

HARRIS, O'BOYLE & WARBRICK
LAW OF THE EUROPEAN
CONVENTION ON
HUMAN RIGHTS

Third edition

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OXFORD
UNIVERSITY PRESS

OXFORD
UNIVERSITY PRESS

Great Clarendon Street, Oxford, OX2 6DP,
United Kingdom

Oxford University Press is a department of the University of Oxford.
It furthers the University's objective of excellence in research, scholarship,
and education by publishing worldwide. Oxford is a registered trade mark of
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First edition published 1994
Second edition published 2009

Impression: 1

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Published in the United States of America by Oxford University Press
198 Madison Avenue, New York, NY 10016, United States of America

British Library Cataloguing in Publication Data
Data available

Library of Congress Control Number: 2014933296

ISBN 978-0-19-960639-9

Printed in Great Britain by
Ashford Colour Press Ltd, Gosport, Hampshire

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THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN CONTEXT

1. BACKGROUND

The European Convention on Human Rights¹ was adopted in 1950. It was drafted within the Council of Europe, an international organization that was formed after the Second World War in the course of the first post-war attempt to unify Europe. The reason for the Convention was partly the need to elaborate upon the obligations of Council membership.² More generally, the Convention was a response to current and past events in Europe. It stemmed from the wish to provide a bulwark against communism, which had spread from the Soviet Union into European states behind the Iron Curtain after the Second World War. The Convention provided both a symbolic statement of the principles for which West European states stood and a remedy that might protect those states from communist subversion. It was also a reaction to the serious human rights violations that Europe had witnessed during the Second World War. It was believed that the Convention would serve as an alarm that would bring such large-scale violations of human rights to the attention of other West European states in time for action to be taken to suppress them. In practice, this last function of the Convention has remained largely dormant, playing a role so far in just a small number of inter-state applications and cases arising out

¹ 87 UNTS 103; ETS 5. See generally Caflisch, Callewaert, Liddell, Mahoney, Villiger, eds, *Liber Amicorum—Luzius Wildhaber: Human Rights—Strasbourg Views*, 2007; Christoffersen and Madsen, eds, *The European Court of Human Rights: Between Law and Politics*, 2007; Costa, *La Cour européenne des droits de l'homme*, 2013; Greer, *The European Convention on Human Rights*, 2006 (hereafter *European Convention*); Leach, *Taking a Case to the European Court of Human Rights*, 3rd edn, 2011; Macdonald, Matscher, and Petzold, eds, *The European System for the Protection of Human Rights*, 1993 (hereafter *European System*); Mahoney, Matscher, Petzold, and Wildhaber, eds, *Protecting Human Rights: the European Perspective: Studies in honour of Rolv Ryssdal*, 2000 (hereafter *Ryssdal Mélanges*); Matscher and Petzold, eds, *Protecting Human Rights: the European Dimension: Studies in Honour of Gérard J Wiarda*, 1988 (hereafter *Wiarda Mélanges*); Reid, *A Practitioner's Guide to the European Convention on Human Rights*, 4th edn, 2011; Sharpe, ed, *The Conscience of Europe*, 2011 and addenda; Van Dijk and Van Hoof, *Theory and Practice of the European Convention on Human Rights*, 4th edn, 2006; White and Ovey, *Jacobs and White: The European Convention on Human Rights*, 5th edn, 2010. On the drafting of the Convention, see Bates, *The Evolution of the European Convention on Human Rights*, 2010; Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention*, 2001; and Wicks, PL 438 (2000).

² Under Article 3, Statute of the Council of Europe 1949, 87 UNTS 103; ETS 1, a member state 'must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms'. The importance of the Convention's role in giving meaning to these obligations has been highlighted in recent years by the fact that becoming a party to the Convention is now a political obligation of membership of the Council: Parliamentary Assembly Resolution 1031 (1994), para 9.

of the state of emergency in Turkey.³ The Convention has instead been used primarily to raise questions of particular violations of human rights in states that basically conform to its requirements and are representative of the ‘common heritage of political traditions, ideals, freedoms and the rule of law’ to which the Convention Preamble refers, or, in the case of post-communist member states, that, upon becoming Convention parties, committed themselves to move in this direction. Increasingly, it has evolved in the direction of being a European bill of rights, with the European Court of Human Rights having a role with some similarities to that of a constitutional court in a national legal system.⁴

The Convention entered into force in 1953 and has been ratified by all forty-seven member states of the Council of Europe,⁵ whose total population of over 800 million people is protected by it. The number of contracting parties increased greatly following the fall of the Berlin Wall in 1989 and the disintegration of the Socialist Federal Republic of Yugoslavia in the early 1990s. As a consequence largely of the policy of admitting Russia and other post-communist states to the Council of Europe in the period that followed these changes, the number of states parties rose from twenty-two in 1989 to forty-seven in 2008. As will be seen, this development, while in other ways welcome, has introduced new problems of interpretation and application of the Convention for the Court and greatly increased its workload.⁶

The substantive guarantee in the Convention has been supplemented by the addition of further rights by the First,⁷ Fourth,⁸ Sixth,⁹ Seventh,¹⁰ Twelfth,¹¹ and Thirteenth¹² Protocols to the Convention that are binding upon those states that have ratified them. There have also been other Protocols that have amended the enforcement machinery. The most recent Protocols of this second kind are the Eleventh¹³ and Fourteenth¹⁴ Protocols, which introduced fundamental reforms to the enforcement machinery of the Convention. The Fifteenth¹⁵ and Sixteenth¹⁶ Protocols were adopted in 2013; they (mostly) amend the

³ On the Convention and gross violations, see Kamminga, 12 NQHR 153 (1994); Reidy, Hampson, and Boyle, 15 NQHR 161 (1997) (Turkey); and Kardaro, 2003 EHRLR 601. On state applications, see Prebensen, 20 HRLJ 446 (1999).

⁴ See section 9.III.

⁵ These are Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Monaco, Montenegro, the Netherlands, Norway, Poland, Portugal, Romania, Russia, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland and the former Yugoslav Republic of Macedonia (FYRM), Turkey, Ukraine, and the UK. The European (or part European) states of Belarus, Kazakhstan, and the Vatican City are not Council of Europe members. On the application of the Convention to Kosovo, see Knoll, 68 ZaoRV 431 (2008).

⁶ See Greer, *European Convention*, p 105 and Ch 3; Gross, 7 EJIL 89 (1996); Harmsen, 5 IJHR 18 (2001); and Schokkenbroek and Zeimele, 75 NJB 1914 (2000).

⁷ 213 UNTS 262; ETS 9. Adopted 1952. In force 1954. Forty-five parties: all Convention parties except Monaco and Switzerland.

⁸ 1469 UNTS 263; ETS 46. Adopted 1963. In force 1968. Forty-three parties: all Convention parties except Greece, Switzerland, Turkey, and the UK.

⁹ ETS 114. Adopted 1983. In force 1985. Forty-six parties: all Convention parties except Russia.

¹⁰ ETS 117. Adopted 1984. In force 1988. Forty-three parties: all Convention parties except Germany, Netherlands, Turkey, and the UK.

¹¹ ETS 177; 8 IHRR 300 (2000). Adopted 2000. In force 2005. Eighteen parties. The UK is not a party.

¹² ETS 187; 9 IHRR 884 (2002). Adopted 2002. In force 2003. Forty-three parties: all Convention parties except Armenia, Azerbaijan, Poland, and Russia.

¹³ ETS 155; 1–3 IHRR 206 (1994). Adopted 1994. In force 1998. Ratified by all Convention parties. See Caffisch, 6 HRLR 403 (2006).

¹⁴ ETS 194; 9 IHRR 884 (2002). Adopted 2004. In force 2010. Ratified by all Convention parties.

¹⁵ ETS 213. Not in force. Ratification by all Convention parties required. Six ratifications so far.

¹⁶ ETS 214. Not in force. Ten ratifications required. None so far.

enforcement machinery and provide for national courts to seek advisory opinions from the European Court respectively.

The Convention is a part of a network of international human rights treaties of universal or regional application. It is the regional counterpart to the International Covenant on Civil and Political Rights 1966 (ICCPR), to which all Convention parties are parties.¹⁷ At the regional level, it is comparable with the American Convention on Human Rights 1969¹⁸ and the African Charter on Human and Peoples' Rights 1981.¹⁹ As with these treaties, the Convention protects rights first spelt out in the Universal Declaration of Human Rights 1948.²⁰

2. THE SUBSTANTIVE GUARANTEE

The human rights in the Universal Declaration are commonly divided into civil and political rights, on the one hand, and economic, social, and cultural rights, on the other. Civil and political rights are those that derive from the natural rights philosophy of the late eighteenth century in Europe. Economic, social, and cultural rights²¹ appeared with the emergence of socialist governments in the early twentieth century. The European Convention protects predominantly civil and political rights.²² This was a matter of priorities and tactics. While it was not disputed that economic, social, and cultural rights required protection too, the immediate need was for a short, non-controversial text which governments could accept at once, while the tide for human rights was strong. Given the values dominant within Western Europe, this meant limiting the Convention for the most part to the civil and political rights that were 'essential for a democratic way of life';²³ economic, social, and cultural rights were too problematic and were left for separate and later treatment.²⁴ The Convention, including²⁵ Protocols, protects most civil and political rights, but not all. It does not directly guarantee the rights of members of minority groups,²⁵ freedom from racist or other propaganda or the right to recognition as a person

¹⁷ 999 UNTS 171. The ICCPR provides for an optional right of individual communication. All Convention parties have accepted it except Monaco, Switzerland, and the UK.

¹⁸ 1144 UNTS 123. In force 1978. Twenty-three parties.

¹⁹ 1520 UNTS 143; 21 ILM 57 (1981). In force 1986. Fifty-three parties. The African Charter is not limited to civil and political rights.

²⁰ GA Res 217A (III), GAOR, 3rd Sess, Part 1, resns, p 71.

²¹ Examples are the rights to work, to health, and to take part in cultural life respectively.

²² The Convention strays into the field of economic, social, and cultural rights with its guarantees of the rights to property and education (Articles 1 and 2, First Protocol) and of equality between the spouses (Article 5, Seventh Protocol). There are also certain overlaps between the two categories in the case of freedom from forced labour (Article 4, Convention), the right to respect for family life (Article 8, Convention), and freedom of association (Article 11, Convention). The non-discrimination guarantee in the Twelfth Protocol applies generally. In *Airey v Ireland* A 32 (1979); 2 EHRR 305 para 26, the Court stated that there is no 'watertight division' separating Convention rights from economic and social rights. See Pellonpää, *European System*, Ch 37 and Warbrick, in Baderin and McCorquodale, eds, *Economic, Social and Cultural Rights in Action*, 2007, Ch 10.

²³ M Teitgen, CE Consult. Ass, Debates, 1st Session, p 408, 19 August 1949.

²⁴ Economic and social rights are now protected by the 1961 European Social Charter, 529 UNTS 89; ETS 35 and the 1996 Revised European Social Charter, 2151 UNTS 279; ETS 163; 3 IHRR 726 (1996). Forty-three Council members are parties to the Charter or the Revised Charter or both. The missing members are Liechtenstein, Monaco, San Marino, and Switzerland.

²⁵ These are the subject of the Council of Europe Framework Convention for the Protection of National Minorities 1995, 2151 UNTS 246; ETS 157; 2 IHRR 217 (1995). In force 1998. Thirty-nine parties, including the UK. See also the European Charter for Regional or Minority Languages 1992, 2044 UNTS 246; ETS 148. In force 1998. Twenty-five parties, including the UK. Neither of these Conventions has a right of petition. Some protection is indirectly afforded by the Convention to members of minority groups, through eg the non-discrimination guarantees in Article 14, Convention and the Twelfth Protocol to the Convention.

before the law. These rights are protected by the ICCPR, which also contains fuller guarantees of the rights to be treated with ‘humanity’ and ‘dignity’ while in detention,²⁶ to a fair trial,²⁷ and to participate in public life.²⁸ The ICCPR also prohibits derogation from its obligations in time of war or public emergency in the case of more rights than does the European Convention.²⁹ In addition, some Convention guarantees are found only in Optional Protocols which not all parties have accepted.³⁰ However, the generally worded guarantees in the Convention text have been interpreted purposively so as to remedy some, at least, of these defects.³¹

3. THE STRASBOURG ENFORCEMENT MACHINERY

Compared to most other international human rights treaties, the Convention has very strong enforcement mechanisms. It provides for both state and individual applications.³² Under Article 33, any party may bring an application alleging a breach of the Convention by another party that has ratified it. In addition, and considerably more important in practice, under Article 34 all parties accept the right of ‘any person, non-governmental organisation or group of individuals’, regardless of nationality,³³ claiming to be a victim of a breach of the Convention to bring an application against it.³⁴ Under Protocol 11, both state and individual applications go to the European Court of Human Rights,³⁵ which is a permanent court composed of full-time judges. The Court decides whether the application should be admitted for consideration on the merits.³⁶ If it is admitted, the Court decides in a judgment that is binding in international law whether there has been a breach of the Convention.³⁷ The execution by parties of Court judgments against them

²⁶ Article 3, Convention covers the more extreme cases.

²⁷ Some Article 6 ‘fair trial’ omissions are made good by the Seventh Protocol for the parties to it. Even with the Seventh Protocol, the Convention contains a less extensive guarantee for juveniles and of the right to appeal in criminal cases.

²⁸ Article 3, First Protocol is narrower than Article 25, ICCPR.

²⁹ See Article 4, ICCPR. The Article 4, ICCPR prohibitions may, however, apply under the Convention by virtue of Article 15(1), Convention.

³⁰ The most important of these is the free-standing non-discrimination guarantee in the Twelfth Protocol.

³¹ Eg, freedom from state discrimination (in Article 14(3)(g) ICCPR) has been read into Article 6 Convention.

³² Article 52 also provides for occasional reports by states on their compliance with the Convention, as and when requested. This procedure has seldom been used. Most recently, in 2005 it provided the vehicle for requesting from parties information about rendition in torture cases. Before that, it had been used just five times requesting reports by all parties on compliance with the Convention generally and on two other occasions, requesting a report from Russia on Chechnya and from Moldova on the suspension of a political party. See <http://www.coe.int>.

³³ An application may be brought by both nationals and non-nationals of the respondent state.

³⁴ This right was made compulsory by the Eleventh Protocol as of 1998; before then, it was only applicable as against those parties that made a declaration accepting it.

³⁵ The Court has its seat at Strasbourg, France, and operates within the framework of the Council of Europe, which has its headquarters there. The Court is totally distinct from the European Court of Justice, which has its seat in Luxembourg and is the Court of the European Union.

³⁶ There is also provision for the friendly settlement of cases.

³⁷ Prior to the Eleventh Protocol, in force 1998, there was a second Strasbourg institution, the European Commission of Human Rights, composed of independent experts, which decided on the admissibility of state and individual applications and assisted with friendly settlements. It also adopted non-legally binding reports on the merits of admitted cases, which could, if the respondent state accepted the Court’s jurisdiction, be referred to the Court by the Commission or a state with a recognized interest for a legally binding judgment, or—if the respondent state was a party to the Ninth Protocol—by the individual applicant. If no such reference was made, the case was decided by the Committee of Ministers of the Council of Europe. Both the Commission and the Court were part-time bodies before 1998.

is monitored by the Committee of Ministers of the Council of Europe, which is composed of government representatives of all of the member states.

4. THE INTERPRETATION OF THE CONVENTION

I. THE GENERAL APPROACH

As a treaty, the Convention must be interpreted according to the international law rules on the interpretation of treaties.³⁸ These are to be found in the Vienna Convention on the Law of Treaties 1969.³⁹ The basic rule is that a treaty 'shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.⁴⁰ A good example of the use of this rule is the case of *Luedicke, Belkacem and Koç v Germany*.⁴¹ There the Court adopted the 'ordinary meaning' of the words '*gratuitement*' and 'free' in the two authentic language texts⁴² of Article 6(3)(e), which it found 'not contradicted by the context of the sub-paragraph' and 'confirmed by the object and purpose of Article 6'. The terms in the Convention have their 'ordinary' meaning. Accordingly, words such as 'degrading' (Article 3) have been understood in their dictionary sense.⁴³

II. EMPHASIS UPON THE OBJECT AND PURPOSE OF THE CONVENTION

In accordance with the Vienna Convention, considerable emphasis has been placed on the interpretation of the Convention through a teleological approach, ie one that seeks to realize its 'object and purpose'. This has been identified in general terms as 'the protection of individual human rights'⁴⁴ and the maintenance and promotion of 'the ideals and values of a democratic society'.⁴⁵ As to the latter, it has been recognized that 'democracy' supposes 'pluralism,

³⁸ See eg, *Golder v UK* A 18 (1978); 1 EHRR 524 para 29 PC, and *Johnston v Ireland* A 112 (1986); 9 EHRR 203 para 51 PC. See Rosakis, in *Valticos Mélanges*, 487. On the interpretation of the Convention generally, see Golsong, *European System*, Ch 8; Greer, *European Convention*, Ch 4; Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, 2007.

⁴⁰ Article 31(1), Vienna Convention. The 'context' of a treaty includes its preamble and any agreement or instrument relating to and made in connection with it: Article 31(2). The subsequent practice of the parties to a treaty and any relevant rules of international law shall be taken into account 'together with the context': Article 31(3). On the use of the *travaux préparatoires*, see section 4.XIII, 'Recourse to the *travaux préparatoires*'.

⁴² Ie, the English and French texts. Where, as was not the case in the *Luedicke* case, the two authentic texts of the Convention differ in their meaning, they must be interpreted in such a way as to 'reconcile them as far as possible': Article 33(4), Vienna Convention. If they cannot be reconciled, the 'object and purpose' becomes decisive: see *Wemhoff v Germany* A 7 (1968); 1 EHRR 55 and *Brogan v UK* A 145-B (1988); 11 EHRR 117 PC.

⁴³ *Tyrer v UK* A 26 (1978); 2 EHRR 1.

⁴⁴ *Soering v UK* A 161 (1979); 11 EHRR 439 para 87 PC. Cf the '*Belgian Linguistics*' case A 6 (1968); 1 EHRR 241 PC.

⁴⁵ *Kjeldsen, Busk Madsen, and Pedersen v Denmark* A 23 (1976); 1 EHRR 711 para 53. Both of the considerations mentioned are confirmed by the Convention Preamble. The Preamble also identifies 'the achievement of greater unity between its Members' as the aim of the Council of Europe. See Gearty, 51 NILQ 381 (2000); Harvey, 29 ELR 407 (2004); Marks, 66 BYIL 209 (1995); and Mowbray, 1999 PL 703. The commitment to democracy was crucial in *United Communist Party of Turkey v Turkey* 1998-I; 26 EHRR 121.

tolerance and broadmindedness.⁴⁶ The primary importance of the ‘object and purpose’ of the Convention was strikingly illustrated in *Golder v UK*.⁴⁷ There the Court read the right of access to a court into the fair trial guarantee in Article 6. It did so, in the absence of clear wording in the text to the contrary, mainly by reference to guidance as to the ‘object and purpose’ of the Convention to be found in its Preamble.⁴⁸ This indicated, *inter alia*, that the drafting states were resolved to ‘take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration’ in furtherance of the rule of law. As the Court stated, one could not suppose compliance with the rule of law without the possibility of taking legal disputes to court. What is remarkable is that the Court has extended the reach of the Convention in many other contexts, too, apparently by reference to its object and purpose. Article 8 is a striking example, with the right to privacy in particular having an almost limitless scope.

The Court also confirmed in the *Golder* case its earlier pronouncement in *Wemhoff v Germany*⁴⁹ that ‘[g]iven that it is a law-making treaty, it is also necessary to seek the interpretation that is most appropriate in order to realize the aim and achieve the object of the treaty, and not that which would restrict to the greatest possible degree the obligations undertaken by the parties’. This approach was forcefully opposed by Judge Fitzmaurice in his separate opinion in the *Golder* case. Judge Fitzmaurice argued, *inter alia*, that the ‘heavy inroads’ made by the Convention into an area previously within a state’s domestic jurisdiction, namely the treatment of its own nationals, demanded ‘a cautious and conservative interpretation’. Such an argument, which emphasizes the character of the Convention as a contract by which sovereign states agree to limitations upon their sovereignty, has now totally given way to an approach that focuses instead upon the Convention’s law-making character and its role as a European human rights guarantee that must be interpreted so as to permit its development with time.

It is in this last connection that statements to the effect that the Convention is ‘an instrument of European public order (ordre public)’⁵⁰ are relevant. They signify that in the interpretation and application of the Convention, the overriding consideration is not that the Convention creates ‘reciprocal engagements’ between contracting states, but that it imposes ‘objective obligations’ upon them for the protection of human rights in Europe,⁵¹ with the Convention evolving in the direction of becoming Europe’s constitutional bill of rights.⁵²

III. DYNAMIC OR EVOLUTIVE INTERPRETATION

It follows from the emphasis placed upon the ‘object and purpose’ of the Convention that it must be given a dynamic or evolutive interpretation.⁵³ Thus, in *Tyrer v UK*,⁵⁴ the Court

⁴⁶ *Handyside v UK* A 24 (1976); 1 EHRR 737 para 49 PC. Cf *Dudgeon v UK* A 45 (1981); 4 EHRR 149 para 53 PC.

⁴⁷ A 18 (1975); 1 EHRR 524 PC.

⁴⁸ The Court also referred to the emphasis on the rule of law in the Statute of the Council of Europe (Preamble, Article 3).

⁴⁹ A 7 (1968) p 23; 1 EHRR 55 at 75. Cf, *Delcourt v Belgium* A 11 (1970); 1 EHRR 355 para 25, concerning Article 6 in particular.

⁵⁰ *Loizidou v Turkey* (Preliminary Objections) A 310 (1995); 20 EHRR 99 para 93. Cf, *Austria v Italy* No 788/60, 4 YB 112 at 140 (1961) and *Chrysostomos, Papachrysostomou and Loizidou v Turkey* Nos 15299/89, 15300/89 and 15318/89, 68 DR 216 at 242 (1991).

⁵¹ *Ireland v UK* A 25 (1978); 2 EHRR 25 para 239 PC. The ‘objective’ character of the obligations manifested itself in *Austria v Italy* No 788/60, 4 YB 112 (1961), in that Austria was permitted to question Italian conduct that occurred before Austria became a party to the Convention.

⁵² See further below, section.

⁵³ The term ‘evolutive’, rather than ‘dynamic’, is sometimes used by the Court: see eg, *Johnston v Ireland* A 112 (1986); 9 EHRR 203 para 53 PC. On the interpretative and law-making role of the Court, and formerly the Commission, generally, see Gearty, 52 CLJ 89 (1993); Mahoney, 11 HRLJ 57 (1990); and Stavros, *The Guarantees for Accused Persons under Article 6 of the European Convention on Human Rights*, 1993, pp 340–50 (hereafter Stavros).

⁵⁴ A 26 (1978); 2 EHRR 1 para 31.

stated that the Convention is 'a living instrument which... must be interpreted in the light of present-day conditions'. Accordingly, the Court could not 'but be influenced by the developments and commonly accepted standards in the penal policy of the member states of the Council of Europe' when considering whether judicial corporal punishment was consistent with Article 3. What was determinative, the Court stated, were the standards currently accepted in European society, not those prevalent when the Convention was adopted. In terms of the intentions of the drafting states, the emphasis is therefore upon their general rather than their particular intentions in 1950.⁵⁵ Other decisions that follow the *Tyler* approach have reflected changes in the policy of the law in European states resulting from changed social attitudes towards, for example, children born out of wedlock⁵⁶ and homosexuals,⁵⁷ and from other policy developments.⁵⁸ However, the Convention may not be interpreted in response to 'present-day conditions' so as to introduce into it a right that it was not intended to include when the Convention was drafted. For this reason, Article 12, which guarantees the right to marry, could not be interpreted as including a right to divorce, even though such a right is now generally recognized in Europe.⁵⁹ In this way, a line is sought to be drawn between judicial interpretation, which is permissible, and judicial legislation, which is not. Mahoney⁶⁰ has suggested that, with this distinction in mind, the Court tends to emphasize incremental rather than sudden change. The closed shop cases⁶¹ are good examples of this gradualist approach. However, as in national law, the line between judicial interpretation and legislation can be a difficult one to draw, particularly in the case of generally worded provisions. Decisions can be seen either as instances of judicial creativity that move the Convention into distinct areas beyond its intended domain, or as the elaboration of rights that are already protected. For example, the Court's finding of positive obligations for states throughout the Convention⁶² and, more particularly, its application of Article 3 to cases of removal of individuals from a state's territory⁶³ and of Article 8 to environmental matters,⁶⁴ can either be seen as the discovery of obligations that were always implicit in the guarantees concerned or as the addition of new obligations for states.

When deciding a case by reference to the dynamic character of the Convention, the Court must make a judgment as to the point at which a change in the policy of the law has achieved sufficiently wide acceptance in European states to affect the meaning of the Convention. In the course of doing so, the Court has generally been cautious, preferring to follow state practice rather than to precipitate a new approach. But the Court does not necessarily wait until only the respondent state remains out of line before it recognizes a

⁵⁵ Cf Mahoney, 11 HRLJ 57 at 70 (1990). See also Nicol, 2000 PL 152.

⁵⁶ *Marckx v Belgium* A 31 (1979); 2 EHRR 330 PC.

⁵⁷ *Dudgeon v UK* A 45 (1981); 4 EHRR 149 PC. Cf, *L and V v Austria* 2003-I; 36 EHRR 1022.

⁵⁸ See eg, *Soering v UK* A 161 (1989); 11 EHRR 439 PC (death penalty); *Sigurjonsson v Iceland* A 264 (1993); 16 EHRR 462 (closed shops); *Stafford v UK* 2002-IV; 35 EHRR 1121 GC (life sentences). The Convention enforcement machinery provisions are also to be interpreted dynamically: *Loizidou v Turkey (Preliminary Objections)* A 310 (1995); 20 EHRR 99 para 71.

⁵⁹ *Johnston v Ireland* A 112 (1986); 9 EHRR 203 PC. *Quaere* whether the sensitive nature of the divorce question in Ireland at the time was another factor in the *Johnston* case.

⁶⁰ 11 HRLJ 57 at 60 (1990). Mahoney draws an analogy with the judicial activism and judicial restraint distinction found in the jurisprudence of the US Supreme Court.

⁶¹ See Chapter 15, section 4.III. Cf, the gradual extension of Article 6(3) to pre-trial criminal proceedings. See also the Court's approach to different retirement ages for men and women in *Stec v UK* 2006-VI; 43 EHRR 1017 GC.

⁶² See generally Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*, 2004.

⁶³ See *Soering v UK* A 161 (1989); 11 EHRR 439 PC.

⁶⁴ See *Lopez Ostra v Spain* A 303-C (1994); 20 EHRR 227.

new approach.⁶⁵ For example, in *Marckx v Belgium*⁶⁶ the Court relied upon a new approach to the status of children born out of wedlock that had been adopted in the law of the ‘great majority’, but not all, of Council of Europe states by 1979. The Court adopted a somewhat different and less demanding approach than this in the case of *Goodwin (Christine) v UK*.⁶⁷ In a series of transsexual cases from the mid-1980s onwards, the Court had indicated that it was not satisfied that a common new European standard requiring the full recognition in law of the new sexual identity of post-operative transsexuals had emerged; standards were still in transition with ‘little common ground between the contracting states’.⁶⁸ However, in the *Goodwin* case, while recognizing that there remained no ‘common European approach’ on the matter, the Court was persuaded to overturn its earlier rulings by ‘clear and uncontested evidence of a continuing international trend’, both in Europe and elsewhere, in the direction of ‘legal recognition of the new sexual identity of post-operative transsexuals’. It thus referred to national standards around the world, as well as in Europe, and did not require that a ‘great majority’ of European states follow the new approach.⁶⁹

IV. RELIANCE UPON EUROPEAN NATIONAL LAW AND INTERNATIONAL STANDARDS

The question whether the Court should be influenced by the law in European states in its interpretation of the Convention is relevant not only in contexts in which the policy of the law has changed. The question may arise when the Court has to decide how rigorously to interpret the requirements of the Convention in other circumstances also. Here, too, any European consensus that exists has had a considerable impact upon the Court’s jurisprudence.⁷⁰ For example, the Court’s ringing pronouncements on the importance of freedom of speech and of the press in a ‘democratic society’⁷¹ stem from a confident conviction as to long-standing values that generally underpin European society. Equally clearly, the easy incorporation into Article 1, First Protocol of a compensation requirement for the taking of the property of nationals, followed from the ‘legal systems of the contracting states’.⁷² And in *S and Marper v UK*⁷³ the Court was strongly influenced by the fact that England, Wales and Northern Ireland appeared to be ‘the only jurisdictions in the Council of Europe to allow the indefinite retention of fingerprints and DNA

⁶⁵ A state that is entirely on its own is particularly at risk of an adverse judgment if its practice offends common European standards relevant to human rights: see eg, the *Tyrer* case, mentioned earlier (corporal punishment) and *Unal Tekeli v Turkey* 2004-X; 42 EHRR 1185 (married women’s surnames). For an exception, see *EB v France* hudoc (2008); 47 EHRR 509 GC.

⁶⁶ A 31 (1979); 2 EHRR 330 para 41 PC. Cf *Dudgeon v UK* A 45 (1981); 4 EHRR 149 PC and *Hirst v UK (No 2)* 2005-IX; 42 EHRR 849 GC.

⁶⁷ 2002-VI; 35 EHRR 447 para 85 GC.

⁶⁸ *Cossey v UK* A 184 (1990); 13 EHRR 622 para 40.

⁶⁹ A ‘majority’, but not the ‘great majority’, of member states provided for full legal recognition: *Sheffield and Horsham v UK* 1998-V; 27 EHRR 163 paras 35, 57 and *Goodwin (Christine) v UK* 2002-VI; 35 EHRR 447 GC.

⁷⁰ See Dzehistarou, Public Law (2011) 534; Dzehistarou, 2 German LJ 1730 (2011); Helfer, 26 Cornell ILJ 133 (1993); Heringa, 3 Maastricht JECL 108 (1996).

⁷¹ See *Lingens v Austria* A 103 (1981); 8 EHRR 407 para 41 PC.

⁷² *James v UK* A 98 (1986); 8 EHRR 123 para 54 PC. Other examples include *A v UK* 2002-X; 36 EHRR 917 (parliamentary immunity) and *Bryan v UK* A 335-A (1995); 21 EHRR 342 (judicial review of administrative action).

⁷³ 2008-; 48 EHRR 1169 GC. See also *Demir and Baykara v Turkey* 2008-; 48 EHRR 1272 para 151 GC (‘vast majority’ of European states recognized civil servants’ right to collective bargaining).

material' of any criminal suspect: there was a 'strong consensus' to the contrary, with the 'great majority' of jurisdictions with DNA databases, including Scotland, requiring that they be destroyed. Former Judge Van der Meersch⁷⁴ has pointed to the paradox of taking standards in national law into account when interpreting an international treaty whose purpose is to control national law. The convincing justification that he provides is that there is a necessarily close relationship between the Convention standards and the European 'common law' by which they are inspired. Another reason may be that an interpretation of the Convention that deviated substantially from general European practice would undermine state confidence in the Convention system and thereby threaten its continued success or acceptance by states.⁷⁵ Generally, the Court's reliance upon any European consensus is acceptable in that it is likely to be in accordance with recognized human rights standards, as in the case of the emphasis placed upon freedom of speech. Even so, the Court needs to be aware that government and individual interests do not always coincide and that a practice may not be acceptable in human rights terms simply because it is generally followed.

The Court increasingly refers to other sources of international human rights standards when interpreting the Convention in its judgments. Thus the Court refers to other human rights treaties and other relevant instruments—both of the Council of Europe itself⁷⁶ and of other international institutions⁷⁷—and decisions by bodies applying them.⁷⁸ A treaty may be referred to whether the respondent state is a party to it or not.⁷⁹ The Court also interprets the Convention, as a treaty, against the background of public international law generally.⁸⁰ This is all to be welcomed in ensuring a uniformity of approach where this is appropriate.

In the absence of a European or international consensus, the Court has tended to reflect national law by applying a lowest common denominator approach or to accommodate variations in state practice through the margin of appreciation doctrine⁸¹ when deciding upon the meaning of a Convention guarantee. The result is that a state's law or conduct may well escape condemnation, if it reflects a practice followed in a number of European states or where practice is widely varied. For example, the fact that members of a linguistic minority may not be able to vote in an election for candidates whose language is theirs⁸² or that civil servants may sit as expert members of a tribunal⁸³ does not present problems for the rights to free elections (Article 3, First Protocol) and an independent

⁷⁴ 1 HRLJ 13 at 15 (1980). ⁷⁵ See Stavros, p 346.

⁷⁶ See eg, *Sorensen and Rasmussen v Denmark* 2006-I; 46 EHRR 572 GC (European Social Charter); *Dickson v UK* 2007-V; 46 EHRR 927 GC (European Prison Rules); *Oneriyildiz v Turkey* 2004-XII; 41EHRR 325 GC (Committee of Ministers and Parliamentary Assembly recommendations).

⁷⁷ See eg, *Al Adsani v UK* 2001-XI; 34 EHRR 273 GC (UN Torture Convention); *Jersild v Denmark* A 298 (1994); 19 EHRR 1 (UN Racial Discrimination Convention); *Siliadin v France* 2005-VII; 43 EHRR 287 GC (ILO Conventions); and *Vilho Eskelinen and Others v Finland* 2007-XX; 45 EHRR 985 GC (EU Charter on Fundamental Rights).

⁷⁸ See Forowicz, *The Reception of International Law in the European Court of Human Rights*, 2010.

⁷⁹ See eg, *Marckx v Belgium* A 31 (1979); 2 EHRR 330 (Children Born Out of Wedlock Convention) and *Demir and Baykara v Turkey* 2008-; 48 EHRR 1272 GC (European Social Charter).

⁸⁰ See eg, *Al-Skeini and Others v UK* 2011- GC (jurisdiction), and *Waite and Kennedy v Germany* 1999-I; 30 EHRR 261 (sovereign immunity). For references to non-human rights treaties, see *Glass v UK* 2004-II; 39 EHRR 341 and *Taskin v Turkey* 2004-X; 42 EHRR 250. 'International law' is directly incorporated into Article 7 of the Convention: see *Kononov v Latvia* hudoc (2008).

⁸¹ As to this doctrine, see section 4.VII.

⁸² *Mathieu-Mohin and Clerfayt v Belgium* A 113 (1987); 10 EHRR 1 para 57 PC ('a good many states').

⁸³ *Ettl v Austria* A 117 (1987); 10 EHRR 225 para 40 ('domestic legislation...of member states affords many examples').

and impartial tribunal (Article 6) respectively, given that such situations are common in European states. Widespread differences in practice in European states can lead to a similar tolerance, as in the case of laws governing abortion,⁸⁴ artificial insemination,⁸⁵ the right of prisoners to vote,⁸⁶ the regulation of political advertising,⁸⁷ and relations between church and state.⁸⁸ Other examples can be found in connection with the right to a fair trial, where there is much diversity of practice resulting, most clearly, from the differences between civil and common law systems of criminal justice. Thus, when interpreting the Article 6(1) requirement that judgments be ‘pronounced in public’, the Court has taken account of the fact that courts of cassation in civil law jurisdictions commonly do not deliver their judgments in public.⁸⁹ Similarly, the Court has been influenced in its approach to the ‘trial within a reasonable time’ guarantee in Article 6(1) by the characteristics of civil law criminal justice systems.⁹⁰

It is encouraging, however, that, faced with a diversity of practice, the Court has sometimes acted positively in the interests of protecting human rights. This is the case, for example, in the Court’s application of Article 6(1) to administrative justice, its strict reading of the requirement of an impartial tribunal that is found in the same provision, and its expansive interpretation of the residual ‘fair hearing’ guarantee.⁹¹ More controversial, perhaps, is the balance that the Court has struck between the rights of parents and their children. The policy of some states of permitting their child care authorities to intervene to protect children at the expense of parental rights more than most European states do so has led to findings of breaches of the Convention in several cases.⁹²

Finally, it is interesting to consider the evidence that the Court has available to it when it acts by reference to the standards in European national law or international law. After many years in which the Court lacked the time or resources to undertake research in relevant areas of law, it now has a research division which is asked to carry out studies on questions of comparative or international law that arise in cases, mostly cases before the Grand Chamber. This is an important, new development in the practice of the Court that has taken place over the last decade or so.⁹³ The result is that today Grand Chambers and occasionally Chambers will have at their disposal in-house documents that provide extremely useful and detailed comparative and international law information.⁹⁴ Beyond such resources, the Court relies upon the collective knowledge of its members and its registry and upon the *amicus curiae* briefs of non-governmental organizations and others, which have been of great assistance on occasion.⁹⁵ The contribution of judges is obviously

⁸⁴ See *Vo v France* 2004-VIII; 40 EHRR 259 GC.

⁸⁵ See *Evans v UK* (2007); 46 EHRR 728.

⁸⁶ See *Scoppola v Italy (No 3)* hudoc (2011). In *Hirst v UK (No 2)* 2005-IX; 42 EHRR 849 GC the margin of appreciation was exceeded.

⁸⁷ *Animal Defenders International v UK* hudoc 2013- GC (‘somewhat wider’ margin).

⁸⁸ *Sindicatul ‘Păstorul Cel Bun’ v Romania* hudoc 2013- GC.

⁸⁹ See Chapter 9 section 3-III.

⁹⁰ See Chapter 9 section 3-IV. Note also the absence of any need for jury trial in criminal cases, which is not found generally across Europe. For other examples of differing practice concerning the law of evidence and trial *in absentia*, resulting in a ‘low common denominator’, see Stavros, pp 238 and 265–266.

⁹¹ See Chapter 9 section 3-II.

⁹² See eg. *Andersson (M & R) v Sweden* A 226-A (1992); 14 EHRR 615.

⁹³ For earlier doubts as to whether the Court made a thorough investigation of the law of European states when relying on common standards, see eg. the dissenting opinion of Judge Matscher in *Öztürk v Germany* A 73 (1984); 6 EHRR 409 PC and, among authors, Bernhardt, *European System*, p 35; Helfer, 26 Cornell ILJ 133 at 138–40 (1989); and Mahoney, 11 HRLJ 57 at 79 (1990).

⁹⁴ At present, research reports are not communicated to the parties to a case.

⁹⁵ See eg. the reliance on a study by the NGO Liberty in *Goodwin (Christine) v UK* 2002-VI; 35 EHRR 447 GC.

valuable but is curtailed by the Court's practice of hearing cases in chambers and the fact that judges are unlikely to claim expertise in all areas of their national law.

V. THE PRINCIPLE OF PROPORTIONALITY

The principle of proportionality⁹⁶ is a recurring theme in the interpretation of the Convention. Reliance on the principle is most evident in those areas in which the Convention expressly allows restrictions upon a right. Thus, under the second paragraphs of Articles 8–11, a state may restrict the protected right to the extent that this is 'necessary in a democratic society' for certain listed purposes. This formula has been interpreted as meaning that the restriction must be 'proportionate to the legitimate aim pursued'.⁹⁷ Similarly, proportionality has been invoked when setting the limits to an implied restriction that has been read into a Convention guarantee⁹⁸ and in some cases in determining whether a positive obligation has been satisfied.⁹⁹ The principle has also been introduced into the non-discrimination rule in Article 14, so that for its prohibition of discrimination to be infringed there must be 'no reasonable relationship of proportionality between the means employed and the aim sought to be pursued'.¹⁰⁰ Finally, the principle is relied upon when interpreting the requirement in Article 15 that measures taken in a public emergency in derogation of Convention rights must be 'strictly required by the exigencies of the situation'.¹⁰¹ In general, the principle of proportionality is not applied under Article 3, which contains an absolute guarantee.¹⁰² A limitation upon a right, or steps taken positively to protect or fulfil it, will not be proportionate, even allowing for a margin of appreciation, where there is no evidence that the state institutions have balanced the competing individual and public interests when deciding on the limitation or steps, or where the requirements to be met to avoid or benefit from its application in a particular case are so high as not to permit a meaningful balancing process.¹⁰³

⁹⁶ See Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights*, 2009; McBride, in Ellis, ed., *The Principle of Proportionality in the Laws of Europe*, 1999; and Van Drooghenbroeck, *La proportionnalité dans le droit de la Convention européenne des droits de l'homme*, 2001.

⁹⁷ *Handyside v UK* A 24 (1976) para 49; 1 EHRR 737 PC. See also the 'absolutely necessary' test in Article 2(2), where the test is one of strict proportionality'. The principle has also been applied to differently formulated restrictions in other Articles, eg, Article 5 (*Winterwerp v Netherlands* A 33 (1979); 2 EHRR 387 para 39); Article 12 (*F v Switzerland* A 128 (1987); 10 EHRR 411 PC); and Article 1, First Protocol (*James v UK* A 98 (1986); 8 EHRR 123 para 50 PC).

⁹⁸ *Mathieu-Mohin and Clerfayt v Belgium* A 113 (1987); 10 EHRR 1 para 52 PC (Article 1, First Protocol) and *Fayed v UK* A 294-B (1994); 18 EHRR 393 para 71 (Article 6(1)). In the former case the Court also stated that a restriction must not impair the 'essence' of the right. Cf, *Ashingdane v UK* A 93 (1985); 7 EHRR 528 para 57 (Article 6(1)). The Court not uncommonly uses this last idea when vetting a restriction under any of the headings discussed above, whether as an element of 'proportionality' or as a separate requirement.

⁹⁹ See eg, the Article 8 cases of *Rees v UK* A 106 (1986); 9 EHRR 56 para 37 PC and *Gaskin v UK* A 160 (1989); 12 EHRR 36 para 49 PC.

¹⁰⁰ *Belgian Linguistics* case A 6 (1968) p 34; 1 EHRR 241 at 284 PC. Cf, the recourse to proportionality when interpreting the term 'forced labour' in Article 4: *Van der Musselle v Belgium* A 70 (1983); 6 EHRR 163 para 37 PC.

¹⁰¹ See *Lawless v Ireland* (Merits) A 3 (1961); 1 EHRR 15 and *Ireland v UK* A 25 (1978); 2 EHRR 25 PC. Although the term proportionality is not mentioned in these judgments, the principle is applied in fact.

¹⁰² See *Saadi v Italy* hudoc (2008).

¹⁰³ *Hirst v UK (No 2)* 2005-IX; 42 EHRR 849 GC (absolute ban on prisoners' right to vote) and *Dickson v UK* 2007-V; 46 EHRR 927 GC (strict limits on prisoners' artificial insemination). See, however, *Odièvre v France* 2003-III; 38 EHRR 871 GC (no right to know one's biological parent) where the Court majority gave little heed to such considerations.

VI. A FAIR BALANCE

In *Soering v UK*,¹⁰⁴ the Court stated that ‘inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights’. Mowbray states that the fair balance principle is used by the Court ‘as a basis for assessing the proportionality of respondents’ interferences with the Convention rights of applicants and for determining when states are subject to implied positive obligations under the Convention’.¹⁰⁵ As to proportionality, in *Hutten-Czapska v Poland*,¹⁰⁶ for example, the Court stated:

there must be a reasonable relation of proportionality between the means employed and the aim sought to be realised [by any interference with the right to property in Article 1, Protocol 1] ... That requirement is expressed by the notion of a ‘fair balance’ that must be struck between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights.

As to positive obligations, in *Verein Gegen Tierfabriken Schweiz v Switzerland (No 2)*,¹⁰⁷ for example, when deciding whether the respondent state had a positive obligation under Article 10 of the Convention to act to allow a controversial television advertisement to be broadcast after the Strasbourg Court had held that its prohibition was a violation of freedom of expression, the Court similarly stated that ‘regard must be had to the “fair balance” that has to be struck’ between ‘the community interest and individual rights’.

VII. THE MARGIN OF APPRECIATION DOCTRINE

A doctrine that plays a crucial role in the interpretation of the Convention and that has been extensively commented upon is that of the margin of appreciation.¹⁰⁸ In general terms, it means that the state is allowed a certain measure of discretion, subject to European supervision, when it takes legislative, administrative, or judicial action in the area of a Convention right. The doctrine was first explained by the Court in *Handyside v UK*.¹⁰⁹ This was a case concerning a restriction upon a right within the Articles 8–11

¹⁰⁴ A 161 (1989); 11 EHRR 439 para 89 PC. Cf. ‘Belgian Linguistics’ case (No 2) A 6 (1968); 1 EHRR 252 PC; *Spjorring and Lönnroth v Sweden* A 52 (1982); 5 EHRR 35 PC; and *Fayed v UK* A 294-B (1994); 18 EHRR 393. More recently, see eg, *N v UK* hudoc 2008-; 47 EHRR 885 GC.

¹⁰⁵ Mowbray, 10 HRLR 289 at 315 (2010).

¹⁰⁶ 2006-VIII; 45 EHRR 52 para 167 GC. The ‘fair balance’ concept is particularly prominent in right to property cases.

¹⁰⁷ Hudoc (2009); 52 EHRR 394 para 91 GC.

¹⁰⁸ From a large literature, see on the doctrine, Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, 2002; Brauch, 11 Col J European Law 113 (2004); Greer, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights*, Council of Europe Human Rights File 17, 2000; id, *European Convention*, Ch 5; Legg, *The Margin of Appreciation in International Human Rights Law*, 2012; Letsas, 26 OJLS 705 (2006); Macdonald, in *European System*, Ch 6; articles by Mahoney *et al*, 19 HRLJ 1–36 (1999); Ostrovsky, *Hanse LR* 47 (2005); Sottiaux and Van Der Schyff, 31 *Hastings I and C LR* 115 (2008); and Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence*, 1996. The doctrine is included in Protocol 15.

¹⁰⁹ A 24 (1976); 1 EHRR 737 paras 48–9 PC. It had in effect been relied upon by the Court earlier, following the Commission, in *Lawless v Ireland* (Merits) A 3 (1961); 1 EHRR 15 para 28, in the context of public emergencies (Article 15). On the use of the doctrine in Articles 8–11, see further, Ch 8.

group of rights. In the *Handyside* case, the Court had to consider whether a conviction for possessing an obscene article could be justified under Article 10(2) as a limitation upon freedom of expression that was necessary for the 'protection of morals'. The Court stated:

By reason of their direct and continuous contact with the vital forces of their countries, state authorities are in principle in a better position than the international judge to give an opinion on the... 'necessity' of a 'restriction' or 'penalty'... it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of 'necessity' in this context.

Consequently, Article 10(2) leaves to the contracting states a margin of appreciation. This margin is given both to the domestic legislator ('prescribed by law') and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force.

Nevertheless, Article 10(2) does not give the contracting states an unlimited power of appreciation. The Court, which, with the Commission, is responsible for ensuring the observance of those states' engagements, is empowered to give the final ruling on whether a 'restriction' or 'penalty' is reconcilable with freedom of expression. The domestic margin of appreciation thus goes hand in hand with a European supervision. Such supervision concerns both the aim of the measure challenged and its 'necessity'; it covers not only the basic legislation but also the decision applying it, even one given by an independent court...

The Court must decide, on the basis of the different data available to it, whether the reasons given by the national authorities to justify the actual measures of 'interference' they take are relevant and sufficient.

The doctrine has since been applied in the above sense to other Convention articles. As well as Article 10, it has been relied upon when determining whether an interference with other rights in the Articles 8–11 group of rights is justifiable on any of the grounds permitted by paragraph (2) of the Article concerned. The doctrine is also used when assessing whether a state has done enough to comply with any positive obligations that it has under these¹¹⁰ and other Articles¹¹¹ and when determining whether a state's interference with the right to property protected by Article 1, First Protocol is justified in the public interest.¹¹² A margin of appreciation is also allowed in the application of other guarantees where an element of judgment by the national authorities is involved, as in certain parts of Articles 5¹¹³ and 6¹¹⁴ and in Article 14.¹¹⁵ It has been instrumental as well in the application of Article

¹¹⁰ See eg, *Abdulaziz, Cabales and Balkandali v UK* A 94 (1985); 7 EHRR 741 para 67 PC and *Keegan v Ireland* A 290 (1994); 18 EHRR 342 para 49.

¹¹¹ See eg, *Mathieu-Mohin and Clerfayt v Belgium* A 113 (1987); 10 EHRR 1 PC (Article 3, First Protocol); and *Vo v France* 2004-VIII; 40 EHRR 259 GC (Article 2).

¹¹² See eg, *James v UK* A 98 (1986); 8 EHRR 123 PC.

¹¹³ See *Winterwerp v Netherlands* A 33 (1979); 2 EHRR 387 (person of unsound mind); *Weeks v UK* A 114 (1987); 10 EHRR 293 PC (release on parole); *Brogan v UK* A 145-B (1988); 11 EHRR 117 PC (terrorist suspects). No margin of appreciation in Article 5(3). As to a margin of appreciation in connection with the 'absolutely necessary' test in Article 2: see *Finogenov v Russia* 2011-.

¹¹⁴ See eg, *Osman v UK* 1998-VIII; 29 EHRR 245 (1998) (right of access), but no margin of appreciation on trial within a reasonable time.

¹¹⁵ '*Belgian Linguistics*' Case A 6 (1968) p 35; 1 EHRR 24 at 284 PC and *Rasmussen v Denmark* A 87 (1984); 7 EHRR 371 para 40.

15 when deciding whether there is a ‘public emergency’ and, if so, whether the measures taken in response to it are ‘strictly required by the exigencies of the situation’.¹¹⁶ As will be apparent, these Articles largely coincide with those to which the principle of proportionality spelt out in the *Handyside* case applies, the point being that in assessing the proportionality of the state’s acts, a certain degree of deference is given to the judgment of national authorities when they weigh competing public and individual interests in view of their special knowledge and overall responsibility under domestic law. Finally, it should be noted that national courts are allowed considerable discretion, either under an implied margin of appreciation doctrine or under the fourth instance doctrine (see section VIII), in the conduct of trials in respect of such matters as the admissibility or evaluation of evidence. Thus the Court has stated that Article 6(3)(d) generally ‘leaves it to the competent authorities to decide upon the relevance of proposed evidence’¹¹⁷ and that ‘it is for the national courts to assess the evidence before them’.¹¹⁸ An interference with a right that has been ordered or approved by the objective decision of a national court following a full examination of the facts will also benefit from a margin of appreciation in its favour.¹¹⁹

The margin of appreciation doctrine is applied differentially, with the degree of discretion allowed to the state varying according to the context. A state is allowed a considerable discretion in cases of public emergency arising under Article 15,¹²⁰ in some national security cases,¹²¹ in cases involving the move from communist to free market economies,¹²² and in the protection of public morals.¹²³ Similarly, the margin of appreciation ‘available to the legislature in implementing social and economic policies should be a wide one’.¹²⁴ It will be wide, too, when ‘there is no consensus within the member states of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues’.¹²⁵ A wide margin also usually applies ‘if the state is required to strike a balance between competing interests or Convention rights’.¹²⁶ At the other extreme, the margin of appreciation is limited where ‘a particularly important facet of an individual’s identity or existence is at stake’¹²⁷ and is reduced almost to vanishing point in certain areas, as where ‘the justification for a restriction is the protection of the authority of the judiciary’.¹²⁸

The margin of appreciation doctrine reflects the subsidiary role of the Convention in protecting human rights.¹²⁹ The overall scheme of the Convention is that the initial and

¹¹⁶ *Ireland v UK* A 25 (1978); 2 EHRR 25 PC. ¹¹⁷ *Engel v Netherlands* A 22 (1976); 1 EHRR 647 para 91 PC.

¹¹⁸ *Isgro v Italy* A 194-A (1991) para 31. A state is also allowed a margin of appreciation under Article 6 in deciding whether an accused must be legally represented: *Croissant v Germany* A 237-B (1987); 16 EHRR 135 para 27.

¹¹⁹ See eg, *Handyside v UK* A 24 (1976); 1 EHRR 737 PC.

¹²⁰ See Chapter 19. ¹²¹ See eg, *Leander v Sweden* A 116 (1987); 9 EHRR 433 para 67.

¹²² *Broniowski v Poland* 2004-V; 40 EHRR 559 para 182 GC.

¹²³ See eg, *Handyside v UK* A 24 (1976); 1 EHRR 737 PC.

¹²⁴ *Hatton v UK* 2003-VIII; 37 EHRR 611 para 97 GC (airport noise), citing *James v UK* A 98 (1986); 8 EHRR 123 PC (taking of property).

¹²⁵ *Evans v UK* hudoc 2007-I; 46 EHRR 728 para 77 GC. Cf, *Rasmussen v Denmark* A 87 (1984); 7 EHRR 371 (fathers’ rights); *Vo v France* 2004-III; 40 EHRR 259 (abortion); *Lautsi and Others v Italy* 2011- GC (crucifixes in classrooms). Even so, a state’s discretion is not unlimited: *Dickson v UK* 2007-V; 46 EHRR 927 GC.

¹²⁶ *Evans v UK* hudoc 2007-I.

¹²⁷ *Evans v UK* hudoc 2007-I. Cf *Dudgeon v UK* A 45 (1983); 4 EHRR 149 PC (homosexual acts) and *Christine Goodwin v UK* 2002-VI; 35 EHRR 447 PC (transsexuals).

¹²⁸ *Sunday Times v UK* A 30 (1979); 2 EHRR 245 PC. The Court may have been influenced by the disagreement within the relevant UK institutions as to the need for the restriction.

¹²⁹ See Matscher, *European System*, Ch 5 at p 76. On the principle of subsidiarity in the Convention generally, see Petzold, *European System*, Ch 4 and Rysdall, 1996 EHRLR 18 at 24ff. The principle will be added

primary responsibility for the protection of human rights lies with the contracting parties.¹³⁰ The Court is there to monitor their action, exercising a power of review that has some similarities with that of a federal constitutional court over conduct by democratically elected governments or legislatures within the federation.¹³¹

The margin of appreciation doctrine serves as a mechanism by which a tight or slack rein is kept on state conduct, depending upon the context. The doctrine is nonetheless a controversial one. When it is applied widely, so as to appear to give a state a blank cheque or to tolerate questionable national practices or decisions,¹³² it may be argued that the Court has abdicated its responsibilities. However, the doctrine has its counterpart in the context of judicial review in national systems of administrative law and may be essential to retain state confidence in the operation of the Convention system. In its absence, Strasbourg might well be seen as imposing solutions from outside without paying proper regard to the knowledge and responsibilities of local decision-makers. Underlying the doctrine is the understanding that the legislative, executive, and judicial organs of a state party to the Convention basically operate in conformity with the rule of law and human rights and that their assessment and presentation of the national situation in cases that go to Strasbourg can be relied upon. Given this premise, the doctrine can probably be justified.¹³³ The difficulty lies not so much in allowing it as in deciding precisely how to apply it to the facts of particular cases.

VIII. THE FOURTH INSTANCE DOCTRINE

The Court, and formerly the Commission, has made it clear that it does not constitute a further court of appeal, ie a fourth instance (*quatrième instance*), from the decisions of national courts applying national law. In the words of the Court, 'it is not its function to deal with errors of fact or law allegedly committed by a national court unless and insofar as they may have infringed rights and freedoms protected by the Convention.'¹³⁴ An application that merely claims without more that a national court has made an error of fact or law will be declared inadmissible *ratione materiae*. A claim that such an error is a breach of the right to a fair hearing in Article 6 will not succeed, as Article 6 provides a procedural guarantee only. It does not guarantee that the outcome of the proceedings is fair. However, where the Court is called upon to determine the facts of a case in order to apply a Convention guarantee (eg whether there was inhuman treatment contrary to Article 3), it is not bound by the finding of facts at the national level.¹³⁵ Where an application alleges that national law violates the Convention, the Strasbourg authorities will not in principle question the interpretation of that law by the national courts.¹³⁶ However,

to the Convention Preamble by Protocol 15. On the principle in the Court's jurisprudence, see eg, *Z v UK* 2001-V; 34 EHRR 97 GC and *Vilho Eskelinen and Others v Finland* 2007-IV; 45 EHRR 985 GC.

¹³⁰ 'Belgian Linguistics' Case A 6 (1968) p 34; 1 EHRR 241 at 284 PC and *Handyside v UK* A 24 (1978); 1 EHRR 737 para 48 PC. Thus Article 1 requires the contracting parties to 'secure' the rights' in the Convention. See also Articles 13 and 53, Convention.

¹³¹ See Mahoney, 11 HRLJ 57 at 65 (1990), who compares the roles of the European Court and the US Supreme Court.

¹³² See, eg, *Barfod v Denmark* A 149 (1989); 13 EHRR 493 paras 28–36.

¹³³ Note, however, that it is not used by UN human rights treaty monitoring bodies, and has only a modest presence in the inter-American and African human rights systems.

¹³⁴ *Garcia Ruiz v Spain* 1999-I; 31 EHRR 589 para 28.

¹³⁵ See eg, *Ribitsch v Austria* A 336 (1995); 21 EHRR 573.

¹³⁶ *X and Y v Netherlands* A 91 (1985); 8 EHRR 235 para 29.

it may do so where the interpretation by the national court is ‘arbitrary or manifestly unreasonable’,¹³⁷ or where it is a part of a Convention requirement that national law be complied with (eg that an arrest is ‘lawful’: Article 5(1)).¹³⁸ Even so, it is very exceptional for the Court to disagree with any decision by a national court on its interpretation and application of its own national law.¹³⁹

IX. EFFECTIVE INTERPRETATION

An important consideration which lies at the heart of the Court’s interpretation of the Convention, and which is key to realizing its ‘object and purpose’, is the need to ensure the effective protection of the rights guaranteed. In *Artico v Italy*,¹⁴⁰ the Court stated that ‘the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective’. There the Court found a breach of the right to legal aid in Article 6(3)(c) because the legal aid lawyer appointed by the state proved totally ineffective. The Court has relied upon the principle of effectiveness in other cases when interpreting positive obligations.¹⁴¹ In other contexts, the Court has emphasized the need to ensure the effectiveness of the Convention when interpreting the term ‘victim’ in Article 25¹⁴² and when giving the Convention extra-territorial reach under Article 3.¹⁴³

X. CONSISTENCY OF INTERPRETATION OF THE CONVENTION AS A WHOLE

In *Stec v UK*,¹⁴⁴ the Court stated that the ‘Convention must be read as a whole, and interpreted in such a way as to promote internal consistency and harmony between its various provisions’. Accordingly, in that case a crucial factor for the Court in ruling that the right to property in Article 1, First Protocol extended to non-contributory as well as contributory benefits was that it had been held that rights to both kinds of benefit were protected by the right to a fair trial in Article 5 of the Convention.

XI. LIMITS RESULTING FROM THE CLEAR MEANING OF THE TEXT

Although the Strasbourg authorities rely heavily upon the ‘object and purpose’ of the Convention, they have occasionally found that their freedom to do so is limited by the clear meaning of the text. Thus in *Wemhoff v Germany*,¹⁴⁵ it was held that Article 5(3) does not apply to appeal proceedings because of the wording of Article 5(1)(a). Remarkably, in *Preto v Italy*,¹⁴⁶ the Court went against the clear wording of the Convention text in order to achieve a *restrictive* result. There it held that the unqualified requirement in Article 6(1)

¹³⁷ See, eg, *Andelković v Serbia* hudoc (2013).

¹³⁸ See, eg, *Lukanov v Bulgaria* 1997-II; 24 EHRR 121.

¹³⁹ *Winterwerp v Netherlands* A 33 (1979); 2 EHRR 387 para 46.

¹⁴⁰ A 37 (1980); 3 EHRR 1 para 33. Cf *Airey v Ireland* A 32 (1979); 2 EHRR 305.

¹⁴¹ See *Klass v Germany* A 28 (1978); 2 EHRR 214 para 34 PC.

¹⁴² *Marckx v Belgium* A 31 (1979); 2 EHRR 330 PC.

¹⁴³ *Soering v UK* A 161 (1989); 11 EHRR 439 para 87 PC.

¹⁴⁴ 2006-V; 43 EHRR 1027 para 48 GC. Cf *Klass v Germany* A 28 (1978); 2 EHRR 214 PC.

¹⁴⁵ A 7 (1968); 1 EHRR 55. ¹⁴⁶ A 71 (1983); 6 EHRR 182 para 26 PC.

that judgments be ‘pronounced publicly’ (*rendu publiquement*) does not apply to a Court of Cassation. The Court considered that it must have been the intention of the drafting states (although there was no clear evidence in the *travaux préparatoires*) to respect the ‘long-standing tradition’ in many Council of Europe states to this effect.¹⁴⁷ For this reason, the Court did not ‘feel bound to adopt a literal interpretation’ and preferred a more flexible approach that it felt was not inconsistent with the basic ‘object and purpose’ of Article 6. Similarly, in *Scoppola v Italy (No 2)*,¹⁴⁸ there was a clear departure from the language of Article 7 to introduce the *lex motior*, this time to the benefit of the accused.

In a remarkable development, the Court has taken the position that the text of the Convention may be amended informally by state practice. In *Soering v UK*,¹⁴⁹ faced with wording in Article 2 which expressly permitted capital punishment, the Court stated that ‘[s]ubsequent practice in national penal policy, in the form of a generalized abolition of capital punishment, could be taken as establishing the agreement of the contracting states to abrogate the exception provided for under Article 2(1)’. While state practice had not reached this point by the time of the *Soering* case, in the *Al-Saadoon* case the Court later concluded that it had, so that the numbers of ratifications of the Thirteenth Protocol prohibiting capital punishment completely and other state practice were ‘strongly indicative that Article 2 has been amended so as to prohibit the death penalty in all circumstances’.¹⁵⁰

XII. THE AUTONOMOUS MEANING OF CONVENTION TERMS

Legal terms that might be considered as referring back to the meaning that they have in the national law of the state concerned have not been so interpreted.¹⁵¹ Instead, they have been given an autonomous Convention meaning. They include terms such as ‘criminal charge’, ‘civil rights and obligations’, ‘tribunal’ and ‘witness’ in Article 6.¹⁵² The words ‘law’ and ‘lawful’, however, have a mixed national law and Convention meaning. They both require that there be a national law basis for what is done and are imbued with a Convention idea of the essential qualities of law. As to the latter, a ‘law’ must not be arbitrary; it must also be publicly available, have a reasonably predictable effect and be consistent with the general principles of the Convention.¹⁵³

XIII. RECOURSE TO THE TRAVAUX PRÉPARATOIRES

Recourse may be had to the *travaux préparatoires*, or preparatory work, of the Convention¹⁵⁴ in order to confirm its meaning as established in accordance with the rule in Article 31 of the Vienna Convention or where the application of that rule leaves its

¹⁴⁷ The Court’s approach may have been influenced by the fact that the text of Article 6 was probably drafted with only trial proceedings in mind. ¹⁴⁸ Hudoc (2009) GC.

¹⁴⁹ A 161 (1989); 11 EHRR 439 para 103 PC.

¹⁵⁰ *Al-Saadoon and Mufdhi v UK*, 2010- para 120. This illustrates the risk that an optional protocol to the Convention may, at least until widely ratified, foreclose the possibility of a broad interpretation of the original Convention. See, however, *Ekbatani v Sweden* A 134 (1988); 13 EHRR 504 para 26 PC, in which the Court stated that the addition of a right in a protocol was not to be taken as limiting the scope of the meaning of the original Convention guarantee.

¹⁵¹ See Letsas, 15 EJIL 279 (2004); Matscher, *European System*, Ch 5 at pp 70–3, and Van der Meersch, *Wiarda Mélanges*, p 201.

¹⁵² Cf, the autonomous meaning of the terms ‘vagrant’ and ‘persons of unsound mind’ in Article 5(1)(d).

¹⁵³ See Chapters 8 and 11 concerning Articles 5 and 8–10.

¹⁵⁴ For the *travaux préparatoires* of the Convention, see the *Collected Edition of the Travaux Préparatoires of the European Convention on Human Rights*, 8 vols, 1975–85 (hereafter TP).

meaning 'ambiguous or obscure' or 'leads to a result which is manifestly absurd or unreasonable'.¹⁵⁵ In practice, the Court, and formerly the Commission, has only made occasional use of the *travaux préparatoires*.¹⁵⁶ This is partly because the *travaux* are not always helpful¹⁵⁷ and partly because of the emphasis upon a dynamic and generally teleological interpretation of the Convention that focuses, where relevant, upon current European standards rather than the particular intentions of the drafting states.¹⁵⁸

XIV. THE INTERPRETATIVE ROLE OF THE COURT

The interpretation of the Convention is the role of the Court. The Committee of Ministers makes no attempt to interpret the Convention when it monitors compliance with judgments under Article 46(2). Before its abolition in 1998, the Commission also played an important part in the interpretation of the Convention. The Commission gave reasoned decisions at the admissibility stage, particularly when it declared an application to be inadmissible.¹⁵⁹ In addition, the Commission's reports on the merits of admitted applications were fully reasoned.¹⁶⁰ However, it followed from the scheme of the Convention that in practice the 'last word'¹⁶¹ as to its meaning rested with the Court. If the Court interpreted the Convention differently from the Commission, the Court's view prevailed and the Commission, if sometimes slowly, changed its mind.¹⁶² Although the Court has, since 1998, developed its own jurisprudence on admissibility and has filled in many of the gaps in its interpretation of the Convention's substantive guarantee, some pre-1998 Commission interpretations remain of authority in the absence of Court pronouncements.

There is no common law distinction between *ratio decidendi* and *obiter dicta* in the practice of the European Court of Human Rights. Any statement by way of interpretation of the Convention by the Court, and formerly the Commission, is significant, although inevitably the level of generality at which it is expressed or its centrality to the decision on the material facts of the case will affect the weight and influence of any pronouncement. Clearly, a Grand Chamber ruling is more authoritative than one by a Court Chamber.

There is no doctrine of binding precedent in the sense that the Court is bound by its previous interpretations of the Convention (or those of the former Commission).¹⁶³ The

¹⁵⁵ Article 32, Vienna Convention.

¹⁵⁶ See, eg, *Johnston v Ireland* A 112 (1986); 9 EHRR 203 para 52 PC; *Lithgow v UK* A 102 (1986); 8 EHRR 329 para 117 PC; *Kudła v Poland* 2000-XI GC; *Hirsi Jamaa v Italy* 2012-; 55 EHRR 627 GC; *Sitaropoulos and Giakoumopoulos v Greece* 2012- GC. See also its extensive use under Article 1, First Protocol.

¹⁵⁷ See, eg, *Cruz Varas v Sweden* A 201 (1991); 14 EHRR 1 para 95 PC (*travaux préparatoires* 'silent').

¹⁵⁸ Remarkably, in *Young, James and Webster v UK* A 44 (1981); 4 EHRR 38 PC and *Sigurjonsson v Iceland* A 264 (1993); 16 EHRR 462, the Court resorted to the *travaux préparatoires* only to reject the evidence that it found.

¹⁵⁹ Applications are sometimes admitted (now by the Court) on the basis that they raise complex issues of fact and law that should be left to the merits; in such cases, there is little or no reasoning at the admissibility stage.

¹⁶⁰ In contrast, Commission reports (and now Court judgments) on friendly settlements contain little or no interpretation of the Convention.

¹⁶¹ Mosler, in Kaldoven, Kuyper and Lammers, eds, *Essays on the Development of the International Legal Order, in Memory of Haro Van Panhuys*, 1980, p 152. In theory, the contracting parties to the Convention have the 'last word' as to the meaning of their treaty and could, if they were all agreed (either when meeting within the Committee of Ministers or otherwise), adopt an interpretation that would prevail over that of the Court.

¹⁶² Eg, the Commission adopted (see eg, its Report, para 95 in *Buchholz v Germany* B 37 (1980)) the Court's approach to the interpretation of the reasonable time requirement in Article 5(3) following the Court's rejection of the Commission's approach in *Wemhoff v Germany* A 7 (1968); 1 EHRR 55.

¹⁶³ On precedent in the Court, see Mowbray, 9 HRLR 179 (2009) and Wildhaber, in *Ryssdal Mélanges*, p 1529.

rules concerning precedent have to be read in the context of a Court that sits in five separate Chambers of equal standing and a Grand Chamber to which certain cases may be relinquished by the Chamber for an initial decision on the merits or to which a case that has been decided initially by a Court Chamber may be referred for a re-hearing.¹⁶⁴ In *Cossey v UK*,¹⁶⁵ the Plenary Court (which was replaced by the Grand Chamber in 1998) stated that it 'is not bound by its previous judgments' but that 'it usually follows and applies its own precedents, such a course being in the interests of legal certainty and the orderly development of the Convention case-law'. However, the Court continued, it is free to depart from an earlier judgment if there are 'cogent reasons' for doing so, which might include the need to 'ensure that the interpretation of the Convention reflects societal changes and remains in line with present day conditions'. For example, in *Goodwin (Christine) v UK*,¹⁶⁶ the Grand Chamber reversed the ruling of the Plenary Court in the *Cossey* and other cases on the legal status of post-operative transsexuals in the light of changing trends. Reformulating the position taken by the Plenary Court in the *Cossey* case, in the *Christine Goodwin* case the Grand Chamber stated that 'it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases'. This 'cogent' or 'good reason' approach applies to Grand Chamber reversals of its own or Plenary Court decisions; it will feel much freer to reverse previous Chamber decisions.¹⁶⁷ As to Chambers, it follows from this approach that a Chamber should follow an earlier decision of another Chamber unless there are 'cogent reasons' not to do so. All Chambers are expected to follow Grand Chamber judgments, regardless of 'cogent reasons', unless the case can be distinguished in some other manner.

5. NEGATIVE AND POSITIVE OBLIGATIONS AND DRITTWIRKUNG

Article 1 of the Convention requires the contracting parties to 'secure' the rights and freedoms included in it.¹⁶⁸ Together with the text of later articles dealing with particular rights, this wording in Article 1 has been interpreted as imposing both negative and positive obligations upon states. A negative obligation is one by which a state is required to abstain from interference with, and thereby respect, human rights. For example, it must refrain from torture (Article 3) and impermissible restrictions upon freedom of expression (Article 10). Since such obligations are typical of those that apply to civil and political rights, it is not surprising that most of the obligations that a state has under the Convention are of this character.

¹⁶⁴ Articles 30, 43, Convention.

¹⁶⁵ A 184 (1990); 13 EHRR 622 para 35 PC.

¹⁶⁶ 2002-VI; 35 EHRR 447 para 74 GC. As well as the need for a dynamic interpretation of the Convention, other 'cogent reasons' recognized by the Court are the needs to clarify the meaning of the Convention (*Vilho Eskelinen and Others v Finland* 2007-XX; 45 EHRR 985 GC) and to tackle the rise in application numbers (*Kudła v Poland* 2000-XI GC). See Mowbray, 9 HRLR 647 (2009).

¹⁶⁷ The Grand Chamber is, of course, totally free to reverse a decision of a Chamber in the same case: see eg, *Dickson v UK* 2007-V; 46 EHRR 927 GC.

¹⁶⁸ See Clapham, *Human Rights in the Private Sphere*, 1993, Ch 7; Cherednychenko, 13 Maastricht JECL 195 (2006); Conforti, 13 ItYIL 3 (2003); and Drzemczewski, *European Human Rights Convention in Domestic Law*, 1983, Ch 8.

A positive obligation is one whereby a state must take action to secure human rights.¹⁶⁹ Positive obligations are generally associated with economic, social, and cultural rights¹⁷⁰ and commonly have financial implications, as, for example, with an obligation to provide medical treatment in realization of the right to health. However, positive obligations can also be imposed in respect of civil and political rights and they are to be found in the European Convention. Before considering those in the Convention, it should be noted that a different, tripartite typology of obligations to respect, protect, and fulfil human rights is now well established.¹⁷¹ In this typology, obligations to respect are negative obligations. Obligations to protect and to fulfil are positive obligations, requiring respectively state protection from the acts of other persons, whether state agents or private persons, and other positive action by the state to fulfil a human right.

A number of positive obligations are expressly present in, or necessarily follow from, the text of the Convention. There are, for example, obligations to protect the right to life by law (Article 2(1)); to provide prison conditions that are not 'inhuman' (Article 3); to provide courts, legal aid in criminal cases, and translators in connection with the right to a fair trial (Article 6); and to hold free elections (Article 3, First Protocol).

Other positive obligations have been read into the Convention by the Court.¹⁷² This process finds its source in the Court's jurisprudence in *Marckx v Belgium*.¹⁷³ There the Court stated, in the context of the right to 'respect for family life' in Article 8, that 'it does not merely compel the state to abstain from such interferences: in addition to this primary negative undertaking, there may be positive obligations inherent in an "effective respect" for family life'. In that case, a positive obligation had been infringed, *inter alia*, because Belgian family law did not recognize a child born out of wedlock as a member of the mother's family, thus not allowing the mother and child 'to lead a normal family life'. In *Airey v Ireland*,¹⁷⁴ the same approach was used to establish a positive obligation, this time one involving public expenditure,¹⁷⁵ under the same Article 8 guarantee to provide for effective access to a court in civil proceedings for an allegedly battered wife to obtain an order of judicial separation. Generally, the Court has justified its finding of positive obligations as being necessary to make a Convention right effective.¹⁷⁶

In the *Marckx* and *Airey* cases, the state's positive obligations were to grant individuals the legal status, rights, and privileges needed to ensure that their Convention rights were 'secured' (Article 1). In terms of the tripartite typology referred to previously, they were obligations to use the power of the state to fulfil Convention rights. Other obligations of this kind of great importance that have been read into the Convention by the Court are

¹⁶⁹ The Court sometimes has difficulty in deciding whether a case involves a positive or a negative obligation, and may decide not to make the distinction: see eg *Broniowski v Poland* 2004-V; 43 EHRR 495 GC. Whichever approach is adopted, 'the applicable principles are broadly similar': *Demir and Baykara v Turkey* 2008-; 48 EHRR 1272 para 111 GC.

¹⁷⁰ See Van Hoof, in Alston and Tomasevski, eds, *The Right to Food*, 1984, p 97.

¹⁷¹ It was first formulated in UN Doc E/CN.4/Sub.2/1987/23 and is used by the UN Committee on Economic, Social, and Cultural Rights. See Koch, 5 HRLR 81 (2005).

¹⁷² See generally Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*, 2004.

¹⁷³ A 31 (1979); 2 EHRR 330 para 31 PC. Cf. *Abdulaziz, Cabales and Balkandali v UK* A 94 (1985); 7 EHRR 471 para 67 PC and *Goodwin (Christine) v UK* 2002-VI; 35 EHRR 447 GC. See also the 'National Union of Belgian Police' case A 19 (1975); 1 EHRR 518 para 39.

¹⁷⁴ A 32 (1979); 2 EHRR 305 para 32.

¹⁷⁵ For other cases involving public expenditure, see eg, *Bouamar v Belgium* A 129 (1988); 11 EHRR 1 and *Poltoratskiy v Ukraine* 2003-V; 39 EHRR 916 para 148.

¹⁷⁶ See Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*, 2004, p 221.

the obligations to investigate suspicious deaths (Article 2)¹⁷⁷ and allegations of torture (Article 3).

In other cases, following the same typology, the Court has established that there are positive obligations upon contracting parties to 'protect' Convention rights, by protecting persons' rights from the acts of others. The first clear indication of this came in *X and Y v Netherlands*,¹⁷⁸ where a state was held liable because its criminal law did not provide a means by which a sexual assault upon a mentally handicapped young woman could be the subject of a criminal prosecution. In the words of the Court, the Article 8 obligation to respect an individual's privacy imposed positive obligations that 'may involve the adoption of measures designed to secure respect for private life *even in the sphere of the relations of individuals themselves*'. The same formula was later used in *Plattform 'Ärzte für das Leben' v Austria*,¹⁷⁹ in which the Court held that a state must take reasonable and appropriate measures to protect demonstrators from interference by other private persons intent upon disrupting their demonstration in breach of the right to freedom of assembly protected by Article 11. More recently, the Court has found positive obligations to protect individuals from assault¹⁸⁰ and other ill-treatment¹⁸¹ and from invasions of their privacy by private persons.¹⁸²

The full extent to which the Convention places states under positive obligations to protect individuals against infringements of their rights by other private persons has yet to be fully established, with the Court continuing to add to their number. Domestic violence (Articles 3 and 8), and deprivation of liberty by terrorists or other kidnappers (Article 5) are obvious areas to which an obligation to protect individuals against interferences with their rights by other persons extend.

The question of the protection under the Convention of individuals against other private persons is sometimes spoken of, misleadingly, in terms of the concept of *drittwirkung*. This concept, which is most developed in German legal thinking and law,¹⁸³ supposes that an individual may rely upon a national bill of rights to bring a claim against a private person who has violated his rights under that instrument.¹⁸⁴ Given that this involves the liability of private individuals, or the horizontal application of law, it can have no application under the Convention at the international level,¹⁸⁵ because the Convention is a treaty that imposes obligations only upon states.¹⁸⁶

Insofar as the Convention touches the conduct of private persons, it does so only indirectly through such positive obligations as it imposes upon a state. As noted earlier, the basis for the state's responsibility under the Convention in the case of such obligations is that, contrary to Article 1, it has failed to 'secure' to individuals within its jurisdiction

¹⁷⁷ This obligation includes investigation of alleged killings by both state and private actors.

¹⁷⁸ A 91 (1985); 8 EHRR 235 para 23. Italics added. See also *Young, James and Webster v UK* A 44 (1981); 4 EHRR 38 PC.

¹⁷⁹ A 139 (1988); 13 EHRR 204 para 32.

¹⁸⁰ *Osman v UK* 1998-VIII; 29 EHRR 245 (death threat); *Özgur Gündem v Turkey* 2000-III, 31 EHRR 1082 (protection of journalists from attack); *A v UK* 1998-VI; 27 EHRR 611 (parental corporal punishment); *Opuz v Turkey* hudoc (2009); 50 EHRR 695 (domestic violence).

¹⁸¹ *Z v UK* 2001-V; 34 EHRR 97 GC. ¹⁸² *Von Hannover v Germany* 2004-VI; 43 EHRR 139.

¹⁸³ For its meaning in German law, see Lewan, 17 ICLQ 571 (1968).

¹⁸⁴ This is the concept of direct *drittwirkung*. For indirect *drittwirkung*, which likewise does not refer to positive obligations of the kind that exist under the Convention, see Lewan, 17 ICLQ 571 (1968).

¹⁸⁵ What may happen, however, is that in a state in which the Convention is a part of national law, the Convention guarantee may be treated, like some national bills of rights, as generating rights vis-à-vis private persons: see Drzemczewski, *European Human Rights Convention in Domestic Law*, 1983, Ch 8, particularly concerning Germany (p 210).

¹⁸⁶ See Article 1. Accordingly, an application may not be brought under Article 34 against a private person and Article 33 supposes only inter-state applications.

the rights guaranteed in the Convention by not rendering unlawful the acts of private persons that infringe them.

The position may be different, however, where the private conduct falls within the area of a Convention right or is the result of ‘privatization’. The first of these situations existed in *Costello-Roberts v UK*,¹⁸⁷ which was a case concerning corporal punishment in a private school. The Court noted that the case fell within the ambit of a right—the right to education—that was protected by the First Protocol to the Convention. It stated that ‘the state cannot absolve itself from responsibility’ to secure a Convention right ‘by delegating its obligations to private bodies or individuals’.¹⁸⁸ Accordingly, the Court held that, although the act of a private person, the treatment complained of could engage the responsibility of the respondent state under Article 3. This approach was followed *mutatis mutandis* in *Woś v Poland*¹⁸⁹ in the situation where the respondent state had entrusted a private law foundation to administer a compensation scheme. The Court held that the ‘exercise of state powers which affects Convention rights and freedoms raises an issue of state responsibility regardless’ of the fact that their exercise may have been delegated by the state to a private actor. Consequently, given the need to protect rights effectively, the respondent state was accountable under the Convention for the acts of the foundation. It would be consistent with this reasoning for the state to be directly responsible under the Convention for the acts of private companies and other persons to whom powers that are traditionally state powers have been transferred by privatization, as in the case of private prisons.

6. RESERVATIONS

Article 57 (formerly Article 64) of the Convention allows a party on signature or ratification ‘to make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision’.¹⁹⁰ Reservations have been made by over twenty of the forty-seven parties to the Convention.¹⁹¹ They have been invoked successfully in several cases to prevent a claim being heard,¹⁹² although some reservations have been held to be invalid.¹⁹³ Article 57 requires that a reservation ‘must not be ‘of a general character’’. In *Belilos v Switzerland*,¹⁹⁴ the Court stated that a reservation falls within this prohibition if it is ‘couched in terms that are too vague or broad for it to be possible to determine their exact meaning and scope’. In that case, having confirmed its competence to rule on the validity of reservations, the

¹⁸⁷ A 247-C (1993); 19 EHRR 112.

¹⁸⁸ A 247-C (1993); 19 EHRR 112 para 27. Cf. *Van der Musselle v Belgium* A 70 (1983); 6 EHRR 163 PC.

¹⁸⁹ No 22860/02 hudoc (2005) para 72 DA.

¹⁹⁰ See Frowein, *Wiarda Mélanges*, p 193. The rules on reservations in Articles 2(1)(d) and 19–23 in the Vienna Convention on the Law of Treaties 1969 apply to the Convention as customary international law: *Temeltasch v Switzerland* 5 EHRR 417 at 432 (1983) Com Rep.

¹⁹¹ For the text of reservations, see <http://www.coe.int>. A few reservations have been withdrawn (eg Finland: Article 6). Reservation may be for a limited time: see *Jecius v Lithuania* 2000-IX; 35 EHRR 400 (one year).

¹⁹² See, eg, *Chorherr v Austria* A 266-B (1993); 17 EHRR 358; *Helle v Finland* 1997-VIII; 26 EHRR 159; and *Shestjorkin v Estonia* No 49450/99 hudoc (2000) DA.

¹⁹³ See *Belilos v Switzerland* A 132 (1988); 10 EHRR 466; *Eisenstecken v Austria* 2000-X; 34 EHRR 860; and *Weber v Switzerland* A 177 (1990); 12 EHRR 508.

¹⁹⁴ A 132 (1988); 10 EHRR 466 para 55. See Bourguignon, 29 VJIL 347 (1989); Macdonald, 21 RBDI 429 (1988); and Marks, 39 ICLQ 300 (1990).

Court held that a Swiss reservation concerning the scope of Article 6 was invalid, *inter alia*, on the basis of this test.¹⁹⁵ Reservations that ‘do not specify the relevant provisions of the national law or fail to indicate the Convention articles that might be affected by the application of those provisions’ are reservations of a ‘general character’ and hence invalid.¹⁹⁶ A reservation is limited in its scope to the articles and national law to which it refers.¹⁹⁷ Moreover, it may only concern the extent to which a national law in force in a state’s territory at the time of signature or ratification is consistent with the Convention; it cannot provide a shield for laws or amendments to laws that come into force later.¹⁹⁸ The text of Article 57 suggests that reservations may only be made to the Articles of the Convention that contain its substantive guarantees. Accordingly, reservations limiting the territorial scope of the Convention are not permitted¹⁹⁹ and a reservation to the right under Article 34 to make an application to the Court is almost certainly invalid.²⁰⁰ A question that remains to be decided is whether a reservation to a provision such as Article 15 is invalid, either on this basis or as being of a ‘general character’.²⁰¹

In the *Belilos* case, the Court also held that a further requirement of a valid reservation in (now) Article 57(2) had not been satisfied, namely, that any reservation ‘made under this Article shall contain a brief statement of the law concerned’.²⁰² Since this is ‘not a purely formal requirement but a condition of substance’,²⁰³ non-compliance with it renders a reservation invalid without more.

The outcome of the Court’s decision in the *Belilos* case was that Switzerland was bound by (and found in breach of) Article 6 without the shield of the reservation that was held to be invalid. In holding that this was the case, the Court noted that it was ‘beyond doubt that Switzerland is, and regards itself as, bound by the Convention irrespective of the validity of the declaration’ and that it had recognised the Court’s competence to rule on the question of validity.²⁰⁴ In later cases in which the Court has held a reservation to be invalid, the Court has not referred to such matters,²⁰⁵ seemingly taking the view that severance is always the outcome, the state remaining a party to the Convention without

¹⁹⁵ The reservation read: ‘The Swiss Federal Council considers that... Article 6 ... is intended solely to ensure ultimate control by the judiciary over the acts or decisions of the public authorities’. A reservation must be interpreted in the language in which it is made, which need not be either the English or French authentic Convention languages: *X v Austria No 2432/65*, 22 CD 124 (1967).

¹⁹⁶ *Slivenko v Latvia No 46321/99* hudoc para 60 DA GC.

¹⁹⁷ *Gradinger v Austria A 328-C* (1995).

¹⁹⁸ *Fischer v Austria A 312* (1995); 20 EHRR 349 and *Dacosta Silva v Spain 2006-XIII*.

¹⁹⁹ *Assanidze v Georgia 2004-II*; 39 EHRR 653 GC.

²⁰⁰ Cf. *Loizidou v Turkey A 310* (1995); 20 EHRR 99 (on restrictions to declarations accepting the former optional right of application). See Barratta, 11 EJIL 413 (2000).

²⁰¹ See the French reservation to Article 15 which restricts the competence of the Court to question the French government’s judgment as to the need for emergency measures.

²⁰² In *Belilos*, there was no statement of the law at all. Cf. *Stallinger and Kuso v Austria 1997-II*; 26 EHRR 81. The ‘brief statement’ need not include a summary of the law concerned; an indication of its subject matter and a reference to an official source in which the text may be found is sufficient: *Chorherr v Austria A 266-B* (1993); 17 EHRR 358 para 21.

²⁰³ *Chorherr v Austria A 266-B* (1993); 17 EHRR 358, para 59. The requirement was ‘both an evidential factor’ and contributed to ‘legal certainty’; generally it was intended to ensure that a ‘reservation does not go beyond the provisions expressly excluded by the state concerned’; para 59. Cf. *Weber v Switzerland A 177* (1990); 12 EHRR 508 para 38 in which another Swiss reservation was held to be invalid for non-compliance with Article 64(2). See also *Eisenstecken v Austria 2000-X*; 34 EHRR 860.

²⁰⁴ *Belilos v Switzerland A 132* (1988); 10 EHRR 466 para 59.

²⁰⁵ See *Eisenstecken v Austria 2000-X*; 34 EHRR 860 and *Weber v Switzerland A 177* (1990); 12 EHRR 508. On the severance of reservations to treaties generally, see Aust, *Modern Treaty Law and Practices*, 3rd edn, 2013, pp 131–4.

the benefit of the reservation regardless of its intention when making the reservation or the importance of the reservation to it.

In the *Belilos* case, the Court also held that an instrument deposited on signature or ratification may qualify as a reservation even though it is not described as such; it is sufficient that the state intended it to be a reservation. In that case, Switzerland had deposited on ratification what it described as two ‘interpretative declarations’, including the instrument in issue, and two ‘reservations’. The Court held that the ‘interpretative declaration’ concerned was a reservation for the purposes of (now) Article 57 (although it proved not to be a valid one) in the light of the evidence in the Swiss *travaux* as to Switzerland’s intentions. The Court’s approach can be criticized as not taking account of the need for certainty in this regard and the reasonable expectation that a state knows the distinction in international law between a reservation and an interpretative declaration, particularly when it uses both terms in the instrument that it deposits.²⁰⁶

7. THE CONVENTION IN NATIONAL LAW

I. THE APPLICATION OF THE CONVENTION BY NATIONAL COURTS

International human rights guarantees are most valuable when they are enforceable in national law.²⁰⁷ Even in the case of as successful an international guarantee as the European Convention on Human Rights, a remedy in a national court will usually be more convenient and efficient than recourse to an international procedure. Accordingly, if the Convention can be relied upon in a party’s national courts, an important extra dimension is added to its effectiveness, particularly in a state that lacks its own national bill of rights.²⁰⁸ Application through national courts is also consistent with the principle of subsidiarity which underlies the Convention, by which the primary responsibility to enforce the Convention falls upon the states parties.

Under Article 1 of the Convention, the parties undertake to ‘secure’ the rights and freedoms in the Convention to persons within their jurisdiction. This does not require a party to incorporate the Convention into its law.²⁰⁹ While compliance with this obligation finds ‘a particularly faithful reflection in those instances where the Convention has been incorporated into domestic law’,²¹⁰ a party may satisfy Article 1 instead by ensuring, in whatever manner it chooses,²¹¹ that its law and practice is such that Convention rights are guaranteed. In fact, the Convention has now been incorporated into the law of all the contracting parties.²¹²

²⁰⁶ Note, however, that Article 2(1)(d), Vienna Convention on the Law of Treaties defines a reservation as a ‘unilateral statement, however phrased or named’ (emphasis added).

²⁰⁷ See Blackburn and Polakiewicz, eds, *Fundamental Rights in Europe*, 2001; Drzemczewski, *European Human Rights Convention in Domestic Law*, 1983; Gardner, ed, *Aspects of Incorporation of the European Convention of Human Rights into Domestic Law*, 1993; Greer, *European Convention*, Ch 2; Keller and Stone Sweet, *A Europe of Rights*, 2008; Polakiewicz, *2 All-European Human Rights Yearbook* (1992), 11, 147; Polakiewicz, 18 HRLJ 405 (1997).

²⁰⁸ The UK is one such state.

²⁰⁹ See, eg, *Observer and Guardian v UK* A 216 (1991); 14 EHRR 153 PC.

²¹⁰ *Ireland v UK* A 25 (1978); 2 EHRR 25 para 239 PC.

²¹¹ ‘*Swedish Engine Drivers Union*’ Case A 20 (1976); 1 EHRR 617.

²¹² See Blackburn and Polakiewicz, eds, *Fundamental Rights in Europe*, 2001, Ch 2 and Keller and Stone Sweet, *A Europe of Rights*, 2008, p.683.

Although incorporation of the Convention into national law is desirable, it does not by itself ensure a remedy in a national court for a breach of the Convention. This will depend on the details of incorporation and the approach taken by the judiciary in response to it. Keller and Stone Sweet²¹³ summarize the position as follows: ‘Other things being equal, the ECHR is most effective where Convention regimes, *de jure* and *de facto*: (1) bind all national officials in the exercise of public authority; (2) ... occupy a rank superior to that of [pre- and post-ratification] statutory law in the hierarchy of legal norms...; and (3) can be pleaded directly by individuals before judges who may directly enforce’ the Convention. They give Austria, Belgium, the Netherlands, Spain, and Switzerland as examples of states in which these conditions are met. Austria and Spain go so far as to give the Convention the status of constitutional law,²¹⁴ and in the Netherlands the Convention even prevails over the Constitution.²¹⁵ Although the Convention has been strongly incorporated in Belgium, it provides an example of the difficulties that may arise in respect of positive Convention obligations. While the negative obligation in Article 8 not to interfere with family life was held to be self-executing, the positive obligation to create an appropriate legal status for children born out of wedlock required legislation.²¹⁶ Whereas formal incorporation of the Convention into national law is most easily achieved by states following the monist—as opposed to dualist—approach to the relationship between international and national law,²¹⁷ in practice the effectiveness of the incorporation for individuals will turn much upon the attitude of the judiciary. For example, ‘the ECHR has had far more impact in Belgium [dualist] than in France [monist], precisely because Belgian judges chose to confer supra-legislative status [prevailing over later as well as earlier legislation] on Convention rights and to directly apply them, while French judges declined to do so.’²¹⁸ Also relevant is that, in a state such as Germany, that has its own well-established national bill of rights, the Convention may be given only a limited role, with the local courts preferring to rely upon the bill of rights in the national constitution.²¹⁹

Local factors may influence how a state incorporates the Convention into its law. For example, in recognition of the long-standing importance of parliamentary sovereignty in the United Kingdom constitution, the Human Rights Act 1998 provides only for the indirect incorporation of the rights of the Convention into UK law as ‘Convention rights’.²²⁰ The courts may not declare a parliamentary statute to be invalid. Instead, first, if primary UK legislation applicable in cases coming before the courts cannot, despite all efforts, be interpreted compatibly with the Convention, the competent court may make a ‘declaration of incompatibility’. This does not affect the validity of the legislation, but alerts the government to the need to amend the law. Second, a victim has a public law right of action for damages or other relief against a public authority (but not a private person) which acts inconsistently with a ‘Convention right’. The Human Rights Act has greatly increased the powers of the UK courts to provide a remedy nationally for a breach of the Convention, with the result that the numbers of both Strasbourg applications and adverse judgments against the United Kingdom has decreased.²²¹

²¹³ Keller and Stone Sweet, *A Europe of Rights*, 2008, p 683.

²¹⁴ Keller and Stone Sweet, *A Europe of Rights*, 2008, Ch 6.

²¹⁵ See *Oerlemans v Netherlands* A 219 (1991); 15 EHRR 561.

²¹⁶ *Vermeire v Belgium* A 214-C (1991); 15 EHRR 488 para 11.

²¹⁷ On the monist and dualist approaches, see Crawford, *Brownlie’s Principles of Public International Law*, 8th edn, 2012, pp 48–59. In a monist state, a treaty will become part of the national law upon ratification; in a dualist state, legislation will be required.

²¹⁸ Keller and Stone Sweet, *A Europe of Rights*, 2008, p 683. French judges have now changed their approach: *ibid.*

²¹⁹ See Ress, 40 *Texas ILJ* 359 at 360 (2005).

²²⁰ Cf the Irish European Convention on Human Rights Act 2003.

²²¹ On the impact the Human Rights Act generally, see UK Department of Constitutional Affairs, *Review of the Implementation of the Human Rights Act*, 2006.

There has generally been a marked increase in reliance upon the Convention in national courts in recent years.²²² With the dramatic increase in the extent and impact of the European Court's jurisprudence, national courts have become all too aware that their decisions may find their way to Strasbourg to be scrutinized there by reference to Convention standards.²²³ When the Convention is relied upon by a national court, the question arises whether, although not bound to do so, it will follow the interpretation of it that has been adopted at Strasbourg. In practice, national courts have usually done so, although there have been exceptions.²²⁴ In *R v Horncastle*,²²⁵ the Supreme Court declined to follow the Strasbourg Court Chamber judgment in *Al-Khawaja and Tahery v UK*²²⁶ on whether the English hearsay rule of criminal evidence complied with the Convention. Lord Phillips stated that although the Human Rights Act obligation to 'take account' of Strasbourg jurisprudence 'will normally result in this Court applying principles that are clearly established by the Strasbourg Court', there will be:

rare occasions where the Court has concerns as to whether a decision of the Strasbourg Court sufficiently appreciates or accommodates particular aspects of our domestic process. In such circumstance it is open to this Court to decline to follow the Strasbourg decision. This is likely to give the Strasbourg Court the opportunity to reconsider the particular aspect of the decision that is in use, so that there takes place what may prove to be a valuable dialogue between the Court and the Strasbourg Court.

Where a point of interpretation has not been ruled upon in a Strasbourg case, the national courts will have no choice but to adopt their own interpretation. Insofar as they do so, it is possible that courts in different legal systems may interpret the Convention differently, particularly as there is at present no procedure for the reference of a case to Strasbourg for a definitive ruling.²²⁷

Whether a state incorporates the Convention into its law or not, it is required by Article 13 to provide an 'effective remedy' under its national law for a person who has an arguable claim under the Convention. Thus, for example, a wife whose husband has been excluded from a state's territory because of an immigration law that may infringe the Convention must have an effective remedy under national law by which to challenge the legality of the husband's exclusion.²²⁸ The Court's jurisprudence suggests that a state that does not make the Convention enforceable in its national law is especially at risk of being in breach of Article 13.²²⁹

²²² See Polakiewicz, in Blackburn and Polakiewicz, eds, *Fundamental Rights in Europe*, 2001, pp 50–2 and Keller and Stone Sweet, *A Europe of Rights*, 2008, pp 695–701. Many key UK human rights cases, eg *A (FC) v Secretary of State for the Home Department* [2004] UKHL 56 and *R (application of Al-Skeini) v Secretary of State for Defence* [2005] EWCA Civ 1609, would have lacked a legal basis without the Human Rights Act. But the Convention is far less known and used as yet by the courts in most post-communist states parties.

²²³ Cf Polakiewicz and Jacob-Folzer, 12 HRLJ 136 at 141 (1997).

²²⁴ Polakiewicz and Jacob-Folzer, 12 HRLJ 136 at 141 (1997), refer to rulings by Austrian, Belgian, and French courts on the scope of Article 6(1) as ones in which exceptionally the Court has been 'openly defied'.

²²⁵ [2009] UKSC 14 *per* Lord Phillips, para 11.

²²⁶ Hudoc (2009); 49 EHRR 1. The Grand Chamber reversed the Chamber judgment after *Horncastle*.

²²⁷ Contrast the provision made under Article 234, Treaty of Rome for the reference by national courts of cases to the European Court of Justice for the interpretation of European Union law. Protocol 16 of the Convention will give the Strasbourg Court jurisdiction to give advisory opinions.

²²⁸ *Abdulaziz, Cabales and Balkandali v UK* A 94 (1985); 7 EHRR 471 para 93 PC.

²²⁹ The number of applications and adverse judgments against the UK under Article 13 has declined since the Human Rights Act.

II. THE EXECUTION OF STRASBOURG JUDGMENTS

A Court judgment is ‘essentially declaratory’.²³⁰ Article 41 of the Convention provides that the Court may award a victim ‘just compensation’—a power which has been understood to permit the award of monetary compensation and legal costs. Otherwise, ‘in principle, it is not for the Court to determine what remedial measures may be appropriate to satisfy the respondent state’s obligations’;²³¹ instead it is for that state ‘to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach’.²³² Whereas, in accordance with this approach, the Court used always to refrain from specifying action that should be taken to comply with its judgments, it has modified its position recently.²³³ In some cases, although these remain the exception, it has indicated specific forms of restitution for the victim of a breach of the Convention. Thus it has required the return of the property concerned *as an alternative* to the payment of compensation for a breach of Article 1, Protocol 1.²³⁴ In the case of the continued detention of an individual contrary to Article 5, the Court has found itself competent to specify, without in this context allowing any alternative, that the individual’s release be secured, on the basis that the ‘very nature’ of the breach does not ‘leave any real choice as to the measures required to remedy it’.²³⁵ Finally, in cases in which a person has been convicted of a criminal offence in proceedings in breach of Article 6, the Court has stated that ‘a retrial or reopening of the case, if requested, represents in principle an appropriate way of redressing the violation’.²³⁶ However, the Court does not have jurisdiction to order a new trial or the quashing of a conviction.²³⁷

As well as specifying particular forms of restitution for the victim, the Court has also, but again exceptionally, moved in the direction of giving some indication in its judgments of the steps that a state found in breach of the Convention should take more generally to bring its law or practice into line with its Convention obligations. Whereas formerly the Court had left it entirely to the state concerned to decide what should be done, in *Broniowski v Poland*²³⁸ the Court introduced the idea of ‘pilot judgments’. These are appropriate where there is a breach of the Convention that results from a ‘systematic defect’ which may give rise to many claims. In such a case, the Court stated, some indication

²³⁰ *Marckx v Belgium* A 31 (1979); 2 EHRR 330 para 58 PC. A judgment ‘cannot of itself annul or repeal’ inconsistent national court judgments or national law: *Marckx v Belgium*. For discussion of the execution of Strasbourg judgments, see Barkhuysen, van Emmerik, and van Kempen, *The Execution of Strasbourg and Geneva Human Rights Decisions in the National Legal Order*, 1999; Janis, 15 Conn JIL 39 (2000); Christou and Raymond, eds, *European Court of Human Rights, Remedies and Execution*, 2005; and Lambert-Abdelgawad, *The Execution of Judgments of the European Court of Human Rights*, CoE Human Rights File 19, 2nd edn, 2008.

²³¹ *Broniowski v Poland* 2004-V; 43 EHRR 495 para 193 GC.

²³² *Brumărescu v Romania* (Article 41) 1999-VII; 35 EHRR 887 para 19.

²³³ See Leach, 2005 EHRLR 148.

²³⁴ See eg, *Papamichalopoulos v Greece* (Article 50) A 330-B (1995); 21 EHRR 439 and *Brumărescu v Romania* (Article 41) 2001-I; 33 EHRR 887 GC.

²³⁵ *Assanidze v Georgia* 2004-II; 39 EHRR 653 para 202 GC. See also *Ilaşcu and Others v Moldova and Russia* 2004-VII; 40 EHRR 1030 GC.

²³⁶ *Sejdovic v Italy* 2006-II para 126 GC. See also *Öcalan v Turkey* 2005-IV; 41 EHRR 985 GC.

²³⁷ *Lyons and Others v UK No 15227/03* 2003-IX; 37 EHRR CD 183 DA and *Komanický v Slovakia, No 13677/03* hudoc (2005) DA (civil case). It did not do so in *Sejdovic* or *Öcalan*.

²³⁸ 2004-V; 40 EHRR 563 para 193. A pilot judgment suspends the consideration by the Court of other applications deriving from the same defect pending measures being taken. In *Hirst v UK (No 2)* 2005-IX; 42 EHRR 849 GC, the Court declined a government request to give guidance on what restrictions were permissible on the right to vote in the absence of a systematic defect.

of the general measures that a state should adopt is in order 'so as not to overburden the Convention system with large numbers of applications deriving from the same cause'.

The judgments of the Court arising out of applications to Strasbourg are binding in international law upon the parties to the case.²³⁹ However, a national court is not obliged under the Convention to give them direct effect; this is a matter for the national law of the respondent state, which is free to implement Strasbourg judgments in accordance with the rules of its national legal system.²⁴⁰ Assessments of the record of states in complying with judgments has until recently been very positive. In 1996, the President of the Court stated that they had 'not only generally but always been complied with by the contracting states concerned. There have been delays, perhaps even examples of minimal compliance, but no instances of non-compliance'.²⁴¹ This was true of the payment of compensation and costs awarded by the Court under (now) Article 41, the steps by way of restitution taken to remedy a wrong done to an individual applicant and the amendment of legislative and administrative practices found contrary to the Convention. In a number of cases, a Strasbourg judgment has provided a government with a lever to help overcome local opposition to law reform, as with the change in the law on homosexuality in Northern Ireland following *Dudgeon v UK*.²⁴² But sometimes it is uncertain whether the steps taken by the defendant state go far enough.²⁴³ In other cases, a state may be slow in putting the necessary measures in place because of constitutional difficulties.²⁴⁴ Thus it took fifteen years before the Isle of Man Tynwald enacted the Criminal Justice (Penalties, etc) Act 1993 to abolish judicial corporal punishment, thereby bringing the United Kingdom fully into line with its obligations under Article 3 following the *Tyler* case.²⁴⁵ Prior to the 1993 legislation, in the context of the special constitutional position of the Isle of Man,²⁴⁶ the UK government had informed the Manx government after the *Tyler* case that judicial corporal punishment would be contrary to the Convention and the case was brought to the attention of the local courts by the Manx authorities. Although this was considered sufficient by the Committee of Ministers, acting under what is now Article 46(2), to

²³⁹ See Article 46(1), Convention. Cf. states' obligations under Article 46, see *Verein Gegen Tierfabriken Schweiz (Vgt) v Switzerland (No 2)*, 2009-; 52 EHRR 394 GC.

²⁴⁰ See eg, *Vermeire v Belgium* A 214-C (1991); 15 EHRR 488. Under Malta's European Convention Act 1987, its Constitutional Court is empowered to enforce judgments of the Strasbourg Court. In national legal systems generally, practice varies as to whether legislative or administrative action is required or whether the national courts are competent, where appropriate, to act, eg by quashing a national court decision, including a criminal conviction, found at Strasbourg to be in breach of the Convention. In Spain, the courts can so act; in Germany, they cannot: see Bernhardt, *European System*, Ch 3, at p 38. See generally *The European Convention on Human Rights: Institution of Relevant Proceedings at the National Level to Facilitate Compliance with Strasbourg Decisions*, Council of Europe Committee of Experts Study, 13 HRLJ 71 (1992).

²⁴¹ Ryssdal, in Bulterman and Kuijers, eds, *Compliance with Judgments of International Courts: Schermers Symposium Proceedings*, 1996, 49 at 67. Cf Leuprecht, *European System*, Ch 35 at p 798. For a case of minimal compliance, see the UK Contempt of Court Act 1981 implementing *Sunday Times v UK (No 1)* A 30 (1979); 2 EHRR 245 PC. A clear case in which a state refused point blank to change its (terrorism) law to comply with a judgment is *Brogan v UK* 145-B (1988); 11 EHRR 117 PC in which the UK made an Article 15 declaration instead. This was considered sufficient by the Committee of Ministers: see *Brannigan and McBride v UK* A 258-B (1993); 17 EHRR 539 PC.

²⁴² *A 45* (1981); 4 EHRR 149 PC.

²⁴³ As Churchill and Young, 62 BYIL 283 at 346 (1992) point out, it may be unclear what steps are required by a judgment or whether the legislation read *in abstracto* is sufficient.

²⁴⁴ Delays in the payment of compensation or legislative or administrative change have many other causes, including the cost involved, political or public opposition, or the parliamentary timetable.

²⁴⁵ *A 26* (1978); 2 EHRR 1. There was much delay in complying with *Marckx v Belgium* A 31 (1979); 2 EHRR 330. See also Mahoney and Prebensen, *European Supervision*, Ch 26 at p 636.

²⁴⁶ The Isle of Man is a Crown possession that by convention is not subject to the legislative powers of Westminster on most internal matters.

comply with the *Tyrer* judgment,²⁴⁷ it would appear that the United Kingdom's obligation to 'secure' the rights and freedoms in the Convention required that it go further and for the relevant law to be amended.

While the record of state compliance with judgments remains generally good, commentators on the record of states have recently been more critical.²⁴⁸ Central and East European states have found particular difficulty in complying with some judgments against them, although they have not been alone in this respect.²⁴⁹ A result is that the role of the Committee of Ministers in supervising the execution of judgments has become more demanding and important.²⁵⁰ Unfortunately, the Committee, being a political body composed of representatives of member states, is not the best equipped or motivated body to question whether the steps taken go far enough. The Parliamentary Assembly has also assumed a role. In its seventh report,²⁵¹ its Committee on Legal Affairs and Human Rights gave priority to the situation in states where major structural problems had led to many repeat violations. The main problems continued to be excessive length of judicial proceedings (endemic notably in Italy), chronic non-enforcement of domestic judicial decisions (widespread, in particular, in Russia and Ukraine), deaths and ill-treatment by law enforcement officials and lack of effective investigations into them (particularly in Russia and Moldova), and unlawful or over-long detention on remand (a problem notably in Moldova, Poland, Russia, and Ukraine).²⁵²

8. THE CONVENTION AND THE EUROPEAN UNION

The European Union (EU)²⁵³ has legislative and executive jurisdiction by which it may act against member states²⁵⁴ or private persons²⁵⁵ in a way that impacts upon their Convention obligations and rights respectively.²⁵⁶ When exercising jurisdiction in these ways, it is possible that EU institutions may infringe Convention rights. The question

²⁴⁷ CM Res DH (78) 39. There was no case in which a sentence of judicial corporal punishment was executed prior to its abolition in 1993. In *Teare v O'Callaghan*, 4 EHRR 232 (1981), a post-*Tyrer* sentence of corporal punishment was quashed by the Isle of Man High Court on the ground that it was contrary to Isle of Man international obligations and should be imposed only if other forms of punishment are unsuitable.

²⁴⁸ See Greer, *European Convention*, Ch 2; Lambert-Abdelgawad, *The Execution of Judgments of the European Court of Human Rights*, CoE Human Rights File 19, 2nd edn, 2008, pp 64–7; and Polakiewicz, in Blackburn and Polakiewicz, eds, *Fundamental Rights in Europe*, 2001, pp 69ff.

²⁴⁹ On Central and East European states and on the systemic problems in Italy, see Greer, *European Convention*, pp 103ff. The UK has yet to implement *Hirst v UK (No 2)* on prisoners' right to vote.

²⁵⁰ On the role of the Committee of Ministers, see above, Chapter 4. See also Cali and Koch, 14 HRLR 000 (2014); Lambert-Abdelgawad, *The Execution of Judgments of the European Court of Human Rights*, pp 32–9; Leuprecht, *European System*, Ch 35; and Martens, in Bulterman and Kuijer, eds, *Compliance with Judgments of International Courts: Schermers Symposium*, 1996, p 77.

²⁵¹ Seventh Report on the 'Implementation of Judgments of the European Court of Human Rights', CE Doc. 12455 (2011), pp 1–2.

²⁵² On compliance with Court judgments, see further Ch 24.

²⁵³ The term European Union is used to refer to the European Union generally and to the European Community in particular.

²⁵⁴ Eg, by requiring them to take certain action: see the *Bosphorus Airways* case later in this chapter.

²⁵⁵ Eg, by imposing a fine: see *M and Co v Germany No 13258/87*, 64 DR 138 (1990).

²⁵⁶ See Craig and de Búrca, *EU Law*, 5th edn, 2011, ch 11, and see further, ch 23. For a comparison of the interpretation of the Convention by the Strasbourg and Luxembourg courts, see Spielmann, in Alston, ed, *The EU and Human Rights*, 1999, Ch 23, and Turner, 5 EPL 453 (1999).

therefore arises whether these institutions must comply with the Convention when they act. A related question is whether member states are responsible under the Convention for the effect on private persons of their national legislative or other public acts that are a consequence of EU membership.

As to the position of the EU, an application may not be made to Strasbourg against it under the Convention for any conduct on the part of its institutions because the EU is not a party thereto.²⁵⁷ Following much debate and hesitation over many years, the Treaty on European Union (TEU), as amended by the Treaty of Lisbon, provides that the EU 'shall accede' to the Convention.²⁵⁸ A draft agreement on EU accession has been drawn up and is now in the final stages of adoption.²⁵⁹ The EU has its own Charter of Fundamental Rights, which was adopted in 2000 and became legally binding in 2009 under Article 6(1) TEU, as amended by the Treaty of Lisbon.²⁶⁰

Pending the EU's accession to it, the Convention controls EU conduct within its own legal order as the Convention has been incorporated into EU law. The TEU²⁶¹ reads:

Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

Accordingly, claims may succeed before the European Court of Justice (ECJ) on the basis that the challenged EU action is inconsistent with the Convention.²⁶² This way of indirectly subjecting EU institutions to the Convention is comparable to its incorporation into the national law of a state and falls short in its impact of Union accession to the Convention. In particular, as noted, it does not allow an individual to make an application to Strasbourg against the EU. Moreover, insofar as the Convention is applied as a part of EU law, the Convention would not prevail over a conflicting provision of Union primary (ie, treaty) law²⁶³ and the interpretation and application of the Convention remains a matter for the ECJ, not the Convention's own Court.²⁶⁴ Generally, the present situation is not satisfactory and EU accession to the Convention is clearly desirable.

With regard to the position of individual EU member states,²⁶⁵ the following general rules apply. The Convention does not prohibit states parties from transferring sovereign power to an international (including supranational) organization such as the EU, but this will not in itself take away from their responsibility under the Convention for acts done as members of the organization. However, there is a presumption that a state party is not in breach of its obligations under the Convention by virtue of acts that are necessarily

²⁵⁷ *Matthews v UK* 1999-I: 29 EHRR 361 GC. The same is true of other European institutions: *Heinz v Contracting States also Parties to the European Patent Convention No 21090/92*, 76A DR 125 (1994); 18 EHRR CD 168 (European Patent Office).

²⁵⁸ Article 6(2), Article 17, Protocol 14, Convention amends Article 59, Convention to permit the EU to accede.

²⁵⁹ See Council of Europe Press Release DCO 41 (2013).

²⁶⁰ On the Charter, see Peers, Harvey, Kenner, and Ward, eds, *The EU Charter of Fundamental Rights*, 2014 and De Vries, Bernitz, and Weatherill, eds, *The Protection of Fundamental Rights in the EU After Lisbon*, 2013.

²⁶¹ Article 6(3), as amended by the Treaty of Lisbon. ECJ case law is to the same effect: see eg, *ERT v DEP and Sotirios Kouvelas*, Case C-260/89 [1991] ECR I-2925. See also the EU Charter of Fundamental Rights, Preamble and Article 52(3).

²⁶² See eg, *P v S and Cornwall CC*, Case C-13/94 [1996] ECR I-2143.

²⁶³ See *Matthews v UK* 1999-I; 28 EHRR 361 GC. Secondary legislation (regulations, directives) must be read subject to the Convention.

²⁶⁴ See Jacque, *European System*, Ch 39 at pp 894–5.

²⁶⁵ All EU member states are parties to the Convention, though not to all of its Protocols.

undertaken by it in fulfilment of obligations as members of the organization so long as the organization concerned provides human rights protection that is 'equivalent' to that in the Convention 'as regards both the substantive guarantee offered and the mechanisms controlling their observance'.²⁶⁶ But this presumption may be rebutted if the protection provided by the other organization is 'manifestly deficient' on the facts of the particular case.²⁶⁷ These general rules were formulated by the Court in the leading case of *Bosphorus Airways v Ireland*.²⁶⁸ There the Irish authorities impounded a civil aircraft leased by the applicant Turkish company from the Yugoslav national airline that had landed in Dublin. The authorities did this in compliance with a legal obligation imposed on EU member states by an EU regulation adopted in implementation of UN Security Council resolutions requiring economic sanctions against the Federal Republic of Yugoslavia in the context of the conflict in the Balkans. The Court rejected a claim that the impounding was a violation by Ireland of the right to property guarantee in Article 1, First Protocol to the Convention, for the reason that Ireland was carrying out an obligation of its membership of the EU and 'equivalent' human rights protection was provided for the applicant in the EU legal order on the facts of the case. The protection afforded by the EU was 'equivalent' substantively, because of the reliance on the Convention as a source of human rights protection in EU law, and, in terms of mechanisms, through the remedies provided to enforce the substantive guarantee before the European Court of Justice and national courts. The resulting presumption that Ireland had not infringed the Convention by impounding the aircraft was not rebutted as this protection was not 'manifestly deficient' on the facts: judicial review, through the national courts and a preliminary ruling at Luxembourg, had been available and had been used to challenge the interference with the Convention right to property.

The immunity allowed by the *Bosphorus* case does not apply where the state has some discretion in its application of EU law, in which case the state will be in breach of the Convention if it does not exercise its discretion consistently with it.²⁶⁹ Nor does the immunity apply to an act of a member state that is in execution of a treaty or other EU primary law obligation that has, by definition, been freely entered into by the member state and that, as primary law, is not subject to judicial review within the EU legal order. This was the case in *Matthews v UK*,²⁷⁰ where the EC Act on Direct Elections governing elections to the European Parliament, which was a EC treaty by which the UK was bound, excluded persons in Gibraltar from voting even though EC law applied to Gibraltar. The UK was held to be responsible for the resulting breach of Article 3, Protocol 1 of the Convention on free elections because it had freely agreed to the Act, which as primary law could not be challenged in the European Court of Justice.

²⁶⁶ *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi (Bosphorus Airways) v Ireland* 2005-VI; 42 EHRR 1 para 154 GC. Cf *Michaud v France* 2012-. 'Equivalent' means 'comparable', not 'identical': *Bosphorus*, para 155. Organizations other than the EU to which the general rule applies include the UN; see *Behrami and Behrami v France and Saramati v France, Germany and Norway*, Nos 71412/01 and 78166/01 hudoc (2007). See also *Waite and Kennedy v Germany* 1999-I; 30 EHRR 261 GC (European Space Agency) and *Gasparini v Italy and Belgium* hudoc (2009) (NATO). And see *Prince Hans-Adam II of Liechtenstein v Germany* 2001-VIII GC (Convention prevails over any later inconsistent treaty obligation).

²⁶⁷ '*Bosphorus Airways*' case, para 156.

²⁶⁸ '*Bosphorus Airways*' case, para 156. See Costello, 6 HRLR 87 (2006).

²⁶⁹ See eg, *Procola v Luxembourg* A 326 (1995); 22 EHRR 193 and *Cantoni v France* 1996-V. Costello, 6 HRLR 87 (2006), p 111, suggests that *Bosphorus Airways* was exceptional on its facts; there will normally be some discretion.

²⁷⁰ 1999-I; 28 EHRR 361 GC. See Harmsen, 7 EPL 625 (2001) and Canor, 25 ELR 3 (2000).

9. ACHIEVEMENTS AND PROSPECTS

I. CONTRIBUTION TO THE INTERNATIONAL LAW OF HUMAN RIGHTS

The Convention was an important landmark in the development of the international law of human rights. For the first time, sovereign states accepted legal obligations to secure the classical human rights for all persons within their jurisdiction and to allow all individuals, including their nationals, to bring claims against them leading to a legally binding judgment by an international court finding them in breach. This was a revolutionary step in a law of nations that had been based for centuries on such deeply entrenched foundations as the ideas that the treatment of nationals was within the domestic jurisdiction of states and that individuals were not subjects of rights in international law. If it has since been joined by other regional and universal treaty-based guarantees of human rights, the Convention remains the most advanced instrument of this kind. It has generated the most sophisticated and detailed jurisprudence in international human rights law and its enforcement mechanisms are unrivalled in their effectiveness and achievements.²⁷¹ The Court has made a large contribution to the jurisprudence of international human rights law concerning the meaning of the particular rights it protects, the development of key concepts of general application, such as the principle of proportionality, and its strongly teleological approach to the interpretation of human rights norms. In addition, it has contributed to other areas of international law, particularly the law on state jurisdiction and state immunity, and on the functioning of international courts (eg the local remedies rule and interim measures).

II. IMPACT ON THE PROTECTION OF HUMAN RIGHTS IN EUROPE

a. Influence upon national law

The Convention has had a considerable effect upon the national law of the contracting parties. It has served as a catalyst for legal change that has furthered the protection of human rights at the national level and has, in so doing, assisted indirectly in the process of harmonizing law in Europe.²⁷² Changes in the law have occurred mostly following judgments on the merits²⁷³ in cases to which the state amending its law has been a party. Insofar as a judgment involves a determination that a national law or administrative practice is inconsistent with the Convention,²⁷⁴ the respondent state is required by international law to change its law or practice in order to comply with its treaty obligation in Article 1 of the Convention to 'secure' the rights and freedoms guaranteed. In compliance with this obligation, the parties to the Convention have made many legislative or other changes following decisions or judgments against them.²⁷⁵ At a more general level,

²⁷¹ See Mowbray, 5 HRLR 57 (2005); O'Boyle, 2008 EHRLR 1; Greer, *European Convention*, ch 7; and Wildhaber, 40 CYIL 309 (2002).

²⁷² See Leonardo, 8 ERPL 1139 (1996).

²⁷³ States have also undertaken to change their law or administrative practice in some friendly settlement cases.

²⁷⁴ This will not always be the case. For example, the failure to try a person within a 'reasonable time' or to treat a prisoner humanely may result from inefficiency or misconduct respectively on the particular facts.

²⁷⁵ See Greer, *European Convention*, Ch 5; Ress, in *European System*, pp 812ff; Ress, 40 Texas ILJ 395 (2005); Polakiewicz and Jacob-Foltzer, 12 HRLJ 65, 125 (1991); Blackburn and Polakiewicz, *Fundamental*

Frowein²⁷⁶ has pointed to the considerable impact that the European Court's judgments have had on the constitutional traditions of contracting parties, involving, for example, the strengthening of the role of national courts in reviewing legislation and the introduction or increased importance of the principle of proportionality as a basis for overturning restrictions upon human rights.

In a number of cases, states have acted to amend their law or practice to bring it into line with the Convention following judgments in cases to which they have not been a party.²⁷⁷ For example, the Netherlands amended its legislation on children born out of wedlock as a consequence of *Marckx v Belgium*.²⁷⁸ There have also been instances of a state changing its law in order to comply with the Convention or a Protocol before becoming a party.²⁷⁹

The Convention's influence upon the law of states that are not parties to a case illustrates the following general point. The real achievement of the Convention system can be said to go beyond the statistical tally of cases and the provision of remedies for individuals. It resides in the deterrent effect of an operational system. States, confronted with a system that works, must keep their law and administrative practices under review. As happens in Whitehall, new legislation must, as far as foreseeable, be 'Strasbourg proofed'.²⁸⁰ In this way the Convention radiates a constant pressure for the maintenance of human rights standards and for change throughout Europe. A judgment of the Court in a case brought by one person may have an impact on forty or more national jurisdictions.²⁸¹

Finally, it may be noted that the Convention has also influenced national law outside of Europe. Its text is echoed in the bills of rights of a number of states that were formerly colonies of Convention parties²⁸² and the jurisprudence of the Court has been relied upon or cited in cases decided in the national courts of non-European states.²⁸³

b. A remedy for individuals

For individuals who claim to be victims of human rights violations, the primary effect of the Convention has been to provide a remedy before an international court of justice when all national remedies have failed. 'We will now take our case to Strasbourg' is a familiar refrain that may mean more than just 'blowing off steam'.

Rights in Europe, 2001, *passim*; Keller and Stone Sweet, *A Europe of Rights*, 2008, pp 695–701. As to the UK, see Churchill and Young, 52 BYIL 283 (1992).

²⁷⁶ Lecture reprinted in *Dialogue between Judges*, published by the European Court of Human Rights, 2007, p 73.

²⁷⁷ Although, as non-parties, they are not legally bound by the judgment, they are bound to 'secure' the rights guaranteed by the Convention.

²⁷⁸ A 31 (1979); 2 EHRR 330 PC. The Netherlands also amended its law concerning the time limit within which a suspect must be brought before a court in the light of the *Brogan* case: see Myjer, NCJM-Bulletin 1989, p 459. The Danish law on the closed shop was amended following *Young, James, and Webster v UK* A 44 (1981); 4 EHRR 38 PC: see Bernhardt, *European System*, Ch 3 at p 39ff. France amended its law on interpretation costs because of *Luedicke, Belkacem, and Koç v Germany* A 29 (1978); 2 EHRR 149: see French Decree no 87–634 of 4 August 1987. For other examples, see Polakiewicz and Jacob-Foltzer, 12 HRLJ 125 (1991).

²⁷⁹ See Polakiewicz and Jacob-Foltzer, 12 HRLJ 125 (1991) and Polakiewicz, in Blackburn and Polakiewicz, eds, *Fundamental Rights in Europe*, 2001, p 50.

²⁸⁰ See now the statement of compatibility required by s 19, Human Rights Act 1998.

²⁸¹ Cf Judge Ryssdal, *European System*, p xxvii.

²⁸² Eg, Nigeria: see Elias, *Nigeria: The Development of its Laws and Constitution*, 1967, p 142. Cf, *Minister of Home Affairs v Fisher* [1980] AC 319 at 328 PC (Caribbean states).

²⁸³ See eg, *State v Ncube* 90 ILR 580 (1992) (a Zimbabwean case referring to the *Tyrer* case). See also *Pratt v AG for Jamaica* [1993] 4 All ER 769, a Privy Council case which cites *Soering v UK* A 161 (1989); 11 EHRR 439 PC. For other examples, see Mahoney and Prebensen, *European Supervision*, Ch 26 at p 637.

One measure of the undoubted value of the Convention remedy from the individual's point of view is the large number of admitted applications that have led to a favourable outcome for the applicant in a judgment of the Court or by way of a friendly settlement.²⁸⁴ Another is the wide variety of cases in which breaches have been found.²⁸⁵ Most violations have concerned the right to a fair trial. Cases under Article 6 have brought to light many delays in the hearing of cases in breach of the right to 'trial within a reasonable time'. Other common Article 6 infringements have concerned the right of access to a court and the requirements of an independent and impartial tribunal and of equality of arms. The next most problematic guarantee for states has been that of the right to property, particularly in recent years. Almost equally problematic has been the right to freedom of the person. Many breaches of Article 5 have been found concerning various aspects of defendants' rights, such as the right to pre-trial release, the length of detention on remand, and the need for a remedy to challenge detention. Other cases have involved the preventive detention of terrorists and the detention of the mentally disordered, vagrants, children, and deportees. Claims relying upon the right to respect for family life, privacy, etc, in Article 8 have been almost equally successful. In this context, the Court has made great use of its 'dynamic' approach to the interpretation of the Convention in the light of changed social values and the idea that there may be positive obligations upon states, requiring them, for example, to legislate so as to respect the rights of homosexuals, children born out of wedlock, and transsexuals.²⁸⁶ Cases under Article 10 have confirmed the fundamental importance attached to freedom of expression, particularly freedom of the press. Violations of Article 3 have been found in such diverse areas as the ill-treatment of persons in detention, judicial corporal punishment, and extradition to face the death row phenomenon, with the concepts of 'inhuman and degrading treatment' being given a broad interpretation. At the other extreme, the guarantees of freedom from slavery and forced labour (Article 4), the right to marry (Article 12), the right to education (Article 2, Protocol 1), and the rights in the Fourth and Seventh Protocols have so far led to relatively few adverse rulings.

Analysing the Strasbourg case law from another perspective, the blind-spots revealed by the Convention have varied from one state to another. For example, in the United Kingdom the Convention has thrown a spotlight on prisons, causing an antiquated system of prison administration to be brought up to date. It has also provided checks upon state conduct in the same country in such diverse contexts as the Northern Ireland emergency, courts-martial, and discretionary life sentences. In the Netherlands and Sweden, the Convention has highlighted the absence of judicial control over executive action in such areas as the licensing of commercial activities. In Italy, it has uncovered repeated delays in the administration of justice. In Central and East European states it has revealed problems in the restitution of property and various weaknesses in the administration of justice left over from the former Soviet systems. The latter include the non-enforcement of judicial decisions in a number of such states and the re-opening of final judicial decisions by way of special supervisory procedures in Russia or as regard property decisions (Romania).

²⁸⁴ A breach of at least one article of the Convention has been found by the Court in the great majority of cases (92% in cases decided on the merits between 1959 and 2012). However, less than 5% of applications are admitted. In 2012, 86,201 applications were declared inadmissible or struck out, a 70% increase over 2011 (50,677).

²⁸⁵ See the table for the period 1959–2012 in the Court's 2012 Annual Report, pp 158–9.

²⁸⁶ The concept of a positive obligation to 'secure' the rights to life and freedom from torture has also led to many findings of breaches of Articles 2 and 3 respectively.

If the Convention may thus provide a valuable remedy in respect of human rights violations over a wide range of subject areas, the Strasbourg procedures nonetheless have certain limitations or disadvantages from the applicant's standpoint. Some of these are inherent in all international remedies. Recourse to Strasbourg is inevitably less convenient than to a local court for obvious reasons, such as language, distance, and cost. Similarly, any international remedy will be less efficient because of procedural weaknesses, such as the absence of a power to subpoena witnesses or to enforce or execute properly interlocutory injunctions or judgments respectively.

Other limitations are particular to the Strasbourg system as it functions at present. By far the most serious of these is the length of proceedings at Strasbourg. Although this has always been a problem, the situation has been made worse by the huge backlog of cases that has developed in recent years. As has often been pointed out, it is somewhat ironic that the Court could well be considered to infringe the trial within a reasonable time guarantee which it enforces against others.

Given the importance now attached to the Convention system as providing a remedy for individuals, it is interesting to note how matters have progressed in this regard beyond the intentions of the drafting states. The original purpose of the Convention was not primarily to offer a remedy for particular individuals who had suffered violations of the Convention but to provide a collective, inter-state guarantee that would benefit individuals generally by requiring the national law of the contracting parties to be kept within certain bounds. An individual (as well as a state) application was envisaged as a mechanism for bringing to light a breach of an obligation owed by one state to others, not to provide a remedy for an individual victim. In accordance with this conception of the Convention, no provision was made for individuals to refer their case to the Court or to take part in proceedings before it. This, however, is not how the Convention has evolved. The individual has been brought more to the centre of the stage by allowing him a right of audience before the Court and also by making the right of individual petition to the Court compulsory. The Court's, and formerly the Commission's, constructive use of the friendly settlement procedure, which usually leads to an immediate remedy for the applicant (compensation, pardon, etc), and the Court's application of Article 41 to award an applicant compensation and costs have also enhanced the value of the Convention remedy from the standpoint of the individual. The situation that has thus developed by which Strasbourg provides an international remedy for all individual victims of violations of the Convention is, however, now under threat because of the great increase in the Court's workload.

III. PROSPECTS

As to the substance of the Convention's guarantee, the Court's future lies in the consolidation and further development of its jurisprudence, particularly in cases coming from post-communist states. The momentum of the Court's work has increased rapidly in recent years, with the Court giving detailed meaning to many different parts of the Convention guarantee. Reassuring examples of the Court's continued willingness to read the Convention in a positive, teleological way are its ruling that the Convention imposes positive obligations to secure various rights, such as the rights to life and privacy, and extends to protection from environmental pollution. Jurisprudence interpreting and applying the free-standing non-discrimination guarantee in the Twelfth Protocol, which entered into force in 2005, will add a new dimension to the Convention guarantee.²⁸⁷

²⁸⁷ However, the more significant consequence of Protocol 12 so far has been the development of the Court's jurisprudence under the non-discrimination guarantee in Article 14 of the Convention.

While it is to be hoped that the Court will continue to conceive of its function as the guardian of human rights in a dynamic and probing way, it must at the same time take care to respect the rich diversity of law in the legal systems of the contracting parties and not lose touch with common European values.

There is much that the contracting parties themselves could do to improve the Convention's impact. They could immediately increase its effect by withdrawing such reservations as they have made and by ratifying the Protocols that they have not yet accepted. A Protocol bringing appropriate economic and social rights within the Convention system of individual petitions would also be valuable.²⁸⁸ Although member states constantly acknowledge that economic and social rights are indivisible from and just as important as civil and political rights,²⁸⁹ states lack the necessary conviction to establish rights of individual petition for the former, even though they are familiar with judicial remedies for the breach of obligations concerning economic and social rights in EU law and their own national law.²⁹⁰ However, a move in this direction is now even less likely than formerly in view of the pressure upon the Court in coping with its workload under the existing Convention guarantee.

The immense difficulties besetting the Convention's enforcement machinery resulting from the overloading of the system by the great increase in the number of applications in recent years is by far the main problem facing the Court. Paradoxically, the large number of applications to the Court that are a testimony to the success of the Convention could also be its undoing. Reasons for the startling increase in applications include the greater awareness of the Convention on the part of individuals and non-governmental organizations, the adoption of more Convention protocols protecting rights, and the fact that the individual right of petition became compulsory for all contracting parties in 1998. But much the most important reason is the large increase since 1989 in the number of contracting parties (from twenty-two to forty-seven), including, most significantly, post-communist states.²⁹¹

The number of applications, which was manageable in the early years, rose steadily in the 1980s and 90s²⁹² to the point where worries about the backlog of pending applications and the anticipated further growth in new applications led to the procedural reforms of the Eleventh Protocol, which came into effect in 1998. Despite Protocol 11, the number of applications continued to spiral upwards. However, the year 2012 marked an encouraging reduction in the Court's backlog of cases. 'The number of pending applications, which had topped 160,000 in September 2011 and stood at 151,000 on 1 January 2012, had been reduced to 128,000 by the end of the year'.²⁹³ This reduction resulted partly from the changes brought about by Protocol 14—particularly the introduction of the single-judge

²⁸⁸ On previously unsuccessful attempts to add a Convention protocol protecting economic, social, and cultural rights, see Berchtold, in Matscher, ed., *The Implementation of Economic and Social Rights*, 1991, p 355. There is a collective complaints mechanism under the European Social Charter.

²⁸⁹ See eg, the Final Resolution of Council of Europe Ministerial Conference on the European Social Charter, Turin, 1991, para 2.

²⁹⁰ See eg, the ECJ case law under Article 119 on sexual discrimination in employment and national law remedies before employment and social security courts or tribunals.

²⁹¹ Other factors were the large number of Turkish cases, resulting mainly from the response to the threat posed by the PKK, and the continuing number of repetitive Italian fair trial cases. For other reasons, see Greer, *European Convention*, pp 38ff. Of the 128,00 applications pending at the end of 2012, 70% were against just six states: Russia, Turkey, Italy, Ukraine, Serbia, and Romania, in decreasing order.

²⁹² Registered applications rose over tenfold, from 404 in 1981 to 4,750 in 1997.

²⁹³ Foreword, European Court of Human Rights Annual Report 2012. 'Pending applications' include those waiting for a decision on admissibility.

formation for deciding on the admissibility of applications²⁹⁴—and from a levelling off of the number of new applications.²⁹⁵ Nonetheless, the number of applications pending before the Court remains formidable. Whereas the backlog of applications waiting for a ruling on admissibility should be brought under control within the next few years, there remains a serious and continuing overload of admitted applications needing a ruling on the merits.²⁹⁶ Using current procedures, the Court is not in a position to give enough judgments annually to bring its caseload of admitted cases down to acceptable proportions. The Convention parties have held conferences considering what further steps to take, leading to a series of Declarations, the latest and most significant of which was the 2012 Brighton Declaration.²⁹⁷ The Brighton Declaration provided the impetus for Protocols 15 and 16, which were adopted in 2013. But these will do little to decrease the Court's backlog,²⁹⁸ and the view of many commentators²⁹⁹ is that, whatever procedural reforms can realistically be put in place, it will not be possible for the Court to cope with the numbers of individual applications generated by more than 800 million individuals across Europe in the case-by-case way that it has done to date. The argument runs that the Court must convert itself into a constitutional court.³⁰⁰ By this is meant that, while continuing to take jurisdiction through the medium of individual applications, as the Convention provides, the Court should focus more upon making general rulings as to what the Convention requires in a particular context, rather than providing individual justice. Thus it might in a selected case make a ruling that a national law or practice is contrary to the Convention, spelling out the Convention requirements in the subject area for the benefit of states parties generally.³⁰¹ It would then not rule on other cases on the same point, at least from the same state, supposing that the state concerned will make the necessary changes to the benefit of others within its jurisdiction. Another approach would be to limit the Court's jurisdiction to 'serious' cases, as suggested by Greer and Wildhaber.³⁰² They also point

²⁹⁴ As a result, in 2012, more than 80,000 applications were declared inadmissible or struck out, a 70% increase over 2011.

²⁹⁵ Other factors were the increased implementation of the Court's case prioritization system and the introduction of a filtering system.

²⁹⁶ At present, admitted cases take on average four-and-a-half years from registration to judgment: Court Registrar at annual press conference: <http://www.echr.coe.int/ECHR/EN/Header/The+Court/The+President/Press+conferences/>.

²⁹⁷ For the Interlaken, Izmir, and Brighton Declarations, 2010, 2011, and 2012, see the European Court of Human Rights website (The Court: Reform of the Court).

²⁹⁸ The reduction in the time limit to bring cases from six to four months will have an effect. Protocol 16 on advisory opinions will increase the Court's workload in the short term.

²⁹⁹ But not the Court or states parties, which continue to see the Convention as providing a remedy for all individual complaints. See eg the Court's Preliminary Opinion in Preparation for the Brighton Conference, on the Court's website. In the Brighton Declaration, para 2, 'the states parties reaffirm their attachment to the right of individual application' and make no mention of a constitutional court. NGOs generally take the same view.

³⁰⁰ See Greer, *European Convention*, pp 174ff; Greer and Wildhaber, 12 HRLR (2012); Sadurski, 9 HRLR 397 (2009); Harmsen, 5 IJHR 18 (2001); Wildhaber, 23 HRLJ 161 (2002). See also Alkema, *Ryssdal Mélanges*, p 50 and Warbrick, 10 MJIL 698 (1989) in the earlier literature.

³⁰¹ Cf the role of the US Supreme Court and the German Constitutional Court: see Greer, *European Convention*, pp 181ff. However the 2006 Report of the Group of Wise Persons, CM (2006) 203, para 42, opposed giving the Court the power to take a case at its discretion (cf the US Supreme Court's certiorari jurisdiction) as risking 'politicising the system'. But the Report stressed that the Court already had a constitutional role, viz to 'lay down common principles and standards of human rights', which it already exercises but could take further, para 24.

³⁰² 12 HRLR 655 at 686 (2012).

out that the Court has already moved towards becoming a constitutional court through its development of the concept of pilot judgments; the introduction by Protocol 14 of a 'no significant advantage' ground for inadmissibility;³⁰³ the adoption of a 'priority policy' whereby the Court has regard to the importance and urgency of the issues raised in a case when deciding the order in which cases are dealt with;³⁰⁴ and the practice of considering similar cases against the same state together in one judgment.³⁰⁵ If these developments do not have the desired effect of reducing the backlog of admitted applications sufficiently, more radical steps in the direction of making the Court a constitutional court may be required.

States may themselves do a great deal to reduce the Court's difficulties. Above all, action to reduce the figure of over 60 per cent of judgments on the merits attributable to 'repetitive' violations resulting from structural problems that states have not rectified following judgments against them³⁰⁶ would help greatly. More effective application of the Convention at the national level, in accordance with the principle of subsidiarity, would also contribute greatly to reducing the burden upon the Strasbourg Court: the provision of local remedies by national courts applying the standards of the Convention would greatly reduce the need for recourse to Strasbourg.

The Convention's future is also bound up with that of the new Europe. Providing both a statement of European human rights values and the machinery for their enforcement, it can continue to have a key role in the process of European integration. This is a role that has taken on an extra dimension as cases are arriving from the new Council of Europe member states in Central and Eastern Europe. The Convention's relationship with the European Union is close to resolution. The fact that the member states of the European Union are subject to the Convention, but that the supranational institutions to which they have transferred certain of their powers are not, has long been a weakness in the arrangements for securing human rights in Europe that should be remedied by the accession of the European Union to the Convention. While the current situation remains, and while the Strasbourg Court continues to have severe workload problems, the European Union's Court of Justice in Luxembourg will, as it applies the EU Charter, have a considerable opportunity to develop a large human rights role for itself vis-à-vis the Union and its member states.

³⁰³ As yet this additional admissibility requirement has had little impact. See Buyse, in Haeck, McGonigle, Herrera, and Garduno, eds, *Liber Amicorum for Leo Zwaak*, 2014.

³⁰⁴ Non-priority cases still remain to be decided in due course.

³⁰⁵ In 2012, the Court gave 1,093 judgments, in which it disposed of 1,678 applications.

³⁰⁶ Explanatory Report to the Fourteenth Protocol, para 7 (figure for 2003).