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Seventy-five years of shared responsibility for the protection of human rights: respect for constitutional identities and subsidiarity in a changing Europe

Drafted in the aftermath of the Second World War, the European Convention on Human Rights[1] ("the Convention") codified "*a common heritage of political traditions, ideals, freedom and the rule of law*"[2] of Europe, in response to the devastating effects of the war. Born of the Founders' commitment to preventing the return of such horror, it intended to serve both as a shield against all forms of totalitarianism and as the first step towards a new European order – a mechanism that would sound the alarm when threats arose, as imagined by Pierre-Henri Teitgen, one of its architects[3]. From its twelve original signatories, the Convention has gradually expanded to include forty-seven states, a figure reduced to forty-six following Russia's exclusion from the Council of Europe in 2022, after the outbreak of the war in Ukraine. It currently protects the rights of more than 700 million people in Europe[4].

The Convention's contribution to the protection of human rights, in a way that makes them '*concrete and effective*'[5], and the promotion of democracy, must be highlighted. Unlike other international treaties based on reciprocal commitments between States[6], the Convention brings together States '*united by a common understanding*'[7] as part of a network of mutual commitments and obligations in the service of human rights. As stated in the Preamble, human rights are protected through a '*collective enforcement*'[8]. Shared responsibility therefore underpins the Convention's order.

1. A CONSTITUTIONAL INSTRUMENT OF EUROPEAN PUBLIC ORDER

A European-level Constitutional Court for Human Rights

From the outset, it has been clear from the Court's case-law that the Convention '*goes beyond the scope of mere reciprocal engagements between contracting States*', given that "*over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a "collective enforcement*"[9]. As Lord Roberts, the United Kingdom's representative, stated during the drafting of the Convention: "*[it] means that the European community as a whole guarantees to keep democracy alive in all its Member States and that the freedom of the common man (…) is the concern of the whole.*"[10]

In the case of *Loizidou v. Turkey* (1995), the Court expressly stated that it had to take into account "*the special character of the Convention as an instrument of European public order for the protection of individual human*

[1] This text originally appeared in the « Schuman Report on Europe, State of the Union 2026 », éditions Hémisphères, Paris, May 2026

[2] Preamble to the European Convention on Human Rights, as amended by the Protocols nos 11, 14 and 15, STE n° 005, 4 November 1950.

[3] Preparatory Commission of the Council of Europe, Committee of Ministers, Consultative Assembly (11 May – 8 September 1949). The Hague: Martinus Nijhoff, 1975, Consultative Assembly, 1st session – Pierre-Henri Teitgen, p. 292. Dans Recueil des Travaux préparatoires de la Convention européenne des Droits de l'Homme, Conseil de l'Europe (The Hague, Boston, London, Dordecht, Lancaster : Martinus Nijhoff, 1975-1985), vol. no 1.

[4] "The Council of Europe: key elements"

[5] Airey v. Ireland, 9 October 1979, series A n° 41, § 26.

[6] Ireland v. United Kingdom [Plenary], no 5310/71 (ECHR, 18 January 1978), § 239.

[7] Preamble, op.cit.

[8] Ibidem.

[9] Ireland v. United Kingdom, op.cit.

[10] Consultative Assembly – Lord Roberts, p. 92. In Preparatory work on the European Convention on Human Rights, vol. no 6.

beings," in order to fulfil the task assigned to it by Article 19, namely "*to ensure the observance of the engagements undertaken by the High Contracting Parties*"[11]. This concept is based on the existence of fundamental principles underpinning the European legal order, and entrusts the Court with the role of a constitutional court for human rights at European level.

This constitutional nature is also evident in the relationship between the Convention and the instruments of the European Union. Article 6(3) of the Treaty on European Union[12] states that fundamental rights, as guaranteed by the Convention, form part of EU law as general principles, whilst Article 52(3) of the Charter of Fundamental Rights[13] provides that, in so far as the Charter sets out rights that are equivalent to those guaranteed by the Convention; their meaning and scope are the same. The Convention stands as a normative benchmark for the protection of human rights across all European institutions and states.

In recent years, the concept of collective guarantee has gained fresh momentum following the Court's examination of various inter-state cases concerning human rights during armed conflict. On 9 July 2025, in delivering the Grand Chamber judgment *Ukraine and the Netherlands v. Russia* – one of the most significant in its history – the Court highlighted the Convention's pressing relevance. Noting the serious and systematic human rights violations committed in Ukraine from 2014 onwards, then in 2016, and again in 2017, it concluded that Russia had violated the Convention. Noting the serious and systematic human rights violations committed from 2014 onwards and following the invasion of February 2022, the Court stated that "*these actions seek to undermine the very fabric of the democracy on which the Council of Europe and its member States are founded by their destruction of individual freedoms, their suppression of political liberties and their blatant disregard for the rule of law*."[14]

Previously, the Court had also ruled against Russia in interstate cases concerning systematic violations committed in Crimea[15] and in Georgia[16]. This increase in the number of inter-state claims is not limited to contemporary conflicts. Indeed, in 2024, the Irish Government lodged a request against the United Kingdom concerning the 2023 Act on the Troubles in Northern Ireland (Legacy and Reconciliation) and, in particular, the provisions relating to immunity from prosecution, the recovery of information and the inability to bring civil proceedings[17]. These requests illustrate the fact that the Convention is regarded as a benchmark for fundamental principles in times of war and peace, particularly with regard to the restoration of peace; this clearly reflects the ideals of peace and justice for which it was designed.

A public order based on a shared set of values

This 'shared heritage' is the ideal referred to in the Preamble, which reflects a vision of the Convention as an instrument rooted in a shared history, leading to the establishment of a '*pan-European ethos*'[18]. The architecture of the conventional order is based on a logical '*ground-up*' approach, in which the common standards defined by the Court draw on national traditions and cultures.

The Convention was deliberately drafted in broad and inclusive terms, thereby echoing the wording of the Universal Declaration, so as to enable judges to adapt its interpretation to new circumstances and developments that were not foreseen at the time of its drafting. As stated in the preamble, the purpose of the Convention is '*the protection of human rights*'[19]. In doing so, the drafting authors entrusted the courts not only with safeguarding the rights in question, but also with developing them. To this end, the Convention must be open to dynamic and contextual interpretation. This idea was set out in the judgment in *Tyrer v. the United Kingdom* (1978), in which the Convention was described as a '*living instrument*'[20] to be interpreted in the light of current living conditions within the '*European family of nations*'.[21] This reference to a '*family*' is no coincidence and clearly indicates that the interpretation of the Convention

[11] *Loizidou v. Turkey [GC], ruling (preliminary objection), 23 March 1995, § 70.*

[12] *Treaty on the European Union, consolidated version, JO C 326/13, 26 October 201*

[13] *Charter of Fundamental Rights of the European Union, JO C 326/391, 26 October 2012.*

[14] *Ukraine and Netherlands v. Russia [GC], nº 8019/16 and 2 others, 9 July 2025, § 177.*

[15] *Ukraine v. Russia (Crimea) [GC], nº 20958/14 and 1 other, 25 June 2024.*

[16] *Georgia v. Russia (IV), nº 39611/18, 28 March 2023.*

[17] *Ireland v. United Kingdom (III), nº 1859/24, petition filed on 17 January 2024.*

[18] *Theilen, Jens T., European Consensus between Strategy and Principle: The Uses of Vertically Comparative Legal Reasoning in Regional Human Rights Adjudication (Nomos Verlagsgesellschaft mbH & Co. KG, 2021).*

[19] *Preamble, op.cit.*

[20] *Tyrer v. United Kingdom, nº 5856/72, 25 April 1978, § 31.*

[21] *Ibidem, § 38.*

is based on a shared identity. This approach gives '*concrete expression to what it means to be European*'[22], defining what we have in common in a pragmatic way, whilst respecting our differences.

The doctrine of the 'living instrument' thus forms part of the judicial pragmatism that serves as the Court's interpretative compass. The aim is always to interpret the text (the Convention) within a given context. The common foundation of a shared history and shared objectives enables the Court to promote '*the ideas prevailing in democratic States today*', particularly in view of '*any evolving convergence as to the standards to be achieved*'[23]. The use consensus legitimizes the Court's interpretative approach.

In its case law on same-sex marriage, for example, the Court drew on comparative law regarding the forms of legal recognition afforded to same-sex couples to determine the level of consensus on this issue[24]. It noted that thirty Member States offered same-sex couples the possibility of having their relationship recognised by law and that, in particular, eighteen of them permitted same-sex marriage. In light of these factors, and recalling that Article 8 of the Convention had already been interpreted as requiring States Parties to provide legal recognition and protection for same-sex couples, it concluded – without, however, imposing the form of marriage – that its case-law was "*in line with the tangible and ongoing evolution of the States Parties' domestic legislation and of international law*."[25]

Since its establishment in 1959, the Court has taken care to ensure that the Convention remains relevant to the realities of the present rather than being a relic of the past. In doing so, it has contributed to the abolition of corporal punishment in schools[26], to prevent torture and ill-treatment in the event of extradition[27], to give journalists the means to exercise their freedom of expression[28], to ensure that homosexuality is not criminalised anywhere in Europe[29], to ensure equal treatment for children born out of wedlock[30] and, more recently, in the case of *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* (2024)[31], to establish the State's obligations regarding climate change and environmental protection. Its doctrine of the '*living instrument*' is echoed in another interpretative tradition: the '*living tree*' doctrine, which stems from a landmark judgement of the Supreme Court of Canada[32]. This progressive interpretation is not without limits, and judges must not take the place of the legislature by inventing new rights and turning the Convention not into a '*living tree*' but into a '*moving tree*'. Through its day-to-day judicial work, the Court therefore acts as a constitutional court at European level: it examines individual applications to address the fundamental issues facing contemporary European societies. Since its establishment, the Court has dealt with over one million one hundred thousand cases, and it dealt with nearly 38,500 such cases in 2025 alone – that is, more than one hundred per day.

The Rule of Law and Democracy

The European public order is based on several guiding principles. In the case of *Al-Dulimi and Montana Management Inc. v. Switzerland* (GC, 2016), the Grand Chamber emphasised that "*one of the fundamental components of European public order is the principle of the rule of law*"[33], and that arbitrariness constitutes the negation of this. The Court emphasised that, even in the field of the interpretation and application of domestic law, where it affords national authorities a very wide margin of discretion, it always does so subject to the prohibition of arbitrariness.

Furthermore, democracy is the only political model considered by the Convention and, by extension, the only one that is compatible with it[34]. Respect for human rights, including the protection of minorities, is an essential prerequisite for peace and democratic security[35]. By protecting individual rights and freedoms, the Court helps to foster the vitality of European democracies.

[22] *O'Boyle, Michael. « The Future of the European Court of Human Rights », German Law Journal 12 (2011) 1862, p. 1866.*

[23] *Fedotova and Others v. Russia [GC], nº 40792/10 and 2 others, 17 January 2023, § 167.*

[24] *Ibidem, §§ 65-67.*

[25] *Ibidem, §§ 162-166.*

[26] *Campbell and Cosans c. United Kiingdom, nº 7511/76 and 1 other, 25 February 1982.*

[27] *Soering v. United Kingdom, nº 14038/88, 9 July 1989.*

[28] *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland [GC], nº 931/13, 27 June 2017.*

[29] *Dudgeon v. United Kingdom, nº 7525/76, 22 October 1981.*

[30] *Marckx v. Belgium, nº 6833/74, 13 June 1979.*

[31] *Verein KlimaSeniorinnen Schweiz and Others v. Suisse [GC], nº 53600/20, 9 April 2024.*

[32] *Edwards v. Canada (P.g.) [1929] UKPC 86.*

[33] *Al-Dulimi and Montana Management Inc. v. Suisse [GC], nº 5809/08, 21 June 2016, § 145.*

[34] *Unified Communist Party of Turkey and Others v. Turkiyë [GC], nº 19392/92, 30 January 1998, § 45. For comments, see Larrouturou, Th., "ECHR and Constitutional Law" Civitas Europa 2022/2 nº 49, 273-289, p. 277.*

[35] *Gorzelik and Others v. Poland [GC], nº 44158/98, 17 February 2004, § 68.*

2. THE EUROPEAN PUBLIC ORDER AND CONSTITUTIONAL IDENTITIES

The European public order must be understood as encompassing – rather than excluding – national constitutional identities. As the preamble states, the Convention is based on '*a common understanding*'[36] human rights and draws its substance and inspiration from the political and legal traditions of the Member States.

National courts resolve disputes whilst taking due account of the historical, social and legal context specific to their respective countries, whilst upholding the fundamental principles of the Convention. The Court, for its part, deliberately takes national legal traditions and the case-law of national constitutional courts into account in its own decisions, thereby avoiding divergent approaches as far as possible.

This inclusive approach by the Court is illustrated by the case of *Savickis and Others v. Latvia* (GC, 2022)[37]. In this case, the Grand Chamber examined the question of retirement pensions for non-citizens payable in respect of periods of employment during the Soviet era. The Court concluded that there had been no violation of the Convention, relying on the reasoning of the Latvian Constitutional Court, which was based on the protection of Latvia's constitutional identity. By deferring to the Latvian Constitutional Court's view on the country's constitutional principles and historical context – in particular the restoration of its independence following the Soviet occupation – the Court recognised the legitimacy of measures aimed at safeguarding national identity within the framework of the Convention[38].

This dialogue through case law reflects the principle of shared responsibility, which underpins the European project, and the influence that constitutional courts exert on the European Court of Human Rights is mirrored by the influence that the latter, in turn, exerts on constitutional courts[39].

3. SUBSIDIARITY AND SHARED RESPONSIBILITY

Under the principle of shared responsibility, the Court intervenes in turn and in its own right.

In turn: procedural subsidiarity

In procedural terms, the principle of subsidiarity requires applicants to exhaust all available domestic remedies: the Court intervenes only to examine allegations of violations which the national courts have not addressed effectively. It helps Member States to 'take ownership' of the rights set out in the Convention ("*bring rights home*"[40], to quote a former President of the Court, Robert Spano), by strengthening the efficacy of their domestic judicial systems. In this regard, the institutional complementarity between the subsidiary supervision of the European Court of Human Rights and the judicial review exercised by national courts is fully operational.

Taken together, these cases illustrate the Court's nuanced approach to questions concerning the independence of the judiciary and freedom of expression. Whilst the judgments in *Tavares de Almeida Fernandes v. Portugal* (2017)[41] and *Danileț v. Romania* (GC, 2025)[42] mainly illustrate the Court's balancing of competing rights in contexts closely linked to public confidence in the judiciary, as seen in the judgment in Ramos Nunes de Carvalho e Sá v. Portugal (GC, 2018)[43] illustrates the principle of subsidiarity more directly, by highlighting the shared responsibility between the Strasbourg Court and domestic courts. This emphasis is reflected in the Court's wider case-law, particularly in its recent judgments concerning Poland[44], where it emphasised "*the special role in society of the judiciary: as the guarantor of justice, a fundamental value in a State governed by the rule of law, must enjoy public confidence if judges are to be successful in carrying out their duties*"[45] National courts therefore play a central role in the Convention framework, acting as the primary guardians of the rights guaranteed by the Convention within the context of effective subsidiarity.

[36] *Preamble, op. cit.*

[37] *Savickis and Others v. Latvia [GC], nº 49270/11, 9 June 2022.*

[38] *Ibidem, § 198.*

[39] *Masterman, Roger, « Deconstructing the Mirror Principle » dans Masterman, Roger et Leigh, Ian, (éd.), The United Kingdom's Statutory Bill of Rights: Constitutional and Comparative Perspectives (OUP 2013), p. 123.*

[40] *Spano, Robert, « Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity », Human Rights Law Review (2014)14, 491.*

[41] *Tavares de Almeida Fernandes and Almeida Fernandes v. Portugal, no 31566/13, 18 January 2017.*

[42] *Danileț v. Romania [GC], no 16915/21, 15 December 2025.*

[43] *Ramos Nunes de Carvalho e Sá v. Portugal [GC], nos 55391/13 and 2 Others, 6 November 2018.*

[44] *Xero Flor w Polsce sp. z o.o. v. Poland, no 4907/18, 7 May 2021, Broda and Bojara v. Poland, nos 26691/18 and 27367/18, 29 June 2021, Reczkowicz v. Poland, no 43447/19, 22 July 2021, and Dolińska-Ficek and Ozimek v. Poland, nos 49868/19 et 57511/19, 8 November 2021 ; see also, Advance Pharma sp. z o.o v. Poland, no 1469/20, 3 February 2022, and Grzęda v. Poland [GC], no 43572/18, 15 March 2022.*

[45] *Grzęda v. Poland [GC], § 250 and § 302*

The right approach: substantive subsidiarity

Recognising the essential role of domestic authorities, as early as 1976, in its judgment in *Handyside v. the United Kingdom*, the Court stated that "*The Court points out that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights (…) The Convention leaves to each Contracting State, in the first place, the task of securing the rights and liberties it enshrines.*"[46] Since Protocol No. 15 came into force in 2021, the principle of subsidiarity has been formally included in the text of the Preamble to the Convention. It is primarily the responsibility of the national authorities to interpret, safeguard and implement the rights and freedoms set out in the Convention and its Protocols. To do so, they have a certain degree of discretion, particularly with regard to the application of the so-called '*derogable*' provisions[47].

Thus, international human rights treaties are integrated into the '*constitutional law*'[48] and, in the event of a conflict between provisions, priority is given to the provision that offers the greatest protection to the individual[49]. This approach reflects what has been termed the '*constitutional commitment to open statehood*'[50], the doctrine that national constitutional orders take account of and incorporate international legal provisions – as is the case with the Portuguese Constitution, described above. Within the Convention system, the principle of subsidiarity finds its expression, in essence, in the doctrine of margin of appreciation, which grants States a certain degree of latitude in the interpretation and application of its provisions. Also enshrined in the preamble to the Convention, the margin of appreciation has always been a cornerstone of the Court's case-law.

The margin of appreciation enables the Court to reconcile national particularities with the universality of human rights[51]. It is based on the idea that there is no single, uniform way of protecting human rights: according to the 2018 Copenhagen Declaration, "*there may be a range of different but legitimate solutions which could each be compatible with the Convention*."[52]

As the Court has repeatedly stated, "*The national authorities have direct democratic legitimation and are, better placed than an international court to evaluate local needs and conditions*."[53] This recognition is particularly important in cases raising complex moral, ethical and societal issues, where there is no clear European consensus. The Court is not a court of fourth instance: it does not re-examine the facts or reinterpret national law as a domestic court of appeal would. This is illustrated by the judgment in *Humpert and Others v. Germany* (GC, 2023)[54], which involved teachers complaining about disciplinary measures imposed on them for having taken part, during their working hours, in strikes organised by their trade union. In the present case, the Grand Chamber concluded that there had been no violation of Article 11, taking into account the sound and convincing reasons put forward by the national authorities to justify the restrictions at issue, which had emerged from the thorough examination of the case previously carried out by the German Federal Constitutional Court.

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In its landmark judgment in the case of *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* (GC, 2024), the Grand Chamber reiterated the following: "*Judicial intervention, including by this Court, cannot replace or provide any substitute for the action which must be taken by the legislative and executive branches of government. However, democracy cannot be reduced to the will of the majority of the electorate and elected representatives, in disregard of the requirements of the rule of law*."[55]

The Strasbourg Court acts both as a watchdog and as a guardian of democracy and the rule of law. It is the cornerstone of the Council of Europe, a project for peace rooted in the conviction that democracy, human rights and the rule of law form an indivisible whole in the service of humanity. Whenever the Court

[46] *Handyside v. United Kingdom, nº 5493/72, 7 December 1976.*

[47] *For the case law of the German Federal Constitutional Court, see CDL-AD (2016)016, § 83. For the Netherlands, see Betlem, Gerritt et Nollkaemper, André, « Giving Effect to Public International Law and European Community Law before domestic courts », European Journal of International Law (EJIL), vol. no 14, 2003, pp. 569-589.*

[48] *Parliamentary Assembly of the Council of Europe, 'The European Convention on Human Rights and National Constitutions', report, Doc. 15741, 11 April 2023, para. 16.*

[49] *Repetto, Giorgio, The Constitutional Relevance of the ECHR in Domestic and European Law. An Italian Perspective, (Intersentia Publishing Ltd, 2013)*

[50] *See for example, Aust, Helmut Philipp and Krieger, Heike, "Once Populist, Now Mainstream? How It Has Become Fashionable Among German Politicians to Belittle International Law and European Law", Verfassungsblog, 13 February 2025.*

[51] *Santos Botelho, Catarina, "Quo vadis "doutrina da margem nacional de apreciação"? O amparo internacional dos direitos do homem face à universalização da justiça constitucional », Estudos Dedicados ao Professor Doutor Luís Alberto Carvalho Fernandes, I, Universidade Católica Editora, Lisbon, 2011, pp. 341-376.*

[52] *Declaration of the High-Level Conference held in Copenhagen at the initiative of the Danish Chairmanship of the Committee of Ministers of the Council of Europe, 12 and 13 April 2018, § 28 c).*

invokes it to protect human rights – for example, by condemning arbitrary detention[56], by defending freedom of expression[57], by ensuring the integrity of the electoral process[58] or by safeguarding the independence of the judiciary[59] – it safeguards the very foundations of the rule of law, democracy and even the sovereignty of states[60]. In full compliance with the principles of subsidiarity and shared responsibility, the Court continues to protect the rights of hundreds of millions of people across the continent, working in perfect harmony with national authorities and, above all, alongside and in support of domestic judicial authorities.

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[53] *S.A.S. v. France [GC], § 129.*

[54] *Humpert and Others v. Germany [GC], nº 59433/18 and 3 Others, 14 December 2023.*

[55] *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland [GC], § 412.*

[56] *Selahattin Demirtaş v. Turkiyë (no 2) [GC], no 14305/17, 22 December 2020.*

[57] *Tsaava and Others v. Géorgia [GC], nos 13186/20 and 4 Others, 11 December 2025.*

[58] *Bradshaw and Other United Kingdom,, no 15653/22, 22 July 2025.*

[59] *Danileț v. Romania [GC].*

[60] *Netherlands v. Russia.*

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