Department of Political Science

Double Master's Degree Programme in International Relations

Chair of International Organisations and Human Rights

The Implementation of the European Convention on Human Rights in the United Kingdom after Brexit: Three Case Studies

Prof. Giuseppe Pascale

LUISS Supervisor

Prof. Salomé Frémineur

ULB Supervisor

Prof. Donato Greco

Co-Supervisor

Eleonora Ristuccia

Candidate

Student ID: 652402 (LUISS) – 000585977 (ULB)

Academic Year 2023/2024

Page intentionally left blank

ULB Faculté de Philosophie et Sciences sociales

UNIVERSITÉ LIBRE DE BRUXELLES

Plagiarism Declaration

Considering that plagiarism is an unacceptable fault on the legal, ethical and intellectual levels;

Aware that tolerating plagiarism would negatively affect all student, scientific and academic bodies by undermining the reputation of the institution and jeopardizing the future of certain pedagogical approaches;

Noting that students are made aware of intellectual integrity issues in their first year of university study and that the ULB Libraries website clearly indicates how to avoid plagiarism:
https://bib.ulb.be/version-francaise/navigation/support/boite-a-outils/evitez-le-plagiat

Reminding that plagiarism is not limited to the borrowing of a text in its entirety without the use of quotation marks or without mentioning the complete bibliographic reference, but also refers to the borrowing of raw data, freely translated text, or ideas paraphrased without the full reference being clearly indicated;

Reminding Articles 86 and 87 of the General Rules of Studies 2023-2024
https://www.ulb.be/fr/documents-officiels/reglement-general-des-etudes

Agreeing that no justification, such as medical considerations, lack of previous disciplinary history or level of education, can be a mitigating factor.

The Faculty of Philosophy and Social Sciences reminds that the minimum sanction for proven plagiarism is the award of a grade of 0 for the entire course in question. This reminder does not presage the sanction finally proposed to the jury by the Dean according to the details of the case of plagiarism which was transmitted.

I **Eleonora Ristuccia**, confirm having read this regulation and certify that I have not committed plagiarism for this research.

Done in (location) **Rome**

Date **18/09/2024**

Signature of the student Eleonora Ristuccia

ABSTRACT

The objective of this thesis is to illustrate the implementation of the European Convention on Human Rights in the United Kingdom after Brexit, a major turning point in contemporary British history. Specifically, it will consider three cases concerning the protection of migrants, the protection of victims of human trafficking, and the protection of the environment, which were submitted before the European Court of Human Rights against the United Kingdom. Then, it will assess whether the country has complied with the obligations set forth in the judgments. Additionally, a broader analysis will be undertaken to examine the implications of the Strasbourg Court's rulings on the British legal system. Overall, the research will show that the United Kingdom has not been adequately implementing the Convention as far as the protection of migrants and the protection of victims of human trafficking are concerned. Nonetheless, this does not hold true for the protection of the environment. The reason why the implementation of the Convention appears not to be effective in some respects might be explained with the fact that said issues are 'sensitive', being intimately connected with notions of the country's identity.

TABLE OF CONTENTS

LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
ACtHPR	African Court on Human and Peoples' Rights
APA	Asylum Partnership Agreement
BBoR	British Bill of Rights
BEIS	Business Energy and Industrial Strategy
BST	British Summer Time
CA	Competent Authority
CB1	First Carbon Budget
CB6	Sixth Carbon Budget
CBDB	Carbon Budget Delivery Plan
CCA	Climate Change Act
CG	Conclusive Grounds
CO_2	Carbon Dioxide
CPS	Crown Prosecution Service
CRC	Committee on the Rights of the Child
DARSIWA	Draft Articles on Responsibility for Internationally Wrongful Acts
ECAT	Council of Europe Convention on Action against Trafficking in Human Beings
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ESNZ	Energy Security and Net Zero
EU	European Union
GHG	Greenhouse Gas
GRETA	Group of Experts on Action against Trafficking in Human Beings
HRA	Human Rights Act
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the Former

	Yugoslavia
ILC	International Law Commission
ILO	International Labour Organisation
IMA	Illegal Migration Act
IPCC	International Panel on Climate Change
MEDP	Migration and Economic Development Partnership
MoU	Memorandum of Understanding
MSA	Modern Slavery Act
NGO	Non-Governmental Organisation
NRM	National Referral Mechanism
NSPCC NCTAIL	National Society for the Prevention of Cruelty to Children National Child Trafficking Advice and Information Line
NZS	Net Zero Strategy
OAU	Organisation of African Unity
PACE	Parliamentary Assembly of the Council of Europe
PTSD	Post-Traumatic Stress Disorder
RAG	Red, Amber, Green
SCA	Single Competent Authority
TCA	Trade and Cooperation Agreement
TEU	Treaty on European Union
UK	United Kingdom
UN	United Nations
UNCAT	United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
UNCRC	United Nations Convention on the Rights of the Child
UNFCCC	United Nations Framework Convention on Climate Change
UNHCR	United Nations High Commissioner for Refugees
UNHRC	United Nations Human Rights Committee
UNODC	United Nations Office on Drugs and Crime

US	United States
VCLT	Vienna Convention on the Law of the Treaties
VoT	Victim of Trafficking

INTRODUCTION

The United Kingdom's ('UK') departure from the European Union ('EU'), dubbed 'Brexit' since May 2012, has been unleashing unforeseen economic and political turmoil in the country.[1] Tellingly, it amounted to one of the most important decisions made by the British people over the last ten years.[2]

Considering the relevance of the 2016 referendum, there has been a spate of interest in the consequences of Brexit for human rights protection in the UK. In this respect, the position of the European Convention on Human Rights (hereafter, 'ECHR' or 'the Convention')[3] appears to be increasingly perilous.[4] While existing studies have clearly established that an overall weakening of fundamental rights protection commenced on 1 January 2021,[5] they have yet failed to assess whether changes have occurred in Britain's continued adherence to the Convention after the so-called 'Brexit day', that is, 1 February 2020.[6]

The ECHR, whose full title is the Convention for the Protection of Human Rights and Fundamental Freedoms, is an international treaty

---

[1] T. MOSELEY, *The Rise of the Word Brexit*, December 2016, www.bbc.com; A. ARNORSSON and G. ZOEGA, *On the Causes of Brexit*, in *European Journal of Political Economy*, 2018, p. 301.

[2] M. DAVIS, *Identifying Victims of Human Trafficking. The Legal Issues, Challenges and Barriers*, Cham, 2024, p. 64.

[3] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14* entered into force 3 September 1953, ETS No. 5 of 4 November 1950.

[4] G. ROBINSON, *Notes on the ECHR and the Disunited United Kingdom 'After' Brexit – In Memoriam Scott Crosby*, in *New Journal of European Criminal Law*, 2021, p. 9; C. MURRAY, *Magna Carta's Tainted Legacy: Historic Justifications for a British Bill of Rights and the Case Against the Human Rights Act*, in F. COWELL, *Critically Examining the Case Against the 1998 Human Rights Act*, Abingdon, 2019, p. 2.

[5] G. ROBINSON, *op. cit.*, p. 8. As of this day, the EU law which has been "retained" has been open to amendment or repeal by Acts of Parliament, and occasionally by government ministers by means of secondary legislation.

[6] T. LOCK, *Human Rights Law in the UK after Brexit*, in *Public Law, November Supplement (Brexit Special Extra Issue)*, 2017, pp. 117-134.

ensuring the protection of fundamental civil and political liberties in European democracies which are committed to the rule of law.[7] It was adopted in 1950, immediately after the creation of the Council of Europe, as part of the Second World War reconstruction process of Western Europe.[8] The status of the ECHR in the domestic legal order of States Parties can differ fundamentally.[9] With reference to the UK, the entry into force of the Human Rights Act ('HRA')[10] in 2000 allowed the incorporation of the Convention in the British legal system, thereby making it both a "source of individual rights" *vis-à-vis* domestic authorities and, in the event of a violation, a "source of remedies" before national courts.[11] As posited by Lord Neuberger and Lord Reed, the HRA is referred to as one of the "constitutional instruments" of the UK, which, indeed, does not have a codified constitution, i.e., a single text collecting fundamental constitutional rules receiving special treatment.[12]

For the sake of understanding, it should be noted that the ECHR is not an instrument of EU law.[13] In actual fact, the ratification of the Convention is a prerequisite for submitting a membership application

---

[7] P. VAN DIJK *et al.*, *Theory and Practice of the European Convention on Human Rights*, Cambridge, 2018; S. C. GREER, *The European Convention on Human Rights: Achievements, Problems and Prospects*, New York, 2006, p. 1.

[8] S.C. GREER, *op. cit.*, p. 1.

[9] G. MARTINICO, *Is the European Convention Going to Be 'Supreme'? A Comparative-Constitutional Overview of ECHR and EU Law before National Courts*, in *The European Journal of International Law*, 2012, p. 403.

[10] Human Rights Act 1998 (c. 42).

[11] S. BESSON, *The Reception Process in Ireland and the United Kingdom*, in H. KELLER and A. STONE SWEET, *A Europe of Rights: The Impact of the ECHR on National Legal Systems*, Oxford, 2008, p. 32.

[12] M. ELLIOT, *The United Kingdom Constitution*, in R. MASTERMAN and R. SCHÜTZE, *The Cambridge Companion to Comparative Constitutional Law*, Cambridge, 2019, pp. 70-71; UK Supreme Court, *R (HS2 Action Alliance Ltd.) v. Secretary of State for Transport*, [2014] UKSC 3, judgement of 22 January 2014, par. 207.

[13] A. CALIGIURI and N. NAPOLETANO, *The Application of the ECHR in the Domestic Systems*, in *The Italian Yearbook of International Law*, 2011, p. 140.

to the Council of Europe.[14] The ECHR is subject to the interpretation of the European Court of Human Rights (further, 'ECtHR', 'the Court' or 'the Strasbourg Court'), whose seat is based in Strasbourg. Therefore, it is important to bear in mind that the mechanism of voluntary and unilateral withdrawal from the EU provided by Article 50 of the Treaty on European Union ('TEU')[15] does not entail the withdrawal from the ECHR.[16]

Notwithstanding the careful considerations previously outlined, one should be aware of the fact that the UK's continued commitment to the Convention is established in Article 524 of the EU-UK Trade and

[14] O. DE SCHUTTER, *International Human Rights Law – Cases, Materials, Commentary*, Cambridge, 2019, p. 25.

[15] Consolidated version of the Treaty on European Union, in OJ C 115/13 of 9 May 2008, Art. 50. Article 50 TEU reads as follows: "(1) Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements. (2) A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament. (3) The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period. (4) For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it. A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union. (5) If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49".

[16] P. EECKHOUT and E. FRANTZIOU, *Brexit and Article 50 TEU: A Constitutionalist Reading*, in *Common Law Market Review*, 2017, pp. 695-734.

Cooperation Agreement ('TCA').[17] More in detail, the latter requires the UK and the EU to cooperate on the basis of a long-standing respect for democracy, the rule of law, and the protection of fundamental rights and freedoms of individuals, including the ECHR, and on the importance of giving effect to the rights and freedoms in the Convention domestically.[18] It follows that the ECHR continues to apply to the UK after its departure from the EU.[19]

Despite the fact that the Brexit process appears to have "locked-in" the *status quo* which surrounds Britain's relationship with the ECHR, uncertainty persists regarding the country's continued adherence to the Convention.[20] In Crosby's words, a "Brexit plus" is feared, namely a British exit from the ECHR system.[21] To date, limits on the enforceability of the ECtHR decisions have been imposed.[22] Additionally, the 2019 Conservative Manifesto envisaged an 'update' of the HRA, which would be replaced with a British Bill of Rights

---

[17] Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, in OJ L 149/10 of 30 April 2021, Art. 524. Article 524 TCA reads as follows: "(1) The cooperation provided for in this Part is based on the Parties' and Member States' long-standing respect for democracy, the rule of law and the protection of fundamental rights and freedoms of individuals, including as set out in the Universal Declaration of Human Rights and in the European Convention on Human Rights, and on the importance of giving effect to the rights and freedoms in that Convention domestically. (2) Nothing in this Part modifies the obligation to respect fundamental rights and legal principles as reflected, in particular, in the European Convention on Human Rights and, in the case of the Union and its Member States, in the Charter of Fundamental Rights of the European Union".

[18] M. CHARRET-DEL BOVE, *What Future for Human Rights in the UK Post-Brexit?*, in *Revue Française de Civilisation Britannique*, 2022, p. 12; V. MITSILEGAS and E. GUILD, *The UK and the ECHR After Brexit: The Challenge of Immigration Control*, in *European Convention on Human Rights Law Review*, 2024, p. 123.

[19] S. CROSBY, *Brexit: Lessons from Different Quarters*, in *New Journal of European Criminal Law*, 2019, pp. 205-208.

[20] M. CHARRET-DEL BOVE, *op. cit.*, p. 4.

[21] S. CROSBY, *Brexit and Brexit Plus: The Non-Material Damage – Thoughts on 29 March 2017*, in *New Journal of European Criminal Law*, 2017, p. 99; G. ROBINSON, *op. cit.*, p. 9.

[22] G. ROBINSON, *op. cit.*, p. 9.

('BBoR').[23] Such a legislative proposal would restrict the influence of the ECtHR by making the UK Supreme Court the ultimate legislative authority on questions arising under domestic law in connection with the Convention.

In view of the above, the present research aims at yielding some insight into how the ECHR has been implemented in the UK after Brexit. A thesis like this one cannot provide an in-depth analysis of the country's implementation of the Convention, nor can it cover all relevant dimensions of human rights protection in post-Brexit Britain. Instead, it concentrates on three case studies, each of which has been selected as it allows to examine the implementation of a wide range of articles enshrined in the ECHR. In addition, the judgements have been chosen since they have been vastly commented upon and extensively studied by scholars, yet they have rarely been considered in relation to an overall assessment of the country's implementation of the Convention. On that basis, the three case studies will be presented herein.

To begin with, the purpose of Chapter 1 is to offer a comprehensive overview of the protection of migrants in the UK under the ECHR. Above all, the case law of the Strasbourg Court in the field of migrant protection will be elucidated. At the heart of this Chapter will be the country's implementation of the urgent interim measure by the Court in the case *N.S.K. v. The United Kingdom*.[24] In this context, reflections on the Migration and Economic Development Partnership ('MEDP') with Rwanda will be prompted, especially on the relationship between the established Memorandum of Understanding

[23] P. MUNCE, *The Conservative Party and Constitutional Reform: Revisiting the Conservative Dilemma through Cameron's Bill of Rights*, in *Parliamentary Affairs*, 2014, p. 81.

[24] ECtHR, *N.S.K. v. The United Kingdom*, Appl. No. 28774/22, urgent interim measure of 14 June 2022.

('MoU')[25] and Article 3 of the Convention (prohibition of torture).[26] Finally, the concluding Section of the Chapter will concern the enactment of the July 2023 Illegal Migration Act ('IMA').[27]

Subsequently, Chapter 2 will focus on the protection of victims of trafficking ('VoTs'). As in Chapter 1, the case law of the ECtHR relating to trafficking in human beings will be illustrated. The judgement at the core of this Chapter will be *V.C.L. and A.N. v. The United Kingdom*.[28] Thereafter, the execution of the ECtHR's ruling by national courts will be assessed. In particular, the domestic judges' approach to the issue of human trafficking will be considered.

In Chapter 3, attention will be drawn to the implementation of the ECHR with regard to environmental protection. It is essential to clarify that a development has been detected in the coverage for environmental concerns and the standards necessary to support them in the context of the Convention, a treaty regime which lacks explicit provisions addressing environmental matters. This will be explained in the first Section of Chapter 3, where the case law of the Strasbourg Court on the protection of the environment will be explored. The case *Duarte Agostinho and Others v. Portugal and 32 Others*[29] will be the focus of this Chapter. Indeed, the UK is among the countries which, according to the applicants, are failing to comply with their obligations under Articles 2 (right to life)[30] and 8 (right to respect for private and

---

[25] UK Government, *Memorandum of Understanding between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Rwanda for the Provision of an Asylum Partnership Arrangement*, April 2022, www.gov.uk.

[26] Article 3 ECHR reads as follows: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment".

[27] Illegal Migration Act 2023 (c. 57).

[28] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, Appl. Nos. 77587/12 and 74603/12, judgement of 16 February 2021.

[29] ECtHR, *Duarte Agostinho and Others v. Portugal and 32 Others* [GC], Appl. No. 39371/20, judgement of 9 April 2024.

[30] Article 2 ECHR reads as follows: "(1) Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a

family life) ECHR.[31] The last Section of the Chapter will revolve around the potential legal implications of *Duarte Agostinho and Others* and address the UK's compliance with the Convention after the ECtHR's judgement.

Lastly, closing remarks will be delivered in the Conclusion, where general considerations pertaining to the country's implementation of the Convention will be outlined.

sentence of a court following his conviction of a crime for which this penalty is provided by law. (2) Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained".

[31] Article 8 ECHR reads as follows: "(1) Everyone has the right to respect for his private and family life, his home and his correspondence. (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

CHAPTER 1. THE PROTECTION OF MIGRANTS

The aim of the present Chapter is to shed light upon the protection of migrants in the UK under the Convention. As a matter of fact, migrant protection has become one of the most hotly debated issues in post-Brexit Britain. Hence, it seems interesting to investigate and discover whether migrants have been afforded adequate protection after the country's withdrawal from the EU.

The plan for Chapter 1 is as follows. Section 1.1 will recall the case law of the Strasbourg Court in the field of migration. In particular, the doctrinal approaches and the legal positions of the ECtHR will be explored. Above all, the evolution of the Court's jurisprudence will be introduced. Then, the core principles to which the ECtHR resorts in the context of migration will be presented. This will be especially useful for understanding the Court's reasoning behind the decision to issue an urgent interim measure in the case of *N.S.K. v. The United Kingdom*, which will be the focus of Section 1.2. The case has been selected because it clearly illustrates the UK's attitude towards migrants. Indeed, the applicant questioned the lawfulness of the Asylum Partnership Agreement ('APA') reached between the UK Government and the Government of the Republic of Rwanda. The second Section of the Chapter will thus proceed by first mentioning the facts of the case as they were submitted before the Strasbourg Court. Thereafter, the subsequent proceedings before the British domestic courts will be summarised. Finally, Section 1.3 will concentrate on the IMA. The latter has been enacted after the issuance of the urgent interim measure in *N.S.K.* and is therefore crucial in determining whether the UK has been complying with its obligations under the ECHR as set forth in the Court's interim measure. The Section will analyse the Act, focusing on three aspects which are deemed to be problematic for the country's implementation of the Convention with respect to migrant protection. Each of these critical aspects will be assessed and will structure Section 1.3.

1.1. Migrant Protection through the Case Law of the European Court of Human Rights

Though migration is as old as humanity, its regulation through law carries a more recent history.[32] It is intertwined with the rise of the sovereign nation-state in Europe at the dawn of the 20th century.[33] At that time, permissive views on migration were challenged, and borders were perceived as important means to reify homogeneous nation-states. This is precisely when law came to demarcate the rules of inclusion and exclusion of aliens. In said context, as domestic laws have increasingly overseen migration in the 20th century and onwards, international law has structurally conformed to domestic law with regard to migration control. In this respect, the Convention, along with its judicial protection system, has been at the very heart of the regional advancement of human rights protection in Europe.[34] Above all, the ECtHR has assumed a pioneering role in the realisation of migrants' rights and fundamental freedoms.

The ECtHR was the first international court to broaden the scope of human rights of foreigners beyond the realm of compelled migration, ensured by international law safeguards since the 1950s, to encompass voluntary migration.[35] Nevertheless, it should be noted that neither the ECHR nor its Protocols contain any explicit reference to the right to

---

[32] V. CHETAIL, *Migration and International Law: A Short Introduction*, in *International Law and Migration*, 2016, pp. ix-xxxi; B. ÇALI, L. BIANKU, and I. MOTOK, *Migration and the European Convention on Human Rights*, New York, 2021, p. 3.

[33] B. ÇALI, L. BIANKU, and I. MOTOK, *op. cit.*, p. 3; M. PRINCE, *Rethinking Asylum: History, Purpose, and Limits*, in *International Migration Law*, 2009, p. 52.

[34] B. ÇALI, L. BIANKU, and I. MOTOK, *op. cit.*, p. 4.

[35] A. DESMOND, *The Private Life of Family Matters: Curtailing Human Rights Protection for Migrants under Article 8 of the ECHR?*, in *The European Journal of International Law*, 2018, p. 262; D. THYM, *Residence as De Facto Citizenship? Protection of Long-Term Residence under Article 8 ECHR*, in *Human Rights and Immigration*, 2014, p. 106; D. THYM, *Respect for Private and Family Life under Article 8 ECHR in Immigration Cases: A Human Right to Regularise Illegal Stay*, in *International & Comparative Law Quarterly*, 2008, pp. 87-112.

enter a foreign country or the right not to be expelled under certain circumstances.[36] The Convention was indeed not meant to sustain migrants' claims, who were hardly a consideration in the newly created human rights scheme.[37] The absence of any textual indication reflects the decision of the Contracting States to control migration flows without a supranational human rights structure.[38] Following the *travaux préparatoires*, the silence on immigration was upheld as a deliberate decision.[39] A long time passed before migrants started to be successful in the complaints they were filing with the ECtHR, and formerly with the European Commission of Human Rights (hereafter, 'the Commission'),[40] concerning their situation as migrants.[41] Since the entry into force of the Convention in the early 1950s, migrants' applications have been regularly declared without 'merit', i.e., inadmissible, at an early stage of the proceedings. In other words, their substantive complaints were not even examined.[42] The Convention, "a

[36] J. EDLUND and V. STEHLIK, *Is the Assessment under Article 8 ECHR for Migrants Justifiable?*, in *Maastricht Journal of European and Comparative Law*, 2022, p. 102.

[37] M. B. DEMBOUR, *When Humans Become Migrants*, Oxford, 2015, p. 2; T. GAMMELTOFT-HANSEN and M. RASK MADSEN, *Regime Entanglement in the Emergence of Interstitial Legal Fields: Denmark and the Uneasy Marriage of Human Rights and Migration Law*, in *Nordiques*, 2021, p. 10.

[38] J. EDLUND and V. STEHLIK, *op. cit.*, p. 102; D. THYM, *Respect for Private and Family Life under Article 8 ECHR in Immigration Cases: A Human Right to Regularise Illegal Stay*, cit., p. 103.

[39] J. EDLUND and V. STEHLIK, *op. cit.*, p. 102; D. THYM, *Residence as De Facto Citizenship? Protection of Long-Term Residence Under Article 8 ECHR*, cit., p. 108.

[40] Now defunct institution which was established within the framework of the Council of Europe in 1954. Based in Strasbourg, the Commission was tasked with resolving individual complaints alleging violations of the ECHR. It was responsible for determining the admissibility of applications. The body was abolished upon the entry into force of Protocol No. 11 to the ECHR. It is not to be confused with the European Commission, which constitutes the EU's politically independent executive arm and is located in Brussels.

[41] M. B. DEMBOUR, *op. cit.*, p. 2; J. EDLUND and V. STEHLIK, *op. cit.*, p. 102.

[42] M. B. DEMBOUR, *op. cit.*, p. 2.

sleeping beauty, frequently referred to but without much impact",[43] awakened particularly late in this regard.[44] The first 'migration case'[45] was pronounced by the ECtHR only in 1985, when an important case law had already been developed in other areas.[46] The relevance of the aforementioned judgement, *Abdulaziz, Cabales and Balkandali v. The United Kingdom*,[47] is essentially twofold. On the one hand, it established the principle whereby a State Party to the Convention is normally not obliged to admit the family members of someone who is living on its territory. On the other hand, the Strasbourg Court acknowledged that the control over the entry and residence of aliens represents a State prerogative.[48] Specifically, the ECtHR emphasised that States enjoy "[the right] to control the entry, residence and expulsion of aliens" and that "the right of a foreigner to enter in a country is not as such guaranteed by the Convention, but immigration controls ha[ve] to be exercised consistently with Convention obligations […]".[49] This 'State control principle' is deemed "a matter

---

[43] M.B. DEMBOUR, *op. cit.*, p. 2. The ECHR was first compared to a "sleeping beauty" in 1984 by Jochen Frowein, Vice President of the Commission. The metaphor accurately conveys how the Convention remained dormant until the mid-1970s. It was in the early 1980s when its potential started to be adequately appreciated. Yet, it did not amount to a decisive awakening in the area of migrant rights.

[44] M. B. DEMBOUR, *op. cit.*, p. 2; R. RAINS, *Legal Recognition of Gender Change for Transsexual Persons in the United Kingdom: The Human Rights Act 1998 and Compatibility with European Human Rights Law*, in *Georgia Journal of International Comparative Law*, 2005, pp. 333-414.

[45] The expression is used herein *in lieu* of Dembour's phrase 'migrant case' in the attempt to employ a more objective-sounding terminology.

[46] M. B. DEMBOUR, *op. cit.*, p. 3.

[47] ECtHR, *Abdulaziz, Cabales and Balkandali v. The United Kingdom*, Appl. Nos. 9214/80, 9473/81, and 9474/81, judgement of 28 May 1985.

[48] M. B. DEMBOUR, *op. cit.*, p. 3.

[49] ECtHR, *Abdulaziz, Cabales and Balkandali v. The United Kingdom*, cit., pars. 43 and 59; J. EDLUND and V. STEHLIK, *op. cit.*, p. 108; Y. KTISTAKIS, *Protecting Migrants Under the European Convention on Human Rights and the European Social Charter – A Handbook for Legal Practitioners*, Strasbourg, 2013, pp. 18 and 105; ECtHR, *Moustaquim v. Belgium*, Appl. No. 12313/86, judgement of 18 February

of well-established international law" and appears to be the starting point of the Court's jurisprudence in immigration cases.[50] Overall, States therefore enjoy a "wide margin of appreciation" in determining who to admit in their territory.[51] It is however necessary to realise that this assertion has been indirectly limited in *Gül v. Switzerland*,[52] where the ECtHR affirmed that the Contracting States appreciate "a *certain* margin of appreciation".[53] On balance, the margin of appreciation is combined with the institutional presumption that the Strasbourg Court should yield to decisions rendered at the national level, as "the machinery for the protection of fundamental rights established by the Convention is subsidiary to the national systems safeguarding human rights".[54] That being said, the fact that States' powers of immigration control are not unlimited is widely accepted. This could be inferred from the language chosen by the Court in order to formulate the State control principle, which subjects such prerogative to treaty obligations. Another prime example of these obligations within the framework of the ECHR is illustrated by Article 3, which prohibits extradition or expulsion to countries where individuals encounter a risk of torture or cruel, inhuman, or degrading treatment or punishment. By virtue of Article 1 ECHR, the Contracting States shall uphold Convention rights for all individuals who fall within their jurisdiction. As a consequence, migrants residing within the territory of a Council of Europe Member

---

1991, par. 43; ECtHR, *Nolan and K. v. Russia*, Appl. No. 2512/04, judgement of 6 July 2009, par. 62.

[50] ECtHR, *Abdulaziz, Cabales and Balkandali v. The United Kingdom*, cit., par. 43; D. THYM, *Residence as De Facto Citizenship? Protection of Long-Term Residence Under Article 8 ECHR*, cit., p. 108.

[51] ECtHR, *Abdulaziz, Cabales and Balkandali v. The United Kingdom*, cit., par. 67.

[52] ECtHR, *Gül v. Switzerland*, Appl. No. 23218/94, judgement of 19 February 1996.

[53] ECtHR, *Gül v. Switzerland*, cit., par. 38 (emphasis added).

[54] ECtHR, *Sisojeva v. Latvia* [GC], Appl. No. 60654/00, judgement of 15 January 2007, par. 90; ECtHR, *Akdivar and Others v. Turkey*, Appl. No. 21893/93, judgement of 16 September 1996, par. 65; D. THYM, *Residence as De Facto Citizenship? Protection of Long-Term Residence Under Article 8 ECHR*, cit., p. 110; D. THYM, *Respect for Private and Family Life under Article 8 ECHR in Immigration Cases: A Human Right to Regularise Illegal Stay*, cit., p. 106.

State are granted the authority to assert their Convention rights against the host State.

To date, academic commentators have lamented the absence of a solid theoretical foundation in the Court's methods of interpretation due to the fragmentary character of the case law in the area of immigration.[55] Despite this, a number of principles and approaches can be identified. Crucially, it is indisputable that the application of the ECHR to immigration cases results in a balancing exercise between the effective protection of human rights and the autonomy of Member States to regulate migration flows. Drawing on the work of Karvatska,[56] the interpretative guidelines for international treaties are applicable to human rights treaties as well. In this sense, the application of the interpretation principles outlined in Articles 31 and 32 of the Vienna Convention on the Law of the Treaties ('VCLT') is uncontested in such instances. In the first place, the principle of conscientiousness, namely the fact that a treaty shall be interpreted "in good faith", is included. Secondly, the principle of literality, i.e., the fact that a treaty shall be interpreted in accordance with the usual meaning of the terms of the contract. Thirdly, the principle of system, that is to say, the entire treaty shall be systematically considered in the process of interpretation. Lastly, a teleological interpretation can be adopted, namely following the object and purpose of the treaty. This notwithstanding, a special approach is required for the interpretation of human rights treaties, whose peculiar characteristics are to be considered in this respect. While adhering to the VCLT interpretative principles, the ECtHR has devised its own methodology of interpretation, based on the so-called "consensus method".[57] The latter is understood as the combination of the interpretation of international treaties, namely the ECHR, with the practice of Member States, namely the national legal system. The

[55] D. THYM, *Residence as De Facto Citizenship? Protection of Long-Term Residence Under Article 8 ECHR*, cit., p. 110.

[56] S. KARVATSKA, *The European Court of Human Rights Interpretation of Migrants Cases: Basic Doctrinal Approaches*, in *Law of Ukraine: Legal Journal (Ukrainian)*, 2019, pp. 132-147.

[57] S. KARVATSKA, *op. cit.*, p. 136.

consensus method illustrates the evolutionary approach within the work of the Court, which proves pivotal for Member States with similar problems, albeit limiting the scope of the State's free discretion. Since the majority of the ECtHR cases concerning migrants are related to granting asylum, the interpretation activities of the Court revolve around the identification of barriers to asylum and the formulation of the principle of prohibition of dismissal. As to this second feature, some of the conditions entailing said restriction pertain the reasons why the asylum seeker was forced to leave his or her home country, e.g., humanitarian crisis, non-selective violence,[58] real threat or danger,[59] denial of justice, unlawful detention or conviction, and procedural violations.[60] Of utmost importance to the resolution of migrants' issues is also the Court's definition of vulnerable groups among them, i.e., the various minorities being brutally abused, or groups with special needs, such as children, pregnant women, the disabled, and the elderly.

By means of the doctrinal approaches outlined above, the ECtHR has thus justified its legal positions when interpreting cases concerning migration and asylum. One of the legal provisions to which the Court usually refers is Article 3 ECHR, which, as previously mentioned, prohibits torture and inhuman or degrading treatment or punishment. Even though no explicit reference is contained therein, the Strasbourg Court has found an implied *non-refoulement* obligation.[61] The latter is widely regarded as a peremptory norm of international law. It ensues that all States, whether or not they are a party to the ECHR, and the Court itself are obliged to respect it.[62] Put differently, States are

[58] ECtHR, *Abdulaziz, Cabales and Balkandali v. The United Kingdom*, cit., par. 67; ECtHR, *Saadi v. Italy* [GC], Appl. No. 37201/06, judgement of 28 February 2008.
[59] ECtHR, *Hirsi Jamaa and Others v. Italy* [GC], Appl. No. 27765/09, judgement of 23 February 2012.
[60] ECtHR, *Mamatkulov and Askarov v. Turkey* [GC], Appl. Nos. 4682/99 and 46951/99, judgement of 4 February 2005; KARVATSKA, *op. cit.*, p. 141.
[61] K. GREENMAN, *A Castle Built on Sand? Article 3 ECHR and the Source of Risk in* Non-Refoulement *Obligations in International Law*, in *International Journal of Refugee Law*, pp. 264-296.
[62] A. DUFFY, *Expulsion to Face Torture?* Non-Refoulement *in International Law*, in *International Journal of Refugee Law*, 2008, p. 383.

precluded from returning individuals to countries where they might suffer persecution.[63] In this sense, in the *Lilia, Julia and Eleonora Alimzhanova and Alexjs Lisikov v. Sweden* case,[64] the ECtHR affirmed that "the Convention does not guarantee a right to asylum or refugee status, but only prohibits the expulsion of persons to a country where they may be subjected to treatment contrary to Article 3".[65] Hence, State responsibility is engaged by the act of removal of an individual to a State where they will be exposed to a certain degree of risk of having their human rights violated.

The first case in which the Court made such a finding is *Soering v. The United Kingdom*.[66] Mr. Soering, the applicant, was a young German national who had killed the parents of his girlfriend in the United States ('US'). The State of Virginia requested his extradition from the UK, where he had fled. Mr. Soering claimed that, were the British authorities to extradite him, they would act in a way contrary to Article 3 by exposing him to the risk of having to endure the "death-row phenomenon",[67] which he deemed to be "inhuman and degrading treatment".[68] The ECtHR unanimously held that, in the event of the applicant's extradition to the US being implemented, there would be a violation of Article 3.[69] A number of key factors upon which the Court

---

[63] J. ALLAIN, *The* Jus Cogens *Nature of* Non-Refoulement, in *International Journal of Refugee Law*, pp. 533-558.

[64] ECtHR, *Lilia, Julia and Eleonora Alimzhanova and Alexijs Lisikov v. Sweden*, Appl. No. 38821/97, judgement of 24 August 1999.

[65] ECtHR, *Lilia, Julia and Eleonora Alimzhanova and Alexijs Lisikov v. Sweden*, cit., p. 3; J. RISTIK, *The Right to Asylum and the Principle of* Non-Refoulement *Under the European Convention on Human Rights*, in *European Scientific Journal*, pp. 108-120.

[66] ECtHR, *Soering v. The United Kingdom*, Appl. No. 14038/88, judgement of 7 July 1989.

[67] This phenomenon may be described as consisting of a combination of circumstances to which the applicant would have been exposed had he been extradited to Virginia to face a capital murder charge and subsequently sentenced to death. As a "death-row" inmate, he would have had to reside in a high-security prison, be separated from other prisoners detained in the same facility, and experience great physical restrictions.

[68] ECtHR, *Soering v. The United Kingdom*, cit., par. 76.

[69] ECtHR, *Soering v. The United Kingdom*, cit., p. 44.

based its decision can be identified. First, the need to interpret the ECHR in light of its special nature as a treaty for enforcing human rights and its object and purpose in promoting democratic values, which means that "its provisions [must] be interpreted and applied so as to make its safeguards practical and effective".[70] Second, the impermissibility of limitation or derogation under Article 3 and its codification of a fundamental value.[71] Third, the fact that extradition to torture and other ill-treatment "would plainly be contrary to the spirit and intendment of [Article 3 ECHR]".[72] The *Soering* decision is therefore significant because the Strasbourg Court identified the proper test to be applied so as to establish whether there are substantial grounds for believing that a person being removed from one country to another would encounter real risks of Article 3 mistreatment. Related to this, as stated in *Ireland v. The United Kingdom*,[73] a minimum level of severity has to be reached in order for the ill-treatment to fall within the scope of said provision. The assessment of this minimum is however relative, depending on the circumstances of the case.[74]

The case law under Article 3 was subsequently summarised in *J.K. and Others v. Sweden*[75] by the Grand Chamber of the Court, where "a detailed restatement of the jurisprudential principles relevant to the principle of *non-refoulement*" was provided.[76] It clarified that the assessment of whether there are compelling reasons for believing that

---

[70] K. GREENMAN, *op. cit.*, p. 271; ECtHR, *Soering v. The United Kingdom*, cit., par. 87; Y. KTISTAKIS, *op. cit.*, p. 87.

[71] K. GREENMAN, *op. cit.*, p. 272.

[72] K. GREENMAN, *op. cit.*, p. 272; ECtHR, *Soering v. The United Kingdom*, cit., par. 87.

[73] ECtHR, *Ireland v. The United Kingdom*, Appl. No. 5310/71, judgement of 18 January 1978; E. K. BLÖNDAL and O. M. ARNARDÓTTIR, *Non-Refoulement in Strasbourg: Making Sense of the Assessment of Individual Circumstances*, in *Oslo Law Review*, 2018, p. 150.

[74] ECtHR, *Ireland v. The United Kingdom*, cit., par. 162.

[75] ECtHR, *J.K. and Others v. Sweden* [GC], Appl. No. 59166/12, judgement of 23 August 2016.

[76] ECtHR, *Non-Refoulement as a Principle of International Law and the Role of the Judiciary in its Implementation*, 27 January 2017, p. 3.

the applicant, if removed, would face a real risk of ill-treatment requires an analysis of the conditions in the receiving country.[77]

In summary, the Strasbourg Court has interpreted Article 3 ECHR as prohibiting the removal of a person where there are substantial grounds for believing that he or she would be subjected to inhuman or degrading treatment or punishment. The implicit obligation of *non-refoulement* thus constitutes an obstacle to deportation and plays an important role with regard to the protection of asylum seekers.

1.2. The *N.S.K. v. The United Kingdom* Case

The previous Section aimed at explaining the doctrinal approaches embraced by the ECtHR in migration cases. This was instrumental in presenting the *N.S.K. v. The United Kingdom* case. The latter concerns the MEDP upon which the UK Government and the Republic of Rwanda agreed in April 2022. It includes a five-year APA disclosed in a non-binding MoU and two diplomatic *Notes Verbales* regarding "the asylum process of transferred individuals" and "the reception and accommodation of transferred individuals".[78] The MoU was signed in Kigali on 13 April 2022 by Priti Patel, the then Home Secretary, and Vincent Biruta, Rwanda's Minister of Foreign Affairs. It entered into force on the same date.[79] The APA allows the UK to transfer individuals to Rwanda prior to the adjudication of their asylum claims. Eventually, Rwanda will either award them asylum or grant permanent residence.

---

[77] ECtHR, *J.K. and Others v. Sweden* [GC], cit., par. 79; E. K. BLÖNDAL and O. M. ARNARDÓTTIR, *op. cit.*, p. 150.

[78] UK Government, *Memorandum of Understanding between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Rwanda for the Provision of an Asylum Partnership Arrangement*, cit.; UK Government, *Note Verbale on Assurances in Paragraphs 8 and 10 of the MoU between the United Kingdom and Rwanda for the Provision of an Asylum Partnership Arrangement*, November 2022, www.gov.uk; UK Government, *Note Verbale on Assurances in Paragraph 9 of the MoU between the United Kingdom and Rwanda for the Provision of an Asylum Partnership Arrangement*, November 2022, www.gov.uk.

[79] M. GOWER, P. BUTCHARD, and C. J. MCKINNEY, *The UK-Rwanda Migration and Economic Development Partnership*, 2023, p. 6.

They cannot apply to return to the UK unless the Home Secretary so requests.[80]

Above all, the subject matter of the case will be illustrated. Mr. N.S.K. (further, 'the applicant') was born in 1968 in Iraq.[81] As of April 2022, he left the country, travelled to Turkey, and crossed the English Channel by boat.[82] Upon his arrival in the UK on 17 May 2022, the applicant claimed to have escaped danger from Iraq and hence sought international protection. One week later, he received a "Notice of Intent", which indicated that his application for asylum in the UK was deemed inadmissible.[83] Subsequently, he was given removal directions to Rwanda for 14 June 2022 at 10:30 p.m. (British Summer Time – 'BST'), pursuant to the MoU.[84] On 27 May 2022, a report suggesting that the applicant may have endured torture was released by a doctor at the immigration detention centre. Even though the evidence provided in the medical examination supported his asylum claim, he was officially notified that his application did not qualify as admissible on 6 June 2022.[85] Thus, he resorted to the High Court of Justice. First, the applicant requested to judicially review the lawfulness of the APA, along with the individual decisions rendered in his case. Second, he sought interim relief, either by preventing the relocation of all asylum seekers to Rwanda under the terms of the APA, or by impeding his

[80] M. GOWER, P. BUTCHARD, and C. J. MCKINNEY, *op. cit.*, 2023, p. 4.

[81] I. B. MUHAMBYA, *UK-Rwanda Agreement versus Legal Framework on the Protection of Refugees: Primacy of Minimum Guarantees of Human Rights*, in *Cahiers de l'Edem – Louvain Migration Case Law Commentary*, 2022, p. 3; ECtHR, *The European Court Grants Urgent Interim Measure in Case concerning Asylum-Seeker's Imminent Removal from the UK to Rwanda*, 14 June 2022, p. 1.

[82] ECtHR, *The European Court Grants Urgent Interim Measure in Case concerning Asylum-Seeker's Imminent Removal from the UK to Rwanda*, cit., p. 1.

[83] I. B. MUHAMBYA, *op. cit.*, p. 3.

[84] ECtHR, *Notification of Case concerning Asylum Seeker's Removal from the UK to Rwanda*, 11 April 2023, p. 1; ECtHR, *The European Court Grants Urgent Interim Measure in Case concerning Asylum-Seeker's Imminent Removal from the UK to Rwanda*, cit., p. 1.

[85] I. B. MUHAMBYA, *op. cit.*, p. 3.

removal to the country.[86] The High Court refused to grant interim relief to the applicant, assuming that Rwanda would respect the MoU, albeit not being legally binding. In addition, the High Court considered that, were the applicant's judicial review challenge successful, he could be returned to the UK. Nonetheless, it acknowledged that the question whether the decision to identify Rwanda as a safe third country was unreasonable or relied upon insufficient investigation raised "serious triable issues".[87] Then, the applicant's appeal against the judgement of the High Court was dismissed. It ensued that he decided to urgently seize the ECtHR. On 14 June 2022 at 12:15 p.m. BST, the Supreme Court refused permission to appeal as well. On the same afternoon, the Strasbourg Court granted the applicant's request for an interim measure by virtue of Rule 39 of the Rules of Court.[88] The ECtHR based its decision on the material which was brought before it, in particular by the United Nations High Commissioner for Refugees ('UNHCR').[89] The latter expressed concerns regarding the fact that asylum seekers transferred from the UK to Rwanda might be unable to access fair and

[86] ECtHR, *The European Court Grants Urgent Interim Measure in Case concerning Asylum-Seeker's Imminent Removal from the UK to Rwanda*, cit., p. 1; ECtHR, *Notification of Case concerning Asylum Seeker's Removal from the UK to Rwanda*, cit., p. 1.

[87] ECtHR, *The European Court Grants Urgent Interim Measure in Case concerning Asylum-Seeker's Imminent Removal from the UK to Rwanda*, cit., p. 1.

[88] Rule 39 of the Rules of the Court empowers a Chamber or, where appropriate, its President, to issue interim measures. It stipulates that: "The Court may, in exceptional circumstances, whether at the request of a party or of any other person concerned, or of its own motion, indicate to the parties any interim measure which it considers should be adopted. Such measures, applicable in cases of imminent risk of irreparable restoration or adequate compensation, may be adopted where necessary in the interests of the parties or the proper conduct of the proceedings". Interim measures are typically applied in situations where there are fears of a threat to life or ill-treatment. The former fall under Article 2 of the Convention, whereas the latter are covered by Article 3 of the Convention.

[89] ECtHR, *The European Court Grants Urgent Interim Measure in Case concerning Asylum-Seeker's Imminent Removal from the UK to Rwanda*, cit., p. 2; ECtHR, *Notification of Case concerning Asylum Seeker's Removal from the UK to Rwanda*, cit., p. 2.

efficient procedures for the determination of their refugee status.[90] Furthermore, in a letter addressed to Mr. Robert Spano, former ECtHR President, the UN Special Rapporteur on Trafficking in Persons, especially women and children, claimed that the scheduled removal of the applicant and the arrangements concluded under the MoU might "fail to ensure sufficient protection against the imminent risk of irreparable harm, specifically treatment that is contrary to Article 3 ECHR".[91] Put differently, the risk of *refoulement* posed serious threats to the applicant, especially since Rwanda is located outside the ECHR legal space and is therefore not bound by the Convention. The ECtHR paid great regard also to the High Court's judgement. In fact, the "serious triable issues" referred to above proved highly relevant to the Strasbourg Court's reasoning.[92] Finally, the ECtHR highlighted the fact that no legally enforceable mechanism existed to ensure the applicant's return to the UK in case of a successful merits challenge before the British domestic courts.[93] In sum, the Strasbourg Court indicated to the UK Government that "the applicant should not be removed until the expiry of a period of three weeks following the delivery of the final domestic decision in the ongoing judicial review proceedings".[94] In consequence, until the British domestic courts had assessed the legality of the MoU, no one could be transferred from the UK to Rwanda. In light of this, the flight planned for 14 June 2022 was cancelled by the Home Secretary very shortly before its departure. On 24 June 2022, the UK Government wrote to the ECtHR to ask for a review of the decision

---

[90] ECtHR, *The European Court Grants Urgent Interim Measure in Case concerning Asylum-Seeker's Imminent Removal from the UK to Rwanda*, cit., p. 2; ECtHR, *Notification of Case concerning Asylum Seeker's Removal from the UK to Rwanda*, cit., p. 2.

[91] S. MULLALLY, *Pending Removal of K.N. from the United Kingdom to Rwanda, at 10.30 p.m. (British Summer Time – "BST") on Tuesday 14 June 2022*, 2022, p. 2.

[92] ECtHR, *N.S.K. v. The United Kingdom*, cit. p. 1.

[93] ECtHR, *The European Court Grants Urgent Interim Measure in Case concerning Asylum-Seeker's Imminent Removal from the UK to Rwanda*, cit., p. 1.

[94] ECtHR, *N.S.K. v. The United Kingdom*, cit., p. 2; ECtHR, *The European Court Grants Urgent Interim Measure in Case concerning Asylum-Seeker's Imminent Removal from the UK to Rwanda*, cit., p. 1.

and for the interim measure to be lifted. The measure was however confirmed at the beginning of July 2022. On 19 December 2022, the judgement in the applicant's judicial review proceedings was delivered by the High Court and was linked to those commenced by other claimants. On the one hand, it was regarded as lawful for the UK to establish an APA with Rwanda. On the other hand, the implementation of the migration policy by the Home Secretary in a number of cases, including that of the applicant, appeared to be flawed. This was due to the fact that adequate reasons were not provided insofar as the inadmissibility of the applicant's asylum claim was concerned.[95] With reference to the lawfulness of the APA, the applicant lodged an appeal against the High Court's findings. By a two-to-one majority, the Court of Appeal declared that the Rwanda policy was unlawful on 29 June 2023.[96] Ultimately, the Home Secretary was permitted to bring the case to the Supreme Court, whose justices agreed with the Court of Appeal's assessment.[97] The judgement of the Supreme Court was pronounced on 15 November 2023.

Since the start of 2022, the British Government has expressed a renewed interest in developing a strategy to deter individuals from embarking on irregular journeys across the English Channel. The country's withdrawal from the EU has made it impossible for the UK to rely on the Dublin system,[98] which previously allowed for the return of asylum seekers to other EU Member States. Moreover, the rejection of the principle of free movement and the adoption of a high sovereigntist position have hindered potential readmission agreements

[95] ECtHR, *N.S.K. v. The United Kingdom*, cit., p. 2.

[96] Court of Appeal, *R (AAA and Others) v. Secretary of State for the Home Department*, EWCA Civ. 745, judgement of 29 June 2023, pars. 293-294; M. GOWER, P. BUTCHARD, and C. J. MCKINNEY, *op. cit.*, 2023, p. 24.

[97] UK Supreme Court, *R (AAA and Others) v. Secretary of State for Home Department*, UKSC 42, judgement of 15 November 2023, par. 149.

[98] The so-called 'Dublin system' establishes the criteria and mechanisms for determining which EU Member State is responsible for examining an application for international protection. It was adopted by means of Regulation (EU) No. 604/2013 'Dublin III'.

with the former EU partners. This has led to the development of the "Rwanda solution", which aims at partially "externalising" the UK asylum system.[99]

The announcement of the MEDP aroused considerable controversy both domestically and overseas. The MoU declares the parties' wish to "strengthen shared international commitments on the protection of refugees and migrants" by creating "new ways of addressing the irregular migration challenge".[100] At the same time, they reaffirm their commitment to uphold fundamental human rights and freedoms without discrimination, as guaranteed by their "strong histories" of implementing the 1951 Convention Relating to the Status of Refugees ('Refugee Convention'),[101] the 1967 Protocol Relating to the Status of Refugees ('Refugee Protocol'),[102] the 1984 United Nations Convention Against Torture ('UNCAT'),[103] and the 1966 International

[99] G. S. GOODWIN-GILL, *Memorandum of Understanding between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Rwanda*, in *International Legal Materials*, 2023, p. 166; D. CANTOR *et al.*, *Externalisation, Access to Territorial Asylum, and International Law*, in *International Journal of Refugee Law*, 2022, p. 22. The term 'externalisation' generally refers to the process of shifting functions which are normally undertaken by a State within its own territory so they occur, in part or in whole, outside its territory. With relation to the asylum field, it can be employed to describe the transfer of asylum seekers from one State to another for the purpose of determining their refugee status and, in some cases, providing them with territorial asylum there.

[100] UK Government, *Memorandum of Understanding between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Rwanda for the Provision of an Asylum Partnership Arrangement*, cit., preamble.

[101] UN General Assembly, *Convention Relating to the Status of Refugees* entered into force 22 April 1954, UN Doc. A/RES/429(V) of 14 December 1950.

[102] UN General Assembly, *Protocol relating to the Status of Refugees* entered into force 4 October 1967, UN Doc. 606 UNTS 267 of 31 January 1967.

[103] UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* entered into force 26 June 1987, UN Doc. A/RES/39/46 of 10 December 1984.

Covenant on Civil and Political Rights ('ICCPR').[104] This notwithstanding, the ECtHR cautioned that asylum seekers may not receive a fair and efficient determination of their refugee status, which could potentially result in a violation of the *refoulement* prohibition.[105] Subsequently, the Court of Appeal's ruling of 29 June 2023, together with the Supreme Court's decision of 15 November 2023, shed light upon the unlawfulness of the APA. Both judgements revealed numerous legal issues surrounding the MoU. An analysis of said decisions will be therefore provided in order to perform a thorough assessment of the protection of migrants in the UK under the ECHR.

At the beginning of the judgement handed down by the Court of Appeal, the Master of the Rolls, Sir Geoffrey Vos, mentioned three ECtHR decisions. First, he recalled the *Soering* test.[106] Second, he referred to *Ilias and Ahmed v. Hungary*,[107] where the Strasbourg Court explained the procedural duty incumbent on States considering the removal of asylum seekers to third countries without evaluating the merits of their asylum application.[108] Third, he quoted *Othman (Abu Qatada) v. The United Kingdom*[109] to explain how the Court should deal with assurances provided by a foreign Government as to the Article 3

[104] UN General Assembly, *International Covenant on Civil and Political Rights* entered into force 23 March 1976, UN Doc. A/RES/21/2200A of 16 December 1966; UK Government, *Memorandum of Understanding between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Rwanda for the Provision of an Asylum Partnership Arrangement*, cit., preamble.

[105] ECtHR, *N.S.K. v. The United Kingdom*, cit., p. 2.

[106] Court of Appeal, *R (AAA and Others) v. Secretary of State for the Home Department*, cit., par. 29; ECtHR, *Soering v. The United Kingdom*, cit., par. 88.

[107] ECtHR, *Ilias and Ahmed v. Hungary*, Appl. No. 47287/15, judgement of 21 November 2019.

[108] Court of Appeal, *R (AAA and Others) v. Secretary of State for the Home Department*, cit., par. 30; ECtHR, *Ilias and Ahmed v. Hungary*, cit., pars. 137-141.

[109] ECtHR, *Othman (Abu Qatada) v. The United Kingdom*, Appl. No. 8139/09, judgement of 9 May 2012.

rights of individuals to be deported to that foreign State.[110] The aforementioned cases were relevant to the question whether substantial grounds existed for considering that Rwanda was not a safe third country, that there was a real risk of *refoulement* or other violations of Article 3, and that there was a real risk that asylum claims would not be properly determined. In this respect, Lord Justice Underhill, the Vice President of the Court of Appeal (Civil Division), appreciated that, despite having now been established for some time, the Rwandan refugee status determination process has been little used in practice – UNHCR described it as "nascent".[111] For many years, Rwanda has been known for providing asylum to a significant number of refugees from neighbouring countries. The majority of these refugees are accommodated in camps where UNHCR plays an active role. However, prior to August 2020, asylum was granted on a "*prima facie* basis", that is to say, without individual evaluation of the claimants.[112] Being a recent creation, the Rwandan refugee status determination process has proved to have limited experience in dealing with asylum seekers with the characteristics of those who are likely to be resettled under the MEDP. "The UNHCR evidence in my view clearly shows that there are important respects in which it has not so far reliably operated to international standards" wrote Lord Justice Underhill.[113] Consequently, as of the relevant date, the Rwandan system for refugee status determination was hardly fair and effective. On these grounds, it was reasonable to assume that the asylum claims of relocated individuals may be mistakenly refused. As to Rwanda's assurances granted in the MoU, both the Master of the Rolls and Lord Justice Underhill

[110] Court of Appeal, *R (AAA and Others) v. Secretary of State for the Home Department*, cit., par. 32; *Othman (Abu Qatada) v. The United Kingdom*, cit., pars. 186-189.

[111] Court of Appeal, *R (AAA and Others) v. Secretary of State for the Home Department*, cit., par. 143.

[112] Court of Appeal, *R (AAA and Others) v. Secretary of State for Home Department*, cit., par. 143.

[113] Court of Appeal, *R (AAA and Others) v. Secretary of State for Home Department*, cit. par. 261.

emphasised that none of the statements provided therein could be treated as reliable. This was particularly true with respect to whether a resettled individual whose asylum claim is refused would be allowed to remain in the country and enjoy basic rights equivalent to those enshrined in the Refugee Convention. Finally, attention was drawn to different risks other than *refoulement* in relation to Article 3 ECHR. The applicant alleged that the repressive nature of the Rwandan regime implies that asylum seekers and refugees would be at risk of inhuman and degrading treatment within the meaning of said provision were they to engage in protests against the Government of Rwanda.[114] In this regard, Lord Justice Underhill stressed that there was clear evidence that the Government of Rwanda is intolerant of dissent.[115]

Concordant with the High Court, the Lord Chief Justice, the Lord Burnett of Maldon, reached conclusions contrary to those supported by the Master of the Rolls and Lord Justice Underhill. He contended that the procedures established under the Rwanda agreement and the assurances given by the Rwandan Government were sufficient to ensure that asylum seekers would not be wrongly returned to countries where they would face persecution or other ill-treatment. Most notably, the Lord Chief Justice asserted that failed asylum seekers are unlikely to be returned to their countries of origin because of the lack of agreements between Rwanda and the countries in question.

To summarise, the decision of the majority, i.e., the Master of the Rolls and Lord Justice Underhill, was that the deficiencies in the asylum system in Rwanda are such that there are substantial grounds for believing that there is a real risk of *refoulement*. In this sense, Rwanda is not a safe third country. The majority considered that the evidence which was already brought before the High Court does not demonstrate that the necessary changes would have been reliably affected at the time of the proposed removals. As a result, transfer to

---

[114] Court of Appeal, *R (AAA and Others) v. Secretary of State for Home Department*, cit., par. 287.

[115] Court of Appeal, *R (AAA and Others) v. Secretary of State for the Home Department*, cit., par. 288.

Rwanda would be in breach of Article 3 ECHR, which is incorporated in the British legal system by means of Section 6 of the 1998 HRA.

The Supreme Court unanimously upheld the Court of Appeal's conclusion that the Rwanda policy is unlawful. Following a brief introduction on the nature of the issue before the Court, the legal framework of the policy, and the legal proceedings, the Supreme Court provided the reasons for the judgement. The latter focused primarily on the grounds of appeal concerning *refoulement*.

Initially, the Supreme Court illustrated the legal background of said prohibition, highlighting that it is contained in both international and domestic law. On the one hand, it recalled Article 33(1) of the Refugee Convention, Article 3(1) UNCAT, as well as Articles 2, 6, and 7 ICCPR. The Supreme Court also mentioned Article 3 ECHR and the already discussed landmark judgement *Soering v. The United Kingdom*. It further posited that the principle of *non-refoulement* forms part of customary international law.[116] On the other hand, Section 6 HRA was invoked.

Then, the issues arising in relation to *refoulement* in the appeal in question were addressed. The Supreme Court first considered whether the High Court had applied the correct legal test. As explained above, the correct test required the High Court to determine if the removal of asylum seekers to Rwanda exposed them to a real risk of ill-treatment due to *refoulement* to another country. With respect to this, the Supreme Court held that it is unclear from the High Court's judgement whether it applied the correct legal test. Nevertheless, the Supreme Court affirmed that there were errors in the High Court's treatment of the gathered evidence. Specifically, the High Court failed to consider the practical operation of the asylum system in the receiving State, i.e., Rwanda. In doing so, the High Court neglected the deficiencies identified by expert bodies such as UNHCR. Since safety in the receiving State relied on assurances provided by the Rwandan Government, the High Court was required to conduct a fact-sensitive

[116] UK Supreme Court, *R (AAA and Others) v. Secretary of State for Home Department*, cit., pars. 19-26.

evaluation of how the assurances were to be implemented. Relevant factors comprised, *inter alia*, the general human rights situation in the receiving State, the receiving State's laws and practices, its record in complying with similar assurances given in the past, and the existence of monitoring mechanisms. Instead, the High Court held that the Home Secretary was entitled to rely on the assurances received from the Rwandan Government in the MEDP and failed to engage with UNHCR's evidence. The latter should have been attached more weight considering its remit and invaluable experience of working in the Rwandan asylum system.

Conversely, the Court of Appeal adopted the correct legal approach. Basing itself on the judgement of the Court of Appeal, the Supreme Court reported the evidence reviewed herein. First, Rwanda's poor human rights record. In 2021, UK Government officials raised concerns about "extrajudicial killings, deaths in custody, enforced disappearances and torture".[117] Constraints on media and political freedom have also been strongly criticised.[118] Second, the serious defects in Rwanda's procedures and institutions for processing asylum claims.[119] These comprise, e.g., Rwanda's practice of *refoulement*, which has continued since the MEDP was formed, and the apparent inadequacy of the Rwandan Government's understanding of the Refugee Convention requirements. Third, Rwanda's failure to comply with an explicit undertaking to adhere with the *non-refoulement* principle, as defined in the 2013-2018 agreement for the removal of asylum seekers from Israel to Rwanda. The Supreme Court accepted that "the Rwandan Government entered into the MEDP in good faith, that it has incentives to ensure that it is adhered to", and that monitoring

[117] UK Supreme Court, *R (AAA and Others) v. Secretary of State for Home Department*, cit., par. 76.
[118] UK Supreme Court, *R (AAA and Others) v. Secretary of State for Home Department*, cit., par. 76.
[119] UK Supreme Court, *R (AAA and Others) v. Secretary of State for Home Department*, cit., par. 50.

arrangements provide a further safeguard.[120] However, the evidence suggested that there is a significant risk that asylum claims may not be properly determined, leaving asylum seekers vulnerable to being returned to their country of origin. While changes and capacity-building may be implemented in the future, they were not in place when the lawfulness of the Rwanda policy was being considered in the proceedings.

To conclude, Section 1.2 yielded insights into the implementation of the urgent interim measure by the Strasbourg Court in the *N.S.K. v. The United Kingdom* case. It also considered the appeals which were brought by the applicant before the British domestic courts. In essence, it seems that the MEDP poses significant risks for migrants who arrive in the United Kingdom, especially as far as *non-refoulement* is concerned. This raises doubts on the country's implementation of the ECHR, most notably with respect to Article 3 of the Convention. The subsequent Section will thus attempt to clarify whether appropriate measures have been undertaken by the UK Government in light of the concerns which have been outlined above.

1.3. The Illegal Migration Act

The APA forms part of a wider range of modifications to the UK asylum system.[121] Under the New Plan for Immigration published on 24 March 2021, the UK Government aims to implement "a fair but firm asylum

---

[120] UK Supreme Court, *Press Summary 15 November 2023. R (on the application of AAA (Syria) and others) (Respondents/Cross Appellants) v Secretary of State for the Home Department (Appellant/Cross Respondent); R (on the application of HTN (Vietnam)) (Respondent/Cross Appellant) v Secretary of State for the Home Department (Appellant/Cross Respondent); R (on the application of RM (Iran)) (Respondent) v Secretary of State for the Home Department (Appellant); R (on the application of AS (Iran)) (Respondent/Cross Appellant) v Secretary of State for the Home Department (Appellant/Cross Respondent); R (on the application of SAA (Sudan)) (Respondent) v Secretary of State for the Home Department (Appellant) and R (on the application of ASM (Iraq)) (Appellant) v Secretary of State for the Home Department (Respondent) [2023] UKSC 42*, 15 November 2023, p. 4.
[121] M. GOWER, P. BUTCHARD, and C. J. MCKINNEY, *op. cit.*, p. 7.

and illegal migration system".[122] The Nationality and Borders Bill, which passed into law in April 2022, is the cornerstone of the Plan.[123] It grants the Home Secretary discretionary powers to differentiate between asylum seekers based on mode of travel.[124] In his five key priorities for the year 2023, Prime Minister Rishi Sunak restated the aforementioned objective: "We will pass new laws to stop small boats, making sure that if you come to this country illegally, you are detained and swiftly removed".[125] These intentions seem to persist even after the issuance of the urgent interim measure in the case of *N.S.K. v. The United Kingdom* and the relevant rulings before the British domestic courts. In one of the latest efforts to halt the crossings of the English Channel, the Illegal Migration Bill was introduced into the House of Commons on 7 March 2023, becoming an Act of Parliament on 23 July 2023.[126]

The intended purpose of the IMA is to "prevent and deter unlawful migration".[127] Its core provision places a duty upon the Home Secretary to remove "illegal entrants" "as soon as is reasonably practicable" and substantially limits the challenges which can suspend removal.[128] The effect resulting from the IMA is that it has become extremely difficult for anyone to claim asylum in the UK unless they arrive in the country under an approved scheme. At the time of writing,

---

[122] UK Government, *Consultation on the New Plan for Immigration: Government Response (Accessible Version)*, March 2022, www.gov.uk.

[123] Nationality and Borders Act 2022 (c. 36).

[124] J. MORGAN and L. WILLMINGTON, *The Duty to Remove Asylum Seekers under the Illegal Migration Act 2023: Is the Government's Plan to 'Stop the Boats' Now Doomed to Failure?*, in *Common Law World Review*, 2023, p. 105.

[125] J. MORGAN and L. WILLMINGTON, *op. cit.*, p. 104; UK Government, *Prime Minister Outlines his Five Key Priorities for 2023*, January 2023, www.gov.uk.

[126] Council of Europe, Parliamentary Assembly, Committee on Legal Affairs and Human Rights, *UK Reform of its Human Rights Legislation: Consequences for Domestic and European Human Rights Protection*, report of 22 May 2023, p. 1.

[127] IMA 2023, cit., clause 1(1).

[128] P. ARNELL *et al.*, *The UK's Illegal Migration Bill: Human Rights Violated*, in *Medicine, Science and the Law*, 2023, p. 267; IMA 2023, cit., clause 1(2)(a); House of Commons Hansard, vol. 729, col. 578, 13 March 2023.

three such schemes exist, relating to Syria, Ukraine, and Afghanistan. Yet, since it is nearly impossible for an individual to enter the UK directly from other countries, e.g., Iran, Venezuela, Eritrea, and Sudan, a bar from claiming asylum has been *de facto* set.[129]

The IMA has been described as an unprecedented attack on the UK's system of human rights protection, as well as a deep affront to international human rights and refugee law.[130] Most notably, it appears to be profoundly difficult to square with the ECHR.[131] When the Act was presented to Parliament as ordinarily required, Suella Braverman, the then Home Secretary, was unable to make a statement of compatibility with the HRA. This notwithstanding, the Government proceeded with the Bill, in effect admitting that the terms of the legislative proposal were such that it was not possible to maintain it was compatible with human rights standards. The latter amounts to a serious admission, especially considering that the inability to make a statement of compatibility under Section 19(1)(a) HRA is fairly rare.[132] Importantly and unusually, the statement was not submitted in respect of one complex or problematic issue.[133] The European Convention of Human Rights Memorandum released by the Home Office in conjunction with the IMA itself identifies a number of different ECHR

[129] P. ARNELL *et al.*, *op. cit.*, p. 267.

[130] P. ARNELL *et al.*, *op. cit.*, p. 267; House of Commons and House of Lords Joint Committee on Human Rights, *Legislative Scrutiny: Illegal Migration Bill*, 6 June 2023, p. 131.

[131] V. MITSILEGAS and E. GUILD, *op. cit.*, p. 120.

[132] P. ARNELL *et al.*, *op. cit.*, p. 268. It was the third time since the entry into force of the HRA that a Government Minister was unable to confirm that the provisions of the Bill are compatible with Convention rights. The two previous occasions were the repetition of Section 28 of the Local Government Act 1988, which prohibited the promotion of homosexuality and was repealed shortly thereafter, and the Communications Act 2003.

[133] Council of Europe, Parliamentary Assembly, Committee on Legal Affairs and Human Rights, *UK Reform of its Human Rights Legislation: Consequences for Domestic and European Human Rights Protection*, cit., p. 13.

provisions which may be affected by the legislation.[134] These include: Article 2 (right to life); Article 3 (prohibition of inhuman and degrading treatment); Article 4 (prohibition of slavery); Article 5 (right to liberty and security of person); Article 6 (right to fair trial); Article 8 (right to respect for private and family life); Article 13 (right to an effective remedy); and Article 14 (prohibition of discrimination).[135] In this context, a report produced by the Parliamentary Assembly of the Council of Europe ('PACE') in May 2023 seems particularly noteworthy.[136] The document is related to a previous decision of the Bureau and was drafted on the basis of the PACE's concerns that the Bill "openly flout[s] the UK's obligations under the ECHR".[137] The PACE feared that the Bill indicated an increased willingness on the part of the UK Government and certain legislators to legislate in a way that could risk breaching the country's international legal obligations. Concerns of compatibility were raised with regard not only to the ECHR, but also to the Refugee Convention, the Refugee Protocol, the 2005 Council of Europe Convention on Action against Trafficking in Human Beings ('ECAT'),[138] the 1989 UN Convention on the Rights of the Child ('UNCRC'),[139] the 1954 Convention relating to the Status of Stateless Persons,[140] and the 1961 Convention for the Reduction of

[134] UK Government, *Illegal Migration Bill – European Convention on Human Rights Memorandum*, 7 March 2023.
[135] UK Government, *Illegal Migration Bill – European Convention on Human Rights Memorandum*, cit., p. 2; P. ARNELL *et al.*, *op. cit.*, p. 268.
[136] Council of Europe, Parliamentary Assembly, Committee on Legal Affairs and Human Rights, *UK Reform of its Human Rights Legislation: Consequences for Domestic and European Human Rights Protection*, cit.
[137] A. DONALD and P. LEACH, *The UK vs the ECtHR: Anatomy of a Politically Engineered Collision Course*, May 2023, www.ein.org.uk.
[138] Council of Europe, *Council of Europe Convention on Action Against Trafficking in Human Beings* entered into force 1 February 2008, CETS No. 197 of 16 May 2005.
[139] UN General Assembly, *Convention on the Rights of the Child* entered into force 2 September 1990, UN Doc. A/RES/44/25 of 20 November 1989.
[140] UN General Assembly, *Convention relating to the Status of Stateless Persons* entered into force 6 June 1960, UN Doc. A/RES/526A(XVII) of 26 April 1954.

Statelessness and International Human Rights Law.[141] Consequently, the Bill was deemed to pose a real risk of increased legal uncertainty and conflict between UK domestic law and the ECHR requirements. Even though a number of amendments have been enacted, thereby reducing the occurrence of possible international law violations in certain limited respects, the central provisions of the IMA are still inconsistent with the country's obligations under international law.[142] Careful consideration should be given to the clauses related to: restrictions on the protections for VoTs; the adequacy of safeguards against indefinite or arbitrary detention of migrants; protections for children, including as concerns detention, removal and standards of case for children, including unaccompanied children; protections for refugees and stateless persons; the adequacy of due process, appeal rights; interim measures; and the availability of an effective remedy for individuals affected by decision-making.[143] Having said that, the present Section will provide a thorough analysis of three critical aspects of the IMA, i.e., removal, the repeal of Section 3 HRA, and interim measures.

As previously explained, the IMA creates a duty to arrange for the removal of individuals who enter or arrive in the United Kingdom without the required permission and have not "come directly" from a territory where their life or liberty were threatened.[144] In essence, individuals who have travelled through or stopped in a country where their life and liberty "were not so threatened" are not considered to have directly arrived in the United Kingdom.[145] They will be removed either

---

[141] UN General Assembly, *Convention for the Reduction of Statelessness and International Human Rights Law* entered into force on 13 December 1975, UN Doc. A/RES/896/IX of 30 August 1961; UNHCR, *UNHCR Legal Observations on the Illegal Migration Bill*, 2 May 2023, p. 1.

[142] UNHCR, *UNHCR Recommendations on the Implementation of the Illegal Migration Act 2023*, 6 October 2023.

[143] Council of Europe, Parliamentary Assembly, Committee on Legal Affairs and Human Rights, *UK Reform of its Human Rights Legislation: Consequences for Domestic and European Human Rights Protection*, cit., p. 2.

[144] IMA 2023, cit., clause 2(4).

[145] IMA 2023, cit., clause 2(5).

to their country of origin, the country from which they arrived, or a country where they will be admitted. A list of States to which individuals may be deported is provided in Schedule 1 IMA.[146] Removal applies irrespective of any asylum, human rights, slavery or human trafficking claims. Should a "real, imminent and foreseeable risk" of "serious and irreversible harm" be assessed, the individual may submit a "serious harm suspensive claim" within eight days of receiving their removal notice.[147] This provision is intended to ensure that removals do not breach the requirements of the Refugee Convention, as well as Articles 2 and 3 ECHR, in particular the principle of *non-refoulement*. At present, no one has been removed under the terms of the IMA because no lawful agreement with any third country cited in Schedule 1 – excluding Albania for some Albanian nationals – has been stipulated.[148] Indeed, as noted before, the APA with Rwanda was ruled unlawful by both the Court of Appeal and the Supreme Court. However, on 5 December 2023, the MoU was upgraded to a formal treaty signed by James Cleverly, the Home Secretary at the time of writing, and Vincent Biruta.[149] Were the treaty to be ratified by both the UK and Rwanda, the section of the IMA which places the duty of removal on the Home Secretary would come into force.[150] Nonetheless, it is crucial to realise that a significant portion of the content of the treaty can also be found in the MoU.[151] The treaty in itself is in fact not capable of changing the circumstances that the reasoning of the Supreme Court no

[146] IMA 2023, cit., Schedule 1.
[147] IMA 2023, cit., clause 38.
[148] J. MORGAN and L. WILLIMINGTON, *op. cit.*, p. 104.
[149] M. GOWER, P. BUTCHARD, and C. J. MCKINNEY, *op. cit.*, p. 4.
[150] J. MORGAN and L. WILLIMINGTON, *op. cit.*, p. 104; UK Government, *UK-Rwanda Treaty: Provision of an Asylum Partnership (Accessible)*, December 2023, www.gov.uk.
[151] Two main changes were implemented. First, Article 10.3 of the treaty provides that no person shall be removed from Rwanda even if their asylum claim is rejected. A residence permit in Rwanda would then be granted. Second, a new structure of determination of asylum claims by UK transferred asylum seekers is designed. Claims will be considered by a First Instance Body, followed by an appeal to an Appeal Body composed of judges from various nationalities.

longer apply.[152] At the heart of the Supreme Court's findings was that the Rwandan Government does not possess the practical ability to fulfil its assurances to the UK Government, at least in the short term.[153] In light of the fact that the treaty was signed less than one month after the Supreme Court judgement, it is rather unlikely that the structural challenges inherent in the Rwandan asylum system have been resolved in due time. Thus, anyone who would be sent to Rwanda under the terms of the treaty and the IMA would encounter the risk of *refoulement*.

Of great practical significance in the protection and promotion of human rights of persons arriving in the UK is the repeal of Section 3 HRA contained in clause 1(5) IMA.[154] Section 3 HRA provides that courts must interpret the law, as far as it is possible to do so, in a way which is compatible with the Convention rights.[155] If it is not possible to do so, then a court may endorse a declaration of incompatibility.[156] Whilst not affecting the validity of that provision, it does lead to the Government considering whether remedial action should be undertaken to remove the incompatibility.[157] Clause 1(5) IMA provides that Section 3 HRA does not apply to it, nor to provision made under it.[158] Accordingly, this important feature of human rights law is excluded.[159] Although it is legally permissible for the Government, through a duly enacted Act of Parliament, to exclude the operation of Section 3 HRA, that Act cannot affect the international legal obligation upon the UK to

---

[152] T. HICKMAN, *What is in the Prime Minister's 'Emergency' Asylum Legislation? Examining the Safety of Rwanda Bill and Rwanda Treaty*, 2023, p. 2.
[153] T. HICKMAN, *op. cit.*, p. 5; UK Supreme Court, *R (AAA and Others) v. Secretary of State for Home Department*, cit., par. 93.
[154] P. ARNELL *et al.*, *op. cit.*, p. 268.
[155] HRA 1998, cit., Section 3(1); O. POLLICINO, *Toward a Convergence Between the EU and ECHR Legal Systems?*, in G. REPETTO (edited by), *The Constitutional Relevance of the ECHR in Domestic and European Law – An Italian Perspective*, Cambridge, 2013, p. 114.
[156] P. ARNELL *et al.*, *op. cit.*, p. 268.
[157] P. ARNELL *et al.*, *op. cit.*, p. 268; HRA 1998, cit., Section 3(2).
[158] P. ARNELL *et al.*, *op. cit.*, p. 268; IMA 2023, cit., clause 1(5).
[159] P. ARNELL *et al.*, *op. cit.*, p. 268.

adhere to the terms of the ECHR.[160] This action ultimately delays consideration of the human rights issues under the IMA, preventing domestic courts from initiating such action and leaving it to the ECtHR to eventually do so.[161] In consequence, the need for further litigation before the Strasbourg Court will arise.[162]

Finally, clause 55 IMA provides that the Secretary of State, immigration officer, Upper Tribunal and courts may not have regard to an interim measure of the ECtHR.[163] The Strasbourg Court has made clear that a failure to abide by interim measures, such as those preventing a person's removal where they could face a real risk of serious harm, is itself a breach of Articles 1 and 34 of the Convention.[164] The scope of these interim measures and the consequences of a respondent State's failure to respect them were ruled upon in the leading case *Mamatkulov and Askarov v. Turkey*.[165] Clause 55 IMA therefore runs a clear risk of placing the UK in breach of its obligations under the Convention.[166] This was confirmed in a joint statement issued on 26

---

[160] P. ARNELL *et al.*, *op. cit.*, p. 268.

[161] P. ARNELL *et al.*, *op. cit.*, p. 268.

[162] Council of Europe, Parliamentary Assembly, Committee on Legal Affairs and Human Rights, *UK Reform of its Human Rights Legislation: Consequences for Domestic and European Human Rights Protection*, cit., p. 8.

[163] P. ARNELL *et al*, *op. cit.*, p. 268; IMA 2023, cit., clause 55; Council of Europe, Parliamentary Assembly, Committee on Legal Affairs and Human Rights, *UK Reform of its Human Rights Legislation: Consequences for Domestic and European Human Rights Protection*, cit., p. 17.

[164] Council of Europe, Parliamentary Assembly, Committee on Legal Affairs and Human Rights, *UK Reform of its Human Rights Legislation: Consequences for Domestic and European Human Rights Protection*, cit., p. 15. Article 34 ECHR reads as follows: "The Court may receive applications from any person, non-governmental organization 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".

[165] ECtHR, *Mamatkulov and Askarov v. Turkey* [GC], cit., par. 125; A. CALIGIURI and N. NAPOLETANO, *op. cit.*, p. 151.

[166] Council of Europe, Parliamentary Assembly, Committee on Legal Affairs and Human Rights, *UK Reform of its Human Rights Legislation: Consequences for Domestic and European Human Rights Protection*, cit., p. 15.

April 2023 by George Katrougalos, rapporteur for "The European Convention on Human Rights and national constitutions" and Constantinos Efstathiou, rapporteur for "Implementation of judgements of the European Court of Human Rights", who affirmed that clause 55 "place[s] on the statute book a provision that contemplates the UK Government deliberately breaching its international obligation to comply with interim measures".[167]

The present Section illustrated the July 2023 IMA in the context of the New Plan for Immigration. Overall, this Chapter has demonstrated that the ECHR has not been adequately implemented in the UK after Brexit with respect to migrant protection.

[167] Council of Europe, Parliamentary Assembly, Committee on Legal Affairs and Human Rights, *UK Reform of its Human Rights Legislation: Consequences for Domestic and European Human Rights Protection*, cit., p. 15; G. KATROUGALOS and C. EFSTATHIOU, *PACE Rapporteurs React to Vote on UK's Illegal Migration Bill*, April 2023, www.pace.coe.int.

CHAPTER 2. THE PROTECTION OF VICTIMS OF HUMAN TRAFFICKING

The purpose of this Chapter is to determine whether the UK has been fulfilling its obligations under the ECHR with reference to the protection of VoTs as a vulnerable group. Trafficking in human beings is considered "one of the most egregious violations of human rights".[168] Consequently, it is surely worth analysing the implementation of the Convention in this regard.

Chapter 2 is structured as follows. First, an overview of the Strasbourg Court's case law will be provided. Section 2.1 will thus start with a short introduction to the subject, emphasising the relevance of trafficking in human beings as a complex international phenomenon.[169] The facts of the cases which have been brought to the ECtHR will be briefly described, whereas their legal analysis will be the object of more detailed investigation. The Section will be useful for understanding the judgement at the heart of the Chapter, i.e., *V.C.L. and A.N. v. The United Kingdom*. At the beginning of Section 2.2, the facts of the case, as submitted by the parties, will be disclosed. Subsequently, the relevant legal framework and practice will be examined. Thereafter, the Court's reasoning will be presented. Finally, some conclusions will be reached. Section 2.3 will then ascertain whether the ECtHR's ruling has been executed by domestic courts in subsequent proceedings. This will be achieved through an examination of two judgements delivered by the Court of Appeal. Once more, the facts of the cases will be described, but the prime focus of the Section will be on their legal analysis.

---

[168] D. R. HODGE, *Assisting Victims of Human Trafficking: Strategies to Facilitate Identification, Exit from Trafficking, and the Restoration of Wellness*, in *Social Work*, 2014, p. 117; K. BALES, *Disposable People: New Slavery in the Global Economy*, Berkeley, 2012.

[169] D. R. HODGE, *op. cit.*, p. 111.

2.1. Victims of Human Trafficking Protection through the Case Law of the European Court of Human Rights

Over the past few decades, human trafficking has been posing major challenges to the international community.[170] As Yury Fedotov, former Executive Director of the UN Office on Drugs and Crime ('UNODC'), asserted in 2016, human trafficking amounts to "a parasitic crime that feeds on vulnerability, thrives in times of uncertainty, and profits from inaction".[171] Numerous international legal instruments have been adopted with the aim of preventing said phenomenon, e.g., the UN Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949)[172] and the UN Convention against Transnational Organized Crime (2000) (further, 'the Palermo Protocol').[173] At regional level, the Council of Europe has promoted the ratification of the ECAT, which came into force on 1 February 2008.[174]

---

[170] L. GASPARI, *The International and European Legal Framework on Human Trafficking: An Overall View*, in *DEP – Deportate, Esuli, Profughe*, 2019, p. 47; B. MILISAVLJEVIC and B. CUCKOVIC, *Case-Law of the European Court of Human Rights Relating to Trafficking in Human Beings*, in *International Scientific Conference "Archibald Reiss Days" – Thematic Conference Proceedings of International Significance*, 2015, p. 257.

[171] UNODC, *World Day against Trafficking in Persons Statements (2020)*, July 2020, www.unodc.org; L. GASPARI, *op. cit.*, p. 47.

[172] UN General Assembly, *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others* entered into force 25 July 1951, UN Doc. 317(IV) of 2 December 1949.

[173] B. MILISAVLJEVIC and B. CUCKOVIC, *op. cit.*, p. 257; L. KING, *International Law and Human Trafficking*, in *Human Rights & Human Welfare*, 2009, p. 88; UN General Assembly, *United Nations Convention against Transnational Organized Crime* entered into force 29 September 2003, UN Doc. A/RES/55/25 of 15 November 2000; V. TURANJANIN and J. STANISAVLJEVIC´, *Human Trafficking and Forced Prostitution under Article 4 of the European Convention on Human Rights*, in *German Law Journal*, 2024, p. 263.

[174] B. MILISAVLJEVIC and B. CUCKOVIC, *op. cit.*, p. 257; Council of Europe, *Action against Trafficking in Human Beings*, August 2024, www.coe.int. It should be

Despite the relevance of the issue, the case law of the Strasbourg Court on human trafficking is remarkably scarce.[175] In a similar vein, the jurisprudence of the Inter-American Court of Human Rights ('IACtHR'), the African Court on Human and Peoples' Rights ('ACtHPR'), and the United Nations Human Rights Committee ('UNHRC') in this field is limited.[176] Above all, one has to consider that the possibility for the ECtHR to pass judgement in a human trafficking case was not immediately clear due to the absence of an express prohibition in the Convention.[177] This notwithstanding, the Court ultimately resorted to its "living instrument doctrine",[178] which is deeply rooted in the case law of the ECtHR.[179] In consequence, Article

---

said that the ECAT has been ratified by all 46 Council of Europe Member States, as well as by Belarus and Israel.

[175] V. STOYANOVA, *European Court of Human Rights and the Right Not to Be Subjected to Slavery, Servitude, Forced Labor, and Human Trafficking*, in J. WINTERDYK and J. JONES (edited by), *The Palgrave International Handbook of Human Trafficking*, Cham, 2020, p. 1394; V. MILANO, *The European Court of Human Rights' Case Law on Human Trafficking in Light of* L.E. v Greece*: A Disturbing Setback?*, in *Human Rights Law Review*, 2017, p. 701.

[176] V. MILANO, *op. cit.*, p. 701.

[177] V. MILANO, *op. cit.*, p. 703.

[178] M. C. PETERSMANN, *Life Beyond the Law – From the 'Living Constitution' to the 'Constitution of the Living'*, in *Heidelberg Journal of International Law*, 2022; R. BERNHARDT, *Evolutive Treaty Interpretation, Especially of the European Convention on Human Rights*, in *German Yearbook of International Law*, 2013; T. WEBB, *Essential Cases: Public Law*, Oxford, 2023. In his capacity as ECtHR President, Rudolf Bernhardt repeatedly stressed the need for a 'dynamic' interpretation of the Convention, depending on the evolving nature of contemporary "questions and problems". In his view, the ECHR was to be regarded as a "living instrument". The "living instrument doctrine" bears resemblance to the US "living constitution" and the Canadian "living tree" doctrines, both of which consider society as a "living organism". This interpretative approach was first established by the Court in its 1979 decision *Tyrer v. The United Kingdom*.

[179] V. MILANO, *op. cit.*, p. 703.

4 of the Convention (prohibition of slavery and forced labour) has been interpreted as encompassing trafficking in human beings.[180]

The Court's embryonic jurisprudence concerning human trafficking commenced in 2005 with the case of *Siliadin v. France*.[181] The application was brought by a Togo national, who had been trafficked to France. She claimed that the country had violated Article 4 of the Convention by failing to afford her adequate protection against slavery and forced labour.[182] In its legal reasoning, the ECtHR proceeded by posing two key questions.[183] On the one hand, it sought to ascertain the nature of the prohibited conduct as set forth in Article 4 ECHR.[184] On the basis of the international legal framework established by the 1926 Slavery Convention,[185] the 1930 International Labour

---

[180] K. HUGHES, *Human Trafficking,* SM v Croatia *and the Conceptual Evolution of Article 4 ECHR*, in *Modern Law Review*, 2021, p. 1045; V. TURANJANIN and J. STANISAVLJEVIC´, *op. cit.*, p. 263; H. FENWICK, *Civil Liberties and Human Rights*, London, 2007, p. 50. Article 4 ECHR reads as follows: "(1) No one shall be held in slavery or servitude. (2) No one shall be required to perform forced or compulsory labour. (3) For the purpose of this Article the term "forced or compulsory labour" shall not include: (a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention; (b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service; (c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community; (d) any work or service which forms part of normal civic obligations". It is worth noting that, as things stand, the Court has identified violations of Article 4 ECHR in a small number of cases. According to Fenwick, Article 4 of the Convention appears to be "largely irrelevant in modern European democracies" because of its "restrictive wording", which "has not proved possible to interpret Art 4 in such a way as to allow it to cover rights unthought of when it was conceived". Nevertheless, over the last ten years, the ECtHR has endeavoured to adopt a more expansive interpretation of the provision.

[181] ECtHR, *Siliadin v. France*, Appl. No. 73316/01, judgement of 26 July 2005.

[182] B. MILISAVLJEVIC and B. CUCKOVIC, *op. cit.*, p. 258.

[183] V. MILANO, *op. cit.*, p. 704.

[184] V. MILANO, *op. cit.*, p. 704.

[185] League of Nations, *Slavery Convention* entered into force 9 March 1927, UN Doc. 60 of 25 September 1926.

Organisation ('ILO') Forced Labour Convention,[186] and the 1956 Supplementary Convention on the Abolition of Slavery,[187] the Strasbourg Court reflected upon the distinction between forced labour, servitude, and slavery.[188] It ruled that the applicant had been subjected to forced labour and servitude. Hence, the conditions under which she had been held did not constitute slavery.[189] The latter was understood as requiring "a genuine right of legal ownership" prohibited, *in casu*, by the French legal system.[190] As indicated by Milano, this approach has been heavily criticised.[191] Since slavery is forbidden *de jure*, "referring to legal ownership over a person limits the applicability of Article 4(1) to cases that are not legally possible today".[192] Therefore, it would have been preferable to interpret the prohibition "as including slavery *de jure* and *de facto*".[193] On the other hand, the Court assessed the extent of the State's positive obligations under Article 4 ECHR.[194] In particular, it was argued that Article 4 of the Convention entails an obligation to impose penalties in the event of a breach of said

[186] ILO, *Convention concerning Forced or Compulsory Labour* entered into force 1 May 1932, UN Doc. ILO/C/029 of 28 June 1930.
[187] UN Conference of Plenipotentiaries on a Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery* entered into force 30 Aprile 1957, UN Doc. 608(XXI) of 30 April 1956.
[188] V. MILANO, *op. cit.*, p. 704.
[189] B. MILISAVLJEVIC and B. CUCKOVIC, *op. cit.*, p. 259; V. MILANO, *op. cit.*, p. 704; V. STOYANOVA, *op. cit.*, p. 1395.
[190] ECtHR, *Siliadin v. France*, cit., par. 122; V. STOYANOVA, *op. cit.*, p. 1395; V. MILANO, *op. cit.*, p. 704.
[191] V. MILANO, *op. cit.*, p. 704.
[192] V. MILANO, *op. cit.*, p. 704.
[193] V. MILANO, *op. cit.*, p. 704.
[194] V. STOYANOVA, *op. cit.*, p. 1395; F. DORSSEMONT, *Enforcing the Prohibition against Human Trafficking: The Teaching of the European Court on Human Rights*, in M. J. J. P. LUCHTMAN, *Of Swords and Shields: Due Process of Crime Control in Times of Globalization*, The Hague, 2023, p. 592; V. MILANO, *op. cit.*, p. 705.

provision.[195] In spite of the Strasbourg Court's narrow interpretation of the definition of slavery, France was found to have violated Article 4 ECHR on the grounds that the conditions of forced labour and servitude to which the applicant was subjected had not been criminalised.[196] Specifically, "the criminal-law legislation in force at the material time did not afford the applicant […] practical and effective protection against the actions of which she was a victim".[197] The issue under French law was the insufficient precision and clarity of Article 225-14 of the French Criminal Code.[198] Indeed, the Court noted that a provision which prohibits the submission of an individual "to working or living conditions incompatible with human dignity" was inadequate in light of "the lack of legal criteria […] which had led in practice to unduly restrictive interpretations".[199]

As noted above, *Siliadin v. France* represents an early stage of the Court's case law on human trafficking. It was with the judgement in *Rantsev v. Cyprus and Russia*[200] that the ECtHR explicitly mentioned trafficking in human beings.[201] The applicant was the father of a young woman who had been subjected to trafficking from Russia to Cyprus.[202] He complained that the Cypriot police had not taken sufficient measures to safeguard his daughter from trafficking while she was alive and to punish those responsible for her death.[203] Furthermore, he complained

---

[195] V. STOYANOVA, *op. cit.*, p. 1395; F. DORSSEMONT, *op. cit.*, p. 592; V. MILANO, *op. cit.*, p. 705.

[196] V. STOYANOVA, *op. cit.*, p. 1395; B. MILISAVLJEVIC and B. CUCKOVIC, *op. cit.*, p. 259.

[197] ECtHR, *Siliadin v. France*, cit., par. 148.

[198] F. DORSSEMONT, *op. cit.*, p. 592 ; ECtHR, *Siliadin v. France*, cit., par. 47.

[199] F. DORSSEMONT, *op. cit.*, p. 592 ; ECtHR, *Siliadin v. France*, cit., pars. 47, 99, and 148;

[200] ECtHR, *Rantsev v. Cyprus and Russia*, Appl. No. 25965, judgement of 7 January 2010.

[201] V. MILANO, *op. cit.*, p. 705.

[202] ECtHR, *Rantsev v. Cyprus and Russia*, cit., par. 282; V. STOYANOVA, *op. cit.*, pp. 1395-1396; ECtHR, *Factsheet – Trafficking in Human Beings*, December 2023, p. 1.

[203] ECtHR, *Factsheet – Trafficking in Human Beings*, cit., p. 1.

that the Russian authorities had failed to adequately investigate the circumstances surrounding his daughter's trafficking and subsequent death, as well as to provide her with the necessary protection from the risk of trafficking.[204] In the first place, the Court recalled that "Article 4 makes no mention of trafficking, proscribing 'slavery', 'servitude' and 'forced labour'".[205] It highlighted, however, that trafficking in human beings is fundamentally at odds with the values espoused by the Convention.[206] Thereafter, it drew upon the International Criminal Tribunal for the Former Yugoslavia's ('ICTY') judgement in the case of *Prosecutor v. Kunarac, Vukovic and Kovac* in order to adopt an expansive interpretation of slavery.[207] The Court further held that it "considers it unnecessary to identify whether the treatment about which the applicant complains constitutes 'slavery', 'servitude' or 'forced and compulsory labour'".[208] Conversely, "trafficking itself, within the meaning of Article 3(a) of the Palermo Protocol and Article 4(a) of the Anti-Trafficking Convention, falls within the scope of the Convention" and requires "a comprehensive approach".[209] Following Milano, this statement is based on the international law principle of systemic

[204] ECtHR, *Factsheet – Trafficking in Human Beings*, cit., p. 1.
[205] ECtHR, *Rantsev v. Cyprus and Russia*, cit., par. 272.
[206] V. MILANO, *op. cit.*., p. 705.
[207] V. MILANO, *op. cit.*, p. 705; ECtHR, *Rantsev v. Cyprus and Russia*, cit., pars. 277 and 282; ICTY, *Prosecutor v. Kunarac, Vukovic and Kovac*, IT-96-23 & 23/1, judgement of 12 June 2002, par. 117.
[208] ECtHR, *Rantsev v. Cyprus and Russia*, cit., par. 282. L. GASPARI, *op. cit.*, p. 59.
[209] F. DORSSEMONT, *op. cit.*, p. 591; ECtHR, *Rantsev v. Cyprus and Russia*, cit., pars. 282 and 285; L. GASPARI, *op. cit.*, p. 85. Article 3(a) of the Palermo Protocol coincides with Article 4(a) ECAT and defines human trafficking as "the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs".

integration, which is illustrated in Article 31(3)(c) VCLT.[210] The aforementioned principle is particularly relevant when the concept to be interpreted is expressed in general terms, rendering it susceptible to evolving interpretations, as is the case for human trafficking.[211] The fact that the Court incorporated trafficking in human beings into Article 4 of the Convention prompted criticism.[212] This is because the ECtHR did not explain its legal reasoning behind the relation between the prohibition of human trafficking and the prohibitions of slavery, servitude, and forced labour expressed in Article 4 of the Convention.[213] First, the Court affirmed that trafficking in human beings "is based on the exercise of powers attaching to the right of ownership", thereby stating that "trafficking is a form of slavery".[214] However, the ECtHR then proceeded to state that trafficking in human beings constitutes a violation of Article 4 of the Convention and that it is not necessary to clarify whether it amounts to slavery, servitude, or forced labour.[215] In spite of such criticism, the Strasbourg Court has persisted in its interpretation of the prohibition of human trafficking as encompassed by Article 4 ECHR.[216] Yet, definitional ambiguity remains owing to the two approaches introduced in *Rantsev*.[217] On the one hand, the Court adopted the "characteristics approach", which provides an account of the nature of trafficking in human beings, the intentions of traffickers,

[210] V. MILANO, *op. cit.*, p. 706. Article 31 of the VCLT specifies the general rules of interpretation of international treaties. As regards the principle of systemic integration, the VCLT clarifies that "there shall be taken into account, together with the context […] any relevant rules of international law applicable in the relations of the parties". The ECtHR usually refers to this provision in cases where it applies rules of customary international law or international treaties to adopt either an expansive or a restrictive reading of the Convention.

[211] V. MILANO, *op. cit.*, p. 707.

[212] K. HUGHES, *op. cit.*, p. 1046.

[213] F. DORSSEMONT, *op. cit.*, p. 591; V. MILANO, *op. cit.*, p. 706.

[214] ECtHR, *Rantsev v. Cyprus and Russia*, cit., par. 281; V. MILANO, *op. cit.*, p. 706.

[215] ECtHR, *Rantsev v. Cyprus and Russia*, cit., par. 282; V. MILANO, *op. cit.*, p. 706.

[216] K. HUGHES, *op. cit.*, p. 1046.

[217] K. HUGHES, *op. cit.*, p. 1048.

and the effects of the phenomenon upon victims.[218] On the other hand, the ECtHR resorted to the "international law definition".[219] It affirmed that trafficking in human beings falls within the scope of Article 4 ECHR when it is understood "within the meaning of Article 3(a) of the Palermo Protocol and Article 4(a) of the Anti-Trafficking Convention".[220] It ensues that the Court has since been employing either one approach or the other.[221] With reference to the States' positive obligations under Article 4 of the Convention, the ECtHR confirmed the obligation to penalise and prosecute any behaviour which implies that a person is subjected to slavery, servitude or forced or compulsory labour.[222] *Rantsev* has been extensively commented upon by scholars and international bodies alike.[223] For instance, in its 2012-2016 Strategy for the Eradication of Trafficking, the EU referred to the judgement "as a decisive human rights benchmark with clear obligations for Member States to take the necessary steps to address different areas of trafficking in human beings".[224]

Even though the complaint under Article 4 of the Convention was deemed inadmissible, the case of *M. and Others v. Italy and Bulgaria*[225] is also noteworthy.[226] As in *Rantsev*, the ECtHR ruled that the prohibition of human trafficking falls within the scope of Article

[218] K. HUGHES, *op. cit.*, p. 1048; ECtHR, *Rantsev v. Cyprus and Russia*, cit., par. 281.
[219] K. HUGHES, *op. cit.*, p. 1048; ECtHR, *Rantsev v. Cyprus and Russia*, cit., par. 282.
[220] K. HUGHES, *op. cit.*, p. 1048; ECtHR, *Rantsev v. Cyprus and Russia*, cit., par. 282.
[221] K. HUGHES, *op. cit.*, p. 1048.
[222] B. MILISAVLJEVIC and B. CUCKOVIC, *op. cit.*, p. 260.
[223] V. MILANI, *op. cit.*, p. 708.
[224] V. MILANI, *op. cit.*, p. 708; European Commission, *The EU Strategy towards the Eradication of Trafficking in Human Beings 2012-2016*, COM(2012) 286 final of 19 June 2012, p. 5.
[225] ECtHR, *M. and Others v. Italy and Bulgaria*, Appl. No. 40020/03, judgement of 31 July 2012.
[226] V. STOYANOVA, *op. cit.*, p. 1399.

4.[227] In the instant case, the international law definition of trafficking was applied.[228]

The distinction between forced labour and servitude was clarified in *C.N. and V. v. France*.[229] The applicants were two orphaned sisters from Burundi who had allegedly been subjected to servitude or forced or compulsory labour as they performed domestic chores in their aunt and uncle's home.[230] The ECtHR held that "servitude corresponds to […] 'aggravated' forced or compulsory labour. […] [T]he fundamental distinguishing feature of servitude is the permanence of the victim's feeling that their condition is permanent and that the situation is unlikely to change".[231] In consequence, only the conditions of the first applicant amounted to servitude, since she did not perceive any possibility of improvement of her situation.[232] Lastly, the ECtHR recalled that France, as in *Siliadin*, was under the obligation to criminalise abuses under Article 4 of the Convention.[233] Also in this case, the national authorities had interpreted the French criminal law in a manner which was unduly restrictive.[234]

In *C.N. v. The United Kingdom*,[235] the Strasbourg Court reflected upon the positive obligation to conduct an effective investigation. The applicants, two Ugandan women, complained that they had been forced into working as live-in carers. In order to assess whether the UK authorities had complied with the country's positive obligations under Article 4 of the Convention, the ECtHR determined that it was crucial to prove the existence of a "credible suspicion" that

---

[227] V. STOYANOVA, *op. cit.*, p. 1400.
[228] V. STOYANOVA, *op. cit.*, p. 1400; ECtHR, *M. and Others v. Italy and Bulgaria*, cit., par. 154.
[229] ECtHR, *C.N. and V. v. France*, Appl. No. 67724/09, judgement of 11 October 2012.
[230] ECtHR, *Factsheet – Trafficking in Human Beings*, cit. p. 1.
[231] V. STOYANOVA, *op. cit.*, p. 1398; ECtHR, *C.N. and V. v. France*, cit., par. 91.
[232] V. STOYANOVA, *op. cit.*, p. 1398.
[233] V. STOYANOVA, *op. cit.*, p. 1398; ECtHR, *C.N. and V. v. France*, cit., par. 91.
[234] V. STOYANOVA, *op. cit.*, p. 1398.
[235] ECtHR, *C.N. v. The United Kingdom*, Appl. No. 4239/08, judgement of 13 November 2012.

the applicants had been held in conditions of domestic servitude.[236] Importantly, *C.N. v. The United Kingdom* indicated that States shall comply not only with their substantial obligations, but also with their procedural obligations under Article 4 ECHR.[237]

The extent of States' positive obligations under Article 4 lied at the heart of the Court's judgement in *L.E. v. Greece* as well.[238] More precisely, the ECtHR focused on Greece's duty to establish an appropriate legal and administrative framework to prohibit and punish trafficking in human beings.[239] In this case, however, a superficial approach was adopted to scrutinise the country's legislative and administrative framework.[240] The latter was deemed appropriate, even though the national legislation criminalising human trafficking simply incorporated the definition of the UN Trafficking Protocol and the ECAT, leaving it open to different interpretations.[241]

With the case of *J. and Others v. Austria*,[242] the Court had the opportunity to clarify that the identification and assistance of victims is of paramount importance and is independent of criminal proceedings.[243] Indeed, while the purpose of the former is "to identify and potentially prosecute alleged traffickers", the latter are aimed at identifying and assisting VoTs.[244] In regard to the definition of trafficking, the ECtHR maintained that it is not necessary to distinguish between slavery, servitude, or forced labour as "[t]he identified elements of trafficking – the treatment of human beings as commodities, close surveillance, the circumscription of movement, the

[236] V. STOYANOVA, *op. cit.*, p. 1399.
[237] V. STOYANOVA, *op. cit.*, p. 1399; ECtHR, *C.N. v. The United Kingdom*, cit., par. 80.
[238] V. STOYANOVA, *op. cit.*, p. 1401; ECtHR, *L.E. v. Greece*, Appl. No. 71545/12, judgement of 21 January 2016.
[239] V. STOYANOVA, *op. cit.*, p. 1401.
[240] V. STOYANOVA, *op. cit.*, p. 1401.
[241] V. STOYANOVA, *op. cit.*, p. 1401.
[242] ECtHR, *J. and Others v. Austria*, Appl. No. 58216/12, judgement of 17 April 2017.
[243] V. STOYANOVA, *op. cit.*, p. 1402.
[244] V. STOYANOVA, *op. cit.*, p. 1403; ECtHR, *J. and Others v. Austria*, cit., par. 115.

use of violence and threats, poor living and working conditions, and little or no payment – cut across these three categories".[245]

Ambiguity regarding the material scope of Article 4 ECHR was further introduced with the case of *Chowdury and Others v. Greece*,[246] which concerned 42 Bangladeshi nationals who had been trafficked to Athens and had been compelled to work in a strawberry farm in Manolada. The Strasbourg Court affirmed that "exploitation through work is one of the forms of exploitation covered by the definition of human trafficking, and this highlights this intrinsic relationship between forced or compulsory labour and human trafficking".[247] Nonetheless, no explanation was provided as to the relation between forced or compulsory labour and human trafficking.[248]

General guidance on how the prohibition of trafficking in human beings can be read into Article 4 of the Convention was offered in *S.M. v. Croatia*,[249] where the Court maintained that "the global phenomenon of trafficking in human beings runs counter to the spirit and purpose of Article 4 and thus falls within the scope of the guarantees offered by the provision".[250] It was also specified that it is not necessary for human trafficking to have a "transnational character".[251] This is of particular significance in light of the fact that "internal trafficking is currently the most common form of trafficking".[252]

To conclude, the above analysis shows that definitional uncertainty continues to surround the notion of human trafficking, which has been inserted as part of the conceptual apparatus of Article 4

---

[245] ECtHR, *J. and Others v. Austria*, cit., par. 104.

[246] ECtHR, *Chowdury and Others v. Greece*, Appl. No. 21884/15, judgement of 30 March 2017.

[247] ECtHR, *Chowdury and Others v. Greece*, cit., par. 93.

[248] V. STOYANOVA, *op. cit.*, p. 1402.

[249] ECtHR, *S.M. v. Croatia* [GC], Appl. No. 60561/14, judgement of 25 June 2020.

[250] F. DORSSEMONT, *op. cit.*, p. 591; ECtHR, *S.M. v. Croatia* [GC], *cit.*, par. 292; G. KANE, *Building a House upon Sand? Human Trafficking, Forced Labor, and Exploitation of Prostitution in* S.M. v. Croatia, in *International Labor Rights Case Law*, 2021, p. 76.

[251] F. DORSSEMONT, *op. cit.*, p. 592 ; ECtHR, *S.M. v. Croatia* [GC], cit., par. 296.

[252] ECtHR, *S.M. v. Croatia* [GC], cit., par. 295.

of the Convention.[253] That being said, considerable progress has been made by the Strasbourg Court as far as the States' positive obligations under Article 4 ECHR are concerned.[254] Drawing on the work of Mennim, these positive obligations can be summarised as follows.[255] First, Article 4 of the Convention places the duty to build a legislative and administrative framework to prohibit and punish trafficking.[256] This was stated in *Siliadin v. France*, where the Strasbourg Court affirmed that Member States shall "penalise and prosecute effectively any act aimed at maintaining a person in a situation of slavery, servitude or forced or compulsory labour".[257] Second, Article 4 creates the obligation, under certain circumstances, to protect VoTs and potential VoTs. Third, it establishes the procedural duty to "investigate situations of potential trafficking", which was defined in *Rantsev v. Cyprus and Russia*.[258] The first and the second obligation amount to substantive obligations, whereas the third obligation corresponds to a procedural obligation.[259]

2.2. The *V.C.L. and A.N. v. The United Kingdom* Case

In the previous Section, the ECtHR case law on human trafficking was reviewed. This thesis will now examine the Court's judgement in *V.C.L. and A.N. v. The United Kingdom*. The case is of paramount importance because it was the first time that Article 4 ECHR was considered in

[253] V. STOYANOVA, *op. cit.*, p. 1406.
[254] V. STOYANOVA, *op. cit.*, p. 1406.
[255] S. MENNIM, *The Non-Punishment Principle and the Obligations of the State Under Article 4 of the European Convention of Human Rights*, in *The Journal of Criminal Law*, 2021, p. 313.
[256] S. MENNIM, *op. cit.*, p. 313.
[257] ECtHR, *Siliadin v. France*, cit., par. 112; S. MENNIM, *op. cit.*, p. 313.
[258] S. MENNIM, *op. cit.*, p. 313.
[259] S. MENNIM, *op. cit.*, p. 313.

connection with the prosecution of (potential) VoTs.[260] Mr. V.C.L. and Mr. A.N. (further, 'the applicants'), two youths of Vietnamese nationality, filed an application against the UK with the Strasbourg Court on 20 November 2012 and 21 November 2012 respectively. The then minor applicants, both of whom were identified as VoTs by the appointed Competent Authority ('CA'), had been prosecuted for criminal offences related to their work as gardeners in cannabis farms.[261] Relying on Article 4 and Article 6(1) (right to a fair trial) ECHR,[262] they contended that they had not been adequately protected as VoTs, that a thorough investigation had not been conducted, and that their trial had been unfair.[263] On 16 February 2021, the Court held, unanimously, that the UK had violated said provisions. Consequently, the applicants were awarded monetary compensation in accordance

[260] J. TRAJER, *V.C.L. and A.N. v. The United Kingdom: Bridging the Gap between Children's Rights and Anti-Trafficking Law under the ECHR?*, in *International Labour Rights Case Law*, 2021, p. 309; H. BLAXLAND QC, E. FITZSIMONS, and S. CLARK, *ECHR Judgment Finds Failure to Adequately Protect Potential Victims of Child Trafficking*, February 2021, www.gardencourtchambers.co.uk.

[261] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 1.

[262] Article 6(1) reads as follows: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice".

[263] ECtHR, *Failure to Adequately Protect Two Potential Victims of Child Trafficking*, 16 February 2021, p. 1.

with Article 44(2) ECHR[264] for the damages sustained, together with the costs and expenses incurred.[265]

For a start, the facts of the case will be illustrated. On 6 May 2009, the police found Mr. V.C.L. (further, 'the first applicant') in a cannabis factory during the execution of a drugs raid.[266] He was discovered in possession of a mobile phone and some money.[267] In the course of the police interview, the first applicant affirmed that he was born in 1994 and that he was thus 15 years old.[268] He claimed to have been smuggled into the UK by his adoptive father.[269] Upon his arrival in the country, he was introduced to two men who escorted him to the cannabis farm.[270] The first applicant was charged with the illicit production of a controlled drug.[271] At the end of May 2009, concerns were voiced by the Non-Governmental Organisation ('NGO') Refugee and Migrant Justice over the fact that he might have been trafficked to the UK.[272] Nonetheless, he decided to plead guilty as advised by his counsel.[273] Even though the CA suggested the existence of "reasonable

[264] Article 44(2) ECHR reads as follows: "The judgment of a Chamber shall become final (a) when the parties declare that they will not request that the case be referred to the Grand Chamber; or (b) three months after the date of the judgment, if reference of the case of the Grand Chamber has not been requested; or (c) when the panel of the Grand Chamber rejects the request to refer under Article 43".

[265] ECtHR, *Failure to Adequately Protect Two Potential Victims of Child Trafficking*, cit., p. 4; ECtHR, *V.C.L. and A.N. v. The United Kingdom – 74603/12 and 77587/12. Information Note on the Court's case-law 248*, February 2021, p. 3.

[266] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 5; ECtHR, *Failure to Adequately Protect Two Potential Victims of Child Trafficking*, cit., p. 2.

[267] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 5.

[268] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., pars. 2 and 6; ECtHR, *Failure to Adequately Protect Two Potential Victims of Child Trafficking*, cit., p. 2.

[269] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 6; ECtHR, *Failure to Adequately Protect two Potential Victims of Child Trafficking*, cit., p. 2.

[270] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 6; ECtHR, *Failure to Adequately Protect Two Potential Victims of Child Trafficking*, cit., p. 2.

[271] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 6; ECtHR, *Failure to Adequately Protect Two Potential Victims of Child Trafficking*, cit., p. 2.

[272] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 8.

[273] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 10.

grounds for believing that he had been trafficked", the Crown Prosecution Service ('CPS') sentenced him to 20 months in a young offenders' institution.[274] In particular, the CPS identified four key aspects. First, that the first applicant was discovered "in an ordinary house" with a mobile phone and some money.[275] Second, that his family, who was still in Vietnam, was not in danger.[276] Third, that he was not indebted to anyone in his country of origin.[277] Fourth, that he had not been subjected to abuse prior to his arrest.[278] Similarly, on 21 April 2009, Mr. A.N. (further, 'the second applicant') was found in a cannabis factory alongside several other Vietnamese nationals.[279] He was discovered in possession of some money and maintained to be born in 1972. Therefore, he was treated as an adult.[280] During the police interview, he claimed that, upon his arrival to the UK, he encountered a man called 'H'.[281] The latter provided him with accommodation, clothes, food, and a job at the cannabis factory.[282] The second applicant was charged with the illicit production of drugs.[283] On 30 April 2009, while he was being heard before the Magistrates' Court, he declared that his year of birth was 1992 instead of 1972.[284] As a result, his case was addressed in accordance with the legal status of a minor.[285] In July 2009, the second applicant was advised by his counsel to plead guilty.[286]

---

[274] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., pars. 12 and 17; ECtHR, *Failure to Adequately Protect Two Potential Victims of Child Trafficking*, cit., p. 2.
[275] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 17.
[276] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 17.
[277] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 17.
[278] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 17.
[279] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 18; ECtHR, *Failure to Adequately Protect Two Potential Victims of Child Trafficking*, cit., p. 2.
[280] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 19; ECtHR, *Failure to Adequately Protect Two Potential Victims of Child Trafficking*, cit., p. 2.
[281] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 20.
[282] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 20.
[283] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 21.
[284] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 23.
[285] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 23.
[286] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 27.

He was then sentenced to 18 months detention and training order.[287] Nearly one year later, the second applicant's case was referred to the National Society for the Prevention of Cruelty to Child Trafficking Advice and Information Line ('NSPCC NCTAIL') by his new solicitor.[288] The second applicant was interviewed by a social worker from NSPCC NCTAIL, who, on the basis of the information collected, concluded that there were "reasonable grounds" for believing that he had been trafficked to the UK.[289] For instance, she noted that the people who arranged for him to leave Vietnam were clearly linked to those who exploited him in the UK.[290] The CA then confirmed the social worker's assumption that he had been trafficked.[291] More precisely, the account of his recruitment and subsequent movement from Vietnam was deemed to align with the definition of trafficking as outlined in Article 4(a) ECAT.[292] In March 2011, he was examined by a psychologist, who diagnosed him with Post-Traumatic Stress Disorder ('PTSD') and depression.[293] The second applicant's case was thus reviewed by a Special Casework Lawyer from the CPS.[294] Notwithstanding the conclusions reached by the NSPCC NCTAIL, the CA, and the psychologist, the lawyer affirmed that the second applicant's prosecution was necessary due to reasons of "public interest".[295] That being said, both applicants were afforded the opportunity to appeal the decision.[296] They argued, *inter alia*, that they should have been granted

[287] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 29; ECtHR, *Failure to Adequately Protect Two Potential Victims of Child Trafficking*, cit., p. 2.
[288] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 30.
[289] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 32.
[290] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 32.
[291] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 33.
[292] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit. par. 33.
[293] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 35.
[294] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 36.
[295] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 36.
[296] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 42; ECtHR, *Failure to Adequately Protect Two Potential Victims of Child Trafficking*, cit., p. 2.

immunity from prosecution given that they were VoTs.[297] At the end of February 2012, the Court of Appeal held that Article 26 ECAT, which sets forth the 'non-punishment principle', does not exclude *in toto* the possibility of prosecution for VoTs who are involved in unlawful activities.[298] In the Court of Appeal's opinion, the country's obligation under international law to respect the aforementioned provision could be fulfilled "by prosecutors exercising their discretion not to prosecute in appropriate cases".[299] The appeals submitted by both applicants were rejected on the grounds that the primary issue at hand was identified as being the abuse of process, which did not subsist.[300] Furthermore, the

[297] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., pars. 38 and 40; ECtHR, *Failure to Adequately Protect Two Potential Victims of Child Trafficking*, cit., p. 2.

[298] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 43; S. MENNIM, *op. cit.*, p. 313. Article 26 ECAT reads as follows: "Each Party shall, in accordance with the basic principles of its legal system, provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so". The non-punishment principle is also embodied in other legal instruments. First, Article 4(2) of the Protocol of 2014 to the 1930 Forced Labour Convention, which provides that "Each Member shall, in accordance with the basic principles of its legal system, take the necessary measures to ensure that competent authorities are entitled not to prosecute or impose penalties on victims of forced or compulsory labour for their involvement in unlawful activities which they have been compelled to commit as a direct consequence of being subjected to forced or compulsory labour". Second, Article 8 of the Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combatting trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, OJ 2011 L 101 (further, 'Anti-Trafficking Directive'), which establishes that "Member States shall, in accordance with the basic principles of their legal systems, take the necessary measures to ensure that competent national authorities are entitled not to prosecute or impose penalties on victims of trafficking in human beings for their involvement in criminal activities which they have been compelled to commit as a direct consequence of being subjected to any of the acts referred to in Article 2". It should be noted that the latter provision was still binding on the UK because the facts of the case occurred prior to the country's withdrawal from the EU.

[299] ECtHR, *Failure to Adequately Protect Two Potential Victims of Child Trafficking*, cit., p. 2.

[300] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 44.

Court of Appeal ruled that the decision to prosecute was "amply justified".[301] The first applicant's sentence was, however, reduced to a 12-month period of detention, while the second applicant's sentence was reduced to four months.[302] Both applicants were denied permission to appeal to the Supreme Court.[303] In December 2013, the first applicant sought to appeal the decision to prosecute once more.[304] Yet, his application was unsuccessful.[305]

In addressing the relevant legal framework, the ECtHR initially considered domestic law and practice. Specifically, the 2015 Modern Slavery Act ('MSA') was referenced.[306] The latter provides the legal framework to be respected with regard to the issue of human trafficking.[307] Section 45 MSA delineates the conditions which must be met for a defence to be applicable in cases where a nexus between trafficking and a criminal act is established.[308] Before the enactment of the 2015 MSA, no domestic legislation transposed the country's international legal obligations towards individuals who had committed crimes for reasons related to their situation as VoTs.[309] Consequently, it was the CPS who was responsible for implementing the UK's international legal obligations.[310] In consideration of the relevant international law and practice, the Court referred to Article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons,

[301] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 45; ECtHR, *Failure to Adequately Protect Two Potential Victims of Child Trafficking*, cit., p. 2.
[302] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., pars. 46 and 49; ECtHR, *Failure to Adequately Protect Two Potential Victims of Child Trafficking*, cit., p. 2.
[303] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 52; ECtHR, *Failure to Adequately Protect Two Potential Victims of Child Trafficking*, cit., p. 2.
[304] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 55.
[305] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 63; ECtHR, *Failure to Adequately Protect Two Potential Victims of Child Trafficking*, cit., p. 2.
[306] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 66; Modern Slavery Act 2015 (c. 30).
[307] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 66.
[308] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 67.
[309] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 68.
[310] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 68.

Especially Women and Children (2000),[311] which supplements the Palermo Protocol. Additionally, the UNCRC, the 1930 ILO Forced Labour Convention, the 2014 Protocol thereto,[312] and the ECAT were invoked. Lastly, the ECtHR referred to the Anti-Trafficking Directive,[313] since the UK was still part of the EU at the time of the events in question.

Turning to the Court's judgement, the alleged violation of Article 4 of the Convention was assessed. The first applicant contended that a proper investigation as to whether he had been trafficked was not conducted by the British authorities, who failed to ensure his protection.[314] The second applicant submitted the following complaints: that a violation of Article 4 ECHR was committed because he was not identified as a VoT prior to his prosecution; that he was deprived with the protection to which he was entitled due to the existing legal framework and the limited availability of judicial intervention; that the UK did not comply with its obligations to identify him as a VoT soon after his arrest at the cannabis factory; that the appropriate test to ascertain whether a child is a VoT was not performed; that VoTs shall not be criminalised for offences committed for reasons related to their status.[315] In the first instance, the scope of the applicants' complaints was clarified. The ECtHR stressed the fact that the central issue at stake was the fact that the CPS, and later the Court of Appeal, did not provide clear reasons for disagreeing with the conclusions reached by the CA

---

[311] UN General Assembly, *Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime* entered into force 25 December 2003, UN Doc. A/RES/55/25 of 15 November 2000.

[312] ILO, *Protocol of 2014 to the Forced Labour Convention, 1930* entered into force 9 November 2016, UN Doc. ILO/P/029 of 11 June 2014.

[313] Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting victims, and replacing Council Framework Decision 2002/629/JHA, in OJ 2011 L 101 of 15 April 2011.

[314] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 109.

[315] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 110.

concerning the applicants' status as VoTs.[316] Even though the applicants relied heavily on Article 26 ECAT, the Court highlighted that its jurisdiction is limited to the provisions enshrined in the ECHR.[317] Thus, it concentrated on the assessment of whether the country fulfilled the positive obligations contained in Article 4 of the Convention. The ECtHR recalled that, as a general principle, trafficking in human beings, irrespective of whether it is national or transnational, or connected with organised crime, is codified in Article 4 ECHR.[318] In order for said provision to be invoked, it is not necessary for the applicant to have been treated in a manner which constitutes slavery, servitude or forced or compulsory labour.[319] Notwithstanding, the three criteria outlined in Article 3(a) of the Palermo Protocol and Article 4(a) ECAT shall be respected.[320] First, "action", that is to say, the fact that the individual has to be recruited, transported, transferred, harboured or receipted.[321] Second, "means", that is to say, the fact that the person has to be forced or shall be subject to other form of coercion.[322] Third, "purpose", that is to say, the fact that the ultimate aim is exploitation, also including forced labour or services.[323] The presence of these criteria is "a factual question" which depends on the circumstances of the case.[324] The positive obligations which derive from Article 4 of the Convention shall be read in light of the ECAT.[325] At the same time, the guidance offered

[316] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 113.
[317] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 113; ECtHR, *National Union of Rail, Maritime and Transport Workers v. The United Kingdom*, Appl. No. 31045/10, judgement of 8 April 2014, par. 106.
[318] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 148; ECtHR, *S.M. v. Croatia* [GC], cit., par. 296.
[319] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 148; ECtHR, *Rantsev v. Cyprus and Russia*, cit., par. 282.
[320] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 149.
[321] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 54.
[322] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 54.
[323] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 54.
[324] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 149; ECtHR, *S.M. v. Croatia* [GC], cit., par. 302.
[325] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 150.

by the interpretation of the GRETA is followed.[326] Under the terms of Article 4 ECHR, States are compelled "to penalise and prosecute effectively any act aimed at maintaining a person in a situation of slavery, servitude or forced or compulsory labour".[327] For this positive obligation to be fulfilled, a legislative framework has to be designed with the aim of protecting VoTs and punishing trafficking in human beings.[328] Where a "credible suspicion" that an individual has been trafficked or exploited as outlined in Article 3(a) of the Palermo Protocol and Article 4(a) ECAT, State authorities are compelled to take "operational measures" towards the person in question.[329] These include actions both to prevent the phenomenon of trafficking of human beings and to protect victims by assisting them from a physical and psychological point of view.[330] This obligation, however, shall not be interpreted in such a way that "an impossible or disproportionate burden" is imposed on State authorities.[331] From a procedural perspective, States shall also investigate a situation which might entail trafficking in human beings once the situation is brought to the attention of the national authorities.[332] That being said, the ECtHR stressed the fact that the case under analysis constitutes the first time in which Article 4 ECHR is considered for the prosecution of a (potential) VoT.[333] Overall, "no general prohibition on the prosecution of victims

[326] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 150; ECtHR, *Chowdury and Others v. Greece*, cit., par. 96.
[327] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 151; ECtHR, *Siliadin v. France*, cit., pars. 89 and 112.
[328] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 151; ECtHR, *Rantsev v. Cyprus and Russia*, cit., par. 285.
[329] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 152; ECtHR, *Rantsev v. Cyprus and Russia*, cit., par. 286.
[330] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 153; ECtHR, *Chowdury and Others v. Greece*, cit., par. 110.
[331] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 154; ECtHR, *Rantsev v. Cyprus and Russia*, cit., par. 287.
[332] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 155; ECtHR, *Rantsev v. Cyprus and Russia*, cit., par. 288.
[333] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 157.

of trafficking" can be derived from the ECAT or other international instrument which has been ratified by the UK.[334] The abovementioned 'non-punishment' provision enshrined in Article 26 ECAT, Article 8 of the Anti-Trafficking Directive, and Article 4(2) of the 2014 Protocol to the ILO Forced Labour Convention requires two criteria to be fulfilled, i.e., the fact that the victims "must have been compelled" to commit the criminal activity and that State authorities should decide not to prosecute.[335] Notwithstanding, the prosecution of a VoT might contrast with the State's positive obligation to protect the individual.[336] This is because prosecution might impede VoTs' integration into the new society and their access to services which could provide the physical as well as psychological support they needed.[337] In this respect, a decision to prosecute should be undertaken after a proper examination of the case and a trafficking assessment, which is particularly timely when children are involved.[338] The prosecutor should then present "clear reasons" to disagree with the assessment made by the CA.[339] With respect to the first applicant, the ECtHR asserted that the UK did not fulfil its obligations under Article 4 of the Convention.[340] Above all, the police should have considered the possibility that he was a VoT when he was discovered in the cannabis factory.[341] Even though social services had raised concerns about the fact that he might be a VoT, no assessment was requested on the part of the CA.[342] Once the CPS reviewed the decision to prosecute the first applicant after the CA's Conclusive Grounds ('CG') decision in which it was stated that he had been trafficked to the UK, the CPS confirmed the decision to prosecute and

[334] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 157.
[335] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 158.
[336] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 159.
[337] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 159.
[338] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 161.
[339] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 162.
[340] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 173.
[341] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 163.
[342] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 164.

affirmed that "no clear evidence of trafficking" was found.[343] When the first applicant was offered the possibility to appeal, the appeal was dismissed because the Court of Appeal concluded, once again, that the decision to prosecute "was amply justified".[344] However, according to the ECtHR, the CPS should have considered a number of elements in the first applicant's case which clearly indicated that he had been trafficked. On the one hand, at the time of his arrest, Vietnamese minors were flagged as being a "specific vulnerable group".[345] On the other hand, in a guidance released in February 2009 the CPS itself denoted that children are often not inclined to reveal pieces of information for several reasons, such as the fear of their traffickers and the psychological coercion to which they are exposed.[346] Hence, the Court affirmed that appropriate operational measures were not undertaken so as to protect the first applicant both as a potential and an actual VoT.[347] Therefore, a violation of Article 4 ECHR has been committed.[348] On similar grounds, the second applicant was not offered adequate protection either.[349] In light of what the CPS knew concerning the situation of young Vietnamese working in cannabis farms, the CPS should have acknowledged the existence of circumstances arising "a credible suspicion" that he had been trafficked.[350] These concerns should have been even more present when it was ascertained that the second applicant was a minor.[351] In consequence, a violation of the same Article was found as well in his regard.[352]

The applicants also argued that a breach of Article 6(1) ECHR had been committed on the part of the UK since they had been denied

[343] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 166.
[344] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 167.
[345] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 171.
[346] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 171.
[347] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 173.
[348] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 174.
[349] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 182.
[350] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 181.
[351] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 181.
[352] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 183.

a fair trial.[353] In order to assess whether a violation of this provision was committed, the Court tried to answer a number of questions, two of which will be analysed as follows.[354] First, whether the failure to conduct a proper investigation into the applicants' status raised issues under the terms of Article 6.[355] In this regard, the ECtHR highlighted the crucial importance of investigation prior to criminal proceedings, since it "determines the framework in which the offence charged will be considered at the trial".[356] Indeed, even though no immunity from prosecution can be found in international law, the identification of an individual as a VoT might influence whether sufficient evidence to prosecute exists and whether "it is in the public interest to do so".[357] Thus, the absence of such an assessment "prevented them from securing evidence which may have constituted a fundamental aspect of their defence".[358] The second question posed by the Court was whether the fairness of the proceedings was compromised on the whole.[359] The ECtHR answered positively in this respect, claiming that the reasons provided by the CPS when it disagreed with the CA were "wholly inadequate" and inconsistent with both the Palermo Protocol and the ECAT.[360] The same could be affirmed for the Court of Appeal, which primarily focused on the issue of abuse of process.[361] Accordingly, a violation of Article 6(1) was found by the ECtHR.[362]

In essence, the case of *V.C.L. and A.N. v. The United Kingdom* showed that the country had not provided adequate protection for two

---

[353] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 184.
[354] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 194.
[355] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 194.
[356] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 195; ECtHR, *Salduz v. Turkey* [GC], Appl. No. 36391/02, judgement of 27 November 2008, par. 54; ECtHR, *Dvorski v. Croatia* [GC], Appl. No. 25703/11, judgement of 20 October 2015, par. 108.
[357] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., pars. 161 and 196.
[358] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 200.
[359] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 200.
[360] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 207.
[361] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 208.
[362] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 210.

VoTs. This thesis will therefore proceed to evaluate whether action has been taken to comply with the judgement of the Strasbourg Court.

2.3. The Legal Implications of the Case for the United Kingdom

Since the facts of the *V.C.L. and A.N. v. The United Kingdom* case, a number of changes have been introduced in the British legislative, institutional, and policy framework with reference to VoTs protection.[363] By way of example, in 2020 the Home Office initiated a Transformation Programme of the National Referral Mechanism ('NRM')[364] with the objective of enhancing the efficacy of the decision-making and identification process.[365] In 2024, the roles and responsibilities of the actors involved in the NRM were delineated in a new Statutory Guidance.[366] Nevertheless, concerns remain over the implementation of the substantive and procedural obligations arising under the Convention.

The next pages will demonstrate that the ability of Section 45 of the MSA to protect VoTs against unjust criminal punishment has been weakened after the Strasbourg Court's ruling on the case of *V.C.L. and A.N. v. The United Kingdom*.[367] This is because CG decisions made by the Single Competent Authority ('SCA') (previously, 'CA') were declared inadmissible at trial in two subsequent judgements rendered by the Court of Appeal.[368] In wider terms, it can be argued that "the

[363] GRETA, *Evaluation Report: United Kingdom. Third Evaluation Round: Access to Justice and Effective Remedies for Victims of Trafficking in Human Beings*, GRETA 2021(12) of 20 October 2021, p. 3.

[364] The NRM consists of a framework for the identification and referral of individuals who may have been subjected to modern slavery. It ensures that these individuals receive assistance and support.

[365] GRETA, *op. cit.*, p. 3.

[366] GRETA, *op. cit.*, p. 3; Home Office, *Modern Slavery: Statutory Guidance for England and Wales (under s49 of the Modern Slavery Act 2015) and Non-Statutory Guidance for Scotland and Northern Ireland*, 31 May 2024.

[367] C. GREGORY, *The Modern Slavery Defence*, in *The Cambridge Law Journal*, 2022, p. 471.

[368] C. GREGORY, *op. cit.*, p. 471.

express policy of the courts has been to turn its face against mitigation" in cases involving VoTs, who tend to be treated as criminals as opposed to victims.[369]

The first case to be discussed is *R v. Brecani*,[370] which was brought before the Criminal Division of the Court of Appeal on 19 May 2021. Mr. Kevin Brecani (further, 'the appellant') is an Albanese national who was a minor at the time of the events.[371] He was part of an organised criminal group supplying cocaine with an estimated value of £ 660,000 from 18 February to 21 August 2019 in Southend, south-eastern Essex.[372] While he was attending school in Albania, he was approached by two young men on multiple occasions.[373] He began to sell cannabis for these individuals and stopped attending school.[374] Meanwhile, he met another man, Mr. Jetmir Cenaj, who was a member of the organised criminal group.[375] Mr. Cenaj encouraged him to travel illegally to the UK, where he was living.[376] The appellant decided to do so, thereby joining the organised criminal group.[377] His entire journey was organised by Mr. Cenaj.[378] Once in London, the appellant was picked up by two men who took him to a house in Mitcham, in the county of Surrey.[379] He was not allowed to leave the premises and was told he had to pay £ 15,000 for his travel to the UK.[380] He was then taken to Birmingham, Southend, and Dartford, where he stayed in a locked house and was forced to sell cocaine.[381] Although he did not want to do so, he eventually agreed as a result of threats of violence

[369] S. MENNIM, *op. cit.*, p. 315.
[370] Court of Appeal, *R v. Brecani*, EWCA Crim. 731, judgement of 19 May 2021.
[371] Court of Appeal, *R v. Brecani*, cit., par. 2.
[372] Court of Appeal, *R v. Brecani*, cit., par. 14.
[373] Court of Appeal, *R v. Brecani*, cit., par. 20.
[374] Court of Appeal, *R v. Brecani*, cit., par. 21.
[375] Court of Appeal, *R v. Brecani*, cit., par. 21.
[376] Court of Appeal, *R v. Brecani*, cit., par. 21.
[377] Court of Appeal, *R v. Brecani*, cit., par. 21.
[378] Court of Appeal, *R v. Brecani*, cit., par. 22.
[379] Court of Appeal, *R v. Brecani*, cit., par. 23.
[380] Court of Appeal, *R v. Brecani*, cit., par. 23.
[381] Court of Appeal, *R v. Brecani*, cit., pars. 23-24.

made by Mr. Cenaj.[382] On 21 August 2019, the appellant was arrested in Dartford, Kent.[383] Relying upon the statutory defence under Section 45(4) MSA, the appellant contended that his actions were "a direct consequence of [his] being, or having been, a victim of slavery or a victim of relevant exploitation".[384] Additionally, he claimed that "a reasonable person in the same situation […] and having [his] relevant characteristics would do that act".[385] At the beginning of March 2023, the SCA rendered a CG decision in which it posited that he was a victim of modern slavery.[386] In consequence, the appellant asked to bring the CG decision as expert evidence, but his request was rejected.[387] As of 26 March 2020, he was convicted of conspiracy to supply cocaine, alongside 13 other defendants.[388] He was found guilty and sentenced to a period of detention of three years.[389] Thus, he appealed the decision posing a number of questions for consideration.[390] The main point of contention was whether CG decisions reached by the SCA could be considered as expert evidence and hence admissible at trial.[391]

As a general rule, non-expert opinion evidence is inadmissible in a criminal trial.[392] In the instant case, the Court of Appeal claimed that members of the SCA are not experts in human trafficking or modern slavery, and that CG decisions should be considered as "statement[s] of opinion" which are released on the basis of the evidence placed before

---

[382] Court of Appeal, *R v. Brecani*, cit., par. 24.
[383] Court of Appeal, *R v. Brecani*, cit., par. 18.
[384] MSA 2015, cit., Section 45(4); Court of Appeal, *R v. Brecani.*, cit., par. 2.
[385] MSA 2015, Section 45(4); Court of Appeal, *R v. Brecani.*, cit., par. 2.
[386] S. MENNIM and T. WARD, *Expert Evidence, Hearsay and Victims of Trafficking*, in *The Journal of Criminal Law*, 2021, p. 472.
[387] S. MENNIM and T. WARD, *op. cit.*, p. 472.
[388] Court of Appeal, *R v. Brecani*, cit., par. 2; S. MENNIM and T. WARD, *op. cit*., p. 471.
[389] Court of Appeal, *R v. Brecani*, cit., par. 2; S. MENNIM and T. WARD, *op. cit.*, p. 471.
[390] S. MENNIM and T. WARD, *op. cit.*, p. 472.
[391] Court of Appeal, *R v. Brecani*, cit., par. 1; S. MENNIM and T. WARD, *op. cit.*, p. 472.
[392] Court of Appeal, *R v. Brecani*, cit., par. 44.

the decision-makers.[393] Consequently, CG decisions cannot be presented at trial as expert evidence.[394] In particular, the Court of Appeal stated the following:

> "It is not sufficient to assume that because administrators are likely to gain experience in the type of decision-making they routinely undertake that, simply by virtue of that fact, they can be treated as experts in criminal proceedings. The position of these decision-makers is far removed, for example, from experts who produce reports into air crashes for the Air Accident Investigation Branch of the Department of Transport which are admissible in evidence in civil proceedings".[395]

Whether the Court of Appeal's decision is compatible with the Strasbourg Court's ruling is questionable.[396] As observed hereinafter, the ECtHR affirmed that evidence of the defendant's status as a VoT is a "fundamental aspect" of the defence.[397] In order for an individual to be recognised as a VoT and protected under Section 45 of the MSA, it is extremely important for courts to be able to rely upon all available evidence, especially CG decisions. The latter are rendered after several months – or even a year – by a group of trained and qualified officials.[398] Indeed, the SCA was specifically established to implement the UK's obligations under Article 10(1) and (2) ECAT for the identification of victims.[399] Furthermore, the significance of CG decisions can be

[393] Court of Appeal, *R v. Brecani*, cit., par. 43.
[394] Court of Appeal, *R v. Brecani*, cit., par. 54.
[395] Court of Appeal, *R v. Brecani*, cit., par. 54.
[396] S. MENNIM and T. WARD, *op. cit.*, p. 473; T. WARD, *Prosecution of Victims of Trafficking: R v. AAD, R v. AAH, R v. AAI [2021] EWCA Crim. 106*, in *The Journal of Criminal Law*, 2022, p. 214.
[397] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 196.
[398] C. GREGORY, *op. cit.*, p. 473.
[399] C. GREGORY, *op. cit.*, p. 473. Article 10(1) and (2) ECAT read as follows: "(1) Each Party shall provide its competent authorities with persons who are trained and

inferred from the fact that, according to the ECtHR, should a court depart from a SCA determination, "clear reasons which are consistent with the definition of trafficking" outlined in the Palermo Protocol and the ECAT shall be presented.[400]

The precedent established in *R v. Brecani* was followed in the 2022 judgement *AAD, AAH, AAI v. R*, where members of the SCA were considered as "junior civil servants performing an administrative function" *in lieu* of "experts in human trafficking or modern slavery".[401] Once again, CG decisions could not be accepted on the grounds that the procedural rules of evidence require only expert-opinion evidence to be admitted at criminal trials.[402] In doing so, the Court of Appeal indicated that juries are adequately equipped to assess claims of human trafficking and modern slavery.[403] As explained by Gregory, "modern slavery […] is not considered sufficiently special for the jury to be assisted by Conclusive Grounds decisions".[404]

---

qualified in preventing and combating trafficking in human beings, in identifying and helping victims, including children, and shall ensure that the different authorities collaborate with each other as well as with relevant support organisations, so that victims can be identified in a procedure duly taking into account the special situation of women and child victims and, in appropriate cases, issued with residence permits under the conditions provided for in Article 14 of the present Convention. (2) Each Party shall adopt such legislative or other measures as may be necessary to identify victims as appropriate in collaboration with other Parties and relevant support organisations. Each Party shall ensure that, if the competent authorities have reasonable grounds to believe that a person has been victim of trafficking in human beings, that person shall not be removed from its territory until the identification process as victim of an offence provided for in Article 18 of this Convention has been completed by the competent authorities and shall likewise ensure that that person receives the assistance provided for in Article 12, paragraphs 1 and 2".

[400] ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 162; T. WARD, *op. cit.*, p. 214.

[401] Court of Appeal, *AAD, AAH, AAI v. R*, EWCA Crim. 106, judgement of 3 February 2022, par. 85; C. GREGORY, *op. cit.*, p. 472.

[402] C. GREGORY, *op. cit.*, p. 472.

[403] C. GREGORY, *op. cit.*, p. 473.

[404] C. GREGORY, *op. cit.*, p. 473.

Overall, the Court of Appeal's approach to VoTs protection seems contentious for two reasons.[405] On the one hand, it appears to be "wrong in principle" in light of "the importance and primacy of protection" of VoTs over prosecution and conviction.[406] On the other hand, it does not serve the public interest, since VoTs might be relied upon as witnesses or useful sources of information against their exploiters.[407] By rejecting CG decisions as expert evidence, the Court of Appeal does not allow VoTs to rely upon the protection afforded by Section 45 of the MSA. Most importantly, the admissibility of CG decisions raises issues concerning the right to a fair trial.[408] One might assume that, if some of the available evidence is excluded from trial, there is "strong indication" that said trial is unfair.[409] This is particularly timely not only in light of the Strasbourg Court's ruling in *V.C.L. and A.N. v. The United Kingdom*, but also on the GRETA evaluation report concerning the access to justice and effective remedies for VoTs.

[405] S. MENNIM, *op. cit.*, p. 315.
[406] S. MENNIM, *op. cit.*, p. 315; ECtHR, *V.C.L. and A.N. v. The United Kingdom*, cit., par. 160.
[407] S. MENNIM, *op. cit.*, p. 315.
[408] C. GREGORY, *op. cit.*, p. 214.
[409] C. GREGORY, *op. cit.*, p. 214.

CHAPTER 3. THE PROTECTION OF THE ENVIRONMENT

The primary objective of this Chapter is to scrutinise the UK's implementation of the Convention with reference to the protection of the environment, which, quoting the International Court of Justice ('ICJ'), "is under daily threat".[410]

The Chapter is organised as follows. Above all, Section 3.1 seeks to illustrate the evolution of environmental concerns in the case law of the ECtHR. By way of context, the relationship between the protection of the environment and human rights will be first explained. Thereafter, some insight will be yielded into the specificities of climate change cases. The aim is to facilitate an understanding of the following Section, which will focus on a climate change decision involving, among other States, the UK. The Chapter will go on, in Section 3.2, to consider the case *Duarte Agostinho and Others v. Portugal and 32 Others*. To begin with, the facts of the case will be disclosed. Then, the legal framework and practice which are relevant to *Duarte Agostinho and Others* will be elucidated. Subsequently, the parties' submissions will be unravelled. Finally, the Court's assessment will be discussed. Since the case did not reach the admissibility stage, the Chapter will conclude, in Section 3.3, by discussing a judgement which was brought before the British domestic courts. First, the case will be contextualised and, subsequently, the grounds of challenge will be presented. Section 3.3 will end with a general reflection on the country's compliance with the overall spirit of the Convention.

[410] ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, para 29.

3.1. Environmental Protection through the Case Law of the European Court of Human Rights

By the 1990s, it was generally accepted that immediate action was necessary in order to counter environmental threats. This has triggered the enactment of a bulk of legal norms. Concurrently, it became evident that environmental damage could affect the enjoyment of basic rights such as the right to life, the right to food, and the right to housing.[411] Although the right to a clean and healthy environment is often regarded as a "third generation" international human right, its significance is now widely acknowledged.[412]

One of the first international courts recognising the relationship between environmental deterioration and human rights was the ECtHR, whose case law "all but in name provides for a right to a healthy

---

[411] K. HECTORS, *The Chartering of Environmental Protection: Exploring the Boundaries of Environmental Protection as Human Right*, in *European Energy and Environmental Law Review*, 2008, p. 165; O. DE SCHUTTER, *op. cit.*, p. 550.

[412] V. P. TZEVELEKOS and K. DZEHTSIAROU, *Climate Change: The World and the ECtHR in Unchartered Waters*, in *European Convention on Human Rights Law Review*, 2022, p. 1; K. MORROW, *The ECHR, Environment-Based Human Rights Claims, and the Search for Standards*, in S. J. TURNER *et al.* (edited by), *Environmental Rights: The Development of Standards*, Cambridge, 2019, p. 43; Human Rights Council, *The Human Right to a Clean, Healthy and Sustainable Environment*, UN DOC. A/HRC/RES/48/13 of 18 October 2021, par. 1; K. VASAK, *A 30-Year Struggle; The Sustained Efforts to Give Force of Law to the Universal Declaration of Human Rights*, in *The UNESCO Courier: A Window Open on the World*, 1977, p. 29; M. A. HANNAN, *Third Generation Human Rights and the Good Governance*, in *International Journal of Sustainable Development*, 2010, p. 41. In accordance with Vasak, human rights can be classified into distinct "generations". "First generation" human rights are civil and political rights. Then, "second generation" human rights are social and economic rights. Finally, "third generation" human rights are the so-called "solidarity rights". These include the right to development, the right to peace, and, most notably, the right to a clean and healthy environment. The latter are considered to be "less legally tangible" and "almost utopian".

environment".[413] The premise underpinning the Strasbourg Court's environmental jurisprudence is that the absence of "basic environmental conditions" renders the assertion of fundamental human rights meaningless.[414] More recently, the relevance of said right has also been stressed by the PACE. In 2021, a resolution was indeed adopted so as to suggest a number of policies which redressed the "inequalities in access to the right to a safe, healthy and clean environment".[415]

First and foremost, it is important to note that the right to a clean and healthy environment is not proclaimed in the text of the Convention.[416] It was not in the drafters' intention to focus on the environment *per se*.[417] In Boyle's words, the ECHR is concerned with the protection of individuals' human rights.[418] Put differently, the Convention safeguards the environment by adopting an inherently

---

[413] B. PETERS, *The European Court of Human Rights and the Environment*, in E. SOBENES, S. MEAD, and B. SAMSON (edited by), *The Environment Through the Lens of International Courts and Tribunals*, The Hague, 2022, p. 190; O.W. PEDERSEN, *The European Court of Human Rights and International Environmental Law*, in J. H. KNOX and R. PEJAN (edited by), *The Human Right to a Healthy Environment*, Cambridge, 2018, p. 86.

[414] O. W. PEDERSEN, *Environmental Principles and the European Court of Human Rights*, in L. KRAMER and E. ORLAND (edited by), *Principles of Environmental Law, IUCN Encyclopedia of Environmental Law*, Cheltenham, 2018, p. 464, ECtHR, *Hatton v. The United Kingdom*, Appl. No. 36022/97, judgement of 8 July 2003, dissenting opinion, par. 1.

[415] Council of Europe, Parliamentary Assembly, *Combating Inequalities in the Right to a Safe, Healthy and Clean Environment*, resolution 2400 (2021) of 29 September 2021, par. 12; V. P. TZEVELEKOS and K. DZEHTSIAROU, *op. cit.*, p. 2.

[416] O. W. PEDERSEN, *Environmental Principles and the European Court of Human Rights*, cit., p. 464; O. W. PEDERSEN, *European Court of Human Rights and Environmental Rights*, in M. FAURE *Elgar Encyclopedia of Environmental Law*, Cheltenham, 2019, p. 464; V. P. TZEVELEKOS and K. DZEHTSIAROU, *op. cit.*, p. 2; O. W. PEDERSEN, *Any Role for the ECHR When It Comes to Climate Change?*, cit., p. 18; K. MORROW, *op. cit.*, p. 41; B. PETERS, *op. cit.*, p. 192.

[417] D. G. SAN JOSÉ, *op. cit.*, p. 5; B. PETERS, *op. cit.*, p. 192.

[418] A. E. BOYLE, *Environment and Human Rights*, April 2009, www.opil.ouplaw.com; B. PETERS, *op. cit.*, p. 192.

"anthropocentric" or "individualistic" approach.[419] In contrast to other regional human rights instruments, the ECHR has not been amended for environmental provisions to be included therein.[420] In fact, not all the Contracting States have consented to the adoption of a new protocol which enshrines the right to a clean and healthy environment.[421] Despite this, the ECtHR has been able to develop a substantial corpus of case law.[422] The Court's prominence in environmental cases can be attributed to two underlying reasons.

Firstly, the ECtHR embraced a "creative interpretation" of the Convention, the latter being a "living instrument" adaptable to "present-day conditions".[423] In particular, the right to a clean and healthy environment has been located within various ECHR rights. Article 2 (right to life) and Article 8 (right to respect for private and family life) are frequently invoked in environmental cases.[424] With regard to the former, the Court contended that the Contracting States' positive obligation to protect the lives of individuals within their jurisdiction applies "in the context of any activity, whether public or not, in which

---

[419] F. FRANCIONI, *International Human Rights in an Environmental Horizon*, in *European Journal of International Law*, 2010, p. 50; B. PETERS, *op. cit.*, p. 192.

[420] O. W. PEDERSEN, *European Court of Human Rights and Environmental Rights*, cit., pp. 463-464; H. A. WONDALEM, *The Right to Environment under African Charter on Human and Peoples' Right*, in *International Journal of International Law*, 2015, p. 208; Organisation of African Unity ('OAU'), *African Charter on Human and Peoples' Rights* entered into force 21 October 1986, OAU Doc. CAB/LEG/67/3/Rev. 5 of 27 June 1981, Art. 24. The African Charter on Human and Peoples' Rights ('ACHPR' or 'Banjul Charter') delineates the right to a clean and healthy environment in Article 24: "All peoples shall have the right to a general satisfactory environment favourable to their development".

[421] V. P. TZEVELEKOS and K. DZEHTSIAROU, *op. cit.*, p. 2.

[422] O.W. PEDERSEN, *Environmental Principles and the European Court of Human Rights*, cit., p. 464.

[423] V. P. TZEVELEKOS and K. DZEHTSIAROU, *op. cit.*, p. 2; O. W. PEDERSEN, *Environmental Principles and the European Court of Human Rights*, cit., p. 464.

[424] V. P. TZEVELEKOS and K. DZEHTSIAROU, *op. cit.*, p. 3; O. W. PEDERSEN, *European Court of Human Rights and Environmental Rights*, cit., p. 465.

the right to life may be at stake".[425] This was clarified in *Öneryildiz v. Turkey*, in which the country was held accountable for the demise of nine family members of the applicant, and upheld in subsequent cases.[426] In respect to the latter, the ECtHR maintained that environmental pollution could endanger an individual's private and family life.[427] This was established in the landmark case *López Ostra v. Spain*,[428] which will be discussed in greater detail below. Furthermore, the Strasbourg Court has referred to Article 10 (right to freedom of expression) in cases concerning activists who advocated for environmental protection.[429] Yet, the "living instrument doctrine" has

[425] ECtHR, *Guide to the Case-Law of the European Court of Human Rights – Environment*, 31 August 2022, p. 7; ECtHR, *Öneryildiz v. Turkey* [GC], Appl. No. 48939/99, judgement of 30 November 2004, par. 71. The aforementioned positive obligation is derived from Article 2(1) ECHR, which reads: "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law".

[426] ECtHR, *Öneryildiz v. Turkey* [GC], cit. par. 110; ECtHR, *Boudayeva and Others v. Russia*, Appl. Nos. 15339/02, 21166/02, 20058/02, 11673/02, and 15343/02, judgement of 29 September 2008; ECtHR, *Kolyadenko and Others v. Russia*, Appl. Nos. 17423/05, 20534/05, 20678/05, 23263/05, 24283/05, and 35673/05, judgement of 9 July 2012; ECtHR, *Brincat and Others v. Malta*, Appl. Nos. 60908/11, 62110/11, 62129/11, 62312/11, and 62338/11, judgement of 24 October 2014; ECtHR, *M. Özel and Others v. Turkey*, Appl. Nos. 14350/05, 15245/05, and 16051/05, judgement of 2 May 2016.

[427] ECtHR, *Guide to the Case-Law of the European Court of Human Rights – Environment*, cit., p. 23.

[428] ECtHR, *López Ostra v. Spain*, Appl. No. 16798/90, judgement of 9 December 1994.

[429] O. W. PEDERSEN, *European Court of Human Rights and Environmental Rights*, cit., p. 465; ECtHR, *Guide to the Case-Law of the European Court of Human Rights – Environment*, cit., p. 60; ECtHR, *Steel and Others v. The United Kingdom*, Appl. No. 67/1997/851/1058, judgement of 23 September 1998; ECtHR, *Hashman and Harrup v. The United Kingdom* [GC], Appl. No. 25594/94, judgement of 25 November 1999; ECtHR, *Drieman and Others v. Norway*, Appl. No. 33678/96, judgement of 4 May 2000; ECtHR, *Steel and Morris v. The United Kingdom*, Appl. No. 68416/01, judgement of 15 February 2005; ECtHR, *Mamère v. France*, Appl. No. 12697/03, judgement of 7 November 2006.

been the subject of some criticism.[430] In particular, Lord Hoffmann maintained that it "does not entitle a judicial body to introduce wholly new concepts, such as the protection of the environment, into an international treaty which makes no mention of them, simply because it would be more in accordance with the spirit of the times".[431]

Secondly, since the number of Contracting States addressing environmental concerns by formulating regulatory responses has steadily increased, the implementation and enforcement of these responses ultimately come before the ECtHR. As indicated by Pedersen, a whole host of cases related to environmental protection simply demonstrate how human rights provisions are employed as a means of enforcing domestic environmental law frameworks.[432]

The first claim to be considered within the context of the ECHR in relation to environmental issues was *S. v. France*.[433] Though the case was declared inadmissible by the Commission in 1990, it nevertheless paved the way for litigation in the field.[434] However, the Strasbourg Court's environmental case law was largely constructed upon the abovementioned *López Ostra v. Spain*. Mrs. López Ostra, i.e., the applicant, lived in the municipality of Lorca, located in the Spanish region of Murcia, near a waste-treatment plant which emanated "smells, noise and polluting fumes".[435] The applicant held that the local authorities were responsible for the nuisance due to their "passive

---

[430] V. P. TZEVELEKOS and K. DZEHTSIAROU, *op. cit.*, p. 3; M. C. PETERSMANN, cit., p. 769.

[431] V. P. TZEVELEKOS and K. DZEHTSIAROU, *op. cit.*, p. 3; L. HOFFMAN, *The Universality of Human Rights*, in *Law Quarterly Review*, 2009, p. 430.

[432] O. W. PEDERSEN, *Environmental Principles and the ECtHR*, cit., p. 464.

[433] K. MORROW, *op. cit.*, pp. 42-43; European Commission of Human Rights, *S. v. France*, Appl. No. 10965/84, judgement of 6 July 1988.

[434] K. MORROW, *op. cit.*, p. 43; European Commission of Human Rights, *S. v. France*, cit., p. 70.

[435] C. G. UNGUREANU, *The European Court of Human Rights and the Major Arguments in Environmental Law*, in *European Journal of Law and Public Administration*, 2023, p. 4; ECtHR, *Factsheet – Environment and the ECHR*, October 2023, p. 12; ECtHR, *López Ostra v. Spain*, cit., par. 11.

attitude".[436] The ECtHR stated that it was "self-evident that serious impacts to the environment can affect a person's well-being and prevent him from enjoying his home, affecting his private and family life".[437] By so doing, the Strasbourg Court submitted that Spain breached Article 8 of the Convention.[438] Nonetheless, a violation of Article 3 ECHR, which was alleged by the plaintiff, was not found. To quote Morrow, the case exemplifies two key issues typical of environment-based human rights claims.[439]

First, the Court refers to the notions of "fair balance" and "margin of appreciation".[440] In this respect, it posited that "regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole, and in any case the State enjoys a *certain* margin of appreciation".[441] Then, it asserted that "despite the margin of appreciation left to the respondent State, the Court considers that the State did not succeed in striking a fair balance between the interest of the town's economic well-being – that of having a waste-treatment plant – and the applicant's effective enjoyment of her right for her home and her private and family life".[442] In consequence, the relevance of the margin of appreciation is twofold. On the one hand, it confers upon States a certain degree of autonomy in the management of their internal affairs, given their superior understanding of the conditions on the ground. On the other hand, the supervisory role of the ECtHR's jurisdiction is implicitly recognised.[443]

Second, the Strasbourg Court delineated a "serious harm threshold".[444] A "minimum level of severity" has to be reached for the

---

[436] ECtHR, *Factsheet – Environment and the ECHR*, cit., p. 12; ECtHR, *López Ostra v. Spain*, cit., par.
[437] ECtHR, *López Ostra v. Spain*, cit., par. 51.
[438] ECtHR, *López Ostra v. Spain*, cit. par. 58.
[439] K. MORROW, *op. cit.*, pp. 45-52.
[440] K. MORROW, *op. cit.*, p. 45.
[441] ECtHR, *López Ostra v. Spain*, cit., par. 51 (emphasis added).
[442] ECtHR, *López Ostra v. Spain*, cit., par. 58.
[443] K. MORROW, *op. cit.*, p. 46.
[444] K. MORROW, *op. cit.*, p. 48; ECtHR, *López Ostra v. Spain*, pars. 40 and 51.

environment-based claim to be assessed.[445] That being explained, it should be stressed that the "serious harm threshold" in *López Ostra* did not refer to the damage caused to the environment itself, but rather to an omission on the part of the local authorities in considering the negative effects on the applicant's private and family life.[446]

After offering a brief overview of the environmental case law before the Strasbourg Court, the present thesis will now turn to the peculiarities of climate change litigation. Insofar as climate change is concerned, "it is less obvious whether, and to what extent, [its] effects can be qualified as human rights violations in a strict legal sense".[447] Nevertheless, climate litigation is experiencing a period of accelerated growth within the international human rights framework. Related to this, the ECtHR has emerged as a pre-eminent human rights tribunal, influencing other human rights courts operating in other jurisdictions.[448] In the context of the Court's environmental jurisprudence, a number of obstacles to the application of the ECHR in climate-related claims can be identified. In accordance with the classification proposed by Keller and Heri, said issues can be divided into two categories, namely admissibility issues and substantive issues.[449] Both of these categories will provide the prime focus for discussion here.

---

[445] K. MORROW, *op. cit.*, p. 49.

[446] K. MORROW, *op. cit.*, p. 49; J. H. BELLO and R. DESGAGNÉ, *López Ostra v. Spain*, in *The American Journal of International Law*, 1995, p. 791.

[447] Human Rights Council, *Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights*, UN Doc. A/HRC/10/61 of 15 January 2009, par. 70; A. MARICONDA, *Victim Status of Individuals in Climate Change Litigation before the ECtHR*, in *The Italian Review of International and Comparative Law*, 2023, p. 261.

[448] B. LEWIS, *Children's Human Rights-Based Climate Litigation at the Frontiers of Environmental and Children's Rights*, in *Nordic Journal of Human Rights*, 2021, p. 181.

[449] H. KELLER and C. HERI, *The Future is Now: Climate Cases Before the ECtHR*, in *Nordic Journal of Human Rights*, 2022, p. 154.

With relation to the former, three legal hurdles can be pinpointed. First, the issue of victim status.[450] In order to have *locus standi* before the ECtHR, the aforementioned requirement has to be satisfied.[451] That is to say, an individual is entitled to submit an application to the Strasbourg Court should the alleged harm be *specific* and *concrete*.[452] Then, a "sufficiently *direct* link" between the applicant and the alleged harm shall exist.[453] Lastly, under the terms of Article 34 ECHR, a "substantive right" set forth in the Convention has to be involved.[454] The requirement in question appears to be problematic owing to the nature of the harms posed by climate change, which are essentially *collective*. One should ponder, however, that the ECtHR is "the most rigid regional human rights Court in denying the admissibility of *actiones populares*".[455] The latter, whose origins are to be retraced to Roman law, are defined as an action initiated by an individual on behalf

[450] H. KELLER and C. HERI, *op. cit.*, p. 155.
[451] A. MARICONDA, *op. cit.*, p. 262.
[452] J. IRTHE and M. DE JONG, *Beyond the Turn to Human Rights: A Call for an Intersectional Climate Justice Approach*, in *The International Journal of Human Rights*, 2023, p. 4; L. ACCONCIAMESSA, *Equality in the Access to the ECtHR – Filling Procedural Gaps Concerning* Locus Standi *and Representation of Extremely Vulnerable Individuals*, in D. AMOROSO *et al.*, *More Equal than Others? Perspectives on the Principle of Equality from International and EU Law*, Berlin, 2023, p. 237; UN General Assembly, *Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power*, UN Doc. A/RES/40/34 of 29 November 1985.
[453] TZEVELEKOS V. P., *Standing: European Court of Human Rights*, December 2019, www.opil.ouplaw.com, par. 22 (emphasis added).
[454] J. IRTHE and M. DE JONG, *op. cit.*, p. 4.
[455] A. MARICONDA, *op. cit.*, p. 265; F. HAMPSON, C. MARTIN, and F. VILJOEN, *Inaccessible Apexes: Comparing Access to Regional Human Rights Courts and Commissions in Europe, the Americas, and Africa*, in *International Journal of Constitutional Law*, 2018, p. 180. Following Mariconda, applications from individuals or groups who are not direct victims of the alleged violation are permitted by the Banjul Charter. As for the Inter-American human rights legal framework, it can be posited that the case law concerning indigenous communities allows for a broad access to justice which is comparable to an *actio popularis*.

of the public interest.[456] By virtue of Article 34 ECHR, the Strasbourg Court has repeatedly dismissed *actio popularis* claims, noting that the aforementioned provision "requires that an individual applicant should claim to have been actually affected by the violation he alleges […]; it does not permit individuals to complain against a law *in abstracto* simply because they feel that it contravenes the Convention".[457] Second, the prior exhaustion of local remedies. The latter amounts to a rule of customary international law and refers to the fact that "a State should be given the opportunity to redress an alleged wrong within the framework of its own domestic legal system before its international responsibility can be called into question".[458] Moreover, the available local remedies shall be "effective, adequate and sufficient".[459] It has been argued, however, that the rule is not suitable for climate cases, since it might be difficult to follow when a great number of respondent States are involved. This appears to be potentially problematic due to the fact that the Court would not be able to rely upon a prior assessment of domestic courts. In addition, the subsidiarity of the ECHR system would be undermined.[460] That is to say, the "*chronological* or *procedural* priority of domestic control over international control"

[456] W. J. ACEVES, *Actio Popularis? The Class Action in International Law*, in *The University of Chicago Legal Forum*, 2003, p. 356; E. SCHWELB, *The Actio Popularis and International Law*, in *Israel Yearbook Human Rights*, 1972, p. 47.

[457] ECtHR, *Klass and Others v. Germany*, Appl. No. 5029/71, judgement of 6 September 1978, par. 33.

[458] A. A. CANÇADO TRINDADE, *The Application of the Rule of Exhaustion of Local Remedies in International Law: Its Rationale in the International Protection of Individual Rights,* Cambridge, 1983, p. 1; S. D'ASCOLI and K. M. SCHERR, *The Rule of Prior Exhaustion of Local Remedies in the International Law Doctrine and its Application in the Specific Context of Human Rights Protection*, in *European University Institute Working Paper LAW*, 2007, p. 117; DE SCHUTTER, *op. cit.*, p. 996.

[459] S. D'ASCOLI and K. M. SCHERR, *op. cit.*, p. 130; DE SCHUTTER, *op. cit.*, p. 996.

[460] H. KELLER and C. HERI, *op. cit.*, p. 159.

would be impinged.[461] Third, extraterritorial jurisdiction. In the landmark judgement *Al-Skeini and Others v. The United Kingdom*, the Strasbourg Court developed a test centred on direct control.[462] Thus, "what is decisive […] is the exercise of physical power and control" over persons abroad.[463] In this context, the Strasbourg Court has established that local activities producing extraterritorial effects might give rise to extraterritorial jurisdiction. To date, the Court has yet to declare admissible decisions on climate change regarding "transboundary environmental harms".[464]

As to substantive hurdles, one particular issue emerges, i.e., attribution and shared international responsibility. In this respect, the ECtHR usually applies the International Law Commission ('ILC')'s Draft Articles on the Responsibility of States for International Wrongful Acts ('DARSIWA').[465] Article 1 DARSIWA enunciates the principle that every internationally wrongful act of a State entails international responsibility.[466] Notwithstanding, it is Article 2 DARSIWA which specifies the requirements to be satisfied for the existence of an internationally wrongful act of a State.[467] Above all, the conduct must be attributable to the State under international law. Then, said conduct must constitute a breach of an international legal obligation in force for

---

[461] G. LAETSAS, *Two Concepts of the Margin of Appreciation*, in *Oxford Journal of Legal Studies*, 2006, p. 722; M. I. VILA, *Subsidiarity, Margin of Appreciation and International Adjudication within a Cooperative Conception of Human Rights*, in *International Journal of Constitutional Law*, 2017, p. 401.

[462] ECtHR, *Al-Skeini and Others v. The United Kingdom* [GC], Appl. No. 55721/07, judgement of 7 July 2011.

[463] H. KELLER and C. HERI, *op. cit.*, pp. 159-160; ECtHR, *Al-Skeini and Others v. The United Kingdom* [GC], cit., par. 136; ECtHR, *Banković and Others v. Belgium and Others* [GC], Appl. No. 52207/99, judgement of 12 December 2001, par. 44.

[464] H. KELLER and C. HERI, *op. cit.*, p. 159.

[465] H. KELLER and C. HERI, *op. cit.*, p. 166. ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, UN DOC. A/56/10 of November 2001.

[466] ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, cit., Art. 1.

[467] J. CRAWFORD, *The International Law Commission's Articles on State Responsibility – Introduction, Text and Commentaries*, Cambridge, 2003, p. 81.

that State at that time.[468] Attribution is *ergo* a necessary – but by no means sufficient – step in determining State responsibility under international law. As for climate change claims, this is certainly a complicated task, especially when more than one State is implicated. In fact, it is not straightforward to attribute each State its own emissions, since "direct and exclusive causality" cannot be established in such instances.[469]

To summarise, even though the right to a clean and healthy environment is not enshrined in the Convention, the ECtHR has been able to develop an extensive case law on the subject. That being said, it should be acknowledged that the ECHR human rights system was not designed with environmental protection as its primary objective. Consequently, a number of obstacles persist, both in terms of admissibility and from a substantive point of view, most notably with respect to climate change claims. In view of the above considerations, the thesis will proceed with the analysis of the case *Duarte Agostinho and Others v. Portugal and 32 Others*.

3.2. The *Duarte Agostinho and Others v. Portugal and 32 Others* Case

On 7 September 2020, six Portuguese nationals aged between 11 and 24 years old (further, 'the applicants') lodged an application with the Strasbourg Court against the Portuguese Republic and 32 other Council

[468] ILC, *Report of the International Law Commission on the Work of its Fifty-Third Session (23 April – 1 June and 2 July – 10 August 2001),* UN Doc. A/56/10, pp. 34-36.
[469] H. KELLER and C. HERI, *op. cit.*, p. 167; J. PEEL, *Climate Change Governance: Policy and Litigation in a Multi-Level System*, in *Carbon & Climate Law Review*, 2011, pp. 15-24.

of Europe Member States,[470] including the UK.[471] The applicants alleged violations of Article 2 (right to life), Article 3 (prohibition of inhuman and degrading treatment), Article 8 (right to respect for private and family life), and Article 14 (prohibition of discrimination) of the Convention.[472] In particular, they claimed that the climate policies of the respondent States were inadequate and hence triggered adverse impacts on "their lives, well-being, mental health and the amenities of their homes" in the municipalities of Pombal and Almada.[473] The present and future effects of climate change specifically referred to heatwaves and wildfires, being both determined by surges in mean temperatures and excessive heat.[474] Under the terms of Article 30 ECHR and Rule 72 of the Rules of the Court,[475] jurisdiction was

[470] The 32 countries therewith mentioned are the following: the Republic of Austria, the Kingdom of Belgium, the Republic of Bulgaria, the Swiss Confederation, the Republic of Cyprus, the Czech Republic, the Federal Republic of Germany, the Kingdom of Denmark, the Kingdom of Spain, the Republic of Estonia, the Republic of Finland, the French Republic, the United Kingdom of Great Britain and Northern Ireland, the Hellenic Republic , the Republic of Croatia, Hungary, Ireland, the Italian Republic, the Republic of Lithuania, the Grand Duchy of Luxembourg, the Republic of Latvia, the Republic of Malta, the Kingdom of the Netherlands, the Kingdom of Norway, the Republic of Poland, Romania, the Russian Federation, the Slovak Republic, the Republic of Slovenia, the Kingdom of Sweden, the Republic of Türkiye, and Ukraine.

[471] ECtHR, *The Court Has Declared Inadmissible the Applications Lodged Against Portugal and 32 Other States on the Issue of Climate Change*, 9 April 2024, p. 1: ECtHR, *Duarte Agostinho and Others v. Portugal and 32 Others* [GC], cit., par. 1; ECtHR, *The Court Has Declared Inadmissible the Applications Lodged Against Portugal and 32 Other States on the Issue of Climate Change*, cit., p. 1.

[472] ECtHR, *Duarte Agostinho and Others v. Portugal and 32 Others* [GC], cit., par. 3.

[473] ECtHR, *Duarte Agostinho and Others v. Portugal and 32 Others* [GC], cit., par. 3.

[474] ECtHR, *Duarte Agostinho and Others v. Portugal and 32 Others* [GC], cit., par. 12.

[475] Article 30 ECHR reads: "Where a case pending before a Chamber raises a serious question affecting the interpretation of the Convention or the Protocols thereto, or where the resolution of a question before the Chamber might have a result inconsistent with a judgment previously delivered by the Court, the Chamber may, at any time before it has rendered its judgment, relinquish jurisdiction in favour of the Grand

relinquished by the Chamber to which the case had been assigned in favour of the Grand Chamber on 29 June 2022.[476] The *Duarte Agostinho and Others v. Portugal and 32 Others* case was indeed accorded priority status in light of the importance of the issue in question, i.e., climate change, which shall be tackled with "absolute urgency".[477] At the President of the Court's request, the composition of the Grand Chamber was ruled to be the same as in two other climate change cases, that is to say, *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*[478] and *Carême v. France*,[479] which had been both relinquished as well.[480] On 18 November 2022, the applicants asked for the withdrawal of their application with regard to Ukraine due to "the exceptional circumstances relating to the ongoing war".[481] An oral hearing occurred at the end of September 2023, while the decision of the Court was rendered on 9 April 2024.[482] As of that day, the complaint was declared inadmissible.

Chamber". In accordance with Rule 72(3) of the Rules of the Court, the parties are notified of the Chamber's intention and invited by the Registrar "to submit any comments thereon within a period of two weeks from the date of notification".

[476] ECtHR, *Duarte Agostinho and Others v. Portugal and Others (relinquishment) – 39371/20*, June 2022, p. 2.

[477] M. GALLAGHER, *Youth Voices for Human Rights Litigation in the Face of Climate Change*, in *Human Rights Brief*, 2023, p. 49; ECtHR, *Duarte Agostinho and Others v. Portugal and Others (relinquishment) – 39371/20*, cit., p. 2; Save the Children, *Groundbreaking Climate Case Involving Children to be Heard by the European Court Tomorrow – Press Release*, September 2023, www.savethechildren.net.

[478] ECtHR, *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* [GC], Appl. No. 53600/20, judgement of 9 April 2024.

[479] ECtHR, *Carême v. France* [GC], Appl. No. 7189/21, judgement of 9 April 2024.

[480] ECtHR, *Duarte Agostinho and Others v. Portugal and 32 Others* [GC], cit., par. 5; ECtHR, *The Court Has Declared Inadmissible the Applications Lodged Against Portugal and 32 Other States on the Issue of Climate Change*, cit., p. 2.

[481] ECtHR, *Duarte Agostinho and Others v. Portugal and 32 Others* [GC], cit., par. 158.

[482] ECtHR, *Duarte Agostinho and Others v. Portugal and 32 Others* [GC], cit., par. 8.

Following Daly, *Duarte Agostinho and Others* is truly remarkable in a number of respects.[483] For a start, it is the first time that such a young group of applicants submits an application to the ECtHR. Second, the case seems to involve "the most countries ever taken to a regional court in a climate change case".[484] Third, never before has the Strasbourg Court pronounced a judgement concerning human rights violations in connection with climate change.[485]

In order to support their arguments, the applicants collected empirical evidence pointing to the impacts of climate change on Portugal. For instance, they relied upon multiple reports prepared by the Intergovernmental Panel on Climate Change ('IPCC'), a UN body created in 1988 so as to examine scientific data related to climate change.[486] They also referred to the 1992 UN Framework Convention on Climate Change ('UNFCCC')[487] and the 2015 Paris Agreement on Climate Change,[488] both of which had been ratified by almost all the respondent States.[489] On the one hand, it appeared that the current extent

---

[483] A. DALY, *Climate Competence: Youth Climate Activism and Its Impact on International Human Rights Law*, in *Human Rights Law Review*, 2022, p. 19.

[484] J. WATTS, *Portuguese Children Sue 33 Countries over Climate Change at European Court*, September 2020, www.theguardian.com.

[485] M. GALLAGHER, *op. cit.*, p. 50.

[486] ECtHR, *Duarte Agostinho and Others v. Portugal and 32 Others* [GC], cit., par. 25; IPCC, *The Intergovernmental Panel on Climate Change – Reports*, April 2024, www.ipcc.ch.

[487] UN Climate Change Conference, *United Nations Framework Convention on Climate Change* entered into force on 21 March 1994, UN Treaty Series, vol. 1771.

[488] UN Climate Change Conference, *Paris Agreement to the United Nations Framework Convention on Climate Change* entered into force 4 November 2016, UN Treaty Series, vol. 3156.

[489] UN Treaty Collection, *Environment – United Nations Framework Convention on Climate Change*, April 2024, www.treaties.un.org; UN Treaty Collection, *Environment – Paris Agreement*, April 2024, www.treaties.un.org. On the one hand, the UNFCCC awaits ratification on the side of: the Czech Republic, the Republic of Finland, the Republic of Croatia, the Kingdom of the Netherlands, the Slovak Republic, and the Republic of Türkiye. On the other hand, the 2015 Paris Agreement awaits ratification on the side of: the Kingdom of Denmark, the Kingdom of the Netherlands, and the Russian Federation.

of climate change is deemed unsafe. On the other hand, Portugal was identified as one of the European countries most significantly impacted by the harmful effects of climate change.[490] The applicants contended that the 33 European States should be held responsible for said phenomena since, e.g., they allowed emissions to be released both within their national territory and in "offshore areas over which they had jurisdiction".[491] It followed that the applicants would be vulnerable to a serious risk of harm posed by climate change. Further, the latter was not expected to be mitigated. On the contrary, it was bound to endanger their whole lives and those of future generations.[492]

Turning to the legal framework and practice, attention will be drawn to the international materials pertinent to the case. These will revolve around the notions of jurisdiction and exhaustion of domestic remedies. The latter, along with the concept of victim status, are in fact the two key admissibility issues of *Duarte Agostinho and Others*.

According to both the UNHRC's General Comment on the right to life[493] and the Committee on Economic, Social and Cultural Rights' General Comment No. 24,[494] States shall prevent violations of human rights from occurring "within their territory or in other areas subject to their jurisdiction.[495] Extraterritorial obligations shall be satisfied when situations located outside a State's territory are likely to be influenced by means of the control of corporate activities "domiciled in its territory

---

[490] ECtHR, *The Court Has Declared Inadmissible the Applications Lodged Against Portugal and 32 Other States on the Issue of Climate Change*, cit., p. 1.

[491] ECtHR, *Duarte Agostinho and Others v. Portugal and 32 Others* [GC], cit. par. 13.

[492] ECtHR, *Duarte Agostinho and Others v. Portugal and 32 Others*, cit. par. 14.

[493] UNHRC, *General Comment No. 36 – Article 6: Right to Life*, UN Doc. CCPR/C/GC/36 of 3 September 2019.

[494] Committee on Economic, Social and Cultural Rights, *General Comment No. 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities*, UN Doc. E/C.12/GC/24 of 10 August 2017.

[495] ECtHR, *Duarte Agostinho and Others v. Portugal and 32 Others* [GC], cit., pars. 55-56; UNHRC, *General Comment No. 36 – Article 6: Right to Life*, cit., par. 22.

and/or under its jurisdiction".[496] Also of significance in this regard is the Committee on the Rights of the Child's ('CRC') General Comment No. 26 on children rights and the environment, with a special focus on climate change.[497] It was submitted therein that mechanisms at the disposal of children under a State's jurisdiction as well as children outside its territory affected by "transboundary harm" shall be ensured.[498] The *Sacchi and Others*[499] decision upheld by the CRC is equally important. The complaint was filed by sixteen children initially against Argentina, but then lodged against Brazil, France, Germany, and Türkiye as well.[500] In short, the petitioners claimed that their rights to life and health had been violated by the respondent States, who had progressively deepened the climate crisis.[501] Even though the case was declared inadmissible owing to the non-exhaustion of domestic remedies, jurisdiction was established in respect of the five countries.[502] The CRC employed the same legal test as that adopted in the IACtHR Advisory Opinion on the Environment and Human Rights.[503] It was

---

[496] ECtHR, *Duarte Agostinho and Others v. Portugal and 32 Others* [GC], cit., par. 56; Committee on Economic, Social and Cultural Rights, *General Comment No. 24…*, cit., par. 28.

[497] CRC, *General Comment No. 26 on Children's Rights and the Environment, with a Special Focus on Climate Change*, UN Doc. RC/C/GC/26 of 23 August 2023.

[498] ECtHR, *Duarte Agostinho and Others v. Portugal and 32 Others* [GC], cit., par. 57; CRC, *General Comment No. 26 on Children's Rights and the Environment, with a Special Focus on Climate Change*, cit., par. 84.

[499] CRC, *Sacchi and Others v. Argentina*, communication No. 104/2019, decision of 22 September 2021.

[500] ECtHR, *Duarte Agostinho and Others v. Portugal and 32 Others* [GC], cit., par. 58.

[501] Y. SUEDI, *Litigating Climate Change before the Committee on the Rights of the Child in Sacchi v. Argentina et al.: Breaking New Ground?*, in *Nordic Journal of Human Rights*, 2022, p. 550.

[502] ECtHR, *Duarte Agostinho and Others v. Portugal and 32 Others* [GC], cit., par. 58.

[503] IACtHR, *The Environment and Human Rights – State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity: Interpretation and Scope of Articles 4(1) and 5(1) in*

specified that a "transboundary harm" occurs where a causal link exists "between the acts or omissions of the State in question and the negative impact on the rights of children located outside its territory".[504] Regarding the emissions originated by the respondent States, the CRC posited that jurisdiction is exercised when the State of origin exerts "effective control" over the sources of said emissions.[505] States must therefore act in compliance with the precautionary principle, thereby countering the threat of a severe and irreversible environmental damage.[506] As for the exhaustion of domestic remedies, the *Sacchi and Others* complaint was dismissed on the grounds that the specific information received from the authors did not provide a compelling justification for the domestic remedies to be deemed "ineffective or unavailable".[507]

As far as the parties' submissions are concerned, the Governments of the 33 European countries asserted that the applicants had attempted to circumvent the fundamental criteria for the admissibility of applications before the Court, as outlined in the Convention. In their view, the applicants' aim was to convince the ECtHR to diverge considerably from its case law with reference to jurisdiction and the rule of prior exhaustion of local remedies. What is more, the Governments of the respondent States held that *Duarte Agostinho and Others* exemplified the characteristics typically associated with an *actio popularis*.[508] To be more precise, they noted that the harm alleged by the applicants was neither *specific* nor

relation to Articles 1(1) and 2 of the American Convention on Human Rights, Advisory Opinion OC-23/17 of 15 November 2017; ECtHR, *Duarte Agostinho and Others v. Portugal and 32 Others* [GC], cit., par. 59.

[504] CRC, *Sacchi and Others v. Argentina*, cit., par. 10.7.

[505] CRC, *Sacchi and Others v. Argentina*, cit., par. 10.7.

[506] B. LEWIS, *op. cit.*, p. 198.

[507] CRC, *Sacchi and Others v. Argentina*, cit., par. 10.20.

[508] ECtHR, *Duarte Agostinho and Others v. Portugal and 32 Others* [GC], cit., par. 76.

concrete. Thus, the requirement of the victim status had not been attained and a violation of Article 34 ECHR was committed.[509]

Conversely, the applicants emphasised the strong potential of the Convention for confronting the daunting challenges posed by climate change to the protection of human rights. Their primary objective was to adapt well-established Convention principles to "the exceptional circumstances of climate change".[510]

With relation to the Court's assessment, a number of preliminary issues were first explored. These concerned the applications against Ukraine and the Russian Federation. As mentioned above, while the former was removed from the list of cases pursuant to Article 37(1)(a),[511] the latter was confirmed.[512] As a matter of fact, the Russian Federation withdrew from the Council of Europe on 16 March 2022, whereas it denounced the ECHR on 16 September 2022.[513] In consequence, any complaint relating to violations occurred before this

[509] J. IRTHE and M. DE JONG, *op. cit.*, p. 4; O.W. PEDERSEN, *Climate Change Hearings and the ECtHR Round II*, October 2023, www.ejiltalk.org.

[510] ECtHR, *Duarte Agostinho and Others v. Portugal and 32 Others* [GC], cit., par. 120.

[511] Article 37(1) reads: "The Court may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that: (a) the applicant does not intend to pursue his application; or (b) the matter has been resolved; or (c) for any other reason established by the Court, it is no longer justified to continue the examination of the application. However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the Protocols thereto so requires".

[512] ECtHR, *Duarte Agostinho and Others v. Portugal and 32 Others* [GC], cit., pars. 160 and 163.

[513] ECtHR, *Duarte Agostinho and Others v. Portugal and 32 Others* [GC], cit., par. 161; Council of Europe, Committee of Ministers, *Resolution CM/Res(2022)2 on the Cessation of the Membership of the Russian Federation to the Council of Europe* of 16 March 2022; ECtHR, *Resolution of the European Court of Human Rights on the Consequences of the Cessation of Membership of the Russian Federation to the Council of Europe in light of Article 58 of the European Convention of Human Rights*, 22 March 2022.

second date is compatible *ratione temporis* with Article 35(3) of the Convention.[514]

General remarks upon the relation between the issue of climate change and the ECHR were delivered in *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*.[515] In *Duarte Agostinho and Others*, the Court likewise reaffirmed that climate change complaints exhibit certain distinctive characteristics which are not commonly found in environmental cases.[516] An example of such features is the importance of "intergenerational burden-sharing", which is crucial for both present and the future generations.[517] The latter will be heavily impacted by the current deficiencies in addressing climate change notwithstanding the commitments of the States Parties to the UNFCCC and the Paris Agreement.

The present Section will now concentrate on the issue of jurisdiction. In contrast, the ECtHR's comments concerning the exhaustion of local remedies and the victim status will be briefly touched upon. This is because the pivotal question with respect to the UK and the other 31 non-territorial States is precisely that of jurisdiction.

---

[514] ECtHR, *Duarte Agostinho and Others v. Portugal and 32 Others* [GC], cit., par. 163. Article 35(3) reads: "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.

[515] ECtHR, *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* [GC], cit., pars. 410-422.

[516] ECtHR, *Duarte Agostinho and Others v. Portugal and 32 Others* [GC], cit., par. 165.

[517] ECtHR, *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* [GC], cit., par. 420.

In this regard, the general principles underpinning the Strasbourg Court's case law were articulated.[518] As suggested in Section 1 of the previous Chapter, Article 1 ECHR restricts the competence of the ECtHR to individuals within the jurisdiction of the High Contracting Parties, who "shall secure […] the rights and freedoms" of the Convention.[519] In *M.N. and Others v. Belgium*,[520] as well as in *Al-Skeini and Others v. The United Kingdom*[521], *Güzelyurly and Others v. Cyprus and Turkey*,[522] and *Loizidou v. Turkey*,[523] the Court clarified that jurisdiction is an admissibility issue and differs from responsibility, which is treated as a substantive issue and shall be assessed during the merits phase of a case.[524] In other words, jurisdiction amounts to a *conditio sine qua non* "in order for [a] State to be held responsible for acts or omissions attributable to it".[525] The ECtHR consistently emphasised this point in its decision. In line with general international law, the Court maintained that a State's jurisdiction is "primarily territorial".[526] However, jurisdiction is not always "restricted to the

[518] ECtHR, *Duarte Agostinho and Others v. Portugal and 32 Others* [GC], cit., par. 168.
[519] Council of Europe, *European Convention on Human Rights*, cit., Article 1; A. NUßBERGER, *The Concept of 'Jurisdiction' in the Jurisprudence of the European Court of Human Rights*, in *Current Legal Problems*, 2012, p. 246.
[520] ECtHR, *M.N. and Others v. Belgium* [GC], Appl No. 3599/18, judgement of 5 May 2020, pars. 96-109.
[521] ECtHR, *Al-Skeini and Others v. The United Kingdom* [GC], cit., par. 130.
[522] ECtHR, *Güzelyurly and Others v. Cyprus and Turkey* [GC], Appl. No. 36925/07, judgement of 29 January 2019, par. 178.
[523] ECtHR, *Loizidou v. Turkey* (preliminary objections), Appl No. 15318/89 Series A No. 310, judgement of 23 March 1995, pars. 61 and 64.
[524] ECtHR, *Duarte Agostinho and Others v. Portugal and 32 Others [GC]*, cit., par. 168.
[525] ECtHR, *M.N. and Others v. Belgium* [GC], cit., par. 97; ECtHR, *Duarte Agostinho and Others v. Portugal and 32 Others* [GC], cit., par. 168.
[526] ECtHR, *M.N. and Others v. Belgium* [GC], cit., par, 98; ECtHR, *Güzelyurtlu and Others*, cit., par. 178; ECtHR, *Banković and Others v. Belgium and Others* [GC], par. 59; ECtHR, *Duarte Agostinho and Others v. Portugal and 32 Others* [GC], cit., par. 168; A. NUßBERGER, *op. cit.*, cit., p. 246.

national territory" of the respondent State.[527] The ECtHR acknowledged that when acts of a State Party are performed or produce effects outside its territory, said acts "can constitute an exercise of jurisdiction within the meaning of Article 1 of the Convention".[528] This occurs when the State in question exercises "effective control over an area outside its national territory".[529] This criterion has been emphatically reiterated by the ECtHR in its case law.[530] In order for extraterritorial jurisdiction to be recognised, "exceptional circumstances" shall exist and must be examined by the Court.[531] In *H.F. and Others v. France*,[532] the ECtHR properly referred to "special features".[533] The applicants in the *Duarte Agostinho and Others* case likewise invoked "exceptional circumstances" and "special features" in order to advance their argument that extraterritorial jurisdiction could be established.[534] Yet, the Court concluded that the applicants'

---

[527] ECtHR, *Loizidou v. Turkey* (preliminary objections), cit., par. 62; O. DE SCHUTTER, *op. cit.*, p. 172.

[528] ECtHR, *M.N. and Others v. Belgium* [GC], cit., par. 101; ECtHR, *Duarte Agostinho and Others v. Portugal and 32 Others* [GC], cit., par. 168; ECtHR, *Hirsi Jamaa and Others v. Italy* [GC], cit., par. 72.

[529] ECtHR, *M.N. and Others v. Belgium* [GC], cit., par. 103; ECtHR, *Duarte Agostinho and Others v. Portugal and 32 Others* [GC], cit., par. 168.

[530] ECtHR, *Loizidou v. Turkey* (preliminary objections), cit., par. 62; ECtHR, *Banković and Others v. Belgium and Others* [GC], cit., par. 71; ECtHR, *Al-Skeini and Others v. The United Kingdom* [GC], cit., pars. 138-140 and 142; ECtHR, *Chiragov and Others v. Armenia* [GC], Appl. No. 13216/05, judgement of 16 June 2015, par. 186; ECtHR, *Mozer v. The Republic of Moldova and Russia* [GC], Appl. No. 11138/10, judgement of 23 February 2016, pars. 110-111; ECtHR, *M.N. and Others v. Belgium* [GC], cit., pars. 103; L. RAIBLE, *Title to Territory and Jurisdiction in International Human Rights Law: Three Models for a Fraught Relationship*, in *Leiden Journal of International Law*, 2018, p. 327.

[531] ECtHR, *Duarte Agostinho and Others v. Portugal and 32 Others* [GC], cit., par. 169.

[532] ECtHR, *H.F. and Others v. France* [GC], Appl. Nos. 24384/19 and 44234/20, judgement of 14 September 2022.

[533] ECtHR, *H.F. and Others v. France* [GC], cit., par. 190; ECtHR, *Duarte Agostinho and Others v. Portugal and 32 Others* [GC], cit., par. 173.

[534] ECtHR, *Duarte Agostinho and Others v. Portugal and 32 Others* [GC], cit., par. 186.

complaints *in casu* were not relatable to any of the circumstances arising to a finding of extraterritorial jurisdiction.[535] Since no basis for determining extraterritorial jurisdiction of the 32 European countries could be found in the Court's jurisprudence, an attempt was made to understand whether it was possible to develop the existing case law on extraterritoriality following the applicants' reasoning.[536] The ECtHR recognised three aspects of climate change which had been stressed by the applicants. First, States are responsible for the production of greenhouse gas ('GHG') emissions resulting from public and private activities located on their respective territories.[537] Second, a causal relationship exists between said activities and the negative effects on "the rights and well-being" of individuals who reside outside the States' borders. Nonetheless, this relationship appears to be "complex and multi-layered".[538] Third, climate change poses an existential threat to humanity and cannot be depicted within a simple cause-and-effect scenario.[539] Having said that, these observations, in and on themselves, are not sufficient to create a novel ground for extraterritorial jurisdiction, nor do they adequately serve as an explanation for elaborating on the existing case law.[540] Hence, the Court proceeded to analyse the other arguments presented by the applicants in order to provide a rationale for an expansion of extraterritorial jurisdiction.[541] In

[535] ECtHR, *Duarte Agostinho and Others v. Portugal and 32 Others* [GC], cit., par. 185.
[536] ECtHR, *Duarte Agostinho and Others v. Portugal and 32 Others* [GC], cit., par. 190.
[537] ECtHR, *Duarte Agostinho and Others v. Portugal and 32 Others* [GC], cit., par. 192.
[538] ECtHR, *Duarte Agostinho and Others v. Portugal and 32 Others* [GC], cit., par 193.
[539] ECtHR, *Duarte Agostinho and Others v. Portugal and 32 Others* [GC], cit., par. 194.
[540] ECtHR, *Duarte Agostinho and Others v. Portugal and 32 Others* [GC], cit., par. 195; ECtHR, *The Court Has Declared Inadmissible the Applications Lodged Against Portugal and 32 Other States on the Issue of Climate Change*, cit., p. 3.
[541] ECtHR, *Duarte Agostinho and Others v. Portugal and 32 Others* [GC], cit., par. 195.

the first place, the applicants argued that positive obligations should be imposed upon the respondent States considering the severe adverse impact of climate change on their rights under the ECHR.[542] However, the Strasbourg Court ruled that extraterritorial jurisdiction could not be established on that basis due to the absence of a particular connection between the applicants and the respondent States, with the exception of Portugal.[543] A jurisdictional link could not be found even by means of the applicants' EU citizenship. The latter was invoked with respect to the 26 EU Member States. Secondly, the applicants proposed that extraterritorial jurisdiction should be recognised with the ultimate aim of encouraging future climate change litigation.[544] In view of the above, the ECtHR emphasised the fact that the Convention was not intended to offer a broad protection of environmental rights.[545] Conversely, other international and domestic legal instruments were specifically designed for that purpose.[546] Were this argument to be accepted, a "radical departure from the rationale of the Convention protection system" would follow.[547] Thirdly, the applicants asserted that a "control over the applicants' Convention interests" test could also be used as a basis for extraterritorial jurisdiction in the context of the latest developments in international law. Related to this, the ECtHR's case law specifically indicates that the control over "the person himself rather than the person's interests as such" is required in order for extraterritorial

[542] ECtHR, *Duarte Agostinho and Others v. Portugal and 32 Others* [GC], cit., par. 196.
[543] ECtHR, *Duarte Agostinho and Others v. Portugal and 32 Others* [GC], cit., pars. 198-199.
[544] ECtHR, *Duarte Agostinho and Others v. Portugal and 32 Others* [GC], cit., pars. 124-125 and 201.
[545] ECtHR, *Duarte Agostinho and Others v. Portugal and 32 Others* [GC], cit., par. 201; D. G. SAN JOSÉ, *op. cit.*, p. 7.
[546] ECtHR, *Duarte Agostinho and Others v. Portugal and 32 Others* [GC], cit., par. 201; ECtHR, *Verein KlimaSeniorinnen Schweiz and Others* [GC], cit., par. 445.
[547] ECtHR, *Duarte Agostinho and Others v. Portugal and 32 Others* [GC], cit., par. 201.

jurisdiction to be established.[548] Once more, the criterion suggested by the applicants would result in the principles underlying Article 1 ECHR being disregarded with reference to the question of jurisdiction.[549] Another point to note is that reliance on the aforementioned test would determine "a critical lack of foreseeability of the Convention's reach", thereby turning the ECHR into "a global climate-change treaty".[550] As far as the recent international law developments pertaining to climate change are concerned, the Strasbourg Court determined that the UNFCCC, the IACtHR's Advisory Opinion, and the CRC's *Sacchi and Others* decision could not explain the States' extraterritorial jurisdiction as indicated in the applicants' complaint.[551] To begin with, the UNFCCC represents an international law document whose nature diverges considerably from that of the Convention.[552] It is clear that the UNFCCC was established with the specific objective of addressing the issue of climate change.[553] In respect to the IACtHR's Advisory Opinion and the CRC's *Sacchi and Others* decision, the Strasbourg Court maintained that they were both based on a notion of jurisdiction which could not be found in the case law of the ECtHR.[554] In light of the considerations allocated above, extraterritorial jurisdiction could

[548] ECtHR, *Duarte Agostinho and Others v. Portugal and 32 Others* [GC], cit., par. 205; ECtHR, *Ukraine and the Netherlands v. Russia* [GC], Appl. Nos. 43800/14, 8019/16, and 28525/20, judgement of 30 November 2022.

[549] ECtHR, *Duarte Agostinho and Others v. Portugal and 32 Others* [GC], cit., par. 205.

[550] ECtHR, *Duarte Agostinho and Others v. Portugal and 32 Others* [GC], cit., pars. 206 and 208.

[551] ECtHR, *Duarte Agostinho and Others v. Portugal and 32 Others* [GC], cit., par. 210.

[552] ECtHR, *Duarte Agostinho and Others v. Portugal and 32 Others* [GC], cit., par. 212.

[553] L. VANHALA and C. HESTBAEK, *Framing Climate Change Loss and Damage in UNFCCC Negotiations*, in *Global Environmental Politics*, 2016, p. 111.

[554] ECtHR, *Duarte Agostinho and Others v. Portugal and 32 Others* [GC], cit., par. 212; ECtHR, *Georgia v. Russia (II)* [GC], Appl. No. 38263/08, judgement of 21 January 2021, par. 124.

not be established following the applicants' reasoning.[555] To conclude, the Court determined that Portugal had territorial jurisdiction, while no jurisdiction could be established with respect to the other 32 respondent States.[556]

In considering the exhaustion of domestic remedies, the ECtHR first recalled its existing case law.[557] It also contended that the prior exhaustion of local remedies is a general principle of international law.[558] As for the 32 respondent States other than Portugal, the question was not addressed due to the inadmissibility of the claim on the grounds of jurisdiction.[559] With regard to Portugal, the Strasbourg Court posited that there were no "special reasons" which could justify the applicants' refusal to pursue their case through the domestic courts.[560]

Lastly, the ECtHR held that "a significant lack of clarity as regards the applicants' individual situations" impeded a comprehensive examination of the victim status requirements identified in *Verein*

---

[555] ECtHR, *Duarte Agostinho and Others v. Portugal and 32 Others* [GC], cit., par. 213.

[556] ECtHR, *Duarte Agostinho and Others v. Portugal and 32 Others* [GC], cit., par. 214.

[557] ECtHR, *Vučković and Others v. Serbia* (preliminary objection) [GC], Appl. Nos. 17153/11 and 29 others, judgement of 25 March 2014, pars. 69-77; ECtHR, *Gherghina v. Romania* (decision) [GC], Appl. No. 42219/07, judgement of 9 July 2015, pars. 83-89; ECtHR, *Communauté Genevoise d'Action Syndicale (CGAS) v. Switzerland* [GC], Appl. No. 21881/20, judgement of 27 November 2023, pars. 138-146; ECtHR, *Duarte Agostinho and Others v. Portugal and 32 Others* [GC], cit., par. 215.

[558] ECtHR, *Vučković and Others v. Serbia* (preliminary objection) [GC], cit., par. 73; ECtHR, *Duarte Agostinho and Others v. Portugal and 32 Others* [GC], cit., par. 215; O. DE SCHUTTER, *op. cit.*, p. 995; C. F. AMERASINGHE, *Local Remedies in International Law*, Cambridge, 1990; A. A. CANÇADO TRINDADE, *op. cit.*, 1983.

[559] ECtHR, *Duarte Agostinho and Others v. Portugal and 32 Others* [GC], cit., par. 216.

[560] ECtHR, *Duarte Agostinho and Others v. Portugal and 32 Others* [GC], cit., par. 226.

KlimaSeniorinnen Schweiz and Others.[561] Tellingly, this was due to the fact that the ECtHR had been treated as a court of first instance.[562]

In summary, the *Duarte Agostinho and Others* case provides a clear illustration of the procedural hurdles inherent in ECHR-based litigation concerning climate change.[563] Although the Court did not probe the merits of the claim because the case did not meet the required admissibility criteria, the decision may play an important role in influencing domestic law and legal responses, thereby affecting policy-making both internationally and domestically.[564] The latter point appears to be relevant in light of the margin of appreciation. While the ECtHR has ruled that respondent States need to reduce their GHG emissions in general, the specifics of how this objective is to be reached are left to the policy-makers at the domestic level.

3.3. The Potential Legal Implications of the Case for the United Kingdom

With respect to the UK, *Duarte Agostinho and Others* may result in modifications to the country's climate-related policies. This appears to be especially significant in the context of a recent judgement which was delivered by the High Court of Justice on 3 May 2024, nearly one month after the Strasbourg Court's decision.

In *Friends of the Earth and Others v. Secretary of State for Energy Security and Net Zero*, the High Court ruled that the Carbon Budget Delivery Plan ('CBDB'), which the former Secretary of State for Energy Security and Net Zero ('ESNZ') Grant Shapps had devised

---

[561] ECtHR, *Duarte Agostinho and Others v. Portugal and 32 Others* [GC], cit., par. 229; ECtHR, *Verein KlimaSeniorinnen Schweiz and Others* [GC], cit., pars. 487-488.
[562] ECtHR, *Duarte Agostinho and Others v. Portugal and 32 Others* [GC], cit., par. 230.
[563] J. PEEL and H. M. OSOFSKY, *A Rights Turn in Climate Change Litigation?*, in *Transnational Environmental Law*, 2017, p. 46.
[564] O. W. PEDERSEN, *Any Role for the ECHR When it Comes to Climate Change?*, cit. p. 22; O. W. PEDERSEN, *Climate Change and the ECHR: The Results are in*, April 2024, www.ejiltalk,org.

pursuant to Section 13 of the Climate Change Act 2008 ('the CCA 2008'), was unlawful.[565] This is because not enough evidence was provided on how the Government intended to achieve the targets of the sixth carbon budget ('CB6'), i.e., the carbon budget allocated for the years 2033-2037. The Secretary for ESNZ is the defendant to the proceeding, while the not-for-profit organisations Friends of the Earth and Good Law Project along with the environmental law charity ClientEarth are the claimants.

During the 21st Conference of the 196 State Parties to the UNFCCC, the 2015 Paris Agreement was adopted. The latter was ratified by the UK on 17 November 2016.[566] Particularly important is Article 2 of the Paris Agreement, which imposes the limit of 1.5 °C on the increase in global average temperature.[567] Also of significance is Article 4 of the Paris Agreement, as it sets the "net zero target".[568] Under the terms of said provision, States are required to pursue policies conducive to the reduction of carbon dioxide (CO_2) emissions to a level

---

[565] High Court of Justice, *Friends of the Earth and Others v. Secretary of State for Energy Security and Net Zero*, EWHC Admin. 995, judgement of 3 May 2024, par. 1; Climate Change Act 2008 (c. 27), Section 13; H. ZEFFMAN, G. RANNARD, and K. WHANNEL, *Claire Coutinho: Who is the New Energy Secretary?*, August 2023, www.bbc.com; A. SOLIMANI, *Case Note: Friends of the Earth v. Secretary of State for Energy Security and Net Zero [2024] EWHC 995 (Admin)*, 2024. Grant Shapps was replaced as Secretary of State for ESNZ on 31 August 2023 by Claire Coutinho.

[566] High Court of Justice, *Friends of the Earth and Others v. Secretary of State for Energy Security and Net Zero*, cit., par. 5; High Court of Justice, *R (Friends of the Earth Ltd) v. Secretary of State for Business, Energy and Industrial Strategy*, EWHC Admin. 1841, judgement of 18 July 2022, par. 2; UN Climate Change Conference, *The Paris Agreement*, May 2024, www.unfccc.int.

[567] High Court of Justice, *Friends of the Earth and Others v. Secretary of State for Energy Security and Net Zero*, cit., par. 5; High Court of Justice, *R (Friends of the Earth Ltd) v. Secretary of State for Business, Energy and Industrial Strategy*, cit., par. 3.

[568] High Court of Justice, *Friends of the Earth and Others v. Secretary of State for Energy Security and Net Zero*, cit., par. 5; High Court of Justice, *R (Friends of the Earth Ltd) v. Secretary of State for Business, Energy and Industrial Strategy*, cit., par. 3; UN Climate Change Conference, *Paris Agreement to the United Nations Framework Convention on Climate Change*, cit., Art. 4.

which "can be absorbed and durably stored by nature […] leaving zero in the atmosphere".[569] The UK's response to the obligations arising from the 2015 Paris Agreement was twofold.[570] On the one hand, an amendment to Section 1 of the CCA 2008 was introduced on 27 June 2019.[571] Consequently, the duty to ensure that the net carbon account for the year 2050 is "at least 100% lower than the baseline in 1990 for CO_2 and other GHGs" was imposed on the then Secretary of State for Business, Energy and Industrial Strategy ('BEIS'), who performed the tasks which are presently assigned to the Secretary for ESNZ.[572] On the other hand, on 12 December 2020, the UK committed to decrease national GHG emissions before 2030 by at least 68% in comparison to the levels observed in 1990.[573]

---

[569] UN, *For a Livable Climate: Net-Zero Commitments Must be Backed by Credible Action*, May 2024, www.un.org.

[570] High Court of Justice, *Friends of the Earth and Others v. Secretary of State for Energy Security and Net Zero*, cit., par. 5; High Court of Justice, *R (Friends of the Earth Ltd) v. Secretary of State for Business, Energy and Industrial Strategy*, cit., par. 5.

[571] High Court of Justice, *Friends of the Earth and Others v. Secretary of State for Energy Security and Net Zero*, cit., par. 5; High Court of Justice, *R (Friends of the Earth Ltd) v. Secretary of State for Business, Energy and Industrial Strategy*, cit., par. 5.

[572] High Court of Justice, *Friends of the Earth and Others v. Secretary of State for Energy Security and Net Zero*, cit., par. 5; High Court of Justice, *R (Friends of the Earth Ltd) v. Secretary of State for Business, Energy and Industrial Strategy*, cit., par. 5; G. PARKER and J. PICKARD, *Rishi Sunak Breaks up UK Business Department to Refocus on Energy and Science*, February 2023, www.ft.com. On 7 February 2023, Rishi Sunak divided the Department for BEIS into three distinct departments, namely the Department for ESNZ, the Department for Business and Trade, and the Department for Science, Innovation and Technology.

[573] [573] High Court of Justice, *Friends of the Earth and Others v. Secretary of State for Energy Security and Net Zero*, cit., par. 5; High Court of Justice, *R (Friends of the Earth Ltd) v. Secretary of State for Business, Energy and Industrial Strategy*, cit., par. 5.

On balance, the CCA 2008 develops the legal framework whereby the UK aims to attain the net zero target by 2050.[574] Following Section 4 of the CCA 2008, the Secretary of State for ESNZ is obliged to establish carbon budgets for successive five-year periods. The first carbon budget ('CB1') was set in 2008.[575] In order to pursue these objectives, Section 13 of the CCA 2008 specifies the Secretary of State for ESNZ's requirement to prepare appropriate proposals and policies. In this regard, both the successive targets and the overall target for 2050 shall be envisaged.[576] Furthermore, in accordance with Section 14 of the CCA 2008, a report has to be prepared so as to explain the effects of the proposals and policies on the different economic sectors.

The claimants advanced five grounds of challenge.[577] First, they posited that the Secretary of State for ESNZ "failed to take into account mandatory material considerations" as indicated in Section 13 of the CCA 2008.[578] Second, they maintained that the Secretary of State for ESNZ's assumption that all the proposals and policies "would be delivered in full" was not pondered.[579] In the claimants' reasoning, this was due to the fact that the "delivery risk", that is to say, the uncertainty concerning the amount of emissions which the presented proposals and policies will reduce, was not outweighed.[580] Third, the Secretary of

---

[574] High Court of Justice, *Friends of the Earth and Others v. Secretary of State for Energy Security and Net Zero*, cit., par. 5; High Court of Justice, *R (Friends of the Earth Ltd) v. Secretary of State for Business, Energy and Industrial Strategy*, cit., par. 7.

[575] High Court of Justice, *Friends of the Earth and Others v. Secretary of State for Energy Security and Net Zero*, cit., par. 5; High Court of Justice, *R (Friends of the Earth Ltd) v. Secretary of State for Business, Energy and Industrial Strategy*, cit., par. 7.

[576] CCA 2008, cit., Section 13(2).

[577] High Court of Justice, *Friends of the Earth and Others v. Secretary of State for Energy Security and Net Zero*, cit., par. 93.

[578] High Court of Justice, *Friends of the Earth and Others v. Secretary of State for Energy Security and Net Zero*, cit., par. 93.

[579] High Court of Justice, *Friends of the Earth and Others v. Secretary of State for Energy Security and Net Zero*, cit., par. 93.

[580] High Court of Justice, *Friends of the Earth and Others v. Secretary of State for Energy Security and Net Zero*, cit., par. 96.

State for ESNZ's conclusion that the carbon budgets could be met was deemed to be "irrational".[581] Fourth, it was submitted that the legal test applied to Section 13(3) of the CCA 2008 was wrong.[582] Fifth, not all the required information was included in the CBDP, in breach of Section 14 of the CCA 2008.[583]

The High Court held that the first, the second, and the third grounds could be analysed together due to a considerable degree of overlap between the three arguments.[584] Conversely, the fourth and the fifth grounds were assessed separately. The five grounds will be summarised following the case note published by the barristers' chambers Francis Taylor Building.[585]

At the heart of the first, the second, and the third grounds there was the idea that the Secretary of State for ESNZ was provided with inadequate evidence concerning the delivery risk of the CBDP proposals and policies.[586] Hence, he was not able to ensure their compliance with Section 13(1) of the CCA 2008.[587] In the High Court's view, the evaluation of the delivery risk involves a "predictive judgement as to what way may transpire up to 14 years into the future, based on a range of complex social, economic, environmental and technological assessments, themselves involving judgments (including predictive judgments), operating in a polycentric context".[588] As highlighted in the Secretary of State for ESNZ's request to be provided with delivery risk information, it was clear that "sufficient information"

---

[581] High Court of Justice, *Friends of the Earth and Others v. Secretary of State for Energy Security and Net Zero*, cit., par. 93.
[582] High Court of Justice, *Friends of the Earth and Others v. Secretary of State for Energy Security and Net Zero*, cit., par. 93.
[583] High Court of Justice, *Friends of the Earth and Others v. Secretary of State for Energy Security and Net Zero*, cit., par. 93.
[584] High Court of Justice, *Friends of the Earth and Others v. Secretary of State for Energy Security and Net Zero*, cit., par. 94.
[585] A. SOLIMANI, *op. cit.*, pp. 1-4.
[586] A. SOLIMANI, *op. cit.*, p. 2.
[587] A. SOLIMANI, *op. cit.*, p. 2.
[588] High Court of Justice, *Friends of the Earth and Others v. Secretary of State for Energy Security and Net Zero*, cit., par. 141; A. SOLIMANI, *op. cit.*, p. 2.

was needed "to make an informed judgement about whether carbon budgets can be met. This must include qualitative explanation of risks and planned mitigations […]".[589] The Net Zero Strategy ('NZS'), that is to say, a former version of the CBDP which was planned by the Secretary of State for BEIS, provided a traffic light system with Red, Amber, Green ('RAG') ratings illustrating the delivery risk of each proposal and policy.[590] Instead, the CBDP was organised with "narrative" summaries of the risks relating to the proposals and policies.[591] In addition, the CBDP, presented to the Secretary of State for ESNZ in March 2023, noted that "[…] this quantification relies on the package of proposals and policies being delivered in full. Our advice is that it is reasonable to expect this level of ambition – having regard to delivery risk […] and the wider context".[592] The High Court proceeded with the analysis of the first three grounds on two bases.[593] Were the primary basis to be considered, the Secretary of State for ESNZ would have wrongly assumed all policies could be delivered in full.[594] This, however, did not appear to represent a novel legal interpretation.[595] In Solimani's view, "it was a question of fact whether the Secretary of State for ESNZ had made such an assumption, and the Secretary of State for ESNZ conceded the legal point that such an assumption would be irrational".[596] Following the alternative basis, it was necessary to ascertain whether the information provided to the Secretary of State for ESNZ constituted a lawful basis for making a

[589] High Court of Justice, *Friends of the Earth and Others v. Secretary of State for Energy Security and Net Zero*, cit., par. 20; A. SOLIMANI, *op. cit.*, p. 2.
[590] High Court of Justice, *Friends of the Earth and Others v. Secretary of State for Energy Security and Net Zero*, cit., par. 21; A. SOLIMANI, *op. cit.*, p. 2.
[591] High Court of Justice, *Friends of the Earth and Others v. Secretary of State for Energy Security and Net Zero*, cit., pars. 29-31; A. SOLIMANI, *op. cit.*, p. 2.
[592] High Court of Justice, *Friends of the Earth and Others v. Secretary of State for Energy Security and Net Zero*, cit., par. 35; A. SOLIMANI, *op. cit.*, p. 2.
[593] A. SOLIMANI, *op. cit.*, p. 2.
[594] A. SOLIMANI, *op. cit.*, p. 2.
[595] A. SOLIMANI, *op. cit.*, p. 2.
[596] High Court of Justice, *Friends of the Earth and Others v. Secretary of State for Energy Security and Net Zero*, cit., par. 126; A. SOLIMANI, *op. cit.*, p. 2.

rational decision.[597] This was contingent upon the idea that the Secretary of State for ESNZ had not made such an assumption.[598] In the end, the High Court ruled that the information provided to the Secretary of State for ESNZ was not a lawful basis for making a rational decision. The legal standard applied was whether the Secretary of State had sufficient information "to work out for himself whether the proposal or policy was likely to miss the target by a small or large amount and if so by how much".[599] The High Court provided the illustrative example of the slurry policy, which projects emissions reductions of 0.00096 Mt CO_{2e}. Nevertheless, the level of delivery risk appeared to be "uncertain" and required further analysis.[600]

The core of the fourth ground revolved around the assumption that the Secretary of State for ESNZ misinterpreted Section 13(3) of the CCA 2008, which stipulates that the proposals and policies in question "taken as a whole, must be such as to contribute to sustainable development".[601] The Secretary of State for ESNZ asserted that, in his perspective, the "overall contribution" of the proposals and policies was "likely" to contribute to sustainable development. The claimants maintained that this was not an acceptable interpretation, citing the use of the term "must" to denote certainty rather than the term "likely" to denote likelihood.[602] The High Court concurred with the claimants' position, ruling that the "overall contribution" of the proposals and policies must contribute to sustainable development.[603] In fact, the phrasing of Section 13(3) of the CCA 2008 "connotes a degree of certainty that a particular outcome will eventuate", and "[on] no

[597] A. SOLIMANI, *op. cit.*, p. 2.
[598] A. SOLIMANI, *op. cit.*, p. 2.
[599] High Court of Justice, *Friends of the Earth and Others v. Secretary of State for Energy Security and Net Zero*, cit., par. 134; A. SOLIMANI, *op. cit.*, p. 2.
[600] High Court of Justice, *Friends of the Earth and Others v. Secretary of State for Energy Security and Net Zero*, cit., par. 47; A. SOLIMANI, *op. cit.*, p. 2.
[601] Climate Change Act 2008, Section 13(3); A. SOLIMANI, *op. cit.*, p. 3.
[602] High Court of Justice, *Friends of the Earth and Others v. Secretary of State for Energy Security and Net Zero*, cit., par. 150; A. SOLIMANI, *op. cit.*, p. 3.
[603] High Court of Justice, *Friends of the Earth and Others v. Secretary of State for Energy Security and Net Zero*, cit., par. 150; A. SOLIMANI, *op. cit.*, p. 3.

reasonable view, could it be said that 'likely' means 'must'".[604] Thus, the Secretary of State for ESNZ misconstrued Section 13(3) of the CCA 2008.

Insofar as the fifth ground is concerned, the claimants contended that the Secretary of State for ESNZ was obliged under Section 14 of the CCA 2008 to publish a report for public consultation presenting the proposals and policies and was required to include the delivery risk analysis for each policy. The High Court rejected the claim, stating that the Secretary of State for ESNZ was required to add the delivery risk analysis for each policy. Therefore, the sector level delivery risk analyses were deemed sufficient, being more than what was required to discharge the "legal object" of a Section 14 document.[605] In essence, the objective was "to enable its readers to understand and assess the adequacy of the Government's policy proposals and their effects" and "in the interests of public transparency".[606]

To conclude, *Friends of the Earth and Others v. Secretary of State for Energy Security and Net Zero* clearly shows that the plan which was designed by the UK Government so as to reach the net zero target, i.e., the CBDP, is inadequate. Yet, one may argue that the UK is acting in a way which is compliant with the overall spirit of the ECHR. In *Verein KlimaSeniorinnen Schweiz and Others*, the Strasbourg Court stated that it will judge climate change policies following five criteria.[607] States are required to: (a) adopt general measures which specify a timeline for the reduction of carbon emissions, as well as the overall carbon budget; (b) prescribe intermediate targets; (c) provide evidence that they are complying, or at least trying to comply with, the intermediate targets; (d) update the intermediate targets according to the

---

[604] High Court of Justice, *Friends of the Earth and Others v. Secretary of State for Energy Security and Net Zero*, cit., par. 150; A. SOLIMANI, *op. cit.*, p. 3.
[605] A. SOLIMANI, *op. cit.*, p. 3.
[606] High Court of Justice, *Friends of the Earth and Others v. Secretary of State for Energy Security and Net Zero*, cit., par. 162; A. SOLIMANI, *op. cit.*, p. 3.
[607] ECtHR, *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* [GC], cit., par. 550.

available scientific evidence; (e) act in a timely manner.[608] The ECtHR also affirmed that the "assessment of whether the above requirements have been met will, in principle, be of an *overall* nature, meaning that a shortcoming in one particular respect alone will not necessarily entail that the State would be considered to have overstepped its relevant margin of appreciation".[609] In this regard, the CBDP seems not to be in line with point (c). Nonetheless, in light of the holistic approach outlined above, the UK appears to be respecting the ECHR with reference to environmental protection, specifically climate change. In addition, it is worth mentioning that the UK's long commitment to reduce GHG emissions can be traced back to when the CCA 2008 was designed. At that time, said legislation was "ground-breaking", being the "world's first attempt to make climate change targets legally binding for a government".[610] That being said, the inadequacy of the CBDP might be due to the fact that both the negotiation and the implementation of Brexit has provided "a substantial distraction from the urgent task of reaching the emissions target".[611]

[608] ECtHR, *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* [GC], cit., par. 550.
[609] ECtHR, *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* [GC], cit., par. 551 (emphasis added).
[610] F. FARSTAD, N. CARTER, and C. BURNS, *What does Brexit Mean for the UK's Climate Change Act?*, in *The Political Quarterly*, 2018, p. 291.
[611] F. FARSTAD, N. CARTER, and C. BURNS, *op. cit.*, p. 293.

CONCLUSION

In the Chapters above has been explored the extent to which the UK has been implementing the ECHR as specifically regards the protection of migrants, the protection of VoTs, and the protection of the environment. The research was undertaken in the context of Brexit, which is deemed a remarkable turning point in contemporary British history.[612]

In the first instance, all Chapters examined the case law of the Strasbourg Court in each relevant field. Chapter 1 revolved around the case *N.S.K. v. The United Kingdom* and demonstrated that the UK is not complying with its obligations under the Convention, the MEDP and the IMA being fundamentally in contrast with the country's obligations under the ECHR as far as the protection of migrants is concerned. Subsequently, Chapter 2 illustrated the domestic courts' approach to the protection of VoTs, which appears to be contrary to the ECtHR decision in *V.C.L. and A.N. v. The United Kingdom*. Finally, Chapter 3 focused on the case *Duarte Agostinho and Others v. Portugal and 32 Others*. Despite the fact that the case did not fulfil the admissibility criteria and could not be assessed in terms of the merits, the High Court's judgement in *Friends of the Earth and Others v. Secretary of State for Energy Security and Net Zero* clearly showed that the UK is complying with the overall spirit of the Convention in relation to the protection of the environment.

Having regard to the various doctrines cited in the thesis, it is difficult to express an unambiguous judgement in respect of the UK's implementation of the ECHR after Brexit. All in all, one may argue that, on the basis of the analysis conducted, the implementation of the Convention has not been particularly effective with reference to the protection of migrants and VoTs. Nonetheless, the same does not hold true for the protection of the environment.

---

[612] P. MITRA, *Immigration, Identity and Security in the Context of Brexit: Examining Linkages Through the Lens of the Copenhagen School*, in *Jadavpur Journal of International Relations*, 2022, p. 44.

The protection of migrants and the protection of VoTs alike could be considered as 'sensitive issues' whose interpretation in the case law of the ECtHR is at odds with "the British conceptions of rights and law".[613] This might be partly attributable to the fact that said issues are intimately intertwined with notions of the country's identity. The latter, despite being complex to define, reinforces itself "against anything perceived as *alien*", i.e., 'different' from what constitutes Britishness.[614] The British see themselves as distinct from Europe, and, needless to say, their feeling of "exceptionalism" is to be detected in their unique imperial history.[615] If, as Gerhart asserts, "a system of law is a reflection of the values a society uses",[616] then the UK's sense of detachment from Europe is reflected in how politicians and judges implement the rulings of the ECtHR. In Jay's words, "the British rights tradition [is perceived] as ancient, intrinsically guaranteed to British citizens".[617] Rights are seen as "political, rather than legal, constructs" since they are created by the British Parliament for the British people.[618] The "doctrine of parliamentary sovereignty", that is to say, the idea that Parliament has "the right to make or unmake any law whatever" without being overruled by any other institution, is pivotal to the British rights culture.[619] Hence, the fact that a foreign, non-British judge of the Strasbourg Court is the ultimate legislative authority on questions arising under domestic law in connection with the ECHR appears not to be widely accepted in Britain.

---

[613] Z. JAY, *Keeping Rights at Home: British Conceptions of Rights and Compliance with the European Court of Human Rights*, in *The British Journal of Politics and International Relations*, 2017, p. 855 (emphasis added).
[614] P. MITRA, *op. cit.*, p. 53.
[615] P. MITRA, *op. cit.*, p. 52.
[616] P. M. GERHART, *Property Law and Social Morality*, Cambridge, 2013, p. 8; K. BARNES, *Recognition and Reflection*, in *Texas A&M Journal of Property Law*, 2015, p. 197.
[617] Z. JAY, *op. cit.*, p. 847.
[618] Z. JAY, *op. cit.*, p. 847.
[619] Z. JAY, *op. cit.*, p. 846; A. V. DICEY, *Introduction to the Study of the Law of the Constitution*, London, 1915, p. 38.

Conversely, the protection of the environment as defined in the case law of the ECtHR appears to be aligned with the conceptions of rights and law as developed in the UK. Therefore, it seems that British politicians and judges are more inclined to comply with the Strasbourg Court's judgements related to this field.

That being said, the way in which the UK is executing the ECtHR's rulings could have repercussions on the implementation of the Convention in other Member States. As already pointed out, the ECHR 'lives' through the case law of the Court, whose judges interpret the Convention according to the "present-day conditions".[620] Thus, the jurisprudence of the ECtHR plays a pivotal role in ensuring the protection of rights which are not explicitly mentioned in the Convention. Should the UK persist in discrediting the Court's jurisprudence, this trend could gain the support of other States and hinder the protection of the human rights system established by the ECtHR and, in wider terms, the Council of Europe.

[620] C. PETERSMANN, *op. cit.*, p. 771.

BIBLIOGRAPHY

Monographs and Book Chapters

ACCONCIAMESSA L., *Equality in the Access to the ECtHR – Filling Procedural Gaps Concerning* Locus Standi *and Representation of Extremely Vulnerable Individuals*, in AMOROSO D. *et al.*, *More Equal than Others? Perspectives on the Principle of Equality from International and EU Law*, Berlin, 2023.

AMERASINGHE C. F., *Local Remedies in International Law*, Cambridge, 1990.

BALES K., *Disposable People: New Slavery in the Global Economy*, Berkeley, 2012.

BATES E., *The Evolution of the European Convention on Human Rights: From its Inception to the Creation of a Permanent Court of Human Rights*, Oxford, 2010.

BELL S., MCGILLIVRAY D., and PEDERSEN O.W., *Environmental Law*, Oxford, 2017.

BESSON S., *The Reception Process in Ireland and the United Kingdom*, in KELLER H. and STONE SWEET A., *A Europe of Rights: The Impact of the ECHR on National Legal Systems*, Oxford, 2008.

ÇALI B., BIANKU L., and MOTOK I., *Migration and the European Convention on Human Rights*, New York, 2021.

CANÇADO TRINDADE A. A., *The Application of the Rule of Exhaustion of Local Remedies: Its Rationale in the International Protection of Individual Rights*, Cambridge, 1983.

CRAWFORD J., *The International Law Commission's Articles on State Responsibility – Introduction, Text and Commentaries*, Cambridge, 2003.

DAVIS M., *Identifying Victims of Human Trafficking. The Legal Issues, Challenges and Barriers*, Cham, 2024.

DE SCHUTTER O., *International Human Rights Law – Cases, Materials, Commentary*, Cambridge, 2019.

DEMBOUR M. B., *When Humans Become Migrants*, Oxford, 2015.

DICEY A. V., *Introduction to the Study of the Law of the Constitution*, London, 1915.

DORSSEMONT F., *Enforcing the Prohibition against Human Trafficking: The Teaching of the European Court on Human Rights*, in LUCHTMAN M. J. J. P., *Of Swords and Shields: Due Process of Crime Control in Times of Globalization*, The Hague, 2023.

ELLIOT M., *The United Kingdom Constitution*, in MASTERMAN R. and SCHÜTZE R., *The Cambridge Companion to Comparative Constitutional Law*, Cambridge, 2019.

FENWICK H., *Civil Liberties and Human Rights*, London, 2007.

GERHART P. M., *Property Law and Social Morality*, Cambridge, 2013.

GREER S. C., *The European Convention on Human Rights: Achievements, Problems and Prospects*, New York, 2006.

KTISTAKIS Y., *Protecting Migrants Under the European Convention on Human Rights and the European Social Charter – A Handbook for Legal Practitioners*, Strasbourg, 2013.

MORROW K., *The ECHR, Environment-Based Human Rights Claims, and the Search for Standards*, in TURNER S. J. *et al.* (edited by), *Environmental Rights: The Development of Standards*, Cambridge, 2019.

MURRAY C., *Magna Carta's Tainted Legacy: Historic Justifications for a British Bill of Rights and the Case Against the Human Rights Act*, in F. COWELL, *Critically Examining the Case Against the 1998 Human Rights Act*, Abingdon, 2019.

PEDERSEN O. W., *Environmental Principles and the European Court of Human Rights*, in KRAMER L. and ORLAND E. (edited by), *Principles of Environmental Law, IUCN Encyclopedia of Environmental Law*, Cheltenham, 2018.

PEDERSEN O. W., *European Court of Human Rights and Environmental Rights*, in FAURE M. *Elgar Encyclopedia of Environmental Law*, Cheltenham, 2019.

PEDERSEN O. W., *The European Court of Human Rights and International Environmental Law*, in KNOX J. H. and PEJAN R. (edited by), *The Human Right to a Healthy Environment*, Cambridge, 2018.

PETERS B., *The European Court of Human Rights and the Environment*, in OBENES E., MEAD S., and SAMSON B. (edited by), *The Environment Through the Lens of International Courts and Tribunals*, The Hague, 2022.

POLLICINO O., *Toward a Convergence Between the EU and ECHR Legal Systems?*, in REPETTO G. (edited by), *The Constitutional Relevance of the ECHR in Domestic and European Law – An Italian Perspective*, Cambridge, 2013

ROMANO C. P. R., *The Rule of Prior Exhaustion of Domestic Remedies: Theory and Practice in International Human Rights Procedures*, in BOSCHIERO N., SCOVAZZI T., and RAGNI C., *International Courts and the Development of International Law*, The Hague, 2013.

SAN JOSÉ D. G., *Environmental Protection and the European Convention on Human Rights*, Strasbourg, 2005.

STOYANOVA V., *European Court of Human Rights and the Right Not to Be Subjected to Slavery, Servitude, Forced Labor, and Human Trafficking*, in WINTERDYK J. and JONES J. (edited by), *The Palgrave International Handbook of Human Trafficking*, Cham, 2020.

VAN DIJK P. *et al.*, *Theory and Practice of the European Convention on Human Rights*, Cambridge, 2018.

WEBB T., *Essential Cases: Public Law*, Oxford, 2023.

Academic Papers

ACEVES W. J., *Actio Popularis? The Class Action in International Law*, in *The University of Chicago Legal Forum*, 2003.

ALLAIN J., *The* Jus Cogens *Nature of* Non-Refoulement, in *International Journal of Refugee Law*, 2001.

ARMSTRONG A., *You Shall Not Pass! How the Dublin System Fueled Fortress Europe*, in *Chicago Journal of International Law*, 2020.

ARNELL P. *et al.*, *The UK's Illegal Migration Bill: Human Rights Violated*, in *Medicine, Science and the Law*, 2023.

ARNORSSON A. and ZOEGA G., *On the Causes of Brexit*, in *European Journal of Political Economy*, 2018.

BAGLAYAN B. and FAHNER J. H., *'One Can Always Do Better' – The Referral Procedure before the Grand Chamber of the European Court of Human Rights*, in *Human Rights Law Review*, 2017.

BARNES K., *Recognition and Reflection*, in *Texas A&M Journal of Property Law*, 2015.

BELLO J. H. and DESGAGNÉ R., *López Ostra v. Spain*, in *The American Journal of International Law*, 1995.

BERNHARDT R., *Evolutive Treaty Interpretation, Especially of the European Convention on Human Rights*, in *German Yearbook of International Law*, 2013.

BLÖNDAL E. K. and ARNARDÓTTIR O. M., *Non-Refoulement in Strasbourg: Making Sense of the Assessment of Individual Circumstances*, in *Oslo Law Review*, 2018.

CALIGIURI A. and NAPOLETANO N., *The Application of the ECHR in the Domestic Systems*, in *The Italian Yearbook of International Law*, 2011.

CANTOR D. *et al.*, *Externalisation, Access to Territorial Asylum, and International Law*, in *International Journal of Refugee Law*, 2022.

CHARRET-DEL BOVE M., *What Future for Human Rights in the UK Post-Brexit?*, in *Revue Française de Civilisation Britannique*, 2022.

CHETAIL V., *Migration and International Law: A Short Introduction*, in *International Law and Migration*, 2016.

CROSBY S., *Brexit and Brexit Plus: The Non-Material Damage – Thoughts on 29 March 2017*, in *New Journal of European Criminal Law*, 2017.

CROSBY S., *Brexit: Lessons from Different Quarters*, in *New Journal of European Criminal Law*, 2019.

D'ASCOLI S. and SCHERR K. M., *The Rule of Prior Exhaustion of Local Remedies in the International Law Doctrine and its Application in the Specific Context of Human Rights Protection*, in *European University Institute Working Paper LAW*, 2007.

DALY A., *Climate Competence: Youth Climate Activism and Its Impact on International Human Rights Law*, in *Human Rights Law Review*, 2022.

DESMOND A., *The Private Life of Family Matters: Curtailing Human Rights Protection for Migrants under Article 8 ECHR?*, in *The European Journal of International Law*, 2018.

DUFFY A., *Expulsion to Face Torture?* Non-Refoulement *in International Law*, in *International Journal of Refugee Law*, 2008.

EDLUND J. and STEHLIK V., *Is the Assessment under Article 8 ECHR for Migrants Justifiable?*, in *Maastricht Journal of European and Comparative Law*, 2022.

EECKHOUT P. and FRANTZIOU E., *Brexit and Article 50 TEU: A Constitutionalist Reading*, in *Common Law Market Review*, 2017.

FARSTAD F., CARTER N., and BURNS C., *What does Brexit Mean for the UK's Climate Change Act?*, in *The Political Quarterly*, 2018.

FRANCIONI F., *International Human Rights in an Environmental Horizon*, in *European Journal of International Law*, 2010.

GALLAGHER M., *Youth Voices for Human Rights Litigation in the Face of Climate Change*, in *Human Rights Brief*, 2023.

GAMMELTOFT-HANSEN T. and RASK MADSEN M., *Regime Entanglement in the Emergence of Interstitial Legal Fields: Denmark and the Uneasy Marriage of Human Rights and Migration Law*, in *Nordiques*, 2021.

GASPARI L., *The International and European Legal Framework on Human Trafficking: An Overall View*, in *DEP – Deportate, Esuli, Profughe*, 2019.

GOODWIN-GILL G. S., *Memorandum of Understanding between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Rwanda*, in *International Legal Materials*, 2023.

GRAHAM L., *Boldness, Caution, Avoidance: Recent Cases Against the UK Before the European Court of Human Rights*, in *European Convention on Human Rights Law Review*, 2024.

GREENMAN K., *A Castle Built on Sand? Article 3 ECHR and the Source of Risk in* Non-Refoulement *Obligations in International Law*, in *International Journal of Refugee Law*, 2015.

GREER S. C., *Is the Prohibition Against Torture, Cruel, Inhuman and Degrading Treatment Really 'Absolute' in International Human Rights Law?*, in *Human Rights law Review*, 2015.

GREGORY C., *The Modern Slavery Defence*, in *The Cambridge Law Journal*, 2022.

HAMPSON F., MARTIN C., and VILJOEN F., *Inaccessible Apexes: Comparing Access to Regional Human Rights Courts and Commissions in Europe, the Americas, and Africa*, in *International Journal of Constitutional Law*, 2018

HANNAN M. A., *Third Generation Human Rights and the Good Governance*, in *International Journal of Sustainable Development*, 2010.

HECTORS K., *The Chartering of Environmental Protection: Exploring the Boundaries of Environmental Protection as Human Right*, in *European Energy and Environmental Law Review*, 2008.

HICKMAN T., *What is in the Prime Minister's 'Emergency' Asylum Legislation? Examining the Safety of Rwanda Bill and Rwanda Treaty*, 2023.

HODGE D. R., *Assisting Victims of Human Trafficking: Strategies to Facilitate Identification, Exit from Trafficking, and the Restoration of Wellness*, in *Social Work*, 2014.

HOFFMAN L., *The Universality of Human Rights*, in *Law Quarterly Review*, 2009.

HUGHES K., *Human Trafficking,* SM v Croatia *and the Conceptual Evolution of Article 4 ECHR*, in *Modern Law Review*, 2021.

IRTHE J. and DE JONG M., *Beyond the Turn to Human Rights: A Call for an Intersectional Climate Justice Approach*, in *The International Journal of Human Rights*, 2023.

JAY Z., *Keeping Rights at Home: British Conceptions of Rights and Compliance with the European Court of Human Rights*, in *The British Journal of Politics and International Relations*, 2017.

KANE G., *Building a House upon Sand? Human Trafficking, Forced Labor, and Exploitation of Prostitution in* S.M. v. Croatia, in *International Labor Rights Case Law*, 2021.

KARVATSKA S., *The European Court of Human Rights Interpretation of Migrants Cases: Basic Doctrinal Approaches*, in *Law of Ukraine: Legal Journal (Ukrainian)*, 2019.

KELLER H. and HERI C., *The Future is Now: Climate Cases Before the ECtHR*, in *Nordic Journal of Human Rights*, 2022.

KING L., *International Law and Human Trafficking*, in *Human Rights & Human Welfare*, 2009.

LAETSAS G., *Two Concepts of the Margin of Appreciation*, in *Oxford Journal of Legal Studies*, 2006.

LEWIS B., *Children's Human Rights-Based Climate Litigation at the Frontiers of Environmental and Children's Rights*, in *Nordic Journal of Human Rights*, 2021.

LOCK T., *Human Rights Law in the UK after Brexit*, in *Public Law, November Supplement (Brexit Special Extra Issue)*, 2017.

MARICONDA A., *Victim Status of Individuals in Climate Change Litigation before the ECtHR*, in *The Italian Review of International and Comparative Law*, 2023.

MARTINICO G., *Is the European Convention Going to Be 'Supreme'? A Comparative-Constitutional Overview of ECHR and EU Law before National Courts*, in *The European Journal of International Law*, 2012.

MENNIM S. and WARD T., *Expert Evidence, Hearsay and Victims of Trafficking*, in *The Journal of Criminal Law*, 2021.

MENNIM S., *The Non-Punishment Principle and the Obligations of the State Under Article 4 of the European Convention of Human Rights*, in *The Journal of Criminal Law*, 2021

MILANO V., *The European Court of Human Rights' Case Law on Human Trafficking in Light of* L.E. v Greece*: A Disturbing Setback?*, in *Human Rights Law Review*, 2017.

MILISAVLJEVIC B. and CUCKOVIC B., *Case-Law of the European Court of Human Rights Relating to Trafficking in Human Beings*, in *International Scientific Conference "Archibald Reiss Days" – Thematic Conference Proceedings of International Significance*, 2015.

MITRA P., *Immigration, Identity and Security in the Context of Brexit: Examining Linkages Through the Lens of the Copenhagen School*, in *Jadavpur Journal of International Relations*, 2022.

MITSILEGAS V. and GUILD E., *The UK and the ECHR After Brexit: The Challenge of Immigration Control*, in *European Convention on Human Rights Law Review*, 2024.

MORGAN J. and WILLMINGTON L., *The Duty to Remove Asylum Seekers under the Illegal Migration Act 2023: Is the Government's Plan to 'Stop the Boats' Now Doomed to Failure?*, in *Common Law World Review*, 2023.

MUHAMBYA I. B., *UK-Rwanda Agreement versus Legal Framework on the Protection of Refugees: Primacy of Minimum Guarantees of Human Rights*, in *Cahiers de l'Edem – Louvain Migration Case Law Commentary*, 2022.

MUNCE P., *The Conservative Party and Constitutional Reform: Revisiting the Conservative Dilemma through Cameron's Bill of Rights*, in *Parliamentary Affairs*, 2014.

NUßBERGER A., *The Concept of 'Jurisdiction' in the Jurisprudence of the European Court of Human Rights*, in *Current Legal Problems*, 2012.

PEDERSEN O. W., *Any Role for the ECHR When it Comes to Climate Change?*, in *European Convention on Human Rights Law Review*, 2022.

PEEL J. and OSOFSKY H. M., *A Rights Turn in Climate Change Litigation?*, in *Transnational Environmental Law*, 2017.

PEEL J., *Climate Change Governance: Policy and Litigation in a Multi-Level System*, in *Carbon & Climate Law Review*, 2011.

PETERSMANN M. C., *Life Beyond the Law – From the 'Living Constitution' to the 'Constitution of the Living'*, in *Heidelberg Journal of International Law*, 2022.

PRINCE M., *Rethinking Asylum: History, Purpose, and Limits*, in *International Migration Law*, 2009.

RAIBLE L., *Title to Territory and Jurisdiction in International Human Rights Law: Three Models for a Fraught Relationship*, in *Leiden Journal of International Law*, 2018.

RAINS R., *Legal Recognition of Gender Change for Transsexual Persons in the United Kingdom: The Human Rights Act 1998 and Compatibility with European Human Rights Law*, in *Georgia Journal of International Comparative Law*, 2005.

RISTIK J., *The Right to Asylum and the Principle of* Non-Refoulement *Under the European Convention on Human Rights*, in *European Scientific Journal*, 2017.

ROBINSON G., *Notes on the ECHR and the Disunited United Kingdom 'After' Brexit – In Memoriam Scott Crosby*, in *New Journal of European Criminal Law*, 2021.

SADOFF D., *International Law and the Mortal Precipice: A Legal Policy Critique of the Death Row Phenomenon*, in *Tulane Journal of International and Comparative Law*, 2008.

SCHWELB E., *The Actio Popularis and International Law*, in *Israel Yearbook Human Rights*, 1972.

SMITH A., BUADZE A., and LIEBRENZ M., *The United Kingdom's Rwanda Asylum Policy and the European Court of Human Rights' Interim Measure: Challenges for Mental Health and the Importance of Social Psychiatry*, in *International Journal of Social Psychiatry*, 2023.

SUEDI Y., *Litigating Climate Change before the Committee on the Rights of the Child in Sacchi v. Argentina et al.: Breaking New Ground?*, in *Nordic Journal of Human Rights*, 2022.

THYM D., *Residence as De Facto Citizenship? Protection of Long-Term Residence Under Article 8 ECHR*, in *Human Rights and Immigration*, 2014.

THYM D., *Respect for Private and Family Life under Article 8 ECHR in Immigration Cases: A Human Right to Regularise Illegal Stay*, in *International & Comparative Law Quarterly*, 2008.

TRAJER J., *V.C.L. and A.N. v. The United Kingdom: Bridging the Gap between Children's Rights and Anti-Trafficking Law under the ECHR?*, in *International Labour Rights Case Law*, 2021.

TURANJANIN V. and STANISAVLJEVIC´ J., *Human Trafficking and Forced Prostitution under Article 4 of the European Convention on Human Rights*, in *German Law Journal*, 2024.

TZEVELEKOS V. P. and DZEHTSIAROU K., *Climate Change: The World and the ECtHR in Unchartered Waters*, in *European Convention on Human Rights Law Review*, 2022.

UNGUREANU C. G., *The European Court of Human Rights and the Major Arguments in Environmental Law*, in *European Journal of Law and Public Administration*, 2023.

VANHALA L. and HESTBAEK C., *Framing Climate Change Loss and Damage in UNFCCC Negotiations*, in *Global Environmental Politics*, 2016.

VASAK K., *A 30-Year Struggle; The Sustained Efforts to Give Force of Law to the Universal Declaration of Human Rights*, in *The UNESCO Courier: A Window Open on the World*, 1977.

VILA M. I., *Subsidiarity, Margin of Appreciation and International Adjudication within a Cooperative Conception of Human Rights*, in *International Journal of Constitutional Law*, 2017.

WARD T., *Prosecution of Victims of Trafficking: R v. AAD, R v. AAH, R v. AAI [2021] EWCA Crim. 106*, in *The Journal of Criminal Law*, 2022.

WONDALEM H. A., *The Right to Environment under African Charter on Human and Peoples' Right*, in *International Journal of International Law*, 2015.

Official Documents

Climate Change Act 2008 (c. 27).

Committee on Economic, Social and Cultural Rights, *General Comment No. 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities*, UN Doc. E/C.12/GC/24 of 10 August 2017.

Committee on the Rights of the Child, *General Comment No. 26 on Children's Rights and the Environment, with a Special Focus on Climate Change*, UN Doc. RC/C/GC/26 of 23 August 2023.

Communications Act 2003 (c. 21).

Consolidated version of the Treaty on European Union, in OJ C 115/13 of 9 May 2008.

Council of Europe, Committee of Ministers, *Resolution CM/Res(2022)2 on the Cessation of the Membership of the Russian Federation to the Council of Europe* of 16 March 2022.

Council of Europe, *Council of Europe Convention on Action Against Trafficking in Human Beings* entered into force 1 February 2008, CETS No. 197 of 16 May 2005.

Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14* entered into force 3 September 1953, ETS No. 5 of 4 November 1950.

Council of Europe, Parliamentary Assembly, Committee on Legal Affairs and Human Rights, *UK Reform of its Human Rights Legislation: Consequences for Domestic and European Human Rights Protection*, report of 22 May 2023.

Council of Europe, *Protocol 11 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby* entered into force 1 November 1988, ETS No. 155 of 11 May 1994.

Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting victims, and replacing Council Framework Decision 2002/629/JHA, in OJ 2011 L 101 of 15 April 2011.

European Commission, *The EU Strategy towards the Eradication of Trafficking in Human Beings 2012-2016*, COM(2012) 286 final of 19 June 2012.

European Court of Human Rights, *Failure to Adequately Protect Two Potential Victims of Child Trafficking*, 16 February 2021.

European Court of Human Rights, *Duarte Agostinho and Others v. Portugal and Others (relinquishment) – 39371/20*, June 2022.

European Court of Human Rights, *Factsheet – Environment and the ECHR*, October 2023.

European Court of Human Rights, *Factsheet – Trafficking in Human Beings*, December 2023.

European Court of Human Rights, *General Presentation of Interim Measures*, 28 March 2024.

European Court of Human Rights, *Guide to the Case-Law of the European Court of Human Rights – Environment*, 31 August 2022.

European Court of Human Rights, *Non-Refoulement as a Principle of International Law and the Role of the Judiciary in its Implementation*, 27 January 2017.

European Court of Human Rights, *Notification of Case concerning Asylum Seeker's Removal from the UK to Rwanda*, 11 April 2023.

European Court of Human Rights, *Resolution of the European Court of Human Rights on the Consequences of the Cessation of Membership of the Russian Federation to the Council of Europe in light of Article 58 of the European Convention of Human Rights*, 22 March 2022.

European Court of Human Rights, *Rules of Court – Registry of the Court*, 28 March 2024.

European Court of Human Rights, *The Court Has Declared Inadmissible the Applications Lodged Against Portugal and 32 Other States on the Issue of Climate Change*, 9 April 2024.

European Court of Human Rights, *The European Court Grants Urgent Interim Measure in Case concerning Asylum-Seeker's Imminent Removal from the UK to Rwanda*, 14 June 2022.

European Court of Human Rights, *V.C.L. and A.N. v. The United Kingdom – 74603/12 and 77587/12. Information Note on the Court's case-law 248*, February 2021.

Government of the United Kingdom, *Illegal Migration Bill – European Convention on Human Rights Memorandum*, 7 March 2023.

GOWER M., BUTCHARD P., and MCKINNEY C. J., *The UK-Rwanda Migration and Economic Development Partnership*, 2023.

Group of Experts on Action against Trafficking in Human Beings, *Evaluation Report: United Kingdom. Third Evaluation Round: Access to Justice and Effective Remedies for Victims of Trafficking in Human Beings*, GRETA 2021(12) of 20 October 2021.

Home Office, *Modern Slavery: Statutory Guidance for England and Wales (under s49 of the Modern Slavery Act 2015) and Non-Statutory Guidance for Scotland and Northern Ireland*, 31 May 2024.

House of Commons and House of Lords Joint Committee on Human Rights, *Legislative Scrutiny: Illegal Migration Bill*, 6 June 2023.

House of Commons Hansard, vol. 729, col. 578, 13 March 2023.

Human Rights Act 1998 (c. 42).

Illegal Migration Act 2023 (c. 57).

International Labour Organisation, *Convention concerning Forced or Compulsory Labour* entered into force 1 May 1932, UN Doc. ILO/C/029 of 28 June 1930.

International Labour Organisation, *Protocol of 2014 to the Forced Labour Convention, 1930* entered into force 9 November 2016, UN Doc. ILO/P/029 of 11 June 2014.

International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, UN Doc. A/56/10 of November 2001.

International Law Commission, *Report of the International Law Commission on the Work of its Fifty-Third Session (23 April – 1 June and 2 July – 10 August 2001),* UN Doc. A/56/10.

League of Nations, *Slavery Convention* entered into force 9 March 1927, UN Doc. 60 of 25 September 1926.

Local Government Act 1988 (c. 9).

Modern Slavery Act 2015 (c. 30).

MULLALLY S., *Pending Removal of K.N. from the United Kingdom to Rwanda, at 10.30 p.m. (British Summer Time – "BST") on Tuesday 14 June 2022*, 2022.

Nationality and Borders Act 2022 (c. 36).

Organisation of African Unity, *African Charter on Human and Peoples' Rights* entered into force 21 October 1986, OAU Doc. CAB/LEG/67/3/Rev. 5 of 27 June 1981.

Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.

Supreme Court of the United Kingdom, *Press Summary 15 November 2023. R (on the application of AAA (Syria) and others) (Respondents/Cross Appellants) v Secretary of State for the Home Department (Appellant/Cross Respondent); R (on the application of HTN (Vietnam)) (Respondent/Cross Appellant) v Secretary of State for the Home Department (Appellant/Cross Respondent); R (on the application of RM (Iran)) (Respondent) v Secretary of State for the Home Department (Appellant); R (on the application of AS (Iran)) (Respondent/Cross Appellant) v Secretary of State for the Home Department (Appellant/Cross Respondent); R (on the application of SAA (Sudan)) (Respondent) v Secretary of State for the Home Department (Appellant) and R (on the application of ASM (Iraq)) (Appellant) v Secretary of State for the Home Department (Respondent) [2023] UKSC 42*, 15 November 2023.

Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, in OJ L 149/10 of 30 April 2021.

United Nations Climate Change Conference, *Paris Agreement to the United Nations Framework Convention on Climate Change* entered into force 4 November 2016, UN Treaty Series, vol. 3156.

United Nations Climate Change Conference, *United Nations Framework Convention on Climate Change* entered into force on 21 March 1994, UN Treaty Series, vol. 1771.

United Nations Conference of Plenipotentiaries on a Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery* entered into force 30 Aprile 1957, UN Doc. 608(XXI) of 30 April 1956.

United Nations General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* entered into force 26 June 1987, UN Doc. A/RES/39/46 of 10 December 1984.

United Nations General Assembly, *Convention for the Reduction of Statelessness and International Human Rights Law* entered into force on 13 December 1975, UN Doc. A/RES/896/IX of 30 August 1961.

United Nations General Assembly, *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others* entered into force 25 July 1951, UN Doc. 317(IV) of 2 December 1949.

United Nations General Assembly, *Convention on the Rights of the Child* entered into force 2 September 1990, UN Doc. A/RES/44/25 of 20 November 1989.

United Nations General Assembly, *Convention Relating to the Status of Refugees* entered into force 22 April 1954, UN Doc. A/RES/429(V) of 14 December 1950.

United Nations General Assembly, *Convention relating to the Status of Stateless Persons* entered into force 6 June 1960, UN Doc. A/RES/526A(XVII) of 26 April 1954.

United Nations General Assembly, *Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power*, UN Doc. A/RES/40/34 of 29 November 1985.

United Nations General Assembly, *International Covenant on Civil and Political Rights* entered into force 23 March 1976, UN Doc. A/RES/21/2200A of 16 December 1966.

United Nations General Assembly, *Protocol relating to the Status of Refugees* entered into force 4 October 1967, UN Doc. 606 UNTS 267 of 31 January 1967.

United Nations General Assembly, *Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime* entered into force 25 December 2003, UN Doc. A/RES/55/25 of 15 November 2000.

United Nations General Assembly, *United Nations Convention against Transnational Organized Crime* entered into force 29 November 2003, UN Doc. A/RES/55/25 of 15 November 2000.

United Nations High Commissioner for Refugees, *UNHCR Legal Observations on the Illegal Migration Bill*, 2 May 2023.

United Nations High Commissioner for Refugees, *UNHCR Recommendations on the Implementation of the Illegal Migration Act 2023*, 6 October 2023.

United Nations Human Rights Committee, *General Comment No. 36 – Article 6: Right to Life*, UN Doc. CCPR/C/GC/36 of 3 September 2019.

United Nations Human Rights Council, *Report of the Office of the United Nations High Commissioner for Human Rights on the*

Relationship between Climate Change and Human Rights, UN Doc. A/HRC/10/61 of 15 January 2009.

United Nations Human Rights Council, *The Human Right to a Clean, Healthy and Sustainable Environment*, UN DOC. A/HRC/RES/48/13 of 18 October 2021.

Websites

BLAXLAND QC H., FITZSIMONS E., and CLARK S., *ECHR Judgment Finds Failure to Adequately Protect Potential Victims of Child Trafficking*, February 2021, www.gardencourtchambers.co.uk.

BOYLE A. E., *Environment and Human Rights*, April 2009, www.opil.ouplaw.com.

Council of Europe, *Action against Trafficking in Human Beings*, August 2024, www.coe.int.

DONALD A. and LEACH P., *The UK vs the ECtHR: Anatomy of a Politically Engineered Collision Course*, May 2023, www.ein.org.uk.

Government of the United Kingdom, *Consultation on the New Plan for Immigration: Government Response (Accessible Version)*, March 2022, www.gov.uk.

Government of the United Kingdom, *Memorandum of Understanding between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Rwanda for the Provision of an Asylum Partnership Arrangement*, April 2022, www.gov.uk.

Government of the United Kingdom, *National Referral Mechanism Guidance: Adult (England and Wales)*, May 2024, www.gov.uk.

Government of the United Kingdom, *Note Verbale on Assurances in Paragraph 9 of the MoU between the United Kingdom and Rwanda for the Provision of an Asylum Partnership Arrangement*, November 2022, www.gov.uk.

Government of the United Kingdom, *Note Verbale on Assurances in Paragraphs 8 and 10 of the MoU between the United Kingdom and Rwanda for the Provision of an Asylum Partnership Arrangement*, November 2022, www.gov.uk.

Government of the United Kingdom, *Prime Minister Outlines his Five Key Priorities for 2023*, January 2023, www.gov.uk.

Government of the United Kingdom, *UK-Rwanda Treaty: Provision of an Asylum Partnership (Accessible)*, December 2023, www.gov.uk.

Intergovernmental Panel on Climate Change, *The Intergovernmental Panel on Climate Change – Reports*, April 2024, www.ipcc.ch.

KATROUGALOS G. and EFSTATHIOU C., *PACE Rapporteurs React to Vote on UK's Illegal Migration Bill*, April 2023, www.pace.coe.int.

MOSELEY T., *The Rise of the Word Brexit*, December 2016, www.bbc.com.

PARKER G. and PICKARD J., *Rishi Sunak Breaks up UK Business Department to Refocus on Energy and Science*, February 2023, www.ft.com.

PEDERSEN O. W., *Climate Change and the ECHR: The Results are in*, April 2024, www.ejiltalk,org.

PEDERSEN O. W., *Climate Change Hearings and the ECtHR Round II*, October 2023, www.ejiltalk.org.

Save the Children, *Groundbreaking Climate Case Involving Children to be Heard by the European Court Tomorrow – Press Release*, September 2023, www.savethechildren.net.

TZEVELEKOS V. P., *Standing: European Court of Human Rights*, December 2019, www.opil.ouplaw.com.

United Nations Climate Change Conference, *The Paris Agreement*, May 2024, www.unfccc.int.

United Nations Office on Drugs and Crime, *World Day against Trafficking in Persons Statements (2020)*, July 2020, www.unodc.org.

United Nations Treaty Collection, *Environment – Paris Agreement*, April 2024, www.treaties.un.org.

United Nations Treaty Collection, *Environment – United Nations Framework Convention on Climate Change*, April 2024, www.treaties.un.org.

United Nations, *For a Livable Climate: Net-Zero Commitments Must be Backed by Credible Action*, May 2024, www.un.org.

WATTS J., *Portuguese Children Sue 33 Countries over Climate Change at European Court*, September 2020, www.theguardian.com.

ZEFFMAN H., RANNARD G., and WHANNEL K., *Claire Coutinho: Who is the New Energy Secretary?*, August 2023, www.bbc.com.

Other

SOLIMANI A., *Case Note: Friends of the Earth v. Secretary of State for Energy Security and Net Zero [2024] EWHC 995 (Admin)*, 2024.

TABLE OF CASES

Domestic Law

Court of Appeal, *AAD, AAH, AAI v. R*, EWCA Crim. 106, judgement of 3 February 2022.

Court of Appeal, *R v. Brecani*, EWCA Crim. 731, judgement of 21 April 2021.

Court of Appeal, *R (AAA and Others) v. Secretary of State for the Home Department*, EWCA Civ. 745, judgement of 29 June 2023.

High Court of Justice, *Friends of the Earth and Others v. Secretary of State for Energy Security and Net Zero*, EWHC Admin. 995, judgement of 3 May 2024.

High Court of Justice, *R (Friends of the Earth Ltd) v. Secretary of State for Business, Energy and Industrial Strategy*, EWHC Admin. 1841, judgement of 18 July 2022.

Supreme Court of the United Kingdom, *R (AAA and Others) v. Secretary of State for Home Department*, UKSC 42, judgement of 15 November 2023.

Supreme Court of the United Kingdom, *R (HS2 Action Alliance Ltd.) v. Secretary of State for Transport*, [2014] UKSC 3, judgement of 22 January 2014.

European Commission and Court of Human Rights

European Commission of Human Rights, *S. v. France*, Appl. No. 10965/84, judgement of 6 July 1988.

European Court of Human Rights, *Abdulaziz, Cabales and Balkandali v. The United Kingdom*, Application Nos. 9214/80, 9473/81, 9474/81, judgement of 28 May 1985.

European Court of Human Rights, *Akdivar and Others v. Turkey*, Appl. No. 21893/93, judgement of 16 September 1996.

European Court of Human Rights, *Al-Skeini and Others v. The United Kingdom* [GC], Appl. No. 55721/07, judgement of 7 July 2011.

European Court of Human Rights, *Banković and Others v. Belgium and Others* [GC], Appl. No. 52207/99, judgement of 12 December 2001.

European Court of Human Rights, *Boudayeva and Others v. Russia*, Appl. Nos. 15339/02, 21166/02, 20058/02, 11673/02, and 15343/02, judgement of 29 September 2008.

European Court of Human Rights, *Brincat and Others v. Malta*, Appl. Nos. 60908/11, 62110/11, 62129/11, 62312/11, and 62338/11, judgement of 24 October 2014.

European Court of Human Rights, *C.N. and V. v. France*, Appl. No. 67724/09, judgement of 11 October 2012.

European Court of Human Rights, *C.N. v. The United Kingdom*, Appl. No. 4239/08, judgement of 13 November 2012.

European Court of Human Rights, *Carême v. France* [GC], Appl. No. 7189/21, judgement of 9 April 2024.

European Court of Human Rights, *Chiragov and Others v. Armenia* [GC], Appl. No. 13216/05, judgement of 16 June 2015.

European Court of Human Rights, *Chowdury and Others v. Greece*, Appl. No. 21884/15, judgement of 30 March 2017.

European Court of Human Rights, *Communauté Genevoise d'Action Syndicale (CGAS) v. Switzerland* [GC], Appl. No. 21881/20, judgement of 27 November 2023.

European Court of Human Rights, *Drieman and Others v. Norway*, Appl. No. 33678/96, judgement of 4 May 2000.

European Court of Human Rights, *Duarte Agostinho and Others v. Portugal and 32 Others* [GC], Appl. No. 39371/20, judgement of 9 April 2024.

European Court of Human Rights, *Dvorski v. Croatia* [GC], Appl. No. 25703/11, judgement of 20 October 2015.

European Court of Human Rights, *Georgia v. Russia (II)* [GC], Appl. No. 38263/08, judgement of 21 January 2021.

European Court of Human Rights, *Gherghina v. Romania* (decision) [GC], Appl. No. 42219/07, judgement of 9 July 2015.

European Court of Human Rights, *Gül v. Switzerland*, Appl. No. 23218/94, judgement of 19 February 1996.

European Court of Human Rights, *Güzelyurly and Others v. Cyprus and Turkey* [GC], Appl. No. 36925/07, judgement of 29 January 2019.

European Court of Human Rights, *H.F. and Others v. France* [GC], Appl. Nos. 24384/19 and 44234/20, judgement of 14 September 2022.

European Court of Human Rights, *Hashman and Harrup v. The United Kingdom* [GC], Appl. No. 25594/94, judgement of 25 November 1999.

European Court of Human Rights, *Hatton v. The United Kingdom*, Appl. No. 36022/97, judgement of 8 July 2003.

European Court of Human Rights, *Hirsi Jamaa and Others v. Italy* [GC], Appl. No. 27765/09, judgement of 23 February 2012.

European Court of Human Rights, *Ilias and Ahmed v. Hungary*, Appl. No. 47287/15, judgement of 21 November 2019.

European Court of Human Rights, *Ireland v. The United Kingdom*, Appl. No. 5310/71, judgement of 18 January 1978.

European Court of Human Rights, *J. and Others v. Austria*, Appl. No. 58216/12, judgement of 17 April 2017.

European Court of Human Rights, *J.K. and Others v. Sweden* [GC], Appl. No. 59166/12, judgement of 23 August 2016.

European Court of Human Rights, *Klass and Others v. Germany*, Appl. No. 5029/71, judgement of 6 September 1978.

European Court of Human Rights, *Kolyadenko and Others v. Russia*, Appl. Nos. 17423/05, 20534/05, 20678/05, 23263/05, 24283/05, and 35673/05, judgement of 9 July 2012.

European Court of Human Rights, *L.E. v. Greece*, Appl. No. 71545/12, judgement of 21 January 2016.

European Court of Human Rights, *Lilia, Julia and Eleonora Alimzhanova and Alexijs Lisikov v. Sweden*, Appl. No. 38821/97, judgement of 24 August 1999.

European Court of Human Rights, *Loizidou v. Turkey* (preliminary objections), Appl No. 15318/89 Series A No. 310, judgement of 23 March 1995.

European Court of Human Rights, *López Ostra v. Spain*, Appl. No. 16798/90, judgement of 9 December 1994.

European Court of Human Rights, *M. Özel and Others v. Turkey*, Appl. Nos. 14350/05, 15245/05, and 16051/05, judgement of 2 May 2016.

European Court of Human Rights, *M.N. and Others v. Belgium* [GC], Appl No. 3599/18 judgement of 5 May 2020.

European Court of Human Rights, *Mamatkulov and Askarov v. Turkey* [GC], Appl. Nos. 4682/99 and 46951/99, judgement of 4 February 2005.

European Court of Human Rights, *Mamère v. France*, Appl. No. 12697/03, judgement of 7 November 2006.

European Court of Human Rights, *Moustaquim v. Belgium*, Appl. No. 12313/86, judgement of 18 February 1991.

European Court of Human Rights, *Mozer v. The Republic of Moldova and Russia* [GC], Appl. No. 11138/10, judgement of 23 February 2016.

European Court of Human Rights, *N.S.K. v. The United Kingdom*, Appl. No. 28774/22, urgent interim measure of 14 June 2022.

European Court of Human Rights, *National Union of Rail, Maritime and Transport Workers v. The United Kingdom*, Appl. No. 31045/10, judgement of 8 April 2014.

European Court of Human Rights, *Nolan and K. v. Russia*, Appl. No. 2512/04, judgement of 6 July 2009.

European Court of Human Rights, *Öneryildiz v. Turkey* [GC], Appl. No. 48939/99, judgement of 30 November 2004.

European Court of Human Rights, *Othman (Abu Qatada) v. The United Kingdom*, Appl. No. 8139/09, judgement of 9 May 2012.

European Court of Human Rights, *Rantsev v. Cyprus and Russia*, Appl. No. 25965, judgement of 7 January 2010.

European Court of Human Rights, *S.M. v. Croatia* [GC], Appl. No. 60561/14, judgement of 25 June 2020, par. 296.

European Court of Human Rights, *Saadi v. Italy* [GC], Appl. No. 37201/06, judgement of 28 February 2008.

European Court of Human Rights, *Salduz v. Turkey* [GC], Appl. No. 36391/02, judgement of 27 November 2008.

European Court of Human Rights, *Siliadin v. France*, Appl. No. 73316/01, judgement of 26 July 2005.

European Court of Human Rights, *Sisojeva v. Latvia* [GC], Appl. No. 60654/00, judgement of 15 January 2007.

European Court of Human Rights, *Soering v. The United Kingdom*, Appl. No. 14038/88, judgement of 7 July 1989.

European Court of Human Rights, *Steel and Morris v. The United Kingdom*, Appl. No. 68416/01, judgement of 15 February 2005.

European Court of Human Rights, *Steel and Others v. The United Kingdom*, Appl. No. 67/1997/851/1058, judgement of 23 September 1998.

European Court of Human Rights, *Tyrer v. The United Kingdom*, Appl. No. 5856/72, judgement of 25 April 1978.

European Court of Human Rights, *Ukraine and the Netherlands v. Russia* [GC], Appl. Nos. 43800/14, 8019/16, and 28525/20, judgement of 30 November 2022.

European Court of Human Rights, *V.C.L. and A.N. v. The United Kingdom*, Appl. Nos. 77587/12 and 74603/12, judgement of 16 February 2021.

European Court of Human Rights, *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* [GC], Appl. No. 53600/20, judgement of 9 April 2024.

European Court of Human Rights, *Vučković and Others v. Serbia* (preliminary objection) [GC], Appl. Nos. 17153/11 and 29 others, judgement of 25 March 2014.

Inter-American Court of Human Rights

Inter-American Court of Human Rights, *The Environment and Human Rights – State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity: Interpretation and Scope of Articles 4(1) and 5(1) in relation to Articles 1(1) and 2 of the American Convention on Human Rights*, Advisory Opinion OC-23/17 of 15 November 2017.

International Court of Justice

International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996.

International Criminal Tribunal for the Former Yugoslavia

International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Kunarac, Vukovic and Kovac*, IT-96-23 & 23/1, judgement of 12 June 2002.

United Nations Human Rights Committee and Other Monitoring Committees

Committee on the Rights of the Child, *Sacchi and Others v. Argentina*, communication No. 104/2019, decision of 22 September 2021.