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Enriched Forms of Legal Representation at the European Court of Human Rights – Alteration, Alienation and Lawfare

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European University Institute

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Abstract

In this paper, we propose to answer the following question: What are the consequences of practicing Enriched Forms of Legal Representation (EFLRs) at the European Court of Human Rights? We answer this question by pursuing three arguments. First, we contend that cause lawyering, but also strategic litigation, human rights litigation and public interest litigation, represent EFLRs, that is a service of legal representation "enriched" with the lawyer's political, economic or social preference. We also argue that EFLRs describe situations in which two trials take place under the cover of a single one. While a "surface trial" takes place in a court of law, a simultaneous "deep trial" allows the applicant and lawyer to fight for a cause that goes beyond the direct interest of the applicant. Second, we contend that the EFLRs may pose risks to the applicants, their lawyers and the legal systems within which they operate. Thus, focusing on the ECtHR, we argue that EFLRs may be devised, practiced or interpreted as alteration, alienation or lawfare. Lastly, we contend that, whereas EFLRs have their place in stable democratic societies, the risks they pose increase during armed conflict. In such instances, a victim-centric approach – drawn from humanitarian principles – to international adjudication should be prioritised.

Keywords

Cause lawyering, Strategic litigation, European Court of Human Rights, Litigation Risks, Humanity, Independence, Impartiality.

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Introduction

In this paper, we investigate the effects of practicing cause lawyering and other forms of strategic litigation – that we call "Enriched Forms of Legal Representation" (EFLRs) – at the European Court of Human Rights (ECtHR).[1] We pay particular attention to EFLRs practiced during or in relation to an armed conflict. We draw inspiration from the case of Zeki Aksoy who lodged an individual application at the European Court of Human Rights (ECtHR) during the armed conflict between Kurdish separatists and the Turkish state forces in south-eastern Turkey from 1984 to 1998. Starting in 1992, a Kurdish lawyer and an English professor devised a "Strasbourg strategy for the Kurds".[2] In that context, a man who was partially paralysed as a result of torture - Zeki Aksoy - decided to petition the ECtHR believing that this would gain him access to healthcare in Western Europe.[3] Following his applications at the ECtHR, Zeki Aksoy was pressured by the Turkish secret police to withdraw his case and was killed as a result of his refusal. Zeki's father, Serif Aksoy, continued the case at the ECtHR, despite also having been tortured as well as castrated to pressure him to withdraw the case. The case resulted in the judgement *Aksoy v Turkey* in which the ECtHR convicted Turkey for a violation of Article 3 European Convention on Human Rights (ECHR)[4]. Despite breaking new legal ground and educating the European public about the situation in south-eastern Turkey, systemic change concerning ill-treatment was slow to come.

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[1] This paper has benefitted from the generous feedback provided during the 2023 ESIL Research Forum.

[2] Goldhaber, Michael D. *A People's History of the European Court of Human Rights.* Rutgers University Press, 2007, p.123.

[3] Goldhaber, *op. cit.*, p. 125.

[4] ECtHR, *Aksoy v. Turkey*, application no. 21987/93, judgement of 18 Dec 1996.

This case prompted us to ask the following question: What are the consequences of practicing EFLRs at the ECtHR? We answer this question by pursuing three arguments. First, we contend that cause lawyering, but also strategic litigation, human rights litigation and public interest litigation, represent EFLRs that are influenced by the lawyers' personal agendas. We also argue that EFLRs describe situations in which two trials take place under the cover of a single one. While a 'surface trial' takes place in a court of law, a simultaneous 'deep trial' allows applicants and their lawyers to fight for a cause that goes beyond the direct interest of the former. Second, we contend that the EFLRs may pose risks to the applicants, their lawyers and the legal systems within which they operate. Thus, focusing on the ECtHR, we argue that EFLRs may be devised, practiced or interpreted as alteration, alienation or lawfare. Lastly, we contend that, whereas EFLRs have their place in stable democratic societies, the risks they pose increase during armed conflict. In such instances, a victim-centric approach to international adjudication should be prioritised.

Before moving forward, a few words about the "dos", "do nots" and "build ups" of this paper, that should be read as a clarification on the method employed. First, we do start with a literature review concerning cause lawyering and other forms of strategic litigation in order to show that they differ from conventional lawyering.

Second, we often refer to the individual applications lodged at the ECtHR in relation to the armed conflicts that started in Ukraine in 2014.[5] We do so in order to focus on the most recent practice of EFLRs and to benefit from a well-documented case study. In addition, since lodging an application at the ECtHR requires exhaustion of domestic remedies, we use the applications lodged at the ECtHR as a proxy for domestic legal representation. In so doing, we observe that, following the reform of the ECtHR, most individual applications are drafted and lodged using the service of a lawyer. Each individual application must show that a violation of a human right guaranteed by the ECHR has occurred. This implies that individual applications lodged at the ECtHR belong to the field of human rights litigation and are, therefore, generated through EFLRs.

1. Enriched Forms of Legal Representation

There are at least three terms – all widely used – to describe the legal representation of victims of human rights violations in courts of law for the purpose of achieving social change: *strategic litigation*, *public interest lawyering* and *cause lawyering*. As one author has recently noted, strict categorisation of litigation into strategic and others types might best be avoided when one focuses on the impact of litigation.[6] Still, we provide brief descriptions of these terms in

[5] Initially, the ECtHR referred in its press releases to "events in Crimea, Eastern Ukraine and the Sea of Azov". The International Criminal Court (ICC) ascertained that an international armed conflict (IAC) was taking place in parallel with a non-international armed conflict (NIAC) in Eastern Ukraine. In addition, the presence of the military forces of the Russian Federation in Crimea is considered as a situation of military occupation. ICC Office of the Prosecutor, 'Report on Preliminary Examination Activities (2016)' (14 November 2016) para. 169; for a contrary view, see Robert Heinsch, 'Conflict Classification in Ukraine: The Return of the "Proxy War"?' (2015) 91 International Law Studies 323. Following the outburst of hostilities in 2022, the ECtHR has used the term "war". "Armed conflict" will be used in this paper to describe the military operations in Ukraine.

[6] Duffy, Helen. *Strategic Human Rights Litigation*. Hart Publishing, 2018, p. 49.

order to show the qualitative leap that has taken place from conventional legal representation and legal aid towards cause lawyering and other forms of strategic litigation. In addition, these descriptions are the first step towards understanding the risks that cause lawyering and other forms of strategic litigation might pose.

1.1. Strategic Litigation

As one author has recently noted, the practice and use of the term strategic litigation has gained popularity but remained surprisingly under-defined.[7] Another recent work attempted to bridge this gap and provided the following definition:

> Strategic litigation is (the intention of) legal action through a judicial mechanism in order to secure an outcome, either by an affected party or on behalf of an affected party. The legal action is used as a means to reach objectives, which consist of creating change (e.g. legal, political, social) beyond the individual case or individual interest. To effectuate this change, certain tactical (strategic) choices based on the circumstances are made by the litigants in the process.[8]

Several authors understand strategic litigation to encompass public interest litigation, cause lawyering and human rights litigation.

Applicants pursuing transnational strategic litigation have focused on a variety of goals, such as obtaining a favourable clarification of international norms and advancing particular interpretations of rules, or using the international tribunal "as an objective and expert tier of evidence, with the aim for it to publicly express conclusions on a situation".[9] Finally, cases have been brought for "publicity and symbolic reasons to educate and shape discourse as well as to stimulate negotiations, even if a successful ruling is uncertain or unlikely".[10]

1.2. Public Interest Litigation and Human Rights Litigation

Fernando Muñoz showed that, "in many parts of the world, there is a historically constructed social expectation that, in the face of poverty and the unequal access to justice that follows from it, the legal profession will provide legal aid for free to individuals and groups in need".[11] He stands behind a historical account that argues that Roman law required patricians to provide the plebeians under their patronage with legal counsel and representation before the courts. This customary rule was codified during the Middle Ages, when the contours of the Western legal profession were drawn.[12] However, it was not until the 1960s that the term *public interest law* was coined "in a self-conscious effort to describe a nascent movement to use legal advocacy, primarily litigation, to advance a political agenda associated with the protection and expansion of rights for social minorities, the poor, women, and other disadvantaged groups, while also seeking to protect collective goods, like a clean

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[7] Ramsden, Michael and Kris Gledhill. "Defining Strategic Litigation." *Civil Justice Quarterly* 4.407 (2019).

[8] Van Der Pas, Kris. "Conceptualising Strategic Litigation." *Oñati Socio-Legal Series* 11.116 (2021), pp. 126–127.

[9] Michael Ramsden, 'Strategic Litigation before the International Court of Justice: Evaluating Impact in the Campaign for Rohingya Rights' (2022) 33 European Journal of International Law 441..

[10] Ramsden (2022), *op. cit*.

[11] Muñoz, L. "Cause Lawyering and Compassionate Lawyering in Clinical Legal Education: The Case of Chile." *Indiana Journal of Global Legal Studies* 27.231 (2020).

[12] Muñoz, *op. cit.*, p. 323.

environment".[13] However, Chen and Cummings reject the definition of public interest legal representation as a tool "to make up for deficient representation in the marketplace of the political arena".[14] Instead, they argue that motivation – which can take the form of altruism, moral or political commitment or seeking to change the status quo – is the defining feature of public interest lawyering.

Public interest lawyering appears to be closely-related to *human rights lawyering*. The latter is "intended to convey a traditional concept of poverty lawyering as well as a modern conception of lawyering on behalf of universally recognized human rights" and it describes "a broad range of human rights lawyering for the poor, the powerless and other marginal populations".[15]

A few authors noted that, since they came into existence in the 1990s, human rights clinics in the United States – which train many of the experts who identify themselves as public interest lawyers – have focused a large part of their work on human rights problems outside of the United States.[16] This has led to recent critiques of international human rights lawyering as "imperialist narratives", "victim essentializing" and "othering".[17]

Political scientists view human rights lawyering as norm diffusion in which lawyers acts as norm entrepreneurs who use "language that names, interprets and dramatizes" in ways that resonate with the public and with the zeitgeist.[18] Furthermore, Keck and Sikkink described human rights litigation as a "boomerang pattern of influence" in which a strategy to influence state behaviour from above (via international organizations) is combined with a strategy to influence state behaviour from below (via grassroots activism).[19] Scholars accept that, even when human rights litigation does not result in a "victory", "litigation can produce significant symbolic results; lawsuits may publicize grievances, attract elite support, and mobilize new activists".[20]

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[13] Chen, Alan and Scott L. Cummings. *Public Interest Lawyering: A Contemporary Perspective*. Aspen Publishing, 2013.

[14] Chen, *op. cit.*, p. 12.

[15] Wilson, Richard J. and Jennifer Rasmussen. *Promoting Justice: A Practical Guide to Strategic Human Rights Lawyering*. International Human Rights Law Group 2001. Available at https://pdf.usaid.gov/pdf_docs/Pnadf477.pdf accessed on 28 June 2023.

[16] Carillo, Arturo J. "Bringing International Law Home: The Innovative Role of Human Rights Clinics in the Transnational Legal Process." *Columbia Human Rights Law Review* 35.527 (2004).
Hurwitz, Deena R. "Lawyering for Justice and the Inevitability of International Human Rights Clinics." *Yale Journal of International Law* 28.505 (2003), p. 526.

[17] Bettinger-Lopez, Carol; Finger, Davida; Jain, Meetali; Newman, JoNel; and Paoletti, Sarah. "Redefining Human Rights Lawyering Through the Lens of Critical Theory: Lessons for Pedagogy and Practice". *Faculty Scholarship at Penn Carey Law* 536 (2011).

[18] Finnemore, Martha and Kathryn Sikkink. "International Norm Dynamics and Political Change." *International Organization* 52.887 (1998), p. 897.

[19] Keck, Margaret and Kathryn Sikkink. *Activists beyond Borders: Advocacy Networks in International Politics.* Cornell University Press, 1998.

[20] Novak, Andrew. *Transnational Human Rights Litigation: Challenging the Death Penalty and Criminalization of Homosexuality in the Commonwealth.* Springer, 2020, p. 18.

1.3. Cause Lawyering

As coined by Scheingold and Sarat in their work *Something to Believe In: Politics, Professionalism, and Cause Lawyering*, "cause lawyering*"* consists of "using legal skills to pursue ends and ideals that transcend client service – be those ideals social, cultural, political, economic or indeed, legal".[21]
Providing a comprehensive review of literature, Marshall and Hale accept that cause lawyering covers a wide range of practices and interests:

> Cause lawyers work for non-profit organizations in poor communities; cause lawyers work in large law firms. Cause lawyers oppose the state; cause lawyers work within the state. Cause lawyers are self-conscious and committed social movement activists; cause lawyers stumble into activism through involvement with cases and conflicts of wider political significance. Cause lawyers are committed to lofty goals of protecting the rule of law and advancing human rights; cause lawyers represent members of marginalized communities with their everyday problems when those communities do not have the resources to engage in wider political mobilization.[22]

Various taxonomies of cause lawyering have been developed in the literature. Thomas Hilbink, for example, distinguishes between *proceduralist*, *elite/vanguard* and *grassroots* cause lawyering.[23]

Proceduralist cause lawyering, is "marked by a belief in the separation of law and politics, and a belief that the legal system is essentially fair and just".[24] This type of lawyering is focused on procedural justice, on neutrality and non-partisanship as professional duties.

Elite/vanguard cause lawyering "treats law as a superior form of politics" and seeks to change substantive law and, as a result, society. This type of cause lawyering is based on the belief that society can be changed through law and makes ample use of test-case litigation to define and re-define the "public interest".[25] Elite/vanguard cause lawyers are often situated in leadership positions to advance causes.[26]
Grassroots lawyering, lastly, "perceives law as just another form of politics and is sceptical of law's utility as a tool of social change".[27] Grassroots cause lawyers often see the legal system as "corrupt, unjust, or unfair – an oppressive force", use legal action "as only one weapon in a widespread assault on justice" and work as supporting players in social movements.[28]

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[21] Scheingold, Stuart A., and Austin Sarat. *Something to Believe In: Politics, Professionalism, and Cause Lawyering*. Stanford University Press, 2004.
[22] Scheingold, *op. cit.*, pp. 301–302.
[23] Hilbink, Thomas M. "You Know the Type: Categories of Cause Lawyering." *Law and Social Inquiry* 29.657 (2004).
[24] Hilbink, *op. cit.*, p. 665.
[25] Hilbink, *op. cit.*, p. 673.
[26] Hilbink, *op. cit.*, p. 678.
[27] Hilbink, *op. cit.*, p. 681.
[28] Ibid.

Most literature on cause lawyering focuses on peaceful democracies. A growing stream of work, however, is dedicated to cause lawyering in contexts of conflict, authoritarianism and the transition from violence.[29] In a recent paper, McEvoy focused on the relationship between cause lawyers, politically motivated violent clients and the movements to which they belong. McEvoy notes that "a central concern for cause lawyers who decide to take sides is how such engagement squares with the idea of *legal professionalism*".[30]

1.4. Enriched Forms of Legal Representation and Their Deep Trials

The literature described in the preceding section highlights two interrelated changes that have taken place in the legal world in the last few decades: the qualitative leap from conventional legal representation to EFLRs and the growing acceptance of the deep trials that EFLRs initiate.

Thus, the literature on cause lawyering and other forms of strategic litigation indicates that EFLRs became widely accepted and practiced after their birth in the US. It is now commonly recognised that lawyering which focuses on the lawyer's cause or strategic preferences has its place in a democracy. What is less recognised, however, is the fact that EFLRs describe situations in which two trials take place under the cover of a single one. In the surface trial, an alleged victim will lodge a complaint in a court of law. Concurrently, in the deep trial, an alleged victim and his/her lawyer will fight for a cause that might go beyond or even against the victim's direct interests in the surface trial. In EFLRs, the surface trial is used as a vehicle for the deep trial. These deep trials contest the meaning and importance of the law – both substantive and procedural. As Hilbink's study shows, cause lawyering challenges the position that law occupies vis-à-vis politics and the society.

Second, the literature on cause lawyering and other forms of strategic litigation also shows that, in peaceful democracies, lawyers engaging in EFLRs craft a particular relationship with the justice system within which they operate. On the one hand, they must show deference to existing norms and procedures. On the other hand, they act as dialogue initiators, pushing the boundaries of the justice system to contest norms, extend rights or resist change. EFLRs also involve a higher degree of agency than conventional lawyering because they require a focus on cases in which the client's interest aligns with the public interest or the cause that the lawyer is pursuing. In addition, lawyers practicing EFLRs have a special relationship with courts and tribunals because these become spaces for political resistance or shortcuts for legislative action. Thus, EFLRs signal democracies with healthy and resilient legal systems in which the agenda for change may be set by a variety of actors. In such systems, a dialogue exists between the various actors involved - lawyers, judges, legislators, enforcement agencies, etc. - that allows for change to take place harmoniously.

Domestic courts in stable democracies are well-equipped to accommodate EFLRs and to deal with the deep trials that they initiate. In particular, lawyers' reputations and financial interests

[29] McEvoy, Kieran, Louise Mallinder and Anna Bryson. *Lawyers in Conflict and Transition.* Cambridge University Press, 2022.

[30] McEvoy, Kieran. "Cause Lawyers, Political Violence, and Professionalism in Conflict" *Journal of Law and Society* 46.529 (2019), p. 539.

are at stake in every case they bring. This, in itself, might represent a strong self-regulatory and self-disciplining pull for the concerned lawyers. At worst, the other members of the guild and the Bar Association may intervene to ensure that EFLRs do not overtake the interests of the clients and of the justice system as such. In addition, domestic cause lawyering and other forms of strategic litigation involve the participation of local actors – law enforcement agencies, security forces, the judiciary. This overt and predictable involvement of other participants of the legal system ensures that the deep trial results in the social change sought.

The situation described above may be significantly different when the EFLRs are targeted at international tribunals. In such instances the positive feedback loop that nourishes the dialogue among the participants of the legal system and ensures social change is interrupted by the distance and the lack of legitimacy that EFLRs present. Instead, these forms of litigation may create risks for the affected participants in the legal process because they can be devised, practiced or interpreted as alteration, alienation or lawfare. In addition, these risks are increased when they are practiced during armed conflict.

2. The Risks of Enriched Forms of Legal Representation

The literature described in Section 1 paints EFLRs as heroic, altruistic forms of lawyering. This might be due in part to the fact that scholars of this discipline are also practitioners of EFLRs. As bards of their own crafts, lawyers might operate from a blind spot that prevents them from engaging critically with the subject. However, even the most ardent believers and practitioners of EFLRs accept that this craft comes with certain risks. Thus, the work of the recently established United Nations Special Rapporteur on Human Rights Defenders describes the killing, kidnapping and ill-treatment of human rights lawyers perpetrated both by state and non-state actors.[31] In addition to the security risks for lawyers and their clients, one author noted that ineffective strategic litigation may traumatise victims and provide "a veneer of legitimacy around practices, policies or indeed the legal system as a whole".[32] Within this debate, we argue that EFLRs targeted at the ECtHR pose three main risks to the human rights system built around the ECHR: the risk of alteration, the risk of alienation and the risk of lawfare.

2.1. Legal Representation as Alteration

The first risk that EFLRs pose to the human rights system guaranteed by the ECtHR is the alteration of applicants' voices through the "privatisation of the right to individual petition". We understand EFLRs to mean a service of legal representation that is enriched with the lawyer's cause or political preference. Within the human rights protection system guaranteed by the ECtHR, legal representation is both a tool to operationalise the right to an individual petition and a right guaranteed by the ECHR. We briefly describe both below.

The ECtHR functions almost entirely through the exercise of the right to individual petition guaranteed by Article 34 ECHR.[33] The Court itself has found that the right to individual petition

[31] The United Nations. *Fact Sheet No. 29, Human Rights Defenders: Protecting the Right to Defend Human Rights*, 2004, p. 11.
[32] Duffy, *op. cit*.
[33] Harris and others. *Law of the European Convention on Human Rights*. Oxford University Press, First Edition, 2023, p. 819.

is a “key component of the machinery” seeking to protect human rights in Europe.[34] The ECHR itself is silent on the issue of legal representation for the purpose of operationalising the right to individual petition. The Rules of Court of the ECtHR, however, distinguish two procedures for representation. On the one hand, Rule 36 (1) allows persons, non-governmental organizations and groups of individuals to represent themselves at the ECtHR prior to the communication of the case to the Contracting Party.[35] On the other hand, after the communication of the case, Rule 36 (2) and (4) requires applicants to be represented by “an advocate authorized to practice in any of the Contracting Parties and resident in the territory of one of them, or any other person approved by the President of the Chamber”.[36]Self-representation is possible in exceptional cases provided that the applicant has “an adequate understanding of one of the Court’s official languages” and “sufficient proficiency to express himself or herself in one of the Court’s languages.”[37] Despite being closely related to the right to individual petition, self-representation appears to have declined at the ECtHR in favour of legal representation of applicants.

The privatisation of the individual petition raises the following issues. First, the exercise of the right to individual petition through conventional and enriched forms of legal representation puts a cost on the individual petition. As foreseen by the ECHR, the exercise of the right to individual petition was free of charge. Lawyers practicing EFLRs are market participants, held to the same market imperatives as other businesspeople. They have to thus factor into their practice concerns about costs, supply and demand. This issue can be better understood through a review of the ECtHR’s case law on costs and expenses which indicates that “the Court is normally strict with representatives and frequently finds that they have either failed to itemise their costs properly or that the number of hours billed in excess or that the hourly rate is excessive”.[38] Thus, market imperatives may compel lawyers to alter the victims’ voices when petitioning the ECtHR.

Even more problematic is the issue of donor support – foreign or domestic – for inducing EFLRs. It is now well established that litigation at the ECtHR is resource-intensive, in particular in terms of the skills and time of legal representatives.[39] A few studies have confirmed that most successful representatives at the ECtHR are well-funded NGOs and that donor support is essential for NGOs inducing litigation activities.[40] Practicing EFLRs at the request or nudging of donors may raise ethical questions that are beyond the ambit of this paper. What is important to highlight here though is the fact that donor-supported EFLRs affects the right to individual petition by channelling the donor’s agenda into the right guaranteed by Article 34 ECHR.

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[34] ECtHR, *Mamatkulov and Askarov v. Turkey* [GC], application 46827/99, judgement of 4 Feb 2005, paragraph 100 and 122.

[35] ECtHR, Rules of the Court, Rule 36(1).

[36] ECtHR, Rules of the Court, Rule 36 (2) and (4).

[37] ECtHR, Rules of the Court.

[38] Harris and others (n 33) 858.

[39] Epp, Charles P. *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective*. University of Chicago Press, 1998.

[40] Kumar, Shashank P. and Cecily Rose. "A Study of Lawyers Appearing before the International Court of Justice 1999–2012." *European Journal of International Law* 25.893 (20214).

Haddad, Heidi Nichols and Lisa McIntosh Sundstrom. "Foreign Agents or Agents of Justice? Private Foundations, Backlash against Non-governmental Organizations, and International Human Rights Litigation." *Law & Society Review* 57.12 (2023).

In sum, the right to individual petition is the cornerstone of the human rights system guaranteed by the ECHR. As initially envisioned, it allowed every citizen or resident of a member state of the Council of Europe to petition the ECtHR about an alleged breach of their human rights. EFLRs inevitably alter the voice of the applicants by injecting into the individual petition political or market concerns that might be of no interest to the applicant.

2.2. Legal Representation as Alienation

The second risk that EFLRs pose to the human rights system guaranteed by the ECtHR is the alienation of the right to a fair trial guaranteed by Article 6 ECHR[41] and the ethical principles concerning the professional conduct of lawyers. The jurisprudence of the ECtHR on the right to a fair trial emphasizes the central position that lawyers have in the administration of justice as intermediaries between the public and the courts.[42] In the same vein, the Council of Bars and Law Societies of Europe (CCBE) has noted that lawyers ensure "the trust of the public in actions of the courts".[43]

First, EFLRs may lead to the alienation of the right to legal representation from the principle of respecting the client's best interest. The full exercise of the right to legal representation requires, among other things, that lawyers act in the best interest of their clients. The CCBE highlights that respecting the best interests of the client means a lawyer "must put those interests before any other interests, including the lawyer's own interests".[44] Sarvarian has documented incidents of professional misconduct of lawyers appearing before the ECtHR which included conflicts of interest, breach of client confidentiality, infringements of judicial confidentiality orders, misleading the Court or adducing dubious documentary evidence.[45] If such instances of professional misconduct take place within EFLR, the public's trust in the ECtHR and the human rights system it guarantees will be ruptured.

Second, EFLRs may lead to the alienation of the right to legal representation from the principle of independence. The CCBE notes that the independence of lawyers is necessary both to enable lawyers to represent clients against the state and to protect them from being identified with clients.[46] It might be important to recall here a study by Sacriste and Vauchez who showed the importance of impartial and independent lawyers for the creation and early development of international law.[47] Nippold has captured this idea in 1924:

> The law of the people does not serve any particular nation, but belongs to humanity as a whole. Any compromise here is impossible. A given fact will either comply with the law or will not. We have said that international law is "a-national". It is also apolitic. Politics and law of the people are two different things and are even frequently antinomic. One

[41] Cristina Teleki. *Due Process and Fair Trial in EU Competition Law: The Impact of Article 6 of the European Convention on Human Rights*. Brill/Nijhoff, 2021.
[42] ECtHR, M*orice v. France,* GC, Application no. 29369/10, 23 Apr 2015, paragraph 132.
[43] Council of Bars and Law Societies in Europe (CCBE), *Model Code of Conduct for Lawyers*, p. 4.
[44] CCBE, *op. cit.*, p. 16.
[45] Sarvarian, A. "Common Ethical Standards for Counsel before the European Court of Justice and European Court of Human Rights." *European Journal of International Law* 23.991 (2012).
[46] CCBE, *op. cit.*, p. 6.
[47] Sacriste, Guillaume and Antoine Vauchez. "The Force of International Law: Lawyers' Diplomacy on the International Scene in the 1920s." *Law & Social Inquiry* 32.83 (2007).

> should have no trouble admitting that within politics, in a general way, the main thing on the agenda is selfishness whose supreme objective, in the history of the great States, has always been the extension of the power of the State. the usual aim of politics has always been force and not law.[48]

Still, a lawyer practicing EFLRs to advance a cause or to reach a political objective will be inevitably identified with that cause or political battle. At the same time, the client – in our case an applicant at the ECtHR – will also be identified with that cause or political goal. It is to be questioned to what extent applicants understand the consequences of this identification. At the same time, the process of identifying lawyers and clients with causes and political goals endangers the principle of independence and obscures the duty that states have to protect them.

Third, EFLRs may bring an alienation from the goals of international law. In this sense, scholars such as Bradlow and Hunter show that certain instances of global cause lawyering may result from a utilitarian approach to international law.[49] They make the strong contention that the emergence of such international law advocates has significant implications for the substance of international law:

> these actors are not focused on the project of international law as an end in itself and with it the notion that we have to go slowly to nurture the growth of international law. These change-motivated advocates, because they see international law as a means to their social objective, would sacrifice the structure and practice of international law for progress in their area of interest.[50]

Finally, EFLRs may create security risks both for the victims and their lawyers that could lead to their alienation from the human rights protection system guaranteed by the ECHR. As noted by Duffy, “the abundant and shocking examples around the world today of the negative consequences that flow from bringing legal action for applicants and those associated with them cannot be neglected”.[51] A well-known case concerned the violent killing of a Ukrainian lawyer in 2016 who represented two detainees accused of acts of terrorism against Ukraine.[52] Victims, on the other hand, might be re-traumatized by being dragged through lengthy judicial proceedings taking place in foreign countries after having exhausted all domestic remedies. Since the ECtHR rejects around 95% of all applications as manifestly ill-founded, applicants might also be disappointed with the formalism and the outcomes of the individual applications they have lodged.

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[48] Nippold, O. *Le développement historique du droit international depuis le congrès de Vienne*. Recueil de cours. Académie de la Haye, 1924, pp. 1:5-120.

[49] Bradlow, Daniel and David Hunter, eds. "Promoting Social Change through Treaties and Customary International Law: The Experience of the Inter-American Human Rights System." *Advocating Social Change through International Law.* Brill Nijhoff (2020).

[50] Bradlow (2020), *op. cit.*

[51] Duffy (n 6) 77.

[52] International Commission of Jurists, press release. *Ukraine: violent death of a lawyer is an attack on the legal profession*. 29 March 2016. Available at https://www.icj.org/ukraine-violent-death-of-a-lawyer-is-an-attack-on-the-legal-profession/ accessed on 29 June 2023.

2.3. Legal Representation between Lawfare and 'Peacefare' within the Humanitarian Space

Every legal regime generates a monocentric space around it in which its meaning and limits are negotiated and contested. The humanitarian space – also known as Dunant's Pyramid – is generated by the application of the International Humanitarian Law (IHL), commonly referred to as the law of war. It holds at its top the principle of humanity, a principle guiding all humanitarian action. The rest of the pyramid consists of the basic rules and principles of international humanitarian law and the principles of impartiality, neutrality and independence which enclose the humanitarian space and make the humanitarian endeavour possible.[53]

Moving away from a monocentric structure, the humanitarian space has become polycentric, whereby "a pull on one strand will distribute tensions after a complicated pattern throughout the web as a whole".[54] Thus, not only has the nature of war changed[55], the actors operating within the constraints of the humanitarian space have changed as well. In current military conflicts, NGOs, businesses and private individuals[56] may play roles unimaginable earlier. These actors create new centres of power within the humanitarian space and may weaken or strengthen existing ones.

Scholars quoted in Section 1 above acknowledge that lawyers have become important actors in the human rights space. Similarly, by seeking and triggering litigation during and in relation to armed conflict they play an increasingly important role within the humanitarian space. Such litigation may create tension rippling across the humanitarian space and may shake the principles enclosing it. This tension may further increase when lawyers leave the confines of conventional legal representation and engage in EFLRs. In such instances, EFLRs may be devised, practiced or interpreted as lawfare, a term coined by Dunlap to describe "the strategy of using—or misusing—law as a substitute for traditional military means to achieve a warfighting objective".[57] In the most comprehensive work about lawfare published so far, Kittrie asserts that lawfare can be waged by a variety of actors, including advocacy networks, non-governmental organisations, individual activists and individual litigators.[58]

EFLRs might take a few forms as lawfare at the ECtHR. First, as asserted by Wittke, litigation in international tribunals may be triggered as "hegemonic contestations in pursuit of interpretive

[53] Daniel Thürer, 'Dunant's Pyramid: Thoughts on the "Humanitarian Space"' (2007) 89 International Review of the Red Cross 47.
[54] Lon Fuller, 'The Forms and Limits of Adjudication'(1978) 92 Harvard Law Review, pp. 353-409.
[55] Herfried Münkler, *The New Wars* (Patrick Camiller tr, Polity 2005).
[56] The Economist, 'How Elon Musk's Satellites Have Saved Ukraine and Changed Warfare' (2023) January 5th, available at: https://www.economist.com/briefing/2023/01/05/how-elon-musks-satellites-have-saved-ukraine-and-changed-warfare accessed on 18.09.2023
[57] Dunlap Jr., Charles. "Lawfare." *National Security Law*. Eds. Moore, Roberts, Turner. Carolina Academic Press, 2015.
[58] Orde F Kittrie, *Lawfare: Law as a Weapon of War* (Oxford University Press 2016).

sovereignty".[59] In other words, lawyers may trigger litigation for the sole purpose of contributing to 'discursive dominance' seeking to legitimize political and military actions.[60]

Second, lawyers aiming for a 'mobilization of shame' through EFLRs[61] may seek strategic objectives unattainable through military means. A well-documented example is the case *Nicaragua v. United States of America*[62] in which the expected public attention to the case led the US Congress to cease the financing of the Contras in Nicaragua.[63]

Third, lawyers practicing EFLRs might devise strategies to transform the ECtHR into a secondary theatre of war during armed conflict.[64] They might select and lodge applications for the sole purpose of confusing the international community about the consequences of the military operations, the qualification of the conflict and the identity of the weapon bearers. This strategy recently came to public attention when media reports alleged that lawyers based in Russia and in parts of eastern Ukraine purposefully flooded the ECtHR with thousands of complaints against Ukraine for purported violations of the ECHR in the conflict-ridden Donbas Region.[65] Allegedly, "around 6,000 claims related to the conflict in the Donbas, out of a total of 10,000 claims Ukraine faces at the ECtHR, were filed by several groups of lawyers from Russia and areas of the Luhansk and Donetsk regions of eastern Ukraine".[66] In another telling example, the ECtHR has, for the first time in its history, permanently banned one Ukrainian lawyer from representing or otherwise assisting applicants in both pending and future applications.[67] Although the Court has not explained the lawyer's involvement with the conflict-related cases, Ukrainian media reported that the lawyer was "known to experts in the field because she had been trying to flood the ECtHR with complaints related to Ukraine over the Donbas hostilities".[68]

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[59] Cindy Wittke, '"Test the West": Reimagining Sovereignties in the Post-Soviet Space' (2018) 43 Review of Central and East European Law 1.
See also, Cindy Wittke, 'The Politics of International Law in the Post-Soviet Space: Do Georgia, Ukraine, and Russia "Speak" International Law in International Politics Differently?' (2020) 72 Europe-Asia Studies 180.

[60] Martti Koskenniemi, 'International Law and Hegemony: A Reconfiguration' (2004) 17 Cambridge Review of International Affairs 197.

[61] Drinan, Robert F. *The Mobilization of Shame – A World View of Human Rights*. Yale University Press, 2002.

[62] *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America); Merits*, International Court of Justice (ICJ), 27 June 1986.

[63] Terry D Gill, *Litigation Strategy at the International Court: A Case Study of the Nicaragua v. United States Dispute* (M Nijhoff ; Distributed in the USA and Canada by Kluwer Academic Publishers 1989).

[64] Simma, Bruno. "Human Rights Before the International Court of Justice: Community Interest Coming to Life?" *The Development of International Law by the International Court of Justice.* Eds. Tams and Sloan. Oxford University Press 2013.

[65] Yeroshina, Valeria. *Ukraine Targeted At European Court In Hail Of Claims From Russia, Donbas, RFE/RL Investigation Finds* (8 April 2021). Available at: https://www.rferl.org/a/ukraine-targeted-european-court-russia-donbas-rferl-investigation/31193899.html accessed on 28 June 2023.

[66] Yeroshina, *op. cit.*

[67] ECtHR, press release. *Ukrainian Lawyer permanently barred from representing applicants before the European Court of Human Rights.* 12 December 2018.

[68] UNIAN. *Unprecedented decision: ECHR disqualifies Ukrainian lawyer who filed claims on behalf of deceased IDPs*. 13 December 2018. Available at: https://www.unian.info/society/10375107-unprecedented-decision-echr-disqualifies-ukrainian-lawyer-who-filed-claims-on-behalf-of-deceased-idps.html accessed on 28 June 2023.

That being said, one must acknowledge that EFLRs may also be devised and practiced as 'peacefare'. This is particularly important within the humanitarian space whose primary goal is to condense itself towards peace. EFLRs that are practiced according to the principles defining the humanitarian space – humanity, independence and impartiality – will not only strengthen the dignity of victims of armed conflict and the judicial institutions concerned, but may as well contribute to peace-making efforts.

Thus, lawyers who prioritize the principle of humanity in their practice, will ensure that their clients understand the risks and opportunities arising from litigation during armed conflict. In the same vein, the respect of the humanitarian principles of independence and impartiality may require lawyers to provide legal aid to all victims of armed conflict, irrespective of their political preferences. It might be naive to expect lawyers engaging in EFLRs to align with the principles of independence and impartiality because EFLRs are by definition partial. Still, ignoring these principles fully in legal practice means that only 'favourite' clients will benefit from legal representation and that only the plight of certain categories of victims of armed conflict will be heard. Consequently, aligning EFLRs with the principles of humanity, independence and impartiality will not only strengthen judicial institutions during armed conflict, but might also pave the way towards transitional justice procedures.

Conclusion

As democratisation and globalisation processes carved space for new powerful civil society actors, they often used domestic and international litigation to advance their agendas and drive social change.[69] Within this context, EFLRs – both domestic and global – are on the rise, attracting a larger pool of lawyers to this practice. Lawyers practicing EFLRs are powerful non-state actors, driving not only the implementation of the ECHR, but also the ECtHR's docket and jurisprudence. The current paper argued that this type of lawyering can be opportunistic, seeking to take advantage of a need for legal representation services or to address a market failure in legal representation. It can also be strategic or activist – a simple continuation of armed conflict by other means. We argued that two trials take place in this situation – a surface trial, owned by the applicants and a deep trial, owned by the applicants' lawyers. We, therefore, deem that EFLRs targeted at the ECtHR pose three risks: alienation, alteration and lawfare. To mitigate these risks, during peacetime and especially during armed conflict, EFLRs could draw inspiration from humanitarian principles.

Global EFLRs, involving a contestation of international law, needs further reflection. Domestic EFLRs may involve a contestation of the lawyers' own legal system that can result in a law being applied or a new precedent being set. This grass-roots aspect legitimises cause lawyering because it involves and alarms all institutions that bear duties under domestic and international law. Global EFLRs – such as the EFLRs targeted at the ECtHR – has to be legitimised through rules and ethical standards which ensure that victims are represented in an equal manner and that international tribunals are presented with accurate facts. In addition,

[69] Bradlow, Daniel and David Hunter, eds. "Introduction: Exploring the Relationship between Hard and Soft International Law and Social Change." *Advocating Social Change through International Law.* Brill Nijhoff (2020), pp. 2-3.

this paper posits that EFLRs targeted at the ECtHR should be primarily concerned with the immediate protection of the victims, not the lawyers' political agendas.

EFLRs targeted at the ECtHR alters the applicants' voices, alienates them from the human rights system guaranteed by the ECtHR and can be devised or perceived as lawfare. The respect of the principles of humanity, independence and impartiality, however, can mitigate these risks and ensure that EFLRs protects the applicants, the lawyers and the ECtHR system. In addition, the respect of these principles at all times may ensure that EFLRs act as 'peacefare', pacifying societies, rather than stirring more conflict. To achieve compliance with the above-mentioned humanitarian principles, bar associations could provide training on IHL and humanitarian action to all lawyers practicing during armed conflicts. Bar associations could also adopt strict ethical rules concerning professional behaviour when representing clients during armed conflict. Finally, it is important that the ECtHR adopts ethical standards for lawyers representing applicants at the Court in Strasbourg. Ethical standards would ensure that law and the protection of individual rights remain a priority at the ECtHR.[70] They could also diminish the probability that the ECtHR is transformed into a wasteland for unresolved political matters. This, in turn, would allow the international community to continue taking the Court seriously.

We do not argue that we hold any definitive answers to the question we raised in this paper, nor that our question is the optimal one for investigating EFLRs. However, it is our hope that this paper will ignite similar questions in the future. In particular, it could be worth exploring comprehensively the impact that lawyers have on the ECtHR and the impact of ECtHR litigation on the applicants themselves. In addition, the financing of EFLRs for the purpose of inducing ECtHR litigation could be tackled. Lastly, it is important to understand, on the one hand, the differences between domestic and transnational EFLRs and, on the other hand, the adaptations of legal strategy during armed conflict.

[70] Vagts, Detlev F. "The International Legal Profession: A Need for More Governance?" *American Journal of International Law* 90.250 (1996).