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Citation

Finnerty, J. C., & Carler, A. U. (2026). Hidden, indirect and ulterior purpose review by regional human rights courts: comparing the cases against Azerbaijan and Venezuela. *Human Rights Law Review*, 26(1). doi:10.1093/hrlr/ngaf048

Version: Publisher's Version

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Note: To cite this publication please use the final published version (if applicable).

Hidden, indirect and ulterior purpose review by regional human rights courts: comparing the cases against Azerbaijan and Venezuela[†]

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ABSTRACT

In their advancement of the third wave of autocratisation, states are cloaking their restrictions on human rights and freedoms with so-called ‘legitimate aims’ to avoid accountability under human rights treaties. One response mechanism available to regional human rights courts in this context is to question the motivation of states through the doctrine of misuse of power. This article examines two bodies of jurisprudence in which this doctrine has been applied: the European Court of Human Rights (ECtHR) judgments against Azerbaijan and Inter-American Court of Human Rights (IACtHR) judgments against Venezuela. The article finds that the ECtHR has applied the doctrine rather restrictively under Article 18 ECHR; meanwhile, the IACtHR has applied the doctrine more broadly and directly under various rights provisions in the ACHR. This challenges the previous parallels drawn in scholarship between Article 18 ECHR and Article 30 ACHR, and further explains why the IACtHR can be more proactive in its detection of misuses of power, identifying ulterior purposes in a broader array of contexts.

KEYWORDS: misuse of power; judicial divergence; judicial convergence; autocratisation; evidence

1. INTRODUCTION

The ‘third wave’ of autocratisation¹ has manifested, and continues to manifest, across the jurisdiction of both the European Court of Human Rights (ECtHR) and the Inter-American

[†] This Article is part of a Symposium on ‘Legitimate Aims and Ulterior Purposes in International Human Rights Law: Comparative Perspectives’ (2026) 26(1) *Human Rights Law Review*.

¹ Lührmann and Lindberg, ‘A third wave of autocratization is here: what is new about it?’ (2019) 26 *Democratization* 1095.

Received: September 7, 2025. Accepted: November 6, 2025

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Court of Human Rights (IACtHR). Compared to previous instances, which were often driven by military coups or foreign invasions, recent autocratisation processes are more gradual in their instigation.² Autocratising governments utilize incrementalism to disguise their dismantling of democratic and rule of law infrastructures.³ They further avoid accountability before (regional human rights) courts by ‘misappropriating’ human rights law and language.⁴ Critically, this includes citing various ‘legitimate aims,’ such as public order or national security, to ‘camouflage’ their authoritarian practices which drive the process of autocratisation.⁵

One important doctrine available to regional human rights courts when responding to these accountability-avoiding authoritarian practices is that of misuse of power. This doctrine allows for the detection of ‘hidden,’ ‘indirect,’ or ‘ulterior’ purposes, piercing the guise provided for by the cited ‘legitimate aim(s)’ to identify the true motivation of states when restricting rights and freedoms. In contrast to ordinary legitimate aim doctrines which provide for an ordinary purpose-based review,⁶ operating as a binary assessment either accepting or rejecting the justification cited by states, this doctrine propels judges to dig deeper and determine the actual (ulterior) purpose(s) behind restrictions. It further permits courts to delineate the main motivating purpose where a plurality of purposes may exist behind a restriction.⁷

Admittedly, the misuse of power doctrine poses a risk to both the normative and social legitimacy of regional human rights courts. This stems from the judicial assessments of policy motivations the doctrine provokes, blurring the line between the legal and the political.⁸ Such risks must, however, be balanced against the prospects of the doctrine. It enables courts to take into account the broader context surrounding an infringement in their examination of an individual case,⁹ and holds further potential in enabling more prescriptive remedies.¹⁰

Notwithstanding such potential, the ulterior purpose doctrine is sparsely applied in practice and remains understudied in the literature. The majority of scholarly work has tended to focus on the proportionality doctrine,¹¹ including the literature that compares the approaches of the ECtHR and IACtHR.¹² In contrast, scholarship on the use of legitimate aim and misuse of power doctrines is more limited,¹³ with only surface level comparisons being drawn between the approaches of the two regional courts to the latter, highlighting the existence of parallels

² Ibid.

³ Petrov, ‘How to Detect Abusive Constitutional Practices’ (2024) 20 *European Constitutional Law Review* 191.

⁴ De Búrca and Young, ‘The (mis)appropriation of human rights by the new global right: An introduction to the Symposium’ (2023) 21 *International Journal of Constitutional Law* 205.

⁵ Ahmed, ‘Constitutional parasitism, camouflage, and pretense: Shaping citizenship through subterfuge’ (2023) 21 *International Journal of Constitutional Law* 285. When referring to ‘authoritarian practices,’ we mean ‘patterns of action that sabotage accountability to people over whom a political actor exerts control, or their representatives, by means of secrecy, disinformation and disabling voice.’ See Glasius, ‘What authoritarianism is . . . and is not: a practice perspective’ (2018) 94 *International Affairs* 515 at 517.

⁶ See, for example, Articles 8(2), 10(2) and 11(2) of the Convention for the Protection of Human Rights and Fundamental Freedoms 1950, ETS 5 (European Convention on Human Rights, ECHR) and Articles 13(2), 15 and 16(2) of the American Convention on Human Rights 1969, OAS TS 36 (ACHR).

⁷ *Merabishvili v Georgia* Application No 72508/13, Merits and Just Satisfaction, 28 November 2017, at para 168.

⁸ Sajó, *Ruling by Cheating: Governance in Illiberal Democracy* (2021) at 298. See also Satzger, Zimmermann and Eibach, ‘Does Art. 18 ECHR grant protection against politically motivated criminal proceedings’ (2014) 4 *European Criminal Law Review* 91 at 112.

⁹ See Finnerty, ‘When is a State’s “Hidden Agenda” Proven?: The Role of the Merabishvili’s Three-Legged Evidentiary Test in the Article 18 Strasbourg Case Law’ (2023) 4 *European Convention on Human Rights Law Review* 447.

¹⁰ See Finnerty, ‘How Should the European Court of Human Rights Remedy Violations of Article 18 ECHR?: The Case for Remedial Realignment’ (2024) 3 *European Convention on Human Rights Law Review* 11.

¹¹ See, for example, Letwin, ‘Proportionality, Stringency and Utility in the Jurisprudence of the European Court of Human Rights’ (2023) 23(3) *Human Rights Law Review* 1; and Lixinski, ‘Balancing Test: Inter-American Court of Human Rights (IACtHR)’ in Ruiz Fabri (ed), *Max Planck Encyclopedia of International Procedural Law* (2019).

¹² Abrucci, *Judicial Convergence and Fragmentation in International Human Rights Law* (2022) at 169–93.

¹³ See, for example, Orcan, ‘Legitimate Aims, Illegitimate Aims and the ECtHR: Changing Attitudes and Selective Strictness’ (2022) 7 *University of Bologna Law Review* 7; and Çalı, ‘Coping with Crisis: Whether the Variable Geometry in the Jurisprudence of the European Court of Human Rights’ (2017) 35 *Wisconsin International Law Journal* 237. Admittedly, ‘ulterior purpose’ analysis by the ECtHR under Article 18 ECHR has been the subject of growing scholarly attention:

between the two treaties but stopping short of investigating how these doctrines are applied by the two courts in material detail.¹⁴ Indeed, noting the similarities between Article 18 ECHR¹⁵ and Article 30 ACHR¹⁶—two general limitation clauses providing for the assessment of misuse of power—Corina Heri noted that ‘more work is needed to determine whether and to what extent comparisons are possible’.¹⁷

This article aims to undertake such work, drawing a more detailed comparison between the application of the misuse of power doctrine by the ECtHR and IACtHR. To do so, the article examines the 11 ECtHR judgments against Azerbaijan and three IACtHR judgments against Venezuela where the doctrine has been applied to identify ‘hidden,’ ‘indirect,’ or ‘ulterior’ purposes. This comparative case selection is justified by the ‘most similar’ case logic,¹⁸ considering that both states have experienced extensive autocratisation and represent the two least free states to have been subjected to the jurisdiction of the Strasbourg and San José courts.¹⁹

The article finds that the ECtHR has applied the misuse of power doctrine rather restrictively under Article 18 ECHR, resulting in some of its potential remaining ‘untapped’.²⁰ In contrast, the IACtHR has applied the doctrine more broadly, and directly under various substantive provisions under the ACHR, without making any material use of Article 30 ACHR. We argue that these findings challenge the parallels previously drawn between Article 18 ECHR and Article 30 ACHR,²¹ attempting to explain these differences by taking recourse to the two respective *travaux préparatoires* and the interpretation and application of the two provisions by the courts. We conclude that these differences, should they remain unaddressed by the ECtHR, better position the IACtHR to make use of the misuse of power doctrine when responding to authoritarian practices in a broader array of contexts.

The article first turns to the application of the misuse of power doctrine by the ECtHR, analysing the relevant judgments against Azerbaijan in Section 2. This is followed by an analysis of the IACtHR’s use of the doctrine in judgments against Venezuela in Section 3. A comparison of the two approaches is made in Section 4, seeking to explain any convergence and divergence. Section 5 concludes.

see, most recently, Finnerty and Çalı, ‘The *Travaux Préparatoires* and Progressive Treaty Interpretation: Article 18 of the European Convention on Human Rights’ (2025) 36 *European Journal of International Law* 475.

¹⁴ See Negishi, ‘Conventionality Control of Domestic “Abuse of Power”: Maintaining Human Rights and Democracy’ (2017) 26 *The Italian Yearbook of International Law* 243; and Hennebel and Tiğroudja, *The American Convention on Human Rights: A Commentary* (2022) at 851–63.

¹⁵ Entitled ‘Limitation on use of restrictions on rights,’ Article 18 ECHR provides: ‘The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.’

¹⁶ Entitled ‘Scope of Restrictions,’ Article 30 ACHR provides: ‘The restrictions that, pursuant to this Convention, may be placed on the enjoyment or exercise of the rights or freedoms recognized herein may not be applied except in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established.’

¹⁷ Heri, ‘Loyalty, Subsidiarity, and Article 18 ECHR: How the ECtHR Deals with Mala Fide Limitations of Rights’ (2020) 1 *European Convention on Human Rights Law Review* 25 at 43–44. Although out with the scope of this article, Article 5 of the International Covenant on Civil and Political Rights also provides for such a general limitations clause which is yet to be applied to detect ulterior purposes, notwithstanding proposals for such application: see *López Burgos v Uruguay* (052/1979), 29 July 1981, CCPR/C/13/D/52/1979, Individual Opinion of Christian Tomuschat.

¹⁸ See Hirsch, ‘The Question of Case Selection in Comparative Constitutional Law’ (2005) 53 *American Journal of Comparative Law* 125 at 133–9.

¹⁹ In the latest round of country scoring in 2024, Freedom House scored Azerbaijan 7/100 and Venezuela 15/100, with both being labelled as ‘not free’ (the most autocratic label used by Freedom House in contrast to ‘partly free’ and ‘free’): see <https://freedomhouse.org/explore-the-map?type=fiw&year=2024>. It should be noted that ECtHR’s and IACtHR’s application of the misuse of power doctrine has not been limited to these two countries; see, for example, concerning judicial independence, *Case of the Supreme Court of Justice (Quintana Coello et al.) v Ecuador* IACtHR Series C 266 (2013); *Case of the Constitutional Tribunal (Camba Campos et al.) v Ecuador* IACtHR Series C 268 (2013); *Miroslava Todorova v Bulgaria* Application No 40072/13, Merits and Just Satisfaction, 19 October 2021; and *Juszczyszyn v Poland* Application No 35599/20, Merits and Just Satisfaction, 6 October 2022.

²⁰ Keller and Heri, ‘Selective Criminal Proceedings and Article 18 ECHR: The European Court of Human Rights Untapped Potential to Protect Democracy’ (2016) 37 *Human Rights Law Journal* 1.

²¹ See Negishi, *supra* n 14; Heri, *supra* n 17; and Hennebel and Tiğroudja, *supra* n 14.

2. THE STRASBOURG COURT'S USE OF THE MISUSE OF POWER DOCTRINE IN JUDGMENTS AGAINST AZERBAIJAN

The ECtHR has established a misuse of power in 11 cases against Azerbaijan, all of which concern instances of authoritarian practices targeting opposition politicians,²² non-governmental organisations (NGO) and actors,²³ lawyers²⁴ and journalists.²⁵ Azerbaijan has been subject to a long process of autocratisation, driven by recurrent authoritarian practices. The first elected president after the country's post-soviet independence, Abulfaz Elchibey, was ousted within one year of taking office following a military coup in 1993. His successor, Heydar Aliyev, went on to centralize state power in his executive, and erode the capacity of the unicameral legislature (the *Milli Mejlis*) and domestic judiciary to hold the president to account, through constitutional and other state reforms.²⁶ Heydar Aliyev was then succeeded by his son, Ilham Aliyev, who has overseen recurrent crackdowns against any opposition and civil society, most notably in 2014²⁷ and 2023.²⁸ The most prominent authoritarian practices in these contexts have been politically motivated individual prosecutions and the adoption or broadening of restrictive NGO regulatory legislation.²⁹

The Strasbourg Court's first explicit finding of a misuse of power and pronouncement of an ulterior purpose in this context came with the 2014 judgment of *Ilgar Mammadov v Azerbaijan*,³⁰ when the ECtHR declared that the 'actual purpose of the impugned measures was to silence or punish the applicant for criticising the Government and attempting to disseminate what he believed was the true information that the Government were trying to hide'.³¹ This case concerned the arrest and pre-trial detention of an opposition politician, blogger and founder of an opposition political movement in Azerbaijan called the Republican Alternative Civic Movement (REAL). Mammadov was detained after he blogged coverage of protests in the city of Ismaili in January 2013. In the relevant blog posts, he criticized the government's role causing the unrest and highlighted the emerging importance of REAL. Mammadov was subsequently charged on 4 February 2013 for two alleged criminal offences: 'organising or actively participating in actions causing a breach of public order' and 'resistance to or violence against public officials, posing a threat to their life or health'.³² After exhausting domestic remedies, the applicant complained, *inter alia*, under Article 18 in conjunction with Articles 5, 6, 13 and 14 that 'the criminal proceedings against him were repressive measures and had the purpose of "removing" him as

²² *Ilgar Mammadov v Azerbaijan* Application No 15172/13, Merits and Just Satisfaction, 22 May 2014.

²³ *Mammadli v Azerbaijan* Application Nos 68762/14 and 71200/14, Merits and Just Satisfaction, 20 September 2018; *Rashad Hasanov and Others v Azerbaijan* Application Nos 48,653/13 et al., Merits and Just Satisfaction, 7 June 2018; *Natig Jafarov v Azerbaijan* Application No 64581/16, Merits and Just Satisfaction, 7 November 2019; *Ibrahimov and Mammadov v Azerbaijan* Application Nos 63,571/16 et al., Merits and Just Satisfaction, 13 February 2020; *Yunusova and Yunusova v Azerbaijan* (No 2) Application No 68817/14, Merits and Just Satisfaction, 16 July 2020; *Azizov and Novruzlu v Azerbaijan* Application Nos 65583/13 and 70106/13, Merits and Just Satisfaction, 18 February 2021; and *Democracy and Human Rights Resource Centre and Mustafayev v Azerbaijan* Application Nos 74288/14 and 64568/16, Merits and Just Satisfaction, 14 October 2021.

²⁴ *Rasul Jafarov v Azerbaijan* Application No 69981/14, Merits and Just Satisfaction, 17 March 2016; and *Aliyev v Azerbaijan* Application Nos 68,762/14 and 71,200/14, Merits and Just Satisfaction, 20 September 2018. See also *Democracy and Human Rights Resource Centre and Mustafayev v Azerbaijan*, supra n 23.

²⁵ *Khadija Ismayilova v Azerbaijan* (No 2) Application No 30778/15, Merits and Just Satisfaction, 27 February 2020.

²⁶ For a detailed overview, see Kamrava, 'State-Building in Azerbaijan: The Search for Consolidation' (2001) 55 *Middle East Journal* 216.

²⁷ See Goyushov, 'The crackdown in Azerbaijan,' *Open Democracy*, 17 March 2015, available at <https://www.opendemocracy.net/en/odr/crackdown-in-azerbaijan/> [last accessed 1 December 2025].

²⁸ Human Rights Watch and Freedom Now, 'We Try to Stay Invisible' Azerbaijan's Escalating Crackdown on Critics and Civil Society', 8 October 2024, available at <https://www.hrw.org/report/2024/10/08/we-try-to-stay-invisible/azerbaijans-escalating-crackdown-critics-and-civil-society> [last accessed 1 December 2025].

²⁹ *Ibid.*

³⁰ *Supra* n 22.

³¹ *Ibid.* at para 143.

³² *Ibid.* at para 27.

a critic of the Government and a potentially serious opponent in the upcoming presidential elections, as well as discouraging others from criticising the Government.³³

The ECtHR elected to focus on the applicant's ulterior purpose complaint under Article 18 in conjunction with Article 5, without reasoning this decision.³⁴ In evaluating whether the state prosecution pursued an ulterior purpose, the Strasbourg Court paid particular attention to the close temporal connection between the applicant's critical blogs and the state prosecution of the applicant.³⁵ This temporal proximity was sufficient for the ECtHR to conclude there was an ulterior purpose.³⁶

The application of Article 18 in conjunction with Article 5, in the specific context of pre-trial detention, continued to be the focus of the ECtHR's application of misuse of power doctrine, with the three judgments that followed *Ilgar Mammadov* between 2016 and 2018 also finding violations of Article 18 in conjunction with Article 5.³⁷ These three judgments all concerned civil society actor applicants who were active in organisations which aimed to pursue objectives related to social justice and human rights protection. In these three judgments, the ECtHR consistently took recourse to contextual evidence in determining the existence of an ulterior purpose.³⁸ It considered, in particular, the close temporal links between criticism against the state and criminal prosecution,³⁹ the increasingly tight regulation of and crackdown against civil society organisations in Azerbaijan⁴⁰ and political statements targeting the applicants just before criminal prosecutions were instigated.⁴¹

A significant development came in the 2018 judgment of *Aliyev v Azerbaijan*.⁴² This case concerned the prosecution of a lawyer and chair of Legal Education Society, a civil society organisation engaged with human rights practice, training and advocacy. Aliyev's work, and that of his organisation, included engaging with the ECtHR itself in the submission and arguing of cases before the Court. In May 2014, the applicant was charged for illegal entrepreneurship, large-scale tax evasion, forgery and abuse of power. In August 2014, both the applicant's home and office at the Legal Education Society were searched by the authorities, during which computers, electronic storage devices and over 100 files concerning pending judicial cases before both domestic and the Strasbourg courts were seized. The applicant complained, *inter alia*, under Article 18 in conjunction with Articles 5 and 8 that 'the restrictions applied in his case were aimed at punishing and silencing him as a critic of the Government, a human-rights defender and a practicing lawyer before the [Strasbourg] Court, thereby neutralising him and preventing him from continuing human rights activities'.⁴³

The ECtHR, in contrast to *Ilgar Mammadov*, considered this Article 18 complaint in conjunction with both Articles 5 and 8, and once again considered the contextual evidence surrounding the detention and searches: the applicant's status as a human rights defender;⁴⁴ the absence of 'reasonable suspicion' within the meaning of Article 5;⁴⁵ statements targeting the applicant from pro-state media, politicians and civil servants;⁴⁶ the absence of any legitimate aim under Article

³³ Ibid. at para 133.

³⁴ Ibid. at para 139.

³⁵ Ibid. at para 142.

³⁶ Ibid. at para 143.

³⁷ *Rasul Jafarov v Azerbaijan*, supra n 24; *Mammadli v Azerbaijan*, supra n 23; and *Rashad Hasanov and Others v Azerbaijan*, supra n 23.

³⁸ For a more detailed analysis of the ECtHR's approach to evidence in Article 18, see Finnerty, supra n 9.

³⁹ *Mammadli v Azerbaijan*, supra n 23 at para 102; and *Rashad Hasanov and Others*, supra n 23 at para 124.

⁴⁰ *Rasul Jafarov v Azerbaijan*, supra n 24 at paras 159 and 161; and *Mammadli v Azerbaijan*, supra n 23 at paras 99 and 101.

⁴¹ *Rasul Jafarov v Azerbaijan*, supra n 24 at para 160; *Mammadli v Azerbaijan*, supra n 23 at para 100; and *Rashad Hasanov and Others v Azerbaijan*, supra n 23 at para 122.

⁴² Supra n 24.

⁴³ Ibid. at para 192.

⁴⁴ Ibid. at para 208.

⁴⁵ Ibid. at para 209.

8 and arbitrary nature of the searches;⁴⁷ the seizure of files relating to cases pending before the ECtHR;⁴⁸ the chilling effect of his prosecution on civil society;⁴⁹ as well as the tightening legislative regulation of NGOs and a general crackdown against human rights defenders in the country.⁵⁰ Considered collectively, the Strasbourg Court deemed this evidence sufficient to hold that ‘the authorities’ actions were driven by improper reasons and the actual purpose of the impugned measures was to silence and to punish the applicant for his activities in the area of human rights as well as to prevent him from continuing those activities’.⁵¹ The ECtHR, therefore, found a violation of Article 18 in conjunction with both Articles 5 and 8.⁵²

Aliyev is significant for the development of the misuse of power doctrine in the ECtHR’s jurisprudence for a number of reasons. In the context of cases concerning Azerbaijan, it affirmed the importance of contextual evidence following the reforms made under the provision in the 2017 Grand Chamber judgment of *Merabishvili v Georgia*.⁵³ Its broader significance, however, lies in its finding of a violation of Article 18 in conjunction with an ECHR provision other than Article 5, in this case Article 8.

The ECtHR continued to expand the scope of Article 18 in its 2021 judgment of *Democracy and Human Rights Resource Centre and Mustafayev v Azerbaijan*.⁵⁴ Partially mirroring the facts in *Aliyev*, this case concerned a human rights defender and his NGO suffering from the state’s crackdown on civil society. Mustafayev was subject to travel bans and both Mustafayev and Democracy and Human Rights Resource Centre, the NGO he founded and chaired working in human rights advocacy, were subject to bank account freezes. This gave rise to complaints, *inter alia*, under Article 18 in conjunction with both Article 2 of Protocol Number 4, in respect of the travel bans, and Article 1 of Protocol Number 1, with regard to the bank account freezes. Taking recourse once again to contextual evidence, for example the general crackdown against human rights defenders at the relevant time in Azerbaijan,⁵⁵ the ECtHR found a violation of Article 18 in conjunction with both Article 2 of Protocol Number 4 and Article 1 of Protocol Number 1, pronouncing on the ulterior purpose of punishing ‘the applicants for their activities in the area of human rights and to prevent them from continuing those activities’.⁵⁶ As with *Aliyev*, the recognition of Article 18’s application in conjunction with other ECHR rights and freedoms marked an important expansion of the misuse of power doctrine in practice by the ECtHR.

The ECtHR addressed a novel element of its misuse of power doctrine in its 2021 judgment of *Azizov and Novruzlu v Azerbaijan*.⁵⁷ This case concerned the criminal prosecution and pre-trial detention of two student-members in the NIDA Civic Movement, a 350-member civil society protest organisation pursuing social justice reforms in Azerbaijan. The applicants were arrested and prosecuted for their involvement in a NIDA organized protests in 2013. *Azizov and Novruzlu* was the first case against Azerbaijan to engage with the predominant purpose test. This test, transposed from French administrative law by the Strasbourg Court in its *Merabishvili* judgment in 2017,⁵⁸ provides that where a plurality of purposes motivate a restriction, the ulterior non-prescribed purpose must be the predominant one in order to find a violation of

⁴⁶ Ibid. at para 210.

⁴⁷ Ibid. at para 211.

⁴⁸ Ibid. at para 211.

⁴⁹ Ibid. at para 213.

⁵⁰ Ibid. at paras 211 and 214.

⁵¹ Ibid. at para 215.

⁵² Ibid. at para 216.

⁵³ See *Merabishvili v Georgia*, supra n 7 at para 317.

⁵⁴ Supra n 23.

⁵⁵ Ibid. at para 109.

⁵⁶ Ibid. at paras 110–11.

⁵⁷ Supra n 23.

⁵⁸ See Tsampi’s contribution in this Symposium.

Article 18.⁵⁹ The predominance test was engaged in this particular case because the applicants did not contend that their pre-trial detention was not based on ‘reasonable suspicion’ under Article 5.⁶⁰ The ECtHR established the existence of an ulterior purpose, namely ‘punishing and silencing NIDA members for their active involvement in the demonstrations held against the government’,⁶¹ on account of public statements from state officials targeting NIDA and the close temporal connection between the applicants’ detention and a protest planned for the following day.⁶² The ECtHR proceeded to consider whether such an ulterior purpose was predominant. Recalling the widespread crackdown against civil society, in particular NIDA,⁶³ and the failure of domestic courts to reason their extensions to applicants’ pre-trial detention,⁶⁴ the Strasbourg Court concluded that the ulterior non-prescribed purpose was the predominant one.

The review of the cases against Azerbaijan shows how Article 18’s applicability has gradually been extended to a number of rights and freedoms under the Convention, notably Article 8, Article 2 of Protocol Number 4 and Article 1 of Protocol Number 1. At the same time, however, the ECtHR has consistently held that the ‘mere fact that a restriction ... does not meet all the requirements of the clause that permits it does not necessarily raise an issue under Article 18’ and that ‘[s]eparate examination of a complaint under that Article is only warranted if the claim that a restriction has been applied for a purpose not prescribed by the Convention appears to be a fundamental aspect of the case’.⁶⁵ Additionally, as illustrated in *Azizov and Novruzlu*, in cases where the authorities’ actions were driven by both legitimate and ulterior purposes, a violation of Article 18 will only be established if the latter purpose was the ‘predominant’ one. Contrasting views on this interpretation have been advanced by both scholars⁶⁶ and individual judges of the ECtHR.⁶⁷ These critiques converge in their reasoning that this present approach results in an unnecessarily restrictive interpretation and application of misuse of power doctrine under Article 18. Nevertheless, the ECtHR has persisted with this interpretation and continues to view Article 18 and the misuse of power doctrine under the ECHR as serving a higher rather than complementary purpose within that treaty.

3. THE SAN JOSÉ COURT’S USE OF THE MISUSE OF POWER DOCTRINE IN JUDGMENTS AGAINST VENEZUELA

The IACtHR has so far established a misuse of power in three cases against Venezuela. All three are to some extent related to the autocratisation process experienced in the country in the last decades. In particular, following the election of Hugo Chávez in 1998, a series of reforms and measures were implemented that gradually strengthened the executive and increased its control over institutions such as the judiciary, the electoral authority and the military.⁶⁸ In April 2002,

⁵⁹ *Merabishvili v Georgia*, supra n 7 at para 305.

⁶⁰ *Azizov and Novruzlu v Azerbaijan*, supra n 23 at para 70.

⁶¹ *Ibid.* at para 74.

⁶² *Ibid.* at paras 71–3.

⁶³ *Ibid.* at paras 76–7.

⁶⁴ *Ibid.* at para 78.

⁶⁵ *Merabishvili v Georgia*, supra n 7 at para 291. See also, for example, *Aliyev v Azerbaijan*, supra n 24 at para 199; *Azizov and Novruzlu v Azerbaijan*, supra n 23 at para 68; and *Rashad Hasanov and Others v Azerbaijan*, supra n 23 at para 120.

⁶⁶ See, for example, Tan, ‘The Dawn of Article 18 ECHR: A Safeguard Against European Rule of Law Backsliding’ (2018) 9 *Goettingen Journal of International Law* 109.

⁶⁷ See Joint Concurring Opinion of Judges Yudkivska, Tsotsoria and Vehabović, and Concurring Opinion of Judge Serhides in *Merabishvili v Georgia*, supra n 7.

⁶⁸ See Corrales, ‘Venezuela’s Autocratization, 1999–2021: Variations in Temporalities, Party Systems, and Institutional Controls’ in Fung, Moss and Westad. (eds), *When Democracy Breaks: Studies in Democratic Erosion and Collapse, from Ancient Athens to the Present Day* (2024) 327. This process has also partly been reflected in the IACtHR’s case law, for example *Case of Reverón Trujillo v Venezuela* IACtHR Series C 197 (2009) and *Case of Chocrón Chocrón v Venezuela* IACtHR Series C 227(2011) (both regarding the judiciary).

a coup d'état briefly removed Chávez from power for two days and led to heightened political polarisation and social conflict in the following years. Chávez was reelected for the third time in 2012 but passed away shortly thereafter. Nicolás Maduro took over as interim president until the 2013 elections, which he then narrowly won. Maduro's rule saw the intensification of autocratisation, including crackdowns against NGOs, the media and the political opposition.

Each of the three identified cases before the IACtHR shows a somewhat different approach in how the IACtHR proceeds to establish a misuse of power. It does so by identifying indirect restrictions on freedom of expression under Article 13(3) of the ACHR (A), by finding discriminatory intent in the enjoyment of the right to political participation under Article 23 (B) and in the context of examining judicial guarantees, judicial protection and freedom of expression (C).

A. Article 13(3): indirect restrictions to the freedom of expression

The 2015 judgment of *Granier et al. (Radio Caracas Televisión) v Venezuela*⁶⁹ concerned a series of alleged violations relating to the state's decision not to renew the concession of a private broadcasting station, Radio Caracas Televisión (RCTV), upon its expiry in May 2007. In this case, the IACtHR established an illegitimate and undeclared motive behind the state's decision, and a misuse of power, in the context of examining indirect restrictions under Article 13(3) ACHR.

Initially, when establishing the facts of the case, the IACtHR found that these took place in context of heightened tension following the 2002 coup, marked by increased polarisation and radicalisation. This included an 'insistent discourse of the Venezuelan Government accusing the private media, including RCTV, of "being enemies of the government," "perpetrators of the coup," and "fascists"' and also mentioning 'the possibility of not renewing the concessions of the media whose position was contrary to the government'.⁷⁰ This 'environment of intimidation' and 'official discourse discrediting the professionalism of journalists'⁷¹ was an important element in the subsequent finding of a misuse of power.⁷²

Regarding the right to freedom of expression, the IACtHR began by finding that the alleged restriction did not follow from the circumstance that the concession had not automatically been renewed because no such renewal obligation existed in domestic or international law.⁷³ It, thus, proceeded to examine whether the state's decision not to renew the concession had amounted to an indirect restriction in terms of Article 13(3) of the ACHR.

In this respect, the IACtHR noted that the state had put forward various justifications for its actions.⁷⁴ For instance, the state had referred to a number of alleged proceedings and sanctions against RCTV, including sanctions for the company's actions during the coup.⁷⁵ The IACtHR noted, however, that this argument had only been invoked before the IACtHR, whereas the official communication announcing the non-renewal decision had explicitly stated that it was not the result of a sanction.⁷⁶ Moreover, the cited proceedings and sanctions were not directly related to the coup, nor were they conclusive as to any link to the renewal of the concession.⁷⁷ Instead, the resolution and communication officially announcing the non-renewal decision had justified this decision by promoting the 'democratization of the use of the broadcasting media and the plurality of messages and contents'.⁷⁸ The IACtHR, therefore, concluded that the

⁶⁹ IACtHR Series C 293 (2015).

⁷⁰ Ibid. at para 61.

⁷¹ Ibid.

⁷² See, for example, ibid. at paras 191 and 197.

⁷³ Ibid. at para 180.

⁷⁴ Ibid. at para 182.

⁷⁵ Ibid. at para 183.

⁷⁶ Ibid. at paras 90 and 184.

⁷⁷ Ibid. at para 184.

declared justification for the decision was the protection of media plurality, and considered that this was, as such, a legitimate purpose.⁷⁹

The IACtHR nonetheless went on to examine whether this had been the real purpose, referring both to its own case law and to that of the ECtHR applying Article 18 ECHR,⁸⁰ and finding that it is

necessary to take into account that the motive or purpose of a specific act of the State authorities is relevant for the legal analysis of a case, because a motivation or purpose that differs from that of the norm that grants the state authority the power to act may show whether the action may be considered an arbitrary act, or a misuse of power.⁸¹

The IACtHR found that the declared motive had in fact not been the real one but had rather been ‘offered to give an appearance of legality’.⁸² Instead, in the IACtHR’s view, the decision had mainly been based on the government’s discontent with RCTV’s editorial line and transmitted political position, and had sought to silence criticism against the government.⁸³ In order to reach this conclusion, the IACtHR reviewed a number of public statements between 2002 and 2007 made by state officials, including the president, relating to RCTV and its concession.⁸⁴ It concluded from this evidence that the decision not to renew RCTV’s concession had, in practice, been taken a long time before the concession expired, and that it had been ordered by the executive.⁸⁵ Moreover, among these public statements, only one had referred to the protection of media pluralism—ie the declared purpose—whereas the remaining statements had coincided in referring to two other main reasons, namely, that RCTV had not changed its editorial line after the coup and the alleged sanctions for RCTV’s actions during the coup.⁸⁶ Having thus established that the decision had been taken previously and that it had been based on the state’s discontent with RCTV’s editorial line, and adding this to the context in which the facts of the case took place, the IACtHR concluded that the state had misused its power by using ‘its lawful authority to try and align the communications outlet’s editorial line with the government’.⁸⁷ Accordingly, there had been an indirect restriction of the right to freedom of expression of RCTV’s shareholders, executives and journalists, and the IACtHR declared a violation of Article 13(1) and 13(3) in relation to Article 1(1) of the ACHR.

As follows from the foregoing, the IACtHR identified a hidden aim and misuse of power by conducting a restriction analysis under Article 13(3) of the ACHR. Article 13(3)—which has no counterpart in the ECHR—complements the limitation clause in Article 13(2) by explicitly prohibiting restrictions on the right to freedom of expression through ‘indirect methods or means’. The provision aims to target more subtle or less visible forms of restrictions⁸⁸ and mentions, as examples, ‘the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information’. It has been applied, for example, where the shareholder of a media channel was deprived of his citizenship⁸⁹

⁷⁸ Ibid. at para 185.

⁷⁹ Ibid. at paras 187–8.

⁸⁰ *Gusinskiy v Russia* Application No 70276/01, Merits and Just Satisfaction, 19 May 2004; *Cebotari v Moldova* Application No 35615/06, Merits and Just Satisfaction, 13 November 2007; and *Lutsenko v Ukraine* Application No 6492/11, Merits and Just Satisfaction, 3 July 2012.

⁸¹ *Case of Granier et al. (Radio Caracas Televisión) v Venezuela*, supra n 69 at para 189 (citations omitted).

⁸² Ibid. at para 196.

⁸³ Ibid. at paras 197–8.

⁸⁴ Ibid. at paras 190–1.

⁸⁵ Ibid. at para 193.

⁸⁶ Ibid. at paras 194 and 196.

⁸⁷ Ibid. at para 197.

⁸⁸ Ibid. at para 162.

and where a presidential candidate was subject to criminal sanctions and restrictions to leave the country.⁹⁰ Although it could be considered that the purpose and formulation of Article 13(3) is thereby well-suited for ulterior purpose analyses, the IACtHR has identified such purposes also by relying on other provisions.

B. Article 23(1) in relation to Article 1(1): non-discrimination in the right to participate in government

The 2018 judgment of *San Miguel Sosa et al. v Venezuela*⁹¹ concerned the termination of the employment contract of three public servants, after they had signed a petition in 2003 requesting a referendum to remove then-president Chávez. The president had authorized the electoral authority, the National Electoral Council (CNE), to release copies of the lists of signatories of the petition to a congressman, who had then published these lists on a website.⁹² In this case, the IACtHR established a misuse of power and a hidden motive behind the alleged victims' dismissal by finding that they had been discriminated against in their right to participate in government, under Article 23(1) (b) and (c) in relation to Article 1(1) of the ACHR.

The IACtHR began by clarifying that being perceived as a political opponent for having signed the petition was not, as such, problematic under the ACHR; the relevant question was rather whether such perception had been used to discriminate against the alleged victims. In this regard, it noted that the letter informing the alleged victims of their dismissal had not stated any reasons or legal justifications. Later, the employer had referred to a clause in their employment contracts on the discretionary power of the employer to terminate the employment, and to a restructuring of the agency and reduction of employees. However, there was no record as to whether this restructuring had been implemented, nor any explanation as to the necessity to terminate the alleged victims' employment on that ground.⁹³

The IACtHR therefore proceeded to examine whether 'beyond the formality or power invoked by the state' there were elements showing that the real motivation for the alleged victims' dismissal had been 'to exercise some form of covert retaliation, persecution or discrimination against them'.⁹⁴ In this respect, it stated that

given the circumstances in which the facts occurred, it is not appropriate to analyze this matter as a case of alleged direct restriction of rights—in which the justification of the restriction would be analyzed in the terms of the Convention—or as a direct case of difference of treatment—in which the objectivity and reasonableness of the justification provided by the State would be assessed.⁹⁵

The IACtHR reiterated the importance of looking into the motives behind states' actions for identifying arbitrary acts or misuses of power, again referring to its own and the ECtHR's case law, and accordingly went on to examine the elements allegedly demonstrating a hidden purpose and misuse of power.⁹⁶ These included the publication of the lists of signatures; the context of political polarisation; statements by public officials in connection with the collection of signatures as well as after the publication of the lists; and the circumstances surrounding the termination of the employment contracts. In reviewing these elements, the IACtHR considered,

⁸⁹ *Case of Ivcher Bronstein v Peru* IACtHR Series C 74 (2001) at para 162.

⁹⁰ *Case of Ricardo Canese v Paraguay* IACtHR Series C 111 (2004) at para 107.

⁹¹ IACtHR Series C 348 (2018).

⁹² *Ibid.* at paras 56–60.

⁹³ *Ibid.* at paras 118–19.

⁹⁴ *Ibid.* at para 120.

⁹⁵ *Ibid.* at para 121.

⁹⁶ *Ibid.*

notably, that the published list had enabled the employer to know that the alleged victims had signed the petition, and that this was ‘clearly related’ to the decision to end their contracts; that there were ‘strong indications’ that the real reason for the dismissals had been a mistrust by the employer due to the participation in the petition; and that the alleged victims’ case had not been an isolated one.⁹⁷

The IACtHR concluded that the alleged victims’ dismissal had occurred ‘in a context of high volatility, political polarization and intolerance of dissidence’ which could have generated discrimination or persecution of political opponents and persons having signed the petition, and that this situation had been made possible by members of the different branches of the state and the electoral authority.⁹⁸ Moreover, the state had not sufficiently explained the reasons for the dismissals and it was not enough to simply refer to elements of reorganisation or convenience without further details.⁹⁹ The IACtHR therefore considered that the dismissals had constituted a misuse of power, and that the invoked clause in the employment contracts had been ‘used as a veil of legality to conceal the true reason or real purpose, namely: a reprisal against the alleged victims for having legitimately exercised a political right established in the Constitution, by signing in favor of the presidential recall referendum’.¹⁰⁰ Their participation in the petition had been regarded as political disloyalty, which had led to a difference in treatment through arbitrary dismissal.¹⁰¹ The IACtHR declared a violation of the right to political participation in Article 23(1) (b) and (c) in relation to the principle of non-discrimination in Article 1(1) of the ACHR.

In this case, it is interesting to note that the IACtHR explicitly chose not to make a regular restriction analysis or examine the case as a direct instance of difference in treatment. It justified this choice with ‘the circumstances in which the facts occurred’ and emphasized, as it did in *Granier*, the importance of identifying any hidden motives in order to establish possible arbitrary acts or misuses of power. Thus, relying on the prohibition of discrimination in the enjoyment of the right to political participation, under Articles 23 and 1(1) of the ACHR, the IACtHR examined whether there had been an ulterior purpose behind the alleged victims’ dismissal so as to determine whether they had in reality been treated differently based on their political opinion.

C. Articles 8, 25 and 13: right to judicial guarantees, judicial protection and freedom of expression

The 2024 judgment of *Capriles v Venezuela*¹⁰² concerned a number of alleged violations in connection with the presidential elections of April 2013, where Henrique Capriles ran as an opposition candidate, and lost, against Nicolás Maduro. In this case, the IACtHR first found a violation of the political rights, freedom of expression and right to equal protection of the alleged victim, owing to several acts and omissions by the state that, taken together, had affected the integrity of the electoral process. Subsequently, the IACtHR examined the complaints relating to the proceedings that Capriles had initiated before the Supreme Court of Justice (TSJ) after the elections, and found a violation of the right to judicial guarantees and the right of defence under Article 8 ACHR, the right to judicial protection under Article 25 ACHR and the right to freedom of expression under Article 13 ACHR. As a part of finding these latter violations, the IACtHR identified an undeclared purpose and misuse of power by the Constitutional Chamber of the TSJ.

⁹⁷ Ibid. at paras 134, 141 and 146.

⁹⁸ Ibid. at para 148.

⁹⁹ Ibid. at para 149.

¹⁰⁰ Ibid. at para 150.

¹⁰¹ Ibid.

¹⁰² IACtHR Series C 541 (2024).

Initially, when establishing the facts of the case, the IACtHR found that these had been preceded by a progressive deterioration of the separation of powers in Venezuela and of the independence and impartiality of the CNE and the TSJ.¹⁰³ This conclusion was reached based on the IACtHR's previous case law regarding Venezuela—including *Granier* and *San Miguel Sosa*—and other evidence, including reports from the Inter-American Commission on Human Rights.¹⁰⁴

Regarding the proceedings before the TSJ, Capriles had, *inter alia*, filed an electoral appeal before the Electoral Chamber of the TSJ seeking a declaration of nullity of the presidential election. The case before the Electoral Chamber had been taken over by the Constitutional Chamber of the TSJ, which had declared it inadmissible for containing offensive and disrespectful language.¹⁰⁵ Capriles was also issued with a fine, and the Constitutional Chamber had ordered the referral of his written observations to the Public Prosecutor's Office in order to assess the possibility of criminal sanctions against him for disrespecting the judiciary.¹⁰⁶ Moreover, his complaint seeking the recusal of the judges of the Constitutional Chamber had been dismissed as unfounded.¹⁰⁷ The IACtHR found that the TSJ had failed to motivate its decision, that it had not properly handled the request for recusal and had acted in breach of national law, and that the alleged victim's right to an effective remedy, right of defence and freedom of expression had been violated.¹⁰⁸

Following this, and before concluding, the IACtHR added a last subparagraph whereby, in addition to the foregoing, it considered that there were elements allowing it to affirm that the decisions of the Constitutional Chamber of the TSJ had intended to favour the permanence of the governing party at the head of the executive, and to silence a legitimate questioning of authority. This was considered to be demonstrated by a series of elements, notably: the Constitutional Chamber's decision to take over the case from the Electoral Chamber, since the former had strong indications of partiality; the way in which the request for recusal had been handled; the lack of motivation and arbitrariness of the decision on the electoral appeal and imposition of a fine; and the referral of the matter to the Public Prosecutor's Office. The IACtHR, therefore, considered that the acts of the Constitutional Chamber in dealing with the electoral appeal had constituted a misuse of power, since the legal provisions allowing it to declare the matter inadmissible and impose a fine had been applied with the real purpose of avoiding a questioning of the election results. Adding this to the previous findings, the IACtHR declared a violation of the right to judicial guarantees, judicial protection and freedom of expression under Articles 8(1), 25 and 13 in relation to Articles 1(1) and 23, as well as the right of defence under Article 8 in relation to Article 1(1).¹⁰⁹

This case is somewhat different from *Granier* and *San Miguel Sosa* in that the IACtHR's identification of a misuse of power was seemingly not the primary focus, nor the main element leading to the finding of a violation. Rather, it constituted an additional aspect complementing the previous findings and contributing to the overall conclusion on the right to judicial guarantees, judicial protection and freedom of expression. Moreover, while the Commission and representatives in *Granier* and *San Miguel Sosa* explicitly argued that there were ulterior purposes and misuses of power,¹¹⁰ such arguments are not as clearly discernible in *Capriles* with regard to the acts of the Constitutional Chamber. In any event, the case further illustrates how the

¹⁰³ Ibid. at paras 33 and 88.

¹⁰⁴ Ibid. at paras 27–32.

¹⁰⁵ Ibid. at paras 69 and 72.

¹⁰⁶ Ibid. at para 72.

¹⁰⁷ Ibid. at paras 70–1.

¹⁰⁸ Ibid. at paras 167–86.

¹⁰⁹ Ibid. at paras 187–9.

¹¹⁰ For example, *Case of Granier et al. (Radio Caracas Televisión) v Venezuela*, supra n 69 at paras 121 and 124; and *Case of San Miguel Sosa et al. v Venezuela*, supra n 91 at para 105.

IACtHR's ulterior-purpose analysis is not linked to any particular article under the ACHR and plays a more holistic role under that treaty.

4. DELINEATING AND EXPLAINING DIVERGENCES AND CONVERGENCES

Comparing the previous two sections, it becomes apparent that the ECtHR and IACtHR diverge in certain elements of their approach to the misuse of power doctrine, whilst converging in other aspects. In terms of divergence, the types of provisions the two courts use to apply the doctrine differ, with the ECtHR using Article 18—a general limitations provision—in conjunction with an article setting out a right or freedom, and the IACtHR applying the doctrine directly under provisions concerning specific rights, without making use of its own general limitations provision in Article 30 ACHR. This sits in contrast to the claims or assumptions in previous scholarship.¹¹¹ Meanwhile, the two regional human rights courts converge in their evidential approach, placing an increasing emphasis on contextual evidence when establishing a misuse of power. This section explores this divergence and convergence, seeking to not only describe their extent but also explain them. It first turns to the reasons behind the inclusion of Article 18 ECHR and Article 30 ACHR to the extent that this is recorded in the two *travaux préparatoires* (A), before considering how the two courts have ultimately diverged in which provisions they use to apply the misuse of power doctrine, whilst converging in their evidential approach (B).

A. The origins of Article 18 of the European Convention on Human Rights and Article 30 of the American Convention on Human Rights

Article 18 ECHR, entitled 'Limitation on use of restrictions on rights', is worded as follows:

The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.

The inclusion of Article 18 ECHR into the European Convention was at least partly inspired by the principle of *détournement de pouvoir* in French administrative law,¹¹² with scholars tracing national influence in the ECHR's drafting process to the national administrative law frameworks of France, Belgium, Greece, Italy, Luxembourg, Netherlands and Turkey.¹¹³ Moreover, although no objections as to necessity of the provision were raised in the ECHR's drafting process, there was a related debate on whether to utilize a specific limitations clause or a general limitations clause.¹¹⁴ However, Article 18 was nevertheless still present in the drafts meant to favour specific limitation clauses, suggesting that it was never seen as a general limitations clause per se.¹¹⁵

Article 30 ACHR, entitled 'Scope of Restrictions', provides:

The restrictions that, pursuant to this Convention, may be placed on the enjoyment or exercise of the rights or freedoms recognized herein may not be applied except in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established.

¹¹¹ See Negishi, *supra* n 14; Hennebel and Tigroudja, *supra* n 14; and Heri, *supra* n 17.

¹¹² See, for example, *Collected Edition of the 'Travaux Préparatoires' of the European Convention on Human Rights Vol. 4* (1975) at 259.

¹¹³ See Finnerty and Çalı, *supra* n 13 at 12.

¹¹⁴ *Collected Edition of the 'Travaux Préparatoires' of the European Convention on Human Rights Vol. 4*, *supra* n 112 at 18.

¹¹⁵ *Ibid.* at 190.

The most notable textual difference between the two provisions is the inclusion of a requirement in Article 30 that restrictions must be ‘in accordance with laws enacted for reasons of general interest’ in addition to the prescribed purpose(s). Initially, however, the provision in the ACHR was intended to address only the question of prescribed purposes, and the additional requirement can be attributed to an amendment advanced by Uruguay when one considers drafting discussions. The Uruguayans were presumably inspired by a similar clause in their own national constitution—at the closing stages of negotiations for the ACHR at the San José Conference in November 1969.¹¹⁶ Prior to this amendment, the provision seems to have been perceived as targeting ulterior motives in the context of restrictions on rights, even though its necessity was to some extent questioned. Indeed, the United States made the following submission:

This article, which could be entitled ‘Restrictions only for the Stated Purpose’, is ambiguous and possibly unnecessary. It appears to mean that any restrictions specified in the Convention as lawful must be applied in good faith and not for an ulterior motive. It is highly unlikely that such an article would serve as a deterrent; it is therefore perhaps best omitted.¹¹⁷

A review of the two respective *travaux préparatoires* shows that both Article 18 ECHR and Article 30 ACHR were originally incorporated and purposed to serve as mechanisms against misuses of power in the context of restrictions on rights.

B. Distinct provisions and interpretations, common evidential approaches

Despite the common initial purposes of Article 18 ECHR and Article 30 ACHR, a striking divergence when comparing the case law in Sections 2 and 3 above is the provisions applied by the two courts when seeking to establish a misuse of power. The ECtHR employs Article 18 ECHR when determining whether an ulterior purpose has been pursued, treating the provision as a *lex specialis* provision for detecting a misuse of power in this regard.¹¹⁸ In contrast, the IACtHR has referenced the ECtHR’s case law on Article 18 ECHR but does not apply the provision claimed to be the American Convention’s equivalent, i.e. Article 30 ACHR. On the contrary, the IACtHR did not make any material use of the latter provision in its judgments against Venezuela, only taking recourse to the provision to clarify the scope of restrictions in the name of the general interest.¹¹⁹

What is critical in this regard is the ECtHR’s interpretation and perceived role of Article 18 ECHR. Regarding the applicability of Article 18, it has long been held that the provision can only be applied in conjunction with rights and freedoms to which restrictions are permissible under the Convention.¹²⁰ The process of identifying those rights and freedoms has been slow. As illustrated by the cases against Azerbaijan, the ECtHR initially applied Article 18 mainly in conjunction with Article 5, before gradually expanding it to Article 8 ECHR, Article 2 of Protocol Number 4 and Article 1 of Protocol Number 1. It was also not until the 2024 judgment in *Ukraine v Russia (re Crimea)* that it recognized the applicability of Article 18 to rights and freedoms which may be implicitly subject to restrictions, such as Article 6 ECHR.¹²¹ Moreover, regarding the threshold for applying the misuse of power doctrine within Article 18,

¹¹⁶ Conferencia especializada Interamericana sobre Derechos Humanos, Actas y Documentos, 7–22 November 1969, OAS/Ser.K/XVI/1.2, San José, Costa Rica (Documents of the 1969 Inter-American Conference on Human Rights [ACHR *Travaux Préparatoires*] where the American Convention on Human Rights was adopted), at 273–4.

¹¹⁷ Ibid. at 68 (authors’ translation from Spanish).

¹¹⁸ See Finnerty and Çali, supra n 13; and Heri, supra n 17.

¹¹⁹ See, for example, *Case of Granier et al. (Radio Caracas Televisión) v Venezuela*, supra n 69 at para 107.

¹²⁰ *Kamma v the Netherlands* Application No 4771/71, Commission Report, 14 July 1974, at 9. This was affirmed by the ECtHR in *Gusinskiy v Russia*, supra n 80 at para 73, and subsequent cases.

¹²¹ *Ukraine v Russia (re Crimea)* Application Nos 20,958/14 and 38,334/18, Merits, 25 June 2024, at paras 1335 and 1338.

the ECtHR approach has consisted in only examining an ulterior purpose claim if it constitutes a 'fundamental aspect of the case' and only establishing a violation of Article 18 if the illegitimate aim is the predominant one. This perceived role of Article 18, although still ambiguous to scholars,¹²² restricts the scope in which the ECtHR applies the misuse of power doctrine, limiting it to 'acute and pronounced cases of an authoritarian abuse of power'.¹²³ For example, the ECtHR limited the application of the doctrine to cases concerning politically motivated detention until the 2018 *Aliyev* judgment, where it extended it to the searching of premises. The ECtHR's approach can perhaps be explained with a concern that a more expansive use of Article 18 ECHR would risk 'watering down' the provision and the stigma that it currently invokes. In any event, limiting the scope of Article 18 and simultaneously setting a high threshold for applying the doctrine within that provision limits the potential of ulterior purpose analysis as a response to autocratisation.

The IACtHR, for its part, has recognized that the legitimate purpose requirement in Article 30 ACHR is a 'teleological criterion [that] establishes control through the deviation of power'.¹²⁴ Despite this, the IACtHR did not make use of the provision when identifying ulterior purposes and misuses of power in the reviewed cases against Venezuela. One explanation could be the justiciability of Article 30, as it is uncertain whether the IACtHR considers the provision justiciable as such.¹²⁵ In any event, instead of relying on Article 30, the IACtHR has applied the prohibition of misuse of power directly under provisions concerning specific rights and freedoms, such as Articles 8, 13, 23 (in conjunction with Article 1) and 25. Moreover, it does not seem to have developed any particular threshold for applying the doctrine. This approach to instances of misuse of power has enabled the San José Court to expand the scope of its misuse of power doctrine faster and this may be explained by an effort to respond to instances of autocratisation more proactively.

Although the ECtHR and IACtHR differ in the provisions relied on and in their application of the misuse of power doctrine, the two courts are increasingly converging in their approach to assessing evidence in this context. Indeed, as illustrated in the reviewed case law, both courts have increasingly taken recourse to contextual evidence when applying the misuse of power doctrine. Notably, the two courts have relied on not only circumstantial evidence concerning the specific cases under assessment, such as statements by public officials targeting the alleged victims,¹²⁶ but also elements related to the broader general context in the country, such as a progressive deterioration of the independence and impartiality of state institutions,¹²⁷ or a general crackdown against civil society.¹²⁸

Considering the nature and characteristics of an allegation of ulterior motives, this approach to evidence is likely explained by the fact that it is the only feasible means to identify such motives. As noted by Judges Jungwiert, Nussberger and Potocki in one separate opinion concerning Article 18:

¹²² See, for example, Finnerty and Çalı, *supra* n 13.

¹²³ *Ibid.* at 478.

¹²⁴ OC-6/86, *The Word 'Laws' in Article 30 of the American Convention on Human Rights* IACtHR Series A 6 (1986), at para 18(b).

¹²⁵ See Hennebel and Tigroudja, *supra* n 14 at 854, noting that 'contrary to Article 18 of the ECHR, Article 30 is not justiciable *per se*, though without providing any further explanation or references. Nonetheless, it may be observed that whereas Article 18 ECHR is placed in Section I of the ECHR, entitled 'Rights and Freedoms,' Article 30 ACHR is placed Chapter IV of the ACHR, entitled 'Suspension of Guarantees, Interpretation and Application.' Moreover, the IACtHR has previously rejected alleged violations of Article 29 ACHR, noting, *inter alia*, that 'pursuant to the contentious jurisdiction of the Court, the interpretation principles contained in Article 29(c) can only result in a violation of a right unduly construed in accordance with those principles.' See *Case of Aptiz Barbera et al. ('First Court of Administrative Disputes') v Venezuela* IACtHR Series C 182 (2008) at paras 216–23.

¹²⁶ See, for example, *Ilgar Mammadov v Azerbaijan*, *supra* n 22; and *Case of Granier et al. (Radio Caracas Televisión) v Venezuela*, *supra* n 69.

¹²⁷ See, for example, *Aliyev v Azerbaijan*, *supra* n 24; and *Case of Capriles v Venezuela*, *supra* n 102.

¹²⁸ See, for example, *Rasul Jafarov v Azerbaijan*, *supra* n 24.

Generally, knowledge about what the Court calls a “hidden agenda” is within the sphere of the authorities and is thus not accessible to an applicant. It is therefore necessary to accept evidence of the authorities’ improper motives which relies on inferences drawn from the concrete circumstances and the context of the case.¹²⁹

The consideration of contextual evidence by the two regional human rights courts, therefore, makes it possible for applicants to have a chance of benefiting from a finding of an ulterior purpose and, ultimately, enables both the ECtHR and IACtHR to establish misuses of power.

5. CONCLUSION

Through a comparison of the case law on misuse of power by the ECtHR and IACtHR in cases against Azerbaijan and Venezuela, respectively, this article has challenged the previous parallels drawn between Article 18 ECHR and Article 30 ACHR. It found that while the ECtHR has used Article 18 ECHR to identify instances of misuse of power, the IACtHR has applied the doctrine directly under a number of substantive provisions in the ACHR.

The article demonstrated how this divergent approach has had important consequences on the application of the misuse of power doctrine. Although the ECtHR has gradually expanded Article 18’s scope to different ECHR rights and freedoms beyond liberty under Article 5 ECHR, most recently concerning fair trial under Article 6 ECHR, it continues to set a high threshold for applying the misuse of power doctrine within those provisions, limiting it to the most egregious misuses of power.¹³⁰ In contrast, the IACtHR has not applied Article 30 ACHR but rather seems to have looked more proactively for misuses of power under the substantive rights provisions themselves and regardless of the rights and freedoms at stake. This more holistic approach enables the San José Court to apply the doctrine at earlier stages in the autocratisation process, in particular in cases involving softer authoritarian practices, and avoid developing any special threshold for its application.

The divergence in interpretation was paired with a convergence on evidentiary assessment. Both the ECtHR and the IACtHR have placed an increasing emphasis on contextual evidence and continue to highlight patterns of crackdowns on civic space. Ultimately, however, the ECtHR cannot hope to harness the full potential of the misuse of power doctrine should it continue to employ a comparatively restrictive approach to Article 18 ECHR. As illustrated in this article, alternative approaches could include further expanding the scope of Article 18 or applying the misuse of power doctrine regardless of the provision invoked.

ACKNOWLEDGEMENTS

The authors wish to express their thanks to the participants of the ‘Legitimate Aims and Ulterior Purposes in International Human Rights Law: Comparative Perspectives’ workshop hosted by the Bonavero Institute of Human Rights (University of Oxford) and the Centre for Fundamental Rights (Hertie School) in November 2024 for their valuable feedback and suggestions that sharpened both the methodological design and argument of this article. All mistakes remain our own.

FUNDING

None declared.

¹²⁹ Joint concurring opinion of Judges Jungwirth, Nussberger and Potocki in *Tymoshenko v Ukraine* Application No 49872/11, Merits and Just Satisfaction, 30 April 2013.

¹³⁰ See Finnerty and Çalı, supra n 13.