Foreword

I am very pleased to be able to provide a foreword to the Council of Europe's *The European Convention on Human Rights - Principles and Law*. Written by a practising academic with two lawyers from the Court's Registry, this edition provides a comprehensive, up-to-date and analytical survey of the case law and practice of the European Court of Human Rights.

As I have had the opportunity of reiterating in a number of my extra-judicial addresses, we are living in a time of political polarisation accompanied by challenges to the rule of law. The very relevance of human rights is increasingly being called into question. In response there is a need for serious human rights education and training, which can be seen as part of an effective human rights communication strategy.

Enhancing knowledge of the European Convention on Human Rights and the European Court's case law is essential to improving understanding and application at the national level. Indeed, the Council of Europe member states have committed themselves to more effective national implementation of Convention standards. Domestic judges, prosecutors, legal professionals and students are on the frontline of relying on, arguing and applying our Convention standards. It becomes self-evident that they all need up-to-date, accurate and engaging training materials on the Convention principles and the Court's case law. This publication provides such material and therefore plays a key role in ensuring that subsidiarity is more than just a concept on paper.

What I particularly appreciate about this work is that in addition to the very detailed chapters on each Article of the Convention, the book begins with a concise overview of the most important principles which assist in understanding how the Convention is interpreted, such as the living instrument doctrine, proportionality and the margin of appreciation. Moreover, each chapter is followed by a section on contemporary and future issues and also provides a guide to further reading which signposts additional research paths.

It is my firm belief that the future of the Convention system depends on its relationship with domestic jurisdictions and consequently *The European Convention on Human Rights - Principles and Law* will play a role in bridging the knowledge gap.

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(May 2020 - Sept. 2022)

Preface

This book considers the European Convention on Human Rights through the work of the bodies that have interpreted and applied its provisions, namely the European Court of Human Rights today and the Commission and Court until 1998. The central role of the Convention in realising "the principles of the rule of law and the enjoyment of human rights and freedoms within European states" (Article 3 of the Statute of the Council of Europe, 1949) was consolidated in 1994 when becoming a party to the Convention was then made a condition of membership of the Council of Europe (Parliamentary Assembly Resolution 1031 (1994), paragraph 9). Since that time the work of the Court has experienced a dramatic increase in the quantity of applications. For example, in 1998 and 2006 the number of completed applications allocated for decision by the Court rose from 6 000 to 39 350 respectively ("ECHR – Analysis of statistics 2006",[1] page 6).

The exponential growth in the number of applications brought under the Convention may appear to be the result of the expansion of the Council of Europe since 1990, with new states joining on the dissolution of the former Yugoslavia and the former Soviet Union. But on closer examination it is evident that the increase in applications reflects the failure of several states in different parts of Europe to implement the Convention in their legal systems. The fact that for many years over half the applications have involved complaints that have been dealt with by the Court in previous cases (known as "repetitive cases") is indicative of a pattern of breach of Convention obligations. The response of the Court to high case numbers and non-compliance with Convention standards has been to embark on a process of reform, as outlined in the Interlaken, Izmir, Brighton, Brussels and Copenhagen Declarations. Most notably, the Court has taken steps within that process to emphasise the principle of subsidiarity, that is, the primary obligation of states to themselves protect the Convention rights and freedoms which they undertook to secure on becoming parties to the Convention.

It is against this background that the book seeks to provide an account of the content of the substantive rights and freedoms guaranteed by the European Convention on Human Rights and its protocols by considering those provisions as currently interpreted and applied by the European Court of Human Rights. Given the large and ever-expanding body of case law generated by the Court, the book's objective is to distil the key legal principles relevant to each right and to address current developments in the jurisprudence. The importance of the Convention at the national level means that the book is most obviously relevant to European university students,

1. "European Court of Human Rights – Analysis of statistics 2006", available at: www.echr.coe.int/Documents/Stats_analysis_2006_ENG.pdf, accessed 20 April 2022.

government officials and legal practitioners. And it is intended as a companion volume to the 2019 Council of Europe publication by Linos-Alexandre Sicilianos and Maria-Andriani Kostopoulou, *The Individual Application Under the European Convention on Human Rights: Procedural Guide*, on the execution of the Court's judgments and the procedure for Council of Europe member states and individuals wanting to bring applications under the Convention.

The Convention's relevance is, however, not confined to Europe. Several Commonwealth countries have modelled their Bills of Rights on the Convention, and in the United States there are similarities in the structure and supervision of the European Convention on Human Rights and the United States Bill of Rights and its review by the United States Supreme Court. More recently, jurisprudential cross-fertilisation and trans-judicial "dialogue" between human rights courts, bodies and systems has meant that the study of the European Convention on Human Rights has an indispensable place in international human rights law courses, regardless of their location.

The book considers cases to 1 June 2021. Where possible, some later case developments have been noted during the proofing stage.

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Carla M. Buckley
Krešimir Kamber
Pamela McCormick

TERMINOLOGY, REFERENCES AND ABBREVIATIONS

This book uses the terms "Convention", "Commission" and "Court" to refer to the European Convention on Human Rights, the former European Commission of Human Rights and the European Court of Human Rights respectively.

Cases are referred to by party names and the year in which the case was delivered.

"Comm. Rep." refers to an official report of the European Commission of Human Rights.

The abbreviation "GC" refers to Grand Chamber; "PC" refers to Plenary Chamber.

The text of cases can be found on HUDOC, the Court's case law website: http://hudoc.echr.coe.int.

Chapter 1

Introduction to the European Convention on Human Rights

I. BACKGROUND

The European Convention on Human Rights ("the Convention")[2] was drafted in the Council of Europe, an international organisation that was formed after the Second World War as the first post-war attempt to unify Europe. The reason for the Convention was partly to elaborate upon the obligations of Council of Europe membership, which include acceptance of the principles of the rule of law and human rights.[3] 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 a symbolic statement of the principles for which western European states stood. It was also a reaction to the gross human rights violations that Europe had witnessed during the Second World War. It was believed that, should they occur again, the Convention would bring them to the attention of other European states in time for action to be taken to suppress them.

The Convention entered into force in 1953 and has been ratified by all 46 member states of the Council of Europe.[4] The number of parties to the Convention 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. This development, while in many ways welcome, introduced new problems of interpretation and application of the Convention for the European Court of Human Rights ("the Court") and greatly increased its workload.

2. European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, European Treaty Series No. 5. Entry into force: 3 September 1953.
3. Article 3, Statute of the Council of Europe 1949. Acceptance of the Convention is now a political obligation of membership of the Council of Europe: Parliamentary Assembly Resolution 1031 (1994), paragraph 9.
4. Following the decision of the Committee of Ministers on 16 March 2022 the Russian Federation ceased to be a member of the Council of Europe; on 16 September 2022 the Russian Federation ceased to be a party to the Convention.

II. THE SUBSTANTIVE GUARANTEE

The Convention protects predominantly civil and political rights. 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; economic, social and cultural rights were too problematic and were left for separate and later treatment.[5]

III. THE INTERPRETATION OF THE CONVENTION

1. The general approach

As a treaty, the Convention must be interpreted according to the international law rules on the interpretation of treaties.[6] 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".[7]

2. Emphasis upon the object and purpose of the Convention

Considerable emphasis has been placed by the European Court on a teleological interpretation of the Convention, that is, one that seeks to realise its "object and purpose". This has been identified in general terms as "the protection of individual human rights"[8] and the maintenance and promotion of "the ideals and values of a democratic society".[9] As to the latter, it has been recognised that "democracy" supposes "pluralism, tolerance and broadmindedness".[10] The primary importance of the "object and purpose" of the Convention was strikingly illustrated in *Golder v. the United Kingdom*. 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.[11]

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5. They are protected by the 1961 European Social Charter (ETS No. 35. Entry into force: 26 February 1965) and the 1996 Revised European Social Charter (ETS No. 163. Entry into force: 1 July 1999).
6. For example, *Golder v. the United Kingdom* (1975) [PC]. The Court also interprets the Convention in accordance with international law generally: for example, *Al-Skeini and Others v. the United Kingdom* (2011) [GC].
7. Article 31(1) Vienna Convention on the Law of Treaties 1969, UN Treaty Series, vol. 1155, p. 331. Entry into force: 27 January 1980.
8. *Soering v. the United Kingdom* (1989) [PC], paragraph 87.
9. *Kjeldsen, Busk Madsen and Pedersen v. Denmark* (1976), paragraph 53. Compare the Convention Preamble, which also identifies "the achievement of greater unity between its Members" as the Council of Europe's aim.
10. *Handyside v. the United Kingdom* (1976) [PC], paragraph 49.
11. The Court also referred to the emphasis on the rule of law in the Council's Statute (Preamble, Article 3).

The emphasis placed by the Court on the Convention's object and purpose is also evident in its occasional statements that the Convention is "a constitutional instrument of European public order".[12] These 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,[13] with the Convention evolving, in one view, as Europe's constitutional bill of rights.

3. Dynamic interpretation

The Convention has been given a dynamic interpretation.[14] In *Tyrer v. the United Kingdom*,[15] the Court stated that the Convention is "a living instrument which … must be interpreted in the light of present-day conditions". Accordingly, in that case 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 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. However, the Convention may not be interpreted in response to "present-day conditions" so as to add 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 recognised in Europe.[16]

4. The role of consensus

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 or support change. With this in mind, the Court commonly seeks to find a consensus in the law and practice of Convention parties favouring a new approach. A state that finds itself entirely on its own because of a new direction that other states have taken is particularly at risk of an adverse judgment.[17] But the Court does not wait until the respondent state is alone. In *Marckx v. Belgium*[18] 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" of Council of Europe states, but not in all. The existence of a consensus will not

12. For example, *Al-Dulimi and Montana Management Inc v. Switzerland* (2016) [GC], paragraph 145.
13. *Ireland v. the United Kingdom* (1978) [PC], paragraph 239.
14. The term "evolutive", rather than "dynamic", is sometimes used by the Court.
15. *Tyrer v. the United Kingdom* (1978), paragraph 31.
16. *Johnston and Others v. Ireland* (1986) [PC].
17. For example, *Tyrer v. the United Kingdom* (1978).
18. *Marckx v. Belgium* (1979) [PC], paragraph 41.

always be conclusive. In *A, B and C v. Ireland*,[19] the Court held that although there was a "substantial majority" among states parties permitting abortion on wider grounds than those in Ireland, this was not decisive in view of the ruling in *Vo v. France* (2004) that the beginning of life for the purposes of Article 2 was undetermined and the "profound moral values of the Irish people".

The Court looks for a consensus not only when applying its dynamic approach to the interpretation of the Convention; it may also do so when identifying existing, as well as new, standards. Thus, the easy incorporation into Article 1 of Protocol No. 1 of a compensation requirement for the taking of the property of nationals followed from its uniform and long-established presence in the "legal systems of the contracting states".[20]

In its more recent jurisprudence, the Court has increasingly looked beyond the national law and practice of states parties to the Convention when seeking a consensus. A striking example of this wider approach is *Christine Goodwin v. the United Kingdom*.[21] In that case, while recognising that there remained no "common European approach" fully recognising the new sexual identity of post-operative transsexuals, the Court was persuaded to overturn its earlier negative rulings by "clear and uncontested evidence of a continuing international trend", both in Europe and elsewhere, in this direction. It 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.

5. The principle of proportionality

The principle of proportionality is a recurring theme in the interpretation of the Convention. Reliance on the principle is most evident in areas in which the Convention expressly allows restrictions upon a right. Thus, under the second paragraphs of Articles 8 to 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".[22] Similarly, proportionality has been invoked when setting the limits to an implied restriction that has been read into a Convention guarantee[23] and in determining whether a positive obligation has been satisfied.[24] The principle is also applied 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".[25] Finally, the principle is relied upon

19. *A, B and C v. Ireland* (2010) [GC], paragraphs 235, 237, 241.
20. *James and Others v. the United Kingdom* (1986) [PC], paragraph 54.
21. *Christine Goodwin v. the United Kingdom* (2002) [GC], paragraph 85.
22. *Handyside v. the United Kingdom* (1976) [PC], paragraph 4.
23. For example, *Mathieu-Mohin and Clerfayt v. Belgium* (1987) [PC] (Article 3, Protocol No. 1). A restriction must not impair the "essence" of the right: ibid.
24. For example, *Rees v. the United Kingdom* (1986) [PC].
25. The "*Belgian linguistic case*" (1968) [PC] p. 34.

when deciding whether a derogation in a claimed public emergency is justified under Article 15.[26]

When deciding on the proportionality of a "general measure" enacted by a legislature, the Court has considered the quality of the parliamentary review in the respondent state of the necessity of the measure. In *Animal Defenders International v. the United Kingdom*,[27] when assessing whether legislation that prohibited political broadcasting during an election was a proportionate restriction upon freedom of expression, the Grand Chamber gave "considerable weight" to the "exceptional examination by parliamentary bodies of the cultural, political and legal aspects of the prohibition". Similarly, but in a negative way, the fact that there was "no evidence that Parliament has ever sought to weigh the competing interests or to assess the proportionality of a blanket ban on the right of a convicted prisoner to vote" counted against the respondent state in *Hirst v. the United Kingdom (No. 2)*.[28] However, by no means all judges of the Court favour this approach. Thus, in the *Animal Defenders* case, in their Joint Dissenting Opinion Judges Ziemele, Sajó, Kalaydjieva, Vučinić and De Gaetano stated that the "fact that a general measure was enacted in a fair and careful manner by Parliament does not alter the duty incumbent upon the Court to apply the established [human rights] standards."

Another element of the proportionality requirement may be that a limitation upon a right is the "least restrictive means" of achieving the relevant public interest. This approach has been adopted by the Court in some cases. For example, in the Article 10 case of *Mouvement raëlien suisse v. Switzerland*,[29] the Court stated that "the authorities are required, when they decide to restrict fundamental rights to choose the means that cause the least possible prejudice to the rights in question". In other cases, however, the Court has not insisted upon this.[30]

6. A fair balance

In *Soering v. the United Kingdom*,[31] 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". The determination of a fair balance may be called upon in cases of conflict of Convention rights, for example in cases of conflicts between freedom of expression and the right to respect for private life or to freedom of religion.[32] The determination of a fair balance is also a feature of disputes about the right to respect

26. *Ireland v. the United Kingdom* (1978) [PC].
27. *Animal Defenders International v. the United Kingdom* (2013), paragraph 114 [GC]. The quality of national judicial review of the legislation may also be taken into account: ibid., paragraphs 115–116.
28. *Hirst v. the United Kingdom (No. 2)* (2005), paragraph 79.
29. *Mouvement raëlien suisse v. Switzerland* (2012) [GC], paragraph 75.
30. For example, *Animal Defenders International v. the United Kingdom* (2013) [GC].
31. *Soering v. the United Kingdom* (1989) [PC], paragraph 89.
32. For example, *Von Hannover v. Germany (No. 2)* (2012) [GC], paragraphs 106–107 (expression and privacy case).

for family life,[33] especially disputes between parents and children or between each parent about their children. In such cases, the initial assessment by the state of how that balance should be struck will carry great weight.

7. The margin of appreciation doctrine

A doctrine that plays a crucial role in the interpretation of the Convention is that of the margin of appreciation. 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 bearing upon a Convention right. The doctrine was first formulated by the Court in *Handyside v. the United Kingdom*.[34] In that 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 domestic margin of appreciation thus goes hand in hand with a European supervision.

The doctrine has since been applied in the above sense to other Convention articles. In addition to 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 deciding whether a state's interference with other Convention rights is justified – for example, the right to property[35] or the guarantee of non-discrimination.[36] The Court relies upon it too when assessing whether a state has done enough to comply with any positive obligations it has.[37] 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 5[38] and 6.[39] It has been instrumental too in the application of Article 15 to public emergencies.[40]

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33. See also Chapter 17 below.
34. *Handyside v. the United Kingdom* (1976) [PC], paragraphs 48–49.
35. For example, *James and Others v. the United Kingdom* (1986) [PC].
36. For example, the "*Belgian linguistic case" (No. 2)* (1968) [PC], p. 35.
37. For example, *Abdulaziz, Cabales and Balkandali v. the United Kingdom* (1985) [PC].
38. For example, *Winterwerp v. the Netherlands* (1979).
39. For example, *Osman v. the United Kingdom* (1998).
40. *Ireland v. the United Kingdom* (1978) [PC].

As will be apparent, these articles largely coincide with those to which the principle of proportionality apply, the point being that in assessing the proportionality of the state's acts, the margin of appreciation doctrine is the vehicle relied upon to give a certain degree of deference to the judgment of national authorities when they weigh competing public and individual interests in view of their local knowledge and the principle of subsidiarity.

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 considerable discretion in cases of public emergency arising under Article 15,[41] in some national security cases,[42] in cases involving the move from communist to free market economies[43] and in the protection of public morals.[44] Similarly, the margin of appreciation available to the legislature in implementing social and economic policies generally should be "a wide one".[45] 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".[46] A wide margin also usually applies "if the state is required to strike a balance between competing interests or Convention rights".[47] 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"[48] 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.[49]

The margin of appreciation doctrine is a controversial one. When it is applied widely, so as to appear in some cases to tolerate questionable national practices or decisions,[50] it may be argued that the Court has abdicated its responsibilities. However, in its absence Strasbourg might well be seen as imposing solutions from outside without paying proper regard to the knowledge 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 human rights and that their assessment and presentation of the national situation in cases that go to Strasbourg can be relied upon. The margin of appreciation doctrine has been given renewed emphasis by inclusion in the Preamble to the Convention by Protocol No. 15.[51]

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41. See Chapter 15 below.
42. For example, *Leander v. Sweden* (1987).
43. *Broniowski v. Poland* (2004) [GC].
44. *Handyside v. the United Kingdom* (1976) [PC].
45. *Hatton and Others v. the United Kingdom* (2003) [GC], paragraph 97 (airport noise).
46. *Evans v. the United Kingdom* (2007) [GC], paragraph 77.
47. Ibid.
48. Ibid.
49. *The Sunday Times v. the United Kingdom (No. 1)* (1979) [PC].
50. For example, *Barfod v. Denmark* (1989).
51. Protocol No. 15 entered into force on 1 August 2021.

8. The principle of subsidiarity

This principle reflects the subsidiary role of the Convention in protecting human rights. It has long been present in the Court's jurisprudence and, like the margin of appreciation, has been inserted in its Preamble by Protocol No. 15.[52] In accordance with the principle, the scheme of the Convention is that "the primary responsibility for implementing and enforcing the guaranteed rights and freedoms is laid on the national authorities. The machinery of complaint to the Court is thus subsidiary to national systems safeguarding human rights. This subsidiary character is articulated in Articles 13 and35 (1) of the Convention".[53]

9. The fourth-instance doctrine

The Court is not a court of appeal, i.e. 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".[54] However, where the Court is called upon to determine the facts of a case in order to apply a Convention guarantee (for example, whether there was inhuman treatment contrary to Article 3), it is not legally bound by the finding of facts by the courts at the national level and, exceptionally, may disagree.[55] Where an application alleges that national law violates the Convention, the Court will not in principle question the interpretation of that law by the national courts.[56] However, it may do so where the interpretation by the national court is "arbitrary or manifestly unreasonable",[57] or where it is a part of a Convention requirement that national law be complied with (for example, that an arrest is "lawful": Article 5(1)).[58] 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.

10. Effective interpretation

An important consideration which lies at the heart of the Court's interpretation of the Convention, and which is key to realising its "object and purpose", is the need to ensure the effective protection of the rights guaranteed. In *Artico v. Italy*,[59] 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.

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52. Ibid.
53. *Kudła v. Poland* (2000) [GC], paragraph 52.
54. *García Ruiz v. Spain* (1999) [GC], paragraph 28.
55. For example, *Ribitsch v. Austria* (1995).
56. *X and Y v. the Netherlands* (1985), paragraph 29.
57. For example, *Anđelković v. Serbia* (2013).
58. For example, *Lukanov v. Bulgaria* (1997).
59. *Artico v. Italy* (1980), paragraph 33.

11. Limits resulting from the clear meaning of the text

Although the Court relies heavily upon the "object and purpose" of the Convention, it has occasionally found its freedom to do so is limited by the clear meaning of the text. Thus, it has held that Article 5(3) does not apply to appeal proceedings because of the clear wording of Article 5(1)(a).[60] Exceptionally, in *Pretto and Others v. Italy*,[61] the Court went against the wording of the Convention text in order to achieve a *restrictive* result. There it held that the unqualified requirement in Article 6(1) 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 to respect the "long-standing tradition" in many Council of Europe states to this effect.

In a remarkable development, the Court has held that the text of the Convention may be amended by state practice. In *Soering v. the United Kingdom*,[62] faced with wording in Article 2 which expressly permitted capital punishment, the Court stated that "subsequent practice in national penal policy, in the form of a generalised 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)". Later, in the *Al-Saadoon* case, the Court concluded that subsequent practice had reached this point: the numbers of ratifications of Protocol No. 13 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".[63]

12. The autonomous meaning of law and other Convention terms

a. Generally

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. 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.

b. Meaning of law

The terms "in accordance with the law" or "prescribed by law" appear in Articles 8–11 as part of the requirements justifying limitations upon the rights concerned. The words "law" and "lawful" are found elsewhere in the Convention. The Court has said that the notion of "law" is autonomous.[64] It both requires that there be a national law basis for what is done and is imbued with a Convention idea of the essential qualities of law. Domestic legality is a necessary condition but is not sufficient.

60. *Wemhoff v. Germany* (1968).
61. *Pretto and Others v. Italy* (1983) [PC], paragraph 26.
62. *Soering v. the United Kingdom* (1989) [PC], paragraph 103.
63. *Al-Saadoon and Mufdhi v. the United Kingdom* (2010), paragraph 120.
64. *The Sunday Times v. the United Kingdom (No. 1)* (1979) [PC], paragraph 49.

In *The Sunday Times v. the United Kingdom (No. 1)*, the Court added two further criteria for a rule to be a "law": accessibility and foreseeability. These further criteria emphasise the quality of the law. Accessibility requires that the texts be available to an applicant, although it is accepted that understanding of the texts may require access to appropriate advice.[65] As to foreseeability, the law must be of "sufficient precision".[66] Wholly general, unfettered discretion will not satisfy the Convention.[67] The test, the Court said in *Silver and Others v. the United Kingdom*,[68] is that where a law conferred a discretion it must also indicate with sufficient clarity the limits of that discretion. Other factors may serve to relax the degree of precision required of a national law. In *Müller and Others v. Switzerland*,[69] the Court acknowledged that obscenity laws could not be framed with "absolute precision", not least because of the need to keep the law in accord with the prevailing views of society. Moreover, the meaning of widely drawn legal texts and rules of common law may be worked out and developed by courts without affecting their quality as "law".[70]

13. Recourse to the *travaux préparatoires*

Recourse may be had to the *travaux préparatoires*, or preparatory work, of the Convention to confirm its meaning or where the application of the basic rule of treaty interpretation in Article 31(1) of the Vienna Convention on the Law of Treaties leaves its meaning "ambiguous or obscure" or "leads to a result which is manifestly absurd or unreasonable".[71] In practice, the Court has only made occasional use of the *travaux préparatoires*.[72] This is partly because the *travaux préparatoires* are not always helpful 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.

14. The interpretative role of the Court

The interpretation of the Convention is the role of the Court. The common law distinction between *ratio decidendi* and *obiter dicta* is not found in the practice of the Court. Any statement by way of interpretation of the Convention by the Court, and formerly the European Commission of Human Rights, 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.

The rules concerning precedent operate in the context of a Court that sits in Chambers of equal standing and a Grand Chamber to which cases may be relinquished by the

65. Ibid.
66. Ibid.
67. This is particularly so where the exercise of the delegated power may be secret (for example, telephone tapping).
68. *Silver and Others v. the United Kingdom* (1983), paragraph 80.
69. *Müller and Others v. Switzerland* (1988), paragraph 29.
70. *Sunday Times v. the United Kingdom (No. 1)* (1978) [PC].
71. Article 32 Vienna Convention on the Law of Treaties 1969.
72. For example, *Johnston and Others v. Ireland* (1986) [PC].