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ARTICLE

Islandness and the European Court of Human Rights: Marooning Rights on Islands?

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Abstract
Some 80 million people live on European islands. It thus comes as no surprise that a number of cases brought before the European Court of Human Rights developed on and/or pertain to islands. What is surprising, though, is that this jurisprudential corpus has not been explored with a view to assessing whether islandness has or should have a role in the implementation of the European Convention on Human Rights on islands. The present paper contemplates the strengths of an islandness-based approach in the implementation of human rights through the mapping of the weaknesses, the potentials and the lost opportunities in the case law of the Court with respect to such an approach. In this context, findings from the field of Island Studies are also considered. By focusing on the ECHR habitat, the present paper exemplifies, in particular, the untapped potential of an islandness-based approach in the development of international human rights law in general.

Keywords European Court of Human Rights · Islandness · Islands · European Convention on Human Rights · Island Studies · Colonial clause

1 Introduction

> Europe's islands are home to over 14 million people and almost 80 million if island-states are included. […] [I]slands deserve distinctive treatment due to special socio-economic development constraints, such as limited local

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> resources and markets, often precarious and costly transport links with the mainland, higher living costs and a vulnerable natural environment.[1]

This is the opening sentence of Resolution 1441 (2005) adopted by the Parliamentary Assembly of the Council of Europe (CoE) on the Development challenges in Europe's islands. This account, even though it is 18 years old, still remains relevant and raises a number of human rights issues. However, even if islandness has attracted the attention of the CoE through the lens of development,[2] this is not the case for islandness through the lens of human rights.

Certainly, this does not imply that islandness is of no relevance to the CoE and its system of human rights protection. From a formal point of view, islandness has not been the object of specialised attention under human rights; pragmatically, though, it is not easy to disregard the fact that both the size of the European island population and the type of islandness-related issues—as indicatively accounted for in Resolution 1441—bring human rights into the fray.

As a matter of fact, many of the cases that have been brought before the European Court of Human Rights (ECtHR/Court) developed on and/or pertain to islands. The present paper scrutinises them with a view to assessing to what extent islandness shapes the stance of the Court[3] thereon and whether islandness is a factor that is relevant to human rights protection and is worth exploring.

Islandness will be the main term used in this paper to generally connote the concept of an island in juxtaposition to the mainland. Admittedly, islandness is a contested concept.[4] 'Islandness is not easily defined'[5] and its content may vary depending on the discipline.[6] There are indeed different disciplines that have studied the concept of islandness and contribute to the development of an entire multidisciplinary field, the so-called 'Island Studies'. Less known to lawyers,[7] Island Studies draw on the scientific tools used in anthropology, archaeology, economics, geography, history, linguistics, politics, psychology, and sociology. There remains a great deal of scope for unpacking what is meant by islandness even in the specialised habitat of Island Studies.[8] Even so, however, islandness revolves around certain traits that dissociate it from other concepts that are relevant and already known to human rights law. The often cited definitions of islandness imply sea-boundedness and

[1] CoE Parliamentary Assembly, Resolution 1441 (2005), Development challenges in Europe's islands, 6 June 2005, para. 1.

[2] CoE Committee of Ministers, Recommendation No. R (87) 10 of the Committee of Ministers to Member States having sovereignty over large Maritime Islands on the Development of Islands or Archipelagos as Extreme Examples of Peripheral Regions, 19 May 1987.

[3] Where appropriate, cases decided by the European Commission of Human Rights (EcomHR) will also be discussed and referenced.

[4] Foley et al. (2023), p. 1.

[5] Gillis and Lowenthal (2017), p. iii.

[6] Foley et al. (2023), pp. 1–2.

[7] Tsampi (2023), pp. 248–249.

[8] Baldacchino (2004).

comparative remoteness/isolation and encompass islandness both as smallness and as a sociocultural phenomenon, which revolves around the idea of island identity.[9] As such, the consideration of islandness goes beyond the dichotomy between capital cities/remote areas or the discussion on accessibility/connectivity and human rights. Unpacking the curious amalgam of islandness does not fall within the ambit of the present paper. However, the aforementioned traits usually associated with islandness compose a working definition for the purposes of the present study.

Where necessary the term insularity will be also employed. Insularity comes with a rather negative connotation, 'representing notions of isolation, limited resources and a narrow-minded, conservative understanding of islanders'.[10] Islandness is different, however. Islandness is positively connoted and comprises narrations and perceptions of the island's society.[11] Revolving around the features of locality and externality, islandness refers to the island condition as the apparent contradiction between 'openness and closure' manifest in, and on, all islands.[12]

To this author's knowledge, this is the first academic study that aspires to holistically consider the practice of an international human rights body with respect to islands and the potential of an islandness-based approach in international human rights law. This is not to disregard the work undertaken with respect to human rights on islands from perspectives that are external to international human rights law[13] and/or the research and monitoring projects on the implementation of a number of human rights on certain islands.[14] The present paper will take into account the existing literature to critically engage with the case law of the Court. By definition, though, the main pull of sources for the present contribution draws from the Court's jurisprudential corpus as the purpose here is to systematize the case law itself on issues of islandness. Scholarly works from the interdisciplinary field of Island Studies[15] will also be considered to better illustrate the added value of an islandness-based approach in human rights.

The rationale of this paper is to discuss an islandness-based approach in the general international human rights law discourse. The focus on the European Convention on Human Rights (ECHR/Convention) habitat exemplifies the potential of such an approach for international human rights law in general. Islandness is not only relevant to the ECHR system; it eventually pertains to other human rights bodies as well. The focus of the present article on the ECtHR is just a starting point. The consideration of islandness by international human rights law offers a novel potential not only for the condition of human rights on islands but also for the development of

[9] Foley et al. (2023), p. 6.
[10] Nimführ and Otto (2020), p. 188.
[11] Nimführ and Otto (2020), p. 189.
[12] Baldacchino (2004), p. 274.
[13] Sermet (2009).
[14] Alegre/Island Rights Initiative (2018); Barker (2016); Care (1999); Commission nationale consultative des droits de l'homme, 'L'effectivité des droits dans les Outre-mer', 10 July 2018, https://www.cncdh.fr/fr/travaux-en-cours/etude-outre-mer; Duong (2009); Farran (2007); Graham and D'Andrea (2021); Vlcek (2013).
[15] See in particular, Baldacchino (2004); Baldacchino (2008). Cf. Tsampi (2023).

human rights as such. Such a consideration can even lay the foundations for a novel islandness' critique of international human rights law, unknown to existing human rights literature. In this context, it would be legitimate to scrutinise the extent to which international human rights has to date been designed to address human rights on the mainland, to the exclusion of an islandness perspective. Even so, it should be specified from the outset that the aim of this paper is not to go as far as to discuss such an islandness' critique. Even though the systematisation of the ECtHR case law proposed here could qualify as a general premise for such a critique, the exploration of an islandness' critique per se does not fall within the ambit of this paper.

The paper revolves around three sections. The first one will delve into the strand of cases in which islandness is relevant but in a rather incidental fashion. These cases pertain to the territorial application of the ECHR and it is the legal status of the territory that puts islandness forward (2). Apart from the legal term of 'territory', islandness is closely connected to the idea of 'space'/'place' in a broader sense. There is indeed a strand of cases where it is not the legal status of the island that matters but simply the fact that the alleged violations of the Convention's rights occurred on or pertain to an island (3). At this stage, it will inductively become clear which traits of islandness the ECtHR case law pertains to. Finally, the juxtaposition of the two distinctive strands of cases discussed in the first two sections will allow certain conclusions to be drawn with respect to the value of an islandness-based approach in the case law of the Court. This will be discussed in the final section, which will examine whether the consideration of islandness can lead to a more consistent system of the protection of rights and ultimately to a more promising protection of rights on islands (4).

2 Islandness by Incident: Islands as 'Territory'

A number of cases where the alleged violations occurred on an island pertains to the territorial application of the Convention in light of Article 56 ECHR, the so-called 'colonial clause'.

> 1. Any State may at the time of its ratification or at any time thereafter declare […] that the present Convention shall, subject to paragraph 4 of this Article, extend to all or any of the territories for whose international relations it is responsible.
> […]
> 3. The provisions of this Convention shall be applied in such territories with due regard, however, to local requirements.

In these cases islandness, by definition, is not relevant. The focus of this case law is not on the trait of a locus as an island but on the legal status of the territory, which just happens to be an island. It concerns certain islands because they happen to have a specific legal status and not because they are islands as such. Yet, this incidental connection between Article 56 and islands is not without importance.

The first part of this section will demonstrate that islands happen to be the most common victims of the 'colonial clause' (2.1). The implication of the applicability

of Article 56 is that under its paragraph 3, '[t]he provisions of this Convention shall be applied in such territories with due regard, however, to local requirements'. While considering the local circumstances on an island would in principle be desirable, the notion of 'local requirements' on the territories of Article 56 has a particular connotation. In this context, the implementation of the Convention with the consideration of local conditions is unrelated to islandness itself. This is what the second part will demonstrate (2.2). Overall, this section will illustrate that the non-consideration of islandness in the context of Article 56 is a red flag for the human rights standards on islands.

2.1 Article 56 ECHR: The 'Colonial Clause' as an 'Island Clause'?

It would not be unfair to state from the outset that Article 56 ECHR is a controversial clause. First, it carries a strong colonial 'aroma'.[16] The ECHR explicitly allows States to choose how the Convention applies to 'territories for whose international relations [they are] responsible' by making a declaration under Article 56. The former Article 63, which now constitutes Article 56 ECHR, made its way into the text of the Convention as a number of potential States Parties still possessed colonial territories.[17]

The exclusionary effect of this clause was and still is defied within the CoE system. It was not always clear that the Convention would contain a colonial clause as the earliest drafts of the Convention contemplated the instrument applying throughout the entirety of member states' metropolitan and dependent territories.[18] When the Consultative Assembly was asked to provide its views on the Ministers' draft Convention, it condemned the colonial clause.[19] The controversy is still ongoing today and to this effect one can hint at the partly dissenting opinion of Judge Pinto de Albuquerque in the Grand Chamber judgment in *Georgia v. Russia (II)* of January 2021.[20] Judge de Albuquerque referred to 'the express provision of Article 56 of the Convention—which is a clear indication of the founding fathers' wish that the Convention should be applied all over the world, in the overseas territories of the Contracting Parties, save for some exceptional cases'.[21]

Notwithstanding this controversy, the Court implemented Article 56 in an exclusionary fashion, continuing to take the State's decisions under Article 56 into account as being fundamental to its interpretation of the territorial application of the ECHR. Ironically, the Court did so even though it itself acknowledged the anachronistic character of the clause.[22]

[16] Moor and Simpson (2006).
[17] Frostad (2013), p. 26.
[18] Miltner (2012), p. 710.
[19] Miltner (2012), p. 716.
[20] Dissenting opinion of Judge Pinto de Albuquerque in ECtHR, *Georgia v. Russia (II)*, Application No. 38263/08, Merits, 21 January 2021.
[21] Ibid., para. 5.
[22] ECtHR, *Chagos Islanders v. the United Kingdom*, Application No. 35622/04, Admissibility, 11 December 2012, para. 74.

This reality is even more striking today[23] as this interpretation of Article 56 is at odds with the interpretation of Article 1 ECHR. The expanding interpretation of Article 1 does not replace the system of declarations under Article 56. The juxtaposition between the anachronistic 'colonial clause' and the expansive 'effective control' principle under Article 1 with reference to the *Al-Skeini* case is telling in terms of two worlds still being apart: the whole globe where the ECHR is automatically applicable under Article 1 if a contracting State is proved to have 'effective control' over it and the overseas territories, in particular, where the ECHR cannot be applicable even if the State has effective control unless an Article 56 declaration is made in this respect.[24]

This distinction is not only artificial nowadays but is also perilous in a discriminatory way. First and foremost its victims are islands. The substantiation of this claim derives, first, from the pragmatic ascertainment that the vast majority of overseas territories are indeed islands.[25] A significant number of islands are not automatically covered by the protective radius of the ECHR, but only if the contracting States decide to submit a declaration in this respect.[26] Second, this is also reflected in the case law of the Court.

Certainly, not all 'territories for whose international relations' the contracting States are responsible are islands. Accordingly, not every Article 56 case adjudicated by the Court concerns an island. Neither the wording nor the implementation of Article 56 suggests that this clause is exclusively relevant to island territories. For example, in *Bui van Thanh and others v. the United Kingdom*, the Commission rejected the application as incompatible *ratione loci* with the Convention, because no declaration under the then Article 63(1) had been made in respect of Hong Kong.[27]

Notwithstanding the aforementioned, one cannot disregard the fact that most of the Article 56(1) cases where the Court declared individual applications to be inadmissible pertain to islands; overseas (pen)insular territories in particular. The most pertinent and recent examples are the cases of *Quark Fishing Ltd v. the United Kingdom*[28] and *Chagos Islanders v. the United Kingdom*.[29] Both cases, declared inadmissible, pertained to UK overseas territories, for which the UK had decided not to make an Article 56 declaration. In *Quark Fishing Ltd* the Court relied on the fact that the application of Protocol No. 1 to the Convention had not been extended to

[23] Interestingly enough, this was already predicted during the drafting process: Miltner (2012), p. 717.

[24] ECtHR, *Al-Skeini and others v. the United Kingdom*, Application No. 55721/07, Merits and Just Satisfaction, 7 July 2011, para. 140.

[25] One World Nations Online, Overseas Territories, Dependent Areas, and Disputed Territories, https://www.nationsonline.org/oneworld/territories.htm.

[26] For an appraisal of such declarations and the fact that they mostly concern islands, see Frostad (2013), pp. 27–28. For examples of territories not covered by such declarations in the case of the United Kingdom and Norway, see Frostad (2013), pp. 36–37.

[27] EComHR, *Bui Van Thanh and others v. the United Kingdom*, Application No. 16137/90, Admissibility, 12 March 1990.

[28] ECtHR, *Quark Fishing Ltd v. the United Kingdom*, Application No. 15305/06, Admissibility, 19 September 2006.

[29] ECtHR, *Chagos Islanders v. the United Kingdom*, supra n. 22.

South Georgia and the South Sandwich Islands (SGSSI). The fact that the United Kingdom had itself extended the Convention to the territory gave no grounds for finding that Protocol No. 1 also had to apply or for the Court to require the United Kingdom somehow to justify its failure to extend that Protocol.[30] In a similar fashion, in adjudicating on the applicability *ratione loci* of the Convention in *Chagos Islanders*, the Court noted that the United Kingdom had never made a notification under Article 56 extending the right of individual petition to the population of the British Indian Ocean Territory (BIOT).[31] In both cases, the Court rejected the applicants' claims of 'effective control' under Article 1.[32] As has rightly been pointed out in the literature, '[t]his situation means that individuals have less protection for their human rights in British territories than they would have, for example, in foreign territory where the UK has effective control such as the situation in Iraq that was the subject of the *Al-Skeini* judgment'.[33]

Earlier case law also 'deprived' more (pen)insular territories of the protective shield of the ECHR. In 1977, the Commission declared as inadmissible the application in the case *X v. the United Kingdom* introduced on 3 March 1976 because the respondent State had not renewed the declaration on behalf of Dominica beyond 13 January 1976.[34] The application in *Yonghong v. Portugal* had the same fate. Portugal had not made a declaration under Article 56 extending the Convention to Macao. In holding that the concept of 'jurisdiction' in Article 1 of the Convention had to be construed in the light of Article 56, the Court concluded that it had no jurisdiction *ratione loci*.[35]

The aforementioned observations add to the existing controversies concerning Article 56. Not only is Article 56 archaic in its conception and threatens the consistency of the applicability standards of the ECHR, but it also targets islands more than mainland territories. Considering this context, the message that the ECHR system sends about human rights on islands—at least a certain category of islands—is disappointing as it keeps them confined in their colonial past. The liberation of islands from their colonial relic is a standard claim in contemporary literature, especially in Island Studies that specialise in the comprehensive and holistic assessment of the conditions and issues impacting island life. The formation of Island Studies itself revolves around the study of islands 'on their own terms', which 'suggests a process of empowerment, a reclaiming of island histories and cultures, particularly for those island people which have endured decades of colonialism'.[36] The role of human rights and the implementation of the ECHR in particular would have a significant impact on (post-colonial) island life. This is why there is one more reason to consider a revision of Article 56.

[30] ECtHR, *Quark Fishing Ltd v. the United Kingdom*, supra n. 28.
[31] ECtHR, *Chagos Islanders v. the United Kingdom*, supra n. 22, para. 61.
[32] ECtHR, *Quark Fishing Ltd v. the United Kingdom*, supra n. 28; ECtHR, *Chagos Islanders v. the United Kingdom*, supra n. 22, paras. 67–75.
[33] Alegre/Island Rights Initiative (2018), p. 13.
[34] EComHR, *X. v. the United Kingdom*, Application No. 7444/76, Admissibility, 4 October 1977.
[35] ECtHR, *Yonghong v. Portugal*, Application No. 50887/99, Admissibility, 25 November 1999.
[36] Baldacchino (2008), p. 37.

After all, it would not be far-fetched to suggest that Article 56 creates, even indirectly, a discriminatory situation against persons who live on a number of islands. This echoes the concerns presciently expressed during the drafting process of the Convention by the delegate of France, Léopold Senghor. Senghor pointed out that the then Article 63 ran counter not only to Article 1 but also 'to the general principles of the Declaration of Human Rights and particularly to Article 14 [ECHR] which condemns all discrimination'.[37]

One would hope that the consideration of 'local requirements' of Article 56 territories in the implementation of the Convention, as prescribed in its paragraph 3, would mitigate the implications of the 'colonial clause' on islands. It is rather the contrary that occurs, however. The controversy surrounding Article 56 and islandness is further exacerbated by paragraph 3.

2.2 'Local Requirements', Yet a Further Irrelevance of Islandness

Article 56(3) prescribes that once a State decides to extend the Convention to a territory for whose international relations it is responsible, the provisions of the Convention shall be applied thereon 'with due regard, however, to local requirements'. In the earliest versions of the Convention the term 'local necessities' was employed instead.[38] Drawing upon the earlier conclusion that an important number of such territories are islands, one could possibly expect that the consideration of 'local requirements' in their cases would by implication at least pertain to islandness and the necessities of the local island population. Such a consideration would have been desirable as it would allow the ECHR system to propose solutions tailored to local needs and allow for their efficient implementation.

Considering the drafting history and implementation of Article 56(3), it however becomes apparent that this provision serves a different purpose. Unlike the current exclusionary Article 56(1), earlier drafts of this provision implied an expansive territorial application inclusive of dependencies. That expansive interpretation which took for granted that the provisions would be applied in the overseas territories explains why Article 56(3) ECHR provided the caveat that they shall apply, 'however', with due regard, to 'local requirements'.[39] In this context, local requirements imply 'possible limitations'[40] in the implementation of human rights on these territories. The idea of limiting rights on these territories is what prevailed in the case law.

The Commission held that the purpose of Article 56 is 'not only the territorial extension of the Convention but its adaptation to the measure of self-government attained in particular non-metropolitan territories and to the cultural and social differences in such territories'.[41] While considering the 'cultural and social differences

[37] Collected Edition of the 'Travaux Préparatoires' of the European Convention on Human Rights, Volume VI (1985) at p. 174—Second Session of the Consultative Assembly (7–28 August 1950).

[38] Miltner (2012), p. 712.

[39] Miltner (2012), p. 715.

[40] Miltner (2012), p. 715.

[41] EComHR, *Cyprus v. Turkey*, Application Nos. 6780/74 and 6950/75, Admissibility, 26 May 1975, para. 9.

in such territories' would be positive for the fulfilment of the Convention's aims, the meaning of these terms has a specific and rather negative connotation in the context of Article 56(3). Indeed, it only points out how human rights implementation can be limited on these territories given the 'state of civilisation'—an anachronistic term in itself—of these territories. As the Court noted, in this connection, Article's 63 system 'was primarily designed to meet the fact that, when the Convention was drafted, there were still certain colonial territories whose state of civilisation did not, it was thought, permit the full application of the Convention […]'.[42] Thus, Article 56 has a double exclusionary effect on the implementation of human rights on overseas territories: first, its paragraph 1 does not allow for the automatic applicability of the Convention throughout both metropolitan and overseas territories; and second, its paragraph 3 permits the application of its provisions to be substantively limited in conformity with local needs.[43]

'But the idea that the enjoyment of human rights should be somehow limited according to local conditions does not sit well with the universality of human rights.'[44] Indeed, in the case of overseas island territories, 'local requirements' could work positively to embrace the exigencies of island life and the particularities of island societies. They could for example invite a consideration of specific positive obligations on behalf of the State to accommodate the challenges implied by the remoteness of these islands or the traumas of their colonial past. Instead, Article 56(3) only expands the State's margin of manoeuvre in limiting human rights on these islands, thereby creating rights at two speeds. As stated in the scholarly debate, '[t]he ambiguous and subjective framing of the provision was designed to allow significant leeway in the manner in which the Convention would apply'.[45] This leeway belongs to the State. The local needs refer mostly to the needs connected to the status of a territory from the State's perspective rather than to the substantive needs of the local communities, the rights holders themselves. This reminds us, after all, of the rationale of State practice with respect to Article 56(1). Commenting, for example, on the aforementioned cases of *Quark Fishing Ltd v. the United Kingdom* and *Chagos Islanders v. the United Kingdom*, Susie Alegre noted:

> […] [G]iven the lack of a permanent population in BAT and BIOT and the support in Pitcairn for the ECHR, […] the decision not to extend the application of the ECHR in these cases is not driven by concerns of the local population but is, rather, a decision taken by Central Government in the UK which results in human rights black holes in British territories.[46]

'Local requirements' operate as a Trojan Horse for political expediencies. As rightfully observed by Karel Vasak,

[42] ECtHR, *Tyrer v. the United Kingdom*, Application No. 5856/72, Merits, 25 April 1978, para. 38.

[43] Miltner (2012), p. 711.

[44] Alegre/Island Rights Initiative (2008), p. 28.

[45] Miltner (2012), p. 711.

[46] Alegre/Island Rights Initiative (2008), p. 13.

> [t]his idea is one which leaves too much freedom to the executive organ responsible for its application, alluding to the fears already expressed in the Consultative Assembly that the words 'local requirements' might be understood as covering 'political requirements'.[47]

From a legal point of view, the consideration of local requirements in the application of the Convention could simply take place at the stage of the consideration of the necessity of an interference in a democratic society, via the assessment of the legitimacy of its aim and its proportionality. Article 56(3) ECHR serves a different purpose, however. It adds one more layer to the State's margin for interfering with the rights enshrined in the Convention. It can function in the same way as 'grounds for excluding wrongfulness' and 'circumstances precluding wrongfulness' operate in criminal and State responsibility law accordingly, in order to 'excuse' a violation of the Convention that the Court would otherwise have found further to the standard assessment of the interference's necessity. The case of *Py v. France*[48] is a useful example here. In this case, the applicant complained of the restrictions on his right to vote in elections for congress in New Caledonia in violation of Article 3 of Protocol No. 1, because of the requirement of 10 years' residence in New Caledonia in order to be registered to vote.[49] The Court took into account the local needs to determine the legitimacy of the measure at hand. It held that the residence requirement pursued a legitimate aim in the case in question,[50] observing that 'the applicant, who has since returned to mainland France, cannot argue that he is affected by the acts of political institutions to the same extent as resident citizens'.[51]

This is an interesting approach where the Court distinguished 'mainlanders' from 'islanders' to assess how the impact of local elections differed for each of them. Legitimate as the aim of the measure might have been, the Court found that the 10-year residence requirement, which corresponds to two terms of office of a member of Congress, might appear disproportionate to the aim pursued.[52] This would have been enough for the Court to conclude that there had been a violation of the applicant's right. However, the Court decided to assess the 'local requirements' in New Caledonia, within the meaning of Article 56, 'such that the restriction in question on the right to vote may be deemed not to breach Article 3 of Protocol No. 1'.[53] This is the first and only time that the Court has accepted that 'local requirements' 'warrant'[54] the restrictions imposed on an applicant's rights: 'After a turbulent political and institutional history, the 10-year residence requirement […] has been instrumental in alleviating the bloody conflict'.[55] Legitimate as this might be, the consideration of local necessities could have been simply considered at the earliest stage

[47] Vasak (1963), p. 1209.
[48] ECtHR, *Py v. France*, Application No. 66289/01, Merits, 11 January 2005.
[49] Ibid., paras. 18–19.
[50] Ibid., para. 52.
[51] Ibid., para. 51.
[52] Ibid., para. 57.
[53] Ibid., para. 58.
[54] Ibid., para. 64.
[55] Ibid., para. 62.

during the necessity/proportionality test employed by the Court, without giving the impression that double standards apply in the protection of human rights in specific territories.

Such an approach would have saved the Court from the awkward position in cases like *Tyrer v. the United Kingdom* where it had to decide whether the 'local requirements' of Article 63(3) could have allowed it to declare that a measure that the Court had found to violate one of the Convention's absolute rights was in fact compatible with the Convention. In *Tyrer*, the applicant claimed that his rights under Article 3 ECHR had been breached by a judicial birching order made against him by a court in the Isle of Man.[56] The Court indeed concluded that such a measure amounted to degrading punishment within the meaning of Article 3.[57] Despite this, the Court found itself, immediately thereafter, having to decide whether there are 'local requirements' in the Isle of Man within the meaning of Article 63(3) such that the penalty in question, 'in spite of its degrading character, does not entail a breach of Article 3'.[58] The government relied on local statistics, debates and petitions indicating that a large majority on the island were in favour of the retention of judicial corporal punishment in specified circumstances.[59]

Tyrer allows for interesting observations. In the context of the then Article 63(3), the Court noted that it 'could not regard beliefs and local public opinion on their own as constituting […] proof [of local requirement]'.[60] Such an absolute discreditation of the local public opinion needs further consideration. Given the gravitas of public opinion in the general case law of the Court but also in the specific settings of an island, the consideration of local needs could also depend on the views of the islanders. What the islanders think of their society should not be *ab initio* and by definition excluded from the Court's radar. Furthermore, the Court observed in *Tyrer* that

> The Isle of Man not only enjoys long-established and highly-developed political, social and cultural traditions but is an up-to-date society. Historically, geographically and culturally, the Island has always been included in the European family of nations and must be regarded as sharing fully that 'common heritage of political traditions, ideals, freedom and the rule of law' to which the Preamble to the Convention refers.[61]

While there was nothing controversial in this very statement, it comes as a surprise that the Court reached this conclusion after pointing out that the great majority of the Member States of the CoE do not consider such punishment to be a

[56] ECtHR, *Tyrer v. the United Kingdom*, supra n. 42, para. 28.
[57] Ibid., para. 35.
[58] Ibid., para. 38.
[59] Ibid., para. 37.
[60] Ibid., para. 38.
[61] Ibid.

requirement for the maintenance of law and order in a European country. It is as if the Court became the judge of local requirements by using non-local requirements to identify local ones only to force such a conclusion. Of course, this controversy relates to the very controversy described at the outset of this section, namely that what the Court considers as 'local requirements' relates to the 'state of civilisation' of the territory at stake and whether it allows for the implementation of the Convention. Can this approach still be acceptable today? If a territory does not share the ideals and values of the Convention, it is the State's obligation to take the necessary action also considering local needs; it cannot be used as an excuse for the State to escape from its obligations under the Convention. This was after all what finally provided the solution in *Tyrer* back in 1978; the Court held that 'even if law and order in the Isle of Man could not be maintained without recourse to judicial corporal punishment, this would not render its use compatible with the Convention'.[62]

What is desirable is a system of human rights protection that takes into account the local particularities of islands without creating a system of double standards. The 'local requirements' of Article 56(3) revolve around the conception of overseas territories, most of them islands, in an undermining way which reflects an outdated perception of islands as remote and second-tier territories. It thus revolves around the idea of 'insularity', which implies separation and backwardness[63] along with the dominance of external perspectives on islands[64] and not the one of 'islandness'. The Article 56 edifice seems to exclude the consideration of local views, which would open the gates to a neo-colonialism critique.[65]

Fortunately enough, the Court has implemented the 'local requirements' clause only once to restrict rights on overseas territories. It is thus unlikely that such a requirement would justify broader limitations on human rights or discriminatory practices on islands.[66] Even though there is still some way to go, there is case law based on the ECHR that suggests that the Court does consider islandness in an inclusive fashion. This is what the following sections will discuss in particular.

3 Islandness by Definition: Islands as a Distinctive 'Space'

The previous section built on the application of the ECHR on certain overseas territories in which the dimension of an island was only incidentally relevant and the Court's approach reflected the one-sided idea of insularity. As has been clarified in Island Studies, space and territory are not identical and the divergence between these two notions is connected to the distinction between 'islandness' and 'insularity'.

[62] Ibid.

[63] Baldacchino (2004), p. 272.

[64] Nimführ and Otto (2020), p. 189.

[65] See Vlcek (2013) on the Cayman Islands and the extent to which the external imposition of legislation to decriminalize homosexuality in 2000 represented a forced transfer of 'modern' norms, or an example of the imperialist/neo-colonial 'modernization' of the native.

[66] Alegre/Island Rights Initiative (2008), p. 28–29.

> The difference between islandness and insularity is reminiscent of the distinction made by geographers between space and territory: Space is a physical reality that is mainly shaped by production dynamics. […] Territory can be defined as the opposite of space: it is conceptual and often even ideal, whereas space is material.[67]

The territorial application of the Convention covers a number of different spaces and one of its relevant distinctions pertains to islands as opposed to the mainland. If 'territory' is important for the implementation of the ECHR, does the same apply to 'space'/'place'? Is it a relevant factor for the Court that the claims brought before it pertain to alleged violations of ECHR rights and freedoms on islands? If yes, how and why?

The following analysis will provide answers to these questions.[68] In this context, cases that occurred on islands will be examined so as to identify at what stage of the Court's reasoning islandness comes into the fray and in what form. Reference will be made to the isolation; smallness; boundedness; and limited resources of islands. Different facets of islandness come into play at different stages of the Court's assessment while it assesses the applicability of a provision (3.1); the legitimacy of the aim pursued by an interference with a right (3.2); the necessity of the interference in a democratic society (3.3); the margin of appreciation that a State enjoys (3.4); and the State's positive obligations (3.5).

The following match facets of islandness to specific legal points that are relevant to the Court's assessment. However, neither this matching nor any of the distinctions made are of normative value. They are not hermetic nor static but are rather interrelated and indicative. However, this systematisation is adopted so as to demonstrate that islandness can be relevant for the Court in a versatile fashion. This certainly comes as little surprise given that the concept of islandness, as clarified from the outset, is in itself versatile.

3.1 Applicability of ECHR Provisions: Islandness as Isolation

The legal characterisation of factual features in a case brought before the Court is of relevance for the assessment of the applicability of an ECHR provision. Islandness is a factor that the Court takes into account in this exercise. This was at least the case in *Guzzardi v. Italy* where the Court had to decide whether the treatment of the applicant amounted to a 'deprivation of [his] liberty' that would accordingly trigger the applicability of Article 5(1) ECHR.[69]

Mr Guzzardi complained of 'the arbitrary action of the Italian authorities' which were compelling him to reside not within a district but rather on a 'scrap of land'

[67] See the relevant reference on the distinction between 'islandness' and 'insularity' in Taglioni (2011), p. 47.

[68] The author is grateful to Miriam Azem for assisting with a part of the section's research.

[69] ECtHR, *Guzzardi v. Italy*, Application No. 7367/76, Merits and Just Satisfaction, 6 November 1980, para. 93.

(*pezzo di terra*)[70] on the island of Asinara. The island spanned across 50 sq. km. and the area reserved for persons in compulsory residence represented a small fraction of no more than 2.5 km^2. This area was bordered by the sea, roads and a cemetery; there was no fence to mark out the perimeter.[71]

For the Court to decide on the difference between the deprivation and the restriction of liberty, which is 'one of degree or intensity, and not one of nature or substance',[72] it took into account all the characteristics of the space in question. Islandness was decisive not only because of the smallness of the space but also because of the isolation that the island space entailed. While the Court acknowledged that 'the area around which the applicant could move far exceeded the dimensions of a cell and was not bounded by any physical barrier',[73] it was hard to dismiss the fact that an island comes with its own barriers. The Court took into account, in a cumulative fashion, the fact that the space in which the applicant found himself covered no more than a tiny fraction of the entirety of an island to which access was already quite difficult.[74] This inaccessibility coupled with the 'few opportunities for social contacts available to the applicant' weighed heavily in the Court's judgment.[75]

It therefore comes as no surprise that in *De Tommaso* 37 years later, the Grand Chamber did not consider Article 5(1) to be applicable to the Italian 'special police supervision' scheme imposed upon the applicant.[76] In order to decide the case on this point, the Court juxtaposed its circumstances with the ones in *Guzzardi*. It concluded in particular that 'unlike the applicant in the *Guzzardi* case, [the applicant] was not forced to live within a restricted area and was not unable to make social contacts'.[77] Such a finding confirms how islandness in its dimension of isolation is a decisive factual feature that the Court cannot disregard. After all, in his partly dissenting opinion, Judge de Albuquerque observed that '[t]he sole difference with regard to the situation in *Guzzardi* was that the applicants were not forced to live on an island'.[78]

3.2 Legitimate Aim: Islandness as Smallness and Separateness

In a different set of cases brought before the ECHR, the smallness of the island space along with the implications of its spatial separateness was of relevance when the Court assessed the legitimacy of the aim pursued by the measure at hand. Islandness creates, even though not necessarily exclusively, a specific socio-economic and cultural environment, which may differ from the one on the mainland. The Court

[70] Ibid., para. 53.
[71] Ibid., para. 23.
[72] Ibid., para. 93.
[73] Ibid., para. 95.
[74] Ibid.
[75] Ibid.
[76] ECtHR, *De Tommaso v. Italy*, Application No. 43395/09, Merits and Just Satisfaction, 23 February 2017.
[77] Ibid., para. 85.
[78] Partly dissenting opinion of Judge Pinto de Albuquerque in *De Tommaso v. Italy*, supra n. 76, para. 14.

took these factors into account to delineate the interests of the island, its community and its people, when deciding on cases where measures adopted on islands interfered with the rights of the applicants.

As analysed below, *Wiggins v. the United Kingdom*[79] and *Zammit Maempel v. Malta*[80] are two representative examples of how the Court accepted that certain measures are justified by the social, economic, traditional, cultural, religious and touristic needs of islands, with special attention being given to the geographical limitations of the island space. In both cases the Court relied on islandness in one way or another to accept the legitimacy of the aim pursued by the States' measures and, when moving on with the rest of its assessment, it finally concluded that the rights of the applicants had not been violated.

In *Wiggins*, the use of the island space itself was at stake as the domestic authorities had adopted measures to control the use of property on Guernsey. They had introduced in particular a licencing system, which reserved all dwellings below a certain rateable value for people either born on the island or otherwise having close connections thereto, and which moreover took into account the size of a dwelling in relation to the number of persons occupying it.[81] The implementation of this regulation in the case of the applicant resulted in a decision not to grant him a housing licence, thereby interfering with a number of his rights.[82] The Commission found this interference to be justified as being in accordance with the general interest. It is interesting to focus on the phrasing that the Commission used in this respect to accept that the control of the use of property serves 'the interests of the people of Guernsey, including the social and economic interests of the island'.[83] The socio-economic interests of the island itself are only one facet of the wider interests of the island people that the Commission considered. It is important that the interests of the island appeared as an autonomous notion but at the same time what was prioritised as the wider objective was the interest of the people living on the island themselves.

This distinction and complementarity was further heightened in *Zammit Maempel.* The applicants, the Zammit Maempel family, lived in a remote grassland area in Malta. By invoking, inter alia, Articles 8 and 6, the applicants complained about the risks they were exposed to by the letting off of fireworks during village feasts in fields close to their home and the ensuing damage to their property from the ensuing debris.[84]

The Court relied on the government's assertion that the letting off of fireworks at the relevant distances from the specific location, in the vicinity of the applicants,

[79] ECtHR, *Wiggins v. the United Kingdom*, Application No. 7456/76, Admissibility, 8 February 1978.
[80] ECtHR, *Zammit Maempel v. Malta*, Application No. 24202/10, Merits and Just Satisfaction, 22 November 2011.
[81] ECtHR, *Wiggins v. the United Kingdom*, supra n. 79.
[82] Ibid.
[83] Ibid., para. 3.
[84] ECtHR, *Zammit Maempel v. Malta*, supra n. 80, para. 30.

was justified not only by 'the cultural and religious interests of the Maltese community but also [by] the economic interests of the country as a whole'.[85] As it noted,

> firework displays are one of the highlights of a village feast which attracts village locals, other nationals and tourists, an occasion which undeniably generates an amount of income and which therefore, at least to a certain extent, aids the general economy. Moreover, it has no doubt that traditional village feasts can be considered as part of Maltese cultural and religious heritage.[86]

The Court thus accepted that the restrictions on the applicants' rights were permitted, inter alia, 'in the interests of the economic well-being of the country and for the protection of the rights and freedoms of others'.[87] The aim pursued was a legitimate one not only because of the socio-economic needs of the island State but also due to the wider needs of its community.

The aforementioned conclusions do not imply that the confined space of an island offers a State's authorities *carte blanche* when it comes to measures to be adopted thereon simply because they take local needs into account. It rather shows that the Court does consider islandness as a legitimate consideration in the adoption of local measures. This does not imply that States are no longer required to adopt measures that are indeed necessary for the fulfilment of this end.

This was made clear in *Mytilinaios and Kostakis v. Greece*.[88] The case was brought before the Court by two islanders from the island of Samos. The applicants were winegrowers and members of the Samos Union of Vinicultural cooperatives ('the Union'). The Union was created in 1934 and had exclusive rights to produce and sell Samos muscat wine. All of the local vinicultural cooperatives had compulsory membership of the Union. Being unable to freely dispose of and sell their muscat wine production, the applicants sought permission from the Union on a number of occasions to withdraw their membership.[89] The Greek Supreme Administrative Court dismissed their claims[90] and the applicants brought a case before the Court claiming a violation of their 'negative' freedom of association under Article 11 ECHR.

The Court accepted that the interference with the applicants' rights pursued the legitimate aim of protecting, in the general interest of the island of Samos, the quality of a unique wine in Greece and the revenue of the island's winegrowers.[91] It acknowledged the reasons as to why the system of cooperatives with compulsory participation was applicable to viticulture in Samos: 'in 1934, it was imperative to protect the quality of this grape, unique in Greece, and therefore a precious resource for the economy of the island […]'.[92] Such cooperatives are closely integrated into

[85] Ibid., para. 64.
[86] Ibid., para. 64.
[87] Ibid.
[88] ECtHR, *Mytilinaios and Kostakis v. Greece*, Application No. 29389/11, Merits and Just Satisfaction, 3 December 2015.
[89] Ibid., para. 7.
[90] Ibid., para. 10.
[91] Ibid., para. 59.
[92] Ibid. Translation by the author.

the local economic fabric and contribute to the exploitation of the territory and the activity of their members.[93] The 1934 Law was intended to encourage the cultivation of this vine, whose low marketing prices at the time had diverted farmers from this crop.[94]

Notwithstanding the legitimacy of the aim, the refusal by the national authorities to grant the applicants a winegrowing licence went beyond what was necessary to strike a fair balance between the conflicting interests. The Court considered that such restrictive measures were no longer necessary at that current historic moment[95] as less intrusive measures were available to the domestic authorities.[96] Striking as it may be that the Court reached such a conclusion, given that on such social policies the domestic authorities enjoy a wide margin of appreciation,[97] *Mytilinaios and Kostakis* implicitly sent an important message with respect to island policies. Measures implemented on islands legitimately take into account islandness, especially if they relate to the use/exploitation of an island territory where the resources are limited. This was after all the case in *Wiggins* and *Zammit Maempel* too. However, the serving of this legitimate aim is something that can be re-evaluated in light of the needs of every age. Time does not become frozen on islands. The evolution of human rights standards are to be factored into the design of modern island policies.

3.3 Necessity: Islandness as Boundedness

The geographical limitations of islands can be of great importance to the Court and have a visible impact even on the way the Court assesses the necessity of certain measures that interfere with the Convention's rights.

Louled Massoud v. Malta is demonstrative of how the boundness of island space not only justifies different policies but it also, on occasion, even imposes a differentiation.[98] Louled Massoud, an Algerian national, who had travelled to Malta by boat in an irregular manner, complained that his detention for more than 18 months after the determination of his asylum claim had been arbitrary and unlawful under Article 5 ECHR.[99] The government alluded, inter alia, to the challenges islandness poses to the management of large migration influxes, invoking the fact that Malta is 'such a small island which had limited financial and human resources'.[100] On this occasion, however, islandness did not work to the State's advantage. Rather the opposite, as the Court decided not only to assess the arbitrariness of the applicant's detention but also its necessity. In the words of the Court, which found a violation of Article 5(1)[101]:

[93] Ibid.
[94] Ibid.
[95] Ibid., para. 62.
[96] Ibid., para. 63.
[97] Ibid., para. 56.
[98] ECtHR, *Louled Massoud v. Malta*, Application No. 24340/08, Merits and Just Satisfaction, 27 July 2010.
[99] Ibid., para. 53.
[100] Ibid., para. 56.
[101] Ibid., para. 74.

> the Court finds it hard to conceive that in a small island like Malta, where escape by sea without endangering one's life is unlikely and fleeing by air is subject to strict control, the authorities could not have had at their disposal measures other than the applicant's protracted detention to secure an eventual removal in the absence of any immediate prospect of his expulsion.[102]

The findings of the Court in *Louled Massoud* introduce the dimension of necessity in the test undertaken by the Court under Article 5(1) ECHR but they also raise important questions concerning the general issue of how islands address externalities. As has been pertinently observed in Island Studies, '[s]mallness emphasises this inescapable combination: [I]slanders are constantly reminded that their way of life and their identity have much to do with insularity and isolation on the one hand, and with migration and mobility on the other'.[103] This raises the question of how large is the State's margin of manoeuvre on such occasions. This is what the following sub-section will delve into.

3.4 Margin of Appreciation/'Objective Difficulties': Externality in Islandness

In dealing with externalities and with migration in particular, there is no explicit evidence in the Court's case law that islandness comes with a broader margin of appreciation on the part of the State. To take the example of migration controls, it is interesting to note the domestic court's stance in *Beghal v. the United Kingdom.*[104] The UK High Court explicitly linked islandness with the wide margin of appreciation the State should enjoy in migration controls: 'The United Kingdom, as an "island nation", concentrated controls at its national frontiers and the court was therefore of the view that it was to be accorded a wide margin of appreciation in carrying out these controls'.[105] The applicant had complained of the power of border control officials to stop and question without suspicion or access to a lawyer under Article 8 ECHR. Unlike the domestic court that focused on islandness, this is not what the Court emphasized. The ECtHR simply recognised that the national authorities enjoy a wide margin of appreciation in matters relating to national security.[106]

This does not imply, however, that islandness is not relevant for the Court when assessing the context in which a violation of a right occurs. *Khlaifia and others v. Italy*[107] is of importance, and even though it does not pertain to the margin of appreciation as such, it does show how the Court takes into account islandness and its externalities to account for the 'objective difficulties' a State might be facing. In that case, the applicants alleged, inter alia, a violation of Article 3 ECHR, arguing that they had sustained inhuman and degrading treatment during their detention

[102] Ibid., para. 68.

[103] Connell and King (1999), p. 2.

[104] ECtHR, *Beghal v. the United Kingdom*, Application No. 4755/16, Merits and Just Satisfaction, 28 February 2019.

[105] Ibid., para. 19.

[106] Ibid., para. 95.

[107] ECtHR, *Khlaifia and others v. Italy*, Application No. 16483/12, Merits and Just Satisfaction, 15 December 2016.

on the island of Lampedusa.[108] The applicants, Tunisian nationals, set off by boat from Tunisia in September 2011 heading for Italy. Their makeshift vessels were intercepted by the Italian Coastguard, which escorted them to a port on the island of Lampedusa, where they were placed in an early reception centre.[109] Before proceeding with the examination of the detention conditions as such, the Court examined whether a humanitarian crisis had occurred at that particular point in time at that particular location. As the Court observed: 'it would certainly be artificial to examine the facts of the case without considering the general context in which those facts arose'.[110] The government explained that in 2011 the massive influx of North African migrants had created a situation of a humanitarian emergency in Italy with 51,573 people landing on the islands of Lampedusa and Linosa.[111]

It was inevitable that in the Court's effort at contextualisation, it had to address the implications of islandness in the formation of the crisis. Islandness was relevant on two accounts. First, the geographical location of islands renders them the first stop for migrant influxes. As such the Court could not in itself criticise the decision to concentrate the initial reception of migrants on Lampedusa: 'As a result of its geographical situation, that was where most rudimentary vessels would arrive and it was often necessary to carry out rescues at sea around the island in order to protect the life and health of the migrants'.[112] Second, the smallness of the island space and its dependence on the mainland for resources[113] created an environment where the needs of those who came to the island clashed with the needs of the islanders themselves. The State was thus expected to balance these two needs. In the context of the case at hand, the Court accepted that the State authorities faced many problems because of the arrival of exceptionally high numbers of migrants and they 'were burdened with a large variety of tasks, as they had to ensure the welfare of both the migrants and the local people and to maintain law and order'.[114]

Such considerations do not absolve a State from its obligations under the Convention but point to the fact that a violation of a right may stem from the objective difficulties experienced in a crisis.[115] Islandness and the challenges of its externalities were certainly one of the factors that contributed to the 'extreme difficulty'[116] with which the Italian authorities were confronted at that particular time.

Khlaifia and others refers to the routes and mobility towards an island. Externalities in islandness extend beyond this; they are bidirectional and do not only refer to the influxes to and from an island. Dependence on the external may take different forms and allude to the regulation of the political relations between the islands and the mainland. The cases in which the geographical and historical particularities translate into differentiation in the electoral system underline the 'separation

[108] Ibid., para. 136.
[109] Ibid., paras. 11–12.
[110] Ibid., para. 185.
[111] Ibid., para. 150.
[112] Ibid., para. 181.
[113] Ibid., paras. 50 and 182.
[114] Ibid., para. 183.
[115] Ibid., para. 184.
[116] Ibid., para. 185.

anxiety'[117] that islanders often feel. One could claim that the applicants' complaints in *Sevinger and Eman v. the Netherlands*[118] reflected this anxiety. Mr Eman and Mr Sevinger were Dutch nationals residing on the island of Aruba. Aruba was part of the Netherlands Antilles until 1986, when it obtained internal autonomy and became a country within the Kingdom of the Netherlands with its own Constitution and a freely elected Parliament. Under the relevant electoral arrangements, the residents of the island could not vote in elections to the Dutch Parliament on the mainland. The applicants thus invoked Article 3 of Protocol No. 1 to the Convention, arguing in particular that they were excluded from participation in the election of members of the Lower House of the Dutch Parliament, although the Lower House is a legislature concerning Kingdom matters, which thus also involve Aruba.[119]

The Court did not disregard the underlying value in the applicants' claim, namely the value of ensuring a certain connectivity between the island and the mainland by guaranteeing that the residents of Aruba can indeed influence decision making in the Parliament of the mainland. It did so even though it did not find a violation of Article 3 of Protocol No. 1.[120] The Court took into account the State's wide margin of appreciation and considered that the islanders could vote in elections to the Parliament of Aruba, which was entitled to send special delegates to the Dutch Parliament.[121] The form of the regulation of the electoral relations between the island and the mainland were left to the discretion of the State.

3.5 Positive Obligations: Islandness as Inaccessibility [to Resources]

As reflected in the previous sections, the dimension of limited resources and islandness comes around as a leitmotiv as it is closely connected to smallness and separateness. In a number of cases, though, the inaccessibility to resources underlines the absence of diligence on the part of State authorities. States should have instead adopted appropriate measures to protect the rights of individuals on islands.

The cases of *Mathew v. the Netherlands*,[122] *Öcalan v. Turkey*,[123] and *O.S.A. and others v. Greece*[124] are demonstrative of how the lack of appropriate resources on islands relates to adherence to the Convention's standards. All three cases were coincidentally related to island detention but pertained to different issues under a different set of Convention rights.

[117] See Baldacchino (2004), p. 274, attributing the term to David Weale.

[118] ECtHR, *Sevinger and Eman v. the Netherlands*, Application Nos. 17173/07 and 17,180/07, Admissibility, 6 September 2007.

[119] Ibid.

[120] Ibid.

[121] Ibid.

[122] ECtHR, *Mathew v. the Netherlands*, Application No. 24919/03, Merits and Just Satisfaction, 29 September 2005.

[123] ECtHR, *Öcalan v. Turkey*, Application No. 46221/99, Merits and Just Satisfaction, 12 May 2005.

[124] ECtHR, *O.S.A. and others v. Greece*, Application No. 39065/16, Merits and Just Satisfaction, 21 March 2019.

For a start, the lack of appropriate infrastructure on islands may be the source of a Convention violation. *Mathew v. the Netherlands* is demonstrative of this. The applicant was arrested on Aruba and for a number of years he was detained on remand in a correctional institution. During most of that time, he was under a special detention regime, which amounted to solitary confinement because of his dangerous and violent disposition. This was due to the fact that accommodation that was suitable for prisoners of the applicant's unfortunate disposition did not exist on Aruba at the relevant time—it was only built at a later date.[125] The Court acknowledged that the applicant was impossible to control except in conditions of strict confinement and that the domestic authorities had made attempts to alleviate the applicant's situation.[126] However, as the Court noted, 'the Government could and should have done more'.[127] The Court did not go as far as to suggest that new infrastructure should be developed on the island but the respondent State should have attempted to find an appropriate place of detention for the applicant elsewhere in the Kingdom.[128]

The lack of resources on islands does not only pertain to the availability of infrastructure but also to the provision of services. In the case of *Öcalan* the applicant was detained on the island of İmralı, which resulted in a number of violations. First, the Court found a violation of Article 5(3) ECHR because the applicant had been detained for seven days without being brought before a judge.[129] According to the government's allegation, which did not however convince the Court, that was due to adverse weather conditions.[130] For the Court there was no evidence that established that the judge had attempted to reach the island on which the applicant was being held so that the latter could be brought before him or her within the total statutory period of seven days which was allowed for police custody.[131] The second violation the Court found, and in which islandness was one of the decisive elements, was that of Article 6 relating to the fairness of the proceedings against the applicant.[132] The restrictions imposed on the number and length of his lawyers' visits were to a large extent due to the absence of appropriate measures that the respondent State should have adopted. The lawyers' visits would simply take place in accordance with the frequency and departure times of the ferries between the island of İmralı and the coast.[133] As the Court observed:

> […] the Government have not explained why the authorities did not permit the lawyers to visit their client more often or why they failed to provide more adequate means of transport, thereby increasing the length of each individual visit, when such measures were called for as part of the 'diligence' the Con-

[125] ECtHR, *Mathew v. the Netherlands*, supra n. 122, para. 204.
[126] Ibid., para. 203.
[127] Ibid.
[128] Ibid., para. 204.
[129] ECtHR, *Öcalan v. Turkey*, supra n. 123, paras. 104–105.
[130] Ibid., para. 102.
[131] Ibid., para. 104.
[132] Ibid., paras. 148–149.
[133] Ibid., para. 135.

> tracting States must exercise in order to ensure that the rights guaranteed by Article 6 are enjoyed in an effective manner […][134]

Just like in the case of *Klaifia and others*, the Court did not oppose the government's decision to hold Mr Öcalan on an island. In the case of *Klaifia and others* that was justified by the geographical position of the islands, which qualified as the first stop for migrant influxes; in the case of *Öcalan* it was justified by the isolation of an island prison far from the coast, thus serving the exceptional security considerations of the case.[135]

Such decisions do not exonerate States from their positive obligations under the Convention to provide for the adequate measures that the fulfilment of a right requires. In the migration context, *O.S.A. and others* is demonstrative of how islandness deprives the persons detained from having access to lawyers. In this case, the applicants were detained on the island of Chios. In its assessment of the complaint under Article 5(4) ECHR, the Court examined the particular circumstances to assess the effectiveness and practical accessibility of the available legal remedies.[136] The Court observed that the applicants did not appear to have access to lawyers on the island.[137] It had not been specified by the respondent State whether refugee-assisting NGOs on the island had sufficient funds and lawyers to address the large number of asylum applicants.[138]

As seen in the aforementioned cases, inaccessibility to resources is also connected to the wider issue of accessing islands. Is the State obliged to take positive measures in this respect and to what extent? The admissibility decision in *Anderson v. the United Kingdom*[139] gives rise to some interesting questions. Are islanders expected to be in a position to choose what means will connect them with the mainland? And what about the cost[140] or the inconvenience of these means? Mr Anderson lived on the Isle of Skye on the north-west coast of Scotland. The island was linked to the mainland by ferry until 1995 when a bridge was built. The bridge was controlled by a private company and provided the only year-round access that was subject to a toll. For the applicant the establishment of a toll barrier across the only entry point to his island home, and the refusal to allow passage for those who challenged the toll, constituted a violation of his rights under Article 8 ECHR.[141] Mr Anderson was not prepared to pay the toll and, according to him, the removal of the ferry service and the introduction of the new bridge had barred him from visiting his family as his four children did not live on the island.[142]

[134] Ibid.
[135] Ibid.
[136] ECtHR, *O.S.A. and others v. Greece*, supra n. 124, paras. 46–58.
[137] Ibid., para. 53.
[138] Ibid., para. 56.
[139] ECtHR, *Anderson v. the United Kingdom*, Application No. 44958/98, Admissibility, 5 October 1999.
[140] A State may adopt specialised measures to support, even financially, islanders in the matter of transportation. See for the Greek case concerning the 'transport equivalent', Boumpa and Paralikas (2021).
[141] ECtHR, *Anderson v. the United Kingdom*, supra n. 139, para. 5.
[142] Ibid.

According to the Court, this was not how the balance should be struck in the present case. It rejected the claim as being manifestly ill-founded.[143] Even though that new situation implied an interference with the applicant's right to respect for family life, the interference had in reality been created by the applicant refusing to pay the toll.[144] As the Court put it: 'the applicant would have had to take a ferry in the past which would have also subjected him to expense and some inconvenience'.[145] Furthermore, the Court also considered the State's margin of appreciation as the obligation to pay a toll may be justified for the economic well-being of the country and the protection of the rights of others.[146] The Court did not hesitate in adopting an explicit stance on the matter of financing the connectivity with the mainland and the convenience of the new measure: 'The toll finances the building of the road link which would otherwise have been funded by taxpayers. The toll bridge is also likely to have improved and facilitated access to the island for those inhabitants and visitors who pay the toll'.[147]

Anderson provided room for some important points with respect to island connectivity. Even though the Court did not find a violation of the Convention, it supported the value of continuous improvement and convenient connectivity. With regard to its cost, the present case could only provide limited information thereon as it built on the fact that the past connectivity scheme also entailed certain expenses. It comes as no surprise that States enjoy a wide margin of appreciation when it comes to opting for a certain funding scheme but this margin is not unlimited. *Anderson* should not be read as offering *carte blanche* to States to create means of connectivity that imply new costs for islanders. While, given the circumstances, the Court had struck a fair balance in the case at hand, it was unfortunate from an islandness-based approach that the Court did not distinguish the islanders from visitors. It was equally unfortunate that the Court went as far as to 'bless' the choice of the State to introduce tolls that would burden the islanders more than anyone else rather than all the taxpayers of the country. The Court could have resolved the case without going into so much detail on an issue that pertains to islanders and their vulnerability.

This final remark harmoniously brings us to the final section of the present paper which aims to demonstrate the value of an islandness-based approach.

4 An Islandness-Based Approach: Worth Pursuing?

The previous sections demonstrated that there are (a) a set of cases where the Court did not consider islandness even though the local requirements were pertinent to the territorial application of the ECHR; and (b) another series of cases where the local considerations that include islandness were pertinent to the Court in a number of ways. While this second set of cases is promising concerning the importance and

[143] Ibid.
[144] Ibid.
[145] Ibid.
[146] Ibid.
[147] Ibid.

the potential of an islandnes-based approach, this does not necessarily imply that the Court has adopted a coherent islandness-based approach. There are a number of cases where islandness is relevant—beyond the ambit of the contested Article 56 ECHR—and the Court did not seem to consider this (4.1). Furthermore, an islandness-based approach comes with a number of strengths and opportunities for the protection of rights on islands that the case law of the Court can further develop (4.2).

4.1 Marooning Islandness: Cases on Islands But Not on Islandness

While our analysis cannot possibly include all of the island cases brought before the Court, it nonetheless distinguishes two major categories of island cases where the Court did not cohesively address the concept of islandness. The first category relates to environmental protection and the second one to institutional designs on islands.

Over the years the Court has developed a rich jurisprudential corpus on environmental protection and, given the current circumstances and pending cases before the Court, this corpus is expected to increase even further.[148] The protection of the environment is certainly a global concern without boundaries, but islandness poses particular challenges. This makes one wonder: Is the versatility but also the vulnerability of island natural resources a factor that the Court takes into account? How can the protection of the island environment be balanced against local needs? One would expect that the rich environmental case law of the Court could provide answers to these questions but this is not necessarily the case. Islandness does not seem to be one of the factors that the Court takes into account.

The cases of *Kyrtatos v. Greece*[149] and *Saliba v. Malta*[150] exemplify how islandness is not a factor that the Court takes into account when considering environmental cases. In *Kyrtatos*, the applicants complained, inter alia under Article 8 ECHR, about the effects of urban development on the environment in the vicinity of their property on the island of Tinos.[151] They alleged in particular that the area had lost all of its scenic beauty and had changed profoundly in character from a natural habitat for wildlife to a tourist development.[152] The Court applied its standard test under Article 8 for environmental issues. A general deterioration of the environment was not sufficient as the Convention was not specifically designed to provide general protection for the environment.[153] For the Court, the applicants had not produced convincing arguments showing that the alleged damage to protected species was of such a nature as to affect their rights directly under Article 8.[154] The fact that the case at hand concerned the fragile environment of a small island did not attract the attention

[148] See indicatively, Feria-Tinta (2021); Heri (2022).
[149] ECtHR, *Kyrtatos v. Greece*, Application No. 41666/98, Merits and Just Satisfaction, 22 May 2003.
[150] ECtHR, *Saliba v. Malta*, Application 4251/02, Merits, 8 November 2005.
[151] ECtHR, *Kyrtatos v. Greece*, supra n. 149, para. 44.
[152] Ibid., para. 46.
[153] Ibid.
[154] Ibid para. 53.

of the Court. The same was the case in *Saliba*, where the protection of the environment was on this occasion invoked by the respondent State. In *Saliba*, the applicant complained that the order to demolish his storage facility on the island of Gozo on the basis of a law which was amended in the course of the proceedings against the applicant violated Article 1 of Protocol No. 1.[155] The Court assessed, inter alia, whether the Maltese authorities had struck a fair balance between the general interest of the community and the applicant's right to the peaceful enjoyment of his possessions.[156] The Court accepted that 'the measure pursued the legitimate aim of preserving the environment and ensuring compliance with the building regulations, with a view to establish an orderly development of the countryside'.[157] The fact that these measures pertained to a small Maltese archipelago island was not relevant for the Court, even though the government had emphasised that the regulations at stake were 'even more necessary in a small and densely populated island like Gozo'.[158]

In *Saliba* the Court referred to the 'countryside' with no reference to the island dimension. Nonetheless, even when the Court referred to the 'protection of the environment and in particular the preservation of [an] island […]'[159] as the legitimate aim of a measure, this does not necessarily mean that the Court does consider islandness as a factor to be weighed. This is what happened in the case of *Consorts Richet and Le Ber v. France*. While the Court acknowledged that there was interference with the applicants' rights that served the purpose of protecting the environment on Porquerolles Island,[160] the Court did not further consider islandness in its assessment of the case.

Notwithstanding the aforementioned observations, perhaps the most striking stance adopted by the Court with respect to islandness and the preservation of the environment can be found in the decision in *Aarniosalo and others v. Finland.*[161] Here, the protection of the environment did not threaten the development of the island for tourism purposes or private interests, but rather the collective interests of the islanders themselves. The case concerned the prohibition of works on a specific part of the Island of Onkisalo for the purpose of protecting the habitat of the white-backed woodpecker.[162] This resulted in the non-completion of a road whose construction had started in the 1980s and would have linked the island to the mainland with which it had no connection. The applicants, all islanders, were also entitled to participate in this construction project. This explains the two types of complaints on the part of the applicants. They complained, under Article 1 of Protocol No. 1, that they had been deprived of their right to the road after such a right had

[155] ECtHR, *Saliba v. Malta*, supra n. 150, para. 23.
[156] Ibid., paras. 42–48.
[157] Ibid., para. 44.
[158] Ibid., para. 26.
[159] ECtHR, *Consorts Richet and Le Ber v. France*, Application Nos. 18990/07 and 23,905/07, Merits and Just Satisfaction, 18 November 2010, para. 116. Translation by the author.
[160] Ibid., para. 116.
[161] ECtHR, *Aarniosalo and others v. Finland*, Application No. 39737/98, Admissibility, 5 July 2005.
[162] Ibid.

already been upheld by the Supreme Administrative Court on 6 March 1996.[163] The applicants also complained, under Articles 3 and 5 of the Convention, that they had been subjected to inhuman treatment, endangering their lives, and that they had been deprived of their liberty as they were forced to remain on their island without any connection to the mainland and without any fire and rescue services or medical care.[164] In this respect they referred to tragic events that even resulted in the loss of human lives, which had occurred during the time when the construction of the road was suspended and there was no secure connection to the mainland.[165]

The Court accepted that the interference with the right to property was necessary for the protection of the environment and for the protection of the white-backed woodpecker, a species so rare as to be on the point of extinction.[166] Again no reference was made to islandness at this point. This would have been necessary as everything about this case was about islandness: how unique an island habitat can be for the preservation of the environment and how high the price of this preservation can be for the islanders. The Court's observations under Article 3 are noteworthy and demonstrate not only that the Court did not consider the particularities of islandness but it attributed the challenges that islanders face to the 'location of, and weather conditions at, the applicants' place of residence' without identifying any State responsibility in this respect.[167] The Court declared the claim to be inadmissible noting that in the circumstances of the present case the authorities had not in any way ill-treated the applicants in the sense prohibited by Article 3 and the applicants themselves had not suffered any injury or damage to health as a result of any difficulty in having access to services.[168] Such a finding is disputable[169] and the Court's indifference and/or misapprehension of islandness is alarming. Instead of acknowledging the challenges that islandness poses to accessing basic services, especially when there is no connection to the mainland, and looking into the positive obligations of the State in this respect, the Court found itself noting that:

> Any obstacle to obtaining necessary medical treatment derives not from any action of the authorities but from the location of, and weather conditions at, the applicants' place of residence, which problems have always been present and are not of the authorities' creation.[170]

The aforementioned observations when the issue of environmental protection is raised demonstrate the complexities inherent in cases that concern islands. The Court does not consider islandness to substantiate its stance where appropriate and it emphasises the pressing need for protecting natural resources on islands.

[163] Ibid., para. 2 under 'Complaints'.
[164] Ibid., para. 1 under 'Complaints'.
[165] Ibid.
[166] Ibid., para. 2 under 'The Law'.
[167] Ibid., para. 1 under 'The Law'.
[168] Ibid.
[169] It would have been interesting to see what the Court's stance would have been if the applicants had also invoked Art. 8 ECHR.
[170] ECtHR, *Aarniosalo and others v. Finland*, supra n. 161, para. 1 under 'The Law'.

Beyond environmental cases, a comparable approach can be detected in cases that pertain to institutional structures on islands under Article 6 ECHR. Can islandness possibly justify 'particularities' in the design of institutional schemes? Here again the Court has not provided an explicit answer, even though voices have been raised on the part of governments but they have also emanated from within the ECHR system suggesting that insular systems can differ from the ones on the mainland without this being incompatible with the Convention's standards.

The controversy was more explicit before the Commission. In *Jon Kristinsson v. Iceland* the government maintained that the combination of investigative and judicial powers in one person was compatible with Article 6 due to the special historical and geographical conditions in Iceland.[171] The Commission did not explicitly address this point but it also did not seem to be convinced by it as it did find a violation of Article 6 under its standard case law on the matter.[172] Ten years later, however, the Commission adopted a clearer stance on the matter on the occasion of the case of *McGonnell v. the United Kingdom*.[173] In that case, it was the independence and impartiality of the Bailiff of Guernsey that was in question. The applicant pointed to the non-judicial functions of the Bailiff, contending that they gave rise to such close connections between the Bailiff as a judicial officer and the legislative and executive functions of the government that the Bailiff no longer had the independence and impartiality required by Article 6.[174] In *McGonnell*, the Commission explicitly noted that it found 'no reasons related to the historical or geographical conditions in Guernsey which could affect its reasoning in this regard'.[175] What is interesting in this case is that the majority's stance triggered the dissenting opinion of Mr Alkema, the Dutch member of the Commission, who very openly held:

> Of course, maintaining the rule of law is essential also in small insular communities such as Guernsey. For that purpose it is not, however, necessary to require that such societies have similar elaborate constitutional structures as generally are to be found in states of an ordinary size. Careful consideration should be given to the peculiarities of small scale societies and to both the specific disadvantages and benefits such scale may entail for the proper functioning of the body politic.[176]

Mr Alkema went as far as to suggest that such circumstances would imply the application of Article 63(3) and that due regard should be given to 'local requirements' of territories whose international relations have been transferred to a High Contracting Party.[177] This is far more surprising as the implementation of this provision was not discussed either by the parties or the majority in this case.

[171] EComHR, *Jon Kristinsson v. Iceland*, Application No. 12170/86, Report, 8 March 1989, para. 43.
[172] Ibid., paras. 49–58.
[173] EComHR, *McGonnell v. the United Kingdom*, Application No. 28488/95, Report, 20 October 1998.
[174] Ibid., para. 47.
[175] Ibid., para. 55.
[176] Dissenting opinion of Mr E.A. Alkema in EComHR, *McGonnell v. the United Kingdom*, supra n. 173.
[177] Ibid.

Notwithstanding the debates before the Commission, the local context was not at all discussed when the case was brought before the Court. Certainly, one can deduce from the finding of a violation of Article 6 that the Court did not regard islandness as being sufficiently pertinent to justify a different solution on an island but the Court did feel the need to clarify that it does not require 'the application of any particular doctrine of constitutional law to the position in Guernsey'.[178] It would have been difficult for the Court to suggest this on the occasion of an island case.[179]

One could argue that the consideration of islandness is not absolutely necessary in these cases since it goes without saying that it cannot justify a deviation from the Convention's standards to maintain existing institutional schemes. However, one cannot disregard the fact that there are cases where islandness does point in the opposite direction, underlying the acute need for institutional changes on islands. One such case is *Nordbø v. the United Kingdom*.[180] Guernsey was again the island in focus, this time because of the non-compatibility of Sark's Court of the Seneschal, the court of first instance on the island of Sark, with Article 6 ECHR. The issues here pertained to the untrammelled power of the parliamentary assembly for Sark (a smaller island which forms part of the Bailiwick of Guernsey) to reduce the Seneschal's remuneration.[181] Regrettably, the Court did not address the question as to whether the Seneschal's alleged lack of objective independence amounted to a violation of Article 6, as the applicant had not suffered any significant disadvantage.[182] Thus, it remains undetermined what the Court's stance with respect to islandness would have been. The High Court of England and Wales, however, had a say on the matter. It had found this situation to be incompatible with Article 6 considering also the context of the small community of the island: 'In our view protecting the independence of the Seneschal from such pressures in the small community where the Seneschal might be required to make unpopular decisions to uphold the rights of a minority is essential to the Seneschal's independence'.[183] Islandness is not a factor one should close one's eyes to.

4.2 An Islandness-Based Approach: Harbouring Island Rights

The previous sections demonstrated the weaknesses, the potential and the lost opportunities of addressing islandness in the case law of the ECtHR. The Court would not be alone in this exploration as a whole field of knowledge, namely Island Studies, would provide for necessary insights. The concept of islandness and its influence on scholarship, politics, economics and human behaviour constitutes the foundation of Island Studies.[184] In their analyses political scientists are well advised

[178] ECtHR, *McGonnell v. the United Kingdom*, Application No. 28488/95, Merits and Just Satisfaction, 8 February 2000, para. 51.
[179] Tsampi (2019), p. 144.
[180] ECtHR, *Nordbø v. the United Kingdom*, Application No. 67122/14, Admissibility, 16 January 2018.
[181] Ibid., paras. 34 and 36.
[182] Ibid., para. 46. In the meantime, the relevant regulations had been amended so as the legislative and executive branches of government were no longer involved in settling the Seneschal's level of remuneration (ibid., para. 33).
[183] Ibid., para. 31.
[184] Baldacchino (2006), p. 9.

to include islandness among the factors that shape institutional choices.[185] The same claim would be applicable in the implementation of human rights law too. Certainly, 'islands are different'.[186] This assertion can be qualified as a fundamental premise of Island Studies and is also apparent in the abovementioned case law of the Court. It therefore comes as no surprise that in Island Studies different approaches have been accommodated concerning the pertinence of islandness. Some see islands as not being essentially different, but merely more extreme, replicated, versions of what is found in the continental world[187]; others focus on what is special about islands and how their experience differs from the mainland[188]; while still others do not treat the island as the main unit of analysis and simply regard it as important for contextualisation.[189] No matter what the approach may be, what matters is that islandness is relevant for the Court and a comprehensive islandness-based approach would be anything but superfluous. Islandness is not simply about smallness or remoteness, points that have already attracted the interest of human rights scholarship. As clarified from the outset, islandness is an amalgam of traits that dissociate a place from the mainland. In such a setting, for example, smallness or remoteness cannot be seen independently from sea boundness and island identity. Many of these traits have been identified in some cases decided by the Court as the previous sections have demonstrated. Capturing, however, the complexities of an island setting is a distinctive exercise that encompasses an assessment of all the possible traits connected to islandness. Such an exercise is worth pursuing in cases that concern islands, with a view to safeguarding the universality of human rights in practice.

Addressing islandness is not an aim on its own for the Court. The Court is mandated, however, with the effective implementation of the Convention in all of its States Parties and everywhere within its jurisdiction. The consideration of islandness in a clear and transparent way can only assist the Court in this task. Islandness is not simply the scenery in which the factual background of a case occurs. The consideration of islandness and its implications can enhance the transparency, legitimacy and consistency of the Court's case law and eventually strengthen the protection of human rights on islands.

The existing case law of the Court, as discussed in the previous sections, shows the way forward and can itself substantiate the claim for a comprehensive islandness-based approach in the Court's practice.

The consideration of islandness can allow the Convention's system to avoid the de facto acceptance of double standards in its implementation such as those directly connected to the implementation of the 'colonial clause' and its 'local requirements' that water down the protection of human rights on a number of islands, excluding the local society's point of view. The same holds true for the rule of law standards. Locality should be considered in the context of islandness without, however, entailing that islandness implies a deviation from the Convention's premises—as

[185] Anckar (2006).

[186] Ronstrom (2009), p. 171.

[187] Bayliss-Smith (2006), p. 284.

[188] Anckar (2006), p. 43.

[189] Nimführ and Otto (2020), p. 197.

demonstrated in the discussion on *Tyrer*[190] above—or backwardness in the design and operation of institutions as illustrated in *Jon Kristinsson*,[191] *McGonnell*[192] and *Nordbø*.[193]

Islandness on its own can be a determinative factor in the limitation of rights. First in line come the cases that pertain to the deprivation of liberty on islands both in the criminal and migration context. The cases of *Guzzardi*[194] and *Öcalan*[195] would invite the Court to rethink whether the isolation of island prisons can indeed be accommodated under the Convention's standards. The cases of *Khlaifia and others*[196] and *Louled Massoud*[197] raise concerns in the migration context. On the one hand, *Khlaifia and others* would invite one to rethink, for example, the long-term stay of asylum seekers on island settings. In situations like the one on the Eastern Aegean islands, this justifies a recommendation for the 'lifting of geographical limitations imposed on [applicants for international protection], as well as [for] their transfer to mainland in order to ensure the immediate decongestion of the islands'.[198] On the other hand, *Louled Massoud* would convince the Court to adopt a uniform approach to the detention of asylum seekers and find a violation of the Convention when, on the basis of the principle of necessity, detention is applied automatically and no other less drastic measure is sought.[199]

Khlaifia and others, along with *Wiggins*,[200] *Zammit Maempel*[201] and *Mytilinaios and Kostakis*,[202] also remind us of the pertinence of island communities. Protecting the socio-economic/cultural interests of island communities might imply a number of interferences with the rights of persons, islanders or others. For a transparent and comprehensive balancing test, the consideration of islandness is of great importance. Islandness may after all come with limited resources, if any. *Mathew v. the Netherlands*,[203] *Öcalan v. Turkey*,[204] and *O.S.A. and others v. Greece*[205] pertinently underline this, accentuating the need for the State's diligence and the adoption of certain

[190] ECtHR, *Tyrer v. the United Kingdom*, supra n. 42.
[191] EComHR, *Jon Kristinsson v. Iceland*, supra n. 171.
[192] ECtHR, *McGonnell v. the United Kingdom*, supra n. 178.
[193] ECtHR, *Nordbø v. the United Kingdom*, supra n. 180.
[194] ECtHR, *Guzzardi v. Italy*, supra n. 69.
[195] ECtHR, *Öcalan v. Turkey*, supra n. 123.
[196] ECtHR, *Khlaifia and others v. Italy*, supra n. 107.
[197] ECtHR, *Louled Massoud v. Malta*, supra n. 98.
[198] Greek National Commission for Human Rights, The GNCHR on the unsettling situation in the Eastern Aegean islands and the recent asylum developments, 6 September 2019, https://www.nchr.gr/images/English_Site/PROSFYGES/GNCHR%20Announcement%20on%20Asylum%20Developments.pdf. See also for Spain, Human Rights Watch, Respect Rights of People Arriving by Sea to Canary Islands, 11 November 2020, https://www.hrw.org/news/2020/11/11/spain-respect-rights-people-arriving-sea-canary-islands#.
[199] Concurring Opinion of Judge Pinto de Albuquerque in ECtHR, *Abdullahi Elmi and Aweys Abubakar v. Malta*, Application Nos. 25794/13 and 28,151/13, Merits and Just Satisfaction, 22 November 2016, para. 27.
[200] ECtHR, *Wiggins v. the United Kingdom*, supra n. 79.
[201] ECtHR, *Zammit Maempel v. Malta*, supra n. 80.
[202] ECtHR, *Mytilinaios and Kostakis v. Greece*, supra n. 88.
[203] ECtHR, *Mathew v. the Netherlands*, supra n. 122.
[204] ECtHR, *Öcalan v. Turkey*, supra n. 123.
[205] ECtHR, *O.S.A. and others v. Greece*, supra n. 124.

measures. Interferences with one's rights on islands may be derived not only from the absence of resources but also from the contrary, the richness of a certain type of resources that needs to be maintained. The environmental cases[206] are of relevance here and this is why it is important for the Court to highlight that the protection of the environment/natural resources on island settings has special gravitas.

A comprehensive islandness-based approach in the practice of the Court would allow it to assess more efficiently—and even with more empathy—the status of a person as an 'islander'. The above discussion on the cases of *Aarniosalo and others*[207] and *Anderson*,[208] both concerning issues relating to the connectivity of islands with the mainland, highlight this need. Life on islands certainly comes with a higher cost for States. This is something that the Court cannot disregard but at the same time the challenges implied by islandness in general should not and cannot be used as an excuse for States to escape from their obligations—positive obligations included—and to abusively invoke 'objective difficulties' to the same end. In certain settings at least, islanders may be regarded as populations in a vulnerable position. As stressed in the literature, islandness does not qualify as an unsound ground for creating extra rights and privileges for islanders, 'but as a principle which should be taken into consideration and respected by the legislator and the administration in order to overcome the vulnerability of the islanders and counterbalance for the harsh conditions suffered due to geographic isolation'.[209] To what extent islanders can be inherently considered as 'vulnerable' or being occasionally in a vulnerable position is a discussion that certainly cannot be exhausted here. The present analysis does trigger the question and provides certain seeds for the answer but the discussion on vulnerability is one with many complexities that should be separately and extensively addressed.[210]

5 Conclusion

'Islands are "morphological anarchists" and the people who live in them do participate—whether they accept it or not—from [sic] this permanent questioning of the "central" power'.[211] This claim belongs to Abraham Moles, the father of nissology,[212] who considered the very existence of islands a disrespect for the authority of

[206] ECtHR, *Kyrtatos v. Greece*, supra n. 149; ECtHR, *Saliba v. Malta*, supra n. 150; ECtHR, *Consorts Richet and Le Ber v. France*, supra n. 159.

[207] ECtHR, *Aarniosalo and others v. Finland*, supra n. 161.

[208] ECtHR, *Anderson v. the United Kingdom*, supra n. 139.

[209] Boumpa and Paralikas (2021), p. 99.

[210] See for example the complexities in the discussion of whether older persons qualify as being vulnerable under human rights law: Mégret (2011), pp. 45–47.

[211] Moles (2009), p. 7.

[212] Nissology can be qualified as the study of islands on their own terms.

the State.[213] Dramatic as it might be, such an assertion has some truth in it. The relations between the State, the islands and the islanders are relations of complexity and complication. International human rights law has not unravelled these complexities. An islandness-based approach in human rights would help in moving forward in this direction, thereby enhancing the safeguarding of human rights on islands.

The present study used the ECHR habitat to explore the strengths of such an approach, having scrutinised the weaknesses, the potential and the lost opportunities in the case law of the ECtHR. The large number of cases that pertain to islands and have been decided by the Court offered a proper laboratory for an exploration of the connections between islandness and human rights. The mapping of these connections demonstrated that islandness should not be about creating or tolerating 'islands of rights' through double standards but about creating routes for the efficient protection of 'rights on islands'. These routes pass through Strasbourg, with the Court being invited to adopt a comprehensive islandness-based approach for a more transparent, legitimate and coherent case law on issues pertaining to the implementation of the Convention in island settings.

Fundamental as the Court might be in the effort for a more efficient protection of rights on islands, Strasbourg is not the end of the road. This paper was only meant to provide a starting point in thinking about the Convention and international human rights law in general through the lens of islandness. One should embark on a long journey to further explore the advantages and the limitations of an islandness-based approach in human rights, both at a European and a global level. The study of the implementation of the ECtHR island judgments or of the perception of the ECHR by the islanders would only qualify as some of the stops on this long but hopefully rewarding journey. In a more general fashion even, the mapping discussed in this paper can be used as foundations for further work on the nexus of islandness and general international human rights law. The stance of other international human rights bodies on islandness is also worth exploring. After all, the aim of this paper was not to exhaust an islandness' critique—not even against the ECtHR itself. It becomes clear, however, that an islandness-based approach to human rights offers untapped potential for further research in the general field of international human rights law.

[213] Moles (2009), p. 6.

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