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Fairness in the Practice of International Law and Organisations: The Council of Europe's perspective

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Abstract

This paper considers how the principle of fairness is incorporated within the framework of the Council of Europe. It first explores how the principle is embedded within the internal procedures and practices of the organisation. The paper then turns to the expulsion of the Russian Federation from the organisation, including its legal consequences in relation to Council of Europe ("CoE", "the organisation") conventions. Finally, it discusses the interpretation and application of this principle in the jurisprudence of the European Court of Human Rights. The foregoing analysis is conducted by reference to recognised indicators of fairness and rule legitimacy.

Keywords

Council of Europe; principle of fairness; rule of law; staff regulations; expulsion procedure; closed conventions; open conventions; right to a fair trial.

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1. Introduction

In 2024 the Council of Europe will celebrate its 75th anniversary. At the 4th Council of Europe Summit held in Reykjavík in May 2023, the Heads of State and Government of the forty-six member states agreed to strengthen the Council of Europe and its work in the field of human rights, democracy and the rule of law by adopting a declaration on democratic principles, recommitting to the European Convention on Human Rights ("ECHR") and developing tools to tackle emerging challenges in the areas of technology and the environment.

Although neither the Reykjavik declaration nor the CoE Statute uses the term "fairness", this foundational principle is reflected in many aspects of the organisation's work. This contribution will demonstrate how the principle of fairness is embedded within the framework of the CoE and how it permeates procedures and practices. Particular focus will be given to the expulsion of the Russian Federation from the organisation, including its legal consequences in relation to CoE conventions as well as the interpretation and application of this principle in the jurisprudence of the European Court of Human Rights ("ECtHR", "the Court").

As a preliminary remark, it should be observed that the principle of fairness is relatively seldom explicitly invoked in the context of the CoE primarily because its plasticity makes it difficult for international organisations to assess the fairness of their activities and measures. Instead, related principles such as the principle of transparency or legal certainty are more frequently cited due to their relatively consistent application by national and international courts. Nevertheless, as already Thomas Franck observed in 1995, "[t]he questions to which the international lawyer must now be prepared to respond, in this post-ontological era, are different from the traditional inquiry: whether international law is law. Instead, we are now asked: is international law effective? Is it enforceable? Is it understood? And the most important question: Is international law, fair?"[1]

The principle of fairness originated in the context of the determination of rules aimed at distributing resources or goods within a community in an equitable manner. The notion of

[1] Thomas M Franck, *Fairness in International Law and Institutions* (Oxford and Clarendon Press, 1995) 6.

distributive justice refers to that which is divisible and encompasses the idea of proportional or meritorious equality.[2] Equity, which could be equated with the principle of fairness, is at the origin of concepts such as good faith, *pacta sunt servanda*, unjust enrichment, estoppel, acquiescence, abuse of rights, *ius cogens*, proportionality, and *rebus sic stantibus* and is also at the root of human rights.[3] The notion of "fairness" is both subjective and the product of historical and social factors. Indeed, there is a certain tendency to define the principle negatively (or in hollow) in relation to what a given society considers to be "unjust" or "inequitable".[4]

Nevertheless, the content of the principle derives from two primary components: legitimacy and distributive justice.[5] These two components perform different functions. Legitimacy is primarily a procedural matter that requires legal mechanisms to be in place to ensure the creation, interpretation, and application of law. Put another way, the purpose of legitimacy is to ensure a certain degree of order.[6] While, the CoE hardly deals with distributive justice, the notion of legitimacy permeates much of the organisation's work. In this regard, legitimacy within the organisation is fundamentally a question of procedural fairness.

In his "fairness thesis", Thomas Franck identified four indicators of rule legitimacy.[7] First, rules should be coherent; that is, they must form part of a system and be applied uniformly in similar instances, with any exceptions duly justified. Second, rules should benefit from a symbolic validation within the social order. Third, there should be an "adherence" or a clear relationship between primary substantive norms and secondary underlying rules deriving from them. Finally, and most importantly, rules should be determinate in order not to be the subject of individual interpretation and circumvention. A balance must be achieved between a certain level of indeterminacy, which is necessary to avoid unjust and unacceptable outcomes caused by automatic application of a rule, and a certain level of determination which ensures a minimum level of legal certainty. In this way, room is left for an authority, in principle a judicial one, to adapt the rule to specific circumstances.[8]

2. Fairness and rule of law in the Council of Europe

As the CoE Administrative Tribunal recalled, "the Council of Europe, by its very nature and the values it defends, has a duty to be an organisation upholding the rule of law."[9] Within the organisation, the Directorate of Legal Advice and Public International Law ("DLAPIL") – the Council of Europe's legal service – is tasked with ensuring that the principles of the rule of law are upheld and respected. Outside the organisation, the CoE has made an important contribution toward the common understanding of rule of law principles; in particular, through ECtHR case law and the Venice Commission's "Rule of Law Checklist".[10] The Checklist acts as an assessment tool through specifying a series of detailed benchmarks and has been

[2] Catharine Titi, *The Function of Equity in International Law* (Oxford University Press, 2021) 76.
[3] Ibid, 161.
[4] Iain Scobbie, "Tom Franck's Fairness" (2002) 13(4) *European Journal of International Law* 909, 916.
[5] Ibid, 910.
[6] Ibid.
[7] Ibid, 916.
[8] Ibid.
[9] *Staff Committee (XIV) v. Secretary General*, Appeal no 540/2013 (Decision of the Council of Europe Administrative Tribunal, 13 March 2014) para 41.
[10] European Commission for Democracy through Law (Venice Commission), "Rule of Law Checklist" (2016) CDL-AD(2016)007.

referred to as "one of the few widely accepted conceptual frameworks for the rule of law in Europe."[11]

At the heart of the struggle to conceptualise the rule of law lies the choice between a formal ("thin") and a material ("thick") perception.[12] The distinction between these two notions is central to an understanding of the rule of law. Thinner notions focus on "process and form". They can apply to a great variety of different historical, political and cultural contexts. Thicker notions of the rule of law, while incorporating the thinner notions, go beyond them in also incorporating values and material principles such as democracy and the protection of human rights. In a nutshell, they are concerned with the fairness of the content of legal norms.

Within the CoE, the latter understanding prevails. To give just one example, fairness is expressly included within the CoE's recent major reform of the Staff Regulations that took place in 2022. Article 2.1 of the reformed Regulations stipulates: "The Council of Europe shall at all times act with fairness and due care in its relations with staff members." Though it is an entirely new provision which has not yet been the subject of any case law, it seems that fairness in this central norm of the new staff regulations cannot be understood merely as requiring procedural regularity. It also has a substantive content meaning that every staff member has "the right to be treated with respect and dignity and the right to expect a positive and harmonious working environment that is free of harassment or any other disrespectful behaviour."[13] Fairness is also explicitly mentioned as a requirement for the selection of new staff members (Article 4.2) and in the elections of the staff committee (rule 1310.3). As Robert McNamara (then President of the World Bank) observed 40 years ago, requirements of due process and fair treatment enhance the morale of staff and improve the quality and efficiency of their work.[14]

3. The expulsion of the Russian Federation from the Council of Europe

While the Russian Federation's war of aggression against Ukraine shocked the world, the ramifications were immediately felt within the CoE since the large-scale invasion represented an act of aggression by one member state against another. It constituted a real "*Zeitenwende"* which led to numerous upheavals within the organisation, particularly from a statutory point of view as articles and procedures of the CoE Statute were suddenly under consideration that had never, or only partially, previously been implemented.

The principle of fairness was an underlying concern when devising the measures relating to the expulsion of the Russian Federation from the CoE. In this respect, while any such measures evidently had to be lawful, it was important that they also be fair, legitimate and certain; especially as international organisations require legitimisation derived from their member states since they lack, in principle, a democratic political process. In this context, an

[11] Sergio Carrera, Elspeth Guild and Nicholas Hernanz, "The Triangular Relationship between Fundamental Rights, Democracy and the Rule of Law in the EU: Towards an EU Copenhagen Mechanism" (Centre for European Policy Studies, Brussels, 2013) 17.

[12] Leonard Besselink, "The Primacy of the Rule of Law and Member States" Constitutional Identities' in A. Rosas, J Raitio & P. Pohjankoski (eds), *The Rule of Law Anatomy in the EU: Foundations and Protections* (Hart 2023) 117 et seq.

[13] Council of Europe, "Policy on Respect and Dignity in the Council of Europe" (2023) [1.1].

[14] Cited in Robert A. Gorman, "The *de Merode* Decision, and its Influence upon International Administrative Law" in Olufemi Elias (ed), *The Development and Effectiveness of International Administrative Law: On the Occasion of the Thirtieth Anniversary of the World Bank Administrative Tribunal* (Brill 2012).

overview of the expulsion process will be provided, followed by an analysis using Franck's fairness indicators described above.

On 24 February 2022, the first day of the war of aggression, the Committee of Ministers ("CM") in an extraordinary session decided to examine, without delay and in close-coordination with the Parliamentary Assembly of the Council of Europe ("PACE") and the SG, the measures to be taken in response to the serious violation by the Russian Federation of its statutory obligations as a member state.[15] The very next day, the Minister Deputies agreed to suspend the Russian Federation from its rights of representation in the CoE in accordance with Article 8 of is Statute and gave immediate effects to this decision in respect of rights of representation in the CM and in the PACE.[16.] The exact legal and financial consequences of the suspension were laid out in a resolution of the CM adopted some days later, on 2 March 2022.[17]

Article 8 of the CoE's Statute states that "*[a]ny member of the Council of Europe which has seriously violated Article 3 may be suspended of its rights of representation and requested by the Committee of Ministers to withdraw under Article 7*". [18] This provision has been subject of divergent interpretations, in particular as regards the sequence of decisions to be taken (suspension, invitation to withdraw, exclusion) and its relationship with Article 7 of the Statute which deals with the voluntary withdrawal of a member state.[19] Furthermore, Article 3 recalls the obligation of member states to abide by the intrinsic values of the organisation – human rights, democracy, and the rule of law.

This first procedural stage may be analysed in light of Franck's fairness indicators. First, from the point of view of legal certainty, the existence of this procedure is explicitly provided for in Article 8 which, in turn, refers to Articles 3 and 7 of the Statute. The Russian Federation could therefore have had no doubt as to the existence of such a procedure. Moreover, this procedure is nested within a clear statutory framework in which the link between the various relevant articles (Articles 3, 7 and 8) is spelt out in the Statute. With respect to Frank's second indicator, the measures taken in response by the organisation, given the atrocity of the acts committed by the Russian Federation in flagrant violation of international law and human rights, enjoyed strong support and symbolic, societal and moral validation from the majority of the international community and public opinion.

The determinability of the rule in question is a more delicate matter as the "trigger" for this procedure remains relatively unclear. First, the values of the organisation that must be violated – namely human rights, democracy and the rule of law – are relatively abstract values whose practical breach is difficult to assess. Article 8 of the Statute does not give concrete examples of acts that may be considered to violate these values. Instead, it is left to states, in the framework of the CM, to determine which circumstances enliven this provision. On one view, the involvement of politics opens the door to questions regarding legal certainty of the

[15] Committee of Ministers, "Situation in Ukraine" (Decision, 24 February 2022) CM/Del/Dec(2022)1426bis/2.3.

[16] Committee of Ministers, "Situation in Ukraine – Measures to be taken, including under Article 8 of the Statute of the Council of Europe" (Decision, 25 February 2022) CM/Del/Dec(2022)1426ter/2.3.

[17] Committee of Ministers, "Resolution CM/Res(2022)1 on legal and financial consequences of the suspension of the Russian Federation from its rights of representation in the Council of Europe" (adopted by the Committee of Ministers on 2 March 2022 at the 1427th meeting of the Ministers' Deputies).

[18] Statute of the Council of Europe.

[19] On withdrawal and expulsion generally, see the analysis contained in: Council of Europe (DLAPIL), "Role and responsibilities of the Council of Europe's statutory organs with special emphasis on the limitation of membership rights" (2018) 38 *Human Rights Law Journal* 468.

procedure. It is for this reason that some authors note that the statutory documents of the CoE are rather vague regarding the circumstances that may trigger the Article 8 procedure. This led the same authors to consider that: "a more precise trigger would certainly be fairer and more transparent."[20]

Furthermore, leaving aside the "nature" of the values violated, the degree of severity of the violation that is required is not precisely defined. Article 8 uses the wording "*seriously violated*" which indicates that a minor violation, with limited and reversible consequences, would not be considered a sufficient trigger. No clarity is given, however, regarding what would constitute a sufficiently serious breach and no checklist of these violations is provided. In these circumstances, it is left to the discretion of each member state to propose that the CM consider suspension of a member State for a violation of Article 3.[21]

However, a certain level of indeterminacy in the rule is necessary to leave some room for flexibility and avoid arriving at absurd results that would not take into account specific circumstances. Given the range of unpredictable circumstances which could activate this provision (such as imprisonment of political opponents, wars and acts of war, violent repression of peaceful movements, to name a few) it would be difficult, and arguably counterproductive, to attempt to list them all. Related materials and precedents can be used to clarify the scope and reach of this rule. The useful contribution of the Venice Commission's "Rule of law checklist",[22] for example, assists in interpreting and applying the fundamental values of the CoE.

Finally, in practice, it seems implausible that, for any member state, an act such as the Russian Federation's war of aggression against Ukraine would not constitute a serious violation of the organisation's fundamental values; particularly in view of its scale, its deliberate character, and the seriousness of the violations of international law (*inter alia*, the principle of the prohibition of the use of force, the violation of a state's territorial integrity, and human rights). Indeed, armed aggression by one member state against another is probably the gravest violation of the fundamental values of the organisation, and consequently of Article 3 of the Statute.

After this first stage of suspension, a second phase of exclusion was initiated. On 15 March 2022, the SG received a communication signed by the Russian Foreign Minister informing of the Russian Federation's withdrawal from the CoE and its intention to denounce the ECHR. However, it was decided not to take this letter of voluntary withdrawal into account as the expulsion procedure had already been initiated against the Russian Federation. Some might argue that this could pose a problem from the point of view of predictability and legal certainty. However, it would be easy to respond to this criticism by saying that a literal interpretation of the text would have enabled the Russian Federation to escape its political and legal responsibilities and would thus have led to an unfair solution that would have run against the purpose of these articles by emptying them of their substance. Thus, having been officially consulted by the CM, the PACE adopted a unanimous opinion on 15 March 2022 that the Russian Federation could no longer be a member State of the organisation.[23] From a political point of view, consultation of the PACE, the second statutory organ with a plural composition representing the different member states and the different political currents within them, is a

20 Kanstantsin Dzehtsiarou and Donal K Coffey, "Suspension and Expulsion of Members of the Council of Europe: Difficult Decisions in Troubled Times" (2019) 68(2) International & Comparative Law Quarterly 443.

21 Ibid.

22 European Commission for Democracy through Law (n 10).

23 Parliamentary Assembly of the Council of Europe, "Opinion 300: Consequences of the Russian Federation's aggression against Ukraine" (15 March 2022).

strong guarantee of transparency and fairness insofar as the unanimous opinion demonstrates the required symbolic validation of the expulsion procedure. Ultimately, on 16 March 2022, the CM decided "that the Russian Federation ceases to be a member of the Council of Europe as from 16 March 2022."[24] From the perspective of fairness, it had to be taken into account that the Russian Federation had committed particularly serious violations of Article 3 of the Statute and, further, did not demonstrate any willingness to stop the armed aggression and related serious violations of international humanitarian and human rights law.

Although a procedure for the suspension of Greece had been initiated in 1969, the CM had never adopted any decision under Article 8 of the Statute. In 1969, the PACE recommended to the CM that action be taken against Greece, "having regard to Articles 3, 7 and 8 of the Statute." However, before the CM could vote on the recommendation of the PACE, Greece announced its withdrawal from the organisation at a CM meeting in Paris on 12 December 1969. Greece's withdrawal from the organisation was hence a voluntary act taken under Article 7 of the Statute, which took effect on 31 December 1970.[25] Today's CoE is a very different organisation from the one existing at the time of the "Greek case". Moreover, the facts of the Greek case are not at all comparable to the situation faced in 2022.[26]

Even if the two procedures under Articles 7 and 8 of the Statute produce the same result – which is that a member state ceases to be a member of the organisation – the two procedures differ in their purpose, scope, and preconditions. Article 7 provides for a unilateral and voluntary withdrawal, where the concerns are mainly of a budgetary nature. Article 8, on the other hand, deals with serious violations of the Statute.

The Rules of Procedure of the Committee of Ministers provide additional clarity in this regard.[27] Once a member state is suspended, the subsequent step to be taken under Article 27 of the Rules of Procedures of the CM is expressed in much clearer language in the French rather than the English version: "*La transformation d'une décision de suspension en décision d'exclusion se fait selon la procédure prévue à l'article précédent, de même que l'annulation d'une décision de suspension*."[28]

The impact of the Russian Federation's expulsion on its participation in CoE conventions

The expulsion of the Russian Federation, and therefore its loss of membership in the CoE, necessarily meant that its participation in Council of Europe conventions had to be reconsidered. This concerned its participation in relation to the CoE's "closed" conventions, open only to CoE member states, and the "open" conventions open to non-member states, as well as a redefinition of the Russian Federation's modalities of participation in those conventions. The fairness of measures adopted in this context may therefore be assessed.

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[24] Committee of Ministers, "Resolution CM/Res(2022)2 on the cessation of the membership of the Russian Federation to the Council of Europe" (adopted by the Committee of Ministers on 16 March 2022 at the 1428ter meeting of the Ministers' Deputies).

[25] Council of Europe, "Russia's expulsion from the Council of Europe – communication to the 62nd meeting of the Committee of Legal Advisers on Public International Law (CAHDI)" (News, 24 March 2022).

[26] Ibid.

[27] Council of Europe, "Rules of Procedure of the Committee of Ministers" (6th revised edition, 2020).

[28] In English: "The procedure specified in the preceding article shall be followed in the event of a decision that a member who has been suspended shall cease to be a member or cease to be suspended".

a. ECHR and other closed conventions

In the case of the closed conventions, problems concerning fairness and legal certainty were much less delicate since these conventions clearly state that the parties must be member states of the Council of Europe. As might be expected, the expulsion meant that the Russian Federation ceased to be a party to these conventions, by virtue of the very articles of those conventions.

As regards the Russian Federation's status in relation to ECHR, both the CM and the Court, acting in harmony, interpreted Article 58 such that the status as High Contracting Party to the Convention would not end immediately after the cessation of membership in the organisation. By analogy to a situation of denunciation of the ECHR by a member state, the CM and the Court considered that a High Contracting Party is released of its obligations under the Convention only 6 months after the cessation of membership, i.e. as of 16 September 2022 in the case of the Russian Federation. It can thus be seen that the application of a constant and widespread practice in treaty law is once again a guarantee of the fairness of this measure.

Accordingly, the Court remains competent to adjudicate on applications directed against the Russian Federation in relation to acts or omissions that occurred until 16 September 2022. This therefore includes the first six months of the largescale invasion of Ukraine, which generated an influx of new applications against the Russian Federation before the Court involving complex questions at the intersection of human rights and international humanitarian law. Although the Russian Government has, since March 2022, abstained from further participation in ongoing proceedings before the Court, it remains duty bound to cooperate with the Court in proceedings where it is a respondent. The ECtHR has set out its approach for the processing of applications against Russia in a series of judgments, namely *Fedotova and Others v. Russia*,[29] *Ukraine and the Netherlands v. Russia*,[30] *Kutayev v. Russia*,[31] and *Svetova and Others v. Russia.*[32] Essentially these rulings explain that the ECtHR is competent to deal with cases concerning acts or omissions which took place before 16 September 2022, the date on which Russia ceased to be a party to the ECHR. The office of judge in respect of Russia having ended, the Court will appoint an *ad hoc* judge from among the sitting judges to examine those cases lodged against Russia within its jurisdiction, and the Court may proceed with examination of applications where the Russian authorities do not cooperate. The failure of a respondent State to participate effectively in the proceedings does not automatically lead to acceptance of an applicant's claims. Instead, the Court must be satisfied by the available evidence that a claim is well-founded in fact and law.[33] As at 31 October 2023, there were 14,150 applications pending against the Russian Federation, roughly 19.1% of the Court's docket.

The CM will, furthermore, continue to supervise the execution of judgments and friendly settlements concerning the Russian Federation. The CM has since taken decisions inviting the

[29] *Fedotova and Others v. Russia* App no 40792/10, 30538/14 and 43439/14 (ECtHR, 17 January 2023).
[30] *Ukraine and the Netherlands v. Russia* App no 8019/16, 43800/14 and 28525/20 (ECtHR, 30 November 2022).
[31] *Kutayev v. Russia*, App no. 17912/15 (ECtHR, 24 January 2023).
[32] *Svetova and Others v. Russia* App no 54714/17 (ECtHR, 24 January 2023).
[33] There are eight inter-State cases pending concerning Russia, which remain a top priority for the Court: Georgia v. Russia (II) (Article 41 – just satisfaction); Georgia v. Russia (IV); Ukraine v. Russia (re Crimea); Ukraine and the Netherlands v. Russia; Ukraine v Russia (VIII); Ukraine v. Russia (IX); Russia v. Ukraine; Ukraine v. Russia (X). See Press Release ECHR 036 (2023) issued by the Registrar of the Court issued by the Registrar of the Court on 3 February 2023.

Russian Federation to continue participating in the meetings of the CM when the latter supervises the execution of judgments, with a view to providing and/or receiving information concerning judgments where the Russian Federation is the respondent or applicant state. In such situations, however, the Russian Federation does not possess a right to participate in the adoption of decisions by the Committee nor to vote. The Russian Federation has this far refrained from availing itself of this possibility. It will be a challenge for the CM, as outlined also in the Declaration adopted at the 4th Summit,[34] to develop means to execute judgments in relation to a non-cooperating respondent State which is no longer a High Contracting Party. [35] In response to this situation, the CM is therefore adapting its strategy regarding supervision of the execution of the Court's judgments delivered against the Russian Federation. In this context, it decided *inter alia*, in light of exceptional circumstances, "to transfer all pending cases and classify all new cases against the Russian Federation to the enhanced supervision procedure" and "to keep under review strategies to ensure the implementation of the Court's judgments with respect to the Russian Federation including with regards to the unconditional obligation on the Russian Federation to pay the just satisfaction."[36]

However, the ECHR is not the only "closed" Council of Europe convention. Twenty-six other CoE conventions also require membership of the organisation in order to become a party.[37] These conventions all contain similarly worded articles which have established a predictable, clear and accessible legal basis for the termination of a member state's status as a party. By way of example, Article 35 of the European Social Charter (ETS No. 035) explicitly states that: *"[t]his Charter shall be open for signature by the members of the Council of Europe"*.

b. Open Conventions

Unlike the ECHR and the closed conventions discussed above, most of the 224 CoE conventions are also open for signature by non-member states of the organisation. The Russian Federation has so far denounced the Criminal Law Convention on Corruption (ETS No. 173) and remains party to 41 others. In addition, the President of the Russian Federation signed a Federal Law on the Denunciation by the Russian Federation of the Framework Convention for the Protection of National Minorities (ETS No. 157) on 19 October 2023. In this case, the problem of respecting the principle of fairness, more particularly from the point of view of respecting a sufficient level of legal certainty, arose in a much more delicate manner than for closed conventions, insofar as the legal basis for restricting the modalities of the Russian Federation's participation in these treaties required further consideration. The Russian Federation's exclusion from the organisation had no bearing on its quality as contracting party

[34] Council of Europe, "Reykjavík Declaration – United around our values" (16-17 May 2023): "[…] Affirm the need to make every effort to ensure the execution of the Court's judgments by the Russian Federation, including through the development of synergies with other international organisations such as the United Nations."

[35] Kirill Koroteev, "Moving on in Strasbourg: How to Deal with the Russian Retreat from the European Court of Human Rights" (VerfBlog, 12 December 2022) <https://verfassungsblog.de/moving-on-in-strasbourg/>: "On 11 June 2022 Russia adopted a law by which it won't comply with the Court's judgments given after 15 March 2022: no compensation awarded by the Court would be paid, no proceedings would be reopened".

[36] Committee of Ministers, "Preparation of the next Human Rights meetings – Cases pending against the Russian Federation" (Decisions, 19-21 September 2023 (DH)), CM/Del/Dec(2023)1475/A2a.

[37] The full list of "closed" conventions can be found on the Council of Europe Treaty Office website: https://www.coe.int/en/web/conventions/full-list2?statesFilter=COE_ONLY.

to these conventions in accordance with the principle of *pacta sunt servanda*. Unsurprisingly, and understandably, some member states consider it problematic to continue treaty relations with a State that has so blatantly violated the values on which the conventional regime established within the CoE is based. This is especially the case with regard to collaboration in monitoring or other follow-up mechanisms foreseen by many of the conventions and in the framework of which meetings and visits take place on a regular basis.

One approach discussed by the Committee of Legal Advisers on Public International Law ("CAHDI") was to consider the application of the suspension and termination provisions of the Vienna Convention on the Law of Treaties ("VCLT"). Although Articles 60 (termination or suspension of the operation of a treaty as a consequence of its breach) and 62 (fundamental change of circumstances) of the VCLT appear to offer solutions for terminating or suspending the operation of a treaty as a consequence of its breach or due to a fundamental change of circumstances, an in-depth analysis of the case at hand – in which also the CAHDI was closely involved at different stages –[38] revealed that it would not be easy to remedy the situation via the procedures foreseen in the VCLT. First, the applicability of Article 60 of the VCLT is limited in the area of human rights treaties, a category to which many of the treaties elaborated within the CoE belong. Article 62 of the VCLT, on the other hand, is not well-fitted to a situation in which other Contracting Parties seek to force a defaulting state to withdraw from a treaty while the other Contracting Parties continue to maintain their treaty relationship. Moreover, any action under Article 60 or 62 of the VCLT would have to follow rather cumbersome and largely untested procedures, requiring unanimous agreement from the other Contracting Parties.

Importantly, on 30 June 2022 the CM adopted decisions entitled "Modalities for the participation of the Russian Federation in open conventions" inviting "where relevant, each body representing all the Parties of treaties to which the Russian Federation remains a Party […], to decide, on the basis of its rules of procedure, on the modalities of participation of the Russian Federation in the respective body […];" and "to consider, […], measures which may include restricting the participation of the Russian Federation in the above-mentioned treaty bodies or limiting its participation exclusively to the monitoring of its own compliance with the obligations under those conventions, without the right to participate in the adoption of decisions by those bodies nor to vote." [39] Similar decisions with regard to Belarus, party to 12 "open" conventions established within the CoE, were adopted on 5 October 2022.[40]

Though innovative in some respects, this approach is consistent with international treaty law. The status of the Russian Federation and Belarus respectively as contracting parties to the treaties concerned is not put into question; instead, these measures only affect the modalities in which both states participate in the follow-up mechanisms of the different treaties. In this context, it is important to stress that the way in which such bodies operate is primarily regulated at the level of their rules of procedure ("RoPs") in the adoption of which the bodies act autonomously as stipulated in most of the conventions in question. Moreover, the measures

[38] See e.g., CAHDI Guidance Note to the Committee of Ministers – Continued participation of the Russian Federation in "open" conventions elaborated in the framework of the Council of Europe (4 May 2022) CM/Inf(2022)17-rev.

[39] Committee of Ministers, "Consequences of the aggression of the Russian Federation against Ukraine", "Modalities for the participation of the Russian Federation in open conventions" (Decisions, 30 June 2022) CM/Del/Dec(2022)1438/2.3.

[40] Committee of Ministers, "Relations between the Council of Europe and Belarus", "Modalities for the participation of Belarus in open conventions" (Decisions, 5 October 2022) CM/Del/Dec(2022)1445/10.4.

restricting the modalities of participation of the Russian Federation were only adopted at the level of RoPs, thus not infringing the rights of the Contracting Parties enshrined and guaranteed in the conventions themselves. To do otherwise would violate principles regarding the hierarchy of norms.

Ultimately, a great majority of the 12 treaty bodies called upon to adopt measures of this kind by the CM have inserted new rules in their respective RoP since September 2022. For example, some prohibit a representative of a contracting party that has been excluded from the CoE for a serious violation of Article 3 of the Statute, or with which the CoE has suspended its relations for a comparable reason, from being elected to the office of a Chair, Vice-Chair or Bureau member of the Conference of the Parties; or prohibiting the contracting party in question from nominating candidates for an expert body. Further examples relate to the prohibition of physical participation in meetings of the treaty body or limitations on online participation. In contrast, the right to vote on all treaty-related issues, to access documents, and to comment on them have remained unaffected as they were considered to represent core rights of the Contracting parties stemming from the respective treaties.

4. Fairness in the jurisprudence of the European Court of Human Rights

When it comes to the implementation of the principle of fairness in the Council of Europe, it is critical to consider the role of the ECHR – the most important treaty concluded within the Council – and its standards relating to the fairness of judicial proceedings. While similar standards are contained in other international human rights instruments, such as the Universal Declaration of Human Rights (UDHR),[41] the International Covenant on Civil and Political Rights (ICCPR),[42] and the American Convention on Human Rights,[43] it is the European Court of Human Rights (ECtHR) which has developed the most extensive case law in this field.

The principle is embedded in several provisions of the Convention. The most prominent expression of the principle of fairness in the ECHR is found in Article 6, which guarantees the right to a fair trial which can be considered as the general guarantee of procedural fairness. Once again, this reflects a “thick” conception of the rule of law and the principle of fairness within the CoE. The term “fair trial” is very broad and is composed of several procedural rights. Some of them are formulated in rather general terms such as the right to an independent and impartial tribunal and the presumption of innocence, while the others are more concrete such as the right to legal assistance and the right to examine witnesses.

The ECHR aims to ensure that all individuals within the jurisdiction of member states are afforded a fair and just treatment in accordance with their rights protected by law. In its role as the protector of human rights and enforcer of the Convention, the Court has dealt with numerous cases which demonstrate the application of the principle of fairness under the

[41] Article 10 of the UDHR states that "everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal." The UDHR is a foundational document in the field of human rights and sets out fundamental rights and freedoms for all individuals.

[42] Article 14 of the ICCPR states that “All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law…”.

[43] Article 8(1) of the ACHR states that “Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.”

ECHR. When deciding on the merits of a particular case, the Strasbourg Court seeks to clarify the nature and extent of the obligations resulting from the rather broadly framed provisions of the Convention. The ECtHR consistently emphasises that its "judgments in fact serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting States."[44] In other judgments, the Court stated that its previous case-law had clarified the nature and extent of the Parties' obligations under the Convention.[45]

Franck's indicators of rule legitimacy and the principle of fairness under the ECHR are closely related, as both emphasise the need for coherence, symbolic validation, adherence to principles and a balanced level of indeterminacy. Further, like the principle of fairness, the guarantee of a fair trial is not an absolute right. The Court plays a crucial role in analysing and applying the principle of fairness in its decisions. In doing so, the Court has over time developed various tests in order to decide whether there has been a violation of Article 6 of the ECHR.

Article 6(1) of the Convention applies irrespective of the parties' status, the nature of the proceedings (civil, criminal, administrative) or the nature of the authorities with jurisdiction in the matter (e.g. ordinary courts, administrative authorities).[46] However, the requirements of a fair hearing are stricter in the sphere of criminal law than under the civil limb of Article 6. In this respect, the Court in *Moreira Ferreira v. Portugal* considered that the rights of persons accused of or charged with a criminal offence require greater protection than the rights of parties to civil proceedings.[47] The principles and standards applicable to criminal proceedings must therefore be laid down with clarity and precision. Lastly, whereas in civil proceedings the rights of one party may conflict with the rights of the other party, no such considerations stand in the way of measures taken in favor of persons who have been accused, charged or convicted, notwithstanding the rights which the victims of offences might seek to uphold before the domestic courts. Given the above mentioned, the forthcoming examples will focus on Article 6 under the criminal limb in relation to the principle of fairness.

Having in mind that the Court adopts a "thick" conception of the rule of law, in each case the Court's primary concern is to evaluate the overall fairness of the criminal proceedings; however compliance with the requirements of a fair trial must also be examined, having regard to the development of the proceedings as a whole and not solely on the basis of one particular aspect or incident.[48] With this interpretation by the Court, the notion of overall fairness was born, having been initially conceived as an additional guarantee to the minimum rights of Article

[44] *Ireland v. The United Kingdom* (1978) Series A no 25, § 154; *Guzzardi v. Italy* (1980) Series A no 39, § 86; *Karner v. Austria* App no. 40016/98 (ECtHR, 24 July 2003), § 26; *Rantsev v. Cyprus and Russia* App no. 25965/04 (ECtHR, 7 January 2010) § 197.

[45] See, for example, *Pentidis and Others v. Greece* 1997-III 990, § 19; *Moreira de Azevedo v Portugal* (1990) Series A no 189, § 73; *B. v. Austria* (1990) Series A no. 175, § 54; *Martins Moreira v Portugal* (1988) Series A no. 143, § 60; *De Cubber v Belgium* (Article 50) (1987) Series A no. 124-B, § 21; *Lingens v. Austria* (1986) Series A no. 103, § 46; *Guincho v. Portugal* (1984) Series A no. 81, § 38; *Zimmermann and Steiner v. Switzerland* (1983) Series A no. 66, § 32.

[46] See *Bochan v Ukraine* (No 2) App. No. 22251/08 (ECtHR, 5 February 2015).

[47] *Moreira Ferreira v. Portugal* App. no 19867/12 (ECtHR, 5 October 2011).

[48] European Court of Human Rights, "Guide on Article 6 of the European Convention on Human Rights, Right to a fair trial (criminal limb)" (2022).

6(3).[49] Based on this notion, in *Nielsen v Denmark*,[50] the European Commission of Human Rights held that "Article 6 of the convention, does not define the notion of fair trial in a criminal case". In fact, paragraphs 2 and 3 of Article 6 enumerate certain specific rights which are considered as essential elements of a fair trial – however, the list cannot be considered as exhaustive and there is still a possibility that a trial may not conform to the general standards of a fair trial even if all the rights listed in those paragraphs have been respected. In that respect, if there is no violation of Article 6(3), the fairness of the trial must be evaluated considering the trial as a whole. The idea of coherence in Franck's indicators aligns with the requirement for overall fairness in the ECHR. The Court assesses the coherence of criminal proceedings, ensuring that all rights and procedures are consistent and that the entire legal process adheres to the principles of fairness.

However, even though the notion of overall fairness is a fundamental aspect of the right to a fair trial, certain issues can be raised in its application. The first concerns a possible lack of clarity and precision, thus leaving wide room for interpretation and subjectivity. The fact that the concept of overall fairness is not precisely defined in legal texts can lead to inconsistencies and varying standards of fairness across jurisdictions, which may undermine the consistent application of this right. An example is the jurisprudence arising from the case of *Salduz v. Turkey*,[51] being a landmark decision of the European Court of Human Rights that significantly impacted the right to a fair trial and the right to legal assistance during police custody and interrogation. The decision also highlighted the importance of providing effective legal representation from the early stages of criminal proceedings. In this case, the applicant was detained on suspicion of participating in an unlawful demonstration in support of an illegal organisation. During his detention, he was denied access to a lawyer, and he admitted his involvement and gave the names of several persons who worked for the organisation. He was later allowed access to a lawyer and sentenced on the alleged facts. The ECtHR held that the absence of legal representation during police custody violated the applicant's right to a fair trial, as guaranteed by Article 6(1) of the ECHR. The Court emphasised that, for legal assistance to be practical and effective, it must be ensured from the initial stages of police questioning unless it could be demonstrated that there were compelling reasons to restrict that right in the relevant circumstances.

The judgment in the *Salduz* case had a significant impact across European jurisdictions. Following the judgment, many European countries amended their laws and practices to ensure that people in custody have access to lawyer from the outset of questioning.[52] This case contributed to enhancing procedural safeguards, recognising the critical role of legal counsel in protecting the rights of the accused during police interrogations. Inspired by this judgment, the EU also adopted Directive 2013/48/EU, [53] also known as the "Right to Access to a Lawyer

[49] Andreas Samartzis, "Weighing Overall Fairness: A Critique of Balancing under the Criminal Limb of Article 6 of the European Convention on Human Rights" (2021) 21(2) Human Rights Law Review 409, 412.

[50] *Nielsen v Denmark* App no 343/57 (Commission Decision, 15 March 1960) para 52.

[51] *Salduz v Turkey* App. No. 36391/02 (ECtHR, 27 November 2008).

[52] The position of the Court also influenced changes in the national legislation of France. The case of *Brusco v France* App no 1466/07 (ECtHR, 14/01/2011), for example, led to changes in criminal procedure regarding the conditions under which a witness may be examined.

[53] Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty. [2013] OJ L 294.

Directive", in order to strengthen the procedural rights of individuals in criminal proceedings, focusing on the right to access legal representation.

In the subsequent Grand Chamber judgment *Ibrahim and Others v UK*[54] the Court adopted a stricter position which implicitly reversed the Court's ruling in *Salduz v Turkey*.[55] The case concerned four applicants who had been accused of an attempted terrorist attack and were arrested and questioned by the police without the opportunity to consult a lawyer. The first three applicants were refused legal assistance and the police conducted "safety interviews" in order to gather information regarding future planned attacks and the identities of others that may have been involved in the plot. The fourth applicant was questioned initially as a witness but became a suspect during that questioning, as a result of self-incrimination. The Court decided that the United Kingdom did not violate the rights to access to counsel and to a fair trial when, without a lawyer present, the authorities questioned the first three applicants suspected of involvement in the bombing attempt. The State did violate those rights, however, when questioning the fourth applicant who was initially brought in as a witness and was later convicted of assisting one of the bombers after the questioning. When adopting this judgment, the ECtHR upheld an exception to the right of access to legal assistance where it is necessary to avoid serious harm to the public, on the condition that it must be done within the domestic legal framework and must be recorded, allowing for later review.

The two cases show the evolving nature of the Court's case law in its quest for a balanced approach to fairness and security. At the same time, such an approach may be perceived negatively in terms of legal certainty and predictability of the Court's case law. For example, in *Simeonovi v Bulgaria*,[56] the applicant, who had been refused access to lawyer while in police custody for three days, relied on the *Salduz* case and reasonably believed that the same would apply in his case.[57] However, in the meantime the Court had delivered its *Ibrahim* judgment, stating that it had merely developed the *Salduz* test. Moreover, relying on the principle of overall fairness, the Court found no violation even though the applicant was denied access to a lawyer and there were no compelling reasons comparable to the case of *Ibrahim and Others v UK* to restrict the right to legal assistance.

This might raise some questions regarding the fourth indicator of Franck's fairness thesis, concerning the balance between rule determinacy and the necessary degree of indeterminacy. Having regard to the Court's jurisprudence analysed above, it is evidently difficult to define the concept of overall fairness with precision which, consequently, can lead to varying standards of fairness across jurisdictions. In the absence of a precise definition, it is therefore left to the Court to strike a balance between ensuring legal certainty (i.e. determinacy) and allowing for flexibility (i.e. indeterminacy) in the context of criminal proceedings. This matter is made even more complex given that different legal systems and cultural contexts may not have the same understandings of what is overall fairness. Practices that are considered fair in one jurisdiction may not be seen as fair in another, which can create challenges when trying to establish universal standards of fairness that are applicable across the different legal systems and cultures in Europe.

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[54] *Ibrahim and Others v UK* App no 50541/08, 50571/08, 50573/08 and 40351/09 (ECtHR, 16 December 2014).

[55] Samartzis (n 49) 412.

[56] *Simeonovi v Bulgaria* App no 21980/04 (ECtHR, 12 May 2017).

[57] Samartzis (n 49) 419.

In this regard, a major challenge for the ECtHR is to define minimum standards while respecting the plurality of national fundamental rights provisions. When developing the Convention standards further, the ECtHR increases the level of acceptance by demonstrating respect for national diversity and "margins of appreciation". The main goal is to ensure that criminal proceedings receive societal acceptance and respect, contributing to their legitimacy, and also highlights the significance of symbolic validation within different cultural and legal contexts. However, a crucial question arises in this context: to what extent can allowance be made for diverging standards?

At the EU level, in order to reduce the imbalance in terms of procedural guarantees that exist between the countries, a Roadmap with a view to fostering protection of suspected and accused persons in criminal proceedings was presented by the Swedish Presidency of the Council of the European Union,[58] setting out its vision of how to foster the right to a fair trial in the Member States. This roadmap outlined six areas in which there is need to strengthen the rights of the accused and the suspects and consequently an agreement was reached on six Directives outlining the rights to interpretation and translation (2010/64/EU), to information (2012/13/EU), to access to a lawyer (2013/48/EU), to legal aid (2016/1919/EU), the presumption of innocence (2016/343/EU), and procedural safeguards for children suspected or accused in criminal proceedings (2016/800/EU).

The implementation of the above-mentioned Directives represented a challenge from the very beginning, since it is a delicate endeavor to try and codify such as vast subject matter as fundamental procedural rights, particularly given that those rights are primarily the result of an evolutive case law generated by the ECtHR on the basis of Article 6 of the ECHR which protects the right to a fair trial.[59] At present, the EU is not a party to the ECHR and therefore not directly bound by the provision in it. However, the ECHR and the case law of the Court is still of relevance for the Court of Justice of the European Union ("CJEU") and the ECtHR has made numerous references to European Union law in cases concerning the fairness of proceedings.[60] In that context, it is encouraging to note that the CJEU recently adopted the "overall fairness of proceedings" test in another Bulgarian case C-229/23, HYA and Others, following a request for a preliminary ruling from the *Sofiyski gradski sad* (Bulgaria).

When it comes to the principle of fairness, the Convention is very important for the Court of Justice from two perspectives. The first is that it serves to fill gaps in the Union law,[61] and the second is that it represents a benchmark, in the sense that domestic courts have to apply the Union law in conformity with the Convention and this conformity can be checked by the ECtHR.[62] The fact that the CJEU uses Strasbourg jurisprudence is of great importance, since

[58] Council Resolution 2009/C 295/01 of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings (Text with EEA relevance).

[59] Jörg Polakiewicz, "European Union Action on Procedural Rights and the European Convention on Human Rights" (2010) 30 Human Rights Law Journal 12; Johan Callewaert, "The recent Luxembourg Case-Law on Procedural Rights in Criminal Proceedings: Towards Greater Convergence with Strasbourg?" (EU Law Live, 4 May 2023) <https://eulawlive.com/op-ed-the-recent-luxembourg-case-law-on-procedural-rights-in-criminal-proceedings-towards-greater-convergence-with-strasbourg-by-johan-callewaert/#> accessed 14 November 2023.

[60] See *Adorisio and Others v. the Netherlands*, App no 47315/13, §§ 38-44; *SA-Capital Oy v. Finland* App no 5556/10 (ECtHR, 14 February 2019) §§ 86 and 93; *Carrefour France v. France* App no 37858/14 (ECtHR, 24 October 2019) §§ 23-25 and 50.

[61] Callewaert (n 59); see also *Spetsializirana Prokuratura* (C-569/20) and *HYA and Others* (C-348/21).

[62] Ibid; see also *Bivolaru and Moldovan v. France* App no 40324/16 and 12623/17 (ECtHR , 25 June 2021).

applicants thus have access to a faster remedy when it comes to protecting certain rights such as the right to a fair trial. In this way, the applicants can get a ruling from the Court of Justice by way of preliminary reference from the domestic courts much faster than before the ECtHR, where the applicants must first exhaust all domestic remedies and then wait for several years for the judgment. Also, the fact that both courts are trying to align with the jurisprudence of the other is of great importance toward mitigating the risk of divergent interpretations of certain human rights, even though a complete consistency of both courts cannot be guaranteed with absolute certainty. Ultimately, these imbalances should be solved with the EU accession to the ECHR, that would certainly impose a new balance of interplay between the two courts.

5. Conclusion

This contribution illustrates the way in which the principle of fairness is integrated across all dimensions of the CoE. Although not mentioned in the CoE Statute, it is a foundational principle of the organisation's normative and practical work. The examples used in this paper demonstrate the role of fairness in different contexts. The first example concerned the expulsion procedure of the Russian Federation based on Article 8 of the CoE Statute. Some authors suggest that the procedure can be improved on the margins, notably giving greater clarity regarding the circumstances which can trigger it, as well as the articulation between its different phases. A sufficient level of legitimacy is nonetheless provided as appropriately determinate provisions are applied in a transparent manner with the involvement of all the statutory organs representing all member states and their political formations. The Article 8 procedure also retains a degree of flexibility necessary to enable the organisation to adapt to different situations that may arise and ensures a balanced reconciliation with other interests and rights involved, bearing in mind that "all rights are subject to limitation. No right is absolute. Fairness must therefore be reconciled with the rights of others."[63]

As far as the ECHR and closed conventions are concerned, the parties to those conventions are aware, from the moment of signing, that their status as party to the treaty is tied to their status as members of the CoE. It follows that, even if the relevant provisions of those conventions do not explicitly address the situation where a state ceases to be a CoE member, it is implicit that in this situation only one solution can be applied: the termination of the expulsed state's status as a party to the conventions in question. In the context of open conventions, the novel solution implemented by the CoE with respect to expelled members was unprecedented and ensures, in the interests of fairness, a balanced reconciliation between respect for the rights guaranteed to the Russian Federation as a party by the conventions themselves and the need to preserve the integrity of the work of the treaty bodies set up by them. This balance is achieved by only restricting the rights of participation of sub-conventional value. As outlined above, compliance with the principle of fairness requires a certain degree of flexibility and adaptability of the rules to avoid unfair and absurd results.

Finally, within the CoE broader setting, the principle of fairness receives frequent attention under Article 6 of the ECHR, which guarantees the right to a fair trial and represents a central element of procedural fairness. The Court has developed extensive case law regarding fairness, particularly in criminal proceedings and it plays a crucial role in interpreting and applying the principle of fairness, often clarifying the obligations of states regarding the

[63] Chios Carmody, "What is Fairness in WTO Law?" unpublished manuscript presented at University of Denver College of Law Conference on International Economic Law (November 2013).

Convention. Franck's indicators of rule legitimacy and the principle of fairness under the ECHR are closely related, as both emphasize the importance of coherence, symbolic validation, adherence to principles, and a balanced level of determinacy to ensure fairness and legitimacy in legal proceedings. The ECtHR's case law exemplifies the application of these indicators. The idea of coherence aligns with the requirement for overall fairness. The Court assesses the coherence of criminal proceedings, ensuring that all rights and procedures are consistent and that the entire legal process adheres to the principles of fairness. The Court's case law also aims to ensure that criminal proceedings receive societal acceptance and respect. The Court takes into consideration that practices considered fair in one jurisdiction may not be seen as fair in another, which highlights the significance of symbolic validation within different cultural and legal contexts. The adherence indicator is related to the requirement that ECHR rights must be respected throughout the entire legal process. This ensures a clear relationship between the primary substantive norms (human rights principles) and the secondary procedural rules governing their implementation. Finally, the ECtHR's evolving approach to fairness is demonstrated through its balance between ensuring legal certainty (determinacy) and allowing for flexibility to avoid unjust outcomes (indeterminacy) in the context of criminal proceedings.

In conclusion, integrating the principle of fairness within the legal framework of the CoE not only upholds ethical standards but also reinforces the organisation's core values. Fairness ultimately expresses a value judgment which lawyers traditionally tend to avoid. Instead, related rule of law principles are used much more frequently, because they have been utilised in the practice of international and national courts. However, it may well be argued that compliance with rule of law principles understood in their "thick" dimension ensures fairness of proceedings and results, both under national and international law. Such compliance enhances the CoE's reputation, sustainability, and effectiveness in achieving its mission on a pan-European and sometimes even global scale. Fairness, as a guiding principle, is essential for fostering trust, collaboration, and positive outcomes both within and outside the organisation.