Coping with Crisis: Towards a Variable Geometry in the Jurisprudence the European Court of Human Rights?

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Introduction

The European Court of Human Rights, its continuously evolving case law, and the effects of its judgments in domestic, transnational and international contexts have attracted significant academic attention from multidisciplinary perspectives. Scholars of the European Court of Human Rights have studied the genesis and development of the Convention system,[1] issue-specific contributions of the Court's case law to human rights interpretation over time[2], the interpretive canons of the European Court of Human Rights,[3] the reception of the Strasbourg case-law in domestic contexts[4], compliance with

[1] ED BATES, THE EVOLUTION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (2010); JONAS CHRISTOFFERSEN & MIKAEL RASK MADSEN, THE EUROPEAN COURT OF HUMAN RIGHTS BETWEEN LAW AND POLITICS (2011); Mikael Rask Madsen, *From Cold War instrument to supreme European court: The European Court of Human Rights at the crossroads of international and national law*

[2] See, generally, CEVA PREMAS Pich, DIVERSITY AND EUROPEAN HUMAN RIGHTS: REWRITING JUDGMENTS OF THE ECHR (2012); MARIE-BENEDICTE DEMBOUR, WHEN HUMANS BECOME MIGRANTS: STUDY OF THE EUROPEAN COURT OF HUMAN RIGHTS WITH AN INTER-AMERICAN VIEWPOINT (2015); JAMES A. SWEENEY, THE EUROPEAN COURT OF HUMAN RIGHTS IN THE POST COLD WAR ERA: UNIVERSALITY IN TRANSITION (2013); Antoine Buyse, *Dangerous Expressions, The ECHR, Violence and Free Speech* 63 INT'L & COMP. L.Q. 491(2014); Lourdes Peroni and Alexandra Timmer, *Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law*, 11 I.CON 1056 (2013).

[3] See, generally, YUTAKA ARAI-TAKAHASHI, THE MARGIN OF APPRECIATION DOCTRINE AND THE PRINCIPLE OF PROPORTIONALITY IN THE JURISPRUDENCE OF THE ECHR (2002); JONAS CHRISTOFFERSEN, FAIR BALANCE: PROPORTIONALITY, SUBSIDIARITY AND PRIMARITY IN THE EUROPEAN CONVENTION ON HUMAN RIGHTS (2009); KANSTANTSIN DZEHTSIAROU, EUROPEAN CONSENSU AND THE EVOLUTIVE INTERPRETATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (2011); ANDREAS FØLLESDAL, BIRGIT PETERS AND GEIR ULFSTEIN, CONSTITUTION EUROPE: THE EUROPEAN COURT OF HUMAN RIGHTS IN A NATIONAL, EUROPEAN AND GLOBAL CONTEXT (2013); LAURENS LAVRYSEN, HUMAN RIGHTS IN A POSITIVE STATE: RETHINKING THE RELATIONSHIP BETWEEN POSITIVE AND NEGATIVE OBLIGATIONS UNDER

the judgments of the European Court of Human Rights[5], as well as the normative and social legitimacy of the Court.[6]

THE EUROPEAN CONVENTION ON HUMAN RIGHTS; GEORGE LESTAS, A THEORY OF INTERPRETATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (2007); ALISTAIR MOWBRAY, THE DEVELOPMENT OF POSITIVE OBLIGATIONS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHT BY THE EUROPEAN COURT OF HUMAN RIGHTS (2004); DIMITRIS XENOS, THE POSITIVE OBLIGATIONS OF THE STATE UNDER THE EUROPEAN CONVENTION OF HUMAN RIGHTS (2012); Eva Brems, The 'Logics' of Procedural Review by the European Court of Human Rights, in PROCEDURAL REVIEW IN EUROPEAN FUNDAMENTAL RIGHTS CASES 17 (Janneke Gerards and Eva Brems eds., 2017); Oddný Mjöll Arnardóttir, *Rethinking the Two Margins of Appreciation*, 27 EU CONST (2016); Eva Brems & Laurens Lavrysen, *Procedural justice in human rights adjudication: The European Court of Human Rights*, 35 HUM RTS Q 176 (2013); Basak Cali, *Balancing human rights? Methodological problems with weights, scales and proportions*, 29 HUM RTS Q 251 (2007); George Lestas, *The truth in autonomous concepts: How to interpret the ECHR*, 15 EUR J. INT. LAW 279 (2004); Alistair Mowbray, *A study of the principle of fair balance in the jurisprudence of the European Court of Human Rights,* H.R.L.Rev. 289 (2010); Dean Spielmann, *Allowing the Right Margin: The European Court of Human Rights and The National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review,* 14 CAMBRIDGE YB EUR LEGAL STUD 381 (2012): Janneke Gerards, *How to improve the necessity test of the European Court of Human Rights*, 11 I.CON 466 (2013); Laurence R. Helfer, *Redesigning the European Court of Human Rights: embeddedness as a deep structural principle of the European human rights regime*, 19 EUR J INT LAW 125 (2008).

[4] HELEN KELLER & ALEX STONE SWEET, A EUROPE OF RIGHTS: THE IMPACT OF THE CHR ON NATIONAL LEGAL SYSTEMS (2008); Alice Donald, Jane Gordon, and Philip Leach, *The UK and the European Court of Human Rights*, UK EQUALITY AND HUMAN RIGHTS COMMISSION (2012), https://www.equalityhumanrights.com/sites/default/files/83._european_court_of_human_rights.pdf; David Kosar, *Nudging Domestic Judicial Reforms from Strasbourg: How the European Court of Human Rights shapes domestic judicial design*. 13 UTRECHT L REV 112 (2017)

[5] COURTNEY HILLEBRECHT, DOMESTIC POLITICS AND INTERNATIONAL HUMAN RIGHST TRIBUNALS: THE PROBLEM OF COMPLIANCE (2014); DIA ANAGNOSTOU, EUROPEAN COURT OF HUMAN RIGHTS: IMPLEMENTING STRASBOURG'S JUDGMENTS ON DOMESTIC POLICY (2013): PHILIP LEACH et al, RESPONDING TO SYSTEMIC HUMAN RIGHTS VIOLATIONS: AN ANALYSIS OF 'PILOT JUDGMENTS' OF THE EUROPEAN COURT OF HUMAN RIGHTS AND THEIR IMPACT AT NATIONAL LEVEL (2010):

[6] PATRICIA POPELIER, SARAH LAMBRECHT & KOEN LEMMENS EDS., CRITICISM OF THE EUROPEAN COURT OF HUMAN RIGHTS (2016); Richard Bellamy, *The Democratic Legitimacy of International Human Rights Conventions: Political Constitutionalism and the European Convention on Human Rights***,** 25 EUR J INT LAW 1019 (2014); Başak Çalı, Anne Koch & Nicola Bruch, *The Legitimacy of*

A central theme in these studies is the nature of the European Convention on Human Rights as a 'living instrument' and the necessity for the case law of the European Court of Human Rights, as the authoritative interpreter of human rights for its forty-seven member states. to respond to its wider political and legal contexts. The case law of the European Court of Human Rights has shown, and continues to show, that interpretation of the Convention by the Court does not take place in a legal and political vacuum. The Court's case-law, for better or worse, has always shown sensitivity, not only to what is a desirable moral interpretation of rights[7], but also what is a reasonable interpretation of the Convention, given the type of rights at stake[8], the state of the European[9] or international consensus[10] on the scope of specific rights, and whether the complexity of issues at stake may be such that 'opinions within a democratic society might reasonably differ widely' on the interpretation of the scope of a right. [11]

A central debate that the European Court of Human Rights has grappled with in the past fifteen years has been whether it has been, and is, facing a crisis and whether it needs further reform.[12] The crisis talk about the European Court of Human Rights is

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Human Rights Courts: A Grounded Interpretivist Analysis of the European Court of Human Rights, 35 HUM RTS Q 955 (2013); Andreas Follesdal, The Legitimacy of International Human Rights Review: The Case of the European Court of Human Rights, 40 J. SOC. PHILOS 595 (2009); Mikael Rask Madsen, *The Challenging Authority of the European Court of Human Rights: From Cold War Legal Diplomacy to the Brighton Declaration and Backlash*, 79 *Law and Contemporary Problems* 79 LAW & CONTEMP. PROBS. 141 (2016)

[7] *Rantsev v. Russia and Cyprus*, App No. 25965/04, 51 Eur. H.R. Rep. 1 at para 277 (2010)

[8] *Hatton and others v. UK,* App No. 36022/97, 37 Eur. H.R. Rep. 28 (2003) (on wide margin of appreciation when development projects are at stake)

[9] A, B and C. v Ireland, App No. 25579/05, 53 Eur. H.R. Rep. 13 (2011) at para 188; *Bayatyan v. Armenia*, App No. 23459/03, 54 Eur. H.R. Rep. 15 (2012); X and others v. Austria, App No. 19010/07, 57 Eur. H.R. Rep. 17 (2013)

[10] Demir and Baykara v. Turkey, App No. 34503/97, 48 Eur. H.R. Rep. 54 (2009) (on international consensus)

[11] Evans v. United Kingdom, App. No., 6339/05, 46 Eur.H.R. Rep. 34 (2008) at para. 69.

[12] SPYRIDON FLOGAITIS, TOM ZWART AND JULIE FRASER (eds.), THE EUROPEAN COURT OF HUMAN RIGHTS AND ITS DISCONTENTS: TURNING CRITICISM INTO STRENGTH (2013); STEVEN GREER, THE EUROPEAN CONVENTION ON HUMAN RIGHTS: ACHIEVEMENTS, PROBLEMS AND PROSPECTS (2006); Steven Greer, *What's wrong with the European Convention on Human Rights?*, 30 HUM RTS Q, 680 (2008): CDDH report on the longer-term future of the system of the European Convention on Human Rights, COUNCIL OF EUROPE STEERING COMMITTEE FOR HUMAN RIGHTS (CDDH), 11 December 2015, available at http://www.coe.int/t/dghl/standardsetting/cddh/reformechr/CDDH(2015)R84_Addendum%20I_EN-Final.pdf

multifaceted. Some focus on the unprecedented rise of repetitive cases, numbering hundreds of thousands, in the docket of the Court that has precipitated ongoing reforms as to how the Court handles its caseload.[13] Others focus on the backlash against the Court, in particular from parliaments and judiciaries of well-established democracies, who argue that the European Court of Human Rights may have gone too far in its (expansive) interpretation of rights as a living instrument, at the expense of the margin of appreciation that domestic authorities should be given.[14] Yet, others focus on the 'implementation crisis' of the judgments of the European Court of Human Rights, emphasizing that the number of states outright ignoring or arguing that they do not need to comply with all judgments of the Court have considerably increased over the years.[15]

In this article, I have two aims. First, as a point of departure, I aim to offer a new take on the diagnosis of the crisis of the European human rights system by focusing on the diversification of the attitudes towards it by the national compliance audiences, namely domestic executives, parliaments and judiciaries.. This diagnosis holds that national compliance audiences of the European Court of Human Rights can no longer be characterized as lending an overall support to the *human rights acquis of Europe*, that centers around the European Court of Human Rights as the ultimate authoritative interpreter of the Convention. Instead, alongside states that continue to lend overall support to the Court's authority over the interpretation of the Convention, two types of new attitudes have developed towards the Convention in recent decades. First, there are now national compliance audiences that demand co-sharing of the interpretation task of the Convention with the European Court of Human Rights. These audiences demand to

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[13] Entin, Jacqué, Mahoney and Wildhaber, *Case Overload at the European Court of Human Rights* (European Law Institute, 27 March 2012) at para 15, see: http://www.europeanlawinstitute.eu/projects/publications/

[14] KATJA S. ZIEGLER, ELIZABETH WISK & LOVEDAY HODSON (eds.), THE UK AND EUROPEAN HUMAN RIGHTS: A STRAINED RELATIONSHIP? (2015); B.M. Oomen, *A serious case of Strasbourg-bashing? An evaluation of the debates on the legitimacy of the European Court of Human Rights in the Netherlands*, *20 IJHR 407,* (2016); Tilmann Altwicker, *Switzerland: The Substitute Constitution in Times of Popular Dissent*, in CRITICISM OF THE EUROPEAN COURT OF HUMAN RIGHTS 385 (Patricia Poperlier, Sarah Lambrecht & Koen Lemmens eds. 2016); Michael Reiertsen, *Norway: New Constitutionalism, New Counter-Dynamics?,* in CRITICISM OF THE EUROPEAN COURT OF HUMAN RIGHTS 361 (Patricia Poperlier, Sarah Lambrecht & Koen Lemmens eds. 2016); Hendrik Wenander, *Sweden: European Court of Human Rights Endorsement with Some Reservations,* in CRITICISM OF THE EUROPEAN COURT OF HUMAN RIGHTS 239 (Patricia Poperlier, Sarah Lambrecht & Koen Lemmens eds. 2016);

[15] In 2016, the Committee of Ministers reported that the total number of unimplemented cases was just under 10,000. See *Annual Report 2016: Supervision of the execution of judgments and decisions of the European Court of Human Rights*, COMMITTEE OF MINISTERS, COUNCIL OF EUROPE at 47, available at https://rm.coe.int/1680706a3d/ See also Nils Muiznieks, *The Future of Human Rights Protection in Europe*, 24 SEC. & HUM. RTS. 43 (2013)

share the interpretive work with respect to the scope of, and restrictions on, Convention rights based on the quality of their own decision-making procedures for human rights interpretation nationally. Second, there are national compliance audiences that flout the well-established Convention standards, not merely by error, or lack of adequate application, but with suspect grounds of intentionality and lack of respect for the Convention acquis. Following this diagnosis, I argue that instead of holding on to a 'business as usual attitude', the Court has developed coping strategies in order to handle the fragmentation of the attitudes of its audiences, adjusting itself to the demands for less Strasbourg interference or none at all.[16]

The central argument of this article is that the European Court of Human Rights has responded to the fracture of the overall attitudes of its national audiences towards the Convention by way of developing a human rights jurisprudence of a 'variable geometry.'[17] In so doing, the Court now has a flexible and variable case-law, and not a unified case-law, that speaks in one voice to all member states of the Council of Europe. Specifically, the Court has developed two novel lines of substantive rights jurisprudence: new procedural review standards that allow the European Court of Human Rights to defer to national authorities due to the quality of decision-making at a national level and an emerging novel bad faith jurisprudence under Article 18 of the Convention through which the Court is able to identify not only that a Convention right was violated, but that

[16] The responses of the Court to its repetitive case law crisis also has an important remedial response dimension, in the form of the development of pilot judgment procedure and as well as the introduction of the yet never practiced infringements proceedings into the European Convention Article 46 for states that do not comply with the judgments of the Court. This remedial jurisprudential response is beyond the scope of this study. On the evolving remedy jurisprudence of the European Court of Human Rights , see, Philip Leach, *No Longer Offering Fine Mantras to a Parcel Child? The European Court's Developing Approach to Remedies*, in CONSTITUTING EUROPE: THE EUROPEAN CONVENTION IN A NATIONAL, EUROPEAN AND NATIONAL CONTEXT 142 (Andreas Follesdal and Geir Ulfstein eds.) (2013). On the infringement proceedings, see Fiona de Londras & Kanstantsin Dzehtsiarou, *Mission Impossible? Addressing Non-Execution through Infringement Proceedings in the European Court of Human Rights*, 66 INT'L & COMP. L. Q. 467 (2017)

[17] Variable geometry is a term that is familiar in the fields of international trade law and European Union Law, where the different speeds by which states are willing to economically integrate is at stake. See e.g. Andrew Comford, *Variable Geometry for the WTO: Concept and precedents*, UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (2004); Craig Van Grasstek & Pierre Sauvé (2006), "The Consistency of WTO Rules: Can the Single undertaking be Squared with Variable Geometry ", 9 J INT'L ECON L 837; Mike Goldsmith, *Variable Geometry, Multilevel Governance: European Integration and Subnational Governance in the New Millenium*, in THE POLITICS OF EUROPEANIZATION (Kevin Featherstone & Claudio Maria Radaelli eds. 2003); John A. Usher, *Variable geometry or concentric circles: Patterns for the European Union*, 46 INT'L & COMP. L. Q. 243 (1997)

it was violated in bad faith.[18]

Part I lays out the fracture of the attitudes of the Court's national audiences towards the European Court of Human Rights, in particular since the 2000s. It shows that demands for more principled deference to national institutions, led by the United Kingdom, and practices of bad faith disrespect of the Convention that have arisen in the case of reversed or stalled democratic transitions in eastern Europe and the Caucasus have simultaneously put the Court's ability to speak in one voice in its case law under strain. Part II analyzes how the Court has coped with this fracture through its substantive case law, first by elucidating a novel standard in respect of the margin of appreciation based on who the Court deems to be good faith interpreters of the Convention and, secondly, by developing a bad faith jurisprudence under Article 18. Part III I assesses the implications of what may now be termed as a variable geometry of jurisprudence of the Court that differentiates between the underlying attitudes of national authorities to the Convention. In conclusion, I reflect on whether these coping strategies may offset the challenges the Court faces from national authorities, or whether this new multi-faceted jurisprudence may deepen the crisis by leaving the Court vulnerable to charges of double standards.

Part I: A Convention Europe that no longer is

The evolution of the European Court of Human Rights from a Cold War institution with a small national audience and hardly any cases in its docket in its early days of the 1960s[19] to an influential human rights court right through the 1970s and 1980s is well documented.[20] A central feature of the rise in the influence of the European Court of Human Rights in the 1970s and throughout the 1980s was due to its relatively homogenous domestic audiences in Western Europe.[21] The old and founding members of the Convention demonstrated respect for the Court's interpretive authority of the Convention, even if at times, they offered slow or begrudging compliance with its

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[18] *Ilgar Mammadov v Azerbaijan*, App No. 15172/13, [2014] ECHR 504; *Tymoshenko v Ukraine*, App No. 49872/11, 58 Eur. H.R. Rep. 3 (2014); *Lutsenko v Ukraine,* App No. 6492/11**,** 56 Eur. H.R. Rep. 22 (2013); *Cebotari v Moldova*, App No. 35615/06, [2007] ECHR 920; *Gusinskiy v Russia*, App No. 70276/01**,** 41 Eur. H.R. Rep. 17 (2005). See also Helen Keller & Corina Heri, *Selective criminal proceedings and article 18 ECHR: The European Court of Human Rights untapped potential to protect democracy*, 37 HRLJ 1 (2016)

[19] Between 1959 and 1969 the Court delivered ten judgments.

[20] MADSEN *supra* n1

[21] From 1953 to 1990 eighteen Western European member states accepted the compulsory jurisdiction of the ECtHR – Denmark (1953), Ireland (1953), Netherlands (1954), Belgium (1955), Germany (1955), Austria (1958), Iceland (1958),Luxembourg (1958), Norway (1964), United Kingdom (1966), Italy (1973), France (1974), Switzerland (1974), Sweden (1976), Portugal (1978), Greece (1979), Spain (1979), Lichtenstein (1982). See COUNCIL OF EUROPE, YEARBOOK OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (1994)

judgments. That the Court was delivering a European public good, for all the members of the Council of Europe, through its development of European human rights law, however, was not fundamentally contested.[22] This overall support for the Convention enabled commentators, in the mid 1990s, to hail the Convention system as a "remarkable success" and a model for comparative learning.[23]

The expansion of the jurisdiction of the European Court of Human Rights beyond Western Europe states started in 1990 with Turkey accepting the compulsory jurisdiction of the Court.[24] For most of its early years, Turkey was under a state of emergency and carried out policies that were suspected of constituting gross human rights violations, cases by then unfamiliar to the Court's docket. A flood of cases against Turkey followed the acceptance of compulsory jurisdiction.[25] Through the Turkish cases, the European Court of Human Rights started to address large volumes of right to life, torture and disappearance cases, bringing its jurisprudence closer to that of the Inter-American Court of Human Rights.[26] The extension of the Court's reach to Turkey and the flood of cases this caused may have been a signal of things to come, with the expansion of the Convention to an audience of significant national diversity in the 1990s and 2000s. But with the end of the Cold War, bringing the Convention to the newly independent central and eastern European states was seen as worth the risks this may bring to the relatively homogenous Convention audience of the 1980s.[27] The Court's jurisdiction covered eighteen states in 1990. This expanded to thirty five states in 1995 and to forty seven by 2007. In line with this expansion, the caseload of the Court, too, saw a significant increase, often made up of repetitive violations of the Convention, pointing to systemic and structural problems in ensuring respect for the Convention.

The initial expansion of the Council of Europe to cover eastern and central Europe has also seen a stronger juridification of the Convention system. Abandoning the Commission and Court system in 1998 and setting up a compulsory Court for all members of the Council of Europe[28] signaled the strong support for the European Court of Human Rights amongst its western European members as the ultimate interpreter of

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[22] Çalı, Koch, and Bruch, *supra* n6

[23] Laurence R. Helfer and Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication,* 107 YALE L J 273

[24] See COUNCIL OF EUROPE, *supra* n21

[25] Basak Çalı, *The Logics of Supranational Human Rights Litigation, Official Acknowledgment, and Human Rights Reform: The Southeast Turkey Cases before the European Court of Human Rights, 1996–2006*, 35 LAW SOC INQ. 311 (2010)

[26] *Id.*

[27] Pamela A. Jordan, *Does membership have its privileges?: Entrance into the Council of Europe and compliance with human rights norms*, 25 HUM RTS Q 660 (2003); but see also Mark Janis, *Russia and the Legality of Strasbourg Law*, 8 *EUR. J. INT'L L.* 93 (1997)

[28] Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby, ETS No.155

the Convention. Supported by its founders, the European Court of Human Rights has thus embarked on the role of a transmission belt of human rights values developed through its case law to its newly enlarged national compliance audiences. In this process, the Committee of Ministers of the Council of Europe, the political arm that supervises the execution of human rights judgments, further confirmed the centrality of the role of the European Court of Human Rights by asking for more guidance from it in the execution process of human rights judgments.[29] In other words, even in the first half of 2000s, the central presumption was that the Court enjoyed overall support and backing from its old member states and the central task was to diffuse the Convention norms for all.

Fractures amongst the Western European Founders: The UK in the lead

This attempt to cultivate a unified attitude towards the Convention system in the new members, however, has faced, what may have been an unexpected challenge from one of the original founders of the Convention system, the United Kingdom, from the mid 2000s onwards. This challenge, over time, has gathered support, even if less vocal, outside of the UK,[30] and, thus, has been an important catalyst in the subsequent division in attitudes of overall support towards the Convention system among the western European founders. It is for this reason that a more detailed tracing of the UK's destabilization of the western European human rights acquis requires attention.

The UK accepted the compulsory jurisdiction of the Court in 1966. Following on from that, the Court has played an important role in the UK human rights scene, both domestically and with respect to its colonies and extra territorial military presence.[31] Whilst the UK had raised its disagreements with cases decided against it by the Court throughout engagement, it has remained a complier with the judgments, even if it was, at times, a begrudging complier.[32] Despite this, it was only in 2000, that the Human Rights Act came into force in the UK, incorporating the Convention into the British domestic legal order and making the Convention rights directly justiciable in UK courts. An intense domestic engagement with the Convention in the domestic courts, including the then UK House of Lords followed.[33]

In 2005, two particular events kick started a debate in the United Kingdom concerning the European Court of Human Rights as the rightful and ultimate interpreter of the Convention. First, on 7 July 2005, London faced the most serious terrorist attack on its soil since the time of the conflict in Northern Ireland. In response to this, the UK Government led by Tony Blair began a concerted effort to deport individuals who may

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[29] Resolution Res(2004)3 of the Committee of Ministers on Judgments Revealing an Underlying Systemic Problem, 12 May 2004, available at https://wcd.coe.int/ViewDoc.jsp?p=&id=743257&Lang=fr&direct=true

[30] Oomen, Altwicker, Reiertsen, Wenander, *supra* n14

[31] Donald, Gordon and Leach, *supra* n4

[32] Courtney Hillebrecht, *Implementing international human rights law at home: Domestic politics and the European court of human rights*, 13 HUM RIGHTS REV 279 (2012)

[33] Thomas Poole & Sangeeta Shah, *The Law Lords and human rights*, 74 MLR 79 (2011)

pose a national security risk to the UK.[34] This policy included the securing of diplomatic assurances from receiving states prior to the deportation of non-nationals suspected of posing security risks. Second, on 6 October 2005, the *Hirst v. UK* judgment was delivered by the European Court of Human Rights.[35] This judgment found the UK ban on prisoner voting incompatible with the Convention. This judgment was seen as too intrusive to the UK Parliament's views on the distribution of democratic rights across its citizenship. Whilst the Labour Party was still in power, in 2006, a Conservative Party backbencher, Douglas Carswell, submitted a report to the Joint Parliamentary Committee on Human Rights entitled 'Why the Human Rights Act must be scrapped', signaling that the UK rights culture was under threat from Strasbourg. [36] Whilst this report did not at the time register any shockwaves in Strasbourg, a widely circulated speech by a member of the House of Lords, Lord Hoffman in 2009[37], did.[38] In this speech, Lord Hoffman epitomized the decay of the European human rights acquis in the UK. In what has subsequently become a core (and unfortunately worded) objection to the ultimate interpreter role of the European Court of Human Rights Lord Hoffman stated 'it cannot be right that the balance we in this country strike between freedom of the press and privacy should be decided by a Slovenian judge.'[39]

Soon after this push-back to the ultimate interpretive authority of the European Court of Human Rights, the Conservative Party, in May 2010, came into power in the UK. Commenting on the Hirst v. UK judgment, the new UK Primer Minister went on record to say that the judgment made him 'physically ill", thus signaling that the executive branch, too, had grave concerns over the Strasbourg Court aligned with the criticisms from the judiciary.[40] By this time, non-compliance with the Hirst judgment had filled the docket of the Strasbourg Court with repetitive cases from prisoners in the UK. The European Court of Human Rights, therefore, delivered a pilot judgment, a procedure devised primarily for the new eastern and central European members in democratic transition, in the *Greens and MT v.UK* asking the UK authorities to find a legislative solution to the repetitive cases from prisoners within twelve months. [41]

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[34] *Full text: The prime minister's statement on anti-terror measures*, THE GUARDIAN, 5 August 2005, available at https://www.theguardian.com/politics/2005/aug/05/uksecurity.terrorism1

[35] *Hirst v. UK (No.2)*, App No. 74025/01, 2 Eur H.R. Rep 41 (2006)

[36] Formal Minutes of the Joint Committee on Human Rights, available at http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/278/278 11.htm

[37] Lord Hoffmann, *The Universality of Human Rights*, Judicial Studies Board Annual Lecture, 19 March 2009, available https://www.judiciary.gov.uk/announcements/speech-by-lord-hoffmann-the-universality-of-human-rights/

[38] Interviews with the Judges of the European Court of Human Rights, 2009, Strasbourg.

[39] *Supra* n37 at para 36.

[40] Andrew Hough, *Prisoner vote: what MPs said in heated debate*, THE TELEGRAPH, 11 February 2011, http://www.telegraph.co.uk/news/politics/8317485/Prisoner---vote---what---MPs---said---in---heated---debate.html

[41] *Greens and M.T. v. The United Kingdom*, App Nos. 60041/08

This move by the Court, treating the UK like any other member of the Convention acquis resulted in a third backlash, this time from the UK Parliament. On 10 February 2011 MPs voted overwhelmingly in favour of maintaining a blanket ban on preventing prisoners from voting.[42] This cross party vote against a judgment of the European Court of Human Rights was justified by many in the UK Parliament due to a sense that Strasbourg was unduly expanding the scope of interpretation of the Convention rights at the expense of the well qualified domestic national authorities. [43] By 2015, the Conservative Party in the UK included the denunciation of the European Convention on Human Rights in its election manifesto.[44]

The questioning, by the UK, of the ultimate authority of the European Court of Human Rights to lead the human rights interpretation in Europe did not remain a domestic affair. The UK also brought this domestic change in the attitudes towards the Convention system to the Council of Europe and demanded a concerted political reaction to the Court's expansionism from other member states. A culmination of this has been the High Level Conference on the Future of the European Convention of Human Rights hosted by the UK in Brighton in 2012. At this conference, after much political and diplomatic talk to keep the human rights acquis intact, the UK won a concession from the supporters of the Convention system by inserting a preambular paragraph to Protocol 15, which places a special emphasis on subsidiarity and margin of appreciation in the Convention system.[45] The newly found interest in the concept of subsidiarity was a call to the Court to let go of its claim to be the sole interpreter of the Convention and to recognize the domestic authorities as co-interpreters of rights.[46] The Brighton Declaration and resulting

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and 60054/08, 53 Eur. H.R. Rep 21(2011)

[42] HC Deb 10 February 2011 Vol.523, No.117, Col 493 - 587

[43] *Id*. See for example speech by Jack Straw at Parliament at Col 498 - 505

[44] The Conservative Party Manifesto 2015, available at https://s3-eu-west-1.amazonaws.com/manifesto2015/ConservativeManifesto2015.pdf

[45] High Level Conference on the Future of the European Court of Human Rights, 'Brighton Declaration' (19-20 April 2012), available at http://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf. See para 3: "The States Parties and the Court share responsibility for realising the effective implementation of the Convention, underpinned by the fundamental principle of subsidiarity. The Convention was concluded on the basis, inter alia, of the sovereign equality of States. States Parties must respect the rights and freedoms guaranteed by the Convention, and must effectively resolve violations at the national level. The Court acts as a safeguard for violations that have not been remedied at the national level. Where the Court finds a violation, States Parties must abide by the final judgment of the Court." This declaration has not yet come into force.

[46] On normative support for the co-interpreter theory for the Convention, see, Besson 'Human Rights and Constitutional Law – Patterns of Mutual Validation and Legitimation', in R. Cruft, S.M. Liao and M. Renzo (eds), *Philosophical Foundations of Human Rights* (2015) 279.

protocols thus turned the UK specific demands into a European political document suggesting a new and deferential direction in the jurisprudence of the Court.

The New Europe: Rise of Reversed Transitions and Illiberal Democracies

The expansion of the Convention system eastwards all the way to Vladivostok and the Caspian Sea was based on the assumption that the Convention principles would in time be diffused in the laws, judicial decisions and political attitudes in newly emerging European democracies. For most of eastern and central Europe, the accession to the European Convention system pre-dated the accession process to the European Union.[47] The EU funded major training projects on the European Convention System in all the new member states of the Council of Europe with a view to entrench the Convention acquis in the new Europe.[48] Whilst the cases coming from the new member states of the Council of Europe steadily increased over the years, this has not been seen as posing an "attitude problem" towards the Convention system or the role of the Court in interpreting the Convention for the new members of the European family.[49] In this process, the Court's jurisprudence, too, has become richer focusing on new terrain such as institutional judicial reform[50] and transitional justice[51]. In effect, the Convention system was broadly regarded as helping the new member states to democratize and restructure their administration of justice systems.[52] Given the lack of outright challenges to the Convention system by its new members, the Court's crisis from the perspective of the new members has often appeared to be one of inadequate implementation, lack of

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[47] Hungary, Poland, Bulgaria, Estonia, Slovenia, Czech Republic, Lithuania, Slovakia, Romania, Latvia and Croatia all joined the Council of Europe between 1990 and 1996. Most of the above joined the EU in 2004, with Romania and Bulgaria joining in 2007 and Croatia in 2013.

[48] For an overview of ongoing and completed projects in Eastern and Southern Europe, including the Russian Federation and Turkey, see http://www.coe.int/en/web/national-implementation/projects-by-geographical-area/south-east-europe-turkey and http://www.coe.int/en/web/national-implementation/projects-by-geographical-area/eastern-partnership-countries-and-russian-federation .

[49] LEONARD M. HAMMER & FRANK EMMERT, THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND FUNDAMENTAL FREEOMS IN CENTRAL AND EASTERN EUROPE (2012); HELEN KELLER AND ALEC STONE SWEET, A EUROPE OF RIGHTS: THE IMPACT OF THE ECHR ON NATIONAL LEGAL SYSTEMS (2008)**,** see chapters on Eastern European states

[50] David Kosar & Lucas Lixinski, *Domestic Judicial Design by International Human Rights Court*, 109 AM J INT L 713 (2015)

[51] James Sweeney, *Restorative justice and transitional justice at the ECHR,* 12 INT'L CRIM L REV 313

[52] Cali, Koch and Bruch, *supra n6*

knowledge of the Convention or lack of capacities or resources to give effect to the Convention. [53]

Attitudes amongst the newer members towards the Convention, however, have seen significant changes since the early 2000s. In particular, in the past decade, instead of steady democratic transitions, Europe has seen the emergence of new forms of national governance that range from authoritarian or semi/competitive authoritarian regimes to illiberal democracies.[54] Whilst categorizing different states is often a matter of debate both as regards empirical accuracy and political correctness, be they called stalled or reversed democratic transitions or semi or competitive authoritarian regimes, these anti-democratic governance structures that stand in direct conflict with the Convention acquis extend to the Caucasus, Russia, Turkey, Ukraine and also into the European Union member states, such as, Hungary and Poland.

What is common in this new terrain of national compliance audiences is not just their minimal commitment to formal democratic institutions, such as elections, but their attitude in favour of limiting protections of civil and political rights, in particular, if opposition groups demand these rights. What is more, semi authoritarian regimes typically exercise strong control over the judiciary or curb the powers of the judiciary and thus prevent the Convention standards from having any real purchase as domestic legal remedies.[55] For semi authoritarian regimes, the attitude towards the Convention system is no longer a good faith acceptance of the standards developed by the European Court of Human Rights. Instead, these regimes offer a systemic challenge to the Convention system and the Convention's non-negotiable structural requirement of pluralist democracy and rule of law as underpinning human rights protections. The most recent manifestation of this has been the Turkey's President Erdoğan's vow to bring back the death penalty. The European Court of Human Rights ever-rising repetitive case-law also reflects this. The Court now deals with cases that concern interference of the executive and legislature with the judiciary[56], detention and imprisonment of journalists[57] and human rights defenders[58], as well as the targeting of opposition politicians.[59] The

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[53] Lisa McIntosh Sundstrom, *Advocacy beyond litigation: Examining Russian NGO efforts on implementation of European Court of Human Rights judgments,* 45 COMMUNIST POST-COMMUNIST STUD 255 (2012)

[54] STEVEN LEVITSKY & LUCAN A. WAY, COMPETITIVE AUTHORITARIANISM: HYBRID REGIMES AFTER THE COLD WAR (2010); MARINA OTTAWAY, DEMOCRACY CHALLENGED: THE RISE OF SEMI-AUTHORITARIANISM (2013)

[55] *Cengiz and others v Turkey*, App Nos.48226/10 and 14027/11, [2015] ECHR 1052

[56] *Salov v. Ukraine*, App no. 65518/01, 45 EUR H.R. Rep. 51 (2007); *Volkov v. Ukraine*, App No. 21722/11, 57 Eur. H.R.Rep 1 (2013); *Baka v Hungary*, App no. 20261/12, 64 Eur. H.R. Rep. 6 (2017)

[57] *Nedim Şener v. Turkey*, App No. 38270/11, [2014] ECHR 730; *Fattullayev v. Azerbajian,* App No. 40984/07, 52 Eur H.R. Rep 2 (2011)

[58] *Jafarov v. Azerbaijan*, App No. 69981/14 , 64 Eur H.R. Rep 13 (2017)

assumption that more training and awareness of the Convention system will lead to enduring respect for Convention standards at the national level no longer stands up to scrutiny in this new geography.

Part III: Coping with the Fractured Convention Acquis

What has been the response of the European Court of Human Rights towards the fracture of the overall attitudes of its national audiences towards the Convention? The Court has responded to these attitudinal changes both through formal channels of communication with its political masters,[60] as well as in writing and speeches by its individual judges.[61] It has, however, also gone beyond these communicative gestures and shown increased willingness to respond to the attitudinal shifts in its national audience through its substantive case law, departing from what may be termed as its "standard jurisprudence"[62]. In other words, the Court has chosen to accept that the national compliance audiences are indeed different from each other and that they need to be treated as such in the case law of the Court. This new outlook emphasizing different treatment for different national institutional arrangements and national cultures of human rights has led the Court to develop sui-generis forms of good faith and bad faith jurisprudence in its substantive case law, alongside its own standard jurisprudence which continues to be the major output, in terms of number of cases.[63]

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[59] *Merabishvili v. Georgia*, App No.72508/13, [2016] ECHR 523; *Lutsenko v Ukraine*, App No. 6492/11**,** 56 Eur. H.R. Rep. 22 (2013)

[60] The ECtHR's contribution to the 2015 Brussels conference explained that the principle of subsidiarity is about the sharing, and not the shifting, of responsibility for human rights protection in Europe

[61] Robert Spano, *Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity*, 14 H.R. L. Rev. 487 (2014).

[62] Scholars of the European Court of Human Rights have recently started to use the 'term standard jurisprudence' partly in an attempt to capture the qualitative changes in the Court's case law in it newly changing political environment. See, for example, Oddný Mjöll Arnardóttir, *Organised Retreat? The Move from "Substantive" to "Procedural" Review in the ECtHR's Case Law on the Margin of Appreciation*, European Society of International Law (ESIL) 2015 Annual Conference (Oslo*)*, 31 December 2015, available at http://ssrn.com/abstract=2709669; Matthew Saul, *Structuring evaluations of parliamentary processes by the European Court of Human Rights*, 20 I.J.H.R. 1077 (2016). A further distinction introduced in the scholarship is between substantive review under the standard case law of the Court and procedural review under the institutional deferential case law of the Court. On this distinction, see Patricia Popelier, *The Court as Regulatory Watchdog: The Procedural Approach in the Case Law of the European Court of Human Rights*, in THE ROLE OF CONSTITUTIONAL COURTS IN MULTILEVEL GOVERNANCE 249 (Patricia Popelier ed. 2012); EVA BREMS & JANNEKE GERARDS, PROCEDURAL REVIEW IN EUROPEAN FUNDEMENTAL RIGHTS CASES (2017); Brems and Lavrysen *supra* n3;

[63] Total number of judgments delivered by the Court in 2016 was 1926. For a full view of the Court's statistics, see the 2016 Annual Report of the European Court of Human Rights http://www.echr.coe.int/Documents/Annual_report_2016_ENG.pdf

In order to see how the Court's jurisprudence diversified based on the audiences it interacts with it is first helpful to clarify what constitutes the 'standard jurisprudence' of the European Court of Human Rights. After all, the European Court of Human Rights has long been well known for its variable standards of review related to its employment of the margin of appreciation doctrine. What, then, is new in its sensitivity to the differing attitudes of national audiences?

The standard jurisprudence of the European Court of Human Rights may be identified through two important features: a) it speaks to all states in one voice, including when it recognises that states may enjoy a wide margin of appreciation with respect to certain provisions of the Convention and its lack of proximity to ascertain facts b) it has developed specific interpretive approaches, and tests, for each right in the Convention with the presumption that these interpretive approaches will have *erga omnes* effect throughout the Convention system.

Speaking in one voice to all member states of the Council of Europe requires the Court to use the same interpretive tests for all similar cases before it when determining the scope and limitation conditions of rights. These interpretive tests are often framed in specific Strasbourg jargon and are repeated in judgments in highly stylized forms. For example, in assessing the justifiability of a right's limitation by a state the Court looks at the case as a whole, exploring whether the domestic law that led to the limitation was foreseeable or accessible, 'whether the "interference" served a legitimate aim, whether it corresponded to a "pressing social need", and whether it was "proportionate to the legitimate aim pursued". Equally, the Court asks whether the reasons given by the national authorities to justify their decisions are "relevant and sufficient', without discriminating between who the authorities are and the quality of their decision making processes. At the end of each judgment, the Court concludes by either finding or not finding a violation, without going into further detail as to whether the violation was a grave one, or whether the national authorities' quality of procedures played an interpretive role in determining the outcome.

The Court's standard case law has interpretive tests for each of the rights in the Convention. For every Convention article, there exists fine-grained tests, transferable from country to country, accounting for the scope of rights, and, in the case of qualified rights, approaches for distinguishing justifiable limitations from violations.[64] In identifying the scope of rights, the Court has paid due attention to whether there exists a European consensus in developing implied rights for Convention articles and held that where the European consensus is lacking, states may have a margin of appreciation. How the Court verifies such consensus is subject to debates.[65] In identifying conditions for the

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[64] For an account of rights-based jurisprudence of the Convention, see the case law guides produced by the Court at http://echr.coe.int/Pages/home.aspx?p=caselaw/analysis&c=#n14278064742986744502025_pointer

[65] Janneke Gerards and Hanneke Senden, *The Structure of Fundamental Rights and the*

restrictions of rights, the Court has also indicated whether states enjoy a narrow or a wide margin of appreciation due to their proximity to the facts of the case or their proximity to the local forces. This, too, attracted much criticism due to the risks of creating a relative normativity in the Convention.[66] However, in rights where the Court has identified a narrow margin of appreciation it has employed the same tests for all cases coming from all countries of the Council of Europe. Neither of these two highly contested features of the standard approach to the Convention, challenge the rights-focused approach to the Convention by the Court and its attempt to develop common standards for all member states whenever it can. In other words, both the lack of European consensus and presence of a wide margin of appreciation simply signaled that the Court was not, yet, able to develop uniform standards that ought to have erga omnes effect across the Convention system.

Letting Good Faith Interpreters be: A quality tigger for deference

A central feature of the western European push back against the European Court of Human Rights has concerned the need for adequate recognition of the domestic institutions, in well-established rule of law respecting states, as the co-appliers and co-interpreters of the European Convention on Human Rights. The argument has been that, if domestic institutions in rights respecting states approach the Convention with good faith, why should the European Court of Human Rights always be the winner in reasonable disagreements with these domestic good faith interpreters? In its case law of the 2000s, the Court has taken this push back seriously and embarked upon a path that offers deference to the good faith interpreters of the European Convention on Human Rights, be they judiciaries or parliaments, provided that a level of quality assurance of their domestic rights interpretation is in place.

This new good faith jurisprudence is qualitatively different from the operation of the margin of appreciation in the 'standard review' case law of the Court. In the latter, the reason to defer to a national decision-maker is based on the nature of the right itself or the specific facts of the case or the lack of a European consensus. In this new good faith jurisprudence, the quality of the national decision maker and the quality assurances provided by them in respecting the Convention takes center stage in identifying whether there is a Convention violation. It is for this reason that some commentators have categorized this new form of deference under the umbrella of procedural review of domestic authorities, rather than a substantive review of whether the right is appropriately protected by them.[67] This new type of deference to domestic authorities has shown itself as a deference both to domestic courts and to parliaments, who are seen, prima facie, as engaging with the Convention in good faith.

The *Von Hannover* case of 2012, is one of the first cases that displayed a deference to good faith interpreters, where the reasons for deference to national authorities shifted from substantive review concerns to the quality of the reasoning of the judicial decision-

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European Court of Human Rights, 7 I.CON 619, 651. (2009)

[66] Kevin Boyle, Refah Partisi case, Essex Human Rights Review.

[67] Brems and Gerards, *supra* n62

makers. The case is unique in the sense that Germany has been a strong supporter of the Convention acquis, even though the German Constitutional Court, in a 2004 judgment, recognized that in the case of a hypothetical conflict with a Strasbourg interpretation and the Constitutional Court's interpretation flowing from the German Constitution, the latter would prevail.[68]

This Van Hannover case involved the question of whether the German courts correctly balanced the right to privacy of Monaco princess Caroline and the freedom of expression of German newspapers. A novelty of this case was that this was the second time that the applicant appeared before the European Court of Human Rights due to similar, but not identical facts. In the first case, decided in 2004, the European Court of Human Rights found a violation of the Convention by holding that the domestic judges did not strike a fair balance between right to privacy and freedom of expression.[69] In this second case, the German Constitutional Court indicated that it had taken into account the principles laid down by the Court in balancing rights. In response, the Court carefully stated that'[w]here the balancing exercise has been undertaken by the national authorities in conformity with the criteria laid down in the Courts case-law, the Court would require strong reasons to substitute its view for that of the domestic courts.'[70] In other words, the Court signaled that it would not review the actual substantive balance of considerations by German domestic courts, so long as the German Courts paid due attention to such considerations. This approach was decisive in the Court's finding that there was no violation of the right to privacy in this case, as the Court did not find strong reasons to substitute the decision reached by domestic courts. The Court, therefore, acknowledged that the German courts had responsibly engaged in a balancing exercise.[71]

This form of reasoning nevertheless constitutes a departure from the 'relevant and sufficient reasons' doctrine of the European Court of Human Rights and showed that the calls for subsidiarity of the Court in interpreting the Convention had struck a chord. Instead of scrutinizing the reasons given by domestic courts to justify their decisions, the requirement, instead, for strong reasons to justify the Court's substantive review lets the

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[68] See Görgülü, 2 BvR 1481/04, BVerfGE 111, 307 (14 Oct 2007). For a similar line of reasoning, see also, Corte Costituzionale (Italian Constitutional Court) Judgment Nos 348 and 349 of 2007

[69] *Von Hannover v Germany*, App No. 59320/00, 40 Eur. H. R. Rep. 1 (2005)

[70] *Von Hannover v Germany (No 2),* App nos. 40660/08 and 60641/08, 55 Eur H.R. Rep. 15 (2012) at para 107. For cases with similar reasoning structures see *Obst v. Germany* App. No. 425/03 (ECtHR, 23 September 2010); *Siebenhaar v. Germany*, App. No. 18136/02 (ECtHR, 3 February 2011); *Schüth v. Germany*, App No.1620/03, 52 Eur H. R. Rep 32 (2011)

[71] Due to the emphasis on responsible action by domestic courts, I have elsewhere called this new doctrine, ' the responsible courts' doctrine. See, Başak Çalı, *From Flexible to Variable Standards of Judicial Review: The Responsible Domestic Courts Doctrine at the European Court of Human Rights,* in SHIFTING CENTRES OF GRAVITY IN HUMAN RIGHTS PROTECTION: RETHINKING RELATIONS BETWEEN THE ECHR, EU AND NATIONAL LEGAL ORDERS 144 (Oddný Mjöll Arnardóttir and Antoine Buyse eds. 2016)

responsible domestic interpreters be. As co-appliers of human rights standards, responsible domestic courts were thus given a space to determine the necessary conditions for violation of Convention provisions.

Again in 2012, in *Palomo Sanchez v. Spain*, the European Court of Human Rights employed its quality focused good faith deference standard to a case, whose facts had never previously arisen before the European Court of Human Rights.[72] Unlike Von Hannover, therefore, what was at stake in this case was whether responsible domestic courts can, on their own, interpret the Convention, in the absence of Strasbourg having ruled on the principled issues in advance. In Palomo Sanchez, domestic courts, (and subsequently the European Court of Human Rights) had to balance the freedom of expression rights of workers with the right to privacy of managers and co-workers. Delivery workers who were dismissed from their jobs by an industrial bakery company in Barcelona had earlier brought proceedings against the company before Spanish employment tribunals seeking recognition of their status as salaried workers (rather than self-employed or non-salaried delivery workers), in order to be covered by the corresponding social security regime. Representatives of a committee of non-salaried delivery workers within the same company had testified against the applicants in those proceedings. The applicants set up the trade union NAA (Nueva alternativa asamblearia) in 2001 to defend their interests and subsequently published a cartoon in the NAA newsletter showing the company manager and two workers who testified against them in an undignified position. They were dismissed from work as a result of this cartoon.

In this case, similar to Von Hannover, the Grand Chamber signaled that it would defer to Courts who are deemed to act responsibly in discharging the domestic interpretation of the Convention. It stated that "the reasoning of the domestic courts decisions concerning the limits of freedom of expression in cases involving a person's reputation is sufficient and consistent with the criteria established by the Court's case-law, the Court would require strong reasons to substitute its view for that of the domestic court where the Court focuses on the necessity and proportionality of the impugned measures with respect to the rights protected in the Convention".[73] It went on to decide that that the domestic courts had duly recognised the importance of freedom of expression and considered these criteria and that the decision of the domestic courts was not 'manifestly disproportionate'.[74] With this decision, the European Court of Human Rights signaled that so long as a domestic court was prima facie viewed as giving due recognition to the Convention, the Court would not carry out a substantive review of competing interests. Furthermore, the Court has introduced a new concept to its jurisprudence of deference: manifest disproportionality as opposed to standard proportionality. Dissenting judges in the Palomo Sanchez case took issue with the Court's willingness to assign such a carte blanche co-interpretation role to domestic courts without itself clarifying the full range of jurisprudential considerations substantively at stake. In particular, the dissenting judgments highlighted the absence of a fulsome discussion by the Court of the freedom of

[72] See dissenting opinions in *Palomo Sanchez and Others v. Spain*, App Nos. 28955/06, 28957/06, 28959/06 and 28964/06, 54 Eur H.R. Rep. 24 (2012)
[73] *Id*. at para 57
[74] *Id.* at. para. 77

expression standards in the labor rights and trade unions dispute context[75]. This distinguishes the Palomo Sanchez case from Von Hannover where the issues at stake had previously been considered by the Court. In other words, by deferring to good faith interpreters of the Convention in this instance, the Court has forgone its right to develop the Convention interpretation for Council of Europe countries as a whole.

The 2017 Grand Chamber judgment in the case of Hutchinson v. United Kingdom points to the ongoing expansion of the deference to domestic courts based on their prima facie nature as good faith interpreters of the Convention. In this case, at stake was whether the European Court of Human Rights should reconsider its own findings concerning the application of Article 3 (torture, inhuman or degrading treatment) of the Convention to cases concerning life prisoners if domestic courts give assurances that their understanding of the treatment of life prisoners coheres with the Convention.[76] In 9 July 2013 the European Court of Human Rights held, in Vinter and Others v. United Kingdom, that whole life orders violate Article 3 of Convention[77]. In so doing, the Court held that the legal framework in the UK failed to provide legal certainty as to when lifers can ask for a review of their sentence and the presence of a dedicated review mechanism. In 2014, The UK Court of Appeal in R v. McLoughlin considered the Vinter and others judgment of the European Court of Human Rights and held that even though the legal framework drawn up by the Home Secretary for reviewing parole for life prisoners may seem restricted, the executive is under a duty to take into account the Convention in its decision-making process and any failure to do so would be subject to appeal before UK Courts.[78] In the light of this assurance by the Court of Appeal of the United Kingdom, the European Court of Human Rights overturned its Vinter decision in Hutchinson and found the UK legal framework compatible with Article 3 of the Convention. In so doing, the Court emphasized that 'the primary responsibility for protecting the rights set out in the Convention lies with the domestic authorities'.[79] The Hutchinson case is a further and deeper expansion of the prima facie deference to good faith interpreters, as the Court treated the UK courts' assurances of compatibility with Article 3 as a reason to reverse its own jurisprudence on the matter.

The deference of the Court towards good faith interpreters is also been apparent in cases where the Court has interacted with national Parliaments[80]. The Animal Defenders v. United Kingdom case of 2013, followed by the SAS v. France judgment of 2015 are two examples in which the Court has forgone the carrying out of a proportionality analysis of the measures taken by parliaments based on the quality of decision-making procedures in domestic contexts. In the Animal Defenders case, the Court first started out by holding

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[75] *Id.* See joint dissenting opinion of Judges Tulkens, Thór Björgvinsson, Jočienė, Popović and Vučinić.
[76] *Hutchinson v. United Kingdom*, App No 57592/08, [2017] ECHR 65
[77] *Vinter and others v United Kingdom*, App No. 66069/09, 55 Eur. H.R. Rep. 34 (2012)
[78] *R v McLoughlin* **[**2014] EWCA Crim 188
[79] Hutchinson, *supra* n76 at para 71
[80] Matthew Saul, *The European Court of Human Rights' Margin of Appreciation and the Processes of National Parliaments*, *15 H.R.L.R. 745 (2015)*

that in the field of freedom of expression states enjoy a narrow margin of appreciation.[81] It, however, held that an almost blanket ban on political advertising that was enacted by Parliament and upheld by domestic courts was not disproportionate because of the quality of the parliamentary and the judicial debates. In so doing, the Court held that in instituting a blanket ban the Parliament had duly considered other options and that was sufficient to ensure compliance with the Convention. In this respect, the Court found that a debate taking place in Parliament was worthy of deference without a substantive review of proportionality. In SAS v. France, the Court continued to place an emphasis on the quality of decision making by noting the subsidiary role of the Convention and the direct democratic legitimacy of the national legislature. The latter meant that the government had a wide margin of appreciation when considering whether limitations on the right to manifest one's beliefs were "necessary".[82] In the SAS case, the Court held that the blanket ban on the burka in France meet the procedural review standards espoused by the Court.[83]

Turn to Bad faith jurisprudence

Since the mid 2000s, a second preoccupation of the Court's substantive case law has been the active use of domestic laws for reasons that are not themselves grounds for restrictions of rights in the Convention. This awareness has been articulated through what has long been a dormant article of the Convention, Article 18, which states that 'the restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they are prescribed.' The travaux preparatoires of the Convention show that insertion of Article 18 to the Convention was a conscious choice on the part of drafters.[84] Restrictions for purposes other than found in the Convention aimed to address the risks of states' backsliding from their commitment to the Convention values. The European experience indeed showed that states abused the power of domestic laws for hidden agendas and illegitimate pretexts.[85]

Despite the concerns of the drafters that pre WWII practices of using domestic laws to undermine rights may be a possibility in the post WWII Europe, the (former) European Commission on Human Rights and the European Court of Human Rights in their pre 2000 jurisprudence treated 'Article 18 risks' to be remote, in particular, in the Western European states, where the good faith presumptions of the post WWII democracies to respect the Convention were taken for granted. The case-law of the Court thus underplayed the textual presence of Article 18 in the Convention. The Kamma v. Netherlands case of 1974, where the Commission identified the scope of Article 18 attests to this attitude of downplaying its necessity. In Kamma, the Court signaled the

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[81] *Animal Defenders International v United Kingdom*, App no.48876/08, 57 Eur. H. R. Rep. 21 (2013) at para 104

[82] SAS v. France, App no. 43835/11, 60 Eur. H.R. Rep.. 11 (2015)

[83] Eva Brems, *SAS v. France: A Problematic Precedent*, available at https://strasbourgobservers.com/2014/07/09/s-a-s-v-france-as-a-problematic-precedent/

[84] Keller and Corina, *supra* n18

[85] No other regional or international human rights treaty has a provision equivalent to Article 18.

limited use that Article 18 has in its case law by two interpretive moves.[86]

First it held that Article 18 is not an autonomous article. Thus, it can only be raised in conjunction with articles of the Convention that allow for restrictions to be placed on rights. Second and connected to this first move, the Commission further held that it was the applicants who must meet a 'very exacting standard of proof' to show that illegitimate pretexts/hidden agendas exist. The Commission, therefore, made the trigger of Article 18 a very onerous task by applicants and confirmed that the respect for the Convention in Europe was a strong presumption. The Court would only assess Article 18, when applicants could, without any doubt, show that the government had an illegitimate agenda.

This reading of Article 18 further confirms the Court's commitment to developing its standard jurisprudence. The Court saw itself as developing the interpretation and application of the individual rights for the Council of Europe as a whole without seeing the need to point the finger at particular states for having illegitimate agendas domestically. Taking for granted the underlying commitment of all member states to the Convention, the Court thus refused to imagine its audience as intentionally seeking to undermine the Convention. Indeed up until 2004, no violation of Article 18 was found by the Court[87]. It has also often been the case that the Court did not consider the examination of Article 18 claims necessary.[88]

This conventional understanding of Article 18 shifted in 2004, when a Chamber of the Court for the first time ever found a violation of Article 18, in conjunction with Article 5 (right to liberty and security of person) in *Gusinskiy v. Russia*.[89] The case concerned the detention of a Chairman of the Board of and majority shareholder in ZAO Media Most, a private Russian media holding company, which also owned NTV, a popular television channel. The detention of the applicant ended when he agreed to sell his company to Gazprom, a Russian state controlled energy company, under favourable conditions. Following on from this Gusinskiy argued that his detention was an abuse of power by the authorities and that by detaining him the authorities forced him to sell his company. Gusinskiy further argued that the authorities intended to silence his media outlets through this forced sale, due to its critical views of the government.[90]

The Court's initial approach when finding a violation under Article 18, in conjunction

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[86] *Kamma v. The Netherlands*, App no. 4771/71, ECHR [1974]
[87] See notably, *Handyside v. United Kingdom*, App No. 5493/72, 7 December 1976 and *Akdıvar and others v. Turkey*, App. No. 21893/93, [1996] ECHR 35
[88] See notably, *Engels and others v. Netherlands,* App nos. 5100/71; 5101/71; 5102/71; 5354/72 and 5370/72, 1 Eur. H.R. Rep. 647 (1976); *Sunday Times v. The UK*, App no. *6538/74,* 2 Eur. H.R. Rep. 245 (1979); *Sporrong and Lönnroth v. Sweden*, App no. 7151/75, 5 Eur. H.R. Rep. 35 (1983); *Bozano v. France*, app no. 9990/82, 9 Eur. H.R. Rep. 297 (1986); *United Communist Party v. Turkey*, App no. 19392/92, 26 Eur. H.R. Rep. 121 (1998); *Ipek v. Turkey*, app no. 25760/94, [2004] ECHR 74
[89] Gusinskiy, *supra* n18
[90] *Id.* at para 72

with Article 5, in the Gusinksiy case was cautious. The Court, following Kamma emphasized that Article 18 of the Convention does not have an autonomous role. It can only be applied in conjunction with other Articles of the Convention.[91] Particularly, in Gusinskiy, the Court made full use of the fact that there was no contestation of the hidden agenda by the state party in finding a violation of Article 18.[92] In particular the Court highlighted that Gazprom asked the applicant to sign an agreement when he was in prison, and a State minister endorsed such an agreement. It further held that given that all charges against the applicant were dropped as soon as he signed the agreement strongly suggested that 'the applicant's prosecution was used to intimidate him'.[93]

Following on from Gusinskiy, the Court has continued to consider Article 18 in its subsequent case law, primarily with respect to cases coming from Eastern Europe and the Caucasus. The countries from which Article 18 cases come from are also the countries with repetitive rights violations cases[94] and those that have fallen off the democratic transition track. In six cases that followed Gusinskiy, Cebotari v. Moldova (2007), Lutsenko v. Ukraine (2012), Tymoshenko v. Ukraine (2013), Mammadov v. Azerbaijan (2014), Jafarov v. Azerbaijan (2016), and Merabshivili v. Georgia (2016) the Court also found a violation of Article 18, in conjunction with Article 5.[95] Cebotari, the then head of a Moldovan State-owned power distribution company called Moldtranselectro, argued that like Gusinskiy, his arrest and subsequent release from custody was made conditional upon making statements desired by the government, which constituted a violation of Article 18.[96]

Starting from Lutsenko, the Article 18 cases of the Court turned to a particular problem in decaying democracies, that of controlling or punishing opposition political movements or civil dissent. Of these cases, three concern the detention of politicians who held high government positions prior to changes in government in Ukraine and Georgia. Lutsenko was a former Minister of the Interior and the leader of the opposition party Narodna Samooborona in Ukraine and Tymoshenko was a former Ukrainian Prime Minister and one of the leaders of the Orange Revolution. Mr Ivane Merabishvili was a former Prime Minister and Minister of the Interior in Georgia. These politicians argued that their detention was a form of retribution by the incoming governments and had the aim of preventing them from taking part in the political life of their countries. In relation to Azerbaijan, the two Article 18 cases brought before the European Courtof Human Rights concerned the silencing of civil dissent through criminal law. Ilgar Mammadov was a

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[91] *Id.* at para 73
[92] *Id.* at para 74.
[93] *Id.* at para 76.
[94] See the "Country Factsheets" of the Department for the Execution of Judgements of the European Court of Human Rights, Council of Europe, available at http://www.coe.int/en/web/execution/country-factsheets
[95] *Supra* notes 18, 58 and 59. In two other cases Article 18 was discussed at length. In *Khodorovskiy and Lebedev v. Russia*, App Nos. 11082/06 and 13772/05, 25 July 2013, the Court did not find a violation. In *Tchankotadze v. Georgia*, App No. 15256/05, [2016] ECHR 537, the Court found the Article 18 claim manifestly ill founded.
[96] Gusinskiy, *supra* n18 *at* para 47.

political activist and an academic and Rasul Jafarov was a well-known civil society activist and human rights defender.

In all of the six cases where Article 18 was raised and violations found by the Court, the applicants were detained under various provisions of domestic criminal law. Applicants argued not only that these detentions were unlawful, therefore not meeting the criteria laid out by the Court in its Article 5 case law, but also that the detention of the applicants in these cases served a hidden agenda of the domestic authorities, removing the applicants from the full protection of the Convention as a whole. In response to these cases, the Court's approach to the standard of proof for finding a violation of Article 18 has also seen important changes. In Cebotari v. Moldova, the Court continued to employ an exacting standard of proof test and held that no objective person could identify the commission of an offence by Cebotari and the applicant convincingly showed the existence of a hidden agenda.[97] In the two Ukranian cases, Lutsenko and Tymoshenko as well as in Mammadov v. Azerbajian, the Court focused on the immediate facts surrounding the cases in finding a violation of Article 18.

In the more recent 2016 cases, the Court has started to debate whether the high burden of proof on the applicants in showing fact-specific illegitimate purposes is adequate in reversed democratic transitions and whether more structural evidence as to what goes on in a country is also relevant. The case of Jafarov v. Azerbaijan, which involves the continuing detention of human rights defenders in the country, the Court has taken a more expansive and systemic approach, not only looking at the specific facts surrounding the case, but also the general state of treatment of human rights defenders in the country.[98] In so doing, it was willing to adduce evidence from the general context of the systemic difficulties that human rights NGOs are facing in Azerbaijan as an Article 18 trigger condition.[99]

The case of Merabishvili v Georgia, which is currently pending before the Grand Chamber upon a request by Georgia, is an important turning point for a less demanding burden of proof test. In this case, the Chamber held that the full burden of proof does not necessarily have to rest on the applicant to show an illegitimate pretext. Some of the burden of proof for disproving a hidden agenda may fall on the government authorities, if the facts of the case so require. In this case the Court has also, for the first time, found that even if the Court finds no violation of a substantive article by itself, (in this case Article 5) that does not mean that there may not be a violation of that Article in conjunction with Article 18.[100] The Grand Chamber of the European Court of Human Rights now has the opportunity to decide the fate of Article 18. Of particular significance will be whether the Court will lower the standard of proof for applicants to prove a hidden agenda and whether it will develop a more principled view about how the broad structural decay of democratic institutions and rule of law may be taken into account in identifying bad faith. There is no doubt that more and more Article 18 cases will soon

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[97] Cebotari, *supra* n18 *at* paras 52-53.
[98] Jafarov, *supra n*58 at para 159-161
[99] *Id.*
[100] Merabishvili, *supra* n59 at paras 102-107

present themselves at the Court's door, and these cases may not only focus on detention as a coercive tool, but also on other rights.

Variable Geometry in the European Court of Human Rights Substantive case law: Deepening the Crisis?

The above analysis shows that the substantive case law of the European Court of Human Rights since the mid and late 2000s has shown a heightened degree of awareness of the changing attitudes towards the Convention system amongst its domestic audiences. This awareness heightened, in particular, after the Brighton Declaration of 2010. This newly emerging substantive case law takes account of the fact that the Convention now has an increasingly heterogeneous, fractured audience. On the one hand, the UK-led criticism of the Court as micro managing the domestic life of the Convention in different national contexts demands, the shifting of more interpretive powers to national authorities who have adequate quality assurances in place. On the other hand, the Court is recognizing that the formal commitment to the Convention by some states may be a façade hiding bad faith circumvention of the Convention by domestic authorities. The standard jurisprudence of the European Court of Human Rights is now sandwiched between two types of case law that operate under differentiated logics: a principled deference to states that demand to be seen as Convention respecting in their own ways and a tendency to name and shame other states for bad faith interpretations of the Convention.

This two-headed development shows that the European Court of Human Rights has opted for a variable geometry of its substantive case law towards its member states, even though formally all states have accepted the same obligations under the Convention. Variable geometry is a concept often used in regional integration and free trade contexts in order to underpin differentiated committments to a single legal order. In the case of the European Union, the term is used to describe the idea of differentiated integration in the EU. It acknowledges that, particularly since the EU's membership almost doubled in under a decade, not all states may be able or willing to integrate at the same speed[101]. In the case of the World Trade Organisation, it refers to inserting flexibility of commitments into the free trade regime.[102] Variable geometry in the case of European human rights case law means that whether a state is found in violation of the Convention and how this violation is classified (standard or grave) depends on the attitudes of domestic institutions to the Convention. In other words, the European Court of Human Rights no longer speaks to all Council of Europe member states in one voice, but recognizes that different tracks of jurisprudence may be applicable, which range from the quality-based deference approach, to standard case law interpretations to findings of bad faith violations. The voice that the Court chooses to speak to states thus depends on how these states approach the Convention domestically. This is what we may call a realist turn in the case law of the

[101] There were 15 EU member states before enlargement in 2004 when 10 new states joined (Czech Republic, Cyprus, Estonia, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia) followed by Bulgaria and Romania in 2007 and Croatia in 2013.
[102] *Supra* n17

Court as the Court develops an increasing awareness of those it interacts with. This has significant consequences for the outcome of cases.

The responsiveness of the European Court of Human Rights to its fractured domestic terrain could be seen as deepening the crisis of increased heterogeneity in the attitudes towards the Convention system. Two particular risks of the new variable geometry jurisprudence of the European Court of Human Rights is apparent: politicization of the European Court of Human Rights in the eyes of its national audiences and the inability of the Court to speak in one voice, thus, weakening its role as the ultimate interpreter of the Convention for all the Council of Europe member states. Both risks can have effects on the authority perception of the European Court of Human Rights not only amongst states, but also amongst members of civil society and individual applicants.

The risk of politicization of the European Court of Human Rights is due to the support that the variable geometry jurisprudence may lend to the charge that the Court is an institution of 'double standards.' A significant aspect of the new good and bad faith jurisprudence of the Court is the distribution of this case law between states. Whilst western European states have been on the receiving end of good faith deference to domestic interpreters, eastern European states have been on the receiving end of the bad faith jurisprudence. This is not to suggest that the Court has intentionally distributed the cases along this axis. It may, however, easily be seen to draw a 'civilizational standard' between west and east Europe by those who would like to promote a deeply political vision of the European Convention system. It is also worth mentioning that the European Court of Human Rights has back tracked from previous findings in its standard case law with respect to cases brought against the UK on at least two occasions, first in *Animal Defenders* and then in *Hutchinson*, admitting that its standard jurisprudence did not apply in its entirety to the UK.

This concern around backtracking from standard jurisprudence of the Court with respect to the UK, has been raised in the dissenting opinions of the Court, in particular, with respect to the consolidation of its deference to trusted domestic human rights interpreters. In the Animal Defenders case, this concern was raised by the dissenting opinion of Judges Ziemele, Sajo, Kalaydijeva, Vucinic and de Gaetano, who queried how a blanket ban on political advertising can be proportionate only because the UK Parliament has found it so after deliberating on the matter. In the context of the case, the judges stated that 'we find it extremely difficult to understand this double standard within the context of a Convention whose minimum standards should be equally applicable throughout all the States parties to it.'[103] In the Hutchinson case, the dissenting opinion by Judge Albuerquerge employed a much stronger dissent to what he saw as the Court creating a special jurisprudence for the UK when he stated that:

> ….the present judgment may have seismic consequences for the European human-rights protection system. The majority's decision represents a peak in a

[103] Animal Defenders, *supra* n81. See joint dissenting opinion of Judges Ziemele, Sajo, Kaalyjıeva, Vucinic and De Getano, at para 1.

> growing trend towards downgrading the role of the Court before certain domestic jurisdictions, with the serious risk that the Convention is applied with double standards. If the Court goes down this road, it will end up as a non-judicial commission of highly qualified and politically legitimised 47 experts, which does not deliver binding judgments, at least with regard to certain Contracting Parties, but pronounces mere recommendations on "what it would be desirable" for domestic authorities to do, acting in an mere auxiliary capacity, in order to "aid" them in fulfilling their statutory and international obligations. The probability of deleterious consequences for the entire European system of human-rights protection is heightened by the current political environment, which shows an increasing hostility to the Court.[104]

These strong dissenting opinions towards the good faith deference UK cases, show that the bench of the European Court of Human Rights is aware of the political repercussions of its variable geometry jurisprudence. Yet, it is not only the deference to trusted states that politicizes the judicial function of the Court. The simultaneous development of the Article 18 case law of the Court too poses a similar risk by further evidencing not only double, but perhaps triple standards in how the Court addreses the Convention audiences. The Article 18 case law of the Court, by its preference to distinguish between ordinary and grave violation of the Convention may fuel criticism from European states that the Convention is not applied in an identical way to all Council of Europe member states. Indeed, the Georgian government referred the Merabashvili case to the Grand Chamber, precisely because it found that no other country was ever asked to prove that they did not have an illegitimate context.[105] Some judges insist that the original founders of the Convention meant for this differentiation of blame and that the Court must speak up when states backslide from rule of law and democratic governance.[106] Judge Sajo stated, in his dissenting opinion in the case of Tchankotadze v. Georgia, in which the Court found the Article 18 claim manifestly ill founded, that the use of legal systems for illegal ends in some member states of the contemporary Council of Europe is a case of 'every school boy knows'.[107] In such cases, Sajo argued, merely declaring a violation of the Convention does not adequately account for the root causes of the violation and the Court must seize an active role in identifying democratic decay. Perhaps, the recent interest in Article 18 of the Convention is also a case of unfortunate timing. It is because the Court has developed its good and bad faith jurisprudence around the same time that the risk of being seen as having double standards has increased.

In addition to the risk of politicization of the Court in the eyes of its beholders, there is the difficulty of conveying to this heterogeneous audience the functions and purpose of the European Court of Human Rights. For most of its existence the core function of the European Court of Human Rights has been the emission of Europe wide standards to national decision-makers in all aspects of the Convention. The new variable geometry

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[104] Hutchinson, *supra* n76. See dissenting opinon of Judge Alburerquerque at para 38.
[105] *Merabishvili, supra* n53
[106] Keller and Corina, *supra* n18
[107] Tchankotadze, *supra* n95. See dissenting Opinion of Judge Sajo

jurisprudence jeopardizes this mission because in considering whether there has been a violation of the Convention the Court will now not only review the nature of the right, and the availability of European consensus on the scope of the right, but also the attitudes of the domestic convention interpreters and the quality of their decision-making in balancing rights with public interests. Engaging in an assessment of the quality of domestic decision-making will always remain in conflict with the carrying out of a substantive review of the act or omission of the state.[108] A move to identify bad faith on the part of states, on the other hand, further fragments the judicial messages sent by the Court. By finding a violation of Article 18, the Court signals that some violations of the Convention are graver than other violations. This stands in stark contrast with the international law of state responsibility, where a state either violates international law or not, without passing judgment on the gravity of the violations.

A final consequence of variable geometry concerns the fate of the standard jurisprudence of the Court in which the Court continues to develop common standards for all member states. The deference accorded to some states based on the quality of their decision making procedures will mean that in some Convention rights, the Court no longer imposes uniform standards. This may lead to the shrinking of the uniform standards developed by the Court with respect to all Convention articles. In other words, over time we may see a consolidated core, where the standard jurisprudence will speak in one voice to all member states, and two types of periphery jurisprudence. In one periphery the standards applicable will be determined more by the domestic interpreters themselves. In another periphery, states will be liable for grave violations of the Convention if their conduct advances illegitimate pretexts not provided for by the Convention.

Conclusion

In this article I argued that shifts in the underlying attitudes of domestic states towards the European Court of Human Rights could be understood as an alternative frame to understand the 'crisis' of the European Convention regime. This alternative framing does not replace other framings of the Court's crisis as being related to its increase in caseload, the non-implementation of judgments or a backlash. Rather it complements them by pointing to the fact that the diversity of attitudes towards the Convention in the European political and legal landscape is part of the ensuing crisis of the European Court of Human Rights. As a corollary to this, I further argued that the European Court of Human Rights has been responsive, perhaps hyper responsive, to these attitudinal changes and has, through its substantive case law, aimed to address its increasingly heterogeneous audience. It has done so by seeking to award the good faith interpreters with deference to them in the interpretation and application of the Convention and by punishing the bad faith interpreters by delivering Article 18 violation judgments. These twin developments in turn has created a novelty in the international human rights landscape by giving way to a variable geometry in human rights case law where there is at once an emphasis on the plurality of rights interpretation and on bad faith interpretation. This variable geometry, however, also means that the Court no longer speaks in one voice to all Council of

[108] Animal Defenders, *supra* n81. See dissenting opinion of Judge Tülkens.

Europe member states. States, depending on their attitudes towards the Convention, receive their own tailor made jurisprudential response.

There may be two important objections to the argument laid out in this article. First, it may be argued that the diversity of the countries under the jurisdiction of the European Court of Human Rights is not of the Court's own doing. The European landscape has indeed shifted by developments in the UK, on the one hand, and in Russia, Turkey and other eastern European states on the other. The Court's variable geometry jurisprudence merely takes these fundamental changes into account rather than pretending that Europe continues to have – more or less – the same attitude towards the Convention acquis. It may further be argued that the Brighton Declaration of 2010 precisely pointed out to this, asking the Court to operate more deferentially towards well-established democracies with strong rule of law systems and focus more robustly on serious violations of human rights where domestic health of democracies are under threat.[109] So, in order to maintain its authority and relevance across diverse jurisdictions, the Court calibrates its case law by employing a variable geometry. After all, the European Court of Human Rights may be seen as the master of calibrating its authority. These new developments can, therefore, be seen as a continuum of the Court's strategic responses to managing diversity and universality[110] and not a break from them.

Second, it may be argued that the small handful of cases discussed in this article do not disturb, in significant ways, the reach and breadth of the standard jurisprudence of the Court and the authority of that case law. After all, the Court continues to deliver a significant amount of judgments canvassing its well-established case law in repetitive cases, for example, in favour of the protection of refugees[111], the principle of non-refoulement,[112] or in cases related to discrimination on the grounds of sexual orientation[113]. The cases discussed above that reflect a variable geometry focus on the balancing of rights, where reasonable disagreement is prevalent, or when hidden agendas are highly suspect. Compared to the number of judgments delivered by the Court each year, the case law discussed in this Article may be regarded as marginal in numbers. The Court, thus, continues to safeguard the European public order, and flexes its muscles

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[109] Brighton Declaration. Also see, Madsen, 'Rebalancing European Human Rights: Has the Brighton Declaration Engendered a New Deal on Human Rights in Europe? (forthcoming, 2017).

[110] *A.P., Garçon & Nicot v France*, App Nos. 79885/12, 52471/13 and 52596/13, [2017] ECHR 338

[111] *Sharifi and Others v. Italy and Greece*, App no.16643/09,[2014] ECHR 1115; (2014); *Tarakhel v. Switzerland*, App no. 29217/12, 60 Eur H.R. Rep. 28 (2015)

[112] *Sufi and Elmi v. the United Kingdom,* App no 8319/07*,* 54 Eur H.R. Rep. 9 (2012)*; Khlaifia and Others v. Italy,* App no. 16483/12, [2015] ECHR 757; Finogenov and Others v. Russia*,* App no. 18299/03*,* 61 Eur. H.R. Rep. 4 (2015); Trabelsi v. Belgium*,* App no.140/10*,* [2014] ECHR 893

[113] For a detailed list of recent cases related to discrimination on the grounds of sexual orientation see *Factsheet – Sexual Orientation Issues,* EUROPEAN COURT OF HUMAN RIGHTS (April 2017) , available at http://www.echr.coe.int/Documents/FS_Sexual_orientation_ENG.pdf

when required.

In response to these objections, two observations may be made. First, the fact that the Court's audience is no longer largely homogenous does not automatically require it to calibrate its case law accordingly. Indeed, the UN Human Rights Committee, with the 103 members that accepted its right to individual petition, has consciously stayed away from developing an explicit doctrine of margin of appreciation with due regard to the nature of rights, precisely because it has a heterogeneous audience. Instead, the Court continues to adopt the exact opposite approach by assuming that all of its members will understand the jurisprudential adjustments it makes in its case law in good faith and will not see these as signals of retreat or undue activism due to country-specific push backs. In the old Europe, the 'old margin' worked as the overall support for the Convention enabled the Court to rise above the politics behind its individual cases. In an increasingly divided European landscape, however, this may be an over optimistic assumption. More Convention States now have more incentives to dismiss the Court as political as a matter of their own domestic politics. Second, the cases, whilst not high in number, show fundamental shifts in the underlying logic of the standard jurisprudence of the case-law and they are saturated across two opposite geographical contexts. As such, their effect on the perception of the Court's authority are more significant than the large volume of repetitive judgments the Court delivers each year.

In this new jurisprudential era of variable geometry, the clarity of the reasoning of the Court, will continue to be its most important arsenal against its highly fractured audience, in offsetting the risks of its jurisprudence being seen as 'tailor made' for certain countries and for Europe as a whole. In this respect, the Court must work to normatively connect its right-based deference doctrines with its institutional quality-based deference doctrines in more coherent ways rather than offering separate tracks of reasoning for different sets of states. On bad faith case-law, too, the Court must not oscillate between higher and lower standards of proof and should have a consistent approach towards taking account of the systematic decay of democratic and rule of law institutions, wherever they may occur. Whether the Court will succeed in speaking in one voice through its variable geometry case law will continue to be tested in years to come.