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THE ELSA LAW REVIEW

75 Years on Shaping the European Convention on Human Rights - Shaping Human Rights in Europe and Beyond

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FOREWORD

Dear Readers,

We are truly excited to present this issue of the ELSA Law Review, which commemorates the 75th anniversary of the European Convention on Human Rights. This publication represents months of exceptional commitment from our authors, reviewers, and editorial team. Additionally, it is a reaffirmed commitment to our readers and the ELSA Network to keep creating an environment for critical discussion on the most important legal issues of our day. We are proud to introduce a collection of works that not only reflects on seventy-five years of achievements, but also engages with the new debates that will shape the future of human rights.

Our authors confront a wide spectrum of topics, each demonstrating how the Convention continues to grow as a living instrument. From climate litigation to wartime environmental destruction, from gender-based violence to constitutional pluralism, and from transnational access to justice to the underexplored potential of inter-state applications, this issue reflects the Convention's constant reinvention, driven by people who continue to question its limits and engage with the difficult issues that matter. These contributions remind us why the ECHR still matters today: not because it has all the answers, but because it continues to inspire critique, reconstruction, and innovation.

With this issue, we reaffirm our commitment to you. The ELR exists because of the belief that student-driven legal scholarship can contribute meaningfully to public debate and to the development of law. We take this mission seriously. We remain dedicated to strengthening our editorial processes, supporting students and young lawyers across Europe, and ensuring that future issues are delivered with the quality that is expected from us.

Thank you for your trust, your patience, and your engagement. We hope that the reflections within these pages challenge you, inspire you, and deepen your appreciation for the evolving legacy of the European Convention on Human Rights as it enters its next seventy-five years.

Warm regards,

Anastasios Vavvas

Vice President in charge of Academic Activities 2025/2026

&
Velina Stoyanova

Director for Publications 2025/2026

I. Architecture and Evolution of the ECHR

A LEGACY IN THE MAKING: THE SIGNIFICANCE OF INTER-STATE CASES UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Jaiden Ahuja

Abstract

As the European Convention on Human Rights approaches its 75th anniversary, its legacy can be readily viewed through an individual-centred perspective. Over the past 75 years, a vast number of brave individuals and victims of injustice have used the European Court of Human Rights to challenge human rights abuses. Yet this paper aims to explore the legacy of the Convention through adopting a broader, collective lens by focusing on the impact of inter-state cases. Although guaranteed by Article 33 of the Convention, inter-state cases have often been overlooked due to their relative numerical insignificance. This article seeks to critically assess opposing claims that inter-state cases have had a limited impact in order to demonstrate the importance of the Convention and specifically Article 33, over the past 75 years. It argues that through opening up another avenue for complaints to be lodged, the Convention has shaped human rights in both a legal sense through developing Article 1 of the ECHR with the effective control doctrine and in a symbolic sense through the creation of a mechanism that publicly legitimises collective responsibility. By broadening accountability, transforming human rights into a shared collective duty, and elevating human rights into the diplomatic sphere by providing an egalitarian mechanism for smaller states to challenge more powerful ones, the Convention via Article 33 has challenged the traditional balances of power that exist in international relations with far-reaching impacts in Europe and abroad. Thus, as the 75th anniversary of the Convention unfolds in a climate where tension and disunity are growing between European states, the need to analyse the legacy of inter-state cases — and ultimately the Convention itself — is of utmost relevance.

Keywords: *Article 33, European Convention on Human Rights, inter-state cases, international relations, jurisdiction, human rights, legacy*

1. Introduction

'We must not take the achievements of the [European Convention on Human Rights] for granted. We owe it to people who were courageous enough to believe in a future where all Europeans could live in dignity.' [1]

While celebrating the 70th anniversary of the European Convention on Human Rights (ECHR), German Minister of Foreign Affairs Heiko Maas would champion the bravery of everyday individuals. His words underscore how human rights have been shaped by the avenues the Convention provides for courageous individuals to challenge injustice. Yet his remarks, while considerate of individual actors, fail to account for the collective, larger-scale action that states have taken to shape human rights. Hence, as the ECHR reaches its 75th anniversary five years later, it is worthwhile to consider another aspect of the Convention that has largely shaped human rights, but remains overshadowed in legal discourse: inter-state cases. Enshrined in the ECHR, Article 33 of the Convention makes it possible for states to lodge a complaint against other states for actions they believe violate the Convention.[2] These applications are referred to as inter-state applications.

This article will demonstrate how the Convention, through allowing for inter-state applications, has played a meaningful role in the protection of human rights. It must be noted that the legacy of inter-state cases can be viewed through both its legal effects through the development of Convention doctrine and its symbolic effects vis-a-vis creating a mechanism that legitimises collective responsibility. First, this paper will consider the growing relevance of inter-state cases in order to justify the application of an inter-state lens. Next, through analysing the legal impact of inter-state cases, three arguments will be posited as to how human rights have been shaped by Article 33 of the Convention. Firstly, the increased accessibility and accountability surrounding human rights protections. Secondly, the development of the Convention's law and legitimacy. Finally, the elevation of human rights into the diplomatic toolbox allows for greater human rights considerations in political and diplomatic decisions. Ultimately, one can argue that as the ECHR approaches its 75th anniversary, it has contributed to the development of human rights in these three ways.

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[1] Heiko Maas, *'Speech by Foreign Minister Heiko Maas at the conference 70 Years of the European Convention on Human Rights'* (Federal Foreign Office, 9 December 2020) <https://www.auswaertiges-amt.de/en/newsroom/news/european-convention-on-human-rights/2425680?> accessed 21 June 2025.

[2] *Convention for the Protection of Human Rights and Fundamental Freedoms* (opened for signature 4 November 1950, ETS No 5) art 33.

2. The Missing Piece: The Relevance of Inter-State Cases in the Human Rights Puzzle

For a case to be brought before the European Court of Human Rights (ECtHR), it is necessary to utilise one of the two avenues granted by the ECHR. On one hand, Article 34 of the Convention allows the Court to 'receive applications from any person, nongovernmental organisation or group of individuals claiming to be the victim of a violation… of the rights set forth in the Convention'. Conversely, Article 33, titled 'inter-state cases' enshrines the right for any High Contracting Party to 'refer to the Court any alleged breach of the provisions of the Convention…by another High Contracting Party'.[3] In other words, a member state can file an application against another member state that has violated the Convention law. However, to fully understand the significance of inter-state cases and hence the Convention's contribution to human rights protections, it is worthwhile to both acknowledge and respond to opposing perspectives that suggest they have had a limited influence. There are at least two potential arguments that can be made against the need to adopt an inter-state lens to analyse the significance of the ECHR.

Firstly, there is a numerical-based argument. As posited by Aletta Mondré, professor at the University of Kiel, statistics demonstrate the relative numerical insignificance that inter-state applications hold compared to individual applications. As Mondré pointed out in 2021, 'In light of the total of some 920,000 applications to the Court, inter-state applications are extremely rare'.[4] It is true that since the signing of the Convention in 1950, there have only been 38 inter-state applications.[5] Using this line of reasoning, focusing on a relatively minor percentage of cases might be futile. However, what this numerical argument fails to consider is other evidence that demonstrates the growing number of interstate applications filed in recent years. Isabella Risini, Senior Research associate from the Ruhr University Bochum, notes how in only the span of twelve years from 2008 to 2020, the total number of inter-state applications before the Court

[3] Ibid.

[4] Aletta Mondré, *'Studying the Increase in Inter-State Applications'* (Conference on Inter-State Cases under ECHR, 13 April 2021) <https://edoc.coe.int/en/european-convention-on-human-rights/11067-inter-state-cases-under-the-european-convention-on-human-rights-experiences-and-current-challenges.html> accessed 21 June 2025.

[5] European Court of Human Rights, *'Inter-State Applications'* (European Court of Human Rights, 2025) <https://www.echr.coe.int/inter-state-applications> accessed 21 June 2025.

has doubled from 15 to 30.[6] This can largely be attributed to increased acts of aggression in the 21st century, such as Russia's 2008 invasion of Georgia and 2014 invasion of Crimea, which would respectively lead to multiple inter-state applications filed against the Russian Federation by both Georgia and Ukraine. This is significant to consider when contextualising how, from 1980 to 2000, Rinisi outlines how inter-state applications did not increase by more than five. Hence, even if inter-state cases have historically represented a smaller portion of the ECtHR's application pool, the growing frequency of these types of applications represents their relevance, especially during the Convention's 75th anniversary.

Moreover, even if inter-state cases are, according to Mondré, 'extremely rare', one must not treat them as entirely independent from the cases brought forth via Article 34. For example, in the case of *Ukraine v Russia (re Crimea)*, the Ukrainian government argued that 'the Russian Federation was responsible for administrative practices' that 'were part of a large, interconnected campaign of political repression'.[7] This matters as proving that large administrative practices violated the Convention can make it 'easier for the individual applicants to subsequently prove [the] practice was applied to their case'.[8] To prove large-scale administrative practices, the ECtHR posits that two criteria must be fulfilled: first, the repetition of acts constituting alleged ECHR violations and second, official tolerance of said acts by administrative superiors. As the Court ruled in 2025 concerning the case of *Ukraine and the Netherlands v. Russia,* the demonstration of large-scale administrative practices affirms how any '[domestic] remedies would clearly be ineffective'.[9] This arguably paves the way for subsequent individual applicants as it fulfils the 'all domestic remedies have been exhausted' burden set out by Article 35 of the ECHR.[10] Hence, inter-state cases, even if numerically less significant, must still be understood as relevant and worthy of consideration, seeing their growing frequency and potential to shape cases brought forth under Article 34.

A second argument that may caution against using inter-state cases to analyse the ECHR's influence is articulated by Kanstantsin Dzehtsiarou, a human rights law professor from the University of Liverpool. According to him, 'the expulsion of Russia from the Council of Europe solves the problem of inter-state applications as the majority of pending cases are against the

[6] Isabella Risini, *'Day 1 Introductions'* (Conference on Inter-State Cases under ECHR, 13 April 2021) <https://edoc.coe.int/en/european-convention-on-human-rights/11067-inter-state-cases-under-the-european-convention-on-human-rights-experiences-and-current-challenges.html> accessed 21 June 2025.

[7] *Ukraine v Russia (re Crimea)* App no 20958/14 (ECtHR, 25 January 2024).

[8] Kanstantsin Dzehtsiarou, *'Ukraine v Russia (re Crimea): The European Court of Human Rights Goes All In'* (EJIL: Talk!, 29 January 2024) <https://www.ejiltalk.org/ukraine-v-russia-re-crimea-the-european-court-of-human-rights-goes-all-in/> accessed 22 June 2025.

[9] *Ukraine and the Netherlands v. Russi*a Apps nos 43800/14, 8019/16, 28525/20 (ECtHR [GC], 9 July 2025).

[10] European Convention on Human Rights, art 35 (n 2).

Russian Federation'.[11] On one hand, this argument holds some relevance when considering that before Russia's expulsion from the Council of Europe (CoE) in 2022, it appeared as the respondent government in 15 inter-state applications out of 38 since the birth of the ECHR.[12] Taking this line of reasoning, one could argue that Russia's expulsion makes inter-state cases less likely, given that inter-state cases can no longer be lodged against one of the most antagonistic countries with a track record of disregarding the Convention.

Before responding to Dzehtsiarou's points, it is also necessary to outline the structural constraints tempering with the effectiveness of inter-state applications. This pertains to the length limits of inter-state proceedings and limits of execution supervision to enforce judgements given to the Committee of Ministers (CoM). As human rights professor and solicitor Phillip Leach outlines, there are structural reasons for this, including the lengthy 'collection and assessment of evidence, non-cooperation [by the respondent state], and failure to disclose crucial documents'.[13] Despite these limitations, one must acknowledge that states continue to submit inter-state applications, suggesting that Article 33 is still seen, in the eyes of Member States, as a mechanism to challenge alleged abuses even if it risks delays.

In evaluating Dzehtsiarou's claim, it is crucial to consider how, even after Russia was expelled from the Council of Europe in 2022, cases submitted before its expulsion still continue to be heard and adjudicated by the Court. For example, a judgment was issued at Strasbourg on 24 July 2024 on the aforementioned case of *Ukraine v Russia (re Crimea) (ECtHR [GC]) App nos 20958/14 and 38334/18*.[14] This is because Article 58 states that a denunciation of the ECHR by any High Contracting Party 'shall not have the effect on obligations under [the] Convention…and alleged violations which may have been performed before the date of…denunciation'.[15] This was affirmed by a plenary session resolution from the ECtHR declaring that 'The Court remains competent to deal with applications directed against the Russian Federation provided that they occurred until 16 September 2022'.[16] This illustrates that despite the expulsion of a main

[11]Kanstantsin Dzehtsiarou, *'Key Challenges for the Next Era of the European Court of Human Rights'* (SSRN, 10 November 2022) <https://ssrn.com/abstract=4274260> accessed 21 June 2025.
[12]European Court of Human Rights, 'Inter-State Applications' (n 5).
[13]Phillip Leach '*On Inter-state Litigation and Armed States Conflicts in Strasbourg'* (1 May, 2021) <https://heinonline.org/HOL/LandingPage?handle=hein.journals/euncvnohn2&div=6&id=&page=> accessed 19 October 2025.
[14] *Ukraine v Russia (re Crimea)* (n 7).
[15] European Convention on Human Rights, art 58 (4 November 1950).
[16] Resolution of the European Court of Human Rights on the consequences of the cessation of membership of the Russian Federation to the Council of Europe in light of Article 58 (22 March 2022). <https://www.echr.coe.int/documents/d/echr/Resolution_ECHR_cessation_membership_Russia_CoE_ENG> accessed 19 October 2025.

respondent state in many inter-state applications, like Russia, these applications are still worthy of consideration.

Moreover, one can also observe the rising number of inter-state cases in the past decade that do not include Russia, but potentially surprisingly, Western European Governments are considered to have strong liberal democracies. As recently as February 2025, Slovakia lodged a complaint against Belgium concerning, according to its application, 'the death of a Slovak national following an incident involving the Belgian police at the Brussels-Charleroi Airport'.[17] A year prior, Ireland lodged an inter-state application against the United Kingdom concerning the 2023 British Legacy and Reconciliation Act.[18] Evidently, as the ECHR reaches its 75th anniversary, analysing its contribution to human rights through an inter-state lens has never been more important.

3. Accessibility Through Article 33: Inter-State Cases as a Force for Accountability

The ECHR, through Article 33 and the ability for member states to put forward complaints against each other, has arguably strengthened human rights protections by broadening accessibility and accountability mechanisms. This is exemplified through the 1967 case of *Denmark, Norway, Sweden, The Netherlands v Greece*.[19] As the 4th inter-state application in the Convention's history, the case was ruled upon by the European Commission on Human Rights (which became obsolete in 1988). A coup by the Military Junta in April 1967 would mark the start of what many historians describe as a seven-year military dictatorship in Greece that would last until 1974.[20] In September of the same year, Norway, Sweden, Denmark and the Netherlands would file identical applications alleging a violation of the ECHR by Greece. Their complaint centred around the Greek dictatorship's Royal Decree No. 280. Under this Decree, Article 1 would 'bring into effect…martial law' and Article 2 would suspend fundamental civil liberties of

[17]European Court of Human Rights, '*New inter-state application lodged by Slovakia against Belgium*' (Press Release ECHR 067, 7 March 2025) <https://hudoc.echr.coe.int/eng-press#{%22itemid%22:[%22003-8319262-9163340%22]}> accessed 21 June 2025.

[18]European Court of Human Rights, '*New inter-State application brought by Ireland against the United Kingdom*' (Press Release ECHR 014, 19 January 2024) <https://hudoc.echr.coe.int/eng-press#{%22itemid%22:[%22003-8319262-9163340%22]}> accessed 21 June 2025.

[19] *Denmark, Norway, Sweden, the Netherlands v Greece* App nos 3321–3323/67 (Commission Report, 5 November 1969) https://hudoc.echr.coe.int/eng?i=001-49209 accessed 22 June 2025.

[20] Othon Anastasakis, *The Greek Military Dictatorship: Revisiting a Troubled Past, 1967–1974* (Berghahn Books 2021).

the 1952 Greek Constitution, including Article 5 on Freedom and Integrity and Article 20 guaranteeing Recourse to Courts.[21]

What is notable about the Greek case is how it demonstrates the importance of inter-state cases and hence the Convention in widening the accessibility of human rights protections. Under Article 34, the Court may receive applications from 'any person, nongovernmental organisation or group of individuals', under the strict condition that they must be 'claiming to be the victim of a violation…of one of the rights set forth in the Convention'.[22] This means that Article 34 is structurally limiting in the sense that complaints (from the non-state side) must directly be from the injured party. The Greek case underscores the potential limitations of this. As a lawyer and witness to the Greek case, James Becket recalls, 'only one victim of torture willing to testify had managed to escape from Greece'.[23] Considering that Article 33 has no conditions related to victimhood, it becomes evident how this alternative avenue broadens human rights protections by allowing for the pursuit of justice when victims cannot advocate on their own behalf of themselves.

The Convention, through Article 33, has also arguably redefined human rights through the symbolic power of international accountability and awareness in other states coming together to defend the ECHR and filing a complaint as opposed to being passive, idle actors. This is especially true of the Greek case, considering Becket notes that 'The Scandinavians did not have any commercial or territorial interests' nor an 'ethnic link'. For these countries, he argues, there was 'nothing to gain' besides a 'belief in human rights and moral duty'. While statements like these demonstrate the potential political instrumentalisation of inter-state filings to advance one's own external perception as a defender of human rights, this does not negate their legal value, as will be further discussed. Effectively, the interstate avenue of the Convention has contributed considerably to human rights protections as it reinforced the idea that said rights are a mutual obligation, a shared commitment for a better community based on common values.

For Ed Bates, law professor at the University of Leicester, this is also exemplified by the ruling in the 1960 case of *Austria v Italy,* where the Commission deemed Austria's application as 'bringing before [us] an alleged violation of the *public order of Europe*'.[24] The inter-state filing centred around

[21]Council of Europe Treaty Office, *'Reservations and Declarations for Treaty'* (Council of Europe, 2025) <https://www.coe.int/en/web/Conventions/full-list?module=declarations-by-treaty&numSte=005&codeNature=10&codePays=GRE> accessed 21 June 2025.

[22] European Convention on Human Rights, art 34 (n 2).

[23] James Becket, 'The Greek Case Before the European Human Rights Commission' (1970) 1 Human Rights 91, 100.

[24]Ed Bates, *'The 1950 Convention'* (Conference on Inter-State Cases under ECHR, 13 April 2021) <https://edoc.coe.int/en/european-convention-on-human-rights/11067-inter-state-cases-under-the-european-convention-on-human-rights-experiences-and-current-challenges.html> accessed 21 June 2025.

Austria's claim that Italy was in violation of Article 6 of the ECHR, where the Commission acknowledged that Austria was not acting 'for the purposes of enforcing its own rights'.[25] This interpretation by the Commission had a clear legal effect, holding that the rights and obligations of the ECHR are not simply owed to individuals, but are erga omnes rights owed by each state to all other member states collectively. Hence, through an inter-state lens, it becomes evident that human rights, thanks to the ECHR, are about the importance of a common order based on a pact for collective action. Ultimately, as the ECHR celebrates its 75th anniversary, human rights have developed, with the Convention not being seen as solely an individual bill of rights, but rather as the collective promotion of common values and inter-state accountability.

This aspect of collective duty also extends to Non-Governmental Organisations (NGOs) with inter-state cases, underscoring the activist and advocacy dimensions of human rights protections. In particular, the Greek case of 1967 allowed for Amnesty International, which had only been created six years prior in 1961, to establish its own legitimacy.[26] As Thomas Hammarberg, a Swedish human rights expert and Amnesty International volunteer at the time, testified, 'I went to Athens to collect evidence about the torture…I was struck by the widespread fear in the community and how the colonels…launch[ed]…systematic terror.[27] Moreover, in a January 1968 report by Anthony Marreco, Amnesty released accounts of first-hand human rights violations. The role of humanitarian actors crucially highlights the extent to which human rights are a shared commitment, a collaborative effort between sovereign states, individuals, and organisations that are rooted in advocacy and activism. Through the accountability from multiple avenues, such as countries and activist organisations, human rights protections have arguably been widened for the better, given the more accessible environment promoted by the existence of the Convention.

4. Case by Case: Building Human Rights Law through Inter-State Claims

In addition to framing human rights as a broader collective duty, Article 33 has allowed for the rigorous testing and development of Convention law, further expanding human rights

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[25] Ibid.

[26] Amnesty International, '*What is Amnesty International*' (Amnesty International, 2025) <https://amnesty.ca/who-we-are/?> accessed 22 June 2025.

[27] Thomas Hammarberg, *'The Greek case became a defining lesson for human rights policies'* (Council of Europe Viewpoints, 18 April 2007) <https://www.coe.int/en/web/commissioner/-/the-greek-case-became-a-defining-lesson-for-human-rights-policies-in-europe> accessed 21 June 2025.

protections. Both the 1979 *Ireland v United Kingdom (I)* case and the 2001 *Cyprus v Turkey* case can be used to develop this line of argumentation.

The 1979 Irish case is contextualised by the 1921 Partition of Ireland and the subsequent tension within Northern Ireland between those who wished to leave and those who wished to remain part of the United Kingdom. The case was lodged against the United Kingdom for the five techniques used in Northern Ireland against the Irish Republican Army (IRA), which were advocating for a united Ireland. According to the application submitted by Ireland, these techniques included wall standing, hooding (keeping a bag over detainees' heads at all times), deprivation of sleep, deprivation of food, and continuous subjection to loud noise.[28] The ECtHR was asked to consider if said techniques qualified as torture under Article 3 of the Convention and whether by targeting the IRA and political dissent, the United Kingdom violated Article 14. This case is significant to consider as it was the first where the ECtHR was forced to rule upon Article 3 of the ECHR. Ultimately, in paragraph 167, the Court declared that although the five techniques due to 'the intense physical and mental suffering fell into the category of inhuman treatment within Article 3', they did not amount to 'the particular intensity and cruelty implied by the word torture as so understood'.[22] Here, the court reasoned that the distinction between inhuman treatment and torture derives 'from a difference in the intensity of the suffering inflicted'.[22] Torture, as understood by the court, encompasses an 'aggravated and deliberate form of cruel…punishment' – a threshold the ECtHR reasoned was not met insofar as the primary objective of the five techniques was the 'naming of others and or information'.[22]

Hence, through this decision, the Court reaffirmed the key distinction in Article 3 by differentiating between 'torture' and 'inhuman or degrading treatment'.

There are arguably two important ways that this inter-state case shaped human rights, further solidifying the significance of the Convention. Firstly, the Irish case demonstrates and further solidifies the normative nature of human rights. Indeed, the ECtHR's phrasing — 'implied by the word torture as so understood' — suggests that the defining crimes like torture depend heavily on how it is contextualised and interpreted. This can then shape the threshold of what qualifies as 'particularly [intense] and [cruel]' and what subsequently counts as something like torture. By making the key distinction between degrading treatment and torture, the Court also affirmed how human rights must not be viewed through a black and white binary prism. This key differentiation underscores the complexity of human rights and the need to evaluate the specific

[28] *Ireland v United Kingdom (I)* App no 5310/71 (ECtHR, 18 January 1978).

details of every case, affirming the nuanced nature that human rights can take, even if, on paper, articles such as Article 3 may appear short, straightforward, and simplistic.[29]

Secondly, this case also demonstrates the Convention's broader significance, insofar as decisions like that for the Irish case have been used in global settings as precedents for other arguments. When defending the enhanced interrogation techniques used in Guantanamo Bay, American lawyers would cite the verdict made by the ECtHR in the Irish case to argue that their actions did not amount to torture. This is exemplified in a 2009 hearing before Congress by Jeffrey Addicott, a member of President Bush's legal counsel. As Addicott argued, 'if you look at the Ireland case (…) they deprived them of sleep (…) food and drink (…) considering the standards set out in the Ireland case, even the worst CIA techniques (…) would not constitute torture'.[30] Evidently, the decisions of the ECtHR do not exist in a vacuum, but rather are critical for human rights protections. As such, the Irish inter-state case exemplifies the significance of the Convention in setting out legal precedents and shaping norms not solely in a regional, but a global context.

The 2001 case of *Cyprus v Turkey* further demonstrates how inter-state cases have played an active role in developing Convention law and shaping human rights protections, specifically through its establishment of the effective control doctrine. In 1974, military operations in Northern Cyprus by Turkey led to the establishment of the Turkish Republic of Northern Cyprus (TRNC) by displacing individuals, controlling access to domestic courts, and controlling educational material. Thus, Cyprus would allege that Turkey had violated the Convention, including Article 10 affirming freedom of expression and Article 14 on the prohibition of discrimination.[31] Yet, a key question in this case was if Turkey could even be held responsible, seeing as its actions did not transpire on Turkish soil but in a region of Cyprus they claimed to be independent – the TRNC. This matters because under Article 1, the ECHR states that 'the obligation to respect human rights (…) shall secure to everyone within their jurisdiction'.[32] After ruling on the case, the Grand Chamber of the ECtHR would conclude that Northern Cyprus was included in Turkey's jurisdiction. Notably, in their judgement, the justices concluded that 'Having effective overall control over northern Cyprus, its responsibility cannot be confined to its own borders' and that within this region, 'Turkey's "jurisdiction" must be considered to extend to securing the entire range of substantive rights set out in the Convention'.[33] This is significant as it established the

[29]Article 3 of the ECHR states, 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'. European Convention on Human Rights, art 3 (n 2).

[30]US Congress, *'Senate Event LC4187 — 111th Congress'* (Congress.gov, 13 May 2009) <https://www.congress.gov/event/111th-congress/senate-event/LC4187/text?> accessed 21 June 2025.

[31] *Cyprus v Turkey* App no 25781/94 (ECtHR, 10 May 2001).

[32]European Convention on Human Rights, art 1 (n 2).

[33] *Cyprus v Turkey* (n 31).

effective control doctrine, affirming that Member States are still responsible for actions that occur off their soil insofar as they have 'effective control' over the region, like Turkey did in Northern Cyprus.

This inter-state case can thus be situated within Article 1 of the ECHR as it proved significant in doctrinal development through broadening jurisdiction beyond the territorial sense of what is within the state's own borders, to a personal sense through looking for indicia or evidence of what the state controls or occupies in practice. Such a development does not simply affect liability but also execution. From a remedial perspective, the Grand Chamber held in a 2014 just satisfaction judgement that the CoM would see to the enforcement of the Court's decision.[34] This underscores how, following this inter-state case, measures to redress violations and ensure compliance occur even where the respondent State's control lies beyond its national borders. Arguably, then, this expansion of what qualifies as a state's jurisdiction under Article 1 broadens human rights protections. This affirms the role of inter-state cases, which have allowed for the development of Convention law and for the interpretations of key articles, thus shaping human rights.

5. The Convention in the Global Arena: The Diplomatic Turn of Human Rights

The final impact that the Convention has had on human rights is diplomatic. The ECtHR has emerged as a new avenue for resolving diplomatic tensions and geopolitical crises through inter-state cases. This dimension may be seen as intuitive, as by nature, inter-state applications involve at least one country (the appellant state) alleging a Convention violation by another country (the respondent state). Yet, there are at least two specific ways that inter-state cases have brought human rights into the diplomatic toolbox used by nations: firstly, through flipping traditional balances of power and secondly by legitimising international action.

Article 33 of the Convention has arguably given power and a voice to smaller countries, helping to challenge the traditional power imbalances that exist in international relations. This is affirmed by Mondré, who notes that inter-state cases, 'aim to discredit the other government in the eyes of the international community'. To her, this is 'particularly attractive to small states facing a more powerful opponent'.[35] This is specifically useful given the automatic, compulsory nature of the ECHR. As articulated by Geir Ulfstein from the University of Oslo, 'the jurisdiction of the

[34] *Cyprus v Turkey* (just satisfaction [GC]) App no 25781/94 (ECtHR, 12 May 2014).

[35] Mondré (n 4).

Strasbourg Court in inter-state cases is compulsory'.[36] This is unlike the International Court of Justice (ICJ), where a state must consent to the Court's jurisdiction even if they have signed its treaty. Comparatively, the ECHR has shaped human rights by offering a more accessible form of justice and a balancing of power, seeing as bigger, more powerful nations cannot refuse the Court's jurisdiction. Indeed, the aforementioned 2001 case between Cyprus and Turkey proved the existence of flagrant imbalances of power between the more powerful respondent and the less powerful applicant. These imbalances can be observed on multiple axes, including the difference in population size, geography[37], and Gross Domestic Product[38], which were all greater in Turkey than in Cyprus in 2001. Yet, the Court's ultimate verdict, which included finding a 'violation of Article 10 by Turkish authorities'[39] demonstrates how the Convention can still be an avenue for justice and human rights protections even against states that may seem more intimidating due to their greater geopolitical and economic power.

This rebalancing and evening of power is not isolated to the Cyprus case, but is also exemplified in other instances, specifically the 2019 ECtHR case of *Georgia v Russia (I)*. Filed in March 2007, the Georgian Government alleged that between September 2006 and January 2007, the Russian Federation had violated parts of the ECHR through the expulsion and detention of 4,600 Georgian nationals.[40] Beyond the obvious geographic and economic imbalance that exists, there are also other dimensions to consider, such as the fact that Russia is a nuclear-armed state with significant influence in supranational institutions, being a permanent member of the United Nations Security Council with veto power. Ultimately, the Court would conclude that 'ruling on an equitable basis, deems it reasonable to award the applicant Government a lump sum of EUR 10,000,000 (ten million euros) [for damages] sustained…by 1,500 Georgian nationals'.[32] Paragraph 79 of the decision stated that the responsibility 'for distributing the sums to the individual victims of the violations' fell onto the 'applicant government' to set up an 'effective mechanism, with the supervision of the Committee of Ministers'.[32] However, Russia has yet to make the payment, despite the Court imposing an eighteen-month deadline. In turn, this may

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[36]Geir Ulfstein, *'Inter-State Applications under the ECHR: Strengths and Challenges',* (EJIL: Talk!, 24 January 2020) <https://www.ejiltalk.org/inter-state-applications-under-the-european-convention-on-human-rights-strengths-and-challenges/> accessed 21 June 2025.

[37] In 2001 Cyprus had only 0.88 million residents while Turkey had 75 times that, or 66.3 million. Moreover, Cyprus has an area of 9,000 km^2 while Turkey has 776km^2 .Gilles Pison, *'The population of the world (2001)'* (Institute of National Demographic Studies, 2001) <https://www.ined.fr/fichier/s_rubrique/18790/publi_pdf2_pop_and_soc_english_370.en.pdf> accessed 21 June 2005nuclear-armeeighteen-month,d

[38]Turkey's Gross Domestic Product was 19 times that of Cyprus in 2001, at 201,753 million compared to 10,390 million. Worldmeterer, *'Gross Domestic Product in 2001'* (Country Economy, 2005), <https://countryeconomy.com/countries/compare/cyprus/turkey> accessed 21 June 2025.

[39] *Cyprus v Turkey* (n 31).

[40] *Georgia v Russia (I)* App no 13255/07 (ECtHR, 3 July 2014).

make states cautious of the significance of inter-state applications in the diplomatic sphere, given the occurrence of non-compliance and the role of the CoM to supervise, but not enforce case law. Yet, there is arguably a symbolic role that such a verdict carries. In essence, the process of making an application and having it accepted by the Court is one that involves publicly placing blame on another country as a perpetrator of human rights abuses. As such, when the ECtHR affirms such allegations, as it did with the Georgian case, the image of the respondent state in the eyes of the international community could be damaged.

This leads to the second diplomatic means through which inter-state cases and hence the Convention have shaped human rights. Notably, the verdict and even the filing alone of an inter-state case can help affirm the legitimacy of other actions against nefarious states considered to be undermining human rights. Though it must be explicitly clarified that this does not imply a causal relationship between ECtHR filings and the use of punitive diplomatic tools, which remain as independent political acts, but rather points to the broad cluster of actions that mutually reaffirm one another. For example, the case of *Ukraine v Russia (re Crimea),* following Russia's annexation of Crimea, was triggered by an application filed by Ukraine on March 13th.[41] Existing examples, both in discourse and in action, suggest that the Convention, through allowing inter-state cases, has expanded human rights concerns into the political and diplomatic toolbox. In a UK Parliamentary meeting just one day later on March 14, Lord Hannay stated, 'it is quite clear that Russia has not fulfilled its obligations as a member of either the Council of Europe'.[42] Such a statement expresses concerns over Russia's human rights track record and undermines its credibility. Moreover, the applicant government can also use the filing of the case as evidence to further discredit the respondent state. As then Ukrainian President Poroshenko stated in a speech, 'The future and spirit of Europe depend on how the situation in Ukraine is settled, and if it develops based on international law'.[43] The idea of making Europe's development conditional on the respect of international law for Ukraine is powerful, signalling to other European states the importance of upholding its shared commitments to human rights. Evidence also suggests that the filing of the case had a transatlantic impact. As senator and former Republican presidential nominee John McCain would state, 'We are all Ukrainians'.[44] Concrete international actions against Russia, which coincide directly after Ukraine's filing of a

[41] *Ukraine v Russia (re Crimea)* (n 7).

[42]Parliament UK, *'Ukraine: Statement'* (Parliament UK, 14 March 2024) <https://publications.parliament.uk/pa/ld201314/ldhansrd/text/140304-0001.htm?> accessed 21 June 2025.

[43]Petro Porochenko, *'Speech made to the Assembly'* (Parliamentary Assembly, 26 June 2014) <https://assembly.coe.int/nw/xml/Speeches/Speech-XML2HTML-EN.asp?SpeechID=179> accessed 21 June 2025.

[44]Time, 'Senator John McCain: "We Are All Ukrainians"' (28 March 2014) <https://time.com/10829/ukraine-john-mccain-putin-crimea/?utm_> accessed 21 June 2025.

complaint, further exemplify the symbolic weight that being accused of violating the ECHR carries. On March 20th, President Obama issued an Executive Order that authorised sanctions against individuals and entities that 'undermine[d] democratic processes' and 'threaten[ed] peace'[45] – exactly what Ukraine claimed was at stake in its inter-state case. The fact that this was done only a week after Ukraine's filing suggests that the Convention has significance in the diplomatic arena, insofar as alleged abuses of human rights can help legitimise and be a consideration for countries to impose punitive measures. As such, the Court carries a symbolic weight in the eyes of the international community. Indeed, the European Union's response on March 17, introduced only four days after the Ukrainian application was filed, brought restrictive measures against 21 Russian officials, including travel bans, asset freezes, and a ban on import goods.[46] Importantly, the EU also responded by cancelling a planned EU-Russia summit, which strengthens the diplomatic message against actions that allegedly violate human rights law. Hence, the ECHR, through its inter-state applications, has pushed human rights into the diplomatic sphere such that it is a valid concern that countries are willing to take political and economic measures to protect. The discourse used by both EU and American actors, followed by their actions, affirms the significance of the Convention in the protection of human rights.

6. Conclusion

As German Federal Minister of Justice Christine Lambrecht would articulate at the opening ceremony of the 2021 ECHR Inter-State Cases Conference, 'the Convention's founding fathers and mothers saw inter-state applications as a powerful tool for actually achieving the promise of peace, rule of law and human rights in Europe'.[47] Seventy-five years later, and it is evident that the founding authors of the Convention were correct in including inter-state cases as an avenue for the protection of human rights. From the 1967 Greek case to cases like *Ukraine v Russia (re Crimea)* decided as recently as 2024, this article has explored the historical and modern-day influence of inter-state applications on human rights.

While the use of the inter-state lens to evaluate the significance of the ECHR has been limited due to scholars contending a lack of its numerical significance and relevance given the 2022

[45]Department of State, *'Executive Orders Against Russia' (*Department of State, 2014) <https://2009-2017.state.gov/e/eb/tfs/spi/ukrainerussia/> accessed 21 June 2025.

[46]Council of the European Union, *'Timeline - EU sanctions against Russia'* (European Council, 16 June 2025) <https://www.consilium.europa.eu/en/policies/sanctions-against-russia/timeline-sanctions-against-russia/?utm_> accessed 21 June 2022.

[47]Christine Lambrecht, *'Opening of The Conference'* (Conference on Inter-State Cases under ECHR, 13 April 2021) <https://edoc.coe.int/en/european-convention-on-human-rights/11067-inter-state-cases-under-the-european-convention-on-human-rights-experiences-and-current-challenges.html> accessed 21 June 2025.

expulsion of Russia from the CoE, inster-state cases have played a growing role in increasing accessibility to human rights justice, developing Convention law, and shaping international affairs. A doctrinal synthesis has demonstrated how following inter-state applications, the understanding of important Articles of the ECHR, such as Article 1, has developed through the effective control doctrine and the expansion of jurisdiction to include occupied and controlled territories. Moreover, following inter-state applications, the Court has affirmed how the freedoms and rights of the ECHR are no longer simply those owed by each state to its citizens but rather, erga omnes rights collectively owed by member states to one another.

Despite these doctrinal developments, it is important to acknowledge the structural constraints that still surround inter-state applications and potentially limit their capacity to shape human rights. As has been demonstrated, these limitations pertain to the lengthy duration for a judgment to be issued and the difficulty of enforcing said judgment. Yet, through providing another avenue for an application to be lodged, establishing new doctrines, and offering a procedure that bridges the power dynamics between smaller and more influential countries, inter-state cases have still proved the ECHR's importance in broadening access to human rights both in theory and in practice.

As the number of inter-state applications rises and the ECHR continues to age, the impact of Article 33 on the protection of human rights may only continue to grow, especially in a context of increasing uncertainty, tension, and disunity between European states. Ultimately, as the Convention celebrates its 75th anniversary, inter-state cases serve as an important reminder that the CoE is not merely a regional actor with limited influence. Rather, it is a community of collective actors committed to defending human rights whose decisions cast ripples and waves across borders and perhaps ultimately, history itself.

CONSTITUTIONAL ORDER VS EUROPEAN PUBLIC ORDER: COSTA I ROSSELLÓ AND OTHERS V. SPAIN

Casper Vanspauwen[48]

Abstract

Can the protection of a State's constitutional order justify rights restrictions under the European Convention on Human Rights (ECHR)? In *Costa i Rosselló and Others v. Spain*, the European Court of Human Rights (ECtHR) answered this question affirmatively, marking a shift from its long-standing case-law. This case note explores the Court's evolving approach in this regard and argues that this development is part of a broader shift towards constitutional pluralism. It further argues that, while this 'pluralist turn' may better reflect contemporary political realities, the way it is currently expressed by the ECtHR also risks weakening the ECHR's role as a 'constitutional instrument of European public order', as well as the future of human rights protection within the Council of Europe as a whole.

Keywords: *constitutional dialogue, constitutional identity, constitutional pluralism, judicial dialogue, multilevel constitutionalism, protection of the constitutional order.*

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1. Introduction

On 27 February 2025, the European Court of Human Rights (ECtHR) delivered its decision in *Costa i Rosselló and Others v. Spain*.[49] The applications were lodged by several (former) members of the Parliament of Catalonia: they had taken several parliamentary initiatives criticising the monarchical form of government and proclaiming the supposed Catalonian right of self-determination. In response to those initiatives, which had largely been declared unconstitutional by the Spanish Constitutional Court, several enforcement measures were taken against the applicants, some of which included criminal proceedings.[50] Although ultimately declared manifestly ill-founded[51] and thus inadmissible, the case nonetheless contains several interesting human rights issues.

This case note argues that by recognising the protection of the constitutional order as a legitimate aim for rights restrictions under the European Convention on Human Rights (ECHR), the ECtHR has further complicated the hierarchical relation between the ECHR and national constitutional law.[52] Thereby, *Costa i Rosselló* not only departs from prior ECtHR case-law, but also stands in sharp contrast with *Costa v ENEL*[53], its nominal cousin in the context of the European Union. More generally, it appears that the ECtHR has adopted a 'pluralist' turn, embracing a form of constitutional pluralism.[54]

The analysis set out in the rest of this case note will be structured as follows. First, the legal and factual background will be elaborated on to give a better overview of the rights and interests that were at stake in the case. Second, the reasoning of the ECtHR will be analysed in more detail, particularly with respect to the Spanish Government's argument that it had sought to protect the Spanish constitutional order. Third, the case will be analysed in its broader context, demonstrating how it diverges from older case-law while simultaneously building on more recent developments. This analysis will ultimately conclude that even at the time of its 75th anniversary, the hierarchical status of the ECHR vis-à-vis national constitutional law remains problematically unclear, leaving the door open for abuse by the domestic authorities.

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[49] *Costa i Rosselló and Others v. Spain* (dec.), nos. 29780/20 and 3 others, 27 February 2025.

[50] Ibid, §§11–31, 34–39, 41–45, 48–81.

[51] Article 35(3)(a) ECHR (defining 'manifestly ill-founded').

[52] For a more holistic commentary, see Anıl Güven Yüksel, 'Political Expression and Representation in Regional Parliaments within the Framework of Constitutional Order: A Critical Reading of the Inadmissibility Decision in Costa i Rosselló and Others v. Spain' (Strasbourg Observers, 13 May 2025) <https://strasbourgobservers.com/2025/05/13/political-expression-and-representation-in-regional-parliaments-and-constitutional-order-a-critical-reading-of-the-inadmissibility-decision-in-costa-i-rossello/> accessed 20 June 2025.

[53] *Costa v ENEL* (Case 6/64) [1964] ECR 585 (first case establishing primacy of EU law).

[54] "By 'constitutional pluralism', I mean that the hierarchical relation between the ECHR and national constitutional law is not univocal – and, in this case, also undefined."

2. Analysis of the Case

2.1. Legal and Factual Background

The case arose in the broader context of the independence movement in Catalonia, one of Spain's Autonomous Communities. In the years surrounding the unconstitutional referendum of October 2017 (between 2015 and 2019), the Parliament of Catalonia also adopted several resolutions proclaiming a Catalan right to self-determination, calling for the abolition of the monarchy and rejecting the legitimacy of the Constitutional Court. These resolutions were repeatedly annulled by the Constitutional Court, as they violated the principles of constitutional supremacy and the unity of the Spanish State.[55] At the request of the Spanish Government, the Court subsequently issued a series of *autos de ejecución* (enforcement decisions) to secure compliance with its prior judgments, which included warnings to the members of the Bureau of the Parliament of Catalonia – the parliamentary body responsible for setting the parliamentary agenda – that a failure to comply could result in (criminal) liability. Eventually, several members of the Bureau were indeed prosecuted, but later provisionally acquitted.[56]

The applicants before the ECtHR were several former or current members of the Parliament of Catalonia, including two members of the Bureau who had faced criminal prosecution. The applications were lodged after the Constitutional Court's latest decisions, but before the criminal proceedings against the two members of the Bureau had come to an end. The applicants mainly alleged that the prohibition of having certain debates in the Parliament of Catalonia, as well as the aforementioned criminal proceedings, violated Article 10 ECHR (freedom of expression), Article 11 ECHR (freedom of assembly) and Article 3 of Protocol No. 1 ECHR (the right to free elections), read together.[57] The case was treated by the Fifth Section of the ECtHR, comprising seven judges, including President Mattias Guyomar.

2.2. Reasoning of the Court

The ECtHR started by observing that Articles 10 and 11 ECHR and Article 3 of Protocol No. 1 ECHR are linked by 'the need to guarantee respect for pluralism of opinion in a democratic society through the exercise of civic and political freedoms'.[58] It was therefore decided that the complaints under those provisions would be assessed jointly.[59] When reiterating the relevant

[55] Spanish Constitutional Court, Judgment No 259/2015 (2 Dec 2015).
[56] An appeal was lodged before the Supreme Court. As of January 2025, the proceedings were still pending, *Costa i Rosselló and Others v Spain* (n 49) §§79–81.
[57] Ibid, §§146, 163–165.
[58] Ibid, § 122.
[59] Ibid, §123.

principles of its prior case-law,[60] it also clarified that it would apply the more stringent test under Articles 10 and 11.[61] The Court then proceeded with the application of these principles in respect of the first applicant, who had been criminally prosecuted. After confirming that the applicable measures were prescribed by law,[62] it accepted the protection of the constitutional order as a legitimate aim relied upon by the Government. It ruled as follows:

> The Court accepts the premise that the impugned decisions of the Constitutional Court and the initiation of criminal proceedings against the first applicant pursued a legitimate aim, namely the protection of the constitutional order and the procedures for revising the Constitution, and the protection of the rights of others.[63]

In the proportionality assessment that followed, the ECtHR reiterated that under Article 10 ECHR, there is little scope for restrictions on political speech or debate,[64] and that political ideas challenging the existing order are no exception in that regard, as long as their realisation is advocated by peaceful means.[65] It further reiterated that the latter category also includes political programmes that call into question the current State organisation, if they do not harm democracy itself.[66] In similar cases, the ECtHR had translated these principles into a strict proportionality test. In the context of the dissolution of political parties under Article 11 ECHR, an interference with that provision is only validated in case of a 'pressing social need', i.e. to stop an imminent threat to democracy.[67] More generally, under Article 10 ECHR, a 'pressing social need' requires that the State opts for the least restrictive measure available.[68]

Nevertheless, the ECtHR applied a significantly more lenient proportionality test *in casu*. It started by taking over the Spanish Constitutional Court's emphasis on 'constitutional loyalty',

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[60] Ibid, §§124–125. More specifically, it reiterated that it is not authorised to interpret national constitutional law and that the criteria for justifying rights restrictions under Articles 8 to 11 ECHR on the one hand and under Article 3 of Protocol No. 1 ECHR on the other hand are different, the latter being less stringent.

[61] This means that, since the criteria for justifying rights restrictions under Articles 10 and 11 ECHR are more stringent than those under Article 3 of Protocol No. 1 ECHR, the Court applies the justification criteria of the former provisions. This refers to the classic three-pronged test (lawfulness, legitimate aim and necessity).

[62] *Costa i Rosselló and Others v Spain* (n 49), §§ 127-132.

[63] Ibid, § 133 (underlining added).

[64] Ibid, § 133.

[65] Ibid, § 134.

[66] Ibid, § 135.

[67] *Refah Partisi (The Welfare Party) and Others v Turkey* [GC] (nos 41340/98–41346/98, 13 Feb 2003) (ECHR 2003-II) §104; *Herri Batasuna and Batasuna v Spain* (nos 25803/04 & 25817/04, 30 Jun 2009) §83; *Vona v Hungary* (no 35943/10, GC, 9 Jul 2013) §54.

[68] *Perinçek v Switzerland* [GC] (no 27510/08, 15 Oct 2015) §273; *Tagiyev and Huseynov v Azerbaijan* (no 13274/08, 5 Dec 2019) §49.

which is understood as 'subjection to constitutional supremacy'.[69] It then reiterated the Constitutional Court's reasoning that the Spanish Constitution could be lawfully amended in accordance with the procedure laid down in its Articles 167 and 168, which could be requested directly by the Autonomous Communities.[70] Furthermore, it observed that the ban on certain debates in the Parliament of Catalonia was imposed only *ex post facto* (i.e. after they had already taken place repeatedly) and that Mr Costa i Rosselló had been (provisionally) acquitted of criminal charges.[71]

As a result, the ECtHR deferred to the reasoning of the Constitutional Court and considered that, in the light of the 'extreme circumstances' that it was faced with as the 'guarantor of the territorial integrity of the State', it had not acted in violation of the Convention.[72] Yet, the ECtHR failed to explain in what way the resolutions taken by the Parliament of Catalonia had posed an imminent threat to democracy, especially given their lack of any legal effect, nor did it consider any less restrictive measures that could have been taken.[73] Apparently, the legitimate aim of the protection of the Spanish constitutional order was sufficient to convince the Court to widen the margin of appreciation.

2.3. Further contextualisation and criticism

To better understand why the ECtHR ultimately ruled the way it did, *Costa i Rosselló*, it is essential to outline the broader developments in the ECHR system. After the collapse of the Soviet Union, many States of Central and Eastern Europe joined the Council of Europe and ratified the ECHR, which was used as a means to facilitate their transformation into liberal democracies.[74] As a result of that, as well as the optimism about liberal democracy and human rights in the early post-Cold War period (the 1990s), the ECtHR was able – and indeed expected – to take a more active and structural role in human rights adjudication.[75] It is in that context that the ECtHR proclaimed the ECHR to be a 'constitutional instrument of European public order'.[76] Moreover, several insiders of the Court, such as former Presidents Luzius Wildhaber, Jean-Paul Costa and

[69] *Costa i Rosselló and Others v Spain* (n 49), §136.
[70] Ibid, §§ 136-138.
[71] Ibid, §§ 140-141, §§ 145-146.
[72] Ibid, §§141–144, 147; on the same grounds the ECtHR found no violation of the same provisions regarding the other applicants, ibid §§158–160).
[73] Yüksel (n 52).
[74] Mikael Rask Madsen, 'The Challenging Authority of the European Court of Human Rights: From Cold War Legal Diplomacy to the Brighton Declaration and Backlash' (2016) 79(1) Law & Contemp Probs 141, 160; Angelika Nussberger, *The European Court of Human Rights* (OUP 2020) 25–26.
[75] Nussberger (n 74) 28–29; Wojciech Sadurski, 'Partnering with Strasbourg: Constitutionalization of the European Court of Human Rights, the Accession of Central and East European States to the Council of Europe, and the Idea of Pilot Judgments' (2008) EUI Working Papers Law 2008/33, 4–5 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1295652> accessed 21 June 2025.
[76] *Loizidou v Turkey* (Prelim Objs) (1995) 20 EHRR 99 (Ser A No 310).

former Registrar (and later judge) Paul Mahoney, started advocating for the ECtHR to adopt a 'constitutional' role and to act as a 'constitutional court' in their extrajudicial writings.[77]

In practice, this encouraged the ECtHR to start proclaiming the supremacy of the ECHR vis-à-vis national constitutional law, with little regard for its subsidiary role. Initially, it did so rather implicitly.[78] However, in 1998, the ECtHR asserted the supremacy of the ECHR a lot more boldly in *United Communist Party of Turkey and Others v. Turkey*. In that case, a political party had been dissolved by the Turkish Constitutional Court. Interestingly, and similarly to the argumentation of the Spanish Government in *Costa i Rosselló*, almost 30 years later, the Turkish Government argued that Article 11 ECHR was inapplicable, as the party ban was grounded in the need to protect the Turkish constitutional order.[79] However, this time, the ECtHR disagreed and explained that Article 1 obliged the States to secure the rights and obligations under the ECHR to everyone within their jurisdiction, and made no exception for national constitutional law in that regard.[80] It then added:

> The political and institutional organisation of the Member States must accordingly respect the rights and principles enshrined in the Convention. It matters little in this context whether the provisions in issue are constitutional […] or merely legislative […]. From the moment that such provisions are the means by which the State concerned exercises its jurisdiction, they are subject to review under the Convention.[81]

In the two decades that followed, the ECtHR did indeed not hesitate to act as a constitutional court and confer a 'supra-constitutional effect' to the ECHR, as judges Pinto de Albuquerque and Dedov observed in their judicial writings.[82] This can be demonstrated by two cases. First, in *Sejdić and Finci v. Bosnia and Herzegovina*, the ECtHR declared several provisions of the Constitution of Bosnia and Herzegovina to be in violation of the Convention.[83] Situated in the

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[77] Stéphanie Hennette-Vauchez, 'Constitutional v International? When Unified Reformatory Rationales Mismatch the Plural Paths of Legitimacy of ECHR Law' in Jonas Christoffersen and Mikael Rask Madsen (eds), *The European Court of Human Rights between Law and Politics* (OUP 2011) 151; ibid; Nico Krisch, 'The Open Architecture of European Human Rights Law' (2008) 71(2) Modern L Rev 183.

[78] *Demicoli v Malta* (no 13057/87, 27 Aug 1991) Series A No 210; *Open Door and Dublin Well Woman v Ireland* (nos 14234/88 & 14235/88, 29 Oct 1992) Series A No 246-A; *Gitonas and Others v Greece* (no 18747/91 & 2 others, 6 Mar 1997) ECHR 1997-IV.

[79] *United Communist Party of Turkey and Others v Turkey* (no 19392/92, 30 Jan 1998) 25 EHRR 25 (Reports 1998-I) §§19–21; see also Arts 68–69 Turkish Const (1982).

[80] *United Communist Party of Turkey and Others v Turkey* (n 79), § 29.

[81] Ibid, § 30; see also *Anchugov and Gladkov v. Russia*, nos. 11157/04 and 15162/05, §§ 51-52, 4 July 2013.

[82] Joint concurring opinion of Judges Pinto de Albuquerque and Dedov in *Baka v Hungary* [GC] (no 20261/12, 23 Jun 2016) §§17–24.

[83] *Sejdić and Finci v Bosnia and Herzegovina* (nos 27996/06 & 34836/06, 22 Dec 2009) ECHR 2009.

context of the aftermath of the disintegration of Yugoslavia and the Bosnian War (1992-1995), the Dayton Agreement was concluded between all parties involved (Serbs, Croats, and Bosniaks) to secure peace in the region, and the Constitution of Bosnia and Herzegovina was annexed to it. This Constitution provided in its Articles IV.1 and V that only the so-called 'constituent peoples' could participate in the House of Peoples (the upper chamber of the legislature) and the Presidency. When a Jewish and Roma applicant argued before the ECtHR's Grand Chamber that this constitutional arrangement was discriminatory, the Court agreed and found a violation of the ECHR.[84]

Second, in *Baka v. Hungary*, the Court found that the Hungarian constituent power had violated the Convention in the establishment of the 2011 Hungarian Constitution by Viktor Orbán's Fidesz, which had gained a two-thirds majority in Parliament in 2010. Through Section 11.2 of its Transitional Provisions, it had removed the applicant from office as President of the Supreme Court and the National Council of Justice, because he had openly criticised some of Fidesz's reforms. When the case came before the Grand Chamber of the ECtHR, it found a violation of Articles 6 and 10 ECHR – again without much hesitation.[85]

As the optimism about liberal democracy began to fade from the early 2000s onwards, so did the ECtHR's case-law on the supremacy of the ECHR, albeit very slowly. This has been the consequence of two main developments. First, in the immediate aftermath of the end of the Cold War, the Court increasingly attracted criticism from domestic political actors.[86] Particularly since the Brighton Declaration (2012), in which the Member States expressed their desire to put more emphasis on the principle of subsidiarity, the ECtHR has become more conservative and has allowed more restrictions on ECHR rights than before.[87] Second, after the German *Bundesverfassungsgericht* set constitutional limits to the binding force of ECtHR judgments in the *Görgülü* case (2004), a series of 'neo-sovereigntist' and 'constitutional-supremacist' strands of legal thought emerged across domestic courts as a form of additional criticism.[88]

Although the ECtHR did not immediately revise its stance from the *United Communist Party of Turkey* in response to these developments, it should be noted that the *Sejdić and Finci* and *Baka* judgments were never implemented on the national level. Moreover, while the Court of Justice of the European Union (ECJ) has recognised the primacy of EU law since 1967,[89] the ECtHR had

[84] Ibid, §§6–18 for a full overview of the legal and factual background.
[85] *Baka v Hungary* [GC] (no 20261/12, 23 June 2016) (n 82).
[86] Madsen (n 74), 167-175.
[87] Ibid 174–175; see also Laurence Helfer and Erik Voeten, 'Walking Back Human Rights in Europe?' (2020) 31(3) Eur J Intl L 797, 800.
[88] Helen Keller and Reto Walther, 'The Bell of Görgülü Cannot Be Unrung – Can It?' in Giuliana Ziccardi Capaldo (ed), *The Global Community: Yearbook of International Law and Jurisprudence 2019* (OUP 2020) 84–86.
[89] *Costa v ENEL* (n 53); cf Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125, para 2.

only started to proclaim the supremacy of the ECHR in the 1990s. In the 1960s, the ECHR was mostly seen as an instrument of 'legal diplomacy', and the Court only gradually became more assertive in the next three decades.[90] Furthermore, until 1998, it was not possible to submit direct applications to the Court.[91] These facts may help explain why, ultimately, the ECtHR's supremacist vision proved to be untenable.

The ECtHR would finally deviate from its prior case-law in *Savickis and Others v. Latvia* (2022). In that case, the applicants were so-called 'permanently resident non-citizens', who had emigrated to Latvia during its illegal occupation by the Soviet Union between 1940 and 1991. As they would not get full pensions for periods in which they had worked abroad, they argued before the ECtHR that this situation violated their rights under the ECHR.[92] When the protection of constitutional identity as a legitimate aim (among other aims) was invoked by the Government, the ECtHR's Grand Chamber accepted this as follows:

> The first, and most important [legitimate aim] according to the domestic authorities, was the <u>need to protect the constitutional identity of the Republic of Latvia</u>, which is based on the principle of State continuity as set out in the Declaration on the Restoration of Independence and subsequent constitutional provisions and doctrine. The Court observes that the essential point in this regard is […] the constitutional foundation of the Republic of 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 […] the Court accepts this aim as legitimate.[93]

In the limited proportionality assessment that followed, the ECtHR deferred to the Government's reasoning and found no violation of the Convention,[94] thereby overruling its earlier precedent.[95] The Court later confirmed *Savickis* in *Valiullina and Others v. Latvia*, in which the linguistic rights of Russian-speaking minorities in public and private schools were restricted, and expanded it further by stating that the constitutional identity argument would pass the

[90] Madsen (n 74), 145-159.
[91] Nussberger (n 74), 27-28.
[92] Ignatius Yordan Nugraha, 'Protection of Constitutional Identity as A Legitimate Aim for Differential Treatment' (2023) 19 Eur Const L Rev 141.
[93] *Savickis and Others v Latvia* [GC] (no 49720/11, 9 June 2022) §198 (underlining added).
[94] Ibid, §§ 200-221.
[95] *Andrejeva v Latvia* (no 55707/00, 24 Feb 2009) ECHR 2009 §87.

proportionality test as long as its usage is not 'arbitrary'.[96] These Latvian cases should be situated in the immediate aftermath of the Russian invasion of Ukraine – not only because the *Savickis* judgment was issued merely months after the invasion, but also because the Russian-speaking minorities were all part of the Russian-speaking minorities or of the former Communist Party of Latvia, that had existed during the Soviet occupation of the country (1940-1991).[97]

Two things are novel in *Costa i Rosselló* compared to the prior case-law. First, the ECtHR confirms explicitly that it is not necessary for the respondent State – or more generally: the domestic authorities – to invoke the protection of constitutional identity as a legitimate aim in order to let the Court widen the margin of appreciation.[98] More generally, the (implicit) reliance on the broader protection of the constitutional order is sufficient. Second, it is now clear that the ECtHR is also willing to widen the margin of appreciation beyond the context of the Russian invasion of Ukraine, thus confirming its general applicability. As a result, since the Court also still considers the ECHR to be a 'constitutional instrument of European public order',[99] it has effectively embraced a form of constitutional pluralism, albeit without setting clear boundaries. So far, the only requirement that the ECtHR imposes to pass the proportionality test is that the argument is not used arbitrarily.[100] In fact, the ECtHR has found no violation since *Savickis,* where the protection of constitutional identity or the constitutional order was invoked as a legitimate aim.[101]

While it falls far beyond the scope of this case note to formulate detailed normative recommendations, it should nevertheless be noted that the ECtHR ought to set clearer counter-limits to argumentation related to the protection of the constitutional order and identity. It can do this by mobilising the notion of European public order in two main ways. First, the Court should reiterate – in similar cases and beyond – that the principles of democracy[102] and the rule of law[103] are fundamental features of European public order.[104] This would not require significant additional effort, as to a large extent, these concepts have already been defined and

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[96] *Valiullina and Others v Latvia* (nos 56928/18 & 2 others, 14 Sept 2023) §208; see also *Džibuti and Others v Latvia* (no 225/20 & 2 others, 16 Nov 2023) §§140–151; *Ždanoka v Latvia (No 2)* (no 42221/18, 25 July 2024) §§55–62.

[97] The link with the Russian invasion of Ukraine is expressed explicitly by the ECtHR in *Ždanoka v Latvia (No 2)* (no 42221/18, 25 July 2024) §55.

[98] *Costa i Rosselló and Others v Spain* (n 49), §133.

[99] *M.L. v Poland* (no 40119/21, 14 Dec 2023) §166; *S.S. and Others v Italy* (dec) (no 21660/19, 20 May 2025) §82.

[100] This is also illustrated by the fact that the Court declared the applications 'manifestly ill-founded' in the sense of Article 32(3)(a) ECHR – and thus technically inadmissible.

[101] However, it did find a violation in (older) cases where the concept of constitutional order was not sufficiently concreticised and thus not sufficiently foreseeable. See *Selahattin Demirtaş v Turkey (No 2)* [GC] (no 14305/17, 22 Dec 2020) §§171–182; *Yüksekdağ Şenoğlu and Others v Türkiye* (nos 14332/17 & 12 others, 8 Nov 2022) §§506–510; *Yüksek v Türkiye* (no 4/18, 22 Oct 2024) §§85–92.

[102] *Vona v Hungary* (n 67), §71; *Bradshaw and Others v UK* (no 15653/22, 22 July 2025) §112.

[103] *M.L. v Poland* (n 99), § 166.

[104] Kanstantsin Dzehtsiarou, *Can the European Court of Human Rights Shape European Public Order?* (CUP 2021) 51–57.

further elaborated on by the Court in its case-law.[105] Second, the ECtHR should establish in its future case-law that the essence of the rights enshrined in the ECHR and its protocols is covered by the notion of European public order, so no such argumentation can be abused to completely erode ECHR rights. This might, however, prove to be more complex in practice than it appears at first sight, since it has not yet consistently been delimited by the Court when the (very) essence of a human right is affected.[106]

3. Conclusion

In *Costa i Rosselló and Others v. Spain*, the ECtHR made clear that the protection of the constitutional order is a legitimate aim for restricting rights under the ECHR, which will moreover pass the proportionality test as long as it is not used arbitrarily. The case thereby sharply contrasts with its 1990s *United Communist Party of Turkey* case-law, and has been the result of both gradual evolutions and more recent developments. Following the end of the Cold War, the Court initially felt confident enough to proclaim the absolute supremacy of the ECHR. However, as the enthusiasm for liberal democracy declined from the 2000s onwards, this position became increasingly more difficult to sustain, until the ECtHR decisively deviated from its prior stance in *Savickis and Others v. Latvia*, in the aftermath of the 2022 Russian invasion of Ukraine.

Costa i Rosselló further confirms that *Savickis* and the other Latvian cases that followed were not standalone exceptions, but marked a structural shift towards constitutional pluralism. This shows that, whereas the primacy of EU law has remained undisputed from the ECJ's perspective since *Costa v ENEL* (1964), the hierarchical status of the ECHR vis-à-vis national constitutional law has only become more complicated from the ECtHR's perspective in *Costa i Rosselló*. Already in 2008, Nico Krisch proposed a pluralist paradigm for the ECHR system, based on the status of the Convention in the domestic legal orders.[107] It is clear that the ECtHR is still struggling to determine its role in this reality. Future case-law should instrumentalise the notion of European public order as a powerful counter-limit, which should include the principles of democracy and the rule of law, as well as the essence of all rights enshrined in the ECHR and its protocols.

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[105] For overviews, see Joseph Zand, 'The Concept of Democracy and the European Convention on Human Rights' (2017) 5(2) Univ Balt J Intl L 195; Robert Spano, 'The Rule of Law as the Lodestar of the European Convention on Human Rights' (2021) 27(1–3) Eur L J 211.

[106] Anaïs Brucher, 'Unpacking the Uses of the "Essence of Rights" in ECtHR Case Law: Symbol, Paradox and Normative Statement' (Strasbourg Observers, 11 July 2025) <https://strasbourgobservers.com/2025/07/11/unpacking-the-uses-of-the-essence-of-rights-in-ecthr-case-law-symbol-paradox-and-normative-statement/> accessed 12 Oct 2025.

[107] Krisch (n 77) 185.

II. Emerging Substantive Dimensions of Human Rights Protection

FROM SILENCE TO SAFEGUARD: THE ECHR AND THE EMERGENCE OF ENVIRONMENTAL HUMAN RIGHTS

Jamal Hajiyev[108]

Abstract

This article explores how the interpretation of the European Convention on Human Rights ('ECHR' or 'the Convention') has been applied dynamically to confront environmental degradation and climate change. Although the Convention makes no specific references to environmental rights, the European Court of Human Rights ('ECtHR' or 'the Court') has repeatedly noted in a body of developing jurisprudence that Articles 2, 3, and 8 impose obligations on the state to ensure the protection of the environment. Through pollution and disaster cases, and, more recently, the Grand Chamber judgment in Verein KlimaSeniorinnen Schweiz v Switzerland (2024), the Court has begun to hold states responsible for failures to adopt adequate climate mitigation and adaptation measures. The ways in which the ECtHR has applied the living instrument doctrine, the proportionality principle, and the doctrine of positive obligations to integrate environmental protection into the Convention demonstrate that the ECHR is emerging as a major mechanism of preventing climate and environmental injustice. There are also legitimate concerns surrounding questions of judicial legitimacy, subsidiarity and the evidential burden needed for such cases.

Keywords: *Article 8 ECHR, Climate Change, Climate Litigation, Environmental Rights, European Convention on Human Rights (ECHR), European Court of Human Rights (ECtHR), Human Rights Law, KlimaSeniorinnen, Living Instrument Doctrine*

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1. Introduction

The ECtHR has an expanding spectrum of topics on which it rules. A new issue that has become particularly significant in the last few years is that of environmental degradation and climate change, which are now recognised as profound threats to human rights and the rule of law.[109] TheECtHR has developed a body of case law mapping the existing provisions of the ECHR, in particular Article 2 (the right to life), Article 3 (the prohibition on inhumane and degrading treatment) and Article 8 (respect for private and family life), onto environmental harms even though there is no express right to a healthy environment contained within the text of the Convention.[110] This jurisprudence illustrates the adoption by the Court of the Convention as a living instrument, which can evolve to cover new forms of harm that were not envisaged by those who drafted it.[111]

This interpretive leeway has enabled the ECtHR to hear cases over the past 30 years on toxic pollution, hazardous waste, and natural disasters, and, most recently, state inaction in the face of climate change. Similar to that in the *Lopez Ostra v Spain*, *Budayeva v Russia*, and *Öneryıldız v Turkey,* the Court deemed environmental degradation a violation of fundamental rights in cases where it poses an actual danger to health, life, or well-being.[112] The latest case added to its long jurisprudence, particularly that in *KlimaSeniorinnen v Switzerland*, the Court has taken a step further and held accountable those states that fail to pass appropriate climate mitigation policies, hence rendering climate change a human rights issue.[113]

This paper is a critical analysis of how the ECtHR has integrated an environmental concern into its understanding of the Convention and which normative, institutional, and procedural issues this development brings about. It cogitates on the extent to which the present jurisprudence of the Court, founded on the re-intervention of existing rights, may go to manage the systematic and planetary environmental harms such as climate change. Specific attention is paid to new landmark cases, procedural techniques, or doctrinal solutions employed to seek an equilibrium between individual liberty, state prerogative, and mercurial science.

To conclude, the paper suggests that the ECHR does not seal off an independent environmental right but that jurisprudential development is quickly turning the Convention into an instrument

[109] United Nations General Assembly Res 76/300 (28 July 2022) UN Doc A/RES/76/300; L Lavrysen, 'Human Rights in a Changing Climate' (2020) 38 *Netherlands QHR* 12.
[110] D Shelton, 'Human Rights and the Environment: What Specific Environmental Rights Have Been Recognized?' (2012) 35 *Fordham Intl LJ* 1021.
[111] *Tyrer v United Kingdom* App No 5856/72 (ECtHR, 25 April 1978) para 31.
[112] *López Ostra v Spain* App No 16798/90 (ECtHR, 9 Dec 1994); *Budayeva and Others v Russia* App No 15339/02 (ECtHR, 20 Mar 2008); *Öneryıldız v Turkey* App No 48939/99 (ECtHR, 30 Nov 2004).
[113] *Verein KlimaSeniorinnen Schweiz and Others v Switzerland* App No 53600/20 (ECtHR, 9 Apr 2024).

of environmental and climate justice. The future utility of the Convention will be determined by how well the Court can balance the sensitivity of emergent human rights risks with democratic legitimacy in the setting of environmental standards.

2. Legal Foundations of Environmental Protection under the ECHR

2.1. Article 8 ECHR: The Right to Respect for Private and Family Life

Although the ECHR does not directly refer to environmental protection, the ECtHR has found a way to apply Article 8, referring to the respect of private and family life, to cases of environmental damage that directly affect the well-being and the enjoyment of family life of individuals.[114]

In *Lopez Ostra*, the applicant resided close to a waste-treatment plant whose harmful emissions made her suffer greatly. The Court established that her private and family life could be interfered with by long-term exposure to smells, noise, and pollution.[115] It identified that extreme cases of environmental pollution can have an impact on the well-being of individuals, and it can deny them the possibility of enjoying their homes in a manner that can negatively impact their personal and family life. This case formulated Article 8 as a means of environmental protection through a positive obligatory duty by states not only to abstain from harmful activities but also to prevent environmental nuisance.[116]

Later jurisprudence made it clear that environmental nuisance alone is not enough; the interference must be serious and enduring. The ECtHR measures such an infringement by reference to a 'standard of severity'.[117] Cases such as *Hatton v UK* and *Fadeyeva v Russia* reaffirmed that only considerable disruptions should be eligible for redress.[118]

In *Fadeyeva*, the Court was unanimous in deciding that the uncontrolled activity of a steel mill near the applicant caused dangerous contamination.[119] The Court also specified that even though domestic laws created buffer zones, the fact that these measures were not enforced was a breach of Article 8. The case supported the general principle that the authorities should provide effective protection and cannot hide behind formal regulations.[120]

[114] A Boyle, 'Human Rights and the Environment: Where Next?' (2012) 23 *EJIL* 613.
[115] *López Ostra v Spain* (1994) 20 *EHRR* 277.
[116] D Shelton, 'Human Rights and the Environment: Substantive Rights' (2006) 1(1) *J Environ L & Pol'y* 19.
[117] Y Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia 2002) 190.
[118] *Hatton and Others v United Kingdom App no 36022/97 (ECtHR, 8 July 2003); Fadeyeva v Russia App no 55723/00 (ECtHR, 9 June 2005).*
[119] *Fadeyeva v Russia* App no 55723/00 (ECtHR, 9 June 2005) paras 134–139.
[120] Council of Europe, *Manual on Human Rights and the Environment* (2nd edn, Council of Europe Publishing 2012).

The ECtHR uses a fair balance test by balancing the rights of an individual with public or economic interests.[121] As in the case of *Lopez Ostra*, the Court observed that the municipality had not recognised any acceptable balance between the utility of the population and individual well-being.[122] In a similar way to *Fadeyeva*, although the industrial activities had a public significance, the absence of serious protective measures was what was determinative in the finding of state noncompliance.[123]

In addition to substantive protection, the Court has now come up with procedural environmental rights under Article 8. For example, states must notify citizens of environmental threats and must allow them to participate in environmental decision-making.[124] Certain scholarly observers have associated the substance of procedural environmental rights established under Article 8, including the rights to information and to participate in public, with those contained in the Aarhus Convention, even though the ECtHR has not officially integrated the Convention into its case law.[125]

This shows a vibrant development of Article 8 as a living instrument.[126] Legal scholarship has accepted that in the ECtHR, an increasingly expansive interpretation of Article 8 has been brought to bear in cases involving indirect, cumulative, or incremental environmental harms, often because the harm is to the quality of private or family life over time.[127] The case law derived from Article 8, especially *Lopez Ostra* and *Fadeyeva*, is commonly used to illustrate the flexibility and contemporaneity of the Convention.[128]

2.2. Article 2 ECHR: The Right to Life and States' Positive Obligations to Prevent Environmental Harm

Although Article 2 was originally aimed at protecting against the arbitrary removal of life, the ECtHR has endowed it with dynamic meaning, to the extent that life must be preserved against environmental threats, not necessarily from industrial accidents alone, but from long-term pollution.[129] In *Onerildiz v Turkey*, the Court has dealt with a tragic methane explosion in an informal landfill in Istanbul that took the lives of people living in the vicinity of the landfill.[130] It

[121] Boyle (n 114), 613.
[122] *López Ostra v Spain* (1994) 20 EHRR 277 paras 51–58.
[123] *Fadeyeva v Russia* App no 55723/00 (ECtHR, 9 June 2005) paras 134–140.
[124] *Manual on Human Rights and the Environment* (n 120), 72–76.
[125] Boyle (n 6), 613; *Guerra v Italy* App no 14967/89 (1998) 26 EHRR 357.
[126] O W Pedersen, 'The Janus-Head of Human Rights and the Environment' (2008) 2(1) *Transnat Environ L* 89.
[127] L Lavrysen, 'Climate Change and the ECtHR: Mapping the Rationale for a Broad Interpretation of Article 8' (2020) 38 *Netherlands QHR*.
[128] A Mowbray, *Cases and Materials on the European Convention on Human Rights* (3rd edn, OUP 2012) 670–673.
[129] D García San José, *Environmental Protection and the European Convention on Human Rights* (Council of Europe Publishing 2005) 25–30.
[130] *Öneryıldız v Turkey* App no 48939/99 (ECtHR, 30 November 2004) paras 70–93.

concluded that even though the Turkish authorities knew about these significant risks as early as 1991, they had not taken any measures to prevent those risks, the Article 2 obligation to protect life.[131] According to the Court, knowledge of an environmental threat should be accompanied by substantive prevention measures, rather than simply tolerated.[132]

Similarly, in *Budayeva and Others v Russia,* a fatal mudflow in North Ossetia brought about a similar result. The Court condemned the state's failure to put in place the proper regulatory mechanisms, keep protective structures, or institute early-warning systems, even though seasonal mudslides were predictable.[133]

This development points to the greening of Article 2: the slow redefinition of the provision, according to which environmental safety is evolving into a core dimension of the right to life. [134] In this sense, the doctrine of positive state obligations with regard to Article 2 now implies the need to have safeguards against foreseeable risks to the environment.

A key doctrinal innovation, the principle of foreseeability, tests whether states knew or ought to have known of an environmental threat.[135] Foreseeability ensures that Article 2 not only encompasses physical violence but also includes ecological governance, meaning that the practice of preventing behaviour deemed harmful through certain types of regulation is deemed vital to the sustainability of human life.[136]

According to scholarship on climate change mitigation and adaptation, environmental risks should be part of the protective and regulating role of states with reference to Articles 2 and 8.[137] This implies the possible extension of the scope of Article 2 into chronic environmental damage, in line with UN human rights resolutions and international climate obligations deriving from recent advisory opinions.[138]

This is highlighted in recent developments. Although not a decision of the ECtHR, one of the longest-running environmental crises, in what is called the region of the Land of Fires in Italy, has been utilised by scholars as an example where chronic toxic exposure may, in principle, give rise to an Article 2 issue on demonstrating a direct and foreseeable risk to life.[139]

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131 Ibid paras 101–107.
132 Ibid paras 117–121.
133 *Budayeva and Others v Russia* App no 15339/02 (ECtHR, 20 March 2008) paras 127–133.
134 E Olsson, *Greening the European Convention on Human Rights* (Univ Gothenburg 2024) <https://gupea.ub.gu.se/handle/2077/79888> accessed 18 Nov 2025.
135 N Kobylarz, 'The European Court of Human Rights: An Underrated Forum for Environmental Litigation' (2018) 5 *Eur Environ L F* (SSRN) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3178983> accessed 18 Nov 2025.
136 Ibid.
137 M Sroka and others, 'Climate, Human Rights, and European Litigation: Mitigation Obligations under the ECHR' (2024) (forthcoming).
138 United Nations Human Rights Council, Res 47/24 'Human Rights and Climate Change' (28 Mar 2021) A/HRC/RES/47/24.
139 A Sroka and others, *Climate, Health, and Human Rights in Europe* (2024).

On the whole, such transposition indicates a significant doctrinal shift. Article 2 now requires active environmental regulation, risk consciousness, and the preservation of life even in situations when the threat is produced by the industrial or ecological environment. This development has effectively "greened" the Convention, ensuring that its protections evolve to address the environmental realities of the modern age.[140]

2.3. Article 3 ECHR: Severe Environmental Harm as Inhuman or Degrading Treatment

Article 3 of the ECHR, which forbids torture, as well as cruel, inhumane or degrading treatment, has not been used extensively in environmental cases. The possibility of evolving interpretation offers the potential to protect the environment in the future.[141]

Strictly, to engage Article 3, environmental conditions have to attain a high bar. They have to inflict suffering equivalent to inhumane or degrading treatment. Article 3, traditionally based on situations of torture, may at times include extreme living conditions, such as the absence of sanitation among discriminated populations. By way of example, in *Georgopoulos and Others v Greece*, the families of Roma that lived close to a landfill in Greece claimed a violation of Article 3. The case demonstrated how environmental dereliction can converge with inequality to cause concern about the inhumane treatment of the vulnerable group.[142]

The argument among the scholars is that although emotional harm due to environmental catastrophe is not yet enough to satisfy Article 3 judgments, extreme events such as the natural disasters enhanced by climate change may begin to enter this high-threshold category.[143]

Although the ECtHR has not yet employed Article 3 in climate-related cases, it has occasionally used it in non-climate environmental cases, that is, in cases concerning slave-labor conditions or forced housing evictions. Dignity and extreme suffering are the focus of the courts for what constitutes degrading treatment. That implies that, through proper framing, long-term environmental risks, such as long-standing chemical contamination, may eventually be understood to constitute degrading conditions, in particular when they are coupled with privation of water, sanitation or shelter.[144]

Although Article 3 is rarely identified as being applied to environmental situations, shifting scholarly discourse and the broad approach to dignity employed by the Court point to the fact

[140] N Kobylarz (n 135) 8–10.
[141] Boyle (n 6) 613.
[142] *Georgopoulos and Others v Greece* App No 59506/00 (ECtHR, 3 Feb 2011); see also J Hohmann, 'The Right to Housing and the Roma: Constructing Space in Europe' (2014) 14(4) *HRLR* 785.
[143] W Galka, 'Apocalypse Now: Climate Change, Eco-Anxiety and Article 3 ECHR's Prohibition of Degrading Treatment' (Oxford Law Faculty Blog, 2022) <https://blogs.law.ox.ac.uk> accessed 18 Nov 2025.
[144] C Heri, 'Climate Change before the European Court of Human Rights: Capturing Risk, Ill-Treatment and Vulnerability' (2022) 33(3) *EJIL* 925.

that it can become a highly effective tool, especially in situations of severe environmental negligence or serious psychological damage. As interest in climate-related suffering has increased, the absolute requirements in Article 3 can establish highly effective protections to victims of irreversible damage to the environment.[145]

3. Recent Developments and the Push for Climate Rights

3.1. The Rise of Climate Litigation before the ECtHR

Over the past ten years, there has been an explosive increase in the number of applications filed at the ECtHR centres around the climate crisis.[146] Though the Convention does not make explicit reference to the environment or climate change, applicants are beginning to present climate inaction as a breach of existing rights, in particular, Articles 2 and 8.[147] An example here is *Duarte Agostinho and Others v Portugal and 32 Other States*, where six young people in the country of Portugal are against thirty-two European states. It was claimed that the fact that the respondents were not cutting greenhouse gas emissions according to the Paris Agreement was infringing on their right to life (Article 2), their right to private and family life (Article 8), and their right to non-discrimination (Article 14).[148] Although the case was dismissed by the Grand Chamber via an admissibility decision in 2023, an important precedent was created by the mere lodging of the application.[149] The case marked the first time that the ECtHR was requested to evaluate the extraterritorial liability of various states in transboundary environmental damage.[150] Scholarship has noted that the ruling did not prevent the imminent onslaught of climate rights cases, but rather reiterated procedural jurisdiction within the prevailing framework.[151] Thus, the aforementioned case can be regarded as a first test of the Court's ability to address diffuse, intergenerational environmental risks.[152]

3.2. Climate Vulnerability and Article 8

[145] T Hogg, 'Is Eco-Anxiety Capable of Amounting to Torture or Inhuman or Degrading Treatment under Article 3 ECHR?' (LLM thesis, University of Glasgow 2023, unpublished).
[146] C Heri, 'The Environment before the ECtHR: The Beginning of a Common Approach to Climate Change?' (2023) 4(2) *JHRE* 301.
[147] J Knox, 'Climate Change and Human Rights Law' (2020) 56 *Colum J Transnat L* 27.
[148] *Duarte Agostinho and Others v Portugal and 32 Other States* App No 39371/20 (ECtHR, 9 Apr 2024).
[149] *Duarte Agostinho v Portugal* (Grand Chamber) App No 39371/20 (ECtHR, 9 Apr 2024).
[150] ECtHR, 'Press Release: Climate Change – The Court Declares the Application Inadmissible' (9 Apr 2023) (press release) <https://hudoc.echr.coe.int/eng-press> accessed 18 Nov 2025.
[151] C Voigt, 'Duarte Agostinho v Portugal: A Missed Opportunity or a Groundwork for Future Claims?' (*EJIL:Talk!*, 9 Oct 2023) <https://www.ejiltalk.org/climate-change-hearings-and-the-ecthr-round-ii/> accessed 30 Nov 2025.
[152] A Savaresi and J Setzer, 'The Implications of Duarte Agostinho for Future Climate Litigation before the ECtHR' (2023) *Transnational Environmental Law* (forthcoming).

The latest verdict, already considered a landmark case, is the *Verein KlimaSeniorinnen Schweiz and Others v Switzerland* case. In this case a group of Swiss women aged 64 and older claimed that their health and well-being were at risk because of the inadequate climate policy of the state, leading to an increased risk of exposure to extreme heat. The ECtHR ruled that Article 8 was violated in its judgment, saying that Switzerland had breached its duty under the convention to guarantee respect for private and family life by not having sufficient climate mitigation policies.[153] The Court said that it is possible to interpret Article 8 as obligating states to undertake positive action to eliminate foreseeable and avoidable hazards to health that occur due to degradation of the environment.[154]

This case has been highlighted not only because of the outcome, but because it is the first time the Court has specifically identified climate vulnerability. The judgment identified elderly women as vulnerable to the effects of climate change, a strategy which is consistent with the recent literature on human rights, which frames climate justice in the context of equality and non-discrimination.[155]

In this way, the Court established a precedent for future applicants who are at an increased risk due to either their demographic or socio-economic status, and has opened the door substantially to intersectional environmental claims under the Convention, in a broader sense.[156]

3.3. Institutional Trend and the Future of Climate Rights under the ECHR

The interest of the ECtHR in climate issues is a part of the broader trend in international human rights law. In 2022, the United Nations General Assembly adopted a resolution that declared the existence of a human right to a clean, healthy, and sustainable environment. This resolution is not legally binding but will further the soft law with which the ECtHR will be functioning, and it will change the international consensus on such a right.[157]

On a scholarly level, commentators like Lavrysen (2020), Boyle (2012) and more recently Hefti (2024), stress the importance of evolutive interpretation as the means of allowing the ECHR to adjust to modern realities. Although it was formulated many years before climate science had

[153] *Verein KlimaSeniorinnen Schweiz and Others v Switzerland* App No 53600/20 (ECtHR, 9 Apr 2024).
[154] Ibid paras 475–478.
[155] J Peel and H Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (CUP 2018) ch 6; C Heri, 'Mattering in the Anthropocene: The ECtHR's Domesticating Framing of Climate Change' (2025) *International Journal of Human Rights* <https://doi.org/10.1080/13642987.2025.2475001> accessed 30 Nov 2025.
[156] A Hefti, 'Intersectional Victims as Agents of Change in International Human Rights-Based Climate Litigation' (2024) *Transnational Environmental Law* <https://doi.org/10.1017/S2047102524000128> accessed 30 Nov 2025.
[157] UNGA Res 76/300 (28 July 2022) UN Doc A/RES/76/300; see also J Bendel and Y Suedi, *Public Interest Litigation in International Law* (Routledge 2023) 148–152.

come of age, Article 2 and Article 8 have proven to be uncommonly flexible in encompassing climate-related factors, notably in the margin of appreciation and proportionality tests.[158]

There are, however, doubts. For example, Lavrysen observes that admissibility based on individual harm and proximity is still applied by the ECtHR and can be unfavourable to applicants who seek to address collective or long-term climate risks. The procedural barriers to systemic environmental actions have been present since it must be proved that there is a direct causal nexus between the omission of the state and the injury to an individual.[159]

Despite these obstacles, the ECtHR has become more of a normative arena in which the climate crisis and fundamental rights interact. *KlimaSeniorinnen* and *Duarte Agostinho* indicate that the Strasbourg Court is no longer external to the unfolding global apparatus of climate constitutionalism, although it has not (yet) worked out a coherent theory of climate justice.[160]

4. The Future of the ECHR in a Changing Landscape

4.1. Political Resistance and the Legitimacy Challenge

The growth of ECtHR environmental rights case law in recent years, culminating with the seminal case of *KlimaSeniorinnen,* has resurrected the discourse regarding the legitimacy of the Court.[161] Other researchers underline that even though the ruling was careful in its extension of doctrine, it has a symbolic force that might face political opposition among member states that feel uncomfortable with judicial intervention in climate regulation.[162] Although the ruling credits the existence of already established obligations under Articles 8 and 6 of the ECHR, it observes that it runs the risk of being viewed as judicial intervention.[163] The Grand Chamber adopted what it calls a 'restraint-enhancing' strategy, meaning that the Court deliberately limited its interference in national climate policymaking while reinforcing the procedural obligations that states must meet. Rather than prescribing greenhouse-gas quotas or concrete policy measures, it required Switzerland to demonstrate through transparent, evidence-based processes, measurable

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[158] L Lavrysen, 'The Role of the European Court of Human Rights in the Climate Crisis' (2020) 1 *Climate Law* 18; A Boyle, 'Human Rights and the Environment: Where Next?' (2012) 23 *EJIL* 613.; Hefti (n 156).

[159] C Heri, *Uncertain Potential: What Role for the Precautionary Principle in Climate Change Litigation before the ECtHR?* (Ghent University 2024) <https://libstore.ugent.be/fulltxt/RUG01/003/216/127/RUG01-003216127_2024_0001_AC.pdf>; E Lagrange, 'La Recevabilité des Requêtes Climatiques Devant la CEDH: Analyse du Critère de Préjudice Personnel' (2023) 56 *Revue Trimestrielle des Droits de l'Homme* 225.

[160] N Kobylarz, 'Anchoring the Right to a Healthy Environment in the European Convention on Human Rights' in *Environmental Law Before the Courts: A US–EU Perspective* (Springer 2023) 115–118 <https://link.springer.com/chapter/10.1007/978-3-031-41527-2_7>.

[161] Hefti (n 156).

[162] Heri (n 155).

[163] E Fornalé, 'Vulnerability, Intertemporality and Climate Litigation' (2023) *Nordic Journal of Human Rights* 103.

targets, and judicially reviewable frameworks that its climate governance is capable of safeguarding human rights.[164] Such a strategy, based on structural, as opposed to prescriptive, obligations, implies the recognition of the ECtHR's vulnerable political status in the Council of Europe system.[165] Such a trajectory represents a broader trend in the direction of so-called substantive subsidiarity: a paradigm where Strasbourg sets the contours of the normative picture but leaves the implementation to national institutions. [166] With such a model, the Court is empowered to exercise a safety net example that does not undermine the sovereignty of nations.[167]

4.2. Climate-Sensitive Interpretation of Article 8: KlimaSeniorinnen Revisited

In *KlimaSeniorinnen*, the Court did not dispute that climate inaction might impede the applicants in enjoying their private and family life under Article 8, an assertion which was based on scientific evidence as well as demographic vulnerability. Indeed, the Court did not insist on evidence of direct harm to certain individuals but acknowledged that a sufficiently real and imminent risk to health and well-being could be enough to engage positive obligations.[168]

It is undoubtedly a doctrinal development since climate change is interpreted by the Court as the determination of predictable and measurable risks. Ergo, the principles of foreseeability and proportionality are applicable. The proponents of this approach, whose arguments are accepted by legal scholars, claim that this judgment is consistent with the living instrument doctrine established by the ECtHR, according to which the Convention can be modernised regarding the new realities of the present day.[169]

Additionally, the Court recognised the gendered character of the consequences of climate change, particularly the high vulnerability of older women to the danger of heatwaves, and thus established the grounds of intersectional reasoning within the ECHR. Such an approach has long been promoted by Peel and Osofsky, who claimed that climate justice should embrace differentiated vulnerabilities along the age, gender, and socio-economic status axes.[170] Notably, the Court also acknowledged the breach of Article 6 (right to access a court) in that Swiss

[164] V Sefkow-Werner, 'Consistent Inconsistencies in the ECtHR's Approach to Victim Status and Locus Standi' (2025) *European Journal of Risk Regulation* <https://doi.org/10.1017/err.2025.12> accessed 30 Nov 2025.
[165] M Petersmann, 'Entangled Harms: A Reparative Approach to Climate Justice' (SSRN, 2024) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5054925> accessed 30 Nov 2025.
[166] A Lavrysen, 'Substantive Subsidiarity in the European Court of Human Rights' (2017) 15(1) *International Journal of Constitutional Law* 168.
[167] C O'Cinneide, 'The European Court of Human Rights and National Sovereignty: A Reappraisal' (2022) 45(4) *Human Rights Law Review* 567.
[168] B Žatkova and Z Paluchova, 'ECtHR and the Emergence of Climate Obligations: A Doctrinal Shift in *KlimaSeniorinnen*?' (2024) *European Yearbook on Human Rights* (forthcoming).
[169] L. Lavrysen, 'The European Court of Human Rights and the Environment: Reconciling Human Rights and Environmental Protection' (2020) 38(1) *Netherlands Quarterly of Human Rights* 11.
[170] J Peel and H Osofsky (n 155); Hefti (n 156).

authorities had not provided the applicants with a realistic possibility of judicial redress. This conclusion shows the growing readiness of the ECtHR to adjudicate procedural environmental rights, echoing the previous environmental transparency doctrines established in *Guerra v Italy* and the Taşkın case against Turkey.[171]

4.3. Strasbourg's Global Role in Climate Litigation

The ECtHR jurisprudence has now become a contributing factor to a body of climate constitutionalism. In an environmental and climate rights case, the Dutch Supreme Court in Urgenda and the German Constitutional Court in 2021 used or duplicated arguments created by the ECtHR. An active inter-judicial dialogue is emerging, with Colombian and Pakistani courts issuing rulings based on the themes of the academic comparisons.[172]

An example is the Urgenda decision, which used proportionality and human rights-based standards to hold the Dutch government to account over its emissions plan.

The fact that the ECHR was directly used by the Dutch Supreme Court implies that the normative power of the Court has grown within Europe.[173]

National courts of non-party countries to the Council of Europe, opting to use a human rights framework to embrace emerging environmental issues, have been inspired by the ECtHR's approach of the living instrument. The ECHR can become a de facto climate change judicial body, but only through its interpretation and not its black-and-white text.[174]

5. Conclusions and Reflections: Climate Litigation within the ECtHR's Evolving Jurisprudence

Three-quarters of a century after it came into force, the European Convention on Human Rights continues to build on its text, in response to new risks and social priorities. Environmental degradation and climate change have risen to become the characteristic issues of this century, amongst others. The European Court of Human Rights has established the role of ECHR in environmental and climate protection based on doctrinal innovation, strategic interpretation, and

[171] *Guerra and Others v Italy* App no 14967/89 (ECtHR, 19 February 1998); *Taşkın and Others v Turkey* App no 46117/99 (ECtHR, 10 November 2004); see also C Heri, 'Environmental Procedure Rights Before the ECtHR: The Legacy of *Guerra* and *Taskin*' (2023) *Revista Catalana de Dret Ambiental* 227.

[172] S Setzer and L Higham, 'Climate Litigation and Human Rights: The Role of the Strasbourg Court in Transnational Environmental Law' (2022) 11(2) *Transnational Environmental Law* 211.

[173] *State of the Netherlands v Urgenda Foundation* (Supreme Court of the Netherlands, 20 December 2019) paras 5.6.2–5.7.9; see also R Wewerinke-Singh, 'From *Urgenda* to *KlimaSeniorinnen*: The Rise of Human Rights-Based Climate Litigation in Europe' (*EJIL: Talk!,* 2024) <https://www.ejiltalk.org>.

[174] C Voigt, 'The ECtHR and International Environmental Law: A Convergence of Norms?' (2023); see also L Lavrysen, 'Climate Change Litigation before the ECtHR' (2020).

growing responsiveness to global trends, namely, the expanding use of Articles 2, 3, and 8 in a dynamic manner.[175]

The rise of the concept of climate vulnerability as a category of law, and in particular intersectional thinking concerning gender, age, and health, has created new avenues of human rights-based environmental demands.

Meanwhile, the reach of the ECtHR is much broader than Europe: its interpretive practices and principled reasoning are starting to play a role in climate litigation across the world.[176]

In the near future, the success of the Convention in preserving its normative power will rely on a number of variables: the capacity of the Court to innovate and build institutional legitimacy, its readiness to incorporate scientific and technological knowledge, and its adaptability to new emerging paradigms of rights-based approaches, such as digital environmental governance and AI-controlled climate instruments.[177]

The institutional dilemma is that climate science is no longer in question. The fact that the ECHR is a living instrument has already demonstrated that it might become not only a way of protecting against the classic abuse of freedom, but also a means of protecting environmental dignity, climate safety, and even intergenerational justice.[178] The flexibility that is the Convention's strongest asset will be indispensable in satisfying the requirements of the climate disaster. The question of whether this evolution will proceed in a coherent, rights-based way is something that the next generation of scholars, judges, and policymakers will have to address.

[175] L Lavrysen, 'The Role of the European Court of Human Rights in the Climate Crisis' (2020) 1 *Climate Law* 18.
[176] E Voigt, 'Transnational Dialogue and Climate Constitutionalism: The Role of the ECtHR in Global Climate Litigation' (2023) *Transnational Environmental Law* <https://doi.org/10.1017/S2047102523000271> accessed 30 Nov 2025.
[177] A Mantelero, 'Digital Environmental Rights and Climate Tech: From Risk Regulation to Digital Due Process' (2023) 41 *Comp L & Sec Rev* 105879.
[178] A Boyle, 'Progressing the Human Right to a Healthy Environment' (2022) 10 *Journal of Human Rights and the Environment* 5.

ENVIRONMENTAL CRIMES AMID THE UKRAINIAN CONFLICT: IMPLICATIONS FOR HUMAN RIGHTS PROTECTION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Claire-Marie Beyet[179]

Abstract

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Keywords: *Armed conflict, Environmental crimes, European Convention, Human Rights, Ukraine*

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1. Introduction

Environmental damage in the context of armed conflict has profound implications for the protection of fundamental human rights under the European Convention on Human Rights (ECHR). In Ukraine, once a major global agricultural hub supplying food to over 400 million people worldwide,[181] the war has had devastating impacts on Ukraine's environment.[182]

Russia's war on Ukraine has violated the United Nations Charter, which states that 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State'.[183] The ongoing conflict in Ukraine has precipitated widespread devastation, not only through direct loss of life,[184] and infrastructure damage,[185] but also via significant environmental harm. Environmental damage from the war in Ukraine has been documented by Ukrainian and international agencies, NGOs, and European institutions. As the country looks toward postwar reconstruction, the environmental crimes, like the destruction of industrial sites, water pollution, and ecosystem damage have become a critical but often overlooked part of the conflict's human toll.[186] Indeed, according to the Prime Minister of Ukraine in October 2024:

> 'Damage to Ukrainian ecosystems is estimated at USD 65 billion. One third of Ukraine's forests have been affected by the war. 20% of Ukraine's protected areas have also been

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[181] A Nagurney, 'The Future of Food Security after the Collapse of Black Sea Grain Deal' (*World Economic Forum*, 21 July 2023) <https://www.weforum.org/stories/2023/07/food-security-black-sea-grain-deal/> accessed 15 Jun 2025.

[182] M Solokha and others, 'Russian-Ukrainian War Impacts on the Environment: Evidence from the Field on Soil Properties and Remote Sensing' (2023) *Science of the Total Environment* 166122 <https://doi.org/10.1016/j.scitotenv.2023.166122> accessed 20 June 2025.

[183] *Charter of the United Nations* (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI.

[184] As of February 2025, according to U.N. statistics, 13,134 civilian deaths have been recorded in Ukraine since Russia launched its full-scale invasion in February 2022. UN Human Rights Monitoring Mission in Ukraine, 'All Reports' <https://ukraine.ohchr.org/en/reports> accessed 14 June 2025.

[185] The damage to housing facilities from the Russian invasion of Ukraine was estimated at 57.6 billion U.S. dollars between 24 February 2022, and 31 December 2024. A further 36.7 billion U.S. dollars were recorded in losses from damages to transportation. The total war damage to Ukrainian sectors was estimated at 176 billion U.S. dollars over that period. Statista, 'Estimated Total War Damage Value in Ukraine from 24 February 2022 to 31 December 2024, by Sector' (2025) <https://www.statista.com/statistics/1303344/ukraine-infrastructure-war-damage/> accessed 17 June 2025.
Analysts verified 4,370 incidents involving infrastructural damage and civilian harm between 24 February 2022 and 31 January 2025. Education facilities were the worst hit, the data reveals, with 1,146 incidents recorded in this category, including incidents involving destruction to schools, kindergartens, university buildings and other education facilities such as sports centres. Eyes on Russia, "The War in Maps: Open Source Data Reveals Scale of Damage to Ukraine's Schools and Critical Infrastructure" *Centre for Information Resilience* (2025) <https://www.info-res.org/eyes-on-russia/articles/the-war-in-maps-open-source-data-reveals-scale-of-damage-to-ukraines-infrastructure/> accessed 19 June 2025.

[186] Eyes on Russia, 'The War in Maps: Open Source Data Reveals Scale of Damage to Ukraine's Schools and Critical Infrastructure' *Centre for Information Resilience* (2025) <https://www.info-res.org/eyes-on-russia/articles/the-war-in-maps-open-source-data-reveals-scale-of-damage-to-ukraines-infrastructure/> accessed 19 June 2025.

affected. As a result of the war, 35% of Europe's biodiversity owned by Ukraine is under threat. In addition, almost 10,000 hectares of internationally important wetlands in Ukraine have been destroyed as a result of Russia's blowing up of the Kakhovka hydroelectric power plant. About a quarter of Ukraine's territory is mined, which also causes significant damage.'[187]

Several international law instruments proscribe military crimes against the environment, including: the 1977 Additional Protocols to the Geneva Conventions;[188] the Environmental Modification Convention;[189] and Article 8(2)(b)(iv) of the 1998 Rome Statute of the International Criminal Court (ICC).[190] From a European standpoint, the destruction caused by the Ukrainian conflict challenges the Convention's guarantees of the right to life[191], the right to respect for private and family life[192]and the right to an effective remedy[193]. These rights are endangered not only by immediate physical threats but also by long-term environmental degradation affecting health, livelihoods and wellbeing.

Only Ukraine has exercised its prerogative to accept the ICC's jurisdiction over alleged crimes occurring on its territory, and became the 125th State Party to the ICC on 1 January 2025.[194] Russia revoked its signature to the Additional Protocol I to the Geneva Conventions related to the protection of victims of international armed conflicts[195], was expelled from the Council of Europe,[196] and denounced in February 2023 the Council's Conventions, including access to the European Court of Human Rights.[197] While Russia no longer has direct obligations to comply

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[187] Organisation for Security and Co-operation in Europe, 'Environmental Monitoring of the War Against Ukraine and Recovery Strategy' (2025) <https://www.osce.org/node/536855> accessed 20 June 2025.
[188] Protocol *Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts* (Protocol I) (entered into force 8 June 1977), 1125 UNTS3.
[189] Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD) (adopted 10 Dec 1976, entered into force 5 October 1978) 1108 UNTS 151.
[190] UN General Assembly, Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (Rome Statute).
[191] Council of Europe, *European Convention on Human Rights* (as amended) (entered into force 4 November 1950) art 2.
[192] Ibid art 8.
[193] Ibid art 13.
[194] ICC, 'ICC welcomes Ukraine as a new State Party' (ICC, 2 January 2025) <https://www.icc-cpi.int/news/icc-welcomes-ukraine-new-state-party> accessed 17 June 2025.
[195] The Ministry of Foreign Affairs of the Russian Federation, 'Press release on the withdrawal of the declaration to Protocol Additional to the 1949 Geneva Conventions and relating to the protection of victims of international armed conflicts (Protocol I) on Russia's acceptance of the competence of the International Fact-Finding Commission' (22 October 2019) <https://www.mid.ru/en/foreign_policy/news/1473198/> accessed 17 June 2025.
[196] Council of Europe Commissioner for Human Rights, 'Report of the Commissioner for Human Rights on the Human Rights Situation in Ukraine' (Council of Europe, 2023) <https://www.coe.int/en/web/commissioner/-/report-of-the-commissioner-for-human-rights-on-the-human-rights-situation-in-ukraine> accessed 17 June 2025.
[197] Council of Europe, 'Russia ceases to be party to the European Convention on Human Rights' (Council of Europe, 2022)

with future ECHR rulings post-exit, it is still possible to file cases on behalf of Russian citizens or those in territories under Russian control.

1. Contextualising Environmental Crimes in the Ukrainian Conflict

Since the conflict in Ukraine started in 2014 and intensified in 2022, the country has faced severe environmental damage, which has faded from the focus on the humanitarian crisis. Destruction is not just an environmental issue; it directly impacts human rights, raising major legal questions under the European Convention on Human Rights, especially regarding state responsibilities to prevent and address such harm during wartime.[198]

The toll on Ukraine's environment has been severe and multifaceted. Industrial sites, including chemical factories, mines and oil depots located near or within conflict zones, have sustained damage or been destroyed, releasing dangerous pollutants into the air, soil, and water systems. Meanwhile, the subsequent explosions have ravaged forests, farmlands and water bodies, disrupting ecosystems and agricultural activities critical to local communities.[199]

The environmental consequences are stark:

Soil degradation: Military operations have left soil contaminated and rendered agricultural lands unusable, threatening food security and livelihoods.[200] Russian defensive lines in Ukraine are among the most extensive fortifications seen since World War II. Chemical pollution is widespread across the country, resulting from munitions, damage to industrial sites and waste facilities, as well as leaks of oil and lubricants. Additionally, Ukraine is heavily contaminated by landmines and unexploded ordnance, further exacerbating the environmental and human toll of the conflict[201]. As of late April 2025, the Ukrainian Defence Ministry estimated that around 156,000 km² of territory (about 28% of the country) may still be polluted with mines and

<https://www.coe.int/en/web/portal/-/russia-ceases-to-be-party-to-the-european-convention-on-human-rights> accessed 17 June 2025.

[198] Council of Europe Commissioner for Human Rights, 'Report on Ukraine and Human Rights Violations' (2023).

[199] Conflict and Environment Observatory, 'Nature' (Conflict and Environment Observatory, 2024) <https://ceobs.org/ukraine-conflict-environmental-briefing-nature/> accessed 17 June 2025.

[200] Organisation for Security and Cooperation in Europe, 'Human Rights and Environmental Impacts of the Conflict in Ukraine' (OSCE, 2024) <https://www.osce.org/ukraine-report-2024> accessed 17 June 2025.

[201] Institute for the Study of War, 'Russian Offensive Campaign Assessment, August 3, 2025' (2025) <https://understandingwar.org/research/russia-ukraine/russian-offensive-campaign-assessment-august-3-2025/> accessed 9 September 2025.

Unexploded Ordnance (UXO).[202] These dangerous munitions have been found in at least eleven of Ukraine's 27 regions.[203]

Water pollution: Damage to water treatment plants and pipelines has compromised access to clean drinking water, while hazardous substances from industrial wreckage have contaminated rivers and groundwater. The war has had several major effects on coastal and marine ecosystems, including chemical contamination, intense noise pollution, and direct physical damage to habitats caused by shelling and military structures. It has also disrupted conservation efforts in these areas. Beaches and coastal zones have been mined to block amphibious assaults, and both Russia and Ukraine have placed sea mines in surrounding waters, as well as landmines.[204] One of the main incidents pertaining to water pollution dates to 6th June 2023, when the Kakhovka dam breach caused massive damage, submerging 620 square kilometres of territory in four oblasts, specifically: Dnipropetrovsk, Kherson, Mykolaiv and Zaporizhzhia. Apart from basic infrastructure and nature, damage was seen in cultural sites such as historic buildings, museums and places of worship.[205] More recently, in mid-December 2024, two Russian oil tankers were hit by a heavy storm in the Kerch Strait, which connects the Black Sea with the Sea of Azov releasing some 4,300 metric tons of mazut oil, while the other ran aground and leaked at least 2,000 tons of the same substance.[206] Additionally, the dumping of ammunition and war equipment, decomposition of ammunition, release and leaching of explosive residues are the primary sources of contamination during war, further increased by direct and indirect military attacks on such infrastructures.[207] As of spring 2025, Ukraine continues to struggle with its water crisis: around 8.5 million people, nearly 20 % of the population, need urgent help with water, sanitation, and hygiene. UNICEF reports that while 88 % of residents have access to safely

[202] United Nations Office at Geneva, "'It Is an Elephant': Ukraine's Unexploded Mine Problem' (United Nations, 5 June 2025) <https://www.ungeneva.org/en/news-media/news/2025/06/107106/it-elephant-ukraines-unexploded-mine-problem> accessed 17 June 2025.

[203] Human Rights Watch, 'Landmine Use in Ukraine' (HRW, 2023) <https://www.hrw.org/sites/default/files/media_2023/06/UkraineLM_Briefing_June2023.pdf> accessed 17 June 2025.

[204] R P Pedrozo, 'Russia-Ukraine Conflict: The War at Sea' (2023) 100 International Law Studies 1.

[205] Government of Ukraine and United Nations, 'Post-Disaster Needs Assessment: 2023 Kakhovka Dam Disaster, Ukraine' (United Nations Development Programme, 2023) <https://www.undp.org/ukraine/publications/post-disaster-needs-assessment-2023-kakhovka-dam-disaster-ukraine> accessed 17 June 2025.

[206] Dimitar Bechev, 'Tackling the Russia-Ukraine War's Environmental Damage in the Black Sea' (Carnegie Europe, 24 Feb 2025) <https://carnegieendowment.org/posts/2025/02/tackling-the-russia-ukraine-wars-environmental-damage-in-the-black-sea?lang=en> accessed 17 June 2025.

[207] D Hryhorczuk, BS Levy, M Prodanchuk, et al., 'The environmental health impacts of Russia's war on Ukraine' (2024) 19 Journal of Occupational Medicine and Toxicology 1.

managed water and another 6 % receive basic services, the remaining 6 % or over two million people, are left with inadequate or unsafe supplies.[208]

Air quality deterioration: The release of smoke, dust, and toxic chemicals from bombed facilities has exacerbated respiratory problems and posed long-term health risks to residents. **Air quality has declined sharply, particularly following the destruction of fuel storage and industrial sites, which released large amounts of harmful pollutants.**

The mass movement of military vehicles added to emissions from burning fossil fuels. Moreover, wildfires have scorched vast areas of Ukraine's forests and plantations, further degrading the environment.[209] Furthermore, in March 2025, Ukraine submitted evidence to the Organisation for the Prohibition of Chemical Weapons, such as RG-Vo gas grenades and contaminated soil and grass, confirming the presence of CS tear gas, a riot control agent banned in wartime. The OPCW has verified traces of tear gas in multiple locations but has yet to attribute responsibility, due to the practical difficulties of collecting samples amid active hostilities.[210]

Ecosystem disruption: Natural habitats have been destroyed or severely impaired, leading to a loss of biodiversity and further ecological imbalance. Fires from conflict destroyed more than 60,000 hectares of wildland.[211]

Certain acts during the Ukrainian conflict can be classified as environmental crimes, or ecocide, namely 'the devastation and destruction of the environment to the detriment of life'.[212] Pursuant to Directive (EU) 2024/1203

> 'Member States shall ensure that criminal offences (…) constitute qualified criminal offences if such conduct causes: (a) the destruction of, or widespread and substantial damage which is either irreversible or long-lasting to, an ecosystem of considerable size or environmental value or a habitat within a protected site, or (b) widespread and

[208] World Health Organization, 'Ensuring Safe Drinking-Water for Ukrainians: Government Works with WHO and UNICEF' (WHO, 3 April 2025) <https://www.who.int/europe/news/item/03-04-2025-ensuring-safe-drinking-water-for-ukrainians--government-works-with-who-and-unicef> accessed 17 June 2025.

[209] United Nations Environment Programme, 'Environmental Assessment of Eastern Ukraine' (UNEP, 2023) <https://www.unep.org/resources/report/environmental-assessment-eastern-ukraine> accessed 17 June 2025.

[210] Permanent Representation of Ukraine to the Organisation for the Prohibition of Chemical Weapons, 'Statement by the Delegation of Ukraine at the 108th Session of the Executive Council' (OPCW, 2025) <https://www.opcw.org/sites/default/files/documents/EC/108/Ukraine_EC-108_National%20Statement_ol_%28e%29.pdf> accessed 17 June 2025.

[211] T Pandito, 'When War and Nature Collide in Ukraine' (*Oxford Political Review,* 25 April 2025) <https://oxfordpoliticalreview.com/2025/04/25/when-war-and-nature-collide-in-ukraine/> accessed 17 June 2025.

[212] European Law Institute, 'ELI Report on Ecocide Model Rules for an EU Directive and a Council Decision' (2023).

substantial damage which is either irreversible or long-lasting to the quality of air, soil or water'.[213]

From an international standpoint, these include attacks on civilian infrastructure with known environmental hazards, such as chemical plants and nuclear facilities; the indiscriminate release of pollutants due to military actions; and the destruction of protected natural areas without military justification.[214]

The destruction of civilian infrastructure with environmental hazards raises both International Humanitarian Law (IHL) and ECHR concerns. Under IHL, principles of proportionality and necessity are key: military actions must not cause excessive civilian harm relative to the anticipated military advantage, and attacks must be necessary to achieve a legitimate military objective.[215] Widespread destruction of civilian infrastructure, especially with significant environmental risks, can violate these principles if deemed disproportionate or unnecessary.[216] This includes the risk of contaminating water sources or releasing toxic chemicals, which could lead to long-term harm. On the other hand, ECHR positive obligations under Articles 2 (Right to Life), 3 (Prohibition of Torture), and 8 (Right to Respect for Private and Family Life) require states to take proactive measures to prevent environmental damage that threatens civilians' health and well-being.[217] While IHL balances military necessity with civilian protection, the ECHR imposes a broader duty on states to protect civilians from environmental harm, even during armed conflict. The tension between these two frameworks is evident when military necessity under IHL collides with the human rights obligations of states to safeguard their citizens' right to a healthy environment.[218]

Furthermore, beyond the immediate physical harm from pollution and toxic exposure, there are broader impacts on public health and community wellbeing. Contaminated water and soil threaten essential needs like food and safe housing, while the degradation of ecosystems undermines livelihoods, particularly for rural and displaced populations. For many,

[213] Directive (EU) 2024/1203 of the European Parliament and of the Council of 11 April 2024 on the protection of the environment through criminal law and replacing Directives 2008/99/EC and 2009/123/EC (2024) OJ L 2024/1203.
[214] International Committee of the Red Cross, 'Guidelines on the Protection of the Natural Environment in Armed Conflict' (ICRC, 2020).
[215] International Committee of the Red Cross, 'Geneva Conventions and Additional Protocols' (ICRC, 1977).
[216] Protocol Additional to the Geneva Conventions of 12 August 1949 (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) art 54(2).
[217] See Section 3.
[218] Alexander Orakhelashvili, 'The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?' (2008) 19 *EJIL* 161-182.

environmental harm compounds the hardships of conflict, eroding the basic conditions necessary for life and dignity. [219]

2. The European Convention on Human Rights and Environmental Protection: Legal Foundations

The ECHR was drafted with the fundamental aim of protecting civil and political rights in the aftermath of World War II. Although it does not explicitly recognise environmental rights as standalone guarantees, over time the Convention and the jurisprudence of the European Court of Human Rights (ECtHR) have increasingly supported the fight for environmental justice insofar as it impacts the core rights protected under the Convention.

2.1. The Relevant Articles of the ECHR

Environmental damage in conflict settings such as Ukraine is inseparable from human rights concerns. Indeed, pollution and environmental degradation can severely interfere with individuals' ability to live in safe and healthy conditions, impacting their physical and psychological well-being. Vulnerable groups, such as children, the elderly, and internally displaced persons, are often disproportionately affected, facing heightened exposure to environmental risks and reduced access to essential services[220] making environmental crimes profound violations of human rights. Environmental harm directly implicates fundamental rights guaranteed by the ECHR, as several key Articles of the Convention provide the foundation for environmental protection through the prism of human rights, including:

Article 2, Right to Life, which guarantees that

> '1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. 2. Deprivation of life shall not be

[219] Conflict and Environment Observatory, 'How does war damage the environment?' (Conflict and Environment Observatory, 2025) <https://ceobs.org/how-does-war-damage-the-environment/> accessed 17 June 2025; Guidelines on the Protection of the Natural Environment in Armed Conflict (n 35); Geneva Centre for Human rights Advancement and Global Dialogue, Geneva Academy, 'Armed Conflicts, Environment and Human Rights-International Panel Debate, Proceedings and Lessons Learned' (Geneva Centre for Human rights Advancement and Global Dialogue, Geneva Academy, 2022), <https://geneva-academy.ch/joomlatools-files/docman-files/Armed-Conflicts-Environment-and-Human-Rights.pdf> accessed 17 June 2025.

[220] John H Knox, 'Linking Human Rights and Climate Change at the United Nations' (2009) 33 *Harvard Environ LR* 477.

regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary (…)'.[221]

This Article guarantees everyone's right to life and requires States to take appropriate measures to safeguard it. The right to life has already been interpreted broadly to include protection from environmental hazards, pertaining to climate change, that pose a serious and immediate risk to individuals' lives.[222]

Article 8, Right to Respect for Private and Family Life:

> '1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others'.[223]

Article 8 protects the physical and psychological integrity of individuals, encompassing a broad understanding of privacy and family life. The ECtHR has recognised that severe environmental pollution and degradation can interfere with these rights by affecting individuals' living conditions, health, and wellbeing.[224]

Article 13, Right to an Effective Remedy: 'Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority, notwithstanding that the violation has been committed by persons acting in an official capacity.'[225] This provision guarantees the right to a fair and effective legal remedy before

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[221] *European Convention on Human Rights* (n 191) art 2.

[222] *Verein KlimaSeniorinnen Schweiz and Others v Switzerland* (GC) App. no 53600/20 (ECtHR, 9 April 2024); *Öneryildiz v Turkey* (GC) App. no 48939/99 (ECtHR, 30 November 2004); *Budayeva and Others v Russia* App. nos 15339/02, 11673/02, 15343/02, 20058/02, 21166/02) (ECtHR, 20 March 2008); *López Ostra v Spain* (1994) Series A no 303.

[223] *European Convention on Human Rights* (n 191) art 8.

[224] *López Ostra v Spain* (1994) Series A no 303; *Guerra and Others v Italy* (GC) (1998) 26 EHRR 357; *Hatton and Others v United Kingdom* (GC) (2003) 42 EHRR 1; *Dactylidi v. Greece* App no 52903/99 (ECtHR, 27 March 2003); *Taşkin and Others v Turkey* App no 46117/99 (ECtHR, 10 November 2004); *Moreno Gómez v. Spain* App no 4143/02 (ECtHR 16 November 2004); *Fadeyeva v Russia* App. no. 55723/00 (ECtHR, 9 June 2005); *Roche v. United Kingdom* (GC) App no 32555/96 (ECtHR, 19 October 2005); *Öckan and others v. Turkey* App no 46771/99 (ECtHR, 28 March 2006); *Ledyayeva and Others v. Russia* App nos 53157/99, 53247/99, 53695/00 an 56850/00 (ECtHR 26 March 2007); Giacomelli v. Italy App no 59909/00 (ECtHR, 2 November 2006); *Lemke v. Turkey* App no 17381/02 (ECtHR 5 June 2007); *Tătar v. Romania* App no 67021/01 (ECtHR, 27 January 2009); *Brânduşe v. Romania* App no 6586/03 (ECtHR 7 April 2009); *Băcilă v. Romania* App no 19234/04 (EChR 30 March 2010); *Deés v. Hungary* App no 2345/06 (ECtHR 9 November 2010); *Dubetska and Others v Ukraine* App no 30499/03 (ECtHR, 10 February 2011); *Grimkovskaya v. Ukraine* App no 38182/03 (ECtHR, 21 July 2011).

[225] *European Convention on Human Rights* (n 191) art 13.

national authorities when rights under the Convention are violated. In the context of environmental harm, this right is crucial to ensure accountability and redress for victims.[226]
Article 1 of Protocol No. 1, Protection of Property:

> 'Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties'.[227]

Though not directly environmental, damage to property caused by environmental destruction can engage this Article, which protects peaceful enjoyment of possessions.

2.2. The Court's Evolving Jurisprudence on Environmental Harm

The ECtHR's case law has progressively recognised environmental protection as integral to safeguarding Convention rights. Landmark judgments have confirmed that environmental degradation, when severe enough, can engage Articles 2 and 8, obliging States to regulate and prevent harmful environmental conditions.
For instance, in *Fadeyeva v Russia* (2005), the Court held that serious environmental pollution causing health risks could violate Article 8, emphasising:

> 'that the authorities in the present case were certainly in a position to evaluate the pollution hazards and to take adequate measures to prevent or reduce them. The combination of these factors shows a sufficient nexus between the pollutant emissions and the State to raise an issue of the State's positive obligation under Article 8 of the Convention.'[228]

Similarly, *Lopez Ostra v Spain* (1994) acknowledged that severe pollution affecting an individual's home and health constituted an interference with private and family life.[229]

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[226] *Dactylidi v. Greece* App no 52903/99 (ECtHR, 27 March 2003).
Hatton and Others v United Kingdom (GC) (2003) 42 EHRR 1; *Öneryildiz v Turkey* (GC) App. no 48939/99 (ECtHR, 30 November 2004).
[227] Protocol No 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 11 May 1994, entered into force 1 November 1998) ETS No 155.
[228] *Fadeyeva v Russia* App no 55723/00 (ECtHR, 9 June 2005), para 92.
[229] *López Ostra v Spain* (1994) Series A no 303, para 51.

These precedents are significant because they extend the Convention's reach beyond direct state violence to encompass environmental conditions that threaten life and well-being. However, the Court balances these rights with States' margin of appreciation, a doctrine allowing some discretion in how States fulfil their obligations, particularly when environmental regulation involves complex social and economic considerations.[230] The margin of appreciation is a doctrine that the ECtHR has developed when considering whether a member State has breached the Convention. It involves permitting member States a degree of discretion, when they take legislative, administrative or judicial action in the area of a Convention right.[231]

The Court's jurisprudence offers a framework for addressing environmental harm, but its application in the context of armed conflict presents unique challenges. The ECHR, designed primarily for peacetime and stable governance, complicates the assessment of state responsibility and enforcement of rights during conflict. States may invoke military necessity to justify environmental damage, citing exceptions or reduced obligations under international law.[232] Yet, while the ECHR's core commitment to protecting life and dignity remains relevant, the realities of war often limit access to remedies, hindering victims' ability to seek justice.

Challenges in Applying the ECHR to Environmental Crimes in Armed Conflict.

Applying the ECHR to environmental crimes arising during armed conflict poses significant challenges. While the Convention offers a framework for protecting fundamental rights that are inevitably affected by environmental harm, the realities of war complicate both the attribution of responsibility and the practical enforcement of these rights.[233]

2.3. Attribution of State Responsibility during Armed Conflict

The complexity of military operations, multiple actors (including non-state armed groups), and rapidly shifting frontlines blur the lines of accountability. States may invoke the principle of military necessity under international humanitarian law to justify certain actions causing environmental damage, complicating claims that such acts violate the Convention.[234] A core difficulty lies in establishing clear State responsibility for environmental harm amidst the chaos of armed conflict. Attribution of state responsibility under the ECHR during armed conflict

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[230] Y Arai, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR (*Intersentia, 2022); A Legg, *The Margin of Appreciation in International Human Rights Law* (OUP, 2012).

[231] Council of Europe, 'Margin of Appreciation Doctrine' (2008) <https://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2_en.asp> accessed 9 September 2025.

[232] ECtHR, 'Armed conflicts' (ECtHR Press Unit, 2023) <https://www.echr.coe.int/documents/d/echr/fs_armed_conflicts_eng> accessed 18 June 2025.

[233] *Banković and Others v Belgium and Others* (GC) App no 52207/99 (ECtHR, 12 December 2001); S Besson, 'Concurrent Responsibilities under the European Convention on Human Rights' in A Van Aaken and I Motoc (eds), *The European Convention on Human Rights and General International Law* (OUP, 2018) 169–170.

[234] A Boyle, 'Human Rights and the Environment: Where Next?' (2012) 3 *EHR LR* 315.

focuses on the control a State has over territory, the actions of State military forces, and the effective control over non-State actors. The Court's extraterritoriality jurisprudence provides guidance in this context, as seen in *Al-Skeini* v the *United Kingdom*, where the Court clarified that a State could be held responsible for human rights violations committed by its forces abroad if it exercises effective control over a territory.[235] Similarly, in *Ilascu v Moldova and Russia*, the Court found Russia responsible for actions in Transnistria based on its control over the region, despite the lack of formal sovereignty.[236] In *Catan v Moldova and Russia*, the Court held that Russia's de facto control over Transnistria made it accountable for the rights violations there.[237] These cases highlight the Court's approach to attributing responsibility for actions in areas of effective control, which is crucial when considering State liability for environmental damage in conflict zones.

Moreover, the ECtHR traditionally operates within the framework of peacetime human rights protection and relies on a relatively stable domestic legal order to attribute responsibility.[238] During active conflict, the functioning of judicial institutions may be severely impaired or suspended, undermining the Convention's effectiveness. These factors present significant hurdles to applying the ECHR's standards in a straightforward manner.

The ECtHR has previously held in the *Al-Skeini and Others v the United Kingdo*m that the ECHR applies extraterritorially to areas under the effective control of a state party, including during military operations outside its borders.[239] This case expanded the scope of the ECHR to cover military occupations, emphasising that the Court has jurisdiction over actions occurring in territories where a State has effective control, meaning even outside its own borders, a principle that is crucial in cases concerning Russian actions in Ukraine.[240] Moreover, the Court already ruled that Russia had effective control over territories which were not formally part of Russian territory, and thus was responsible for human rights violations occurring there.[241] The judgment reinforced that a state's responsibility for violations can extend to areas where it has military control or influence, regardless of formal sovereignty. This is crucial for understanding Russia's actions in Crimea and eastern Ukraine, where it exerts control over territories even if they are not

[235] *Al-Skeini and Others v. the United Kingdom* App no 55721/07 (ECtHR 7 July 2011) paras 135-150.
[236] *Ilascu and Others v. Moldova and Russia* App no 48787/99 (ECtHR 8 July 2004) paras 376-399.
[237] *Catan and others v. Moldova and Russia* App nos 43370/04, 8252/05 and 18454/06 (ECtHR 19 October 2012), paras 107-108.
[238] P Sands, 'From Conflict to Peacebuilding: The Role of Environmental Law' (2016) 12 *Intl Environ LJ* 89.
[239] *Al-Skeini and Others v. the United Kingdom* App no 55721/07 (ECtHR 7 July 2011), paras 135-150
[240] ECtHR, 'Extra-territorial jurisdiction of States Parties to the European Convention on Human Rights' (ECtHR Press Unit, 2018), <https://www.echr.coe.int/documents/d/echr/fs_extra-territorial_jurisdiction_eng> accessed 18 June 2025.
[241] *Georgia v. Russia (I)* (GC) App no 13255/07 (ECtHR, 3 July 2014) paras 168; *Ukraine v. Russia (re Crimea)* (GC) App nos 20958/14 and 38334/18 (ECtHR, Admissibility decision, 16 December 2020) para 352.

formally part of Russia. Lastly, the ECtHR emphasised the need for a balance between military necessity and humanitarian considerations in occupied territories.[242]

2.4. Enforcement of ECtHR Judgments Amid Hostilities and Political Tensions: Balancing Military Necessity and Human Rights Obligations

Another significant challenge is the enforcement of the ECtHR's rulings concerning environmental harm in conflict contexts. The Court's decisions depend on States' good faith implementation, however, in wartime conditions, compliance may be delayed, partial, or entirely disregarded. Political instability and weakened rule of law undermine mechanisms designed to ensure redress.

In the Ukrainian conflict, where territorial control is contested and sovereignty questions are acute, enforcing environmental protection obligations becomes even more difficult. The Court's capacity to influence conduct on the ground is therefore constrained, raising questions about the practical utility of human rights litigation as a tool to address environmental crimes during active hostilities.[243] If violations of the ECHR occur in regions under a State's control, the State may be held responsible. However, enforcement of rulings has become more challenging since Russia's withdrawal from the Council of Europe in 2022.

A further complication arises from the tension between military necessity and human rights protections. International humanitarian law recognises that certain environmental harm may occur as collateral damage during legitimate military operations.[244] The challenge lies in distinguishing unlawful environmental destruction, such as targeting civilian infrastructure or wilful pollution, from unavoidable wartime impacts.

The ECtHR's jurisprudence has yet to fully articulate how it would navigate this balance, especially in large-scale conflicts like Ukraine's. Developing clear standards for when environmental damage in war breaches Convention rights is crucial for ensuring that human rights protections remain meaningful without unduly constraining legitimate military conduct.

3. Case Studies: ECHR Jurisprudence and Conflict-related Environmental Harm

[242] *Hassan v. the United Kingdom* App no 29750/09 (ECtHR, 16 September 2014) paras 92 and 102.
[243] Catherine Robinson, 'The Environmental Jurisprudence of the European Court of Human Rights' (2010) 22 Oxford Journal of Environmental Law 97; Jacqueline Peel and Hari M Osofsky (eds), Climate Change Litigation: Regulatory Pathways to Cleaner Energy (Cambridge University Press 2015).
[244] International Committee of the Red Cross, 'The Environment and International Humanitarian Law' (ICRC Casebook) <https://casebook.icrc.org/case-study/environment-and-international-humanitarian-law> accessed 18 June 2025.

To better understand the practical application of the ECHR to environmental crimes, it is relevant to examine key cases in which the ECtHR has addressed environmental harm, particularly in contexts involving armed conflict or state responsibility for environmental degradation. While direct case law on conflict-related environmental harm is limited, selected peacetime pollution precedents provide insight into how the Court has conceptualised environmental harm as a human rights issue. One of the earliest and most influential cases is *Lopez Ostra v Spain* (1994), where the Court held that 'severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely'.[245] Moreover, 'despite the margin of appreciation left to the respondent State, the Court considers that the State did not succeed in striking a fair balance between the interest of the town's economic well-being - that of having a waste-treatment plant - and the applicant's effective enjoyment of her right to respect for her home and her private and family life'[246] constituted a violation of Article 8 (right to respect for private and family life). The Court recognised that environmental damage could seriously impact physical and psychological well-being, extending the Convention's protection to encompass 'the quality of life', environmental quality.[247]

In *Fadeyeva v Russia (2005*), the Court further developed this approach, ruling that a local resident exposed to industrial pollution suffered a violation of her right to respect for private and family life. The Court concluded 'that the authorities in the present case were certainly in a position to evaluate the pollution hazards and to take adequate measures to prevent or reduce them'.[248]

Another example stands in the *Öneryıldız v Turkey* case, pertaining to a methane explosion at a landfill. The ECtHR held Turkey responsible for violation of Article 2 and Article 8 due to its 'failure to comply with its procedural obligation' and to prevent environmental hazards.[249]

These cases illustrate the Court's willingness to engage with environmental issues, holding States accountable for harm arising from pollution and environmental mismanagement even absent direct physical violence.

Nevertheless, despite these advances, the ECtHR has not yet extensively dealt with environmental harm caused by armed conflict. The Ukrainian conflict exemplifies the challenges of applying existing jurisprudence to wartime environmental damage. The Court has tended to focus on peacetime scenarios, where States have clear regulatory control and judicial mechanisms are functioning.

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[245] *López Ostra v Spain* (1994) Series A no 303 para 51.
[246] Ibid para 58.
[247] Ibid para 50.
[248] *Fadeyeva v Russia* App no 55723/00 (ECtHR, 9 June 2005) para 92.
[249] *Öneryildiz v Turkey* (GC) App no 48939/99 (ECtHR, 30 November 2004) para 148.

The lack of direct case law on conflict-related environmental harm means that the Court's principles may need further development to address issues such as damage caused by military operations, destruction of industrial infrastructure, or pollution resulting from hostilities. Questions remain about how the Court will balance State sovereignty, military necessity, and human rights protection in these contexts.[250]

4. National Implementation: Challenges and Approaches in Applying the ECHR to Environmental Crimes in Ukraine

Effective environmental governance depends on robust institutions that ensure compliance with regulations while making remedies accessible. In conflict-affected areas, the breakdown of state control weakens these institutions, hindering both the prosecution of environmental crimes and the protection of victims' rights.

The existing jurisprudence establishes that environmental harm affecting health and living conditions can engage Article 8 protections. However, the practical realities of armed conflict complicate enforcement. Nonetheless, the Court's recognition of environmental harm as a human rights issue provides a vital legal foundation for holding States accountable for environmental crimes committed during the conflict. It also underscores the importance of strengthening national legal systems to ensure victims have access to remedies. The practical protection of rights, including those affected by environmental crimes, largely depends on national courts and authorities. In the context of the Ukrainian conflict, national implementation presents a complex and evolving landscape, shaped by legal, political, and practical challenges.[251]

National courts serve as the first line of defence for individuals seeking to vindicate their Convention rights. Under the principle of subsidiarity, the ECtHR expects States to provide effective domestic remedies before cases are brought to Strasbourg.[252] This places a significant responsibility on Ukrainian courts to address environmental harm linked to the conflict.

However, the capacity of national courts to apply the ECHR to environmental crimes in wartime is constrained by several factors. These include limited resources, disrupted judicial infrastructure

[250] Council of Europe, 'Legal Analysis of the derogation made by Ukraine under Article 15 of the European Convention of Human Rights and Article 4 of the International Covenant on Civil and Political Rights' (2022) <https://rm.coe.int/legal-analysis-of-the-derogation-made-by-ukraine-under-article-15-of-t/1680aa8e2c> accessed 18 June 2025.

[251] JM Sorel, 'International Law and War in Light of the Ukrainian Conflict: A Relation Biased Since Its Inception' (2023) 5 *Revue Européenne du Droit* 101.

[252] Council of Europe, 'Guide to Good Practices in respect of Domestic Remedies' (Directorate General Human Rights and Rule of Law Council of Europe, 2013) <https://www.echr.coe.int/documents/d/echr/Pub_coe_domestics_remedies_ENG> accessed 18 June 2025.

in conflict zones and challenges in evidence collection. Moreover, political pressure and security concerns can undermine judicial independence and impartiality, impacting fair adjudication.

Ukraine's legal system is based on civil law principles and consists of a hierarchical court structure. At the top is the Constitutional Court, which interprets the Constitution, followed by the Supreme Court, which handles appeals and sets legal precedents. Below that, appellate courts and local courts deal with civil, criminal, and administrative cases. Specialised courts focus on business and government-related matters. Ukraine's judiciary is designed to be independent, though it has faced challenges in terms of corruption and political interference. Ongoing legal reforms aim to modernise the system, improve transparency, and align it with European Union standards, particularly in terms of human rights and fair trial practices.[253]

Ukraine has made legislative efforts to align national laws with its international human rights obligations, including environmental laws, regulations on industrial safety and frameworks for protecting natural resources. As an illustration, Article 50 of the Constitution of Ukraine states that 'Everyone has the right to an environment that is safe for life and health, and to compensation for damages inflicted through the violation of this right'.[254] This is further complemented by numerous national laws focusing on the protection of the environment and its related activities.[255] Ukraine is also a signatory to the Kyoto Protocol[256] and the Paris Agreement on Climate Change.[257] However, Ukraine faces implementation difficulties amid conflict.

There are emerging examples of litigation in Ukraine addressing environmental harm and human rights violations related to the conflict, such as damage to property or health impacts caused by pollution. These cases test how national courts interpret the ECHR's environmental protections in practice and whether they can provide timely and adequate remedies. Various domestic cases by Ukrainian environmental organisations, such as the Ukrainian Environmental League and Greenpeace Ukraine, have been filed against the Ukrainian government and Russia, focusing on the impact on biodiversity.

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[253] Dr I Paliashvili, 'Presentation for the Country Focus Workshop on Ukraine at the 1998 International Conference on Contractual Law and Agreements in Russia and the CIS' (Russian-Ukrainian Legal Group, 1998) <http://www.rulg.com/documents/ipprsnt.htm> accessed 18 June 2025; European Commission, 'Ukraine 2024 Report' COM(2024) 690 final.

[254] Constitution of Ukraine (adopted 28 June 1996, amended 8 December 2004, 1 February 2011, 19 September 2013, 21 February 2014, 2 June 2016 and 7 February 2019) art 50.

[255] See e.g Law of Ukraine of 25 June 1991 (as amended on 01 December 2022) No 1264-XII About protection of the surrounding environment; Forest code of Ukraine of 21 January 1994 (as amended on 17 June 2020) No 3852-XII; Law of Ukraine of 21 February 1995 No 46/95-BPN on Ecological Expertise; Law of Ukraine of 19 June 2003 (as amended on 11 April 2023) No 962-IV on the Protection of the Agricultural Land Fund; Subsoil Code of 24 July 2014 (as amended on 19 December 2019) No 132/94-VR; Law of Ukraine of 23 May 2017 No. 2059-VIII on Environmental Impact Assessment; Law of Ukraine of 8 October 2024 No 3991-IX about the basic principles of the State climatic policy.

[256] Kyoto Protocol to the United Nations Framework Convention on Climate Change (1997) 2303 UNTS 162.

[257] Conference of the Parties, Adoption of the Paris Agreement (2015) UN Doc FCCC/CP/2015/L.9/Rev/1.

For instance, in February 2025, the first war-related environmental crime against a natural reserve was formally brought before a court by Ukrainian Prosecutors, creating a precedent. 'Kherson prosecutors have filed an indictment against the Russia-appointed head of the Askania-Nova Biosphere Reserve for the illegal transfer of rare and specially protected animals to Russia'. [258]

5. Future Prospects: Strengthening the ECHR Framework to Address Environmental Crimes in Conflict

Beyond immediate conflict-related environmental crimes, the Convention faces growing pressure to respond to the broader global challenge of climate change, which increasingly intersects with security and human rights.[259] Climate-induced displacement, resource scarcity and environmental degradation exacerbate existing tensions and may fuel conflicts. The ECtHR's evolving jurisprudence on environmental rights, coupled with the Convention's protective framework, positions it as a potentially vital instrument to address these emerging risks.[260] Future developments could include clearer recognition of environmental rights within the Convention's ambit, strengthening State obligations to prevent environmental harm, and integrating climate resilience into human rights protections, like the International Criminal Court has tried at its level. Indeed, the ICC Draft Policy on Environmental Crimes underscores the growing international commitment to addressing environmental harm in conflict, which mirrors the broader challenges facing the ECHR in responding to climate change and environmental degradation.[261] As the Convention faces increasing pressure to address climate-induced displacement, resource scarcity, and environmental degradation, issues that exacerbate tensions and fuel conflicts, the growing alignment between international criminal law and human rights law becomes critical. The ECtHR's evolving jurisprudence on environmental rights, combined with the ICC's focus on prosecuting environmental crimes, strengthens the case for the ECHR to more explicitly recognise environmental harm as a violation of human rights. This could lead to clearer state obligations under the Convention, ensuring that environmental protections are

[258] Global Rights Compliance, 'Ukraine Brings First-Ever War Crimes Case to Court for Harm to a Natural Reserve' (Global Rights Compliance, 2025) <https://globalrightscompliance.org/ukraine-brings-first-ever-war-crimes-case-to-court-for-harm-to-a-natural-reserve/>, accessed 18 June 2025.

[259] *Verein KlimaSeniorinnen Schweiz and Others v Switzerland* (GC) App no 53600/20 (ECtHR, 9 April 2024); *Carême v France* (GC) App no 7189/21 (ECtHR, 9 April 2024); *Duarte Agostinho and Others v. Portugal and 32 Others* (GC) App no 3937/20 (ECtHR, 9 April 2024).

[260] ECtHR, 'Factsheet – Climate change' (ECtHR Press Unit, 2024) <https://www.echr.coe.int/documents/d/echr/fs_climate_change_eng> accessed 18 June 2025.

[261] Office of the Prosecutor of the International Criminal Court, 'Draft Policy on Environmental Crimes under the Rome Statute' (18 December 2024).

integrated into broader human rights frameworks and contributing to climate resilience in conflict and post-conflict settings.

Another important step would be for the ECtHR to clarify and possibly expand how it interprets rights, such as the right to life (Article 2) and the right to respect for private and family life (Article 8), to explicitly cover environmental harm during conflicts. More explicit guidance from the Court would help national courts and governments understand what's expected and push for stronger protections.

There is also room to consider whether the Convention should have a dedicated protocol or official guidance focused specifically on environmental rights. To do so, the Committee of Ministers could initiate discussions and recommend drafting an additional protocol, which would require negotiation and ratification by member States.[262] This process would be similar to the adoption of Protocol No. 12, which expanded anti-discrimination protections.[263] Alternatively, the Committee could issue interpretative guidance, either through the European Court of Human Rights or a non-binding resolution, clarifying the application of existing provisions in relation to environmental harm. While an additional protocol would involve a more formal and lengthy process, interpretative guidance could offer a quicker and less intrusive solution to enhance environmental protections under the Convention. This could better reflect how seriously we now take environmental issues as part of fundamental human rights.

Moreover, even if the ECHR already requires States to actively protect people's rights, not just avoid violating them, this principle needs to be developed further when it comes to environmental harm in conflict zones. States should have clear duties to prevent environmental damage, reduce their impact, and fix it when it happens, including in areas of contested control. This aligns with the ECtHR's established doctrine on positive obligations, particularly in contexts of risk to life and health, as seen in cases like *Fadeyeva v Russia* and *López Ostra v Spain*, where the Court emphasised the State's duty to take proactive measures to protect individuals from environmental harm, even in challenging or disputed circumstances.[264]

Making sure states are held responsible for environmental crimes during conflicts is crucial. The ECtHR can play a stronger role in reviewing state actions, and national courts must be encouraged to take environmental claims seriously. Cooperation with international courts, like the ICC, will also help when environmental destruction is a war crime.[265]

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[262] Council of Europe, 'Committee of Ministers', <https://www.coe.int/en/web/cm> accessed 9 September 2025.

[263] Protocol No 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 2000, entered into force 1 April 2005) ETS No 177.

[264] *Fadeyeva v Russia* App no 55723/00 (ECtHR, 9 June 2005); López Ostra v Spain (1994) Series A no 303.

[265] 'Draft Policy on Environmental Crimes under the Rome Statute' (Office of the Prosecutor, ICC 2024).

6. Conclusion

Historically, significant advances in international law have often emerged in the aftermath of particularly devastating conflicts, as exemplified by the adoption of the 1949 Geneva Conventions following the aftermath of World War II. Within this framework, the longstanding principles of military necessity and proportionality already provide a solid legal basis to hold Russia accountable for the extensive environmental destruction caused by its military campaign in Ukraine. However, stronger protections for the environment are essential, given its critical role in sustaining human life.

Through its evolving jurisprudence, the ECtHR has recognised that environmental degradation can severely interfere with the rights to life, private and family life, and access to justice. Yet, applying the Convention in the complex realities of conflict zones reveals challenges in attribution of responsibility, access to effective remedies and enforcement of judgments. These difficulties highlight the critical role of national courts and institutions, which must be empowered and supported to translate international standards into tangible protections on the ground.

Looking forward, the ECHR faces a rapidly changing environment—politically, technologically, and environmentally. As geopolitical tensions rise and digital technologies transform the ways we monitor and address environmental harm, the Convention must adapt to ensure it remains a guardian of human dignity and the environment. This includes addressing emerging issues such as climate change and digital rights, as well as reinforcing the rule of law in conflict-affected regions.

Ultimately, the Convention's future effectiveness will depend on sustained political commitment, judicial innovation, and collaborative approaches that bridge national and international efforts. By rising to these challenges, the ECHR can continue to safeguard both the rights of individuals today and the environmental foundations essential for future generations.

III. Expanding Access and Protection Mechanisms

CASE NOTE ON NAÏT-LIMAN: FORUM OF NECESSITY AND ACCESS TO JUSTICE BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS

Gabriel Melchiorre[266]

Abstract

This case note critically examines the European Court of Human Rights' Grand Chamber judgment in *Naït-Liman v Switzerland*, which confirms a restrictive interpretation of Article 6(1) ECHR. The decision underlines the enduring tension between safeguarding state sovereignty and ensuring effective access to justice for victims of extraterritorial human rights violations. While the ruling reinforces procedural and jurisdictional constraints, dissenting opinions highlight a growing acceptance of the forum of necessity, as an essential remedy within international human rights law. The note explores the normative challenges in reconciling these competing principles and contends about *Naït-Liman*'s possibility for future jurisprudential evolution towards broader access to justice in transnational cases.

Keywords: *Access to justice, European Convention of Human Rights, extraterritorial human rights violations, forum necessitatis, forum of necessity, transnational human rights litigation.*

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Introduction: Jurisdictional Barriers and the Right of Access to a Court.

This case note is introduced by a concise fiche d'arrêt, summarising the facts, procedural history, key legal issues, and judgment.

1. Facts, Procedure, and Legal Issues

Mr Naït-Liman, a Tunisian national residing in Switzerland as a recognised refugee, brought a civil action before Swiss courts against the former Tunisian Minister of the Interior, alleging acts of torture committed in Tunisia in 1992. The Swiss courts declined jurisdiction, holding that the dispute lacked a sufficient territorial connection with Switzerland. The legal issue before the European Court of Human Rights was whether such a refusal breached Article 6(1), and whether Switzerland was obliged to provide a *forum necessitatis* in the absence of any other forum.

2. Judgment Summary

The Grand Chamber found no violation of Article 6(1), holding that the Convention does not impose a general obligation on States to grant jurisdiction over extraterritorial civil claims without a sufficient connection to the forum State. The Court emphasised territoriality, immunity principles, and the margin of appreciation accorded to States.

3. Analysis

The judgment has been widely discussed for its implications on transnational access to justice and the balance between procedural sovereignty and substantive human-rights protection. These aspects will be examined in greater depth below.

The European Convention on Human Rights (ECHR) has served as a key instrument of transnational justice in Europe, notably through Article 6(1), which guarantees that 'everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal.'[267] However, this right is not unlimited. Tensions arise where principles of state sovereignty and jurisdictional limits meet the protection of fundamental rights guaranteed by the European Court of Human Rights (ECtHR).

[267] Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) art 6(1).

These issues are apparent in the Grand Chamber's decision in *Naït-Liman v Switzerland*,[268] where the Court declined to require States to provide civil claims for extraterritorial torture, even when no other forum was available. Central to the case was the doctrine of *forum necessitatis* - a jurisdictional fiction allowing a court to hear a case when no other reasonable forum exists. The applicant, a Tunisian refugee living in Switzerland, was denied access to Swiss courts to bring a tort claim against a former Tunisian minister accused of torture. The Court held that the Convention does not oblige States to offer such a mechanism, affirming that 'there is also no international treaty obligation obliging the States to provide for a forum of necessity.'[269] This decision has drawn criticism for its impact on victims of serious human rights violations and for the wide discretion it grants States in restricting judicial access.

While *Naït-Liman* concerns the technical application of Article 6, it also reveals broader structural issues within the Convention system. These are especially clear when national supreme and constitutional courts - such as Italy's *Corte di Cassazione*[270] or Germany's *Bundesverfassungsgericht*[271] - set constitutional limits on the application of human rights. This reflects growing tensions between national constitutional identity and supranational human rights law, where denial of access to justice may result from state inaction or judicial restraint based on sovereignty.

Moreover, the Court's reasoning in *Naït-Liman* differs from established international law principles. Francioni observes that:

> Certain human rights norms, such as those prohibiting torture, genocide, slavery, and arbitrary killing, are never derogable and judicial guarantees must be maintained under all circumstances because they are a component of the non-derogable character of the substantive norm. Therefore, in these circumstances the exercise of jurisdiction is justified even if it entails an encroachment on the immunity rule.[272]

Nonetheless, in *Jurisdictional Immunities of the State*, the International Court of Justice held that violations of *jus cogens* - the fundamental principles of international law - do not override immunity.[273] *Naït-Liman* thus continues a doctrinal line where procedural immunity trumps substantive rights - a stance increasingly contested in human rights forums.

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[268] [GC] App no 51357/07 (ECtHR, 15 March 2018).
[269] Ibid para 202.
[270] *Cassazione – Sezioni unite civili – sentenza 6 novembre 2003-11 marzo 2004, n. 5044* (IT) [*Ferrini v Germany*].
[271] *Bundesverfassungsgericht, Beschluss vom 13 Mai 2013 - 2 BvR 2660/06, 2 BvR 487/07* (DE).
[272] Francesco Francioni, 'The Rights of Access to Justice under Customary International Law' in Francesco Francioni (ed), *Access to Justice as a Human Right* (OUP 2007) 131.
[273] *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening) (Judgment) [2012] ICJ Rep 99.*

If *forum necessitatis* is a tool to prevent impunity, its rejection in *Naït-Liman* raises serious questions about the Convention's ability to address new forms of transnational harm, such as mass atrocities, cybercrime, and extraterritorial repression.

This note contends that *Naït-Liman* exposes a normative tension between the Convention's promise of access to justice and its structural limitations regarding extraterritorial jurisdiction, particularly when no alternative forum exists. This thesis is well-anchored in case law and doctrinal debates.

3.1. Forum Necessitatis and Denial of Justice in the ECHR System

The doctrine of *forum necessitatis* is a well-established principle of international law, permitting courts to assume jurisdiction when no other reasonable forum exists to resolve a dispute. Its purpose is to prevent denial of justice - particularly in cases involving serious human rights violations - by providing a remedial forum where victims would otherwise be denied judicial redress. As Shelton explains, 'denial of justice is limited to the failure to redress a prior wrong. That failure, in turn, creates a new wrong, attributable to the state.'[274] However, the ECtHR, in *Naït-Liman v Switzerland*, categorically rejected any obligation on Contracting States under the Convention to provide such a forum, thereby raising serious questions about the Convention's capacity to guarantee access to justice in transnational cases.

3.1.1. The Doctrine of Forum Necessitatis: Origins and Application

Forum necessitatis has been described as a 'jurisdictional fiction' designed to prevent the rigid application of sovereignty and territoriality principles, thereby ensuring that the right to a remedy is not frustrated by gaps in jurisdictional competence. In human rights law, the doctrine functions as a safeguard against denial of justice when no other judicial authority exists or is willing to adjudicate claims, especially in cases of grave violations such as torture, genocide, or arbitrary detention.[275]

The ECtHR approach to the forum of necessity is notably cautious. In *Naït-Liman*, the Court reaffirmed that the Convention 'contains no indication of any extraterritorial application of this rule,'[276] and held that 'the refusal to accept the forum of necessity [...] was far from being arbitrary or manifestly unreasonable.'[277] This restrictive interpretation places the ECHR system apart from broader principles of international law, which increasingly recognise *forum necessitatis* as

[274] Dinah Shelton, *Remedies in International Human Rights Law* (3rd edn OUP 2015) 7.
[275] Francioni (n 272). See also Maria Monnheimer, *Due Diligence Obligations in International Human Rights Law* (OUP 2021) 282.
[276] *Naït-Liman* para 148.
[277] Ibid para 147.

a remedial jurisdiction aimed at combating impunity and filling judicial gaps.[278] The Court's reluctance can be partially attributed to a respect for State sovereignty and concerns about the limits of extraterritorial jurisdiction, reflecting a delicate balance between protecting human rights and maintaining the legal order of Contracting States.

Critics argue that this approach risks perpetuating denial of justice by depriving victims of extraterritorial human rights violations of meaningful legal remedies.[279] The exclusion of *forum necessitatis* thus undermines the non-derogable nature of these substantive rights and restricts the scope of judicial protection.

This tension reveals a structural paradox: while the ECHR guarantees the right to a fair hearing under Article 6(1), it does not impose a positive obligation on States to exercise extraterritorial jurisdiction in civil proceedings, even where no alternative forum exists.[280] Consequently, States retain discretion to deny access to justice, raising concerns about the effective enforceability of fundamental rights within the Convention system.

3.2. The Naït-Liman Judgment: Access to Justice and the Limits of Forum Necessitatis

The *Naït-Liman v Switzerland* judgment represents a watershed in the ECtHR's approach towards *forum necessitatis* and the right of access to justice under Article 6(1) ECHR. The Court was faced with the tough question of whether the denial by the Swiss courts of the acceptance of complaints for tortures extraterritorially committed violated the right of the applicant to a remedy. This section analyses the reasoning of the Court, its approach to extraterritorial jurisdiction, and the more general implications of the ruling for the protection of fundamental rights in the transnational context.

3.2.1. The Reasoning of the Court: Sovereignty, Territoriality, and the Right to a Remedy

At the heart of *Naït-Liman* lies the tension between upholding State sovereignty and effective judicial protection. The ECtHR restated the principle that the ECHR is, in its nature, territorial in application. It elucidated categorically that Article 6(1) 'could not create, by way of interpretation, a substantive civil right which had no legal basis in the State concerned,'[281] reiterating that no inherent obligation exists for States to grant jurisdiction where there is no other available forum.

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[278] Maximilian Kübler-Wachendorff, *Forum Necessitatis Im Europäischen Zuständigkeitsrecht* (Mohr Siebeck GmbH & Company KG 2021) 2-4.

[279] Jan Paulsson, *Denial of Justice in International Law* (CUP 2005) 100-30.

[280] *Naït-Liman* para 201. See also Philip Leach, *Taking a Case to the European Court of Human Rights* (3rd edn, OUP 2018).

[281] *Naït-Liman* para 103.

The Court restated that Article 6(1) guarantees the right to a 'fair and public hearing within a reasonable time by an independent and impartial tribunal,'[282] despite the fact that it 'considers that the Swiss courts' refusal ... pursued legitimate aims and was not disproportionate.'[283] The decision thereby shows an unequivocal reluctance to enlarge jurisdictional scope over defined territorial limits, even where this has the effect of leaving victims outside of access to judicial remedy.

This follows the principles of non-intervention. As the Court noted, 'respondents enjoyed immunity from jurisdiction, since the acts of torture had been perpetrated in exercise of sovereign authority (*iure imperii)*[284] and not under private law *(iure gestionis*)[285].[286] The judgment therefore reflects the primacy the Court grants to state sovereignty and jurisdictional immunity even on the face of gross claims of human rights, reflecting the collusion of law between protecting individual rights and upholding the sovereign parity of states.

This judicial restraint appears logically inconsistent with the ECtHR's broader commitment to *effet utile*, a principle of interpretation whereby the provisions of the ECHR must be construed so as to ensure that the rights and freedoms guaranteed are practical and effective, not theoretical or illusory. If access to a tribunal is illusory where no forum exists, the procedural protection under Article 6 becomes hollow.

While *Naït-Liman* reflects a restrictive, territorial approach to Article 6, other ECtHR cases suggest alternative ways of interpreting extraterritorial jurisdiction. Comparing these decisions helps illuminate the Court's discretion and the potential for broader access to justice in transnational cases. In *Al-Skeini v UK*, the Court took a purposive approach in extending jurisdiction based on effective control, even beyond state territory.[287] A similar functional rationale might have justified a limited obligation to hear claims like *Naït-Liman*'s.

Scholarship has identified that this conservative step aligns with a classical vision of international law, favouring jurisdictional boundaries. Professor Cassese observes the effect of legal positivism throughout legal history: 'Its principal postulate is that international law is exclusively produced by the will of States; anything which does not stem from the State cannot be binding law.'[288] This perspective, however, has been criticised on the grounds that it does not adequately respond to new transnational realities, where human rights violations often happen beyond State borders.

[282] ECHR art 6(1).
[283] *Naït-Liman* para 217.
[284] *Iure imperii* refers to acts performed by a state in its sovereign capacity, such as passing laws, issuing decrees, or conducting military operations - these acts typically enjoy state immunity.
[285] *Iure gestionis* refers to acts carried out by a state in a private or commercial capacity - these acts may not enjoy immunity and can be subject to foreign court jurisdiction.
[286] *Naït-Liman* para 28.
[287] *Al-Skeini and Others v the United Kingdom* [GC] App no 55721/07 (ECtHR, 7 July 2011) paras 137-40.
[288] Antonio Cassese, *International Law in a Divided World* (Oxford Clarendon Press 1986) para 65.

3.2.2. Contrasting Views and the Challenge of Transnational Justice

The Court's reasoning is contested for blending two distinct issues: the central controversy - seeking damages for torture in Tunisia under Tunisian law - and a minor, procedural issue regarding jurisdiction. Since the case has no concrete connection with Switzerland and cannot find any recognised basis of international jurisdiction, it should not have been resolved by Swiss courts.[289]

The *Naït-Liman* judgment provoked dissent within the Court on the erosion of effective judicial protection. Judge Serghides argued as follows:

> [D]espite the fact that the Federal Supreme Court held that one of the three cumulative mandatory conditions for assigning jurisdiction ... is that "the Swiss authorities do not have jurisdiction under another provision" which, as it also noted was "indisputably fulfilled" "in the present case", it nevertheless neglected to take this into account in interpreting the other mandatory condition, namely that "the case in question has a sufficient connection with Switzerland". In interpreting this last condition as being limited only to wrongful acts having taken place in Switzerland, it negated the first condition of its applicability, namely that no other provision is applicable.[290]

This interpretation underlines a broader normative tension: access to justice, although framed as a procedural entitlement, operates as a constitutional safeguard against impunity in instances of serious human rights violations.

In his dissent, Judge Serghides emphasised the following point:

> [T]he Grand Chamber's search for whether there existed a relevant customary international law is irrelevant, for two reasons: (a) firstly, because the applicant did not base his argument on international civil jurisdiction; and (b) secondly, because the doctrine of a forum of necessity is a concept of private international law rather than of public international law, and so any customary international rule has no application to it.[291]

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[289] *Naït-Liman* para 69; *Tribunal fédéral, 22 mai 2007, 4C379/2006* (CH). See also *Naït-Liman v Switzerland* [GC] App no 51357/07 (ECtHR, 15 March 2018), Partially Dissenting Opinion of Judge Wojtyczek, para 7.
[290] *Naït-Liman v Switzerland* [GC] App no 51357/07 (ECtHR, 15 March 2018), Dissenting Opinion of Judge Serghides, para 26.
[291] Ibid para 108.

Judge Serghides' methodological critique challenges the Court's framing of the problem, urging a distinction between sources of jurisdictional competence and procedural justice. His insistence that Article 6 must not be treated as a dead letter when a State fails to provide any remedy seems to reinforce the Court's own *Soering* logic, where jurisdiction arose not only from territory, but from the real risk of serious harm.[292]

Judge Dedov also condemned the majority's formalist adherence to legal positivism. He asserted that by denying Swiss courts' jurisdiction to hear a civil claim for torture on technical grounds, the Court subordinated the substance of human rights to procedural rigidity. In Dedov's view, a more appropriate approach would have embraced a values-based interpretation of Article 6, grounded in universal human rights principles and the certainty of compensation for grave violations.[293]

Such dissents resonate with evolving academic perspectives on *forum necessitatis*: the Court's judgment, despite its conservatism, leaves the door open for future doctrinal developments. Hess and Mantovani argue that the Court recognises that its interpretation reflects the prevailing legal framework and leaves open the possibility of future developments. Should states begin to adopt a consistent approach in recognising the forum of necessity in the context of human rights violations, this practice could contribute to the formation of a customary norm in international law, thereby constraining the interpretation of domestic authorities. The Court further encourages this pathway by suggesting that national jurisdictions should be empowered to provide a remedy for claims arising from acts committed beyond their territorial boundaries.[294]

At its core, *Naït-Liman* exposes a structural dilemma: while Article 6 ECHR guarantees access to justice, the Convention does not explicitly mandate extraterritorial jurisdiction, leading to gaps in protection when no domestic forum is available. This gap is particularly noticeable in cases involving torture, where the absence of a remedy conflicts with the Convention's core values and the State's positive obligations on respect and enforcement of human rights,[295] and on prohibition of torture.[296]

3.2.3. Emerging Practice: Forum Necessitatis and Universal Jurisdiction in Comparative Perspective

While the *Naït-Liman* case reaffirmed a cautious interpretation of extraterritorial jurisdiction under Article 6 ECHR, national courts in several jurisdictions have adopted a more assertive

[292] *Soering v the United Kingdom* (1989) Series A no 161.
[293] *Naït-Liman v Switzerland* [GC] App no 51357/07 (ECtHR, 15 March 2018), Dissenting Opinion of Judge Dedov.
[294] Burkhard Hess and Martina Mantovani, 'Current Developments in Forum Access: Comments on Jurisdiction and *Forum Non Conveniens* – European Perspectives on Human Rights Litigation' (MPILux Research Paper 2019/1, 2019) <https://ssrn.com/abstract=3325711> accessed 9 June 2025
[295] ECHR art 1.
[296] Ibid art 3.

approach to *forum necessitatis*, particularly in cases implicating human rights violations. In its own comparative survey, the ECtHR acknowledged that eleven European States 'explicitly recognise either the forum of necessity, or a principle [...] entailing very similar if not identical consequences', and notably referenced most Member States and Canada - despite the latter not being a member of the Council of Europe and consequently of the ECHR system.[297]

In *Van Breda v Village Resorts Ltd*, the Supreme Court of Canada held that access to justice could, in exceptional circumstances, justify the assumption of jurisdiction even in the absence of conventional connecting factors.[298] A similar orientation may be observed in the United Kingdom. In *Belhaj v Straw*, the courts showed readiness to entertain claims involving extraterritorial acts of rendition and torture, recognising the obligation of offering judicial recourse when no adequate alternative forum exists.[299]

Among European jurisdictions, the Netherlands occupies a unique position for its explicit recognition of universal civil jurisdiction in matters concerning torture. This doctrinal framework enables Dutch courts to hear civil claims arising from torture irrespective of the place of commission or nationality of the parties.[300] The underlying reasoning stems from the recognition that torture constitutes a violation of *jus cogens* - access to justice is not merely a procedural guarantee, but a substantive obligation anchored in international legal commitments to prevent impunity. Meanwhile, the French Code guarantees French citizens' right to sue foreigners in France, offering a dormant but powerful form of *forum necessitatis* to combat denial of justice, although it is not formally recognised as a jurisdictional principle within French private international law.[301]

Experience from jurisdictions recognising the forum of necessity shows that victims of serious human-rights violations can secure remedies that would otherwise be unavailable, demonstrating the tangible impact of this legal mechanism. A victim of extraterritorial torture might otherwise have no access to a domestic court to pursue compensation and accountability, showing how such jurisdictional recognition directly affects victims' ability to obtain remedies.

4. Conclusion: A Guarded Court, an Unfettered Discussion

The *Naït-Liman* ruling confirms the ECtHR's cautious stance in extending access to justice under Article 6(1) in the absence of a territorial link. By endorsing Switzerland's denial of jurisdiction,

[297] *Naït-Liman* paras 84-6. See Appendix.
[298] [2012] 1 SCR 572 (CA).
[299] *Belhaj and another v Straw and others* [2017] UKSC 3 (UK).
[300] *Rechtbank 's Gravenhage, 21 maart 2012, 400882/HA ZA 11-2252* (NL) [*El-Hojouj v Amer Derbas and others*]; *Rechtbank Den Haag, 30 januari 2013, C/09/337050/HA ZA 09-1580* (NL) [*Akpan v Shell*].
[301] *Code de Procédure Civile* (enacted by *Décret n° 75-1123, 05-12-1975*) (FR) art 14; *Naït-Liman* para 86. See Appendix.

the Grand Chamber emphasised sovereignty, legal certainty, and subsidiarity. While doctrinally defensible, this position exposes a structural limitation in the ECHR framework: its limited capacity to provide redress for serious extraterritorial harms when no other forum is available. The Court's reliance on state discretion and procedural barriers risks enabling impunity in cases involving torture and grave human rights violations.

The dissenting opinions, particularly those of Judges Serghides and Dedov, proposed a more expansive reading of access to justice, drawing on evolving principles in international and comparative practice, including the emerging doctrine of *forum necessitatis*. These views indicate a possible direction for future jurisprudence, contingent upon wider recognition and state practice.

Naït-Liman thus leaves unresolved a persistent normative tension: reconciling sovereign limitations with the need for effective remedies in a transnational legal space. While the Court did not foreclose future developments, its decision leaves victims of extraterritorial abuses with few procedural avenues, calling into question the full effectiveness of the Convention in such contexts.

The *Naït-Liman* judgment signals that victims of extraterritorial human rights violations may face significant barriers in seeking judicial remedies, even within well-established human rights systems. Lawyers and advocates should therefore carefully assess available forums and consider strategic use of comparative or international jurisprudence when domestic courts are inaccessible. For states, the case highlights the importance of establishing clear mechanisms to address claims arising from serious violations abroad, not only to uphold human rights obligations but also to prevent impunity and reinforce the credibility of their legal systems. Finally, policymakers and human-rights organisations may use the ruling as a reference point to advocate for legislative reforms that recognise *forum necessitatis* in civil proceedings.

From my own perspective, the Grand Chamber's restrictive approach unduly prioritises procedural sovereignty over the fundamental right of access to justice. A more expansive interpretation of Article 6, aligned with the emerging doctrine of *forum necessitatis*, would better safeguard victims of extraterritorial human rights violations and uphold the Convention's core values. As cross-border human rights litigation grows in prominence, the debate surrounding jurisdictional thresholds and the evolving role of domestic courts within the ECHR system must intensify beyond this case, especially as the Convention's legitimacy depends on its ability to provide meaningful remedies in a globalised legal landscape.

Appendix

Forum Necessitatis in Selected Jurisdiction in Naït-Liman v Switzerland [GC] App no 51357/07 (EctHR, 15 March 2018) para 84.

Austria: Jurisdiktionsnorm §§ 99 et seq.

Belgium: Judicial Code, Art. 5 et seq.

Estonia: Code of Civil Procedure § 14 (residual jurisdiction)

France: Civil Code Art. 14; CPC Art. 1070

Germany: ZPO § 17(5)

Luxembourg: Code de procédure civile (art. 22bis or analogous provisions)

Netherlands: Mastnak case

Norway: Disputes Act (Tvisteloven) § 4-3

Poland: Law on Private International Law (2011), Art. 47

Portugal: Code of Civil Procedure Art. 70

Romania: Civil Procedure Code (Law No. 134/2010), Art. 28(2)

Switzerland: Private International Law Act (PILA/LDIP) Art. 3

MIGRATION, SECURITY, AND HUMAN RIGHTS: THE ECtHR UNDER PRESSURE TO RETHINK ITS STANCE ON MIGRATION

Joanna Walkowiak[302]

Abstract

The European Court of Human Rights is a supranational court created under the auspices of the Council of Europe. As a supranational judicial body, it checks the compliance of judgments issued by the national courts of the Council of Europe Member States with the European Convention on Human Rights. CoE Member States encompass a great majority of European states, a notable exception since 2022 being Russia, and include all of the European Union Member States. On 22nd May 2025, nine European leaders issued a letter to the ECtHR, calling on it to reconsider its case law interpreting the ECHR in cases of migrants who interact with the criminal justice system. While the Open Letter may be dismissed as an attempt to politicise the ECtHR and tailor it to the current political climate in Europe, this paper proposes to use it as an opportunity to critically analyse the ECtHR's recent case law on migration, focusing on cases of expulsion of settled migrants charged with criminal offences. The paper seeks to uncover whether the balance of interests in those cases is truly as limiting to the countries' possibility of expulsion of migrants committing crimes that the country's security can be compromised. It concludes that the ECtHR's case law on migration is, as a whole, not biased towards migration, although there might be room for reinterpretation in cases concerning Article 8 of the ECHR. Moreover, the ECtHR should not engage in the political debate nor attempt to politicise its own case law. The case of the Open Letter remains, however, an example of the undue influence of the ECtHR. More such examples can be expected, given the present push towards securitisation and increasing anti-immigration sentiments.

Keywords: *criminal law, ECHR, ECtHR, human rights, migration, expulsion of migrants, criminal procedure*

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1. Introduction

The European Convention on Human Rights[303] (ECHR, the Convention) is a regional, European convention signed in 1950 in Rome. ECHR was concluded by the state parties to the Council of Europe (CoE), established by ten Western European states[304] in London in 1949.[305] Since then, it has amassed 46 ratifications,[306] becoming one of the most important international legal instruments regulating human rights. Only in 2022, Russia was expelled from the CoE and the ECHR system following its full-scale invasion of Ukraine.[307] Currently, the number of CoE Member States is 46, and it is debated whether the European Union (EU) could join in the future.[308] Regardless, where the Charter of Fundamental Rights of the EU (Charter)[309] contains provisions corresponding to those contained in the ECHR, the meaning and scope of those rights shall be the same in the Charter and the ECHR unless the EU law provides more extensive protection.[310]

Nowadays, the success of the ECHR and the CoE framework lies not only in the number of ratifications which span across the entire continent, nor in the scope of human rights which are protected under the Convention. A crucial factor is the existence of the European Court of Human Rights (ECtHR), which admits claims of human rights violations from individuals from the CoE Member States. ECtHR has the sole jurisdiction to give a binding interpretation of the ECHR and adjudicate on ECHR violations by CoE Member States. Despite the inactivity in its first years of operating, which brought ECtHR the nickname 'sleeping beauty',[311] the Court has since then not only 'awakened' but also given crucial judgements in various areas of human rights protection. Its influence and importance have grown considerably over time.[312] Given its recognised authority, the majority (although not all) of the judgements are enforced[313] and some

[303] *Convention for the Protection of Human Rights and Fundamental Freedoms* (adopted 4 November 1950, entered into force 3 September 1953) ETS No 005 ('ECHR'). If no legal act is given after a precise provision is invoked, the legal act in question is ECHR.

[304] Belgium, Denmark, France, Ireland, Italy, Luxembourg, Norway, the Netherlands, the United Kingdom and Sweden.

[305] Council of Europe, *The Council of Europe: Key Facts* <https://www.coe.int/en/web/about-us/key-facts>.

[306] Council of Europe, 'Chart of Signatures and Ratifications of Treaty 005 (Convention for the Protection of Human Rights and Fundamental Freedoms)' <https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=005>.

[307] Council of Europe, 'The Russian Federation Is Excluded from the Council of Europe' (Press Release, 16 March 2022) <https://www.coe.int/en/web/portal/-/the-russian-federation-is-excluded-from-the-council-of-europe>.

[308] The EU accession to the ECHR was hotly debated in early 2010s, however the plan failed following the CJEU's Opinion 2/13 in which it stated, in a nutshell, that it is not legally viable for the EU to join the ECHR.

[309] *Charter of Fundamental Rights of the European Union* [2012] OJ C 326/391 ('Charter').

[310] Ibid art 8.

[311] Marie-Bénédicte Dembour, 'The Migrant Case Law of the European Court of Human Rights: Critique and Way Forward' in Başak Çalı, Ledi Bianku and Iulia Motoc (eds), Migration and the European Convention on Human Rights (Oxford University Press 2021) 20.

[312] K Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (CUP 2015) 146.

[313] More detailed information, as well as a breakdown of enforcement rates in each CoE Member State, can be found at Department for the Execution of Judgements of the European Court of Human Rights, Country factsheets,

lead to profound normative changes in CoE Member States where violations have been found.[314] Furthermore, while ECHR was drafted before 1950, its status as a living instrument liable to re-interpretation[315] makes it continuously relevant despite great social and technological changes in the 20th and the 21st century.

Today, one of the biggest social challenges that the CoE Member States face is international (third-country) migration, occurring on an ever greater scale.[316] So far, the ECtHR has been supportive of international migration, rendering notable judgments defending human rights in cases involving migrants and refugees.[317] However, the CoE Member States are growing increasingly discontent with migration, the problems that they consider it to pose, and ultimately also with ECtHR's judicial activity in this sphere. On 22nd of May 2025, leaders of nine European states – Austria, Belgium, Czech Republic, Denmark, Estonia, Germany, Italy, Latvia, Lithuania, and Poland – signed a letter (Open Letter) in which they called the ECtHR to reinterpret the rights contained in the ECHR when applying them to migration cases.[318] The Open Letter

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<https://www.coe.int/en/web/execution/country-factsheets>. The number of non-implemented judgements is reported to have been on the rise in recent years, see Nino Tsereteli, Jakub Jaraczewski, Ioana Iliescu, Ioulietta Bisiouli, Vincent Lefebvre & Agnès Ciccarone, *Justice Delayed and Justice Denied: Report on the Non-Implementation of European Courts' Judgments and the Rule of Law* (4th edn, Democracy Reporting International / European Implementation Network 2024) 30 *et seq*.

[314] For a general comment, cf Laurence R Helfer and Erik Voeten, *Do European Court of Human Rights Judgments Promote Legal and Policy Change?* (Working Paper, 2011). See also literature on specific themes, including LGBT rights: Laurence R Helfer and Erik Voeten, 'International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe' (2014) 68 *International Organization* 77-110; and minority rights: Dia Anagnostou, 'Does European Human Rights Law Matter? Implementation and Domestic Impact of Strasbourg Court Judgments on Minority-Related Policies' (2010) 14 *The International Journal of Human Rights* 721-743.

[315] The idea that ECHR is a living instrument does not stem from the Convention itself but is widespread in the ECtHR's jurisprudence and the doctrine. An analysis of the legality of the ECtHR's doctrine of ECHR as a living instrument is offered by Stefan Theil, 'Is the "Living Instrument" Approach of the European Court of Human Rights Compatible with the ECHR and International Law?' (2017) 23 *European Public Law* 587.

[316] It is remarked that 'Europe has increasingly become a destination of significant migratory flows in the last decades' European Investment Bank Economic Department, *Migration and the EU Challenges, opportunities, the role of EIB* (2016) European Investment Bank. The cited source reports a significant growth of asylum applications in 2015 (at 1.2 million). Eurostat reports a growing third-country migrants influx since 2012, although the number of immigrants have dropped in 2023 after peaking in 2022, see: Yulia Aster, "The Immigrant Population in the European Union" (RFBerlin, 12 April 2025) <https://www.rfberlin.com/immigrant-population-eu/>. The rise in net migration overall (taking into account both EU and non-EU countries) has been also reported e.g. by World Bank, 'Net Migration – European Union' (World Development Indicators, The World Bank Group) <https://data.worldbank.org/indicator/SM.POP.NETM?locations=EU>. Eurostat reports migration rising from the 2020 level of 2 million newcomers from outside the EU to over 4 million in 2023 (peaking at the level of slightly above 5 million in 2023. Eurostat, *Migration to and from the EU* (Statistics Explained) <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Migration_to_and_from_the_EU>.

[317] A factsheet on ECtHR cases regarding migration and asylum is accessible, Council of Europe, *Migration and Asylum: Thematic Factsheet* (Department for the Execution of Judgments of the European Court of Human Rights, November 2021) <https://rm.coe.int/thematic-factsheet-migration-asylum-eng/1680a46f9b>. An overview of some of the most important case law is cited by Peter Hilpold, 'Challenging Strasbourg: The May 2025 Letter and the Pushback Against the European Court of Human Rights' (Verfassungsblog, 30 May 2025) <https://verfassungsblog.de/may-2025-letter-and-the-pushback-against-the-european-court-of-human-rights/>. As the author aptly observes, a considerable number of scholars remain critical towards ECtHR's cases on migration.

[318] The joint open letter of Austria, Belgium, Czech Republic, Denmark, Estonia, Germany, Italy, Latvia, Lithuania, and Poland to the ECtHR, 22 May 2025, Italian Government, *Lettera aperta 22 maggio 2025* (22 May 2025) <https://www.governo.it/sites/governo.it/files/Lettera_aperta_22052025.pdf>.

distinguishes between migrants who respect the law and values of the hosting states and those who commit crimes. With respect to the latter group, it calls for greater room for the national legislature and authorities in making decisions as to whether the migrants should be expelled or not. Thus, this article sees the Open Letter's message as a call for a less pro-migration interpretation of the ECHR in migration cases, at least the ones concerning migrants with a criminal record.

This paper aims to shed light on this new development, which uncovers a conflict of interests between the ECtHR and the CoE Members. It strives to analyse the current case law on migration and answer whether the ECHR could be re-interpreted in the way requested by the CoE Member States or if another direction of ECtHR's jurisprudence is recommended.

The first chapter of this paper will present a wider background of the issues posed by migration in the CoE Member States and will scrutinise the postulates of the Open Letter in greater detail. The second chapter delves into the recent case law of the ECtHR on illegal and irregular migration to critically analyse and uncover the consequences of the judgements which the CoE Members might have been particularly uncomfortable with. Following this, this paper aims to outline the possibilities of reconciliation, exploring whether the ECHR can – and should – be reinterpreted to the effect desired by the CoE Member States. While the Open Letter can be dismissed as an attempt to politicise the ECHR, which should remain an objective instrument guaranteeing the protection of human rights, it is worth analysing what the 75 years of the ECtHR's case law on migration have changed and in which direction it is going.

2. The Background of the Open Letter and Its Postulates

2.1 The Context of the Open Letter

Currently, one can notice an increasing interest and focus on guaranteeing internal security in European countries.[319] The securitisation has been on the rise since the start of the century, and has been fuelled by terrorist attacks such as the ones in Paris in 2015, Barcelona in 2017, or

[319] In discussing the issue of security, this paper focuses on internal rather than external security, meaning that it focuses on threats of internal (domestic) nature rather than those posed (see the distinction made by Stanisław Koziej, 'Bezpieczeństwo: istota, podstawowe kategorie i historyczna ewolucja' (2011) 2 19. On the margin, one can note that migration is seen increasingly as an internal aspect of security, see: Catherine W de Wenden, 'Migration as an International and Domestic Security Issue' in Hans G Brauch et al (eds), *Security and Environment in the Mediterranean*, Hexagon Series on Human and Environmental Security and Peace, vol 1 (Springer 2003) 441–442. This is without prejudice to the fact that a lot of countries in Europe recognise the importance of ensuring security from external threats, especially the war in Ukraine which broke out in 2022. On this topic see, among others: Ondřej Ditrych and Martin Laryš, 'What Can European Security Architecture Look like in the Wake of Russia's War on Ukraine?' (2024) 34(1) *European Security* 44-64; Agata Dziewulska, 'European Security Strategies and the War in Ukraine' (2023/2) *Studia Europejskie – Studies in European Affairs* 27-44; Davide Genini, 'How the War in Ukraine Has Transformed the EU's Common Foreign and Security Policy' (2025) *Yearbook of European Law* 1-43.

Manchester in 2018. There is evidence that numerous countries in Europe are indeed getting less safe,[320] and this is also a common narrative presented across the media in European countries. The factor often cited as the main reason for the increase in crime rate is illegal immigration.[321] While such a narrative is rebutted in academic literature,[322] it would be futile to deny that immigration poses an issue to the CoE Member States and their societies, also because of increasing anti-migration sentiments.[323] In many EU countries, the rise of negative attitudes towards migrants is one of the main factors polarising society and giving momentum to such right-wing movements as AfD in Germany, Konfederacja in Poland, or VOX in Spain.[324] The issues connected to migration from outside Europe have also largely conflicted the EU Member States, leading to the adoption of the EU-Turkey agreement in 2016 as well as the adoption of the new EU Pact on Migration and Asylum in 2024.[325] The 2024 Pact was welcomed by most leaders in an attempt to enhance cooperation to regulate migration and avert future crises, but voices were raised that this may come at a cost to the migrants and their rights.[326]

The ECtHR's case law on migration and the rights of migrants has, for some years now, been a subject of backlash in certain CoE Member States, particularly in Denmark. More broadly, in 2018, the draft 'Copenhagen Declaration', created under Danish auspices, was criticised as an attempt to undermine the authority of the ECtHR, question its competences, and restrict the practical impact of its judgements.[327] With respect to international migration, the Declaration also suggested establishing 'separate mechanisms' to deal with both inter-state and individual

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[320] Euronews, 'Gang Crime on the Rise: Which European Countries Have the Most Dangerous Neighbourhoods?' (2025) <https://www.euronews.com accessed>.

[321] This narrative is critically discussed in Openpolis, *The Alleged Relationship Between Immigration and Criminality* (June 2022) <https://www.openpolis.it/wp-content/uploads/2022/06/The-alleged-relationship-between-immigration-and-criminality.pdf>.

[322] Michael T Light and Ty Miller, 'Does Undocumented Immigration Increase Violent Crime?' (2017) 56(2) *Criminology* 401, strongly emphasises that 'the weight of the evidence presented (…) challenges claims that unauthorized immigration endangers the public. At a minimum, the results of our study call into question claims that undocumented immigration increases violent crime. If anything, the data suggest the opposite'.

[323] RAN Practitioners, 'Attitudes Towards Migration and the Impact on P/CVE' (19 April 2024) <https://home-affairs.ec.europa.eu/ran-practitioners_en accessed>.

[324] POLITICO, 'Europe Cracks Down on Migration: The Far Right Is Cheering' (11 March 2025) <https://www.politico.eu>.

[325] Regulation (EU) 2024/1351 of the European Parliament and of the Council of 14 May 2024 on asylum and migration management, amending Regulations (EU) 2021/1147 and (EU) 2021/1060 and repealing Regulation (EU) No 604/2013. For more information see European Commission, 'Pact on Migration and Asylum' (Migration and Asylum – EU Commission) <https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/promoting-our-european-way-life/migration-and-asylum/pact-migration-and-asylum_en>.

[326] Andrea Spehar, 'The EU's New Pact on Migration and Asylum: Towards a Long-Term Sustainable European Migration Policy?' in Lars Oxelheim et al (eds), The Depth and Size of the European Union in a Time of War (Palgrave Macmillan Cham 2025)..

[327] European Human Rights Advocacy Centre (EHRAC), 'NGOs: Draft Copenhagen Declaration Risks Undermining the Independence and Authority of the European Court, and the Universality of Human Rights' (14 February 2018) <https://ehrac.org.uk/news/draft-copenhagen-declaration/>.

cases arising from international conflicts. While it was presented to aid the overload of cases, which the ECtHR had long been struggling with, it is also clear that this is precisely the type of cases which concern migration, also irregular, and which states see as posing a threat to their security.[328] However, the final version of the Copenhagen Declaration was far more toned down and was considered proof that the Danish initiative backfired.[329] The sentiment of mistrust towards ECtHR's jurisprudence might have persisted in some countries, as is evidenced by the Open Letter itself.

The UK has been experiencing a similar turn, championing the anti-ECtHR stance. It was found that since mid-2000, the UK has been strongly against the ECtHR's interventionism and its position might have also influenced other CoE Member States to take an increasingly anti-ECtHR position.[330] Recently, POLITICO, an online news provider, reported that Kern Steiner's UK wants to act towards tightening the application of Article 8, 'which offenders from overseas have used to avoid deportation'.[331] The very language of this comment, 'avoid deportation,' paints Article 8 not as granting migrants a deserved human right, but as providing them with a perfect excuse not to be expelled for the crimes they have committed. The ECtHR issued a lot of judgments against the UK in cases concerning migrants and asylum-seekers, such as the *N.S.K. v. the United Kingdom*[332] on the infamous Rwanda deportations plan. The issues related to migration and crime-combatting might have been at the forefront of the growing sentiment against the ECtHR's judgments.

2.1.1 The Postulates of the Open Letter

In the Open Letter, the CoE Member States asserted that ECtHR 'has extended the scope of the Convention too far as compared with the original intentions behind the Convention, thus shifting the balance between the interests which should be protected.'[333] There were three main requests expressed by the States which signed the letter. They asked that there is a greater margin of discretion left to the state to decide whether or not to expel migrants who commit crimes (i), to decide how to keep track of migrants with a crime record who cannot be expelled (ii), and that

[328]A Donald and P Leach, 'A Wolf in Sheep's Clothing: Why the Draft Copenhagen Declaration Must Be Rewritten' (21 February 2018) *EJIL: Talk! Blog of the European Journal of International Law* <https://www.ejiltalk.org/a-wolf-in-sheeps-clothing/>.
[329] J Gerards and S Lambrecht, 'The Final Copenhagen Declaration: Fundamentally Improved with a Few Remaining Caveats' (18 April 2018) *Strasbourg Observers* <https://strasbourgobservers.com/2018/04/18/the-final-copenhagen-declaration/>.
[330] Stiansen Øyvind, Voeten Erik. *Backlash and Judicial Restraint: Evidence from the European Court of Human Rights, International Studies Quarterly* (2020) 64, p. 771 *et seq.*
[331]POLITICO, '"Lefty Lawyer" Keir Starmer to Push for ECHR Reform' (18 June 2025) <https://www.politico.eu>.
[332] *N.S.K. v United Kingdom* App no 28774/22 (ECtHR, interim measure) (case also before the UK House of Lords).
[333] Joint Open Letter (n 318), 2.

they have more power to counter hostile states who try to instrumentalise migration (iii).[334] It was remarked that the scope of review requested by the signatories is unclear, as it remains a question if the Open Letter concerns 'migration as a whole, only irregular migration, or merely the problems associated with foreign nationals who engage in criminal activity'.[335] This paper focuses on the last category as the Open Letter seems to target, first and foremost, precisely this type of case. Attempts at irregular crossing of borders will not be considered as they require a separate analysis that is beyond the scope of this paper. Moreover, from the perspective of state security, which is the focal point of the Open Letter, such cases are the most controversial ones.

This paper agrees that, beyond the vague language of the Open Letter, one may uncover and attempt to politically pressure the ECtHR to change its views and begin to render judgements which will be more politically acceptable for CoE Member States. The Secretary General of the CoE, Alain Berset, defended the judicial independence of the ECtHR in a statement issued in response to the Open Letter, as he said, 'debate is healthy, but politicising the Court is not'.[336] It is worth analysing whether there is room for a legal, apolitical debate on the migration case law and the ECtHR's interpretation of Article 3 and Art 8 of the ECHR in expulsion cases of migrants accused of committing crimes.

3. ECtHR Case Law on Migration in Criminal Law Cases

To assess whether the assertions of the Open Letter hold water, one has to dive deeper into the recent case law of the ECtHR and the interpretation of the ECHR given in the cases of migrants related to criminal law. As the analysis of all case law of the ECtHR on this matter is beyond the scope and purpose of this paper, only selected cases will be scrutinised in greater detail, as information on the historical background will be provided. The author aimed for recent cases, especially ones which involved one of the countries which were the signatories of the Open Letter. Most of the cases discussed in this are also Grand Chamber cases, underscoring their significance.

As mentioned, the first decades of ECtHR operation passed with no legal breakthroughs or landmark rulings. However, this has changed considerably once the Court has matured, and it has since delivered a plethora of judgements delineating the conditions under which migrants can

[334] Ibid.

[335] P Hilpold, 'Challenging Strasbourg: The May 2025 Letter and the Pushback Against the European Court of Human Rights' *VerfassungsBlog* (30 May 2025) <https://verfassungsblog.de>.

[336]European Court of Human Rights, 'Alain Berset on the Joint Letter Challenging the European Court of Human Rights' (24 May 2025).

be expelled from a country where they are settled. The relevant provisions of the ECHR in this regard are Article 3 and Article 8, which will be analysed subsequently.

3.1 Case Law on Article 3 ECHR

First, expulsion is impossible in the case where it would constitute the violation of Article 3, which states that no one shall be subjected to torture, to nhuman or degrading treatment or to punishment. The right to freedom from such treatment is absolute, meaning that it cannot be restricted under any condition, and there is no legal justification that would allow for such treatment, even in what one can consider to be extreme circumstances.[337] This is also evidenced by the absence of any exception or limitation clause in the Convention's text on Article 3, which further differentiates it from the majority of its provisions. The ample case law on Article 3 provides that the alleged violation of this provision shall be examined *in concreto*. Moreover, the Court shall take into account all facts of the case, and especially the accessibility of treatment in the country of destination and the particular vulnerability of the person concerned.[338] In its well-established case law, ECtHR determined that to be classified as ill and degrading treatment, the treatment of the concerned person has to attain a minimum level of severity.[339] The assessment of this severity is relative and always subject to a case-by-case analysis on the basis of the case's unique factors,[340] but the general characteristics of the threshold are that it is a high one. Cases under Article 3 are more likely to arise in deportation cases of refugees and asylum-seekers if their return to the country of origin is being sought, or in extradition cases. However, those judgments can be transferred to the ones concerning migrants. Those cases tend to examine the return to the country of origin, but expulsion to a third country can also be contemplated.[341]

Indeed, the first remarkable judgement on migration was delivered in *Soering v United Kingdom*,[342] in which the ECtHR held that the extradition of a migrant facing degrading or inhumane treatment is illegal. In this way, while the ECHR does not explicitly address the rights of migrants save a few additional protocols on 'aliens', the scope of the Convention was extended to protect migrants just the same way it protects the citizens of CoE Member States. The possibility to apply Article 3 to a case of expulsion was also contemplated by the Court *obiter dicta* in the

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[337] For such a case, see *Gäfgen v Germany* App no 22978/05 (ECtHR, 1 June 2010).
[338] See *Paposhvili v. Belgium*, Application no. 41738/10, §139 and the case law referred there.
[339] *Paposhvili v. Belgium*, Application no. 41738/10, §124 and the case law referred there.
[340] Ibid.
[341] European Court of Human Rights, *Guide on the Case-Law of the Convention – Immigration* (28 February 2025) <https://ks.echr.coe.int/documents/d/echr-ks/guide_immigration_eng> 34.
[342] *Soering v United Kingdom* App no 14038/88 (ECtHR, 7 July 1989).

extradition case *Cruz-Varas and others v Sweden*.[343] Following the judgement in *Soering v The United Kingdom*, the Court decided that an expulsion of a migrant by a CoE Member State may give rise to an issue under Article 3, in this way incurring the State's liability under the ECHR. For the responsibility to arise, substantial grounds must be shown to evidence that the applicant, if extradited, would face a real risk of torture or inhuman or degrading treatment or punishment in the requesting country.[344]

Since the issues of extradition and expulsion of migrants are, by the Court itself, considered similar, at least when Article 3 is involved, one may invoke the extradition case *Sanchez-Sanchez v United Kingdom*[345] regarding a Mexican national's extradition to the US, where he would face a life sentence without parole. In this fairly recent case, ECtHR argued that his extradition to the U.S. would not violate Article 3 as his treatment in the US involved the possible sanction of life imprisonment without parole. What seemed to have weighed on the Court's judgment was, however, that no punishment of life imprisonment without parole was given to persons charged in the US for comparable offences.[346] Therefore, in the view of the Court, no risk of such punishment existed in the applicant's case.

A special category of cases can be distinguished in which expulsion or extradition concerns a seriously ill person. As an example of such a case, one can use *Paposhvili v Belgium*[347] in which the applicant suffered from a lethal health condition.[348] The Court reiterated that, according to established case law, non-removal on the grounds of health could only occur in truly exceptional circumstances, where poignant humanitarian reasons would justify the prohibition of expulsion. The Court has, however, emphasised that only exceptional cases cannot mean that the rights guaranteed by the ECHR are illusory and merely theoretical. The ECtHR provided a list of factors and evidence that should have been considered by the national court before the decision on his expulsion would have been rendered.[349]

To conclude, while the case law on Article 3 concerns extradited persons, refugees, and asylum-seekers, the reasoning from those cases can be replicated with ease in the cases concerning the expulsion of migrants. While the threshold for finding a violation of Article 3 is

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[343] *Cruz Varas and Others v Sweden* App no 15576/89 (ECtHR, 20 March 1991) para 69. See: D Thym, 'Respect for Private and Family Life under Article 8 ECHR in Immigration Cases: A Human Right to Regularize Illegal Stay?' (2008) 57(1) *International and Comparative Law Quarterly* 87.

[344] Ibid §§69-70.

[345] *Sanchez-Sanchez v United Kingdom* App no 22854/20 (ECtHR, 3 November 2022).

[346] Ibid §108.

[347] *Paposhvili v Belgium* App no 41738/10 (ECtHR, 13 December 2016).

[348] The applicant passed away while the procedure before the ECtHR was pending but his partner and children expressed the wish to continue the proceedings; ibid, §1.

[349] Ibid §§203-206.

rather high, the rule is clear-cut – once the threshold is fulfilled, expulsion goes against the human rights recognised in the ECHR.

3.2 Developing Case Law on Article 8 of the ECHR

A provision invoked most frequently by migrants is Article 8, guaranteeing the right to private and family life. Clearly, expulsion from a country where one has an established life, family or partner constitutes a violation of private life; it has to be ascertained whether the violation is legitimate and justified. Under the limitation clause in Article 8(2), there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society. Article 8(2) lists several interests that can be taken into account in assessing this necessity: national security (i), public safety or the economic well-being of the country (ii), preventing disorder or crime (iii), protecting health or morals (iv), and protecting rights and freedoms of others (v). On the face of it, therefore, this provision permits a CoE Member State to expel a migrant who commits crimes,[350] and whose behaviour constitutes a peril to the rest of the society. This possibility was later confirmed by the case law of the ECtHR, which will be analysed later in this article.

The Court has provided guidance on how the infringement of this provision can be invoked in cases of migrant expulsion, such as *Üner v the Netherlands*,[351] characterised as an important authority for following case law.[352] This case was identified as the first case evaluating migrant expulsion on grounds of criminal offences.[353] There, the Grand Chamber considered that deporting the applicant to Turkey, which was his country of origin, along with issuing a 10-year entry ban, was justified and lawful, even though he had a partner and children in the Netherlands. In that case, the applicant's ties to the Netherlands might not have been so strong as he did not live with his family, and the offences of manslaughter and assault were of such a grave nature that family considerations could not outweigh them. Hence, in the Court's view, the authorities had not assigned too much weight to the State's own interests when deciding to impose the 10-year entry ban.[354] The case drew on the criteria developed in *Boultif v Switzerland*[355] regarding the balance between an individual's interests and the interests of the state in Article 8

[350] As defined by each state's criminal substantive law.
[351] *Üner v Netherlands* App no 46410/99 (ECtHR, 18 October 2006).
[352] Charlotte Steinorth, 'Üner v The Netherlands: Expulsion of Long-term Immigrants and the Right to Respect for Private and Family Life' (2008) 8(1) *Human Rights Law Review* 187.
[353] Ibid 185.
[354] Information Note on the Court's case-law No. 90, European Court of Human Rights, *Information Note on the Court's Case-law* No 90, *Üner v Netherlands* [GC] App no 46410/99 (ECtHR, 18 October 2006).
[355] *Boultif v Switzerland* App no 54273/00 (ECtHR, 2 August 2001).

cases. While *Boultif* did not concern an immigrant, the Court found no reason to examine the cases involving migrants in a different way than other cases, decided on the basis of Article 8.
All in all, the most important takeaway of the *Üner v The Netherlands* was the possibility of CoE Members expelling a convicted migrant. After this judgment, there have been multiple cases before the ECtHR addressing the measures taken against settled immigrants who had been convicted of violent crimes and expelled on this ground.[356] While the ECtHR tended to find no violation of Article 8, the case law on the topic was characterised as a 'lottery' and 'a source of embarrassment' for the Court.[357] On a European scale, the period has seen a number of recommendations and calls not to expel long-term settled migrants (and especially migrants who were already born in the CoE country),[358] but the judgements of the ECtHR did not accept that there would be a general prohibition of expulsion of such migrants. This was especially justified by the existence of limitation clauses in Article 8.

3.3 Recent Case Law on Article 8 of the ECHR

Fairly recently, a few cases from Denmark have been decided concerning the proportionality of imposing a re-entry ban on settled migrants. The cases *Noorzae v. Denmark*[359] and *Sharifi v Denmark*[360] were decided against a similar factual background, and the Court found that there had been a violation of Article 8 in both of them. To compare, in cases *Goma v Denmark*[361] as well as *Al Masudi v Denmark*,[362] ECtHR did not find a violation of Article 8. The comparative analysis of those cases aids in understanding how the Court currently assesses whether the expulsion and re-entry ban satisfies the requirements of proportionality and an appropriate balance of interests.
In *Noorzae v Denmark*, a migrant who had settled in Afghanistan was convicted of violence, specifically driving without a valid licence and drug possession. When first convicted, he was warned that further offences may result in his expulsion.[363] On account of subsequent charges for attempted threats, a Danish court issued an expulsion order against him with a twelve-year re-entry ban. He appealed against it, arguing that the decision did not meet the balancing criteria

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[356] The principles established in *Boultif* and *Üner* were later confirmed in the case of *Unuane v United Kingdom* App no 80343/17 (ECtHR, 24 November 2020). An analysis of less recent case law can be found e.g. in Daniel Thym, 'Respect for Private and Family Life under Article 8 ECHR in Immigration Cases: A Human Right to Regularize Illegal Stay?' (2008) 57(1) International and Comparative Law Quarterly 87-1120; PICUM, Barriers to Return: Protection in International, EU and National Frameworks (2022) 12–13.
[357] *Boughanemi v France* App no 22070/93 (ECtHR, 24 April 1996) para 4.
[358] Recommendation of the European Council of Europe Parliamentary Assembly and the adoption of national policies within some European States barring long-term immigrants from expulsion, 2001.
[359] *Noorzae v Denmark* App no 44810/20 (ECtHR, 5 September 2023).
[360] *Sharifi v Denmark* App no 31434/21 (ECtHR, 19 September 2023).
[361] *Goma v Denmark* App no 18646/22 (ECtHR, 26 October 2023).
[362] *Al Masudi v Denmark* App no 35740/21 (ECtHR, 21 November 2023).
[363] *Noorzae v Denmark* App no 44810/20 (ECtHR, 5 September 2023).

and thus violated his right to private life. Once the court in Denmark had rejected his appeal, the case reached Strasbourg.

The ECtHR agreed with the applicant, finding that the applicant's previous convictions did not indicate that he posed a threat to public order, the sentence in the case giving rise to the re-entry ban was lenient, he had not received any previous warnings regarding the possibility of expulsion, and had attempted to reintegrate himself into Danish society after serving his sentence. Moreover, he had virtually no ties with Afghanistan, while his ties to Denmark were very strong as he had lived there for 18 years.[364] On this factual basis, the Court decided that the Danish court erred in its assessment and that the 12-year re-entry ban was disproportionate in the case at hand.

Sharifi v Denmark concerned an expulsion order against a settled migrant with a considerable criminal record.[365] As an adult, he was convicted for repeated acts of violence and drug possession and was expelled from Denmark with a twelve-year re-entry ban.[366] He appealed against the expulsion order, raising that his partner was pregnant with their child and the impossibility of re-entering Denmark would violate his right to private life.[367] Moreover, he claimed that he had no ties to Afghanistan, where he was born and that no 'very compelling reasons' to expel him existed. Thus, he alleged that the Danish courts have failed to properly exercise the balancing test.[368] The ECtHR found in the applicant's favour as it had arrived at the conclusion that the expulsion was disproportionate. The Court considered various arguments in assessing the proportionality of the expulsion, arguing that the applicant had a six-year period during which he had not committed any offence.[369] Moreover, the authorities did not warn him of the risk of expulsion[370] and the court, despite having discretion, did not consider if a shorter period of the re-entry ban would be more appropriate.[371] Last, while he had existing strong ties with Denmark, his connection to Afghanistan was virtually non-existent.[372]

Another high-profile case, *Sharafane v Denmark*[373] decided in 2024, concerned the expulsion of a settled migrant who was convicted of drug-related offences. The national Danish court issued a re-entry ban after performing a thorough analysis of the situation of the migrant, taking into account both that he had no criminal past and, at the same time, that the offence he was charged

[364] Ibid §37.
[365] *Sharifi v Denmark* App no 31434/21 (ECtHR, 19 September 2023) paras 1–6.
[366] Ibid para 7.
[367] Ibid para 9.
[368] Ibid para 21.
[369] Ibid para 34.
[370] Ibid para 35
[371] Ibid para 36.
[372] Ibid para 37.
[373] *Sharafane v Denmark* App no 5199/23 (ECtHR, 10 October 2023)

with was of a very serious nature.[374] The Court found that there was a violation of Article 8, given that the Danish law provided no realistic possibility of the applicant re-entering Denmark after the ban came to an end. ECtHR pointed out that while re-entry is possible for nationals from Iraq and other countries in the same Visa group (under Danish legislation, the possibility of obtaining a visa is dependent on the nationality of the applicant) who have family ties in Denmark, for those who do not, it remains a purely theoretical possibility.[375]

All those cases would picture the ECtHR as relatively permissive of migration and arguments lingering on Article 8 violations. However, this is only one side of the coin, and, to scrutinise the postulates of the Open Letter, it is equally important to delve into the case law in which the ECtHR finds that, despite deportation, there has been no violation of Article 8. For example, expulsion was found to be allowed in the case *Goma v Denmark*,[376] a case involving the expulsion of a settled migrant who arrived in Denmark while three years old and, as an adult, was charged with rape and fined for the use of prohibited substances.[377] The crime had been committed while the applicant had been on a probation period for a previous suspended expulsion order.[378] The Danish court found this circumstance to be one of the decisive factors when deciding to expel the applicant and ban his re-entry to Denmark permanently. The ECtHR sided with the Danish courts. It stated in the judgments that the gravity of the offence, which was committed during the probation period, as well as the applicant's demonstrated unwillingness to comply with the Danish law, made for sufficient factors to consider that the applicant posed a serious threat to public security and order. Hence, his expulsion was justified, and the permanent ban on re-entry to Denmark was justified and proportionate in light of the case's circumstances.[379]

In *Al Masudi v Denmark*,[380] the applicant, of Iraqi origin but who was born and resided in Denmark, was charged with theft, robbery, aggravated violence, and possession of drugs multiple times between 2010 and 2020.[381] The Danish courts have finally decided to expel him from Denmark with an entry ban for life. The applicant argued before the Court that the Danish courts failed to account for several circumstances: his sentence was rather moderate, his previous convictions never exceeded six months' imprisonment, and while he had strong family ties to Denmark as he had a partner and a child born there, he had no ties to Iraq. The applicant made

[374] Ibid para 49.
[375] Ibid paras 61, 71-72.
[376] *Goma v Denmark* App no 18646/22 (ECtHR, 26 October 2023).
[377] Ibid paras 5-6.
[378] Ibid para 33.
[379] Ibid paras 34-35.
[380] *Al Masudi v Denmark* App no 35740/21 (ECtHR, 21 November 2023).
[381] Ibid paras 7-9.

an argument that there were no 'very compelling reasons'[382] to expel him in light of public security interests.[383] In this case, however, the ECtHR found that the expulsion and the unlimited ban were justified by the fact that the applicant consistently showed no willingness to comply with the Danish law and had been previously warned of the possibility of his expulsion.[384] Thus, the ECtHR agreed that the Danish national courts properly 'weighed up the applicant's personal interests against the more general public interest in the case'[385] and found no violation of Article 8.

As the foregoing analysis shows, the judgments of the ECtHR are never exclusively anti- or pro-migration but provide for a detailed case-by-case analysis of the relevant circumstances of the applicant and weighing of his and the state's interests. The standard of assessment that the ECtHR invokes, i.e. whether 'very serious reasons' required to justify the expulsion of the migrant were adequately adduced and examined by the national authorities when they assessed the applicant's case, remains the same for all types of cases involving the expulsion of migrants.[386] It is only the differing factual circumstances, such as the applicant's background, his or her ties to the country of origin and the CoE state against whom the case is conducted, and the gravity of crimes that have the Court's analysis give different results, depending on the case. Because of the approach, it may seem that the ECtHR acts in a very casuistic way when assessing the cases.

Moreover, one may sometimes wonder if the balance is indeed struck appropriately enough. Presently, one could think that having well-developed social ties and especially having proof that one has a partner and kids in the host country is enough to make an application under Article 8 successful. This would not be a welcome solution if the sole fact of having a family should prevail in the domestic court's assessment of the applicant's situation over state security concerns. Being able to demonstrate having, e.g. children does not always mean that the applicant is genuinely engaged with the family life, and thus, that their interests in terms of family life would be worthy of protection under ECHR. On the other hand, the *Goma v Denmark* judgement referred to 'the solidity of social, cultural and family ties with the host country and with the country of destination'[387] as the relevant criterion under Article 8 and still found that this provision has not been violated. For settled migrants who were born in the host country or

[382] The notion of 'very compelling reasons' is a general clause that is common in ECtHR jurisprudence, used to classify reasons which may justify restrictions of freedoms and rights granted by the Convention. The notion was used numerous times in Court's expulsion and migration cases referred to in this paper and sets a particularly high threshold that has to be met for freedoms and rights granted by the ECHR. As a general clause, the assessment of 'very compelling reasons' by the ECtHR occurs on a case-by-case basis.
[383] *Al Masudi v Denmark* App no 35740/21 (ECtHR, 21 November 2023) para 22.
[384] Ibid para 35.
[385] Ibid para 36.
[386] The Court has also made repeated references in its following case law i.e. to *Üner v. the Netherlands*, see *Goma v. Denmark*, Application no. 18646/22, §24; *Al-Masudi v.* Denmark, Application no. 35740/21, para 24.
[387] *Goma v Denmark* App no 18646/22 (ECtHR, 26 October 2023) para 31.

arrived there at a very young age, the solidity of such a connection will likely be very high, especially if they never or only rarely travelled to their country of origin or the country where their family was originally from. This may indeed be an issue for CoE Member States that do not accept migrants born in their territory as their nationals, yet have low possibilities of successfully establishing their life abroad, given they have never or rarely been there, do not speak the language, and have weak social ties in those countries.

Nevertheless, it should be recognised that such cases require a very careful balancing of rights and interests. As was aptly observed by the ECtHR itself, 'it is not for the Court to substitute its own assessment of the merits (including, in particular, its own assessment of the factual details of proportionality) for that of the competent national authorities'.[388] Thus, the appropriate degree of autonomy of the proceedings before the national body is safeguarded.

4. The Interaction of the ECtHR's Case Law with the Open Letter's Postulates

The analysis of the ECtHR case law on illegal migration uncovers that the cases related to expulsion can touch upon Article 3 and Article 8 of the ECtHR. There are numerous reasons for distinguishing between those provisions. Article 3 provides for an absolute right (freedom from torture and degrading treatment), while the rights included in Article 8 may be balanced against other rights, such as public security. The limitation clause expressed in Article 8(2) ECHR is, moreover, wide and may yield differing interpretations. Article 8 has already been stated to have 'dynamic potential'[389] and the Court has modified its interpretation of Article 8's contents throughout the years of applying the Convention. It requires a careful balancing of the diverging interests to find the appropriate border where the individual right to family and private life should give way to the collective interests of public order and public security.

The protection against torture and the inhumane and degrading treatment under Article 3 lies at the very heart of the Convention and provides for protection without exceptions, but the threshold to be granted such protection is already high. On the other hand, the wording of Article 8 shows that the states could be granted more discretion in assessing whether a migrant should be expelled from the country or not. One can see that there are cases where the decision

[388] Ibid para 34; *Al Masudi v Denmark* App no 35740/21 (ECtHR, 21 November 2023) para 35.

[389] Alan Desmond, 'Dubious Distinctions? Calling the European Court of Human Rights to Account for Its Differential Treatment of Immigrants in Its Article 8 Expulsion Jurisprudence' (Refugee Law Initiative Blog, 11 September 2024) <https://rli.blogs.sas.ac.uk/2024/09/11/dubious-distinctions-calling-the-european-court-of-human-rights-to-account-for-its-differential-treatment-of-immigrants/>.

regarding the expulsion and the re-entry ban of a migrant infringes upon the right to private life, which are exceedingly difficult to decide. While the ECtHR may not have been consistent and conclusive enough in its judgments, it grants national courts the ability to assess the case pending before them since they are in the best position (i.e. through gathering the documents directly, conducting the hearing, etc.) to do so. Moreover, the judgements of the ECtHR have always respected the premise that CoE Member States reserve the right 'to control the entry, residence and expulsion of aliens'.[390]

It remains recommendable that the ECtHR provides more uniform guidelines on the procedure before the national courts. One should agree that the assessment done on the level of the CoE Member States should meet certain criteria; the courts should hear the migrant, thoroughly examine the evidence put forward to it, and take into account the domestic as well as international standards of human rights protection. Presently, the ECtHR judgements cannot be assessed overly critically, although they do not provide crystal clear criteria used to determine whether the expulsion is compliant with the ECHR or not. While the assessment on a case-by-case basis is difficult to escape, there is a poignant need to work out more specific and less malleable criteria to figure out whether expulsion is lawful, and on what conditions.

Nevertheless, despite the challenges that still await the ECtHR, the postulates of the Open Letter are not to be supported. While the judgements can be debated and argued with, and they can also be criticised for not providing uniform guidelines, the direction of thought in which the Open Letter uncovers a narrative in which migrants are not treated on par with other citizens and migrants obeying the values and the culture of the host CoE Member States. The Open Letter sees a distinction between the migrants who assimilate and respect the values of the host CoE Member States – those who allegedly do not commit crimes – and those who do not integrate as well; they are accused of committing crimes and destabilising the public order. As was aptly observed, the Open Letter, in the way it 'juxtaposes deserving and undeserving migrants, the letter creates a hierarchy of belonging and entitlement which runs antithetical to the values underlying the human rights law paradigm'.[391]

Further, any migration-related security issues in the CoE Member States that signed the Open Letter are far too complex to be solved by a change in the ECtHR case law. The strategy against increasing crime rates should be backed by thorough research of the situation, examining the underlying issues of the increasing crime rates. All in all, looking at the statistics, it is indeed true

[390] *Paposhvili v Belgium* App no 41738/10 (ECtHR, 13 December 2016) para 172.

[391] Harriet Ní Chinnéide and Eva Sevrin, 'Restoring Balance: A Critical Response to the Open Letter on Migration and Human Rights' (Strasbourg Observers, 17 June 2025) <https://strasbourgobservers.com/2025/06/17/restoring-balance-a-critical-response-to-the-open-letter-on-migration-and-human-rights/>.

that Europe is getting less safe. It is also true that European countries should, and should be able to, act against increasing crime rates and guarantee public order and the security of their citizens. However, the Open Letter against the ECtHR case law and its interpretation of the ECHR cannot be considered a part of this strategy.

5. Conclusion

The case law of the ECtHR is not conclusively pro-migration or permissive towards migrants who commit crimes. While the rights of migrants are safeguarded to an extent, one cannot claim that the stance of the ECtHR is biased or not legally grounded. The case law of ECtHR on cases concerning migrants can be subject to criticism due to its rather casuistic approach and sometimes unpredictable results. Indeed, some have also criticised the Court for not taking a more active position in the quest to protect migrant's rights. Clearly, the criticism of the case law as presented in the Open Letter is unacceptable. Apart from it being a political pressure mechanism, it also depicts the ECtHR's case law in a way that simply does not do it justice.

The concerns of the CoE Member States about security and maintaining public order are, to an extent, legitimate, as every government is obliged to guarantee public safety to its citizens. Nevertheless, it seems that migrants who have been charged or accused with serious crimes are a drop in the ocean of all migrants, even if one counts only those who have not been assimilated perfectly well into the host country. Moreover, evidence has been put forward showing that, despite the common media narrative, increased immigration does not lead to increased crime rates. In any case, the attack on ECtHR's case law is a misguided attempt that cannot result in guaranteeing greater security in the CoE Member States.

The CoE Member States, both those who signed the Open Letter and those who may join the appeal in the future, should work on a greater scale, implementing better strategies to restore public order and security, and enable migrants to integrate better into society. In terms of impact on security, such strategies will exercise far greater influence on the situation in CoE Member States. While a review of the ECHR interpretation in immigration cases is certainly possible, the Open Letter is too vague to formulate any concrete postulates on the reinterpretation, and due to its vagueness, it also runs the risk of overturning the achievements of 75 years of ECtHR jurisprudence, recognising that migrants, just as everyone else, deserve their rights to be appropriately protected.

IV. Reimagining Protection for the Future

BEYOND RECOGNITION: RETHINKING GENDER-BASED VIOLENCE IN LAW

Zubeyir Baghirzade[392]

Abstract

This Article critically examines the landmark judgment of the European Court of Human Rights in *Opuz v Turkey*, exploring its doctrinal advancements and limitations in addressing gender-based violence. While the decision marked a significant step by recognising domestic violence as a human rights violation and gender-based discrimination, the Article argues that the Court did not fully adopt a feminist and transformative framework. Relying on feminist theoretical insights, the Article maintains that the Court's reasoning remained confined within traditional legal boundaries and failed to interrogate the deeper structural and cultural dynamics that sustain patriarchy. The analysis shows how the Court's formalist reasoning limited its ability to achieve substantive justice and systemic change. In response, the Article advocates for a shift in legal reasoning that prioritises anti-stereotyping principles and directly engages with the social context of gendered violence, which is essential for international human rights law to effectively challenge and dismantle systemic violence against women.

Keywords: *discrimination, domestic violence, European Court of Human Rights, feminism, gender, human rights, patriarchy, stereotypes.*

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1. Introduction

Gender-based violence remains one of the most widespread and persistent human rights violations around the world. Despite increased awareness and legal recognition, international human rights law has struggled to fully address the complex social, cultural, and institutional factors that allow such violence to continue.[393] The European Court of Human Rights (the Court or the ECtHR) judgment in *Opuz v Turkey* stands as a landmark decision in this field. For the first time, the Court explicitly recognised domestic violence as a violation of human rights and identified it as a form of gender-based discrimination, holding states responsible for failing to act with due diligence to protect victims.[394] This ruling was widely celebrated as a major step forward in developing the legal protection of women against violence.

However, this Article argues that the ECtHR's decision ultimately failed to adopt a truly transformative legal approach. The Court's reasoning remained confined within traditional legal frameworks and did not sufficiently challenge the deeper patriarchal structures and stereotypes that underpin systemic gender-based violence. As a result, the judgment's potential to bring about substantive justice and meaningful social change is limited. While many scholars have analysed this case from various perspectives, this Article offers a distinct contribution by applying the feminist critiques of Dianne Otto and Alexandra Timmer to reveal the Court's limitations in addressing the structural causes of violence against women.

This Article does not aim to provide a comprehensive survey of all Strasbourg jurisprudence on domestic violence. Rather, it takes *Opuz v Turkey* as its starting point and analyses selected subsequent judgments, such as *Aydin v Turkey* and *Eremia v Moldova*, as well as broader sources, including the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Inter-American Court of Human Rights (the IACtHR), to trace both the advances and the shortcomings of the Court's case law. These cases and instruments were chosen because they represent key doctrinal developments and illustrate recurring tensions in the Court's reasoning. The inquiry is primarily theoretical, in that it relies on feminist legal scholarship, particularly Otto's and Timmer's frameworks, to interrogate the Court's approach. Its scope is therefore limited to judicial reasoning and doctrinal evolution, without assessing domestic implementation or empirical outcomes.

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[393] *Levchuk v Ukraine* App no 17496/19 (ECtHR, 3 September 2020); *A v Croatia* App no 55164/08 (ECtHR, 14 October 2010); *J.I. v Croatia* App no 35898/16 (ECtHR, 8 September 2022).

[394] *Opuz v Turkey* App no 33401/02 (ECtHR, 9 September 2009) 199–202.

This analysis critically examines how the ECtHR's formalistic and reactive approach falls short of embracing feminist principles that demand a more contextual and anti-stereotyping framework. By doing so, it highlights the need for a shift in international human rights jurisprudence toward transformative equality that confronts not only individual violations but also the social and institutional factors that sustain gender-based violence.

This Article begins by presenting the legal and factual background of the *Opuz* case, providing the necessary context for understanding the Court's decision. It then introduces certain legal theories of the feminist scholars that critique traditional legal approaches to gender-based violence. Using these theories, the Article critically examines the Court's reasoning, showing where it falls short in addressing the deeper social and structural causes of violence against women. Through this analysis, the Article aims to contribute to the evolving conversation on how international courts can more effectively address gender-based violence.

2. Legal and Factual Background of *Opuz v Turkey*

This section sets out the legal and factual background necessary to understand the significance of *Opuz v Turkey*, as well as the grounds raised and the ECtHR's decision. By doing so, it establishes the foundation for the critical and theoretical analysis that follows, highlighting how the case exemplifies systemic state failure to address gender-based violence.

2.1. Factual Summary

The case of *Opuz v Turkey* concerns a pattern of severe domestic violence endured over several years by Nahide Opuz, born in 1972, and her mother at the hands of Opuz's husband, H.O., whom she married in 1995. Despite multiple complaints and medical reports documenting severe physical abuse, including a 1998 incident where H.O. attempted to run them over with his car and a 2001 assault where H.O. stabbed the applicant, Turkish authorities repeatedly failed to take effective action.[395] Although H.O. was convicted on several occasions, his sentences were systematically reduced, and he was released without adequate punishment.[396] The situation escalated when, on 11 March 2002, H.O. murdered the applicant's mother while she was attempting to move away from her husband for safety.[397] While he was convicted of intentional murder in 2002, his sentence was reduced due to alleged provocation and good conduct, leading

[395] Ibid 23, 37

[396] Ibid 17, 36, 44.

[397] Ibid 54.

to his release pending appeal in 2008.[398] Following his release, H.O. resumed issuing threats against the applicant, who repeatedly sought state protection but was left without adequate safeguards.[399] The authorities' response remained limited, reactive, and ineffective throughout, despite clear signs of escalating violence and known risks to the women's lives and safety. The authorities' continued inaction and the climate of impunity were the basis of the applicant's complaint before the ECtHR.

2.2. Procedural History

On 15 July 2002, Opuz brought the case before the ECtHR, alleging violations of Article 2 (right to life), Article 3 (prohibition of torture and inhuman or degrading treatment), and Article 14 (prohibition of discrimination) of the European Convention on Human Rights (the ECHR or the Convention) due to Türkiye's failure to protect her and her mother from domestic violence. Before bringing the case to Strasbourg, Opuz had exhausted domestic remedies. She repeatedly sought protection from Turkish authorities due to severe domestic violence inflicted by her husband. Despite filing multiple complaints and obtaining court decisions, law enforcement failed to intervene effectively. Turkish courts had consistently failed to detain H.O. or issue protective measures, even in the face of ongoing violence and escalating threats.

2.3. ECtHR's Reasoning and Judgment

The ECtHR had to determine whether Türkiye (the State) failed to fulfil its positive obligations under Article 2 and Article 3 by not taking adequate measures to protect the applicant and her mother from domestic violence. Additionally, the Court examined whether Türkiye's failure to address gender-based violence constituted discrimination under Article 14 in conjunction with Articles 2 and 3. In its judgment delivered on 9 June 2009, the Court unanimously found that Türkiye had violated Articles 2, 3, and 14, holding that this inaction constituted a failure to safeguard the right to life, as well as the prohibition on inhuman and degrading treatment and gender-based discrimination under the ECHR.

First, the Court found that Türkiye's failure to fulfil its positive obligations under Article 2 constituted a violation of both the preventive and procedural aspects of the right to life.[400] While the authorities had been made aware of the threats posed by H.O. to the applicant's mother, they failed to take adequate measures to prevent her killing, notwithstanding clear indications of imminent danger. The Court emphasised that the State could not rely on the victim's reluctance

[398] Ibid 57.
[399] Ibid 59.
[400] Ibid 129, 136

to pursue legal action as a justification for its inaction when there was an expected risk to her life.[401] Additionally, the criminal investigation into the killing was significantly delayed, with judicial proceedings continuing for more than six years, despite the perpetrator's confession.[402] The Court concluded that these failures made both criminal and civil remedies ineffective and that the criminal legal regime was insufficient to deter similar unlawful acts.[403] Finally, it held that there had been a violation of Article 2.

Secondly, the ECtHR affirmed that ill-treatment must reach a minimum level of severity to fall within the scope of Article 3, with the assessment depending on various factors.[404] In the present case, the applicant, having suffered repeated and severe domestic violence, fell within the category of vulnerable individuals entitled to special State protection.[405] The Court found that the violence inflicted upon her, both physically and psychologically, constituted ill-treatment under Article 3.[406] Although Türkiye took some actions, such as medical examinations, criminal proceedings, and temporary detentions of the perpetrator, these measures were held as inadequate to prevent further violence. The Court strongly criticised the legal framework, which required that the victim be actively involved in order for the prosecution to move forward, even in cases of severe violence.[407] The authorities' failure to act allowed the perpetrator to continue his attacks, with the Court finding that the State had not met its Article 3 obligations to protect the applicant from inhumane treatment.[408]

As regards Article 14, the Court further revealed Türkiye's systemic judicial passivity, which resulted in discrimination against women in the context of domestic violence, as shown by statistical evidence and reports.[409] By failing to take proper action to prevent, investigate, and punish these acts, the authorities perpetuated gender inequality and denied women equal legal protection.[410] The conclusive evidence and the hesitation of law enforcement to act in domestic violence cases showed that the State's response was insufficient and lacked effective safeguards.[411] Consequently, the Court concluded that this inaction was not just the failure of the authorities but represented a wide and existing discriminatory practice that disproportionately impacted women, breaching Article 14 in conjunction with Articles 2 and 3.[412] This recognition

[401] Ibid 153.
[402] Ibid 151.
[403] Ibid 200.
[404] Ibid 158.
[405] Ibid 160.
[406] Ibid 161.
[407] Ibid 167–169.
[408] Ibid 176.
[409] Ibid 192–193.
[410] Ibid 191.
[411] Ibid 195–196.
[412] Ibid 198, 202.

of systemic gender bias was crucial; the Court acknowledged that discrimination can be inferred not only from differential treatment but also from a failure to treat particular needs of a vulnerable group seriously.

2.4. Relevance and Novelty of the Case

Opuz v Turkey was the first case in which the ECtHR explicitly recognised domestic violence as a form of gender-based discrimination under Article 14 of the Convention. This judgment marked a key evolution in the ECtHR's understanding of state accountability, signalling that inaction in the face of domestic abuse may amount not only to violations of bodily integrity and life but also to gender-based discrimination. It underscored the principle that effective human rights protections require states to address not only direct violations by public actors but also their inaction in the face of private violence. The case has since been widely invoked in academic literature as a turning point in European human rights jurisprudence and has influenced both subsequent ECtHR case law and international advocacy on violence against women.

3. Theoretical Framework: Feminist Insights for Analysing the ECtHR

3.1. Structural Blind Spots in International Human Rights Law

International human rights law has long been regarded as a powerful tool for safeguarding individual dignity and restraining state power. Built on principles of universality, equality, and accountability, it aims to provide legal protection against abuse and to promote justice across national boundaries. However, despite its aspirational ideals, the framework of IHRL has increasingly come under scrutiny for its conceptual blind spots and structural limitations. Critics argue that the architecture of human rights law often reflects the dominant values and perspectives of the frequently Western, male and state-centric actors who shaped it, resulting in a body of law that does not fully address or even recognise certain forms of harm.[413] One of the most sustained and rigorous critiques has emerged from feminist legal scholars, who contend that IHRL systematically marginalises the lived experiences of women. Feminist theorists challenge the field's foundational assumptions and highlight how its formal structures fail to capture gender-specific injustices, particularly those arising in the private or domestic sphere.

A central concern identified by feminist critiques is the entrenched public/private divide within international human rights law. Under this dichotomy, state responsibility is primarily limited to

[413] Hilary Charlesworth, Christine Chinkin and Shelley Wright, 'Feminist Approaches to International Law' (1991) 85 *Am J Intl L 613*.

violations committed in the public sphere, typically by state actors, while abuses occurring in the private sphere, such as domestic violence or intimate partner abuse, often fall outside the scope of legal protection.[414] This divide effectively renders private harms legally invisible and shields them from scrutiny under international norms, reinforcing patriarchal assumptions that treat the home as an apolitical, private domain beyond state accountability. Moreover, international human rights law tends to emphasise formal equality, where individuals are treated the same regardless of context. While this approach may appear neutral, it fails to acknowledge the historical, structural, and social inequalities that shape women's lived experiences.[415] As a result, laws designed with ostensibly universal application can, in practice, perpetuate existing gender hierarchies and exclude those whose circumstances deviate from the assumed norm.

The normalisation of harm present in the legal system, particularly where certain groups are disadvantaged through neglect or omission, has been critically examined in light of the concept of structural violence, which refers to systemic and often invisible harm embedded in social and institutional arrangements.[416] In response to these limitations, feminists advocate for an approach of transformative equality, which seeks not merely the equal enforcement of existing rights, but the substantive transformation of the institutions, norms, and legal frameworks that sustain gender-based subordination.[417]

Hilary Charlesworth, Christine Chinkin, and Shelley Wright's seminal 1991 article, 'Feminist Approaches to International Law,' paved the way for such critiques by exposing the masculine norms embedded in international law and questioning the supposed neutrality of its doctrines and categories. This foundational work has since been expanded by scholars like Dianne Otto and Alexandra Timmer, whose contributions offer contrasting but complementary lenses for analysing the gender dynamics in human rights jurisprudence. Each approach will be discussed in detail in the following subsections.

3.2. Dianne Otto's Feminist Critique of Legal Neutrality

Dianne Otto's scholarship offers a foundational feminist critique of international human rights law, particularly targeting its claims to neutrality and universality. Otto argues that these claims are not only misleading but also serve to obscure the law's embedded hierarchies and exclusions. According to her, international law operates through a form of 'false universalism', in that it presents itself as objective and inclusive, but in practice, it reflects the values and experiences of a

[414] Ibid 625.
[415] Ibid 626.
[416] J Galtung, 'Violence, Peace, and Peace Research' (1969) 6(3) *Journal of Peace Research* 167.
[417] A Timmer, 'Toward an Anti-Stereotyping Approach for the European Court of Human Rights' (2011) 11 *HR LR* 707.

privileged subject, who is typically male, Western and heteronormative.[418] As a result, the perspectives and experiences of marginalised groups, particularly women, non-heterosexual identities, and non-Europeans, are treated as anomalies rather than as central to the human rights project.

A key element of Otto's analysis is her argument that international human rights law does more than merely regulate individuals' actions. It treats them as certain kinds of subjects. As is explained, there is no 'natural' legal subject that exists prior to representation in law; rather, legal discourse actively produces and reproduces dominant norms and identities, including those that naturalise women's inequality.[419] In this way, international human rights law participates in constructing subjects, such as women, in ways that often reinforce existing hierarchies. This dual role of law, as both a regulator of behaviour and a producer of identity, means that legal neutrality can conceal the reproduction of stereotypes, such as the passive female victim, under the appearance of objectivity.

Otto critiques the international human rights law framework for failing to address the structural inequalities that perpetuate gender-based violence.[420] She argues that human rights law remains deeply entrenched in a patriarchal paradigm, often reinforcing rather than dismantling existing power structures. It fortifies hierarchical power dynamics by framing women as victims needing protection, rather than as autonomous legal subjects. Human rights discourse frequently prioritises state action in the form of protective measures, rather than the broader societal transformation needed to dismantle gendered violence. This tendency aligns with the broader concern that international human rights law adopts a victim-protection model rather than tackling systemic and cultural norms that sustain gender-based violence. While certain international instruments have advanced women's rights, they remain limited by their focus on formal rather than substantive equality. This strengthens the international legal regime's tendency to focus on the consequences of violence rather than its root causes, limiting the transformative potential of international human rights law. Thus, while existing frameworks acknowledge gender inequality, they often fail to challenge the underlying social, economic, and cultural structures that perpetuate it.

3.3. Alexandra Timmer and Transformative Equality

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[418] D Otto, 'Rethinking Universals: Opening Transformative Possibilities in International Human Rights Law' (1997) 18 *Austral Year Book of Intl L* 1, 14–15.

[419] D Otto, 'Lost in Translation: Re-scripting the Sexed Subjects of International Human Rights Law' in Anne Orford (ed), *International Law and Its Others* (Cambridge University Press 2006) 319–320.

[420] D Otto, 'Women's Rights' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (3rd edn, Oxford University Press 2018).

Alexandra Timmer's approach centres on a transformative equality model which goes beyond the frameworks of both formal and substantive equality. While formal equality is concerned with treating everyone the same regardless of differences, and substantive equality aims to correct disadvantages through differential treatment, transformative equality seeks to dismantle the deep-rooted social norms, stereotypes, and institutional structures that sustain discrimination and inequality.[421]

Timmer draws inspiration from anti-stereotyping jurisprudence, particularly from the constitutional courts of the United States and Canada, where courts have begun to reject legal reasoning that reinforces gender-based or identity-based stereotypes.[422] She argues that international human rights bodies, especially the ECtHR, should adopt a similar approach. Rather than simply evaluating whether discrimination occurred in a given case, courts should critically assess how legal norms and reasoning might be complicit in reinforcing systemic harm. The author critiques the Strasbourg Court for its inconsistent application of this approach, noting that while the Court has sometimes addressed gender stereotypes, it has largely failed to apply this reasoning systematically.[423] This inconsistency weakens the Court's ability to challenge deeply embedded societal norms that contribute to gender-based violence.

In Timmer's view, transformative equality requires courts to engage more deeply with context, identity, and power structures. It is not enough to acknowledge individual harm; courts must also interrogate the institutional and cultural frameworks that allow such harm to persist. This entails a rethinking of positive obligations under human rights law, not merely as procedural requirements for states to prevent rights violations, but as substantive responsibilities to actively reshape unjust social arrangements.[424]

In this sense, transformative equality offers a normative and doctrinal foundation for feminist legal reform, prompting judicial bodies to take a proactive role in achieving structural change. This framework presents a stronger alternative to the traditional human rights model, calling for transformative legal reasoning which actively dismantles gender hierarchies. By challenging the stereotypes that normalise gender-based violence instead of treating cases as isolated incidents, courts play a more substantive role in addressing structural discrimination.

3.4. Situating Otto and Timmer Together

[421] Timmer (n 417) 712.
[422] A Timmer, 'Judging Stereotypes: What the European Court of Human Rights Can Borrow from American and Canadian Equal Protection Law' (2015) 63 *American Journal of Comparative Law* 239.
[423] Timmer (n 417) 709.
[424] Ibid 713.

While Dianne Otto and Alexandra Timmer approach international human rights law from different theoretical perspectives, their critiques share a common concern: that the legal regime has failed to confront and dismantle the structural and cultural foundations of gendered inequality. Otto focuses on the ideological basis of international law, revealing its claims of neutrality and universality as vehicles for reproducing dominant, hierarchical norms. Her critique is grounded in post-structural feminist theory, emphasising how law constructs subjects and reinforces hierarchies under the mask of neutrality. Timmer, however, develops her analysis through the lens of transformative equality, advocating for a doctrinal shift in adjudication that challenges stereotypes and reshapes institutional practices. While Otto critiques the foundations of the international legal order, Timmer offers a framework for reform from within, advocating for judicial practices that recognise and address systemic discrimination. Their work highlights the need for a critical engagement with the law, which moves beyond formal equality to resist the power structures entrenched in legal reasoning and institutions.

3.5. From Theory to Case: *Opuz v Turkey*

The theoretical insights of Otto and Timmer offer complementary tools for assessing the strengths and limitations of the ECtHR's judgment in *Opuz v Turkey*. Their perspectives are applicable to this case, reflecting the treatment of gender-based violence as a private issue rather than a matter of structural injustice. Otto's critique of legal neutrality reveals how Türkiye's inaction reflected broader structural complicity in gender-based violence, this being a dynamic the Court begins to acknowledge through its finding of discrimination under Article 14. This lens clarifies both the progress and the limits of the Court's reasoning in *Opuz*.

Timmer's model of transformative equality sets the standard for a gender-sensitive interpretation of the Convention. This interpretation might demand that proactive duties be placed on states to challenge social and legal norms that sustain violence against women. Her approach highlights the necessity of actively deconstructing the gender stereotypes that sustain violence.

In the next section, these theoretical frameworks will be applied to evaluate the efficacy of the Court's engagement with the gendered dimensions of domestic violence in Opuz, the alignment of its reasoning with standards of transformative equality, and the effectiveness of its judgment in advancing feminist aspirations in international law.

4. Critical Doctrinal and Theoretical Analysis of the *Opuz* Judgment

A close examination of the *Opuz* judgment is necessary to evaluate its doctrinal innovations and its theoretical limits in addressing gender-based violence. An analysis of the strengths and shortcomings of the Court's approach, in light of feminist legal theory and comparative jurisprudence, reveals the extent to which the judgment challenged or reproduced structural gender inequalities.

Under Articles 2 and 3, the Court assessed Türkiye's obligations through the framework it had previously developed in Osman v United Kingdom: whether the authorities knew or ought to have known of a real and immediate risk to the applicant's life, and whether they took measures within the scope of their powers that could reasonably be expected to avert that risk.[425] In the domestic-violence context, this translates into duties of proactive risk assessment, timely protective measures such as restraining orders, and effective coordination between police and prosecutors. Clarifying what the authorities were required to know and when, and which preventive steps they were expected to take, is central to understanding the scope of positive obligations under the Convention.

On the discrimination dimension, it is important to note that a violation of Article 14 does not require proof of explicit discriminatory intent. A discriminatory effect may be established through an evidentiary pathway that combines statistical or institutional data indicating systemic under-protection of women, recurring patterns of investigative or prosecutorial inertia, and evidence of gender-stereotyped reasoning in administrative or judicial decisions. Mapping these indicators onto Articles 2 and 3 in conjunction with Article 14 clarifies how structural discrimination can be demonstrated even in the absence of overtly sexist language or policies.

4.1. Strengths of the Court's Approach

One of the judgment's significant achievements was its recognition of domestic violence as a form of gender-based discrimination.[426] The Court explicitly linked the state's failure to prevent and respond adequately to prolonged abuse to a pattern of discriminatory state inaction. This interpretation disrupted the longstanding public/private divide in human rights law and established that systemic tolerance of domestic violence could amount to gender-based discrimination under the Convention.

Another notable strength of the judgment was the Court's invocation of the due diligence standard, a concept drawn from broader international human rights jurisprudence.[427] The Court

[425] *Osman v United Kingdom* App no 87/1997/871/1083 (ECtHR, 28 October 1998) 115–116.
[426] *Opuz* (n 394) 199–202.
[427] M Malaihollo and L Lane, 'Mapping out Due Diligence in Regional Human Rights Law: Comparing case law of the European Court of Human Rights and the Inter-American Court of Human Rights' (2024) 37 *Leiden J of Intl L* 462, 462–483.

found that Türkiye had breached its positive obligations by failing to take preventive measures despite clear warnings and an escalating pattern of violence. In *Opuz*, the Court applied these established principles in a context shaped by gendered structural inequality, highlighting the state's responsibility to prevent harm within systemic patterns of domestic violence. This aligns closely with feminist legal theory, which emphasises the need to address state complicity in private violence. In practical terms, the *Opuz* judgment opened the door to holding states accountable for failing to dismantle the institutional conditions that allow such violence to persist.

4.2. Shortcomings and Missed Opportunities

Despite its progressive elements, the *Opuz* judgment fell short in several respects. Most notably, the Court failed to engage with the patriarchal assumptions underpinning state inaction. The ruling primarily focused on Türkiye's failure to act, and did not interrogate the societal and cultural norms that allowed domestic violence to persist. The judgment remained within the traditional framework of state responsibility, failing to call for broader societal transformation and systemic legal reforms. It lacked an analysis of how prevailing gendered norms, such as the minimisation of domestic violence, the framing of abuse as a private matter, or the perception of women as unreliable or overly emotional complainants, shaped the authorities' failure to intervene. From Otto's perspective, this silence reflects a deeper commitment to formal legal neutrality, which, as she argues, obscures the ways law reproduces patriarchal hierarchies under the guise of universality.[428] While the Court rightly condemned the outcome of state inaction, it did not probe the institutional ideologies and practices that allow such outcomes to become the norm.

Moreover, as Otto's critique suggests, the reliance on human rights instruments alone is insufficient when these mechanisms themselves operate within a patriarchal legal framework.[429] With its narrow focus, the Court implicitly maintained that gender-based violence is an issue of enforcement rather than of structural inequality. This framing limits the potential of the judgment to promote sociolegal transformation. The Court could have gone further by examining the reluctance of the Turkish judiciary to intervene and demonstrating that this was a reflection of broader societal norms that view domestic violence as a private issue.

In addition, the Court's application of Article 14 was doctrinally underdeveloped. Timmer's critique suggests that without addressing these stereotypes, legal judgments limit their

[428] Otto, 'Lost in Translation' (n 419) 319–320.
[429] Otto, 'Women's Rights' (n 420) 321–324.

transformative potential.[430] While the *Opuz* ruling set an important precedent, it did not go far enough in challenging the cultural narratives that sustain gender-based violence. It acknowledged that the applicant had suffered discrimination but offered no clear standard for what constitutes discrimination in cases of state inaction toward gender-based violence. It lacked a clear set of criteria for determining when a state's omission becomes discriminatory under the Convention, as well as any examination of how systemic inequality or gender stereotypes may have played a role. There was no attempt to articulate the state's positive obligations in challenging those patterns. From Timmer's perspective, this reflects a missed opportunity to adopt a model of transformative equality, requiring that courts interrogate the structural and cultural frameworks permitting harm done to individuals.[431]

As Timmer observes, 'the Court eschews its pedagogical role,' failing to confront the societal narratives that normalise gender-based violence.[432] Had the Court applied this anti-stereotyping approach, it could have articulated a more robust vision of Article 14, grounded in comparative jurisprudence and capable of recognising gender-based inaction as systemic discrimination. In doing so, it would have laid the groundwork for structural reforms aimed at eliminating the stereotypes and ideologies that normalise domestic violence.

4.3. Comparative and Doctrinal Expansion

To evaluate the doctrinal consistency of *Opuz*, it is useful to consider how the ECtHR and other legal bodies have handled gender-based violence in related cases. Before *Opuz*, cases such as *Aydin v Turkey* and *M.C. v Bulgaria* addressed sexual violence but approached it through narrower legal frameworks without fully engaging with its gendered dimensions. In the *Aydin* case, the Court found a violation of Article 3 due to the rape and ill-treatment of a Kurdish woman in detention.[433] However, the judgment primarily focused on abuse of power by state officials, without engaging in a broader gender-based analysis. In *M.C. v Bulgaria*, the Court examined issues of consent and the state's duty to conduct an effective investigation in rape cases, but again without framing the case through the lens of gender discrimination.[434] In this context, the *Opuz* case was a significant development, in that it extended the Court's protection to violence occurring in the private sphere and explicitly recognised the role of discrimination.

The Court's case law after *Opuz*, however, shows an uneven trajectory. In *Eremia v Moldova*, the Court found violations of Articles 3 and 14 due to the authorities' failure to act in a domestic

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[430] Timmer (n 422) 250.
[431] Timmer (n 417) 712.
[432] Timmer (n 422) 251.
[433] *Aydin v Turkey* App no 57/1996/676/866 (ECtHR, 25 September 1997), 80-88.
[434] *M.C. v Bulgaria* App no 39272/92 (ECtHR, 4 December 2003), 148-187.

violence situation, citing the *Opuz* judgment as precedent.[435] Yet, it did not provide a clear standard for identifying when state inaction amounts to discrimination, nor did it offer a structured approach to addressing systemic gender inequality. A similar pattern appeared in *Volodina v Russia*, where the Court acknowledged widespread domestic violence but refrained from further developing Article 14 jurisprudence.[436] This recurring absence of a robust anti-discrimination framework underscores the Court's ongoing challenge in fully embracing a transformative equality or anti-stereotyping approach in its interpretation of the Convention.

Other international bodies provide more developed doctrinal approaches. The 1992 General Recommendation No. 19 of the Committee on the Elimination of Discrimination against Women (the CEDAW Committee) was well ahead of *Opuz*, stating clearly that gender-based violence constitutes discrimination under Article 1 of the CEDAW Convention.[437] In *A.T. v Hungary*, the Committee held the state responsible for failing to offer protection against domestic violence.[438] It developed a strong understanding of state due diligence and recognised that such violence stems from structural discrimination. Similarly, the IACtHR, in *González et al. ('Cotton Field') v Mexico*, adopted a broader and more integrated legal approach. The Court acknowledged that gender-based violence is deeply rooted in structural inequality.[439] It required states to eliminate discriminatory laws and cultural practices and interpreted the duty of due diligence as an obligation to actively challenge and change harmful gender norms.[440] Compared to *Opuz*, the *Cotton Field* judgment reflects a more thorough feminist understanding of both legal obligations and social realities.

These comparative developments help illustrate the critiques advanced by Otto and Timmer. The more developed approaches of the CEDAW Committee and the Inter-American Court concur with Otto's argument that international human rights law should move beyond formal notions of neutrality and address the deeper, structural causes of gender-based harm. Likewise, Timmer's emphasis on the Court's failure to fulfil its pedagogical role and to adopt an anti-stereotyping approach is visible in the ECtHR's reluctance to articulate a coherent doctrine under Article 14. The jurisprudence of these other bodies demonstrates the practical operation of a transformative equality model, which also aims to change the underlying conditions that allow gender-based violence to persist.

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[435] *Eremia v Moldova* App no 3564/11 (ECtHR, 28 May 2013), 85-91.

[436] *Volodina v Russia* App no 41261/17 (ECtHR, 9 July 2019), 109-133.

[437] United Nations Committee on the Elimination of Discrimination against Women, 'General Recommendation No 19' in (*Note by the Secretariat: Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, 29 July 1994) UN Doc HRI/GEN/1/Rev.1 6.

[438] *A T v Hungary* UN Doc CEDAW/C/32/D/2/2003 (26 January 2005) paras 9.1–9.6.

[439] *González et al. ("Cotton Field") v Mexico* (Inter-American Court of Human Rights, 16 November 2009) paras 128–236.

[440] Ibid 258.

4.4. Broader Implications

The *Opuz* judgment represents both a significant advancement in and a failure of the development of international human rights law on gender-based violence. The *Opuz* case also played a formative role in shaping broader legal and policy developments at the European level.

The judgment is widely recognised as one of the key influences behind the adoption of the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (Istanbul Convention) in 2011.[441] The Convention builds upon the principles affirmed in *Opuz*, particularly the idea that gender-based violence constitutes a form of structural discrimination and that states have positive obligations to prevent, investigate, and punish such violence.[442] In this way, *Opuz* did not merely interpret existing legal standards; it helped to generate momentum for the creation of new, more comprehensive legal instruments addressing gendered harms.

This development reinforces the critiques made by Otto and Timmer. Otto challenges the idea of legal neutrality and calls for international law to confront the structural conditions that produce gendered harm. Timmer emphasises the Court's missed opportunities to adopt an anti-stereotyping approach and to fulfil its pedagogical function. The Istanbul Convention, while a separate legal instrument, reflects many of these theoretical concerns by explicitly addressing the need to dismantle gender stereotypes and by calling for transformative state action. In this sense, *Opuz* can be seen as a foundational case that contributed to a broader shift in international legal thinking on gender-based violence.

For international human rights law to develop in this direction, future jurisprudence must build upon *Opuz* by adopting feminist legal methodologies that interrogate state complicity, move beyond formal neutrality, and demand transformation of the social and institutional conditions that enable it.

5. Conclusion

This article examines the European Court of Human Rights' landmark decision in *Opuz v Turkey* through a feminist legal lens, highlighting both its significance and limitations. The analysis began by outlining the legal and factual background of the case and emphasising the Court's groundbreaking recognition of domestic violence as a form of gender-based discrimination

[441] Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) (adopted 11 May 2011, entered into force 1 August 2014) CETS No 210.

[442] Ibid arts 3(a), 4(1), 5(2), 12(1), 12(2).

under Article 14 of the European Convention on Human Rights. A theoretical framework was then developed by engaging with feminist critiques of international human rights law, focusing on the persistent public-private divide, the flawed claim of legal neutrality, and the need for transformative equality in dismantling patriarchal norms. Key contributions from scholars such as Dianne Otto and Alexandra Timmer were employed to demonstrate how current human rights doctrines fail to address structural gender inequality and instead reproduce stereotypes that hinder meaningful change.

The Article applied these feminist theories in a critical analysis of the *Opuz* judgment. While the Court's approach was progressive in linking state inaction to discrimination and affirming positive obligations, it stopped short of challenging the underlying patriarchal assumptions that enable domestic violence. The ruling did not fully embrace a transformative model of equality, instead remaining within a reactive and formalistic legal framework. The Court's failure to adopt an anti-stereotyping approach and to provide clear doctrinal guidance on systemic gender discrimination limits the judgment's potential to drive broader social and legal reforms.

To address these shortcomings, this Article argues that future human rights adjudication must move beyond mere protection of individual victims and engage more actively with the cultural and institutional structures that perpetuate gender-based violence. Incorporating feminist methodologies, especially the transformative equality model, can strengthen international legal standards by demanding not only enforcement but substantive change. Comparative analysis of other international bodies, such as the CEDAW Committee and the Inter-American Court of Human Rights, shows promising paths for advancing these goals.

Ultimately, *Opuz* represents both a crucial step forward and a missed opportunity. Its legacy includes inspiring comprehensive instruments, such as the Istanbul Convention, which better reflect feminist concerns. For international human rights law to realise its full potential in combating gender-based violence, it must critically confront patriarchal legal paradigms and develop a jurisprudence that actively dismantles systemic inequalities rather than merely responding to their effects.

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POPULISM AND THE RULE OF LAW: WHY LAW MUST RESIST IDEOLOGY TO REMAIN LAW

Stefan Bakrachev[443]

Abstract

This essay explores the essential incompatibility between populism and the rule of law. It argues that law, rooted in reason and structure rather than ideology, must resist political will to preserve neutrality and justice. Drawing on Kant, Kelsen, Radbruch, D. Valchev, and K. Takov defends law as a rational framework for peaceful coexistence.

Keywords*: ideology, justice, populism, positivism, reason, rule of law*

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1. Introduction

Across political systems today, populism presents itself as the voice of the people against an elite minority. Yet beneath this rhetorical framing lies a deeper challenge: the undermining of legal neutrality. Populism seeks not only to mobilise political frustration, but to capture institutions and reconstruct the legal order according to a singular ideological "truth." The rule of law, whose essence lies in predictability, impartiality, and the equality of all under the law, is placed in direct opposition to this populist impulse.

This essay explores the essential incompatibility between populism and the rule of law. It argues that all ideologies, including populism, inherently strive to subordinate law to political will. By contrast, the rule of law emerges not from ideology, but from reason. It is the natural structure of coexistence. Drawing on thinkers like Kant, Kelsen, Radbruch, Daniel Valchev, and Kristian Takov, this essay affirms that law can only survive populist pressures by maintaining its apolitical core and resisting any form of ideological colonisation.

2. The Nature of Law: Reason, Will, and Structure

The essence of law lies not in its ability to command, but in its capacity to structure human coexistence through reason. Even in everyday life, traffic laws illustrate this principle. They are not about commanding individuals arbitrarily, but about organising coexistence on the roads. Traffic rules allow everyone to move safely and predictably as an expression of reasonable, structured freedom, not suppressing it.

Thus, law, at its most authentic, is not an expression of power but of restraint; it is not the will to dominate, but the will to coexist. Understanding this nature of law: Its grounding in reason, its distinction from mere political will, and its structural function is fundamental to grasping why it cannot serve ideology without losing itself.

Immanuel Kant, whose legal philosophy remains foundational, famously echoed that freedom is obedience to a law we give to ourselves.[444] The principle that he was inspired by was Jean-Jacques Rousseau. This statement captures the paradox at the heart of modern law: that true liberty is not the absence of constraint, but the acceptance of rational, self-imposed limits. For Kant, the legal order is not something imposed from above, but a system that rational beings construct to enable peaceful and dignified coexistence. The law, then, is not an instrument of will; it is the form of reason that allows freedom to exist without self-destruction.

[444] Immanuel Kant, *Grundlegung zur Metaphysik der Sitten* (Akademie-Ausgabe, vol 5, 33).

The Kantian view sees law as a universal, rational structure that transcends the desires of individuals or political groups. It is in this sense that law must remain separate from ideology. Ideologies, even when clothed in democratic rhetoric, operate through particularistic visions that impose a specific idea of the good, the just, or the true.

Law, by contrast, must remain agnostic toward truth-claims. Its function is not to decide which ideology is correct but to guarantee that all ideologies coexist under the same rules. Law is not the guardian of truth; it is the precondition for the peaceful coexistence of many truths.

Hans Kelsen, building upon the Kantian tradition, elaborated this understanding in his Pure Theory of Law.[445] Kelsen's core contribution lies in his radical separation between law and politics, law and morality, and law and ideology. For him, the validity of a legal norm depends not on its content but on its position within a hierarchical structure of norms, culminating in a basic norm (Grundnorm).[4] This formalistic approach seeks to protect the legal system from ideological capture by ensuring that laws derive their authority from structure, not substance.

In Kelsen's model, law is valid because it is enacted according to legal procedures, not because it embodies a particular moral or political ideal. This is what makes it 'pure': it does not pretend to be good or right, only legal. Such purity is not a philosophical indulgence, but a practical necessity. In a pluralistic society, where competing values and worldviews constantly clash, the only way to sustain legal order is to ground it in neutral forms rather than ideological content. The law must be like a vessel capable of holding different beliefs, but never becoming one of them.

This structural and rational understanding of law stands in direct contrast with the logic of will. It will be the will of the monarch, the people, the party, or the nation that seeks to impose itself. It demands obedience not because of procedure or reason, but because of identity, truth, or mission. Political will is, by nature, impatient with neutrality. It sees legal restraint as an obstruction. It wants the law to serve, not to limit. And it is here that the tension between law and populism, or any other ideology, becomes most visible.

When law becomes an extension of political will, it ceases to be law in the meaningful sense. It may still be called 'law', it may still be enforced by courts, but it loses the essential character that makes it law: its universality, its neutrality, its commitment to procedural equality. The philosopher Lon Fuller once described law as 'fidelity to form'.[446] This is highly contrasting with Kelsen's formalism, which treats law as a morally neutral hierarchy of valid norms, while Fuller's proceduralism sees law as a moral enterprise grounded in the inner morality of fair and transparent procedures. In short, it is not the outcome that makes law legitimate, but the method

[445] Hans Kelsen, *Pure Theory of Law* (University of California Press 2005) ch 5.
[446] Lon L Fuller, *The Morality of Law* (Yale University Press 1965) 155–59.

by which it is produced and applied. Law is not a command; it is a process, a disciplined, predictable, and rational structure through which society regulates itself.

This structure is not accidental. It emerges from the human need to live together peacefully despite deep differences. Unlike morality, which is often individual and internal, or politics, which is collective and conflictual, law is the rational mediator between the two. It takes the energy of will and channels it into predictable forms. It allows for disagreement without violence. It allows for change without collapse. In short, it allows society to survive itself.

To maintain this function, however, the law must be constantly defended against the temptation of ideology. Ideological movements, particularly populist ones, often reject the idea of legal neutrality. They argue that law should reflect the 'true will' of the people, the 'natural order', or the 'real justice' of the majority. But when law is asked to embody a truth rather than structure coexistence, it is turned into a tool of exclusion. It no longer protects all; it protects only those who agree with the prevailing ideology.

This is why the structural integrity of law, its form, its neutrality, and its restraint are not a weakness, but its greatest strength. Law cannot promise salvation. It cannot tell us who is right or wrong in the moral or political sense. What it can do, and must do, is create a space where such questions can be debated without fear, and where no one is silenced simply because they dissent. As Professor Daniel Valchev observes, 'The most important characteristic of law is that it is a mechanism for resolving any significant social conflict without mutual violence between the participants'. In this lies its dignity and its fragility.

Populism, like other ideologies, thrives on division. It demands loyalty, not deliberation; obedience, not procedure. In such a context, the rational and structural nature of law is seen as an obstacle to action. But history shows that every time law is subordinated to will, justice becomes arbitrary, and society becomes unstable. Law without reason is merely a command. Law without structure is merely policy. Law without restraint is merely force.

Thus, the nature of law, its grounding in reason, its resistance to will, and its commitment to structure are not an academic ideal but a practical necessity for democratic life. Without this foundation, the rule of law becomes hollow. And once hollowed out, it can be filled with anything: ideology, passion, or tyranny.

3. Populism as Ideology: And All Ideology as Populism

Populism presents itself as an anti-ideological return to authenticity, simplicity, and truth. Yet this is an illusion. Populism is not a negation of ideology; it is ideology in its purest, most emotional form. It offers salvation through identification with a mythic community and condemns pluralism and democracy as betrayal.

What makes populism especially dangerous is that it hides its ideological nature behind anti-ideological slogans. While traditional ideologies like socialism, liberalism, or conservatism often come with intellectual traditions and internal checks, populism moves fast and strikes hard. It is reactive, emotional, and highly adaptable. It thrives in crisis and conflict. In times of uncertainty, people crave simple answers, and populism offers them confidence.

The Bulgarian law professor Daniel Valchev observes that 'The most important characteristic of law is that it is a mechanism for resolving any significant social conflict without mutual violence between the participants'.[447] It is precisely this relativism that populism rejects. The populist leader cannot afford neutral law; they need obedient law. Courts are delegitimised as partisans. Parliaments become battlegrounds.

Legal constraints are recast as obstacles to democracy, rather than its guarantee. The law does not exist to proclaim who is absolutely right. It exists to ensure that people with different views, beliefs, and ways of life can live together peacefully. The law provides structure, not dogma. It offers space for disagreement, not just a platform for one side.

Populist leaders, however, are not interested in this kind of law. Neutral law is a threat to their agenda. For a populist, the law must not be an impartial framework. It must be a tool of enforcement. Courts that rule against the leader are labelled corrupt or captured by the opposition. Parliaments become spaces of constant warfare, not deliberation. Legal checks are reframed not as safeguards of democracy, but as obstacles placed by the old elite to stop 'the people' from reclaiming power.

This shift in perspective is subtle at first. Populist parties begin by questioning the neutrality of institutions. They accuse judges of being political, journalists of lying, and academics of brainwashing. Then they start to demand 'reforms' and changes in laws, courts, and constitutions to reflect the supposed will of the people. And slowly, the idea of law as a neutral framework begins to disappear. In its place comes the expectation that law must follow the majority's sentiment.

Populism, in this way, becomes indistinguishable from ideology. Even if it uses a different language, its structure is the same. It divides society into us and them, loyal and disloyal, people and traitors. It defines justice not as something universal, but as something that serves a particular group. And like any ideology that seeks total dominance, it tries to control the legal system so that only its version of the good can survive. But this is not limited to right-wing or

[447] Daniel Valchev, *General Theory of Law*, vol I (2017) 130.

left-wing populism, as any ideology that tries to monopolise truth and inject it into the heart of law becomes populist in its methods. Whether it is extreme nationalism, religious fundamentalism, or radical social activism, the danger arises when a movement begins to see legal neutrality as an enemy.

4. The Radbruch Formula: When Law Loses Itself

Perhaps no thinker better illustrated the tension between law and ideology than Gustav Radbruch. Initially a legal positivist, Radbruch changed course after witnessing the collapse of justice under the Nazi regime, which came as a populist nationalist movement.

In 1946, he wrote that 'where statutory law reaches a degree of injustice that it contradicts the very essence of law, it ceases to be law'.[448] This statement is known as the Radbruch Formula and is the moral limit within legal positivism. It does not demand that all law be just, but that no law be radically unjust and should preserve the peace.

The Formula is the clearest rejection of ideological legality: it reminds us that even the most formally valid statute loses its authority when it becomes a weapon of tyranny. It is no coincidence that populist regimes, whether fascist, communist, or nationalist, always seek to legalise repression. Radbruch warns us: legality is not legitimacy. In today's world, we see echoes of this in more places than we would like. Democratically elected leaders try to weaken constitutional courts. Politicians change electoral laws to make sure they stay in power. Parties demand that judges 'respect the will of the people', as if that should replace independent interpretation. All of this is done in the name of democracy. But it slowly poisons the foundations of the rule of law.

So what is the answer? It is not to reject all ideology. People will always have different beliefs about justice, society, and government. The solution is to keep those beliefs out of the legal structure itself. Law must remain the common ground.

5. The Role of the Lawyer: As Guardian, Not Servant

Theories like Kelsen's legal purity or Radbruch's moral threshold are not just intellectual puzzles. They are tools, compasses that guide lawyers through the most difficult terrains of legal life. Law is not made or applied in a vacuum. It is practised by people, and those people often stand at the

[448] Gustav Radbruch, 'Gesetzliches Unrecht und Übergesetzliches Recht' (1990) 89.

crossroads of power and principle. In times of stability, the distinction between right and wrong may seem obvious.

As the Bulgarian Professor, Kristian Takov, once said in his interview, 'Law is the concretisation of a moral principle in a given situation. It is an instrument'.[449] While this quote sounds philosophical, it is actually rooted in reality. Every time a judge rules on a case or a lawyer chooses how to argue something, they are not just applying rules; they are shaping people's lives. They are deciding, sometimes in subtle ways, who gets protected and who gets exposed. That is why legal work is not just technical. It is deeply moral and instrumental in keeping that moral.

In populist systems, this moral dimension becomes dangerous. The lawyer is no longer seen as an independent professional, but as a tool and, more specifically, a tool of the state. A servant of 'the people' as defined by those in power. The role of the lawyer is reduced to obedience: drafting laws that entrench control, prosecuting opponents, interpreting the law not with fairness, but with loyalty.

But law, if it is to remain law, cannot accept such a position. The legal profession carries a responsibility greater than simply following orders or pleasing the majority. A lawyer must be a guardian of limits, not of ideology or partisanship, but of balance. A society that respects the rule of law needs lawyers who are not afraid to say 'no' to power when power asks too much.

Such a task is not easy and often comes with risk. In many countries, lawyers who defend unpopular causes are insulted, threatened, or even punished. Judges are accused of political bias for simply doing their jobs. Constitutional courts are discredited when they limit executive power. In such moments, the role of the lawyer becomes more than professional; it becomes existential.

To resist in law does not mean to become political. It means to stay faithful to the idea that the law must protect everyone equally. That no one, not even the most popular leader or the loudest movement, is above the rules. Lawyers must remember that their loyalty is not to a party, not even to a moment in history, but to the long-term integrity of the legal order.

Neutrality here does not mean apathy. It means applying the law fairly, even when it is unpopular to do so. It means believing that justice cannot be bent to fit political needs. It means understanding that the true power of law lies in its ability to restrain power, not to serve it.

Populism demands passion. It thrives on division. It asks lawyers to take sides, to align with 'the people', to abandon neutrality for the sake of 'truth'. But law, if it wants to survive, must respond

[449] Kristian Takov (1965–2017) was a prominent Bulgarian legal scholar and public intellectual, specializing in civil, family, and commercial law. He served as Associate Professor at the Faculty of Law, Sofia University "St. Kliment Ohridski"

with restraint. It must insist on rules, on process, on fairness, even when the world outside is boiling with emotion. The lawyer must not become an architect of political will. Their job is not to help power move faster or strike harder. Their job is to slow things down when passion runs too high. To ask hard questions when easy answers are too tempting. To protect the structure of legality when others want to tear it down in pursuit of speed or popularity.

This way, the lawyer becomes a quiet hero. Not loud, not flashy, but essential. Not the voice of the crowd, but the steady hand that holds the line. Not the servant of ideology, but the guardian of order. Even when the tide of populism rises and institutions begin to tremble, the lawyer's duty is to stand firm, not because it is safe or popular, but because without that stance, law collapses into power.

6. Conclusion: Law as Reason against Ideology

The populist challenge to the rule of law is not temporary. It is eternal and structural. It reminds us that law is always one political storm away from being reduced to command. But precisely for this reason, the rule of law must be defended not as an ideal but as a condition for living in one society.

Ideologies promise justice through war. The rule of law promises justice through peace. Populism collapses this distinction. It pretends that passion is justice and that loyalty is truth. But law is neither. Law is reason, written in restraint. And its survival depends on our ability to remember that. Ideologies of all kinds try to claim a monopoly on truth. The rule of law does the opposite: it accepts that truth is complex, that people believe different things, and that peace is more valuable than certainty. In this sense, law is not a final answer but a shared language. It does not tell us what to think; it tells us how to live together while thinking differently.

As the Jedi Code says, 'There is no passion; there is serenity'. I say: 'There is no passion; There is no absolute truth; there is reason'.

This is why the law must remain outside ideology. The moment it begins to serve a cause, it ceases to be neutral. And once neutrality is gone, justice becomes selective, rights become fragile, and those who disagree become enemies instead of fellow citizens.

The survival of law depends on our ability to resist the temptation of absolutes. It requires us to value patience over passion, principles over power. Law is not a battlefield for ideas; rather, it is the condition that allows ideas to exist side by side. It is not the echo of the strongest voice, but the balance that keeps all voices from shouting each other into silence.

To defend the rule of law, then, is not to defend a theory. It is to defend the very possibility of peace in a pluralistic world. It is to insist that reason, not rage, must govern our public life. And that even when politics is loud, law must remain calm.

And for young lawyers, it must be understood that we do not uphold the rule of law because it is perfect. We uphold it because it is the last defence between civilisation and the abyss. The world may crave passion, force, or loyalty to a single truth, but the lawyer must walk a different path. One of clarity. One of silence when others shout. One of conscience when others obey. We must see through the dogma. Not to reject meaning, but to create it ourselves, anchored in reason and guided by restraint.

The real test of the legal profession is not how it acts in times of peace, but how it holds its ground in moments of political heat. Anyone can respect the law when it is easy. But the lawyer's role is to respect it even when it is hard, even when it means defending someone hated or challenging something popular.

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