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Resilience Amidst Restraint

The ECtHR's Living Instrument Doctrine as a Mechanism of Democratic Resilience
in the Shadow of the Chișinău Declaration

Author: Ana Domínguez Rodríguez
Supervisor: Florence Benoit-Rohmer

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ABSTRACT

This thesis dives into the European Court of Human Rights' 'living instrument' doctrine as a mechanism of democratic resilience amidst critical political backlash from Contracting States. Focusing on the critical fault line of migration, the essay covers the structural tensions between the Court's dynamic and progressive interpretation of the provisions in the European Convention on Human Rights and strong State demands for judicial restraint. This conflict escalated dramatically following the May 2025 'Letter of Nine,' a political statement by 9 Member States' leaders challenging the ECtHR's interpretative authority in migration governance, which later expanded into a December 2025 Joint Statement signed by 27 States. This political pushback ultimately culminated in the unanimous adoption of the May 2026 Chișinău Declaration by the Committee of Ministers.

It is through the analysis of foundational jurisprudence under Articles 3 and 8 ECHR, alongside Protocol No. 4, that the research tracks how the Court historically expanded non-refoulement protections, qualified deportation powers, and regulated border pushbacks. However, contemporary security narratives surrounding the 'instrumentalization' of migration and 'hybrid warfare' are pushing the Court toward a phenomenon of legal exceptionalism. The Chișinău Declaration attempted to reconcile these tensions by reaffirming the standing of the ECHR framework while simultaneously institutionalizing political pressure through a fixation on the principle of subsidiarity and process-based review. Ultimately, this thesis assesses whether the living instrument doctrine will survive as a tool of progressive judicial resilience or succumb to an unprecedented 'evolutive regression' that narrows human rights protections to appease sovereign States.

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Abbreviation	Meaning
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
ICCPR	International Covenant on Civil and Political Rights
ILO	International Labor Organization
UNDHR	United Nations Declaration on Human Rights
VCLT	Vienna Convention on the Laws of Treaties

CHAPTER 1: INTRODUCTION

1.1 The 75th Anniversary Crisis: The 2025 'Letter of Nine' as a turning point

75 years after the adoption of the European Convention on Human Rights (ECHR)[1], the European Court of Human Rights (ECtHR)[2] is once again facing renewed challenges to its authority. The publication of the May 2025 'Letter of the Nine', signed by 9 States members of the Council of Europe marked a significant moment in this debate. In this letter, the signatory States have argued that the interpretation of the Convention by the Court, in particular in migration cases, had extended beyond the 'original intentions' of the instrument and has limited the ability of States to respond to contemporary challenges.[3]

While criticism of the Court is not new, and the calls for reform are as old as time, the letter represented a direct political challenge to its interpretative authority and sparked a much broader conversation about the future of the Convention system.[4] The controversy has further amplified its noise with subsequent political action, culminating in the adoption of the Chișinău Declaration at the 135th Committee of Ministers Session, on the 15th May 2026 in Chișinău Moldova.[5] All of these developments together have raised fundamental questions regarding the relationship between State sovereignty, judicial independence and the evolving interpretation of human rights when new political and societal challenges arise.

At the centre of this debate is the 'living instrument' doctrine, through which the Court interprets the Convention in light of present-day conditions, accounting for political, technological and societal developments, rather than freezing the meaning of its provisions to the understandings of 1950.[6] The growing contestation of this doctrine provides the starting point for this thesis.

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[1] Also referred to as 'the Convention'

[2] Also referred to as 'the Court' or 'the Strasbourg Court'

[3] 'Letter of the Nine'. Joint Letter by the Heads of State and Government of Austria, Belgium, Czech Republic, Denmark, Estonia, Italy, Latvia, Lithuania and Poland on the Interpretation of the European Convention on Human Rights (22 May 2025)

[4] Vassilis P Tzevelekos, 'Has the ECHR Failed Us?' (2025) 6(3) *European Convention on Human Rights Law Review* 275

[5] Council of Europe Committee of Ministers, Chişinău Declaration CM(2026)99-final, 135th Session of the Committee of Ministers (15 May 2026)

[6] *Tyrer v. United Kingdom.* Application number 5856/72 (1978) / Also referred as 'evolutive interpretation'

1.2 Weaponization of migration and the living instrument doctrine

The Letter of the Nine was framed as a response to the migration jurisprudence developed by the Court, however, a more far-reaching conversation has surged from it. Migration has become the vehicle through which challenges to the institution are framed. This means that in politically sensitive areas such as *non-refoulement* obligations and border control, States claim to feeling constrained by the Strasbourg jurisprudence, to be able to face contemporary challenges.

These developments must be linked with the trends of securitization of migration in Europe. Migration is not merely presented as a social or economic-related phenomenon, but as its own threat to national security, public order, cultural identity and social cohesion. Thus, it became an exceptional issue that required extraordinary governmental responses, which would often include demands for higher executive powers and reduced external limitations on State action.[7] This discourse is what can be seen in the Letter. By linking migrant individuals with criminality and threats to democratic societies, the Signatory States have justified asking for greater national discretion over migration governance, in order to respond to challenges to their sovereignty and security.[8] The debate has now shifted to question whether international human rights obligations should continue to limit State's responses to 'national threats'.

Tensions are particularly visible in cases concerning Articles 3 and 8 ECHR. Through the evolving of case law, the Court has developed safeguards to protect individuals against removal to involving torture, inhuman or degrading treatment, while also requiring proportionality assessments when deportation interferes with private and family life.[9] These protections have been constantly at the centre of political criticism. This is the case where governments seek to have more autonomy to expel foreign nationals or restrict access to the territory.

Pushback practices are an alarming aspect of this conflict. While States increasingly validate their restrictive measures through claims of national security or migration-management concerns, the cross-border expulsion of migrants and refugees with no due process or individual assessment may interfere with the obligations under *non-refoulement* principles. As migration has become one of the most

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[7] Arianna Vedaschi, 'The Securitisation of Immigration: Trends and Challenges in Western Europe' (2026) 2 European Human Rights Law Review 177

[8] Letter of the Nine (n. 3)

[9] Fiona de Londras and Kanstantsin Dzehtsiarou, 'Evolution or Revolution? Interpretation of the Convention by the European Court of Human Rights' in *Great Debates on the European Convention on Human Rights* (2nd edn, Hart Publishing 2025) 83

politically contested issues in Europe, disputes on governance are further evolving into disputes over the scope of human rights protection itself.

Such developments are occurring within a wider European context characterized by growing sovereignist discourse and resistance to supranational oversight.[10] Criticism to migration jurisprudence is thus understood not in isolation, but joining a bigger threat to the Court's authority and its use of the living instrument doctrine to adapt Convention rights. The Chișinău process, and subsequent political declaration, although being presented as an opportunity for dialogue within the Convention system, has also raised questions as to whether such initiatives constitute genuine dialogue or coordinated political pressure aiming to achieve more judicial restraint. The debate therefore goes beyond migration itself to the future relationship between Member States and the Strasbourg Court.

This thesis portrays how migration has become an easy route that political actors rely on to reshape the boundaries of judicial authority within the Convention system. Therefore, it examines whether the living instrument doctrine can continue to function as a mechanism of resilience when facing political pressure, while maintaining the legitimacy necessary for continued State compliance.

1.3 Research question and sub-questions

This thesis addresses the following research question: To what extent does the European Court of Human Rights' use of the living instrument doctrine function as a judicial mechanism of democratic resilience in the context of organized political pressure during the Chișinău process?

To answer this question, the following sub-questions will be examined:

1. How has the living instrument doctrine interacted with the 'original intentions' of the Convention's drafters in light of the challenges raised by the May 2025 Letter of Nine?
2. How has the ECtHR developed its jurisprudence under Articles 3 and 8 ECHR to influence migration governance?

[10] Giuseppe Martinico, 'In the Mind of the Illiberal: Constitutionalism as a Dispositif of Depoliticization' (2025) 31(2) European Public Law 239, 250

3. Does the Chişinău Declaration represent a form of constructive judicial dialogue or a manifestation of asymmetric political pressure aimed at shaping the Court's interpretative authority?
4. Can the living instrument doctrine continue to operate as a mechanism of democratic resilience without generating a legitimacy crisis that undermines State compliance?

1.4 Methodology

When it comes to the methodology used for the research of these questions, this thesis adopts a doctrinal legal approach combined with a critical analysis of political discourse.

Firstly, the doctrinal component involves the analysis of the ECHR, Articles from the Vienna Convention on the Laws of Treaties (VCLT), and relevant case law from the ECtHR. On one side, particular emphasis will be placed in where the living instrument doctrine is found among the jurisprudence and legal instruments. On another side, due to dealing with the topic of migration, a focus will be given to migration-related judgements under Articles 3 and 8 ECHR, and Article 4 Protocol 4. This would include evolutionary jurisprudence, *non-refoulement* obligations, and border pushbacks among others.

Secondly, a more critical qualitative analysis will cover political declarations and other institutional responses of the Council of Europe, as well as State communications. The primary sources used would include the Letter of the Nine (May 2025), the Joint Statement of 27 Member States (December 2025), and most importantly the Chişinău Declaration (May 2026), among other political declarations and statements.

1.5 Structure of the research

The thesis proceeds as follows. Chapter 2 provides the historical and theoretical foundation of the 'living instrument' doctrine *Tyrer v. United Kingdom* to contemporary debates surrounding judicial activism, sovereignty, and the Letter of the Nine and subsequent Joint Statement.

Chapter 3 tackles migration jurisprudence as the catalyst of political backlash, bringing to light the tension between absolute human rights protection and state territorial sovereignty. Articles 3 and 8

ECHR, as well as, Article 4 Protocol 4, will be the main protagonists in ECtHR jurisprudence in cases of *non-refoulement* obligations, family life, and pushback practices.

Chapter 4 will dive deep into the Chișinău Declaration and the most immediate reception of the document. A the textual analysis proceeds, it will try to situate the declaration into geopolitical context, including the interaction with new international obligations such as the EU Migration and Asylum Pact. It will conclude with two opposing interpretations of the Declaration, either as a legitimate exercise of institutional dialogue or as a codifying assurance of political pressure.

Chapter 5 will provide the last instance of the perception of the Court amidst the political hostile climate, including how did the Court acted in other times of undermining, and whether this will be a period of judicial resilience or retreat. Most importantly, it covers the call for the use of the living instrument doctrine regressively, resulting in the revocation of rights protections already established by jurisprudence, and the alternative use of the doctrine to avoid such measures.

Concluding, the future role of the living instrument doctrine will be affected, and thus, the Court could fall for the political shaping of the Member States to retain their political will, or it could demonstrate a strong position, keeping its legitimacy as an independent tribunal.

Chapter 2: The Living Instrument Doctrine - Evolution of the European Convention on Human Rights until the Letter of the Nine

The ECHR remains one of the most successful treaties in international law, precisely because its framework recognizes that human rights protections cannot be left static while the surrounding world advances.[11] It is through its jurisprudential development of the 'living instrument' doctrine that the Strasbourg Court has consistently ensured that the Convention adapted to changing legal, ethical and societal realities. This doctrine asserts that the ECHR must be interpreted dynamically, reflecting contemporary standards, international developments and shifts in the social and political ecosystem it covers, rather than becoming frozen in the mid-twentieth century.[12]

Historically, the Convention was born out of the devastation that the Second World War had in Europe.[13] It served then, as it does now, as a collective effort for the preservation of democratic stability and the protection of the rights of individuals across the continent. In fulfilling its mandate to assess and respond to human rights violations, the ECtHR has regularly found itself adapting to unprecedented categories of cases, extending the treaty's reach into areas of modern life that could not have been foreseen at the time of drafting.[14]

While many legal scholars and jurists have deemed the use of the living instrument doctrine necessary to maintain the treaty's relevance, the expansion of human rights protections has never been neutral or without frictions.[15] As the Court has relied on dynamic interpretation to amplify individual liberties and pose positive obligations on Contracting States, it has progressively infiltrated into sensitive areas of national policy, triggering intense debates questioning judicial activism, state sovereignty and overall democratic legitimacy.

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[11] Mohammad Habibur Rahman, 'Doctrine of Living Instrument: An Inevitable Doctrine to Keep the European Convention on Human Rights Alive' (5 May 2021) Lexkhoj Research Journal of Law & Socio-Economic Issues vol 1, issue IV 13
[12] Ibid.
[13] De Londras and Dzehtsiarou (n. 9) 83
[14] Lorenzo Acconciamessa, 'L'efficacia inter-temporale dell'interpretazione evolutiva dei trattati sui diritti umani' (2025) 108(2) Rivista di diritto internazionale 429, 432-433
[15] De Londras and Dzehtsiarou (n. 9) 83

This chapter covers the trajectory and evolution of the living instrument doctrine, from its conception, in *Tyrer v. United Kingdom* (1978), to the most modern applications, especially in complex and contentious areas such as *non-refoulement*, prisoners' rights and other minority rights.[16] Additionally, it contextualizes how this doctrine has been put under pressure, first by covering accusations of judicial activism, and secondly, by diving deep into the organized resistance in the Letter of the Nine. This background explains the fundamental role of this principle as a basis for effective human rights protection and how the current backlash to the ECtHR affects the application of evolutive interpretation.

2.1 From Tyrer to 'Present-day Conditions' as a supported notion

2.1.1 Tyrer v. United Kingdom (1978)

The living instrument doctrine allows for the Convention to be considered as such, a living instrument, interpreted 'in the light of present-day conditions'. This was firstly established in *Tyrer v. United Kingdom*, where a 15 year-old residing in the Isle of Man had been subjected to corporal punishment while studying at school.[17] The applicant argued that the nature of the punishment violated Article 3 ECHR, prohibiting inhuman or degrading treatment.[18] On the other hand, the punishment, had been carried out according to domestic legislation, not causing outrage in the public opinion, the State responded, claiming that it did not constitute degrading treatment.[19] The Court held that the nature of the punishment, specifically one human being inflicting violence on another, carried an 'element of humiliation', and that 'institutionalized violence' permitted by the law infringed on the applicant's 'dignity and physical integrity'.[20] The Court found a violation of Article 3 ECHR.

The relevance of this case to evolutive interpretation lies in the reconceptualization of what can constitute 'degrading treatment'. The Court recognized that the Convention is a living instrument to be applied in present-day conditions, thus, it has been influenced by the Member States on their developments of new standards for corporal punishment.[21] Therefore, the conception of 'degrading treatment' remaining to its 1950's meaning would not match the protection given by Contracting States, and thus the provision would be stripped of its effectiveness.

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[16] Tyrer v United Kingdom (1978) (n. 6)
[17] Ibid. §9
[18] Ibid. §28
[19] Ibid. §31
[20] Ibid §35
[21] Ibid. §38

2.1.2 The authority of interpretation

It should be undisputed that the Court has the interpretative authority of the Convention and its Protocols, that includes having the authority to interpret cases through the doctrine of the living instrument.[22] The *Tyrer* judgement provided a normative foundation for the living instrument doctrine, based on common Member State practice, however, the ECtHR did not operate in a vacuum of international law, but relied on international understandings on treaty interpretation. Following the Vienna Convention on the Laws of Treaties (VCLT), an implicit legitimacy of the evolutive interpretation can be inferred from Article 31.[23] This is confirmed in the most recent Chișinău Declaration (2026).[24] In fact, the Court bases its doctrine in three different requirements of the provision: the treaty's object and purpose, the subsequent state practice and overall systematic interpretation.

Article 31(1) VCLT reads as follows: '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.' For the ECHR, this aspect is highly reflected on its Preamble, which binds the Contracting States to the 'further realization of Human Rights and Fundamental Freedoms'.[25] Considering such text, the Court has rightly assumed that human rights protections were not meant to be frozen to the landscape of 1950, but for the establishment of a system that remains effective.[26] A strict adherence to the historical context would actually frustrate the Convention's object and purpose, rendering such instrument obsolete. Thus, by the parties agreeing to further the realization of human rights protections, it covered this implicitly dynamic text capable of maintaining its efficacy over time.[27]

This aspect remains highly controversial. As it will be explored further in this chapter, Contracting States declare that they have agreed to the initial 1950's version of the Convention, and not to an instrument that is interpreted through judicial activism, or judge-made law, that provided new and unforeseen positive obligations.

[22] Article 32 ECHR
[23] De Londras and Dzehtsiarou (n. 9) 84/Article 32 ECHR gives the authority of interpretation to the Court based on the VCLT.
[24] Chişinău Declaration (n. 5) §12
[25] Preamble of the ECHR
[26] Acconciamessa (n. 14) 468
[27] Ibid. 476

However, this criticism is not new by any means, and quite predictable. Thus, the ECtHR has, as well, relied on Article 31(3)(b), that reads as follows: 'There shall be taken into account, together with the context: (b) any *subsequent practice* in the application of the treaty which establishes the agreement of the parties regarding its interpretation;'[28] The continuous practice by Contracting States in the execution of the judgements by the Court, specifically those that involve the living instrument doctrine, and not establishing any measures, such as Protocols, to reverse such standards, can provide for sufficient evidence that States consented to the development of the doctrine and the judgements it affected.[29]

Lastly, consensus must also be awarded to the use of the doctrine itself, not only the consequences of its application. To best prove that the living instrument doctrine has solid backing, we may rely on the Copenhagen Declaration (2018), where Contracting States collectively reaffirmed that the Court is required to give 'appropriate consideration to present-day conditions'.[30] By including such assurances into a powerful political declaration, the Member States actively validated evolutive interpretation. The Copenhagen Declaration demonstrates that even during periods of structural reform and state pushback, subsequent state practice has officially recognized, legitimized, and codified the living instrument doctrine as an essential element for safeguarding human dignity in an ever-evolving political ecosystem.[31]

2.2 Expanding the Boundaries of Interpretation

2.2.1 Development through ECtHR jurisprudence

Tyrer did not act as a standalone case. It did not confine evolutive interpretation within one set of facts or within one article, but it became the genesis of a doctrine that has since progressively expanded the scope of existing provisions of the Convention, but at the same time, remaining faithful to the instrument's purpose.[32]

The living instrument doctrine soon extended beyond questions of punishment. In *Marckx v Belgium* (1979), a violation was found regarding practices of discrimination targeting children born outside of

[28] Article 31 VCLT
[29] De Londras and Dzehtsiarou (n. 9) 84
[30] Council of Europe, Copenhagen Declaration (High-Level Conference on the Continued Reform of the European Human Rights Convention System, Copenhagen, 12–13 April 2018) §26
[31] Acconciamessa (n. 14) 446
[32] De Londras and Dzehtsiarou (n. 9) 83

wedlock.[33] The Court has relied on the living instrument doctrine to expand the interpretation of Article 8 ECHR, and supported its decision by referring to the evolving common understanding within international law about the equality of treatment among children, citing the Brussels Convention of 1962 on the Establishment of Maternal Affiliation of Natural Children and the Convention of 1975 on the Legal Status of Children born out of Wedlock.[34]

Another salient case is *Dudgeon v. United Kingdom* (1981), where it was determined that laws prohibiting certain homosexual acts between consenting adult males was an unjustified interference into the applicant's private life.[35] In its judgement the Court stated that 'as compared with the era when that legislation was enacted, *there is now a better understanding,* and in consequence, an increased tolerance of homosexual behavior to the extent that it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied'.[36]

Even most saliently, the case of *Verein KlimaSeniorinnen v. Switzerland* (2024) demonstrates the continued expansion of the doctrine into entirely new fields, such as climate change.[37] According to Taghavi, the Court relied on a combination of international agreements, scientific consensus, and broader Convention values without explicitly invoking the living instrument doctrine, representing a form of 'silent expansion' of evolutive interpretation.[38]

The case to pay attention to, for the purpose of this research is *Soering v. United Kingdom* (1989).[39] *Soering* expanded the scope of Article 3, establishing the principle of *non-refoulement*, where extraditions could fall under the sending State's responsibility if the applicants face a risk of inhuman and degrading treatment. Although the Convention contains no explicit prohibition on extradition, the Court held, since the Convention is a living instrument, that effective protection of Convention rights

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[33] *Marckx v. Belgium.* Application number 6833/74 (1979)
[34] Ibid. §§20-21
[35] *Dudgeon v. United Kingdom*. Application number 7525/76 (1981)
[36] Ibid. §60
[37] *Verein KlimaSeniorinnen v. Switzerland*. Application number 53600/20 (2024)
[38] Hani Taghavi, 'Silent Expansion: The Role of the Living Instrument Doctrine Before and After the Verein Klimaseniorinnen Judgment' (2025) 94(3) *Nordic Journal of International Law* 313, 315
[39] *Soering v. United Kingdom.* Application number 14038/88 (1989)

requires States to refrain from exposing individuals to foreseeable violations outside their territory.[40] This judgment laid the foundations for the Court's later migration and non-refoulement jurisprudence.

All these judgements together reveal that the living instrument doctrine has evolved into a comprehensive instrument of interpretation for adapting the Convention to contemporary realities. The doctrine has covered very diverse areas such as migration, gender identity, labor rights and environmental protection, while at the same time, broadening the sources upon which the Court relies to justify evolutive interpretation.

2.2.2 Types of consensus

As *Tyrer* demonstrated, consensus among Member States on protection standards remain the main legitimizing tool for the living instrument doctrine. This is how the ECtHR can apply the evolutive interpretation to legal and societal developments, and not as a standard that emanates from judicial preference. This is named 'European Consensus'.

European consensus identifies common legal trends among Contracting States of the Convention, including domestic legislation and judicial practice, and from such information, the Court evaluates the degree of convergence regarding the issue at hand. This approach is the most traditional reasoning the Court uses to justify its expansion of protection, as the States have practically adopted it in their domestic systems and it would not suppose the introduction of new obligations that contravene the interests of the Members. An example of its use is again in the case of *Goodwin v. United Kingdom* (2002), where the progressive recognition of transgender people across Europe was taken into consideration to depart from earlier case law and expand protections under Articles 8 and 12 ECHR.[41] As de Londras and Dzehtsiarou note, consensus sets a bridge between State consent and judicial development, and thus it holds a highly important legitimizing function.[42]

A form of consensus is becoming more present within the ECtHR case law, is international consensus, based on developments in international law. It could include updated or new treaties and resolutions, and the practice of international organizations. This can be seen in the case of *Demir and Baykara v. Turkey*

[40] Ibid. §§88–91
[41] *Goodwin v. United Kingdom.* Application number 28957/95 (2002)
[42] De Londras and Dzehtsiarou (n. 9) 89

(2008) regarding the recognition of the right to collective bargain and the right to strike under Article 11 ECHR.[43] In this judgement, there are references to the ILO Forced Labor Convention, the UNDHR, the ICCPR among other instruments.[44]

However, consensus may not always justify the expansion of rights. By *A, B and C v. Ireland* (2010), restrictive abortion laws had become rare, but Ireland's position on abortion had its basis on its Constitution, and confirmed by the referendum in 1983, and thus, the State had argued the existence of an internal consensus among Irish citizens.[45] While the Grand Chamber did not necessarily recognized the concept of internal consensus, the Court observed that since such referendum, little reports could demonstrate any change of opinion among the population, and summed to the lack of general consensus on when life begins, Ireland cannot be said to have contravened the Convention.[46]

The different forms of consensus represent the evolution of the Court's methodology, from early European-wide considerations to a more pluralistic approach with domestic trends and international standards. However, consensus may also be a double-edged concept. When there is a lack of European consensus, the Court often delegates to the margin of appreciation doctrine, respecting State sovereignty and avoiding claims of judicial activism. However a new challenge has emerged, which may place informal European consensus in a lower standard of protection than the one established by the Convention, and possibly calling for the use of a form of regressive evolutive interpretation.

2.2.3 Interaction with the principle of effectiveness

Aside from the use of consensus to be able to apply the living instrument doctrine, the Court has also relied on the principle of effectiveness to justify its expansive approach. The principle of effectiveness functions under the premise that the Convention is intended to guarantee rights that are 'practical and effective', rather than 'theoretical and illusory'.[47]

Effectiveness becomes an important consideration when a strict textual or more historical interpretation would undermine the Convention's capacity to respond to the more contemporary cases approaching the

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[43] *Demir and Baykara v. Turkey.* Application number 34503/97 (2008)
[44] Ibid. §§69-73
[45] *A, B and C v. Ireland*. Application number 25579/05 (2010)
[46] Ibid. §§ 222-228
[47] *Airey v. Ireland.* Application number 6289/73 (1979) §24

Court. Therefore, effectiveness goes hand in hand with the living instrument doctrine.[48] It can be seen in cases where the Court has extended the scope of the provisions beyond situations very explicitly envisaged by the drafters. The judgement of *Soering* mentions the need for establishing responsibility for sending States in extradition cases where violations to the Convention are foreseeable, and not doing so would not ensure an effective protection of Article 3.[49]

This is one of the approaches that grants increased freedom to the Court to use the evolutive interpretation. The Court is acting as the guardian for the safekeeping of human rights and is tasked with keeping the Convention far from obsolete.[50] However, the Court has simultaneously recognized that Convention system is founded upon the principle of subsidiarity. The Court cannot upkeep such function of guardianship without the active participation of States, thus the living instrument doctrine gets limited by the delegation of decision-making to the Member States, and it can happen in different approaches: through the margin of appreciation doctrine, process-based review and incrementalism.[51]

The limitation on evolutive interpretation remains a necessary burden. It is the fact that States get certain discretion that the Convention system retains its democratic legitimacy, by the recognition of the role of national authorities. Rather than operating as opposing principles, they function as complementary mechanisms through which the Court manages the delicate balance between universal human rights protection and State sovereignty. This balance has been taken into consideration in politically sensitive areas, as migration can be, and when the Court leans further on the side of evolution, criticism for judicial activism becomes prominent. Nonetheless, the other side of the scale is also affected, where greater deference has made scholars coin the term of ‘judicial passivism’.

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[48] Konrad Ksiazek, 'The Living Instrument Doctrine and Effectiveness of Human Rights' [2024] (6) EHRLR 507
[49] *Soering v. United Kingdom* (1989) (n. 39) §90
[50] Lena Riemer and Lorenzo Acconciamessa, ‘From “Original Intentions” to “Unforeseeable Change of Circumstances”: The 2025 Escalation of Pressure Towards the ECtHR’ (EJIL: Talk!, 5 January 2026)
[51] Fiona de Londras and Kanstantsin Dzehtsiarou, ‘The Convention, the Court and the Heart of the Matter’ in *Great Debates on the European Convention on Human Rights* (2nd edn, Hart Publishing 2025) 12

2.3 The Charge of Judicial Activism

The living instrument doctrine is an essential and legally valid method of interpretation, backed by both international law and by the Convention system. However, it supposes a change from precedence and a stricter standard of protection of the rights of individuals, and thus a higher limitation on the sovereignty of States. To this, the States, coming unsatisfied from unfavorable judgements, created a narrative that the Court utilizes the evolving interpretation to further their 'agendas', and resort to judicial activism to advance what the Court perceives as how rights should be interpreted and not how the Convention and jurisprudence had conformed it. The question lies on whether judicial activism is a present phenomenon or simply political critique to an expansion in human rights protection and monitoring, taken out of the control of the States.

Judicial activism, while one may introduce it as the action of a judge imposing its own views instead of following the letter of the law, it is better understood as the consideration of, at the time of judgement, evolving societal circumstances that may not have been present at the time of drafting or during precedence.[52] This means that, the mere existence of the living instrument doctrine signifies the biggest movement of judicial activism.

The concept of judicial activism at the ECtHR relates to the same circumstances as the creation of judge-made law, one must not be confused, and judge-made law is not rare in countries following a common law tradition, such as the United Kingdom. The Court, by applying its authorized interpretation under the living instrument doctrine, more factors are taken into account, providing more abundant case-law, and consequently, increasing the matters falling into its jurisdiction, creating more judge-made law.[53]

The issue lies with the fact that this creates 'new' rights and new obligations to Member States, now being held liable in areas they were not before. This is the most common critique, present in the Letter of the Nine, arguing that the Court's actions may fall under judicial overreach and outside of their jurisdiction.[54] However, these new rights do not necessarily come from the willingness of the judges to

[52] Chris Rager, 'Judicial Activism: An Overview' (EBSCO Research Starters, 2022)
[53] Marko Bošnjak and Kacper Zajac, 'Judicial Activism and Judge-Made Law at the ECtHR' (2023) 23(3) Human Rights Law Review ngad015
[54] Letter of the Nine (n. 3)

interpret cases in a different light. Due to the general nature of the original text, it is the task of the Court to define concepts such as ‘private life’ or ‘torture’, and when needing, amending it.

There is no more significant example than the treatment of the death-penalty in cases of migration and extradition. The death penalty was written as one of the exceptions of Article 2 ECHR, the right to life. In the case of *Al-Saadoon and Mufdhi v. United Kingdom* (2010), where two Iraqi nationals were under British custody pending transfer to Iraq’s authorities and highly likely face the death penalty, the Court ruled that the death penalty itself is now incompatible with Article 3 ECHR.[55] By ‘upgrading’ the death penalty from a permitted punishment to a form of prohibited ill-treatment, the Court has imposed a strict non-refoulement obligation on Member States. They are now liable if they extradite an individual to a jurisdiction where a ‘real risk’ of the death penalty exists, which is a significant expansion of jurisdiction that has overridden the original consensus of the drafters.

Contrary to the claim of ‘judicial activism’, the reality is that there is still a lot of power that remains under the hands of States. To begin, the importance of the entry into force of Protocol Nº15 of the ECHR, amending Article 1 of the Convention to add the principle of subsidiarity and highlight the concept of the margin of appreciation.[56] While the Court has the living instrument doctrine of interpretation to ‘advance its agenda’, it has much more providing a contrary push, such as the European Consensus doctrine, evaluating whether a common trend can be found among the different Member States, and the margin of appreciation, leaving assessment to the Member States. These are also important factors on the application of the evolutive interpretation itself.

In fact, in socially contentious areas, there is the critique that the Court relies in ‘judicial passivism’, and overly delegating matters to the States. The claims of overuse of the margin of appreciation remain just as many as the subsidiarity reclaim.[57] Many examples can be attributed to judicial passivism due to lack of European consensus, such as the issue of abortion,[58] same-sex marriage,[59] euthanasia,[60] or religious

[55] *Al-Saadoon and Mufdhi v. United Kingdom*. Application number 61498/08 (2010)
[56] Protocol No 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms (opened for signature 24 June 2013, entered into force 1 August 2021) CETS No 213.
[57] Pierre Thielbörger, ‘Judicial Passivism at the European Court of Human Rights’ (2012) 19(3) Maastricht Journal of European and Comparative Law 341.
[58] *A, B and C v. Ireland* (2010) (n. 45)
[59] *Schalk and Kopf v. Austria*. Application number 30141/04 (2010)
[60] *Lambert and Others v. France*. Application number 46043/14 (2015)

symbols in public spaces.[61] The Court entrusts so much to the States that it has developed a practice, known as process-based review, by which, if the national court has 'examined the facts, applied the relevant human rights standards consistently with Convention and its case-law, and adequately balanced the applicant's personal interest against the more general public interest in the case'[62], the ECtHR would not undergo its own revision, even if the assessment would have led to different conclusions.[63]

Another avenue has been named 'incrementalism', where the Court shifts away from sudden expansions of the living instrument doctrine in favor of a much more gradual and case-by-case development of the jurisprudence.[64] Instead of establishing wide and politically disruptive legal principles, the Court utilizes restrained judicial tactics such as analogous reasoning and 'particularization', a process where judges accentuate distinctive facts of a specific case to justify its ruling to those narrow circumstances, while quietly leaving the door open for future growth.[65]

However, this strategic maneuvering through judicial deference and incrementalism hits an impossible legal barrier when confronted with Article 3 of the Convention. Due to the absolute, non-derogable nature of the prohibition against torture and inhuman or degrading treatment, the Court traditionally has an extremely narrow margin of appreciation in these cases. This leaves no room for tactics such as judicial passivism, process-based review, or factual flexibility.[66] This rigid legal reality is precisely what several member states are pushing against in the context of migration and border control. Eager to regain control over their borders, these states are demanding structural reforms that would limit the living instrument doctrine, forcing the Court into a state of judicial passivism, even when evaluating Article 3 claims. By insisting that absolute human rights protections be recalibrated to balance against national security and public order, this State frustration erupted into open political revolt on May 22, 2025, with the joint statement of the 'Letter of Nine'.[67]

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[61] *Lautsi and Others v. Italy.* Application number 30814/06 (2011)
[62] *Ndidi v. United Kingdom.* Application number 41215/14 (2017)
[63] Robert Spano, 'Over-reaching or under-achieving? The trajectory of the case-law of the European Court of Human Rights' (Speech at Leuven University, 12 March 2022)
[64] Saoirse Flattery, 'Incrementalism at the European Court of Human Rights: A New Version of the Living Instrument Doctrine?' (*Cork Online Law Review*, 22 March 2024)
[65] Ibid.
[66] Ezgi Yildiz, *Between Forbearance and Audacity: The European Court of Human Rights and the Norm against Torture* (Cambridge University Press 2023).
[67] Peter Hilpold, 'Challenging Strasbourg: The May 2025 Letter and the Pushback Against the European Court of Human Rights' (Verfassungsblog, 30 May 2025)

2.4 The ‘Letter of Nine’ and the Political Revolt Against Strasbourg

The publication in May of 2025 of the ‘Open Letter of the Nine’ provoked an escalation of the palpable and long-running tensions between the European Convention system and the claims of sovereignty by Contracting States, revolting against supranational-adjudication in domestic sensitive areas.[68] The letter, signed by the leaders of 9 EU States (Denmark, Italy, Austria, Belgium, the Czech Republic, Estonia, Latvia, Lithuania and Poland), defied the jurisprudence of the ECtHR in the matter of migration, and called for a ‘a new and open-minded conversation about the interpretation of the European Convention on Human Rights’.[69] While, it may not be surprising for the Court to receive criticism, this initiative remains unprecedented because it came about through non-institutional channels, and outside the Council of Europe’s bodies, and directly challenged the Court’s interpretative approach in such a politicized area.[70]

These criticisms are closely linked to the use of the living instrument doctrine by the Court, and the continuous debates regarding the evolutive interpretation. As addressed, the ECtHR holds the authority of interpretation of the Convention, and since *Tyrer*, it was maintained that the Convention must be interpreted in light of present-day conditions.[71] However, evolutive interpretation consequently created tensions with the development of its jurisprudence, possibly imposing obligations that states had neither foreseen nor consented to when ratifying the Convention.[72] The States that signed this letter mention the ‘original intention’ behind the text of the Convention, hence, it is not anymore only a criticism of migration judgements, but a broader challenge to the legitimacy of the Court’s interpretative authority and to the expansion of the protection of rights by the Convention, born out of the living instrument doctrine.[73]

This letter became the thunder that accompanied a climate of growing political pressure on the Convention system, specifically on when it comes to migration, subsidiarity, and national sovereignty. According to Steininger, this document does not differ from earlier discussions that shaped reform debates in the Interlaken (2010), Brighton (2012) and Copenhagen (2018) processes, which can be

[68] Letter of the Nine (n. 3)
[69] Ibid.
[70] Tzevelekos (n. 4) 275-276
[71] De Londras and Dzehtsiarou (n. 9) 81
[72] Riemer and Acconciamessa (n. 49)
[73] Letter of the Nine (n. 3)

summarized on demands for greater deference towards national authorities in sensitive political matters.[74] The international political context present worried many about the possible disregard of legitimacy and authority of international courts, when increasingly sovereigntist politics, democratic backsliding and resistance to international jurisdiction have dominated the space.[75]

Against this background, the Letter of the Nine arrived at the battlefield over the role of Strasbourg within the European legal order. The following sections therefore address, first, how the letter framed sovereignty, migration and democratic legitimacy as a justification for the calls of reform of the Convention and the recalibration of the protection of rights; second, how the argument of the 'original intentions' is used to challenge the living instrument doctrine; and third, how the aftermath (including the post-letter Joint statement by 27 Member States) transformed the debate into a wider struggle over the future authority of the Convention system.

2.4.1 Sovereignty, Migration and Political Backlash

The letter had taken advantage of the political context brewing in several countries in Europe, where nationalist sentiments have been taken higher presence in the electorate, populist personalities occupied all spheres of communication, and citizens seeking someone to blame for their increased struggles. The Letter of the Nine framed migration as a crisis of sovereignty, democratic legitimacy and public security, and constructed a narrative of the ECtHR as an institution that had increasingly restricted the capacity of states to exercise their governance over politically sensitive areas. 'We now live in a globalized world where people may migrate across borders on a completely different scale', signatories say, making the argument that the contemporary migratory phenomena could not relate to the society at the time of drafting of the Convention.[76] The document kept referring to irregular migration as the cause of social fragmentation, and mentioning those migrants that had 'chosen not to integrate, isolating themselves in parallel societies', and the ones who 'have chosen to commit crimes' threaten the undermining of the 'foundation of our societies'.[77] By the use of such rhetoric, and buzzwords such as 'fundamental values', 'rule-based international order' or 'democratic societies', Signatory States transformed migration as a

[74] Silvia Steininger, 'What Are Human Rights For? On the May 2025 Danish-Italian Public Letter to the ECtHR' (Verfassungsblog, 2 June 2025)
[75] Martinico (n. 10) 250
[76] Letter of the Nine (n. 3)
[77] Ibid.

subject, instead of another legal question, of political challenge to supra-national authority, and self-introduce themselves as the 'leaders of societies that safeguard human rights'.[78]

Signatory States claimed that the Court's jurisprudence had limited excessively discretion in national migration-related issues. In their words, the ECtHR had 'in some cases, extended the scope of the Convention *too far* compared with the *original intentions* behind the Convention, thus shifting the balance between the interests that should be protected'.[79] This is a specific attack on the living instrument doctrine, by which has been 'too progressively' used by the Court and included obligations States did not foresee when consenting to the ratification of the Convention.

To this concern, the States formulated 3 demands:

- To have a wider discretion to decide 'when to expel criminal foreign nationals'
- Broad powers for the supervision of foreign criminals who cannot be deported
- Freedom to take 'effective' measures to 'counter hostile states that are trying to use our values and rights against us'

The demands are broadly written and even the examples provided are vague, such as 'serious violent crime or drug-related offences' and unnecessarily demonizes migrants as 'taking advantage' of their solidarity. However, the message is clear, States seek more control over migration, deportation and border security.

However, the language and structure of the letter do not assimilate a formal legal complaint, there is no reference to any cases by which they can support the 'wrongdoing' by the Court, and States seem to target what they recognize as 'a minority of immigrants', however tackling and aiming to lower protections for all migrants. It is uncertain who is this letter supposed to be addressed to, either the Court, other Member States, or the Council of Europe as a whole.[80] Former ECtHR President and Judge Spano has actually pointed out that the letter's 'poor quality' suggests that it 'was primarily meant for a national audience in a political debate or that the leaders were not sufficiently advised by their legal experts on

[78] Steininger (n. 74)
[79] Letter of the Nine (n. 3)
[80] Hilpold (n. 66)

the multiple dimensions of the Court's existing case-law in this field and the current state of Convention law.'[81] The fact that the letter was simply published in the website of the government of Italy, and not through formal reform procedures, such as through Protocol discussions or Third Party interventions, it has been deemed mostly performative, to make the confrontation with the Court highly visible.[82]

However, signatories aimed to provide a more solid foundation to the critique through the repeated appeals to democracy, European values and public alignment. A juxtaposition is present in the reaffirming on one hand a commitment to 'rule-based international order' and the 'inviolability of the right of the individual', and in the other, on the argument that the Court constrained the capacity of 'making political decisions in our own democracies'.[83] The ECtHR is blamed as the responsible to upsetting the 'proper balance' between the individual rights protections and collective democratic interests. Ní Chinnéide and Sevrin expressed that the letter not hinted, but affirmed, that the 'safety and security for the vast majority of law-abiding citizens' should be placed at a higher priority in this balance.[84] This document frames democracy as the 'will of the majority', which is very visible in sovereignty discourse, specifically on the criticism that international courts protect unpopular minorities at the expense of democratic 'self'-governance.

Martinico describes this rhetoric as modern sovereignism, where national sovereignty claims express unsatisfactory dependence of domestic governance, both in politics and law, to the international limitations.[85] The notion of sovereignty is then used as a shield, or mostly as a wall to block or deter supranational judicial intervention. As mentioned, the political backlash against the Court is not about migration alone, but a disagreement on the authority of the Court to 'dictate' the scope of the rights in the Convention when it comes to politically sensitive areas. Londras and Dzehtsiarou note that the ECtHR remains vulnerable to accusations of illegitimacy because it 'protects vulnerable and sometimes unpopular groups of people' while intervening in 'the most sovereign of spaces'.[86]

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[81] Harriet Ní Chinnéide and Eva Sevrin, 'Restoring Balance: A Critical Response to the Open Letter on Migration and Human Rights' (Strasbourg Observers, 17 June 2025)
[82] Ibid.
[83] Letter of the Nine (n. 3)
[84] Ní Chinnéide and Sevrin (n. 81)
[85] Martinico (n. 10) 250
[86] De Londras and Dzehtsiarou (n. 51) 1-3

Nevertheless, criticism is still directed at migration jurisprudence. Some scholars refer that on one side, there is a willful misunderstanding on the migration case law of the ECtHR, and a complete disregard the efforts by the Court to self-restraint in this area. In fact, it was Judge Spano that declared that the Court is in an 'age of subsidiarity'.[87] Ní Chinnéide notes that the Court recognizes migration as a core aspect of state sovereignty in their case law, and that non-refoulement obligations are exceptional.[88] Furthermore, the Court increasingly adopted the process-based review, embraced by Judge Spano, where the focus shifts on the quality of the assessment of domestic authorities, not on the outcome, specifically on deportation cases under Article 8.[89] The Court held that it requires 'strong reasons' before substituting its own assessment for that of domestic authorities where national courts have adequately balanced competing interests.[90] Thus, the reality of such international court overriding national migration policy does not align with the conservative and careful trajectory of the Strasbourg assessment.

The letter should be placed among the democratic backsliding trends and growing resistance to international control in Europe. Tzevelekos notes that the Convention system is facing such backlash in the form of persistent non-implementation of judgements, discourses vouching for the prioritization of national interests over supranational standard-setting and overall challenges to the Court's legitimacy and authority in such controversial areas.[91] Steininger argues that the letter mirrors the political ambitions that had already dominated the Interlaken, Brighton, and Copenhagen reform processes, particularly demands for greater judicial deference in relation to 'unwanted' minorities that the Court is apparently 'over-protecting' as opposed to the majority that conforms the democratic society.[92]

In conclusion, the Letter of the Nine represents a direct challenge to the legitimacy of the ECtHR, specifically, on supranational human rights adjudication in politically sensitive areas, such as migration. The use of the 'migration crisis' as a threat to democracy and sovereign control, seemed enough justification to demand an expansion of national discretion. However, the Convention system aims to protect rights of individuals, even if they are politically unpopular. This backlash, in the end is not

[87] Harriet Ní Chinnéide and Tobias Mortier, 'Progressive Is in the Eye of the Beholder: Competing Narratives on the ECtHR and Its Role' (Strasbourg Observers, 18 December 2025)
[88] Ibid.
[89] Flattery (n. 64)
[90] *Ndidi v. United Kingdom* (2017) (n. 62) §76
[91] Tzevelekos (n. 4) 275
[92] Steininger (n. 74)

exclusively about migration any more, but a struggle on what are the actual limits of sovereignty and what should be the place of the ECtHR within the European legal order.

2.4.2 Reclaiming the 'Original Intentions' of the Convention

An interesting but questionable criticism that touched upon migration jurisprudence has been the invocation of the 'original intentions' behind the Convention. The Signatory States have expressed that the Court has broadened the scope of the Convention far beyond what would have been intended by those who drafted the text. As mentioned, this is a specific attack towards the living instrument doctrine. Earlier political criticism of Strasbourg had often focused on particular judgments or procedural questions; the 2025 letter instead contested the very legitimacy of dynamic interpretation itself and consequently transformed the migration debate into a constitutional dispute over who ultimately has the authority to define the meaning of Convention rights.

This appeal to the 'original intentions' refers to what is called an originalist understanding of treaty interpretation. This means that this approach support legal texts interpreted according to the meaning or intentions attached to them at the time of drafting, and thus, 'freezing' case law beyond the consent initially given by states.[93] Originalists, in this sense, claim that the Convention has created new obligations that would not have been foreseen at the time that States provided its consent.[94] This remains unconvincing, it is not the same to take the text of the Convention literally, where its rights' are purposely broad, than to talk about what the drafters intended, also present under originalist discourse. The truth is, we cannot be certain on what the drafters' intent truly was, however, when looking at the *travaux préparatoires*, there was a heavy discussion on which rights should be part of this instrument, and furthermore, there was an expectation of revisiting the text to include further protections.[95] This means that even the drafters had the evolutive interpretation in mind.

However, States claim to not have agreed to how the Court has 'transformed' the scope of protection of the rights in the Convention. To this argument, it is important to re-address the fact that original consent is not enough to bring forward claims of illegitimacy, when throughout the development of the Court, States have continued to apply the cases of the Court, and thus, follows consent given via State-practice

[93] Acconciamessa (n. 14) 439
[94] De Londras and Dzehtsiarou (n. 9) 81
[95] Riemer and Acconciamessa (n. 50)

as reflected in the VCLT Article 31.[96] This means that States cannot simply withdraw consent when human rights protections get 'too inconvenient'.

Approaching the text of the letter again, the originalist rhetoric used remained ambiguous and in some way contradictory. The document points out the Convention as having been 'conceived in the ashes of great wars,' simultaneously arguing that present-day migration realities are highly different from those faced by the Convention drafter's.[97] Yet, as it has been noted by Steininger, post-war Europe experienced displacement on a massive scale, with more than eleven million displaced persons present in Europe following the Second World War, and at a similar time, the Refugee Convention (1951) was being discussed, thus, this analogy loses its credibility.[98] Moreover, the Court having to adapt to the 'answer of tomorrow' while condemning their dynamic interpretative methodology remains highly disappointing and contradictory argument.[99] This demonstrates that the Signatory States did not seek to recover the original interpretation, but how it looks is to use the living instrument doctrine regressively to lower the standard of protection.

However, an originalist interpretation would strike the core of the jurisprudence of the ECtHR. Since *Tyrer*, the Court has consistently held that the Convention is 'a living instrument which… must be interpreted in the light of present-day conditions.' Evolutive interpretation was used to ensure that Convention rights remain 'practical and effective' rather than 'theoretical and illusory.'[100] If we were to freeze the Convention in time, it would risk the Court being incapable of responding to societal changes and new challenges in governance.[101] The living instrument doctrine was created as a mechanism intended to preserve the effectiveness and relevance of human rights protection in changing political and social contexts. Abandoning or regressively applying the evolutive interpretation would have consequences that would affect more than only migration law, easily become a slippery slope. Hilpold warns that retreating from the 'living instrument' approach would mean abandoning 'one of the Convention's most characteristic features,' potentially triggering a much general global regression in human rights protection.[102] Principles developed in migration cases, such as procedural safeguards, are

[96] De Londras and Dzehtsiarou (n. 9) 84
[97] Letter of the Nine (n. 3)
[98] Steininger (n. 74)
[99] Ibid.
[100] *Airey v. Ireland* (n. 47) §24
[101] De Londras and Dzehtsiarou (n. 9) 82
[102] Hilpold (n. 66)

linked to the evolution of the provisions of the Convention, Articles 3 and 8, and cannot easily be isolated from the overall system of protection of the Convention. The questions that arise are 'how far back' the Court's jurisprudence should be reversed and from which 'specific rulings or lines of reasoning' Strasbourg should now move on from.[103]

Original interpretation aims to switch who has the interpretative authority to the Convention. On one side, originalists rely this power on the drafters, who have decided which rights have been included in the Convention and their limitations as far as the text concerns, on another, the Signatory States do not want this necessarily, but they want themselves to dictate what is the scope of the protection of rights, through regressive interpretation. However, Article 32 is clear, which is that it is the Court that holds such authority, it is vested by the Convention itself. Ní Chinnéide and Sevrin emphasize that this competence was accepted by all Contracting States through ratification of the relevant Protocols.[104]

In the end, the appeal to 'original intentions' did not actually mean an actual journey to 1950, but a regressive evolutive interpretation. Signatory states aim to dictate the limits to the authority of interpretation by the Court, but that quickly can become a slippery slope that not only can risk the significant reduction of human rights protection and undermining the effectiveness of the Convention, but possibly endangering the independence of the Court, and thus, losing completely its legitimacy.

2.4.3 Institutional Dialogue or Political Intimidation?

The signatory States presented the Letter of the Nine as an invitation to institutional engagement, specifically calling for a 'new and open-minded conversation about the interpretation of the European Convention on Human Rights'.[105] While at a first glance this initiative was framed as legitimate constitutional discussion concerning the future direction of the Convention system and a recalibration of the balance between individual protection and domestic migration control (or as they claim 'the safety and stability of their own societies'). However, and following up on the elements discussed, the form, timing and political context of the letter raised significant concerns regarding whether this initiative truly represented institutional dialogue or rather an attempt to exert political pressure on the Strasbourg Court.

[103] Ibid.
[104] Ní Chinnéide and Sevrin (n. 81)
[105] Letter of the Nine (n. 3)

Several scholars strongly questioned the nature of the letter. Ní Chinnéide and Sevrin argue that the letter cannot be understood as a form of 'democratic iteration' or constructive communication because its tone was ultimately 'corrective, not dialogic'.[106] It is not like the States where opening a channel of discussion but used the letter to reassert their sovereignty and directly influence the Court's interpretative authority. This is why Steininger defines the initiative as essentially a 'political statement,' and that is displaying a coalition of like-minded governments that are committed to reclaiming national control over migration and contesting supranational jurisdiction.[107]

The fact that the letter deliberately bypassed the ordinary institutional channels of the Council of Europe, such as Protocol negotiations or Committee of Ministers procedures, simply reaffirmed the hypothesis of never intending to open a dialogue, and instead it was published in the Italian Government Website. Hilpold accurately questions as to whom is it even addressed to, since neither the Convention nor international law grants a minority of States authority to demand interpretative changes from the Court.[108] Ní Chinnéide and Sevrin further emphasize that States already possess legitimate avenues to express disagreement with the Court, including litigation before the Grand Chamber and Third-Party Interventions.[109] Thus, the decision to make a public political declaration seemed less like institutional cooperation and more like an attempt to pressure the Court out in the open.

The aftermath of the letter only furthered these issues. The United Kingdom joined the debate soon after publication and aimed to reopen discussions concerning not only the interpretation of the text, but also potential changes to the text of the Convention itself.[110] To this, Riemer and Acconciamessa note that the 2025 backlash signified an escalation of pressure aimed at the ECtHR, going beyond normal political disagreement into a coordinated effort to reshape the limits of supranational governance.[111]

The seriousness with which this escalation was viewed was demonstrated by the reaction of the Council of Europe institutions. Council of Europe Secretary General Alain Berset responded firmly in defense of judicial independence, declaring:

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[106] Ní Chinnéide and Sevrin (n. 81)
[107] Steininger (n. 74)
[108] Hilpold (n. 66)
[109] Ní Chinnéide and Sevrin (n. 81)
[110] Tzevelekos (n. 4) 276
[111] Riemer and Acconciamessa (n. 50)

‘Upholding the independence and impartiality of the Court is our bedrock. Debate is healthy, but politicizing the Court is not. In a society governed by the rule of law, no judiciary should face political pressure. […] The Court must not be weaponized — neither against governments, nor by them.’[112]

Although Berset did acknowledge that migration was a ‘complex challenge,’ he stressed that any reform discussions must stay within the appropriate institutional framework and fully respect the Court's independence. Attempts to influence judicial interpretation through coordinated public pressure risk undermining the rule of law itself.

The wider calls for reform culminated in an informal ministerial meeting on the 10th of December 2025, the purpose being to assess the concerns through a more diplomatic and procedural tone, and ‘bring the conversation back into the appropriate forum: the Committee of Ministers’.[113] It concluded with the goal of releasing a political declaration in the next session of the Committee of Ministers, what is now known as the Chișinău Declaration.

On the same day, the coalition of 9 States expanded to 27 through the adoption of a Joint Statement, illustrating how criticism of Strasbourg had rapidly evolved into a broader political movement within the Council of Europe.[114] This expansion on signatories is significant. One cannot speak any more about the opinion of a minority of States. Riemer and Acconciamessa have mentioned that the inclusion of the United Kingdom was ‘particularly ominous’ given its long history of criticism of Strasbourg and recurrent threats of withdrawal from the Convention.[115] Now, non-compliance of judgements is not the biggest risk, but a complete abandonment of the Council of Europe, if the Court continued to issue judgments that certain governments considered politically inconvenient.

The Joint Statement followed the same line of reasoning as the Letter of the Nine. The States continued to argue that migration control and national security were constrained excessively by ECtHR

[112] Council of Europe, ‘Alain Berset on the Joint Letter Challenging the European Court of Human Rights’ (24 May 2025)
[113] Council of Europe Committee of Ministers, 'Informal Ministerial Conference (Strasbourg, 10 December 2025) – Follow-up' CM/Del/Dec(2025)1546/4.3 (10 December 2025)
[114] Ministry of Justice, 'Joint Statement to the Conference of Ministers of Justice of the Council of Europe' (GOV.UK, 10 December 2025)
[115] Riemer and Acconciamessa (n. 50)

jurisprudence. The Statement properly responded to criticisms received, for example, illustrating how the 'rebalance' would apply to Article 8 ECHR in regards to expulsions, where greater weight would be given to the seriousness of criminal offences and less weight to migrants' social and family ties.[116] Additionally, and more controversially, Joint Statement proposed limiting the scope of Article 3 ECHR in expulsion and extradition cases, particularly regarding healthcare and prison conditions, and asked for greater flexibility for 'proportionate' expulsions.[117] These demands only will dilute the non-refoulement principle and will fall into a slippery slope of new restrictions that will not stop on healthcare or prison conditions.[118]

When it comes to the living instrument doctrine, the Joint Statement abandoned explicit originalist rhetoric. As explained by Riemer and Acconciamessa, states recognized the weakness of relying on original intentions, especially since the *travaux préparatoires* of the Convention showed universalist aspirations.[119] The Joint Statement put into evidence what the Letter of the Nine hinted at, the use of evolutive interpretation regressively.[120] Traditionally, evolutive interpretation had been used to preserve the effectiveness of the Convention in changing social conditions, by broadening the scope of protection. By contrast, the Joint Statement attempted to transform the doctrine into a mechanism for reducing protections in politically sensitive areas.

In the end, what started as a letter within a minority of State Members, an apparent criticism on migration cases, and a call for an open and 'constructive' dialogue on the interpretation of the Convention, evolved into an established confrontation over the authority of the ECtHR and the future of the Convention system itself. The progression from the Letter of the Nine to the Joint Statement of the Twenty-Seven showed an increase in coordinated political pressure on the Court and a shift in the rhetoric surrounding the living instrument doctrine. What had traditionally functioned as a mechanism for the progressive expansion and effective protection of rights was frequently invoked by states to justify restrictive reinterpretations and the lowering of protection standards in migration-related cases. This attempt to use evolutive

[116] Joint Statement of the Twenty-Seven (n. 114)
[117] Ibid.
[118] Andrew Forde and Alice Donald, 'Countdown to Chișinău: The Risk of Politicising the ECHR over Migration' (EJIL: Talk!, 19 December 2025)
[119] Riemer and Acconciamessa (n. 50)
[120] Forde and Donald (n. 118)

interpretation in a regressive way raises a fundamental question about the future of the Convention system: Can rights, once developed through the living instrument doctrine, also regress?

Before addressing question, it is necessary to examine the specific legal arena where this political friction is currently playing out: the field of migration, Europe's critical political fault line and the ultimate testing ground for the boundaries of international human rights protection.

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Chapter 3: Migration and the Boundaries of Human Rights Protection

The living instrument doctrine has properly integrated into the ECtHR's jurisprudence, becoming a reliable tool for progressive interpretation. However, growing higher standards of protection on politically contentious areas, unsurprisingly, triggered a political counterreaction from Contracting States seeking to reclaim authority over their domestic borders. The use of evolutive interpretation for expanding individual safeguards, including the recognition of the non-refoulement principle, the Court has restricted the State's discretion in areas they consider vital for their national security. Migration is not an incidental situation to the push against the living instrument doctrine; it is, as the previous chapter suggested, the vehicle through which broader anxieties about judicial authority, state sovereignty and democratic legitimacy have been channeled. This chapter, however, aims to contextualize such tensions by addressing key migration jurisprudence and the influence of such in State governance.

3.1 Migration as Europe's Political Fault Line

3.1.1 Security narratives and sovereignty politics

Migration is no longer an isolated debate on asylum administration or humanitarian protection. Over the past decades, and specifically since the migration movements of the 2010's and subsequent geopolitical crisis at Europe's external borders, migration has gradually been positioned as an issue of national security and territorial integrity, and consequently, fundamentally shaping the political discourse regarding the role of international human rights law. The ECHR is no longer perceived primarily as a legal framework protecting vulnerable individuals, but as a constraint on State's ability to effectively respond to contemporary security threats.

'Securitization' describes the political process by which an issue is construed as an existential threat needing extraordinary governmental action. Migration is no longer noticed by its social, humanitarian or administrative elements, but as dangers capable to undermine public order, cultural identity and even democratic institutions. Thus, migration governance is operating on a logic of deterrence and prevention, rather than focused on individual protection.[121]

[121] Vedaschi (n. 7)

This transformation has essentially changed the relationship between States and the ECtHR. With the increased security concerns associated with migration, judicial oversight over State action has been framed as an obstacle for effective governance, instead of a mechanism for safeguarding fundamental rights. Political criticism has as well switched from disagreements about the outcome of individual cases, but about who should ultimately determine the balance between human rights and border control.

Closely connected to the securitization of migration is the renewed emphasis placed on State sovereignty. Historically, immigration control has been regarded as one of the defining fields of sovereign statehood. States have consistently maintained that decisions concerning admission, residence and expulsion fall within their exclusive competence, subject only to limited international constraints. While the Convention itself contains no explicit right to asylum and originally reflected a predominantly sovereigntist understanding of migration regulation, the Court's jurisprudence has progressively imposed important substantive and procedural limitations upon the exercise of these sovereign powers through the interpretation of Articles 3, 5 and 8 ECHR together with Article 4 of Protocol No. 4.[122]

As nationalist and sovereigntist political movements have gained influence across Europe, migration has become one of the principal areas through which demands for the restoration of subsidiarity are expressed. Legislative reforms restricting access to asylum procedures, tightening family reunification rules and facilitating removals have become increasingly common across several European states.[123] According to Larché, this shows a broader political movement characterized by the progressive hardening of the legal status of foreigners and the erosion of rights previously regarded as firmly established.[124] Within this political climate, the ECtHR is frequently portrayed as an institution that interferes excessively with democratic choices made at the national level.

The tension between sovereignty and human rights is particularly visible in recent debates concerning the Court's use of the living instrument doctrine. As explored in the previous chapter, critics increasingly argue that the Court has interpreted Articles 3 and 8 beyond the intentions of the Convention's drafters, thereby creating obligations that states never accepted. Contrariwise, many scholars argue that such

[122] Marion Larché, 'Les droits des étrangers' in Aurélia Schahmaneche (ed), *Les régressions jurisprudentielles de la Cour européenne des droits de l'Homme : de quoi parle-t-on exactement ?* (2026) 82–83
[123] Ibid. 75-77
[124] Ibid.

criticism overlooks the Court's considerable deference towards domestic authorities, particularly through the increasing reliance on subsidiarity and process-based review. Rather than systematically expanding Convention rights, the Court has often demonstrated restraint by assessing whether national authorities have properly balanced competing interests before intervening.[125] The contemporary political narrative therefore often contrasts with the reality of the Court's jurisprudence.

3.1.2 Instrumentalization of migration and exceptionalism of migration governance

The growing presence of security narratives and sovereignty discourse have also contributed to the emergence of 'legal exceptionalism' in migration governance, by which contemporary migration presents circumstances so extraordinary that ordinary standards are no longer capable of providing effective responses.[126] Migration is thus portrayed as a permanent emergency requiring exceptional frameworks and broader domestic discretion. Human rights protections are not necessarily rejected outright but are argued to require reinterpretation in light of unprecedented geopolitical realities.

This logic is visible in the political initiatives that followed the publication of the Letter of the Nine. The Signatory States argued that contemporary migration challenges differ fundamentally from those envisaged when the Convention was adopted and therefore require a more restrictive interpretation of Articles 3 and 8 ECHR. By referring to unforeseen changes of circumstances, the participating states suggested that evolving conditions should permit a narrowing of Convention guarantees rather than their progressive development.[127] In this sense, exceptionalism becomes closely connected to a broader debate surrounding evolutive regression.

Tigroudja situates the Chișinău process within exactly this logic of normalized exception, arguing that the 'migration crisis' framing used to justify restraint on the Court is not new but traces back to the 1990s security-based challenges to *Soering*, later recast from a counter-terrorism vocabulary into a migration-crisis vocabulary once the political utility of the earlier framing had been exhausted.[128]

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[125] Ní Chinnéide and Sevrin (n. 81)
[126] Riemer and Acconciamessa (n. 50)
[127] Ibid.
[128] Hélène Tigroudja, 'Stop Blaming the Migrants: The Chisinau Process as the Symptom of a Global Pushback against Otherness' (ECHR Blog, 6 May 2026)

The clearest manifestation of this exceptionalist approach could be found in the concept of instrumentalization of migration. This phenomenon entails the ‘weaponization’ of migration as a tool of foreign policy, for example, when Morocco facilitated mass entry movements into Spain amid a diplomatic dispute over Western Sahara, and most recently, the movement of migrants from Belarus toward the Lithuanian, Latvian and Polish borders from 2021 because of EU sanctions.[129] Thus, migration is being increasingly perceived as a form of hybrid warfare, and migrants as instruments allegedly deployed by hostile states to destabilize European democracies.[130]

This reframing is significant. Positioning migration as part of geopolitical warfare, would entail State responses evaluated according to considerations of national defense rather than human rights protection, thus, pushback practices, restrictions on access to asylum procedures and emergency border measures are justified as necessary responses to exceptional security threats.

Several scholars, however, caution against accepting this narrative without scrutiny. Tigroudja argues that the Chișinău process shows a broader tendency to attribute responsibility for geopolitical tensions to migrants themselves, rather than addressing the structural or political causes of migration management failures. Migrants are portrayed as security threats and deprived of their status as rights holders.[131] Furthermore, Yildiz states that current political initiatives seek to reinterpret the principle of non-refoulement through instrumentalization narratives, placing pressure upon the Court to reconsider previously settled jurisprudence concerning Article 3 ECHR.[132]

Instrumentalization arguments implicitly invoke the customary international law doctrine of *rebus sic stantibus*, the idea that a fundamental change of circumstances may release a party from treaty obligations, while pointing out that this sits in tension with the competing principle of *ex injuria non oritur*, under which a legal right (or an escape from legal obligation) cannot be permitted to arise from another actor's wrongful conduct, in this case a hostile third state's manipulation of migrant flows.[133]

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[129] Jari Pirjola, ‘Hostile Instrumentalized Migration and the Right to Seek Asylum: Reflecting the European Legal Framework’ [2025] 27(1) European Journal of Migration and Law 1, 2-3
[130] Aleksandra Ancite-Jepifánova, 'Beyond the “Hybrid Attack” Paradigm: EU-Belarus Border Crisis and the Erosion of Asylum-Seeker Rights in Latvia, Lithuania and Poland' (2024) 15(2) Avant 16, 20
[131] Tigroudja (n. 128)
[132] Ezgi Yildiz, Umut Yüksel and Collin Lucken, ‘The Chișinău Declaration in the Data: Non-Refoulement and States’ Insatiable Appetite for a Restrained Court’ (EJIL:Talk!, 19 June 2026)
[133] Maxime Lebrun and others, ‘Instrumentalized migration: avoiding the trap’ [2025] 4 Open Research Europe 251

Riemer and Acconciamessa identify precisely this rhetorical structure in the December 2025 Joint Statement, observing that its language "almost exactly" tracks the wording of Article 62 of the VCLT governing withdrawal for fundamental change of circumstances, an overlap they consider unlikely to be coincidental, given that the statement was issued while three Grand Chamber cases on EU–Belarus border pushbacks remained pending.[134]

States are not merely seeking a policy accommodation but attempting to build, through coordinated political pressure timed to pending litigation, a doctrinal justification for treating non-refoulement obligations as conditional in the face of an "unforeseen" phenomenon.

3.2 Article 3 and the Expansion of Non-Refoulement Protection

Such sovereigntist and security-focused framing of migration developed as Article 3 jurisprudence progressively widened the scope of the non-refoulement principle. It is precisely this body of case law, as well known as '*Soering* jurisprudence', that the current political backlash seeks to restrict. While ECtHR decisions are being contested by States, scholars actually have commended the Court for 'freeing itself from the sovereigntist logic' of the original Convention text, and where able to construct a framework that protects from extradition or expulsion of a foreigner to a State where they would risk inhuman or degrading treatment contrary to Article 3.[135] The most pressing aspect of Article 3 is its absolute nature, thus, States do not get discretion over the interpretation of such provision, and thus, cases falling under Soering jurisprudence have no 'wiggle room' of interpretation.

Soering v. United Kingdom (1989)

The landmark case of Soering established the foundation of the non-refoulement principle, where an extradition could trigger a Member State's liability under Article 3 ECHR.[136] The case concerned a German citizen detained in the United Kingdom, who challenged his extradition to Virginia for capital murder by arguing that exposure to the "death row phenomenon", being the long waiting period between the sentencing to the death penalty until its execution, constituted inhuman treatment.[137] While Article 3

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[134] Riemer and Acconciamessa (n. 50)
[135] Larché (n. 122) 82
[136] *Soering v. United Kingdom* (1989) (n. 39)
[137] Ibid. §§ 11-26

did not explicitly forbade extradition, the Court deliberated that a Contracting State could not bypass Convention obligations by surrendering an individual to a State where inhuman or degrading treatment, under Article 3 conceptualization, is a predictable outcome.[138] Such assessment included the duration of the period of detention and the stressful penitentiary conditions, among other factors.[139] This ruling as well introduced a 'real risk' standard, by which substantial grounds to believe an extradited individual would face a genuine risk of ill-treatment in the receiving nation are required, lowering the threshold established in earlier case law.[140] Lastly, the Court affirmed that this safeguard applies 'however heinous the crime allegedly committed,' reinforcing that the absolute nature of Article 3 permits no compromise for law enforcement priorities.[141]

Soering remains foundational for the development of migration jurisprudence, but as well deeply contributed to the complete abolition of the death penalty among Council of Europe Member States in any circumstance. Overall, this case reaffirms the absolute character of Article 3, imposes the obligation to States to ensure that their actions will not facilitate human rights violations by other States (also reaffirming the extraterritorial application of the Convention), and brought a human rights lens into migration management and law enforcement.

Chahal v. United Kingdom (1996) and Saadi v. Italy (2008)

Chahal further reinforced, and clarified, Article 3's absolute nature regarding national security arguments.[142] Karamjit Singh Chahal, a Sikh political activist and Indian citizen, challenged his deportation from the United Kingdom, which was ordered on national security grounds.[143] In this case, the Court determined that the protection offered by Article 3 is 'equally absolute' and that 'the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration'.[144] This means that even if an individual is suspected of terrorism, or presents a threat to public safety, their expulsion would contravene the Convention if a real risk of torture or ill treatment is found, consequently expanding the jurisprudence under the provision.

[138] Ibid. §91
[139] Ibid. §§105-110
[140] Ibid. §§92-99
[141] Ibid. §88
[142] *Chahal v United Kingdom*. Application number 22414/93 (1996)
[143] Ibid. §12 and §25
[144] Ibid. §80

The prohibition of balancing the risk of ill-treatment of an individual against collective national security was again challenged in *Saadi*.[145] In this case, both Italy and the United Kingdom (as a third party intervener) argued that the rise of international terrorism may require a reassessment of the *Chahal* precedent.[146] Similarly as in *Chahal*, the United Kingdom stated that the evaluation of the risk of the applicant should be weighed against the danger that they would present to society, including a standard where the applicant should prove 'more likely than not' that they would be subjected to torture or treatment prohibited by Article 3.[147] Nonetheless, the Grand Chamber determined that both notions of 'risk' and 'dangerousness' could not be balanced against each other because the must be independently evaluated, as an applicant being considered a danger to national security does not reduce or influence the existence of ill-treatment in their country of return.[148] As well, the Court stated that diplomatic assurances does not automatically end the judicial oversight, but that an obligation still persist to guarantee that they are sufficient to effectively protect the applicant, and will be disregarded if 'reliable sources' show the destination country carrying practices that contravene the standards of the Convention.[149]

Ultimately, both *Chahal* and *Saadi* have blocked the conversation regarding national security exceptions to the non-refoulement principle, solidifying the absolute character of Article 3 and its application as a protection of an individual's rights, regardless of its conduct or a State's interests.

M.S.S v. Belgium and Greece (2011)

M.S.S. expanded even more the scope of Article 3, compared to the evaluation of more direct inflictions of ill-treatment by State actors covered in Soering, Chahal, and Saadi, to include systematic State failures resulting in severe socio-economic deprivation.[150] The applicant, an Afghani national seeking to flee from a Taliban-associated assassination attempt, arrived in Greece initially, but did not seek asylum until his arrival to Belgium.[151] By the Dublin II EU Regulation, asylum applications may be assessed by the first country to take an applicant's fingerprints, thus, Belgium transferred the individual back to Greece for his application processing.[152] The Court found that the applicant was living in a State of poverty

[145] *Saadi v. Italy*. Application number 37201/06 (2008)
[146] Ibid. §§102-116, and §§117-123
[147] Ibid. §122
[148] Ibid. §139
[149] Ibid. §§147-148
[150] *M.S.S v. Belgium and Greece*. Application number 30696/09 (2011)
[151] Ibid. §§9-15 and §31
[152] Ibid. §§12-14

during his detention in Greece, being denied fundamental human needs such as appropriate shelter, food and basic hygiene, or at least with resources to acquire those.[153] Thus, an Article 3 violation can be triggered by the State failing to meet positive obligation duties.[154] Consequently, the decision contrasted completely with the principle of 'mutual trust' among EU Member States and drives the Dublin system, and Contracting States could no longer assume that other Member States would act in compliance with the Convention regarding the treatment of asylum-seekers, and they are required to investigate what are the actual reception conditions of the receiving State prior any transfer.[155]

M.S.S did broaden the scope of Article 3 and the preemptive responsibility of States beyond high-stakes physical mistreatment but including the socio-economic conditions of the resulting transfer or expulsion, helping settle the approach of migration governance through human rights and individual protection lenses.

Paposhvili v Belgium (2016)

Paposhvili introduced one more element for the reinterpretation of non-refoulement, that being regarding the deportation of seriously ill individuals.[156] The applicant was a Georgian national, suffering from leukemia and recurrent tuberculosis and was facing removal due to criminal activity in Belgium.[157] The case altered significantly the threshold to meet Article 3 violations for medical reasons, being previously established in N. v. United Kingdom (2008) a narrow standard to extreme, near-death situations.[158] The Grand Chamber dictated that the 'other very exceptional cases' referred to in N. should include where an individual, even if not at his deathbed, would face a valid risk of 'serious, rapid and irreversible decline of his state of health resulting in intense suffering or to a significant reduction in life expectancy'.[159] Consequently, the Court introduced a procedure for domestic authorities to use in their assessment, including verifying that the destination country's healthcare system is adequate and accessible for the applicant,, nonetheless, in doubt, authorities must secure individual binding assurances that the treatment will be provided.[160]

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[153] Ibid. §254
[154] Ibid. §253 and §263
[155] Ibid. §§358-359
[156] *Paposhvili v Belgium*. Application number 41738/10 (2016)
[157] Ibid. §1, §34, §49 and §73
[158] *N. v. United Kingdom*. Application number 26565/05 (2008)
[159] *Paposhvili v Belgium* (2016) (n. 156) §183
[160] Ibid. §§189-192

Read together, *Soering*, *Chahal*, *Saadi*, *M.S.S.* and *Paposhvili* properly trace a clear journey of expansion of Article 3: from initial negative obligations recognizing extraterritorial responsibility for extradition, to the reinforcement of the absolute nature of the provision that leave no room for national security exceptions, and finalizing with the inclusion of positive obligations that seek to protect from deplorable socio-economic conditions or serious decline of health of vulnerable and ill individuals. Such progressive widening of the non-refoulement principle is precisely the '*Soering* jurisprudence' that the Letter of the Nine and the subsequent Chișinău process identify as the target of reform.

3.3 Family Life at the Border: Article 8 and Deportation Powers

Unlike Article 3, which, because of its absolute nature, prohibits any possibility of balancing an individual's rights against the interests of States, Article 8, in turn, permits such interference. Article 8§2 permits the restriction of the right to private and family life, where it is justified by considerations such as national security, public safety, or the prevention of disorder and crime. Article 8 being a qualified right, in turn, is taking most of the pressure for reform by States, requesting the 'rebalancing' of the provision so that greater weight is given to the 'nature and seriousness of the offense committed, and less weight less weight is put on the foreign criminal's social, cultural, and family ties with the host Country and with the Country of destination'.[161]

Migration, being a field outside of the original scope of the Convention, did initially provided near-total deference to States, and the expansion of Article 8 demonstrates how the Convention has adapted to include key protections and standards, including the establishment of an equivalence to a 'right to return' for deported foreign criminals.[162]

The *Boultif* and *Üner* guiding principles: Proportionality and State Discretion

The oversight under Article 8 by the Court regarding expulsions only properly developed as a framework in the most recent decade, however the first violation of the provision was ruled in the 1988 case *Berrehab v. the Netherlands*. The case concerned a Moroccan father denied a residence permit despite his daughter

[161] Joint Statement of the Twenty-Seven (n. 114)
[162] Nicolas Bauer, 'The Expulsion of Foreign Criminals in Light of European Case Law' (European Centre for Law and Justice, 8 April 2026)

living in Amsterdam.[163] Such precedent made the Court gradually establish a framework to evaluate the proportionality of deportation orders.

In *Boultif v. Switzerland* (2001), where the Court ruled in favor of an Algerian national, married to a Swiss citizen and convicted of property and weapons offenses, finding that his expulsion violated his right to family life, 8 criteria were introduced for the assessment.[164] 3 regarded the offender (the severity of the crime, time elapsed since the offense and subsequent behavior, and duration of stay in the host country), and 5 focused on family dynamics (the situation of the spouse and children, and the potential hardship of relocating abroad, for example).[165] This list was furthered in *Üner v. the Netherlands* (2006), including 2 subjective factors: the depth of the individual's social, cultural, and familial ties to both the host and destination countries, and the best interests of any affected children.[166]

Such 'Boultif–Üner' criteria had since remained static, contrasting the Court's use of evolutive interpretation, nonetheless, the ECtHR used its discretion by not providing a specific weight to any of the factors, and shaping the outcome case-by-case. However, such principles still allowed for the development of further jurisprudence.

Levakovic v. Denmark (2019), Abdi v. Denmark (2022) and Savran v. Denmark (2021)

While expulsions were subjected to such proportionality assessment, *Levakovic* evidenced that permanent re-entry bans (instead of time-limited) accompanying the deportation were not included in the evaluation. Jura Levakovic, a Croatian Roma man residing in Denmark, had accumulated around ten criminal convictions between 2003 and 2016, thus, under the Danish Aliens Act at the time, his sentence mandated an automatic, permanent re-entry ban upon deportation.[167] The Court unanimously upheld the expulsion and did not assess the proportionality of the ban's indefinite duration, in fact, it relied on process-based review, citing *Ndidi*, claiming that the 'balancing exercise' by national authorities was carried out in accordance with the Convention.[168]

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[163] *Berrehab v. the Netherlands.* Application number 10730/84 (1988)
[164] *Boultif v. Switzerland*. Application number 54273/00 (2001)
[165] Ibid. §48
[166] *Üner v. the Netherlands*. Application number 46410/99 (2006) §58
[167] *Levakovic v. Denmark.* Application number 7841/14 (2019) §§7-24
[168] Ibid. §45

Three years later, the same Chamber reached a strikingly different conclusion in *Abdi v. Denmark*, offering no explanation. The applicant, Mohamed Hassan Abdi, was a Somali national convicted of theft, burglary, drug offenses, and aggravated unlawful possession of a loaded firearm, a criminal profile more severe than Levakovic's.[169] The Court did apply the 10 factor criteria but created a second-stage proportionality test that addressed specifically the duration of the re-entry ban.[170] Because Abdi had received no prior deportation warnings or conditional expulsion orders, the Court deemed the permanent ban disproportionate, despite acknowledging that his conduct posed a serious threat to public order.[171] While the Court relied on previous case law regarding the overturn of permanent re-entry bans, the applicants did not constitute a danger to public order, unlike Abdi, and thus this decision remains controversial.[172]

This doctrinal shift was solidified shortly after, in *Savran v. Denmark*. Arıf Savran, a Turkish national convicted of aggravated robbery and a group assault that resulted in a fatality, had been deported with a permanent re-entry ban in 2009 under the same Danish Aliens Act provision applied in *Levakovic* and *Abdi*.[173] This time, the duration of the re-entry ban seemed the determining factor for the conclusion of the assessment. Due to Danish law stripping domestic courts of the discretion to limit or later review the ban's timeframe, the Grand Chamber concluded that Savran's chances of ever returning to Denmark were 'purely theoretical,' incompatible with Article 8.[174] Such ruling invited a strong dissent by part of the panel of judges, claiming that a generalization was made from cases that had 'distinguishable facts,' and that it would increase the focus on the duration of a ban when a balancing exercise is done by the domestic courts.[175] Consequently, Danish law was amended to grant discretion to domestic judges to shorten re-entry bans.[176]

[169] *Abdi v. Denmark.* Application number 41643/19 (2022) §§5-7
[170] Ibid. §§32-38
[171] Ibid. §§41-45
[172] Bauer (n. 162)
[173] *Savran v. Denmark.* Application number 57467/15 (2021) §§10-15
[174] Ibid. §§200-201
[175] Joint Partly Dissenting Opinion of Judges Kjølbro, Dedov, Lubarda, Harutyunyan, Kucsko-Stadlmayer and Poláčková in *Savran v. Denmark.* §50
[176] Bauer (n. 162)

Toward a "right of return": the November 2024 trilogy

Savran influenced three further Danish cases decided together in 2025, Sharafane, Savuran, and Al-Habeeb, all of them involving temporary re-entry bans.[177] In these cases, the Court formed an additional requirement for States, where even temporary bans must provide the applicant with a realistic prospect of return when they lapse.[178] Such condition avoids another situation similar to *Savran,* where temporary bans become practically permanent if there is no avenue for return under the host State's migration law, thus contravening Article 8.[179]

Article 8 jurisprudence, which started with a set of guiding principles, part of a balancing exercise that granted States meaningful discretion, has evolved into something closer to an entitlement for expelled offenders to eventually return. The Court has taken back the delegation of assessment, specifically on what could count as a 'realistic prospect' of re-entry, and thus, States seek for a 'rebalancing' that provides the weight to serious offences, rather than the measures they establish to control them.

3.4 Pushbacks, Pullbacks, and the Court's Search for Consistency

Articles 3 and 8 are provisions which didn't have an initial or explicit relationship with migration, and State obligations developed as cases were decided. Additional Protocol 4 of 1963, however, includes in its Article 4 the prohibition of collective expulsions, being the first international treaty to do so. It functions as a procedural due-process guarantee that exists precisely to protect the substantive, absolute prohibition of refoulement under Article 3, by requiring that no migrant be removed without an individualized assessment of their circumstances.[180] Such requirement, the individual assessment of a migrant's situation before carrying out its removal has been tested by two distinct practices: the pushback, where a State removes migrants directly at the border at the moment of crossing, and the pullback, where a State arranges for a third country to do so on its behalf. Both practices question whether there is genuine good faith action within migration governance, seeking to disregard or avoid established obligations towards asylum-seekers, only for them to be removed to unsafe conditions.

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[177] Sharafane v. Denmark. Application number 5199/23 (2025); Savuran v. Denmark. Application number 3645/23 (2025); and Al-Habeeb v. Denmark. Appication number 14171/23 (2025)
[178] Bauer (n. 162)
[179] Ibid.
[180] Alex Geraki-Trimi and Eleni Karageorgiou, 'Tales of Agency and Exclusion: Deconstructing the "Own Culpable Conduct" Requirement in the ECtHR Migration-Related Jurisprudence' (2025) 36 EJIL 707, 709

3.4.1 Direct Territorial Confrontations: The Evolution of Pushback Jurisprudence

The foundation of such obligation was established in *Hirsi Jamaa and Others v. Italy* (2012), which concerned a group of Somali and Eritrean nationals part of a group of around 200 migrants crossing by boat from Libia to Italy.[181] Italy returned the migrants to Libia without any individual assessment, and the Grand Chamber concluded that Italy could not disregard its Article 4 Protocol 4 obligations because of the fact that the removal took place on the high seas rather than on Italian territory.[182] The Court rejected Italy's framing of the operation as a ‘rescue,’ holding instead that jurisdiction, and with it, the obligation to assess, followed automatically once individuals came under the ‘continuous and exclusive *de jure* and *de facto* control’ of Italian authorities, applying its extraterritorial protection.[183] The underlined conclusion was the establishment of such unconditional obligation, where a migrant’s manner of arrival would not excuse a State from conducting individual assessments.

Nonetheless, such standard fell out the window in *N.D. and N.T. v. Spain* (2020), when this obligation was applied at the land border. The case concerned two applicants that attempted to cross the fence bordering Spain and Morocco, alongside a group of several dozen others, where they were apprehended by Spanish police and ‘pushed back’ into Moroccan soil without any access to legal processes nor protection.[184] In this case, controversially, the Grand Chamber observed migrant smuggling networks taking advantage of large numbers and use of force to storm a border crossing, and thus, the absence of individual removal decisions may be attributed to the applicants’ own ‘own (culpable) conduct’, instead of a failure of action by the State.[185] To justify the depart from jurisprudence, the Court included that such exception applies only where the State has first made ‘genuine and effective access to legal means of entry’ available.[186] Essentially, this just means a transfer of obligations into an earlier stage, more preventive in nature, which is to keep a genuinely accessible lawful route, and then the duty to assess is applicable. However, the judgement makes the clarification that the *Hirsi* principles are maintained, and thus, this exception does not apply to sea crossings.[187] The impact of this case is clear, which means that an individual’s conduct may now be a determining factor, where in many occasions, it was defended that individual assessments were an obligation as absolute as Article 3 compliance.

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[181] *Hirsi Jamaa and Others v. Italy.* Application number 27765/09 (2012) §9
[182] Ibid. §180
[183] Ibid. §81
[184] *N.D. and N.T. v. Spain.* Application numbers 8675/15 and 8697/15 (2020)
[185] Ibid. §200
[186] Ibid. §201
[187] Ibid. §187

M.K. and Others v. Poland (2020) does show *N.D. and N.T.*'s conception of maintaining a 'genuine accessible legal route'. In this case, 13 Russian nationals of Chechen origin repeatedly presented themselves at the official crossing spot seeking asylum, and were repeatedly turned back to Belarus without their claims ever being recorded.[188] The Court then concluded that Polish authorities not only should have taken record of their applications, but as well had the obligation to ensure the applicants' safety by keeping them on Polish soil 'until such time that their claims had been properly reviewed by a competent domestic authority'.[189] Therefore, the obligation of maintaining a genuine accessible route, must include the non-refusal when applicants seek to not enter irregularly.

Ultimately, *M.K.* and *N.D.* include a much more detailed look at the applicant's conduct, when earlier migration judgements were highly protective of 'undesirable' migrants. Nonetheless, a State-focused shift is returning, with the judgement of *A.R.E v. Greece* (2025), by which Greece's pushback practices to Türkiye were recognized, after decades of persistent denial and a great amount of records and NGO reports built.[190] This judgement remained as well significant due to the Court's assessment to first establish whether there was a 'systematic practice' of pushbacks in the Evros region generally, before determining the applicant's claims.[191] Such assessment may be introduced for other pushback cases, possibly introducing *A.R.E.* as a pilot judgement to be able to tackle such systematic abuses that would lead to a great amount of applications.

3.4.2 Outsourcing Deterrence: The Jurisprudential Challenge of 'Pullbacks'

Pushback jurisprudence, specifically *Hirsi*, covered by sea interceptions, where Member States had clear effective control extra-territorially. It did not account for a State training, funding, and equipping a third country to intercept on its behalf, the practice now described as a 'pullback', precisely so as to avoid ever exercising the direct control that triggered Italy's obligations in *Hirsi* in the first place.[192] Italy's 2017 Memorandum of Understanding with Libya, building on the earlier 2008 Treaty of Friendship, formalized exactly this arrangement, financing Libyan Coast Guard capacity in exchange for a reduction in arrivals on Italian shores.[193]

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[188] *M.K. and Others v. Poland.* Application numbers 40503/17, 42902/17 and 43643/17 (2020)
[189] Ibid. §178
[190] *A.R.E. v. Greece.* Application number 15783/21 (2025)
[191] Ibid. §229
[192] Annick Pijnenburg, 'From Italian Pushbacks to Libyan Pullbacks: Is Hirsi 2.0 in the Making in Strasbourg?' (2018) 20 European Journal of Migration and Law 396, 403
[193] Ibid. 396

S.S. and Others v. Italy (2025) has tested what these types of agreements would entail to Contracting States' obligations. Following a distress call from a sinking migrant dinghy, Italy's Maritime Rescue Coordination Centre directed the Libyan Coast Guard vessel Ras Jadir to the scene, which resulted in 20 people dying in the course of the operation and 47 survivors were returned to Libya, where they faced torture and abuse.[194] The Court concluded that in this case, contrary to Hirsi, Italy had not exercised the 'effective control' required to trigger jurisdiction and the case was left inadmissible.[195] This decision remained highly controversial as, in a way, it is permitting States to have their obligations met by proxy, and there was no account for the 'special relationship of dependency' between the Italian authorities and the people on board.[196]

There is an evident gap in State's obligations, and most likely, a high incentive in the outsourcing of migration control measures. Still, the Member State that trains and equips a third country's coast guard, with knowledge of the treatment migrants face on return, arguably remains bound by the same obligation of individual assessment that *Hirsi* imposed directly.[197] It would conflict with ECtHR precedent in *M.S.S. v. Belgium and Greece*, where the Court recognized that a State's knowledge of, and influence over, a foreseeable chain of harm can trigger responsibility, even absent direct physical control.

Pushback and pullback jurisprudence challenge the absolute and applicant-focus notion of Article 4 of Protocol 4, and the obligation to individually assess is restricted geographically and operationally. The fact that such practices may find certain leeway only becomes more concerning in the case that the Court steps further back amidst the political pressure facing currently. This is a real risk for the future decisions on 3 Belarus pushback cases.

[194] *S.S. and Others v. Italy.* Application number 21660/18 (2025) §§4-17
[195] Ibid. §98
[196] Izza Drury, 'S.S. and Others v. Italy: The Danger of All or Nothing Framing' (Opinio Juris, 19 August 2025)
[197] Himani Jha, 'S.S. and Others v. Italy: ECtHR's Missed Chance to Curb Pullback Agreements and Strengthen Non-Refoulement Protections' (Völkerrechtsblog, 1 October 2025)

3.5 The Pending Case Law: The Frontier of the 2026 Crisis

The release of the Letter of the Nine in May 2025 has put all consequent migration judgements in the crosshairs of universal scrutiny, transforming ordinary judicial practice into a high-stakes test of institutional resilience. Would the Court retreat to allow for subsidiarity? Would it do anything different? This climate brings concern over judicial independence. With key cases still pending, political pressure by States could target the outcome of such, aiming to influence in favor of the States. Thus, the Court is finding itself in a contested space, but jurisprudence is simultaneously in need for developing. These cases concern pushback practices at the Belarusian border, and they are important precisely because of this collision, for the Court to be able to continue its work amidst the political pressure of the Chișinău process.

C.O.C.G. and Others v. Lithuania, *R.A. and Others v. Poland*, and *H.M.M. and Others v. Latvia* are 3 cases pending deliberation at the Grand Chamber. All of them arise from the 2021–2022 instrumentalization crisis at the EU–Belarus border: four Cuban nationals repeatedly pushed back at gunpoint in *C.O.C.G.;* twenty-six Iraqi Kurds trapped between Latvian and Belarusian forces for days in *H.M.M.*; and thirty-two Afghan nationals stranded for over two months in a makeshift camp in *R.A*. These cases remain salient because of the relinquishment by the Court to the Grand Chamber, which happens only where a case raises a serious question of interpretation or risks a result inconsistent with existing jurisprudence.[198] Thus, it could be anticipated that the conclusion of these cases could suppose a key shift in the Court's case law.

These cases have been met with the approach of *N.D. and N.T. v. Spain* at the hearing in February 2025, arguing whether the 'own (culpable) conduct' exception to collective expulsion should extend to these facts.[199] The responding States have argued that it should. Lithuania's representative stated that the applicants had disregarded the legal order by not using humanitarian visas, while Poland and Latvia mentioned the official border crossings theoretically available to them.[200] However, as Beuscher and her co-authors note, the applicants did not challenge the *N.D. and N.T.* itself, but sought only to distinguish their situations from it, emphasizing that small, peaceful groups pushed back and forth between hostile

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[198] Maja Lysienia, 'For Better or For Worse? Grand Chamber Takes Over Cases Concerning Pushbacks at the Belarusian Border' (Strasbourg Observers, 6 September 2024)
[199] Ibid.
[200] Alison Jolynn Beuscher and others, 'The Claim of Hybrid Attacks: Balancing State Sovereignty and Migrants' Rights at the European Court of Human Rights' (Verfassungsblog, 19 February 2025)

border authorities did not resemblance to the 'violent rush' of six hundred people storming the Melilla fence.[201] Klüger disagrees with such strategy, as not contesting the *N.D. and N.T.* precedent, there may be a normalization of such exception, which had shocked many in 2020.[202]

These cases however represent a different type of pushbacks practices, as they fall under what has been described as the 'instrumentalization' of migration by 'hostile countries'. Poland and Lithuania characterized Belarus's conduct as a coordinated 'hybrid war', with the Lithuanian representative going so far as to claim that Belarus was 'using the Convention as a weapon against our democracy'.[203] Furthermore, Finland, as an intervening 3rd party, argued that safeguarding European security had itself been a founding aim of the Convention in 1950.[204] Such rhetoric aligns with what has been addressed in the previous sections, the use of migration as a security threat that needs emergency action by the States. This can be seen in the fact that Lithuania, Latvia and Poland had each declared domestic states of emergency, restricting access to asylum procedures to a narrow the set of official crossing points, with Lithuania's declaration remaining continuously in force since July 2021 despite a falling number of irregular arrivals.[205] Goller has observed that such domestic measures function to switch responsibility for the crisis to the individual migrant, converting a geopolitical conflict between States into a question of the applicant's personal 'culpability'.[206]

Legal commentary attempted to predict how the Grand Chamber would rule in these cases. An optimistic outcome would not attribute the applicants' irregular entry not to their own conduct but to the deliberate, coercive actions of Belarusian forces, or find that none of the three states offered 'genuine and effective' legal entry routes in either law or practice.[207] Nonetheless, a more negative conclusion would entail the Court accepting the States' argument that they bore no direct responsibility for the absence of legal entry routes, since it was Belarus, not a contracting State of the Convention, that forced the irregular crossings.[208]

201 Ibid.
202 Jessica Klüger, 'What is the Future of the Prohibition Against Collective Expulsion in the European Human Rights Legal Framework?' (EJIL: Talk!, 12 March 2025)
203 Beuscher and others (n. 200)
204 Ibid.
205 Laura Goller, 'Deflecting Reality by Viewing Migration Through the Lens of "Emergency"' (Observatori de Dret Públic, 5 May 2025)
206 Ibid.
207 Lysienia. (n. 198)
208 Ibid.

Considering that these three judgments were argued mere months before the Chișinău Declaration was finalized and given that all three respondent states were signatories to the December 2025 Joint Statement, the pending rulings will no longer appear as ordinary adjudication, but as the practical consequence of the Declaration's influence. Whether it will provide for more restrictive action, as the State-led documents requested, depends on the framing of the political declaration. Nonetheless, these cases could be the illustration on whether judicial independence is untouched after political backlash.

3.5.1 The Ultimate Dilemma: How the Impending Grand Chamber Rulings on Hybrid Warfare and State Emergency Laws Will Test the Durability of the Living Instrument Doctrine

The significance of the Polish, Latvian and Lithuanian cases lies on the invitation to the Court to make a somewhat implicit acceptance that the absolute character of certain Convention guarantees can bend according to the perceived hostility of the geopolitical context in which they are involved. Council of Europe Commissioner for Human Rights Michael O'Flaherty, intervening as a third party, named this danger directly, warning that the States' argument assimilated a call for 'human rights exceptionalism', in which governments would be permitted to manufacture convenient exceptions to guarantees that admit of none.[209] In his oral submission to the Grand Chamber, O'Flaherty reiterated that the Court has 'consistently stated' that the Article 3 prohibition on refoulement is absolute, and has already established that an applicant's own conduct, including irregular border crossing, does not diminish a State's obligations under that provision.[210] He characterized the discourse of 'instrumentalization', 'hybrid threats' and 'weaponization' as a rhetorical device that improperly parallels the individual asylum seeker with the hostile State accused of manipulating them, when the only relevant legal question is whether the applicant's own Convention rights have been violated.[211]

Beuscher identifies why such framing threatens the living instrument doctrine's coherence. If national security and geopolitical pressure can justify an unwritten exception to Article 3, the doctrine that has for decades been used to expand protection could, for the first time, be reused as a mechanism for its own contraction, again approximating regressive interpretation, and opening a 'Pandora's box' with no natural

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[209] Michael O'Flaherty, 'Oral intervention before the Grand Chamber in the case of C.O.C.G. and Others v. Lithuania' (12 February 2025)
[210] Ibid.
[211] Ibid.

stopping point.[212] This is not a hypothetical concern. Goller found that the 2024 Crisis Regulation and the revised Schengen Borders Code have already begun to build ‘instrumentalization’ into EU secondary law as grounds for derogation from ordinary procedure, even if both instruments formally reaffirm non-refoulement. This means that Court will be asked to accommodate or align its own absolutist Article 3 jurisprudence with a rapidly developing EU law, explicitly designed to accommodate the exception the States are seeking.[213]

The Court's answer, whenever it comes, will resolve more than three individual applications. These cases are an important test for the Court, because a restrictive result would not be limited to the Belarus border, but it would supply every government facing irregular migration with a ready-made vocabulary (instrumentalization, hybrid warfare, emergency) through which to look for similar loopholes from Convention obligations previously understood as inviolable.[214] Whether the living instrument doctrine survives 2026 as a mechanism of resilience, or bends into an instrument of its own regression, will likely be settled here first.

[212] Beuscher and others (n. 200)
[213] Ibid.
[214] Lysienia. (n. 198)

Chapter 4: The Chișinău Declaration and the Politics of Judicial Restraint

The Chișinău Declaration was adopted at the 135th Session of the Committee of Ministers on the 15th of May of this year by unanimity. Its adoption signified a new phase in the conversation regarding the future of the ECHR. While the Letter of the Nine very openly challenged the Court's authority of interpretation in politically sensitive areas, as migration has been, the Declaration sought however to reaffirm the resilience of the Convention system, and simultaneously covered the concerns relating to subsidiarity, and security challenges in the field. The outcome: an ambiguous position. In the goal of attempting to reconcile the preservation of the Convention system with increasing political demands for greater national discretion, the final document reflected the result of practically impossible task.

The ambiguity has already been pointed out by academic literature, even fractioning the understanding of the purpose of such document. Some scholars such as Donald and Forde, see the Declaration as a constructive exercise through institutional dialogue, that may be capable to reinforce the legitimacy of the Convention system while preserving judicial independence.[215] Möller disagrees, stating that the existence of such institutionalizes political pressure and creates the expectation that the Court should have more judicial restraint in migration cases.[216] This chapter seeks to go over the Declaration, almost clause by clause, for the best overview of the main themes and the relationship with the living instrument doctrine.

4.1 Reading Chișinău: Reaffirming the Convention System

The Chișinău Declaration starts with the reaffirmation of the continuous commitment by the Member States to the Convention as 'the cornerstone of the Council of Europe's system for the protection of human rights, democracy and the rule of law' and restates that the main responsibility for securing the Convention rights lies on the Contracting States, in accordance with the principle of subsidiarity.[217] This

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[215] Alice Donald and Andrew Forde, 'Reinforce, Reform or Rupture? The Future of the European Convention on Human Rights' (EJIL: Talk!, 29 October 2025)
[216] Lina Sophie Möller, 'Crossing a Line in Plain Sight: The Chișinău Declaration and the Politics of Convention Interpretation' (Verfassungsblog, 1 June 2026)
[217] Preamble and §1 and §3 of the Chișinău Declaration (n. 5)

effort is done with the purpose of framing the debate away from the questioning of legitimacy of the Court itself, but closer to addressing the function of the Convention system as a whole. The Declaration has put high emphasis on the institutional integrity of the Convention system, the central role of the ECtHR and the importance of States supporting the Court's independence.[218] Hernández argues that this language already demonstrates a more neutral discourse, contrary to the Letter of the Nine, adopting consciously with a vocabulary of cooperation to stir away from calls for structural reform.[219]

The preambulatory clauses remain the same as the 'Draft Elements of the Political Declaration Outcome Document', published by the Steering Committee for Human Rights (CDDH), an expert body tasked with conducting a detailed analysis of Strasbourg's case law.[220] The reception of the CDDH Outcome Document was not with open arms. Critical legal scholars, including Alice Donald and Andrew Forde, argue that the preparatory document derived too much of its content from the Letter and Joint Statement.[221]

However, the CDDH's output is also a necessary legal anchor. It transformed what was an initial performative, populist complaint into a substantiated conversation grounded in legal precedence and thorough citations of existing ECtHR jurisprudence, no merely vague statements.[222] While these references do not make it to the final declaration, it is enough to conclude that the Council of Europe has taken the matter seriously and does not act out of emotional political response. The Outcome Document was a thoughtful and composed reaction, which in the end, demonstrates the institutional capabilities of the organization for providing stability and fomenting cooperation and institutional dialogue.

The overall comparison between the Chișinău Declaration and the CDDH's Outcome Document is grounded on a shift in orientation. The Declaration represented a more neutral and sanitized position, which in practice ended up providing a State-centric perspective. Going back to the Preamble of the Chișinău Declaration, the Committee of Ministers state that 'inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the

[218] Ibid.
[219] Nancy Hernández López, 'Leading Through Dialogue' (Verfassungsblog, 5 December 2025)
[220] Council of Europe Steering Committee for Human Rights, 'CDDH Outcome Document Containing Elements for a Political Declaration' (20 March 2026)
[221] Alice Donald and Andrew Forde, 'The Chișinău Process: Dialogue or Duress?' (ECtHR Blog, 14 April 2026)
[222] Lorenzo Acconciamessa, 'The Steering Committee's 'Preliminary Draft Text' for the Chișinău Declaration: Nothing is Wrong with the ECtHR's Migration Case-Law' (EJIL: Talk!, 9 February 2026)

requirements of the protection of the individual's fundamental rights'.[223] Legal critics have pointed out that explicitly mentioning 'general interests' prior to 'fundamental rights,' opposes the traditional hierarchy of the Convention system.[224] The very purpose of the ECHR is to protect individual fundamental rights, not the general interest (even if the latter can play a role in the assessment of legitimate aims). This switch moves away from the more victim-centered language of the earlier drafts, and appeases the unsatisfied members, providing the perfect conceptual transition for the presence of subsidiarity in the Declaration as the most central principle, to the detriment of the living instrument doctrine.

4.2 Convention Interpretation: Between Evolution and Restraint

While the opening paragraphs of the Chișinău Declaration sought to reaffirm the institutional foundations of the Convention system, the Declaration quickly moves to the matter of interpretation and application of the Convention when facing contemporary challenges. The Declaration sought to reconcile the two principles that have been in tension throughout this debate: the living instrument doctrine and the principle of subsidiarity. Most importantly, this document is not a binding reform of the Convention, nor a additional Protocol, thus interpretative authority is not being redifined, but the conditions for the exercise of such.

The provisions reiterate Article 32 ECHR, vesting the final authority of interpretation to the Court, and explicit reference is given to the living instrument doctrine and the VCLT. Nonetheless, while it may seem that this section is just a consolidation of a well-established framework, there is still a lingering concern that an expectation of more judicial restraint is being 'codified'.

4.2.1 The authority of interpretation

Article 32 ECHR is present in the Declaration to state that Court 'authoritatively interprets the Convention in accordance with relevant norms and principles of public international law, and, in particular, in the light of the Vienna Convention on the Law of Treaties', adding that the Convention must be interpreted as a living instrument, with consideraton to the conditions of the present.[225] In

[223] Preamble and §1 and §3 of the Chișinău Declaration (n. 5)
[224] Lize R Glas and others, 'Open-Minded or Open-Ended? The Chișinău Declaration on the ECHR and Migration' (ECtHR Blog, 15 April 2026)
[225] §12 of the Chișinău Declaration (n. 5)

pinciple, this is simply a reinstatement: Article 32 vests the Court with the final power of interpretation, a competence accepted by all State Parties through ratification. In isolation, the paragraphs could be considered as a reaffirmation of a settled doctrine, and supported by the Committee of Ministers, expressing its 'continued appreciation' for the clarity, consistency and balance of the Court's case law.[226]

However, the very act of adopting a political declaration that is addressing how the Convention must be interpreted, shakes the premise of the interpretative authority belonging to the Court. Möller has identified a core structural problem in the text of Chişinău, the fact that a political declaration is indirectly claiming the interpretative authority over the Convention, regardless of diplomatic wording, or how moderate the measures may seem.[227] This aspect was already concerning pre-Chişinău. Seeking to influence the adjudicatory function of the Court may risk a breach of the duties under Article 32, and more worryingly, a threat to judicial independence.[228] This can be seen in paragraph 21 of the Declaration, encouraging States to 'develop and clarify domestic frameworks' for the application of the Convention in expulsion and extradition cases, which may be read as an invitation for States to exercise, through domestic legislative guidance, the very same role as Article 32 gives to the Court.

The result is another double meaning principle that seeks to please everybody. Formally, it reaffirms the Court's interpretative authority and the State's support for judicial independence. However, it inserts the Committee of Ministers into a discussion on how that authority should be exercised, specifically in respect of the living instrument doctrine. Whether this is a permissible method of dialogue between the Court and the political organs of the Council of Europe, or whether it translates into an improper attempt to pre-determine the outcome of future decisions, depends on how the text interacts with both the doctrine of the living instrument and the principle of subsidiarity.

4.2.2 The living instrument doctrine

The living instrument doctrine appears twice in the text of the Declaration (§12 and §40). Both instances appear more as support for the doctrine rather than seeking a departure from it. Paragraph 12 mentions that the Convention 'is interpreted as a living instrument, giving appropriate consideration to present-day conditions', and paragraph 40 repeats that the Convention 'remains applicable in response to novel

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[226] Ibid. §13
[227] Möller. (n. 216)
[228] Forde and Donald. (n. 118)

challenges', adding that it does not 'operate in a vaccum'. Glas and co-writers note that these paragraphs remain similar to earlier political declarations such as Brighton, Copenhagen and Reykjavik, where there was also the need to balance the calls for restraint with the continuing confidence in the Court.[229]

Superficially, paragraphs 12 and 40 could be read as a routine confirmation of the doctrine established in *Tyrer*. Breuer however says to take caution with this.[230] He deems the phrasing of paragraph 12 as ambiguous in a way that earlier case law was not. The Declaration referencing 'novel challenges', read alongside paragraph 16's framing of migration as a phenomenon 'unforeseen at the time the Convention was drafted', may indirectly integrate what the Signatory States were pursuing in the Letter within the political declaration, 'invoking 'present-day conditions' to justify the restriction of migrant's rights. Nonetheless, Breuer concludes that the doctrine still remains, at the very least in principle, still in a one-way street.[231] Mere apparent shift in societal opinion, without active compelling reasons, cannot suffice as justification to lower an already established standard.

Whether the Declaration is actively narrowing the doctrine or is just clarifying it is a question left open, therefore, it is not strange for scholars to interpret the implications of such document in different ways. Möller identifies that the Declaration is even more moderate than previous political statements, and states that approaching the tensions with moderation is not problem-solving.[232] In fact, the underlying conflict of States seeking unlimited control over migration policy, and the framework established by evolutive interpretation, still persists, even with the careful drafting. Thym also finds ambiguity as a choice between two future paths: either to keep continuity with the jurisprudence formed by the living instrument doctrine of the past decades, or to subtly re-balance the doctrine, not through a outright reversal, but highlighting specific language in existing jurisprudence to justify the gradual shift.[233]

The relief is that the Declaration is not allowing any question on the legitimacy of the living instrument doctrine, nonetheless, the textual reaffirmation does little else to resolve the question on judicial restraint, and thus, it is most important than even to properly asses how subsidiarity is framed.

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[229] Glas and others. (n. 224)
[230] Marten Breuer, 'Can the Living Instrument Doctrine Be Reversed?' (EJIL: Talk!, 17 June 2026)
[231] Ibid.
[232] Möller. (n. 216)
[233] Daniel Thym, 'The Chișinău Declaration: Competing Trajectories' (Strasbourg Observers, 9 June 2026)

4.2.3 The presence of the principle of subsidiarity

If paragraph 12 is leaving the living instrument doctrine in an ambiguous position, Chişinău is actually giving protagonism to the principle of subsidiarity, addressing it more directly and setting the expectation to be the moving force for the reassessment of balance. Already in paragraph 1, primary responsibility for securing Convention rights is placed on States Parties 'in accordance with the principle of subsidiarity', and paragraphs 4 and 5 include national authorities, who are deemed 'better placed' than an international court to 'evaluate local needs', through the enjoyment of the margin of appreciation.[234] Crucially, paragraph 5 describes process-based review, where the Court won't subsitute the domestic courts' assessment as long as the balancing assessment has been done in conformity with the standards set in the Convention.[235] Similarly, paragraph 32 repeats the same logic for cases of expulsion on national security grounds, giving a wide margin of appreciation for these cases.[236]

Voeten has pointed out a longlasting institutional pattern, when the Court has been confronted with criticism, the institution has used subsidiarity as its coping strategy, specifically since the 2012 Brighton Conference and the establishment of Protocol 15.[237] This attitude has even led Former ECtHR's President Spano to describe an 'age of subsidiarity'. Thus, seen from this angle, paragraphs 4, 5 and 32 of the Declaration are not revolutionary, nonetheless worrying, as they are pressing the Court to move further down a path it had already set for itself.

The danger lies in what process-based review is actually substituting in the place of substantive scrutiny. Delegating the balancing exercise to domestic authorities and mainly assessing the quality of reasoning may even create some sort of passport to complience, regardless on how restrictive the outcome ends up being for applicants. The more eager is the Court to accept a well-drafted domestic judgment as proof of an adequate balancing exercise, the less it needs to question whether this balance is compatible with the Convention.

Former ECtHR's President Spielmann warned: 'I sometimes detect, a sense that subsidiarity is code for something else, for less scrutiny from Strasbourg. That it means taking the "self" out of judicial self-

[234] §1, §4 and §5 of the Chișinău Declaration (n. 5)
[235] Ibid. §5
[236] Ibid. §32
[237] Erik Voeten, 'The ECtHR's Coping Strategy: The Pitfalls of Subsidiarity and Deference as Strategies to Avoid Backlash' (Verfassungsblog, 30 September 2022)

restraint'.[238] Having process-based review even before the mentioning of 'shared responsibility' between the Court and States ratifies the increased role of domestic authorities, and how the Court is undeniably granting such space.[239] Most importantly, this could only head in one direction: the divergence of standards of protection within the Member States.

Beyond the margin of appreciation and process-based review, the Declaration notes that that States retain the 'undeniable sovereign right' to control migration (§18) and that they prossess a 'fundamental duty' to guarantee public safety and security (§20). Glas observes this subsidiarity language revealing the obvious: that this political declaration is a text written with the concerns of States in mind, instead of individual applicants, and written insisting more on duties owed to the community than in the rights of migrants.[240] Thus, a declaration this insisting in reassuring States of their increased role and say, is likely to encourage the Court to apply the margin of appreciation substantively.

The implications of this practice may not end in migration cases. Fikfak and Madsen argue that the Declaration's ambition is mostly structural rather than based on the doctrine, as treating the deference to domestic authorities as a general operating system in politically sensitive cases, is actively institutionalizing the retreat that the Court had already been quietly making on its own initiative.[241] This could very well quickly move from migration cases to a reshaping the relationship with national authorities across the Convention system as a whole.

4.3 Migration as the Test Case of Convention Interpretation

Migration occupies a distinctive position within the Chișinău Declaration. While the Declaration does address the functioning of the Convention system as a whole, its *raison d'être lies* on the discussion on migration-related concerns. The Declaration includes the fact that it is an area in which the balance between State sovereignty and Convention obligations has allegedly become the most contested, but what one must not make the mistake is to interpret it as an isolated policy issue, but as the practical test through which broader debates on the limits of evolutive interpretation and subsidiarity are integrated.

[238] De Londras and Dzehtsiarou (n. 51) 12
[239] Forde and Donald. (n. 221)
[240] Glas and others. (n. 224)
[241] Veronika Fikfak and Mikael Rask Madsen, 'Shopping Lists and Steppingstones: On the Chișinău Declaration' (Verfassungsblog, 15 May 2026)

4.3.1 Article 3: The Absoluteness Under Pressure

The Chișinău Declaration's commentary on Article 3 constitutes one of its most alarming and political. The paragraphs go back and forth from a reaffirmation on the absolute character of the provision and framing choices and invitations to guidance that are pushing for a possible restriction.

The first note is simple, Article 3 is absolute, with no derogations, exceptions or legitimate interference, found in paragraph 22. In isolation, it seems that there is no avenue for modification or qualification. Nonetheless, once it is attached to the following paragraphs, such absolute character is being subjected to a series of contextual limitation, difficulting its interpretation.

Paragraph 23 takes the concept of the 'minimum level of severity', required to trigger the prohibition, and uses it as a tool for explaining its approach. The Declaration reads that this minimum level 'must remain high and constant', that it is 'relative and depends on all the circumstances of the case', and must be applied in a way that avoids 'unnecessary constraints on decisions to extradite, or to expel foreign nationals.'[242] Indeed, through this threshold, the Court has recognized certain situations not amounting to inhuman or degrading treatment, but what remains concerning is the call for this threshold to remain high, and to avoid 'unnecessary constraints' on expulsion decisions, leading to the perception that the current scope is too burdensome. This was already an alarm bell before the adoption of the text. Scholars believed that the calls for the narrowing of Article 3 would impact the very core of the Convention, and create a key disconnection between acknowledging the absoluteness of the provision, but allowing States to take decisions in expulsion and extradition cases.[243]

Within the Joint Statement of the 27 States, calls for restriction are explicit, for the scope of Article 3 to be 'constrained to the most serious issues in a manner which does not prevent State Parties from taking proportionate decisions on the expulsion of foreign criminals'.[244] The language changes in the political declaration, possibly out of consensus between the 46 Member States. Yet the tone and effect remains the same, establishing a preference for a high and clear threshold that would reduce the situations falling under Article 3.

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[242] §23 of the Chișinău Declaration (n. 5)
[243] Forde and Donald. (n. 118)
[244] Joint Statement of the Twenty-Seven (n. 114)

Paragraph 24 brings out a concern of impunity of those who cannot be extradited to serve a sentence for a serious offence because of Article 3 obligations. To this matter, even if the Declaration is stating that 'all possible steps must therefore be taken to avoid this, consistent with Convention obligations', the framing already assimilates to the Letter of the Nine, by recognizing that Article 3 protects these people, the 'wrong ones'.

This is an intentional reverse by the Signatory States, reading an individual's human rights protection as an enabler for impunity. Falling for this rhetoric is alarming. The idea of migrants convicted of serious crimes having to forfeit their human rights, including the *non-refoulement* principle, violates core international standards of treatment.[245] Furthermore, this would create a two tier human rights protection system, one that would grant lesser protection to undesirable individuals, which now are 'foreign criminals', but quickly could extend to migrants as a whole. The fact that the Committee of Ministers have fallen for such rhetoric is astonishing, even so with the antiethical considerations contrary to the values of the Council of Europe, and contrary to the principle of non-discrimination included in the first page of the document. 'There is no one undeserving of having their basic human rights protected'.[246]

Paragraphs 25, 26 and 27 cover aspects of Article 3 that are most likely to have effects on domestic courts and the ECtHR's jurisprudence. Paragraph 25 addresses healthcare cases, reiterating that 'where an individual is being expelled, accessible healthcare in the receiving state should only give rise to a real risk of treatment contrary to Article 3 in very exceptional circumstances', and underlines that 'there is no obligation for the returning state to alleviate disparities between its own healthcare system and that of the receiving state'. This paragraph is a mere recapitulation of the *Paposhvili*, requiring a 'serious, rapid and irreversible decline' in health leading to 'intense suffering' or 'a significant reduction in life expectancy'.[247] It is still demanding a high standard, nonetheless the Court was already moving in such direction.

Both paragraphs, 26 and 27, request for further guidamce when it comes to the overall assessment of socio-economic factors to reach such threshold (§26), or the overall assessment of detention conditions (§27). These could be considered as genuine requests for guidance, yet some scholars believe it spells an

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[245] Steininger (n. 74)
[246] Ní Chinnéide and Sevrin (n. 81)
[247] *Paposhvili v. Belgium* (2016) (n. 156)

invitation towards having a more ‘clear’ restrictive scope.[248] This is merely especulative until these calls are put into practice. Truth is, the absolute aspect is still formally respected and the Court’s interpretative authority is not yet disregarded.

Paragraphs 28 and 29 address what might be called the transnational dimension of Article 3. Paragraph 28 notes that the Court ‘has rarely found’ a violation of Article 3 where the receiving State ‘had a long history of respect for democracy, human rights and the rule of law’, and paragraph 29 calls for ‘caution when applying case law’ concerning conditions in a State Party when assessing whether expulsion to a non-State Party would violate Article 3. The Declaration suggests that domestic courts may need ‘further guidance’ on how to apply the judgements to this type of transposition.[249]

Bates has observed that the Article 3 extraterritorial context is quite legally complex, and the calls for caution by the Declaration has the potential to make it harder for individuals to invoke Article 3 protections, specifically when it comes to pushbacks and returns to States with deficient human rights records.[250] Higher urgency is given to this paragraph considering the pending cases at the Belarus border, where the approach of instrumentalization of migration is still green in its application.

Paragraph 30 closes the Article 3 section by mentioning diplomatic assurances. As Glas notes, the Court has indeed accepted diplomatic assurances in some cases while finding them not enough in others, depending on their specificity, the monitoring mechanisms in place, and the human rights record of the receiving State.[251] Nonetheless, and the purpose of the paragraph, is not get confortable, for example, *Makuchyan and Minasyan v. Azerbaijan and Hungary* (2020), where diplomatic assurances were not implemented in good faith even between Council of Europe Member States.[252]

In essence, the Court’s approach in the last decades to Article 3 has been based on ‘selective forberance’ and with a tendency of ‘backtrack’ on what were considered progressive rulings, specifically on the rights of migrants and refugees.[253] The Chişinău Declaration, could pottentialy reinforce such pattern, giving

[248] Glas and others. (n. 224)
[249] §29 of the Chişinău Declaration (n. 5)
[250] Ed Bates, ‘The CDDH’s Chişinău Report, Article 3 and the “Extra-Territorial” Context’ (*ECHR Blog*, 2 April 2026)
[251] Glas and others. (n. 224)
[252] *Makuchyan and Minasyan v. Azerbaijan and Hungary.* Application number 17247/13 (2020)
[253] Yıldız (n. 66)

an institutional cover for the Court to narrow the Article 3 threshold while maintaining the formal absoluteness of the provision. However, this has been deemed a 'slippery slope', as there is no real change to the text of the Convention, nor any calls for a formal revision, but by the strong emphasis on the minimum threshold to remain high, and the calling for guidance to reduce constraints in expulsion decisions, it will change the overall environment where the Court interprets the provision moving forward.[254]

4.3.2 Article 8 and the Politics of Proportionality: The Chisinau Declaration's Call for Rebalancing

Article 8 is mentioned regarding the expulsion of foreign nationals who have been convicted of criminal offences. While the Committee of Ministers attempted throughout the Declaration to remain with a neutral language, this section may be directly repeating the demands proposed months earlier, in both the Letter of the Nine and the Joint Statement.

Paragraph 31 is not controversial in itself, but a restatement of established case law, claiming that the expulsion interfering with their private or family life must be 'lawful, proportionate, and necessary in a democratic society in pursuit of a legitimate aim', lists the legitimate aims allowed, including national security, public safety, the prevention of disorder or crime, and concludes that 'the right balance must be struck between individual rights and interests and the weighty public interests of defending freedom and security'.

The fact that such paragraph is followed by a mention of subsidiarity gives the perception that the balance assessment should tilt more towards a more favorable position for the State. In fact, it gives the role of exercising such balance to national authorities, stating that they are 'better placed than an international court' to do so.[255]

Additionally, it is left to the national authorities to decide the 'weight they attach to the nature and seriousness of the crime committed', which worryingly is mirroring the Joint Statement. States had called for 'the balance between individual rights and legitimate aims as per Article 8 of the Convention [to be]

[254] Forde and Donald. (n. 221)
[255] §32 of the Chișinău Declaration (n. 5)

adjusted so that more weight is put on the nature and seriousness of the offence committed and less weight is put on the foreign criminal's social, cultural, and family ties with the host Country'.[256]

There is overall unacknowledgement that the Court has been increasingly deferring to national decision-making cases of expulsion of migrants who have committed crimes as long as domestic authorities properly do the balancing exercise. It makes sense that there is at least reference to process-based review in paragraph 33. Nonetheless, this paragraph adds that 'it is important that the Court makes clear its awareness of the particularities of national legal systems and traditions, including for example the extent to which the length of a sentence of imprisonment reflects the seriousness of an offence, and fully and clearly explains its reasons'. Möller argues that this sentence provides for a high legal ambition, where the Declaration seeks to demand a higher burden of explanation when the Court departs from the national assessment.[257] This can be considered as an attempt to narrow the Court's discretion through procedural means, without actively amending the standard.

As mentioned earlier, the Declaration does not outright state for the balance under Article 8 to be 'adjusted', unlike the Joint Statement, it is however the structure that is consistently highlighting the State perspective, rather than individual rights protection. Thym has stated that this is a call for the support of a 'subtle re-balancing', shifting the weight when it comes to serious offences.[258]

4.3.3 Mass Arrivals and Instrumentalization: New Exceptions to Old Obligations?

Other aspects related to migration addressed by the Declaration, most famously framed as key emergencies that need urgent response by the Convention system, are the challenge of mass arrivals at external borders and the instrumentalization of migration.

The Declaration acknowledges that the arrival of large number of migrants represents 'a complex and evolving challenge for frontline States,' citing a sovereign right to protect national borders and the duty or responsibility to ensure national security and public safety.[259] Similarly, the Declaration decides to express its awareness of the burden that States carry with the increasing influxes of migrants and asylum

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[256] Joint Statement of the Twenty-Seven (n. 114)
[257] Möller. (n. 216)
[258] Thym. (n. 233)
[259] §34 of the Chișinău Declaration (n. 5)

seekers.[260] Nonetheless, it does reinstate that responses should fall accordingly to Convention obligations, and promotes Council of Europe instruments to combat human trafficking and migrant smuggling networks.[261]

Most importantly, the Declaration finally covers instrumentalization. Paragraph 37 offers a definition: instrumentalisation refers to 'situations where migratory movements, including unlawful border crossings, are deliberately facilitated, encouraged or exploited by a hostile State or other actor, in some cases involving the use of force, with the aim of exerting pressure on, destabilising or undermining another State and European democracies'. It understands instrumentalization as a 'a new contemporary phenomenon' that has 'emerged in a specific geopolitical and security context' and that risks 'undermining support for and the integrity of the Convention system.'[262] This means that instrumentalization is not merely a threat to the national security of Member States, but an attack on the Convention system itself. As mentioned, there are still pending cases against Poland, Latvia and Lithuania, and not only one should be worried that the Joint Statement has referred to this phenomenon, possibly to influence the outcome of such judgements, but the acknowledgement within the political declaration may cause a similar effect.

Paragraph 38 attempts to square this circle by affirming that even in instrumentalised scenarios, 'migrants involved in instrumentalised migratory movements are entitled to respect for and protection of their rights under the Convention and other European and international law'. However, in the same breath, noting that protections are 'subject to limitations permitted under the Convention,' and that 'the conduct of the individuals involved in attempts to irregularly cross the State border may be relevant in assessing the State's compliance with certain Convention obligations.'[263] This is significant, as it is echoing the Court's own reasoning in *N.D. and N.T. v. Spain*, possibly seeking to expand on precedent, not only on what concerns collective expulsions, but to also make individual conduct relevant in the broader assessment of obligations in pushback cases.

[260] Ibid. §35
[261] Ibid. §36
[262] Ibid. §37
[263] Ibid. §38

Paragraph 39 goes even further, invoking the concept of a 'democracy capable of defending itself'. While this principle has been developed by the Court's case law, it was more in a context of restriction of political parties, and is now being brought up as potentially relevant for instrumentalization.[264] Donald and Forde disagree, describing the perspective as "disingenous", as the concept was created to be applied against domestic threats to democratic institutions, and that it would be a strecht to amply its meaning to geopolitical border control.[265]

However, the novelty lies on the reiteration of the living instrument doctrine in paragraph 40. It highlights that the doctrine does not operate in a vacuum and that the overall context of the assessment of State obligations is considered. More importantly, the States invited the Court for guidance for the application of the Convention in such context. This is a completely different approach to the conversation over evolutive interpretation. Instead of denouncing the living instrument doctrine as judicial overreach, it is actually the mechanisim that is being sought after to establish legal standards in the face of this new phenomenon.

The section on instrumentalization represents the main compromise achieved by the Chișinău process. The fact that the Committee of Ministers is refusing to make instrumentalization an exception to the rule and entrusts the Court with developing its jurisprudence through the solid mechanisms of evolutive interpretation, provides a relief that there is still protection of judicial independence and the adaptive character of the Convention.[266] Political dialogue should not demand how the Court ought to interpret the Convention, but asking for guidance regarding the application of the existing principles to new geopolitical challenges.[267]

Thus, the theme of instrumentalization has shown that there can be responses to contemporary migration crises that do not need the abandoment of the Convention's established protection standards, but to have faith on the Convention having the capacity to function as a living instrument, with experience in accomodating new factual realities while maintaining long-lasting principles.

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264 Ibid. §39
265 Forde and Donald. (n. 221)
266 Glas and others. (n. 224)
267 Forde and Donald. (n. 221)

4.3.4 New Approaches and Third-Country Returns

The Declaration finalizes its migration section with a commentary on procedural and structural aspects of migration governance including decision-making efficiency and, most controversially, what the Declaration defines as "new approaches", including the cooperation with third countries regarding asylum processing and returns. In a way, this becomes alarming, because this document is not being used as a reaffirmation of principles, or as a acknowledgement of challeges, but claiming an authority for the application of the Convention that in theory it shouldn't have. The support for policy innovation, which some Member States have already been wanting to pursue, puts the Court in a position of stressed tension.

The most politically salient paragraphs address 'new approaches' to migration management. Paragraph 45 confirms that States 'may establish their own immigration policies, which may include co-operation with third countries, provided that they continue to fulfil their Convention obligations'. Then, paragraph 46 includes as a possible option the processing of asylum requests in a third country, third country 'return hubs', and the cooperation with countries of transit. Lastly, paragraph 47 highlights the importance of 'fair and efficient procedures for the return of persons found not to be in need of international protection'.

Including 'return hubs' and third-country processing makes the Declaration properly political. These practices entail asylum applications being processed outside the territory of the receiving State, where individuals are held in third countries pending the outcome of their claims, or refugees are sent to designated 'safe' nations. Specifically, return hubs function as another method of outsourcing migration control, with offshore transit or detention facilities designed for the centralization and expedition of deportation of rejected applicants, for the purpose of avoiding obligations falling under their jurisdiction, similarly to the pullback practices. This has generated high controversy, for example, with the United Kingdom's Rwanda scheme.[268] The critical question is whether such arrangements are compatible with the provisions under the Convention. Specifically delegating processing to a third country may not guarantee adequate protection under their legal frameworks. In fact, the Rwanda scheme failed in its realization because, among other elements, the asylum system did not follow the wide approach to subsidiary protection during civil wars, as it was established in the European system.[269]

[268] Vedaschi and Graziani (n. 7) 191
[269] Ibid.

While valuing the European unity in the adoption of the Declaration, the representative of Spain expressed its dissociation with such practices, in the session of the Committee of Ministers, in Chișinău, issuing a national statement.[270] Approaching its 50th anniversary of membership in the Council of Europe in 2027, Spain upheld its unwavering commitment to active multilateralism, the rule of law, and a human rights-based approach to migration. 'Spain expresses its opposition to return hubs as a tool to manage migration. We deem such a mechanism not to be in compliance with human rights and dignity.'[271] Spain stood as a principal defender of the universality of human rights and the independence of the Court, refusing to align with any language that could imply support for externalized migration management mechanisms. Spain was not a signatory in any of the State-led initiatives but hosts one of the highest numbers of asylum-seekers in Europe, and in turn, took on efforts for regularization of migrants and vouched for the legal rights of migrants.[272] In 2026, Spain became the example on how migration management does not mean the disregard of international institutions and human rights principles.

Interestingly, the timing of the Declaration becomes significant in this regard, as its adoption happened only a month short of the entry into force of the EU Pact on Migration and Asylum, on 12 June 2026.[273] This legislative initiative includes provisions for accelerated border screening, reducing individual appeal opportunities and new form of arrangements for return. This situation suggests that the Declaration might have been designed, in a way, to provide coverage politically and legally to these quite questionable provisions of the EU Pact.[274]

The Declaration is not amending in any way the Convention formally and the ECtHR has not necessarily prohibited such policies as long as the *non-refoulement* principle is upheld, which includes the assessment of risk of denial of the access to asylum proceedings in a, presumably, safe third country.[275] However, this must be read alongside the call for constrain Article 3's scope as it was seen in paragarph 23. Thus, if there is a subtle redefinition of the obligations under the Convention to lower the standards of protection, that means such initiatives will offer even less protection, as there is a lower threshold to be considered compliant with the Convention.

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[270] Committee of Ministers, *Draft Minutes of the 135th Session (Chișinău, 15 May 2026)* (Provisional, CM/PV(2026)135-prov, 1 June 2026) Spanish intervention
[271] Ibid.
[272] Forde and Donald. (n. 118)
[273] Forde and Donald. (n. 221)
[274] Ibid.
[275] Glas and others. (n. 224)

In the end, as the Commissioner for Human Rights said in the Chişinău Session, 'assumption that adjusting the law or practice of the Convention and the Court … will somehow axiomatically change practice on the ground – for instance, that it would impact irregular migratory flows – is not grounded in fact'.[276] Truth is that multiple non-legal factors, as it can be resource constraints, administrative delays, for example, play a bigger role in the gap between removal orders and the actual removals.[277] Thus, throughout the Chişinău process, the targeting of the Court's interpretative authority and application, claiming to be the main driver of domestic migration crisis, is essentially misguided and very dangerous. Treating the living instrument doctrine as a political scapegoat, the discussion has been framed as the necessity for rights to be restricted rather than actively resolving the more operational challenges of migration governance.

However, not everyone seems as alarmed. For some scholars, the Declaration was not 'as bad as it could have been', for others though, it essentially 'codified' external political pressure, that at the end of the day, works.

4.4 Dialogue or Constraint? Competing Readings of the Declaration

Since the agreement that a political declaration was going to be adopted, communicated in December 2025, scholars were not necessarily convinced that this document would properly address the political landscape the Convention system was under at the time. It certaintly was a good decision to bring the discussion back to the political bodies of the Council of Europe, unlike the Letter of the Nine, and thus reinforcing the role of the organization. However, as expressed in earlier sections, this matter becomes critical when thinking about the target of the political pressure, which is the Court. In the end, political means are being used to either reshape or reaffirm the role of the ECtHR, creating risks to undermine their judicial independence.

After its adoption, there is not an answer, but more fragmentation. Some viewed the Declaration as an opportunity for genuine institutional dialogue capable of reinforcing the Convention's legitimacy while preserving judicial independence, others strongly disagree. This declaration may as well institutionalize

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[276] Draft Minutes of the 135th Session (Chişinău, 15 May 2026) (n. 270) Michael O'Flaherty's intervention
[277] Alice Donald and Andrew Forde, 'Briefing on the Chişinău Declaration' (Dublin European Law Institute Report and Submissions No 2/2026, 2026)

external political pressure, creating a problematic expectation that the Court should exercise more judicial restraint in sensitive migration cases.

4.4.1 Reading one: Constructive Institutional Dialogue

The first perspective considers the Chișinău Declaration as a legitimate exercise of institutional dialogue within a system of shared responsibility. It is perceived that the Declaration, by trying to establish a balance to mitigate the tensions between the Court and the Member States, is overall strengthening the system. Donald and Forde see the Declaration as a formalized channel of dialogue and based on legal procedures, such as through its unanimous adoption at the 135th Committee of Ministers Session.[278]

Instead of bypassing the Council of Europe, the Chișinău process brought the conversation back into the Committee of Ministers, transforming unilateral political complaints into an objective analysis of Strasbourg's case law. Paragraphs 48, 49 and 52 explicitly welcome this 'open, informed and constructive dialogue,' pointing to established legal mechanisms like third-party interventions and Protocol No. 16 as the possible avenues for ongoing engagement.

The Declaration has as well acknowledged State concerns, some may say that exclusively, and by integrating them into the text, the Declaration is seeking to reinforce public confidence and State complience.[279] Paragraph 16 warns that failing to address complex, migration-related challenges 'may weaken public confidence in the Convention system'. Thus, addressing these realities directly, such as the 'sovereign right to to decide on and control' borders (§18) and the burden placed on frontline States (§35), was deemed as an essential move to prevent a more catastrophic legitimacy crisis, such as non-compliance or outright withdrawal.

Thus, it is perceived that the text of the Declaration successfully preserves the Court's judicial autonomy while validating state interests. Specifically, the Preamble has stated that Member States support the independence of the Court, and adding to the paragraph on the authority of interpretation (§12), the document is not altering in any way or undermining the Convention system, but merely asking for more transparency when it comes to judgements in politically sensitive areas.

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[278] Forde and Donald. (n. 221)
[279] §48 of the Chișinău Declaration (n. 5)

4.4.2 Reading two: Institutionalization of Political Pressure

Nonetheless, it is not the opinion of everyone that the Chișinău Declaration represents a balanced dialogue, but looks more similar to a 'codification' of asymmetric political pressure designed to limit the Court's interpretative authority in favor of greater judicial restraint.

Critics of the Declaration such as Möller argue that the Declaration is integrating into the formal systems of the Council of Europe external political hostilities.[280] The result of this could be an influence on the Court's action in future cases, or at the very least, higher attention to their reasonings. This is exemplified with the commentary on the 'instrumentalization' of migration, under the paragraphs 37 to 40, where critics argue that it imposes improper pressure on the Court regarding the cases currently pending before the Grand Chamber.[281]

The principle of subsidiarity is the most central element of the Declaration, and it is considered to be weaponized, alongside process-based review, to subtly encourage judicial passivism. Most importantly, it goes beyond judicial restraint, this perspective warns that Chișinău normalizes a dangerous precedent where political bodies dictate the substantive meaning of absolute human rights protections.[282] Again, the section on Article 3 explicitly pressures the Court to keep the minimum level of severity required to trigger the absolute prohibition of ill-treatment 'high and constant' to avoid 'unnecessary constraints' on expulsions (§23). As well, it attempts attempts to restrict non-refoulement protections regarding poor healthcare (§25), socio-economic hardships (§26), and cumulative detention conditions (§27).

The Chișinău Declaration has been adopted unanimously by the Member States, but a wrong assumption would be that such document can be reduced to a single narrative. States, NGOs, and scholars have voiced their agreements and concerns over the text of the Declaration. Whether the impact of Chișinău will be a restoration of public trust and long-term complience, or a subtle redirection towards greater judicial retreat to dilute protection standards, will depend on how its principles are applied, specifically on migration-related situations. The document's legacy will be reflected on the living instrument doctrine where, if protected, it will represent a tool of resilience to face political movements destined to lower the

[280] Möller. (n. 216)
[281] Forde and Donald. (n. 277)
[282] Möller. (n. 216)

standards of protection. However, if a greater role is given to subsidiarity, the doctrine will fall under the hands of national authorities seeking reverse evolutive interpretation.

Chapter 5: Judicial Resilience or Judicial Retreat?

The discussions carried through these chapters converge on a single anxiety: the living instrument doctrine, developed to ensure that Convention rights remain practical and effective, is now at risk of being turned against its own purpose. The Letter of the Nine challenged the doctrine through appeals to the Convention's 'original intentions,' while the Chișinău Declaration, despite explicitly reaffirming evolutive interpretation, situates it within an enhanced framework of subsidiarity and process-based review. This is leaving an ample space for a potentially regressive use of dynamic interpretation, relying on references to present-day conditions and unforeseen circumstances to justify restrictions rather than expansions of rights of migrants. Thus, the living instrument doctrine is facing political backlash aimed at changing the direction the wind blows.

Nonetheless, political pressure has long accompanied the Court's work. Earlier reform processes, Brighton and Copenhagen, similarly used the language of subsidiarity, dialogue, and the margin of appreciation in attempts to recalibrate the relationship between national authorities and Strasbourg. However, despite such tense periods, the Court's independence and the continuing vitality of the Convention's interpretive framework endured. Thus, to answer the question of whether the living instrument can still serve as a tool for resilience in light of Chișinău, it is important to have in mind its proven capacity to survive recurrent waves of political contestation without yielding to majoritarian pressures.

5.1 Political Pressure, Principled Resistance and Threats of Withdrawal

The ECtHR occupies quite a vulnerable position, considering that its mission is to hold Contracting States accountable to standards they have themselves ratified, and because it does so by protecting groups who are frequently 'unpopular': foreign nationals, prisoners, religious or sexual minorities. It is 'particularly susceptible to claims of illegitimacy' precisely because of the perception that it is a 'foreign court' in areas where states protect their sovereignty, thus, political contestation is practically invited.[283] Chișinău represents, then, an unprecedented conflict, but the most recent version of a repertoire States have relied upon before.

[283] De Londras and Dzehtsiarou (n. 51) 1

5.1.1 The Precedent of Brighton and Copenhagen

Since Interlaken in 2010, Member States have used high-level political declarations, Izmir, Brighton, Brussels, Copenhagen and Reykjavik, as an instrument to 'nudge' the Court in a preferred direction.[284] Donald and Forde note that even if these declarations are non-binding, they are still strongly persuasive for the Court's functioning, as judges cannot escape 'the real world' and the perspective of States.[285] The Brighton Conference of 2012 is regarded as a turning point, from which Voeten traces the Court's institutional pattern of retreating into subsidiarity when confronted with criticism, a pattern formalized through Protocol 15.[286] Copenhagen, in 2018, had a similar script. The Danish government, hosting the conference, circulated a draft that sought to extend the margin of appreciation dramatically and to submit the Court to a, sort of, continuous political 'dialogue' through the Committee of Ministers.[287] Had it been adopted as drafted, this would have constituted the kind of institutionalized pressure that scholars now warn of in relation to Chișinău.

Luckly, it was not adopted as drafted, and the final Copenhagen Declaration ended up affirming that the Court has the final adjudicatory decision on Convention violations. On another hand, the Declaration did extend the language around a 'strong reasons' standard for overturning domestic proportionality assessments, nonetheless relying on jurisprudence the Court itself had already developed in *Von Hannover (No. 2)*.[288] Ulfstein and Follesdal interpret this outcome as evidence that fears of a 'democratic deficit' produced by an independent Court are often overstated, while a different democratic deficit, that of States negotiating constraints on judicial independence behind closed doors, deserves more scrutiny.[289] Read against Chișinău, Copenhagen offers a cautious precedent: political pressure aimed at rebalancing the Convention system toward the State has repeatedly reached the negotiating table, thankfully, without succeeding in formally subjugating the Court, even when, the initial ambition was more aggressive than what was eventually adopted.

These conclusions do not to suggest that political pressure has been totally ineffective. Yıldız recognizes a post-2010 'age of backlash' in which the Court has exercised 'selective forbearance' in cases

[284] Forde and Donald. (n. 215)
[285] Ibid.
[286] Vetoen. (n. 237)
[287] Geir Ulfstein and Andreas Follesdal, 'Copenhagen – Much Ado About Little?' (*EJIL: Talk!*, 14 April 2018)
[288] Ibid.
[289] Ibid.

concerning migrants and refugees, recalibrating its Article 3 jurisprudence in response to state criticism.[290] Tzevelekos describes a similar development following the backlash to *Hirst (No. 2)* regarding allowing prisoners to vote, where the Court in *Scoppola (No. 3)* retreated from the more demanding standard articulated in *Frodl,* further explained in section 5.2.[291] These examples show that evolutive interpretation may bend to political pressure. Yet the fact that such retreats remained limited instead of systematic suggests that the living instrument doctrine still retains the capacity for recovery and rediscovery.

5.1.2 Principled Resistance and the Threat of Withdrawal

Political declarations have been described as a slower, negotiated form of pressure, contrasting to harsher methods such as principled resistance and the threat of withdrawal from the Convention system. Liakopoulos describes principled resistance as a formal type of disobedience different from simple non-compliance of a judgment, where a State frames its refusal to execute a ruling as a legitimate objection, grounded in an alleged excess of judicial activism by the Court, for example.[292] This was the phenomenon with the United Kingdom's decades-long refusal to fully implement *Hirst,* where a blanket disenfranchisement for prisoners was deemed incompatible with the Convention. However, and this is better illustrated in cases of politically motivated detention, there are little avenues for counterreaction, limited to infringement proceedings, which were never brought against the United Kingdom.[293]

Withdrawal from the Convention system itself is, at the moment, more of a political threat than an active measure. Article 58 ECHR permits it only after five years of membership and on six months' notice and does not release the withdrawing State from responsibility for violations that occurred prior to the denunciation taking effect.[294] Throughout the Convention's history, only Greece has withdrawn in 1969 and re-joined 15 years later, thus such occurrences are fairly uncommon. Donald and Forde's have counted the alternatives currently circulating in political discourse, being a partial derogation under Article 15, reservations under Article 57, or a proposed 'boomerang strategy' of withdrawing and rapidly re-acceding on more restrictive terms.[295] They conclude that each option is either legally foreclosed,

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[290] Yıldız. (n. 66)
[291] Tzevelekos. (n. 4)
[292] Dimitris Liakopoulos, 'Principled Resistance and Future of the European Court of Human Rights' (2024) 24 Revista Estudios Jurídicos. Segunda Época e8505.
[293] Ibid.
[294] Article 58 ECHR
[295] Forde and Donald. (n. 215)

practically unworkable, or would constitute an act of bad faith, but nonetheless, it still retains its leverage: threat whose value lies precisely in not being carried out.

The United Kingdom is currently testing the limits of such leverage. The far-right political party, Reform UK, has made withdrawal a priority, and the Conservative Party has moved toward adopting it as policy, demanding that parliamentary candidates commit to leaving the Convention.[296] Donald, however, sees that such position is practically reduced to a minority, even among the States that criticize the Court's migration jurisprudence.[297] Denmark's Mette Frederiksen, despite adopting one of Europe's hardest lines on immigration, praised the Convention at the 2023 Reykjavik summit as 'one of the world's best examples of how human rights can be safeguarded', and Italy's Giorgia Meloni reaffirmed, her country's commitment to the Council of Europe.[298] These positions were not that different at the Chișinău Session, thus a pattern emerges of States probing and teasing the robustness of the Convention system through declarations, threats and selective non-compliance, without, so far, following through into actual exit.

In essence, it should provide reassurance to the resilience of the living instrument doctrine, faced with the Chișinău process, but the attention is now on whether the Court will admit a regressive application of the principle, in order to appease the defying States and avoid not only non-compliance, but an unprecedented chain of withdrawals.

5.2 Evolutive Regression: Can Rights Evolve Backwards?

It is true that when we speak of evolutive interpretation, we think of progressive evolution. In human rights jurisprudence, the living instrument doctrine functions as a mechanism which would expand and increase the standards of protection in light of "present-day conditions". However, if the Letter of the Nine demonstrated something is that the progressive conception may not be assured, it is not however binding. The conversation among scholars has now turned to a possible regressive evolution, shaped by the contemporary political and structural challenges, and resulting in the watering down, narrowing or rolling back on the previously recognized protections.

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[296] Alice Donald, 'A Badge of Dishonour: Will the UK Conservatives Follow the Far-Right Towards ECHR Withdrawal?' (Verfassungsblog, 29 September 2025)
[297] Ibid.
[298] Ibid.

Londras has questioned whether the ECtHR should ever be open to formally restricting rights under sovereign duress.[299] In a way, the ECtHR has began to backtrack. As mentioned, the Court has entered what is called the 'age of subsidiarity' and has approached migration related cases carefully and with a strong self-restraint. As well, some scholars have agreed that the Court has applied such regressive evolution, but in rare ocasions, and never admitting error.[300] This has been done either through the judgement of another case that would override previous case law, or readjusting existing standards.

It is exceptional that the Court would further restrict the protections they have granted, however, and unfortunately, it happened when trying to navigate systemic resistance from powerful Member States. To provide an illustration, one should turn to the Grand Chamber's decision in *Scoppola v. Italy* (No. 3) and the retraction on the standards previously set when it comes to prisoner voting rights.[301] Parting from the intial ruling of *Hirst v. the United Kingdom* (No. 2)[302], which declared the UK's blanket ban on prisoner voting incompatible with the Convention without detailing specific compliance thresholds, the Chamber in *Frodl v. Austria* had sought to narrow the state's margin of appreciation by dictating that disenfranchisement could only be Convention-compatible if it were individually decided by a judge in each specific case.[303] Such demanding requirement sparked an even higher outrage, including the UK. Thus, through this political ecosystem, the Grand Chamber in Scoppola (No. 3) validated Italy's general legislative framework, which automatically disenfranchised anyone sentenced to more than three years in prison without individualized judicial assessment.[304] The Court overrode Frodl and adjusted its interpretation to allow States more leeway, demonstrating how intense domestic pushback can successfully drive a regressive evolution in rights protection.

The second form of regression takes the shape of the re-clarification of the standards set. In *Lacatus v. Switzerland,* the right to beg had been progressively addressed under the umbrella of "private life" protected by Article 8 ECHR, but in *Dian v. Denmark*, the Court declared a highly restrictive, non-absolute ban on begging to be Convention-compatible.[305] For some, such change is quite abrupt and claim the Court "distorted its own words", in a way falling victim of external pressure. This decision

[299] De Londras and Dzehtsiarou (n. 9) 102
[300] Ibid.
[301] *Scoppola v. Italy* (No. 3). Application number 126/05 (2012)
[302] *Hirst v. the United Kingdom* (No. 2). Application number 74025/01(2005)
[303] *Frodl v. Austria.* Application number 20201/04 (2010)
[304] *Scoppola v. Italy* (No. 3) (n. 122) §106
[305] *Lacatus v. Switzerland.* Application number 14065/15 (2021) and *Dian v. Denmark.* Application number (44002/22)

even caused disagreeements among the Court itself, and Judge Serghides stated that the living instrument doctrine should not be used in a manner that negates, abrogates, or renders a fundamental right impractical and ineffective under the pretext of other considerations.[306]

The Court is simply finding itself in an impossible position. Using regressive evolution waters-down human rights protections and provides the message that if the State makes sufficient noise, the Court will sway their way. On another hand, if the Court has a fiercer standard-setting, not only criticism on judicial activism would be prominent, but it risks non-compliance (as it was seen in *Hrist v UK*). If States systematically ignore judgements, the Convention system risks losing its authority. Breuer argues that from *Tyrer* to *Selmouni* and *KlimaSeniorinnen*, the living instrument doctrine has functioned strictly as a 'one-way street' toward expansion.[307] Because human rights are inherently counter-majoritarian safeguards against majoritarian overreach, allowing the doctrine to justify a step back in protection due to pressing societal attitudes would be, in his words, 'wholly unpersuasive', and doing so would reduce human rights to a mere bargaining chip in the Court's struggle for institutional survival.[308]

To Yıldız's observation of 'selective forberarance' post-2010, it should be added that the use of regressive evolution is not even uniform, but concentrates heavily on highly politicized areas like immigration control and refugee rights while leaving uncontroversial domains untouched.[309] Yıldız expresses a noticeable contrast with the post-1998 Court as being historically audacious in expanding Article 3 positive obligations and lowering severity thresholds, when the contemporary Court has frequently backtracked on progressive rulings concerning migrants to please hostile States. However, Larché argues that there is no broader trend of regressive jurisprudence in migration cases, but a set of disguised, micro-regressive episodes concentrated in a narrow scope of highly sensitive migration issues.[310] Even skeptics of an overarching 'age of regression' can agree that the pattern exists exactly where this thesis locates it, in politically weaponized areas concerning foreign nationals.

As seen in Section 2.4.2, the Signatory States of the Letter of the Nine do not seek a return to the intention of the drafters of 1950, but to use the living instrument in a regressive manner to diminish current

[306] Ksiazek. (n. 48) 509
[307] Breuer. (n. 230)
[308] Ibid.
[309] Yıldız. (n. 66)
[310] Larché. (n. 122)

standards of human rights protection in the field of migration, for example, by demanding greater leeway in the expulsion of foreign nationals. A similar approach has been taken in the Joint Statement by the 27 Member States, and, more consequentially, in the Chișinău Declaration itself, where the living instrument doctrine is invoked in language that, while formally reaffirming the doctrine, indirectly holds the qualification that it 'ensures applicability in response to novel challenges', wording Breuer sees as an invitation to downsize, rather than expand, the protection owed to migrants.[311]

In conclusion, a historical tool of progressive expansion is now being weaponized by States to demand formal regression, through the creation of exceptions for entire categories of individuals who are deemed "unwanted" in Europe. The conversation about evolutive regression is just another way of addressing the susceptibility of the ECtHR to State pressure, and the answer may not be what we like. The exceptionalism that was once believed to characterize a regressive application of the living instrument doctrine now threatens, through the Chișinău process, to become a permanent device for weakening human rights protection standards.

5.3 Can the Convention Remain a "Living Instrument"?

The question that closes this chapter is not merely whether the Court will bend to the Chișinău process, but whether the living instrument doctrine itself can survive being asked to do something it was never built for, and that entails a complete departure of its function. Yet, reaffirming the doctrine as untouchable is not the same as explaining how the Court can keep using it credibly in an environment openly hostile to it.

Flattery answers that the Court has already begun quietly replacing the doctrine's 'heavy-handed blows' with incrementalism, by building rights protection case-by-case through analogous reasoning and the particularisation of facts. This lets the Court continue to develop Convention rights while triggering less of the legitimacy criticism that comes from an explicit invocation of 'present-day conditions,' and it is more compatible with a caseload too large and varied for strong decisions.[312] However, this method remains futile where the Court faces genuine urgency or deep uncertainty, in the line with the framing of migration jurisprudence. If the future of evolutive interpretation is by incrementalism, then, it is a future

[311] Breuer. (n. 230)
[312] Flattery. (n. 64)

of slower, more defensible progress, but also one less capable making decisive interventions, such as those that produced landmark rulings such as *Hirsi Jamaa* or *M.S.S.*

A much harder question is whether the Court's direction toward subsidiarity and deference is actually at the price of institutional survival, or whether it is a strategy adopted on a mistaken idea. Voeten's empirical work finds little evidence that the public has any preference for a Court that prioritizes deference, but the driver of support or opposition is the substance of its rulings, not necessarily who made it.[313] If this is correct, then the Court's process-based coping strategy may not even achieve the legitimacy it is designed to achieve, but simply makes less favourable outcomes for a population, migrants and asylum seekers, that was never the audience the strategy was meant to appease.

This is the deeper tension in the debate over whether the Convention can remain a living instrument: democratic resilience and institutional survival are not obviously the same, and may in fact go in opposite directions in some circumstances. A Court worried with its own survival is incentivised toward the kind of ‘selective forbearance’, sacrificing the rights of the least politically popular applicants to preserve the complience of powerful States. On another hand, a Court committed to democratic resilience, by contrast, would treat the countermajoritarian function of human rights as the very reason the living instrument doctrine cannot be switched, regardless of the political cost. The Chișinău process forces the Court to choose, at least implicitly, between these two conceptions of its own mandate. Whether the Convention remains a living instrument in any meaningful sense will depend less on whether the phrase survives in the Court's vocabulary than on which of these two logics it is ultimately deployed to serve.

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[313] Voeten. (n. 237)

Conclusion: The Future of Strasbourg After Chișinău

> 'That system may indeed be imperfect. But it is the only one that we have. What is needed is not to turn one's back on that system but to work within it, to make it more effective and, in doing so, ensure that, 60 years after it came into effect, the Convention becomes not a dead letter but the vital and living instrument it was always supposed to be.' - Sir Nicolas Bratza, Former President of the European Court of Human Rights.[314]

The adoption of the 2026 Chișinău Declaration seemed the end of the discussions that occupied the 75th anniversary of the Convention. Particularly, this Declaration became the reason to discuss how evolutive interpretation developed throughout migration jurisprudence, in the living instrument doctrine. Through landmark rulings like *Soering*, *Chahal*, and *M.S.S.*, the Court established *non-refoulement* obligations, affirmed the absolute nature of Article 3, and included a victim-centered lens into European border management. Similarly, its Article 8 jurisprudence gradually limited domestic deportation powers, moving toward a recognized 'right of return' for expelled foreign nationals.

However, as migration became increasingly securitized and framed through narratives of 'hybrid warfare' and 'instrumentalization,' this progressive expansion triggered severe political backlash. The Letter of Nine and the subsequent Joint Statement created an unprecedented challenge to Strasbourg, weaponizing originalist rhetoric to indirectly demand an evolutive regression that would lower protection standards for politically unpopular minorities.

The Chișinău Declaration represents the Committee of Ministers' institutionalized attempt to manage this profound conflict. By textually balancing the preservation of the Convention system with strong appeals to state sovereignty, the Declaration places the living instrument doctrine in a highly ambiguous position. The Declaration formally preserves the Court's final interpretative authority under Article 32, but it aggressively promotes the principle of subsidiarity and process-based review. This structural shift risks transforming judicial self-restraint into a form of passive deference, providing domestic authorities

[314] Sir Nicholas Bratza, 'Living Instrument or Dead Letter – the Future of the European Convention on Human Rights' (2014) 2 EHRLR 116, 128.

with a procedural 'passport to compliance' regardless of how restrictive their substantive immigration policies may be.

The pending Grand Chamber rulings regarding the 2021–2022 border crises in Poland, Lithuania, and Latvia will end up as the ultimate testing ground for this new political reality. If the Court bends to the exceptionalist pressures codified in the Chișinău process, permitting geopolitical manipulation or individual migrant conduct to find unwritten exceptions to Article 3, the living instrument doctrine will be turned against itself, operating as a mechanism for its own contraction.

Moving forward, the ECtHR faces a fundamental dilemma. Either attempt to preserve institutional survival, by appeasing to hostile Contracting States, and thus, sacrificing the rights of vulnerable foreign nationals to prevent compliance crises or potential withdrawals. Or, vouch for democratic resilience by upholding the core counter-majoritarian mandate of human rights, maintaining that the living instrument doctrine remains a strictly progressive framework that cannot bend to majoritarian anxieties or sovereign duress.

In conclusion, the future of Strasbourg depends on which logic the Court chooses to follow. For the Convention to remain a genuine living instrument, the Court must demonstrate the resilience necessary to resist regressive political waves, ensuring that human rights protections remain practical and effective for all individuals across Europe.

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