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The monitoring mechanism of the Strasbourg Court: inter-State applications under Article 33 of the European Convention on Human Rights

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Table of Contents

Introduction……………………………………………….……………….4

Chapter I. Preliminary analysis of inter-State complaints for the protection of human rights………………………………………………6
1.1 Inter-State appeals in the United Nations system of human rights protection…………………………………………………………………6
1.1.1 The International Bill of Human Rights………………………………6
1.1.2 Other United Nations human rights conventions……………………..10
1.2 Inter-State disputes in the African system of human rights protection…..13
1.3 The jurisdiction of the Inter-American Court of Human Rights in the examination of inter-State applications……………………………………..15
1.4 The regional System of Protection of Human Rights in Europe…………17
1.4.1 The Council of Europe………………………………………………17
1.4.2 The European Convention on Human Rights………………………...20
1.4.3 The Strasbourg Court: composition, responsibilities, and advisory function……………………………………………………………………..22

Chapter II. The monitoring procedure of the European Convention on Human Rights……………………………………………………………..26
2.1 Individual and inter-State complaints…………………………………..26
2.2 The jurisdiction of the Strasbourg Court………………………………. 31
2.3 The proceedings before the European Court of Human Rights: the admissibility stage……………………………………………………………..34
2.3.1 Conditions of admissibility applied to individual appeals……………34
2.3.2 Conditions of admissibility applied to individual and inter-State appeals………………………………………………………………………...37
a) *The exhaustion of domestic remedies*…………………………………...37
b) The compliance with the four-month time limit…………………………39
2.3.3 The evolution of case law: exceptions to the exhaustion of domestic remedies in inter-State complaints…………………………………………41

Chapter III. The examination of the merits of inter-State complaints pending before the Strasbourg Court……………………………………46
3.1 Actions based on the collective enforcement of human rights…………..46
3.1.1 The Greek Case (applications nos. 3321-23/67, 3344/67 and 4448/70)………………………………………………………………………46
3.1.2 The Turkish Case (applications nos. 9940-44/82)……………………49

3.1.3 The Case of Denmark v. Turkey (application no. 34382/97)…………50
3.2 Actions to protect specific national interests of the applicant States……52
3.2.1 The cases of Greece v. United Kingdom (applications nos. 176/56 and 299/57)…………………………………………………………………...52
3.2.2 The case of Austria v. Italy (application no. 788/60)…………………55
3.2.3 The case of Ireland v. United Kingdom (application no. 5310/71)…...57
3.2.4 The cases of Cyprus v. Turkey (applications nos. 6780/74, 6950/75, 8007/77 and 25781/94)……………………………………………………..60
3.3 The role of inter-State applications under the European Convention on Human Rights……………………………………………………………63
3.3.1 The initial purpose of inter-State appeals by the High Contracting Parties………………………………………………………………………63
3.3.2 The present purpose and effects of inter-State complaints…………..65

Chapter IV. The Effect of the European Union's Access to the European Convention on Human Rights on Inter-State Applications…………….67
4.1 The evolution of human rights in the European Union………………...67
4.2 The Protection of human rights in the European Union………………..70
4.2.1 The monitoring of Member States' compliance with European law...71
a) The control procedure under Article 7 of the Treaty of the European Union……………………………………………………………………71
b) The infringement procedure……………………………………………..73
c) The preliminary rulings procedure……………………………………...76
4.2.3 The control of legality of European Union acts……………………...80
a) Actions for annulment…………………………………………………..80
b) Actions for failure to act………………………………………………..83
4.3 The accession to the European Convention on Human Rights………...85
4.3.1 The draft agreement of 5th April 2013……………………………….85
4.3.2 The Court's Opinion 2/13…………………………………………….87
4.4 The possible effect of EU access on inter-State complaints……………90
4.4.1 The possibility for the European Union to be a respondent in an appeal……………………………………………………………………91
4.4.2 The possibility for EU Member States to bring inter-State complaints…………………………………………………………………93
4.4.3 Possible consequences on EU for Member States's violations and vice versa…………………………………………………………………….94

Conclusion……………………………………………………………..99
Bibliography…………………………………………………………..103
Abstract……………………………………………………………….120

Introduction

Even today, respecting and safeguarding universally recognised human rights is one of the main missions of the international community. In fact, although the atrocities of the two great world conflicts would seem to have been overcome, in reality we still witness serious and systematic violations of the inalienable rights of the individual, even in Western societies. Although States are still the main subjects of international law and, as such, the main guarantors of respect for human rights, it is also true that, following the Second World War, the role of international organisations in this regard has been, and continues to be, of fundamental importance[1]. In fact, they have contributed to the universalisation of human rights, working at both international and regional levels[2]. In this regard, it is necessary to refer to the work done by the United Nations. Indeed, thanks to the adoption of the Universal Declaration of Human Rights in 1948, the subsequent drafting of the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights, a body of legal norms of international law has been established that, to date, can be defined as the International Bill of Human Rights[3]. These were followed by numerous other documents drafted at international level, which have and continue to be the main references for the drafting of as many international treaties on the subject at regional level[4].
Respect for human rights is guaranteed above all by the control mechanisms that have been established both at the international level and at the level of individual organisations with a regional character. With regard to the first control mechanisms established within the United Nations, these can find the legal basis for their establishment either in the UN Charter itself, as in the case of the Human Rights Council, or in specific international treaties, as in the case of the Human Rights Committee[5]. With reference to organisations of a regional nature, it is necessary to mention the work done by the Organisation of American States ('OAS'), the African Union ('AU'), the European Union ('EU'), but especially the Council of Europe ('CoE').

The Council of Europe in particular provides the institutional framework for this paper, which focuses on the control mechanism established with the adoption of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR'), with particular reference to the mechanism governed by Article 33 of the latter, i.e., inter-State litigation. In fact, although the possibility for a State to bring a claim against another contracting party has been provided for in the Convention since it was first drafted, to date it

[1] KLEIN (2007: 1).
[2] *Ibid*.
[3] *Ibid*,
[4] ZANGHÌ, PANELLA (2019:18).
[5] *Ibid*.

appears that there are always more claims brought by individuals than by States[6]. The purpose of this paper is to analyse the appeals submitted to the Strasbourg bodies, both with reference to the peculiarities of the admissibility requirements placed on them and with reference to the examination of the merits.

The first chapter of an introductory nature is devoted to an analysis of the control mechanisms put in place to protect human rights at the international and regional levels. The first part will examine the functioning of the bodies that guarantee the observance of the rights of the individual in the United Nations system, with particular reference to inter-State remedies. In the following sections, the regional control mechanisms operating in the American, African and finally European territories will be examined.

The second chapter focuses on the examination of the admissibility of appeals to the Strasbourg bodies. First, the jurisdiction of the European Court of Human Rights ('ECtHR') will be examined, which, like other courts also operating at the international level, is limited by four universally recognised rules of international law[7]. Secondly, the admissibility requirements applied to both individual and inter-State appeals will be examined. The last section of this chapter will be devoted to the peculiarities of admissibility requirements in the case of inter-State appeals.

The third chapter deals with the examination of the merits of appeals submitted both to the European Commission of Human Rights before the entry into force of Protocol no. 11 and to the European Court of Human Rights. In particular, the cases examined have not been arranged in chronological order but are divided into two broad categories. The first category of inter-State appeals analysed refers to appeals brought in the name of the collective protection of human rights, while the second category analysed refers to those inter-State appeals that have more specific national interests at stake. In addition, in the last section of the chapter, the role that inter-State appeals have taken on since the entry into force of the European Convention on Human Rights until today will actually be examined, becoming above all an instrument of political denunciation of serious and persistent violations of human rights.

Finally, the fourth chapter is devoted to the analysis of the possible accession of the European Union to the Convention, with particular reference to the effects that such accession could have on inter-State actions brought both by the member States of the Union itself and by States that are Contracting Parties to the Convention but are not members of the Union.

[6] OETHEIMER, CANO PALOMARES (2020: 5).
[7] NUßBERGER (2012: 245).

Chapter I. Preliminary analysis of inter-State complaints for the protection of human rights

1.1 Inter-State appeals in the United Nations system of human rights protection

1.1.1 The International Bill of Human Rights

In the aftermath of the death of the 32nd President of the United States of America Franklin Delano Roosevelt, precisely on 25 April 1945, the conference that would lead to the adoption of the Charter of the United Nations opened in San Francisco. Indeed, a few months later, on the 26th of June of the same year, the United Nations Charter was signed[8].
The entire Statute is inspired by respect for human rights. Indeed, they are listed among the purposes of the Organisation in Article 1:

> "The Purposes of the United Nations are: [...] 3. To achieve international cooperation […] promoting and encouraging respect of human rights and for fundamental freedoms for all without distinction of race, sex language, or religion"[9].

The Preparatory Commission was established following the entry into force of the San Francisco Charter. The Preparatory Commission, as early as the autumn of 1945, recommended that the Economic and Social Council ('ECOSOC'), exercising the powers conferred on it by the Charter, immediately establish a Human Rights Commission with the mandate to draft an International Declaration of Human Rights[10].
Only a few years later, the United Nations General Assembly, meeting in Paris, adopted the Universal Declaration of Human Rights on 10 December 1948 with 48 votes in favour, none against and eight abstentions. Among those abstaining was the Soviet bloc, consisting of the USSR, Belarus, Ukraine, Czechoslovakia, Poland, and Yugoslavia. In addition, abstentions included South Africa and Saudi Arabia[11].
From a purely legal point of view, this Declaration belongs to that category of acts that are not binding and therefore do not create legal obligations[12].
In spite of this, the 1948 Declaration represents a fundamentally important crossroads in the evolution of human rights as it constitutes the main starting point for the institutionalisation of protection systems aimed at protecting human rights[13]. In fact, the Commission on Human Rights, following the

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[8] VARSORI (2015: 147).
[9] Charter of the United Nations, San Francisco, 26 June 1945.
[10] ZANGHÌ PANELLA (2019, 14-15).
[11] *Ibid.*
[12] KLABBERS (2015: 156-157).
[13] ZANGHÌ, PANELLA (2019, 74).

drafting of the Declaration, was given the mandate to draft a binding human rights instrument. In the course of its work, the Commission decided to draft two binding Covenants: one aimed at the protection of civil and political rights, and another one aimed at the protection of economic, social, and cultural rights[14]. The Covenant on Civil and Political Rights ('ICCPR') and the Covenant on Economic, Social and Cultural Rights ('ICESCR') were both adopted in 1966 and entered into force in 1976 and represent the so-called International Bill of Human Rights[15]. The decision to adopt two different binding instruments derives from the different nature of the rights protected: while civil and political rights (e.g. the right to life and integrity of the person, the freedoms of thought, expression and association) essentially translate into an obligation of non-interference by the State economic, social and cultural rights (e.g. the right to work, right to education, right to an adequate standard of living) require the State to guarantee the enjoyment of these rights by individuals[16]. Therefore, the application of the latter cannot be immediate, as it requires necessary financing by the State, and is therefore dependent on the economic, and not only, condition of each contracting party[17].

The different nature of the rights recognised in the two different Covenants of 1966 is also reflected in the definition of the control mechanisms envisaged for them. Indeed, the Covenant on Economic, Social and Cultural Rights does not provide for an *ad hoc* control body. According to Article 16(2), the supervisory functions on the text are entrusted to the Economic and Social Council: "2. (a) All reports shall be submitted to the Secretary-General of the United Nations, who shall transmit copies to the Economic and Social Council for consideration in accordance with the provisions of the present Covenant"[18].
Subsequently, the ECOSOC, with Resolution 1985/17 of 28 May 1985, established a specific body to monitor the ICESCR, that is the Committee on Economic, Social and Cultural Rights ('CESCR')[19]. The intention was to establish a parallel body to the Human Rights Committee, which oversees the observance of the rights guaranteed in the ICCPR[20]. There are similarities between the two bodies in several respects, e.g., the number of members and term of office, but they are radically different in that the CESCR is a subsidiary body of ECOSOC, and not a conventional body in the strict sense[21].
The main task of the CESCR is to examine the periodic reports sent in by Member States concerning the implementation of the rights guaranteed in the

[14] *Ibid.*
[15] *Ibid.*
[16] Van Boven (2014: 144).
[17] *Ibid.*
[18] International Covenant on Economic, Social and Cultural Rights, New York, 16 December 1966.
[19] Zanghì, Panella (2019, 75).
[20] *Ibid.*
[21] *Ibid.*

ICESCR. Following the examination of these reports, the Committee develops concluding observations, which contain suggestions and recommendations to the State under review[22].

The Optional Protocol to the ICESCR, adopted by the UN General Assembly on the 10 December 2008 and subsequently entered into force on 5 May 2013, provides, in Article 2, the competence of the Committee to receive and consider communications submitted by an individual or groups of individuals who are victims of violations of the rights contained in the Covenant.[23] This procedural mechanism has a mandatory nature, unlike the examination of inter-State complaints and the enquiry procedure: the latter two procedural mechanisms are indeed subject to a further express manifestation of will by the State parties[24].

As mentioned earlier, the Covenant on Civil and Political Rights, under Article 28, establishes a Human Rights Committee, composed of 18 members, individually elected by the State Parties. The Committee meets in ordinary sessions three times a year and in possible special sessions at the request of 2/3 of its members or of a State party to the Covenant. Generally, the Committee takes its decisions by consensus, but, if necessary, it proceeds by vote. In the latter case, each member of the Committee has one vote, and a majority of the members present is required for the decision to be taken[25].

Under Article 40(1) of the Covenant on Civil and Political Rights, States Parties are obliged to submit periodic reports on the measures taken to implement the rights recognised in the Covenant. These reports are addressed to the Secretary-General of the United Nations, who then forwards them to the Committee that, after a review thereof, formulates its final observations, including recommendations to the State under review[26].

In addition to the system of periodic reports, the ICCPR provides, under Article 41, for the possibility of *communications* to be made by States and examined by the Committee. Such submissions are classified as communications because they do not establish a jurisdictional or quasi-judicial procedure, but merely give rise to a conciliation mechanism[27]. Furthermore, the first paragraph of the above-mentioned article provides that any State Party may declare that it recognises the competence of the Committee to receive and consider communications in which a State Party declares that another State Party is not fulfilling its obligations under the Covenant[28]. The procedure governed by Article 41 consists essentially of three phases: in the first phase, the State Party which considers that another

[22] Chapman, Carbonetti (2011, 701).
[23] Optional Protocol to the International Covenant on Economic, Social and Cultural rights, New York, 10 December 2008.
[24] Russo (2015: 4).
[25] Zanghì, Panella (2019: 91).
[26] Buergenthal (2001: 347-349).
[27] *Ibid.*
[28] *Ibid.*

State Party has violated the rights contained in the Covenant notifies the violating State; in the second phase, if any, the Committee has the possibility to intervene only if, within six months of receipt of the communication, the matter has not been resolved to the satisfaction of both Parties concerned[29]. At this point, the Committee must ascertain the admissibility of the communication, which is only admissible if the rule of prior exhaustion of domestic remedies has been applied. This principle may be waived if and only if "the application of the remedies is unreasonably prolonged"[30].
Once the admissibility examination has been completed, the Committee shall place its good offices at the disposal of the States in order to reach an amicable solution respecting the rights recognised in the Covenant. The Committee may request any relevant information from the States concerned and, in turn, they may present their observations, orally or in writing, and, if necessary, be represented before the Committee during the handling of the matter. At the conclusion of the procedure, the Committee draws up a report which is then forwarded to the Parties. Nonetheless, it must be emphasised, that even this second phase is merely an attempt at conciliation, especially in view of the fact that, in its concluding opinion, the Committee may not express its views, but only outline the facts[31]. If, despite the intervention of the Committee, the dispute is not resolved, Article 42 provides that, with the consent of the Parties, an *ad hoc* Conciliation Commission shall be established, composed of five members appointed by the Committee in agreement with the States concerned. The members of the Commission serve in their individual capacities and may not be nationals of the States Parties involved in the dispute[32]. The Commission, within a maximum period of twelve months, must conclude the procedure and submit a report to the President of the Committee. This report is then communicated to the Parties, who have three months to notify the President of the Committee of their intentions in accepting or not the terms proposed by the Conciliation Commission[33]. Currently, of the 173 States Parties to the Covenant on Civil and Political Rights, only about 50 States have recognised the Committee's competence to receive and examine inter-State communications[34].

As it can be seen from the procedure just described, there is no follow-up in the event that the parties do not accept the Commission's proposal or in the event that the Commission itself has been unable to reach an amicable settlement. This conciliation mechanism, as described in Art. 41 and Art. 42, is not particularly effective. This weakness is however partly compensated for by Art. 44 of the ICCPR, according to which:

[29] International Covenant on Civil and Political Rights, New York, 16 December 1966.
[30] *Ibid.*
[31] BUERGENTHAL (2001: 365).
[32] ZANGHÌ, PANELLA (2019: 94-95).
[33] *Ibid.*
[34] RISINI, ULFSTEIN (2022: 7).

> "The provisions for the implementation of the present Covenant shall apply without prejudice to the procedures prescribed in the field of human rights by or under the constituent instruments and the conventions of the United Nations and of the specialized agencies and shall not prevent the States Parties to the present Covenant from having recourse to other procedures for settling a dispute in accordance with general or special international agreements in force between them"[35].

Therefore, this Article allows Member States to refer a possible question on the application or interpretation of the ICCPR to other competent bodies, e.g., the International Court of Justice or, in the case of Member States of the Organisation of American States, Parties may request an advisory opinion from the Inter-American Court of Human Rights on the same question. Moreover, the above-mentioned article does not mention any time limitation on the possibility of referring the matter to other jurisdictional or quasi-jurisdictional bodies: it follows that the question may possibly be referred both before and after the conclusion of the procedures described in Articles 41 and 42 [36].

Under Article 4 of the Protocol, the Committee is obliged to bring to the attention of the Member State in question any individual communications concerning it. The Member state must, within a period of six months, submit statements on the matter under consideration and any remedies it has taken[37]. Article 5 also requires the Committee to consider the communication on its merits and the same article provides that the process of examining individual communications is confidential and therefore takes place during the camera sessions of the Committee[38]. At the end of the examination of the individual complaint, the Committee draws up its "final views". If the State in question has indeed breached its obligations under the ICCPR, the Committee clarifies possible solutions to address this breach and, generally, it requires the *restitutio ad integrum* or the payment of a fine. In any case, the Committee' s final opinions are not legally binding, although the Committee's finding of a breach of the obligations set out in the ICCPR is an important statement of the violation of the *cogens* principle *pacta sunt servanda*[39].

1.1.2 Other United Nations human rights conventions

The possibility of inter-State complaints is common to many human rights instruments. Indeed, such a review mechanism is contained not only in the ICCPR and the Optional Protocol to the ICESCR, but also in other conventions of a universal character. Some of these conventions, developed in the framework of the United Nations, are: the 1965 International

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[35] International Covenant on Civil and Political Rights, New York, 16 December 1966.
[36] BUERGENTHAL (2001: 365-366).
[37] ZANGHÌ, PANELLA (2019: 94-95).
[38] *Ibid.*
[39] DAVIDSON (1997: 386-387).

Convention on the Elimination of All Forms of Racial Discrimination ('ICERD'); the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('CAT'); the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families ('ICRMW'); the 2006 International Convention for the Protection of All Persons from Enforced Disappearance; and the 2011 Optional Protocol to the Convention on the Rights of the Child on a Communication Procedure[40]. Despite the fact that the possibility of inter-State appeals is present in a number of instruments at the universal level, to date the ICERD is the only universal human rights treaty through which inter-State appeals have been lodged.

According to Article 11 of the ICERD, if a Member State considers that another Member State is not fulfilling its obligations under the Convention, it may make a communication to the Committee on the Elimination of Racial Discrimination and the latter must notify the State concerned, which has a period of three months to submit a declaration on the matter or to indicate any measures taken to remediate it. If the issue is not resolved through bilateral negotiations or other procedures available to them, the matter may be referred to the Committee again. In this case, the latter is legitimately entitled to deal with it[41]. Pursuant to Articles 12 and 13, the Chairman of the Committee may appoint an *ad hoc* Conciliation Commission, composed of five members, which shall place its good offices at the disposal of the States to achieve an amicable settlement of the matter. After a careful examination of the matter, the Commission shall prepare a non-binding final report, which may be accepted by the Parties within three months, containing recommendations for reaching an amicable settlement of the dispute[42]. The control mechanism described in Articles 11-13 is of a compulsory nature since there is no explicit declaration by the Contracting Parties to accept the competence of the Committee to examine inter-State appeals[43].
In addition to this mechanism, the ICERD also provides for an arbitration clause. Indeed, pursuant to Article 22:

> "Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement"[44].

[40] RISINI, ULFSTEIN (2022: 2-3).
[41] TAMADA (2021: 411-412).
[42] EIKEN , KEANE (2022: 322-338).
[43] *Ibid.*
[44] International Convention on the Elimination of All Forms of Racial Discrimination, New York, 21 December 1965.

To date, considering the procedures described in Articles 11-13 and Article 22, eight inter-State appeals have been filed concerning the ICERD. Pursuant to Articles 11-13, three inter-State appeals were lodged in 2018: *State of Qatar v. Kingdom of Saudi Arabia*; *State of Qatar v. United Arab Emirates*; *State of Palestine v. State of Israel*. In early 2021, following the conclusion of the Al Ula Agreement, the proceedings involving Qatar against the Kingdom of Saudi Arabia and the United Arab Emirates were discontinued[45]. Furthermore, the case *Qatar v. United Arab States* was pending in parallel before the CERD and the International Court of Justice ('ICJ'). The risk of bringing two different dispute resolution bodies at the same time and on the same issue is that different conclusions may be reached[46]. In 2021, the ICJ, following the preliminary objection filed by the United Arab Emirates, found it lacked jurisdiction *ratione materiae* under Article 22 ICERD[47].

The first case filed with the ICJ concerning its application under Article 22 ICERD was filed by Georgia against the Russian Federation. Georgia had no recourse to the means of dispute settlement described in Articles 11-13 and Article 22 ICERD, but the ICJ denied having jurisdiction in 2011[48]. Subsequently, in 2017, Ukraine filed a claim with the ICJ against the Russian Federation partly based on the ICERD. In the same year, the ICJ imposed provisional measures and two years later, in 2019, it found the application admissible, rejecting the Russian Federation's preliminary objections to the Court's jurisdiction in examining the claims filed by Ukraine[49]. Finally, in September 2021, Armenia and Azerbaijan both filed appeals before the ICJ. Both appeals are based on the ICERD and could lead to an eventual development regarding the interpretation of Article 22. Currently, the ICJ has taken *interim* measures in both cases[50].

Some conclusions can be drawn from the above analysis. Although several instruments at the international level provide for the possibility of inter-State remedies, this practice has not always been frequently used. First, there are substantial limitations, precisely because very often this control mechanism is only optional[51]. Secondly, in most cases, the bodies that are entitled to reach conclusions on the issues at stake are not empowered to adopt legally binding decisions. Indeed, it is often left to the States to decide whether to adopt the measures proposed by the *ad hoc* commissions. Nevertheless, it cannot be inferred that the mechanisms described above are completely ineffective. Rather, their scope of application may be limited[52].

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[45] RISINI, ULFSTEIN (2022: 2-3).
[46] EIKEN, KEANE (2022: 319).
[47] RISINI, ULFSTEIN (2022: 4).
[48] *Ibid.*
[49] *Ibid.*
[50] *Ibid.*
[51] RAGNI (2021: 599).
[52] RAGNI (2021: 609-610).

1.2 Inter-State disputes in the African system of human rights protection

The Organisation of African Unity was founded in Addis Ababa, Ethiopia, in 1963. Subsequently, in 2002, the Organisation was renamed the African Union ('AU') and, with its founding act, the grounds for the creation of a regional system for the protection of human rights on the African continent were established[53]. The document on which this protection system is based is the African Charter on Human and People's Rights, which was unanimously adopted on 27 June 1981 and entered into force in October 1986. To date, the African Charter represents the largest regional human rights protection system, as it has been ratified by 53 out of 55 States on the entire African continent. It has not been ratified by Morocco, which has not been part of the then Organisation since 1985, and by South Sudan, which has not yet ratified following independence only in 2011[54].

The African Charter is composed of three distinct parts. In detail, the first part defines rights and duties: Chapter I of Part I defines the rights and freedoms of individuals that are guaranteed by it, while Chapter II defines the duties that individuals have towards family, society, the State and also towards the African Union itself[55].
In Part II of the African Charter, an African Commission on Human and People's Rights is established. This Commission consists of eleven members, nominated by the Member States and elected by the Assembly of African Unity, and has the main task of promoting human rights and monitoring compliance with the African Charter[56]. In addition, the Commission may adopt resolutions on the interpretation of the African Charter and may indicate *interim* measures to be taken in the event of the violation of rights and freedoms recognised in the African Charter. However, the African Commission is a quasi-judicial body in that, even if it makes recommendations, these recommendations are not legally binding[57].
The Commission can accept and consider complaints from both States and individuals concerning the violation of rights recognised in the African Charter. Furthermore, it is the practice of the Commission to also accept complaints from non-governmental organisations because the Charter does not specify who is eligible to complain[58]. Even in the case of complaints brought before the African Commission, there are admissibility requirements that must necessarily be met, chief among them being the rule of prior exhaustion of domestic remedies[59].

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[53] HEYNS (2004: 681).
[54] ZANGHÌ, PANELLA (2019: 416).
[55] GITTLEMAN (1982: 673-674).
[56] UMOZURIKE (1983: 908-909).
[57] *Ibid.*
[58] HEYNS (2004: 694).
[59] *Ibid.*

In addition to the Commission, the African regional system for the protection of human rights also provides for a fully judicial body, which performs a control function complementary to that of the Commission. This body is the African Court of Human and Peoples' Rights, established by the Ouagadougou Protocol, which was approved on 9 June 1998 and entered into force on 25 January 2004. To date, the Protocol establishing the African Court has obtained a total of thirty-one ratifications[60].

As mentioned earlier, any State party can bring an action before the African Commission with the aim of accusing another State party of violating the rights and freedoms enshrined in the African Charter, regardless of the link to the victim. Moreover, this possibility derives directly from the Covenant itself since, by ratifying it, State parties automatically accept that they can be respondent to an inter-State action at any time[61]. The inter-State complaints that can be brought before the African Commission consist of different procedures, governed by Articles 47-49 of the African Charter. In particular, Article 47 regulates the communication-negotiation procedure, which is initiated in the event that a State sends a written notification to another State alleged to have violated the rights enshrined in the African Charter. This notification is also forwarded to the President of the African Commission, but for information purposes only, as the Commission itself does not assume any specific role in the case of a communication-negotiation procedure[62].
To date, the communication-negotiation procedure has never been activated, while five communication-complaints have been filed. With respect to three of these, the Commission has declared its lack of competence *ratione materiae.* A fourth communication, filed by Djibouti against Eritrea in 2014, was declared admissible in 2019 and is still pending before the Commission. Finally, the only inter-State communication examined on the merits was the one brought by the Democratic Republic of the Congo against Burundi, Rwanda and Uganda in 1999, which concerned certain violations of human rights committed by the three defendants during the armed conflict that took place in the 1990s on the territory of the plaintiff. In 2003, the Commission issued its final report on the matter, declaring the defendant States guilty of violating numerous rights guaranteed in the African Charter on Human and Peoples' Rights. Indeed, the Commission itself demanded that the offending States immediately withdraw their troops stationed in the Democratic Republic of Congo and recommended "that adequate reparations be paid"[63].

As mentioned earlier, the African Court is the judicial body of the African regional human rights protection system that has the power to adopt final and legally binding judgments. As in the case of the Commission, it is also

[60] BEKKER (2007: 166-170).
[61] PASCALE (2021: 659-662).
[62] *Ibid.*
[63] Final Report of the African Commission, 29 May 2003, 277/99, *Democratic Republic of the Congo v. Burundi, Rwanda, and Uganda.*

possible to refer to the Court in cases of inter-State litigation and the rules relating to such procedures are contained in the Protocol that established the Court itself[64]. Pursuant to Article 5(1) of the Protocol:

> "The following are entitled to submit cases to the Court:
>
> a. The Commission;
>
> b. The State Party which has lodged a complaint to the Commission;
>
> c. The State Party against which the complaint has been lodged at the Commission;
>
> d. The State Party whose citizen is a victim of human rights violations;
>
> e. African Intergovernmental Organizations"[65].

Sub-paragraphs (b) and (c) allow for the possibility of States Parties that have already brought an action before the Commission to also bring an action before the Court. Despite the fact that five inter-State communications were submitted to the Commission, in neither case was the matter referred to the Court at the will of the parties[66]. Subparagraph (d), on the other hand, emphasises the link between the alleged victim of a violation of a guaranteed right and their national State. In fact, subparagraph (d) of the aforementioned article clearly emphasises the importance of the bond of nationality between the applicant state and the victim, establishing a sort of primacy in favour of the victim's State of nationality. Notwithstanding this, conventional human rights standards produce obligations *erga omnes partes*. Therefore, the violation of such obligations allows for the possible reaction of all contracting States. Indeed, all contracting States are entitled to bring cases before the Court.[67] In spite of this, to date no State has lodged a complaint with the Court under Article 5(1)(d) of the Protocol, evidence that African States are reluctant about the possibility of taking action against other African States, even in defence of the rights of their own citizens.[68]

1.3 The jurisdiction of the Inter-American Court of Human Rights in the examination of inter-State applications

Since World War II, attention to the protection of human rights has taken centre stage on the international scene and it is precisely for this reason that regional systems aimed at protecting them have emerged. Indeed, following the birth of the United Nations, the Organisation of American States ('OAS')

[64] ZANGHÌ, PANELLA (2019: 428).
[65] Protocol to the African Charter on Human and Peoples' rights on the establishment of an African Court on Human and peoples' rights, Ouagadougou, 10 June 1998.
[66] PASCALE (2021: 665).
[67] *Ibid.*
[68] *Ibid.*

was established with the Charter of Bogotá on 30 April 1948. At the same conference that adopted the Charter, the American Declaration of Human Rights and Duties was also adopted[69]. Theoretically, the Declaration should not be binding. Despite this, the Inter-American Commission on Human Rights has deemed itself competent to hear appeals lodged for the violation of norms contained in the Declaration, in particular for the violation of Article 1 of the Declaration, which enshrines the right to life[70]. Following the adoption of the 1966 Covenants, the Inter-American system recognised the need to adopt a binding human rights instrument. Indeed, on 22 November 1969, during a specialised conference on human rights convened by the Permanent Council of the OAS, the text of the American Convention on Human Rights, also known as the San José de Costa Rica Covenant, was adopted. It entered into force in 1978[71].
One of the main bodies of the Inter-American system of human rights protection is the Inter-American Commission on Human Rights, established at the fifth meeting of OAS Foreign Ministers in Santiago in 1959. The Commission consists of seven members of different nationalities, who act in total independence and impartiality[72]. The functions of the Commission are divided between those with the purpose of promotion and those with the purpose of protection of human rights[73]. The judicial body of the Inter-American System of Human Rights Protection is the Inter-American Court of Human Rights. It consists of seven judges, appointed by the General Assembly of the OAS and chosen from a list of candidates submitted by the Member States. Each State may propose up to three names, even of different nationalities. Its function is not only limited to dispute resolution but is also advisory in nature. In fact, although the Court was established under the Convention, advisory opinions may be requested by the Commission, the other OAS organs and Member States, but also by OAS Member States that have not ratified the Convention[74].

As in other human rights protection systems, the Inter-American Convention provides for the possibility of inter-State and individual appeals, but with different modalities. In particular, with regard to individual appeals, these must necessarily first be accepted by the Commission, which will eventually refer the case to the Court, and can be presented not only by the victim of the alleged violation, but also by all those who demonstrate a concrete interest, thus allowing the possibility of adopting the institution of *actio popularis*[75].

[69] Zanghì, Panella (2019, 375).
[70] Resolution of the Inter-American Commission on Human Rights, 22 September 1987, case 9647 Res. 3/87, *Terry Roach v. J. Pinkerton.*
[71] Cerna (2004: 197).
[72] Goldman (2009: 863).
[73] Zanghì, Panella (2019, 398-399).
[74] Tanzarella (2009: 9).
[75] *Ibid.*

There is, however, a substantial difference regarding the possibility of individual and inter-State remedies: whereas for the former, the Member States, by ratifying the Convention, automatically accept the Commission's jurisdiction in this regard, for inter-State complaints there is a need for an explicit declaration of acceptance by the Member States of the Commission's competence to examine and resolve a complaint brought by one Member State against another[76]. The reason for this choice is primarily historical. Experience with inter-State complaints shows that they have often been used as a purely political weapon. Indeed, the risk could be to use this instrument with the intention of taking political advantage of the situation and not to denounce serious and systematic human rights violations. Moreover, such an instrument can only be used by extremely strong governments that do not fear the possibility of a souring of relations with the accused State[77].

In conclusion, it can be deduced that the most widely used mechanism within the Inter-American system of human rights protection is that of individual complaints, given also the ease offered to individuals to bring an action. Furthermore, the possibility to petition the Commission does not only refer to the Convention and the rights contained therein, but also to the OAS Declaration of Human Rights[78]. In such a regional system of human rights protection, given the ease with which individual complaints can be filed, the mechanism of inter-State litigation loses its effectiveness because it is seen as an instrument of accusation between States, encouraging reticence in its use[79]. Moreover, the Court's jurisdiction is provided for in the Convention, but is subject to a declaration of acceptance by the Member States. This acceptance is of an optional nature and therefore, unless an inter-State action is brought before the Court, whose jurisdiction must necessarily be recognised by both parties to the dispute, there can be no final and legally binding judgment on the merits[80].

1.4 The regional System of Protection of Human Rights in Europe

1.4.1 The Council of Europe

The Second World War was characterised by gross and systematic violations of human rights on a large scale. It is precisely for this reason that the idea of uniting Europe itself in an organisation aimed at promoting democracy, freedom, and defending human rights was developed[81].

[76] American Convention on Human Rights, San José, 22 November 1969, Articles 44 and 45.
[77] TANZARELLA (2009: 9).
[78] ZANGHÌ, PANELLA (2019, 404-405).
[79] RAGNI (2021: 610).
[80] American Convention on Human Rights, San José, 22 November 1969, Article 62.
[81] RISINI (2018: 16).

On 19 September 1946, Winston Churchill, in his famous speech at the University of Zurich, stated for the first time the need to create "a kind of United States of Europe". Two years later, on 22 January 1948, in a speech in the House of Commons, Foreign Secretary Ernest Bevin reiterated Churchill's wish, stating that British foreign policy was directed towards the creation of a coalition of Western European countries based on respect for human rights[82].
The movement in favour of European unity was taken up in the famous Hague Congress of 1948, which laid the foundations for the creation of an organisation in Europe, based on cooperation in various areas, not only economic[83]. These ideas were then drafted into a political declaration, which emphasised the need to transfer part of the sovereignty of the Member States to the organisation itself[84].
Based on this proposal, the Statute of the Council of Europe ('CoE') was adopted in London on 5 May 1949. It initially consisted of ten members: Belgium, Denmark, France, United Kingdom, Ireland, Italy, Luxemburg, the Netherlands, Norway, and Sweden. Initially, the Council of Europe was intended as an international organisation for European cooperation, but, already in the mid-1950s, it became clear that the Council itself could not serve as a basis for European political and economic cooperation. In fact, it is the CoE statute itself that describes the organisation as aiming at respect for human rights, the rule of law and firmly based on democracy[85].
In other words, it was clear that the CoE could not be the forum for the creation of a federal or quasi-federal character as discussed in the 1948 Congress. Economic and political cooperation in Europe necessarily had to be achieved through different instruments and rules, which were then institutionalised into the European Union[86].
The Treaty of London is thus a multilateral treaty establishing an international organisation with an international legal personality[87]. Article 1(a) of the treaty establishing the CoE reads as follows:

> "The aim of the Council of Europe is to achieve a greater unity between its members for the purpose of safeguarding and realizing the ideals and principles which are their common heritage and facilitating their economic and social progress"[88].

In fact, the above-mentioned article describes in general terms what the purposes of this organisation are, but this is explained in the light of the fact that the Council of Europe is the first organisation of an international character that came into being after the Second World War in Europe[89]. Although in the

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[82] POLAKIEWICZ (2019, 2).
[83] RISINI (2018: 16).
[84] *Ibid.*
[85] RISINI (2018: 17).
[86] WASSENBERG (2013: 48).
[87] KLABBERS (2015: 46).
[88] Statute of the Council of Europe, London, 5 May 1949.
[89] POLAKIEWICZ (2019, 2).

first paragraph of Article 1 the purposes of the organisation are defined rather broadly, in paragraphs (c) and (d) it is stated, firstly, that the work of the CoE is not intended to interfere with that of the United Nations or other international organisations and, secondly, that the CoE has no competence in matters concerning national defence[90].

The members of the CoE all belong to the same geographical area, comprising all European countries, with the exception of Kosovo and Belarus, which are clearly lacking in human rights protection[91].
As of today, there are 46 members of the CoE, following the decision of the Committee of Ministers on 16 March 2022 to suspend the Russian Federation from the Organisation, in application of Article 8 of the Statute. This decision was taken in the wake of the Russian Federation's aggression against Ukraine, resulting in a serious violation of Article 3 of the Statute, which defines the prerequisites for membership of the Organisation[92]. Indeed, pursuant to Article 3:

> "Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council as specified in Chapter I"[93].

In addition to the Member States, there are others that do not belong to the same geographical area but enjoy observer status. These are: Canada, Japan, Mexico, the United States of America, and the Holy See, while Israel only enjoys observer status in the Parliamentary Assembly[94].
The Statute of the CoE establishes, according to Article 10, two bodies, namely the Committee of Ministers and the Consultative Assembly, later changed in 1994 to the Parliamentary Assembly[95]. The Committee of Ministers represents the political body of the Council, "which act on behalf of the Council of Europe"[96]. As can be seen, it is therefore the decision-making body of the Council, and also oversees the execution of judgements of the European Court of Human Rights ('ECtHR'). Furthermore, decisions taken under Articles 8 and 9 of the Statute, i.e., the suspension and expulsion of a Member State from the Council, lie with the Committee of Ministers, after consultation with the Parliamentary Assembly[97]. According to the Statute, the members of the Committee of Ministers are the foreign ministers of the

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[90] Statute of the Council of Europe, London, 5 May 1949.
[91] Borlini (2022: 2)
[92] Resolution of the Committee of Ministers of the Council of Europe, 16 March 2022, CM/Res.(2022)2, *on the cessation of the membership of the Russian Federation to the Council of Europe*.
[93] Statute of the Council of Europe, London, 5 May 1949.
[94] Risini (2018: 16).
[95] *Ibid.*
[96] Statute of the Council of Europe, London, 5 May 1949, art. 13.
[97] Polakiewicz (2019, 3).

Member States[98]. For most decisions taken in the Committee of Ministers, a two-thirds majority of those present voting and a majority of those entitled to vote in the Committee is required[99]. In the majority of cases, the practice has been to take decisions on new issues on the proposal of the Parliamentary Assembly. Although the latter's proposals can be amended or rejected, decisions by the Committee to this effect must be justified and reported to the Assembly[100].
The Parliamentary Assembly is the deliberative body of the Committee of Ministers and adopts recommendations on its own initiative or if the Committee of Ministers itself asks it for an opinion on a specific issue[101].
The number of seats in the Parliamentary Assembly is not fixed for each Member State but varies from a number of 18 seats for the largest States (France, Germany, Italy, Turkey, the United Kingdom and, prior to the withdrawal, Russia) to a number of 2 seats for the smallest ones (Andorra, Liechtenstein, Monaco and San Marino)[102]. Representatives are elected by the Member States' parliaments and the composition of national delegations must be gender-balanced[103]. The Parliamentary Assembly meets in four sessions each year and has established various committees, each of which specialises in a particular area. The committees meet more frequently and ensure the continuity of the Assembly's work[104].

1.4.2 The European Convention on Human Rights

The international movement for the protection of human rights, which developed in the immediate post-war period, had great resonance on the European continent. At the 1948 Congress of the European movement, respect for human rights was recognised as an essential factor for the European Union, an organisation that the movement itself aimed to promote[105].
Following the 1948 Hague Congress, a legal section of the European Movement was established with the task of drafting a European Convention on Human Rights and, concomitantly, a Statute of the European Court[106]. In the meantime, on 5 May 1959, the Statute of the Council of Europe was signed, the main purpose of which was to safeguard respect for human rights and fundamental freedoms[107]. In fact, the Consultative Assembly induced the Committee of Ministers to set up a Committee to draw up a draft Convention.

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[98] Statute of the Council of Europe, London, 5 May 1949, art. 14.
[99] Statute of the Council of Europe, London, 5 May 1949, art. 20 lett. d).
[100] POLAKIEWWICZ (2019, 6).
[101] *Ibid.*
[102] Statute of the Council of Europe, London, 5 May 1949, art. 26.
[103] Resolution of the Parliamentary Assembly of the Council of Europe, 30 September 2003, Res.1348/2003, *Gender-balanced representation in the Parliamentary Assembly*.
[104] POLAKIEWICZ (2019, 7).
[105] RISINI (2018:19).
[106] ZANGHÌ, PANELLA (2019: 164).
[107] Statute of the Council of Europe, London, 5 May 1949, art. 3.

The final draft was signed with the approval of the Committee of Ministers in Rome on 4 November 1950 and came into force on 3 September 1953[108].

The initial text of the Convention contained two optional clauses: the first provision concerned individual complaints (*ex*-Article 25), while the second provision concerned the mandatory jurisdiction of the Court (*ex*-Article 46). These clauses were deliberately made optional so as not to hinder the ratification process, but the Convention's normative activity did not come to a halt thanks to the drafting of 16 Additional Protocols, only four of which are still in force today; the remainder have either been absorbed into the new text of the Convention or have lost all reason to exist as a result of subsequent amendments[109]. The European Convention for the Protection of Human Rights and Fundamental Freedoms mainly contains first-generation rights, i.e., civil and political rights. The only guaranteed rights that are an exception to this rule are set out in Articles 1 and 2 of the First Protocol, which respectively protect property rights and guarantee the right to education[110].

The First Section of the Convention lists, in a more specific form, the civil and political rights already contained in the Universal Declaration of 1948, while the First, Fourth, Sixth, Seventh, Twelfth and Thirteenth Protocols add certain recognised rights and freedoms. In contrast, Protocols 14 and 16 introduce changes to make the implementation of the Convention even more effective[111]. Particular attention must be paid to Protocol No 11, which was signed on 11 May 1994 in Strasbourg and entered into force on 1 November 1998, having been ratified by all the Member States[112]. This Protocol radically changed the original control mechanism, consisting of a Commission and a Court, by establishing a single Court. In this context, one of the main objectives of Protocol No. 11 was to abolish the aforementioned optional clauses by making both the acceptance of individual actions and the jurisdiction of the Court compulsory and unlimited[113].
As far as territorial application is concerned, according to Article 1 each State must ensure that the rights and freedoms contained in the Convention are respected by all those "within their jurisdiction"[114]. Furthermore, the European Court of Human Rights has confirmed that the jurisdictional criterion is primarily territorial, confirming that Contracting Parties have obligations

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[108] RISINI (2018: 20-25).
[109] ZANGHÌ, PANELLA (2019: 165).
[110] Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Paris, 20 March 1952.
[111] RAINEY, MCCORMICK, OVEY (2021: 7).
[112] Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, reconstructing the control machinery established thereby, Strasbourg, 11 May 1994.
[113] BERNHARDT (1995: 145).
[114] Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, article 1.

under the Convention in their own territory[115]. In addition to this criterion of territorial application, under Art. 56 para. 1:

> "Any State may at the time of its ratification or at any time thereafter declare by notification addressed to the Secretary General of the Council of Europe that the present Convention shall […] extend to all or any of the territories for whose international relations it is responsible"[116].

However, here is another issue of particular interest, which was examined by the Commission in relation to Article 1 of the Convention. In fact, the Commission has arrived at a broad interpretation of the aforementioned article, arguing that the Convention applies not only to Member States and States whose international relations are ensured by the High Contracting Parties, but also to activities carried out by organs and agents of the State, irrespective of the territory on which the activities are performed[117].

In general, it can be said that the European Convention on Human Rights still represents the most effective normative instrument for the protection of human rights and serves as an inspiration for the drafting of other human rights instruments. Moreover, the control mechanism provided for in the Convention is currently more advanced than the mechanisms provided for at universal level and the other control mechanisms provided for other regional human rights protection organisations. The effectiveness of the control mechanism is guaranteed by the activity of the judicial body provided for by the Convention: the European Court of Human Rights[118].

1.4.3 The Strasbourg Court: composition, responsibilities, and advisory function

The European Court of Human Rights was originally envisioned in Article 19 of the Convention, but then underwent a radical transformation following the entry into force of Protocol No. 11[119].
According to Article 20, the Court consists of the same number of judges as the High Contracting Parties and may also include more than one national of the same State. Previously, this was not possible because it was intended to prevent that, although the body is individual in character, a State could exert more influence on it. Instead, the change introduced allows some small States to formulate suitable lists of possible candidates for the Court, possibly including candidates from other contracting States[120]. The judges are elected

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115 LUSH (1993: 73).
116 Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, article 56.
117 MILLER (2009: 1231-1232).
118 KLEIN (2007, 5).
119 BERNHARDT (1995: 145).
120 ZANGHÌ, PANELLA (2019: 192).

by the Parliamentary Assembly on behalf of each High Contracting Party by a majority of the number of votes cast, on the basis of a list of three candidates submitted by the High Contracting Party itself[121]. Furthermore, "The judges shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence"[122]. With the changes introduced by Protocol No. 14, the term of office of judges is nine years and they are not eligible for re-election. In the past, there were no limits on re-eligibility, but today half of the judges of the European Court have seen their term of office even halved in order to favour a partial renewal of the body every three years[123].
The Court may sit in Plenary, in a Grand Chamber, several chambers of five or seven judges, committees of three judges or as the newly instituted single judge[124]. While the Plenary Court, composed of all the judges of the Court, has organisational tasks, the Single Judge, the Committee of three judges and the Chamber composed of five or seven judges are the articulations competent to deal with each question submitted to the Court[125].
For the handling of each matter submitted to the Court, the judge elected on behalf of a State party to the dispute is an *ex officio* member of the Chamber or Grand Chamber; in the event of that judge's absence or inability to perform his duties, the President of the Court chooses a person to sit as judge from a list submitted by each of the Member States[126]. Committees of three judges are essentially set up to examine admissibility, while the chambers, composed of seven judges each, carry out the examination of the merits. On the other hand, for individual appeals, the judgement on admissibility is entrusted to the single judge, who is required to declare the appeal inadmissible when such a decision can be made *prima facie* and thus without recourse to a detailed examination of the matter. Where a detailed examination is necessary, the single judge transmits the individual appeal to the Committee or the Chamber[127]. The Grand Chamber, composed of seventeen judges, performs the function of reviewing the case when it is referred to it[128].
The Court was established to "Ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols"[129]. However, the primary competence of the Court is to ensure

[121] Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, art. 22.
[122] Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, art. 21.
[123] ZANGHÌ, PANELLA (2019: 193).
[124] Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, articles. 26 and 27.
[125] VAN DIJK, HOOF, VAN HOOF (1998: 32).
[126] Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, art. 26 par. 4.
[127] ZANGHÌ, PANELLA (2019: 2011-2013).
[128] MORTE GÓMEZ (2021: 3).
[129] Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, art. 19.

compliance with the obligations undertaken by the High Contracting Parties. This competence is developed through the mechanism of individual and interstate appeals. Individual applications, which are more numerous, do not concern disputes arising between two subjects of international law, but between an individual and the defendant State that has allegedly committed a violation of the individual's rights and freedoms recognised in the Convention; inter-State applications, on the other hand, concern the possibility for any State Party to present an application to the Court against another State[130].

In addition to its contentious jurisdiction, the Court also has an advisory function. The idea of conferring an advisory role was born with the aim of enabling the Court to function until it could exercise contentious jurisdiction, which, at the time of the adoption of the Convention, seemed a distant prospect. To this end, Protocol No. 2 was adopted in 1963, which allowed the Court to exercise advisory jurisdiction, but with many limitations: the Court, in fact, could not rule on matters that might later be appealed. In practice, none of the rights provided for in the Convention could be the subject of an opinion[131].
The effective advisory competence of the Court was recognised with Protocol No. 16, which was adopted on 2 October 2013 and entered into force on 1 October 2018, following France's ratification in April 2018. France's ratification was necessary because, according to Article 8 of the Protocol, ten ratifications were needed for the Protocol to enter into force[132].
The Protocol allows the highest national courts of the contracting parties to submit requests to the Court for opinions on questions of principle concerning the interpretation or application of the rights and freedoms set forth in the Convention[133]. The main reason for granting this advisory competence is expressly stated in the Preamble to Protocol No. 16:

> "[…] The extension of the Court's competence to give advisory opinions will further enhance the interaction between the Court and national authorities and thereby reinforce implementation of the Convention, in accordance with the principle of subsidiarity"[134].

As just mentioned, the Preamble itself reaffirms the principle of subsidiarity: this implies that the Court does not rule on the question raised in domestic proceedings, but only on the compatibility of possible solutions with the Convention precisely because it belongs exclusively to the domestic jurisdiction to decide the case before it[135].

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[130] Oetheimer, Cano Palomares (2020: 5).
[131] *Ibid.*
[132] Zanghì, Panella (2019: 199).
[133] Gerards (2018: 2).
[134] Protocol No. 16 to the Convention on the Protection of Human Rights and Fundamental Freedoms, Strasbourg, 2 October 2013, *ETS 214.*
[135] Gerards (2018: 4).

The limitation for requesting an advisory opinion from the Court is in that the opinion can only be requested on the occasion of a pending case precisely because, as is clear from the Court's case law, the Court can only deal with concrete cases and not abstract situations[136].
Finally, the opinion provided by the Court is by its very nature not binding, neither on the State requesting it nor on the Court itself which, on the occasion of even a similar interpretation to be made in order to resolve a concrete case, may change its opinion and conclude in a different sense from an opinion previously rendered[137].

[136] ZANGHÌ, PANELLA (2019: 201).
[137] GERARDS (2018: 6-7).

Chapter II. The monitoring procedure of the European Convention on Human Rights

2.1 Individual and inter-State complaints

Nowadays, the control mechanism established through the adoption of the European Convention on Human Rights is recognised as the most efficient protection mechanism, especially through the establishment of the European Court of Human Rights. The latter was established in 1959 with the task of safeguarding the observance of the rights recognised in the Convention by the Contracting Parties and has assumed an increasingly important role also following the changes introduced by the adoption of Protocol No. 11[138].
There are two main reasons why this protection mechanism is so effective. Firstly, any European citizen can bring an individual action against any of the current 46 Contracting Parties concerning the violation of rights and freedoms recognised in the Convention. Secondly, Member States are obliged to implement the Court's judgments, as they are legally binding[139]. The system established by the Convention provides for two different possibilities of appeals: one offered to States against other Contracting Parties, which gives rise to so-called inter-State appeals; the other offered to individuals, non-governmental organisations, and groups of individuals[140].

Pursuant to Article 33: "Any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the Protocols thereto by another High Contracting Party"[141]. First of all, it is possible to classify inter-State applications in human rights matters into two distinct categories: the first comprises actions where the victims of violations are natural or legal persons having the nationality of the applicant State; the second comprises actions in which the claim is brought for the protection of collective values, i.e., in the absence of a legally qualified link between the applicant and the victims of the injury which is the subject matter of the application[142]. The result is that inter-State complaints under the ECHR are not simply a manifestation of diplomatic protection. This interpretation was also reached by the International Court of Justice in a passage of the Barcelona Traction judgment:

> "[…] on the universal level, the instruments which embody human rights do not confer on States the capacity to protect the victims of infringements of such rights irrespective of their nationality. It is therefore still on the regional level

[138] BUERGENTHAL (2006: 783-807).
[139] BAKIRCI (2019: 1).
[140] LECKIE (1988: 271-272).
[141] Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950.
[142] RISINI (2018: 31-47).

> that a solution to this problem has had to be sought; thus, within the Council of Europe, of which Spain is not a member, the problem of admissibility encountered by the claim in the present case has been resolved by the European Convention on Human Rights, which entitles each State which is a party to the Convention to lodge a complaint against any other contracting State for violation of the Convention, irrespective of the nationality of the victim"[143].

In this sense, diplomatic protection is an institution of international law by which a State may act to protect the right or interest of one of its nationals who has been injured by an "internationally wrongful act" by a foreign State[144]. Thus, while the mechanism so described by Article 33 of the European Convention on Human Rights resembles in one respect the institution of diplomatic protection, there are substantial differences from this traditional rule of international law[145]. Indeed, not only can inter-State complaints be used to protect individuals regardless of their nationality, but they can also be used to denounce serious and systematic violations of human rights by the High Contracting Parties to the Convention[146].

In the latter case, inter-State applications can be configured as *actiones populares*, because in those specific cases there is no concrete individual right being violated. In other words, the applicant does not stand in defence of a private interest or an individual whose rights or freedoms have been violated, but uses this instrument to denounce systematic failures in the protection of human rights by the defendant[147].

In support of this, the idea that certain obligations to protect collective values bind States *vis-à-vis* the entire international community has gradually gained support. It follows that in the event of a breach of such obligations, the legitimacy to invoke the responsibility of a State is recognised not to an individual State, but to *omnes* or *omnes partes* where such an obligation is recognised in an international treaty[148].

Despite this, the actions brought to date mainly concern the protection of a private interest and are therefore cases in which the victims of the violations are nationals of the applicant State, a fact that is easily foreseeable given that the State of nationality of the person whose rights have been violated is traditionally considered, under international law, to be specially injured by the unlawful conduct perpetrated against its national. The State of nationality of the subject is therefore entitled to make claims for compensation or other claims against the State that committed the unlawful conduct, through the exercise of diplomatic protection[149].

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[143] Judgment of the European Court of Justice, 5 February 1970, ICJ Reports 1970, p. 3, para 91, *Case Concerning the Barcelona Traction, Light and Power Company (Belgium v Spain).*
[144] RISINI (2015: 70).
[145] *Ibid.*
[146] *Ibid.*
[147] RAGNI (2021: 601).
[148] *Ibid.*
[149] *Ibid.*

In the terms mentioned, the inter-State complaint is not intended to resolve a dispute, but rather to promote review by an international body as to whether conduct by a State party to the Convention constitutes a violation of the provisions of the latter[150]. Moreover, there seems to be a general reluctance to file inter-State appeals unless there is a pre-existing political tension, either in the case of proportionality between the alleged violation and the political interest of the appeal, or in the case where the appeal constituted a pretext to sue the respondent State[151]. In contrast, cases brought against Greece at the time of the dictatorship following the colonels' *coup d'état* belong to a different category. In this case, the serious and systematic violations of human rights fully justified, also politically, the action of the plaintiff States[152].

Traditionally, States have been regarded as the only subjects of international law. Indeed, States themselves considered individuals to be "without international legal rights and duties"[153]. However, after the Second World War, a significant movement of emergence of interests worthy of legal protection began, not belonging to States, but to different entities, lacking an autonomous *status* at the level of the international order and often carrying values conflicting with those of States[154]. In other words, the end of the Second World War opened a new phase of international relations, characterised by the centrality assumed by the individual as such in the international community, and this relevance of the individual has found express recognition first and foremost in the norms of international law, both general and conventional[155]. In particular, the norms protecting the dignity of the human person, starting with the United Nations Charter of 1945 and the Universal Declaration of Human Rights of 1948, have progressively eroded the reserved dominion of States, requiring them to respect certain precepts on the structure of their governmental apparatus and on the sphere of freedom of the individuals settled on their territory[156].
In spite of this, at the present stage of development of the international community it does not yet seem possible to consider the individual as fully a subject of international law for two reasons. First, international law considers individuals as centres of interests susceptible and worthy of international protection, but international law itself does not come into direct contact with the individual, because of the interposing role of the State, to whose power of authority the individual remains subject. Secondly, individuals can only benefit from the rights and freedoms enshrined in treaties on condition that the

[150] Zanghì, Panella (2019: 209).
[151] Prebensen (2009: 458-459).
[152] Zanghì, Panella (2019: 210).
[153] Gorski (2013: 2).
[154] Leanza, Caracciolo (2012:107-110).
[155] *Ibid.*
[156] *Ibid.*

States of their nationality have bound themselves internationally to respect their provisions by ratifying or acceding to those treaties[157].
With reference to the active procedural capacity within the particular framework of the European Convention, it is worth emphasising that, although the individual is the holder of real international subjective legal situations, assisted by effective guarantees whose operation is not dependent on the will of States, it is nevertheless the recognition of subjective positions that operate in particular systems of international derivation, created by means of an international agreement[158].

The European Convention for the Protection of Human Rights and Fundamental Freedoms is the first instrument aimed at the protection of human rights that guarantees a control mechanism in which the possibility for individuals to make individual complaints was included[159].
As already mentioned, Protocol No. 11, which entered into force in 1998, abolished the optional clauses by making the acceptance of individual complaints mandatory and unlimited. In fact, according to Article 34 of the Convention:

> "The Court may receive applications from any person, non- governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right"[160].

As is clear from the provision of the Convention, it does not merely identify the persons who may bring an action, but also lays down a precise condition for them to have standing[161]. Indeed, they must be able to claim to be the victim of an infringement and this condition exists not only when the applicant is the direct victim of an infringement, but also when it is any third person who can demonstrate a valid personal interest in having the infringement stopped or when the action is brought on behalf of the victim who is unable to act[162].
In addition, Article 34 also introduces the notion of potential victim. The potential victim, in order to qualify as such, must make it clear that violations of the Convention or incompatibilities with it are potentially harmful to them and to the protection of their recognised rights. This article, therefore, does not provide a legal basis for *actio popularis,* precisely because individuals

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[157] MULLERSON (1990: 33-43).
[158] LEANZA, CARACCIOLO (2012:115).
[159] SHELTON (2006: 6).
[160] Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950.
[161] TZEVELEKOS (2019: 7-11).
[162] *Ibid.*

must show that incompatibilities with the Convention have the potential to cause harm, personally and directly, to the claimants[163].
Within the framework of the European system for the protection of human rights, the issue between inter-State and individual complaints having as their object, in whole or in part, the same issue has only gained prominence in recent years, due to the increase in inter-State litigation[164]. The Convention itself does not regulate the relationship between the two types of actions, probably because of the original structure. Indeed, the Commission had compulsory jurisdiction with respect to inter-State complaints, whereas, as mentioned above, there was an arbitration clause concerning the examination of individual complaints[165]. In the absence of any clear indication in the text of the Convention, first the Commission and then the Court were called upon to ascertain whether it was possible to examine an individual appeal concerning the same issue as an inter-State appeal. Although the Court's practice is not to examine applications that are essentially identical[166], the Court specified that applications dealing with the same issues, but with different applicant(s), cannot fall under the category of Article 35(2)(b) and therefore cannot be called identical[167]. Thus, in the absence of any preclusion of inter-State and individual actions on the same issue, efficient management of inter-State and individual litigation pending before the Court is necessary, also considering the large number of individual actions pending before the Court. The Court made it clear in a 2018 press release that the rationale chosen is to give priority to the inter-State application, so as to create a precedent for the consideration of individual applications[168].

In conclusion, it can be argued that, following the explosion of the use of the inter-State litigation mechanism, there is an increasing overlap of this type of action with the already numerous individual actions[169]. Although the Court has clarified, in the absence of specific provisions, the relationship between inter-State and individual actions concerning the same issue, many grey areas remain on this question[170]. Indeed, in November 2019, the Drafting Group on Effective Processing and Resolutions of Cases Relating to Inter-State Disputes was established with the aim of developing proposals to effectively handle inter-State and individual complaints arising out of inter-State disputes[171].

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[163] *Ibid.*
[164] CARPARELLI (2021: 392).
[165] RISINI (2018: 208).
[166] Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, Article 35 (2)(b).
[167] Judgment of the European Court of Human Rights, 18 September 2009, 16064/90, *Varnava et al. v. Turkey.*
[168] CARPARELLI (2021: 398).
[169] *Ibid.*
[170] CARPARELLI (2021:406)
[171] *Ibid.*

2.2 The jurisdiction of the Strasbourg Court

Within the European Convention on Human Rights, the expression "jurisdiction" is used both with reference to the Court and its subdivisions and as an essential element to define the duties of the High Contracting Parties[172]. The Convention provides under Article 32:

> "The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto […]
> In the event of dispute as to whether the Court has jurisdiction, the Court shall decide"[173].

As can be seen from this provision, the Court has jurisdiction in the interpretation of both the Convention and the Protocols. This means that it is the Court itself that can define its jurisdiction, in accordance with the *competence-competence* principle[174]. Nevertheless, the fact that the European Court of Human Rights, as well as other international courts, has the competence to define its own jurisdiction does not mean that it has discretionary power, precisely because both the European Court and other international courts are bound by the provisions contained in their own founding treaty, as well as by the rules of international law that define the applicability of a treaty[175]. Indeed, the jurisdictional criteria, although they cannot be defined as criteria of admissibility in the strict sense, nevertheless represent the limit of the European Court in examining cases pending before it. In other words, the jurisdiction of international courts, and thus also of the European Court of Human Rights, is limited by four criteria of international law that define the applicability of a treaty: *ratione materiae*, *ratione temporis, ratione loci* and *ratione personae*[176]. These limits of the Court's jurisdiction are defined from the provisions contained in the Vienna Convention on the Law of Treaties ('VCLT').

As regards jurisdiction *rationae materiae*, reference must be made to Article 31(1) VCLT: "1.A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose"[177].
Considering this provision in conjunction with Article 32 of the European Convention, it follows that the Court's jurisdiction extends to questions of

[172] NUBBERGER (2012: 243).
[173] Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, Article 32.
[174] HAZI-VIDANOVIC (2018: 2).
[175] NUBBERGER (2012: 245).
[176] *Ibid.*
[177] Convention on the Law of Treaties, Vienna, 23 May 1969, Article 31(1).

interpretation and application of the Convention and its protocols. Notwithstanding this, questions must be referred to the Court in one of the five forms covered by the Convention, namely inter-State complaints, individual complaints, referral for the interpretation of a judgment, ruling on compliance with Article 1 ECHR, and request for an advisory opinion[178].

As regards temporal jurisdiction, pursuant to Article 28 VCLT:

> "Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party"[179].

Interpreting this provision, the European Convention and its Protocols bind the Contracting Parties from the moment the Convention and Protocols entered into force for each individual State. This moment, in the case law of the Court, is referred to as the "critical date". In practice, the Court has made it clear that, in the case of dissolution of States or succession of States, both the Convention and the Protocols must necessarily be considered to be in continuous force by the successor States[180]. Furthermore, the Court differentiates between instantaneous acts and continuous situations. This differentiation arises mainly from the difficulty in defining instantaneous acts that nevertheless have continuous effects over time. Generally speaking, it can be said that omissions are classified as continuous situations, whereas most actions are referred to as instantaneous acts[181]. This rule is subject to exceptions, the best known of which is enforced disappearance because, in the case law of the Court, it has been defined as a continuous act[182].

Regarding the application *ratione loci*, the European Court has not yet clearly defined the relevance of the territorial principle in establishing its jurisdiction, preferring an approach that refers to the application *ratione personae*. Indeed, first the Commission and then the Court have repeatedly rejected a territorial application model[183]. The only exception to this practice was the *Banković* decision, which not only supported a strong territorial application of the Convention and Protocols, but also introduced the concept of *espace juridique*. This concept basically envisages the Convention operating in the European regional context in the strict sense, and with reference only to the

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[178] HAZI-VIDANOVIC (2018: 3).
[179] Convention on the Law of Treaties, Vienna, 23 May 1969, Article 28.
[180] HADZI-VIDANOVIC (2018: 6).
[181] *Ibid.*
[182] Judgment of the European Court of Human Rights, 18 September 2009, 16064/90, *Varnava et al. v. Turkey.*
[183] Judgment of the European Court of Human Rights, 10 May 2001, 25781, *Cyprus v. Turkey.*

legal space of the Member States of the Council of Europe[184]. This concept has since been progressively abandoned by almost all Sections of the Court.

With regard to the application *ratione personae*, the Court has jurisdiction to hear any application received from natural or legal persons "claiming to be victims" of violations of provisions contained in the Convention and Protocols by one of the Member States. Furthermore, according to Article 33 of the Convention, the Court is also entitled to judge actions brought by Member States concerning a violation committed by another Contracting Party[185].
Thus, while active legal standing belongs not only to the Member States, but also to every natural and legal person, i.e., individuals or non-governmental organisations, who believes they are the victim of a violation, passive legal standing, i.e., the entitlement to be defined as a defendant in a case before the Court, belongs exclusively to the High Contracting Parties[186].
In the Court's practice, the main problem with regard to standing is found in cases where a Contracting Party is sued for actions not undertaken on its own territory or for actions undertaken as members of other international organisations, i.e., acts undertaken to implement supranational law of the European Union. With regard to the first category, the Court's practice is to verify whether the defendant State has carried out a certain degree of control over the territory where the violation occurred[187], although the degree of control necessary for the attribution of the violation has never been precisely defined, giving different interpretations depending on the case[188].

In conclusion, it can be said that although the jurisdiction of the European Court is defined according to the *competence-competence* principle, this does not mean that it can operate arbitrarily[189]. The rules of international law defining the applicability of a treaty limit the jurisdiction of the Court itself and, although these rules have often been interpreted extensively, it is also true that the Court is obliged to take into account various aspects, including not only the consequences of its decisions, but also, and above all, the legal relevance of the consent of the High Contracting Parties[190].

[184] Decision of the European Court of Human Rights, 12 December 2001, 52207/99, *Banković et al. v Belgium et al.*, Paragraph 80.
[185] Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, Article 33 and 34.
[186] HAZI-VIDANOVIC (2018: 4).
[187] Decision *Cyprus v. Turkey.*
[188] HAZI-VIDANOVIC (2018: 3-7).
[189] NUBBERGER (2012: 260-268).
[190] *Ibid.*

2.3 The proceedings before the European Court of Human Rights: the admissibility stage

2.3.1 Conditions of admissibility applied to individual appeals

Article 35 of the European Convention on Human Rights and Fundamental Freedoms lists, in paragraphs 2 and 3, conditions of admissibility that apply exclusively to individual applications.

> "2. The Court shall not deal with any application submitted under Article 34 that
>
> (a) is anonymous; or
>
> (b) is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information"[191].

In particular, under Article 35(2)(a), the Court is obliged to dismiss any appeal that is brought anonymously. Indeed, in this case, the Court is obliged to dismiss an appeal lodged on the basis of Article 34 for failure to indicate the author of the appeal[192].

Another condition which, if met, renders the appeal inadmissible is also indicated in the same article and refers to the well-known *ne bis in idem* principle[193]. The provision therefore not only excludes the possibility of declaring admissible appeals that have already been examined by the same Court, but also excludes the examination of appeals that are already pending before another international court, regardless of whether the appeal has already been decided or not, thus resolving in a negative sense the possible contemporaneity of the two appeals to two different instances[194]. According to this provision, the limit of inadmissibility does not apply if the appeal contains "new facts"[195]. The Court's case-law has repeatedly held that in order to overcome the bar of inadmissibility, it is not sufficient for new facts to be generically referred to but they must necessarily consist of genuinely new facts and evidence, which have arisen or have been ignored previously, and

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[191] Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950.

[192] Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, Article 35 paragraph 2 letter a).

[193] CONWAY (2003: 217-235).

[194] HAZI-VIDANOVIC (2018: 11-12).

[195] Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, Article 35 paragraph 2 letter b.

which could lead the Court to reconsider the decision already handed down, thus altering the outcome of the case[196].

Paragraph 3 of Article 35 contains further conditions which render an appeal under Article 34 inadmissible:

> "3. The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that:
>
> (a) the application is incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of individual application; or
>
> (b) the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits"[197].

As regards the incompatibility of an application, it is not easy to interpret this notion by giving it a meaning independent of other grounds that would justify its rejection. It is clear that when the conditions for declaring an application inadmissible are met, the application is also incompatible with the Convention[198]. For this reason, the condition of incompatibility, interpreted in general terms, can be taken to encompass any other ground of inadmissibility[199]. The Commission, in order to avoid a possible confusion of concepts, has never invoked incompatibility whenever it has been able to reject an application on one of the other grounds listed in Article 35, and has used the ground of incompatibility as a general ground of inadmissibility in all cases other than the grounds expressly stated[200].

The second ground of inadmissibility set out in paragraph 3(a) is the manifest ill-founded of an application. In such cases it often already appears *prima facie* that there has been no violation of the Convention and for that reason the actions are dismissed[201]. In the relevant case-law, the Court has declared an appeal inadmissible because it was manifestly ill-founded only when an initial examination of the case did not reveal the very appearance of a violation of the Convention, whereas when an appeal is not manifestly ill-founded, the Court proceeds to the merits, with the possibility of declaring the complaint inadmissible at any time[202].

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[196] HAZI-VIDANOVIC (2018: 11-12).
[197] Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950.
[198] ZANGHÌ, PANELLA (2019: 218-219).
[199] *Ibid.*
[200] *Ibid.*
[201] ZANGHÌ, PANELLA (2019:222).
[202] *Ibid.*

The hypothesis of abuse of the right to appeal is the third ground of inadmissibility under this provision. In this case, the concept of abuse is to be understood in its ordinary meaning. The Court has in fact specified that the term "abuse" means "the harmful exercise of a right by its holder in a manner that is inconsistent with the purpose for which such right is granted"[203]. To date, the cases that have been dismissed on this ground are not numerous, as the Court has often opted, in case of hesitation, to declare an action inadmissible for manifest ill-foundedness. In any case, to conclude that an applicant has acted improperly, it is also necessary to show that his or her action impedes the functioning of the Court or hinders the proper conduct of proceedings before it[204].

Protocol 14 added an ulterior ground of admissibility with the aim of eliminating minor applications by virtue of the principle *de minimis non curat praetor*[205]. Indeed, with the aim of reducing the Court's workload and also considering that many actions brought before it contains minor infringements, which do not cause actual prejudice to the applicant, Article 35(3)(b) gives the Court the power to declare an action inadmissible if the applicant has not suffered any significant disadvantage[206].
However, this rule is subject to two conditions. First, this principle cannot in any way be applied if, from the point of view of the protection of human rights, an examination of the application on the merits is necessary. Second, this principle is not applied in cases where an application has not been properly examined on the merits by a national court[207].
The application of this admissibility criterion appears rather controversial because it leaves the Court with a certain degree of discretion, as it is not possible to define it in a completely exhaustive manner. The Court, when examining the existence or otherwise of material injury, should take into consideration "both the applicant's subjective perceptions and what is objectively at stake in a particular case". Finally, although the concept of significant disadvantage has often been considered in relation to economic issues, it cannot be excluded that the injury that can be assessed may also be only of a moral nature[208].

[203] Judgment of the European Court of Human Rights, 1 July 2014, 43835/11, *S.A.S. v. France.*
[204] *Ibid.*
[205] SCHABAS (2015: 782).
[206] *Ibid.*
[207] SCHABAS (2015: 784).
[208] ZANGHÌ, PANELLA (2019: 2020-2021).

2.3.2 Conditions of admissibility applied to individual and inter-State appeals

a) *The exhaustion of domestic remedies*

The Court, when examining any type of appeal, whether lodged under Article 33 or under Article 34, must, in the first place, consider whether the application may be declared admissible. While the Convention for determining the admissibility of an application provides as many as six criteria applicable only to individual actions, as regards the conditions of admissibility that are applied to both inter-State and individual actions the Convention itself provides only two common conditions, namely the prior exhaustion of domestic remedies and the time-limit of four months, from the date of the final domestic decision, within which an appeal may be lodged with the Court[209].
The rule of prior exhaustion of domestic remedies provides that an appeal cannot be declared admissible if, where there is an alleged violation of a right guaranteed by the Convention, the matter has not first been examined by the competent national courts, up to the highest possible level of jurisdiction[210].
This rule of exhaustion of domestic remedies is recognised as a general principle of international law, which allows States to remedy any violation through the means and bodies provided for in their domestic law. In fact, it is the Grand Chamber itself that has clarified that the purpose of this rule is to give the national authorities the possibility of remedying the violation without the intervention of the European Court, whose jurisdiction is only subsidiary and which may therefore intervene only if, despite the intervention of the organs of the State, it is not possible to obtain the removal of the violation or adequate reparation[211].
This admissibility criterion is applied by the Court with a certain degree of flexibility, precisely because it is the Court itself that has clarified that this criterion cannot be applied automatically because the circumstances of each case must also be taken into consideration. In particular, the Grand Chamber clarified that:

> "[…] the Court must take realistic account not only of the existence of formal remedies in the legal system of the Contracting State concerned but also of the general context in which they operate, as well as the personal circumstances of the applicant. It must then examine whether, in all the circumstances of the case, the applicant did everything that could reasonably be expected of him or her to exhaust domestic remedies"[212].

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[209] Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, Article 35 paragraph 1.
[210] ROMANO (2013: 561-562).
[211] Judgment of the European Court of Human Rights, 28 April 2004, 56679/00, *Azinas v. Cyprus*.
[212] Judgment of the European Court of Human Rights, 13 November 2007, 5735/00, *D.H. and Others v. the Czech Republic*.

The failure of the exhaustion of domestic remedies, which may be identified by the Court, may be absolute and irremediable, where the time limits for bringing the unexercised action have already expired, or relative and capable of being remedied, where it is possible to exhaust the remedies available in the system and thus satisfy the requirement of Article 35(1) of the Convention[213].
Moreover, the existence of remedies must be sufficient both on a theoretical and a purely practical level, precisely because there is no obligation to pursue remedies that are not effective. If the defendant State considers that not all domestic remedies have been exhausted, it is for it to indicate which remedies have not been exhausted and it is for the defendant to convince the Court that those remedies were available and effective, in theory and in practice, at the material time. Indeed, if a remedy that is proposed is not effective, it is not necessary to exhaust it in order for the case to be declared admissible[214].
As can be seen, Art. 35 draws a clear division between domestic and international remedies, precisely because the latter are listed in para. 2 of this article. In the event a dispute arises as to the nature of the remedy itself, and in particular whether it can be defined as a domestic or an international remedy, the Court will decide on the basis of the legal character of the instrument founding the body, the composition of the body, the possible place of the body in an existing legal system and also on the basis of the funding of the body itself[215].

In conclusion, the rule of prior exhaustion of domestic remedies is a cardinal principle of the admissibility criteria applied not only to the European Court of Human Rights, but also to many other international courts. Given the centrality of the rule, it should provide the obstacle for international litigation to be more the exception than the rule[216]. In reality, the rule is accompanied by so many exceptions that a veritable body of law has been constructed that is complex and, even today, not entirely exhaustive[217].
Finally, in some judgments there is a formulation to the effect that, according to generally recognised rules of international law, there may be special circumstances that lead to a non-rigid application of the rule of prior exhaustion of domestic remedies. In fact, the rule has not been applied in countless actions brought against Italy for the excessive duration of judicial procedures. For this reason, on 24 March 2001, the "Legge Pinto"[218] came into

[213] SCHABAS (2015: 763-764).
[214] *Ibid.*
[215] *Ibid.*
[216] SCHABAS (2015: 767).
[217] *Ibid.*
[218] Law of 24 March 2001, No. 89

force, enacted precisely to remedy the countless condemnations of Italy by the European Court of Human Rights for the excessive duration of trials[219].

b) The compliance with the four-month time limit

According to Article 35 of the European Convention on Human Rights and Fundamental Freedoms, an appeal may be lodged within four months from the date of the final domestic decision[220]. Previously, the time limit was six months, but the entry into force of Protocol No. 15 reduced this time limit[221]. Precisely the Protocol, providing for an amendment of the Convention, required ratification by all Member States to enter into force. The last instrument of ratification was deposited by the Italian government on 12 January 2021, and the Protocol entered into force on 1 August 2021[222].

In order to determine the *dies a quo*, i.e., the date on which the final national decision is delivered, the Court has made it clear that it must be understood as the date of the decision within the normal framework of the exhaustion of domestic remedies, as understood according to generally recognised principles of international law[223]. Moreover, the time limit begins to run from the moment the final decision has been made known to the applicant or his legal representative, whether by notification, public reading of the decision or other means provided for at national level[224]. In fact, when deciding when to start the four-month time limit, the European Court refers to the national procedural law. This means that if, at the national level, it is expressly provided that the plaintiff is entitled to a written statement of the final decision, the four-month period within which to file an appeal starts from the claimant's receipt of that final written decision[225]. That period expires after four calendar months, without taking into account the actual duration of those calendar months. However, if the period of four months falls on a Sunday or public holiday, the appeal must be lodged before that day[226].
This provision refers to the final decision as the date from which the four-month time limit runs. Since that final decision refers to the decision taken at

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[219] AZZALINI (2012: 1702-1721).
[220] Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, Article 35 paragraph 1.
[221] Protocol No. 15 amending the Convention on the Protection of Human Rights and Fundamental Freedoms, Strasbourg, 24 June 2013, Article 4.
[222] ARDITO (2021)
[223] HAZI-VIDANOVIC (2018: 8).
[224] *Ibid.*
[225] Judgment of the European Court of Human Rights, 29 August 1997, 83/1996/702/894, *Worm v. Austria*.
[226] [226] Judgment of the European Court of Human Rights, 29 June 2012, 27396/06, *Sabri Güneş v. Turkey*.

the national level that is issued upon exhaustion of domestic remedies, only those remedies that are recognised as effective are taken into account[227].
Following the filing of the appeal, the applicant must act diligently by providing additional information where necessary. As the Court itself noted, this would be contrary to the objective of the provision at issue "if, by any initial communication, an application could set into motion the proceedings under the Convention and then remain inactive for an unexplained and unlimited length of time"[228].
Nevertheless, in particular circumstances, it becomes clear that the applicant has no effective remedy at national level. For example, it may happen that the claimant proceeds to exhaust domestic remedies and then realises that remedies at the domestic level are ineffective. In these circumstances, it is more appropriate to run the four-month period from the date on which the claimant becomes aware of these circumstances[229].

The date that marks the interruption of the four-month period corresponds to the date on which the appeal is lodged with the European Court of Human Rights. For an application to be actually filed, it must comply with Rules 46 or 47 of the Rules of the Court, depending on whether it is an inter-State or an individual application. If the submission of the application does not comply with the aforementioned provisions, the application is not considered valid and therefore the submission of the application does not affect the running of the four-month period[230]. The primary objective of setting such a time limit is to respect legal certainty. Indeed, the Court has made it clear that the time-limit thus fixed ensures that, if a question concerning the Convention is raised, action can be taken within a reasonable time, without there being the possibility that decisions taken previously can be continually challenged[231]. Precisely because the purpose of setting a time limit for bringing an action before the Court is to ensure the proper application of the Convention, that time limit cannot be derogated by the State concerned[232]. Moreover, according to the Court, the purpose of that time limitation is twofold. On the one hand, it precludes the possibility of submitting to the Court facts dating from a period when the respondent State was not in a position to foresee international responsibility or any legal proceedings arising from the acts to which the application relates[233]. On the other hand, judgments of the Court have repeatedly held that setting a time-limit within which an application may be brought means that the Court itself can examine them when the facts have

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[227] HAZI-VIDANOVIC (2018: 8).
[228] Decision of the European Court of Human Rights, 24 August 2004, 6638/03, *P.M. v. the United Kingdom.*
[229] Judgment *Varnava et al. v. Turkey.*
[230] [230] HAZI-VIDANOVIC (2018: 8).
[231] Judgment of the European Court of Human Rights, 18 September 2009, 16064/90, *Varnava et al. v. Turkey.*
[232] Judgment of the European Court of Human Rights, 8 March 2006, 59532/00, *Blečić v. Croatia.*
[233] Judgment *Varnava et al. v. Turkey.*

recently occurred, thus preventing the passage of time from making it difficult to ascertain the relevant facts, which would also make it difficult to examine the matter fairly[234].
Cases involving procedural obligations related to Articles 2 and 3 of the Convention raise peculiar issues. Indeed, if a question is posed as to the lack of an adequate investigation following a death in suspicious circumstances, applicants must not only take all appropriate steps to follow the progress of the investigation or lack thereof but must also submit the application promptly upon becoming aware of any actual criminal investigation[235]. A similar approach is applied in the case of enforced disappearances as applicants cannot wait an unreasonably long period of time before applying to the Court. While the issue of undue delay will not be raised where there is significant contact between the families of victims of disappearances and the competent authorities, and such contact involves complaints and requests for information, it is also true that there will come a time when it becomes apparent that there is no effective investigation in this regard. It follows that if applicants do not apply at a time when it is evident that investigations are ineffective, they risk losing their rights under the Convention[236].

2.3.3 The evolution of case law: exceptions to the exhaustion of domestic remedies in inter-State complaints

Over more than sixty years of activity, the European Court of Human Rights has significantly changed the interpretation of numerous rules of the Convention in order to accelerate procedures and reduce the number of cases pending before it[237]. Indeed, if one strictly adheres to the provisions of the Convention, from a literal interpretation the Court should not examine any type of appeal unless the latter has exhausted all the ordinary and extraordinary remedies provided for by the domestic law of the State concerned. In reality, as a result of progressive interpretations of the Convention text, numerous exceptions to the principle have been formulated[238].
The rule of prior exhaustion of domestic remedies is a rule of a procedural nature to protect the principle of subsidiarity[239]. However, in the field of international human rights law, the idea has gradually developed that the effectiveness of coordination between the different levels of rights protection, national and supranational, could not depend solely and exclusively on

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[234] Decision of the European Court of Human Rights, 17 February 2009, 32567/06, *William v. The United Kingdom*.
[235] Decision of the European Court of Human Rights, 4 July 2002, 42428/98, *Eren and Others v. Turkey*.
[236] Judgment *Varnava et al. v. Turkey*.
[237] SICCARDI (2019: 145).
[238] *Ibid.*
[239] COSTA (2013: 267).

compliance with the conditions of admissibility laid down to protect the principle of subsidiarity, but this must also be accompanied by a commitment on the part of States to implement measures aimed at the recognition and judicial protection of human rights[240].
From this perspective, the doctrine has come to identify two specific functions of the rule of prior exhaustion of domestic remedies. In fact, if the first function imposes a negative obligation on supranational courts not to examine complaints, the second function, which is positive in nature, requires States to provide effective judicial remedies capable of stopping the violation of internationally recognised human rights[241]. This interpretation is supported by the jurisprudence of the European Court of Human Rights which, when examining the conditions of admissibility relating to the prior exhaustion of domestic remedies, often makes explicit reference to Article 13 of the Convention, which enshrines the right to an effective remedy[242]. It follows, therefore, that the rationale behind the Court's flexible interpretation of the admissibility condition in Article 35(1) of the Convention is to ensure the effective protection of conventional obligations which, through a rigid and literal application of the rule, would risk not being upheld[243].

The rule of prior exhaustion of domestic remedies, as it is clear from the Convention itself, is generally applied to inter-State remedies as well. Nevertheless, the question of the applicability of the rule has given rise to quite a few controversies. In particular, in order to determine whether the rule applies in the case of inter-State appeals, a classification of the latter must be made[244]. In fact, it is possible to distinguish between inter-State actions that have as their object alleged violations carried out directly against the plaintiff State and inter-State actions that, on the other hand, have as their object alleged violations carried out by a State against an individual and the individual's State of nationality acts as a representative to support its citizen's cause[245]. In other words, it is necessary to distinguish between cases in which the State exercises diplomatic protection against one of its nationals and cases that refer to the notion of "direct injury", i.e., cases of "direct breach of international law, causing immediate injury by one State to another"[246]. This classification is therefore of fundamental importance to understand whether or not the rule applies in both cases. Generally speaking, it can be deduced from the Court's case law that in the case of disputes falling within the scope of diplomatic protection, the rule of prior exhaustion of domestic remedies

[240] SPANO (2014: 2014: 487).
[241] MALFATTI (2018: 105).
[242] *Ibid.*
[243] SICCARDI (2018: 148).
[244] HYDE (1945: 888).
[245] *Ibid.*
[246] MERON (1959: 83).

applies. Conversely, in cases where there is an alleged "direct injury", the rule does not apply[247].

Nevertheless, making such a classification is often not so straightforward. Generally speaking, it has been argued that, in order to place an inter-State complaint within the casuistry of diplomatic protection or cases of direct injury, it is necessary to consider those elements that are preponderant in the case taken as a whole, taking into account the real interests of the State acting as claimant[248]. Indeed, while the State may pursue its own objectives, it may also support the causes of its citizens[249].

In the course of the Commission's work first and then the Court's, the rule of prior exhaustion of domestic remedies found application in certain cases, while in other situations the issue was examined even though not all available domestic remedies had been pursued. Indeed, it follows from the settled case law of the Court that the requirement of prior exhaustion does not apply in the case of administrative practices or legislative measures[250]. The administrative practice consists in the repetition of a particular act and official tolerance. In other words, it consists of perpetual violations that are not only interconnected, but also traceable to a pattern or system[251]. It was the Court itself that made it clear that:

> "Where an administrative practice consisting of a repetition of acts incompatible with the Convention and official tolerance by the State authorities has been shown to exist, and is of such a nature as to make proceedings futile or ineffective"[252].

In particular, the rule of prior exhaustion of domestic remedies was not applied in the *First Cyprus Case* and the *First Greek Case*[253]. In the *First Cyprus Case* the Commission stated that:

> "The provision of Article 26 concerning the exhaustion of domestic remedies according to the generally recognized rules of international law does not apply to the present application, the scope of which is to determine the compatibility with the Convention of legislative measures and administrative practices in Cyprus"[254].

The reasons that led the Commission to the non-application of the rule are the same for the *First Greek Case* precisely because the main objective of those

[247] TRINDADE (1978: 213).
[248] *Ibid.*
[249] MERON (1959: 88).
[250] RISINI (2015: 74).
[251] *Ibid.*
[252] Judgment of the European Court of Human Rights, 18 December 1996, 21987/93, *Aksoy v. Turkey.*
[253] TRINDADE (1978: 214).
[254] Decision of the European Commission of Human Rights, 2 June 1956, 176/56, *Greece v. United Kingdom.*

applications was "to determine the compatibility with the Convention of legislative measures and administrative practices in Greece"[255].

If, therefore, the rationale is not to apply the rule in the case of administrative practices or legislative measures, it is necessary to examine the cases in which the applicability of the rule was called into question even though there were no such practices and measures at stake. The Commission had already declared part of the second application filed by Greece against the United Kingdom inadmissible in 1957 because not all of the forty-nine victims had exhausted their domestic remedies[256].
Subsequently, however, the Commission was able to clarify its position on the question of the applicability or non-applicability of the rule ex-Article 26 of the Convention[257]. In particular, the Commission has already clarified its position in *Austria v. Italy*. In fact, in opposition to the Austrian Government's argument that the rule was not applicable in the case of inter-State actions, the Commission clarified that the Convention made no specific reference to the distinction between individual and inter-State actions with regard to the admissibility condition of the prior exhaustion of domestic remedies[258]. In support of this view, the Commission rejected part of the application in *Ireland v. United Kingdom* precisely on the ground of non-exhaustion of domestic remedies[259]. On the other hand, in *Cyprus v. Turkey*, the Commission made it clear that the exception to the requirement of prior exhaustion of domestic remedies was not due to the fact that the case was an inter-State dispute, but to the fact that the case itself concerned gross and systematic violations of human rights on a large scale by the military corps of a foreign power[260].
In conclusion, it can therefore be said that the rule of prior exhaustion of domestic remedies applies to both Article 33 and Article 34 remedies. If, however, for individual actions there is no particular uncertainty as to the applicability of the rule, the same is not true for inter-State actions[261]. First, there is no doubt about the non-applicability of the rule in cases of alleged "direct injury"[262]. Nevertheless, not all cases presented first to the Commission and then to the Court fall into the category of diplomatic protection. Under the Convention, various inter-State cases may arise,

[255] Decision of the European Commission of Human Rights, 24 January 1968, 3321-3323/67 and 3344/67, *Denmark/Norway/Sweden/Netherlands v. Greece.*
[256] Decision of the European Commission of Human Rights, 10 January 1958, 299/57, *Greece v. United Kingdom (II).*
[257] Cançado Trindade (1978: 218).
[258] Decision of the European Commission of Human Rights, 11 January 1961, 788/60, *Austria v. Italy.*
[259] Decision of the European Commission of Human Rights, 1 October 1972, 5310/71 and 5451/72, *Ireland v. United Kingdom.*
[260] Decision of the European Commission of Human Rights, 26 May 1975, 6780/74 and 6950/75, *Cyprus v. Turkey.*
[261] Trindade (1978: 220).
[262] Wittich (2000: 121).

involving either general prevailing situations or alleged violations committed against individuals or groups of individuals. While in the former case the rule of prior exhaustion of domestic remedies applies, in the latter case it does not[263]. In particular, if no individuals or groups of individuals are involved and the situation concerns only general situations of non-compliance with the Convention, the rule of prior exhaustion of domestic remedies does not apply[264].

[263] *Ibid.*
[264] *Ibid.*

Chapter III. The examination of the merits of inter-State complaints pending before the Strasbourg Court

3.1 Actions based on the collective enforcement of human rights

The control mechanism established by the European Convention on Human Rights provides for both individual complaints and inter-State complaints. While the former are aimed at the protection of an individual's specific interest, the latter can be used for the collective enforcement of human rights in the event of serious and systematic human rights violations[265]. Nevertheless, while the inter-State litigation brought before the Court to date has concerned large-scale human rights violations, there have also been cases where claims have been brought to protect a specific national interest[266]. In this chapter, the analysis of the merits of the complaints will be organised in such a way as to deal first with those cases whose subject matter concerns large-scale human rights violations, and then those types of complaints concerning the protection of a specific national interest will be addressed.

3.1.1 The Greek Case (applications nos. 3321-23/67, 3344/67 and 4448/70)

The first case involving large-scale violations of human rights was the one brought against Greece by Denmark, Norway, Sweden, and the Netherlands in 1967[267]. The case was brought before the Court following the *coup d'état* that took place in Greece in 1967, initiating what was called the colonels' dictatorship[268]. In fact, although the elections had been scheduled for May of that year, on 21 April 1967 the Greek army had taken control of the country, initiating a period marked by mass arrests, censorship, and martial law[269]. Moreover, in the same month of May, Greece informed the then Secretary of the Council of Europe that it had taken measures in derogation of certain obligations under the Convention, as stipulated in Article 15 of the latter[270]. Indeed, according to Article 15, any Contracting Party may, in the event of war or public danger threatening the life of the nation, derogate from its obligations under the Convention, but only if such derogations are necessary[271]. Therefore, Greece decided to exercise this right guaranteed by the aforementioned article but did not specify which rights in particular were

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[265] Risini (2018: 64).
[266] Rogge (2007: 291).
[267] *Ibid.*
[268] Venturoli (2012: 8).
[269] *Ibid.*
[270] Risini (2018: 83).
[271] Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, Article 15 paragraph 1.

being derogated and, as a reason for these derogations, referred to communist strikes and demonstrations that had brought the country "to the brink of anarchy"[272].
In the same year, on 20th of September, Denmark, Norway, and Sweden filed an inter-State application against Greece and seven days later the Netherlands filed another one that had essentially the same object as the first three presented by the said governments[273]. The applicants alleged the violation of Articles 5, 6, 8, 9, 10, 11, 13 and 14 of the Convention by seeking to prove the incompatibility with the Convention of legislative measures adopted by the Greek military dictatorship in suspension of its Constitution[274]. Moreover, the applicants argued that Greece had failed to prove that the necessary conditions for the activation of Article 15 of the Convention were met[275]. Subsequently, in 1968, the governments of Denmark, Norway and Sweden reported successive violations of Articles 3 and 7 ECHR[276] and Articles 1 and 3 of the First Protocol to the Convention, which cannot be subject to any derogation[277]. In 1969, the Commission adopted a report in which it stated that it had found numerous violations of human rights on Greek territory, also claiming that the measures taken on the territory were in no way justifiable as derogations implemented under Article 15 of the Convention[278]. Moreover, for the first time since the Convention was adopted, the Commission stated that acts of torture as understood under Article 3 ECHR were being practiced on Greek territory[279]. The report adopted by the Commission included proposals, which are not binding, so that the violations of human rights guaranteed by the Convention could be discontinued[280]. These proposals referred to detention measures, to guaranteeing the independence of the judiciary, referred to the need to hold free elections as soon as possible and suggested compensation for victims of torture and ill-treatment[281].

In this tense environment, in December 1969, the Council of Europe met to consider a possible suspension of Greece from the CoE under Article 3 of the Statute[282], but the Greek Minister of Foreign Affairs himself announced

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[272] Notice of the Greek Government, 3 May 1967, *of Derogation of Obligations under Article 15 of the European Convention on Human Rights*.
[273] RISINI (2018: 84).
[274] Applications to the European Commission of Human Rights, 20 and 27 September 1967, 3321-3323,3344/67, *Denmark, Norway, Sweden, and the Netherlands v. Greece.*
[275] *Ibid.*
[276] Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, Article 15 paragraph 2.
[277] Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Paris, 20 March 1952
[278] Report of the European Commission of Human Rights, 5 November 1959, 3321-3323,3344/67, *Denmark, Norway, Sweden and the Netherlands v. Greece (I).*
[279] *Ibid.*
[280] Appendix to the report of the European Commission of Human Rights, 5 November 1959, *Proposals made by the European Commission of human rights.*
[281] *Ibid.*
[282] FERNÁNDEZ, SORIANO (2017: 368).

Greece's withdrawal from the Council of Europe under Article 7 of the Statute on 12 December 1969[283]. At the same time, Greece denounced the European Convention on Human Rights under ex-Article 65 ECHR, thus ceasing to be a Contracting Party on 12 June 1970[284].
Greece became a member State of the Council of Europe and a Contracting Party to the Convention again in 1974, following the fall of the colonels' dictatorship[285]. In November of the same year, the Council of Ministers decided not to reopen the case concerning Greece due to the "fundamental changes" that took place following the re-establishment of the democratic regime[286].

The second inter-State application brought before the Commission concerning the situation in Greece during the dictatorship was filed by Denmark, Norway and Sweden in 1970, in contrast to the first application in which the Netherlands was also an applicant[287]. The second application concerned criminal proceedings against 34 individuals of Greek nationality, who were tried before courts-martial in Athens between March and April 1970[288]. The application refers to violations of Articles 2 and 6 ECHR and was filed two days after the public prosecutor had requested the death penalty for one of the defendants, but the Commission requested to suspend any possible execution of the death penalty because the case was simultaneously pending in Strasbourg[289]. Even though Greece had not ruled in favor of the death penalty, it did not take part in the proceedings, leading the Commission to declare that it was unable to adequately continue exercising its functions[290]. When Greece re-established a democratic regime in its country, the case was removed from the list of proceedings pending before the Commission[291].

The case so far has been of fundamental importance in the caselaw of the judicial bodies established under the ECHR. In particular, the situation in Greece involved the violation of rights underpinning a democratic regime aimed at the protection of human rights, such as the right of association and collective organization[292]. Moreover, this is the first case in which Contracting Parties to the Convention use the mechanism of inter-State litigation to

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283 *Ibid.*
284 RISINI (2018: 85).
285 WASSEMBERG (2019: 109).
286 Resolution of the Committee of Ministers of the Council of Europe, Strasbourg, 26 November 1974, 3321-3323,3344/67, *Denmark, Norway, Sweden, and the Netherlands v. Greece (I).*
287 RISINI (2018: 86).
288 Admissibility decision of the European Commission of Human Rights, Strasbourg, 26 May 1970, 4448/70, *Denmark, Norway and Sweden v. Greece (II).*
289 Report of the European Commission of Human Rights, Strasbourg, 4 October 1976, 4448/70, *Denmark, Norway and Sweden v. Greece (II).*
290 *Ibid.*
291 *Ibid.*
292 RODLEY, POLLAND (2009: 83).

denounce human rights violations in another State, but without any kind of citizenship link between the applicants and the citizens whose rights are violated[293]. Despite this, the case demonstrated how neither the Council of Europe nor the Commission had the ability to prevent the stabilization of a dictatorship in one of the Council's Member States[294].

3.1.2 The Turkish Case (applications nos. 9940-44/82)

In 1982, Denmark, France, Norway, Sweden and the Netherlands filed an application with the European Commission of Human Rights against Turkey[295].

Turkey became a member of the Council of Europe in 1949 and in 1954 also became a member of NATO, making it the country with the largest military force in Europe and the second largest within NATO, preceded only by the United States[296]. In fact, it can be said that since the establishment of the Turkish Republic in 1923, born at the end of the First World War from the disintegration of the Ottoman Empire, the military has assumed a fundamentally important role in the management of the country's politics, and this is also evidenced by the fact that from 1960 to 1980, Turkey underwent three *coups d'état*[297].
Turkey's history is marked by continuous clashes between extreme right and extreme left parties, which, unable to come to any kind of agreement to defend the parliamentary government, have repeatedly left room for the military corps, which has repeatedly intervened with the promise of restoring democracy[298]. It was precisely in this spirit that, on 12 September 1980, the Turkish army regained military power in Turkey for the umpteenth time, imposing martial laws which, after a few years, led to the execution of numerous Turkish citizens, but also to their torture and illegal detention[299].
In such tense atmosphere, on 1 July 1982, Denmark, France, Norway, Sweden and the Netherlands submitted an application to the European Commission concerning emergency legislation and practices that violated Articles 3,5,6,9 and 15(3) of the Convention during the period between 12 September 1980 and 1 July 1982[300]. It is important to emphasize that the same political pressure was not exerted at the level of the Parliamentary Assembly of the Council of Europe as in the case involving Greece during the colonels' dictatorship, precisely because in that case the outcome was the denunciation of the

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293 RISINI (2018: 88).
294 FAWCETT (2018: 88).
295 Applications, 1 July 1982, nos. 9940-44/82, *France, Norway Denmark, Sweden, and the Netherlands v. Turkey.*
296 GANSER (2005: 69).
297 MOECKLI, SHAH, SIVAKUMARAN, HARRIS (2022: 203).
298 MOECKLI, SHAH, SIVAKUMARAN, HARRIS (2022: 209-210).
299 *Ibid.*
300 RISINI (2018: 130).

Convention by the Greek government and withdrawal from the Council of Europe[301].

The Commission declared the appeal admissible in 1983[302]. In 1985, the case was resolved by a friendly settlement between the parties[303]. In fact, according to ex-Article 28(b) of the Convention, the Commission must make itself available to the parties so that an friendly settlement can be found for the resolution of the pending case and, if such a settlement is accepted by both the applicants and the defendant, the Commission must issue a report which is communicated to the claimants and the defendant, to the Committee of Ministers and to the Secretary General of the Council of Europe for publication[304]. It is important to note that at the time the applications were submitted, Turkey had accepted neither the right to individual petition under former Article 25 ECHR nor the jurisdiction of the Court under former Article 46 ECHR[305]. Since acceptance of the individual petition was seen as an implied condition for an amicable resolution of the case, Turkey declared this positive intention on 28 January 1987[306].

3.1.3 The Case of Denmark v. Turkey (application no. 34382/97)

Years later, in 1997, Denmark filed another application in which the Turkish government was again named as a defendant[307].

This second application against Turkey concerned the ill-treatment of a Danish citizen, Mr Kemal Koc, during his pre-trial detention in Turkey between 8 July and 16 August 1996[308]. Mr Koc was born in Turkey and later moved to Denmark, obtaining Danish citizenship in 1992[309]. Mr Koc was a member of the Union of Kurdish Association in Denmark and decided to leave for Turkey in 1996, but as soon as he arrived on Turkish territory, he was arrested[310]. After six weeks of detention he was released, but during criminal proceedings in his absence, he was sentenced to four years imprisonment "for offences against the Turkish State"[311].

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[301] Pancracio (1984: 161).

[302] Admissibility decision of the European Commission of Human Rights, Strasbourg, 6 December 1983, 9940-44/82, *France, Norway Denmark, Sweden, and the Netherlands v. Turkey.*

[303] Report of the European Commission of Human Rights, Strasbourg, 7 December 1985, 9940-44/82, *France, Norway Denmark, Sweden, and the Netherlands v. Turkey.*

[304] Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, ex-Articles 28(b) and 30.

[305] Risini (2018: 135).

[306] *Ibid.*

[307] Application, 7 January 1197, no 34382/97, *Denmark v. Turkey.*

[308] *Ibid.*

[309] Risini (2018: 134).

[310] *Ibid.*

[311] *Ibid.*

The application focused on the defendant's violation of Article 3 ECHR, both during the Danish citizen's detention and with reference to an administrative practice in Turkish detention facilities[312]. In addition, Denmark attached to the application medical certificates stating that the individual had been subjected to acts of torture, both physical and psychological, during his detention on Turkish territory[313]. The Court declared the application admissible on 8 June 1999[314], but on 30 and 31 March 2000, the respective representatives of the Danish and Turkish governments made a formal declaration on the friendly settlement of the dispute, and these declarations were then made public by the Court's judgment of 5th April 2000[315]. Specifically, the Danish government obtained an *ex-gratia* payment to the value of 450,000 Danish Kroner, and the Turkish government expressed its regret for this individual case of torture and ill-treatment[316]. In addition, the two parties to the dispute agreed to establish a bilateral project focused on the training of police officers about human rights[317].

Looking at the appeals in the Turkish case and *Denmark v. Turkey*, it can be said that both appeals filed against Turkey have aspects in common, first and foremost the outcome of both proceedings. The friendly settlement of both appeals filed against Turkey highlights the role of the control mechanism established by the ECHR. This mechanism is mainly aimed at ensuring that the Contracting Parties fulfil their obligations under the Convention itself. This case shows how the combination of a fair degree of flexibility and collective litigation can be beneficial if the ultimate goal is the respect of universally recognized human rights[318]. Moreover, such appeals are of fundamental importance to the jurisprudence of the Court, which, with the beginning of inter-State proceedings as early as 1982, was able to highlight how, on Turkish territory, there was an administrative practice contrary to Article 3 ECHR[319]. This administrative practice was established *prima facie*, during the admissibility examination, causing the rule of prior exhaustion of domestic remedies to be disapplied[320].
As for the 1997 inter-State litigation, Denmark has largely benefited from the Court's clarification of administrative practices, precisely because Mr. Koc's case was presented as clear evidence of an existing administrative practice in Turkey contrary to Article 3 ECHR[321]. Moreover, it should be emphasized that

[312] Application *Denmark v. Turkey.*
[313] Admissibility Decision of the European Court of Human Rights, Strasbourg, 8 June 1999, 34382/97, *Denmark v. Turkey.*
[314] *Ibid.*
[315] Judgment of the European Court of Human Rights, Strasbourg, 5 April 2000, 34382/97, *Denmark v. Turkey.*
[316] *Ibid.*
[317] RISINI (2018: 133).
[318] NOWAK (1989: 98-99).
[319] Admissibility decision *Denmark et al. v. Turkey.*
[320] *Ibid.*
[321] RISINI (2018: 133).

Mr Koc could have submitted an individual application precisely because, as mentioned above, Turkey had accepted this possibility in 1987. Denmark's choice to support the case of one of its citizens is instead a clear manifestation of the greater effectiveness of inter-State litigation when there are serious and systematic violations of human rights[322].

In conclusion, considering the specific situation in Turkey, the outcome of said proceedings was the best of all possible scenarios precisely because the goal was to bring about a radical change in human rights on Turkish territory[323]. Indeed, it must be considered that during the first part of the proceedings Turkey had accepted neither the possibility of an individual complaint nor the jurisdiction of the Court[324]. One of the possible scenarios was that the case would end up before the Committee of Ministers and, from the experience of the Cyprus v. Turkey case, it appeared that this political body did not have the capacity to make an important contribution to the respect of universally recognised human rights[325].

3.2 Actions to protect specific national interests of the applicant States

3.2.1 The cases of Greece v. United Kingdom (applications nos. 176/56 and 299/57)

The cases involving Greece and the United Kingdom are the first that were presented to the European Commission of Human Rights, in a context where human rights were still a fairly new concept in international law[326].
To better understand the cases, it is necessary to look at the historical context in which they were presented. The island of Cyprus was part of the Ottoman Empire for more than three centuries and consisted of a Greek-Cypriot majority and a Turkish-Cypriot minority[327]. In 1878, during the Congress of Berlin, the island was ceded to the United Kingdom, which then represented the colonial power, in order to gain political support against the Russian Empire[328].
In the period between 1915, the year Cyprus was formally annexed to the United Kingdom, and the 1950s, a strong anti-British movement emerged with the simultaneous support of *Enosis*, i.e., the concept of the unification of Greece with the island of Cyprus[329].

[322] *Ibid.*
[323] Keller, Forowicz, Engi (2010: 74).
[324] Risini (2018: 133).
[325] Risini (2018: 137).
[326] Simpson (2004: 941).
[327] Taylor (2001: 250).
[328] *Ibid.*
[329] Markides (1974: 212-213)

In 1953, the United Kingdom, under former Article 63 ECHR, which contained the so-called colonial clause, had decided to extend the scope of the Convention abroad to some forty crown colonies, including the island of Cyprus[330]. In October 1955, the United Kingdom adopted measures derogating from Article 5 ECHR, under Article 15 ECHR[331].

In 1956 and 1957, Greece filed two applications against the United Kingdom concerning a series of legislative measures that were allegedly contrary to Articles 3 and 5 of the Convention. Furthermore, Greece argued that the requirements for exemptions implemented through Article 15 ECHR were not met[332].
The first application was declared admissible in 1956[333]. Bearing in mind that Greece had expressly targeted legislative measures and had therefore made no reference to individual, concrete and specific violations, the rule of prior exhaustion of domestic remedies did not apply[334]. In 1958, during the examination of the merits, the Commission also visited the island of Cyprus and, as a result of this visit, drafted a report, as required by former Article 31 ECHR[335]. This report was not initially disclosed but was only published in full in 1997[336]. As can be read from the report, the Commission did not highlight any kind of violation of the Convention by the British crown, choosing not to legally assess the measures repealed or discontinued by the UK[337].

In 1957, Greece submitted a second application alleging ill-treatment of 49 individuals, thus violating Article 3 ECHR. In particular, the content of the charge referred to collective punishments inflicted on individuals[338]. In October of the same year, the Commission declared the application partially inadmissible because not all 49 individuals had exhausted domestic remedies as required under former Article 26 ECHR[339]. As with the first inter-State appeal, the Commission, under former Article 31 ECHR, produced a report in 1959 and again this report remained confidential until 2006[340]. The 1959

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330 MOOR, SIMPSON (2005: 76).
331 *Ibid.*
332 Applications, 7 May 1956 and 17 July 1957, nos. 176/56 and 299/57, *Greece v. United Kingdom*.
333 Admissibility decision of the European Commission of Human Rights, Strasbourg, 2 June 1956, 176/56, *Greece v. United Kingdom (I).*
334 *Ibid.*
335 Report of the European Commission of Human Rights, Strasbourg, 26 September 1958, 175/56, *Greece v. United Kingdom (I)*.
336 Resolution of the Committee of Ministers of the Council of Europe, Strasbourg, 17 September 1997, 176/56, *Greece v. United Kingdom (I)*.
337 *Ibid.*
338 Application of the Greek Government, 17 July 1957, 299/57, *Greece v. United Kingdom (II)*.
339 Admissibility decision of the European Commission of Human Rights, Strasbourg, 10 January 1958, 299/57, *Greece v. United Kingdom (II).*
340 Resolution of the Committee of Ministers of the Council of Europe, Strasbourg, 5 April 2006, 299/57, *Greece v. United Kingdom (II).*

report does not go into the merits of the matter and furthermore reveals that both the British and Greek governments repeatedly requested that the proceedings in Strasbourg be discontinued because there had been "fundamental changes" following the agreement reached between the parties in 1959[341].

It is important to note that the European Court of Human Rights was established in the same year but could not exercise its functions in this case because the United Kingdom had not accepted the jurisdiction of the Court, while Greece had provided an *ad-hoc* reference[342]. In fact, the only body competent to examine the matter after the Commission's report was the Committee of Ministers which, in the first appeal brought against the United Kingdom, had limited itself to drafting a resolution in April 1959, without pursuing an examination of the merits[343]. In addition, the second appeal also ended in the same way, with a resolution of 14 December 1959[344]. Probably the outcome of both appeals stemmed from the fact that the parties, in February of the same year, reached an agreement, the so-called Zurich and London agreement. In particular, Greece, the United Kingdom and Turkey concluded an agreement on the independence of the island of Cyprus, without the involvement of the Strasbourg institutions[345].

The significance of these appeals lies in the fact that, for the first time, there was a willingness to fill the vacuum left by the institution of diplomatic protection, thus allowing for a strong denunciation of human rights violations on a large scale[346]. One aspect that needs to be emphasized is that the Commission had requested a stay of execution for one of the 49 individuals in the second appeal[347]. The individual was Nikos Sampson who would later, in 1974, become the President of Cyprus for only eight days[348]. This request to suspend the execution of the individual was the first *interim* measure to come from Strasbourg, but it had no compulsory character, considering that the binding decisions the Commission could issue concerned only the admissibility of the applications[349]. The United Kingdom's acceptance of this *interim* measure therefore does not seem so obvious, given the non-binding nature of this request[350]. The impact of such appeals was especially suffered by the British crown, precisely because the UK was "partially disarmed in

341 *Ibid.*
342 RISINI (2018:68).
343 Resolution of the Committee of Ministers, Strasbourg, 20 April 1959, 176/56, *Greece v. United Kingdom (I).*
344 Resolution of the Committee of Ministers, Strasbourg, 14 December 1959, 299/57, *Greece v. United Kingdom (II).*
345 SÖZEN (2004: 61-77).
346 SIMPSON (2004: 1032).
347 Report of the Commission *Greece v. United Kingdom (I).*
348 RISINI (2018: 68).
349 RISINI (2018: 72).
350 *Ibid.*

future colonial insurrections"[351]. On the other hand, as far as Greece is concerned, the defendant most likely sued the United Kingdom before the Commission mainly for a private interest in the island of Cyprus[352]. Nevertheless, this case demonstrates that even cases where the interest at stake is purely individual are functional to the respect of human rights[353].

3.2.2 The case of Austria v. Italy (application no. 788/60)

The third inter-State application under the European Convention on Human Rights was filed by Austria against Italy in 1960[354]. The application concerned criminal proceedings against six Italian citizens of the South Tyrol region belonging to the German-speaking minority in Italy[355].
Already at the time of the adoption of the Convention, South Tyrol was divided by numerous ethnic conflicts. The region had in fact belonged to Italy since 1919 thanks to the peace treaty of Saint Germain, but before the First World War the region belonged to Austria-Hungary[356]. With the beginning of the Fascist period, South Tyrol underwent a strong process of Italianization through numerous reforms, including the compulsory teaching of Italian in the German schools located in the territory[357]. In 1946, Italy and Austria reconfirmed the borders established in 1919 on condition that greater autonomy would be granted to the German minorities in the region[358]. The central point underlying the disputes between Austria and Italy is precisely the implementation, or non-implementation, of the latter agreement[359]. Moreover, the conflict over this issue persisted for a very long time and the matter was only closed in 1992, with the implementation of the 1946 agreement, the so-called Paris Agreement[360].

The inter-State application brought by Austria against Italy concerned criminal proceedings against six Italian citizens belonging to the German minority in the village of Pfunders, South Tyrol, which were contrary to Articles 6 and 14 ECHR[361]. The application was declared admissible by the

[351] SIMPSON (2004: 962).
[352] RISINI (2018: 76).
[353] *Ibid.*
[354] Application, 12 July 1960, no. 788/60, *Austria v. Italy.*
[355] *Ibid.*
[356] NIEZING (2017: 4-10).
[357] *Ibid.*
[358] *Ibid.*
[359] PALLAVER (2012: 145-146).
[360] MONACO (1992: 531).
[361] Application no. 788/60, *Austria v. Italy.*

Commission in 1961[362]. Two years later, the Commission issued a report stating that there was no violation of the Convention[363].
Indeed, according to the Commission:

> "While it [the Commission] agrees that such conclusions might vary according to the national temperament and legal tradition of different countries, the Commission feels that the Court of Bolzano/Bozen did not violate Article 6(2) of the Contention in this respect"[364].

At the merits stage, the Committee of Ministers also supported this view and, in a letter to the Foreign Ministers of the Italian and Austrian governments, clarified how:

> "The Commission considered it desirable for humanitarian reasons, among which may be counted the youth of the prisoners, that measures of clemency be taken in their favor"[365].

Italy had not made any statement allowing individual petitions or accepting the Court's jurisdiction. For these reasons, the case was closed following the 1963 resolution[366].

Analyzing the case carefully, it can be said that this represents exactly what the drafters had in mind when elaborating the Convention. In fact, the possibility of Austria bringing an action in defense of nationals of the defendant State precisely represented the principle of collective enforcement as it is still enshrined in the Convention[367]. In addition, during the stage of admissibility of such an action, some doubts arose as to the rule of prior exhaustion of domestic remedies. In particular, the Austrian Government argued that the above-mentioned rule did not apply in this case, given the collective enforcement nature of the action brought[368]. Notwithstanding this, the Commission clarified that the prior exhaustion of domestic remedies was necessary where the individuals whose rights have been violated are nationals of the respondent State, given that such individuals are subject to the jurisdiction of that State[369]. Moreover, the requirement of prior exhaustion of domestic remedies, as enshrined under the ECHR, distinguishes this latter instrument for the protection of human rights from the supervisory mechanism

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[362] Admissibility decision of the European Commission of Human Rights, Strasbourg, 11 January 1961, 788/60, *Austria v. Italy.*
[363] Report of the European Commission of Human Rights, Strasbourg, 30 March 1963, 788/60, *Austria v. Italy.*
[364] *Ibid.*
[365] Resolution of the Committee of Ministers of the Council of Europe, Strasbourg, 23 October 1963, 788/60, *Austria v. Italy.*
[366] RISINI (2018: 78).
[367] RISINI (2018: 79).
[368] *Ibid.*
[369] ANTONOPOLUS (1967: 71).

present at the international level[370]. Indeed, when States bring a complaint against other States at the international level, they do so on the basis of bilateral agreements, which do not guarantee any rights to the individual, but create respective obligations for the States[371]. The *Austria v. Italy* case highlights how the control mechanism configured with the adoption of the ECHR is a mechanism that places the protection of the interests of individuals at the center and is therefore extremely "individual-centered"[372].

In conclusion, the context in which the *Austria v. Italy* case developed highlights the ongoing conflicts between the two parties regarding the South Tyrol region. As evidence of this, one can cite the 1960 UN General Assembly resolution, which recommended finding means of peaceful resolution in order to implement the 1946 Paris Agreement[373]. Moreover, the case shows how the concept of collective enforcement of human rights was of fundamental importance at that time, given the optional nature of the right to individual petition[374].

3.2.3 The case of Ireland v. United Kingdom (application no. 5310/71)

In 1971, Ireland brought an application against the United Kingdom alleging breaches committed by the defendant in the context of the Northern Ireland conflict[375].
To understand the historical context in which this application was filed, it is necessary to go back to 1949, the year in which Ireland became a Republic independent of the United Kingdom[376], while Northern Ireland remained part of the United Kingdom, exercising devolved powers of a significant nature[377]. Protests in Northern Ireland began to break out in the late 1960s and the driving motive seems to be acts of discrimination in relation to the allocation of social housing in the territory[378]. Precisely, in 1969 there were explosions, murders, and shootings to which the Northern Irish government responded promptly[379]. In fact, in August 1969, the Northern Irish government requested the United Kingdom to send troops into the territory to try and put an end to the protests[380]. In March 1972, the UK suspended government in Northern Ireland, taking full responsibility for the region and imposing the so-called

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370 KAVACS (2013: 324).
371 *Ibid.*
372 RISINI (2018: 80).
373 Resolution of the General Assembly of the United Nations, New York, 31 October 1960, 1497(XV), *The status of the German-speaking element in the Province of Bolzano (Bolzen), implementation of the Paris agreement of 5 September 1946.*
374 RISINI (2018: 83).
375 RISINI (2018: 97).
376 DICKSON (2010: 212).
377 DICKSON (2010: 9).
378 BONNER (2014: 49).
379 *Ibid.*
380 RISINI (2018: 97).

“direct rule”, which remained until 1999[381]. The magnitude of the “Ulster Problem” is evident both because the number of British soldiers who died on Northern Ireland territory exceeds those who died in the Falklands War, the Gulf War and the Afghanistan War, but also because the situation in Northern Ireland influenced the drafting of the Additional Protocol to the Geneva Convention in the period between 1974 and 1977[382]. In fact, the United Kingdom only ratified this Additional Protocol in 1998, when the fighting in Northern Ireland was no longer characterized by violence[383].
The conflicts in Northern Ireland pitted the Protestant majority of the population against the Catholic minority. The latter favored the annexation of Northern Ireland to Ireland[384]. In view of the numerous clashes in Northern Ireland, the United Kingdom submitted derogations under Article 15 ECHR in 1969 and 1971[385].

In the application submitted by Ireland in December 1971, the claimant found violations of Articles 1, 2, 3, 5, 6, 13 and 15 ECHR[386]. In addition, the plaintiff pointed to further violations of Article 7 ECHR in respect of the North Ireland Act 1972, by which the United Kingdom established the direct rule in Northern Ireland[387]. These violations were the subject of a second application against the United Kingdom, but Ireland withdrew the application before the examination of the merits because the British Attorney General had assured the Commission that no individual would be found guilty on the alleged retroactive nature of the Act in question[388].
The core of the matter concerned alleged violations of Article 3 ECHR in connection with the so-called “five techniques” used by the British government during interrogation[389]. These techniques included depriving detainees of food, water, and sleep, covering detainees with a black hood, and only removing it when interrogated, subjecting detainees to continuous sounds so loud that they could not communicate with other detainees, and forcing detainees to assume a certain posture, with their face against the wall[390]. As early as 1972, the British government declared an end to the use of the five techniques during interrogations although the application had already been

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381 *Ibid.*
382 DICKSON (2010: 12).
383 HAINES (2012: 117).
384 RISINI (2018: 98).
385 *Ibid.*
386 Application of the Irish Government to the European Commission of Human Rights, 16 December 1971, no.5310/71*, Ireland v. United Kingdom.*
387 RISINI (2018: 101).
388 Application of the Irish Government to the European Commission of Human Rights, 6 March 1972, no. 5451/72*, Ireland v. United Kingdom (II).*
389 RISINI (2018: 98-99).
390 Report of the European Commission of Human Rights, Strasbourg, 9 February 1976, 5310/71, *Ireland v. United Kingdom.*

filed, but there had not yet been any kind of decision on the admissibility of the application[391].
The Commission declared the appeal admissible in October 1972[392]. In 1976, the Commission issued a report on the matter, stating that the five techniques were classifiable as acts of torture within the meaning of Article 3 ECHR[393]. Ireland then referred the case to the European Court of Human Rights in March 1976 because both parties had accepted the Court's jurisdiction under former Article 46 ECHR[394]. On 18 January 1978 the Court handed down its first judgement in an inter-State application, stating that while it supported the conclusions reached by the Commission, it did not consider that the acts carried out by the British Government in Northern Ireland could be classified as acts of torture within the meaning of Article 3 ECHR[395]. The Committee of Ministers did not wish to continue with its consideration of the case after the Court's judgement, publishing its resolution in June 1978[396].

This appeal is of particular importance for two reasons. First, it was the first appeal that was heard by the European Court of Human Rights before Protocol No. 11 came into force. Secondly, it was the first time that an inter-State application was joined by several individual appeals[397]. The reference is to the appeals *Donnelly and others v. United Kingdom*, which concerned the ill-treatment of the applicants, contrary to Article 3 ECHR, after their arrest in 1972[398]. The applicants considered that the ill-treatment that was the subject of the complaint was part of administrative practices in violation of Article 3 ECHR, but the applicants had not pursued domestic remedies[399]. In the first decision, the Commission had declared the applications admissible because the applicants had demonstrated *prima facie* the existence of an administrative practice, rejecting the defendant's argument that questions concerning administrative practices and legislative measures could only be raised in inter-State applications[400]. Subsequently, the Commission heard forty witnesses and concluded that the possible national remedies were effective or adequate[401].

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[391] RISINI (2018: 99).
[392] Admissibility decision of the European Commission of Human Rights, 1 October 1972, 5310/71, *Ireland v. United Kingdom.*
[393] Report of the European Commission of Human Rights, 9 February 1976, 5310/71, *Ireland v. United Kingdom.*
[394] DICKSON (2010: 377-378).
[395] Judgment of the European Court of Human Rights, 18 January 1978, 5310/71, *Ireland v. United Kingdom.*
[396] Resolution of the Committee of Ministers of the Council of Europe, 27 June 1978, 5310/71, *Ireland v. United Kingdom.*
[397] DICKSON (2010:377-378).
[398] HANNUM, BOYLE (1977: 316-322).
[399] *Ibid.*
[400] Admissibility decision of the European Commission of Human Rights, 5 April 1973, 5577-83/72, *Donnelly and others v. United Kingdom.*
[401] Admissibility decision of the European Commission of Human Rights, 15 December 1975, 5577-83/72, *Donnelly and others v. United Kingdom.*

For this reason, the seven applications filed were declared inadmissible by the Commission[402].

3.2.4 The cases of Cyprus v. Turkey (applications nos. 6780/74, 6950/75, 8007/77 and 25781/94)

Since 1974, the island of Cyprus has brought four claims against Turkey concerning numerous violations of the Convention.
As mentioned above, in 1960 the island of Cyprus gained independence from the British crown with the so-called Zurich and London agreement and the parties to the pact were Greece, Turkey and the United Kingdom[403]. Despite this, the acquisition of the island's independence did not diminish the contrasts between the Greek and Turkish inhabitants on the island and, in 1963, hostilities erupted that could be attributed to a civil war between the island's two different ethnic groups[404]. This situation worsened especially for the Turkish-Cypriots due to the destruction of numerous villages, which led to approximately 25,000 Turkish-Cypriots being internally displaced[405]. In 1964, the United Nations established the need for a peacekeeping operation, which is still present on the island today[406]. In July 1974, with the help of the Greek government that had come to power on the island in 1967, a *coup d'état* was staged with the intention of carrying out the so-called *enosis*, i.e., the unification of the island with Greece, which had itself been agreed to another inter-State resort since 1967[407]. The 1974 *coup d'état* brought about the fall of the military dictatorship in Greece on the one hand, and triggered Turkey's reaction on the other, to the extent that the Turkish military intervened in the north of the island of Cyprus[408].
The consequences of the events of 1974 were catastrophic, with about 4,000 people killed, 3,000 others disappeared and about 200,000 Greek-Cypriots left the north of the island[409]. Furthermore, after the events of 1974, Turkey systematically tried to alter the population structure of the island by making large numbers of Turkish people immigrate to Cyprus[410].
In 1983, the "Turkish Republic of Northern Cyprus" proclaimed its independence, but the UN Security Council required all States not to recognize it[411]. To date, only Turkey has recognized its independence, while the

[402] *Ibid.*
[403] Sözen (2004: 61-77).
[404] Ehrlich (1965: 1021).
[405] Necantigil (1998: 36).
[406] Talmon (2002: 33-37).
[407] Markides (1974: 212-213).
[408] Rumpf (1993: 394).
[409] Risini (2018: 118).
[410] Coufoundakis (1982: 451).
[411] Resolution of the Security Council of the United Nations, 18 November 1983, S/RES/541.

international community continues to recognize the Republic of Cyprus as the only State on the island[412].
In May 2004, *referenda* were held on the island for a "comprehensive settlement plan", drawn up by UN Secretary General Kofi Annan[413]. The so-called "Plan Annan", which envisaged the reunification of the island into a single federal republic, did not see approval by the Greek Cypriots, who rejected it[414].
Despite this, the island of Cyprus joined the European Union, while the non-recognition of Cyprus by Turkey is the major obstacle preventing the latter from joining the Union[415].

The inter-State applications filed against Turkey stem from the events of 1974. In fact, the first two applications were filed in 1974 and 1975 and were joined and declared admissible on 26 May 1975[416].
The subject matter of the application concerned systematic conduct and practices in violation of Articles 1, 2, 3, 4, 5, 6, 8, 13, 14 and 17 ECHR and Article 1 of the First Additional Protocol to the Convention[417]. Furthermore, the island of Cyprus contested the disappearance of approximately 3,000 persons and the expulsion from their residences of more than 200,000 Greek Cypriots by the Turkish military[418]. The applicant further stated that "atrocities and criminal acts were directed against Greek Cypriots because of their ethnic origin, race and religion"[419]. Pursuant to former Article 31 ECHR, the Commission issued a report on the matter in which it stated that it had found numerous violations of the Convention[420]. The Committee of Ministers only declared the need for dialogue between the two communities on the island and closed the case with a one-page resolution[421].

Cyprus presented its third application against Turkey in September 1977 and was concerned with Turkey's continued violations of the Convention[422]. The application was declared admissible by the Commission the following year[423].

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412 RISINI (2018: 119).
413 *Ibid.*
414 *Ibid.*
415 *Ibid.*
416 Admissibility decision of the European Commission of Human Rights, 26 May 1975, 6780/74 and 6950/75*, Cyprus v. Turkey (I)* and *(II).*
417 Applications the Cypriot Government to the European Commission of Human Rights, 10 September 1974 and 21 March 1975, nos. 6780/74 and 6950/75, *Cyprus v. Turkey (I)* and *(II).*
418 *Ibid.*
419 *Ibid.*
420 Report of the European Commission on Human Rights, 10 July 1976, 6780/74 and 6950/75*, Cyprus v. Turkey (I)* and *(II).*
421 Resolution of the Committee of Ministers of the Council of Europe, 20 January 1979, 6780/74 and 6950/75*, Cyprus v. Turkey (I)* and *(II).*
422 Application of Cypriot Government to the European Commission of Human Rights, 6 September 1967, no. 8007/77, *Cyprus v. Turkey (III).*
423 Admissibility decision of the European Commission of Human Rights, 10 July 1978, 8007/77, *Cyprus v. Turkey (III).*

The Commission's final report on the subject was finalized in 1983, and there too the Commission found numerous violations of the Convention by the respondent[424]. In 1992, nine years later, the Committee of Ministers decided to publish this Commission report and took no further action in the case *Cyprus v. Turkey (III)*[425].

The fourth complaint against Turkey was filed by Cyprus in 1994 and was declared admissible by the Commission in 1966[426]. The subject of the complaint still concerned numerous violations of the Convention, especially in the Turkish-occupied part of the island[427]. In 1999, again under ex-Article 31 ECHR, the Commission drafted the report on the matter and the case was subsequently referred to the European Court of Human Rights, whose jurisdiction had been accepted by Turkey in 1990[428]. The Grand Chamber of the Court then issued its judgment on the merits in 2001, in which it declared that Turkey had committed numerous violations of the rights and freedoms guaranteed in the Convention[429]. The execution of the judgment on the merits is still under the supervision of the Committee of Ministers and the latter has repeatedly clarified what measures should be put in place to comply with the 2001 judgment on the merits[430].
In 2014, the Grand Chamber of the European Court of Human Rights issued its judgment of just satisfaction, ruling that the Cypriot government was to be awarded EUR 90 million of non-pecuniary damages, which were then to be distributed to the victims of the violations suffered[431]. Specifically, EUR 30 million is to be paid to the families of the victims, while EUR 60 million is to be paid to the residents of the Karpas peninsula, an enclave located in the north of the island of Cyprus and inhabited by Greek Cypriots[432]. The then Prime Minister Davutoglu stated that this sum of money would not be released, precisely because Turkey does not recognize the counterpart as a State and, for this reason, no payment has yet been made by Turkey[433].
One of the main problems in this case results precisely from Turkey's non-recognition of the Cypriot government and for this reason Turkey itself did not even participate in the proceedings on the merits of the first three inter-

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[424] Report of the European Commission on Human Rights, 4 October 1983, 8007/77, *Cyprus v. Turkey (III).*
[425] Resolution of the Committee of Ministers of the Council of Europe, 2 April 1992, 8007/77, *Cyprus v. Turkey (III).*
[426] Admissibility decision of the European Commission of Human Rights, 28 June 1086, 25781/94, *Cyprus v. Turkey (IV).*
[427] *Ibid.*
[428] RISINI (2018: 115).
[429] Judgment of the European Court of Human Rights, 10 May 2001, 25781/94, *Cyprus v. Turkey (IV).*
[430] Resolution of the Committee of Ministers of the Council of Europe, 7 June 2005, 25781/94, *Cyprus v. Turkey (IV).*
[431] Judgment of the European Court of Human Rights, 12 May 2014, 25781/94, *Cyprus v. Turkey (IV).*
[432] *Ibid.*
[433] RISINI (2018: 115).

State applications[434]. Moreover, although after an initial refusal to cooperate it decided to participate in the proceedings on the merits in the fourth case presented, Turkey stated that participation in the proceedings on the merits in no way constituted an act of recognition by Turkey of the Greek Cypriot government[435]. Furthermore, what emerges from the analysis of this case is the total failure of the Committee of Ministers to exercise its functions, especially in the first three appeals filed, in which the European Court of Human Rights had no jurisdiction whatsoever and, therefore, could not enter into the merits of the matter[436].
In conclusion, the comments on the appeals lodged against Turkey were almost entirely negative. Indeed, the ineffectiveness and excessive duration of the latter was highlighted[437]. Moreover, on the one hand, the 2001 binding judgment did not change the situation, and on the other hand, the execution of the judgment issued in 2014 was not guaranteed in any way, calling into question the very role of the Court when its own binding judgments are not executed[438].

3.3 The role of inter-State applications under the European Convention on Human Rights

3.3.1 The initial purpose of inter-State appeals by the High Contracting Parties

The intention of the High Contracting Parties in concluding the Convention was to guarantee a mechanism for monitoring respect for universally recognized human rights that was different from the mechanism of diplomatic protection, already guaranteed by the norms of international law. Thus, the aim was not to establish reciprocal rights and duties to protect specific national interests, but:

> "To realize the aims of the Council of Europe, as expressed in its Statute, and to establish a common public order of free democracies of Europe with the object of safeguarding their common heritage of political traditions, ideals, freedom and rule of law"[439].

Precisely for this reason, the then Consultative Assembly agreed that under former Article 24 ECHR, the right of any Member State to file a petition with another Member State as respondent arose from the ratification of the Convention itself, so that any contracting party could submit any violation of

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434 *Ibid.*
435 Report of the Commission *Cyprus v. Turkey (IV).*
436 RISINI (2018: 120).
437 HARRIS (2014: 115).
438 RISINI (2018: 129).
439 Decision of the Commission *Austria v. Italy*.

the Convention to the Commission[440]. As for the right of individual petition, on the other hand, there were conflicting views as to whether this right should be made mandatory or optional. In particular, while on the one hand there was the idea that the right to individual petition was an essential tool to make the control mechanism established by the Convention effective, on the other hand it was felt that such a procedure, being indeed a new mechanism to protect universally recognized human rights, was also too revolutionary and could be subject to possible abuse[441]. For this reason, it was decided that the right to individual petition would be made optional and thus only apply to States that made a declaration of their own willingness to accept this right granted to the individual[442]. In other words, in 1950 the mechanism for protecting the human rights recognized by the Convention was mainly based on inter-State dispute, the latter being the only mandatory mechanism under the Convention[443].

The intention of the Contracting Parties to place inter-State litigation at the heart of the collective guarantee of recognized rights and freedoms can also be deduced from the fact that the admissibility requirements for inter-State litigation are much less stringent than the requirements for individual complaints[444]. In fact, under former Article 25 ECHR, now replaced by Article 35, the Commission could not examine any individual complaint unless it was brought by an individual who considered himself a victim of the violation itself[445]. In other words, there is a fundamental limitation for an individual complaint to be admissible: the person bringing an application to the Strasbourg bodies must show that the practice or law implemented by the defendant causes him harm that is contrary to the Convention[446]. In contrast, this limitation does not apply to inter-State complaints since the Contracting Parties to the Convention may communicate "any alleged breach" to the Strasbourg bodies[447].

Secondly, it is well known that the rule of prior exhaustion of domestic remedies, like the four-month limitation rule, applies to both individual and inter-State remedies[448]. Nevertheless, as discussed above, the rule of prior exhaustion of domestic remedies is subject to peculiar exceptions in the case of inter-State appeals, since it does not apply in inter-State applications when

[440] PREBENSEN (2009: 445).
[441] RISINI (2018: 129).
[442] PREBENSEN (2009: 445).
[443] *Ibid.*
[444] KRÜGER, NØRGARD (1998: 659-660).
[445] Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950.
[446] KRÜGER, NØRGARD (1998: 661).
[447] Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950.
[448] *Ibid.*

the dispute concerns administrative practices or legislative measures contrary to the Convention[449].
In addition, while the Commission already could not examine any action that is manifestly ill-founded or incompatible with the Convention, in the case of inter-State actions this rule does not apply, and thus the examination of the merits, unlike in individual actions where the plaintiff must present *prima facie* evidence in support of the alleged violation, is carried out entirely at the post-admissibility stage[450].
In addition, it is also necessary to mention that actions brought by Member States of the Convention take precedence over actions brought by individuals, although this precedence is understandable given that the Member States themselves have significant responsibilities in the collective enforcement mechanism set up under the Convention[451].

3.3.2 The present purpose and effects of inter-State complaints

One of the main consequences of the less restrictive admissibility requirements for inter-State complaints is that most of the complaints filed by individuals have been declared inadmissible[452]. In spite of this, the intention to place inter-State litigation as the main guarantor of respect for the rights and freedoms recognized by the Convention has not been confirmed by the subsequent practice pursued by the States given the large number of individual appeals lodged with both the Commission and the European Court following the entry into force of Protocol No. 11, by which the optional clause on the right to individual petition was eliminated[453]. Furthermore, it can be said that the individual petition mechanism has proved effective, whereas the same cannot be said for the inter-State litigation mechanism[454]. The latter had satisfactory effects in the case brought by Ireland against the United Kingdom, which is also the only one that reached the Court prior to the entry into force of Protocol No. 11[455]. In this particular complaint, the so-called “five techniques” used by the United Kingdom were effectively disapplied even before the Court ruled on the violation of Article 3 of the Convention[456]. However, in the other cases brought before the Strasbourg bodies, it is more difficult to assess the positive impact the applications have had. The fact that individual litigation is used more frequently than inter-State litigation is testimony to the fact that Convention member States are reluctant to use this instrument especially when political interests are at stake[457]. In addition, inter-

449 Judgment of the European Commission *Ireland v. United Kingdom*.
450 PREBENSEN (2009: 447).
451 *Ibid.*
452 *Ibid.*
453 PREBENSEN (2009: 450).
454 *Ibid.*
455 PREBENSEN (2009: 455).
456 Judgment of the European Court of Human Rights, *Ireland v. United Kingdom.*
457 PREBENSEN (2009: 458).

State litigation is often difficult to resolve and in some circumstances the defendants did not even participate in the proceedings during the examination of the merits[458].

Despite this, the role of inter-State appeals is highly relevant, especially at the political level. Indeed, inter-State appeals have often been used as a mechanism to denounce serious and systematic violations of human rights in situations where democratic principles no longer existed and as well as when effective remedies at the national level[459]. Furthermore, it must be emphasized that inter-State remedies can relate to any violation of the Convention and therefore, in general, they can be a more effective instrument for denouncing violations of the Convention by another Member State than the individual remedy mechanism[460].
Individual justice has become the central focus of the Convention's control mechanism, mainly due to the very high number of complaints submitted by individuals to the Strasbourg bodies[461]. While the latter was not initially one of the primary objectives of the Convention's control mechanism, today it is actually possible to say that the mechanisms of individual and inter-State complaints complement each other precisely because the former is primarily aimed at the protection of individual justice, while the latter is primarily aimed at the collective enforcement of human rights and is therefore posed for the benefit of more individuals[462].

In conclusion, it can be said that inter-State actions have their relevance primarily on a political level. This means that their importance does not lie in the subject matter of the action brought, but in the political relevance of the action itself, i.e., the willingness of a State to sue another Contracting Party for a violation of the Convention. This becomes even more important if several Contracting Parties to the Convention are suing another State to protect individuals with whom they have no nationality ties[463].

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[458] Report of the Commission *Cyprus v. Turkey.*
[459] RISINI (2018: 62).
[460] *Ibid.*
[461] *Ibid.*
[462] RISINI (2018: 66).
[463] PREBENSEN (2009: 460).

Chapter IV. The Effect of the European Union's Access to the European Convention on Human Rights on Inter-State Applications

4.1 The evolution of human rights in the European Union

The founding Treaties of the European Communities, both the Paris Treaty and the subsequent Rome Treaties, being marked by a purely economic integration, contained no reference to the protection of human rights[464]. Later, with the establishment of the direct applicability of EU law in the domestic law of the Member States, the idea arose that the application of the provisions of EU law could interfere with the fundamental rights recognized by the domestic law of the members of the Union[465].
The Court of Justice of the European Union ('CJEU') therefore addressed the issue from its first ruling on the subject[466], referring both to the constitutional traditions common to the Member States and to the international instruments to which they have acceded[467]. In the development of jurisprudence in this regard, the *Rutili* judgment, in which the CJEU declared that the European Convention on Human Rights is to be regarded as a source of general principles of law, gained particular importance[468].
With the establishment of the European Union, human rights, already repeatedly affirmed in the jurisprudence of the Court, are codified among the first articles of the Maastricht Treaty, and then later included in the preamble of the Amsterdam Treaty[469]. In this context, it is necessary to mention that, in 1989, the European Parliament had already adopted a Declaration of Fundamental Rights and Freedoms necessary for the codification of the rights of individuals[470]. Ten years later the European Council, at the Tampere Summit on 15/16 October 1999, decided to set up an *ad hoc* body with the task of drafting a Charter on Fundamental Rights of the Union[471]. After about a year, the draft of the Charter was submitted to the institutions of the Union and was solemnly proclaimed on 7 December 2000 in Nice[472].

[464] ZANGHÌ, PANELLA (2019: 337).
[465] *Ibid.*
[466] Judgment of the Court of Justice of the European Union, 12 November 1969, 29/69, *Erich Stauder v. Stadt Ulm-Sozialamt.*
[467] Judgment of the Court of Justice of the European Union, 14 May 1974, 4/73, *J. Nold, Kohlen- und Baustoffgroßhandlung v. Commission of the European Communities.*
[468] Judgment of the Court of Justice of the European Union, 28 October 1975, 36/75, *Roland Rutili v. Ministre de l'intérieur.*
[469] ZANGHÌ, PANELLA (2019: 338).
[470] Resolution of the European Parliament, 12 April 1989, Doc. A2-3/89, *adopting the Declaration of Fundamental Rights and Freedoms*.
[471] ZANGHÌ, PANELLA (2019: 344).
[472] *Ibid.*

The content of the Charter traces, especially in the first part, the standards already deduced from the European Convention on Human Rights, such as the right to life, physical integrity, the prohibition of torture and slavery, the right to education as well as the right to property[473]. In some cases, the provisions contain additions, as in the case of Article 3 on physical integrity, in which a paragraph 2 is introduced that, in relation to medicine and biology, imposes a ban on eugenic practices, the use of human body parts as a source of financial gain, the prohibition of reproductive cloning of human beings and the requirement of informed consent[474]. By contrast, in other cases, the ECHR provisions have only been reproduced in their essential terms, such as in the case of Article 6, which states that everyone has the right to liberty and security but omits all the specifications contained in Article 5 ECHR[475].

The legal nature of the act and its effects are not easy to deduce, at least if one refers to the period before the entry into force of the Lisbon Treaty. In particular, the Charter of Fundamental Rights does not fit into any of the categories of acts that can be adopted by the European Union, falling into the so-called category of "atypical acts", as do all previous declarations on human rights adopted by the institutions of the Union[476]. With this in view, the question must therefore be asked whether the Union actually had competence to adopt a text on fundamental rights. Despite continuous references to the protection of human rights, the CJEU had ruled out that the Community had any kind of competence in the field of human rights[477]. Notwithstanding this, it is well known that the limitation imposed by the Court in respect of jurisdiction relates exclusively to the adoption of acts provided for by Community law or acts from which binding legal consequences flow in any event, but the same limitation does not apply when it is a question of adopting acts without such effects and having essentially political significance[478]. Moreover, the fact that the document in question does not affect the competences of the Union is also stated in Article 51(2) of the Charter: "This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties"[479]. The interpretation of the legal nature of the act is further complicated by the first part of the aforementioned article: "[t]he provisions of this Charter are

[473] Charter of Fundamental Rights of the European Union, Nice, 7 December 2000.
[474] *Ibid.*
[475] *Ibid.*
[476] *Ibid.*
[477] Opinion of the Court of Justice of the European Union, 28 March 1996, 2/94, *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms.*
[478] EECKHOUT (2002: 946-947).
[479] Charter of Fundamental Rights of the European Union, Nice, 7 December 2000.

addressed to […] the Union […] and to the Member States only when they are implementing Union law"[480].

As mentioned above, all previous Declarations on human rights have always been interpreted as acts of purely political relevance through which institutions solemnly and formally manifest their will to conform to certain principles in the implementation of their competences and activities[481]. Although the Charter falls into this category of acts where there is a reference to the institutions of the Union and its bodies, a justification must be found for the reference to the Member States in Article 51. Indeed, such a reference may be justified considering that the *ad hoc* body formed for the drafting of the Charter was composed of both representatives of the Council of the Union and representatives of national parliaments[482]. This allows an initial conclusion to be drawn as to the nature of the Charter, which can be defined as an atypical act attributable to inter-institutional declarations, from which it differs, however, and is characterized by being at the same time inter-State in nature[483]. But the real breakthrough regarding the legal nature of the Charter of Fundamental Rights only came with the process of treaty reform, which ended with the signing of the Lisbon Treaty. With the latter, the Charter becomes an integral part of the first-level sources of EU law, thus giving it the same legal value as the Treaties[484].

As regards the scope of application of the Charter, the jurisprudence of the Court of Justice is rather rich and articulate and has given rise to a heated doctrinal debate. In particular, the reasoning of the Court of Justice has centered on the assertion that fundamental rights guaranteed in the legal order of the Union find protection in all situations governed by Union law, but not outside them[485]. In that perspective, the Court of Justice has made it clear that it cannot assess national legislation that is not within the scope of Union law with regard to the Charter[486]. On the other hand, once such legislation falls within the scope of EU law, the Court, when giving a preliminary ruling, must provide all the elements of interpretation necessary for the national court to assess the conformity of that legislation with the fundamental rights whose respect it guarantees[487]. At the same time, further clarification was provided on the notion of "implementation of Union law" contained in Article 51(1) of the Charter. In particular, the Court clarified that this notion requires the

[480] *Ibid.*
[481] Zanghì, Panella (2019: 350).
[482] *Ibid.*
[483] García Roca (2003: 166).
[484] Tesauro (2020: 148).
[485] Judgment of the Court of Justice of the European Union, 15 November 2011, C-256/11, *Dereci et al. v. Bundesministerium für Inneres.*
[486] Judgment of the Court of Justice of the European Union, 6 March 2014, C-206/13, *Siragusa v. Regione Sicilia.*
[487] Tesauro (2020: 149).

existence of a connection of a certain consistency, going beyond the matters under consideration and the similarities between them[488]. Indeed, in order to determine whether national legislation falls within the implementation of Union law, within the meaning of Article 51 of the Charter:

> "Some of the points to be determined are whether that legislation is intended to implement a provision of EU law, the nature of that legislation and whether it pursues objectives other than those covered by EU law, even if it is capable of indirectly affecting EU law, and also whether there are specific rules of EU law on the matter or capable of affecting it"[489].

Article 52 contains the provisions that are considered most relevant, as they aim to ensure the systematic coherence of the Charter with the ECHR, in line with the Union's obligation to respect fundamental rights as guaranteed by the Convention under Article 6(3) of the Treaty on European Union ('TEU')[490]. This Article first emphasizes that the meaning and scope of the fundamental rights recognized by the Charter corresponds to those conferred by the ECHR, adding that the level of protection afforded to those rights may not be lower than the standards set by the ECHR, but that the link with the rules of the ECHR must in no way undermine the autonomy of Union law[491]. With regard to the relationship with national rules, Article 52(4) provides that the fundamental rights of the Charter must be interpreted "in harmony" with those resulting from the constitutional traditions common to the Member States[492]. This provision should be read in conjunction with Article 53, which provides that the Charter is not intended to call into question the level of protection of fundamental rights recognized by national constitutions[493].
Furthermore, the Court has made it clear that Member States are free to adopt a more protective standard of protection than that deriving from the Charter where the Union legislature has not established a common standard of protection[494]. Conversely, where there are specific rules of Union law defining applicable standards of protection, there is no possibility for Union Member States to apply their own national standards[495].

4.2 The Protection of human rights in the European Union

[488] Judgment of the Court of Justice of the European Union, 6 October 2016, C-218/15, *Request for a preliminary ruling from the Tribunale ordinario di Campobasso (District Court, Campobasso, Italy) in the criminal proceedings against Paoletti et al.*
[489] Order of the Court of Justice of the European Union, 7 September 2017, C-177/17 and C-178/17, *Demarchi Gino Sas et al. v. Ministero della Giustizia.*
[490] Treaty on European Union, Maastricht, 7 February 1992.
[491] TESAURO (2020: 152).
[492] Charter of Fundamental Rights of the European Union, Nice, 7 December 2000.
[493] *Ibid.*
[494] Judgment of the Court of Justice of the European Union, 26 February 2013, C-399/11, *Melloni v. Ministerio Fiscal.*
[495] *Ibid.*

4.2.1 The monitoring of Member States' compliance with European law

a) The control procedure under Article 7 of the Treaty of the European Union

Parallel to the evolution of the European integration process, the Treaties have increasingly attached importance to the Union's primary and identity values, which constitute its moral heritage. Indeed, the Court has clarified that:

> "Each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the law of the EU that implements them will be respected"[496].

The values referred to by the Court are therefore those on which the European integration is founded and, precisely for that reason, must be respected by all the actors of the Union, i.e., institutions and bodies of the Union, States, and individuals[497]. Moreover, these values underpin not only the internal action of the Union, but also its external action[498]. The values referred to are those listed in Article 2 of the TEU:

> "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail"[499].

These values, according to Article 49 TEU, have become a *conditio sine qua non* for the accession of new States, but also for their permanence in the Union[500]. These values are all-encompassing, as they must necessarily be respected not only by new States, but by all member States, both in situations falling under Union law and in purely domestic situations[501]. To this end, Article 7 TEU provided for a control system, the so-called "nuclear option" of

[496] Opinion of the Court of Justice of the European Union, 18 December 2014, 2/13, *pursuant to Article 218(11) TFEU.*
[497] TESAURO (2020: 21).
[498] *Ibid.*
[499] Treaty on European Union, Maastricht, 7 February 1992.
[500] TESAURO (2020: 26-27).
[501] *Ibid.*

a purely intergovernmental nature, on compliance with the values listed in Article 2[502].
According to Article 7(1), on a reasoned proposal by one third of the Member States of the Union, the European Parliament, or the Commission, the Council may determine that there is a *clear risk* of a serious breach of the founding values of the Union by a Member State, acting by a majority of four fifths of its members[503]. However, this decision must also be approved in advance by the European Parliament, by a two-thirds majority of the votes expressed, representing a majority of the components[504]. Nevertheless, the Council may also use the instrument of a recommendation, acting according to the same procedure so as to invite the State to put an end to the violation of the founding values of the Union[505].
Notwithstanding this, there is a huge difference between the existence of a clear risk of an infringement by a Member State of the Union and a finding that the infringement is serious and persistent. This justifies the fact that the Article 7(2) procedure needs much higher majorities for its activation[506]. In particular, the European Council, acting unanimously and after obtaining the consent of the European Parliament, on a proposal from one third of the Member States or from the Commission, may determine the *existence* of a serious and persistent breach of the values mentioned in Article 2[507]. If the breach has been established, the Council may decide, by qualified majority, to suspend the voting rights of the representative of the government of the breaching State in the Council, it being understood that the State in question continues to be bound by the obligations of the Union[508].

As can be seen from an analysis of this regulatory instrument, the procedures described so far in Article 7 TEU take on a purely political character[509]. This is evident from the fact that the finding of an infringement is, firstly, a matter for the institutions of the Union representing the interests of the Member States and, secondly, from the fact that the deliberative *quorum* are extremely high, respectively four fifths of the total votes for the procedure under Article 7(1) TEU and even unanimity for the procedure under paragraph 2 of that Article, again excluding the infringing State from the counting[510].
The evident political connotation of the procedure is confirmed by the fact that the Court of Justice assumes a very limited judicial control, as it can only be seized by the Member State affected by the finding, which can only lodge complaints concerning purely procedural matters[511].

[502] Treaty on European Union, Maastricht, 7 February 1992.
[503] KOCHENOV (2017: 7).
[504] *Ibid.*
[505] Treaty on European Union, Maastricht, 7 February 1992, Article 7 paragraph 1.
[506] KOCHENOV (2017: 9).
[507] Treaty on European Union, Maastricht, 7 February 1992, Article 7 paragraph 2.
[508] Treaty on European Union, Maastricht, 7 February 1992, Article 7 paragraph 3.
[509] AMALFITANO (2017: 1352).
[510] SANNA (2014: 71).
[511] NASCIMBENE (2017: 631).

Practice has shown that the mechanisms provided for in Article 7 TEU, although critical situations have indeed occurred, have proved to be ineffective, especially because of the political impact that the initiation of the procedure might entail[512]. To date, the procedure described in Article 7(1) has been activated at the proposal of the Commission against Poland, following continuous dialogues with the State concerned, which have not achieved the desired results[513]. With reference to the Hungarian case, the European Parliament approved the resolution noting the risk of the fundamental values of the Union being endangered and urged the Council to intervene in defense of the integrity of the democratic system in Hungary[514].

b) The infringement procedure

The judicial review by the Court of Justice of the punctual application of European Union law in all the Member States is intended not only to verify continuously the compatibility of acts and conduct of those States with European Union law, but also to ensure the necessary uniformity of application of the same European rules in all the Member States, so as to guarantee the harmony of the legal system of the Union taken as a whole[515]. The infringement procedure relates to the Commission's role as guardian of the correct application of the Treaties and Union acts by the Member States[516]. Indeed, although under Article 259 of the Treaty on the Functioning of the European Union ('TFEU') actions may also be brought by another Member State, in practice actions brought under Article 258 TFEU by the Commission has become increasingly important[517]. The procedure of infringement consists in establishing the breach of any obligation incumbent on the Member States[518]. The obligations referred to are both those arising from the Treaties, but also those arising from the binding acts of the Union, from the international agreements concluded by the Union, but also the fundamental rights as they result from the Charter of Nice and guaranteed by the Rome Convention on Fundamental Rights, since the latter are part of the general principles of the Union's legal order under Article 6 TEU[519].

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512 PARODI (2014: 12).
513 Press release of the European Commission, 20 December 2017, *Rule of Law: European Commission act to defend the judicial independence in Poland.*
514 Resolution of the European Parliament, 15 September 2022, 0324/2022, *Resolution on the proposal for a Council decision determining, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded.*
515 TESAURO (2020:397).
516 Treaty on European Union, Maastricht, 7 February 1992 Article 17 paragraph 1.
517 ADAM, TIZZANO (2017: 260).
518 TESAURO (2020: 398).
519 ADAM, TIZZANO (2017: 261).

The infringement procedure is essentially divided into two phases, namely the pre-litigation phase, which takes place at the instigation and under the responsibility of the Commission, and the judicial phase, in which the central role is played by the Court of Justice[520].
The pre-litigation phase is triggered either *ex officio* or upon a complaint by another party alleging the presumed infringement. Given the complexity of the situations, the complaint aimed at harming the State is examined by the Commission with a wide margin of discretion, as the latter can deliberately decide whether or not to initiate the procedure and, if so, when to do so[521]. If, after verification, the Commission considers that an infringement has indeed been committed, it sends a letter of formal notice to the State concerned, with a view to formally informing the latter of the procedure against it and to submit its observations within a period of time to be set by the Commission itself[522]. If the Member State's observations are inadequate or if the Member State does not react to the letter of formal notice, the Commission is obliged to send the Member State a reasoned opinion specifying the continuing infringements, the legal and factual elements supporting such an allegation, and setting a deadline, usually of two months, within which the State concerned should put an end to the conduct complained of[523]. The letter of formal notice and the reasoned opinion are obligatory steps in the infringement procedure, they are intermediate and non-binding[524]. Precisely because of this nature, the failure to adopt the reasoned opinion cannot be the subject of an action before the European Court[525].

If after the expiry of the time limit set by the Commission the Member State does not comply with the reasoned opinion, the Commission may bring the matter before the Court pursuant to Article 258 TFEU[526]. It should be emphasized that the grounds of complaint in the appeal must correspond to those set out in the pre-litigation phase, precisely because it follows from the case law of the Court that an appeal will be inadmissible when it contains objections that were not the subject of dialogue between the Member State and the Commission during the pre-litigation phase[527]. On the substance of the case, the infringement must be rigorously proven by the Commission because it is the latter's obligation to provide the Court with the necessary elements to establish the infringement[528].

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[520] TESAURO (2020: 398).
[521] ADAM, TIZZANO (2017: 265-266).
[522] *Ibid.*
[523] ALBANESI (2018: 136).
[524] ADAM, TIZZANO (2017: 268).
[525] *Ibid.*
[526] Treaty on the Functioning of the European Union, Rome, 25 March 1957.
[527] Judgment of the Court of Justice of the European Union, 14 July 1988, 298/86, *Commission of the European Communities v. Kingdom of Belgium.*
[528] Judgment of the European Court of Justice, 5 October 1989, 290/87, *Commission of the European Communities v. Kingdom of Netherlands.*

The effects of a Court ruling on the outcome of an infringement procedure are prefigured by Article 260 TFEU. According to the latter, with the judgment the Court recognizes that the State has actually committed an infringement[529]. However, as can be seen from the words used in the provision, this judgment is merely declaratory in nature and in fact the State's obligation to comply with the judgment does not derive from the Court's ruling, but from Article 260 TFEU[530]. Indeed, in these types of judgments, the measures to be taken by the State concerned to bring the breach to an end are not specified, precisely because the choice of the measures to be taken is left to the latter[531].
The freedom of the Member States to choose for themselves the means necessary to comply with the Court's judgment does not transcend the obligation on the States themselves to ensure its effective implementation in a timely manner[532]. In addition, the Maastricht Treaty first and the Lisbon Treaty later brought about changes whereby the Commission can bring an action directly before the Court against the doubly non-compliant State and can also request that financial sanctions be imposed on the latter[533].

The procedure described above can also be initiated by a Member State. Indeed, according to Article 259 TFEU, any Member State of the Union may bring an action before the Court to have another Member State's failure to fulfil its obligations recognized[534]. Here, again, the Commission plays a key role as it is the Commission's task to make attempts to ensure that the situation is resolved without the intervention of the Court[535]. At the end of the contradictory procedure between the two States concerned, the Commission issues a reasoned opinion in which it expresses its opinion on the request of the complainant State to open the procedure in question[536]. In particular, the opinion may be interlocutory if the Commission does not consider that it can take a final position on the matter due to insufficient evidence, it may be favorable to the accused State or favorable to the accusing State[537]. While the first two cases do not in principle preclude the State from bringing an action before the Court anyway, in the last case the procedure will be the same as that described above with regard to the Commission's action. That is to say, the opinion will contain a time limit within which the offending State may take appropriate action and, if this does not happen within the time limit, the matter may be brought before the Court[538].

[529] Treaty on the Functioning of the European Union, Rome, 25 March 1957, Article 260.
[530] ADAM, TIZZANO (2017: 271).
[531] *Ibid.*
[532] ADAM, TIZZANO (2017: 272).
[533] *Ibid.*
[534] Treaty on the Functioning of the European Union, Rome, 25 March 1957 Article 259.
[535] TESAURO (2020: 412).
[536] ADAM, TIZZANO (2017: 276).
[537] *Ibid.*
[538] *Ibid.*

c) The preliminary rulings procedure

In the system of judicial review of the correct and uniform application of Union law in all Member States, cooperation between national courts and the Court of Justice has played a decisive role. In fact, the concrete application of Community rules or even acts of the Union is mainly left to the Member States and their administrations, either because the latter apply the Union rule directly or because internal rules of the Member States have intervened to regulate the implementation of European rules[539]. Precisely in order to ensure a continuous dialogue between the national court and the Court of Justice, Article 267 TFEU gives the national court the power, and if of last resort the obligation, to ask the Court of Justice for a ruling on the interpretation or validity of a rule of Union law when such a ruling is necessary to resolve the dispute before it[540]. In particular, when faced with the possible or established relevance of a Union rule for the resolution of the dispute, it may be useful for the national court to ask what the correct interpretation and scope of the Union rule is or whether the relevant Union rule is valid and effective[541]. The two cases just mentioned correspond respectively to the reference for a preliminary ruling on the interpretation and validity of Union rules[542].
The essential function of the reference for a preliminary ruling is to bring about a uniform interpretation and consequently a uniform application of Union law in all Member States, so that it has the same effect everywhere[543]. The second function of the preliminary reference is to verify the legality of a national law, an administrative act or even an administrative practice in relation to Union law[544].

The Court's review of the lawfulness of national rules and acts, even if indirect, has been affirmed as a fundamental moment in the system of protection that the individual enjoys under EU law. Indeed, of relevance is the *Van Gend en Loos* Court's ruling on Article 30 TFEU, a provision prohibiting Member States from introducing new customs duties in intra-Community trade and from increasing existing ones, conduct that had been imputed to the Netherlands[545]. The objection, also of the many governments that intervened in the procedure, was that to review infringements by Member States, in the form of national laws incompatible with Union law, the Treaty had provided for procedures under Articles 258 and 259 TFEU, precisely because the individual could not claim to reach the same result by provoking a preliminary

[539] TESAURO (2020: 417).
[540] BONELLI (2022: 177).
[541] PUGLIA (2020: 6).
[542] *Ibid.*
[543] Judgment of the Court of Justice of the European Union, 16 January 1974, 166/73, *Rheinmühlen v. Einfuhr.*
[544] PUGLIA (2020: 8).
[545] TESAURO (2020: 421).

reference from the national court[546]. The Court replied that limiting the possibility of asserting the infringement of a Union rule to that offered by the infringement procedure would be tantamount to leaving the rights of individuals "without direct judicial protection"[547]. Ultimately, when an individual considers that it is suffering prejudice as a result of the application of a national rule or practice alleged to be incompatible with European Union law, it may invoke that incompatibility and have it established in two ways, either by reporting it to the Commission, which may or may not initiate infringement proceedings under Article 258 TFEU, or by requesting the national court to make a reference for a preliminary ruling on the interpretation under Article 267 TFEU[548].

The third function of the reference for a preliminary ruling consists in supplementing the system of judicial review of the legality of acts of the Union. In fact, the hypothesis of a reference for a preliminary ruling on validity is fully part of the exercise of the function of judicial review of acts of the Union entrusted to the Court of Justice, and therefore this hypothesis must be linked to the direct review procedures provided for by the Treaties, which include the action for annulment under Article 263 TFEU and the action for failure to act under Article 277 TFEU[549]. This implies that the reference for a preliminary ruling on validity completes the system of judicial remedies provided for the protection of the rights of the individual in relation to acts carried out by the institutions of the Union[550]. In fact, the reference for a preliminary ruling on invalidity ends up filling a legal vacuum existing in the judicial system as a whole, caused by the fact that such an action is precluded to an individual in respect of a Union act of general application, unless the latter directly and personally affects him[551]. On the other hand, by virtue of this mechanism, when such an act has been adopted domestically, the individual may challenge the internal implementing measure before the national court and propose that the latter ask the European Court of Justice for a preliminary ruling[552].

The object of a reference for a preliminary ruling is very broad. For a reference for interpretation, the object may be sources of primary law, acts of the institutions, including non-binding acts, but also general principles of Union

[546] *Ibid.*
[547] Judgment of the Court of Justice of the European Union, 5 February 1963, 26/62, *Van Gend end Loos v. Netherlands Inland Revenue Administration.*
[548] TESAURO (2020: 421).
[549] FERRARO, ROLANDO (2020: 37).
[550] Judgment of the Court of Justice of the European Union, 3 October 2013, C-583/11, *Inuit Tapiriit Kanatami v. European Parliament, Council of the European Union, Kingdom of the Netherlands, European Commission.*
[551] TESAURO (2020: 423).
[552] Judgment of the Court of Justice of the European Union, 29 June 2010, C-550/09, *Criminal proceedings against E, F.*

law[553]. On the other hand, as regards questions of validity, these may only concern acts performed by the institutions, bodies, offices, and agencies of the Union[554]. Ultimately, these are all those acts that can be challenged by direct appeal under Article 263 TFEU[555].

A reference for a preliminary ruling may be made by any national ordinary, administrative, accounting or tax court, provided that it is within the judicial system of a Member State[556]. The definition of "court or tribunal of a Member State" within the meaning of Article 267 TFEU has been defined by the Court of Justice itself, which has determined qualifying features such as the legal and non-conventional origin of the body, its permanent character, compulsoriness, application of the law, independence, and tertiary nature[557]. On the other hand, as regards the objective conditions, the Court has repeatedly stated that, according to the principle of cooperation between the Court of Justice and the national court and the consequent division of jurisdiction, the Court cannot review the reasoning of the order for reference[558]. In addition, the Court clarified that according to the same article governing the case, the Court cannot rule on fictitious disputes, and this implies that the preliminary ruling procedure presupposes that a real dispute is pending before the national court[559]. Furthermore, the Court has declared itself competent to rule on internal rules that expressly refer to Community rules for their interpretation[560] or even if the rule in question reproduces a Community rule almost textually[561].

What is relevant is the interpretation of the Charter of Fundamental Rights by the Court of Justice. In particular, the latter is called upon to interpret the Charter within the limits of the competences granted to the Union itself[562]. For that reason, the Court of Justice has repeatedly declared that it lacks jurisdiction to give preliminary rulings on cases that are completely unrelated to Union law[563]. Furthermore, Article 51 of the Charter contains the notion of "implementation of Union law", but this notion requires the existence of a connection of a certain consistency, which goes beyond the affinity of the subject matter[564]. In view of the difficulty in identifying when national

[553] PUGLIA (2020, 15).
[554] *Ibid.*
[555] *Ibid.*
[556] CAPUANO (2020: 33).
[557] *Ibid.*
[558] TERMINIELLO (2020: 62).
[559] TERMINIELLO (2020: 64).
[560] Judgment of the Court of Justice of the European Union, 11 December 2007, C-280/06, *Autorità Garante della Concorrenza del Mercato v. ETI SpA et al.*
[561] Judgment of the Court of Justice of the European Union, 12 November 1992, 73/89, *A Fournier et al. v. V. van Werven et al.*
[562] TESAURO (2020: 438).
[563] Judgment *Siragusa.*
[564] TESAURO (2020: 438).

legislation falls within the scope of implementation of EU law, the Court has provided guidance in this regard, including, for example, whether the legislation is intended to implement a provision of EU law, what its nature is, and whether there is any legislation of EU law specifically governing the matter or likely to affect it[565].

Concern about damages actions has prompted courts of last resort to significantly increase the number of references for preliminary rulings to the Court of Justice, precisely because the breach of the obligation to make a reference for a preliminary ruling by the latter may result in the State concerned being liable to individuals for damages caused by breaches of Union law attributable to judicial bodies[566]. Notwithstanding this, mere failure to comply with the obligation to make a reference for a preliminary ruling is not sufficient to invoke the State's liability for damages, since it is also necessary for the individual to prove that, if the reference for a preliminary ruling had actually been made, the court of last resort could have adopted a decision favorable to him[567].

The Court's interpretative judgment given on a reference for a preliminary ruling is binding on the national court, which is therefore obliged to apply the rule of Union law as interpreted by the Court and, if necessary, to disapply the conflicting national rule[568]. Moreover, this judgment must also be considered outside the procedural context that gave rise to it and therefore the other courts of the national administrations are obliged to apply the rules as interpreted by the Court, thus also determining the rights that individuals can enjoy[569].
When, on the other hand, the Court rules in the sense of the validity of the act, then the effect is strictly limited to the case at hand and to the specific grounds of the complaint[570]. Finally, when the Court rules that the act is invalid, this has the same effect as a judgment of annulment pursuant to Article 263 TFEU[571]. This implies that the declaration of invalidity binds in substance not only the administration but also other courts before which the act may still be invoked[572].

The mechanism of the preliminary reference has been considered the cornerstone of the Union's judicial system, because it enables the consistency of Union law, including fundamental rights as recognized by the Charter, to

565 *Ibid.*
566 Judgment of the Court of Justice of the European Union, 13 June 2006, C-173/03, *Traghetti del Mediterraneo SpA v. Repubblica Italiana.*
567 Ferraro (2020: 141).
568 Maffeo (2020: 202).
569 Judgment of the Court of Justice of the European Union, 16 June 2015, C-62/14, *Gauweiler et al. v. Deutscher Bundestag.*
570 Tesauro (2020: 448).
571 *Ibid.*
572 *Ibid.*

be guaranteed[573]. Ultimately, the Court's jurisprudence has identified a true European standard of judicial protection of individual rights[574]. Thus, the power reserved to the States to use national instruments to ensure the judicial protection of rights attributed on the basis of Union law is in fact subject to review by the Court of Justice. In particular, this control is based on two parameters, namely non-discrimination, which requires that rights of Union origin be afforded at least the same protection under national law as rights attributed to that law, and effectiveness, which requires the adequacy of remedies to ensure effective protection with respect to the parameters identified by the Court, as is, inter alia, enshrined in Article 19 TEU[575].

4.2.3 The control of legality of European Union acts

a) Actions for annulment

The direct review of the legality of the Court of Justice takes place in a number of situations, first and foremost the action for annulment. The latter consists in challenging by way of appeal an act adopted by the institutions of the Union which is held to be defective and harmful[576]. Article 263 TFEU, which governs actions for annulment, gives the Court of Justice exclusive jurisdiction to review the legality of acts of the institutions of the Union[577].
Challengeable acts are legislative acts, acts of the Council, acts of the Commission and the European Central Bank that are not recommendations or opinions, acts of the European Parliament and the European Council intended to produce legal effects *vis-à-vis* third parties[578]. In other words, the acts that may be challenged are all those acts that produce binding effects, irrespective of the *nomen iuris* attributed to the act of the institution, favoring an appreciation based on the substantive content of the act[579].
Furthermore, appealable acts are characterized by being final acts, even if it does not matter whether the final position on a given issue is immediate or not[580].

The review of the legality of acts of the Union is not activated *ex officio*, but on a proposal by the plaintiffs. In fact, active legitimacy is first and foremost intended for the Member States of the Union, even in relation to other Member

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573 Opinion of the Court of Justice of the European Union, 8 March 2011, 1/09, *Opinion Pursuant to Article 218(11) TFEU.*
574 TESAURO (2020: 452).
575 TESAURO (2020: 453).
576 Treaty on the Functioning of the European Union, Rome, 25 March 1957 Article 263.
577 Judgment of the Court of Justice of the European Union, 19 December 2018, C-219/17, *Berlusconi v. Banca d'Italia.*
578 ADAM, TIZZANO (2017: 283).
579 Judgment of the Court of Justice of the European Union, 9 October 1990, C-366/88, *French Republic v. Commission of the European Communities.*
580 ADAM, TIZZANO (2017: 284).

States or individuals[581]. Secondly, the applicants include the institutions, namely the Council, the Commission and the Parliament[582]. Those two categories of claimants are qualified as privileged claimants in that they are eligible to bring an action before the Court of Justice irrespective of an alleged infringement of a specific interest of theirs precisely because their interest in bringing an action is found in the very need to ensure the effectiveness of the Union legal order[583].
Semi-privileged plaintiffs include the Court of Auditors, the European Central Bank, and the Committee of the Regions, which, pursuant to Article 263(3) TFEU, are entitled to bring actions "for the purpose of protecting their prerogatives"[584]. Lastly, persons governed by domestic law, natural and legal persons, may challenge Union acts at first instance before the General Court and at second instance, on points of law, before the Court of Justice[585]. Nevertheless, there are requirements that the individual must meet in order to challenge an act. Firstly, the appellant must prove an interest in the act at the time it is filed, failing which it is inadmissible[586]. In addition, the individual may challenge acts specifically addressed to him, or he may challenge acts of which he is not the formal recipient provided that those acts directly and individually affect him, i.e., that he is identified or identifiable as the substantive recipient of the act and that there is a causal link between the individual's situation and the measure taken[587]. In particular, an act can be said to refer to the subject "individually" when it is addressed to the subject as an individual and not when the individual is included in a category of subjects[588]. On the other hand, an act is directly referable to the individual when no enforcement measure is provided for the application of the act in question and therefore the act itself produces its effects on the individual as a consequence of the direct enactment of the act[589].
With the Treaty of Lisbon, a revision of the conditions of admissibility of actions for annulment proposed to individuals was adopted, expressly sanctioning their right to challenge all acts adopted against them or which are of direct and individual concern to them, as well as regulatory acts which are of direct concern to them and do not entail the adoption of implementing measures[590]. With reference to the term "regulatory acts", this must be

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581 Judgment of the Court of Justice of the European Union, 20 March 1985, C-41/83, *Italian Republic v. Commission of the European Communities.*
582 ADAM, TIZZANO (2017: 293-294).
583 *Ibid.*
584 Treaty on the Functioning of the European Union, Rome, 25 March 1957 Article 263 paragraph 3.
585 ADAM, TIZZANO (2017: 294).
586 TESAURO (2020: 346).
587 ADAM, TIZZANO (2017: 296-297).
588 Judgment of the Court of Justice of the European Union, 15 July 1963, C-25/62, *Plaumann & co. v. Commission of the European Communities.*
589 *Ibid.*
590 Treaty on the Functioning of the European Union, Rome, 25 March 1957 Article 263 paragraph 4.

interpreted to include acts of general application with the exception of legislative acts[591].

The time limit for appeal is two months from the publication of the act or its notification to the appellant or from the day on which the appellant has actual knowledge of it[592]. To this period must be added the so-called distance period, which is equivalent to ten days, provided for in Rule 51 of the Rules of Court[593].

As regards the individual defects that may be relied upon, these are the traditional ones of administrative litigation, first and foremost the defect of lack of competence, which may be relative, if referring to the institution that adopted the act, or absolute, if referring to the Union as such[594].
Secondly, an act may be vitiated for breach of essential procedural requirements, even if this definition is not expressly stated[595]. In general, lack of reasons, failure to consult another institution where expressly provided for, but also the incorrect identification of the legal basis for the adoption of the act when the latter has consequences for the adoption of the act falls under this category[596].
The third ground of appeal is violation of the Treaties or any rule of law relating to their application, including the general principles established in the Court's case law, as well as the rules binding on the Court, conventional and customary, and, of course, violation of the Charter of Fundamental Rights[597]. Analyzing the practice, it is possible to state that this last vice is the one that most concerns defects in acts and, given the very nature of the vice in question, it is possible to understand its importance and the complexity of the analysis it raises. Indeed, in assessing whether an act is actually vitiated by a violation of the law, it is often necessary to enter into the merits of the matter and examine the assumptions that led to the adoption of the act[598]. Moreover, an important place is taken by the Charter of Fundamental Rights itself, which is now binding on the institutions, so that the Court has ruled for the annulment of acts adopted by the Union[599][600]. Finally, misuse of power occurs when the

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[591] ADAM, TIZZANO (2017: 301).
[592] Judgment of the Court of Justice of the European Union, 10 March 1998, C-122/95, *Federal Republic of Germany v. Council of the European Union.*
[593] TESAURO (2020: 351).
[594] ADAM, TIZZANO (2017: 285).
[595] ADAM, TIZZANO (2017: 287).
[596] Judgment of the Court of Justice of the European Union, 30 April 2004, C-338/01, *Commission of European Communities v. Council of Europe.*
[597] Judgment of the Court of Justice of the European Union, 9 November 2010, C-92/09 and C-93/09, *Volker und Markus Schecke et al. v. Land Hessen.*
[598] ADAM, TIZZANO (2017: 290).
[599] Judgment of the Court of Justice of the European Union *Volker und Markus Schecke et al. v. Land Hessen.*
[600] Judgment of the Court of Justice of the European Union, 8 April 2014, C-293/12 and C-594/12, *Digital Rights Ireland et al, v. Minister for Communications, Marine and Natural Resources et al.*

administration, within the scope of the discretion it enjoys, exercises a given power for the exclusive or at least decisive purpose of achieving ends other than those for which the same power has been conferred on it[601].

The action brought before the Union judicature does not have suspensive effect, but, pursuant to Article 278 TFEU, it is possible to apply to the Court for *interim* measures, such as the suspension of the contested act[602]. In addition, the Court may also order such provisional measures, other than suspension, as it deems appropriate[603].

The outcome of the proceedings is, if the appeal is successful, the annulment of the contested act. In addition, if the Court considers it necessary, it must specify "which of the effects of the act which it has declared void shall be considered as definitive"[604]. This provision reflects the characteristics of the Court's jurisdiction, which is not punitive towards the institution that adopted the act[605]. In fact, that competence is entirely directed to the protection of the legal system of the Union and that characteristic is also emphasized by the fact that the judgment of annulment means that the annulment of the act is absolute, with effect *erga omnes* and from the very moment it was enacted[606]. Following the issuance of the judgment, the act is considered as "not having taken place", which implies that the situation prior to the issuance of the act must be restored, eliminating the legal effects that the act has produced[607]. This implies that the institution that issued the act has an obligation to take the necessary measures to ensure compliance with the judgment, re-establishing the *status quo ante*[608].

b) Actions for failure to act

The action for failure to act is an instrument designed to remedy the unlawful failure of an institution, body, office or agency of the Union to act if, in breach of the Treaties, it refrains from taking a decision[609]. This instrument thus mirrors the action for annulment, but nevertheless remains an autonomous instrument in relation to the one examined above[610]. Inaction on the part of the institution may relate to the failure to adopt not only an act producing legal effects, but also to a preparatory act, provided that the latter constitutes the

[601] ADAM, TIZZANO (2017: 290-291).
[602] Treaty on the Functioning of the European Union, Rome, 25 March 1957, Article 278.
[603] Treaty on the Functioning of the European Union, Rome, 25 March 1957, Article 279.
[604] Treaty on the Functioning of the European Union, Rome, 25 March 1957, Article 264.
[605] ADAM, TIZZANO (2017: 307).
[606] *Ibid*.
[607] *Ibid*.
[608] Treaty on the Functioning of the European Union, Rome, 25 March 1957, Article 266.
[609] Treaty on the Functioning of the European Union, Rome, 25 March 1957, Article 265.
[610] TESAURO (2020: 359).

prerequisite for the carrying out of a procedure which is intended to culminate in the adoption of an act producing binding legal effects[611].

The bringing of an action before the Court is preceded by a pre-litigation phase in which the institution is formally requested to take a position and adopt the required measures[612]. This formal notice to the institution must be given within a reasonable period, starting from the moment when the unwillingness of the institution or body in question to act becomes apparent[613]. From the time of the formal notice, the institution or body has a period of two months to take a position and, if it fails to do so, the author of the formal notice may appeal to the Court, within a period of two months in turn[614].

As regards the persons having standing to bring proceedings, the Member States and the institutions of the Union are once again among the privileged applicants, just as for the action for annulment and in the same terms as described for the latter[615]. Conversely, non-privileged claimants include persons under domestic law who, however, in order to qualify as a person entitled to bring an action, must show that the institution in question has failed to issue an act, which must be characterized as an act in the nature of a decision, to that person[616].

The judgment of the Court granting the appeal, as for the action for annulment, is merely declaratory of the unlawfulness of the omissive conduct[617]. Following a judgment of the Court to this effect, the institution that has engaged in such omissive conduct is obliged to ensure full compliance with the judgment by taking the measure that was challenged in the appeal [618].

In conclusion, the action for annulment and the action for failure to act constitute the two main instruments through which judicial review of Union acts by the Court of Justice is ensured. Notwithstanding this, it is necessary to mention that the TFEU also regulates the Union's contractual liability action, which requires the Union to compensate, in accordance with the general principles common to the laws of the Member States, for damage caused by its institutions or by its servants in the performance of their duties[619].

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[611] Judgment of the Court of Justice of the European Union, 23 November 2017, C-596/15 and C-597/15, *Bionica et al v. European Commission.*
[612] *Ibid.*
[613] Judgment of the Court of Justice of the European Union, 6 July 1971, 59/70, Kingdom of *Netherlands v. Commission of the European Communities.*
[614] TESAURO (2020: 359).
[615] ADAM, TIZZANO (2017: 313).
[616] *Ibid.*
[617] ADAM, TIZZANO (2017: 315).
[618] *Ibid.*
[619] Treaty on the Functioning of the European Union, Rome, 25 March 1957 Article 340 paragraph 2.

4.3 The accession to the European Convention on Human Rights

4.3.1 The draft agreement of 5th April 2013

As early as 1996, the Court of Justice of the European Union was questioned about the possibility of the European Union acceding to the European Convention on Human Rights, but the Court ruled against it because there was no *ad hoc* legal basis to allow such accession[620]. For this very reason, with the entry into force of the Lisbon Treaty, it was stipulated that "The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties"[621]. As can be seen, this provision is peculiar in that it does not grant a general legal basis to conclude international agreements, but the specific and direct competence to accede to the ECHR[622]. This provision is then supplemented by Protocol No. 8 annexed to the Treaties, which lays down criteria to be met in the accession agreement, and by Article 218 TFEU, which sets out the procedural provisions. In particular, Protocol No. 8 stipulates that the accession agreement must not affect the competences of the Union as provided for in the Treaties, must preserve the specificities of the Union and its law, must not affect the competences of the Union, and Article 344 TFEU, which stipulates that "Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein"[623].

The mandate to represent the Union in the negotiations was given by the Council to the European Commission on 4 June 2010 while, for the Council of Europe, the Committee of Ministers gave an ad hoc mandate to the Steering Committee for human rights ('CDDH') on 26 May 2010[624]. Negotiations started in July of the same year and were concluded on 24 June 2011 with the approval by the negotiating group, consisting of fourteen members of the Council of Europe's Steering Committee, including seven from EU and CoE Member States and seven from the CoE alone and the Commission, of a draft accession agreement[625].

620 Opinion of the Court of Justice of the European Union, 28 March 1996, Opinion 2/94, *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms.*
621 Treaty on European Union, Maastricht, 7 February 1992 as revised by the Treaty of Lisbon, entered in force on the 1st December 2009, Article 6 paragraph 2.
622 *Ibid*.
623 Treaty on the Functioning of the European Union, Rome, 25 March 1957, Article 344.
624 MIGNOLLI (2012: 543).
625 *Ibid*.

Since the proposal of the accession draft, several issues have arisen that remain unresolved. First, although Article 6 TEU refers to the accession of the Union to the ECHR, there is no reference to the Protocols to the ECHR. Indeed, although all EU Member States are parties to the Convention, this does not apply to its Protocols. A solution to this problem could have been to make an assessment on a case-by-case basis, taking the presence or absence of the relevant right in the Nice Charter as a guide[626]. However, the Council opted for a strict application of the principle of neutrality of accession *vis-à-vis* the Member States, preferring to opt for the Union's accession only to those Protocols to the Convention to which all the States of the Union are already Contracting Parties, namely the Additional Protocol and Protocol No. 6[627].

Secondly, the draft accession provided for the European Union to be given a full seat at the European Court of Human Rights, while it was envisaged that the European Union would participate with voting rights in the Committee of Ministers when the Committee is called upon to take decisions in accordance with the rules of the Convention when the latter provides for them[628].

Much more complex was the problem of the jurisdiction of the two Courts caused by the concomitance of two exclusive competences, one of the European Court of Human Rights to interpret the rules of the ECHR and the other of the Court of Justice of the European Union to determine the rules of Union law[629]. Indeed, it cannot be ignored that the identity of the subject matter and the duplicity of the jurisdiction could lead to conflicts of interpretation between the two Courts, as indeed has happened in the past, as in the case of the CJEU's interpretation, more restrictive than the Strasbourg Court's interpretation, of the protection of the home[630].

After extensive debates aimed at safeguarding the autonomy of the two legal systems and the respective exclusive competences of the two courts, the draft agreements adopted a compromise solution aimed at eliminating some of the potential conflicts, but which inevitably recognizes a prevailing residual competence of the Strasbourg Court, since it is still the accession of a new subject, albeit sui generis, to the European Convention. The system devised is referred to as the co-respondent mechanism and in this sense included in Article 36 of the Convention[631]. Under this mechanism, any High Contracting Party could have assumed the role of co-defendant in a procedure, either at the Court's explicit invitation or at the Court's decision following a request by the

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[626] JACQUÉ (2011: 997).
[627] *Ibid*.
[628] ZANGHÌ, PANELLA (2019: 365).
[629] *Ibid*.
[630] Judgment of the Court of Justice of the European Union, 21 September 1989, C-46/87 and 277/88, *Hoechst AG v. Commission of the European Communities.*
[631] MARTÍN, NANCLARES (2013: 10).

High Contracting Party[632]. It should be emphasized that such a mechanism could have resolved relations between the Union and its Member States in the application of Community law deemed to be in contention, but the procedure, and thus the role of co-defender, would always be derived from a decision of the Strasbourg Court[633].

Finally, another problematic aspect concerned the interpretation of Union law that fell within the exclusive competence of Union law. In order to solve this problem, a provision had been envisaged whereby, when the European Union is co-defendant in a procedure in which the compatibility of a rule of Union law that has not yet been interpreted by the Court of Justice of the Union itself is examined, the latter is granted the time necessary for this examination and for the parties to make their observations. Concluded at negotiation level, the draft agreement necessarily had to be submitted to the Court of Justice of the European Union for examination.

4.3.2 The Court's Opinion 2/13

On 4 July 2013, the European Commission, pursuant to Article 218(11) TFEU, submitted the following request for an opinion to the Court of Justice:

> "Is the draft agreement providing for the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms [, signed in Rome on 4 November 1950 ("the ECHR"),] compatible with the Treaties?"[634].

The Court then carried out its analysis and, at its plenary session on 18 December 2014, issued its Opinion 2/13[635]. The Court, going into the merits of the request for an opinion, noted that, in contrast to its previous expression in Opinion 2/94, the European Union now has a specific legal basis to enable it to accede to the ECHR, and that specific legal basis is Article 6 TEU[636].

Secondly, the Court ruled on the compatibility of the draft agreement with primary Union law. The Court pointed out how Article 6(3) TEU expressly states that fundamental rights as enshrined in the ECHR are an integral part of Union law by virtue of general principles[637].However, by virtue of the accession itself, the Convention would, under Article 216(2) TEU, bind both the institutions and the Member States, becoming an integral part of Union

[632] *Ibid*.
[633] *Ibid*.
[634] Opinion of the Court of Justice of the European Union, 18 December 2014, 2/13, *Opinion pursuant to Article 218(11) TFEU.*
[635] *Ibid*.
[636] Opinion of the Court of Justice of the European Union *2/13*, Paragraph 153.
[637] Opinion of the Court of Justice of the European Union *2/13*, Paragraph 179.

law[638]. By virtue of its status as a contracting party to the Convention, the Union would be subject to external control, i.e., control of the mechanisms provided for in the ECHR[639]. The Court again stated that:

> "An international agreement providing for the creation of a court responsible for the interpretation of its provisions and whose decisions are binding on the institutions, including the Court of Justice, is not, in principle, incompatible with EU law; that is particularly the case where, as in this instance, the conclusion of such an agreement is provided for by the Treaties themselves"[640].

However, the agreement can only affect the Union's competences if the conditions aimed at safeguarding Community law are met, excluding the possibility of undermining the autonomy of the Union's legal order. In fact, in the now well-known *Melloni* judgment, the Court interpreted Article 53 of the European Charter of Fundamental Rights restrictively, not allowing Member States to guarantee higher standards of protection than those laid down in the Charter itself[641]. Article 53 ECHR, on the other hand, provides that the Member States of the ECHR may guarantee higher standards of protection than those conferred by the Convention and, for this very reason, the Court stated that, for rights that are common to the Charter and the ECHR, there must be a rule governing the coordination between the two sets of rules, which is not the case in the accession draft[642]. Nevertheless, this stance of the Court seems unjustifiable given that the aforementioned Article 53 ECHR also allows for *different* standards of protection to be applied within the scope of other national and international human rights instruments. The Court's statements regarding the coordination of Article 53 ECHR and 53 Charter seem to be unfounded given that the Court is exclusively engaged in the application of the Convention alone and it is highly unlikely that the ECtHR would require higher standards of protection than those guaranteed by the Convention[643].

Subsequently, the Court's opinion focused on one of the fundamental principles of Community law, namely the principle of mutual trust, with particular reference to the Area of Freedom, Security and Justice matters[644]. Indeed, in Opinion 2/13, the Court recalled how this principle allows the Member States of the Union to presume respect for fundamental rights as guaranteed by sources of primary law. By virtue of this principle, the Member States cannot verify, save in exceptional cases, that the fundamental rights of

[638] Judgment of the Court of Justice of the European Union, 30 April 1974, C-181/73, *Haegeman v. Belgian State.*
[639] Opinion of the Court of Justice of the European Union *2/13*, Paragraph 181.
[640] Opinion of the Court of Justice of the European Union, *2/13*, Paragraph 182.
[641] DEFTOU (2022: 382).
[642] Opinion of the Court of Justice of the European Union *2/13*, Paragraph 189-190.
[643] DEFTOU (2022: 382).
[644] DEFTOU (2022: 383).

the Union have in fact been respected by the Member States[645]. The Court stated that:

> "In so far as the ECHR would […] require a Member State to check that another Member State has observed fundamental rights, even though EU law imposes an obligation of mutual trust between those Member States, accession is liable to upset the underlying balance of the EU and undermine the autonomy of EU law"[646].

Subsequently, the Court examined Protocol No. 16 to the ECHR. This protocol authorizes the highest courts of the Member States to submit questions to the ECtHR concerning the interpretation or application of the rights and freedoms guaranteed by the ECHR[647]. The possibility to request an opinion to the ECtHR is subject to two conditions. First, the highest national courts may only request it if there is a case pending before them. Second, national courts must give reasons for their request and provide all necessary documentation of the pending case[648]. One of the most relevant provisions is that described in Article 5 of this Protocol, which states that advisory opinions have no binding effect[649]. As can easily be guessed, this provision has very similar features to the preliminary reference as described by Article 267 TFEU, considered by the Court itself to be the keystone of the Community court system[650]. Although the draft agreement does not provide for the European Union to accede to the Protocol in question, in the Court's opinion the mechanism thus envisaged by this Protocol could "affect the autonomy and effectiveness of the preliminary ruling procedure provided for in Article 267 TFEU"[651].
Regarding the position taken by the Court on the subject, a few thoughts can be made. First, the substantial difference between the mechanism provided for in Protocol No. 16 and the reference for a preliminary ruling under Article 257 TFEU is that the latter is binding on the national courts of the Member States[652]. This implies that the Member States of the Union must necessarily give precedence to the mechanism provided for in Union law over that provided for in Protocol No. 16, failing which Community law itself would be violated[653].
Secondly, it should be emphasized that even if the European Union were to become a contracting party to the Protocol, the highest national jurisdiction for those EU Member States that are also contracting parties to the Protocol would be the Court of Justice of the European Union, preventing the national

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645 Opinion of the Court of Justice of the European Union *2/13*, Paragraph 192.
646 Opinion of the Court of Justice of the European Union *2/13*, Paragraph 194.
647 KORENICA, DOLI (2016: 271).
648 *Ibid*.
649 *Ibid*.
650 Opinion of the Court of Justice of the European Union *2/13*, Paragraph 176.
651 Opinion of the Court of Justice of the European Union *2/13*, Paragraph 197.
652 KORENICA, DOLI (2016: 279).
653 *Ibid*.

courts of the Member States themselves from seeking an opinion from the ECtHR[654]. Furthermore, if a Member State were to request an opinion from the ECtHR concerning the interpretation of Union law, the Member State in question would be in breach of the principles of loyal cooperation and attribution of competences, principles that are part of primary Union law[655].

Finally, it must be emphasized that the Court, in its examination of the co-defendant mechanism, stated that the ECtHR, in order to make the assessments as to whether or not to admit the application of an additional defendant and thus assess whether or not a Union act is in fact directly or indirectly involved in the proceedings of the proposed action:

> "ECtHR would be required to assess the rules of EU law governing the division of powers between the EU and its Member States as well as the criteria for the attribution of their acts or omissions, in order to adopt a final decision in that regard which would be binding both on the Member States and on the EU"[656].

Therefore, such an interpretation by the ECtHR of Union law not only interferes with the exclusivity of the competences of the Court of Justice but could also interfere with the division of competences between the Union and its Member States[657].

In conclusion, the Court stated that:

> "The agreement on the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms is not compatible with Article 6(2) TEU or with Protocol (No 8) relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms"[658].

In the light of what has just been said, it appears that the position of the Court of Justice of the Union is highly directed towards safeguarding, without any derogation or exception, its exclusive jurisdiction, even when the objective of greater protection of human rights. If the Court had taken more account of the latter, it could have taken note of its lack of jurisdiction in the matter and accepted that of the ECtHR, which would not have been of a competing, but alternative nature[659].

4.4 The possible effect of EU access on inter-State complaints

[654] *Ibid*.
[655] KORENICA, DOLI (2016:280).
[656] Opinion of the Court of Justice of the European Union *2/13*, Paragraph 224.
[657] Opinion of the Court of Justice of the European Union *2/13*, Paragraph 225.
[658] Opinion of the Court of Justice of the European Union *2/13*.
[659] JACQUÉ (2014: 6).

4.4.1 The possibility for the European Union to be a respondent in an appeal

In Opinion 2/13 of 2014, the Court also commented on Article 344 TFEU, which states that "Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein"[660]. Indeed, the Court made it clear that this obligation on Member States to respect the dispute settlement methods established by Union law is nothing more than a manifestation of the more general principle of loyal cooperation, also enshrined in the Treaties[661]. By virtue of the importance of the principle of sincere cooperation, which is traced back to Article 344 TFEU, Article 3 of Protocol No. 8 expressly states that the accession of the European Union to the ECHR shall in no way affect the aforementioned Article[662].

Having said that, it is necessary to ask what effect the accession of the Union might have on the control mechanism established by the ECHR, with particular reference to inter-State remedies under Article 33 ECHR. First, it must be recalled that all Member States of the Union are already parties to the ECHR and that, secondly, the principles guaranteed by the Convention already form an integral part of Union rights as general principles of European law[663]. Notwithstanding this, as clarified by the CJEU itself, the accession of the Union to the ECHR would imply that the Convention itself would become an integral part of Union law, thus constituting a legal instrument incorporated into Union law in the same way as any other international agreement concluded by the Union pursuant to Article 216(2) TFEU[664].

In the accession draft submitted to the Court, the possibility of inter-State or inter-party applications, where one of the litigants was the Union itself, had not been excluded. Nevertheless, in an attempt to preserve the Court's exclusive jurisdiction, a provision had been included in the accession draft to interpret Articles 35 and 55 ECHR. In particular, Article 35 ECHR paragraph 2(b) states that the European Court of Human Rights may not hear any appeal brought under Article 34, i.e., an individual appeal, which is:

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660 Treaty on the Functioning of the European Union, Rome, 25 March 1957.
661 Treaty on European Union, Maastricht, 7 February 1992, Article 4 paragraph 2.
662 Opinion of the Court of Justice of the European Union *2/13*, Paragraph 203.
663 Treaty on European Union, Maastricht, 7 February 1992 as revised by the Treaty of Lisbon, entered in force on the 1st of December 2009, Article 6 paragraph 3.
664 Opinion of the Court of Justice of the European Union *2/13*, Paragraph 180.

> "Substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information"[665].

Article 55 of the ECHR states instead that:

> "The High Contracting Parties agree that, except by special agreement, they will not avail themselves of treaties, conventions or declarations in force between them for the purpose of submitting, by way of petition, a dispute arising out of the interpretation or application of this Convention to a means of settlement other than those provided for in this Convention"[666].

The provision that was intended to preserve the exclusive competence of the Union was, on the other hand, contained in Article 5 of the accession draft and was essentially intended to exclude proceedings before the Court of Justice of the Union as actions under Articles 35 and 55 above[667]. Despite the intention to find a compromise between the exclusive jurisdiction of the CJEU and the ECtHR, the CJEU clarified in its Opinion 2/13 that Article 5 inserted in the Accession Draft could not be considered sufficient to ensure that the exclusive jurisdiction of the Court of Justice of the European Union would be preserved precisely because the possibility of bringing actions under Article 33 ECHR would still remain[668]. In particular, the Court made it clear that an action brought before the ECtHR under Article 33 ECHR concerning an alleged breach of the ECHR related to Union law is prejudicial to Article 344 TFEU[669].

From what has just been examined, it seems obvious that at this stage there is no possibility for the Union to be a defendant in an action brought by an EU Member State to the ECtHR. This is apparent in light of the fact that, as the Court has repeatedly made clear, if the EU became a party to the ECHR, the latter would become part of EU law[670]. It follows that, should the Union adopt any act that is inconsistent with the rights and freedoms recognized by the ECHR, the only means available to the Member States to enforce their rights would be the instruments already provided by the Union itself, which include actions for annulment and actions for failure to act.

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[665] Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, article 35 paragraph 2(b).

[666] Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, article 55.

[667] Draft revised agreement on the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, Strasbourg, 5 April 2013, Article 5.

[668] Opinion of the Court of Justice of the European Union *2/13*, Paragraph 207.

[669] *Ibid.*

[670] KORENICA, DOLI (2016: 275).

4.4.2 The possibility for EU Member States to bring inter-State complaints

In ruling on Article 344 TFEU, the Court expressly refers to a specific judgment delivered by the Court, in which the Commission itself is the applicant and Ireland is the defendant[671]. This judgment is of fundamental importance because it refers to a so-called mixed agreement, i.e., an international convention to which both the Union itself and the Member States of the Union are contracting parties, that is the United Nations Conventions on the Law of the Sea[672]. In particular, the Court states that that international convention *expressly provides* that the dispute settlement mechanism established by Union law takes precedence over that established by that convention[673]. In fact, upon careful analysis of the Convention in question, it is possible to see how the Convention provides for the *possibility* for parties to proceedings on the application or interpretation of the Law of the Sea Convention to refer the matter to the European Court of Justice, thus avoiding a violation of the exclusive jurisdiction of the Court[674]. The Court itself, in its judgment of 30 May 2006, had held that the fact that there was a possibility for Member States to avoid such an infringement was sufficient to ensure respect for the Court's exclusive jurisdiction[675].

In Opinion 2/13, the Court made a complete reinterpretation, stating that the mere possibility of filing an inter-State action under Article 33 ECHR would undermine the purpose of Article 344 TFEU and would be contrary to the very nature of Union law[676]. This means that, by choosing not to follow an interpretation aimed at the possibility of signing international agreements that provide for other dispute settlement mechanisms and, at the same time, also include provisions aimed at the possibility of not infringing Article 344 TFEU, the Court has ruled that Member States are not given even the theoretical possibility of infringing that Article[677]. Indeed, the Court ruled that:

> "In those circumstances, only the express exclusion of the ECtHR's jurisdiction under Article 33 of the ECHR over disputes between Member States or between Member States and the EU in relation to the application of the ECHR within the scope *ratione materiae* of EU law would be compatible with Article 344 TFEU"[678].

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[671] Judgment of the Court of Justice of the European Union, 30 May 2006, C-459/03, *Commission of the European Communities v. Ireland.*
[672] JOHANSEN (2019: 172).
[673] Opinion of the Court of Justice of the European Union *2/13*, Paragraph 205.
[674] JOHANSEN (2019: 174).
[675] *Ibid*
[676] Opinion of the Court of Justice of the European Union *2/13*, Paragraph 212.
[677] JOHANSEN (2019: 175).
[678] Opinion of the Court of Justice of the European Union *2/13*, Paragraph 213.

The Court's position of excluding the possibility for Member States to submit inter-State applications to the ECtHR would exclude a large number of applications by virtue of the fact that to date Community law constitutes an important part of domestic law[679]. Furthermore, it must be emphasized that the impossibility for Member States to lodge complaints to the ECtHR is not counterbalanced by the mechanisms of the infringement proceedings under Articles 258 and 259 TFEU, nor by the control mechanism under Article 7 TEU[680]. In particular, in the case of infringement proceedings, it is necessary to emphasize that the proceedings can only relate to human rights violations if the conduct of the infringing State falls within the scope of EU law[681]. In addition, the control mechanism provided for in Article 7 TEU is not a real instrument for denouncing specific individual violations or violations of fundamental rights, precisely because the mechanism established can only be activated if there is a clear generalized risk of violations of the founding principles of the Union as set out in Article 2 TEU[682].

In conclusion, the possibility for the EU Member States to bring actions on the violation of the rights and freedoms enshrined in the ECHR to the European Court of Human Rights should not be completely excluded, considering that the Union does not provide for a large-scale human rights protection mechanism. This approach of the CJEU seems far too restrictive and aimed solely and exclusively at preserving the autonomy of the EU system, without taking into account that the ultimate goal should be the strengthening of the human rights protection system, and not its weakening[683].

4.4.3 Possible consequences on EU for Member States's violations and vice versa

In the preceding paragraphs, the possible effect of the accession of the European Union on inter-State remedies was examined with express reference to the latter's relationship with members of the Union. However, as is well known, the Contracting Parties to the ECHR are not only Member States of the Union and for this reason the Union may indeed find itself accused of a violation of the Convention by a third State. The ECtHR, in order to ascertain the existence of a violation by the Union, and to ascertain whether there is in fact also a concurrent liability of the Member States of the Union itself, would have to refer to the liability of international organizations for wrongful acts. In fact, it should be borne in mind that the international liability in tort of an international organization is currently the subject of the work of the

[679] RISINI (2018: 188).
[680] *Ibid*.
[681] RISINI (2018: 189).
[682] RISINI (2018: 190).
[683] *Ibid*.

International Law Commission which, in 2011, approved a draft Convention on the subject[684].

To assess the effect on the Union of a violation committed by a Member State, it is necessary to refer to Article 17 of the Draft articles on the responsibility of international organizations. The latter states that:

> "1. An international organization incurs international responsibility if it circumvents one of its international obligations by adopting a decision binding member States or international organizations to commit an act that would be internationally wrongful if committed by the former organization.
>
> 2. An international organization incurs international responsibility if it circumvents one of its international obligations by authorizing member States or international organizations to commit an act that would be internationally wrongful if committed by the former organization and the act in question is committed because of that authorization.
>
> 3. Paragraphs 1 and 2 apply whether or not the act in question is internationally wrongful for the member States or international organizations to which the decision or authorization is addressed"[685].

First of all, it must be observed how an international organization, and in this case the Union, could seek to influence the behavior of its Member States in order to make them commit an action that, if committed by the Union itself, would constitute an unlawful act. The organization's ultimate aim would thus be to achieve certain results that it would not legitimately be able to achieve[686]. Indeed, the term "circumvention" refers to the fact that the international organization uses the separate legal personality of its Member States "in order to avoid compliance with an international obligation"[687].

Adapting this provision to the present case, it is possible to state that in cases of international liability for a Union act, there may be consequences for the Member States. In particular, it is possible that Member States have a margin of discretion to adopt binding Union acts and that discretion is such that Member States may indeed adopt an alternative course of action to avoid circumvention[688]. If this were the case, then the liability of the organization itself could only arise if the circumvention actually took place[689]. If, on the other hand, the Member States had little "room for maneuver", it would be

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684 PUSTORINO (2012: 318).
685 Draft articles of the International Law Commission, 5 August 2011, *on the responsibility of international organizations with commentaries*, Article 17.
686 Draft articles of the International Law Commission, 5 August 2011, *on the responsibility of international organizations with commentaries*, Commentary to Article 17, paragraph 1.
687 DE SHUTTER (2014: 266).
688 Draft articles of the International Law Commission, 5 August 2011, *on the responsibility of international organizations with commentaries*, Commentary to Article 17, paragraph 7.
689 *Ibid*.

unreasonable to hold the Member State in question solely responsible for the unlawful conduct[690]. Moreover, in the case of a binding decision, Article 17 does not provide that the condition for the organization's international liability to actually arise is that the act claimed actually be committed. In fact, in the event of the present case, the Union could already hold itself liable for the wrongful act even before its Member States commit the act, thus allowing the person who challenges the possible violations to request a remedy even before the members comply with the binding decision[691].

In paragraph 2 of Article 17, on the other hand, there is the possibility of an international organization circumventing its obligations by authorizing its Member States or another international organization to commit a certain act[692]. Applying that provision to the present case, it must be emphasized that the authorization granted by the Union to a Member State of the Union is not binding and that therefore the Union's international liability could only arise if the Member State actually performs the action for which it has received an authorization[693]. Furthermore, it is necessary that the act committed by the Member States of the Union flows directly from the authorization granted by the Union, thus necessitating an analysis of the context in which the authorization is granted and the role of the authorization[694]. Moreover, although the Union might be liable because of an authorization addressed to the Member States made in order to circumvent one of its international obligations, it is not possible to conclude that the Union would be liable for any other breach committed by the Member States to which the authorization is addressed[695].

Notwithstanding the previous points, it must be emphasized that the mere membership of a Member State to the Union does not necessarily entail the international responsibility of the Member State for violations committed by the Union. This line of principle has been upheld in various *fora* and also with regard to membership of international organizations other than the European Union. In fact, at the 57th session of the International Law Commission the German government stated that:

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[690] Summary record of the 22nd meeting of the Sixth Committee of the United Nations General Assembly, 5 November 2004, A/C.6/59/SR.22, paragraph 66.
[691] Draft articles of the International Law Commission, 5 August 2011, *on the responsibility of international organizations with commentaries*, Commentary to Article 17, paragraph 5.
[692] Draft articles of the International Law Commission, 5 August 2011, *on the responsibility of international organizations with commentaries*, Article 17.
[693] Draft articles of the International Law Commission, 5 August 2011, *on the responsibility of international organizations with commentaries*, Commentary to Article 17, paragraph 8.
[694] Draft articles of the International Law Commission, 5 August 2011, *on the responsibility of international organizations with commentaries*, Commentary to Article 17, paragraph 11.
[695] Draft articles of the International Law Commission, 5 August 2011, *on the responsibility of international organizations with commentaries*, Commentary to Article 17, paragraph 13.

> "The federal Government has to date advocated the principle of separate responsibility before the European Commission of Human Rights (*M & Co.*), the European Court of Human Rights (*Senator Lines*) and ICJ (*Legality of Use of Force*) and has rejected responsibility by reason of membership for measures taken by the European Community, NATO and the United Nations"[696].

Notwithstanding this, the fact that the Member States of an international organization, and in this case of the Union, are not, by virtue of their membership of the organization, liable for an unlawful act committed by the latter does not exclude that there may be cases in which such liability may in fact arise anyway. In this connection, reference should be made to Article 62 of the Draft articles on the responsibility of international organizations:

> "1. A State member of an international organization is responsible for an internationally wrongful act of that organization if:
>
> 1. (a) it has accepted responsibility for that act towards the injured party; or
> 2. (b) it has led the injured party to rely on its responsibility.
>
> 2. Any international responsibility of a State under paragraph 1 is presumed to be subsidiary"[697].

Adapting this provision to the present case, it is possible to say that the liability of the Member States of the Union for an unlawful act committed by the latter could derive from an express acceptance by the States to that effect. Since there is no specification whatsoever as to the qualification of that acceptance, it could be express or presumed, and could even derive from the founding documents of the Union or other rules of Community law[698]. However, for international liability to arise against the third party, acceptance by the Member State must produce binding effects between the latter and the injured party[699].

In the second paragraph of the above-mentioned article, there is another condition in which a Member State can be held liable for the unlawful conduct of an international organization, i.e., when the Member States have induced the third party to the responsibility of the latter[700]. This can happen if Member States induce third States to conclude contracts with the Union based on the

[696] Draft articles of the International Law Commission, 5 August 2011, *on the responsibility of international organizations with commentaries*, Commentary to Article 62, paragraph 3.
[697] Draft articles of the International Law Commission, 5 August 2011, *on the responsibility of international organizations with commentaries*, Article 62.
[698] Draft articles of the International Law Commission, 5 August 2011, *on the responsibility of international organizations with commentaries*, Commentary to Article 62, paragraph 7.
[699] *Ibid*.
[700] Draft articles of the International Law Commission, 5 August 2011, *on the responsibility of international organizations with commentaries*, Commentary to Article 62, paragraph 8.

trust placed by the third States in the Union's ability to meet its obligations with the continued support of the Member States[701].
Finally, it should be emphasized that the Union's liability could also arise in cases where the Union itself is a party to another international organization and the latter commits an internationally wrongful act in the same circumstances as it does for Member States of an international organization[702].

In addition to the hypotheses just described, there are other circumstances in which a Member State of the Union could incur international liability for an unlawful act committed by it. This could be the case if the Member State aids or assists the Union in the commission of the tort and the tort is unlawful even if committed by the Member State itself[703]. Furthermore, a Member State of the Union could incur international liability if it knowingly directs and controls the Union in the commission of an unlawful act[704]. In addition, the international liability of the Member State of the Union could also exist if it knowingly coerces the Union in the commission of the unlawful act[705]. Finally, the Draft Articles of the International Law Commission on the responsibility of international organizations provide for another possibility applicable to the present case. According to Article 61, a Member State of the Union could incur international responsibility if, by taking advantage of the Union's competence in relation to one of the Member State's obligations, the Member State circumvents that obligation and causes the Union to commit an act that, if committed by the Member State, would have constituted a breach of that obligation[706]. Moreover, under that article, whether or not the act committed is unlawful for the international organization is not relevant[707].

In conclusion, it is necessary to emphasize that the examination that has just been conducted is purely hypothetical, since there is currently no certainty as to whether the EU will join the ECHR. However, if this were to happen, it would be necessary to further clarify how cases submitted to the ECtHR should be handled both by EU Member States themselves, but especially by third States. The question remains unresolved precisely because it seems that the CJEU has no intention of ceding even part of its exclusive competence in favor of a tighter control mechanism over the observance rights and freedoms of individuals.

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[701] HIGGINS (1995: 375-379).
[702] Draft articles of the International Law Commission, 5 August 2011, *on the responsibility of international organizations with commentaries*, Article 18.
[703] Draft articles of the International Law Commission, 5 August 2011, *on the responsibility of international organizations with commentaries*, Article 58.
[704] Draft articles of the International Law Commission, 5 August 2011, *on the responsibility of international organizations with commentaries*, Article 59.
[705] Draft articles of the International Law Commission, 5 August 2011, *on the responsibility of international organizations with commentaries*, Article 60.
[706] Draft articles of the International Law Commission, 5 August 2011, *on the responsibility of international organizations with commentaries*, Article 61.
[707] *Ibid.*

Conclusion

This paper focuses on the analysis of the control mechanism established following the entry into force of the European Convention on Human Rights and Fundamental Freedoms, with particular reference to the mechanism provided for in Article 33 of the Convention. In particular, under Article 33 ECHR, any Member State of the Convention may refer to the European Court of Human Rights the non-compliance of another Member State with the provisions of the Convention and its Protocols. The mechanism described, i.e., inter-State litigation, is present in many other human rights instruments, both at the universal level and in the context of regional mechanisms, such as the African or Inter-American mechanisms. However, in the latter cases, the possibility of bringing claims with States as parties is subject to an explicit acceptance by the States themselves. In other words, unlike the mechanism under the ECHR, in many human rights mechanisms, both at the international and regional level, the possibility for a State to be a respondent in a complaint does not follow directly from the ratification of the respective Convention, but from an explicit declaration by the State of its acceptance to that effect. By making this possibility merely optional, the effectiveness of inter-State applications is often not guaranteed. In addition, the bodies designed to examine the issues submitted to them often have no possibility of making decisions that are legally binding on the parties involved. As a result, although human rights were not effectively guaranteed in many situations, there was no possibility of achieving substantial positive results, precisely because of the limits imposed on the examination of inter-State appeals. From what has just been said, a first conclusion can be drawn. Indeed, it is clear that the mechanism established with the birth of the Council of Europe and the adoption of the European Convention on Human Rights is the most effective in ensuring that the rights enshrined therein are actually respected. This effectiveness is above all guaranteed by the jurisdiction, now made mandatory by the entry into force of Protocol No. 11 to the Convention, of the European Court of Human Rights. Indeed, the latter, within the limits imposed by the rules of international law on the application of treaties, is competent to examine appeals submitted to it by both individuals and the Member States of the Convention, provided that the appeals are admissible. However, while numerous requirements must be met in order for an individual appeal to be admissible for examination on the merits by the Court, for appeals brought by Member States these requirements are much less stringent and, very frequently, are subject to exceptions. The fact that the admissibility requirements are less stringent derives from the very nature of inter-State actions. In fact, the latter can be used as an instrument to denounce serious and systematic violations of human rights on a large scale. This characteristic represents the substantial difference of the latter from the institution of diplomatic protection. Indeed, in order to bring an inter-State complaint before the European Court of Human Rights, there need not be a direct link of nationality between the State bringing the complaint and the individual who

has actually suffered the effects of a violation committed by a State party to the Convention. In addition, the object of the action may also consist of generalized violations of human rights, as has been the case in some actions brought before the European Court. From what has just been said, it is possible to come to a second conclusion, namely that inter-State appeals represent an instrument of complaint that can be used to assert the rights not of a single individual, but of several individuals, also thanks to the intervention of States that have no nationality ties with the victims. This is also apparent from practice, precisely because inter-State appeals to the European Court of Human Rights sometimes did not have as their object specific national interests but were aimed at ensuring the collective enforcement of human rights.

Given the continuing and growing interest in the protection of human rights, with the entry into force of the Lisbon Treaty, a provision was included in the Treaties to ensure a legal basis for the European Union to accede to the European Convention on Human Rights. With this in mind, a draft accession was submitted to the Court of Justice of the European Union in 2013 to ask whether it was compatible with EU law. In its Opinion 2/13, the Court ruled in the negative, stating that the draft articles did not comply with the Treaties. What is relevant for the purposes of this elaboration, however, is that the Court of Justice of the European Union explicitly referred to inter-State remedies as one of the reasons why the draft does not comply. In particular, the Court of Justice made it clear how, by leaving the possibility for EU Member States to bring actions under Article 33 of the European Convention on Human Rights, compliance with EU law, and especially with the principle of loyal cooperation, which is one of the focal points of EU law, is in no way ensured. Providing for the total exclusion of inter-State appeals by the Member States of the Union would have the effect of weakening the mechanism of protection guaranteed by the Convention, adversely affecting a mechanism that, although not used so frequently, certainly represents an essential tool for safeguarding the rights and freedoms recognized by the Convention and its Protocols. Furthermore, it should be emphasized that if it were stipulated that the Member States of the Union could not bring actions before the European Court of Human Rights, there would be no instrument left under Community law that guarantees the respect of human rights by the Member States. In fact, it must be emphasized that the Court of Justice of the European Union has deemed itself competent to judge actions concerning the violation of human rights only if these violations were committed in order to implement EU law.

From the above, it appears that inter-State appeals are of great significance, especially in political terms. In fact, if one compares the number of claims filed by individuals with the claims filed by States, it appears that the former far outnumber the latter. This reticence of States to bring actions against other States is mainly due to the possible political consequences of such actions. Indeed, it is no coincidence that the appeals filed to date had, and still have, a

very tense background between the parties involved. Resorting to such a dispute resolution instrument therefore appears to be a last resort, precisely because the intention is often not to have a fully judicial body intervene in already contentious issues. This might lead one to infer that the mechanism is ineffective given the reluctance of the Contracting Parties to the Convention to bring the matter before the Court. In reality, the effectiveness of inter-State appeals lies not so much on the substantive level as on the political level. In other words, the effectiveness of inter-State appeals lies precisely in the possibility of using them, often in a very versatile manner, as a real instrument for denouncing the conduct of a State against individuals. This instrument is therefore crucial for the resonance it causes rather than for the actual result it brings. Although the mechanism set up by the Convention provides for the possibility of lodging complaints in which the plaintiff is the individual, and although this mechanism has proved extremely effective given the large number of complaints lodged to date, it cannot be concluded that this is sufficient. Indeed, the mechanism of individual appeals does not carry the same political weight as inter-State appeals and, although it can highlight actual violations by the respondent State, it cannot function as a large-scale complaint tool. Precisely because of these unique characteristics of inter-State litigation, the Court of Justice of the European Union should cede part of its exclusive jurisdiction and allow the European Court of Human Rights to perform its functions in the field where it has jurisdiction. In other words, it should be kept in mind that the goal is respect for universally recognized human rights. It seemed that the atrocities committed during the two World Wars were overcome, but the entire international community is witnessing serious and generalized human rights violations. By virtue of the fact that the protection of human rights must always be recognized and guaranteed, and given the current circumstances, there would be a need to give a strong impetus on the issue by ceding part of its exclusive jurisdiction for the ultimate purpose of ensuring respect for human rights in all spheres.

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Abstract

Following the atrocities committed during the Second World War, and especially with the establishment of the United Nations through the Charter of San Francisco in 1945, it became clear to the entire international community that a mechanism for the protection of human rights was needed. In fact, as early as 1948, the UN General Assembly adopted the Universal Declaration of Human Rights, which, however, was not legally binding. Nevertheless, this Declaration represents a fundamental crossroads both for the establishment of protection systems aimed at protecting the individual and for the adoption of binding instruments on the subject. Two fundamental Covenants were adopted in 1966, namely the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights, both of which came into force in 1976. The monitoring of the rights guaranteed in these two binding instruments is ensured by two specific bodies, namely the Committee on Economic, Social and Cultural Rights and the Human Rights Committee. Both bodies monitor the observance of human rights mainly through the periodic reports submitted by the Member States, but they can also examine inter-State complaints, if the Member States so expressly consent. In spite of this, the inter-State complaints mechanism established by the two Committees is not mandatory in nature and is therefore inefficient. In addition to the 1966 Covenants, the United Nations system has given rise to numerous other conventions of a universal character aimed at the protection of human rights. Although in many of these conventions there is the possibility of filing inter-State complaints, to date such complaints have only been filed with the Committee on the Elimination of Racial Discrimination, a body established by the Convention against Torture and Other Inhuman and Degrading Treatment or Punishment, adopted by the UN General Assembly on 10 December 1984. However, it is necessary to emphasize that the mechanism for inter-State appeals established by this Convention is of a mandatory nature since there is no explicit declaration by the Member States to accept the competence of the Committee to examine inter-State appeals. It can therefore be inferred that although several instruments at the international level provide for the possibility of inter-State appeals, this possibility has often not been exercised. Although there are substantial limitations, precisely because in some cases this mechanism is not compulsory, it is also true that the bodies entitled to reach conclusions on the matter do not have the possibility of adopting binding decisions to this effect.

In addition to the universal system of human rights protection, regional mechanisms were established to protect human rights. These include the Organization of African Unity, founded in 1963, which was later amended in 2002 to become known as African Unity. The document on which this protection mechanism is based is the African Charter on Human and Peoples' Rights, which was unanimously adopted in 1981 and came into force five years later. The adoption of this instrument established the African

Commission on Human and Peoples' Rights as a quasi-judicial body, while the fully judicial body is the African Court on Human and Peoples' Rights, established by the Ouagadougou Protocol approved in 1998. The African regional system provides for the possibility of inter-State appeals to the African Commission for violations of the rights and freedoms guaranteed by the African Charter, and the passive legitimacy of Member States flows directly from the ratification of the African Charter. This type of remedy may involve a prior dialogue between the parties to the dispute or the possibility of bringing the case directly before the Commission. While the Commission cannot draw up binding acts on the matter, the African Court has the power to adopt final judgments if brought before it by the African Commission, Member States or African intergovernmental organizations. Despite this possibility, to date only one appeal has actually been examined by the Commission, while the Court has not had the opportunity to examine any.
In addition to the African regional system, following the birth of the United Nations, the Organization of American States was established in 1948, which also adopted the American Declaration of the Rights and Duties of Man at the same conference at which it was established. Three years after the adoption of the 1966 Covenants, the text of the American Convention on Human Rights was adopted, which did not come into force until 1978. The main organs of the American regional system of human rights protection are the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights, to which inter-State complaints may be submitted, but subject to explicit acceptance by the Member States of the Commission's jurisdiction in this regard. The decision to make the possibility of submitting inter-State complaints to the organs of the Inter-American system of human rights protection optional is essentially of a historical nature, precisely because experience shows that the latter have often been used as a political tool and not as an instrument aimed at the effective protection of human rights.
The most effective regional system for the protection of human rights is certainly the one established through the adoption of the Statute of the Council of Europe, adopted in London on 5 May 1949. Today, the Council of Europe has 46 members, following the expulsion of Russia due to the aggression against Ukraine. In addition to the Member States, there are others that enjoy observer *status* in the organization, namely Canada, Japan, Mexico, the United States and also the Holy See, while Israel only enjoys observer *status* in the parliamentary assembly. The Council of Europe essentially has two fundamental bodies, namely the Committee of Ministers, which is the political body, and the Parliamentary Assembly, which is the deliberative body of the Committee of Ministers. The international movement for the protection of human rights led to the adoption of an instrument for the protection of human rights in Europe as well. In fact, the Convention for the Protection of Human Rights and Fundamental Freedoms was adopted on 4 November 1950 and came into force in 1953. Initially, the Convention contained optional clauses concerning the possibility for individuals to lodge individual complaints and concerning the jurisdiction of the European Court of Human Rights.

Following the entry into force of the Convention, a large number of protocols were approved, among which Protocol No. 11 is relevant, by which these optional clauses were abolished, and both the acceptance of individual complaints and the jurisdiction of the Court were made mandatory. In particular, the latter is the body that guarantees the respect of human rights by the Contracting Parties to the European Convention, especially through the examination of complaints lodged by individuals or States concerning alleged violations of the rights and freedoms guaranteed by the Convention. Furthermore, with the entry into force of Protocol No. 16, the European Court of Human Rights has also been granted an advisory function. Indeed, Contracting Parties to the Convention may request an opinion from the European Court of Human Rights on the interpretation or application of the provisions contained in the Convention. The effectiveness of the European Regional Protection Mechanism is guaranteed by two fundamental factors, namely the possibility for individuals to file individual complaints and the binding nature of the Court's rulings. Furthermore, the system established by the Convention provides for the possibility for Member States to bring actions before the Court concerning any violation of the rights and freedoms guaranteed by the Convention by another Member State. This implies that, in order to bring an action before the Court, it is not necessary for there to be a nationality link between the victim of the violation and the applicant State. In fact, this characteristic distinguishes inter-State actions that can be brought before the ECtHR from the mechanism of diplomatic protection, which is already guaranteed by international law. This substantive difference is also evident because inter-State appeals under the ECHR can be used as a means of denouncing serious and systematic violations in Member States of the Convention. In the latter case, the object of the remedy is not a specific national interest of the appellant State or an individual, precisely because the instrument is used to denounce systematic failures of human rights protection in the respondent State.

The jurisdiction of the European Court of Human Rights extends to all cases concerning the interpretation or application of the Convention. However, to determine whether the Court actually has jurisdiction in the case of disputes, it is necessary to refer to jurisdiction *ratione materiae*, *ratione temporis*, *ratione loci* and *ratione personae*. These four basic criteria, although they cannot be regarded as admissibility requirements in the strict sense, constitute the limits within which the scope of the ECtHR's jurisdiction is defined. These rules of international law, enshrined in the Vienna Convention on the Law of Treaties itself, thus define the applicability of the ECHR itself, even though they have often been interpreted extensively. On the other hand, as regards the admissibility requirements defined by the Convention, it must be emphasized that these are not entirely common to inter-State and individual actions. Individual appeals may indeed be declared inadmissible if they are anonymous and if they are essentially identical to cases already examined by the ECtHR or another international dispute resolution body and contain no new information. In addition, individual appeals cannot be examined if they

are incompatible with the Convention and its Protocols, if they are manifestly unfounded, or in the case of an abuse of law. Furthermore, Protocol No. 14 introduced another requirement to make an appeal admissible in compliance with the principle *de minimis non curat praetor*. In fact, following the entry into force of this Protocol, an appeal will be declared inadmissible if the alleged victim has not suffered significant harm.
In addition to the admissibility criteria just described, which are only applied to individual actions brought under Article 34 ECHR, there are two others which are also applied to inter-State actions brought under Article 33 ECHR. The first of these requirements is the prior exhaustion of domestic remedies. According to the latter, an appeal cannot be declared admissible if the question of the alleged violation has not been examined by the competent national courts up to the highest level of jurisdiction. This rule is recognized as a general principle of international law and is intended to ensure that States have a opportunity to remedy violations committed before the matter is adjudicated by an external court such as the ECtHR precisely because the latter's jurisdiction is only subsidiary. Nevertheless, this criterion cannot be applied automatically precisely because the circumstances of each case must be taken into account. The other admissibility criterion applied to both inter-State and individual appeals is the time limit. In particular, an appeal may be lodged with the ECtHR within four months from the date on which the domestic decision, at national level, was issued. Previously, the time limit was six months, but was later reduced to four months by Protocol No. 15. The main reason for this time limit is to respect legal certainty. Indeed, the European Court of Human Rights itself has made it clear that the limitation imposed ensures that, if a dispute arises which has as its object the provisions of the Convention, the matter will be brought before the European Court of Human Rights within a reasonable time limit, thus preventing appeals from being brought repeatedly on matters already examined. Precisely for the very purpose for which this time limit was imposed, it cannot be derogated from under any circumstances, neither by individuals nor by Member States.
After more than sixty years of activity, the European Court of Human Rights has continuously interpreted the provisions of the Convention in progressively different ways with the aim of speeding up procedures and reducing the number of cases pending before it. In fact, numerous exceptions have been outlined by the Court especially with regard to the rule of prior exhaustion of domestic remedies. In particular, in order to actually ascertain whether that rule applies in the case of inter-State actions, it is necessary to define whether the action brought is under the institution of diplomatic protection or whether, on the other hand, the action relates to infringements committed directly against the appellant State. In the first case the rule applies, whereas in the second case the prior exhaustion of domestic remedies is not necessary. Secondly, this rule does not apply in cases of administrative practices, which essentially consist of repetition of a certain conduct traceable to a pattern or system and official tolerance, or legislative measures. Beyond these specific categories, it can generally be said that in cases where specific individuals or

groups of individuals are involved in the case, the rule applies. Conversely, in the case where the subject of the complaint concerns serious and systematic human rights violations, then the rule does not apply.

Inter-State applications to the ECtHR can be divided into two categories, i.e. applications concerning large-scale human rights violations and applications concerning specific national interests. The first category includes the claims brought against Greece. The first two of these were filed by Denmark, Sweden, the Netherlands and Norway, while the last instance did not include the Netherlands. The complaints filed concerned large-scale human rights violations during the period of the so-called Colonels' Dictatorship, which was established in Greece following a *coup d'état* in 1967. Following the filing of the first two complaints in 1967, the then European Commission of Human Rights had indeed found that serious human rights violations were committed on Greek territory, including acts of torture within the meaning of Article 3 ECHR. The Commission's report contained suggestions, which by their very nature were not binding, so that appropriate measures could be implemented to ensure respect for the rights and freedoms guaranteed by the Convention. At the same time, the Council of Europe had indeed considered suspending Greece, but the latter's Minister of Foreign Affairs announced its withdrawal from the Council. Concomitantly, Greece denounced the European Convention on Human Rights and ceased to be a member in 1970. Greece rejoined the Council of Europe in 1974, following the fall of the colonels' dictatorship and the re-establishment of democratic rule.

The second complaint that falls into this category is the one involving Turkey as a defendant. Specifically, this complaint was brought by Denmark, France, Norway and Sweden for serious and persistent violations committed on Turkish territory following yet another *coup d'état* on 12 September 1980. Although this complaint is of fundamental importance, it was resolved by an amicable settlement in 1985. Nevertheless, in 1997, Denmark filed another complaint in which Turkey was again a defendant. In particular, the Danish complaint concerned the ill-treatment of a Danish citizen during his pre-trial detention in Turkey. Following the declaration on the admissibility of the appeal by the ECHR, the parties to the case made a formal declaration on the peaceful resolution of the appeal. The appeals lodged against Turkey represent a fundamental crossroads for the case law of the ECHR, especially because in the case lodged by Denmark, the Court was able to clarify how the Turkish government was using administrative practices contrary to Article 3 of the ECHR, which expressly states the prohibition of torture. The existence of this administrative practice was already established at the time of the admissibility examination and in fact it was stated by the Court itself that there was no need for the application of the rule of prior exhaustion of domestic remedies. Furthermore, considering the specific case of Turkey, it must be emphasised that the outcome of the cases examined was entirely positive. In fact, one of the possible scenarios was that the appeal would end up before the Committee

of Ministers of the Council of Europe, which, as a purely political body, did not have the possibilities to make a significant contribution in this regard.

Appeals belonging to the second category, i.e. those types of appeals that have specific national interests at stake, include the appeal filed by Greece against the United Kingdom. This appeal was the first to be considered by the European Commission of Human Rights, in a context where human rights were still a new concept in international law. The appeal was lodged in a peculiar historical context, in which the central role is assumed by the island of Cyprus. The latter, after the break-up of the Ottoman Empire, had been ceded to the United Kingdom in exchange for political support against the Russian federation. Around the 1950s, a strong anti-British movement emerged on the island based on the concept of so-called *enosis*, i.e. the unification of the island of Cyprus with Greece. In 1956 and 1957 respectively, Greece brought two actions against the United Kingdom concerning legislative measures contrary to Articles 3 and 5 of the ECHR. The first complaint was declared admissible in 1956 and two years later the Commission, although it also visited the island of Cyprus, stated in its report that it did not find any violations of the Convention committed by the United Kingdom. In 1957, Greece filed a second application concerning the ill-treatment of 39 individuals, which was declared partially inadmissible because not all victims had exhausted their domestic remedies. In this case, the Commission did not even conduct the examination of the merits precisely because the parties to the case requested that it be discontinued due to substantial changes in circumstances. In spite of this, this case is of fundamental importance because for the first time there is the manifestation of a willingness on the part of the Member States of the Convention to fill the normative gap left by diplomatic protection in order to ensure greater protection of human rights.

The third inter-State appeal lodged under the ECHR pits Austria and Italy against each other. In particular, the appeal concerned criminal proceedings against six Italian citizens of the South Tyrol region belonging to the German-speaking minority. In fact, even at the time the application was filed, the region was divided by numerous ethnic conflicts. Moreover, during the fascist period, the region, which before the Treaty of St. Germain belonged to Austria-Hungary, underwent a strong process of Italianisation. In 1919, Italy and Austria reconfirmed the borders thus established in 1919, on condition that greater autonomy was granted to the German minorities in the region. The complaint submitted to the Commission was declared admissible in 1961 and the Commission later stated in its final report that there was in fact no violation committed by Italy. In spite of this, the case is of fundamental importance because Austria did indeed bring an action to protect the rights of the citizens of the defendant State, reflecting what the drafters actually had in mind when drafting the Convention.

In 1971, Ireland brought an action against the United Kingdom concerning violations committed by the defendant in Northern Ireland. In 1949, Ireland became an independent republic from the United Kingdom, while Northern Ireland remained part of the United Kingdom. In 1969, numerous protests broke out in Northern Ireland and for this reason the Northern Ireland government requested the intervention of the United Kingdom. The subject of the application was essentially the so-called five techniques used by the United Kingdom during interrogation, which, according to the applicant, were contrary to Article 3 ECHR. The Commission declared the appeal admissible in 1972 and published a report on the merits four years later, supporting the appellant's argument. Subsequently, the appeal was submitted to the European Court of Human Rights because both parties to the case had accepted the Court's jurisdiction, which was not mandatory at the time. The latter, for the first time in 1978, issued its first judgement, stating that although it agreed with the conclusions reached by the Commission, it did not consider that the acts carried out by the British government could be classified as acts of torture under Article 3 ECHR.

Despite what has just been said about the appeals examined, the cases that most occupied the Strasbourg bodies were those filed by the island of Cyprus against Turkey. The appeals presented were set in a complicated historical context, especially following the independence of the island of Cyprus acquired in 1960. Moreover, in 1974, with the help of the Greek government, a *coup d'état* was staged on the island with the intention of achieving the unification of the island with Greece. The consequences of the 1974 events were catastrophic and led on the one hand to the fall of the military dictatorship in Greece and on the other hand to the intervention of the Turkish army in the north of the island. In 1983, the Turkish Republic of Northern Cyprus proclaimed its independence, but at the request of the UN Security Council, it was not recognized by the international community. The first complaints lodged against Turkey date back to the period following the events of 1974 and concerned a large number of provisions contained in the Convention. Although the Commission, in its final report, supported the claimant’s arguments, the Committee of Ministers only emphasized the need for dialogue between the two communities, i.e., the Greek and Turkish communities, on the island. In 1977, an appeal was lodged again, it was accepted by the Commission and the latter ruled again on the merits, but there were no radical changes. Finally, the fourth appeal was filed in 1994, but in this case the appeal was also heard by the European Court of Human Rights, which issued its judgment on the merits in 2001, confirming once again that Turkey had committed numerous violations of the rights and freedoms enshrined in the Convention. In 2014, the Grand Chamber of the Court issued its judgment of just satisfaction. Despite this, the sum of EUR 90 million, awarded for non-pecuniary damages, was never paid by Turkey precisely because the latter does not recognize the other party as a State.

When the Convention was drafted, the intention was to place inter-State litigation as the main guarantor of the system to safeguard compliance with the provisions of the Convention. This is confirmed by the fact that, as mentioned above, the admissibility requirements for the latter are much less stringent than those applied to individual actions. Nevertheless, this intention has not been confirmed by practice, precisely because the number of individual appeals submitted to the ECtHR far exceeds the number of inter-State appeals submitted to date. The reasons why inter-State appeals far exceed inter-State appeals are varied, but certainly one of the reasons is that the mechanism of individual appeals is indeed very effective. On the other hand, although the Inter-State litigation has not been so effective in practice, it must be acknowledged that it has assumed a fundamental role mainly on the political level. Indeed, inter-State appeals have often been used as a means to denounce serious and systematic violations of human rights, especially in situations where remedies for the violation of such rights were no longer effective at the national level. This role assumed by inter-State litigation is all the more relevant when the Contracting Parties to the Convention defend the rights and freedoms of individuals with whom they have no nationality ties whatsoever.
The possible accession of the European Union to the ECHR might have some unfavorable implications on whether or not inter-State appeals to the European Court of Human Rights can be lodged. It must be emphasized that, at the beginning of its formation, the Union itself was not conceived as an organization aimed at the protection of universally recognized human rights, but was primarily an organization aimed at economic integration on the European continent. Despite this, especially thanks to the jurisprudence of the Court of Justice of the European Union, the protection of human rights has become one of the cornerstones of EU law. In fact, in 2000, the institutions of the Union solemnly proclaimed the Charter of Fundamental Rights of the Union and this Charter, with the entry into force of the Lisbon Treaty, assumed the same legal value as the Treaties. In order to actually assess whether the Member States of the Union respect the fundamental rights thus enshrined in the Nice Charter, two procedures provided for in the founding Treaties can be used. The first of these is the so-called nuclear option, i.e. the mechanism established by Article 7 of the Treaty on European Union. This control mechanism can be activated if there is a clear risk of violation of the founding values of the Union, enshrined in Article 2 TEU, which include respect for human rights. If, on the other hand, there is a certainty of a violation in the sense of Article 7, then the Council can decide to suspend the voting rights of the violating State in the Council. In reality, this procedure is not very effective because, for its activation, very high *quorum* are required, which are not easy to achieve. Moreover, the mechanism thus described is of a purely political nature, which is evidenced by the fact that the Court of Justice of the Union assumes an extremely residual role in the procedure.
Another procedure aimed at the control by Member States of Union law, and thus also of the Nice Charter, is the infringement procedure, regulated by

Articles 258 and 259 of the Treaty on the Functioning of the European Union. In this procedure, the main role is played by the Commission, which can activate the procedure. Moreover, although the procedure can also be activated by the EU Member States, the Commission also plays a key role here because it mediates between the two claimants. The procedure is divided into two phases, namely the pre-litigation phase and the judicial phase, and in the latter the Court of Justice plays a central role. In fact, if the case is referred to the latter, the Court will issue a judgment finding that the conduct of the Member State is not in conformity with EU law. In addition to these two mechanisms just described, there is a third procedure, the preliminary ruling procedure, which ensures a continuous dialogue between national and EU courts. By means of this procedure, governed by Article 267 TFEU, the national court may suspend the proceedings pending before it and refer the matter to the Court of Justice of the Union for a ruling on the interpretation of the law of the Union or acts of the Union or the validity of those acts. If, on the other hand, the national court is a court of last resort, then the latter is obliged to refer the question to the European Court of Justice. The essential functions of the preliminary reference are twofold, namely to ensure a uniform interpretation of Community law in all Member States and to assess the conformity of national law with Community law.
Furthermore, in order to verify the legality of Union acts, the founding Treaties provide for two procedures, namely the action for annulment and the action for failure to act. The two procedures represent two sides of the same coin because the first of these has the effect of annulling a Union act that is not in conformity with Community law, whereas the second procedure is intended to establish the non-conformity with Community law of an omission on the part of the Union institutions.

Following the entry into force of the Lisbon Treaty, it was expressly stipulated that the European Union accede to the European Convention on Human Rights. Therefore, a draft accession was drawn up to this effect. This draft was drawn up by a body consisting of the Commission, representatives of the Member States of the Union, representatives of the Member States of the Council of Europe alone, and representatives of the Council of Europe itself. The accession draft was finalised on 5 April 2013 and a few months later an opinion was requested from the Court of Justice of the European Union on the compatibility of this draft agreement with the Treaties. The Court, in its Opinion 2/13, ruled in the negative, stating that the draft articles were not compatible for several reasons, first and foremost the possibility of inter-State claims under Article 33 ECHR. In particular, the Court stated that in order for the Union to accede to the ECHR, it should be expressly prohibited for inter-state actions to be brought between Member States of the Union or against the Union itself. This means that there is therefore no possibility of the Union being a defendant in an inter-State action brought by one of the Member States of the Union, but the complete exclusion of the possibility of bringing such actions for the Member States of the Union does not seem to be appropriate.

If this were to be the case, Member States would be left with no means of ensuring respect for fundamental rights on a broad scale, considering that the Court of Justice of the Union has held itself competent to judge actions that do not comply with respect for human rights only if the actions committed by the State fall within the scope of Community rights. Finally, even more controversial is the possibility for a Member State of the Council of Europe, and not of the European Union, to bring an action against the latter. In particular, it is unclear how the European Court of Human Rights should act on the issue and how the latter should determine whether or not there are concurrent responsibilities of both the Union and the Member States.

In conclusion, it is evident that the mechanism thus established by the Council of Europe and the European Convention on Human Rights is, to date, the most effective mechanism for ensuring respect for human rights. This is evident from the fact that although the possibility of filing inter-State complaints is also provided for by the other mechanisms for the protection of human rights, regional and universal, most of the latter have been filed before the Strasbourg bodies. However, especially in the first years of operation, the outcome of the latter has not been as successful as hoped. However, this does not imply that inter-State appeals are an ineffective mechanism, precisely because of the versatility of inter-State appeals as a tool to denounce human rights violations on a large scale. In other words, Inter-State complaints are highly effective as a political instrument to denounce generalized violations that go beyond the individual case. For this very reason, the accession of the European Union to the European Convention on Human Rights should in no way limit the scope of their application.