this is not an optional requirement that states may modify according to their national interests, but rather an imperative obligation under international law. As the ACtHPR asserts, 'exhaustion of local remedies by an applicant is not a matter of choice. It is a legal requirement in international law'.[76] This formulation underscores the fundamental nature of this rule in ensuring the proper administration of justice, meaning that it cannot be circumvented or mitigated by domestic considerations. The ACtHPR goes even further by adopting a public-order approach to this rule. For the Court, compliance with the exhaustion requirement is not just mandatory but can also be raised *ex officio*, regardless of the arguments presented by the parties. Thus, even in the absence of an explicit objection from the respondent state, the ACtHPR considers that it has the responsibility rigorously to ensure the

73 ECtHR, Kozacioğlu *v Turkey*, no 2334/03 [GC], 19.02.2009, para. 40; ECtHR, *D.H. and Others v the Czech Republic*, no 57325/00 [GC], 13.11.2007, para. 116; ECtHR, İlhan *v Turkey*, no 22277/93 [GC], 27.06.2000, para. 59.

74 ECtHR, *De Wilde, Ooms and Versyp v Belgium*, nos 2832/66, 2835/66 and 2899/66, 18.06.1971, para. 55.

75 ECtHR, *Navalnyy v Russia*, nos 29580/12, 36847/12, 11252/13, 12317/13 and 43746/14 [GC], 15.11.2018, paras. 60–61; ECtHR, *Liblik and others v Estonia,* nos 173/15, 181/15, 374/15, 383/15, 386/15 and 388/15, 28.05.2019, para. 114; ECtHR, *Khlaifia and others v Italy*, no 16483/12 [GC], 15.12.2016, paras. 51–52.

76 ACtHPR, *Peter Joseph Chacha v United Republic of Tanzania*, no 003/2012, 28.03.2014, para. 142; ACtHPR, *Diakité couple v Republic of Mali,* no 009/2016, 28.09.2017, para. 53.

application of this rule.[77] This contrast between the ECtHR and the ACtHPR highlights the distinct regional approaches of the two courts in addressing the same legal issue. While the ECtHR oscillates between flexibility and respect for the particularities of national legal systems, taking local specificities into account, the ACtHPR adopts a stricter approach, aiming to strengthen human rights protection through the universality of principles. This divergence illustrates how each system interprets and adapts common legal principles based on the specific needs of its regional context.

Secondly, standing to bring proceedings constitutes a key point of divergence between the ECtHR and the ACtHPR. The ECtHR adopts a resolutely individualistic approach to the protection of human rights, stemming directly from the normative structure of the European Convention. Pursuant to Articles 34 and 35 of the Convention, only individuals, groups of individuals or non-governmental organisations which claim to be 'victims' of a violation of the rights guaranteed therein may bring a case before the Court. This textual requirement expressly excludes any form of *actio popularis* – that is, the possibility of initiating proceedings in the general interest or on behalf of abstract legal principles. Accordingly, the ECtHR confines itself to adjudicating on concrete disputes involving an individualised application of the contested norm.[78] It refrains from ruling *in abstracto* on the general compatibility of legislation or administrative practice with the Convention,[79] and instead focuses on the tangible effects produced on the applicant's legal situation. For a claim to be admissible, it must demonstrate that the measure in question has already interfered with the effective exercise of a protected right, or that it poses a real and imminent threat.[80] This restrictive orientation is therefore not the result of mere judicial policy, but flows directly from the wording of

77 The ACtHPR notes that 'the law does not have to be pleaded. Failure by the respondent to raise the issue of non-compliance with the requirements stipulated in the Protocol and the Charter cannot render admissible an application which is otherwise inadmissible': ACtHPR, *Urban Mkandawire v Republic of Malawi*, no 003/2011, 21.06.2013, para. 37.

78 ECtHR, *Vallianatos and others v Greece* [GC], nos 29381/09 and 32684/09, 07.11.2013, para. 47; ECtHR, *Centre for Legal Resources on behalf of Valentin Câmpeanu v Romania*, no 47848/08 [GC], 17.07.2014, para. 101; ECtHR, *Monnat v Switzerland*, *supra* note 64, paras. 31–32.

79 ECtHR, *Aksu v Turkey*, nos 4149/04 and 41029/04 [GC], 15.03.2012, para. 50; ECtHR, *Tănase v Moldova*, no 7/08, 27.04.2010, para. 104; ECtHR, *Burden v The United Kingdom*, no 13378/05 [GC], 29.04.2008, para. 33.

80 ECtHR, *Roman Zakharov v Russia*, no 47143/06 [GC], 04.12.2015, para. 164; ECtHR, *N.C. v Italy*, no 24952/94 [GC], 18.12.2002, para. 56; ECtHR, *Krone Verlag GmbH & Co. KG v Austria (n°4)*, no 72331/01, 09.11.2006, para. 26.

the European Convention, which strictly defines the admissibility criteria applicable to individual applications.

This stands in stark contrast to the framework established by the African Charter, which does not condition access to the Court on the status of *victim stricto sensu*, thereby enabling a more collective or preventive approach to human rights litigation. The ACtHPR embraces a markedly broader conception of standing, grounded in a communal reading of rights-bearers. In the absence of a textual requirement analogous to that found in the European Convention, the African Charter allows individuals or non-governmental organisations to bring *in abstracto* challenges against laws or regulations alleged to be incompatible with the rights it guarantees, provided the action aims to protect a general public interest. This procedural openness gives rise to a form of *actio popularis*, endowing the Court with a preventive and systemic adjudicatory function. Several landmark decisions illustrate this dynamic. In a case concerning the exclusion of pregnant girls from schools, the ACtHPR declared admissible a petition against a regulation requiring mandatory pregnancy testing in educational institutions, even though the NGO applicants had not suffered direct harm.[81] The Court also admitted applications challenging, on the one hand, a provision of the Code of Criminal Procedure deemed discriminatory,[82] and, on the other hand, an electoral law alleged to skew political representation in favour of the ruling coalition.[83] This divergence in approach reflects not only a difference in legal philosophy but also an adaptation to the distinct regional contexts in which each Court operates. While the ECtHR confines itself to *ex post* review centred on the redress of concrete and individualised harm, the ACtHPR favours a preventive form of review, aimed at transforming legal and regulatory frameworks that pose a potential threat to fundamental rights. Human rights litigation before the ACtHPR is thus structured around the defence of the collective interest: identifying a risk to the legal order is sufficient to ground an action, without the need to wait for the violation to materialise.

The diversity of approaches to standing in climate and environmental litigation immediately reveals both points of convergence and notable divergences between the ECtHR and the ACtHPR. While both courts recognise the urgency of climate and environmental challenges and the need to adapt

81 ACtHPR, *Tike Mwambipile and Equality Now v United Republic of Tanzania*, no 042/2020, 01.12.2022.

82 ACtHPR, *Legal & human rights Centre and Tanzania human rights defenders' coalition v United Republic of Tanzania,* no 039/2020, 13.06.2023, para. 74.

83 ACtHPR, *APDH v Republic of Cote d'Ivoire*, *supra* note 37.

their legal frameworks, they differ in their admissibility criteria. The ECtHR requires that the applicant demonstrate a personal and direct impact, relying on two central criteria: a significant exposure to the harmful effects of environmental risk and a pressing need for individual protection.[84] The ECtHR has thus clearly established that it is not sufficient for applicants to complain of a general environmental harm; they must personally suffer the effects of the alleged damage or risk.[85] By contrast, the ACtHPR adopts a more inclusive approach, considering that, in environmental matters, it is not necessary to establish a direct and individual link between the applicant and the alleged harm, particularly when the violations affect entire communities. Unlike the ECtHR, whose strict interpretation of admissibility criteria – grounded in Articles 34 and 35 of the Convention, which require the applicant to qualify as a 'victim' – excluded any possibility of transnational climate justice for a group of young Portuguese applicants facing a global environmental challenge,[86] the ACtHPR holds that the right to a healthy environment, as a collective right, cannot be restricted by procedural requirements ill-suited to the global and diffuse nature of environmental harm.[87] This methodological contrast is also evident in the courts' approach to the standing of associations. While the ECtHR specifies that an association cannot rely on considerations of health or environmental nuisances – criteria that only natural persons can directly experience[88] – the ACtHPR, recognising the diffuse and global nature of environmental harm, allows representative entities to act both on behalf of

84 ECtHR, *Verein Klimaseniorinnen Schweiz and others v Switzerland*, no 53600/20 [GC], 09.04.2024, para. 465.

85 ECtHR, *Di Sarno and Others v Italy*, no 30765/08, 10.01.2012, paras. 80–81. In this regard, the European Court rejected the application of an environmental activist alleging that the French State's inaction on climate change violated his rights, due to the lack of a direct link between the alleged harm and the invoked violation: ECtHR, *Carême v France*, no 7189/21 [GC], 09.04.2024, paras. 79–84.

86 ECtHR, *Duarte Agostinho and others v Portugal and 32 others,* no 39371/20 [GC], 09.04.2024, paras. 216–218.

87 ACtHPR, *Ligue ivoirienne des droits de l'homme* (LIDHO) *and others v Republic of Cote d'Ivoire*, no 041/2016, 05.09.2023, paras. 69–80.

88 ECtHR, *Verein Klimaseniorinnen Schweiz and others v Switzerland, supra* note 84, para. 496; ECtHR, Asselbourg *and others v Luxembourg*, no 29121/95, 17.10.1995; *Yusufeli İlçesini Güzelleştirme Yaşatma Kültür Varlıklarını Koruma Derneği v Turkey,* no 37857/14, 07.12.2021, para. 41. The ECtHR generally denies standing to associations whose interests are not directly at stake, even if the interests of their members – or some of them – may be: ECtHR, *Nencheva and others v Bulgaria*, no 48609/06, 18.06.2013, paras. 90 and 93; ECtHR, *Association of the Friends of Saint-Raphaël and Fréjus and others v France*, no 45053/98, 29.02.2000, para. 18; ECtHR, *Jacobus Pieter Van Melle and Others v The Netherlands*, no 19221/08, 29.09.2009.

their members and in their own name, without having to demonstrate an explicit personal interest.[89] In a context defined by intergenerational environmental challenges, the African Court considers collective representation not merely admissible, but essential to ensuring the effectiveness of environmental rights protection. This approach does not stem solely from a voluntarist judicial stance; rather, it is firmly anchored in the text of the African Charter itself, which does not condition access to the Court on the demonstration of personal harm or the strict status of 'victim'. This procedural flexibility reflects both the spirit and the letter of the Charter, particularly its Article 24, which states that '[a]ll peoples shall have the right to a general satisfactory environment favourable to their development'.[90] By establishing the environment as a collective good and as a right belonging to peoples, the African Charter legitimises a model of environmental justice oriented towards the protection of the common interest, the preservation of social cohesion and the pursuit of sustainable development. From this perspective, collective action becomes a central vehicle for access to justice – better suited to addressing the diffuse, cumulative and transboundary nature of environmental harm than the more individualistic approach mandated by the European Convention.

Thirdly, both the European Convention (Article 35 § 2(b)) and the African Charter (Article 56(7)) require that the ECtHR and the ACtHPR declare inadmissible any application that is essentially identical to a case already examined by them or submitted to another international investigative or dispute resolution body. This principle, commonly summarised by the adage *non bis in idem*, aims to prevent applicants from circumventing final decisions or judgments by submitting new applications based on the same facts and grievances. The fundamental objective of this rule is to uphold the finality of judicial decisions, ensure legal certainty and delineate the limits of the Court's

89 For the African Court, the right to a healthy environment is a collective right falling within a public interest cause, involving collective responsibilities, including for NGOs working to defend human rights: ACtHPR, *Ligue ivoirienne des droits de l'homme* (*LIDHO*) *and others v Republic of Cote d'Ivoire*, *supra* note 87, paras. 69–80.

90 Article 24 of the African Charter exhibits two fundamental characteristics. First, it represents a bold legal innovation that, in 1981, dared to enshrine the emerging right to the environment, which was then absent from binding international law. Second, this provision grants the right to a healthy environment a collective dimension by attributing it not to individuals, but to 'all peoples'. This wording broadens the scope of this right by transcending individual interests to embrace a communal and intergenerational perspective. This collective nature does not weaken the justiciability of the right; on the contrary, it strengthens it by positioning it as an enforceable norm that individuals, groups or organisations can invoke to hold states accountable for their obligations.

jurisdiction.[91] In interpreting this rule, the ECtHR adopts a rather restrictive approach. It declares an application inadmissible only if both cases concern essentially the same dispute – meaning they involve the same individual, present identical facts, and raise the same grievances.[92] This approach seeks to prevent the *non bis in idem* exception from being misused to block the examination of substantive claims that may not have been rigorously assessed in previous proceedings. By contrast, while the ACtHPR refers to the ECtHR in defining the conditions for applying *non bis in idem*,[93] it adopts a broader interpretation. The ACtHPR declares an application inadmissible even when the parties involved are entirely distinct, as long as they pursue the same interest.[94] By substituting the traditional criterion of identity of parties with that of similarity of interests, the ACtHPR expands the scope of *non bis in idem*. As a result, this extensive approach renders the criterion of identity of parties almost artificial, shifting the focus of analysis to the subject matter of the dispute and the interests at stake, whether private or public. Consequently, even when different actors seek to assert similar rights, the ACtHPR considers the application inadmissible due to the risk of procedural redundancy.[95] Moreover, the ECtHR's jurisprudence establishes that an application should be declared inadmissible only if the dispute has already been examined by another competing or similar international oversight mechanism.[96] In other words, for the *non bis in idem* exception to apply, the case must have already been reviewed by a body whose jurisdiction is comparable to that of the ECtHR. By contrast, the ACtHPR adopts a significantly broader approach to the application of *non bis in idem*. For the ACtHPR, an application may be deemed inadmissible even when a prior decision originates from an international body with non-equivalent jurisdiction, such as a quasi-judicial mecha-

91 ECtHR, *Phillip Harkins v The United Kingdom*, no 71537/14 [GC], 15.06.2017, para. 51; ECtHR, *Panayiotis Agapiou Panayi Kafkaris v Cyprus*, no 9644/09, 21.06.2011, para. 67; ECtHR, *Garry Norman Mann v Portugual and the United Kingdom*, no 360/10, 01.02.2011.

92 ECtHR, *Dušan Vojnović and Dragica Vojnović v Croatia*, no 4819/10, 26.06.2012, para. 28; CEDH (Grande Chambre), *Verein gegen Tierfabriken Schweiz* (*VgT*) *v Switzerland* (*no 2*), no 32772/02, 30.06.2009, para. 63; ECtHR, *León Madrid v Spain*, no 30306/13, 26.10.2021, para. 44; ECtHR, *Amarandei and others v Romania*, no 1443/10, 26.10.2016, paras. 106–111.

93 ACtHPR, *Sébastien Germain Marie Aikoué Ajavon v Republic of Benin*, no 013/2017, 29.03.2019, para. 179.

94 ACtHPR, *Jean-Claude Roger Gombert v Republic of Cote d'Ivoire*, no 038/2016, 22.03.2018, para. 48; ACtHPR, *Legal and human rights Centre and Tanzania human rights defenders coalition v United Republic of Tanzania, supra* note 82, para. 74.

95 ACtHPR, *Suy Bi Gohoré and others v Republic of Cote d'Ivoire*, no 044/2019, 15.07.2020.

96 CEDH, *Selahattin Demirtaş v Turkey* (*no 2*), no 14305/17 [GC], 22.12.2020, para. 182; ECtHR, *Nuray Tunç and Mustafa Tunç v Turkey*, no 45801/19, 22.02.2022, para. 65.

nism.[97] In other words, the ACtHPR considers that protecting the finality of decisions should not be limited to mechanisms that are formally equivalent to its own oversight system. It ensures that each case is reviewed only once, regardless of the nature of the body that previously adjudicated on it. This divergence in approach between the ECtHR and the ACtHPR reflects differing priorities in balancing access to justice with the need to uphold the authority of rendered decisions.

5 Conclusion

The influence of the ECtHR on the ACtHPR illustrates a dynamic process of appropriation and adaptation of international human rights law. Far from being a mere transposition, it profoundly shapes the ACtHPR's jurisprudence and serves as a structural tool for its institutional affirmation. Analysing the ACtHPR's decisions reveals the undeniable imprint of the ECtHR, both in substance and form. From Strasbourg to Arusha, the circulation of ideas and interpretative methods has enabled the ACtHPR to strengthen human rights protection by drawing on a well-established jurisprudential framework. However, the ACtHPR does not simply follow in the footsteps of the ECtHR; it modulates this influence by taking into account the cultural, social and political specificities of the African continent. This contextualisation allows it to adapt European standards to local challenges without compromising the originality of the African human rights system. This evolution reflects a process of maturation. While the ACtHPR initially relied heavily on the ECtHR to establish its jurisprudence, it is now moving towards a more autonomous interpretation of human rights. European influence, though still present, now operates within a framework of complementarity rather than strict dependence.

The ACtHPR no longer hesitates to broaden its comparative horizon by drawing on other regional systems in order to enrich its sources and diversify its jurisprudential references. As a result, the authority of the ECtHR is increasingly relativised, giving way to a more open and pluralistic comparative approach. In this dynamic, the African Court refers not only to the ECtHR, but also, with growing frequency, to the Human Rights Committee, the African Commission on Human and Peoples' Rights, and the ICtHR. In the specific domain of economic, social and cultural rights, as well as collective rights and

97 ACtHPR, *Tike Mwambipile and Equality Now v United Republic of Tanzania*, *supra* note 81, paras. 57–58; ACtHPR, *Dexter Eddie Johnson v Republic of Ghana*, no 016/2017, 28.03.2019, para. 54.

human duties – areas to which the African Charter assigns a foundational role – the jurisprudence of the ECtHR often proves insufficient or ill-suited. On these matters, the ACtHPR turns more readily to the ICtHR, whose holistic and substantive approach to human rights aligns more closely with the normative concerns and structural realities of African societies. This convergence is not merely jurisprudential; it is also contextual. The economic, social and political conditions prevailing in many African States bear greater resemblance to those in Latin America than to those in Europe. This contextual proximity functions as a prism through which the ACtHPR selectively receives and adapts external influences, thereby naturally limiting the reach of European authority within the African system.

This rebalancing of influences has also manifested itself in the establishment of institutional mechanisms aimed at formalising interjurisdictional dialogue. The adoption of the San José Declaration in 2018 by the ECtHR, the ACtHPR and the ICtHR marked a significant milestone in this process. The Declaration formalised the creation of a permanent forum for dialogue among the three regional courts which convenes biennially to discuss jurisprudential developments, shared challenges and best practices in the protection of human rights. In the wake of this cooperation, the three courts have since published an annual *Joint Law Report* reviewing and analysing landmark decisions delivered by each of them over the previous year. This exercise not only fosters greater mutual understanding of respective case law, but also encourages a gradual convergence of human rights standards. Since the inaugural San José Declaration, this dialogue has intensified through biennial meetings held in 2020, 2021 and 2023, bringing together judges and registrars from all three courts. These gatherings aim to deepen technical cooperation and enhance the effectiveness of regional protection mechanisms. Thus, far from being locked in a unilateral relationship of influence, the interaction between the ACtHPR and the ECtHR is evolving into a model of mutual engagement. African human rights law draws upon both European and inter-American experiences, while simultaneously forging its own path towards normative autonomy. This form of transregional cooperation has become a strategic lever for strengthening the effectiveness of regional courts and promoting a more harmonised and robust protection of human rights worldwide.

Territorial and Material Jurisdiction of the European Court of Human Rights: How Flexible Has the 'Living Instrument' Been Thus Far?

Ivan Levy

Abstract

The European Court of Human Rights has consistently applied the 'living instrument' doctrine, interpreting the European Convention on Human Rights in light of contemporary legal and societal developments. This dynamic interpretation method has the potential to create tension with regard to the boundaries of state consent, particularly regarding the extent to which states accepted the obligations under the Convention. This paper examines the extent to which this interpretative approach has influenced the Court's determination of its territorial and subject-matter jurisdiction. By assessing key jurisprudence, it explores how the Court has sought to ensure that the rights enshrined in the Convention remain practical and effective while respecting its structural constraints.

In particular, this paper examines how the Court has maintained a primarily territorial scope when assessing its jurisdiction, recognising limited exceptions where states exercise effective control beyond their borders. Similarly, regarding subject-matter jurisdiction, this paper examines how the Court has refrained from expanding its remit beyond the rights explicitly enshrined in the European Convention, reaffirming that any substantive development remains a matter for the Member States through formal treaty amendment. This paper concludes that while the living instrument doctrine entails some flexibility in terms of interpretation, it does not justify jurisdictional expansion, reinforcing the principle that international judicial authority remains subject to state consent.

1 Introduction[1]

Treaty interpretation remains one of the core matters in the dynamics of international law. The relevance of treaty interpretation is grounded on its pivotal role in the determination of the rights and obligations set out in treaties. As

1 The author extends his gratitude to Juan Pablo Barragán for his research endeavours.

© IVAN LEVY, 2026 | DOI:10.1163/9789004751026_005
This is an open access chapter distributed under the terms of the CC-BY-NC-ND 4.0 license.

the primary authority on the interpretation of the European Convention on Human Rights ('ECHR' or 'European Convention'), the European Court of Human Rights ('ECtHR' or 'Court') has often referred to the European Convention as a 'living instrument' which should be interpreted in present-day conditions. This then begs the question, does the living instrument doctrine grant flexibility to the Court in assessing its territorial and subject-matter jurisdiction?

In answering this question, this paper reviews the extent to which interpretation under the living instrument doctrine has allowed the Court some flexibility to assess its jurisdiction both geographically and substantively. This paper explores the dynamics of this jurisdictional assessment in light of the living instrument doctrine, highlighting landmark cases that illustrate the Court's evolving jurisdictional analysis as well as its limitations.

To evaluate the extent of flexibility in the application of the 'living instrument' doctrine thus far, an introduction to the ECtHR's interpretation of the European Convention as a 'living instrument' will be provided (Part 2), to then explore how this interpretation doctrine has shaped the development of the Court's territorial (Part 3) and subject-matter (Part 4) jurisdictions. The paper will conclude by discussing the degree of flexibility in the interpretation of the European Convention concerning the ECtHR's territorial and substantive jurisdiction (Part 5).

2 The Interpretation of the European Convention as a 'Living Instrument'

The European Convention serves as the primary legal framework upheld by the ECtHR and is also the ECtHR's constituent instrument. In the same way as any other treaty, the European Convention will at times need to be interpreted. In general, the goal of treaty interpretation is to determine the meaning of a treaty from the perspective of the shared contemporary understanding of the parties.[2] In this regard, it is often argued that the ECtHR has developed a more dynamic and evolutive interpretation approach when it comes to the rights protected by the European Convention.[3]

2 S. Ratner, 'International Law Rules on Treaty Interpretation', in C. McCrudden (ed.), *The Law and Practice of the Northern Ireland Protocol,* Cambridge University Press, Cambridge 2022, p. 82.

3 V. Stefanovska, 'Retrospective of the Dynamic and Evolutive Interpretation of ECHR: Framing the Strasbourg's Interpretative Ethic', (2020) 11(1) *Iustinianus Primus Law Review*, p. 1.

In this section, this paper will explore the early cases concerning the interpretation of the European Convention as a 'living instrument' (Part 2.1), to then address the evolution of the interpretation of the European Convention as a 'living instrument' (Part 2.2).

2.1 *Early Cases of Interpretation of the European Convention as a 'Living Instrument'*

The European Convention entered into force in 1953 and, since then, its content has been subject to interpretation by various legal and political actors. Having entered into force in 1980, the rules of treaty interpretation were laid out in the Vienna Convention on the Law of Treaties (VCLT).[4] The general interpretation rule, laid out in Article 31 of the VCLT, establishes that '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.[5] This rule of interpretation is also considered customary international law.[6] Additionally, Article 32 of the VCLT allows, in certain scenarios, for recourse to supplementary means of interpretation, including preparatory work and the circumstances surrounding the treaty's conclusion.[7]

In applying these interpretative rules to the European Convention, the ECtHR has tended to favour a dynamic interpretation, guided by the rights enshrined in the treaty. The first instance in which this dynamism surfaced was in 1978 with the *Tyrer v United Kingdom* judgment, in which the ECtHR assessed whether the punishment imposed on the then 15-year-old Mr. Tyrer – three strokes of the birch in accordance with local legislation at the time – constituted a 'degrading punishment' for the purposes of Article 3 of the European Convention.[8] In deciding the case, the Court recalled that the European Convention 'is a living instrument which … must be interpreted in the light of the present-day conditions'.[9]

In particular, the Court referred to the developments and commonly accepted standards in the criminal policy of the member states of the Council of Europe in the field.[10] Specifically, at the time of the judgment, judicial cor-

4 Vienna Convention on the Law of Treaties (VCLT) (adopted 23 May 1969, entered into force on 27 January 1980), 1155 UNTS 331.

5 Article 31 VCLT.

6 International Law Commission, *Report on the Work of the Sixty-Fifth Session*, A/CN.4/SER. A/2013/Add.1 (Part 2), 2013, para. 29.

7 Article 32 VCLT.

8 ECtHR, *Tyrer v The United Kingdom*, no 5856/72, 25.04.1978, paras. 9–11, 29.

9 Ibid., paras. 31, 34.

10 Ibid., para. 31.

poral punishment had been abolished in the rest of the United Kingdom and in most of the Contracting states.[11] The Court also drew attention to the fact that in the Isle of Man itself, the provisions allowing judicial corporal punishment had been under review.[12] So, the Court concluded that corporal punishment, such as birching, was to be considered, in the light of the present-day conditions of the time, a 'degrading treatment' for the purposes of Article 3 of the European Convention.[13]

About a year after the landmark judgment on *Tyrer v United Kingdom*, the ECtHR referred once again to the need to interpret the Convention in the light of present-day conditions.[14] In *Marckx v Belgium*, the Court had to decide whether the laws in Belgium distinguishing between 'illegitimate children' and 'legitimate children' were discriminatory to the former and their unmarried mothers and thus violated their rights to respect for private and family life under Article 8 of the Convention.[15] On the issue of discrimination, the Belgian Government argued that, at the time the Convention was drafted, it was permissible and normal in European states to distinguish between 'legitimate' and 'illegitimate' children, and that this distinction became contested only after the adoption of the Brussels Convention of 12 September 1962 on the Establishment of Maternal Affiliation of Natural Children – which Belgium itself had not ratified.[16] The Court rejected this argument on the basis of an interpretation under the living instrument doctrine.[17] As the Court understood it, the domestic law of the great majority of member states of the Council of Europe had evolved towards full recognition of the principle of *mater semper certa est* (motherhood is always certain), which informed the Brussels Convention.[18] Therefore, the Court concluded that the distinction at issue lacked objective and reasonable justification and therefore constituted a violation of Article 14 of the Convention taken in conjunction with its Article 8.[19]

---

11 V. Stefanovska, 'Retrospective of the Dynamic and Evolutive Interpretation of ECHR' *supra* note 2, p. 7; G. Lestas, 'Strasbourg's Interpretative Ethic: Lessons for the International Lawyer', (2010) 21(3) *European Journal of International Law*, p. 528.

12 ECtHR, *Tyrer v The United Kingdom*, supra note 7, para. 31.

13 Ibid., paras. 31, 25.

14 ECtHR, *Marckx v Belgium,* no. 833/74, 13.06.1979, para. 41.

15 Ibid., paras. 13, 22.

16 Ibid., para. 41.

17 Ibid.

18 Ibid.

19 Ibid., para. 43.

Similarly, in *Dudgeon v the United Kingdom*, the ECtHR applied the living instrument doctrine to address laws prohibiting homosexual behaviour.[20] Jefferey Dudgeon, a homosexual man in Northern Ireland, claimed that the laws criminalising consensual homosexual acts between adult men violated his right to respect for his private and family life under Article 8 and the prohibition of discrimination under Article 14 of the Convention.[21] The Government defended the law in question, claiming it necessary for the protection of morals and rights of others.[22] In evaluating the necessity of the law, the Court referred to the increased tolerance of homosexual behaviour 'to the extent that in the great majority of the member States of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied'.[23] In addition, the Court found no 'pressing social need' for the criminalisation of private homosexual acts between adults in Northern Ireland, and thus the interference in the victim's private life was found to be a violation of Article 8 of the Convention.[24] Both *Marckx v Belgium* and *Dudgeon v United Kingdom*, so closely after *Tyrer v United Kingdom*, confirmed that the Convention was to be interpreted in the light of present day conditions for the majority of member states, regardless of a particular state's exceptional attitude towards an issue.

However, the Court also noted some inherent limits to interpretation under the living instrument doctrine. More than ten years after *Tyrer v United Kingdom*, the ECtHR was faced with another claim tied to the dynamic interpretation of the European Convention. In the *Soering v United Kingdom* judgment of 1989, the Court established certain boundaries on the interpretation of the European Convention as a 'living instrument'. Among other issues, the Court had to decide on the 'death row phenomenon', defined as a combination of circumstances to which the applicant would be exposed if, after being extradited to Virginia to face a capital murder charge, he was sentenced to death.[25] Accordingly, the Court had to determine whether, under the circumstances, the risk of exposure to the 'death row phenomenon' constituted a violation of the prohibition of torture under Article 3 of the European Convention.[26] In

20 ECtHR, *Dudgeon v The United Kingdom*, no 7525/76, 22.10.1981, para. 60
21 Ibid., paras. 37–39.
22 Ibid., para. 42.
23 Ibid., para. 60.
24 Ibid., paras. 62–63.
25 ECtHR, *Soering v The United Kingdom*, no 14038/88, 07.07.1989, para. 81.
26 Ibid., para. 100.

this regard, Article 2(1) of the European Convention allows for capital punishment under certain conditions, as it states that 'no one shall be derived of this life intentionally save in the execution of a sentence of a court following his conviction for a crime for which this penalty is provided by law'.[27] The Court was presented with the argument that the 'evolving standards in Western Europe regarding the existence and use of the death penalty required that it should now be considered as an inhuman and degrading punishment within the meaning of Article 3' of the European Convention.[28]

In the light of the argument presented, the Court acknowledged that the European Convention is a 'living instrument' to be interpreted in the light of present-day conditions. Regarding the death penalty, the Court ruled that there was a 'virtual consensus in Western European legal systems [that this punishment was] no longer consistent with regional standards of justice'.[29] However, the Court cautioned that 'Article 3 evidently cannot have been intended by the drafters of the [European] Convention to include a general prohibition of the death penalty' since that would nullify the clear wording of Article 2(1).[30] Additionally, the Court emphasised that, at the time of the judgment, the recently signed Protocol 6 reflected the Contracting States' intent to require the introduction of a new obligation to abolish capital punishment in times of peace.[31] In other words, the Court noted that while the European Convention allows for flexibility as a 'living instrument', such interpretation could not override or contradict the text of the European Convention itself.[32]

Finally, the Court has also applied the living instrument doctrine as a means to evolve its understanding in previous judgments concerning the rights of the Convention. In the judgment of *Selmouni v France,* a Dutch Moroccan national was arrested in Paris on drug-trafficking charges. While on police custody, he was punched, kicked, beaten with a baseball bat, dragged by the hair, urinated on and threatened.[33] The applicant alleged violation of the prohibition of torture under Article 3 of the Convention

27 ECHR Article 2 (1); ibid., para. 101.

28 ECtHR, *Soering*, *supra note 24*, para. 101.

29 Ibid., para. 102.

30 Ibid., para. 103.

31 Ibid.

32 See G. Baboulene, 'Has the Elastic Interpretation of Human Rights Law Led to the "Living Instrument" Approach to the ECHR Interpretation Being Inherently Flawed?', (2022–2023) 48 *Exeter Law Review*, p. 52.

33 Ibid., para. 91.

because of ill treatment while on police custody.[34] The State alleged that, even if proved, the ill-treatment did not amount to torture under Article 3 of the Convention.[35] Significantly, the Court referred to the need to interpret the convention as a 'living instrument' to conclude that certain acts which were previously classified as 'inhuman and degrading treatment' as opposed to 'torture' could be classified differently in the future in light of the increasingly high standards required in the area of protection of human rights.[36] Thus, the Court considered that the actions imposed on the applicant amounted to torture, and not just inhumane treatment.[37]

Following this overview of early ECtHR cases which established the interpretation of the European Convention as a 'living instrument', it is important to underscore the following idea: while the interpretation of concepts such as 'degrading punishment' appears flexible enough to evolve over time to reflect contemporary social and cultural developments, it is equally true that, no matter how dynamic an interpretation is, it cannot override or detach from the wording and fundamental principles enshrined in a treaty and, of interest in this paper, the European Convention.

2.2 *Recent Case Law on the Interpretation of the European Convention as a 'Living Instrument'*

Throughout its existence, the ECtHR has encountered further instances in which the notion of the European Convention as a 'living instrument' came into play. More recently, in 2021, the ECtHR was once again called upon to determine the boundaries of the European Convention's interpretation as a 'living instrument': In *Yakut Republican Trade-Union Federation v Russia*, the Court had to assess whether a statutory prohibition on trade union membership for working inmates violated the right to freedom of association under Article 11 of the European Convention.[38]

The case arose after a group of prisoners in a high-security criminal colony in Yakutsk attempted to form a trade union and join the applicant federation.[39] While the union was initially recognised, subsequent legislative amendments explicitly barred convicted prisoners from founding or joining

34 Ibid., para. 91.
35 Ibid., para. 94.
36 Ibid., para. 101.
37 Ibid.
38 ECtHR, *Yakut Republican Trade-Union Federation v Russia*, no 29582/09, 07.12.2021, para. 21.
39 Ibid., paras. 4–6.

public associations.[40] The applicant federation resisted the authorities' demand to dissolve the union, arguing that such restrictions were incompatible with international labour standards, including those established by the International Labour Organisation (ILO).[41]

The ECtHR was thus confronted with the following question: to what extent does the Convention protect the trade union rights of incarcerated individuals? In addressing this issue, the Court had to balance the evolving nature of human rights protections with the textual limitations of the Convention, particularly in light of the member states' existing legal frameworks and the margin of appreciation afforded to national authorities.[42] Ultimately, while reaffirming the European Convention's dynamic character, the Court determined that 'the domestic courts' order to the applicant federation to expel the union of working inmates did not exceed the margin of appreciation available to the national authorities in this sphere, and that the restriction complained of was therefore necessary in a democratic society'.[43]

The Court's interpretation remained grounded in both legal precedent and the prevailing consensus among member states, as it stated that '[i]t is true that the [European] Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective' reiterating that the European Convention 'is a "living instrument" … and it may well be, therefore, that developments in that field may at some point in future necessitate the extension of trade-union freedom to working inmates, especially if they work for a private employer'.[44] Indeed, the Court highlighted that the right of freedom of assembly and association under Article 11 of the Convention did not exclude 'any occupational group from [its] scope …. At most, the national authorities are entitled to impose "lawful restrictions" on certain of their employees ….'[45] Overall, having studied the current practice of the member states of the Council of Europe the Court concluded that 'there [was] not a sufficient consensus to interpret Article 11 in the manner advocated by the applicant federation'.[46]

The ECtHR was once again called upon in 2023 to determine the scope of the European Convention as a 'living instrument' in the context of evolving

40 Ibid., paras. 5–7.
41 Ibid., para. 8.
42 Ibid., paras. 39–48.
43 Ibid., para. 47.
44 Ibid., paras. 45–46.
45 Ibid., para. 45.
46 Ibid., para. 46.

social and legal standards. In *Fedotova and Others v Russia*, the Grand Chamber examined whether the Russian Federation's refusal to provide any form of legal recognition for same-sex couples violated the right to respect for private and family life under Article 8 of the European Convention.[47] The case arose after three same-sex couples, all Russian nationals, sought to register their marriages with the relevant civil authorities.[48] Their applications were summarily rejected on the basis of Article 1 of the Russian Family Code, which defines marriage exclusively as a 'voluntary marital union between a man and a woman'.[49] The applicants argued that the absence of any legal framework recognising same-sex relationships denied them fundamental protections afforded to different-sex couples and was inconsistent with the evolving legal consensus across Europe.[50]

Before the Grand Chamber, one of the core issues was determining whether the right to respect for private and family life under Article 8 of the European Convention imposes a positive obligation on states to provide legal recognition and protection to same-sex couples.[51] The Court's assessment was guided by its established interpretative principle that the European Convention is 'a "living instrument" that must be interpreted in the light of present-day conditions and of the ideas prevailing in democratic States' citing, among others, the previously mentioned *Tyrer v The United Kingdom* case.[52] Indeed, the ECtHR further explained that 'what may have been regarded as "permissible and normal" at the time when the [European] Convention was drafted, may subsequently prove to be incompatible with it'.[53] The ECtHR recognised a growing consensus within Europe favouring legal protections for same-sex relationships,[54] and concluded that states have a duty under Article 8 of the European Convention to provide 'a legal framework allowing same-sex couples to be granted adequate recognition and protection of their relationship'.[55]

The cases reviewed illustrate the ECtHR's ongoing efforts to balance the evolving nature of human rights protections with the structural limitations of the European Convention. While the Court has reaffirmed the Convention

47 ECtHR, *Fedotova and others v Russia*, no 40792/10, 30538/14, 43439/14, 17.01.2023, para. 97.
48 Ibid., paras. 27–40.
49 Ibid., para. 25.
50 Ibid., paras. 1–23.
51 Ibid., para. 99.
52 Ibid., para. 167.
53 Ibid., para. 170.
54 Ibid., paras. 172–176.
55 Ibid., para. 178.

as a 'living instrument' that must be interpreted following current conditions, it remains cautious in extending rights beyond the existing consensus among member states. In *Yakut Republican Trade-Union Federation v Russia*, the Court acknowledged the potential for future expansion of trade union rights for working inmates but ultimately deferred to the prevailing legal landscape, emphasising the margin of appreciation available to national authorities. Conversely, in *Fedotova and others v Russia*, the Court recognised a clear and evolving European consensus on the need for legal recognition of same-sex relationships, thereby affirming a positive obligation under Article 8 of the European Convention.

Taken together, these judgments reinforce the Court's dual approach: on one hand, ensuring that the European Convention rights remain practical and effective in the light of societal changes while, on the other, respecting the limits of judicial interpretation where no sufficient consensus exists. This notion is not novel in international law; about a century ago, the dynamics of the inter-temporality of the law had already been described by one of the most prominent figures in international law: Max Huber. Max Huber, who was the sole arbitrator in the *Island of Palmas* case between the United States and the Netherlands, presented a difference between the creation and the existence of rights under international law: '[t]he same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words, its continued manifestation, shall follow the conditions required by the evolution of law' which speaks, mainly, to the existence of a general principle of law ruling these scenarios: *tempus regit actum*.[56] Under this general principle of law, while the creation of a right is judged against the law as it existed at the time of creation, the legality of an act concerning such right has to be evaluated against the standards in force at the time the act occurs; that is, it is subject to the evolution of the law. This understanding seems to be what underlies the ECtHR's interpretation of the European Convention as a 'living instrument'.

3 Territorial Jurisdiction in Light of the Living Instrument Doctrine

Having provided a general selection of some cases in which the ECtHR has interpreted the European Convention as a 'living instrument', this section first examines its territorial application of the European Convention (Part 3.1)

56 Permanent Court of Arbitration (PCA), *Island of Palmas* (*The Netherlands / The United States of America*), PCA Award, 04.05.1928, p. 14.

before turning to the Court's interpretation of its territorial jurisdiction (Part 3.2).

3.1 *Territorial Application of the European Convention*

Under international law, states can generally claim jurisdiction only if the offence has been committed, in part or in whole, in their territory.[57] Article 29 of the VCLT has codified this rule by stating that 'unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory'.[58] Similarly, Article 1 of the European Convention states that the Parties '[s]hall secure to everyone within their jurisdiction the rights and freedoms' defined in the first part of the treaty, which include the right to life, the prohibition of torture, the prohibition of slavery and forced labour, among many others. Regarding what constitutes the territorial jurisdiction of the Court, the European Convention employs the term "jurisdiction" instead of "territory".'

In interpreting Article 1 of the European Convention, following Article 32 of the VCLT, which establishes that '[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion …', the European Convention's drafting history could also be taken into consideration under certain circumstances.[59] The Collected Edition of the *travaux préparatoires* of the European Convention on Human Rights reveals that Article 1 of the Convention initially established that 'member States shall undertake to ensure to all persons residing within their territories the rights …', but that the term residing could be too restrictive as:

> [t]here were good grounds for extending the benefits of the Convention to all persons in the territories of the signatory States, even those who could not be considered as residing there in the legal sense of the word. The Committee [of the Consultative Assembly of the Council of Europe] therefore replaced the term 'residing' by the words 'within their jurisdiction' which are also contained in Article 2 of the Draft Covenant of the United Nations Commission.[60]

57 M. Akehurst, 'Jurisdiction in International Law', (1972–1973) 46 *British. Yearbook of International Law.*, p. 152.

58 Article 29 VCLT.

59 Article 32 VCLT.

60 Collected Edition of the *Travaux Préparatoires* of the European Convention on Human Rights (Vol. III, p. 260).

The *travaux préparatoires* indicate that the wording of Article 1, including 'within their jurisdiction', was adopted by the Consultative Assembly on 25 August 1950 without modification or further debate.[61] Therefore, the term 'jurisdiction' in Article 1 of the European Convention can be equated, in principle, with the term 'territory'.

3.2 *The Interpretation of Territorial Jurisdiction under the European Convention*

In this section, the paper will focus on the Court's interpretation of territorial jurisdiction under the European Convention. Revisiting the above-referenced *Soering v United Kingdom* judgment of 1989, the Court also interpreted its territorial jurisdiction in this case, as the matter in question involved determining whether the risk of exposure to the 'death row phenomenon' rendered the extradition incompatible with the European Convention.[62] To entertain this question, the Court had first to rule on whether the European Convention was applicable to the case. This was a contentious matter because the adverse consequences of extradition under these circumstances would be suffered outside the jurisdiction of the extraditing state as a result of treatment or punishment administered in the receiving state.[63] The Court began its analysis by stating that:

> Article 1 of the [European] Convention, which provides that 'the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1' sets a limit, notably territorial, on the reach of the [European] Convention. In particular, the engagement undertaken by a Contracting State is confined to 'securing' (*reconnaître* in the French text) the listed rights and freedoms to persons within its own 'jurisdiction'. Further, the [European] Convention does not govern the actions of States not parties to it, nor does it purport to be a means of requiring the Contracting States to impose Convention standards on other States.[64]

However, the Court analysed the issue not as a matter of jurisdiction but as one of responsibility under Article 3 of the European Convention, which reads

61 Collected Edition of the *Travaux Préparatoires* of the European Convention on Human Rights (Vol. VI, p. 132).

62 ECtHR, *Soering*, *supra* note 24, para. 76.

63 Ibid., para. 85.

64 Ibid., para. 86.

that '[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment'.[65] Independently of the territorial limit, the Court considered that an extraditing contracting state would be liable for having taken an action with the direct consequence of the exposure of an individual to proscribed ill-treatment.[66] The reasoning of the Court in this case seems to have been based on the fact that the act of extradition itself takes place within the territory of the sending state, with knowledge of the likely consequences for the applicant in the receiving state.

The Court had, however, other occasions on which specifically to address its territorial jurisdiction. The Court truly laid out its jurisprudence on territorial jurisdiction in the landmark judgment of *Loizidou v Turkey* in 1995. In this case, the Court was faced with jurisdictional challenges for conduct taking place out of the territory of the respondent state. The facts in question had occurred in the territory of Northern Cyprus, occupied by Turkey and under the Turkish Republic of Northern Cyprus administration (TRNC).[67] The applicant, a Cypriot national with property in northern Cyprus, had led a group of 50 marchers to the Turkish-occupied part of Cyprus with the intent of crossing the cease-fire line.[68] The group was eventually surrounded by Turkish soldiers and prevented from moving any further, and the applicant was detained.[69] The applicant contended that, as from the time of the Turkish occupation of northern Cyprus, she had been deprived of her right peacefully to enjoy her property in the territory under Turkish control.[70] In this context, the Court had to decide whether Turkey was bound by the European Convention for alleged violations which took place outside its national territory in the TRNC.[71] The Court considered that the concept of jurisdiction was not restricted to the national territories of the contracting states, and cited in this regard its own case law regarding responsibility for extradition under Article 3 of the European Convention, including *Soering v The United Kingdom* mentioned above, and regarding acts of authorities which produce effects outside their own territory, specifically *Drozd and Janousek v France*.[72] The Court contended that '[b]earing in mind the object and purpose of the [European] Convention, the responsibility of a Contracting Party may also arise when, as a result of military action – whether lawful or unlawful – it

65 Ibid., para. 86.
66 Ibid., para. 91.
67 ECtHR, *Loizidou v Turkey* (*Preliminary Objections*), no 15318/89, 23.03.1995, para. 16–18.
68 Ibid., para. 10–14.
69 Ibid.
70 Ibid., para. 53.
71 Ibid., para. 61.
72 Ibid., para. 62.

exercises effective control of an area outside its national territory'.[73] This case effectively resulted in the Court interpreting its territorial jurisdiction to include territories occupied outside the national territory of a state and laying the groundwork for the exceptions to the territoriality principle.

Additionally, Turkey invoked certain declarations it had made rejecting the Court's jurisdiction over acts performed outside its national territory, which could potentially result in the exclusion of the application of the Convention to the TRNC.[74] Thus, the Court also needed to determine the validity of the territorial restrictions made in Turkey's declarations.[75] To this end, the Court stated that the living instrument interpretation is not confined to its substantive provisions but extends to those provisions that govern the operations of its enforcement machinery.[76] The Court considered particularly that the restriction advocated by Turkey 'which would enable States to qualify their consent under the optional clauses, would not only seriously weaken the role of the Commission and Court in the discharge of their functions but would also diminish the effectiveness of the Convention as a constitutional instrument of European public order'.[77] The Court considered, additionally, that the subsequent practice of member states confirmed its understanding,[78] and rejected the contention invoked by Turkey based on its own declarations.[79]

Interestingly, in its subsequent *Cyprus v Turkey* judgment of 2001, the Court further clarified that because Turkey had 'effective control' over a region of Cyprus, its responsibility was not confined to the acts of its own agents but also included the acts of the local administration which survived by virtue of Turkish support.[80]

In 2001, the Court momentarily limited the reach of its territorial jurisdiction in the case of *Banković v Belgium et al*.[81] Significantly, the Court addressed once again the living instrument doctrine, this time explicitly concerning territorial jurisdiction.[82] The Court was faced with a claim concerning air strikes carried out by several contracting states, as members of the North Atlantic

73 Ibid.
74 Ibid., para. 55.
75 Ibid., paras. 15, 67–70.
76 Ibid., para. 71.
77 Ibid., para. 75.
78 Ibid., para. 79.
79 Ibid., para. 78.
80 ECtHR, *Cyprus v Turkey*, no 25781/94, 10.05.2001, para. 77.
81 C. Mallory, 'A Second Coming of Extraterritorial Jurisdiction at the European Court of Human Rights?', (2021) Zoom-in *82 Questions of International Law*, pp. 31–51.
82 ECtHR, *Banković and Others v Belgium and others*, no 55207/99 [GC] 12.12.2001, para. 64.

Treaty Organisation (NATO), on the territory of the former Federal Republic of Yugoslavia (FRY), at the time beyond the territorial jurisdiction of the respondent states.[83] In order to determine its jurisdiction over this case, the Court applied the VCLT's rules of interpretation, clarifying that Articles 31 and 32 of the VCLT should operate in conjunction, without 'drawing a rigid line' between them.[84] In seeking the ordinary meaning given to the phrase 'within their jurisdiction' the Court cited the general rules of international law, finding that Article 1 of the European Convention reflected the territorial notion of jurisdiction, with 'other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case'.[85] Additionally, it found confirmation of its interpretation in the preparatory works of the European Convention.[86] The Court further considered the living instrument interpretation and referred to the previously mentioned *Loizidou v Turkey* understanding of it.[87] However, in this case, the ECtHR considered that:

> [t]he scope of Article 1, at issue in the present case, is determinative of the very scope of the Contracting Parties' positive obligations and, as such, of the scope and reach of the entire Convention system of human rights' protection as opposed to the question, under discussion in the Loizidou [v Turkey] case (Preliminary Objections), of the competence of the [European] Convention organs to examine a case.[88]

The Court stated that the ordinary meaning, complimented by the preparatory works, constituted a clear indication of the intended meaning of Article 1 of the European Convention.[89] On this basis, the Court rejected the claim based on lack of jurisdiction by revisiting the *Loizidou v Turkey* exceptions to the rule of territorial jurisdiction.[90] To that end, it explained that 'other bases of jurisdiction' beyond territorial control are exceptional and require 'special

83 Ibid., paras. 7, 54

84 Ibid., paras. 18, 55–58. The Court cited the ILC commentary on the relationship between the rules of interpretation codified in Articles 31 and 32 to justify its position, and particularly ILC, *Yearbook of the International Law Commission*, Volume II, A/CN.4/SER.A/1966/Add.l, 1966, 219–220. Articles 31 and 32 of the VCLT consider, accordingly, the general rules of interpretation and the supplementary rules of interpretation.

85 ECtHR, *Banković, supra* note 82, paras. 59–61.

86 Ibid., paras. 18, 58, 63.

87 Ibid., para. 64.

88 Ibid., para. 65.

89 Ibid.

90 Ibid., para. 82.

justification in the particular circumstances of each case'.[91] The Court reaffirmed that jurisdiction under Article 1 of the European Convention is 'primarily territorial' with extraterritorial jurisdiction recognised only in limited and well-defined scenarios.[92] It recalled that such exceptions had been acknowledged in cases where a Contracting State exercised 'effective control' over a foreign territory, either through direct military presence or governance via a subordinate local administration.[93] Additionally, it noted that jurisdiction could arise when a state's actions, such as extradition or expulsion, place an individual at a real risk of treatment contrary to the European Convention.[94]

However, the Court dismissed the argument that the mere extraterritorial effects of a state's actions could establish jurisdiction, rejecting the termed 'cause-and-effect notion of jurisdiction'.[95] It emphasised that the Convention is a 'constitutional instrument of European public order' with an 'essentially regional vocation' and that its application could not be extended indefinitely beyond the legal space of the Contracting States.[96] The Court concluded that while the European Convention is a 'living instrument', its interpretation must remain consistent with the clear text and structure of Article 1, as well as the intent of its drafters, as:

> [t]he [European] Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States. Accordingly, the desirability of avoiding a gap or vacuum in human rights' protection [had] so far been relied on by the Court in favour of establishing jurisdiction only when the territory in question was one that, but for the specific circumstances, would normally be covered by the Convention.[97]

Therefore, the Court held that the bombings carried out by NATO, as a coalition of respondent states, in the FRY territory fell outside the Court's jurisdiction on account that it did not fit within the exceptional extra-territorial acts previously mentioned.[98]

---

91 Ibid., para. 61.
92 Ibid., para. 59.
93 Ibid., paras. 74–81.
94 Ibid.
95 Ibid., para. 75.
96 Ibid., paras. 79–80.
97 Ibid., para. 80.
98 Ibid.

Following *Banković v Belgium*, the Court's approach to jurisdiction fluctuated between the restrictive stance established in that case and its more flexible tendencies in subsequent jurisprudence. For example, in the 2005 judgment of *Öcalan v Turkey*, the Court chose a broad approach to territorial jurisdiction.[99] The applicant, the previous leader of the PKK (Worker's Party of Kurdistan), had been arrested in Kenya by Turkish authorities and transferred to Turkey.[100] Once there, he was imprisoned and sentenced to death, which was commuted to life imprisonment after legal reforms.[101] The applicant contended that he had been unlawfully deprived of his liberty, without the applicable extradition procedure being followed, in violation of the right to liberty and security under Article 5 of the Convention.[102] The Government submitted that the detention had been lawful: Turkey had accepted the Kenyan authorities' 'offer to hand over the applicant, who was in any event an illegal immigrant in Kenya'.[103] Even though the arrest had taken place in Kenyan territory, the Court explicitly stated 'directly after being handed over to the Turkish officials by the Kenyan officials, the applicant was effectively under Turkish authority and therefore within the "jurisdiction" of that State for the purposes of Article 1 of the Convention, even though in this instance Turkey exercised its authority outside its territory'.[104] On this basis, the Court concluded that Kenyan authorities had decided to hand the applicant over to Turkish authorities. The Court also noted that there was no evidence that Turkey had failed to respect Kenyan sovereignty or to comply with international law and thus concluded that the arrest was made in accordance with 'a procedure prescribed by the law'.[105]

There was no shortage of criticism of the decision by scholars who thought the assumption of jurisdiction embedded in the decision was inconsistent with or even contradictory to *Banković*.[106] To these scholars, *Banković* represented a

99 S. Miller, 'Revising Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the European Convention', (2009) 20 *European Journal of International Law*, p. 1229.

100 ECtHR, *Öcalan v. Turkey,* no 46221/99, 12.05.2005, paras. 13–19.

101 Ibid., paras. 20–51.

102 Ibid., para. 73.

103 Ibid., para. 81.

104 Ibid., para. 91.

105 Ibid., paras. 91–99.

106 S. Miller (2009), 'Revising Extraterritorial Jurisdiction', *supra* note 98, p. 1229; E. Roxtrom, M. Gibney and T. Einarsen, 'The NATO Bombing Case (Bankovic *et al.* v. Belgium *et al.*) and the Limits of Western Human Rights Protection', (2005) 23(55) *Boston University International Law Journal*, pp. 89–90; C. Byron, 'A Blurring of the Boundaries: The Appli-

decision where the exceptions to the rule of territorial jurisdiction had been defined narrowly, and *Öcalan* broadened the scope of exceptions 'to encompass almost any instance where a state exercises authority or control over an individual outside of its own territory in a way which involves Convention rights'.[107] Other cases, such as *Issa*, *Al-Saadoon* and *Medvedyev,* similarly proposed broad interpretations of the Convention in an ambiguous manner.[108]

This tension was temporarily resolved in 2011 in *Al-Skeini and Others v United Kingdom*, where the Court clarified its position on extraterritorial jurisdiction.[109] In *Al-Skeini and Others v United Kingdom*, the Court attempted to systematise its previous case law on territorial and extra-territorial jurisdiction into a coherent set of rules.[110] The case concerned an application by six Iraqi nationals against the United Kingdom, alleging that their relatives had been killed while under the United Kingdom occupation of Iraq, and that the authorities had failed to conduct an effective investigation into their deaths, in violation of the right to life under Article 2 of the Convention.[111] Indeed, while the applicants claimed that their deceased relatives' deaths fell within United Kingdom jurisdiction by virtue of the authority and control exercised over them by state agents,[112] the United Kingdom argued that it did not exercise jurisdiction under Article 1 of the Convention over the relatives of the applicants at the time of their deaths.[113]

In finding ground between these opposing forces, the Court used the template *Banković* provided regarding the exceptions to the territorial reach of jurisdiction, stating that a Contracting State's jurisdiction under Article 1 may extend to acts of its authorities which produce efforts outside its own territory, particularly when it corresponds to acts of diplomatic and consular agents,[114] executive or judicial functions are carried out on the territory of

cation of International Humanitarian Law by Human Rights Bodies', (2007) 47 (4) *Virginia Journal of International Law*, pp. 891–895.

107 S. Miller (2009), 'Revising Extraterritorial Jurisdiction', *supra* note 98.

108 ECtHR, *Issa v Turkey*, no 31821/96, 16.11.2004; *Al Saadoon v United Kingdom,* no 61498/08, 2.03.2010; *Medvedyev and others v France,* no 3394/03, 10.07.2008.

109 C. Mallory (2021), 'A second Coming of extraterritorial jurisdiction at the European Court of Human Rights?', *supra* note 81, p. 37.

110 ECtHR, *Al-Skeini and others v The United Kingdom*, no 55721/07, 07.07.2011, paras. 131et seq.

111 Ibid., paras. 1–3.

112 Ibid., paras. 123–124.

113 Ibid., para. 118.

114 Ibid., para. 134.

another state with its invitation or acquiescence,[115] in certain circumstances, when the state's agents operating outside its territory use force against an individual,[116] or when, as a consequence of lawful or unlawful military action, a Contracting State exercises effective control over an area outside the national territory.[117] Regarding the novel third exception, the Court explicitly determined that: '[W]henever [a] State, through its agents, exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 [of the European Convention] to secure to that individual the rights and freedoms under … the Convention that are relevant to the situation of that individual. In this sense, therefore, the Convention rights can be "divided and tailored".'[118]

In applying these principles to the facts of the case, the Court held that the United Kingdom had jurisdiction over individuals killed during its securities operations in Iraq as, following the removal from power of the Baáth regime, it had assumed in Iraq the exercise 'of some of the public powers normally to be exercised by a sovereign government'.[119] In this case, the Court did not refer to the concept of the 'living instrument' directly.

In a concurring opinion, Judge Bonello criticised the Court's 'unwillingness to establish a coherent and axiomatic regime', claiming that the Court seeming lacked coherence in its judgments on extraterritorial jurisdiction.[120] Judge Bonello harshly addressed that:

> Up until now, the Court has, in matters concerning the extraterritorial jurisdiction of Contracting Parties, spawned a number of 'leading' judgments based on a need-to-decide basis, patchwork case-law at best. Inevitably, the doctrines established seem to go too far to some, and not far enough to others. As the Court has, in these cases, always tailored its tenets to sets of specific facts, it is hardly surprising that those tenets then seem to limp when applied to sets of different facts. Principles settled in one judgment may appear more or less justifiable in themselves, but they then betray an awkward fit when measured against principles established in another.[121]

115 Ibid., para. 135.
116 Ibid., para. 136.
117 Ibid., para. 138
118 Ibid., para. 137.
119 Ibid., para. 149.
120 Ibid., Judge Bonello's Concurring Opinion, paras. 4–5.
121 Ibid., paras. 8–16.

Regrettably, the ECtHR has failed to exhibit consistency in regard to the interpretation of its territorial jurisdiction. While it has consistently held that a territory under the effective control of a member state is considered its 'jurisdiction' under Article 1 of the European Convention, other exceptions, which resemble rules of attribution of responsibility more than jurisdictional prescriptions, remain unclear. For example, the exception for a state's agents operating outside its territory to use force against an individual might be argued to have justified the Court's jurisdiction in *Banković*.

Following the *Al-Skeini and Others v United Kingdom* judgment, these standards became the framework for applying extraterritorial jurisdiction, as reflected in subsequent cases such as *Hassan*, *Al-Jedda*, *Hirsi Jamaa v Italy*; *N.D. and N.T. v Spain*; and *Ukraine v Russia* (*re: Crimea*).[122] For instance, in its 2014 *Jaloud v Netherlands* judgment, the Court explicitly referred to the framework established in *Al-Skeini and Others v United Kingdom*.[123] That case dealt with the death of Mr. Jaloud, an Iraqi national, while passing through a checkpoint located in Iraq but manned by personnel under the command and direct supervision of a Netherlands Royal Army officer.[124] The Court found that the death of Mr. Jaloud occurred within the jurisdiction of the Netherlands, as it exercised its jurisdiction within the limits of the Stabilisation Force and for the purposes of asserting authority and control over persons passing through the checkpoint.[125]

Overall, the Court's clear exception to territoriality under Article 1 of the Convention is the case in which a member state exercises effective control over a foreign territory. This contention is, however, not exclusive to the European Convention. For instance, in international investment law, the application of investment treaties to occupied territories has been explicitly recognised. In the case of *Stabil, Crimea-Petrol LLC*, *Elefteria LLC*, *Novel-Estate LLC and others v The Russian Federation*, a Ukrainian investor brought a claim against Russia for facts which took place in Crimea after its annexation in 2014. Regarding territorial jurisdiction, the tribunal considered that:

> [t]he Tribunal construes term 'territory' for purposes of the Treaty to include territory over which a State exercises de facto control and jurisdiction. Any other interpretation would, to borrow the words of the

122 C. Mallory (2021), 'A second Coming of extraterritorial jurisdiction at the European Court of Human Rights?', *supra* note 81, p. 38.

123 ECtHR, *Jaloud v The Netherlands*, no 47708/08, 20.11.2014, para. 139.

124 Ibid., para. 152.

125 Ibid.

> Russian Federation, 'contradict objective reality'. The Tribunal thus finds that the Treaty became opposable to Russia with respect to Ukrainian investments in Crimea upon Russia's incorporation of Crimea.[126]

Therefore, it can be concluded that the flexibility of the interpretation of territorial jurisdiction concerning territories under effective control is not exclusive to the European Convention. Concerning the other exceptions outlined by the Court to Article 1 of the Convention, namely, acts of diplomatic and consular agents, executive or judicial functions are carried out on the territory of another state with its invitation or acquiescence, in certain circumstances, and when the state's agents operating outside its territory use force against an individual, regrettably the Court has failed to maintain consistency in its case law, as noted by Judge Bonello. This makes arriving to a specific conclusion particularly challenging. The difficulty is increased by the fact that these exceptions resemble more matters of attribution within state responsibility than exceptions to territorial jurisdiction.

4 The Court's Dynamic Understanding of Subject-Matter Jurisdiction

As with territorial jurisdiction, the subject-matter jurisdiction of the Court is limited by the text of the Convention itself. Historically, the Court's understanding of the Convention as a 'living instrument' has allowed for an inclusive approach to matters which might appear to fall outside the material scope of the Convention. In this section, the paper will first address the subject-matter application of dispute resolution clauses in international law (Part 4.1), then to focus on the ECtHR's dynamic interpretation of subject-matter jurisdiction (Part 4.2).

4.1 *Subject-Matter Jurisdiction in International Law*

In international law 'the general rule [is] that States may or may not submit their disputes to [international courts] at their discretion'.[127] Consequently, the consent to submit disputes to an international court may be qualified according to a legal criterion of subject-matter. Historically, dispute resolution clauses in international treaties contained formulations which limited them

126 PCA, *Stabil, Crimea-Petrol LLC, Elefteria LLC, Novel-Estate LLC and others v The Russian Federation*, no. 2015–35, 26.06.2017, para. 175.

127 PCIJ, *Mavrommatis Palestine Concessions* (*Greece v The United Kingdom*), PCIJ Series A. No 2, 30.08.1924, p. 17.

to disputes arising out of the 'interpretation and application' of a treaty.[128] When this is the formulation, the court or tribunal's subject-matter jurisdiction is limited to those disputes only.[129]

An early example of subject-matter jurisdiction can be found in the landmark case of the *Mavrommatis Palestine Concessions*. In this case, the Permanent Court of International Justice (PCIJ) was faced with several objections to its jurisdiction over a dispute concerning a number of concessions for public services in the Palestinian territory. The relevant dispute resolution clause was Article 26 of the Mandate for Palestine, under which 'any dispute … relating to the interpretation or the application of the provisions of the mandate … shall be submitted to the Permanent Court of International Justice'.[130] In terms of jurisdiction, the PCIJ ruled that '[t]he dispute may be of any nature; the language of the article in this respect is as comprehensive as possible […] but in every case it must relate to the interpretation or the application of the provisions of the Mandate'.[131] The PCIJ applied this understanding and concluded that certain public concessions held by Mavrommatis were not protected by the Mandate for Palestine.[132] Therefore, the PCIJ lacked subject-matter jurisdiction over these concessions, and hence dismissed the claims concerning them.[133]

The current status of international law is built upon the Mavrommatis understanding. An example of this is the International Centre for Settlement of Investment Disputes (ICSID) case of *Generation Ukraine Inc. v Ukraine*. The relevant dispute resolution clause was contained in Article VI (1) of the Treaty Between Ukraine and the United States of America Concerning the Encouragement and Reciprocal Protection of Investments. This provision, in its relevant part, referred to 'a dispute between a Party and a national or company of the other Party arising out of or relating to … an alleged breach of any right conferred or created by this Treaty with respect to an investment'.[134] In this dispute, the investor brought a number of different claims, some based on Ukrainian tort, constitutional and administrative law, and others based on the treaty in question.[135] The tribunal in *Generation Ukraine Inc. v Ukraine*

128 See e.g., PCIJ, *Mavrommatis Palestine Concessions, supra* note 126, pp. 16–17.

129 See e.g., *Generation Ukraine Inc. v Ukraine*, ICSID Case No. ARB/00/9, 16.09.2003, para. 8.10.

130 PCIJ, *Mavrommatis, supra* note 7, p. 11.

131 Ibid., pp. 15–16.

132 Ibid., p. 28.

133 Ibid., p. 29.

134 ICSID, *Generation Ukraine Inc. v Ukraine*, No. ARB/00/9, 16.09.2003, para. 8.10.

135 Ibid., para. 8.9.

concluded that it was 'not endowed with general jurisdiction to hear claims based on any source of law arising at any point in time against any potential defendant. The jurisdiction of the Tribunal is limited to investment disputes, which are defined in Article VI (1) of the [treaty]'.[136] On this basis, the tribunal upheld only subject-matter jurisdiction over some claims, while rejecting others.[137]

Therefore, under international law generally, an international court or tribunal will have jurisdiction to the extent that the dispute itself falls within the subject-matter boundaries of the dispute resolution clause. In the following section, this particular aspect of the European Convention will be analysed.

4.2 *Subject-Matter Jurisdiction under the European Convention*

The ECtHR's subject-matter jurisdiction is governed by the Convention. Article 32 of the Convention states: 'The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto.' This formulation is similar to the one analysed in *Mavrommatis*, and its findings are thus applicable to the ECtHR. In a nutshell, the subject-matter jurisdiction of the European Court is restricted to matters concerning the interpretation and application of the European Convention and its Protocols.

This section will focus on how the Court has addressed questions concerning its subject-matter jurisdiction by means of interpretation.[138] In this section, this paper will explore the early cases of the interpretation of subject-matter jurisdiction (4.2.1), then briefly to address the relationship between the Convention and other international treaties as an issue of subject-matter jurisdiction (4.2.2). The section will then delve into more recent examples of jurisdictional interpretation by the ECtHR, particularly regarding climate change protection (4.2.3), sports law (4.2.4) and rights not explicitly protected in the Convention (4.2.5).

4.2.1 Early Cases of Subject-Matter Jurisdiction

Traditionally, the Court has understood that a dynamic interpretation of human rights law under the living instrument doctrine does not mean that

136 Ibid., para. 8.10.

137 Ibid., para. 8.14.

138 See R. Ita and D. Hicks, 'Beyond Expansion or Restriction? Models of Interaction between the Living Instrument and Margin of Appreciation Doctrines and the Scope of the ECHR', (2021) 10(1), *International Human Rights Law Review,* pp. 40–70.

the Court can derive a right not included in the Convention itself and thus expand its own subject-matter jurisdiction.[139] This understanding is in line with the general understanding in international law.[140]

This subject-matter limitation was laid out early on, only a few years after *Tyrer v United Kingdom*. In 1986, in the case of *Johnston and others v Ireland*, the applicants claimed that the impossibility under Irish law of obtaining a divorce and remarriage constituted a violation of the right to marry under Article 12 of the Convention. The relevant provision of Irish law stated: '[m]en and women of marriageable age have the right to marry and to find a family, according to the national laws governing the exercise of this right'.[141] The applicants contended that the central issue was not whether the Convention contained a right of divorce but, rather, whether the impossibility of marring each other was compatible with the right in Article 12 of the Convention.[142] This consideration might have been central to the subject-matter jurisdiction of the Court: If the dispute had been about an unprescribed right to divorce, it would not have been a dispute 'concerning the interpretation and application of the Convention and the Protocols'.

The Court considered that the right of marriage, as presented by the applicants, could not be examined in isolation from the non-availability of a right to divorce.[143] Thus, the ECtHR analysed the matter on the merits. The Court considered that the ordinary meaning of the words 'right to marry' covered the formation of marriage but not its dissolution, an interpretation that the Court confirmed with reference to the object and purpose as revealed by the *travaux préparatoires*.[144] In fact, in the *travaux préparatoires*, the drafters had explicitly rejected the possibility of including the right to dissolve marriage.[145]

139 G. Baboulene (2022–2023) 'Has the Elastic Interpretation of Human Rights Law Being Inherently Flawed?', *supra* note 31, p. 52. See also I. Jelic and E. Fritz, 'The Living Instrument at the Service of Climate Action: The ECtHR Long-Standing Doctrine Confronted to the Climate Emergency', (2024) 36 *Journal of Environmental Law*, p. 147.

140 G. Baboulene (2022–2023), 'Has the Elastic Interpretation of Human Rights Law Being Inherently Flawed?', *supra* note 31, p. 52. See also I. Jelic and E. Fritz, 'The Living Instrument at the Service of Climate Action: The ECtHR Long-Standing Doctrine Confronted to the Climate Emergency', (2024) 36 *Journal of Environmental Law*, p. 147.

141 ECtHR, *Johnston and others v Ireland*, no 9697/82, 18.12.1986, para. 49.

142 Ibid., para. 50.

143 Ibid.

144 Ibid., para. 52.

145 Ibid.

In terms of interpretation, the applicants had given considerable weight to 'the social developments that have occurred since the Convention was drafted'.[146] In this regard, the Court conceded that 'the Convention and its Protocols must be interpreted in the light of present-day conditions'.[147] However, 'the Court cannot, by means of an evolutive interpretation, derive from these instruments a right that was not included therein at the outset. This is particularly so here, where the omission was deliberate'.[148] Thus, the Court concluded that the right to divorce could not be derived from Article 12 of the Convention.[149]

This subject-matter limitation was maintained over time. In 2002, in the case of *Pretty v United Kingdom*, the Court was faced with an applicant who suffered from an incurable, degenerative disease. The disease incapacitated the applicant from taking her own life without assistance. The applicant argued that her rights had been violated by the Director of Public Prosecutions because he had refused to give an undertaking not to prosecute her husband if he were to assist her in ending her life, a criminal offence under English law.[150] The Government contended that the application was ill-founded and should be dismissed on the grounds that the applicant's complaint did not deal with any of the rights in the Convention.[151] The Court did not dismiss the application on jurisdictional or admissibility grounds because it considered 'that the application as a whole raises questions of law which are sufficiently serious that their determination should depend on an examination of the merits'.[152] This reasoning is cryptical because, in principle, the gravity of the matter at hand should not play any role in the determination of jurisdiction or admissibility.

In any event, on the merits the ECtHR limited its analysis to the rights prescribed in the Convention. In this regard, the Court first rejected the applicant's claim that the right to life under Article 2 involved a negative aspect: a right to die.[153] In particular, the ECtHR was 'not persuaded that "the right to life" guaranteed in Article 2 can be interpreted as involving a negative aspect';

146 Ibid., para. 53.
147 Ibid.
148 Ibid.
149 Ibid., para. 54.
150 ECtHR, *Pretty v The United Kingdom*, no 2346/02, 29.04.2002, para. 32.
151 Ibid.
152 Ibid., para. 33.
153 Ibid., paras. 37–42.

to the contrary 'Article 2 cannot, without a distortion of language, be interpreted as conferring the diametrically opposite right, namely a right to die'.[154]

Similarly, the Court rejected the applicant's claim that the state had violated the prohibition of torture prescribed in Article 3 of the Convention by failing to authorise assisted suicide. The applicant argued that the lack of assisted suicide would equate subjecting the applicant to degrading treatment, the suffering that awaits her illness, by its inaction.[155] The Court ruled that while it 'must take a dynamic and flexible approach to the interpretation of the Convention, which is a living instrument, any interpretation must also accord with the fundamental objectives of the Convention and its coherence as a system of human rights protection'.[156] In this line, the Court considered that the Director of Public Prosecutions' refusal to undertake not to prosecute the applicant's husband was not in line with the ordinary meaning of the prohibition of torture.[157] The Court thus concluded that no obligation under Article 3 of the Convention was involved in the case.[158]

Based on the Court's analysis of the rights under Articles 2 and 3 of the Convention, the dispute in *Pretty v United Kingdom* can be considered one 'concerning the interpretation and application of the Convention and the Protocols'.

Overall, early cases on subject-matter jurisdiction reveal that, while the Court repeatedly states that the Convention must be interpreted flexibly and dynamically as a living instrument, it may not, by means of interpretation, grant a right that is not prescribed in the Convention.

4.2.2 The Relationship of the Convention and Other International Treaties

As explained above, the Court's subject-matter jurisdiction is limited to 'all matters concerning the interpretation and application of the Convention and the Protocols thereto'.[159] However, at times, other international treaties may appear relevant to disputes before the Court. The case law of the Court reveals that these other instruments may be valuable in assisting the Court in its interpretation of the Convention. However, these other treaties would not

154 Ibid., para. 39.
155 Ibid., para. 44.
156 Ibid., para. 54.
157 Ibid.
158 Ibid., para. 56.
159 Article 32 ECHR.

be directly applicable by the Court, as they would fall outside the scope of its subject-matter jurisdiction.

One case in which this matter was addressed was the 2008 judgment in *Demir and Baykara v Turkey*. In this case, the Court entertained a claim by two municipal civil servants, members of a trade union, because Turkish authorities had annulled a collective agreement the trade union had reached with a Municipal Council. The ground for the annulment was that the council lacked the legal capacity to enter such agreement.[160] The applicants alleged that this annulment violated their rights to freedom of association under Article 11, and non-discrimination under Article 14 of the Convention.[161] In this case, some attention was drawn to the European Social Charter and the case law of its supervisory organ.[162] However, Turkey had not ratified the European Social Charter.[163]

On this basis, concerning subject-matter jurisdiction, the state raised an objection based on the argument that it was impossible for the applicant to rely 'on international instruments other than the Convention, particularly instruments that Turkey had not ratified'.[164] As regards this objection, the Court reaffirmed 'that it had always referred to the 'living' nature of the Convention, which had to be interpreted in the light of present-day conditions, and that it had taken account of evolving norms of national and international law in its interpretation of Convention provisions'.[165] The Court referred to several of its previous judgments, including *Soering* and *Marckx,* to conclude that 'in defining the meaning of terms and notions in the text of the Convention, [it] can and must take into account elements of international law other than the Convention', including the consensus emerging from specialised international instruments and from the practice of Contracting States.[166] Additionally, the Court clarified that it is not necessary for the respondent state to have ratified the instruments applicable to the subject-matter of the case. Instead, '[i]t will be sufficient for the Court that the relevant international instruments denote a continuous evolution in the norms and principles applied in international law or in the domestic law of the majority of member States of the Council of

160 ECtHR, *Demir and Baykara v Turkey*, no 34503/97, 12.11.2008, paras. 1–3, 15–33.
161 Ibid., para. 3.
162 Ibid., paras. 45, 49. 54.
163 Ibid., paras. 54, 149.
164 Ibid., para. 53.
165 Ibid., para. 68.
166 Ibid., para. 85.

Europe and show, in a precise area, that there is common ground in modern societies'.[167]

The Court's judgement in *Demir and Baykara v Turkey* serves as a clear example of the fact that treaties other than the Convention may be relevant as means of interpretation of the Convention. However, the Court's subject-matter jurisdiction remains limited to the Convention and its Protocols.

4.2.3 Subject-Matter Jurisdiction and Climate Change

The Court's established jurisprudence in support of the contention that the Convention is to be interpreted as a 'living instrument' has been putto the test in recent years. In the realm of climate change, it has been contended that the gravity of the climate crisis and the underdeveloped state of environmental law at the time the Convention was drafted should not hinder the Court's jurisdiction over related matters.[168] Until recently, the Court's existing case law in environmental matters concerned only situations involving specific sources from which environmental harm emanates.[169] In 2024, the Court finally ruled over the scope of the Convention to address matters of climate change in its judgment in *Verein Klimaseniorinnen Schweiz and Others v Switzerland*. This case, as the Court understood it, possessed key characteristics and circumstances which are significantly different from previous environmental case law.[170]

In *Klimaseniorinnen*, the Court assessed the claim by a number of applicants (a non-profit organisation and four Swiss residents) that Switzerland had failed to mitigate climate change, and in particular the effects of global warming, which adversely affected the lives, living conditions and health of the applicants.[171] The applicants relied on the protections awarded by Articles 2 (right to life), 6 (right to a fair trial), 8 (right to respect for private and family life) and 13 (right to an effective remedy) of the Convention.[172] As can be seen, while *Klimaseniorinnen* deals with environmental damage and climate change, the dispute concerned rights prescribed in the Convention. This

167 Ibid., para. 86.

168 I. Jelic and E. Fritz, 'The Living Instrument at the Service of Climate Action: The ECtHR Long-Standing Doctrine Confronted to the Climate Emergency', (2024) 36 *Journal of Environmental Law*, pp. 141–158.

169 ECtHR, *Verein Klimaseniorinnen Schweiz and others v Switzerland*, no 53600/20 [GC] 09.04.2024, para. 415.

170 Ibid., para. 416.

171 Ibid., para. 291.

172 Ibid.

means that the dispute in *Klimaseniorinnen* was one 'concerning the interpretation and application of the Convention and the Protocols'.

From the outset, the Court acknowledged 'the evolution of scientific knowledge, social and political attitudes and legal standards concerning the necessity of protecting the environment'.[173] Therefore, the Court recalled that the Convention is a 'living instrument' and highlighted the need to reflect the 'increasingly high standard being required in the area of the protection of human rights, thus necessitating greater firmness in assessing breaches of the fundamental values of democratic societies'.[174] Thus, the Court chose to take a tailored approach towards the various Convention issues arising from climate change considerations.[175]

In this case, the Court found no genuine issue of jurisdiction within the meaning of Article 1 of the Convention, but, rather, issues concerning the responsibility of Switzerland's emissions with extraterritorial harm, which were examined in the merits.[176] Specifically, the Court did not face subject-matter jurisdiction objections, essentially because the applicants' claims were based on rights prescribed in the Convention.[177] In any event, before addressing the merits of the violations or their admissibility, the Court devoted a section to the 'scope of the Court's assessment' towards the alleged violations of Articles 2 and 8 of the Convention.[178] Here, the Court recalled that it 'has repeatedly stressed that no Article of the Convention is specifically designed to provide general protection of the environment as such'.[179] However, 'the Court has often dealt with various environmental problems deemed to affect the Convention rights of individuals, particularly Article 8'.[180]

Indeed, the Court cautioned that it was 'not for the Court to determine whether the general trends regarding the recognition of [the human right to a clean, healthy and sustainable environment] give rise to a specific legal obligation. … Such a development forms part of the international-law context in which the Court assesses Convention issues before it'.[181] The Court concluded that while environmental matters involve policy and political choices, where a Convention right is affected, 'this subject matter is no longer merely an issue of politics or policy but also a matter of law having a bearing on the interpretation and

173 Ibid., para. 431.
174 Ibid., para. 434.
175 Ibid.
176 Ibid., para. 287.
177 Ibid., paras. 64–82.
178 Ibid., para. 445.
179 Ibid.
180 Ibid., para. 446.
181 Ibid., para. 448.

application of the Convention'.[182] The Court concluded its scope assessment stating that 'given the necessity of addressing the urgent threat posed by climate change, and bearing in mind the general acceptance that climate change is a common concern of humankind … there is force in the argument … that the question is no longer whether, but how, human rights courts should address the impacts of environmental harms on the enjoyment of human rights'.[183]

This cryptic conclusion, however, does not seem to suggest in any way that the Court may exceed the boundaries of its subject-matter jurisdiction. Indeed, in *Klimaseniorinnen*, the Court has made it clear that its jurisdiction extends only to violations to the rights prescribed in the Convention. Therefore, while climate change is expected to gain increasing relevance in the human rights arena, the Court's subject-matter jurisdiction remains set by the Convention: climate change situations may fall within the scope of the Court's jurisdiction to the extent that environmental damage affects rights prescribed by the Convention.

4.2.4 Subject-Matter Jurisdiction and Sports Law

The Court's interpretation of the Convention as a 'living instrument' was also tested in the area of sports law. In 2023 with a tight majority ruling of four to three, the Third Section of the Court decided in the judgement in *Semenya v Switzerland* that Switzerland – by actions of the Swiss Federal Supreme Court – had violated several Convention rights regarding a professional South African athlete. In particular, the Court found violations of the rights of non-discrimination under Article 14 of the Convention, the right to respect for private life under Article 8 of the Convention and the right to an effective remedy under Article 13 of the Convention.[184] From the outset, it can be seen that, as in *Klimaseniorinnen*, the dispute concerned rights explicitly provided for in the Convention. Therefore, the dispute in *Semenya* was one 'concerning the interpretation and application of the Convention and the Protocols'.

In this case, the applicant had brought a claim before the Court of Arbitration for Sports (CAS) regarding new rules issued by the International Association of Athletics Federations (SFSC) with respect to the participation of athletes with hyperandrogenism in gendered sports.[185] The CAS panel found that while the aforementioned rules were discriminatory, 'the IAAF has demonstrated the necessity of establishing regulations governing the eligibility of

182 Ibid., para. 450.
183 Ibid., para. 451.
184 ECtHR, *Semenya v.Switzerland*, no 10934/21 [TS], 11.07.2023, paras. 4, 200–202.
185 Ibid., paras. 4, 114.

female athletes with 46 XY DSD to participate in certain events in order to maintain fair competition in female athletics'.[186]

While there were other jurisdictional contentions, the parties did not dispute the subject-matter jurisdiction of the Third Section of the Court.[187] However, the Third Section of the Court decided to examine the question by its own motion.[188] It first noted that the prohibition of discrimination under Article 14 of the Convention contained no substantive provisions or independent existence; this provision existed solely in relation to the enjoyment of the rights and freedoms safeguarded in other provisions.[189] For subject-matter jurisdiction purposes, the Third Section of the Court noted that '[i]t is necessary, but it is also sufficient, for the facts of the case to fall "within the ambit" of one or more of the Convention Articles'.[190] As the applicant had based its case on Articles 3 (prohibition of torture) and 8 (right to respect for private and family life) of the Convention, the Third Section of the Court considered that it 'must therefore establish whether the facts of the case fall within the ambit of at least one of those two Articles'.[191]

Based on the fact that the CAS and the Federal Supreme Court of Switzerland had concluded that the applicant's physical characteristics were 'not sufficiently female' for the purposes of the sports classification, the Third Section of the Court concluded that 'an individual's sex characteristics fall within the scope of his or her "private life" within the meaning of Article 8'.[192] The case of *Semenya* was referred to in the Grand Chamber on 6 November 2023, and at the time of writing the judgment is pending.

Therefore, much as in *Klimaseniorinnen*, the Court's subject-matter jurisdiction remains set by the Convention: matters of sports law may fall within the scope of the Court's jurisdiction to the extent that the alleged violations concern rights prescribed by the Convention.

5 Concluding Remarks

The ECtHR has consistently reaffirmed the living instrument interpretation doctrine as a means of ensuring that the rights enshrined in the European

186 Ibid., para. 19.
187 Ibid., para. 118.
188 Ibid.
189 Ibid., para. 119.
190 Ibid., para. 120.
191 Ibid., para. 121.
192 Ibid., para. 123.

Convention remain practical and effective in the light of evolving societal standards.[193] However, its approach has not been one of unbridled expansion; rather, the Court has sought to maintain a careful balance between adapting to contemporary human rights developments and respecting the structural limitations of the Convention.

The Court's recent jurisprudence illustrates this dual approach. In *Yakut Republican Trade-Union Federation v Russia*, the Court acknowledged the potential for the future extension of trade union rights to working inmates, but ultimately deferred to the prevailing legal consensus, emphasising the margin of appreciation afforded to states.[194] By contrast, in *Fedotova and others v Russia*, it recognised a clear and growing consensus within Europe on the need for legal recognition of same-sex relationships and affirmed a positive obligation in that regard, based on the right to respect for private and family under Article 8 of the ECHR.

This approach aligns with broader principles of international law regarding the inter-temporality of legal interpretation. Almost a century ago, Max Huber, in the *Island of Palmas* arbitration, had already distinguished between the creation and existence of rights, asserting that while the creation of a right is governed by the law in force at the time, its continued existence must evolve in accordance with legal developments.[195] This principle underpins the ECtHR's reasoning: while the European Convention's provisions must be interpreted within their historical context, their application must reflect contemporary standards to ensure their continued relevance. Thus, the Court's use of the living instrument doctrine does not imply judicial expansion. Rather, it operates within the constraints of the ECHR, evolving in response to demonstrable legal and social progress while respecting the consensus-based foundation of the European human rights system.

Regarding territorial jurisdiction, the ECtHR has consistently reaffirmed the primarily territorial scope of Article 1 of the Convention, recognising limited exceptions under exceptional circumstances. Indeed, the Court has decided on its extraterritorial jurisdiction only in specific instances where states exercised effective control over foreign territory, exerted authority over individuals outside their borders, or undertook actions, such as extradi-

193 See, for instance, ECtHR, *Tyrer v The United Kingdom*, *supra* note 7, paras. 31, 34; ECtHR, *Soering*, *supra* note 24, para. 102; ECtHR, *Fedotova and others*, *supra* note 46, para. 167; ECtHR, *Johnston supra* note 2, para. 53.

194 ECtHR, *Yakut Republican Trade-Union Federation*, supra note 37, paras. 39–48.

195 PCA, *Island of Palmas*, *supra* note 55, p. 14.

tion, that directly exposed individuals to foreseeable risks recognised within the Convention violations.

At the same time, the Court has rejected broad interpretations of extraterritorial jurisdiction, as illustrated in *Banković v Belgium*, where it dismissed a cause-and-effect notion of jurisdiction and reiterated the European Convention's 'essentially regional vocation'.[196] Subsequent judgments, particularly in *Al-Skeini and others v United Kingdom* introduced a more structured framework for assessing the jurisdictional reach of the Convention. This framework has since been applied in cases such as *Hassan*, *Al-Jedda*, *Hirsi Jamaa v Italy*, *N.D. and N.T. v Spain*, and *Ukraine v Russia* (*re: Crimea*).

Despite the progressive elements in its jurisprudence, the Court has remained cautious not to overstep the ECHR's jurisdictional limits. As emphasised in *Loizidou v Turkey* and *Cyprus v Turkey*, extraterritorial jurisdiction remains an exception requiring 'special justification in the particular circumstances of each case'.[197] The Court has, thus, sought to maintain a balance between adapting to contemporary human rights challenges and upholding the textual and structural constraints of the European Convention. As seen in other non-human rights cases, such as *Stabil and others v Russia*, this is not a unique approach to the interpretation of territorial jurisdiction.[198] Thus, if territorial jurisdiction under the ECHR is to be ultimately expanded, it remains a task for the member states through formal treaty amendments, rather than judicial interpretation alone.

Finally, in terms of subject-matter, the Court's interpretation of the European Convention has not resulted in an actual expansion of its jurisdiction. To the contrary, the ECtHR has delved into areas of law such as sports law and environmental law only by interpreting and applying the rights explicitly prescribed in the European Convention. At times, the Court has explicitly addressed the fact that if a right were not included in the European Convention, the Court would not be tasked with its protection. For instance, in the cases of *Johnston and others v Ireland* and *Verein Klimaseniorinnen Schweiz and Others v Switzerland* the Court openly refused to recognise rights to divorce and a clean, healthy and sustainable environment, respectively. The ECtHR arrived at such conclusions noting that these rights were not included in the Convention itself.

The Court has thus respected the jurisdictional limits set by the European Convention concerning its subject-matter, despite its cryptic statements con-

196 ECtHR, *Banković, supra* note 82, paras. 79–80.

197 Ibid., para. 59–61.

198 PCA, *Stabil, supra* note 126, para. 175.

cerning the future role of human rights courts. It is noteworthy that, if the Court's jurisdiction is to be expanded in terms of subject-matter, that is a task of the member states through an amendment to the European Convention.

Absent an amendment in terms of territory or subject-matter, the ECtHR must uphold the boundaries of its jurisdiction, for, as stated by the PCIJ over 100 years ago in *Mavrommatis*, international jurisdiction is voluntary, and therefore going beyond its prescribed limits amounts to contravening state consent.

Stereotyped Narratives as Mechanisms of Discrimination: The Evolution of the ECtHR Approach in Protecting Migrants' Rights

Elena Ghidoni, Encarnación La Spina and Dolores Morondo Taramundi

Abstract

Over the past decades, the European Court of Human Rights has significantly expanded its anti-discrimination jurisprudence under Article 14. Nevertheless, migrants, and especially asylum seekers, have not benefited from this development to an extent comparable with European citizens and their families. This disparity is especially evident in one of the most innovative aspects of the Court's recent anti-discrimination jurisprudence: the introduction of the anti-stereotyping approach. Notably, this approach has yet to be applied in cases concerning the human rights of migrants. By examining the evolution of stereotyped arguments and categorisations underpinning some of the ECtHR's landmark cases, this paper highlights the dynamic role of stereotypes in justifying the inadequate protection of migrants' human rights. This analysis is conducted under three interrelated perspectives: the serialisation effect produced by stereotyped categories, the intersectionality of these categories, and the problematisation of vulnerability. While categorisation is an inherent aspect of legal reasoning, stereotypes often serve to legitimise discriminatory practices against migrants. Therefore, they must be subjected to strict scrutiny to prevent their misuse as tools for limiting the scope of human rights protections.

1 Introduction[1]

Over the last 75 years, the European Court of Human Rights (ECtHR) has progressively developed its approach to migrants' rights, overcoming the

1 All three authors conceived this paper as a joint effort through continuous exchange and discussion. However, in translating the research findings into written text, they have each taken responsibility for specific sections. E. La Spina is credited with Section 2, 'Migrant Stereotyped Categories as Binary Forms of Categorisation', E. Ghidoni with Section 3, 'Migrants' Rights and the Challenge of Intersectional Invisibility', and D. Morondo with Section 4, 'Stereotyped Narratives of Vulnerability as Limitations to Anti-discrimination Protection'. All authors contributed to the Introduction and Conclusions. This work has been carried out with the support of the Human Rights and Socio-cultural Challenges in a

© ELENA GHIDONI ET AL., 2026 | DOI:10.1163/9789004751026_006
This is an open access chapter distributed under the terms of the CC-BY-NC-ND 4.0 license.

absence of their explicit protection in the European Convention on Human Rights (ECHR).[2] It has done so by interpreting the obligation to protect everyone within his or her jurisdiction and guaranteeing respect for the rights enshrined in the ECHR. As a result, the Court has imposed certain limitations on the right of states to turn someone away from their borders or to control entry, residence and expulsion in cases involving non-nationals of the respondent state, especially migrants, asylum seekers, refugees and stateless persons.

Many cases brought before the Court have concerned access to the territory of non-nationals and the processing of their visa applications to enter a country in order to seek asylum formally or access to the territory outside of legal procedures.[3] In other cases, the Court's legal reasoning has focused on determining whether a state is under a positive obligation under Article 8 of the Convention to grant access for the purposes of family reunification.[4] On the one hand, the Court found that the applicants fell within the respondent state's jurisdiction for the purposes of Article 1 of the Convention as it exercised control over them on the high seas.[5] On the other hand, the Strasbourg

Changing World Project (ref.: IT1468–22) and the R+D+i RESEST Project on 'Resilience of antidiscrimination law to biases and stereotypes: challenges and proposals for intervention' (ref. PID2021–123171OB-I00), funded by the Spanish Ministry of Science and Innovation, https://sites.google.com/deusto.es/resest/inicio?authuser=0.

2 As a result, the Court has found violations of rights under the Convention in a number of cases concerning guarantees in the context of reception conditions and assistance to persons due to be removed, age-assessment procedure and freedom of movement, trafficking in human beings and cases of gender-related persecution, such as widespread sexual violence. See E. Y. Krivenko, 'Reassessing the Relationship between Equality and Vulnerability in Relation to Refugees and Asylum Seekers in the ECtHR: The MSS Case 10 years on', (2022) 34(2) *International Journal of Refugee Law*, pp. 192–214, p. 207, footnotes 69 to 70 and selected cases in Section 4. See also ECtHR *H.A. v the United Kingdom*, no 30919/20, 8.04.2024 in relation to various forms and scenarios of gender-related persecution, such as widespread sexual violence, among others ECtHR, *M.M.R. v the Netherlands*, no 64047/10, 24.05.2016.

3 See among others, e.g., ECtHR *M.N.N. and Others v Belgium* no 3599/18, 05.03.2010; ECtHR *Hirsi Jamaa and Others v Italy,* no 27765/09, 23.02.2012; *ECtHR Safi and Others v Greece,* no 5418/15, 07.07.2022. In several cases, asylum claimants have been exposed to the discriminatory aspects of racial border control. See Achiume's comments on the default of liberal borders racialising inclusion and exclusion that privileges 'Whiteness' in international mobility and migration in T. Achiume, 'Racial Borders', (2022) 445 *Georgetown Law Journal UCLA School of Law*, Public Law Research Paper, pp. 21–33.

4 See the cases cited in Section 3.

5 Briefly, the Court's reasoning has been pivotal in several of the ECtHR's leading cases concerning the interception, rescue operations and summary returns (push-backs) both at sea and at the border and/or shortly after entry into the territory, the confinement in transit

Court has extended the application of Article 8 to situations of cross-border migration in expulsion and family reunion cases, but has broadened its scope to the legal conditions for leave to remain, especially for refugees.

However, considering its central and decisive role in ensuring human rights protection, the ECtHR's judgments have not always granted the same level of protection in the case of migrants' human rights. In particular, the language of vulnerability has produced mixed results in terms of protection, as noted by Krivenko.[6] Such protection has been higher for asylum seekers and refugees, seen through the lens of vulnerability.[7] Yet, in the case of irregular or undocumented migrants or unauthorised entrants, the Court's approach has led to several unintended negative effects, due to the hierarchies and legal stratification among predominant migrant categories which will be explained below.

Looking at the past few decades, the ECtHR's approach to migrants' rights has been narrow *vis-à-vis* other vulnerable groups, with protection being accorded on a case-by-case basis. In general, according to an instrumental interpretation of the open-ended phrase 'or other status' contained in Article 14 ECHR, the ECtHR has sought to protect individuals and groups from discrimination on various grounds, including age, sex/gender, national origin, migrant/refugee status, place of birth and family status. However, in certain leading cases, it has remained silent regarding the states' indirect discriminatory treatment of third-country nationals, and particularly the role played by ethnic national origin, gender and racist stereotypes.

As Giolo observes, in legal processes, 'it is difficult to dispense with categorisations, with the reference to groups and classes of people, or with the iden-

---

zones and reception centres for the identification and registration of migrants (hotspots), immigration detention or access to the procedural and reception conditions. For an analysis of recent ECtHR case-law, see D. Thym, 'The End of Human Rights Dynamism? Judgments of the ECtHR on "Hot Returns" and Humanitarian Visas as a Focal Point of Contemporary European Asylum Law and Policy', (2020) 32 (4) *International Journal of Refugee Law*, pp. 569–596. See also the leading cases mentioned in Sections 2 and 4, as well as ECtHR, *M.H. and Others v Croatia*, nos 15670/18 and 43115/18, 4.04.2022, para. 294; ECtHR *A.A. and Others v North Macedonia*, nos 55798/16 and 4 others, 05.07.2022, paras. 112–123, among others.

6 E.Y. Krivenko, 'Reassessing the Relationship', *supra* note 2, pp. 204–206.

7 They have been treated the same as migrants not seeking asylum or those whose applications have been rejected due to lack of additional vulnerability or lack of proof of a particular vulnerability. See B. Hudson, 'Asylum Marginalisation Renewed: Vulnerability Backsliding at the European Court of Human rights', (2024) 20 *International Journal of Law in Context*, pp. 19–20; V. Moreno-Lax and N. Vavoula, 'Vulnerability's Legal Life: an Ambivalent Force of Migration Governance', (2024) 20 *International Journal of Law in Context*, pp. 1–15 and see in our Section 4 the critiques on migratory vulnerability on the basis of Article 14 ECHR.

tification of general, abstract, and collective characteristics'.[8] Migration law and its judicial application are no exception to this, requiring the categorisation of migrants into classes of subjects with shared characteristics. Such classifications are necessary to determine whether their rights should be protected, but they also justify why 'members belonging to the groups in question are [treated as] identical',[9] despite the apparent heterogeneity of human mobility. Consequently, this legal categorisation inevitably reinforces conditions of oppression and subordination, perpetuating discriminatory treatment based on stereotyped categories.

As forms of categorisation, stereotyped narratives shape the boundaries that define who belongs to vulnerable groups (particularly which migrants), who deserves protection, and under what conditions. Building on prior research,[10] this contribution examines migrant categorisations through the lens of stereotypes. In line with the existing literature, stereotypes are defined as forms of generalisation that attach roles and characteristics to individuals based on their membership of a specific group.[11] Contrary to other types of generalisations, stereotypes are binary categories that filter the complexity of reality into two mutually exclusive and static terms. One of these is the norm-category, while the opposite term represents the exception or negative, devalued category. A distinctive harm of stereotypes lies in their capacity to erase individual identity and specific characteristics, facilitating decisions based on assumed group traits. We refer to this effect as 'serialisation',[12] in which individuals are treated as interchangeable entities within a series of identicals. Members of such series are not recognised as autonomous subjects but are instead subsumed within the homogeneous group/category. The concept illustrates how these specific categories strip migrants (and other vulnerable groups) of their individuality and the implications of such categorisation for adjudicating their human rights. Being a form of categorisation, stereotypes

8 O. Giolo, 'La Critica Femminista degli Stereotipi di Genere nel Diritto: Concezioni, Usi, Funzioni, Retoriche', in M.G. Bernardini and O. Giolo (eds.), *Giudizio e Pregiudizio. Gli Stereotipi di Genere nel Diritt*o, Giappichelli: Turin, 2023, p. 4.

9 C. Amorós and A. De Miguel, *Teoría Feminista: De la Ilustración a la Globalización*, Minerva: Madrid, 2005, pp. 88–89.

10 E. Ghidoni and D. Morondo, 'El Papel de los Estereotipos en las Formas de Desigualdad Compleja: Algunos Apuntes desde la Teoría Feminista del Derecho Antidiscriminatorio', (2022) 28 *Discusiones*, pp. 37–70. See also the RESEST project, *supra* note 1.

11 R.J. Cook and S. Cusack, *Gender Stereotyping: Transnational Legal Perspectives*, University of Pennsylvania Press: Philadelphia, 2010, p. 9.

12 Y. M. Young, 'Gender as Seriality: Thinking about Women as a Social Collective', (1994) 19 *Signs: Journal of Women in Culture and Society*, pp. 713–738.

are often enmeshed in legal categories as implicit norms. The difficulty lies precisely in identifying their operation in laws and legal reasoning. Sometimes they leave traces in a chain of arguments; through these traces, it is possible to let them emerge as unstated premises of a given conclusion.

While embracing the definition of stereotypes as forms of generalisation, this research develops the hypothesis that stereotypes are more than innocuous tools for simplifying information or expediting decision-making. In our view, regardless of their content – whether negative, positive or neutral – stereotypes invariably serve to justify inequality, manifesting as direct, indirect or structural discrimination. They achieve this by normalising or rendering invisible unequal power relations based on gender, race, class, migrant status, or other grounds.[13] Since stereotypes justify social hierarchies, they should always be regarded as harmful mechanisms that perpetuate discrimination. This justificatory function distinguishes stereotypes from other forms of categorisation that are not linked to the reproduction of inequality.

By reviewing various leading cases, this contribution posits that stereotyped narratives contribute to the discrimination of migrants and render that discrimination invisible, making it more difficult to substantiate claims for human rights protection. Furthermore, there is an intersectionality gap in the ECtHR's case law, with significant challenges in recognising intersectional discrimination due to the role that stereotyped narratives play in serialising migrants, thereby rationalising and justifying the discrimination they suffer. At the same time, concepts such as vulnerability, which initially promised to broaden the scope of protection, have instead individualised and restricted the conditions for protection, overshadowing the role of structural discrimination in creating vulnerable subjects.

The anti-stereotyping approach developed in the ECtHR's jurisprudence appeared and evolved in the context of gender discrimination, with limited application to other protected grounds of discrimination and their intersections. Nonetheless, examining migration through the prism of stereotyped narratives illuminates how categories of protection operate in different contexts and contribute to the stratification of human rights protection.

To this end, this contribution analyses significant examples within the ECtHR's case law on Articles 3 (prohibition of torture), 8 (right to family life) and 14 (right to non-discrimination) of, and Articles 3 and 4 of Protocol 4 (prohibition of collective expulsions) to the ECHR. The aim is to trace the

13 E. Ghidoni and D. Morondo 'El Papel de los Estereotipos en las Formas de Desigualdad Compleja', *supra* note 10.

evolution of the Court's reasoning and to identify the dynamic role of stereotyped justifications in the domains of migrants' human rights protection.

The discussion is structured as follows: Section 2 provides an overview of migrant categorisations, particularly binary constructions, and examines their effects in the light of the concept of serialisation of stereotyped migrant subjects. Section 3 explores the role of intersectionality in producing the invisibility or hyper-visibility of migrant subjects at the intersection of race and gender assumptions. Section 4 critically examines the use of vulnerability and its impact on the emergence of new and more restrictive categories of migrants deserving protection.

Through these three perspectives, this contribution aims to illuminate how stereotypes fundamentally determine the invisibility and the justification of human rights violations against migrants.

2 Migrant Stereotyped Categories as Binary Forms of Categorisation

Feminist scholars and experts on anti-stereotyping agree that stereotypes are a harmful tool of oppression. They strip people of their individuality by assigning them generalised traits instead of recognising them as unique individuals.[14] In the context of migration, the existence of migrant categories combined with the serialisation of associated stereotypes reproduces this oppressive effect through a process of diffraction, impacting on both individual and group dimensions of migrant categorisation. Indeed, the very definition of migrant reveals a core problem in migrant categorisation: the same term or category can encompass a wide range of meanings (for example, migration as a condition, a process or a status)[15] within different scientific disciplines.[16] This semantic ambiguity, alongside the pre-constructed imagery

14 Ibid., pp. 56–57. The authors explain that 'stereotypes, in their original meaning, are, after all, plates that enable the repetitive, serial production of a typographical composition. The stereotypical image conceals this mechanism of oppression, which consists of denying individuality: through the attribution of generalised traits to the stereotyped subjects, they are prevented from emerging as individualised, autonomous and free subjects.'

15 O. Bakewell, 'Conceptualising Displacement and Migration: Processes, Conditions and Categories', in S. Forbes Martin and K. Koser (eds.), *In the Migration-Displacement Nexus: Patterns, Processes and Policies*, Berghahn Books: London, 2011, p. 17.

16 The terms 'international migrant', 'forced migrant' and 'migrant worker' have not been formally defined within international law and are often used inconsistently by various stakeholders or within judicial practice. Based on an inclusive and factual understanding, a migrant is 'any person who is moving or has moved across an international border

of migrant categories, can hinder a genuine understanding of migration and render the terms of the legal and political debate misleading. For instance, a 'protection' logic may be applied to specific migrant categories, while a 'management' logic is applied to others.

Migration scholars have long problematised the feasibility of clearly and easily distinguishing between different categories of migrants. They have called for moving beyond opposing binaries such as 'refugees vs. migrants' or 'forced vs. voluntary migration'. However, less attention has been paid to the serialisation of migrant stereotypes,[17] which perpetuates oppressive effects, including the denial of individuality. These migrant categories are constructed[18] to make sense of migration, understand the causes of movement, or determine the time or duration of migration. Yet, they are often used to homogenise and over-simplify the migrant experience, stripping it of individual features and reducing it to a static status, category or process. Furthermore, migrant categories contribute to the fragmented subjectivity of refugee or migrant status,[19] reinforce false dichotomies (for example, refugee

---

or within a State, away from his/her habitual place of residence, regardless of their legal status, whether the movement is voluntary or involuntary, what the causes for the movement are or what the length of the stay is'. See these definitions in E. La Spina, 'The legal interpretation and semantic indeterminacy of migrant vulnerability: an analysis of conceptual and argumentation problems', (2021) 76 *Journal of Language and Law*, pp. 189–190, in footnotes 2–4.

17 M. Collyer and H. De Haas, 'Developing Dynamic Categorisations of Transit Migration', (2012) 18(4) *Population, Space and Plac*e, pp. 468–481; C. K. Meyer and S. Bol, 'Editorial: Categorising Migrants: Standards, Complexities, and Politics', (2018) 11 *Anti-trafficking Revie*w, pp. 1–14; R. Zetter, 'More Labels, Fewer Refugees: Remaking the Refugee Label in an Era of Globalization', (2007) 20(2) *Journal of Refugee Studies*, pp. 172–192; R. Zetter, 'Labelling Refugees: Forming and Transforming a Bureaucratic Identity', (1991), 4(1) *Journal of Refugee Studies*, pp. 39–62; S. Robertson, 'Status-making: Rethinking Migrant Categorization', (2018), 55(2) *Journal of Sociology*, pp. 219–233; L. Schuster, 'Turning Refugees into "Illegal Migrants": Afghan Asylum Seekers in Europe', (2011) 34(8) *Ethnic and Racial Studie*s, pp. 1392–1407; F. Staiano, 'Good Mothers, Bad Mothers: Transnational Mothering in the European Court of Human Rights', (2013) 15 *European Journal of Migration and La*w, pp. 155–182.

18 H. Crawley and D. Skleparis, 'Refugees, Migrants, Neither, Both: Categorical Fetishism and the Politics of Bounding in Europe's "Migration Crises"', (2018) 44(1) *Journal of Ethnic and Migration Studies*, pp. 48–64. The authors pointed out that 'there is nothing "natural" or "fixed" about the legal and policy categories associated with international migration.... [they] do not simply exist but rather are made' (p. 52).

19 R. Zetter, 'More Labels, Fewer Refugees', *supra* note 17; C. K. Meyer and S. Bol, 'Editorial: Categorising Migrants', *supra* note 10; S. Mezzadra and B. Neilson, *Border as Method, or, the Multiplication of Labo*r, Duke University Press: Durham and London, 2013, p. 144.

vs. economic migrants),[20] and legitimise certain narratives or moral labelling practices.[21]

Over the past 75 years, the ECtHR has explicitly and implicitly promoted the serialisation of migrants through stereotypes associated with dominant and opposing binaries of migrant categories. This serial production has, in recent years, contributed to the stigmatisation, vilification and undermining of the rights of refugees and migrants. Among these, the first dominant dual category refers to economic and regular/legal migrants, often perceived as genuine, welcome and inherently integrated. This category includes EU citizens (and their families) or 'born-national' citizens without an ethnic minority background. These groups are constructed as a 'norm-category', shaped by EU and national laws on freedom of movement, and are legally encouraged to be mobile.

A second widespread category encompasses the broad and fragmented group of racialised third-country nationals. This is a complex construct, comprising three subcategories. Firstly, the genuine refugee or asylum seeker is defined as a person who has left their country and is seeking protection from persecution and serious human rights violations in another country, but who has not yet been legally recognised as a refugee and is waiting to receive a decision on their asylum claim. Such individuals are often portrayed as passive, devoid of agency and autonomy. Secondly, the economic or family migrant is understood as a person who leaves their home country, with or without their family, to live in another country with better working or living conditions (a productive member of the social welfare system). This group is often depicted as the good migrant and the ideal citizen. Finally, the bogus, deceitful or opportunistic migrant or false asylum seeker: This subcategory includes migrants who are 'irregular, invulnerable, undocumented, rejected, or unwanted', whose mobility is considered immoral, abusive and risky, and, therefore, discouraged, restricted and persecuted.[22]

As a result of these dominant migrant categories, a confluence of binary classifications and serialised migrant subjectivities has emerged, such as 'legal/regular versus illegal/irregular', 'vulnerable versus invulnerable', 'genuine versus false citizen or migrant', 'social parasite versus *homo economicus*',

20 M. Collyer and H. De Haas, 'Developing Dynamic Categorisations', *supra* note 17; H. Crawley and D. Skleparis, 'Refugees, Migrants, Neither, Both', *supra* note 18; O. Bakewell 'Conceptualising Displacement and Migration', *supra* note 15.

21 M. Kmak, 'Between Citizen and Bogus Asylum Seeker: Management of Migration in the EU through the Technology of Morality', (2015) 21(4) *Social Identities*, pp. 403–406.

22 See S. Mezzadra and B. Neilson, *Border as Method*, *supra* note 19, p. 144 and the cited definitions in E. La Spina, 'The Legal Interpretation', *supra* note 16, p. 189.

'guilty versus innocent', 'welcome versus unwanted', 'integrated versus unintegrated', 'good versus bad migrant', 'criminal versus victim migrant'. Through stereotyped lenses, these categories appear as multiple facets of fragmented migrant and refugee subjectivities, as they remain interrelated and mutually dependent, even within judicial praxis.

On the one hand, asylum seekers or economic migrants must conform to passive and victimised narratives to be deemed deserving of international protection or be recognised as productive members of the social welfare system. These narratives are defined by the subjectivity of 'genuine asylum seekers', 'welcome refugees' or 'economic and integrated migrants'. This oppressive classification occasionally benefits those within the forced migration category, as their special status within the migrant population can alleviate migration controls and social scrutiny compared to the broader category of 'voluntary' migrants or *homo economicus* migrants, who are under permanent state scrutiny and control.[23]

An examination of the increasing serialisation of stereotyped categories in the ECtHR's case law reveals both direct and indirect examples, primarily based on the administrative status of migrants or asylum seekers.[24] In the following judgments, a dominant migrant category emerges: the 'irregular/illegal/undocumented migrant' (as opposed to the legal/regular migrant), often paired with the category of 'vulnerable/non-vulnerable'.

Firstly, in the substantial approach adopted by the Grand Chamber in *N.D. and N.T. v Spain,*[25] irregular entrants who did not use the border procedures available at designated entry points, including asylum seekers, can be immedi-

23 M. Kmak, 'Between Citizen and Bogus Asylum Seeker', *supra* note 21, p. 389: 'the European and national law arbitrarily codes migration and asylum flows and imposes particular forms of subjectivity on different groups of migrants through reference to risk … and to present themselves in a manner fitting into the victimisation narrative'.

24 E. Rigo, *La Straniera. Migrazioni, Asilo, Sfruttamento in una Prospettiva di Genere*, Carocci editore: Roma, 2022, p. 106.

25 ECtHR, *N.D. and N.T. v Spain,* no 8675/15 and 8697/15 [GC], 13.02.2020, paras. 135 and 204. See also the partly dissenting opinion of Judge Koskello at para. 26: 'I find it difficult to see why the States Parties should be expected to accept that, as a matter of principle, any persons about to penetrate their external borders must be treated as potential asylum seekers, and that nobody can be stopped and prevented from entry without individualised procedural safeguards, including persons whose hostile intentions are obvious …. A situation where the States Parties would no longer be able to respond to national security crises or incidents at their borders … appears neither reasonable nor very sensible.' And see also para. 41: 'Furthermore, it may be feared that the principles set out in the present judgment will create the risk of false incentives, namely by encouraging people smugglers to direct the flows of migrants to places that may best lend themselves to

ately returned. The effect of the serialisation of false or guilty migrant categories reinforced the distinction between refugees and non-refugees or between regular and irregular migrants, with regard to the protection guaranteed by Article 4 of Protocol No. 4. The Spanish Government had argued that the applicants' expulsion was a consequence of their own 'criminal conduct', in line with the Court's settled case law. The Grand Chamber concurred, stating that the applicants (Malian nationals) had tried to enter Spanish territory in an unauthorised manner[26] and had failed to demonstrate that they were unable to use the numerous legal procedures available to obtain permission to cross the border. Consequently, the Court questioned the vulnerability of adult migrants or asylum seekers, treating them as being all indistinguishably false migrants. In other words, the stereotyped categories of 'false vs. genuine' migrant established a presumption that serialised them all as suspect, irrespective of their actual circumstances. Following the case *H.A. and Others v Greece,*[27] on the inadequate detention conditions imposed on nine unaccompanied minors who had entered Greece irregularly, the Court was inclined to consider that only certain persons (such as unaccompanied children) were particularly vulnerable. However, it was reluctant to extend this recognition to irregular migrants as a whole group or to establish the characteristics that

arguing a lack of access to points of legal entry, thereby giving rise to excuses for the storming of borders by aliens quite regardless of whether the obligation of non-refoulement is engaged in their regard. Such developments in turn may have negative repercussions on attitudes among the public even towards those who actually do need protection under that principle.'

26 See section 25 para. 32 of Spain's Organic Law 4/ 2000 of 11 January 2000 on the Rights and Freedoms of Foreign Nationals in Spain and Their Social Integration (*Ley Orgánica 4/2000 de 11 de enero de 2000 sobre derechos y libertades de los extranjeros en España y su integración social*), BOE, nº 10, 12.01.2000. See also the Court's conclusions at para. 231: 'in the event that … the applicants … crossed the border in an unauthorised manner (in this instance taking advantage of their large numbers and using force), only the absence of cogent reasons … could lead to this being regarded as the consequence of the applicants' own conduct'.

27 ECtHR, *H.A. and Others v Greece*, no 19951/16, 28.02.2019. See also, the impact of migrant categories under the procedural approach in the decision of inadmissibility in ECtHR, *Albert Julio DOUMBE NNABUCHI v Spai*n, no 19420/15, 01.06.2021, para. 29: '[he] has failed to provide any credible evidence demonstrating at least that his nickname corresponds to the identity of Dany Williams, which both parties agree was the name of the person involved in the incident. The applicant has indeed contradicted himself in various aspects, and his account of the events differs from what can be deduced from those same videos', and in other inadmissibility decisions in cases concerning the entry, residence and removal of non-nationals (e.g., ECtHR, *Sisojeva and Others v Latvia*, no 60654/00 [GC], 15.01.2007, para. 89; ECtHR, *Ilias and Ahmed v Hungary*, no 47287/15 [GC], 21.11.2019, paras. 147 and 150).

constitute vulnerability. Instead, it limited itself to cautious observations on a generic conception of migrant vulnerability and emphasised the obligation of states to strike a balance between the protection of human rights and the imperatives of immigration policy.[28] Again, stereotyped categories of 'vulnerable', 'genuine' and 'regular' migrants interact to restrict protection by casting doubts on the vulnerability of all those who do not enter regularly. Through stereotyped categories, irregular entry activates a presumption of invulnerability that serialises all irregular migrants as non-vulnerable.

Secondly, migrants are also labelled 'vulnerable or invulnerable' based on their migrant status, administrative status or personal circumstances. The serialisation of stereotypes such as 'genuine', 'suspicious' and 'false' serves to differentiate between those considered desirable or deserving of protection and those perceived as undesirable or unwelcome. While the ECtHR has sought to identify certain particularly vulnerable groups within broader vulnerable populations – such as unaccompanied minors or foreign national children – it has not systematically organised these groups within migration contexts. The Court has consistently emphasised that the extreme vulnerability of children is the decisive factor taking precedence over considerations related to irregular immigration status. This principle has been reiterated in cases such as *Popov v France, Muskhadzhiyeva and Others v Belgium, Mubilanzila Mayeka and Kaniki Mitunga v Belgium, Rahimi v Greece and Kanagaratnam v Belgium.*[29] However, the criteria the Court has employed in practice to assess vulnerability in these cases have included evidence of traumatic migration

28 Thus, the loop reproduction of the false dichotomy between the stereotypical 'guilty irregular migrant' and 'false asylum seeker' if there is irregular entry provides explanatory support for the Grand Chamber's legal reasoning, which concluded that 'in the event that … the applicants … crossed the border in an unauthorised manner (in this instance taking advantage of their large numbers and using force), only the absence of cogent reasons … could lead to this being regarded as the consequence of the applicants' own conduct, justifying the fact that the Spanish border guards did not identify them individually' (ECtHR, *H.A. and others, supra* note 27, para. 211).

29 There are many examples of 'vulnerable or other special vulnerability' cases, focusing on detention conditions of minor refugees, or health risk of LGBTI asylum seekers. See, e.g., ECtHR, *Rahimi v Greece*, no 8687/08, 05.07.2011; ECtHR, *Tarakhel v Switzerland*, no 29217/12, 04.11.2014; ECtHR, *Sufi and Elmi v United Kingdom*, no 8319/07, 08.06.2011; ECtHR, *A.B. and Others v Finland*, no 41100/2019, 02.08.2019; ECtHR, *M.A. and Others v Lithuania*, no 59793/17, 11.03.2019; ECtHR, *VM. and Others v Belgium*, no 60125/11, 11.11.2016; ECtHR, *Kanagaratnam v Belgium*, no 15297/09, 13.12.2011; ECtHR, *Popov v France*, no 39472/07 and 39474/07, 19.01.2012; ECtHR, *A.B. and Others v France*, no 11593/12, 12.07.2016, paras. 11–115; ECtHR, *R.M. and Others v France*, no 33201/11, 12.07.2016, paras. 72–76; ECtHR, *A.M. v France*, no 24587/12, 12.07.2016, paras. 48–53; ECtHR, *R.K. and Others v France*, no 68264/14, 12.07.2016, paras. 68–726; ECtHR, *R.C.*

experiences, membership of historically discriminated groups, and full reliance on the vulnerability test by the state responsible for examining an asylum application. Consequently, another effect of serialisation is the broad interpretation of irregularity and the restrictive application of vulnerability recognition. The benefit of being classified as vulnerable is often limited to the specific precarious situations of migrant minors in host countries.

Moreover, the serialisation of the migrant worker category as *homo economicus* or economic denizens[30] – in opposition to bogus, passive, poor and opportunistic migrants[31] highlights the link between welfare policies, economic productivity and access to social rights in terms of effective equality. It also underscores the consequences of losing legal resident status within the migrant categorisation. Only someone in the *homo economicus* migrant category, who holds resident status, is generally perceived as having *carte blanche* access to social rights. Consequently, their prospects for integration are

---

and VC. v France, no 76491/14, 12.06.2016, paras. 36–40; ECtHR, *Abdullahi Elmi and Aweys Abubakar v Malta*, no 25794/13 and 28151/13, 22.02.2011; ECtHR, *Muskhadzhiyeva and Others v Belgium*, no 41442/07, 19.01.2010; ECtHR, *SHD and Others v Austria, Croatia, Macedonia, Serbia and Slovenia*, no 14165/16, 13.09.2019. On reception conditions: ECtHR *N.T.P. and Others v France,* no 68862/13, 24.08.2018; ECtHR, *R.R. and Others v Hungary*, no 36037/17, 02.03.2021. On health risk: ECtHR *Ahmed v Malt*e, no 55352/12, 09.12.2013; ECtHR, *Mahmundi v Greece*, no 14902/10, 24.01.2012; ECtHR, *Abdula and Others v Greece*, no 62782/16, 28.10.2016; ECtHR, *Tsarpelas v Greece*, no 74884/13, 26.04.2018, paras. 48–50; ECtHR, *Abdi Mahamud v Malta*, no 56796/13, 03.08.2016; ECtHR, *Bilalova and Others v Poland*, no 23685/14, 26.03.2020. On LGTBI asylum seekers: ECtHR *O M v Hungary*, no 9912/15, 05.07.2016.

30 Neoliberal economic models and the migrant policies have traditionally promoted a category of *homo economicus* as a rational, controllable and governable subject, see Foucault's biopolitical theory in M. Foucault, *Birth of Biopolitics: Lectures at the Collège de France, 1978–1979*, A.I. Davidson (ed.) and G. Burchell (trans.), Palgrave Macmillan: New York, 2008. For instance, the classic male role of the breadwinner or the *Gastarbeiter* (guest worker in German) exemplifies a governable, manageable and rational subject who seeks to maximise their utility for both monetary and non-monetary gains. This category represents the archetype of a well-considered migrant worker or an economic denizen, valued for their self-sufficiency and alignment with the economic interests and labour needs of the state. Such individuals are often granted permanent residential status without being naturalised, thereby remaining excluded from full citizenship rights. See Hammar's distinction between temporary foreign visitor/guest worker, denizen and citizen. T. Hammar, *Democracy and the Nation State: Aliens, Denizens, and Citizens in a World of International Migration*, Aldershot: Avebury. 1990.

31 The preservation of conditions in host societies increasingly requires legal protection from outsiders who are perceived as lacking the so-called 'right' values or who do not fully align with these economic values. Among others, see the reference to a bogus category in B. Anderson, *'Us and Them?',* Oxford University Press: Oxford, 2013, pp. 3–5 and in M. Kmak, 'Between Citizen and Bogus Asylum Seeker', *supra* note 21, p. 403.

higher, though these depend on reducing administrative status precarity by converting their initial residence permits into long-term or permanent resident legal status and/or successfully applying for family reunification or labour immigration. Both scenarios are strongly affected by the accreditation of social, economic and integration (depending on national laws) requirements and the proof of an economical and rational agency.[32] In fact, the lack of basic social and economic conditions or the risk of becoming a passive individual devoid of agency and autonomy questions the *homo economicus* migrant category through the serialisation of stereotypes such as the bogus, poor, opportunistic or social parasite migrant categories. The Strasbourg Court has contributed to the serialisation of the stereotype 'social parasite' or 'opportunistic migrant' category in various cases.[33] For instance, in *Bah v the United Kingdom,* Ms. Bah was denied social housing due to her son's immigration status. Her son, aged 13 or 14 at the time, had joined her in the UK and was granted leave to remain on condition that he would not have recourse to public funds. The Court ruled that the refusal of housing assistance based on his conditional immigration status resulted from the son's free decision to migrate and his mother's decision to take care of him.[34] In doing so, the Court differentiated between persons in priority need of social housing based on whether their immigration status prevented them from having recourse to public funds. Similarly, in *Abdulaziz, Cabales and Balkandali v*

32 Among others, see S. W. Goodman, 'Measurement and Interpretation Issues in Civic Integration Studies: A Rejoinder', (2012) 38(1) *Journal of Ethnic and Migration Studies*, pp. 173186; Y. Soysal, *Limits of Citizenship: Migrants and Postnational Membership in Europe*, University of Chicago: Chicago, 1994, p. 36.

33 ECtHR, *Bah v The United Kingdom*, no 56328/07, 27.09.2011; ECtHR *Gouri v France*, no 41069/11, 23.03.2011. In contrast, there was discrimination on grounds of national origin without 'weighty reasons' in ECtHR, *Koua Poirrez v France*, no 40892/98, 30.09.2003 (a case of refusal of a disability allowance on the grounds that the claimant was neither a national of the EU nor a French national); ECtHR, *Dhahbi v Italy*, no 17120/09, 08.04.2014 (a case of refusal of family allowance due to foreign nationality or temporary residence permit); ECtHR, *Rangelov v Germany*, no 5123/07, 22.03.2012 (a case of denial of access to a treatment programme for a foreign national).

34 ECtHR, *Bah, supra* note 33. The Court noted that the nature of the status upon which differential treatment was based weighed heavily in determining the scope of the margin of appreciation to be accorded to Contracting States (para. 47). Given the element of choice involved in immigration status, while differential treatment based on this ground must still be objectively and reasonably justifiable, the justification required will not be as weighty as in the case of a distinction based, e.g., on nationality (para. 47). The Court concluded that the differential treatment to which the applicant was subjected was reasonably and objectively justified (para. 52).

the United Kingdom,[35] the Court engaged in a stereotyping process of migrant workers, based on a stereotyped division of gender roles within the family. As explained below, this case established stricter conditions for husbands seeking to join their wives (of Asian descent) in the UK. The ECtHR accepted these measures under the ostensibly objective but stereotyped justification of (1) protecting the domestic labour market from perceived threats posed by male immigrants and (2) maintaining domestic order. This reasoning incidentally reinforced the narrative of 'bogus marriages' or opportunistic migrants.[36]

Finally, the controversial migrant categories of 'unintegrated' and 'well-integrated' migrants, as well as the notion of the 'genuine citizen', depend on the correlation between the rules for admission of members to the community (immigration and citizen policy and naturalisation rules) and the treatment and opportunities for social inclusion available to foreigners (political integration and equality strategies). However, the jurisprudence of the ECtHR reveals two serialisation tendencies of stereotyped categories concerning social integration. On the one hand, the Court has reiterated that some individuals arrive on temporary visas, asylum applications or illegally, subsequently start families, and use this situation as a *fait accompli* to secure legal residence, refugee protection or to avoid expulsion due to family ties. In fact, the majority of leading cases under Article 8 ECHR demonstrates that the Court appears to accept family dislocation as a consequence of individual choices, assuming that only de-naturalised parents (more frequently women than men) provoke family separation or integration challenge, and they are responsible for their free actions according to the 'elsewhere approach'.[37] On the other hand, the

35 ECtHR, *Abdulaziz, Cabales and Balkandali v the United Kingdom*, no 9214/80; 9473/81; 9474/81, 28.05.1985, para. 75.

36 See, among others, M. Bottero, 'Integration (of Immigrants) in the European Courts' Jurisprudence: Supporting a Pluralist and Rights-Based Paradigm?' (2023) 24 *Int. Migration & Integration*, pp. 1732–1736.

37 According to the 'elsewhere approach', the Court considered whether the applicants could or could not enjoy their right to family life elsewhere, namely, in their countries of origin. For instance, the ECtHR did not find any violation of Article 8 ECHR in the refusals by Switzerland and the Netherlands to grant reunification of Turkish and Moroccan children with their parents, Strasbourg took into account the already high degree of cultural and linguistic integration of the children concerned in their home country: see ECtHR, *Gül v Switzerland*, no 23218/94, 04.04.1995; ECtHR, *Ahmut v The Netherlands*, no 21702/93, 28.11.1996. However, the Court rejected the application of this approach in other cases involving refugees, emphasising the latter's intrinsically vulnerable position and the 'insurmountable obstacles' they would face in establishing family life in their country of origin. See, among others, ECtHR, *Mengesha Kimfe v Switzerland*, no 24404/05, 29.07.2010; ECtHR, *Tanda-Muzinga v France*, no 2260/10, 10.07.2014; ECtHR, *Mugenzi v*

Court has consistently developed measures to control or 'exclude' a specific profile of 'unwanted' parents with criminal records (the archetype of the 'bad father' or 'bad mother'), expecting irreproachable conduct from the applicants in the domestic proceedings.[38] Furthermore, the ECtHR has tended to prioritise the good behaviour of nationals born in the country over that of naturalised nationals or the so-called second-generation immigrants, who are perceived as having an integration deficit.[39] This reasoning is based on a stereotypical assumption of the inherent incompatibility of these categories, suggesting that settled immigrants are incapable of good parenting or achieving a high degree of integration. As a result, they remain 'imperfect' 'citizens' or even 'immigrants',[40] even if they or their born-national sons have not immigrated at all. Similarly, they are often considered unloving or incapable parents, even when they actively care for their children from a distance.

France, no 52701/09, 10.07.2014. Finally, the ECtHR has progressively modulated this approach since the *Abdulaziz* case, applying 'the most adequate means' test to determine whether relocation was the proper and proportional solution to ensure family life. Meanwhile, the Court's reasoning has incorporated the ambiguous 'best interest of the child' principle: see among others, ECtHR *Şen v The Netherlands*, no 31465/96, 21.12.2021, para. 37–40; ECtHR, *Tuquabo-Tekle and Others v The Netherlands*, no 60665/00, 1.12.2005.

38 E.g., see cases concerning the deportation of a foreign national from a Contracting State in which his child resided, which was not considered justified under Article 8 (ECtHR, *Berrehab v the Netherlands,* no 10730/84, 21.06.1988; ECtHR, *Moustaquim v Belgium*, no 12313/86, 18.02.1991). See also a case concerning the Swiss authorities' refusal to grant residence permits to the applicants' three children, who were born in Kosovo and entered Switzerland illegally. The authorities expelled the children to Kosovo, due to the parents' wrongful conduct, ECtHR, *Berisha v Switzerland*, no 948/12, 20.01.2014, paras. 41 and 61.

39 Some leading cases conveyed the idea that in order to be recognised as 'well-integrated' and enjoy the protection of Article 8 ECHR, a migrant should have stronger social, cultural and family ties with the host country than with the home country. For instance, ECtHR, *Cruz Varas v Swede*n, no 15576/89, 20.03.1991; ECtHR, *Beldjoudi v Franc*e, no 12083/86, 26.03.1992; ECtHR, *Dalia v France*, no 11444/1985, 19.02.1998; and ECtHR, *Ezzouhdi v France*, no 47160/1999, 13.02.2001. On gender roles and their impact on the adjudication of Article 8, see Section 3 and the cases ECtHR *Boultif v Switzerland*, no 54273/2000, 02.08.2001; ECtHR, *Yilmaz v Germany*, no 52853/99, 17.03.2003; and ECtHR, *Jeunesse v the Netherlands*, no 12738/10, 03.10.2014.

40 See Concurring Opinion of Judge Pinto de Albuquerque in ECtHR, *Biao v Denmark*, no 38590/10 [GC], 24.05.2016, para. 9, emphasising that throughout the judgment Biao was portrayed as a 'poorly integrated immigrant', namely, a Danish expatriate who 'speak[s] Danish at home, take[s] holidays in Denmark, read[s] Danish newspapers regularly and so on'.

3 Migrants' Rights and the Challenge of Intersectional Invisibility

Consolidated in social movements' practices and discourses, intersectionality has received mixed reactions and criticisms in academic fora, especially in legal studies. With few exceptions, lawmakers and law interpreters across Europe have remained indifferent to intersectionality or chosen implementation mechanisms that watered down its critical dimension.[41] Nonetheless, in the context of human rights and non-discrimination law, this concept has contributed several insights, which are particularly useful in analysing migrants' categorisation. First, intersectionality is a critique of categorisations, especially the ones underlying the grounds of discrimination. Categories of discrimination are exposed for being/assuming homogeneity and creating an inclusion/exclusion dynamic. In Crenshaw's analysis,[42] the fact that black women could not build their cases on either gender or racial discrimination was indicative of how both gender and race were shaped as exclusionary categories, as representative of some women (white) and some blacks (men). The second insight brought by intersectionality connects with the idea of invisibility and its opposite – the hyper-visibility of groups located at the intersection of inequality grounds. The interaction of inequalities (that is based on gender and race) produces an invisibility effect. While one of the regimes and its operations can emerge and be detected, the other remains invisible. Moreover, invisibility is instrumental in the mutual reinforcement of inequality grounds. This invisibility effect was observed, for example, in the cases of forced sterilisation of Roma women, where the racist dimension of this practice was mentioned (though it was dismissed), while the gender dimension was completely neglected.[43]

41 As *Bello* points out, it was only in 2017 that a Dissenting Opinion of Judges Pinto De Albuquerque and Vehabović in *Garib v the Netherlands* explained the scope of intersectional discrimination, in a case regarding the barriers experienced by a single mother relying on social benefits for accessing housing. B.G. Bello, N. Likke, P. Moreno-Cruz *et al.*, 'Doing Intersectionality in Explored and Unexplored Places', (2022) 11(22) *AG About Gender,* pp. 1–33, 25. In the EU, intersectionality has been mentioned in different soft law documents (e.g., the European Commission's Gender Equality Strategy 2020–2025), and in the recent Pay Transparency Directive (EU) 2023/970, but not yet applied in the reasoning of the Court of Justice of the European Union.

42 K. Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics', (1989) 139 *The University of Chicago Legal Forum,* pp. 139–167.

43 ECtHR, *V.C. v Slovakia*, no 18968/07, 08.11.2011. In this case, the Court found there was no evidence of an 'organised policy' or 'that the hospital staff's conduct was intentionally racially motivated' (para 170). Therefore, it did not find it relevant to assess a breach of Article 14. *Contra*: see the dissenting opinion of Judge Mijovic in the same judgment.

The ECtHR has not yet explicitly mentioned intersectionality in its anti-discrimination reasoning, nor has it developed on the potential interplay between intersectionality and stereotyped narratives, either in general or specifically with regard to migrants' rights. On the contrary, it has either emphasised the relevance of multiple (not intersecting) grounds of discrimination[44] or avoided engaging with intersectionality explicitly, preferring 'vulnerability' instead.[45]

Nonetheless, the dynamic of invisibility and hyper-visibility is particularly relevant in cases regarding migrants' right to family life, as it reflects the extent to which migrants' human rights are curtailed. When it comes to the intersection of gender and migrant background/racism, few judgments have identified the combined effects of both regimes. For example, in *B.S. v Spain,*[46] a case of racial profiling and racist remarks against a sex worker of African descent, the Court argued that 'the decisions made by the domestic courts failed to take account of the applicant's particular vulnerability inherent in her position as an African woman working as a prostitute'.[47] Gender and racist assumptions put B.S. in a position of hyper-visibility to repeated police inspections. Yet, neither gender nor race was a relevant aspect in the domestic court's assessment of police treatment, ultimately leading to the invisibility of the harms perpetrated against her.

B.S. and *Biao*[48] stand as exceptions, given that many cases regarding migrant categorisations are either dismissed as inadmissible or, at best, adjudi-

44 ECtHR, *Carvalho Pinto De Sousa Morais v Portugal*, no 17484/15, 25.07.2017. Ms Carvalho was a victim of medical malpractice. The domestic court decided to lower the amount of pecuniary damages, based on 'the assumption that sexuality is not as important for a fifty-year-old woman and mother of two children as for someone of a younger age' (para. 52). According to the Court, age and sex were decisive factors in the difference of treatment (para. 53). Strasbourg held that this assumption connected female sexuality to child-bearing purposes and that the domestic court had not assessed the assumption's validity in the specific case. Contra, see *J.L. v Italy*, a case of gender-based violence and re-victimisation, where sexist and bi-phobic assumptions played a role in the victim's judiciary treatment. While the Court mentioned the impact of prejudices as barriers to women's rights (para. 140), it did not discuss the impact of sexist and bi-phobic assumptions on the discriminatory treatment of the victim under Article 14. ECtHR, *J.L. v Italy*, no 5671/16, 27.05.2021, paras. 138–140.

45 ECtHR, *B.S. v Spain*, no 47159/08, 03.07.2012.

46 Ibid.

47 Ibid., para. 62. For a comment on this judgment, see K. Yoshida, 'Towards Intersectionality in the European Court of Human Rights: The Case of B.S. v Spain', (2013) 21 *Feminist Legal Studies,* pp. 195–204.

48 ECtHR, *Biao*, *supra* note 40. The Court found that the Danish law on family reunification constituted an indirect discrimination based on ethnic origin.

cated on as violations of a substantive human right. More frequently, the Court sidelines the analysis of discrimination through the formula 'there is no need to examine separately the complaint under Article 14'.[49] An alternative scenario is that discrimination is found to be objectively justified, as in the case of face-veil bans, which are also based on gender and racist stereotypes against Muslim women that impair their access to education, employment and public spaces.[50]

Despite the Court's reluctance to incorporate intersectionality, an intersectional approach could be beneficial for a thorough analysis of migrant categorisations and their serialising effects. In the examples below, invisibility and hyper-visibility are analysed to expose how migrants' human rights are routinely undermined, using intersectionality to shed light on this process. Stereotypes with intersecting dimensions have emerged in several domains (that is, child custody, gender-based persecution, reproductive rights), but this section focuses specifically on family reunification and non-separation/dislocation of family unity under Article 8 ECHR.

Already in the landmark case of *Abdulaziz, Cabales and Balkandali,*[51] mentioned above, it emerged how the discriminatory rule regarding family reunification was tied to gender roles and racist assumptions. The national provision determined a differential treatment between men and women who claimed reunification with their migrant partner, on the assumption that migrant women would pose a lesser threat than men to the domestic labour market. The rule was based on what the government considered a statistical fact, that 'men were more likely to seek work than women, with the result that male immigrants would have a greater impact than female immigrants on the said market'.[52] The norm was based on a clear gender (and racist) stereotype,[53] that of the male breadwinner and female housewife, reinforced by implicit

49 ECtHR, *M.A. v Denmark*, no 6697/18 [GC], 09.07.2021, para 197.

50 ECtHR, *S.A.S. v France*, no 43835/11[GC], 01.07.2014. See also ECtHR, *Dahlab v Switzerland*, 42393/98 42393/98, 15.02.2001; ECtHR, *Leyla Şahin v Turkey*, no 44774/98, 10.11.2005. In both judgments the Court explicitly upholds the ban based on the idea that Muslim women are oppressed. More recently, see ECtHR, *Mikyas and Others v Belgium*, no 50681/20, 09.04.2024 (inadmissible).

51 ECtHR, *Abdulaziz*, *supra* note 35.

52 Ibid., para. 75.

53 E. La Spina, 'Indirect Discrimination and Racist Stereotypes in the European Court of Human Rights' Case Law on Family Migration' (2021) *Diritto & Questioni Pubbliche*, pp. 31–54. The author also discusses the intersection of ethnic, racist and gender stereotypes of the *Biao* case.

assumptions on the inherently patriarchal nature of other cultures.[54] This stereotype created a barrier for settled wives in reuniting with their spouses, undermining their right to family life. Reasoning under Article 14, read in conjunction with Article 8, the Court found discrimination on grounds of sex, but not on grounds of race. This would be a first example of the invisibility created by intersecting forms of discrimination, which has a negative effect on the enjoyment of migrants' human rights.

Abdulaziz also introduced a consolidated principle in this field, by which Article 8 cannot be interpreted to impose on a state a general obligation to respect a migrant person's choice of country for their family life or to authorise family reunification on its territory.[55] In a case which concerns family life as well as immigration, a fair balance has to be struck between the competing interests of the state and the persons involved. Different factors and tests are taken into account in this context, depending on the type of case (admission, regularisation, expulsion) and the obligations it creates upon the state (positive/negative).[56] Some of the circumstances the Court considered to tip the balance against the applicant in these cases[57] hide stereotypical assumptions about migrants, the family model they should follow, and the gender roles attached to their family. However, they are presented as objective criteria to establish whether the state has positive or negative obligations under Article 8 in a given case.

54 The stereotyped categories implicitly in use in this case are the 'breadwinner vs. housekeeper' one, which maps onto the 'male vs. female' binary, and the 'western culture vs. foreign culture', which maps onto the 'civilised/human rights champions vs. barbaric' binary.

55 ECtHR, *Abdulaziz*, *supra* note 35, para. 68.

56 In all cases, the Court would need to strike a fair balance between the interests of the state and those of the individuals involved, but the application of different tests (i.e. the 'elsewhere test' and the 'exceptional circumstances test') undermines the fair balance exercise. For a thorough discussion of these differentiated criteria, see J. Edlund and V. Stehlík, 'Is the Assessment under Article 8 ECHR for Migrants Justifiable?' (2022) 29(1) *Maastricht Journal of European and Comparative Law,* pp. 100–117.

57 These circumstances are: 1) the creation of family life at a time when the persons involved were aware that the immigration status of one of them was precarious; 2) limited ties of the applicant to the host country (typical of short or illegal stays); 3) no insurmountable obstacles to the family living in the country of origin; 4) lack of sufficient independent and lasting income, other than welfare benefits, to support family members, as stated in ECtHR, *M.A.*, *supra* note 49, para. 134. See also ECtHR, *Rodrigues da Silva and Hoogkmer v the Netherlands*, no 50435/99, 31.01.2006, para. 39; ECtHR, *Jeunesse*, *supra* note 39, para. 107.

For example, under the 'elsewhere approach',[58] relocation (or dislocation of families)[59] to the country of origin, the default option to maintain family unity under the Court's interpretation, rests upon and reinforces stereotyped assumptions based on gender. In *Darren Omoregie,*[60] for example, relocation was based on the sacrifice of the insider family member, whose interests and ties to the member state are overshadowed in the balancing exercise. Mr Darren Omoregie, a Nigerian national, went to Norway in 2001 and applied for asylum. There, he formed a family with a Norwegian national, and the couple had a child in 2006. His asylum application was rejected, and he stayed unlawfully in the country. The applicant's unlawful stay in Norway and the fact that he formed a family despite his precarious circumstances played a key role in the judgment. However, the 'elsewhere approach' fundamentally rested on a cursory analysis of the insider's interests and sacrifices imposed on her.[61] The Court acknowledged that the insider partner might experience some difficulties in settling in Nigeria, but did not find any insurmountable obstacles to moving there or visiting the applicant occasionally.[62] While the Court presents this as a choice dependent upon the partner, it reinforces the stereotype of the 'good mother' who sacrifices herself, her interests, job and social ties for the family. Absent is any consideration as to the father's role and the care he would provide. The insider partner is made invisible,[63] but her choice to form a family with a migrant also puts her under the light of hyper-visibility, as a non-deserving citizen who engaged in immoral behaviour. In this case, gender roles are instrumental to the pursuit of immigration control and have

58 G. Milios, 'The Immigrants' and Refugees' Right to "Family Life": How Relevant are the Principles Applied by the European Court of Human Rights?', (2018) 25 *International Journal on Minority and Group Rights*, pp. 401–430; E. Ghidoni, '"Elsewhere, Not Here": The Right to Respect for Family Life between Gender Stereotypes and Anti-migrant Policies', (2021) 10 *AG About Gender*, pp. 117–142. See also *supra* note 37.

59 M. B. Dembour, *When Humans Become Migrants. Study of the European Court of Human Rights with an Inter-American Counterpoint*, Oxford University Press: Oxford, 2015, p. 97.

60 ECtHR, *Darren Omoregie and Others v Norway*, no 265/07, 31.07.2008. See also ECtHR, *Nunez v Norway*, no 55597/09, 28.06.2011, and ECtHR, *Rodrigues da Silva*, *supra* note 57.

61 B. De Hart, 'Love Thy Neighbour: Family Reunification and the Rights of Insiders', (2009) 11 *European Journal of Migration and Law*, pp. 235–252.

62 ECtHR, *Darren Omoregie*, *supra* note 60, para. 66.

63 This contradicts the Court's original interpretation of Article 8 in *Abdulaziz*, where family reunification is about the interest of the insider to be joined by their migrant family members. The insider's interest should be prominent. Nevertheless, it is the migrant's interests that are more often assessed. See J. Edlund and V. Stehlík, 'Is the Assessment under Article 8 ECHR for Migrants Justifiable?' *supra* note 56, p. 114.

the ultimate effect of undermining migrants' family unity.[64] However, in some cases involving a male insider reuniting with a migrant woman performing a caring role, the Court's assessment has led to granting family reunification.[65]

Another factor, the income requirement, clearly results in discrimination against (certain) migrants on grounds of race and/or gender. Migrants with low economic resources, and those performing caring roles that prevent them from engaging in full time waged labour, clearly face structural barriers in complying with this requirement. The latter obliterates racial discrimination and legal barriers in accessing the labour market, housing and other rights and services, which are often instrumental to reunification applications, as well as the lengthy and expensive processes to get their education and professional qualifications recognised in the host country.[66] It also negates the barriers connected to the gender pay gap and the unequal division of care, which clearly affects women when it comes to access to the labour market, the jobs available to them, and their wages. This was the case in *Haydarie v the Netherlands*,[67] where an Afghan woman legally residing in the Netherlands with a permanent residence permit had no sufficient independent and lasting income to comply with reunification rules in the Netherlands. In particular, she relied on welfare benefits, which were not considered independent income to cover the costs of the subsistence of her three children with whom she sought reunification. In assessing whether a fair balance between the state's interests and the applicant's was struck, the Court engaged with gender stereotyping. According to the Court, Mrs Haydarie 'preferred to care for her wheel-chair bound sister at home', instead of entrusting her care to an agency and seeking gainful employment as soon as she got the work permit in the country. Not only is Mrs Haydarie stereotyped as a lazy person, but care is

64 See also ECtHR, *Kazim Useinov v the Netherlands*, no 61292/00, 11.04.2006 (inadmissible). *Contra*, see ECtHR, *Boultif, supra* note 39. In the case of migrant mothers who break immigration law, see ECtHR, *Nunez*, *supra* note 60; ECtHR, *Rodrigues da Silva*, *supra* note 57.

65 ECtHR, *Rodrigues da Silva*, supra note 57, and in ECtHR, *Jeunesse*, supra note 39.

66 European Union Fundamental Rights Agency, 'Being Black in the EU – Experiences of People of African Descent' 2024, available at https://fra.europa.eu/sites/default/files/fra_uploads/fra-2023-being-black_in_the_eu_en.pdf, last accessed on 05.03.2025. The results of this survey show that there has been no improvement compared to the 2016 survey. On the contrary, greater levels of discrimination were reported in several domains (policing, housing, education and employment, among others).

67 ECtHR, *Marjam Popal Haydarie and Others v the Netherlands*, no 8876/04, 20.10.2005 (inadmissible). For a more recent case on the income requirement imposed in family reunification procedures, see ECtHR, *Dabo v Sweden*, no 12510/18, 18.01.2024; ECtHR, *B.F. and Others v Switzerland*, nos 13258/18 and three others, 04.07.2023.

also assumed to be a relaxing activity that she chose willingly despite having alternative options. From one side, Haydarie is made hyper-visible as an unfit worker, but the barriers that put her in this situation remain invisible. The income requirement is treated as an objective parameter, independent of race and gender, which remain overshadowed. As a migrant woman being responsible for caring for her sister, Mrs Haydarie's right to reunite with her family is unreasonably denied because of how she is categorised, based on gender and racist assumptions. A tension emerged here between gender roles and the standard of the deserving migrant as a productive subject (the *homo economicus* category).

Similarly, migrant mothers who claim reunification with their children become hyper-visible as abnormal mothers. In several cases involving single mothers claiming reunification with their children,[68] the Court missed a chance to discuss again how gender roles shape the notion of family, the conditions under which family ties are considered broken, and what is expected from a migrant mother in order to have her family unity restored. Not only was this a missed opportunity for the Court, but the latter explicitly engaged in stereotyping the mothers' behaviour as not conforming to the 'good mother standard'. Their invisibility as human rights holders was thus produced by the intersection of racist and sexist stereotypes.[69] For example, the Court negatively assessed the mother's decision to migrate, leaving behind her child, the child's age and need of care, the time elapsed before lodging the reunification request, and the fact that she had met a new partner in the host state. Overall, the very decision to migrate is held against her as an act of abandonment, all the more so if the mother met a new partner in the country of arrival, another sign that she had broken the ties with her child. Such elements are not discussed in the case of single fathers or couples that seek reunification with their children. On the contrary, the 'elsewhere approach' is imposed on women not as a sacrifice but as an implicit (maternal) duty, whereas for single fathers the Court acknowledged that it would be 'unreasonable to give the parent the choice between giving up the position which she/he has acquired in the country of settlement or to renounce the mutual enjoyment by parent and child of

68 ECtHR, *Knel and Veira v the Netherlands*, no 39003/07, 05.09.2000 (inadmissible); ECtHR, *P.R. v the Netherlands*, no 39391/98, 07.11.2000 (inadmissible); ECtHR, *I.M. v the Netherlands*, no 41226/98, 25.03.2003 (inadmissible); ECtHR, *Ramos Andrade v the Netherlands*, no 53675/00, 6.07.2004 (inadmissible).

69 *Contra* see ECtHR, *Sen*, *supra* note 37, and the case of single fathers reuniting with their children, where the Court did not engage in gender stereotyping. For a comment on this case law, see F. Staiano, 'Good Mothers, Bad Mothers', *supra* note 17.

each other's company which constitutes a fundamental element of family life'.[70] While in this case law, neither single mothers nor single fathers succeeded in having their complaints admitted, it is significant that the reasoning behind the decisions was built on gender roles and expectations about parenting and self-sacrifice. Such standards reflect racist expectations about the life choices of migrant families and contribute to making them invisible as human rights bearers and hyper-visible as 'bad parents'.

4 Stereotyped Narratives of Vulnerability as Limitations to Anti-discrimination Protection

The right not to be discriminated against has been subject to dynamic interpretation by the ECtHR, largely due to the fact that the prohibition of discrimination under Article 14 is not confined to specific categories. Instead, it provides a non-exhaustive list of examples (such as …) followed by an open-ended clause (or other status). Consequently, unlike in EU law, the prohibition of discrimination under the ECHR encompasses a broader and more flexible range of potential grounds.

The concept of vulnerability was welcomed as a promising tool in this context, as it was considered to expand the scope of protection under the anti-discrimination prohibition.[71] This development was deemed particularly significant for groups suffering intersectional discrimination, as well as for those who did not clearly fall within the explicitly listed grounds of discrimination and were forced to rely on the 'other status' clause of Article 14 ECHR.[72] Vulnerability thus emerged as (another) mechanism to advance substantive equality, moving beyond formal equality.[73]

However, the use of vulnerability as an interpretative tool has not been without criticism. It has been argued that framing individuals or groups as vulnerable

70 ECtHR *Lahnifi v the Netherlands*, no 39329/98, 13.02.2001 (inadmissible).

71 L. Peroni and A. Timmer, 'Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Law', (2013) 11 *International Journal of Constitutional Law*, pp. 1056–1085; O.M. Arnardóttir, 'Vulnerability under Article 14 of the European Convention on Human Rights. Innovation or Business as Usual?' (2017) 4(3) *Oslo Law Review*, pp. 150–171.

72 L. Peroni and A. Timmer, 'Vulnerable Groups: The Promise', *supra* note 71.

73 S. Fredman, 'Emerging from the Shadows: Substantive Equality and Article 14 of the European Convention on Human Rights', (2016) 16 *Human Rights Law Review* pp. 273–301.

risks portraying them as helpless or pathological, rather than as rights-holders.[74] Moreover, the vulnerable group approach has been criticised for obscuring structural inequalities by attributing the deviation from equality to the inherent characteristics of the individuals within the vulnerable group themselves rather than to systemic issues.[75] As such, it is crucial critically to assess whether vulnerability arguments genuinely enhance anti-discrimination cases and to evaluate their broader implications for anti-discrimination reasoning.

In the context of migrants, this concept of vulnerability may appear appealing, as the application of the anti-discrimination clause to migrant status has faced significant challenges. Migrant status is problematic as a ground for discrimination: under international law, and states are not generally required to treat migrants (aliens) in the same way as their own citizens, although migrants are entitled to the rights in the ECHR, and states are obliged to protect the rights of all individuals within their jurisdictions. Issues of discrimination against migrants in relation to Convention rights are typically examined under the ground of 'nationality'. In *Gaygusuz v Austria*, the Court established that different treatment based on nationality requires 'very weighty reasons' to be justified.[76] Similarly, in *Biao v Denmark*, the Court considered nationality as a suspect ground of discrimination, demanding 'very weighty reasons' to permit differential treatment.[77]

Nevertheless, the Court has confined its Article 14 case law on nationality mainly to situations involving legally resident aliens in limited areas while permitting various other forms of differential treatment based on nationality.[78] Especially, in *Ponomariovy v Ukraine,* the Court acknowledged that states may have legitimate reasons for treating short-term and illegal (*sic*) migrants differently and that states may justifiably differentiate between categories of aliens, as in distinguishing between nationals of EU Member States and third-country nationals.[79] This creates a paradox in the relationship between anti-discrimination protection and vulnerability in the field of immigration, where applicants with more secure legal status, which makes them less vulnerable,

74 A. Timmer, 'A Quiet Revolution: Vulnerability in the European Court of Human Rights', in M.A. Fineman and A. Grear (eds.), *Vulnerability. Reflections on a New Ethical Foundation for Law and Politics*, Ashgate: Farnham/Burlington, 2013, pp. 147–170.

75 D. Morondo Taramundi, '¿Un nuevo paradigma para la igualdad? La vulnerabilidad entre condición humana y situación de indefensión', (2016) 34 *Cuadernos Electrónicos de Filosofía del Derecho*, pp. 205–221.

76 ECtHR, *Gaygusuz v Austria*, no 17371/90, 16.09.1996, para. 42.

77 ECtHR, *Biao*, *supra* note 40, para. 93.

78 M-B. Dembour, *When Humans Become Migrants*, *supra* note 59.

79 ECtHR, *Ponomaryovi v Ukraine*, no 5335/05, 21.06.2011, para. 55.

are better positioned successfully to claim the protection of Article 14 than migrants with a precarious status, and, therefore, are more at risk of rights violations.[80]

A further limitation in the Court's case law is its failure adequately to address the fact that differential treatment of certain migrants, while formally categorised under the ground of nationality, is often materially linked to race or ethnic origin, or ethnicised understandings of religion. This distinction is significant because the ECtHR's anti-discrimination doctrine does not treat all grounds of discrimination equally. Discrimination grounds can be considered 'as running along a spectrum':[81] for identity grounds – those pertaining to inherent personal characteristics or deeply held convictions and beliefs – the reversal of the burden of proof is almost automatic, as comparability is presumed, and the state's margin of appreciation is very narrow. From there, a 'sliding scale of increasingly lenient review'[82] applies to other discriminatory grounds, where applicants must demonstrate comparability, the margin of appreciation afforded to states is broader, and objective and reasonable justifications for differential treatment are more frequently accepted.

The Court has not consistently confronted the racist and xenophobic undertones in the treatment of some migrants, which would lead to stricter scrutiny. For example, in *Makhashevy v Russia*, the Court found that 'racial prejudice was a causal factor' in the police's beating of Chechen detainees and the subsequent lack of investigation, leading to a violation of Article 3 in conjunction with Article 14, both substantively and procedurally.[83] Similarly, in *B.S. v Spain*, the Court found a procedural violation of Article 14 in conjunction with Article 3 due to the failure to investigate the degrading treatment of an immigrant sex worker by the police.[84] However, these are the exceptions. In most cases involving racialised migrants, Article 14 is dismissed or not even invoked. For example, in *M. and Others v Italy and Bulgaria*, the Court did not find a violation of Article 14 despite the lack of an effective police investigation into serious crimes involving a Roma migrant girl and the use of stereotyped reasoning by Italian courts.[85]

80 See further, M. Baumgärtel and S. Ganty, 'On the Basis of Migratory Vulnerability: Augmenting Article 14 of the European Convention on Human Rights in the Context of Migration', (2024) 20 *International Journal of Law in Context*, pp. 92–112.

81 O.M. Arnardóttir (2017), 'Vulnerability under Article 14', *supra* note 71, p. 155.

82 Ibid.

83 ECtHR, *Makhashevy v Russia*, no 20546/07, 31.07.2012.

84 ECtHR, *B.S., supra* note 45.

85 ECtHR, *M. and Others v Italy and Bulgaria*, no 40020/03, 31.07.2012.

The concept of vulnerability exhibits significant variations in the jurisprudence of the ECtHR, both within and beyond the framework of anti-discrimination doctrine, particularly in cases involving migrants. We cannot go here into a detailed examination of the Court's use of the concept of vulnerability.[86] For this discussion, it is sufficient to note that the Court has generally adopted a broader approach to vulnerability outside the scope of Article 14 of the ECHR. In such instances, vulnerability is often grounded in the precarious circumstances of individuals rather than their membership of specific identity-based groups. For example, in cases concerning migrants, the Court has recognised, within the framework of Article 3, the *prima facie* vulnerability of asylum seekers.[87] In this context, vulnerability has been employed to extend the Court's protective reach, such as by facilitating access to justice through procedural accommodations for vulnerable claimants – similar to those afforded to children or persons with disabilities. In substantive rights analysis, vulnerability has functioned as an equity-based tool, prioritising contextual justice over strict textual interpretation or adherence to precedent.[88]

However, within the ambit of Article 14, the application of the vulnerability argument is more circumscribed. It tends to focus on specific sub-groups within categories defined by the prohibited grounds of discrimination.[89] In its case law, the Court has occasionally invoked vulnerability as a condition of precarity, extreme deprivation or helplessness, portraying individuals as victims of their circumstances and thereby warranting enhanced or special protection. While this approach may underscore the need for special consideration, it can also obscure the structural dimensions of discrimination at play. Narratives of vulnerability often align with victimhood discourses, which centre on the individual's plight while diverting attention from the systemic nature of the discrimination they face.

---

86 Beyond the literature already cited, see R. Chenal, 'La Definizione della Nozione di Vulnerabilità e la Tutela dei Diritti Fondamentali', (2018) 2 (luglio-dicembre 2018) *Ars Interpretandi*, pp. 35–55; S.Y. Kim, 'Les Vulnérables: Evaluating the Vulnerability Criterion in Article 14 Cases by the European Court of Human Rights', (2021) 41 *Legal Studies*, pp. 617–632; M.V. Catanzariti, 'The Juridification of Vulnerability in the European Legal Culture', (2022) 12(6) *Oñati Socio-legal Series*, pp. 1391–1416; A. Limante, 'Protecting Vulnerable Groups in Europe: Highlights from Recent Case Law of the European Court of Human Rights' (2024) 28(4) *The International Journal of Human Rights*, pp. 671–688.

87 ECtHR, *M.S.S. v Belgium and Greece*, no 30696 [GC], 21.01.2011, and the cases referred to *supra* in note 30.

88 R. Chenal, 'La Definizione della Nozione', *supra* note 86; L. Peroni and A. Timmer, 'Vulnerable Groups: The Promise', *supra* note 72; O.M. Arnardóttir, 'Vulnerability under Article 14', *supra* note 71.

89 O.M. Arnardóttir (2017), 'Vulnerability under Article 14', *supra* note 71.

Stereotypes of vulnerability as a state of precarity or incapacity can further complicate the recognition of discrimination, particularly when claimants deviate from these stereotypical portrayals by demonstrating agency or autonomy. This can lead to problematic reasoning, such as the inference that 'since they are not vulnerable, they are not discriminated against'. A notable example of this dynamic can be observed in cases involving women who are victims of gender-based violence or domestic violence and who seek to avoid deportation after their asylum applications have been denied. A 2018 study by Peroni revealed that the majority of the 29 cases involving gender-based violence as grounds to avoid deportation were dismissed by the Court, often based on stereotyped perceptions of victims of gender-based violence.[90] While the Court did not dispute the violence experienced by these women, it declined to grant them protection also because they did not conform to the stereotypical image of vulnerability: they had shown either knowledge, resourcefulness or determination. For instance, in *A.A. v Sweden*,[91] the Court did not assess the protection needs of a woman and her children fleeing a violent father and husband in the light of their home country's capacity to safeguard them. Instead, it emphasised that the woman had 'shown proof of independence by going to court in Yemen on several occasions to file for divorce from X and also shown strength by obtaining the necessary practical and financial means to leave Yemen'.[92] Similarly, in *Collins and Akaziebie v Sweden*,[93] rather than examining the gendered barriers to justice and protection in her home country, the Court focused on the applicant's unlikeness to the stereotype of a vulnerable victim: she too had shown 'a considerable amount of strength and independence', had gone to school for 12 years, had managed to secure the means to escape abroad and to apply for asylum.[94]

A similar pattern emerges in cases such as *N.D. and N.T. v Spain*,[95] where the evident vulnerability and precarity of individuals who undertake perilous journeys – often fleeing violence and deprivation – fail to meet the threshold imposed by the vulnerability/victim narrative. This narrative presupposes not only a desperate situation but also a passive or resigned response to it, which is incompatible with acts such as breaching border controls. In such instances,

90 L. Peroni, 'The Protection of Women Asylum Seekers under the European Convention on Human Rights: Unearthing the Gendered Roots of Harm', (2018) 18(2) *Human Rights Law Review*, pp. 347–370.

91 ECtHR, *A.A. and Others v Sweden*, no 14499/09, 28.06.2012.

92 Ibid., para. 83.

93 ECtHR, *Collins and Akaziebie v Sweden,* no 23944/05 (Admissibility), 08.03.2007.

94 Ibid., pp. 13–14.

95 ECtHR, *N.D. and N.T., supra* note 25.

the violation of legal norms shifts the focus from vulnerability to the narrative of 'bogus refugees' or 'criminal and dangerous migrants', undermining the applicants' claims for protection and obscuring the racist practices for restricting access to legal entry points.

In the context of migration, stereotypes of vulnerability thus serve as a filter for protection claims, permitting only those individuals in the most extreme circumstances to qualify. In these cases, the violence endured by the applicants, their treatment by authorities in European countries, or the arguments presented before the ECtHR are not subjected to anti-discrimination or anti-stereotyping analysis. Even when Article 14 ECHR has been invoked, stereotypes can obstruct the recognition of discrimination. For example, in *M. and Others v Italy and Bulgaria*,[96] an immigrant Roma girl was allegedly forced into marriage, raped, physically abused and coerced into participating in criminal activities. Although the Italian police rescued the girl, they conducted a superficial investigation and accused her and her family of fabricating their claims. While the Italian courts dismissed the charges against the girl and her family, they declined to prosecute the other parties involved, justifying their actions as disagreements in the context of a Roma marriage. The ECtHR found that the Italian authorities' failure to conduct an effective and timely investigation violated the ECHR. However, it did not recognise the discriminatory harm arising from the intersectional stereotypes employed by the Italian authorities, such as the dismissal of Roma women's credibility when reporting serious crimes (Roma people are stereotyped as criminals and liars), the notion of 'Roma marriage' (the racist assumption that non-Western cultures are inherently patriarchal, which works to trivialise the violence perpetrated within them as 'natural' and a 'private matter'), and the general lack of credibility afforded to women reporting gender-based violence (women are stereotyped as 'pathological liars' or 'false victims'). Consequently, the Court ruled that Article 14 had not been violated,[97] as no explicitly racist or derogatory language had been used.

5 Conclusions

Over the last decades, the ECtHR has expanded its non-discrimination jurisprudence in several domains and introduced an anti-stereotyping approach which prohibits the use of these discriminatory narratives as justifications for

96 ECtHR, *M. and Others*, *supra* note 85.

97 *Contra*, see the dissenting opinion of Judge Kalaydjieva in the judgment.

unequal treatment. Nevertheless, these achievements have not been consistently applied to all discriminated groups. In particular, the protection of the human rights of migrants and the recognition of their subjectivity have often taken a back seat within the ECtHR's anti-discrimination doctrine. In fact, the Court's reasoning has, at times, contributed to the reproduction of various stereotypes, particularly in the context of specific forms of unwanted human mobility. For instance, the level of protection afforded to forced vs voluntary migrants, or to regular vs irregular migrants has been different, due to the application of a 'norm-category' (for instance the integrated migrant, well-behaved and productive, or the recognised refugee) which implies the rejection of the correlated negative category (for instance the unintegrated migrant, the culturally suspicious, the unproductive/parasite, the bogus refugee or asylum seeker). These narratives are based on the unquestioned prevalence attached to the states' interests listed in Article 8(2) ECHR, such as the economic wellbeing of the country, including the protection of the labour market, national security or the protection of morals.

Categorisation is an inherent and unavoidable process in law; however, it is crucial that categories are not constructed on the basis of stereotypes. When they are, such categories inevitably reproduce the hierarchies embedded in the stereotypes they rely upon, thereby lowering the level of or obstructing the protection of migrants' human rights. This contribution has focused on three aspects of stereotyped narratives in ECtHR cases concerning migrants. First, it has explored how stereotypes influence the serialisation of migrants as indiscernible members of the homogenous and static categories of migration law and policies. Second, it has highlighted how these categories are structured around intersectional positions of relative power and inequality, requiring an analysis through an intersectional lens. Third, it has demonstrated how tools intended for enhancing the protection of (substantive) equality law – such as the concept of vulnerability – can be co-opted by stereotypes unless a proactive anti-stereotyping approach is adopted.

Over time, stereotyped narratives have come to play a leading role in shaping legal categories, yet they are seldom analysed in legal reasoning. Our analysis highlights some of the limitations of the non-discrimination jurisprudence in the context of migrants' protection under the ECHR. In this contribution we have argued that, since stereotypes are forms of discrimination, these narratives must be exposed and challenged – particularly when they obscure human rights violations or undermine the individual and collective dimensions of discrimination against migrants.

Stereotypes linked to dominant narratives of migration are remarkably resilient, especially if their justificatory function is concealed behind the

assumption of a rational or objective argumentative reasoning. To strengthen the protection of migrants' human rights in Europe, the ECtHR must actively identify and address stereotypes in the arguments presented before it, engaging rigorously with anti-stereotyping reasoning. It is essential to evaluate critically how stereotypes set the parameters for legal discussions, often through dichotomous categorisations that fail to reflect the complex realities of migration experiences. These categorisations may, instead, rely on circumstances that do not constitute legitimate aims (such as racial prejudice against migrant families seeking reunification in Europe) or are disproportionate (such as border control policies that exacerbate the number of deaths at sea, or narrow interpretations of 'fear of persecution' that fail to prevent the deportation of individuals to countries where their safety is not effectively guaranteed). The Court also needs to confront the challenges posed by intersectionality, particularly in relation to discrimination and inequality. It should be cautious in its use of the concept of vulnerability, ensuring that it does not reduce individuals to passive victims or obscure the structural dimensions of inequality and violence, thereby reducing the scope of protection of Article 14 ECHR.

The Evolving Role of the European Convention on Human Rights in Preventing, Protecting against and Punishing Domestic Abuse

Stevie Martin

Abstract

This chapter critically examines the evolving jurisprudence of the European Court of Human Rights (ECtHR) in relation to domestic abuse and the interpretative expansion of the European Convention on Human Rights (ECHR) in this context. It traces the Court's shift towards a more nuanced and gender-sensitive understanding of domestic abuse as a cyclical and often escalating form of abuse that predominantly affects women. The paper analyses the Court's gradual modification of the state's positive obligations under Articles 2 ECHR – particularly by requiring states to undertake autonomous, proactive and comprehensive lethality risk assessments in the context of domestic abuse. The influence of the Istanbul Convention and the work of the Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO) in shaping the ECtHR's domestic abuse jurisprudence is also considered, particularly insofar as it has been relied upon by the ECtHR to refine its interpretation and application of the ECHR to cases involving domestic abuse. The paper argues that while the Court has made substantial progress, notable deficiencies remain, particularly in the classification of abuse (including cyberviolence) under Article 3 and the recognition of suicidality among domestic abuse victims as engaging the state's protective obligations under Article 2. The analysis underscores the need for the ECtHR to continue to adopt a gender-sensitive interpretation of the ECHR to ensure that the Convention's protections are both practical and effective for victims and survivors of domestic abuse.

1 Introduction

A man subjects his partner to a campaign of violence, both physical and psychological, with injuries resulting in the loss of a pregnancy. Domestic law does not criminalise the conduct, and authorities take no steps to protect the woman despite being aware of the perpetrator's abuse.[1]

1 ECtHR, *Volodina v Russia*, no 41261/17, 09.07.2019.

© STEVIE MARTIN, 2026 | DOI:10.1163/9789004751026_007
This is an open access chapter distributed under the terms of the CC-BY-NC-ND 4.0 license.

In the presence of her former husband (who had been the subject of six restraining orders), a woman falls from her fifth-floor apartment, ultimately succumbing to her injuries. Her former husband had subjected her to years of physical and psychological abuse.[2]

A father murders his son before taking his own life. The mother had made repeated reports of domestic abuse by her former partner, but authorities had failed to consider the risk of violence towards the children of the relationship.[3]

A woman is founded hanged in the bathroom of her former partner's home. During the four years preceding her death, she had contacted police on at least 16 occasions. Investigations into potential negligence by police were pending almost five years later.[4]

A woman is shot by her former husband – a police officer – in the context of a history of domestic abuse. The authorities failed to act on reports of violence and harassment, with evidence suggesting the perpetrator's position as a police officer may have played a role in the authorities' complacency (and, arguably, complicity).[5]

A woman's former intimate partner subjects her to a campaign of harassment, including the dissemination online of intimate photos of her without her consent (otherwise known as 'revenge porn').[6]

A father kills his son and attempts to kill his partner (the mother). The mother had made repeated reports to the police about the father's violence, but the authorities had failed to conduct an autonomous or proactive risk assessment and, thus, failed to take protective measures in respect of either the mother or her children.[7]

These cases – a drop in the ocean of complaints before the European Court of Human Rights (ECtHR) concerning domestic abuse[8] – are illustrative not only of the various forms of abuse perpetrated in the domestic context (and

2 ECtHR, *Vieru v the Republic of Moldova*, no 17106/18, 19.11.2024.

3 ECtHR, *Kurt v Austria*, no 62903/15 [GC], 15.06.2021.

4 ECtHR, *Gaidukevich v Georgia*, no 38650/18, 15.06.2023.

5 ECtHR, *A and B v Georgia*, no 73975/16, 10.02.2022.

6 ECtHR, *M.Ş.D v Romania*, no 28935/21, 03.12.2024. See also, ECtHR, *Volodina v Russia* (*No 2*), no 40419/19, 14.09.2021.

7 ECtHR, *Landi v Italy*, no 10929/19, 07.04.2022.

8 While the Court uses the term 'domestic violence', unless necessary accurately to reflect the content of judgments or other materials, this paper refers to 'domestic abuse' to reflect the fact that abuse in the domestic context (i.e. between spouses (current and former), parents and children and so on) includes, but is not limited to, physical violence or threats of such

primarily against women[9]) but also of the continuing failure of Contracting States adequately to address domestic abuse, which has been described by the World Health Organisation (WHO) as 'a major public health problem and a violation of women's human rights'.[10] To give an indication of the level of the problem, the first wave of the European Union's study into domestic abuse revealed that 17.7 per cent of women surveyed had experienced physical (including threats) or sexual violence by an intimate partner and 14.1 per cent

violence. Domestic abuse includes psychological abuse, such as coercive and controlling behaviour, cyberviolence (including, for instance, revenge pornography), economic and social isolation and control, immigration abuse (for instance, threatening to revoke support for visas), sexual harassment, stalking and so on. The issues associated with using the terminology of 'violence' were recently illuminated in the separate dissenting opinion of Judge Von Werdt (joined by Judge Mourou-Vikström) in ECtHR, *N.D. v Switzerland*, no 56114/18, 03.04.2025 in which the Judge appears to conclude that there was no real and immediate risk to life from domestic violence because the perpetrator (who raped, strangled and shot the applicant – his former partner – three times with a crossbow) had last committed an act of physical violence against a woman (which entailed rape and murder) more than a decade prior to his assault on the applicant. In so concluding, the Judge appears to have overlooked the fact that, shortly before commencing a relationship with the applicant, the perpetrator had been remanded in custody in relation to criminal proceedings stemming from threats, coercion, misuse of a telecommunications system and defamation of his former partner (which would meet the definition of domestic abuse and, indeed, of 'domestic violence' adopted in Directive (EU) 2024/1385 of the European Parliament and of the Council of 14 May 2024 on combating violence against women and domestic violence, OJ L, 24.5.2024). Further, while the applicant had informed police that the perpetrator was constantly harassing her by telephone and text messages, behaviour which was recorded by police as 'stalking', Judge Von Werdt placed considerable emphasis on the absence of allegations of physical violence in concluding that there was no real and immediate threat to the applicant's life of which the authorities were or ought to have been aware, such as to engage the state's obligations under Article 2 of the European Convention on Human Rights (ECHR) (see, for instance paras. 6 and 7 of the dissenting opinion). The Judge's emphasis on the lack of physical violence plainly fails to appreciate the nature of domestic abuse, particularly its tendency to escalate, as has been recognised by the Court elsewhere (see, for instance, ECtHR, *Kurt v Austria*, *supra* note 3, para. 175). Using the nomenclature of 'abuse' rather than 'violence' could assist in avoiding such limited reasoning.

9 As recognised in the preamble to the Istanbul Convention: 'domestic violence affects women disproportionately, and … men may also be victims of domestic violence'.

10 World Health Organisation, 'Violence Against Women', 25.03.2024, https://www.who.int/news-room/fact-sheets/detail/violence-against-women, last accessed 19.05.2025. See also, European Council/Council of the European Union, 'Infographics: Violence against women', available at https://www.consilium.europa.eu/en/infographics/figures-gender-based-violence/, last accessed 19.05.2025.

had experienced psychological violence.[11] And in Europe in 2022, there were approximately 2,300 female victims of intimate partner/family-related homicide.[12] While none of the core international human rights treaties explicitly addresses violence against women and girls or domestic abuse more generally, the provisions of the European Convention on Human Rights (ECHR) – particularly as interpreted by the ECtHR in the light of the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) – undoubtedly provides a framework for addressing such abuse. In this context, the rights to life (Article 2), freedom from torture or inhuman or degrading treatment or punishment (Article 3), respect for private life (Article 8) and freedom from discrimination (Article 14) ECHR are especially pertinent.

Since the early 2000s, the ECtHR has developed its conceptualisation (and, consequently, the application) of these rights to include protection from gender-based abuse as an essential part of upholding dignity and equality in Contracting States. Today, the ECHR – together with the Istanbul Convention – imposes a range of obligations on Contracting States to prevent domestic abuse, protect victims and survivors and investigate instances of abuse. While the Istanbul Convention is not directly enforceable by the ECtHR, it complements the rights and obligations located in the ECHR by setting clear standards for the prevention, protection and prosecution of gender-based violence and there is frequent reference to it in the ECtHR's domestic abuse case law, as well as the state reports of GREVIO[13] (the body responsible for monitoring the implementation of the Istanbul Convention).

While the gendered nature of domestic abuse has been recognised by the ECtHR since the early 2000s,[14] it is only recently that the Court has acknowledged that the unique nature of domestic abuse requires a distinct and tailored approach to the interpretation (and application) of the ECHR if its protections are to be effective for victims and survivors of domestic abuse. Indeed, it was only in 2021 with the Grand Chamber's landmark decision in

11 Eurostat, 'Every third woman in the EU experienced gender-based violence', 25.11.24, available at https://ec.europa.eu/eurostat/web/products-eurostat-news/w/ddn-20241125–3#:~:text=a%20non%2Dpartner-,Based%20on%20the%20EU%20gender%2Dbased%20violence%20survey%20(wave%202021,and%204%25%20having%20experienced%20rape, last accessed 19.05.2025.

12 Ibid., p.11.

13 Council of Europe's Group of Experts on Action against Violence against Women and Domestic Violence.

14 See, for instance, ECtHR, *Opuz v Turkey*, no 33401/02, 09.06.2009.

Kurt v Austria[15] that the ECtHR adopted an approach to the state's protective and investigative obligations under Article 2 (right to life) of the ECHR, which is tailored to the unique features of domestic abuse. While *Kurt* was certainly a watershed moment in the Court's domestic abuse jurisprudence – and has provided the foundation for subsequent findings of violations under Articles 2 and 3 (taken alone, and together with Article 14) – wider challenges endure in the fight against gender-based violence, including domestic abuse. Some states continue to resist the obligations imposed by the ECHR regarding the protection of women and girls, leading to persistent gaps in the enforcement of fundamental rights, particularly for vulnerable women and girls including migrants/those with an unstable migration status and ethnic and cultural minorities. Other states are less intentional in their failures, but nevertheless continue to fall short of the protections required by the ECHR in the context of domestic abuse (and, indeed, violence against women and girls more generally).

This paper examines the strides that have been made in the ECtHR's approach to domestic abuse and sets out ways in which the ECtHR can ensure that the ECHR operates effectively as a mechanism for protecting the safety, dignity and equality of all individuals, particularly vulnerable women and girls. Specifically, Section 2 considers the ECtHR's relatively recent appreciation of the characteristics of domestic abuse as 'a particular form of a continuous offence characterised by an ongoing pattern of behaviour … in which each individual incident forms a building block of a wider pattern'.[16] As is discussed, the Istanbul Convention and the work of GREVIO have been instrumental in the ECtHR's recognition that domestic abuse is a distinct form of gendered violence requiring a modified, gender-sensitive approach to interpreting and applying the protections in the ECHR. While Section 2 illuminates the progress that has been made in terms of the ECHR's response to domestic abuse, Section 3 critically examines aspects of the Court's domestic abuse case law which demonstrate that further development is necessary in order fully to realise the protective potential of the ECHR for victims and survivors of domestic abuse. In particular, issues of classification of abuse – including the Court's reluctance to characterise certain forms of abuse (including cyberviolence[17]) as inhuman or degrading treatment or, indeed, to recognise that some

15 ECtHR, *Kurt v Austria*, *supra* note 3.

16 ECtHR, *Gaidukevich v Georgia*, *supra* note 4, para. 67.

17 There is no universal definition of 'cyberviolence'. In this paper, the term is used to refer to the 'digital dimension of violence against women' and includes behaviours such as the non-consensual sharing of nude or sexual images (i.e. 'revenge pornography') and stalk-

forms of domestic abuse constitute torture for the purposes of Article 3 – are considered, as is the need for a greater appreciation by the ECtHR that the suicide of a victim or survivor of domestic abuse may constitute a breach of the state's positive (i.e. protective) obligations under Article 2 (right to life).

2 The Court's Evolving Understanding of Domestic Abuse

This section does not purport to survey all of the Court's domestic abuse jurisprudence, which is the subject of a considerable body of academic work.[18] Rather, this section concentrates on the Court's evolving understanding of domestic abuse (facilitated in no small measure by the Istanbul Convention and the work of GREVIO) and the implications of the same for the ECtHR's interpretation – and application – of the ECHR to such forms of violence. This is done by considering three key cases: *Talpis v Italy*,[19] *Volodina v Russia*[20] and *Kurt v Austria*.[21] In doing so, this section will demonstrate the potential for the ECHR to provide protection for victims and survivors of domestic abuse in *all* its iterations. This is an important normative foundation for Section 3 in which it is argued that the ECtHR must continue to develop its understanding of the nature of domestic abuse and its potential implications for rights under the ECHR, particularly insofar as 'new' aspects of domestic abuse are coming before the Court for consideration, including cyberviolence and suicides of victims and survivors of domestic abuse. There is a real risk – which has materialised in several cases already – that if the Court does not persist with its evolutive approach in domestic abuse cases, the rights of victims and survivors will be unvindicated and, more generally, states will continue to fail to protect victims and survivors of domestic abuse in all its pernicious forms.

---

ing online (including, for instance, identity theft) (GREVIO, General Recommendation No. 1 on the digital dimension of violence against women, 20.10.2021, available at https://rm.coe.int/grevio-rec-no-on-digital-violence-against-women/1680a49147, last accessed 19.05.2025).

18 See, in particular, the detailed analysis provided in J. Herring, *Domestic Abuse and Human* Rights, Intersentia: Cambridge, 2021, ch. 3 and R. McQuigg, *Domestic Abuse and the European Convention on Human Rights,* Routledge: Oxford, 2025. See also, E. Brodeală, I. Jelić and S. Şuteu (eds.), *Violence Against Women under European Human Rights Law*, Edward Elgar: Cheltenham and Massachusetts, 2024.

19 ECtHR, *Talpis v Italy*, no 41237/14, 02.03.2017.

20 ECtHR, *Volodina v Russia*, *supra* note 1.

21 ECtHR, *Kurt v Austria*, *supra* note 3.

2.1 *Bringing the Private into the Public: The Developing Role of Articles 2 and 3 in Domestic Abuse Cases*

While the Court's early domestic abuse case law centred on violations of Articles 2 and 3[22] (which 'rank as the most fundamental provisions of the Convention'[23]), there was a period of several years in which most of the domestic abuse cases were considered under Article 8 (which protects, *inter alia,* the right to respect for private life).[24] Given the Court's early findings of violations of Articles 2 and 3, it is unlikely that its concentration on Article 8 was, at least solely/or even predominantly, explicable by a failure to appreciate the gravity of domestic abuse. Indeed, in one of its early Article 8 domestic abuse cases, the Court explicitly recognised 'the particular vulnerability of victims of domestic violence and the need for active State involvement in their protection … and that the Convention is intended to guarantee rights that are not theoretical or illusory, but rights that are practical and effective'.[25] According to Ronagh McQuigg, this concentration on Article 8 by the Court in domestic abuse cases may be explicable by reasons of efficiency and practicality:

> the Court frequently adopts the approach of finding a breach of one article of the ECHR and then omitting to consider the application of other articles on which arguments have been made by applicants. This approach is by no means limited to cases of domestic violence. It is likely that the Court's apparent preference for the use of article 8 as opposed to article 3 in its earlier jurisprudence on this issue was due simply to the fact that it can be more straightforward to establish a violation of article 8 than it is to establish a breach of article 3.[26]

Echoing *McQuigg*'s observations regarding the comparatively straightforward application of Article 8 to domestic abuse cases, Jonathan Herring states '[d]omestic violence can readily be seen as involving an interference with Article

22 See, for instance, ECtHR, *Opuz v Turkey*, *supra* note 14, ECtHR, *Bevacqua and S v Bulgaria*, no 71127/01, 12.06.2008, ECtHR, *Kontrová v Slovakia*, no 7510/04, 13.06.2007 and ECtHR, *Branko Tomašić and Others v Croatia*, no 46598/06, 15.01.2009.

23 ECtHR, *Hasmik Khachatryan v Armenia,* no 11829/16, 12.12.2024, para. 205.

24 As noted, for instance, by A. Sinclair-Blakemore, 'Cyberviolence Against Women under International Human Rights Law: *Buturugă v Romania* and *Volodina v Russia* (*No 2*)', (2022) 23(1) *Human Rights Law Review*, p. 17.

25 ECtHR, *Hajduová v Slovakia*, no 2660/03, 30.11.2010, para. 41.

26 R. McQuigg, 'The European Court of Human Rights and Domestic Violence: Volodina v Russia', (2021) 10(1) *International Human Rights Law Review,* p. 164.

8 rights', such that 'except in the most trivial cases, an incident of domestic abuse is likely to breach Article 8 rights'.[27]

Nevertheless, as discussed in Section 3, by concentrating on Article 8 in domestic abuse cases – particularly those that involve forms of abuse that do not entail physical violence, such as cyberviolence – the Court's jurisprudence may perpetuate the (false) narrative that such abuse is a 'private' issue when it is, in fact, a 'major health issue' with profound physical, psychological, social and economic consequences for victims and survivors and their families, and society more generally.[28] As the WHO has recognised, '[t]he social and economic costs of intimate partner and sexual violence are enormous and have ripple effects throughout society. Women may suffer isolation, inability to work, loss of wages, lack of participation in regular activities and limited ability to care for themselves and their children'.[29] Concentrating on Article 8 – a qualified right – also has the potential to diminish the gravity of certain forms of domestic abuse. This is a particular issue in the context of cyberviolence which is discussed in this Section but it is also a wider issue within the Court's domestic abuse jurisprudence, with an apparent reluctance on the part of the Court to label certain acts of domestic violence torture when, if removed from the domestic (i.e. 'private') context, it seems plain that the conduct would constitute torture, especially if inflicted by state authorities.

One should, however, not consider the Court's case law in isolation, bracketed by time or Article of the ECHR. Adopting a holistic perspective of the ECtHR's domestic abuse jurisprudence, it is apparent that the Court understands that domestic abuse is a form of gender-based violence which extends beyond physical and sexual violence, and that a failure to have regard to the particular characteristics of domestic abuse (including its cyclical nature and propensity to escalate rapidly) risks compromising the effectiveness of the protections enshrined in the Convention.[30] While the Court explicitly recog-

27 J. Herring, *Domestic Abuse*, *supra* note 18, p. 75.

28 'Across the European Union, the cost of gender-based violence was estimated at €366 billion a year, with violence against women making up 79 per cent of this cost, or €289 billion' (European Institute for Gender Equality, 'Gender-based violence: The costs of gender-based violence in the European Union', 28.10.2021, Table 12, available at https://eige.europa.eu/publications-resources/publications/costs-gender-based-violence-european-union, last accessed 13.05.2025.

29 WHO, *Violence Against Women*, 25.03.2024, available at https://www.who.int/news-room/fact-sheets/detail/violence-against-women#:~:text=Over%20a%20quarter%20of%20women,WHO%20South%2DEast%20Asia%20region, last accessed 19.05.2025.

30 See, for instance, ECtHR, *Talpis v Italy*, *supra* note 19 and ECtHR, *Bălşan v Romania*, no 49645/09, 23.05.2017.

nised the gendered nature of domestic abuse in its Article 14 case law in 2009[31] – holding states responsible for passivity in the face of domestic abuse which had the effect of creating a climate conducive to violence – it took several more years for the Court to adapt its approach to interpreting the substantive protections in Articles 2 and 3 in cases involving domestic abuse. The need for the Court to take a gender-sensitive approach to interpreting the Convention in domestic abuse cases appears first to have been explicitly recognised by Judge Pinto de Albuquerque in his concurring opinion in *Valiulienė v Lithuania,*[32] in which he stated 'the full *effet utile* of the European Convention on Human Rights … can only be achieved with a gender-sensitive interpretation and application of its provisions which takes in account the factual inequalities between women and men and the way they impact on women's lives'.[33] Such an interpretation, according to Judge Pinto de Albuquerque, required an alteration to the so-called '*Osman* test'[34] (which applies when determining whether states had a positive obligation to protect an individual from the criminal acts of a third party) in order to render effective the protective potential of the Convention for domestic abuse victims and survivors.[35] It would take almost a decade – and further calls for development of the relevant principles from Judge Pinto de Albuquerque (and others[36]) – for the Court finally to make such changes.

2.2 *From Talpis to Volodina: 'The Law Has Its Limits', but the Court Plays an Integral Part in Setting (and Amending) Them*

In *Talpis v Italy*,[37] a majority of the Court found that the authorities' passivity in the face of the applicant's complaints regarding her husband's vio-

31 ECtHR, *Opuz v Turkey*, *supra* note 14.

32 ECtHR, *Valiulienė v Lithuania*, no 33234/07, 26.03.2013, Separate Concurring Opinion of Judge Pinto de Albuquerque.

33 Ibid.

34 Referring to the decision in which the positive operational obligation to protect was first recognised: ECtHR, *Osman v the United Kingdom*, no 23452/94 [GC], 28.10.1998. Pursuant to the standard *Osman* test, a state has a positive obligation to take reasonable steps to protect an identified individual where the state knows or ought to know at the time of the existence of a real and immediate risk to the individual's life from the criminal acts of a third party (ibid., para. 116).

35 ECtHR, *Valiulienė v Lithuania*, *supra* note 32, Separate Concurring Opinion of Judge Pinto de Albuquerque.

36 See the separate opinions of Judge Pinto de Albuquerque (with Judge Dedov) and Judge Serghides in ECtHR, *Volodina v Russia*, *supra* note 1.

37 ECtHR, *Talpis v Italy*, *supra* note 19.

lence[38] violated the state's protective and investigative obligations under Articles 2 and 3, taken together with Article 14. In finding a violation of the operational (or protective) obligation under Articles 2 and 3, the majority emphasised the need to ensure that ECHR protections are 'practical and effective'.[39] According to the majority, 'children and other vulnerable individuals – into which category fall victims of domestic violence – in particular are entitled to state protection, in the form of effective deterrence, against such serious breaches of personal integrity'.[40] While the Court did not alter the erstwhile principles it had established under Articles 2 and 3 in the context of protection and prevention (in particular, it retained the immediacy requirement of the *Osman* test)[41] it nevertheless explicitly acknowledged that:

> the risk of a real and immediate threat … must be assessed *taking due account of the particular context of domestic violence*. In such a situation it is not only a question of an obligation to afford general protection to society … but above all *to take account of the recurrence of successive episodes of violence within the family unit*…[42]

Judge Spano's dissenting opinion in *Talpis* is of note for what it reveals in terms of the Court's capacity to modify its approach to the interpretation and application of the ECHR in cases of domestic abuse. According to Judge Spano, there had been no violation of Article 2 (taken alone or together with Article 14). He began his opinion by observing that '[t]he law has its limits, even human rights law'[43] and proceeded to highlight the 'tensions' that arise 'between the demands of justice for the relatives of victims [of domestic abuse] and the imposition of unrealistic burdens on law enforcement agents governed by the rule of law'.[44] According to Judge Spano, the failure of the

38 Which, ultimately, culminated in him murdering the parties' son (who had intervened to protect his mother) and severely injuring the applicant.

39 ECtHR, *Talpis v Italy*, *supra* note 19, para. 97.

40 Ibid., para. 99.

41 Reiterating that 'it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk' (Ibid., para. 101).

42 Ibid., para. 122. Emphasis added.

43 Ibid., Separate Partly Dissenting Opinion of Judge Spano, para. 1.

44 Ibid., para. 1.

authorities to conduct an adequate assessment of the risk posed by the applicant's husband could not be converted into knowledge of a real and immediate risk of harm for the purposes of the *Osman* test: 'investigative passivity [can not] give rise to constructive knowledge'.[45] Notably, Judge Spano did consider that such passivity 'will usually, and in the present case does, give rise to an Article 3 violation in the domestic violence context'.[46] As for why the authorities' (in)action was sufficient to engage Article 3 but not Article 2, Judge Spano considered that '[d]iluting the *Osman* standard, to take account of the nature of different types of fatal criminal offences between individuals, will simply impose an unrealistic burden on law enforcement authorities'.[47] Such a contention is patently at odds with the gender-sensitive approach to the ECHR espoused by Judge Pinto de Albuquerque in *Valiulienė v Lithuania,*[48] nor, indeed, did it accord with the majority's appreciation in *Talpis* that a history of domestic abuse can and often does indicate a real risk of further, potentially fatal, violence 'the imminent materialisation of which [can] not be excluded'.[49]

Two years after *Talpis*, Judge Pinto de Albuquerque returned to the issue of the applicability of the *Osman* test in domestic abuse cases. The applicant in *Volodina v Russia*[50] had been subjected to a campaign of domestic abuse by her former partner over the course of several years. Despite repeated instances of very serious physical violence (one occurence of which resulted in the loss of a pregnancy), property damage, stalking, cyberviolence and so on, the domestic authorities were either unable (due to inadequacies in the legal system) or unwilling (due to discriminatory attitudes towards victims and survivors of domestic abuse) to take action to protect the applicant, prevent further instances of abuse and punish the perpetrator. The Court concluded that there had been a violation of Article 3 (alone, and together with Article 14). The Court's characterisation of the conduct under Article 3 is further considered in Section 3 below. For now, it is sufficient to note Judge Pinto de Albuquerque's separate opinion, in which he squarely challenged the effectiveness of the Convention in cases of domestic abuse, particularly given the formula-

45 Ibid., para. 7.
46 Ibid., para. 8.
47 Ibid., para. 9.
48 ECtHR, *Valiulienė v Lithuania*, *supra* note 32, Separate Concurring Opinion of Judge Pinto de Albuquerque.
49 ECtHR, *Talpis v Italy*, *supra* note 19, para. 122.
50 ECtHR, *Volodina v Russia*, *supra* note 1.

tion of the standard necessary (i.e. the *Osman* test) for a state's operational/protective obligation to arise. As the Judge observed:

> The *Osman* test fails to achieve its purpose if taken word for word. A 'real and immediate risk' in the context of domestic violence infers that the risk, namely the batterer, is already in the direct vicinity of the victim and about to strike the first blow. Were the test to be applied in such a manner, two concerns arise. Firstly, any protective action offered by the State would be too late and secondly, the State would have a legitimate excuse for not acting in a timely manner, since it is implausible to assume that the victim will be constantly accompanied by a State agent who may jump in to help. Hence, the 'immediacy' of the *Osman* test does not serve well in the context of domestic violence.[51]

The solution, according to Judge Pinto de Albuquerque, was to alter the standard against which the state's action (or inaction) is judged, such that it 'spans … a wider window of time, starting from the moment when a risk of domestic violence is present, but not yet imminent'.[52]

Judge Serghides also authored a separate opinion in *Volodina*. He 'fully subscribe[d] to the separate opinion of Judge Pinto de Albuquerque'[53] though he also expanded upon the criticism of the Court's failure to characterise the abuse to which the applicant had been subjected as 'torture' under Article 3. This is further considered in Section 3 below.

It would be another two years before the Court (sitting as the Grand Chamber) finally modified its interpretation of the ECHR in domestic abuse cases to reflect the specific nature of domestic abuse.

2.3 *The Obligation to Perform an Autonomous, Proactive and Comprehensive Lethality Risk Assessment*

Kurt v Austria[54] concerned the authorities' alleged failure to protect the applicant's son from lethal violence perpetrated by his father (the applicant's former spouse). The authorities were aware of a number of instances of domestic abuse (including violence against both the applicant and their children) and had taken out protection orders but had done so solely in the name of the applicant. The applicant's former spouse subsequently went to their children's

51 Ibid., Separate Opinion of Judge Pinto de Albuquerque (Joined by Judge Dedov), para. 12.
52 Ibid., para 12.
53 Ibid., Separate Opinion of Judge Serghides, para. 1.
54 ECtHR, *Kurt v Austria*, *supra* note 3.

school and shot their son (in the presence of their daughter), before leaving the school and shooting himself. The applicant alleged, *inter alia*, a breach of the protective obligation under Article 2. Notably – given his resistance in *Talpis* (discussed above) to moderating the principles applicable under Article 2 to reflect the context of domestic abuse – Judge Spano (who was President of the Court) was one of the members of the Grand Chamber. While the Court ultimately concluded that there had been no violation of Article 2 (by a narrow majority of 10:7), it nevertheless determined that its erstwhile approach to interpreting the ECHR in cases of domestic abuse had to change if the protections contained therein were to be effective. Specifically, the Grand Chamber held:

> an immediate response to allegations of domestic violence is required from the authorities… The authorities must establish whether there exists a real and immediate risk to the life of one or more identified victims of domestic violence *by carrying out an autonomous, proactive and comprehensive risk assessment*… The *reality and immediacy of the risk must be assessed taking due account of the particular context of domestic violence cases*… If the outcome of the risk assessment is that there is a real and immediate risk to life, the authorities' obligation to take preventive operational measures is triggered. Such measures must be adequate and proportionate to the level of the risk assessed…[55]

In order for a lethality risk assessment to be 'autonomous and proactive', the authorities must investigate allegations of domestic abuse 'of their own motion' (i.e. they cannot rely on the 'victim's own perception of risk'),[56] by 'proactively collecting and assessing information on all relevant risk factors and elements of the case'.[57] In terms of comprehensiveness, the Court recommended the use of standardised assessments since they 'indicate specific risk factors and have been developed on the basis of sound criminological research and best practices in domestic violence cases, [and] can contribute to the comprehensiveness of the authorities' risk assessment'.[58]

The Grand Chamber did not dispose of the requirement under the traditional *Osman* test that a risk of lethal injury be 'immediate' for the state's

55 Ibid., para. 190. Emphasis added.
56 Ibid., para. 170.
57 Ibid.
58 Ibid., para. 171.

positive obligation to protect to be engaged in domestic abuse cases, though it significantly curtailed its application, holding that:

> the application of the immediacy standard … should take into account the *specific features of domestic violence cases, and the ways in which they differ from incident-based situations* such as that in *Osman.* … The Court reiterates that *consecutive cycles of domestic violence, often with an increase in frequency, intensity and danger over time, are frequently observed patterns in that context* … The Court has observed in numerous other cases that a perpetrator with a record of domestic violence posed a significant risk of further and possibly deadly violence … *Based on what is known today about the dynamics of domestic violence, the perpetrator's behaviour may become more predictable in situations of a clear escalation of such violence. This general knowledge of domestic violence and the comprehensive research available in this area must duly be taken into account by the authorities when they assess the risk of a further escalation of violence, even after the issuance of a barring and protection order.*[59]

Kurt was undoubtedly a landmark judgment – generally, and specifically in the context of domestic abuse. For the purposes of this paper, the judgment is particularly notable as it demonstrates the Court's capacity to develop the principles applicable under the ECHR to bolster the effectiveness of the Convention's protections in the context of domestic abuse. Nevertheless, the majority's conclusion that there was *no* violation of Article 2 was met with significant criticism, including from within the Court itself.[60] As Vladislava Stoyanova notes:

> the reasoning [of the Grand Chamber] is pulled in different directions. On the one hand, the Court aims with the judgement [*sic*] to establish some general standards of state conduct by formulating positive obligations at the abstract level …. On the other hand, when these obligations are concretized and applied to the particular facts, they can be nar-

59 Ibid., para 175. Italic emphasis added.

60 ECtHR, *Kurt v Austria*, *supra* note 3, Dissenting Opinions of Judge Elósegui and of Judges Turković, Lemmens, Harutyunyan, Elósegui, Felici, Pavli and Yüksel. As for academic criticism see, for instance, R. McQuigg, '*Kurt v Austria*: Domestic Violence Before the Grand Chamber of the European Court of Human Rights', (2021) 5 *European Human Rights Law Review*, pp. 550–557.

> rowed down. For this purpose, the overall reasoning includes ambiguities as to the nature and content of the obligation (i.e. is it one of means or of result), which ensures the scope of manoeuvre for the Court when determining whether the obligation has been breached.[61]

Notwithstanding that ambiguity, the principles enunciated in the judgment, in particular the need for the authorities to conduct an autonomous, comprehensive and proactive lethality risk assessment, undoubtedly reflect a watershed moment in the Court's gender-sensitive interpretation of the Convention in domestic abuse cases and have been integral in subsequent cases in which states have been found to have violated Article 2.[62] The judgment is also evidence of the capacity of the Court to develop its interpretation of the Convention in the light of evolving understandings of the nature of domestic abuse. Additionally, the obligations on states set out in *Kurt* have been extended to Article 3,[63] thereby further expanding the protective potential of the ECHR in cases of domestic abuse.

The judgment is also notable for the Grand Chamber's reliance on the Istanbul Convention, the Explanatory Report accompanying it and on reports on Austria by GREVIO in justifying its reasoning. GREVIO was also a third-party intervener in the proceedings, making submissions regarding the gendered nature of domestic abuse.[64] The Court's willingness to draw on the Istanbul Convention and the expert evidence of GREVIO to develop the principles applicable under the ECHR to cases of domestic abuse is encouraging in terms of the ECtHR's capacity further to refine its approach in cases involving less well-understood forms of domestic abuse (such as cyberviolence and suicides of victims and survivors of domestic abuse which are discussed in Section 3). That is not to suggest, however, that the Istanbul Convention is a panacea when it comes to preventing domestic abuse and protecting the rights of victims and survivors. The Istanbul Convention's limitations have been discussed extensively elsewhere[65] and, in terms of the ECHR, its effec-

61 V. Stoyanova, 'Framing Positive Obligations under the European Convention on Human Rights Law: Mediating between the Abstract and the Concrete', (2023) 23(3) *Human Rights Law Review*, pp. 26–27.

62 See, for instance, ECtHR, *Y and Others v Bulgaria*, no 9077/18, 22.03.2022, ECtHR, *A and B v Georgia*, *supra* note 5, ECtHR, *Landi v Italy*, *supra* note 7.

63 See, for instance, ECtHR, *Tunikova and Ors v Russia*, no 55974/16, 14.12.2021, ECtHR, *De Giorgi v Italy*, no 23735/19, 16.06.2022, ECtHR, *A.E v Bulgaria*, no 53891/20, 23.05.2023.

64 ECtHR, *Kurt v Austria*, *supra* note 3, para. 137.

65 See, for instance, J. Jones, 'The European Convention on Human Rights (ECHR) and the Council of Europe Convention on Violence Against Women and Domestic Violence

tiveness depends on the use to which it is made by the ECtHR, recalling that the Convention is not directly enforceable by the ECtHR. While the ECtHR's case law reveals a willingness to rely on the Istanbul Convention to clarify the scope of ECHR rights and, indeed, to provide specific content to the general obligations under the ECHR in the context of domestic abuse,[66] the dissenting opinion of *ad hoc* Judge Von Werdt (who was joined by Judge Mourou-Vikström) in the recent decision in *N.D. v Switzerland*[67] highlights the potential for the Istanbul Convention to *limit*, rather than expand, the protective scope of the ECHR. The applicant in *N.D.* argued that Article 2 imposes a positive obligation on authorities to disclose to current partners information relating to a perpetrator's history of domestic abuse and violence against women (a right not contained in the Istanbul Convention). In rejecting that contention, Judge Von Werdt observed:

> ...the Istanbul Convention reflects, on the one hand, the [ECtHR's] case-law and, on the other, the consensus of the Council of Europe member States as to the level of protection that they must ensure in relation to violence against women and domestic violence. *In my view, there is neither justification nor need to impose positive obligations arising from Articles 2 and 3 of the Convention that go beyond the obligations of the member States arising from the Istanbul Convention.*[68]

Governments have also sought to limit the extension of the ECHR in domestic abuse cases by highlighting the absence of certain protections in the Istanbul Convention.[69]

(Istanbul Convention)', in R. Manjoo and J. Jones (eds.), *The Legal Protection of Women From Violence Normative Gaps in International Law,* Routledge: London, 2018, ch. 5, A. Hefti, *Conceptualizing Femicide as a Human Rights Violation State Responsibility Under International* Law, Edward Elgar: Cheltenham, 2022, ch. 6 and C. Nardocci, 'The Istanbul Convention: yes and nos', (2025) 26 *ERA Forum*, pp. 127–147.

66 See, for instance, ECtHR, *Kurt v Austria*, *supra* note 3, ECtHR, *Talpis v Italy*, *supra* note 19, ECtHR, *Hasmik Khachatryan v Armenia, supra* note 23, ECtHR, *Giuliano Germano v Italy,* no 10794/12, 22.06.23 (see, in particular, the concurring opinion of Judge Sabato, paras. 22–28) and ECtHR, *M.Ş.D v Romania, supra* note 6, which is discussed in greater detail below in the context of cyberviolence.

67 ECtHR, *N.D. v Switzerland*, *supra* note 8.

68 Ibid., Separate Dissenting Opinion of Judge Von Werdt, para. 10 (Author's own translation). Emphasis added. See, in contrast, the use of the Istanbul Convention to *expand* the protections of the ECHR in the concurring opinion of Judge Sabato in ECtHR, *Giuliano Germano v Italy, supra* note 66.

69 See, for instance, ECtHR, *Hasmik Khachatryan v Armenia, supra* note 23, para. 146.

2.4 Section 2 Conclusion: Much to Be Celebrated, More Work to Be Done

The Court's domestic abuse case law has come a considerable way in a comparatively short period of time. Since its first decisions involving violations of the ECHR in cases of domestic abuse in the early 2000s, the Court has significantly expanded its understanding of domestic abuse as covering 'sexual, economic, emotional or verbal abuse' as well as physical violence.[70] It has also recognised and taken steps to adopt a gender-sensitive interpretation of the ECHR, acknowledging not only the gendered nature of domestic abuse, but also its particular characteristics, including 'that consecutive cycles of domestic violence, often with an increase in frequency, intensity and danger over time, are frequently observed patterns'.[71] The Court's findings with respect to cyberviolence and its treatment of cases involving potential suicides of victims and survivors of domestic abuse (as discussed in Section 3) are further welcome steps towards ensuring that the ECHR protections are practical and effective for victims and survivors of domestic abuse. However, as Section 3 illustrates, there is ample scope for improvement in the Court's domestic abuse jurisprudence. In particular, it will consider deficiencies in the Court's approach to classifying certain acts of domestic abuse under Article 3 and limitations apparent in the Court's burgeoning case law on the suicides of victims and survivors of domestic abuse.

3 Domestic Abuse and the ECHR: Where to from Here?

3.1 *Domestic Abuse and the Prohibition on 'Torture', 'Inhuman' and 'Degrading' Treatment: What Is in a Name?*

How conduct is classified under the ECHR has significant implications for victims and survivors. Framing a domestic abuse case through the lens of Article 3 may result in the Court being 'more alert to the impact of the abuse on the victim' thus improving the Court's examination of the alleged ill-treatment and the state's response to it.[72] Further, whether conduct (and, specifically, the state's response to the same) falls for consideration under Article 3 or Article 8 can have an impact on the quantum of non-pecuniary damages

70 ECtHR, *Oghlishvili v Georgia*, no 7621/19, 04.07.2024, para. 85.
71 Ibid., para. 96.
72 J. Herring (2021), *Domestic Abuse*, *supra* note 18, p. 69.

awarded if a violation is found.[73] While damages are an integral component of the Court's remedial powers, a finding of a violation is in and of itself an important means of reparation for a breach of the Convention.[74] And the legitimacy of the finding of a violation as a means of reparation is inextricably bound up in the accuracy of the violation found; a finding that a person has been subjected to degrading treatment when, in fact, they have been tortured is not an adequate form of reparation. More generally, if conduct is considered to be torture, the impetus on states to take preventive and protective steps – including by way of changes to the regulatory framework – is likely to be greater.[75] Perhaps most fundamentally, though, victims and survivors deserve to have the gravity of the abuse perpetrated against them properly recognised; it is intimately connected to their dignity which is a fundamental principle underpinning the ECHR.[76]

In separate opinions in *Volodina v Russia*,[77] Judges Pinto de Albuquerque (with Judge Dedov) and Serghides lamented the Court's failure to classify the abuse the applicant had been subjected to as torture under Article 3. As noted above, the applicant had been subjected to a campaign of domestic abuse by her former partner, including 'persistent instances of extreme'[78] physical violence, cyberviolence (including accessing the applicant's social media and posting intimate photos of her online without her consent (i.e. revenge pornography)), surveillance and threats. An issue before the Court was whether the applicant's treatment fell within the remit of Article 3 and, if so, whether it was inhuman and/or degrading or, indeed, torture.

For Article 3 of the ECHR to be engaged, there must have been inhuman or degrading treatment or punishment or torture. Treatment has been found to be inhuman because it 'was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical and mental

73 As recognised by Judge Pinto de Albuquerque (with Judge Dedov) in ECtHR, *Volodina v Russia*, *supra* note 1, Separate Opinion of Judge Pinto de Albuquerque (Joined by Judge Dedov), para. 9.

74 As Judge Serghides observed in ECtHR, *Volodina v Russia*, *supra* note 1, para. 3, a failure properly to characterise conduct under Article 3 can 'undermine' a person's dignity.

75 'If the state faces condemnation for allowing its women to be submitted to torture, the positive obligation to protect is even more stringent' (ECtHR, *Volodina v Russia*, *supra* note 1, Separate Opinion of Judge Pinto de Albuquerque (Joined by Judge Dedov), para. 9).

76 ECtHR, *Pretty v the United Kingdom*, no 2346/02, 29.04.2002, para. 65.

77 ECtHR, *Volodina v Russia*, *supra* note 1.

78 Ibid., Separate Opinion of Judge Pinto de Albuquerque (Joined by Judge Dedov), para. 7.

suffering'.[79] Treatment has been characterised as degrading because 'it was such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance … or when it was such as to drive the victim to act against his will or conscience'.[80] Conduct may also be 'degrading' because it was inflicted for the purpose of humiliating or debasing the person concerned, although the absence of such a purpose does not render degrading treatment otherwise compatible with Article 3.[81] For Article 3 to be engaged, the ill-treatment must reach a minimum level of severity. In deciding whether that threshold has been attained, the Court considers 'many factors, including the nature and context of the treatment, its duration, and its physical and mental effects, … also the sex of the victim and the relationship between the victim and the author of the treatment'.[82] In addition to prohibiting inhuman and degrading treatment (and punishment), Article 3 also prohibits torture. Torture for the purposes of Article 3 has been defined as 'deliberate inhuman treatment causing very serious and cruel suffering'.[83] Torture thus entails a purposive element.

Given the nature of domestic abuse,[84] it is unsurprising that it has repeatedly been found by the Court to constitute ill-treatment contrary to Article 3 such as to engage the state's positive and procedural obligations under that Article.[85] As demonstrated in *Volodina*, physical violence can readily reach the required minimum level of severity,[86] but so too can controlling and coercive

79 ECtHR, *Jalloh* v *Germany, no* 54810/00 [GC], 11.07.2006, para. 68.

80 Ibid.

81 Ibid.

82 ECtHR, *Volodina v Russia*, *supra* note 1, para. 73.

83 ECtHR, *Ireland v the United Kingdom*, no 5310/71, 13.12.1977, para. 67.

84 The World Health Organisation defines 'domestic abuse' as 'physical, sexual, emotional, economic or psychological actions or threats of actions that influence another person. This includes any behaviours that frighten, intimidate, terrorise, manipulate, hurt, humiliate, blame, injure, or wound someone' (World Health Organisation, 'COVID-19 Response: What is Domestic Abuse?', available at https://www.un.org/en/coronavirus/what-is-domestic-abuse, last accessed 19.05.2025. Similarly, Judge Pinto de Albuquerque opined, in a concurring opinion in ECtHR, *Valiulienė v Lithuania*, *supra* note 32 that *'it is self-evident that the very act of domestic violence has an inherent humiliating and debasing character for the victim, which is exactly what the off ender aims at'* (underlined emphasis in original).

85 See, for instance, ECtHR, *Tunikova and Others v Russia*, *supra* note 63, ECtHR, *De Giorgi v Italy*, *supra* note 63, ECtHR, *A.E v Bulgaria*, *supra* note 63.

86 Indeed, the Court has recognised that fear of further assaults can reach the level of severity to constitute ill-treatment contrary to Article 3: see, for instance, ECtHR, *Eremia v the Republic of Moldova*, no 3564/11, 28.05.2013.

behaviour, and other forms of psychological abuse (for example cyberviolence) which do not entail physical assaults (or threats thereof) where it causes the victim or survivor to experience 'feelings of fear, anxiety and powerlessness'[87] as was the case for the applicant in *Volodina*.

While the Court has found that domestic abuse constitutes inhuman and/or degrading treatment in many cases,[88] it has stopped short of determining that such abuse constitutes torture under Article 3. This is perplexing, given the egregious nature of the abuse detailed in many of the cases that have come before the Court. The issue of whether domestic abuse ought to be characterised as torture was squarely considered by Judges Pinto de Albuquerque (with Judge Dedov) and Serghides in *Volodina v Russia*. The violence that the applicant had been subjected to was 'extreme' (culminating in one instance in the loss of a pregnancy) and 'she was further psychologically taunted through the publication of private photographs, the finding of what was believed to be a GPS tracker inside her purse, threats to kill her – which [her former partner] attempted to substantiate by damaging her car – and abduction from her city of residence'.[89] As Judge Pinto de Albuquerque eloquently put it:

> [t]aking into account all of the circumstances of the case, which display an accumulation of *aggravating factors of harmful masculinity* leading to the *grave infringement of the applicant's dignity and physical and psychological integrity*, as well as the *purposive conduct of the perpetrator*, I wonder what more is needed to reach a finding of torture under Article 3.[90]

According to Jonathan Herring, Judge Pinto de Albuquerque's judgment in *Volodina* is 'more alert to the impact of the abuse on the victim' which is what led the Judge to conclude that the abuse was torture.[91] Judge Serghides also observed that a failure to characterise that abuse as torture undermined the Convention's effectiveness:

87 ECtHR, *Volodina v Russia*, *supra* note 1, para. 75.

88 See, for instance, ECtHR, *Talpis v Italy*, *supra* note 19, ECtHR, *De Giorgi v Italy*, *supra* note 63, ECtHR, *M.S v Italy,* no 32715/19, 07.07.2022 and ECtHR, *A.E v Bulgaria*, *supra* note 63.

89 ECtHR, *Volodina v Russia*, *supra* note 1, Separate Opinion of Judge Pinto de Albuquerque (Joined by Judge Dedov), para. 7.

90 Ibid., para. 10. Emphasis added.

91 Herring (2021), *Domestic Abuse*, *supra* note 18, p. 69.

> it would *undermine the level of protection* of the right under Article 3 and the victim, *as well as his or her human dignity*, if the Court were to wrongly classify a violation as 'inhuman treatment' instead of 'torture'. *Such a wrong classification, not being in line with the real intensity of the violation, would be against the text, and the object and purpose of Article 3*. The distinction in Article 3 between the three kinds of violations according to their intensity is based on the effectiveness principle, which requires, in this connection, that, *to give full effective protection to the right under Article 3, the Court must rightly assess the intensity of the violation and the corresponding positive obligation of the respondent State regarding such violation, taking into account the meaning, the threshold, and the differences between the three separate kinds of violation*.[92]

Two years after *Volodina*, the Court was again confronted with the issue of whether domestic abuse constituted torture for the purposes of Article 3. In *Tunikova and Others v Russia*,[93] three of the four applicants argued that the abuse to which they had been subjected reached the threshold of torture under Article 3. In inviting the Court to label the abuse 'torture', the applicants submitted that 'recognising severe instances of domestic violence as "torture" would emphasise the gravity of the violence in the eyes of the public and the authorities tasked with monitoring and response, empower victims, and discourage or even deter perpetrators'.[94] The Court declined to rule definitively on whether the abuse was torture, instead finding simply that the treatment to which the applicants had been subjected (which resulted in one of the applicants being 'mutilated …, leaving her disabled for life'[95]) 'went beyond the threshold of severity under Article 3'.[96] Notwithstanding the fact that the Court recognised that 'the additional characterisation [of the applicant's abuse as 'torture' under Article 3], [was] important for the applicants and capable of influencing the public perception of domestic violence', the Court did not consider it 'necessary' to resolve the question whether the treatment constituted torture since 'there is no doubt that the treatment inflicted on the applicants attained the necessary threshold of severity to fall within the scope

92 ECtHR, *Volodina v Russia*, *supra* note 1, Separate Opinion of Judge Serghides, para. 3. Emphasis added.

93 ECtHR, *Tunikova and Ors v Russia*, *supra* note 63.

94 Ibid., para. 71.

95 Ibid., para. 75.

96 Ibid., para. 74.

of Article 3 of the Convention'.[97] For many reasons, this is an unsatisfactory outcome. Normatively, it is perplexing since it suggests that the Court will resolve the question whether abuse is torture when there is a doubt whether it has attained the threshold of severity. But, as noted above, torture is a deliberate form of inhuman treatment causing very serious and cruel suffering.[98] Consequently, it is unlikely that treatment which is alleged to constitute torture will not reach the minimum level of severity to come within Article 3. On a more systemic level, since torture is inherently purposive, the Court's refusal to engage with the consideration whether abuse is torture suggests that it has 'not fully grasped the significance of the fact that domestic abuse is gender-based violence in determining the gravity of the wrong done to the victim and thus is relevant in determining whether the conduct falls within Article 3 and under the label of "torture"'.[99] In contrast, in reaching his conclusion, Judge Pinto de Albuquerque 'emphasised the purposes of the abuser (to control) and its gendered nature to show it amounted to torture'.[100]

The failure of the Court to classify certain acts of domestic abuse as torture also sits at odds with the position taken elsewhere in international human rights law. For instance, according to the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment:

> domestic violence *degrades, humiliates, coerces, brutalizes* and *otherwise violates the physical, mental and emotional integrity of persons* who are often subjected to controlling and disempowering situations or environments. In this context, *pain or suffering is in general inflicted intentionally, or even systematically, for purposes such as punishment, intimidation or coercion of any kind, or to express or consolidate gender-based or other forms of discrimination*. Depending on the circumstances, the pain, suffering or humiliation resulting from domestic violence can range from comparatively moderate and brief to extremely severe and

97 Ibid., para. 77.

98 ECtHR, *Ireland v the United Kingdom*, *supra* note 83, para. 167.

99 J. Herring (2021), *Domestic Abuse*, *supra* note 18, pp. 69–70. For further discussion of the Court's reluctance to characterise domestic abuse as torture see E. Grdinic, 'Application of the Elements of Torture and Other Forms of Ill-Treatment, as Defined by the European Court and Commission of Human Rights, to the Incidents of Domestic Violence', (2000) 23 *Hastings International and Comparative Law Review*, p. 217, R. McQuigg, 'Domestic Violence as a Human Rights Issue: *Rumor v Italy*', (2015) 26(4) *European Journal of International Law* and R. McQuigg, 'The European Court of Human Rights and Domestic Violence: *Volodina v Russia*', (2021) 10(1) *International Human Rights Law Review*.

100 J. Herring, *Domestic Abuse*, *supra* note 18, p. 69.

> long-lasting *but, being abusive by definition, always amounts to a violation of physical, mental and emotional integrity that is incompatible with human dignity*. From a substantive perspective under international law … *domestic violence therefore always amounts to cruel, inhuman or degrading treatment or punishment and very often to physical or psychological torture.*[101]

If the Court is, as it says, truly committed to 'address[ing] the phenomenon of domestic violence' and, more generally, to ensuring that the rights in the Convention are 'practical and effective' and 'not theoretical or illusory',[102] then, in cases where the issue arises, it must engage directly with the question whether domestic abuse constitutes torture under Article 3. A failure to do so not only affects the interests of the victims and survivors, subverting their dignity and compromising the effectiveness of the ECHR's protections as well as the Convention's remedial potency, but it also suggests a failure on the part of the Court to appreciate the purposive aspects of domestic abuse, and the gendered implications of same.

Issues regarding the appropriate classification of domestic abuse under Article 3 have recently arisen in the context of the specific issue of cyberviolence. Cyberviolence or 'cyberbullying' has been 'recognised as one aspect of

101 Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 'Interim Report: Relevance of the prohibition of torture and other cruel, inhuman or degrading treatment or punishment to the context of domestic violence', UN Doc A/74/148, 12.07.2019, para. 9, available at https://docs.un.org/en/A/74/148, last accessed 19.05.2025. Emphasis added. See also, Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Report, UN Doc A/HRC/13/39/Add.5, 05.02.2010, paras. 195 and 208, available at https://docs.un.org/en/A/hrc/13/39/Add.5, last accessed on 19.05.2025. Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Report, UN Doc A/HRC/7/3, 15.01.2008, paras. 45–49, https://documents.un.org/doc/undoc/gen/g08/101/61/pdf/g0810161.pdf, last accessed on 19.05.2025. See also, Committee Against Torture, General comment No 2 (2007) on the implementation of Article 2 by states parties, UN Doc CAT/C/GC/2, 24.01.2008, para. 18, available at https://www.ohchr.org/en/documents/general-comments-and-recommendations/catcgc2-general-comment-no-2–2007-implementation, last accessed 19.05.2025, Committee on the Elimination of All Forms of Discrimination against Women, General recommendation No 35 (2017) on gender-based violence against women, updating general recommendation No 19 (1992), UN Doc CEDAW/C/GC/35, 26.07.2017, para. 16, available at https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-recommendation-no-35–2017-gender-based, last accessed on 19.05.2025.

102 See, for instance, ECtHR, *Talpis v Italy*, *supra* note 19, para. 103.

violence against women and girls, and can take a variety of forms, including breaches of cyberprivacy, intrusion into the victim's computer and the capture, sharing and manipulation of data and images, including private data'.[103] To date, the Court has considered the implications of cyberviolence as a specific form of domestic abuse on three occasions. In each case, the Court has considered the issue through the prism of the right to respect for private life enshrined in Article 8. The reliance on the right to private life as opposed to Article 3 in cases of cyberviolence is problematic. It suggests that the Court has failed to appreciate that such forms of violence can cause the victim or survivor to experience feelings of fear, anxiety and powerlessness and can compromise their dignity and psychological integrity such as would, ordinarily, bring treatment within the scope of Article 3. In the first case – *Buturugă v Romania*[104] – the Court found that the state had violated the applicant's Article 8 rights as a result of the inadequacy of the authorities' response to the applicant's claims that her former spouse had, in the context of a wider campaign of domestic abuse, accessed her computer and social media accounts and made copies of her private conversations, documents and photographs. Such conduct, particularly in the context of a history of domestic abuse, is very likely to arouse in victims 'feelings of fear, anguish and inferiority' (and, thus, constitute degrading treatment) – indeed, debasement is often a central purpose of the cyberviolence.

In the next cyberviolence case – *Volodina v Russia* (*No. 2*)[105] which was a follow-up to the case of *Volodina v Russia* discussed above – the Court was asked to consider the (in)adequacy of the state's response to the applicant's former partner hacking her social media account and sharing her personal details (including passport details) and intimate photos (otherwise known as 'revenge pornography'). In finding that there had been a violation of Article 8, the Court set out several key principles pertaining to state responses to cyberviolence, including that:

> Online violence, or cyberviolence, is closely linked with offline, or 'real-life', violence and falls to be considered as another facet of the complex phenomenon of domestic violence… The States have a positive obligation to establish and apply effectively a system punishing all forms of domestic violence and to provide sufficient safeguards for the victims…

103 ECtHR, *Buturugă v Romania*, no 56867/15, 11.01.2020, para. 74.
104 Ibid.
105 ECtHR, *Volodina v Russia* (*No 2*), *supra* note 6.

> The positive obligation applies to all forms of domestic violence, whether occurring offline or online.[106]

It is especially notable that the Court in *Volodina v Russia* (*No. 2*) examined the issue of the state's response to the acts of cyberviolence to which the applicant had been subjected under Article 8 rather than Article 3, given that in *Volodina v Russia*, the Court had found that such abuse 'undermined her *dignity*, conveying a message of *humiliation and disrespect*'.[107] Given that treatment which is 'such as to arouse in its victims feelings of fear, anguish and inferiority capable of *humiliating and debasing* them and possibly breaking their physical or moral resistance'[108] has been found to constitute degrading treatment, it is unclear why the cyberviolence to which the applicant was subjected was not considered to constitute ill-treatment so as to engage the state's obligations under Article 3.

The third, and most recent, case of cyberviolence as a form of domestic abuse is that of *M.Ş.D. v Romania*.[109] In this case, as with the earlier two decisions, the Court considered the authorities' passivity in the face of complaints from the applicant regarding her former partner's non-consensual sharing of intimate photos of her online (as well as giving her personal details to a website advertising escort services) constituted a violation of Article 8. It is notable that the Court explicitly recognised that 'acts of online violence, online harassment and malicious impersonation [are] … forms of violence against women and children *capable of undermining their physical and psychological integrity*…'[110] Yet, the Court did not consider the case through the prism of Article 3. This is particularly surprising, given that the Court accepted that the cyberviolence to which the applicant had been subjected 'had exposed [her] to being harassed by unknown individuals for sexual services and, along with the consequences to which those acts gave rise, they had been capable of causing the applicant *psychological trauma and damage* and emotional instability, as well as instilling in her *feelings of anxiety and fear*'.[111] Such findings would seem to provide ample support for the conclusion that the treatment was at the least degrading for the purposes of Article 3 (and, indeed, was likely inhuman, given the degree of psychological suffering the applicant experi-

106 Ibid. at [49].
107 ECtHR, *Volodina v Russia, supra* note 1, para. 50. Emphasis added.
108 ECtHR, *Jalloh* v *Germany, supra* note 79, para. 68. Emphasis added.
109 ECtHR, *M.Ş.D v Romania, supra* note 6.
110 Ibid., para. 118. Emphasis added.
111 Ibid., para. 123. Emphasis added.

enced as a result, as detailed in the Court's judgment). This is all the more given the evidence – again, unchallenged before the Court – that the applicant's former partner had engaged in the conduct because he was 'fuelled by [a] desire to take revenge on the applicant and to defame, denigrate and humiliate her both publicly and within the circle of her friends, family and acquaintances because he had felt betrayed by her'.[112] Such a purpose further supports a finding that the conduct engaged Article 3.

As the UN has observed, 'technology-facilitated gender-based violence has surged in recent years, posing *serious threats to the safety and well-being* of women and girls everywhere' with sexual harassment (which includes sharing intimate photos without consent) being one of the most common forms of 'digital abuse and technology-facilitated violence against women'.[113] As the Court recognised in *Tunikova and Others*,[114] the classification of domestic abuse as treatment contrary to Article 3 has the capacity to influence the public perception of domestic abuse. Given the surging rates of cyberviolence as a form of domestic abuse, appropriate classification of this abuse is crucial if the Convention's protections are to be effective for victims and survivors of domestic abuse. A further issue is that by examining such instances of domestic abuse through the prism of the right to respect for private life protected under Article 8, the Court runs the risk of undermining the progress that has been made in dragging domestic abuse out of the 'private sphere' and placing it squarely where it needs to be: as a *public* health issue.[115] Recognising that cyberviolence constitutes ill-treatment under Article 3 will also bring the ECtHR in line with the EU which, having acknowledge that such abuse – including the non-consensual sharing of intimate images online – 'can be very harmful for victims', now requires that all member states 'ensure that' such abuse 'is punishable as a criminal offence'.[116] Indeed, GREVIO's first and, thus far only, general recommendation concentrates on the 'digital

112 Ibid.

113 UN WOMEN, FAQS: Digital abuse, trolling, stalking, and other forms of technology-facilitated violence against women, 10.02.2025, available at https://www.unwomen.org/en/articles/faqs/digital-abuse-trolling-stalking-and-other-forms-of-technology-facilitated-violence-against-women, last accessed 19.05.2025. Emphasis added.

114 ECtHR, *Tunikova and Others v Russia*, *supra* note 63, para. 77.

115 See also, A. Sinclair-Blakemore, 'Cyberviolence Against Women Under International Human Rights Law: *Buturugă v Romania* and *Volodina v Russia* (*No 2*)', (2022) 23(1) *Human Rights Law Review*, pp.1–27.

116 Directive (EU) 2024/1385 of the European Parliament and of the Council of 14 May 2024 on combating violence against women and domestic violence, para. 19 and Art 5(1).

dimension of violence against women'[117] and recognises that '[l]ike offline violence, [cyberviolence] is deeply rooted in power dynamics, economic imbalances and patriarchal attitudes that foster the idea of women's inferiority to men. These damaging beliefs and attitudes are deeply embedded in the fabric of societies and thus require a largescale societal change.'[118] Such societal change is, however, less likely to occur (or is likely to be considered less pressing) if the conduct to which it is directed is treated as an issue arising in the private sphere. A failure to engage with cyberviolence through the lens of Article 3, particularly given the latter's focus on the *effect* of the treatment on victims and survivors and a consideration of the purpose for which the treatment is inflicted, also has the potential to mask the gendered nature of the abuse.

3.2 *Suicide in the Context of Domestic Abuse: A New Application of Article 2?*

Domestic abuse is associated with an increased risk of suicide among victims and survivors of such abuse.[119] The 'WHO multi-country study … showed that women with experience of physical or sexual violence were nearly 4 times more likely to attempt suicide than women without such experiences'.[120] Given this data, it is arguable that the lethality risk assessment which states must conduct in response to allegations of domestic abuse to comply with Article 2 needs to include a consideration of the risk of suicide of victims and survivors of such abuse. Indeed, there have been cases in the UK in which victims of domestic abuse have died by suicide and the perpetrators of the abuse have been found to have unlawfully killed the victim.[121] Such

117 GREVIO, General Recommendation No 1 on the digital dimension of violence against women, 20.10.2021, available at https://rm.coe.int/grevio-rec-no-on-digital-violence-against-women/1680a49147, last accessed 19.05.2025.

118 Ibid., para. 35.

119 See, for instance, R. C. Keynejad, S. Davidge and L. M. Howard, 'Domestic Abuse is Important Risk Factor for Suicide' (2022) *BMJ* 379:02890.

120 S. McManus, S. Walby, E. Capelas Barbosa, L. Appleby *et al.*, 'Intimate Partner Violence, Suicidality, and Self-harm: A Probability Sample Survey of the General Population in England', (2022) 9(7) *Lancet Psychiatry*, p. 574. See also, L. C Potter, R. Morris, K. Hegarty and C. García-Moreno, 'Categories of Health Impacts of Intimate Partner Violence in the World Health Organization Multi-country Study on Women's Health and Domestic Violence', (2021) 50(2) *International Journal Epidemiology*, pp. 652–662.

121 See, for instance, the Prevention of Future Deaths Report issued by the Coroner following the inquest into Kellie Sutton's death: Courts and Tribunals Judiciary, 'Kellie Sutton: Prevention of Future Deaths Report', 30.04.2024, available at https://www.judiciary.uk/prevention-of-future-death-reports/kellie-sutton-prevention-of-future-deaths-report/,

cases suggest that the suicide of a victim of domestic abuse may engage a range of the state's obligations under Article 2, particularly the protective and investigative obligations. This is illuminated in the UK case of Kellie Sutton who died by suicide after being 'subjected to months of' domestic abuse, including controlling and coercive behaviour.[122] According to the Coroner conducting Kellie Sutton's inquest:

> The evidence at the inquest indicated a lack of awareness of the link between domestic abuse and suicide. Whilst officers did have an awareness of the 'harm' from others through domestic abuse, *a heightened awareness of the risk of 'harm' by taking one's own life was relevant to a risk assessment and the consequential steps which may be required.*[123]

Similar concerns have been raised by coroners in other cases of suicides of victims of domestic abuse.[124]

In several recent cases, the ECtHR has had cause to consider whether states have complied with their obligations under Article 2 where women who have been subjected to domestic abuse have died in circumstances which (at least superficially) suggest they may have suicided.[125] In each of the cases, the Court has found that the authorities violated the procedural obligation to conduct an effective investigation under Article 2, noting the importance of considering whether domestic abuse has contributed to the victim's suicide or, indeed, whether the victim did not, in fact suicide, but was the victim of homicide with the perpetrator purporting to conceal their unlawful conduct by staging the killing as suicide. Thus, in *Vieru v the Republic of Moldova,*[126] the Court was

---

last accessed 19.05.2025. See also, the case of Justene Reece whose former partner pleaded guilty to manslaughter after Reece suicided following a 'sustained campaign of harassment by her ex-partner … who was jailed for ten years': Staffordshire Police, 'Statement: Publication of Domestic Homicide Review following the death of Justene Reece', 18.11.2021, available at https://www.staffordshire.police.uk/news/staffordshire/news/2021/november/statement—publication-of-domestic-homicide-review-following-the-death-of-justene-reece/, last accessed 19.05.2025.

122 Courts and Tribunals Judiciary, 'Kellie Sutton: Prevention of Future Deaths Report', *supra* note 121.

123 Ibid. Emphasis added.

124 See, for instance, Courts and Tribunals Judiciary, 'Lee-Ann Ince: Prevention of Future Deaths Report', 20.06.2024, available at https://www.judiciary.uk/prevention-of-future-death-reports/lee-ann-ince-prevention-of-future-deaths-report/, last accessed 19.05.2025.

125 See ECtHR, *Vieru v the Republic of Moldova*, *supra* note 2, ECtHR, *Oghlishvili v Georgia*, *supra* note 70 and ECtHR, *Gaidukevich v Georgia*, *supra* note 4.

126 ECtHR, *Vieru v the Republic of Moldova*, *supra* note 2.

'struck by the investigating authorities' readiness to accept that [the applicant's sister's] death was the result of her accidental fall [out of a fifth-floor window] without any other version being duly considered'.[127] The Court further held that:

> The history of domestic violence over a prolonged period of time, which presented the characteristics of a form of gender-based violence, should have incited the authorities to respond with particular diligence in carrying out the investigative measures. In particular, *they should have considered the possibility that they were dealing with a potential case of gender-motivated murder*. In this latter respect, the Court notes that *whenever there is a suspicion that an incident or death might be gender-motivated, it is particularly important that the investigation be pursued with vigour*.[128]

Similarly, in *Gaidukevich v Georgia*,[129] the Court found a violation of the procedural obligation under Article 2 in circumstances in which the applicant's daughter had been subjected to years of domestic abuse by her former partner before she was found dead in his bathroom, apparently having hanged herself. In finding a violation of the procedural obligation under Article 2, the Court noted that, as with *Vieru v the Republic of Moldova,* the authorities had 'hastily accepted' suicide as the cause of death 'without any other version ever being ever considered'.[130] The Court reiterated the need for there to be an 'examination of the previous incidents of domestic violence and of the possible role of gender-based discrimination in the commission of the offence' in order for the state to comply with its procedural obligations under Article 2 where a person has died in the context of domestic abuse, even if the ostensible cause of death is suicide.[131] Consistent with the Court's findings in *Vieru* and *Gaidukevich,* the 'sheer unwillingness on the part of the investigative authority to establish the truth surrounding' the death of the applicant's daughter who was found hanged in the context of a history of domestic abuse constituted a violation of the procedural obligation to investigate under Article 2 in *Oghlishvili v Georgia*.[132]

---

127 Ibid., para. 91.
128 Ibid., para. 92. Emphasis added.
129 ECtHR, *Gaidukevich v Georgia*, *supra* note 4, para. 67.
130 Ibid., para. 66.
131 Ibid.
132 ECtHR, *Oghlishvili v Georgia*, *supra* note 70.

The Court's emphasis on the need for authorities rigorously and expeditiously to investigate deaths that occur where there is a history of domestic abuse, and not too readily to accept suicide as an explanation, is a further illustration of the gender-sensitive approach the Court has adopted to interpreting the Convention in domestic abuse cases. It is notable, however, that in none of these cases did the Court find a violation of the substantive obligation to protect under Article 2. In *Vieru v the Republic of Moldova*,[133] in a rather cruel irony, the Court considered that the lack of an effective investigation by the authorities (which violated the procedural obligation under Article 2) meant that it was 'not possible to discern without speculation if [the applicant's sister's] death had resulted from an accident, a suicide, a crime or a gender-motivated crime.'[134] Consequently, it could not 'reach any conclusive findings' regarding the state's alleged violation of its substantive protective obligation.[135] In contrast to the majority's position, Judges Krenc and Sârcu considered that 'the facts … yielded sufficient material to warrant an examination under the substantive limb of Article 2'.[136] Having conducted such an examination, the dissenting Judges determined that the authorities had failed to conduct a proper lethality risk assessment which, had it been completed, 'might have disclosed a risk to the victim's life, either by reason of a potential escalation of violence on the part of the aggressor, or by reason of the victim's susceptibility to suicide'.[137] As Judges Krenc and Sârcu observed, '[t]here is a strong correlation between a woman's experience of violence and her mental distress, up to and including the risk of suicide'.[138] The dissent is further notable for the following, concluding remarks:

> the Court has missed an opportunity to deal with the issue of suicide as it arises in the context of proven domestic violence and to reiterate the corresponding obligations on the authorities to provide support for the victims of such violence who, for the most part, feel isolated and trapped in their own private tragedy. Nor can the successive cycles of domestic violence be ignored, the frequency, acuteness and dangerousness of which all increase significantly over time. By bracketing out the question of suicide from the phenomenon of domestic violence, the

133 ECtHR, *Vieru v the Republic of Moldova, supra* note 2.
134 Ibid., para. 97.
135 Ibid., paras. 97–98.
136 Ibid., Joint Partly Dissenting Opinion of Judges Krenc and Sârcu, para. 1.
137 Ibid., para. 4.
138 Ibid., para. 5.

> present judgment is fraught with the risk of failing to consider that phenomenon as a whole, including in its most serious forms.[139]

The Court's findings of violations of the procedural obligation under Article 2 in *Vieru, Gaidukevich* and *Oghlishvili* are critical to ensuring that the protections in the Convention are 'practical and effective' 'not theoretical or illusory' for victims and survivors of domestic abuse,[140] particularly in the light of the rates of suicide among women who have been subjected to such abuse. Without effective investigations into apparent suicides, it is possible that further violations of the Article 2 rights of victims and survivors of domestic abuse are going unaddressed (whether that is because they have, in fact, been murdered or because their suicides were the foreseeable consequence of their abuse[141] such that, in either case, the state's protective and investigative obligations under Article 2 are potentially engaged). Indeed, the Court's judgments suggest that the lethality risk assessment which must be undertaken by authorities to comply with Article 2 in cases of domestic abuse must also include an assessment of the risk of suicide by victims and survivors of domestic abuse. That said, the failure of the Court to consider the state's preventative obligations – in particular, its obligation to take reasonable measures to protect against real and immediate risks to life – in such contexts is disappointing. If the authorities are not factoring in a risk of suicide into their lethality risk assessment, there is – as the dissenting judges recognised in *Vieru* – a strong argument that the authorities have failed to comply with the requirements set out in *Kurt* in breach of the positive operational obligations under Article 2.

4 Conclusion

The Court's approach to cases involving domestic abuse has evolved considerably in the last two decades. This evolution has been characterised by a process of expansion and refinement of the Court's understanding of the nature of domestic abuse and of the ECHR's applicability to the same. The Court has

139 Ibid., para. 9.

140 See, for instance, ECtHR, *Talpis v Italy*, *supra* note 19, para. 103.

141 Recent research in the UK indicates that a majority of victims of domestic abuse who have subsequently suicided are known to the authorities: K. Hoeger, C. Gutierrez-Munoz, A. Sagullah and A. Whitaker, 'Vulnerability Knowledge and Practice Programme (VKPP) Domestic Homicides and Suspected Victim Suicides 2022–2024 Year 4 Report', March 2025, ch.8, available at https://www.vkpp.org.uk/assets/Year-4-Report_publication.pdf, last accessed 19.05.2025.

recognised that domestic abuse is a form of gender-based violence which necessitates a gender-sensitive interpretation of the ECHR and, today, the Court acknowledges that domestic abuse is rarely an isolated incident but is, more often, characterised by successive instances of abuse, which may escalate in severity and/or frequency before culminating in lethal force being used against the victim (usually a spouse/intimate partner or former spouse/intimate partner and/or other family members (most frequently children)). The Court has drawn on specialist material, most notably the Istanbul Convention and submissions and reports of GREVIO, to inform its decision-making, and to extend the protections of the ECHR, particularly as they relate to the protective obligations under Article 2. Plainly, the Court's jurisprudence is a welcome step towards addressing the public health crisis that is domestic abuse. But one should not become complacent; there is still much to be done. To ensure that the ECHR protections are effective for domestic abuse victims and survivors, the Court must overcome its apparent reluctance to characterise domestic abuse as inhuman or degrading treatment where the minimum level of severity has been met. Not only do such characterisations affect the level of damages likely to be awarded, but a finding that domestic abuse (or specific forms of it) constitutes inhuman or degrading treatment (or, indeed, torture) under Article 3 has the capacity to influence the public perception of (and the motivation for states to address) such abuse. This is particularly pertinent with respect to cyberviolence, rates of which are surging. Likewise, there is a growing awareness of the risks of suicide of victims of domestic abuse, and while the Court's findings of procedural violations in such cases are undoubtedly welcome, the Court must also consider the state's protective obligations in such cases if the ECHR is to offer meaningful protection from domestic abuse. In the 2017 decision of *Talpis v Italy*,[142] Judge Spano stated that '[t]he law has its limits, even human rights law'.[143] While that is undoubtedly true, what the Court's growing domestic abuse case law reveals is that such limits are not fixed; they can (and must be) be expanded as society (and the Court) develops its understanding of the nature of domestic abuse.

142 ECtHR, *Talpis v Italy*, *supra* note 19.

143 Ibid., Separate Partly Dissenting Opinion of Judge Spano, para. 1.

Human Rights in Motion and People on the Move: Navigating Individual and Collective Claims Amidst Climate Change

Irene Sacchetti and Carla Field

Abstract

While decisions like *Teitiota* are often celebrated as groundbreaking, they raise critical questions about whether human rights frameworks provide justice for those most affected by climate impacts or effectively compel states to fulfil their climate obligations in light of their persistent failures to meet international targets. More recent rulings suggest a more optimistic perspective, such as the European Court of Human Rights (ECtHR)'s successful decision in *Verein Klimaseniorinnen Schweiz and Others v Switzerland* and *Daniel Billy and Others v Australia* (*Torres Strait Islanders case*) adjudicated on by the Human Rights Committee (HRC). Nonetheless, the inherent tension between human rights' individual and collective dimensions remains a significant challenge in substantiating claims within a human rights framework. In critically examining the differing approaches to human rights protection amidst environmental decline, our contribution reflects on potential ways to navigate the tension between individual and collective human rights dimensions. It considers how recent jurisprudence either reinforces this divide or provides insights into strategically addressing it. Specifically, to what extent could the ECtHR's recent ruling expand the conceptual and practical boundaries of human rights-based claims, and might such developments catalyse broader shifts within international legal frameworks? In turn, we consider how this may influence future climate-based decisions, including those in the context of climate-induced mobilities.

1 Introduction

As the impacts of climate change intensify, rights-based climate litigation has emerged as a critical strategy for advancing climate justice across national, regional and international dimensions.[1] Yet, climate change is, by its nature, a collective phenomenon – its impacts extend across societies, cultures and

1 B. Batros and T. Khan, 'Thinking Strategically about Climate Litigation', in C. Rodríguez-Garavito (ed.), *Litigating the Climate Emergency: How Human Rights, Courts, and Legal*

© IRENE SACCHETTI AND CARLA FIELD, 2026 | DOI:10.1163/9789004751026_008
This is an open access chapter distributed under the terms of the CC-BY-NC-ND 4.0 license.

human and non-human communities,[2] and far beyond existing generations, as its intergenerational dimensions clearly demonstrate.[3] However, human rights legal frameworks have historically focused on the protection of individual rights, with the requirement that any risk of harm or violation must be proven as an individualised occurrence.[4] In practice, when there is a risk for a human right to be violated, victim status is assessed on the basis of an individual violation or risk of violation that has to be personal and unique.[5] This insistence creates a profound disconnection between the communal nature of climate-induced impacts and the individualised nature of risk underpinning current criteria to assess human rights violations.[6]

How can a legal system that is traditionally designed to address individualised harm adequately respond to a phenomenon that is inherently collective? This is not to imply that the intersectional nature of climate change and its implications for human rights are less significant than the collective experience of climate-related impacts, nor is it intended to undermine the experience of the individual in the face of collective harm. Rather, it is imperative to question whether the insistence on individualised claims might undermine the recognition of communal losses – such as the cultural dimension of human rights when confronted by climate threats – and the broader intergenerational impacts of the ongoing socio-ecological collapse.[7]

In this paper, we explore the tension between the collective dimension of climate impacts *vis-a-vis* the prevailing legal paradigm mandating the need to demonstrate climate-related harms on an individual basis. This exploration enables us to highlight the risk that this tension poses of undermining the recognition of communal losses – such as the erosion of cultural rights – and ultimately the ability of human rights law in responding to climate-related challenges and inter-generational impacts.[8] While entire communities are at

---

Mobilization Can Bolster Climate Action. Globalization and Human Rights, Cambridge University Press: Cambridge, 2022, pp. 97–116.

2 L.J. Kotzé, 'The Anthropocene, Earth System Vulnerability and Socio-Ecological Injustice in an Age of Human Rights', (2019) 10(1) *Journal of Human Rights and the Environment*, pp. 62–85.

3 Ibid.

4 A. Venn, 'Rendering International Human Rights Law Fit for Purpose on Climate Change', (2023) 23(1) *Human Rights Law Review*, p. 14.

5 E.B. Weiss, 'Climate Change, Intergenerational Equity, and International Law', (2008) 9(1) *Vermont. Journal of Environmental* Law, pp. 615–627.

6 A. Venn, 'Rendering International Human Rights Law', *supra* note 4.

7 L.J. Kotzè, 'The Anthropocene', *supra* note 2.

8 Ibid., pp. 80–81.

risk of, or already undergoing, displacement from their ancestral lands due to rising sea levels, prolonged droughts or extreme weather events,[9] international refugee law demands that for a claim to succeed, the violation of a right must be sufficiently individualised and circumscribed to the claimant's specific circumstances. In practice, national courts applying the standards necessitated by the Refugee Convention require a demonstration of the concrete, personal nature of the climate-related harm – a criterion that appears all but impossible to meet in the face of the diffuse impacts of climate change. This is true not only of the exceptionally high standards of the prevailing refugee criteria but also of the secondary protection offered through the means of international human rights law. As we will go on to explore in the remainder of this paper, while both present strategies for mobile persons in the face of a changing climate, neither option appears immediately accessible, given the strict reliance on the individual harm assessment. As a caveat, our argument does not imply that climate change impacts on everyone uniformly. On the contrary, as intersectional approaches to the human rights implications of climate change suggest, individuals experience climate change differently and with varying intensity.[10] However, in the context of climate-induced mobilities, claimants face the challenge of demonstrating that their conditions are significantly more adverse than those of others in their community. This criterion, which requires proof of a uniquely personal risk, presents a substantial obstacle for potential claimants. While it should be noted that there are conceivable instances in which individuals or defined groups within a geographic location may experience the effects of climate change to a greater degree than others due to exposure to specific vulnerability,[11] these effects are still experienced within the setting of a general degradation of the environmental conditions which affects communities as a whole.

9 A.I. Almulhim, G.N. Alverio, A. Sharifi *et al.,* 'Climate-Induced Migration in the Global South: an in Depth Analysis', (2024) 3(47) *npj Climate Action,* p. 5.

10 A. Kaijser and A. Krosnell, 'Climate Change through the Lens of Intersectionality', (2013) *23*(3) *Environmental Politics*, pp. 417–433.

11 See, D. Cantor, B. Burson, B. Aycock *et al.*, 'International Protection, Disasters, and Climate Change', (2024) 36 *International Journal of Refugee Law*. See also the accompanying declaration which states at para. 6 [b]; 'In disaster contexts, the risk of harm generated by a hazard, even a natural one, is shaped not only by its frequency and intensity but also by human factors that determine the extent to which people are exposed and vulnerable to the hazard and can manage the risks', Refugee Law Initiative, 'Declaration on International Protection in the context of Disasters and Climate Change', (2024) 36 *International Journal of Refugee Law*, p. 169.

Reflecting on the persistent challenges that climate-mobile persons face in securing human rights claims, we are compelled to confront a fundamental question: how can international human rights law – specifically those rights which can engage *non-refoulement* obligations, which are traditionally designed to address discrete, individualised harms – effectively respond to a phenomenon that is inherently collective? Acknowledging the complexity of this issue – which cannot be fully resolved within a single paper – our analysis is dedicated to exploring strategies for navigating the inherent tension between the individual and collective dimensions of human rights in the context of a changing climate.

This paper comprises three parts. First, we provide a background to collective rights theory, addressing the development of collectivism concerning international human rights and how the concept of collective rights bearing can play an essential role in relation to climate-based human rights jurisprudence. This foundation sets the stage for understanding the broader implications of collective vs individual dimensions of rights in addressing climate-related challenges. In the second section, we examine these challenges and the critical role of collective rights in both European and global jurisprudence. Finally, in the third section, through an analysis of the *Teitiota* case,[12] we illustrate how the tension between individual and collective rights manifests in human rights-based climate litigation, and the challenges of this in the context of climate-induced mobilities. By comparing recent decisions, including the *Klimaseniorinnen*[13] case from the European Court of Human Rights and the *Torres Strait Islanders*[14] case from the UN Human Rights Committee (HRC), we identify overarching approaches to individual and collective human rights-based climate claims. We investigate how these judicial and quasi-judicial bodies assess harm differently. We question whether collective human rights claims are strategically more advantageous than individual claims, considering the contrasting outcomes in cases like *Teitiota*, the *Torres Strait Islanders*, and *Klimaseniorinnen.* In conclusion, we argue that recent jurisprudential developments offer emerging strategic paradigms for advancing human rights-based claims in the context of climate change-induced mobilities. We propose that reframing human rights claims as collective, rather than individual, has potentially more strategic litigation outcomes, including in cases of climate-

12 HRC, *Ioane Teitiota v New Zealand*, CCPR/C/127/2728/2016, 07.01.2020.

13 ECtHR, *Verein Klimaseniorinnen Schweiz and Others v Switzerland*, no 53600/20, 09.04.2024.

14 HRC, *Daniel Billy and Others v Australia* (*Torres Strait Case*), CCPR/C/135/D/3624/2019, 22.09.2022.

related mobilities, and may, in turn, provide protection and justice for those most impacted on by climate change.

This paper compares three landmark climate-related human rights cases – *Ioane Teitiota v New Zealand*, *Daniel Billy and Others v Australia* (the *Torres Strait Islanders* case), and *Verein Klimaseniorinnen Schweiz and Others v Switzerland* – to examine how legal systems at different levels respond to the challenge of addressing collective harm within frameworks traditionally focused on individual rights. These cases were selected because they reflect divergent legal approaches, claim structures and outcomes across national, quasi-judicial and regional judicial bodies.

Teitiota involved an individual claim before the HRC, a quasi-judicial treaty body. It failed largely because the claimant could not demonstrate that the climate-related harm he faced was sufficiently personal and distinct. In contrast, the *Torres Strait Islanders* case, also before the HRC, was a collective claim brought by an indigenous community. The Committee found in favour of the claimants, recognising that Australia had violated their rights by failing to protect their culture and environment, demonstrating that collective cultural identity can influence the legal interpretation of harm, even within the same quasi-judicial forum. Meanwhile, *Klimaseniorinnen*, decided by the European Court of Human Rights (ECtHR) – a regional judicial body with binding authority – marked a significant shift. The Court recognised the standing of a group of older women and acknowledged the state's obligations to prevent foreseeable climate-related harms, reflecting growing judicial openness to collective vulnerability and group-based claims. The diversity of legal forums – from international quasi-judicial bodies to regional courts – matters not only for procedural access but also for shaping how collective versus individual climate harms are understood. This institutional plurality facilitates dialogue between courts and treaty bodies, allowing decisions in one forum to influence others. Such cross-referencing might foster a shared interpretive space, gradually expanding human rights law better to address the collective and systemic nature of climate impacts.

2 Collective Rights and Collective Dimensions of Rights in the Context of a Changing Climate

Moral theories as to why and how we are rights bearers are complex and long discussed, and this paper is not the space for this debate to be revisited in depth. However, to be able to give a clear overview of why the concept of collective rights is relevant in the context of both regional European and

more global-reaching jurisprudence concerning some of the biggest climate questions of our time, a brief discussion of collective rights theory should be explored.

While some argue that 'collective', 'group' or 'solidarity'[15] rights are a distinct form of human rights, often placed as so-called third-generational rights,[16] that should be seen as distinct (although not divisible) from individual rights,[17] collective rights theory suggests otherwise. Early developments in collective rights theory by Joseph Raz[18] has been both built on and challenged over the years,[19] but his early conceptualisation of collective rights is useful for understanding the foundations of the theory. Raz grounds his definition of collective rights in the common good. As Jovanović summarises, 'one's well-being (interest), which is a base for one's legal right, not only is rarely confronted, but also often essentially contributes to the "common good"'.[20] What this means is that when it comes to collective-based rights, those rights are grounded in the individualised well-being that will be derived from a collective good that could not be achieved individually, as collective goods are reliant on group participation. Raz demonstrates this by example, using the 'common good' of unpolluted air as far back as 1995 which is, of course, relevant to the context of this contribution and within the environmental context:

15 These three terms are often used interchangeably to address non-individualised rights, as will be explored throughout this section.

16 Human Rights discourse often separates rights into three 'generations'. First generation rights being Civil and Political rights, second generation rights are Social, Economic and Cultural Rights, and the third generation rights are collective or solidarity rights. However, it has been recognised by some that this separation fails properly to address the complex socio-political history of human rights development of the last 75 years.

17 See e.g., D. Sanders, 'Collective Rights', (1991) 13(4) *Human Rights Quarterly*, p. 368.

18 Joseph Raz first discussed the concept of collective or 'group' rights in *Morality of Freedom*, but later went on to refine his conceptualisation in other works. Early on, he defines collective rights as needing to satisfy three core conditions: '[a] collective right exists when the following three conditions are met. First, it exists because an aspect of the interest of human beings justifies holding some person(s) to be subject to a duty. Second, the interests in question are the interests of individuals as members of a group in a public good and the right is a right to that public good because it serves their interest as members of the group. Thirdly, the interest of no single member of that group in that public good is sufficient by itself to justify holding another person to be subject to a duty.' See, J. Raz, *Morality of Freedom*, Oxford University Press: Oxford, 1988, p. 208.

19 For an interesting and comprehensive discussion of this see M.A. Jovanović, *Collective Rights: A Legal Theory*, Cambridge University Press: Cambridge, 2012.

20 Ibid., p. 79.

> everyone benefits from unpolluted air. Everyone has a health interest which benefits from unpolluted air. The benefit is noncompetitive (one person's enjoyment is not at the expense of anyone else), and it is similar in nature for everyone (all enjoy it in the same way), since it serves the same health interest in every person's case (though people do not necessarily enjoy the benefit to the same degree).[21]

Breaking down Raz's example individually, everyone benefits from the effects of clean air, but those effects are achievable only, and the individual benefits felt only, when this is achieved by group. One person cannot achieve clean air alone.

This conceptual basis for collective rights has since been built on, and as Jovanović notes, Raz 'never pretended to offer a complete theoretical account of collective rights. However, he certainly provided more than solid theoretical grounds for a further conceptualization of collective rights.'[22] In his comprehensive discussion of collective rights theory, Jovanović expands on Raz's concept using the theory of value collectivism[23] and highlights the methods for exercising collective rights, noting three key ways, which will be outlined below.

In the first instance, Jovanović notes that rights can be exercised 'jointly (communally) by a group'.[24] This is perhaps the most straightforward way in which a collective-based right would be exercised. Given the participatory nature of collective rights, it is 'the most natural'[25] way we would expect to see them in action. Thinking abstractly, an obvious exercise of a collective right would be an Indigenous community group, acting within a communal function, to challenge access to collectively owned land. Exercising collective rights in this manner often includes elements of collective decision-making.[26]

The second format for exercising collective-based rights is also readily seen in everyday examples, and is 'via some representative body or agent'.[27] In his description of group rights, Buchanan describes this kind of action as that

21 J. Raz, 'Rights and Politics', (1995) 71(1) *Indiana Law Journal*, p. 35.
22 Jovanović, *Collective Rights, supra* note *19*, p. 108.
23 Ibid.
24 Ibid., p. 115.
25 Ibid.
26 Ibid.
27 Ibid.

which is 'wielded nonindividually'[28] and gives the example of 'rights of internal self-government … by agents of the group (for example hereditary or elected leaders)'.[29] An example of this could be the exercise of certain cultural rights, which benefit the individual but are actioned through an identified leader (the agent).

'Finally, and most controversial … collective rights can be exercised individually.'[30] This is the third method for collective rights action noted by Jovanović, and while it may seem paradoxical that rights based in participatory action or 'value collectivism' could be exercised individually, this is indeed possible. Jovanović gives the very useful example of 'the right to use one's mother tongue in communication with local authorities'.[31] While the exercise of the right is individual (speaking one's language), the ability to exercise that right is dependent on participatory action (that others also speak that language).

These conceptual understandings of collective rights are important as there is no generally accepted definition of collective or group rights in international law, although they are referred to with increasing frequency in key human rights instruments. Turning to instruments such as the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) – where we may reasonably expect to find a definition – while the existence of collective rights is recognised in Article 1[32] of the Declaration and the impact of collective rights-bearing is recognised in the preambular material,[33] no definition of what constitutes a collective right is provided. Why then is this relevant in the context of environmental degradation and ongoing climate-related judicial developments?

---

28 A. Buchanan, 'Liberalism and Group Rights', in J.L. Coleman and A. Buchanan (eds.), *In Harms Way: Essays in Honor of Joel Feinberg*, Cambridge University Press: Cambridge, 1994, p. 3.

29 Ibid.

30 Jovanovic, 'Collective Rights', *supra* note 19, p. 116.

31 M.A. Jovanović, 'Cultural Rights as Collective Rights', in A. Jakubowski (ed.), *Cultural Rights as Collective Rights: An International Law Perspective*, Studies in Intercultural Human Rights Series, Vol. 7, Brill: Leiden, 2016, p. 21.

32 Article 1 UNDRIP: 'Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law'.

33 Preamble to the UNDRIP: 'Recognizing and reaffirming that indigenous individuals are entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples'.

Reflecting on the example of a common good provided by Raz, clean air, collective-based rights, and particularly the second (via an agent) and third (individualised) actionable methods of collective-based rights understood through the theoretical concepts highlighted above are highly relevant when analysing recent climate-based judicial developments. This will be addressed in more detail in the next section of this paper. These concepts are also relevant when considering the impact of climate change on human rights more broadly. For example, Folkesson has recognised that the concept of sustainable development, given its focus on both intergenerational and intragenerational equity, must include a collective element in all three pillars of its operationalisation.[34] The challenge, as she recognises, is the balance that judiciaries must strike between the collective elements of, say, the environmental pillar, with the individual elements of the economic pillar.[35] She concludes that '[o]ne of the keys to operationalising sustainable development hence seems to be recognition of the collective dimension of individual rights, as it will facilitate the inclusion of all pillars in the balancing between the conflicting interests'.[36] This is pertinent, given the current trends in climate-based jurisprudence, where conflicting interests between a clear common good are often contrasted with the sovereign decision-making powers of the state. As Folkesson has noted, the 'right to a clean environment is by nature an interest of the collective',[37] and Raz's example of clean air, ever more significant with statistics placing air pollutants as the second global risk factor for death, surpassing tobacco,[38] emphasises the potential for collective-based rights to enhance the justiciability of common goods at risk. The next section of this contribution will look at how this has been used in practice in recent years, identifying where the collective elements of rights have impacted on the outcome of climate-based litigation and how the requirement of an individualised assessment in cases of climate-based displacement may be an unworkable model, given the element

34 See E. Folkesson, 'Human Rights Courts Interpreting Sustainable Development: Balancing Individual Rights and the Collective Interest', (2013) 6(2) *Erasmus Law Review*: Folkesson notes that three pillars of sustainable development are the Environmental Pillar, the Social Pillar and the Economic Pillar and that these three pillars represent the often competing interests within sustainable development.

35 Ibid., section 3.1.

36 Ibid., p. 148.

37 Ibid., p. 144.

38 Health Effects Institute, 'State of Global Air 2024: A special report on global exposure to air pollution and its health impacts, with a focus on children's health', 2024, available at https://www.stateofglobalair.org/resources/report/state-global-air-report-2024, last accessed on 14.05.2025.

of the impact on the community of climate decline. In highlighting the tension between the collective dimension of climate change and its impact on existing human rights and the individual approach necessary in human rights-based claims within the climate mobilities context (as will be demonstrated through the discussion of the *Teitiota* case) an analysis of the potential benefits of a collective-rights approach to future climate-based litigation will be explored.

3 Unravelling the Tension: Individual *versus* Collective Dimensions of Human Rights-based Claims in a Changing Climate

Climate change impacts pose challenges on a collective level, with communities already experiencing profound threats to their human rights.[39] Greenhouse gas emissions are not just altering weather patterns and natural ecosystems but are also contributing to climate-induced mobilities – both within national borders and across them.[40] Cross-border climate-induced human mobility occurs in a legal vacuum, as international law does not explicitly recognise climate change as a driver of migration and consequently fails to provide protection for those compelled to move because of climate impacts.[41] While legal scholarship has extensively examined the inadequacy of refugee law in addressing climate-related mobility,[42] human rights law appears more adaptable in grounding claims for climate-related human rights violations.[43] Yet, even this approach is not without its difficulties, as this section will demonstrate. The inherent tension between the collective nature of climate change impacts and the individualised structure of human rights law is particularly pronounced in the context of climate-induced mobility. On one hand, climate change disrupts socio-economic structures, cultural continuity,

39 B.S. Levy and J.A. Patz, 'Climate Change, Human Rights, and Social Justice', (2015) 81(2) *Annals of Global Health,* pp. 310–322.

40 G. Daoust and J. Selby, 'Climate change and migration: A review and new framework for analysis', (2024) 15(4) *WIREs Climate Change*, pp. 2–14.

41 J. Draper, 'Climate Change and Displacement: Towards a Pluralist Approach', (2024) 23(1) *European Journal of Political Theory,* pp. 44–64.

42 For discussions on the use of refugee law to address the 'climate refugee' issue see J. Draper, *Climate Displacement*, Oxford University Press: Oxford, 2023, pp. 106–130, see also, F. Gemenne, 'One Good Reason to Speak of Climate Refugees', (2015) *Forced Migration Review*, p. 49, see also C. Nicholson and B. Mayer (eds), *Climate Migration, Critical Perspectives for Law, Policy and Research*, Hart: Oxford, 2023.

43 S. Atapattu, 'Climate Change and Displacement: Protecting "Climate Refugees" within a Framework of Justice and Human Rights', (2020) 11(1) *Journal of Human Rights and the Environment,* pp. 86–113.

and community integrity – harms experienced collectively. On the other, international human rights law has traditionally centred on the individual as the primary subject of rights. This individualised orientation has deep roots in the post-World War II development of international human rights law, particularly with the adoption of instruments such as the Universal Declaration of Human Rights (1948) and the International Covenant on Civil and Political Rights (1966). These foundational texts were shaped by a historical context that prioritised the protection of individuals against state abuse. This traditional prioritisation of the individual has elevated the concept of the 'rights-holder' as being typically conceived in individual terms, with legal redress contingent on the demonstration of harm suffered by that specific person. Rights, such as the right to life, the prohibition of torture or the right to privacy and family life, are structured around this personalised model of injury and redress.

This doctrinal legacy creates serious limitations in climate-related claims, where harm is diffuse, slow-onset and often experienced collectively. For example, when assessing victim status, courts and human rights treaty-monitoring bodies – including quasi-judicial bodies like the HRC – require proof that the applicant faces a real and personal risk of harm. As will be further explored in *Teitiota v New Zealand*, this high evidentiary threshold persists even where an entire community is exposed to climate-driven threats, such as sea-level rise or freshwater scarcity. By insisting on a discrete, individualised harm, such bodies may overlook the cumulative and shared dimensions of climate impacts that fundamentally drive displacement. In doing so, international legal institutions not only constrain the legal avenues available to those affected by climate-induced mobility, but also perpetuate a narrow framework ill-suited to the collective nature of impacts.[44]

At its core, the tension between the collective impacts of climate change and the predominantly individualistic nature of human rights law creates a significant gap between lived experiences and legal requirements. Climate-induced mobilities – where communities are forced to abandon their ancestral lands due to rising sea levels, prolonged droughts or extreme weather events – reveal a form of harm that is both cumulative and shared. These collective experiences often manifest themselves as the disruption of social, cultural and economic bonds, resulting in a loss of identity and a fracturing of community life. Yet, to secure protection under human rights law, claimants are required to isolate and demonstrate specific, individualised injuries. This discrepancy raises fundamental questions: is it possible for a legal claim to

44 S. Behrman and A. Kent, 'The Teitiota Case and the Limitations of the Human Rights Legal Framework', (2020) 75 *Questions of International Law*, p. 35.

capture the collective dimensions of climate harm when its very structure demands an individual victim narrative? And, if not, how might legal doctrines evolve to bridge this critical gap? The following sections critically engage with these questions by analysing how current legal frameworks respond to the individual and collective dimensions of climate-induced harm, and what emerging jurisprudence suggests about the evolving capacity of human rights law to accommodate such claims.

3.1 *The Tension at Play:* Teitiota v New Zealand

Teitiota v New Zealand is the first international ruling on 'climate refugees'.[45] Given its significance and the constraints of space, we provide only a brief summary. In this case, the HRC was tasked with addressing cross-border climate-induced mobility for the first time. The case has been hailed as a milestone, with the United Nations Human Rights Office of the High Commissioner's press release describing it as 'opening the door to climate change asylum claims'.[46] Yet, this recognition is somewhat paradoxical, as the claim ultimately failed at every stage. This raises critical questions: did the Committee miss an opportunity to expand protections for climate-mobile persons and push the boundaries of human rights law in the face of climate change and mobility? Does the Committee's decision reflect the obstacles to relying on human rights in climate mobilities litigations, such as the requirement for individualised victim status? The tension between the individual-collective dimensions of human rights-based claims and how this amplifies the challenge in protecting people on the move because of climate change is visibly at play in *Teitiota*.

Ioane Teitiota is from Kiribati, a low-lying archipelago in the South Pacific, a region already grappling with severe socio-economic challenges, which are further exacerbated by climate change impacts such as rising sea levels, coastal erosion, severe droughts, soil salinisation and the contamination of drinking water. Faced with these escalating environmental climatic threats, Teitiota and his family sought asylum in New Zealand after his work visa expired. However, his claims for refugee status based on environmental and

45 The Guardian, 'Climate refugees can't be returned home, says landmark UN human rights ruling', *The Guardian*, 20.01.2020, available at www.theguardian.com/world/2020/jan/20/climate-refugees-cant-be-returned-home-says-landmark-un-human-rights-ruling, last accessed on 12.05.2025.

46 United Nations Human Rights Office of the High Commissioner Press Release, 'Historic UN Human Rights case opens door to climate change asylum claims' 21.01.2020, available at https://www.ohchr.org/en/press-releases/2020/01/historic-un-human-rights-case-opens-door-climate-change-asylum-claims, last accessed on 28.01.2025.

climatic factors were rejected at all domestic stages. The core reason for rejection was that the impacts of climate change were not recognised as 'persecution' as defined for the purposes of the 1951 Refugee Convention.[47] After being deported back to Kiribati, Teitiota filed a communication with the HRC, grounding his claim against deportation in human rights law. In his application, Teitiota argued that his return violated his right to life under Article 6 of the ICCPR,[48] as well as the principle of *non-refoulement*, given the extreme climatic impacts in his home country.[49] While the Committee acknowledged that '…the effects of climate change in receiving States may expose individuals to a violation of their rights under articles 6 or 7 of the Covenant, thereby triggering the non-refoulement obligations of sending States …',[50] the majority ultimately dismissed the claim. Despite recognising that the environmental conditions in Kiribati might pose a risk to Teitiota's right to life, the Committee placed the risk of life-threatening violation for Teitiota within a 10–15-year timeframe. Arguably, the ruling fails to take into account the ongoing dire living conditions in Kiribati, including health crises and water supply contamination that were affecting Teitiota and his family. While the case has been hailed as a step forward for the protection of climate-mobile persons under international law,[51] the decision exemplifies the limitations of international law – and specifically refugee law at the domestic level and human rights law at the international level – in providing adequate protection in response to climate mobilities, as Teitiota was deported back to Kiribati with his family, where living conditions are already 'dire' and challenging.[52] Moreover, *Teitiota* set a very high bar for a violation of

47 Convention Relating to the Status of Refugees, 28.07.1951, 189 UNTS 137 (Refugee Convention).

48 Article 6(1) ICCPR: 'Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life'.

49 Office of the United Nations High Commissioner for Human Rights, 'The Principle of Non-Refoulement under International Human Rights Law',05.07.2018, available at https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf, last accessed on 12.05.2025.

50 HRC, *Teitiota, supra* note 12, para. 9.11

51 Mainly because of para. 9.11 of the decision. See e.g., A. Francis, 'U.N. Human Rights Committee Issues Landmark Climate Migration Decision', *Sabin Center Blog*, 21.01.2020, available at https://blogs.law.columbia.edu/climatechange/2020/01/21/landmark-u-n-decision-says-countries-may-not-turn-away-climate-migrants-in-the-future/, last accessed on 01.02.2025.

the right to life activated in response to *non-refoulement*.[53] The claim failed on three grounds: Teitiota was unable to demonstrate the personal nature of the injury to his right to life in the event of deportation,[54] the real risk of irreparable harm upon his deportation, and the foreseeability of such harm.[55] The Committee suggested that the risk to his right to life might materialise in the next 10–15 years, leaving room for local governments to take preventive action. However, if issues like water contamination, increasing food insecurity leading to severe health conditions, flooding and the destruction of homes are deemed not extreme enough to pose a serious threat to the right to life, what criteria would meet the threshold the Committee has set? As Laki Muhumuza points out in the dissenting opinion,[56] there should be no need to wait until a livelihood is entirely compromised before recognising a serious risk to life.

Yet, the *Teitiota* claim illustrates that, despite the profound and far-reaching effects of climate change in Kiribati, existing legal remedies grounded in international human rights law fail to provide adequate protection – even in circumstances where the right to life is ostensibly under severe threat. The case underscores that the burden of proof rests on each individual to demonstrate how the cumulative effects of climate change have caused or will directly cause harm, even though many of these impacts are shared broadly across the community. It is precisely on this basis that Teitiota's claim faltered: as Behrman and Kent note, 'the danger faced was not specific enough to Teitiota and his family; it was basically the same as that faced by all other inhabitants of Kiribati.'[57] As the Committee emphasised, 'the risk must be personal, that it cannot derive merely from the general conditions in the receiving State, except in the most extreme cases…'.[58] In addition, the Committee observed that 'the author has not demonstrated clear arbitrariness or error in the domestic authorities' assessment as to whether he faced a real, personal and reasonably foreseeable risk of a threat to his right to life…'.[59] Despite unani-

52 Expression used by the dissenting member of the HRC in HRC, *Ioane Teitiota v New Zealand*, CCPR/C/127/2728/2016, 07.01.2020, Individual Opinion of Committee Member Duncan Laki Muhumuza (dissenting), para. 6.

53 S. Behrman and A. Kent, 'The Teitiota case', *supra* note 44, p. 33.

54 Ibid.

55 Ibid.

56 Individual Opinion of Committee Member Duncan Laki Muhumuza (dissenting), *supra* note (55), para. 5.

57 S. Behrman and A. Kent, 'The Teitiota case', *supra* note 44, p. 35.

58 HRC, *Teitiota, supra* note 12, para. 9.3.

mous recognition by all parties that the material conditions in Kiribati were both poor and deteriorating, Teitiota was unable to establish that his circumstances were significantly more adverse than those of other residents.

Teitiota foregrounds the challenge posed by the requirement for an individualised risk of harm in human rights-based climate litigation and its tension with the collective dimension of climate change impacts. We concur with Behrman and Kent, who assert that 'the criterion of individualised risk of harm presents a real problem for potential claimants in the context of climate change, as that is precisely a phenomenon that affects communities in general, rather than specific individuals. It is difficult to imagine a case where an individual or defined group within a geographic area will experience the effects of climate change in ways that go beyond general conditions.'[60] As stressed by Committee member Laki Muhumuza in his dissenting opinion, 'the conditions of life laid out by the author, resulting from climate change in the Republic of Kiribati, are significantly grave, and pose a real, personal and reasonably foreseeable risk of a threat to his life under Article 6(1) of the Convention. Moreover, the Committee needs to handle critical and significantly irreversible issues of climate change, with the approach that seeks to uphold the sanctity of human life'.[61] In particular, '… the threshold should not be too high and unreasonable'.[62]

In short, the *Teitiota* case epitomises the current human rights regime's strict application of the personal risk requirement, even when facing the collective threat posed by climate change. Despite the severe environmental degradation in Kiribati, Teitiota's claim failed because he could not demonstrate that his risk was individualised rather than shared by the entire community. This disconnection brings us back to the critical tension: legal protection is contingent on proving unique harm, despite the inherently communal nature of climate impacts. The next subsection will examine the *Torres Strait Islanders* and the *Klimaseniorinnen* cases, exploring how these examples might offer effective strategies for addressing the individual–collective tension in human rights-based climate litigation in comparison with the above-explored *Teitiota* case.

59 Ibid., para. 9.7

60 S. Behrman and A. Kent, 'The Teitiota case', *supra* note 44.

61 Individual Opinion of Committee Member Duncan Laki Muhumuza (dissenting), *supra* note (55), para. 1

62 Ibid., para. 3

3.2 *Collective Claims in Europe and Beyond: A Perspective on Klimaseniorinnen, Daniel Billy and Others, and Teitiota*

As the above discussion has highlighted, there are distinct challenges present in the approaches taken by decision-making bodies when assessing the potential human rights violations in cases of individual harm in relation to climate-based mobilities. The individualised approach necessitated in such cases presents clear challenges, but how can more recent climate-based jurisprudence concerning collective rights approaches highlight potential solutions? This section aims to illustrate the current approaches to climate justice via collective-based claims, employing the methodology highlighted in section two, to explore how this could offer a potential solution to the issues highlighted in the above discussion of the *Teitiota* case. However, while there are visible differences between the approaches taken by decision-makers in assessing the individual versus collective elements of certain rights, these are not the only differences that must be explored. There is also a discernible division in the approach between how the *collective* claims themselves are dealt with within European jurisprudence and international decisions. Taking the examples of the *Torres Strait* case and *Klimaseniorinnen,* these differences can be illuminated, and the potential impact on future climate litigation can be sketched. This section will be broken down into three subsections. Firstly, an analysis of the *Torres Strait* case will highlight how collective claims are dealt with at the international level, and what this may mean for climate-mobile persons. Secondly, the *Klimaseniorinnen* case will be discussed to consider the apparent regional difference between the approaches in climate-based human rights litigation at a collective level. Lastly, this section will consider these differences in the light of the *Teitiota* case, the challenges this presents for climate-mobile persons, and what this could mean for strategic litigation in the future.

3.2.1 *Daniel Billy and Others v Australia* (*Torres Strait* Case)

The *Torres Strait* case, which was heard by the HRC, concerned a collective indigenous minority group residing on the four Torres Strait Islands, which asserted that the effects of climate change had had a profound impact on their general way of life.[63] Their case engaged several substantive rights under the ICCPR, and did so whilst collectively utilising human rights discourse to establish a violation by their state. While their case engaged rights that may be traditionally expected within collective exercise, such as Article

63 HRC, *The Torres Strait Case*, *supra* note 14, para. 2.1.

27 concerning minority rights,[64] others that may not traditionally be considered 'collective' rights, including the right to private and family life, are addressed in the *Torres Strait* case substantively and considering their collective-based elements. Space precludes a detailed discussion of all these, such as how the rights of children have been addressed, so the focus here will be on how the HRC has dealt with the collective exercise of Article 17 in this case.

Article 17 of the ICCPR outlines the right to private, family, and home life;

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.[65]

The language of Article 17 demarcates this right, as with most IHRL, as individualised: identifying 'his' right to privacy, family, and home. However, applying the collective-rights methodology explored in section 2, we know it is possible to exercise rights collectively in three ways, including as an individual, if the right itself, or elements of it, requires some form of participatory action. The right to private, family and home life, while described in a traditionally singular sense ('his right to…') can require participatory action to be exercisable (i.e. the participation of an individual within a collective family unit). In the *Torres Strait case*, there is clearly a collective exercise of Article 17, as the right to private and family life and home is applied to the islanders as a collective group dependent on their shared actions, as will be explored below. In its assessment, the Committee recognises that Article 17 requires states to 'prevent interference with a person's privacy, family, or home that arises from conduct not attributable to the State, at least where such interference is foreseeable and serious'[66] and so recognises that 'when environmental damage threatens disruption to privacy, family, and the home, States parties must prevent serious interference'.[67] The Torres Strait Islanders depend on the land not only for their physical subsistence,[68] but also for their cultural subs-

64 Article 27 ICCPR.

65 Article 17 ICCPR.

66 HRC, *The Torres Strait Case*, *supra* note 14, para. 8.9.

67 Ibid.

68 Ibid.: The Islanders rely on marine species for their physical nutrition [paras. 2.3, 2.5], as well as subsistence crop growing, which has been prevented by reason of soil salination [para. 2.5]. They also rely on local fruiting tree species which have become diseased

istence,[69] and the Committee recognises that 'the aforementioned elements constitute[...] components of the traditional Indigenous way of life of the authors, who enjoy a special relationship with their territory, and that these elements can all be considered to fall within the scope of protection under article 17 of the Covenant'.[70] The Committee acknowledges in this case that the scope of Article 17, while articulated in an individualised manner, does not exclude it from being exercised in a collective manner where the impacts are being felt collectively; in this case, due to the ongoing and unimpeded effects of climate decline. The Committee notes that where environmental-based degradation impacts on communities reliant on natural resources for their subsistence (and there is no alternative means to subsistence available, including humanitarian aid), there will be 'direct repercussions on the right to one's home'[71] that may cause 'physical or mental harm',[72] and so 'the degradation of the environment may then adversely affect the well-being of individuals and constitute a foreseeable and serious violation of private and family life and the home'.[73] The exercise of this right in a collective manner is very obvious in the *Torres Strait* case as it concerns an indigenous group which is dependent physically, culturally and mentally on the successful upkeep and protection of their lands. Without this, the positive obligations of the right to home (the physical retention of a safe space as well as the mental safety this supplies) could not be discharged. Both intergenerational and intragenerational equity are of key importance when addressing matters of climate justice.[74] Without it being explicitly recognised by the HRC, we can see this being operationalised in the *Torres Strait* case through the collective recognition of the violation of the right to private and family life. The case emphasises the loss of culturally significant ancestral grounds and the capabilities of the community to pass both physical land and cultural knowledge on to future gener-

---

[para. 2.5]. They are also economically dependent on marine life, which is now unpredictable [para. 2.5]. Physical homes have been lost [para. 2.4].

69 HRC, *The Torres Strait Case*, *supra* note 14: The Torres Strait region contains 'culturally important marine species' [para. 2.3], familial gave sites [para. 2.4] which are used for spiritual communion [para. 5.2] the loss of which effects the Islanders' wellbeing [para. 8.12],

70 HRC, *The Torres Strait Case*, *supra* note (14), para.8.10.

71 Ibid., para. 8.12.

72 Ibid.

73 Ibid.

74 B.H. Weston, 'Climate Change and Intergenerational Justice: Foundational Reflections', (2008) 9(3) *Vermont Journal of Environmental Law*, p. 375.

ations.[75] The demonstration of these intergenerational losses are recognised not only as the loss of culture under the minority rights recognised under Article 27,[76] but the substantive and *collective* violation of the right to private and family life as a result of those significant intergenerational losses. It is via the intergenerational equity principle that these losses can be engaged with substantively, and collectively under Article 17: not only is there present loss occurring, but there is future loss occurring also.

3.2.2 *Verein Klimaseniorinnen Schweiz and Others v Switzerland*

The case of *Klimaseniorinnen* addressed the concerns of a group of Swiss women, all over the age of 70, who felt the inaction of the Swiss government in respect of climate change had led to impacts on their 'health and daily routines'[77] as the result of worsening heatwaves in Switzerland. The applicants felt there 'was no doubt that climate change-induced heatwaves had caused, were causing, and would cause further deaths and illnesses to older people and particularly women'.[78] In response to their concerns, the authors of the complaint, which included not only the association but also several individual applicants, complained of multiple rights violations. The focus of this analysis will be on the Article 8 complaint, whereby 'the applicants contended that they were all (the applicant association an applicants numbers 2–5) victims, within the meaning of Article 34 of the Convention … on account of the ongoing failure of the respondent State to afford them effective protection against global warming'.[79]

In this case, the ECtHR has expended a great deal of time deciding whether the substantive rights addressed, including the right to private and family life under Article 8 of the ECHR, can be operationalised collectively. Article 8 of the ECHR protects the right to private and family life;

75 The comments of the case authors note the 'flooding and inundation of ancestral burial lands' and that for 'six of the authors, upkeep of ancestral graveyards and visiting and feeling communion with deceased relatives is at that heart of their culture and the most important ceremonies (such as coming-of-age and initiation ceremonies) are culturally meaningful only if performed on the native lands'. See HRC, *The Torres Strait Case*, *supra* note 14, para. 5.2, see also para. 8.12.

76 Ibid., para. 8.14.

77 ECtHR, *Klimaseniorinnen*, *supra note* 13, para. 10.

78 Ibid., para. 299.

79 Ibid., para. 305.

> Everyone has the right to respect for his private and family life, his home and his correspondence,[80]

Again, as with Article 17 of the ICCPR in the above section, Article 8 of the ECHR is written in individualised language ('his home', 'his correspondence'), but that is not to say that this right cannot be operationalised in a collective manner using the collective rights methodology outlined in section 2. The complaints raised – here focusing on the Article 8 complaint – by individual applicants were found not to fulfil victim status, with the Court noting that 'it follows from the above considerations that applicants nos. 2–5 do not fulfil the victim status criteria',[81] while the group by association was found to have standing: '[a]ccordingly, it follows that the applicant association has the necessary *locus standi* in the present proceedings and that Article 8 is applicable to its complaint'.[82] The Court found the Article 8 claim viable only through its claim by association – and thus collectively – and not by the individual applicants. It is important to note that the Court has made it explicitly clear that the 'victim status of the applicant association … should simply be seen as a group of individuals',[83] and that the complaint of the association is not an *actio popularis* representing the interests of the general public.[84] However, the manifestation and exercise of the rights in this case are clearly collective, and as section 2 of this work has highlighted, rights can certainly be collectively exercised by individuals where the exercise of that right is reliant in some way on the participation of others (we can perhaps revisit Raz's unpolluted air example here).[85] This may not be an action on behalf of the general population, but it is certainly collective action and the exercise of traditionally individualised rights in a collective manner, leading to, as we will see, more successful climate litigation in this example.

The application of Article 8 within *Klimaseniorinnen* focused specifically – although not exclusively – on the right to 'age with dignity'[86] under the concept of private and family life. This highlights one of the key differences between the international context and the ECtHR context: the application of the right to life with dignity has been established within this European

80 Article 8(1) ECHR.
81 ECtHR, *Klimaseniorinnen*, *supra* note 13, para. 535.
82 Ibid., para. 526.
83 Ibid., para. 306.
84 Ibid.
85 See section 2 of this contribution.
86 ECtHR, *Klimaseniorinnen*, *supra* note 13, para. 316.

context as a subcategory of the right to private and family life, as opposed to the right to life, which is how it has been established within the international climate decisions. The Court acknowledges its previous engagement with Article 8 concerning harm to an 'individual's health… well-being and quality of life'[87] and specifically in respect of environmental decline. Importantly, the Court notes that, given the fact that '*actio popularis* type complaints' are not permitted under the jurisdiction of the ECtHR, 'the crucial element which must be present in determining whether, in the circumstances of a given case, an environmental harm has adversely affected one of the rights safeguarded by the Convention is the existence of a harmful effect on a person and not simply the general deterioration of the environment'.[88] This may seem to contradict the very hypothesis of this paper – that collective-based claims are more strategically positive – when the Court is recounting the need for the individualised harm test we have historically seen, even in a case brought by an association. But this is again about *how* rights are exercised, and in *Klimaseniorinnen* the collective rights perspective of Article 8 that has been operationalised has enabled the authors to engage their claim as a collective and express the harms they have suffered through the collective dimensions of Article 8.

The Court recognised that 'in the specific context of climate change, intergenerational burden-sharing assumes a particular importance both in regard to the different generations of those currently living and in regard to future generations',[89] providing a blanket recognition of the importance of the intergenerational equity principle over its merits assessment. Having then addressed the substantive impacts on Article 8 of the Association's claim, the Court establishes that for the protection of Article 8 to be 'genuinely feasible, and to avoid a disproportionate burden on future generations, immediate action needs to be taken and adequate immediate reduction goals must be set for the period leading to net neutrality'.[90] The ECtHR makes a significant comment here: by operationalising the principle of intergenerational equality, the ECtHR has been able to find Switzerland in dereliction of its international climate obligations and thus in violation of Article 8. However, it has been able to do this only through the recognition of the intergenerational equity principle via the collective exercise of the right to private and family life. This is a contentious point, as it relies on the collective exercise of Article 8. To

87 Ibid., para. 435.
88 Ibid., para. 446.
89 Ibid., para. 420.
90 Ibid., para. 549.

highlight this better the dissenting opinion of Judge Eicke is helpful. While Judge Eicke disagrees with the victim status assessment undertaken by the Court, and felt that the association did not have the 'highly exceptional circumstances'[91] to establish *locus standi*, his reflections on the Court's choices regarding intergenerational burden sharing are illuminating;

> Of course, I also, in principle, perfectly understand (and share) the majority's desire to ensure inter-generational justice and to 'avoid a disproportionate burden on future generations' (§ 549). However, not having sought (or having been unable) to establish the necessary 'highly exceptional circumstances' to justify the need for an exception to the traditional 'victim'/standing test … the inevitable conclusion is that there is no basis for drawing any enforceable obligation from the current text of the Convention to combat 'future risk' in respect of the applicants before the Court and even less to combat a 'future risk' in respect of 'future generations', i.e. by or on behalf of individuals who are, by definition, not even before the Court.[92]

While Judge Eicke clearly disagrees with the Court's reasoning, his comments highlight how, in utilising a collective rights methodology, the association in *Klimaseniorinnen* has been able to engage substantive human rights provisions traditionally treated as individualised. Climate change and environmental decline are common experiences, with commonly shared harms. This case has highlighted, in the inability to establish victim status as singular victims but the success of establishing victim status as singular victims within a collective capacity, through engaging collective common good principles, such as intergenerational equality, how a collective rights approach may be more beneficial. As with the international decisions, this is a comparable approach to the *Torres Strait* case; the operationalisation of the right to private and family life in a collective manner has enabled the decision-makers to take a broader view of climate impacts on human rights and see the long-term connections that are present. However, as we see in this dissenting opinion, this is not without contention as it does shift the usual paradigm of direct and individual harm.

91 ECtHR, *Verein Klimaseniorinnen Schweiz and Others v Switzerland*, no. 53600/20, 09.04.2024, Partly Concurring Partly Dissenting Opinion Of Judge Eicke, para. 42.

92 Ibid.

3.2.3 *Teitiota* and the Broader Implications for Climate Mobility Cases

While the international decision-making of the Committee in the *Torres Strait* case has clearly accepted that the effects of climate degradation can lead to impacts on rights, including the right to private and family life, *of the collective*, accepting the potential for this under the ECHR has proved far more contentious, given the complexities around victim status. However, this has led to some important points being raised by the Court regarding the standing of associations in future climate-based litigation. The Court recognises that:

> recourse to collective bodies such as associations is one of the accessible means, sometimes the only means … [to] defend their particular interests effectively. This is especially true in the context of climate change, which is a global and complex phenomenon… in this context where intergenerational burden-sharing assumes particular importance, collective action through associations or other interest groups may be one of the only means through which the voice of those at a distinct representational disadvantage can be heard and through which they can seek to influence the relevant decision-making process.[93]

Collective-based claims, whether obviously collective, such as the *Torres Strait* case, or less clearly grounded in collective exercise, as in *Klimaseniorinnen*, do appear to have more successful outcomes for their litigants in respect of articulating climate harms. This then begs the question whether climate-change cases of this kind can be successful only where human rights-based claims involving an environmental degradation context are grounded in collective exercise?

Looking at how these claims have been articulated can help to answer this question. As noted above, the *Klimaseniorinnen* case actively discusses the right to life with dignity, but does so under the collective exercise of this concept through the right to private and family life. Comparatively, the case of *Teitiota*, discussed earlier in this paper, also deals substantively with this issue, but individualistically under the right to life enshrined under Article 6 of the ICCPR. The two different applications of this concept lead to two very different approaches to how the right to life with dignity principle is deemed to interact with climate decline and, importantly, the steps that must be taken to ensure that this concept is upheld. The *Klimaseniorinnen* case confirms that for Article 8 to be upheld, and critically, the arguments made collectively by the

93 ECtHR, *Klimaseniorinnen*, *supra* note 13, para. 489.

applicant association regarding their right to life with dignity to be ensured, states must comply with their international climate obligations. Alternatively, in *Teitiota*, the concept of the right to life with dignity is explored under Article 6, the right to life, and therefore in a purely individualistic context. Interpreted this way, the right to life with dignity concept must be read within the bounds of the dignity of the individual and the traditionally prescriptive individual harm criteria that have traditionally been seen. The Committee notes that 'without robust international efforts, the effects of climate change in receiving States may expose individuals to a violation of their rights under articles 6 and 7 of the Covenant, thereby triggering non-refoulement obligations … Furthermore, given that the risk of an entire country becoming submerged under water is such an extreme risk, the conditions of life in such a country may become incompatible with the right to life with dignity before the risk is realized'.[94] However, unlike the finding of the Court in *Klimaseniorinnen*, the Committee in *Teitiota*, while noting the possibility for the right to life with dignity to engage a cross-border protection claim,[95] established that the potential for mitigation, and thus the ambiguous 'imminence' of the risk to his life with dignity, was enough to satisfy the state's obligations in respect to Article 6 in the context of climate decline and ensure the right to life with dignity was respected. Space precludes a discussion of the complexities of the 'imminence' criteria applied in the *Teitiota* decision, and others have addressed this substantively,[96] but the primary concern in the light of our discussion is the Committee's decision that the risk to life was viewed as less foreseeable considering the individualised approach taken.

The disparity in these approaches comes from the collective vs non-collective application of the right to life with dignity concept. An individualistic approach to the concept of the right to life with dignity that does not engage – as just one example that we have explored in this paper – the intergenerational equality principle relevant to effective climate justice, precludes a full examination of the concept of the right to life with dignity in respect of climate harms. Where the right to life with dignity has been applied collectively under the right to private and family life the principle of intragenerational equality must be considered, as the full extent of the right to life with dignity cannot be fulfilled without the intergenerational context: Private and

94 HRC, *Teitiota, supra* note 12, para. 9.11.

95 Ibid., para. 5.

96 See M. Foster and J. McAdam, 'Analysis of "Imminence" in International Protection Claims: Teitiota v New Zealand and beyond', (2022) 71 *International and Comparative Law Quarterly*.[page nos?]

family life innately concern intergenerational relationships, such as the ancestral burial sites concerned in the *Torres Strait* case[97] or the young generations being protected by their father in *Teitiota* from a future degrading homeland that has not been recognised by the Committee in its assessment due to the individualised account being advanced. There is a clear participatory nature to the fulfilment of the intergenerational context of the right to life with dignity, understood under the right to private and family life. Conversely, the right to life with dignity recognised under Article 6 of the ICCPR relies solely on personal participation and the risk of individual harm and cannot engage with the intergenerational equality concept with ease. As a result, it appears that international human rights exercised in relation to climate decline in a non-collective manner, such as the example seen in *Teitiota*, therefore, may struggle to engage environmental obligations as these obligations are, by their nature, grounded in the common good.

However, and this must be stressed, this is not to say that the reading of the right to life adopted in *Teitiota* precludes the finding of a violation. While this case was brought by an individual and represents an individualised claim, the collective methodology highlighted in section 2 of this contribution has recognised the potential to exercise collective-based rights, or the collective elements of rights as an individual. It is not impossible to argue that the applicant's right to life with dignity could not be fully fulfilled by reference to a collective element of the right to life. Given the principle of intergenerational equality and the interaction of this principle with the right to private and family life, a reframing of the applicant's claim could have proven more successful on the basis that his children and any future familial generations were unlikely to lead a safe or dignified life in Kiribati. This has been recognised in the dissenting opinion of Committee Member Laki Muhumuza who notes:

> It is the Committee's position that the right to life includes the entitlement of individuals to enjoy a right to life with dignity … It is also the Committee's position that environmental degradation and climate change constitute extremely serious threats to the ability of both present and future generations to enjoy the right to life. In recognition of that reality, States have been obligated to preserve the environment … In my view, the author faces a real, personal, and reasonably foreseeable risk of a threat to his right to life.[98]

97 HRC, *Teitiota, supra* note 12, paras. 5.2 and 8.12.

98 Individual Opinion of Committee Member Duncan Laki Muhumuza (dissenting), *supra* note 55, paras. 4–5.

What the above highlights is the importance of the collective exercise of international human rights for persuading international adjudicatory bodies substantively to consider the interconnected nature of international climate obligations and human rights protection. If environmental principles such as clean air are grounded in the common good, it is impossible for decision-makers to avoid considering the legal implications of climate obligations on human rights when faced with collectively exercised rights cases. This demonstrates the importance of highlighting where rights contain collective elements that may be engaged with and utilising further communal based action for advancing climate-based concerns, including those in relation to climate-based mobilities.

4 Human Rights in Motion: What the Future of Climate-Induced Mobilities Litigation Might Look Like

The question whether collective human rights claims in the context of environmental decline are inherently more viable or strategically advantageous than individual claims is pivotal, especially when considering cases like *Teitiota*, the *Torres Strait Islanders* and *Klimaseniorinnen*. These cases highlight the evolving landscape of human rights litigation in response to climate change impacts, and different approaches taken by international and regional bodies. They reveal how sovereignty concerns shape legal approaches, particularly when cases involve cross-border climate-induced mobility to Global North countries or when applicants – such as a group of older Swiss women – seek protection. The varying responses across jurisdictions underscore the complex interplay between human rights obligations and state sovereignty in addressing climate justice. In the *Teitiota* case, the HRC ultimately rejected his claim, emphasising the necessity for an individualised risk of harm. This decision underscores the challenges inherent in cases involving cross-border mobility from the Global South to the Global North, as well as the requirement of an individualised assessment of harm, where the burden of proof rests on demonstrating personal, imminent danger – a criterion often difficult to satisfy in the context of climate change, which typically manifests as widespread, collective harm. Conversely, in the *Klimaseniorinnen* case, the ECtHR ruled in favour of the association to ensure its right to life with dignity under Article 8 was upheld, recognising that the state's inaction on climate change actively contributed to the violation of the group's human rights. This landmark decision highlights the potential efficacy of collective claims, where the shared experience of harm among a group can compellingly illustrate the

broader impacts of climate inaction. Similarly, in the *Torres Strait Islanders* case, the HRC acknowledged the collective nature of their claim, recognising that the environmental degradation of their ancestral lands posed a significant threat to their community's way of life. This acknowledgment signifies a shift towards appreciating the collective dimensions of human rights in the face of climate change. But how far will these acknowledgements reach when balanced against claims of state sovereignty in the mobilities context, which is traditionally deferential to the said sovereignty?

These cases suggest that collective human rights claims may offer strategic advantages over individual claims, particularly in illustrating the communal nature of climate change impacts. The ECtHR's recent rulings, especially in the *Klimaseniorinnen* case, have expanded the conceptual and practical boundaries of human rights-based claims. By recognising the validity of collective experiences of harm, the Court has set a precedent that could influence broader international legal frameworks. This development may prompt bodies like the HRC to adopt a more inclusive approach, considering both individual and collective dimensions of human rights violations in the context of climate change. Similarly, the cases analysed in this paper suggest a potential strategy for shaping future applications concerning human rights violations in the context of climate change impacts, highlighting the relevance of a collective dimension of harm in the face of climatic threats. However, it is crucial to acknowledge the challenges posed by courts' longstanding deference to state sovereignty, particularly in the context of migration. Although the *Klimaseniorinnen* case highlights an increasing acceptance of collective claims in climate litigation, it is still unclear whether the European Court of Human Rights or other quasi-judicial bodies would adopt the same approach for migrants from the Global South seeking protection from climate-related mobilities in the Global North.

The question arises whether the Court's reasoning would have differed had the applicants been non-citizens asserting a right to remain in Europe rather than older Swiss women. This highlights a fundamental tension between the expansion of human rights-based climate claims and the persistent authority of states to regulate migration, raising critical questions about the extent to which international courts are willing to challenge sovereignty in favour of climate justice for displaced populations.

As the above discussion highlights, claims pertaining to climate-related harms grounded in the collective exercise of human rights or, alternatively, the individual exercise of a collective (based) right may provide a more reliable framework for enabling positive outcomes for litigants. This is arguably much easier to achieve in some cases of climate harm than in others, as dem-

onstrated in the above analysis, and when considering the issue of cross-border climate-induced mobilities, where the current judicial framework is reliant on an individualised assessment, this is particularly challenging. This then begs the question: what methodology could be employed by applicants to demonstrate effectively the climate-based harms they are suffering, which are grounded in the common good of the climate and therefore collectively felt, but pertain to an individualised exercise of the harms suffered, and thus the need to seek protection? This leads us to consider the third exercise of collective rights (the individual exercise) in which rights grounded in the common good can be exercised by an individual where those rights cannot be fully realised without the full participation of others. In 2022 the United Nations General Assembly voted to adopt the right to a Clean, Healthy and Sustainable Environment (R2HE),[99] and while this right is yet to be defined internationally, it is recognised to include 'both substantive and procedural elements',[100] including, crucially, 'access to justice and effective remedies'.[101] The R2HE, by its very nature, is grounded in the collective good and, therefore, must facilitate collective exercise similarly to the ways demonstrated in this paper. In fact, this has already been recognised through the use of the right in particular contexts and, as Clérico and Aldao have noted in their analysis of the Inter-American Court of Human Rights (IACtHR) case law, the R2HE 'has at least three components: substantive, procedural and intertemporal. In turn, it develops an individual as well as a collective dimension and recognises the anthropocentric as well as the ecocentric conception'.[102] As with the examples given in section 2 of this paper, both clean air (which in itself forms a part of the R2HE) and sustainable development are recognised as engaging collective exercise because of their grounding in the common good. The R2HE falls into much the same category, but, unlike these two much more abstract principles, the R2HE has formally been recognised as a human right. Consequently, the R2HE could be a potential avenue through which those seeking sanctuary

99 United Nations General Assembly (UNGA), *The Human Right to a Clean, Healthy and Sustainable Environment*, A/Res/76/300, 28.07.2022.

100 United Nations Environment Programme (UNEP) and United Nations Office of the High Commissioner for Human Rights (OHCHR) and United Nations Development Programme (UNDP), 'What is the Right to a Healthy Environment? Information Note', 25.01.20232023) available at https://www.und p. org/publications/what-right-healthy-environment, p. 9.

101 Ibid.

102 L. Clérico and M. Aldao, 'The Direct Adjudication of the Human Right to a Healthy Environment by the IACtHR: methodological structure', (2024) 18(1) *Journal for Human Rights*, p. 112.

across borders could satisfy both the individualised harm requirements necessitated by decision-makers ('how does the harm pertain to you'), whilst still being able to ground their claims in the collective harm experienced by them as individuals within their communities. In essence, what we are arguing for is the potential for the R2HE to engage existing *non-refoulement* obligations by overcoming the hurdles explored in this paper. The utility of the right to a Clean, Healthy and Sustainable Environment is a complex idea that requires its own dedicated space for unpacking,[103] but it presents one example of the potential utility of collective rights to situate climate harms better in the existing international protection frameworks.

Our comparative analysis indicates that these jurisprudential developments offer emerging strategic paradigms for advancing human rights-based claims related to climate change-induced mobility. The disparity in outcomes between these cases appears to stem from the framing of the right to life with dignity – whether it is approached from a collective or individual perspective, as explored in section 3.2. This suggests that the success of human rights-based climate litigation may depend significantly on how claims are structured. Framing claims to highlight collective experiences of harm could enhance their viability and strategic advantage. By learning from cases like *Klimaseniorinnen* and the *Torres Strait Islanders*, future litigation can explore reframing human rights claims the better to capture the collective nature of climate change impacts. Such an approach could become a more effective tool in providing protection and justice for those most affected by climate change, potentially influencing international legal frameworks and the decisions of bodies like the HRC.

5 Conclusion

Collective rights can serve as a more effective tool for addressing climate-related harms than individualised litigation. By invoking collective rights or the collective dimensions of certain rights, applicants may more clearly establish the connections between climate-related effects and the harms they have

103 The potential utility of the right to a Clean, Healthy, and Sustainable Environment has previously been explored further by one of the contributing authors: see C. Field, 'Special Issue on Climate-induced (im)mobilities: "The Climate Refugee" – a short review: Developing new solutions through the Right to a Clean, Healthy, and Sustainable Environment', *Socio-Legal Studies Association* (*SLSA*) *Blog*, 23.01.2025, available at https://slsablog.co.uk/blog/blog-posts/special-issue-on-climate-induced-immobilities-the-climate-refugee-a-short-review-developing-new-solutions-through-the-right-to-a-clean-healthy-and-sustainable-environ/, last accessed on 04.04.2025.

suffered or anticipate suffering in the future. As outlined in section 2, the operationalisation of collective rights does not necessarily require a group but can also be pursued by an individual. This approach may be particularly advantageous in the context of climate-induced mobility, providing a more robust framework for applicants to demonstrate the links between climate decline and the harms that contribute to their decision to migrate, as illustrated in the case of *Teitiota*.

With the Intergovernmental Panel on Climate Change recognising with high confidence that '[c]limate change and weather extremes are increasingly driving displacement'[104] combined with the recent recognition that 2024 was the hottest year on record, surpassing the recommended 1.5 degrees target,[105] the need for effective legal strategies in the context of climate-induced mobilities has never been more pressing. As our contribution highlights, collective rights present a promising legal avenue, offering an emerging strategy for individuals like *Teitiota* who seek protection abroad when climate-related harms in their home countries are challenging to articulate within the confines of the usual individual harm paradigms. A promising line of future inquiry could involve examining the potential of a collective rights-based strategy – exemplified by cases such as *Klimaseniorinnen* and the Torres Strait Islanders – as a novel and effective approach to overcome the legal void in the protection of climate-mobi persons.

Ultimately, climate change presents a profound collective threat that transcends borders, demanding adaptive legal responses that move beyond rigid individualistic paradigms to embrace more inclusive and collective approaches to climate-induced harm and mobilities. The emergence of a shared interpretive space between regional courts and international treaty bodies offers hope that legal systems can evolve in conversation with each other, gradually building more responsive and equitable frameworks for climate justice.

---

104 Intergovernmental Panel on Climate Change (IPCC), 'Climate Change Synthesis Report 2023', Contribution of Working Groups I, II, and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, 24.09.2024, p. 51, available at https://civil-protection-knowledge-network.europa.eu/media/climate-change-2023-synthesis-report-contribution-working-groups-i-ii-and-iii-sixth, last accessed on 19.05.2025.

105 See World Meteorological Organisation (WMO), 'WMO confirms 2024 as warmest year on record at about 1.55°C above pre-industrial level', Press release, 10.01.2025, available at https://wmo.int/news/media-centre/wmo-confirms-2024-warmest-year-record-about-155degc-above-pre-industrial-level#:~:text=pre-industrial%20level-,WMO%20confirms%202024%20as%20warmest%20year%20on%20record%20at%20about,C%20above%20pre-industrial%20level&text=The%20World%20Meteorological%20Organization%20(WMO,based%20on%20six%20international%20datasets, last accessed on 04.04.2025.

The ECHR and Human Rights Protection in Immigration and Asylum Law: From a Catalyst Role to a Constitutional Task

Bahija Aarrass

Abstract

This contribution discusses the importance of the ECHR for migration and asylum law. In the light of reflecting on the 75th anniversary of the ECHR, attention will be paid to the great influence that the ECHR has (had) in migration and asylum matters, not only for individual legal protection but also for the establishment of legal frameworks. The landmark cases of *Abdulaziz* and *Soering* are discussed in order to outline the historical context in which Articles 3 and 8 ECHR have played a key role in defining human rights claims in migration and asylum law. Next, two other human rights provisions in the ECHR are discussed which have relatively recently given rise to claims under migration law: the right to respect for private life and the right to a fair trial. Finally, the focus is shifted to discussing some ECHR provisions that have so far been virtually absent from migration and asylum law, such as the right to freedom of religion. This results in an overview of the ECtHR's influence on migration and asylum law through Articles 3 and 8 ECHR, while also discussing the application of other Convention rights. The objective is to analyse how the ECtHR has established protective standards in migration and asylum law through its case law and to what extent it has stayed within the boundaries of its constitutional task of interpreting human rights.

1 Introduction

The European Convention on Human Rights (ECHR) has had a major impact on the protection of human rights in national immigration law and can be called a driving force of the legal protection that is now offered in migration and asylum law across several European states. Two of the central grounds for generating a migration rights claim are directly or indirectly based on human rights norms, namely the right to family reunification on the basis of the right to respect for family life (Article 8 ECHR) and subsidiary asylum protection on the basis of the prohibition of torture, degrading and inhuman treatment or punishment (Article 3 ECHR). The European Court of Human Rights (ECtHR)

© BAHIJA AARRASS, 2026 | DOI:10.1163/9789004751026_009
This is an open access chapter distributed under the terms of the CC-BY-NC-ND 4.0 license.

has played a key role in the application of these standards in migration law, originating in the landmark cases of *Abdulaziz and others v The United Kingdom*[1] in 1985 and *Soering v The United Kingdom*[2] in 1989. Some of the principles laid down in these cases seem self-evident now, but were by no means so at the time, given the prevailing view on the application of the ECHR in migration cases back then.[3] Drawing on a historical perspective, I will first briefly reflect on the origins of these principles which have proven to be of great significance in later case law.

In the four decades since the landmark cases mentioned above, the ECtHR has issued a great number of judgments in which these principles were applied and further interpreted. From this, a framework can be derived for two different subcategories: regular immigration law and asylum law. The first is based on guidelines for the application of the right to respect for family life laid down in Article 8 ECHR in migration cases. The second is based on the Court's assessment framework for the prohibition of ill treatment in Article 3 ECHR in asylum cases.[4] This case law has yielded praise and validation for judgments of the ECtHR that have established important protective standards for migrants.[5] At the same time, the ECtHR has received criticism for disregarding the principle of subsidiarity and the margin of appreciation national authorities have, especially in immigration matters. This is said to lead the Court to detract from its 'constitutional' task.[6] That raises the question how far the ECtHR's influence on migration and asylum law through Articles 3 and 8 ECHR stretches and subsequently opens the discussion on the application of other Convention rights. Questions on how to interpret other human rights norms in an asylum context, such as procedural rights (the right to liberty and security in Article 5 and the right to a fair trial in Article 6 ECHR) and freedom

1 ECtHR, *Abdulaziz, Cabales and Balkandali v The United Kingdom*, no 9214/80, 9473/81, 9474/81, 28.05.1985.

2 ECtHR, *Soering v The United Kingdom,* no 14038/88, 07.07.1989.

3 This is evident not only from the arguments put forward by the defendant state in those first cases, but also from the Commission's rulings leading to the Abdulaziz judgment, EComHR, *X., Cabales and Balkandali v The United Kingdom,* no 9214/80 9473/81 9474/81, 11.05.1982, p. 183.

4 Ill-treatment is the overarching term, used by the ECtHR in the asylum context for the prohibited acts in Article 3 ECHR. See, C. Heri, *Responsive Human Rights: Vulnerability, Ill-treatment and the ECtHR*, Hart Publishing: Oxford, 2021, pp. 11–12.

5 D. Anagnostou, *The European Convention of Human Rights Regime: Reform of Immigration and Minority Policies from afar,* Routledge: Abingdon/Oxon/New York, 2023.

6 See, e.g., M. Bossuyt, 'Judges on Thin Ice: The European Court of Human Rights and the Treatment of Asylum Seekers', (2010) 3(1–2) *Inter-American and European Human Rights Journal*, pp. 3–48.

rights in a migration context (such as the freedom of religion and freedom of expression), are apparent in recent case law. However, this has received little attention in the literature.[7] I will argue that rights of entry and residence on the basis of these ECHR rights can be fleshed out in more detail, inspired by the assessment frameworks developed by the Court addressing family reunification under Article 8 ECHR and *non-refoulement* under Article 3. Applying a historical perspective to the case law of the ECtHR, this contribution will first trace back the successes the ECHR has had in catalysing legal protection in immigration and asylum law on the national level. In doing so it will answer the question whether the Court has confined itself to explaining the Convention and setting out lines of jurisprudential rule, rather than expanding the application of the ECHR to 'extraterritorial' cases. The objective is to analyse how, through its case law, the ECtHR has established protective standards in migration and asylum law and to what extent the ECtHR has stayed within the boundaries of its constitutional task of interpreting human rights.

Some methodological points are in place here. This paper will start by briefly discussing the ECHR provisions dominantly present in migration and asylum case law and literature, while also touching upon current challenges to legal protection in migration and asylum cases. This will provide an overview and at the same time delimit the scope of this contribution. The first objective is to answer the question to what extent human rights provisions in the ECHR can provide entitlements to admission or residence. This means that the contribution is limited in scope: it concerns only rights of residence (admission and return or expulsion) and does not address claims in the domestic context, such as when ECHR rights are invoked in the event of a claim to social security by a foreign national within a state. As a result, migrant detention (Article 5 ECHR), an issue that is an important source of migration cases at the ECtHR, falls outside its scope.

By distinguishing between regular immigration and asylum law through the applicable rights and legal frameworks, this contribution further aims to clarify the analytical importance of this distinction. On the one hand, one can discern regular migration cases, in which Article 8 ECHR is often invoked in family reunification cases to underscore admission or non-expulsion of family members. On the other hand, one can distinguish asylum cases, in which Article 3 ECHR is often invoked to underpin an obligation on the state not to return

7 P. Boeles *et al.*, *European Migration Law*, Intersentia: Cambridge, 2014; C. Costello, *The Human Rights of Migrants and Refugees in European Law*, Oxford University Press: Oxford, 2015; D. Moya and G. Milios (eds.), *Aliens before the European Court of Human Rights: Ensuring Minimum Standards of Human Rights Protection,* Brill Nijhoff: Leiden/Boston, 2021.

someone to his or her country of origin, where they would face a real risk to ill-treatment. This is qualified as the *non-refoulement* obligation.[8] In relation to this latter framework, the definition of subsidiary protection is relevant.

Subsidiary protection is complementary to refugee protection. A refugee is defined as a person who, owing to a well-founded fear of being persecuted for particular discriminatory grounds, is outside their country of nationality and unable or, owing to such fear, unwilling to avail themselves of the protection of that country.[9] In contrast, a person eligible for subsidiary protection is a person who does not qualify as a refugee but who would face a real risk of suffering serious harm and who is unable or unwilling to avail themselves of the protection of that country. Serious harm may include the death penalty or execution, torture, inhuman or degrading treatment or punishment, or a serious and individual threat to a civilian's life by reason of indiscriminate violence in situations of international or internal armed conflict.[10]

The demarcation between regular immigration and asylum law is sometimes blurred, particularly with regard to so-called 'medical cases' and to the rights of refugees and individuals eligible for subsidiary protection.[11] Nonetheless, distinguishing between regular immigration and asylum provides an analytical framework for other human rights provisions in the ECHR.

2 Providing Legal Protection through the ECHR in Migration and Asylum Cases: A Constitutional Task for the ECtHR?

The objective of this contribution is to analyse how the ECtHR has established through its case law protective standards in migration and asylum law and to

8 Article 2 ECHR is also often invoked in asylum cases, but will not be considered separately here, because the Court often conflates this provision with Article 3 ECHR in asylum cases: see, e.g., ECtHR, *Mamatkulov and Askarov v Turkey*, no 46827/99, 46951/99, 04.02.2005, para. 78; ECtHR, *Said v The Netherlands,* no 2345/02, 05.07.2005, para. 56.

9 Article 1 Refugee Convention, cf. Article 2d, Qualification Directive.

10 Cf. Article 2f Qualification Directive. See further, H. Battjes, 'Subsidiary Protection and Other Alternative Forms of Protection', in V. Chetail and C. Bauloz (eds.), *Research Handbook on International Law and Migration*, Edward Elgar Publishing: Cheltenham, 2014, pp. 541–562; R.M.M. Wallace, 'The Principle of Non-refoulement in International Refugee Law', in ibid., p. 417.

11 See: K. Greenman, 'A Castle Built on Sand? Article 3 ECHR and the Source of Risk' in *Non-Refoulement* Obligations in International Law', (2015) 27(2) *International Journal of Refugee Law*, pp. 264–296; K. Gallicz, 'Health Cases before the European Courts: From Non-refoulement to Subsidiary Protection through Health Lens*',* in P. Czech, L. Heschl *et al.* (eds.), *European Yearbook on Human Rights 2024,* Brill: Leiden, 2024.

what extent it has stayed within the boundaries of its constitutional task of interpreting human rights. For that purpose, referring to the past, present and future developments is necessary as they pose challenges to the legal protection the ECHR has provided in migration and asylum cases. A substantial amount of literature on the ECHR is directly or indirectly related to these themes. Research that covers migration and asylum law in relation to human rights standards, however, mainly focuses on Articles 3 and 8 ECHR.[12] That literature corresponds to the distinction set out above, between regular migration cases on the one hand and asylum cases (and *non-refoulement* obligations) on the other.[13] In the literature on regular migration, it is often contended that while the ECtHR provides important protection for the human rights of migrants, the Court is too deferential to the states' migration control prerogative.[14] As far as the asylum context is concerned, the literature focuses on Article 3 ECHR in relation to the prohibition of *refoulement*.[15] Although this literature sometimes contains some analysis of other human rights norms, it does not systematically examine how a generic theory of human rights (provisions) can be applied to *non-refoulement* obligations of the state. That is no surprise, since case law on these other human rights provisions is scarce compared to the norms previously mentioned. Nonetheless, the right to respect for private life and, to a lesser extent, the right to freedom of religion and expres-

12 The most comprehensive literature in a European context in this field is B. Çalı, L. Bianku and I. Motoc (eds.), *Migration and the European Convention on Human Rights*, Oxford University Press, 2021; R. Rubio-Marin (ed.), *Human Rights and Immigration*, Oxford University Press: Oxford, 2014; C. Costello, *The Human Rights of Migrants and Refugees in European Law, supra* note 7; D. Moya and G. Milios (eds.), *Aliens before the European Court of Human, supra* note 7; E. Desmet, M. Belloni, D. Vanheule, J. Verhellen and A. Güdük (eds.), *Exposing Inequalities*, Routledge: London, 2024.

13 C. Costello and M. Foster, 'Non-refoulement as Custom and *Jus Cogens*? Putting the Prohibition to the Test', in M. den Heijer and H. van der Wilt (eds.), *Netherlands Yearbook of International Law*, T.M.C. Asser Press: The Hague, 2015; J. Allain, 'The Jus Cogens Nature of Non-refoulement', (2001) 13(4) *International Journal of Refugee* Law, pp. 533–558.

14 M. Dembour, *When Humans Become Migrants. Study of the European Court of Human Rights with an Inter-American Counterpoint,* Oxford University Press: Oxford, 2015, pp. 118–122; R. Rubio-Marin, 'Introduction: Human Rights and the Citizen/Non-citizen Distinction Revisited', in R. Rubio-Marin (ed.), *Human Rights and Immigration, supra* note 12, p. 5; C. Costello, *The Human Rights of Migrants and Refugees in European Law, supra* note 7.

15 M. Den Heijer, 'Whose Rights and Which Rights? The Continuing Story of Non-Refoulement under the European Convention on Human Rights', (2008) 10(3) *European Journal of Migration and Law*, pp. 277–314; H. Battjes, 'In Search for a Fair Balance. The Absolute Character of the Prohibition of Refoulement under Article 3 ECHR', (2009) 22(3) *Leiden Journal of International law*, pp. 583–621.

sion are increasingly finding their way into ECtHR case law on migration and asylum law. The literature has paid attention only on an *ad hoc* basis to these human rights provisions.[16]

A great deal of scholarship has been dedicated to the interpretation of human rights standards in current migration-related challenges. These lie, for instance, in the context of the extraterritorial application of the ECHR,[17] and the application of ECHR provisions in the context of migrants' rights within European states.[18] This resonates with recent developments which have reached the Court, such as pushbacks,[19] automated decision making[20] and externalisation.[21] Although these developments pose major challenges to the legal protection the ECtHR provides, this falls outside the scope of this paper, since the core question is to what extent human rights provisions in the ECHR can provide entitlements to admission or residence, as explained above.

A second objective of this paper is to address the extent to which the ECtHR has stayed within the boundaries of its constitutional task of interpreting human rights. A brief reflection on this definition is therefore due. The litera-

16 D. Thym, 'Respect for Private and Family Life Under Article 8 ECHR in Immigration Cases: A Human Right to Regularise Illegal Stay?', (2008) 57 *International and Comparative Law Quarterly*, pp. 87–112; A. Desmond, 'The Private Life of Family Matters: Curtailing Human Rights Protection for Migrants under Article 8 of the ECHR?', *European Journal of International Law*, 2017 28(3), pp. 261–279; K.M. de Vries, *Integration at the Border: The Dutch Act on Integration Abroad and International Immigration Law*, Hart Publishing: London, 2013, pp. 179–218.

17 E.g. J.H. Gerards and E. Brems, *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights*, Cambridge University Press: Cambridge, 2013.

18 E.g. E. Brems, *Diversity and European Human Rights. Rewriting Judgements of the ECHR*, Cambridge University Press: Cambridge, 2013; D. Moya and G. Milios (eds.), *Aliens before the European Court of Human Rights, supra* note 7.

19 M.J. Alpes and G. Baranowska, 'The Politics of Legal Facts: The Erasure of Pushback Evidence from the European Court of Human Rights', *Law and Social Inquiry* 2025 50(1), pp. 225–248. See for the case law: ECtHR, *N.D. and N.T. v Spain*, nos 8675/15 and 8697/15 [GC], 13.02.2020; ECtHR, *M.H. and Others v Croatia*, no 15670/18 43115/18 [GC], 18.11.2021; ECtHR, *A.R.E. v Greece*, no 15783/21, 07.01.2025.

20 F. Palmiotto, 'Procedural Fairness in Automated Asylum Procedures: Fundamental Rights for Fundamental Challenges', (2024) 55 *Computer Law and Security Review*, p. 65.

21 L. M. Komp, *Border Deaths at Sea under the Right to Life in the European Convention on Human Rights*, Routledge: London, 2022; A. Pijnenburg, *At the Frontiers of State Responsibility: Socio-Economic Rights and Cooperation on Migration*, Intersentia: Cambridge, Antwerp, Chicago, 2021; M. Fink, *Frontex and Human Rights: Responsibility in 'Multi-actor Situations' under the ECHR and EU Public Liability Law*, Oxford University Press: Oxford, 2018.

ture on the 'constitutional task' of the ECtHR focuses on the role of the Court in interpreting and enforcing the ECHR. Many academics have argued that the ECtHR fulfils an important constitutional function by protecting the rights and freedoms of individuals against infringements by states. This includes assessing national legislation and practices against the standards of the ECHR.[22] Critics argue that the Court sometimes goes too far in its interpretations, undermining national sovereignty and interfering in policy matters that are best left to national governments. This tension between the protection of human rights and respect for national sovereignty is a central point of debate in the literature on the constitutional task of the ECtHR. Next to increased allegations of expanding the Court's mandate, the ECHR system has been deeply challenged by a massive caseload in recent decades.[23] The limitations of the ECtHR, such as the growing number of cases and the unpredictability of admissibility criteria, which hinder the Court's ability to create a coherent and predictable pan-European human rights mechanism, have led to calls for a clearer constitutional approach in which the Court should limit itself to cases of principle that provide guidelines for national judicial authorities. Wildhaber has suggested that the Court should focus on 'constitutional' decisions of principle to build a European public order based on human rights, democracy and the rule of law.[24] Greer supports this view, asserting that the primary purpose of the judicial process is to address the most serious defects in Convention compliance in member states, which he terms 'constitutional justice'.[25] In my view there is no clear-cut dichotomy between providing human rights protection and a constitutional approach. The Court has a significant role in determining the content of relevant human rights with national courts, often taking guidance from the ECtHR in interpreting national law in the light of the ECHR. Thus, in providing individual human rights protection the constitutional task of interpreting and formulating guid-

22 L. Wildhaber, 'A Constitutional Future for the European Court of Human Rights', (2022) 23 *Human Rights Law Journal*, pp. 161–164.

23 J. Christoffersen, 'Individual and Constitutional Justice: Can the Power Balance of Adjudication be Reversed?', in J. Christoffersen and M. Rask Madsen (eds.), *The European Court of Human Rights between Law and Politics,* Oxford University Press: Oxford/New-York, 2011, pp. 181–203.

24 L. Wildhaber, 'A Constitutional Future', *supra* note 22.

25 S. Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects*, Cambridge University Press: Cambridge, 2006, p. 59; see also S. Greer and L. Wildhaber, 'Revisiting the Debate About "Constitutionalising" the European Court of Human Rights', (2012) 12(4) *Human Rights Law Review*, p. 655. They advocate 'constitutional pluralism' as the best analytical paradigm, in order to avoid 'misunderstanding and misrepresentation'.

ing principles is also fulfilled. By applying constitutional standards, the Court ensures that human rights are protected within a robust legal framework, while also allowing for the dynamic interpretation and evolution of these rights in response to societal changes in individual cases.[26]

3 Back to Basics: *Abdulaziz* and *Soering* and the Application of the ECHR in Migration and Asylum Cases

3.1 *Introduction*

The ECHR does not contain any provision which expressly gives a right to admission or residence.[27] The Convention rather provides for some specific guarantees in the event of deportation of foreign nationals, such as Article 1 of Protocol 7,[28] Article 4 of Protocol 4[29] and Article 5 ECHR on immigration detention. These are mainly intended to provide procedural guarantees regarding measures of expulsion and removal. Nevertheless, the ECtHR has delivered a large number of judgments on migration cases,[30] the vast majority of which revolve around Articles 8 and 3 ECHR. The framework developed in the case law regarding these provisions was first implemented in *Abdulaziz* and *Soering*.[31] The principles set out in these cases have been fundamental in shaping the constitutional task of the Court to interpret ECHR rights in migration and asylum law. How these principles came about will be discussed in this section.

3.2 *Applicability of the ECHR in Migration Cases*

In *Abdulaziz*, the Court ruled for the first time that, although the ECHR – apart from the aforementioned provisions – does not explicitly refer to admission or

26 Cf. G. Ulfstein, 'Transnational Constitutional Aspects of the European Court of Human Rights (Special Issue: Judicial Authority, Legitimacy and the (International) Rule of Law)', (2021) 10(1) *Global Constitutionalism,* pp. 151–174.

27 E. Bates, 'The Birth of the European Convention on Human Rights – and the European Court of Human Rights', in J. Christoffersen and M. Rask Madsen (eds.), *The European Court of Human Rights*, *supra* note 23, pp. 17–43.

28 ECtHR, *Muhammad and Muhammad v Romania*, no 80982/12 [GC], 15.10.2020; ECtHR, *Khalaifia and Others v Italy,* no 16483/12, 15.12.2016; ECtHR, *Hirsi Jamaa v Italy*, no 27765/09 [GC], 23.02.2012; ECtHR, *N.D. and N.T.*, *supra* note 19.

29 ECtHR *N.D. and N.T.*, *supra* note 19; ECtHR, *Khalaifia*, *supra* note 28; ECtHR *Hirsi Jamaa*, *supra* note 28.

30 In more than 300 cases, when 'expulsion' is used as a keyword in the HUDOC database of the ECtHR.

31 ECtHR, *Abdulaziz, supra* note 1*;* ECtHR, *Soering, supra* note 2.

expulsion, immigration measures may indeed affect the human rights standards laid down in the ECHR. That seems obvious now, but it was by no means so in the mid-eighties.

The *Abdulaziz* case concerned three British foreigners with permanent residence whose (future) spouses were refused entry by the British government. They invoked the right to respect for family life in Article 8 ECHR and the principle of equality in Article 14 ECHR.[32] The Court first addressed the question of the applicability of the ECHR in a migration context.[33] The United Kingdom's main argument was that Article 8 ECHR, like other provisions of the ECHR, could not apply to immigration measures. In its view only the Fourth Protocol to the ECHR, the only provision explicitly mentioning migration, could apply to immigration regulation.[34] The ECtHR rejected this argument, firstly, because the case was brought before the Court by the complainants residing in the United Kingdom and not the foreign nationals requesting entry. They did not contest the refusal of admission as such, but the central issue was that they, as lawfully resident persons, were deprived of reunification with their spouses. The exercise of the right to respect for family life was therefore at stake. Secondly, the Court pointed out that the ECHR (i.e. the Convention and the protocols together) must be read cumulatively and endorsed the EComHR's consideration that 'immigration controls have to be exercised consistently with Convention obligations'.[35] This presupposes that measures relating to admission and residence may also affect the right to respect for family life.[36]

The establishment that immigration measures are subject to Convention obligations is no longer explicitly reflected in other judgments on family reunification. The applicability of Article 8 ECHR in immigration cases is in itself no longer under discussion.[37] Importantly, *Abdulaziz* has had a major impact on consolidating the ECHR as a relevant legal framework in migration law. The fact that ECHR provisions do not explicitly intend to provide protection to foreign nationals does not preclude this. The ECtHR's approach fits

32 ECtHR, *Abdulaziz, supra* note 1, paras. 39–56.

33 Article 2 of the Fourth Protocol to the ECHR includes the right to freedom of movement.

34 ECtHR, *Abdulaziz, supra* note 1, para. 59. The Fourth Protocol to the ECHR contains explicit provisions on the right to leave any country (including one's own) and the right to enter the country of nationality.

35 ECtHR, *Abdulaziz, supra* note 1, paras. 59–60.

36 ECtHR, *Abdulaziz*, *supra* note 1, para. 60.

37 See, e.g., ECtHR, *Berrehab v The Netherlands*, no 10730/84, 21.06.1988, paras. 20–21; ECtHR, *Sen v Netherlands*, no 31465/96, 21.12.2001, para. 21. Under 'applicability', the Court only assessed whether the relations could be qualified as 'family life'.

within an international human rights law paradigm which does not operate by focusing on the *de jure* legal status of individuals, but rather by shifting attention to the rights of individuals as human rights subjects and the consequent duties states have towards individuals.[38]

3.3 *Application of the ECHR and the Question of Jurisdiction*

A second issue raised as a threshold for the application of the ECHR in migration cases was the question of jurisdiction. This was put forward in *Soering* by the United Kingdom. Soering was a German man who was suspected of a double murder in Virginia and, after fleeing to the United Kingdom, would be extradited to the United States. He invoked Article 3 ECHR because he would possibly face the death penalty and a stay on death row. The British government argued that Article 3 ECHR should not be interpreted as creating any state responsibility for acts that were outside their jurisdiction.[39] However, the Court ruled that states must comply with treaty obligations when exercising their sovereignty and referred to *Abdulaziz*, from which it was already clear that a measure taken by national authorities does not fall outside the scope of the Convention, solely because it is a measure exercised with regard to foreign nationals.[40] The complicating aspect in the *Soering* case, however, was that the actual consequences of the extradition (namely the stay on death row and possibly the death penalty) would take place in the United States and therefore outside the (territorial) jurisdiction of the deporting state (the United Kingdom). The question was therefore whether Article 3 ECHR could apply under such circumstances.[41] The Court answered this question affirmatively:

> in so far as a measure of extradition has consequences adversely affecting the enjoyment of a Convention right, it may, assuming that the consequences are not too remote, attract the obligations of a Contracting State under the relevant Convention guarantee.[42]

38 B. Calı, 'Migration and the European Convention on Human Rights', in B. Çalı, L. Biancu and I. Motoc (eds.), *Migration and the European Convention on Human Rights*, *supra* note 12, p. 7.

39 ECtHR, *Soering, supra* note 2, para. 83.

40 See above: ECtHR, *Abdulaziz, supra* note 1, paras. 59–60.

41 ECtHR, *Soering, supra* note 2, para. 85.

42 Ibid., para. 85.

At the same time, the Court tried to limit the potentially far-reaching implications of the above quotation, referring to Article 1 ECHR.[43] Firstly, it emphasised the territorial scope of the ECHR and indicated that it entailed the obligation to safeguard the rights and freedoms of persons *within one's own jurisdiction*. Furthermore, the Convention does not regulate the actions of states not party to the treaty, nor can the treaty be intended to require states to impose the ECHR standards on other states. The Court concluded that Article 1 ECHR cannot be read as meaning that a contracting party cannot extradite an individual unless it is convinced that the conditions in the country of destination are fully in accordance with the guarantees of the ECHR.[44] Nevertheless, the act of extradition by a State Party may (indirectly) invoke the responsibility of that state under the ECHR:

> These considerations cannot, however, absolve the Contracting Parties from responsibility under Article 3 for all and any foreseeable consequences of extradition suffered outside their jurisdiction. (..) In so far as any liability under the Convention is or may be incurred, it is liability incurred by the extraditing Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment.[45]

This principle has subsequently been applied in other cross-border cases as well, such as on the admission and expulsion of migrants. Here, a distinction has to be made between the extraterritorial application of the ECHR and applying the ECHR in such cases. Some circumstances necessitate the extraterritorial application of the ECHR, such as when state representatives exercise actual power elsewhere.[46] In recent cases, the Court has confirmed that a state measure could lead to responsibility attributed to that state, as in the case of the exercise of border controls at sea or on land.[47] However, there are also limitations: submitting a visa application does not as such bring the applicant under the jurisdiction of the state concerned, if there is no link with the State Party.[48] That link does exist in the case of expulsion of foreign

43 Article 1 ECHR: 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention'.

44 ECtHR, *Soering, supra* note 2, paras. 85–86.

45 Ibid., paras. 86, 91.

46 ECtHR, *Al Skeini and Others v The United Kingdom*, no 55721/07, 07.07.2011.

47 ECtHR, *Hirsi Jamaa, supra* note 28; ECtHR, *N.D. and N.T., supra* note 19.

48 ECtHR, *M.N. et al. v Belgium*, no 3599/18 [GC], 05.05.2020.

nationals, as was the case in *Soering*, because they are in or at the border of the country.[49] In conclusion, the jurisdiction argument does not preclude applying human rights provisions in the ECHR to migration and asylum cases.

3.4 *The Immigration Clause*

The above principles would have potential far-reaching consequences, were it not for the introduction of the 'immigration clause' at the same time. In *Abdulaziz,* the Court considered that the case concerned not only 'family life', but also immigration. The Court added, in what seemed a superfluous 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.[50]

While the immigration clause did not seem to play a prominent role in *Abdulaziz*, in later judgments this clause is taken as a starting point in almost all migration cases, in particular family reunification cases.[51] The consideration is invariably followed by the observation that the ECHR does not guarantee a right to admission or residence in a particular state.[52] The Court refers to the immigration clause in asylum cases as well, adding that the ECHR does not include a right to (political) asylum.[53] The immigration clause leads to a considerable degree of leeway to states in restricting human rights in immigration matters. The wide margin of appreciation is, according to case law, partly explained by the sovereignty of the state, which is apparently paramount in

49 Ibid., paras. 119–125.

50 ECtHR, *Abdulaziz, supra* note 1, para. 67.

51 See, e.g., ECtHR, *Ahmut v The Netherlands*, no 21702/93, 28.11.1996, para. 67; ECtHR, *Tuquabo-Tekle and Others v The Netherlands,* no 60665/00, 01.12.2005, para. 43; ECtHR, *Kuric and Others v Slovenia*, no 26828/06, 26.06.2012, para. 355.

52 See, e.g., ECtHR, *Üner v The Netherlands,* no 46410/99, 18.10.2006, para. 54; ECtHR, *Nunez v Norway,* no 55597/09, 28.06.2011, para. 66; ECtHR, *Jeunesse v The Netherlands,* no 12738/10, 04.12.2012, para. 100. Sometimes the 'immigration clause' appears in other variations such as in: ECtHR, *Moustaquim v Belgium,* no 12313/86, 18.02.1991, para. 43; ECtHR, *Beljoudi v France*, no 12083/86, 26.02.1992, par. 74; ECtHR, *Boultif v Switzerland,* no 54273/00, 02.08.2011, para. 39.

53 ECtHR, *Vilvarajah and Others v The United Kingdom*, no 13163/87, 30.10.1991, para. 102; ECtHR, *Chahal v The United Kingdom*, no 22414/93, 15.11.1996, para. 74; ECtHR, *Hilal v The United Kingdom*, no 45276/99, 06.03.2001, para. 59; ECtHR, *Saadi v The United Kingdom*, no 13229/03, 29.01.2008, para. A 124.

the regulation of immigration.[54] The use of the immigration clause is widely contested by multiple scholars, for its effect of generally privileging state sovereignty over migrants' rights.[55] Despite this, the general principles set out in the cases of *Abdulaziz* and *Soering* on the applicability of the ECHR in migration cases opened up jurisprudential paths for subsequent successful claims to the effect that return to a country of origin would be contrary to Article 3 and Article 8 ECHR, to be discussed hereafter.

4 Setting the Principles: Family Reunification and Subsidiary Protection

4.1 *Family Reunification and Article 8 ECHR*

Since *Abdulaziz*, the ECtHR has decided a large amount of case law on Article 8 ECHR in migration cases, in which a framework has been created and refined. The protection of this fundamental right is essentially aimed at enabling or maintaining the family relationship and thus concerns the protection of the collective relationship of the family unit.

Article 8 ECHR requires, first of all, establishing family life. In migration cases, this protection is primarily reserved for the nuclear family, consisting of parents and minor children. That means that the question whether the expulsion of a foreign national is contrary to the right to respect for family life is in principle limited to the cohabitation of minor children and their parents. In order to be able to rely on the protection of other forms of family life, the Court requires 'more than the normal emotional ties'.[56] Secondly, the assessment of compatibility with the right to respect for family life is characterised by a certain structure. The Court has developed a twofold framework in migration cases: a positive obligations assessment in admission cases and a negative obligations test in expulsion cases. The Court interprets the right to *respect* for family life in such a way that it may entail positive obligations to take measures to give effect to that right. This means that, although the state,

54 ECtHR, *Pajić v Croatia*, no 68453/13, 23.02.2016, para. 58. See Y. Arai, 'The Margin of Appreciation Doctrine in the Jurisprudence of Article 8 ECHR', (1998) (16)1 *NQHR*, p. 49.

55 See C. Costello, *The Human Rights of Migrants and Refugees in European Law*, *supra* note 7, p. 112; M. Dembour, *When Humans Become Migrants, supra* note 14, pp. 118–122; R. Rubio-Marin, 'Introduction: Human Rights and the Citizen/Non-citizen Distinction Revisited', in R. Rubio-Marin (ed.), *Human Rights and Immigration, supra* note 12, p. 5.

56 ECtHR, *Konstatinov v The Netherlands*, no 16351/03, 26.04.2007, para. 52; ECtHR, *Ezzouhdi v France*, no 47160/99, 13.02.2001, para. 34.

by refusing admission, does not actively interfere in family ties, there may nevertheless be a positive obligation for the state to grant admission in order to effectively guarantee family life.[57] Expulsion, i.e. termination of residence, on the other hand, is generally regarded as an interference in the right to respect for family life. After all, by withdrawing a residence permit or terminating any other form of state permission to reside, existing family life is ruptured, in which case a negative obligation test is applied. At the same time, the Court constantly emphasises that the boundaries between positive and negative obligations of the public authorities are not as strict as the distinction seems to convey and that an assessment is needed whether a fair balance is struck between the interests of the individual and the public interest, taking into account the objectives referred to in Article 8(2) ECHR.[58] The distinction is most evident in a different degree of review intensity with which the Court assesses the situations. In general, a significantly larger margin of appreciation applies to positive obligations than to negative ones.[59]

The tenability of the distinction between positive and negative obligations under the ECHR is much debated.[60] Nevertheless, for conveying the assessment framework in family reunification cases, the distinction between positive and negative obligations provides some guidance. Firstly, in the judgment in *Jeunesse*, the Grand Chamber summarised the general principles in previous admission cases, assessed as positive obligations. The first starting point in the balancing exercise is that the right to respect for family life does not include an obligation to enable family life to exist (in a country other than one's own). Family members residing in the host state are therefore not, in principle, entitled to family reunification with family members residing in

57 ECtHR, *Abdulaziz, supra* note 1, para. 67.

58 ECtHR, *Jeunesse*, *supra* note 52, para. 106; ECtHR, *Konstatinov, supra* note 56, para. 46; ECtHR, *Üner*, *supra* note 52, paras. 54–55; ECtHR, *Tuquabo-Tekle, supra* note 51, para. 42; ECtHR, *Ahmut, supra* note 51, para. 63. See also Council of Europe, *ECHR Guide Article 8 ECHR* 2020, p. 8.

59 Y. Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, Intersentia: Antwerpen/Oxford/New York, 2002, p. 85.

60 A. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights,* Hart: Oxford/Portland, 2004, pp. 1–6; L. Lavrysen, *Human Rights in a Positive State: Rethinking the Relationship Between Positive and Negative Obligations Under the European Convention on Human Rights*, Intersentia: Cambridge/Antwerp/Portland, 2016; J.H. Gerards, *General Principles of the European Convention on Human Rights,* Cambridge University Press: Cambridge, 2019, pp. 108–135.

another country.[61] In line with this, the second principle in admission cases is that a positive obligation to admit family members may exist only in exceptional cases, depending on the individual circumstances and the public interest. Relevant criteria include the extent to which family life would be ruptured if admission were refused. The weight of the ties of the foreign national and his family members with the receiving state is also important. Furthermore, it is relevant whether insurmountable obstacles exist to the exercise of family life in the country of origin. Finally, the interests of children are an explicit factor to take into account. On the other hand, several factors play a role in the public interest: immigration regulations and the consequences if these are not met; considerations of public policy that militate in favour of expulsion of the foreign national; and the question whether family life was entered into during a period in which those involved were aware of their precarious immigration status.[62] Furthermore, in assessing whether there is a positive obligation to guarantee the right to respect for family life, the extent to which the state has contributed to the creation and continuation of (family) ties during the unlawful residence is of significance.[63]

The Court emphasises that non-admission, which is in most cases actual removal after unlawful residence, results only in exceptional circumstances in a violation of Article 8 ECHR.[64] In almost all cases concerning the admission of family members, the Court therefore concluded that Article 8 ECHR had not been violated. Central to this is the 'insurmountable or objective obstacles' test, which assumes that family life, in the absence of such obstacles, can be exercised elsewhere.[65] In the few cases in which the Court concluded that a positive obligation under Article 8 ECHR had been violated, the interests of young children or other forms of vulnerability were paramount.[66] This has led to some states, such as the Netherlands, adapting their national immigration

61 ECtHR, *Jeunesse*, *supra* note 52, paras. 100 and 107. See also ECtHR, *Nunez*, *supra* note 52, para. 70.

62 Ibid., paras. 107–109. See also Council of Europe, *Guide on article 8 ECHR*, 2020, p. 83.

63 Ibid., para. 103.

64 ECtHR, *Jeunesse*, *supra* note 52, para. 108.

65 ECtHR, *Arvelo Aponte v The Netherlands*, no 28770/05, 03.11.2011; ECtHR, *Ahmut, supra* note 51. See also C. Costello, *The Human Rights of Migrants and Refugees in European Law, supra* note 7, p. 113.

66 ECtHR, *Berrehab*, *supra* note 37; ECtHR, *Ciliz v The Netherlands*, no 29192/95, 11.07.2000; ECtHR, *Sen, supra* note 37; ECtHR, *Tuquabo-Tekle, supra* note 51; ECtHR, *Rodrigues and Da Silva Hoogkamer v The Netherlands*, no 50435/99, 31.01.2006; ECtHR, *Nunez*, *supra* note 52; ECtHR, *Jeunesse*, *supra* note 52. See for a recent case: ECtHR, *Martinez Alvarado v The Netherlands*, no 4470/21, 10.12.2024.

laws because of the excessive formalism it has applied in family reunification cases.[67]

In expulsion cases, a negative obligations test is applied in which an interference is justified if it meets the criteria of Article 8(2) ECHR. The Court's assessment of the first two requirements – whether the measure is provided for by law and serves a legitimate aim – does not pose any problems in most migration cases.[68] The test which it comes down to in most cases is whether the restriction is necessary and proportionate. The Court has not established precise criteria for assessing proportionality.[69] However, it has laid down a number of criteria as 'guiding principles' which are relevant when balancing the interests in expulsion cases of foreign nationals on grounds of public order issues, in most cases having committed a criminal offence. These so-called *Boultif* criteria include: the nature and seriousness of the offence, the duration of the stay in the country, the time that has elapsed since the offence and the behaviour during that period, the nationality of the complainant and other persons involved and the consequences of the deportation for those involved.[70] In *Űner*, the Court added 'the solidity of the foreigner's social, cultural and family ties with the host country and with his country of origin' to the *Boultif* criteria. From case law, it can be concluded that the seriousness of an offence is trumped by the foreign national's interests in only exceptional cases and that these exceptions often relate to the minority of children. The fact that the best interests of minor children can tip the scales is shown by *Unuane v the United Kingdom,* in which the complainant had been convicted of forgery of documents and was to be expelled.[71] The national authorities recognised that the father's residence was in the best interests of the children, but nevertheless concluded that his expulsion was not incompatible with Article 8 ECHR. The Court considered this to be contrary to a careful weighing of interests and thus came to the conclusion that his deportation would be in violation of Article 8 ECHR because of the interests of the children.[72]

67 ECtHR, *Rodrigues and Da Silva Hoogkamer v The Netherlands, supra* note 66; ECtHR, *G.R. v The Netherlands*, 22251/07, 10.12.2007; cf. ECtHR, *Jeunesse*, *supra* note 52, para. 121.

68 With a few exceptions: in ECtHR, *Al Nashif v Bulgaria*, no 50963/99, 22.06.2002 the Court ruled that the measure was not provided for by law.

69 M.A.K. Klaassen, *The Right to Family Unification: Between Migration Control and Human Rights*, Leiden University: Leiden, 2015, p. 47.

70 ECtHR, *Boultif*, *supra* note 52. And later in ECtHR, *Üner*, *supra* note 52.

71 ECtHR, *Unuane v The United Kingdom*, no 80343/17, 24.11.2020.

72 Ibid., para. 89.

Finally, it should be noted that in family reunification cases, the Court is increasingly moving towards ensuring that adequate legal protection is provided, to be interpreted as 'procedural review', rather than a substantive review of ECHR provisions. In a number of recent cases, the Court concluded that there had been a violation because the national proceedings did not sufficiently demonstrate a balancing of interests in the context of Article 8 ECHR, and that it failed sufficiently to take into account the case law of the ECtHR.[73] This shows that the protection under Article 8 ECHR in the case of long-term lawful residence by the Court has recently been mainly limited to the requirement of adequate (national) legal protection. The Court itself therefore mainly carries out a procedural test whether legal protection has been adequate.[74] In cases where such legal protection is not provided at the national level, the Court is in some cases prepared to carry out an in-depth review of Article 8 ECHR, where the national weighing of interests falls short.[75]

4.2 *Article 3 in Asylum Cases: Consolidating Subsidiary Protection*

Article 3 ECHR stipulates that no one shall be subjected to torture or to inhuman or degrading treatment or punishment, but does not expressly prohibit expulsion or extradition to the country of origin or to any other country. The ECtHR derived the 'inherent' obligation not to extradite when ill-treatment is imminent from the purpose and spirit of the provision, read in the light of the ECHR as a whole and international law.[76] In the same vein the Court has interpreted this provision in asylum cases as a prohibition on returning foreign nationals to a third country if they run a real risk of being treated in violation of Article 3 ECHR (the prohibition of *refoulement*). The states party to the ECHR must therefore under certain circumstances refrain from expelling foreign nationals who will be exposed to such ill-treatment.[77]

To determine whether the qualification of ill-treatment is met, the Court uses the 'minimum level of severity' test.[78] If treatment is qualified as ill-treatment, an absolute prohibition applies in the asylum context: balancing

73 ECtHR, *Makdoudi v Belgium*, no 12848/15, 18.02.2020; ECtHR, *Saber and Boughassal v Spain*, no 76550/13 45938/14, 18.12.2018; ECtHR, *I.M. v Switzerland*, no 23887/16, 09.04.2019.

74 See ECtHR, *I.M., supra* note 73, para. 77.

75 ECtHR, *Unuane*, *supra* note 71.

76 ECtHR, *Soering*, *supra* note 2, par. 88.

77 ECtHR, *Cruz Varas and Others v Sweden*, no 237/307, 20.03.1991, paras. 69–70; ECtHR, *Vilvarajah, supra* note 53, para. 103; ECtHR, *Chahal, supra* note 53, para. 80. See *supra* note 4, on the definition of 'ill-treatment'.

78 ECtHR, *Gäfgen v Germany*, no 22978/05, 01.06.2010, para. 90.

interests of public order or otherwise is not permitted, regardless of the behaviour of the person concerned.[79] Nevertheless, in the application of Article 3 ECHR, qualification of what falls under ill-treatment includes an assessment in which intention, nature and other contextual aspects of the treatment are relevant.[80] In the asylum context this means that the question whether a certain act reaches a minimum level of severity depends on all the circumstances of the case, including those in the country of origin, which the Court has classified as a relative assessment.[81]

In addition to the minimum level of severity test, there are other elements that play a role in the assessment of Article 3 ECHR in *refoulement* cases. Firstly, there is the assessment of the risk that the breach will occur (real risk). This aspect shows the difference between *refoulement* cases, in which the alleged violation has yet to take place, and cases in which the alleged violation has taken place within the state (domestically). Although potential violations of the ECHR are not considered, the Court reiterated that the effective protection of ECHR rights, requires exceptions to this rule, given the seriousness and irreparable nature of the threat of inhuman treatment in extradition and expulsion cases.[82] In asylum cases, the Court has explained that the mere possibility that ill-treatment will take place because of an unstable situation in the country of origin is not in itself sufficient for a violation of Article 3 ECHR. A certain degree of probability that the breach will occur, a real risk, is required.[83]

The so-called humanitarian cases are a special subcategory of asylum cases. In humanitarian cases, the ECtHR takes socio-economic circumstances in the country of origin into account when assessing whether the general situation in the country of origin is so serious that it qualifies as inhuman treatment within the meaning of Article 3 ECHR. The Court must then assess whether certain circumstances such as reception conditions, or even a situation of total poverty in the country of origin, reach the standard of inhuman or degrading

79 ECtHR, *Saadi, supra* note 53, para. 127. ECtHR, *Chahal, supra* note 53, para. 79.

80 H. Battjes, 'In Search of a Fair Balance: The Absolute Character of the Prohibition of Refoulement under Article 3 ECHR Reassessed', (2009) 22(3) *LIJL*, p. 583; G. van der Schyff, 'Interpreting the Protection Guaranteed by Two-stage Rights in the European Convention on Human Rights: The Case for Wide Interpretation', in J.H. Gerards and E. Brems (eds.), *Shaping Rights in the ECHR, supra* note 17, p. 68.

81 ECtHR, *J.K. et al. v Sweden*, no 59166/12, 23.08.2016, para. 79.

82 ECtHR, *Soering*, *supra* note 2, par. 90.

83 ECtHR, *Saadi, supra* note 53, paras. 127, 131; ECtHR, *Mamatkulov and Askarov, supra* note 8, para. 73.

treatment.[84] In *M.S.S.*, the Court assessed the living conditions of an asylum seeker when returned to Greece. The Court considered that Article 3 ECHR does not impose a general obligation to provide refugees with financial assistance in order to provide a certain standard of living.[85] Nevertheless, the deportation to Greece was a violation of Article 3 ECHR, because of the combination of humiliating (living) conditions, the vulnerability of asylum seekers and the state's obligations under the Reception Directive.[86] In *Sufi and Elmi v the United Kingdom*, the Court also found the humanitarian conditions, this time those in Somalia, to be in breach of Article 3 ECHR.[87]

Although the Court has developed an extensive assessment framework for Article 3 ECHR in *non-refoulement* cases, in which the purport of the reasoning in *Soering* has been confirmed and elaborated, only a relatively small number of cases has resulted in a violation of Article 3 ECHR in asylum cases.[88] It should also be noted that in recent years the Court has placed increasing emphasis on its subsidiary role in asylum cases. Whereas in the early years the Court invariably considered that Article 3 ECHR requires a full and *ex nunc* review in the event of an imminent expulsion to prevent irreparable damage, in most recent cases the Court also considers that it is not its task to replace the outcome of the national procedure with its own judgment. As a general principle, national authorities are best placed to assess the facts and credibility of an asylum application.[89] If this is done in a careful manner, the Court will not easily come to a violation of Article 3 ECHR.

In conclusion, this section has shown that the assessment framework for Articles 8 and 3 ECHR, which was first articulated in *Abdulaziz* and *Soering*, laid the groundwork for the ECtHR's constitutional role in shaping human rights application in migration and asylum law. Recent case law shows a shift towards procedural scrutiny: the Court increasingly focuses on whether national authorities have adequately balanced interests and engaged with its case law. Substantive review is reserved for cases where national procedures fall short, particularly involving long-term residents or vulnerable children.

84 ECtHR, *M.S.S. v Belgium and Greece,* no 30696/09, 21.01.2011; ECtHR, *Sufi and Elmi v The United Kingdom*, no 8319/07 11449/07, 28.06.2011.

85 ECtHR, *M.S.S. v Belgium and Greece*, *supra* note 84, para. 249.

86 Ibid., paras. 367–368 in conjunction with para. 276.

87 ECtHR, *Sufi and Elmi v The United Kingdom, supra* note 84, para. 291.

88 E. Hamdan, *The Principle of Non-Refoulement under the ECHR and the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Brill Nijhoff: Leiden, 2016.

89 ECtHR, *F.G. v Sweden,* no 43611/11, 26.03.2016; ECtHR, *J.K. et al. v Sweden,* no 59166/12, 23.08.2016.

Similarly, in asylum cases, the Court emphasises its subsidiary role, deferring to national decisions when national procedures are fair and thorough. This approach underscores that the ECtHR acts as a safeguard, not a substitute, for national human rights systems in migration and asylum law. Moving forward, the question arises what role other human rights provisions in the ECHR play in migration and asylum law. This will be addressed in the next section.

5 Exploring Unpaved Ways in Migration and Asylum Law

5.1 *Introduction*

For a long time, the focus in migration and asylum cases was on the two rights discussed above: the right to respect for family life in Article 8 ECHR and Article 3 ECHR. Not only the complaints at the ECtHR case law, but also (national) legal practice focused almost exclusively on these rights. This is not surprising, since ECtHR case law was reflected in national legal practice, which in turn stimulated reliance on the same provisions at the ECtHR. Recent developments indicate a shift in invoking other ECHR provisions that have established important additional protective standards in migration and asylum law. I will illustrate this by discussing two human rights provisions in the ECHR: the right to respect for private life (in Article 8 ECHR) in migration cases and the right to a fair trial in Article 6 ECHR in asylum context.

5.2 *The Right to Respect for Private Life as a Ground for Residence*

In addition to the right to respect for family life, Article 8 ECHR guarantees the right to respect for private life. The drafters of the treaty may not have envisaged that the right to respect for private life would be invoked to substantiate immigration residence claims,[90] but in recent decades this right has proven to be at least as important in migration cases as the right to respect for family life. In line with a general trend in which more and more interests were brought under the heading of private life by the Court,[91] the development in migration law can also be attributed to the broadening of the scope of 'private life'. The Court has recognised that establishing and developing relationships with

90 P. van Dijk *et al.* (eds.), *Theory and Practice of the European Convention on Human Rights*, Intersentia: Cambridge/Antwerp/Portland, 2018, p. 669.

91 ECtHR *Paradiso and Campanelli v Italy,* no 25358/12, 24.01.2017, paras. 159–160 and the case law referred to therein. See also J.H. Gerards, 'Margin of Appreciation and Incrementalism in the Case Law of the ECHR', (2018) 18(3) *HRLR* 2018, pp. 495–515.

others falls under the right to social identity, including in migration matters.[92] A simultaneous development that influenced the emergence of the right to respect for private life was the limitation of the scope of 'family life' in migration cases to the nuclear family.[93] The distinction in 'family life' between the nuclear family and other family members has impacted on the interpretation of the concept of private life, as a result of which other family ties are considered under the scope of private life.

The Court's case law in this area mainly revolves around settled migrants. The right to a social identity was first applied to so-called second-generation migrants, who had grown up (and had sometimes even been born) in the country of residence. In the cases in question, a conviction for a criminal offence was often a reason for expulsion.[94] The Court expressly considered that the long-term residence of settled foreign nationals individually (i.e. regardless of whether there is family life) falls within the scope of private life, most explicitly in *Üner v The Netherlands* and *Maslov v Austria.*[95] For the weighing of interests the Court elaborated on the *Boultif* criteria,[96] to which this criterion was added: 'the solidity of social, cultural and family ties with the host country and with the country of destination'.[97] In doing so, the Court expressed an interaction between the strength of a foreigner's ties with the host country on the one hand and the country of origin on the other. The presumption here is that the longer the stay is in the country of residence, the stronger the ties with that country and the weaker the ties with the country of origin.[98] This results in a more stringent test when balancing the interests of long-term resident foreign nationals, because the Court requires very serious reasons to justify expulsion in such cases.[99] Nevertheless, this has led to a violation of the right to respect for private life only in a limited number of cases, which – with regard the category of settled migrants convicted of a

92 ECtHR, *Fernández Martínez v Spain*, no 56030/07, 12.06.2014, para. 126. ECtHR, *Űner*, *supra* note 52, para. 59; ECtHR *Maslov v Austria*, no 1638/03, 23.06.2008, para. 63.

93 See earlier, section 3.2.

94 ECtHR, *C. v Belgium,* no 21794/93, 07.08.1996, para. 25; ECtHR, *Bouckelkia v France*, no 23078/93, 29.01.1997; ECtHR, *El Boujaidi v France,* no 25613/94, 26.09.1992; ECtHR, *Mehemi v France,* no 25017/94 26.09.1997; ECtHR, *Boujlifa v France,* no 25404/94, 21.10.1997; ECtHR, *Dalia v France*, 26102/95, 19.02.1992; ECtHR, *Baghli v France*, no 34374/97, 30.11.1999.

95 ECtHR, *Üner*, *supra* note 52, para. 59; ECtHR *Maslov v Austria*, *supra* note 92, para. 63.

96 See ECtHR, *Boultif, supra* note 52.

97 ECtHR, *Üner*, *supra* note 52, para. 58.

98 Ibid., para. 59; ECtHR *Maslov v Austria*, *supra* note 92, para. 63.

99 ECtHR, *Levakovic v Denmark*, no 7841/14, 24.10.2018, para. 45; ECtHR, *Azerkane v The Netherlands*, no 3138/16, 02.06.2020, para. 62.

criminal offence – is characterised by two aspects: minority and model citizenship. In short, the seriousness of the offence is mitigated only if it was committed at a minor age and the foreign national does not show recidivism as an adult.[100] Although the complainant, *Üner,* was born and raised in the Netherlands and would be expelled as a (young) adult, the seriousness of the offence and the recidivism tipped the scales to his disadvantage.[101]

It was perhaps inevitable that the right to a social identity of long-term settled foreign nationals would be recognised by the Court, since they have generally been granted a form of permanent residence by the state, in which social identity can be shaped.[102] It was less obvious that long-term unlawful residence would also be assessed under the heading of the right to respect for private life, because unlawful residence presupposes that the state has never expressly authorised that residence.[103] Although the Court does not seem consistent in assessing this right in the event of unlawful residence due to the distinction between negative and positive obligations, it is in any case clear that the social identity of a minor and their rootedness in a society in particular deserves protection under Article 8 ECHR.[104] In that context, the Court has included ties during the unlawful stay of foreign nationals under the heading of private life. But in line with family reunification cases, the exceptional circumstances test is applied, which means that the removal of these persons will only in exceptional circumstances be incompatible with Article 8 ECHR.[105] In the recent case of *Pormes,* these principles have been confirmed and nuanced. But the Court introduced a new assessment framework, since the strict assessment framework for settled foreign nationals according to the *Üner*-criteria was not applicable to him. Nor was the exceptional circumstances test applied, since he was, as a child, not aware of his unlawful status and thus not responsible for his unlawful residence. The Court thus applies a 'neutral test' when the uncertainty of the unlawful residence cannot be attributed to the person concerned.[106]

---

100 ECtHR, *A.W. Khan v The United Kingdom,* no 47486/06, 12.01.2010; cf. ECtHR, *A.H. Khan v The United Kingdom,* no 6222/10, 20.12.2011; ECtHR, *A.A. v The United Kingdom,* no 8000/08, 20.09.2011.

101 ECtHR, *Üner, supra* note 52; ECtHR, *Azerkane, supra* note 99.

102 P. van Dijk, 'Protection of "Integrated" Aliens against Expulsion under the ECHR', (1999) 1 *EJML*, pp. 298–301.

103 D. Thym, 'Respect for Private and Family Life', *supra* note 16, p. 87.

104 ECtHR, *Pormes v the Netherlands*, no 25402/14, 28.07.2020.

105 ECtHR, *Butt v Norway,* no 47017/09, 04.12.2012, paras. 78–79; ECtHR, *Konstatinov, supra* note 56, para. 48; ECtHR, *Jeunesse, supra* note 52.

106 ECtHR, *Pormes*, *supra* note 104, paras. 58–61.

5.3 *The Right to a Fair Trial as a Prohibition of Refoulement*

Another interesting development has occurred in asylum law, where procedural rights such as the right to a fair trial in Article 6 ECHR have been invoked as a prohibition of *refoulement*. Some background on the application of Article 6 ECHR in migration cases is relevant in this regard: in *Maaouia v France* the Court ruled that Article 6 ECHR does not apply to disputes relating to admission and residence because these do not qualify as 'civil rights or obligations' or 'criminal prosecution' as codified in Article 6(1) ECHR.[107] The disputes take place domestically in the national states, but the question was raised what role the right to a fair trial had to play, when invoked in a transnational context, where a person would face a violation of a fair trial in a third country. Already in *Soering* the Court had accepted the potential of Article 6 ECHR as a *refoulement* prohibition, under (exceptional) circumstances.[108] This was reiterated by the Court in several cases, but never led to the conclusion that this provision had actually been violated until the case of *Othman v The United Kingdom*.[109] In that case, the Court ruled for the first time that the expulsion of the complainant would constitute a violation of the right to a fair trial.[110] Othman, a Jordanian national, had applied for asylum in the United Kingdom in 1993, because he had allegedly been imprisoned and tortured by the Jordanian authorities. He obtained a temporary residence right in the United Kingdom, after which he was detained under anti-terrorism legislation there, where in August 2005 a deportation order was issued against him by the United Kingdom. He invoked Articles 3, 5 and 6 ECHR. The Court held that there was no risk of treatment in violation of Article 3 ECHR in the event of deportation to Jordan, because of the diplomatic guarantees provided by the Jordanian authorities.[111] With regard to Article 6 ECHR, together with Article 5, the Court applied a different threshold from that under Article 3 ECHR for assessing the claim that expulsion is contrary to these rights: only in the event of a real risk of a flagrant denial of the right in question would expulsion be imper-

107 ECtHR, *Maaouia v France*, no 39652/98, 05.10.2000.

108 *Soering*, *supra* note 2, para. 113.

109 ECtHR, *Hilal, supra* note 53; ECtHR, *Razaghi v Sweden,* no 64599/01, 11.03.2003; ECtHR, *Tomic v The United Kingdom,* no 17837/03, 14.10.2003; ECtHR, *Basnet v The United Kingdom*, no 43136/02, 24.06.2008; ECtHR, *F. v The United Kingdom,* no 17341/03, 22.06.2014. No violation of Article 6 ECHR was found in extradition cases either: e.g. ECtHR *Mamatkulov and Askarov, supra* note 8.

110 ECtHR, *Othman* (*Abu Qatada*) *v United Kingdom,* no 8139/09, 17.01.2012.

111 Ibid., para. 197 *et seq*.

missible. According to the Court, the term 'flagrant denial of justice' is synonymous with a trial that is manifestly contrary to the essence of the right to a fair trial or the principles deriving from it.[112] Thus, only serious obstacles to a fair trial should be considered, such as a conviction *in absentia* based on evidence obtained through torture.[113]

From the previous sections it becomes clear that the impact of the ECHR in migration and asylum law is mainly based on Articles 3 and 8 ECHR, but case law with regard to the right to respect for private life in migration cases and the right to a fair trial in asylum cases has paved the way for recent doctrinal developments. These have not yet reached the status of the well-established principles we saw in family reunification and ill-treatment cases, but it is clear that the Court does not refrain from applying these rights in migration and asylum contexts.

6 'New' Human Rights in Migration and Asylum Cases: Between Expansion and Application of ECHR Provisions

6.1 *Introduction*

What about the other provisions in the ECHR? To what extent are these invoked and applied in migration cases? Case law as early as that of the EComHR shows that other rights, such as the right to freedom of religion and the freedom of expression and even the right to education, have been invoked at an early stage to contest immigration measures.[114] I will discuss some of these cases below, making a distinction between the migration context and the asylum context (in analogy with the *Abdulaziz* and the *Soering* doctrines discussed in section 2.

6.2 *The Migration Context*

A first example is the right to freedom of religion which is invoked as a ground for admission and residence claims. In some cases concerning the admission or expulsion of religious leaders, the Court invariably considered that no right

112 Ibid., para. 259.

113 Ibid., para. 259.

114 EComRM, *Agee v The United Kingdom,* no 7729/76, 17.12.1976; EComRM, *Bertrand Russel Peace v The United Kingdom,* no 7597/76, 02.05.1978*;* EComRM, *Omkarananda and the Devine Light Zentrum v Switzerland,* no 118/77, 19.03.1981.

of an alien to enter or to reside in a particular country, or not to be removed from that country, is as such guaranteed by the Convention.[115]

Nevertheless, the freedom of religion in Article 9 ECHR may be at stake if it is established that an expulsion measure was intended to stifle or prevent the exercise of those rights or the spread of a belief. In *Nolan and K. v Russia,* this led the Court to conclude that the expulsion of the American Nolan, who spent several years in Russia for religious activities for the branch of the Unification Church, posed a violation of the freedom of religion.[116] The Court came to this conclusion while applying the criterion that the expulsion measure was imposed with a view to preventing the exercise of religious freedom (the target criterion).[117] In doing so, the Court took into account Russia's policy in which almost every activity of foreign missionaries was considered a threat to national security. Therefore, the expulsion was not justified because it did not serve a legitimate purpose.[118]

The Court applied similar reasoning with regard to the right to freedom of expression in Article 10 ECHR, invoked in *Piermont v France.*[119] Piermont was a German Member of the European Parliament (MEP) and acted as an environmental activist and pacifist. She was denied access to the French overseas territories in the Pacific Ocean (French Polynesia and New Caledonia) because of speeches and demonstrations against nuclear energy at the time. The Court ruled that her expulsion from the territories amounted to a violation of her freedom of expression, emphasising her role as an EU citizen and MEP.[120] Likewise, in the case of *Cox*, an American who was banned from Turkey because of her statements on some controversial issues, the Court ruled that the refusal to admit her constituted a violation of Article 10 ECHR.[121] As with religious freedom, the Court applied the criterion whether the measure was aimed at restricting the freedom of expression (the target criterion),

115 EComRM, *Hüsnü Öz v Germany,* no 32168/96, 3.12.1996; ECtHR, *Al Nashiri v Bulgaria,* no 50963/99 20.06.2002; ECtHR, *Perry v Latvia,* no 30273/03, 02.06.2008; ECtHR, *Nolan and K. v Russia,* no 2512/04, 12.02.2009.

116 ECtHR, *Nolan and K. v Russia, supra* note 115.

117 Ibid., para. 62.

118 Ibid., paras. 73–75.

119 ECtHR, *Piermont v France,* no 15773/89, 27.04.1995; ECtHR, *Cox v Turkey,* no 2933/03, 20.05.2010.

120 ECtHR, *Piermont, supra* note 119, paras. 64, 77.

121 ECtHR, *Cox, supra* note 119.

which is not required in domestic cases to qualify an interference in the freedom of expression.[122]

6.3 *The Asylum Context*

In addition to the situation in which fundamental rights are invoked in order to be able to exercise them in the country of residence, fundamental rights are also invoked because the relevant rights cannot be exercised in the country of origin. The right to a fair trial has already been referred to in this context above. But in recent years, the Court has increasingly been confronted with asylum cases concerning LGBT persons and converts (referred to as *sur place* refugees[123]) or persons with a minority religion, who invoked the right to respect for private life and the right to religious freedom.[124] It is apparent from the case law of the Court that it cannot be ruled out that these rights may result in a prohibition of *refoulement*. However, a very high threshold is required, namely a flagrant violation of these freedoms:

> the Court would not rule out the possibility that the responsibility of the returning State might in exceptional circumstances be engaged under Article 9 of the Convention where the person concerned ran a real risk of flagrant violation of that Article in the receiving State.[125]

This resembles the threshold mentioned under Article 6 ECHR,[126] but in the case of the rights at issue it has an even stricter effect because the test is difficult to achieve without the threshold of Article 3 ECHR in the case of *ill-treatment* also being met. This is explicitly shown in a case about Pakistani Christians who, as a minority in Pakistan, feared religious persecution. The

122 In some cases explicitly, as in ECtHR, *Cox v Turkey, supra* note 119, and EComHR, *Agee v The United Kingdom, supra* note 114. In other cases implicitly, such as in ECtHR, *Zarubin and others v Lithuania,* no 69111/17, 69112/17 69113/17, 26.11.2019.

123 *Sur place* is a term used to indicate that a person becomes a refugee during his stay in a country (which is not his country of origin) because he performs certain activities there, e.g. converting or coming out.

124 The fact that a similar development occurred in EU asylum law undoubtedly played a role in this, with preliminary questions on the interpretation of the Qualification Directive being submitted to the CJEU, such as: CJEU, *X.,Y. and Z. v Minister for Immigration and Asylum,* Case C-199/12, C-200/12 and C-201/12, 07.11.2014, ECLI:EU:C:2013:720 on homosexual asylum seekers and CJEU, *Bundesrepublik Deutschland v Y. and Z,* C-71/11 and C-99/11, 05.09.2012, ECLI:EU:C:2012:518, on members of a minority religion in the country of origin.

125 ECtHR, *Z. and T. v The United Kingdom,* no 27034/05, 28.02.2006, p. 7.

126 See above, section 4.3.

Court considered the complaint under Article 9 ECHR to be manifestly unfounded.[127] With regard to a homosexual asylum seeker from Iran, the Court also considered in connection with the complainant's homosexuality that his physical and moral integrity may be at stake, but that for expulsion cases in an asylum context, the responsibility of states is in principle assumed only if there is a risk of *ill-treatment* under Article 3 ECHR.[128]

The Court justifies the application of the high threshold in those cases with pragmatic and principled considerations. The Court considered that the prohibition of *refoulement* under Article 3 ECHR is based on the fundamental importance of this provision and that this does not automatically apply to other ECHR provisions.[129] In addition, Article 3 ECHR has been labelled absolute by the ECtHR, while other provisions provide limitation possibilities. However, this does not have to be an obstacle to subjecting other rights in the asylum context to a review, by means of the positive obligation doctrine. After all, a state's obligation to provide protection against removal to other states can be compared to the obligation in cases where an infringement of fundamental rights by third parties takes place (in a domestic context).[130]

While various ECHR rights, such as freedom of religion or expression, have been invoked in migration and asylum cases, the ECtHR remains highly reluctant fully to apply or expand on these rights in such contexts. The Court maintains a restrictive approach when requiring a target criterion in migration cases and a flagrant violation threshold in asylum cases. This raises critical questions about whether the differentiated, higher standards applied in migration and asylum law are sufficiently justified. Despite its constitutional role as the supreme interpreter of human rights, the Court appears to prioritise procedural safeguards over substantive expansion of rights in this domain.

7 Conclusion

This contribution has outlined the importance of the ECHR for migration and asylum law. It has indicated the development that started with the landmark

127 ECtHR, *Z. and T.*, *supra* note 125, p. 7.

128 ECtHR, *F. v The United Kingdom*, *supra* note 109, pp. 11–12.

129 ECtHR, *Z. and T.*, *supra* note 125, p. 7; ECtHR, *F. v The United Kingdom, supra* note 109, p. 12.

130 ECtHR, *O'Keeffe v Ireland,* no 35810/09 [GC], 28.01.2014, para. 144; ECtHR, *Ćwik v Poland*, no 31454/10, 05.11.2020, para. 63. Cf. K. Greenman, 'A Castle Built on Sand?', *supra* note 11, pp. 264–296.

cases of *Abdulaziz* and *Soering*. As a general starting point, which can be derived from both cases, migration law does not exclude the applicability of the ECHR from the outset. This may not seem surprising now – 75 years after the genesis of the ECHR – but was quite a revolutionary statement at the time. The Court has ruled that the state is also obliged to guarantee ECHR rights in the case of measures relating to migration. However, the approach of the ECtHR in migration cases is characterised by the use of the immigration clause, which means that there is no right to admission or residence on the basis of the ECHR and that states have the right to regulate immigration. Moreover, in reviewing such measures in the light of human rights norms, a margin of appreciation is left for states since migration law is typically related to state sovereignty by the Court. These are general principles which, logically, can also be taken into account when applying other human rights provisions in migration matters. Entitlements to residence on the basis of other fundamental rights can therefore potentially be fleshed out, inspired by the assessment frameworks developed by the Court in Articles 3 and 8 ECHR. However, it has become apparent that in recent decades ECtHR case law has still mainly focused on the right to respect for family life in Article 8 ECHR and the prohibition of torture, inhuman and degrading treatment in Article 3 ECHR. On the one hand, this has provided extensive and refined frameworks in family reunification and asylum law in these areas: the Court has delivered many groundbreaking judgments that guide the interpretation of the ECHR in national immigration law. At the same time, this development has probably led to a neglect of other ECHR rights in migration law. Additionally, it should be borne in mind that despite the large number of judgments on migration and asylum issues, relatively few have amounted to a violation of the ECHR and many have led to decisions of inadmissibility. To some this indicates a lack of courage and a sign of the Court's conventional approach.[131] This is true to the extent that the Court applies a procedural approach in 'established' human rights and a particularly restricted approach to 'new' human rights in migration and asylum law. At the same time others criticise the Court for its activism in broadening the scope of the ECHR in these areas.[132] In my view, the ECtHR is rightly renowned for judgments that have established important

131 M.B. Dembour, 'The Migrant Case Law of the European Court of Human Rights: Critique and Way Forward', in B. Çalı, L. Bianku and J. Motoc (eds.), *Migration and the European Convention on Human Rights*, *supra* note 12.

132 M. Bošnjak and K. Zajac, 'Judicial Activism and Judge-Made Law at the ECtHR', (2023) 23(3) *Human Rights Law Review*, pp. 1–15, with further references on p. 2.

protective standards in migration and asylum law, since there are no persuasive interpretative human rights arguments to refrain from applying the ECHR human rights standards to new domains as well, which is in line with the living instrument doctrine the Court adheres to. In that sense, the Court would do no more than execute its constitutional task.

The Contribution of the European Court of Human Rights to End-of-Life Law and Practice: Looking Back to Look Forward

Nataly Papadopoulou and Elizabeth Wicks

Abstract

Our paper brings together jurisprudence from the European Court of Human Rights (the Court) on end-of-life, including on assisted dying and withdrawal of life-sustaining treatment. It does so in order to identify the key principles that the Court has established over the years with a vision of assessing how future applications on new end-of-life issues may be dealt with. With this paper, we highlight the crucial importance human rights have for end-of-life law and practice, and the continued role they can play as more cases come before the Court on existing and new challenges around legal, medical and ethical issues around death and dying in a health care context.

1 Introduction

In this paper, we review the European Court of Human Rights' (the Court's) case law on end-of-life issues in order to assess how we think the Court might deal with future applications dealing with new end-of-life issues, as well as how we think it should do so. By 'end-of-life' in this paper, we mean death and dying within the context of health care. This encompasses not only issues of euthanasia and assisted suicide (assisted dying)[1] but also the withdrawal of life-sustaining treatment, palliative care and voluntary actions to end life. We regard this topic as a major contemporary concern, one that affects us all, and in our first section we contemplate the Court's role within a broad end-of-life landscape, question what a 'good death' might be, and what the role of the Court might be in protecting rights in relation to that. Our second section then proceeds to analyse the Court's existing jurisprudence on end-of-life, includ-

1 By this term we mean the practices of both assisted suicide (providing the means to an individual for them to take the final act that will bring about their own death) and also voluntary active euthanasia (with the consent or upon the request of the individual, the process where, usually a physician, ends the individual's life to alleviate suffering).

© NATALY PAPADOPOULOU AND ELIZABETH WICKS, 2026 | DOI:10.1163/9789004751026_010
This is an open access chapter distributed under the terms of the CC-BY-NC-ND 4.0 license.

ing the choices it makes about which Convention rights to prioritise and the ways it seeks to strike a balance between conflicting rights. In a third section, we review the Court's use of the margin of appreciation and highlight the significance of the question of European consensus, and emerging global trends. Building on this review, in our final section we identify a number of guiding principles that we argue the Court has used thus far, and we consider how these principles might be further used and developed in future cases. We end by arguing for a more progressive judicial approach by the Court in order to ensure that the Convention is able to realise its potential in contributing to deaths and dying processes that respect all of our rights, including the well-established Convention right to self-determination in respect of how and when our lives come to an end.[2] We will all face death in one way or another; those that face it within the health care context should be supported by respect for their fundamental human rights, and the Court is a key player in ensuring that support is available when most needed.

2 The Court and the Broader End-of-Life Landscape

In recent decades, the Court has issued a number of significant and well-publicised judgments on the topic of assisted dying. The extensive publicity and the debate in the aftermath of these judgments partly explain the perception that sometimes equates the end-of-life exclusively with assisted dying. This is not quite right. It is tempting, and even understandable to have this view, which may also include viewing the legal issues, patterns and principles highlighted in these judgments in isolation from the broader end-of-life landscape. However, in the most recent of these judgments, *Karsai v Hungary*, the Court made a point of specifically engaging with other end-of-life landscapes, including treatment refusal, sedation and palliative care. In doing so, it provided a welcome reminder that assisted dying is but one small aspect of a much wider and complex legal and ethical discussion about death and dying within the health care context. The Court, we argue, is cautiously engaging with the concept of 'a good death', or 'how we die well', or 'with dignity', or

2 ECtHR, *Haas v Switzerland*, no 31322/07, 20.06.2011, para. 51: 'the Court considers that an individual's right to decide by what means and at what point his or her life will end, provided he or she is capable of freely reaching a decision on this question and acting in consequence, is one of the aspects of the right to respect for private life within the meaning of Article 8 of the Convention'.

'peacefully'.[3] While we are all likely to have ideas of what this entails, labels and, much more, its actual meaning have troubled commentators and society through the years.[4] Even the very attempt to give meaning to this term has been the subject of justifiable critique. The Lancet Commission on the Value of Death noted, for instance, that 'by defining the "good death" as a list of tickboxable criteria, we are losing sight of the individual',[5] a comment that highlights the subjectivity of the term, and the complexity of giving it any kind of meaningful definition. In this first section, we reflect on what a 'good death' may mean, followed by an investigation of instances where the Court, in the context of end-of-life, has reflected on its own position of a 'good death', cautious, as always, to ensure that it remains respectful to all those it represents.

2.1 *What Is a 'Good Death'?*

Death and dying have changed dramatically over the years. The timing of death is often prolonged, dying has moved from the community to clinical settings, end-of-life care (including palliative care) is not equitably available to everyone, and there is a struggle to understand death and dying as a relational, multifaceted concept, shaped by past approaches.[6] Although the event of death may be universal, that is, it will happen to everyone, the process of dying significantly varies depending on our attitudes, perspectives, where it happens; socio-economic conditions; individual beliefs and values, religious or otherwise. With advances in medicine and technology, death from the perspective of health care is sometimes seen as a failure, with the process of dying sometimes prolonged, often at the expense of quality of life. A 'good death'

3 See some literature, which is by no means exhaustive: K. A. Kehl, 'Moving Toward Peace: An Analysis of the Concept of a Good Death', (2006) 23(4) *American Journal of Hospice & Palliative Medicine*, pp. 277–286; R. O'Neil, 'A Good Death', (1983) 1(4) *Applied Philosophy*, pp. 9–17; E. A. Meier, J. V Gallegos, L. P. Montross-Thomas, *et al.*, 'Defining a Good Death (Successful Dying): Literature Review and a Call for Research and Public Dialogue', (2016) 24(4) *The American Journal of Geriatric Psychiatry*, pp. 261–271; M. Zaman, A. Mohapatra, S. Espinal-Arango, *et al.*, 'What Would it Take to Die Well? A Systematic Review of Systematic Reviews on the Conditions for a Good Death', (2021) 2 *Lancet Healthy Longevity*, pp. 593–600.

4 We use 'good death' in the rest of this paper, but we are far from convinced that this is our preferred term. We do not make a further comment on this, but we remain intrigued and committed to exploring this further in future work.

5 The Lancet Commissions, 'Report of the Lancet Commission on the Value of Death: Bringing Death Back into Life' 31.01.2022, available at https://www.thelancet.com/pdfs/journals/lancet/PIIS0140-6736(21)02314-X.pdf, last accessed 09.05.2025.

6 Ibid., pp. 837, 839.

looks different for the patient, the health care professional and the health care system, and various studies have been carried out at a global scale trying to capture the views and perspectives of these key actors.[7]

Some of the factors that may contribute to a 'good death' may be the ability to be involved in decision-making, acting autonomously up until death, to be treated with dignity, being free from pain, controlling the timing and manner of dying, planning for how affairs are arranged after death. The underlying, core issue it seems – one that we all must face at some point in our lives – is how we would prefer those lives to come to an end. But of course, this goes beyond our own, individual preferences; the complexity of a 'good death' means a constant, empowering, perplexing interaction between the individual, the professional, the societal. Concepts of a 'good death' are inherently subjective – our idea of a good death may be different from yours – and that is an important point for the Court, and all of us working in the area, to bear in mind as we seek to assess the role of the European Convention of Human Rights (the Convention) in helping to achieve these goals.[8] What we choose to prioritise as we approach death is unique to us and no 'good death' can be achieved without due regard to that. While a 'good death' may be perceived as the ultimate goal for those who choose to concern themselves with it, different routes to that exist, and different conditions may contribute to its realisation. The Court certainly acknowledges that, especially in its most recent judgments, the end-of-life landscape is vast, and a 'good death' may mean different things for each one of us.

2.2 *The Court's View on a 'Good Death'*

How does the Court then engage with this complex, multifaceted concept of a 'good death'? Over the years, while cautious to remain respectful to all the individuals and member states it represents, the Court seems to be moving

7 See some literature, which is by no means exhaustive: A. Krikorian, C. Maldonado and T. Pastrana, 'Patient's Perspectives on the Notion of a Good Death: A Systematic Review of the Literature', (2020) 59(1) *Journal of Pain and Symptom Management*, pp. 152–164; K.E. Steinhauser, E.C. Clipp, M. McNeilly *et al.*, 'In Search of a Good Death: Observations of Patients, Families, and Providers', (2000) 132(10) *Annals of Internal Medicine*, pp. 825–832; M. Miyashita, T. Morita, K. Sato, *et al.*, 'Good Death Inventory: A Measure for Evaluating Good Death from the Bereaved Family Member's Perspective', (2008) 35(5) *Journal of Pain and Symptom Management*, pp. 486–498.

8 See, for instance: Council of Europe, 'Guide on the Decision-Making Process Regarding Medical Treatment in End-Of-Life Situations', May 2014, available at https://www.coe.int/en/web/human-rights-and-biomedicine/guide-on-the-decision-making-process-regarding-medical-treatment-in-end-of-life-situations, last accessed on 09.05.2025, pp. 1–33.

to a more specific conception of what a 'good death' may mean, or how it may be realised.

In the Court's earliest judgment on end-of-life, *Pretty v the United Kingdom*, the Court acknowledged the role of 'quality of life', and, in particular, subjective views upon such quality. It noted that the applicant was prevented by law from 'exercising her choice to avoid what she considers will be an undignified and distressing end to her life' and the Court was not prepared to rule out that this synthesis of notions of choice, dignity, distress constituted an interference with her Article 8 right to respect for private life.[9] It was specifically the disconnect between the applicant's preferred ending and the one that she faced, that caused the potential interference, and the Court was well aware that such disconnects are becoming regrettably common:

> In an era of growing medical sophistication combined with longer life expectancies, many people are concerned that they should not be forced to linger on in old age or in states of advanced physical or mental decrepitude which conflict with strongly held ideas of self and personal identity.[10]

In *Koch v Germany*, the Court laconically acknowledges that the applicant's wish self-determinedly to end his life raise 'fundamental questions' 'of general interest transcending the person'.[11]

In *Karsai*, the Court seems to engage with a concept of dying peacefully and it explicitly acknowledges the role of high-quality palliative care in achieving that: 'high-quality palliative care, including access to effective pain management, is in many situations – and no doubt in that of the applicant – essential to ensuring a dignified end of life…'[12] In this context, it refers to the European Association of Palliative Care's Revised Recommendations, including the use of palliative sedation, and notes that palliative care options are 'generally able to provide relief to patients in the applicant's situation and allow them to die peacefully'.[13] The Court also notes other available options to allow a peaceful

9 ECtHR, *Pretty v the United Kingdom*, no 2346/02, 29.04.2002, para. 67.

10 Ibid., para. 67.

11 ECtHR, *Koch v Germany*, no 497/09, 19.07.2012, para. 46.

12 ECtHR, *Dániel Karsai v Hungary*, no 32312/23, 02.09.2024, para. 154. On the case see also: S. Martin, 'Dániel Karsai v Hungary: Further Clarification of State Obligations in the Context of Assisted Dying', Strasbourg Observes, 26.11.24, available at https://strasbourgobservers.com/2024/11/26/daniel-karsai-v-hungary-further-clarification-of-state-obligations-in-the-context-of-assited-dying/, last accessed 09.05.2025.

13 ECtHR, *Karsai*, *supra* note 12, para. 154.

death such as the refusal of life-sustaining treatment including breathing assistance, and medical sedation to relieve suffering.[14] It seems to us that the Court's comments recognise a dignified, peaceful end as the ultimate goal in the context of the end of life. While we acknowledge that a 'good death' is subjectively determined, we welcome the recognition that the achievement of this ultimate goal may be pursued through different, individually chosen, routes, not necessarily mutually exclusive. The applicant in *Karsai* indeed had rejected the legally permissible options available to him, choosing, for example, not to be medically sedated because of the loss of autonomy that that would entail. While the Court recognised this was a 'legitimate personal choice', it was somewhat blunt in its rejection of the significance of the applicant's priorities in this regard, stating that 'a personal preference to forego otherwise appropriate and available procedures cannot in itself require the authorities to provide alternative solutions, let alone to legalise physician-assisted dying (PAD)'.[15] From our perspective, it is a pity that the Court was not prepared to at least acknowledge that access to PAD[16] was the only means by which this particular applicant could achieve the 'good death' he preferred.

If the ultimate goal of the Court is a peaceful, dignified, subjectively 'good death', the regulation of assisted dying should be viewed as one possible means of achieving this for individuals who consider this as part of their self-sought 'good death'. While the Court has not yet recognised access to regulated assisted dying as required under the Convention, it has recognised the right to self-determination in how and when our lives end,[17] a right to refuse medical treatment,[18] a right to have our choices given priority in decisions about life-sustaining treatment withdrawal,[19] and the need for high-quality palliative care options to facilitate a peaceful death.[20] In recognising these rights and setting guiding principles that shape the end of life, the Court makes it clear that the Convention has a crucial role to play in death and dying. In the context of assisted dying, particularly, the role of the Court is especially important considering the growing number of member states regulating and offering this end-of-life option to those who meet the set criteria.[21]

14 Ibid., paras. 154–155.

15 Ibid., para. 155.

16 This is the term preferred by the Court in ECtHR, *Karsai*, *supra* note 12, para. 82.

17 ECtHR, *Pretty*, *supra* note 9.

18 ECtHR, *V.C. v Slovakia,* no 18968/07, 08.02.2012.

19 ECtHR, *Lambert v France,* no 46043/14 [GC] 05.06.2015, para. 178.

20 ECtHR, *Karsai*, *supra* note 12, para. 154.

21 See just a couple of examples of this trend: Austria's new legislation: Bundesgesetz über die Errichtung von Sterbeverfügungen (Sterbeverfügungsgesetz – StVfG) 2021; or Spain's

We now proceed to investigate how the Court makes use of the rights and mechanisms within the Convention when dealing with the end of life.

3 The Court's Use of the Convention in End-of-Life Issues

The Court has the opportunity to consider a variety of end-of-life issues, although not by any means all of them. In order to evaluate how the Court approaches these issues, it is helpful to look, first, at how it draws a (ideally coherent) line between those applications that are admissible and those that are not. This will enable us to identify the types of end-of-life issues that are relatively settled under the Convention, and those which are still 'live'. After doing this, we will proceed to analyse the Court's preferred rights to prioritise in this context, before assessing the ways in which the Court ensures that it reads the Convention as a whole when deciding on violations of the Convention rights in respect of obligations on the states in relation to the end of life. We do this in order to identify the likely approaches of the Court to future end-of-life applications which may potentially raise new, as yet unconsidered, dilemmas.

3.1 *Determining Admissibility*

A number of end-of-life applications have been found to be inadmissible as manifestly ill-founded. In particular, this has been the result for most applications complaining of a violation of Article 2 in relation to the withdrawal of life-sustaining treatment. For example, in *Glass v the United Kingdom*, while the Court made clear that it cannot be ruled out that the acts and omissions of the health care authorities may in certain circumstances engage their responsibility under Article 2, it found that the relevant regulatory framework was unproblematic, and thus the complaint under this Article was inadmissible as manifestly ill-founded.[22] The Court also hinted in this decision that an argument under Article 2 in relation to medical opinion can 'amount to a criticism of the doctors' clinical judgment' and that the Court's role under this provision is not to 'gainsay the doctors' assessment'.[23] Such reluctance to consider that a

new legislation: Ley Orgánica 3/2021, de 24 de marzo, de regulación de la eutanasia. See also in Germany this very important judgment: Judgment of 26.02.2020 – 2 BvR 2347/15, 2 BvR 2527/16, 2 BvR 2354/16, 2 BvR 1593/16, 2 BvR 1261/16, 2 BvR 651/16 which held that the criminalisation of the assisted suicide service was unconstitutional.

22 ECtHR, *Glass v the United Kingdom*, no 61827/00, 09.03.2004.

23 ECtHR, *Karsai*, *supra* note 12.

health care professional may have infringed the right to life reflects the influential admissibility decision in *Powell v the United Kingdom* in which the Court held that a death resulting from medical negligence does not generally constitute a breach of Article 2 ECHR's right to life.[24] More recently, the Grand Chamber judgment in *Lopes de Sousa Fernandes v Portugal*[25] reaffirmed this approach. This judgment reflected an apparent reluctance to apply in the health care context Article 2's operational duty to take reasonable steps to save a life that the authorities know, or ought to know, is at risk. The Court's judgment in *Fernandes* can be criticised for failing to provide a sufficiently clear or explicitly reasoned approach to the application of positive obligations to preserve life within the health care context, and the requirements imposed in this judgment of systemic or structural dysfunction resulting from a lack of regulatory framework appears unduly demanding.[26]

The Court's apparent reluctance fully to engage with the demands of the right to life within health care might also be regarded as crucial to the inadmissibility decision in *Burke v the United Kingdom* where the Court was easily satisfied that 'the presumption of domestic law is strongly in favour of prolonging life where possible' and that this presumption 'accords with the spirit of the Convention'.[27] As the case law has progressed, it has become clear that the Court perceives Article 2's role in relation to the withdrawal of life-sustaining treatment to be one of securing procedural safeguards rather than setting substantive requirements. In *Lambert v France*, an application that was admissible, the Court helpfully set out the factors to be taken into account when addressing the question of the administering or withdrawal of medical treatment (drawing upon its approach in *Glass* and *Burke*).[28] The first factor is the existence in domestic law and practice of a regulatory framework compatible with the requirements of Article 2. As noted above, this framework should contain a presumption in favour of prolonging life. The second factor is the question whether account had been taken of the patient's previously expressed wishes and those of the persons close to him or her, as well as the opinions of other medical personnel. In *Lambert*, the Court emphasised the importance of taking into account the patient's wishes, going so far as to state that 'it is the patient who is the principal party in the decision-making process and whose

24 ECtHR, *Powell v the United Kingdom*, no 45305/99, 04.05.2000.

25 ECtHR, *Lopes de Sousa Fernandes v Portugal,* no 56080/13 [GC] 19.12.2017.

26 E. Wicks, 'The Role of the Right to Life in Respect of Deaths caused by Negligence in the Healthcare Context', (2024) 32 (1) *Medical Law Review*, pp. 81–100.

27 ECtHR, *Burke v the United Kingdom*, no 19807/06, 11.07.2006.

28 ECtHR, *Lambert*, *supra* note 19, para. 143.

consent must remain at its heart; this is true even where the patient is unable to express his or her wishes'.[29] Although a wide margin of appreciation is provided on this question of the specific decision-making process due to a lack of European consensus on this issue (as will be discussed further below), the Court was nonetheless able to identify a 'consensus as to the paramount importance of the patient's wishes in the decision-making process, however those wishes are expressed'.[30] The final factor is the ability to approach the domestic courts in the event of doubts as to the best decision to take in the patient's interests. A procedural triumvirate is thus explicit within *Lambert*. In this case, the French framework, process and remedies were of the appropriate standard to support a majority finding of no violation of Article 2. In subsequent cases, the factors have been applied at the admissibility stage to support inadmissibility decisions. Thus, in *Gard and Others v the United Kingdom*, on the question of withdrawal of treatment, these three factors were said to be satisfied,[31] and also in both *Afiri and Biddarri v France*[32] and *Parfitt v the United Kingdom*[33] Article 2 complaints concerning the withdrawal of life-sustaining treatment against parental wishes were found to be inadmissible as manifestly ill-founded due to these factors again being satisfied. In both cases, the Court reiterated that the specific details of how the decision-making process is organised fall within a state's margin of appreciation, and thus it is a somewhat superficial evaluation of the procedural requirements.

It appears, therefore, that provided a state has a regulatory framework in place that reflects a presumption in favour of prolonging life, takes into account the wishes of the patient and family (while not necessarily regarding those views as decisive) and provides access to judicial oversight when a decision is disputed, there will be no arguable claim under Article 2. To this extent, the question of withdrawal of treatment leading to death is settled under the Convention, and the Court does not wish to concern itself with the specifics of the process by which a decision to withdraw treatment is reached. It is conceivable, however, that some aspects of the process could exceed the state's margin of appreciate and require, at least, a judgment on the merits. One such example might be a process that pays no regard to an adult patient's wishes. The centrality of the patient's perspective and preferences is emphasised in *Lambert*, and

29 ECtHR, *Lambert*, *supra* note 19, para. 178.

30 Ibid., para. 147.

31 ECtHR, *Gard and Others v the United Kingdom* (dec.), no 39793/17, 27.06.2017, paras. 85–89.

32 ECtHR, *Afiri and Biddarri v France*, no 1828/18, 25.01.2018.

33 ECtHR, *Parfitt v the United Kingdom*, no 18533/21, 20.04.2021.

even in *Burke* (where arguably the patient's desire for treatment not to be withdrawn was not given adequate respect), the Court regarded it as relevant that a doctor would be 'obliged to take account of the applicant's previously expressed wishes'.[34] Although the Court also notes in this decision that patients, whether competent or not, cannot require a doctor to provide treatment 'which that doctor considers is not clinically justified', it is significant that the patient's wishes are expected to feed into such clinical judgement. If a domestic decision-making process paid no heed to what the patient wanted, or had wanted, it might potentially be vulnerable to a greater level of scrutiny by the Court, all the more so if the views of family and/or second medical opinions were also ignored.

While the Court appears to regard the role of the right to life in respect of withdrawal of treatment as a relatively settled issue, it is less consistent in its approach to the admissibility of complaints involving Article 8 and the regulation of assisted dying. In *Karsai*, the Court regarded the question whether Article 8 requires member states to allow or provide the applicant with a certain form of physician-assisted dying as 'a matter which can be resolved only through an examination on the merits',[35] thereby implying that this is a question that remains open within the Strasbourg jurisprudence. By contrast, in the earlier admissibility decision in *Nicklinson and Lamb v the United Kingdom*, the first applicant's complaint under Article 8 was found to be inadmissible as manifestly-ill founded.[36] Admittedly, the specific complaint in this application focused upon the alleged failure of the domestic courts to determine the compatibility of the UK's absolute prohibition of assisted suicide with the applicant's right to respect for private life, and thus the focus of the Court was squarely upon the UK Supreme Court's judgment on this issue. It is not unusual for the Court to show reluctance to undermine a recent, relevant settling of an issue by a domestic higher court or legislature.[37] However, it could also be argued that the Court's earlier judgment in *Pretty* had already closed the door on the question whether Article 8 requires exceptions to an absolute prohibition on assisted dying. Indeed, in *Pretty* the Court explicitly stated that it did not find the blanket prohibition in the UK to be dispropor-

34 ECtHR, *Burke, supra* note 27.

35 ECtHR, *Karsai, supra* note 12, para. 87.

36 ECtHR, *Nicklinson and Lamb v the United Kingdom*, nos. 2478/15 and 1787/15, 23.06.2015. For discussion from a UK perspective, see E. Wicks, '*Nicklinson and Lamb v United Kingdom* – Strasbourg Fails to Assist on Assisted Dying in the UK', (2016) 24 (4) *Medical Law Review*, pp. 633–640.

37 See e.g., ECtHR, *Evans v the United Kingdom*, no 6339/05 [GC] 10.04.2007 in which the wide margin of appreciation encompassed Parliament's regulation of the issue at hand in the relevant Act of Parliament.

tionate under Article 8.[38] Of course, there are many possible justifications for the Court appearing to reconsider the issue of a blanket prohibition in *Karsai*: the Convention is a living instrument and interpretations of proportionate restrictions on rights will evolve over time; the means by which the blanket prohibition is implemented and enforced is a relevant factor that will vary between jurisdictions; and each application is considered on the basis of its individual context. Nonetheless, it is also possible to read the Court's approach to admissibility in *Karsai* as recognition that the question of what Article 8 requires in relation to assisted dying is now reopened after an earlier apparent closure behind the door of a wide margin of appreciation. (Pertinent developments on the question of the width of the margin will be discussed below.)

It can certainly be seen that assisted dying continues to raise admissible questions for the Court. Beyond the cases already mentioned (which have focused upon absolute prohibitions), the Court has also found admissible cases related to the operation of regulated systems for assisted dying.[39] Such systems vary widely between different jurisdictions and the Court has recognised, and performed, its crucial role in ensuring that such regulation is Convention-compliant. Specific issues about who should be able to access assistance in dying, and the procedural safeguards that are required, have been considered by the Court, and further such issues seem inevitable.

3.2 *Prioritising the Most Relevant Convention Rights*

Beyond admissibility determinations, the Court has made a significant contribution to legal thinking about end-of-life issues by means of its prioritisation of certain rights over others in this context. In the earliest admissible application, *Pretty v the United Kingdom*, Pretty's lawyers introduced arguments based on all possibly relevant rights. This was understandable, given that it was the first opportunity for the Court to engage with these issues, and the Court likewise provided full and detailed responses to almost all of these rights. So, Articles 2, 3, 8 and 14 were all subjected to some detailed analysis of their potential contribution to a 'right to die' under the Convention. Only Article 9 received short shrift with a quite brief rejection of its relevance to this context. Although Articles 2, 3 and 14 were provided with more detailed rejections, it was clearly in Article 8, the right to respect for private life, that the Court felt that the arguable issues in relation to assisted dying were best

38 ECtHR, *Pretty, supra* note 9, para. 76.

39 ECtHR, *Haas*, *supra* note 2; ECtHR, *Koch, supra* note 11; and ECtHR, *Mortier v Belgium*, no 78017/17, 04.10.2022.

placed. Indeed, it notes that 'it is under Article 8 that notions of the quality of life take on significance'[40] and was 'not prepared to exclude' that the failure to respect the applicant's choices in respect of the end of her life constituted an interference with her Article 8 rights.[41] The Court's focus on Article 8 in respect of these issues has remained consistent and has been recognised by subsequent applications. Thus, in *Haas v Switzerland*, *Koch v Germany*, *Gross v Switzerland* and *Karsai v Hungary*, complaints focused upon assisted dying regimes or the lack of one are framed solely around the requirements of Article 8, with only the last case also involving some detailed discussion of Article 14 taken in conjunction with Article 8. (*Mortier v Belgium* raising very different questions has a main focus upon Article 2, although Article 8 is also relevant.)

Even in a case involving a refusal of treatment for religious reasons, the Court preferred Article 8 over Article 9's right to manifest religion and belief. In *Pindo Mulla v Spain*, the applicant as a Jehovah's Witness had a profound religious objection to the use of blood products and the Court noted that her Articles 8 and 9 rights were 'very closely intertwined' as 'her wishes with respect to the treatment of her illness were rooted in her fidelity to the relevant teaching of her religious community.'[42] Nonetheless, the Court once again channelled its focus into Article 8 alone on the basis of its view that the principal issue in this case related to the autonomy and self-determination of a patient in respect of medical treatment and that such issues were appropriately examined under Article 8. In the Court's view, the religious aspect of the applicant's complaint could be adequately accommodated by interpreting and applying Article 8 in the light of Article 9.[43] Thus, even in a case that seems primarily focused upon the issue of a manifestation of religious belief, the Court prefers to categorise the health care issues around refusal of treatment as Article 8 issues.

A comparable focusing of issues into a single Convention right can be seen with respect to the withdrawal of treatment cases. The applicant in *Burke* in 2006 raised arguments under Articles 2, 3, 8 and 14 (none of which was regarded as admissible) but in the *Lambert v France* judgment in 2015 the Court funnels the issues into an Article 2 analysis, explicitly finding that the Article 8 issues raised by the applicants were 'absorbed' into those considered under Article 2.[44] Later applications in *Gard and Others v the United Kingdom*

40 ECtHR, *Pretty, supra* note 9, para. 65.

41 Ibid., para. 67.

42 ECtHR, *Pindo Mulla v Spain*, no 15541/20 [GC] 17.09.2024, para. 97.

43 Ibid., para. 98.

44 ECtHR, *Lambert*, *supra* note 19, para. 184.

and *Afiri and Biddarri v France* then also focused upon Article 2 (albeit alongside Article 8 in *Gard*, which is explainable by the context of that case).

Going forward, it seems clear that the Court is likely to address arguments around access to assistance in dying primarily under Article 8 and arguments around withdrawal of treatment primarily under Article 2, perhaps because it feels that the rights to life and autonomy encompass the core elements of the likely complaints on these topics. Awareness of this approach will in turn encourage legal teams to focus upon these two provisions when drafting applications, further consolidating the Strasbourg jurisprudence on end-of-life issues into these two rights. Such an approach might overlook other potentially helpful contributions from other Convention rights. For example, it might be regarded as surprising that Article 3, the prohibition of degrading treatment, has not featured more heavily in either set of cases. In *Pretty*, the Court rejected the Article 3 argument on the basis that the state authorities had not imposed any 'treatment' on the applicant, degrading or otherwise. The Court took the view that extending the meaning of 'treatment' to encompass the UK's actions in this case would place a new construction on the meaning of the word beyond its ordinary meaning.[45] It also emphasised that the positive obligation that the applicant was seeking in this case would require that the state 'sanction actions intended to terminate life' and the Court was adamant that such an obligation could not be derived from Article 3.[46] So, ultimately the wording of Article 3 (with its requirement of a state action amounting to 'treatment' and its absolute nature), plus the Court's insistence on reading the Convention as a whole and thus ensuring its interpretation of Article 3 is consistent with that of Article 2,[47] has meant that Article 3 has not been significant in the Court's end-of-life judgments to date. This might be viewed as a missed opportunity. Colloquially, as well as in some of the end-of-life literature, dying with dignity is often viewed as an overarching concern and the concept of dignity sits most comfortably within the Article 3 setting. Being denied access to assistance in dying and forced to continue with an existence at odds with one's own wishes and values can

45 ECtHR, *Pretty, supra* note 9, para. 54.

46 Ibid., para. 55.

47 Ibid., para. 54. A similar concern about coherence between Articles 2 and 3 was evident in ECtHR, *Soering v the United Kingdom*, no 14038/88, 07.07.1989 when the Court refused to interpret the death penalty as an inhuman or degrading punishment due to its status as an explicit exception to the right to life in Article 2. The Court's approach of reading the Convention as a whole will be further considered below.

easily be framed as a 'degrading' issue,[48] as too can treatment decisions to which one is not a party. It remains to be seen whether future applications raising novel arguments around access to palliative care, terminal sedation and end-of-life care standards might find a home within Article 3.

Article 14 and its prohibition on discrimination in relation to the enjoyment of the other Convention rights have also failed to live up to its potential in the context of end-of-life cases. Many of the issues that lead to complaints in this context seem to be rooted in a lack of consistency in how different dying processes are treated. For example, a patient suffering from a condition that enables them to retain capacity as they approach the end of their lives has many more options to influence that ending than a patient suffering from a condition that leads to an early loss of capacity, or one with both a terminal illness and a separate condition leading to loss of capacity (as is increasingly common within an aging population). The dying patient who retains capacity can refuse further treatment and is likely to be provided with medical assistance to prevent any suffering as a result of that choice, or may even be able to choose to take steps to end their own life outside the health care context. Without capacity, those options do not exist, suggesting a potential 'discriminatory' issue. Other notable differences exist beyond the capacity issue, such as whether or not a medical condition requires life-sustaining treatment, such as assisted ventilation, which can be withdrawn, leading to death. Notoriously the applicant in *Pretty v the United Kingdom* was denied the right to choose her preferred death, while at the same time another patient, reliant upon life-sustaining treatment, was found to have a clear right in domestic law to choose to die and require health care professionals to facilitate that.[49] Given such apparent inconsistencies, it is regrettable that the Court has not focused more upon Article 14 arguments, and has instead tended to dismiss them on relatively superficial grounds. For example, in *Pretty*, when considering the apparent discrepancy that those able to end their own lives without assistance are permitted by domestic law to do so, but assistance for those who need it is prohibited, the Court found objective and reasonable justification for not distinguishing in law between those who are and those who are not physically

48 See S. Martin, 'Living Through Dying: The Case for the Legalisation of Assisted Dying based on the Rights to Life and Freedom from Ill-treatment in the European Convention on Human Rights' in E. Wicks and N. Papadopoulou (eds), *Research Handbook on Human Rights Law and Health,* Edward Elgar: Cheltenham, 2025.

49 UK High Court, Family Division, *Ms B v An NHS Hospital Trust* [2002] EWHC 429 (Fam) 22.03.2002.

capable of performing suicide.[50] In *Burke*, the Court rejected the argument that the situations of competent and incompetent patients could be compared in relation to treatment decisions,[51] and in *Karsai* the Court held that:

> cogent reasons exist under Article 14 for justifying the allegedly different treatment of those terminally ill patients who are dependent on life-sustaining treatment and those patients who are not, and who in consequence cannot hasten their death by refusing such treatment.[52]

Thus, discrimination arguments seeking to highlight differences between a) those who are able to end their own lives without assistance and those who cannot, b) patients with the capacity to consent to, or refuse, treatment and those without such capacity, and c) those dependent on life support who can choose to refuse further life-supporting intervention and those without this option open to them have all been overlooked in the case law. The health care context presents many different end-of-life scenarios, and the Court has chosen not directly to compare the opportunities and challenges presented within them in terms of its approach to Article 14. It is hard to avoid the conclusion, however, that a lack of consistency in legal protection for autonomous decision-making in different end-of-life scenarios, which exist in response to different health conditions, is a matter of discrimination in the exercise of Convention rights. In particular, the opportunity to apply Article 14 in the context of Article 3, and thus to recognise the degrading treatment and lack of dignity in some endings compared to others, is one that should be embraced by the Court in future case law. In our view, it would be particularly well-suited to future cases raising issues about voluntarily stopping eating and drinking (VSED) and the availability of terminal sedation. It also presents an opportunity further to develop the Strasbourg jurisprudence on discrimination on the grounds of disability in the context of treatment decisions and access to physician-assisted death, enabling a more nuanced perspective on the meaning of assistance during the dying process.

3.3 *Reading the Convention as a Whole*

Having decided that the key provisions within the Convention in relation to end-of-life issues are Article 2's protection for the right to life and Article 8's

50 ECtHR, *Pretty, supra* note 9, para. 89.
51 ECtHR, *Burke, supra* note 27.
52 ECtHR, *Karsai*, *supra* note 12, para. 176.

right to respect for private life, encompassing a right to autonomy, the Court has been adamant that both rights must be considered in conjunction with each other and not in isolation. This is part of a broader interpretive principle that the Court adopts in many different scenarios, requiring that the Convention is read as a whole.[53] Within the end-of-life context, this has meant that Article 8 is taken into account when considering complaints raised under Article 2 and that Article 2 is taken in account when considering complaints raised under Article 8. This is undoubtedly a sensible approach, given that the ethical principles of autonomy and sanctity of life are dominant within end-of-life discourse.

This approach of the Court was first explicit within *Haas v Switzerland* in 2011.[54] This case was brought by an applicant who sought to obtain assistance in ending his life, within a state in which assisted suicide was lawful in some circumstances, but where he was unable to obtain a medical prescription for the necessary lethal substance due to his suffering from a serious bipolar affective disorder. He argued that this infringed his Article 8 rights. The Court confirmed that 'an individual's right to decide by what means and at what point his or her life will end, provided he or she is capable of freely reaching a decision on this question and acting in consequence, is one of the aspects of the right to respect for private life within the meaning of Article 8 of the Convention'.[55] The Court was prepared to examine the applicant's request to obtain access to sodium pentobarbital without a medical prescription from the perspective of 'a positive obligation on the State to take the necessary measures to permit a dignified suicide'.[56] However, the Court emphasised that the Convention must be read as a whole, and therefore considered it to be appropriate to refer also to Article 2 which it recognised 'creates for the authorities a duty to protect vulnerable persons, even against actions by which they endanger their own lives'.[57] Crucially, for the Court, Article 2 was regarded as obliging national authorities to 'prevent an individual from taking his or her own life if the decision has not been taken freely and with full understanding of what is involved'.[58] This is an important finding as it clarifies the limits of any Article

53 See ECtHR, *Soering*, *supra* note 47.

54 See I. Black, 'Suicide Assistance for Mentally Disordered Individuals in Switzerland and the State's Positive Obligation to Facilitate Dignified Suicide: *Haas c. Suisse*', (2012) 20(1) *Medical Law Review*, pp. 157–166.

55 ECtHR, *Haas*, *supra* note 2, para. 51.

56 Ibid., para. 53.

57 Ibid., para. 54 referring to ECtHR, *Keenan v the United Kingdom*, no 27229/95, 03.04.2001, para. 91.

58 Ibid., para. 54.

8-based right to end one's own life. Such a right can exist only if the individual concerned is able to reach a voluntary, informed and autonomous choice to die. Significantly the Court clarified this expectation in the context of a case from a jurisdiction that permits assisted suicide. The Court warned that the 'risks of abuse inherent in a system that facilitates access to assisted suicide should not be underestimated'.[59]

Subsequently, in later cases including *Mortier v Belgium*, the Court would provide greater detail on the safeguards required under the Convention to counter such risks of abuse.[60] In this judgment, it found a procedural violation of Article 2 in relation to the post-euthanasia review in the Belgium system which lacked independence and due to the lengthy delay in the criminal investigation of the applicant's case. In *Mortier*, the Court sent a clear message that Article 2 requires very high standards of safety and control from member states who regulate forms of assisted death.[61] It is notable that although the Court's focus remains primarily upon the nature of the procedural safeguards within the regulation of assisted death, the substantive content of the system, such as issues of eligibility, is relevant in the Court's assessment. Thus, in *Mortier*, the Court noted the importance of the Belgian system including additional guarantees for cases of euthanasia, such as that of the applicant's mother, which concern mental suffering and where death will not occur in the short term.[62] This indicates that the substantive criteria for assisted death within a jurisdiction may have an impact upon the level of procedural safeguards the Court expects to see in the context of Article 2.[63] This is partic-

59 Ibid., para. 58.

60 ECtHR, *Mortier*, *supra* note 39. See also S. Martin, 'The Right to Life at the End of Life: A Note on *Mortier v Belgium* App No 78017/17, 4 October 2022', (2023) 2(2) *Medical Law International*, pp. 1–14.

61 N. Papadopoulou and E. Wicks, 'Taking the Right to Life Seriously: Addressing the Role of the Right to Life in the Context of Assisted Dying', (2024) *Medical Law International*, pp. 1–22.

62 ECtHR, *Mortier*, *supra* note 39, para. 153.

63 This might be viewed as a change in approach from that suggested in the Chamber's judgment in ECtHR, *Gross v Switzerland*, no 67810/10, 14.05.2013, para. 69 (before the Grand Chamber's finding of inadmissibility of this application due to abuse of the right of petition): 'the Court considers that it is primarily up to the domestic authorities to issue comprehensive and clear guidelines on whether and under which circumstances an individual in the applicant's situation – that is, someone not suffering from a terminal illness – should be granted the ability to acquire a lethal dose of medication allowing them to end their life. Accordingly, the Court decides to limit itself to the conclusion that the absence of clear and comprehensive legal guidelines violated the applicant's right to respect for her private life under Article 8 of the Convention, without in any way taking up a stance on the substantive content of such guidelines'.

ularly important considering the number of jurisdictions that are currently considering introducing a framework on assisted death, especially as regards their human rights obligations. Furthermore, in line with the Court's message in many contexts, the practice is just as important as the law and it remains possible for either an entire regulatory framework on assisted death, or a particular aspect of it, to violate Article 2. In terms of *Mortier*, we discuss elsewhere that the Court makes a 'safeguarding' use of Article 2, highlighting the importance of protecting the right to life, alongside autonomy-based arguments.[64]

It is clear from the *Haas* judgment that the need for such safeguards primarily arises from the Court's approach of reading the Convention as a whole and ensuring that any positive obligation upon the states to adopt measures to facilitate a dignified suicide is subject to their (overriding) obligation to protect the lives of those unable to choose freely to end their lives. That there is a presumption in favour of preserving life is a necessary protection and, provided that it can be rebutted by an exercise of autonomy by a capacitated adult, is not inconsistent with the protection of a right to respect for private life under Article 8.

It is noteworthy that in *Haas* the Court introduced the focus on Article 2 of its own initiative. It did likewise in the case of *Pindo Mulla v Spain*. In this case about refusal of treatment, having decided to consider the applicant's arguments under Article 8, the Court then introduced the Convention's protection for the right to life under Article 2 as another relevant consideration. Having reiterated that the Convention must be read as a whole, the Court stated that '[i]n a situation involving real and imminent danger for an individual's existence, the right to life will also be in play, in tandem with the individual's right to decide autonomously on medical treatment'.[65] It is interesting that the flexibility offered by Article 8(2) in this regard is felt not to be sufficient and the Court explicitly refers to Article 2 instead. This aspect of the Court's judgment in *Pindo Mulla* was the subject of criticism from two concurring judges who viewed the Court's judgment as 'rather paternalistic' and queried the pivotal 'appearance' of Article 2 in it.[66] They noted that the applicant had not relied on Article 2 or on the state's responsibility to take positive measures to protect life.[67] They also queried the prominence of *Lopes de Sousa Fernandes v Portugal* (a case about right to life obligations in the health care

64 N. Papadopoulou and E. Wicks, 'Addressing the Role of the Right to Life' *supra* note 61.
65 ECtHR, *Pindo Mulla, supra* note 42, para. 147.
66 Ibid., para. 4: concurring Opinion of Judge Ktistakis, joined by Judge Mourou-Vikström.
67 Ibid., para. 5.

context) in the Court's judgment, while other cases about the rights of Jehovah's Witnesses,[68] which included discussion about whether the 'protection of health' in Article 8(2) and Article 9(2) justifies restrictions on the right of Jehovah's Witnesses to refuse blood transfusions, were downplayed.[69] The Court's insistence on engaging Article 2 on its own initiative in cases involving Article 8 obligations in respect of medical treatment does seem to overlook the role of Article 8(2) in securing a balanced approach to respect for private life and autonomous choices. However, the Court's preference for Article 2 in this context may be because that provision imposes obligations upon member states to take appropriate steps to preserve life, while Article 8(2) only permits such steps. Article 2 enables the Court to require, rather than merely allow, member states to intervene in order to preserve life, and that is why the Court's reading of the Convention as a whole incorporates both Articles 2 and 8 – rights to life as well as autonomy – when considering end-of-life and/or medical treatment issues.

The Court had the opportunity to explore the flip side of this approach in *Lambert v France* in 2015. This case involved a complaint that the right to life under Article 2 was violated due to the withdrawal of life-sustaining treatment. The Court reiterated that the Convention has to be read as a whole and this meant that 'in a case such as the present one reference should be made, in examining a possible violation of Article 2, to Article 8 of the Convention and to the right to respect for private life and the notion of personal autonomy which it encompasses…'[70] This is perhaps a more surprising consequence of reading the Convention as a whole than the reverse in *Haas* because the condition of the patient in *Lambert* meant that he was no longer able to exercise autonomy or express his wishes or preferences. It is striking, therefore, that the Court still feels able to insist that 'it is the patient who is the principal party in the decision-making process and whose consent must remain at its heart; this is true even where the patient is unable to express his or her wishes'.[71] Here we see the flip side of the approach in *Haas*, under which a presumption in favour of preserving life imposes restrictions upon wishes to end life that are not an exercise of free will; in *Lambert* a patient's wishes/preferences impose obligatory considerations into clinical decisions about whether to continue supporting life.

68 ECtHR, *Jehovah's Witnesses of Moscow and Others v Russia*, no 302/02, 10.06.2010 and ECtHR, *Taganrog LRO and Others v Russia*, nos. 32401/10 and 19 others, 07.09.2022.

69 ECtHR, *Pindo Mulla, supra* note 42, para. 5.

70 ECtHR, *Lambert*, *supra* note 19, para. 142.

71 Ibid., para. 178.

The margin of appreciation is central to the *Lambert* judgment, and this will be discussed further in the next section, but it is significant in the context of the relationship between Articles 2 and 8 – protecting life and respecting autonomy – that the Court recognises a European consensus on the specific issue of the 'paramount importance of the patient's wishes in the decision-making process'.[72] Within the context of a lack of consensus and thereby a wide margin of appreciation on many aspects of the end-of-life context, it is interesting that the Court does identify consensus on the centrality of the patient in respect of life-sustaining treatment decisions. This sends a message that, despite the importance of the presumption in favour of preserving life in order to comply with the need to respect everyone's right to life regardless of their health condition, it is the individual wishes and priorities of the person approaching the end of life that are central. Life is not preserved for its own sake but to ensure respect for that person; an individuated approach to a good death is not only apparent under the Court's interpretation of the Convention but is also apparently a rare issue on which there is consensus across the member states, although it has not yet been translated into the arena of assisted dying.

4 The Margin of Appreciation and an Emerging Consensus

On issues of moral and ethical sensitivity, the Court traditionally utilises the interpretive tool of a margin of appreciation to provide states with a degree of discretion on how to regulate the topic. This can sometimes be equated with a high degree of deference to states. While a recent study revealed that there is no direct relationship between the Court's usage of the margin and deference to states, it did confirm that the margin is more likely to be used in 'hard cases' – of which the end-of-life context is full – and that these are more likely to result in non-violation judgments, in part due to the Court's incremental approach and its use of the admissibility criteria.[73] Within the academic literature on the margin, which has been extensive,[74] one particularly influential

72 Ibid., para. 147.

73 H. Molbaek-steensig, 'Subsidiarity does not win cases: a mixed methods study of the relationship between margin of appreciation language and deference at the European Court of Human Rights' (2023) 36 *Leiden Journal of International Law*, pp. 83–107.

74 For academic evaluation of the margin, its conceptual underpinnings and practical usage, see e.g., Y. Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR,* Intersentia: Antwerp, 2002; G. Letsas, *A Theory of Interpretation of the European Convention on Human Rights,* Oxford Univer-

account has been that of George Letsas who identified two distinct concepts of the margin.[75] The 'substantive' margin concerns the balancing of public and private interests under the Convention, while the 'structural' margin relates to the intensity of review by the Court. Letsas argues that the failure to distinguish between these two approaches leads to confusion, and this is indeed a potential problem within the end-of-life cases. In utilising the margin, the Court might be sending a message about the limits of the applicant's rights at the end of life, or it might be declaring that it will not substantively review the regulation of end of life or the relevant decision in this context, of the national authorities. The latter seems to be the most applicable because the end-of-life is a prime candidate for the application of a wide 'structural' margin. As the Court explained in *Mortier v Belgium*:

> The area of end of life, and in particular euthanasia, raises complex legal, social, moral and ethical questions. Opinions and legal responses to these questions among States parties to the Convention are very diverse, and there is no consensus on the right of an individual to decide how and when their life should end…[76]

The lack of consensus between member states has been crucial to the Court's judgments in a number of cases on the end of life because it has explicitly justified a wide margin, and thus a rather light-touch review of domestic laws by the Court. A wide margin was utilised in the judgments in *Pretty*, *Haas*, *Koch*, *Lambert*, *Lings v Denmark* and *Mortier* (although this did not prevent the finding of procedural violations in *Koch* and *Mortier*). In all cases, the lack of consensus between member states was presented as the reason for a wide margin being provided, alongside emphasis on the morally contentious nature of the topic. The width of the margin also serves as a justification for finding applications on end-of-life inadmissible, as in *Afiri and Biddarri v France*.

---

sity Press:, Oxford, 2007), ch.4; A. Legg, *The Margin of Appreciation in International Human Rights Law,* Oxford University Press: Oxford, 2012); J. Gerards, 'Margin of Appreciation and Incrementalism in the Case Law of the European Court of Human Rights' (2018) 18 *Human Rights Law Review* pp. 495–515; N. Vogiatzis, 'The Relationship between European Consensus, the Margin of Appreciation and the Legitimacy of the Strasbourg Court' (2019) 25 *European Public Law*, pp. 445–480; and B. Tripkovic, 'A New Philosophy for the Margin of Appreciation and European Consensus' (2022) 42 *Oxford Journal of Legal Studies* pp. 207–234.

75 G. Letsas, 'A Theory of Interpretation', *supra* note 74.

76 ECtHR, *Mortier*, *supra* note 39, para. 142.

The relationship between European consensus and the width of the margin is not simple, however. In the important case of *A, B and C v Ireland*,[77] the recognition of a European consensus did not prevent a wide margin being permitted to Ireland in respect of its strict abortion law.[78] In that case, the Grand Chamber explicitly recognised 'a consensus amongst a substantial majority of the contracting states of the Council of Europe towards allowing abortion on broader grounds than accorded under Irish law'[79] but avoided reducing Ireland's margin due to the lack of consensus on the distinct, but relevant, issue of the scientific and legal definition of the beginning of life.[80] Six dissenting judges were critical of the majority's approach to the margin in this case, making the very forceful point that this case was 'the first time that the Court has disregarded the existence of a European consensus on the basis of "profound moral views"' and that to consider that such moral views 'can override the European consensus, which tends in a completely different direction, is a real and dangerous new departure in the Court's case-law'.[81] *A, B and C* is hard to reconcile with the Court's usual approach to the issue of consensus and reminds us of the inherent flexibility within the Court's interpretation.

It might be tempting to summarise the end-of-life jurisprudence as primarily focused on confirming a wide margin of appreciation, and thus a reluctance by the Court to lead the way in determining the appropriate role of human rights in the regulation of end-of-life issues. However, although the margin has been important in the Court's case law on this topic, it is rather more nuanced than in some other topics. For example, as mentioned above, the Court has recognised a specific consensus in relation to the withdrawal of treatment under which the patient's wishes are treated as paramount.[82] Thus, while there is a wide margin accorded to the organisation of the treatment withdrawal decision-making process, it must nonetheless have the patient's 'voice' at its heart. The consensus on this point serves to restrict the wide discretion otherwise granted to national authorities. Within the assisted dying context, there is likewise development beyond a simple 'no consensus

77 ECtHR, *A, B and C v Ireland*, no 25579/05 [GC] 16.12.2010.

78 For discussion see E. Wicks, 'A, B, C v Ireland: Abortion Law under the European Convention on Human Rights', (2011) 11 *Human Rights Law Review*, pp. 556–566, and P. Ronchi, 'A, B and C v Ireland: Europe's Roe v Wade still has to wait', (2011) 127 *Law Quarterly Review*, pp. 365–369.

79 ECtHR, *A, B and C, supra* note 76, para. 235.

80 Ibid., para. 237.

81 Ibid., note 74, Joint Partly Dissenting Opinion of Judges Rozakis, Tulkens, Fura, Hirvela, Malinverni and Poalelungi, para. 9.

82 ECtHR, *Lambert*, *supra* note 19, para. 147.

thus wide margin' headline approach. In the most recent judgment in *Karsai*, the Court says that it 'cannot but note that a certain trend is currently emerging towards decriminalisation of medically assisted suicide, especially with regard to patients who are suffering from incurable conditions'.[83] This is potentially a highly significant acknowledgment and appears to be a slight change in approach by the Court, given that previous judgments have not recognised any such 'trend'. It is based on the Court's review of the current rules governing PAD in which, it has to be said, the Court takes an expansive view of the scale of recent developments. Thus, while it notes that euthanasia and assisted suicide are lawful as forms of PAD in only five member states: Belgium, Luxembourg, the Netherlands, Spain and Portugal, it also notes that in seven more member states (Austria, Finland, Germany, Italy, Lichtenstein, Sweden and Switzerland) certain forms of assisted suicide are lawful, and that consultative processes with regard to PAD have been initiated in some other European jurisdictions, including France, and England and Wales.[84] The Court also notes in this context that therapeutic withdrawal (discontinuation of life-sustaining treatment leading to natural death) is conditionally allowed in 27 member states,[85] and acknowledges the broader global (western) trend towards decriminalisation such as assisted suicide becoming lawful in 11 United States jurisdictions (California, Colorado, Oregon, Washington, Vermont, New Jersey, New Mexico, Maine, Montana, Colorado and Hawaii, as well as the District of Columbia), all Australian states and in New Zealand and Canada.[86] It cannot be denied that a trend is emerging, but it is perhaps surprising that the Court is so open to recognising it, given that (as it admittedly notes) PAD remains criminally punishable in the majority of the Council of Europe member states.[87]

83 ECtHR, *Karsai*, *supra* note 12, para. 143.

84 Ibid., para. 60. The developments across the UK are particularly important considering the long-standing criminal prohibition and the extensive number of individuals seeking access to this end-of-life option abroad. For England and Wales, the Terminally Ill Adults (End of Life) [HC] Bill 12 2024–25 was introduced in Parliament on 16 October 2024. The Bill was amended by the Public Bill Committee, and a revised version (28 March 2025) has returned to the House of Commons. The Health, Social Care and Sport Committee published its report on 30 April 2025 for the Scottish Bill: The Assisted Dying for Terminally Ill Adults (Scotland) Bill SP Bill 46 at Stage 1 of the process. In the Isle of Man (part of the British Isles), a Private Members' Bill on assisted dying has been approved by the Legislative Council and will now be sent for Royal Assent. This end-of-life choice could be made available in the Isle of Man in 2027.

85 ECtHR, *Karsai*, *supra* note 12, para. 59.

86 Ibid., para. 62.

87 Ibid., para. 61.

The identification of a 'trend', as opposed to a 'consensus', has been the subject of criticism in other contexts. For example, Judge Lobov, dissenting in *Fedotova and others v Russia*, criticises the majority for seeking to overcome the lack of a consensus on the legal recognition of same-sex couples by 'resorting to the more slippery concept' of a 'clear ongoing trend' in favour of such recognition.[88] Judge Lobov claims that this poses risks for the integrity of the Strasbourg case law. Certainly, it may again remind us of the flexibility of the interpretive frameworks adopted by the Court in different contexts. Nonetheless, a genuine trend across member-states cannot be ignored. It opens the door to a dialogic approach, in which the Court can engage in a strategy of communication to national authorities about likely future directions for rights protection. The end-of-life context is extremely apt for a judicial dialogue approach. For example, in domestic law, it is central to the majority judgments in *Nicklinson* where the UK Supreme Court manoeuvres its way through the constitutional issues of parliamentary sovereignty and the separation of powers to send a clear message to the Westminster Parliament that the absolute prohibition of assisted suicide is problematic in human rights terms (to which Parliament responded, albeit inadequately).[89]

Such a dialogic approach is also evident in the *Karsai* judgment. The Court continues to grant a 'considerable' margin of appreciation to member states to determine how to strike the balance between accommodating the interests of those who wish to be assisted in dying and the risks of abuse and error and the 'wider social implications' entailed in the provision of PAD.[90] But significantly, it also used its recognition of a trend towards decriminalisation to call upon member states to keep the law under review. The Court reiterated that 'the Convention has to be interpreted and applied in the light of present-day conditions. The need for appropriate legal measures should therefore be kept under review, having regard to the developments in European societies and in the international standards on medical ethics in this sensitive domain'.[91] It seems as if the Court is issuing a warning to states that they should keep their laws on assisted dying under review because the wide margin that currently protects member states who enforce blanket bans on assisting dying may be

88 ECtHR, *Fedotova and Others v Russia*, nos. 40792/10, 30538/14 and 43439/14, 17.01.2023, Dissenting Opinion of Judge Lobov, para. 14.

89 ECtHR, *Nicklinson and Lamb, supra* note 36. See E. Wicks, 'The Supreme Court Judgment in Nicklinson: One Step Forward on Assisted Dying; Two Steps Back on Human Rights' (2015) 23 *Medical Law Review,* pp. 144–156.

90 ECtHR, *Karsai*, *supra* note 12, para. 152.

91 Ibid., para. 167.

narrowed in the near future if they find themselves outside an emerging consensus.

There is a precedent for such a warning, and in another context what was being warned about materialised.[92] Could the Court's warning in *Karsai* be the start of a similar approach in respect of the regulation of PAD? By identifying the early signs of a trend towards decriminalisation specifically in relation to patients suffering from incurable conditions, and explicitly warning member states of this, is the Court preparing the ground for later decisions that regret the failure of some member states to bring their laws in line with an emerging European consensus about which it has been warned, opening the door to findings of violations? It is worth noting that in other contexts, the Court has made it clear that it 'attaches less importance to the lack of evidence of a common European approach to the resolution of the legal and practical problems posed, than to the clear and uncontested evidence of a continuing international trend…'[93] A similar approach to the regulation of PAD would ensure that member states retained a wide discretion on how, and on what grounds, to regulate physician-assisted death but could give effect to a growing trend to recognise the importance of respecting, and, where appropriate, facilitating individual choices about when and how to die. A common criticism of the Court's frequent use of the margin of appreciation to resolve cases is that it encourages the Court to abdicate responsibility for tackling the difficult ethical dilemmas in contemporary society. Its willing recognition, and considerable emphasis, on a trend towards decriminalisation of medically assisted suicide is a subtle shift in approach by the Court, and one that secures its potential to make a real difference in the future by consolidating the trend across Europe. This is not a case of the Court leading the way, but perhaps it

92 In a series of cases in the 1980s and 1990s, the Court was called upon to consider whether a refusal to provide legal recognition of a change of gender infringed Article 8. Initially, in a number of cases against the UK, the Court granted a wide margin of appreciation under Article 8(2) but issued a warning that the laws in this context needed to be kept under continual review as there was an emerging consensus which the UK's approach was outside. (ECtHR, *Rees v the United Kingdom*, no 9532/81, 17.10.1986; ECtHR, *Cossey v the United Kingdom*, no 10843/84, 27.09.1990; ECtHR, *Sheffield and Horsham v the United Kingdom*, nos. 22985/93 and 23390/94, 30.07.1998.) Eventually, the Court seemed to lose patience with the UK and its failure to amend its laws to recognise a change in gender and found it to be in violation of Article 8 (ECtHR, *Christine Goodwin v the United Kingdom*, no 28957/95, 11.07.2002; and ECtHR, *I. v the United Kingdom*, no 25680/94, 11.07.2002). When doing so, the Court explicitly noted that it had previously emphasised the importance of keeping the need for appropriate legal measures under review in ECtHR, *Goodwin*, para. 92.

93 ECtHR, *Goodwin, supra* note 92, para. 85.

might at least be tempted to follow the leaders without waiting for a numerical majority to form a consensus before it moves at all.

5 Looking Forward: The Need for a More Progressive Judiciary?

The Court's contribution to the end-of-life discourse has been, and continues to be, of immerse importance, allowing individuals to challenge aspects of existing regulatory frameworks, or the absence of such. We summarise here what we think are the key end-of-life principles as established by the Court, intrigued whether new end-of-life cases reaching the Court soon[94] will be decided in line with these principles, or allow the Court to go further. In that regard, we also make a comment that there is perhaps space for more progressive interpretations, relying especially on the dissenting judgment of Judge Felici in *Karsai v Hungary*.

5.1 *The Court's Principles*

The first principle evident in the Court's end-of-life jurisprudence is the centrality of the patient's wishes. In *Lambert v France*, the Court emphasised the importance of taking into account the patient's wishes, even going so far as to regard the patient as 'the principal party in the decision-making process'.[95] The fact that this applies even in circumstances when the patient is unable to express their own wishes illustrates the wide-ranging importance of this as a starting point for the consideration of Convention rights. While this first principle has been rooted in the withdrawal of treatment context, the Court has also recognised a right to choose when and how to die. In *Pretty v the United Kingdom*, the Court established that choices about when and how to die engage Article 8(1), a crucial finding because it places the burden on the member state to justify the interference in the absence of a domestic regulatory framework. The Court talks about notions of personal autonomy,[96] quality of life,[97] and the domestic prohibition in England and Wales preventing the

94 ECtHR, *A. and Others v France*, no 17952/23, 04.09.2023; ECtHR, *B v France and 2 other applications*, nos. 28026/23, 28036/23 and 28043/23, 06.09.2023; ECtHR, *Medmoune and Others v France*, no 55026/22, 27.02.2023.

95 ECtHR, *Lambert*, *supra* note 19, para. 178.

96 ECtHR, *Pretty*, *supra* note 9, para. 61: 'the Court considers that the notion of personal autonomy is an important principle underlying the interpretation of its guarantees'.

97 Ibid., para. 65: 'it is under Article 8 that notions of the quality of life take on significance'.

applicant from avoiding an undignified and distressing end to her life.[98] This is later confirmed in *Haas*,[99] *Koch*,[100] *Mortier*[101] and *Karsai*.[102] Thus, the first and second principles combine to ensure that it is the person dying whose preferences and wishes are prioritised, albeit subject to other rights and interests recognised within the Convention.

A third principle established in the Court's jurisprudence is a primary focus upon just two of the Convention rights in the end-of-life context. Article 8 is the main focus for cases related to assisted dying, while Article 2 is the main focus for the withdrawal of treatment issues. However, the Court is adamant that both rights must be considered together and not in isolation in end-of-life cases. This may be a significant approach going forward, as it is clear that the Court will always seek what it views as an appropriate balancing between obligations to respect private choices about the end-of-life and obligations to safeguard human life. It means that the importance of the patient's perspective will be subject to the need to have a legal presumption in favour of preserving life and the need to ensure that any choice to end life is an autonomous and freely made one. On the other hand, it also means that any legal interventions to preserve life are subject to protection of the patient's autonomy. The battlefield on which end-of-life conflicts will be fought under the Convention is one of reconciling our rights to autonomy and to life.

Fourthly, in the context of treatment decisions, the Court has established a clear procedural framework requiring the existence in domestic law and practice of a regulatory framework containing a presumption in favour of prolonging life; a decision-making process that takes account of the patient's previously expressed wishes, those close to them, and other medical opinions; and an ability to approach the domestic courts in the event of doubts as to the best decision to take in the patient's interests. The Court has confined itself to considering these procedural requirements and is unlikely to engage more substantively with treatment decisions.

Fifthly, the Court has accepted the compatibility of conditional decriminalisation of euthanasia and assisted suicide. In *Mortier v Belgium*, the Court notes that the right to life 'cannot be interpreted as per se prohibiting the

98 Ibid., para. 67: the applicant is 'prevented by law from exercising her choice to avoid what she considers will be an undignified and distressing end to her life. The Court is not prepared to exclude that this constitutes an interference with her right to respect for private life as guaranteed under Article 8 § 1 of the Convention'.

99 ECtHR, *Haas*, *supra* note 2, para. 51.

100 ECtHR, *Koch, supra* note 11, para. 52.

101 ECtHR, *Mortier*, *supra* note 39, paras. 124 and 135.

102 ECtHR, *Karsai*, *supra* note 12, para. 85.

conditional decriminalisation of euthanasia', placing emphasis on both the safeguards in place in Belgium, but also on the proper role of Article 2. This means that member states are all free to regulate access to assisted dying within their domestic law without automatically infringing their Convention obligation to protect the right to life. However, a sixth principle firmly established by the Court recognises the importance of safeguards for any regulated system. The Court has made it very clear, especially for those member states with established frameworks, that safety is a key consideration, if not the most important one, when permitting assisted dying within their jurisdictions. In the assisted dying cases against Switzerland and Belgium, in particular, the Court emphasises the possibility of abuse of an existing regulatory framework,[103] and the need for 'substantive and procedural safeguards'.[104] The required safeguards will probably be wide-ranging but will have as a common theme a need to ensure that any person requesting assistance in dying has made a free and autonomous choice to do so (or, in other words, is purporting to exercise their Article 8 rights by making the request).

Finally, the Court's jurisprudence on end-of-life so far has recognised a wide margin of appreciation on how member states regulate issues such as withdrawal of treatment and assisted dying. This wide margin is in part due to the morally and ethically sensitive nature of the issues, but is also due to the lack of consensus amongst member states on these issues. Of particular significance as we look forward, however, is the Court's recognition of a European, and global, 'trend' towards the decriminalisation of assisted dying, specifically in relation to patients suffering from incurable conditions. The Court's early warning of its awareness of this trend paves the way for a future narrowing of the margin of appreciation for member states who do not move in the direction of the trend. It is an indicator that the Court will resume a dialogic strategy in order to facilitate future development of the law on end-of-life. In this way, while the Court may be reluctant to lead the way on this emotive topic, it can nonetheless ensure that it is part of the conversation, and thereby that the Convention rights are central to end-of-life regulation.

When engaging with future end-of-life applications we can expect the Court to place the patient's choices at the centre of its decision; rely primarily upon Article 2 and Article 8 and the relationship between them; impose procedural requirements to ensure that the balance between the two rights is appropriately respected; and grant a wide margin of appreciation on aspects

103 ECtHR, *Haas*, *supra* note 2, para. 58: 'the Court considers that the risks of abuse inherent in a system that facilitates access to assisted suicide should not be underestimated'.

104 ECtHR, *Mortier*, *supra* note 39, para. 145.

not yet the subject of consensus. Does such an approach to end-of-life go far enough?

5.2 *Looking Ahead*

The Court has played a key role in the end-of-life landscape as the principles set out above evidence. But perhaps now it is beginning to see the need to do even more. Recently, we have seen longer, more detailed judgments, with dissenting opinions highlighting the polarising nature of the issue, especially if this is compared with the earlier end-of-life judgments. In *Karsai*, for example, we see a recognition of a trend emerging towards decriminalisation of medically assisted suicide. Furthermore, in the same judgment, we found the dissenting opinion of Judge Felici to be particularly refreshing in the way in which it pushed the boundaries of law by means of legal reasoning, ethics and personal convictions, while looking, as he notes, for 'a different', 'fairer outcome'.[105] Starting his dissenting judgment by citing Dworkin,[106] and seeking 'a much-needed "progressive" interpretation of the Convention',[107] Judge Felici finds 'no insurmountable legal obstacles' to a positive obligation on member states regulating a form of assisted dying,[108] and while the Judge finds the majority judgment 'legally impeccable', he points out that it is 'not adequate to respond to a legal gap and social demand which have not yet found a uniform and guaranteed response in the various member States, but which potentially affects us all'.[109] We emphasise this timely dissenting opinion because it is one in which the Judge is clearly pushing the Court to do more.[110] We believe that such forward-looking thinking is needed in assisted dying judgments, as well as new end-of-life cases to reach the Court. It is not enough for the Court to be a passive observer while member states grapple, in their own ways, with how to contribute to the 'good deaths' we all seek. On the matter of assisted dying, there is indeed an emerging trend, with the Netherlands, Belgium, Luxembourg, Switzerland, Austria, Spain and Portugal already having regulatory frameworks in place, parts of the United Kingdom intensively debating legislation, and Italy and Germany navigating complex relationships between the judiciary and the legislature on the matter. On other

105 ECtHR, *Karsai*, *supra* note 12, para. 1: dissenting Opinion of Judge Felici.

106 R. Dworkin, *Life's Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom,* Knopf: New York, 1993.

107 ECtHR, *Karsai*, *supra* note 12, para. 1: dissenting Opinion of Judge Felici.

108 Ibid., para. 6: dissenting Opinion of Judge Felici.

109 ECtHR, *Karsai*, *supra* note 12, para. 14: dissenting Opinion of Judge Felici.

110 See, in contrast, *Karsai*, the partly concurring, partly dissenting opinion of Judge Wojtyczek, who is calling for a more restrictive approach by the Court.

end-of-life fronts, the legal definition of death may come before the Court especially as it affects other areas of law, health and health care, issues around palliative care, including its effectiveness in dealing with the individual's concerns and priorities at the end of life, the practice of voluntary stopping eating or drinking as an alternative to the absence of an assisted dying framework, as well as the availability of terminal sedation. Legal strategies are likely to be framed around Articles 2 and 8, as we note earlier, but it is not unlikely that boundaries could be pushed through other provisions, such as Article 3.

Certainly then, a proactive rather than a reactive approach is urgently needed from the Court. The Convention sets a clear end-of-life framework via the principles we have set in this paper, acting as the minimum protection available for end-of-life decisions, guiding applicants and member states around notions of choice, dignity, autonomy, safety and risks. At the same time, however, there is a danger of the Convention becoming irrelevant in this context if there is a failure to recognise the emerging, rapid rise of interest in the area. We expect more cases to come before the Courts on a wide range of end-of-life issues as the emphasis on the principle of autonomy extends, and as we see more medical and technological advances challenging medicine, as well as more emphasis (rightly) being placed on how we conceptualise, think and communicate on death and dying.

From Helsinki to Strasbourg: Synergies and Tensions in the Multi-layered European Minority Rights Regime

Aristoteles Constantinides

Abstract

Minority protection is one of the areas best capturing the interconnected legacies of the Organisation for Security and Co-operation in Europe (OSCE), the Council of Europe (CoE) and the European Union (EU), the three institutions that have shaped the European minority rights regime despite their different perspectives and missions. The aim of the paper is to look back on the synergetic cooperation of these institutions in shaping that regime and explore their intersection, synergies and tensions. The first part of the paper takes a historical perspective and reviews the trajectory of minority rights in Europe, highlighting the interactions of the three European institutions in their standard-setting and monitoring activities since the early 1990s. The second part surveys the case law of the European Court of Human Rights on selected issues of relevance to minorities such as self-identification, non-discrimination and education and examines the role of the Court in bringing coherence to the multi-layered European minority rights regime. This part highlights the Court's systemic integration approach, focusing on its consideration of the relevant CoE, OSCE and EU work, and shows that, despite some tensions, the Court has contributed to the coherence of European minority rights law.

1 Introduction

Minority protection forms an integral part of international human rights law and is essential to ensuring equality, justice, regional stability, cultural diversity, democratic security and peace in Europe. It is a thematic area that best captures the interconnected legacies of the Organisation for Security and Co-operation in Europe (OSCE), the Council of Europe (CoE) and the European Union (EU), the three institutions that have shaped the European minority rights framework, in a year marking the 75th anniversary of the European Convention on Human Rights (ECHR) and the 50th anniversary of the Helsinki Final Act of the OSCE.

© ARISTOTELES CONSTANTINIDES, 2026 | DOI:10.1163/9789004751026_011
This is an open access chapter distributed under the terms of the CC-BY-NC-ND 4.0 license.

It is well-known that states were reluctant to adequately address minority rights in international law. Until the 1990s, the post-War international legal framework on minority rights consisted only of Article 27 of the International Covenant on Civil and Political Rights (ICCPR) and non-discrimination provisions in universal and regional human rights instruments whose relevance to minorities was made plain in the practice of the respective monitoring bodies.[1] The situation in Europe changed considerably with the end of the Cold War, with the OSCE, a security-focused organisation, taking the lead, followed by the Council of Europe, an organisation promoting human rights, democracy and the rule of law in Europe, and – to some extent – the European Union, a regional integration organisation.

The aim of this paper is to look back at the role of these institutions in shaping the legal landscape of minority rights in Europe, and explore their intersection, synergies and tensions. The first part of the paper takes a historical perspective and reviews the trajectory of minority rights in Europe. It highlights the pioneering and influential role of the Helsinki process in standard-setting in the early 1990s, at a time when minority protection resurged as a major security and human rights concern, and international standards were largely lacking. The paper then focuses on standard-setting in the CoE, which took centre stage with the adoption of the Framework Convention for the Protection of National Minorities (FCNM) in 1994. This part concludes with an overview of the still rudimentary EU legal framework.

The second part of the paper surveys the case law of the European Court of Human Rights (ECtHR) on minorities and examines its role in bringing coherence to the multi-layered European minority rights regime. This part highlights the Court's systemic integration approach, that is, an interpretation technique that integrates materials of other international bodies into the interpretation of the Convention to ensure coherence, focusing on the Court's consideration of the FCNM and the work of its Advisory Committee (ACFC), the OSCE and the EU, and highlighting their synergies and pointing to tensions. This is necessary in view of the different perspectives and missions of those actors, which pose a constant risk of uncoordinated

1 A proposal by the Parliamentary Assembly of the Council of Europe (PACE) in 1961 to draft a minority-specific additional protocol to the ECHR was not accepted by the Council of Ministers. See P. Thornberry, *International Law and the Rights of Minorities*, Clarendon Press: Oxford, 1991, p. 306. For an overview of the rights of minorities, see A. Constantinides, 'Minorities, Rights of', in M. Nowak, C. Binder, J. Hofbauer and P. Janig (eds.), *Elgar Encyclopedia of Human Rights*, Edward Elgar: Chestenham, 2022, pp. 494–507.

action and contradictory outcomes that can have adverse effects on the rights of minorities if governments opt for interpretations and outcomes that best suit them and may also undermine the authority of the actors concerned.[2]

In the concluding remarks, the paper reflects on the interactions, synergies and tensions in the multi-layered framework of minority rights in Europe, notwithstanding ongoing challenges regarding their effective implementation.

2 From Helsinki to Strasbourg: The Trajectory of European Minority Rights Law

2.1 *The OSCE as Pioneer*

2.1.1 The Flexible Helsinki Process

The Helsinki Final Act of the Conference on Security and Cooperation in Europe (CSCE) was signed on 1 August 1975, and marked the beginning of a process of cooperation between the participating states which comprised all European states (except Albania) from both sides of the Cold War divide, plus Canada and the United States. Cooperation was grouped into three dimensions or 'baskets' (political and military aspects of security, economic and environmental aspects of security and human aspects of security). The human dimension of the CSCE/Helsinki process was accepted by the Soviet Union in exchange for the West's formal recognition of the post-War *status quo* in Europe.[3] The CSCE was renamed the OSCE from 1995.

The Helsinki Final Act included a single paragraph on minorities which followed the traditional approach of individual protection against discrimination on grounds of belonging to a 'national minority'. This term is used in all OSCE documents (and those of the CoE) and remains undefined.

The human dimension was prominent within the Helsinki process and its comprehensive security concept that linked peace, security and prosperity

2 A. Bloed and R. Letschert, 'The OSCE High Commissioner on National Minorities', in K. Henrard and R. Dunbar (eds.), *Synergies in Minority Protection: European and International Law Perspectives*, Cambridge University Press: Cambridge, 2008, pp. 103–104; see also S. Berry, 'Democracy and the Preservation of Minority Identity', (2017) 24(3) *International Journal on Minority and Group Rights*, p. 207, focusing on the ECtHR and the ACFC.

3 P. van Dijk, 'The Final Act of Helsinki – Basis for a Pan-European System?', (1980) *Netherlands Yearbook of International Law*, p. 103.

with the observance of human rights and democratic freedoms.[4] It is largely credited with impressive standard-setting in terms of democratisation, the rule of law and minority protection.[5] The political nature of the OSCE commitments, which entailed no requirement for ratification and no formal enforcement procedure, was rather an advantage, making it easier to adopt detailed and far-reaching provisions in an expeditious manner without jeopardising uniform application.[6] The Helsinki process was also pioneer in establishing the principle that human (and minority) rights matters are 'of international concern' and therefore no longer regarded as being exclusively internal affairs.[7]

As the Cold War was coming to an end, the Copenhagen Human Dimension Meeting of June 1990 reflected the new political situation in Europe and adopted a landmark document which included a long chapter on national minorities. Although the negotiations were difficult and had to overcome the reluctance of some participating states (especially France, Greece, Bulgaria and Romania),[8] the minority provisions were the most detailed and far-reaching international commitments adopted until that date.[9]

2.1.2 Far-Reaching Political Commitments

The Copenhagen Document embraced the concept of full or substantive equality in relation to minorities, which was quite far-reaching at the time: '[t]he participating states will adopt, where necessary, *special measures* for the purpose of ensuring to persons belonging to national minorities *full equality* with the other citizens'.[10]

---

4 M. van der Stoel, 'The Heart of the Matter: The Human Dimension of the OSCE', (1995) 6(3) *Helsinki Monitor*, p. 29.

5 A. Bloed, 'The Human Dimension of the OSCE: More Words than Deeds', (1995) 6(4) *Helsinki Monitor*, pp. 23–24.

6 A. Heraclides, 'The Diplomatic Process of Elaborating the CSCE Human Dimension Commitments: From Ideological Incompatibility to Community of Values', in E. Decaux and L-A. Sicilianos (eds.), *La CSCE: Dimension Humaine et Règlement des Différends*, Montchrestien: Paris, 1993, p. 29; H-J. Heintze, 'Minority Issues in Western Europe and the OSCE High Commissioner on National Minorities', (2000) 7 *International Journal on Minority and Group Rights*, p. 383.

7 A. Glover, 'The Human Dimension of the OSCE: from Standard-Setting to Implementation', (1995) 6(3) *Helsinki Monitor*, p. 31.

8 A. Bloed, 'A New CSCE Human Rights Catalogue: A Critical Analysis', (1990) 1(3) *Helsinki Monitor*, p. 40.

9 Ibid., 42. A. Constantinides, 'The Involvement of the Organization for Security and Cooperation in Europe in Issues of Minority Protection', (1996) 9(2) *Leiden Journal of International Law*, p. 395.

10 Para. 31(2) (emphasis added).

Paragraph 32(1) contains the first international provision on self-identification: '[t]o belong to a national minority is a matter of a person's individual choice and no disadvantage may arise from the exercise of such a choice'. This provision was further expanded in Article 3 FCNM.

Paragraph 32 also offers a list of rights for persons belonging to national minorities, including linguistic rights, religious rights, freedom of association, the right of minority organisations to seek voluntary financial and other contributions, and the right to maintain unimpeded contacts with those with whom they share common origin, heritage, or religious beliefs, within and across frontiers, which was a novelty.[11] Paragraph 33 is about the protection and promotion of the identity of national minorities following a participatory process. The Document goes as far as to refer to autonomy as a possible means of achieving this. The Document also provides for the use by persons belonging to national minorities of their mother tongue before public authorities, the instruction of/in their mother tongue, and their effective participation in public affairs.

Despite the very cautious drafting (states 'endeavour to ensure', 'wherever possible and necessary', 'in conformity with applicable national legislation'), which reflects the difficulties of several states, some of those commitments are unparalleled in intergovernmental documents, while others paved the way for similar or stronger provisions in subsequent instruments. Overall, it is generally acknowledged that the Copenhagen Document, although not legally binding, exerted great influence upon the development of minority rights in Europe.[12]

2.1.3 A Dedicated High Commissioner on National Minorities

The OSCE High Commissioner on National Minorities (HCNM) was established in 1992 as a security instrument and the OSCE's pivotal tool for preventive diplomacy in potential conflicts involving national minorities. The HCNM's mandate is to

> provide 'early warning' and as appropriate, 'early action' at the earliest possible stage in regard to tensions involving national minority issues which have not yet developed beyond an early warning stage, but in the

11 J. Helgesen, 'Protecting Minorities in the CSCE Process', (1994) 2(1) *International Journal on Minority and Group Rights*, pp. 23–24.

12 A. Philips, 'The Beginning', in T. Malloy and U. Caruso (eds.), *Minorities, their Rights, and the Monitoring of the European Framework Convention for the Protection of National Minorities: Essays in Honour of Rainer Hofmann*, Brill: Leiden, 2013, p. 16.

> judgement of the High Commissioner, have the potential to develop into a conflict within the [OSCE] area, affecting peace, stability or relations between participating states.[13]

The HCNM's involvement is meant to be impartial, confidential, cooperative and non-coercive.[14] The HCNM is not a human rights monitoring body and may not consider violations of OSCE commitments with regard to individuals belonging to a national minority.[15]

Having said that, compliance with international norms soon became a necessary element and core strategy of the HCNM's problem-solving approach.[16] Successive High Commissioners routinely refer to the OSCE commitments, especially the Copenhagen Document, and the repository of recommendations and guidelines issued by the HCNM since the mid-1990s.[17] Those were developed with the assistance of experts, giving more contemporary relevance to existing standards.[18] They aim further to clarify the content of minority rights in specific areas and to guide states and policymakers in formulating relevant legal and policy frameworks in accordance with international norms and standards and the consolidated experience of the HCNM in a manner that may help to ease inter-ethnic tensions.[19] The Explanatory

13 CSCE Helsinki Document: The Challenges of Change, (1992) 31 *International Legal Materials* 1385.

14 M. van der Stoel, 'The Role of the CSCE High Commissioner on National Minorities in CSCE Conflict Prevention', (1994) XLVII(4) *Studia Diplomatica*, p. 64.

15 Ibid.

16 S. Ratner, 'Does International Law Matter in Ethnic Conflicts?', (2000) 32(3) *New York University Journal of International Law and Politics*, p. 621.

17 They are the following: the Hague Recommendations regarding the Education Rights of National Minorities (1996); the Oslo Recommendations regarding the Linguistic Rights of National Minorities (1998); the Lund Recommendations on the Effective Participation of National Minorities in Public Life (1999); Guidelines on the Use of Minority Languages in the Broadcast Media (2003); Recommendations on Policing Multi-Ethnic Societies (2006); the Bolzano/Bozen Recommendations on National Minorities and Interstate Relations (2008); the Ljubljana Guidelines on Integration of Diverse Societies (2012); The Graz Recommendations on Access to Justice and National Minorities (2017); the Tallinn Guidelines on National Minorities and the Media in the Digital Age (2019); and the Recommendations on the Effective Participation of National Minorities in Social and Economic Life (2023).

18 H-J. Heintze, 'The Significance of the Thematic Recommendations of the OSCE High Commissioner on National Minorities', (2013) 18 *OSCE Yearbook 2012*, p. 254.

19 See extensively E. Lantschner, 'The OSCE High Commissioner on National Minorities as Norm-setter? Relations Between the Commissioner's Recommendations and the Evolving Interpretation of the Framework Convention for the Protection of National Minori-

Notes to these Guidelines and Recommendations make extensive reference to the relevant international legal framework, including OSCE commitments, the FCNM and other CoE standards, the case law of the ECtHR, Article 27 of the ICCPR and other international conventions and the practice of their monitoring bodies, UN Declarations and other international standards, thus contributing to a valuable synergy of norms and standards in the field of minority protection.[20] Thus, apart from the initial conflict prevention mandate involving country-specific action, the HCNM's role has evolved over the years also to become a normative actor, engaging in norm entrepreneurship and standard-setting in the form of general thematic recommendations and guidelines.[21]

Successive High Commissioners have framed the implementation of their mandate around the idea of integration with respect for diversity. The underlying logic of this approach is that integration, based on the protection of minority rights and their participation in public life, provides a framework of conflict avoidance through prevention and/or resolution of disputes within the democratic institutions established and consolidated through the process of integration.[22]

The HCNM's tools for change-making consist of mediation and facilitation, advising on legislation and policy making, and capacity building, which are frequently used together in mutually reinforcing ways.[23] These tools have been extensively used to facilitate dialogue, mediate negotiations and assist in drafting laws and formulating policies in a variety of contexts.[24]

Importantly, when using those tools, the HCNM cooperates with other organisations, particularly the CoE and the EU, referring to their work, reports or opinions.[25] The HCNM commonly refers to the FCNM and the need to

---

ties', (2023) 22(2) *Journal on Ethnopolitics and Minority Issues in Europe*, p. 124; A. Farahat, 'Regulating Minority Issues through Standard-Setting and Mediation: The Case of the High Commissioner on National Minorities', (2008) 9(11) *German Law Journal*, p. 1468.

20 A. Bloed and R. Letschert, 'The OSCE High Commissioner on National Minorities', *supra* note 2, p. 107.

21 J. Jackson-Preece, 'The High Commissioner on National Minorities as a Normative Actor', (2013) 12(3) *Journal on Ethnopolitics and Minority Issues in Europe*, p. 77.

22 S. Wolff, 'The OSCE High Commissioner on National Minorities: A Changemaker on the Ground', (2023) 22(2) *Journal on Ethnopolitics and Minority Issues in Europe*, p. 91. See further K. Vollebaek, 'The Challenge of Diversity: Is Integration an Answer?', (2010) 21(3) *Security and Human Rights*, p. 213 as well as the Ljubljana Guidelines, *supra* note 17.

23 Ibid., pp. 95, 108.

24 Ibid., p. 97.

25 A. Bloed and R. Letschert, 'The OSCE High Commissioner on National Minorities', *supra* note 2, p. 89.

implement it, an approach also followed by OSCE missions, which are sometimes even considered as informally monitoring the implementation of the FCNM and ACFC Opinions.[26] Depending on the situation, those organisations provide the HCNM with diplomatic backing, additional political leverage, logistical and financial support, justifying the conclusion that the most successful instances of conflict prevention have resulted from the joint efforts of the HCNM and partner organisations.[27]

2.2 *Strasbourg in the Driving Seat*

2.2.1 The Framework Convention on the Protection of National Minorities

The FCNM is the first and only comprehensive multilateral treaty dedicated to minorities and constitutes a central pillar of the European minority rights system.[28] The Convention has built on the OSCE standards of the early 1990s, particularly the Copenhagen Document.[29] It was opened for signature on 1 February 1995 and entered into force in 1998. As at 2025, the FCNM numbers 38 states parties. Four states (Andorra, France, Monaco and Turkey) have not signed the Convention, and four others (Belgium, Greece, Iceland and Luxembourg) have signed but not ratified it. The FCNM is monitored by the Advisory Committee on the Framework Convention for the Protection of National Minorities, an independent expert body that advises and reports to the Committee of Ministers (CoM). The Committee has adopted four detailed thematic commentaries summarising the key experience and findings from its monitoring practice and aiming to assist states parties in implementing the Convention.[30]

---

26 Ibid., p. 102.

27 V-Y. Ghebali, 'The High Commissioner on National Minorities after 15 Years: Achievements, Challenges and Promises', (2009) 20(2) *Security and Human Rights*, p. 116.

28 B. De Witte, 'Introduction: Exploring a Central Pillar of the European Minority Rights System', in A. Verstichel, A. Alen, B. De Witte and P. Lemmens (eds.), *The Framework Convention for the Protection of National Minorities: A Useful Pan-European Instrument?*, Intersentia: Antwerp/Oxford/Portland, 2008, p. 1.

29 K. Henrard, 'The Added Value of the Framework Convention for the Protection of National Minorities (II): The Two Pillars of an Adequate System of Minority Protection Revisited', in A. Verstichel, A. Alen, B. De Witte and P. Lemmens (eds.), *The Framework Convention for the Protection of National Minorities*, *supra* note 28, p. 95.

30 ACFC, Thematic Commentary No 1, 'Education under the Framework Convention for the Protection of National Minorities', 31 May 2024, revising and replacing Thematic Commentary No 1 (2006), ACFC/31DOC(2008)001; ACFC, Thematic Commentary No 2, 'The effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs', 27 February 2008, ACFC/31DOC(2008)001; ACFC,

The Convention does not recognise collective rights. Article 3 is an important provision on self-identification, while Article 4 guarantees equality and non-discrimination, specifying that special measures promoting full and effective equality of persons belonging to a national minority in all areas of economic, social, political and cultural life do not constitute discrimination. Article 5(1) sets out obligations to promote conditions for minorities to develop their culture and preserve the essential aspects of their identity, namely their religion, language, traditions and cultural heritage, while Article 5(2) requires states parties to abstain from assimilationist policies. The Convention also includes standard human rights and freedoms (freedom of assembly, freedom of association, freedom of expression, freedom of thought, conscience and religion or belief, freedom to establish religious institutions, organisations and associations). Articles 10 and 11 are important provisions on language rights and Articles 12 to 14 set out educational rights, which are crucial for minorities. Article 15 provides for effective participation in cultural, social and economic life and in public affairs. Article 17 provides for peaceful contacts across borders and Article 18 is on bilateral cooperation. Importantly, under Articles 19 and 23, the ECHR is in effect given priority over the FCNM in relation to both the interpretation of the FCNM's substantive rights, which are the subject of a corresponding provision in the ECHR, and the scope of permissible limitations and derogations. The relevance of those provisions has been downplayed in view of the different roles of the ACFC and the ECtHR, which should delineate any such deference, in conjunction with the need for the ACFC to safeguard its mission.[31]

An attempt to adopt an additional protocol to the ECHR on minority protection had previously failed in the CoM despite the strong support of the Parliamentary Assembly (PACE).[32] The Assembly was in favour of a legal

---

Thematic Commentary No 3, 'The language rights of persons belonging to national minorities under the Framework Convention', 24 May 2012, ACFC/44DOC(2012)001; ACFC, Thematic Commentary No 4, 'The Framework Convention: a key tool to managing diversity through minority rights; the scope of application of the Framework Convention for the Protection of National Minorities', 27 May 2016, ACFC/56DOC(2016)001.

31 S. Berry, 'Democracy and the Preservation of Minority Identity', *supra* note 2, p. 223; S. Spiliopoulou-Åkermark, 'The Added Value of the Framework Convention on the Protection of National Minorities I', in A. Verstichel, A. Alen, B. De Witte and P. Lemmens (eds.), *The Framework Convention for the Protection of National Minorities, supra* note 28, p. 87.

32 See PACE, Recommendation 1201 (1993) of 1 February 1993. In Recommendation 1994 (2012) of 9 March 2012, the Parliamentary Assembly recommended anew that the CoM consider drafting an additional protocol to the ECHR providing for minimum rights for national minorities, which could include the rights contained in PACE Resolution 1866

instrument that would ensure enforceability and supervision by the ECtHR and criticised the FCNM as 'weakly worded' with a feeble implementation machinery, containing 'vaguely defined objectives and principles', which do not amount to rights that individuals may invoke before independent judiciary organs.[33] In defence, it was maintained that the Framework Convention is a legally binding treaty creating obligations in international law and cannot be treated as less binding because it sets out a framework for action.[34]

The practice of the ACFC has rendered those concerns an old debate of almost no relevance today. It has stressed that the Framework Convention was deliberately conceived as a living instrument whose interpretation must evolve and be adjusted regularly to new societal challenges, an approach which is in line with the principle of dynamic interpretation developed by the ECtHR when interpreting the ECHR.[35] It turned out that the vague wording of the Framework Convention allowed for dynamic and practical interpretation, turning the Convention's flexibility from a weak feature to its strength,[36] while monitoring was proven considerably more effective than was expected by critics.[37] This has led the once critical PACE to praise the FCNM for having benefited national minorities in states parties and helped to maintain their linguistic, ethnic and cultural identities.[38]

The ACFC has embraced and built on the body of work and the rich experience of the OSCE, the UN and other CoE organs (PACE, Venice Commission, ECRI) in minority issues.[39] Considerable synergy is achieved in the course of the Committee's monitoring practice through the inflow of information, the

(2012) of the same day. In its reply (Doc. 13097) of 21 January 2013, the CoM reiterated that there was no need for new normative work in this field.

33 PACE, Recommendation 1255 (1995), Protection of the rights of national minorities, 31 January 1995, para 7.

34 A. Spiliopoulou-Åkermark, *Justifications of Minority Protection in International Law*, Kluwer: London/The Hague/Boston, 1997, p. 229; P. Thornberry and M. A. Martín Estébanez, *Minority Rights in Europe: A Review of the Work and Standards of the Council of Europe*, Council of Europe: Strasbourg, 2004, p. 115.

35 ACFC Thematic Commentary No. 4, *supra* note 30, para. 5.

36 A. Philips, 'The Beginning', *supra* note 12, p. 40; F. Steketee, 'The Framework Convention: A Piece of Art or a Tool for Action?', (2001) 8(1) *International Journal on Minority and Group Rights*, p. 14.

37 A. Eide, 'Towards a Pan-European Instrument?', in A. Verstichel, A. Alen, B. De Witte and P. Lemmens (eds.), *The Framework Convention for the Protection of National Minorities, supra* note 28, p. 15.

38 PACE Resolution 2368 (2021) 'Preserving national minorities in Europe', 19.04.2021, para. 2.

39 A. Philips, 'The Beginning', *supra* note 12, p. 25.

lessons learned and assessments made by those other organisations/bodies ahead of the Committee's country visits as well as in the preparation of its country-specific Opinions.[40] Moreover, in its thematic Commentaries, the Committee has taken into account the standards contained in other international instruments, including the case law of the ECtHR and the thematic recommendations and guidelines of the OSCE HCNM. For example, the ACFC has carefully considered the HCNM's Lund Recommendations in its analysis of Article 15 of the Framework Convention,[41] and the HCNM's Oslo and Hague Recommendation in its thematic commentary on language rights.[42] Overall, informal cooperation between the HCNM and the Advisory Committee has been used to avoid different positions on issues of common concern.[43] Besides, reliance of the EU's enlargement policy on the FCNM as normative benchmark as well as on the ACFC's recommendations, and CoM resolutions have also added (more) 'teeth' to the FCNM.[44]

2.2.2 The European Convention on Human Rights

It is well-known that the ECHR does not guarantee rights that are peculiar to minorities, but sets out rights and freedoms that are secured to 'everyone'.[45] A prominent example is linguistic freedom, which, despite its centrality for minority identity, is not as such one of the rights and freedoms governed by the Convention.[46] Yet, the Convention enshrines a number of human rights that address essential concerns of (persons belonging to) minorities.[47] These include the right to private life (Article 8), the freedoms of religion (Article 9),

40 Ibid., p. 36; A. Eide, 'The Council of Europe's Framework Convention for the Protection of National Minorities', in K. Henrard and R. Dunbar (eds.), *Synergies in Minority Protection*, *supra* note 2, p. 149.

41 ACFC Thematic Commentary No. 2, *supra* note 30, para. 7.

42 ACFC Thematic Commentary No. 3, *supra* note 30, para. 10.

43 W. Zellner, 'Working without Sanctions: Factors Contributing to the (Relative) Effectiveness of the OSCE High Commissioner on National Minorities', (2013) 12(3) *Journal on Ethnopolitics and Minority Issues in Europe*, p. 42.

44 C. Hillion, 'The Framework Convention for the Protection of National Minorities and the European Union' (Council of Europe Report, 2008).

45 ECtHR, *Noack v Germany*, no 46346/99 [dec.], 25.05.2000.

46 See e.g., ECtHR, *Bulgakov v Ukraine*, no 59894/00, 11.09.2007, para. 43, adding, however, that 'there is no watertight division separating linguistic policy from a field covered by the Convention, and a measure taken as part of such policy may fall within certain Convention provisions'.

47 P. Thornberry and M. A. Martín Estébanez, *Minority Rights in Europe*, *supra* note 34, p. 39; S. Wheatley, 'Minorities under the ECHR and the Construction of a "Democratic Society"', (2007) *Public Law*, p. 773.

expression (Article 10), association and assembly (Article 11), and the right to education (Article 2 of Additional Protocol 1), which protect core aspects of the political, social and cultural life as well as education of (members belonging to) minorities. In addition, the Convention lists 'association with a national minority' among the prohibited grounds of discrimination under Article 14, which applies only in conjunction with other Convention rights, and under Article 1(1) of Protocol 12, an autonomous non-discrimination guarantee that is not limited to Convention rights.

What is more, the very foundational values of democracy, the rule of law and human dignity that are reflected in the ECHR and the case law of the ECtHR are crucial for minority protection. In this vein, the Strasbourg Court sees itself as the guardian of the democratic process and has embraced the concept of democratic pluralism as a value permeating the Convention.[48] As the Grand Chamber put it:

> pluralism is also built on the genuine recognition of, and respect for, diversity and the dynamics of cultural traditions, ethnic and cultural identities, religious beliefs .... The harmonious interaction of persons and groups with varied identities is essential for achieving social cohesion.[49]

2.2.3 Other CoE Instruments and Bodies

The FCNM was preceded by the European Charter for Regional and Minority Languages of 1992, which aims to protect and promote the languages used by traditional minorities in Europe. However, the Charter has been of less relevance because of its limited scope (linguistic rights), its rather low ratification rate (25 states parties as at 2025) and, especially, the wide discretion of states parties in choosing the measures they wish to apply to promote the languages that they have determined to be covered by the Charter.

The (Revised) European Social Charter (ESC) has also proven a valuable instrument for the protection of the social rights of minorities in Europe through its non-discrimination provision. The ESC system has a collective

48 L. Peroni, 'Minorities before the European Court of Human Rights: Democratic Pluralism Unfolded', in J. Boulden and W. Kymlicka (eds.), *International Approaches to Governing Ethnic Diversity*, Oxford University Press: Oxford, 2015, p. 25. See also G. Pentassuglia, 'The Strasbourg Court and Minority Groups: Shooting in the Dark or a New Interpretive Ethos?' (2012) 19(1) *International Journal on Minority and Group Rights*, p. 2, who speaks of cultural pluralism.

49 ECtHR, *Gorzelik and Others v Poland*, no 44158/98 [GC], 17.02.2004, para. 92.

complaints procedure enabling, among others, international NGOs that hold participatory status with the CoE, to file applications before the European Committee of Social Rights (ECSR) against states that have accepted the procedure. The procedure has been widely used with respect to the Roma and has led to considerable case law on their social rights.[50]

Other organs of the Council of Europe (CoM, PACE, Commissioner for Human Rights) as well as expert bodies such as the European Commission against Racism and Intolerance (ECRI) and the Venice Commission also play a role in shaping the legal landscape on the rights of minorities in Europe through a series of thematic or country-specific resolutions, recommendations, reports and other action. Both the Language Charter and the ESC, as well as the decisions of the ECSR and the normative and monitoring activities of the political and expert bodies of the CoE, contribute to the mosaic of European minority rights law and are commonly referred to in judgments of the ECtHR on the rights of minorities.

2.3 *Brussels in the Back Seat*

The founding agreements of the EU did not contain any specific provision on minority rights. Yet, the EU has shown (uneven) interest in minority protection. Since the 1980s, the European Parliament has addressed the rights of minorities, especially linguistic and cultural rights, and adopted some (non-binding) resolutions, in a rather idealistic and unrealistic effort to 'supranationalise' minority protection.[51] The other EU organs did not follow suit,[52] and EU member states turned to the OSCE and the CoE for standard-setting in the field of minority rights. Under EU law, minorities benefited from legislative and other action that was based primarily on EU Treaty provisions on non-discrimination. The relevant legislation mainly consists of the Equality Directives of 2000 that protect individuals (including third-country nationals) against direct and indirect discrimination on the grounds of racial and ethnic origin in a wide range of fields in both the public and private spheres, includ-

50 See extensively A. Constantinides, 'Social Rights of Minorities', in C. Binder, J. Hofbauer, F. Piovesan and A. Úbeda de Torres (eds.), *Research Handbook on International Law and Social Rights*, Edward Elgar: Cheltenham, 2020, p. 264.

51 See G. Toggenburg, 'The European Union vis-a-vis Minorities: A Play in Three Parts and an Open End', in C. Tabajdi (ed.), *Pro Minoritate Europae: Minorities of Europe Unite!*, EU-Ground: Brussels, 2009, pp. 163–164.

52 N. Nagy and B. Vizi, 'The European Parliament, the Council and the European Council', in T. Malloy and B. Vizi (eds.), *Research Handbook on Minority Politics in the European Union*, Edward Elgar: Cheltenham, 2022, p. 142.

ing employment, training, social protection, education, housing and access to public goods and services, and on the ground of religion in employment.[53]

In parallel, however, the EU has been a significant actor in minority protection in its external policy, particularly in the framework of its enlargement process.[54] Indeed, according to the Copenhagen criteria of 1993, 'stability of institutions guaranteeing democracy, the rule of law, human rights, and respect and protection of national minorities' are precondition for European states wishing to become EU members. In this respect, the European Commission performs assessments of the treatment of national minorities in EU candidate countries, using minority protection as part of accession conditionality in its annual progress reports. This scheme has led to (uneven) improvements in minority protection in states going through this process.[55] However, candidate states were required to adopt standards not applicable to existing member states, casting doubt to the credibility of the EU's commitment to minority protection and prompting rightful criticism for double standards,[56] including in the application of minority rights standards between groups, issues or candidate states.[57] Applicable standards that are used – albeit inconsistently – as the normative yardstick for assessing compliance with minority

53 Directive 2000/43 on Equal Treatment between Persons Irrespective of Racial or Ethnic Origin [2000] OJ L180/22 (Race Equality Directive); Directive 2000/78/EC, Establishing a General Framework for Equal Treatment in Employment and Occupation [2000] OJ L303/16 (Employment Directive).

54 See generally K. Topidi, *EU Law, Minorities and Enlargement*, Intersentia: Cambridge/Antwerp/Portland, 2010.

55 G. Pentassuglia, 'The EU and the Protection of Minorities: The Case of Eastern Europe', (2001) 12(1) *European Journal of International Law*, p. 26; J. Hughes and G. Sasse, 'Monitoring the Monitors: EU Enlargement Conditionality and Minority Protection in the CEECs', (2003) 4(1) *Journal on Ethnopolitics and Minority Issues in Europe*, p. 30.

56 B. de Witte, 'Politics versus Law in the EU's Approach to Ethnic Minorities', in J. Zielonka (ed.), *Europe Unbound: Enlarging and Reshaping the Boundaries of the European Union*, Routledge: London, 2002, p.137; C. Hillion, 'Enlargement of the European Union – The Discrepancy Between Membership Obligations and Accession Conditions as Regards the Protection of Minorities', (2004) 27(2) *Fordham International Law Journal*, p. 715; T. Malloy, 'Enlargement and Minority Politics: The Unravelling of the EU's Transformative Power?', in T. Malloy and B. Vizi (eds.), *Research Handbook on Minority Politics in the European Union*, *supra* note 52, p. 162;

57 T. Ahmed, 'The European Commission and Minority Rights', in T. Malloy and B. Vizi (eds.), *Research Handbook on Minority Politics in the European Union*, *supra* note 52, p. 146; D. Kochenov, 'A Summary of Contradictions: An Outline of the EU's Main Approaches to Ethnic Minority Protection', (2008) 31(1) *Boston College International and Comparative Law Review*, p. 27.

protection include those of the FCNM,[58] while there is also cooperation and coordination with the OSCE HCNM.[59] Indeed, during the accession process, the EU relied considerably on the monitoring mechanisms of the CoE and the OSCE,[60] thus filling a gap in the broad Copenhagen political criteria that could not be filled with the EU framework. This illustrates a welcome interaction by European organisations.

The Lisbon Treaty, which came into force in 2009, was ground-breaking in including 'respect for human rights, including the rights of persons belonging to minorities' among the foundational values of the European Union (Article 2 TEU) and giving the EU Charter for Fundamental Rights the same legal value as the EU Treaties. A breach of those fundamental values can trigger the sanctions mechanism under Article 7 TEU.[61] Hence, a legal obligation to respect the rights of persons belonging to minorities is incumbent both on EU member states,[62] and (by virtue of Article 49 TEU) candidate states.[63] However, Article 2 TEU does not constitute a legal basis for legislative competences of EU institutions, since the EU was never given general competence for minority-specific legislation in the EU treaties.[64]

This was confirmed by the refusal of the Commission to act upon the Minority SafePack, a European Citizens' Initiative aimed to promote minority

58 G. Guliyeva, 'Joining Forces or Reinventing the Wheel? The EU and the Protection of National Minorities', (2010) 17(2) *International Journal on Minority and Group Rights*, p. 290.

59 C. Johnson, 'The Use and Abuse of Minority Rights: Assessing Past and Future EU Policies towards Accession Countries of Central, Eastern and South-Eastern Europe', (2006) 13(1) *International Journal on Minority and Group Rights*, p. 40; W. Zellner, 'Working without Sanctions', *supra* note 43, pp. 41–42; A. Bloed and R. Letschert, 'The OSCE High Commissioner on National Minorities', *supra* note 2, p. 89.

60 K. Drzewicki, 'The Enlargement of the European Union and the OSCE High Commissioner on National Minorities', in M. Weller, D. Blacklock and K. Nobbs (eds.), *The Protection of Minorities in the Wider Europe*, Palgrave Macmillan: New York, 2008, p. 161.

61 M. Klamert and D. Kochenov, 'Article 2 TEU', in M. Kellerbauer, M. Klamert and J. Tomkin (eds.), *Commentary on the EU Treaties and the Charter of Fundamental Rights*, Oxford University Press: Oxford, 2019, p. 27.

62 Ibid.

63 T. Ahmed, 'The Treaty of Lisbon and Beyond: The Evolution of EU Minority Protection?', (2013) 38(1) *European Law Review*, p. 35.

64 D. Kochenov, 'EU Minority Protection: A Modest Case for a Synergetic Approach', (2011) 3(4) *Amsterdam Law Forum* p. 37; U. Barten, 'Minority Rights in the European Union after Lisbon', (2015) 33(1) *Nordic Journal of Human Rights*, p. 80; AA Bilgin, 'Minority Protection in the European Union: To Protect or Not to Protect?', (2019) 26(1) *International Journal on Minority and Group Rights*, p. 102.

rights through a proposed package of 11 EU legal acts.[65] The Commission asserted that the EU has no general legislative competence 'specifically on the protection of national minorities' or 'over questions such as the use of regional or minority languages, in public education or elsewhere', that 'those questions fall under the responsibility of the Member States', and that Articles 21 and 22 of the Charter do not provide powers to legislate on the protection of national minorities 'other than those conferred to the Union by the legal bases applicable to the specific policy areas'.[66] The General Court upheld the Commission's refusal, and the case was appealed to the Court of Justice of the EU (CJEU).[67]

Thus, the EU legal framework on minority rights remains rudimentary.[68] It revolves around the proper scope and interpretation of scattered provisions in EU primary and secondary law that are not specific to minorities, and the relevance of Article 21 of the Charter's prohibition of discrimination on the ground of 'membership of a national minority'. In *JMcB v LE*, the CJEU held that when the rights under the Charter correspond to rights under the ECHR, 'their meaning and scope are to be the same as those laid down by the ECtHR',[69] thus ensuring consistent and coherent protection standards.

It follows that minority protection in the EU largely refers to and depends on the normative and monitoring frameworks of the UN, the CoE, the OSCE and those of its member states,[70] which curtails the autonomous development of a genuine, coherent and credible EU minority protection policy.[71] Such a

65 B. Tárnok, 'European Citizens' Initiatives for the Protection and Promotion of Rights and Interests of National Minorities: Latest Developments', (2020) *Hungarian Yearbook of International Law and European Law*, p. 299.

66 European Commission, Communication on the European Citizens' Initiative 'Minority SafePack – one million signatures for diversity in Europe', COM(2021) 171 final, 14.01.2021), pp. 1, 4.

67 CJEU, *Minority SafePack – one million signatures for diversity in Europe v European Commission*, Case T-158/21, 09.11.2022, ECLI:EU:T:2022:696.

68 R. Hofmann and M. Malkmus, 'The Treaties and Minority Rights', in T. Malloy and B. Vizi (eds.), *Research Handbook on Minority Politics in the European Union*, *supra* note 52, p. 31.

69 CJEU, *PPU JMcB v LE*, Case C-400/10, 05.10.2010, ECLI:EU:C:2010:582, para. 53.

70 See also the European Parliament's discontent in its resolution of 13 November 2018 on minimum standards for minorities in the EU (2018/2036(INI)), para. 3: 'regrets that in the field of minority protection the EU has either taken for granted the assumption that its Member States comply with minority rights or has relied on external monitoring instruments, such as those of the UN, the Council of Europe or the OSCE'.

71 T. Ahmed, 'The Treaty of Lisbon and Beyond', *supra* note 63, pp. 49–51.

policy will have to wait (long) until all EU member states are bound by relevant international law, particularly the FCNM.[72]

From a minority rights perspective and from an EU (law) perspective, there is discontent with this state of affairs, including by the European Parliament.[73] On the other hand, the EU's reliance on other European regimes adds to a (common) European legal framework on minority rights, which is formulated, consolidated and evolves through the meaningful and fruitful interaction of the key European organisations.

3 The Case Law of the European Court of Human Rights: Ensuring Coherence in European Minority Rights Law (?)

3.1 *The Strasbourg Court's Shifting Approach towards Minorities*

Although the ECtHR and the former European Commission of Human Rights have reviewed dozens of cases on the rights of minorities in the twentieth century,[74] the Strasbourg Court was long considered to be of limited relevance to minority protection due to its rather reluctant approach. A shift towards a more minority-sensitive jurisprudence has been evident since the early 2000s. In this respect, the Court has echoed the statement in the FCNM's preamble that 'the protection of national minorities is essential to stability, democratic security and peace on this continent' and that 'respect for them is a condition *sine qua non* for a democratic society' as reflecting 'a commonly shared European view'.[75]

This shift is further enabled by the ECtHR's evolutive and dynamic interpretation of the ECHR as a 'living instrument', reading its provisions in the light of current social circumstances. This approach is informed by the consideration of relevant international law and practice.[76] Mindful of the Convention's special character as a human rights treaty, the Court has long main-

72 N. Tóth, 'European Union Law and International Minority Rights Law', in T. Malloy and B. Vizi (eds.), *Research Handbook on Minority Politics in the European Union*, *supra* note 52, p. 125.

73 See the European Parliament resolution of 13 November 2018 on minimum standards for minorities in the EU (2018/2036(INI)), *supra* note 70. See also, *inter alia*, T. Ahmed, 'The European Commission and Minority Rights', in T. Malloy and B. Vizi (eds.), *Research Handbook on Minority Politics in the European Union*, *supra* note 52, p. 146.

74 R. Medda-Windischer, 'The European Court of Human Rights and Minority Rights', (2003) 25(3) *Journal of European Integration*, p. 266.

75 ECtHR, *Gorzelik*, *supra* note 49, para. 68.

76 G. Pentassuglia, 'The Strasbourg Court and Minority Groups', *supra* note 48, p. 14.

tained that it must also take the relevant rules of international law into account since the Convention 'cannot be interpreted in a vacuum'.[77] In the words of former ECtHR President Sicilianos:

> the Court streamlines its dialogue with other international bodies, carefully selects the 'relevant rules of international law' and has changed the structure of its judgments to better highlight the various elements of international law and practice taken into account when interpreting the Convention.[78]

Against this background, this part of the paper examines the ECtHR's case law on minorities through the lens of the Court's systemic integration approach and explores its role in the harmonisation of the multi-layered European minority rights framework, identifying synergies as well as tensions. It examines whether the Court draws on the building blocks of the European minority rights regime, particularly the FCNM and the practice of the ACFC, the practice of other CoE bodies (PACE, CoM, ECRI, Venice Commission, Commissioner for Human Rights), the OSCE standards and the practice of the HCNM, and relevant EU law. Thus, it does not present a comprehensive survey of the Court's case law on minority protection. The focus is on leading Strasbourg judgments on some of the most important issues and rights that are specific to minorities such as self-identification, equality and non-discrimination, and education in minority language. Most of these judgments have been delivered by the Court sitting as Grand Chamber, which is when it mostly engages in the search for and consideration of relevant international norms and other material.[79]

3.2 *Identity*

3.2.1 Group Self-Identification versus Recognition

The definition of the 'national minority' concept came before the ECtHR in *Gorzelik and Others v. Poland*, which concerned the denial of the Polish authorities to register the association called 'Union of People of Silesian

77 See e.g., ECtHR, *Sabeh El Leil v France*, no 34869/05 [GC], 29.06.2011, para. 48.

78 L-A. Sicilianos, 'Adapting International Instruments over Time: Remarks on the Evolutive Interpretation of the European Convention on Human Rights', in A. Gattini (ed.), *Time and International Adjudication: The Temporal Factor in Proceedings before International Courts and Tribunals*, Brill/Nijhoff: Leiden/Boston, 2024, p. 486.

79 A. Nußberger, 'The ECtHR' Use of Decisions of International Courts and Quasi-Judicial Bodies', in A. Müller (ed.), *Judicial Dialogue and Human Rights*, Cambridge University Press: Cambridge, 2017, p. 420.

Nationality', which was intended to be an 'organisation of the Silesian national minority'.[80] The government asserted that the Silesians were not considered a national minority, which status would give them certain electoral privileges under Polish law such as exemptions from electoral thresholds. The ECtHR took a cautious position and avoided defining the concept, considering the variety of state practice and the absence of a definition in any international treaty and in the FCNM, as also mentioned in the latter's Explanatory Report.[81] The Court held that states parties are not obliged by international law to adopt a particular concept of national minority in their legislation or to introduce a procedure for the official recognition of minority groups,[82] ruling that the choice of what form such recognition should take and the means of its implementation 'must, by the nature of things, be left largely to the State concerned, as it will depend on particular national circumstances'.[83] Thus, states were allowed wide discretion in (not) recognising minority groups, particularly when such recognition would entail access to specific rights.

The ECtHR's approach seems to be in tension with that of the ACFC, which has opined that 'access to minority rights should not depend on formal recognition'.[84] True, the ACFC also accords states parties a wide margin of appreciation in determining the personal scope of application of the FCNM, which, however, the Committee monitors in order to prevent arbitrary or unjustified distinctions between different groups with regard to access to rights.[85] What is more, in its fourth Opinion on Poland, the ACFC made it clear that it 'strongly regrets that no progress has been made regarding the requests for recognition of the Silesians as an ethnic minority',[86] which further illustrates the difference between the Committee's approach and that of the ECtHR.

In fact, *Gorzelik* seems also – at least on the face of it – to contradict the Strasbourg Court's own case law on the registration of associations by groups of individuals claiming to belong to a certain minority that is not recognised by the state. The Strasbourg Court early on found the refusal to register such associations as in breach of Article 11. In *Sidiropoulos and Others v. Greece*, regarding the non-registration of an association called 'The Home of Macedonian Civilisation' on the grounds that it had separatist intentions, the ECtHR

80 ECtHR, *Gorzelik*, *supra* note 49, para. 22.
81 Ibid., paras. 46, 67.
82 Ibid., para. 68.
83 Ibid., para. 67.
84 ACFC, Thematic Commentary No. 4, *supra* note 30, para. 28.
85 Ibid., para. 26.
86 ACFC, 'Fourth Opinion on Poland', 6 November 2019, ACFC/OP/IV(2019)003, para. 27.

ruled, making its first reference to the OSCE Copenhagen Document, that the assertion that the association represented a danger to Greece's territorial integrity was based on a mere suspicion, and thus the refusal to register the association was disproportionate and in breach of Article 11.[87] Subsequent cases reaffirmed the Court's firm position that groups and associations claiming an ethnic identity, asserting a minority consciousness and promoting their cultural heritage do not *per se* constitute a threat to territorial integrity, public order or national security and must not be denied registration or dissolved, even if their claims may provoke tensions or hostile sentiments among the majority unless there is concrete evidence suggesting that they advocate the use of violence or anti-democratic means.[88] According to the Court:

> the existence of minorities and different cultures in a country was a historical fact that a 'democratic society' had to tolerate and even protect and support according to the principles of international law.[89]

The tension in the ECtHR's case law became apparent more recently in *Association of People of Silesian Nationality* (*in liquidation*) *v. Poland*, which concerned the dissolution of that association, which was initially registered because, as per *Gorzelik*, it avoided the use of the terms 'Silesian nation' or 'Silesian national minority' and explicitly confirmed that it would not register electoral lists.[90] However, the association was dissolved because its name was considered to be misleading in suggesting that a Silesian national minority existed legally in Poland, which was in breach of Polish law. The Polish courts condoned its dissolution relying on *Gorzelik*. In disapproving the dissolution

87 ECtHR, *Sidiropoulos and Others v Greece*, no 57/1997/841/1047, 10.07.1998, paras. 44–47.

88 See, in chronological order, ECtHR, *United Macedonian Organisation Ilinden and Ivanov v Bulgaria*, no 44079/98, 20.10.2005; ECtHR, *United Macedonian Organisation Ilinden and Others v Bulgaria*, no 59491/00, 19.01.2006; ECtHR, *Bekir-Ousta and Others v Greece*, no 35151/05, 11.10.2007; ECtHR, *Tourkiki Enosi Xanthis and Others v Greece*, no 26698/05, 27.03.2008; ECtHR, *Association of Citizens 'Radko' and Paunkovski v the former Yugoslav Republic of Macedonia*, no 74651/01, 15.01.2009; ECtHR, *United Macedonian Organisation Ilinden and Ivanov v Bulgaria* (*no 2*), no 37586/04, 18.10.2011; ECtHR, *United Macedonian Organisation Ilinden and Others v Bulgaria* (*no 2*), no 33496o/04, 18.10.2011; ECtHR, *National Turkish Union and Kungyun v Bulgaria*, no 4776/08, 08.06.2017; ECtHR, *United Macedonian Organisation Ilinden and Others v Bulgaria* (*no 3*), no 29496/16, 11.01.2018.

89 ECtHR, *Sidiropoulos*, *supra* note 87, para. 41; ECtHR, *Tourkiki Enosi Xanthis*, *supra* note 88, para. 51.

90 ECtHR, *Association of People of Silesian Nationality* (*in liquidation*) *v Poland,* no 26821/17, 14.03.2024, para. 7.

of the association, the ECtHR seemed to acknowledge the tension in its case law:

> Even though the domestic courts relied on the judgment *Gorzelik and Others* ..., they failed to engage more extensively with the issue of compatibility of the impugned measure with the Convention in the light of the Court's rich case-law on freedom of association.[91]

What differentiates *Gorzelik* is that the recognition of Silesians as a minority in that case would have given them access to certain entitlements under Polish law, which was not the case in the *Sidiropoulos* line of judgments as well as in *Association of People of Silesian Nationality* (*in liquidation*), since the association had expressly stated that it would not pursue those entitlements. This was crucial in the ECtHR's finding that the dissolution of the association infringed Article 11.[92] In other words, the Court is sympathetic to registration of associations asserting a minority identity as long as they do not impinge on the right of states (not) to take positive action in favour of minorities that they do not themselves recognise.[93] Yet, the sweeping statements in *Gorzelik* that allow states a wide margin of appreciation as to the (non-)recognition of minorities are unhelpful and a source of confusion.

3.2.2 Individual Self-Identification

On the other hand, the Strasbourg Court's approach is perfectly in line with that of the ACFC when it comes to self-identification of individuals. The ACFC has consistently underlined that the right to free self-identification in Article 3 of the FCNM is a cornerstone of minority rights.[94] The ECtHR echoed (but did not cite) the ACFC in *Molla Sali v Greece*, which concerned the judicial application of the Sharia law of succession to a Muslim minority woman in Greece, as opposed to her right voluntarily to opt for and benefit from ordinary law. As Greece is a signatory but not a party to the FCNM, the Court made a more general remark that '[t]he right to free self-identification is not a right specific to the Framework Convention. It is the "cornerstone" of international law on

91 Ibid., para. 48.

92 Ibid., para. 50.

93 See also R. Hofmann, 'The Future of Minority Issues in the Council of Europe and the Organization for Security and Cooperation in Europe', in M. Weller, D. Blacklock, and K. Nobbs (eds.), *The Protection of Minorities in the Wider Europe, supra* note 60, p. 181.

94 ACFC, Thematic Commentary No 4, *supra* note 30, para. 9.

the protection of minorities in general'.[95] The statement was repeated in *Tasev v North Macedonia*, which concerned the refusal of the authorities to change the ethnic affiliation of a judge in the electoral roll of judges.[96] That judgment also made reference to the Explanatory Report of the FCNM.[97]

Previously, in *Ciubotaru v Moldova*, the ECtHR had upheld the state's right to require objective evidence of a claimed ethnicity and to refuse claims based on purely subjective and unsubstantiated grounds,[98] which is also in line with the ACFC's approach.[99] The Court also specified that 'an individual's ethnic identity constitutes an essential aspect of his or her private life and identity' under Article 8, which also entails certain positive obligations.[100] Moldova failed to comply with such obligations by not entertaining the applicant's claim to belong to a certain ethnic group even though he had adduced objectively verifiable evidence in support of that claim.[101] In *Ciubotaru*, the Court referred not only to Article 3 FCNM but also to the CSCE/OSCE Copenhagen Document of 1990.[102]

Overall, even though the relevant cases are few, they all draw on the FCNM. The reason can be that the right to self-identification is specific to minorities and the FCNM and relevant instruments can well inform the integrative interpretation of (Article 8 of) the ECHR, which is a common quest of the ECtHR.

3.3 *Equality and Non-discrimination*

The main themes of the ECtHR's case law on Article 14 ECHR that are of special relevance to minorities revolve around the parameters of permissible differential treatment (3.3.1), indirect discrimination (3.3.2) and the Court's reluctance to engage in discrimination analysis (3.3.3).

3.3.1 Permissible Differential Treatment

The ECtHR first interpreted Article 14 ECHR in the *Belgian Linguistics case*, which concerned certain restrictions in French language education in the

95 ECtHR, *Molla Sali v Greece*, no 20452/14 [GC], 19.12.2018, para. 157.

96 ECtHR, *Tasev v North Macedonia*, no 9825/13, 16.05.2019, para. 33.

97 Ibid., para. 26.

98 ECtHR, *Ciubotaru v Moldova*, no 27138/04, 27.04.2010, para. 57.

99 ACFC, Thematic Commentary No 4, *supra* note 30, paras. 9–10 ('the choice of the individual is not to be arbitrary but must be linked to some objective criteria'; 'a person's free self-identification may only be questioned in rare cases, such as when it is not based on good faith').

100 ECtHR, *Ciubotaru, supra* note 98, paras. 49–50, 53.

101 Ibid., para. 59.

102 Ibid., paras. 24–25.

Dutch-speaking region of Belgium.[103] In an early endorsement of affirmative action, the Court held that Article 14 ECHR allows differential treatment that is objective, reasonable and proportionate to the aim it seeks to realise. The Court accepted that different situations and problems call for different legal solutions and that 'certain legal inequalities tend only to correct factual inequalities'.[104]

In *Thlimmenos v Greece*, regarding discriminatory treatment against a Jehovah's witness, the Grand Chamber ruled that a breach of Article 14 may arise 'when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different'.[105] Exemplifying this reasoning, the ECtHR held in *Nachova v Bulgaria*, with reference, *inter alia*, to various UN instruments and Article 6 FCNM,[106] that state authorities have a positive (procedural) obligation, that may also arise under Article 14, to investigate and unmask potential racist motives in the context of violent incidents, in order to maintain the confidence of minorities in the ability of the authorities to protect them from the threat of racist violence.[107] This is so because

> treating racially induced violence and brutality on an equal footing with cases that have no racist overtones would be to turn a blind eye to the specific nature of acts that are particularly destructive of fundamental rights.[108]

Building further on *Thlimmenos*, in *Chapman v UK*, regarding the housing situation of the Roma/Gypsies,[109] the Grand Chamber held that the vulnerable position of Roma/Gypsies as a minority means that 'some special consideration should be given to their needs and their different lifestyle both in the relevant regulatory … framework and in reaching decisions in particular cases', entailing a positive obligation under Article 8 to facilitate the Gypsy

103 ECtHR, *Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium* (Merits), (*Belgian Linguistics* case) (1968) 1 EHRR 252.

104 Ibid., p. 31.

105 ECtHR, *Thlimmenos v Greece*, no 34368/97 [GC], 06.04.2000, para. 44.

106 ECtHR, *Nachova v Bulgaria*, nos 43577/98 and 43579/98 [GC], 06.07.2005, paras. 76–82.

107 Ibid., para. 160.

108 Ibid.

109 Although 'Gypsy' is considered pejorative by the Roma, the British travelling communities seem commonly to self-identify as 'Gypsy' and 'Traveller'. See Helen O'Nions, *Minority Rights Protection in International Law: The Roma of Europe*, Routledge: London, 2007, pp. 3–4.

way of life.[110] Yet, by a 10–7 majority, the Court found no violation of Article 8 ECHR in that case, by deferring to the evaluation made by the national authorities, which had concluded that the general interest in preserving the rural character of the countryside prevailed over the personal circumstances of the applicant, which had been duly considered.[111] The Court considered international developments, that is, the FCNM (Articles 1, 4 and 5), some non-binding instruments adopted by the CoE and the EU, and developments in the OSCE.[112] The judgment was hailed for referring for the first time to:

> an emerging international consensus amongst the Contracting States of the Council of Europe recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle …, not only for the purpose of safeguarding the interests of the minorities themselves but to preserve a cultural diversity of value to the whole community.[113]

Yet, those instruments did not help the applicant. On the contrary, the programmatic character of the FCNM was invoked by the ECtHR to justify the wide margin of appreciation accorded to states and the corresponding 'strictly supervisory' role of the Court.[114]

The ECtHR further delimited the scope of positive obligations in *Yordanova and Others v Bulgaria*, where the Court clarified that it is 'very specific and relatively narrow' and aims to 'facilitate itinerant way of life which is determinative of an identity'.[115] *Yordanova* was the first of a line of cases brought by Roma or Traveller applicants representing entire communities and contesting their evictions from the land or houses (mostly hazardous makeshift dwellings) they had unlawfully occupied for some time.[116] The Court found a violation of Article 8, limiting the states' margin of appreciation, and ruling that,

110 ECtHR, *Chapman v UK*, no 27238/95, 18.01.2001, para 96. The following similar cases were decided in the same manner on the same day: ECtHR, *Beard v UK*, no 24882/94; ECtHR, *Coster v UK*, no 24876/94; ECtHR, *Lee v UK*, no 25289/94; and ECtHR, *Jane Smith v UK*, no 25154/94.

111 ECtHR, *Chapman*, *supra* note 110, paras. 94, 109–110.

112 Ibid., paras. 55–67.

113 Ibid., para. 93.

114 Ibid., para. 94.

115 ECtHR, *Yordanova and Others v Bulgaria*, no 25446/06, 24.04.2012, para. 131.

116 ECtHR, *Winterstein and Others v France*, no 27013/07, 17.10.2013; ECtHR, *Bagdonavicius and Others v Russia*, no 19841/06, 11.10.2016; ECtHR, *Hirtu and Others v France*, no 24720/13, 14.05.2020; ECtHR, *Paketova and Others v Bulgaria*, nos 17808/19 and 36792/19, 04.10.2022.

while evictions from unlawfully occupied land are in principle allowed, proportionality requires particular consideration of its consequences, the risk of homelessness, especially if the authorities had long tolerated the occupation, and the needs and different lifestyle of an unprivileged, socially disadvantaged and vulnerable minority group such as the Roma.[117] Such consideration could be given by assisting the Roma and Travellers to become eligible for available social dwellings,[118] or relocating them in social housing that corresponds to their lifestyle.[119] *Yordanova* and *Winterstein* referred to various materials on the housing situation of the Roma, including the case law of the ECSR, Recommendations by the CoM and the CoE Commissioner for Human Rights, a PACE Resolution and a EU Agency for Fundamental Rights (FRA) report.[120]

The Court extended the special consideration and protection due to minorities to the sphere of education in *D.H. v Czech Republic*, regarding the routine placement of Roma children in special schools.[121] In doing so, it referred extensively to several thematic recommendations of Council of Europe bodies (CoM, PACE and ECRI) on the situation/education of Roma.[122] In that context, the Court indicated that positive measures aiming to raise awareness of the importance of education among the Roma and to assist Roma pupils with difficulties in following the school curriculum, and thus address problems such as high drop-out rates, include the active and structured involvement of social services,[123] the setting up of appropriate support structures or safeguards against misdiagnosis of tests used to assess their learning abilities or difficulties.[124] Likewise, differential treatment, by means of introducing appropriate exceptions in favour of minority/Roma children, could entail facilitating their school enrolment even if some of the requisite administrative documents are missing.[125]

The *Chapman* rationale was also applied in *Muñoz Díaz v Spain*, regarding the refusal of the authorities to grant a survivor's pension to a Roma woman whose marriage was held according to Roma traditions, but was not solemnised under Spanish law although it was *de facto* recognised by the authori-

117 ECtHR, *Yordanova*, *supra* note 115, paras. 121, 126, 129, 133; ECtHR, *Winterstein*, *supra* note 116, paras. 150, 159–160.
118 ECtHR, *Yordanova*, *supra* note 115, para. 132.
119 ECtHR, *Winterstein*, *supra* note 116, para. 161.
120 ECtHR, *Yordanova*, *supra* note 115, paras. 73–82; *Winterstein*, *supra* note 116, paras. 80–98.
121 ECtHR, *D.H. v Czech Republic*, no 57325/00 [GC] 13.11.2007, para. 183.
122 Ibid., paras. 54–61.
123 ECtHR, *Oršuš and Others v Croatia*, no 15766/03 [GC], 16.03.2010, para. 177.
124 ECtHR, *Horvath and Kiss v Hungary*, no 11146/11, 29.01.2013, paras. 104, 119.
125 ECtHR, *Sampanis and Others v Greece*, no 32526/05, 05.06.2008, para. 86.

ties.[126] The Court found a breach of Article 14 in conjunction with the applicant's property rights, stressing that 'while the fact of belonging to a minority does not create an exemption from complying with marriage laws, it may have an effect on the manner in which those laws are applied'.[127] What is more, the Court's conclusion was informed by its observation that:

> under the Framework Convention for the Protection of National Minorities ..., the States Parties to the Convention are required to take due account of the specific conditions of persons belonging to national minorities.[128]

3.3.2 Indirect Discrimination

In the aftermath of *Thlimmenos*, the ECtHR appeared increasingly ready to accept the notion of indirect discrimination, but was still ambivalent as to the standard and burden of proof. In *Kelly and Others v UK*, which concerned the killing of Catholic men in Northern Ireland, the Court accepted the notion of indirect discrimination ('Where a general policy or measure has disproportionately prejudicial effects on a particular group, ... this may be considered as discriminatory notwithstanding that it is not specifically aimed or directed at that group'), but was hesitant to accept statistics as evidence disclosing a discriminatory practice under Article 14.[129]

In *Nachova v Bulgaria*, faced with the question whether or not racism was a causal factor in the shooting that led to the deaths of two Roma, the Grand Chamber was still hesitant to follow the Chamber's ruling that had shifted the burden of proof to the Government upon the finding of a *prima facie* case of discrimination, and maintained – albeit with some nuances – its stringent approach on the standard of proof ('proof beyond reasonable doubt') and on the burden of proof when assessing evidence for racist prejudice in the context of Article 14.[130]

The breakthrough came with *D.H.*, which not only explicitly endorsed the notion of indirect discrimination, but also clearly accepted less strict evidential rules.[131] The case concerned the placement of Roma children in special schools for children with learning difficulties, where they received inferior education,

126 ECtHR, *Muñoz Díaz v Spain*, no 49151/07, 08.12.2009.
127 Ibid., para. 61.
128 Ibid., para. 64.
129 ECtHR, *Kelly and Others v UK*, no 30054/96, 04.05.2001, para. 148.
130 ECtHR, *Nachova*, *supra* note 106, paras. 147, 157.
131 ECtHR, *D.H.*, *supra* note 121, para. 186.

based on psychological tests (apparently with their parents' consent) that did not take Romany specifics into consideration. Drawing on a variety of international sources, including EU law (Council Directives 97/80/EC and 2000/43/EC) and the case law of the CJEU, the Court held that applicants alleging indirect discrimination were not required to prove discriminatory intent, but could rely on any means, including reliable and sound statistics, to establish a *prima facie* case, shifting the burden of proof to the state, which must show that the difference in treatment is not discriminatory.[132]

This was the first of several cases in which the Court found the placement or overrepresentation of Roma pupils in special schools or in Roma-only schools or in Roma-only classes in ordinary schools to be in breach of Article 14 ECHR in conjunction with Article 2 of Protocol 1 to the ECHR.[133] Most of these cases abound with references to other international instruments, particularly country-specific reports that corroborate the applicants' allegations. For instance, in *Oršuš and Others v Croatia*, the Court referred extensively to reports of the ECRI, the ACFC and the CoE Commissioner on the educational segregation of Roma children in Croatia,[134] while in *X and Others v Albania*, the ECtHR also referred to successive European Commission progress reports on Albania in the context of the EU's enlargement process, in which school segregation was among the matters of serious concern.[135]

3.3.3 Reluctance to Engage in Discrimination Analysis

It is remarkable that, apart from the educational segregation cases, some cases involving police violence and some cases concerning political participation, particularly regarding ineligibility to stand for election,[136] in most other cases

132 Ibid., paras. 187–189. According to the Court, 'it would be extremely difficult in practice for applicants to prove indirect discrimination without such a shift in the burden of proof' (para. 189).

133 ECtHR, *Sampanis and Others*, *supra* note 125; ECtHR, *Oršuš and Others*, *supra* note 123; ECtHR, *Sampani and Others v Greece*, no 59608/09, 11.12.2012; ECtHR, *Horvath and Kiss*, *supra* note 124; ECtHR, *Lavida and Others v Greece*, no 7973/10, 30.05.2013; ECtHR, *Elmazova and Others v North Macedonia*, nos 11811/20 and 13550/20, 13.12.2022; ECtHR, *Szolczan v Hungary*, no 24408/16, 30.03.2023. In ECtHR, *X and Others v Albania*, nos 73548/17 and 45521/19, 31.05.2022, failure and delays in implementing desegregating measures in an elementary school attended almost exclusively by Roma and Egyptian children was found in breach of Article 1 of Protocol 12.

134 ECtHR, *Oršuš and Others*, *supra* note 123, paras. 65–86.

135 ECtHR, *X and Others*, *supra* note 133, paras. 45–47.

136 ECtHR, *Sejdic and Finci v. Bosnia and Herzegovina*, nos 27996/06 and 34836/06 [GC], 22.12.2009, para 50.

involving the Roma and other minorities, the Court refuses to engage in analysis under Article 14 ECHR. For instance, in cases concerning the forced sterilisation of Roma women,[137] as well as the aforementioned cases concerning the non-registration of associations and the forced evictions from and demolition of Roma houses, the Court prioritised its concern for judicial economy, insisting that, having found a breach of Article 8 (or Article 3 in *V.C. v Slovakia*) or Article 11, it does not consider it necessary to examine the complaint separately under Article 14.[138]

The ECtHR did engage in non-discrimination analysis and found a violation of Article 14, in conjunction with Articles 6 (fair trial) and 8, in the extreme circumstances of *Moldovan and Others v Romania*, involving racist attacks against the Roma applicants and severe hardship and destitution following the destruction of their houses, compounded by discriminatory remarks by the authorities.[139] It also did so in *Paketova*, which involved anti-Roma protests, compounded by discriminatory remarks (and a series of other omissions) by the authorities.[140] Thus, the Court largely sticks to a very high – and much criticised – threshold that requires strong objective evidence of an organised policy or intentional racially motivated conduct.

3.4 *Education*

The first Strasbourg case on the right to education was the aforementioned *Belgian Linguistics Case*, where the ECtHR ruled that Article 2 of Protocol 1 did not guarantee education in a language of one's choice,[141] and did not require states to establish or subsidise schools providing education in a given language.[142] Hence, the Court held unanimously that, despite the harsh consequences for French-speaking families in the Dutch-speaking regions, the contested legislation was not arbitrary but fell within Belgium's wide margin of appreciation and served the legitimate aim of achieving linguistic homogene-

137 ECtHR, *V.C. v Slovakia*, no 18968/07, 08.112011; ECtHR, *N.B. v Slovakia*, no 29518/10, 12.06.2012; ECtHR, *I.G. and Others v Slovakia*, no 15966/04, 13.11.2012.

138 This refusal was subject to criticism in dissenting opinions, such as by Judge Mijović in *V.C.*, Judge Keller in *Bagdonavicius*, and Judge Power-Forde in *Winterstein*. See also N. Baumgart, 'The European Court of Human Rights and the Protection of National Minorities: Are We There Yet?', (2023) 20(1) *European Yearbook of Minority Issues*, p. 109.

139 ECtHR, *Moldovan and Others v Romania*, nos 41138/98 and 64320/01, 12.06.2005, paras. 139–140.

140 ECtHR, *Paketova and Others*, *supra* note 116, para. 167.

141 ECtHR, *Belgian Linguistics case*, *supra* note 103, p. 32, para. 11.

142 Ibid., p. 30, para 9 and p. 39, para. 7.

ity within the two large regions of Belgium where a large majority spoke only one of the two national languages.[143]

By contrast, the ECtHR found a breach of the right to education in two cases relating to occupied territories. In *Cyprus v Turkey*, the ECtHR held that the abolition of Greek-language secondary schools for Greek Cypriot pupils living in Turkish-occupied northern Cyprus violated Article 2 of Protocol 1, pointing out that since they were receiving primary education in Greek they should continue receiving secondary education in Greek.[144] In *Catan and Others v Moldova and Russia*, the Court held that the forced closure of Moldovan-language schools using the Latin script in Transdniestria, aiming at the Russification of the region's Moldovan population, was attributable to Russia and violated the pupils' right to education in their national language.[145] In *Catan*, the Court made an exemplary integrative interpretation of Article 2 of Protocol 1. Recalling fundamental tenets of the Convention's interpretation and application, the Court highlighted that the provision's context is a treaty for the effective protection of individual human rights, whose object and purpose require that its provisions be interpreted and applied so as to make its safeguards practical and effective, and must be interpreted in a way that promotes internal consistency and harmony between its various provisions, particularly Articles 8, 9 and 10, as well as in harmony with other relevant rules of international law.[146]

Those tenets were largely overshadowed in the ECtHR's recent judgments on Latvia's educational reform of 2018, where the Court reaffirmed its ruling in the *Belgian Linguistics case* and prioritised Latvia's wide margin of apprecia-

143 Ibid., p. 40, para. 7 and p. 45, para. 13. The Court did, however, narrowly (8–7) find a violation of Article 2 in conjunction with Article 14, in respect of the French-speaking children that were denied access to French-language schools in six predominantly Dutch-speaking communes, which were accorded special status and offered bilingual education. The sole ground for the denial was that their parents were not living in those communes but in the (nearby) Dutch unilingual region, which was found to be discriminatory treatment because the same residence condition did not apply to the Dutch-speaking children resident in the French unilingual region (ibid., pp. 65–67, para. 32).

144 ECtHR, *Cyprus v Turkey*, no 25781/94 [GC], 10.05.2001, para. 278.

145 ECtHR, *Catan and Others v Moldova and Russia*, nos 43370/04, 8252/05 and 18454/06 [GC], 19.10.2012, paras. 143–144, 150. See also para. 137: 'the right to education would be meaningless if it did not imply in favour of its beneficiaries, the right to be educated in the national language or in one of the national languages, as the case may be'.

146 Ibid., para. 136 (referring to the Universal Declaration of Human Rights, the Convention against Discrimination in Education, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Rights of the Child).

tion over substantive equality and minority rights considerations. The reform significantly increased Latvian – the state's only official language – as the language of instruction in public schools (*Valiullina*), in private schools (*Džibuti*), as well as in public and private pre-school education (*Djeri*) and reduced Russian, which, however, could still be used in the educational system to varying degrees.[147] The Court took into consideration, *inter alia*, the consequences of Russia's long unlawful occupation of Latvia and the legitimate aim and need to protect and strengthen the official language as part of the state's constitutional identity, concluding that the differential treatment of Russian-speaking pupils served a legitimate purpose and was proportionate.[148]

More importantly for present purposes, the Court held that the FCNM and other developments in international law in the last more than 50 years were not sufficient to overrule its conclusion in the *Belgian Linguistics case* that the right to education under the ECHR does not include the right to access educational institutions in a language of one's choice. The Court's assessment was based on a rather selective use of the relevant material. It trivialised the FCNM's relevance to the matter by referring to its Explanatory Report, which does leave states parties a wide margin of discretion, but sidestepped the ACFC's interpretation of the FCNM as a living instrument, as exemplified in the relevant Thematic Commentary and – most importantly – the Committee's clear (and critical) views of Latvia's policy. Instead, the Court picked out a single reference from the Thematic Commentary that corroborated its own approach. This undermined the authority of the ACFC, as evidenced by Latvia's rejection of the Committee's relevant recommendations by reference to the judgments of the ECtHR.[149]

147 ECtHR, *Valiullina and others v Latvia*, nos 56928/19 and 2 others, 14.09.2023; ECtHR, *Džibuti and others v Latvia*, nos 225/20 and 2 others, 16.09.2023; ECtHR, *Djeri and others v Latvia*, nos 50942/20 and 2022/21, 18.07.2024.

148 ECtHR, *Valiullina*, *supra* note 147, paras. 200, 206–215.

149 See Comments of the Government of Latvia on the Fourth Opinion of the Advisory Committee on the implementation of the Framework Convention for the Protection of National Minorities by Latvia, 19.02.2024, GVT/COM/IV(2024)001, paras. 23 and 130 ('Latvia repeatedly draws the Advisory Committee's attention to the 2023 judgments of the Court'). The Committee's assessment and recommendations in the Fourth Opinion are based on the educational reform of 2022, which by and large surpassed that of 2018 in further reducing the teaching of Russian, but Latvia's response to the Committee did not make that distinction.

4 Concluding Remarks

Taking stock of minority rights protection in Europe in recent decades, there is a lot to commend. Starting with norm-setting, Europe has moved from rudimentary rules to a fully-fledged minority-specific Convention, which has successfully built on the pioneering work of the OSCE. Both the OSCE and the CoE made a good and expedient use of their comparative advantages to transform the legal landscape of minority rights in Europe in less than four years in the 1990s. The EU did not follow suit but has used the FCNM as the normative and compliance yardstick in its enlargement policy, adding some 'teeth', albeit in uneven and unprincipled ways. Overall, the OSCE and its HCNM through, *inter alia*, the High Commissioner's Recommendations and Guidelines, the CoE through the resolutions and recommendation of various organs, but especially through the FCNM and the work of the ACFC, including the Thematic Commentaries, as well as the EU, especially in the framework of its enlargement process, have acted in synergetic cooperation, reinforcing each others' work for the benefit of minorities both in the normative field and in their monitoring and other activities on the ground.

Admittedly, the legal situation of minorities would have been even better if the Additional Protocol to the ECHR, which was forcefully advocated by the PACE, had not been aborted. Yet, much of the initial criticism of the FCNM for its programmatic character and weak monitoring mechanism has been addressed to a considerable extent in the laudable work of the ACFC. Nevertheless, the FCNM is still not a 'pan-European' instrument, since eight CoE states are not party to the Convention. This factor, in conjunction with the prioritisation of the ECtHR over the FCNM under Articles 19 and 23 of the FCNM, highlights the role of the Strasbourg Court in ensuring coherence in the multi-layered European minority rights regime.

Indeed, the ECtHR has worked towards that goal, gradually adding more strength to this framework. Immersed in its mission to safeguard democracy in Europe and building on its strong jurisprudence on democratic/cultural pluralism, the Strasbourg Court has developed a rich body of case law, addressing many issues and concerns of special relevance to minorities. It has done so in the context of its evolutive and integrative interpretation of the Convention, by drawing on this synergetic framework with reference to the normative and monitoring work of the UN, the OSCE, the EU and, of course, the FCNM/ACFC and other CoE bodies working in the field of minority protection. This is done commonly under the heading 'Relevant international law' of the Court's judgments, where the ECtHR explains the basis for its legal analysis, but frequently also in the essential part of its judgments (under the

heading 'The law'), which concerns the interpretation and application of the Convention.[150]

Yet, in some politically sensitive cases (*Gorzelik*, *Valiullina,* etc.), the ECtHR has rendered minority-insensitive judgments, prioritising majoritarian democracy through the (wide) margin of appreciation of states over the rights of minorities to preserve their identity, resulting in tension with the approach of the ACFC, which could undermine the latter's authority.[151]

On balance, however, the ECtHR has largely done its share in ensuring considerable coherence in European minority rights law. The main challenge that lies ahead in an era of rising – if not reigning – populism and backlash against human and minority rights and international institutions, is to safeguard the synergetic framework of cooperation and its achievements in minority rights protection for the sake of equality, justice, stability, cultural diversity, democratic security and peace in Europe.

150 See A. Nußberger, 'The ECtHR' Use of Decisions', *supra* note 79, pp. 420–421.

151 See also S. Berry, 'Democracy and the Preservation of Minority Identity', *supra* note 2, p. 222.

Defending Democracy or Subverting Rights? The Role of 'Militant Democracy' in Baltic States Cases before the ECtHR

Donatas Murauskas

Abstract

In this paper, I examine the evolving jurisprudence of the European Court of Human Rights (ECtHR) on 'militant democracy,' with a particular focus on recent cases from Latvia and Lithuania. I explore how the Court navigates the tension between protecting democratic order and upholding fundamental rights, particularly in response to contemporary security threats such as hybrid warfare. The study argues that the ECtHR has moved beyond a rigid application of Article 17 of the Convention, instead embracing a more context-sensitive approach rooted in subsidiarity and national constitutional identity. By analysing cases such as *Savickis and Others v Latvia*, *Ždanoka v Latvia* (*No. 2*) and *Kirkorov v Lithuania*, I highlight the Court's evolving stance on external threats manifesting through more individualised analysis of the domestic specificity.

1 Introduction

Democracy is inherently fragile. It can serve as a powerful instrument for achieving noble ends and fostering an inclusive society. Yet, it can also be exploited for wrongful purposes. As A. Sajó points out, '[w]ithin the framework of the democratic process, using the mechanisms of democracy (free speech, assembly, elections), a regime may be established that dissolves democracy'.[1]

What if an adversary exploits the mechanisms of democracy for wrongful purposes? Are there legal tools that can both uphold democratic values, including fundamental rights, and safeguard democracy itself? There is no straightforward answer. However, the European Court of Human Rights (the ECtHR or the Court) frequently encounters attempts to invoke human

1 A. Sajó, 'From Militant Democracy to the Preventive State', (2006) 27 *Cardozo Law Review*, p. 2262.

© DONATAS MURAUSKAS, 2026 | DOI:10.1163/9789004751026_012
This is an open access chapter distributed under the terms of the CC-BY-NC-ND 4.0 license.

rights enshrined in the Convention as a basis for challenging measures adopted by member states to counter perceived existential threats to their constitutional order. As the supranational human rights framework governing most European states, the Convention for Protection of Human Rights and Freedoms (the Convention) system provides a unique vantage point from which to observe the evolving dynamics of applicants' claims regarding alleged violations of the Convention – claims that governments justify as necessary responses to protect democracy.

The objective of this paper is to examine the ongoing evolution of the Court's case law concerning situations that pose an existential threat to the state. I systematise the Court's approaches to cases that align with the concept of 'militant democracy', with particular emphasis on those involving the Baltic states. In my view, the Lithuanian and Latvian cases exhibit distinctive characteristics that reflect their specific historical and political contexts, thereby necessitating a recalibrated judicial approach to threats against the constitutional order of states.

Although the concept of 'militant democracy' seemed to fade after the end of the Cold War, it has recently re-emerged.[2] The reasons for this resurgence include its potential use to justify restrictions on freedom of religion (primarily in relation to Islam), the rise of populism and the emergence of new forms of authoritarianism – regimes that formally claim to uphold democracy while selectively maintaining certain democratic elements.[3] I argue that the Court's most recent case law represents another step in its ongoing effort to balance the protection of human rights with respect for the constitutional order and sovereignty of states. This statement provides empirical support for the trend already identified by a number of authors, namely, the shift from the traditional paradigm of militant democracy.[4] Some of the cases pending adjudication at the time of this paper's submission continue to place this debate at the core of their subject matter.[5]

2 J.-W. Müller, 'Militant Democracy and Constitutional Identity', in G. Jacobson and M. Schor (eds.), *Comparative Constitutional Theory*, Edward Elgar: Chaltenham/Northamption, 2018, p. 415.

3 Ibid., pp. 415–416.

4 P. de Moree, *Rights and Wrongs under the ECHR: The Prohibition of Abuse of Rights in Article 17 of the European Convention on Human Rights*, Intersentia: Cambridge/Antwerp/Portland, 2016, p. 238. P. Harvey, 'Militant Democracy and the European Convention on Human Rights', (2004) 29(3) *European Law Review,* pp. 409–412.

5 See e.g. G. Baranowska, 'What, if any, are the Consequences of the Instrumentalization of Migration for Human Rights Protection under the ECHR? A Look at the Arguments Raised at the ECtHR', *Strasbourg Observers*, 4 March 2025, available at https://strasbourgobservers

Human rights are an inalienable feature of democracy. However, they can also be subject to abuse. The long-term objective of undermining democracy and fundamental rights may, paradoxically, be pursued through actions that formally rely on the functioning of democratic institutions and the fundamental rights enshrined in the Constitution. A. Kirshner has highlighted that the moral costs of militant action and the inherent challenges of protecting democracy remain ambiguous and insufficiently defined. As a result, there is no clear principled framework for determining when defensive measures are justified or how to address the harm they may inflict.[6] This demonstrates the importance of identifying the legal instruments available to both applicants and governments in disputes where the constitutional order is at stake.

This research aims to delineate the conceptual boundaries and meaning of 'militant democracy' within the framework of the ECtHR. To this end, a comprehensive literature review was undertaken, drawing on academic databases to identify scholarly articles, legal analyses and other substantial contributions to the subject. Given that militant democracy is frequently associated with states of emergency, I also examined the protection of human rights in such contexts. This entailed an analysis of legal frameworks, case law and academic discourse concerning the balance between democratic principles and security imperatives. I conducted a distinct doctrinal analysis of the case law of the ECtHR, with a particular focus on the prohibition of the abuse of rights under Article 17 of the Convention. Using the HUDOC database, I identified cases in which the Court has applied Article 17 and explicitly referenced the concepts of 'militant democracy' and 'democracy capable of defending itself'. Furthermore, I examined cases involving the Baltic states that may illustrate circumstances in which external actors seek, albeit indirectly, to influence or destabilise the state.[7]

.com/2025/03/04/what-if-any-are-the-consequences-of-the-instrumentalization-of-migration-for-human-rights-protection-under-the-echr-a-look-at-the-arguments-raised-at-the-ecthr-g/, last accessed 10.03.2025.

6 A.S. Kirshner, *A Theory of Militant Democracy: The Ethics of Combatting Political Extremism*, Yale University Press: New Haven/London, 2014.

7 I wish to thank the committed participants in the discussion on 8 April 2025 at Jagiellonian University in Kraków, organised by Dr hab. Wojciech Ciszewski, for their valuable feedback on an earlier draft of this paper. I am also grateful to those attending f the lecture 'Defending Democracy or Restricting Rights? Militant Democracy in the ECtHR', held at Vilnius University on 12 March 2025. Finally, my thanks go to the anonymous reviewer whose detailed and insightful analysis greatly contributed to the improvement of this work.

This research does not address constitutional identity in the context of EU law, as it constitutes a distinct and complex domain requiring a separate analytical approach. Moreover, while engaging with concepts derived from political science, I do not seek to develop a comprehensive argument in that field. My objective is limited to examining recent ECtHR cases against Latvia and Lithuania, specifically in the light of the [alleged] attempt by the Court to align the Convention framework with the existential threats faced by member states.

First, I establish the conceptual foundations of 'militant democracy', including an analysis of the 'scissors effect' between ECHR obligations and national constitutional orders. Second, I examine the evolution of 'militant democracy' in the case law of the ECtHR, focusing on the practical developments in the interpretation of the Convention, including Article 17. This section provides a positive analysis of these interpretative trends. Third, I analyse the Latvian and Lithuanian cases before the ECtHR as a key area for the development of a more nuanced application of 'militant democracy'. In particular, considering the *Savickis and Others v Latvia*[8], *Ždanoka v Latvia No. 2*[9] and *Kirkorov v Lithuania*[10] cases, I argue that the ECtHR's current case law seeks to shift the role of 'militant democracy' away from an overly restrictive interpretation of Article 17 of the Convention towards a more context-sensitive approach. This approach, grounded in the legitimate aims of restrictions, aligns with the principles of subsidiarity and judicial dialogue.

2 The Conceptual Foundations of 'Militant Democracy'

2.1 *The Theory Is Political, and the Practice Is Legal*

By focusing on 'militant democracy' in the legal system, I find myself wading into deep waters that do little to enhance clarity. The topic permeates political and legal sciences, appears in practical political discourse, is referenced in real-world applications, and spans various fields of law. While this may align with the ever-present call for 'interdisciplinarity', the complexity of the subject does not necessarily contribute to greater clarity. But let us try anyway.

The idea of 'militant democracy' is related to the legal and political framework designed to safeguard 'democracy against those who want to overturn it from within or those who openly want to destroy it from outside by utilizing

8 ECtHR, *Savickis and Others v Latvia,* no 49270/11 [GC], 09.06.2022.

9 ECtHR, *Ždanoka v Latvia* (*No. 2*), no 42221/18, 25.07.2024.

10 ECtHR, *Kirkorov v Lithuania,* no 12174/22, 19.03.2024.

democratic institutions as well as support within the population'.[11] This understanding of 'militant democracy' aligns with M. Steuer's argument that its rationale is rooted in the assumption that unrestricted freedoms within a democracy may enable actors seeking to dismantle it to gain traction and ultimately succeed.

M. Steuer indicates that 'the rationale for militant democracy stems from the assumption that if unbounded liberty is permitted in democracies, those actors striving to overthrow it and introduce some form of authoritarianism will be more likely to succeed'.[12] Even if most citizens do not support the ideas promoted by anti-democratic actors, their trust in democracy may still be weakened in the process.[13] Therefore, 'militant democracy is a rational response to prevent (negative) emotional reactions leading to the downfall of the regime'.[14]

The conceptual foundations of 'militant democracy' were set by K. Loewenstein in his famous two articles on 'Militant Democracy and Fundamental Rights'.[15] K. Loewenstein, who coined the term, explained that fascism took advantage of democracy's vulnerabilities to seize power, ultimately intending to dismantle the system from the inside.[16] By referring to the failure of the Weimar Republic to sustain its democracy and liberties against the Nazis, he argued for the need for democracies to fight the threat using the methods the threat used:

> More and more, it has been realized that a political technique can be defeated only on its own plane and by its own devices, that mere acquiescence and optimistic belief in the ultimate victory of the spirit over force only encourages fascism without stabilizing democracy.[17]

C. Schmitt may also be considered one of the theorists associated with the concept of 'militant democracy', although he did not use the term explicitly.

---

11 S. Pfersmann quoted in J.-A. Santos, 'Constitutionalism, Resistance and Militant Democracy', (2015) 28 *Ratio Juris*, p. 395.

12 M. Steuer, 'Militant Democracy', in S. N. Romaniuk and P. N. Marton (eds.), *The Palgrave Encyclopedia of Global Security Studies*, Palgrave: Cham, 2023, p. 955.

13 Ibid.

14 Ibid., p. 956.

15 K. Loewenstein, 'Militant Democracy and Fundamental Rights I', (1937) 31(3) *The American Political Science Review*, pp. 417–432; K. Loewenstein, 'Militant Democracy and Fundamental Rights II', (1937) 31(4) *The American Political Science Review*, pp. 638–658.

16 K. Loewenstein, 'Militant Democracy and Fundamental Rights I', *supra* note 15, p. 424.

17 Ibid., p. 430.

He emphasised that a constitution has validity because it originates from a constitution-making authority and is founded on the will of that power. He stressed that the political existence of the state served as the foundation for unity and order.[18] His approach to constitutional order suggests that democratic freedoms may be restricted – contrary to standard constitutional principles – if such measures are deemed necessary to safeguard the 'political core' of the constitution itself.[19]

The difficulty of defining this 'political core' and the extent to which the measures may still be valid within the constitutional order are among the major concerns discussed by scholars. The 'systematic unity'[20] of the constitution makes the constitutional identity a key for understanding how a society member belongs to the people governed by the constitution. C. Schmitt's suggestion that the political nature of this belonging complicates the implementation of liberal democracy that is purely normative. The idea of substantive democracy (advocated by C. Schmitt, among others) is in a direct clash with the ideas of modern multicultural societies.[21]

This tension between democratic principles and the necessity of restricting certain freedoms to protect the constitutional order raises the question how far a democratic state may go in countering its challengers. A democratic state may counter its challengers through various measures that appear antidemocratic, ranging from restricting access to political office to engaging in covert actions.[22] While the term 'militant democracy' may not always be explicitly invoked, similar outcomes can be achieved through other legal and political mechanisms. In *Herri Batasuna and Batasuna v Spain,*[23] the ECtHR ruled that the Spanish Supreme Court's decision to ban the party – later upheld by the Spanish Constitutional Court – fell within the narrow margin of appreciation afforded to states and could reasonably be considered to meet 'an imperative social need'.[24]

---

18 C. Schmitt, *Constitutional Theory*, Duke University Press: Durham/London, 2008, pp. 64–65.

19 C. Invernizzi Accetti and I. Zuckerman, 'What's Wrong with Militant Democracy?', (2017) 65 *Political Studies*, p. 186.

20 C. Schmitt, *Constitutional Theory*, *supra* note 18, p. 65.

21 See R. O'Connell, 'Theories of Democracy', in R. O'Connell (ed.), *Law, Democracy and the European Court of Human Rights*, Cambridge University Press: Cambridge/New York, 2020.

22 A.S. Kirshner (2014), *A Theory of Militant Democracy*, *supra* note 6.

23 *ECtHR, Herri Batasuna and Batasuna v Spain,* nos 25803/04 and 25817/04, 30.06.2009.

24 J.-A. Santos, 'Constitutionalism, Resistance and Militant Democracy', *supra* note 11, p. 401.

Rights that may be restricted under the framework of 'militant democracy' include freedom of speech, the exercise of religion (in certain cases), freedom of association, freedom of assembly, and, in some instances, surveillance and detention without judicial oversight.[25] However, the framework of 'militant democracy' also poses a threat to a democratic order, which is an interesting paradox itself – by grounding the need to interfere with certain democratic features of a state the authorities impose restrictions on democratic order if we assume the morally neutral meaning of liberal democracy.

Although the concept of 'militant democracy' originates in political science, the issues it addresses – particularly the abuse of legal mechanisms to undermine democracy – are deeply intertwined with concrete legal challenges. These challenges primarily arise in the domains of international and constitutional law, particularly from the perspective of human (fundamental) rights.

Consider one of the early cases before the European Commission of Human Rights (EComHR), *German Communist Party and Others v Germany*.[26] The German Federal Constitutional Court dissolved and banned the Communist Party. The EComHR declared the party's application inadmissible, citing Article 17 of the Convention and reasoning that the party's objective – the establishment of a dictatorship of the proletariat – was incompatible with the values enshrined in the Convention. While the broader implications of the case may appear political – given that the party sought to dismantle the existing constitutional framework – the legal dimension is equally significant. The party's dissolution was carried out under a constitutional provision, and its challenge before the EComHR was framed through specific Convention rights.

2.2 *Between National and International*

The concept of 'militant democracy' is complex, as its rationale is rooted in domestic legal orders (the constitutional framework of a state) while its effects extend into the realm of international law. This dual nature creates tensions between national sovereignty and international legal obligations.

At the core of the hierarchy between militant democracy and human rights lies a fundamental question: the primacy of international law versus constitutional law.[27] The principles of militant democracy are anchored in national

25 A. Sajó 'From Militant Democracy to the Preventive State', *supra* note 1, pp. 2274–2275.

26 EComHR, *German Communist Party* (KPD) *v Germany*, no 250/57, 20.07.1957.

27 This does not negate the tension within the constitutional framework itself. Many cases on the international level are grounded on the adjudication of the same issues at the national level (as part of the requirement to exhaust all domestic measures before applying to international tribunals). However, for the purposes of this paper, I underline

legal orders, often in direct contrast with potential conflicts arising from international obligations.

For instance, when addressing conflicts between United Nations (UN) Security Council measures and internationally protected human rights, the issue is framed as a question of hierarchy between two normative sources operating at the same level – both derived from international law within the context of collective security.[28] However, the situation is different in the context of 'militant democracy'. Here, the conflict arises between international law and the highest domestic legal norms, such as constitutional provisions. The resolution of this conflict often depends on the legal perspective of the respondent, with different fields of law offering distinct approaches to reconciling these tensions.

'Militant democracy' seeks to safeguard the democratic order of a sovereign state, which can be seen as a prerequisite for the effective implementation of human rights standards. State sovereignty, grounded in the principle of non-interference in domestic affairs, remains the Westphalian foundation of the post-war international order – an order in which nation-states coexist as equals under a collective pact of negative liberty.[29]

However, while a sovereign state may reasonably argue that preserving its democratic order justifies certain constitutional limitations, the situation becomes far more complex when such prioritisation conflicts with the state's human rights obligations. These obligations, rooted in the principle of *pacta sunt servanda*, require states to uphold their international commitments to human rights, creating a legal and normative tension between democratic self-preservation and adherence to binding international norms.

Article 1 of the Convention establishes the general obligation of member states to secure the rights and freedoms enshrined therein. However, states do not relinquish their sovereignty entirely. Rather, they seek to balance their international obligations with the sensitive demands of their own constitutional frameworks. It is within this delicate interplay between international commitments and domestic constitutional priorities that the concept of 'mili-

---

the tension of national vs international (supranational) while applying the 'militant democracy' concept.

28 See A. Tzanakopoulos, 'Collective Security and Human Rights', in E. de Wet and J. Vidmar (eds.), *Hierarchy in International Law: The Place of Human Rights*, Oxford University Press: Oxford, 2012, p. 44.

29 M. Goodale, 'Human Rights beyond the Double Bind of Sovereignty', in B. Fassbender and K. Traisbach (eds.), *The Limits of Human Rights*, Oxford University Press: Oxford, 2020, p. 81.

tant democracy' emerges, highlighting the tensions between safeguarding democratic order and adhering to supranational human rights obligations.

This tension between international obligations and domestic constitutional priorities is further complicated by the relationship between state sovereignty and popular sovereignty, particularly in the context of defining and enforcing human rights. State sovereignty, often perceived as an obstacle to the realisation of universal human rights, is deeply intertwined with popular sovereignty. It is national citizens who determine the content, scope and applicability of human rights law that constrains the democratic state.[30] As a result, tensions arise between the rights owed to citizens and those owed to non-citizens, leading to the politicisation of human rights law.[31] However, as C. Calhoun argues, nationalism has also been – and continues to be – an often-overlooked source of solidarity. Through its commitment to public institutions and civic values, nationalism can serve as one of the foundational conditions for democracy itself.[32]

The conflict between constitutional orders and international human rights obligations contributes to the fragmentation of international human rights law, as the specific constitutional contexts of individual states may be placed at risk in various ways. As K. Nash has noted:

> in fact, it can be argued that international law will never become a predictable, routinely applied set of coherent and consistent rules precisely because, in the absence of global consensus on fundamental norms, and without a final authoritative law-maker and enforcer at the global scale, states remain the most important actors in making and institutionalising international human rights law.[33]

The ECtHR is no exception. While the Court seeks to develop a coherent and universal approach to conflicts between constitutional orders and human rights obligations – particularly in cases concerning 'militant democracy' – its case law remains highly context-specific.

---

30 K. Nash, 'Human Rights, Global Justice, and the Limits of Law', in B. Fassbender and K. Traisbach (eds.), *The Limits of Human Rights*, *supra* note 29, p. 75.

31 Ibid., p. 76.

32 Ibid. Also C. Calhoun, *Nations Matter: Culture, History, and the Cosmopolitan Dream*, Routledge: London/New York, 2007, p. 17.

33 K. Nash, 'Human Rights, Global Justice, and the Limits of Law', *supra* note 31, p. 71. Also see S.D. Krasner, 'The Whole in a Hole', (2004) 25(4) *Michigan Journal of International Law*, pp. 1076–1078.

The scholarship on 'militant democracy' highlights specific conceptual challenges in the development of this doctrine. I have identified three major dilemmas that, in my view, also reflect the evolution of the Court's case law. Accordingly, I examine these dilemmas briefly to establish a foundation for the subsequent discussion of the Court's jurisprudence.

2.3 *Protecting Democratic Order or Destroying It?*

The potential abuse of legal mechanisms designed to address threats to democracy has been a concern since the initial discussions of this concept. J.-W. Müller cautions against the use of constitutional identity as a justification for restricting human rights, noting that 'constitutional identity can become a sword (wielded against minorities) or a shield against criticism of authoritarian populist projects'.[34] He further warns that 'the focus on historical particularity and identity can also justify restrictions in areas of public and even private life that have nothing directly to do with party politics and the survival of democracy'.[35]

This concern raises a fundamental question about the very nature of militant democracy: whether the measures taken to protect democracy ultimately risk eroding its core principles, as M. Steuer critically asks, '[w]ill democracies employing such measures remain democratic, or will they basically adopt some of the techniques democracy's opponents long for?'[36] M. Steuer illustrates this dynamic through the political situation in Slovakia. A Slovak MP from an extreme right political party, when prosecuted for extremist speech with the potential to incite hatred and violence, claimed that the trial was politically motivated, designed to exclude him from parliament, and indicated that Slovakia is a police state. In this way, the implementation of militant democratic measures becomes not only a legal challenge but also a battle of competing narratives. Crucially, the outcome of the legal process does not necessarily determine the success or failure of the broader political discourse surrounding it.[37] This underlines the complex interplay between law and political rhetoric in shaping perceptions of democracy and its legitimacy.

2.4 *What Are We Actually Safeguarding?*

Another conceptual issue within the legal framework for defending democratic order concerns the point of reference. Are we safeguarding democracy

34 J.-W. Müller, 'Militant Democracy and Constitutional Identity', *supra* note 2, pp. 434–435.
35 Ibid., p. 425.
36 M. Steuer, 'Militant Democracy', *supra* note 12, p. 955.
37 Ibid.

as a universally recognised principle, or are we preventing threats to a specific constitutional order shaped by a state's unique constitutional identity? Referring to C. Schmitt's notion of the 'political core' of the constitution,[38] this perspective prevails. The response to this question leads to fundamentally different legal and theoretical outcomes, shaping further discussions on the subject. In my view, prioritising a specific constitutional order – one that reflects a state's constitutional tradition and identity – is a more viable approach, as it allows for a context-sensitive analysis of the challenges individual states face.

The theoretical notion that certain provisions constitute the 'political core' of a constitution conforming to the foundation of the constitutional framework – presents a challenge in determining which provisions qualify as such. In this regard, unless a constitutional system explicitly identifies these 'political core' provisions, it is difficult to assert that any particular provision requires a higher level of protection. The concept of constitutional identity may be regarded as the 'political core' of a constitution.

Constitutional identity has the potential to undermine the essence of certain human rights. For instance, in a highly homogenous society, constitutional identity may be invoked to legitimise measures that are oppressive towards minorities. This can lead to conflicts with the state's human rights obligations at the international level. As S. Levinson emphasises, there will always be a degree of alienation experienced by some members of minority groups in relation to the dominant culture, highlighting the inherent tensions between national identity and the protection of universal human rights.[39]

Besides, the belief in a political community's self-definition and the values it upholds is essential. Without this foundation, anti-democratic actors may successfully promote their narrative, framing democrats as 'hypocritical' and undermining the legitimacy of their core principles.[40] We may witness a trend that an increasing number of people perceive their nation-state, rather than international institutions, as the sole dependable 'area of freedom, security,

38 C. Invernizzi Accetti and I. Zuckerman, 'What's Wrong with Militant Democracy?', *supra* note 19, p. 186.

39 See S. Levinson, discussing Y. Tamir's approach towards Israeli Arabs and Palestinians in S. Levinson, 'The Continuing Spectre of Popular Sovereignty and National Self-Determination in an Age of Political Uncertainty', in M. A. Graber, S. Levinson and M. Tushnet (eds.), *Constitutional Democracy in Crisis?*, Oxford University Press: New York, 2018, p. 662.

40 M. Steuer, 'Militant Democracy', *supra* note 12, p. 958.

and justice' that must be protected from foreign or international interference.[41]

The question of what is being safeguarded is closely tied to the question of who constitutes the self-determining authority and the 'sovereign'. According to S. Levinson, Wilsonian self-determination implies a people united by shared characteristics, suggesting a more homogenous society.[42] Fundamentally, the concept of a democracy capable of defending itself serves as a legal mechanism to preserve at least some degree of self-determination within the constraints of Convention obligations. This raises the question of whether the national constitutional order genuinely reflects the views and will of the constituency.

2.5 *How to Define 'Enemy'?*

The two-dimensional relationship inherent in militant democracy – the sovereign versus the enemy – raises significant challenges in defining the characteristics of 'the enemy'. This issue lies at the heart of the fundamental tensions between militant democracy and human rights. The distinction between 'friend' and 'enemy' reminds us, yet again, of the fundamental (although very disputed) works of C. Schmitt. *The Concept of the Political*[43] is the most prominent work, where he develops the idea of antagonism between social organisations unified under specific sets of values and defending them.

The original concept of 'militant democracy' emerged in specific historical contexts as a preventive mechanism against radical political movements that threatened the constitutional order, as seen in the Weimar Republic. This rationale is reflected in the case law of the ECtHR, particularly in cases concerning Germany. For instance, in *Voigt v Germany,*[44] the Grand Chamber ruled that Germany had violated Articles 10 and 11 of the Convention in a case involving the dismissal of a teacher from civil service due to her political activities on behalf of the German Communist Party. Although this was the violation judgment, the Court ruled that the aim of the interference at issue was legitimate:

41 B. Fassbender, 'The State's Unabandoned Claim to Be the Centre of the Legal Universe', (2018) 16(4) *International Journal of Constitutional Law*, p. 1214.

42 S. Levinson, 'The Continuing Spectre', *supra* note 39, p. 655.

43 C. Schmitt, *The Concept of the Political. Expanded Edition*, The University of Chicago Press: Chicago/London, 2007.

44 ECtHR, *Voigt v Germany,* no 17851/91 [GC], 26.09.1995.

> In this case the obligation imposed on German civil servants to bear witness to and actively uphold at all times the free democratic constitutional system within the meaning of the Basic Law (see paragraphs 26–28 above) is founded on the notion that the civil service is the guarantor of the Constitution and democracy. This notion has a special importance in Germany because of that country's experience under the Weimar Republic, which, when the Federal Republic was founded after the nightmare of nazism, led to its constitution being based on the principle of a 'democracy capable of defending itself' (wehrhafte Demokratie). Against this background the Court cannot but conclude that the applicant's dismissal pursued a legitimate aim within the meaning of paragraph 2 of Article 10 (art. 10–2).[45]

In the German tradition of addressing political extremism through 'militant democracy', the concept was later adopted by Turkey, as exemplified in *Refah Partisi* (*the Welfare Party*) *and Others v Turkey*, concerning Article 11 (freedom of association). In this case, the Grand Chamber ruled that the dissolution of the political party by the Turkish Constitutional Court did not violate the Convention. The Turkish government explicitly invoked the doctrine of 'militant democracy' to justify its actions.[46]

Just as it seemed that the end of the Cold War had eliminated the concept from legal and political practice, it re-emerged in two ways: as a framework to support the transition of newly established democracies and as a framework for combating religious fundamentalism. This shift is also reflected in the Court's case law, particularly in cases concerning the prohibition of religious clothing.

The transition of newly established democracies was viewed by the Court as a possibility of temporary restriction in the context of the political sensitivity of the state.[47] For example, in *Rekvényi v Hungary,*[48] the ECtHR examined a constitutional amendment adopted by Hungary in 1993, which prohibited members of the armed forces, police and security services from participating in political activities. The applicant, a police officer, claimed that this restriction infringed his rights to freedom of expression (Article 10 of the Conven-

45 Ibid., para. 51.

46 ECtHR, *Refah Partisi* (*the Welfare Party*) *and Others v Turkey,* nos. 41340/98, 41342/98, 41343/98 and 41344/98 [GC], 13.02.2003, para. 62.

47 P. de Moree 'Militant Democracy in the Context of the ECHR', *supra* note 4, p. 233.

48 ECtHR, *Rekvényi v Hungary*, no 25390/94 [GC], 20.05.1999.

tion) and freedom of association (Article 11). The Hungarian government argued that the limitations were necessary to protect democratic order. The Court acknowledged the government's position and, taking into account Hungary's historical context, concluded that such restrictions could be justified in a democratic society. As a result, it held that there was no violation of Article 10 or 11.

The religious fundamentals trend may be witnessed in the Grand Chamber case of *S.A.S. v France,*[49] where the Court found no violation of the Convention concerning France's ban on wearing religious face coverings in public. The Court broadened the scope of the interference ground, shifting from the traditional justification of 'the protection of the rights and freedoms of others' to a more expansive concept encompassing the requirement that all individuals within a jurisdiction demonstrate 'respect for the minimum requirements of life in society' – or, as the government framed it, the principle of 'living together'.[50]

The Court noted that 'individuals who are present in places open to all may not wish to see practices or attitudes developing there which would fundamentally call into question the possibility of open interpersonal relationships, which, by virtue of an established consensus, forms an indispensable element of community life within the society in question.' As a result, the Court accepted that 'the barrier raised against others by a veil concealing the face is perceived by the respondent State as breaching the right of others to live in a space of socialisation which makes living together easier'.[51]

S.A.S. v France highlights a paradoxical situation in which the applicant is not, in themselves, a threat to the state, yet the characteristics of their conduct are perceived as posing a challenge to fundamental aspects of the constitutional order. Moreover, the contemporary debate has become even more complex. First, new methods of challenging the national order have emerged, particularly through the use of social media and other soft tools. While such mechanisms have been employed by non-democratic regimes to consolidate power, they are also increasingly used to exploit vulnerabilities within democratic systems, further complicating the balance between safeguarding democracy and upholding fundamental rights.

Invernizzi and *Zuckerman* express concern that the determination of who qualifies as an enemy of democracy inevitably touches upon the very bound-

49 ECtHR, *S.A.S. v France*, no 43835/11, 01.07.2014.

50 C. Gearty, 'Reason, Faith, and Feelings', in B. Fassbender and K. Traisbach (eds.), *The Limits of Human Rights*, *supra* note 29, pp. 115–116.

51 ECtHR, *S.A.S., supra* note 49, para. 122.

aries of the political entity itself and, as such, cannot be fully governed by any pre-existing democratic norm.[52] They ask: what is the 'principled, non-arbitrary way of distinguishing between what can and cannot be tolerated within a democratic framework?'[53]

In this regard, the focus of the response should not be solely on the structural deficiencies of 'militant democracy' but also on its practical application. In my view, the Court seeks to individualise the grounds for restricting 'the enemy' by carefully calibrating the limitations imposed on individual freedoms, thereby avoiding the excessive abstraction that could otherwise result from an overly rigid application of 'militant democracy'.

The need for a more individualised approach has become even more apparent in recent years. The rapid emergence of new forms of interaction, particularly in the online environment, has introduced unprecedented challenges to democratic governance.[54] In general, restrictions on social media can extend to traditional media, and in cases of democratic backsliding, this may result in effective government control over the media landscape. Such developments can significantly narrow public debate and suppress legitimate criticism of government decisions.[55] A. Sajó emphasises that democracies are particularly vulnerable to emotionally manipulative politics and challenges that exploit constitutional mechanisms to undermine democratic principles.[56]

However, the major challenge has become the increasingly complex notion of 'the enemy', which has shifted from an internal threat to an external one. The distinctiveness of this external 'enemy' – one that operates within the internal legal framework – has led to the development of the term 'post-militant democracy'.[57] I delineate the evolution of threats to democracy since the Second World War until today in Table 1 below.

52 C. Invernizzi Accetti and I. Zuckerman, 'What's Wrong with Militant Democracy?', *supra* note 19, p. 184.

53 Ibid., p. 185.

54 M. Steuer 'Militant Democracy', *supra* note 12, p. 956.

55 Ibid., p. 957.

56 A. Sajó, 'From Militant Democracy to the Preventive State', *supra* note 1, p. 2263.

57 See J. Rak, 'Conceptualizing the Theoretical Category of Neo-Militant Democracy: The Case of Hungary', 49(2) *Polish Political Science Yearbook*. For the sake of simplicity, however, I continue to use 'militant democracy' in this paper.

TABLE 1 Evolution of 'militant democracy' contexts since the end of the Second World War

The type of the threat for democracy	Example
Radical political movements that aim to destroy the democratic regime by using democratic means (internal threat)	German Communist party trying to get into power and dissolve the constitutional framework
Radical religious movements that use democratic means to fight against individuals of other views (internal threat)	Islam radicals acting against non-believers
External agents, states act against the state by using proxies (external threat)	Russia acting against European states, exploiting individuals who serve the purpose of destabilising the state

3 'Militant Democracy' under the Convention and the Recent Case Law of the ECtHR

Let us now turn to the Convention. Here, I aim to illustrate the ongoing development of the Court's case law, highlighting general trends as well as the challenges they present. The Convention appears to reflect the evolution of 'militant democracy', with the Court striving to respond to existential threats as they arise. First, I outline the general mechanism established by the drafters of the Convention, which formally empowers the Court to address threats to democratic order. I then examine the specific context of the Latvian and Lithuanian cases, arguing that the changing nature of these 'threats' has compelled the Court to adopt a more context-specific application of the Convention, moving away from previously established formulas where necessary.

3.1 *Abuse of Application: The Formal Way to Deal with Existential Threats to Member States*

The Convention system incorporates mechanisms that enable states and the Court to prevent the potential abuse of complaints brought under the Convention. Two formal approaches are designed to address such claims. The first

is Article 17, and the second is Article 35.[58] The latter, Article 35, is procedural in nature and does not directly apply to situations that might be classified under the concept of 'militant democracy'. Article 17, however, presents a different and more substantive dimension to this issue.

Article 17 prescribes that:

> [n]othing in [the] Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

Article 17 is derived from Article 30 of the Universal Declaration of Human Rights (UDHR). In one of its early rulings, *German Communist Party* (*KPD*) *v Germany*, the EComHR emphasised that the purpose of Article 17 is to safeguard the rights enshrined in the Convention by ensuring the uninterrupted functioning of democratic institutions.[59] Article 17 was incorporated into the Convention to prevent individuals or groups from invoking the rights it guarantees as a means to justify actions that seek to undermine those very rights.[60]

The greatest challenge with Article 17 is that it is narrowly construed. The Court has acknowledged this limitation in numerous cases, emphasising that Article 17 applies only in exceptional circumstances and in the most extreme cases.[61] Moreover, the threshold for its applicability remains particularly high.[62] Article 17 should be invoked only when it is immediately evident that the applicant has sought to rely on the Convention to justify activities or actions that are fundamentally at odds with its values and are intended to undermine the rights and freedoms it enshrines.[63]

The Court has developed a Convention-linked concept that allows for greater flexibility in the application of Article 17 – namely, the notion of a 'democracy capable of defending itself'. In numerous cases, the Court has emphasised the close connection between Article 17 and this principle,

58 Article 35 of the Convention: … 3. The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that: (a) the application is incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of individual application ….

59 ECtHR, *German Communist Party* (*KPD*) *v Germany*, no 250/57, 20.07.1957.

60 ECtHR, *Perinçek v Switzerland*, no 27510/08 [GC], 15.10.2015, para. 113.

61 ECtHR, *Paksas v Lithuania*, no 34932/04 [GC], 06.01.2011, para. 87.

62 ECtHR, *Lilliendahl v Iceland*, no 29297/18, 12.05.2020, para. 26.

63 ECtHR, *Perinçek v Switzerland*, no 27510/08 [GC], 15.10.2015, paras. 114–115.

highlighting its role in safeguarding democratic institutions from those who seek to undermine them.[64] The early case law of the Court is directly linked to the traditional concept of 'militant democracy' as the tool to fight anti-democratic ideologies.[65]

Moreover, the Court has acknowledged that Article 17 implicitly informs its assessment of potential threats to member states, even in cases where Article 17 is not directly applicable. However, the Court's implicit reliance on Article 17 introduces an additional layer of uncertainty, raising concerns about the consistency and predictability of its approach. This marks the emergence of a new phase of 'militant democracy' within the Convention framework – one in which the tools of 'militant democracy' are increasingly framed within the standard proportionality tests applied to specific Convention Articles.

I have already briefly discussed *S.A.S. v France* as an example of the evolving concept of 'militant democracy' and the incorporation of democratic order into the application of individual Convention Articles. This is achieved through the restrictive clauses within specific Articles, which permit interference when activities are deemed contrary to public order or the interests of others. In *S.A.S. v France*, the underlying principle defended was the distinct French concept of 'living together'.

3.2 *ECtHR Dealing with the Constant Battle against the Crouching Past and Present Threats*

The Court's recent case law has developed even further, with the Latvian and Lithuanian cases playing a particularly significant role. In this regard, I will examine three recent cases that, in my view, have made a substantial contribution to the development of a more context-specific legal framework within the Court's jurisprudence. Before I do so, however, a brief overview of the context of the Baltic states is necessary to understand better some of the key emphases in the Court's reasoning.

Baltic States were attributed to the USSR's sphere of interest under the secret additional protocol to the Molotov-Ribbentrop Pact on 23 August 1939.[66] The occupation, which lasted for 50 years, had far-reaching consequences in Latvian society which continue to influence democracy even now. A significant part of society is still open to totalitarian ideas and has a positive

64 ECtHR, *Voigt v Germany*, no 17851/91 [GC], 26.09.1995, paras. 51 and 59; ECtHR, *Ždanoka v Latvia*, no 58278/00 [GC], 16.03.2006, para. 100.

65 P. de Moree, 'Militant Democracy in the Context of the ECHR', *supra* note 4, p. 228.

66 See *Vasiliauskas v Lithuania*, no 35343/05 [GC], 25.10.2015.

assessment of the period of occupation by the USSR.[67] Currently, Russia continues the USSR doctrine on spheres of influence that targets some of the Council of Europe member states, including the Baltics, Georgia, Armenia, Moldova and Ukraine.

The persistent pressure from Russia provides a basis for considering the use of non-conventional warfare, which has been intensively deployed against the Baltic States. One of the key concepts in this context is hybrid warfare. While the term remains contested, an increasing number of experts recognise its relevance.[68] Basically, it is related to the concept of the fourth-generation war, which incorporates the manipulation of mass media, execution of acts of terrorism, absence of a clear hierarchy and structure of the enemy, employment of military, economic, financial, energy-related and social pressure measures, use of asymmetric tactics, and the implementation of combined and coordinated, overt and covert military, para-military and civilian measures.[69]

In this context, it is crucial to interpret the Court's case law as an effort to provide the necessary protection for a state's constitutional order when faced with pressure from non-conventional means employed by an external adversary. The ECtHR cases *Ždanoka v Latvia* (*No. 2*) and *Kirkorov v Lithuania* directly address the Court's context-specific recognition of national authorities' capacity to respond to existential threats. While *Savickis and Others v Latvia* does not directly concern an existential threat to the state, it nonetheless establishes a conceptual framework for the further incorporation of vital state interests in addressing such threats.

3.3 *External Interests Fuel Internal Threats:* Ždanoka *and* Kirkorov *Cases*

The premise of *Ždanoka v Latvia No. 2* is directly related to the Grand Chamber *Ždanoka v Latvia*[70] judgment. Ms Ždanoka had been an active member of the Communist Party of Latvia since 1971. On 21 August 1991 Latvia recovered its independence and outlawed the Communist Party. Based on the national regulation Ms Ždanoka was not allowed to stand in parliamentary elections in 1998 and 2002. Therefore, she invoked the alleged violation of the right to stand for elections. The Grand Chamber of the ECtHR in the first *Ždanoka v*

67 The Latvian Constitutional Court accurately summarised the context of the Baltic States. See ECtHR, *Ždanoka v Latvia* (*No. 2*), no 42221/18, 25.07.2024, para 16.

68 E. Bajarūnas and V Keršanskas, 'Hybrid Threats: Analysis of Content, Challenges Posed and Measures to Overcome', 16 *Lithuanian Annual Strategic Review*, pp. 124–125.

69 Ibid., pp. 125–126.

70 *Ždanoka v Latvia*, no 58278/00 [GC], 16.03.2006.

Latvia case held that in 2006 that restriction was neither arbitrary nor disproportionate, finding no violation of the Convention.

However, the difficulties for Ms Ždanoka continued after the Grand Chamber judgment and led to the second case before the ECtHR. In 2017 she sought a review of the compatibility of section 5(6) of the Parliamentary Elections Act with the Constitution. The Constitutional Court found the provision constitutional, underlining that the aim of the relevant provision was to protect the democratic state order, national security and the territorial unity of Latvia. The Constitutional Court narrowed the permitted reasons to restrict participation in the election to (i) having endangered Latvian independence and the principles of a democratic state governed by the rule of law and (ii) continuing to endanger Latvian independence and the principles of a democratic state governed by the rule of law at the time of application. In 2018 the Central Electoral Commission adopted a decision to strike the applicant's name out of the list of candidates of her political party participating in the parliamentary elections.

After exhaustion of domestic remedies Ms Ždanoka again applied to the ECtHR. In its second judgment the Court heavily relied on the Constitutional Court judgment that grounded the restriction. In its 2018 decision the Constitutional Court underlined the importance of considering the status of an individual subject to the restriction, namely, whether the person was still a threat to Latvian democracy. The ECtHR's emphasis on the threat on democracy is part of the development of its case law of 'democracy capable of defending itself' notion.[71] The ECtHR's approach is shaped in the context of weakened European stability and includes cases that similarly address restrictions on fundamental rights based on potential internal threats based on external interests. Although Ms Ždanoka applied to the ECtHR before Russia's aggression against Ukraine in 2022 the Court's explicit reference to developments occurring after the restriction of the applicant's rights illustrates how willing the Court is to incorporate a contextual background into its deliberations on individual cases. The Court indicated that it 'cannot ignore the fact that on 24 February 2022 Russia launched a military invasion of Ukraine, following which, as a result of a procedure initiated under Article 8 of the Statute of the Council of Europe, the Russian Federation ceased to be a member State as from 16 March 2022'.[72] This aspect is particularly significant in the light of

71 See M. Melnika and J. Senders, 'Self-Protecting Democracy and Electoral Rights', *VerfBlog*, available at https://verfassungsblog.de/self-protecting-democracy-and-electoral-rights/, last accessed 07.03.2025.

72 ECtHR, *Ždanoka v Latvia* (*No. 2*), no 42221/18, 25.07.2024, para. 55.

Russia's ongoing use of hybrid warfare – a form of non-conventional conflict marked by a blend of military, economic, informational and covert operations, which has been systematically directed against the Baltic States.

The decision in *Kirkorov v Lithuania* is significant due to its reference to Article 10 of the Convention (freedom of expression), in which the applicant alleged censorship.

The premise of the case is as follows. The applicant, a well-known singer and music producer from Russia, was denied entry to Lithuania on the ground that he posed a threat to national security. What is particularly relevant in this context is that he was not considered a direct threat himself but was instead viewed as a vehicle for advancing Russian propaganda in former Soviet states. His frequent performances in Crimea were interpreted as an endorsement of the Russian state's policy of aggression.

The Court declared the application inadmissible. However, given the nature of the case, it chose to issue a fully reasoned decision, including an analysis of the proportionality of Lithuania's interference in the applicants' rights guaranteed by Article 10 of the Convention.

The decision also highlights policies considered by the Court in its admissibility assessment. While analysing whether the interference was 'necessary in a democratic society', the Court upheld the ban on the applicant's entry into Lithuania, finding it justified on the ground that his presence constituted a threat to national security and public order. This conclusion was based on the applicant's role as a tool of the Russian Federation's 'soft power'.[73] The Court also emphasised that national courts and the Lithuanian Parliament (*Seimas*) as well as the European Parliament had recognised the need to counter Russian disinformation and propaganda warfare. It ultimately determined that the domestic courts had sufficiently balanced national security and public order interests against the applicant's actions, declaring the application inadmissible as manifestly ill-founded.

3.4 *Protection of Constitutional Identity: The Legitimate Aim to Interfere with the Convention Rights*

The third crucial case I wish to highlight is the Grand Chamber judgment in *Savickis and Others v Latvia*. This case concerns applicants who were denied having their periods of employment accrued in other former USSR states being counted towards the calculation of their social benefits. The applicants argued that they were treated differently due to their status as 'permanent resident

73 ECtHR, *Kirkorov v Lithuania,* no 12174/22, 19.03.2024, para. 59.

non-citizens' in contrast to Latvian citizens. The distinction between 'permanent resident non-citizens' and Latvian citizens has been the subject of numerous cases before the ECtHR, reflecting ongoing legal and human rights debates surrounding the rights and status of this group.

In the *Andrejeva v Latvia*[74] case the Court found a violation of Article 14 taken in conjunction with Article 1 of Protocol No. 1 to the Convention, considering that the national authorities' refusal to take into account the years of the applicants' employment 'outside Latvia' had been based exclusively on the consideration that she had not had Latvian citizenship. In contrast to *Andrejeva*, the national courts in the *Savickis and Others* circumstances indicated the absence of legal ties between them and Latvia.[75] The difference between the factual circumstances of the *Andrejeva* and *Savickis and Others* cases was acknowledged by the Court in the *Savickis and Others v Latvia* judgment.

The most conceptually significant conclusion was reached in the discussion of whether the interference was legitimate. Here, the Court recognised that the alleged difference in treatment was justified by the legitimate aims of protecting Latvia's constitutional identity, which is grounded in the doctrine of state continuity, as well as its economic system. The Court emphasised the importance of the specific historical context, particularly the decades of unlawful occupation and annexation, as well as the complex policy choices faced by Latvia following the restoration of its independence:

> More specifically, the Court acknowledges that the aim in that context was to avoid retrospective approbation of the consequences of the immigration policy practised in the period of unlawful occupation and annexation of the country. In this specific historical context, such an aim, as pursued by the Latvian legislature when establishing the system of retirement pensions, was consistent with the efforts to rebuild the nation's life following the restoration of independence, and the Court accepts this aim as legitimate.[76]

Savickis and Others, along with *Kirkorov* and *Ždanoka* (*No. 2*), appears to mark another step in the Court's evolving doctrine on a democracy capable of defending itself. The Court's approach has been shaped by the broader context

74 ECtHR, *Andrejeva v Latvia,* no 55707/00 [GC], 18.02.2009.

75 See the excerpt from the Latvian Constitutional Court ruling of 17 February 2011, ECtHR, *Savickis and Others v Latvia,* no 49270/11 [GC], 09.06.2022, para. 51.

76 Ibid., para. 198.

TABLE 2 The Court's response to the evolution of 'militant democracy' contexts[a]

The type of the threat to democracy	The Court's toolkit
Radical political movements that aim to destroy the democratic regime by using democratic means (internal threat)	Article 17 applicable
Radical religious movements that use democratic means to fight against individuals of other views (internal threat)	Article 17 could be applicable in some cases, individual analysis and the proportionality test
External agents, states act against the state by using proxies (external threat)	Individual analysis and the proportionality test – the threat is external, the applicant is a threat indirectly

a The explanation of the Court's toolkit is simplified and does not include instances when the applicant's behaviour is excluded from the scope of application of the relevant right or the Court refers to Article 17 implicitly.

of weakened European stability, emphasising an individualised assessment of situations involving external threats.

In the light of ongoing challenges, I include the table that reflects the Court's potential legal framework for dealing with different settings of threats to democracy, based on Table 2 (above).

However, the Court's case law in developing these constitutional self-defence doctrines rests on uncertainty.as it risks compromising the universality of human rights. Several key aspects of this shift in the Court's jurisprudence should be considered in the broader context of its commitment to upholding subsidiarity and reinforcing the role of national authorities as the primary interpreters and implementers of the Convention, particularly in context-dependent cases.

4 The Context-Specific Court's Approach

First, the Court's case law recognises the challenges faced by the constitutional order of member states when the threat comes from an external adversary that operates indirectly, using individuals who may not themselves pose a

direct danger. However, it is important to recognise that the unique challenges posed by 'internal threats driven by external pressures' complicate the individualised application of human rights safeguards to individuals who are deemed a threat solely due to the broader context. Addressing this issue effectively requires an explicit focus on external threats while encouraging individuals to distance themselves from activities that could be exploited by external actors.

This issue gains particular relevance in the context of Russia's ongoing hybrid warfare against European states, especially its neighbouring countries, which Russia may regard as falling within its sphere of influence. The need for the Court to adopt a more nuanced and responsive approach to national security concerns in the context of hybrid threats became even more apparent following Russia's full-scale invasion of Ukraine in 2022. On 16 March 2022, the Committee of Ministers adopted a resolution declaring that the Russian Federation would cease to be a member of the Council of Europe, thus ending 26 years of membership. Prior to this decision, the Council of Europe retained at least a theoretical capacity to influence Russia's position on certain political matters. However, this avenue of engagement was effectively shut down following Russia's expulsion.

The shift in the Court's case law reflects this approach by emphasising the constitutional framework as it has been substantially developed through national constitutional court jurisprudence. In response to criticism regarding the absence of a non-arbitrary assessment, the Court increasingly refers to national constitutional case law to justify its reasoning.

The clearest example of this is the recognition of constitutional identity as a legitimate aim. While *Savickis and Others v Latvia* is not itself a militant democracy case, its use of constitutional identity as a legitimate aim exemplifies the Court's attempt to establish a framework that: (i) allows democracy to safeguard its core values (a concept applicable to militant democracy); (ii) upholds the principle of subsidiarity; and (iii) ensures an individualised assessment of circumstances under the necessity of restriction test. In this way, the 'enemy' is no longer merely an individual or group challenging majority political views but rather one that, in C. Schmitt's terms, seeks to undermine the very core of democratic values.

Second, the Court seeks to address the challenge of the 'politicisation' of 'the enemy', which risks suppressing human rights without an impartial and objective analysis. Invernizzi and Zuckerman criticise this approach, arguing that subjecting decisions on who should be permitted to participate in the democratic process to a reflexive process of democratic deliberation does not, in itself, provide any assurance that such deliberation will lead to the

exclusion of actors who pose a genuine 'threat' to the stability of the democratic system as a whole.[77] Instead, they argue, this approach merely reproduces the very problem that militant democracy was originally designed to resolve. The core concern of militant democracy was precisely that an anti-democratic majority (or super-majority) could capture the democratic process and exploit it to exclude others arbitrarily from participation.[78]

The Court seeks to address this issue through a procedural approach, allowing the national framework to generate reasoned opinions during the adjudication process.[79] In doing so, it objectifies the political aim of safeguarding the constitutional order, recognising it as a legitimate objective – particularly in *Savickis and Others*. This inclusion has been widely criticised by scholars, primarily due to the vagueness of concepts such as 'constitutional identity' and the risks of abusing them.[80] However, it at least provides the Court with an opportunity to develop and refine these concepts in a manner that aligns them more closely with the principles of the Convention.

Third, the Court emphasises the subsidiary nature of the Convention by emphasising the significance of national constitutional orders and the fragmentation of regional specificity. The *bottom-up* approach, which aligns with the principle of subsidiarity, may explain the ECtHR's increasing reliance on interpretations linked to constitutional identity.[81] This appears even more

77 C. Invernizzi Accetti and I. Zuckerman, 'What's Wrong with Militant Democracy?', *supra* note 19, p. 188.

78 Ibid.

79 The term 'procedural' refers to the 'procedural embedding phase' of the Courts' case law (as indicated by R. Spano: 'the significance of process-based review lies in its shift of the Court's primary methodological focus from its own independent assessment of the "Conventionality" of the domestic measure towards an examination of whether the issue has been properly analysed by the domestic decision-maker in conformity with already embedded principles and the states' obligations to secure Convention rights to peoples within their jurisdictions' (R. Spano, 'The Future of the European Court of Human Rights – Subsidiarity, Process-Based Review and the Rule of Law', *Human Rights Law Review*, 18, pp. 480–481)).

80 'The outcome of the constitutional identity trend is messy and incomprehensible: a broad catch-all pretext to suspend a broad spectrum of rights guaranteed by law.' See S. Ganty, D. V Kochenov, and I. Y. Nugraha, 'Constitutional Identity vs. Human Rights: The ECtHR's Bizarre Turn in Three Latvian Cases', *VerfBlog*, 21.12.2023, available at https://verfassungsblog.de/constitutional-identity-vs-human-rights/, DOI: 10.59704/55184a96adabe0b0, last accessed on 09.03.2025.

81 G. Ulfstein, 'The European Court of Human Rights and National Courts: A Constitutional Relationship?', in O. M. Arnardóttir and A. Buyse (eds.), *Shifting Centres of Gravity in Human Rights Protection: Rethinking Relations between the ECHR, EU, and National Legal Orders*, Routledge: London/New York, 2016, p. 57.

justifiable when one considers the diverse challenges faced by the member states of the Convention. The significance of hybrid warfare and the direct threats posed by Russia to its neighbouring states lend greater credibility to the Baltic States' reliance on militant democracy arguments when seeking to justify interferences with Convention rights. The Court's willingness to assess constitutionally grounded justifications aimed at safeguarding democratic order not through a rigid universal standard but via a contextualised, individualised approach suggests that states must articulate more clearly how their constitutional imperatives align with the Convention framework. This also places a greater responsibility on states to develop constitutionally sound and balanced regimes that remain consistent with their obligations under the Convention.

As G. Ulfstein argues, national courts can serve as mediators between national and international legal systems: '[t]his would reflect an application of the principle of subsidiarity adapted to the special constitutional setting represented by the interaction between the ECtHR and national constitutional organs'.[82] In *Savickis and Others*, the Latvian Constitutional Court clearly fulfilled this mediating role.

The present challenges and emerging threats to democracies raise critical questions about whether the Convention can provide an adequate response. In some cases, the absence of a clear response may be problematic not only for states that risk violating the Convention but also for the credibility of the Court and the Convention itself – particularly when states perceive no viable alternative but to act in contravention of Convention obligations.

One such highly complex situation is the phenomenon of 'instrumentalised migration' at the borders of Poland, Lithuania and Latvia.[83] The argument for protecting democracy from external threats by addressing indirect threats – such as individuals being used as instruments – has not yet been developed in the Court's case law.[84] The Court may try balancing the necessity to maintain order with the requirement to remain sensitive to individual needs in instrumentalised migration cases. In any case, applying the Convention in a manner that is both context-sensitive and respectful of individual rights presents a

82 Ibid., p. 58.

83 ECtHR, *C.O.C.G. and Others v Lithuania,* no 17764/22, *R.A. and Others v Poland*, no 42120/21, and *H.M.M. and Others v Latvia*, no 42165/21 cases, still pending at the Court at the time of submission of this paper.

84 V. Milašiūtė, 'Valstybės sienų uždarymas pagal tarptautinę ir Europos Sąjungos teisę žmogaus teisių apsaugos požiūriu', *Vilnius University Open Series*, 2024, available at https://www.zurnalai.vu.lt/open-series/article/view/38062, last accessed on 03.03.2025, p. 260.

significant challenge. Although the Court's attempt to balance both is under critique, there might be no other alternative in emerging substantial threats to the existence of the Convention member states. The Court's evolving approach to balancing state security needs and existential threats within the framework of 'militant democracy' offers a potentially less interventional pathway to safeguarding democracies while simultaneously establishing a case-specific and emergency grounded threshold for human rights protection. In this regard, the capabilities of the Convention member states reasonably to ground arguments for the protection of their constitutional order might be of highest importance – this will determine whether the necessity to interfere in the Convention rights is justified in the eyes of the Strasbourg judges.

5 Conclusions

The evolution of the European Court of Human Rights' case law on militant democracy mitigates the growing tension between safeguarding democratic institutions and upholding fundamental rights. As demonstrated by cases such as *Savickis and Others v Latvia*, *Ždanoka v Latvia* (*No. 2*) and *Kirkorov v Lithuania*, the Court is increasingly called upon to balance constitutional identity concerns with its role as the guardian of the Convention. While the recognition of constitutional identity as a legitimate aim signals a shift towards a more context-sensitive approach, it also raises concerns about the potential erosion of universal human rights protection. The Court's reliance on national constitutional reasoning to justify restrictions highlights the increasing fragmentation of human rights law, reinforcing the argument that the principle of subsidiarity plays a crucial role in shaping the Court's jurisprudence.

This shift, however, is not without its risks. The broadening of militant democracy's conceptual framework to include threats arising from external actors operating through domestic legal channels complicates the Court's ability to establish clear and predictable legal standards. While national courts establish the link between domestic and international legal frameworks, their reliance on contested concepts such as constitutional identity introduces the possibility of arbitrary restrictions on fundamental rights.

Moving forward, the Court faces a critical challenge: developing a coherent legal framework that allows democratic states to protect their constitutional order without compromising the universality of human rights. This requires a more refined application of the Convention's proportionality test to ensure that restrictions are both necessary and proportionate to the threats they

seek to address. The Court must remain vigilant against the potential misuse of militant democracy as a political tool to silence dissent or entrench majoritarian dominance. The Court's case law provides national courts – particularly constitutional courts – with a framework for developing well-reasoned arguments that thoroughly examine the protection of the constitutional order in relation to interferences with fundamental rights. As the legal landscape continues to evolve, the Court's ability to balance these competing imperatives will shape the future of militant democracy within the Convention system and, more broadly, define the extent to which European democracies can defend themselves without subverting the very rights they seek to protect.

Effective Investigation as a Mechanism of Transitional Justice: Romania at the European Court of Human Rights

Sabina-Andreea Grigore

Abstract

Following the collapse of communism in Central and Eastern Europe, the European Court of Human Rights (ECtHR) confronted a surge in cases involving alleged human rights violations by new High Contracting Parties. Romania, a signatory since 1994, faced 24 cases linked to pivotal national events – the 1989 Revolution and the *Mineriade* protests (1990–1999). The ECtHR ruled on violations of the right to effective investigation, thereby influencing domestic jurisprudence and transitional attitudes. Employing a methodology that blends legal analysis and transitional justice theory, this study underscores the Court's role in constructing event narratives, countering impunity and acknowledging marginalised victims. As cases linger in national courts, the ECtHR's judgments uphold its oversight, facilitating peaceful transitions, democratisation and the pursuit of justice for victims, perpetrators and societies.

1 Introduction

The collapse of authoritarian regimes is commonly marked by a need for systemic reform and democratisation, often operationalised through transitional justice mechanisms aimed at confronting the legacy of repression.[1] As transitions frequently involve the legitimisation of a new power through comparison with the former one, the process inevitably becomes highly politicised. In continental Europe, where a strong tradition of separation of powers prevails, courts are generally regarded as ill-suited to intervene in matters seen as the prerogative of elected officials. Consequently, transitional justice is habitually conceptualised not as a legal process but as a product of political negotiation, best situated within the domain of domestic political institutions, which are

1 R. Grosescu, 'Judging Communist Crimes in Romania: Transnational and Global Influences', (2017) 11(3) *International Journal of Transitional Justice*, pp. 505–524.

© SABINA-ANDREEA GRIGORE, 2026 | DOI:10.1163/9789004751026_013
This is an open access chapter distributed under the terms of the CC-BY-NC-ND 4.0 license.

presumed to possess the democratic legitimacy and sovereign authority necessary for such decisions.[2]

Despite this, victims' needs for justice have, in many cases, gone beyond non-judicial means to address the harms they suffered before, during or after the transition of their state.[3] In response, there has been an increase in international and hybrid criminal tribunals,[4] and the investigation and prosecution of international crimes started playing a crucial role in the implementation of transitional justice as a whole.[5] While international criminal tribunals are leading these advancements, the discourse surrounding the abovementioned topics also involves other judicial bodies. For instance, the Inter-American Court of Human Rights (IACtHR) is recognised as a pioneer in the integration of international humanitarian law, international human rights law and transitional justice.[6] With a primary focus on contexts facing systemic impunity, the IACtHR has addressed issues such as amnesty laws, presidential pardons, but also measures that effectively prevented meaningful investigations.[7] Remarkably, it also developed a duty to investigate not only as a means of accountability, but as a core element of the right to access justice and a necessary reparative measure in response to widespread patterns of violence.[8]

In contrast, although the jurisprudence of the European Court of Human Rights (hereinafter referred to as the ECtHR or the Court) reflects similar patterns and concerns, there is far less scholarly exploration of its role in address-

2 E. Brems, 'Transitional Justice in the Case Law of the European Court of Human Rights', (2011) 5(2) *International Journal of Transitional Justice*, pp. 282–303.

3 A. Balta, 'Retribution through Reparations? Evaluating the European Court of Human Rights. Jurisprudence on Gross Human Rights Violations from a Victims' Perspective', in L. Lavrysen and N. Mavronicola (eds.), *Coercive Human Rights. Positive Duties to Mobilise the Criminal Law under the ECHR*, Bloomsbury Publishing: New York, 2020, p. 71.

4 UNSC Report of the Secretary-General, 'The rule of law and transitional justice in conflict and post-conflict societies', Un Doc S/2004/616, 23.08.2004, p. 14.

5 International Centre for Transitional Justice, 'Criminal Justice', available at https://www.ictj.org/criminal-justice, last accessed on 12.03.2025.

6 L. van den Herik and H. Duffy, 'Human rights bodies and international humanitarian law: Common but differentiated approaches', in C.M. Buckley, A. Donald and P. Leach (eds.), *Towards Convergence in International Human Rights Law: Approaches of Regional and International Systems*, Brill: Leiden, 2016, pp. 366–407.

7 T. M. Antkowiak, 'Truth as Right and Remedy in International Human Rights Experience', (2001) 23(4) *Michigan Journal of International Law*, pp. 977–1013.

8 G. M. Frisso, 'The Duty to Investigate Violations of the Right to Life in Armed Conflicts in the Jurisprudence of the Inter-American Court of Human Rights', (2018) 51(2) *Israel Law Review*, pp. 169–191.

ing transitional contexts.[9] Even though it was not originally designed to adjudicate on matters related to international crimes, the ECtHR complements criminal accountability efforts by ensuring state responsibility for systemic human rights violations.[10] This role reflects the post-World War II developments that shaped the Court's creation, embedding it within a broader effort to secure lasting peace, human rights protection and democratic transition in Europe.[11] Illustrative of this fact is, for instance, Article 7 of the European Convention of Human Rights (ECHR), which addresses criminal offences under national or international law and crimes against the 'general principles of law recognised by civilised nations'.[12] Additionally, its jurisprudence has demonstrated its capacity to deal with topics related to transitional justice, such as prosecutions, compensation, restitution, lustration, politics of memory and, most recently, the right to truth.[13]

The role of the ECtHR in addressing transitional justice issues gained particular relevance after the fall of communism in Central and Eastern Europe, which led not only to the enlargement of the membership of the ECHR but also to a surge in cases in which states that engaged in systematic violence against civilians did not adequately investigate alleged human rights violations, particularly under Articles 2 and 3 ECHR, which protect the right to life and, respectively, prohibit torture as well as inhuman or degrading treatment.[14] In a similar vein to the IACtHR, throughout the existence of the ECtHR, the interpretation of these Articles has extended beyond assessing the substantive aspects of physical violence to encompassing a greater emphasis on procedural dimensions.[15] The landmark case of *McCann and Others v United Kingdom*, dealing with violations of Article 2 ECHR, demonstrates this

9 F. Ni Aolain, *Transitional Justice and the European Convention on Human Rights,* Geneva, Geneva Academy 2017, pp. 10–11.

10 The Genocide Network, *Digest of the European Court for Human Rights jurisprudence on core international crimes*, EUROJUST 2017, p. 1.

11 F. Ni Aolain, 'Transitional Justice', *supra* note 9, p. 10.

12 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) Article 7.

13 E. Brems, 'Transitional Justice in Case Law', *supra* note 2.

14 D. Kurban, 'Rethinking Effectiveness: Authoritarianism, State Violence and the Limits of the European Court of Human Rights', in H.P. Aust and E. Demir-Gursel (eds.), *The European Court of Human Rights. Current Challenges in Historical Perspective*, Edward Elgar Publishing Limited: Cheltenham, 2021, pp. 177–200.

15 L. Lavrysen, 'Positive Obligations and the Criminal Law. A Bird's Eye View on the Case Law of the European Court of Human Rights', in L. Lavrysen and N. Mavronicola (eds.), *Coercive Human Rights. Positive Duties to Mobilise the Criminal Law under the ECHR*, Hart Publishing: Oxford, 2020, pp. 29–30.

development,[16] establishing that 'there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, inter alia, agents of the State'.[17] Further cases have expanded upon the duty to conduct an effective investigation.[18] Concisely, this duty consists of four elements: independence, promptness, transparency and effectiveness – the persons conducting the investigation should be independent of any external influences; the investigation should be made promptly so that public confidence is maintained in the state's determination not to tolerate unlawful acts; the investigation should be transparent and secure accountability by including the victims or their next of kin in the proceedings; and the investigation has to be able to identify and, should it be necessary, punish those responsible for the violations.[19] As the Court underlines in multiple cases, the duty to investigate effectively is an obligation of means, not of results. This means that the goal is not to ensure criminal prosecution but to establish the circumstances surrounding the case and identify those responsible for the violations.[20] Subsequently, these principles have also been included in the Court's interpretation of duties raised under Article 3 ECHR.[21]

As authoritarian repression and transitional circumstances frequently involve violent acts perpetrated by the authorities,[22] one can observe a clear link between potential violations of Articles 2 and 3 ECHR and matters of transitional justice. This intersection is evident in the context of Romania, which has received relatively limited scholarly attention.[23] Since the beginning of the 2000s, Romanians have started bringing cases related to the transition from communism to democracy in front of the ECtHR.[24] The most peculiar series of cases which reached the ECtHR was related to Romania's duty to effectively investigate the violence surrounding the most significant events that marked the beginning of the country's transition – the Revolution of

16 ECtHR, *McCann and Others v United Kingdom*, no 18984/91 [GC] 27.09.1995.

17 Ibid., para. 161.

18 See ECtHR, *Kelly and Others v the United Kingdom*, no 30054/96, 4.05.2000; ECtHR, *Ergi v Turkey*, no 23818/94, 28.07.1998.

19 J. Gallen, 'The European Court of Human Rights, Transitional Justice and Historical Abuse in Consolidated Democracies', (2020) 19(4) *Human Rights Law Review*, pp. 675–704.

20 See, for instance, ECtHR, *McKerr v United Kingdom*, no 28883/95, 04.05.2001.

21 See ECtHR, *Assenov and Others v Bulgaria*, no 90/1997/874/1086, 28.10.1998.

22 S. Răduleţu, 'The Role of International Criminal Tribunals in Promoting Human Rights' (2013) 1 *Law Review*, p. 4.

23 Most research is focused on Turkey, Russia, Northern Ireland, etc. See, for instance, F. Ni Aolain, 'Transitional Justice', *supra* note 9, p. 10; J. Gallen, 'The European Court of Human Rights', *supra* note 19.

24 R. Grosescu, 'Judging Communist Crimes', *supra* note 1, pp. 505–524.

1989, and the violent quelling of protests between 1990 and 1999 known as *Mineriade* – which amounted to violations of Articles 2 and 3 ECHR. These cases were distinctive as they concerned the only violent transition from communism in Europe. They were handled, most prominently, in *Association '21 December 1989' and Others v Romania*,[25] and, respectively, in *Mocanu and Others v Romania*.[26] To this day, the matters pertaining to these cases remain unresolved on the national level.[27] Consequently, this paper aims to address the following research question: how does the ECtHR's interpretation of the principle of effective investigation contribute to Romania's process of transition from communism?

2 Revolution, Repression and Reform: Romania's Fragile Transition

2.1 *The Romanian Revolution of 1989*

The communist regime in Romania is recognised as one of the harshest of its kind in the former communist bloc.[28] After a prolonged period of hardship, characterised by systemic deprivation policies and an intrusive state security apparatus called the *Securitate*,[29] the regime collapsed during a violent revolution in December 1989.[30] Following a nationwide proliferation of unex-

25 ECtHR, *Association '21 December 1989' and Others v Romania*, no 33810/07, 24.05.2011.

26 ECtHR, *Mocanu and Others v Romania*, nos 10865/09, 45886/07 and 32431/08 [GC] 17.09.2014.

27 The file of the Revolution was sent once more to the Military Prosecutor's Office in September 2024. In April 2025, the case of the June 1990 *Mineriad* was sent, again, to trial. (A. Ardelean, 'Dosarul Revoluției, cu Ion Iliescu și Gelu Voican Voiculescu inculpați, retrimis la Parchetul Militar. Decizie definitivă', *Radio Free Europe Romania*, 20.09.2024 available at https://romania.europalibera.org/a/dosarul-revolutiei-retrimis-la-parchet/33127740.html, last accessed on 14.05.2025; B. Enache, 'Dosarul mineriadei din 13–15 iunie 1990, trimis în judecată: Ion Iliescu și Petre Roman, inculpați alături de alte șase persoane', *DIGI24*, 02.04.2025 available at https://www.digi24.ro/stiri/actualitate/justitie/dosarul-mineriadei-din-13–15-iunie-1990-trimis-in-judecata-ion-iliescu-si-petre-roman-inculpati-alaturi-de-alte-sase-persoane-3181971 last accessed on 14.05.2025.)

28 D. Deletant, *Ceausescu and the Securitate. Coercion and Dissent in Romania, 1965–1989*, Routledge: New York, 1995, p. 68.

29 L. Turcu, 'Politrucii si securistii fac si azi cartile. [Politrucians and the Securitate members still make the books today]', *Jurnalul National*, 17.11.2004, available at https://jurnalul.ro/special-jurnalul/politrucii-si-securistii-fac-si-azi-cartile-56787.html, last accessed on 12.03.2025.

30 D. Deletant, 'Ceausescu and the Securitate', *supra* note 28, p. 322; M. Iacobescu, 'Prima sinteză științifică despre un eveniment epocal controversat – Revoluția Română din Decembrie 1989', (2007) 13(1) *Codrul Cosminului*, p. 283.

pected public demonstrations, Nicolae Ceaușescu, the dictator at the time, held a public meeting in Bucharest on 21 December to attempt to regain the trust of the masses. However, his efforts were met with overwhelming dissent, prompting the deployment of military and antiterrorist forces to silence the demonstrators.[31] The next day, as the public unrest was still intensifying, Ceaușescu and his wife fled Bucharest,[32] after which the Front of National Salvation (FSN), an *ad hoc* organisation of revolutionaries led by Ion Iliescu, announced Ceaușescu's overthrow and assumed control as a provisional government.[33] Nevertheless, the violence continued. On 24 December, following the arrest of Ceaușescu and his wife, the Council of the FSN decided that, to bring the revolution definitively to an end, there had to be an urgent trial for the dictatorial couple, who were subsequently executed on Christmas Day. By 28 December, 1,104 people had died and 3,321 people were injured, with more than half of the victims having been injured after the dictator's arrest.[34]

2.2 *The Mineriade*

Despite high levels of dissatisfaction with the situation in which the country found itself, no substantial changes took place after the fall of the regime.[35] Early in January 1990, the FSN, which had promised to be only a provisional government, declared its ambition to take part in the elections of May of that year.[36] This prompted a non-violent protest in Bucharest, with people demanding its resignation. The FSN, then asked the Jiu Valley miners to come and re-establish order in the capital by force.[37] This was the first of six

31 P. Siani-Davies, 'Revoluția în societățile comuniste și postcomuniste. O agendă de cercetare pentru un studiu compara.tiv a două cazuri din Balcani: România (1989) și Serbia (2000)', in B. Murgescu, *Revoluția Română din Decembrie 1989. Istorie și memorie*, Polirom: Iasi, 2007, pp. 116–152.

32 P. Siani-Davies, 'Romanian Revolution or Coup d'etat? A Theoretical View of the Events of December 1989', (1996) 29(4) *Communist and Post-Communist Studies*, p. 453.

33 V.C. Ionescu Isac Gotia, 'The End of *Mineriade*: Labour Relations and Romania's Transition from Socialism', Master of Arts Thesis, Institute of European, Russian and Eurasian Studies, Carleton University, Ontario 2011, p. 22.

34 I. Scurtu, 'The Romanian Revolution of December 1989' (2010) 2(1) *Annals of the Academy of Romanian Scientists Series on History and Archaeology*, p. 109.

35 L. Stan, 'Access to Securitate Files: The Trials and Tribulations of a Romanian Law', (2002) 16(1) *East European Politics and Societies*, pp. 145–181.

36 K. Adamson and S. Florean, 'Discourse and Power: The FSN and the mythologization of the Romanian Revolution', in K. McDermott and M. Stibbe (eds.), *The 1989 Revolutions in Central and Eastern Europe: From Communism to Pluralism*, Manchester University Press: Manchester, 2013, pp. 172–192.

37 The reasons miners were involved in these quellings are extremely complicated and, thus, beyond the purposes of this paper. For more details, see, for instance, A. Rus,

such events, now known as the *Mineriade*.[38] Following this, Ion Iliescu personally thanked the miners for their service, and the FSN promised to start discussions with the opposition parties in order to ease the public tensions.[39]

Nonetheless, on 18 February, new anti-communist and, inextricably, anti-FSN protests emerged. These were, again, quelled with the help of 4,000 Jiu Valley miners, which resulted in several dozen people being injured and 105 detained.[40] Despite the violence, in March 1990, a group of protestors signed a proclamation in which they called, most distinctly, for a lustration law targeting, in particular, FSN members such as Iliescu, who played an active role as members of the communist party.[41] Iliescu reportedly agreed to support the lustration law as long as he could be exempt from it, but this request was ultimately rejected.[42] In response, the FSN ran a deligitimisation campaign, characterising protests as irresponsible and dangerous to national unity and the democratic future of Romania.[43] This campaign proved to be successful, as both the FSN and Iliescu achieved an overwhelming victory in the 1990 parliamentary and presidential elections.[44] Two prominent figures that emerged out of these elections were Petre Roman, the son of communist activists, serving as Prime Minister, and Gelu Voican Voiculescu, an alleged collaborator of *Securitate*,[45] serving as Deputy Prime Minister.[46] The newly established power

Mineriadele. Între manipulare politică și solidaritate muncitorească, Curtea Veche Publishing: Bucharest, 2007.

38 V.C. Ionescu Isac Gotia, 'The End of *Mineriade*', *supra* note 33, p. 7.

39 Jiu Valley Portal, 'Mineriada Ianuarie 1990', available at https://www.jiuvalley.org/history-heritage/coal-mining/mineriada/january-1990-mineriad/#January_1990_mineriad, last accessed on 12.03.2025.

40 R. Cristea, *Piața Universității 1990*, Foc-Filocalia, 2007, Ploiești.

41 L. Stan, 'Lustration in Romania: The Story of a Failure', (2006) 6(1) *Romanian Political Science Review*, p. 137.

42 Ibid.

43 K. Adamson and S. Florean 'Discourse and Power', *supra* note 36, pp. 172–293.

44 New York Times, 'Upheaval in the East: A Rising Star; A Man Who Could Become Rumania's Leader', 24.12.1989, available at https://www.nytimes.com/1989/12/24/world/upheaval-in-the-east-a-rising-star-a-man-who-could-become-rumania-s-leader.html last accessed on 12.03.2025.

45 L. Stan, *Transitional Justice in Post-communist Romania: The Politics of Memory*, Cambridge University Press: Cambridge, 2013, p. 111.

46 Agerpres, 'ICCJ: Mineriad Case, returned to Military Prosecutors' office for criminal investigation repeat; ruling – final' [ÎCCJ: Dosarul Mineriadei, restituit la Parchetul Militar pentru refacerea de la zero a urmăririi penale; decizia e definitivă], 10.12.2020, available at https://agerpres.ro/justitie/2020/12/10/iccj-dosarul-mineriadei-restituit-la-parchetul-militar-pentru-refacerea-de-la-zero-a-urmaririi-penal–625777, last accessed on 12.03.2025.

also allowed former *Securitate* members to continue their careers in the new Romanian Intelligence Service (SRI) under Virgil Măgureanu.[47]

As the relations between the FSN and the Communist Party were unveiled, and due to the slowness of the reform taking place following the elections, multiple people started protesting on 13 June 1990. During that night, the police, together with the army, carried out a violent offensive against the protestors,[48] and the next day 10,000 miners were transported from Jiu Valley to Bucharest by order of President Iliescu. Supported by the state apparatus, the miners were given the freedom to use force against anyone whom they thought to be opposing the government. This event was by far the most violent quelling of protests during the post-communist era.[49] Four persons died, 1,388 suffered physical and psychological damage, and 1,250 were arrested.[50]

2.3 *Post-1990 Developments and the End of the Mineriade*

Romania started re-establishing its relations with the European community shortly after the Revolution, and it was one of the first former communist countries to apply for membership of the Council of Europe. However, the start of the *Mineriade* created significant difficulties in its process of European integration. Most notably, its accession to the European Council was postponed until 1993, as its practices were considered still to be reminiscent of its totalitarian past.[51]

Domestically, the instability peaked with the *Mineriad* of 1991. This time, dissatisfied with wages and working conditions, Jiu Valley miners and other industrial workers protested in Bucharest, demanding the resignations of Petre Roman and Ion Iliescu. Their demands were partially successful as, after violent protests, Petre Roman resigned. This *Mineriad* led to four deaths and 455 injuries. Its consequences also spread to the political realm. Combined with the already existing tensions between Iliescu and Roman, this event resulted in a split in the FSN.[52] Therefore, the reforms that took place during Iliescu's first

47 L. Stan, *Transitional Justice*, *supra* note 45, pp. 45–46.

48 V.C. Ionescu Isac Gotia, 'The End of *Mineriade*', *supra* note 33, p. 27.

49 Jiu Valley Portal, 'Mineriada Ianuarie 1990', *supra* note 39.

50 Agerpres, 'ÎCCJ: Dosarul Mineriadei, restituit la Parchetul Militar pentru refacerea de la zero a urmăririi penale; decizia e definitivă', 10.12.2020, available at https://agerpres.ro/justitie/2020/12/10/iccj-dosarul-mineriadei-restituit-la-parchetul-militar-pentru-refacerea-de-la-zero-a-urmaririi-penal–625777, last accessed on 12.03.2025.

51 R. Radu, 'After a Violent Revolution: Romanian Democratisation in the Early 1990s', (2013) 7(1) *Central European Journal of International and Security Studies*, p. 117.

52 B. Pădurean, 'Pagina de istorie: Mineriada din 1991 – tentativa reusita de lovitura de stat sau rafuiala politica?', *ClujToday*, 25.09.2018, available at https://clujtoday.ro/pagina-de

mandate were overwhelmingly lengthy and inefficient. Consequently, the elections in 1996 were won by a coalition of anti-communist parties, and Emil Constantinescu became president.[53]

2.4 *Investigative Efforts*

Romania's struggle to come to terms with the legacy of its past is considered to be a mix of unwillingness and inability to do so,[54] with the post-1996 political landscape failing to introduce substantive systemic reforms.[55] The judiciary was, for a very long time, *de facto* subjected to the executive, which lacked the will to judge crimes related to communism and to the transition therefrom. Moreover, society was poorly organised and lacked adequate legal education, so there was only very weak societal pressure to investigate the events of the past.[56]

One notable short-term objective of Constantinescu's presidency was the investigation of the events of the *Mineriade.* The most significant achievement of this endeavour was that Miron Cozma, the leader of the miners during the 1991 protests, was prosecuted and sentenced to two years in prison.[57] He was released in 1999 amid mining industry restructuring, which sparked new miners' protests that were, nonetheless, rapidly quelled by the authorities, marking the end of the *Mineriade*.[58]

Following multiple decisions not to bring prosecutions in the cases of the Revolution and the *Mineriade*,[59] and after decades in which investigations and prosecutions were delayed by the domestic authorities, victims took their cases to the ECtHR. Despite their crucial importance to the development of post-communist Romania, these cases have not been given sufficient attention in the academic field. As a result, this paper will explore the way in which

---

-istorie-mineriada-din-1991-tentativ-reux15fit-de-lovitur-de-stat-sau-rfuial-politic/, last accessed on 12.03.2025.

53 V.C. Ionescu Isac Gotia, 'The End of *Mineriade*', *supra* note 33, pp. 30–31.

54 L. Stan, 'The Basescu Case: Romania's Lustration Debate Revisited', *Cultures of History Forum*, 13.12.2019, available at https://www.cultures-of-history.uni-jena.de/politics/the-basescu-case-romanias-lustration-debate-revisited, last accessed on 12.03.2025.

55 L. Stan, *Transitional Justice*, *supra note* 45, p. 84.

56 R. Grosescu and A. Fijalkowski, 'Retrospective Justice and Legal Culture: Romania in Comparative Perspective', in L. Stan and L. Turcescu (eds.), *Justice, Memory and Redress in Romania: New Insights,* Cambridge Scholars Publishing: Newcastle upon Tyne, 2017, p. 123.

57 V.C. Ionescu Isac Gotia, 'The End of *Mineriade*', *supra* note 33, p. 9.

58 Jiu Valley Portal, 'Mineriada Ianuarie 1990', *supra* note 39.

59 ECtHR, *Association '21 December 1989'*, *supra* note 25; ECtHR, *Mocanu*, *supra* note 26.

the ECtHR has helped Romania in its process of transition through the application of the principle of effective investigation.

3 Transitional Justice and the Legal Struggles over Romania's Authoritarian

The academic field in Romania has been severely impacted on by its difficult post-communist transition. During the first years after Ceaușescu's fall, academic reform was slow, and systemic issues like politicisation and corruption undermined scholarly credibility and institutional development. These factors, combined with acute underfunding, have hindered the production of high-quality academic work.[60] Additionally, efforts to study Romania's communist past have often been met with resistance, with researchers seeking to explore recent events facing institutional pushback, limited access to documents and archives, and, at times, direct intimidation.[61] These difficulties persist, as key documents have remained classified for decades.[62] For this reason, many of the academic publications on the topics relevant to this research are limited in their scope, and there are very few publications that adequately deal with the socio-legal developments that occurred in the post-communist era.

Romania's transition to democracy has been examined in depth primarily by Lavinia Stan, whose work remains the most comprehensive and widely

60 V. Cernat, 'The Unprincipled Principal: How Romania's Inconsistent Research Reform Impacted Scientific Output', (2024) 129(9) *Scientometrics*, pp. 5557–5575.

61 C. Woodard, 'Historians Push Regime to Reveal Romania's Communist-Era Secrets', *The Christian Science Monitor*, 15.11.1996, available at https://www.csmonitor.com/1996/1115/111596.intl.intl.4.html, last accessed on 11.05.2025.

62 E.g., only in 2017 did the Ministry of National Defence declassify a five-page document revealing that the Army, following government orders, had provided food and equipment to the miners involved in the *Mineriad* of June 1990 (see C. Simina, 'Document declasificat după 27 de ani: în iunie 1990, Armata i-a hrănit şi îmbrăcat pe minerii care au "restabilit ordinea" în Bucureşti', *PressOne*, 12.09.2017, available at https://pressone.ro/document-declasificat-dupa-27-de-ani-in-iunie-1990-armata-i-a-hranit-si-imbracat-pe-minerii-care-au-restabilit-ordinea-in-bucuresti, last accessed on 11.05.2025). Similarly, 33 years after the Revolution, the SRI declared that it had finally completely declassified all the documents concerning the 1989 events (see D. Vulcan, 'Dosarul controversatei comisii senatoriale care a anchetat implicarea Securității în Revoluția din 1989, declasificat de SRI', *Europa Liberă România*, 22.12.2022, available at https://romania.europalibera.org/a/sri-declasific%C4%83-dosarul-intern-al-revolu%C5%A3iei-din-1989/32189124.html, last accessed on 11.05.2025)

cited in the field, reflecting limited scholarly engagement with the topic.[63] Stan presents Romania as having a 'veritable "justice cascade" unique in the region',[64] as, by 2004, it had approximately 4,500 investigations open. The most important problem which she identifies with these investigations is that they mostly relate to the events of December 1989, neglecting the crimes conducted during and after communism. The reasons identified for this type of judicial practice concern the influence which the communist elites still possessed after the Revolution, as well as the problem of improper adoption of crimes of international law in domestic jurisprudence.[65] The second of these issues, more relevant to the case at hand as it also directly addresses the issue of effective investigations, is explored in more depth by Grosescu and Ursachi, whose work stands out as one of the few sustained scholarly efforts to address this dimension. Their research starts from the identification of a surge in genocide allegations in the early 1990s in relation to the events of the Revolution. These were rapidly discarded by the courts as not fulfilling the criteria outlined in the Genocide Convention. As a result, most charges were either dismissed or recategorised as belonging to domestic criminal law, as, for example, aggravated murder, and, as such, were not adequately investigated.[66]

This situation changed only after 2014, when Romania adopted a new Criminal Code for the first time since 1969. Grosescu argues that this change took place due to a combination of exogenous and endogenous factors.[67] Exogenously, she argues that there was a global convergence towards using international criminal law for addressing matters of transitional justice. This happened, for instance, through the creation of international criminal tribunals, and, to a certain extent, at the level of the ECtHR during the early 2000s in cases that addressed political crimes perpetrated during communism in Estonia, Latvia, Lithuania and even Germany.[68] Endogenously, she identified the establishment of the Institute for the Investigation of Communist Crimes in Romania (IICCR) in 2005 as critical for promoting change. As the judiciary became more independent due to norms imposed for accession to the Euro-

63 See, for instance, L. Stan and L. Turcescu (eds.), *Justice, Memory and Redress in Romania: New Insights*, Cambridge Scholars Publishing: Newcastle upon Tyne, 2017, *supra* note 56; L. Stan, 'The Basescu Case', *supra* note 54; L. Stan, *Transitional Justice*, *supra note* 45, etc.

64 Ibid., p. 53.

65 Ibid., pp. 29–57.

66 R. Grosescu and R. Ursachi, *Justitia Penala de Tranzitie. De la Nürnberg la Postcomunismul Romanesc*, Polirom: Iasi, 2009, p. 18.

67 R. Grosescu, 'Judging Communist Crimes', *supra* note 1, pp. 505–524.

68 Ibid.

pean Union, the IICCR could bring a criminal complaint against 210 former commanders of communist prisons who were alleged to have committed genocide.[69] This initiative faced the same problem as did those in the 1990s – the cases did not fulfil the criteria for genocide. Nevertheless, a strong domestic debate emerged about their classification as crimes against humanity. The Ministry of Justice initially rejected the prospect of this change, despite the fact that the country still had the same Criminal Code as during communism. However, in 2012, as the statutory limitations for investigating the events of December 1989 had expired, there were significant domestic pressures to make changes to national jurisprudence. As a result of these pressures, the Criminal Code was amended and entered into force two years later.[70]

Colojoară notes that, in the light of the changes to the Criminal Code, and pushed by the findings of violations of Articles 2 and 3 ECHR in *Mocanu* and *Association '21 December 1989'*, the High Court of Cassation and Justice (HCCJ) announced the reopening of investigations into the Romanian Revolution and the *Mineriade*, and the legal classification of the crimes committed during these events was changed from alleged ill-treatment and murder to crimes against humanity.[71] Colojoară's study is one of the few that address the findings of the ECtHR and their impact on the domestic level. It ends on an optimistic note, claiming that the re-opening of the cases lit 'a new flame of hope' that the prosecutions could finally take place.[72] However, as Constantinescu-Mărunțel notes, neither of the cases reached a definitive decision.[73] Other studies regarding the cases brought against Romania at the ECtHR are, mostly, limited to addressing matters of restitution of property, as these account for the majority of the Romanians' applications.[74] Even when that is not the case,

69 Institute for the Investigation of Communist Crimes and the Memory of Romanian Exile, 'Acuzaţi de genocid, 210 de foşti comandanţi ai închisorilor comuniste vor fi cercetaţi penal de procurori la sesizarea IICCR', 24.05.2007, available at https://www.iiccmer.ro/comunicate-de-presa/2007/acuzati-de-genocid-210-de-fosti-comandanti-ai-inchisorilor-comun
iste-vor-fi-cercetati-penal-de-procurori-la-sesizarea-iiccr/, last accessed on 12.03.2025.

70 R. Grosescu, 'Judging Communist Crimes', *supra* note 1, pp. 505–524.

71 R. Colojoară, 'Prosecuting Crimes against Humanity in Romania: from the Communist Prison Torturers to the Former President', (2018) 9(9) *International Journal on Rule of Law*, p. 74.

72 Ibid., p. 87.

73 C.N. Constantinescu-Mărunțel, 'Infracțiunile contra umanității și genocidul', Unpublished Doctoral Dissertation, Faculty of Law, University of Bucharest, 2021.

74 See, for instance, L. Stan, *Transitional Justice*, *supra note* 45, pp. 136–160; M. Șerban, 'Law and Liberation: Legal Consciousness and Legal Mobilization in Post-communist Europe',

and these events are addressed, only the two above-mentioned cases are analysed in more depth, while other related cases are, in most instances, not even mentioned.[75] Therefore, there is a notable gap in the literature concerning discussions surrounding the changes which Romania went through, the demands of the victims, and the impact of national and international judicial rulings. These critical issues are primarily addressed in the media, with no substantial scholarly works identified that systematically engage with them within the broader socio-political context.

In addition to having only segmented research related to Romania's transition, there is only one official record established by the Romanian authorities concerning the Revolution and the *Mineriade*, initiated by the Presidential Commission for the Analysis of the Communist Dictatorship in Romania in 2004. The result of this commission was the so-called Tismăneanu Report, which helped to condemn the communist regime as 'illegitimate and criminal'.[76] Nonetheless, the report is criticised for the lack of practical repercussions of condemning the communist regime. Therefore, the Commission and the subsequent report were perceived as a mere symbolic gesture, aimed at creating good publicity a few weeks before Romania joined the European Union.[77]

Consequently, this paper aims to explore more comprehensively the cases that the victims of the Revolution and the *Mineriade* took to the ECtHR. It seeks to contribute to a better understanding of the legal, political and social aspects of the struggles for justice, accountability and recognition faced by the victims, while also considering the potential long-term effects of the Court's decisions on Romania's transitional justice process.

4 Methodology

The topic of this paper requires an extensive qualitative analysis of the legal proceedings that took place at the ECtHR. The most commonly accepted

in S.A. Boutcher, C.S. Shdaimah and M.W. Yarbrough (eds.), *Research Handbook on Law, Movements and Social Change*, Edward Elgar Publishing: Cheltenham, 2023, pp. 102–117.

75 See, for instance, F. Ni Aolain, 'Transitional Justice', *supra* note 9; R. Teitel, 'Transitional Justice and Judicial Activism: A Right to Accountability', (2015) 48(1) *Cornell International Law* Journal, p. 385.

76 C. S. Smith, 'Romanian Leader Condemns Communist Rule', *New York Times*, 19.12.2006, available at https://www.nytimes.com/2006/12/19/world/europe/19romania.html, last accessed on 12.03.2025.

77 V. Moghioroși, 'Raportul Tismăneanu: Reacții și Dezbateri' (2014) 1(2) *Hiperboreea*, p. 301.

approach to legal research is doctrinal analysis. This relies on the assessment of 'treaties, legislation, state practice or case law',[78] and is well-suited to examining the way in which norms and standards are applied. However, recent developments show the increasing importance of tackling the contexts in which law unfolds. This has become particularly central to the field of human rights, relevant for the case at hand. By its nature, this field affects large areas of human existence, and so it demands an interdisciplinary analysis of its practices and effects.[79] Thus, it is commonly accepted that legal issues within transitional contexts – for instance, 'a victim's right to compensation, access to justice, fair trial, protection, participation, and effective remedy'[80] – can be understood only by combining these legal standards with concepts developed in the field of transitional justice such as, for instance, victims' perceptions and needs.[81] The ECtHR itself has demonstrated a sensitivity to such contexts, notably avoiding one-size-fits-all jurisprudence in favour of nuanced engagement with local settings, particularly in cases in which rights restrictions resemble past totalitarian practices or where the issues at stake are fundamental to democratic consolidation.[82] For these reasons, the approach chosen for this research combines legal methods with methods drawn from the field of transitional justice.

The current research is based on 24 cases that were adjudicated on at the ECtHR, based on alleged violations of Articles 2 and 3 ECHR. The cases were selected by using key search terms such as *'Mineriad'*, 'Revolution' and 'effective investigation', while using the most notorious cases, namely *Association '21 December 1989'* and *Mocanu,* for guidance regarding further judgments. The collection process had the purpose of creating an exhaustive list of cases that were adjudicated on by the Court, in order to facilitate an extensive understanding of the matter. The justification for treating both the Revolution as well as the *Mineriade* in the same research is based on the fact that the legal issues and the factual circumstances concerned in these cases are of a very

78 E. Lieblich, 'How to do Research in International Law? A Basic Guide for Beginners', (2021) 62 *Harvard International Law Journal Online*, p. 9.

79 P. M. Langbroek, K. Van Den Bos, M. S. Thomas, *et al.*, 'Methodology of Legal Research: Challenges and Opportunities', (2017) 13(3) *Utrecht Law Review*, p. 1.

80 P. Ishwara Bhat, *Idea and Methods of Legal Research,* Oxford University Press: Oxford, 2019, 126.

81 Ibid.

82 J.A. Sweeney, 'Divergence and Diversity in Post-Communist European Human Rights Cases' (2005) 21(1) *Connecticut Journal of International Law*, pp. 1–40.

similar nature.[83] The cases were analysed using the data analysis software Atlas.ti. Alongside codes meant to aid the establishment of the facts of the case and track the progress of the domestic proceedings, multiple codes were created in the process of reading the cases, aimed at easing the process of comparing the cases and establishing the effects which the ECtHR could have on transitional processes. These codes were worded as follows: Effective Investigation, Effective Remedy, Fight Against Impunity, Right to Truth and Change in National Jurisprudence. The codes illustrate how the principle of effective investigation is assessed by the Court. The first one plays a descriptive role, while the last four represent the most important impacts that the Court expects this principle to have.

The results of this first step were then connected with principles drawn from two complementary theoretical approaches within the field of transitional justice, both of which consider the broader repercussions of legal decisions beyond the confines of the courtroom. By linking Romania's specific context to two key theoretical frameworks – one examining the role of prosecutions in transitional societies, and the other focusing on the quasi-criminal jurisdiction developed by the ECtHR – this paper positions the principle of effective investigation, as envisaged by the ECtHR, not merely as a legal duty, but as a potential tool of transitional justice. This focus is particularly pertinent in the case of Romania, where the question of effective investigation sits at the intersection of delayed justice, institutional weakness and contested historical narratives. While the country has undertaken multiple transitional justice initiatives, these have often lacked substantial public support or produced less significant outcomes than in other post-communist societies,[84] of which only a few examples, such as Bulgaria or Albania, are considered less successful.[85] Additionally, the continued influence of former regime actors and the perception that formal justice mechanisms were limited or unlikely to succeed have led many comparative studies, particularly those linking post-authoritarian constitutionalism and transitional justice, deliberately to exclude Romania from their analysis.[86] Even when studies do include it,

83 This reasoning can be found in the Court's judgment in ECtHR, *Alexandrescu and Others v Romania*, nos 56842/08 and 7 others, 24.02.2016, para. 19, in which the applicants were affected by both the Revolution and the *Mineriade.*

84 L. Stan, *Transitional Justice*, *supra note* 45, p. 233.

85 I. Kalemaj, 'Transitional Justice and Democratic Consolidation in Post-communist Eastern Europe: Romania and Albania', (2021) 12(1) *Eastern Journal of European Studies*, pp. 81–103.

86 See e.g., G. Halmai, *The Role of Constitutionalism in Transitional Justice Processes in Central Europe*, European University Institute: Florence, 2016.

Romania is presented as an anomaly in the implementation of principles of constitutionalism and democratisation due to major constitutional crises faced in the post-communist period.[87] These lacunae underscore the need to explore this case further.

4.1 *Theory 1: Sikkink's 'Justice Cascade'*

The first theory chosen is drawn from Kathryn Sikkink's 'The Justice Cascade',[88] which explores the effectiveness of prosecutions in transitional contexts. Sikkink argues that, particularly after the fall of the Soviet Union in 1989, significant progress was made in the realm of prosecutions, as an increasing number of perpetrators could be held criminally accountable. In cases in which prosecutions did not happen despite public demand, victims became 'disillusioned with institutions that can neither heal their broken bodies and minds nor return their loved ones'.[89] Therefore, prosecutions serve as a form of remedy against the harms suffered, as they lead to the identification and punishment of the perpetrators. At the same time, prosecutions represent a form of re-establishing trust in the competencies of state institutions, by showing their unwillingness to tolerate violations of human rights and dismantling the influence of old networks of power. Lastly, trials are also seen as contributing 'to cultural change and the internalisation of human rights norms among state officials'.[90] Overall, prosecutions are conceptualised as a form of enforcement of legal norms through which individuals are held accountable for the violations of human rights in which they were involved.[91] They are thus essential not only for legal accountability but also for broader social transformation. The importance of this theory for the Romanian context results from its potential to decipher the effects of the high number of prosecutions that occurred during post-communism, which, in 24 cases, culminated in the ECtHR ruling that the investigations conducted by the Romanian authorities were defective. Applying Sikkink's framework enables this research to assess whether the legal efforts towards

87 A.I. Drăgulin, 'The European Union's Democratic Paradigm in the Post-Communist Countries of Eastern Europe', (2017) 13(1–2) *Romanian Review of Eurasian Studies*, pp. 173–186; D. Toptchiyska, 'Constitutional Law and Human Rights in Eastern Europe' in J. Cremades and C. Hermida (eds.), *Encyclopedia of Contemporary Constitutionalism*, Springer: Cham, 2024, pp. 1–16.

88 K. Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics*, W. W. Norton & Company: New York, 2011.

89 Ibid., p. 25.

90 Ibid., p. 28.

91 Ibid.

prosecution contributed to remedying institutional trust and normative transformation, or whether they instead exacerbated disillusionment.

4.2 *Theory 2: Coercive Human Rights at the ECtHR*

While the first theory can provide an account of how and why prosecutions function as tools of accountability and norm-building in transitional contexts, it does not fully account for the judicial mechanisms through which these goals are operationalised, particularly in contexts where domestic legal systems fall short. This limitation becomes clear in the Romanian post-communist context where, as Șerban observes, legal mobilisation frequently bypassed national institutions in favour of supranational mechanisms of accountability such as the ECtHR, exhibiting what she terms a 'supranational legal consciousness', even perceiving domestic courts as mere obstacles to be overcome before reaching international courts.[92]

This is where the second theory, focused more specifically on the ECtHR, becomes essential. A collection of articles edited by Lavrysen and Mavronicola develops a complementary theory about the role of criminal prosecutions in the specific context of this court.[93] In a similar manner to Sikkink's, the authors argue that prosecutions and afferent investigations are necessary in order to ensure the deterrent effect of the judicial system, ensuring that its activity does not lose legitimacy in the eyes of the public. Nevertheless, most cases of this kind that reach the ECtHR stop at the step of investigations, as states face significant issues in adequately handling them.[94] Thus, the Court plays a significant role in establishing a certain right to truth regarding the relevant circumstances of the case, important for victims, perpetrators, victims of similar crimes and the general public alike. Particularly in cases of serious human rights violations perpetrated by state agents, it is critical for the cases not to be stalled, amnestied or pardoned, so that the states do not give the impression of lenience towards grave breaches conducted by their own personnel.[95] Setting these obligations enabled the ECtHR to develop a quasi-criminal jurisdiction, which helps the Court to contribute to the existing

92 M. Șerban, 'Law and Liberation', *supra* note 74, p. 109.

93 L. Lavrysen and N. Mavronicola (eds.), *Coercive Human Rights. Positive Duties to Mobilise the Criminal Law under the ECHR*, Hart Publishing: Oxford, 2020.

94 P. Lemmens and M. Courtoy, 'Positive Obligations and Coercion. Deterrence as a Key Factor in the European Court of Human Rights' Case Law', in L. Lavrysen and N. Mavronicola (eds.), *Coercive Human Rights. Positive Duties to Mobilise the Criminal Law under the ECHR*, Hart Publishing: Oxford, 2020, pp. 55–117.

95 Ibid.

international anti-impunity agenda, while also providing the victims with redress for the harms they suffered.[96]

4.3 *Merging the Theories*

The two chosen theories combine scholarly approaches from the field of transitional justice with the jurisprudence of the ECtHR. Both theories reach similar conclusions – although the criminal justice system is supposed to function as a measure of last resort, certain grave violations can be addressed only through prosecutions. While Sikkink emphasises the role of prosecutions in both legal accountability and broader social transformation, the ECtHR-centred theory highlights the Court's role in advancing justice in cases where domestic prosecutions are not satisfactory.[97]

In applying these theories to the Romanian context, this study focuses on four key aspects crucial to understanding the role of effective investigations in the country's post-authoritarian transition. First, it explores how truth and historical context are constructed within the legal proceedings at the ECtHR, aiding in the establishment of a national narrative. This is based on the fact that both theories argue that legal proceedings can serve as critical tools for establishing and preserving the right to truth of victims, perpetrators, as well as society at large. Second, the research will examine the contributions of the Court's rulings in the fight against impunity, positioning the Court as a guardian of the principle that effective investigations and adequate prosecutions ensure that states do not allow serious violations to remain unpunished. The third aspect addressed will be victims' right to redress and the role of the ECtHR in ensuring it when domestic systems fail, potentially offering recognition, accountability and a sense of justice. Finally, this research will attempt to track whether there is any drive for change in national jurisprudence in the aftermath of the judgments of the ECtHR, as both studies claim that properly conducted legal proceedings can constitute an impetus for change and strengthen the rule of law. By examining the ECtHR's judgments, this study intends to bring a unique perspective to the investigation of the crimes related to the Revolution and the *Mineriade*, highlighting how international legal

96 L. Lavrysen and N Mavronicola, 'Coercive Human Rights. Introducing the Sharp Edge of the European Convention on Human Rights', in L. Lavrysen and N. Mavronicola (eds.), *supra* note 94, pp. 1–29.

97 N. Persak, 'Positive Obligations in View of the Principle of Criminal Law as a Last Resort', in L. Lavrysen and N. Mavronicola (eds.), *supra* note 94, pp. 141–161; see also K. Sikkink, *The Justice Cascade*, *supra* note 88.

standards may or may not shape notions of truth, accountability and victims' rights, and influence domestic legal reform.

5 Effective Investigation as a Mechanism of Transitional Justice

5.1 *Romania at the ECtHR: The Cases*

The first case relating to the Revolution was adjudicated on in 2009,[98] and the cases continued until 2021.[99] They total 21 cases. Except for *Agache and Others*,[100] *Șandru and Others*[101] and *Melnichuk and Others v Romania*,[102] all cases share the same procedural aspects and, for the most part, the same factual circumstances, as *Association '21 December 1989'*. Two of the cases, *Mocanu* and *Alexandrescu* concern the *Mineriad* of June 1990.[103] *Crăiniceanu and Frumușanu v Romania* concerns the *Mineriad* of 1991.[104]

In all the cases, the Court found a violation of the procedural obligation to conduct an effective investigation under either Article 2, 3 or 6 ECHR. In *Mocanu* and *Association '21 December'*, the Court emphasised the unusual nature of the investigations. On the one hand, the national authorities were confronted with a complex body of evidence, consisting of thousands of witness statements, ballistic reports, medical reports and many other types of evidence.[105] On the other hand, the events which needed to be investigated were highly sensitive historical events for Romania.[106] Nonetheless, the Court underlined that the importance of these events should have driven the state to conduct a prompt and independent investigation which did not suffer from unnecessary delays.[107] Yet, the gaps on the domestic level are visible in every case. As shown in *Moroșanu*, only in 2016 did the military prosecutor order the opening of a criminal investigation *in rem* for crimes against humanity in the

98 ECtHR, *Agache and Others v Romania*, no 2712/02, 20.01.2010

99 ECtHR, *Moroșanu and Others v Romania*, nos 84271/17 and 4 others, 16.03.2021.

100 ECtHR, *Agache, supra* note 98.

101 ECtHR, *Șandru and Others v Romania,* no 22465/03, 10.05.2010.

102 ECtHR, *Melnichuk and Others v Romania,* nos 35279/10, 34782/10, 05.08.2015.

103 ECtHR, *Mocanu*, *supra* note 26; ECtHR, *Alexandrescu, supra* note 83.

104 ECtHR, *Crăiniceanu and Frumușanu v Romania*, no 12442/04, 24.04.2012.

105 See e.g., ECtHR, *Mocanu*, *supra* note 26, paras 303, 304; ECtHR, *Association '21 December 1989'*, *supra* note 25, para. 38.

106 Ibid.

107 See e.g. ECtHR, *Mocanu*, *supra* note 26, para. 338; ECtHR, *Association '21 December 1989'*, *supra* note 25, para. 142.

case of the Revolution.[108] Subsequently, in 2019, the military prosecutor sent to trial a former president, a former prime minister and a former commander of the Romanian Air Force, discontinuing the proceedings as regards other individuals.[109] As of September 2024, the case has been reassigned to the Military Prosecutor's Office.[110]

As regards the *Mineriade*, the Court's last decision took place in 2016 in *Alexandrescu.* As shown in this case, in 2009 the domestic case was faced with a decision not to bring a prosecution, and this decision had been upheld until the ECtHR proceedings began.[111] After almost 30 years since the events, in 2017 the *Mineriad* file was returned to the General Prosecutor's Office in the Military Prosecutor's Department in order to redo the investigation from scratch,[112] and in April 2025, the case was sent for trial.[113] Based on the developments which occurred over time in these two cases, the next section will focus on the impact of the ECtHR's judgments on the domestic approaches and attitudes towards an effective investigation.

5.2 *The Impact of the ECtHR's Judgments*

5.2.1 Establishing a National Narrative

Sikkink argues that some of the countries which most successfully rebounded from authoritarianism applied a combination of truth commissions and human rights prosecutions, focusing on achieving 'partial truth and partial justice'.[114] However, in transitional contexts, politics and history become highly convoluted.[115] As outlined above, the Romanian authorities did not place particular emphasis on establishing an authoritative record regarding the Revolution and the *Mineriade*. The closest the authorities came to establishing a truth commission was the Tismăneanu Report, which proved to be a highly politicised instrument that lacked the impact expected from a truth

108 ECtHR*, Moroșanu, supra* note 99, para. 10.

109 Ibid., para. 11.

110 A. Ardelean, 'Dosarul Revoluției' *supra* note 27.

111 ECtHR*, Alexandrescu, supra* note 83, para. 18.

112 HotNews.ro, '32 de ani de la Mineriada din 13–15 iunie și un dosar ratat de justiția din România', 13.06.2022, available at https://www.hotnews.ro/stiri-esential-25616612–32-ani-mineriada-din-13–15-iunie-dosar-ratat-justitia-din-romania.htm, last accessed on 12.03.2025.

113 B. Enache, 'Dosarul mineriadei', *supra* note 27

114 K. Sikkink, *The Justice Cascade*, *supra* note 88, p. 227.

115 A. Buyse, 'The Truth, the Past and the Present: Article 10 ECHR and Situations of Transition', in A. Buyse and M. Hamilton (eds.), *Transitional Jurisprudence and the ECHR. Justice, Politics and* Rights, Cambridge University Press: Cambridge, 2011, pp. 131–151.

commission.[116] Moreover, as results from the judgments of the ECtHR, despite the existence of thousands of domestic cases, the investigations conducted by the Romanian authorities were ineffective and untransparent, and thus lacked the exigencies imposed by Articles 2 and 3 ECHR. Thus, the state had failed to provide both truth and justice to victims, perpetrators and society at large.

Analysis of the cases brought to the ECtHR unveils a promising starting point for the creation of an official narrative regarding the violence that surrounded the Revolution and the *Mineriade*. It is common in the practice of the ECtHR for the judgment to outline a summary of the facts of the case.[117] As regards the Revolution, the Court conducted a thorough examination of the events between 16 and 30 December 1989, meticulously documenting both the victims and the escalation of violence.[118] The cases reviewed by the Court were not limited to civilian victims. *Agache*[119] and *Romanescu*,[120] for instance, concern the death and, respectively, the ill-treatment of officers belonging to the *Securitate*, which resulted exclusively from their association with the communist regime. The cases of the *Mineriade* analysed by the Court concern the events of 1990–1991. The involvement of the miners, as well as the support offered to them by the state, is mapped in great detail.[121] The subsequent developments on the national level are described in the judgment in *Crăiniceanu and Frumușanu*, highlighting the involvement of the antiterrorist forces in the quelling of the *Mineriad* of 1991.[122]

Considering the content covered by these cases, even though the domestic proceedings were ineffective in determining those responsible for the thousands of victims of the Revolution and the *Mineriade*, the detailed accounts provided in the summaries of the cases yield a comprehensive chronology of the events. Sikkink argues that trials usually provide only a ritualised presentation of evidence as required by the legal system.[123] Nevertheless, by going through the evidence presented in multiple domestic judgments, in comparison with the official state narratives, the Court manages to provide a relatively comprehensive account of the version of truth that had until then been established. Thus, the judgments, either alone or analysed together, by their very

116 V. Moghioroși, 'Raportul Tismăneanu', *supra* note 77.

117 Cf D. J. Harris, M. O'Boyle, M. Bates, *et al.*, *Law of the European Convention on Human Rights*, Oxford University Press: Oxford, 2024, p. 143.

118 ECtHR, *Association '21 December 1989', supra* note 25.

119 ECtHR, *Agache*, *supra* note 98.

120 ECtHR, *Romanescu v Romania,* no 78375/11, 16.08.2017.

121 ECtHR, *Mocanu*, *supra* note 26, para. 63.

122 ECtHR, *Crăiniceanu and Frumușanu, supra* note 104.

123 K. Sikkink, *The Justice Cascade*, *supra* note 88.

nature provide a set of interrelated narratives that collectively construct a detailed picture of the events. Additionally, many of the judgments link the addressed violations to state officials, although these individuals are seldom identified by name. This process of truth construction, as seen in the ECtHR's rulings, not only aligns with the theoretical assertions that legal mechanisms are central to uncovering the truth but also emphasises the Court's role in fostering a more extensive historical narrative.

These judgments have not remained confined to the courtroom. As argued by Sikkink,[124] and Lemmens and Courtoy,[125] trials and judgments play a significant role in shaping collective memory. This effect has not been measured in Romanian society so far. However, as shown in numerous domestic press publications, the judgments have been presented to the population as a form of pacification for society at large, particularly as domestic authorities could, at last, be held responsible for their lack of engagement in investigating the Revolution and the *Mineriade*.[126] Considering the fact that the press is held in scholarly literature to be an important factor in shaping collective memory,[127] one can infer a certain level of influence exercised by the judgments on the level of collective memory through the constant press releases which followed the judgments of the Court. Thus, in the light of the lack of an authoritative domestic account, the judgments of the ECtHR can be considered an important starting point in shaping a collective narrative and advancing the right to truth, both through the content they cover as well as through the impact observed on the Romanian media. Nonetheless, the extent of their influence remains a subject for further research.

124 Ibid.

125 P. Lemmens and M. Courtoy, 'Positive Obligations and Coercion', *supra* note 94.

126 See e.g., A. Pricopie, 'România, condamnată la CEDO în dosarul revoluției', *Epoch Times România,* 24.11. 2015 available at https://epochtimes-romania.com/news/romania-condamnata-din-nou-la-cedo-in-dosarele-revolutiei—240987, last accessed on 12.03.2025; DIGI24, Din interior. România condamnată. CEDO: 'Crimele de la Mineriadă nu se prescriu!', 26.10.2014, available at https://www.digi24.ro/special/reportaje/reportaj/dininterior-romania-condamnata-cedo-crimele-de-la-mineriada-nu-se-prescriu-312641, last accessed on 12.03.2025; G. Arun, 'Ion Iliescu: "Este momentul să încetăn să căutăm vinovați"', *DeutscheWelle*, 13.04.2022, available at https://www.dw.com/ro/ion-iliescu-este-momentul-s%C4%83-%C3%AEncet%C4%83m-s%C4%83-c%C4%83ut%C4%83m-vinova%C8%9Bi/a-61458371, last accessed on 12.03.2025, etc.

127 M. Neiger, 'Theorizing Media Memory: Six Elements Defining the Role of the Media in Shaping Collective Memory in the Digital Age', (2020) 14(5) *Sociology Compass*, p. 1.

5.2.2 Fight against Impunity

Transitional societies are often confronted with difficult choices regarding accountability for the violations perpetrated by the former regime.[128] Sikkink highlights that the idea that heads of state and high-ranking officials can be held criminally accountable for their acts has only recently gained impetus.[129] Romania had deeply conflicting approaches regarding this matter. The first trial held in the post-communist era took place amid the Revolution of 1989, with the trial of the Ceaușescu couple.[130] Between 1990 and 1996, the former communist elites promoted a discourse of national reconciliation based on a model of social amnesia, in which society separates itself from its past. This rhetoric, thus, impeded the investigations opened in the 1990s.[131] Even if regimes changed, the attitude towards the already open investigations did not, and the state tried on many occasions to absolve itself of any obligation to investigate the events.[132]

While investigations were never definitively closed, their length was criticised in all cases brought to the ECtHR. The Court emphasises that not carrying out these investigations without unnecessary delay can give the appearance of impunity for the gravest violations of human rights.[133] While the obligation to conduct an effective investigation represents an obligation of means, and not of results,[134] the right to a fair trial and the conviction and eventual imprisonment of those found guilty hinge exclusively on the effectiveness of the investigations. This is shown, on the one hand, in the decision not to examine complaints under Article 6§1 ECHR, which deals with the right to a fair trial, in cases in which the Court established a violation of the procedural limb of Article 2 or Article 3 ECHR.[135] On the other hand, in the two cases

128 S. Cohen, 'State Crimes of Previous Regimes: Knowledge, Accountability, and the Policing of the Past' (1995) 20(1) *Law & Social Inquiry*, pp. 7–50.

129 K. Sikkink, *The Justice Cascade*, *supra* note 88.

130 Ibid., p. 13.

131 L. Stan, 'Reckoning with the Communist Past in Romania: A Scorecard', (2013) 65(1) *Europe-Asia Studies*, p. 127.

132 See e.g., ECtHR, *Association '21 December 1989'*, *supra* note 25, para. 80.

133 See e.g., ECtHR, *Bănuțoiu and Ștefoglu v Romania,* nos 64752/13 and 54607/14, 03.07.2018, para. 41; ECtHR, *Giurcanu and Others v Romania,* nos 30365/15 and two others, 16.10.2018, para. 19; ECtHR, *Mocanu*, *supra* note 26, paras. 288, 311, etc.

134 ECtHR, *El-Masri v the former Yugoslav Republic of Macedonia,* no 39630/09, 13.12.2012.

135 ECtHR, *Anamaria-Loredana Orășanu and Others v Romania*, nos 43629/13 and 74 others, 7.11.2017; ECtHR, *Chicheanu v Romania*, no 30300/15, 16.10.2018; ECtHR, *Mateescu v Romania,* no 30462/15, 16.10.2018; ECtHR, *Picu and Others v Romania*, nos 74269/16 and 22 others, 30.10.2018; ECtHR, *Sidea and Others v Romania*, nos 889/15 and 38 others, 05.06.2018; ECtHR, *Iordan v Romania*, nos 43899/13, 43903/13, 05.06.2018.

in which the Court decided that there was no violation of these two articles,[136] the Court still found a violation of Article 6§1 ECHR due to the length of the investigations, albeit acknowledging the fact that the domestic investigative authorities faced a number of challenges, ranging from the lack of cooperation by the authorities and the destruction of files,[137] to death threats from unknown individuals, meant to scare the prosecutors into not pursuing certain investigations.[138]

In *Association '21 December 1989'* the Court invoked Article 46 ECHR, as the case concerned widespread and systematic problems. Thus, it aimed to remind the Romanian authorities that the judgment of the Court is subject to monitoring by the Committee of Ministers of the Council of Europe and has the obligation to pay the compensation awarded by the Court, as well as to change the domestic legislation in order to end the violations identified and to redress their effects. The Court also noted that all subsequent judgments on the matter should serve as a reminder for Romania to enact the changes needed to implement the judgment.[139] Nonetheless, even though certain changes occurred domestically, in 2021, the Court still identified the type of procedural defects as in the earlier cases.[140] Therefore, as much as the Court can advocate against impunity by emphasising the importance of the identification and punishment of those responsible, the domestic authorities still have a wide margin of appreciation in conducting the investigations.[141] Drawing on Sikkink's argument that accountability mechanisms are increasingly aimed at breaking cycles of impunity, the Romanian context reveals both the potential and the limitations of international rulings. The Court's jurisprudence reinforces the normative expectation that serious violations must not go unpunished, yet it also illustrates the difficulty of translating these standards into concrete outcomes when domestic inertia and structural deficiencies persist.

5.2.3 Establishing an Effective Remedy

Victims of the Revolution and the *Mineriade* have consistently sought justice and recognition. Sikkink argues that prosecutions serve as a form of social

136 ECtHR, *Alexandrescu, supra* note 83; ECtHR, *Boșnigeanu and Others v Romania,* nos 56861/08 and 33 others, 15.02.2017.

137 See e.g., ECtHR, *Crăiniceanu and Frumușanu, supra* note 104; ECtHR, *Association '21 December 1989', supra* note 25, paras. 139–141.

138 ECtHR, *Agache*, *supra* note 98.

139 ECtHR, *Association '21 December 1989', supra* note 25, para. 190.

140 ECtHR, *Moroșanu, supra* note 99.

141 E. Brems, 'Transitional Justice in Case Law', *supra* note 2, pp. 282–303.

disapproval of human rights violations. However, if these prosecutions are not adequate, victims are left with limited options to voice their dissatisfaction.[142] In Romania, ever since the Revolution, associations of victims have been active in advocating for truth-seeking and the proper acknowledgement of victimhood.[143] In many of their public declarations, they use the judgments of the ECtHR to condemn the tardy responses of the justice system.[144] For instance, the leader of Association '21 December 1989' declared that the most important result of the *Boșnigeanu* judgment was the recognition by the Court of the victim status of the applicants.[145] This matter was particularly pressing as, within that case, the national authorities contested the right of multiple applicants to join the proceedings, as they were not part of the main criminal investigations or because they did not raise any civil claims for redress domestically.[146] Even in cases in which the applicants joined as civil parties in the proceedings, the state denied their victim status as they had received compensation for the harm suffered during the Revolution and the *Mineriade*, although this compensation was not originally meant to be a redress for the ineffectiveness of the investigation.[147] In *Alecu*, the Court also questioned whether the effectiveness of the investigation would be impacted by victims joining the proceedings as civil parties and, in further cases, it outlined the problems Romania faced in terms of including the victims or their next of kin in the proceedings.[148] This dynamic reflects the core of the chosen theoretical framework, which stresses the role of international legal mechanisms in upholding victims' rights when domestic institutions fall short. The ECtHR has not only validated the claims of the victims that the state overlooked, providing them with the recognition they demanded, but has also imposed

142 K. Sikkink, *The Justice Cascade*, *supra* note 88.

143 R. Grosescu and A. Fijalkowski, 'Retrospective Justice and Legal Culture', *supra* note 56.

144 O. Dima, 'Teodor Mărieş: "Nu avem nevoie de o justiţie înfăptuită prin învoială cu grupări de crimă organizată şi represiune"', *Timpolis*, 11.02. 2016, available at https://timpolis.ro/teodor-maries-nu-avem-nevoie-de-de-o-justitie-infaptuita-prin-invoiala-cu-grupari-de-crima-organizata-si-represiune/, last accessed on 12.03.2025.

145 T. Dabija, 'Evaluarile medicale si psihologice ale victimelor Revolutiei, probe importante la CEDO', *ICAR Foundation*, 6.11.2014, available at http://www.icarfoundation.ro/evaluarile-medicale-si-psihologice-ale-victimelor-revolutiei-probe-importante-la-cedo/, last accessed on 12.03.2025.

146 See e.g., ECtHR, *Alecu and Others v Romania,* nos 56838/08 and 80 others, 15.02.2017; ECtHR, *Mocanu*, *supra* note 26.

147 See e.g., ECtHR, *Cătălina Filip v Romania,* no 15052/09, 19.10.2015; ECtHR, *Pastor and Țiclete v Romania,* nos 30911/06, 40967/06, 19.07.2011; ECtHR, *Lăpușan and Others v Romania*, nos 29007/06 and 8 others, 15.09.2011.

148 Ibid., para. 37; ECtHR, *Alecu, supra* note 146, para. 27.

obligations on Romania to address systemic shortcomings. Additionally, the Court affirmed the victims' entitlement to monetary compensation, serving as an external guarantor of recognition and redress.

Domestically, the investigations and prosecutions still faced significant obstacles. One defining moment for the victims' pursuit of legal redress was the decision of the Association '21 December 1989' to turn, for the first time, to the ECtHR.[149] This came as, in 2007, the Constitutional Court, composed predominantly of judges appointed during Ion Iliescu's presidency, ruled that investigations involving civilians and military officials could no longer be conducted by military prosecutors. This meant that jurisdiction over the files of the Revolution and the *Mineriade* had to be relinquished to civilian prosecutors, who had to take over the immense volume of information that the files contained.[150] Unsurprisingly, due to the inadequate legal framework, the civilian prosecutors closed the investigations into the Revolution shortly after this decision, arguing that the statutory limitation for murder expired in 2005.[151] These developments, combined with the fact that Iliescu was removed from the criminal investigation of the *Mineriade* due to alleged procedural defects of the criminal investigation[152] further eroded victims' faith in the justice system and motivated the association to turn to the ECtHR.[153] In the case of the *Mineriade*, this erosion was compounded by public statements from Iliescu himself, who dismissed the victims' complaints as aberrant and claimed that he had nothing to blame himself for.[154] In response, victims took the investigation into their own hands, being involved, for instance, in the unofficial investigation into the *Mineriade*.[155] At the ECtHR, this mistrust was outlined in *Mocanu*, with many victims describing a feeling of powerlessness and vul-

149 R. Grosescu, 'The Trials of the Romanian Revolution', *Cultures of History Forum,* 17.01.2019, available at https://www.cultures-of-history.uni-jena.de/politics/the-trials-of-the-romanian-revolution, last accessed on 12.03.2025.

150 D. Petrisor, 'Iliescu scapa de procesele mineriadei si revolutiei', *Cotidianul,* 21.06.2007, available at http://portalulrevolutiei.ro/arhiva/2007_416.html, last accessed on 12.03.2025.

151 R. Grosescu, 'The Trials of the Revolution', *supra* note 149.

152 D. Petrisor 'Iliescu scapa de procesele', *supra* note 150.

153 R. Grosescu, 'The Trials of the Revolution', *supra* note 149.

154 Ziarul Financiar, 'Faptele de omor din dosarul mineriadei se prescriu in 2022', 18.07.2007, available at https://www.zf.ro/politica/faptele-de-omor-din-dosarul-mineriadei-se-prescriu-in-2022–3077014, last accessed on 12.03.2025.

155 Association '21 December 1989' and The Institute for the Investigation of Communist Crimes and the Memory of Romanian Exile, *Raport despre fratricidul din 13–15 iunie 1990*, Bucharest, 2010.

nerability concerning their complaints about the national authorities.[156] This confirms Sikkink's assumption that the lack of prosecution of gross human rights violations results in the erosion of the relations between society and the authorities.[157] At the same time, the judgments also demonstrate the role of the ECtHR as a partial substitute for domestic shortcomings,[158] upholding the victims' rights to recognition and redress.

5.2.4 Driving for Change in National Jurisprudence

The impacts described thus far are particularly difficult to measure objectively. However, the developments which occurred in the domestic jurisprudence subsequent to the ECtHR's judgments are the most tangible results of these proceedings. Sikkink holds that trials 'can contribute to cultural change and the internalisation of human rights norms among state officials'.[159] This could be observed in the case of Romania as well, and three major changes occurred domestically after the first judgment.

First, the state addressed the independence of the judiciary. The aspect which was, by far, most problematic for conducting an effective investigation was the jurisdiction given to military prosecutors over the files of the Revolution and the *Mineriade*s.[160] In *Șandru* and *Elena Apostol and others*, the Court concluded that the lack of investigative activities which occurred from 1990 to 1994 in the case of the Revolution, as well as the closing of the case in 1996, can be linked to the direct association of the defendants with the military prosecutors. According to their military hierarchy, the prosecutors were subjected to the defendants, among whom, in that case, one could identify the former Minister of Defence and the former Minister of Internal Affairs.[161] Therefore, the Court concluded that an effective investigation has to be free from any hierarchical or institutional links to the accused, so that the investigation could not be tampered with by external influences.[162] In all cases which followed, the Court drew attention to the state's lack of response to the criticism related to the independence of the prosecutors, constantly requesting the state institutions to cooperate fully with the domestic investigators and to

156 ECtHR, *Mocanu*, *supra* note 26, para. 275.

157 K. Sikkink, *The Justice Cascade*, *supra* note 88.

158 A. Balta, 'Retribution through Reparations', *supra* note 3, pp. 71–93.

159 K. Sikkink, *The Justice Cascade*, *supra* note 88.

160 See e.g. ECtHR, *Alecu, supra* note 146; ECtHR, *Crăiniceanu and Frumușanu, supra* note 104.

161 ECtHR, *Șandru, supra* note 101; ECtHR, *Elena Apostol and Others v Romania,* nos 24093 and 16 others, 23.05.2016.

162 ECtHR, *Șandru, supra* note 101; ECtHR, *Association '21 December 1989', supra* note 25, etc.

report to the Committee of Ministers about the measures taken domestically.[163] The first case in which the independence of the prosecutors became unproblematic was *Ecaterina Mirea*, in 2016.[164] The judgment outlines the legislative changes which occurred in Romania between 2013 and 2014,[165] concluding that, for the first time, 'the investigation carried out by the military prosecutors does not, of itself, raise questions under the procedural head of Article 2'.[166] Thus, the Court's judgments and their constant monitoring have effected a significant change to mending the procedural defects of the investigations.

A second change which could be noticed in the domestic procedures was the adjustment of the domestic prosecutors' rhetoric by embracing the language of the ECtHR in their motivations. In 2011, the Bucharest Territorial Military Tribunal noted the importance of fulfilling the requirements of an effective investigation.[167] In 2015, the General Prosecutor's Office declared in a press release that the investigations conducted into the *Mineriade* were deficient, incomplete and not intended to discover and prosecute those truly responsible for the tragedies which occurred during those events.[168] When those accused in the Revolution file were sent to trial in 2022, the General Prosecutor noted that the case was taken over by the same prosecutor who was responsible for the indictment in 2019, as relinquishing the case to another prosecutor would have caused an unnecessary delay in the investigations due to the very high volume of work involved in processing the case.[169] These declarations of the domestic authorities demonstrate the domestic

163 ECtHR, *Cătălina Filip, supra* note 147.

164 ECtHR, *Ecaterina Mirea and Others v Romania, nos 43626/12 and 69 others,* 17.10.2016.

165 Ibid. In paras. 18–20, the Court outlines that while the military prosecutors are active-duty officers, they are, by the new legislation, 'disciplinarily liable based on the statutory provisions concerning judges and prosecutors, the military discipline not being applicable to them' anymore (para. 19).

166 Ibid., para. 36.

167 ECtHR, *Crăiniceanu and Frumușanu, supra* note 104, para. 93.

168 Stirile ProTV, 'Dosarul Mineriadei din 1990 va fi redeschis. Procurorul general Tiberiu Nitu recunoaste ca ancheta a fost de mantuiala', 22.02.2015, available at https://stirileprotvro/stiri/actualitate/dosarul-mineriadei-din-1990-va-fi-redeschis-procurorul-general-recunoaste-ca-ancheta-a-fost-de-mantuiala.html, last accessed on 12.03.2025.

169 Observator, 'Dosarul Revoluției, din nou în instanță după 33 de ani. Ion Iliescu, Gelu Voican Voiculescu şi Iosif Rus, acuzați de crime împotriva umanității', 3.08.2022, available at https://observatornews.ro/eveniment/dosarul-revolutiei-din-nou-in-instanta-dupa-33-de-ani-ion-iliescu-gelu-voican-voiculescu-si-iosif-rus-acuzati-de-crime-impotriva-umanitatii-482157.html, last accessed on 12.03.2025.

internalisation of the norms expressed in the ECtHR judgments, thereby confirming Sikkink's theory about the impact of trials on transitional discourses.

The third change in domestic attitudes and jurisprudence occurred in 2014, with the adoption of the new Criminal Code. Thereafter, Ion Iliescu, Petre Roman, Virgil Măgureanu, Gelu Voican Voiculescu and other former officials could be accused of crimes against humanity for the *Mineriad* of 13–15 June 1990.[170] Subsequently, in 2019, Ion Iliescu, Gelu Voican Voiculescu and other high-ranking military officials were also accused of crimes against humanity in the case file related to the Revolution.[171] These changes occurred in the context in which the two cases had previously been closed on the grounds that the crimes were statute-barred. However, a combination of sustained pressure from the ECtHR and persistent demands from victims and civil society prompted their reopening, with the reclassification of the crimes as incapable of being prescripted effectively eliminating one of the most significant obstacles faced by the domestic justice system.[172] Thus, the Court has further contributed to the changes which occurred domestically, driving a drastic change in the national legislation.

6 Conclusion

The case of Romania's post-communist transition underscores the long-term challenges of securing justice and truth in contexts of state-sponsored violence. The actions put in motion by the associations of victims distinctly show that the most affected by the delays which occurred in the investigation and prosecution of the Revolution and the *Mineriade* remain, to this day, the victims and their families. However, the Romanian experience before the ECtHR supports the theoretical claim that international legal mechanisms can act as crucial catalysts in post-authoritarian transitions, even when domestic accountability efforts remain inadequate. While the state initially failed to uphold its procedural obligations under the ECHR, the sustained involvement of the Court has fuelled a slow but discernible shift in legal, insti-

170 Romania Insider, 'Former Romanian President Ion Iliescu will be prosecuted for crimes against humanity', 21.10.2015, available at https://www.romania-insider.com/former-romanian-president-ion-iliescu-will-be-prosecuted-for-crimes-against-humanity, last accessed on 12.03.2025.

171 D. Vulcan, 'Dosarul Revoluției: Cronologia unei rușini judiciare', *Europa Liberă România*, 11.11.2021, available at https://romania.europalibera.org/a/dosarul-revolutiei-cronologie-rusine-judiciara/31555941.html, last accessed on 12.03.2025.

172 R. Grosescu, 'Judging Communist Crimes', *supra* note 1, pp. 505–524.

tutional and discursive practices within the country. Crucially, its insistence on ensuring independent, prompt, transparent and effective investigations has not only pushed Romania to reopen long-stalled cases but also to provide redress and recognition for victims and to change antiquated legal provisions inherited from the communist era.

This paper reveals four significant effects of the ECtHR rulings on Romania's transitional justice process. First, in terms of truth and historical narrative building, the ECtHR judgments managed to start filling the vacuum left by the domestic institutions. Through a detailed examination of the contextual background of each case, the Court has constructed a balanced, quasi-authoritative chronology of events that helps to define the contours of Romania's transitional justice narrative, providing a basis for shaping collective memory. Second, regarding the fight against impunity, the ECtHR has played a vital role in reinforcing the normative expectation that serious human rights violations must not remain unpunished. Although the implementation of these judgments has faced significant delays and obstructions, the past years have brought hope that the cycle of impunity can finally be broken and the perpetrators can be brought to justice. This confirms the theoretical assumptions that such rulings can generate pressure for accountability, even though they cannot enforce outcomes directly. Third, in terms of victim recognition and effective remedies, the ECtHR has served as an indispensable recourse for victims abandoned by the domestic justice system. Through its consistent acknowledgement of victim status and its critiques of the exclusionary practices of Romanian authorities, the Court has upheld victims' rights to truth, justice and reparations, and offered a symbolic platform where state denial and neglect could directly be confronted, echoing Sikkink's view of trials as instruments of moral condemnation and social accountability. Lastly, the ECtHR's judgments have led to tangible changes in domestic law and prosecutorial practice. From legislative reforms ensuring the independence of investigations to shifts in the legal classification of the crimes, Romania has begun to internalise international legal norms. These changes support Sikkink's argument that international trials and judgments contribute to the diffusion of legal standards and cultural change within state institutions, even in the absence of immediate political will. Therefore, even though Sikkink's 'justice cascade' has not been perfect, the judgments of the ECtHR have brought the principle of effective investigation closer to the cases of the Revolution and the *Mineriade*, thereby improving domestic practices and helping to fulfil the victims', perpetrators' and society's right to truth and justice.

Romania's distinct post-communist trajectory, marked by the only violent revolution in the former Eastern Bloc and the continued, often forceful and

repressive influence of former communist elites, renders the findings of this study highly context-specific. These exceptional historical and political conditions limit the broader applicability of the conclusions to other transitional societies with different forms of authoritarian legacies or power transitions. Nonetheless, the Court's stable interpretation of the duty to conduct effective investigations provides a transferable legal standard that other transitional contexts can engage with. Additionally, the reliance on broad theoretical frameworks, confirmed in several other transitional contexts, enhances the potential for generalisability by linking local developments to widely applicable transitional justice dynamics. What this study ultimately suggests, however, is that there is enduring relevance of international mechanisms such as the ECtHR in advancing democratic transitions and human rights discourse, but also that there is a need for nuanced, context-sensitive evaluations of their effectiveness across diverse contexts.

Current Challenges to the Execution of ECtHR Judgments and the Role of the Parliamentary Assembly of the Council of Europe

Agnieszka Szklanna

Abstract*

The effectiveness of the system based on the European Convention on Human Rights (Convention)[1] relies on implementing judgments of the European Court of Human Rights (ECtHR), a sometimes lengthy process that is overseen by the Council of Europe's statutory and decision-making body – the Committee of Ministers (CM).[2] Although, according to the Convention, the Parliamentary Assembly of the Council of Europe (PACE) – the 'deliberative body of the Council of Europe'[3] composed of members of national parliaments – has no specific role which would result directly from the provisions of the Convention, it has gradually become involved in 'parliamentary scrutiny' of the implementation of ECtHR judgments. This role's importance has been underlined in the Reykjavik Declaration adopted at the fourth Summit of the Heads of State and Government of the Council of Europe Member States in May 2023 (Reykjavik Declaration).[4] Since 2000, the PACE and its Committee on Legal Affairs and Human Rights (CLAHR) have regularly monitored the state of execution of ECtHR judgments, focusing on structural problems, judgments not implemented for more than five years and 'pockets of resistance',[5] including judgments concerning violations of Article 18 of the European Convention on Human Rights (Article 18 judgments) and the right to free elections. These judgments still pose serious challenges to the Convention system, as noted in the 12th report of CLAHR

* The paper reflects the author's personal views and does not engage the responsibility of the Council of Europe.

1 European Convention on Human Rights and Fundamental Freedoms, adopted at Rome on 4 November 1950, ETS 5 (entered into force 3 September 1953).

2 On the basis of Article 46 (2) of the Convention.

3 Statute of the Council of Europe, signed in London on 9 May 1949, Article 22.

4 CM, Reykjavik Summit of the Council of Europe, United around our values, 16.-17.05.2023.

5 This term was used by Mr Pierre-Yves Le Borgn' (France, SOC) in the 9th report of the CLAHR on implementation of ECtHR judgments referring to difficulties related to deeply rooted prejudices of a social nature, political or national security considerations or to the situations/areas of 'frozen conflicts'; PACE, CLAHR, Implementation of ECtHR Judgments – 9th Report, Rapporteur: Mr. Pierre-Yves Le Borgn', Doc. 14340, 12.06.2017, para. 24.

© AGNIESZKA SZKLANNA, 2026 | DOI:10.1163/9789004751026_014
This is an open access chapter distributed under the terms of the CC-BY-NC-ND 4.0 license.

on the implementation of ECtHR judgments (12th Report).[6] It is vital to examine these challenges and the tools available to PACE for enforcing ECtHR judgments, along with the role of the PACE Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee), which reviews countries' political and legal developments.

1 Introduction

Over the years, the PACE has managed to establish itself as a key player in debates on the execution of ECtHR judgments, in particular through the adoption of reports on this topic, the political pressure it has exerted in the context of other reports and its awareness-raising activities aimed at national parliamentarians. The importance of its role has been underlined in the annual reports of the Committee of Ministers on the supervision of the execution of ECtHR judgments[7] and, recently, in the Reykjavik Declaration.[8]

The Reykjavik Declaration reaffirmed member states' commitments to the European Convention on Human Rights and the European Court of Human Rights 'as the ultimate guarantors of human rights' across Europe and the 'unconditional obligation' to abide by the final judgments of the ECtHR.[9] It underlined 'the fundamental importance of the execution of the Court's judgments and the effective supervision of that process to ensure the long-term sustainability, integrity and credibility of the Convention system' and recalled 'the importance of involving national parliaments in the execution of judgments'. Its Appendix IV, entitled 'Recommitting to the Convention system as the cornerstone of the Council of Europe's protection of human rights', underlined 'the fundamental importance of the execution of the Court's judgments and the effective supervision of that process to ensure the long-term sustainability, integrity and credibility of the Convention system' and the states recommitted to 'resolving the systemic and structural human rights problems identified by the Court and to ensure the full, effective and prompt execution of the final judgments of the Court, … while also recalling the importance of

6 PACE, CLAHR, Implementation of Judgments of the European Court of Human Rights – 12th Report, Rapporteur: Mr. Constantinos Efstathiou (Cyprus, SOC), provisional version, available at https://rm.coe.int/committee-on-legal-affairs-and-human-rights-implementation-of-judgment/1680b49da5, last accessed on 10.03.2025.

7 E.g., in CM, Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights. 17th Annual Report, 2023, April 2024, p. 76.

8 Reykjavik Summit of the Council of Europe, United around our values, *supra* note 4.

9 Ibid., p. 2.

involving national parliaments in the execution of judgments'.[10] Appendix IV also proposed a number of steps to 'develop a more co-operative, inclusive and political approach based on dialogue' in the supervision of the execution of ECtHR judgments, to assist states in this process.[11] It also included the 'Reykjavik Principles for Democracy' in its Appendix III.

The Reykjavik Declaration was a response to new threats and challenges to the human rights protection system based on the European Convention on Human Rights, and in particular to those posed by the Russian Federation's war of aggression against Ukraine. Without going into an in-depth analysis of the implications of the latter, it would be noteworthy to have a closer look at the other current challenges to the execution of ECtHR judgments.

As an analysis of all serious challenges to the execution of ECtHR judgments would go beyond the scope of this paper, it is thus proposed to focus on Article 18 judgments and those concerning the right to free elections, which are under the CM's 'enhanced procedure'[12] and which pose the most serious challenges and result from long-standing problems. Such judgments have a direct impact on the state of democracy and/or rule of law in a given country, and their implementation requires the use of political tools, including those which are at the disposal of the PACE and its two committees, the CLAHR and the Monitoring Committee. While the role of the former has often been referred to in academic literature,[13] little attention has been given to the latter.[14]

10 Ibid., p. 18.

11 Ibid., p. 19, section entitled 'Develop a more co-operative, inclusive and political approach based on dialogue'.

12 The CM uses two types of procedures when supervising the execution of ECtHR judgments: an 'enhanced' one for the most complex cases, which entails systemic examination at the CM Human Rights (DH) meetings, and a 'standard' one, which is carried out in writing.

13 See e.g., A. Drzemczewski, 'The Parliamentary Assembly's Involvement in the Supervision of the Judgments of the Strasbourg Court', (2010) 28 (2) *Netherlands Quarterly of Human Rights*, pp. 164–178; A. Donald, 'Parliaments as Compliance Partners in the European Convention on Human Rights System', in M. Saul, A. Follesdal and G. Ulfstein (eds.), *The International Human Rights Judiciary and National Parliaments: Europe and Beyond*, Cambridge University Press: Cambridge, 2017, pp. 75–109, and A. Szklanna, 'Implementation of Judgments of the European Court of Human Rights: the Interaction between the Court, the Committee of Ministers and the Parliamentary Assembly of the Council of Europe', in W. Benedek, M. Kettemann, R. Klaushofer, *et al.* (eds.), *European Yearbook on Human Rights 2017*, NWV: Vienna, 2017, pp. 289–306.

14 See e.g., J. Kleijssen, 'The Monitoring Procedure of the Council of Europe's Parliamentary Assembly', in G. Alfredsson (ed.), *International Human Rights Monitoring Mechanisms: Essays in Honour of Jakob Th. Möller*, Nijhoff: Leiden, 2001, pp. 623–626.

2 Recent Work of the PACE on Execution of ECtHR Judgments

Over the past decade, PACE/CLAHR reports on the implementation of ECtHR judgments have focused on the issue of structural problems and considerable delays – of more than five years or even more than ten years – in the execution of judgments revealing such problems. In its 2017 report, the PACE also focused on 'pockets of resistance' cases,[15] and since then it has also highlighted the problems related to the execution of judgments in cases concerning inter-state conflicts.[16]

In April 2023, the CLAHR published its eleventh report on this topic (11th Report),[17] concentrating on states with the highest number of cases pending before the Committee of Ministers (Turkey, Romania, Ukraine, Hungary and the Russian Federation), inter-state cases and judgments related to violations of Article 18 of the European Convention on Human Rights and some other 'specific challenges'.[18] The 11th Report led to the adoption of Resolution 2494 (2023) of the PACE.[19]

The CLAHR's twelfth Report',[20] which refers to the latest report of the CM on the execution of ECtHR judgments of 2023 (2023 CM Annual Report),[21] focuses on the 'leading cases'[22] pending before the CM, including for more than five years (particularly in countries like Azerbaijan, Bulgaria, Hungary, Italy, Moldova, Poland, Romania, Turkey and Ukraine). It also analyses the implementation of ECtHR judgments 'protecting democratic principles' (see

15 PACE, CLAHR, 9th report, *supra* note 5, para. 24.

16 Ibid., para. 42.

17 PACE, CLAHR, Implementation of Judgments of the European Court of Human Rights – 11th Report, Rapporteur: Mr. Constantinos Efstathiou (Cyprus, SOC), Doc. 15742, 11.04.2023.

18 Ibid., Section 6 'specific challenges, including cases revealing long-standing "systemic and structural problems" identified by the Court's judgments'. This section included also a new issue – the judgments concerning violations of Article 6 of the Convention in relation to the reform of the judiciary in Poland: ECtHR, *Xero Flor w Polsce v Poland*, no 4907/18, 07.05.2021, *Broda and Bojara v Poland*, no 26691/18, 29.06.2021 and *Reczkowicz v Poland*, no 43447/19, 22.07.2021.

19 PACE, Resolution 2494 (2023), 'Implementation of Judgments of the European Court of Human Rights', 26.04.2023. The resolution also pointed out the complexity of the situation in Ukraine due to the Russian war of aggression and the specific challenges related to the latter. The PACE praised the Ukrainian authorities for 'their commitment to full compliance with the Convention' and for the measures they had taken to solve the structural problems identified by the ECtHR; ibid., para. 4.

20 PACE, CLAHR, 12th Report, *supra* note 6.

21 CM, 2023 Annual Report, *supra* note 7.

22 Such cases 'indicating that human rights issues are not being resolved in a reasonable period of time', *supra* note 6, para. 6 of the preliminary draft resolution.

below),[23] inter-state cases and individual cases with inter-state features[24] as well as problems with the execution of judgments concerning the Russian Federation.[25] The report proposes a large number of measures that could be taken by member states of the Council of Europe and Council of Europe institutions as well as the European Union effectively to address current challenges to implementation of ECtHR judgments.

3 Current Challenges to the Execution of ECtHR Judgments: Selected Examples

3.1 *Judgments 'Protecting Democratic Principles'*

The CLAHR's twelfth report on the implementation of ECtHR judgments focuses on problems with the implementation of ECtHR judgments which are crucial for 'protecting democratic principles', i.e. those concerning the protection of the right to freedom of expression (Article 10 of the Convention),[26] the right to freedom of assembly and freedom of association (Article 11 of the Convention),[27] the right to free and fair elections (Article 3 of Protocol No 1 to the Convention),[28] judgments highlighting an abusive limitation of rights and freedoms (Article 18 of the Convention)[29] (including *Kavala v Turkey*[30]) and judgments concerning the independence of the judiciary (Article 6 of the

23 Some of these judgments were analysed under Section D, 'Systemic, structural or complex problems and advances', of the CM 2023 Annual Report; *supra* note 7, pp. 29–57.

24 PACE, CLAHR, 12th Report, *supra* note 6, Section 5. The report focuses mainly on the *Cyprus v Turkey* and *Georgia v Russia* (*I, II and IV*) cases. As regards the non-implementation of the latter, it is related to the general refusal of the Russian Federation's authorities to cooperate with the Council of Europe. On its basis, the PACE adopted its Resolution 2599 (2025) on 09.04.2025.

25 Ibid., Section 6. The Russian Federation refuses to implement most ECtHR judgments and to cooperate with the CM. The report stresses this state's ongoing obligation to comply with judgments despite its departure from the Council of Europe and also notes that the CM disposes of very limited tools (such as cooperating with the United Nations and civil society, sending 'symbolic' messages to the Russian authorities) and that the issue of non-implementation of judgments concerning that state would deserve a separate report. Ibid., paras. 62 and 66.

26 Ibid., Section 4.1.

27 Ibid., Section 4.2.

28 Ibid., Section 4.3.

29 Ibid., Section 4.4.

30 ECtHR, *Kavala v Turkey,* no 28749/18, 10.12.2019 [Chamber judgment] and 11.07.2022 [Grand Chamber judgment on Article 46 (4) of the European Convention on Human Rights].

Convention).[31] In doing so, the rapporteur refers to the 'Reykjavik Principles for Democracy', which reiterate that democracy is '… the only means to ensure that everyone can live in a peaceful, prosperous and free society …', and that Council of Europe member states endeavour to '… prevent and resist democratic back-sliding on our continent, including in situations of emergency, crisis and armed conflicts' and to 'stand firm against authoritarian tendencies …'.[32] It goes without saying that those judgments refer to a large variety of themes and legal issues and different degrees of difficulties at the stage of execution process. Therefore, it is proposed to focus only on Article 18 judgments and those concerning the right to free elections.

3.2 *Article 18 Judgments*

Article 18 of the Convention states that restrictions on rights and freedoms must not be applied for purposes other than those prescribed by the Convention.[33] It has no independent existence and can be applied only in conjunction with another Article of the Convention or its Protocol. Nevertheless, it is a critical provision whose role '… is to protect individuals from limitations of their rights through State actions, such as politically motivated prosecutions, which run against the spirit of the Convention'.[34] Therefore, it protects individuals against misuse of powers by the state, in particular in cases of arrest, detention and/or conviction of government critics, civil society activists, human-rights defenders and politicians, in relation with criminal proceedings not supported by evidence.[35]

Violations of Article 18 are rarely found by the Court: in only 27 cases have violations of Article 18, in connection with other Articles of the Convention (mainly Article 5), been found so far by the ECtHR.[36] There are 19 such cases

31 PACE, CLAHR, 12th Report, *supra* note 6, Section 4.5.

32 CM, Reykjavik Declaration, Appendix III, *supra* note 4.

33 Article 18 of the Convention on 'limitation on use of restrictions on rights' stipulates that '[t]he restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed'.

34 CM, Annual Report 2023, *supra* note 7, p. 26.

35 For more analysis on this subject see e.g., B. Çali and E. Demir-Gürsel (eds.), 'The Council of Europe's Responses to the Decay of the Rule of Law and Human Rights Protections: Special Issue [Collection of Articles]', (2021) 2(2) *European Convention on Human Rights Law Review*, pp. 165–335; E. Turkut, 'The "Reasonable Suspicion" Test of Turkey's Post-coup Emergency Rule under the European Convention on Human Rights', (2020) 38(4) *Netherlands Quarterly of Human Rights*, pp. 264–282 and E. Turkut, 'Osman Kavala v Turkey: Unravelling the Matryoshka Dolls', (2020) 3 *European Human Rights Law Review*, pp. 288–294.

36 As of 10.03.2025, according to the HUDOC database.

pending before the Committee of Ministers,[37] concerning seven states: Azerbaijan,[38] Bulgaria,[39] Georgia,[40] Poland,[41] the Russian Federation,[42] Turkey[43] and Ukraine.[44] As stressed by the CLAHR's rapporteur, Mr Efstathiou, in the 11th Report, 'violations of Article 18 of the Convention deny par excellence the very gist of democracy and are regarded as particularly serious given that they relate to the purposive misuse of power'.[45]

According to the CM practice, the principle of *restitutio in integrum* requires in such cases that all the negative consequences of the abusive criminal/disciplinary proceedings be erased for the applicant (in the framework of the so-called 'individual measures').[46] This practice was confirmed in the ECtHR's Grand Chamber judgment in *Ilgar Mammadov v Azerbaijan* concerning the arbitrary detention of the applicant, an opposition politician, and delivered in the infringement proceedings launched on the basis of Article 46(4) of the Convention.[47] So-called 'general measures', i.e. measures aimed at preventing similar violations in the future, might also be required in this type of case to

37 As of 10.03.2025.

38 The so-called 'Mammadli group v Azerbaijan' containing five cases: ECtHR, *Mammadli v Azerbaijan*, no 47145/14, 19.04.2018; *Aliyev v Azerbaijan*, nos 68762/14 and 71200/14, 20.09.2018; *Ibrahimov and Mammadov*, no 63571/16, 13.02.2020; *Khadija Ismayilova* (*No 2*), no 30778/15, 27.02.2020 and *Yunusova and Yunusov* (*No 2*), no 68817/14, 16.07.2020, and ECtHR, *Democracy and Human Rights Resource Centre and Mustafayev*, nos 74288/14 and 64568/16, 14.10.2021.

39 ECtHR, *Miroslava Todorova v Bulgaria*, no 40072/13, 19.10.2021.

40 ECtHR, *Merabishvili v Georgia*, no 72508/13 [GC], 28.11.2017.

41 ECtHR, *Juszczyszyn v Poland*, no 35599/20, 06.10.2022.

42 ECtHR, *Ukraine v Russia* (*re Crimea*), nos 20958/14 and 38334/18 [GC], 25.6.2024; *Zarema Musayeva v Russia*, no 4573/22, 28.08.24; *Navalnyy v Russia*, no 29580/12 [GC], 15.11.2012; *Navalnyy* (*No 2*) *v Russia*, no 43734/14, 09.04.2019; *Kogan v Russia*, no 54003/20, 07.03.2023 and *Kutayev v Russia*, no 17912/15, 24.01.2023.

43 ECtHR, *Kavala v Türkiye*, *supra* note 30; *Selahattin Demirtaş v Turkey* (*No 2*), no 14305/17 [GC], 22.12.2020, and *Yüksekdağ Şenoğlu and Others v Turkey*, no 14332/17, 08.11.2022.

44 ECtHR, *Lutsenko v Ukraine*, no 6492/11, 03.07.2012.

45 PACE, CLAHR, 11th Report, *supra* note 17, para. 44. See also the Appendix to this report – 'Summary of the hearings held during this reporting cycle', which refers to a hearing on Article 18 judgments held before the CLAHR on 14 November 2022, paras. 6–12. The hearing took place with the participation of Ms Clare Ovey, Head of the Department for the Execution of Judgments of the European Court of Human Rights, Council of Europe; and Dr Başak Çalı, Professor of International Law, Co-director of the Centre for Fundamental Rights, Hertie School, Berlin.

46 CM, Annual Report 2023, *supra* note 7, p. 26.

47 ECtHR, Proceedings under Article 46 (4) in the case of *Ilgar Mammadov v Azerbaijan*, no 15172/13, 29.05.2019, paras. 190–195. This was the first time the CM had used this type of proceedings.

avoid a repetition of the abuse of power, either for the applicant or for others. If the violation of Article 18 reveals a misuse of the criminal justice system, reforms to strengthen the independence of the judiciary and to shield the prosecuting authorities from political influence might be required by the CM.[48]

Where the ECtHR has found a violation of Article 18, the execution process can be particularly complex. As stressed by the CLAHR's rapporteur, judgments finding such violations '… often indicate pervasive and systemic malfunctioning within a constitutional system, such that the separation of powers is eroded and thus the system is open to the misuse and abuse of power for ulterior motives'.[49] In such cases, a higher level of 'international intervention' may be required.[50] Nevertheless, despite these difficulties, the CM has closed the supervision of some cases concerning violations of Article 18[51] or noted positive developments in some of those cases which are still pending before it.[52] Other cases raise serious execution problems. While the implementation of Article 18 cases against the Russian Federation is hindered by the general lack of cooperation following that state's exclusion from the Council of Europe, so far the CM has seen no progress as regards the Turkish cases: *Kavala v Türkiye, Selahattin Demirtaş v Turkey* (*No 2*)[53] and *Yüksekdağ Şenoğlu v Türkiye*.[54] There are also outstanding problems as regards the execution of

48 CM, Annual Report 2023, *supra* note 7, p. 26.

49 PACE, CLAHR, 12th report, *supra* note 6, para. 36.

50 PACE, CLAHR, 11th report, *supra* note 17, Appendix, para. 7.

51 For instance, CM, Resolution CM/ResDH (2020) 178, Execution of the judgments of the European Court of Human Rights. Three cases against Azerbaijan: *Ilgar Mammadov, Ilgar Mammadov* (*No 2*) and *Rasul Jafarov*, 03.09.2020, following the applicants' release and the quashing of their convictions; Resolution CM/ResDH(2021)204, Execution of the judgment of the European Court of Human Rights. *Natig Jafarov vs Azerbaijan* (Mammadli group), 16.09.2021, following the termination of the criminal proceeding against the applicant or Resolution CM/ResDH(2021)426, Execution of the judgment of the European Court of Human Rights Rashad Hasanov and Others against Azerbaijan (Mammadli group), 02.12.2021, following the quashing of the applicants' convictions. For more examples see the factsheet of the Department for the Execution of ECtHR Judgments, 'Limitation on the use of restrictions of rights (Article 18)', available at: https://rm.coe.int/tfs-article-18-/1680b204c2, last accessed on 10.03.2025.

52 In particular, in *Miroslava Todorova v Bulgaria,* in which the applicant returned to her judgeship position and the disciplinary sanctions against her had been erased, and *Lutsenko v Ukraine,* in which the applicant was pardoned by the President and released. For more information, see the Factsheet of the Department for the Execution of ECtHR Judgments, 'Limitation on the use of restrictions of rights (Article 18)', *supra* note 51.

53 ECtHR, *Selahattin Demirtaş v Turkey* (*No 2*), *supra* note 43.

54 ECtHR, *Yüksekdağ Şenoğlu and Others v Turkey*, *supra* note 43.

the judgments from the *Mammadli v Azerbaijan* group of cases, pending for more than five years.[55]

3.2.1 The *Kavala* Case

The continued detention of the Turkish philanthropist and human rights defender Mr Osman Kavala, despite two ECtHR judgments delivered in the *Kavala v Turkey* case[56] and repeated calls from the CM to release him, remains a 'salient challenge' to the Convention system.[57] In its first judgment of 10 December 2019, the ECtHR found, *inter alia*, that the applicant's arrest and pre-trial detention had taken place in the absence of evidence to support a reasonable suspicion that he had committed an offence (violation of Article 5(1) of the Convention) and also that they pursued the ulterior purpose of silencing him and dissuading other human rights defenders (violation of Article 18 taken in conjunction with Article 5(1)). It indicated that any continuation of the applicant's pre-trial detention would entail a prolongation of these violations of the Convention, as well as a breach of Turkey's obligations to abide by its judgments in accordance with Article 46(1) of the Convention.[58] The ECtHR therefore held that the government should secure his immediate release. However, since the applicant was not released, the CM referred the matter to the ECtHR under Article 46(4) of the Convention (under 'infringement proceedings'). On 11 July 2022, the ECtHR's Grand Chamber found that Turkey had failed to fulfil its obligation to comply with final judgments of the ECtHR under Article 46(1) of the Convention.[59]

Mr Kavala has been deprived of his liberty since 18 October 2017. On 28 September 2023, the Court of Cassation upheld the judgment of the Assize Court of 25 April 2022 concerning his conviction for and sentencing to life imprisonment for attempting to overthrow the government within the context of the Gezi Park events of 2013.[60] He lodged two applications to the Constitutional

55 PACE, CLAHR, 12th Report, *supra* note 6, Section 4.4.

56 ECtHR, *Kavala v Turkey*, *supra* note 30.

57 CM, 2023 Annual Report, *supra* note 7, p. 7

58 Which refers to the state's obligation to abide by the ECtHR's judgments.

59 It was the second judgment ever delivered in the framework of infringement proceedings, after the one in *Ilgar Mammadov v Azerbaijan*. The ECtHR also held that its finding in the first *Kavala* judgment of a violation of Article 18 in conjunction with Article 5(1) of the Convention had vitiated any action resulting from the charges relating to the Gezi Park events and the attempted coup and that the proceedings which resulted in his conviction had not made it possible to remedy the problems identified in the first judgment.

60 HUDOC EXEC, description of the *Kavala v Turkey* case, available at: https://hudoc.exec.coe.int/eng?i=004–55161, last accessed on 10.03.2025.

Court complaining about the unlawfulness of his detention following conviction (on 9 June 2022) and his final conviction (on 24 October 2023). Both are still pending. On 18 January 2024, Mr Kavala lodged a second application with the ECtHR, complaining that the decision of the Court of Cassation upholding his conviction violated several provisions of the Convention (including the right to a fair trial),[61] which was communicated to the Turkish authorities on 21 March 2024. Mr Kavala also tried to use extraordinary judicial remedies but to no avail.[62]

The issue of legal avenues that could lead to Mr Kavala's release was discussed during two high-level technical missions of the Council of Europe (the Director General of Human Rights and Rule of Law) and the competent Turkish authorities in February and October 2024.[63] Following these missions, the CM Secretariat identified three main avenues as 'having a realistic chance of bringing results in line with the ECtHR's judgments, by providing a procedural possibility for a retrial and acquittal, as well as provisional release pending such a retrial'.[64] These are 1) a Convention-compliant ruling of the Turkish Constitutional Court in respect of one or both of Mr Kavala's pending applications; 2) the conclusion of Mr Kavala's application currently pending before the ECtHR; 3) a friendly settlement of Mr Kavala's current application to the ECtHR, or a unilateral declaration by the government in respect of it. Both the first and third avenues could lead to the reopening of proceedings according to Turkish law. The CM continues to examine the Kavala case at its weekly meetings. At its meeting (DH) on 4–6 March 2025, the CM (Ministers' Deputies) again expressed 'profound concern' about the continued detention of Mr Kavala and recalled these three main avenues,[65] and 'noted with interest the authorities' expression of continued openness to cooperation in particular for

61 ECtHR, *Kavala v Turkey*, *supra* note 30.

62 CM, Communication from the applicant's representative, DH-DD(2024), 30.05.2024. Under Article 311 of the Code on Criminal Procedure, he had made two requests to the 13th Assize Court on 26 March and 6 May 2024 to reopen the proceedings. Both requests were refused, as were the applicant's appeals against the refusals. On 6 May, the applicant further filed a request for 'reversal of judgment in the interest of law' with the 13th Assize Court.

63 CM, Notes for the agenda, 1521st meeting, 4–6 March 2025 (DH), H46–32 *Kavala v Türkiye*, CM/Notes/1521/H46–32, 06.03.2025.

64 CM, Notes for the agenda, 1514th meeting, 3–5 December 2024 (DH), H46–37 *Kavala v Türkiye*, CM/Notes/1514/H46–37, 05.12.2024.

65 CM, Decisions, 1521st meeting, 4–6 March 2025 (DH), H46–32 *Kavala v Turkey*, *supra* note 63, paras. 4 and 5. The CM also recalled that both the first and the third options could provide a procedural possibility for a retrial and acquittal, as well as provisional release pending such a retrial; ibid., para. 6.

a new technical meeting in May 2025'.[66] It also stressed '... that any further high-level technical meeting between the authorities and the Secretariat should aim to achieve swift, concrete, and result-oriented progress towards ensuring Mr Kavala's immediate release by all available means'.[67]

The PACE has consistently supported the execution of the ECtHR's judgments in Mr Kavala's case, in particular in its Resolution 2459 (2022) on '[h]onouring of obligations and commitments by Türkiye' of October 2022, based on a report of the Monitoring Committee.[68] The rapporteurs of the Monitoring Committee visited Mr Kavala in prison twice, in January 2023 and in June 2024.[69] On 9 October 2023, he was awarded the 11th PACE Václav Havel Human Rights Prize.

Moreover, on 12 October 2023, the PACE adopted Resolution 2518 (2023), 'Call for the immediate release of Osman Kavala', in which it considered that Mr Kavala fell within its definition of 'political prisoner'[70] and called again for his immediate release.[71] Considering that a refusal to release him '... casts a shadow on the commitment of Türkiye to respect the rule of law, human rights and democratic values, which are central for all Council of Europe member States', it also recommended that the Council of Europe and its member states initiate the complementary joint procedure foreseen in its Resolution 2319 (2020)[72] to put pressure on Turkey to implement the judgments in his case.[73] It also suggested that it could challenge the credentials of the Turk-

66 Ibid., para. 7.

67 Ibid., para. 8.

68 PACE, Resolution 2459 (2022) on Honouring of obligations and commitments by Turkey, 12.10.2022, para. 8.1. It is based on a report of the Monitoring Committee, Honouring of obligations and commitments by Türkiye, rapporteurs: Mr. John Howell (United Kingdom, EC/DA) and Mr Boriss Cilevičs (Latvia, SOC), Doc. 15618, 26.09.2022 and Doc. 15618 Addendum, 10.10.2022.

69 PACE, Monitoring Committee, The honouring of obligations and commitments by Turkey. Information note following the fact-finding visit (11–14 June 2024), AS/Mon (2024) 16 declassified, 11.09.2024. On 13 January 2023, Mr Kavala received the visit of Mr. John Howell (United Kingdom, EC/DA) and Boriss Cilevičs (Latvia, SOC) and on 13 June 2024 that of Mr. Stefan Schennach (Austria, SOC).

70 PACE, Resolution 2518 (2023), 12.10.2023, para. 4. See report by CLAHR, 'Call for the immediate release of Osman Kavala', rapporteur: Ms Petra Bayr (Austria, SOC), Doc. 15841, 10.10.2023.

71 PACE, Resolution 2518 (2023), Ibid., para. 7.

72 PACE, Resolution 2319 (2020), 'Complementary joint procedure between the Committee of Ministers and the Parliamentary Assembly in response to a serious violation by a member State of its statutory obligations', 29.01.2020.

73 PACE, Resolution 2518(2023), *supra* note 70, para. 10.

ish delegation at its first part-session of 2024, if Mr Kavala had not been released from prison by 1 January 2024;[74] however, eventually, it did not use this power. In its Recommendation 2261 (2023), adopted on the same day and on the same subject, it again expressed concerns about the detention of Mr Kavala and recommended that the CM take more robust steps, such as to 'establish country monitoring in respect of the execution of judgments of the European Court of Human Rights by Türkiye, in line with the 1994 Declaration on compliance with commitments accepted by member States of the Council of Europe' and to engage in 'dialogue at the highest levels, including by involving groups of ministers, ambassadors or former high-level politicians'.[75]

The newly proposed preliminary draft resolution on the implementation of ECtHR judgments, which was included in the CLAHR's twelfth report, refers to the above-mentioned Resolution 2518 (2023) and even the idea of initiating the complementary joint procedure. It finds Mr Kavala's continued detention 'absolutely unacceptable' and reiterates its call to Turkey immediately to release him.[76] In the CLAHR's twelfth Report, the rapporteur referred to the hearing that the CLAHR had held jointly with the Monitoring Committee on 29 January 2025 and during which the representatives of the Turkish authorities had to present the measures they were taking to implement the most problematic ECtHR's judgments, including *Kavala.* According to the rapporteur, Mr Efstathiou, '… the responses did not demonstrate a concrete plan or intention to implement these judgments'.[77]

The implementation of the *Kavala v Turkey* judgments also raises important questions about general measures. Regarding the ECtHR's findings of a violation of Article 18 in conjunction with Article 5 of the Convention, since its 1398th meeting in March 2021 (DH),[78] the CM has stressed the need to take all legislative and other measures to ensure the independence of the judiciary, in particular by securing the structural independence of the Council of Judges and Prosecutors (*Hâkimler ve Savcılar Kurulu* – HSK) from the executive.[79] The composition of the HSK lies at the heart of the problem regarding the lack of independence of the Turkish judiciary and is due to the fact that the majority of HSK members are appointed by the executive and the legislative

74 Ibid., para. 16.

75 PACE, Recommendation 2261 (2023), 12.10.2023, para. 6.

76 PACE, CLAHR, 12th Report, *supra* note 6, preliminary draft resolution, para. 9.

77 Ibid., para. 17.4.

78 CM, Decisions adopted at 1398th meeting, 9–11 March 2021 (DH), H46–33 *Kavala v Turkey*, CM/Del/Dec (2021)1398/H46–33, para. 6.

79 For instance, in its decision taken at its 1521st meeting, 4–6 March 2025 (DH), 06.03.2025, CM/Del/Dec (2025)1521/H46–32, para. 10.

powers,[80] which is not in line with European standards.[81] This situation raises doubts about the judiciary's independence from the political power because of the HSK's role in appointing as well as dismissing judges and public prosecutors and taking decisions on their careers.

At the initiative of the PACE Monitoring Committee, the European Commission for Democracy through Law (Venice Commission) prepared an opinion on the relevant provisions of the Turkish Constitution and legislation. The opinion, which was adopted in December 2024,[82] highlights the persistent issues with the current structure of the HSK and its impact on the judiciary and recommends that its composition should be changed to ensure the judiciary's independence and impartiality. At its 1521st meeting (DH) in March 2025, the CM took note of this opinion and 'strongly urged' the Turkish authorities to adopt legislative and other measures in the context of the implementation of the Judicial Reform Strategy of 2025–2029 (one of whose aims is to 'reconsider' the structure of the HSK and judicial bodies), taking inspiration from the Venice Commission's recommendations contained in that opinion.[83]

3.2.2 The Case of Selahattin Demirtaş and Other Similar Cases

The implementation of the ECtHR judgments delivered in *Selahattin Demirtaş v Turkey* (*No 2*) and *Yüksekdağ Şenoğlu and Others v Turkey* raises similar issues to that of *Kavala v Turkey*. The *Selahattin Demirtaş* (*No 2*) case concerns the arrest and pre-trial detention of, and criminal proceedings against, the applicant, a member of the Turkish Grand National Assembly and one of the

80 The HSK is the main self-governing body of the judiciary, overseeing appointments, promotions, transfers, disciplinary measures and the dismissal of judges and public prosecutors. It has 13 members: the Minister of Justice and his deputy, four members directly appointed by the President and, following constitutional amendments of 2017, seven members appointed by the Grand National Assembly. As regards the members elected by the parliament, three are from the Court of Cassation, one from the Council of State, and three others who must be academics and lawyers with specific qualifications laid down in law. Moreover, the HSK is chaired by the Minister of Justice.

81 According to the CM's Recommendation CM/Rec (2010) 12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, 17.11.2010, the composition of a Council for the Judiciary should include a majority of judges elected by their peers. *Ex officio* membership is not acceptable or should not include members or representatives of the legislature or the executive.

82 Venice Commission, Türkiye – Opinion on the composition of the Council of Judges and Prosecutors and the procedure for the election of its members, adopted at its 141st Plenary Session (Venice, 6–7 December 2024), CDL-AD(2024)041, 09.12.2024, paras. 120 and 121.

83 CM, CM/Del/Dec (2025)1521/H46–32, *supra* note 63, paras. 11 and 12.

leaders of the People's Democratic Party (HDP). Mr Demirtaş was one of 154 parliamentarians (including 55 HDP members) who lost parliamentary inviolability following constitutional amendments abolishing the inviolability from prosecution of certain members of parliament.[84] He was arrested on 4 November 2016 and placed in pre-trial detention, charged with various terrorism-related offences. At the same time eight other democratically elected HDP members of parliament were also detained, as was the former HDP co-chair, Ms Figen Yüksekdağ Şenoğlu.

In its judgment in *Selahattin Demirtaş v Turkey* (*No 2*), the ECtHR found a number of violations of the Convention relating to Mr Demirtaş's pre-trial detention between 4 November 2016 and 7 December 2018 and the removal of his parliamentary inviolability (violations of Articles 5(1) and (3), and Article 10 of the Convention and Article 3 of Protocol No 1). The Court considered that the domestic courts had failed to give specific facts or information that could give rise to a reasonable suspicion that Mr Demirtaş had committed the offences in question. Finally, taking into account, among other elements, the applicant's return to pre-trial detention on 20 September 2019, the Court found it established that the detention pursued the ulterior purpose of stifling pluralism and limiting the freedom of political debate (violation of Article 18 in conjunction with Article 5 of the Convention). Therefore, it considered that any continuation of the applicant's pre-trial detention on grounds pertaining to the same factual context would entail a prolongation of the violation of his rights as well as a breach of Turkey's obligation to abide by the Court's judgment (Article 46 (1) of the Convention). It therefore held that Turkey had to take all necessary measures to secure Mr Demirtaş's immediate release.[85] As regards Ms Yüksekdağ Şenoğlu, the ECtHR came to similar conclusions and found the same violations of the Convention in *Yüksekdağ Şenoğlu and Others v Turkey*.[86]

84 In October 2014, violent protests took place in 36 provinces in eastern Turkey (6–8 October events), followed by further violence in 2015 in the wake of the breakdown of negotiations aimed at resolving the 'Kurdish question'. On 20 May 2016, with a view 'to address[ing] public indignation about statements by certain members of parliament constituting emotional and moral support for terrorism', Article 83(2) of the Constitution was amended, abolishing inviolability from prosecution for certain members of parliament. See CM, Notes for the agenda, 1521st meeting, 4–6 March 2025 (DH), H46–33 *Selahattin Demirtaş* (*No 2*) *group v Turkey*, CM/Notes/1521/H46–33, 06.03.2025.

85 Ibid.

86 ECtHR, *Yüksekdağ Şenoğlu and Others v Turkey*, *supra* note 43, see, in particular, paras. 507–509.

Both Mr Demirtaş and Ms Yüksekdağ Şenoğlu remain in detention, despite the ECtHR's judgments and numerous decisions of the Committee of Ministers calling for their release.[87] On 7 November 2019, Mr Demirtaş lodged before the Constitutional Court a complaint about his current pre-trial detention, while Ms Yüksekdağ Şenoğlu did so on 8 June 2023. Both complaints are still pending.[88]

On 16 May 2024 the Assize Court delivered its judgment and convicted the applicants of various charges. The reasons for this judgment are not yet known. The domestic court had considered the applicants' detention to have been based on different charges, facts and new evidence which had not been examined by the ECtHR.[89]

At the 1521st meeting of the Ministers' Deputies (DH) on 6 March 2025, the CM adopted an interim resolution in which it deplored the absence of a decision by the Constitutional Court on Mr Demirtaş's application as well as the absence of the reasoned decision of the Assize Court of 16 May 2024. It underlined that '… it is incumbent on the authorities to establish on the basis of cogent evidence that the applicants' current detention does not relate to the same factual grounds examined by the Court and is not therefore a continuation of the violations it found'. It exhorted the authorities to 'take all possible steps to ensure that the Constitutional Court completes its determination on the applications introduced by Mr Demirtaş and Ms Yüksekdağ Şenoğlu with full regard to the Court's findings and the Assize Court issues its reasoned judgment in the shortest possible time frame'. Finally, it reiterated its call to release the applicants immediately until the Constitutional Court or the ECtHR established whether the Assize Court had based its judgment on the same factual context as that of the ECtHR, providing a direct and sufficiently strong link between the applicants and the offences they were convicted of. In the meantime, the authorities could explore other measures than detention.[90]

The PACE has also consistently supported the execution of the ECtHR's judgments in these cases. In its June 2021 Resolution 2381 (2021) on '[s]hould

87 See, for instance, the decision adopted at its 1501st (DH) (11–13 13 June 2024), *H46–35 Selahattin Demirtaş (No 2) group v Turkey*, CM/Del/Dec(2024)1501/H46–35, para. 4.

88 See CM, Notes for the agenda, CM/Notes/1521/H46–33, *supra* note 84. The remaining 11 applicants involved in the judgment in *Yüksekdağ Şenoğlu and Others v Turkey* have been released. Criminal proceedings are pending against all of them, either before the first-instance courts or on appeal before the Court of Cassation.

89 Ibid.

90 CM, Interim Resolution CM/ResDH(2025)34, Execution of the judgments of the European Court of Human Rights, *Selahattin Demirtaş (No. 2) group v Turkey*, 06.03.2025.

politicians be prosecuted for statements made in the exercise of their mandate?', it called for the release of Mr Demirtaş[91] and criticised the practice of the retroactive incrimination of political statements.[92] In its Resolution 2459 (2022) on the '[h]onouring of obligations and commitments by Türkiye' of October 2022, it again called for Mr Demirtaş's release and for ensuring that the Constitutional Court examined rapidly and '… in a manner compatible with the spirit and conclusions of the Court's judgment …' the individual application challenging his current detention.[93] The rapporteur of the Monitoring Committee, Mr Stefan Schennach, visited Mr Demirtaş in prison in June 2024,[94] having previously condemned the judgment of 16 May 2024.[95]

3.2.3 The Mammadli Group of Cases

The above-mentioned *Mammadli group v Azerbaijan*[96] (the former Ilgar Mammadov group[97]) concerns seven applicants: human-rights defenders, civil

91 PACE, Resolution 2381 (2021), Should politicians be prosecuted for statements made in the exercise of their mandate?, 21.06.2021, para. 10.2.1. It was adopted on the basis of the report of the CLAHR, Doc. 15307, Rapporteur: Mr Boriss Cilevičs (Latvia, SOC).

92 Ibid., para. 8.2: 'These cases are particularly egregious as they have arisen after numerous findings by the Court of violations of freedom of speech in similar circumstances. In the case of Mr Selahattin Demirtaş, the president of one of the main opposition parties, the authorities are openly defying a judgment by the Court which ordered Mr Demirtaş's immediate release. Also, the incriminating political statements often date back several years, to when the position of the government was more tolerant with regard to the Kurdish issue and the politicians in question could not predict that their statements would one day be considered as criminal. These prosecutions often take many years, during which the accused politicians are either in pre-trial detention, or otherwise prevented from exercising their political mandates.'

93 PACE, Resolution 2459 (2022), *supra* note 68, para. 8.5.

94 PACE, Monitoring Committee, AS/Mon (2024) 16 declassified, *supra* note 69, para. 4.

95 PACE, Monitoring Committee, 'PACE Türkiye monitors express dismay at verdicts in the Kobane case, statement by the co-rapporteurs', 17.05.2024, available at https://pace.coe.int/en/news/9471/pace-turkiye-monitors-express-dismay-at-verdicts-in-the-kobane-case, last accessed on 10.03.2025.

96 ECtHR, supra note 38. For more information on this group of cases, see the description in the HUDOC EXEC database, *Mammadli v Azerbaijan,* available at: https://hudoc.exec.coe.int/?i=004–50875, last accessed on 11.03.2025.

97 The CM closed the examination of the *Ilgar Mammadov v Azerbaijan* case and some other similar cases, in which, between 2020 and 2022, the Supreme Court reopened the domestic criminal proceedings and quashed the convictions (for the applicants Ilgar Mammadov, Rasul Jafarov, Natig Jafarov, and the applicants in the cases of *Rashad Hasanov and Others v Azerbaijan* and *Azizov and Novruzlu v Azerbaijan*). However, the same steps were not taken by the Supreme Court in the remaining cases, which are now examined in the context of the *Mammadli v Azerbaijan* group of cases.

society activists and a journalist, who were subject to arrest and detention between 2013 and 2016. They were released before the ECtHR delivered its judgments in the case. The ECtHR concluded that the actual purpose of the criminal proceedings was to punish the applicants for their activities or to prevent their further work, and that the restriction of their rights was applied for purposes other than those prescribed by the Convention.[98] In the *Aliyev* judgment, the ECtHR noted with concern that this series of cases reflected a 'troubling pattern' of arbitrary arrest and detention of government critics, civil society activists and human-rights defenders through retaliatory prosecutions and the misuse of criminal law in defiance of the rule of law, and the actions of the state gave rise to a risk of further repetitive applications.[99] As noted in the 12th CLAHR report, Annar Mammadli, one of the applicants and the PACE Václav Havel prize winner, was re-arrested on 29 April 2024 and placed in pre-trial detention.[100]

As regards the execution of these cases, the CM has repeatedly underlined that *restitutio in integrum* could be achieved only through the quashing of all the applicants' convictions, their erasure from their criminal records and the elimination of all other consequences of the criminal charges brought against them, including by fully restoring their civil and political rights.[101] No progress has been made on this despite an exchange of letters between the CM Chair and the Minister of Foreign Affairs in the first half of 2024.

At its last examination of the group at its 1521st meeting (March 2025) (DH), the CM noted 'with the gravest concern' that the applicants had been waiting for the Plenum of the Supreme Court to review their convictions for more than five years. It urged the authorities to intensify their efforts to remedy the applicants' situation and to ensure in the meantime that their impugned convictions did not have any bearing on any new criminal proceedings initiated against them.[102] It also recalled that the quashing of the applicants' convictions by the Supreme Court was awaited as a key general measure, 'aimed at establishing a solid judicial practice against retaliatory and abusive detentions and prosecutions of critics of the government with a strong message of non-

98 Violations of Article 18 taken in conjunction with Article 5 in *Mammadli, Ibrahimov and Mammadov*, *Khadija Ismayilova* (*No. 2*) and *Yunusova and Yunusov* (*No. 2*); the violation of Article 18 is taken in conjunction with Articles 5 and 8 in *Aliyev*.

99 ECtHR, *Aliyev v Azerbaijan*, *supra* note 38, para. 223.

101 HUDOC EXEC database, *Mammadli v Azerbaijan*, *supra* note 96.

102 CM, *Mammadli group v Azerbaijan*, Decisions adopted at its 1521st meeting, 4–6 March 2025 (DH), 06.03.2025, CM/Del/Dec(2025)1521/H46–4, para. 2.

tolerance of similar abuses of criminal justice system'.[103] The CM also took note of recent arrests and detentions of journalists and activists in the country and urged the authorities to demonstrate that the pattern of arbitrary arrest and detention identified by the ECtHR was being, or had been, 'eradicated in line with the principle of the rule of law'.[104] It also invited the authorities to consider reviewing the relevant framework on the reopening of cases following final judgments of the ECtHR and on the outcome of the draft law introduced into Parliament further to strengthen the powers of the Judicial Legal Council.[105] Finally, 'considering the urgency of adopting the outstanding measures', the CM noted 'with disappointment' that, despite its efforts, 'no dialogue at a high level' had taken place so far and reiterated its call on the authorities to engage in such a dialogue without delay.[106]

It is noteworthy, in connection with the lack of progress in the execution of these cases, that the Azerbaijani delegation has not participated in the work of the PACE since the latter refused to ratify its credentials in January 2024. That decision was taken for substantive reasons, including issues with the independence of the judiciary and respect for human rights pointed to by numerous judgments of the ECtHR and opinions of the Venice Commission.[107] In February 2024, a report of the PACE Monitoring Committee on '[t]he honouring of obligations and commitments by Azerbaijan' was published.[108] It raises concerns about the lack of independence of the judiciary, restrictions on freedom of expression, freedom of association and freedom of assembly and numerous

103 Ibid., para. 3.

104 Ibid.

105 Ibid., paras. 4 and 5. In its previous decisions, the CM positively noted legislative changes that had been made to reinforce the role of the judiciary within the Judicial Legal Council (JLC). It also took note of the draft law which was introduced in the Parliament to amend certain provisions of the Law on Courts and Judges, aiming to curtail any potential influence on the judiciary by the executive branch; HUDOC EXEC database, *Mammadli v Azerbaijan*, *supra* note 96.

106 CM, *Mammadli group v Azerbaijan*, CM/Del/Dec(2025)1521/H46–4, *supra* note 102, para. 6.

107 PACE, Resolution 2527 (2024). Challenge, on substantive grounds, of the still unratified credentials of the parliamentary delegation of Azerbaijan, 24.01.2024, para. 2. The resolution was adopted on the basis of a report by the Monitoring Committee, rapporteur: Mr Mogens Jensen (Denmark, SOC), Doc. 15898, 23.01.2024. The reports pointed out a wave of arrests of journalists in November and December 2023 as well as ongoing restrictions on the exercise of the right to freedom of association; see its paragraphs 11 and 12.

108 PACE, Monitoring Committee, Doc. 15927, 12.02.2024, rapporteurs: Mr Ian Liddell-Grainger (United Kingdom, EC/DA) and Lise Christoffersen (Norway, SOC).

allegations of the use of politically motivated charges against activists and journalists, already reported on in the previous texts of the PACE.[109]

3.3 Cases Concerning Free Elections: *Sejdić and Finci v Bosnia and Herzegovina* and Other Similar Cases

The right to free elections, enshrined in Article 3 of Protocol No. 1 to the Convention,[110] is obviously central to a functioning democracy governed by the rule of law, which Council of Europe member states reaffirmed in Appendix III to the Reykjavik Declaration.[111] The CM has been examining a number of cases concerning violations of this provision.[112] Some of these cases still require the adoption of comprehensive measures, including legislative ones, and are examined under the 'enhanced procedure'.[113] The implementation of the judgment in *Sejdić and Finci v Bosnia and Herzegovina,*[114] pending now before the CM for over 14 years, is the most problematic in this group of cases.[115]

---

109 Ibid., Section 6 of the report.

110 Article 3 of Protocol No 1 to the Convention stipulates that '[t]he High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.'

111 The states committed 'actively [to] enable and encourage democratic participation at national, regional and local levels through free and fair elections' and to 'hold elections and referenda in accordance with international standards and take all appropriate measures against any interference in electoral systems and processes'; Reykjavik Declaration – Uniting around our values, *supra* note 4, at principles 1 and 2.

112 For examples of closed cases see the thematic factsheet on 'Right to Free Elections', Department for the Execution of Judgments of the ECtHR, available at: https://rm.coe.int/tfs-electoral-rights-final-eng/1680aa6951, last accessed on 11.03.2025.

113 As indicated in the 2023 CM Annual Report, *supra* note 7, pp. 48–49. These are, e.g.: ECtHR, *Mugemangango v Belgium*, no 310/15, 10.07.2020 (concerning the absence of a procedure offering effective examination of the complaint of the applicant, a candidate for election to the Parliament of the Walloon Region), *Kulinski and Sabev v Bulgaria*, no 63849/09, 21.07.2016 (concerning the exclusion of applicants to vote in parliamentary elections or in elections to the European Parliament because they were serving prison sentences) or *Cegolea v Romania*, no 25560/13, 24.03.2020 (concerning discrimination in respect of national minority organisations not yet represented in Parliament).

114 ECtHR, *Sejdić and Finci v Bosnia and Herzegovina,* nos 27996/06 and 34836/06 [GC] 22.12.2009.

115 For more on this subject, see e.g., C. Grewe, 'L'exécution des arrêts de la Cour européenne des droits de l'homme par la Bosnie-Herzégovine: mission impossible?', in C. Giannopoulos, *' L'exécution des arrêts de la Cour européenne des droits de l'homme: pratiques et perspectives après la fin du processus d'Interlaken: actes du colloque des 4 et 5 février 2021 / organisé par l'Institut de recherches Carré de Malberg* (UR3399) *de l'Univer-*

While Article 3 of Protocol No 1 to the Convention applies only to elections relating to the 'choice of the legislature', provisions concerning the prohibition of discrimination (Article 14 of the Convention and Article 1 of Protocol No 12) can also be applicable to discriminatory provisions in other elections, such as presidential elections.[116] That is why, in *Sejdić and Finci v Bosnia and Herzegovina,*[117] the ECtHR, for the first time, found that there has been a violation of Article 1 of Protocol No 12[118] prohibiting discrimination in the enjoyment of any right 'set forth by law'. It found that the country's presidential election procedure was discriminatory, since it prevented the applicants (on the grounds of their Roma and Jewish origin) from standing due to their refusal to declare affiliation with a 'constituent people' (namely the Bosnians, Croats and Serbs).[119] The Court also found a violation of Article 14 taken in conjunction with Article 3 of Protocol No 1 as, for the same reasons, the applicants were prevented from standing in the elections for the House of Peoples.[120]

Later on, the ECtHR found similar violations in *Zornić v Bosnia and Herzegovina* (in which the applicant refused to declare affiliation with any of the 'constituent people') and *Šlaku v Bosnia and Herzegovina* (in which the appli-

sité de Strasbourg', Pedone: Paris, 2022, pp. 215–222; F. Pirola, 'Democracy and Political Participation in the Countries of the Former Yugoslavia: A Complicated Combination under the Lens of the European Court of Human Rights', in. G. Citroni, I. Spigno and P. Tanzarella (eds.), *The Right to Political Participation: A Study of the Judgments of the European and Inter-American Courts of Human Rights*', Routledge: Abingdon, Oxon, New York, 2022, pp. 131–158 and A. Szklanna, 'Delays in the Implementation of ECtHR Judgments: The Example of Cases Concerning Electoral Issues', in W. Benedek, P. Czech, L. Heschl, *et al.* (eds.), *European Yearbook on Human Rights 2018*, Intersentia: Cambridge, 2019, pp. 445–464.

116 PACE, CLAHR, 12th Report, *supra* note 6, para. 34.

117 ECtHR, *Sejdić and Finci v Bosnia and Herzegovina, supra* note 114.

118 Adopted on 04.11.2000, European Treaty Series no 177.

119 The Constitution of Bosnia and Herzegovina made such a declaration of affiliation a condition of eligibility to stand for election for the Presidency and the House of Peoples (the second chamber of the State Parliament).

120 ECtHR, *Sejdić and Finci*, *supra* note 114, paras. 45 and 46. The ECtHR concluded that their ineligibility lacked an objective and reasonable justification and was discriminatory. Although at the time when the Dayton Agreement (including as one of the appendices the Constitution of the country) was approved in 1995, the approval of the 'constituent peoples' was necessary to ensure peace, there have been 'significant positive developments' since then.

cant was of Albanian origin).[121] In *Pilav v Bosnia and Hercegovina,*[122] it found a violation of Article 1 of Protocol No 12, as the applicant, a Bosnian living in Republika Srpska, was ineligible to stand for the presidential elections.

The CM has been supervising the implementation of the judgment in *Sejdić and Finci v Bosnia and Herzegovina* since December 2009. It has always considered that a number of amendments to the Constitution and the electoral legislation should be adopted to implement it. However, despite the general elections of 2010, 2014, 2018 and 2022, the legislation has not been modified. The CM has used a wide range of tools with a view to addressing the situation, but to no avail.[123] After the last general election, on 29 November 2022, the leaders of a dozen political parties signed a coalition agreement in which they, *inter alia*, agreed to adopt, within six months at the latest following the formation of governments at all levels in Bosnia and Herzegovina, 'limited changes' to the Constitution of Bosnia and Herzegovina and amendments to the Election Law of Bosnia and Herzegovina in accordance with the judgments of the ECtHR. However, despite the formation of governments at all levels, the necessary constitutional and legislative amendments have still not been made.

At its 1521st DH meeting (4–6 March 2025), the CM deeply deplored this lack of progress despite the repeated assurances on this matter by the authorities of Bosnia and Herzegovina over the past 15 years and the forthcoming 2026 elections.[124] It reiterated that the failure to amend the Constitution and the electoral legislation 'would not only amount to a manifest breach of obligations under Article 46, paragraph 1, of the Convention but would also seriously undermine the legitimacy and the credibility of the country's future elected bodies, and would ultimately represent a threat to the future effectiveness of the Convention machinery'.[125] Underlining the urgency of the situation, the CM exhorted the authorities without further delay to devise a concrete

121 ECtHR, *Zornić v Boosnia and Herzegovina,* no 3681/06, 15.07. 2014 and *Šlaku v Bosnia and Herzegovina,* no 56666/12, 26.05.2016.

122 ECtHR, *Pilav v Bosnia and Herzegovina,* no 41939/07, 09.06.2016.

123 HUDOC EXEC, *Sejdić and Finci v Bosnia and Herzegovina,* description of the case, available at https://hudoc.exec.coe.int/?i=004–3141, last accessed on 11.03.25. This range of tools included five interim resolutions (in 2011, 2012, 2013, 2021 and 2023); the issue of a declaration by the Chair; the examination of these judgments at each of its Human Rights (DH) meetings; sending a letter from the Chair; inviting member states, observer states and the European Union to raise the case in their contacts with Bosnia and Herzegovina and inviting the competent minister to an exchange of views.

124 CM, Decisions adopted at its 1521st meeting (DH) (4–6 March 2025), *Sejdić and Finci group v Bosnia and Herzegovina*, CM/Del/Dec(2025)1521/H46–7, 06.03.2025, para. 3.

125 Ibid., para. 4.

action plan, with a clear timeframe, and strongly encouraged them to establish an inter-agency working group comprised of all relevant stakeholders to work on the required electoral system reform.[126]

The issue of the implementation of this group of judgments is also being closely followed by other bodies of the Council of Europe, namely the PACE and its Monitoring Committee. In its Resolution 2574 (2024) on '[t]he honouring of obligations and commitments by Bosnia and Herzegovina' adopted in October 2024, the PACE deplored the lack of progress in these cases and called on the authorities of Bosnia and Herzegovina to bring the electoral legislation into line with the Convention and ensure the equality and non-discrimination of citizens.[127]

4 Potential Role of the PACE and other Stakeholders in Addressing New Challenges to the Implementation of ECtHR Judgments

4.1 *Proposed Ways of Improving the Execution of ECtHR Judgments Presented in the Twelfth Report*

In its twelfth report on the implementation of ECtHR judgments, the CLAHR proposed a number of measures designed to improve this process. It urged States Parties to the Convention to take the measures it had already indicated in paragraph 7 of its Resolution 2494 (2023)[128] and urged stronger national coordination and the use of best practices for the rapid execution of judg-

126 Ibid., para. 6.

127 PACE, Resolution 2574 (2024), The honouring of obligations and commitments by Bosnia and Herzegovina, 2.10.2024, paras. 5 and 10.1. It is based on a report by the Monitoring Committee, Doc. 16039, 13.09.2024, co-rapporteurs: Mr Zsolt Németh (Hungary, EC/DA) and Mr Aleksandar Nikoloski (North Macedonia, EPP/CD).

128 PACE, Resolution 2494 (2023), Implementation of judgments of the European Court of Human Rights, 26.04.2023. Para. 7 of this resolution recommended implementing in good faith and without delay final binding judgments, providing for effective domestic remedies to address violations of the Convention, fully co-operating with the CM, the ECtHR and the Department for the Execution of Judgments of the European Court of Human Rights and other relevant Council of Europe bodies, submitting quality action plans, action reports and information on the payment of just satisfaction to the CM in a timely manner, effective national co-ordination mechanisms and sufficient resources, strengthening the role of civil society, bar associations and national human rights, paying particular attention to cases raising 'systemic, structural, endemic or complex problems', etc.

ments.[129] It also promoted enhanced parliamentary oversight,[130] in line with '[b]asic principles for parliamentary supervision of international human rights standards' set out by the PACE in Resolution 1823 (2011).[131]

Further and novel recommendations include better integration of the issue of ECtHR judgments' implementation into the European Commission's Rule of Law Reports, greater support for the President of the PACE on this issue in high-level meetings and organising country-specific briefings for national delegations in the PACE.[132] An interesting proposal refers to the creation of 'Network of Parliamentarians to Promote the Implementation of ECHR judgments',[133] and to the PACE's enhanced promotion of political dialogue in difficult cases.[134] Moreover, a more radical proposal to introduce financial sanctions for 'widespread non-execution' was mentioned by Mr Efstathiou in the report, but the rapporteur also noted that there was insufficient political support for it in the CM.[135] Further ideas – including enhanced cooperation with the Monitoring Committee – were also presented before the adoption of the twelfth report.[136]

---

129 PACE, CLAHR, 12th report, *supra* note 6, paras. 11 and 12 of the preliminary draft resolution.

130 Ibid., para. 13 of the draft preliminary resolution. This requires the establishment of appropriate parliamentary structures to ensure regular monitoring of compliance with international human rights obligations, including those stemming from the Convention and judgments of the ECtHR.

131 PACE, Resolution 1823 (2011), National parliaments: guarantors of human rights in Europe, 23.06.2011, Appendix.

132 PACE, CLAHR, 12th report, *supra* note 6, paras. 14 and 16 of the draft preliminary resolution. As explained in the 12th report, para. 76, such briefings are now regularly provided.

133 Ibid., para. 16 of the preliminary draft resolution. The creation of the Network (that could meet twice a year) would be subject to adequate funds. Moreover, the Network would replace the existing Sub-committee on the Implementation of the ECtHR judgments, as explained in Mr Efstathiou's revised information note 'Reykjavik Follow-Up: The Role of PACE and National Parliamentarians in Improving the Timely and Effective Implementation of Judgments of the European Court of Human Rights', AS/Jur (2023) 37 declassified, 23.11.2024, para. 15.

134 Ibid., para. 4 of the preliminary draft recommendation, in which it is also proposed that the CM will 'redouble its efforts to ensure high-level engagement in discussions on the implementation of the Court's judgments, in order to facilitate dialogue at the political level'. The draft preliminary recommendation also contains more concrete recommendations concerning the work of the CM and the Department for the Execution of ECtHR Judgments.

135 Ibid., para. 71.

136 PACE, CLAHR, AS/Jur (2023) 37, *supra* note 133, Sections 4. The rapporteur mentioned, *inter alia,* some old (regular meetings of the Sub-Committee on Implementation of ECtHR Judgments, rapporteur country visits, rapporteur's statements) and new proposals (annual reporting by the CM to the PACE, new motions for resolutions, organising

4.2 *Enhanced Coordination with the Monitoring Committee*

The Monitoring Committee was set up by PACE Resolution 1115 (1997)[137] on the setting up of an Assembly Committee on the honouring of obligations and commitments by member states of the Council of Europe. It is responsible for 'verifying the fulfilment of the obligations assumed by the member States under the terms of the Council of Europe statute, the European Convention of Human Rights and all other Council of Europe conventions to which they are parties, as well as the honouring of the commitments entered into by the authorities of member States upon their accession to the Council of Europe'.[138] Therefore, verifying compliance with judgments of the ECtHR falls within the remit of the Monitoring Committee.

Currently, ten Council of Europe member states are subject to a full monitoring procedure: Armenia, Azerbaijan, Bosnia and Herzegovina, Georgia, Hungary, the Republic of Moldova, Poland, Serbia, Turkey and Ukraine.[139] A full monitoring procedure involves regular visits by a pair of rapporteurs (from different countries and different political groups), who conduct an ongoing dialogue with the authorities, and occasional plenary debates to ensure that a state's progress and problems are honestly assessed.[140] Four member states are currently engaged in a post-monitoring dialogue: these are Albania, Bulgaria, Montenegro and North Macedonia. The post-monitoring dialogue involves the states that have progressed to this stage following the termination of a full monitoring procedure.[141] In March 2024, the Monitoring Committee recommended the termination of post-monitoring dialogue with Bulgaria, but this decision has not yet been approved by the PACE.[142]

---

trainings, conferences, country visits by a 'liaison group' of a few members of the PACE and 'compatibility studies visits').

137 PACE, Resolution 1115 (1997) Setting up of an Assembly committee on the honouring of obligations and commitments by member states of the Council of Europe (Monitoring Committee), 29.01.1997.

138 Ibid., para. 15.

139 See information from the webpage of the Monitoring Committee, available at: https://pace.coe.int/en/pages/committee-4/AS-MON, last accessed 10.03.2025.

140 Ibid. See also PACE, Resolution 1115 (1997), *supra* note 137, para. 9.

141 Ibid.

142 At its meeting on 06.03.2024, PACE, Monitoring Committee, synopsis of the meeting, AS/Mon (2024) CB 02, 08.03.2024. See this committee's report on post-monitoring dialogue with Bulgaria, rapporteurs: Ms Thórhildur Sunna Ævarsdóttir (Iceland, SOC) and Ms Deborah Bergamini (Italy, EPP/CD), Doc. 15947, 25.03.2024, para. 23 of the preliminary draft resolution.

The Monitoring Committee is also charged with preparing regular 'periodic reviews' of all Council of Europe member states which are not under a full monitoring procedure or engaged in a post-monitoring dialogue. The order and frequency of these reports are decided upon by the committee in accordance with its internal working methods, based on substantive grounds.[143] The Monitoring Committee is currently preparing reports about Greece, the Netherlands, Spain and Sweden. Finally, the Monitoring Committee can also prepare a report on the functioning of democratic institutions in any member state 'when particular developments warrant'.[144]

The Monitoring Committee also has an important role in deciding about the non-ratification of the credentials of a national delegation at the beginning of a PACE ordinary session or by the annulment of ratified credentials in the course of the same ordinary session.[145] Any procedure conducted by the Monitoring Committee involves a political dialogue between the committee and the member state being 'scrutinised'. This is in particular reflected in the exchanges of views held in the committee – always with the participation of members representing the ruling majority and the opposition[146] – as well as in the process of the preparation of a report, the draft of which is always submitted to the authorities for their comments, before it is finally adopted by the committee.[147]

It is apparent that the majority of the states under the monitoring or post-monitoring procedure face challenges in executing ECtHR judgments. According to the CM 2023 Annual Report, Ukraine, Turkey, Azerbaijan, Bulgaria, Hungary, the Republic of Moldova, Poland and Georgia were among the top

143 PACE, Monitoring Committee, 'Monitoring Committee: Work Overview', AS/Mon/WP (2025) 01, 21.01.2025, available at: https://pace.coe.int/en/pages/committee-4/AS-MON, last accessed on 10.03.2025, p. 58.

144 See information from the webpage of the Monitoring Committee, available at: https://pace.coe.int/en/pages/committee-4/AS-MON, last accessed on 10.03.2025

145 According to para. 13 of Resolution 1115 (1997), 'The Assembly may penalise persistent failure to honour obligations and commitments accepted, and lack of co-operation in its monitoring process, by adopting a resolution and/or a recommendation, by the non-ratification of the credentials of a national parliamentary delegation at the beginning of its next ordinary session or by the annulment of ratified credentials in the course of the same ordinary session in accordance with Rule 6 of the Rules of Procedure. Should the member state continue not to respect its commitments, the Assembly may address a recommendation to the Committee of Ministers requesting it to take the appropriate action in accordance with Articles 8 and 9 of the Statute of the Council of Europe.'

146 PACE, Resolution 1115 (1997), *supra* note 137, para. 10.

147 PACE, Rules of Procedure, Terms of reference of the Monitoring Committee, para. 14.

ten countries with the highest number of non-implemented judgments.[148] All seven of these countries are currently under the monitoring procedure.

There are several ways in which the Monitoring Committee may engage in the process of implementation of ECtHR judgments and hold the authorities to account. First, the Monitoring Committee's rapporteurs may raise the non-implementation of ECtHR judgments in the process of preparing their reports (including draft resolutions), information notes and public statements. In particular, they can refer to this issue during their country visits when exchanging views with the highest state authorities, such as members of parliament as well as representatives of the government or the judiciary. Country visits may be of particular importance when it comes to the implementation of judgments concerning complex reforms. For example, during his March 2023 visit to Warsaw, the rapporteur on Poland raised the issue of implementing ECtHR judgments concerning the reform of the justice system.[149] Monitoring Committee rapporteurs' country visits also appeared to be useful as regards the execution of Article 18 judgments concerning abusive detention based on politically motivated grounds. Committee rapporteurs had a chance to meet with the imprisoned applicants and raise their cases at the highest political level. For example, in 2017, rapporteurs on Azerbaijan met with Ilgar Mammadov, who remained in prison at that time despite clear calls for his release included in the ECtHR's judgment and the decisions of the Committee of Ministers.[150] More recently, in June 2024, the co-rapporteur for Turkey, Mr Stefan Schennach, travelled to the country and held high-level discussions on the implementation of judgments concerning Osman Kavala and Selahattin Demirtaş. He was also permitted to meet the two of them separately in Istanbul's Silivri and Edirne prisons.[151] Secondly, the issue of the implementation of the ECtHR's judgments is examined by the Monitoring Committee when it holds discussions on the preparation of specific country reports. It can also organise hearings devoted to that subject. For example, hearings were organised on the

148 With respectively 766, 446, 337, 166, 165, 162, 131 and 78 cases pending before the CM as of 31.12.2023. They were followed by Serbia (77), Armenia (70) and Greece (70), which is under periodic review. CM, 2023 Annual Report, *supra* note 7, pp. 119–121.

149 PACE, Monitoring Committee, statement by Ms. Azadeh Rojhan (Sweden, SOC), PACE monitor, ending visit: much-needed rule of law reforms in Poland should comply with European standards, 26.11.2024.

150 PACE, Monitoring Committee, 'Honouring of obligations and commitments by Azerbaijan', Information note on a fact-finding visit to Baku (12–14 January 2017), Co-rapporteurs: Mr Stefan Schennach (Austria, SOC) and Mr Cezar Florin Preda (Romania, EPP/CD), AS/Mon (2017) 06 declassified, 19.02.2017, para. 3.

151 PACE, Monitoring Committee, AS/Mon (2024) 16 declassified, *supra* note 69, para. 4.

non-implementation of the *Kavala v Türkiye* judgments (also jointly with CLAHR)[152] and the *Sejdić and Finci v Bosnia and Herzegovina* judgment.[153] Thirdly, the Monitoring Committee cooperates closely with the Venice Commission. It has been at the origin of several requests concerning the compliance of draft or binding legislation with international human rights standards. Such requests may also be aimed at assisting the authorities in implementing the ECtHR's judgments. For example, in April 2024, the Monitoring Committee asked the Venice Commission for an opinion on the relevant provisions of the Turkish Constitution and legislation concerning the composition of the Council of Judges and Prosecutors, in relation to the implementation of the judgment in *Kavala v Türkiye* (see above). Fourthly, the Monitoring Committee is obliged to report to the PACE, on an annual basis, on the general progress of the monitoring procedures. Thus, annual reports of the Assembly's monitoring procedure and the resolutions adopted on the basis of them may also refer to cases of flagrant non-implementation of ECtHR judgments. For example, Resolutions 2534 (2023) of January 2024 and 2580 (2024) of January 2025 called on Azerbaijan, North Macedonia, Poland and Turkey to implement judgments of the ECtHR.[154] Fifthly, the issue of non-implementation of ECtHR judgments was one of the substantive reasons which led to the PACE decision on the non-ratification of credentials of the Azerbaijani delegation, as stated in Resolution 2527 (2024) of January 2024[155] and the subsequent crisis in the relations between the PACE and the Azerbaijani authorities.[156] Sixthly, there is obviously scope for improving cooperation between CLAHR and the Monitoring Committee, bearing in mind that the latter's meetings are held *in camera*. As indicated above, the holding of joint hearings or other events on the execution of ECtHR judgments, as suggested by CLAHR's rapporteur, Mr Efstathiou,[157] could be one of the ways of ensuring better coordination between the two committees. Mr Efstathiou also proposed that the

152 PACE, CLAHR, 12th Report, *supra* note 6, para. 17.4.

153 PACE, Monitoring Committee, Work Overview, *supra* note 143, p. 17.

154 PACE, Resolution 2534 (2024) 'The progress of the Assembly's monitoring procedure (January-December 2023)', 26.01.2024, paras. 4.2, 4.7, 4.9 and 5.4 and Resolution 2580 (2025) 'The progress of the Assembly's monitoring procedure (January–December 2023)', 27.01.2025, paras. 4.2, 4.8, 4.10 and 5.3.

155 PACE, Resolution 2527 (2024), *supra* note 108.

156 Currently, there is no parliamentary delegation from Azerbaijan in the PACE. In the course of 2024, the delegation was absent due to the PACE's decision not to ratify its credentials and no new delegation showed up during the January 2025 part-session (27.01–31.01).

157 PACE, CLAHR, *supra* note 133, para. 22.

CLAHR's chairperson, who is a member *ex officio* of the Monitoring Committee, could seek to make a statement or ask questions at meetings of the Monitoring Committee on issues relevant to the execution of judgments in respect of the items on the agenda of a given Monitoring Committee meeting.[158] Moreover, he/she or the CLAHR's rapporteur for the implementation of ECtHR judgments '… could write to the Monitoring Committee to highlight potential priority countries in respect of the implementation of judgments that are not under regular monitoring', for the purpose of assisting the Monitoring Committee in choosing the next countries for periodic review.[159] These proposals might strengthen collaboration between the two committees, though the last two are primarily procedural.

5 Conclusions

The year 2025 marks the 75th anniversary of the adoption of the European Convention on Human Rights, which has played a key role in promoting democracy, the rule of law and human rights in Europe. The European Court of Human Rights has been instrumental in upholding these values, and it is important that it continues to do so. For that purpose, the full and rapid implementation of its judgments is of critical importance.

The implementation of the ECtHR's judgments now faces new important challenges, as numerous complex structural problems have not been resolved for more than ten years. At the same time, new issues have appeared, including those related to the implementation of Article 18 judgments or judgments concerning the right to free elections (the group of cases in *Sejdić and Finci v Bosnia and Herzegovina*).

As highlighted in the Reykjavik Declaration, the proper functioning of the Convention system is crucial, not only for the protection and promotion of human rights and the rule of law, but also for 'the maintenance and promotion of democratic security and peace throughout the continent'.[160] Thus, full and effective implementation of ECtHR judgments, on which the credibility of the Convention system depends, is crucial for upholding democracy and the rule of law. While judgments concerning violations of the right to free elections stem from deficiencies in electoral systems and in the holding of democratic elections, judgments concerning violations of Article 18 of the Convention

158 Ibid., para. 23.
159 Ibid, para. 24.
160 Reykjavik Declaration, *supra* note 4, Appendix IV, p. 17.

reveal problems with the separation of powers and the independence and impartiality of the judiciary as well as with the existence of genuine political opposition and civil society. The Article 18 judgments examined above exhibit serious problems with the functioning of the judiciary as well as ongoing crackdowns on opposition politicians and civil society. Their non-implementation can only reinforce authoritarian tendencies. As indicated above, while there might eventually be some hope for the release of Mr Kavala, there has been no sign of the Turkish authorities' goodwill quickly to implement the *Selahattin Demirtaş* (*No 2*) and *Yüksekdağ Şenoğlu and Others v Turkey* judgments. Besides that, issues relating to the independence of the Turkish judiciary, which have again recently been pointed out by the Venice Commission, would require complex constitutional and legislative reforms. As regards the *Mammadli* group of cases, despite some initial progress concerning Ilgar Mammadov and the other applicants, whose cases have been closed by the CM, and the general measures (reform of the Judicial Legal Council), they have remained unimplemented for more than five years. It is not ruled out that the stalemate in the execution of these cases is related to the ongoing crackdown on civil society, which has been reported on by the PACE on numerous occasions. Regarding the right to free elections and the *Sejdić and Finci v Bosnia and Herzegovina* judgment, they have been on the agenda of the CM since December 2009 and, despite the holding of four general elections in the meanwhile, the electoral system, stemming from the Dayton agreement, has not been reformed in accordance with the ECtHR's requirements.

All these judgments are crucial for the functioning of democracy in the respondent states and their non-implementation puts into question those states' ability to comply with their obligations stemming from their membership of the Council of Europe. As illustrated above, all these cases have been closely followed by the PACE and referred to in its various resolutions. The PACE is composed of members of national parliaments and has a direct interest in promoting and protecting democratic values across Europe. Even if PACE resolutions and recommendations do not have binding legal effect, the political pressure associated with them and the media coverage of the debates and discussions held during their preparation or adoption constitute an important means of pressure, which complements the modalities of the supervision of the execution of judgments exercised by the CM. Moreover, the PACE has always promoted a more proactive involvement of parliaments in this process and this constitutes its added value.

Against this background, the reports of CLAHR's rapporteurs play a crucial role in strengthening cooperation between the CM, the PACE and respondent states on the implementation of the ECtHR's judgments. The CLAHR's twelfth

Report includes several innovative proposals on how to improve the existing tools aimed at supporting the implementation of ECtHR judgments, especially within the PACE. Although the majority of these proposals are procedural, it is not excluded that they could allow the PACE and its relevant actors to streamline their activities when supporting the CM's supervisory role in the execution of the ECtHR's judgments. The CLAHR's contribution can be complemented by the work of the Monitoring Committee, which closely follows the political and legal developments in specific member states of the Council of Europe. By focusing its work on certain countries and establishing a steady political dialogue with them, the Monitoring Committee has developed its own tools which may also be used in assisting the CM in supervising the implementation of the ECtHR's judgments. This role is complementary to that of the CLAHR, which focuses more on general ways of improving the execution of the ECtHR's judgments and on promoting the role of national parliaments in this process.

Therefore, the CM and the PACE (and in particular the CLAHR and the Monitoring Committee) should strengthen their synergies and elaborate and use more powerful tools to put pressure (mainly political) on states which persistently fail to implement the ECtHR's judgments. This is particularly critical with respect to cases representing a high degree of political and/or legal complexity, where there is growing political resistance to implementing the ECtHR's judgments. As the use of the infringement proceedings from Article 46(4) of the Convention has not (yet?) been effective in the *Kavala v Turkey* case, that shows the limits of this procedure. Therefore, it will be necessary – sooner or later – to carry out an in-depth reflection on the effectiveness of this mechanism within the Council of Europe.

PART 2

European Union (*EU*)

∵

The European Union and Human Rights: An Overview

Wolfgang Benedek

1 Introduction

When the European Union (EU) was founded in 1957 as the European Economic Community (EEC), its responsibilities did not include human rights. Human rights became an issue first in its trade relations with African, Caribbean and Pacific States by way of the Lomé agreement of 1975, while internally it became an important issue with the evolution of the EEC into a political union with the treaty of Maastricht on the European Union of 1992. Of particular importance was the treaty of Amsterdam of 1997, which stated that the Union shall respect fundamental rights as guaranteed by the European Convention on Human Rights (ECHR) and in the constitutional traditions of member states as general principles of community law.[1]

In 1998, inspired also by the fiftieth anniversary of the Universal Declaration of Human Rights (UDHR), the European Union, then chaired by Austria, invited a Comité des Sages to produce a human rights agenda for the EU for the year 2000, which agenda was based on the outcomes of a major project on the EU and Human Rights undertaken by the European University Institute in Florence.[2] The Human Rights Agenda identified by the experts proved to be the blueprint for the development of a new EU policy on human and fundamental rights. Like the Council of Europe (CoE), the enlargement perspective of the EU also played a role, as did the observation of the existence of various forms of discrimination in the EU, like racism and xenophobia or lack of gender equality. In particular, the Human Rights Agenda suggested the creation of

1 J. Wouters, 'From an Economic Community to a Union of Values: The Emergence of the EU's Commitment to Human Rights', in J. Wouters, M. Nowak, A.-L. Chané, and N. Hachez (eds.), *The European Union and Human Rights: Law and Policy*, Oxford University Press: Oxford, 2020, pp. 11–38.

2 See Leading by Example: A. Cassese, C. Lalumière, P. Leuprecht and M. Robinson, 'A Human Rights Agenda for the European Union for the Year 2000', and P. Alston and J.H.H. Weiler, 'Final Project Report', Academy of European Law and European University Institute, Florence 1998.

© WOLFGANG BENEDEK, 2026 | DOI:10.1163/9789004751026_015
This is an open access chapter distributed under the terms of the CC-BY-NC-ND 4.0 license.

an EU Commissioner on Human Rights and of an EU Human Rights Monitoring Agency. The decision to establish a Human Rights Agency in Vienna was finally taken in 2003, while it took until 2007 to establish it as the 'Fundamental Rights Agency'.

A major step has been the adoption of the EU Fundamental Rights Charter in 2000. Based on the work of a broadly based 'convent' it was the first Western human rights document to assemble civil and political as well as economic, social and cultural rights under one roof together, with several modern rights like the right to a good administration thus following the comprehensive approach of the UDHR. Starting from the inalienability of human dignity its rights were grouped under freedom, equality and solidarity as well as civil and judicial rights. It also contains principles like a high level of environmental and consumer protection. It was originally adopted as a non-binding text but then foreseen as the first part of the planned EU constitution which failed to be adopted. However, its adjusted version was finally included in the Treaty of Lisbon of 2007 as an annex which, according to Article 6(1), is as binding as the treaty itself. Its revised version entered into force in 2009.

Article 6(2) also requires that the Union become a party to the ECHR, and the Fundamental Rights Charter in Article 53 aligns the level of protection to be provided with that of the ECHR. However, while first efforts to access the EU to the ECHR go back to 1979, this project has not been successfully completed to date, mainly due to concerns by the European Court of Justice (CJEU) to have the final say in the interpretation of all EU law.[3] However, the EU has become an active party to the UN Convention on the Rights of Persons with Disabilities of 2006, which entered into force for the EU in 2011 and has also acceded to the Istanbul Convention on Preventing and Combating Violence against Women of the Council of Europe in 2023. The Directive on Combating Violence Against Women and Domestic Violence is to be transposed into national law by 2027.[4]

Today, the EU with its 27 members can be considered as a third European human rights framework, which, however, distinguishes itself from the CoE

3 P. Gragl, *The Accession of the European Union to the European Convention on Human Rights*, Hart Publishing: Oxford, 2013. See in particular CJEU, Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms – Compatibility of the draft agreement with the EU and FEU Treaties, Opinion 2/13, 18.1.2014, ECLI:EU:C:2014:2454.

4 Directive (EU) 2024/1385 of the European Parliament and of the Council of 14 May 2024 on combating violence against women and domestic violence, OJ L 2024/1385.

and the OSCE by a different focus and different tools.[5] In particular, due to its competences its role with regard to the protection of fundamental rights inside the EU is rather limited as the main actors in charge are the member states. The EU focus is to monitor the observance of fundamental rights in the application of EU law. On the other hand, the EU has become the largest supporter of human rights worldwide. Accordingly, there is a need to distinguish between the internal dimension of EU fundamental rights action and external human rights action. They employ different legal bases and bodies, procedures and instruments, and thus different tool boxes.

2 The External Dimension of EU Human Rights Action

In Article 21 of the Treaty of Lisbon the Union commits itself to strengthening and promoting democracy, the rule of law, human rights and the principles of international law as part of its common policy in its external relations. This applies also to the values of the EU identified in Article 2. This commitment becomes more important in times of a global backlash in democracy, rule of law, human rights and freedom.

In 2011, the year of the Arab spring, the EU Council adopted the joint communication 'Human Rights and Democracy at the Heart of European External Action',[6] which was followed in 2012 by the Human Rights Strategy and the first Plan of Action of Human Rights covering the three following years. The ambitious plan contained some 100 action points. Subsequent versions showed more general objectives to be obtained over five years while the last version covered the period 2020–2027. It still provides an ambitious programme to be achieved with a complex toolbox and is structured according to five lines of action: I. Protecting and empowering individuals; II. Building resilient, inclusive and democratic societies; III. Promoting a global system for human rights and democracy; IV. Adopting new technologies: harnessing opportunities and addressing challenges; and V. Delivering by working together. The global focus is unique to the European Union, which also employs significant funds to promote human rights in the world.

5 See G. Toggenburg, 'The EU Human Rights Regime: Development, Actors, Policy Framework and Effectiveness', in B.A. Andreassen (ed.), *Politics of International Human Rights Law*, Edward Elgar Publishing: Cheltenham, 2023, pp. 409–439.

6 See European Commission, Joint Communication on Human Rights and Democracy at the Heart of European External Action – Towards A More Effective Approach, COM (2011) 886 final, 12.12.2011.

In particular, there are several thematic programmes with specific budgets allocated to them, which are for Human Rights and Democracy (1.5 Bio EUR), Civil Society (1.5 Bio EUR), Stability and Peace (1 Bio EUR) and Global Challenges, like health, education, migration (approx. 3 Bio EUR). Before these arrived, the main funds available through global- and country-based calls came from the European Instrument on Democracy and Human Rights (EIDHR).[7] As an example of an operational tool available around the clock, the Human Rights Defenders Mechanism, run by a group of NGOs with the support of the EU, should be highlighted.[8]

The priorities for its human rights policy were developed over the years and partly laid down in 13 'Human Rights Guidelines' adopted between 1998 and 2019. These are guidelines on the Death Penalty (adopted in 1998, updated in 2008), on Human Rights Dialogues (adopted in 2001, revised in 2021), on Children and Armed Conflict (CAAC) (adopted in 2003, updated in 2008), on Human Rights Defenders (adopted in 2004, updated in 2008), on Violence against Women and Girls and Combating All Forms of Discrimination against them (adopted in 2008), on Promoting Compliance with International Humanitarian Law (2005, 2009), on the Promotion of Human Rights of LGBTI People (2013), on **the** Freedom of Religion or Belief (2013), on the Freedom of Expression Online and Offline (2014), on the Promotion and Protection of the Rights of the Child (adopted in 2007, 2017), on Non-discrimination (2019), on Torture and Other Cruel, Inhuman Treatment or Punishment (2001, 2008, 2019) and on Safe Drinking Water and Sanitation (2019).[9] The last guideline is the only one related to economic, social and cultural rights, while the EU has committed itself to more attention to this group of rights in its human rights action plans.

The guidelines should serve as orientation for EU staff in implementing EU human rights policies, but also provide valuable guidance to outside actors. In spending the funds, the EU services are expected to take the guidelines into account. However, as can be seen from the dates of adoption in recent years there was a certain loss of momentum with the effect that some of the guidelines are in need of an update. One example is the EU's Guideline on Human

7 W. Benedek, 'The Contribution of the European Instrument on Democracy and Human Rights (EDIHR) to the Implementation of the EU Human Rights Agenda', in F. Gómez Isa, C. Churruca Muguruza and J. Wouters (eds.), *EU Human Rights and Democratization Policies, Achievements and Challenges*, Routledge: New York, 2018, pp. 105–116.

8 See for more information on the Human Rights Defenders Mechanism https://protectdefenders.eu, last accessed on 17.06.2025.

9 See EEAS, EU Human Rights Guidelines, available at https://www.eeas.europa.eu/eeas/eu-human-rights-guidelines_en, last accessed on 17.06.2025.

Rights Defenders, updated in 2008, which no longer adequately reflects the present human rights toolbox of the EU.[10] However, as there is a fear that the far-reaching commitments in the guideline might experience a backlash, it was left unchanged.[11]

Specific tools exist for the promotion of democracy which is also part of the EU's Action Plan on Human Rights and Democracy. While OSCE/ODIHR is focused on observing elections within its 57 participating states, EU Election Observation Missions may be sent to countries outside Europe. The EU claims that since the year 2000 more than 180 missions have been deployed to 65 countries. In the first half of 2025 they went to the Philippines, Kosovo and Ecuador.[12] The finding that an election has been free and fair is of great importance for the inviting countries and justifies the high costs of such missions.

Another important instrument is the European Endowment for Democracy (EED). This is an autonomous institution operating as an NGO funded by the EU and member states. It was created in response to the Arab spring. It provides technical and financial support to democracy defenders like training, grants and expertise. The original focus was on the European neighbourhood, Turkey and the Western Balkans, but was extended in 2015 to 'neighbours of the neighbours'. Its independence allows for fast reaction to democracy emergencies in authoritarian, repressive or conflict environments.[13]

There are several other human rights tools connected to the sectoral policies of the EU. The oldest relates to the EU trade policy which, besides the interregional trade agreements, also covers all other trade agreements. The European Parliament used its power of ratification to require the inclusion of a 'human rights clause' for all EU agreements, in particular trade agreements. Today the free trade agreements need also to contain trade and sustainability chapters dealing with workers' rights and environmental obligations.[14] The EU also par-

10 See European Parliamentary Research Service, 'EU Guidelines on Human Rights Defenders, European Implementation Assessment of 2022', available at https://www.europarl.europa.eu/RegData/etudes/STUD/2022/730345/EPRS_STU(2022)730345_EN.pdf, last accessed on 17.06.2025.

11 W. Benedek, 'The EU's Engagement with Human Rights Defenders', in J. Wouters, M. Nowak, A.-L. Chané, and N. Hachez (eds.), *The European Union and Human Rights*, *supra* note 1, pp. 504–519.

12 See EEAS, EU Election Observation Missions, available at https://www.eeas.europa.eu/eeas/eu-election-observation-missions-1_en#66071, last accessed on 17.06.2025.

13 See European Endowment for Democracy, 'History of EED', available at https://www.democracyendowment.eu/about/history, last accessed on 17.06.2025.

14 See L. Bartels, 'Assessment of the Implementation of the Human Rights Clause in International and Sectoral Agreements, In-Depth Analysis for the European Parliament',

ticipates in the Generalised System of Preferences (GSP) providing trade benefits to developing countries, and offers a GSP+ treatment for those countries which have committed themselves to observe 12 major human rights treaties. It thus applies the principle of 'more for more' based on conditionality.

In its development policy the EU is committed to a human rights-based approach, and human rights also play an important role in its peace activities. For this purpose, specific women's rights or children's rights advisors are funded to join the missions.

On all its activities in the field of human rights and democracy the EU Council provides an annual report, which has two parts, a thematic and a country-related part. The thematic part follows the structure of the action plan and thus provides valuable information on its implementation, although it needs to be observed that the amount of information shared has been reduced over the years. The country-related part covers all countries with which the EU cooperates and provides a short overview about recent developments and the concerns of the EU in each country.[15]

The EU human rights policy is the result of an interaction of the main EU bodies between themselves and with the member states as well as civil society. For the development of the EU human rights policy and in the monitoring of it the European Parliament (EP) has a key role. Besides the human rights clauses in the treaties, the EP adopts numerous resolutions on all major human rights issues worldwide, but also on the annual reports produced by the Council. It is also involved in all legislation projects which allows it to support human rights concerns in this context. Regarding the external matters it mainly works through the Human Rights Sub-Committee (DROI) of the Foreign Affairs Committee and with the assistance of its Human Rights Unit.[16] Among its activities are regular hearings and meetings with UN special rapporteurs, human rights NGOs and Human Rights Defenders. Members of the EP are also undertaking country visits and might pursue a silent diplomacy to address human rights cases.

The flagship activity of the EP is the annual award of the Sakharov prize on Freedom of Thought, awarded, for example, to Jina Amini (Iran) in 2023 and

15.05.2023, available at https://www.europarl.europa.eu/thinktank/en/document/EXPO_IDA(2023)702586, last accessed on 17.06.2025.

15 EEAS, 'Annual Report on Human Rights and Democracy in the World', available at https://www.eeas.europa.eu/eeas/eu-annual-reports-human-rights-and-democracy_en, last accessed on 17.06.2025.

16 See European Parliament, DROI Activity Report 2020–2024, available at https://www.europarl.europa.eu/cmsdata/286697/DROI%20Activity%20Report%202019–2024%20v3.pdf, last accessed on 17.06.2025.

Maria Machado (Venezuela) in 2024, which usually takes place around human rights day, i.e. 10 December. The EP also keeps a network of all Sakharov prize winners which inform the EP on the situation of human rights in their countries. The EP also commissions numerous studies related to its activities, including human rights topics which are publicly available.[17]

Within the EU Council, the External Action Service (EEAS) is responsible for the EU's human rights policy. The competent body is the Working Party on Human Rights (COHOM), which is in charge of elaborating the action plan on human rights and democracy and its implementation. It also adopts human rights strategies for all countries with which the EU cooperates which, however, are kept confidential. COHOM is in charge of some 30 'human rights dialogues' which are regularly organised with countries like China or regional institutions like the African Union. They are usually chaired by the EU Special Representative (EUSR) for Human Rights, who since 2024 has been Olof Skoog. He represents the EU High Representative for Foreign Affairs and Security Policy also in various international fora like at meetings of the UN Human Rights Council where the EU conducts its multilateral human rights policy in cooperation with its member states. The EEAS is represented in most countries by EU delegations which have focal points for civil society and liaison officers for human rights defenders, which can also be supported financially in emergency situations.

Human rights also play an important role in the enlargement process related to the Western Balkans, Turkey and also Ukraine, together with Moldova and Georgia. While Turkey is part of that process for historical reasons and its human rights performance has significantly deteriorated with the increasingly autocratic nature of the Turkish government, Ukraine was included in the process as a way of supporting its European orientation while it was defending itself from the Russian aggression. In spite of the circumstances the state of the rule of law and fundamental rights was considered satisfactory. In the case of Moldova, the report notes the adoption of a new national fundamental rights programme, while in Georgia the backsliding observed has halted the accession process. With regard to the six Western Balkan countries human and minority rights as well as the rule of law are an important part of the preparations for EU membership which, however, is at very different levels of advancement. The EU Commission, which is leading the process, publishes an annual 'enlargement package' which contains an assessment of the progress

17 For the studies undertaken in the context of DROI see ibid., p. 98.

or lack of it observed in the field of human and minority rights as well as the rule of law.[18]

The EU is also an important actor in the field of business and human rights, which is related to both its external human rights and internal fundamental rights policies. EU companies are expected to pursue a policy of corporate social responsibility (CSR) and sustainability. The EU supports the UN Guiding Principles on Business and Human Rights and has encouraged its member states to produce National Action Plans for their implementation.[19] After years of negotiations, in 2024 it adopted the Corporate Sustainability Due Diligence Directive (CSDDD), which commits large companies to identify and address violations of human rights and degradations of the environment in their global supply chain.[20] Also in 2024 the Forced Labor Regulation was adopted and will apply from 2027.[21]

3 The Internal Dimension: EU Fundamental Rights Policy

As the protection and promotion of fundamental rights are mainly a member state competence, the internal dimension of the EU human rights policy is more limited. The EU's obligations are considered part of the protection of fundamental rights which are mainly covered by the national constitutions. On the regional level the ECHR already provides a system of oversight available to any EU citizen as all EU member states are also parties to it.

Nonetheless, the European Union has adopted its EU Charter of Fundamental Rights, which is more comprehensive and up-to-date than the ECHR,

18 See European Commission, 'Commission adopts 2024 Enlargement Package', available at https://enlargement.ec.europa.eu/news/commission-adopts-2024-enlargement-package-2024–10–30_en, last accessed on 17.06.2025.; see also W. Benedek, 'The Human Rights Policy of the European Union towards Western Balkans Enlargement States – Problems of Credibility and Coherence', in A.J. Kumin, K. Schmalenbach, L.-J. Wagner und J. Schimpfhuber (eds.), *Außen – und sicherheitspolitische Integration im Europäischen Rechtsraum*, Festschrift für Hubert Isak, Jan Sramek Verlag: Vienna, 2020, pp. 263–279.

19 See M.E. Footer, 'The EU's Engagement with Business on Human Rights', in J. Wouters, M. Nowak, A.-L. Chané, and N. Hachez (eds.), *The European Union and Human Rights*, *supra* note 1, pp. 312–341.

20 Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859, OJ L 2024/1760.

21 Regulation (EU) 2024/3015 of the European Parliament and of the Council of 27 November 2024 on prohibiting products made with forced labour on the Union market and amending Directive (EU) 2019/1937, OJ L 2024/3015.

which, however, remains the minimum standard in the field of the rights covered. As the coverage of EU law is constantly increasing, so is the applicability of the Charter. For this purpose, a 'Strategy on Strengthening the Application of the Charter of Fundamental Rights' was also adopted in 2020.[22] The CJEU in Luxembourg is the main body to apply the Charter next to national courts. These courts provide key remedies for addressing fundamental rights violations.[23] An Annual Report on the application of the EU Charter shows its increasing importance.[24]

The European Commission also promotes fundamental rights in the EU through the Citizens, Equality, Rights and Values (CERV) Programme (2021–2027) which has significant funds, i.e. 1.5 Bio EUR. It sets out four specific objectives: to promote equality and rights, including gender equality, anti-discrimination and the rights of children; to promote citizens' engagement and participation in the democratic life of the EU and to raise awareness of the common European history; to fight violence, notably against children and women, and to protect and promote EU values.

One of the 27 members of the European Commission, i.e. Michael McGrath has a specific mandate for democracy, justice, the rule of law and consumer protection. However, fundamental rights are a cross-cutting matter of relevance to several responsibilities like enlargement or internal affairs and migration. The European Parliament is actively involved through its Committee on Civil Liberties (LIBE), while the EU Council participates through its Working Group on Fundamental Rights, Citizen Rights and Free Movement of Persons (FREMP). Of increasing importance are issues like data protection, for which purpose the General Data Protection Regulation (GDPR) was adopted in 2016, the fundamental rights of Internet platform users to be protected by the Digital Service Act (DSA) generally applicable since 2024 and the protection of fundamental rights in the context of artificial intelligence in the Artificial Intelligence Act (AIA) of 2024.[25] In regulating the practice of inter-

22 See European Commission, Strategy on Strengthening the Application of the Charter of Fundamental Rights in the EU, COM(2020) 711 final, 02.12.2020.

23 See M. Fink (ed.), *Redressing Fundamental Rights Violations by the EU, The Promise of the 'Complete System of Remedies'*, Cambridge University Press: Cambridge, 2024.

24 See European Commission, Annual Reports on the Application of the EU Charter of Fundamental Rights, available at https://commission.europa.eu/aid-development-cooperation-fundamental-rights/your-fundamental-rights-eu/eu-charter-fundamental-rights/application-charter/annual-reports-application-charter_en, last accessed on 17.06.2025.

25 See W. Benedek, 'Digital Human Rights and Artificial Intelligence', in Pravni zapisi (Union University Law School Belgrad), (2023) XIV(2), pp. 227–237.

national companies, the Commission has the ability to impose high fines to protect the rights of consumers.

3.1 *The Fundamental Rights Agency*

When the Fundamental Rights Agency (FRA) of the EU was established in 2007 it was based on the European Monitoring Centre on Racism and Xenophobia which has existed in Vienna since 1997. The FRA serves as an independent human rights institution of the EU. It assists EU bodies with data and studies on fundamental rights in EU countries plus associated countries, which are currently Albania, North Macedonia and Serbia. All these countries also have liaison officers with the FRA. Accordingly, it is not concerned with the external dimension of the EU's human rights policy except for the overlap regarding Western Balkan accession candidates. Its areas of work are defined by the Managing Board, which consists of the 27 member states, the European Commission and the Council of Europe as well as the associated states as observers. In its work it also involves civil society organisations/NGOs as well as academia through its Fundamental Rights Platform and conferences. The FRA also maintains a network of national correspondents (FRANET), which give information about relevant national practice and contribute to FRA studies. These studies, surveys and publications, which cover a large number of fundamental rights issues like the situation of Roma, LGBTI discrimination, migration and asylum, fundamental rights online or at the local level, are available from the FRA's website and constitute useful resources for research into fundamental rights in the EU.[26]

3.2 *The EU Rule of Law Report and Mechanisms*

Since 2020 the Commission has published an annual Rule of Law report which covers the situation in the European Union and in its individual member states and candidate countries, i.e. Albania, Montenegro, Northern Macedonia and Serbia. Since 2022 it has also contained recommendations to all member states and candidate countries which are annually reviewed and updated as a basis for a continuous dialogue.[27]

To respond to serious violations of EU values which might coincide with violations of fundamental rights, Article 7 of the Treaty on the EU foresees a

26 See on FRA activities and publications generally https://fra.europa.eu/en, last accessed on 17.06.2025.

27 See e.g., European Commission, '2024 Rule of Law Report: Communication and Country Chapters', 24.07.2024, available at https://commission.europa.eu/publications/2024-rule-law-report-communication-and-country-chapters_en, last accessed on 17.06.2025.

rule of law mechanism which consists of three phases: first the Commission undertakes an assessment of the situation, then it engages in a dialogue leading to recommendations and, if those are ignored, a two-thirds majority of the member states may decide a suspension of rights related to the membership or of membership altogether. However, in practice the final sanction, also called the 'atomic option', is not realistic as it resulted in the fact that the mechanism did not show substantive results.

However, with the purpose of protecting funds from misuse by EU member states a new 'Rule of Law Conditionality Mechanism' was agreed upon in 2021 and was based on a regulation which could lead to significant budgetary consequences.[28] So far, mainly Poland and Hungary have been sanctioned, both in relation to measures interfering with the independence of the judiciary and the prevention of corruption. In the case of Hungary, the CJEU also decided on sanctions for non-application of the EU's rules on asylum. While the measures on Poland were lifted after the Tusk government promised to address the concerns, the measures on Hungary continued because Hungary refused to comply. Hungary and Poland also lost a case before the CJEU regarding the application of the mechanism against the Commission which confirmed the conformity of the mechanism with EU law in 2022.[29]

4 Assessment and Outlook

The European Union is the main supporter of human rights globally and has become a major actor for fundamental rights internally. However, its human rights policies have come under criticism for several reasons. The legitimacy of external EU human rights action worldwide has been challenged because of a trend towards 're-sovereignisation' in international relations by countries which increasingly reject such policies as interference. There are a growing number of authoritarian states and autocracies which try to shield themselves from international criticism of their performance in human rights and democ-

28 See Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, OJ L 433I. See as well and S. Progin-Theuerkauf and M. Berger, 'ECJ Confirms Validity of the Rule of Law Conditionality Regulation', *European Law Blog*, 11.03.2022, available at https://www.europeanlawblog.eu/pub/ecj-confirms-validity-of-the-rule-of-law-conditionality-regulation/release/1, last accessed on 17.06.2025.

29 See M. Mandujano Manriquez and T. Pavone, 'Follow the Leader, the European Commission, the European Court of Justice, and the EU's Rule of Law Revolution', (2025) 32(2) *Journal of European Public Policy*, pp. 444–473.

racy. The soft power of the EU has decreased with the emergence of funding alternatives like China and the strengthening and enlargement of political groupings like the BRICS states. However, double standards and a lack of coherence in the EU human rights policy and ignorance of Southern concerns in the field of migration and non-discrimination have also played a role. On the academic level the debate on decolonising the approach to human rights is reflecting the new trend.[30] Consequently, the socialisation of countries into EU human rights policies has experienced a backlash.

This is also reflected in the shrinking space for civil society worldwide, which the EU human rights policy considers to be its main partner. In certain autocratic states the work of human rights defenders has become very dangerous or even impossible. The onslaught on multilateralism by the new US administration and its aversion to human rights policies have contributed to the changes in the geopolitical environment.

In addition, the internal dimension of EU human rights policy, i.e. the protection and promotion of fundamental rights in the European Union is also increasingly facing challenges by populist and nationalist governments. Efforts in the field of fundamental rights and the environment are experiencing a backlash, as can be seen by plans to withdraw or lower the standards of the Corporate Sustainability Due Diligence Directive because of the opposition of large business companies who fear additional costs in a difficult economic environment. The main field of the debate on lowering the level of fundamental rights protection and even the rule of law standards relates to migration and asylum where the new migration and asylum pact is aimed at lowering the standards of protection.[31] The CJEU has been criticised for protecting the rights of asylum seekers and migrants.[32] There is criticism of the alleged complicity of the EU Border and Coast Guard Agency (Frontex) with illegal push backs and other human rights violations in spite of the good efforts of its fundamental rights protection and moni-

30 A.A. An-Naim, *Decolonizing Human Rights*, Cambridge University Press: Cambridge, 2021.

31 See A. Spehar, 'The EU's New Pact on Asylum and Migration: Towards a Long-term Sustainable EU Migration Policy?', in P. Ekman, B. Lundqvist, A. Michalski and L. Oxelheim (eds.), *The Depth and Size of the European Union in a Time of War*, Springer: Heidelberg, 2025, pp. 197–221.

32 See e.g., the debate on its ruling on the systematic discrimination of Afghan women, A. Koymali, 'Are all Options Exhausted? How an ECJ Ruling Affects the Lives of Afghan Women', *Völkerrechtsblog*, 19.03.2025, available at https://voelkerrechtsblog.org/are-all-options-exhausted/, last accessed on 17.06.2025.

toring systems.[33] The European Parliament, in its resolution on the latest Rule of Law report by the European Commission, has deplored the backlash and requested a 'smart conditionality mechanism' to avoid the suspension of funds being used against civil society and local authorities as well as a 'fully-fledged mechanism to protect EU values in their entirety'.[34]

This restrictive approach is also reflected in the open letter by nine heads of government requesting a more restrictive interpretation of the ECHR by the European Court of Human Rights with regard to the interpretation of Article 3 on freedom from torture and inhuman and degrading treatment, which constitutes an absolute right, allegedly in order more easily to deport criminal migrants.[35] As the CJEU in Luxembourg is following the interpretation of the ECHR by the Strasbourg Court, this would mean changing its interpretation.[36] Such direct pressure on the European Courts by member states is unprecedented so far and must not prevail. Instead, there is a need to improve the Rule of Law Conditionality Mechanism to make it more broadly applicable. Generally, the European human rights system is facing a test of its resilience and potential to develop, in which the European Union will remain a key actor.

33 See J. Koçi, 'Frontex and Challenges for Human Rights Protection', (2025) 9(1) *European Journal of Economics, Law and Social Sciences*, pp. 105–116.

34 See European Parliament, 'The rule of law in the EU remains in peril, MEPs say', Press Release, 20.05.2025, available at https://www.europarl.europa.eu/news/en/press-room/20250519IPR28498/the-rule-of-law-in-the-eu-remains-in-peril-meps-say, last accessed on 17.06.2025.

35 See P. Hilpold, 'Challenging Strasbourg', *Verfassungsblog*, 30.05.2025, which also contains a link to the open letter, available at https://verfassungsblog.de/may-2025-letter-and-the-pushback-against-the-european-court-of-human-rights/, last accessed on 17.06.2025.

36 See J. De Coninck, 'The Impact of ECtHR and CJEU Judgments on the Rights of Asylum Seekers in the European Union: Adversaries or Allies in Asylum?', in W. Benedek, P. Czech. L. Heschl, K. Lukas und M. Nowak, *European Yearbook on Human Rights 2018*, Intersentia: Cambridge, 2018, pp. 343–372.

Restriction of Movement and Deprivation of Liberty under the New Pact

Sian Donkers

Abstract

This paper considers jurisprudence by the European Court of Human Rights (ECtHR) and the Court of Justice of the EU (CJEU) to analyse whether the use of screening and border procedures in the New Pact on Asylum and Migration may constitute arbitrary deprivation of liberty. This paper concludes that in the light of the fiction of non-entry and practical realities, it will be very difficult for practices not to amount to arbitrary deprivation of liberty, and that the mandatory nature of screening and border procedures reflects a broader creeping criminalisation of migration through the banalisation of detention.

1 Introduction

The New Pact on Asylum and Migration has introduced new obligatory methods of processing individuals arriving at the borders of EU MS, including in some cases the processing of the substance of an asylum claim. The Screening Regulation,[1] Asylum Procedures Regulation (APR)[2] and the Return Border Procedure Regulation (RBPR)[3] mandate that those arriving at the external borders are processed under a 'fiction of non-entry', restricting free access to the member state's territory of individuals arriving at the EU's external borders. Despite being on EU member state soil, they are not authorised to enter the

1 Regulation (EU) 2024/1356 of the European Parliament and of the Council of 14 May 2024 introducing the screening of third-country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817, OJ L 2024/1356 (hereinafter Screening Regulation).

2 Regulation (EU) 2024/1348 of the European Parliament and of the Council of 14 May 2024 establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, OJ L 2024/1348 (hereinafter Asylum Procedures Regulation).

3 Regulation (EU) 2024/1349 of the European Parliament and of the Council of 14 May 2024 establishing a return border procedure, and amending Regulation (EU) 2021/1148, OJ L 2024/1349 (hereinafter Return Border Procedure Regulation).

© SIAN DONKERS, 2026 | DOI:10.1163/9789004751026_016
This is an open access chapter distributed under the terms of the CC-BY-NC-ND 4.0 license.

country's territory during this period. While not formally classified as detention, this confinement, where individuals arguably cannot voluntarily leave, may amount to *de facto* detention, raising concerns about arbitrary deprivation of liberty in the absence of judicial oversight and periodic review. Although safeguards exist for vulnerable individuals, these groups are not categorically exempted from border procedures, and even unaccompanied minors may be subject to such confinement if deemed security risks. Furthermore, the border procedures provide no explicit right to challenge one's placement in them, with procedural rights to judicial review becoming available only if a person is officially placed in detention under the Reception Conditions Directive (RCD)[4] or issued with a return decision in accordance with the Return Directive (RD).[5] While Article 53 APR offers limited protections for vulnerable applicants, these are contingent on effective vulnerability assessments and access to legal representation, both of which are often undermined by the remote location of border facilities and resource constraints.

This paper aims to examine critically whether such restrictions on movement, coupled with limited procedural safeguards, meet the threshold for arbitrary deprivation of liberty in the EU legal order and European Court of Human Rights' (ECtHR) jurisprudence. While the use of screening and border procedures poses many concerns to the risk of *non-refoulement* with the speeding up of the assessment of claims, the joint issue of asylum claim and return decisions, and the lack of suspensive effect of appeals, this paper will focus only on the conditions of confinement and procedural safeguards related to conditions. This paper will first introduce the role of detention in the immigration context and then introduce the relevant provisions of concern in the New Pact. Then it will examine ECtHR and Court of Justice of the European Union (CJEU) jurisprudence to identify how screening and border procedures under the New Pact may amount to practices of *de facto* detention as opposed to mere restriction of liberty, drawing on examples of member state practice in hotspots and border zones. Then, with this in consideration, this paper will consider the procedural safeguards regarding the protections of

4 Art 26 Asylum Procedures Regulation referring to Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), OJ L 180 (hereinafter Reception Conditions Directive).

5 Art 13 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348 (hereinafter Returns Directive).

vulnerable individuals and access to judicial review that exist in the New Pact and in what ways these could result in concluding such *de facto* detention to be arbitrary and unlawful.

2 Defining Immigration Detention

Immigration detention is defined by administrative necessity and state security interests as opposed to punishment. Article 31 of the Geneva Refugee Convention (GRC) forbids states from penalising refugees for illegal entry and therefore implicitly discourages unnecessary detention.[6] The UNHCR's Guidelines on the Applicable Criteria and Standards for the Detention of Asylum-Seekers explain that 'detention' refers to 'deprivation of liberty or confinement in a closed place which an asylum-seeker is not permitted to leave at will',[7] distinguishing it from lesser restrictions like residence or reporting requirements. Immigration detention, by itself, does not inherently constitute a human rights violation, but only if it is considered to be arbitrary, i.e. unjustified in both purpose and means. There are different legal approaches to the regulation of immigration detention. In contrast to the Inter-American Court of Human Rights which emphasises the presumption of personal liberty regardless of migration status,[8] the ECtHR views immigration detention as a necessary tool of a sovereign state to control admission into, or deportation from, its borders 'in accordance with a procedure prescribed by law'.[9] Further, the CJEU considers the practice of detention as a necessary means of ensuring the effective operation of the Common European Asylum System (CEAS) with efficient administrative processing and preventing secondary movements.[10]

EU law exhaustively defines the legitimate purposes for which immigration detention can be used, such as; the verification of the person's identity

6 Confirmed by the CJEU that mere illegal entry is not a criminal offence: CJEU, *Association Avocats pour la défense des droits des étrangers* (*ADDE*) *and Others v Ministre de l'Intérieur*, Case C-143/22, 21.09.2023, ECLI:EU:C:2023:689.

7 UN High Commissioner for Refugees (UNHCR), 'Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention', 2012, p. 9.

8 IACtHR, *Vélez Loor v Panama*, Series C No 218, 23.11.2010.

9 Article 5 ECHR; ECtHR, *Amuur v France*, no 19776/92, 25.06.1995, para. 41.

10 CJEU, *K. v Staatssecretaris van Veiligheid en Justitie*, Case C-18/16, 14.09.2017, ECLI:EU:C:2017:680, paras. 36 and 39.

or nationality,[11] gathering elements of an asylum claim,[12] deciding whether someone has the right to enter at the border (i.e. preventing unauthorised entry),[13] effecting a Dublin Transfer for those who have been found to have already entered the EU from another member state,[14] or when effecting a return decision;[15] and where there is a risk of the individual absconding[16] or 'when protection of national security or public order so requires'[17] in addition to showing ultimately that detention is truly a measure of last resort after considering alternatives. Assessments must be based on objective criteria[18] and reasonable. For example, the absence of an identity document cannot be considered as an inherent demonstration of an intention to abscond.[19] The authorities must examine the personal circumstances of the person (such as their cooperation, community ties, health, or vulnerabilities) to judge whether detention is truly needed.[20] A blanket policy of detention or detention based on convenience violates this requirement.

Immigration detention is distinct from criminal detention for its administrative aims and used where there is a belief that the person will otherwise abscond/move freely in the state's territory without permission before the conclusion of the administrative processes they must undergo, though nonetheless its use is criticised for its criminal law connotations.[21] We can consider that the administrative actions are the purposes of immigration detention. and the risk of absconding or protection of national security and public

11 Article 8(3)(a) Reception Conditions Directive; CJEU, *K.,* ibid. note 10.

12 Article 8(3)(b) Reception Conditions Directive.

13 Ibid., Art 8(3)(c).

14 Ibid., Article 8(3)(f) referring to 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 L 180 (hereinafter the Dublin III Regulation).

15 Article 8(3)(d) Reception Conditions Directive referring to the Returns Directive.

16 Ibid., Article 8(3)(b); CJEU, *Policie ČR,Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie v Salah Al Chodor, Ajlin Al Chodor, Ajvar Al Chodor,* Case C-528/15, 15.03.2017 ECLI:EU:C:2017:213; CJEU, *I. L. v Politsei- ja Piirivalveamet*, Case C-241/21, 06.10.2022, ECLI:EU:C:2022:753.

17 Article 8(3)(f) Reception Conditions Directive.

18 CJEU, *Al Chodor, supra* note 16, paras. 40 and 47.

19 CJEU, *Bashir Mohamed Ali Mahdi*, Case C-146/14, 05.06.2014, ECLI:EU:C:2014:1320, para. 73.

20 Article 8(2) Reception Conditions Directive.

21 I. Majcher, 'Creeping Crimmigration in CEAS Reform: Detention of Asylum-Seekers and Restrictions on Their Movement under EU Law' (2021) 40(1) *Refugee Survey Quarterly*, p.97.

order is the ground on which the state justifies the deprivation of liberty. In the EU legislation referred to above only the term 'grounds' is used for both what this paper refers to as purposes and grounds, However, this paper believes that it is clearer to make a distinction between the administrative processes and the perceived risk of an individual absconding or the perceived risk that the individual poses themselves to the public or national security. These grounds borrow from criminal law concepts of preventing flight (as in pre-trial detention) in an 'asymmetric' manner.[22] The ground of the protection of national security and public order that applies to cases where an individual poses a serious threat (for example, due to past serious crimes or suspected terrorism) cannot be used as an extra-legal punishment and must be accompanied by strict procedural safeguards,[23] nor can material reception conditions in detention be withdrawn as a punitive measure.[24] However, the inclusion of the protection of the public and national security as a ground has been criticised as a further convergence of criminal detention and immigration detention.[25] This borrowing of criminal legal practice is driven by a strong preventive rationale: viewing foreign nationals fundamentally as a risk to the state who need to be administratively processed until they may be unconfined and be permitted (free)[26] movement on the territory.[27]

22 S. Legomsky, 'The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms' (2007) 64(2) *Washington & Lee Law Review* p. 469.

23 CJEU, *J. N. v Staatssecretaris van Veiligheid en Justitie,* Case C-601/15, 15.02.2016, ECLI:EU:C:2016:84, para. 67.

24 CJEU, *Zubair Haqbin v Federaal Agentschap voor de opvang van asielzoekers*, Case C-233/18, 12.11.2019, ECLI:EU:C:2019:956, para. 48.

25 See PICUM, 'Between Administrative and Criminal Law: An Overview of Criminalisation of Migration across the EU', 01.04.2024, available at https://picum.org/wp-content/uploads/2024/04/Betwenn-Administrative-and-Criminal-Law.pdf, last accessed on 07.03.2025.

26 Even after admittance to the territory, they may still be subject to administrative processes that restrict their movements before they can enjoy full freedom of movement in the territory.

27 V. Mitsilegas, 'The EU External Border as a Site of Preventive (in)Justice' (2022) 28 *European Law Journal*, p. 277; PICUM 'Beyond Walls and Fences: EU Funding Used for a Complex and Digitalised Border Surveillance System. Study on the Use of the Border Management and Visa Instrument during the 2021–2027 Multiannual Financial Framework', 01.06.2024, available at https://picum.org/wp-content/uploads/2024/07/Beyond-walls-and-fences_EU-funding-used-for-a-complex-and-digitalised-border-surveillance-system_EN.pdf, last accessed on 08.03.2025.

3 Changes under the New Pact

The Screening Regulation has introduced a first step in the processing of all non-EU nationals who do not fulfil the entry conditions of the Schengen Borders Code.[28] It includes everyone at the external border who does not already have permission to enter, not just those intending to seek international protection. Screening must take place within seven days of arrival/apprehension and involves health and vulnerability assessments, identity verification, the registration of biometric data and a security check.[29] After screening, the individual may be admitted to the territory to have their claim for international protection assessed or they may be transferred to 'border procedures' where the admissibility and merits of their protection claim will be assessed.[30] A member state (MS) must use border procedures whenever an application for international protection is made at a border point or transit zone, or a person has been disembarked from a search and rescue operation, apprehended after crossing an external border without authorisation, or when an applicant has been relocated as a result of a take charge or take back request.[31] While in border procedures an applicant may receive a negative decision on their claim in combination with a return decision (instead of initially a negative decision that can be challenged first).[32]

Screening and border procedures operate in the legal fiction of 'non-entry', as the purpose of these processes is to determine whether someone may be admitted to the territory or not. The concept of non-entry is not based on the imaginary removal of territory or the alteration of state jurisdiction, but it is the absence of a formal authorisation to move freely within the territory.[33] Normally, the Schengen Borders Code allows for derogations from entry requirements due to international obligations,[34] i.e. the obligation to allow

28 Article 6 Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (codification), OJ L 77 (hereinafter Schengen Borders Code).

29 Article 1 Screening Regulation.

30 Ibid., Article 44.

31 Ibid., Article 43.

32 Recital 40 Asylum Procedures Regulation.

33 T. Basaran, 'Security, Law, Borders: Spaces of Exclusion' (2008) 2(4) *International Political Sociology*, pp. 339–354.

34 Article 14(1) Schengen Borders Code.

entry for the assessment of a claim for international protection. However, the Screening Regulation excludes from this derogation[35] people seeking international protection because of the fiction of non-entry. Entry to the territory can then be refused if someone has been assessed as not fulfilling the requirements of the border procedures,[36] if they have not already been admitted to the territory after the conclusion of the screening, or because the time limit for the screening or border procedures has passed.[37]

Border procedures are not entirely new; they are currently found as a discretionary measure at Article 43 of the APD where a member state may conduct assessments at the border or transit zone with a time limit of four weeks after which they must 'be granted entry to the territory',[38] unless there are mass arrivals, in which case a state may prolong this as long as needed 'as long as these third-country nationals or stateless persons are accommodated normally',[39] i.e. in conditions that do not amount to detention. With the APR, border procedures will be mandatory[40] for individuals who are considered to be a threat to national security,[41] where their country of origin has a recognition rate (rate of nationals of a particular country of origin who are recognised as in need of international protection) that is less than 20 per cent,[42] or are considered to have intentionally misled the authorities such as by using false documents, withholding information or destroying documents in bad faith.[43] If the administration fails to make a decision on the protection claim in 12 weeks,[44] significantly longer than the previous four weeks, the person is finally 'authorised to enter' the state territory to continue processing their asylum claim. When a return decision is issued while someone is in border procedure, then the RBPR governs the return process, essentially retaining the person in the border procedure, However, this must still conclude within the 12 week time-limit, after which the person must be admitted to the territory.[45]

35 Article 5(3) Screening Regulation.
36 Ibid., Recital 70.
37 Article 8 Screening Regulation; Recital 68 Asylum Procedures Regulation.
38 Article 43(2) Asylum Procedures Directive.
39 Ibid., Article 43(3).
40 Ibid., Article 45(1).
41 Ibid., Article 42(1)(f).
42 Ibid., Article 42(1)(j).
43 Ibid., Article 42(1)(c).
44 Ibid., Article 52(2).
45 Article 4(2) Return Border Procedures Regulation.

The time limits can be extended in times of crisis to up to 18 weeks in total.[46] However, this six-week extension cannot be combined with the different extraordinary extension provided by Article 51(2) APR for responsibility determination under the Asylum and Migration Management Regulation (AMMR). If the AMMR determination process exceeds 18 weeks, it must continue within the territory of the member state under the (mandatory) 'accelerated' asylum procedure.[47] Worryingly, states may additionally delay the triggering of the start of the border procedure by delaying the registration of asylum claims by up to four weeks in situations of crisis.[48] As the person will still not have a right to enter, their non-entry may last for up to a total of 22 weeks.[49] Arguably this is still an improvement from the APD's Article 43 undefined limit in times of crisis, yet the aggregate derogations still constitute an alarming amount of time for which it is considered acceptable to be held pending entry to the territory.

EU-wide, there should be institutional capability, 'adequate capacity', to process 30,000 individuals through border procedures,[50] with a more specific number assigned to each member state calculated according to a formula found at Article 47 APR.[51] If a MS reaches its adequate capacity or is faced with a crisis/*force majeure*, then it may notify the commission and choose to stop applying the criteria for mandatory border procedure for applicants who are from a country with a recognition rate of 20 per cent or less and reduce the threshold to a recognition rate of 5 per cent or less.[52] The formula for calculating an MS's adequate capacity still places a higher responsibility on member states on the external border and therefore may incentivise greater use of informally denying access to international protection, i.e. pushbacks, as these will not contribute to and not increase a member state's 'adequate

46 Regulation (EU) 2024/1359 of the European Parliament and of the Council of 14 May 2024 addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147, OJ L, 2024/1359, Art 11(1) (hereinafter Crisis Regulation); Article 6(1)(a) Return Border Procedures Regulation.

47 Article 11(11) Crisis Regulation.

48 Ibid., Article 10(1)

49 C. Scissa and F.L Gatta, 'Access to Asylum in Times of Crises, Force Majeure and Instrumentalization in the EU: Restrictive Trends in Asylum Law and in the Case-law' (2024) 3 *Freedom, Security & Justice*, 226–262, p. 259

50 Article 46 Asylum Procedures Regulation.

51 Ibid., Article 47.

52 Article 11(2)–(3) Crisis Regulation; Article 48(2) Asylum Procedures Regulation and by way of derogation from Article 45(1), criteria for applicants who are nationals of a country with less thana 20% recognition rate Article 42(1)(j).

capacity'.[53] Alternatively, an MS may respond to a crisis or *force majeure* by choosing to expand the scope of the border procedure by increasing the recognition rate to 50 per cent.[54] In cases of instrumentalisation, MSS may request that all applications be examined under the border procedure, regardless of recognition rates or other factors.[55] However, MSS should refrain from applying the derogation, or cease to apply it, if medical reasons or the inability to provide necessary support to applicants with special procedural needs (unaccompanied minors) or special reception needs arise.[56] Special procedural and reception needs should be identified as part of the health and vulnerabilities check during the screening procedure.[57]

The legal fiction of non-entry cannot be used to deny access to the international protection procedure,[58] but the practical realities of restriction to a border area or another location result in a difference in the enjoyment of procedural rights and material reception conditions, such as access to legal assistance and access to greater reception services including charity support. This lack of permission to 'enter' the territory during specific administrative processes requires a strictly set restriction of movement. Applicants undergoing the asylum border procedure are required 'to reside at or in proximity to the external border or transit zones as a general rule or in other designated locations within its territory'.[59] These locations, and indeed the logic of the use of border procedures to suspend permission to enter the territory, are essentially designed to prevent a kind of absconding which implies deprivation of liberty. Otherwise, why limit access to territory?

4 Defining Deprivation of Liberty in Border Procedures

In times of crisis as claimed by MSS, border procedures have been implemented through the use of hotspots and transit zones as initial reception

53 ECRE, 'ECRE Comments on the Regulation of the European Parliament and of the Council Establishing a Common Procedure for International Protection in the Union and Repealing Directive 2013/32/EU', 01.10.2024, available at https://ecre.org/wp-content/uploads/2024/11/ECRE_Comments_Asylum-Procedures-Regulation.pdf, last accessed on 08.03.2025.

54 Article 11(4) Crisis Regulation.

55 Ibid., Article 11(6).

56 Ibid., Article 11(9).

57 Article 12 Screening Regulation.

58 Article 2 Asylum Procedures Regulation.

59 Ibid., Article 54(1).

points for those arriving or apprehended at the border.[60] Additionally, MSs have sought to use pre-existing transit zones, such as international airports, to delay a person's admission to the territory. These practices have led to assessments of whether they amounted to *de facto* detention, as opposed to mere restrictions of movement, by assessing the degree, intensity, and duration of confinement, and then whether such detention should be considered arbitrary or not. The ECtHR has delivered far more judgments than the CJEU in identifying the distinction between deprivation of liberty and the restriction of movement.

The greater the spatial and temporal constraints imposed on an individual, the more likely it is that the restriction qualifies as deprivation of liberty. There is no need for a prison cell for practice to constitute deprivation of liberty, such as confinement for 9–12 days on a boat during Italy's hotspot practices, where applicants were not allowed to leave, with no communication with the outside world, and they were under constant police surveillance.[61] Italy's Lampedusa hotspot practices would be assessed as *de facto* detention again in 2023, despite the previous judgment in 2016,[62] recalling the 'absolute' obligation to respect human rights even in situations of increased numbers of people arriving at the borders.[63] Even being restricted to an island of 2.5km^2 with constant supervision and a lack of social interaction amounted to deprivation of liberty,[64] whereas the use of curfews that allowed breaks in confinement did not amount to it.[65]

Even relatively short confinements can engage Article 5 of the European Convention on Human Rights (ECHR) if combined with other factors such as a high level of coercion and control. Evena few hours of unlawful handcuffing and transfer were considered a deprivation of liberty because the persons were under the complete control of the authorities during that time.[66] The ECtHR has reasoned that the mere theoretical possibility of leaving a location does not automatically preclude a finding of deprivation of liberty under Article 5 ECHR. The Court has made it clear that the assessment of whether someone may voluntarily leave must take into account the practical and legal con-

60 ECRE, 'The Implementation of the Hotspots in Italy and Greece: A Study', 01.10.2016, available at https://www.ecre.org/wp-content/uploads/2016/12/HOTSPOTS-Report-5.12.2016.pdf, last accessed on 08.03.2025, pp. 16 and 23.

61 ECtHR, *Khlaifia and Others v Italy*, no 16483/12 [GC], 15.12.2016, paras. 66–73.

62 ECtHR, *J.A. and Others v Italy*, no. 21329/18, 30.06.2023.

63 Ibid., para. 65.

64 ECtHR, *Guzzardi v. Italy*, no. 7367/76, 06.11.1980.

65 ECtHR, *Raimondo v. Italy*, no. 12954/87, 22.02.1994.

66 ECtHR, *Ilaşcu and Others v. Moldova and Russia*, no. 48787/99, 08.07.2004.

straints they face, rather than relying on a formalistic notion of their ability to exit. This was evident in *Amuur v France*,[67] when four asylum-seekers were kept in the transit zone at Paris-Orly Airport for 20 days, under police guard and without proper access to legal counsel. France argued they had not been 'admitted' to its territory and were free to leave for any other country that would receive them. The Court rejected this formalistic view: holding asylum seekers in an airport transit zone under such constraints was 'equivalent in practice … to a deprivation of liberty'.[68] Similarly, in *Riad and Idiab v Belgium*, 'the mere fact that it was possible for the applicants to leave voluntarily cannot rule out an infringement of the right to liberty'.[69] Control also includes assessment of the person's understanding of the situation and to what extent they have a realistic choice to leave, to avoid states using implied consent to override a situation of *de facto* detention, ensuring that Article 5 protection cannot be waived merely by passive acquiescence.[70] The particular vulnerability of the applicants can determine the degree of control exerted, even in the context of a brief duration of 20 hours in a police station, as the applicants were unaccompanied children placed in a closed waiting area with unrelated adults under police guard.[71] Likewise, the placement of unaccompanied minors in 'protective custody' in locked cells in police stations for 23–35 days pending space becoming available in the reception centre was clearly considered to be *de facto* detention, despite the state's objections.[72]

Two judgments in 2019 issued on the same day showed the differences in the interpretation of whether applicants had a realistic opportunity to leave voluntarily. As in *Ammar* and *Riad and Idiab* and in *Z.A. and Others v Russia*,[73] the ECtHR found that the applicants' continued presence in an airport transit zone for extended periods was not voluntary, as they had no viable alternative; returning to their countries was unsafe, and no other state was willing to admit them. However, in *Ilias and Ahmed v Hungary*,[74] the Grand Chamber did not find Article 5 ECHR to be applicable for two people seeking asylum

67 ECtHR, *Amuur, supra* note 9.

68 Ibid. para. 49.

69 ECtHR, *Riad and Idiab v Belgium*, nos. 29787/03 and 29810/03, 24.01.2008, para. 68.

70 ECtHR, *Storck v Germany*, no. 61603/00, 16.06.2005; N. Allen, 'Restricting Movement or Depriving Liberty?' (Spring 2009) 19 *Mental Health L*, p.29.

71 ECtHR, *Moustahi v France*, no. 9347/14, 25.06.2020.

72 ECtHR, *H.A. and Others v Greece*, no. 19951/16, 28.02.2019, paras. 198–208; ECtHR, *Sh. D. and Others v Greece, Austria, Croatia, Hungary, North Macedonia, Serbia, and Slovenia*, no. 14165/16, 13.06.2019, para. 69.

73 ECtHR, *Z.A. and Others v Russia*, nos. 61411/15, 61420/15, 61427/15 and 3028/16, 21.11.2019.

74 ECtHR, *Ilias and Ahmed v Hungary*, no. 47287/15, 21.11.2019.

who were held in Hungary's land-border transit zone for 23 days. The Court reasoned that the applicants were not *de facto* deprived of their liberty because they had entered Hungary voluntarily; they could have left the transit zone voluntarily in the direction of Serbia, which the Court considered a 'safe third country' which had ratified the GRC; the short duration; and there was no undue delay or treatment beyond what was necessary to verify their asylum requests. Importantly, the Court considered that the fence-enclosed zone was 'albeit involving a significant restriction on their freedom of movement, did not limit their liberty unnecessarily' and the confinement was strictly connected to the permissible purpose of managing entry to the territory.[75] Ultimately, the Grand Chamber found that the men's confinement was a severe restriction on movement but not a deprivation of liberty, declaring Article 5 ECHR complaints to be inadmissible *ratione materiae*.[76] Notably, the dissenting opinion criticised the supposed voluntary nature of their confinement, pointing out that:

> It should also be emphasised that the word 'choice' means something completely different in connection with asylum-seekers from when it is used … I therefore find it difficult to conceive of the fact of asylum-seekers crossing a border as a 'choice'.[77]

and that the applicants' 'choice' to leave was illusory, given that exiting to Serbia would lead to them to abandoning their asylum claims.[78]

The CJEU did not follow this reasoning of the ECtHR in the CJEU's *FMS* judgment.[79] The reasoning of the Court was whether the applicants were cut off from the outside world, 'within a narrowly bounded or restricted loca-

75 Ibid., para. 233.

76 Ibid., para. 250.

77 Ibid., dissenting opinion.

78 V. Stoyanova, 'The Grand Chamber Judgment in Ilias and Ahmed v Hungary: Immigration Detention and how the Ground beneath our Feet Continues to Erode', *Strasbourg Observers*, 23.12.2019, available at https://strasbourgobservers.com/2019/12/23/the-grand-chamber-judgment-in-ilias-and-ahmed-v-hungary-immigration-detention-and-how-the-ground-beneath-our-feet-continues-to-erode/, last accessed on 08.03.2025; J. Ruiz Ramos, 'The Strasbourg Reversal after the "Refugee Crisis": ECtHR Deference to State Sovereignty in Asylum Detention Cases', *EU Migration Law Blog*, 12.07.2021, available at https://eumigrationlawblog.eu/the-strasbourg-reversal-after-the-refugee-crisis-ecthr-deference-to-state-sovereignty-in-asylum-detention-cases/, last accessed on 08.03.2025.

79 CJEU, *FMS and Others v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*, Joined Cases C-924/19 PPU and C-925/19 PPU, 14.05.2020, ECLI:EU:C:2020:367, para. 148.

tion'[80] and had a realistic possibility of leaving their place of accommodation of their own free will.[81] While their asylum applications were processed, the Röszke transit zone was the applicants' mandatory place of accommodation that was set by the Hungarian authorities.[82] Moreover, the physical characteristics,[83] restrictions on freedom of movement with outings supervised by police or armed guards,[84] the severity of the control and restriction had led to total deprivation of liberty. Furthermore, the inability to leave for Serbia without losing asylum status[85] and the impossibility of re-entering Serbia legally[86] made it impossible to leave Hungary. The Court found that there was no real or practical option for the applicants but to return to Serbia.[87] This decision brought the CJEU's interpretation closer to that in *Ammur*, stressing a substantive, effects-based assessment rather than a formalistic one.[88]

Following this alternative assessment of having a prospect of leaving voluntarily, Hungary's transit zone was once again assessed by the ECtHR. The turning point came with *R.R. and Others v Hungary*.[89] Unlike the 2019 case, which involved two adult men confined for 23 days, *R.R. and Others* concerned an Iranian-Afghan family, including three minor children and a pregnant woman, who had been held in the Röszke transit zone for nearly four months. The Court clarified that while an individual may technically have the option to leave, this does not preclude a finding of detention if departure would result in the abandonment of fundamental rights, such as access to asylum.[90] Subsequent cases from 2024 closely followed the same reasoning as in *R.R. and Others*, finding that the applicants' confinement in the Hungarian transit zones amounted to a deprivation of liberty.[91]

80 Ibid., para. 219.
81 Ibid., para. 229.
82 Ibid., para. 245.
83 Ibid., para. 226.
84 Ibid., para. 226.
85 Ibid., para. 230.
86 Ibid., para. 229.
87 Ibid., para. 268.
88 A. Bombay and P. Heynen, 'The ECtHR's Ilias and Ahmed and the CJEU's FMS case: a difficult reconciliation?', Sui Generis Verlag, 01.07.2021, available at https://sui-generis.ch/article/view/sg.189/2019, last accessed on 08.03.2025.
89 ECtHR, *R.R. and Others v Hungary*, no. 36037/17, 02.03.2021.
90 Ibid., para. 81.
91 ECtHR, *Z.L. and Others v Hungary*, no. 13899/19, 12.09.2024; ECtHR, *K.K.S. v Hungary*, no. 32660/18, 03.10.2024; ECtHR, *A.P. v. Hungary*, no. 18581/19, 03.10.2024.

The role of vulnerability and the duration of confinement in assessing the degree, intensity and duration of confinement for the purposes of determining deprivation of liberty under Article 5 ECHR can sometimes be difficult to disentangle. In a number of cases,[92] the Court has assessed whether Article 5 ECHR was applicable by assessing whether the duration of confinement was reasonable for the purpose of asylum processing and the existence of procedural safeguards, i.e. through assessing the merits of whether Article 5 ECHR had been violated. The examination of the existence of procedural safeguards shows a blurred line between the assessment of whether deprivation of liberty has occurred and whether the deprivation of liberty was arbitrary or not. However, while particular vulnerabilities were present in *Z.L. and Others v Hungary*[93] (a mother and four children confined for 17 months), and *K.K.S. v Hungary*[94] (unaccompanied minor detained for 82 days), in *A.P. v Hungary*[95] concerning a single adult male who was detained for 379 days, the Court did not factor in these particular vulnerabilities in order to reason that Article 5 ECHR was applicable. The court simply referred to *R.R and Others* equally across the three subsequent cases. This can be seen as a return to *M.S.S. v Belgium and Greece*,[96] where the Court recognised asylum seekers as inherently vulnerable, an understanding seemingly absent in *Ilias* and *Ahmed*. While assessment of the applicability of Article 5 ECHR may be done in conjunction with the assessment on the merits, it seems the mere fact that an applicant is not deemed vulnerable does not, on its own, exclude the applicability of Article 5 ECHR.

The ECtHR recognised from early on that state practice of exploiting international airport zones, and Italy's hotspot in Lampedusa amounted to *de facto* detention despite the state's objections. However, it took longer for the Court to recognise Hungary's practices in their transit zone. In 2019, *Ilias and Ahmed* represented a high-water mark of deference to Hungary's border control practices, effectively treating the transit zone as a *sui generis* space where asylum-seekers had weakened Article 5 rights.[97] However, by 2021, the Court had changed to a far more rights-protective stance, influenced by the humanitarian realities on the ground. Each subsequent case pushed this evolution fur-

92 ECtHR, *R.R. and Others, supra* note 89, para. 72.

93 ECtHR, *Z.L. and Others, supra* note 91.

94 ECtHR, *K.K.S., supra* note 91.

95 ECtHR, *A.P., supra* note 91.

96 ECtHR, *M.S.S. v Belgium and Greece*, no. 30696/09, 21.01.2011.

97 V. Stoyanova, 'The Grand Chamber Judgment in Ilias and Ahmed v Hungary', *supra* note 78; J. Ruiz Ramos, 'The Strasbourg Reversal after the 'Refugee Crisis'', *supra* note 78.

ther: from families with young children to unaccompanied minors to single adults in extreme conditions, the Court consistently tightened the Article 5 ECHR standards applicable to transit-zone confinement. Over time, the *Ilias and Ahmed* emphasis on a notional ability to leave and a short stay gave way to a focus on the actual constraints and suffering experienced by the detainees. By 2024, the ECtHR had effectively repudiated the idea that Hungary's transit zone was anything other than a *de facto* detention centre.

MSS cannot easily avoid the duty of ensuring procedural safeguards by simply claiming that the practice does not constitute detention. However, the infrastructure requirements of placing people into screening and border procedures that do not amount to detention may prove difficult. The EU has endorsed and funded the creation of Closed Controlled Access Centres (CCAC) on islands like Samos, Kos and Leros, and they hark back to the hotspots.[98] The Samos CCAC, founded in 2021, is a high-security compound surrounded by double barbed-wire fences, with surveillance cameras, magnetic gates and a 24/7 police presence.[99] Asylum seekers arriving on Samos are transferred to this remote camp and subjected to 'restriction of freedom' orders initially, meaning that they cannot leave the facility for an initial period (ostensibly for identification and screening).[100]

98 ECRE, 'Greece: EU-Funded Refugee Camps in the Aegean Built on a Regime of Incarceration, Authorities Use Criminal Proceedings as 'Intimidation Tactic' Towards Humanitarians Amid Ongoing Pushbacks of Migrants, Refugees in Türkiye Suffer From Increasing Anti-Migrant Sentiment and Poverty', available at https://ecre.org/greece-eu-funded-refugee-camps-in-the-aegean-built-on-a-regime-of-incarceration-authorities-use-criminal-proceedings-as-intimidation-tactic-towards-humanitarians-amid-ongoing-pushb/, last accessed on 08.03.2025; A. Dimitriadi, 'The Internal Dimension in The New Pact: A Glass Half-Full', in M. Ferbr and N. Antonetti (eds.), *Migration and Asylum - Towards a Joint European Response: Next Steps in Implementing The New Pact*, Hanns Seidel Stiftung and Instituto Luigi Sturzo,, Brussels 2024p. 20; M. Gerbaudo, 'The European Commission's Instrumentalization Strategy: Normalising Border Procedures and De Facto Detention' (2022) 2 *European Papers-A Journal on Law and Integration,* pp.617–619; V. Moreno-Lax, 'Crisis as (Asylum) Governance: The Evolving Normalisation of Non-access to Protection in the EU' (2024) 1 *European Papers-A Journal on Law and Integration*, p. 200.

99 Amnesty International, 'People Seeking Asylum detained in EU-funded "Pilot" Refugee Camp on Samos', 30.07.2024, available at https://www.amnesty.org/en/latest/campaigns/2024/07/people-seeking-asylum-detained-in-samos-camp-in-greece/, last accessed on 08.03.2025.

100 I Have Rights, 'The EU-Funded Closed Controlled Access Centre: The De Facto Detention of People Seeking Protection on Samos', 23.02.2023, available at https://ihaverights.eu/wp-content/uploads/2023/02/detention_report_full.pdf, last accessed on 08.03.2025, p. 6.

Amnesty International's on-site research in late 2023 found that this pilot implementation amounted to systematic arbitrary detention of asylum seekers under the pretext of screening. New arrivals were confined for weeks or even months in what residents themselves described as a 'prison-like' environment with insufficient food, water and medical care.[101] In a recent development, the Administrative Court of First Instance of Syros has indeed considered the CCAC on Samos to amount to *de facto* detention regarding the confinement of an unaccompanied minor for 64 days. The court ordered that the applicant should be transferred immediately to a facility expressly for unaccompanied minors.[102] The CCACs will be likely to form a model of how the Pact's border procedure might be operationalised in practice. In July 2024, Amnesty International warned that the Samos CCAC involved 'unlawful and arbitrary detention' and sub-standard conditions, and urged that it 'must not become a blueprint for the EU Migration Pact'.[103]

The ECtHR's recognition of Italy's hotspot practices[104] and subsequent ECtHR reinforcement of *FMS*, in addition to this recent decision from the Administrative Court of First Instance of Syros, creates a strong basis for the CJEU to follow *FMS* if it assesses whether an MS employing screening and border procedures would be subjecting groups of people to *de facto* detention.[105]

101 Amnesty International, 'Samos: Unlawful Detention and Sub-Standard Conditions Must Not Become a Blueprint for the EU Migration Pact', 25.02.2025, available at https://www.amnesty.eu/news/samos-unlawful-detention-and-sub-standard-conditions-must-not-become-a-blueprint-for-the-eu-migration-pact/, last accessed on 08.03.2025; Rescue.Org, 'One Year Since Greece Opened New 'Prison-Like' Refugee Camps, NGO s Call for a More Humane Approach', 20.09.2022, available at https://www.rescue.org/eu/statement/one-year-greece-opened-new-prison-refugee-camps-ngos-call-more-humane-approach, last accessed on 08.03.2025.

102 The Administrative Court of First Instance of Syros ruled in case no. AP7/2025, reported in ELENA Weekly update 7 March 2025, available at https://ecre.org/our-work/elena/weekly-legal-updates/, last accessed on 08.03.2025.

103 Amnesty International (2025), 'Samos: Unlawful Detention and Sub-Standard Conditions Must Not Become a Blueprint for the EU Migration Pact', *supra* note 101.

104 The ECtHR has not yet explicitly assessed Greece's hotspots outside explicit or very obvious *de facto,* detention practices: ECtHR, *H.A. and Others, supra* note 72; ECtHR, *J.R. and Others v Greece*, no. 22696/16, 25.01.2018; ECtHR, *O.S.A. and Others v Greece*, no. 39065/16, 21.3.2019. However, the Greek Ombudsman has criticised the fact that the CCAC on Samos does constitute *de facto* detention: I Have Rights, 'Degrading conditions in Samos CCAC: The European Court of Human Rights grants Interim Measures', Press Release, 07.03.2024, available at https://ihaverights.eu/european-court-of-human-rights-grants-interim-measures/, last accessed on 08.03.2025.

105 B. Nagy, 'A – Pyrrhic? – Victory Concerning Detention in Transit Zones and Procedural Rights: FMS & FNZ and the Legislation adopted by Hungary in its Wake', *EU Migration Law Blog*, 15.06.2020, available at https://eumigrationlawblog.eu/a-pyrrhic-victory-con

The individuals seeking asylum in *FMS* were effectively isolated behind fences, with their movement strictly limited and monitored. The CJEU noted that detention occurs when a person is forced to remain in a specific place, cut off from the general population. It is difficult to imagine having no 'right to enter' the territory and residing 'at or in proximity to the external border or transit zones' with this ultimately not being considered as being forced to remain in a specific place, cut off from the general population. Additionally, those in screening and border procedures are there as part of administrative processes ostensibly intended to pursue their right to access asylum. Therefore, as established in *FMS*, it cannot be considered a legitimate option for applicants voluntarily to leave screening or border procedures and return to the state they entered from as that would mean abandoning their pursuit of accessing their right to asylum processes.

Furthermore, in *Saadi v UK*[106] a person seeking asylum was held for seven days in a secure reception centre for fast-track asylum screening. While considered by the ECtHR as permissible, it was nonetheless considered a deprivation of liberty. The Grand Chamber held that Article 5(1)(f) ECHR does not require the authorities to prove that detention was 'necessary' in the individual case to prevent flight, as long as the detention is in good faith, closely tied to the asylum process, in appropriate conditions, and not excessive in length. This judgment was controversial because it appeared to lower the necessity threshold for initial asylum detention and endorsed a use of automatic short-term detention out of administrative convenience.[107] The six dissenting judges in *Saadi* objected that 'in no circumstances can the end justify the means; no person, no human being may be used as a means towards an end'.[108] The judgment could be considered as justifying holding individuals for up to seven days during screening procedures. However, under the ECtHR's reasoning, screening could still be considered as detention, and doing it would require accompanying safeguards. In the EU legal

cerning-detention-in-transit-zones-and-procedural-rights-fms-fmz-and-the-legislation-adopted-by-hungary-in-its-wake/, last accessed on 08.03.2025.

106 ECtHR, *Saadi v United Kingdom*, no. 13229/03, 29.01.2008.

107 H.O'nions, 'No Right to Liberty: The Detention of Asylum Seekers for Administrative Convenience' (2008)10(2) *European Journal of Migration and Law*, p. 149; C. Costello, 'Immigration Detention: The Grounds Beneath Our Feet' (2015) 68 *Current Legal* Problems, p. 143; V. Moreno-Lax 'Beyond Saadi v UK: Why the 'Unnecessary' Detention of Asylum Seekers is Inadmissible under EU Law' (2011) 5(2) *Human Rights and International Legal Discourse*, p.166.

108 ECtHR, *Saadi, supra* note 106, dissenting opinion.

order, considering the seven days to be detention would additionally need to show that such a measure was justified on the ground of the risk of absconding, which requires an individualised assessment.

5 Procedural Safeguards

As with the previous cases establishing *de facto* detention, violations were always found regarding procedural safeguards. The New Pact includes specific provisions aimed at protecting children and other vulnerable individuals in border procedures, both at screening and in the context of ensuring that the conditions of border procedures meet the special reception needs of an individual.[109] The APR exempts unaccompanied minors from the border procedure by default, unless the authorities consider 'the applicant as a danger to the national security or public order'.[110] Additionally, Article 53 APR lists several vulnerability-based exceptions. For example, an applicant with special reception needs (including minors) must not be held in a border facility if the necessary support for their needs cannot be provided at that location. Similarly, applicants identified as needing special procedural guarantees (such as due to trauma, disability or other vulnerability affecting their ability to navigate the process) are exempt if the border setting cannot accommodate those needs.[111] Recital 61 APR stipulates that vulnerable individuals 'should only be admitted to a border procedure' if the reception conditions there meet all the requirements for their special situation. The Pact also mandates that if a family with minors is in a border procedure, it must be housed in appropriate reception facilities after a 'best interests' assessment, with an adequate standard of living for the children's development.[112] In theory, these safeguards reflect an understanding that border camps are harsh environments unsuitable for children and the vulnerable unless exceptional arrangements are in place. While procedural safeguards for vulnerable persons are always welcome, if there is acknowledgment that they will probably be unsuitable for vulnerable persons, then why stop short of identifying the confinement as detention and then applying the full set of procedural safeguards with individual assessment?

109 Recitals 15 and 61 Asylum Procedures Regulation.
110 Ibid., Article 42(3)(b).
111 Ibid., Article 54n.
112 Ibid., Recital 61.

The ECtHR has repeatedly stressed the requirement of individual assessment in cases involving vulnerable persons. In *Rahimi v. Greece*,[113] involving an unaccompanied minor, the Court criticised that the authorities had made no distinction between adults and minors.[114] Likewise, in *O.M. v Hungary*[115] the ECtHR held that detaining an asylum seeker who was a gay man fleeing persecution was arbitrary, because the authorities failed to make an individualised assessment accounting for his vulnerability (risk of homophobic abuse in detention). The Court stressed that special care is needed 'in order to avoid situations which may reproduce the plight that forced these persons to flee in the first place'.[116] If a group is identified as vulnerable (for example, asylum-seeking children), the state is expected to seek alternatives to detention and assess the person's individual needs rather than applying detention by default.[117] The ECtHR has reiterated that authorities must examine whether less severe measures could suffice before detaining someone, failing to consider alternatives (for example, open reception centres, reporting obligations) can render detention 'arbitrary' under Article 5 ECHR. For example, in *Abdullahi Elmi and Aweys Abubakar v Malta*, the Court noted that 'at no stage did the authorities ascertain whether the placement in immigration detention of the applicants was a measure of last resort for which no alternative was available,'[118] and found the detention not to be compliant with Article 5(1) ECHR. Even with the best intentions, a closed, security-driven camp is not a child-friendly setting. The requirement to provide for basic needs and development in border camps will be hard to satisfy in practice, as is evidenced by past experiences in EU hotspots and transit where children have faced distressing conditions.[119]

For other vulnerable groups (victims of torture, pregnant women, people with disabilities, etc.), the Pact's safeguards rely on proper identification and accommodation of their needs, which could be seen as a form of individual assessment. If a vulnerable person's needs cannot be met in the border site,

113 ECtHR, *Rahimi v Greece*, no. 8687/08, 05.07.2011.

114 Ibid., para. 101.

115 ECtHR, *O.M. v Hungary,* no. 9912/15, 05.07.2016.

116 Ibid., para. 53.

117 ECtHR, *M.S.S., supra* note 96; ECtHR, *Khlaifia and Others, supra* note 61; J.RUIZ RAMOS (2021), 'The Strasbourg Reversal after the 'Refugee Crisis'', *supra* note 78.

118 ECtHR, *Abdullahi Elmi and Aweys Abubakar v Malta*, nos. 25794/13, 28151/13, 22.02.2017, para. 146.

119 ECRE (2016), 'The Implementation of the Hotspots in Italy and Greece: A Study', *supra* note 60.

authorities should exempt them from the border procedure.[120] This is an important safeguard on paper, however; it places the onus on states effectively and efficiently to identify vulnerabilities and make a judgment call about their capacity to care for the person at the border. Especially when considering the number of Article 3 ECHR violations regarding reception conditions already identified in MSS' practice,[121] there is a real risk of error or neglect in this process. If, for example, a victim of trafficking or someone with severe post-traumatic stress disorder (PTSD) is not flagged during the initial screening, they could languish in a detention-like environment that exacerbates their trauma. The Screening Regulation includes the establishment of national independent monitoring mechanisms to ensure compliance with EU and international law during the screening process,[122] the EU Agency for Asylum (EUAA) also has a significantly expanded mandate in monitoring (and following up) member-state compliance with sufficient reception condition standards,[123] and the Fundamental Rights Agency (FRA) is tasked with issuing general guidance for MSS on setting up such mechanisms and ensuring their independent functioning.[124] Any failure in implementation would mean children and vulnerable individuals being exposed to conditions of confinement that, arguably, can never be in their best interests or compatible with human dignity.[125] Additionally, even if vulnerability assessments are swift and accurate and do not result in vulnerable persons being placed in border procedures with conditions unfit for their needs, this would still not be sufficient for the standards of assessing necessity of the deprivation of liberty (if indeed border procedure facilities are considered *de facto* detention) as this does not entail an assessment of risk of absconding, in addition to other procedural safeguards.

120 Article 54 and Recital 61 Asylum Procedures Regulation.

121 E.g., ECtHR, *Mubilanzila v Belgium*, no. 13178/03, 12.10.2006; ECtHR, *M.S.S., supra* note 96; ECtHR, *H.A. and Others, supra* note 72; ECtHR, *Sh.D. and Others, supra* note 72; ECtHR, *A.R. and Others v Greece*, nos. 59841/19 and 2 others, 18.04.2024.

122 Article 10(2) Screening Regulation.

123 Articles 14–15 Regulation (EU) 2021/2303 of the European Parliament and of the Council of 15 December 2021 on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010, OJ L 468 (hereinafter the EUAA Regulation).

124 Article 10 Screening Regulation.

125 International Commission of Jurists, 'Never in the Best Interests of the Child: Risks of child detention in the screening and border procedures under the 2024 EU Migration Pact', Briefing paper, 01.11.2024; ECRE (2024) 'Comments on the Regulation of the European Parliament and of the Council Establishing a Common Procedure for International Protection in the Union and Repealing Directive 2013/32/EU', *supra* note 53.

Under the APR, the decision to channel an applicant into the border procedure is an administrative one following the outcome of the screening process. There is currently no dedicated remedy to contest the decision to examine an application at the border. In fact, it is only if a formal decision is made to place an individual in detention during border procedures or they are issued with a return decision, that there may be an opportunity to reach a court both to challenge the detention decision and the administrative decision to process them through the border procedure. This is further exacerbated if the opportunity for judicial review arises only through challenging a return decision, as return decisions may not carry automatic suspensive effect.

If an applicant is able to bring an appeal, the appeal will have no automatic suspensive effect where: an application assessed in the border procedure or accelerated assessment is rejected as unfounded;[126] the application has been considered to be inadmissible on certain grounds,[127] including where the applicant had missed the seven-day deadline to make an international protection claim following a return decision;[128] an application has been considered implicitly withdrawn as through lack of cooperation;[129] or where a decision has been taken to withdraw international protection.[130] The lack of automatic suspensive effect is somewhat similar to the Schengen Borders Code where challenging a refusal of entry does not carry suspensive effect.[131] However, it is important to note that this comparison is not justified because where someone does not meet entry conditions but requests international protection, the Schengen Code is also bound to the GRC and therefore must admit the person to the territory to access international protection procedures. The CJEU had clarified that the legal effects of a return decision must be suspended when an appeal against the rejection of an application for international protection is ongoing.[132] The ECtHR has considered that the suspensive effect of appeals is required,[133] and the CJEU has clarified that this is the case where there are

126 Article 68(3)(a) and (d) Asylum Procedures Regulation.
127 Ibid., Article 68(3)(b).
128 Ibid., Article 38(1)(e).
129 Ibid., Article 68(3)(c).
130 Ibid., Article 68(3)(e).
131 Annex V Schengen Borders Code.
132 CJEU, *Sadikou Gnandi v État belge*, Case C-181/16, 19.06.2018, ECLI:EU:C:2018:465.
133 ECtHR, *A.M. v the Netherlands*, no. 29094/09, 05.07.2016; ECtHR, *M.A. and Others v Lithuania*, no. 59793/17, 11.12.2018, paras. 83–84; ECtHR, *M.K. and Others v Poland*, nos. 40503/17, 42902/17, 43643/17 23.07.2020; ECtHR, *A.I. and Others v Poland*, no. 39028/17, 30.06.2022; ECtHR, *A.B. and Others v Poland*, no. 42907/17, 30.06.2022.

substantial concerns of *refoulement*,[134] in order to protect Article 3 and Article 13 ECHR rights sufficiently. Additionally, a five-day time limit for lodging an appeal, combined with difficulties in accessing interpreters, has been deemed insufficient and also contrary to Articles 3 and 13 ECHR.[135] Both an adequate time-limit for submitting an appeal and the suspensive effect of that appeal are necessary components of guaranteeing access to an effective remedy, as the CJEU has stated, 'a remedy enabling suspension of enforcement of the measure authorising removal should, *ipso jure*, be available to the applicant.'[136]

This places huge weight on the initial vulnerability screening and the monitoring mechanisms. If the authorities misapply the criteria or the person's circumstances change, there is no explicit appeals process to secure their removal from the border regime. This stands in contrast to the normal guarantees against detention, under both ECtHR jurisprudence[137] and CJEU jurisprudence,[138] where access to judicial review is key to ensuring that detention remains justified and proportional, and therefore lawful. Furthermore, the CJEU has ruled that states should not wait for an individual to challenge their detention decision or conditions of detention, that states have an obligation to conduct judicial review *ex officio* in order to preserve the right to an effective remedy under Article 47 of the EU Charter of Fundamental Rights.[139] This is particularly important for considering those with vulnerabilities who may not be able to advocate for themselves or be equipped, or have the avail-

134 CJEU, *Centre public d'action sociale d'Ottignies-Louvain-La-Neuve v Moussa Abdida,* Case C-562/13, 18.12.2014, ECLI:EU:C:2014:2453; CJEU, *Sadikou Gnandi, supra* note 132; CJEU, *FMS and Others, supra* note 79.

135 ECtHR, *IM v France*, no. 9152/09, 02.05.2012.

136 CJEU, *Abdoulaye Amadou Tall v Centre public d'action sociale de Huy,* Case C-239/14, 17.12.2015, ECLI:EU:C:2015:824, para. 54.

137 ECtHR, *Chahal v The United Kingdom*, no. 22414/93, 15.11.1996; ECtHR, *Shamsa v Poland*, nos. 45355/99 and 45357/99, 27.11.2003; ECtHR, *A. and Others v the United Kingdom*, no. 3455/05, 19.02.2009; ECtHR, *Louled Massoud v Malta*, no. 24340/08, 27.10.2010; ECtHR, *J.N. v United Kingdom*, no. 37289/12, 19.05. 2016; ECtHR, *Khlaifia and Others, supra* note 61; ECtHR, *Abdullahi Elmi and Aweys Abubakar, supra* note 113; ECtHR, *Z.A. and Others, supra* note 73; ECtHR, *R.R. and Others, supra* note 89; ECtHR, *Z.L. and Others, supra* note 91; ECtHR, *A.P., supra* note 91.

138 CJEU, *Said Shamilovich Kadzoev*, Case C-357/09 PPU, 30.11.2009, ECLI:EU:C:2009:741; CJEU, *Mahdi, supra* note 19; CJEU, *Abdoulaye Amadou Tall, supra* note 136; CJEU, *J. N., supra* note 23*;* CJEU, *K., supra* note 10; CJEU, *FMS and Others, supra* note 80.

139 CJEU, *Staatssecretaris van Justitie en Veiligheid v C and B and X v Staatssecretaris van Justitie en Veiligheid*, Joined Cases C-704/20 and C-39/21, ECLI:EU:C:2022:858, replicated at art. 11(3) Directive (EU) 2024/1346.

ability, to seek legal advice. National procedural rules cannot restrict courts from addressing such issues on their own initiative.[140]

Beyond challenging the fact of confinement, asylum seekers must have the ability to know and scrutinise their rights within the border procedure. Access to legal assistance is an important aspect of the international protection process. During assessment there is a right to 'legal counselling', and it may be free according to the discretion of the member state which will receive additional financial support for this.[141] The legal counselling may come from a 'person entrusted with counselling',[142] although there is no guarantee of independence. Due to the significant effect of information that is given at screening on which route the application is processed through, and then further the importance of information given during the initial assessment, or the 'administrative stage' as it is referred to in the legislation, access to independent legal counselling at screening and the initial assessment can be key in ensuring that a protection claim is properly made so that its merits can truly be assessed. However, only at the appeal stage will there be an explicit right to free legal assistance.[143] During screening, 'legal' advice is not explicitly included nor is it excluded,[144] although access to information and advice can be limited on the grounds of 'security concerns'.[145] There are already concerns about the poor standards of access to information and legal assistance in MSs.[146] Border detention centres are often in remote or restricted locations where lawyers, NGO s and family members have limited access, such as the CCAC on Samos, where lawyers must give advance notice to visit, are escorted by security during client meetings, and face restricted visiting hours; meanwhile asylum seekers under curfew inside the camp struggle to exit to meet lawyers off-site.[147]

140 Ibid.

141 Article 76 Asylum Procedures Regulation.

142 Ibid., Recital 14, Articles 15, 16(1), and 18(3).

143 Ibid., Article 15(2).

144 Article 8(6) and 11(c) Screening Regulation.

145 Ibid., Article 8(6).

146 ECtHR, *D v Bulgaria*, no. 29447/17, 20.7.2021, paras. 124–134; ECRE, 'ECRE/ELENA Legal Note on Access to Legal Aid in Europe', 01.11.2017, available at https://www.ecre.org/wp-content/uploads/2017/11/Legal-Note-2.pdf, last accessed on 08.03.2025, p. 5; EUAA, '4.10.1. Legal Information and Access to Legal Aid as Prerequisites of an Effective Asylum Procedure in Asylum Report 2023', Asylum Report 2023, available at https://euaa.europa.eu/asylum-report-2023/4101-legal-information-and-access-legal-aid-prerequisites-effective-asylum-procedure, last accessed on 08.03.2025.

147 I Have Rights, 'Greek Ombudsman finds that CCAC is unlawfully restricting access to lawyers', Press Release, 26.01.2024, available at https://ihaverights.eu/ccac-unlawfully-restricting-access-to-lawyers/, last accessed on 08.03.2025.

The Pact places heavy emphasis on vulnerability assessments as the gateway to safeguards. If officials fail to spot a person's special needs, the person might remain in the border procedure with no easy way to contest that decision. There is an implicit expectation that an asylum seeker who is, say, severely ill or traumatised will somehow advocate for their own exemption or find a lawyer to do so. Yet the very nature of vulnerability (for example. mental health issues, language barriers, trauma) might impede one's ability to self-identify or argue one's case.[148] The lack of a formal remedy to challenge being in the border procedure means that the initial administrative screening is effectively final.

6 Banalisation of Detention

Automatic use of immigration detention effectively criminalises irregular entry, contrary to international obligations stemming from Article 31 of the GRC. In Cyprus, there has been systematic violation of the procedural requirements to ensure that detention is not arbitrary, resulting in its automatic use.[149] As an EU MS on the external borders of the union, such automatic use of detention is not surprising as such states, even under the New Pact, face pressure to prevent secondary movements to other MSs. Famously, Commission President Ursula von der Leyen praised Greece as Europe's 'ασπίδα' (shield),[150] despite what has since been found in repeated rulings of unlawful use of automatic detention and violations of reception conditions,[151] in addi-

148 ECRE, 'The Guarantees of the EU Charter of Fundamental Rights in Respect of Legal Counselling, Assistance and Representation in Asylum Procedures', 01.06.2024, available at https://ecre.org/ecre-legal-note-the-guarantees-of-the-eu-charter-of-fundamental-rights-in-respect-of-legal-counselling-assistance-and-representation-in-asylum-procedures/, last accessed on 08.03.2025, pp.16–17.

149 Global Detention Project, 'Country Report: Immigration Detention in Cyprus: Reception Challenges in Europe's New Gateway, 01.08.2019, available at https://www.globaldetentionproject.org/wp-content/uploads/2019/08/mmigration-Detention-in-Cyprus-August-2019-Online.pdf, last accessed on 24.04.2025, p.17.

150 European Commission, 'Remarks by President von der Leyen at the joint press conference with Kyriakos Mitsotakis, Prime Minister of Greece, Andrej Plenković, Prime Minister of Croatia, President Sassoli and President Michel', Press Release, STATEMENT/20/380, available at https://ec.europa.eu/commission/presscorner/detail/en/statement_20_380, last accessed on 24.04.2025.

151 ECtHR, *M.S.S.*, *supra* note 96; ECtHR, *Rahimi*, *supra* note 113; ECtHR, *H.A. and Others*, *supra* note 72; ECtHR, *J.R.*, *supra* note 104; ECtHR, *O.S.A. and Others*, *supra* note 104; *A.R. and Others*, *supra* note 123; ECtHR, *Sh.D. and Others*, *supra* note 72.

tion to unlawful prevention of entry.[152] Secondary movement remains a fundamental concern of the central and northern EU MSs, as the ECRE noted in the negotiation of the New Pact where the (limited) solidarity measures were not agreed to until the mandatory nature of screening and border procedures were included.[153] In 2023, Italy dropped its prior objections in the New Pact negotiations and embraced the EU's border procedure approach, accepting the need for screening procedures, accelerated decisions and 'detention at the external border.'[154] Such banalisation of detention exposes that more fundamentally those seeking to enter at borders are firstly a threat that must be contained, 'made possible by the gradual dehumanisation of racialised exiled people, criminalised for what they are and what they represent'.[155]

The use of detention has a profound impact on the well-being of those subject to it. Immigration detention, even if not intended as punishment, often replicates prison-like conditions with high-security facilities, fenced perimeters and surveillance. Multiple studies have documented the severe mental health toll of immigration detention: high rates of anxiety, depression, post-traumatic stress, self-harm and even suicide among those who have already fled persecution or conflict. The longer or more indeterminate the detention, the more detrimental the effects on mental well-being.[156] The new mandatory obligation of states to restrict movement and not permit entry to the territory in screening and border procedures, for potentially significant periods of time justified by crisis, risks generalising the exceptional nature of what should be an extraordinary measure depriving a person of his liberty. The administrative convenience of detention and therefore its sup-

152 ECtHR, *A.R.E. v. Greece*, no. 15783/21, 07.01.2025.

153 ECRE, 'Migration Pact Agreement Point by Point', Press Release, 09.06.2023, available at https://ecre.org/editorial-migration-pact-agreement-point-by-point/, last accessed on 24.04.2025.

154 ICMPD, 'Breaking taboos: EU asylum and migration policy since 2020', 05.06.2024, available at https://www.icmpd.org/blog/2024/breaking-taboos-eu-asylum-and-migration-policy-since-2020, last accessed on 24.04.2025. Additionally, Italy is now looking for earlier implementation of the Pact: INFO MIGRANTS, 'Meloni-Brunner promise to expedite EU Migration Pact and List of 'Safe Countries', available at https://www.infomigrants.net/en/post/62957/melonibrunner-promise-to-expedite-eu-migration-pact-and-list-of-safe-countries, last accessed on 24.04.2025.

155 Migreurop, '2023 Activity Report', 01.07.2023, available at https://migreurop.org/IMG/pdf/migreurop_activity_report_2023_en.pdf, last accessed on 24.04.2025, p.3.

156 M. von Werthern, K. Robjant, Z. Chui, *et al.*, 'The Impact of Immigration Detention on Mental Health: A Systematic Review' (2018) 18(382) *BMC Psychiatry*; I. Priestley, S. Cherian, G. Paxton, *et al.*, 'The Impact of Immigration Detention on Children's Mental Health: Systematic Review' (2025) *The British Journal of Psychiatry*.[full reference]

posed value to the functioning of the CEAS cannot justify its indiscriminate use.[157] State practice shows that expediency and deterrence are already overtaking the 'last resort' requirement. While the New Pact still espouses restraint, the mandatory nature of non-entry and retention of persons in specific zones risks validating and formalising automatic detention as what is considered a necessary element of the functioning of the CEAS.

There is always the possibility that MSs can manage to create infrastructure that cordons off sufficient geographical space with sufficient access to services and privacy so as not to amount to deprivation of liberty while retaining the fiction of non-entry. However, this may not be achievable either in in practice or in political will. Alternatively, MS could ensure that screening, monitoring and access to legal counsel are robust enough efficiently to identify vulnerable people to prioritise their wellbeing and grant access to the territory on this basis. Additionally, for those who cannot be classed as 'vulnerable', MSs could remedy the current lack of access to judicial review as a procedural safeguard in the screening and border procedure, by default considering its infrastructure for these purposes to be places of detention and therefore make an individualised assessment to every person and render detention orders. Essentially, MSs could simply regard the screening and border procedures as detention measures and therefore choose to treat them as such in order to ensure that the procedural safeguards of detention are implemented. In the likely case that no member state would have such political will, it will then be for the CJEU to consider exactly how MSs can achieve the seemingly impossible of following New Pact provisions while avoiding arbitrary detention practices, without diverting from its previous jurisprudence or that established by the ECtHR.

7 Conclusion

In conclusion, the New Pact on Asylum and Migration introduces measures that, while formally classified as restrictions on movement rather than detention, raise significant concerns regarding deprivation of liberty when considering ECtHR and CJEU jurisprudence. Where screening and border procedures are indeed considered *de facto* detention, it is likely therefore that the

157 E. Tsourdi, 'The New Screening and Border Procedures: Towards a seamless migration process?', 07.06.2024, European Policy Centre, available at https://epc.eu/content/FEPS-Policy_Study_-_The_New_Screening_and_Border_Procedure_-_DP_66__9_.pdf, last accessed on 24.04.2025, p. 19.

lack of procedural safeguards would render the detention arbitrary, even during the screening process. While seven days may be considered permissible for conducting a screening process, in cases where vulnerable people, including unaccompanied children, are being automatically subjected to a screening process that amounts to *de facto* detention without considering alternatives, this could be likely to result in the detention becoming arbitrary.

We can see, with the creeping criminal elements to administrative immigration detention and the use of the fiction of non-entry, represent that those seeking to enter are firstly a security risk and therefore should be contained. While on paper, measures are purported to be designed to restrict movement but not deprive one of liberty, it has been through practical assessment of state practice that the combination of the need to conduct administrative procedures while someone exists in a certain geographical place with no right to enter, results in *de facto* detention. Indeed, it is difficult to interpret the 'fiction of non-entry' as anything other than considering that all those subject to it would otherwise abscond and move across the territory in a way in which administrative processes could not be concluded effectively.[158] The jurisprudence of the ECtHR and CJEU has demonstrated that the assessment of deprivation of liberty depends on the practical realities of an individual's situation rather than formal characterisations. The legislative choice of screening and border practices as a mandatory obligation of MS has the effect of normalising detention, or *de facto* detention, in the context of migration.[159] The banalisation of detention further merges immigration detention conceptions and justifications with those of criminal detention, further treating those in need of protection as those the state needs to protect itself from.

158 ECRE (2024), 'ECRE Comments on the Regulation of the European Parliament and of the Council Establishing a Common Procedure for International Protection in the Union and Repealing Directive 2013/32/EU', *supra* note 53; ECRE, 'ECRE Comments on the Regulation of the European Parliament and of the Council Addressing Situations of Crisis and Force Majeure in the Field of Migration and Asylum and Amending Regulation (EU) 2021/1147', 17.05.2024, available at https://ecre.org/comments-paper-regulation-on-addressing-situations-of-crisis-and-force-majeure-in-the-field-of-migration-and-asylum/, last accessed on 08.03.2025.

159 A. Halilovic, 'Executive Migration Governance and Law-making in the European Union: Towards a State of Exception' (2024) 2 *European Papers-A Journal on Law and Integration*, p. 204; V. Moreno-Lax (2024), 'Crisis as (Asylum) Governance', *supra* note 98, p. 204; M. Gerbaudo (2022), 'The European Commission's Instrumentalization Strategy', *supra* note 98.

The EU AI Act and Human Rights by Design Obligations

Akanksha Bisoyi

Abstract

The purpose of the EU AI Act is two-dimensional; on the one hand, it aims to improve the functioning of the internal market and support innovation, and on the other hand, its aspiration is to conceptualise human-centric and trustworthy AI artefacts. This is in line with Schuman's Declaration of not only protecting its market and economic interests but also strategically promoting its EU-centric fundamental values of democracy and the rule of law. This paper focuses on the second strand of Schuman's thought on preserving fundamental values, specifically with respect to human rights protection in the digital age. Article 1 of the AI Act emphasises that the creation of new innovative AI systems ought to be integrated with the material notions of the rule of law, such as the protection of human rights, including safety, environmental protection and individual rights, against the harmful effects of such systems. Evidence suggests that there are primarily five issues that are raised concerning AI systems: first, fairness in association with the right to non-discrimination second, data protection in connection with the individual right to privacy; third, environmental footprint in relation to environmental protection; fourth, accountability of the AI system; and, fifth, the protection of individual rights. Analysis of the jurisprudence of the European Court of Human Rights and the EU human rights specific laws with respect to these 'elements' results in its formulation of human rights objectives, highlighting the discretionary, open-ended nature of the legal system. By situating these human rights objectives as design goals, this paper aims to explore the human rights by design obligations in the Act and ascertain the potential of the AI Act.

1 Introduction

The imperative to utilise technology for the promotion and safeguarding of human rights is enshrined in international legal frameworks such as the Convention of the Rights of People with Disabilities, wherein Article 4 articulates a commitment for states to engage in and promote the research and develop-

© AKANKSHA BISOYI, 2026 | DOI:10.1163/9789004751026_017
This is an open access chapter distributed under the terms of the CC-BY-NC-ND 4.0 license.

ment of new technologies,[1] ensuring the full realisation of human rights and fundamental freedoms for all individuals including those with disabilities. The legal duties associated with the employment of technology for the promotion and protection of human rights can be implemented through a multifaceted approach, which includes the adoption of appropriate legislative, administrative and other measures aimed at realising the rights recognised in the legal frameworks.

A pertinent question arises regarding the mechanism by which states can incentivise the development of Artificial Intelligence (hereinafter AI) that aligns with human rights objectives. Effective strategies include legal mechanisms that involve legal obligations for deployment, testing facilities, access to data and exemptions from certain regulatory frameworks.[2] The AI Act[3] represents a framework that establishes a systematic approach to the regulation of AI, which seeks to mitigate the challenges that the artefact[4] poses to human rights.[5]

This legislation serves as a model aiming to marry technological advancements with human rights, such as safety, environmental protection and individual rights against the harmful effects of AI systems. In this context, there

1 These technologies include information and communications technologies, mobility aids, devices and assistive technologies.

2 Other mechanisms would encompass financial ones – such as research funding and public procurement – as well as the establishment of technical tools, including innovation units, infrastructural support and guidance and expertise.

3 The AI Act was officially published in July 2024 and entered into force in August 2024. Regulation (EU) No. 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (hereinafter AI Act).

4 AI has been referred here as an artefact with the intention that it is something created or constructed by humans, rather than occurring naturally, like other technologies. The concept of AI as an artefact can be traced back to the early days of computing, and AI research. It was in the Dartmouth Conference in 1956 that the term 'AI' first appeared. Researchers like John McCarthy, Marvin Minsky, Nathaniel Rochester and Claude Shannon discussed the possibility of creating machines that could stimulate human intelligence.

5 European Union Agency for Fundamental Rights, 'FRA Strategic Plan 2023–2028', 20 October 2023, p. 8, available at http://fra.europa.eu/en/publication/2023/strategic-plan-2023–2028, last accessed on 27 February 2025; European Union Agency for Fundamental Rights, 'Getting the Future Right: Artificial Intelligence and Fundamental Rights', 14 December 2020, p. 7, available at https://fra.europa.eu/en/publication/2020/artificial-intelligence-and-fundamental-rights, last accessed on 27 February 2025.

are, *inter alia*, five issues that need to be deliberated and addressed: first, the fairness of the system in association with the right to non-discrimination; second, the data protection mechanism of the system in connection with the right to privacy and data protection; third, environmental footprint in relation to the legal value of environment protection;, fourth, accountability of the AI system; and, fifth, the protection of individual rights, which connects to the other four issues stated.[6]

The term 'individual rights' is used here to emphasise the impacts of AI systems on each person. These rights include the right to non-discrimination, privacy and data protection, which are fundamental to ensuring that AI systems operate fairly and accountably. While the AI Act does not explicitly use the term 'individual rights', the issues raised are deeply connected to the rights and freedoms of individuals. This distinction is crucial as we evaluate how AI systems interact with personal data and privacy, ensuring that each person's rights are safeguarded.

The purpose of the AI Act is two-dimensional: one, it aims to improve the functioning of the internal market and support innovation and, two, its aspiration is to conceptualise human-centric and trustworthy AI artefacts. This is in line with Schuman's Declaration of not only protecting its market and economic interests but also strategically promoting its EU-centric fundamental values of democracy and the rule of law. This paper focuses on the second strand of Schuman's thought on preserving fundamental values, specifically with respect to human rights protection in the digital age.

Article 12 of the Constitution of the Free Hanseatic Town of Bremen, adopted by the electorate on 12 October 1947, states that:

> the individual has a higher status than technical skill or the machine. In order to protect the individual and the community, the use of scientific inventions and technical installations may be placed by law under state supervision and direction, or may be restricted and prohibited.

6 N. Diaz-Rodriguez, J. Del Ser, M. Coeckelbergh, *et al.*, 'Connecting the dots in trustworthy Artificial Intelligence: From AI principles, ethics, and key requirements to responsible AI systems and regulation' (2023), 99 *Information Fusion*, p. 7; B.C. Stahl, 'Ethical Issues of AI', in B.C. Stahl, *Artificial Intelligence for a Better Future*, Springer: Cham, 2021, pp. 35–53; M. K. Land and J.D. Aronson, 'Human Rights and Technology: New Challenges for Justice and Accountability' (2020) 16(1) *Annual Review of Law and Social Science*, pp. 223–240; E. Donahoe and M.M. Metzger, 'Artificial Intelligence and Human Rights' (2019) 30(2) *Journal of Democracy*, pp. 115–126.

The underlying rationale of this provision, grounded in the historical context of industrialisation, is that human rights should take precedence over technological advancement. Recognising the need to protect the individual and the community, Article 1 of the AI Act also emphasises that the creation of new innovative AI systems ought to be integrated with the material notions of the rule of law, such as the protection of human rights, including safety, environmental protection and individual rights, against the harmful effects of such systems.[7]

Protecting human rights from the adverse outcomes of AI stands as a fundamental goal of the legislation, which aims to adopt a proportional, risk-based approach.[8] Recital 27 to the AI Act emphasises the importance of designing AI systems that are coherent, trustworthy and human-centric, in line with the Charter of Fundamental Rights of the European Union (hereinafter CFR)[9] and the values on which the Union is founded. It refers to the ethical principles laid down in the High-Level Expert Group (hereinafter HLEG) Ethics Guidelines,[10] which include seven non-binding principles intended to ensure that AI is trustworthy and ethically sound. These principles encompass:

> human agency and oversight, technical robustness and safety, privacy and data governance, transparency, diversity as well as discrimination and fairness, alongside considerations for social and environmental well-being.[11]

While these principles contribute to the design of AI systems that respect human dignity and rights, they should not be confused with human rights values. Human rights values refer to the core principles enshrined in international human rights laws, such as the rights to privacy, non-discrimination and the protection of personal data. These values are essential for safeguarding

7 Article 1(1) AI Act.

8 The basic premise of the AI Act is that the use of AI systems that pose unacceptable risks to human rights is strictly forbidden, whereas AI systems identified as high-risk can be employed, but only under stringent requirements and safeguards. See Recitals 3 and 46 of the AI Act.

9 European Union, Charter of Fundamental Rights of The European Union, 2000/C 364/01, 18 December 2000 (hereinafter CFR).

10 European Commission, Independent High-Level Expert Group on Artificial Intelligence, Ethics Guidelines for Trustworthy AI, 8 April 2019 (hereinafter HLEG AI Ethic Guidelines).

11 Recital 27 AI Act.

individual freedoms and ensuring that AI systems do not infringe the rights of individuals. Since human rights are based on certain ethical principles, such as human dignity and non-discrimination, by integrating such principles into the design and development of the AI artefacts, the AI Act effectively formalises human rights by design obligations pertaining to providers, deployers and member states.

Implementing a by-design framework evinces the Act positioning itself as a protector of human rights and values,[12] ensuring that human rights are not considered in an *ex post* assessment but are embedded within the core of the regulation; this approach emphasises an *ex ante* assessment of the AI systems. This means that developers must consider and incorporate these principles from the outset, ensuring that AI systems respect and protect throughout their lifecycle. This proactive approach ensures that AI systems are developed in a manner that upholds the values and principles foundational to human rights.

2 What Is an AI System?

The AI Act applies only to systems that fulfil the definition of an 'AI system' within the meaning of Article 3(1).[13] This definition is crucial in determining the Act's scope, emphasising 'only' artefacts that have the ability to learn and adapt, echoing aspects of intelligence and its behaviour-influencing applications in increasingly complex environments.[14]

12 European Parliament, 'Artificial Intelligence Act: MEP s adopt landmark law', Press Release, 20240308IPR19015, available at https://www.europarl.europa.eu/news/en/press-room/20240308ipr19015/artificial-intelligence-act-meps-adopt-landmark-law, last accessed on 27 February 2025.

13 Article 3(1) AI Act defines AI as 'a machine-based system that is designed to operate with varying levels of autonomy and that may exhibit adaptiveness after deployment, and that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments'.

14 Recital 12 AI Act clarifies that the definition of an AI system should 'differentiate it from simpler traditional software systems or programming methods. It should not encompass systems that function based solely on rules established by natural persons to automate operations'. Some systems may possess the ability to infer in a limited capacity but can still fall outside the definition of AI due to their restricted ability to analyse patterns and autonomously adjust their output. Examples of such systems include those designed for mathematical optimisation, basic data processing, classical heuristic-based systems and simple predictive systems.

There are seven key ingredients in the AI system: (1) it is machine-based, (2) designed to operate autonomously, (3) may exhibit adaptiveness post-deployment, (4) functions with explicit or implicit objectives, (5) infers outputs from received inputs, (6) generates outputs such as predictions, content, recommendations or decisions, and (7) can influence physical or virtual environments.[15] The definition adopts a lifecycle-based approach, encompassing both the *ex ante* ('building') and the *ex post* ('use') phases.[16] However, these elements do not need to be present across both phases continuously.[17]

Recital 28 to the AI Act acknowledges AI's benefits while also recognising its risks, including opaque decision-making, discrimination, privacy intrusions and misuse for criminal activities.[18] Thus, it warrants a rigorous assessment of the artefact in respect of: fairness, data protection, environmental footprint, accountability and the infringement of individual rights.[19]

2.1 *Risks and Challenges Identified with AI Systems*

The issues concerning AI systems encompass a wide range of risks, including health, changes in the labour market, environmental impacts and risks for rights.[20] These risks manifest themselves in the form of novel and potent tools that may facilitate manipulative, exploitative and socially controlling practices. Such practices are particularly harmful and abusive, and they con-

---

See European Commission, Annex to the Communication to the Commission Approval of the content of the draft Communication from the Commission - Commission Guidelines on the definition of an artificial intelligence system established by Regulation (EU) 2024/1689 (AI Act), C(2025) 924 final, 6 February 2025, pp. 8–10.

15 Ibid., p. 2.

16 OECD, 'Explanatory memorandum on the updated OECD definition of an AI system', 5 March 2024, p. 7, available at https://doi.org/10.1787/623da898-en, last accessed 27 February 2025.

17 European Commission, C(2025) 924 final, *supra* note 14, p. 2.

18 European Commission, Annex to the Communication to the Commission Approval of the content of the draft Communication from the Commission – Commission Guidelines on prohibited Artificial Intelligence practices established by Regulation (EU) 2024/1689 (AI Act), C(2025) 884 final, 4 February 2025, para. 8.

19 O. Akinrinola, C.C. Okoye and C. E. Ugochukwu, 'Navigating and Reviewing Ethical Dilemmas in AI Development: Strategies for transparency, fairness and accountability' (2024) 18(3) *GSC Advanced Research and Reviews*, pp. 50–58; B.C. Stahl, 'Ethical Issues of AI', in B.C. Stahl, *Artificial Intelligence for a Better Future*, *supra* note 6, pp. 35–53; M. K. Land and J.D. Aronson, 'Human Rights and Technology', *supra* note 6, pp. 223–240; E. Donahoe and M.M. Metzger, 'Artificial Intelligence and Human Rights', *supra* note 6, pp. 115–126.

20 European Parliament, Resolution on Artificial Intelligence in a Digital Age, C 465/65 (2022/C 465/06), 3 May 2022, paras. 16, 17, 19.

tradict the foundational values of the Union, which include respect for the rule of law, human dignity, freedom, equality and democracy. The CFR upholds the Union's values, which underscore specific rights such as non-discrimination, data protection, privacy and the rights of the child.[21]

Firstly, fairness of the system becomes paramount in relation to the right to non-discrimination. It is often categorised under risk for rights, which poses a significant challenge to people's lives.[22] AI-driven discrimination arises from biased data, flawed system design and developer biases. It is primarily associated with 'bias',[23] defined as prejudice towards certain individuals, objects or positions,[24] which can manifest themselves in data, algorithms and statistical analyses.[25] Recitals 12[26] and 54[27] to the AI Act warn that self-learning capabili-

21 Articles 21, 8, 7 and 24 CFR.

22 Proposal for a Regulation laying down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts, COM/2021/206 final, 21 April 2021, paras. 28, 37, 39 (hereinafter EC Proposal); European Commission, Staff Working Document, Impact Assessment Accompanying the Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts, SWD/2021/84 final, 21 April 2021, paras. 129–138.

23 European Commission, Communication from the Commission Artificial Intelligence for Europe, COM(2018)237 final, 25 April 2018; European Parliament, C 465/65, *supra* note 20, paras. 34, 93, 94.

24 European Commission, 'Independent High-Level Expert Group on Artificial Intelligence Set Up by the European Commission, Ethics Guidelines for Trustworthy AI', 8 April 2019, available at https://op.europa.eu/en/publication-detail/-/publication/d3988569–0434-11ea-8c1f-01aa75ed71a1, last accessed on 27 February 2025.

25 Ibid.; European Commission, SWD/2021/84 final, *supra* note 22, paras. 96–98, 129–132; European Commission, Implementing Decision amending Commission Implementing Decision C(2021)1940 on the adoption of the work programme for 2021–2022 within the framework of the Specific Programme implementing Horizon Europe – the Framework Programme for Research and Innovation and on its financing as regards the 2022 budget, C/2022/2975 final, 10 May 2022.

26 Recital 12 AI Act notes that adaptive self-learning capabilities in AI may inadvertently perpetuate inequalities as systems evolve, allowing discriminatory elements to infiltrate through biased data and implicit developer biases. The artefact can be infiltrated with discriminatory elements through various channels, such as during categorisation, classification, characterisation, segmentation, selection, scoring and exclusion of data sets based on which the system is to be trained. While algorithms are designed to be objective, they can yield discriminatory outcomes due to underlying biases present in the data or the framework of the algorithms themselves. See S. P., Gangadharan and J. Niklas, 'Decentering Technology in Discourse on Discrimination', 2019 22(7), *Information, Communication & Society*, pp. 882–899.

27 Recital 54 AI Act highlights that technical inaccuracies in AI systems can result in biased outcomes that disproportionately affect individuals based on age, ethnicity, race, sex or

ties may reinforce biases, potentially leading to systemic discrimination. The ethical deployment of AI hinges on ensuring that these systems do not perpetuate biases or inequalities.[28]

Secondly, AI collects and processes vast amounts of personal data, raising issues regarding informed consent and privacy.[29] Web-scraped datasets can lead to unintended exposure of private or sensitive data, which may be retained and reintroduced in model outputs.[30] The use of Generative AI also increases the risks of data breaches and model inversion, undermining users' control over their personal information.[31]

Thirdly, the environmental footprint of AI architecture raises important questions about sustainability and ecological responsibility, highlighting the need to align AI development with the legal value of environmental protection. The sustainability of AI focuses particularly on the energy-intensive processes involved in training large machine learning models and operating data centres. AI's lifecycle involves raw material extraction, manufacturing, transportation, operation and disposal, contributing to emissions and electronic waste.[32] The environmental impact can be direct (energy consumption),[33]

---

disabilities. It is well-established that AI generates unfairness which often stems from the discrimination embedded within the system.

28 Recitals 35, 36 EC Proposal.

29 K. Manheim and L. Kaplan, 'Artificial Intelligence: Risks to Privacy and Democracy' (2019) 106(21) *Yale Journal of Law and Technology*, p. 106.

30 Consent can be severely affected due to the use of web-scraped datasets, as users may not completely understand how their information is being gathered, stored and utilised, leading them unintentionally to input private or sensitive data into prompts for generative AI. Once these data are collected, they are frequently used for retraining models and raising questions about the extent to which such sensitive information might reappear in outputs intended for other individuals. See T. Duke, *Building Responsible AI Algorithms: A Framework for Transparency, Fairness, Safety, Privacy, and Robustness*, Springer, Apress Berkley, California, 2023, pp. 37–58.

31 Z.L. Teo, C.Q.W. Ning, J.L.Y. Wong, *et al.*, 'Cybersecurity in the Generative Artificial Intelligence Era' (2024) 13(4) *Asia-Pacific Journal of Ophthalmology*, p.3.

32 A. Zhuk, 'Artificial Intelligence Impact on the Environment: Hidden Ecological Costs and Ethical-Legal Issues' (2023) 1(4) *Journal of Digital Technologies and Law*, pp. 932–954; UNEP, 'Artificial Intelligence end-to-end: The environmental impact of the full AI lifecycle needs to be comprehensively assessed', 21 September 2024, available at https://wesr.unep.org/sites/default/files/2024–09/AI%20Environmental%20Impact%20Issues%20Note%20%281%29.pdf, last accessed on 27 February 2025.

33 The use of energy, water and mineral resources has direct impacts, alongside the generation of emissions and electronic waste. The adverse environmental effects of AI stem from the operation and deployment of digital hardware and infrastructure, including data centres and communication networks. Although scientific evidence is limited, it is estimated that the global water demand associated with AI could reach between 4.2 and

indirect (resource depletion),[34] or higher-order (exacerbation of socioeconomic inequalities).[35]

Fourthly, accountability remains a challenge due to AI's partial autonomy.[36] The reference to 'some degree of independence of action' in Recital 12 to the AI Act excludes systems that are designed to operate only with the engagement and involvement of humans.[37] However, this element raises the accountability issue in AI, where:

> accountability in AI requires both the function of guiding action (by forming beliefs and making decisions), and the function of explanation (by placing decisions in a broader context and by classifying them along moral values).[38]

6.6 billion cubic metres by 2027. Manufacturing semiconductors requires large amounts of pure water, and data centres use water both directly for cooling and indirectly through electricity production. The growing need for data centres in warmer regions facing water shortages worsens water management issues, heightening conflicts over water use between data centres and human requirements. See ibid; UNEP, 'Artificial Intelligence end-to-end: The environmental impact of the full AI lifecycle needs to be comprehensively assessed', Issues Note, available at https://wesr.unep.org/sites/default/files/2024–09/AI%20Environmental%20Impact%20Issues%20Note%20%281%29.pdf, last accessed on 27 February 2025.

34 The indirect effects of AI are marked by environmental degradation stemming from technological advancements. Minerals and metals play a crucial role in digital technologies, including data centres and GPU chips. From 2001 to 2022, the demand for these chips has surged, quadrupling in response to the rising popularity of AI systems. Although specific data on mineral demand within the AI sector are scarce, the mining of minerals and rare earth elements (REE) carries significant environmental consequences, such as water and air pollution as well as biodiversity loss. See UNEP, 'Artificial Intelligence end-to-end', *supra* note 32.

35 Ibid.

36 Out of possible human-machine interactions, there are systems at one end which are designed to perform all tasks manually, while systems at the other end are fully autonomous, i.e. capable of operating without any human involvement or intervention. One of the key elements that comprise AI systems is a certain degree of autonomy, which is central to the aspect of 'human involvement' and 'human intervention' and, thus, human-machine interaction. See European Commission, C(2025) 924 final, *supra* note 14, p. 3.

37 Human involvement and intervention can occur in two ways: directly, such as through manual controls, or indirectly, via automated systems that enable humans to oversee or assign system functions.

38 V. Dignum, 'The ART of AI – Accountability, Responsibility, Transparency', *Medium*, 04.03.2018, available at https://medium.com/@virginiadignum/the-art-of-ai-accountability-responsibility-transparency-48666ec92ea5#:~:text=To%20this%20effect%2C%20we

AI decision-making often lacks transparency, creating an 'accountability gap'.[39] The complexity of AI systems makes it difficult to assign responsibility for harmful outcomes. From a philosophical perspective, the 'many hands' problem further complicates accountability, as multiple actors – developers, data providers and users – share responsibility, leading to diluted obligations and reduced oversight.[40] Legally, this issue raises significant challenges in determining liability and ensuring that all parties involved in the development and deployment of AI systems are held accountable for their actions. The lack of mechanisms to contest AI decisions – termed as a lack of contestability – heightens concerns regarding individual dignity and human rights, necessitating the establishment of robust standards to address these issues effectively.

Fifthly, AI's role in decision-making can impact on individual rights such as access to justice, freedom of expression and public services.[41] AI-generated misinformation can undermine democratic processes and pose risks to mental health and bodily security.[42] Vulnerable groups, particularly children, are susceptible to AI-driven misinformation, potentially resulting in cognitive biases and reliance on inaccurate information. Over-dependence on AI may also restrict critical thinking and impede individuals' ability to engage meaningfully with society.[43] Additionally, the phenomenon of 'automation bias' – where individuals over-rely on automated systems and trust their outputs without sufficient scrutiny – can exacerbate these issues, leading to further erosion of critical thinking and increased vulnerability to misinformation.

%20propose,a%20transparent%20and%20systematic%20manner, last accessed on 27 February 2025.

39 F. Santoni de Sio and G. Mecacci, 'Four Responsibility Gaps with Artificial Intelligence: Why They Matter and How to Address Them', *Philosophy & Technology* (2021) 34(4), pp. 1057–1084.

40 The lack of transparency, exacerbated by the deliberate obfuscation of algorithmic processes, undermines accountability among parties such as data providers, designers and end-users. See B.B. Arcila, 'AI Liability in Europe: How Does it Complement Risk Regulation and Deal with the Problem of Human Oversight?', *Computer Law and Security Review* (2024) 54, pp. 11–15.

41 European Parliament, 'Artificial intelligence (AI) and human rights: Using AI as a weapon of repression and its impact on human rights', EP/EXPO/DROI/FWC/2019–01/Lot6/1/C/30, 5.2024, pp. 10–12.

42 K. Manheim and L. Kaplan, 'Artificial Intelligence', *supra* note 29, pp. 150–151.

43 C. Zhai, S. Wibowo and L.D. Li, 'The Effects of Over-Reliance on AI Dialogue Systems on Students' Cognitive Abilities: A Systematic Review' (2024) 11(28) *Smart Learning Environments*, pp. 2, 5, 7, 18–30.

3 EU Human Rights–Specific Jurisprudence

The CFR is a collective and harmonised answer to the question of how to protect against violations of human dignity. In order to uphold human dignity, both rights and limitations have been manifested in the CFR. Together with the European Convention on Human Rights (hereinafter ECHR), both legislations provide a legal basis for determining that the five issues concerning AI, namely, fairness, data protection, environmental protection, accountability, and the safeguarding of individual rights, are 'elements' of the broader notion of 'the protection of human rights'.

The European Court of Human Rights (hereinafter the ECtHR) has consistently upheld principles of fairness, due process and non-discrimination, all of which are directly relevant to AI.[44] Fairness is deeply rooted in Article 14 ECHR and Article 21 CFR, which prohibit discrimination based on ethnicity, gender, religion and other attributes.[45] In *D.H. and others v Czech Republic*, the ECtHR ruled against systematic indirect discrimination in education by applying principles of proportionality and necessity,[46] setting a precedent for algorithmic biases disproportionately disadvantaging marginalised groups.[47] The

44 J. Gerards and F. Z. Borgesius, 'Protected Grounds and the System of Non-Discrimination Law in the context of Algorithmic Decision-Making and Artificial Intelligence' (2022) 20 *Colorado Technology Law Journal*, p. 1.

45 The general principle of non-discrimination in EU law finds expression in Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation; and Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services.

46 ECtHR, *D.H. and others v the Czech Republic*, no. 57325/00, 13.11.2007, paras. 196–204.

47 In cases of algorithmic indirect discrimination, the treatment of protected groups appears neutral at first glance. This can encompass a broad range of scenarios where algorithms do not directly account for protected groups and even instances where algorithms are intentionally designed to be unaware of these groups, preventing them from being used as relevant variables. Indirect discrimination seems suitable for identifying a wide array of seemingly neutral yet genuinely discriminatory outputs produced by algorithms, such as instances where training data are biased towards certain groups (either under- or overrepresentation), the occurrence of 'redundant encoding' that perpetuates structural discrimination through algorithmic models, and proxy discrimination, in which variables that correlate with a protected characteristic are utilised as significant features or labels in an algorithm.

principle of fairness in AI demands mechanisms that prevent the aggravation of socioeconomic disparities through opaque and discriminatory algorithms.

Data protection is another human right intertwined with AI regulation. Article 8 CFR[48] and the GDPR[49] establish the right to privacy and informational self-determination.[50] In *Big Brother Watch and others v UK*,[51] the ECtHR ruled against indiscriminate data collection and surveillance, underscoring concerns about AI-driven mass profiling. At the EU level, the GDPR's provisions on automated decision-making (Article 22) and data minimisation emphasise the necessity of transparency, consent and oversight.[52] The ECtHR rulings in *Barbulescu v Romania* highlight the necessity of balancing individual privacy with legitimate state or corporate interests,[53] a matter of growing relevance in AI-driven workplace monitoring and predictive analytics.

Although environmental protection is not explicitly articulated in the ECHR, the ECtHR has interpreted Article 8 to encompass environmental concerns, as evidenced in *Lopez Ostra v Spain*.[54] The Court acknowledged that environmental harm could violate the right to private and family life, a principle increasingly applicable to the environmental footprint of AI. More recently, the ECtHR addressed environmental issues in the case of *Verein Klimaseniorinnen Schweiz and others v Switzerland*.[55] In this case, the Court rec-

---

See R. Xenidis, 'Tuning EU Equality Law to Algorithmic Discrimination: Three Pathways to Resilience' (2020) 27(6) *Maastricht Journal of European and Comparative Law*, pp. 736–758.

48 Article 8(2) CFR states that collected data should be processed 'for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law'. Additionally, every individual is provided with the right of 'access to data which has been collected concerning him or her'.

49 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (hereinafter GDPR).

50 P. Vogiatzoglou and P. Valcke, 'Two Decades of Article 8 CFR: A Critical Exploration of the Fundamental Right to Personal Data Protection in EU Law, in E. Kosta, R. Leenes and I. Kamara (eds.), *Research Handbook on EU Data Protection*, Edward Elgar: Cheltenham, 2022, pp. 11–49.

51 ECtHR, *Big Brother Watch and others v the United Kingdom*, nos. 58170/13, 62322/14 and 24960/15, 25.5.2021, paras. 34, 59.

52 These provisions align with broader fundamental rights principles, ensuring that individuals retain control over their personal data.

53 ECtHR, *Bărbulescu v Romania*, no. 61496/08, 05.09.2017, para. 112.

54 ECtHR, *López Ostra v Spain,* no. 16798/90, 09.12.1994, paras. 44–58.

55 ECtHR, *Verein Klimaseniorinnen Schweiz and others v Switzerland*, no. 53600/20, 09.04.2024, paras. 435, 481, 514–526, 544–548.

ognised the significant impact of environmental degradation on individuals' rights, reinforcing the notion that environmental protection is integral to the right to respect for private and family life under Article 8 ECHR. The European Green Deal[56] and Article 37 CFR[57] establish sustainability as a component of human rights protection that extends to AI, particularly in curbing excessive energy consumption and mitigating the environmental impact of large-scale data processing.

Accountability is a foundational pillar of the rule of law, firmly embedded in both ECHR jurisprudence and EU legal instruments. The ECtHR has consistently ruled that the states have positive obligations to ensure accountability for human rights violations, including those involving private actors.[58] In *K. U. v Finland*, the Court emphasised that the states must provide effective remedies for digital rights breaches.[59] AI governance frameworks must incorporate transparency, responsibility and redress mechanisms to prevent arbitrary or harmful decision-making. In *Társaság a Szabadságjogokért v Hungary*,[60] the ECtHR reaffirmed that access to information is vital for democratic participation,[61] a principle applicable to algorithmic transparency. The Court of Justice of the European Union (hereinafter CJEU) in the *Dun & Bradstreet Austria*

56 European Commission, 'European Green Deal', available at https://commission.europa.eu/strategy-and-policy/priorities-2019–2024/european-green-deal_en, last accessed on 28 February 2025.

57 Article 37 CFR states that '[a] high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development'.

58 *D.H.* Augenstein and L. Dziedzic, 'State Obligations to Regulate and Adjudicate Corporate Activities under the European Convention on Human Rights', EUI Working Paper LAW 2017/15, p. 29, available at https://cadmus.eui.eu/bitstream/handle/1814/48326/LAW_2017_15.pdf?sequence=1, last accessed on 04 March 2025.

59 ECtHR, *K.U. v Finland*, no. 2872/02, 2.3.2009, paras. 40–51.

60 ECtHR, *Társaság a Szabadságjogokért v Hungary,* no. 37374/05, 14.7.2009, paras. 26–39.

61 The right to democratic participation is closely linked to the right to freedom of expression, particularly because access to information is a key aspect of this freedom. Article 11(1) CFR states that 'everyone has the right to freedom of expression. This right encompasses the freedom to hold opinions and to seek and share information and ideas without interference from public authorities and without regard to borders'. This aligns with Article 10 ECHR. Article 11 CFR emphasises the right to express and share information, guaranteeing individuals the freedom to exchange and access information without unjust obstacles. This provision is relevant to the ongoing discussions about balancing freedom of speech with issues like hate speech, public shaming and misinformation on social media and the broader Internet. Additionally, it relates to the challenges posed by content personalisation algorithms, such as news recommendation systems, and their effects on information diversity, which is essential for a healthy democracy.

case highlighted the notion of algorithmic transparency. It stated that companies using automated credit scoring must offer consumers clear and meaningful information about how decisions are made.[62] In the frame of AI, this means that the lack of transparency in an algorithm cannot be a reason to withhold important information about the basis of a decision. Consequently, if the outcome of an algorithm cannot be meaningfully challenged, the AI system should not be deployed.

The safeguarding of individual rights is fundamental to EU human rights jurisprudence. AI-driven decision-making in criminal justice, such as predictive policing and risk assessments, must comply with Article 6 ECHR, which guarantees fair trials and due process. The right to access information, recognised under Article 42 CFR, is also essential in AI governance. In the case of *Delfi AS v Estonia*, the ECtHR addressed liability for online content moderation, illustrating the risks of automated systems restricting the freedom of expression under Article 10 ECHR.[63]

The EU human rights–specific jurisprudence emphasises that the AI artefact must be 'built' upon the issues (risks and challenges) identified as 'elements' of the 'broader notion of human rights', which facilitates outlining certain human rights objectives that can be translated into design goals for AI systems. The objective of fairness is to ensure non-discrimination and equal treatment in AI decision-making and generative interpretation tools. To achieve this, the design goals must include bias mitigation strategies, utilising inclusive datasets and implementing a 'trustworthy' data governance architecture. For data protection, the objective is to safeguard individual autonomy over personal information and prevent unlawful surveillance. This necessitates privacy by design approaches, stringent data minimisation principles and practices, and ensuring user control over personal data. Environmental protection aims to mitigate the ecological footprint of AI technologies and promote sustainable innovation. Consequently, design goals mandate energy-efficient computing, ethical sourcing of resources, and regulatory alignment with climate commitments. Accountability seeks to establish clear responsibility frameworks, ensuring that AI-related rights violations are preventable and remediable. This includes mechanisms such as algorithmic explainability, auditability, human oversight and redressal mechanisms for harm caused by AI. Finally, since the protection of individual rights encompasses dignity, access to justice and freedom of expression, ensuring that AI does not under-

62 CJEU (ECJ), *CK v Magistrat der Stadt Wien and Dun & Bradstreet Austria GmbH*, Case C-203/22, 27.2.2025, ECLI:EU:C:2025:117, paras 38–66.

63 ECtHR, *Delfi AS v Estonia,* no. 64569/09, 16.6.2015, paras. 110–162.

mine these foundational freedoms, the design goals in AI systems are set accordingly to uphold such fundamental rights.

The European Data Protection Supervisor (hereinafter EDPS) has argued that:

> better respect for, and the safeguarding of, human dignity could be the counterweight to the pervasive surveillance and asymmetry of power which now confronts the individual. It should be at the heart of a new digital ethics.[64]

The same principle can be applied to AI when assessing the technology from the perspective of human rights. Therefore, the AI Act attempts to embed these human rights objectives and aligns with the broader notion of the 'protection of human rights' to a certain extent, such that fundamental rights violations ought to be preventable and remediable.

3.1 *Framing the AI Act*

The AI Act has been framed with two-dimensional functionality: firstly, the Act functions as a catalyst for innovation in critical societal domains, positioning legal mechanisms as motivational instruments for the development and advancement of AI technologies that are beneficial to humanity; secondly, it leverages legal frameworks to safeguard human rights and promote the development of 'good AI'. This dual nature of the Act emphasises the necessity of establishing legal limitations to ensure that AI artefacts align with ethical standards and that they do not disproportionately infringe individual rights.

The European Commission (hereinafter EC) initially conceptualised the AI Act as a market-regulating instrument, balancing innovation with human rights protection.[65] It advocated for a 'medley' of product safety legislation and fundamental rights protection by classifying AI systems by their risk levels: unacceptable, high and low risk.[66] However, the European Parliament (hereinafter EP) shifted the legal basis[67] of the AI Act to emphasise AI as a threat to fundamental rights, democracy and the rule of law,[68] which led to a

64 European Data Protection Supervisor, Opinion 4/2015 Towards a new digital ethics, Data, dignity and technology, 11 September 2015, p. 12.

65 Recital 1 and Article 1 EC Proposal.

66 M. Almada and N. Petit, 'The EU AI Act: between the rock of product safety and the hard place of fundamental rights' (2025) 62(1), *Common Market Law Review*, pp. 85–120.

67 The EP shifted the legal basis from Article 114 TFEU to Article 16 TFEU.

68 Amendments adopted by the European Parliament on 14 June 2023 on the Proposal for a Regulation of the European Parliament and of the Council on laying down harmonised

more human-centric and protective regulation.[69] This shift resulted in a hybrid regulatory model, integrating market legislative functionality with robust human rights legislation.[70]

The AI Act intertwines the protection of individual rights with collective interests because the protection and promotion of individual rights contribute to the overall well-being and stability of society, ensuring that democracy, the rule of law and environmental protection are upheld for the benefit of all. Article 1(1) of the AI Act covers not only the protection of individuals' 'health and safety', but it also includes collective interests, in particular 'fundamental rights…, including democracy, the rule of law, and environmental protection'. Thus, Article 1 of the AI Act reflects a twin-objective framework[71] that integrates AI systems with material notions of the rule of law, promoting human rights protection while introducing assessment tools to address accountability, data governance, non-discrimination, privacy, robustness, transparency and safety. However, a key criticism of the Act is its differential treatment of individuals based on legal status;[72] it provides weaker protections for individuals suspected of crimes, as well as for migrants, asylum seekers and refugees.

4 AI Act and Human Rights by Design

The principle of 'designability' aims to translate democratic values into technological design in a general yet actionable manner.[73] 'By design' as an approach offers a meaningful intervention to bridge the gap between machine knowledge and legal norms. This concept extends beyond engineering to human-machine interfacing, emphasising that embedding legal norms is not

rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts (COM(2021)0206 – C9–0146/2021 – 2021/0106(COD)), Recital 1, 13, 27 and new Recital 28a (hereinafter EP Mandate).

69 Article 1 EP Mandate.

70 Ibid., Article 4a.

71 The 'twin objective' may seem contradictory, but it aligns with the strategic priority of the EU to create a 'well-functioning internal market for AI systems where both benefits and risks of AI are adequately addressed at Union level'. See EC Proposal, p. 1, para 2.

72 S. Wachter, 'Limitations and Loopholes in the EU AI Act and AI Liability Directives: What This Means for the European Union, the United States, and Beyond' (2024) 26(3) *Yale Journal of Law and Technology*, p. 672.

73 C. Djeffal, 'AI, Democracy and the Law', in A. Sudmann (ed.), *The Democratization of Artificial Intelligence: Net Politics in the Era of Learning Algorithms*, transcript Verlag Publisher: Bielefeld, 2019, p. 255.

only a technical endeavour but also an art.[74] Compliances with legal obligations are ensured through technical enforcement mechanisms aimed at protecting human rights.[75] As a collaborative and participatory process, 'by design' begins with an understanding of human, emotional and social needs (individual as well as collective), encouraging both designers and non-designers to recognise its potential as an instrument of change.[76]

4.1 *Framing Law by Design Obligation*

In contemporary scholarship, the 'by design' framework exists at the intersection of law, philosophy and technology, primarily explained through two notions: 'value-sensitive design' and 'compliance by design'. Hagan views the 'by design' as complementary to legal methodologies like empirical legal studies,[77] while Perry-Kessaris highlights the value of design approaches to socio-legal studies.[78]

The notions of 'legal protection by design' and 'legal by design' incorporate the broader 'law by design obligation', which requires legal values or legal requirements to be translated and integrated into technical specifications and, eventually, into designing socio-technical systems.[79] This can be inferred from the notion of the security by design obligation,[80] which aligns with Recital 12 to the Cybersecurity Act, encouraging ICT developers to implement security measures from the earliest design stages.[81] A similar provision exists in the GDPR, particularly Article 35, which mandates Data Protection Impact Assessment (hereinafter DPIA) for high-risk processing activities. This provi-

74 M. Hildebrandt, 'Legal Protection by Design: Objections and Refutations', *Legisprudence* (2011) 5(2), pp. 223–248; C. Djeffal, 'AI, Democracy and the Law', in A. Sudmann (ed.), *The Democratization of Artificial Intelligence*, *supra* note 73, pp. 255–279.

75 M. Hildebrandt, *Law for Computer Scientists and Other Folk*, Oxford University Press: Oxford, p.267.

76 T. Fry, 'Configuring Design as Politics Now', in P. Sparke and F. Fisher (eds.), *The Routledge Companion to Design Studies*, Routledge: London, 2016, pp. 363–372.

77 M. Hagan, 'Legal Design as a Thing: A Theory of Change and a Set of Methods to Craft a Human-Centered Legal System' (2020) 36(3) *Design Issues,* pp. 3–15.

78 A. Perry-Kessaris, 'Making Socio-Legal Research More Social by Design: Anglo-German Roots, Rewards, and Risks' (2020) 21(7) *German Law Journal* p. 1427.

79 C. Djeffal, 'Law by Design Obligations: The Future of Regulating Digital Technologies in Europe?', SSRN Electronic Journal, 2024, p. 3, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4765471, last accessed on 28 February 2025.

80 Ibid., pp. 3–4.

81 Regulation (EU) 2019/881 of the European Parliament and of the Council of 17 April 2019 on ENISA (the European Union Agency for Cybersecurity) and on information and communications technology cybersecurity certification and repealing Regulation (EU) No 526/2013, Recital 12 (hereinafter Cybersecurity Act).

sion reflects the core principles of Article 25 GDPR, which requires default data minimisation and proactive compliance measures at both the *ex ante* and *ex post* levels.

This approach ensures that legal values are embedded within both system architecture and specific design elements. Beyond prescribing rigid rules, the by-design methodology manages technological effects by embedding legal values into socio-technical environments, operationalising norms outside conventional legal systems.[82] In doing so, it translates legal values into guiding frameworks that influence and direct the development of technological artefacts at a fundamental level.

4.2 *Framing Human Rights by Design Obligations*

The functional dimensions of law by design obligations highlight their broad legal scope, material application, procedural mechanisms and accountability measures. These obligations often extend beyond traditional regulatory mandates, applying to specific technologies, society and individuals. Regulatory frameworks define law by design goals that must be 'built' into technologies and their associated socio-technical environments, encompassing processes, policies and governance structures.[83]

Human rights by design obligations are based on the premise that values embedded in technologies exert normative effects on individuals and societies. Concepts such as 'machines making history',[84] 'the politics of artefacts',[85] 'code is law',[86] and 'affordances'[87] demonstrate how technology shapes human interactions and the legal landscape. By managing these effects, human rights by design enable the realisation of human rights values through technological design, providing flexibility and discretion in implementation to align technological advancements with democratic values.

Historically, human rights by design goals have influenced legal frameworks and have evolved through methodologies that integrate human rights protections with technological development. Approaches such as legal protec-

82 C. Djeffal, 'Law by Design Obligations', *supra* note 79, p. 26.

83 M. Hansen, 'Art. 25' in S. Simitis, G. Hornung and I. S. Döhmann (eds.), *Datenschutzrecht: DSGVO mit BDSG*, Nomos: Baden-Baden, Germany. 2019, para. 16.

84 R.L, Heilbroner, 'Do Machines Make History?' (1967) 8(3) *Technology and Culture*, pp. 335–345.

85 L. Winner, 'Do Artifacts Have Politics?', in J. Weckert (ed.), *Computer Ethics*, Routledge: London, 2007, p. 177.

86 L. Lessig, *Code. Version 2.0,* Basic Books: New York, 2006, pp. 1–8.

87 J. J. Gibson, *The Ecological Approach to Visual Perception: Classic Edition*, Psychology Press: New York, 2014, p. 119.

tion by design,[88] and frameworks like value-sensitive design[89] and design justice[90] illustrate the breadth of this paradigm. Human rights by design seek to embed legal values into technological innovation, guiding development beyond functionality, efficiency and effectiveness to include compliance with human rights standards.

Such an approach differs from traditional command and control regulations, as it emphasises human rights values over rigid rules. Whereas rules dictate specific actions, values serve as overarching objectives that shape socio-technical environments. Similar to Dworkin's view that legal decision-making is guided by moral considerations,[91] human rights by design approach infuses human rights goals into technological development. By prioritising human rights alongside technical functionality, it fosters responsible innovation while preventing regulatory circumvention.

4.3 *Framing Human Rights by Design Obligations in the AI Act*

The AI Act incorporates provisions that establish human rights by design obligations for ensuring that the development, deployment and utilisation of AI systems uphold human rights values. These obligations serve as a critical benchmark for categorising AI systems under the Act, distinguishing between prohibited AI systems and those that pose a 'risk of adverse impact' to fundamental rights.[92]

The EC's proposal on the AI Act sought to establish human rights protection as an *ex ante* requirement, compelling AI providers[93] to adhere to regulatory safeguards prior to deploying[94] their systems.[95] This framework emphasises

88 M. Hildebrandt, 'Legal Protection by Design', *supra* note 74, pp. 9–10.

89 B. Friedman, P. Kahn, and A. Borning, 'Value Sensitive Design: Theory and Methods' (2002) 2(8) *University of Washington Technical Report*, pp. 1–8.

90 S. Costanza-Chock, *Design Justice: Community-led Practices to Build the Worlds We Need*, The MIT Press: Cambridge, MA, 2020, pp. 6–7.

91 R. Dworkin, *Taking Rights Seriously*, Harvard University Press: Cambridge, MA, 1978, Chapter 2.

92 Article 7 EC Proposal states that the use of AI is forbidden if it is fundamentally incompatible with human rights. When AI presents a potential risk for negatively affecting these rights, the AI Act seeks to offer safeguards to reduce or avoid this risk.

93 Providers is defined in Article 3(3) AI Act as the 'natural or legal person, public authority, agency or other body that develops an AI system or a general-purpose AI model or that has an AI system or a general-purpose AI model developed and places it on the market or puts the AI system into service under its own name or trademark, whether for payment or free of charge'.

94 Prior to deployment means 'before an AI system enters the market or is put into service'.

95 Article 7 EC Proposal.

the importance of a broader notion of protection of human rights to ensure responsible artefact development. The EP has further refined this framework by articulating guiding principles for providers, including fairness, transparency, non-discrimination, human agency and technical robustness.[96] For high-risk AI systems, these principles are operationalised in Chapter 3 of the AI Act, aiming to align the AI framework with the fundamental human rights values.[97] The requirements for high-risk AI systems, which are outlined in Section 2 of this chapter, can be translated to human rights by design obligations, emphasising the need to uphold fundamental rights and minimise the risk of biased or erroneous AI-assisted decisions.[98]

4.3.1 Safeguarding of Individual Rights by Design

Articles 5, 6, 7, and 27 of the AI Act primarily aim to fulfil the 'safeguarding of individual rights' by design obligation, inclusive of fairness by design and accountability by design obligations. The objective of these provisions is to ensure that the AI system upholds individual rights such as freedom of thought, due process and human dignity. In addition to the provisions governing the design of the AI systems, the AI Act also establishes the 'safeguarding of individual rights by design' provision for General-Purpose AI (hereinafter GPAI) models under Article 51.

Article 5 of the AI Act establishes specific prohibited uses of AI that are deemed to pose an unacceptable risk, undermining democratic values and the rule of law.[99] The ban on AI practices that manipulate, exploit vulnerabil-

96 New Article 4a EP Mandate.

97 Ibid. This approach of the EP's Mandate circumvents the strict regulatory framework of the EC. Chapter 3 AI Act.

98 Recital 14 EC Proposal. Chapter 3, Section II AI Act.

99 Article 5 AI Act includes some exceptions concerning the use of AI artefacts in law enforcement, particularly for locating missing persons or preventing terrorist acts. The Council permits a broader application of real-time biometric identification in three specified exceptional circumstances, contrasting with the EP's stance, which opposes any such identification by both public and private entities without exceptions. The EP argues that such a total ban is essential to uphold fundamental rights and the rule of law, citing the risks of pervasive surveillance and disproportionate power granted to those deploying these technologies. The debate surrounding the prohibition of real-time biometric identification has revealed significant divisions among MS, with some advocating for an absolute ban while others support conditional usage accompanied by strict safeguards, such as mandatory judicial authorisation.

Council of the European Union General Approach on the Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts,

ities or enable mass surveillance is consistent with respect for the rights to human dignity, autonomy and privacy recognised in the CFR.[100] Such measures emphasise transparency, accountability and rigorous human oversight to mitigate significant harm to individuals and groups. Both the EC and the EP emphasise fundamental rights as the 'normative' rationale for these prohibitions.

The scope of prohibited uses encompasses AI systems that influence decision-making or exploit user vulnerabilities, as well as those that assess or categorise individuals based on social behaviour or personal characteristics,[101] including predictive policing models. These restrictions are grounded in respect for the rights to non-discrimination and human dignity,[102] particularly concerning algorithmic bias, which can result in biased outcomes and discriminatory effects stemming from technical inaccuracies in AI systems.[103] Additionally, the EP introduced four further prohibitions, which include law enforcement profiling and the indiscriminate collection of data for facial recognition and emotion detection systems, citing the significant risks they pose to fundamental rights.[104] The EP highlights concerns related to the CFR, particularly regarding privacy, dignity and non-discrimination,[105] while also addressing the technical limitations and unreliable nature of certain AI systems, such as those involved in emotion detection.[106]

In order to address these concerns, Article 5 of the AI Act articulates specific design goals aimed at embedding the 'safeguarding of individual rights' by design obligation within the AI system architecture. These ingredients include: first, the prevention of subliminal manipulation or coercion; second, the prohibition of exploitation of vulnerable populations based on socio-economic or physiological factors; third, the avoidance of mass surveillance, biometric profiling and discriminatory social scoring; and fourth, mandating

---

25 November 2022, Recital 18 and 5(1)d (hereafter Council Mandate); Recital 18 of the EP Mandate.

100 European Commission, SWD/2021/84 final, *supra* note 22, Section 2.1.1, 5.3.2(c).

101 One instance of this is social scoring conducted by public authorities, which involves the use of AI to monitor, profile and evaluate citizens, similar to the system implemented in China. It may also include other comparable use cases characterised by extreme sensitivity for fundamental rights and the abuse of power particularly in subordinate relationships. Additionally, AI systems employed for the purposes of emotional recognition in the work environment are also covered under the scope of Article 5 AI Act.

102 Recital 17 EC Proposal.

103 Ibid., Recital 33.

104 Article 5(1)ba, Article 5(1)da, Article 5(1)db, Article 5(1)dd EP Mandate.

105 Ibid., Recitals 16a, 26a, 26b, 26c.

106 Ibid., Recital 26c.

adherence to the principles of necessity, proportionality and legality within law enforcement applications of AI.

The AI Act emphasises the protection of individual rights through its classification system for AI systems, outlined in Article 6.[107] This Article serves as a rudimentary element in establishing criteria that differentiate low-risk from high-risk AI.[108] High-risk AI systems are subject to rigorous conformity assessments and must adhere to specific compliance requirements for entry into the European market.[109] The classification as high-risk is based on the intended use of the system, particularly for products with safety implications[110] or those that could impact on fundamental rights.[111] An AI system is deemed high-risk if it meets two criteria: first, it is included in Annex III, and, second, it presents a 'significant risk of harm to the health, safety, or fundamental rights of individuals'.[112] According to Article 6(3), systems that do not 'materially influence the outcome of decision-making', such as those performing limited procedural functions, are not classified as high-risk. How-

107 In the EC's proposal, fundamental rights are essential to the classification criteria for high-risk AI systems, albeit with some significant distinctions. The EP argues that AI systems should be categorised as high risk not just based on the instances outlined in Annex III but rather only when they present 'a significant risk of harm to the health, safety, or fundamental rights of natural persons'. Ibid., Article 6(2).

108 Systems categorised as low or minimal risk do not have mandatory obligations; however, providers may voluntarily comply with regulations. In that case, deployers are exempt from conducting a Fundamental Rights Impact Assessment (hereinafter FRIA), and affected individuals do not have the right to an explanation under Article 86 AI Act. According to Recital 48 to AI Act, the classification of high-risk systems depends on the potentially negative impact on fundamental rights as outlined in the CFR, including dignity, privacy and children's rights. Therefore, high-risk deployers must conduct an FRIA prior to deployment, as they are expected to identify significant risks not foreseen in development.

New Article 29a of the EP Mandate; Article 86 of the AI Act. See A. Thomaidou and K. Limniotis, 'Navigating Through Human Rights in AI: Exploring the Interplay Between GDPR and Fundamental Rights Impact Assessment' (2025) 5(1) *Journal of Cybersecurity and Privacy*, p. 7.

109 Article 43; Chapter 3, Section II and Section III, AI Act.

110 This includes AI systems applied in sensitive product groups such as machinery, medical products or vehicles. Article 6(1) AI Act and Annex I AI Act.

111 This includes AI systems applied for sensitive purposes such as biometrics, employment, education, public administration and law enforcement. Article 6(2) AI Act and Annex III AI Act.

112 Article 6 AI Act. See T. Keber, R. Schwartmann and K. Zenner, 'The EU AI Act: A Practice-Oriented Interpretation: An Initial Overview' (2024) 25(4) *Computer Law Review International*, pp. 114–120.

ever, systems that engage in the profiling of individuals are automatically categorised as high-risk.[113]

The EC's initial draft of Article 6 aimed to provide legal clarity and predictability[114] by presenting a definitive list of high-risk AI systems.[115] This mechanical approach reflects the EC's interpretation of fundamental rights, health and safety concerning the adverse effects of AI systems. In contrast, the EP advocates for a broader classification of high-risk systems, suggesting that any system posing a significant risk to these areas should be subject to the same stringent regulations, regardless of its inclusion in Annex III.[116]

The principal objective of Article 6 of the AI Act is to safeguard individual rights in the context of high-risk AI systems. By classifying specific AI systems as high-risk, the Act aspires to address concerns regarding discrimination, bias and unfair profiling, thereby aligning AI artefacts with human rights values and the rule of law. The design aspiration of this provision is to ensure that AI systems are conceived, developed and implemented with values of fairness, transparency and accountability. While fairness is essential to prevent unjust discrimination and bias, ensuring that AI artefacts promote equality and do not perpetuate existing prejudices, transparency is crucial for building trust and understanding in AI systems, allowing parties to see how decisions are made and identify potential biases or errors. Accountability ensures that developers and operators of AI artefacts are held responsible for their outcomes, enabling them to address any harm caused and implement corrective measures. These three elements collectively ensure that AI systems are designed and operated in a manner that respects and protects individual rights, promotes trust and maintains ethical standards. The key components of a proactive approach to achieve the primary design objective of Article 6 are: first, ensuring that AI does not materially influence decisions adversely affecting individuals' rights without appropriate human oversight; second, establishing rigorous documentation and risk assessment protocols for AI pro-

113 Article 6(3)(d) AI Act. An example highlighted in the AI Act under Recital 62 mentions that to mitigate the risks of undue external interference with the voting rights protected by Article 39 CFR, as well as potential negative impacts on democracy and the rule of law, AI systems designed to affect the results of an election or referendum or to sway the voting behaviour of individuals during elections or referenda should be categorised as high-risk AI systems, except for those whose outputs are not directly encountered by individuals, like tools that manage, enhance and organise political campaigns from an administrative and logistical perspective.

114 The notion of legal certainty is emphasised as a primary goal of the EC proposal.

115 Recital 27 EC Proposal.

116 Article 6(2) EP Mandate.

viders to substantiate their classification of systems as high-risk; and, third, maintaining stringent regulatory oversight for AI systems utilised in sensitive areas like individual profiling.

Article 6 calls for a strict proportionality approach to risk,[117] empowering providers to determine whether their system falls within the latitude of the AI Act.[118] This design obligation requires providers to evaluate potential impacts on fundamental rights and conduct a risk assessment based on criteria in Annex III, followed by comprehensive documentation and registration of the AI system under Article 49(2) if the artefact concerned is determined to be not high-risk.[119]

Assessing fundamental rights and their risks is complex, necessitating a level of expertise and legitimacy that typically resides within judicial and legislative domains. This raises critical questions about the oversight and governance of fundamental rights; thus, the design obligation mandates *ex post* enforcement, allowing market surveillance authorities to access documentation and enforce compliance in cases of misclassification,[120] though misclassification may allow non-compliant systems to enter the market temporarily and thus potentially harm individuals' fundamental rights.

The 'safeguarding of individual rights' by design obligation extends beyond the responsibilities of providers to encompass deployers in both public and private bodies. Article 27 of the AI Act imposes on the deployers the obligation to conduct a Fundamental Rights Impact Assessment (hereinafter FRIA) of high-risk AI systems that provide public services, evaluating how the system could have an impact on individual rights. This provision creates a by-design obligation for deployers to integrate human rights protection at the earliest stage of AI development. The FRIA necessitates three components: one, the incorporation of safeguards such as bias mitigation, risk assessment and

117 Recital 27 AI Act.

118 Both the EP and the Council suggested implementing an extra layer of classification rules that would assign the responsibility of risk assessment to the providers.

Submissions from Belgium, the Netherlands and Austria sought to introduce a horizontal framework within the Regulation to apply it solely to high-risk cases. However, there were divergent perspectives on the design of this framework. Many MS expressed concerns regarding the legal uncertainty surrounding exemptions, particularly in relation to AI's role in decision-making. This uncertainty complicates providers' ability to foresee how their systems will be employed by human users. Ultimately, an agreement was achieved by incorporating specific criteria for exemptions and establishing a monitoring obligation for misclassification. The final outcome appears to reflect a balance of competing interests rather than a clear legislative intent.

119 Article 6(2) EP Mandate; Article 6(2) and 6(4) AI Act.

120 Ibid., Articles 80, 79(5) and (9)t.

human oversight before deployment; two, compliance with data protection laws and ethical AI principles; and, three, a mechanism for continuous monitoring and updates to adapt to evolving risks.[121] Under the FRIA, deployers are responsible for identifying specific risks that AI systems may generate for individual or group rights, as well as formulating appropriate measures to address these risks should they materialise. Furthermore, it is vital that deployers inform the supervisory authority about the findings of the FRIA, thereby fostering accountability and transparency.

The design goal of Article 27 is to institutionalise a rights-based approach in AI regulation. By crafting the FRIA as a prerequisite for deploying high-risk AI, this provision aspires to enhance public trust and legitimacy by ensuring compliance with fundamental rights values, which underpin the AI Act's resonance with human rights, ensuring that they are actively protected and promoted. This provision also intends to reduce systemic harms by proactively addressing risks to fundamental rights and to facilitate pathways for redress, enabling affected individuals to access remedies when their rights are infringed.

The FRIA requirement appears to draw inspiration from the necessity of performing a DPIA as mandated by the GDPR. While DPIA is primarily designed to address risks associated with personal data, the FRIA adopts a more extensive approach by incorporating various human rights considerations, such as the right to freedom of expression, access to justice and the right to good administration. The European Data Protection Board (hereinafter EDPB) and the EDPS have both underscored this broader perspective, emphasising the importance of strong privacy and data protection measures as essential for the preservation of a wide array of fundamental rights. They contend that the AI Act serves to complement the GDPR in the safeguarding of fundamental rights, including dignity, non-discrimination and privacy – rights that may be infringed when AI systems process personal data.[122]

Beyond the AI systems, the AI Act establishes a classification framework for GPAI models under Article 51, differentiating those with systemic risk from those without. Assessment of systemic risk involves evaluating the model's potential impact on individual rights, including non-discrimination, privacy,

121 Ibid., Article 27 Recital 93 and 96.

122 European Data Protection Board-European Data Protection Supervisor, Joint Opinion 5/2021 on the Proposal for a Regulation of the European Parliament and of the Council laying down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) 18.06.2021, p. 7, 22 (hereafter EDPB-EDPS Joint Opinion).

freedom of expression and access to information.[123] Providers must utilise technical tools and methodologies to identify significant risks. To alleviate potential harms, the Act mandates that GPAI models incorporate provisions that ensure accountability, transparency and fairness, necessitating a 'safeguarding of individual rights by design' approach.[124] This implies continuous evaluation and mitigation of human rights risks throughout the lifecycle of the GPAI model,[125] both *ex ante* and *ex post*.

4.3.2 Non-discrimination by Design

Under the AI Act, Recital 27 defines the design goal for diversity, non-discrimination and fairness as:

> AI systems are developed and used in a way that includes diverse actors and promotes equal access, gender equality and cultural diversity, while avoiding discriminatory impacts and unfair biases that are prohibited by Union or national law.

The scope of prohibited uses and classification of high-risk AI systems are grounded in this design goal of achieving fairness and equality.

Articles 9, 10 and 17 of the AI Act primarily represent the non-discrimination by design obligation, principally for marginalised and vulnerable groups. The intention behind these provisions is not only to uphold fundamental rights to equality, non-discrimination and privacy, but also to ensure human dignity and safety throughout the operative phases of AI systems.

Article 9 establishes a substratum framework for non-discrimination by design, mandating a risk-management system tailored to the intended purpose of the AI system.[126] This continuous process requires systematic identification and evaluation of potential risks to health, safety and fundamental rights throughout the artefact's lifecycle, ensuring that necessary management measures[127] are in place.[128] This risk-based approach is crucial for addressing discrimination within AI policy, wherein the human rights

123 Recital 111 read with Article 52 AI Act.

124 Ibid., Article 52.

125 Ibid., Recital 111.

126 Ibid., Article 9.

127 Necessary management measures include regular review and update mechanisms.

128 Adopting a risk-based approach requires systematic identification and analysis of potential risks to health, safety or fundamental rights, as well as estimation and evaluation of these risks, followed by adoption of corresponding risk management measures.

element embedded in Article 9 concerns the rights to privacy, non-discrimination and protection from harm, as articulated in the CFR.

Therefore, the risk management measures must strive to balance the minimisation of risks with compliance with relevant requirements, ensuring that the system is designed with strategies to eliminate or reduce risks to the greatest extent possible. High-risk AI systems are required to undergo rigorous testing to ascertain the most effective risk management measures and to verify their intended functionality. Furthermore, the risk management system should consider the potentially adverse effects of AI on individuals under the age of 18 and other vulnerable groups.

To achieve the human rights objective of 'non-discrimination or fairness', the AI Act imposes upon the providers the by-design obligation to incorporate principles of privacy by design, fairness by design and safety by design throughout the design, testing and deployment of high-risk AI systems. This obligation manifests the implementation of measures for bias detection and mitigation, ensuring the transparency and explainability of AI procedures, and adhering to data minimisation practices. The design goal is to cultivate AI systems that are transparent, accountable and aligned with human rights values. These systems should be capable of identifying, mitigating and minimising risks to fundamental rights 'by design'.

Article 55 of the AI Act states that the providers of GPAI models with systemic risks ought to implement risk management systems similar to those required for high-risk AI. These include proactive model assessments, adversarial testing and continuous risk mitigation throughout the GPAI model's lifespan.[129] The design goal embedded in this provision is non-discrimination by design, requiring GPAI models not to reinforce bias. It imposes an obligation on the providers to embed human rights protections along the entire lifecycle of the model through data governance architecture, accountability process and post-market monitoring to detect and mitigate against discriminatory impacts.[130] Additionally, cybersecurity by design is essential to prevent 'accidental model leakage, unauthorised releases, circumvention of safety measures, and defence against cyberattacks, unauthorised access or model theft'.[131]

In addition to the risk management system, the AI Act in Article 17 states that providers of high-risk AI systems ought to establish a comprehensive quality management system. This provision embodies a by-design obligation that mandates providers to incorporate mechanisms such as reporting and

129 Recital 114 AI Act.
130 Ibid.
131 Ibid., Recital 115.

communication procedures, record-keeping practices, resource management and an accountability framework specifically aimed at bias detection, fairness assessment and explainability. Such integration is vital in preventing algorithmic discrimination, specifically within sensitive areas such as employment, credit scoring and law enforcement. The quality management system must be meticulously documented and encompass a range of critical strategies aimed at ensuring regulatory compliance. This includes robust procedures for the design of AI systems,[132] as well as thorough testing and validation processes. Furthermore, it necessitates the incorporation of detailed technical specifications, effective data management systems, and an informed risk management framework. The design goal for Article 17 is to create a quality management system that features measures to ensure that outcomes derived or generated from AI artefacts are not only transparent and auditable but also dynamically work against the perpetuation of biases and systemic inequalities.

The AI Act addresses the pervasive issue of bias within AI systems by complementing its provisions with existing EU non-discrimination laws.[133] It stipulates clear rules on data quality and documentation requirements under Article 10 of the AI Act, mandating the use of high-quality training data and systematic validation procedures[134] for bias detection and correction.[135] This provision emphasises by design measures to prevent discriminatory effects, ensuring continuous compliance monitoring with relevant equality legislation throughout the AI system lifecycle.[136]

The non-discrimination design obligation prioritises 'debiasing' in data collection and AI development, promoting inclusive data practices, particularly concerning gender and ethnicity.[137] Such an obligation aligns with Article 21 of the CFR, which underscores the right to non-discrimination and

132 Ibid., Recital 27 defines the design goal of technical robustness and safety as 'AI systems are developed and used in a way that allows robustness in the case of problems and resilience against attempts to alter the use or performance of the AI system so as to allow unlawful use by third parties and minimise unintended harm'.

133 Recital 45 AI Act.

134 Ibid., Article 10 states that 'training, validation and testing data used in building the AI should be relevant, representative and, as far as possible, free of errors and complete'.

135 Ibid., Recital 67.

136 AI systems must be developed with bias detection and mitigation mechanisms integrated from the outset. This includes robust data governance, safeguards for privacy and security, and ensuring representative, high-quality datasets that reflect the diversity of the population affected by AI systems.

137 This focus aims to ensure that AI systems do not inadvertently serve as a source of discrimination. European Union Agency for Fundamental Rights, 'Bias in algorithms –

equality, highlighting the imperative to prevent biases that may infringe upon fundamental rights. The design goal is to ensure that the AI functions fairly and without bias, thus protecting individuals from potential discriminatory harm. Moreover, designing the system with continuous monitoring, evaluation and rectification of bias mechanisms is essential, alongside strict limitations on processing sensitive personal data to uphold privacy and fundamental freedoms and rights.

Recital 59 to the AI Act indicates that AI systems trained and built on 'not high-quality data' or failing to meet performance standards could lead to unjust or discriminatory outcomes. Article 15 of the AI Act states that the systems ought to be designed with adequate robustness, accuracy and cybersecurity measures[138] to mitigate these risks, particularly regarding age, ethnicity, race, sex and disabilities.[139] The EC emphasises that compliance with these obligations by both providers and deployers is crucial for upholding fundamental rights.[140] By directing the design of AI-assisted decision-making systems, especially in sensitive areas like migration and border control, to be built with the feature of minimising 'risk-generation', the Act aims to safeguard individual rights.[141]

The Act emphasises the importance of incorporating human rights objectives throughout the entire lifecycle of AI system design and development to uphold fundamental rights, including privacy through secure data processing, non-discrimination by preventing biased outcomes, and security through robust defences against cyber threats.[142] By prioritising these objectives, the goal is to design AI that respects human dignity, promotes inclusivity and protects individual rights while proactively addressing risks related to discrimination and data breaches, thereby fostering societal benefits without undermining human rights.

Artificial intelligence and discrimination', 8 December 2022, available at https://fra.europa.eu/en/publication/2022/bias-algorithm, last accessed on 28 February 2025.

138 Recital 77 AI Act.

139 Ibid., Recital 32.

140 Explanations of the EC Proposal, p 11.

141 Such rights include free movement, non-discrimination, protection of private life, personal data rights, and international protection, alongside the principle of good administration: Recital 60 AI Act.

142 Ibid., Recital 74; Article 15 – this provision establishes a prerequisite for the design of high-risk AI systems, mandating the integration of principles such as accuracy, robustness and cybersecurity to safeguard personal data integrity, mitigate harmful biases and ensure operational security without compromising individual safety.

4.3.3 Accountability by Design

The accountability by design obligation primarily aims to fulfil four human rights objectives: first, informed consent and autonomy, which empower individuals to make informed privacy decisions; second, protection of freedom of expression by clearly labelling AI-generated content to prevent misinformation; third, adherence to privacy and data protection standards, particularly in compliance with GDPR for emotional and biometric systems; and, fourth, the promotion of non-discrimination and equality by preventing bias in AI systems.

Recital 59 to the AI Act highlights that insufficient transparency, explainability and documentation can hinder the exercise of fundamental procedural rights, particularly in law enforcement contexts where accuracy, reliability and explainability are critical.[143] Transparency is essential for fostering public trust and facilitating accountability, but it must be paired with effective redressal mechanisms, ensuring that AI providers are held responsible for their systems' outcomes. Transparency is, therefore, a critical cornerstone in the pursuit of accountability within AI systems.[144] The interdependence of these two principles is essential; without transparency, evaluating the societal and ethical impacts of AI becomes exceedingly challenging. Conversely, without accountability, the potential for harmful consequences to persist unaddressed increases significantly.

The AI Act, particularly Articles 11 to 13 and Article 50, emphasises the necessity of embedding transparency by design, facilitating clearer insights into AI operations. Complementary provisions in Articles 14, 18 and 20 establish a comprehensive framework concerning accountability by design that mandates coherent communication of AI functionality and delineates developer responsibilities to mitigate associated risks effectively.

4.3.3.1 *Transparency Requirements*

Articles 11, 12 and 13 of the AI Act collectively establish transparency requirements for specific AI systems, highlighting the necessity of accountability and the protection of individual rights. Recital 27 defines transparency as the development and utilisation of AI systems in a manner that ensures traceabil-

143 Fundamental procedural rights include the right to an effective remedy, the right to a fair trial, the right of defence, and the presumption of innocence.

144 While transparency provides visibility into the operational processes and decision-making criteria of AI systems, it must be accompanied by a robust mechanism of accountability to ensure that ai providers and developers are answerable for the outcomes produced by their systems.

ity and explainability. This includes making users aware that they are interacting with AI and informing both deployers and affected individuals about the AI's capabilities, limitations and their rights.

A critical concern arises regarding the feasibility of achieving 'true' explainable AI, particularly for the average user, given that even software engineers may struggle to comprehend self-learning algorithms. For transparency to foster accountability, the shared information must be precise and comprehensible enough to enable effective oversight.[145] Over-simplification can compromise accuracy, rendering scrutiny ineffective.[146]

Importantly, full transparency is not a prerequisite for meaningful control; a minimum level of explanation can still provide sufficient insight. As transparency serves as a cornerstone of governance in democratic societies, the complexity and opacity of AI should not dilute the demand for accountability. The AI Act mandates a comprehensive documentation process and requires the incorporation of design features that ensure traceability and auditability.[147] Additionally, high-risk AI systems must be designed with transparency in mind to facilitate correct utilisation.[148]

Article 11 emphasises the obligation of transparency by design, mandating that technical documentation for AI systems is prepared and regularly updated before deployment and *ex ante*. This documentation must demonstrate compliance with legal requirements and provide accessible information to the authorities,[149] thereby serving as the foundation for accountability. It should detail the design specifications, system logic, algorithmic processes[150] and the rationale behind the design choices and any assumptions made, as well as the relevance of the different parameters.

Article 12 introduces the requirement for high-risk AI systems to record operational events automatically, enhancing traceability.[151] This comprehensive logging – capturing usage timestamps, databases, matched data and result validation – is essential for monitoring system performance and detecting errors *ex ante*, particularly in self-learning algorithms, thereby ensuring accountability and safety.

145 Recital 132 AI Act.

146 S. Chesterman, 'Through a Glass, Darkly: Artificial Intelligence and the Problem of Opacity' (2021) 69(2) *The American Journal of Comparative Law*, pp. 271–294.

147 Article 12 AI Act.

148 Ibid., Article 13.

149 Ibid., Recital 157.

150 Annex IV: Technical Documentation referred to in ibid., Article 11(1).

151 Ibid., Recital 53.

Addressing the legitimacy gap resulting from undemocratic production practices, Article 13 of the AI Act outlines accountability by design obligations, ensuring that users have access to the inner workings of AI systems. This provision empowers both users and authorities with power and control over the design of the artefact, facilitating oversight of technology implementation. It mandates the inclusion of clear instructions regarding system capabilities, limitations, risks, output interpretation and data handling processes, fostering an informed user base.[152]

Article 50 of the AI Act complements Article 13 by obligating both providers and deployers to disclose relevant information to users, further underscoring the importance of transparency and accountability. The design goal behind these Articles is to promote the design and employment of high-risk AI systems in a manner that respects human rights to information, privacy and freedom of expression. Article 50 seeks to empower deployers to interpret the outputs of AI systems in a transparent and responsible manner,[153] preventing harm and discrimination and upholding fundamental rights, ultimately reinforcing the legitimacy of AI.

The transparency requirements outlined in Article 18 of the AI Act are complemented by the accountability by design obligation through comprehensive documentation-keeping practices. This requirement is essential, particularly for high-risk AI systems, as it upholds fundamental human rights principles of informed decision-making. By mandating the retention of technical documentation and compliance records for ten years, Article 18 upholds the right to an effective remedy,[154] facilitating regulatory authorities and affected individuals to review and contest AI-related decisions. Article 18 also safeguards the rights to due process, non-discrimination and fairness by allowing oversight bodies to examine patterns of bias or discrimination systematically, within AI systems over time.[155] This provision imposes a design obligation on AI providers to implement traceability mechanisms, ensuring that documentation is maintained in a structured and accessible manner to facilitate regulatory scrutiny and opportunities for redress throughout an AI system's lifecycle.

The AI Act introduces similar transparency requirements for GPAI models, as stated in Article 53, aimed at ensuring accountability by design and safe-

152 Ibid., Recital 72.

153 Ibid., Recital 134.

154 Article 47 CFR.

155 Since the retention of documentation enables oversight bodies to evaluate whether an AI system has systematically led to biased, unfair or discriminatory outcomes over time.

guarding human rights. Providers are obliged 'by design' to maintain up-to-date technical documentation,[156] disclose essential information to downstream AI developers,[157] and publish a summary of training data sources.[158] While open-source models with publicly accessible parameters are exempt from these stipulations, those that present systemic risks must adhere to compliance measures.[159] These requirements effectively operationalise accountability by design through the implementation of three design goals: clear documentation, structured disclosure and robust oversight mechanisms.

4.3.3.2 *Accountability Requirements*

In discussing accountability, it is essential to highlight the significance of human agency and oversight throughout all phases of AI system development and deployment. Recital 27 to the AI Act defines the design goal of human agency and oversight as:

> AI systems are developed and used as a tool that serves people, respects human dignity and personal autonomy, and that is functioning in a way that can be appropriately controlled and overseen by humans.

Cultivating meaningful human oversight is fundamental for building trust in AI systems.[160] The AI Act states that such oversight stipulates that necessary measures must either be integrated into the system or enacted by users.[161]

The AI Act aims to address issues of automation bias – the tendency to rely overly on outputs from high-risk AI systems. It establishes guidelines to maintain awareness among users of potential biases, especially in high-risk AI systems that influence critical decisions. Without maintaining human oversight in these domains, reliance on AI recommendations could undermine safety and efficacy.[162] Thus, the Act promotes human-centric AI development by requiring system providers to include documentation-keeping as an assessment tool for human oversight.

Article 14 of the AI Act emphasises safeguarding individuals' fundamental rights – such as health, safety, and dignity – when interacting with high-risk AI

156 Recital 101 AI Act.
157 Ibid., Recital 102.
158 Ibid., Recital 107.
159 Ibid., Recital 104.
160 N. Diaz-Rodriguez, J. Del Ser, M. Coeckelbergh, *et al.*, 'Connecting the Dots in Trustworthy Artificial Intelligence', *supra note* 6, p. 7.
161 Article 14 AI Act.
162 Ibid., Recital 73.

systems; the design of human oversight mechanisms must prioritise minimising risks that could endanger these rights, ensuring alignment with human well-being and dignity. It posits a by-design obligation for these systems to integrate effective oversight mechanisms from the outset. This entails ensuring that users or deployers possess a clear comprehension of the system's capabilities and limitations, allowing them to intervene, override or halt outputs in situations where infringement of rights or harm may arise.

Article 20 of the AI Act embodies accountability measures for companies providing high-risk AI systems. When compliance with EU regulations is identified as lacking, companies must rectify the issue, suspend usage or recall the system. They are also obliged to notify all parties involved in the system's distribution or employment and must investigate risks, informing relevant authorities and certifying organisations about the deficiencies and corrective actions taken.

The human rights element embodied in Article 20 emphasises safety and protection from harm, aligning with fundamental rights outlined in the CFR, which safeguard human dignity, non-discrimination and consumer protection.[163] This provision posits a by-design obligation mandating AI providers to incorporate risk mitigation and accountability mechanisms by design, promoting continuous monitoring, transparency and responsive systems capable of being disabled or recalled when necessary. The goal is to embed trustworthiness and accountability, ensuring that AI systems are explainable, auditable and subject to human oversight, facilitating immediate corrective actions.[164]

In instances of fundamental rights infringements, requirements for traceability, documentation-keeping and transparency facilitate effective redress for 'affected' persons.[165] The EP[166] defined the role of 'affected'[167] persons, mirroring the GDPR's provisions and introducing rights such as being informed

163 Articles 1, 21 and 38 CFR.

164 Recital 81 AI Act.

165 Explanations of the EC Proposal, p 11. The proposal, while acknowledging the notion of 'affected persons' in various Recitals, predominantly omits the involvement of individuals who may have their rights compromised by AI systems. The text includes only two relevant provisions that pertain to these individuals who are affected and seek redress: Article 50 AI Act, which outlines transparency obligations, and Article 49 AI Act, which establishes a public database for high-risk AI systems.

166 The intention, language and formal articulation of rights and principles in the EP's mandate transform the AI Act from a merely internal market instrument into a robust framework that emphasises human-centric artificial intelligence.

167 Article 2(1)8a EP Mandate.

about AI-supported decisions and obtaining clear explanations regarding the AI's role in decision-making.[168] These informational rights are essential for exercising remedies against regulatory violations. The EP expanded on the Council's abstraction to empower natural or legal persons to lodge complaints with market surveillance authorities,[169] establishing rights to challenge violations of the AI Act and to seek effective legal remedies against supervisory authority decisions.[170] Accordingly, the AI Act introduces new rights and remedies to be 'built' into the artefact, including the right to an explanation for AI-driven decisions,[171] which complements Article 22 of the GDPR concerning automated decisions.[172] Recital 171 to the AI Act underscores the necessity for these explanations to be clear and meaningful, enabling individuals to comprehend and assert their rights effectively while also allowing the filing of complaints with market surveillance authorities for violations of the Act.[173]

4.3.4 Data Protection by Design

Recital 10 to the AI Act articulates the fundamental principle of safeguarding personal data by adhering to existing 'special' Union legal frameworks.[174] Nota-

168 Ibid., New Article 68c.

169 Ibid., Article 63(7d).

170 The EP's Mandate expands upon the Council's approach by enabling both 'natural and legal persons' to submit formal grievances to market surveillance authorities. This initiative establishes two fundamental rights: firstly, the right to file a complaint with national regulatory bodies concerning violations of the AI Act; and, secondly, the right to seek an effective judicial remedy in response to decisions made by the regulatory authority: New Articles 68a, 68b EP Mandate.

171 Article 86 AI Act. This provision was embedded into the AI Act upon recommendation by the EDPS–EDPB and the EP.

172 G. Pavlidis, 'Unlocking the Black Box: Analysing the EU Artificial Intelligence Act's Framework for Explainability in AI' (2024) 16(1) *Law, Innovation and Technology,* pp. 293–308.

173 See Article 85 AI Act.

174 The 'special' Union frameworks include Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation), Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC, Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecu-

bly, the Act preserves the obligations of AI system providers and deployers in their roles as data controllers or processors, as mandated by both Union and national data protection laws. This is pertinent, especially when AI systems are designed or employed in the processing of personal data.

Supporting this, Article 19 of the AI Act mandates the maintenance of automatically generated logs, which play a crucial role in reinforcing the individual rights to an effective remedy,[175] privacy and data protection.[176] By requiring comprehensive logging of relevant events, the AI Act facilitates post-market monitoring and risk detection, addressing potential human rights violations.

The emphasis on transparent logging is integral to ensuring accountability within AI decision-making processes. It empowers individuals to contest decisions determined by AI systems that may significantly affect their fundamental rights. Such a provision promotes transparency, accountability and non-discrimination within high-risk AI systems through the features of 'traceability and auditability'. The spirit of this requirement is also outlined in the HLEG Ethics Guidelines, fulfilling Goal 4: Transparency in relation to Goal 3: Privacy and Data Protection.[177] To achieve this, AI systems are enforced with a by-design obligation to generate, store and provide access to logs in a way that enables effective oversight, investigation and redress, ensuring that logs cannot be altered or deleted without proper justification. This design obligation is crucial for promoting the responsible deployment of high-risk AI systems that align with human rights objectives.

4.3.5 Environmental Protection by Design

The AI Act integrates the principle of environmental protection by design into its framework for 'trustworthy and human-centric' AI development, reflecting a commitment to fundamental rights. This human rights–centric approach mandates designing and deploying AI systems that prioritise environmental

tion of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA and Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications). These legislative frameworks established by the Union lay the foundation for sustainable and accountable data processing practices. This framework is particularly relevant in contexts where data sets comprise both personal and non-personal data.

175 Article 6 and Article 13 ECHR; Article 47 CFR.

176 Ibid., Articles 7 and 8; Article 8 ECHR.

177 HLEG AI Ethic Guidelines, pp. 17–18; European Commission, High-Level Expert Group on Artificial Intelligence, The Assessment List for Trustworthy Artificial Intelligence (AI) (hereinafter HLEG AI Assessment List), pp. 12–15.

sustainability. Achieving this integration was a 'hard-won compromise',[178] when the EP proposed substantial amendments to the draft AI Act to incorporate environmental risks into the Act's risk management obligations, addressing an initial omission by the EC, which had excluded 'any hazards related to the environment'.[179]

This line of approach can be inferred from the EP's mandate for amending the risk management obligations for providers of high-risk AI systems in Article 9(2)(a) of the AI Act to include all potential risks that an AI system may pose to 'the health or safety of individuals, their fundamental rights (such as equal access and opportunities), democracy, the rule of law, and the environment'.[180] Additionally, the EP proposed an amendment to the obligations of the deployers of high-risk AI systems, requiring them to assess 'the reasonably foreseeable adverse impacts of using the system on the environment' as part of their FRIA.[181] Therefore in the final AI Act, Recital 48 states the necessity for AI risk assessments to include environmental effects, referencing the CFR's right to a high level of environmental protection. The Act's risk-based model calls for heightened scrutiny and mitigation measures for AI systems presenting significant environmental risks, aligning with the Sustainable Development Goals. This principle demands that AI systems be developed with the 'right to environmental protection' *ex ante* rather than addressing sustainability concerns *ex post*.

The by-design obligations embedded in the Act promote the design of AI systems that are not only efficient but also environmentally responsible. Recital 4 to the AI Act highlights AI's role in enhancing resource and energy efficiency, monitoring environmental changes, and supporting biodiversity conservation. These objectives signal a need for sustainability principles to be woven into the architecture of AI systems, ensuring that energy-efficient models and resource-conscious practices become standard rather than optional features. According to Article 95 of the AI Act, the Codes of Conduct should be established to promote the environmentally sound design, training and use of AI systems and models, thus implementing environmental protection by

178 U. Pagallo, 'On Twelve Shades of Green: Assessing the Levels of Environmental Protection in the Artificial Intelligence Act' (2025) 35(10), *Minds and Machines: Journal for Artificial Intelligence, Philosophy, and Cognitive Science*, p. 5.

179 This position by the EC was heavily criticised. P. Gailhofer, A. Herold, J.P. Schemmel, *et al.* 'The Role of Artificial Intelligence in the European Green Deal', 2021, Study for the special committee on Artificial Intelligence in a Digital Age (AIDA), Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, p. 10.

180 Article 9(2)(a) EP Mandate.

181 Ibid., New Article 29(a).

design.[182] Article 95(2)(a) of the AI Act refers to elements outlined in the HLEG AI Ethics Guidelines, which encompass Goal 6: Social and Environmental Well-Being.[183] Furthermore, Article 95(2)(b) suggests the inclusion of components that enable the assessment and minimisation of the impact of AI systems on environmental sustainability. This includes considerations for energy-efficient programming and techniques for the effective design, training and use of AI.

A fundamental aspect of the AI Act's aspiration towards environmental protection is its call for standardisation and lifecycle sustainability. Article 40 of the AI Act states that the EC ought to request standardisation bodies to establish frameworks that minimise energy and resource consumption across the AI lifecycle, encompassing both training and deployment phases. This requirement highlights the significance of lifecycle thinking in AI governance, necessitating environmental protection by design throughout the entire lifespan of an AI system. Articles 11 and 53 of the AI Act require providers of AI systems and models to create and maintain up-to-date technical documentation throughout their lifecycle,[184] which must also include environmental-related information, though the level of detail may vary. For GPAI models, Article 53(1) of the AI Act and its Annex XI explicitly require the documentation of the energy efficiency of these models.[185] As a minimum requirement outlined in Annex XI, this documentation must include information on the 'known or estimated energy consumption of the model'.[186] This can be measured directly or inferred from details such as 'the computation resources used to train the model (e.g., the number of floating-point operations), the training time, or other relevant training-related details'.[187]

Moreover, the regulatory framework established in Article 59 of the AI Act allows for testing AI systems' environmental impacts within regulatory sandboxes, reinforcing the Act's commitment to ensuring that innovations contribute to climate change mitigation and adaptation while adhering to ethical and legal standards.

182 These Codes of Conduct serve two main purposes: firstly, to facilitate the voluntary adoption of requirements for high-risk AI systems in non-high-risk AI systems; and, secondly, to encourage the voluntary implementation of additional requirements. Among these additional requirements, environmental protection by design must be explicitly included: Article 95(1) and 95(2) AI Act.

183 HLEG AI Ethics Guidelines, p. 19; HLEG, AI Assessment List, p. 19.

184 Recital 71 AI Act.

185 Regardless of whether they pose systemic risks, all providers of GPAI models must prepare technical documentation for their models.

186 Annex XI Section 1(2)(e) AI Act.

187 Ibid., Annex XI Section 1(2)(d).

Finally, the Act supports research and development initiatives aimed at fostering ecological AI innovation. Recital 142 to the AI Act inspires member states to invest in AI-driven solutions that provide social and environmental benefits, urging the allocation of funding to projects aligned with sustainability targets. The objective is to ensure that emerging artefacts not only drive innovation but also reinforce environmental responsibility.[188]

5 Conclusion

The AI Act enforces human rights by design obligations through measures provided under Articles 16, 23, 24 and 26. The intention behind these measures is to ensure that high-risk AI systems adhere to strict compliance, transparency and accountability requirements, thereby safeguarding human rights such as non-discrimination, privacy, accountability, environmental protection and individual rights. The design objective is to foster the development of trustworthy AI that aligns with EU fundamental rights, ensuring fairness, transparency and safety while mitigating systemic risks to privacy, autonomy and non-discrimination. This approach is further reinforced by Recital 80, which underscores the necessity of safeguarding rights in the development and deployment of high-risk AI systems.

However, these design obligations are accompanied by legal privileges that allow for certain exceptions and flexibilities. For instance, Article 46 of the AI Act provides derogations from the conformity assessment procedures.[189] It stipulates that, under exceptional circumstances, such as public security, the protection of life and health, environmental protection or the safeguarding of key industrial and infrastructural assets, the market surveillance authority may authorise the temporary use of high-risk AI systems within a member state.[190]

188 Ibid., Recital 8.

189 Article 43 AI Act discusses the process of assessing whether high-risk AI systems meet certain standards. If a provider has used certain standards in creating their AI system, they must choose one of two conformity assessment procedures. If the provider has not used these standards or used only part of them, they must follow a specific assessment procedure. If the AI system is for law enforcement or immigration authorities, a market surveillance authority will act as the assessment body. The Article also states that if an AI system is significantly modified, it must undergo a new assessment. The Commission can update these procedures as technology advances.

190 Article 46 AI Act states that in urgent situations, law enforcement or civil protection authorities may deploy these systems without prior approval, provided that they request authorisation shortly thereafter. If approval is denied, the system must be discontinued, and its outputs must be discarded. The EC and other MS must be notified of such

Another significant legal privilege is the provision for regulatory sandboxes under Article 57. The Act mandates that each member state establish at least one national AI regulatory sandbox – a controlled environment where AI systems can be developed, tested and validated before being introduced to the market. The intention behind the crafting of this provision for promoting sandbox mechanisms is to foster innovation while simultaneously identifying and mitigating risks, particularly those related to fundamental rights, health and safety. They also function to provide guidance on regulatory expectations, thereby facilitating compliance with the legal obligations. AI systems that successfully undergo testing in a sandbox can use this as evidence of regulatory compliance.

In addition, Article 59 of the AI Act allows the use of personal data within regulatory sandboxes, provided that such data processing is conducted in the public interest, which means that the AI systems are designed for public safety, health, environmental protection and the efficiency of public administration. The use of personal data must adhere to stringent human rights by design obligations, ensuring that risks are monitored and mitigated, data remains segregated and secure, and unauthorised sharing is prohibited.[191] This provision ensures that the design and development of AI artefacts remain aligned with human rights while allowing for controlled innovation in key public interest areas.

By integrating these measures and by-design obligations, the AI Act seeks to balance innovation with human rights protection, ensuring that high-risk AI systems operate within a robust legal framework while allowing for necessary flexibility in exceptional circumstances. The expected contribution of these regulatory mechanisms is the realisation of a trustworthy AI ecosystem within the EU.

---

approvals, and if no objections are raised within 15 days, the authorisation is deemed justified. However, if objections arise, the Commission will review the matter in consultation with relevant stakeholders to determine whether the approval remains valid. Should it be deemed unjustified, the authorisation must be withdrawn.

191 Once the project concludes, the collected data must be deleted. The process and results must be documented, with summaries published, except in cases involving sensitive law enforcement data.

The Right to Be Forgotten in the Age of Artificial Intelligence

Nidal Askar

Abstract

The Right to Be Forgotten (RTBF), as established under the General Data Protection Regulation (GDPR), presents unique challenges in the age of artificial intelligence (AI), particularly with generative AI models that process vast amounts of data and lack inherent mechanisms to 'forget' information. This paper examines the legal, ethical and technical complexities surrounding the RTBF within AI environments, emphasising the conflicts between data erasure obligations and machine learning architectures. It explores whether the EU's AI Act addresses the RTBF for generative AI systems. A key issue arises from the storage, replication and continuous learning processes of AI, which complicate the practical implementation of data deletion. Additionally, AI's self-adaptive nature and 'black box' problem create transparency concerns, making it difficult to determine how personal data are processed and whether they can be effectively erased. The paper analyses landmark legal cases, such as *Google Spain v González*, which shaped the RTBF, and evaluates their applicability in an AI-driven digital landscape. To mitigate these challenges, the study proposes a multifaceted approach incorporating data minimisation principles, technical privacy-enhancing solutions (for example, differential privacy) and integrated regulatory-technical frameworks. It advocates for international cooperation, industry-led compliance initiatives and algorithmic oversight mechanisms, such as an Algorithm Committee, to ensure that AI systems align with data protection norms. Ultimately, the paper underscores the necessity of adapting legal and technological infrastructures to uphold the RTBF while balancing innovation, privacy and fundamental rights in an AI-dominated era.

1 Introduction

In the context of AI, European data protection law, particularly the General Data Protection Regulation (GDPR), stands as a comprehensive and harmon-

© NIDAL ASKAR, 2026 | DOI:10.1163/9789004751026_018
This is an open access chapter distributed under the terms of the CC-BY-NC-ND 4.0 license.

ised framework that applies to most data processing operations.[1] This does not mean that the GDPR strictly bans all data processing activities; on the contrary, it establishes solid obligations and requirements for handling special categories of personal data.[2] The legal intent behind this legislation is to grant data owners greater control over their personal data through the rights available to data subjects.[3]

Machine learning (ML) relies on both personal and non-personal data, making its interaction with the GDPR inevitable and potentially conflictual.[4] The rapid rise of generative AI, in particular, is intensifying debates around the Right to Be Forgotten (RTBF) in today's digital world. Generative AI models such as Large Language Models (LL.M.S) – including ChatGPT and similar applications – are trained on extensive datasets, which makes it difficult for them to "forget" due to their large memory capacity and data regeneration capabilities. Given that LL.M.S are trained on vast, decentralised datasets – often comprising publicly accessible texts – there is a significant risk that they may inadvertently regenerate personal data, even after a valid erasure request has been made. When individuals request erasure of their information, what does happen and how does this request function? The RTBF is regulated under the GDPR, which plays a vital role in the digital privacy landscape by granting individuals' requests to erase their personal information from online platforms.

Yet, in the era of AI, where the storage and replication of personal data by AI systems are virtually limitless, enforcing RTBF has become a significant legal and technical challenge – especially within the realm of generative artificial intelligence (GAI). The key point is to determine whether such conflicts are surmountable. The technical opacity of these models complicates the identification and removal of specific data points, while their capacity to regenerate information learned during training underscores the limitations of conventional erasure mechanisms. The convergence of advanced technologies – most notably generative AI – and the fundamental right to data protection pose novel and urgent legal challenges. These developments call for an adaptive interpretation of Article 17 GDPR, which empowers individuals to obtain erasure of their personal data when it is no longer necessary for its original

1 T. S. Cabral, 'Forgetful AI: AI and the Right to Erasure under the GDPR' (2020) 6 *EDPL* (*European Data Protection Law Review*), pp. 378–379.

2 Ibid.

3 Ibid., p. 379.

4 Ibid.

purpose or has been processed unlawfully. This right is further reinforced by the AI Regulation's transparency and explainability requirements to ensure that data subjects can truly 'forget' within a dynamic digital ecosystem. While the GDPR establishes the foundational principles of data minimisation, storage limitation and erasure, the EU's AI Act builds upon this framework by introducing risk-based safeguards tailored to AI systems. Together, these instruments seek to reconcile individual autonomy over personal information with the public interest in access to data-driven innovation.

The content generation of LL.M.s such as ChatGPT may also contain outdated or inaccurate personal information. Once an AI system has used data for training, their erasure becomes a real challenge within the AI environment. The exponential growth of AI systems and their intricate data processing structures, coupled with increasing privacy issues, underscore the need for a specific study of this right. To this end, in this contribution, the legal and ethical implications of RTBF in the context of AI, as well as its regulatory framework and the need for adaptation in the face of rapidly evolving technologies will be explored. Recent advancements in regulatory frameworks, such as the EU's AI Act, alongside the development of innovative data erasure technologies, are crucial measures to ensure the effective protection of this right amidst a rapidly evolving technological landscape. Safeguarding fundamental rights such as the RTBF not only upholds individual dignity and autonomy but also lays the foundation for a future where AI serves humanity as a tool, rather than posing a threat to its core values. Both the GDPR and the EU's AI Act complement each other to address the challenges posed by AI in the field of data protection. On the one hand, the GDPR establishes general principles for the protection of personal data as a human rights-centred legal framework. On the other hand, the EU's AI Act sets out technical measures aimed at ensuring the safe development and deployment of AI systems. Nevertheless, the implementation of such principles like anonymisation and data removal remain a key challenge for the protection of privacy in the era of AI. At the end of the examination, this study will propose several potential solutions for the effective application of the RTBF to AI models.

2 The Concept and the Context of the Right to Be Forgotten

2.1 *The Emergence of the RTBF*

The second half of the twentieth century marked the increasing integration of machines into human daily life, which means integrating into private life and

thus playing a bigger role in private lives.[5] The emergence of AI and the increasing value of data meant that tech companies began collecting and using large amounts of data to offer personalised services, leading to a data-driven ecosystem.[6] The development of machine learning further enhanced this trend, leading to people spending more time online and sharing even more personal data.[7] However, many individuals were unaware of how valuable their data were to these companies and how they were being collected and processed. Over time, this resulted in a gradual loss of control over personal data. To address this issue, lawmakers introduced stronger regulations, including the RTBF, as part of the GDPR. The GDPR was designed to restore individuals' control over their data, which had been weakened by the power imbalance between users and tech companies due to technological advancements.

The notion of a 'right to be forgotten' is multifaceted and has been subject to diverse interpretations.[8] It initially emerged in the jurisprudence of the Court of Justice of the European Union (CJEU) as a dimension of data subjects' right to privacy within the framework of personal data processing.[9] In other words, the RTBF constitutes a vital component of the fundamental human right to privacy.[10] The CJEU's interpretation of the Data Protection Directive[11] underscored the fundamental rights such as respect for private and family life and the protection of personal data enshrined in Articles 7 and 8 of the Charter of Fundamental Rights of the European Union (CFREU)

5 J. Ausloos, *The Right to Erasure in EU Data Protection Law: From Individual Rights to Effective Protection*, 1st edition, Oxford University Press: New York, 2020, p. 39.

6 European Commission, Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions towards a thriving data-driven economy, COM(2014) 0442 final 02.07.2014

7 S. Wachter, 'Data Protection in the Age of Big Data' (2019) 2(6) *Nature Electronics*; S. Fina and R. Vogl, 'Navigating EU Data Protection Law: The Challenge of the Right to Be Forgotten in AI-Driven Text Producers' (2024) *European Union Law Working Papers No. 86,* Stanford Law School.

8 European Union Agency for Fundamental Rights (FRA), 'Right to be Forgotten: ECtHR and CJEU Case-law - Joint Factsheet', 30 October 2024, available at https://fra.europa.eu/en/publication/2024/right-be-forgotten-ecthr-and-cjeu-case-law-joint-factsheet, last accessed on 05.05.2025.

9 CJEU, *Google Spain SL v Agencia Española de Protección de Datos*, Case C-131/12, 13.05.2014, ECLI:EU:C:2014:317.

10 D. Zhang, P. Finckenberg, T. Hoang, *et al.*, 'Right to Be Forgotten in the Era of Large Language Models: Implications, Challenges, and Solutions' (2024) *AI and Ethics,* p. 2445.

11 Directive (EU) 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281.

respectively. Subsequent developments have been observed in national case law and in the jurisprudence of the European Court of Human Rights (ECtHR), particularly concerning the republication of previously disclosed judicial information by the press.[12] In such cases, individuals invoking the 'right to be forgotten' sought legal remedies against those who republished the information. A further evolution of this right emerged with the digitisation of print-published news articles, raising concerns not about the mere reappearance of information, but rather its prolonged accessibility in digital archives, where issues remain continuously available online rather than simply resurfacing.[13]

2.1.1 The RTBF under Directive 95/46 and the Landmark Judgment in *Google Spain v Gonzales*

The RTBF, also known as the right to erasure, originates from the European Directive on Data Protection and Free Movement of such data (95/46/EC) and the Directive on Electronic Commerce (2000/31/EC).[14] These directives establish the legal basis obliging search engine providers within the EU to remove certain links. This right gained significant prominence following the landmark case of *Google Spain v Gonzales*[15] in 2014, which provided a solid legal foundation for the RTBF.

A Spanish citizen filed a complaint requesting the removal of information about past social security debts from a newspaper (*La Vanguardia*) and Google Search results. The CJEU ruled that Google, as a search engine, processes personal data and should be considered a data controller under Directive 95/46/EC. As a result, Google was required to remove certain links from search results when a person's name was searched, even if the original webpage containing the information remained online. The CJEU prioritised individuals' data protection rights over Google's economic interests and the public's right to access certain information – unless there was a strong public interest in keeping the information accessible. The ruling clarified that this was not an absolute 'right to erasure', but rather a 'targeted delisting' of search results. This meant that Google still indexed the information but had to suppress certain links under

12 FRA, 'Right to be Forgotten', *supra* note 8.

13 ECtHR, *Hurbain v Belgium*, no 57292/16 [GC], 04.07.2023, paras. 187 and 194.

14 Council Directive (EU) No. 95/46/EC of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, OJ L 281/31 (1995); Directive (EU) 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market, 2000 OJ L 178 1, Art 2(c).

15 CJEU, *Google Spain SL v Agencia Española de Protección de Datos, supra* note 9.

specific conditions. The GDPR later expanded on this ruling, providing a more structured and detailed legal framework for the right to be forgotten.

2.1.2 The RTBF as a Human Rights Norm

The RTBF, also referred to as the right to erasure, has evolved into a significant human rights concept grounded in fundamental rights principles.[16] While not explicitly enshrined in most international human rights instruments, it finds implicit support in provisions such as Article 17 of the International Covenant on Civil and Political Rights (ICCPR), Article 12 of the Universal Declaration of Human Rights (UDHR) and Article 8 of the European Convention on Human Rights (ECHR), which collectively affirm the right to privacy and protection from unlawful interference. The RTBF lies at the intersection of privacy, data protection and freedom of expression, reflecting its essential role in safeguarding human dignity and personal autonomy in the digital age.[17]

This right gained prominence following the landmark judgment in *Google Spain SL, Google Inc. v AEPD and Mario Costeja González*, which responded to the growing challenge of persistent and omnipresent digital information.[18] Recognising the individual's need to reclaim control over their personal data – a concern far less prevalent in the pre-digital era[19] – the Court laid the groundwork for what later became a codified right under Article 17 of the GDPR.[20] The GDPR not only enshrined this right but also expanded its scope beyond the conventional boundaries of privacy and data protection, establishing a more comprehensive human rights framework.[21] In other words, the GDPR not only enshrined this right but also expanded its scope beyond the traditional boundaries of privacy and data protection – such as the emphasis on consent, transparency and purpose limitation – by incorporating broader concerns related to autonomy, dignity and accountability. In doing so, it operationalised international human rights norms through concrete legal mechanisms that address the complexities of data governance in the digital era. Therefore, the RTBF represents a significant development in the evolution of privacy rights within the context of the digital era. It provides

16 M. Susi, 'The Right to Be Forgotten', and O. R. Puccinelli, 'The RTBF 2.0', both in A. von Arnauld, K. von der Decken and M. Susi (eds.), *The Cambridge Handbook of New Human Rights*, 1st edition., Cambridge University Press: Cambridge, 2020, at pp. 287 and 300.

17 C. Chang, 'When AI Remembers Too Much: Reinventing the Right to be Forgotten for the Generative Age' (2024) 19(3) *Washington Journal of Law, Technology & Arts*, p. 26.

18 Ibid.

19 Ibid.

20 Ibid.

21 Ibid.

individuals with a mechanism to exert control over their online presence, responding to the specific challenges introduced by internet technologies, particularly search engines.[22] Recognised as an emerging right, it reflects the ongoing transformation of privacy law and the necessity for legal and ethical frameworks to adapt in the light of technological advancement. In view of the rapid progression of artificial intelligence and the complex privacy issues it raises, a thorough examination of the RTBF is essential.

The RTBF is intrinsically linked to other fundamental human rights, with the right to privacy in the context of personal data processing occupying a central position.[23] Article 8 ECHR explicitly guarantees the right to respect for private life. Notably, in the light of the *Olivier G. v Le Soir*[24] case, it can be contended that the right to be forgotten constitutes a critical dimension of the right to privacy. From this perspective, it empowers individuals to exert control over the dissemination of their personal information, thereby safeguarding their private lives against potential unwarranted intrusions.

The 2016 ruling of the Belgian Court of Cassation in *Olivier G. v Le Soir* marked a significant milestone in the recognition and enforcement of the right to be forgotten within European jurisprudence.[25] The case centred on Dr Olivier G., who sought the anonymisation of a 1994 online article detailing a fatal accident he caused while driving under the influence.[26] The court's decision underscored the lasting reputational harm caused by the article's continued online accessibility, despite his rehabilitation.[27] This judgment is important because it confirms that erasure rights extend beyond search-engine results to legacy journalistic archives. By recognising that keeping a decades-old article online amounts to a 'new disclosure', the court squarely brought digital news repositories within the scope of Article 17 GDPR.[28] Crucially, it also established that anonymisation – such as masking a subject's name – can satisfy erasure requests without unduly infringing press freedom.[29] This

22 D. Zhang, P. Finckenberg, T. Hoang. *et al.*, 'Right to Be Forgotten', *supra* note 10.

23 C. Chang, 'When AI Remembers Too Much', *supra* note 17, p. 27.

24 Belgian Court of Cassation*, Olivier G. v Le Soir*, no.° C.15.0052.F, 29.04.2016.

25 H. Tomlinson, 'Case Law, Belgium: Olivier G v Le Soir. "Right to be forgotten" requires anonymisation of online newspaper archive', *Inforrm's Blog*, 19 July 2026, available at https://inforrm.org/2016/07/19/case-law-belgium-olivier-g-v-le-soir-right-to-be-forgotten-requires-anonymisation-of-online-newspaper-archive-hugh-tomlinson-qc/, last accessed on 05.05.2025.

26 Ibid.

27 Ibid.

28 Belgian Court of Cassation*, Olivier G. v Le Soir*, *supra* note 24.

29 Ibid.

decision therefore broadens practical RTBF scope, ensuring that individuals can reclaim control over their personal data even in historical online publications. Balancing the right to privacy with the public's right to information, the court acknowledged that the passage of time had diminished the newsworthiness of the archived article.[30] While affirming the importance of freedom of expression, it emphasised that this right is not absolute and must be reconciled with privacy protections.[31] Citing Article 8 ECHR and Article 17 ICCPR, the court recognised the right to be forgotten as essential to human dignity and reintegration into society.[32] By mandating not only the de-indexing but also the anonymisation of the article, the ruling established a precedent for the application of the right to be forgotten to digital archives.[33] This decision highlights the ongoing need to recalibrate the balance between privacy rights and public information in an era of evolving digital technologies.[34]

The ECtHRs' judgment in *Biancardi v Italy*[35] is significant for the RTBF because it extends de-indexing obligations beyond major search engines to all online content hosts, including small news websites. The Court affirmed that a publisher's failure to de-index a 2008 article about a restaurant brawl – even after a formal removal request – interfered with the applicant's private-life rights under Article 8 ECHR and warranted compensation for reputational harm. *Biancardi* confirms that RTBF can require local controllers to remove or de-index content when a reasonable expectation of privacy outweighs the public interest – thereby broadening practical RTBF remedies against any online publisher, not only global platforms. Yet, *Biancardi* represents a significant extension of the RTBF in two respects. First, the Court holds that those online publishers – including journalists and newspapers – must comply with de-indexing requests.[36] Second, in the proportionality assessment between freedom of expression and privacy, the balance tilts more decisively in favour of private-life rights where de-indexing is at issue.[37] This shift is underscored

30 Ibid.
31 Ibid.
32 Ibid.
33 C. Chang, 'When AI Remembers Too Much', *supra* note 17, p. 28.
34 Ibid.
35 ECtHR, *Biancardi v Italy*, no 77419/16 , 25.11.2021.
36 J. van de Kerkhof, 'Biancardi v. Italy: A Broader Right to Be Forgotten', *Strasbourg Observers*, 07.01.2022, available at https://strasbourgobservers.com/2022/01/07/biancardi-v-italy-a-broader-right-to-be-forgotten/, last accessed on 05.05.2025.
37 Ibid.

by a compressed timeframe during which content retains 'newsworthiness', particularly when the applicant lacks public prominence.[38]

2.2 *The RTBF under the GDPR*

The *Google Spain* landmark judgment of the CJEU recognising the RTBF was enacted under Article 17 GDPR and grants individuals the right to obtain from the controller the erasure of their personal data without delay when such data are no longer necessary for the purposes for which they were collected or processed, or upon the withdrawal of the consent on which the processing was based.[39] Given its connection to the right to erasure, the right to be forgotten extends beyond the mere publication of personal information by news organisations and search engines. It may also encompass requests for the removal of personal data from public records after a specified period[40] or the deletion of unlawfully processed data, irrespective of whether or not they have been publicly disclosed.[41]

38 Ibid.

39 Article 17 GDPR.

40 See CJEU, *Manni*, Case C-398/15, 09.03.2027, ECLI:EU:C:2017:197. The CJEU was required to assess whether EU law recognised a right to obtain the erasure of personal data from a Chamber of Commerce register on the grounds that such information could prejudice an individual's potential clients and adversely affect their commercial interests. In reaching its decision, the Court undertook a balancing exercise between EU data protection rules and Mr. Manni's interest in having information about his former company's bankruptcy removed, on the one hand, and the public interest in ensuring access to such information, on the other. The Court emphasised that the publication of company-related data in a public register was legally mandated and served to safeguard the interests of third parties engaging in business transactions with companies. Given the fundamental role of the register in securing legal certainty, fair trading and the proper functioning of the internal market, the CJEU concluded that Mr Manni did not have the right to demand the deletion of his personal data. However, the Court acknowledged that, in exceptional cases, there might be compelling and legitimate reasons specific to the concerned individual that could justify restricting access to personal data recorded in the register – particularly after the passage of a sufficiently long period – so that only third parties demonstrating a specific interest in consulting the data would be granted access.

41 For instance, in CJEU, *Újpesti Polgármesteri Hivatal*, Case C-46/23, 14.03.2024, EU:C:2024:239, the CJEU addressed the scope of supervisory authorities' powers under the GDPR. The case arose when the municipal administration of Újpest, Hungary, requested personal data from the Hungarian State Treasury and the government office in 2020 to distribute financial aid to individuals affected by COVID-19. The Hungarian Supervisory Authority determined that Újpest and the involved entities had violated GDPR provisions by failing to inform data subjects about the processing of their personal data, leading to the imposition of a fine. Furthermore, the authority found that the municipal administration had not provided the necessary notifications to data subjects and conse-

According to Article 17 GDPR 'the data subject shall have the right to obtain from the controller the erasure of personal data concerning him or her without undue delay and the controller shall have the obligation to erase personal data without undue delay where one of the following grounds applies:

a) the personal data are no longer necessary in relation to the purposes for which they were collected or otherwise processed.
b) the data subject withdraws consent on which the processing is based according to point (a) of Article 6 (1), or point (a) of Article 9 (2), and there is no other legal ground for the processing;
c) the data subject objects to the processing pursuant to Article 21(1) and there are no overriding legitimate grounds for the processing, or the data subject objects to the processing pursuant to Article 21 (2);
d) the personal data have been unlawfully processed;
e) the personal data have to be erased to comply with a legal obligation in Union or member state law to which the controller is subject;
f) the personal data have been collected in relation to the offer of information society services referred to in Article 8(1).

These six measures were introduced by the GDPR to facilitate the exercise of data subjects' rights, particularly when multiple entities are involved in data processing.[42] However, the exercise of this right is subject to limitations. The GDPR outlines four exceptions to which the right to erasure does not apply, such as where its application would infringe the right to freedom of expression or to compromise public interests, including public health, scientific or historical research and legal obligations. As a result, although the RTBF is absolute in intent, it is limited in practice and the data's characteristics determine its

quently ordered the deletion of data belonging to individuals who had not applied for financial aid. In response, the municipal administration contested this decision in court, arguing that the supervisory authority lacked the competence to mandate data erasure without an explicit request from the data subjects. Seeking clarity on the matter, the Hungarian court referred the case to the CJEU for an interpretation of the GDPR. In its ruling, the CJEU clarified that a national supervisory authority possesses the power to order the erasure of unlawfully processed personal data on its own initiative, even in the absence of a request from the data subject. The Court emphasised that when a supervisory authority determines that data processing does not conform to GDPR requirements, it is obligated to rectify the identified infringement, irrespective of whether a data subject has lodged a specific request for erasure. Requiring such a request would otherwise enable data controllers to retain and continue processing personal data unlawfully in cases where no request is made. Moreover, the CJEU affirmed that a supervisory authority may order the deletion of unlawfully processed personal data regardless of whether the data originated from the data subject or were obtained from a third party.

42 T. S. Cabral (2020), 'Forgetful AI', *supra* note 1, p. 382.

limits.[43] The purpose behind the RTBF is to give individuals complete control over their personal data once it is no longer needed or was unlawfully processed. However, in actual application, it is limited by various legal exceptions and balancing tests (for example, the freedom of expression, public interest, statutory retention requirements). These limitations are particularly complex in multi-party data processing scenarios, such as when data are handled by joint controllers or processors. When data are processed by joint controllers, they must establish contractual agreements outlining their respective responsibilities and make the essence of these arrangements available to data subjects.[44] Despite these agreements, a data subject retains the right to address any of the joint controllers in order to exercise their rights, and even if a specific controller is not contractually responsible for handling the request, it must still ensure compliance if a legal basis exists.[45]

In cases where data are processed by a data processor on behalf of a controller, the contractual relationship between them must include provisions requiring the processor to assist the controller in complying with data subjects' rights.[46] Additionally, the controller has the obligation to inform each recipient of the personal data about a request for erasure unless doing so is impossible or would require disproportionate effort, as stipulated in Article 19 GDPR.[47] If the original controller made the data publicly available, they must take reasonable steps to inform other controllers processing these data about the erasure request, in accordance with Article 17(2) GDPR.[48]

Despite these provisions, challenges remain in determining the precise moment when personal data are no longer necessary for their original purpose or when a controller's legitimate interests outweigh the rights of the data subject.[49] This determination requires a context-specific and proportionality-based assessment. Controllers must consider factors such as the original purpose's duration, the nature and sensitivity of the data, the frequency of their use, and whether the intended processing could reasonably be achieved by less intrusive means. For example, if the data no longer contribute meaningfully to the stated purpose or can be replaced with anonymised alternatives, continued retention may be unjustified. Similarly, legitimate interests must be

43 C. Chang (2024), 'When AI Remembers Too Much', *supra* note 17, p. 27.
44 Ibid.
45 Ibid.
46 Ibid.
47 Art 19 GDPR.
48 Art 17(2) GDPR.
49 T. S. Cabral (2020), 'Forgetful AI', *supra* note 1, p. 382.

weighed against the data subject's rights in using the criteria set out in Recital 47 of the GDPR, including expectations of the data subject and the impact on their fundamental rights. Similarly, questions arise regarding what data must be retained to comply with legal obligations, as legislation often mandates compliance without specifying the exact data that should be kept as proof.[50] The balance between the right to erasure and freedom of expression and information requires contextual assessment that considers both the individual's privacy rights and the public interest in accessing or preserving the information. The CJEU addressed this issue in the *Buivids*[51] judgment, where it ruled that the concept of 'journalistic purposes' should be interpreted broadly and not be restricted to media organisations. According to the Court, this protection extends to cases where the sole purpose of data processing is to disclose information, opinions or ideas to the public. This underscores the need to assess erasure requests not in isolation but in relation to competing societal values like free expression.

Another important question is how long data should be retained for the establishment, exercise or defence of legal claims, emphasising that data may be necessary until a claim can no longer be pursued in theory.[52] The Court determined in *Google Spain* that the data no longer held immediate value for Google; however, if Mr. Mario Costeja González were to become a public figure, it could acquire sufficient significance to challenge the reasoning behind the judgment. This raises the question whether data that possess only a potential future value should be retained or deleted, and it prompts a broader inquiry into the threshold of value that data must attain to justify their continued storage.[53] As another example, if a contractual dispute arises decades after the agreement was made and the claim is still legally permissible under national law, relevant data may be required to demonstrate compliance.[54] Similarly, Closed-Circuit Television (CCTV) footage could serve as evidence in liability disputes, such as proving that an alleged accident did not occur as claimed.[55] However, the extent of data retention should be carefully considered. Not all data are equally necessary; for example, if a photographer

50 Ibid.

51 CJEU, *Sergejs Buivids*, Case C-345/17, 14.02.2019, ECLI: ECLI:EU:C:2019:122.

52 T. S. Cabral (2020), 'Forgetful AI', *supra* note 1, p. 383.

53 M. L. Ambrose, 'It's About Time: Privacy, Information Life Cycles, and the Right to Be Forgotten' (2013) 16 *Stanford Technology Law Review*, p. 101.

54 T. S. Cabral (2020), 'Forgetful AI', *supra* note 1, p. 383.

55 A. Watson, 'Can I request CCTV Footage from an Accident?', *Blackwater Law*, 30.08.2024, available at https://blackwaterlaw.co.uk/can-i-request-cctv-footage-from-an-accident/, last accessed 05.05.2025.

is hired for a birthday, retaining all photographs indefinitely to prove contract fulfilment would be excessive. Instead, obtaining a signed declaration from the client confirming completion could suffice, allowing the deletion of more sensitive data. Moreover, the burden of proof typically lies with the claimant, meaning that if a claim is brought decades later, proving non-compliance may be inherently difficult, reducing the need for indefinite data retention.

Nevertheless, some cases justify prolonged data retention, particularly when dealing with products with long-term usage, services that recur over extended periods, or obligations that continue to affect individuals.[56] Despite its utility, excessive data retention presents challenges, balancing transparency and information availability against privacy risks and the potential inclusion of outdated or misleading information. This issue is particularly relevant for machine learning systems, which rely on large datasets and struggle with erasing or 'forgetting' information once it has been incorporated into their processing models.[57] Nevertheless, some cases justify prolonged data retention – such as product-liability statutes requiring records for the entire lifespan of a good, tax-audit obligations or anti–money-laundering rules under Article 5(1)(e) GDPR.[58] Despite its utility, excessive retention presents a fraught balance between transparency and privacy, especially when outdated or misleading information persists. For example, a medical device manufacturer may lawfully retain patient data for device monitoring, yet must later purge records according to an automated 'deletion flag' once the retention period expires. Implementing simple storage tiers – keeping recent data in 'active' databases and older data in separate 'archive' systems – and using basic risk-versus-benefit tables in privacy impact assessments can help to ensure that we keep data for only as long as they still have a clear value. In machine-learning systems that process huge datasets and do not have built-in ways to 'forget' data, these practical steps are crucial in telling necessary data from excess and in making the RTBF work without harming model accuracy. All these highlight the difficulty of drawing a clear line between necessary and excessive data retention, demonstrating that while more data can improve accuracy, they also raise significant legal and ethical concerns.

56 T. S. Cabral (2020), 'Forgetful AI', *supra* note 1, p. 383.

57 Ibid.

58 Article 5(1)(e) GDPR.

2.3 *The RTBF under the GDPR in the Context of AI: The Challenge of the Right to Be Forgotten for Generative AI*

The GDPR was originally conceived for traditional data processing contexts, and it does not fully account for the complexities of very large databases.[59] The processes of data input and erasure do not operate as seamlessly as one might assume or as they do on personal computers.[60] In contrast to the traditional internet, where erasure of personal data can be realised manually, erasure of data is not a straightforward task in AI models.[61] This is because an AI model is more than just lines of code; it represents a learned set of statistical relationships between data points, capturing intricate connections that are often too complex for humans fully to understand.[62] Once the model has learned these relationships, it becomes difficult to make the model disregard any part of what it has learned.[63] During the period of pre-generative AI, individuals could protect their privacy through profile setting adjustments and data deletion.[64]

However, new generative AI models, a subset of AI which can produce digital content such as images, video, audio and text by training on vast datasets, hinder the right to be forgotten due to their failure in the misuse of anonymised data.[65] In short, 'misuse' here means the failure of anonymisation – the way anonymised inputs can still re-emerge or be re-associated with individuals when processed by generative AI – undermining the RTBF's reliance on anonymisation as a privacy safeguard. Anonymised datasets used in generative AI may inadvertently disclose personal information, either through unintended data correlations or deliberate exploitation by malicious actors, thereby challenging the assumption that anonymisation guarantees pri-

59 T. S. Cabral (2020), 'Forgetful AI', *supra* note 1, p. 383.

60 Ibid.

61 S. Pastis, 'A.I.'s un-learning problem: Researchers say it's virtually impossible to make an A.I. model 'forget' the things it learns from private user data', *Fortune Europe,* 30 August 2023, available at https://fortune.com/europe/2023/08/30/researchers-impossible-remove-private-user-data-delete-trained-ai-models/, last accessed 05.05.2025.

62 Y. Xu, L. Xin, C. Zin et al., 'Artificial Intelligence: A Powerful Paradigm for Scientific Research' (2021) 2(4) *The Innovation*, pp. 709–727.

63 Ibid.

64 D. Citron and D. J. Solove, '*Privacy Harms*' (2022) 102 *Boston University Law Review*, p. 862.

65 C. Gordon, 'Google Faced with an AI Privacy Challenge: Do I Have the Right to be Forgotten?', *Forbes*, available at https://www.forbes.com/sites/cindygordon/2023/09/30/google-faced-with-a-canadian-ai-privacy-challenge-do-i-have-the-right-to-be-forgotten/, last accessed 10.03.2025.

vacy.[66] Therefore, the RTBF in the generative AI environment should extend beyond traditional privacy rights, as its current framework fails adequately to address the risks associated with anonymised data.[67] Because generative AI can reverse anonymisation, the RTBF can no longer rely solely on traditional privacy frameworks. Its underlying principles must be rethought to address the realities of today's digital ecosystem. Furthermore, retraining of data raises significant concerns in terms of the right to be forgotten: How can a person exercise his right to be forgotten? Can AI truly forget all data on which it has been trained? Generative AI reveals a loophole in the right to be forgotten due to its ability to retain and reproduce information.[68]

There are two moments when artificial intelligence collects data: first, data are collected on a massive scale to create the AI model and, secondly, data are collected during the use of AI by individuals, namely through individual user interactions. This dual-phase collection of data by various artificial intelligence systems therefore creates a close link between the GDPR and the Artificial Intelligence Regulation.[69]

Several obligations are therefore imposed on companies using AI systems. Under Article 13 GDPR and subsequent Articles, they have an obligation to inform individuals whose personal data are being processed. Individuals can also exercise their rights because of data processing, including the rights of access, rectification and erasure under Article 16 GDPR and subsequent Articles. Despite this legal protection of personal data, in practice it is difficult to compel artificial intelligence to forget the data it has processed.[70] When artificial intelligence learns from an outdated database, it will be challenging for an individual to obtain the erasure of certain data from the AI.[71] Once data have been absorbed into a model's parameters, they cannot simply be 'deleted'. The model's opacity and the entanglement of personal with non-personal data mean that, in practice, honouring an RTBF request often

66 P. Ohm, 'Broken Promises of Privacy: Responding to the Surprising Failure of Anonymization' (2010) 57 *UCLA Law Review* p 1701.

67 C. Chang (2024), 'When AI Remembers Too Much', *supra* note 17, p. 29.

68 P. Grad, 'Right to Be Forgotten Laws Must Extend to Generative AI, Say Researchers', available at https://techxplore.com/news/2023-07-forgotten-laws-generative-ai.html, last accessed 09.03.2025.

69 J. Branco De Vera, 'L'intelligence artificielle et le droit à l'oubli', *Blog Cyberjustice*, 10.01.2025, available at https://cyberjustice.blog/2025/01/10/lintelligence-artificielle-et-le-droit-a-loubli/, last accessed 17.01 2025.

70 Ibid.

71 Ibid.

requires full model retraining or advanced 'machine unlearning' techniques – solutions that remain technically and operationally burdensome.

AI systems are powered by self-learning mechanisms.[72] These mechanisms have the capability to modify their predefined algorithms in response to the data they receive as input.[73] Initially, algorithms may be transparent to their designers;[74] however, over time, when the system has cycled millions of recursive algorithms through a computational process, the system or algorithm autonomously modifies or evolves its own code or operational rules based on the data it processes or the outcomes it observes, and even the original programmers may no longer be able to determine how certain data were weighted, which correlations lead to specific inferences, or the importance assigned to certain data.[75] This behaviour of self-adaptation causes the problem of transparency.[76] This problem is commonly known as the black box dilemma in AI technologies.[77]

Why does this issue pose a problem for the traditional approach to data protection evolution? The analytical approach relies on justifying each instance of personal data processing. However, in AI systems, it is unclear which specific personal data have been utilised, how frequently they have been processed, and how they have been cross-analysed with other types of data.[78] As a result, applying the analytical approach to assessing the occurrence, extent and nature of potential violations of the right to data protection becomes unfeasible.[79] AI's lack of transparency seems to rule this out and it works in favour of AI.[80] In fact, the inherent opacity of LL.M.s – stemming from their complex architectures and training processes – hinders users' ability to discern how personal data are collected, stored and utilised, thereby impeding

72 H. Surden, 'Machine Learning and Law' (2014) 89 *Washington Law Review*, pp. 88–90; W. Hoffmann-Riem, 'Artificial Intelligence as a Challenge for Law and Regulation', in T. Wischmeyer and T. Rademacher (eds.), *Regulating Artificial Intelligence*, Springer International Publishing, Cham 2020, pp. 1–29.

73 Ibid., p. 93.

74 W. Hoffmann-Riem (2020), 'Artificial Intelligence', *supra* note 72, pp. 1–29.

75 Ibid., p. 17.

76 R. Poscher, 'Artificial Intelligence and the Right to Data Protection', in S. Voeneky et al. (eds.), *The Cambridge Handbook of Responsible Artificial Intelligence*, 1st ed., Cambridge University Press, Cambridge 2022, pp. 281–283.

77 Y. Bathaee, 'The Artificial Intelligence Black Box and the Failure of Intent and Causation' (2018) 31(2) *Harvard Journal of Law & Technology*, pp. 890–934.

78 S. Gutwirth, R. Leenes, P. De Hert (eds.), *Reloading Data Protection: Multidisciplinary Insights and Contemporary Challenges*, Springer, Dordrecht 2014, p. 221.

79 R. Poscher (2022), 'Artificial Intelligence', *supra* note 76, p. 283.

80 Ibid.

the practical exercise of rights such as erasure. Yet, transparency and user control are foundational to both the GDPR and the EU's Artificial Intelligence Regulation. Consequently, AI challenges the traditional understanding and enforcement of the right to data protection due to its lack of transparency.[81] These challenges are also reflected in the transparency requirements of the GDPR, which is largely grounded in the traditional interpretation of data protection as a fundamental right.[82]

The RTBF can be readily applied to personal data; however, its implementation in the context of AI presents significant challenges.[83] For instance, AI models such as DALL-E are trained on vast datasets comprising numerous images and concepts, enabling them to generate new outputs.[84] Once the training phase is completed, these models lack the ability to filter specific data selectively.[85] The sheer scale of datasets used – often reaching billions of parameters – combined with the inherent complexity and opacity of neural networks – makes targeted data removal, such as forgetting specific information, exceptionally difficult.[86]

The removal of personal data from the training corpus does not automatically expunge them from an already-trained model; effective erasure can be achieved only through a full retraining of the system, and large-scale language models routinely require several months to train – LLaMA, for example, was trained between December 2022 and February 2023 – which far exceeds the GDPR's 'undue delay' threshold (approximately one month under Article 17).[87] Moreover, the selective removal of personal data from a deployed model presents significant technical challenges, as the model's parameter set constitutes an inseparable integration of the entire training corpus.[88] A further com-

81 N. Marsch, 'Artificial Intelligence and the Fundamental Right to Data Protection: Opening the Door for Technological Innovation and Innovative Protection', in T. Wischmeyer and T. Rademacher (eds.), *Regulating Artificial Intelligence*, Springer International Publishing, Cham 2020, p. 36.

82 R. Poscher (2022), 'Artificial Intelligence', *supra* note 76, p. 283.

83 C. Chang (2024), 'When AI Remembers Too Much', *supra* note 17, p. 36.

84 R. O 'Connor, 'How DALL-E 2 Actually Works', available at https://www.assemblyai.com/blog/how-dall-e-2-actually-works/, last accessed 10.03.2025.

85 K. Hays, 'OpenAI Offers a Way for Creators to Opt out of AI Training Data. It's so Onerous That One Artist Called It "Enraging"', *Business Insider*, available at https://www.businessinsider.com/openai-dalle-opt-out-process-artists-enraging-2023-9, last accessed 10.03.2025.

86 Ibid.

87 D. Zhang, P. Finckenberg, T. Hoang et al. (eds.) (2024), 'Right to be Forgotten in the Era of Large Language Models', *supra* note 10.

88 Ibid.

plication stems from the difficulty of purging 'hallucinated' outputs – content that was never explicitly present in the training corpus – and therefore cannot be removed by deleting training records; as a result, eliminating such spurious information from the model proves technically intractable.[89]

The GDPR's mandate ensuring the inaccessibility of forgotten information does not inherently guarantee its absolute elimination from AI architectures; rather, the removal processes may merely transform the representation of such data.[90] Within AI models, residual traces of ostensibly erased data may persist in influencing outputs, as learned patterns become ingrained within the system's computational framework.[91] Consequently, the realisation of a substantive 'right to be forgotten' in the realm of AI remains more theoretical than actionable.[92] Achieving comprehensive data erasure would necessitate not only regulatory interventions but also substantial technological breakthroughs.[93] For large-scale AI models, this could involve the formidable challenge of reconfiguring and retraining models with modified datasets – a process that is both computationally prohibitive and operationally impractical in response to recurring deletion requests.[94]

The application of the right to be forgotten within AI frameworks is further complicated by the intrinsic nature of these systems, which do not simply erase training data but rather integrate them into intricate networks of learned associations and predictive models.[95] Consequently, the removal of specific data points is analogous to modifying entrenched cognitive patterns in the human brain, rendering selective forgetting a highly complex endeavour.[96]

From a practical standpoint, enforcing the right to be forgotten demands a multifaceted strategy that extends beyond legal mandates to encompass technical feasibility and cost considerations.[97] Following the precedent established by the CJEU in *Google Spain SL v AEPD*, Google was required to assess

89 Ibid.

90 M. Burgess, 'How to Delete Your Data from ChatGPT', available at https://www.wired.com/story/how-to-delete-your-data-from-chatgpt/ last accessed 10.03.2025.

91 S. Pastis (2023), 'A.I.'s un-learning problem', *supra* note 61.

92 Ibid.

93 Ibid.

94 Ibid.

95 Ashoka, 'We Forgot To Give Neural Networks The Ability To Forget', Forbes, available at https://www.forbes.com/sites/ashoka/2023/01/25/we-forgot-to-give-neural-networks-the-ability-to-forget/, last accessed 10.03.2025.

96 Ibid.

97 ENISA, 'The right to be forgotten - between expectations and practice', 20.11.2012, available at https://www.enisa.europa.eu/publications/the-right-to-be-forgotten, last accessed 10.03.2025.

and implement individual de-indexing requests through labour-intensive manual review.[98] In the context of AI, this complexity is significantly magnified, necessitating ongoing surveillance and, in many cases, the retraining of models – a process that is not only resource-intensive but often operationally impractical.[99]

Ultimately, while the right to be forgotten remains a fundamental component of privacy and data protection laws, its applicability to AI, particularly in generative models such as GPT-4 and DALL-E, introduces unprecedented technical obstacles.[100] These challenges necessitate a fundamental reassessment of the concept of 'forgetting' within machine learning and whether it can be meaningfully implemented.[101] Without addressing these obstacles, the right to be forgotten risks remaining a theoretical ideal rather than an enforceable principle in the realm of AI.[102]

2.3.1 From the EU AI Act Perspective

The EU's AI Act does not currently mandate 'forgetting' mechanisms for generative AI. However, future amendments or complementary regulations may introduce algorithmic unlearning as a legal requirement to align AI processing with the GDPR's RTBF. The lack of an RTBF enforcement mechanism in the AI Act is a critical shortcoming that affects the alignment between AI governance and data protection laws. This gap underscores the need for future regulatory updates or complementary frameworks that explicitly address the technical and legal challenges of forgetting in AI systems. Article 17 GDPR grants individuals the right to request data erasure, but the AI Act does not clarify how this right should be implemented in AI systems that have already incorporated the data into their models. As explained, unlike structured databases, AI models embed learned patterns, making selective data deletion practically unfeasible without retraining. The AI Act remains silent on how the RTBF should be enforced in such cases.

In addition to Article 17 GDPR, the EU's AI Act contains a suite of provisions directly addressing how personal data must be handled in AI lifecycles. Article

98 Google, Right to be Forgotten Overview – Legal Help, available at https://support.google.com/legal/answer/10769224?hl=en&sjid=18412393822176023237-NA, last visited 10.03.2025.

99 S. Greengard, 'Can AI Learn to Forget?' (2022) 65(4) *Communications of the ACM*, p. 9.

100 C. Chang (2024), 'When AI Remembers Too Much', *supra* note 17, p. 37.

101 Ibid.

102 Ibid.

10 mandates that training, validation and testing datasets must be 'relevant, representative, free of errors, and complete in relation to the intended use', echoing the GDPR's data-minimisation and accuracy principles. Article 10 of the EU's AI Act addresses the issue of bias in training data, but it is specifically aimed at developers of predictive AI systems in high-risk areas, not developers of generative AI.[103] If generative AI is developed for a high-risk area, developers are required to comply with these rules. However, the effectiveness of Article 10 in addressing generative discrimination will largely depend on how 'bias' is interpreted within the AI Act.[104] Currently, it is uncertain whether the harms discussed in this paper would be classified under the AI Act's concept of 'bias'.[105] Regulators might interpret 'bias' in a technical sense (regarding the diversity of training data) rather than in a social and ethical sense (relating to demeaning and abusive content).[106]

The EU's AI Act, specifying the relationship of the data minimisation principle and data governance obligations under its Article 10(5), stipulates that the providers of AI systems may exceptionally process special categories of personal data, but only to the extent that they are strictly necessary for the purposes of ensuring bias monitoring, detection and correction related to these high-risk AI systems, subject to appropriate safeguards for the fundamental rights and freedoms of natural persons, such as pseudonymisation or encryption. According to Article 6(1)(f) of the GDPR, legitimate interest might serve as a lawful ground for processing to avoid biased data and discrimination. However, this legitimate interest alone is not sufficient, as it must also meet the exemption requirements under Article 9(2) GDPR, which is not always feasible.[107] Article 10(5) of the EU's AI Act might be invoked as an exemption under Article 9(2)(g) GDPR; however, ensuring safeguards for the data subject's fundamental rights could be challenging, especially when large amounts of special categories of data are being processed.

Article 12 requires providers to maintain comprehensive technical documentation and logs, which can support downstream erasure requests by trac-

103 M. Van Bekkum, 'Using Sensitive Data to De-Bias AI Systems: Article 10(5) of the EU AI Act' (2025) 56 *Computer Law & Security Review*, pp. 1–11.

104 P. Hacker, F. Zuiderveen Borgesius, B. Mittelstadt, S. Wachter, 'Generative Discrimination: What Happens When Generative AI Exhibits Bias, and What Can Be Done About It', in P. Hacker, A. Engel, S. Hammer, B. Mittelstadt (eds.), Oxford University Press, Oxford 2024, p. 39.

105 Ibid.

106 Ibid.

107 E. Drouard, O. Kurochkina, R. Schilch, D. Ozturk, 'The interplay between the AI Act and the GDPR' (2024) 1(2) *Journal of AI Law and Regulation.*

ing data provenance. Under Article 14, users must be clearly informed of the categories of personal data processed, mirroring the GDPR's transparency duties in Articles 12–14. Moreover, the EU's AI Act's risk-management framework in Article 9 and its obligation for human oversight in Article 16 create natural touchpoints for incorporating RTBF into AI operations: risk assessments should evaluate erasure feasibility, and oversight mechanisms must ensure that deletion requests trigger concrete technical actions. By mapping these AI Act data-governance rules onto existing GDPR rights, we can identify where 'algorithmic unlearning' requirements may be introduced to close the current enforcement gap.

2.4 *Strengthening the Right to Be Forgotten in AI Systems: Legal and Technological Considerations*

To address the complex and persistent risks associated with AI effectively, especially considering the current gaps in regulation, it is crucial to expand the RTBF.[108] This expanded right should be all-encompassing, covering the entire data lifecycle, including stages such as collection, storage, processing and deletion.[109] To clarify, when I argue that the RTBF ought to encompass the entire data lifecycle – including collection, storage, processing and deletion – I do not claim that current legal frameworks universally achieve this breadth in practice. Rather, Article 17 GDPR theoretically grants erasure rights at every stage, but real-world implementation often falls short. Each stage of the data lifecycle presents its own unique challenges and nuances, and so the right to be forgotten must be tailored to meet the specific needs and contexts of these different phases to ensure its proper implementation.[110] AI's risks are both intricate and long-lasting, and regulatory shortcomings exacerbate them. Therefore, broadening the right to be forgotten is essential for advancing towards an effective solution.[111] This expansion must account for the distinct characteristics and difficulties inherent in each phase of data management.[112]

International efforts to regulate generative AI, particularly ChatGPT, highlight the importance of balancing the protection of individual rights with the

108 C. Chang (2024), 'When AI Remembers Too Much', *supra* note 17, p. 38.

109 Ibid.

110 K. Roose, 'A.I. Poses Risk of Extinction', Industry Leaders Warn', *The New York Times*, 30.05.2023, available at https://www.nytimes.com/2023/05/30/technology/ai-threat-warning.html, last accessed 10.03.2025.

111 C. Chang (2024), 'When AI Remembers Too Much', *supra* note 17, p. 38.

112 Ibid.

promotion of innovation.[113] A significant example is the intervention of Italy's Data Protection Authority, the Garante, against OpenAI's ChatGPT, which underscores the urgent need for effective regulatory frameworks in line with the GDPR.[114] The Garante raised concerns about transparency in data processing, the legal basis for data collection, the accuracy of generated content, and safeguards for children,[115] all of which relate to potential violations of key GDPR provisions such as Articles 5, 6, 8, 13 and 25.[116] The Garante's decision required OpenAI to take corrective measures, such as improving transparency in data processing and ensuring a legitimate legal basis for data collection.[117] This intervention reflects the EU's commitment to data protection and privacy rights, particularly as generative AI technologies continue to evolve.[118] While the Garante's ChatGPT decision did not explicitly cite Article 17, its requirements on transparency, lawful processing, accuracy and privacy-by-design create the necessary preconditions for effective RTBF claims against generative AI systems.

The case also emphasises the need for a dedicated body, such as an Algorithm Committee, to oversee AI algorithms and ensure compliance with regulations like the GDPR.[119] Such a committee could address concerns related to transparency, data accuracy and child protection, thus maintaining a balance between protecting individual rights and fostering technological innovation.[120] This committee would play a key role in algorithmic accountability and data privacy.

113 Ibid., p. 42.

114 F. D 'Emilio and M. O'Brien, 'Italy temporarily blocks ChatGPT over privacy concerns', *AP News,* 01.04.2023, available at https://apnews.com/article/chatgpt-ai-data-privacy-italy-66634e4d9ade3c0eb63edab629150 66f, last accessed 10.03.2025.

115 Garante Per La Protezione Dei Dati Personali (GPDP), 'Provvedimento del 30 marzo 2023 [9870832]', available at https://www.garanteprivacy.it:443/home/docweb/-/docweb-display/docweb/9870832, last accessed 10.03.2025.

116 C. Chang (2024), 'When AI Remembers Too Much', *supra* note 17, p. 42.

117 GPDP, 'Provvedimento del 30 marzo 2023 [9870832]', *supra* note 115.

118 K. Roose, 'A.I. Belongs to the Capitalists Now', *The New York Times*, 12.11.2013, available at https://www.nytimes.com/2023/11/22/technology/openai-board-capitalists.html, last accessed 10.03.2025.

119 University of Technology Sydney, *Human Rights and Technology Issues Paper: UTS Submission, 2018*, pp. 59 -61, available at https://www.uts.edu.au/globalassets/sites/default/files/2018-12/human-rights–technology-issues-paper_uts-submission.pdf, last accessed 10.03.2025.

120 C. Chang (2024), 'When AI Remembers Too Much', *supra* note 17, p. 42.

2.4.1 Solution Recommendations for Enhancing the Right to Be Forgotten in AI and Machine Learning Environments

Given the complexities of implementing the RTBF within the context of rapidly evolving AI and machine learning technologies, several practical solutions can be proposed to bridge the gap between technological realities and legal frameworks. These recommendations focus on addressing regulatory shortcomings, incorporating innovative technical solutions and enhancing the integration between law and technology to ensure a more effective protection of personal data in AI environments.

2.4.1.1 *Data Minimisation*

One of the most fundamental approaches to safeguarding the RTBF is through the principle of data minimisation, which aims to limit the collection of unnecessary personal data.[121] As articulated in privacy laws like the GDPR, the less personal data that is collected, the fewer challenges there will be in deleting or 'forgetting' those data.[122] By reducing the volume of data, companies and governments can more effectively comply with the RTBF. In other terms, by limiting the collection of personal data at the outset, data minimisation reduces the volume of information that may later be subject to erasure requests. If unnecessary personal data are excluded during model training, LL.M.s are less likely to require complex 'unlearning' procedures. Moreover, with a more narrowly defined dataset, data provenance and traceability improve, making targeted data removal more feasible within AI systems. Regulatory bodies could support this approach by issuing guidance documents to inform and assist data controllers in adopting data minimisation strategies, as in the case of the Dutch Data Protection Authority which has implemented successful initiatives, such as recommending the anonymisation of personal identification information when scanning identification documents, thereby reducing the collection of sensitive data.[123] Encouraging such best practices, and potentially mandating them in high-risk areas like AI, would significantly ease the implementation of the RTBF.

121 E. F. Villaronga, P. Kieseberg and T. Li, 'Humans Forget, Machines Remember: Artificial Intelligence and the Right to Be Forgotten' (2018) 34(2) *Computer Law & Security Review*, p. 304.

122 Ibid.

123 Ibid.

2.4.1.2 *Purely Technical Solutions*

Advancements in AI and machine learning have necessitated the development of innovative technical solutions for data deletion, which can complement or even replace traditional methods.[124] However, current legal frameworks, including the GDPR, do not provide clear guidelines regarding which methods of deletion meet legal standards.[125] Some methods, such as differential privacy, are designed so that statistical outputs cannot be traced back to any individual, even though the underlying raw data themselves remain intact.[126] These technologies offer viable alternatives to traditional data deletion by safeguarding personal data while enabling the use of AI models. Further interdisciplinary research is necessary better to understand the full spectrum of technical solutions available, as well as their compatibility with existing legal frameworks.[127] Regulators and policymakers should actively encourage such innovations and consider them as legitimate ways to address RTBF challenges in the AI context.

There are two main types of solutions to address AI privacy challenges: privacy-preserving machine learning (PPML) and post-training methods, which include fixing the original model and temporary fixes. As mentioned earlier, while these approaches are promising, further research is still required.[128] The aim here is to highlight potential solution areas for implementing the RTBF in LL.M.S. PPML aims to protect privacy during the machine-learning process, addressing risks like data leaks and inference attacks.[129] A key technique, Differential Privacy (DP), allows training with formal privacy guarantees.[130] While DP can enable effective synthetic text generation and the training of smaller models, its current use in LL.M.S is limited and insufficient for strong privacy protection.[131]

---

124 Ibid.

125 Ibid.

126 Ibid., p.309.

127 Ibid.

128 D. Zhang, P. Finckenberg, T. Hoang et al. (2024), 'Right to Be Forgotten in the Era of Large Language Models', *supra* note 10.

129 M. Al-Rubaie and J. M. Chang, 'Privacy-Preserving Machine Learning: Threats and Solutions' (2019) 17(2) *IEEE Security and Privacy*, p. 49.

130 X. Yue et al., 'Synthetic Text Generation with Differential Privacy: A Simple and Practical Recipe', *Proceedings of the 61st Annual Meeting of the Association for Computational Linguistics* (*Volume 1: Long Papers*), Association for Computational Linguistics., Toronto 2023, pp. 1321–1342.

131 D. Zhang, P. Finckenberg, T. Hoang et al. (2024), 'Right to Be Forgotten in the Era of Large Language Models', *supra* note 10.

As a type of post-training method, machine unlearning methods, which aim fully or partially to remove specific data from AI models.[132] One method is exact unlearning, which retrains the model by partitioning the data (for example, sharded, isolated, sliced and aggregated training (SISA) method), but can raise fairness concerns.[133] Another approach is approximate unlearning, which adjusts the model weights to mimic the effect of data removal but also carries the risk of over-unlearning, potentially degrading model performance.[134] Both approaches are promising but not yet widely adopted in industry.[135]

Another type of post-training method is band-aid approaches, which modify model behaviour without changing the original model.[136] Two main solutions exist: Model editing keeps the model as it is and stores changes separately, but this can cause inconsistencies.[137] Guardrails add external controls (for example, blocking outputs via prompts), but face risks like prompt attacks and do not fully comply with legal data removal requirements, making them an incomplete solution on their own.[138]

2.4.1.3 *Regulatory-Technical Solutions*

A promising approach to addressing the challenges of the RTBF in AI systems involves integrating legal and technological frameworks. As Gasser notes in his work on the relationship between law and technology, integrated privacy tools that combine legal and technical approaches offer a more robust solu-

132 Ibid.

133 L. Bourtoule, V. Chandrasekaran, C.A. Choquette-Choo et al., 'Machine Unlearning: 42nd IEEE Symposium on Security and Privacy, SP 2021', *Proceedings- 2021 IEEE Symposium on Security and Privacy SP 2021*, pp. 141-159.

134 D. Zhang, P. Finckenberg, T. Hoang et al. (2024), 'Right to Be Forgotten in the Era of Large Language Models', *supra* note 10.

135 H. Hu, S.Wang, J.Chang et al., 'A Duty to Forget, a Right to Be Assured? Exposing Vulnerabilities in Machine Unlearning Services', *Proceedings 2024 Network and Distributed System Security Symposium*, available at https://www.ndss-symposium.org/wp-content/uploads/2024-252-paper.pdf, last accessed 02.05.2025.

136 D. Zhang, P. Finckenberg, T. Hoang et al. (2024), 'Right to Be Forgotten in the Era of Large Language Models', *supra* note 10.

137 E. Mitchell et al., 'Fast Model Editing at Scale', *arXiv.org*, 21.10.2021, available at https://arxiv.org/abs/2110.11309v2, last accessed 02.05. 2025; Eric Mitchell et al., 'Memory-Based Model Editing at Scale', *arXiv.org*, 13.06.2022, available at https://arxiv.org/abs/2206.06520, last accessed 02.05 2025.

138 T. Rebedea et al., 'NeMo Guardrails: A Toolkit for Controllable and Safe LL.M. Applications with Programmable Rails', *arXiv.org*, 16.10.2023, available at https://arxiv.org/abs/2310.10501, last accessed 02.05.2025.

tion for information privacy.[139] Such tools could provide a dual layer of protection, blending the strengths of legal regulations with the capabilities of cutting-edge technologies. For instance, programming languages like Jeeves, developed to enforce data protection policies, or projects such as the Harvard Privacy Tools Project could serve as foundational examples of how technology can support legal compliance.[140] Although the legal community may still question the sufficiency of these integrated tools, ongoing research and collaboration between technologists and legal scholars can help to refine these solutions and demonstrate their efficacy.[141] Ultimately, integrated tools could play a crucial role in making AI systems more compliant with the RTBF, ensuring a balance between data protection and technological innovation.

2.4.1.4 *Legal and Policy Adaptations*

In addition to technical and integrated solutions, it is essential to adapt existing legal frameworks to better reflect In addition to technical and integrated solutions, it is essential to adapt existing legal frameworks better to reflect the realities of AI and machine learning.[142] While updating comprehensive regulations like the GDPR to account for new technologies is a complex and time-consuming process, there are still opportunities for regulatory authorities to facilitate the RTBF through guidance and standards.[143] For instance, technical standards, such as the ISO/IEC 29134:2017 Guidelines for Privacy Impact Assessment, provide detailed instructions on managing privacy risks and could offer an important tool for data controllers seeking to comply with the RTBF.[144] Its standards provide better guidance than does Article 35 GDPR in terms of the privacy impact assessment process.[145] While these standards are not legally binding, they offer a soft law approach that can address the pace of technological advancements more quickly than formal legislative processes.[146]

---

139 U. Gasser, 'Recoding Privacy Law: Reflections on the Future Relationship Among Law, Technology, and Privacy' (2016) 130(2) *Harvard Law Review*, pp. 61-70.

140 Y. Qu et al., 'Learn to Unlearn: A Survey on Machine Unlearning', *arXiv.org*, 12.05.2023, available at https://arxiv.org/abs/2305.07512, last accessed 20.01.2025.

141 E. F. Villaronga, P. Kieseberg and T. Li (2018), 'Humans Forget, Machines Remember', *supra* note 121, p. 16.

142 Ibid.

143 Ibid., p. 17.

144 Ibid.

145 Ibid.

146 R.N. Shea, 'Robot Safety Standard Update: Safety Regulatory Compliance', 22.02.2013, available at https://fr.scribd.com/document/474643492/TH-RIA-Roberta-Nelson-Shea-pdf, last accessed 10.03.2025.

However, it is crucial to recognise the limitations of soft law and ensure that it is used in conjunction with binding legal frameworks to provide enforceable protections.

Additionally, regulatory authorities could provide targeted guidance documents or best practices that offer more immediate compliance pathways for AI developers, data controllers and technology providers. These documents could clarify how emerging technologies, like differential privacy or AI-specific data processing methods, can be used to meet the requirements of the RTBF without the need for drastic legal changes. By taking a collaborative approach that integrates industry input, regulatory oversight and technological innovation, regulators can foster a more adaptive and responsive regulatory environment.[147]

2.4.1.5 *Intergovernmental Cooperation and Harmonisation*

The challenges of AI and machine learning are global, and international cooperation is crucial in ensuring the consistent application of the RTBF across borders.[148] Given the cross-border nature of data flows, national regulations must be harmonised to avoid inconsistencies that could undermine privacy protections. International bodies, such as the European Union, the Council of Europe and the OECD, can play a pivotal role in developing shared principles and guidelines for the RTBF in the context of AI, facilitating smoother global compliance.[149] Under Article 11 of the Framework Convention on Artificial Intelligence of the Council of Europe enshrines the RTBF within AI governance, ensuring that individuals retain the power to request the deletion of their personal data throughout AI lifecycles, underpinned by design obligations, supervisory oversight and harmonised GDPR principles.[150] Collaborative efforts in research, standard-setting and knowledge exchange can ensure that regulatory bodies are equipped to handle the nuances of AI technology

147 K. W. Abbott, D. Snidal, 'Hard and Soft Law in International Governance' (2000) 54(3) *International Organization*, pp. 421-456.

148 T. Hemphill, P. Longstreet, 'How Private Governance Mitigates AI Risk', *The Center for Growth and Opportunity*, 2025, available at https://www.thecgo.org/research/how-private-governance-mitigates-ai-risk/, last accessed 10.03.2025.

149 C. Chang (2024), 'When AI Remembers Too Much', *supra* note 17, p. 40.

150 Art 11 Council of Europe, Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law, 05.09.2024, available at https://www.coe.int/en/web/artificial-intelligence/the-framework-convention-on-artificial-intelligence, last accessed 29.04.2025.

while safeguarding individuals' rights.[151] In other terms, collaboration among legal scholars, AI developers and regulatory authorities is indispensable for devising pragmatic, ethically sound solutions that align with European regulatory frameworks.

3 Conclusion

The RTBF intersects in a complex manner with the fields of law, technology and ethics. To ensure the effective protection of the Right to Be Forgotten in AI environments, it is essential to adopt a multifaceted approach that combines legal, technical and policy innovations. As this paper has discussed, the advent of generative AI introduces challenges that complicate traditional notions of privacy, data protection and the feasibility of data deletion. While existing legislative frameworks, such as the GDPR, offer foundational guidance, effectively safeguarding the right to be forgotten in the context of AI requires a more holistic and detailed approach.

Several critical insights emerge from this analysis. First, the right to be forgotten should be established as an autonomous right, rooted in the principle of personal data self-determination, and should extend beyond privacy or reputational concerns which would grant individuals greater control over their data within AI systems.[152] Secondly, it is essential to recognise the inherent limitations of AI technology regarding data deletion, necessitating a careful balancing of individual rights with technical limitations and societal interests.[153] Regulatory creativity is required to address issues such as the traceability of anonymised data. Thirdly, the continuous evolution of legal frameworks is necessary, achieved through collaboration among oversight bodies, the private sector and international regulatory efforts.[154] As discussed, a balanced approach, integrating human values and technological capabilities, is vital. In this regard, solutions such as data minimisation, innovative privacy technologies, integrated legal and technical frameworks, and adaptive legal regulations all offer practical pathways. At the same time, international cooperation is necessary to ensure that these solutions are applied consistently and effectively across jurisdictions. By embracing these recom-

151 T. Hemphill, P. Longstreet (2025), 'How Private Governance Mitigates AI Risk', *supra* note 148.

152 C. Chang (2024), 'When AI Remembers Too Much', *supra* note 17, p. 45.

153 Ibid.

154 Ibid.

mendations, regulators and policymakers can navigate the challenges posed by AI and machine learning while upholding the core principles of data protection and individual privacy.

In conclusion, while the challenges presented by generative AI to the right to be forgotten are significant, by implementing nuanced legal frameworks and fostering ethical AI development, it is possible to harness the benefits of AI technologies while upholding human dignity and protecting individual rights. As the digital environment evolves, maintaining this balance must be a collective responsibility of legislators, regulators, technologists and civil society. While not a catch-all remedy, the RTBF remains a crucial reference point for embedding human-centred privacy principles in AI governance.

PART 3

Organization for Security and Co-operation in Europe (OSCE)

∴

Very Unfinished Business: The OSCE and Human Rights, 50 Years On

Christian Strohal

1 Introduction

When they met in Helsinki on 31 July 1975 for an unprecedented all-European summit, little did the heads of state and government representing 35 countries[1] expect that they were about to engage a long-term process for changing geopolitical fundamentals: after all, the Cold War was still the status quo, in spite of some positive developments towards détente in the so-called German Question and in US–Soviet relations. While strengthening security in Europe was the declared goal in the two-year preparatory process leading to the Helsinki summit, the other goal of advancing the protection of human rights had quickly become as entrenched in the East–West confrontation as it had been the case for years already in the framework of the United Nations (UN). Nevertheless, the power of the Helsinki Final Act (HFA) adopted on 1st August 1975 proved to be stronger than expectations, particularly its long-term effects because of two factors: the continuing diplomatic processes as well as the strengthening of the position and role of civil society who were legitimized by the HFA's and became more forceful in recalling the obligations especially in the communist countries.

Fifty years later, however, there is little to celebrate: not only is war raging again in Europe, with Russia violating with its illegal war of aggression against Ukraine all Principles of the HFA as well as core principles of international law; also, the implementation of the detailed commitments contained in the so-called 'human dimension' chapters continues to be highly imbalanced and often incomplete, if not openly questioned and flaunted by some governments.

This is not the place to review in detail the different stages of the Conference for Security and Cooperation in Europe (CSCE or Helsinki process) and its successor, the Organization for Security and Cooperation in Europe (OSCE),

1 Reflecting the geopolitical situation prevailing then, all European states including the Soviet Union and excluding Albania were joined by the USA and Canada. In addition, countries from the southern side of the Mediterranean took part as guests.

© CHRISTIAN STROHAL, 2026 | DOI:10.1163/9789004751026_019
This is an open access chapter distributed under the terms of the CC-BY-NC-ND 4.0 license.

established in 1994.[2] Rather, we summarize the long-winded and bumpy road of developing government commitments to human rights, the rule of law, and democracy, and efforts to strengthen their concrete implementation.

2 The Promise of Helsinki and Its Follow-Up

At the outset, efforts concentrated around two distinct sets of priorities: In the Helsinki Decalogue of ten fundamental principles governing the behaviour of states towards each other, and towards their citizens, a balance had to be found, on one hand, between the principles of sovereignty and non-interference in the internal affairs of another state (Principles I and VI) and the 'respect for human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief' (Principle VII). In the subsequent paragraphs of Principle VII, the essence of the effective exercise of human rights is contained, together with minority rights, the 'right of the individual to know and act upon his rights' and the significance of human rights and fundamental freedoms for peace and justice; cooperation with the UN is also referred to.

In the ensuing chapters on implementation of these principles, drafters had mostly focused on practical measures in three broad 'baskets' – political-military co-operation and confidence-building; economic cooperation including environment, science, and transport; and the somewhat shyly named third

2 We do not provide an overview about relevant literature. In addition to the organization's website www.osce.org, where all relevant documents can be found, and the websites of its institutions and field missions, a number of platforms provide entry points, e.g.: Centre for OSCE Research at the University of Hamburg (ed.), 'OSCE Insights', available at www.ifsh.de (replacing the former OSCE Yearbook); Center for Security Studies at ETH Zurich www.css.ethz.ch; the Geneva Centre for Security Policy, www.gcsp.ch; and the Security and Human Rights Monitor www.shrmonitor.org. For a coordinated perspective of over 100 NGOs, see www.civicsolidarity.org (all last accessed on 01.07.2025).

On the origins of the Helsinki Final Act and its consequences, see the recollections of a participant in M. Reimaa, *Helsinki Catch, European Security Accords 1975*, Edita: Helsinki, 2008 and more recently M.C. Morgan, *The Final Act, the Helsinki Accords and the Transformation of the Cold War*, Princeton University Press: Princeton, 2018. For further testimonials see as well OSCE (ed.), *CSCS Testimonies, Causes and Consequences of the Helsinki Final Act 1972–1989*, OSCE: Prague, 2013. S. Pöllinger, *Der KSZE/OSZE Prozess, ein Abschnitt Europäischer Friedensgeschichte*, Braumüller: Wien, 1998 and M.Borchard et al. (eds.), *Entspannung im Kalten Krieg, Der Weg zum Moskauer Vertrag und zur KSZE*, Leykam: Graz/Wien, 2020. For a critical appraisal of developments beyond the Charter of Paris, see S. Lehne, *The CSCE in the 1990s - Common European House or Potemkin Village?*, Braumüller: Wien, 1991.

basket on 'Co-operation in Humanitarian and Other Fields' concentrating on crucial issues in the Est-West-context of that time such as human contacts, reunification of families, travel facilitation, access to information, scientific and cultural exchanges and education. Fundamental civil and political rights were not explicitly specified.

Already at Helsinki, US president Gerald Ford coined the phrase that what mattered were 'not the promises we make, but the promises we keep'. Subsequently, governments were reminded of their promises more systematically than some of them may have expected.[3]

It is precisely these civil and political rights and their continuing repression by communist governments, however, that have arguably dominated the subsequent elaboration of the commitments for what has become known as the 'human dimension', encompassing fundamental human rights, the rule of law, and democracy. This patient drafting effort, stretching over a number of years, was facilitated mainly by two factors: On the one hand, the provisions in the HFA for a follow-up process, which included not only periodic follow-up conferences, but also increasingly specialized expert meetings, were implemented even in times of geopolitical reversals; on the other hand, the provisions on information exchange empowered civil society, often in newly created 'Helsinki Committees', as well as individual politicians to hold governments accountable against this growing body of detailed commitments.

Overall, the core of these commitments was the product of the formal CSCE follow-up meetings – in Belgrade 1977–78, Madrid 1980–83, and especially Vienna 1986–89 – and expert meetings, in particular the Copenhagen Meeting on the Human Dimension 1990.[4]

Looking at the commitments, one can identify several strands in substance and procedure alike:

Following up on the HFA, issues were amplified and added upon. While freedom of religion, minorities and information continued to figure prominently, the structure of the third basket was followed closely in the Madrid and Vienna concluding documents. The Copenhagen meeting on the human

3 See R. Davy, 'Helsinki Myths: Setting the Record Straight on the Final Act of the CSCE, 1975', (2009) 9 (1) *Cold War History*, pp. 1–22 and also D. Fried, 'Fifty Years Later, the Helsinki Process Stands as a Turning Point for Human Rights in Europe', *The New Atlanticist*, 01.09.2023, available at https://www.atlanticcouncil.org/blogs/new-atlanticist/csce-fifty-years-human-rights-europe/, last accessed on 01.07.2025.

4 The human dimension commitments are compiled thematically and chronologically in ODIHR, OSCE – Human Dimensions Commitments, 4th edition, 2023, available at https://www.osce.org/odihr/human-dimension-commitments-thematic, last accessed on 01.07.2025.

dimension specified the HFA commitments and enlarged them considerably, especially in the fields of elections, democratic institutions, the rule of law and national human rights safeguards, non-discrimination and persons with specific needs. Later, commitments were added regarding specific threats to human security, such as trafficking in human beings, illicit trafficking in drugs and arms, and the prevention of terrorism.

Altogether, while the commitments are of a political rather than legal nature, it has been argued throughout and convincingly that they are equally binding on participating States.[5] And from the beginning, it was made clear that human rights were not only 'internal affairs', but a shared responsibility.

3 The Growing Institutionalization towards an Organization: The Human Dimension Is Strengthened by Specific Institutions

After the end of the Cold War and the breakdown of the Soviet Union, further steps for the practical implementation of human rights commitments and its control were taken, together with the growing institutionalization of the process, and in 1990, the second summit met, 15 years after Helsinki, adopting the Charter of Paris for a New Europe. Subsequently, summits accelerated, with those at Helsinki 1992, Budapest 1994 and Lisbon 1996, as well as Istanbul 1999. However, after Istanbul it took until 2010 to convene another summit, at Astana, which only had limited success.

Of particular importance for the operationalization of the human dimension commitments proved the creation of an Office for Free Elections, to be located in Warsaw as foreseen in the Paris Charter. This office was subsequently restyled as Office for Democratic Institutions and Human Rights (ODIHR) at the Helsinki summit in 1992, in recognition that the original purpose of assisting the 'new' democracies in electoral processes could better be achieved by a broader mandate. So, it was decided that the ODIHR was to help states

> 'to ensure full respect for human rights and fundamental freedoms, to abide by the rule of law, to promote principles of democracy and … to

5 It has also been pointed out that given the numerous cross-references to international (human rights) law, these commitments may create customary international law – e.g. E. Menton, 'The OSCE Human Dimension Process and the Process of Customary International Law Formation', IFSH (ed.), *OSCE Yearbook 2005*, Nomos: Baden-Baden, 2006, pp. 195–214.

> build, strengthen and protect democratic institutions, as well as promote tolerance throughout society.'

The Helsinki summit also created a new institution: the High Commissioner on National Minorities, as an 'instrument of conflict prevention at the earliest possible stage'. Located in the Hague, the different High Commissioners, supported by a small secretariat, were developing silent diplomacy at the highest political levels to address concrete situations, but also reporting to the Chairpersonship; in addition, they developed several sets of thematic recommendations and guidelines, to offer guidance on developing policies that may help ease inter-ethnic tensions.

In 1997, the Representative for the Freedom of the Media was established, in Vienna, as the third institution. This mandate combines early warning and rapid response functions regarding non-compliance with media freedom commitments including the safety of journalists. In addition to monitoring, engaging and reporting their activities include, like those of the other two institutions, the elaboration of specific reports and tools to assists governments in fulfilling their commitments.

The heads of all three institutions report regularly to the Permanent Council and the chairpersonship on their activities. While the institutions themselves are autonomous in their work within their respective mandate, the core funding is part of the OSCE budget and therefore subject to governmental decision-making.

Of importance proved to be furthermore the creation of a Parliamentary Assembly (PA), as called for in the Paris Charter, at a follow-up meeting of parliamentarian representatives in 1991: As the working methods of this autonomous body with its own secretariat (established subsequently in Copenhagen) included the possibility to take decisions by a vote, in contrast to the governmental processes defined by the consensus principle, a considerable number of initiatives can be traced back to the PA, especially in the field of human rights. Its annual meetings are conducted within three committees, along the three 'baskets', or dimensions, and are complemented by Special Representatives nominated for specific issues.[6]

At the same time, the Helsinki process was also institutionalized at the governmental level: The Paris Charter laid the ground for moving from a 'travelling' conference process into a diplomatic structure, supported by a secretariat and a Conflict Prevention Centre, with a permanent diplomatic 'machinery'

6 See www.oscepa.org.

established around weekly meetings in Vienna, and a political leadership elected for a calendar year ('Chairman-in-Office'). Members – still called 'participating States' – were to meet annually at ministerial level and periodically at the level of heads of state and government; also among EU delegations, there was little appetite to take this dimension seriously.

With these parallel developments of creating autonomous institutions and a continuous diplomatic and political process, human rights issues increasingly took centre stage, together with arms control issues and confidence building measures in the political-military field. The second dimension, economic and environmental issues, remained secondary, a fact subject to increasing complaints from the Russian Federation and a few other states who did little, however, to address this possible imbalance through concrete proposals of themselves; also among EU delegations, there was little appetite to take this dimension seriously.

The most concrete steps in addressing violations of human rights concretely were taken by deciding on specific processes, established in the so-called Vienna[7] and Moscow[8] mechanisms: essentially, they are about an obligation to exchange information upon request, and to respond to an expert mission decided upon proposal by at least ten participating states, respectively. In both cases, the ODIHR is to serve as secretariat while a reporting back to the governmental structures is also foreseen. In the following years, however, these procedures were used only exceptionally, being considered by a number of governments as a 'nuclear option' in the human rights field. More recently, however, they were invoked more often, especially in the context of Russia's war of aggression against Ukraine and related severe human rights violations, as well as regarding the violent suppression of protests by the authorities in Belarus.[9] They always result in a publicly available report.

On the intergovernmental side, in addition to the regular meetings of the Permanent Council in Vienna, specialized expert meetings were organized in all three dimensions, allowing for a more in-depth exchange of information and debate with the participation of experts and representatives from civil society. On human rights, particularly important became the Human Dimen-

7 See OSCE, Concluding Document of the Vienna Meeting 1989, available at https://www.osce.org/mc/40881, last accessed on 01.07.2025.

8 See OSCE, Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE, 03.10.1991, available at https://www.osce.org/odihr/elections/14310, last accessed on 01.07.2025.

9 See e.g. W. Benedek, *The Moscow Mechanism of the OSCE: Rules, Practice, and Possible Improvements*, Nomos: Baden-Baden, 2025, pp. 25–38.

sion Implementation Meetings (HDIM), organized annually in Warsaw as the prime occasion to address the whole range of human dimension commitments and their implementation, together with civil society representatives. The HDIM developed into Europe's largest annual human rights conference, stretching over two weeks with close to 2000 participants and a large variety of side-events in addition to the official agenda.

In addition, so-called Supplementary Human Dimension Meetings were established, to address specific challenges in the human rights sphere over one-and-a-half days in Vienna, typically three times a year and also with expert and NGO participation. An annual Human Dimension Seminar for a more in-depth discussion of a specific substantive issue was discontinued after 2021, purportedly for budgetary reasons.

Finally, the Permanent Council established three informal (sub-)committees, one for each dimension, to discuss issues in depth, also with expert participation, and to develop recommendations for participating States and possible decision-making. They have their own chairpersonship separate from the chairperson-in-office, but appointed by them, and meet typically once a month each.

Today, this institutionalization process is more or less but not fully concluded as the organization lacks a single founding document and full legal personality as an international organization. It is treated, however, by many participating states, as a *de facto* international organization. For instance, Austria has concluded a host country agreement with the organization, as has Poland with regard to the ODIHR.

4 Field Missions and the Human Dimension

Within the overall framework of the OSCE's comprehensive security concept, the most direct way to bring the human dimension onto the ground into individual states became field missions established for most countries emerging from communist rule.[10] While their mandates are different from each other and have to be decided annually by consensus of the participating states, they typically include monitoring and supporting in areas related to the rule of law, democracy, and human rights, often within the framework of concrete project activities.

10 For a full list of past and present missions, and their respective, and evolving, mandates see www.osce.org/where-we-are, last accessed on 01.07.2025. The respective websites of individual missions give a good overview of their activities.

With the growing hardening of political developments in some of these countries, missions had to reduce their human rights related activities in some instances or were closed down completely, as they were increasingly seen by some governments as a stain on their democratic credentials. In such cases, the activities of the three aforementioned institutions – ODIHR, the High Commissioner on National Minorities, and the Representative for the Freedom of the Media – play an important complementary role, or even replace mission work, as they operate more freely within their overall mandates. Where missions continue today to operate with a meaningful human rights mandate, especially in South-Eastern Europe, their activities not only contribute to reforms and have a stabilizing effect on rather volatile political environments; they also create, especially with their now overwhelmingly local staff, a new generation of human rights awareness and engagement.

The benefits which could be drawn from establishing a mission in one's country were also recognized by the organization's most recent member, Mongolia: When joining in 2012 as the 57th member, it expressed interest in establishing a field mission, which was however vetoed by Russia.

To counter the closure of missions, debates have grown on creating thematic or roving missions, but currently without any chance for finding consensus. At the same time, however, reflecting the pragmatic character of the organization, after the closure in 2022 of the Special Monitoring Mission to Ukraine, established (by a surprisingly rapid consensus) in 2014 and operating successfully in mitigating many effects of the violent conflict in eastern Ukraine, a Ukraine Support Program was established on the basis of voluntary contributions by a number of participating states.

5 The Growing Politization of the Human Dimension, Election Observation as Field of Contention, and Calls for Reform

After the transformative processes were more or less concluded in the 1990ies, human rights issues became increasingly victim of the politization of the organization by Russia and some other states. They described the focus on human rights as one-sided, selective, and dominated by 'Western' prejudice. One of the main factors in this development was the work of ODIHR, considered by many as very successful in developing concrete implementation tools. This included working with civil society organizations, strengthening national monitoring capacities, assisting in trial monitoring, and strengthening the independence of the judiciary. Criticism against ODIHR was raised particu-

larly regarding two areas of work: the conduct of the annual HDIM, and election observation:

Regarding the HDIM, some governments tried to limit the participation of civil society representatives, expressing their continuous criticism of the human rights situation in their countries, both in the meetings as well as in numerous side events organized by themselves. 'Naming and shaming' by NGOs is less effective, however, when governments become shameless. Still, a few governments went so far as to label NGO-representatives as terrorists – this was a particularly odious process, as some of them had to flee their country in view of severe repression, but were living legitimately and without restrictions in other participating states. Also, state-sponsored 'NGO s' were increasingly participarting.

Criticism became most persistent regarding the work of ODIHR on election observation. Two facts raised special ire: ODIHR's autonomy in deciding where to observe and in which format;[11] and the public nature of all election-related reports, from needs assessment reports to interim reports, preliminary statements to final reports, all without having gone through a 'vetting process' by governments.[12] It is precisely those factors, however, which have prevented a politization of electoral observation and made the work of ODIHR in this area to what is often described as the 'gold standard'.

The negative, even hostile stance towards ODIHR's election observations became more virulent already in the aftermath of the criticism voiced in the observation of the presidential elections in Russia in 2004, and the cancellation of the planned ODIHR observation in 2007 due to the unprecedented and unacceptable conditions and requirements forwarded by the Russian authorities regarding in particular the size and duration of the mission.[13] Political developments in some countries of the former Soviet Union centring on

11 All elements of ODIHR's observation methodology are public, contrary to the criticism voiced by some governments, contained in a number of specialized publications, and can be found at www.odihr.pl, last accessed on 01.07.2025.

12 In the case of a full observation mission, preliminary findings are being presented at a press conference, typically the day after election day, and together with the observer delegations of the OSCE Parliamentary Assembly, and the Council of Europe and the European Parliament, if present.

13 For a detailed discussion of Russia's efforts to discredit ODIHR see F. Marchesano, 'Election Observation as a Point of Contention between the Russian Federation and ODIHR', in IFSH (ed.), *OSCE Yearbook 2014*, Nosmos: Baden-Baden, 2015, pp. 263–274. In spite of its somewhat misleading title, given that ODIHR was simply following its mandate, it provides a good overview on the evolution of Russia's criticism and efforts to delegitimize ODIHR's election observation, if not ODIHR itself.

upheavals in the wake of manipulated electoral processes, the so-called 'colour revolutions', raised fears within the Russian leadership of possible spillover into Russia itself. Starting in 2003, in Georgia, Ukraine, and Kyrgyzstan – if not already in Serbia in 2000 – these mostly non-violent upheavals often referred to election observation reports and achieved leadership changes (Georgia) or a repeat of elections (Ukraine).

In parallel to this mounting criticism and efforts to discredit ODIHR, most other international organizations and institutions involved in election observation in showing support for ODIHR collaborated in the elaboration of a Declaration of Principles for International Election Observation and Code of Conduct for Election Observers, adopted (or 'commemorated') at the UN in New York on 27 October 2005 which was endorsed by numerous international institutions.[14]

The ODIHR responded in detail to criticism voiced, explaining their methodology not only in its publications but also in various meetings in Vienna, and in particular in the special publication 'Common Responsibility, Commitments and Implementation',[15] proposing a number of recommendations regarding improved implementation. This report was written in response to a decision by the Ministerial Council 2005 on 'Strengthening the Effectiveness of the OSCE', tasking the ODIHR to report on 'the implementation of existing commitments; possible supplementary commitments; ways of strengthening and furthering its election-related activities; and improving the effectiveness of its assistance to participating States…'[16] It was prepared by ODIHR in the framework of a consultative process with participating States, as documented in its annexes.

That report started by referring to the existing commitments as 'not formally legal, but nevertheless binding, obligations'.[17] It took as reference the

14 For the text and list of original sponsors, see https://dppa.un.org/sites/default/files/declaration_of_principles_for_international_electoral_observation_and_code_of_conduct-_english.pdf, last accessed on 01.07.2025.

15 OSCE, Common Responsibility – Commitments and Implementation. Report submitted to the OSCE Ministerial Council in response to MC Decision No.17/05 on Strengthening the Effectiveness of the OSCE, OSCE: Warsaw 2006, available at https://www.osce.org/odihr/22681, last accessed on 01.07.2025.

16 OSCE, Decision No. 17/5 on Strengthening the Effectiveness of the OSCE, 06.12.2005, para. 2, available at https://www.osce.org/files/f/documents/3/0/17454.pdf, last accessed on 01.07.2025. The rest of the decisions task the Permanent Council with follow-up activities to the report of a Panel of Eminent Persons, cf. note 20 infra.

17 OSCE, Common Responsibility, *supra* note 13, para. 1

declaration adopted by the first Summit under the new 'label' OSCE in 1996,[18] which stated that

> 'among the acute problems within the human dimension, the continuing violations of human rights, such as involuntary migration, and the lack of full democratization, threats to independent media, electoral fraud, manifestations of aggressive nationalism, racism, chauvinism, xenophobia and anti-Semitism, continue to endanger stability in the OSCE region.'[19]

While explicitly refraining from offering 'a detailed and comprehensive record of instances of non-implementation', the report proceeded to 'outline a number of critical areas that require our joint efforts…'[20] and continued with a detailed description of shortcomings in in the holding of democratic elections, summarized with the words: '*This* is the real electoral crisis in the OSCE region today',[21] thus indirectly responding to Russia's complaints about a crisis in election observation. In its conclusion, the report underlined that one 'cannot…gloss over the fact that the political will of individual States to implement commitments at home and to use their influence to bring about implementation in other States' remains the 'cornerstone of an effective OSCE'.[22,23]

Needless to say that this rather unprecedented report was quite well received, overall, by many states, but that its recommendations found their way only incrementally into being implemented; unsurprisingly, it did not prevent Russia from continuing its criticism, while at the same time increasingly mimicking ODIHR's election observation with an 'observation' exercise conducted by the secretariat of the Commonwealth of Independent States (CIS), the organization of former Soviet republics, with their Secretary-General, at the time a former police chief and short-term Interior Minister of Russia, as chief observation officer.

18 OSCE, Lisbon Summit Declaration, DOC. S/1/96, 03.12.1996, available at https://www.osce.org/files/f/documents/1/0/39539.pdf, last accessed 01.07.2025.

19 OSCE, Lisbon Summit Declaration, *supra* note 16, para. 9.

20 OSCE, Common Responsibility, *supra* note 13, para. 26.

21 Ibid., para. 29.

22 Ibid., p. 77.

23 On the need for a more systematic follow-up to observation reports by governments see also C. Strohal, 'La voie tordue vers des élections démocratiques dans les pays en transition et le rôle des institutions internationales', *Révue EstEuropa* 2016–2017, Bayonne 2018, pp. 197–203.

6 The Gradual Disintegration of the OSCE's Core

These developments are, unfortunately, an apt illustration of the gradual (self-)estrangement of Russia in the organization, contributing to criticism of other aspects of ODIHR's activities as well, and by a few other governments, too: apart from Belarus, this concerns essentially Azerbaijan, and affects also the growing budgetary crisis in the organization. Overall, the continued focus on human dimension commitments was also one of the reasons for several efforts at reforming the organization, including two special reports mandated to outside bodies: a Panel of Eminent Persons has been tasked to develop reform recommendations, once in 2005, ahead of ODIHR's special report, and then again, a Panel of Eminent Persons was formed in 2015. Both reports[24] were well presented and received but did not muster sufficient support for a truly meaningful follow-up. But even without major reforms, the organization prevailed.

7 Fifty Years Later: Can the 'Helsinki Spirit' Be Revived?

The strengths of the OSCE as it has emerged since 1975 are manifold: in addition to its inclusiveness with a presence of all countries of the Euro-Atlantic and Eurasian sphere, gathered around a broad set of shared commitments, this includes an equal footing through the consensus principle governing their decision-making (even when occasionally abused by a few governments), and the operational capacity represented in its institutions and field missions. Its comprehensive concept of security is well developed to address the key substantive challenges effectively. And its political and operational flexibility allows for an effective and cost-efficient response to political developments. This includes addressing emerging challenges in the human dimension.

Altogether, however, the developments illustrated here demonstrate the growing difficulties in an organization of non-likeminded countries to address challenges within their region together and effectively. This regressive mode

24 OSCE, Common Purpose: Towards a more effective OSCE, Report of the Panel of Eminent Persons on Strengthening the Effectiveness of the OSCE, 27.06.2005, available at https://www.osce.org/cio/15805, last accessed on 01.07.2025 and OSCE, Back to Diplomacy, Final Report and Recommendations of the Panel of Eminent Persons on European Security as a Common Project, 03.12.2015, available at https://www.osce.org/networks/205846, last accessed on 01.07.2025.

has evolved over several years already and is not limited to the human dimension;[25] with Russia's war of aggression against Ukraine, the whole concept which has served the CSCE/OSCE region for 50 years so well has been put into question.

In this current geopolitical context, it is no small achievement that the organization continues its core functions at the diplomatic, institutional, and operational levels. Aggravated by a lack of agreement on the organization's budget since 2021, meaningful diplomatic exchanges have become largely absent, operational capacities and planning are affected, and working with the 2021 budget figures five years later is an overall restriction, also on the institutions.[26] Work, however, continues, on all fronts.

What is not expected is a festive commemoration of the Helsinki summit and its Final Act – it is considered surreal while war rages in the region. However, a number of initiatives are being taken to use the anniversary to take stock and examine options for the future. The NGO platform civic solidarity has launched, already last year, a Helsinki+50 reflection process.[27] But the key question remains: who is listening?

In the human dimension, challenges reflect the current global human rights crisis: The UN High Commissioner for Human Rights, Volker Türk, has been a consistent voice for putting human rights back at the centre of politics. As he put it, for example, to the opening of the UN Council on Human Rights in February 2024:

> At a time of such atrocious violations, is it naïve to demand that all States uphold their human rights commitments? Or is it crucial – the

25 Also in the first dimension, the erosion of the confidence- and security-building measures established in the Vienna Document of 1999 has been ongoing for years already. For a discussion of the human dimension see C. Strohal, 'The Crisis of the International Protection of Human Rights and the Geopolitical OSCE Perspective: "The End of Human Rights", "Shooting the Messenger" or Strengthening Cooperation?, in W. Benedek et al. (eds.), *European Yearbook on Human Rights 2018*, Intersentia: Cambridge, 2018, pp. 481–493. See also a veteran of the OSCE, P. Remler, 'The OSCE as Sisyphus: Mediation, Peace Operations, Human Rights', (2021) 21(16) *IAI Papers* 21/16, available at https://www.iai.it/sites/default/files/iaip2116.pdf, last accessed on 01.07.2025.

26 See C. Friesendorf and R. Patz, 'International Bureaucracies as Constrained Entrepreneurs: The Budget Crisis of the OSCE', *Global Policy*, 26.06.2025, available at https://doi.org/10.1111/1758–5899.70056, last accessed on 01.07.2025.

27 See Civic Solidarity, Helsinki +50 Reflection process, 24.01.2025, available at https://civicsolidarity.org/article/helsinki-50-reflection-process/, last accessed on 01.07.2025.

> most important, the most consequential, the most urgent task that any of us could possibly undertake?[28]

After having called for a global human rights year 2023, in recognition of the Universal Declaration of Human Rights, he had summarized the significance of the Declaration as follows:

> In the ashes of global warfare, it brought hope. To put an end to cycles of bloodshed, it promised justice. It promised development that would be secure; equitable; inclusive. It set out the path to peace. Because 75 years ago, in adopting the Universal Declaration of Human Rights, all Member States of the newly born United Nations acknowledged this deep truth: '*recognition of the inherent dignity, and of the equal and inalienable rights of all members of the human family, is the foundation of freedom, justice and peace in the world*'.[29]

The current OSCE chairperson-in-office, Finnish Foreign Minister Elina Valtonen, has launched a consultation process to lead up to an expert meeting in Helsinki and to the Ministerial Council in December in Vienna. A high-level conference at Finlandia Hall on 31 July 2025 is to 'pay tribute to the legacy of Helsinki 1975, it also reminds us that the OSCE's shared principles are not merely memories of the past but must continue to guide us even in turbulent times. The conference will also highlight the role of civil society in advancing respect for OSCE principles and commitments'.[30]

What is missing, so far, are concentrated efforts to go beyond the art of the possible under the current restraining circumstances, and to look at the OSCE as an essential tool in developing a European security architecture not relying on cooperative security, as was the case so far, but to find ways for securing comprehensive security also within a more confrontational environment. Despite all obvious differences, the run-up to 1975, after all, was not taking place in an easy geopolitical environment either. Achievements made in the

28 OHCHR, Opening the Human Rights Council, Türk launches new human rights solutions, 26.02.2024, available at https://www.ohchr.org/en/statements-and-speeches/2024/02/opening-human-rights-council-turk-launches-new-human-rights, last accessed on 01.07.2025.

29 OHCHR, Türk opens global human rights event with call for hope, 11.12.2023, available at https://www.ohchr.org/en/statements-and-speeches/2023/12/turk-calls-world-leaders-rebuild-foundation-hope, last accessed 01.07.2025.

30 See OSCE, Helsinki+50 Conference: Respecting the Legacy, Preparing for the Future, available at https://www.osce.org/chairpersonship/591551, last accessed 01.07.2025.

past 50 years need to be preserved and expanded, while responding effectively to the new challenges, which include in particular those in the human dimension: democratic backsliding, erosion of the rule of law domestically as well as internationally, and blatant disregard for fundamental human rights in a growing number of states. The Vienna and Moscow mechanisms may not suffice.

Again, a call for civil society, as battered as it has become, to step up. The renewal of the Helsinki spirit, and what is left of it, needs broad support – a new Helsinki movement, throughout the region, to recall the commitment, and to demand accountability. Heeding the message, rather than shooting the messenger. The task is not easy, but crucial.

From Co-operation to Negation: The Uneven Legacy of the Helsinki Final Act in Russia

Anna Weininger

Abstract

This paper examines how and why the 1975 Helsinki Final Act, and particularly the Basket III provisions, have had an uneven legacy on human rights and civil society in both the Soviet Union and contemporary Russia. Initially praised as a diplomatic victory to reduce Cold War tensions, the Helsinki Accords committed the Eastern and Western blocs to uphold security and human rights and, through the provisions of Basket III, to maintain humanitarian cooperation. While the Soviet Union used the Accords to secure recognition of post–World War II borders, the commitment to Basket III rights exposed it to criticism. With the Iron Curtain remaining firmly in place and the Soviet Constitution of 1977 only formally complying with Basket III provisions, dissidents and human rights groups used the Helsinki framework to spark early civil rights movements. After the Soviet Union collapsed, the newly established Russian Federation sought to align itself with the provisions of Basket III as reflected in its 1993 Constitution. However, this alignment began to weaken notably with the onset of the Russo-Ukrainian war and further declined following Russia's invasion of Ukraine. Legislative measures targeting 'the foreign' and criminalising the 'discrediting' and 'false information' about Russia's armed forces expanded, effectively transforming Basket III from an embrace of co-operation into its negation. Despite these limitations, Basket III provisions continue to resonate within Russia, serving as both an international benchmark for human rights advocacy and a source of inspiration for civil society activists. As the Helsinki Final Act approaches its 50th anniversary, the enduring legacy of Basket III illustrates a dual impact: While it prompted human rights movements during the Cold War and remains a standard for civil liberties advocacy today, modern Russia's negation of these principles underscores the challenges international frameworks face in promoting human rights in authoritarian contexts.

1 Introduction

In the midst of the Cold War and what appeared to be unbridgeable ideological trenches between the Western and the Soviet blocs, 'the real Magna Carta

© ANNA WEININGER, 2026 | DOI:10.1163/9789004751026_020
This is an open access chapter distributed under the terms of the CC-BY-NC-ND 4.0 license.

of détente', as former President of Finland, Tarja Halonen, phrased it, was signed.[1] The Helsinki Final Act concluded the Conference on Security and Cooperation in Europe (CSCE) and negotiations which lasted over a period of three years. The agreement committed the 35 signatory countries to a wide range of measures aimed at strengthening security and cooperation by 'bridging the East-West divide' and was categorised into four so-called baskets.[2] Whilst the first basket contained principles regarding European security, such as the inviolability of borders, the peaceful settlement of disputes and respect for human rights, the second basket focused on cooperation in economics, science, technology and environmental issues. With Basket IV containing a follow-up process to the conference to monitor implementation, it was Basket III which committed the signatories to cooperation in humanitarian and other fields, such as the enabling of human contacts and the exchange of information, culture and education. The Soviet Union was one of those 35 signatory countries. This paper seeks to explore both the limitations and the potential of human rights documents in authoritarian regimes by examining the impact of the Helsinki Final Act, and primarily of the Basket III provisions, through the case study of Russia. Methodologically, the study employs a qualitative content analysis of existing documents and data, reviewing legislation, court rulings, articles, reports and political statements. While extensive research has been conducted on the impact of the European Convention on Human Rights (ECHR) in Russia, particularly following Russia's expulsion from the Council of Europe (CoE) on 15 March 2022, a research gap remains regarding the influence of human rights documents within the Organization for Security and Cooperation in Europe (OSCE) and in particular of its founding Helsinki Final Act. This study aims to bridge that gap.

2 Signing the Helsinki Accords: Acting in Good Faith?

The Soviet Union initially celebrated the Helsinki Accords as a 'belated peace accord', gaining recognition of post–World War II borders, especially in Eastern and East Central Europe, including the GDR and the *status quo* of its

1 See Appendix 1 for the 35 signatories to this Act, featured in *OSCE Magazine*, Special Anniversary Issue, October 2005.

2 M.R. Freire, 'The Evolving Role of the OSCE in the Shaping of European Security' (2022) 15(2) *Vestnik of Saint Petersburg University. International Relations*, p. 124.

sphere of influence.[3] The Basket III provisions on 'Co-operation in Humanitarian and Other Fields' were considered the Western bloc's political security vision and a superficial concession to Western powers.[4] The Helsinki Accords always remained, as Entin and Zakorski framed it, a 'balance of opposing expectations', rather than congruent agreement between the Soviet Union and the Western bloc.[5] In loyal adherence to Soviet dualism, Basket III provisions and the Helsinki Accord as a whole were never viewed as an obligation to the Soviet domestic sphere. According to Soviet legal theory, the supremacy of state power was absolute and incontestable, and individual complaints, based on international agreements, were never able to trump state authority.[6] Thus, the scope of the Helsinki Final Act in the USSR was never aimed to be defined by the international agreement the Soviet Union willingly signed, but solely by the legal and political frameworks of the domestic Soviet system. A signing in good faith was therefore absent from the onset. In line with Soviet legal theory, any comparison between universal benchmarks and conducting meaningful international scrutiny of their implementation thus proved impossible.[7] Furthermore, the vocal and permanent Soviet contestation of the legal bindingness of the Helsinki Final Act always remained a central pillar of its labelling as solely recommendatory.[8] However, unlike its approach to the International Covenant on Civil and Political Rights (ICCPR), the Soviet Regime decided to publish the full text of the Accords in the newspaper *Pravda* to celebrate what it considered a great diplomatic triumph. What came to a surprise to Brezhnev's government was some of its citizens' attentiveness to the totality of the Helsinki Accords. As Ludmila Alexeeva, a prominent Soviet dissident and founder of the Moscow Helsinki Group described it: 'In the late sixties it had seemed,

3 A. Neier, 'Yuri Orlov and the Legacy of Helsinki Watch', *Open Society Foundations*, 14.10.2020, available at https://www.opensocietyfoundations.org/voices/yuri-orlov-and-the-legacy-of-helsinki-watch, last accessed on 19.03.2025.

4 M.R. Freire, *The Evolving Role of the OSCE in the Shaping of European Security, supra* note 2, p. 124.

5 M. Entin and A. Zagorski, 'Can the European Security Dialogue Return Russia the Sense of Ownership of the OSCE?' (2009) 12 *Russia, the OSCE and European Security, EU-Russia Centre Review*, p. 16.

6 V. Pechota, 'East European Perceptions of the Helsinki Final Act and the Role of Citizen Initiatives' (1980) 13(2) *Vanderbilt Journal of Transnational Law*, p. 482.

7 Ibid., p. 474.

8 See e.g., G. I. Grigelionis, 'Concerning the Legal Nature of the Final Act of the 1975 Conference on Security and Cooperation in Europe' (In Russian: "K voprosu o pravovoj prirode zakljuchitelnogo akta soveschanija po bezopasnosti i sotrudnichestvu v Evrope") (1977) *Soviet Yearbook of International Law*, p. 167.

and the KGB leadership supposed, that the human rights movement was finished. It is otherwise impossible to explain why the government took the unusual step in August 1975 of publishing in newspapers the complete text of the Final Act of the Helsinki Accords, including humanitarian articles. Up until then almost total silence had prevailed within the country on the international obligations of the Soviet Union with regard to human rights. The relevant documents had been published only in special editions with very limited circulation. … But Soviet citizens, reading the text of the Final Act in the papers, were stunned by the humanitarian articles; it was the first they had heard of any kind of international obligations in the human rights field of their government.'[9] Thus, despite being more a political declaration than a legally binding document, the Helsinki Final Act was, also due to its follow-up meetings, more visible in the USSR than the ICCPR.

3 Catalysing Civil Society: Dissident Movement and Moscow Helsinki Group

The unexpected and well- displayed Soviet commitment to human rights sparked enthusiasm in civil society. Despite the legally non-binding nature of the Helsinki Final Act, 'the right of the individual to know and act upon his rights and duties in this field' became the impetus for empowering human rights activists and dissidents.[10] Nine months after the Helsinki Final Act was signed, on 12 May 1976, the 'Public Group to Promote Fulfillment of the Helsinki Accords in the USSR' (better known as the Moscow Helsinki Group (MHG)) was formed. Its objective was to assist in ensuring compliance with the humanitarian provisions of the Final Act on the territory of the USSR and inform the heads of governments who signed the Final Act as well as the general public about cases of violations.[11] For this matter, any Soviet citizen, regardless of membership in the MHG, was called upon to submit written complaints concerning them personally, relating to violations of Basket III

9 L. Alexeeva, *Soviet Dissent: Contemporary Movements for National, Religious, and Human Rights*, Wesleyan University Press: Middletown, Conneticut, 1985, available at https://archive.org/details/sovietdissentcon0000alek, last accessed on 01.05.2025, p. 293.

10 Conference on Security and Co-operation in Europe, Helsinki Final Act, 01.08.1975, Basket I, Principle VII, available at https://worldjpn.net/documents/texts/docs/19750801.D1E.html, last accessed on 21.04.2025.

11 Dokumenty Moskovskoi Khelsinkskoĭ gruppy / [Moscow Helsinki Group; Memorial Society; compiled by D I Zubarev and G V Kuzovkin] (Moscow Helsinki Group 2006), p. 23.

rights as well as other provisions of the Helsinki Accords.[12] Furthermore, the public as a whole was addressed to assist in gathering information concerning violations. In its one and a half page-long founding document, the term 'civil society' was mentioned a whopping six times, underlining the immense public empowerment triggered by the Helsinki Final Act and channelled through the MHG. However, despite the group's core objective being to monitor the implementation of the principles the Soviet government itself willingly subscribed to, the prosecution of the dissident movement was not long in coming. While still referring to Basket III's freedom of information to express criticism of the Soviet regime, during his trial, Yuri Orlov, the MHG's founder, received the maximum sentence of seven years of labour camp and an additional five years of exile for 'anti-Soviet agitation and propaganda'.[13] On 6 September 1982, the three remaining members of the MHG, Yelena Bonner, Sofiya Kalistratova and Naum Meiman, declared the end of the MHG.[14] However, the impact of the Helsinki Final Act did not end there. On the contrary, it evolved from sparking civil society movements in the USSR to inspiring activism across Warsaw Pact countries and even globally, encompassing, not conclusively, groups in Ukraine, Lithuania, Georgia, Armenia, Hungary, Poland, Czechoslovakia, Canada and the US. Human Rights Watch, one of the biggest human rights NGOs, was founded under the influence of civil activism in the USSR. Thus, the Moscow Helsinki Group planted 'the seed from which the Helsinki movement grew'.[15] Therefore, to the Soviet Union's own surprise and against its will, Brezhnev's signing of the Helsinki Final Act was the yardstick under which Soviet human rights violations were finally measured by foreign players. As Yuri Orlov put it, the Helsinki Final Act moved human rights from mere aspirations and domestic matters to the arena of tangible international policy.[16]

12 Ibid., p.23.

13 Amnesty International, Newsletter, June 1982 Volume XII Number 6, p. 6, available at https://www.amnesty.org/en/documents/nws21/006/1982/en/, last accessed on 01 May 2025.

14 Y.Bonner, S. Kalistratova and N. Meiman, 'Moscow Helsinki Group – History', available at https://web.archive.org/web/20090729195004/http://www.mhg.ru/history/229C280, last accessed on 19.03.2025.

15 Organisation for Security and Co-operation in Europe (OSCE), OSCE: The Organization and its Activities, available at https://www.osce.org/files/f/documents/6/4/73223.pdf, last accessed on 19.03.2025.

16 Y. F. Orlov, *Opasnye mysli. Memuary iz russkoi zhizni, Argumenty i Fakty*, Moskovskaja Hel'sinkskaja Gruppa, Moscow 1992, p. 187.[Dangerous Thoughts. Memoirs from Russian Life: Arguments and Facts].

4 1977 Constitution: Basket III's Impact?

Despite the harsh Soviet crackdown on MHG members and the dissident movement as a whole, the momentum of the Helsinki Final Act made it into Soviet domestic law, on display in the brand new 1977 Constitution, which came into force in 1978. Pressured by principle VII of Basket I, human rights were moved upwards, from previously being tenth to being second in terms of chapters, with a dedicated sub-chapter 7 being named 'The Basic Rights, Freedoms and Duties of Citizens of the USSR'. However, despite the nominal alliance with the Helsinki Accords, the support of the Soviet regime was a precondition for the granting of those rights. While Article 39 introduces the subsequently following chapter 7 of the Constitution, entitled 'The Basic Rights, Freedoms and Duties of Citizens of the USSR', it makes clear that 'rights and freedoms must not be to the detriment of the interests of society or the state'. The individual rights' subordination to the Soviet regime and ideology was made even clearer through Article 6, affirming the Communist Party as 'the leading and guiding force of Soviet society', placing it effectively above the law. Thus, whilst seemingly aligning the constitution with the Helsinki Accords, the dominance of the Communist Party and the priority given to socialist ideals elevated the strict Soviet dualism to the rank of constitutional law and effectively hollowed out the human rights provisions of the Helsinki Final Act. However, it will be the ideas incorporated in those provisions that will, evidently without containing provisions regarding the disintegration of the USSR, contribute to the deconstruction of the isolated 'Eurasian superpower'.[17]

5 Basket III in Post-Soviet Russia: An Initial Embrace

After the collapse of the USSR, the newly formed Russian Federation sought to redefine its identity and governance structure in the post-Soviet world. In contrast to Soviet-era constitutional frameworks, which emphasised state power over individual liberties as well as Marxism-Leninism as the official state ideology, the 1993 Constitution in Article 13(2) explicitly rejected the establishment of any state ideology. With the goal of establishing a legal and political framework that aligned more closely with international human rights standards and in the light of Mikhail Gorbachev's vision of a 'common European home', based on the idea of the Helsinki framework as the main architect

17 L. Malksoo, 'The Controversy over Human Rights, UN Covenants, and the Dissolution of the Soviet Union' (2018) 61 *Japanese Yearbook of International Law*, p. 261.

of European security, the influence of Basket III was visible in the extensive catalogue of civil and political, as well as economic, social and cultural rights being included at the top of the constitution, with chapter 2 being titled 'Rights and Freedoms of Man and Citizen'.[18] The alignment of Russian law with international human rights standards was elevated to the level of constitutional law through Article 15(4) of the constitution, stating that 'the universally recognized principles and norms of international law' are part of the Russian legal system. For the first time since its signing in 1975, Russia as the USSR's successor state embraced a monistic approach and effectively integrated the Helsinki Final Act into Russian domestic law. Going even further, the Article mandates that if there is a conflict between an international treaty ratified by Russia and a domestic law, the provisions of the international treaty prevail. In addition, Article 79 introduced a transferring of state competences to supranational institutions, as long as human rights and citizens' rights as well as foundational principles of Russia's constitutional system are not affected, with the foundational principles encompassing the first chapter of the constitution.[19]

6 Institutional Rejection of Basket III under Vladimir Putin

However, as Vladimir Putin was inaugurated as president on 7 May 2000, the Russian government's stance towards Basket III began to shift. Whilst Basket III provisions were already massively under attack during the Second Chechen War and viewed critically by the Russian regime during the Colour Revolutions in Georgia in 2003 and Ukraine in 2004, the impulse for an institutional rejection of Basket III was set in Strasbourg.

6.1 *'Qualitative Monism'*

An open conflict between Russia and the European Court of Human Rights (ECtHR) began to unfold with the chamber judgment in *Markin v Russia* in October 2010.[20] Valery Zorkin, chairman of the Constitutional Court,

18 Centre Virtuel de la Connaissance sur l'Europe,'Address given by Mikhail Gorbachev to the Council of Europe', 06.07.1989, available at https://www.cvce.eu/en/obj/address_given_by_mikhail_gorbachev_to_the_council_of_europe_6_july_1989-en-4c021687–98f9–4727–9e8b-836e0bc1f6fb.html, last accessed on 01.05.2025.

19 Constitution of the Russian Federation, Article 16.

20 See ECtHR, *Konstantin Markin v Russia*, no 30078/06, 07.10.2010 (First Section) and 22.03.2012 (Grand Chamber).

promptly, on 29 October 2010, published an article in the daily *Rossiiskaia Gazeta* entitled 'The Margin of Giving In', arguing that just the state and its authorities, instead of international judges, have the primary role in determining the public interest, which in fact constitutes the margin of appreciation.[21] Russia's relationship with the ECtHR was also the subject of debate in Russia's parliament, when Aleksandr Torshin, then acting chairman of the Federation Council (Russia's upper house of parliament), introduced a draft law, which was later dismissed, stipulating that the enforcement of judgments of the ECtHR should be conditional upon prior approval by the Russian Constitutional Court.[22] Additional ECtHR judgments against Russia soon followed. Notably, the 2013 case of *Anchugov and Gladkov v. Russia*, which conflicted with Article 32 of the Russian Constitution, and the financially highly unfavourable *Neftyanaya Kompaniya Yukos v. Russia* ruling in 2014, set the stage for a pivotal decision by the Russian Constitutional Court. On 14 July 2015, the Court declared that it would reserve the right to review ECtHR rulings for their compatibility with the Russian Constitution, specifically referring to *Konstantin Markin v. Russia* and *Anchugov and Gladkov v. Russia*.[23] Five months later, the 2015 amendments were passed by the State Duma on 4 December 2015, entering into force 11 days later, backing up the Russian Constitutional Court's judgment.[24] The amendments legally allowed Russia's Constitutional Court to review the constitutionality of international treaty provisions as they apply within Russia, thus not only violating Russia's own constitution's Article 15(4) by introducing a conditionality of monism, but

21 V. Zorkin, 'Predel ustupchivosti [The Margin of Giving In]', Rossiiskaia Gazeta, 29.10.2010, available at http://www.rg.ru/2010/10/29/zorkin.html, last accessed on 21.04.2025.

22 Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe, The honouring of obligations and commitments by the Russian Federation, Doc. 13018, 14.09.2012, available at https://pace.coe.int/en/files/18998/html#_TOC_N05AF6C80N259112FC, last accessed on 01.05.2025; R. I. A. Novosti, 'Torshin predlagaet sdelat' resheniya KS priorytetnymi nad resheniyami ESPCH', 20.06.2011, available at http://council.gov.ru/events/news/16967/, last accessed on 20.04.2022.

23 Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 14 iiulia 2015 g. [Ruling of the Russian Federation Constitutional Court of 14.07.2015], Rossiiskaia Gazeta, 27 July 2015, available at https://rg.ru/2015/07/27/ks-dok.html, last accessed on 21.04.2025; L. Mälksoo, 'Russia's Constitutional Court Defies the European Court of Human Rights: Constitutional Court of the Russian Federation Judgment of 14.07.2015, No 21-П/2015' (2016) 12(2) *European Constitutional Law Review*, p. 377.

24 Federal Constitutional Law No 7-FKZ of 14 December 2015, 'On Introducing Amendments to the Federal Constitutional Law "On the Constitutional Court of the Russian Federation"'.

even further establishing a conditionality of enforcement, violating Russia's commitment to the ECHR. In 2020, this conditionality was elevated to constitutional law through the newly introduced Article 79, stating that '[d]ecisions of interstate bodies adopted on the basis of the provisions of international treaties of the Russian Federation in their interpretation that contradict the Constitution of the Russian Federation are not subject to execution in the Russian Federation'. Thus, while being primarily designed to block the implementation of ECtHR judgments within Russia, the law and its constitutional confirmation send the loud and clear message of legal insulation from any international criticism, including any based on the Helsinki Final Act's Basket III provisions.[25]

6.2 *Targeting the Foreign*

While the Basket III provisions' main aim is to promote humanitarian cooperation, legislative measures portraying 'the foreign' as a threat to national security expanded under Vladimir Putin's administration, in particular since the beginning of the Russo-Ukrainian war. In line with Russia's embrace of statism, the number as well as the severity of crimes against the state, however, increased even further after the beginning of Russia's full-scale invasion of Ukraine on 24 February 2022. Legislation on 'undesirable organisations' and 'foreign agents' vividly illustrates the campaign against the so-called 'foreign' and full-frontal attack on Basket III values that has been unfolding. The term 'undesirable organisation' was incorporated into the Russian legislation on 23 May 2015.[26] Since then, it has repeatedly been expanded. According to its initial definition in Article 3.1(1), a foreign or international NGO may be deemed 'undesirable' if its activities are considered 'a threat to the foundation of the constitutional order of the Russian Federation, the defence capability of the country or the security of the state'. The consequences of such a label are harsh, with the term 'undesirable' being a trivialisation of the real impact this label has. The organisation is forced to close any existing branches and is prohibited from disseminating material or conducting any sort of projects resulting in an extensive ban on any organisation activity in Russia.[27] How-

25 L. Mälksoo, *Russia's Constitutional Court Defies the European Court of Human Rights*, *supra* note 24, p. 381.

26 Federal Law no. 129-FZ of 23.05.2015 'On Amendments to Certain Legislative Acts of the Russian Federation'.

27 ECtHR, *Andrey Rylkov Foundation and Others v Russia*, nos 37949/18 and 84 others, 06.02.2024, para 112, available at https://hudoc.echr.coe.int/eng?i=001–231962, last accessed on 09.04.2025.

ever, since its 2021 version, the legislation has not only targeted 'undesirable organisations', but also individuals, who participate in the activities of the 'undesirable organisation', even outside the Russian Federation, with a definition of participation being absent.[28] In July 2021, administrative and criminal liability for the 'participation in activities' of the 'undesirable organisation' was introduced through Article 20.33 CAO and Article 284.1 CC.[29] Since 2022, an extraterritorial component has been introduced, removing the requirement for the offence to be committed within the territory of the Russian Federation.[30] The overall lack of clarity and predictability of the legislation on 'undesirable organisations' was repeatedly criticised by OSCE rapporteurs.[31] On 23 July 2024, this legislation was further expanded by recognising any organisation as undesirable if its 'founders or stakeholders include state bodies of a foreign country'. An interpretation of the Council of Europe, NATO or the ICC as undesirable thus does not seem too farfetched.[32] As human rights activist and former Moscow Helsinki Group member Lyudmila Alexeyeva put it, the law functions as 'another step toward lowering the curtain between our country and the West'.[33] The Iron Curtain, the disintegration of which was largely influenced by the ideas and values of the Helsinki Accords, is not

28 Federal Law No. 230-FZ of 28.06.2021 'On Amendments to Art. 6 of the Federal Law "On Combating the Legalisation (Laundering) of Proceeds of Crime and the Financing of Terrorism" and Article 3.1 of the Federal Law 'On Measures to Apply to Persons Involved in Violations of Fundamental Human Rights and Freedoms, Rights and Freedoms of Citizens of the Russian Federation'.

29 Federal Law No. 292-FZ of 01.07.2021 'On Amendments to Art. 284.1 of the Criminal Code of the Russian Federation'.

30 Federal Law No. 260-FZ of 14 July 2022 'On Amendments to the Criminal Code of the Russian Federation and the Criminal Procedure Code of the Russian Federation'.

31 A. Nußberger, Report on Russia's Legal and Administrative Practice in Light of its OSCE Human Dimension Commitments: General Observations and Executive Summary, 22.09.2022, p. 44, available at https://www.osce.org/files/f/documents/7/5/526720.pdf, last accessed on 09.04.2025; European Commission for Democracy Through Law (Venice Commission), Draft Opinion on Federal Law No 129-FZ on Amending Certain Legislative Acts (Federal Law on Undesirable Activities of Foreign and International Non-Governmental Organisations), Opinion No 814/2015, CDL(2016)025, 27.05.2016, p. 41, available at https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL(2016)025-e, last accessed on 09.04.2025.

32 Deutsche Welle, 'Russia Tightens Undesirable Organizations Law', 27.07.2024, available at https://www.dw.com/en/russia-tightens-undesirable-organizations-law/a-69780289, last accessed on 19.03.2025.

33 ABC News, 'Russia's New NGO Law Draws Western Ire', 24.05.2015, available at https://www.abc.net.au/news/2015–05–24/russia-new-ngo-law-draws-western-ire/6493520, last accessed on 19.03.2025.

only being lowered, but is being hung lower than it hung during the diplomatic heyday of *détente*.[34] As of April 2025, 218 organisations – predominantly based in the U.S. and Western Europe – have been designated 'undesirable'.[35] Apart from the label of undesirable organisations, the 'foreign agent' law has been the central pillar of Russian legislation on civil society organisations since its inception in 2012.[36] Since then it has been amended multiple times. On 1 December 2022, the 'foreign agent law' became the 'persons under foreign influence' law, regulating the activities of not only civil society's NGOs, but even the social activity of individuals. Whilst the initial version required the receipt of foreign money for classification as a foreign agent, the post 24 February 2022 version extended this requirement to receiving 'support and/or otherwise be under foreign influence', with the law describing foreign influence as the 'provision of support and/or influencing someone through coercion, persuasion or other means' and support as 'provision of money or other assets, but also organisational, methodological, scientific or technical assistance provided in other forms'.[37] With each amendment, not only has the scope of application broadened, but in particular so has the severity of restrictions and sanctions. Although the law contains a long catalogue of extensive, almost unfulfillable registering and reporting requirements, even for 'foreign agents' residing outside Russia, the designation of a 'foreign agent' remains incontestable in court. The consequences of not obeying are harsh, subjecting the individual or the organisation to ongoing administrative and criminal liability, ultimately forcing them to cease operations. Even before that, 'foreign agents' are prohibited, amongst others, from participating in independent anti-corruption reviews of bills and effective legal acts, organising public events and receiving funds, rendering it almost impossible to pursue their activities domestically. With mainly journalists, bloggers and independent media being targeted, the foreign agent law becomes a central tool out of

34 Ibid.

35 Ministerstvo yustitsii Rossiiskoi Federatsii, 'Spisok inostrannykh i mezhdunarodnykh nepravitel'stvennykh organizatsii, deiatel'nost' kotorykh priznana nezhelatel'noi na territorii Rossiiskoi Federatsii' (Ministry of Justice of the Russian Federation), available at https://minjust.gov.ru/ru/documents/7756/, last accessed on 22.04.2025.

36 Federal Law No. 121-FZ of 13.07.2012 'On Entering Amendments to Individual Legislative Acts of the Russian Federation in the Part Regulating the Activities of Non-Commercial Organisations Performing the Functions of a Foreign Agent'; OSCE, Report on Russia, available at https://www.osce.org/files/f/documents/5/e/20066.pdf, last accessed on 19.03.2025.

37 Federal Law No. 255-FZ of 14.07.2022 'On the Control of Activities of Persons under Foreign Influence' Art. 1(1).

the Russian state's toolbox to crack down on the free dissemination of information. Therefore in today's Russia, the stigma of activism for foreign powers is rebranded activism for Basket III values. Or, as the UN Special Rapporteur on the Situation of Human Rights Defenders paints in even darker colours, the 'foreign agents' law is used to punish journalists and human rights defenders for doing the valuable work of monitoring human rights abuses'.[38] Despite overwhelming international criticism, Russian lawmakers have not only refused to reverse those laws' core principles, but have continuously expanded their scope. As of March 2025, there were 409 individuals labelled 'foreign agents', while there were only five in March 2021.[39] The foreign agent law is not only incompatible with Russia's Basket III commitment, but is much rather specifically designed to breach it by targeting humanitarian cooperation.

6.3 *The War on Ukraine and the Role of Propaganda: Fostering the Narrative*

The erosion of the Basket III principle of free exchange of information accelerated in the context of Russia's war of aggression against Ukraine in 2022. The state narrative and its fostering became Russia's main tool to gain society's support or at least silence and suppress opposition. Harsh legislation, correspondent jurisprudence and digital propaganda act as the three pillars with which to control public opinion. On 26 February 2022, the Russian government, through its media watchdog Roskomnadzor, appropriated its pre-existing censorship laws (Articles 13.15 of the Code on Administrative Offences (CAO) and 15.3 of the Law on Information) by ordering media outlets to use only information from official government sources that refer to the war of aggression as a 'special operation related to the situation in the Luhansk and Donetsk People's Republics', with the leverage of fines for non-compliance.[40] As announced by Roskomnadzor, the use of words as 'invasion', 'attack' or

38 UN Office of the United Nations High Commissioner for Human Rights, Press Release, 31.08.2021, available at https://www.ohchr.org/en/press-releases/2021/08/russia-free-semyon-simonov-and-stop-criminalising-human-rights-defenders, last accessed on 01.05.2025.

39 B. Dickson, 'Chislo inostrannykh agentov v Rossii vyroslo v 3,5 raza za tri goda' Social Bites, 29.03.2024, available at https://socialbites.ca/latest-news/530698.html, last accessed on 22.04.2025.

40 The Moscow Times, 'Russia Bans Media Outlets from Using Words War, Invasion', 26.02.2022, available at https://www.themoscowtimes.com/2022/02/26/russia-bans-media-outlets-from-using-words-war-invasion-a76605, last accessed on 19.03.2025.

'declaration of war' in relation to the coverage of Russia's war against Ukraine was classified as spreading false information.[41]

6.3.1 Discrediting the Army

Anticipating ongoing anti-war protests, on 4 March 2022 the Russian Duma approved amendments to the criminal and administrative codes, tackling the 'discreditation of the army'. The newly introduced Article 20.3.3 CAO penalizes '[p]ublic actions aimed at discrediting the use of the Armed Forces of the Russian Federation in order to protect the interests of the Russian Federation and its citizens, to maintain international peace and security'. The Article further covers the discrediting of 'state bodies of the Russian Federation of their powers outside the territory of the Russian Federation'.[42] Penalties range from up to 50,000 rubles for individuals to up to 500,000 rubles for legal entities. However, if the discrediting is accompanied by 'calls to hold unauthorised public events, as well as creating a threat of harm to the life and (or) health of citizens, property, a threat of mass disruption of public order and (or) public safety' the fine ranges from up to 100,000 rubles for individuals to up to 1,000,000 rubles for legal entities. The law's vague wording is true to the direct lineage of Soviet traditions, preventing a foreseeable interpretation. A repeated violation of the provision within a year can result in criminal liability under Article 280.3 CC, which can trigger a fine of up to one million rubles or imprisonment for up to seven years.

6.3.2 Fake Laws

On the same day, Article 207.3 of the Criminal Code was instituted, introducing criminal liability for the 'public dissemination, under the guise of a truthful message, of knowingly false information including facts on the use of the Armed Forces of the Russian Federation'. Following Soviet positivism, the state has the sole authority to decide on what is truth. Thus, effectively any statements contradicting the official state narrative fall under the scope of the law. Penalties for a violation range from fines of 700,000 to up to 1,500,000 rubles, corrective labour for up to one year, compulsory labour for up to five

41 E. Moskvy, InoSMI, Media Zone, The New Times, Dozhd, Svobodnaya Presa, Krym.Realii, Nowaya Gazeta, Zhurnalist, and Lenizdat, available at https://t.me/rkn_tg/194, last accessed on 19.03.2025; OSCE Representative on Freedom of the Media, Press Release, 27.02.2022, available at https://www.osce.org/representative-on-freedom-of-media/513064, last accessed on 19.03.2025.

42 Federal Law No. 31-FZ of 04.03.2022, rev. 14 July 2022, 'On Amendments to the Code of Administrative Offences of the Russian Federation'.

years or up to five years of imprisonment. Cases deemed to have 'severe consequences', a term remaining undefined in the Russian criminal code, and committed by *inter alia* 'a person using his official position', 'by an organised group' or 'out of selfish motives' can lead to imprisonment for up to 15 years. A month later, in April 2022, the parliament adopted Article 13.48 of the Administrative Offences Code (AOC), which builds on the constitutional notion of historical truth introduced through the constitutional amendments of 2020 and not only bans comparisons between the Soviet Union and Nazi Germany during World War II, but also criminalises any insult to the memory of the Soviet Union's role in that War, building on the prohibition of the 'rehabilitation of Nazism' already introduced in 2014 by Article 354.1 of the Criminal Code. The importance of those memory laws to generate and implement the state-given narrative proves particularly relevant in the context of 'taming' anti-war dissent.[43]

6.3.3 The Self-Serving Russian Media

The lack of independence of the media functions as an important enforcement mechanism for Russia's restriction of Basket III's free exchange of information. While for ten months after the start of the full-scale war of aggression against Ukraine no reference to the events as a war was allowed within Russia, this iron rule was first broken by TV presenter and propagandist Vladimir Solovyov during a broadcast in November 2022.[44] One month later, Russian Foreign Minister Sergei Lavrov was the first Kremlin official to use the previously sanctioned terminology on 1 December 2022.[45] Vladimir Putin himself followed on 22 December 2022.[46] The new conceptuality was then spread in mainstream Russian state TV by Margarita Simonyan, editor-in-chief of the Russian state-controlled broadcaster, RT, effectively calling the special mili-

43 A. Nekoliak and E. Klochkova, 'Weaponizing Russia's Memory Law', *Verfassungsblog*, 11.07.2023, available at https://verfassungsblog.de/weaponizing-russias-memory-law/, last accessed on 19.03.2025.

44 Newsweek, 'Russia War Ukraine: State TV, Vladimir Solovyov, Putin Ally', 06.10.2022, available at https://www.newsweek.com/russia-war-ukraine-state-tv-vladimir-solovyov-putin-ally-1749352, last accessed on 19.03.2025.

45 Newsweek, 'Russia Slips on Ukraine War, Sergei Lavrov', 01.12.2022, available at https://www.newsweek.com/russia-slips-ukraine-war-sergei-lavrov-1763941, last accessed on 19.03.2025.

46 M. Ilyushina, 'Putin Declares "War" – Aloud – Forsaking his Special Euphemistic Operation', *The Washington Post*, 22.12.2022, archived from the original on 22.12.2022, available at https://www.washingtonpost.com, last accessed on 19.03.2025.

tary operation and the war to be interchangeable terms.[47] However, not only were television channels infiltrated with the Russian narrative, but Russia has steadily increased its control over the internet through a set of legal regulations. Since July 2012, restrictions on websites have been tightened through amendments to the Law of Information.[48] In 2013, Article 15.3 of the Law on Information was introduced, enabling an immediate website blocking by the Roskomnadzor, the Federal Service for Supervision of Communications and Information Technology and Mass Media, in the event of *inter alia* calls for mass disorder, extremist activity and participation in mass public events held in violation of the established legal procedure.[49] In March 2019, Article 15.3 was further extended to include the dissemination of 'inaccurate information of public importance … under the guise of accurate reports'.[50] On the same day, Article 15.1(1) was introduced to include the Roskomnadzor's permission to delete content or block websites, which includes information 'expressing in an indecent form that offends human dignity and public morals, clear disrespect for society, the state, official state symbols of the Russian Federation, the Constitution of the Russian Federation or bodies exercising state power in the Russian Federation'.[51]

The 'Sovereign Internet Law' of 2019, signed by Vladimir Putin on 1 May 2019 and entered into force six months later, established a legal framework for centralised state control over the internet within Russia, enabling, as one measure, Roskomnadzor to enforce access restrictions to information illegal under Russian law.[52] Two years later, on 1 July 2021, the 'Law on Landing' came into effect, applying exclusively to foreign individuals and legal entities.[53]

47 Newsweek, 'Russian State TV Admits War, Special Military Operation Are the Same', 29.01.2023, available at https://www.newsweek.com/russian-state-tv-admits-war-special-military-operation-are-same-1777368, last accessed on 19.03.2025.

48 Federal Law No. 139-FZ of 28.07.2012 'On Amendments to the Federal Law on the Protection of Children from Information Harmful to their Health and Development and Certain Legislative Acts of the Russian Federation on Restricting Access to Illegal Information on the Internet'.

49 Federal Law No. 398-FZ of 28.12.2013 'On Amendments to the Federal Law on Information, Information Technologies and the Protection of Information'.

50 Federal Law No. 31-FZ of 18.03.2019 'On Amendments to Art. 15.3 of the Federal Law on Information, Information Technology and Information Protection'.

51 Federal Law, No. 30-FZ of 18.03.2019 'On Amendments to the Federal Law on Information, Information Technology and Information Protection'.

52 Federal Law No. 90-FZ of 01.05.2019 'On Amendments to the Federal Law on Information, Information Technology and Information Protection'.

53 Federal Law No. 236-FZ of 01.07.2021 'On the Activities of Foreign Persons in the Information and Telecommunication Network Internet'.

According to its Article 9, coercive measures enable the Roskomnadzor to limit access to search engines, as well as restricting and closing down foreign websites if registering requirements are not fulfilled. On 30 December 2021, Article 15.3 of the Law on Information was further extended to include websites containing false reports of acts of terrorism and information justifying extremist activities, including terrorist activity.[54] In its current version, Article 15.3 allows for restrictions in the case of 'inaccurate information disseminated under the guise of true reports containing data on the use of the Armed Forces of the Russian Federation … or information aimed at discrediting the use of the Armed Forces of the Russian Federation to protect the interests of the Russian Federation', 'information containing a proposal to finance the enemy in an armed conflict, military action [or] counter-terrorist operation' as well as 'calls to impose political, economic and (or) other sanctions against the Russian Federation, its citizens or Russian legal entities'.[55] The procedure outlined in Article 15.3 of the Law on Information permits such measures without a court order. The European Court of Human Rights has already determined that Article 15.3 of the Law on Information falls short of the criteria set out in Article 10(2) of the European Convention on Human Rights (ECHR), as it does not guarantee 'safeguards capable of protecting individuals from excessive and arbitrary effects of blocking measures' and lacks judicial review.[56] Additionally, website blockings that occur without prior court decision, due process and adequate notification to the website owner violate freedom of expression standards and raise concerns under Article 19 of the International Covenant on Civil and Political Rights (ICCPR).[57] These concerns are echoed in the OSCE's human dimension commitments, which uphold the principles of the ICCPR.[58] In 2024, Russia blocked 523,000 websites, with access later

54 Federal Law No. 441-FZ of 23.12.2021 'On Amending Article 15.3 of the Federal Law "On Information, Information Technologies and Information Security" and Articles 3 and 5 of the Federal Law 'On Amending Certain Legislative Acts of the Russian Federation'.

55 Federal Law No 149-FZ of 27.07.2006 (as amended on 23.11.2024), On Information, Information Technologies and the Protection of Information, article 15.3 (effective from 01.01.2025).

56 ECtHR, *Kharytonov v Russia*, no 10795/14, 25.03.2020, paras. 38, 42, 46; ECtHR, *Engels v Russia*, no 61919/16, 23.06.2020, para 34; ECtHR, *OOO Flavus and Others v Russia*, nos 12468/15 and 2 others, 23.06.2020, para. 44; ECtHR, *Kablis v Russia*, nos 48310/16 and 59663/17, 30.04.2019, paras. 96–97.

57 UN Human Rights Council, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/HRC/47/25, 13.04.2021.

58 Conference on Security and Co-operation in Europe (CSCE), Helsinki Final Act, 01.08.1975, Basket I Principle 9 and Basket III, available at https://www.osce.org/helsinki-final-act, last accessed on 18.04.2025; OSCE, Document of the Copenhagen Meeting

being restored to around 106,000. A record high was reached in 2023 with 571,000 blocked websites, of which 197,000 were unlocked, with the Prosecutor-General's Office and Roskomnadzor remaining the primary authorities responsible for imposing online censorship.[59] The unblocking rate was therefore almost halved between 2023 and 2024. Judging by the Roskomsvoboda registry, the focus of court blocking has broadened since 24 February 2022. While prior resources, mainly related to pornography and gambling, were blocked, since the beginning of the war of aggression against Ukraine, offences under provisions concerning the 'discrediting of the army' and so-called 'fake news' laws have become key justifications for the blocking of websites.[60] Among those blocked are multiple international news outlets such as *Politico*, *der Spiegel* and *Le Monde*.[61] The latest development is the blocking of virtual private networks (VPNs). While a ban on technologies that enable access to blocked websites was already introduced in July 2017, legislation empowering Roskomnadzor unilaterally to block information related to VPN s was introduced in July 2023.[62] On 1 March 2024, the ban on the sharing of information on methods for bypassing internet restrictions, including the use of VPNs, came into force, enabling the Roskomnadzor to block entire websites.[63] How-

of the Conference on the Human Dimension of the CSCE, 29.06.1990, available at https://www.osce.org/odihr/elections/14304, last accessed on 18.04.2025; OSCE, Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE, 03.10.1991, available at https://www.osce.org/odihr/elections/14310, last accessed on 18.04.2025.

59 Verstka, 'Vlasti ogranichili dostup k rekordnomu chislu saĭtov v 2024 godu – bolee chem k 417 tysiacham', 28.01.2025, available at https://verstka.media/vlasti-ogranichili-dostup-k-rekordnomu-chislu-saitov-v-2024-godu-bolee-chem-k-417k-news, last accessed on 19.03.2025.

60 Ibid.

61 International Press Institute (IPI), 'Russia bans websites of 81 European media outlets', 25.06.2024, available at https://ipi.media/alerts/95008/, last accessed on 19.03.2025; Radio Free Europe/Radio Liberty (RFE/RL), 'YouTube Practically Blocked in Russia, Expert Says', 24.12.2024, available at https://www.rferl.org/a/youtube-practically-blocked-in-russia-expert-says/33251568.html, last accessed on 19.03.2025.

62 Federal Law No. 276-FZ of 29.07.2017 'On Amendments to the Federal Law 'On Information, Information Technologies and Information Protection'', 01.11.2017, available at https://www.hrw.org/news/2017/08/01/russia-new-legislation-attacks-internet-anonymity, last accessed on 21.04.2025; Federal Law No 406-FZ of 31.07.2023, 'On Amendments to the Federal Law "On Information, Information Technologies and the Protection of Information"' and the Federal Law 'On Communications', available at https://www.consultant.ru/document/cons_doc_LAW_457089, last accessed on 19.04.2025.

63 Roskomnadzor Order No 168 of 08.11.2023, On Amendments to the Criteria for Assessing Materials and/or Information Necessary for Roskomnadzor to Make Decisions Serving as the Basis for Inclusion of Domain Names, Website Page Identifiers, and Network

ever, Russia banned the operation of means to circumvent blocking access to illegal content already in February 2020.[64] Since 30 November 2024, the ban has extended to scientific, scientific-technical and statistical information shared about VPN's usage to circumvent blocking.[65] Currently, 197 VPNs are blocked in Russia, not only amplifying the impact of website blockages, but effectively undermining the core principle of free information exchange outlined in Basket III.[66]

7 The Enduring Relevance of Basket III

7.1 *Moscow Mechanism*

Despite Russia's rejection of Basket III, its principles continue to serve as a benchmark for international advocacy. The OSCE's Moscow Mechanism, established in 1991 in Moscow to complement the Vienna Mechanism, enables an *ad hoc* mission of experts to assist with the resolution of a member state's problem in the human dimension, including regarding the implementation of human rights. Their mandate's human rights monitoring therefore resonates with the Helsinki Accords Basket III provisions. The Moscow Mechanism's objective is twofold: assisting in fact finding as well as conflict management within the OSCE.[67] Since its establishment, the Moscow Mechanism was invoked 15 times, while the first three decades of the mechanism's existence were characterised by its very rare invocations, sparking speculation that it

Addresses in the Unified Register of Prohibited Information, registered with the Ministry of Justice of the Russian Federation on 01.12.2023, reg no 76199, available at https://www.consultant.ru/document/cons_doc_LAW_460130, last accessed on 19.04.2025.

64 Government Resolution No. 127 of 12.02.2020 'On the Rules for Centralized Regulation of the Public Communications Network', 12.02.2020, available at https://interfax.com/newsroom/top-stories/72609/, last accessed on 21.04.2025.

65 Roskomnadzor, Ukazanie o zapreshchenii rasprostraneniia nauchnoi, nauchno-tekhnicheskoi i statisticheskoi informatsii o VPN-uslughakh, ispol'zuemykh dlia obkhoda ogranichenii interneta, 21.11.2024, available at https://rg.ru/2024/11/21/roskomnadzor-zapretil-rasprostraniat-nauchnuiu-informaciiu-i-statistiku-o-vpn.html, last accessed on 21.04.2025.

66 Interfax, 'V Rossii zablokirovany 197 VPN-servisov [197 VPN Services Blocked in Russia]', 05.12.2023, available at https://www.interfax.ru/russia/988396, last accessed on 19.04.2025.

67 V. Sancin, 'The Role and Impact of the OSCE Moscow Mechanism Reports Following the Russian Invasion of Ukraine' (2023) 23(1) *International and Comparative Law Review*, p. 224.

might have become obsolete.[68] However, Russia's war of aggression against Ukraine has given the Moscow Mechanism a new momentum and uncovered its potential. The Mechanism was activated a total number of six times against the Russian Federation. On 1 November 2018, 16 OSCE participating states have invoked the Moscow Mechanism to investigate alleged human rights violations and impunity in the Chechen Republic of the Russian Federation since January 2017, these mainly concerning 'violations and abuses against persons based on their perceived or actual sexual orientation or gender identity, as well as against human rights defenders, lawyers, independent media, civil society organizations and others'.[69] On 28 July 2022, the Moscow Mechanism was once again invoked in relation to Russia, aiming to investigate alleged violations of the OSCE's human dimension commitments within the Russian Federation. The resulting 125-page report highlights a deteriorating human rights situation in the country. It urges Russia to comply with its OSCE human dimension obligations and calls on the OSCE to monitor closely developments in Russian civil society and the broader human rights environment, particularly in the light of legislation introduced after 24 February 2022.[70] Four invocations of the Moscow Mechanism against Russia alone are directly linked to Russia's war of aggression against Ukraine. On 3 March 2022 as well as 2 June 2022, the Moscow Mechanism was invoked to 'address the human rights and humanitarian impacts of the Russian Federation's invasion and acts of war, supported by Belarus, on the people of Ukraine, within Ukraine's internationally recognized borders and territorial waters'.[71] Two further invocations followed on 30 March 2023 and 29 February 2024 to 'build upon previous findings and establish the facts and circumstances surrounding possible contraventions of relevant OSCE commitments, violations and

68 V. Bilkova and E. Šteinerte, 'The Moscow Mechanism Expert Report on the Arbitrary Deprivation of Liberty of Ukrainian Civilians by the Russian Federation', *European Journal of International Law* (*EJIL*) *Talk*, 23.05.2024, available at https://www.ejiltalk.org/the-moscow-mechanism-expert-report-on-the-arbitrary-deprivation-of-liberty-of-ukrainian-civilians-by-the-russian-federation/, last accessed on 19.03.2025.

69 W. Benedek, OSCE Rapporteur's Report under the Moscow Mechanism on Alleged Human Rights Violations and Impunity in the Chechen Republic of the Russian Federation (OSCE 2018), available at https://www.osce.org/files/f/documents/b/7/407402.pdf, last accessed on 01.05.2025, p. 2.

70 A. Nußberger, 'Report on Russia's Legal and Administrative Practice in Light of its OSCE Human Dimension Commitments: General Observations and Executive Summary', OSCE, 22.09.2022, available at https://www.osce.org/files/f/documents/7/5/526720.pdf, last accessed on 9 April 2025, p. 44.

71 OSCE/ODIHR, Human Dimension Mechanisms, available at https://www.osce.org/odihr/human-dimension-mechanisms, last accessed on 19.03.2025.

abuses of human rights, and violations of international humanitarian law and international human rights law, as well as possible cases of war crimes and crimes against humanity, associated with or resulting from the forcible transfer of children within parts of Ukraine's territory temporarily controlled or occupied by Russia and/or their deportation to the Russian Federation; and to collect, consolidate, and analyse this information with a view to offer recommendations, as well as provide the information to relevant accountability mechanisms, as well as national, regional, or international courts or tribunals that have, or may in future have, jurisdiction'.[72] All four invocations tied to Russia's war of aggression against Ukraine were supported by an overwhelming 45 states, marking the highest level of consensus for any invocation of the Mechanism to date.[73] Therefore, besides fulfilling its potential to unify OSCE member states, the Moscow Mechanism enables a network of information sharing across different international organisations. To name an example: the Moscow Mechanism reports, invoked on 3 March 2022 and 2 June 2022, were both presented to the UN Human Rights Council-mandated Independent International Commission of Inquiry on Ukraine and the UN Human Rights Committee regarding the International Covenant on Civil and Political Rights, which then both proceeded to use the information in their respective reports and periodic reviews.[74] And the Moscow Mechanism has another strengthmomentum: It has the potential to empower human rights defenders and affected civil society by acknowledging their demands and human rights complaints through an international instrument, staffed with experts.

7.2 *Domestic Resilience*

Despite increasing state repression, civil society activists continue to invoke the ideals of Basket III to challenge government policies. Despite direct advocacy within Russia having become increasingly constrained, the ideals of the Helsinki Final Act remain alive through the persistent efforts of activists, journalists and organisations continuously operating from within Russia or from

72 Ibid.

73 Ibid.

74 United Nations Human Rights Council, Situation of Human Rights in Ukraine Stemming from the Russian Aggression, 04.03.2022, UN Doc A/HRC/RES/49/1; United Nations Human Rights Council, The Deteriorating Human Rights Situation in Ukraine Stemming from the Russian Aggression, 12.05.2022, UN Doc A/HRC/RES/S-34/1; United Nations Human Rights Council, Report of the Independent International Commission of Inquiry on Ukraine, 25.09.2023, UN Doc A/HRC/52/62; United Nations Human Rights Committee, Concluding Observations on the Eighth Periodic Report of the Russian Federation, 01.12.2022, UN Doc CCPR/C/RUS/CO/8, pp. 6 and 20.

abroad. Their work ensures that Basket III's core principles – human rights, free exchange of information and culture – continue to challenge authoritarian policies, even in the face of adversity.

Golos, the only independent election-monitoring group in Russia, founded in 2000, stayed active in Russia and remains committed to fighting for electoral transparency despite ongoing state persecution. In 2013, the Golos association was the first organisation to be branded with the new 'foreign agent' label after being accused of accepting the prize money for winning the Andrei Sakharov Freedom Award in 2012. After resisting registering as a 'foreign agent', its activities were suspended, and it was then formally liquidated on 28 July 2016 by the Presnensky Court of Moscow at the request of the Ministry of Justice. The Golos civil movement continued the work of the former Golos association without forming a legal entity. It was later designated a 'foreign agent' in August 2021 following amendments introduced on 30 December 2020, which extended the label to include 'public associations operating without legal entity status'.[75] In addition to that, Golos was accused of being a member of the European Network of Election Monitoring Organisations (ENEMO), which was earlier added to the Justice Ministry's 'undesirable organisations' list on 1 October 2021.[76] Despite Golos not having the status of an 'undesirable' organisation, Grigory Melkonyants, co-chairman of the Golos movement, was charged and arrested on 17 August 2023 for 'organising the activities of an undesirable organization' under Article 284.1(3) CC and remains imprisoned to this day.[77] Despite all repressive measures,, Golos remains active as a grassroots movement, circum-

75 Federal Law No. 481-FZ of 30.12.2020 'On Amendments to Certain Legislative Acts of the Russian Federation in Connection with the Establishment of Additional Measures to Counter Threats to National Security', available at https://www.consultant.ru/document/cons_doc_LAW_372648/, last accessed on 21.04.2025; The Moscow Times, 'Russian Vote Monitor Was Named a Foreign Agent After 3 Donations from Armenian', 22.10.2021, available at https://www.themoscowtimes.com/2021/10/22/russian-vote-monitor-was-named-foreign-agent-after-3-donations-from-armenian-a75374, last accessed on 19.03.2025.

76 Ministry of Justice of the Russian Federation, List of Foreign and International Non-Governmental Organisations Whose Activities Are Recognised as Undesirable in the Russian Federation (International Legal Forum), 01.10.2021, available at https://web.archive.org/web/20211002023845/https://minjust.gov.ru/ru/documents/7756/, last accessed on 21.04.2025.

77 Meduza, 'K uchastnikam dvizhheniya Golos prishli s massovymi obyskami; na sopredsedatelya dvizhheniya Grigoriya Melkonyantsa zavelil delo o nezelatelnoy organizatsii', 17.08.2023, available at https://meduza.io/feature/2023/08/17/k-uchastnikam-dvizheniya-golos-prishli-s-massovymi-obyskami-na-sopredsedatelya-dvizheniya-grigoriya-melkonyantsa-zaveli-delo-o-nezhelatelnoy-organizatsii, last accessed on 21.04.2025.

venting harsh censorship laws and reporting from Russia. OVD-Info, an independent human rights media project, founded in the face of mass arrests following the 2011 parliamentary elections, was declared a 'foreign agent' on 29 September 2021. However, its mission to track political arrests in Russia from within Russia remains uninterrupted.

A prominent example of Russian activism from abroad is Memorial. Despite International Memorial and Human Rights Center Memorial being liquidated as legal entities under the 'foreign agent' law on 29 December 2021, the organisation is spread across various countries and remains active in documenting historical repression and modern abuses.[78] A similar fate is shared by Meduza, an independent news website. Despite being first declared a foreign agent in 2021 and banned as an 'undesirable organisation' on 26 January 2023, forced exile to Riga did not stop the organisation from continuing to publish in English and Russian to cater continuously to the Russian population, circumventing Russian censorship. TV Rain, after being ousted from Russia, continues to broadcast from Amsterdam to people inside and outside the Russian Federation. *Novaya Gazeta*, a Nobel Peace Prize-winning newspaper, had its media licence revoked in September 2022, and was designated an 'undesirable organisation' ten months later. However, the newspaper continues to expose government abuses and offer a critical counterpoint to state-controlled narratives, mainly from exile in Latvia. And the list of organisations as well as individual journalists and online activists keeping the spirit of Basket III alive goes on. Therefore, despite a harsh backlash within Russia and in vast parts forced exile, civil society activists continue to uphold the ideas and provisions that were set out in Helsinki 50 years ago.

8 Conclusion: Is the Helsinki Final Act and Détente Dead?

Fifty years after the monumental diplomatic breakthrough of the Helsinki Final Act, collective societal activism is treated like the harshest adversary. In December 2022, the Moscow Helsinki Group, emancipator of Soviet civil

78 Council of Europe, Human Rights Commissioner, Statement, 29.12.2021, available at https://www.coe.int/en/web/commissioner/-/the-liquidation-of-memorial-ngos-is-a-harsh-blow-to-humanrights-protection-in-russia, last accessed on 19.03.2025; World Organisation Against Torture (OMCT), 'Russia: Dissolution of Human Rights Center Memorial Confirmed in Appeal', 05.04.2022 available at https://www.omct.org/en/resources/statements/russia-dissolution-of-human-rights-center-memorial-confirmed-in-appeal, last accessed on 19.03.2025.

society and inspiration for Helsinki Monitoring groups worldwide, faced proceedings by the Russian Ministry of Justice to dissolve the group.[79] On 25 January 2023, the Moscow City Court ordered the Moscow Helsinki Group to be dissolved, citing the group's activities outside its region, Moscow, as the reason.[80] With Russia's growing antagonism towards Europe and the so-called West, the formerly proudly celebrated 'spirit of Helsinki' now resembles a ghost.[81] As the Helsinki Final Act approaches its 50th anniversary, its legacy in Russia reflects a radical and inherent antagonism between co-operation and negation. While Basket III catalysed human rights movements during the Cold War and inspired post-Soviet reforms, its principles have been systematically undermined under Vladimir Putin, with the negation being accelerated since the beginning of Russia's war in Ukraine. This trajectory underscores the challenges of promoting universal human rights in authoritarian contexts and the limitations of international frameworks in influencing domestic policy. The Helsinki Final Act and détente remain frozen, awaiting a better time – when at least a bad-faith embrace becomes possible. However, its power lies in its inclusiveness through maintaining a channel of communication for countries that seem more and more like adversaries, serving as one of the few remaining multilateral platforms for dialogue between Russia and the West, aside from the UN.[82] Now it is the collective West's responsibility also to act as a collective and defend a firm and unified position in respect of the Helsinki Accords and against Russia's policy of the so-called 'Russian World'. What the Helsinki Final Act now needs more than ever is a 'steely defence' to keep its legacy relevant and alive.[83]

79 BBC News, 'Russia Dissolves Memorial, Landmark Human Rights NGO', 12.12.2022, available at https://www.bbc.com/news/world-europe-64402929, last accessed on 19.03.2025.

80 Ibid.

81 W. Kemp, 'Crisis and Opportunity for the OSCE', 20.03.2024, *Security and Human Rights Monitor*, p. 5, available at https://www.shrmonitor.org/assets/uploads/2024/03/Walter-Kemp-Crisis-and-Opportunity-for-the-OSCE-.pdf, last accessed on 20.04.2025.

82 H. Patomäki, 'The Relevance of the Helsinki Process and the Charter of Paris for Future Security Policies and Institutions' (2024) 36(4) *Journal of International Relations and Area Studies*, p. 134 (1154).

83 W. Kemp, 'Crisis and Opportunity for the OSCE', *supra* note 82, p. 4.

The Role of OSCE at the Eurasian Border: Towards a Legal Clash?

Patricio Ignacio Barbirotto

Abstract

The Russian invasion of Ukraine has placed the Organization for Security and Co-operation in Europe (OSCE) in a difficult position, directly challenging its core principles while restricting its ability to act. Although Kazakhstan and Kyrgyzstan have formally distanced themselves from Russia's aggression, their commitments under the Collective Security Treaty Organisation (CSTO) and the Eurasian Economic Union (EAEU) impose legal and political constraints that limit their engagement with the OSCE. This paper examines how these competing obligations shape the role of the OSCE programme offices in Astana and Biškek. While the mandates of these offices could, in theory, allow for initiatives monitoring financial and technological flows linked to the war in Ukraine, their implementation would require state approval. Given the legal constraints arising from CSTO and EAEU membership, such programmes remain unfeasible. As a result, OSCE activities in the region are effectively paralysed. Moreover, the OSCE itself faces a trade-off: pressing Kazakhstan and Kyrgyzstan to take action could provoke diplomatic repercussions, potentially weakening cooperation and further undermining regional security.

1 Introduction

The Russian invasion of Ukraine has posed a profound challenge to the Organization for Security and Co-operation in Europe (OSCE). For decades, the OSCE has been pivotal in building and reinforcing Europe's security architecture, and after the dissolution of the Soviet Union it extended its stabilising role across Eurasia. However, the invasion and the resulting international backlash have severely strained the relationship between the Russian Federation and the OSCE. Russia has suspended its payments to the OSCE Parliamentary Assembly, deriding it as a 'Russophobe circus', and has effectively blocked any direct OSCE intervention in the conflict. This rupture not only limits the OSCE's ability to address the war in Ukraine but also threatens to undermine its broader regional operations, particularly in Central Asia.

© PATRICIO IGNACIO BARBIROTTO, 2026 | DOI:10.1163/9789004751026_021
This is an open access chapter distributed under the terms of the CC-BY-NC-ND 4.0 license.

In this context, the OSCE's programme offices in Kazakhstan (Astana) and Kyrgyzstan (Biškek) could be seen as potential avenues for indirect engagement. Although their mandates do not directly target conflict resolution in Ukraine, these offices could, in theory, initiate activities that – while remaining within their formal competences – might influence the regional security environment and indirectly contribute to the OSCE's overall response to the war. However, such initiatives may come into conflict with the host countries' other obligations. Kazakhstan and Kyrgyzstan are bound by commitments to Russia through the Collective Security Treaty (CST), the Collective Security Treaty Organisation (CSTO) and the Treaty on the Eurasian Economic Union (TEAEU). Even the normal activities of the OSCE programme offices in these two Central Asian states could be undermined – or at least restricted – if the host countries were to perceive the trade-offs arising from conflicting obligations as unfavourable.

This paper examines the potential for the OSCE programme offices in Astana and Biškek to support the organisation's efforts in the context of the war in Ukraine, while navigating the delicate balance between their obligations to the OSCE and their commitments to Russia under the CST and the TEAEU. It focuses on how Kazakhstan's and Kyrgyzstan's international commitments may constrain or facilitate the OSCE's potential activities, and on the trade-offs these states would face if required to balance – and ultimately choose between – conflicting obligations. Through the lens of these conflicting obligations, the paper explores the feasibility of a meaningful contribution by the OSCE programme offices in Kazakhstan and Kyrgyzstan to the organisation's broader engagement with the war in Ukraine.

2 Analytical and Theoretical Framework

This paper investigates how far the OSCE could pursue war-related projects via its programme offices in Kazakhstan and Kyrgyzstan and how such actions may require these countries to decide on in a trade-off between certain international obligations. This trade-off occurs in a larger context in which the commitments Kazakhstan and Kyrgyzstan have under the OSCE framework could conflict with their obligations resulting from regional cooperation and integration arrangements – in particular those driven by the Russian Federation. This dilemma sets the main issue of the current paper: whether, and in what way, might possible OSCE activities in Kazakhstan and Kyrgyzstan create a conflict of obligations. Parallel commitments to other international

regimes – most notably those aligned with Russia – may limit these states' ability to work with OSCE initiatives, particularly those with indirect relevance to the war in Ukraine, in the event that the OSCE decides to explore this path. Examining the larger idea of conflicting obligations in international law will help one to assess the legal and practical effects of this possible conflict.

States are required to fulfil their international legal obligations in good faith. However, in an increasingly complex international system, a state's obligations under different treaties may come into conflict. This occurs when two treaties impose obligations that cannot simultaneously be fulfilled, even resorting to interpretative techniques or doctrines such as *lex specialis* or *lex posterior*, such that compliance with one results in the violation of the other.[1] This understanding of conflicting obligations in international law does not account for situations where conflicts arise indirectly – when two agreements do not formally contradict one another but require implementation measures and subsequent practice that lead to an incompatibility. Such scenarios often arise in agreements with a strong political character, such as military alliances or regional integration treaties, particularly when they involve different parties (for instance, an agreement between Party A and Party B, and a separate agreement between Party A and Party C). In these cases, it is useful not only to consider the legal conflict in a strict sense but also to redefine it as a situation in which one of the two treaties is *de facto* paralysed – at least in certain provisions – because implementing those provisions would lead to a direct conflict. The paralysis of an agreement prevents the fulfilment of its object and purpose, effectively undermining its legal and practical relevance. To understand this issue better in the context of the present paper, it is useful to apply tools from game theory and the economic analysis of law.[2]

1 See, among the many, W. Jenks, 'Conflict of Law-Making Treaties' (1953) 30 *British Yearbook of International Law*, p. 453; W. Czapliński and G. Danilenko, 'Conflicts of Norms in International Law' (1990) 21 *Netherlands Yearbook of International Law*, p. 3; A. Lindroos, 'Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of Lex Specialis' (2005) 74(1) *Nordic Journal of International Law*, pp. 27–66; J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law*, Cambridge University Press; Cambridge/New York, 2009, pp. 5–24; R. Ferguson, *The Right to Food and the World Trade Organization's Rules on Agriculture: Conflicting, Compatible, or Complementary?*, Brill: Leiden, 2017, pp. 51–97.

2 On game theory applied to international law see U. Weiss Van Leer and J. Agassi, 'Game Theory for International Accords' (2020) 16(3) *South Carolina Journal of International Law and Business*, article 6; on the economic analysis of law see R. A. Posner, *Economic Analysis of Law*, 1st edition, Little Brown: Boston, 1973 and subsequent editions.

When a state faces conflict between two obligations towards different parties – where the obligations cannot by any means be reconciled – it must decide which obligation to fulfil and, consequently, which one to violate. To illustrate this, an abstract example using mathematical logic may be helpful. Suppose Party A concludes an agreement with Party B (AB Agreement) and a separate agreement with Party C (AC Agreement). If fulfilling a provision of the AB Agreement results in the violation of the AC Agreement and vice versa, Party A must choose between complying with the AB Agreement and committing an internationally wrongful act towards Party C, or complying with the AC Agreement and committing an internationally wrongful act towards Party B. In this scenario, Party A faces a classic trade-off in game theory as applied to international law.

As discussed earlier, such a trade-off can take different forms. It may manifest itself as an open conflict, as in the abstract example above, where complying with one rule necessarily entails violating another. In this case, the state must determine to whom it will owe reparations for international responsibility. However, conflicts can also arise in a more subtle manner – where obligations towards one party are not technically violated but are instead paralysed to avoid violating commitments to another party. When this occurs, international responsibility may still be engaged, particularly in cases where obligations require the adoption of further implementing provisions. If these implementing provisions result in the violation of another obligation towards a different party, the state may choose not to adopt or enforce them – thus formally respecting its original commitments while effectively reducing the functional impact of the agreement. This paralyses the legal framework, limiting the extent to which the agreement achieves its intended objectives. Ultimately, a state's decision in such trade-offs will likely be based on a cost-benefit analysis, weighing legal, economic and political consequences to select the least costly and most advantageous option. This paper applies this theoretical framework to examine the obligations, both existing and potential, of Kazakhstan and Kyrgyzstan towards the OSCE on one hand, and towards the EAEU and the CSTO on the other – which, in practice, represent obligations towards the Russian Federation.

In this regard, the two sets of international obligations – those resulting from the OSCE framework and those integrated inside regional arrangements such the EAEU and the CSTO – may be seen as separate and mostly parallel structures, or 'pillars', that rarely interact. But when certain obligations inside these systems conflict, the points of contact become possible conflict areas. Should such conflict be impossible to resolve, the state being impacted on is forced strategically to choose one obligation over another, therefore giving

priority to one at the cost of the other. While Section 4 shifts to an examination of the obligations themselves and the possible conflicts that could arise between them, the next section first presents these two pillars as the legal and institutional frameworks from which the pertinent obligations arise.

3 Cooperation Structures in the Former Soviet Space

3.1 *OSCE in the Former Soviet Space*

The origins of the OSCE trace back to the Helsinki Process, initiated with the first meeting of the Conference on Security and Cooperation in Europe (CSCE), held in Helsinki on 3 July 1973.[3] The aim was to enhance security in Europe and prevent conflicts between the so-called 'Western' and 'Eastern' blocs by fostering dialogue between the states of both sides.[4] On 1 August 1975, the CSCE convened again, resulting in the signing of the Helsinki Final Act (hereinafter the Helsinki Accords).[5] As a legal instrument, the Helsinki Accords were adopted as a soft law instrument rather than an international treaty or the charter of an international organisation. In pursuing its primary goal of maintaining peace in Europe, the Helsinki Accords contain broad obligations, reaffirming general principles of international law, some of which hold customary status.[6] In 1990, following the end of the Cold War, the CSCE entered a new phase with the adoption of the Charter of Paris for a New Europe,[7] in which the participating states agreed to transform the CSCE into a permanent platform for security negotiations. In 1992, the participating

3 For the history of OSCE refer to OSCE's history resources page, OSCE, 'From CSCE to OSCE: 1973–2003', available at https://www.osce.org/secretariat/585754, last accessed on 10.03.2025.

4 V. Ghebali, *The Diplomacy of Détente: The CSCE from Helsinki to Vienna 1973–1989 vol.I*, The Library am Guisanplatz BiG: Bern, 2025, pp. 1–6.

5 Conference on Security and Co-Operation in Europe, Final Act, Helsinki 1 August 1975.

6 Ibid., Questions relating to Security in Europe, 1. (a) Declaration on Principles Guiding Relations between Participating States. The principles to which the signatories commit are: Sovereign equality, respect for the rights inherent in sovereignty; Refraining from the threat or use of force; Inviolability of frontiers; Territorial integrity of states; Peaceful settlement of disputes; Non-intervention in internal affairs; Respect for human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief; Equal rights and self-determination of peoples; Co-operation among States; Fulfilment in good faith of obligations under international law.

7 Charter of Paris for a New Europe, Paris 1990.

states established the Forum for Security Co-operation (FSC),[8] designed as a permanent framework for negotiations and discussions on security-related issues. Finally, at the Budapest Summit in 1994, it was decided that, as of 1 January 1995, the CSCE would be restructured into the OSCE, a full-fledged international organisation with permanent institutions headquartered in Vienna and Prague.[9]

Given its role in facilitating dialogue between 'Western' and 'Eastern' European states, the OSCE has been active in the former Soviet space and Central Asia since the very dissolution of the Soviet Union. Over the past three decades, the OSCE has played a significant role in promoting democratisation and security in the former-Soviet region, engaging in all major armed conflicts that have erupted in the area. The first former Soviet conflict in which the OSCE was involved was in Georgia, where a mission was established in 1992 to monitor the conflict between the Georgian government and the separatist entities of Abkhazia and South Ossetia.[10] The mission was terminated on 31 December 2008,[11] when its mandate expired and was not renewed following the *de facto* independence of Abkhazia and South Ossetia. The OSCE Mission to Moldova has played a mediatory role between the Moldovan authorities and the self-proclaimed Moldovan Republic of Transnistria,[12] a conflict that has been labelled 'frozen' since 1994. Similarly, in the case of the Republic of Nagorno-Karabakh/Artsakh, the OSCE acted as a mediator, establishing the Minsk Group in 1995.[13] However, tensions escalated in late 2021, ultimately leading to the dissolution of the Republic of Nagorno-Karabakh/Artsakh.[14] Regarding the events in Donbas in 2014, the OSCE deployed a Special Monitoring Mission to Ukraine,[15] which was closed on 31 March 2022 due to the lack of consensus

8 CSCE, 'Helsinki Document 1992, The Challenges of Change', V Decision adopted at the 1992 Helsinki Summit. CSCE,

9 CSCE, 'Budapest Document 1994, Towards a Genuine Partnership in a New Era', 21.12.1994.

10 OSCE, 'Decision on the Appointment of a Personal Representative of the CSCE Chairman-in-Office for Georgia', 17th CSO Meeting, Journal No. 2, Annex, 06.11.1992.

11 OSCE, 'Permanent Council Decision No. 831 on the Extension of the Mandate of the OSCE Mission to Georgia', PC.DEC/831, 21.12.2007.

12 See OSCE, 'Mission to Moldova', available at https://www.osce.org/mission-to-moldova/104529, last accessed 10.03.2025.

13 OSCE, 'Mandate of the Co-Chairmen of the Conference on Nagorno Karabakh under the auspices of the OSCE', Doc. 525/95, 23.03.1995.

14 OSCE, 'Joint Statement by the OSCE Minsk Group Co-Chair Countries', 07.12.2021, https://www.osce.org/minsk-group/507320, last accessed on 19.05.2025.

15 OSCE, 'Permanent Council Decision no. 1117 on the Deployment of an OSCE Special Monitoring Mission to Ukraine', PC.DEC/1117, 21.03.2014.

on extending its mandate following Russia's full-scale invasion of the country.[16] Additionally, between 24 July 2014 and 30 September 2021, the OSCE maintained an observer mission at the Gukovo and Donec'k checkpoints on the Ukrainian–Russian border, which were temporarily under separatist control.[17]

Following the full-scale invasion of Ukraine, relations between Russia and the OSCE deteriorated significantly, directly undermining the organisation's ability to function. While the OSCE lacked a direct mandate to intervene in the war itself, it attempted to remain engaged through projects under the Secretariat's Extra-Budgetary Support Programme for Ukraine, primarily aimed at civil society resilience.[18] However, the OSCE's broader conflict-prevention tools – such as field missions, consensus-based resolutions and political mediation – were effectively paralysed by Russia's obstruction. In response to the OSCE's condemnation and calls for an immediate cessation of hostilities,[19] Russia suspended its participation in the OSCE Parliamentary Assembly, though it stopped short of a full withdrawal.[20] Russia has openly stated that this decision was made to prevent the OSCE from falling entirely under the influence of 'Western countries'.[21] By retaining its seat, Russia has continued

16 The Chairman-in-Office and Secretary General expressed regret that no consensus had been reached on the extension of the mandate of the Special Monitoring Mission to Ukraine.

17 OSCE, 'Permanent Council Decision no. 1130 on the Deployment of OSCE Observers to two Russian Checkpoints on the Russian-Ukrainian Border', PC.DEC/1130, 24.07.2014.

18 See OSCE, 'OSCE Secretariat Extra-Budgetary Support Programme', available at https://www.osce.org/osce-secretariat-exb-support-programme-for-ukraine, last accessed on 10.03.2025.

19 The OSCE Parliamentary Assembly condemned the invasion on the very day it started: see OSCE Parliamentary Assembly, 'Statement of the OSCE PA leadership on Russian Federation military action in Ukraine', 24.02.2022, available at https://www.oscepa.org/en/news-a-media/press-releases/2022/statement-of-the-osce-pa-leadership-on-rus

20 Decree of 3 July 2022 No. 202-SF, on the request of the Chamber of the Federal Assembly of the Russian Federation 'on the suspension of the participation of the delegation of the Federal Assembly of the Russian Federation to the activities of the Parliamentary Assembly of the Organization for Security and Co-Operation in Europe (PA OSCE)'.

21 On 20 December 2024, during an interview with the *Komsomol'skaja Pravda*, the vice-minister for foreign affairs of the Russian Federation Aleksander Gruško, when asked about the withdrawal from the OSCE, declared that 'at the moment the West aims at subordinating OSCE to its narrow interest, to transform it into the field for the realisation for the infamous "order based on rules." We will not allow that. The point is not to leave OSCE but about its relevance to the participating states'. Available in Russian at https://www.kp.ru/daily/27675/5027265/, last accessed on 10.03.2025.

to exercise its veto power, blocking or diluting OSCE initiatives that touch on the Ukraine conflict. Using the consensus rule, Russia has successfully prevented OSCE from adopting a unified budget since 2022.[22] This use of the consensus rule to neutralise action was also evident, for instance, in its threat not to renew the OSCE Mission to Moldova's mandate, which was extended for only six months instead of the usual year.[23] In effect, the war has not only strained internal diplomacy but also exposed the limitations of the OSCE's consensus-based structure, allowing a single participating state – Russia – to curtail the organisation's role in managing and responding to one of the gravest security crises in Europe since its founding.

While Russia's obstruction has largely incapacitated the OSCE's ability to respond to the war in Ukraine at the organisational level, the institution continues to function – albeit within narrow constraints – through its remaining field presences. Among these the programme offices in Central Asia play a unique role. Though far from the front line, they remain active understanding mandates and may offer indirect avenues for engagement on issues increasingly shaped by the war, such as regional security, economic resilience and transnational threats. These programme offices, particularly in Kazakhstan and Kyrgyzstan, represent some of the OSCE's last operational footholds in the former Soviet space, and, at the same time, in countries actively participating in regional agreements promoted by Russia. Their role, limits and potential will be the focus of Section 4.

3.2 *Regional Integration and Cooperation Agreements in the Former Soviet Space*

While both Kazakhstan and Kyrgyzstan have committed to cooperation with the OSCE, they have also actively participated in regional integration and cooperation organisations aimed at maintaining ties among the former Soviet states. Since the dissolution of the Soviet Union in 1991, the region has witnessed a number of integration and cooperation initiatives, largely driven by Russia, often in conjunction with Belarus and Kazakhstan. These initiatives were, to a significant extent, necessary for the former Soviet states, many of

22 On the OSCE Unified Budget see, for instance, the Statement by the Delegation of the Russian Federation at the 1436th Meeting of the OSCE Permanent Council on the lack of consensus on the 2023 Unified Budget, PC.DEL/1051/23, 27.07.2023; and the Statement by the European Union at the 1490th Meeting of the OSCE Permanent Council in response to the presentation of the 2025 Unified Budget Proposal, PC.DEL/1161/24, 03.10.2024.

23 OSCE, 'Permanent Council Decision No. 1504, Extension of the Mandate of the OSCE Mission to Moldova', PC.DEC/1504, 19.12.2024.

which shared governmental institutions, infrastructure and socio-economic ties for centuries. In some cases, such as those of Kazakhstan and Kyrgyzstan, it was within the Soviet Union that they first experienced statehood.[24] This form of regional integration, which seeks to preserve what was once unified, rather than integrate previously distinct entities is known as holding-together integration.[25] The number of states willing to engage in regional integration projects falling within the holding-together framework has steadily declined since the early 1990s. Of the 12 former Soviet republics, only a third have accepted the translation of regional integration and cooperation into legally binding instruments creating hard-law obligations for participating states.[26] With regard to the relationship between Eurasian regional integration and the OSCE, and potential conflicts between norms, binding obligations arise primarily in two areas: military cooperation, through membership of the Collective Security Treaty Organisation (CSTO), and economic integration, through the EAEU. Given Russia's current relationship with the OSCE and the geopolitical implications of the CSTO and EAEU, these two sets of obligations pose challenges of incompatibility. This is particularly relevant in the light of the interpretative declarations issued by both Kazakhstan and Kyrgyzstan.

3.2.1 CSTO

The CSTO represents the final stage in efforts to maintain a coordinated system among the former Soviet armed forces. Its origins can be traced back to the dissolution of the Soviet Union and the subsequent integration dynamic known as holding-together integration.[27] Following an initial attempt to retain joint armed forces under a unified command within the Commonwealth of Independent States,[28] Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, the Russian Federation, Tajikistan and Uzbekistan sought more effective mechanisms for military cooperation. This led to the conclusion of the CST

24 M. Larrotcha Parada, 'Central Asia: The Long Road to Statehood' (December 2014) 305 *ISPSW Strategy Series: focus on Defence and Intenational Security*.

25 A. Libman and E. Vinokurov, *Holding-Together Regionalism: Twenty Years of Post-Soviet Integration*, Palgrave MacMillan: London, 2012, p. 48.

26 Estonia, Latvia and Lithuania were not included in the Soviet constituent republics for historical reasons. For the participant states to the relevant regional integration project refer *infra*, Sections 4.2 and 4.3.

27 A. Libman and E. Vinokurov, *Holding-Together Regionalism, supra* note 25, p. 48.

28 Agreement on the Joint Armed Forces for a transitory period, done at Kyiv on 20 March 1992. See P. Kubicek, 'The Commonwealth of Independent States: an example of failed regionalism?' (2009) 35 (S1 Globalising the Regional, Regionalising the Global) *Review of International Studies*, pp. 237 – 256.

on 15 May 1992, for an initial term of five years following its entry into force.[29] The treaty entered into force on 20 May 1994 and was extended for a further five years in 1999,[30] though Azerbaijan, Georgia and Uzbekistan withdrew at that time.[31] In 2002, on the basis of the CST, the participating states established a permanent organisation, the CSTO, through the adoption of the Charter of the CSTO.[32] Today, the CSTO member states are Armenia, Belarus, Kazakhstan, Kyrgyzstan, the Russian Federation and Tajikistan.[33]

The CSTO operates in a manner that resembles the North Atlantic Treaty Organisation (hereinafter NATO). The most evident similarity lies in Article 4 of the CST, which provides that an act of aggression against a CSTO member requires a collective response by the alliance if requested by the state under attack.[34] Under Article 4 CST, a threat to state stability is included within the definition of an attack.[35] On this basis, Kazakhstan invoked the CSTO's collective defence mechanism during the protests of January 2022.[36] Additionally, the CST prohibits member states from joining military alliances or participating in groups directed against any CSTO member.[37] It also requires parties to engage in mutual consultations on security matters in order to adopt a coordinated position.[38] These obligations are complemented by Article 8 CST, which states that the treaty does not affect the rights and obligations of the parties under other agreements. However, it also commits member states to refrain from undertaking any obligations that would be contrary to the CST.[39]

29 Treaty on Collective Security, done at Taškent on 15 May 1992.

30 Protocol on the prolongation of the Treaty on Collective Security, done at Moscow on 02.04.1999.

31 Azerbaijan, Georgia and Uzbekistan did not enter the Protocol on the Prolongation of the CST, ibid. Uzbekistan joined the CSTO again in 2006, withdrawing for a second time in 2012. For the history of the CSTO see CSTO, 'Ot Dogovora k Organizacii', available at https://odkb-csto.org/25years/, last accessed on 10.03.2025.

32 Charter of the CSTO, done at Chisinau on 07.10.2002.

33 Ibid.

34 Article 4 CST.

35 Ibid., the concept of armed attack is defined as an 'armed attack menacing to safety, stability, territorial integrity and sovereignty'.

36 Address of the Chair of the Council of Collective Security of the CSTO – Prime Minister of Armenia Nikol Pašinjan of 6 January 2022, available at https://odkb-csto.org/mirotvorcheskaya-operatsiya-odkb-v-kazakhstane-6–19-yanvarya-2022-goda/, last accessed on 10.03.2025.

37 'The Member States shall not enter military alliances or take part in any groups of the states, as well as in the actions against other Member States', Article 1 CST.

38 Ibid., Article 2.

39 Ibid., Article 8.

3.2.2 The EAEU

The second relevant international organisation is the EAEU, established as an economic union in 2015 through the conclusion of the TEAEU.[40] Like the CSTO, the EAEU fits within the holding-together regionalism framework and was founded on the basis of previous integration initiatives dating back to the dissolution of the Soviet Union. The first reference to a Eurasian Union was made as early as 1994 by the then Kazakh President, Nursultan Nazarbayev,[41] while the first concrete steps were taken in 2000 with the establishment of the Eurasian Economic Community.[42] Within this framework, Belarus, Kazakhstan and the Russian Federation formed a customs union in 2007,[43] introducing the first elements of a permanent governance structure through the creation of the Customs Union Commission. In 2011, the heads of state of these three countries established a formal decision-making body, the Supreme Eurasian Economic Council (hereinafter Supreme Council),[44] envisaging further integration in line with the Declaration on Eurasian Integration.[45] Consequently, the Customs Union Commission was renamed and restructured as the Eurasian Economic Commission (hereinafter Eurasian Commission),[46] and the participating states concluded 17 separate international agreements.[47] On this basis, the Supreme Council established a common economic

40 Treaty on the Eurasian Economic Union, done at Astana on 29.05.2014.

41 Speech of the President of the Republic of Kazakhstan Nursultan Nazarbaev at Lomonosov State University in Moscow on 29.03.1994.

42 Treaty on the establishment of the Eurasian Economic Community, done at Astana on 10.10.2000.

43 Agreement on the establishment of a common customs space and the creation of the customs union, made in Dushanbe on 06.10.2007.

44 Decision of the Supreme Eurasian Economic Council of 18.11.2011, N°1.

45 Declaration on the Eurasian economic integration of 18.11.2011.

46 Treaty on the creation of the Commission of the customs union, done at Dušanbe on 6.10.2007.

47 All 17 agreements forming the legal basis for the common economic space are: Agreement on cooperation in fight to illegal labour migration from third countries, 09.12.2010; Agreement on the legal status of the labour migrants and their family members, 19 11.2010; Agreement on the agreed macroeconomic policy, 09.11.2010; Agreement on the creation of the conditions to guarantee the free circulation of capitals on the financial markets, 09. 12.2010; Agreement on the agreed principles of monetary policy, 09.12.2010; the Agreement on common principles and regulations of the activities of the subjects of the natural monopolies, 09.12.2010; Agreement on the common principles and regulations on concurrency, 09. 12.2010; Agreement on the common regulation for the assignment of industrial subsidies, 09.12.2010; Agreement on the common regulation on state agricultural subsidies, 09. 12.2010; Agreement on state (public) purchases, 09. 12.2010; Agreement on commercial services and investments in member States of the Common

space, which became operational on 1 January 2012.[48] Following the establishment of the customs union and the common economic space, Belarus, Kazakhstan and the Russian Federation pursued a deeper level of integration by merging the legal foundations of these frameworks into the TEAEU, thereby formally establishing the EAEU on 1 January 2015,[49] and simultaneously dissolving the Eurasian Economic Community.[50] Armenia joined the EAEU on 2 January 2015,[51] followed by Kyrgyzstan on 13 August 2015,[52] bringing the total number of member states to five. The EAEU has a complex governance structure that, in addition to the Supreme Council and the Eurasian Commission, includes the Eurasian Intergovernmental Council and the Court of the Eurasian Economic Union (hereinafter Court of the EAEU).[53]

The obligations of states under EAEU law are highly complex. The EAEU legal system shares many characteristics with EU law and may be considered an EU-like legal system, albeit in an early stage of development. A detailed examination of these obligations would exceed the scope of the present paper. In fact, obligations under EAEU law do not stem solely from the TEAEU but also from EAEU secondary law, which takes precedence over domestic law and, to a certain extent, enjoys direct effect.[54] If a member state fails to comply with a provision of EAEU law, another member state may bring a claim before the Court of the EAEU,[55] which has the authority

Economic Space 09.12.2010; Agreement on the common principles and regulations in the area of protection and defence of intellectual property, 09.12.2010; Agreement on the organisation, regulation, functioning and development of the common oil and oil products markets of Belarus, Kazakhstan and Russia, 09.12.2010; Agreement on the access guarantee to the services of natural monopolies in the sphere of electric energy, including basics on price determination and tariff policy, 19.11.2010; Agreement on the rules of access to the services of the natural monopolies' subjects in the sphere of the gas transportation by gas transportation systems, including basics on price determination and tariff policy, 09.12.2010; Agreement on the access of railways services, including basics on tariff policy, 09.12.2010; Agreement on the common principles of technical regulation in Belarus, Kazakhstan and Russia, 18.11.2010.

48 Decision of the Supreme Eurasian Economic Council of 19.12.2011, No. 9.

49 TEAEU, *supra* note 40.

50 Treaty on the termination of the Eurasian Economic Community, Minsk, 10.10. 2014.

51 Agreement on Accession of the Republic of Armenia to the Treaty on the Eurasian Economic Union, 29.05.2014, done at Minsk on 10.10.2014.

52 Agreement on Accession of the Kyrgyz Republic to the Treaty on the Eurasian Economic Union, 29.05.2014, done at Moscow on 23.12.2014.

53 Art. 8 TEAEU.

54 See M. Karliuk, *The Emerging Autonomous Legal Order of the Eurasian Economic Union*, Cambridge University Press: Cambridge, 2024.

55 Point 39 of the Statute of the EAEU Court, Annex 2 to the TEAEU.

to determine non-compliance,[56] and to refer the matter to the Supreme Council for further action.[57] The EAEU legal system is designed to guarantee the free movement of goods, services, capital and labour.[58] While the construction of a fully integrated Eurasian economic space remains incomplete, trade barriers for goods have largely been removed. In particular, following the adoption of the EAEU Customs Code in 2018,[59] once a good crosses the customs border, it is released for free circulation throughout the entire EAEU territory.

3.2.3 Geopolitical Meaning

The CSTO and the EAEU constitute the main pillars of regional holding-together integration projects in the former Soviet space. They share nearly identical memberships, with the only exception being Tajikistan, which is a member of the CSTO but not of the EAEU. However, Tajikistan's potential accession to the EAEU has been the subject of longstanding debate, and on several occasions the country's president has been invited to attend sessions of the EAEU Supreme Council.[60] While Tajikistan's membership remains unresolved, its engagement in EAEU discussions underscores the broader geopolitical nature of the organisation and the pressures surrounding regional alignment. A defining characteristic of integration projects within the Eurasian holding-together model is that states participate in it for reasons extending beyond purely legal commitments. The CSTO and the EAEU each carry significant geopolitical weight, but their strategic importance becomes even more pronounced when they are considered together. While the geopolitical nature of a military alliance such as the CSTO is self-evident, given the inherent military- and security-based rationale underpinning such organisations, the geopolitical function of the EAEU is more nuanced. Examining the historical dynamics that led to the establishment of the EAEU, as well as the role it plays in the foreign policy strategies of its member states, reveals the deliberate use of international economic law to achieve geopolitical objectives.[61]

56 Point 105 of the Statute of the EAEU Court, Annex 2 to the TEAEU.

57 Point 114 of the Statute of the EAEU Court, Annex 2 to the TEAEU.

58 Article 4 TEAEU.

59 Treaty on the Customs Code of the EAEU, done at Moscow on 11.04.2017.

60 Ministry of Foreign Affairs of the Republic of Tajikistan, 'Učastie v rasširennom zasedanii Vyššego Evrazijskogo ėkonomičeskogo soveta EAĖS' News, 25.05.2023, available at https://mfa.tj/ru/main/view/12705/uchastie-v-rasshirennom-zasedanii-vysshego-evraziiskogo-ekonomicheskogo-soveta-eaes, last accessed on 10.03.2025.

61 See F. Marrella, R. K. Usmanov and P. Barbirotto, 'On Trade Liberalization for Political Ends: The Case of the EAEU' (2021) 55(4) *Journal of World Trade*, pp. 597–618.

Beyond facilitating economic cooperation, the EAEU operates as a vehicle for strengthening Russia's regional influence and fostering economic dependencies that reinforce political alignment. When viewed in tandem, the CSTO and the EAEU can thus be understood as complementary components of a broader, Russian-driven project aimed at consolidating a geopolitical bloc through the mechanisms of international law. This aligns with what has been described as authoritarian international law, whereby legal and institutional frameworks are utilised to advance strategic state interests rather than being driven solely by normative or cooperative imperatives.[62] By embedding military and economic dimensions virtually within a single overarching structure (the components of the highest decision-making bodies of both organisations are the same individuals), Russia has sought to maintain cohesion among former Soviet states, ensuring their alignment within its sphere of influence while mitigating external pressures from competing international actors.

4 Between Helsinki and Moscow: Trade-Offs in Kazakhstan and Kyrgyzstan

4.1 *OSCE Activities in Kazakhstan and Kyrgyzstan since 2022*

The *OSCE*'s ability to exercise influence on the war in Ukraine has been severely undermined by the Russian veto. Exploring alternative paths to exercise at least indirect influence can lead to the OSCE programme offices in Astana and Biškek, due mainly to their geostrategic position.

Kazakhstan joined the OSCE in 1992, committing to respect the Helsinki Accords.[63] The country has actively participated in the organisation's activities. During the 1994 CSCE Budapest Summit, Kazakhstan renounced its 1,400 nuclear warheads in exchange for security guarantees from the Russian Federation, the United States and the United Kingdom – a step linked to its accession to the Treaty on the Non-Proliferation of Nuclear Weapons,[64] which Kazakhstan had ratified on 13 December 1993.[65] In 2010, Kazakhstan chaired

62 T. Ginsburg, 'Authoritarian International Law?' (2020) 114 *American Journal of International Law*, pp. 245–247.

63 CSCE, 'Final Document of the Second Meeting of the CSCE Council of Ministers', Prague, 30–31.01.1992.

64 CSCE, 'Memorandum on Security Assurances in connection with the Republic of Kazakhstan's accession to the Treaty on the Non-proliferation of nuclear weapons', made in Budapest on 05.12.1994.

65 Decree of the Supreme Council of the Republic of Kazakhstan of 13 December 1993 No. 2593-XII, on the accession to the Treaty on Non-Proliferation of Nuclear Weapons.

the OSCE for the first time.[66] The OSCE programme office in Astana evolved from the OSCE Centre in Almaty, established in 1998.[67] The mandate for the OSCE programme office in Astana (hereinafter Astana Mandate) was adopted on 18 December 2014.[68]

Under this mandate, the office is responsible for developing, implementing and reporting on programmatic activities to assist Kazakhstan in fulfilling its OSCE commitments, as well as for activities requested by Kazakh authorities or civil society, subject to approval by the Kazakh Ministry of Foreign Affairs.[69] The projects undertaken by the office focus, as priority areas, on transnational security, regional security, economic and environmental issues, and civil society.[70] In the context of potential conflicts between Kazakhstan's OSCE obligations and other commitments in the light of the war in Ukraine, economic aspects such as anti-money laundering measures, enterprise development, border crossings and customs control are of interest.[71] Additionally, certain aspects of regional security are particularly relevant – specifically, the politico-military dimension connected to OSCE commitments within the FSC.[72] Kazakhstan has attached an interpretative declaration to the Astana Mandate, which, on the one hand, limits the scope of the mandate's priorities and the extent of OSCE reporting operations.[73] Nevertheless, Kazakhstan emphasises

66 OSCE, 'Kazakhstan takes over OSCE Chair, seeks to strengthen Organization and advance dialogue on future European security architecture', 01.01.2010, available at https://www.osce.org/cio/51810, last accessed 19.05.2025.

67 OSCE, 'Permanent Council Decision No. 243', 23.07.1998.

68 OSCE, 'Permanent Council Decision No. 1153', OSCE Programme Office in Astana, 18.12.2014.

69 Ibid., operational para. 2.

70 Ibid., operational para. 3.

71 Ibid., operational para. 3, letter c): 'Projects related to the economic and environmental dimension, with an emphasis on economic and ecological development and on promoting good governance, the fight against corruption and money laundering, public-private partnerships, the development of small and medium-sized enterprises, transport and border and customs control, environmental protection, water management issues and natural disaster reduction'.

72 Ibid., operational para. 3, letter b): 'Politico-military dimension, focusing on regional security or OSCE commitments in the framework of the Forum for Security Co-operation'.

73 OSCE, 'Attachment 1 to Permanent Council Decision No. 1153', Interpretative Statement Under Paragraph IV.1(A)6 of the Rules of Procedure of the Organization for Security and Co-Operation in Europe, OSCE Programme Office in Astana, 18.12.2014, operational paragraph 1.

that the Astana Mandate should be understood as a Kazakh effort to contribute to all OSCE activities.[74]

The situation in Kyrgyzstan is very similar to that of Kazakhstan. Like Kazakhstan, Kyrgyzstan joined the OSCE in 1992, committing to the principles of the Helsinki Accords.[75] The OSCE's activities in the country began with the establishment of the OSCE Centre in Biškek in 1998,[76] which was later transformed into the OSCE programme office in 2017.[77] The mandate for the OSCE programme office in Biškek (hereinafter Biškek Mandate) empowers the office to develop, implement and report on programmatic activities that assist Kyrgyzstan in fulfilling its OSCE obligations.[78] Compared to the Astana Mandate, Kyrgyz authorities have placed stricter control mechanisms on the Biškek Mandate, requiring that all activities be agreed upon with the Ministry of Foreign Affairs through a consultative mechanism,[79] and conducted in close cooperation with the Kyrgyz government.[80] The programme office's activities prioritise politico-military cooperation, the economic and environmental dimensions, human rights and gender equality.[81] As in the case of Kazakhstan, the most relevant areas for the present analysis – and for a potential impact on the war in Ukraine – are those related to the economic dimension, especially regarding anti-money laundering measures, enterprise development, border crossings and customs control.[82] Additionally, the provisions area of regional security could be of interest. However, while the Astana Mandate broadly covers regional security, the Biškek Mandate places greater emphasis on law enforcement, particularly in relation to counter-terrorism and organised

74 Ibid., [is this really 'ibid'?] operational paragraph 4. [are there really 2 with 'operational paras.?]

75 CSCE, 'Final Document of the Second Meeting of the CSCE Council of Ministers', Prague, 30–31.01.1992.

76 OSCE, 'Permanent Council Decision No. 245', 23.07.1998.

77 OSCE, 'Permanent Council Decision No. 1250', OSCE Programme Office in Biškek, 27.04.2017.

78 Ibid., operational paragraph 2.[and a third one?]

79 Ibid.

80 Ibid., letter b).

81 Ibid., operational paragraph 3.[is this correct?]

82 Ibid., operational para. 3, letter b): 'Projects related to the economic and environmental dimension, with an emphasis on economic and ecological development and on promoting good governance, the fight against corruption and money laundering, public-private partnerships, the development of small and medium-sized enterprises, transport and border and customs control, environmental protection, water management issues and natural disaster reduction'.

crime.[83] Kyrgyzstan has attached a more restrictive interpretative declaration to the Biškek Mandate than Kazakhstan has to the Astana Mandate. According to this declaration, any activity carried out by the OSCE programme office without the approval of the Kyrgyz Ministry of Foreign Affairs, within the consultative mechanism, constitutes a violation of the Biškek Mandate.[84] Nonetheless, as in Kazakhstan's case, Kyrgyzstan asserts that the Biškek Mandate reflects the country's willingness to cooperate actively with OSCE activities.[85]

While both Kazakhstan and Kyrgyzstan host OSCE programme offices, the degree of operational flexibility afforded to these missions is shaped by differing interpretations of their mandates and the political oversight exercised by national authorities. In Kazakhstan, the Programme Office in Astana operates under a more narrowly interpreted mandate that emphasises technical assistance and capacity-building, often circumscribed to projects aligned with government priorities. Oversight mechanisms – such as the vetting of project proposals and closer monitoring by the Ministry of Foreign Affairs – limit the OSCE's room to address politically sensitive issues, including human rights or governance reform. By contrast, the Programme Office in Biškek benefits from a relatively more permissive environment, with greater latitude being given to engage civil society actors and address multidimensional security topics, including police reform and electoral integrity. This difference reflects not only domestic political openness but also a looser grip on interpretative control by the Kyrgyz authorities, who tend to view OSCE engagement as a source of legitimacy and external balancing. As a result, while both offices operate under consensus-based mandates, the scope and political manoeuvrability of their activities diverge significantly, offering the OSCE a comparatively more versatile platform in Kyrgyzstan than in Kazakhstan.

When it comes to the war in Ukraine, both Kazakhstan and Kyrgyzstan have, on several occasions, distanced themselves from Russia's position,

83 Ibid., operational para. 3, letter a): 'Projects related to the politico-military dimension, with a focus on transnational threats and law enforcement co-operation, with an emphasis on security sector governance, the fight against terrorism and violent extremism, and the fight against organized crime and drug trafficking'.

84 OSCE, 'Attachment 3 to Permanent Council Decision No. 1250', Interpretative Statement Under Paragraph IV.1(A)6 of the Rules of Procedure of the Organization for Security and Co-Operation in Europe, OSCE Programme Office in Biskek, 27.04.2017, operational paragraph 1. [Is this correct? Does it really refer to Biskek?]

85 Ibid., operational para. 2.

though without openly condemning the invasion.[86] They have consistently abstained from voting on United Nations General Assembly Resolution ES-11/1,[87] as well as on subsequent votes in the Eleventh Emergency Special Session on the war in Ukraine.[88] The OSCE mandates in both countries serve as the programmatic basis for joint projects coordinated by the OSCE programme offices. However, their implementation requires additional agreements between the OSCE and the respective states, with programmes in sensitive areas being subject to approval by the Ministries of Foreign Affairs. The OSCE's initiatives in Kazakhstan and Kyrgyzstan have contributed to strengthening human rights protections and improving the financial sector. Activities within the security cluster primarily focus on counterterrorism and, since 2022, have been limited, particularly in Kazakhstan. Nonetheless, the OSCE programme offices could in theory explore how to leverage their role within the mandates to increase their impact on the Russian aggression. Specifically, monitoring transactions or trade flows that may contribute to Russia's military effort could be considered within the provisions on security cooperation and financial control, as will be described below.

The mandates of the OSCE programme offices in Astana and Biškek operate therefore within a politically constrained space where formal cooperation coexists with latent resistance to externally driven agendas. While the interpretative declarations significantly limit the OSCE's freedom of action, they also reflect the host states' desire to appear compliant with international norms without antagonising regional power centres. This duality enables a form of strategic ambiguity: even restricted programmatic areas such as anti-money laundering or border security can, in practice, be leveraged to detect and disrupt indirect support mechanisms for the Russian war effort – so long as such activities are framed in terms of technical assistance or capacity building. Therefore, the mandates' real significance lies not merely in their written provisions, but in the political bandwidth OSCE actors have to navigate them.

The relationship between the OSCE and Kazakhstan and Kyrgyzstan, and the impact that relationship can potentially have on the war in Ukraine, must

86 See, for instance, the press conference of the Kazakh President Kassym-Jomart Tokaev of 1 March 2022, press release available at https://www.gov.kz/memleket/entities/mfa/press/news/details/334985, last accessed on 10.03.2025; the address of the Kyrgyz President Sadym Joparov of 9 March 2022, video available at https://www.youtube.com/watch?v=WnlOMO6U7e8&t=825s, last accessed on 10.03.2025.

87 United Nations General Assembly (UNGA), 'Resolution adopted by the General Assembly on 2 March 2022', A/RES/ES-11/1, 18.03.2022.

88 See the website of the Eleventh Emergency Special Session, available at https://www.un.org/en/ga/sessions/emergency11th.shtml, last accessed on 10.03.2025.

be understood within the described broader context of OSCE in Eurasia. The OSCE programme offices in Astana and Biškek are the closest – if not in geographical terms, then in contextual terms – to the war in Ukraine. Under the mandates establishing these programme offices, Kazakhstan and Kyrgyzstan are subject to more stringent obligations than the general ones set out in the Helsinki Accords. These mandates assign to the OSCE the responsibility for developing, implementing and reporting on programmatic activities. Such activities range from transnational security threats, including counterterrorism, extremism, organised crime and trafficking in drugs and human beings, to the politico-military dimension, emphasising regional security and the OSCE's commitments within the framework of the FSC, to social, economic and environmental issues, and in these fields there is room for the OSCE to develop measures that can have at least an indirect impact on the war, being nonetheless at odds with regional integration obligations of Kazakhstan and Kyrgyzstan.

4.2 *OSCE Programme Offices and Regional Obligations*

When it comes to the war in Ukraine, the obligations for Kazakhstan and Kyrgyzstan deriving from the OSCE, either existing or potential in the form of measures adopted within the mandates and those of the regional structures described in Section 3, that is the CSTO and the EAEU, at a certain point present a conflict. Such a conflict, as introduced in Section 2, happens on two layers: first there is a more general potential conflict between the very commitments with the OSCE and the regional integration engagements; then there is a second layer that involves the eventual trade-offs Kazakhstan and Kyrgyzstan would face if the OSCE explored the route of the OSCE programme offices as avenues to overcome Russian obstructionism within the OSCE and to have an impact on the war in Ukraine.

The first, more general, layer is that of general OSCE obligations. The very purpose of the mandates is to assist states in implementing the OSCE's commitments and principles, particularly those contained in the Helsinki Accords. Kazakhstan's and Kyrgyzstan's obligations under the OSCE – which include upholding principles of territorial integrity, human rights and peaceful conflict resolution – could appear at odds with its commitments to the CSTO, a Russia-led military alliance. Since Russia's invasion of Ukraine violates these very OSCE principles, Kazakhstan and Kyrgyzstan face a conflict at least in their positioning, if not in legal terms: supporting OSCE norms risks straining its strategic alliance with Moscow, while staying silent undermines its credibility within the OSCE framework. As recalled earlier, both countries have only expressed general disagreement without necessarily condemning the

invasion or taking an active role for instance in voting at the UN. In addition to these developments, Kazakhstan launched the Central Asian Security and Cooperation Forum in 2023.[89] Organised by the Presidential Institute of Strategic Studies, this forum has addressed the role of the EAEU Eurasian Economic Union in regional cooperation, as well as that of other regional organisations in the area, thereby shifting the focus of the present analysis to how these structures play a role in the war and following sections.

A second, and arguably more compelling, layer of analysis concerns the possibility that the OSCE, acting in the broader interest of the organisation, might seek to utilise its programme offices to implement ad hoc measures aimed at enhancing its role in relation to the war in Ukraine. This must be considered against the backdrop of the regional integration structures introduced in Section 3 – particularly the EAEU – which have, in practice, been leveraged by Russia as mechanisms to circumvent European and US sanctions and to pursue its geopolitical objectives. Sanctions imposed by the majority of OSCE participating states against Russia and Belarus following the invasion of Ukraine have been designed to undermine the sustainability of the Russian war effort, particularly by targeting dual-use and high-technology goods essential to its military-industrial base.[90] However, their effectiveness has been significantly compromised. Both Kazakhstan and Kyrgyzstan have registered substantial increases in the importation of high-technology products, suggesting a role as intermediaries in sanctions evasion.[91] Likewise, the EAEU's provisions on the free movement of services and capital have facilitated the development of alternative payment channels, resulting in increased capital flows through Kazakhstan and Kyrgyzstan (as well as Armenia), argu-

89 Kazakhstan Institute of Strategic Studies under the President of the Republic of Kazakhstan, 'Central Asian Security and Cooperation Forum in Asia: Kazakhstan offers ways to deepen cooperation and overcome challenges', 13.07.2023, available at https://kisi.kz/en/central-asian-security-and-cooperation-forum-in-asia/, last accessed on 10.03.2025.

90 On the sanctions placed on the Russian Federation and Belarus see, e.g., the official web page of the European Union, available at https://www.consilium.europa.eu/en/policies/sanctions-against-russia/, last accessed on 10.03.2025; the official page of the United States of America, available at https://www.state.gov/division-for-counter-threat-finance-and-sanctions/ukraine-and-russia-sanctions, last accessed on 10.03.2025; the official page of the United Kingdom, available at https://www.gov.uk/government/collections/uk-sanctions-on-russia, last accessed on 10.03.2025.

91 See, among the many works, the report of F. Costa Buranelli, 'Central Asia and Secondary Sanctions: The Tight Rope of Compliance', 06. 11.2023, available at https://www.ispionline.it/en/publication/central-asia-and-secondary-sanctions-the-tight-rope-of-compliance-151442, last accessed on 10.03.2025.

ably with the ultimate destination being Russian enterprises.[92] Although sanctions have proved effective to some extent, they have not succeeded in curtailing Russia's capacity to conduct military operations. Indeed, the country's military capabilities have remained largely intact, with evasion schemes involving third countries playing a crucial role in mitigating the impact of the sanctions regime.

The introduction of measures as suggested in Section 4.1 can potentially be used by the OSCE programme offices as a tool to play a more active role in contrasting Russian military activities in Ukraine and to overcome Russian obstructionism within the OSCE. In certain areas, the OSCE programme office might propose programmatic activities fully aligned with operational paragraph 3 of both the Astana and the Biškek mandates. It should be clarified that such activities do not necessarily fall within the primary purpose of the mandates of the programme offices in Kazakhstan and Kyrgyzstan, which are primarily geared towards promoting regional security, human rights and good governance. However, in the light of changed geopolitical circumstances and the crisis in Ukraine, it could be argued that an evolutionary interpretation of the mandates could justify such initiatives, while recognising the political and legal challenges this would entail. Given the growing role of both Kazakhstan and Kyrgyzstan as an import hub for high-technology goods destined for the Russian market, as well as countries of transit for capital flows destined to Russian companies – as demonstrated above – OSCE programme offices might propose programmatic activities in particular within the anti-money laundering, customs control and border crossing areas. OSCE activities could potentially have been implemented to track or record the movement of goods and capital transiting through Kazakhstan and Kyrgyzstan into Russia, eventually contributing to its military aggression.[93] While taking any direct action to block the flow of capital and goods would certainly exceed both the scope of the mandates and the capabilities of the programme offices, activities such as those described, focussed on customs control and financial oversight could still fall within the mandates. This could at least provide more precise figures for the goods and capital flows, in particular in those areas subject to sanctions

92 See, among the many works, the report of M. Chupilkin, B. Javorcik and A. Plekhanov, 'The Eurasian Roundabout: Trade Flows into Russia through the Caucasus and Central Asia', 276 *EBRD Working Paper*), available at https://www.ebrd.com/publications/working-papers/the-eurasian-roundabout, last accessed on 10.03.2025.

93 The projects implemented by the OSCE Programme office in Astana can be found at https://www.osce.org/programme-office-in-astana, last accessed on 10.03.2025. The projects implemented by the OSCE Programme office in Biškek can be found at https://www.osce.org/programme-office-in-bishkek, last accessed on 10.03.2025.

and that can have a direct impact on the war, helping OSCE member states to identify the weakest spots in the sanctions system, and, eventually, making sanctions more efficient. In addition, measures could theoretically also be considered in the field of security, even though these would be harder fully to fit into the mandates and could be of reduced impact in relation to the war in Ukraine. A strong limitation in operating directly in the security field could be related to the limited role of the FSC in the war in Ukraine; this is particularly true for the Astana Mandate, where the FSC is designated to function as the primary framework for politico-military cooperation.

Should such a course of action be pursued, the measures implemented through the programme offices would encounter limitations stemming from the interpretative declarations attached by both Kazakhstan and Kyrgyzstan to their respective mandates. These declarations restrict the scope of permissible activities, and any unauthorised initiatives are expressly prohibited. Nonetheless, both states maintain that the Astana[94] and Biškek[95] mandates represent their willingness actively to engage with the OSCE and support its objectives. At this stage, the analytical lens of conflicting obligations, game theory and trade-offs becomes particularly relevant. Initiatives such as monitoring and reporting on the flow of goods and capital – while potentially falling within the scope of the economic and financial dimensions of the mandates – would probably raise questions of compatibility with existing regional obligations under the TEAEU, that guarantee the free movement of goods and capital among member states. Consequently, such OSCE measures could be perceived as constituting non-tariff barriers, thus infringing upon EAEU provisions.[96] This could trigger an inter-state judicial procedure before the Court of the EAEU,[97] which may result in a binding judgment.[98] In this scenario, approving an OSCE programme office to carry out such programmatic activities – and committing to the associated agreements – could place Kazakhstan and Kyrgyzstan in violation of EAEU norms, leading to an unavoidable trade-off between the two sets of obligations.

More profoundly, however, these economic measures could ignite a deeper conflict of obligations – not merely with the EAEU, but with the CSTO. While not military in nature, such measures could nonetheless provoke contention under CSTO obligations. The drafting of Article 8 of the CST must be inter-

94 See *supra* note 68, operational para. 4.

95 See *supra* note 77, operational para. 2.

96 Article 38 para. 3) TEAEU.

97 Point 39.1 of the Statute of the EAEU Court, Annex 2 to the TEAEU.

98 Points 99 and 105 of the Statute of the EAEU Court, Annex 2 to the TEAEU.

preted in light of the principle *lex posterior derogat priori*, which dictates that, in cases of conflicting obligations under successive treaties, the later treaty prevails. Therefore, on the one side Article 8 serves as a compatibility clause for commitments undertaken prior to the entry into force of the CST, and on the other sets the obligation that any international agreements concluded after the CST's entry into force must conform to its provisions. Accordingly, measures derived from OSCE mandates that – though indirectly – target Russia's military activities could be interpreted as a breach of Article 1 CST, which prohibits participation in coalitions or actions directed against a CSTO member. This is particularly significant in light of the Russian Federation's overt hostility towards the OSCE, as expressed by a member of the Russian Parliament who described the OSCE Parliamentary Assembly as a 'Russophobe circus' during the vote to suspend participation.[99] Any new commitments by Kazakhstan or Kyrgyzstan under OSCE frameworks could thus be seen by Russia as antagonistic, potentially leading to accusations of CSTO violations. Importantly, Article 8 does affect not only the hypothetical measures discussed above. A rigid interpretation of the provision has implications for the broader obligations arising from the Helsinki Accords, as discussed in the first analytical layer. In this light, any form of cooperation perceived as 'anti-Russian', including when Kazakhstan and Kyrgyzstan are called upon to approve potential OSCE programme office initiatives that may play even an indirect role in responding to the war in Ukraine, they are unlikely to endorse any measure that could be perceived as engaging with Ukrainian affairs or criticising Russia. This practical limitation significantly narrows the OSCE's room for manoeuvre and blocks any attempt to pursue this alternative path of engagement, thereby sparing the host states the necessity of choosing between competing international obligations.

5 Conclusions

The Russian invasion of Ukraine has had a profound impact on the OSCE, creating a crisis that challenges the organisation's core principles. Russia's

99 During an interview with the official newspaper of the Parliament of the Russian Federation, Representative Tolstoy stated that 'with the withdrawal of the Russian Federation, the OSCE Parliamentary Assembly loses 6% of its financial means' and that 'it makes no sense to spend money on tickets for the Russophobe circus the OSCE Parliamentary Assembly has become'. Available in Russian at https://www.pnp.ru/politics/deputat-tolstoy-s-ukhodom-rf-byudzhet-pa-obse-poteryaet-6-finansovykh-postupleniy.html, last accessed on 02.05.2025; see also *supra* note 20.

actions are in clear violation of the fundamental tenets of the Helsinki Accords, which, while a soft law instrument, reaffirm some of the most basic principles of international law. The situation concerning Kazakhstan and Kyrgyzstan, however, is even more complex. While their potential responsibility under public international law could be explored, both states have formally distanced themselves from Russian aggression within the OSCE and the FSC. The status of the OSCE programme offices in Astana and Biškek adds further complexity. At this stage, the framework outlined in Section 2 becomes relevant. Even if the tension between the programmatic provisions of the OSCE mandates and the obligations arising from Kazakhstan's and Kyrgyzstan's membership of the CSTO and the EAEU does not amount to a direct conflict of obligations, the mandates provide the legal basis for the implementation of purpose-driven programmes through separate agreements. In the current context, with the war in Ukraine being a priority for the OSCE, the offices in Astana and Biškek could, in theory, implement programmes the better to monitor activities that support the Russian military effort. As explained in Section 3, while the mandates were not originally designed for such purposes, their provisions could, at least in theory, allow for the development of such initiatives. Following the closure of the OSCE mission in Ukraine, the offices in Astana and Biškek – alongside the mission in Moldova, which remains vulnerable to the Russian veto – are among the closest OSCE structures to the war in Ukraine. However, given the current geopolitical landscape and the obligations of Kazakhstan and Kyrgyzstan under the TEAEU, the CST and the CSTO Charter, these offices are unable fully to exploit their potential to contribute more effectively to addressing one of the most pressing security challenges of today.

It is undeniable that the OSCE offices in Astana and Biškek play a crucial role in promoting human rights, enhancing financial governance and supporting arms control efforts in cooperation with military authorities. However, none of these activities has an impact on the war in Ukraine. For example, there are no financial monitoring initiatives tracking artificial capital flows into Kazakhstan and Kyrgyzstan, nor programmes designed to monitor the movement of technological and dual-use goods entering these countries but ultimately destined for the Russian war effort. Any such initiatives, in any case, would require the explicit authorisation of the respective Ministries of Foreign Affairs, as per the mandates and the attached interpretative declarations attached to the mandates of both states. Proposing such programmes would place Kazakhstan and Kyrgyzstan in a strategic dilemma. Participating in these initiatives would not only create political tensions with Russia but could also be seen as a breach of obligations arising from their CSTO and

EAEU commitments, as outlined in Section 4. For instance, such actions could be interpreted as infringing the principle of free movement of goods and capital under the TEAEU, and even as violating the prohibition against participating in groups directed against a CSTO member state. This, in turn, could lead to legal consequences, including potential proceedings before the Court of the EAEU. In summary, the approval of such hypothetical programmes would amount to a breach of Kazakhstan's and Kyrgyzstan's commitments under the CSTO and the EAEU, and thus towards the Russian Federation. Given the current circumstances, it appears unlikely that the two states would pursue such a course of action. As a result, OSCE programme offices, while theoretically capable of implementing initiatives relevant to the Russian war in Ukraine, remain effectively unable to do so due to political and legal constraints. To avoid a potential legal conflict, these activities remain paralysed, hindering the OSCE programme offices' ability effectively to make the most of their mandates. Moreover, the OSCE itself faces a trade-off. Pressuring Kazakhstan and Kyrgyzstan to engage in such initiatives could have unintended consequences. While such efforts might offer a means of exerting influence on Russia – despite Moscow's ongoing efforts to obstruct OSCE decision-making – they could also provoke a reduction in cooperation from Kazakh and Kyrgyz authorities. This, in turn, could undermine OSCE operations in the region, potentially destabilising the broader security architecture in Central Asia.

PART 4

Jurisprudence by the European Courts

∴

The Case Law of the ECtHR in 2024: The ECHR and the Contemporary Global Challenges for the International Community

Lorenzo Acconciamessa

Abstract

This contribution analyses the main developments in the case law of the European Court of Human Rights in 2024. As usual, the main criterion for selecting the relevant cases has been the list of 'key cases' published by the Court. A preliminary overview shows that many of those cases concerned, in one way or another, issues that have been described by scholars, states and international organisations, and sometimes even by the Court, as 'global challenges' or 'emergencies', such as, to mention just the most notable ones, the war of aggression against Ukraine, migration, climate change, attacks on judicial independence, the Covid-19 pandemic, the fight against terrorism, and the protection of cultural heritage. The developments in the Court's case law are therefore assessed in the light of the question whether the European Convention on Human Rights is an instrument capable of dealing with global challenges. The analysis of the Court's approach in this respect leads to two conclusions. First, the ECHR is an instrument which is, in itself, capable of contributing to the international management of global challenges. Secondly, and conversely, the ECHR can be also used to limit states' powers while dealing with global challenges, with the purpose of guaranteeing that the measures adopted in this respect are in any case compatible with human rights. The Court's 2024 case law therefore demonstrates that the ECHR is a truly 'living instrument' which can be adapted to 'present-day condition', such as the contemporary challenges faced by the international community.

1 Introduction

In his foreword to the 2024 Annual Report of the European Court of Human Rights (ECtHR or the Court) President Bošnjak noted that during that year, in addition to the continuing full-scale war waged by the Russian Federation against Ukraine, the member states of the European Convention on Human Rights and Fundamental Freedoms (ECHR or the Convention) 'faced serious challenges, such as those posed by conflict, migration, new technologies and climate change' and reiterated that '[i]n such circumstances, it is vitally

© LORENZO ACCONCIAMESSA, 2026 | DOI:10.1163/9789004751026_022
This is an open access chapter distributed under the terms of the CC-BY-NC-ND 4.0 license.

important that our Court is able to respond effectively and in a timely manner to those calls'.[1] The role of the Court and the Convention in dealing with such challenges is even more noticeable if one looks at the subjects of the rulings included in the list of 'key cases' identified by the Court in its 2024 case law:[2] a preliminary overview indeed shows that during that year the Court issued rulings in cases which concerned, in one way or another, issues that have been described by scholars, states and international organisations, and sometimes even by the Court, as 'global challenges'[3] or 'emergencies',[4] such as, to mention just the most notable ones, the war of aggression against Ukraine, climate change, migration, attacks on judicial independence, the Covid-19 pandemic, the fight against terrorism, and the protection of cultural heritage.

In this context, the main developments in the Court's case law during 2024 are examined here in the light of a question which has never before been so pressing,[5] notably the question whether the Convention, which was concluded in 1950, is an instrument capable of dealing with, and adjusting to, the main contemporary challenges which its member states and, more generally, the international community of states are nowadays facing.[6]

1 ECtHR, 'Annual Report 2024', 2025, available at https://www.echr.coe.int/documents/d/echr/annual-report-2024-eng, last accessed on 31.03.2025, p. 6.

2 ECtHR, 'Key cases 2024', List of cases recommended by the Jurisconsult and approved by the Bureau, 01.01.2025, available at https://ks.echr.coe.int/documents/d/echr-ks/key-cases-2024-eng, last accessed on 31.03.2025.

3 In general, 'global challenges' have been defined as issues which are multidimensional and spatially unbounded, and which require large-scale cooperation in order to be resolved. See, for an in-depth analysis, A. Isakova, M. Neuwinger, R. Schulze Waltrup and O. Uraiqat (eds.), *Constructing Global Challenges in World Politics*, Routledge: Abingdon/New York, 2024.

4 See, for a similar observation, J. Sommardal, 'Reflections on the Court's Key Case Law of 2024: Part II', *ECHR Blog*, 21.01.2025, available at https://www.echrblog.com/2025/01/reflections-on-courts-key-case law-of.html, last accessed on 31.03.2025.

5 The role of the Convention in respect of global challenges has indeed been highlighted several times recently. E.g., during a Conference held in 2021, Judge Robert Spano, at that time president of the Court, highlighted and examined the application of the ECHR in relation to three global challenges, notably attacks on judicial independence and the rule of law, responses to the global pandemic, and the environmental crisis (see HELP, *Human Rights Responses to Global Challenges: 2021 HELP Network Conference*, 01.07.2021, available at https://www.coe.int/en/web/help/-/human-rights-responses-to-global-challenges-2021-help-network-conference, last accessed on 31.03.2025).

6 More generally, on the need to address global challenges through the prism of human rights, see United Nations High Commissioner for Human Rights, 'Navigating Our Global Challenges Through Human Rights', speech delivered at the Celebration of the 50th anniversary of the Declaration of the Rights of Citizens and the Fundamental Principles of San Marino Ordi-

To answer the above question, the contribution will first summarise and assess the most important rulings issued in 2024 which dealt with those issues, and highlight how the Court's findings might be relevant for the purpose of addressing the global challenge underlying each case, and then try to assess them globally and make some general observations concerning the role of the Court and the Convention in respect of the international management of global challenges.

2 Article 1 ECHR: States' Jurisdiction in Respect of Harm Caused by Climate Change

In the case of *Duarte Agostinho and Others v Portugal and 32 Others* the Court had to establish whether the respondent states exercised jurisdiction for the purposes of Article 1 ECHR in respect of complaints lodged by a group of Portuguese children concerning the harm allegedly caused to them by climate change, an issue which by definition concerns a global challenge[7] and which the same Court has defined as 'one of the most pressing issues of our times'[8] which 'poses existential risks for humankind'.[9]

Although admitting that the facts of the case did not fall within any of the categories of extraterritorial jurisdiction established in the case law,[10] the applicants claimed that 'special features regarding climate change militated in favour of finding jurisdiction'.[11] In particular, they argued that the respondent states exercised 'control over the applicants' Convention interests'.[12]

---

nance, 05.07.2024, available at https://www.ohchr.org/en/statements-and-speeches/2024/07/navigating-our-global-challenges-through-human-rights, last accessed on 31.03.2025.

7 See, e.g., General Assembly of the United Nations, *Request for an Advisory Opinion of the International Court of Justice on the Obligations of States in Respect of Climate Change*, UN Doc. A/RES/77/276, 04.04.2023, which recognised that 'climate change is an unprecedented challenge of civilizational proportions and that the well-being of present and future generations of humankind depends on our immediate and urgent response to it'.

8 ECtHR, *Verein KlimaSeniorinnen Schweiz and Others v Switzerland*, no. 53600/20 [GC] 09.04.2024, para. 410. See also para. 374, reporting that the Government of Romania 'submitted that climate change represented a global challenge that required international reaction'.

9 Ibid., para. 421.

10 ECtHR, *Duarte Agostinho v Portugal and 32 Others* (dec.), no. 39371/20 [GC] 22.04.2024, para. 121.

11 Ibid., para. 124.

12 Ibid., para. 126.

The Court found without hesitation that the applicants fell within Portugal's territorial jurisdiction, since they were all resident there.[13] As regards the other respondent states, the Court noted that there was no suggestion that they exercised effective control over an area,[14] or that they had exercised any 'authority or control' over the applicants capable of triggering personal jurisdiction,[15] and observed that a jurisdictional link could not be established by the institution of domestic proceedings, since the applicants had not taken any step in that regard.[16]

The Court therefore examined whether there were any relevant 'special features' capable of establishing jurisdiction. In this respect, it reiterated that its case law had consistently rejected the idea that the fact of a decision being taken at national level which has an impact on the situation of a person abroad could in itself establish jurisdiction,[17] or the argument according to which the fact that a state is capable of taking a decision or action impacting on the applicant's situation abroad would suffice.[18] In this context, the Court assessed whether it would have been necessary to adapt its case law in order to take into account the special features of climate change, and admitted that climate change presents several special and unique features.[19] However, the Court considered that those considerations could not in themselves serve as a basis for creating a novel ground for extraterritorial jurisdiction.[20] It subsequently rejected the further arguments raised by the applicants, observing that the seriousness or gravity of the situation,[21] the respondent states' capacity to take measures,[22] and the applicants' EU nationality[23] were insufficient to trigger jurisdiction. Most importantly, and although acknowledging that 'climate change is undoubtedly a global phenomenon which should be

13 Ibid., para. 178.
14 Ibid., para. 181.
15 Ibid., para. 182.
16 Ibid., para. 183.
17 See, in particular, ECtHR, *Banković and Others v Belgium and Others* (dec.), no. 52207/99 [GC] 12.12.2001, para. 75; ECtHR, *M.N. and Others v Belgium* (dec.), no. 3599/18 [GC] 05.05.2020, para. 112: 'The mere fact that decisions taken at national level had an impact on the situation of persons resident abroad is also not such as to establish the jurisdiction of the State concerned over those persons outside its territory'.
18 ECtHR, *H.F. and Others v France*, nos. 24384/19 and 44234/20 [GC] 14.09.2022, para. 199.
19 ECtHR, *Duarte Agostinho*, *supra* note 10, paras. 192-194.
20 Ibid., para. 195.
21 Ibid., para. 198.
22 Ibid., para. 199.
23 Ibid., para. 200.

addressed at the global level by the community of States',[24] the Court strongly dismissed the applicants' argument based on the respondent states' 'control over the applicants' Convention interests':

> extending the Contracting Parties' extraterritorial jurisdiction on the basis of the proposed criterion … would lead to an untenable level of uncertainty for the States. Action taken in relation to some of the basic human activities mentioned above, or any omission in managing the activity's potential harmful effects on climate change, could lead to the establishment of a State's extraterritorial jurisdiction over the interests of persons outside its territory and without any particular link with the State concerned. More importantly, accepting the applicants' arguments would entail an unlimited expansion of States' extraterritorial jurisdiction under the Convention and responsibilities under the Convention towards people practically anywhere in the world. This would turn the Convention into a global climate-change treaty. An extension of its scope in the manner requested by the applicants finds no support in the Convention.[25]

The Court also acknowledged that a different approach had been taken by the Inter-American Court of Human Rights[26] and by the UN Committee of the Rights of the Child,[27] but briefly replied that 'both are based on a different notion of jurisdiction, which, however, has not been recognised in the Court's case law'.[28] It therefore concluded that the applicants did not fall within the respondent states' extraterritorial jurisdiction, and dismissed their claims as inadmissible.

---

24 Ibid., para. 202.

25 Ibid., para. 208.

26 IACtHR, *Advisory Opinion on the Environment and Human Rights. State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity. Interpretation and Scope of Articles 4(1) and 5(1) in Relation to Articles 1(2) and 2 of the American Convention on Human Rights*, no. OC-23/17, 15.11.2017, para. 4 of the operative provisions. The Inter-American Court adopted a cause-effect approach.

27 UN Committee on the Rights of the Child, *Sacchi and Others v Argentina*, UN Doc. CRC/C/88/D/104/2019, 21.09.2021, para. 10.7. It also adopted a cause-effect approach.

28 ECtHR, *Duarte Agostinho*, *supra* note 10, para. 212.

Such an outcome has been described as 'inevitable',[29] since it is consistent with the case law, while the alternative 'would have represented a radical departure from existing approaches and could have paved the way for climate cases from all around the world'.[30] It was also argued that, being the applicants' arguments 'bound to fail' from the outset, 'pursuing this litigation was potentially counterproductive'.[31] In order to avoid negative consequences of this decision, a few clarifications are needed. The Court's dismissal of the 'functional' approach to jurisdiction must be understood as a dismissal of such an approach *as that advanced by the applicants*, in the sense that 'the respondent States' emissions and/or failure to regulate/limit their emissions produced effects outside their territories bringing the applicants within their jurisdiction'.[32] In essence, the applicants were basing jurisdiction on a mere *abstract* cause-effect link, in the absence of any element capable of connecting the action or omission attributed to the respondent states and the specific concrete adverse effects on the enjoyment of their rights. The rejection of this argument by the Court seems indeed understandable.[33] However, this must not be understood as a rejection of the notion of functional jurisdiction in itself, in the version proposed by other international bodies[34] and sometimes accepted by the same Court, which might prove extremely relevant, for example, in migration cases:[35] that is to say, a notion of jurisdiction based on the *effective control* by the state, demonstrated in the specific circumstances of the case on the basis of several legal and factual connecting factors, of the enjoyment of a certain right by the individual concerned.

In any case, it does not appear that the Court's approach to jurisdiction in climate cases 'creates a protection gap between emitters and affected individ-

29 M. Milanovic, 'A Quick Take on the European Court's Climate Change Judgments', *EJIL Talk!*, 29.04.2024, available at https://www.ejiltalk.org/a-quick-take-on-the-european-courts-climate-change-judgments/, last accessed on 31.03.2025.

30 C. Heri, 'On the *Duarte Agostinho* Decision', *Verfassungsblog*, 15.04.2024, available at https://verfassungsblog.de/on-the-duarte-agostinho-decision/, last accessed on 31.03.2025.

31 M. Milanovic, 'A Quick Take on the European Court's Climate Change Judgments', *supra* note 29.

32 ECtHR, *Duarte Agostinho*, *supra* note 10, para. 121.

33 See A. Ollino, 'Qualche Riflessione sul Caso *Duarte Agostinho* e sulla Nozione di Giurisdizione come "Controllo sull'Esercizio dei Diritti Umani"' (2024) 18(2) *Diritti umani e diritto internazionale*, pp. 401–418, who considered that this understanding of jurisdiction poses conceptual and practical problems.

34 See, e.g., UN Human Rights Committee, *A.S., D.I., O.I and G.D. v Italy*, UN Doc. CCPR/C/130/D/3042/2017, 28.04.2021, para. 7.5.

35 E.g., in ECtHR, *Carter v Russia*, no. 20914/07, 21.09.2021, para. 161.

uals'.[36] And indeed, provided that the relevant domestic remedies are exhausted, and that the victim status requirements established in the *Klima-Seniorinnen* judgment are complied with,[37] nothing prevents individuals or associations from lodging applications with the Court against the states exercising territorial jurisdiction over the affected individuals, notably the states in which they reside.

3 Article 3 ECHR and Article 4 of Protocol No. 4: Pushbacks of Asylum-Seekers and Migrants at Sea

The case of *M.A. and Z.R. v Cyprus* concerned the respondent state's practice of intercepting and immediately returning migrants arriving from Lebanon. The case therefore must be read in the context of 'the challenges fac[ed by] European States in terms of immigration control as a result of the economic crisis and recent social and political changes which have had a particular impact on certain regions of Africa and the Middle East'.[38]

The applicants complained that the Cypriot authorities had returned them to Lebanon without an examination of individual circumstances, thereby exposing them to treatment prohibited by Article 3 ECHR; that they were expelled as part of a collective measure, in breach of Article 3 of the Convention and Article 4 of Protocol No. 4; and that they had not had access to an effective domestic remedy, as required by Article 13.

To rule on those complaints, the Court had to assess the available evidence, since there was strong disagreement between the parties on whether the applicants had expressed their wish to seek asylum.[39] In this respect, the Court noted that, although the applicants had not provided direct evidence substantiating their assertion, they had been intercepted and stranded at sea in a wooden boat for two days without being allowed to disembark, and therefore had had very limited contacts with the outside world.[40] Moreover, the

36 A. Rocha, 'States' Extraterritorial Jurisdiction for Climate-Related Impacts', *Verfassungsblog*, 12.04.2024, available at https://verfassungsblog.de/states-extraterritorial-jurisdiction-for-climate-related-impacts/, last accessed on 31.03.2025.

37 See *infra*, section 10.

38 See, among others, ECtHR, *N.D. and N.T. v Spain*, nos. 8675/15 and 8607/15 [GC] 13.02.2020, para. 169, with further references on the migration challenge faced by European states.

39 ECtHR, *M.A. and Z.R. v Cyprus*, no. 39090/20, 08.10.2024, para. 82.

40 Ibid., para. 83. The Court also noted that UNHCR Cyprus had not been given access to the passengers on the boat.

Court considered that their account of the dates, the reasons they had entered Cyprus and their interactions with the authorities had always been consistent, while the Government had submitted inconsistent accounts of the facts.[41] The Court also relied on reports by civil society and international organisations concerning push-backs and summary returns to Lebanon of persons entering Cyprus illegally, without their having had access to a procedure for claiming asylum even when they had requested it.[42] In these circumstances, the Court considered that there was 'prima facie evidence confirming the applicants' statement that … they had orally informed the Cypriot authorities that they were seeking asylum and did not wish to be returned to Lebanon'.[43] Therefore, the Court shifted the burden of proof to the Government.[44] However, not only had the Government provided neither any record or evidence of the interviews which allegedly had taken place, nor a statement of the interpreter who had assisted the authorities, but their accounts of the facts were entirely unconvincing.[45] Having regard also to the available statistics on the Cypriot authorities' practice to push back asylum-seekers without an individualised assessment of their situation, the Court found that it was 'sufficiently established' that the Cypriot authorities had returned the applicants without processing their asylum claims'.[46]

In similar situations, the Court examines whether the domestic authorities have complied with their procedural obligation to conduct on their own motion an assessment of whether the applicants had had access to an adequate asylum process in the destination country (Lebanon) and sufficient guarantees against their subsequent removal to their country of origin (Syria) without a proper evaluation of the risk.[47] In this respect, the Court considered that Cyprus could not evade its responsibility by pointing out

41 Ibid., para. 84.

42 Ibid., para. 85.

43 Ibid., para. 86.

44 ECtHR, *M.H. and Others v Croatia*, nos. 15870/18 and 43115/18, 18.11.2021, para. 273.

45 ECtHR, *M.A. and Z.R.*, *supra* note 39, para. 89: 'The Court finds it still more unconvincing that the applicants, having travelled across the sea on a wooden boat, risking their lives to go to Cyprus where they had relatives in order to seek asylum, and having asked the Court to apply interim measures allowing them to apply for asylum in Cyprus, would for no apparent reason abandon their efforts and not express their wish to apply for asylum to the Cypriot authorities, even when they were each asked again, on the date of their removal to Lebanon, as asserted by the Government'.

46 Ibid., para. 89. Therefore, the Court also dismissed the Government's non-exhaustion objection, which was based on the allegation that the applicants had failed to request asylum from the Cypriot authorities.

47 ECtHR, *Ilias and Ahmed v Hungary*, no. 47287/15 [GC] 21.11.2019, para. 139.

that the return had been carried out on the basis of an international agreement.[48] It also held that Cyprus could not successfully argue that Lebanon was a safe country on the basis of the good relations between the two countries, the presence of the UNHCR, and Lebanon's submissions to UN bodies, given reliable reports by international governmental and non-governmental organisations which had acknowledged the insufficiencies of the legal framework of that country, its incapacity to deal with the mass influx of asylum requests, the deterioration of the conditions of asylum-seekers, and the enforcement of returns to Syria.[49] The Court therefore considered that the Cypriot authorities were aware of these deficiencies[50] and, having failed to undertake an individualised assessment of the applicants' situation,[51] had breached their procedural obligations under Article 3.[52]

As regards the applicants' complaints under Article 4 of Protocol No. 4, the Court considered that it was undisputed that the applicants' forced return constituted an 'expulsion'.[53] When assessing whether it could be considered 'collective', the Court noted that the Government had not provided any records specific to each migrant, transcripts of interviews, or any other documents. The Government had also provided no records of the applicants' alleged interactions with the interpreter, or any evidence capable of demonstrating that they had been informed of their rights or told how to challenge the decision.[54] The Court further considered that the (unfortunate) 'one's own conduct' exception[55] could not apply in this case, since there was no indication that the absence of an individual decision could be attributed to the applicants. There was nothing suggesting that they had failed to cooperate,[56] and there were no other genuine and effective means for the applicants to submit their asylum request and challenge their expulsion.[57] The Court therefore found that the applicants had been subjected to a 'collective expulsion', in

48 ECtHR, *M.A. and Z.R.*, *supra* note 39, para. 91: 'the Court reiterates that States … cannot evade their own responsibility by relying on obligations arising out of bilateral agreements with other countries'.

49 Ibid., para. 92.

50 Ibid., para. 93

51 Ibid., para. 93.

52 Ibid., para. 96.

53 Ibid., para. 115.

54 Ibid., para. 116.

55 ECtHR, *N.D. and N.T.*, *supra* note 38, para. 200.

56 ECtHR, *M.A. and Z.R.*, *supra* note 39, para. 117.

57 Ibid., para. 118.

breach of Article 4 of Protocol No. 4. On the basis of the same findings, it also concluded that there was no effective domestic remedy enabling the applicants to raise their complaints, in breach of Article 13 ECHR.[58]

The applicants had further complained under Article 3 ECHR of the conditions in which they had been kept for two days on the boat. The Court noted from the outset that, irrespective of the specific treatment to which they had been subjected, the complete 'absence of a relevant legal framework regulating the circumstances under which a person is to be kept at sea pending a determination of their status could on its own raise a structural issue for the purposes of Article 3'.[59] However, since the applicants had not submitted arguments in this respect, the Court focused on the circumstances of the case and noted that the Government had not provided sufficient evidence capable of rebutting the applicants' allegations that they had been provided with insufficient food and water,[60] and that they had slept on the boat for two days with no access to hygiene facilities.[61] Therefore, the Court considered that they must have suffered considerable distress and feelings of humiliation, and that this sufficed to amount to degrading treatment in breach of Article 3.[62]

Overall, the judgment should be welcomed since it sets out important developments concerning the distribution of the burden of proof in pushback cases[63] which, by definition, are very difficult to prove.[64] Moreover, it is a significant (although implicit) reaffirmation of the principle pursuant to

58 Ibid., para. 126.

59 Ibid., para. 133.

60 Ibid., para. 135.

61 Ibid., para. 136.

62 Ibid., para. 137.

63 I. Kienzle and J. Biebling, 'Evidently Unlawful, Yet Difficult to Evidence: *M.A. and Z.R. v Cyprus* Advances Strasbourg's Case law on Pushbacks', *Strasbourg Observers*, 22.10.2024, available at https://strasbourgobservers.com/2024/10/22/evidently-unlawful-yet-difficult-to-evidence-m-a-and-z-r-v-cyprus-advances-strasbourgs-case-law-on-pushbacks/, last accessed on 31.03.2025.

64 See, in this respect, ECtHR, *G.R.J. v Greece* (dec.), no. 15067/21, 03.12.2024, where the Court considered that, notwithstanding the existence of evidence of a practice of systemic return of migrants and asylum-seekers from the Greek islands to Turkey, the applicant had failed to submit *prima facie* evidence capable of demonstrating that he was present on the island of Samos at the relevant date and that he had been pushed back to Turkey. Accordingly, the Court held that the applicant could not claim to be a victim of the alleged violation within the meaning of Article 34. For a critical assessment of this case, see S. Motz and A. Mullis, 'Undermining Protection Standards in Pushback Cases: The ECtHR in *A.R.E. v Greece* and *G.R.J. v Greece*', *Strasbourg Observers*, 28.03.2025, available at https://strasbourgobservers.com/2025/03/28/undermining-pro

which the fact that states are experiencing 'considerable difficulties in coping with the increasing influx of migrants and asylum-seekers' and 'the burden and pressure this situation places on the States concerned', also in the light of the additional 'difficulties related to the phenomenon of migration by sea, involving for States additional complications in controlling the borders in southern Europe', cannot in themselves exempt states from their obligations under the Convention, especially as far as absolute rights are concerned.[65]

This principle is even more important today, with pushbacks becoming established and given the systematic practice of European states.[66] Moreover, there are currently several cases pending before the Grand Chamber which concern pushbacks of migrants and asylum-seekers at the EU's borders with Belarus.[67] In those proceedings, both the respondent states and several states which intervened as third parties argued that the cases should be examined in their context, notably the instrumentalisation of migration by Russia and Belarus as a form of 'hybrid warfare' against European states, and that this should somehow lead to a relaxation of the safeguards imposed by the Convention.[68] In this respect, one should recall that the Court can – and should – take the general context into account while assessing the proportionality of interferences.[69] This was reiterated also with specific regard to the threats caused by Russia and its various forms of intervention in and against Euro-

---

tection-standards-in-pushbacks-cases-the-ecthr-in-a-r-e-v-greece-and-g-r-j-v-greece/, last accessed on 31.03.2025.

65 ECtHR, *Hirsi Jaama and Others v Italy*, no. 27765/09 [GC] 23.02.2012, para. 122.

66 ECtHR, *A.R.E. v Greece*, no. 15783/21, 07.01.2025, para. 230.

67 ECtHR, *C.O.C.G. and Others v Lithuania*, no. 17764/22 [GC] communicated on 02.12.2022; ECtHR, *H.M.M. and Others v Latvia*, no. 42165/21 [GC] communicated on 03.05.2022; ECtHR, *R.A. and Others v Poland*, no. 42120/21 [GC] communicated on 17.11.2021. For a summary of the cases, see M. Lysienia, 'For Better of for Worse? Grand Chamber Takes Over Cases Concerning Pushbacks at the Belarusian Border', *Strasbourg Observers*, 06.09.2024, available at https://strasbourgobservers.com/2024/09/06/for-better-or-for-worse-grand-chamber-takes-over-cases-concerning-pushbacks-at-the-belarusian-border/, last accessed on 31.03.2025.

68 For a summary and assessment of those arguments, see G. Baranowska, 'What – If Any – Are the Consequences of the "Instrumentalization of Migration" for Human Rights Protection under the ECHR? A Look at the Arguments Raised at the ECtHR Grand Chamber Hearing on Pushbacks to Belarus', *Strasbourg Observers*, 04.03.2025, available at https://strasbourgobservers.com/2025/03/04/what-if-any-are-the-consequences-of-the-instrumentalization-of-migration-for-human-rights-protection-under-the-echr-a-look-at-the-arguments-raised-at-the-ecthr-g/, last accessed on 31.03.2025.

69 ECtHR, *Zdanoka v Latvia* (*No. 2*), no. 42221/18, 25.07.2024, para. 55.

pean states,[70] in particular Ukraine.[71] However, on the one hand, this should not lead to a general reduction in the safeguards imposed by absolute rights which, by their definition, are not context-related; on the other hand, the same Court has recently reiterated that the threats and difficulties caused by Russia cannot absolve a respondent state from its responsibility under the Convention.[72]

While, for the reasons stated above, the judgment has the merits of reaffirming the force of the Convention standard in the face of claims to 'exceptionalism', it appears hardly understandable why the Court decided that it was not necessary to examine the applicants' complaint that they had been unlawfully arrested and detained, in breach of Article 5(1) of the Convention.[73] This is the usual practice of the Court, which tends to deal with the main issues raised by a case and then sets aside the others on the basis of the so-called 'Câmpeanu formula'.[74] However, this practice seems acceptable when, having dealt with a given factual and legal issue, the Court does not deem it necessary to reaffirm the same conclusion under a different provision: for example, having found under the procedural assessment of a substantive provision that there is no effective domestic remedy to safeguard a given right, it does not seem necessary to reiterate the same finding under Articles 6 and/or 13.[75] However, when the complaints concern different factual and legal allegations, this approach may prove problematic, since the Court entirely overlooks some aspects of the case, also without providing any indication of which are the criteria for identifying the 'main' aspect.[76] In this case, the Court had not

70 Ibid., with further references.

71 ECtHR, *Vyacheslavova and Others v Ukraine*, nos. 39553/16 and others, 13.03.2025, para. 286: 'in examining the facts of the present case, the Court will give due consideration to their general context consisting, in particular, in the established involvement of the Russian Federation in the events and Crimea and the east of Ukraine'. See also ECtHR, *Borzykh v Ukraine* (dec.), no. 11575/24, 19.11.2024.

72 ECtHR, *Vyacheslavova and Others*, *supra* note 71, paras. 334–335 and 338.

73 Ibid., para. 139.

74 ECtHR, *Centre for Legal Resources on Behalf of Valentin Câmpeanu*, no. 47848/08 [GC] 17.07.2024, para. 156.

75 ECtHR, *Grande Oriente d'Italia v Italy*, no. 29550/17, 19.12.2024, paras. 147 and 150; ECtHR, *Italgomme Pneumatici S.r.l. and Others v Italy*, nos. 36617/18 and others, 06.02.2025, paras. 137 and 143.

76 See ECtHR, *X and Others v Slovenia*, no. 27746/22, 19.12.2024, partly dissenting opinion of Judge Serghides; ECtHR, *Grande Oriente d'Italia v Italy*, *supra* note 75, Partly dissenting opinion of Judge Serghides; ECtHR, *Adamčo v Slovakia* (*No. 2*), nos. 55792/20 and others, 12.12.2024, partly dissenting opinion of Judge Serghides. See also, on this issue, A. Greene, 'Allegation-Picking and the European Court of Human Rights: A Pervasive Court Practice Hiding in Plain Sight', *Strasbourg Observers*, 25.02.2025, available at https://strasbourgob

dealt at all with the question concerning the existence of a sufficient legal basis for detaining the applicants, thus leaving an important issue unaddressed.[77] Moreover, a similar issue, concerning the alleged deprivation of liberty by confining an individual on a boat, is currently pending before the Grand Chamber.[78] Therefore, it is difficult to argue that this concerned a 'minor' issue.

4 Article 4 ECHR: States' Obligations Aimed at Fighting Human Trafficking and Servitude

In *F.M. and Others v Russia* the Court examined under Article 4 ECHR a complaint concerning the alleged failure by the state's authorities to protect irregular female migrant workers from trafficking and servitude and to investigate the crimes allegedly committed against them, another issue which the Court has defined as a 'global phenomenon [which] has increased significantly in recent years'. The Court noted also that there is 'increasing recognition at international level of the prevalence of trafficking and the need for measures to combat it'.[79]

The applicants, all female irregular migrant workers from Kazakhstan and Uzbekistan, had worked in convenience stores in the district of Moscow, where they were severely exploited, not paid for working excessive hours, their identity documents were taken and they had no labour contracts; moreover, they were constantly beaten, raped and subjected to forced pregnancies, forced abortions and the removal of their children. Having managed to escape, they lodged criminal complaints with the Russian authorities. Before the Court, they complained that the authorities had failed to protect them from trafficking, exploitation and violence.

The Court considered that the Russian authorities were under a positive obligation to take measures to protect the applicants and institute an effective investigation. In particular, having examined the evidence that had been sub-

servers.com/2025/02/25/allegation-picking-and-the-european-court-of-human-rights-a-pervasive-court-practice-hiding-in-plain-sight/, last accessed on 31.03.2025.

77 I. Kienzle and J. Biebling, 'Evidently Unlawful, Yet Difficult to Evidence', *supra* note 63.

78 ECtHR, *Mansouri v Italy*, no. 63386/16 [GC] communicated on 20.11.2018.

79 ECtHR, *Rantsev v Cyprus and Russia*, no. 25965/04, 07.01.2010, para. 278. On the qualification of human trafficking as a global challenge see also United Nations Office on Drug and Crime, 'Global Report of Trafficking in Persons 2024', United Nations Publications: Vienna, 2024, available at https://www.unodc.org/documents/data-and-analysis/glotip/2024/GLOTIP2024_BOOK.pdf, last accessed on 08.05.2025.

mitted to the Russian authorities, the Court found that there were at the material time credible suspicions, and in some cases even *prima facie* evidence, that the applicants had been victims of trafficking for labour exploitation.[80] The Court also found that there was ample evidence to conclude that all the constituent elements of the international definition of trafficking were present:[81] as regards the 'action', the applicants had been recruited in their home countries and transported to Russia for the purpose of being employed while held at the place of exploitation;[82] as regards the 'means', the perpetrators had resorted to deception and abuse of the applicants' position of vulnerability on account of their gender and migrant status;[83] as regards the 'purpose', the exploitation was undeniable.[84] The Court considered that the applicants had been further subjected to 'forced labour', since they had been forced to work without offering themselves voluntarily,[85] and to 'servitude', given that they had been 'obliged to live on their employers' property and had no opportunity to alter their situation'.[86]

The Court therefore assessed whether the domestic authorities had complied with their obligations. First, it considered that there had been a breach of the substantive limb of Article 4, since the domestic legal system had not put in place an appropriate legislative and administrative framework: there was a notable lacuna in the legislation criminalising trafficking, since it did not clarify that the victim's consent could not be used to defend or excuse the crime;[87] moreover, forced labour and servitude were not properly criminalised.[88] Secondly, the Court considered that the Russian authorities had not taken the operational measures that they were reasonably required to take, since the investigators had not taken any steps to protect the applicants, which were not even qualified as potential victims of human trafficking.[89] Lastly, the Court also found a breach of the procedural limb of Article 4, since the domestic authorities had not instituted any effective investigation: they had reiterated a series of non-reasoned decisions declining to act;[90] when the investiga-

80 ECtHR, *F.M. and Others v Russia*, nos. 71671/16 and 40190/18, 10.12.2024, para. 263.
81 Ibid., para. 272.
82 Ibid., para. 273.
83 Ibid., para. 274.
84 Ibid., para. 275.
85 Ibid., para. 276.
86 Ibid., para. 277.
87 Ibid., paras. 282–287.
88 Ibid., para. 288.
89 Ibid., paras. 297–305.
90 Ibid., para. 313.

tions were opened, the authorities accepted without any scrutiny the statements of the alleged perpetrators denying the crimes;[91] no forensic examinations were undertaken;[92] and no investigations were undertaken in respect of the alleged corruption and discriminatory motives which had led to the dismissal of all the applicants' credible allegations.[93] In this context, the Court also added a new obligation among those concerning investigations against human trafficking:[94]

> when investigating violent incidents, State authorities have the additional duty to take all reasonable steps to unmask possible discriminatory motives and to establish whether or not violence was induced by, for instance, racial or religious intolerance or motivated by gender-based discrimination. Treating violence and brutality with a discriminatory intent on an equal footing with cases that have no such overtones would be turning a blind eye to the specific nature of acts that are particularly destructive of fundamental rights.[95]

In the circumstances of the case, the Court considered that this duty had not been complied with, since 'the likelihood that the traffickers had used the applicants' vulnerability as females and migrants in order to exploit them was left without any assessment'.[96]

With regard to the applicant's vulnerability as females and migrants, the Court also separately examined the applicants' complaint, raised under Article 14 taken in conjunction with Article 4 ECHR, that they were victims of intersectional discrimination on the grounds of their gender, ethnicity and social position, which stemmed from the authorities' gender, ethnic and anti-immigrant biases. In this respect, the Court noted that research and statistics showed that 'a disproportionate number of women and girls have been victims of human trafficking, particularly in Eastern Europe and Cen-

91 Ibid., para. 316.
92 Ibid., para. 318.
93 Ibid., paras. 321–328.
94 Such an obligation had been previously identified in Articles 2 and 3 of the Convention (see, e.g., ECtHR, *Identoba and Others v Georgia*, no. 73235/12, 12.05.2015, para. 67, with further references). For an assessment of this case law, see V Stoyanova, *Positive Obligations under the European Convention on Human Rights: Within and Beyond Boundaries*, Oxford: Oxford University Press, 2023, p. 146.
95 ECtHR, *F.M. and Others*, *supra* note 80, para. 325.
96 Ibid.

tral Asia',[97] and that the international community had repeatedly stressed the lack of recognition by the Russian Federation of this issue.[98] In this context, the Court referred to its case law pursuant to which 'a general policy that has disproportionately prejudicial effects on a particular group may be considered to constitute discrimination, even where it is not specifically aimed at that group and there is no discriminatory intent'.[99] It therefore considered that, while the breach of Article 4 derived from a general situation, notably 'the respondent State's poor anti-trafficking efforts', this situation inevitably hit mainly those disproportionately affected by trafficking, labour exploitation and related violence, notably female foreign migrant workers in an irregular situation.[100] Therefore, the Court concluded that the authorities' inaction also 'amounted to repeatedly condoning trafficking, labour exploitation and related gender-based violence and reflected a discriminatory attitude towards the applicants as women who were foreign workers with an irregular immigration status', in breach of Article 14 of the Convention.[101]

This judgment is a significant step forward in the fight against human trafficking, since it introduced into the Court's case law on this topic the question of the discriminatory motives behind the treatment to which the victims are subjected as well as the inaction, and condoning of violence, of the domestic authorities. While it has somehow been criticised for having failed to qualify the treatment to which the applicants had been subjected as 'slavery' instead of or merely as 'forced labour' and 'servitude',[102] this qualification does not appear essential, since the obligations of Article 4 are in any case the same.

5 Article 5 ECHR: Immunities of International Judges, the Protection of the International Judiciary, and the Attacks against Judicial Independence

In *Aydin Sefa Akay v Türkiye* the Court examined under Article 5 ECHR a complaint concerning the alleged unlawfulness of the arrest and pre-trial

97 Ibid., para. 342.
98 Ibid., para. 343.
99 ECtHR, *Volodina v Russia*, no. 41261/17, 09.07.2019, para. 109, with further references.
100 ECtHR, *F.M. and Others*, *supra* note 80, para. 344.
101 Ibid., para. 346.
102 V Stoyanova, '*F.M. and Others v Russia*: The Role of the Prohibition on Discrimination for Migrant Victims of Slavery' (2025) *European Human Rights Law Review*, forthcoming.

detention of a judge serving at the United Nations International Residual Mechanism for Criminal Tribunals (hereinafter: Mechanism), despite his diplomatic immunity. The case therefore raised the issue of the protection of the independence of the judiciary and the rule of law, which are seriously under attack,[103] both nationally[104] and internationally.[105]

The applicant, an international judge at the Mechanism, was arrested and subjected to pre-trial detention on account of his alleged participation in an armed terrorist organisation. Before the Court, he complained under Article 5(1) that these measures had not been in accordance with a procedure prescribed by law, in that they had been contrary to the immunities he enjoyed as a judge of the Mechanism. He further complained, under Article 5(1)(c) that there was no evidence giving rise to a reasonable suspicion of his having committed an offence, and under Article 5(4) that the domestic courts had failed to address his arguments regarding his diplomatic immunity.

In setting out the relevant principles, the Court referred to its case law pursuant to which, in cases concerning the detention of judges, 'where domestic law has granted judicial protection to members of the judiciary in order to safeguard the independent exercise of their functions, it is essential that such arrangements should be properly complied with'.[106] In its further reasoning, the applicability of this principle was extended to the protection of the international judiciary, as set out in the relevant international instruments.

The Court noted from the outset that the applicant's pre-trial detention had had a legal basis in domestic law. However, it considered that, in order to rule on the issue whether the applicant was 'lawfully' detained and was deprived of his liberty 'in accordance with a procedure prescribed by law', it was necessary to assess whether the domestic authorities had dealt in a foreseeable way with his argument according to which those measures were unlawful since he enjoyed immunity by virtue of the statute of the Mechanism, and could not be deprived of his liberty in the absence of a waiver by the UN Secretary

103 See, e.g., M. Kayser and R. Altmann, 'The Authority of the Judiciary. Counteracting Challenges to Judicial Authority", seminar on the occasion of the opening of the judicial year of the ECtHR, 26.12.2018, available online at https://www.echr.coe.int/documents/d/echr/Speech_20180126_Kayser_Altmann_JY_ENG, last accessed on 31.03.2025.

104 Among many others, ECtHR, *Grzęda v Poland*, no. 43572/18 [GC] 15.03.2022, para. 346.

105 Consider, e.g., the attacks of the United States Government against the International Criminal Court (D. Hovell, 'Punishing Sanctions: A Call to Arms Against Fortress America', *EJIL Talk!*, 25.02.2025, available at https://www.ejiltalk.org/punishing-sanctions-a-call-to-arms-against-fortress-america/, last accessed on 31.03.2025).

106 ECtHR, *Aydin Sefa Akay v Türkiye*, no. 59/17, 23.04.2024, para. 113, referring to ECtHR, *Alparslan Altan v Turkey*, no. 12778/17, 16.04.2019, para. 102.

General.[107] In this respect, the Court noted that the applicant had submitted to the domestic courts a letter from the President of the Mechanism confirming that he enjoyed immunity in his capacity as an international judge; moreover, a *note verbale* from the UN Office of Legal Affairs asserting that the applicant enjoyed immunity was communicated to the Permanent Mission of Turkey to the UN, requesting his immediate release and the termination of all legal proceedings against him.

The Court considered, first, that it was unacceptable that, irrespective of its outcome, a first assessment of the applicant's immunity was carried out by the trial court only eight and a half months after his arrest and seven and a half months after his counsel had raised the issue: this delay was in itself in breach of Article 5, in so far as it '*de facto* rendered futile any protection afforded to [the applicant] by virtue of his immunity, that being detrimental to the proper functioning of the Mechanism'.[108]

As regards the question whether the domestic courts' interpretation of the extent of the applicant's immunity was foreseeable and compatible with the principle of legal certainty, the Court noted that both the trial court[109] and the Constitutional Court[110] had concluded, although on the basis of different reasoning, that the applicant could not enjoy immunity before the authorities of the state which he represented and of which he was a national. In this context, and while reiterating that its only task was to apply the Convention and not to decide on the applicant's immunity as such, the Court held that it had nevertheless to be convinced that the domestic courts' approach was compatible with Article 5(1) of the Convention.[111] After having engaged in a thorough and in-depth analysis of the relevant international provisions, the Court concluded as follows:

> In the light of the above the Court finds that there are strong arguments for concluding that a judge of an international court is not a representative of a member State to an organ of the UN, that being incompatible with the very independence that defines a judge and judiciary, be it national or international.[112]

107 ECtHR, *Aydin Sefa Akay*, *supra* note 106, para. 115.
108 Ibid., para. 116.
109 Ibid., para. 117.
110 Ibid., para. 118.
111 Ibid., para. 119.
112 Ibid., para. 128.

Therefore, it held that the domestic courts' interpretation of the applicant's immunity was not foreseeable nor in keeping with the requirements of the principle of legal certainty,[113] and, having ruled out that the derogation made by Turkey under Article 15 ECHR could apply to this case (since this provision in any case requires compliance with 'other obligations under international law'),[114] found that there had been a breach of Article 5(1). It also considered that it was not necessary to assess the other complaints raised by the applicant.[115]

The same findings were reiterated while dealing with the applicant's complaint, under Article 8 ECHR, that the search of his house and person were unlawful since they had blatantly disregarded his immunity. The Court noted that, in the light of the relevant international provisions – which enable judges of the Mechanism to exercise their functions remotely – 'the applicant's place of residence was in an analogous position to that of an office' and, therefore, 'it was subject to a heightened protection, similar to the protection afforded to searches of a lawyer's office in the Court's case law'.[116] The Court further dismissed the Government's argument according to which the applicant had failed to invoke his diplomatic protection, since that immunity did not belong to him but to the UN, which had formally asserted his immunity, had not waived it and had not *ex post facto* consented to the search.[117] Therefore, the Court concluded that, in the light of the breach of the applicant's immunity, the interference could not be regarded as 'in accordance with the law' within the meaning of the Convention, and was accordingly in breach of Article 8.[118]

In his concurring opinion, in which he was joined by Judge Schembri Orland, Judge Krenc stressed the importance of judicial independence also for international judges, and the need for them 'in the exercise of their judicial functions, remain free from any external authority, influence or pressure, including from their State of nationality or residence', emphasising also that this is not 'a privilege for the judges themselves but a crucial tool for upholding the rule of law and ensuring the proper functioning of international justice'.[119]

113 Ibid., para. 129.
114 Ibid., para. 130.
115 Ibid., para. 132.
116 Ibid., para. 142.
117 Ibid., para. 143.
118 Ibid., para. 144.
119 ECtHR, *Aydin Sefa Akay v Türkiye*, no. 59/17, 23.04.2024, Concurring opinion of Judge Krenc, joined by Judge Schembri Orland, para. 2.

From a methodological point of view, the judgment is noteworthy because it integrated safeguards provided for by international law into the lawfulness test required by the Convention,[120] a technique which is becoming quite established in the Court's case law[121] and which is extremely relevant when states deal with issues and challenges that, being of interest for the whole international community, are clearly regulated under international law. During the same year, a similar approach was adopted in *Zahariev v North Macedonia*, where the Court found a breach of Article 6 ECHR due to the domestic courts' failure to address the applicant's argument related to his immunity from prosecution under the 1961 Vienna Convention on Diplomatic Relations.[122]

As regards the judgment issued in *Aydin Sefa Akay v Türkiye*, it must be noted that it was criticised because the Court dismissed the applicant's request under Article 46 ECHR to release him.[123] However, the case brought to the Court concerned the applicant's arrest and pre-trial detention, while he is currently detained on the basis of a final criminal conviction, an issue which was not brought before the Court. Therefore, the latter cannot be criticised for having failed to order such a measure.

6 Article 6 ECHR: Access to Justice to Complain of the Implementation of Climate Change Mitigation Measures

Going back to climate change, it must be recalled that in the already cited case of *KlimaSeniorinnen* the Court assessed under Article 6(1) ECHR a complaint concerning the lack of effective access to a court to complain of the (in)effective implementation of climate change mitigation measures.

The Court examined, first of all, whether the applicants could be regarded as victims – within the meaning of Article 34 ECHR – of the violation alleged by them, and whether Article 6 ECHR was applicable. Having recalled the applicable general principles, the Court held that they must be applied by taking into account 'the specificities of climate-change litigation'.[124] There-

120 A. Shrivastava, 'On an International Judge's Immunity: The ECtHR in *Akay v Turkey*', *EJIL Talk!*, 17.10.2024, available at https://www.ejiltalk.org/on-an-international-judges-immunity-the-ecthr-in-akay-v-turkey/, last accessed on 31.03.2025.

121 See also *infra*, section 6.

122 ECtHR, *Zahariev v North Macedonia*, no. 26760/22, 05.11.2024.

123 A. Shrivastava, 'On an International Judge's Immunity', *supra* note 120.

124 ECtHR, *KlimaSeniorinnen*, *supra* note 8, para. 608.

fore, it clarified that: a 'civil' right in this matter might be recognised under international law and therefore trigger the applicability of Article 6;[125] the question whether there is a 'genuine and serious dispute or disagreement' over the manner of ensuring respect for such right is a matter to be determined on the facts of each case;[126] and that the requirement that the outcome of the proceedings must be 'directly decisive' for the applicant's right must be assessed in the light of the object of climate change litigation. The Court therefore held as follows:

> the various elements of the analysis under this limb of the test, and in particular the notion of imminent harm or danger, cannot be applied without properly taking into account the specific nature of climate change-related risks … Where future harms are not merely speculative but real and highly probable (or virtually certain) in the absence of adequate corrective action, the fact that the harm is not strictly imminent should not, on its own, lead to the conclusion that the outcome of the proceedings would not be decisive for its alleviation or reduction. Such an approach would unduly limit access to a court for many of the most serious risks associated with climate change. This is particularly true for legal actions instituted by associations. In the climate-change context, their legal actions must be seen in the light of their role as a means through which the Convention rights of those affected by climate change, including those at a distinct representational disadvantage, can be defended and through which they can seek to obtain an adequate corrective action for the alleged failures and omissions on the part of the authorities in the field of climate change.[127]

In the specific case, the Court noted that, while the applicants' action mostly concerned requests for legislative and regulatory action falling outside the scope of Article 6, they also acted to obtain the implementation of the reduction target provided for by the currently existing law,[128] a matter capable of falling within the scope of this provision.[129] As regards the 'civil' nature of the

125 Ibid., para. 610.
126 Ibid., para. 611.
127 Ibid., para. 614.
128 See the case law pursuant to which Article 6 does not guarantee a right of access to a court with the power to invalidate or override a law enacted by the legislature (ECtHR, *Project Trade d.o.o. v Croatia*, no. 1920/14, 19.11.2020, para. 68)
129 ECtHR, *KlimaSeniorinnen*, *supra* note 8, para. 616.

right, the Court observed that the applicants had relied on the right to life and physical integrity as enshrined in the Constitution, considered that those rights could be seen as civil in nature,[130] found that they were at least 'arguable', and that a 'genuine and serious dispute' over their respect existed.[131] As regards the question whether the outcome of the dispute was 'directly decisive' for the applicants' rights, the Court considered that this condition was satisfied as regards the applicant association's action: the latter had 'demonstrated that it had an actual and sufficiently close connection to the matter complained of and to the individuals seeking protection against the adverse effects of climate change on their lives, health and quality of life',[132] since in the Court's view the requirement in question had to be interpreted 'in the broader sense of seeking to obtain a form of correction of the authorities' actions and omissions affecting the civil rights of its members'.[133] By contrast, relying on its finding concerning the individual applicants' victim status under Article 8 ECHR,[134] the Court considered that they had not 'made out a case demonstrating that the requested action by the authorities … alone would have created sufficiently imminent and certain effects on their individual rights in the context of climate change',[135] and therefore dismissed their complaint under Article 6 as incompatible *ratione materiae* with this provision.[136]

As regards the merits of the applicant association's complaint, the Court noted that there had been a limitation of its right of access to a court, since its action had been rejected on procedural grounds at two levels of jurisdiction.[137] According to the Court, this limitation could be seen as pursuing a legitimate aim, given that it had been justified on the basis of the need to maintain the separation of powers between the legislature and the judiciary.[138] It therefore examined whether there was a reasonable relationship of proportionality between the means employed and the legitimate aim sought to be achieved. In this respect, the Court noted that the action was hybrid: on the one hand, it concerned issues pertaining to the democratic legislative process, which the Court had already found to fall outside the

130 Ibid., para. 617.
131 Ibid., paras. 618–619.
132 Ibid., para. 621.
133 Ibid., para. 622.
134 See *infra*, section 10.
135 ECtHR, *KlimaSeniorinnen*, *supra* note 8, para. 624.
136 Ibid., para. 625.
137 Ibid., para. 630.
138 Ibid., para. 631.

scope of the right of access to a court,[139] but, on the other hand, it aimed at obtaining the implementation of existing mitigation measures, an issue which cannot be considered as an *actio popularis*.[140] In respect of this complaint, the domestic courts had limited themselves to considering that 'there was still some time to prevent global warming from reaching the critical limit',[141] dismissed it without examining the question whether the applicant association could be considered as having a standing different from that of its members,[142] and after the administrative authorities had dismissed the applicants' claims without any sufficient consideration on the merits.[143] In the light of the above, the Court considered that the applicant association's right of access to a court had been restricted in such a way and to such an extent that the very essence of the right was impaired,[144] and further added the following considerations:

> In this connection, the Court considers it essential to emphasise the key role which domestic courts have played and will play in climate-change litigation, a fact reflected in the case-law adopted to date in certain Council of Europe member States, highlighting the importance of access to justice in this field. Furthermore, given the principles of shared responsibility and subsidiarity, it falls primarily to national authorities, including the courts, to ensure that Convention obligations are observed.[145]

These findings have to be seen in the light of the Court's conclusions that, in order validly to lodge an application with the Court in the field of climate change, the available domestic remedies must be exhausted.[146]

7 Article 8 ECHR

Many developments concerning states' international obligations under the ECHR in respect of global challenges can be found in the case law concerning Article 8 of the Convention. For reasons of space, only those cases concerning climate change and the Covid-19 pandemic will be examined here.

139 Ibid., para. 633.
140 Ibid., para. 634.
141 Ibid., para. 635.
142 Ibid., para. 636.
143 Ibid., para. 637.
144 Ibid., para. 638.
145 Ibid., para. 639.
146 See *infra*, section 11.

7.1 *Positive Obligations to Combat the Adverse Effects of Climate Change on Human Rights*

In *KlimaSeniorinnen* the Court identified in Article 8 ECHR a positive obligation to combat climate change and, notably, considered that this provision encompasses a right to effective protection from the serious adverse effects of climate change on lives, health, well-being and the quality of life.

In order to justify the existence of similar obligations, the Court relied on the available scientific evidence regarding the 'urgency of combating the adverse effects of climate change' and the 'scientific, political and judicial recognition of a link between the adverse effects of climate change and the enjoyment of (various aspects of) human rights'.[147] As regards the principle that states must enjoy a certain margin of appreciation, the Court distinguished between 'the State's commitment to the necessity of combating climate change' – in respect of which it considered that 'the nature and gravity of the threat and the general consensus as to the stakes involved … call for a reduced margin of appreciation' – and the 'choice of means designed to achieve those objectives' – in respect of which it considered that states should be accorded a wide margin of appreciation as to the operational choices and policies in order to meet internationally anchored standards.[148]

As regards the specific content of states' positive obligations, the Court considered that 'the State's primary duty is to adopt, and to effectively apply in practice, regulations and measures capable of mitigating the existing and potentially irreversible, future effects of climate change',[149] and, notably, to act in accordance with the international commitments.[150] In this context, the Court considered that each state is 'called upon to define its own adequate pathway for reaching carbon neutrality',[151] by undertaking 'measures for the substantial and progressive reduction of their respective GHG emission levels, with a view to reaching net neutrality within, in principle, the next three decades',[152] as well as intermediate measures for the period leading to net neutrality.[153] In the light of the above, the Court held that, in deciding whether

147 ECtHR, *KlimaSeniorinnen*, *supra* note 8, para. 542.
148 Ibid., para. 543.
149 Ibid., para. 545.
150 Ibid., para. 546.
151 Ibid., para. 547.
152 Ibid., para. 548.
153 Ibid., para. 549.

those obligations have been complied with, it will assess whether the competent (legislative, executive and judicial) authorities have had due regard to the need to:

> (a) adopt general measures specifying a target timeline for achieving carbon neutrality and the overall remaining carbon budget for the same time frame, or another equivalent method of quantification of future GHG emissions, in line with the overarching goal for national and/or global climate-change mitigation commitments;
>
> (b) set out intermediate GHG emissions reduction targets and pathways (by sector or other relevant methodologies) that are deemed capable, in principle, of meeting the overall national GHG reduction goals within the relevant time frames undertaken in national policies;
>
> (c) provide evidence showing whether they have duly complied, or are in the process of complying, with the relevant GHG reduction targets (see sub-paragraphs (a)-(b) above);
>
> (d) keep the relevant GHG reduction targets updated with due diligence, and based on the best available evidence; and
>
> (e) act in good time and in an appropriate and consistent manner when devising and implementing the relevant legislation and measures.[154]

The Court also clarified that the assessment must be 'of an overall nature',[155] and that those mitigation measures must be supplemented by 'adaptation measures aimed at alleviating the most severe or imminent consequences of climate change'.[156] Lastly, the Court considered that also in this field Article 8 enshrines procedural obligations as regards the state's decision-making processes.[157]

In the specific circumstances of the case, the Court noted several lacunae in Switzerland's regulatory framework, in particular the insufficient setting of reduction targets, the absence of any domestic measure attempting to quantify

154 Ibid., para. 550.
155 Ibid., para. 551.
156 Ibid., para. 552.
157 Ibid., para. 554.

its remaining carbon budget or otherwise, national GHG emissions limitations, and that it had previously failed to meet its past reduction target. Accordingly, the Court considered that the respondent state had failed to act in good time and in an appropriate and consistent manner regarding the devising, development and implementation of the relevant legislative and administrative framework, therefore breaching its positive obligations.[158]

As rightly noted, this very sophisticated[159] ruling shows that 'the Court takes climate change seriously'.[160] In what has been described as a 'landmark' judgment, the Court highlighted the 'crucial role of human rights law as a means of enforcing the duty of states to meet their obligations under international climate change law'.[161] In this respect, it has been observed that, while 'significant', the requirements imposed in the Court's ruling 'are not necessarily very onerous, and most EU States would likely comply already'.[162] However, the most groundbreaking aspect of this case is not to set new standards – an issue in respect of which the Court would (rightly) be criticised for exceeding its jurisdiction and lacking legitimation – but rather to recognise that the internationally set standards in this field can be 'enforced' through human rights instruments.[163]

7.2 *The Legitimacy and Proportionality of State Measures Aimed at Combating Covid-19*

In *Pasquinelli and Others v San Marino* the Court examined the compatibility with Article 8 ECHR of state employment-related measures imposed on health care and social health workers for refusing to be vaccinated against Covid-

158 Ibid., para. 573.

159 M. Milanovic, 'A Quick Take on the European Court's Climate Change Judgments', *supra* note 19.

160 J. Laffranque, '*KlimaSeniorinnen* – Climate Justice and Beyond?' (2024) 5(4) *European Convention on Human Rights Law Review*, pp. 433–443, p. 439.

161 A. Savaresi, '*Verein KlimaSeniorinnen Schweiz and Others v Switzerland*: Making Climate Change Litigation History', *Review of European, Comparative and International Environmental Law*, 27.03.2025, available at https://onlinelibrary.wiley.com/doi/10.1111/reel.12612, last accessed on 31.03.2025.

162 O.W. Pedersen, 'Climate Change and the ECHR: The Results are In', *EJIL Talk!*, 11.04.2024, available at https://www.ejiltalk.org/climate-change-and-the-echr-the-results-are-in/, last accessed on 31.03.2025.

163 For an extensive analysis of this issue, including citations of relevant literature, see C. Heri, 'Mattering in the Anthropocene: The ECtHR's Domesticating Framing of Climate Change', *The International Journal of Human Rights*, 10.03.2025, available at https://www.tandfonline.com/doi/epdf/10.1080/13642987.2025.2475001?needAccess=true, last accessed on 31.03.2025.

19,[164] an issue which was defined by the UN Secretary General as an 'unprecedented global challenge'.[165] For its part, the Court stressed in its case law that it had to take into account 'the exceptional nature of the context which existed at the relevant time', that 'the emergence of the Covid-19 pandemic presented the States with the challenge of protecting public health while guaranteeing respect for every person's fundamental rights',[166] and that it was 'liable to have very serious consequences not just for health, but also for society, the economy, the functioning of the State and life in general, and that the situation should therefore be characterised as an "exceptional and unforeseeable context"'.[167]

The applicants, social health workers, complained that, as a consequence of their refusal to be vaccinated, they had been affected by one or more measures related to their employment. The Court clarified that it was necessary to determine whether the applicants had been subjected to compulsory vaccination or whether vaccination was merely voluntary or recommended.[168] To this end, it noted that the relevant legislation used the expression 'voluntarily be vaccinated'.[169] In this context, the Court noted that the failure to be vaccinated could not entail any statutory sanction,[170] nor any other automatic consequence, but rather consequences based on every individual situation: if possible, they would have continued to work with some minor arrangements; where this was not possible, they could have been reassigned to other services or offered optional social work to be remunerated within a fixed maximum; in the worst scenario, where they refused the latter possibility, they would have been suspended without any remuneration.[171] The Court considered that those possible consequences were insufficient for making the recommended vaccination compulsory.[172]

164 The present contribution will not deal with the many admissibility issues dealt with by the Court in this judgment, since they are not directly relevant to the topic here examined.

165 United Nations, 'United Nations Comprehensive Response to COVID-19. Saving Lives, Protecting Societies, Recovering Better', Geneva, 2020, p. 5.

166 ECtHR, *Communauté Genevoise d'Action Syndicale (CGAS) v Switzerland*, no. 21881/20 [GC] 27.11.2023, para. 162.

167 ECtHR, *Terheş v Romania* (dec.), no. 49933/20, 13.04.2021, para. 39; ECtHR, *Fenech v Malta*, no. 19090/20, 01.03.2022, para. 96.

168 ECtHR, *Pasquinelli and Others v San Marino*, no. 24622/22, 29.08.2024, para. 57.

169 Ibid., para. 58.

170 Ibid., para. 59.

171 Ibid., para. 60.

172 Ibid., paras. 61–62.

As regards the question whether Article 8 ECHR was applicable, the Court relied on its well-established approach in similar cases,[173] and noted that the applicants had been affected by a series of negative consequences concerning their employment due to their refusal to be vaccinated,[174] and considered that those measures had been based on a manifestation of the applicant's private life.[175] Relying on the so-called 'reasons-based approach', the Court therefore considered that, irrespective of the seriousness of the negative consequences suffered by the applicants, the measures complained of were sufficiently linked to their individual private sphere to engage the applicability of Article 8.[176]

Before assessing whether the interference could be considered justified, the Court recalled that 'healthcare policy matters come within the margin of appreciation of the national authorities, who are best placed to assess priorities, use of resources and social needs' and that, '[i]n this field, … the margin of appreciation afforded to the States must be a wide one'.[177]

The Court considered that there could be no doubt that the measures had been lawful,[178] and that they pursued the legitimate aim of the protection of health and the protection of the rights and freedoms of others, taking into account the member states' obligation under Article 2 ECHR,[179] in the context of a public health emergency of international concern declared by the WHO.[180] As regards the question whether the measures were necessary in a

173 See ECtHR, *Denisov v Ukraine*, no. 76639/11 [GC] 25.09.2018, para. 115 which, in order to assess whether employment-related issues fall within the scope of Article 8, distinguished between the so-called 'reasons-based approach' and the 'consequence-based approach'.

174 ECtHR, *Pasquinelli and Others*, *supra* note 168, para. 74. All the applicants, except one, had been 'affected by one or a combination of the following measures complained of: suspended without pay where they refused to carry out socially useful activities; undertook community service in exchange for an allowance proportionate to the hours worked (but not exceeding EUR 600 per month); or were relocated to vacant posts in the public administration at the same pay or at a lower pay level than they were entitled to prior to the transfer (see the appended table for details). All these measures (alone or in combination) were temporary and lasted between a minimum of less than two weeks and a maximum of around fifteen months; in the majority of cases the measures lasted less than seven months because the applicants either recovered from Covid-19 infection, got vaccinated, were transferred permanently or their contracts came to an end'.

175 Ibid., para. 77.

176 Ibid., para. 78.

177 Ibid., para. 92.

178 Ibid., para. 93.

179 Ibid., para. 95.

180 Ibid., para. 97.

democratic society, the Court noted that it was undisputed that the applicants, being unvaccinated, were and remained both susceptible to the infection and in a position to contaminate others and spread the virus,[181] that the impugned law was 'a result of a global reduction of restrictive measures, in the light of the availability of vaccination in 2021', and that unvaccinated people were more vulnerable to serious consequences of the disease.[182] As regards the question whether a fair balance had been struck between the applicants' rights and the state's public interest, the Court noted that the applicants had been subjected to a series of merely temporary and progressively less restrictive measures,[183] which had not affected their dignity in any way,[184] and in most of the cases had had a very tenuous financial impact,[185] which should be seen in any case in the context of a Covid-19 pandemic. This led the Court to consider that 'such [economic] losses are an unavoidable consequence of a global pandemic and the exceptional and unforeseeable context States found themselves in at the relevant time'.[186] Lastly, the Court noted that the state had offered several alternatives to the applicants.[187] In this context, the Court considered:

> that the choice of the San Marino legislature to apply a graduated number of measures effecting employment to a small number of individuals involved in the health and socio-health sector with the aim of protecting the health of the population in general, including the applicants themselves, and the rights and freedoms of others, was justified and stood in a reasonable relationship of proportionality to the legitimate aims pursued by the respondent State. It thus cannot be said that the latter exceeded its wide margin of appreciation in health care policy matters.[188]

The Court therefore concluded that there had been no breach of Article 8 of the Convention[189] and, for the same reasons, also dismissed the applicants' complaint raised under Article 14 ECHR.[190]

181 Ibid., para. 99.
182 Ibid., para. 100.
183 Ibid., para. 101.
184 Ibid., para. 102.
185 Ibid., paras. 104–105.
186 Ibid., para. 106.
187 Ibid., para. 107.
188 Ibid., para. 108.
189 Ibid., para. 109.
190 Ibid., para. 128.

The judgment confirmed once again the wide margin of appreciation left to states in the context of the fight against the Covid-19 pandemic, with the purpose of safeguarding other rights and interests protected by the Convention.[191] Most notably, the Court considered that, in the present case, the applicants' individual rights had to be balanced against the 'momentous competing interests of the community as a whole'.[192] The Court's balancing approach was therefore guided by the unprecedented and unforeseeable seriousness of the situation, thereby justifying the existence of a pressing social need for states to act.[193] This judgment therefore demonstrates that the Court is ready to give a greater margin of manoeuvre to states when they are engaged in facing a global challenge capable of seriously affecting other rights protected under the Convention.

8 Article 15: The Limits for Derogations Aimed at Fighting Terrorism

In *Domenjoud v France* the Court examined the validity, under Article 15 ECHR, of a derogation issued in respect of state-of-emergency legislation enacted following terrorist attacks against a member state. In this respect, it must be noted that since its very first judgment the Court has recognised that an 'alarming increase in terrorist activities' constituted a 'public emergency threatening the life of the nation' within the meaning of Article 15.[194] Since then, the Court has recognised that the terrorist threat justified derogations from the Convention in several cases.[195]

Domenjoud concerned the question whether the measure imposed on the applicants, consisting of the obligation not to leave the municipality in which they were residing (*assegnation à residence*), with the purposes of maintaining

191 See ECtHR, *Communauté Genevoise d'Action Syndicale* (CGAS), *supra* note 166.

192 ECtHR, *Pasquinelli and Others*, *supra* note 168, para. 102.

193 P. Järvinen and V. Vikman, '*Pasquinelli and Others v San Marino* – The Momentous Competing Interests of the Community as a Whole Against Healthcare Workers Refusing the Covid-19 Vaccine', *Strasbourg Observers*, 04.10.2024, available at https://strasbourgobservers.com/2024/10/04/pasquinelli-and-others-v-san-marino-the-momentous-competing-interests-of-the-community-as-a-whole-against-healthcare-workers-refusing-the-covid-19-vaccine/, last accessed on 31.03.2025.

194 ECtHR, *Lawless v Ireland* (*No. 3*), no. 332/57, 01.07.1961, para. 30.

195 As regards, e.g., terrorism in Northern Ireland (ECtHR, *Ireland v the United Kingdom*, no. 5310/71 [Plenary] 18.01.1978, paras. 205 and 212), the threat of serious attacks against the UK after 11 September 2001 (ECtHR, *A. and Others v the United Kingdom*, no. 3455/05 [GC] 19.02.2009, para. 181), and the attempted military coup in Turkey in 2016 (ECtHR, *Mehmet Hasan Altan v Turkey*, no. 13237/17, 20.03.2018, paras. 91-93).

public order during a climate change summit, was compatible with Articles 5, 6 and 13 of the Convention, as well as Article 2 of Protocol No. 4. The Court found that the measure in question did not amount to a deprivation of liberty within the meaning of Article 5 of the Convention, which accordingly was found to be inapplicable *ratione materiae* to the facts of the case.[196] As regards the question whether the measure was compatible with the right to liberty of movement, enshrined in Article 2 of Protocol No. 4, the Court considered that, insofar as it had been imposed on the first applicant, the measure was justified.[197] By contrast, it concluded that the measure was not justified in respect of the second applicant: the domestic authorities had not provided a detailed list of behaviours which had led them to consider that the applicant had been violent during public protests,[198] and they had not provided sufficient elements capable of demonstrating that there was a risk that the applicant could have been violent during the protests concerning the summit.[199] Accordingly, the Court considered that the measure had not been imposed on the basis of a sufficiently individualised assessment of the applicant's behaviour or conduct with the purpose of establishing that it entailed a risk for public order and security; therefore, the Court held that the measure was not 'necessary in a democratic society' and had not complied with the substantive and procedural requirements of Article 2 of Protocol No. 4.

In the light of this finding, the Court had to examine whether the measure could nonetheless be considered justified on the basis of the declaration of derogation issued by France on 24 September 2015 in facing the serious threat to which it had been exposed due to several terrorist attacks. In this respect, the Court noted from the outset that it was indisputable that the right to liberty of movement could be subject to derogations,[200] that France's derogation had been rightly issued in order to face the serious threat to the life of the nation caused by several tragic terrorist attacks,[201] and that it had complied with the formalities required by Article 15 ECHR.[202] The Court recalled, however, that Article 15 allows for the adoption of those measures which are 'strictly required by the exigencies of the situation', a requirement that entails

196 ECtHR, *Domenjoud v France*, nos. 34749/16 and 79607/17, 16.05.2024. para. 72.
197 Ibid., para. 125.
198 Ibid., paras. 127-129.
199 Ibid., paras. 131-132.
200 Ibid., para. 149.
201 Ibid., para. 150.
202 Ibid., para. 151.

that the measure in question must not be used for purposes different from the one to which the derogation was aimed.[203] In this respect, the Court noted that, while in principle restrictions on the liberty of movement might be accepted 'in the light of the scale of the terrorist threat and the imperious necessity to guarantee the security of a population',[204] France's derogation had been expressly justified on the basis of the 'seriousness of the terrorist threat' and the purpose of 'preventing the perpetration of further terrorist attacks'. While the Court considered that this purpose was of 'fundamental importance', it also reiterated that only measures having a 'sufficiently strong link' with that purpose could be justified under the derogation.[205] In the specific circumstances of the case, the Court considered that the Government had not demonstrated that the measure in question had been adopted within the context of the fight against terrorism and that it was strictly necessary to that aim; accordingly, the measure had breached Article 2 of Protocol No. 4.[206]

The judgment is a very useful reminder to the member states that, even when they are lawfully derogating from their ECHR obligation in order to face serious challenges, they 'do not enjoy unlimited powers'.[207] This principle had already been stressed by the Court in several cases concerning the invocation by Turkey of the validly issued derogation following the attempted military coup in 2016,[208] where it also further clarified that '[a] derogation under Article 15, even if it may be justified by the circumstances surrounding it, does not have the effect of dispensing the States from the obligation to respect the principle of the rule of law and its attendant guarantees' and that 'even in the context of a state of emergency, the fundamental principle of the rule of law must prevail'.[209] It also reiterated that, while the state authorities 'have direct responsibility for establishing the balance between effectively combatting terrorism on the one hand and respecting individual rights on the other', and while the difficulties they face in this respect 'are undoubtedly a contextual factor which must be taken into account', they do not exempt the

203 ECtHR, *Lawless*, *supra* note 194, para. 38.

204 ECtHR, *Domenjoud*, *supra* note 196, para. 153.

205 Ibid., para. 154.

206 Ibid., para. 155.

207 J. Sommardal, 'The Court's Key Cases in 2024: Part I', *ECHR Blog*, 20.01.2025, available at https://www.echrblog.com/2025/01/the-courts-key-cases-in-2024-part-i.html, last accessed on 31.03.2025.

208 See, in particular and among many others, ECtHR, *Yüksel Yalçinkaya v Türkiye*, no. 15669/20 [GC] 26.09.2023, para. 349: 'Contracting Parties do not enjoy an unlimited power of appreciation'.

209 Ibid., para. 350, with further references.

Court from guaranteeing that any measure adopted in this context must be compatible with the limitations enshrined in the Convention.[210] Therefore, in a moment in which terrorism is only one among the many challenges that states are facing in the international plane, the Court is rightly pointing out that, on the one hand, it will take into account the problems that they might face but, on the other hand, it will continue requiring compliance with the Convention from them.

9 Article 33 ECHR: Administrative Practices of Human Rights Violations in Occupied Territory

In 2024 the Grand Chamber of the Court issued its judgment on the merits of *Ukraine v Russia* (*re Crimea*), the inter-state case joining two applications lodged by Ukraine in order to complain of several administrative practices entailing numerous violations of the Convention perpetrated by the Russian Federation in Crimea. While this case concerned facts that took place more than ten years ago, it must be read, of course, as dealing with the global challenge caused by the unlawful war of aggression perpetrated by the Russian Federation against Ukraine in February 2022, which has been rightly described as an 'unforeseen and calamitous event' which marked 'the return of dark times' in Europe.[211]

By a unanimous 346-page judgment, the Court found violations of almost all the substantive rights and freedoms enshrined in the Convention (notably, Articles 2, 3, 5, 6,[212] 8, 9, 10 and 11 of the Convention, Articles 1 and 2 of Protocol No. 1, Article 2 of Protocol No.4, and Articles 14 and 18 of the Convention in conjunction with several other provisions) on the basis of an established practice of systemic oppression which affected the Ukrainian population in Crimea in every aspect of its life, something that has been described as 'a clear

210 Ibid., para. 335.

211 K. Dzehtsiarou and V. Tzevelekos, 'The Aggression Against Ukraine and the Effectiveness of Inter-State Cases in Case of War' (2022), 3(3) *European Convention on Human Rights Law Review*, pp. 165–163.

212 Notably, the Court considered that all tribunals established in Crimea in accordance with Russian law and applying Russian law cannot be deemed tribunals 'established by law' as provided for by Article 6. See, more specifically, J. Miklasová, '*Ukraine v Russia* (*re Crimea*): Article 6 ECHR in the Context of Russia's Annexation and Implications for Ukrainian Sovereignty', *Strasbourg Observers*, 03.07.2024, available at https://strasbourgobservers.com/2024/07/03/ukraine-v-russia-re-crimea-article-6-echr-in-the-context-of-russias-annexation-and-implications-for-ukrainian-sovereignty/, last accessed on 31.03.2024.

and undeniable victory for Ukraine'.[213] The Court found that the elements identifying administrative practices in breach of human rights – notably 'the repetition of acts constituting the alleged violation and official tolerance of those acts'[214] – were met.

Since it would be impossible to deal with all the issues raised by the judgment, only the general approach adopted by the Court will be assessed. Notably, the Court expressly identified the appropriate approach to be applied, on the one hand, to the relationship between the provisions of the Convention and the rules of international humanitarian law and, on the other hand, to the issue of 'lawfulness' under the Convention.

As regards the relationship between international humanitarian law and the Convention, and having assessed its previous case law, the Court considered that the factual basis on which the respondent state obtained extraterritorial jurisdiction and continued to exercise it throughout the relevant periods on the basis of 'effective control' over Crimea 'militate in favour of taking account of the relevant provisions of IHL when interpreting the Convention rights in issue in this case': in particular, the Court noted that, among others, the Office of the Prosecutor of the International Criminal Court had considered that the situation within the territory of Crimea 'amounts to an ongoing state of occupation'.[215] Accordingly, the Court considered that it was necessary to follow the approach established in *Georgia v Russia* (*II*) and *Ukraine and the Netherlands v Russia*, according to which the Court will thus examine the interrelation between the two legal regimes with regard to each aspect of the case and each Convention Article alleged to have been breached. In doing so, it will ascertain each time whether there is a conflict between the provisions of the Convention and the rules of international humanitarian law.[216]

The Court added that 'the above approach is limited to the interpretation and application of the Convention in so far as necessary in the circumstances of the present case' and that 'it has no bearing on the issues pertaining to Crimea's status under international law', issues which are 'outside the scope

213 K. Dzehtsiarou, 'Ukraine v Russia (re Crimea): The European Court of Human Rights Goes 'All-In'", *EJIL Talk!*, 27.06.2024, available at https://www.ejiltalk.org/ukraine-v-russia-re-crimea-the-european-court-of-human-rights-goes-all-in/, last accessed on 31.03.2025.

214 ECtHR, *Ukraine v Russia* (*re Crimea*), nos. 20958/14 and 38334/18 [GC] 25.06.2024, para. 948.

215 Ibid., para. 918.

216 ECtHR, *Georgia v Russia* (*II*), no. 38263/08 [GC] 21.01.2021 para. 95; ECtHR, *Ukraine and the Netherlands v Russia* (dec.), nos. 8019/16, 43800/14 and 28525/20 [GC] 20.11.2022, paras. 718-721.

of the case'.[217] However, this is somehow a fiction: if the Court is saying that it will consider Crimea as an occupied territory and apply the Convention in the light of the relevant rules on military occupation, it is clear that it is considering that Russia is occupying Ukrainian territory, and that therefore Ukraine remains entitled to sovereignty over that territory, because 'a State by definition cannot occupy its own territory'.[218]

Having said that, the Court examined the general issue of 'lawfulness' as required by the Convention. In this respect, it noted that its previous case law had concerned the 'lawfulness of acts adopted by unrecognised entities'. While in *Loizidou v Turkey* the Court had held that the acts (the Constitution) of the internationally unrecognised entity (the Turkish Republic of Northern Cyprus) could not be considered legally valid,[219] in the subsequent case law it clarified that, in the light of the need to safeguard the rights of individuals living in those territories, the decisions taken by the courts of an unrecognised entity could not automatically be regarded as unlawful purely because of the entity's unlawful nature and the fact that it was not internationally recognised, being necessary to ascertain whether the acts of those entities 'reflect a judicial tradition compatible with the Convention'.[220]

However, in *Ukraine v Russia* (*re Crimea*) the Court considered that several factors militated in favour of adopting a different approach: among those, the fact that the Court was called upon to interpret the Convention in the light of the rules of IHL,[221] and that the case did not concern the acts of unrecognised entities, but rather the application of Russian law and the acts of 'Russian courts' operating in Crimea following the establishment of 'effective control' over that territory, which replaced the previously applicable and valid Ukrainian law.[222] Accordingly, the Court considered that, in establishing whether Russian law could be regarded as 'law' within the meaning of the Convention, it was necessary to assess the relevant and applicable rules of international humanitarian law.[223] The Court therefore examined the relevant provisions of IHL, which stipulate that an occupying power has to maintain the laws in

217 ECtHR, *Ukraine v Russia* (*re Crimea*), *supra* note 214, para. 919.

218 M. Milanovic, 'Some Additional Comments on the ECtHR Crimea Judgment: Occupation, Sovereignty, and "Law"', *EJIL Talk!*, 27.06.2024, available at https://www.ejiltalk.org/some-additional-comments-on-the-ecthr-crimea-judgment-occupation-sovereignty-and-law/, last accessed on 31.03.2025.

219 ECtHR, *Loizidou v Turkey*, no. 15318/89 [GC] 18.12.1996, paras. 43-46.

220 ECtHR, *Ukraine v Russia* (*re Crimea*), *supra* note 214, para. 929.

221 Ibid., para. 931.

222 Ibid., para. 932.

223 Ibid., para. 934.

force in the occupied territory (predating the occupation) and cannot modify, suspend or replace them with its own legislation, unless this is 'necessary' for achieving some strictly defined purposes.[224] Accordingly, the Court held as follows:

> unless it can be justified by reference to one of the narrow exceptions recognised by IHL, the "repetition of acts" element of the administrative practice (defined as "an accumulation of identical or analogous breaches which are sufficiently numerous and interconnected not to amount to merely isolated incidents or exceptions but to a pattern or system"…) referred to under various of the Articles relied on can only be considered "lawful" or "in accordance with the law" in so far as it has its origin in Ukrainian law and not if it is based on Russian law, the law of the "occupier".[225]

The Court also noted that Russia had not submitted any argument capable of demonstrating that the replacement of Ukrainian law with Russian law had been 'necessary' within the meaning of IHL.[226] It therefore considered that this replacement was, in itself, in contravention of the Convention, as interpreted in the light of IHL. As a consequence, Russian law could not be regarded as 'law' within the meaning of the Convention, and could not be invoked to justify any measure of interference with the rights protected under the ECHR.[227] Accordingly, each human rights restriction which required to be lawful was considered automatically unlawful and therefore in breach of the Convention.

This approach has been questioned by the observation that, while the replacement of Ukrainian law with Russian law was clearly in breach of IHL, it might still be compatible with the Convention, given that 'the relevant rules of IHL are there not just to protect the interests of the population of an occupied territory, but also those of the displaced sovereign' and that it would not be clear how this would automatically entail human rights violations: in particular, Milanovic considered that, given that the Court would in any case have found violations on the basis of the lack of legitimate aims,

224 Ibid., paras. 935–941.
225 Ibid., para. 942.
226 Ibid., para. 944–945.
227 Ibid., para. 946.

necessity and proportionality of the measures, such a strong position was not necessary.[228]

However, one should recall that the acquisition of control over a territory on the basis of armed force is contrary to peremptory norms of international law and that, under paragraph 2 of Article 41 of the ILC's Draft Articles on the Responsibility of States for Internationally Wrongful Acts and Article 42 of the Draft Articles on the Responsibility of International Organisations, no state or international organisation shall recognise as lawful a situation created by a serious breach of a peremptory norm of international law, nor render aid or assistance in maintaining that situation. Although these provisions were not expressly mentioned in the Court's judgment, it must be noted that the Court established the approach to be followed by taking into account 'the factual basis on which the respondent State obtained extraterritorial jurisdiction and continued to exercise it', notably the use of armed force in breach of fundamental principles of international law. The Court's approach might therefore be seen as a strong position against the recognition of the 'lawfulness' of the situation created by the annexation of Crimea by Russia, which also sends a strong signal to states with regard to the further territories annexed following 16 September 2022, on which the Court does not retain jurisdiction.

10 Article 34: Victim Status and Locus Standi in Respect of Climate Change Cases

In the cited case of *KlimaSeniorinnen* the Court also established the approach to be adopted in respect of the question whether individuals and associations can claim to be victims within the meaning of Article 34, and accordingly whether they have *locus standi* to lodge complaints against states' actions and inactions in the field of climate change. The Court split the analysis concerning individual victims and that concerning non-governmental organisations.

As regards individual applicants, and having recalled the principles regulating the victim status requirement, the Court considered that 'in the climate-

228 M. Milanovic, 'Some Additional Comments on the ECtHR Crimea Judgment', *supra* note 218. See also A. Piperides, 'Three Aspects of the Relationship between IHL and the Convention' in *Ukraine v Russia* (*re Crimea*), *Opinio Juris*, 25.07.2024, available at https://opiniojuris.org/2024/07/25/three-aspects-of-the-relationship-between-ihl-and-the-convention-in-ukraine-v-russia-re-crimea/, last accessed on 31.03.2024.

change context, everyone may be, one way or another and to some degree, directly affected, or at a real risk of being directly affected, by the adverse effects of climate change' and that, as a consequence, 'potentially a huge number of persons could claim victim status under the Convention on this basis'. It therefore considered 'it would not sit well' with the prohibition of *actio popularis* if it accepted individuals' victim status in the climate change field 'without sufficient and careful qualification',[229] and concluded that the circle of victims had to be somehow restricted,[230] in order to avoid recognising 'virtually anybody' as victims.[231]

This argument is based on the assumption that the prohibition of *actio popularis* is aimed at restricting the number of individuals who are entitled to lodge applications to the Court. However, it merely entails that, in order to lodge such applications, a victim must exist: it has not prevented the Court from recognising that a high number of people might be victims of a general measure affecting a specific class of the population,[232] or that the victims of a violation might be millions of individuals constituting the population of a specific region[233] or even the entire population of the state.[234] Therefore, the prohibition of *actio popularis* does not exclude the fact that an extremely high or even indeterminate number of individuals might be considered victims.[235] What the Court used here is actually the 'floodgates argument', which does not

229 ECtHR, *KlimaSeniorinnen*, *supra* note 8, para. 483.

230 Ibid., para. 484: 'If the circle of "victims" within the overall population of persons under the jurisdiction of the Contracting Parties actually or potentially adversely affected is drawn in a wide-ranging and generous manner, this would risk disrupting national constitutional principles and the separation of powers by opening broad access to the judicial branch as a means of prompting changes in general policies regarding climate change'.

231 Ibid., para. 485.

232 See, e.g., ECtHR, *Vallianatos v Greece*, nos. 29381/09 and 32684/09 [GC] 07.11.2013, para. 49; ECtHR, *Oliari and Others v Italy*, nos. 18766/11 and 36030/11, 21.07.2015, para. 71.

233 ECtHR, *Cannavacciuolo and Others v Italy*, no. 51567/14 and others, 30.01.2025, para. 466. On the approach to victim status adopted in this judgment, see L. Acconciamessa, 'The Strange Case of Dr Jekyll and Mr Hyde: Victim Status for Life-Threatening Environmental Harm in the ECtHR's "Terra dei Fuochi" Judgment', *SIDIBlog*, 28.02.2025, available at http://www.sidiblog.org/2025/02/28/the-strange-case-of-dr-jeckyll-and-mr-hyde-victim-status-for-life-threatening-environmental-harm-in-the-ecthrs-judgment-cannavacciuolo-and-others-v-italy/, last accessed on 31.03.2025.

234 ECtHR, *Roman Zakharov v Russia*, no. 47143/06 [GC] 04.12.2015, para. 171; ECtHR, *Centrum för rättvisa v Sweden*, no. 35252/08 [GC] 25.05.2021, para. 167; ECtHR, *Ekimdzhiev and Others v Bulgaria*, no. 70078/12, 11.01.2022, para. 262.

235 V. Sefkow-Werner, 'Consistent Inconsistencies in the ECtHR's Approach to Victim Status and *Locus Standi*' (2025) 16(2) *European Journal of Risk Regulation*, pp. 1–10, p. 7.

find any basis in the Convention, according to which, 'if it is very costly to hear the applications of all victims, then those victims should be deemed not to have a legal right'.[236]

In the light of the above, the Court considered that it was necessary to identify some 'distinguishing criteria' capable of demonstrating that some individuals are more affected than others by the adverse consequences of climate change on human rights, notably 'a particular level and severity of the risk of adverse consequences of climate change affecting the individual(s) in question' and 'the pressing nature of their need for individual protection'.[237] Accordingly, the Court held that two cumulative conditions must be respected:

> (a) the applicant must be subject to a high intensity of exposure to the adverse effects of climate change, that is, the level and severity of (the risk of) adverse consequences of governmental action or inaction affecting the applicant must be significant; and
>
> (b) there must be a pressing need to ensure the applicant's individual protection, owing to the absence or inadequacy of any reasonable measures to reduce harm.[238]

The Court further added that 'the threshold for fulfilling these criteria is especially high' and must be assessed taking, among others, several circumstances into account.[239] The Court therefore introduced criteria which are exceptionally strict, and which find no precedents in its case law, with the clear aim of restricting the number of individuals entitled to lodge applications,[240] and which are virtually impossible to meet. And indeed, in the specific circumstances of the case, although observing that 'the applicants belong to a group which is particularly susceptible to the effects of climate change' (notably, they were a group of elderly women), the Court concluded that none of the individual applicants had met the threshold in order to be considered victims.[241]

---

236 G. Letsas, 'The European Court's Legitimacy After *KlimaSeniorinnen*' (2024) 5(4) *European Convention on Human Rights Law Review*, pp. 444–453, p. 449.

237 ECtHR, *KlimaSeniorinnen, supra* note 8, para. 486.

238 Ibid., para. 487.

239 Ibid., para. 488.

240 K. Dzehtsiarou, '"*KlimaSeniorinnen* Revolution": The New Approach to Standing' (2024) 5(4) *European Convention on Human Rights Law Review*, pp. 423–431, p. 424. *Contra*, see J. Laffranque, '*KlimaSeniorinnen* – Climate Justice and Beyond', *supra* note 160, p. 434: 'With respect to the individual applicants … the Court followed its traditional approach'.

241 ECtHR, *KlimaSeniorinnen, supra* note 8, para. 531.

As regards the applicant association, the Court went in the opposite direction. On the basis of what has been defined as the '*KlimaSeniorinnen* revolution',[242] the Court decided to challenge its established approach pursuant to which, except when they are acting as representatives of their members, legal persons cannot complain of alleged breaches of human rights which ontologically pertain exclusively to individuals, such as the rights to life, liberty, physical and psychological integrity, and the quality of life. The Court considered that a special approach was necessary in order to take into account the specificities of climate change as 'a global and complex phenomenon'.[243] On the basis of several elements, the Court considered that there was a European and international consensus in favour of recognising standing to associations in lodging actions 'in the interests of the protection of the environment and/or in the interests of private individuals who may be affected by specific environmental hazards or industrial projects', while the consensus specifically concerning actions in the field of climate change appeared 'still [to be] a developing issue'.[244] Nonetheless, the Court considered that it was possible to infer from the above that:

> it would appear that in most member States there may at least be a theoretical possibility for environmental associations to bring a climate-change case, and in some States the criteria for such standing have already been established either in domestic legislation or in the domestic courts' case law.[245]

Accordingly, the Court decided that it was necessary to establish a specific test,[246] and held as follows:

> In order to be recognised as having *locus standi* to lodge an application under Article 34 of the Convention on account of the alleged failure of a Contracting State to take adequate measures to protect individuals against the adverse effects of climate change on human lives and health, the association in question must be: (a) lawfully established in the jurisdiction concerned or have standing to act there; (b) able to demonstrate that it pursues a dedicated purpose in accordance with its statutory

242 K. Dzehtsiarou, '"*KlimaSeniorinnen* Revolution"', *supra* note 240, p. 423.
243 ECtHR, *KlimaSeniorinnen*, *supra* note 8, para. 489.
244 Ibid., para. 494.
245 Ibid., para. 494.
246 Ibid., para. 498.

> objectives in the defence of the human rights of its members or other affected individuals within the jurisdiction concerned, whether limited to or including collective action for the protection of those rights against the threats arising from climate change; and (c) able to demonstrate that it can be regarded as genuinely qualified and representative to act on behalf of members or other affected individuals within the jurisdiction who are subject to specific threats or adverse effects of climate change on their lives, health or well-being as protected under the Convention.[247]

While those criteria appear vague and capable of different interpretation,[248] the main observation that must be made in respect of this innovative approach[249] is that, once again, it seems to be based on a distorted notion of the prohibition of *actio popularis*: in the absence of a victim (be it the individual members of the association, the association itself, or even future generations in general), the mere fact that the Court introduced criteria aimed at assessing the 'quality' of the association and its 'representativeness' does not change the fact that the association is acting in the general interest. Therefore, Judge Eicke rightly observed that the majority 'created exactly what the judgment repeatedly assets it wishes to avoid, namely a basis for *actio popularis*'.[250] By separating the recognition of *locus standi* from the identification of a victim, the Court admitted the possibility of lodging actions in the general interest.[251]

In this respect, it must be noted that Letsas tried to identify a hidden logic in the Court's approach by arguing that it implicitly admitted that the association was acting as a representative of future generations, which are clearly more affected than others by the adverse effects of climate change and in respect of which 'collective action … may be one of the only means through which the

247 Ibid., para. 502.

248 K. Dzehtsiarou, '"*KlimaSeniorinnen* Revolution"', *supra* note 240, p. 428.

249 J. Laffranque, '*KlimaSeniorinnen* – Climate Justice and Beyond', *supra* note 160, p. 435. See also J. Letwin, '*KlimaSeniorinnen*: The Innovative and the Orthodox', *EJIL Talk!*, 17.04.2024, available at https://www.ejiltalk.org/klimaseniorinnen-the-innovative-and-the-orthodox/, last accessed on 31.03.2025.

250 ECtHR, *KlimaSeniorinnen*, *supra* note 8, Partially concurring, partially dissenting, opinion of Judge Eicke, para. 45. See also L. Sicilianos and M.L. Deftou, 'Breaking New Ground: Climate Change before the Strasbourg Court', *EJIL Talk"*, 12.03.2024, available at https://www.ejiltalk.org/breaking-new-ground-climate-change-before-the-strasbourg-court/, last accessed on 31.03.3025.

251 G. Letsas, 'The European Court's Legitimacy After *KlimaSeniorinnen*', *supra* note 236, p. 448. See also V. Sefkow-Werner, 'Consistent Inconsistencies in the ECtHR's Approach to Victim Status and *Locus Standi*', *supra* note 235, p. 7.

voice of those at distinct representational disadvantage can be heard'.[252] However, this interpretation seems to have been excluded by the very same text of the judgment,[253] in which the Court held that 'the legal obligations arising for States under the Convention extend to those individuals currently alive who, at a given time, fall within the jurisdiction of a given Contracting Party'.[254] It therefore excluded that future generations might be considered as rights-holders under the Convention. If they do not hold rights, they are not entitled, even through representatives, to lodge applications with the Court.

In conclusion, it appears that it cannot be questioned that the Court decided the issue of victim status in climate change cases not on the basis of the principles governing this issue, but rather on the basis of a 'utilitarian concern with floodgates and a worry about an indefinite number of victims'.[255] As has been observed, the Court somehow 'contracted out the filtering of some applications to these specialised NGO s' with the aim of 'discourag[ing] individual applications and agree[ing] only to deal with highly sophisticated professionally drafted applications from relevant associations'.[256] In this way, the Court contained the number of applications, but at the same time allowed itself to deal with one of the most pressing issues of our times.[257]

The Court's concern, while understandable, should not have been pursued at the expense of the coherence of its case law.[258] Moreover, it could have

252 G. Letsas, 'The European Court's Legitimacy After *KlimaSeniorinnen*', *supra* note 236, p. 451.

253 See, for the same observation, C. Heri, '*KlimaSeniorinnen*, the Prohibition of *Actio Popularis* Cases, and Future Generations – A False Dilemma?', *EJIL Talk!*, 19.12.2024, available at https://www.ejiltalk.org/klimaseniorinnen-the-prohibition-of-actio-popularis-cases-and-future-generations-a-false-dilemma/, last accessed on 31.03.2025; L. Netto, 'Resisting the Allure of Future Generations' Rights. The ECtHR's Approach to Climate Action in *KlimaSeniorinnen*', *Völkerrechtsblog*, 19.04,2024, available at https://voelkerrechtsblog.org/resisting-the-allure-of-future-generations-rights/, last accessed on 31.03.2025.

254 ECtHR, *KlimaSeniorinnen*, *supra* note 8, para. 420.

255 G. Letsas, 'The European Court's Legitimacy After *KlimaSeniorinnen*', *supra* note 236, p. 450. See also K. Dzehtsiarou, '"*KlimaSeniorinnen* Revolution"', *supra* note 240, p. 424.

256 K. Dzehtsiarou, '"*KlimaSeniorinnen* Revolution"', *supra* note 240, p. 427. See also J. Laffranque, '*KlimaSeniorinnen* – Climate Justice and Beyond', *supra* note 140, p. 435: 'By turning down the individual applicants, the ECtHR thereby protected itself from an overwhelming case load as a result of applications from "lone actors" (and by "everybody" as such), whilst at the same time welcoming the standing of an association'.

257 K. Dzehtsiarou, '"*KlimaSeniorinnen* Revolution"', *supra* note 240, p. 426.

258 In this regard, it should be recalled that 'it is in the interest of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from

been, and would in any case have been, achieved through other means. If one considers the principles established in *Duarte Agostinho* with regard to the limits of states' jurisdiction,[259] and those in the same *KlimaSeniorinnen* judgment concerning the need in any case to exhaust the available domestic remedies,[260] it is quite unlikely that the Court would have been flooded with climate change applications. Those findings oblige individuals and associations aiming to lodge climate change applications with the Court to exhaust long, complex and (above all) expensive domestic proceedings, in which experts have to be appointed and in which the legal fees in the event of unsuccessful litigation might be enormous. Not many individuals will have the time and resources to do that.

Moreover, by allowing exceptions to the principles governing the functioning of the individual applications system, the Court seems to convey the idea that a situation of crisis or emergency might be invoked as a 'ready-made excuse for drastic action', even derogating from existing rules.[261] The Court has strongly opposed those arguments when they are invoked by states to justify human rights violations in emergency and crisis situations.[262] It should therefore not use the same arguments, even when motivated by the best intentions.

11 Article 35: Exhaustion of Domestic Remedies in Climate Change Cases

In *Duarte Agostinho and Others v Portugal* the Court also dealt with the question whether applicants complaining of the failure on the part of several member states to adopt appropriate climate change mitigation measures might be

precedents laid down in previous cases' (ECtHR, *Magyar Helsinki Bizottság v Hungary*, no. 18030/11 [GC] 08.11.2016, para. 150).

259 ECtHR, *Duarte Agostinho*, *supra* note 10, para. 213.

260 See *infra*, section 11.

261 J. Klabbers, *The Love of Crisis*, in M.M. Mbengue and J. D'Aspremont (eds.), *Crisis Narratives in International Law*, Brill: Leiden, 2021, pp. 8–20, p. 15.

262 E.g., the Court strongly held that 'even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman and degrading treatment or punishment' (ECtHR, *Gäfgen v Germany*, no. 22978/05 [GC] 01.06.2010, para. 87), and that 'States which form the external borders of the European Union are currently experiencing considerable difficulties in coping with the increasing influx of migrants and asylum-seekers … cannot absolve a State of its obligations' (ECtHR, *Hirsi Jaama*, *supra* note 65, para. 122).

exempted from pursuing the domestic remedies in each of the respondent states.[263]

Since the Court declared inadmissible the applications lodged against all the respondent states except Portugal, it is with regard to the latter that it examined the non-exhaustion objection.[264] In this respect, it noted that the Portuguese Constitution included a directly applicable and enforceable provision recognising the right to a healthy and ecologically balanced environment,[265] and the legal system provided for the possibility of instituting *actio popularis* actions requesting public authorities to act to protect the environment and the quality of life, including in the field of climate change.[266] Moreover, similar complaints could be lodged through civil actions aimed at protecting the right of personality:[267] civil liability actions against the state in order to obtain compensation for harm or damage caused by action or inaction by the state,[268] and administrative actions aimed at compelling the state administration to adopt measures regarding the environment and the quality of life.[269] Being satisfied that there was a 'comprehensive system of remedies in the national legal order', the Court considered that the absence of specific case law concerning climate change was not decisive, since there was extensive case law concerning environmental litigation.[270] As regards the applicants' argument concerning unreasonable burdens in the exhaustion of those remedies, the Court was satisfied that the domestic provisions concerning mechanisms to overcome the parties' lack of means for legal representation and effective remedies for the excessive length of proceedings were sufficient to dispel any doubts regarding the practical effectiveness of those remedies.[271] In this context, the Court considered that there were no special reasons for exempting the applicants from the requirement to exhaust the domestic remedies.[272]

Finally, the Court dismissed the applicants' argument according to which climate change was 'a novel and supranational issue', the Court's subsidiary nature would have required it to give instructions in advance to the domestic

263 ECtHR, *Duarte Agostinho*, *supra* note 10, para. 132.
264 Ibid., para. 216.
265 Ibid., para. 219.
266 Ibid., para. 220.
267 Ibid., para. 221.
268 Ibid., para. 22.
269 Ibid., para. 223.
270 Ibid., para. 224.
271 Ibid., para. 225.
272 Ibid., para. 226.

authorities.[273] According to the Court, 'this stands in sharp contrast to the principle of subsidiarity', which prevents the Court from acting as a first-instance court, ruling on cases which require the finding of basic facts, this issue being within the domain of domestic jurisdictions.[274]

Therefore, the Court considered that even the most serious situations do not justify an exception to the non-exhaustion rule, and that applicants intending to bring climate change cases to the Court must first submit their complaints to the domestic authorities.[275]

12 Article 1 of Protocol No. 1: Upholding the International Interest in the Return of Unlawfully Exported Cultural Heritage

In *The J. Paul Getty Trust and Others v Italy* the Court assessed under Article 1 of Protocol No. 1 a confiscation order issued by the Italian authorities aimed at recovering a bronze statue from the classical Greek period, the 'Victorious Youth'. The domestic authorities had found that the statue had been unlawfully exported from Italy and then negligently purchased by the Trust despite the absence of an export licence and repeated attempts by the Italian authorities to recover it as part of Italy's cultural heritage and on account of the non-payment of customs export duties. The case therefore concerned the return of unlawfully exported cultural items to their country of origin, an issue which has attracted the heightened attention of the international community in recent years.[276]

The Trust and the members of its board of trustees alleged that the adoption of the confiscation order constituted a violation of their right to the peaceful enjoyment of their possessions. They further complained of the risk of being deprived of that right if the Italian authorities succeeded in obtaining recognition and enforcement of the confiscation in the USA, where the statue

273 Ibid., para. 133.

274 Ibid., para. 228.

275 For the same approach, see UN Committee on the Rights of the Child, *Sacchi and Others*, *supra* note 27.

276 See, among many others, General Assembly of the United Nations, *Return or Restitution of Cultural Property to the Countries of Origin*, UN Doc. A/79/L.16, 19.11.2024, which cited all the relevant international binding and non-binding instruments, and which stipulates that 'the issue of return and restitution of cultural property to the countries of origin is gaining growing visibility' and recognises 'the moral imperative to take all measures in this respect, to ensure the full enjoyment of everyone's right to take part in cultural life'.

was still being kept and exhibited at the Getty Villa in Malibu, California, one of two campuses of the Getty Museum.

Having dismissed the preliminary objections raised by the Government,[277] the Court clarified the general approach to be adopted in the assessment of the merits of the applicant Trust's complaints. In this regard, it held that 'the present case concerns a very particular issue, namely the protection of cultural heritage and the recovery of an unlawfully exported cultural object'.[278] The Court cited several international instruments[279] which led it to consider that 'the specificity of the subject matter … is further demonstrated by the fact that similar measures … have been progressively regulated under international law',[280] and, accordingly, to conclude that 'irrespective of the applicable rule under Article 1 of Protocol No. 1, the justification for the interference at issue in the present case must be assessed by taking into account that, due to the unique and irreplaceable nature of cultural objects, States enjoy a wide margin of appreciation where cultural heritage issues are concerned'.[281] On the basis of this finding, the Court assessed the applicant Trust's complaints.

As regards the complaint concerning the legal basis, the Court noted that the domestic case law had progressively clarified the standard of diligence required of a purchaser of cultural objects,[282] as well as the possibility of imposing the measure even when the criminal offence of unlawful exportation had become statute-barred, due to the non-punitive nature of the measure, which is aimed rather at recovering specific objects.[283] As regards the applicant Trust's complaint concerning the absence of a time-limit for imposing the measure, the Court admitted that under its case law a domestic statute may lack foreseeability when it leaves open the time-limit for the exercise of certain powers.[284] However, it considered that the issue had to be examined in

277 Except for the one concerning the lack of victim status of the members of the board of trustees of the applicant Trust. However, the Government's objections and the reasons given by the Court for dismissing them will not be examined here.

278 ECtHR, *The J. Paul Getty Trust and Others v Italy*, no. 35271/19, 02.05.2024, para. 278.

279 Notably, the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, the 2001 UNESCO Convention on Underwater Cultural Heritage, and Directive 2014/60/EU on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State.

280 ECtHR, *The J. Paul Getty Trust*, *supra* note 278, para. 279.

281 Ibid., para. 280.

282 Ibid., paras. 301-306.

283 Ibid., paras. 308–317.

284 Ibid., para. 321.

the light of the specific nature of the interference in question, and 'the fact that in the field of cultural heritage, States enjoy a wide margin of appreciation, not least because the measure at issue pursues the aim of recovering a unique and irreplaceable object'.[285] In this respect, it noted that the absence of a statute of limitation or a time-limit for actions aimed at recovering stolen or unlawfully exported cultural objects appeared to be a distinctive feature of several countries, including within the Council of Europe,[286] and concluded accordingly that this factor could not lead to the conclusion that the legal basis lacked foreseeability.[287] The Court therefore held that the legal basis for the contested measure was sufficiently clear, foreseeable and compatible with the rule of law.

When dealing with the applicant Trust's argument that the measure had not pursued any legitimate general interest, the Court recalled that 'the Convention cannot be interpreted in a vacuum but instead in harmony with the general principles of international law' and that, in the light of its 'living' nature, the Court must take into account 'evolving norms of national and international law'.[288] As regards the question whether the protection of cultural heritage could be considered a 'legitimate general interest', the Court considered its previous case law[289] and the international instruments specifically dealing with the matter[290] and concluded that:

> the legitimacy under the Convention of State measures aimed at protecting cultural heritage against unlawful exportation from the country of origin, or at ensuring its recovery and return therein in case that the unlawful act has nonetheless taken place, in both cases with a view to facilitate in the most effective way wide public access to works of art, cannot be called into question.[291]

The applicant Trust, however, had argued that the contested measure had not pursued that aim in the specific circumstances of the case: it argued that the statue had been discovered by some fishermen in the 1960s outside Italy's territorial waters and, accordingly, had never become part of Italy's cultural

285 Ibid., para. 322.
286 Ibid., para. 323.
287 Ibid., para. 324.
288 Ibid., para. 338.
289 Ibid., para. 340.
290 Ibid., para. 341.
291 Ibid., para. 342.

heritage. However, the Court considered that 'the domestic authorities fulfilled their duty to reasonably demonstrate that the contested measure pursued the aim of protecting cultural heritage'.[292] In particular, they had considered that, even assuming that the statue had been discovered on the high seas, it had been discovered by an Italian-flagged vessel and then brought to Italian territory and, accordingly, had become part of Italy's cultural heritage. Relying on the relevant instruments concerning the international law of the sea and international cultural heritage law, the Court considered that this finding could not be considered arbitrary or manifestly unreasonable,[293] and found that the measure had been adopted 'in the public or general interest' of protecting Italy's cultural heritage.

Lastly, the Court dealt with the applicant Trust's argument that the measure had been disproportionate. In this regard, the Court stressed the following circumstances: when purchasing the statue in the 1970s, the applicant Trust's representatives had been 'at the very least, negligent, if not in bad faith', since they had ignored several indices showing that it had been unlawfully exported from Italy;[294] for their part, the domestic authorities had mostly acted 'in good time, and in an appropriate and consistent way', since they had done everything they could to try to recover the statue and, although sometimes they had not diligently followed the procedures, the Court took into account the difficulties they had faced since 'they operated in a legal vacuum, as there were no binding international legal instruments in force at the time in which the Statue was exported and purchased by the applicant which would have allowed it to recover it or, at the very least, to obtain the full cooperation of the foreign domestic authorities';[295] lastly, the Court considered that, by acting negligently and in breach of the relevant legal requirements and with full knowledge of the possible legal consequences, the applicant Trust had 'accepted, at least implicitly, the risk that the Statue might be confiscated in the absence of any compensation'.[296] In the light of the above, the Court held that there had been no breach of Article 1 of Protocol No. 1.[297]

The judgment is a significant contribution to the doctrine of the living instrument.[298] In this regard, we do not share the view that this approach

292 Ibid., para. 348.
293 Ibid., paras. 350-356.
294 Ibid., paras. 380-390.
295 Ibid., paras. 391-400.
296 Ibid., paras. 401-404.
297 Ibid., para. 408.
298 See also ECtHR, *Executief van de moslims van België and Others v Belgium*, nos. 16760/22 and others, 13.02.2024, paras. 90-102. See, on this issue, E. Verniers, '*Executief van de*

would be incompatible with the doctrine of inter-temporal law, as enshrined in international law, since 'inter-temporality would mean that the Trust could not be reproached for its lack of diligence and refusal of restitution given that no international instrument required the Trust to do so at the time of acquisition'.[299] The Court's lawfulness assessment shows that the standard in question already existed, under Italian law, when the Trust purchased the statue,[300] while the fact that the same standard was subsequently endorsed in several international instruments was merely used as a circumstance demonstrating that it was a reasonable standard that could also be taken into account for the purpose of applying the ECHR.[301] The mere fact that the Court resorted to subsequent international instruments to interpret the Convention does not infringe the principle of inter-temporality, which merely requires that a state act must be assessed in the light of the rules of law that are contemporaneous with it:[302] the object of the case before the Court was the confiscation order adopted by the Italian authorities with a final domestic decision of 2019; therefore, it was more than legitimate for the Court to take into account the current state of international law.

13 Conclusions: A Truly 'Living Instrument'

The above analysis cannot but confirm what the Court already stated in 1978, namely that the ECHR is truly 'a living instrument which … must be interpreted in the light of present-day conditions'.[303] This doctrine has enabled

moslims van België and Others v Belgium: The ECtHR's Perspective on Balancing Animal Welfare with Religious Freedom', *Strasbourg Observers*, 08.05.2024, available at https://strasbourgobservers.com/2024/05/08/executief-van-de-moslims-van-belgie-and-others-v-belgium-the-ecthrs-perspective-on-balancing-animal-welfare-with-religious-freedom/, last accessed on 31.03.2025.

299 M.S. de Clippele, 'Who Owns Art Over Time? The Judicial Saga of the Statue of Victorious Youth in Getty Trust v Italy', *Strasbourg Observers*, 16.08.2024, available at https://strasbourgobservers.com/2024/08/16/who-owns-art-over-time-the-judicial-saga-of-the-statue-of-victorious-youth-in-getty-trust-v-italy/, last accessed on 31.03.2025.

300 ECtHR, *The J. Paul Getty Trust*, *supra* note 278, paras. 302-303 and 380.

301 Ibid., paras. 381-383.

302 International Law Institute, *The Intertemporal Problem in Public International Law*, session of Wiesbaden, 11.08.1975, available at https://www.idi-iil.org/app/uploads/2017/06/1975_wies_01_en.pdf, last accessed on 31.03.2025.

303 ECtHR, *Tyrer v the United Kingdom*, no. 5856/72, 25.04.1978, para. 31.

the Court, over time, to adapt the Convention to legal, social, ethical and scientific developments.[304]

The same holds true as regards the possibility of adapting the interpretation and application of the ECHR to the new challenges faced by the international community of states. The case law examined above suggests several observations in this respect. First, it confirms that the Convention can be interpreted in an evolutive way in order to impose obligations concerning the international management of global challenges. The most notable example is the identification of positive obligations concerning how states are expected to address the adverse effects of climate change on human rights (*Verein Klima-Seniorinnen Schweiz and Others v Switzerland*).[305] However, the case law shows that other global challenges can also be addressed by imposing on states human rights obligations, such as, for example, international human trafficking (*F.M. and Others v Russia*), and attacks against judicial independence and the rule of law, both nationally and internationally (*Aydin Sefa Akay v Türkiye*). It can also contribute to the enforcement of other regimes of international law, for example by refusing to recognise the lawfulness of situations created on the basis of serious breaches of peremptory rules (*Ukraine v Russia* (*re Crimea*)). Secondly, the case law examined above shows that the living and contextual nature of the ECHR can also be used to adapt the Convention standards to the challenges faced by states and to the difficulties they might encounter while doing so. For example, the Court has been prepared to accept that a wider margin of appreciation can be recognised to the domestic authorities when they face serious challenges, such as a world pandemic (*Pasquinelli and Others v San Marino*) or the need to recover unlawfully exported cultural items (*The J. Paul Getty Trust and Others v Italy*).

However, and at the same time, the case law reminds states that this contextual and flexible nature is not without its limits and that, even when facing serious challenges, states must remain within the boundaries of the Convention. Accordingly, difficulties encountered in facing serious challenges should not be invoked in order to lower down standards of protection imposed in respect of absolute rights (*M.A. and Z.R. v Cyprus*). Moreover, even measures

304 L.A. Sicilianos, 'Adapting International Instruments over Time: Remarks on the Evolutive Interpretation of the European Convention on Human Rights', in A. Gattini and M. Dimetto (eds.), *Time and International Adjudication. The Temporal Factor in Proceedings before International Courts and Tribunals*, Brill: Leiden, 2025, pp. 473-506, p. 473.

305 I. Jelić and E. Fritz, 'The "Living Instrument" at the Service of Climate Action: The ECtHR Long-Standing Doctrine Confronted to the Climate Emergency' (2024) 36(2) *Journal of Environmental Law*, pp. 141–158.

aimed at facing the most serious threats, such as terrorism, must be in compliance with the relevant principles and rules of international law (*Aydin Sefa Akay v Türkiye*) and cannot go beyond what is strictly required by the exigencies of the situation (*Domenjoud v France*).

All of the above shows that the ECHR, which this year is celebrating its 75th anniversary, is as alive now as it was at the moment of its adoption. It is capable of adapting to changing circumstances, as well as to emergencies, crises and challenges. The ECHR has contributed and still contributes to the international management of those challenges, while at the same time reminding states that even the most serious and difficult situations must be addressed in compliance with human rights obligations. In this sense, the Convention still remains today a truly living instrument at the service of European states and, more generally, of the international community as a whole.

The Court of Justice of the European Union and Human Rights in 2024

Eva Maria Molinari

Abstract

The current contribution examines some of the key developments in 2024 in the case law of the Court of Justice of the European Union (CJEU) regarding fundamental rights. The CJEU's jurisprudence continues to be defined by the Court's effort to balance diverse national regulations and practical considerations within member states, on the one hand, and fundamental rights, on the other. In this context, the CJEU has maintained its use of fundamental rights as strong guiding principles for interpreting EU law, while also establishing a common minimal standard within national legal systems. This contribution focuses on several areas, namely the protection of data and privacy, specifically regarding mass data retention, the protection of (trans*-)gender identity and sex-based discrimination, as well as judicial independence as a safeguard for effective judicial protection. The judgments discussed address novel issues or highlight landmarks in the evolution of previous case law. Critical legal aspects are analysed and placed within the broader context of trends in human rights jurisprudence.

1 Introduction

In 2024 the CJEU had to address an important number of cases, among them 'a rise in number of complex and sensitive cases concerning, in particular, … matters related to fundamental rights'.[1] In its fundamental rights jurisprudence, the CJEU continued to establish case law that is in essential aspects guided by fundamental rights and values. This case law is characterised by the ongoing effort to strike a balance between diverse national rules and practical considerations within the member states on the one hand and fundamental rights on the other. The CJEU also continues to insist on compliance with minimal standards of fundamental rights in areas within the competence of the member states, prompting criticism for exceeding its authority. Depend-

1 CJEU, *Annual Report 2024. The Year in Review*, Luxembourg 2024, p. 24.

© EVA MARIA MOLINARI, 2026 | DOI:10.1163/9789004751026_023
This is an open access chapter distributed under the terms of the CC-BY-NC-ND 4.0 license.

ing on the area of law, the CJEU alternates between granting member states broader discretion and prescribing detailed requirements for the design of national legal frameworks. In any case, the CJEU has developed its fundamental rights case law in significant areas, to some extent even setting new standards.

The present contribution examines some of the major developments in the CJEU's fundamental rights jurisprudence in 2024, focusing on three topics: the protection of personal data and privacy (Section 2), the protection of fundamental rights related to gender (Section 3) and the guarantee of effective judicial protection (Section 4). These topics reflect areas that appear on the one hand to be particularly important, since they encompass several judgments that have been qualified as 'major cases of the year' by the CJEU's Annual Report 2024[2] or were adopted by the Grand Chamber or the Full Court of the Court of Justice (CJEU). On the other hand, they raise novel issues or highlight landmarks in the evolution of earlier case law or appear to be particularly notable or illustrious, prompting broader scientific discourse. Nevertheless, there are other areas in which important cases have been enacted which will not be addressed below, for example, on equal treatment and labour law,[3] migration and asylum,[4] access to public documents[5] or cases relating to the freedom of the press[6] or the right to vote.[7]

2 Protection of Personal Data and Privacy

2.1 *Introduction*

In 2024 the CJEU delivered an important number of judgments on the protection of personal data. Some of them refer to the GDPR[8] rather than to the

2 Ibid., pp. 54–72.

3 CJEU (ECJ), *BU v Commune die Copertino*, Case C-218/22, 13.01.2024, ECLI:EU:C:2024:51; CJEU (ECJ), *FIFA v BZ*, Case C-650/22, 04.10.2024, ECLI:EU:C:2024:824.

4 CJEU (ECJ), *SN, LN v Zamestnik-predsedatel na Darzhavna agentsia za bezhantsite*, Case C-563/22, 13.06.2024, ECLI:EU:C:2024:494; CJEU (ECJ), *European Commission v Hungary*, Case C-123/22, 13.06.2024, ECLI:EU:C:2024:493.

5 CJEU (ECJ), *Right to Know v European Commission*, Case C-588/21 P, 05.03.2024, ECLI:EU:C:2024:201.

6 CJEU (ECJ), *Real Madrid Club de Fútbol and AE v EE and Société Éditrice du Monde SA*, Case C-633/22, 04.10.2024, ECLI:EU:C:2024:843.

7 CJEU (ECJ), *European Commission v Czech Republic*, Case C-808/21, 19.11.2024, ECLI:EU:C:2024:962.

8 Regulation (EU) No. 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and

CFREU.[9] However, the GDPR is closely linked to Articles 7 and 8(1) of the CFREU and has to be interpreted in the light of the CFREU.[10]

After a short overview of several of the 2024 data protection cases (section 2.2), the CJEU's case on data retention, *Quadrature du Net II*,[11] will be discussed in more detail (Section 2.3). The CJEU has addressed mass data retention in an important number of cases in recent years;[12] *Quadrature du Net II* builds upon this body of case law and introduces significant clarifications and developments.

2.2 *Overview of the Main Data Protection Cases*

In *Landeshauptstadt Wiesbaden*[13] the CJEU declared Regulation 2019/1157[14] on strengthening the security of identity cards for union citizens to be invalid, insofar as it was adopted on an incorrect legal basis. However, the CJEU noted that the mandatory inclusion of two fingerprints in identity cards, as required by the regulation, is compatible *inter alia* with the fundamental rights regarding the protection of private life and personal data. Accordingly, the CJEU

on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L119.

9 Charter of Fundamental Rights of the European Union, 26.10.2012, OJ 2012/C 326/02.

10 B. Schmidt, 'Commentary of article 1 GDPR', in J. Taeger and D. Gabel (eds.), *Kommentar DSGVO – BDSG – TTDSG*, 4th edition. Deutscher Fachverlag: Frankfurt am Main: 2022, para. 19.

11 CJEU (EJC), *La Quadrature du Net, Fédération des fournisseurs d'accès à Internet associatifs, Franciliens.net, French Data Network v Premier minister, Ministre de la Culture*, Case C-470/21, 30.04.2024, ECLI:EU:C:2024:370.

12 Namely CJEU (ECJ), *La Quadrature du Net, French Data Network, Fédération des fournisseurs d'accès à Internet associatifs, Igwan.net v Premier ministre, Garde des Sceaux, ministre de la Justice, Ministre de l'Intérieur, Ministre des Armées,* Joined Case C-511/18, C-512/18 and C-520/18, 06.10.2020, ECLI:EU:C:2020:791; CJEU (ECJ), *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natura'l Resources, Minister for Justice, Equality and Law Reform, Commissioner of the Garda Síochána, Ireland, The Attorney General*, Joined Cases C-293/12 and C-594/12, 08.04.2014, ECLI:EU:C:2014:238; CJEU (ECJ), *G.D. v The Commissioner of the Garda Síochána and Others*, Case C-140/20, 05.04.2022, ECLI:EU:C:2022:258; CJEU (ECJ), *Proceedings brought by Spetsializirana prokuratura.*, Case C-350/21, 17.11.2022, ECLI:EU:C:2022:896; CJEU (ECJ), *Bundesrepublik Deutschland v SpaceNet AG (C-793/19), Telekom Deutschland GmbH (C-794/19)*, Joined Cases C-793/19 REC and C-794/19 REC, 27.10.2022, ECLI:EU:C:2022:854.

13 CJEU (ECJ), *Detlev Sieber v Landeshauptstadt Wiesbaden*, Case C-61/22, 21.03.2023, ECLI:EU:C:2024:251.

14 Regulation (EU) No. 2019/1157 of the European Parliament and of the Council of 20 June 2019 on strengthening the security of identity cards of Union citizens and of residence documents issued to Union citizens and their family members exercising their right of free movement, OJ L188.

decided to maintain the effects of the regulation until a new regulation, based on the correct specific legal basis, enters into force.

Direktor na Glavna Natsionalna politsia[15] addressed the storage of personal data – including biometric data of convicted individuals – for the purpose of combatting further criminal offences. The CJEU held that a uniform retention period until death of the persons concerned fails to comply with the compulsory principle of proportionality. The CJEU acknowledged that the retention of biometric and genetic data may be strictly necessary for law enforcement purposes, particularly in verifying involvement in future offences. However, such necessity must be assessed considering specific factors, including the seriousness of the offence, contextual elements, links to ongoing proceedings, and the individual's criminal background. National legislation that mandates lifetime retention of such data without a case-by-case assessment is excessively broad and not compatible with the GDPR's requirements.

In *Bezirkshauptmannschaft Landeck,*[16] the CJEU examined the conditions under which national authorities may access data stored on a mobile phone for the purpose of combating criminal offences. The CJEU clarified that such access is not necessarily limited to the investigation of serious crime, as such a restriction creates a risk of impunity. However, any access must be subject to prior review and authorisation by an independent body and must be proportionate – considering the context, including the nature of the offence in question. Additionally, the CJEU affirmed the individual's right to be informed of the reasons justifying the access, once doing so no longer compromises the authorities' operations.

The following factual background gave rise to the case of *Schrems v Meta* (formerly Facebook):[17] M. Schrems, a data protection activist, received on the Facebook platform politically themed advertisements that were tailored to his sexual orientation. This sensitive personal information he had neither published or disclosed on his Facebook profile, nor had he granted permission to use the corresponding profile fields. However, he publicly referred to his sexual orientation during a panel discussion that was streamed on Facebook. The CJEU ruled that by doing so M. Schrems had made his sexual orientation public. Nevertheless, this does not entitle the operator of an online social

15 CJEU (ECJ), *NG v Direktor na Glavna direktsia 'Natsionalna politsia' pri Ministerstvo na vatreshnite raboti – Sofia*, Case C-118/22, 30.01.2024, ECLI:EU:C:2024:97.

16 CJEU (ECJ), *CG v Bezirkshauptmannschaft Landeck*, Case C-548/21, 04.10.2024, ECLI:EU:C:2024:830.

17 CJEU (ECJ), *Maximilian Schrems v Meta Platforms Ireland Limited, formerly Facebook Ireland Limited*, Case C-446/21, 04.10.2024, ECLI:EU:C:2024:834.

network to process further data concerning his sexual orientation for the purpose of offering personalised advertising. Moreover, the principle of data minimisation prohibits the operator from using all personal data collected, whether on or off the platform, without any time restriction or differentiation between types of data.

2.3 *Mass Data Retention: Quadrature Du Net II* (*C-470/21*)

2.3.1 Facts of the Case

To detect online infringements of copyright or related rights, a French Decree[18] stipulates that the competent authority, Hadopi,[19] has access to certain personal data retained by internet access providers.[20] For this access, personal data is processed in two stages: first, organisations that hold copyrights (rightsholder organisations) collect IP addresses that appear to have been used for copyright infringements (upstream processing). These organisations provide Hadopi with the IP addresses, along with other data related to the infringement, such as the protected works involved, the file names as they appear on the subscriber's device, the pseudonym used and the internet access provider. In a second stage (downstream processing), at Hadopi's request, internet access providers match the IP addresses to their owners and provide Hadopi with data regarding their civil identity (names, postal address, contact details, etc.).[21] These data processing operations enable Hadopi to initiate proceedings against the individuals identified, combining educational and punitive measures, which in severe cases may result in referral to the public prosecutor.[22]

The applicants in the main proceedings brought an action before the Conseil d'État (Council of State) requesting essentially the repeal of the Decree. They argued, *inter alia,* that the Decree is contrary to Article 15 of Directive

18 Decree No. 2010–236 of 5 March 2010 on the automated personal data processing system authorised by Article L. 331–29 of the *code de la propriété intellectuelle* (Intellectual Property Code).

19 High Authority for the Dissemination of Works and the Protection of Rights on the Internet; today ARCOM (Autorité de Régulation de la Communication Audiovisuelle et Numérique; Authority for the Regulation of Audiovisual and Digital Communication), see <https://www.arcom.fr/>, last accessed on 06.10.2025.

20 CJEU, *Qudrature du Net II*, *supra* note 11, para. 52.

21 Ibid., paras. 53–55.

22 Hadopi follows a 'graduated response' procedure. Specifically, it is authorised to send the individual two recommendations, which function as warnings and, if the behaviour continues, a letter informing them that their actions may lead to criminal prosecution. Ultimately, Hadopi has the right to refer the case to the public prosecutor for possible legal action. CJEU, *Qudrature du Net II*, *supra* note 11, para. 25.

2002/58[23] and Articles 7, 8, 11 and 52 of the CFREU.[24] The referring Conseil d'État asked the CJEU in essence whether these provisions preclude access to the retained IP addresses and the associated civil identity data (i.e. the downstream processing) without a prior review by a court or an independent body.[25] While the Conseil d'État focused solely on the lawfulness of *access* to the retained data,[26] the CJEU emphasised that the issue of lawful access cannot be separated from the question of lawful *retention*.[27] The core of the dispute was, thus, whether internet access providers are allowed systematically and indiscriminately to collect information on IP addresses and associated civil identity data simply because these data could be decisive for detecting copyright infringements.[28]

2.3.2 Judgment

The starting point of the CJEU's examination of the case was Article 5(1) of Directive 2002/58, which requires member states to ensure the confidentiality of communication and the related traffic data. Article 15(1) of the same Directive provides exceptions to this rule, but only under the strict and narrowly defined conditions of this provision and ensuring that fundamental rights (Articles 7, 8, 11 CFREU; see also Article 52 CFREU) are not violated.[29]

With regard to data *retention*, the CJEU – referring to *Quadrature du Net I*[30] – stated that IP addresses are considered less sensitive than other traffic data, as long as they are used exclusively to identify users of electronic communications services.[31] However, this applies only if the IP addresses cannot be linked with other data in a way that reveals detailed information about a person's private life.[32] If IP addresses are instead used to monitor online behaviour and build comprehensive user profiles, such use amounts to a serious

23 Directive (EU) No. 2002/58 of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), OJ L201.

24 CJEU, *Quadrature du Net II*, *supra* note 11, para. 41.

25 Ibid., para. 52; for the questions for preliminary ruling in detail see para. 51.

26 Ibid., paras. 51–52.

27 Ibid., paras. 59, 65, 71.

28 M. Rojszczak, 'Data Retention Laws and La Quadrature du Net *II*', *Verfassungsblog*, 02.12.2024, available at https://verfassungsblog.de/data-retention-laws-and-la-quadrature-du-net-ii/ last accessed on 06.10.2025.

29 CJEU, *Quadrature du Net II*, *supra* note 11, paras. 66–67.

30 CJEU, *Quadrature du Net I*, *supra* note 12, para. 152.

31 CJEU, *Quadrature du Net II*, *supra* note 11, para. 76.

32 Ibid., para. 81.

interference with fundamental rights.[33] Such serious interferences can be justified only by the prevention of serious crimes or serious threats to public and national security, but not by the purpose of combatting standard criminal offences like copyright infringements.[34]

However, in the present case, the CJEU considered the general and indiscriminate retention of IP addresses to be a non-serious interference, if the national legislation provides for clear and precise rules ensuring a strict and effective separation between different categories of retained data, in the way that conclusions about the users' private life are effectively ruled out.[35] In particular, the data retention framework must comply with the following requirements: civil identity data, IP addresses, and other retained data must be kept strictly separate. This separation must be enforced through technical safeguards, including secure and reliable IT systems. Any mechanism used to link these data categories must be technically sound and must not undermine their separation. The separation must be subject to regular review by an independent public authority, distinct from the body requesting access.[36] Lastly, the retention period must be confined to what is strictly necessary.[37]

According to the CJEU, also the *access* to the civil identity linked to the retained IP addresses is in principle below the threshold of serious interference.[38] However, among the data available to Hadopi is also information about the protected works. The CJEU acknowledged that in atypical situations – specifically when the IP addresses have been repeatedly used on a large scale to share protected works – such data may disclose relevant aspects of the IP address holder's private life, including sensitive information regarding sexual orientation, political opinions, religious, philosophical, societal or other beliefs and health status.[39] Nevertheless, the CJEU denied that there is 'necessarily a high degree of seriousness' of the interference with the privacy of the person affected.[40] The key factors in this assessment were, namely, the specific and limited purpose for accessing the data (the prosecution of criminal offences), the restricted number of individuals with access to this information, and the limitation of data access to what is strictly necessary for the purpose of combatting copyright infringements. Also, the fact that Hadopi's

33 Ibid., paras. 77–78.
34 Ibid., para. 77.
35 Ibid., paras. 82–83.
36 Ibid., paras. 84–89.
37 Ibid., para. 93.
38 Ibid., paras. 95–96.
39 Ibid., paras. 108–112.
40 Ibid., para. 113.

personnel are bound by an obligation of confidentiality was relevant in this respect.[41] And, finally, the specific context of online crimes was decisive: Accessing a person's identity through their IP address may be the only, or at least the least intrusive, means to investigate such crimes and thus prevent the risk of 'systemic impunity'.[42]

According to the CJEU, a prior review by an independent body is necessary if the access carries the risk of serious interference with fundamental rights, such as the disclosure of personal information based on information about the copyright works.[43] The procedure must thus be structured to allow judicial review before identity data are connected to content data.[44] Finally, to safeguard against misuse, clear regulations must be in place to ensure sufficient regular review of the integrity of the data processing systems by an independent body.[45] And data processing mechanisms must ensure substantive and procedural safeguards, such as the right to access, rectify and erase personal data, as well as the ability to file a complaint with an independent supervisory authority to seek a judicial remedy.[46]

2.3.3 Comment

Quadrature du Net II marks a significant milestone in the development of the CJEU's case law on data retention, marking a further expansion of the leeway granted to member states in this field.[47] Initially, the CJEU ruled out untar-

41 Ibid., paras. 113–114.

42 Ibid., paras. 116–121.

43 Ibid., paras. 135–136.

44 Ibid., para. 141. The CJEU completely rules out the automation of the examination to be carried out by an independent body prior to access: the 'balancing of the various legitimate interests and rights concerned requires the intervention of a natural person, all the more so where the automatic nature and large scale of the data processing in question pose privacy risks' (ibid., paras. 148–149).

45 Ibid., para. 156.

46 Ibid., para. 161.

47 The question whether *Quadrature du Net II* represents a turning point or is simply a logical continuation of the development of the CJEU's case law and EU security law in general is disputed among legal scholars: O. Vettermann, '"Don't stop me now!": Speicherung von IP-Adressen auf Vorrat zur Prävention von Urheberrechtsverletzungen' (2024) 68(10) *Zeitschrift für Urheber- und Medienrecht* (ZUM), p. 722, speaks of a deviation from previous case law and the softening of previously strict standards. Other authors call the case a 'copernican revolution' (S. Krempl, 'Vorratsdatenspeicherung: Forscher erkennen "kopernikanische Wende" beim EuGH', 05.05.2024, available at https://www.heise.de/news/Vorratsdatenspeicherung-Forscher-erkennen-kopernikanische-Wende-beim-EuGH-9708717.html, last accessed on 06.10.2025) or 'Pandora's box' (T. Bosl, 'Not You Again!', *Völkerrechtsblog*, 07.09.2023, available at https://voelkerrechts

geted general data retention, permitting only specific and time-limited data storage.[48] However, in subsequent years, the CJEU softened these standards.[49] In *Quadrature du Net I*[50] (2020) and *SpaceNet*[51] (2022), the Court allowed the general retention of traffic data in exceptional circumstances. In this regard, the CJEU distinguished between untargeted (universal or generalised) and targeted data retention. And it established a hierarchy of justifying purposes: at the highest level, it placed serious threats to national security, followed by the fight against serious crime on the second level, and, at the lowest level, other purposes aimed at serving the public interest, such as combating crime in general.[52] Based on these distinctions, untargeted (general) data retention was only permitted to address serious, actual and ongoing or foreseeable threats to national security. In contrast, targeted data retention was allowed for the (less significant) purposes of combating serious crime and preventing significant threats to public security.[53]

The generalised retention of IP addresses held a special role in this structure: Compared to other data, IP addresses were qualified as 'less sensitive'.[54] However, the CJEU qualified the general retention of IP addresses still as 'a serious interference in the fundamental rights … as those IP addresses may allow precise conclusions to be drawn concerning the private life of the user'.[55] '[O]nly action to combat serious crime, the prevention of serious threats to public security and the safeguarding of national security are capable

blog.org/not-you-again/, last accessed on 06.10.2025). For other authors the case is a logical step in the general development of case law and legislation in the EU (M. Rojszczak, 'La Quadrature du Net *II*', *supra* note 28; L. M. Landerer, 'Data Retention', *Verfassungsblog*, 21.11.2024, available at https://verfassungsblog.de/data-retention/, last accessed on 06.10.2025).

48 Cf. e.g., CJEU, *Digital Rights Ireland, supra* note 12; CJEU (ECJ), *Tele2 Sverige AB v Post-och telestyrelsen*, and *Secretary of State for the Home Department v Tom Watson, Peter Brice, Geoffrey Lewis*, Joined Cases C-203/15 and C-698/15, 21.12.2016, ECLI:EU:C:2016:970.

49 Cf. A. Roßnagel, 'Datenschutzrecht: EuGH lockert Voraussetzungen zur Vorratsdatenspeicherung' (2024) 35(14) *Europäische Zeitschrift für Wirtschaftsrecht* (*EuZW*), pp. 657–666.

50 CJEU, *Quadrature du Net I*, *supra* note 12; Cf. M. Tranou and S. Karyda, 'Privacy International and Quadrature du Net: One Step Forward Two Steps Back in the Data Retention Saga?' (2022) 28(1), *European Public Law*, pp. 123–154.

51 CJEU, *SpaceNet, supra* note 12.

52 CJEU, *Quadrature du Net I*, *supra* note 12, paras. 140–148; CJEU, *SpaceNet*, *supra* note 12, paras. 71–75.

53 Ibid.; cf. also L. M. Landerer, 'Data Retention', *supra* note 47.

54 CJEU, *Quadrature du Net I*, *supra* note 12, para. 152.

55 CJEU, *SpaceNet*, *supra* note 12, para. 100; cf. also para. 79 and also CJEU, *Quadrature du Net I*, *supra* note 12, para. 153.

of justifying the general retention of IP addresses assigned to the source of a connection'.[56]

The case at hand deviates from this previous case law: The general retention of IP addresses and the access to these data are not qualified as a serious interference with fundamental rights and can therefore – in accordance with the previous case law – be justified by purposes of the lowest level: the detection and investigation of simple criminal offences such as a copyright infringement.[57]

The reason the CJEU classified the *retention* of IP addresses as falling below the threshold of serious interference lies in the strict separation of different types of data during retention[58] and procedural mechanisms.[59] What is decisive, therefore, is not the potential to track a user's online activity through retained IP addresses, but rather the technical and procedural safeguards in place. In this respect, the CJEU aligns with a broader trend observed in the context of data retention under security law: its proceduralisation.[60] However, the assumption that data retention is risk-free if different types of data are stored separately appears not to be fully thought through: The risk of unjustified insights into the personal life of users is merely shifted from the storage to the act of linking for access: even if IP addresses, identity data, and other data are stored separately, this separation can be reversed – at the request of Hadopi.[61]

Also, *access* to retained data falls, according to the CJEU, below the threshold of serious interference. However, the decisive factors are not technical safeguards, but rather the limited scope of information associated with IP addresses, the restricted purposes for which the data are used, the narrow group of individuals granted access, and the fact that such access may be the only means of investigating the offence. This approach, however, leads down a dangerous path.[62] It is clear – and explicitly acknowledged by the CJEU – that the IP addresses at the time of access are already linked to information regarding a potential underlying crime. This link can reveal sensitive personal details, such as sexual orientation, political opinions, religious or philosophical beliefs, social affiliations or health conditions. While in the context of

56 CJEU, *SpaceNet*, *supra* note 12, para. 103.

57 CJEU, *Quadrature du Net II*, *supra* note 11, para. 82.

58 Ibid., paras. 84–93.

59 Ibid., paras. 123–163.

60 L. M. Landerer, 'Data Retention', *supra* note 47; M. Tranou and S. Karyda, 'Privacy and Quadrature du Net', *supra* note 50, p. 148.

61 O. Vettermann, 'Don't stop me now!', *supra* note 47, p. 724.

62 T. Bosl, 'Not You Again!', *supra* note 47.

copyright infringements the risk of exposing such sensitive information may be rare,[63] this is not be the case for other criminal offences. When we – considering that democratic and fundamental rights values are not upheld equally in all EU member states – imagine that the underlying offence would relate to, for example, homosexuality, abortion, defamation or affiliation with a specific religious group, the situation is entirely different.[64] In such cases, gaining significant insight into a user's private life is likely to be the rule rather than the exception. Given these concerns and the fact that it lies within the competence of the member states to decide what acts they consider worth penalising, it is crucial that access to retained data be subject to prior review by an independent authority – as requested by the CJEU[65] – and that the proportionality test be applied with the highest level of scrutiny.[66]

Against this background it becomes clear, that *Quadrature du Net II* opens the door to broader data retention practices, particularly in the context of investigating general criminal offences. This may reflect practical needs in law enforcement. However, the protection of private life and personal data must continue to serve as the key benchmark. This encompasses the requirement for independent review bodies that scrutinise both, retention and access and enforce the principle of proportionality with strict rigour. Moreover, national legislation must provide for sufficient substantive and procedural safeguards enabling individuals to lodge complaints and seek judicial remedies. By these means the balance between law enforcement and the effective protection of fundamental rights can be maintained, ensuring that data retention – as requested by the CJEU itself[67] – remains the exception rather than the rule.

3 Fundamental Rights and Gender

3.1 *Introduction*

The CJEU has issued several cases regarding gender and fundamental rights such as the protection of gender identity and non-discrimination. It has thereby strengthened its role as a protector of fundamental rights and formulated important requirements regarding the protection of people who experi-

63 Cf. CJEU, *Quadrature du Net II*, *supra* note 11, paras. 110–111, 135, 164.
64 Cf. T. Bosl, 'Not You Again!', *supra* note 47.
65 Cf. CJEU, *Quadrature du Net II*, *supra* note 11, paras. 123–141.
66 Cf. T. Bosl, 'Not You Again!', *supra* note 47.
67 CJEU, *Quadrature du Net II*, *supra* note 11, paras. 48, 66.

ence discrimination and the preclusion of rights due to their sex or gender identity.

In what follows, two cases will be discussed: The first concerns the right to private and family life in the context of free movement within the EU (Section 3.2.). The second case addresses standards of non-discrimination in refugee law (Section 3.3).

3.2 *Protection of* (*Trans**) *Gender Identity:* Mirin (*C-4/23*)

3.2.1 Facts of the Case

M.-A.A. was born in Romania and, according to the birth certificate at the time, registered as female with a female name. After moving to the United Kingdom and having obtained British nationality, M.-A.A. changed his first name and title from female to male, which is possible for British citizens by simple declaration in a deed poll procedure. M.-A.A. obtained a gender identity certificate, confirming his male gender identity. Based on this document, M.-A.A. requested the Romanian authorities to issue a new birth certificate and register his male gender identity and his new name. The Romanian authorities rejected this request, *inter alia*, on the ground that according to Romanian domestic law a change of the gender contained in official documents and registers may be issued only when the 'new' identity has been acknowledged by a final judicial decision in Romania.[68] M.-A.A. challenged this decision. The competent Romanian court referred the matter to the CJEU, asking in essence whether the obligation to issue new proceedings in Romania constituted an obstacle to the exercise of the right to European citizenship and the right to move and reside freely in conditions of dignity, equality before the law and non-discrimination, respecting the right to private and family life (Articles 20, 21, 18 TFEU, Article 2 TEU, Articles 1, 7, 20, 21 and 45 CFREU).[69]

---

68 CJEU (ECJ), *M.-A.A.* [*Mirin*] *v Direcţia de Evidenţă a Persoanelor Cluj, Serviciul stare civilă, Direcţia pentru Evidenţa Persoanelor şi Administrarea Bazelor de Date din Ministerul Afacerilor Interne, Municipiul Cluj-Napoca,* Case C-4/23, 04.10.2024, ECLI:EU:C:2024: 845, paras. 24–29.

69 CJEU, *Mirin*, *supra* note 68, paras. 30–35. In addition, the Romanian court wanted to know whether the answer to this question was affected by Brexit (the procedure for changing civil status was commenced before Brexit and was completed during the transition period): The CJEU addressed this question in the context of the admissibility of the request for a preliminary ruling. It stated that the present case concerned the interpretation of EU law. M.-A.A. was – as a Romanian citizen – entitled to rely on the status of being a Union citizen, namely on the rights laid down in Articles 20 and 21 TFEU. The CJEU therefore refused to treat the case in the same way as a purely internal situation and declared the preliminary ruling admissible (CJEU, *Mirin*, *supra* note 68,

3.2.2 Judgment

The CJEU emphasised that the refusal of the authorities to recognise a name and gender identity as acknowledged by another member state hinders the exercise of, *inter alia,* the freedom of movement and residence within the territory of the EU. The divergence between two names and sexes in official documents and registers causes serious inconveniences in both, the public and private domains (namely in administrative, professional and private matters).[70] Such a restriction of the rights enshrined in Article 21 TFEU must be justified by objective considerations and be proportionate. In addition, even if the national legislation pursues a legitimate objective – that cannot be detected by the CJEU in the case at hand – the national legislation must be consistent with fundamental rights guaranteed by the CFREU.[71] The respect for private life (Article 7 CFREU, which has the same meaning and scope as Article 8 ECHR[72]) 'encompasses the right [of individuals] to establish details of their identity as individual human beings, which includes the right of transsexual people to personal development and physical and moral integrity and to respect for and recognition of their sexual identity'.[73] The protection of trans*sexual people's identity requires the member states to provide for a 'clear and foreseeable procedure for legal recognition of gender identity which allows for a change of sex and thus of name and digital personal code, on official documents, in a quick, transparent and accessible manner'.[74]

The Romanian procedure does not meet these requirements: First, the CJEU referred to the case law of the ECtHR[75] which held that the procedure laid down by the Romanian legislation was incompatible with Article 8 ECHR. The reasons therefore are *inter alia* uncertainties – under Romanian law – regarding the applicable procedure, the competent court, the conditions for the legal recognition of gender reassignment and modification of civil status.[76] Moreover, the requirement of a second procedure in Romania entails the risk

paras. 36–46). On the merits, the CJEU stated that it is irrelevant that the request for recognition and entry of the change of first name and gender identity was made in that first member state on a date on which the withdrawal from the European Union of the other member state had already taken effect (CJEU, *Mirin*, *supra* note 68, para. 71).

70 Ibid., paras. 54–58.

71 Ibid., paras. 59–62.

72 Cf. ibid., para. 63.

73 Ibid., para. 64.

74 Ibid., para. 66.

75 Cf. ibid., para. 67, referring to ECtHR, *X and Y v Romania*, nos. 2145/16 and 20607/16, 19.01.2021, paras. 157, 168.

76 ECtHR, *X and Y v Romania*, *supra* note 75, para. 155.

that the outcome of that procedure is contrary to the outcome before the United Kingdom authorities.[77] For those reasons, the lack of recognition of the gender identity acknowledged in the United Kingdom entails serious inconveniences regarding the exercise of the rights of free movement and thus infringes Article 21 TFEU (read in the light of Articles 7 and 45 of the CFREU).[78]

3.2.3 Comment

For years, LGBTIQ* rights have become an increasingly prominent topic in public discourse – also within the European Union.[79] Yet, EU law still lacks explicit provisions protecting the rights of trans*individuals. Within the EU, the formal, substantive and procedural requirements for recognising gender identity in official records differ significantly between member states.[80] However, the CJEU has issued several cases strengthening the rights of trans*people: Building on *Coman*[81] and *Pancharevo*,[82] the CJEU calls on member states to recognise legal gender affirmations acknowledged in other EU countries. The pivotal point of this case law is the right to free movement: because diver-

77 CJEU, *Mirin*, *supra* note 68, para. 68.

78 Ibid., paras. 69–71.

79 European Parliament, resolution of 11 March 2021 on the declaration of the EU as an LGBTIQ Freedom Zone, 2021/2557(RSP).

80 Cf. M. Payandeh, 'Europarecht: Geschlechtsidentität im Lichte von Unionsbürgerschaft und Unionsgrundrechten' (2025) 2 *Juristische Schulung* (*JuS*), p. 188; D. Spieker, 'Die Europäische Union: ein Freiheitsraum für trans* Menschen?' (2025) 36(1) *Europäische Zeitschrift für Wirtschaftsrecht* (*EuZW*), pp. 112–113.

81 CJEU (ECJ), *Relu Adrian Coman, Robert Clabourn Hamilton, Asociaţia Accept v Inspectoratul General pentru Imigrări, Ministerul Afacerilor Interne*, Case C-673/16, 05.06.2018, ECLI:EU:C:2018:385. In this case, Adrian Coman, a Romanian national, married Claibourn Robert Hamilton, a U.S. citizen, in Belgium, where same-sex marriage is legal. Upon returning to Romania, the Romanian authorities refused to grant Hamilton residency rights, citing Romania's non-recognition of same-sex marriages. The ECJ ruled that the term 'spouse' in EU law is gender-neutral and includes same-sex spouses, thereby affirming Hamilton's right to reside in Romania under the EU's free movement laws.

82 CJEU (ECJ), *V.M.A. v Stolichna obshtina, rayon 'Pancharevo'*, Case C-490/20, 14.12.2021, ECLI:EU:C:2021:1008. In this case, a Bulgarian national, VMA, and her spouse, KDK, both residing in Spain, had their daughter, SDKA, in Spain. The Bulgarian authorities refused to issue a Bulgarian birth certificate for SDKA, citing the presence of two female parents on the Spanish birth certificate, which was contrary to Bulgarian public policy. The CJEU ruled that Bulgaria was obliged to issue an identity document to SDKA without requiring a Bulgarian birth certificate, emphasising the child's right to free movement within the EU.

gent gender identities constitute an obstacle to free movement, a gender identity acknowledged in one member state must be recognised by another member state and the corresponding official documents and registers must be adapted.

This approach has a major disadvantage, namely that the protection of trans*people has limited scope. The principle of non-discrimination applies only in relation to specific rights protected under EU law, and the recognition of a trans*person's gender identity is neither a general nor a direct obligation for member states' civil status laws.[83] Consequences of this limitation are that firstly, the requirements formulated by the CJEU apply only in cross-border constellations and, secondly, they apply only to 'mobile' trans*people. 'Immobile' persons cannot invoke them – despite their status as union citizens.[84]

These limitations stem primarily from the EU's lack of competence regarding an individual's personal status.[85] Additionally, the emphasis on free movement rights is a result of the specific scope of the preliminary questions submitted to the CJEU by the referring court. Nevertheless, two factors could have allowed the CJEU to further promote the recognition of trans*people's gender identity within the EU: first, there is an extensive body of CJEU case law that qualifies unequal treatment on the grounds of gender reassignment as discrimination on the grounds of sex. This case law was initially limited to cases of medical gender reassignment.[86] However, this understanding is in the process of changing: The CJEU increasingly recognises gender identities without medical or surgical gender confirmation treatments to enter the scope of the right to non-discrimination.[87] Regarding the *MB* case,[88] for example, Advocate General M. Bobek emphasised that gender recognition is inherently dynamic. He argued that gender identity requires protection not only

83 Cf. also D. Spieker, 'Freiheitsraum für trans* Menschen', *supra* note 80, p. 115; A. M. Plan, 'Trans Rights and Gender Recognition before the CJEU', *Verfassungsblog*, 05.06.2024, available at https://verfassungsblog.de/trans-rights-and-legal-gender-recognition/, last accessed on 06.10.2025.

84 D. Spieker, 'Freiheitsraum für trans* Menschen', *supra* note 80, pp. 115–116.

85 CJEU, *Mirin*, *supra* note 68, para. 53.

86 For an overview of the case law see: S. Osella, 'The Court of Justice and gender recognition: A possibility for an expansive interpretation?' (2021) 87 *Women's Studies International Forum*, available at https://www.sciencedirect.com/science/article/pii/S0277539521000571#s0015, last accessed on 06.10.2025, pp. 3–4.

87 D. Spieker, 'Freiheitsraum für trans* Menschen', *supra* note 80, p. 115.

88 CJEU (ECJ), *MB v Secretary of State for Work and Pensions*, Case C-451/16, 26.06.2018, ECLI:EU:C:2018:492.

once fully recognised but also throughout the process of recognition.[89] In the *Országos* case of 2025, the CJEU then stated that the right to rectification of the gender identity contained in a public register may not be subject to proof of gender affirmation surgery.[90] Following this case law, the transgender identity in the *Mirin* case is in principle covered by the right to non-discrimination.

This does, however, – and this is the second factor – not yet answer the question whether the guarantee of non-discrimination applies to the *Mirin* case: since the law on civil status is not subject to EU law, the CFREU is not applicable (Article 51[1] CFREU). However, the CJEU refers in the *Mirin* case to the 'fundamental status of nationals of the Member States' due to their Union citizenship,[91] developed *inter alia* in *Ruiz Zambrano*.[92] In that case, the CJEU stated that this status 'precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union'.[93] This would open the door for the recognition of a core content related to union citizenship that would allow a direct application of the principle of non-discrimination even beyond the scope of application of the CFREU.[94]

Even though the CJEU did not go down this path, the *Mirin* case holds important potential to generate impulses within national legal systems. The recognition of gender identity in the context of the right to free movement

89 CJEU, *Secretary of State for Work and Pensions*, Case C-451/16, Opinion of *AG* Bobek, 05.12.2017, ECLI:EU:C:2017:937, paras. 72–74; cf. also D. Spieker, 'Freiheitsraum für trans* Menschen', *supra* note 80, p. 116; S. Osella, 'gender recognition', *supra* note 86, pp. 4–5.

90 CJEU (ECJ), *VP v Országos Idegenrendészeti Főigazgatóság*, Case C-247/23, 13.03.2025, ECLI:EU:C:2025:172, para. 50.

91 CJEU (ECJ), *Mirin*, *supra* note 68, para. 51.

92 CJEU (ECJ), *Gerardo Ruiz Zambrano v Office national de l'emploi* (*ONEm*), Case C-34/09, 08.03.2011, ECLI:EU:C:2011:124. In CJEU, *Mirin*, *supra* note 68, para. 51, the CJEU refers to the 'case-law cited' in CJEU, *Pancharevo*, *supra* note 82, para. 41, which also encompasses the *Ruiz Zambaro* case.

93 CJEU, *Ruiz Zambrano, supra* note 92, para. 42.

94 A. M. Plan, 'Trans Rights before the CJEU', *supra* note 83; A. von Bogdandy, M. Kottmann, C. Antpöhler, *et al.*, 'Ein Rettungsschirm für europäische Grundrechte. Grundlagen einer unionsrechtlichen Solange-Doktrin gegenüber Mitgliedstaaten' (2012) 72 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, pp. 48, 60–65. Critical is D. Spieker, 'Freiheitsraum für trans* Menschen', *supra* note 80, p. 116; M. van den Brink, 'EU citizenship and (fundamental) rights: Empirical, normative, and conceptual problems' (2019) 25(1) *European Law Journal*, pp. 21–36.

may contribute to 'normalising' transgender identities. And it may trigger a certain pressure to harmonise – especially to avoid placing one's own citizens at a disadvantage compared to those of other member states.[95]

Moreover, in the *Mirin* case the CJEU refers to gender identity in general.[96] It thus does not limit itself to a binary concept of gender. On the contrary: The CJEU has in different contexts declared that the right to non-discrimination cannot 'be confined simply to discrimination based on the fact that a person is of one or other gender' but also applies to discrimination arising from the gender reassignment of the person concerned.[97] The CJEU's case law thus leaves the door open for the recognition of non-binary identities, as already provided for by some member states.[98]

3.3 Gender Discrimination in Refugee Law: AH and FN (C-608/22, C-609/22)

3.3.1 Facts of the Case

In joined cases *AH and FN v Bundesamt für Fremdenwesen und Asyl*,[99] the CJEU had to decide about the refugee status of two women from Afghanistan.[100] Both women applied for international protection in Austria in 2020. The competent Austrian authority refused to recognise their refugee status but granted them subsidiary protection status. It argued in essence that there is no real risk of persecution in Afghanistan. In the subsequent proceedings before the Aus-

95 D. Spieker, 'Freiheitsraum für trans* Menschen', *supra* note 80, p. 117.

96 Cf. e.g., CJEU, *Mirin*, *supra* note 68, paras. 47–48, 55.

97 CJEU, *Sarah Margaret Richards v Secretary of State for Work and Pensions*, Case C-423/04, 27.04.2006, ECLI:EU:C:2006:256, para. 24; cf. also CJEU (ECJ), *Mousse v Commission nationale de l'informatique et des libertés (CNIL), SNCF Connect*, Case C-394/23, 09.01.2025, ECLI:EU:C:2025:2, para. 62.

98 D. Spieker, 'Freiheitsraum für trans* Menschen', *supra* note 80, p. 118.

99 CJEU (ECJ), *AH and FN v Bundesamt für Fremdenwesen und Asyl*, Cases C-608/22 and C-609/22, 04.10.2024, ECLI:EU:C:2024:828.

100 Ibid., paras. 19–20: '*AH* is an Afghan national and was born in 1995. After her father wanted to sell her, she claims to have fled with her mother to Iran. After a period of residence in Greece, during which time she married, she entered Austria in 2015 and lodged an application for international protection in that member state, where her husband lived. *FN* is an Afghan national born in 2007, who has never lived in Afghanistan. She applied for international protection in Austria in 2020. Her brother, also from Afghanistan, had previously been granted subsidiary protection in Austria. She claimed in her application to have fled Iran, where she had been living with her mother and two sisters, that none of them had a residence permit, which meant that she could not attend school and their mother could not work, and that she wanted to live freely and have the same rights as men'.

trian courts the women claimed, *inter alia*, that since the Taliban had seized power in 2021, the general oppression of women alone justified their being granted refugee status.[101]

The Supreme Administrative Court of Austria referred two questions to the CJEU. In the first place, it sought to establish whether the measures taken by the Taliban in respect of women were sufficiently serious to be classified as an 'act of persecution' for the purposes of Article 9(1) of Directive 2011/95.[102] In the second place, the referring court wanted to know whether an Afghan woman might be granted refugee status without an individual assessment of her situation being carried out.[103]

3.3.2 Judgment

The CJEU stated first that Directive 2011/95 has to be interpreted in accordance with the Geneva Convention,[104] and other relevant treaties in accordance with Article 78(1) TFEU, specifically the Istanbul Convention[105] and the CEDAW,[106] as well as the right to non-discrimination (Article 21[1] CFREU).[107] According to the Istanbul Convention and the CEDAW[108] gender equality entails, *inter alia*, 'the right of every woman to be protected against all gender-based violence, the right not to be forced into marriage, the right to subscribe or not to a belief, the right to have her own political opinions and to

101 Ibid., paras. 19–24.

102 Directive (EU) No. 2011/95 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 of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), OJ L 337/9.

103 CJEU, *AH and FN*, *supra* note 99, paras. 28–30.

104 Convention relating to the Status of Refugees, adopted on 28 July 1951 and entered into force on 22 April 1954 (United Nations General Assembly resolution 429 [V] of 14 December 1950, United Nations, Treaty Series, Vol. 189, p. 150, No. 2545 [1954]).

105 Decision (EU) No. 2023/1076 of the Council of Europe of 1 June 2023 on the conclusion, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence with regard to matters related to judicial cooperation in criminal matters, asylum and non-refoulement, OJ L 143I.

106 Convention on the Elimination of All Forms of Discrimination against Women adopted on 18. December 1979 and entered into force on 3. September 1981 (United Nations General Assembly resolution 34/180, United Nations Treaty Series, Vol. 1249, No. 1–20378, p. 13).

107 CJEU, *AH and FN*, *supra* note 99, paras. 33, 36.

108 Cf. Article 4(2) Istanbul Convention and Articles 3, 5, 7, 10, 16 CEDAW.

express them and the right to make her own life choices freely in relation to, *inter alia*, education, career or activities in the public sphere'.[109]

Secondly, the CJEU emphasised that the recognition of refugee status requires a well-founded fear of persecution, *inter alia* by reason of membership of a particular social group.[110] The relevant persecution acts must be sufficiently serious to constitute a severe breach of basic human rights, namely the right to life, the prohibition of torture and inhuman or degrading treatment, slavery or punishment without law (see Article 9(1) of Directive 2011/95 and Article 15(2) ECHR).[111] However, the CJEU acknowledged that the level of seriousness required may also constitute an accumulation of various measures, including breaches of human rights outside Article 15(2) ECHR, that – taken together – undermine full respect for human dignity.[112]

In the case at hand, the CJEU ruled that the repression women face under the new Taliban regime qualifies without doubt as an act of persecution: On the one hand, women face measures that by themselves reach the level of seriousness required, namely forced marriage and a lack of protection against gender-based violence and domestic violence. On the other hand, the accumulation of measures denying women access to healthcare, political life, education, the exercise of a professional or sporting activity and restricting their freedom of movement and freedom to choose their clothing, also constitutes a sufficiently serious breach of their fundamental rights.[113] Given that those measures 'have a cumulative effect and are applied deliberately and systematically, they blatantly and relentlessly deny Afghan women fundamental rights related to human dignity on account of their gender'.[114]

According to the CJEU, the determination of acts of persecution is subject to a case-by-case assessment to be conducted by the competent national authority 'with vigilance and care'.[115] However, regarding the Taliban regime, it is considered established that women in general are subject to a well-founded fear of persecution based solely on their female gender. As a result, there is no need to assess other personal circumstances beyond gender and nationality.[116]

---

109 CJEU, *AH and FN*, *supra* note 99, paras. 33–34.

110 Ibid., para. 31; cf. Article 2(d) of the Qualification Directive which reproduces Article 1[A][2] of the Geneva Convention.

111 CJEU, *AH and FN*, *supra* note 99, para. 37; cf. Article 15(2) and Articles 2, 3, 4(1), 7 ECHR.

112 CJEU, *AH and FN*, *supra* note 99, para. 41.

113 Ibid., paras. 43–44.

114 Ibid., para. 44.

115 Ibid., para. 49.

116 Ibid., paras. 56–58.

3.3.3 Comment

With the cases at hand, the CJEU takes an important step towards the protection of women against discrimination – in Afghanistan and beyond. It allows Afghan women to benefit from more comprehensive protection compared to merely subsidiary protection status (for example, regarding family reunification).[117]

On a factual level, the CJEU recognised the structural danger for women in Afghanistan. The Taliban (re-)introduced a system of widespread and systematic discrimination, that is to be seen – independent of an individual case – as gender-specific persecution.[118] This qualification of the facts is convincing,[119] but it is also noteworthy: Although the CJEU is not formally limited to addressing only legal questions, it generally leaves the determination of factual circumstances to the competent authorities of the member states.[120] This is reasonable since the CJEU has no means of conducting its own taking of evidence or establishing the facts.[121] In the present cases, however, the CJEU evaluated the facts in detail. This was possible only because the referring Court presented the norms and living conditions in Afghanistan in its request for preliminary ruling.[122]

AH and *FN* also clarify important points at the legal level: First, with regard to relevant acts of persecution, the CJEU affirmed that the cumulative effect of individual acts of discriminatory treatment against women – which, taken alone, may not reach the threshold of persecution in the sense of Directive 2011/95 – can, when considered in their entirety, reach the relevant level of

117 I. Dervisopoulos, 'Geschlechtsspezifische Verfolgung im Flüchtlingsrecht: Orientierungslinien zu drei richtungsweisenden Urteilen des EuGH Haus dem Jahr 2024' (2024) 51 (18–21) *Europäische Grundrechte-Zeitschrift* (*EuGRZ*), p. 399; S. S. Iranbomy, 'Europäisches Gericht beendet die Diskriminierung der afghanischen Flüchtlingsfrauen', 06.10.2024, available at https://www.anwalt.de/rechtstipps/europaeisches-gericht-beendet-die-diskriminierung-der-afghanischen-fluechtlingsfrauen-232567.html, last accessed on 06.10.2025.

118 W. Kluth, 'Geschlechterdiskriminierung (Frauen) als Verfolgungshandlung – Afghanistan' (2025) 44(1–2) *Neue Zeitschrift für Verwaltungsrecht* (*NVwZ*), p. 64; S. S. Iranbomy, 'Diskriminierung afghanische Flüchtlingsfrauen', *supra* note 117.

119 Likewise I. Dervisopoulos, 'Geschlechtsspezifische Verfolgung', *supra* note 117, p. 399; A. Pfersich, 'Anmerkung zu EuGH, Urt. v 4.10.2024, C-608/22 u. C 609/22' (2024) 44(11–12) *Zeitschrift für Ausländerrecht und Ausländerpolitik* (*ZAR*), p. 433.

120 H. Dörig, 'Höchstrichterliche Rechtsprechung zum Asylrecht im Jahr 2024' (2025) 45(2) *Zeitschrift für Ausländerrecht und Ausländerpolitik* (*ZAR*), p. 82.

121 I. Dervisopoulos, 'Geschlechtsspezifische Verfolgung', *supra* note 117, p. 399.

122 H. Dörig, 'Asylrecht im Jahr 2024', *supra* note 120, p. 82; I. Dervisopoulos, 'Geschlechtsspezifische Verfolgung', *supra* note 117, p. 399.

severity.[123] This shows the importance of discrimination in the realm of socio-economic rights. Namely, the CJEU acknowledged the connection between socio-economic factors – such as the limited or lack of access to healthcare or education – and serious fundamental rights violations, including the violation of human dignity.[124]

Regarding the individual assessment of the persecution risk, the matter at hand does not introduce entirely new elements or lines of argument.[125] In particular, the CJEU does not endorse abandoning the requirement of an individual evaluation of refugee status. On the contrary, it explicitly reaffirms the necessity of individual assessment; while clarifying that, besides gender and nationality, no additional factors must be examined to determine the persecution risk. In doing so, the CJEU dismantles a 'false dichotomy',[126] namely, the assumption that gender-based persecution requires additional factors showing individual persecution, while for other criteria like ethnicity or age (which also pertain to broader groups pf people), the individuals concerned do not have to show that they have been singled out.[127] With the cases at hand the CJEU clarified in the realm of gender discrimination that individuals belonging to a large group being affected by widespread violence and discrimination do not need to show they have been individually targeted.[128]

The third notable point is the acknowledgement of women from a particular country as a 'particular social group' within the meaning of Directive 2011/95 and the Geneva Convention.[129] Although this issue was not explicitly examined in the present case, it is an implicit assumption underlying the CJEU's decision.[130] This is not self-evident and was only confirmed by the CJEU in two cases decided in 2024: The first case concerned a Turkish woman who had fled her country of origin following a forced marriage and domestic violence, fearing that upon return she would become a victim of honour-based violence,

123 Ibid.

124 C. Querton, 'Consolidating Group-Based Refugee Protection', *Verfassungsblog*, 12.02.2024, available at https://verfassungsblog.de/consolidating-group-based-refugee-protection/, last accessed on 06.10.2025.

125 W. Kluth, 'Geschlechterdiskriminierung', *supra* note 118, p. 64.

126 C. Querton, 'Refugee Protection', *supra* note 124.

127 Ibid.; see in more detail C. Querton, *Conflict Refugees. European Union Law and Practice*, Cambridge University Press: Cambridge, 2023, pp. 83–102.

128 C. Querton, 'Refugee Protection', *supra* note 124.

129 Articles 2(d) and 10(d) of the Qualification Directive; Article 1(2) of the Refugee Convention.

130 Cf. CJEU, *AH and FN*, *supra* note 99, para. 57; I. Dervisopoulos, 'Geschlechtsspezifische Verfolgung', *supra* note 117, p. 399.

forced marriage and further domestic abuse (the *WS* case).[131] In the second case Iraqi women who had entered the Netherlands as children and later submitted a subsequent application for international protection, claimed that due to their 'Westernisation' they would face persecution upon their return to Iraq (the *Staatssecretaris* case).[132] In both cases, the CJEU stated that a 'particular social group' is characterised by two criteria: the presence of a common identifying feature and a 'distinct identity' within the country of origin.[133] With regard to the first criterion (identifying feature), the Court held that 'the fact of being female constitutes an innate characteristic and therefore suffices to satisfy that condition'.[134] The second criterion is fulfilled when women are perceived as being different due to social, moral, or legal norms prevailing in the society of origin.[135] The fact that women are subject to discrimination and persecution is considered a relevant factor in this context.[136]

On the basis of these considerations, the CJEU held that 'women as a whole' may qualify as a particular social group when, in their country of origin, they are exposed to physical or mental violence, including sexual and domestic violence, on account of their gender.[137] This legal reasoning rightly contradicts the view that only sub-groups of women (for example, women affected by forced marriage) but not women as a whole can constitute a particular social group.[138] However, while the first two cases (*WS* and *Staatssecretaris*) involved

131 CJEU (ECJ), *WS v Intervyuirasht organ na Darzhavna agentsia za bezhantsite pri Ministerskia savet*, Case C-621/21, 16.01.2024, ECLI:EU:C:2024:47; for an analysis of this case cf. S. Steininger, 'The CJEU's Feminist Turn? Gender-based Persecution as a Ground for Protection', *Verfassungsblog*, 20.02.2024, available at https://verfassungsblog.de/the-cjeus-feminist-turn/, last accessed on 06.10.2025; A. Kompatscher, 'Victims of Gender-Based Violence: Between Hope and Reality', *Völkerrechtsblog*, 11.03.2024, available at https://voelkerrechtsblog.org/victims-of-gender-based-violence-between-hope-and-reality/, last accessed on 06.10.2025.

132 CJEU (ECJ), *K, L v Staatssecretaris van Justitie en Veiligheid*, Case C-646/21, 11.06.2024, ECLI:EU:C:2024:487; for an analysis of this case cf. S. Losch, 'Im "Westen" viel Neues. EuGH bestätigt Übernahme europäischer Werte als Asylgrund', *Verfassungsblog*, 27.06.2024, available at https://verfassungsblog.de/gleichberechtigung-asylgrund-eugh/, last accessed on 06.10.2025; G. Raimondo, 'Beyond Protection Gender Equality in K, L (C 646/21)', *Verfassungsblog*, 05.07.2024, available at https://verfassungsblog.de/beyond-protection/, last accessed on 06.10.2025.

133 CJEU, *WS*, *supra* note 131, para. 40; CJEU, *Staatssecretaris*, *supra* note 132, para. 40.

134 CJEU, *WS*, *supra* note 131, para. 49; CJEU, *Staatssecretaris*, *supra* note 132, para. 42.

135 CJEU, *WS*, *supra* note 131, para. 52; CJEU, *Staatssecretaris*, *supra* note 132, para. 48.

136 CJEU, *WS*, *supra* note 131, para. 56.

137 Ibid., para. 57.

138 A. Pfersich, 'Anmerkung zu EuGH (Große Kammer), Urt. v 16.1.2024, C-621/21' (2024) 44(2) *Zeitschrift für Ausländerrecht und Ausländerpolitik* (ZAR), p. 96 argues, e.g., that

women who could actually be clustered into sub-groups,[139] it was only the *AH and FN* cases that pertained to women as a whole. Thus, the *obiter dicta* in the first two cases facilitated the judgment in the matter at hand.[140] With this case law, the CJEU strengthens the protection of women against (structural) discrimination. It remains however open, if the arguments developed by the CJEU also apply – in the given circumstances – to structurally disadvantaged groups outside the scope of the Istanbul Convention, namely men or male children and adolescents.[141]

4 Effective Judicial Protection

4.1 *Introduction*

In 2024, the CJEU ruled in several cases on different aspects of effective judicial protection. After an overview of some of these cases (Section 4.2), one matter will be discussed in depth (joined cases C-554/21, C-622/21 and C-727/21, Section 4.3). In these cases, the CJEU examined an important aspect of the guarantee of effective judicial protection: judicial independence. However, for the first time, the CJEU does not focus on threats to judicial independence coming from external sources, such as the legislature or the executive. Rather, the decision marks the starting point of case law that contains principles to be applied when judicial independence is threatened by the judiciary itself.

4.2 *Overview of the Main Cases on Effective Judicial Protection*

In three cases[142] the General Court of the CJEU examined the right to legal assistance as an aspect of the right to effective judicial protection: In response

women as a whole cannot constitute a particular social group because this would imply that the surrounding society referred solely to men. Of the contrary opinion is I. Dervisopoulos, 'Geschlechtsspezifische Verfolgung', *supra* note 117, p. 397.

139 Women subject to forced marriage in CJEU, *WS*, *supra* note 131, paras. 50–51; women who adhere to the fundamental value of gender equality in CJEU, *Staatssecretaris*, *supra* note 132, para. 51.

140 I. Dervisopoulos, 'Geschlechtsspezifische Verfolgung', *supra* note 117, pp. 395, 399–400.

141 Cf. A. Pfersich, 'C-608/22 u. C 609/22', *supra* note 119, p. 433; W. Kluth, 'Geschlechterdiskriminierung', *supra* note 118, p. 64.

142 CJEU (GC), *Ordre néerlandais des avocats du barreau de Bruxelles and Others v Council of the European Union*, Case T-797/22, 02.10.2024, ECLI:EU:T:2024:670; CJEU (GC), *Ordre des avocats à la cour de Paris and Couturier v Council of the European Union*, Case T-798/22, 02.10.2024, ECLI:EU:T:2024:671; CJEU (GC), *ACE-Avocats, ensemble* (*Paris, France*) *v Council of the European Union,* Case T-828/22, 02.10.2024, ECLI:EU:T:2024:672.

to the escalating Russian military aggression against Ukraine in 2022, the Council of the European Union adopted a series of sanctions designed to intensify pressure on Russia. One of these measures included a ban on providing legal advisory services to the Russian state and to companies or organisations based in Russia. A group of Belgian and French lawyers challenged the measure before the General Court, arguing that it infringed fundamental rights. The General Court recognised that the right to legal assistance is a key component of effective judicial protection, especially when it comes to legal proceedings. However, the Court clarified that the ban does not apply to legal advice related to court cases or to services provided to individuals. On that basis, the Court dismissed the lawyers' claims, finding no violation of fundamental rights in the specific context of the challenged measure.

In *Forumul Judecătorilor din România*,[143] the CJEU hat to examine an aspect of the Romanian procedural rules regarding the appointment of prosecutors responsible for investigating corruption cases: A professional association of judges and prosecutors filed a case with the Romanian Court of Appeal, seeking the partial annulment of an appointing order. According to Romanian law, such proceedings are inadmissible for the lack of legitimate private interests. The CJEU emphasised that it lies within the competence of the member states to determine the standing and interest of a party in bringing legal proceedings. And there is no provision in EU law that would require the member states to grant procedural rights to professional associations enabling them to challenge any purported incompatibility with EU law. While the guarantee of effective judicial protection requires that the member states provide legal remedies, when measures have an impact on judges' careers or the composition of courts this obligation does not extend to the appointment of prosecutors competent to conduct criminal proceedings against judges. Consequently, member states are not obliged to grant professional associations of judges the right to bring proceedings in such cases.

4.3 *Judicial Independence: Hann-Invest (Joined Cases C-554/21, C-622/21 and C-727/21)*

4.3.1 Facts of the Case

The CJEU ruling concerned three appeals to the Croatian High Commercial Court regarding insolvency proceedings. This court, which is the court of sec-

143 CJEU (ECJ), *Asociația 'Forumul Judecătorilor din România' and others v Parchetul de pe lângă Înalta Curte de Casație și Justiție – Procurorul General al României*, Case C-53/23, 08.05.2024, ECLI:EU:C:2024:388.

ond instance and also the referring court, unanimously examined and dismissed those appeals.[144]

However, according to the 'Rules of Procedure of the Courts' of Croatia the judgments of the court must be registered by a 'registrations judge', before the decision is sent to the parties and the case can become legally binding.[145] This registrations judge is appointed by the court's president and is not a member of the judicial panel hearing and deciding the case.[146] Even though the applicable procedural rules do not provide so, in practice, the registration depends on the registrations judges' approval of the decision's content with a view to the coherence of the case law. If a judgment is inconsistent with the court's practice, the registrations judge may refuse registration and refer the case back to the judicial panel for re-examination. If the re-examination does not lead to an alignment with the registration judges' opinion, the latter may initiate a section meeting for the purpose of adopting a 'legal position', which will be binding on the judicial panel.[147] The parties to the case have no knowledge of the involvement of the registrations judge or the section meeting and cannot participate in those procedural stages.[148]

In the case at hand, the registrations judge referred the three judgments back to the court. The reasons for remittal were different for each of the judgments: the first judgment was, in the registration judges' eyes, inconsistent with the court's practice. The second decision contradicted the solution adopted in the main proceedings. Regarding the third judgment, the registrations judge – without further reasoning – stated that he disagreed with the legal interpretation adopted by the judicial panel.[149] In this third case, the judicial panel refused to alter its previous decision. Favouring a different legal interpretation, the registrations judge transmitted the case to the competent section for examination. The section adopted a legal position in which it accepted the outcome favoured by the registrations judge. Subsequently, the same case was referred back to the judicial panel for it to give a ruling in accordance with that legal position.[150]

144 CJEU (ECJ), *Financijska agencija v Hann-Invest d.o.o.* (*C-554/21*), *Mineral-Sekuline d.o.o.* (*C-622/21*), *and Udruga KHL Medveščak Zagreb* (*C-727/21*), Joined Cases C-554/21, C-622/21 and C-727/21, ECLI:EU:C:2024:594, paras. 9–10.

145 See CJEU, *Hann-Invest*, *supra* note 144, para. 8.

146 Ibid., para. 18.

147 Ibid., paras. 18, 60–64.

148 Ibid., paras. 18, 23.

149 Ibid., paras. 12–14.

150 Ibid., paras. 15–17.

Against this background the referring court wanted to know – in essence – whether the second subparagraph of Article 19(1) TEU must be interpreted as precluding national law from providing for such a mechanism internal to a national court.[151]

4.3.2 Judgment

Having established its jurisdiction[152] and the admissibility of the request for a preliminary ruling,[153] the CJEU turned to the merits of the case. In the first place, it recalled that although the establishment, composition, powers and functioning of national courts falls within the competence of the member states, the courts of the member states must meet the requirements of effective judicial protection, including that of independence.[154] This principle, referred to in Article 19(1) TEU, is a general principle of EU law which has been enshrined in Article 6(2) of the ECHR and Article 47(2) of the CFREU. The protection provided must meet at least the minimum standard set by these fundamental guarantees.[155]

The CJEU – in the second place – outlined the relevant elements of judicial independence and referred to two aspects: On the one hand, courts must exercise their functions wholly autonomously, i.e. without 'external interventions or pressure' liable to impair or influence their independent decision making.[156] On the other hand, the court must maintain objectivity and neutrality, which implies 'the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law'.[157] Those principles require there to be rules regarding, *inter alia*, the composition of the judicial body, i.e. the status of judges and the performance of their duties.[158]

Against the background of these general principles, the CJEU formulated three key findings: (1) judicial independence not only protects from external influence from the legislature or the executive, but also from internal influence from within the court concerned; (2) Article 19(1)(2) TEU requires the existence of a tribunal previously established by law, encompassing not only a legal bases for the very existence of courts but also the composition of the bench in each case; (3) the right of the parties to be heard implies rules that

151 Ibid., paras. 24–25, 43.
152 Ibid., paras. 29–38.
153 Ibid., paras. 39–42.
154 Ibid., paras. 44, 47.
155 Ibid., paras. 45–46.
156 Ibid., para. 50.
157 Ibid., para. 51.
158 Ibid., paras. 52–53.

guarantee the transparent composition of judicial panels and preclude interference from persons outside those panels 'before whom the parties have not been able to put forward their arguments'.[159]

In the case at hand, the CJEU held that the mechanism of the registrations judge was not compatible with the principle of judicial independence. First, the national legislation does not provide for intervention by the registrations judge. Second, the intervention of the registrations judge occurs after the deliberation and decision of the judicial panel without his having participated in the previous stages of the proceedings. And, third, 'the power of the registrations judge to intervene does not even appear to be circumscribed by clearly stated objective criteria which reflect a specific justification and are capable of preventing the exercise of discretion'.[160]

The CJEU raised similar objections regarding the section meeting. Through this mechanism, judges who are not part of the competent judicial panel exert significant influence over the decision, without their competence being limited by objective criteria and without the parties being informed of their involvement, or having any opportunity to exercise their procedural rights in relation to the section deliberations.[161]

To conclude, the CJEU held that mechanisms for resolving conflicts in case law are permissible, provided that (1) the case has not yet been deliberated by the originally competent judicial panel, (2) the applicable law clearly defines the circumstances of referral, and (3) the parties have the chance to participate in the proceedings before the extended panel. The competent judicial panel can always decide to make such a referral.[162]

4.3.3 Comment

Issues of judicial independence have gained particular significance in the case law of the CJEU in recent years. On the basis of the rule of law principle and the importance of independent national courts for the functioning of the EU's legal systems and fundamental rights, the CJEU has increasingly differentiated and refined the requirements for the independence of national judiciaries.[163]

159 Ibid., paras. 54–59.

160 Ibid., paras. 65–68.

161 Ibid., paras. 76–79.

162 Ibid., para. 80.

163 M. Payandeh, 'Europarecht: Richterliche Unabhängigkeit innerhalb der Judikatice' (2025) 1 *Juristische Schulung* (*JuS*), p. 84; examples from case law are CJEU (ECJ), *European Commission v Republic of Poland*, Case C-619/18, 24.06.2019, ECLI:EU:C:2019:531; CJEU (ECJ), *A. K. v Krajowa Rada Sądownictwa* (*C-585/18*), *and* CP (*C-624/18*), DO (*C-625/18*), Joined Cases C-585/18, C-624/18 and C-625/18, 19.11.2019, ECLI:EU:C:2019:982;

However, while the CJEU has thus far addressed issues of judicial independence only regarding potential threats from the executive or the legislature, the *Hann-Invest* case raises the issue of judicial independence within the judiciary itself. The CJEU made it very clear that judicial independence provides safeguards against all kinds of undue influence – whether it originates from outside or from within the judiciary. The CJEU thus added an internal dimension to the formerly recognised external one. It moreover differentiated clearly between an institutional understanding of judicial independence, protecting the court as an institution from undue pressure from other powers, and a functional understanding, protecting judges from pressure from other judges within their own institution[164] – especially when those other judges enjoy administrative powers.[165] In making this determination, the CJEU relied on the jurisprudence of the ECtHR regarding internal dimensions of judicial independency.[166]

The *Hann-Invest* cases are also remarkable for other reasons: they address a conflict between the principle of judicial independence and another equally fundamental principle underlying EU law: the requirement of consistency in case law.[167] Ensuring uniformity in the interpretation of EU law is a *raison d'être* of the CJEU (namely of the preliminary ruling procedure under Article 267 TFEU) and is repeatedly emphasised in case law.[168] Accordingly, the CJEU rightly acknowledged not only judicial independence but also legal certainty as inherent to the principle of the rule of law.[169] In the *Hann-Invest* cases, the CJEU weighed up those two principles. Interestingly, it thereby comes to a

---

CJEU (ECJ), *A. B. and Others v Krajowa Rada Sądownictwa*, Case C-824/18, 02.03.2021, ECLI:EU:C:2021:153.

164 N. B. Selanec and D. Petrić, 'New Frontiers for article 19(1) TEU: A Comment on Joined Cases C-554/21, C-622/21 and C-727/21 Hann-Invest' (2024) 20 *Croatian Yearbook of European Law and Policy* (*CYELP*), pp. 140, 148–149.

165 N. B. Selanec and D. Petrić, 'Comment on Hann-Invest', *supra* note 164, p. 140; cf. A. Uzelac, 'The Meaning of "Court"' in B. Hess, M. Woo, L. Cadiet, *et al.* (eds.), *Comparative Procedural Law and Justice*, Max Planck Institute Luxembourg for Procedural Law: Luxembourg, 2024, p. 18.

166 Namely ECtHR, *Parlov-Tkalčić v Croatia*, no. 24810/06, 22.12.2009, para. 86; cf. also N. B. Selanec and D. Petrić, 'Comment on Hann-Invest', *supra* note 164, p. 149; J. Sillen, 'The Concept of "Internal Judicial Independence" in the Case Law of the European Court of Human Rights' (2019) 15(1) *European Constitutional Law Review*, pp. 104–133.

167 C. D. Classen, 'Ein zu grosser Schritt in Richtung europäische Harmonisierung der Justizverfassung?' (2024) 79(15) *Juristen Zeitung* (*JZ*), pp. 721.

168 Cf. e.g., CJEU (ECJ), *European Commission v Republic of Poland*, Case C-204/21, 05.06.2023, ECLI:EU:C:2023:442, para. 75.

169 CJEU, *Hann-Invest*, *supra* note 144, paras. 47–48; C. D. Classen, 'europäische Harmonisierung?', *supra* note 167, p. 721.

very different assessment from the Advocate General's. While, according to the CJEU, legal certainty does not prevail on judicial independence and the national legislation is thus contrary to EU law requirements, the Advocate General places significant emphasis on the importance of legal certainty. In his eyes, the national legislation provides for an appropriate balance between those requirements and does not interfere with EU law.[170]

The Advocate General's positive assessment was essentially linked to his conception of judicial proceedings and interpretation of law, namely the distinction between the interpretation and the application of legal rules.[171] In his view, delivering legal positions is merely a question of the interpretation of the law on an abstract level. The registrations judge and the section thus do not decide on the application of those provisions to a particular set of facts in a concrete dispute. This task remains with the judicial panel, which is free to apply the abstract interpretation of the law to the specific factual situation.[172] Therefore, there is, according to the Advocate General, no interference with the principle of judicial independence and the participation of the parties in these stages of the procedure is not required.[173] However, the CJEU rightly disagreed with this opinion and advocated for a judicial process that is 'inclusive, discursive and argumentative'.[174] Legal reasoning is not an entirely abstract 'art', and the specific meaning of legal rules often emerges only through engagement with a specific situation and the interests of the parties at stake. If a part of the judicial process is entirely removed from the parties' sight with the potential that this may lead to blockage of the decision and the imposition of a particular legal view as binding, then there is a significant risk to procedural rights.[175]

In the present matter, disagreement existed not only between the Advocate General and the CJEU; rather, the rulings also provoked criticism about the CJEU having exceeded its competence by setting specific requirements for the design of judicial procedures, even though the 'establishment, composition,

170 CJEU, *Hann-Invest*, C-554/21, C-622/21 and C-727/21, Opinion of *AG* Pikamäe, 26.10.2023, ECLI:EU:C:2023:816, paras. 91–92; cf. also C. D. Classen, 'europäische Harmonisierung?', *supra* note 167, pp. 723–724 who is of the opinion that the CJEU has placed insufficient emphasis on legal certainty.

171 N. B. Selanec and D. Petrić, 'Comment on Hann-Invest', *supra* note 164, p. 138.

172 CJEU, *Hann-Invest*, Opinion of *AG* Pikamäe, *supra* note 170, paras. 68–71, 78; N. B. Selanec and D. Petrić, 'Comment on Hann-Invest', *supra* note 164, p. 138.

173 CJEU, *Hann-Invest*, Opinion of *AG* Pikamäe, *supra* note 170, paras. 67, 71, 77; N. B. Selanec and D. Petrić, 'Comment on Hann-Invest', *supra* note 164, p. 138.

174 Ibid., pp. 139, 141.

175 Same opinion is in ibid., pp. 138–139, 141.

powers and functioning of national courts, falls within the competence of those [i.e. the Member] States'.[176] Given the 'open' norms in Articles 2 and 19 TEU, the CJEU should – in the eyes of the critics – have exercised more restraint and limited itself to formulating general principles, as it normally does in similar cases.[177] However, it is well-established case law that the member states have to comply with the general requirements of EU law, even in areas where they have exclusive competence.[178] By this 'spilling over' mechanism, the CJEU frames national substantive and procedural laws.[179] In the case at hand the CJEU – referring to the spirit of judicial cooperation[180] – provided a 'useful' answer to the preliminary question preordaining the outcome at which the referring court would eventually arrive.[181] It emphasised that the individual autonomy of national judges is the core of the empowerment of judiciaries necessary for the effective application of EU law and that this autonomy has to be protected *inter alia* against internal structural threat as seen in the case at hand.[182] The CJEU established detailed directions regarding Article 19(1) TEU, marking the start of a potentially more active involvement with the standard practice of national judiciaries.[183]

Finally, the *Hann-Invest* cases can be viewed in the broader context of the preservation of legal continuity and certainty on the one hand, and legal development on the other. Case law is increasingly important for legal development. This requires that judges have a certain leeway for an evolving interpretation of the law that inevitably may – from time to time – lead to cases

176 CJEU, *Hann-Invest*, *supra* note 144, para. 44; for the criticism see: C. D. Classen, 'europäische Harmonisierung?', *supra* note 167, pp. 729, 724; M. Payandeh, 'Richterliche Unabhängigkeit', *supra* note 163, p. 84.

177 C. D. Classen, 'europäische Harmonisierung?', *supra* note 167, pp. 720, 724; cf. also, the CJEU cases cited *supra* in note 163.

178 N. B. Selanec and D. Petrić, 'Comment on Hann-Invest', *supra* note 164, p. 139; from the case law see e.g., CJEU, *Commission/Poland*, *supra* note 163, para. 63 and the case law cited.

179 N. B. Selanec and D. Petrić, 'Comment on Hann-Invest', *supra* note 164, p. 139.

180 CJEU, *Hann-Invest*, *supra* note 144, para. 60.

181 N. B. Selanec and D. Petrić, 'Comment on Hann-Invest', *supra* note 164, p. 142.

182 Ibid., p. 150.

183 Ibid., p. 128. A first impact of the principles set out in the Hann-Invest cases was seen in CJEU, *D. K. and Others v Prokuratura Rejonowa w Bytowie and Prokuratura Okręgowa w Łomży*, Joined Cases C-647/21 and C-648/21, ECLI:EU:C:2025:143. In this case, the CJEU ruled, *inter alia*, that national legislation that allows the college of a court to withdraw from a judge cases assigned to him or her is contrary to Article 19(1) TEU when that legislation does not provide objective criteria guiding this withdrawal decision.

being inconsistent with a previous practice.[184] The ECtHR emphasised in that respect the importance of a dynamic and evolutive approach to enable reform and improvement. The requirements of legal certainty do not confer an acquired right to consistency of case law.[185] On the other hand, ensuring a uniform and predictable judicial practice is increasingly difficult since society and its environments evolve and are reaching new levels of complexity and interdependence. This brings new challenges that the judicial system has to address.[186] These demanding conditions require the establishment of forums in which judges can engage in professional discourse on the consistency, development and quality of case law.[187] Mechanisms for the unification of case law form such a forum. The CJEU fosters this discourse through the *Hann-Invest* cases, as the independence of judges is central to a free and open dialogue. At the same time, the CJEU sets the limits for such mechanisms, namely regarding the participation of the parties.

Overall, the CJEU's ruling in the case at hand strikes a well-balanced compromise between the need for effective legal protection and judicial independence on the one hand and practical realities faced by national courts on the other. The CJEU acknowledges that 'ensuring consistency in case law and legal certainty is crucial, but the law must be able to evolve in the courtroom, even if this temporarily leads to divergent case law'.[188]

5 Conclusion

From the overview of key aspects of the CJEU's fundamental rights case law in 2024, three aspects can be observed: First, a central focus lies on procedural rights. These are increasingly viewed as a safeguard to mitigate risks to funda-

184 M. de Werd, 'Uninvited Oversight: Judges Watching Judges – the ECJ Hann-Invest case', *Amsterdam Centre on the Legal Professions and Access to Justice Blog*, 16.07.2024, available at https://aclpa.uva.nl/en/content/news/2024/07/blog-marc-de-werd.html, last accessed on 06.10.2025.

185 ECtHR, *Lupeni Greek Catholic Parish and Others v Romania*, no. 76943/11 [GC] 29.11.2016, para. 116.

186 M. de Werd, 'Judges Watching Judges', *supra* note 184; cf. also CJEU, *Annual Report 2024. The Year in Review*, Luxembourg 2024, p. 24, where the President of the CJEU, Koen Lenaerts, acknowledges 'a rise in the number of complex and sensitive cases concerning, in particular, … matters related to fundamental rights'.

187 M. de Werd, 'Judges Watching Judges', *supra* note 184.

188 Ibid.

mental rights.[189] *Quadrature du Net II* provides a clear illustration of this.[190] It was in essence not the potential threat to fundamental rights posed by the retention of IP address data as such that determined its admissibility, but the effectiveness of the (procedural and technical) safeguards implemented to manage that threat.[191] The CJEU in its case law also emphasised the importance of procedural forums of discourse for law finding and law development. In the *Hann-Invest* joined cases, the CJEU upheld an understanding of judicial procedure that is inclusive, discursive and argumentative.[192] Debates about the interpretation and application of the law in a specific case must allow for the participation of the parties involved, and the independence of judges in forming their decisions is protected – even from influence exerted within the court.[193]

Secondly, the case law demonstrates that the CJEU is willing – if the cases referred to it allow – to use its discretionary power not only to formulate concrete requirements for national legal frameworks but also to determine the factual circumstances: In the *Hann-Invest* cases, the CJEU formulated specific requirements for the design of judicial procedures, marking a potentially more active involvement in the standard practice of national judiciaries.[194] In the *Mirin* case, the CJEU used union citizens' rights as a vehicle to strengthen gender identity protection in the member states.[195] In *AH and FH*, the CJEU made its own determination of the factual situation in Afghanistan, instead of leaving the assessment of the factual circumstances to the member states.[196] This illustrates that the CJEU is willing to make far-reaching determinations, at times stepping into areas typically reserved for the discretionary authority of the member states.

Thirdly, the case law proves that the CJEU is receptive to expanding fundamental rights to specific groups when a particular vulnerability warrants such

189 Cf. e.g., regarding the case law of the ECtHR, L. Acconciamessa, 'The Case Law of the ECtHR in 2023: The Proceduralisation of the ECHR', in P. Czech, L. Heschl, K. Lukas, *et al.* (eds.), *European Yearbook on Human Rights 2024*, Leiden: Brill, Nijhoff, 2025, pp. 523–560.

190 Cf. L. M. Landerer, 'Data Retention', *supra* note 47; M. Tranou and S. Karyda, 'Privacy and Quadrature du Net', *supra* note 50, p. 148.

191 Cf. CJEU, *Quadrature du Net II*, *supra* note 11 and *supra*, section 2.3.2.

192 Cf. N. B. Selanec and D. Petrić, 'Comment on Hann-Invest', *supra* note 164, pp. 139, 141.

193 Cf. CJEU, *Hann-Invest*, *supra* note 144; cf. also *supra*, section 4.3.3.

194 N. B. Selanec and D. Petrić, 'Comment on Hann-Invest', *supra* note 164, p 128; cf. also CJEU, *Hann-Invest*, *supra* note 144 and *supra*, section 4.3.

195 Cf. CJEU, *Mirin*, *supra* note 68 and *supra* section 3.2.3.

196 Cf. CJEU, *AH and FN*, *supra* note 99; cf. also *supra* section 3.3.2.

protection. In *AH and FH*, the CJEU broadened the understanding of a 'specific social group' in the context of refugee status protection. This notion may encompass all women of a country in case of widespread structural discrimination and violations that contradict human dignity.[197] By recognising the specific protection needs in situations of structural discrimination and violations of human rights, the CJEU opens the possibility that the principles of this case law could also apply – given the circumstances – to other vulnerable groups, such as male children and adolescents, or even men in general.

In the *Mirin* case, the CJEU exercised more restraint in extending the protection of (trans*)gender identity to individuals outside the scope of free movement rights, i.e., to 'immobile' persons. While this limited approach can be justified in the light of the EU's limited competence regarding civil status and the question referred to the CJEU, the Court could – based *inter alia* on its case law on discrimination on the grounds of sex – have made a more assertive ruling, expanding the protection of trans*gender persons in general. However, it is also to be noted that the CJEU increasingly recognises gender identities without medical or surgical gender confirmation treatments. And by referring to 'gender identity' in general, the CJEU opens the door to recognising non-binary identities, as already provided for in some member states.[198] Therefore, a tendency towards an expansion of fundamental rights protection to 'new' groups can also be observed in the realm of (trans*)gender identity.

Overall, the CJEU's case law in 2024 is continuously marked by efforts to strike a balance between the diversity of national legal systems and the practical needs of the member states, on the one hand, and the establishment of a common fundamental rights framework and standards, on the other hand. Even though the CJEU – in *Quadrature du Net II* – granted greater leeway to the member states[199] and stated that there is no necessity to grant procedural rights that enable any purported incompatibility with EU law to be challenged (see *Forumul Judecătorilor din România*[200]), the CJEU continues to uphold human rights and human rights values as a common minimal standard. Fundamental rights form key guidelines for the interpretation and application of EU law and frame the national legal systems.[201]

197 Cf. CJEU, *AH and FN*, *supra* note 99; cf. also *supra* section 3.3.

198 Cf. CJEU, *Mirin*, *supra* note 68 and *supra* section 3.2.3.

199 Cf. CJEU, *Quadrature du Net II*, *supra* note 11 and *supra* section 2.3.2.

200 CJEU (ECJ), *Forumul Judecătorilor*, *supra* note 143 and *supra* section 4.2.

201 N. B. Selanec and D. Petrić, 'Comment on Hann-Invest', *supra* note 164, p. 139; cf. also *supra* section 4.3.3.

Index

access to justice 53–54, 58, 60, 121, 185, 320, 420, 424, 435, 568–571
Advisory Committee on the Framework Convention for the Protection of National Minorities 254
anti-discrimination jurisprudence 96
anti-stereotyping approach 96, 100, 123–124
artificial intelligence 10, 20–21, 25, 379, 412–414, 416–418, 420–421, 426, 430, 439, 444, 446–447, 451–479
assisted suicide 87, 217, 223, 226, 232–233, 239–241, 243–245
asylum 7, 96–98, 103–107, 109, 115, 121–122, 169, 188–216, 380–387, 390–392, 394–400, 402–403, 406–407, 409–410, 426, 555–561, 601, 617

Basket III 498–520

Central Asia 7, 9, 521–522, 526, 528–529, 545
civil society 8, 20, 23, 335, 342, 354, 359, 366, 376–377, 380, 382–383, 479, 483, 485, 488–491, 496–498, 501–502, 508, 516–517, 519, 527, 535, 537, 556
climate 56, 134, 424
  change 57, 84, 89–91, 158–187, 448, 549, 551–555, 568–574, 579, 585–593, 598
  justice 57, 158, 173, 175, 181, 183–184, 187
  litigation 158, 161, 172–173, 177, 184, 186
collective rights 34–35, 60, 161–167, 173–174, 177–179, 185–187, 255
Committee of Ministers of the Council of Europe 330
Committee on Legal Affairs and Human Rights of the Council of Europe 338
constitutional 21–22, 25, 29, 43, 75, 77, 83, 188–216, 240, 285–286, 291, 293–294, 298, 304, 322, 332, 345–347, 350–353, 358, 366, 371, 503–505, 511, 566, 586
  identity 276, 279, 282, 284, 288–289, 299–303, 305
  order 280–282, 284, 287, 289–290, 292, 297, 301, 303, 305–306, 506
  task of interpreting human rights 188, 190, 192–193
cultural heritage 50, 255, 266, 549–550, 593–597

de facto detention 385–386, 393–394, 397–399, 401, 403, 409–410
democracy capable of defending itself 281, 290–291, 295, 298, 300
democratisation 250, 307, 322, 526
Derogations 255, 389, 391, 449, 578–581
design goals 411, 424–425, 428, 431, 443
differential treatment 108, 113, 119–120, 268–272, 276, 426
discrediting the army 510
discriminatory practices 96, 272
dissident movement 501–503
domestic abuse 126–157, 621

effective investigation 79, 153, 155–156, 307–337, 561–562
end-of-life 217–246
Eurasia 521, 539
Eurasian Economic Union 521–522, 532, 540
euthanasia 217, 233, 237, 239, 243–244

fake laws 510–511
foreign agent' law 508, 519
free exchange of information 509, 511, 518
freedom of religion 188, 190, 192, 211–212, 214, 280, 374, 485

gender-sensitive understanding 126
generative AI models 451–452, 464
global challenges 374, 549–599
'good death' 217, 219–223

Helsinki Final Act 7–8, 247, 249, 483–486, 498–520, 525
human rights by design obligations 411–450
human trafficking 18, 561–564, 598

implementation of ECtHR judgments 338–339, 341–342, 349, 357, 359–365, 367, 506
indirect discrimination 112–113, 259, 268, 272–273, 421

individualised harm 56, 159, 161, 168, 178, 186
intergenerational equality 178–179, 181–182
interpretative expansion 126
intersectionality 96, 100–101, 111–113, 125

jurisdiction 11–12, 14, 29, 33, 36, 39–40, 59, 62–95, 97, 119, 178, 183, 197–199, 227, 233–234, 239, 244, 292, 303, 321, 323, 332–333, 389, 478, 517, 551–555, 570, 574, 582, 585–586, 588–591, 593, 625
territorial and subject-matter 62–63

Kazakhstan 521–522, 524, 528–530–532, 534–545, 561
Klimaseniorinnen 89–92, 161, 172–184, 186–187, 568, 572, 585, 588, 590–591
Kyrgyzstan 521–522, 524, 528–529, 532, 534–545

legal protection 70, 107, 172, 188, 190–195, 204, 231, 427, 465, 630
living instrument 36, 62–95, 216, 227, 256, 263, 276, 549, 596–599
locus standi 177, 179, 585–591

machine learning 418, 451–452, 454, 463, 469, 473–474, 476–477, 479
margin of appreciation 35, 43, 69, 71, 93, 108, 120, 189, 199, 201, 215, 218, 225–227, 236–242, 244, 265, 267, 270, 274, 278, 284, 330, 505, 572, 576–578, 594–595, 598
migration 16, 31, 97–104, 106, 123–125, 130, 167, 184, 188–200, 203, 206–216, 280, 304, 379–380, 382, 384, 386, 391, 395, 399, 408–410, 439, 493, 531, 554–555, 559, 601
militant democracy 279–306
minorities 8, 10, 17–18, 25, 28, 49–50, 103, 130, 173–174, 176, 203, 209, 213, 247–278, 288–289, 356, 377–378, 484–485, 487, 490
monistic approach 504
Monitoring Committee of the Council of Europe 339, 359, 361–365, 367
Moscow Helsinki Group 500–502, 507, 519–520
moscow mechanism 488, 497, 515–517

New Pact on Migration and Asylum 382, 384, 409

online censorship 514

Parliamentary Assembly of the Council of Europe 9, 248, 338–367
positive obligations 70–71, 76, 93, 97, 126, 134, 139–141, 143, 146, 149–150, 175, 200–202, 209, 214, 224, 229, 232, 234, 245, 268–270, 309, 323–324, 423, 561, 563, 572–574, 598
post-communism 322
procedural safeguards 21, 104, 214, 224, 227, 233, 244, 385, 388, 397–398, 401–407, 409–410, 607, 609–610
progressive judicial approach 218
pushbacks 193, 316, 391, 398, 555–561

Reykjavik Declaration 10, 31, 338–340, 356, 365
right 7–31, 32–61, 62–95, 96–125, 126–157, 158–187, 188–216, 217–246, 247–278, 279–306, 307–337, 338–367, 371–383, 411–450, 451–479, 483–497, 549–599, 600–632
to be forgotten 451–479
to education 211, 258, 274–276
to a fair trial 29, 38–39, 41, 188–189, 207, 210–211, 213, 329, 347, 440
to free elections 44, 338, 340, 343, 356, 365–366
to respect for private life 91, 132, 149, 151, 188, 192, 207–209, 211, 213, 218, 221, 226–227, 232, 234–235, 243, 457
to truth 309, 321, 323–324, 328, 336
risk-based approach 436
Roma 23, 111, 120, 123, 259, 269–274, 357, 380
rule of law 2, 8–11, 20–22, 25, 28–31, 135, 194, 248, 250, 258, 260, 298, 303, 308, 324, 340, 343, 347–348, 354–356, 360, 363, 365, 373, 377–383, 411, 413–414, 417, 423, 425–426, 430, 433, 477, 486, 489, 497, 550, 565, 567, 580, 595, 597–598, 625–627

Self-identification 247, 255, 264–268
Soviet dualism 500, 503

state narrative 509–510, 527
statism 506
substantive equality 118, 250, 276
systematic integration 32

Teitiota 158, 161–162, 167, 169–183, 187
Torres Strait Islanders Case 158, 162, 184
transitional justice 307–337
treaty interpretation 62–64

undesirable organization 507, 518

vulnerability 96–98, 100–102, 105–107, 112, 118–125, 132, 160, 162, 202, 206, 385, 389, 394, 397, 401–403, 405, 407, 420, 562–563, 631

website blockings 512–513
withdrawal of life-sustaining treatment 217, 223, 225, 235

Celebrate with the *European Yearbook on Human Rights 2025* the 75th anniversary of the European Convention of Human Rights, the 50th anniversary of the Helsinki Final Act, and the 75th anniversary of the Schuman Declaration!

Explore with us the profound and lasting impact of the Council of Europe, the European Union and the Organization for Security and Co-operation in Europe, and the human rights instruments adopted and mechanism established under their umbrella while critically examining the current challenges they face. With this critical resource we reaffirm the importance of academic work for advancing and defending human rights and freedoms essential to our shared humanity.

Join us in honoring these legacies and committing to a future where justice, security, and dignity are upheld for all!



BRILL.COM/EYHR
ISSN: 2566-137X
ISBN: 978 90 04 74771 5