
The Travaux Préparatoires and Progressive Treaty Interpretation: Article 18 of the European Convention on Human Rights

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Abstract

Article 18 of the European Convention on Human Rights (ECHR) has become a central provision employed by the European Court of Human Rights in response to authoritarian practices in Europe over the last decade. Notwithstanding its increased use, important disagreements persist regarding the interpretation of the provision. Analysing the provision's ordinary meaning, the convention's travaux préparatoires as a whole and the interpretation of the provision by majority and minority judges of the Court, this article identifies three competing normative models for specifying Article 18's purpose. Whilst the text is open for Article 18 to address all forms of abuse of power – authoritarian or democratic – the travaux suggest a purpose of detecting emerging authoritarian practices. The majority on the Court's bench, on the other hand, view Article 18 as a narrow tool to respond to predominant and pronounced authoritarian practices. These normative disagreements are also reflected in concurring and dissenting opinions annexed to Article 18 judgments, with some minority judges defending the narrow normative model and others advocating for a more progressive interpretation, not only on familiar grounds of evolutive interpretation but also because the convention's history calls for progressive interpretation of this particular provision. Our findings

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complicate the well-established presumption that progressive interpretation of the convention comes about by treating it as a ‘living instrument’ at the expense of the drafters’ intent, highlighting the turn to ‘progressive originalism’ in the interpretation of Article 18 of the ECHR.

1 Introduction

Article 18 of the European Convention on Human Rights (ECHR), unlike the substantive human rights provisions of the convention, exclusively concerns restrictions on human rights and freedoms. The text of Article 18 states that restrictions on convention ‘rights or freedoms shall not be applied for any purpose other than those for which they have been prescribed’. Following a long dormant existence,¹ the interpretation of Article 18 by the European Court of Human Rights (ECtHR) has attracted much scholarly attention in recent times.² This is due to a marked increase in the use of the provision by the Court when rights or freedoms are restricted in the context of what may be commonly characterized as contemporary ‘authoritarian practices’ in Europe.³ In particular, Article 18 violations have been found in cases that concern measures taken by domestic authorities to silence,⁴ punish⁵ and/or dissuade⁶ domestic actors who are critical of the erosion of democratic and rule of law infrastructures. These critical actors include opposition politicians,⁷ human rights defenders,⁸ lawyers,⁹ journalists¹⁰ and judges.¹¹ More recently, an Article 18 violation has been

¹ See Çalı and Hatas, ‘History as an Afterthought: The (Re)discovery of Article 18 in the Case Law of the European Court of Human Rights’, in H. Aust and E. Demir-Gürsel (eds), *The European Court of Human Rights: Current Challenges in Historical and Comparative Perspective* (2021) 158.

² See, e.g., Heri, ‘Loyalty, Subsidiarity, and Article 18 ECHR: How the ECtHR Deals with Mala Fide Limitations of Rights’, 1(1) *European Convention on Human Rights Law Review (ECHRRL)* (2020) 25; Mortier, ‘Reprehensible or Legitimate Aims? A Proposal for a New Approach to Article 18 ECHR in Light of Its Predominance Test’, 4(2) *ECHRRL* (2023) 133; Tan, ‘The Dawn of Article 18 ECHR: A Safeguard against European Rule of Law Backsliding?’, 9(1) *Goettingen Journal of International Law* (2018) 109; Tsampi, ‘The New Doctrine on Misuse of Power under Article 18 ECHR: Is It About the System of Contre-Pouvoirs within the State after All?’, 38(2) *Netherlands Quarterly of Human Rights (NQHR)* (2020) 134.

³ Throughout this article, we employ the definition of authoritarian practices formulated by Marlies Glasius, who defines such practices as ‘patterns of action that sabotage accountability to people over whom a political actor exerts control, or their representatives, by means of secrecy, disinformation and disabling voice’. See Glasius, ‘What Authoritarianism Is ... and Is Not: A Practice Perspective’, 94(3) *International Affairs* (2018) 515, at 517.

⁴ ECtHR, *Kavala v. Turkey*, Appl. no. 28749/18, Judgment of 10 December 2019, para. 232. All ECtHR rulings are available at <http://hudoc.echr.coe.int/>.

⁵ ECtHR, *Azizov and Novruzlu v. Azerbaijan*, Appl. nos. 65583/13 and 70106/13, Judgment of 18 February 2021, para. 79.

⁶ ECtHR, *Juszczyszyn v. Poland*, Appl. no. 35599/20, Judgment of 6 October 2022, para. 337.

⁷ ECtHR (GC), *Selahattin Demirtaş v. Turkey (No. 2)*, Appl. no. 14305/17, Judgment of 22 December 2020.

⁸ ECtHR, *Rasul Jafarov v. Azerbaijan*, Appl. no. 69981/14, Judgment of 17 March 2016.

⁹ ECtHR, *Aliyev v. Azerbaijan*, Appl. nos. 68762/14 and 71200/14, Judgment of 20 September 2018.

¹⁰ ECtHR, *Khadija Ismayilova v. Azerbaijan (No. 2)*, Appl. no. 30778/15, Judgment of 27 February 2020.

¹¹ ECtHR, *Miroslava Todorova v. Bulgaria*, Appl. no. 40072/13, Judgment of 19 October 2021.

found by the Court in the context of an interstate case.¹² There have also been Article 18 cases brought by businesspersons attempting to underline economic ulterior purposes pursued by authoritarian executives.¹³ Indeed, it has been previously argued by Aikaterini Tsampi that Article 18 case law has become a means of protecting social and economic *contre-pouvoirs*.¹⁴

Despite the rising popularity of Article 18 as the ECtHR's apparent legal response to contemporary authoritarian practices in Europe,¹⁵ there are important disagreements about what Article 18 is for and what methods of treaty interpretation are employed to determine the object and the purpose of this provision. The weight placed on different interpretive methods – textual, historical or evolutive – has important consequences for the application of Article 18. This is vividly reflected in the number of separate opinions that Article 18 judgments have attracted: in the 80 judgments delivered by the Court where the applicants invoked Article 18, since its first finding of a violation of the provision in 2004¹⁶ until the end of 2024, 24 (partly) dissenting and/or concurring opinions engaging with Article 18 were annexed to chamber judgments,¹⁷ and six were annexed to Grand Chamber judgments.¹⁸

This article investigates the normative disagreements concerning the purpose of Article 18 and which methods drive the interpretation of Article 18 by majority and minority judges in the light of rules of treaty interpretation found in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT).¹⁹ It pays particular attention to what drives progressive interpretation in Article 18 case law. The central argument of the article is twofold. First, we demonstrate that the text, the *travaux préparatoires* and the interpretive practice employed by the Strasbourg majority provide distinct normative answers as to what Article 18 is for. The ordinary meaning of the provision is open-ended and can support the interpretation of the provision as a response to all forms of abuse of power where convention rights are restricted, including major or minor abuses and irrespective of whether they play out in democratic or authoritarian contexts. The *travaux préparatoires*, however, point to this provision being purposed to identify subtle encroachments of what the drafters notably identified as resurgent 'totalitarianism' at the time. According to the drafters, the types of abuse of power that the provision aims to help detect and respond to are not all degrees and kinds of abuse of power but, rather, those that present nefarious structural risks to democratic societies. Notably, however, this purpose is not exclusive to the drafting

¹² ECtHR, *Ukraine v. Russia (re Crimea)*, Appl. nos. 20958/14 and 38334/18, Judgment of 25 June 2024.

¹³ ECtHR, *Khodorkovskiy v. Russia*, Appl. no. 5829/04, Judgment of 31 May 2011; ECtHR, *OAO Neftyanaya Kompaniya Yukos v. Russia*, Appl. no. 14902/04, Judgment of 20 September 2011; ECtHR, *Nevzlin v. Russia*, Appl. no. 26679/08, Judgment of 18 January 2022.

¹⁴ Tsampi, *supra* note 2.

¹⁵ See Çalı, 'Coping with Crisis: Whither the Variable Geometry in the Jurisprudence of the European Court of Human Rights', 35 *Wisconsin International Law Journal* (2017) 237.

¹⁶ ECtHR, *Gusinskiy v. Russia*, Appl. no. 70276/01, Judgment of 19 May 2004.

¹⁷ See Annex A at the end of this article.

¹⁸ See Annex B at the end of this article.

¹⁹ Vienna Convention on the Law of Treaties (VCLT) 1969, 1155 UNTS 331.

history of Article 18 but is instead a cross-cutting purpose. For instance, it is present in the requirement that all restrictions must pursue a legitimate aim (Articles 8–11 of the ECHR) and the prohibition on the abuse of rights (Article 17 of the ECHR).

The majority in the Strasbourg Court, however, endorse neither of these purposes when they interpret Article 18. Instead, the majority's interpretation focuses on calling out what the Court determines to be 'predominant'²⁰ cases of abuse of power in authoritarian contexts and only where it considers that such an inquiry represents a 'fundamental aspect of the case'.²¹ Article 18, from the perspective of the majority's interpretation, therefore, is not purposed to identify either all risks of abuse of power or subtle structural risks to safeguarding democratic forms of government but, rather, what the Court considers to be acute and pronounced cases of an authoritarian abuse of power.

Second, we show how the interpretive disagreement from judges in the minority addresses the tensions between these normative models. Some minority judges have endorsed the narrow purposive path and have demanded that it be applied more consistently to different facts. Others have opposed the narrowing down of the purpose of Article 18 to so-called 'predominant' cases by the majority. In so doing, they are not only relying on making Article 18 relevant to present-day conditions but also distinctively relying on the *travaux* of the ECHR for the progressive interpretation of Article 18. This finding complicates and deviates from the standard wisdom which associates progressive interpretation of the convention with the living instrument doctrine, on the one hand, and the restrictive interpretation of the convention with originalist interpretations and drafters' intent, on the other.²² In the case of Article 18, the drafters' intent emerges as the key method for progressive interpretation, akin to 'progressive originalism'.

Progressive originalism, originally developed in the context of US constitutional law, 'views the Constitution as an initial framework for governance that sets politics in motion and must be filled out over time through constitutional construction'.²³ Its logic emphasizes the key principles underpinning a constitution or treaty to challenge the long-held presumption that an originalist approach, be that textualism or intentionalism,²⁴ leads to a conservative interpretation.²⁵ For example, progressive originalism was employed by the US Supreme Court in its 2020 *Bostock v. Clayton* judgment to conclude that the 1964 Civil Rights Act prohibits discrimination based on lesbian, gay, bisexual and transgender grounds.²⁶ Our analysis shows that a similar approach

²⁰ ECtHR (GC), *Merabishvili v. Georgia*, Appl. no. 72508/13, Judgment of 28 November 2017, para. 295.

²¹ *Ibid.*, para. 291.

²² See, e.g., Letsas, 'Intentionalism and the Interpretation of the ECHR', in M. Fitzmaurice, O. Elias and P. Merkouris (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On* (2010) 255; Letsas, 'Strasbourg's Interpretive Ethic: Lessons for the International Lawyer', 21 *European Journal of International Law (EJIL)* (2010) 509; Orakhelashvili, 'Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights', 14 *EJIL* (2003) 529.

²³ J. Balkin, *Living Originalism* (2011), at 21; see also A. Ahmar, *America's Constitution: A Biography* (2006).

²⁴ On this distinction, see Letsas, 'Intentionalism', *supra* note 22, at 258–259.

²⁵ See A. Ahmar, *What Gorsuch Has in Common with Liberals* (2017), available at www.nytimes.com/2017/03/18/opinion/sunday/what-gorsuch-has-in-common-with-liberals.html.

²⁶ *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).

to convention interpretation has uniquely emerged, at least in the minority opinions, in the context of Article 18 of the ECHR.

In section 2, we start with the general approach to treaty interpretation adopted by the ECtHR, which closely associates progressive interpretation with the living instrument doctrine and the ECHR's history with restrictive interpretation. In section 3, we turn to the text of the provision and the *travaux préparatoires* of the convention. Our analysis of the *travaux préparatoires* covers the totality of the drafting history of the convention as contained within the eight published volumes, situating the drafting history of Article 18 in this broader context. In section 4, we examine the Article 18 case law of the Court and the treatment of the provision by the majority. Section 5 considers the disagreements between the judges of the Court, as evidenced in the Article 18 separate opinions, and shows the role played by progressive originalism in countering restrictive interpretation in Strasbourg. Section 6 concludes.

2 Treaty Interpretation and the ECtHR

According to Article 31(1) of the VCLT, a treaty 'shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.²⁷ In addition, Article 32 of the VCLT permits recourse to supplementary means of interpretation, including the *travaux préparatoires* to 'confirm' or 'determine' the meaning of a provision, where an interpretation under Article 31 'leaves the meaning ambiguous or obscure' or 'leads to a result which is manifestly absurd or unreasonable'.²⁸ It has long been observed that these elements of treaty interpretation are not sequentially ordered but form part of a 'crucible' approach.²⁹ In the words of the International Law Commission, '[a]ll various elements, as they were present in any given case, would be thrown into the crucible, and their interaction would give the legally relevant interpretation'.³⁰ Treaty interpreters thus seek a persuasive coherence between wording, legal context, object and purpose and the historical antecedents resulting in a 'single combined operation'.³¹ The interpreting court benefits from a wide margin of discretion with the use of its own 'judgment'.³² This allows courts to combine the primary and supplementary means of interpretation to determine the specific meaning of the legal provisions in treaties.

International human rights law, however, is well known for its development of 'specialized interpretive canons' when applying rules of treaty interpretation to human

²⁷ VCLT, *supra* note 19, Art. 31(1).

²⁸ *Ibid.*, Art. 32.

²⁹ R. Gardiner, *Treaty Interpretation* (2018), at 9, citing International Law Commission (ILC), 'Reports of the Commission to the General Assembly', in ILC (ed.), *Draft Articles on the Law of Treaties with Commentaries Vol. 2* (1966) 169, at 220.

³⁰ ILC, *supra* note 29, at 220.

³¹ Gardiner, *supra* note 29, at 10.

³² Gardiner, 'The Vienna Convention Rules on Treaty Interpretation', in D. Hollis (ed.), *The Oxford Guide to Treaties* (2012) 459, at 488.

rights law treaties.³³ Motivated by the general purpose of these treaties as ensuring protection of human rights, regional human rights courts and treaty bodies interpret these treaties to make them real and effective for individuals.³⁴ In this effort, evolutive interpretation of the provisions of the treaties plays a central role.³⁵ The ECtHR is known for its endorsement of both the crucible and evolutive approach.³⁶ Over the years, it has underlined that the object and the purpose of the ECHR as a human rights treaty is to ensure ‘protection of individual human beings’³⁷ and to do so to ‘promote the ideals and values of a democratic society’ understood as the best political and legal regime to protect human rights.³⁸ The ECtHR consistently holds that ‘the Convention is a living instrument which must be interpreted in the light of present-day conditions and of the ideas prevailing in democratic States’.³⁹ This in turn means that the Court does not find itself obligated to ‘attach decisive importance’⁴⁰ to either the ordinary meaning of the convention’s text or the *travaux* when interpreting the ECHR.⁴¹

The 1981 judgment of *Young, James and Webster v. United Kingdom* illustrates this approach.⁴² Notwithstanding an express exclusion of a right not to join an association in the *travaux*,⁴³ the Court recognized such a right by holding that any other interpretation ‘would strike at the very substance of the freedom it is designed to guarantee’.⁴⁴ More recently in 2016, the Grand Chamber held in *Magyar Helsinki Bizottság v. Hungary* that ‘the *travaux préparatoires* are not delimiting for the question whether a right may be considered to fall within the scope of an Article... if the existence of such a right was supported by the growing measure of common ground that

³³ See Killander, ‘Interpreting Regional Human Rights Treaties’, 7(13) *Sur: International Journal of Human Rights* (2010) 145; Lixinski, ‘Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law’, 21 *EJIL* (2010) 585; Burgogue-Larsen, ‘“Decompartmentalization”: The Key Technique for Interpreting Regional Human Rights Treaties’, 16(1) *International Journal of Constitutional Law* (2018) 187; Çalı, ‘Specialized Rules of Treaty Interpretation: Human Rights’, in D. Hollis (ed.), *The Oxford Guide to Treaties* (2020) 504.

³⁴ Çalı, *supra* note 33, at 513.

³⁵ This interpretive method is not entirely distinct to human rights law, however, and extends to other fields in public international law – for example, international humanitarian law. See Gaggioli, ‘The Strength of Evolutionary Interpretation in International Human Rights Law’, in G. Abi-Saab *et al.* (eds), *Evolutionary Interpretation and International Law* (2019) 103, at 110.

³⁶ ECtHR (GC), *Demir and Baykara v. Turkey*, Appl. no. 34503/97, Judgment of 12 November 2008, paras 65–66; ECtHR, *Golder v. United Kingdom*, Appl. no. 4451/70, Judgment of 21 February 1975, para. 29.

³⁷ ECtHR, *Soering v. United Kingdom*, Appl. no. 14038/88, Judgment of 7 July 1989, para. 87.

³⁸ ECtHR, *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, Appl. nos. 5095/71, 5920/72 and 5926/72, Judgment of 7 December 1976, para. 53.

³⁹ ECtHR (GC), *Bayatyan v. Armenia*, Appl. no. 23459/03, Judgment of 7 July 2011, para. 102.

⁴⁰ ECtHR, *Sigurður A. Sigurjónsson v. Iceland*, Appl. no. 16130/90, Judgment of 30 June 1993, para. 35.

⁴¹ ECtHR, *Tyrer v. United Kingdom*, Appl. no. 5856/72, Judgment of 25 April 1978; see also Ullstein, ‘Interpretation of the ECHR in Light of the Vienna Convention on the Law of Treaties’, 24 *International Journal of Human Rights* (2020) 917.

⁴² ECtHR, *Young, James and Webster v. United Kingdom*, Appl. nos. 7601/76 and 7806/77, Judgment of 13 August 1981, paras 51–52.

⁴³ *Collected Edition of the Travaux Préparatoires of the European Convention on Human Rights*, vol. 4 (1975), at 262.

⁴⁴ *Young, James and Webster*, *supra* note 42, para. 52.

had emerged in the given area'.⁴⁵ The Court, however, does not always disregard the ordinary meaning and/or the *travaux*. For instance, it held that the 'right to marry' under Article 12 of the ECHR did not encompass a right to divorce on account of the ordinary wording of that provision.⁴⁶ It further confirmed this interpretation with reference to the relevant *travaux*.⁴⁷ In its 2001 Grand Chamber inadmissibility decision in *Banković*, the *travaux* also played a role in confirming the Court's restrictive interpretation of jurisdiction under Article 1 of the ECHR, limiting the prospects of extra-territorial application of the Convention.⁴⁸

In summary, where the ECtHR wishes to foster progressive interpretation of the ECHR's text, it generally deploys evolutive interpretation, treating the convention as a living instrument.⁴⁹ Conversely, the Court tends to turn to the *travaux* and defend its continued confirmatory relevance in instances where it wishes to substantiate a restrictive interpretation of the convention. In other words, it does not use the *travaux* to justify or confirm a progressive interpretation of the convention: the Court's standard interpretation of the convention, therefore, steers clear from progressive originalism.

3 Article 18: The Text and the Drafters' Intent

In this section, we first turn to the text and the *travaux* of the ECHR before analysing in sections 4 and 5 how the Court's majority and minority judges employ these documents in their interpretations of Article 18.

A Article 18: The Text

Article 18 of the ECHR, entitled 'Limitations on use of restrictions on rights', provides that '[t]he restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed'. From a close reading of this wording, the following three observations can be made. First, the ordinary meaning of the provision does not assign a value-protecting normative purpose to Article 18. It does not provide a definition or a (non-)exhaustive list of 'purpose[s] other than those ... prescribed' with reference to any of the values underpinning the convention or the normative institutional aims of the convention. As such, the text itself is not limited to offering protections against authoritarian practices. Given that one overarching purpose that the Court assigns to the convention is the 'protection of individual human beings', any unprescribed purpose that leads to the under-protection of human rights may trigger a violation of Article 18 based on an ordinary reading of the text. Second, the text does not clarify whether the purposes

⁴⁵ ECtHR, *Magyar Helsinki Bizottság v. Hungary*, Appl. no. 18030/11, Judgment of 8 November 2016, para. 125. See also ECtHR (GC), *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, Appl. no. 53600/20, Judgment of 9 April 2024, para. 434 (the recent application of the living instrument doctrine in the context of climate change).

⁴⁶ ECtHR, *Johnston and Others v. Ireland*, Appl. no. 9697/82, Judgment of 18 December 1986, para. 52.

⁴⁷ *Ibid.*, para. 53.

⁴⁸ ECtHR (GC), *Banković and Others v. Belgium and Others*, Appl. no. 52207/99, Decision of 12 December 2021, paras 75, 80.

⁴⁹ *Bayatyan*, *supra* note 39, para. 98.

that are not legitimate from the perspective of the convention, and capable of violating Article 18, need to be concealed or hidden by the state. In other words, from reading the text of Article 18, it may be plausible to state that, where restrictions do not serve a purpose prescribed elsewhere in the convention, they would violate the provision. Third, the text does not explain what happens when a restriction is applied for a plurality of purposes. For instance, the text does not indicate whether the existence of an illegitimate purpose, irrespective of its predominance in the overall motivation of the state's restriction, is also prohibited by Article 18.

It suffices to say that the text of Article 18 allows for a broad understanding of the prohibition of right restrictions for 'any purpose' outside of the convention, providing there is a blanket prohibition on the use of non-prescribed purposes to restrict rights. Such an interpretation would be in good faith and would not be inconsistent with either the context or the object and purpose of the ECHR.⁵⁰

B The Drafters' Intent

Before considering what the *travaux* may reveal about the purpose of Article 18, it is helpful to provide an overview of the key institutions and procedures that paved the way for the drafting of the ECHR. Relabelled the Parliamentary Assembly of the Council of Europe in February 1994 by the Committee of Ministers,⁵¹ the Consultative Assembly is made up of parliamentary representatives from each member state of the Council of Europe and primarily debates issues with a view to communicate recommendations to the Committee of Ministers.⁵² The latter is the key decision-making body of the Council of Europe, made up of one ministerial member from each of the Council of Europe states.⁵³ The two other key groups in the drafting stages, both of which have since been dissolved, are the Committee on Legal and Administrative Questions and the Committee of Experts. The Committee on Legal and Administrative Questions was born from 24 lawyers in the Consultative Assembly and, as will be shown, assumed a key role in the drafting of the convention. The Committee of Experts was a group of experts established by the Committee of Ministers, consisting of individuals nominated by each Council of Europe member state.

It is well established in the historical scholarship on the drafting of the ECHR that the intentions of the drafters regarding the overarching goal of the convention were not unanimous.⁵⁴ One group of drafters wanted the convention to serve, as a whole, as a future-looking international protection mechanism for human rights, in addition to serving as an 'alarm bell' mechanism against the return of totalitarianism.⁵⁵ The

⁵⁰ See *Merabishvili*, *supra* note 20, Concurring Opinion of Judge Serghides.

⁵¹ Committee of Ministers, 508th Meeting of the Ministers' Deputies (Held in Strasbourg from 14 to 17 February 1994) – Decisions Adopted and Records CM/Del/Dec/Act(94)508 (1994), Appendix 8, available at <https://rm.coe.int/090000168062df17>.

⁵² Statute of the Council of Europe (SCE) 1949, 87 UNTS 103, Articles 22, 25.

⁵³ *Ibid.*, Art. 14.

⁵⁴ See, among others, Nicol, 'Original Intent and the European Convention on Human Rights', *Public Law* (2005) 152, at 170–172; E. Bates, *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights* (2010), at 7–8.

⁵⁵ Ed Bates, reflecting on the drafting of the ECHR, has convincingly argued that the convention clearly formed a 'collective pact' against totalitarianism. See Bates, *supra* note 54, at 75.

other drafters focused on the latter ‘alarm bell’ function, even though they did not have a common understanding of the triggering threats.⁵⁶ They perceived the convention as an instrument to maintain the *status quo* in terms of human rights protection, with little appetite for creating a forward-looking instrument.⁵⁷ It is important to underscore that this oft-referenced ‘alarm bell’ function was thought to apply to the convention as a whole. Discussions to this effect were present well before Article 18, or any equivalent provision, was introduced into the drafting process. For example, in delivering Report no. 77 of the Committee on Legal and Administrative Questions to the Consultative Assembly, Pierre-Henri Teitgen, the French statesman and committee rapporteur, when presenting his view on the impetus behind the convention, identified it as a protection mechanism against the perils of authoritarian evil.⁵⁸ He went on famously:

Democracies do not become Nazi countries in one day. Evil progresses cunningly, with a minority operating, as it were, to remove the levers of control. One by one, freedoms are suppressed, in one sphere after another. ... It is necessary to intervene before it is too late. A conscience must exist somewhere which will sound the alarm to the minds of a nation menaced by this progressive corruption to warn them of the peril and show them that they are progressing down a long road which leads far, sometimes to Buchenwald or Dachau.⁵⁹

This presentation is important as Report no. 77 annexed a September 1949 draft convention,⁶⁰ which was largely adopted by the Consultative Assembly of the Council of Europe (now the Parliamentary Assembly) in Recommendation no. 38,⁶¹ and formed the basis of a substantial part of earlier drafting negotiations. However, Article 18 was not present in this annex. Nevertheless, these earlier stages are relevant for exploring the purpose of the provision as they do address concerns as to how restrictions on rights and freedoms could operate.⁶² Nodding to the sovereignty of states recognized by international law,⁶³ Article 4 of the September 1949 draft provided that ‘every Member State, signatory to the Convention, shall be entitled to establish the rules by which the guaranteed rights and freedoms shall be organised and protected within its territory’.⁶⁴ The draft placed three restrictions on this discretion concerning: non-discrimination (Article 5); the tri-partite test concerning legality, legitimate aims and proportionality that we now see in Articles 8–11 of today’s convention (Article 6); as well as accordance with the law of civilized nations as provided for under Article

⁵⁶ For example, Marco Duranti’s work underlines that the United Kingdom’s drafters, specifically David Maxwell Fyfe, viewed the UK Labour Party as a totalitarian risk. See M. Duranti, *The Conservative Human Rights Revolution: European Identity, Transnational Politics, and the Origins of the European Convention* (2017), at 365–366.

⁵⁷ This conservative position was most prevalent amongst British representatives. See A. Simpson, *Human Rights and the End of Empire* (2001), at 5.

⁵⁸ *Collected Edition of the ‘Travaux Préparatoires’ of the European Convention on Human Rights*, vol. 1 (1975), at 292.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*, at 228–234.

⁶¹ Council of Europe Consultative Assembly, Recommendation no. 38, Doc. 108, 8 September 1949.

⁶² Merabishvili, *supra* note 20, para. 290.

⁶³ *Travaux Préparatoires*, vol. 1, *supra* note 58, at 222.

⁶⁴ *Ibid.*, at 230.

38(1)(c) of the Statute of the Permanent Court of International Justice (Article 7).⁶⁵ Article 6 of the September 1949 draft Convention provided:

In the exercise of these rights, and in the enjoyment of the freedoms guaranteed by the Convention, no limitations shall be imposed except those established by law, with the sole object of ensuring the recognition and respect for the rights and freedoms of others, or with the purpose of satisfying the just requirement of public morality, order and security in a democratic society.⁶⁶

This provision, providing for the limitations on rights, sought to prohibit ‘any restriction on a guaranteed freedom for motives based, not on the common good or general interest, but on reasons of State’.⁶⁷ In proposing his amendments to this section of the September 1949 draft, Lodovico Benvenuti, the Italian parliamentary representative before the Consultative Assembly, further affirmed the importance of regulating the way in which rights are restricted in the face of totalitarian threats:

[W]hat we must fear today is not the seizure of power by totalitarianism by means of violence, but rather that totalitarianism will attempt to put itself in power by pseudo-legitimate means. Experience has shown that it is sufficient to establish an atmosphere of intimidation and terror in one single electoral campaign in a country for all the executive acts establishing a totalitarian regime to acquire a character, an appearance, of legality. That is exactly what happened with us. For example, the Italian constitution was never repealed, all constitutional principles remained in theory, but the special laws approved by the Chambers, elected in one misdirected campaign, robbed the constitution little by little of all its substance, especially of its substance of freedom.⁶⁸

Benvenuti first proposed that ‘a special Convention shall be annexed to the present Convention with a view to establishing between Member States a uniformity in legislation concerning the organisation and the protection of fundamental freedoms under which democracy operates’.⁶⁹ He argued that such an amendment would ensure unambiguous protection for the rights and freedoms of the convention by empowering domestic courts to declare any ‘pseudo-legitimate’ law unconstitutional and best combat any ‘abuse of legislative power’.⁷⁰ In his second amendment, motivated by Article 30 of the Universal Declaration of Human Rights, Benvenuti sought to introduce what would later be incorporated as Article 17 of the ECHR: ‘No provision of the proposed Convention may imply the recognition of the right of a State or of any individual to undertake activity aimed at the destruction of the freedoms which are contained within it.’⁷¹ For Benvenuti, such a provision was purposed for ‘countries which find themselves menaced by a totalitarian movement enjoying the protection of law’.⁷² Benvenuti’s amendments were, however,

⁶⁵ Statute of the Permanent Court of International Justice 1920, 6 LNTS 390.

⁶⁶ *Travaux Préparatoires*, vol. 1, *supra* note 58, at 130.

⁶⁷ *Ibid.*, at 223.

⁶⁸ *Collected Edition of the ‘Travaux Préparatoires’ of the European Convention on Human Rights*, vol. 2 (1975), at 136.

⁶⁹ *Ibid.*, at 134.

⁷⁰ *Ibid.*

⁷¹ *Ibid.*, at 136–140; Universal Declaration of Human Rights, GA Res. 217A (III), 10 December 1948.

⁷² *Travaux Préparatoires*, vol. 4, *supra* note 43, at 140.

withdrawn following a request from Teitgen,⁷³ who considered that such amendments would result in the premature codification of rights and risked undermining the negotiation process with the government representatives in the Committee of Ministers.⁷⁴

It was around this point, in November 1949, that the Committee of Ministers started to rear its more cautious head regarding the drafting of the ECHR. Such efforts are most clearly demonstrated by the committee's establishment of the Committee of Experts on 5 November 1949.⁷⁵ In establishing this group, the Committee of Ministers tasked the Committee of Experts with questioning the need for a convention and, should they deem one necessary, providing their own draft, which would take due account of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) drafts.⁷⁶ It was this direction that ultimately led to the inclusion of Article 17 of the ECHR into the Committee of Experts' draft convention in February 1950, in the form of Article 8(a),⁷⁷ borrowing it straight from Article 5 of the drafts of the ICCPR and the ICESCR.⁷⁸

Shortly after Article 17 of the ECHR's addition, the drafters started to negotiate with four drafts of the convention simultaneously. The need to continue to negotiate with multiple drafts on the table was precipitated by two stalemates – namely, the establishment of the ECtHR and the extent of any delineation of rights. The Committee of Ministers established the Conference of Senior Officials, with members once again appointed by the member states, to narrow the number of convention drafts on the table and lay the runway for the Committee of Ministers to adopt a final decision on signing at its next sitting.⁷⁹ Owing to concerns of incompatibility between a general limitations clause, applicable to all convention provisions, and national constitutions,⁸⁰ the Conference of Senior Officials ultimately favoured the use of specific limitation clauses and, thus, opted to shift their focus to the development of draft alternative B and alternative B/2.⁸¹ Both of these drafts had benefited from the addition of Article 18, in the form of Article 15(2), in their further development.⁸²

Critically, however, the impetus behind this inclusion is difficult to discern. When it was introduced, the provision was labelled as 'an application of the theory of the misuse of power'.⁸³ The concept originates from the long-established principle in French administrative law of '*détournement de pouvoir*',⁸⁴ which appears in the French *travaux*

⁷³ *Ibid.*, at 142; see also *Collected Edition of the 'Travaux Préparatoires' of the European Convention on Human Rights*, vol. 3 (1975), at 16–18.

⁷⁴ *Travaux Préparatoires*, vol. 2, *supra* note 68, at 142.

⁷⁵ *Travaux Préparatoires*, vol. 3, *supra* note 73, at 302–304.

⁷⁶ *Travaux Préparatoires*, vol. 2, *supra* note 68, at 302–304; International Covenant on Civil and Political Rights 1966, 999 UNTS 171; International Covenant on Economic, Social and Cultural Rights, 1966, 993 UNTS 3.

⁷⁷ *Travaux Préparatoires*, vol. 3, *supra* note 73, at 224.

⁷⁸ *Ibid.*, at 266.

⁷⁹ *Ibid.*, at 92–94.

⁸⁰ See, e.g., the speech of Mr. Hoare in *Travaux Préparatoires*, vol. 4, *supra* note 43, at 170.

⁸¹ *Ibid.*, at 176.

⁸² *Ibid.*, at 190.

⁸³ *Ibid.*, at 258.

⁸⁴ *Ibid.*, at 259; see also Tsampi, *supra* note 2, at 138–141.

text.⁸⁵ This domestic legal principle prohibits the use of powers by the public administration for purposes other than for which they were prescribed.⁸⁶ Notwithstanding its French origins, its inclusion appears to have been pushed by the British drafters.⁸⁷ Of the 12 states represented in the Conference of Senior Officials,⁸⁸ seven had a public law doctrine akin to the '*détournement de pouvoir*' at the time of Article 18's introduction into the drafting of the ECHR. In addition to France,⁸⁹ Belgium,⁹⁰ Greece,⁹¹ Italy,⁹² Luxembourg,⁹³ Netherlands⁹⁴ and Turkey⁹⁵ appear to have applied the same legal concept prior to the convention being formulated. A more distant comparison can also be drawn with the judicial review of improper purposes in the law of England and Wales.⁹⁶ The explicit reference to *détournement de pouvoir* in the *travaux*, read with these domestic legal backgrounds of the drafters, suggests that they viewed Article 18 as having a very similar, if not identical, role to that doctrine as applied in these domestic contexts – namely, prohibiting the misuse of administrative power for any purpose other than for which that power was prescribed.

The drafters also discussed the specific types of abuses of power that they considered to be relevant to the ECHR. For example, the Committee of Senior Officials had discussions pertaining to the abuse of power in the context of detention under Article 5 of the ECHR. Specifically, they recommended that Article 18 (Article 13(2) at that time) be applied strictly in the context of detention to 'avoid any possible abuses' by public authorities⁹⁷ and to reduce the risks of detention leading to the 'introduction of a regime of a *Police State*'.⁹⁸ Beyond these two discussions, however, no other concrete examples of abuse of power were discussed by the drafters to the extent that their discussions are recorded in the eight volumes of the *travaux*. Reading only those sections of the *travaux* that pertain to Article 18, therefore, can support the broad interpretation of Article 18's purpose, as suggested by its ordinary meaning.

Reading the *travaux préparatoires* holistically, however, may suggest a more specific purpose. In addition to the 'alarm bell' function assigned to the ECHR as a whole, Teitgen, in his opposition to the removal of a provision providing for 'respect for the

⁸⁵ *Travaux Préparatoires*, vol. 4, *supra* note 43, at 259.

⁸⁶ Auby, 'The Abuse of Power in French Administrative Law', *American Journal of Comparative Law* (1970) 549, at 549.

⁸⁷ Simpson, *supra* note 57, at 716.

⁸⁸ *Travaux Préparatoires*, vol. 4, *supra* note 43, at 244.

⁸⁹ See, e.g., Conseil d'État (the French Council of State), 26 November 1875 (Laumonier-Carriol).

⁹⁰ Act Establishing a State Council, 23 December 1946, Art. 9 (only available in French and Dutch).

⁹¹ See *Judgments of the Administrative Tribunal of the ILO upon complaints made against the UNESCO*, Advisory Opinion, 23 October 1956, ICJ Reports (1956) 77 at 224, Dissenting Opinion of Vice-President Badawi, at 60 and 141.

⁹² See O.V. Emanuele, *Trattato di Diritto Amministrativo*, Vol. 3 (1901), at 800–815.

⁹³ See Joint Opinion of Advocate General Lagrange in respect of Joined Cases C-3/54 and C-4/54, *Associazione Industrie Siderurgiche Italiane and Industrie Siderurgiche* (EU:C:1954:6), paras 78–79.

⁹⁴ See, e.g., Hoge Raad (the Dutch Supreme Court), 14 January 1949, N.J. 1949, no. 557.

⁹⁵ See *Judgments of the Administrative Tribunal* Advisory Opinion, *supra* note 91, Dissenting Opinion of Vice-President Badawi, at 60 and 141.

⁹⁶ See *Galloway v. London Corporation*, (1866) L.R. 1 H.L. 34.

⁹⁷ *Travaux Préparatoires*, vol. 4, *supra* note 43, at 260.

⁹⁸ *Ibid.*, at 260 (emphasis added).

fundamental principles of democracy in all good faith',⁹⁹ argued that the rights and freedoms provided for under the convention were intertwined with democratic institutions and that any international mechanism must be 'capable of intervention right from the start'.¹⁰⁰ Meanwhile, the United Kingdom's Lord Layton opined that the convention should enable the 'helping [of] one another to watch and nip in the beginning any of that undermining process'.¹⁰¹ What can be inferred from the *travaux préparatoires* in respect of the convention, including Article 18, therefore, is an awareness of the need for a pre-emptory response mechanism to the risks of reversal of democratic regimes under the guise of legality. Whilst the ECHR as a whole was conceived to have an alarm bell function,¹⁰² Article 18 may be seen as but one detection tool in the convention.

The evidence from the *travaux préparatoires* concerning an early response to anti-democratic and totalitarian practices, therefore, shows that multiple provisions of the convention were thought to form such a response collectively, including the legitimate aim requirement (which eventually formed part of Articles 8–11), Article 17 and Article 18. In particular, it shows that the alarm bell motivation was apparent well before the introduction of Article 18.

4 Article 18: Interpretation by the Majority over Time

A close examination of the Article 18 case law of the ECtHR to date shows that the Court views the purpose of Article 18 neither as a catch-all provision to determine any absence of a legitimate purpose, as the ordinary meaning allows, nor as a vehicle to detect subtle but systemic encroachments of totalitarian and anti-democratic rule under the guise of domestic legality, as reflected in the *travaux préparatoires* of the ECHR. Instead, the Court has employed Article 18 to identify what it considers predominant cases of abuses of power in the context of authoritarian practices in Europe. The majority's interpretation, therefore, narrows the purpose of this provision.

In the first ever case substantively engaging with Article 18, *Kamma v. The Netherlands* in 1974,¹⁰³ the European Commission of Human Rights held that a very high threshold of abuse of power accompanied by exacting evidence was needed to find a violation of Article 18.¹⁰⁴ Based on its reading of the 'terms of Article 18', the commission further held that the provision could only be violated when rights or freedoms that may be subject to restrictions are at stake.¹⁰⁵ In so doing, the commission did not engage with the ordinary meaning of the text nor with the *travaux*

⁹⁹ *Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights*, vol. 5 (1979) at 286.

¹⁰⁰ *Ibid.*, at 294.

¹⁰¹ *Travaux Préparatoires*, vol. 2, *supra* note 68, at 52. Similar arguments were advanced by the Nordic states, including Sweden and Denmark (at 66 and 84).

¹⁰² *Travaux Préparatoires*, vol. 1, *supra* note 58, at 292

¹⁰³ ECmHR, *Kamma v. The Netherlands*, Appl. no. 4771/71, Decision of 14 July 1974. Two earlier cases deemed Article 18 complaints manifestly ill-founded and did not engage with the provision in the merits. See ECmHR, *WB v. Germany*, Appl. no. 104/55, Decision of 17 December 1955; ECmHR, *X v Germany*, Appl. no. 2366/64, Decision of 7 April 1967.

¹⁰⁴ *Kamma*, *supra* note 103, at 10.

¹⁰⁵ *Ibid.*

préparatoires. The Court sustained this narrow interpretation in its own jurisprudence by affirming the high threshold for Article 18 and going on to clearly demand ‘incontrovertible and direct evidence’ in order to find a violation of the provision.¹⁰⁶ Such an evidential threshold was seldom met in cases brought before the Court, resulting in only six violations of Article 18 between 1960 and 2014.¹⁰⁷ For example, the inaugural violation of the provision in 2004, in the case of *Gusinskiy v. Russia*, followed the production of a state ministry document admitting the ulterior purpose of persecuting the applicant to pressure him to sell his company.¹⁰⁸ This high evidential standard allowed the Court to avoid undertaking any comprehensive interpretation of Article 18’s purpose. Notwithstanding citations from applicants,¹⁰⁹ the Court continued to avoid materially engaging with any analysis of the *travaux* throughout this period. In doing so, and by implementing an exacting evidential standard, the Court distanced itself from both the ordinary meaning of the text and the drafters’ intent in making sense of Article 18.

The Grand Chamber’s first Article 18 violation judgment, *Merabishvili v. Georgia* in 2017, provided an important opportunity for the ECtHR to review and reform its case law concerning the provision.¹¹⁰ This case concerned the detention of Ivane Merabishvili, the former prime minister of Georgia. He successfully complained that his detention pursued the ulterior purpose of extracting information unrelated to his prosecution, and he benefited from the finding of a violation of Article 18 as a result. *Merabishvili* was decisive in outlining how the Court understands the purpose of Article 18. In this case, the Court held that the interpretation of the provision should take into account ‘Article 18’s wording and the place in the general scheme of the Convention’.¹¹¹ The Court then used this to hold that, given its deferential approach to the aims and purposes permitted under qualified rights under the convention as well as the common reality that multiple aims or purposes may motivate a restriction, it is possible for state authorities to pursue legitimate and ulterior aims at the same time.¹¹² The Court went on to hold that, where a plurality of purposes exists, the ulterior purpose must be the ‘predominant’ purpose motivating the restriction.¹¹³ The Court was able to further clarify that its application of the provision required that the Article 18 complaint represent a ‘fundamental aspect of the case’.¹¹⁴

¹⁰⁶ *Khodorkovskiy*, *supra* note 13, para. 260. For an overview of this sustained approach, see Çalı and Hatas, *supra* note 1, at 162–168.

¹⁰⁷ *Gusinskiy*, *supra* note 16; ECtHR, *Cebotari v. Moldova*, Appl. no. 35615/06, Judgment of 13 November 2007; ECtHR, *Lutsenko v. Ukraine*, Appl. no. 6492/11, Judgment of 3 July 2012; ECtHR, *Tymoshenko v. Ukraine*, Appl. no. 49872/11, Judgment of 30 April 2013; ECtHR, *Ilgar Mammadov v. Azerbaijan*, Appl. no. 15172/13, Judgment of 22 May 2014; *Rasul Jafarov*, *supra* note 8.

¹⁰⁸ *Gusinskiy*, *supra* note 16.

¹⁰⁹ *Khodorkovskiy*, *supra* note 13, para. 251.

¹¹⁰ *Merabishvili*, *supra* note 20.

¹¹¹ *Ibid.*, para. 293.

¹¹² *Ibid.*, paras 293–302.

¹¹³ *Merabishvili*, *supra* note 20, para. 305.

¹¹⁴ ECtHR, *Mammadli v. Azerbaijan*, Appl. no. 47145/14, Judgment of 19 April 2018, paras 96–97.

The Court introduced this ‘fundamental aspect’ criterion in *Merabishvili*, but it did not elaborate on the specificities of this requirement.¹¹⁵ The ‘fundamental aspect of the case’ criterion is a doctrinal creation of the Court. It has no basis in the provision’s text or the relevant *travaux préparatoires*. The Court has also not used its living instrument doctrine to justify this criterion. This criterion, however, is key to understanding the purpose of Article 18 according to the majority. In cases where the Court does not find that an applicant provided robust arguments and/or evidence that they were personally and seriously victimized by what may generally be a systemic or subtle authoritarian practice, the Court has frequently found that it was not necessary to examine the Article 18 complaint.¹¹⁶ Therefore, contrary to the ordinary wording and the *travaux*, the Court is not guided by the assessment of all abuses of power or subtle encroachments of authoritarian forces but, rather, by whether the consequences of authoritarian practices on individual victims, as applicants, are ‘fundamental’ in the cases before it. The Court’s way of focusing on the wording and the place of Article 18 in the overall convention, therefore, gives rise to a restrictive understanding of the purpose of Article 18.

This way of approaching cases with Article 18 complaints means that, even though authoritarian practices in a certain country may be systematically present, say in the case of the widespread criminalization of dissent, the alienation of independent media or pressure on the independence of judiciaries by the executive, the Court may either not examine Article 18 at all or not find a violation of the provision because it does not consider the complaint to be a fundamental aspect of the case. It is not possible to reconcile this interpretation of the provision with the catch-all purpose provided for in the text of Article 18 or the pre-emptory purpose of warning against subtle encroachments of totalitarianism as suggested by the *travaux*: it does little to halt the establishment of the ‘Police State’.¹¹⁷ Article 18, therefore, is not an alarm bell but, at best, a partially defective smoke detector, capable of detecting that a building is on fire but not the preceding smoke.

This recurrent interpretive practice of the ECtHR can be most prominently observed with regard to cases against Turkey and the Russian Federation, two countries where the systemic nature of authoritarian encroachment is well documented.¹¹⁸ For example, whilst the Court found three Article 18 violations in respect of Turkey, concerning the persecution of a prominent human rights defender and opposition

¹¹⁵ *Ibid.*, para. 291. For a critical review of the fundamental aspect criterion, see Finnerty, ‘When Is a State’s “Hidden Agenda” Proven? The Role of the Merabishvili’s Three-Legged Evidentiary Test in the Article 18 Strasbourg Case Law’, 4(4) *ECHRLR* (2023) 447.

¹¹⁶ See the overview provided of Article 18 case law in ECtHR, *Turan and Others v. Turkey*, Appl. nos. 75805/16 and others, Judgment of 23 November 2021, Partly Dissenting Opinion of Judge Küris, para. 17; see also Finnerty, *supra* note 115.

¹¹⁷ *Travaux Préparatoires*, vol. 4, *supra* note 43, at 260.

¹¹⁸ Along with Azerbaijan, Bosnia and Herzegovina, Hungary, Poland and Serbia, Turkey and the Russian Federation have been recorded to have the steepest declines in world freedom over the past 10 years and are the only two states who have benefited from Council of Europe membership, categorized as ‘not free’ based on an assessment of political rights and civil liberties. See Freedom House, *Freedom in the World 2023*, March 2023, at 12.

members of parliament between 2019 and 2022,¹¹⁹ the Court dismissed Article 18 complaints in a long list of subsequent cases concerning persecuted journalists¹²⁰ and other human rights defenders.¹²¹ The Court has further considered Article 18 complaints selectively in the cases concerning Alexei Navalnyy, the late opposition politician in Russia, even though his continued political persecution consistently demonstrates systemic features. The Court found an Article 18 violation in two of the five Article 18 cases brought by Navalnyy¹²² and dismissed his claims concerning the abuse of power in the course of one of his criminal trials because, in the Court's view, Article 18 could only be used in conjunction with rights that have express limitation clauses.¹²³ The latter reasoning is neither part of the wording of this provision nor does it flow clearly from the drafters' intent. The Court also declined to analyse the systemic crack down on 73 Russian civil society organizations under Article 18.¹²⁴ This selective use of Article 18, depending on the ECtHR's assessment of the veracity of personalized arguments and/or evidence furnished by the applicants, does not allow the Court to assess preliminary features of authoritarian practices with a view to pronounce on their structural nature, reoccurrence or protraction. Instead, Article 18 has become a provision that offers symbolic individual redress to a select number applicants, which the Court appears to view as high profile. Yet it is not possible to deduce the exact criteria that the Court employs in making such assessments.

The second requirement read into Article 18 by the majority in *Merabishvili* – namely, the predominance criterion – introduced an additional doctrinal threshold to assess the seriousness of authoritarian practices by recognizing that ulterior authoritarian purposes may exist but not be predominant.¹²⁵ This translates to an additional requirement in cases where a plurality of purposes exist – namely, that the ulterior purpose must be the main purpose motivating the restriction.¹²⁶ Non-predominant ulterior purposes will not result in a violation of Article 18.¹²⁷ In determining predominance, the majority have regard to the 'nature and degree of reprehensibility of the alleged ulterior purpose', bearing 'in mind that the Convention was designed

¹¹⁹ *Kavala*, *supra* note 4; *Demirtaş*, *supra* note 7; ECtHR, *Yüksekdağ Şenoğlu and Others v Türkiye*, Appl. nos. 14332/17 and others, Judgment of 8 November 2022.

¹²⁰ See ECtHR, *Sabuncu v Turkey*, Appl. no. 23199/17, Judgment of 10 November 2020; ECtHR, *Şik v Turkey* (No. 2), Appl. no. 36493/17, Judgment of 24 November 2020; ECtHR, *Ahmet Hüseyin Altan v Turkey*, Appl. no. 13252/17, Judgment of 13 April 2021.

¹²¹ See, e.g., ECtHR, *Taner Kiliç v Turquie* (No. 2), Appl. no. 208/18, Judgment of 31 May 2022; ECtHR, *Kasparov v Russia*, Appl. no. 53659/07, Judgment of 11 October 2016.

¹²² ECtHR (GC), *Navalnyy v Russia*, Appl. no. 29580/12, Judgment of 15 November 2018; ECtHR, *Navalnyy v Russia* (No. 2), Appl. no. 43734/14, Judgment of 9 April 2019.

¹²³ See ECtHR, *Navalnyy and Ofitserov v Russia*, Appl. nos. 46632/13 and 28671/14, Judgment of 23 February 2016; ECtHR, *Navalnyy v Russia*, Appl. no. 101/15, Judgment of 17 October 2017. The Court deemed it not necessary to examine the Article 18 complaint in ECtHR, *Navalnyy and Yashin v Russia*, Appl. no. 76204/11, Judgment of 4 December 2014. The Court has since clarified this position and confirmed that Article 18 can apply in conjunction with Article 6. See *Ukraine v. Russia*, *supra* note 12, para. 1338.

¹²⁴ ECtHR, *Ecodefence and Others v Russia*, Appl. no. 9988/13 and others, Judgment of 14 June 2022.

¹²⁵ *Merabishvili*, *supra* note 20, para. 308.

¹²⁶ See Finnerty, *supra* note 115, at 456–457.

¹²⁷ *Ibid.*

to maintain and promote the ideals and values of a democratic society governed by the rule of law'.¹²⁸ This predominance criterion imposes additional challenges for the Court to use Article 18 to detect early systemic threats to democratic regimes and marks a further departure from the pre-emptive 'alarm bell' purpose perceived by the drafters. Whilst framing a threat to democracy as becoming 'predominant' may help with identifying such threats in the long run, it also cuts the other way, placing the Court in a position to argue that there is an ulterior anti-democratic purpose but it does not undermine the ECHR. The notion of 'reprehensibility' risks exacerbating this effect by only conferring recognition of predominance in cases concerning the most prominent democratic actors who attain a high level of attention from the authorities. In addition, this test has so far led the Court to focus on a narrow chronology of events, which is not suitable to assess systemic threats.¹²⁹

What emerges from this analysis is that, even though the ECtHR indeed has an anti-democratic purposive orientation in its application of Article 18, its case law does not seek to capture encroachments against the Court's conception of democratic rule as a part of a systemic policy. Rather, the Court's perceived purpose concerns individual redress for those directly targeted as prominent direct victims of authoritarian practices. This analysis is further supported by the remedial case law of the Court under Article 18. Specifically, the Court's focus under the provision has been to indicate individual remedies for victims of authoritarian practices (most notably, the immediate release from politically motivated detention).¹³⁰ Article 18 does not, however, appear to fully engage the Court's powers under Article 46 of the ECHR to indicate the types of structural reform needed to prevent similar violations through the prescription of general measures.¹³¹

5 Article 18's Separate Opinions and the Turn to Progressive Originalism in Strasbourg

In the previous sections, we have shown that the text, intent and the majority's interpretation of Article 18 pull in different directions concerning the specification of the purpose of this provision. Whilst the text and intent allow for an expansive interpretation of Article 18, the majority have developed a more restrictive interpretation. In this section, we show that this underlying purposive disagreement about the aim of this provision has also attracted a significant number of separate opinions, the most notable for our thesis being those that employ progressive originalism in their interpretive methodology. It is important to note that not all separate opinions engaging Article 18 explicitly address interpretative disagreements or call for progressive

¹²⁸ *Merabishvili*, *supra* note 20, para. 307.

¹²⁹ See most notably *Navalnyy* (GC), *supra* note 122.

¹³⁰ See, e.g., *Kavala*, *supra* note 4; *Demirtaş*, *supra* note 7.

¹³¹ There are two notable exceptions where such general measures were provided by the Court. See *Navalnyy* (GC), *supra* note 122; *Aliyev*, *supra* note 9. For a more detailed analysis of Article 18 and remedies, see Finnerty, 'How Should the European Court of Human Rights Remedy Violations of Article 18 ECHR? The Case for Remedial Realignment', 5(3) *ECHRLR* (2024) 380.

interpretation but that many instead endorse the narrow normative model but disagree on how this is applied to the facts of a particular case. One group of separate opinions, for example, focus on the Court's approach to evidence for finding a violation of Article 18.¹³² In particular, they critique the standard of proof employed by the majority in establishing an ulterior purpose, advocating for either a higher¹³³ or lower¹³⁴ standard in a particular case. This group also targets the application of the Court's 'fundamental aspect of the case' criterion, which is required to trigger the material examination of an Article 18 complaint, and argue that this remains prohibitively high as an evidentiary element in certain cases.¹³⁵

A second group of judges have queried whether Article 18 is the right provision to address ulterior purposes. In the 2018 Grand Chamber judgment of *Navalnyy v. Russia*,¹³⁶ Judges Aleš Pejchal, Dmitry Dedov, Georges Ravarani, Tim Eicke and Péter Paczolay argued that Article 17 is better suited to address authoritarian practices than Article 18 in their partly concurring opinion.¹³⁷ The conflation of the two provisions may be explained by the fact that the former emerged from the comparative influence of international law and the latter from the comparative influence of domestic administrative law. It is worth recalling here that the difference between Article 17 and Article 18 of the ECHR in practice is a result of the Court's departure from the original intent of the drafters in its interpretation of Article 17.¹³⁸ Ultimately, however, the Court could distinguish any application of Article 17 and affirm the application of Article 18 on account that it is a *lex specialis* in the regulation of restrictions on rights and freedoms.¹³⁹

There is, however, a third group who openly disagree with the ECtHR's narrow normative model. As would be ordinarily expected in the advancement of a more progressive interpretation of the convention, this group turn to the principle of effective interpretation, demanding that the Court ensure real protections for those who suffer from contemporary authoritarian practices in Europe.¹⁴⁰ The ECtHR has generally implemented the principle of effectiveness by consistently holding that the convention's

¹³² Nineteen of the 30 separate opinions either exclusively or partially concern the assessment of evidence in Article 18 cases and whether the requisite standard of proof has been met. See Annexes A and B at the end of this article.

¹³³ See, e.g., *Merabishvili*, *supra* note 20, Joint Partly Dissenting Opinion of Judges Raimondi, Spano, Kjølbros, Grozev, Ravarani, Pastor Vilanova, Poláčková and Hüseyinov.

¹³⁴ See, e.g., *Ahmet Hüseyin Altan*, *supra* note 120, Partly Dissenting Opinion of Judge Kūris.

¹³⁵ Twelve of the 30 separate opinions (partly) concern the necessity to examine Article 18 complaints. See Annexes A and B at the end of this article. See, e.g., *Tuner Kiliç*, *supra* note 121, Partly Dissenting Opinion of Judges Kūris and Koskelo.

¹³⁶ *Navalnyy* (GC), *supra* note 122, Partly Concurring, Partly Dissenting Opinion of Judges Pejchal, Dedov, Ravarani, Eicke and Paczolay.

¹³⁷ *Ibid.*, para. 25.

¹³⁸ See Cannie and Voorhoof, 'The Abuse Clause and Freedom of Expression in the European Human Rights Convention: An Added Value for Democracy and Human Rights Protection?', 29 *NQHR* (2011) 54; Buyse, 'Dangerous Expressions: The ECHR, Violence and Free Speech', 63 *International and Comparative Law Quarterly* (2014) 491.

¹³⁹ The Court regularly employs such reasoning in distinguishing Article 10 in favour of applying Article 11. See, e.g., *Navalnyy* (GC), *supra* note 122, para. 101.

¹⁴⁰ For an overview of approaches to other human rights treaties, see Çalı, *supra* note 33.

'provisions be interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory'.¹⁴¹ Relying heavily on the principle of effectiveness, Judge Georgios Serghides, in his concurring opinion to the landmark Grand Chamber judgment in *Merabishvili*, assigned a far more important purpose to Article 18 than the majority in that case.¹⁴² Judge Serghides understood the purpose of Article 18 as ensuring 'that the national authorities never deviated from the rule of law and the principle of democracy in any way or to any extent when limiting the rights safeguarded in the Convention'.¹⁴³ To extend his own analogy, Article 18 serves as a 'normative umbrella',¹⁴⁴ and an umbrella is of little to no use when it is not opened pre-emptively against the rain. Recalling the views of the drafters,¹⁴⁵ for Judge Serghides, Article 18 and the ECHR must be applied early, if not pre-emptively, against authoritarian practices to oppose them or, at the very least, identify them prior to them undermining democratic processes. Interestingly, however, Judge Serghides contends that no such recourse to the *travaux préparatoires* is necessary on account of the text leaving 'the meaning of Article 18 neither ambiguous nor obscure',¹⁴⁶ with its meaning being discernible from its ordinary wording under Article 31 of the VCLT. This places Judge Serghides firmly in line with the broadest textual interpretation explored in the first section of this article, identifying him as a progressive textualist critiquing the majority's conservative approach.

Finally, a sizeable fourth group of separate opinions mobilize progressive originalism to promulgate a more expansive interpretation of Article 18, relying heavily on the *travaux préparatoires*.¹⁴⁷ In contrast to Judge Serghides, these judges place more normative weight on the *travaux* in their interpretive approach to argue that Article 18 has a clear intended purpose – namely, to readily identify systematic authoritarian practices. These judges, in turn, have challenged the introduction of the predominant purpose test and the now revised requirement that Article 18 can only be applied in conjunction with a right with express restrictions as an erroneous purposive understanding of the provision by the majority.

¹⁴¹ See most recently ECtHR, *S.E. v. Serbia*, Appl. no. 61365/16, Judgment of 11 July 2023, para. 47. This approach first emerged in ECtHR, *Airey v. Ireland*, Appl. no. 6289/73, Judgment of 9 October 1979, para. 24.

¹⁴² *Merabishvili*, *supra* note 20, Concurring Opinion of Judge Serghides, para. 21.

¹⁴³ *Ibid.*, para. 13.

¹⁴⁴ *Ibid.*, para. 21.

¹⁴⁵ *Ibid.*, para. 70. Judge Serghides appears, however, to disregard the draft of Article 17 and ordinary legitimate aim analysis in the limitations of rights; for him, 'Article 18 stands as a safeguard against totalitarianism in Europe and it is the only Article in the Convention that regulates the limitation of rights enshrined therein'.

¹⁴⁶ *Ibid.*, para. 74.

¹⁴⁷ See *Navalnyy and Ofitserov*, *supra* note 123, Joint Partly Dissenting Opinion of Judges Nicolaou, Keller and Dedov; ECtHR, *Tchankotadze v. Georgia*, Appl. no. 15256/05, Judgment of 21 June 2016, Joint Concurring Opinion of Judges Sajó, Tsotsoria and Pinto De Albuquerque, paras 4–6; ECtHR, *Tchankotadze v. Georgia*, Appl. no. 15256/05, Judgment of 21 June 2016, Concurring Opinion of Judge Kūris, paras 27–33; *Navalnyy* (GC), *supra* note 122, Partly Dissenting Opinion of Judge Serghides; *Navalnyy*, *supra* note 122, Joint Partly Dissenting Opinion of Judges Keller and Dedov; ECtHR, *Ilgar Mammadov v. Azerbaijan* (No. 2), Appl. no. 919/15, Judgment of 16 November 2017, Joint Concurring Opinion of Judges Nussberger, Tsotsoria, O'leary and Mits.

Judges Ganna Yudkivska, Nona Tsotsoria and Faris Vehabović, in their concurring opinion in *Merabishvili*, for instance, argued that the introduction of the predominant purpose test, allowing for the recognition of mixed purposes, undermines the provision's ability to detect authoritarian practices, overshadowing 'the core purpose of Article 18, namely that there should be no misuse of the restrictions placed on the rights and freedoms set out in the Convention'.¹⁴⁸ They placed a notable emphasis on speeches included in the *travaux préparatoires* from both Teitgen and Benvenuti to highlight the particular importance of Article 18 in monitoring the (mis)use of domestic criminal law.¹⁴⁹ In particular, these progressive originalists recount the drafters' concerns of the creeping nature of totalitarianism to challenge the dulling effect that the predominant purpose test imposes on Article 18's sensitivity to pre-emptive threats to democracy and the rule of law.¹⁵⁰

Other progressive originalists, including Judges Helen Keller and Dmitriy Dedov, further challenged the majority's previous view that Article 18 can only be applied in conjunction with ECHR provisions containing express limitations.¹⁵¹ Judges Keller and Dedov focused on the earlier parts of the *travaux préparatoires* discussed in detail in section 3, arguing that the earlier 'version of Article 18 was part of the universal limitations clause' (Article 6 in the draft convention from September 1949).¹⁵² Indeed, 'a plethora of political trials have been staged ... in the context of transitions from authoritarian rule',¹⁵³ many of which have continued to manifest in the post-Soviet space.¹⁵⁴ It follows that not only 'bad faith detentions' but also 'bad faith trials' constitute a prominent authoritarian practice.¹⁵⁵ Accordingly, isolating Article 6 of the ECHR from Article 18 further compromised the latter's ability to detect systemic policies aimed at eroding democratic society and the rule of law. It should be recalled here that one of the most effective means of systemic repression of civil society in pre-war Nazi Germany was the establishment and operation of the *Volksgerichtshof* (the People's Court), tasked with dealing with domestic political opponents in the Nazi regime,¹⁵⁶ an experience that no doubt shaped the intentions of the drafters of the ECHR.

¹⁴⁸ *Merabishvili*, *supra* note 20, Joint Concurring Opinion of Judges Yudkivska, Tsotsoria and Vehabović, para. 16.

¹⁴⁹ *Ibid.*, paras 12–13.

¹⁵⁰ *Ibid.*, paras 12–16.

¹⁵¹ *Navalnyy and Ofitserov*, *supra* note 122, Joint Partly Dissenting Opinion of Judges Keller and Dedov, para. 3.

¹⁵² *Ibid.*, para. 2.

¹⁵³ Meierhenrich and Pendas, "'The Justice of My Cause Is Clear, but There's Politics to Fear": Political Trials in Theory and History', in J. Meierhenrich and D. Pendas (eds), *Political Trials in Theory and History* (2017) 1, at 1.

¹⁵⁴ See A. Galushko, *Politically Motivated Justice: Authoritarian Legacies and Their Role in Shaping Constitutional Practices in the Former Soviet Union* (2021).

¹⁵⁵ See J. Shklar, *Legalism: Law, Morals, and Political Trials* (1986).

¹⁵⁶ Geerling *et al.*, 'Sentencing, Judicial Discretion, and Political Prisoners in Pre-War Nazi Germany', 46 *Journal of Interdisciplinary History* (2016) 517.

The efforts of these progressive originalists to extend Article 18's scope of application to Article 6 were vindicated by the majority in the 2024 Grand Chamber judgment of *Ukraine v. Russia (re Crimea)*.¹⁵⁷ After recalling various sections of the *travaux préparatoires*, including excerpts from both Teitgen and Benvenuti,¹⁵⁸ the majority concluded that 'the object and purpose of Article 18, as described by the *travaux préparatoires*, do not support a narrow application of Article 18, for example only in relation to Articles which expressly provide for restrictions. It can therefore be applied in conjunction with other Articles of the Convention which contain inherent restrictions'.¹⁵⁹ The majority nevertheless went on to apply its living instrument doctrine to restrict this expansion to Article 6 and deny recognizing the application of Article 18 in conjunction with Article 7 of the ECHR.¹⁶⁰ Recalling the historical context surrounding the convention's drafting, the abolition of the legal principle provided for under Article 7 – *nullum crimen, nulla poena sine lege* (no crime/punishment without law) – was instrumental in the pursuit of a totalitarian state under the Nazi regime.¹⁶¹

6 Conclusion

What Article 18 of the ECHR is for is marred by important disagreements in the ECtHR's case law, despite this provision's hailed importance as the Court's judicial response to authoritarian practices in Europe.¹⁶² These disagreements are significant in determining which abuses of power the Court is willing and able to detect through its application of the provision and which ones the Court is willing to normalize or leave within the margin of appreciation of the state parties. The differences that we have identified are not trivial and are capable of significantly changing which applicants in which contexts and with what types of evidence can successfully claim an Article 18 violation. Whilst the text of Article 18, read alongside the overall purpose of the convention to protect human rights of individuals, allows the provision to respond to all forms of the abuse of power, major or minor, in democratic and non-democratic contexts, the drafters' intent and the interpretation by the majority view this provision primarily to detect authoritarian forms of abuse of power.

Yet the drafters' intent and the majority's interpretation also part ways when it comes to determining which authoritarian practices are worthy of detection under this provision. Arguments based on a reconstruction of the drafters' intent allow for the casting of a wider net, whilst the interpretation by the Court offers a much narrower detection mechanism, made available only in limited 'fundamental' and 'pre-dominant' cases of authoritarian abuse of power in Europe. The interpretation by the majority, therefore, emerges as an exercise of restrictive interpretation of the ECHR.

¹⁵⁷ *Ukraine v. Russia*, *supra* note 12.

¹⁵⁸ *Ibid.*, para. 1334.

¹⁵⁹ *Ibid.*, para. 1335.

¹⁶⁰ *Ibid.*, paras 1336–1340.

¹⁶¹ See C. Krefß, 'Nulla poena nullum crimen sine lege', in *Max Planck Encyclopaedias of International Law* (2010), para. 13.

¹⁶² See, e.g., Çalı, 'Autocratic Strategies and the European Court of Human Rights', 2 *ECHRLR* (2021) 11.

Such a restrictive interpretation may be motivated by a variety of socio-political factors. The majority's continued conservative approach may be motivated, for instance, by an intent to avoid 'watering down' the impact of Article 18, reserving it for only the most serious and harmful authoritarian practices in Europe today. Indeed, some judges have indicated that Article 18 should only be applied 'in the most serious of cases'.¹⁶³ The majority's caution may be equally motivated by fears of allegations of politicking, with the purpose analysis under Article 18 veering from the legal towards the political.¹⁶⁴ However, as we have shown, these concerns come at the expense of the meaning of the ordinary text and the drafting history of the convention, which ultimately undermines the utility of Article 18 as a response doctrine to authoritarian practices.

Our analysis has further shown that the living instrument doctrine is largely absent in the majority's interpretation of Article 18 in the case law. Many of the judges who annex separate opinions to these judgments also share this omission. More interestingly, our close analysis of all the separate opinions annexed to that case law enables us to identify a new category of minority judges on the Court's bench when it comes to Article 18: progressive originalists. In stark contrast to the traditionally restrictive functions that the *travaux préparatoires* had in the Court's jurisprudence concerning other articles of the convention,¹⁶⁵ these progressive originalists have utilized the intentions of the drafters to advocate for a more expansive interpretation of Article 18 in the context of authoritarian practices in Europe. These findings taken together challenge well-versed ideas both in the case law and in the scholarship about which of the Court's interpretive doctrines favour progressive or restrictive interpretations of the convention.¹⁶⁶ The extent to which our findings on progressive originalism are unique to Article 18 or can be replicated in the study of other ECHR provisions remains to be seen.

Annex A: Separate Opinions Annexed to Chamber Judgments Addressing Article 18

Case	Type of separate opinion	Author(s)	Ground(s) of disagreement (paragraph numbers)
<i>Tymoshenko v. Ukraine</i> Appl. no. 49872/11, Judgment of 30 April 2013	Joint concurring opinion	Judges Jungwirth, Nussberger and Potocki	Evidence (no paragraph numbers)

¹⁶³ See *Merabishvili*, *supra* note 20, Joint Partly Dissenting Opinion of Judges Raimondi, Spano, Kjølbros, Grozev, Ravarani, Pastor Vilanova, Poláčková and Hüseyinov, para. 3.

¹⁶⁴ A. Sajo, *Ruling by Cheating: Governance in Illiberal Democracy* (2021), at 298.

¹⁶⁵ See *Banković*, *supra* note 48; *Johnston*, *supra* note 46, respectively.

¹⁶⁶ See Klabbers, 'International Legal Histories: The Declining Importance of *Travaux Préparatoires* in Treaty Interpretation?', 50 *Netherlands International Law Review* (2003) 267; K. Knop, *Diversity and Self-determination in International Law* (2002).

Case	Type of separate opinion	Author(s)	Ground(s) of disagreement (paragraph numbers)
<i>Navalnyy and Ofitserov v. Russia</i> , Appl. nos. 46632/13 and 28671/14, Judgment of 23 February 2016	Joint partly dissenting opinion	Judges Nicolaou, Keller and Dedov	Object and purpose necessary to examine; scope of application (paras 2–7)
<i>Tchankotadze v. Georgia</i> , Appl. no. 15256/05, Judgment of 21 June 2016	Concurring opinion	Judge Kūris	Evidence not necessary to examine, scope of application, admissibility (paras 14–51)
<i>Tchankotadze v. Georgia</i> , Appl. no. 15256/05, Judgment of 21 June 2016	Joint concurring opinion	Judges Sajó, Tsotsoria and Pinto De Albuquerque	Scope of application; evidence (paras 4–10)
<i>Kasparov v. Russia</i> , Appl. no. 53659/07, 11 October 2016	Partly dissenting opinion	Judge Keller	Object and purpose necessary to examine; evidence (paras 2–8)
<i>Kasparov and Others v. Russia (No. 2)</i> , Appl. no. 51988/07, Judgment of 13 December 2016	Partly dissenting opinion	Judge Keller	Object and purpose, necessary to examine; evidence (paras 2–5)
<i>Navalnyy v. Russia</i> , Appl. no. 29580/12, Judgment of 2 February 2017	Joint partly dissenting opinion	Judges López Guerra, Keller and Pastor Vilanova	Necessary to examine; evidence (paras 1–5)
<i>Navalnyy v. Russia</i> , Appl. no. 101/15, Judgment of 17 October 2017	Partly dissenting opinion	Judge Serghides	Necessary to examine; scope of application (paras 1–5)
<i>Navalnyy v. Russia</i> , Appl. no. 101/15, Judgment of 17 October 2017	Joint partly dissenting opinion	Judges Keller and Dedov	Object and purpose; scope of application (paras 3–9)
<i>Ilgar Mammadov v. Azerbaijan (No. 2)</i> , Appl. no. 919/15, Judgment of 16 November 2017	Joint concurring opinion	Judges Nussberger, Tsotsoria, O’leary and Mits	Scope of application (paras 9–15)
<i>Selahattin Demirtaş v. Turkey (No. 2)</i> , Appl. no. 14305/17, Judgment of 20 November 2018	Partly dissenting opinion	Judge Karakaş	Necessary to examine; evidence (paras 2–8)
<i>Korban v. Ukraine</i> , Appl. no. 26744/16, Judgment of 4 July 2019	Partly dissenting opinion	Judge O’Leary	Evidence (paras 18–22)

Case	Type of separate opinion	Author(s)	Ground(s) of disagreement (paragraph numbers)
<i>Razvozhayev v. Russia and Ukraine and Udaltsov v. Russia</i> , Appl. nos. 75734/12, 2695/15 and 55325/15, Judgment of 19 November 2019	Concurring opinion	Judge Keller	Necessary to examine; evidence (paras 1–5)
<i>Kavala v. Turkey</i> , Appl. no. 28749/18, Judgment of 10 December 2019	Partly concurring and partly dissenting opinion	Judge Yüksel	Evidence (paras 7–9)
<i>Kavala v. Turkey</i> , Appl. no. 28749/18, Judgment of 10 December 2019	Concurring opinion	Judge Bošnjak	Evidence (paras 18–23)
<i>Sabuncu and Others v. Turkey</i> , Appl. no. 23199/17, Judgment of 10 November 2020	Partly dissenting opinion	Judge Kūris	Evidence (paras 26–38)
<i>Şik v. Turkey (No. 2)</i> , Appl. no. 36493/17, Judgment of 24 November 2020	Partly dissenting opinion	Judge Kūris	Evidence (no paragraph numbers)
<i>Ahmet Hüsrev Altan v. Turkey</i> , Appl. no. 13252/17, Judgment of 13 April 2021	Partly dissenting opinion	Judge Kūris	Evidence (paras 3–20)
<i>Ilker Deniz Yücel v. Turquie</i> , Appl. no. 27684/17, Judgment of 25 January 2022	Partly dissenting opinion	Judges Kūris and Koskelo (available only in French)	Necessary to examine; evidence (paras 1–4)
<i>Taner Kiliç v. Turquie (No. 2)</i> , Appl. no. 208/18, Judgment of 31 May 2022	Partly dissenting opinion	Judges Kūris and Koskelo	Necessary to examine (para. 4)
<i>Juszczyszyn v. Poland</i> , Appl. no. 35599/20, Judgment of 6 October 2022	Joint partly concurring, partly dissenting opinion	Judges Wojtyczek and Paczolay	Scope of application (para. 3)
<i>Yüksekdağ Şenoğlu and Others v. Türkiye</i> , Appl. nos. 14332/17 and others, Judgment of 8 November 2022	Partly dissenting opinion	Judges Kjølbro and Yüksel	Evidence (para. 2) (citing her separate opinion annexed to <i>Selahattin Demirtaş v. Turkey (No. 2)</i> (Grand Chamber))
<i>Kogan and Others v. Russia</i> , Appl. no. 54003/20, Judgment of 7 March 2023	Concurring opinion	Judge Serghides	Object and purpose (paras 2–3)
<i>Zarema Musajeva and Others v. Russia</i> , Appl. no. 4573/22, Judgment of 28 May 2024	Partly dissenting opinion	Judge Serghides	Necessary to examine (paras 4–8)

Annex B: Separate Opinions Annexed to Grand Chamber Judgments Addressing Article 18

Case	Type of separate opinion	Author(s)	Ground(s) of disagreement (paragraph numbers)
<i>Georgia v. Russia (I)</i> (GC), Appl. no. 13255/07, Judgment of 3 July 2014	Partly dissenting opinion	Judge Tsotsoria	Scope of application; evidence (no paragraph numbers)
<i>Merabishvili v. Georgia</i> (GC), Appl. no. 72508/13, Judgment of 28 November 2017	Joint concurring opinion	Judges Yudkivska, Tsotsoria And Vehabović	Object and purpose (para. 16)
<i>Merabishvili v. Georgia</i> (GC), Appl. no. 72508/13, Judgment of 28 November 2017	Concurring opinion	Judge Serghides	Object and purpose (paras 12–44)
<i>Merabishvili v. Georgia</i> (GC), Appl. no. 72508/13, Judgment of 28 November 2017	Joint partly dissenting opinion	Judges Raimondi, Spano, Kjølbros, Grozev, Ravarani, Pastor Vilanova, Poláčková and Hüseyinov	Object and purpose (paras 2–3); evidence (paras 6–9)
<i>Navalnyy v. Russia</i> (GC), Appl. no. 29580/12, Judgment of 15 November 2018	Partly concurring and partly dissenting opinion	Judges Pejchal, Dedov, Ravarani, Eicke and Paczolay	Object and purpose (paras 20–32)
<i>Selahattin Demirtaş v. Turkey (No. 2)</i> (GC), Appl. no. 14305/17, Judgment of 22 December 2020	Partly concurring and partly dissenting opinion	Judge Yüksel	Evidence (paras 25–30)

