SORBONNE DOCTORAL LAW REVIEW
REVUE DOCTORALE DE DROIT DE LA SORBONNE

2025

Volume 8, N°1

Sorbonne Doctoral Law Review – Revue doctorale de droit de la Sorbonne
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Publié en ligne le 22 décembre 2025.
Published online on December 22th, 2025

SORBONNE DOCTORAL LAW REVIEW
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Vol. 8 N.1

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EDITORIAL: L'EFFECTIVITÉ DES DROITS FONDAMENTAUX EN DROIT EUROPÉEN : APPROCHES JURISPRUDENTIELLES ET ENJEUX INSTITUTIONNELS

Marina LOVICHI, Doctorante à l'Université Paris 1 Panthéon-Sorbonne

Chères lectrices, chers lecteurs,

Nous avons le plaisir de vous annoncer la parution du Volume 8, numéro 1 de la Revue doctorale de droit de la Sorbonne. Ce nouveau numéro s'inscrit dans une double dynamique : celle du renouvellement et celle de la continuité. Renouvellement, parce qu'il marque une étape importante dans la vie de la revue, avec le remaniement de son comité éditorial, appelé à poursuivre l'ambition fondatrice de ce projet collectif : offrir un espace d'expression exigeant, ouvert et rigoureux aux recherches doctorales et jeunes recherches en droit. Continuité, ensuite, parce que cette exigence demeure notre boussole, à travers un travail éditorial attentif, guidé par la qualité scientifique, la précision argumentative et le dialogue des disciplines juridiques.

Dans cette dynamique, nous sommes également ravis d'annoncer l'arrivée du nouveau rédacteur en chef, Christian Karemera. Son engagement contribuera à accompagner l'élan de la revue et à consolider notre travail collectif au service de la qualité scientifique et de l'effectivité des droits. Nous lui adressons tous nos vœux de réussite dans cette nouvelle responsabilité, convaincues que ce mandat prolongera l'élan éditorial qui anime la revue depuis ses débuts.

Le présent numéro réunit trois articles qui, par-delà la diversité de leurs objets, se répondent autour d'une interrogation commune : qu'est-ce que "protéger" signifie, en droit Européen, lorsque les droits fondamentaux se jouent dans des expériences concrètes (violences, santé, autonomie) et qu'ils dépendent autant des standards jurisprudentiels que des architectures institutionnelles qui rendent le recours possible ?

La contribution de Katerina Koukouraki, « Le rôle de la Cour européenne des droits de l'homme dans la lutte contre le féminicide : défis et possibilités d'amélioration », interroge la capacité de la Cour européenne des droits de l'homme à appréhender le féminicide comme phénomène systémique à travers le prisme de la Convention. L'article met en lumière les obstacles juridiques et probatoires, mais surtout les marges de progression possibles : qualification, obligations positives, prévention, diligence des États, et reconnaissance de la dimension structurelle des violences fondées sur le genre. Cette analyse rappelle avec force que le contentieux des droits humains n'est jamais abstrait : il se mesure à sa capacité à saisir la réalité des atteintes, et à transformer les standards de protection en garanties effectives. L'article rappelle que, si la Cour a développé un contentieux

substantiel sur les obligations positives des États en matière de droit à la vie, de mauvais traitements, de vie privée et de non-discrimination dans les affaires de violences domestiques, elle demeure confrontée à des limites persistantes : une jurisprudence encore largement centrée sur la sphère domestique, un seuil probatoire élevé (notamment au regard des exigences de prévisibilité du risque) et une mobilisation encore trop parcimonieuse de l'article 14 pour révéler la dimension systémique des violences fondées sur le genre. En filigrane, l'autrice plaide pour une approche plus globale, qui ne se réduise pas au seul réflexe pénal et qui articule protection, prévention, accès effectif à la justice et politiques publiques.

Dans « Aujourd'hui et demain : la jurisprudence en matière d'avortement à la Cour européenne des droits de l'homme et orientations pour l'avenir », Juliette Moran déplace l'analyse vers un autre terrain où le droit se mesure à son effectivité : celui de l'accès à l'avortement. prolonge cette réflexion sur le terrain des droits reproductifs. À travers l'étude de la jurisprudence de la Cour, l'autrice met en évidence les équilibres instables entre marge d'appréciation des États, autonomie personnelle, accès effectif aux soins et exigences procédurales. L'article ouvre également des perspectives sur l'avenir : quelles directions pour une protection plus cohérente, plus lisible, et plus pleinement ancrée dans l'effectivité ? Ici encore, la question centrale demeure celle de la traduction juridictionnelle d'expériences profondément concrètes, intimes, et pourtant traversées par des enjeux publics majeurs. L'autrice revient sur la « réticence persistante » de la Cour à consacrer un « droit à l'avortement » en tant que tel, tout en montrant que le contentieux conventionnel permet déjà et pourrait permettre davantage de protéger l'accès à l'avortement à travers une combinaison d'outils : article 8 (vie privée et autonomie), article 3 (interdiction des traitements inhumains et dégradants) et article 14 (non-discrimination). L'analyse s'ancre dans un contexte particulièrement révélateur : les restrictions issues de la décision du Tribunal constitutionnel polonais de 2020, présentées comme ayant rendu l'accès à l'avortement légal pratiquement inopérant, et les contentieux en cours ou à venir à Strasbourg, qui constituent selon l'autrice une opportunité décisive pour clarifier les obligations conventionnelles face aux reculs normatifs.

Enfin, Dimitris Liakopoulos, dans « Le nouveau projet d'adhésion à la Convention européenne des droits de l'homme. Recours individuel devant la Cour européenne des droits de l'homme et intégration du droit de l'Union européenne », rappelle que l'effectivité des droits dépend aussi de la structure des ordres juridiques. L'article examine le nouveau projet d'adhésion de l'Union européenne à la CEDH, en se concentrant sur le recours individuel et l'articulation avec l'autonomie du droit de l'Union. L'auteur revient sur un enjeu d'architecture juridique : celui de l'adhésion de l'Union européenne à la Convention européenne des droits de l'homme et les ajustements procéduraux et institutionnels qu'elle implique, en particulier pour le recours individuel et l'articulation avec l'autonomie du droit de l'Union. L'article éclaire les tensions, mais aussi les promesses d'une intégration plus aboutie, à la croisée des logiques institutionnelles et des garanties substantielles.

En filigrane, se dessine une interrogation essentielle : comment organiser, au niveau européen, une protection des droits qui soit à la fois unifiée, accessible et respectueuse de la pluralité des systèmes ? L'article s'inscrit dans la séquence ouverte après l'Avis 2/13 et la reprise des négociations, notamment autour du groupe dit « 46+1 » et de l'adoption d'un nouveau projet en mars 2023, en soulignant les enjeux de cohérence, d'attribution de responsabilité et de mécanismes procéduraux destinés à renforcer la protection des droits au sein de l'ordre juridique européen.

La cohérence de ce numéro tient ainsi à un fil conducteur net : la protection des droits n'est pas seulement une promesse normative ; elle est une technique faite de standards, de preuves, de procédures, d'accès au juge et d'architecture institutionnelle. Les deux premières contributions montrent une Cour confrontée à des atteintes qui touchent aux corps, à la vie, à l'autonomie et à la dignité et donc à la nécessité de penser l'effectivité au-delà des proclamations. La troisième rappelle que l'effectivité se joue aussi "en amont" : dans la manière dont l'Union Européenne organise l'intégration de ses systèmes de protection et garantit, concrètement, la voie du recours.
Pris ensemble, ces trois articles montrent une Cour Européenne des Droits de l'Homme au centre de débats contemporains, tantôt sollicitée pour combler des lacunes de protection, tantôt contrainte par les équilibres institutionnels et la marge d'appréciation, toujours attendue au tournant de l'effectivité. Violences fondées sur le genre, droits reproductifs, intégration européenne : autant de terrains où le droit des droits de l'homme se révèle, simultanément, outil, limite et horizon.

Nous adressons nos remerciements les plus sincères aux autrices et auteurs pour la qualité de leurs travaux, ainsi qu'à l'ensemble des membres du comité éditorial sortants et entrants pour leur engagement dans le processus d'évaluation, de relecture et d'édition. Ce numéro témoigne de la vocation de la Revue Doctorale de Droit de la Sorbonne : faire vivre un espace scientifique où les problématiques contemporaines peuvent être saisies avec rigueur, nuance et ambition.

Nous vous souhaitons une excellente lecture ainsi que nos plus sincères voeux pour cette nouvelle année.

Joyeuses fêtes.

EDITORIAL: THE EFFECTIVENESS OF FUNDAMENTAL RIGHTS IN EUROPEAN LAW: JURISPRUDENTIAL APPROACHES AND INSTITUTIONAL CHALLENGES

Marina LOVICHI, PhD Candidate at Université Paris 1 Panthéon-Sorbonne

Dear readers,

We are pleased to announce the publication of Volume 8, Issue 1 of the *Sorbonne Doctoral Law Review*. This new issue is shaped by a dual dynamic: renewal and continuity. Renewal, because it marks an important milestone in the life of the Review with the reconfiguration of its editorial committee, tasked with carrying forward the founding ambition of this collective project: to provide a demanding, open, and rigorous forum for doctoral research and early-career legal scholarship. Continuity, because this commitment remains our compass, through careful editorial work guided by scientific quality, argumentative precision, and dialogue across legal disciplines.

In this spirit, we are also delighted to announce the appointment of the new Editor-in-Chief, Christian Karemera. His commitment will help sustain the Review's momentum and strengthen our collective work in the service of scholarly excellence and the effectiveness of rights. We extend to him our very best wishes in this new role, convinced that his term will carry forward the editorial drive that has animated the Review since its inception.

This issue brings together three articles which, beyond the diversity of their topics, respond to a shared question: what does it mean to "protect" in European law when fundamental rights are lived through concrete experiences (violence, health, autonomy), and when their protection depends as much on judicial standards as on the institutional architectures that make legal remedies possible?

Katerina Koukouraki's contribution, *"The Role of the European Court of Human Rights in Addressing Femicide: Challenges and Room for Improvement,"* examines the European Court of Human Rights' ability to grasp femicide as a systemic phenomenon through the lens of the Convention. The article highlights legal and evidentiary obstacles, but above all the scope for progress: legal characterisation, positive obligations, prevention, States' due diligence, and recognition of the structural dimension of gender-based violence. This analysis powerfully reminds us that human-rights litigation is never abstract: it is measured by its capacity to capture the reality of harm and to translate standards of protection into effective guarantees. The article notes that, while the Court has developed substantial case-law on States' positive obligations regarding the right to life, ill-treatment, private life, and non-discrimination in domestic-violence cases, it continues to face persistent limitations: a jurisprudence still largely centred on the domestic sphere, a high evidentiary threshold (notably in light of foreseeability requirements), and a still too cautious use of Article 14 to reveal the systemic nature of gender-based violence. In the background, the author argues for a more holistic approach one that does not reduce the response to a purely punitive reflex, but instead combines protection, prevention, effective access to justice, and public policies.

In *"Now and Beyond: Abortion Jurisprudence at the European Court of Human Rights and Directions for the Future,"* Juliette Moran shifts the analysis to another field where law is tested by its effectiveness: access to abortion. Continuing the reflection in the area of reproductive rights, the author highlights the unstable balances within the Court's case-law between States' margin of appreciation, personal autonomy, effective access to healthcare, and procedural requirements. The article also opens perspectives for the future: which directions could lead to more coherent and intelligible protection, more firmly anchored in effectiveness?

Here again, the central issue remains how profoundly concrete, intimate experiences yet ones permeated by major public stakes are translated into judicial reasoning. The author revisits the Court's "persistent reluctance" to recognise a substantive "right to abortion" as such, while showing that Convention litigation already allows and could allow more to protect access to abortion through a combination of tools: Article 8(private life and autonomy), Article 3 (prohibition of inhuman or degrading treatment), and Article 14 (non-discrimination). The analysis is rooted in a particularly telling context: the restrictions following the 2020 decision of the Polish Constitutional Tribunal, presented as having rendered access to lawful abortion practically ineffective, and the cases pending or yet to come before Strasbourg, which, according to the author, constitute a decisive opportunity to clarify Convention obligations in the face of normative backsliding.

Finally, in *"The New Project of Accession to the European Convention of Human Rights. Individual Appeal at the European Court of Human Rights and Integration of European Union Law,"* Dimitris Liakopoulos reminds us that the effectiveness of rights also depends on the structure of legal orders. The article examines the new project for the European Union's accession to the ECHR, focusing on individual applications and their articulation with the autonomy of EU law. The author returns to an institutional and procedural question of legal architecture: EU accession to the European Convention on Human Rights and the adjustments it entails, particularly regarding individual applications and the relationship with the autonomy of EU law. The article sheds light on tensions, but also on the promises of a more fully realised integration, at the crossroads of institutional logics and substantive guarantees. In the background, an essential question emerges: how can a European system of rights protection be organised so as to be both unified and accessible, while still respecting the plurality of legal systems? The article situates itself in the sequence opened after Opinion 2/13and the resumption of negotiations, notably around the so-called "46+1" group and the adoption of a new draft in March 2023, emphasising the stakes of coherence, attribution of responsibility, and procedural mechanisms designed to strengthen rights protection within the European legal order.

The coherence of this issue therefore rests on a clear thread: the protection of rights is not merely a normative promise; it is a technique made up of standards, evidence, procedures, access to a judge, and institutional architecture. The first two contributions show a Court confronted with harms affecting bodies, life, autonomy, and dignity, and thus with the need to think about effectiveness beyond proclamations. The third reminds us that effectiveness is also decided "upstream": in the way the European Union organises the integration of its systems of protection and concretely guarantees access to remedies. Taken together, these three articles portray a European Court of

Human Rights at the centre of contemporary debatessometimes called upon to fill gaps in protection, sometimes constrained by institutional balances and the margin of appreciation, always expected to deliver on effectiveness. Gender-based violence, reproductive rights, European integration: these are terrains on which human-rights law reveals itself simultaneously as a tool, a limit, and a horizon.

We extend our most sincere thanks to the authors for the quality of their work, and to all members of the outgoing and incoming editorial committee for their commitment to the process of evaluation, review, and editing. This issue reflects the vocation of the *Sorbonne Doctoral Law Review*: to sustain a scholarly space where contemporary issues can be addressed with rigour, nuance, and ambition.

We wish you an excellent read, and extend our warmest wishes for the New Year.

Happy holidays

THE ROLE OF THE EUROPEAN COURT OF HUMAN RIGHTS IN ADDRESSING FEMICIDE: CHALLENGES AND ROOM FOR IMPROVEMENT

Katerina Koukouraki

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Résumé

Cet article examine le rôle de la Cour européenne des droits de l'homme (CEDH) dans la lutte contre le féminicide au regard de la Convention européenne des droits de l'homme. Il explore la jurisprudence dans laquelle la Cour a reconnu l'obligation des États de prévenir la violence fondée sur le genre et de protéger le droit des femmes à la vie. L'article analyse l'évolution de l'approche de la Cour, en mettant en lumière les arrêts importants, leurs apports ainsi que leurs limites. Il s'attarde sur les obstacles structurels, probatoires et procéduraux auxquels la Cour est confrontée dans le traitement des affaires de féminicide. Enfin, il plaide en faveur d'une approche plus globale de la part de la Cour et des États afin de lutter efficacement contre le féminicide et de renforcer la protection effective des droits des femmes.

Abstract

This article examines the role of the European Court of Human Rights (ECtHR) in addressing femicide within the framework of the European Convention on Human Rights. It explores key case law where the ECtHR has recognised states' obligations to prevent gender-based violence and protect women's right to life. The article analyses the Court's evolving approach, highlighting significant rulings, their contribution and their shortcomings. It discusses the structural, evidentiary and procedural hurdles the Court faces in handling femicide cases. Ultimately, the article argues for a more holistic approach on the part of the Court and the States to tackle femicide and to enhance women's effective protection.

Keywords: Femicide; gender-based violence; European Court of Human Rights; structural limitations; evidentiary and procedural hurdles.

INTRODUCTION

It is April 1st, 2024 and Kyriaki Griva, a 28-year-old woman living in Greece, arrives to the police station, scared for her life, to report that her ex-partner had been stalking her. The police officers on duty tell her to go home without escorting her and that 'everything would be fine'. She exits the station and a few moments later, no more than two meters away from the station, she gets fatally stabbed by the same ex-partner she had just reported.

This is not an unusual case. Contrarily to the general decrease of homicides in the world, femicides are steadily increasing[1] and impunity thriving. The number of women and girls killed intentionally in 2022 reached that of 89,000 – the highest number recorded in the last 20 years.[2]

Many States allow this violence to take unprecedented dimensions, despite the emergence of movements all around the world voicing women's experiences.

Women's rights were not always perceived as human rights. This is partly due to the notion of universality, which permeates international human rights law and emanates from the presumption of a 'genderless, neutral and abstract human being'.[3] This portrayal of the rights-holder, however, is not really universal but implicitly assumes a masculine perspective.[4]

Women's rights are also often associated with the so-called 'second-generation' socioeconomic

[1] United Nations : Office on Drugs and Crime, 'Symposium on Femicide: A Global Issue That Demands Action' (*United Nations : Office on Drugs and Crime*) <//www.unodc.org/unodc/en/ngos/DCN5-Symposium-on-femicide-a-global-issue-that-demands-action.html> accessed 5 January 2025..

[2] United Nations Office on Drugs and Crime, *Gender-Related Killings of Women and Girls (Femicide/Feminicide): Global Estimates of Female Intimate Partner/Family-Related Homicides in 2022* (United Nations 2023) <https://www.un-ilibrary.org/content/books/9789213587072> accessed 8 January 2025.

[3] Maria Sjöholm, *Gender-Sensitive Norm Interpretation by Regional Human Rights Law Systems* (Brill Nijhoff 2018) 48–49.

[4] Ivana Radicic, *Feminism and Human Rights: The Inclusive Approach To Interpreting International Human Rights Law*, 14 UCL JURISPRUDENCE REVIEW 238, 240 (2008)

rights, which were incorporated later into Universal Declarations and Human Rights Treaties.[5] These rights were considered secondary to those of free movement, life and torture, which were in reality conceptualised in a gendered manner, as they are based on an abstract, autonomous rights-bearer that ignores the relational nature of individuals and fails to account for the structural and social conditions shaping women's experiences and autonomy.[6]

Indeed, women face an increased threat when it comes to those 'first-generation', primary civil and political rights. Discrimination against women begins even before birth, with sex-selective practices resulting in the forced abortion of female fetuses. It continues through childhood and adulthood, as girls and women lose control over their reproductive rights, endure constant ill-treatment, and even face death simply because of their gender. The murder of women and girls, generally called 'femicide', is usually not instant: it can be preceded by rape and abuse or be a long-term result of practices such as female genital mutilation or botched abortions. Women experience different treatment when they are in detention, in prison, or even in refugee camps.

In this context, it became apparent that women often experience rights violations by States specifically due to their gender and that this should be regulated at the international level. The primary international instrument for the protection of women's rights, often described as an 'international bill of rights for women', is the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), adopted in 1979 by the United Nations General Assembly and ratified by 189 States. The CEDAW, however, does not recognise femicide as a human rights violation. Violence against women was introduced through General Recommendations of the CEDAW Committee, where it was acknowledged that this violence infringes the right to life.[7]

While steps have been made, discrimination and violence against women still prevails. And some States seem to follow the opposite direction in the combat of fighting this reality. In March 2021, Turkey announced its withdrawal from the Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention)[8], a groundbreaking instrument that deals with gender-based and domestic violence. At the same time, femicides in

[5] Charlotte Bunch, 'Women's Rights as Human Rights: Toward a Re-Vision of Human Rights' (1990) 12 Human Rights Quarterly 486, 493–494.
[6] Radicic (n 5) 243.
[7] UN COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN, *General Recommendation No. 19: Violence against Women*, (1992); *General Recommendation No. 35 on Gender-Based Violence against Women, Updating General Recommendation No. 19*, (2017).
[8] Council of Europe, 'Turkey's Announced Withdrawal from the Istanbul Convention Endangers Women's Rights' (*Commissioner for Human Rights*) <https://www.coe.int/en/web/commissioner/-/turkey-s-announced-withdrawal-from-the-istanbul-convention-endangers-women-s-rights> accessed 11 January 2025.

Turkey reach alarming numbers: in 2023, there were 315 reports of female killings, and 248 reports of women found suspiciously dead.[9]

Turkey was not the only one to contest the Istanbul Convention. Seven states that have signed it still refuse to ratify it: Armenia, Azerbaijan, Bulgaria, the Czech Republic, Hungary, Lithuania, and the Slovak Republic. In 2018, the Bulgarian Constitutional Court declared the Convention unconstitutional due to its definition of gender as not binary and biologically inherited.[10] For the same reason, there was a petition by the Polish government for a constitutional review of the Istanbul Convention in 2020, although withdrawn later after encouragement by the new government.[11]

As conservatism grows in Europe, many States' protection for women's rights recedes. The ideas promoted by the Istanbul Convention seem to clash with cultural beliefs and the traditional image of 'family' as portrayed by the religious and patriarchal constructions that reign in a great number of European states.[12]

Invisibility in scientific research also puts obstacles in combatting femicide. Disagreements in the definition, lack of acknowledgment of femicide as a crime with distinct motives, limited data availability and comparability, or concealment of the actual numbers[13] contribute to the minimisation of women's protection from femicide by States.

In this lies the difficulty and, at the same time, the importance of the involvement of international human rights bodies, including the European Court of Human Rights (hereinafter 'ECtHR', 'Court', 'Strasbourg Court'). On the one hand, the polemics surrounding the concept of femicide, in combination with the principle of subsidiarity that permeates international human rights systems, constitute a deterrent factor for such bodies to develop this term and condemn States for their negligence towards women's rights. On the other hand, the power of

[9] 'We Will Stop Femicides Platform 2023 Annual Report' (2024) <https://kadincinayetlerinidurduracagiz.net/veriler/3089/we-will-stop-femicides-platform-2023-annual-report>.
[10] Bulgarian Helsinki Committee, 'Bulgarian Rights Groups Condemn Rejection of the Istanbul Convention' (*Liberties.eu*, 2 August 2018) <https://www.liberties.eu/en/stories/top-court-in-bulgaria-rejects-the-istanbul-convention/15388> accessed 12 January 2025.
[11] Laurenz Gehrke, 'Polish Court to "Examine" Istanbul Convention on Violence against Women' (*POLITICO*, 30 July 2020) <https://www.politico.eu/article/poland-court-violence-against-women-istanbul-convention/> accessed 12 January 2025; Jules Eisenchteter and Claudia Ciobanu, 'Women's Rights in Poland and Czechia: Seeing Past the Istanbul Convention' (*Balkan Insight*, 7 February 2024) <https://balkaninsight.com/2024/02/07/womens-rights-in-poland-and-czechia-seeing-past-the-istanbul-convention/> accessed 12 January 2025.
[12] Sociologist James Davison Hunter called this the clash between two cultures in the American public life: the progressives and the orthodox, or "culture wars". This can be applied accordingly to the European reality. James Davison Hunter, *Culture Wars: The Struggle to Define America* (Nachdr, Basic Books 1991).
[13] European Institute for Gender Equality, 'Defining and Identifying Femicide: A Literature Review' (2021) 7.

international human rights courts to influence and shape domestic practices makes their role crucial in addressing femicide.

The ECtHR has acknowledged women's experiences and has helped shape the positive obligations of States regarding gender-based violence.[14] When taking a closer look, however, the Court still has a long way to go before fully adopting a gender-sensitive approach to femicide. This paper aims to examine how the ECtHR has addressed the 'shadow epidemic' of femicide and why it is crucial for the Court to further develop its case law on this issue. To achieve this, it will begin by defining femicide and exploring how it is understood by both domestic and international bodies, before critically analysing the ECtHR's relevant case law. It is particularly important to first establish a clear understanding of the concept itself, the theoretical frameworks surrounding its criminalisation, and the broader landscape of femicide in Europe, in order to provide the necessary context for assessing the Court's approach. This paper's analysis will be conducted through an intersectional lens, referring at points to feminist legal methods,[15] which the author considers essential when conducting research on femicide. Finally, the paper will conclude by outlining the structural, evidentiary and procedural hurdles the Court faces in handling femicide cases.

1. Understanding Femicide

1.1. Definition(s)

The term *femicide* had been used in the Anglo-Saxon world for a long time to describe the act of killing women.[16] It was during the proceedings at the International Tribunal of Crimes Against Women in 1976, however, that Professor Diana Russell added a critical political

[14] *Gender-based violence* refers to the violence targeted to individuals on the basis of their gender, regardless of what that gender may be. However, for the purposes of this paper, the term will be used interchangeably with *violence against women*, as gender-based violence affects women disproportionately, and at the same time violence against women is mainly inflicted for gender-based reasons.

[15] Feminist legal methods aim at exposing the gendered nature of law and jurisprudence. They deconstruct texts and practices to reveal the different effects that treaty provisions and interpretations impose on women. As there exist multiple methods, when this paper mentions 'feminist legal method' it should be understood as integrating a critical discourse with the aforementioned purposes, unifying principles from different methods. See generally, Katharine T Bartlett, 'Feminist Legal Methods' (1990) 103 Harvard Law Review 829; Hilary Charlesworth, Christine Chinkin and Shelley Wright, 'Feminist Approaches to International Law' (1991) 85 American Journal of International Law 613.

[16] Magdalena Grzyb, Marceline Naudi and Chaime Marcuello-Servós, 'Femicide Definitions', *Femicide across Europe: Theory, Research and Prevention* (Bristol University Press 2018) 20. The first record of this term's use dates to 1801 in John Corry's book 'A Satirical View of London at the Commencement of the Nineteenth Century'. M Kouroutsidou and SM Kakarouna, 'Phenomenon of Femicide and the Greek Experience' (2021) 1 European Journal of Humanities and Social Sciences 23.

meaning to the word, without ascribing to it a specific definition yet.[17] She later explicitly defined *femicide* as 'the murder of women by men motivated by hatred, contempt, pleasure, or a sense of ownership of women' and 'the misogynistic killings of women by men',[18] before eventually settling on 'the killing of females by males because they are female' to include baby girls and older girls.[19] Russell refers only to males as perpetrators in order to showcase that the vast majority of femicides is committed by men. The limitation to male perpetrators only was also followed in the definition of femicide by the Inter-American Model Law on the Prevention, Punishment and Eradication of the Gender-Related Killing of Women and Girls (Femicide/Feminicide) (Article 5). In reality, of course, femicides are not committed exclusively by men.

At the same time, feminist Jill Radford described femicide as a form of sexual violence, which stems from a man's desire for 'power, dominance and control' and is an expression of the overall oppression of women in a patriarchal society, rather than a simplistic pursuit of sexual pleasure.[20] This definition aligns with other scholars' comprehension of femicide as a pattern of multiple acts targeting females, given that the killing is often preceded by other forms of violence, such as sexual, physical and mental abuse.[21] Sexual violence against women can be seen as a 'continuum', meaning that there is an interrelationship between the different forms of violence women face without a hierarchy of seriousness or severity based on physical harm.[22]

Mexican anthropologist Marcela Lagarde y de los Rios further linked femicide to state responsibility after the epidemic levels of women killings in Ciudad Juárez, Mexico. She used the term *feminicidio* (translated into *feminicide* in English) and explained that in Spanish, *femicidio* is equivalent to homicide and refers solely to the killing of women, whereas *feminicidio* denotes a broader concept, encompassing the systematic violation of women's human rights by the State.[23] According to Lagarde, feminicide can be characterized as a 'crime

[17] Diana EH Russell, *Crimes against Women: Proceedings of the International Tribunal* (Diana EH Russell and Nicole Van de Ven eds, Russell Publications 1976).
[18] Jill Radford and Diana EH Russell, *Femicide: The Politics of Woman Killing* (Twayne Publishers 1992).
[19] Diana EH Russell, 'Defining Femicide' (2012).
[20] Radford and Russell (n 19) 3.
[21] See Angela Hefti, *Conceptualizing Femicide as a Human Rights Violation: State Responsibility under International Law* (Edward Elgar Publishing 2022) 1; Nadera Shalhoub-Kevorkian, 'Reexamining Femicide: Breaking the Silence and Crossing "Scientific" Borders' (2003) 28 Signs 581, 581 (presenting an interesting perspective that death in femicide can occur already by the time a female is put on "death row", i.e. when she lives under the continual threat of being killed).
[22] Liz Kelly, *Surviving Sexual Violence* (University of Minnesota Press 1988).
[23] Marcela Lagarde y de los Ríos, *Antropología, feminismo y política: violencia feminicida y derechos humanos de las mujeres* 209, 216 (2008), https://dialnet.unirioja.es/servlet/articulo?codigo=3078742 (last visited Jan 21, 2025). For the purposes of this paper, the two terms, *femicide* and *feminicide*, will be used interchangeably without different connotations to include all the characteristics described by scholars. It should be noted that *feminicide* is

against humanity' and a 'genocide', revealing a deliberate ignorance by the State towards women.[24]

Despite some minor differences in the specific definitions provided by scholars,[25] the shared understanding is that this crime involves a distinct motive compared to a simple homicide. It is important to note, however, that recently the term femicide takes a more neutral meaning, in contrast to the initial political one provided by Russell, to include generally all killings of females. This is explained by the idea that it is often difficult to decide whether women and girls were killed because of their gender and a more general use of the term facilitates research and data collecting. According to this interpretation, the analysis starts from every woman and girl that has been killed, before differentiating between cases to reveal specific motives.[26]

Although intimate partner violence is the most common form of femicide, a number of other forms can be observed as well: racist, homophobic, marital, dowry, honour, serial, mass femicide, female infanticide,[27] or as a result of violent practices such as female genital mutilation and illegal botched abortion.[28] The latter are also called *passive or indirect* forms of femicide.[29] In any case, the motives are gender-related, distinguishing these crimes from the broader categories to which they belong and necessitating specific regulation.

1.2. Criminalisation of femicide

One of the most heated debates worldwide regarding femicide is whether it should constitute a separate criminal offense or remain classified under the broader category of homicide. As previously analysed, femicide differs from homicide as it involves a specific motive, reflects a deeply rooted issue of systemic discrimination within society, and is often accompanied by other

mostly used in Latin American, Spanish, French and Italian literature and legislation, while *femicide* is prominent in the English doctrine.

[24] ibid.

[25] Definitions usually depend on the specific approach followed: feminist, sociological, criminological, human rights, decolonial, ecological and more. See European Institute for Gender Equality, 'Defining and Identifying Femicide: A Literature Review' (n 14) 8.

[26] Christiana Kouta and others, 'Understanding and Preventing Femicide Using a Cultural and Ecological Approach' in Shalva Weil, Consuelo Corradi and Marceline Naudi (eds), *Femicide across Europe* (Bristol University Press 2018) 57 <https://www.jstor.org/stable/j.ctv8xnfq2.9> accessed 12 January 2025.

[27] Russell uses the term *female feticide* to describe the practice of aborting female fetuses, and excludes it from the term *femicide*. Diana EH Russell, 'Origin and Importance of the Term Femicide' (2011) <https://www.dianarussell.com/origin_of_femicide.html> accessed 12 January 2025.

[28] Anna Costanza Baldry and Maria José Magalhães, 'Prevention of Femicide', *Femicide across Europe: Theory, Research and Prevention* (Bristol University Press 2018).

[29] OHCHR, 'Latin American Model Protocol for the Investigation of Gender-Related Killings of Women (Femicide/Feminicide)' (2014) 14.

forms of violence. A possible criminalisation of femicide would aim at recognising the exposure of women to gender-based violence, making femicide visible, preventing it, and increasing the reports of it to the authorities.

This is, however, far from being realised in most countries. On the contrary, for a long time such initiatives were suppressed by a prevailing 'victim-blaming' culture, where women's murder was often considered a result of her behaviour, thereby deemed 'justified' and regarded as less significant than homicide. This is the case particularly when the wife is cheating on her husband. Indeed, for a long time existed – and in some countries still exist[30] – the so-called 'provocation laws' justifying sexual infidelity as a trigger for loss of control.[31] In Latin-American countries, however, where feminicide legislation is more prominent, such crimes are in contrast considered aggravated homicide, qualifying for a harsher punishment.[32]

It is evident that the criminalisation of femicide does not entail exclusively the adoption of a legally separate crime. It necessitates several different legal approaches and modifications of existing laws. For instance, the aforementioned 'provocation laws' created the conditions to allow particularly men to get away with the murder of their wives, as men are statistically the majority to kill their female intimate-partners based on misogynistic preconceptions (eg, because 'she cheated'), rather than the other way around. On the other hand, women sometimes kill their partners as a response to the latter's violent behaviour, and such crimes fall outside the scope of both provocation laws and self-defence, thereby punished as homicides even though they bear different characteristics.

The criminalisation of femicide is, nevertheless, criticised for its ineffectiveness. Carol Smart, for instance, argued that the law fails to modify social reality and disqualifies women's experience, as it is an expression of power highly linked to a 'masculine culture'.[33] Moreover, according to Patsilí Toledo, focusing on the criminalisation of femicide shifts the attention from state responsibility to individual criminal responsibility.[34] While this is not inherently negative, as it can lead to more direct outcomes in vindicating women's rights, when States use this to evade accountability for their own negligence, women's protection is ultimately undermined.

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[30] For instance, in some States of the USA. See Hava Dayan, 'Femicide and the "Heat of Passion" Criminal Doctrine', *The Routledge International Handbook on Femicide and Feminicide* (Routledge 2023).

[31] Adrian Howe and Daniela Alaattinoğlu, *Contesting Femicide: Feminism and the Power of Law Revisited* (Routledge 2019) 3. Such crimes can be referred to as 'crimes of passion' or the 'heat of passion criminal doctrine', and legally originate from 17th-century England. Dayan (n 31).

[32] Toledo Vasquez Patsilí, 'Femicide/Feminicide and Legislation', *The Routledge International Handbook on Femicide and Feminicide* (Routledge 2023) 412.

[33] Carol Smart, *Feminism and the Power of Law* (Carol Smart and Maureen Cain eds, Routledge 1989).

[34] Toledo Vasquez Patsilí, *Criminalising Femicide in Latin American Countries - Legal Power Working for Women*, *in* CONTESTING FEMICIDE: FEMINISM AND THE POWER OF LAW REVISITED, 42 (Adrian Howe ed., 2019).

After all, femicide is part of a structural problem calling for broad state action, rather than a fragmentary, individualised act, where the main restorative measure consists of perpetrator's criminal persecution.[35]

Furthermore, when adding a misogynistic or gender-based motive in the subjective element of the crime, there is a risk of how prosecutors and judges are going to classify some women killings as femicides. At the end of the day, who applies the law plays the most crucial role in its effectiveness. As a result, any relative legislation could go without any positive developments if there is no awareness and appropriate education among law enforcement and the judiciary.

All the above highlight the role of international human rights bodies in shaping unified principles and providing guidance to domestic authorities on effectively addressing femicide in legal and political practice. Only in that way can a possible criminalisation of femicide have the desirable results, while not disorienting from state responsibility.

1.3. The reaction of international human rights bodies

International human rights conventions are binding only for the States that sign and ratify them. They require state agents to respect and protect human rights. This includes, on the one hand, negative obligations, ie, the obligation of state agents to refrain from violating the human rights of individuals within their jurisdiction, and on the other hand, positive obligations, including the adoption of legislation, policies and practices to ensure adherence to human rights standards and prevent violations.

Although private individuals who commit violations cannot be held accountable by human rights bodies, this does not mean that violations occurring within the private sphere fall outside of state responsibility. This is particularly relevant in cases of gender-based discrimination and violence, where state inaction, negligence, or harmful practices can perpetuate such phenomena, making the State indirectly accountable for failing to protect victims and address systemic issues. The CEDAW, notably, goes as far as urging States to take measures to modify social and cultural patterns of conduct of men and women, which are based on the idea of inferiority or superiority of either of the sexes or on stereotyped roles (Article 5(a)).

[35] infra Part III.

Nevertheless, femicide, as most common forms of violence against women, has long been considered as a domestic affair excluded by international scrutiny.[36] It was first acknowledged as a systemic human rights problem amounting to States' responsibility after the increase of women killings in the borders of Mexico in the 1990s. Hundreds of women and girls were found dead after being mutilated, abused and raped in the infamous city of Ciudad Juárez, amidst a climate of constant impunity and discriminatory disregard by the authorities. This situation led to the adoption of the 1994 Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Belém do Pará Convention), the first binding treaty to recognize violence against women, including murder, as a human rights violation.[37] Some years later, the Inter-American Court of Human Rights (IACtHR) delivered a landmark judgment in the case of *González et al. v. Mexico* (also known as the 'Cotton Field Case') declaring state responsibility in the perpetuation and impunity of femicides in the area.[38]

The IACtHR concluded that Mexico had violated the victims' rights to life, personal integrity and personal liberty, in connection to its general obligation under the American Convention on Human Rights to guarantee these rights and to adopt legal provisions to protect them.[39] Additionally, it declared that the State violated its obligations under the Belém do Pará Convention, as well as its obligation not to discriminate, marking a pivotal moment in declaring violence against women, and particularly femicide, as a form of discrimination.[40] The Inter-American Court showed sensitivity towards the vulnerability of women in some contexts and acknowledged the systematic and structural nature of the violence against them.

This judgment revealed the importance of human rights courts' reaction in the fight against femicide. In 2008, nine States in Latin America already had specific legislation on femicide. By 2015, this number almost doubled, with sixteen countries having adopted laws to criminalise femicide.[41] Whether it carries different prison sentences or considered aggravated homicide, this crime is now widely accepted in Latin America as gender-specific. Feminist critics regarding these legislations still exist, as their scope is sometimes limited.[42] However, various

[36] This is part of the public/private divide, which excludes violations in the private sphere from international examination and disproportionally affects women. Sjöholm (n 4) 56.
[37] Article 1 of the Belém do Pará Convention defines violence against women as 'any act or conduct, based on gender, which causes *death* or physical, sexual or psychological harm or suffering to women, whether in the public or the private sphere.', thereby including killings of women.
[38] *Case of González et al. ("Cotton Field") v. Mexico*, Inter-American Court of Human Rights Series C No. 205 (16 November 2009).
[39] ibid [286].
[40] ibid [402].
[41] Global Americans, 'Femicide and International Women's Rights: An Epidemic of Violence in Latin America' (2021) <https://perma.cc/ST5M-4XQR> accessed 21 January 2025.
[42] For more extensive analysis about the different Latin American legislations, see Patsilí (n 35) 43 et. seq.

Latin American States have additionally adopted policies and concrete prevention measures. Guatemala, for instance, besides creating specialised courts for the prosecution of crimes related to violence against women,[43] also set up a Commission responsible for implementing the law, organising campaigns and setting up special units in the police.[44]

1.4. The situation in Europe

After the IACtHR's judgment, European bodies followed suit: the European Parliament, as well as the Parliamentary Assembly of the Council of Europe conducted reports and adopted resolutions to address their role in combatting the murders of women after the escalation of the situation in Mexico.[45] Nevertheless, studies demonstrate limited action on the part of the European States. While their femicide rates might not be as high as those of other States around the world, they are still not decreasing. Even in countries with a high gender quality index, such as Sweden and Finland, femicide rates do not appear to have dropped.[46]

There are only seven European countries that have adopted femicide provisions: Spain, Cyprus, Malta, Belgium, Croatia, North Macedonia and the Netherlands.[47] Spain established a femicide classification system in 2021, while Malta and Cyprus both introduced a legal definition of femicide in their Criminal Codes in 2022. Belgium, Croatia and North Macedonia criminalised femicide[48] after the publication of a report by the European Institute for Gender Equality (EIGE)

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[43] UNODC, 'Global Study on Homicide: Gender-Related Killing of Women and Girls' (United Nations 2019) 49.
[44] Presidential Commission Against Femicide. Sydney Bay, 'Criminalization Is Not the Only Way: Guatemala's Law Against Femicide and Other Forms of Violence Against Women and the Rates of Femicide in Guatemala' (2021) 30 Washington International Law Journal 385.
[45] Directorate-General for External Policies of the Union Policy Department of the European Parliament, 'Femicide in Mexico and Central America' (European Parliament 2011) DG EXPO/B/PolDep/Note/2011_127; Parliamentary Assembly of the Council of Europe, 'Recommendation 1861' (2009) <https://pace.coe.int/en/files/17717/html> accessed 23 January 2025.
[46] Marceline Naudi and others, 'Femicide in Europe', *The Routledge International Handbook on Femicide and Feminicide* (Routledge 2023) 174.
[47] The Italian government recently approved a draft law introducing a definition of femicide in criminal law. Angela Giuffrida, 'Murders of Two Female Students Prompt Calls for a "Cultural Rebellion" in Italy' *The Guardian* (3 April 2025) <https://www.theguardian.com/world/2025/apr/03/murders-of-two-female-students-prompt-calls-for-a-cultural-rebellion-in-italy> accessed 4 April 2025.
[48] All the data for the EU countries (Spain, Malta, Cyprus, Belgium, Croatia) are derived from EIGE's official factsheets published on its website: European Institute for Gender Equality, 'Providing Justice to Victims of Femicide: Country Factsheets' (10 December 2024) <https://eige.europa.eu/areas/providing-justice-victims-femicide-country-factsheets?language_content_entity=en> accessed 10 February 2025. For North Macedonia see UN Women – Europe and Central Asia, 'New Amendments in North Macedonia's Criminal Code Expand Protection for Various Forms of Violence against Women' (12 June 2023) <https://eca.unwomen.org/en/stories/news/2023/06/new-amendments-in-north-macedonias-criminal-code-expand-protection-for-various-forms-of-violence-against-women> accessed 30 January 2025.

in 2023 urging EU member-States to adopt femicide provisions.[49] Similarly, the Dutch government adopted a Stop Femicide Action Plan in 2024.[50] Not long after that, there was a negative reaction in both Malta and Croatia, alleging that such legislation is discriminatory against men.[51]

Other countries' criminal codes do not establish a specific crime for femicide but provide gender-related aggravating factors for all crimes. These include objective (eg, the relationship between the victim and the perpetrator) or subjective circumstances (eg, discrimination based on sex as a motive).[52] The former is the case in the Austrian Penal Code, providing that punishment is aggravated when violent acts are committed against family members or (ex-) partners,[53] while the latter is observed in the Greek Penal Code providing that the penalty is increased if the victim was selected due to their 'race, colour, national or ethnic origin, descent, religion, disability, sexual orientation, identity or gender characteristics'.[54] This, however, excludes crimes that were committed for 'gender reasons' and not because of the victim's gender per se, for instance, when a man kills another man because the latter was talking or going out with the former's ex-girlfriend. Such cases are again a result of perceptions of dominance by the perpetrator over his ex-girlfriend.[55] This approach was adopted by Italy through the law on feminicide (*legge sul femminicidio*) of 2013, which provides for measures to prevent feminicide using gender-neutral terms.[56]

This legislation is unsatisfactory compared to the examples of Latin American countries and to the guidelines provided by specialised organizations like the EIGE. Criminalisation, of course, is not the sole solution. European states need to understand that femicide is not a crime simply committed by private actors, but a result of broader social and political structures that can be deconstructed by state policies and actions. The European Court of Human Rights has tried in some cases to illustrate this responsibility, while not reaching its full potential.

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[49] European Institute for Gender Equality, 'Improving Legal Responses to Counter Femicide in the European Union: Perspectives from Victims and Professionals' (Publications Office of the European Union 2023) <https://data.europa.eu/doi/10.2839/748307> accessed 30 January 2025.

[50] European Institute for Gender Equality, 'Country Factsheet for Netherlands' (10 December 2024) <https://eige.europa.eu/gender-based-violence/countries/netherlands?language_content_entity=en> accessed 30 January 2025.

[51] Émilie Weidl, *Criminalising Femicide: What the Western Balkans Can Learn from Global Practices*, AIRE CENTRE (Dec. 9, 2024), https://airewb.org/criminalising-femicide-what-the-western-balkans-can-learn-from-global-practices/ (last visited Jan 30, 2025).

[52] UNODC (n 44) 47.

[53] Patsilí (n 33) 413.

[54] Article 82A of the Greek Penal Code. Original translation from Greek to English provided by the author.

[55] Patsilí (n 33) 413.

[56] ibid 417. This law does not introduce femicide into the Criminal Code, but some aggravating factors related to gender-based violence.

2. The European Court of Human Rights and Femicide

2.1. Overview of the Court's mandate and jurisdiction

The European Court of Human Rights is an international court established in 1959 based on Article 19 of the European Convention on Human Rights (hereinafter 'ECHR', 'Convention'). Since the abolition of the European Commission of Human Rights in 1998, the Court directly accepts individual or inter-state applications alleging that any of the contracted States has violated one or more of the human rights envisaged in the Convention.[57] Additionally, the highest national courts can request non-binding advisory opinions from the ECtHR.[58]

The ECtHR's judgments are binding for the State concerned, although its enforcement powers do not equal those of domestic courts. The Court has only jurisdiction to apply the ECHR and can declare violations of the provisions thereof. Nonetheless, it has referred to other international conventions numerous times in accordance with the principle of harmonious and in good faith interpretation of international rules,[59] as well as the dynamic interpretation of the ECHR's provisions, taking into account evolving circumstances and attitudes, particularly when a 'European consensus' exists.[60] The Court also follows the principles of subsidiarity and margin of appreciation to be accorded to the High Contracted Parties. This means that national authorities are the primary bodies to implement the Convention rights and that they are better placed to judge the restriction or not on a right by balancing public and private interests.

There are no specific provisions in the ECHR regarding women's rights particularly. The main Convention addressing gender-based violence in Europe is the Istanbul Convention, although not subject to the jurisdiction of the ECtHR. It is considered 'the most far-reaching international treaty to tackle violence against women',[61] providing ground-breaking definitions to gender-related issues and requesting contracted States to take relevant legislative and political action. It defines violence against women and girls (VAWG) as 'all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering

[57] Article 33 for inter-state and Article 34 ECHR for individual applications.
[58] Council of Europe, Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms 2013 [CETS 214].
[59] Articles 31 of the 1969 Vienna Convention on the Law of Treaties.
[60] Jeremy McBride and Council of Europe, 'The Doctrines and Methodology of Interpretation of the European Convention on Human Rights by the European Court of Human Rights' (Council of Europe 2021) 34 ff.
[61] Organization of American States and Council of Europe, 'Regional Tools to Fight Violence against Women: The Belém Do Pará and Istanbul Conventions' (2014) 88.

to women' (Article 3). Unlike the American Convention of Belém do Pará, it does not explicitly mention the term 'femicide' or even murder as a form of VAWG. Instead, femicide is implicitly covered through the Convention's declaration in Article 1, which aims to protect women against '*all* forms of violence'.

The ECtHR has made use of the Istanbul Convention to highlight the gendered dimension of domestic violence, sexual violence and rape, but is far from revealing a holistic picture of the problem. The following analysis aims at unravelling the ECtHR's case law on gender-based violence, and particularly femicide. Before proceeding, it must be noted that femicide should not be understood in a narrow sense as solely the murder of a woman. Instead, it should be seen within the broader context of gender-based violence rooted in ideas of women's subordination. This perspective allows for the inclusion of non-female victims, such as women's family members, whose murders result from this context and have been the object of ECtHR's judgments, while not femicides per se.[62] Besides, as analysed above, femicide, outside of criminal law terminology, does not refer to an instant killing.

2.2. Landmark cases related to femicide

The main rights protected under the ECHR that are relevant to femicide are the right to life (Article 2), the right to not be subjected to torture or to inhuman or degrading treatment or punishment (Article 3), and the right to private and family life (Article 8). Relevant could also be the right to a fair trial (Article 6) and to an effective remedy (Article 13), although not usually analysed by the ECtHR after finding a violation of other rights.[63]

Article 2 has been applied in cases of domestic violence[64] or human trafficking[65], while Article 3 in cases related to sexual acts, mainly rape[66], but also increased psychological and physical pain in the context of domestic violence.[67] Regarding Article 2 specifically, the Court has found in some cases violation of its substantive limb, ie, of the State's obligation to put in place

[62] Accordingly, the ECtHR has confirmed that 'Violence against children belonging to the common household, including deadly violence, may be used by perpetrators as the ultimate form of punishment against their partner'. ECtHR, *Kurt v. Austria* [GC], no. 62903/15, § 163, 15 June 2021.
[63] Hefti (n 22) 130. An example where the ECtHR found a violation of Article 13 in addition to Article 2 is that of *Kontrová v. Slovakia*, where the applicant was not able to apply for compensation of non-pecuniary damage. ECtHR, *Kontrová v. Slovakia*, no. 7510/04, 31 May 2007.
[64] ECtHR, *Opuz v. Turkey*, no. 33401/02, ECHR 2009.
[65] ECtHR, *Rantsev v. Cyprus and Russia*, no. 25965/04, ECHR 2010 (extracts).
[66] ECtHR, *M.C. v. Bulgaria*, no. 39272/98, ECHR 2003-XII.
[67] ECtHR, *Volodina v. Russia*, no. 41261/17, 9 July 2019.

effective criminal law provisions backed up by law enforcement machinery for the prevention, suppression and punishment of theses provisions' breaches,[68] while in other cases there was only a violation of the article's procedural limb, entailing the duty to duly investigate the death of an individual.[69] Accordingly, Article 8 has been applied in instances where the violence did not reach the threshold of Articles 2 or 3 but still threatened the victim's psychological and physical integrity.[70] As previously pointed out, femicide should not be perceived as an instant killing but as a part of the continuum of violence, sometimes putting women and girls on 'death row'.[71]

All these provisions can also be invoked in relation to the principle of non-discrimination (Article 14). Article 14 is a subsidiary provision that can only be used in conjunction with other conventional rights. Nevertheless, it can be applicable in cases where the Court found no violation of the substantive right itself but the facts at issue fall within the ambit of the right, making Article 14 to this extent autonomous.[72] Regarding gender equality, the Court has affirmed that only 'very weighty reasons' could justify a difference of treatment, and these do not include traditions or prevailing social attitudes stemming from the idea that women are subordinate.[73]

The ECtHR had issued significant judgments related to femicide even before the drafting of the Istanbul Convention, holding states accountable for inadequate measures that contributed to the murder of women and children.[74] In *Opuz v. Turkey*, particularly, the Court for the first time highlighted the discriminatory nature of violence against women and found a violation of Article 14 in conjunction with Articles 2 and 3 ECHR. It also made a reference to the CEDAW and the Belém do Pará Convention, as well as to the CEDAW Committee's and the IACtHR's case law on gender-based violence.[75]

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[68] *Opuz v. Turkey,* (n 64).
[69] ECtHR, *Tërshana v. Albania*, no. 48756/14, 4 August 2020; *Durmaz v. Turkey*, no. 3621/07, 13 November 2014.
[70] See ECtHR, *Hajduová v. Slovakia*, no. 2660/03, 30 November 2010 (where the verbal and physical assault experienced by the applicant caused her a constant fear for her life and for the life of her children, essentially putting them on "death row" while the authorities remained passive). The ECtHR has observed, through the relevant cases it receives, that when a perpetrator has a record of domestic violence, there is 'a significant risk of further possibly deadly violence'. *Kurt v. Austria,* (n 62) para 175.
[71] Shalhoub-Kevorkian (n 22) 581.
[72] ECtHR*, Sidabras and Džiautas v. Lithuania*, nos. 55480/00 and 59330/00, § 38, ECHR 2004-VIII.
[73] ECtHR, *Konstantin Markin v. Russia* [GC], no. 30078/06, § 127, ECHR 2012 (extracts).
[74] ECtHR, *Kontrová v. Slovakia*, (n 63); *Branko Tomašić and Others v. Croatia*, no. 46598/06, 15 January 2009; *Opuz v. Turkey,* (n 64).
[75] According to Sara de Vido, however, the Court did not use these international instruments to interpret the ECHR, but only to make reference to international standards so as to make subsequently its own interpretation. Sara De Vido, *The Istanbul Convention as an Intepretative Tool at the European and National Levels*, *in* INTERNATIONAL LAW AND VIOLENCE AGAINST WOMEN: EUROPE AND THE ISTANBUL CONVENTION, 63 (Johanna Niemi, Lourdes Peroni, & Vladislava Stoyanova eds., 2020).

In this case, the applicant was repeatedly assaulted by her husband, until one day she endured seven knife injuries causing her serious bodily harm. Subsequently, her husband killed her mother while trying to find out where she was staying. However, he was convicted for only ten months' imprisonment, as it was deemed that he was 'provoked' by the deceased.

Interestingly enough, when examining whether the authorities displayed due diligence in preventing the killing, the Court established some criteria for determining whether to proceed with persecution even after the victim withdraws her complaint, forced by threats from the perpetrator.[76] Indeed, in a great number of cases women are too afraid to seek the police for help or are threatened to withdraw any relevant complaints against their partner. Even if there is no legal provision allowing prosecution to continue after a complaint withdrawal (as in the case of Turkey), authorities must strike a balance between the victim's right to life and the right to private and family life.[77]

Reports presented to the Court revealed a common practice among authorities of dismissing such cases as 'family matters', further implicating the State in its failure to prevent gender-based violence.[78] The ECtHR criticised the systemic failure of the entire criminal justice system to protect the victims.[79] States are obliged to establish adequate legal provisions, along with an effective law enforcement mechanism, so as to secure the right to life in domestic violence cases. Various reports confirmed that women are disproportionately affected by domestic violence and that the State had not demonstrated the necessary responsiveness; on the contrary, impunity for perpetrators persisted.[80] The Court also recognised that the applicant fell within the group of 'vulnerable individuals' due to her gender, which put her as such in a vulnerable position in south-east Turkey.[81] Consequently, for the first time in a domestic violence case the Court found a violation of Article 14 of the Convention. Subsequent judgments have also

[76] *Opuz v. Turkey,* (n 64) para 138.
[77] ibid para 140. Contra LINDA G. MILLS, INSULT TO INJURY: RETHINKING OUR RESPONSES TO INTIMATE ABUSE, PRINCETON UNIVERSITY PRESS (2003) (criticising mandatory arrest and prosecution policies). But cf. Diana Majury, *Book Review of "Insult to Injury: Rethinking Our Responses to Intimate Abuse by Linda G. Mills,"* 35 OTTAWA LAW REVIEW 313 (2004).
[78] ibid para 143.
[79] ibid para 153.
[80] ibid para 200.
[81] ibid para 160. This was reiterated by the Court in its subsequent judgments, see *Talpis v. Italy*, no. 41237/14, § 99, 2 March 2017; *Tkhelidze v. Georgia*, no. 33056/17, § 48, 8 July 2021. It should be noted that women are not intrinsically vulnerable; it is the particular situation of domestic violence in combination with the structural discrimination they face that puts them in a vulnerable position. For a discussion of the vulnerability of victims in domestic violence cases, see generally Lisa Grens, 'The Impact of Vulnerability on State Obligations in Criminal Proceedings on Domestic Violence: Interpreting the Istanbul Convention and the European Convention on Human Rights' [2023] Women & Criminal Justice.

recognised breaches of the non-discrimination principle in cases where the State failed to protect women from domestic violence.[82]

In its judgment on the case *Talpis v. Italy* delivered a few years later, the ECtHR went even further. It expanded its *Osman* test, which requires authorities to be aware of a 'real and immediate risk to life' for the State's obligations under Article 2 to arise,[83] to acknowledge the continuous nature of domestic violence.[84] In this case, the applicant had filed a complaint against her abusive husband several months before her son was killed in an effort to protect her during an attack by her husband. Therefore, although *prima facie* the threat did not seem immediate, the specific circumstances of the case – namely, the 'recurrence of successive episodes of violence' and the communication with the police on the night of the murder – fulfilled the immediacy requirement, thereby imposing an obligation on the State to protect the applicant. The Court also used for the first time the term *femicide* stating that 'a large number of women are murdered by their partners or former partners (femicide)'.[85] While it did not characterise the murder of the applicant's son as a case of femicide per se – and correctly, if we follow the definition of femicide as the killing of *women and girls* because of their gender – the use of the term to describe women killings was a significant step.

In the more recent Grand Chamber judgment of *Kurt v. Austria*, however, the outcome was different. The ECtHR found, by a mere ten votes to seven, no violation of Article 2 regarding the murder of an 8-year-old boy by his father, in the context of a long history of violence towards the applicant (at the time wife of the perpetrator) and their two children. After a series of complaints, several measures were taken against the perpetrator; however, they ultimately failed to prevent him from committing the lethal strike.

In its judgment, the Court further elaborated the *Osman* test in domestic-violence cases, noting that States should carry out a lethality risk assessment, which is 'autonomous, proactive and

[82] ECtHR, *Eremia v. the Republic of Moldova*, no. 3564/11, 28 May 2013; *Mudric v. the Republic of Moldova*, no. 74839/10, 16 July 2013; *M.G. v. Turkey*, no. 646/10, 22 March 2016.
[83] The *Osman* test was developed by the ECtHR in the case: *Osman v. the United Kingdom,* 28 October 1998, § 116, Reports of Judgments and Decisions 19. The Court established that, for State responsibility to arise from the death of the victim, it must be shown that 'the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk'.
[84] ECtHR, *Talpis v. Italy* (n 81) para 122. Applying the *Osman* test in domestic-violence cases has been deemed irrelevant altogether, as the 'immediacy' criterion does not serve well in such cases (where any protective action by the authorities would be too late or would have to be constant). Ronagh McQuigg, 'Kurt v Austria: Domestic Violence Before the Grand Chamber of the European Court of Human Rights' (2021) 5 European Human Rights Law Review 550.
[85] ibid para 145.

comprehensive'.[86] This means that authorities should rely on their own assessment and not solely on the victim's statements, and that they should receive regular training and awareness-raising.[87] Furthermore, obligations relating to operational measures are linked to the adequacy of the legal framework, meaning that authorities must have access to a range of sufficient measures.[88] Nevertheless, when applying these principles to the specific case, the Court found that the authorities' response was immediate and that they carried out the necessary risk assessment.[89] According to its findings, authorities could not have foreseen such an escalation of events based on the information available to them, and therefore, their decision not to put him in pre-trial detention was justified.[90]

The issue with this judgment lies in the Court's conclusion that, since authorities cannot be expected to achieve the impossible, the State's positive obligations are fulfilled as long as an assessment procedure provides some level of protection – even if it does not align with standardised methods proposed by criminologists. The Court's majority deemed that authorities displayed the required special diligence in this case, as they took certain measures in a timely manner. While this reasoning carries some logic, particularly in the sense that positive obligations should not impose an 'impossible or disproportionate burden' on authorities,[91] it disregards the complexity of the case and risks setting a low threshold for state accountability.

The intensity and extent that domestic violence can reach is not something unknown. Asserting that authorities could not have predicted that the children might also fall victim to an extreme act of violence outside of their house in the context of their father's systematic attacks, undermines the very reason why domestic violence must be addressed in a sensitive and holistic manner.[92] Throughout the assessment process in the present case, elements indicating the persistence of preconceptions within law enforcement and judicial mechanisms were evident.[93]

[86] *Kurt v. Austria* (n 62) para 168.
[87] ibid paras 169-173.
[88] ibid para 179.
[89] ibid paras 191 ff.
[90] ibid para 207.
[91] ibid para 158.
[92] Contra ibid para 5 (Judge Koskelo joined by Judges Lubarda, Ravarani, Kucsko-Stadlmayer, Polackova, Ilievski, Wennerström, Sabato, concurring) (supporting that 'Although, …, the risk of violence between partners and ex-partners may also entail an increased risk of violence against any children in the family, such a general risk factor alone could not suffice as a justification for cutting off contact between a parent and a child in the absence of sufficiently concrete indications of the reality of such a risk in specific circumstances.').
[93] See, eg, the prosecutor's note regarding the applicant's report suggesting an 'outdated conception of rape'. ibid para 19 (Judges Turković, Lemmens, Harutyunyan, Elósegui, Felici, Pavli, Yüksel, joint dissenting).

The Court should not have been satisfied with a minimised assessment, which did not adhere to international standards.[94]

This was supported by the dissenting Judges, who highlighted that 'Domestic violence should be seen as occurring within the family as a unit even if it is primarily directed at a particular family member'.[95] They emphasised that authorities could have taken into consideration more risk factors and carried out a separate risk assessment in relation to the children.[96]

In theory the ECtHR made some important advances regarding the approach that should be followed when assessing risk in domestic violence cases. Its explicit references to various provisions of the Istanbul Convention are positively welcomed, as well as its novel domestic-violence standards. However, it failed to adopt a gender-sensitive approach when applying the theory in the specific facts of the case. It missed the opportunity to demonstrate the role of 'secondary victims', to analyse the intersectional dimension of the case, and to urge Austria and the rest of the Council of Europe member States to adopt standardised risk assessment tools, in order for authorities to take more holistic and effective decisions. It is evident in this case how the margin of appreciation can limit the Court's findings in femicide cases, where, although the *Osman* test is applied differently, States enjoy discretion in implementing their own risk assessment tools, regardless of how inclusive they may be.

2.3. Legal standards applied by the ECtHR

Despite a positive evolution of ECtHR's case law on VAWG, several critics can be aborded, particularly when applying a feminist legal method. Beyond the specific points raised regarding the *Kurt* judgment, it appears that while the Court acknowledges the systemic nature of the problem, its examination of state responsibility tends to focus more on the adequacy of the legal framework in protecting individuals from perpetrators in specific cases rather than on how States can provide meaningful protection and resources to combat and prevent such violence. Legislative actions might not be able to change the reality women face and disorient from other approaches that could protect them more effectively. When delving into the root causes of this violence and examining the facts of most relevant cases, it becomes evident that criminal punishment does not serve as a deterrent for men who commit gender-based crimes.

[94] The authorities did not use standardised checklists developed by criminological research. ibid paras 140, 171.
[95] ibid para 14 (Judges Turković, Lemmens, Harutyunyan, Elósegui, Felici, Pavli, Yüksel, joint dissenting).
[96] ibid paras 11-12 (Judges Turković, Lemmens, Harutyunyan, Elósegui, Felici, Pavli, Yüksel, joint dissenting).

Nevertheless, the Court puts a lot of emphasis on the penal apparatus, whether it be legislative, judicial or law enforcement actions, and persecution and punishment are considered, per Silvana Tapia Tapia's words, 'adequate to prevent violence, protect survivors, and remedy damages even in the face of present penal violence'.[97] In *Opuz*, notably, the Court focused only on the State's obligation to arrest the perpetrator and not on the victim's needs for protection.[98]

Such approaches also overlook other factors that shape women's experiences, such as race, place of origin, economic situation and more. Focusing solely on the legislative measures disregards the particularities of each VAWG-related case, where different factors call for different assessments. Femicide should not be investigated through a one-dimensional lens that assumes a uniform experience of all women. A holistic understanding of the phenomenon requires a different approach centred on intersectional analysis.[99] In the *Kurt* case, for instance, Judge Elósegui integrated such an analysis in her dissenting opinion, affirming that authorities should have considered the social and cultural background of the family. This included a disadvantaged socio-economic category to which the victims and the perpetrator belonged, and the 'cultural patterns associated with the country of origin of the perpetrator'.[100] The applicant had migrated from Turkey to Germany at the age of fourteen and did not finish her secondary education, nor learned German at a sufficient level. The interview with the police, however, was carried out in German.[101] In addition to that, at the time of the escalation of violence, she was unemployed, and her husband had a gambling addiction. Similarly, in the *Talpis* case, the applicant was of Romanian origin married to a Moldovan man, struggling with the Italian language, which prevented her from turning to the police for help in the beginning of her abuse.

[97] Silvana Tapia Tapia, 'Human Rights Penality and Violence Against Women: The Coloniality of Disembodied Justice' [2023] Law Critique <https://doi.org/10.1007/s10978-023-09355-4> accessed 8 February 2025 (presenting interesting arguments as regards the colonialist approach of justice inherent in this 'human rights penality' mindset).

[98] ibid. For a discussion of the challenges of criminal prosecution as a remedy to domestic violence, as well as alternative restorative victim-centered measures, see also, C Quince Hopkins, Mary P Koss and Karen J Bachar, 'Applying Restorative Justice to Ongoing Intimate Violence: Problems and Possibilities' (2004) 23 Saint Louis University Public Law Review 289. Nonetheless, arresting the perpetrator should not be entirely disregarded, as it is an effective measure in protecting the victim from eventual lethal violence.

[99] The concept of intersectionality was first developed by Professor Kimberlé Crenshaw as a tool to analyse the multidimensionality of Black women's experience. see Kimberlé Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) 1989 University of Chicago Legal Forum 139. An intersectional analysis considers various systems of oppression (race, gender identity, sexual orientation, age, disability, employment status etc.) in a single case.

[100] *Kurt v. Austria* (n 62) paras 2, 6 (Judge Elósegui, dissenting).

[101] ibid para 8 (Judge Elósegui, dissenting).

Besides these lacunes as regards the approach followed by the ECtHR, there are also various structural, evidentiary and procedural hurdles limiting the Court from delineating a broader, multidimensional case law on the subject of femicide.

3. Challenges in Addressing Femicide at the ECtHR

3.1. Structural Limitations of the Court

The Strasbourg Court receives thousands of applications every year, most of which get dismissed at the admissibility stage. In 2024 only, the Court disposed of 36,819 applications judicially, 25,990 of which were declared inadmissible or struck out of the list of cases.[102] It is thus logical that a great number of cases related to VAWG do not reach the Chamber or Grand Chamber. Notably, only two Grand Chamber judgments have been delivered related to the Istanbul Convention,[103] while regarding specifically the murder of a woman or her close relative(s) as a result of domestic violence, there have been twelve Chamber judgments.[104] Besides the fact that most VAWG-related applications submitted to the Court might be declared inadmissible, in a lot of relevant cases the Court also chooses not to examine complaints based on Article 14.

3.2. Evidentiary and Procedural Hurdles

Women face several difficulties accessing justice. These extend from economic ones (eg, cost of services, childcare) to structural (eg, lack of understanding of the justice system, perplexities in VAWG regulations) and social ones (eg, prejudice, discrimination). Given that the gender factor often interplays with other ones, such as class, race, ethnicity and others, women might not have the means to seek legal assistance, or they might face language barriers or discrimination on the part of authorities, discouraging them to pursue litigation against their

[102] European Court of Human Rights, Council of Europe, 'Analysis of Statistics 2024' (2025).
[103] ECtHR, *O'Keeffe v. Ireland* [GC], no. 35810/09, ECHR 2014 (extracts); *Kurt v. Austria* [GC] (n 62).
[104] ECtHR, *Kontrová v. Slovakia* (n 63); *Branko Tomašić and Others v. Croatia* (n 74); *Opuz v. Turkey* (n 64); *Civek v. Turkey*, no. 55354/11, 23 February 2016; *Halime Kılıç v. Turkey*, no. 63034/11, 28 June 2016; *Talpis v. Italy* (n 81); *Penati v. Italy*, no. 44166/15, 11 May 2021; *Tkhelidze v. Georgia* (n 81); *A and B v. Georgia*, no. 73975/16, 10 February 2022; *Y and Others v. Bulgaria*, no. 9077/18, 22 March 2022; *Landi v. Italy*, no. 10929/19, 7 April 2022; *Gaidukevich v. Georgia*, no. 38650/18, 15 June 2023; *Oghlishvili v. Georgia*, no. 7621/19, 4 July 2024.

abuser. This situation is not facilitated by the fact that the time-limit to submit an application before the Court was reduced from six to four months.[105]

A significant evidentiary hurdle that applicants face in such cases is the difficulty of providing sufficient data to substantiate discriminatory treatment. Seeing that Article 14 is often declared inadmissible or manifestly ill-founded, it is evident that the Court is not easily satisfied. The Strasbourg Court examines Article 14 when the case contains a 'clear inequality of treatment'.[106] The threshold is high, and at the same time the available data is limited.[107] This was the case in *Landi v. Italy*, where the Court was not persuaded that the applicant provided sufficient *prima facie* evidence of widespread judicial passivity or of the discriminatory nature of the measures or practices adopted by the authorities in her regard. According to the Court, she did not present any statistical data or observations from non-governmental organisations,[108] but only relied on the data from the earlier *Talpis* case[109], which the Court deemed not enough, given that Italy had taken some relevant measures since then.[110] Although the Court accepts evidence of practical discrimination – and not necessarily of discriminatory intent – to admit an Article 14 complaint,[111] this discrimination should be proven 'beyond reasonable doubt'.[112] Very often, however, it is difficult to find the required data, as domestic authorities do not gather comprehensive statistics regarding relevant cases. At the same time, it is difficult to prove that the victim was the target of individual prejudice by authorities, due to the indirect expression of the discrimination and the lack of tangible evidence. According to Maria Sjöholm, the discarding of Article 14 in VAWG-related cases is not an inherent limitation of the Convention, but rather a choice by the ECtHR, as it has been generally used in cases of financial discrimination.[113]

Another procedural issue that arises in VAWG-related cases is that of the incompatibility of Article 2 *ratione personae*, when the woman loses victim status due to reaching a settlement at the domestic level. In *Penati v. Italy*, for instance, the applicant, whose son was brutally killed by his father during a supervised visit at the premises of a local authority, initiated civil

[105] Council of Europe, Protocol No. 15 amending the Convention on the Protection of Human Rights and Fundamental Freedoms 2021 [213] (Article 4 amending Article 35, paragraph 1 of the ECHR).
[106] ECtHR, *Airey v. Ireland*, 9 October 1979, § 30, Series A no. 32.
[107] For a discussion of the burden of proof under Article 14 ECHR, see generally, Oddný Mjöll Arnardóttir, 'Non-Discrimination Under Article 14 ECHR: The Burden of Proof' [2007] Scandinavian Studies in Law 13.
[108] *Landi v. Italy* (n 104) para 104.
[109] *Penati v. Italy* (n 104) paras 98-99.
[110] ibid para 103.
[111] But cf. Sjöholm (n 4) 218–219.
[112] Samantha Besson, 'Evolutions in Non-Discrimination Law within the ECHR and the ESC Systems: It Takes Two to Tango in the Council of Europe' (2012) 60 The American Journal of Comparative Law 168.
[113] Sjöholm (n 4) 217.

proceedings against employees and employers of the local authority, which ultimately resulted in a monetary settlement. Given that she gave up any rights to pursue civil and penal litigation against those responsible, the Court concluded that she had lost victim status under the substantive limb of Article 2.[114]

The Court has substantive basis to declare Article 2 incompatible *ratione personae* in such circumstances, but this creates barriers for women seeking justice at the international level. While in *Penati* the perpetrator committed suicide, precluding criminal prosecution against him, in several VAWG cases women may feel pressured into settling rather than enduring the painful and unsafe process of a criminal trial. This also raises concerns about what constitutes true reparation in cases of gender-based violence. Placing the responsibility mainly on individuals shifts the focus away from systemic state obligations to prevent and combat VAWG altogether.

Conclusion

While femicide has been studied for years and it is a term widely known today, all the statistics above showcase how relevant it still is. In Argentina, the government plans to remove femicide from the Penal Code.[115] In Europe, when there is a step towards regulating femicide, it is met with a negative reaction, alleging discrimination towards men. Regression is an unpleasant reality, which can only be halted through constant advocacy by international bodies, such as the ECtHR, which possess the power and authority to bind States into taking action.

Violence against women is not a private affair. It emanates from structural gender inequalities sustained by States. State responsibility for femicide has been established through the positive obligations regime, requiring States to act through legislation, policies and operational measures, in order to prevent and punish VAWG.

In this context, the ECtHR has made substantive progress in vindicating women's rights. There is a significant case law recognising positive obligations of the States as regards the right to life, ill-treatment and private and family life, as well as the principle of discrimination, in cases of domestic violence, including femicide. The Court has made various references to the CEDAW and the Istanbul Convention and has acknowledged the need for special due diligence when it comes to VAWG.

[114] *Penati v. Italy* (n 104) paras 154-156.
[115] Harriet Barber, 'Milei Government Plans to Remove Femicide from Argentina Penal Code' *The Guardian* (29 January 2025) <https://www.theguardian.com/world/2025/jan/29/argentina-femicide-womens-rights-law> accessed 23 February 2025.

However, challenges are still evident. The ECtHR's case law on femicide is almost exclusively focused on domestic-violence cases, and therefore, other situations where femicide is committed outside the private sphere have not been addressed. In such instances, it would be harder to prove state accountability, as there may be no prior acts leading up to the murder that would have alerted authorities to intervene. As a result, only the procedural limb of Article 2 ECHR can be invoked. Moreover, while the *Osman* test for the application of Article 2 was developed to reflect domestic violence's particular characteristics, its threshold remains high. Alice Edwards words echo strongly in this regard: 'a woman's right to life is protected not absolutely … but only reasonably'.[116] On the other hand, the principle of non-discrimination provided under Article 14 ECHR, although important for revealing the structural causes of VAWG and femicide, is often overlooked or dismissed. The ECtHR is not completely gender-neutral: while it has recognised both female and male victimhood in domestic violence, it noted that it mainly affects women. Nevertheless, the Court requires strong evidence and statistics to admit an Article 14 complaint. On the contrary, the CEDAW and the Belém do Pará Convention recognize domestic violence as a form of gender discrimination per se.

Additionally, we can notice an (over)reliance on the criminal apparatus when the Court outlines States' positive obligations. Criminal justice for the perpetrator is not the sole solution for women who endure violence and whose lives are at risk due to their gender. While a protective and effective legal framework is certainly essential, traditional notions of access to justice do not always align with the realities faced by women in such situations. Alternative forms of justice must be put in place, including effective protection orders, accessible safe spaces, comprehensive health services for physical and mental recovery, and financial aid for legal representation. A broader effort is needed, encompassing public policies and education, to address the root causes of the issue and dismantle the social and cultural patterns that perpetuate violence against women.

Women face various challenges when trying to access the justice system. They are confronted with stigma and shame by their family, their community, and even authorities. Secondary victimisation is a reality for a great number of women turning to the police for help. A lot of cases will never reach the national judge, let alone the ECtHR. For all these reasons, the ECtHR plays an essential role in setting the example for the Council of Europe Member States to take effective action in systematically and structurally combatting VAWG.

[116] Alice Edwards, *Violence against Women under International Human Rights Law* (Cambridge University Press 2011) 294.

Unfortunately, the work of the ECtHR will not have the desirable effects as long as States fail to implement its judgments. The case of Mexico demonstrated that States' inaction is directly linked to the increase of femicides. The more governments and authorities neglect this issue and downplay its severity, the more femicide will find ground to encroach. In the case of Kyriaki Griva mentioned in the beginning, the police officers who disregarded her fears have been charged with felony.[117] While this represents a positive step toward accountability for the authorities' negligence, it raises a crucial question: Would Kyriaki's life, and those of other women, have been saved if the right policies, law enforcement training, and assessment procedures had been in place from the outset? Primary prevention should not be overlooked by States or the ECtHR, as it may be the most effective long-term strategy for combating VAWG. A justice system that intervenes only after irreparable harm has occurred is failing in its fundamental duty of preventing, protecting, and eliminating systemic barriers that allow femicide to persist.

[117] 'Charges Filed against Four Police Officers over Femicide' (*Kathimerini*, 30 January 2025) <https://www.ekathimerini.com/news/1260210/charges-filed-against-four-police-officers-in-connection-with-femicide-outside-athens-police-station/> accessed 23 February 2025.

Now And Beyond: Abortion Jurisprudence at the European Court of Human Rights and Directions for the Future

Juliette Moran

TABLE DES MATIÈRES

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Abstract

This dissertation addresses the ‘right to abortion’ question under the European Convention on Human Rights (ECHR) fixing on the jurisprudence of the European Court of Human Rights (ECtHR). A description of the state of play of abortion rights, as part of reproductive and international human rights, under the ECHR is given. The persistent reluctance of the ECtHR to declare a right to abortion is discussed with respect to articles of the ECHR; in particular, the right to respect for private life, the prohibition of inhuman and degrading treatment and the right to non-discrimination. Recent rulings by the Polish Constitutional Tribunal are seen to effectively limit, if not abolish, the right to legal abortion. The ability of the ECtHR to find that such restrictive abortion laws are a violation of the ECHR is posited with respect to Article 8, highlighting the margin of appreciation (MoA) doctrine and (European) consensus; Article 3 and the denial of abortion as inhuman and degrading treatment; and Article 14, in respect of gender discrimination. The thesis concludes that the ECtHR has the capacity to find that restrictive abortion legislation violates multiple articles under the ECHR, namely, Articles 3, 8 and 14. Given past decisions of the ECtHR, the finding of a violation of Article 3, an absolute right, would seem to be the most secure way for the court to ensure that therapeutic abortion is protected under the Convention.

Résumé

Cette thèse traite de la question du « droit à l'avortement » dans le cadre de la Convention européenne des droits de l'homme (CEDH) en se concentrant sur la jurisprudence de la Cour européenne des droits de l’homme (CEDH). Elle décrit la situation actuelle des droits à l'avortement, dans le cadre des droits reproductifs et des droits humains internationaux, en vertu de la CEDH. La réticence persistante de la CEDH à reconnaître le droit à l'avortement est examinée au regard des articles de la CEDH, en particulier le droit au respect de la vie privée, l'interdiction des traitements inhumains et dégradants et le droit à la non-discrimination. Les récentes décisions du Tribunal constitutionnel polonais sont considérées comme limitant effectivement, voire abolissant, le droit à l'avortement légal. La capacité de la CEDH à conclure que ces lois restrictives en matière d'avortement constituent une violation de la CEDH est posée au regard de l'article 8, en mettant en évidence la doctrine de la marge d'appréciation (MoA) et le consensus (européen) ; de l'article 3 et du refus de l'avortement en tant que traitement inhumain et dégradant ; et de l'article 14, en ce qui concerne la discrimination fondée sur le sexe. La thèse conclut que la CEDH a la capacité de conclure que les législations restrictives en matière d'avortement violent plusieurs articles de la CEDH, à savoir les articles 3, 8 et 14. Compte tenu des décisions antérieures de la CEDH, la conclusion d'une violation de l'article 3, un droit absolu, semble être le moyen le plus sûr pour la Cour de garantir que l'avortement thérapeutique est protégé par la Convention.

INTRODUCTION

The right to abortion and broad abortion access is a socio-political issue, and importantly, a legal and human rights issue. Continuing a pregnancy to term can have enormous and life-changing physical, psychological, and socio-economic implications not only for the woman or girl but for the wider family and community; particularly for those in disadvantaged, oppressed or highly religious societies.[1] The United Nations highlights the frightening statistics of unsafe abortion , particularly in countries with highly restrictive abortion law.[2] Approximately 25 million unsafe abortions occur each year with nearly 10% of maternal deaths resulting from unsafe abortions.[3] Moreover, women and girls living in poverty or belonging to marginalised groups are disproportionally impacted, with safe termination reserved for the socioeconomically privileged. If broad abortion access was available, many (if not all) of these deaths would be avoided. It is worth noting that countries with broad access to abortion have lower abortion rates than those with highly restrictive laws. Summarising, limiting access to legal abortion, which goes hand in hand with unsafe abortion, threatens the lives of women and represents a significant public health concern.

How then can human rights discourse be framed to guarantee the right to broad abortion access? Abortion has been variably viewed as a matter of, *inter alia,* access to health care (and reproductive health care), a privacy right, a gender equality right, and a right to be free from torture, cruel or inhuman or degrading treatment ('IDT'). Notably, whilst most Council of Europe ('CoE') States permit abortion on demand up to the twelfth week of pregnancy, it will become apparent throughout this paper that *de jure* abortion access does not always guarantee abortion access. [4] Many countries that allow for abortion beyond therapeutic reasons do not facilitate *de facto* abortion, with barriers such as mandatory wait times or counselling.[5] International human rights law (hereinafter 'IHRL') be it a normative concept, treaty or jurisprudence, is invoked by defenders of dignity, respect and equality, to ensure the rights

[1] 'Abortion', OHCRC, last updated 2020, last accessed 26 June 2023, https://www.ohchr.org/sites/default/files/Documents/Issues/Women/WRGS/SexualHealth/INFO_Abortion_WEB.pdf.

[2] *Ibid.*

[3] *Ibid*.

[4] 'European Abortion Laws: Comparative Overview', Centre for Reproductive Rights, accessed 7 September 2023, https://reproductiverights.org/wp-content/uploads/2023/09/European-Abortion-Laws-A-Comparative-Overview-new-9-13-23.pdf.

[5] Centre for Reproductive Rights, n (4).

espoused in this system are protected and promoted.[6] Nonetheless, the abortion debate, in any of its facets, is one of the most polarising human rights issues, with IHRL vigorously invoked by both sides of the debate. Bulchoc, for example, considers 'there are few better illustrations of the internal differentiation of the global regime of human rights than the human rights treatment of abortion'.[7] We can see this dichotomy in comparing the 2020 decision of the Polish Constitutional Tribunal (hereinafter 'the Tribunal'),[8] and the 2023 Mexican Supreme Court decision.[9] Whilst the Tribunal invoked IHRL as the basis for backsliding on Poland's abortion rights, the Mexican Supreme Court invoked human rights as a means to decriminalise abortion across the country, a watershed moment for the country and Latin America. At this juncture, it must be noted that under the current IHRL regime, the right to abortion access is not a distinct or specific human right, with the exception of the Maputo Protocol which women in the African Union the specific right to access safe and legal abortion.[10] Nonetheless, one may argue that the right to abortion access in various jurisdictions is indirectly afforded through other protected human rights. Accordingly, the many overarching international human rights, and interactions between them, are pertinent and important for the debate surrounding women's ability to legally access abortion.

The recent decision of the United States Supreme Court in *Dobbs v Jackson Women's Health Organisation* (hereinafter '*Dobbs*')

[11] has particularly provoked a global conversation on women's[12] access to abortion, both negative and positive.[13] Reversal of the precedent set in

[6] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) preamble, art 1

[7] Marta Bucholc, 'Abortion Law and Human Rights in Poland: The Closing of the Jurisprudential Horizon", *Hague Journal on the Rule of Law* 14, (2022): 74.

[8] 'Poland's Constitutional Tribunal Rolls Back Reproductive Rights', Amnesty International, 22 October 2020, accessed 4 August 2023, https://www.amnesty.org/en/latest/press-release/2020/10/polands-constitutional-tribunal-rolls-back-reproductive-rights/

[9] 'Historic Decision: Mexico's Supreme Court Decriminalizes Abortion', Centre for Reproductive Rights, 7 September 2023, accessed 15 September 2023, https://reproductiverights.org/mexico-supreme-court-decriminalizes-abortion-federal/.

[10] Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (adopted 28 March 2003) (Maputo Protocol), art 14(c).

[11] *Dobbs v. Jackson Women's Health Organization*, 597 U.S. (2022).

[12] This paper will use the term 'woman' in the sense of a 'woman's' right to abortion, as this is the term most used in the relevant literature. However, the author expressly recognises that abortion laws and rights affect anyone who can become pregnant, regardless of their gender identity.

[13] See, e.g., Domenico Montanaro, 'Majority of Americans say it was wrong for the Supreme Court to overturn Roe', *NPR*, 21 June 2023, accessed 14 August 2023, https://www.npr.org/2023/06/21/1183253121/roe-dobbs-abortion-affirmative-action-gender-supreme-court; cf., Helen Alvaré, 'Dobbs decision shows US can be both powerful and humane', *The Hill,* 26 June 2022, accessed 4 August 2023, https://thehill.com/opinion/civil-rights/3537176-dobbs-decision-shows-us-can-be-both-powerful-and-humane/.

Roe v Wade[14] and *Planned Parenthood v Casey*[15] (hereinafter '*Roe*' and '*Casey*', respectively), which for fifty years guaranteed abortion rights in the US, has led people to question other countries' rights, or indeed, lack thereof; and, thereby, consider how concrete the right to abortion is in domestic, regional and international human rights systems.[16]

The CoE human rights system, consisting of the *European Convention on Human Rights* ('*ECHR'* or the Convention)[17] and the European Court of Human Rights (hereinafter the 'ECtHR' or 'Strasbourg') has not been immune to this discussion. Commentary has variously suggested that the ECHR, and thus ECtHR, is an inappropriate vehicle to advance abortion rights in CoE,[18] particularly considering criticism that the ECtHR is 'deciding not to decide' on abortion related issues.[19] Further, considering the potential and actual backsliding of abortion rights globally, and the numerous applications to the ECtHR in relation to the Polish Tribunal decision, it is more important than ever to examine how the European human rights system can better protect women's right to abortion.

Increasingly restrictive abortion access in some CoE member States creates a timely imperative to examine how the ECHR can safeguard accessible and safe legal abortion, be that abortion on demand or, at a minimum, therapeutic abortion. Notably, the CoE Parliamentary Assembly 'takes the view that abortion should not be banned within reasonable gestational limits'.[20] Further, as above, 'a ban on abortions does not result in fewer abortions but mainly leads to clandestine abortions, which are more traumatic and increase maternal mortality and/or lead to abortion 'tourism' … The lawfulness of abortion does not have an effect on a woman's need for an abortion, but only on her access to a safe abortion'. [21]

[14] *Roe v. Wade*, 410 US 113 (1973).

[15] *Planned Parenthood v. Casey*, 505 US 833 (1992).

[16] See, e.g., Karolina Szopa and Jamie Fletcher, "The Future of Abortion Rights under the European Convention on Human Rights in Light of Dobbs" UK Constitutional Law Association, 30 June 2022, accessed 1 August 2023, https://ukconstitutionallaw.org/2022/06/30/karolina-szopa-and-jamie-fletcher-the-future-of-abortion-rights-under-the-european-convention-on-human-rights-in-light-of-dobbs/#:~:text=This%20blog%20will%20demonstrate%20that,in%20the%20US%20post%2DDobbs.

[17] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR).

[18] E.g., Spoza and Fletcher, n (16).

[19] Fiona de Londras, 'When the European Court of Human Rights Decides Not to Decide: The Cautionary Tale of A, B & C v Ireland and Referendum-Emergent Constitutional Provisions' in *Building Consensus on European Consensus: Judicial Interpretation of Human Rights in Europe and Beyond*, eds. Panos Kapotas and Vassilis P Tzevelekos (Cambridge: Cambridge University Press, 2019), 311.

[20] Council of Europe Parliamentary Assembly, Access to safe and legal abortion in Europe, Resolution 1607 (2008), http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17638.

[21] *Ibid*.

This paper will analyse what the ECtHR can and must do to better protect women's abortion rights and align itself with the international human rights position of broad abortion access. Specifically, this paper will argue that, in the absence of a right to abortion 'on demand',[22] the Court must find, as a minimum, a right to abortion under the ECHR in three scenarios: risk to the mother's life and health, fatal foetal abnormality ('FFA') and rape or incest. This argument will be examined in the context of the regressive abortion measures recently implemented in Poland, and the subsequent cases initiated at the ECtHR. To avoid doubt, this author believes that access to abortion is a right all women should be afforded. This paper will necessarily be written from that perspective.

This paper is divided into three parts. Chapter 2 will examine current ECtHR jurisprudence on abortion under the ECHR. In doing so, the chapter will outline the Convention articles invoked in abortion cases before the Court and assess crucial case law and various tests of the Court; thereby setting the groundwork for the substantive analysis in the following chapter. Chapter 3 will seek to answer this paper's main question. By drawing on the preceding analysis and opinions of scholars, this chapter will consider Articles 3, 8 and 14 as the most constructive and effective foundation for finding the right to abortion under the ECHR. Chapter 4 will present the conclusions of the paper.

THE STATE OF PLAY UNDER THE ECHR

Despite being widely considered the most effective human rights protection mechanism in international law, the ECtHR has had limited opportunity to consider or advance abortion rights under the ECHR.[23] Notably, the Convention makes no reference to abortion or reproductive health or rights therein, and, unlike other international human rights treaties, there is no directly expressed right to health. Accordingly, abortion under the ECHR is shaped by jurisprudence.[24] The purpose of this chapter is to examine the ECtHR's jurisprudence on abortion under its variously considered articles.

[22] A generally accepted term for abortions other than therapeutic abortion is lacking. The term 'abortion on demand' presents itself in both the scholarship and the legal judgements. However, this and adjacent terms such as 'elective abortion' is criticised. However, the lack of consensus on the best alternative term necessitates using 'abortion on demand'.

[23] Martin Buijsen, 'On Interpretation and Appreciation. A European Human Rights Perspective on Dobbs' *Cambridge Quarterly of Healthcare Ethics* 32, no. 3 (2023): 327.

[24] Bucholc, n (7), 78.

I. THE ECtHR'S JURISPRUDENTIAL FRAMEWORK

As Buijsen identifies, to understand how Strasbourg has dealt with abortion, the 'living instrument' doctrine must be understood.[25] This interpretive approach has been regularly referred to in the entirety of the ECtHR's jurisprudence and specifically in its abortion case law, noting that the ECHR is subject to an evolutive and dynamic interpretation.[26] Accordingly, the Convention is interpreted 'in the light of present day conditions'.[27] We can already see the (potential) impact of this doctrine on abortion under the ECHR by comparing the US Supreme Court's decision in *Dobbs*. The Supreme Court's ruling highlights that it is 'holding onto what it sees as the intention of the Constitution's authors',[28] which was not to protect abortion. Conversely, by continually interpreting the ECHR's standards under present-day conditions, the ECtHR 'never feels any need to disqualify its previous rulings in retrospect',[29] and can 'update' its position accordingly. It will be important to keep this doctrine in mind throughout this paper.

II. WHAT HAS THE ECtHR SAID ABOUT ABORTION UNDER THE ECHR?

The Court has repeatedly declined to find that there exists a right to abortion (in particular abortion on demand) within any ECHR articles.[30] According to scholars such Fenwick, Ní Ghráinne and McMahon, this has allowed the ECtHR's record on abortion to be 'largely one of avoidance.'[31] Nevertheless, the Court has considered abortion access under Article 8 of the ECHR, in addition to Articles 2, 3 and 14, either alternatively or simultaneously.

A *Abortion and the Right to Respect for Private Life*

Article 8 provides that every individual has the right to respect for their private life, and the court has determined this to encompass the right to personal autonomy and personal

[25] Buijsen, n (23), 324.
[26] *Vo v France* App no 53924/00 (ECtHR, 8 July 2004), para 82; *S.M. v Croatia*, App no 60561/14 (ECtHR, 25 June 2020), para 288.
[27] ECtHR, 'The European Convention on Human Rights: A living instrument', September 2020, last accessed 8 August 2023, https://www.echr.coe.int/documents/d/echr/Convention_Instrument_ENG.
[28] Buijsen, n (23), 327.
[29] *Ibid*, 324.
[30] See, e.g., *Tysiąc v Poland* App no 5410/03 (ECtHR, 20 March 2007), para 104; *A., B. and C. v Ireland* App no 25579/05 (ECtHR, 16 December 2010), para 253.
[31] Daniel Fenwick, 'The Modern Abortion Jurisprudence under Article 8 of the European Convention on Human Rights', *Medical Law International* 12, no. 3-4 (2012): 273.

development.[32] In *Tysiąc v Poland,*[33] *A., B. and C v Ireland,*[34] *R. R. v Poland*,[35] and *P. and S v Poland*, [36] *the ECtHR confirmed the rights protected by Article 8 are engaged by the issue of abortion, as the right to private life concerns 'a person's physical and psychological integrity… as well as decisions both to have and not to have a child or to become genetic parents'.*[37] Therefore, the general applicability of Article 8 to the issue of abortion is not contested.

Whilst the primary purpose of Article 8 is to protect against arbitrary interferences by a public authority, thus entailing negative obligations,[38] the State also has inherent positive obligations to respect the right to private life.[39] Both obligations are engaged by abortion issues, although as yet the ECtHR has only found Article 8 violations due to States' failure to implement its positive obligations to adequately protect the right to a *lawful* abortion. Thus, the court has, effectively, considered such Article 8 violations as a procedural issue; or, *de facto* abortion access. Nonetheless, the Court has been criticised on this point, for example by Fenwick and Erdman, for solely focusing on procedural issues, to the detriment of progressing jurisprudence on the substantive issue of abortion access where it is prohibited by State legislation; namely, *de jure* abortion access.[40] Wicks suggests that the danger of focusing on procedure over substance is that the Court is 'forcing states to pick one of the extremes: genuine access to abortion or complete prohibition'.[41]

In future cases before the ECtHR against States where abortion is broadly accessible, the Court would be required to undertake a similar procedural task in relation to that State's positive obligations. That is, in CoE jurisdictions where broad abortion access is legislated for, a State would likely only find itself before the ECtHR for failing to provide a *legal* abortion. Three cases against Poland, *Tysiąc, R. R.*, and *P. and S* in 2007, 2011 and 2012 respectively, illustrate the Court's approach in such matters. Indeed, it is interesting to examine cases against Poland

[32] *Pretty v the United Kingdom* App no 2346/02 (ECtHR, 29 July 2002), para 61.
[33] *Tysiąc,* n (30).
[34] *A., B. and C.*, n (30).
[35] *R.R. v Poland* App no 27617/04 (ECtHR, 26 May 2011).
[36] *P. and S. v Poland* App no 57375/08 (ECtHR, 30 October 2012).
[37] *A., B. and C.,* n (30), para 212.
[38] *Libert v France*, App no 588/13 (ECtHR, 22 February 2018), paras 40-42.
[39] *Lozovyye v Russia* App no 4587/09 (ECtHR, 24 April 2018), para 36.
[40] Daniel Fenwick, 'Abortion Jurisprudence' at Strasbourg: Deferential, Avoidant and Normatively Neutral?' *Legal Studies* 34, no. 2 (2014); Joanna N Erdman, 'Procedural Abortion Rights: Ireland and the European Court of Human Rights', *Reproductive Health Matters* 22, no. 44 (2014).
[41] Elizabeth Wicks, '*A, B, C v Ireland*: Abortion Law under the European Convention on Human Rights', *Human Rights Law Review* 11, no. 3 (2011): 126.

given the steps taken to regress its abortion laws. The cases currently awaiting adjudication before the ECtHR against Poland are no longer cases of procedural access to abortion, but rather are questions of Poland's negative obligation not to interfere with the applicants' Article 8 rights and its prohibition of therapeutic abortion in cases of FFA

Importantly, paragraph 2 of Article 8 enshrines the right to respect for private life as a *qualified right*. Public authorities cannot interfere with individuals exercising this right except: (i) in accordance with the law, (ii) in pursuit of a legitimate aim and (iii) when necessary in a democratic society for, *inter alia*, the protection of health or morals. It is the third consideration of 'necessity in a democratic society' which requires the Court to consider the question of proportionality of the interference. In doing so, it will determine whether the State is within its margin of appreciation ('MoA') to interfere with an individual's Article 8 rights. The MoA doctrine features consistently in the ECtHR's abortion jurisprudence and will be critiqued in Chapter 3. Broadly speaking, the MoA 'is the range of discretion accorded by the ECtHR in some areas to Member States, varying with the extent to which there is consensus among Member States on the issue'.[42]

When assessing democratic necessity, the Court must balance the applicant's Article 8 rights with those of a third party. Where they have been tasked with weighing the pregnant woman's rights against others' individual's rights, such as the father, the Court has consistently safeguarded the woman's interest in her bodily autonomy.[43] However, where the Court has assessed the relationship between the woman and the State's interests (generally being to protect unborn life/the life of the foetus), their record is unpredictable. It is here that examination of the ECtHR's abortion case law is necessary.

Tysiąc v Poland concerned a woman suffering from severe myopia and was advised by doctors that to continue her pregnancy would adversely affect her eyesight. However, she was refused a therapeutic abortion, despite being permissible under Polish law (if the pregnancy posed a risk to the mother's life or health). Following the child's birth, the applicant became severely disabled after suffering a retinal haemorrhage.[44]

[42] Paolo Ronchi, '*A, B and C* v *Ireland*: Europe's *Roe* v *Wade* Still Has to Wait', *Law Review Quarterly* 127, no. 3 (2011).

[43] Chiara Cosentino, 'Safe and Legal Abortion: An Emerging Human Right? The Long-lasting Dispute with State Sovereignty in ECHR Jurisprudence', *Human Rights Law Review* 15, no. 4 (2015): 572.

[44] *Tysiąc*, n (30), paras 7-31.

The issue before the Court rested upon the lack of effective mechanism in Poland to obtain certification of a legal abortion. The Court specifically noted that its task was not to examine whether abortion was a right under the ECHR, and in doing so did not find it appropriate to consider whether refusing the abortion was an interference with the applicant's right under Article 8. Instead, they considered that it was 'more appropriately examined from the standpoint of the respondent State's… positive obligations alone'.[45] In finding an Article 8 violation, the court noted that doctors were deterred from authorising abortions given an 'absence of transparent and clearly defined procedures determining whether the legal conditions for a therapeutic abortion were met in an individual case'.[46] The court concluded that, where State legislation allows abortion, 'it must not structure its legal framework in a way which would limit real possibilities to obtain it'.[47]

Similarly, in *R. R v Poland*, the applicant was informed her foetus had a possible abnormality and she wanted an abortion if the diagnosis was confirmed. However, doctors refused to administer the necessary tests. By the time it was confirmed the foetus suffered a malformation, the applicant could not have an abortion as Polish law only provided for therapeutic abortion in the first twenty-four weeks of pregnancy. Had the tests been undertaken when requested, R.R could have accessed a lawful abortion.[48] Referring to its conclusions in *Tysiąc*, the Court found that Polish law provided no effective mechanism in which R.R. could have obtained the testing and exercised her legal abortion rights. Ergo, authorities failed to comply with its positive obligations under Article 8.[49]

In *P. and S.*, *v Poland,* the court found that Poland violated Article 8 on the same grounds as *Tysiąc* and *R.R*.

[50] A fifteen-year-old girl became pregnant after rape, a lawful reason for abortion in Poland. Yet, she was repeatedly denied access to an abortion by doctors and was harassed to keep the child by religious figures and anti-abortion groups.[51]

Summarising, these illustrative cases have been instrumental in shaping abortion jurisprudence. Specifically, the Court has consistently found that in States where abortion is

[45] *Tysiąc*, n (30), paras 104, 107.
[46] *Ibid,* para 114.
[47]*Ibid*, para 116.
[48] *R.R v Poland,* n (35), paras 6-3.
[49] *Ibid*, para 214.
[50] *P and S*, n (36), paras 128-137.
[51] *Ibid,* paras 5-32.

legal, denial is a violation of a woman's right to private life under the ECHR. Importantly, however, the ECtHR failed to address whether pregnant women are entitled, under the right, to abortions 'on demand'.

In this respect, the Court's most authoritative abortion case is *A., B. and C. v Ireland* as it was not solely a question of procedural access to legal abortion; rather it was the first time the Court had considered the substantive issue of *de jure* abortion access. At the time, the Irish Constitution prohibited abortion under any circumstances except where the mother's life was at risk whilst equally enshrining the right to life of the unborn. Three women brought an application to Strasbourg arguing that the implementation of Ireland's abortion legislation, as well as the legislation itself, violated their rights under Articles 3, 8 and 14. Having been denied an abortion, they travelled abroad to undergo the procedure (this was not prohibited by the Constitution).

The court distinguished the claims of A and B from C. A and B, who sought abortions for health and well-being reasons, argued that prohibition violated their right to respect for private life. As noted above, the Court was required to consider whether abortion prohibition was an interference 'necessary in a democratic society' (it was accepted that such interference was in accordance with the law and pursued a legitimate aim of protection of morals including protection of the right to life of the unborn).[52] Whilst the Court claimed that for intimate matters, States will only be given a narrow MoA,[53] the Court went against this in *A., B., and C.* Despite consensus for broad abortion access in a majority of ECHR State parties, the Court 'undermined the effects of its own doctrine' by concluding that consensus did not decisively narrow a broad MoA. Instead, it deferred to the 'profound moral views' of the Irish people on the unborn's right to life.

The fact that the Court disregarded consensus and instead deferred to the Irish State has been criticised. For de Londras, the Court's decision 'shows little intellectual consistency with the generally narrow [MoA] for intimate decisions, as if abortion were not an intimate, private decision'.[54] Those who dissented the judgement criticised the majority, arguing that allowing

[52] *A., B. and C.*, n (30), paras 219-228.

[53] See, e.g., *Handyside v the United Kingdom* App no 5493/72 (ECtHR, 7 December 1976).

[54] Fiona de Londras, 'Fatal Foetal Abnormality, Irish Constitutional Law, and Mellet v Ireland', *Medical Law Review* 24, no. 4 (2016): 597.

the moral views of the population to 'override the European consensus, which tends in a completely different direction, is a real and dangerous new departure in the Court's case-law'.[55] Where the court did find a violation was for applicant C, who was undergoing chemotherapy and the pregnancy posed a risk to her life. C would have been able to access an abortion under this exception but was denied the procedure.[56] The court undertook the same analysis as in *Tysiąc*, confirming that as Ireland had legislated for therapeutic abortion, there must exist an accessible and effective procedure to establish whether someone qualifies for a lawful abortion.[57]

The sum of the Courts Article 8 abortion jurisprudence can thus be considered as one of judicial minimalism, a view that has been extended into the court's stance on reproductive rights overall.[58] As Lebret highlights, minimalist approaches may be constructive where consensus has yet to solidify. Yet, the position starts **'**to lose legitimacy when the Court continues to use them despite social evolutions' and 'creates a gap between society and the ECtHR'.[59]

B *Abortion and The Prohibition of Inhuman and Degrading Treatment*

Arguably, the ECtHR has taken a bolder attitude towards Article 3, which enshrines one of the most fundamental rights under the Convention,[60] being that no one shall be subjected to torture or to IDT. Unlike Article 8, it is an *unqualified* right and the State's interest (or other individuals) are not balanced against an individual's right. Article 3 is also an absolute right to which no derogation is permissible.[61] Accordingly, the MoA, the main obstacle in Article 8 abortion jurisprudence, does not apply to Article 3. However, the ill-treatment suffered must reach a minimum level of severity to be considered IDT and fall within the scope of Article 3.[62] Notably, IDT goes beyond physical or mental suffering, and may include 'treatment [that]

55 *A., B. and C.*, n (30), partly dissenting opinion, para 9.
56 *Ibid,* paras 22-26.
57 *Ibid*, para 267.
58 Audrey Lebret, 'The European Court of Human Rights and the framing of reproductive rights', *Droits fondamentaux* 18 (2020).
59 *Ibid*, 51.
60 See, e.g., *Selmouni v France* App no 25803/94 (ECtHR, 8 July 1999) para 95; *Bouyid v Belgium* App no 23380/09 (ECtHR, 28 September 2015) para 81.
61 ECHR, n (17), art 15(2).
62 It is not argued that abortion restrictions rise to the level of torture.

humiliates or debases an individual, showing a lack of respect for or diminishing his or her human dignity, or arouses feelings of fear, anguish or inferiority'.[63]

There has been a progressive attitude by the Court to finding Article 3 violations in respect of abortion. In *Tysiąc* the ECtHR dealt with IDT in a single paragraph, concluding that the 'facts alleged did not disclose a breach'.[64] Three years later in *A., B. and C.*, the Court again declined to find a violation. Invoking Article 3, the applicants argued that 'criminalisation of abortion was discriminatory (crude stereotyping and prejudice against women), caused an affront to women's dignity and stigmatised women, increasing feelings of anxiety'.[65] They further argued that 'the two options open to women - overcoming taboos to seek an abortion abroad and aftercare at home or maintaining the pregnancy in their situations - were degrading and a deliberate affront to their dignity'.[66] Despite recognising the psychological and physical burden of obtaining an abortion overseas, the Court concluded that the treatment did not reach the minimum level of severity.[67]

More recently, in both *R.R.* and *P. and S.*, the Court was willing to accept that the treatment suffered by denying an legal abortion reached the minimum level of severity and amounted to IDT. In *P. and S.*, the Court concluded an Article 3 violation because of: (a) the applicant's 'great vulnerability' due to her age and the pregnancy being the result of rape, (b) that she was treated in a 'deplorable manner' by authorities, and (c) her right to liberty was breached by being removed from her mother's care over the rape and abortion request.[68] Noting again the vulnerability of the applicant in *R.R.,* her treatment amounted to IDT by having to endure weeks of 'painful uncertainty' and 'acute anguish' over the foetus's health, and being humiliated by 'shabby' treatment by practitioners, Poland was deemed to have violated Article 3.[69]

C *Abortion and the Right to Sex and Gender Equality and Non-Discrimination*

In the opinion of feminist legal scholars, abortion discourse and jurisprudence lack the perspective of discrimination or gender equality. The inclusion of discrimination and gender equality discourse has found comparatively greater support among UN treaty monitoring

[63] *Pretty*, n (32), para 52.
[64] *Tysiąc,* n (30), para 66.
[65] *A., B. and C.*, n (30), para 162.
[66] *Ibid*, para 162.
[67] *Ibid*, para 164.
[68] *P. and S.*, n (36), paras 157-169.
[69] *R.R.*, n (35), paras 153-162.

bodies than under the ECHR system.[70] In the absence of this perspective, applicants before the ECtHR have asked the Court to find violations of Article 14 enshrining the prohibition of discrimination, namely, enjoyment of the rights and freedoms under the ECHR without discrimination on any ground such as, *inter alia*, sex or other status.[71] Article 14 is a parasitic right, meaning that the Court can only consider a violation of the right when considering another right; although this does not mean that an Article 14 violation is only possible if the primary Article is violated.

So far, the court has rarely engaged with Article 14, and has only reflected briefly on discrimination in relation to reproductive rights generally, including abortion. Development of the ECtHR's jurisprudence has been detrimentally affected by the Court's tendency not to consider an Article 14 violation if a violation of the primary right is found; described by Partsch as 'reasons of procedural economy'.[72] As Londono argues, this is perhaps the most disappointing aspect of the ECtHR's abortion jurisprudence, particularly in light of how the Human Rights Committee (HRC) and Committee on the Elimination of Discrimination Against Women ('CEDAW Committee') have approached the issue.[73]

Whilst this deferential position has begun to change in other areas,[74] it continues to prevail in abortion jurisprudence. In both *A., B. and C.*, and *P. and S.*, the applicants argued claims of discrimination. However, the court did not find a violation: in *A., B., and C.,* it concluded it was unnecessary to consider Article 14 separately,[75] and in *P. and S.*, it dismissed the argument as inadmissible, without giving reasons why.[76] Arguably, these decisions are another symptom of the judicial minimalism by the court.

[70] See, e.g., *L.C. v Peru* CEDAW/C/50/D/22/2009, CEDAW, 4 November 2011; *Mellet v Ireland* CCPR/C/116/D/2324/2013, UNHRC, 17 November 2016.

[71] ECHR, n (17), art 14.

[72] Karl Joseph Partsch, 'Discrimination' in *The European System for the Protection of Human Rights,* eds. Ronald St J, Macdonald, Franz Matscher and Harold Petzold (Dordrecht: Martinus Nijhoff, 1993), 583.

[73] Patricia Londono, 'Redrafting abortion rights under the Convention: *A, B and C v. Ireland*', in D*iversity and European Human Rights: Rewriting Judgments of the ECHR*, ed. Eva Brems, (Cambridge: Cambridge University Press, 2012), 113.

[74] See, e.g., *Bradshaw and others v Malta* App no 37121/15 (ECtHR, 23 October 2018).

[75] *A., B., and C.,* n (30), para 270.

[76] *P. &. S*, n (36), paras 170-171.

D ***A Note on the Right to Life***

The right to abortion is invariably linked with the right to life; predominantly the right to life of the unborn, but also the mother's right to life. Dispute on whether the unborn possess the right to life (or indeed any human rights) has generated enormous scholarship; not least due to religious sentiments. Furthermore, as noted above, the unborn's right to life has had a significant impact on the ECtHR's decision in *A., B., and C.*; the 'profound moral values' of the Irish people in safeguarding the right to life of the unborn were the linchpin allowing the Court to disregard consensus and confer a broad MoA.

That the court has not proclaimed prohibition of abortion on demand is a violation of any ECHR rights is largely because the ECtHR views the issue of abortion as un-severable from the question of when life begins, a question that lacks consensus across CoE States. In its principal case on foetal rights, *Vo v France*, the ECtHR declined to answer the question, noting that it is neither desirable nor possible to answer the question whether the unborn child is a person for the purposes of Article 2.[77] Accordingly, the court deferred to States to address this question.[78] *Vo* concerned a woman whose amniotic sack was punctured iatrogenically, necessitating a therapeutic abortion. The applicant believed that the unintentional death of the foetus was manslaughter. Ultimately, the Court found no violation of Article 2, despite equivocating on the question of the rights of the foetus.

Contrast this with the right to life under other IHRL instruments. At the time of drafting, inclusion of the right to life of the foetus in the *International Covenant on Civil and Political Rights* was explicitly rejected. Moreover, the *Universal Declaration of Human Rights* was specifically drafted as conferring rights on 'all human beings are *born* free' [emphasis added] so as to exclude application to the foetus. [79] Nonetheless, a conclusion on whether there exists a right to life of the unborn under the Convention does not preclude the Court from addressing abortion in the ways examined below.

The culmination of the above discussion begs the question central to this paper, namely what jurisprudential solutions are available under the ECHR to better guarantee women access to abortion, both therapeutic abortion and on demand?

[77] *Vo,* n (26), para 85.

[78] *Ibid*, para 82.

[79] UDHR, n (6), art 1; Christina Zampas and Jaime M. Gher, 'Abortion as a Human Right - International and Regional Standards', *Human Rights Law Review* 8, no. 2 (2008): 263.

WHERE TO FROM HERE?

There is a pressing need to strengthen *de jure* and *de facto* abortion access under the ECHR. As examined in Chapter 2, this must be achieved through ECtHR jurisprudence. To move beyond a normative argument, this analysis must be situated against the backdrop of the ECtHR in contemporary abortion law, how the Court is influenced by State legal frameworks and practices, and future opportunities for change. As noted earlier, the many cases brought to Strasbourg against Poland will provide a significant and timely opportunity for the ECtHR to consider abortion under the Convention, particularly the controversial 2020 decision of the Polish Constitutional Tribunal.

I. THE POLISH CONSTITUTIONAL TRIBUNAL DECISION

There has been a gradual erosion of abortion, and other reproductive, rights in Poland with respect to Articles 3, 5 (the right to liberty and security), and 8.[80] Between 1959 and 1993 abortion was available on demand in Poland and was widely practiced.[81] However, in 1993, legislative changes meant that abortion was only allowed in cases of FFA, risk to the mother's life or health, or pregnancy resulting from rape or incest. [82] In 2020 abortion access was further restricted following the Polish Constitutional Tribunal ruling that abortion on the basis of foetal impairment was unconstitutional, characterising the permissibility of abortion, in particular due to FFA, as one of 'liberal eugenics'.[83] Given that legalised abortions before this decision were almost exclusively performed for FFA, access to legal abortion effectively ended.[84]

Notably, the new abortion regime was not subject to Parliamentary debate; rather simply accomplished by constitutional jurisprudence. Such judicial activism is likely the culmination of right-wing populist agitation.[85] Bucholc stated that such behaviour represents the closure of the 'jurisprudential horizon'.[86] That is, such decisions effectively removed Polish constitutional

[80] Julia Kapelanska-Pregowska, 'The Scales of the European Court of Human Rights: Abortion Restriction in Poland, the European Consensus, and the State's Margin of Appreciation', *Health and Human Rights Journal* 23, no. 1 (2021): 214.

[81] *Ibid*; Bucholc, n (7), 80.

[82] Kapelanska-Pregowska, n (80), 214.

[83] Bucholc, n (7), 88.

[84] Kapelanska-Pregowska, n (80), 215; Commissioner for Human Rights, 'Third party intervention by the Council of Europe Commissioner for Human Rights', Council of Europe, 28 October 2021, [43].

[85] Magdalena Furgalska and Fiona de Londras, 'Rights, Lawfare and Reproduction: Reflections on the Polish Constitutional Tribunal's Abortion Decision', *Israel Law Review* 55, no. 3 (2022).

[86] Bucholc, n (7).

jurisprudence from the ambit of international law and human rights existing in Europe, the ECHR, and international bodies such as the CEDAW.[87]

It is unlikely that Poland would now implement changes to its abortion regime in law or practice to align with the ECHR should the Court conclude that it has violated the Convention. As examined above, Poland is no stranger to the ECtHR in relation to abortion, having been brought to the Court many times for essentially the same violation. Further, Poland is progressively distancing itself from IHRL.

Nonetheless, the Tribunal's decision and ensuing cases is of paramount importance. Whilst ECtHR decisions technically only bind the state party to individual cases, in practice they are considered to have an *erga omnes* effect on other states.[88] How the Court chooses to engage with abortion in respect of Poland's restrictive laws will necessarily affect how other CoE States are permitted to deal with abortion; particularly States such as Andorra where it is completely prohibited, or countries with similar restrictions to Poland such as Liechtenstein or Monaco.[89] Were the court to conclude the Polish cases in any of the ways analysed below, other States countries would likely have to transform their own abortion laws. Further, such a decision would prevent States, for example Italy where abortion is not prohibited but in practice is increasingly inaccessible, from backsliding.

II. HOW CAN EUROPEAN ABORTION RIGHTS MOVE FORWARD?

Considering the above, we arrive at this paper's key analysis; that is, how can the ECtHR find that restrictive abortion laws are a violation of the ECHR in future cases? Chapter 2 indicated that the Court is willing to finding violations of Articles 8 and/or 3 for *de facto* abortion access; that is, where abortion is legally available. The below will analyse how Articles 8, 3 and 14 can be used by the Court to find violations where abortion is not legally available (whether it be a complete prohibition or only available in certain circumstances). Notably, the principle analysis will concern Article 8, as this is where the Court's jurisprudence has focused.

[87] Bucholc, n (7).

[88] See, e.g., Oddný Mjöll Arnardóttir, 'Res Interpretata, Erga Omnes Effect and the Role of the Margin of Appreciation in Giving Domestic Effect to the Judgments of the European Court of Human Rights', *European Journal of International Law* 28, no. 3 (2017).

[89] 'The World's Abortion Laws', Centre for Reproductive Rights, accessed 28 August 2023, https://reproductiverights.org/maps/worlds-abortion-laws/.

It has been suggested that the Court heeds political calls for abortion access under the Convention.[90] Such calls are particularly in the wake of not only the Tribunal decision, but also the *Dobbs* ruling and the wave of abortion decriminalisation in countries such as Malta. Such a position is immediately countered by the fact that the court does not, and should not, consider political considerations. However, this author would argue that such a view is naïve. Abortion is not the first issue affected by political sentimentality at the ECtHR. Hurford, for example, suggests there are justified claims that the Court is more ready to find breaches of the right to freedom of expression in Article 10 where such breaches involve Christianity rather than Islam 'due to tensions surrounding Islam in Europe'.[91] As we begin with the analysis of Article 8 and the effect of European consensus on the MoA, this position is worth remembering; and, as Hurford argues 'it would be a brave Court – although one that has tremendous respect for precedent and the rule of law – that would ignore such pressure'.[92]

A *Article 8, the Margin of Appreciation and Changing European and International Consensus*

Whilst the Court's procedural approach under Article 8 provides some protection for women to access abortion, it does not go far enough. The Court must be able to find violations of the substantive issues of *de jure* abortion. As examined in Chapter 2, the ECtHR adopts the MoA doctrine in its evaluation of the balancing test required for determining the limits of State action with respect to qualified rights under the ECHR. Once merely an interpretative tool of jurisprudence in the Court, albeit an influential one, it has now found express reference in Protocol No. 15 of the Convention, adding that parties 'enjoy a margin of appreciation, subject to the supervisory jurisdiction' of the ECtHR to the Preamble of the Convention.[93] Under this doctrine, and in line with changing European and international consensus on broad access to abortion, this paper posits that the Court can find a right to abortion, or at the very least, broaden women's access.

[90] See, e.g., James E. Hurford, 'Vox Populi or Vox Curiae? Some Possible Consequences of Dobbs v Jackson Women's Health Organisation on Abortion in the European Court of Human Rights', *Judicial Review* (2023).
[91] *Ibid*, 8.
[92] *Ibid*, 9.
[93] ECHR Protocol 15.

The MoA Doctrine and Consensus

Scholars and the Court provide varied definitions of the MoA doctrine. Yourow describes it as 'freedom to act; manoeuvring, breathing or "elbow" room; or the latitude of deference or error which the Strasbourg organs will allow to national legislative, executive, administrative and judicial bodies before it is prepared to declare' a violation of the Convention.'[94] Brauch describes it as 'a doctrine the Court uses to interpret certain Convention provisions… [and] refers to the amount of discretion the Court gives national authorities in fulfilling their obligations under the Convention' and is analogous to a standard of review.[95]

In a leading MoA application, the ECtHR in *Handyside v United Kingdom* defined the doctrine as follows:

"[I]t is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals... By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them .... Consequently, Article 10 para. 2 ... leaves to the contracting States a margin of appreciation."[96]

Importantly, the MoA afforded to States is not fixed and may broaden or narrow over time, particularly as consensus shifts.[97] The Court uses various consensus types, often employing more than one in any given case, including internal State, European and international consensus, to adjust the MoA.

Whilst consensus is not decisive or determinative of the MoA, Legg suggests that consensus affects the MoA in three ways: (i) where there is a lack of consensus, the Court will afford the State greater deference; (ii) where there is a common trend or consensus amongst states in favour of the applicant's case, the ECtHR may heighten their scrutiny and narrow the MoA;

94 Howard Charles Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence*, (The Hague: Kluwer, 1996), 13.

95 Jeffrey A. Brauch, 'The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law', *Columbia Journal of European Law* 11, no. 1 (Winter 2004/2005):115

96 *Handyside,* n (53), para 48.

97 Dobbs, n (11), Brief amicus curiae of European Law Professors, 12.

and, conversely, (iii) where domestic practice favours the State's position, it will strengthen deference to the State and broaden the MoA.[98]

2 *Is the MoA an Appropriate Tool to Guide the ECtHR?*

Given the importance the MoA has in ECtHR abortion jurisprudence, it is prudent to consider the justifications for/against its use by the Court.

The most notable justification for using the MoA is the subsidiary nature of the ECHR mechanism; that is, the primary responsibility to safeguard the rights and freedoms enshrined in the ECHR and its Protocols lies with the States. As early as 1993, Petzold described the MoA as the 'natural product' of the principle of subsidiarity. In this way, the 'Convention leaves to each Contracting State in the first place the task of securing within the domestic legal order the rights and freedoms which it enshrines: the Convention institutions make their own contribution to this task but they become involved only through contentious proceedings and once all domestic remedies have been exhausted'.[99] Petzold found support for this in early cases such as *Handyside* where the court ruled that national authorities are allowed a MoA when determining a pressing social need.[100] However, there is now support for the MoA in the inclusion of the principle of subsidiary in the same ECHR Protocol that enshrined the MoA.[101] It can also be argued that using the MoA is justified because the ECHR 'does not command or even aspire to strict uniformity throughout Europe in the protection of human rights'.[102]

In terms of justifying the use of consensus to determine the MoA, various arguments are espoused. From a normative perspective, scholars such as McGoldrick argue that, as the European human rights system depends on the cooperation of national courts, the appreciation of European consensus when undertaking the court's balancing test is favourable. Particularly so, considering that ECtHR judgements are technically only binding on the State party; albeit the Court's decisions have an *erga omnes* effect. The ECHR and the human rights system it has created are predicated on States' consent to voluntarily bind themselves to the Convention's

[98] Andrew Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality*, (Oxford: Oxford Academic 2012), 116.

[99] Herbet Petzold, 'The Convention and the Principle of Subsidiarity' in *The European System for the Protection of Human Rights*, eds. Ronald St.J. Macdonald, Franz Matscher & Herbert Petzold, (Dordrecht: Martinus Nijhoff, 1993), 59

[100] *Ibid*; *Handyside*, n (53).

[101] ECHR Protocol 15.

[102] Jean-Paul Costa, 'On the Legitimacy of the European Court of Human Rights' Judgments' *European Constitutional Law Review* 7, no. 2 (2011): 180.

obligations. Thus, the success of Court's jurisprudence is predicated on the 'ultimate acceptance and implementation of the ECtHR's evolutive interpretation by national legislatures, executives and judiciaries'[103] and allows the ECtHR 'to avoid backlash and ensures public support and compliance with its judgements'.[104]

Nonetheless, even within the ECtHR the use of the MoA has critics, either its use at all or its erroneous application in specific cases. For example, in his concurring opinion in *Egeland and Hanseid v Norway*, Judge Rozakis criticised the majority's 'automatic' MoA application and suggested it may have made no difference to the judgement if the doctrine was never mentioned.[105] Judge De Meyer's comments in *Z v Finland* are categorical: 'it is high time for the Court to banish that concept from its reasoning. It has already delayed too long in abandoning this hackneyed phrase and recanting the relativism it implies'.[106] As noted in Chapter 2, the way in which the Court dealt with the MoA in *A., B., and C*, was heavily criticised in multiple concurring and dissenting judgements.

The commonest scholarly critique, and, again, one finding support even within the Court, is the incoherency, lack of inconsistency and non-uniformity of the MoA application. Scholars such as Meaney, [107] and Brauch, [108] rigorously challenge the Court's application of the MoA this way. The use of consensus to determine the MoA is similarly critiqued. There is no transparency or coherency on how many states constitute consensus or whether it is legal or social consensus. The inconsistency criticism is difficult to ignore. In this author's opinion, any in-depth analysis of the ECtHR's use of the MoA doctrine must arrive at the same conclusion. Brauch's conclusions take this one step further, arguing that the Court's incoherent and unpredictable use of the MoA ultimately threatens the rule of law within Europe. Others such as Legg, suggest that the doctrine is at odds with the theory of the universality of human rights;

[109] in direct contradiction of the argument that there is no 'wholesale standardisation' of human

[103] Dominic McGoldrick, 'A Defence of the Margin pf Appreciation and an Argument for its Application by the Human Rights Committee', *International & Comparative Law Quarterly* 65, no. 1 (2015): 30.

[104] Orlaith Meaney, 'The European Court of Human Rights and Abortion: A Right or Moral Issue?', *Hibernian Law Journal* 20 (2021): 76.

[105] *Egeland and Hanseid v Norway* App no 34438/04 (ECtHR, 16 April 2009), concurring opinion of Judge Rozakis.

[106] *Z. v Finland* App no 22009/93 (ECtHR, 25 February 1999), partly dissenting opinion of Judge de Meyer.

[107] Meaney, n (104).

[108] Brauch, n (95).

[109] Legg, n (98), 40.

rights principles under the ECHR system.[110] We can see the undesirable consequences of the Court's use of consensus to determine the MoA in *Rekvényi v Hungary*, where the court afforded a broad MoA to Hungary in its prohibition of police force members joining political parties.[111] In the following years, the Hungarian Constitutional Court referred to the ECtHR judgement to relax domestic constitutional standards.[112] Current ECtHR judge Péter Paczolay, who at the time was Vice-President of the Hungarian Constitutional Court, critiqued the decision, stating that a broad MoA because of an absence of consensus, led the ECtHR to unintentionally lower national human rights standards.[113]

Nonetheless, as the Court is unlikely to move away from its reliance on the MoA in either abortion cases or Article 8 cases generally, we must consider how the ECtHR can embrace the MoA and changed consensus on abortion access to advance Article 8 abortion rights.

3 *How the MoA Can Positively Inform Abortion Law*

As Chapter 2 examined, the failure of arguments before the ECtHR that restrictive abortion legislation violates Article 8 of the Convention has generally been due to the Court's application of a broad MoA. Thus, the ECtHR has given deference to the State to legislate against abortion access, and the balancing of State interests versus the pregnant women's interests under Article 8 falls on the State's side.

There are few cases wherein Strasbourg has had the chance to consider abortion, with those coming after the ECtHR's *A., B. and C.* decision not directly considering the State's MoA. The Court has also not altered their position of deference to States. One commentator has considered the Court's approach to the MoA on abortion as 'irrefutable Strasbourg dogma'.[114] However, with Strasbourg considering a multiplicity of cases against Poland in the near future, the success of even one case may be instrumental in defining future abortion jurisprudence. For the ECtHR to find there exists a right to abortion under Article 8, in any of the myriad forms (therapeutic abortion, abortion on demand), the Court has the power to narrow States'

[110] Costa, n (102), 180.
[111] *Rekvényi v Hungary* App no 25390/94 (ECtHR, 20 May 1999).
[112] 'Dialogue Between Judges', ECtHR, accessed 15 August 2023, 47, https://www.echr.coe.int/documents/d/echr/dialogue_2008_eng
[113] *Ibid*, 48
[114] Kapelanska-Pregowska, n (80), 217.

MoA in regard to restrictive abortion legislation. This change to the MoA, based upon European and international consensus of broad abortion access, would be, in this author's opinion, a crucial step forward in guaranteeing the right to abortion.

4 *The Changing Consensus*

As Meaney remarks, the ECtHR is generally cautious in declaring an updated or new-found consensus and prefers not to engage in progressive determinations.[115] This is not to say that the Court will not change its view of the MoA on the basis of a consensus change, even for sensitive moral or ethical issues. *Christine Goodwin v the United Kingdom*[116] is an illustrative example. Prior to the ECtHR's decision in *Goodwin*, the ECtHR considered that the alteration of birth certificates of transgender individuals was not considered to interfere with the right to respect for private life under Article 8, and allowed a broad MoA to States to legislate on the issue.[117] However, after 'evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals',[118] the Court narrowed States' MoA in preventing transgender individuals from obtaining legal recognition of their gender reassignment. Because the issue related to a 'particularly important facet of an individual's existence or identity',[119] the MoA was narrowed because of changing consensus on the fair balance between State and applicant interests. [120]

This calls to mind an argument that the court is 'locked in' because of their decision in *A., B . and C.,* In deferring to the Irish State to legislate against abortion, they ignored European consensus that suggested, even in 2010, a right to abortion access.[121] This author's position, however, is that this argument fails to appreciate not only the progressive solidification of European and international trends, but, more importantly, the evolutive nature of the ECHR. That is, one of, if not *the,* foundational principles of the Convention is that it is a living instrument continually assessed in light of present-day conditions. Whilst there has been commentary on cases such as *A., B. and C.* arguing that the court disproportionately or

[115] Meaney, n (104), 76.
[116] *Christine Goodwin v the United Kingdom* App no 28957/95 (ECtHR, 11 July 2002).
[117] *Rees v the United Kingdom* (1986), Series A no. 106; *Cossey v the United Kingdom* App no 10843/84 (ECtHR, 27 September 1990); *X, Y and Z v the United Kingdom* App no 21830/93, (ECtHR, 22 April 1997).
[118] *Goodwin,* n (116), para 55.
[119] *Parillo v Italy* App no 46470/11 (ECtHR, 27 August 2015), para 169.
[120] Dobbs, n (11), Brief amicus curiae of European Law Professors, 13.
[121] *A., B. and C.*, n (30), 235-236.

erroneously applied a broad MoA on restrictive abortion legislation, the Court does not have to find in future cases that it was wrong to do so.

We can, then, consider the trends in consensus towards broad abortion access. As concerns the European consensus, it is possible to see the change in the thirteen years since the ECtHR decided *A. B. and C.* As examined above, at that time the Court disregarded the emerging consensus in Europe towards allowing abortion access, in particular in the case of therapeutic abortion in preference to the 'acute sensitivity of the moral and ethical issues raised by the question of abortion' and the 'profound moral views' of the majority of the Irish people.[122] Presently, a clear majority of the 47 CoE member states allow abortion on broad grounds, including on demand.[123] Abortion in circumstances of risk to the life or health of the mother, rape and incest is accepted in almost all member states. This consensus is strengthened further when considering the number of recent developments decriminalising abortion in States where it was highly restricted: following the decision in *A., B. and C.*, a referendum in Ireland altered the Constitution to allow for abortion on broad grounds;[124] Malta and San Marino, 2 of 3 states where there was a complete ban on abortion, have removed restrictions and now allow abortion to save the mother's life or on demand.[125]

Apropos of the international trend towards the right to abortion access, the ECHR 'cannot be interpreted in a vacuum'[126] and must be viewed considering the jurisprudence of international human rights bodies. Comments of the HRC in *Mellet* and *Whelan* are significant.[127] In contradiction of the ECtHR, the HRC readily found the same Irish abortion laws impugned in *A., B. and C.*, violated the right to private life (Article 26 ICCPR) in both cases.

Insofar as internal consensus is concerned, the Court's consideration will differ across States. As the Court will have the opportunity to consider the right to abortion in the wave of upcoming

[122] *A., B and C.,* paras 222, 233.

[123] Centre for Reproductive Rights, n (89).

[124] 'Irish abortion referendum: Ireland overturns abortion ban', BBC, 26 May 2018, accessed 14 August 2023, https://www.bbc.co.uk/news/world-europe-44256152.

[125] 'San Marino votes to legalise abortion in referendum', *BBC*, 21 September 2021, accessed 14 August 2023, https://www.bbc.co.uk/news/world-europe-58701788; 'Malta to allow abortion but only when woman's life is at risk', *The Guardian,* 28 June 2023, accessed 14 August 2023, *https*://www.theguardian.com/world/2023/jun/28/malta-to-allow-abortion-but-only-when-womans-life-is-at-risk.

[126] *Al-Adsani v United Kingdom* App no 35763/97 (ECtHR, 21 November 2001), para 55.

[127] *Mellet*, n (70); *Whelan v Ireland*, CCPR/C/119/D/2425/2014 , UNHRC, 12 June 2017.

cases against Poland, it is instructive to consider how internal consensus would play out in these cases. As above, one of the inherent purposes of considering internal consensus is that internal public authorities 'are *in principle* in a better position than the international judge to give an opinion on the 'requirement of morals''.[128] Further, as Kapelanska-Pregowska observes, the Court's determination of the MoA is also based on the democratic legitimacy of the law-making process.[129] Yet, the 2020 Tribunal decision has been criticised by lawyers and scholars alike as invalid *ab initio*, resulting from, *inter alia*, the Court's lack of impartiality and independence due to the composition and appointment of various judges within the backdrop of the abuse of constitutional procedures occurring in Eastern Europe. From a social perspective, restrictions were met with widespread protest across the country. This has led scholars including Kapelanska-Pregowska to conclude that it is doubtful whether the decision to regress Poland's abortion rights 'should be regarded as instructive [of] society's views on abortion',[130] and should not serve to elucidate an internal consensus.

Considering internal consensus in *In the matter of an application by the Northern Ireland Human Rights Commission for Judicial Review* is similarly instructive.[131] In Lady Hale's obiter, she compared the ECtHR's conclusion that 'profound moral views', in other words internal consensus of the people of Ireland on the right to life of the unborn in *A., B., and C.*, with internal consensus in Northern Ireland. She concluded there was no evidence that the Northern Irish people were against allowing abortion in the case of FFA, rape and incest (the circumstances under consideration), and, in fact, internal consensus was 'quite the reverse'.[132] Thus, she was able to conclude that internal consensus did not broaden the MoA.

5 *Narrowing the MoA*

The MoA is now subject to narrowing as European and international consensus favour broad abortion access. Kapelanska-Pregowska considers the only way in which the 'idea and interpretive function of the European consensus is to be maintained in a meaningful manner', is for consensus to necessarily narrow the MoA.[133] She further argues that, by Strasbourg basing their decision, in, for example, the upcoming Polish cases, on the changed European

[128] Kapelanska-Pregowska, n (80), 221.
[129] *Ibid*.
[130] Kapelanska-Pregowska, n (80), 221.
[131] [2018] UKSC 27 9 ('*Re NIHRC'*).
[132] *Ibid,* [24].
[133] Kapelanska-Pregowska, n (80), 221.

(and international) consensus, the court would avoid criticisms of judicial activism and legitimise the narrowing of States' MoA. Given the political backdrop of any legal decisions on abortion, this is a notable point.

Likewise, various authorities in ECtHR jurisprudence consider the narrowing of the MoA for abortion to be substantiated. Dunja Mijatović, the Council of Europe Human Rights Commissioner, has intervened in the proceedings against Poland's 2020 abortion restrictions, arguing that the 'existence of a firmly established European consensus in favour of ensuring access to safe and legal abortion on women's request or broad social grounds and related progress in facilitating access to abortion impose on States a *very* narrow margin of appreciation in discharging their obligations under Article 8 of the Convention' [emphasis added].[134]

This author argues that the ECtHR must consider European and international consensus as *the* relevant consideration in its interpretation of MoA. In doing so, by declaring that consensus had been reached among ECHR State Parties, the MoA is no longer broad and has sufficiently narrowed as to find that laws prohibiting abortion are a disproportionate interference on pregnant women's right to privacy under Article 8 of the ECHR. Thus, they are not 'necessary in a democratic society' as required under Article 8(2).

This being said, it is likely that consensus has only narrowed sufficiently that abortion restrictions are only disproportionate in certain circumstances. That is, the consensus has yet to narrow adequately as to afford a narrow MoA to restrictions on abortion on demand. An important caveat is that the ECtHR would only feel justified in finding that legislative restrictions on abortion in the case of risk to life (and potentially health) of the mother, rape and incest, and FFA are not within States' MoA, violating Article 8. Whilst others have concluded that the right to abortion on demand has also found sufficient consensus,[135] the position of this author is that it is arguably premature to consider that the Court would conclude as such.

[134] Commissioner for Human Rights, n (84), [43].

[135] See, e.g., Dobbs, n (11), Brief amicus curiae of European Law Professors.

B ***Article 3, and Denial of Abortion as Inhuman and Degrading Treatment***

What is conceived of as torture or IDT has expanded over the last two decades. Where such conduct was once mainly considered within the context of State detention, the application of Article 3 (and of corresponding articles in other IHRL jurisdictions) has reached into the public and private sphere.[136] It is perhaps unsurprising then that Chapter 2 revealed that the ECtHR is open to finding that *de facto* restrictions on abortion can violate an individual's rights under Article 3. That is, the treatment of women in attempting to access legal abortions can cause such severe pain and suffering as to reach the level of IDT. Consequently, there has been a proliferation of scholarship on the use of Article 3 to guarantee a substantive right to abortion in the ECHR system; not least because other human rights bodies, such as the HRC, are increasingly supporting this position by finding that a State's legislation prohibiting abortion can amount to IDT.[137]

The opinion of this author is that the previous section supports the argument that it is possible to broaden abortion access under Article 8. Suffice to say, however, others believe that Article 8 is a 'futile avenue for applicants within the ECtHR context'.[138] It is imperative to consider how Article 3 of the ECHR may be used to secure abortion access for women in CoE states, and under what circumstances the ECtHR may do so. To be clear, the argument analysed below is how the Court finds that *de jure* restrictions on abortion constitutes IDT and, following a consideration of the theoretical and jurisprudential support for the affirmative position, considers the practicalities and qualifications to do so.

1 *The Nexus Between IDT and Women's Rights*

Not only does the concept of 'human dignity' form the basis of IHRL,[139] it is inherent in the prohibition of torture and IDT.[140] Narrowing to this paper's issue, it is also indivisible from women's right to abortion.[141] Moore provides a valuable discussion of this link, citing the

[136] Alyson Zureick, '(En)gendering Suffering: Denial of Abortion as a Form of Cruel, Inhuman, or Degrading Treatment', *Fordham International Law Journal* 38, no. 1 (2015): 101.

[137] E.g., *Mellet*, n (70); *Whelan*, n (127).

[138] Brid Ní Ghráinne and Aisling McMahon, 'Access to Abortion in Cases of Fatal Foetal Abnormality: A New Direction for the European Court of Human Rights', *Human Rights Law Review* 19, no. 3 (2019): 566. See also, e.g., de Londras, n (54), Fenwick, n (40).

[139] UDHR, n (6).

[140] See, e.g., Elaine Webster, 'Interpretation of the Prohibition of Torture: Making Sense of 'Dignity' Talk', *Human Rights Review* 17, (2016).

[141] See, e.g., Samantha Halliday, 'Protecting Human Dignity: Reframing the Abortion Debate to Respect the Dignity of Choice and Life, *Contemporary Issues in Law* 13, no. 4 (2016).

works of various theorists.[142] Kant's theory in particular merits exploration, the argument being that a person's intrinsic worth requires them to be treated as an end in itself, rather than the *means* to that end.[143] This evokes women's right to possess reproductive freedom; that is, by forcing pregnant women to carry and give birth to a child against their will to protect the foetus' life is, inherently, treating women as a means to an end. By accepting the sentiment of Kant's theory, 'intrinsic worth that human beings possess includes the autonomous moral agency to continue with or terminate a pregnancy'.[144] Whilst not mentioned explicitly in the ECHR, the ECtHR have held that 'the very essence of [the Convention] is respect for human dignity and human freedom'.[145]

On this point, criticisms have been levelled at the scope and judicial interpretation of Article 3 for 'overlooking the harms that most commonly or disproportionately affect women'.[146] By drawing on the body of feminist literature on Article 3 and its analogous provisions in IHRL, there exists an undeniable intersection with feminist jurisprudence and the ability of IHRL bodies to consider abortion as coming within the scope of torture or IDT. Whilst gender perspectives will be further explored in the following section, it remains pertinent to consider how IHRL may be structured to prevent abortion (and indeed other harms that disproportionately affect women) from being considered as torture or IDT.

Edwards identifies three overarching critiques in feminist scholarship of IHRL applicable to the prohibition of torture and IDT, two of which serve this paper's analysis.[147] First, feminist scholars argue that IHRL was 'conceived as a set of 'male' rights'[148] in that the major human rights treaties are 'defined according to what men fear will happen to them'.[149] This can be seen, for example, in the definition of 'torture' under the CAT which requires the conduct to be at the hands of public officials, stressing that women are more likely to suffer abuse at the hands of private citizens;[150] albeit in the situation of State restrictions on abortion this is not

[142] Isabella Moore, 'Indignity in unwanted pregnancy: denial of abortion as cruel, inhuman and degrading treatment', *The International Journal of Human Rights* 23, no. 6 (2019).
[143] *Ibid*, 1012.
[144] Moore, n (142), 1012.
[145] *S.W. v United Kingdom* App no 20166/92 (ECtHR, 22 November 1995), para 44.
[146] Alice Edwards, 'The 'Feminizing' of Torture under International Human Rights Law', *Leiden Journal of International Law* 19, no. 2 (2006): 349.
[147] *Ibid*.
[148] *Ibid*, 352.
[149] Hilary Charlesworth and Christine Chinkin, 'The Gender of Jus Cogens', *Human Rights Quarterly* 15, no. 1 (1993): 69.
[150] Edwards, n (146), 353.

the case. Second, the feminist scholarship points to the public/private dichotomy in the IHRL legal order as being 'the source of women's exclusion' from IHRL.[151] Through this lens, the public sphere of government, politics economics, or the workplace is subject to State interference, whereas the private sphere of the home and family life is not intruded upon.[152] Therefore, 'the effect of distinguishing between the public and the private has rendered invisible, or at least less important, the many violations that women suffer in private'.[153]
In Edwards' work on the 'feminisation of torture' in IHRL, she challenges Article 3's interpretation as only being able to deal with 'past abuse, insofar as a complainant must be a 'victim' of a violation'.[154] She proposes that 'prevention or protection against future harm may be more relevant to women'.[155] We can see this playing out in case law. In *Re NIHRC*, the majority of the UK Supreme Court found that they could not consider whether the Northern Irish law prohibiting abortion was a violation of Article 3 of the ECHR.[156] Of course, this came down to domestic UK law and the NIHRC's standing. Nonetheless, it serves to illustrate Edwards' point.

2 *The Role of Jurisprudence*

There is also increasing jurisprudential support for the position that denial of abortion rises to the level of IDT under the ECHR, and as one commentator describes, has brought about the '(en)gendering' of suffering in the context of abortion.[157]
The ECtHR has confirmed that the Convention is to be read in light of wider international human rights law.[158] Accordingly, we must consider that restrictions on abortion access have been found to have amounted to IDT by other human rights bodies; notably, the HRC. Ní Ghráinne and McMahon make the compelling argument that the ECtHR can use the decisions of other human rights bodies to 'bolster' their decisions 'to move from its traditional position

[151] *Ibid*, 355.
[152] Catherine Moore, 'Women and domestic violence: the public/private dichotomy in international law', *The International Journal of Human Rights* 7, no. 4 (2003): 93.
[153] Edwards, n (146), 356.
[154] *Ibid,* 390.
[155] *Ibid*.
[156] *Re NIHRC*, n (131), [42].
[157] Zureick, n (136).
[158] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1115 UNTS 331, art 31(3)(c); e.g., *Al-Adsani*, n (126).

of self-restraint to expressly acknowledge a right to access abortion'.[159] Their argument relates to FFA cases. However, the overall point stands; noting that this distinction will be considered later in this section. The Court frequently refers to decisions of other human rights bodies, including the HRC and the Inter-American Court of Human Rights.[160] More importantly, the Court often cites other international human rights instruments, such as the ICCPR, that the respondent state is party to and their obligations under it, including the ICCPR to which all State parties to the ECHR are also parties, making the conclusions of its treaty monitoring body directly relevant.

(a) *The HRC*

The conclusions of the HRC on Article 7 of the ICCPR, for which the HRC is the treaty monitoring body, prohibits IDT, and offers support for the denial of abortion as a violation of Article 3 of the ECHR. Early cases such as *K.L v Peru*[161] and *L.M.R. v Argentina*[162] were paramount in recognising that denial of abortion amounted to IDT. In *K.L.*, the seventeen-year-old author, after discovering the foetus had a fatal abnormality, was refused a therapeutic abortion. The baby survived only for four days, after which K.L became deeply depressed. The HRC accepted that, by being forced to continue the pregnancy and endure the distress of seeing her child's marked deformities, her suffering amounted to IDT.[163] Importantly, the Committee accepted that mental suffering was within the scope of Article 7, and found that the deep depressive state caused by the pregnancy was foreseeable and preventable, also amounted to IDT.[164] *L.M.R.*, followed similar reasonings, finding that the humiliation and pain the author felt being denied an abortion after being raped and becoming pregnant violated Article 7.[165]

(b) *The ECtHR*

Crucially, ECtHR case law has the foundations to find that abortion prohibition under certain circumstances amounts to IDT due to mental and physical suffering. That is, jurisprudence of the Court signals that it can move beyond the procedural issues that lead to Article 3 violations, as examined in Chapter 2 in cases such as *R.R.*, and that there has been 'an incremental

[159] Ní Ghráinne and McMahon, n (138), 577.
[160] *A., B., and C,* n (30), 209; *S.M. v Croatia*, n (26), 190.
[161] *K.L. v Peru,* CCPR/C/85/D/1153/2003, UNHRC, 22 November 2005.
[162] *L.M.R v Argentina,* CCPR/C/101/D/1608/2007, UNHRC, 28 April 2011.
[163] *K.L. v Peru*, n (161), para 6.3.
[164] *Ibid,* para 6.3.
[165] *L.M.R v Argentina*, n (162), paras 9.2, 10.

broadening in the ECtHR's approach to Article 3 in the abortion context'.[166] Ní Ghráinne and McMahon identify a significant point in both *R.R.* and *P. and S.* wherein the Court's treatment of Article 3 arguments passed over whether the applicant's abortion was legally available, instead focusing on the vulnerability and suffering they endured because abortion was not available. They further asserted that the lack of legal abortion would worsen the suffering and 'make a finding of a violation under Article 3 all the more likely'.[167]

The ECtHR has already recognised that denying a woman autonomy over her body and reproductive choices is a violation of Article 3. In three cases involving forced sterilisation of Roma women in 2011-2012, the Court considered whether sterilisation amounted to IDT.[168] In finding Article 3 violations in each case, the court noted that sterilisation 'bears on manifold aspects of the individual's personal integrity including his or her physical and mental well-being and emotional, spiritual and family life'.[169] The Court thus concluded that the feelings of humiliation, 'fear, anguish and inferiority and… lasting suffering' and resulting depression, and deterioration of their personal relationships and community standing attained the level of suffering to violate Article 3.[170] As Ní Ghráinne and McMahon argued, it is evident that the same sequelae would occur if women were denied access to abortion, particularly in the context of societal norms stigmatising abortion and abortion being difficult to access.[171]

3 *A Connection Between Article 3 and Article 8?*

The utility of Article 3 to guarantee abortion access is evident in the fact that, unlike Article 8, it is an unqualified, absolute right. Zureick, whose work expertly analyses gender perspectives in human rights bodies' treatment of abortion as IDT, suggests that by framing women's experiences of pain and suffering as IDT under the non-derogable right (which she argues the prohibition of is potentially a jus cogens norm in the same way as the prohibition of torture is) serves to highlight 'the imperative of addressing women's suffering as a human rights issue and demands greater accountability from States for their role in such suffering'.[172] This

166 Ní Ghráinne and McMahon, n (138), 567.
167 Meaney, n (104), 88.
168 *V.C. v Slovakia* App no 18968/07 (ECtHR, 8 November 2011); *N.B. v Slovakia* App no 29518/10 (ECtHR, 12 June 2012); *I.G., M.K. and R.H. v Slovakia* App no 15966/04 (ECtHR, 13 November 2012).
169 *V.C. v Slovakia*, n (168), para 106.
170 *Ibid*, para 118 ; *N.B v Slovakia*, n (168), para 80; *I.G., M.K. and R.H. v Slovakia*, n (168), paras 123, 125.
171 Ní Ghráinne and McMahon, n (158), 575.
172 Zureick, n (136), 104.

sentiment is echoed by other scholars,[173] and in this author's opinion, is a significant advantage over Article 8, where the ECtHR's application of the MoA is unfavourable in the abortion context.

For Zureick, there exists a link between the furtherance of Article 3 abortion jurisprudence and Article 8.[174] She argues that, whilst the substantive component of the ECtHR's Article 3 findings, particularly in *R.R* and *P. and S.*, indicates the Court is able to find that States' restrictive abortion legislation amounts to IDT, this decision is contingent on the Court's handling of Article 8. In her opinion, the ECtHR will likely only find 'a State's substantive abortion law has violated Article 3 if it also concludes that the law has exceeded the MoA under Article 8';[175] and, in doing so, the Court will need to shift its view of the MoA, as argued above. Zureick's point is compelling and would seem to be supported in particular by the HRC's conclusions abortion.

4 *Concluding Observations*

The foundations have been laid for the Court to find that restrictive abortion laws violate Article 3. An important question arises, however, as to whether the court would be supported in finding that denial of abortion in *any* circumstance violates Article 3. That is, does the physical and/or mental suffering arising from denial of abortion for reasons beyond therapeutic abortion amount to IDT? In view of the theoretical arguments that any prohibition of abortion rises to the level of IDT, Cosentino questions, how the violation of a non-derogable norm can 'be justifiably subordinated to the existence of a domestic law…it would be a very weak protection of human rights by the ECtHR, if that was the case'.[176]

Despite the ECtHR's views on Article 3 not focusing on *de jure* availability of abortion, which as suggested above indicates that the Court can find a violation of Article 3 where the law prohibits abortion, this suffering has almost exclusively been considered in the case of risk to life of the mother, FFA or rape/incest; and indeed, much of the scholarship on abortion and Article 3 has been in the context of one of these circumstances. It would therefore be remiss not to temper the conclusions of this section. It is likely that the Court would find that the

[173] See, e.g., Ní Ghráinne and McMahon, n (8), 566.
[174] Zureick, n (136).
[175] *Ibid*, 125.
[176] Cosentino, n (43), 588.

suffering caused by States in prohibiting abortion rises to the level of IDT, thus violating Article 3, when it relates to therapeutic abortion. Nevertheless, even this would be a significant and necessary step in the direction of abortion on demand rights.

C *Article 14 and the 'Feminisation' of Abortion under the ECHR*

Important scholarship has been undertaken by feminist and gender scholars attempting to embed a gender perspective into abortion rights;[177] not least because IHRL has been considered a male construct. It seems intuitive there would be a feminist and gender perspective to any discussion of abortion, as it only affects one gender. The lack of gender discrimination in abortion jurisprudence is certainly not a question of the lack of grounds available to Courts or treaty bodies to do so and there exists the right against gender discrimination in human rights treaties across the IHRL regime.

As noted in Chapter 2, the Court has a habit of not considering Article 14 if a violation of the primary article, Articles 8 or 3, is found. Since the Court has declined to consider abortion issues as discriminatory, there exists a growing sentiment for the ECtHR to actively recognise gender discrimination in respect of restrictions on abortion, be they substantial or procedural, under Article 14 of the ECHR. For Fenwick, this amounts to 'a very striking flaw in its abortion jurisprudence'.[178] He argues that the Court finally engaging with Article 14 violations for abortion restrictions would 'not only force the government to seek to demonstrate that obstructing the access of women to medical services was non-discriminatory but might also have the effect of drawing attention to the various adverse impacts on women of [abortion] prohibition.'[179]

Notwithstanding the desires of scholars, and this author, to have the ECtHR embrace violations of Article 14, the legal basis to do so is complicated.

[177] See, e.g., *Ruth Bader Ginsburg*, 'Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade', *North Carolina Law Review* 63, no. 2 (1985); Reva B. Siegel, 'Abortion as a Sex Equality Right: Its Basis in Feminist Theory' in *Mothers in Law: Feminist Theory and the Legal Regulation of Motherhood*, eds. Martha Albertson Fineman and Isabel Karpin (New York: Columbia University Press,1995)

[178] Fenwick, n (40), 234.

[179] *Ibid*, 239.

The Comparator Hurdle

Article 14 requires the applicant show a 'comparator'; that is, that s/he has either been treated differently from a person or group of persons in a relatively similar situation or treated equally to a group of persons in a relatively different situation.[180] Once a comparator is determined, the Court determines if the facts demonstrate differential treatment.

The uniqueness of female reproductive biology 'has been one of the primary grounds for de jure and de facto discrimination against women'[181] For Ford, this uniqueness 'threaten[s] to isolate pregnant women from the very analogies that might be able to guarantee them their fundamental right'.[182] Clearly, pregnancy can only occur in women. Thus, theoretically, there is no comparator which seems a significant flaw in the structure of Article 14 jurisprudence; and, the literature is divided on how the ECtHR can best address this hurdle.

In their feminist rewritings of the *A., B and C.* judgement,[183] both Londono and Avolio conclude on Article 14 that is sufficient to demonstrate differential treatment on the basis that the Court has previously accepted that 'a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory notwithstanding that it is not specifically aimed at that group' in *D.H. v Czech Republic*.

[184] Fenwick suggests a

similar basis, that a policy seeking to protect foetal life by restricting abortion arguably 'affects both men and women, since men might, for example, experience stress on behalf of a partner and the burdens, financial and otherwise, of unwanted fatherhood. But the impact of restrictions on [abortion access] and of unwanted pregnancy obviously has a far greater impact on women'.[185] However, this is arguably not a sufficiently strong basis for the Court to readily accept, as it does not quite make a clear comparator.

The stronger argument, in this paper's opinion, is based on access to healthcare/medical procedures.[186] Where differential treatment relates to abortion and associated medical services, such as the tests for FFA in the case of *R.R.*, an obvious comparator is men seeking access to

[180] *Zarb Adami v Malta* App no 17209/02 (ECtHR, 20 June 2006), para 71.

[181] *Mellet*, n (70), Individual opinion of Committee member Sarah Cleveland (concurring), [12].

[182] Mary Ford, 'Evans v. United Kingdom: What Implications for the Jurisprudence of Pregnancy?' *Human Rights Law Review* 8, no. 1 (2008), 184.

[183] Vanessa Sauls Avolio, 'Rewriting Reproductive Rights: Applying Feminist Methodology to the European Court of Human Rights' Abortion Jurisprudence' *Feminists@law* 6, no. 2 (2017); Londono, n (73).

[184] *D.H. v Czech Republic* App no 57325/00 (ECtHR, 13 November 2007), para 59.

[185] Fenwick, n (40), 236

[186] *Ibid*.

similar medical services, such as a genetic test.[187] That is, it would be discriminatory to deny those tests to a pregnant woman, but not a man. Further, as in *Z v Poland*, the comparator may simply be denial of medical services for a pregnant versus non-pregnant woman.[188] Committee Member Sarah Cleveland's concurring opinion in *Mellet*, she expertly articulates this argument. Whilst Ireland argued that because of the biological uniqueness of pregnancy means that abortion restrictions cannot be discriminatory. She decidedly refuted their argument, stating that 'under such an approach, apparently it would be perfectly acceptable for a State to deny health care coverage for essential medical care uniquely required by one sex, such as cervical cancer, even if all other forms of cancer (including prostate cancer for men) were covered'.[189]

2 *Justification and Legitimate Aim*

Beyond the comparator issue, once the Court has decided there is a difference in treatment, the treatment is only discriminatory 'if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim'.[190] Arguably, this point is easier to resolve. The Court has repeatedly stated that the advancement of gender equality is a major goal of the CoE and the ECHR, and there must be 'very weighty reasons' before a difference in treatment between genders is considered compatible with the ECHR.[191] Importantly, the Court has previously found in *Konstantin Markin v Russia* that prevailing social attitudes in State is an insufficient justification for differences in treatment between genders.[192]

The relationship between the Court accepting a substantive violation of Article 8 and its finding of an Article 14 violation is particularly relevant. By accepting that a State has violated Article 8 through legislation denying abortion, the Court is concluding that the State's restrictions have failed the balancing test under Article 8(2). That is, the interests of the State to protect the unborn's right to life does not strike the correct balance (in other words, outside the MoA) with the mother's rights. The argument would follow that it is not a legitimate aim to preference the rights of the unborn over the mother's. Avolio demonstrates this point in her *A., B. and C.*

[187] *Ibid*.
[188] *Z v Poland* App no 46132/08 (ECtHR, 13 November 2012).
[189] Mellet, n (70), Individual opinion of Committee member Sarah Cleveland (concurring), [6].
[190] *Burden v the United Kingdom* App no 13378/05 (ECtHR, 12 December 2006).
[191] *Konstantin Markin v. Russia* App no 30078/06 (ECtHR, 22 March 2012), para 127.
[192] *Ibid*.

rewriting. Unlike the ECtHR, she concludes that 'discrimination against abortion-seeking women is not a proportionate means of protecting the life of the foetus or the morals of the Irish people' on the basis that Constitutional restrictions on abortion violated Article 8.[193] Fenwick similarly argues that weighty reasons are unlikely to be identified for abortion restrictions.[194] He argues that in *A., B. and C.*, ECtHR 'found little or no rational connection between Ireland's policy of protecting foetal life, and its policy of, in effect, requiring travel for abortion' in its conclusions on Article 8, which, had the court considered Article 14, would have served to show there was no legitimate aim or justification for the restrictions.[195]
Where a legitimate aim and justification clearly fail is in relation to FFA. A state may enact abortion restrictions in order to protect the life of the foetus. As Zureick highlights, however, 'where there is little to no chance that the child will survive long after birth, denying a woman access to an abortion does not seem to advance… these State interests'.[196] In Cleveland's view, 'any claimed purpose of protecting a foetus could have no purchase'.[197]
Nonetheless, this author concedes that the likelihood of the ECtHR 'striking down' restrictive abortion legislation solely on the basis of gender discrimination under a parasitic right like Article 14 is low; despite the Court being able to find a violation of Article 14 where they have not found a violation of another ECHR right. Rather, this paper's argument concerns the fact that the Court has been unwilling to treat restrictive abortion legislation, and restrictions on legal abortion access, as a gender discrimination issue. However, the importance of treating abortion within the context of equality, furthering the discourse on abortion access as a positive equality right cannot be underestimated.

CONCLUSIONS

This paper aimed to analyse what the ECtHR can do to better protect women's abortion rights and to align itself with the international human rights position of broad abortion access. In doing so, this paper has considered how the Court can develop its approach to abortion under

193 Avolio, n (183), 7.
194 Fenwick, n (40), 238.
195 *Ibid,* 238.
196 Zureick, n (136), 134.
197 Mellet, n (70), Individual opinion of Committee member Sarah Cleveland (concurring), [14].

Articles 8, 3 and 14 in the context of the Court's upcoming abortion cases related to Poland's recent abortion restrictions. The question remains, what can be concluded from the above?
The ECtHR is not in step with international human rights bodies, such as the HRC and CEDAW, that restrictive abortion laws violate women's human rights. Chapter 2 established that whilst the Court has expressed that the ECHR does not confer an explicit right to abortion, it has been prepared to consider procedural issues related to abortions. In cases such as *Tysiąc* and *R.R.*, the court found violations of Articles 3 and/or 8 where abortion is *de facto* restricted. However, the Court has been criticised for ignoring the both the substantive issue of abortion access, in other words, *de jure* abortion restrictions, as well gender discrimination under Article 14, particularly in *A., B. and C*. Therefore, the chapter concluded that going forward and in line with the evolutive approach of the Convention, the court can align itself with international abortion jurisprudence and find violations of substantive abortion restrictions.
Chapter 3 critically analysed three Articles under the ECHR to determine how to expand abortion access. First, the ECtHR can conclude that the MoA afforded to interfere with women's rights under Article 8 is narrow based on the European and international consensus of broad abortion access. Therefore, restrictions on abortion are not necessary in a democratic society and violate women's right to respect for private life; the caveat being that consensus is likely to find that restrictions on therapeutic abortion only are outside the MoA.
Second, by drawing support from the concept of human dignity in IHRL and the conclusions of the HRC, the ECtHR's case law on Article 3 lends support to the Court being able to conclude that the physical and mental suffering cause by *de jure* restrictions on abortion rise to the level of IDT and violate Article 3. Again, the scholarship would suggest that this would only relate to therapeutic abortion.
Third, whilst the Court may struggle with determining a comparator it is argued that this hurdle is not insurmountable for the ECtHR to consider abortion restrictions, both *de facto* and *de jure*, as gender discrimination under Article 14. Particularly regarding therapeutic abortion, there cannot be a legitimate aim, therefore no justification, in the State's interest to protect the life of the foetus, especially when the foetus has a FFA and will not survive.
37It is this paper's argument that the ECtHR can, and therefore *must*, execute all three options. Nevertheless, it must unfortunately be concluded that this is unlikely, as it would be considered significant progression of the jurisprudence (albeit this is the point). Therefore, in the alternative, this author would argue the following. The most secure way for the court to ensure that therapeutic abortion is indirectly protected under the Convention would be for the Court to find a violation of Article 3 due to it being an absolute right. Therefore, it is a stronger foundation for a right to abortion than a qualified right such as Article 8; especially where in Article 8 the Courts judgement rests on consensus and the MoA, which theoretically can change for the worse. This being said, the least 'radical' way forward, thus the most likely one, is under Article 8. The majority of the Court's abortion jurisprudence is in relation to this right and it is not too great a leap to adjust the MoA on therapeutic abortions. In respect of Article 14, the importance of imbuing abortion access with gender discrimination rights under the

Convention cannot be overstated. Strasbourg's arguably apathetic attitude to considering Article 14 may, however, prevent the court from engaging with gender discrimination, despite its central connection to the human rights of abortion.

Furthermore, to reiterate Zureick's point made above, the ability (and likelihood) of the Court to accept that restrictions on therapeutic abortion rise to the level of IDT thus violating Article 3, is likely predicated on it accepting that the MoA under Article 8 has narrowed and that such restrictive abortion laws also violate Article 8. The same can be said in respect of article 14; that is, whilst it is not a requirement that a violation of a primary ECHR right be found for the court to conclude Article 14 is violated, it is evident that the Court would likely have to find a violation of Article 8 and/or 3 to conclude that restrictive abortion laws that discriminate against (pregnant) women do not serve a legitimate aim thus are not justified.

To conclude, this paper has argued that, in light of both the Court's current jurisprudence on abortion and conclusions of other human rights treaty bodies, the ECtHR is poised to find that restrictive abortion legislation violates multiple articles under the ECHR, namely, Articles 3, 8 and 14, and the Court has the opportunity to do so in the upcoming cases against Poland. Whilst this author argues that there is sufficient support to conclude that restrictions on abortion on demand violate the Convention, thus indirectly conferring a right to abortion on demand, it is likely that the Court would only find that the ECHR protects the right to therapeutic abortion in the case of risk to the life of the mother, rape or incest, and FFA. Should the court conclude 38as such, ensuring there is *de facto* and *de jure* access to abortion on demand is, in this author's opinion, the imperative of the European and wider international human rights system.

CLIMATE REFUGEES: EVOLVING REFUGEE LAW IN DEARTH OF DEFINITION

Naman Pratap Singh

TABLE DES MATIERES

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Abstract

Displacement brought on by climate change frequently worsens preexisting vulnerabilities, like poverty, access to healthcare, and food security. While international refugee law has not yet adapted to the reality of climate migration, widespread awareness of climate change as a critical global concern is a new development that should lead to critical overhaul. This article will critically examine the existing legal framework which addresses the protection and provide sanctity to refugee law framework. Further, the article will look upon the recent climate litigation and assess the scope of state obligation in safeguarding of environment and climate change leading to the context of climate refugees. The article's hypothesis believes that the lack of farsightedness in the current international human rights regime implies necessary inclusion of factors related to climate change in definition of refugees, to accord adequate protection to such vulnerable groups.

Résumé

Les déplacements provoqués par le changement climatique aggravent souvent les vulnérabilités préexistantes, telles que la pauvreté, l'accès aux soins de santé et la sécurité alimentaire. Si le droit international des réfugiés ne s'est pas encore adapté à la réalité des migrations climatiques, la prise de conscience généralisée du changement climatique en tant que problème mondial crucial constitue une évolution récente qui devrait conduire à une refonte en profondeur. Cet article examine de manière critique le cadre juridique existant qui traite de la protection et garantit le caractère sacré du droit des réfugiés. En outre, l'article se penchera sur les récents litiges climatiques et évaluera l'étendue des obligations des États en matière de protection de l'environnement et de changement climatique, qui conduisent à la situation des réfugiés climatiques. L'hypothèse de l'article est que le manque de vision à long terme du régime international actuel des droits de l'homme implique la nécessité d'inclure les facteurs liés au changement climatique dans la définition des réfugiés, afin d'accorder une protection adéquate à ces groupes vulnérables.

Introduction

The repercussions of slow-onset climate change events, such as rising sea levels and global warming, are increasingly being felt worldwide. According to United Nations High Commission for Refugees (UNHCR) estimates, climate-related catastrophes cause around 21.5 million people to be displaced annually where such displacements can cause both inter-state and intra-state movement.[1] The UNHCR claims that "refugee and human rights law still have a part to play" in defending the rights of climate refugees since there may be persons escaping across national boundaries due to climate change.[2] Natural catastrophes have displaced 376 million people globally since 2008. In 2022, a record 32.6 million people were displaced. Due mostly to climate change, yearly displacements have increased by 41% since 2010, with 2020 data showing a significant rise. In the worst-case scenario, growing ecological risks may force up to 1.2 billion people to relocate by 2050.[3] Another report claims that "By 2050, approximately 1 billion people in low-lying coastal zones and Small Island Developing States (SIDS) will face heightened risks from sea-level rise, storm surges, and coastal erosion, increasing displacement pressures."[4] Although refugees and internally displaced people are recognized by international law, individuals displaced by climate change are neither adequately defined nor protected by it. The term "climate refugees" highlights the serious human rights concerns in relation to the protection of people who have been displaced by climate change-related disasters like desertification, harsh weather, and rising sea levels, under the existing international human rights framework. Such anomalies in legal frameworks create a challenge in addressing the specific needs of climate refugees and form discourses to address challenges in scope and implementation under international refugee law. The role of states and international organizations becomes pertinent to mitigate displacement, particularly by protecting vulnerable populations. Applying human rights principles to address the socio-economic vulnerabilities of climate refugees is essential for equitable and sustainable solutions.

1. Who are climate refugees?

In 1985, Essam El-Hinnawi defined "climate refugees" as peoples who had to flee their homes as a result of environmental changes, either natural or human-caused, that threatened

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[1] Internal Displacement Monitoring Centre, *Global Report on Internal Displacement 2016* (May 2016) https://www.internal-displacement.org/globalreport2016/ accessed 28 April 2025.

[2] Ibid.

[3] Joanna Apap & Sami James Harju, The Concept of "Climate Refugee": Towards a Possible Definition, European Parliamentary Research Service (Oct. 2023), https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/698753/EPRS_BRI(2021)698753_EN.pdf last accessed 24 October 2024.

[4] Intergovernmental Panel on Climate Change, Climate Change 2022: Impacts, Adaptation and Vulnerability, Contribution of Working Group II to the Sixth Assessment Report, *Cambridge University Press*, 2022, p. 12.

their survival.[5] Given current frameworks such as the Refugee Convention and previous attempts to classify environmental refugees, identifying "climate refugees" precisely is a significant obstacle in providing protection for persons displaced by climate change.[6] While many use terms like "climate migrants" and "climate refugees" to describe those displaced by environmental changes, these terms have no official legal status. In reality, the people who are forced to leave their home country either internally or cross-borders due to climate change events, these events can be can be sudden, such as floods, hurricanes, or wildfires, or gradual, like drought, desertification, and sea-level rise, have no other alternative but to find a new place and shelter. Climate refugees rarely have the option of returning to their place of origin. The relationship between climate change and migration is hence complex, involving various social, institutional, and environmental factors rather than climate alone.

2. Beyond Persecution: The Refugee Crisis of Climate Displacement

The foundational framework for international refugee protection was established by the 1951 Refugee Convention which shows significant limitations in addressing modern climate-driven displacement, even as environmental threats escalate globally. The 1951 Refugee Convention, together with its 1967 Protocol, outlines refugee status and places more emphasis on political grounds and primarily for those escaping persecution or conflict based on five specific grounds: racial background, religious beliefs, national origin, social group affiliation, or political views.[7] The Convention mandates, that asylum decisions must be made without bias regarding factors such as gender identity, age, physical ability, sexual orientation, ethnic background, faith, or nationality. This framework, however, excludes people forced to leave their homelands due to environmental disasters or climate change impacts.

The Convention's narrow definition excludes those directly displaced by climate change, including people who have lost their homes or even entire nations to environmental impacts, only recognizing refugee status for those fleeing violence that may be indirectly triggered by climate-related issues.[8] To exemplify, people who may be affected from rising sea levels in small island nations would not receive the benefit of refugee status under the current legal framework. Unless some extreme weather events such as drought, landslides, climate induced famines etc. effectuating scarcity of resources tension among communities leads to violence,

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[5] Ibid.

[6] Ibid.

[7] United Nations, Convention Relating to the Status of Refugees art 1(A)(2), July 28, 1951, 189 UNTS 137 (as amended by the Protocol).

[8] Tetsuji Ida, “Climate Refugees – The World’s Forgotten Victims” (World Economic Forum, June 18, 2021) available at https://www.weforum.org/agenda/2021/06/climate-refugees-the-world-s-forgotten-victims (last visited on October 15, 2024).

the displaced people will not be considered refugees under international law. Persecution and violence are the centrepieces to the definition of refugees and always the perceptible threat to one's life and freedom under the purview of persecution is essential.

Article 1(A)(2) of the Refugee Convention mandates that refugee status requires demonstrating a legitimate, credible fear of persecution. Meanwhile, broader human rights protections prevent countries from deporting people who face genuine threats of cruel treatment, torture, or unlawful loss of life in their home country. International courts, as in Soering v. the United Kingdom[9], have ruled that the "foreseeable consequences" of deportation determine whether there is a "real risk." Non- refoulement[10] as an international refugee law principle obligates the states from repatriating or removing individuals from their jurisdiction or effective control if there are substantial grounds to believe they would face irreparable harm upon return, such as persecution, torture, ill-treatment, or serious human rights violations, applies if such "real risk" is foreseeable. This aligns with the "well-founded fear" standard[11], which has been interpreted as a "reasonable possibility" or "real chance" of persecution. Both standards focus not on a specific period or immediacy but rather on whether there is any plausible scenario where the individual may face such risks, necessitating protection from refoulement.[12]

The "credible fear of persecution" standard fails to accommodate climate-related displacement on many key aspects. Firstly, such climate displacement is an altogether different form of incidents, unusual to be seen under the garb of international human rights conventions as it lacks a certain responsible "persecutor". The refugee definition requires persecution by an identifiable agent, which could be ascertained as a government, armed group or an institution; however, climate disasters are not intentional harm. They are typically framed as "acts of nature" rather than human-made persecution. There will always be an absence of a direct persecutor in such events of climate-change led displacements, making it difficult to attribute responsibility in a way that fits refugee law. Secondly, an adjective usually attributed to climate change is "slow". The process itself denotes a slow onset of global climate levels leading to disastrous natural events. The issue aggravates when slow-onset disasters (e.g., sea-level rise, desertification) complicate claims because harm is gradual rather than direct and the current refugee law is ill-equipped for climate displacement because

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[9] Soering v. United Kingdom, App. No. 14038/88, 90 (Eur. Ct. H.R. 1989).

[10] *Convention Relating to the Status of Refugees* (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137, art 33.

[11] Ibid at art 1A(2).

[12] Spyridoula Katsoni & Jan-Phillip Graf, The Future of 'Climate Refugees' in International Law, Völkerrechtsblog (2021), https://voelkerrechtsblog.org/the-future-of-climate-refugees-in-international-law/ (last visited Oct. 19, 2024).

it requires human agency.[13] Furthermore, courts have been reluctant to acknowledge such categorisation as “particular social group" requires an innate or unchangeable characteristic, but climate vulnerability is often tied to geography or economics rather than identity. Courts often reject claims for climate migrants because the group is not sufficiently distinct, and harms were faced by broad populations generally.[14] Refugee law assumes immediate threats, but climate displacement is often progressive (e.g., rising seas, crop failure), making the courts struggle with future harm claims.

Article 35 of the Refugee Convention assigns the role of overseeing refugee processing to the UNHCR. However, nations such as India see migration as a bilateral rather than international issue. It is certain that many host nations may feel that an international supervising agency may subdue their decision-making power and sovereignty. It is thus a fair argument to hold that refugees could present considerable responsibility on host nations to ensure their welfare which in turn poses stress on existing resources. The 1951 Refugee Convention could potentially raise concerns about one’s sovereignty as it may force them to host refugees which can affect their national demographic and internal security concerns. As a result, India and other countries have remained unwilling to implement measures aimed explicitly at climate refugees.[15] While many nations in the global south have emerged as a vocal supporter for climate justice in forums like COP26, emphasizing “common but differentiated responsibilities,” its resistance to formal recognition of climate refugees reflects deeper anxieties about precedent-setting obligations. The Indian Supreme Court, in *Mohammad Salimullah v. Union of India (2021)*[16], affirmed that non-refoulement applies only to statutory refugees, not environmental displaces, solidifying the stances to follow a narrow interpretation of obligations. Many consider that it is unfortunate that a coherent and collaborative approach towards climate change related issues is less likely with such more political pragmatism and unassailable sovereign righteousness.[17]

3. Regional Convention: Way Forward?

A more comprehensive definition is given by regional frameworks like the 1984 Cartagena Declaration and the 1969 Organisation of African Unity Convention, considered one of the

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[13] Jane McAdam, Climate Change, Forced Migration, and International Law (OUP 2012).

[14] Ioane Teitiota v. New Zealand (2728/2016) CCPR/C/127/D/2728/2016 (UNHRC, 24 October 2019).

[15] Sincy Wilson, Recognition of Climate Refugees: What Should Be India’s Stand?, Refugee Law Initiative Blog, SOAS London (Mar. 18, 2021), https://rli.blogs.sas.ac.uk/2021/03/18/recognition-of-climate-refugees-what-should-be-indias-stand/ (last visited Oct. 12, 2024).

[16] Mohammad Salimullah v. Union of India, AIR 2021 SC 1789.

[17] Sumudu Atapattu, Climate Change, Disasters, and the Refugee Convention, 12 Climate Law 78 (2022).

most generous and flexible affirmation on refugee protection,[18] grants protection to refugees fleeing circumstances that gravely disturb public order. Though, it fails to provide the essential safeguards for those displaced by climate change on a global scale as it does not specifically recognize “climate refugee" status. The 1984 Cartagena Declaration established an expanded understanding of refugee status that goes beyond the 1951 Refugee Convention's scope, stating: *“Generalized violence, foreign aggression, internal conflicts, massive human rights violations, or circumstances seriously disturbing public order”*. This non-binding framework, initially created for Central American refugee movements,[19] encourages the inclusion of people escaping various threats - from widespread violence and external aggression to domestic conflicts and major societal disruptions.

Article I (1) para 1[20] of the 1969 OAU Refugee Convention largely reflects the UN Refugee Convention's definition, but Article I (2)[21] expands it to include anyone forced to flee their habitual residence due to external aggression, occupation, foreign domination, or serious disruption of public order in their country. The formulation was draughted with an emphasis on providing a flexible and pragmatic framework for safeguarding asylum seekers and refugees, rather than precise legal interpretations and case law under the 1969 Convention.[22] The initial motivation was to encompass individuals who were forced to flee from African nations still involved in anti-apartheid and anti-colonial liberation movements as well as those escaping civil wars in their home countries,[23] since the African continent was still under the process of decolonization and arduous resistance led to major displacement to avoid colonial oppression.[24] But these disruptions could stem also from environmental disasters, and the Declaration provides optional guidelines that governments and humanitarian organizations can incorporate into their policies, potentially extending protection to those

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[18] UNHCR, 'UN High Commissioner for Refugees Lauds Africa Refugee Convention, at 40, for Saving Millions of Lives' (Press Release, 18 June 2014) https://www.unhcr.org/in/news/news-releases/un-high-commissioner-refugees-lauds-africa-refugee-convention-40-saving-millions accessed 29 April 2025.

[19] Cartagena Declaration on Refugees, art 3, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama (22 November 1984).

[20] OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45, art I (1).

[21] Ibid at art I (2)

[22] Eduardo Arboleda, 'Refugee Definition in Africa and Latin America: The Lessons of Pragmatism' (1991) 3 *International Journal of Refugee Law* 185, 195.

[23] George Okoth-Obbo, ‘Thirty Years On: A Legal Review of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa’ (2001) 20 *Refugee Survey Quarterly* 79, 120.

[24] Tamara Wood, 'Expanding Protection in Africa? Case Studies of the Implementation of the 1969 African Refugee Convention's Expanded Refugee Definition' (2014) 26 *International Journal of Refugee Law* 555, 557.

displaced by environmental crises when these events destabilize communities.[25] It should also be noted that the application of the 1951 and/or 1969 Conventions is frequently treated pragmatically. According to Okoth-Obbo,[26] the refugee definition under Article I (2) is often easier to implement in circumstances of mass influx than Article 1A (2) of the 1951 Convention, particularly because it is suitable for Refugee Status Determination (RSD) conducted on a prima facie basis. Furthermore, several States believe that applying Article I (2) is more practicable and less resource-intensive than applying Article 1A (2) of the 1951 Convention.[27] Thus, many states such as Cartegena criteria have been adopted under Mexico's 2011 Refugee Law[28] and Chile's 2010 Law No. 20,430 with recent amendments to the procedure for determining refugee status, particularly in Law No. 21,325 of 2021.[29]

The 1951 Refugee Convention and the 1984 Cartagena Declaration represent two distinct approaches to refugee protection; one binding under international law, the other non-binding but influential. Their differences in scope and legal force shape how states respond to displacement, particularly in contexts like climate-related migration. The 1951 Refugee Convention is ratified by 149 states which creates enforceable obligations under international law. The 1952 Convention enforces its provisions into domestic law and non-compliance can lead to international scrutiny by various disputes settlement bodies. However, the Cartagena Declaration, being a regional agreement, adopted by Latin American states lacks treaty status which sustains on political persuasion and regional solidarity. States are not obligated to adopt its provisions and will not be subjected to any legal penalties for non-compliance. Further, the 1951 Refugee Convention applies globally but is implemented unevenly with different implementation seen in Global North as compared to Global South disparities in recognition rates. The Cartagena Declaration inspired the 1969 OAU Refugee Convention

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[25] Walter Kälin and Nina Schrepfer, *Protecting People Crossing Borders in the Context of Climate Change: Normative Gaps and Possible Approaches* (Legal and Protection Policy Research Series, UNHCR Division of International Protection, PPLA/2012/01, February 2012).

[26] George Okoth-Obbo, 'Thirty Years On: A Legal Review of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa' (2001) 20 *Refugee Survey Quarterly* 79, 120.

[27] Marina Sharpe, *The 1969 OAU Refugee Convention and the Protection of People Fleeing Armed Conflict and Other Situations of Violence in the Context of Individual Refugee Status Determination* (UNHCR Legal and Protection Policy Research Series, PPLA/2013/01, January 2013) http://www.unhcr.org/pages/4a16b17a6.html accessed 28 April 2025

[28] UNHCR, 'UNHCR Welcomes New Refugee Law in Mexico' (UNHCR, 2022) https://www.unhcr.org/news/briefing-notes/unhcr-welcomes-new-refugee-law-mexico#:~:text=The%20new%20law%20incorporates%20Mexico's,and%20Myanmar%2C%20among%20others.> accessed 26 April 2025.

[29] Global Legal Monitor, *Chile: Amendments Enacted to Procedure for Determining Refugee Status* (14 November 2024) https://www.loc.gov/item/global-legal-monitor/2024-11-14/chile-amendments-enacted-to-procedure-for-determining-refugee-status/#:~:text=20%2C430%20of%202010%20and%20Law,21%2C325%20of%202021.&text=Under%20the%20new%20law%2C%20refugee,receiving%20refugee%20status%20in%20Chile accessed 27th April 2025.

(Africa) and the 2023 Kampala Declaration (climate displacement). The perceptible impact of both instruments varies significantly, with the 1951 Convention incorporated with predictable standards and judicial enforceability, but failing to address modern drivers of displacement. The Cartagena Declaration, on the other hand, presents a solution-oriented perspective as a regional declaration which is also adaptable to new challenges, though with inconsistent application. Furthermore, the Kampala Decleration[30] acknowledges that climate change worsens forced migration, particularly in vulnerable regions like the Sahel and coastal Africa. It calls for legal recognition of climate refugees under African human rights and refugee law and application of this convention to cross border climate displacement. Kampala Declaration further links climate displacement to its 2009 Convention on Internally Displaced Persons (IDPs). It urges states to extend protections to cross-border climate migrants

4. Influence on National Policies

Various international efforts have gradually increased states' responsibilities to address climate change-induced migration. Beginning with COP16 in 2010, states committed to step up efforts to safeguard vulnerable countries from climate risks. The 2011 Nansen Conference and the 2012 Nansen Initiative both aimed to fill legal protection gaps for cross-border displacement without establishing new legal norms.[31] State obligation is one of the five Nansen principles. The 2013 Warsaw Mechanism focused on addressing loss and damage in high-risk developing nations.[32] States included these safeguards into their national frameworks in 2015, and the Paris Agreement committed them to reducing global emissions to minimize climate change. Additionally, when the Platform on Disaster Displacement launched in 2016, it helped establish protections for climate disaster victims. This work emphasized how countries must use laws and regulations to manage climate-driven population movements. The United Nations' 2030 Agenda for Sustainable Development contains migration-related objectives and calls for periodical progress evaluations based on data disaggregated by variables such as migrant status. In response to the rising issue of migration, the United Nations General Assembly approved the New York Declaration for Refugees and Migrants[33], asking for the creation of two global compacts. The Global Compact for Safe, Orderly, and Regular Migration (GCM) which calls on States to work

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[30] African Union, Kampala Declaration on Climate Change and Forced Displacement (2012), in African Union Legal Instruments, Vol. III, 45–50 (2013).

[31] Norwegian Refugee Council (NRC) and UN High Commissioner for Refugees (UNHCR), *Report from the Nansen Conference: Climate Change and Displacement in the 21st Century* (6-7 June 2011, Oslo) 5 https://www.unhcr.org/protection/environment/4ea969729/nansen-conference-climate-change-displacement-21st-century.html accessed on 26th April 2025.

[32] Decision 2/CP.19, Warsaw International Mechanism for Loss and Damage Associated with Climate Change Impacts (UNFCCC COP 19, 23 November 2013) FCCC/CP/2013/10/Add.1.

[33] G.A. Res. 71/1, New York Declaration for Refugees and Migrants (2018).

together to better address the effects of climate change and environmental degradation, reaffirms this pledge to the international community. It also includes a pledge not to repatriate individuals where there is a genuine risk of irreparable harm.[34] According to customary international law, governments have an obligation not to allow their territory to be exploited in ways that violate the rights of other states.[35] This idea was utilized in the Inuit claim to argue that nations have human rights duties in the context of global warming, as greenhouse gas emissions from one state can hurt others.[36] This indicates that governments must join global efforts to address climate change. Failure to ratify accords like the Kyoto Protocol, as shown in Australia and the United States, demonstrates a lack of commitment. Furthermore, ratification alone is insufficient; nations must guarantee that the international system properly defends human rights, and if global efforts fall short, home actions are required.

Many essential principles and safeguards from the above stated international initiatives have permeated well in several national policies on climate change displacements to addressing human rights concerns. These programs offer protection at various levels from temporary to permanent residencies. Some states offer complementary protection (e.g., humanitarian visas), which can be at times, ad hoc and non-binding. To list a few of such similar policies; the Disposición DNM No. 891/2022[37] was introduced by Argentina's National Immigration Directorate (DNM) in May 2022, provides humanitarian visas to citizens and residents of Mexico, Central America, and the Caribbean who are at great danger of being displaced. The program offers temporary visas with a three-year maximum duration and a pathway to permanent residency under Article 23 of Immigration Act No. 25.871. Beneficiaries get housing and integration assistance for a year under the sponsorship of civil society organisations. The International Committee of the Red Cross, the United Nations High Commissioner for Refugees and the International Organization for Migration are among the organisations that supervise and manage the program. Further in 2012, Brazil created humanitarian visas for Haitians after the 2010 earthquake. The new visas made it easier for Haitians to legally reach Brazil, requiring fewer documents than tourist visas. About 85,000 Haitians entered Brazil through this pathway. In Brazil, Disaster displacement is recognised

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[34] G.A. Res. 73/195, Global Compact for Safe, Orderly, and Regular Migration, 18(h), (i), (l), 37 (2018).

[35] Corfu Channel Case (U.K. v. Alb.), 1949 I.C.J. 4, 22 (Apr. 9).

[36] Brian Smith, Global Warming and Human Rights: Testimony of Martin Wagner Before the Inter-American Commission on Human Rights, Earthjustice (2007), https://earthjustice.org/press/2007/global-warming-human-rights-gets-hearing-on-the-world-stage (last visited Oct. 24, 2024).

[37] Dirección Nacional de Migraciones, 'Disposición DNM No 891/2022' (Boletín Oficial de la República Argentina, 19 May 2022) https://www.boletinoficial.gob.ar/detalleAviso/primera/262784/20220519?busqueda=1 accessed 26 April 2025.

under its 2017 Migration Law (Law No. 13,445)[38], wherein Article 13 lists reasons for issuing a visiting visa to those travelling to the country for a brief period without intending to settle there. This includes “other hypotheses defined in regulation” which may be read to include circumstances resulting from natural catastrophes or occurrences linked to climate change that result in relocation. In similar vein, the United States established Temporary Protected Status (TPS)[39], which is a humanitarian protection that is given by the Secretary of the Department of Homeland Security to qualified foreign nationals who are unable to return home safely because of circumstances that make secure repatriation impossible. In reaction to ongoing armed conflicts, natural catastrophes, epidemics, or other exceptional and transient circumstances, a nation may be recognised for TPS. A citizen of a specified nation may be granted TPS if they apply during a registration period and have been physically present in the US continuously since a specific date. New Zealand offers similar visas under “Pacific Access category” to citizens of nearby island nations.[40] Much alike, the Swedish immigration policy recognises environmental migrants as a unique group, classifying them as "persons in need of protection" who are unable to return to their home country owing to an environmental disaster. Nonetheless, it is unclear how far this provision goes in addressing the consequences of climate change. In the legislative commentary that expands on this category, a nuclear accident is used as an example of an "environmental disaster," although natural disasters are not specifically mentioned.[41]

The above initiatives, though necessary, are not immune to criticisms and at times marred with executive control. As under the 2012 Brazil’s temporary residence initiative, after arriving in Brazil, migrants still had to apply for permanent residency or refugee status, since much of the initiative was at disposal of the administrative organs of the Executive, early mistakes in group refugee registration, selective application, legal uncertainty and system overload were apparent.[42] In similar fashion, as required, the United States’ Department of Homeland Security may designate and renew TPS based on ongoing risks. People often lose

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[38] Brazil, Migration Law (Law No 13,445 of 24 May 2017), art 13 https://www.gov.br/mj/pt-br/acesso-a-informacao/atuacao-internacional/legislacao-traduzida/lei_n_13-445_de_24_de_maio_de_2017_eng-docx.pdf accessed 26 April 2025.

[39] US Citizenship and Immigration Services, *Temporary Protected Status* (USCIS, 23 April 2024) https://www.uscis.gov/humanitarian/temporary-protected-status accessed 26 April 2025.

[40] Immigration New Zealand, *Pacific Access Category Resident Visa* (2025) https://www.immigration.govt.nz/new-zealand-visas/visas/visa/pacific-access-category-resident-visa accessed 26 April 2025.

[41] Oli Brown, Migration and Climate Change (International Organization for Migration 2008) Migration Research Series No 31 https://www.ipcc.ch/apps/njlite/srex/njlite_download.php?id=5866 accessed on 29 April 2025.

[42] ‘Humanitarian Visas: Building on Brazil’s Experience - Forced Migration Review’ (Forced Migration Review, April 2025) https://www.fmreview.org/community-protection/jubilut-andrade-madureira/#:~:text=Brazil's%20granting%20of%20humanitarian%20visas,this%20Brazil%20has%20been%20praised accessed 26 April 2025.

their papers and risk deportation when a country's TPS designation expires, and they revert to their prior immigration status. Not much different for New Zealand's Pacific Access category visas since, it is offered only to a limited pool of 'skilled' individuals and climate-induced disasters may only be one of several motivating factors, such visas cannot be characterized as a genuine framework for assisting climate refugees.

Under the existing conundrum of self-serving national refugee policies and frameworks, Ecuador's Organic Law on Human Mobility, 2017[43] is a global example for rights-based migration regulation, adhering to international human rights, in consonance with their regional circumstances. It is the emphasis on universal citizenship, non-criminalization, and social inclusion in the Ecuadorian legislation which sets a high standard for other countries. It prohibits criminalization of irregular migration and treats migration violations as administrative infractions rather than crimes. Along with all fundamental and basic human rights privileges, it recognizes "Rights of Ecuadorians Abroad" such as consular protection for all Ecuadorians abroad, regardless of their migratory status, right to confidentiality including personal data of migrants, right to remittances and right to political participation, including voting in Ecuadorian elections from abroad. It incorporates skill and vocational trainings, social integration along with special focus on vulnerable groups (children, LGBTQ+, victims of trafficking).

Notably, the Ecuadorian enactment envisages a broader refugee definition, beyond the 1951 Convention's purview, including victims of generalized violence, human rights violations and environmental disasters. Despites challenges at implementation, the enactment is a leading example of a solution-oriented, well rounded refugee law framework to support refugees with all necessary guarantees warranted in the 21st century. Moreover, in dearth of any global framework on refugees' access to host countries open to providing asylum, a regional framework is a far better alternative under which the neighbouring countries of a subcontinent/region can mutually agree to accommodate refugees from each other in cases of natural calamities leading to displacements. The criticism to such regional framework, however, could be that since it would be the underdeveloped and under developing nations who are going to be the major recipients of the havocs of climate change, a mutual agreement between such vulnerable nations is though possible but something of such nature to materialise with the western, developed nations is rare, even bilaterally so.

5. Essentiality of Non-Refoulement in Contemporary Climate Litigation

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[43] *Organic Law on Human Mobility* (Ecuador) Supplement to Official Registry No 938, 6 February 2017 https://www.acnur.org/fileadmin/Documentos/BDL/2017/11404.pdf accessed 27 April 2025.

The principle of non-refoulement has evolved to be the touchstone of international law on refugees:[44] it guarantees a person's right to not be returned to a country where he/she is perceived threat or imminent danger.[45] Deportation bans under national immigration law and the European Convention on Human Rights (ECHR), subsidiary protection based on the European Qualification Directive, and refugee status under the Refugee Convention are the three types of protection evaluated in routine asylum cases. Similarly, the 1969 OAU Convention reinforces the non-refoulment principle in three important ways. First, it protects "persons" rather than just "refugees," which means that individuals do not require legal refugee status to benefit from non-refoulement, extending protection to a larger population.[46] Second, unlike the UN Refugee Convention, the 1969 Convention prohibits exceptions based on national security considerations,[47] emphasising the absolute nature of the protection. Third, the 1969 Convention's wording appears to widen the extent of risk: although the UN Refugee Convention prohibits repatriation when life or freedom is endangered, the 1969 Convention's version potentially includes risks to life, bodily integrity, and liberty, providing a broader safeguard. Furthermore, the OAU Convention emphasises the significance of voluntary repatriation, stating in Article V (1) that no refugee may be repatriated against their choice. In effect, this supports and enhances the concept of non-refoulement by emphasising the ban on forced return.[48]

A German Higher Administrative Court decided in a case involving deportation of an Afghan person which was restricted due to the increasing humanitarian situation in Afghanistan, consideration aggravation by the COVID-19 epidemic at the time, as well. When examining the humanitarian situation, the court emphasised "environmental conditions, including climate and natural disasters" factors.[49] At another instance, a French Court of Appeals overturned the expulsion of a Bangladeshi citizen, citing concerns that air pollution in his

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[44] Elihu Lauterpacht and Daniel Bethlehem, 'Refugee Protection in International Law: UNHCR's Global Consultations on International Protection' in Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (CUP 2003) 87–177.

[45] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137, art 33.

[46] WJEM van Hövell tot Westerflier, 'Africa and Refugees: The OAU Refugee Convention in Theory and Practice' (1989) 7 *Netherlands Quarterly of Human Rights* 172, 176.

[47] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137, art 33(2).

[48] Tiyanjana Maluwa and Anton Katz, 'Who is a Refugee? Twenty-Five Years of Domestic Implementation and Judicial Interpretation of the 1969 OAU and 1951 UN Refugee Conventions in Post-Apartheid South Africa' (2020) 27 *Indiana Journal of Global Legal Studies* 2, art 3.

[49] VGH Baden-Wuerttemberg, Judgment of Dec. 17, 2020 - A 11 S 2042/20, 25.

native country might exacerbate his respiratory ailment.[50] Referencing the Court of Justice of the European Union's (CJEU) *M'Bodj ruling*[51], the German Federal Administrative Court recently upheld in a case involving Somalia that subsidiary protection necessitates that the harm be intentionally caused by a third party rather than just by the country's general circumstances. Natural disaster-related injury is therefore usually not covered by these safeguards.[52] In another decision by the New Zealand Refugee Status Appeals Authority, the concept of "persecution" was linked to violations of human rights. An Iranian woman abused by her influential first husband, who was a high- ranking official in the Iranian Armed Forces, appealed as she was facing further risk when her second husband was imprisoned for assisting her escape. Her first spouse issued a warrant for her arrest. The Appeals Authority reversed her rejection of refugee status, citing her fear of persecution rather than the persecutor's purpose.[53]

In Ioane Teitiota v. Chief Executive of the Ministry of Business, Innovation and Employment[54], Ioane Teitiota's application for refugee status in New Zealand was declined because the consequences of climate change in Kiribati were determined to affect the broad community rather than to constitute targeted persecution under the 1951 Refugee Convention. Teitiota alleged that New Zealand breached his ICCPR rights by refusing him refuge; however, the Human Rights Committee (HRC) disagreed. Although the HRC's decision was unfortunate for climate migrants, it did provide a foundation for potential future safeguards. The Human Rights Council agreed that climate change might breach rights under Articles 6 and 7 of the ICCPR, prompting non-refoulement responsibilities. However, it decided that Teitiota was not in immediate danger of death since his country was dealing with climate issues and had time to decrease hazards. Climate circumstances might so trigger the exporting states' non-refoulement responsibilities. It acknowledges that governments could decide not to send individuals back to their home countries if the effects of climate change increase and put their lives in danger or subject them to cruel or humiliating treatment while they are there. As a result, states would be subject to the non-refoulement responsibilities. Human rights and refugee rights groups have praised the judgement as a "ground-breaking" finding that opens the door to future protection claims for those whose lives are threatened by climate change.

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[50] Bordeaux Admin. Ct. of Appeal, 2d Chamber, Dec. 18, 2020, Nos. 20BX02193, 20BX02195.

[51] Mohamed M'Bodj v. État belge, C-542/13, 35-36 (CJEU 2014).

[52] Camilla Schloss, Climate Migrants: How German Courts Take the Environment into Account When Considering Non-Refoulement, Völkerrechtsblog (2021), https://voelkerrechtsblog.org/climate-migrants/ (last visited Oct. 14, 2024).

[53] Refugee Appeal No. 71427/99, New Zealand Refugee Status Appeals Auth., 22-26 (Aug. 16, 2000).

[54] Teitiota v. Chief Exec. of the Ministry of Bus., Innovation & Emp't, [2015] NZSC 107, 11-14.

In *AF (Kiribati) v. New Zealand Immigration and Protection Tribunal*[55], Mr. AF (and his wife) were citizens of Kiribati came to New Zealand in 2007. They overstayed their visas, and to avoid deportation, Mr. AF applied for refugee status under the Immigration Act 2009, which incorporates the 1951 Refugee Convention. It was argued that he should be recognized as a refugee due to the changes in the environment of Kiribati caused by sea-level rise linked to climate change which threatened his and his family's human rights, compelling their migration. The Immigration & Protection Tribunal (IPT) dismissed his appeal on the ground that difficulties faced were a result of general environmental degradation affecting the entire population of Kiribati, which is not targeted and the refugee mandates act of a human agency for invocation of its protection. The U.S. Court of Appeals (9th Circuit) rejected the claim of Guatemalan lady and her son who sought asylum in the U.S., citing climate-induced drought and food insecurity ruling that ruling that "economic hardship induced from climate change is not persecution."[56]

6. The Great Abdication: States' Obligations Forsaken

As Judge Weeramantry of the International Court of Justice has said: *The protection of the environment is ... a vital part of contemporary human rights doctrine, for it is [an indispensable requirement] ... for numerous human rights such as the right to health and the right to life itself.*[57] International law places specific duties on nations to prevent climate-related displacement and assist those forced to relocate due to environmental changes. The frameworks of human rights law work alongside refugee protections, each playing vital but distinct roles in safeguarding displaced populations, particularly those affected by climate disasters. The protection available through international law for climate migrants varies depending on one's perspective of existing frameworks. Critical to determining protection is evaluating the predictable risks and degree of harm faced by individuals based on their specific situation. Over time, the international community has developed stronger expectations for how countries should respond to and manage climate-driven human movement.[58]

Initially articulated at the international level in the 1972 Stockholm Declaration, which acknowledged the intricate linkages between environmental preservation and economic development and later defined in the Brundtland Report, 1987 – sustainable development as a principle with anthropocentric origin, primarily mandates to fulfill the incessant demands of material, human development and acknowledges certain limitations towards

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[55] AF (Kiribati) v. Immigration and Protection Tribunal, [2015] NZSC 76.

[56] Hernandez v. Garland, 67 F.4th 1090 (9th Cir. 2023).

[57] Hungary v. Slovakia, 1997 I.C.J. 92, Separate Opinion of Judge Weeramantry, A(b).

[58] Id at 10.

environmental safeguards. One of the perspectives could be that the acknowledgement of environmental obligations is conditional, only to prolong relentless development ambitions. However, the international community has travelled far to understand that environmental obligations are necessary not to prosper, but to exist. Thus, everyone involved in large-scale development needs to contribute towards a safer future. It is at this point, where two sets of principles evolved, come to aid two separate groups of nations to avoid any such obligations i.e., sovereignty and national priorities for developed countries and common but differentiated responsibilities (CBDR) for the under-developed/developing countries. The CBDR concept as enshrined in the Rio Declaration (1992)[59] asserts that industrialized and developing countries bear similar but distinct climatic obligations based to their past emissions and capacities. The Kyoto Protocol put this into practice by mandating only industrialized nations (Annex I) to reach enforceable carbon reduction targets while providing financial assistance, technology transfer, and capacity development to underdeveloped countries.[60]

At many international forums, developing and underdeveloped nations have argued that their responsibilities should be significantly lesser than those of developed countries. Historically, developed nations have exploited natural resources to achieve prosperity, while developing nations must still prioritize their own growth and development targets. Consequently, it falls upon developed countries to take greater initiative, both through independent actions and financial aid, to help others meet emission targets. Moreover, a substantial portion of emissions attributable to developed nations is effectively outsourced to developing and underdeveloped countries, as these nations engage in production to meet global demand. Thus, much of the pollution stems not from local consumption but from the demands of wealthier economies. This disparity underscores the principle of Common but Differentiated Responsibilities (CBDR), which developing nations invoke to safeguard their interests.

A notable example is the U.S. withdrawal[61] from the Paris Agreement under Donald Trump's administration, citing national priorities, claims of biased obligations favoring developing countries and misused funds allocated to international environment bodies. Such decisions often reflect political motivations, with nations exploiting sovereignty or

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[59] United Nations, Rio Declaration on Environment and Development (12 August 1992) UN Doc A/CONF.151/26 (Vol I), Principle 7.

[60] Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 February 2005) 2303 UNTS 148.

[61] United States, Putting America First in International Environmental Agreements (Presidential Actions, 20 January 2025) https://www.whitehouse.gov/presidential-actions/2025/01/putting-america-first-in-international-environmental-agreements/ accessed 27th April 2025.

developmental vulnerabilities to evade environmental accountability. These maneuvers are frequently designed to pressure international institutions into conceding to national demands. Similarly, climate refugee policies reveal self-interested approaches, as nations, anticipating future displacement crises, adopt restrictive measures that disregard international human rights principles. These policies prioritize narrow national interests over collective responsibility, demonstrating a troubling reluctance to address global challenges equitably. Thus, it is imperative to create enforceable deterrent instruments to ensure climate change led disaster are effectively dealt with, but still at last consensus and political will is needed.

In 2019, United Nations Human Rights Committee established that Australia violated indigenous Torres Islanders' rights by neglecting to safeguard them from the effects of climate change.[62] Eight Australians and six of their children filed a combined case alleging that Australia did not react effectively, such as by strengthening seawalls and lowering emissions. Climate change, such as floods and increasing sea levels, has damaged their economy, culture, and traditional way of life. The Committee determined that Australia's inadequate safeguards breached their right to enjoy their culture while protecting their private lives, homes, and families. It recommended Australia to pay the islanders, consult with them, and take additional measures to protect their islands. The Committee considered a complaint filed by Indigenous writers alleging that the state infringed their rights by failing to appropriately address climate change. They stated that it violated their right to life (Article 6), private and family life (Article 17), and cultural rights (Article 27). Under Article 6, the Committee acknowledged that governments must address climate-related concerns but found inadequate proof of an urgent threat to the authors' safety, noting that the state has implemented adaptation measures. Though, under Article 17 International Covenant on Civil and Political Rights, it was determined that the State's delay in establishing protective measures such as sea barriers infringed the authors' right to private and family life. Addressing Article 27 ICCPR, the Committee determined that the State failed to preserve the authors' territory and cultural way of life, therefore breaching their cultural rights as Indigenous people.

Recently, the International Tribunal for the Law of the Sea (ITLOS) in its advisory opinion[63] affirmed imposition of obligation on States to prevent, reduce, and control marine pollution from human activities, including GHG emissions, based on the best available science and international standards, such as the Paris Agreement, under Article 194(1) United Nations

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[62] Daniel Billy et al. v. Australia, Communication No. 3624/2019, U.N. Doc. CCPR/C/135/D/3624/2019 (Sept. 23, 2022).

[63] Request for an Advisory Opinion Submitted by the Comm'n of Small Island States on Climate Change and Int'l Law, Case No. 31, ITLOS Rep. (May 21, 2024).

Convention on the Law of the Sea (UNCLOS). The duty is one of due diligence, and while it is strict, its implementation varies according to each State's capabilities. In line with UNCLOS Article 192, states must restore ecosystems and foresee hazards to preserve the marine environment from ocean acidification and climate change. This obligation is strict since there is a chance of permanent damage. Additional provisions such as Articles 194(5), 61, 119, 63, 64, and 196 require the preservation of maritime resources, the protection of fragile ecosystems, and collaborative efforts to mitigate the effects of climate change, including the management of invasive species, with an emphasis on diligence and ecosystem- based methods.

Conclusion

Climate-driven displacement presents complex challenges for international protection frameworks. Major factors which driving forced population movements could be ascertained as diminishing water resources, declining agricultural productivity, increased extreme weather events, and deteriorating public health conditions, with vulnerable populations bearing the greatest burden.[64] It has been pointed out that 'climate refugee' definition should include the following parts: 'forced migration, temporary or permanent relocation, movement across borders, disruption consistent with climate change, sudden or gradual environmental disruption, and a more than likely standard for human contribution to the disruption'.[65] The barriers preventing displaced people from returning to their homes fall into three categories. First, legal obstacles arise when return would expose individuals to human rights violations. Second, practical limitations occur when basic infrastructure has been destroyed. Third, humanitarian concerns may make return inadvisable even when physically possible. The presence of any of these barriers should qualify individuals for international protection and assistance.

Defining "climate refugee" requires consideration of several elements: whether the migration is forced or voluntary, the duration of displacement, cross-border movement, and the clear connection to climate-related disruptions, whether sudden or gradual.[66] This becomes increasingly relevant as environmental destabilization threatens communities, particularly in coastal and island regions. Despite these growing challenges, international

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[64] Walter Kälin & Nina Schrepfer, Protecting People Crossing Borders in the Context of Climate Change: Normative Gaps and Possible Approaches, U.N.H.C.R. Research Paper No. 24, PPLA/2012/01 (2012).

[65] Bonnie Docherty and Tyler Giannini, 'Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees' (2009) 33 *Harvard Environmental Law Review* 249.

[66] International Organization for Migration, *World Migration Report 2024: Chapter 7 – Climate Change, Food Insecurity and Human Mobility: Interlinkages, Evidence and Action* (IOM 2024) https://worldmigrationreport.iom.int/what-we-do/world-migration-report-2024-chapter-7/appendix-key-definitions accessed 28 April 2025.

law lacks binding mechanisms to protect climate-displaced people, highlighting the urgent need for a new global framework that would establish clear obligations for nations to provide refuge and support.[67] Addressing the climate refugee issue in a way that allows for recourse for such individuals beyond the application of refoulment principles is of critical importance. As many academics[68] have underlined, the emphasis should be on the responsibility and onus of such damages, which should also serve as crucial determining elements in situations involving reparations.

7. Path Forward: Adapting International Human Rights Law to Future Challenges

The Refugee Convention and the UNFCCC as international legal instrument face failures to address newer challenges, owing to their own limitations. The absence of a coherent legal mechanism starting, with the definition of refugees itself, exacerbates protection gaps for climate migrants[69] even for internally displaced person who are excluded from the convention's purview, serving as one of the prominent themes of the criticism the 1951 Convention faces.[70] The Refugee Convention and UNFCCC operate in silos, with no institutional mechanism to address climate displacement holistically. A major drawback to the 1951 Convention is its lack of an environmental mandate/enforceability and adequate technical instruments to address post migration problems. Similarly, the UNFCCC does not seem to be either people-centered or remedial in nature. both have limitations as fora for a possible climate change refugee protocol. One assessment on the obsolescence of the 1951 Refugee Convention is attributable to its extensive emphasis on host state responsibility and none whatsoever to that of the home state. It implies some burden-sharing with its mention of international cooperation, but it does not assign responsibility for assistance according to the principle of common but differentiated responsibility. A new treaty is not the best available alternative if the same ignorance regarding non-adaptability, non-enforceability and ill-framed policies is repeated, serving no purpose. Instead, learning from the Ottawa and Oslo processes, which emerged from international humanitarian law and emphasized involvement of civil society and affected individuals, a regional cooperative instrument could be adopted. Such convention would reflect participatory principles with application in

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[67] Tyler Bergeron, No Refuge for 'Climate Refugees' in International Law, Lewis & Clark Coll. Blog (2023), https://www.lclark.edu/live/blogs/200-no-refuge-for-climate-refugees-in-international (last visited Oct. 19, 2024).

[68] See Benoît Mayer, 'Climate Change Adaptation and the Law' in Research Handbook on Climate Change Adaptation Law (Edward Elgar 2021) 112–130; Henry Shue, 'Global Environment and International Inequality' (1999) 75(3) International Affairs 531.

[69] Elizabeth Ferris, *Governance and Climate-Induced Migration*, 34(1) Global Environmental Politics 45 (2020).

[70] Supra note 48 at 138.

the climate change refugee context.[71] Regional instruments like the Model International Mobility Convention (MIMC), which, if ratified, might become a legally binding agreement, could be a viable remedy. By utilizing global collaboration, such a convention might fill in the legal loopholes impacting migrants and refugees affected by climate change. Regional cohesion on climate induced displacement can alleviate to a greater extent owing to the cultural, linguistic similarities between states which would even translate to a more robust agreement. Moreover, a region can a more apt indications of the migration influx and its climatic situation, encouraging advanced foresight and better-equipped contingency planning.[72] Similarly, in the international theatre, a climate change refugee instrument could be attached as a protocol to the 1951 convention amending the definition of refugees to include climate refugees within its ambit may serve the immediate concerns to mitigate the emerging crisis, adopting relevant provisions while adapting them to address the specific challenges of climate-induced displacement.[73] Regions that face a high influx of climate refugees may adopt regional conventions. International and national courts should resort to a more beneficial approach for such vulnerable groups, affording them protection under the existing legal framework.

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[71] See generally International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), (n 127); Rio Declaration on Environment and Development (adopted 14 June 1992) UN Doc A/CONF.151/26 (vol I), Principle 10 (Rio Declaration), (n 125).

[72] Columbia University Global Policy Initiative, Model International Mobility Convention (2017) https://perma.cc/5HRN-SKSC accessed 27th April 2025.

[73] Supra note 65 at 350.

THE NEW PROJECT OF ACCESSION TO THE EUROPEAN CONVENTION OF HUMAN RIGHTS. INDIVIDUAL APPEAL AT THE EUROPEAN COURT OF HUMAN RIGHTS AND INTEGRATION OF EUROPEAN UNION LAW

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TABLE DES MATIERES

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ABSTRACT: The present paper aims to investigate the new project of accession to the European Convention of Human Rights. Interest is the individual appeal at the European Court of Human Rights and the autonomy of the law of the European Union. It is worth paying attention first of all to the aspects of the accession of the Union to the ECHR, as well as to the adaptation of the individual appeal procedure before the ECtHR. This is a discipline that aims to ensure the integration of the law of the European Union as well as to achieve the accession that leads to the effective strengthening of the protection of individual rights within the legal order of the Union. Also important is the aspect that reflects (and cannot be preliminary) the potential and limits the individual appeal procedure to a new draft agreement within the perspective of the autonomy of the law of the Union through the rank of constitutional framework.

RÉSUMÉ: Le présent article vise à examiner le nouveau projet d'adhésion à la Convention européenne des droits de l'homme. L'intérêt est le recours individuel devant la Cour européenne des droits de l'homme et l'autonomie du droit de l'Union européenne. Il convient de prêter attention tout d'abord aux aspects de l'adhésion de l'Union à la CEDH, ainsi qu'à l'adaptation de la procédure de recours individuel devant la CEDH. Il s'agit d'une discipline qui vise à assurer l'intégration du droit de l'Union européenne ainsi qu'à réaliser l'adhésion qui conduit au renforcement effectif de la protection des droits individuels au sein de l'ordre juridique de l'Union. Est également important l'aspect qui reflète (et ne peut être préliminaire) le potentiel et limite la procédure de recours individuel à un nouveau projet d'accord dans la perspective de l'autonomie du droit de l'Union par le biais du rang de cadre constitutionnel.

KEYWORDS: accession to the ECHR; ECtHR; CJEU; CFREU; CDDH; European Union law; Council of Europe; opinion 2/13; integration of EU law; individual appeal; principle of attribution; sincere cooperation; international responsibility; attribution of conduct; ILC; DARIO; CFSP; CSDP; co-respondent; prior involvement.

INTRODUCTION

Opinion 2/13 of 2013 was an important milestone in the integrative history of the European Union[1]. On 17 March 2023, an ad hoc negotiating group, the so-called "46+1" group, attempted to adopt a new draft of the Union's accession to the European Convention on Human Rights (ECHR)[2]. This is a non-definitive agreement, which allows the Union to continue with its accession to the ECHR, and seen as a specific possibility for its future. Art. 6, par. 2 TEU already provided for accession in preceptive terms and after the judgment of the Court of Justice of the European Union (CJEU) also on the compatibility with the draft agreement and with the law of the Union, which doubted the possibility of starting negotiations ex novo[3].

The opinion 2/13 has allowed and gave birth in 2019 to the resumption of negotiations when the President and Vice President of the European Commission communicated to the Secretary General of the Council of Europe their intentions (political and legal) on the matter[4]. The first response was the decision of the Committee of Ministers of Europe, which approved and followed with priority the

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[1]CJEU, 18 December 2013, Avis 2/13, Adhésion de l'Union à la CEDH, ECLI:EU:C:2014:2454, published in the electronic Reports of the cases.

[2] Council of Europe, 18th meeting of the CDDH ad hoc negotiation group ("46+1") on the accession of the EU to the European Convention on Human Rights. Final consolidated version of the draft accession instruments, 30 March 2023, 46+1(2023)36: https://www.coe.int/en/web/human-rights-rule-of-law/-/latest-meeting-of-the-cddh-ad-hoc-negociation-group-46-1-. See ex multis: P. Gragl, "The New Draft Agreement on the EU Accession to the ECHR: Overcoming Luxembourg's Threshold", *ECHR Law Review*, (2024), 2ss. T. Lock, "Third time lucky? The revised agreement on the EU's accession to the ECHR", *EULaw Live*, (2023). V. Pergantis, S.Ø. Johansen, "The EU Accession to the ECHR and the Responsibility Question: Between a Rock and a Hard Place", in N. Levrat, Y. Kaspiarovich, C. Kaddous, RA Wessel (eds), T*he EU and its Member States' Joint Participation in International Agreements,* (Oxford University Press, Oxford, 2022), 234ss.

[3] Council of Europe, Fifth negotiation meeting between the CDDH and ad hoc negotiation group and the European Commission on the accession of the European Union to the European Convention on Human Rights. Final Report to the CDDH, (47+1(2013)008Rev2), 13 June 2013: https://www.echr.coe.int/d/ue_report_cddh_eng

[4] Council of Europe, Decision authorising the Commission to negotiate the agreement on the accession of the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, (10817/10 Restreint EU), 8 June 2010: https://data.consilium.europa.eu/doc/document/ST-16573-2012-INIT/en/pdf. S. Peers, "The EU's Accession to the ECHR: The dream becomes a nightmare", *German Law Journal*, 16, (2015), 213, 222.

issues of its agenda[5]. Since October 2020, after a final meeting that was concluded in June, a new negotiation under the leadership of the ad hoc group of "46 + 1" began. It was divided into thirteen meetings and civil society presented its observations on the matter.

The negotiators tried to use the draft accession agreement of 2013 as a starting point, affirming the related commitment and conditions set by the Council of Europe as well as to limit the related modifications that are brought by the Convention to ensure that the Union adheres in an analogous way to the other contracting parties. The issues were many, both of a substantive and procedural nature, thus identifying the positions of the CJEU as well as of the organizing group of its work, which divided the main topics addressed in four "baskets".

The first topic was the one that adjusted the introduction of the individual complaint procedure before the European Court of Human Rights (ECtHR). The second one has to do with inter-partes complaints according to the limits of access to the procedure relating to the advisory opinion of the ECtHR, provided for by Protocol No. 16 and annexed to the ECHR. The third one was dedicated to the protection of the principle of mutual recognition between Member States and the last one concerned the topic of Common Foreign and Security Policy (CFSP). Further ad hoc subject under consideration was the question of the relationship with Art. 53 of the ECHR. In particular, the Union does not become part of the Council of Europe and the accession to the ECHR takes place as a complete and possible way that is foreseen by the participants and the activities of bodies of the Council of Europe, also exercising the related functions that are connected with the functioning of the system of the ECHR.

Between 14 and 17 March 2023, the negotiators unanimously reached a provisional agreement on the first three baskets but not on foreign policy. The fourth basket has to do with an important policy that, according to the negotiators, was better to be addressed at a national level independently. The Steering Committee for Human Rights (CDDH) was informed about the progress of the internal negotiations. After a year, no other news has been recorded that respected

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[5] Council of Europe, decision of the Committee of Ministry, 15 January 2020, CM/Del/Dec(2020)1364/4.3: https://www.coe.int/en/web/cm/-/1364th-meeting-of-the-ministers-deputies-15-january-2020-; Council of Europe, 6th meeting of the CDDH ad hoc negotiation group ("47+1") on the accession of the EU to the European Convention on Human Rights, Meeting report, 22 October 2020, 47+1(2020)R6.

the progress of the accession process.

The course of the procedure is an opportunity for preliminary reconstruction based on the constitutional framework of the Union. A basis that considers the functioning of the individual appeal before the ECtHR and the accession of the ECHR focusing on issues that are inherent to the scope of accession. This reconstruction focuses on the discipline that has to do with the individual appeal and the elements that take into account the internal regulations to ensure their full functioning.

1. RESPECTING THE CONSTITUTIONAL FRAMEWORK AS AN EVOLUTIONARY STAGE FOR THE ACHIEVEMENT OF ACCESSION

The indications coming from Art. 6, par. 2 TEU; the well-known opinion 2/94 of the CJEU[6]; the declaration n. 2 relating to Art. 6, par. 2, TEU which was annexed to the final act of the intergovernmental conference relating to the adoption of the Treaty of Lisbon and; Art. 1 of the protocol n. 8, which was supposed to guarantee the precise and specific characteristics of the Union, are stages that have addressed the modalities for participation in the Union to the control bodies of the ECHR, as well as the related guarantee mechanisms for individual, inter-partes appeals before the ECtHR addressed to the Member States of the Union. It is also noted that the provisions of the protocol highlight the need that the accession of the Union to the ECHR cannot modify, alter the distribution between Member States and Union, and certainly does not affect the exclusive jurisdiction clause, according to Art. 344 TFEU, as well as does not change the obligations of Member States complying with the ECHR.

These are general rules since international agreements concluded by the Union must comply with the founding treaties and cannot derogate from them according to Art. 218, par. 11 TFEU. It was the CJEU that placed limitations on the conclusion of international agreements thus affirming the external autonomy of the law of the Union. This is a traditional orientation from the CJEU, as an agreement that provides and does not deteriorate the distribution of competences between Member States and the Union by affecting the nature, the functions that

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[6] CJEU, 28 March 1996, Avis 2/94-Adhésion de la Communauté à la CEDH, ECLI:EU:C:1996:140, I-01759.

are attributed to the institutions of the Union[7]. It is an external body that does not pronounce on these aspects. A reference to the treaties, to the precise characteristics of the Union, that are contained in Art. 1 of the protocol n. 8 helps in a partial way a complete clarification, which operates in an individual way to the qualities that it refers to. The relevant provision specifies the aspects that are regulated by the accession agreement. It is also in accordance with a peculiarity that does not allow other elements of identification for the characteristics and does not exhaust the profiles taken into consideration of an accession agreement. The drafting of Art. 1 of the Protocol n. 8 is in accordance with the drafters of the treaty, specifying the uniqueness, originality of the legal system of the organization without pushing to identify in a peremptory manner the contents of the same, which in reality are intangible.

This is an understandable choice. On the one hand, one can see the observation and definition of a constitutional framework of the Union, given that the drafters of the treaty wanted to indicate it and thus found an adequate place within the Treaty of the Union among the first articles of this. On the other hand, Protocol No. 8 is a primary source for the conclusion of an important agreement for its accession to the ECHR, as a document that provides formal and limited indications to Art. 6, par. 2 TEU. The substantial profile, as a specific provision that binds, in a particular and rigorous way, the European institutions that involve the title of the procedure and conclusion of the agreement, also includes the CJEU. This is a provision that respects the prerogatives for the treaties, that are entrusted to each other. In this way, the treaties and the precise characteristics of the Union are consolidated within the law, that seems to convince and make it difficult to adapt to developments in the process of European integration, as well as the related critical issues that are found and will have to be addressed.

Specifically, art. 1 of Protocol No. 8 leaves the freedom of individual interpretation of the characteristics that establish the accession agreement in a compliant manner, attributing the relative recognition as formal coverage at primary level. The relevant provision allows the CJEU to carry out an assessment

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[7] CJEU, 14 November 1991, opinion 1/91, Accord EEE-I ECLI:EU:C:1991:490, I-06079. 10 April 1992, opinion 1/92, Accord EEE-II, ECLI:EU:C:1992:189, I-02821. 18 April 2002, opinion 1/00, Accord sur la création d'un espace aérien européen commun, ECLI:EU:C:2002:23, I-03493. 8 March 2011, avis 1/09 **,** Avis 1/09-Accord sur la création d'un système unifié de règlement des litiges en matière de brevets, ECLI:EU:C:2011:123, I-01137.

of the first draft of the accession agreement without reaching the provisions of Art. 218, par. 11 TFEU within the scope of the procedure for the conclusion of an agreement, which provides for the control exercised and verified by the treaties themselves[8].

The Opinion 2/13 has clarified the concept of external autonomy. It has also elaborated and respected the reading of opinions already mentioned[9]. The autonomy of the Union and the jurisprudential concept is related to the process of European integration through a level of integration that reaches the content of autonomy of the law of the Union. It is concluded that the autonomy of the law of the Union takes into account the constitutional framework, as a result of innovations that are introduced with the Treaty of Lisbon[10]. The CJEU, after the opinion no. 2/13, has allowed to identify the precise and specific characteristics of

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[8] CJEU, 18 December 2014, 2/13, Avis 2/13-Adhésion de l'Union à la CEDH, ECLI:EU:C.2014:2454, published in the electronic Reports of the cases. in this regard the CJEU has highlighted the relevant parameter of compatibility within the constitutional framework of the Union and the control of the draft agreement that has been concluded with Canada. 30 April 2019, Avis 1/17-Accord ECG UE-Canada, ECLI:EU:C:2019:341, published in the electronic Reports of the cases. 16 May 2017, Avis 2/15 - Accord de libre-échange avec Singapour, ECLI:EU:C:2017:376, published in the electronic Reports of the cases. 6 October 2021, Avis 1/19-Convention d'Istanbul, ECLI:EU:C:2021:832, published in the electronic Reports of the cases. 10 December 2018, C-621/18, Andy Wightman and others v. Secretary of State for Exiting the European Union, ECLI:EU:C:2018:999, published in the electronic Reports of the cases. D. Halberstram, ""It's the autonomy, stupid!". A modest defense of opinion 2/13 on EU accession to the ECHR, and the way forward", *German Law Journal,* 16, (2015), 114ss.

[9] For further details see also: B. De Witte, S. Imamoviê, "Opinion 2/13 on Accession to the ECHR: Defending the EU Legal Order against a Foreign Human Rights Court", *European Law Review,* 40, (2015), 684ss. P. Gragl, "The Reasonableness of Jealousy: Opinion 2/13 and EU Accession to the ECHR", *European Yearbook of Human Rights, 27,* (2015), 28ss. J.P. Jacquè, "CJUE-CEDH: 2-0", *Revue trimestrille de droit europeènne,* 48, (2014), 824ss. T. Lock, "The future of the European Union's accession to the European Convention on Human Rights after Opinion 2/13: is it still possible and is it still desirable?", *European Constitutional Law Review,* 12 (2), (2015), 240ss. E. Spaventa, "A very Fearful Court. The protection of Fundamental Rights in the European Union after Opinion 2/13", *Maastricht Journal of European and Comparative Law*, 22 (1), (2015), 38ss.

[10] D. Liakopoulos, "Der Beitritt der Europäischen Union zur EMRK: Jurisprudenz und kriminelle Profile", *Juris Gradibus-working paper,* (2018), 20. B. De Witte, "European Union Law: How Autonomous is its Legal Order?", *Zeitschrift für öffentliches Recht,* 65 (2010), 142ss. C. Eckes, "The autonomy of the EU legal order", *Europe and the World: A Law Review,* 4 (1) (2020), 2ss. M.L. Öberg, "Autonomy of the EU Legal Order: A Concept in Need of Revision?", *European Public Law*, 26 (3) (2020), 708ss.; J. Odermatt, "The Principle of Autonomy: An Adolescent Disease of EU External Relations Law?", in M. Cremona (ed), *Structural Principles in EU External Relations Law*, (Oxford University Press, Oxford, 2018), 292ss.

the law of the Union at the current stage of the integration process[11]. Such characteristics are united and established by Art. 2 TEU of fundamental rights as well as the objectives that are pursued by the Union within the framework of the principle of mutual recognition and mutual trust, as well as the respect for fundamental rights within the scope of space, security and justice of a constitutional nature. With the opinion 2/13 the CJEU referred to the constitutional structure of the Union. Instead, as far as the constitutional framework is concerned, it is a different expression and concept that was used in paper 1/17. These are interchangeable opinions. The conclusion of international agreements protects and ensures the limit that respects the external autonomy, that is entrusted to the CJEU itself.

The precise characteristics of the Union also include the related institutional framework exercised by the CJEU, which complements that of the Member States[12]. In this regard, Opinion 2/13 used the expression "essential" to give a precise description of the fundamental characteristics of the Union. Instead, in Protocol No. 8 the expression "specific" was used with reference to the distinguishing features of the organization and of the law as well as the need to clarify the consolidated expression of primary law, which attributes to a different stylistic nature but without substantial relevance.

As an integral part of a constitutional framework the Union and the characteristics that frame it are part of the organization of the Member States, within the scope of application of the law of the Union. This framework includes the principle of attribution of competences, as well as the principle of loyal cooperation between the principle of mutual trust and of mutual recognition. The precise characteristics of the law of the Union enter and have to do with the

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[11] CJEU, 26 February 2013, C-617/10, Åklagaren v Hans Åkerberg Fransson, ECLI:EU:C:2013:105, published in the electronic Reports of the cases. 26 February 2013, C-399/11, Melloni, ECLI:EU:C:2013:107, published in the electronic Reports of the cases. Chiarendo ed interpretando art. 53CCFREU e le sentenze come per esempio: 5 April 2016, joined cases C-404/15 and C-659/15 PPU, Aranyosi and Càldàraru, ECLI:EU:C:2016:198, published in the electronic Reports of the cases. M., Kellerbauer, M., Klamert, J., Tomkin, *Commentary on the European Union treaties and the Charter of fundamental rights.* (Oxford University Press, Oxford, 2024). D. Liakopoulos, "Procedural harmonization, mutual recognition and multi-level protection of fundamental procedural rights", *Revista del Instituto Colombiano de Derecho Procesal*, n. 48, 2018, 47-113.

[12] C. Cortantese, "The autonomy of the EU legal order in the ECJ's external relations case law: From the "essential" to the "specific characteristics" of the Union and back again", *Common Market Law Review,* 54 (2017), 1628ss.

primacy of the law over the national law of the Member States as well as the capacity of norms that produce direct effects[13].

The new draft of the accession agreement identifies the ways to allow the Union to join the ECHR without changing these characteristics. The Opinion 2/13 indicates the elements introduced by the draft agreement. The accession through its own group takes seriously Opinion 2/13, as a directive that negotiates and directs in a possible and faithful way. The accession process interprets in a positive and probable way the new draft agreement that passes the evaluation with the submitted treaties. It is asked that the drafters of the founding treaties entrusted to the CJEU, as a prerogative of carrying out the ex ante legitimacy control in relation to foreseen international agreements, attributing an active, definitive role to the content of an international agreement. The answer to the question requires a greater in-depth analysis of a favorable attitude towards the institutions as well as the Member States and the Council of Europe towards a practice of a judicial body.

Unlike the previous negotiation, the implementation of the accession to an international agreement is concluded between the Union and the parties of the Council of Europe, including the Member States of the Union. Thus, a draft agreement is foreseen that enters into force through the contracting parties that have concluded the ratification procedure. It should be noted that for the Member States of the Union, a double honor is noted for Art. 218, par. 8 TFEU within the force of the decision of the Council for the conclusion of an agreement through its prior approval by the Member States and according to the rules and norms of a constitutional nature. The latest report of the ad hoc group "46+1" to the CDDH[14] included the accession agreement through a draft that asks to the Union to make the ratification of the agreement through provisions added to the regulation of the Committee of Ministers of the Council of Europe, becoming thus a draft of

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[13] D. Liakopoulos, "Transnationality and application of EU law in national legislation. Analysis, critics and comparison in CJEU jurisprudence", *Revista General de Derecho Constitucional,* n. 30 (2019). D. Liakopoulos, "The influence of EU law on national civil procedural law: Towards the adoption of common minimum standards?-La influencia de la legislaciòn de la UE en el derecho procesal civil nacional: ¿hacia la adopciòn de normas minimas comunes?", *Revista General de Derecho Europeo,* 46, (2018), 1ss.

[14] Council of Europe, 18th meeting of the CDDH ad hoc negotiation group ("46+1") on the accession of the EU to the European Convention on Human Rights. Final consolidated version of the draft accession instruments, 21 March 2023, 46+1(2023)35FINAL, par. 9: https://www.coe.int/en/web/human-rights-rule-of-law/-/latest-meeting-of-the-cddh-ad-hoc-negociation-group-46-1-

memorandum of understanding. In this way, the project relates and connects with the accession agreement[15]. More precisely, with the related documents that are annexed to the draft accession agreement, having to do with Appendices I, II, III, IV and V attached to the latter. Reference is also made to the related draft explanatory report, that is referring to Appendix V of the draft accession agreement. The negotiation reaffirms and reinforces the documents based on the accession and on its own implementation.

Already in paragraph 9 of the report, proposed by the negotiators for the CDDH of the Council of Europe, it was noted that they agree with the proposal for a recommendation to the Committee of Ministers of the Council of Europe. Such a report contains indications of an interpretative nature for the provision of the draft agreement, which is useful for the letter in accordance with the law of the Union. It should not be forgotten that already in opinion 2/13 the references of the draft are missing. It has used the CJEU to a valid document of a draft agreement[16]. The new agreement does not leave points incompatible with primary law by specifying the draft in relation to the CJEU. Furthermore, it uses explanatory notes and annexes with agreements as a means of interpretation, sufficient to allow the CJEU to consider the criticisms that are in contrast with the text of the agreement already decided[17]. It, therefore, seems better for the explicit terms of the accession agreement to relate and recognize the value of a document, which integrates the parties to take into account the interpretative objectives.

The structure of the agreement is short and consists of only twelve necessary introductory articles with interpretative clauses for the adaptation of the protection system provided for in the ECHR and the specificities of the Union thus avoiding interventions on the text of the same.

The first opening article of the draft agreement is similar to the previous version, which establishes the Union as well as accedes to the convention and the additional protocols n. 1 and 6. This provision includes in a unitary manner Art. 2

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[15] Council of Europe, 18th meeting of the CDDH ad hoc negotiation group ("46+1"). Final consolidated version of the draft accession instruments, 21 March 2023, 46+1(2023)36, op. cit.

[16] CJEU, 18 December 2014, Avis 2/13, Adhésion de l'Union à la CEDH, op. cit., parr. 128, 135, 185, 215, 219, 236, 240 e 242.

[17] Council of Europe, 18th meeting of the CDDH ad hoc negotiation group ("46+1"). Final consolidated version of the draft accession instruments, Appendix V, 30 March 2023, 46+1(2023)36, cit.

of the protocol n. 8, annexed to the treaties. The accession agreement guarantees and provides the particular situation for the Member States with respect to the convention, which concerns their protocols according to the derogating measures of the same, Art. 15 and the reservations that are formulated according to Art. 57 ECHR.

The additional protocols of the ECHR, during the first negotiation, considered the limitation of the accession of the Union only to the protocols that have been adhered to by all the Member States of the Union, as a necessary condition for the respect and the guarantee of the condition set in the recalled Art. 2 of the protocol n. 8 of the annex to the treaties. The accession to the protocols as well as to the ECHR determines that the sources of the law of the Union, as intermediate sources, place the primary law and the derived ones in Art. 216, par. 2 TFEU. The Member States are bound by the rights, which ensure instruments as parts of the law of the Union, i.e. sources of international law. The consequences entail in the national legal system and in the Member State the hypotheses of limitation and of direct invocation. From a substantial point of view this situation does not produce differences, which does not produce differences and respect the rights guaranteed through the CFREU. The fundamental rights of the Union are protected by additional protocols of the ECHR and not ratified by all the Member States. Some of these are based on Art. 52, par. 3CFREU[18], which provides the so-called equivalence clause between CFREU and the ECHR. It also identifies the correspondence between the content of a right and the freedom protected by an additional protocol, i.e. the freedom included in the same CFREU[19]. The Member States respect the CFREU and implement the law of the Union in a way that is

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[18] M., Kellerbauer, M., Klamert, J., Tomkin, *Commentary on the European Union treaties and the Charter of fundamental rights.* (Oxford University Press, Oxford, 2024).

[19] We notice the Additional Protocol No. 12 which refers to the general discrimination which constitutes a general principle of the law of the Union as a point of affirmation within art. 21CFREU. As well as the Additional Protocol No. 4 which referred to the prohibition of collective expulsions of foreign citizens and the prohibition which is established by art. 19CFREU. The Additional Protocol No. 7 established that the prohibition to be tried and/or punished twice for the same crime is based on art. 50CFREU as well as the Additional Protocol No. 13 which does not allow the death penalty in the circumstances which are specified by art. 2 CFREU. M., Kellerbauer, M., Klamert, J., Tomkin, *Commentary on the European Union treaties and the Charter of fundamental rights*. op. cit., J.P. Jacquè, "The accession of the European Union to the European Convention n Human Rights and Fundamental Freedoms", *Common Market Law Review,* 48 (2011), 997ss. A. Łazowski, R.A. Wessel, "When Caveats Turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR", *German Law Journal,* 16(1) (2015), 179-212.

evident for the Member States, that have not ratified the additional protocols of the ECHR. The CFREU thus refers to and finds constraints on compliance with the jurisprudence of the ECtHR.

From an external point of view, the accession of the Union to protocols not ratified by the Member States, which precisely make it possible for Member States not adhering to a specific additional protocol, can attribute to the responsibility of the Union, that concerns the violation of a right and freedom contained in this. Thus, a rather anomalous situation arises given that the ECtHR establishes that a Member State is jointly responsible with the Union for the violation of a protocol ratified by it. A possible violation by the Member State of an international agreement that has been concluded with the Union determines international responsibility, while the Member State faces an infringement procedure for having violated the law of the Union, as well as the effects that are exhausted in a unique way at a national level.

The restrictive choice of accession to the Union and to the additional protocols, which are ratified by all the Member States, seems to be the objective of simplification of complex negotiations that favor the acceptance of a final text by the Member States of the Union. Thus, we observe the provision that precludes for the future the faculty of the Union to decide the relative autonomy for further protocols that adhere and choose those ratified by all the Member States. As a solution, is the production of a situation in which the Union is not the recipient of appeals before the ECtHR, which concern the violation of rights that are contained in additional protocols to the ECHR and not ratified but entailing a content that corresponds to rights that are protected by the CFREU. In this spirit, the individual determines the protection that benefits from the accession limiting the possibility of a complete external control by the ECHR and in relation to the violation of rights and freedoms. The accession of the Union to the ECHR determines a scope of individual appeals to the ECtHR and the accession of the Union to additional protocols, that already respect individuals by founding motivated choices of a substantial nature and exclusively linked to the position of individual Member States thus taking into account such choice. Member States safeguard the provision of ad hoc clauses within the accession agreement and the internal implementation discipline.

As regards reservations, Art. 3, par. 2 of the new draft agreement is in line with Art. 2 of Protocol No. 8 of the Annex to the Treaties, which establishes

reservations based on the former Art. 57 ECHR, placed by a contracting party which also retains its effect as a respondent in proceedings before the ECtHR. Reservations constitute an element of criticism within the scope of a draft agreement, which is connected with the attribution of liability and the execution of judgments of the ECtHR, if it is in joint participation with the Member States of the Union.

2. INDIVIDUAL APPEAL BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS. CONFIRMATIONS, NEWS AND QUESTIONS OF DEFINITION

Speaking of individual appeals to the ECtHR, it is clear that the need for changes and amendments was necessary even before the accession to the ECHR of the Union[20]. The distribution between the Union and its members that is part of the nature of the organization involves the ability to introduce changes to the founding treaties that find a basis and implementation not resolvable with questions. The acts adopted by the Union are applied, executed by the Member States. After accession, the configuration does not make it possible to immediately identify a subject against the appeal, which involves the risk that the ECtHR should establish between the Member State and the Union with a correct manner the defendant and evaluating together its admissibility[21]. The case law to a similar evaluation of an external jurisdiction of the Union involves an indirect ruling regarding the distribution of competences not in accordance with the autonomy of the legal system of the Union. Already Art. 1, letter b) of Protocol no. 8 of the Annex to the Treaties provides that the accession agreement preserves the peculiarities of the Union and the law that the latter includes the mechanisms necessary to ensure the proceedings initiated by third states, by individuals who are correct and addressed with one and/or the other type of procedural

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[20] European Commission, The protection of fundamental rights as Community law is created and developed. The problems of drawing up a catalogue of fundamental rights for the European Communities, 4 February 1976, Bulletin EC, Supplement 5/76; Accession of the Communities to the European Convention on Human Rights, 4 April 1979, in Bulletin E.C., Supplement 2/79 and I; Adhesion de la Communauté à la Convention européenne des droits de l'homme et des libertes fondamentales, 25 October 1990, SEC(90)2087.

[21] CJEU, 14 December 1991, Avis 1/91, Accord EEE-I, op. cit., 30 May 2006, C-459/03, Commission v. Ireland, ECLI:EU:C:2006:345, I-04635. 3 September 2008, joined cases C-402/05 and C-415/05, Kadi and Al Barakaat Foundation, ECLI:EU:C:2008:461, I-06351.

mechanisms. The CJEU includes the principle of attribution of the relative competences[22]. This requirement is important to identify a suitable , that simplifies the position of the individual applicant without obtaining in-depth Union law. Of course, if this were the case, the possibility of using a subsidiary protection system, that is prepared by the ECHR and the correct defendant, would be lost.

The issues identified in the first draft of the accession agreement are preserved in the version of the adopted draft. It is expected that the introduction of a clause of attribution of the conduct shown to be detrimental to the applicant. The form of participation in the relevant ad hoc proceeding is reserved to the own Member States of the Union in the capacity of co-respondent and/or as a second respondent. The attribution clause is responsible for the violation of the ECHR and perhaps it is established. The negotiators decided to separate the attribution of the conduct, which contests from the attribution of responsibility for the violation established. This provision provides as a general rule of the draft the articles on the international responsibility of international organizations (DARIO), as well as the contemplated option of Art. 64, which admits that the derogation from the discipline generates is oriented towards the adoption of a lex specialis[23].

The accession to the ECHR places the co-respondent alongside the principal defendant and the attribution clause that is linked to the liability, which allows the Union to avoid and move to an internal level the decision that assumes for the Member States the role of a principal defendant. This is a technique, which uses the rule of a framework. It is part of the agreements, which also concern investments. It seems that the practice is really varied. For example, CETA as an investment agreement concluded with Vietnam and the related free trade agreements with Mexico and Singapore provide specific provisions for the situation faced since the Union does not communicate the choice of the defendant

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[22] CJEU, 18 December 2014, 2/13, Avis 2/13-Adhésion de l'Union à la CEDH, op. cit., par. 165.

[23] International organizations, especially of an economic and regional nature, have discussed within the framework of the International Law Commission the draft articles on the international responsibility of international organizations (DARIO). The ILC has put forward the proposal for a formal distinction and attribution of a conduct of attribution for the responsibility of the related disputes involving the international organization and its member states. The relative proposal of the ILC has not found application within the accession project and especially in this regard art. 64 has been inserted. D. Liakopoulos, *Complicity in international law,* (W.B. Sheridan Law Books, ed. Academica Press, Washington, London, 2020).

within the terms that are prescribed by the same agreements. The Singapore-EU agreement also tries to identify another solution. At the time of the notification of intent the investor exclusively identifies the related treatments by a Member State that acts as defendant. The notification of intent tries to identify a treatment by an institution, such as a body, an agency of the Union that will be the same Union that acts as defendant. CETA, Vietnam-EU, Mexico-EU have highlighted that Union has agreed on measures, which identify the notification and include measures for the Union. The notion of measure is valid for the same agreements as an act, regulation, procedure, rule, decision, requirement, practice, and form of measure of a party.

The Transatlantic Trade and Investment Partnership (TTIP) agreement with the United States does not include a specific provision, which is related to the decision by the Union. The inclusion of these adjustments in an accession agreement avoids the introduction of the relevant changes to an individual complaint procedure, which is provided for by the ECHR itself and leaves the applicant with the relevant task of identifying the main defendant against whom the complaint is brought. The participatory decision in the draft accession agreement sufficiently identifies and allows the Union to assess the participation of the assumption of joint responsibility. The envisaged changes present elements of continuity and innovation, which respect the practice of the Union and the Member States, as a definition of participation in other agreements of an international nature[24]. The accession project confirms a trend for the Union of acceptance of control bodies that are jurisdictional, para-jurisdictional and accompany the trend that provides for ad hoc instruments within the text of suitable agreements at national level and the adoption of decisions, which affect essential characteristics within a constitutional framework of the Union, such as

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[24] L. Pantaleo, *The Participation of the EU in International Dispute Settlement,* (ed. Springer, Berlin, 2019). P.T. Stegmann, *Responsibility of the EU and the Member States under EU International Investment Protection Agreements*, ed. (Springer, Cham, 2019) 141ss. S. Vezzani, "The International Responsibility of the European Union and of Its Member States for Breaches of Obligations Arising from Investment Agreements: Lex Specialis or European Exceptionalism?", in M. Anjdenas, L. Pantaleo, M. Happold, C. Contartese (eds), *EU External Action in International Economic Law. Recent Trends and Developments,* (ed. Springer, The Hague, 2020), 282ss. C. Contartese, L. Pantaleo, "Division of Competences, EU Autonomy and the Determination of the Respondent Party: Proceduralisation as a Possible Way-Out?", in E. Neframi, M. Gatti (eds), *Constitutional Issues of EU External Relations Law,* (ed. Nomos, Baden-Baden 2018), 411ss. D. Liakopoulos, "Procedural harmonization, mutual recognition and multi-level protection of fundamental procedural rights", *Revista General de Derecho Procesal,* 47, 2019, 2ss.

for example the principle of attribution of its own competences.

3.ATTRIBUTION OF CONDUCT AS A GENERAL CLAUSE

The attribution of conduct as a general clause has been introduced in the paragraphs of the third and fourth article of the new draft agreement. It has, therefore, remained the same with the previous version. According to Art. 1, par. 3 the accession of the ECHR highlights obligations to the Union, which are exclusive and in relation to acts, measures, omissions by its institutions, bodies, agencies, and offices. The relevant paragraph ends with the provision that the ECHR is liable according to the rules of international law. Furthermore, it includes the circumstance for the court that investments must be assessed if the applicant sues the Union and/or the host Member State as a party.

Within the framework of the UN Convention on the Law of the Sea (UNCLOS), Art. 6, par. 2 of Annex IX allows third parties to address the relevant request to the Union and/or the Member States as an acknowledgement of liability for a matter, which does not specify the declaration of competence submitted by the Contracting Parties, i.e. the Union and the Member States. If the Member States and the Union do not provide the relevant request for information in a reasonable time, they shall respond in a controversial manner and shall be considered jointly liable.

With reference to the Member States, paragraph 4 of the relevant provision under investigation highlights that any act, omission, measure of an organ of a Member State as well as any person acting in the capacity of any Member State shall attribute such act, measure, omission that occurred in implementing a provision of Union law. The relevant criteria identify the attributing subject of the conduct that defines the draft accession agreement. They are in line with general rules, respecting Art. 4 of the draft articles on the international responsibility of states as well as Art. 6 DARIO[25]. Interesting is the position taken by the special rapporteur Gaja in the International Law Commission (ILC), that proposes and presents the drafting works from DARIO. The draft contains an ad hoc provision for the European Union, a "(…) conduct of a state would be attributed to a Member State when it exercises its discretion and to the EU when the state

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[25] D. Liakopoulos, *Complicity of States in the international illicit,* (ed. Maklu, Antwerp, Portland, 2020). D. Liakopoulos, *Complicity in international law,* (W.B. Sheridan Law Books, ed. Academica Press, Washington, London, 2020).

implements a binding act of the Union to the extent that the act does not leave discretion (...)"[26]. By including such a clause in the relevant agreement, that allows the Union and the Member States to declare the violation of the ECHR as the only ones responsible, national measures are derived and adopted to enforce the rule of Union law. The inclusion of such criteria recalls the new draft as well as the value that fully responds to the need of the individual appellant to reduce the relative risk of addressing the appeal to the wrong defendant. The clause thus described ensures that the accession of the Union occurs mostly through appeals and continues to be addressed towards Member States. The organization and roles between the Member States and the Union all the more reason for the acts adopted are implemented, executed in this way and by the same members of the Union.

Art. 1, par. 4 of the draft agreement highlights that the Union includes decisions that are adopted, according to TEU and TFEU. The decisions are based on the TEU and call the scope of the Common and Foreign Security Policy (CFSP). The draft report confirms that the general attribution clause describes the application and related issues of this type of policy. The extension of the judicial review from the CJEU what has been decided. The judicial review of the ECtHR in relation to CSDP acts and restrictive measures shall admit the competence of the CJEU according to Art. 257 TFEU. The relevant case law in this respect and the CJEU have exercised the relevant jurisdiction over regulations that are adopted according to Art. 215 TFEU as well as the implementation of positions of the Union decided within the context of the CSDP.

The draft report on the CFSP policy similarly shows a version that goes against Opinion 2/13 and takes as its only aspect that of the Common Security and Defence Policy (CSDP). Paragraph 28 of this document highlights the cases that the ECtHR detects as well as the conduct of a contracting party within the scope of a mission that is led by an international organization and follows precise rules regarding the attribution of a contested conduct. In this spirit, the Behrami and Saramati appeals are noted, since the ECtHR denied its admissibility ratione personae and affirms the conducts under examination attributed by the United Nations under the aegis of the operations created for the violations verified by the ECHR. In contrast, for the Al-Jedda judgment the ECtHR has reasonably

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[26] G. Gaja, "Accession to the ECHR", in A. Biondi, P. Eeckhout, S. Ripley (eds), EU Law after Lisbon, (Oxford University Press, Oxford, 2012) 180 ss.

highlighted the effective control and ultimate authority according to the conduct of British personnel, who are employed in Iraq, attributing thus to the contracting state a conduct that is in accordance with the framework of the resolution of the Security Council of the United Nations. Namely, the document did not require the United Kingdom to act within the framework of violation of fundamental rights. Thus, it provides for an indefinite detention of the applicant.

The reference of the Behrami, Saramati[27] and Al-Jedda[28] judgments, within the scope of the ECtHR, attribute extraterritorial conducts of civilian and/or military personnel belonging to a contracting party and verifies the framework of missions established by international organizations that have not appeared within the lines of appeal over time.

The accession agreement decides, extends the jurisdictional review of the ECtHR to the CFSP and verifies the scenario that respects the background of the judgments just cited. The organization under the established support and the mission of the Member State, that the personnel participate in the mission, are subjects of the ECHR. The accession agreement, as a result, provides in a precise way rules of attribution of a harmful conduct. The appeal is addressed to the Member State that committed the act and the measure under investigation. It was understood for the Union the possibility of standing next to the Member State as a defendant and is declared responsible according to any eventual violation that is encountered. This approach ensures for individuals a full external judicial control, which is of responsibility of the Union according to the opinion 2/13[29]. The case law within the scope of the CSDP, leads to a control (according to the ECtHR) of acts, measures, and/or missions, which fall within the judicial review of the

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[27] ECtHR, 2 May 2007, Behrami v. France and Saramati v. France, Germany and Norway, cases n. 71412/01 and 78166/01. D. Liakopoulos, "La volonté de la Cour de justice de privilégier la Convention européenne des droits de l'homme dans sa protection des droits fondamentaux", International and European Union Legal Matters-working paper series, (2012). M.E.Villiger, *Handbook on the European Convention on Human Rights*, (ed. Brill, Bruxelles, 2023).

[28] ECtHR, 7 July 2011, Al Jedda v. United Kingdom, case n. 55721/07 and 27021/08. M.E.Villiger, *Handbook on the European Convention on Human Rights*, op. cit.

[29] P. Gragl, "An Olive Branch from Strasbourg? Interpreting the European Court of Human Rights' Resurrection of Bosphorus and Reaction to Opinion 2/13 in the Avotinš Case ECtHR 23 May 2016, Case No. 17502/07, Avotinš v Latvia", *European Constitutional Law Review,* 13 (3) (2017), 552ss.

CJEU[30], as well as to ensure the right of autonomy of the law of the Union[31]. In this spirit, we note the KS and KD[32] case, which confirmed Art. 24, par. 1, second subparagraph TEU and Art. 275, letter a) TFEU.

4.PARTICIPATION OF THE UNION AND/OR MEMBER STATES AS CO-RESPONDENT

Another point of adaptation that has been foreseen for the accession of the Union to the ECHR has to do with the participation of the Union and/or Member States as co-respondent. This is a participatory form that is distinct from that of a third party intervener since the co-respondent becomes a party to a proceeding in its own right and the main defendant establishes the violation of the ECHR, thus also incurring its own liability.

This is an intervening form reserved exclusively to the Union and to Member States, including the text of the Convention by introducing a paragraph in Art. 36. The draft report shows that the participation as a co-respondent does not constitute a privilege in favour of the Union and its Member States, which respects the other parties, but on the contrary makes it necessary to ensure the correct administration of justice. This statement is shared and puts the substantive and procedural discipline provided for, through the participation of the Union, and the title that ends the assurance of the latter, to decide and join the principal defendant to the relevant proceedings before the ECtHR. The joint attribution clause and the principal defendant as well as the co-respondent are declared co-responsible for an established violation. The Union, as a consequence, decides the

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30 CJEU, 12 November 2015, C-439/13 P, Elitaliana/Eulex Kosovo, ECLI:EU:C:2015:753, published in the electronic Reports of the cases. 19 July 2016, C-455/14 P, H v. Council and others, ECLI:EU:C:2016:569, published in the electronic Reports of the cases. 28 March 2017, C-72/15, Rosneft, op. cit., 25 October 2018, T-286/15, KF/CSUE, ECLI:EU:T:2018:718, published in the electronic Reports of the cases. 10 July 2020, T-619/19, KF/CSUE, ECLI:EU:T:2020:337, published in the electronic Reports of the cases. B. Rainey, W. Wicks, C. Ovey, Jacbos, *White and Ovey: The European Convention on Human Rights*, (Oxford University Press, Oxford, 2021).

31 P. Grag, The New Draft Agreement on the EU Accession to the ECHR, op. cit., p. 20 ss.; M.J. Rangel De Mesquita, "Judicial Review of Common Foreign and Security Policy by the ECtHR and the (Re) Negotiation on the Accession of the EU to the ECHR", *Maastricht Journal of European and Comparative Law*, 28 (3), (2021), 358ss. D. Sarmiento, S. Iglesias Sànchez, "KS and Neves 77: Paving the Way to the EU's Accession to the ECHR", *EULaw Live*, (2024).

32 CJEU, 10 September 2024, joined cases C-29/22 P and C-44/22 P, KS and KD, op. cit.

circumstances that are assumed jointly, for the violation of cases, which will not have as sole defendant a proceeding before the ECtHR.

We must also take into account another preliminary aspect that concerns the decision of the ECtHR on the admissibility of the application. Art. 3, par. 1 of the draft agreement provides that Art. 36 ECHR integrates in paragraph 4 "(…) an application that shall be assessed without regard to the participation of a co-respondent in the proceedings (…)". Thus, it is specified that the draft report as an anticipatory choice for the decision on admissibility respects the possible entry of the respondent and the need to avoid, that the application can be declared as inadmissible due to the failure to exhaust internal remedies of ex Art. 35, par. 1 ECHR. This intention seems to be shared since it implicitly highlights the new draft agreement that leads to the exclusion of the possibility for the ECtHR to declare the application as inadmissible ratione personae. This conclusion also comes in the case that the Union and/or the Member States after the invitation by the ECtHR decide to refuse the relevant joinder to the proceedings. This conclusion is different and is equivalent to the attribution of the ECtHR, as an indirect power, that pronounces on the distribution of competences between the Union and the Member States in an incompatible manner, while respecting the autonomy of Union law.

The substantive conditions have remained unchanged and comply with the previous draft agreement according to Art. 3, par. 3, which concerns the relative participation of the Member States as co-respondents in the event that the appeal of the ECtHR is directed against the Union. This provision recalls the form of active participation when the violation as the subject of a pending appeal calls into question the compatibility of a provision of the TEU, of the TFEU and of any other provision that has as its objective the legal value, with the ECHR and/or the additional protocols to which the Union adheres. Art. 3, par. 3 of the draft agreement specifies that this position is verifiable when the organization avoids the violation of the ECHR only by disapplying the rule of primary law. The extension of the jurisdictional review of the ECtHR to primary law is not a delicate issue until the Matthews case[33]. The ECtHR has considered admissible the appeals that are addressed by the Member States to the European community to support the violations of the ECHR and/or of an annexed protocol that derives

[33]ECtHR, 18 February 1999, Matthews v. United Kingdom, case n. 24833/94.

from a content of a provision that contains the treaties establishing the Union of the time and the related acts annexed to it. With the accession, the possibility of acting directly and against the Union changes the respect of a general attribution clause. The Member States join the proceedings as co-respondents in order to be able to defend their position and provide for possibly remedy to the ascertained violation.

Art. 3, par. 2 of the new draft agreement establishes that an allegation directed against one or more Member States entitles the Union to join a proceeding as a co-respondent, "(…) such allegation calls into question the compatibility with the rights at issue defined in the Convention or in the Protocols to which the European Union (...) including decisions taken under the TEU and under the TFEU (…)". The last sentence of the paragraph highlights in a precise and special way cases where the violation contests one or more Member States, avoiding only obligations of the main defendant from the law of the Union.

Obviously, this provision refers to acts of Union law and does not leave the relative discretion to the Member States in the implementation phase. The violation contests and appears, as a content of an act adopted by the Union itself, that the defendant limits itself to executing, applying without the possibility of intervention for the conformation of its own action of the ECHR. The ECtHR has resolved situations of this kind through the presumption of equivalent protection, which has known the presumption since the Bosphorus-Michaud case[34]. The ECtHR within a general interest of international cooperation waives the exercise of its own jurisdictional control given that the act applies the violation contested by an organisation super partes and of an international nature, such as the EU, which ensures protection in an equivalent manner to that ensured within the system of the ECHR. The existence of comparable protection, within the spirit of the ECtHR, has refined its control to the evaluation of a specific situation for the protection of the rights of the individual, which ensures Union law in an effective, equivalent manner and as a guarantee of the ECHR itself. After the accession of the Union to the ECHR, the reasons that pushed the ECtHR to identify the

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[34] ECtHR, 30 June 2005, Bosphorus v. Ireland, case n. 45036/98; 6 December 2012, Michaud v. France, case n. 12323/11. G. Gaja, "The Review by the European Court of Human Rights of Member States' Acts Implementing European Union law: "Solange" Yet Again?", P.M. Dupuy (eds), *Common Values in International Law. Essays in Honour of Christian Tomuschat*, (Engel Kehl, 2006).

compromise solution that awaits the ECtHR, exercising full jurisdictional control, are reduced. The participation of the Union as co-respondent allows the defense of its actions through the ECtHR involving the CJEU by way of the instrument of prior involvement as we will see in the next paragraphs.

Art. 3, par. 2 of the draft accession agreement results, for the participation of the Union as co-respondent, as a means for the activation of cases that fall under the presumption of Bosphorus-Michaud case. All this happens whenever the act, action, omission of the Member State results from a rule of the law of the Union derived and/or primary. Paragraph 61 of the draft specifies that the verification of the conditions for activating the participation as co-respondent presupposes the evaluation of rules of law of the Union, that regulate the division of competences between it and its Member States.

Reading together Art. 3, par. 2 of the draft agreement and paragraph 61 of the draft report concerning the negotiators, the substantive conditions for participation in the Union and the title of co-respondent are defined, as are the criteria used in other international agreements for the establishment and attribution of conduct, responsibility through the Union and the Member States. In this spirit, we can refer to the so-called "Exculpating Normative Control", which inspires the observations that are part of the European Commission and the ILC in the drafting works of the DARIO[35]. The related doctrine developed is based on the theory of state bodies that de facto act as bodies of an international organization to implement an act of Union law, that does not leave the relevant margins of appreciation[36]. This criterion, even in a partial way, corresponds to Art. 17 DARIO by virtue of what the state acts in compliance with the obligation that derives from the participation of an international organization that supports the

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[35] See Comments and observations received from international organizations in Report of the International Law Commission on the Work of its Sixty-third session (26 April-3 June and 4 July-12 August 2011), in Yearbook of the International Law Commission, 2011, p. 37ss. J. D'Aspremont, "A European Law of International Responsibility? The Articles on the Responsibility of International Organizations and the EU", in V. Kosta (eds), *The EU Accession to the ECHR*, (Hart Publishing, Oxford, Oregon, Portland 2014) 75ss. S. Mc Ardle, P.J. Cardwell, "EU External Representation and the International Law Commission: An Increasingly Significant International Role for the European Union?", in S. Blockmans, R.A. Wessel (eds), *Principles and Practices of EU External Representation*, (CLEER Working Papers, 2012), 83ss.

[36] C. Contartese, "Competence-Based Approach, Normative Control, and the International Responsibility of the EU and Its Member States", *International Organizations Law Review*, 17 (2), (2019), 341ss. A. Delgado Casteleiro, *The International Responsibility of the European Union from Competence to Normative Control,* (Cambridge University Press, Cambridge, 2016), 148ss.

co-responsibility between the latter and the Member State that does not find any other discretion of implementation on the part of this state.

Competence has the basis for the conduct and the responsibility attributed to the subject, through the organization and the Member Atates, i.e. the relative discipline of the matter under investigation. The competence based model comes to distinguish the precise model, that is, the conduct, the responsibility that is attributed to the organization even if it has not exercised its own competence, that is, the attribution of the conduct and responsibility to the prior exercise of the competence by the same organization. In practice, this criterion has found its application in the case of mixed international agreements that are concluded by the Union and the Member States. The organization and the Member States define to who is attributed the conduct and the basis of the internal distribution of competences through the ad hoc declarations that are taken into consideration at the time of the conclusion of their agreement.

The reference to competence finds its reason through the need to protect the principle of attribution, as an essential characteristic for the law of the Union, that refers to protocol n. 8 of the annex of the treaties, as a consequence of its external autonomy. The nature seems to be approximate towards the provisions of a draft agreement. The paragraphs that correspond to the draft also include the activation of the co-respondent mechanism, which concerns the participation of the Union and the internal question, as a discipline that specifies the necessary regulation ensuring the execution of the accession agreement.

The fourth paragraph of Art. 4 of the draft agreement considers the case of an action that has been simultaneously and in parallel brought against the Union and to one or more Member States. It provides for the relative possibility for the parties to change their participation as co-respondent. The conditions for activating this mechanism are satisfied. If it were otherwise, the possibility for the Union and the Member States to invert their participation, thus passing from the principal defendant to the co-respondent at a later time, is not contemplated. In the event of a violation, which is ascertained, the principal defendant and the co-respondent are both declared as liable since the inversion of the title of participation does not lead to other benefits for the defendants except for the possibility of terminating their participation in the action, which is reserved only to the second defendant. This eventuality is explicitly contemplated in the previous draft agreement in the draft explanatory report. The choice to insert an

ad hoc paragraph to a new draft agreement leaves the negotiators to exhaust the relative discipline of each aspect to the co-respondent mechanism that becomes after the accession agreement. Therefore, after the conclusion of the participation in the title of co-respondent of the Union and/or of a Member State, it intervenes as a third party if the conditions and its interests exist.

The substantive conditions for the activation of the co-respondent mechanism and the articulation of participation between the title of the Union and the Member States are not subject to amendments, which respect the previous version of the draft accession agreement and the procedural aspects, that have undergone the relevant changes for the respect of the decision-making autonomy of the Union and the activation of the co-respondent. In the first draft agreement, the participation of the co-respondent is subject to the request of the contractor regarding the procedure and its participation in the ECtHR.

The request for activation of the co-respondent mechanism by the Union and the Member States, as well as the draft agreement establishing that the ECtHR has adopted a decision to accept the arguments put forward as the basis for the request, seem plausible. The first draft report, considers that the ECtHR is not prejudiced in its judgment on the report of the violation that is complained of. Already in Opinion 2/13 the CJEU has established the conduct of this control. It has evaluated the rules of Union law that govern the distribution of competences for the Member States, as well as the criteria for attributing acts, the omissions of the same in a way that is not compatible with the requirements that preserve the precise characteristics of Union law[37].

The new draft agreement has tried to heal the profile that recalls the attribution of a decisive role to the Union. According to Art. 3, par. 5 of the new draft agreement the ECtHR shall admit[38] the co-respondent after the request of the potential co-respondent for the Union and the Member States. Thus, the request for an assessment for the Union is in line with the request for participation that comes from the Member States. It seems that the Union as a subject that calls to present the assessment for the draft report is affirmed producing a timely

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[37] CJEU, 18 December 2014, 2/13, Avis 2/13-Adhésion de l'Union à la CEDH, op. cit., par. 224.

[38] The group of negotiatiors "46+1" on 16 February 2023 (46+1(2023)31) through art. 3, par. 5 affirmed: "(…) the Court admits a co-respondent by decision if the conditions in para 2 or 3 of this article are met according to a reasoned assessment by the European Union (...)".

document. The role of the ECtHR appears to be entirely formal. The explanatory report establishes the conclusions that arrive for the Union through the assessment considered in a determined manner.

Presenting the reasoned report, as an obligation for the Union, is very problematic in the case that follows the request for participation as co-respondents the Member States and the Union. The draft report clarifies the tools available to the Member States to react to cases of inertia. This aspect has direct repercussions on the principle of loyal cooperation of the Union and the Member States, thus regulating the implementing the legislation of the agreement. It also affects the progress of the appeal before the ECtHR and the position of the appellant, who considers as appropriate to provide the agreement with a deadline. Within this spirit the Union will have to produce an assessment in the case that the co-respondent requests to activate the relevant procedure. As foreseen by the agreement between Singapore and the EU, the accession draft can be amended.

In a different way if the ECtHR invites the potential co-respondent to participate, paragraph 62 of the draft report specifies that the ECtHR indicates a limit for the potential co-respondent, communicating its intention to participate. It is provided that the ECtHR indirectly highlights the times of the Union for the reasoned assessment report. The reasoned statement asks to decline the invitation and in order to block the proceedings before the ECtHR, considering the adoption of a sort of clause of silence refusal, even when one is invited to participate. After the time for the presentation of the reasoned assessment, the silence of the Union has been considered as a refusal for the participation of the appeal.

Such solutions allow the safeguard and autonomy of the right of the Union, that avoids the risk of an appeal that suffers delays in the attitude and appears with a voluntary way to avoid in time the path of the Union. And all this because it does not affect the decision of the admissibility of the appeal to the ECtHR. This clarification is important when a Member State may be interested in invoking the inadmissibility ratione personae after the refusal of the Union to accept the invitation to participate as a co-respondent[39].

According to Art. 3, par. 5 of the draft agreement, the explanations of the draft report put forward the intention of the ad hoc group of 46+1 to identify a suitable

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[39] See Art. 8, par. 21(6) of the agreement of CETA; art. 3.32, par. 5 of the agreement of EU-Vietnam for the protectio of investmnets and art. 5, par. 5, of chapter II of the project of agreement TTIP.

solution, that prevents the ECtHR from carrying out the assessment, that indirectly concerns the principle of attribution of competences of the Union. The decision, thus, adopts a procedural nature for the ECtHR. The adoption of this type of decision implies an internal analysis that does not produce consequences to the progress of the appeal to the ECtHR and to the decision that it seeks to adopt. The role of limitation, as foreseen by the ECtHR, does not seem to have a negative impact on the authority, even of a symbolic nature, but on a position that privileges the Union and the Member States to respect other contracting parties.

5.PRIOR INVOLVEMENT IN THE PROCEDURE OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

The mechanism of prior involvement of the CJEU is completed by the adaptation of the individual appeal procedure. This is a provision that is not privileged but makes it necessary to respect the autonomy of Union law[40]. The system of liaison with the judicial authorities of the Member States and the CJEU has not functioned adequately. The accession agreement allows the CJEU to have and recover the competence attributed by Art. 267 TFEU. The draft agreement legitimises and provides for prior involvement. This mechanism involves a reflection on questions of a substantive and procedural nature that are interconnected. Art. 3, par. 7 as a new draft agreement contains the previous version and establishes the mechanism for applying the procedures. The CJEU does not have the opportunity through the preliminary reference to ascertain the compatibility with the rules of Union law and the protected rights of the ECHR and/or one of the protocols that the Union is adhering to. Paragraph 77 of the draft shows that the CJEU takes a position through a main action and, contrary to a preliminary ruling, limits itself to the interpretation of the provision of Union law, that is relevant to primary, secondary law. In this way, it ascertains the validity of the act of secondary law, that constitutes the legal basis of the action, omission of the Member State, giving rise to complaints of violation of rights under the ECHR law. This is a precision that is part of Opinion 2/13. Paragraph 66 of the first draft report does not provide for the possibility of consulting the CJEU to know the relevant interpretation for a provision of secondary law and also to ascertain its

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[40] R. Baratta, "Accession of the EU to the ECHR: the rationale for the ECJ's prior involvement mechanism", *Common Market Law Review,* 50 (5) (2013), 1307ss.

own validity[41]. The new draft report explicitly takes into account the draft accession agreement, providing for this possibility.

From a procedural point of view, Art. 3, par. 7 of the draft agreement limits itself and establishes the condition that satisfies the activation of the mechanism by leaving sufficient time to the CJEU to decide on the parties involved through a main procedure for the submission of their respective observations. According to the Union, the decision of the CJEU is requested and secured. Moreover, it is adopted without delaying the continuation of the relevant proceedings before the ECtHR. The draft report lays the foundations for the Union to adopt an internal procedure ensuring the opportunity to activate the prior involvement procedure, which is considered as possible. This is a point that seeks to resolve the objection of the CJEU in opinion 2/13 and to ensure the autonomy of the law of the Union, as a question that seeks to verify whether the CJEU has ruled on the question of law that identifies and constitutes the subject of a proceeding before the ECtHR by resolving the competent institution of the Union.

Art. 3, par. 7 of the draft agreement highlights, what is noted in the paragraph, namely the possibility of establishing the existence of a violation of the ECHR. The draft report seeks to explicitly terminate the procedure of the prior involvement of the CJEU without removing from the ECtHR the control over proceedings and the powers of its jurisdiction. Paragraph 78 of the draft report replies ad abundatiam the decision that the CJEU makes at the end of the procedure without being binding on the ECtHR. The prior involvement ensures respect for the autonomy of Union law in an appropriate manner and the negotiators define the essential elements of this mechanism by referring (also the sensitive issues of) the implementing legislation of the agreement. This aspect also raises limits and criticisms, including the effects of recognition of the decision that comes from the CJEU, as a result of the prior involvement procedure. This case law dates back to the jurisdictional system that provides for an international and incompatible agreement for the autonomy of Union law. It does not determine the competences of the CJEU and does not subject the Union to a specific interpretation of Union law. The CJEU, through Opinion 1/91, has highlighted its function as a jurisdictional body according to binding judgments.

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[41] CJEU, 18 December 2014, 2/13, Avis 2/13-Adhésion de l'Union à la CEDH, op. cit., parr. 242-243.

Through Opinion 1/91, the CJEU has taken a position on the compatibility of the relevant mechanism that has been envisaged in the draft agreement establishing the EEA area through the judges of the EFTA Member States, who have requested the interpretation of a provision of the agreement identical to the provision of the law of the European Union. This interpretation is not binding and allows the judge a quo to adopt different interpretations through the provisions of the EEA agreement that are in analogy with EU law.

Already in Opinion 2/13 the lack of binding effects that are external to the rulings from the CJEU do not create problematic terms. The CJEU states, in this regard, that: "(…) inherent in the very notion of external control is the fact that (…) the interpretation given by the Court (of Justice) of a right recognised by the ECHR does not bind the control mechanisms provided for by the latter and, in particular, the ECtHR (...)"[42]. The interpretation of the CJEU is binding for the ECtHR. This is a right protected in the ECHR that distorts the role of the ECtHR and empties its meaning of the very membership of the Union to the ECHR. The procedure of prior involvement is taken into consideration, which the CJEU finds and interprets rights that are contained through the CFREU. They are based on Art. 52, par. 3 of the same and correspond to the rights of the ECHR[43]. This interpretation is not mandatory for the ECtHR. This is a theoretical line that does not exclude what is guaranteed within the scope of the ECHR, corresponding to a right protected in the CFREU different from that granted by the CJEU itself.

The CJEU reiterated that this condition includes the very nature of external judicial control and: "(...) may apply to the interpretation given by the Court of Justice of Union law, including the Charter (...)"[44]. The discipline of prior involvement describes the new draft agreement, which appears to be suitable to

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[42] CJEU, 18 December 2014, 2/13, Avis 2/13-Adhésion de l'Union à la CEDH, op. cit., par. 185.

[43] The related explanations attached are part of the CFREU which are related to art. 52, par. 3 of the same and which thus include the list of rights at the time the adoption of the document excludes the evolution of the law and the legislation of the treaties thus considering correspondence with those of the ECHR. In particular the CFREU has brought some articles which correspond identically with those of the ECHR. For example art. 2 which corresponds to art. 2 ECHR. Art. 4 which corresponds to art. 3 ECHR. Art. 7 which corresponds to art. 7 ECHR. Art. 5 which corresponds to art. 4 ECHR. Art. 10 which corresponds to art. 9 ECHR. Art. 11 which corresponds to art. 10 ECHR. Art. 17 which corresponds to art. 1 of the additional protocol of the ECHR. Art. 19 which corresponds to art. 3 ECHR. Art. 49 which corresponds to art. 7 ECHR.

[44] CJEU, 18 December 2014, 2/13, Avis 2/13-Adhésion de l'Union à la CEDH, op. cit., par. 186.

preserve the autonomy of Union law at a formal level without guaranteeing in an absolute and assured manner its substantive autonomy. The references of the CJEU to the case law of the ECtHR and the risk of divergences of views between the courts appear to be limited. The explanations, which are attached to the CFREU and relating to Art. 52, par. 3, have specified that the reference to the ECHR includes the case law of the ECtHR. The CJEU takes into account the explanations of the exercise of its functions, as well as the divergences in a restrictive manner by the court thus trying to reduce and limit them. The ECtHR does not oblige and does not take into account the interpretations of the CJEU itself through the prior involvement and the autonomy of the law of the Union, which is not restricted by the discipline of this instrument thus providing for the new draft agreement. The greatest risk of interpretations comes into conflict and manifests itself when the CJEU finds itself interpreting a right protected by the ECHR and by the CFREU applying the relative specific factual situation before the ECtHR, that has had the opportunity to take a position. This is a scenario of internal effect which recognizes the decisions of the CJEU as well as making the prior involvement capable of ensuring the pursuit of the objective and the procedure which puts in place.

6.RESPONSIBILITY FOR THE VERIFIED VIOLATION, EXECUTION OF THE JUDGMENT AND ITS ATTRIBUTION

The individual appeal procedure is part of the draft accession agreement as well as the attribution of responsibility for the established violation. The draft agreement regulates the ECtHR ruling that divides the responsibility between the main defendant and the co-defendant, indirectly constituting the position that is part of the division of competences between the Union and the Member States that is not compatible with the autonomy of the law of the Union. It avoids the possibility, that is realized, through Art. 3, par. 8 of the new draft agreement, establishing that the Union and the Member States participate as co-defendants in a settlement procedure before the ECtHR, finding a violation for the ECHR and considering the main defendant and the co-defendant jointly responsible. The joint attribution clause allows to move to an internal level the actual allocation of responsibility of the Union and of its Member States, as well as the decisions that are inherent to the execution of the judgment.

In the relevant practice and in the international agreements that are concluded

by the Union, the Member States participate by recalling that the draft accession agreement results through trade agreements concluded with the Union without providing provisions relating to the attribution of liability. The reasons are therefore different. In general, in the trade agreements, the absence of the clause on the attribution of liability depends on the fact that the person responsible for the conduct coincides with the person responsible for the violation. Once it moves to the identification of the defendant among the Member States and/or of the Union, the responsible person is indirectly defined. These agreements tend to accession at the ECHR and the Union through the use of criteria for the attribution of conduct and liability. They take part in international disputes in place of the Member States by accepting and recognizing as responsible the ascertained violation of the agreement and not otherwise.

The adjustments to the individual complaint take into account and allow the Union (together with the Member States) to include cases of those responsible for the violation of the ECHR. The draft agreement shows the will of the Union to maintain a formal role within the framework of the individual complaint procedure before the ECtHR, thus preferring solutions that allow for the autonomy of Union law and its precise characteristics to intervene.

Art. 3, par. 8 of the draft agreement highlights criticisms made by the CJEU in Opinion 2/13. This article also contains a paragraph derogating from the general rule of joint liability by allowing the ECtHR to attribute the relevant liability only to one of the parties at risk of the same. The rule seeks to modify the position of the co-respondent in relation to any reservations opposed by him. The CJEU considered that this provision is not compatible with the autonomy of the Union law since it allows the ECtHR to take a position indirectly on the distribution of competences. This version of the draft agreement, as well as the last paragraph of Art. 3, par. 8 of the first version, have been deleted.

By reading jointly Art. 2, par. 380 and Art. 3, par. 8 of the new draft agreement, the conciliation of different needs is interpreted, as well as the position that respects the reservations that do not undergo formal alterations. The ECtHR does not declare that the defendants are jointly liable, leaving the task of identifying the methods of execution of the judgment and the reservations placed by the same. This interpretation is necessary due to the intervention of the draft report text that modifies the commentary to Art. 2, par. 3 of the draft agreement by those, who state that the maintenance of the effects of a reservation, that is placed

by the co-defendant precludes the ability for the ECtHR to declare jointly and liable the ascertained violation[45]. This clarification conflicts with that provided by Art. 3, par. 8 of the draft agreement, which raises a profile of incompatibility with the autonomy of the law of the Union. This draft agreement allows the co-defendant to detect at internal level the execution of its own judgment. As regards the relations with the ECHR, the existence of a reservation could be taken into consideration through the Committee of Ministers and in the event of a failure to execute the judgment of the ECtHR, which decides to activate the procedure according to Art. 46, par. 4 and 5 of the ECHR. The public documents are related to the negotiation and ask the modification of the internal regulation of the Committee of Ministers regarding the supervision of the execution of judgments and the related conditions for the amicable settlement with the aim of including this particularity[46].

The draft agreement as well as the draft report do not provide for the relative methods of execution for the judgment. The choice within the spirit of autonomy of the law of the Union seems to be acceptable. The attempt to ensure the adhesion of the Union to the ECHR occurs in a similar way and according to the contracting parties given that the draft agreement does not establish any other precise indication according to the content of the judgments, that the ECtHR pronounces in the relative appeals against the Union and together with other Member States of the Union.

In order to enforce the judgments of the ECtHR as provided by Art. 46 ECHR[47] we must take into account the principle of international law since a state, an international organization is the responsible author for an unlawful act and has the obligation to restore the situation existing before the unlawful act was committed and providing that the restitution is not "(…) impossible and does not

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[45] Council of Europe, 18th meeting of the CDDH ad hoc negotiation group ("46+1"). Final consolidated version of the draft accession instruments, Appendix V, 21 March 2023, 46+1(2023), op. cit. para 71.

[46] The Committee of Ministers at the 964th meeting of the representatives of 10 May 2006 adopted the regulation which after the relevant amendments with final on 6 July 2022 at the 1439th meeting of the ministerial representatives of the Council of Europe: https://rm.coe.int/09000016806dd2a5

[47] W.A. Schabas (ed), *The European Convention on Human Rights. A Commentary,* (Oxford University Press, Oxford, 2015), 1879ss.

entail a burden disproportionate to the benefit deriving from restitution rather than compensation (...)"[48]. The Union and one or more of the Member States are in the position to be able to enforce the judgment pronounced by the ECtHR and to fulfill the obligation of international law from a contract performed liberally. The enforcement of the judgments of the ECtHR is presented in a complex way due to the content they may have. The relevant legislation of the implementation of the accession agreement entrusts a discipline that awaits the enforcement brought in respect of the matter in time.

7.ACCESSION AGREEMENT: GENERAL FRAMEWORK AND IMPLEMENTATION

The agreements concluded by the Union according to Art. 216, par. 2 TFEU are binding by the institutions and the Member States. An agreement concluded by the Union creates the related effects[49]. The CJEU until the Haegeman case was relied on provisions that made up an international agreement "(…) from the moment of entry into force, (they become) an integral part of the legal system (of the Union) (...)"[50]. As a consequence, the provisions of an agreement have the quality of producing direct effects without any other act adopted by the institutions and/or the Member States. The decision to conclude an agreement expresses the will of the Union to respect and determine the incorporation of its own legal system[51]. On the contrary, the provisions of the agreement need to be complete. This obligation does not reflect the international constraint but satisfies the entry into force of the agreement itself that enters and is part of it[52].

Treaties do not include and do not provide for any legislation for the

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[48] See Art. 35DARIO. ECtHR, 30 June 2009, Verein Gegen Tierfabriken Schweiz (VgT) v. Switzerland (N°2), case n. 32772/02, par. 86.

[49] CJEU, 26 October 1982, C-104/81, Kupferberg, ECLI:EU:C:1982:362, I-03641: "(…) to ensure compliance with the commitments arising from an agreement concluded by the Community institutions, the Member States fulfil an obligation (...) towards the third country concerned (...)".

[50] CJEU, 30 April 1974, C-181/73, Haegeman v. Belgium, ECLI:EU:C:1974:41, I-00449

[51] CJEU, 30 April 1974, C-181/73, Haegeman v. Belgium, op. cit., par. 5. 14 December 1991, Avis 1/91, Accord EEE-I, op. cit., par. 37.

[52] I. Macleod, I.D. Hendry, S. Hyett, *The external relations of the European Communities*, (Oxford University Press, Oxford, 1996), 129ss.

implementation of international agreements that are concluded by the Union. This topic is a marginal object of attention by the doctrine itself. It is observed that is difficult to reconstruct in a systematic way a practice that implements, applies the agreements that each of them requires in various types of actions, inactions as part of the Union and the Member States[53]. Already the Kupfeberg case has clarified for the CJEU that the "(...) measures necessary to implement the provisions of an agreement (...) must be adopted on the basis of the current state of law (...) in the sectors affected by the agreement, sometimes by the institutions (...) sometimes by the Member States (...)"[54].

The obligations arising from the accession to the ECHR are complex and the related implementation of the agreement implies the substantial nature of procedures, institutions and funding that require the adoption of ad hoc measures. This is a different discipline that requires the adoption of a single act of national law as well as the additions to the relevant Rules of Procedure from the CJEU that are dedicated to prior involvement.

The implementing measures are the act of adoption for this purpose. Through Art. 288 TFEU the appropriate regulation is included. The relative constitutional relevance of the accession is linked to the procedure that adopts this act and the legislation that ensures full involvement of the European Commission, Council and European Parliament. The legal basis for this act derives from the same Art. 6, par. 2 TEU and the competence of accession to the ECHR, as well as the conferral of powers that equips the implementing acts of an agreement.

8.PARTICIPATION AS A CO-RESPONDENT

The draft agreement highlights some amendments relating to the individual appeal to the ECtHR to adapt its values of autonomy of the Union. They are complemented by the national implementing legislation. The related inter-party appeal calls in particular for the adoption of implementing measures. In particular, Art. 4, par. 4 of the draft agreement establishes that the CJEU should ensure for the Union the relevant time sufficient to establish whether an appeal between Member States has been submitted to the ECtHR for the relevant interpretation and application of Union law. The measures envisaged are necessary to identify

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[53] P. Eeckhout, *EU External Relations Law,* (Oxford University Press, Oxford, 2011), 329ss.

[54] CJEU, 26 October 1982, 104/81, Kupferberg, op. cit., par. 12.

the European Commission, which defines, in addition to the act that has been adopted, the criteria and the timescales that should be followed.

The activation of the participation as co-respondent for the Member States and the Union of the procedural aspects and the national effects of the judgment puts the prior title of involvement of the CJEU and beyond the position of responsibility between Member States and the Union, which thus ensues the execution of the judgment.

Implement Art. 3 of the draft agreement requires in an individualized manner the institution that entrusts the decision of the activation of the participation, as well as the act of adoption for the effects that produce the related control instruments. The European Commission as representative of the Union has the role within the scope of the ECHR that the final choice of control and cooperation is not yet defined in a decisive manner. The related act that the European Commission establishes whether the Union and the Member States participate as co-respondent to an appeal before the ECtHR should have the nature of an enforceable decision relating to the provision provided for in the regulation implementing the agreement. Ensure that the internal procedure of the Union does not determine the time, that is extended in front of an appeal to the ECtHR. The regulation implementing the agreement provides for the terms within which the European Commission adopts the related decision. A decision that contains elements that are necessary for the interested parties especially for the Member States that understand as a rationale for choice for the institution that allows the judicial control. It is appropriate that the implementing regulation indicates the essential content, which includes the relevant references for the appeal before the ECtHR, the provisions of Union law of a secondary and primary nature, which are in conflict with the ECtHR and the possible articles, which are part of the CFREU and the screening of the basis of the pre-established criteria for deciding the co-respondent mechanism. The work carried out by the European Commission seeks to justify the decision, which is elaborated and becomes an integral part of the reasoned statement sent to the ECtHR.

The involvement procedure for Member States and the admission of the Union and the Member States as co-respondents is in the spirit of reasoned assessment by the Union thus envisaging a procedure that allows the European Commission and the Member States that are interested to give consultations and respecting the decision to take, share information that is available in relation to the dispute

before the ECtHR[55]. This solution seems in line with the needs and choices of the European Commission that have matured according to the principle of sincere cooperation. In practice, the communication of a complaint to a Member State and/or to the Union before the ECtHR, the European Commission immediately activates the consultation procedure for the Member State(s) concerned adopting thus its own position. In analogy, the procedure follows the hypothesis that the Union and the Member States are invited by the ECHR to join its proceedings.

This type of information takes into account the European Commission. By adopting the decision, the European Commission observes the relevant criteria that generally outline the draft accession agreement and specify the implementing regulation of the same agreement. It is, therefore, reasonable that the institution after having ascertained the factual situation, that is the subject of the appeal, applies the law of the Union and evaluates each case separately to satisfy the substantive conditions to activate the co-respondent and distinguish the appeals that are addressed against to one or more Member States. The draft agreement highlights the ECtHR that brings together the provisions of the Union relating to the appeal communicated to several Member States. The ECtHR thus communicate to the Member States the information that is relevant for the appeals against the EU.

The first type of appeals for the institution highlights and creates, through the criterion of attribution, the competence from the so-called "Exculpating Normative Control" for the evaluation and satisfaction of the conditions of the activation of the co-respondent. With exclusive mode it does not allow a precise response to the needs based on the introduction of the participation in the title of the co-respondent. The criterion of competence is based in a way that is shared by the principle that the subject has the competence to remedy the relative violation and does not allow to identify in an unequivocal way the subject, who is responsible for an illicit conduct, since it is a violation of fundamental rights. As an example are the matters that concern the competence of a concurrent type and the case that the Union has the exclusive competence of a matter. The Union more than the competence of an exclusive nature also provides for the relative acts that,

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[55] See art. 6 of the Regulation (EU) No 912/2014 of the European Parliament and of the Council of 23 July 2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party, OJ L 257, 28.8.2014, p. 121–134

for the Member States, complete the regulation. The violation of a fundamental right is the result of a bad conduct for the executing Member State.

The exclusive use of the criterion, in this regard, is not decisive. The criterion of the "Exculpating Normative Control" provides for the participation of the Union only in cases where the Member State is the executor of an act to be adopted. This is a criterion that has been accepted by the Union within the scope of the Montego Bay Convention on the Law of the Sea and is used by the ITLOS. Within the scope of dispute resolution procedures in the agreements of the WTO this criterion is based on the DSB in a technical and systematic way.

Within the framework of accession of the ECHR, which exclusively and as a requirement criterion limits the participation of the Union only to the relevant appeals, that resemble those of the past, i.e. the Bosphorus-Michaud. It is evident that the intervention of the Union is appropriate for the situations that allow the CJEU to interpret the relevant norm of the Union law and to rule on the validity through a prior involvement. In this regard, the European Commission finds and ascertains between the Union and the Member State the exercise of the competence thus adopting the act and its own execution, that arises from the violation of the ECHR. The act under investigation adopted by the Union and the institution carries out the assessment as a margin of autonomy that puts and leaves to the act and the Member States its own implementation.

In a different way that concerns the appeal before the ECtHR, the Union is the main defendant and the Member States and the European Commission are directly called upon to assess the provision of primary law. In this way, a sufficient margin of autonomy is left that allows the application in a manner compliant with the ECHR. In the event of doubt, the letter compatible with the ECHR allows the institution and admits the participation of the Member States as co-defendants. It is noted that the Union is the main defendant and the Member States participate as co-defendants. In this way, it is not possible to involve the CJEU. It will be task of the European Commission to carry out this type of assessment.

The content of the decision draws attention to the challengeability of the act. Art. 263, par. 1 TFEU and the CJEU carry out a review of the legitimacy of the executive decision of the European Commission with the aim of assessing the existence of a defect of substantial forms and the violation of the treaties, as well as the accession agreement and the implementing regulation and any other rule inherent to its application. In an analogous manner the European Commission

leaves the terms for adopting the activation decision for the co-respondent without considering the interest of acting in an action for failure to act according to Art. 265 TFEU.

On the other hand, the parties are interested in appealing. These are the European Parliament, the Council and the Member State also defendant in the main appeal. It is specified that the appeal is directed against the Union and the European Commission. It decides whether the participation of the Member States as co-defendants alone and/or collectively as well as the Council may have an interest in challenging the decision coming from the European Commission.

In an immediate manner the right of active legitimacy for the appellants identified in a main appeal at the ECtHR as well as the European Commission means their participation in the capacity of co-respondent without directly concerning the timing and the non-participation of the co-respondent, which does not cause prejudice to the conduct of an appeal before the ECtHR and does not even allow to declare the appeal ratione personae as inadmissible.

Criticisms arise in relation to the references of the appeal for annulment and to the action for failure to act on a temporal level. The time of the two proceedings is not compatible with the need not to extend the time of the appeal to the ECtHR. The draft accession agreement does not comply with the procedure for activating a co-respondent mechanism. The draft report limits itself only to specifying what happens in a timely manner once the Union has received the relevant information[56]. The ECtHR has sent to the Union and the Member States the relevant procedure. Art. 62 of the draft attributed to the ECtHR the right to establish the limit within which the High Contracting Party communicates its decision of refusal and/or acceptance to the ECtHR itself.

Suspending the proceedings before the ECtHR means limiting only the necessary time and carrying out the analysis that draws up the reasoned statement. A prolonged suspension of the proceedings allows the relevant appeal to be carried out before the CJEU, which does not seem to be true. The challenge of the relevant decision from the European Commission regarding the activation of the co-respondent to a failure occurs in limited cases allowing the CJEU to rule on the relevant issue indirectly given the positions on the issue of the division of competences between the Union and the Member States and the autonomy of

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[56] See par. 60 of the project.

Union law.

Trying to coordinate different needs it is necessary to separate the relative subject of the external proceeding before the ECtHR. After the production of the reasoned statement, that certifies the relative need to activate the participation in the title of co-respondent, it is decided not to use a proceeding before the ECtHR that regularly resumes. The same also falls when the European Commission lets, the terms that are foreseen by the draft agreement, begin to run by communicating the reasoned statement without producing this document. These considerations assume that the ECtHR invites the Union and/or the Member States to join its proceeding.

The appeal for annulment and the action for failure to act shall comply with the time limits set by the Treaties. It is an argument that is connected to the external effects of the judgment that the CJEU pronounces as a result of its appeal. It is distinguished by the case that the decision of the CJEU is pronounced at the conclusion of the procedure before the ECtHR and the opposite case. In this case, the possibility of integration of the co-respondent in the relative appeal before the ECtHR is foreseen. At a later stage, the provision of the draft agreement is added providing for the automatic entry of the co-respondent before a request by the contracting party to the well-founded judgment of the CJEU. This request cancels and replaces the previous reasoned statement that is produced by the European Commission. The draft accession agreement does not set time limits relating to the request for participation as a co-respondent and this occurs even before the pronouncement of the judgment of the ECHR. On the contrary, the CJEU considers the participation of the co-respondent as light and superfluous, which ends its participation in what is foreseen in the draft agreement.

From an internal point of view, it is necessary that the insertion of a provision in the implementing regulation requires the Union and the Member States to activate and terminate even late the participation as co-respondent in the proceedings before the CJEU in a way to ensuring the execution of the judgment of the CJEU. In this way, a precise allocation of responsibility for the violation of the rights provided by ECHR is guaranteed.

If this is not the case, the decision of the CJEU is pronounced after the relevant conclusion of the procedure at the ECtHR. The implementing regulation of the agreement thus provides for compliance with the decision of the CJEU with the objectives of execution of the judgment pronounced by the ECtHR, the Union

and the Member State(s), acting as states declared jointly responsible. On the contrary, the CJEU does not consider necessary the participation in the title of co-respondent. It introduces the provision of the implementing regulation, attributing to the principal defendant the duty to execute the provision relating to the execution of the judgment of the ECtHR. These are considerations that are developed with reference to the case that the Union and the States are addressed to an invitation to the ECHR to join their proceedings.

9.PRIOR INVOLVEMENT AS A PROCEDURE WITH INTERNAL EFFECTS WITHIN AND THROUGH THE RULING OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

The report as well as the draft agreement were limited to the discipline of prior involvement in a general manner. Thus, reference is made to national legislation to regulate the procedure. The provision of the regulation implement the agreement in a unitary manner as well as the amendments to the regulation of the procedure of the CJEU.

In the draft agreement, the national legislation establishes that the subject is responsible for initiating its own procedure. The role of the European Commission is part of the general framework of the appeal before the ECtHR, as well as the activation of the participation of the co-respondent through prior involvement of the CJEU. Thus, we can doubt, based on the treaties, that the European Commission does not have the necessary competence to carry out the related task. According to Art. 13, par. 2 TEU, the limits of the attributions to the institutions come from the same treaties, the procedures and the conditions of finality that are foreseen. It is the treaties that establish for the European Commission to appeal to the CJEU through direct appeals for failure to act, annulment procedure, and through the infringement appeal. Instead, the nature, object and purpose of the prior involvement is in relative assimilation with the preliminary reference. A literal interpretation provides and excludes that the European Commission can appeal to the CJEU through prior involvement and without making the relative amendment to the treaties. The draft agreement does not provide for anything and does not find application in the case law of the CJEU since an international agreement attributes other new competences to the institutions and does not alter the essential character of the powers attributed by their own treaties.

This is a criticism that goes beyond, without however modifying the Treaties, accepting the interpretation of the usual expression "The Union accession to the ECHR", as used in Art. 6, par. 2 TEU, which is noted in this regard: "(...) qualified commitment of means, rather than a genuine obligation of result: the finalization of the EU accession indeed requires several conditions to be met (…)". Art. 6, par. 2 TEU deals with the qualification of the Union to join the ECHR by allowing the institutions the task of relative functions that are necessary for the accession pursued in an effective manner. It is concluded that the task of the European Commission is to supervise the application of Union law under the relative control of the CJEU[57]. This is a control that interprets and includes the activation of the prior involvement and the function of providing the relative elements of interpretation that are necessary to ensure the correct application of Union law. The internal procedure for the activation of the prior involvement directly regulates the regulation of implementation of the agreement without intervening in its own Treaties.

The possibility of involvement of the CJEU within the framework of the procedure and by prior involvement is assessed by the European Commission through the relevant analysis of activation of participation and as co-respondent for individual applications to the ECtHR against one or more states. This choice involves the CJEU and contains the executive decision establishing the activation of participation as co-respondent. It is ensured that the participation of the ad hoc committee elaborates this type of decision. The European Parliament as well as the Council can authorise and submit their observations in relation to this aspect. This provision is in line with what is provided for through the draft agreement, which allows for the relevant delays for the conduct of the main appeal.

Within the framework of the substantive profile, the relative choice of activation of the prior involvement is not indifferent and without difficulty. The draft agreement limits itself to providing in a general manner the involvement of the CJEU which ensures the act, the omission resulting in the violation of the ECHR, which contests the main appeal at the ECtHR and calls into question the compatibility and the provision of Union law as a legal basis. If the CJEU has not had the opportunity to decide on this type of compatibility, the provision with the ECHR could not consider situations which may be manifested.

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[57] See art. 17, par. 1, TEU.

In the functioning of the procedure the control by the European Commission to carry out the judgment of the CJEU makes the dispute before the ECtHR by preliminary ruling and after request of the judge of last instance and of the principal defendant Member State. The non-judgment means not to determine autonomously the need to refer to its own CJEU. In a specific case the exceptions of the obligation of preliminary reference are integrated through the Cilfit[58] judgment as well as by the CJEU. It is not necessary to ensure in a uniform manner the precise interpretation and application of the law of the Union. The condition contemplated through the Cilfit case changes the circumstances and evolves the law that makes it appropriate a new judgment between the CJEU. As a special case are the disputes that concern the violation and the related complaints of the ECHR by implementing a CSDP act. In this case the CJEU could not decide through a prior involvement and after the related response to propose.

The draft agreement refers to the ECHR. The CJEU deals with the validity of the CFREU and the general principles, according to Art. 6, par. TEU. The implementing regulation evaluates and considers the presence of a preliminary ruling of the CJEU, as well as the interpretation of the relevant provision of Union law within the main proceedings of the CFREU as a response to the right that is protected by the ECHR and the rights allegedly violated. According to the coordination clause, that is part of Art. 52, par. 3 CFREU, the condition of activation of the prior involvement is not satisfactory. Thus, a correspondence of the rights, that are part of the possibility that the prior involvement of the CJEU is requested and the verification of the conditions that are not excluded in an autonomous manner[59], is considered. These are considerations that are valid as parameters that use for the CJEU a precedence ruling as a general principle.

The scenarios that include the implementing regulation are very complex. They ask whether the European Commission is in a position to carry out assessments within the timeframes that the situation requires. The prior involvement is thus activated according to the conditions that impose it, according to a discipline that requires the European Commission to involve the CJEU whenever preliminary rulings on validity or interpretation are found within the

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[58] CJEU, 6 October 1982, C-283/81, Cilfit, ECLI:EU:C:1982:335, I-03415.

[59] T. Lock, End of an Epic? The Draft Agreement on the EU's Accession to the ECHR, *Yearbook of European Law,* 31 (1) (2012), 162 ss.

scope of the dispute that led them to the appeal before the ECtHR.

If we follow this path, the CJEU assesses the conditions that require the ruling through prior involvement. Thus, the CJEU is allowed to carry out through the European Commission the necessary elements and define the intertwined facts through proposals that induce the need for a new ruling from the CJEU, according to the interpretation and validity of Union law[60]. As regards the implementing regulation, it is foreseen that the timeframes for the European Commission to decide whether or not to refer to the CJEU the issues inherent to the conduct of the procedure, also include the time and the faculty for the parties involved through the main proceedings to submit observations to the CJEU and to any other aspect that is relevant and respects the statute of the CJEU relating to the regulation of procedure.

In relation to prior involvement, the internal effects recognise the judgments of the CJEU. The prior involvement allows and restores the interpretation of the law of the Union. It also challenges the invalidity of an act making appropriate the explicit spirit of the judgment of the CJEU, which is pronounced through a procedure with the same effects as a decision to a preliminary reference, according to ex Art. 267 TFEU. This has an interpretative and valid nature. This precision, also, ensures that the judgments are established according to the content and scope of the rights guaranteed in the ECHR, which correspond to rights protected in the CFREU and know the institutions of the Union and the jurisdictions of the Member States. The internal effects of the judgments resulting from the prior involvement clarify and add what is pre-established by Art. 3, par. 7 of the draft accession agreement. It should be noted that it has not affected in a negative way the autonomy of the law of the Union. The instrument of prior involvement is comparable to the objective that leads to preliminary reference without altering the functions of the CJEU provided for by the treaties. The silence of the new draft agreement also suggests the lack of will of the negotiators, who proceed along this path.

The main issue of internal nature is considered as an opportunity that specifies the aspect of the implementation discipline of the agreement. It also integrates the procedural regulation from the CJEU with the related references. The provision of the autonomy of the law of the Union is effectively safeguarded. The

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[60] CJEU, 9 April 2008, C-305/07, Radiotelevisione italiana Spa, ECLI:EU:C:2008:208, I-00055.

interpretation of the act that comes from the CJEU is accepted. The finding of the invalidity profiles of the act leads to and adopts the necessary measures as well as remedies to ascertained illegitimacy. The orientation of a jurisprudence that consolidates the preliminary ruling and ascertains the illegitimacy is extended to an act that in reality: "(…) imposes on the institutions concerned the obligation to adopt the necessary measures to remedy the ascertained illegitimacy, the obligation provided for in Art. 266 TFEU being applicable by analogy (...)"[61].

10.ATTRIBUTED RESPONSIBILITY AND EXECUTION OF EUROPEAN COURT OF HUMAN RIGHTS JUDGMENTS

When speaking of accession to the ECHR we refer to the relative submission of the institutions and bodies of the Union to the respect of the decisions of the ECtHR. The Opinion 2/13 of the CJEU reiterated that: "(…) the Union's competence in matters of international relations and its capacity to conclude international agreements necessarily entail the ability to submit to the decisions of a court established or designated by virtue of such agreements (…) the interpretation and application of their provisions (…)"[62]. The execution of judgments is a necessary condition for the accession of a real and logical standard that ensures the order of the Union.

The ECtHR sentences already demonstrate the finding of the breach committed by the defendant[63]. The choice of the relevant means to remedy is left to the defendant state. It is the ECtHR itself that specifies and entails the obligation to compensate the interests and the sums that are awarded as just satisfaction. It adopts also individual measures to restore the status quo ante. The execution of the ECtHR sentences is incompatible with the act of Union law that raises procedural issues linked to the autonomy of Union law. Equally important is the pilot judgment that the ECtHR has identified the nature of the structural

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[61] CJEU, 28 January 2016, joined cases C-283/14 and C284/14, CM Eurologistik and GLS, ECLI:EU:C:2016:57, published in the electronic Reports of the cases, par. 48.

[62] CJEU, 18 December 2014, 2/13, Avis 2/13-Adhésion de l'Union à la CEDH, op. cit., par. 182. 14 November 1991, Avis 1/91, project EEE-I, op. cit., parr. 40 and 70.

[63] ECtHR, 30 June 2009, Vereingegen Tierfabriken Schweiz (VgT) v. Switzerland (n. 2), case n. 32772/02, par. 61; 13 June 1979, Marckx v. Belgium, case n. 6833/74, par. 58; 8 July 2003, Lyons and others v. United Kingdom, case n. 15227/03; 30 March 2004, Krčmář and others v. Czech Republic, case n. 69190/01; 12 May 2005, Öcalan v. Turkey, case n. 46221/99, par. 210.

problem and the dysfunction of the remedial measures that the defendant party adopts in execution of its own judgment.

The implementation of the accession agreement identifies the modalities that are suitable to ensure the relevant judgments from the ECtHR even when the Union is in the role of respondent and/or has been named as respondent together with other Member States and that effectively follow, guarantee what negatively impacts the autonomy of the law of the Union. The discipline concerns the execution of judgments of the Union and/or of more Member States that participate in the title of co-respondent. From a procedural point of view, the execution of judgments of the ECtHR, that the Union and/or the Member States are in the role of co-respondent, takes into consideration the place and the identification of the person responsible for the ascertained violation. It is possible to introduce in the implementing regulation the provisions, that are necessary for the European Commission, when it receives the judgment of the ECtHR that is used in this sense. The discipline distinguishes the case in which the Member States are co-respondents from that in which the Union itself will be.

11.MEMBER-STATES AS CO-RESPONDENTS AND EXECUTION OF JUDGMENTS

The violation that is noted from the ECtHR originated from the incompatibility of the provision of primary law with the ECHR and/or from an erroneous interpretation that finds application to the provision that is disputed by the institutions. The outcome of the evaluation leads to different scenarios. A first orientation leads to the modification of the treaties, to the annexed protocol, that is in line with the Matthews judgment[64]. Another second orientation makes it appropriate to adopt an interpretative act that clarifies the attribution of the disputed provision compatible with the ECHR.

This hypothesis reflects the subject, the unchanged treaties that materially deal with fulfilling the function of the procedure and the related act. This is a solution, that provides in the implementing regulation, at the time it is received, the judgment of the ECtHR. The European Commission consults that the Member States evaluate the opportunity to activate the related procedure according to Art. 48 TEU. If this is the conclusion, the European Commission submits to the

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[64] ECtHR, 18 February 1999, Matthews v. United Kingdom, op. cit.

Council a draft amendment that has primary law. The Council then transmits the draft to the European Council, that is responsible for the position of deciding and continuing the examination of the amendments that are proposed or not. Thus, the European Council decides and follows the proposed amendment, as a result of an uncertain procedure that subordinates the ratification of all the Member States.

The role of the European Commission highlights that such attribution is similar with the implementing regulation that cannot in any way put a limit to the government of each Member State, to the European Parliament and this because it does not have the possibility to activate the review procedure autonomously. The European Commission is not bound to activate Art. 48 TEU since it exclusively provides for the evaluation of the opportunity to act in this sense.

The adoption of an interpretative act avoids further violations from the ECHR. The competence of the European Council to continue in this sense is doubtful in the event of an intervention to amend the treaties. The political institutions already possess sufficient prerogatives to adopt an interpretative act that is related to the provision containing the treaties and/or the annexed Protocol. The interpretation of the provision of primary law does not follow the revision of the provision of primary law and is incompatible with the rights protected by ECHR. This possibility is eventual and cannot be considered as a way of executing the judgment of the ECtHR.

Enforcing the judgment of the ECtHR requires the amendment and repeal of a secondary law act of a general and/or individual nature, thus adopting the application of the primary law provision that is incompatible with the spirit of the ECHR. In this case, it is expected that the implementing regulation and the institution, body, or organism that issued the act are indirect and involved with the measures, that are appropriate to ensure the execution of the judgment of the ECtHR. The adoption of the act and the individual measures integrate the necessary condition for the consent of the applicant to the main cause according to ex Art. 340 TFEU to compensate for other damage suffered[65].

Compensation and damages may include those established by the ECtHR. The implementation of the agreement distinguishes the case of violation of the ECHR on which the incompatibility of the provision with a primary right depends from

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[65] A. Thies, *International Trade Disputes and EU Liability,* (Cambridge University Press, Cambridge, 2013), 46ss.

the fact that the violation of the ECHR arises from an erroneous interpretation and application of the provision to a primary right by the institution, the body, the organism of the Union. The responsibilities are solid for the Member States and the Union. The Union and the Member States provide for the distribution of financial responsibility in a different way. The agreement contains a decision for the European Commission that is addressed to the Member States and communicated to the Council and the European Parliament. The implementing regulation provides for the deadline once the decision comes into force and the Member States pay through the budget of the Union the relative sum that corresponds to the compensation of their competence. The payment of compensation to the applicant is made in a direct way by the European Commission.

12.THE UNION AS CO-RESPONDENT AND EXECUTION OF JUDGMENTS

The enforcement of the judgment by the ECtHR can be regulated by inserting in the implementing regulation a provision that provides for consultation between the European Commission and the Member States to identify the person responsible as well as the violation that establishes between the Union and the Member State the burden of following the judgment. The implementing regulation provides in time for the European Commission to receive the judgment and to consult for the Member States, through the relevant committee, the adoption of the decision to enforce the judgment. This decision is subject to judicial control by the CJEU through the action for annulment by the Member State that is the defendant as well as by the institutions of the Union. The related conditions that legitimise the action by the actors of the appeal to the ECtHR are not satisfactory. The attribution of responsibility is in itself autonomous and does not produce effects on them while the appellants may have an interest in acting with an action for failure to act given that the European Commission after the judgment does not adopt some other decision.

The content of the ECtHR judgment distinguishes the cases comparable to any case such as the Bosphours-Michaud since the situations for the violation of the ECHR are the result of a correct application of the provision of secondary and primary law and of the law of the Union by the Member State and in the case that the provision is controversial and leaves a margin of autonomy to the Member

States with an appropriate way to avoid the related violation.

In this spirit, it is recalled what we predicted previously according to the proposal of G. Gaja and fron cases like the Bosphorus-Michaud where the responsible for the violation ascertains what is identified in the Union. This does not mean that necessarily the execution of a judgment falls exclusively under its own responsibility. The ECtHR provides for compensation for damages, which certainly corresponds from the Union. It seeks to repair the violation that is ascertained and intervenes by modifying the national act that has materially produced the violation. It also adopts a new one as a task for the Member State that is in the capacity of defendant and follows this path.

The procedural autonomy for the Member States as well as the implementing regulation define the time within which a Member State as defendant is activated to follow up on the decision of the European Commission and the Union thus provides for the related payment of damages. Within the spirit of loyal cooperation it is established that the Member State should communicate to the European Commission the related activation measures. The failure to execute the decision by the European Commission allows the infringement procedure against the Member State that is in default. Thus, the appellant presents itself before the action for failure to act to execute the decision by the Union which is entitled to act in default. The person responsible for the execution is also the Member State since the appellant can use the means of communication to report to the European Commission the related failure to comply. Outside the procedures of control of execution, the judgments from the ECHR and the internal remedies to the national legal system of the Union undoubtedly contribute to the strengthening of the protection of the individual according to the execution phase of the judgments of the ECtHR.

The execution of the judgments concerns situations similar to the Bosphorus-Michaud case, observing that in this way it is appropriate to repeal and modify the act of the law of the Union, that is indirectly incompatible with the ECHR through the judgment of the ECtHR. Art. 266 TFEU, as a provision of the implementing regulation, provides that the subject that has adopted the act is incompatible with the ECHR, evaluating thus the measures necessary to save their incompatibility. The implementing regulation leaves the institutions, bodies, organisms of the Union that choose the methods through which it intervenes. The possibility of adopting an interpretative act, that is suitable to avoid other violations of the

ECHR, is not excluded. This regulation is in line with the autonomy of the law of the Union that does not constitute a limit to the institutions, i.e. bodies and organisms that intervene by repealing, modifying acts of secondary law incompatible with the agreement concluded by the Union[66].

The European Commission together with the Member States consider that the person responsible for the infringement is the Member State itself as the main respondent in the appeal to the ECtHR. Such a state provides for an ad hoc procedure, and undertakes to communicate to the European Commission the measures to adopt and implement the judgment. The failure to communicate within the time limits provides that the implementing regulation authorizes the European Commission to initiate an infringement action against the state under investigation. The applicant thus contacts the institution to inform of the non-compliance.

The implementing regulation on financial responsibility provides for the timeframes by which the European Commission and the Member States consult the objectives to be achieved through an agreement on the distribution of financial responsibility. The payment of the amount is made directly by the European Commission. The implementing regulation indicates the timeframes by which the Member State should pay the share of its competence to the Union budget.

CONCLUDING REMARKS

The present investigation has highlighted some points relating to the individual appeal to the ECtHR within the constitutional framework of the Union. The compatibility of the individual appeal model recalls and provides for the compatibility screening with the treaties carried out by the CJEU, according to Art. 218, par. 11 TFEU, which necessarily complies with primary law[67].

Going beyond the national implementing legislation, the discipline of an individual appeal is in line with primary law. National law also plays a specific role, which ensures indirect damage to the constitutional framework of the Union.

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[66] Council Regulation (EC) No 1515/2001 of 23 July 2001 on the measures that may be taken by the Community following a report adopted by the WTO Dispute Settlement Body concerning anti-dumping and anti-subsidy matters, OJ L 201, 26.7.2001, p. 10–11. A regulation that has been adopted by the institutions and has modified secondary legislation and is found to be incompatible with the agreements of the WTO after the relevant recommendation from the DSB.

[67] CJEU, 18 December 2014, 2/13, Avis 2/13-Adhésion de l'Union à la CEDH, op. cit., par. 150.

The discipline relating to the clause of attribution of conduct provides for the draft agreement and does not present criticisms from any of these. Likewise, the procedure for activating the co-respondent has no elements of incompatibility with the principle of attribution noted with the opinion 2/13. The different profiles of the discipline are implemented by national law ,which ensures the principle of loyal cooperation between the Union and the Member States.

The regulation of prior involvement seems complex. From a procedural perspective, doubts arise about the possibility of attributing to the European Commission the power to initiate the procedure without intervening on the Treaties. From a material perspective, it is necessary to consider the discipline suitable to ensure that the CJEU is not involved in the autonomy of Union law, as a substantial and compromising result due to the absence of its own pronouncement. The activation of prior involvement gives a response that requires ensuring compliance with the principle of loyal cooperation between the European Commission and the CJEU. Such a profile affects the autonomy of Union law. The effects recognize the judgments from the Court through this procedure. The discipline provides for the draft agreement that does not ensure in an absolute manner the substantial autonomy of Union law due to the lack of external effects that come from decisions of the CJEU. In this spirit, even the internal effects of the decisions follow the same path. The prior involvement within the role of preliminary reference clarifies the decisions from the CJEU that are pronounced and based on the procedure of the effects of preliminary reference. The draft agreement remains silent on this profile and national legislation should provide.

The profile that preserves the constitutional framework of the Union concerns the attribution of responsibility and the execution of judgments from the ECtHR. The draft agreement has no formal critical profiles. The definition of a national discipline suitable to ensure substantial respect for the precise characteristics of the Union and its own law is in compliance with the international obligations that the Union assumes through the accession of the ECHR, which seems to be contrary.

The dubious profile of constitutionality through the accession to the ECHR has many aspects regarding the issues that have to do with direct and incidental way with the constitutional framework of the Union. We are very limited in our investigation on the central aspects of the accession process, that is to the

individual appeal before the ECtHR, that proposes solutions that seem to ensure such evidence, i.e. a profile system that realizes the accession to the ECHR that contributes and strengthens the protection of individuals. The draft agreement does not present critical profiles and respects the autonomy of the law of the Union since national law has to do with different elements that include the individual appeal procedure that presents itself in a discussed and contrasted way. A discipline to be effective for the individual appeal should also have possible effects. Such a long and complex process needs the will of the Union and of the Member States. One year after the adoption of the draft agreement, the lack of news from the internal negotiations on the extension of jurisdictional control from the ECtHR to the CSDP sector points to the conclusion of a road to adoption that is long and certainly also full of complexities and obstacles that will have to be faced.