



# THE DOCTRINES AND METHODOLOGY OF INTERPRETATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS BY THE EUROPEAN COURT OF HUMAN RIGHTS

Prepared by  
Jeremy McBride

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## Introduction

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Questions about the application of the European Convention on Human Rights (“the Convention”) are generally raised with very specific situations in mind, such as one of the following:

- ▶ **Is this kind of treatment inhuman?**
- ▶ **Can an accused person have three lawyers in court?**
- ▶ **What should internet service providers be expected to do about hate speech?**
- ▶ **When should someone arrested be able to meet with a lawyer?**

Answers to many questions of this kind can often be found by referring to the case law of the European Court of Human Rights (“the Court”), as well as that of the former European Commission of Human Rights. This case law is very much the flesh on the bare bones found in the text of the Convention itself. Certainly, without this case law, it can be hard to fully appreciate what is required by the various rights and freedoms in the Convention.

However, there will not always be a case dealing exactly with the particular situation that is of concern and for which it is thought or suggested that the Convention is relevant. Moreover, even if there are cases that do seem relevant for that situation, certain features in them might mean that it would be inappropriate to follow their approach or that this should only be done in some modified form.

This brochure cannot provide an answer to specific problems of this kind. Rather it seeks to shed light on the considerations that inform the interpretation and application of Convention provisions by the Court – its doctrines and methodology – so that it is possible to work out how to resolve such problems where there is no case with absolutely identical facts which can be applicable.

This brochure has grouped the various doctrines and methodology employed by the Court for the interpretation of the Convention into a number of broad themes: (1) The Role of the Court; (2) Issues relating to the Text; (3) Law as the basis for limiting rights and freedoms; (4) The Nature of the Rights and Duties; (5) The Approach to Interpretation; (6) A Matter of Balance; and (7) Issues of Application.

This grouping is done to assist understanding of the Court's doctrines and methodology. However, it should be kept in mind that the different elements in these themes are generally not entirely self-contained. Instead, they often overlap and interact with each other. An appreciation of their interconnections is essential to working out how the Convention rights and freedoms should be applied in a given situation.

The different elements in the themes are illustrated through short extracts taken from the case law that highlight the approach of the Court. These extracts come from a wide range of cases dealing with many of the rights and freedoms in the Convention, mainly judgments of the Court's Grand Chamber ("[GC]") or the former Plenary Court ("[P]") but also some Chamber judgments and a few admissibility decisions ("(dec.)"). However, the extracts do not focus on the actual finding of the Court in the cases concerned as the aim is only to show key aspects of its reasoning process.

The extracts are abridged as there is no cross-referencing to other paragraphs and, with very limited exceptions, no mention of other cases cited by the Court. This abridgement is intended to make the reasoning clearer and more digestible. The omissions are indicated by introducing (...) into the extracts concerned.

Where there is a need to follow up in greater detail what the Court said on a particular point, the full judgment can be accessed through its HUDOC database ([https://hudoc.echr.coe.int/eng#%22documentcollectionid2%22:\[%22GRANDCHAMBER%22,%22CHAMBER%22\]](https://hudoc.echr.coe.int/eng#%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22]))

## I. The Role of the Court

The Court can be seized under Articles 33 and 34 of the Convention for the purpose of adjudicating whether, respectively, there has been a “breach of the provisions of the Convention and the Protocols thereto” and an applicant is “the victim of a violation ... of the rights set forth in the Convention or the Protocols thereto”.

In performing this role, but especially as regards applications under Article 34, three considerations will shape its approach, namely, that it is not a **fourth instance**, the **principle of subsidiarity** and the **margin of appreciation** to be accorded to High Contracting Parties to the European Convention.

The Court has repeatedly emphasised that it is not a further court of appeal from the rulings of national courts, i.e., it is not a **fourth instance** simply examining whether the rulings of those courts was in some respect in error.

Rather, its role is to determine whether a particular ruling has resulted in a violation of a Convention right.

This will limit the extent to which it will make its own assessment of the evidence or the compliance with national law in a case.

47. Having regard to the limits of its international supervision, notably that it is not a court of fourth instance empowered to call into question the findings of the domestic courts as regards the commission of the offence in question, the Court notes that, in the examination of the present case, it must be guided by the relevant factual findings established at the domestic level. Thus, the Court will base its assessment on the fact – established by the domestic courts – that the applicant indeed accepted a bribe from Ms K. in exchange for a promise to assist her in the implementation of a business plan (...). The only major procedural lacuna that was apparently left open at the domestic level – despite the fact of its being at the core of the question of whether or not the applicant was given a fair trial – is the latter’s claim that he was the victim of police entrapment and the domestic courts’ failure to address this allegation. The Court is therefore called on to address this particular procedural defence. ***Tchokhonelidze v. Georgia*, no. 31536/07, 28 June 2018**

47. The Court has said on numerous occasions that it is not called upon to deal with errors of fact or law allegedly committed by the national courts, as it is not a court of fourth instance, and that it is not called upon to reassess the national courts’ findings, provided that they are based on a reasonable assessment of the evidence (...). Thus, issues such as the weight attached by the national courts to given items of evidence or to findings or assessments submitted to them for consideration are not normally for the Court to review (...).

48. Nevertheless, the Court may entertain a fresh assessment of evidence where the decisions reached by the national courts can be regarded as arbitrary or manifestly unreasonable (...). Thus, for instance, in the case of *Dulaurans v. France* (...), the Court found a violation of the right to a fair trial because the sole reason why the French Court of Cassation had arrived at its contested decision rejecting the applicant’s appeal on points of law as inadmissible was the result of “a manifest error of assessment”. In *Anđelković v. Serbia* (...), the Court also found that the domestic court’s decision, which principally had had no legal basis in domestic law and had not established any connection between the facts, the applicable law and the outcome of the proceedings, was arbitrary. In *Bochan (no. 2)* (...), the Supreme Court had so “grossly misinterpreted” a legal text (an earlier judgment of the Court) that its reasoning could not be seen merely as a different reading of that text, but was “grossly arbitrary” or entailing a “denial of justice”. In *Carmel Saliba v. Malta* (...), the Court criticised the domestic courts for having relied on the inconsistent testimony of one witness and having failed to adequately comment on the remaining evidence; combined with other less significant shortcomings of the civil proceedings, this meant that those proceedings had not been fair. ***Dimitar Yordanov v. Bulgaria*, no. 3401/09, 6 September 2018**



53. The Court reiterates that, under Article 19 of the Convention, its duty is to ensure the observance of the engagements undertaken by the Contracting Parties to the Convention (...). It is not competent to rule formally on compliance with domestic law, other international treaties or EU law. The task of interpreting and applying the provisions of EU law falls firstly to the CJEU, in the context of a request for a preliminary ruling, and secondly to the domestic courts in their capacity as courts of the Union, that is to say, when they give effect to a provision of EU law as interpreted by the CJEU (...). It is therefore primarily for the national authorities, notably the courts, to interpret and apply domestic law, if necessary in conformity with EU law, the Court's role being confined to ascertaining whether the effects of such adjudication are compatible with the Convention (...). Furthermore, the Court should not act as a fourth instance and will not therefore question under Article 6 § 1 the judgment of the national courts, unless their findings can be regarded as arbitrary or manifestly unreasonable (...). **Somorjai v. Hungary, no. 60934/13, 28 August 2018**

The principle of **subsidiarity** and the **margin of appreciation** accorded to national authorities are necessarily interlinked.

The former (now formally recognised in Protocol No. 15 amending the Convention) gives primacy to the implementation of Convention rights by national authorities. The latter entails a degree of deference to their assessment as to whether particular measures affecting rights that are not absolute (see **the Nature of the Rights and Duties** below) are consistent with those rights.

The principle of **subsidiarity** will thus often be expressed in connection with the limits to which the Court considers its supervisory role is subject.

174. The object and purpose underlying the Convention, as set out in Article 1, is that the rights and freedoms should be secured by the Contracting State within its jurisdiction. It is fundamental to the machinery of protection established by the Convention that the national systems themselves provide redress for breaches of its provisions, with the Court exercising a supervisory role subject to the principle of subsidiarity (...). Moreover, the domestic courts are part of the "national authorities" to which the Court affords a wide margin of appreciation under Article 15. In the unusual circumstances of the present case, where the highest domestic court has examined the issues relating to the State's derogation and concluded that there was a public emergency threatening the life of the nation but that the measures taken in response were not strictly required by the exigencies of the situation, the Court considers that it would be justified in reaching a contrary conclusion only if satisfied that the national court had misinterpreted or misapplied Article 15 or the Court's jurisprudence under that Article or reached a conclusion which was manifestly unreasonable. **A. and Others v. United Kingdom [GC], no. 3455/05, 19 February 2009**

61. The Court recognises the State's interest in controlling access to a court when it comes to certain categories of staff. However, it is primarily for the Contracting States, in particular the competent national legislature, not the Court, to identify expressly those areas of public service involving the exercise of the discretionary powers intrinsic to State sovereignty where the interests of the individual must give way. The Court exerts its supervisory role subject to the principle of subsidiarity (...). If a domestic system bars access to a court, the Court will verify that the dispute is indeed such as to justify the application of the exception to the guarantees of Article 6. If it does not, then there is no issue and Article 6 § 1 will apply. **Vilho Eskelinen and Others v. Finland [GC], no. 63235/00, 19 April 2007**

115. The Court therefore accepts that in cases where the domestic authorities institute two sets of proceedings but later acknowledge a violation of the *non bis in idem* principle and offer appropriate redress by way, for instance, of terminating or annulling the second set of proceedings and effacing its effects, the Court may regard the applicant as having lost his status as a "victim". Were it otherwise it would be impossible for the national authorities to remedy alleged violations of Article 4 of Protocol No. 7 at the domestic level and the concept of subsidiarity would lose much of its usefulness. **Sergey Zolotukhin v. Russia [GC], no. 14939/03, 10 February 2009**

98. Having regard to the principle of subsidiarity and to the wording of the Court's 2011 judgment, the Court considers that the Supreme Court's

refusal to reopen the proceedings as requested by the applicant was not arbitrary. The Supreme Court's judgment of 21 March 2012 provides a sufficient indication of the grounds on which it was based. Those grounds fall within the domestic authorities' margin of appreciation and did not distort the findings of the Court's judgment. ***Moreira Ferreira v. Portugal (no. 2) [GC], no. 19867/12, 11 July 2017***

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At the same time, this principle does not preclude the Court from underlining to the national authorities their obligation to give effect to the well-established requirements flowing from the Convention.

72. In that connection the Court questions the decision of the national court, in 2007 – years after the *Marckx* and *Mazurek* judgments cited above – to apply the principle of protection of legal certainty differently according to whether it was asserted against a legitimate child or a child “born of adultery”. It also notes that the Court of Cassation did not address the applicant's principal ground of appeal relating to an infringement of the principle of non-discrimination as guaranteed by Article 14 of the Convention. The Court has previously held that where an applicant's pleas relate to the “rights and freedoms” guaranteed by the Convention the courts are required to examine them with particular rigour and care and that this is a corollary of the principle of subsidiarity (...). ***Fabris v. France [GC], no. 16574/08, 7 February 2013***

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The **margin of appreciation** is invoked by the Court to indicate that national authorities are better placed to judge whether a restriction on a right – i.e. one that is not absolute (see **The Role of the Court** above) – is required by competing public and private interests.

60. Nonetheless, the rights bestowed by Article 3 of Protocol No. 1 are not absolute. There is room for implied limitations and Contracting States must be allowed a margin of appreciation in this sphere.

61. There has been much discussion of the breadth of this margin in the present case. The Court reaffirms that the margin in this area is wide (...). There are numerous ways of organising and running electoral systems and a wealth of differences, *inter alia*, in historical development, cultural diversity and political thought within Europe which it is for each Contracting State to mould into their own democratic vision. ***Hirst v. the United Kingdom (no. 2) [GC], no. 74025/01, 6 October 2005***

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The extent of the margin of appreciation can vary according to the absence of any European consensus (see **The Approach to Interpretation** below) on resolving a particular matter, the aim being pursued, the significance that the Court considers should be attached to a particular aspect of a right and the existence of a conflict between two rights protected by the Convention.

78. Accordingly, where a particularly important facet of an individual's existence or identity is at stake (such as the choice to become a genetic parent), the margin of appreciation accorded to a State will in general be restricted.

Where, however, 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 how best to protect it, the margin will be wider. This is particularly so where the case raises complex issues and choices of social strategy: the authorities' direct knowledge of their society and its needs means that they are in principle better placed than the international judge to appreciate what is in the public interest. In such a case, the Court would generally respect the legislature's policy choice unless it is “manifestly without reasonable foundation”. There will also usually be a wide margin accorded if the State is required to strike a balance between competing private and public interests or Convention rights (...). ***Dickson v. United Kingdom [GC], no. 44362/04, 4 December 2007***

44. In view of the essential role played by political parties in the proper functioning of democracy (...), the exceptions set out in Article 11 are, where political parties are concerned, to be construed strictly; only convincing and compelling reasons can justify restrictions on such parties' freedom of association. In determining whether a necessity within the meaning of Article 11 § 2 exists, the Contracting States have only a limited margin of appreciation, which goes hand in hand with rigorous European supervision embracing both the law and the decisions applying it, including those given by independent courts (...). ***Freedom and Democracy Party (ÖZDEP) v. Turkey [GC], no. 23885/94, 8 December 1999***

61. The breadth of such a margin of appreciation varies depending on a number of factors, among which the type of speech at issue is of particular

importance. Whilst there is little scope under Article 10 § 2 of the Convention for restrictions on political speech (...), a wider margin of appreciation is generally available to the Contracting States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion (...). Similarly, States have a broad margin of appreciation in the regulation of speech in commercial matters or advertising (...).

62. In the present case, the Court observes that it can be reasonably argued that the poster campaign in question sought mainly to draw the attention of the public to the ideas and activities of a group with a supposedly religious connotation that was conveying a message claimed to be transmitted by extraterrestrials, referring for this purpose to a website address. The applicant association's website thus refers only incidentally to social or political ideas. The Court takes the view that the type of speech in question is not political because the main aim of the website in question is to draw people to the cause of the applicant association and not to address matters of political debate in Switzerland. Even if the applicant association's speech falls outside the commercial advertising context – there is no inducement to buy a particular product – it is nevertheless closer to commercial speech than to political speech *per se*, as it has a certain proselytising function. The State's margin of appreciation is therefore broader. ***Mouvement raëlien suisse v. Switzerland [GC], no. 16354/06, 13 July 2012***

102. As to the breadth of the margin of appreciation to be afforded, it is recalled that it depends on a number of factors. It is defined by the type of the expression at issue and, in this respect, it is recalled that there is little scope under Article 10 § 2 for restrictions on debates on questions of public interest (...). Such questions include the protection of animals (...). The margin is also narrowed by the strong interest of a democratic society in the press exercising its vital role as a public watchdog (...): freedom of the press and other news media affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. It is incumbent on the press to impart information and ideas on subjects of public interest and the public also has a right to receive them (...).

103. Accordingly, the Court scrupulously examines the proportionality of a restriction of expression by the press in a television programme on a subject of general interest (...). In the present context, it must be noted that, when an NGO draws attention to matters of public interest, it is exercising a public watchdog role of similar importance to that of the press (...).

104. For these reasons, the margin of appreciation to be accorded to the State in the present context is, in principle, a narrow one.

105. The Court will, in light of all of the above factors, assess whether the reasons adduced to justify the prohibition were both "relevant" and "sufficient" and thus whether the interference corresponded to a "pressing social need" and was proportionate to the legitimate aim pursued. In this respect, it is not the Court's task to take the place of the national authorities but it must review, in the light of the case as a whole, those authorities' decisions taken pursuant to their margin of appreciation (...). ***Animal Defenders International v. United Kingdom [GC], no. 48876/08, 22 April 2013***

123. The Court reiterates that when it is called upon to rule on a conflict between two rights that are equally protected by the Convention, it must weigh up the interests at stake (...). In the present case, this balancing exercise concerns the applicant's right to his private and family life, on the one hand, and the right of religious organisations to autonomy, on the other. The State is called upon to guarantee both rights and if the protection of one leads to an interference with the other, to choose adequate means to make this interference proportionate to the aim pursued. In this context, the Court accepts that the State has a wide margin of appreciation (...). ***Fernández Martínez v. Spain [GC], no. 56030/07, 12 June 2014***

## II. Issues Relating to the Text

There are three issues relating to the text of the Convention that are important for its interpretation by the Court. These are that: the terms used in the Convention are to be given an **autonomous meaning**; the **bilingual nature of the text** must be kept in mind; and the need for the application of a particular provision to be made in the light of the Convention **read as a whole**.

The Convention is a text that was written for all of Europe's legal systems. While its design might have been particularly influenced by some of them, the Court treats the concepts used in the Convention as having an **autonomous meaning**.

Thus, the concepts found in the Convention are not necessarily going to be understood in the same way as they would in some or all of the legal systems of the High Contracting Parties.

Furthermore, the way in which one of those legal systems classifies an action or entity will not be decisive when the Court is called upon to determine whether a provision in the Convention is applicable in a particular situation.

63. The concept of "possessions" referred to in the first part of Article 1 of Protocol No. 1 has an autonomous meaning which is not limited to ownership of physical goods and is independent from the formal classification in domestic law: certain other rights and interests constituting assets can also be regarded as "property rights", and thus as "possessions" for the purposes of this provision. The issue that needs to be examined in each case is whether the circumstances of the case, considered as a whole, conferred on the applicant title to a substantive interest protected by Article 1 of Protocol No. 1 (...). **Anheuser-Busch Inc. v. Portugal [GC], no. 73049/01, 11 January 2007**

100. However, the question is not so much whether in French law ACCAs are private associations, public or para-public associations, or mixed associations, but whether they are associations for the purposes of Article 11 of the Convention.

If Contracting States were able, at their discretion, by classifying an association as "public" or "para-administrative", to remove it from the scope of Article 11, that would give them such latitude that it might lead to results incompatible with the object and purpose of the Convention, which is to protect rights that are not theoretical or illusory but practical and effective (...).

Freedom of thought and opinion and freedom of expression, guaranteed by Articles 9 and 10 of the Convention respectively, would thus be of very limited scope if they were not accompanied by a guarantee of being able to share one's beliefs or ideas in community with others, particularly through associations of individuals having the same beliefs, ideas or interests.

The term "association" therefore possesses an autonomous meaning; the classification in national law has only relative value and constitutes no more than a starting-point. ***Chassagnou and Others v. France* [GC], no. 25088/94, 29 April 1999**

216. In the Court's view, if the criminal nature of a measure were to be established, for the purposes of the Convention, purely on the basis that the individual concerned had committed an act characterised as an offence in domestic law and had been found guilty of that offence by a criminal court, this would be inconsistent with the autonomous meaning of "penalty" (...). Without an autonomous concept of penalty, States would be free to impose penalties without classifying them as such, and the individuals concerned would then be deprived of the safeguards under Article 7 § 1. That provision would thus be devoid of any practical effect. It is of crucial importance that the Convention be interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory, and this principle thus applies to Article 7 (...).

217. Consequently, while conviction by the domestic criminal courts may constitute one criterion, among others, for determining whether or not a measure constitutes a "penalty" within the meaning of Article 7, the absence of a conviction does not suffice to rule out the applicability of that provision. ***G.I.E.M. S.r.l. and Others v. Italy* [GC], no. 1828/06, 28 June 2018**

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Moreover, even the common usage of a term found in the Convention will not be seen by the Court as decisive for its application.

60. The Court observes that the word "alcoholics", in its common usage, denotes persons who are addicted to alcohol. On the other hand, in Article 5 § 1 of the Convention this term is found in a context that includes a reference to several other categories of individuals, that is, persons spreading infectious diseases, persons of unsound mind, drug addicts and vagrants. There is a link between all those persons in that they may be deprived of their liberty either in order to be given medical treatment or because of considerations dictated by social policy, or on both medical and social grounds. It is therefore legitimate to conclude from this context that a predominant reason why the Convention allows the persons mentioned in paragraph 1 (e) of Article 5 to be deprived of their liberty is not only that they are dangerous for public safety but also that their own interests may necessitate their detention (...).

61. This *ratio legis* indicates how the term "alcoholics" should be understood in the light of the object and purpose of Article 5 § 1 (e) of the Convention. It indicates that the object and purpose of this provision cannot be interpreted as only allowing the detention of "alcoholics" in the limited sense of persons in a clinical state of "alcoholism". The Court considers that, under Article 5 § 1 (e) of the Convention, persons who are not medically diagnosed as "alcoholics", but whose conduct and behaviour under the influence of alcohol pose a threat to public order or themselves, can be taken into custody for the protection of the public or their own interests, such as their health or personal safety.

62. That does not mean that Article 5 § 1 (e) of the Convention can be interpreted as permitting the detention of an individual merely because of his alcohol intake. However, the Court considers that in the text of Article 5 there is nothing to suggest that this provision prevents that measure from being applied by the State to an individual abusing alcohol, in order to limit the harm caused by alcohol to himself and the public, or to prevent dangerous behaviour after drinking. On this point, the Court observes

that there can be no doubt that the harmful use of alcohol poses a danger to society and that a person who is in a state of intoxication may pose a danger to himself and others, regardless of whether or not he is addicted to alcohol. *Witold Litwa v. Poland*, no. 26629/95, 4 April 2000

The Convention is a **bilingual text**, having been drafted in both English and French. These two texts are equally authentic. Thus, one or other cannot be ignored when trying to determine what its provisions actually require.

6. Another question relating to the interpretation of Article 5 (3) (...) raised in the course of the hearing before the Court is that of the period of detention covered by the requirement of a "reasonable time". While the Commission had expressed the opinion in its Report that the appearance of the accused before the trial court, which in this case took place on 9 November 1964, should be considered as the end of the detention, the length of which was to be appreciated by it, the President of the Commission, recalling that Wemhoff's detention on remand had continued after his appearance before the Regional Court of Berlin and referring also to the dissenting opinion of a minority within the Commission, requested the Court during the oral proceedings to pronounce upon the lawfulness of the detention from 9 November 1961 until 9 November 1964 or a later date.

The representative of the German Government expounded the reasons which led him to maintain the interpretation, accepted in the Commission's Report, that it is the time of appearance before the trial court that marks the end of the period with which Article 5 (3) (...) is concerned.

7. The Court cannot accept this restrictive interpretation. It is true that the English text of the Convention allows such an interpretation. The word "trial", which appears there on two occasions, refers to the whole of the proceedings before the court, not just their beginning; the words "entitled to trial" are not necessarily to be equated with "entitled to be brought to trial", although in the context "pending trial" seems to require release before the trial considered as a whole, that is, before its opening.

But while the English text permits two interpretations the French version, which is of equal authority, allows only one. According to it the obligation to release an accused person within a reasonable time continues until that person has been "jugée", that is, until the day of the judgment that terminates the trial. Moreover, he must be released "pendant la procédure", a very broad expression which indubitably covers both the trial and the investigation.

8. Thus confronted with two versions of a treaty which are equally authentic but not exactly the same, the Court must, following established international law precedents, interpret them in a way that will reconcile them as far as possible. Given that it is a law-making treaty, it is also necessary to seek the interpretation that is most appropriate in order to realise the aim and achieve the object of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the Parties. It is impossible to see why the protection against unduly long detention on remand which Article 5 (...) seeks to ensure for persons suspected of offences should not continue up to delivery of judgment rather than cease at the moment the trial opens. *Wemhoff v. Federal Republic of Germany*, no. 2122/64, 27 June 1968

123. Sub-paragraphs (a) to (f) of Article 5 § 1 of the Convention contain an exhaustive list of permissible grounds for deprivation of liberty, and no deprivation of liberty will be lawful unless it falls within one of those grounds (...). Article 5 § 1 (a) permits "the lawful detention of a person after conviction by a competent court". Having regard to the French text, the word "conviction", for the purposes of Article 5 § 1 (a), has to be understood as signifying both a finding of guilt after it has been established in accordance with the law that there has been an offence (...), and the imposition of a penalty or other measure involving deprivation of liberty (...). *Del Rio Prada v. Spain* [GC], no. 42750/09, 21 October 2013

146. When setting forth the various legitimate aims that may justify interferences with the rights enshrined in the Convention and its Protocols, the various Articles in the English text of the Convention and its Protocols use different formulations. Article 10 § 2 of the Convention, as well as Articles 8 § 2 and 11 § 2, contains the term “prevention of disorder”, whereas Article 6 § 1 of the Convention and Article 1 § 2 of Protocol No. 7 speak of the “interests of public order”, Article 9 § 2 of the Convention uses the formula “protection of public order”, and Article 2 § 3 of Protocol No. 4 refers to the “maintenance of *ordre public*”. While, (...), when using the same term the Convention and its Protocols must in principle be taken to refer to the same concept, differences in the terms used must normally be presumed to denote a variation in meaning. Seen in this context, the latter formulas appear to bear a wider meaning, based on the broad sense of the notion of public order (*ordre public*) used in continental countries (...) – where it is often taken to refer to the body of political, economic and moral principles essential to the maintenance of the social structure, and in some jurisdictions even encompasses human dignity – whereas the former appears to convey a narrower significance, understood in essence in cases of this type as riots or other forms of public disturbance.

147. On the other hand, the French text of Article 10 § 2 of the Convention, as well as those of Articles 8 § 2 and 11 § 2, speak of “*la défense de l’ordre*”, which might be perceived as having a wider meaning than the term “prevention of disorder” in the English text. Yet here also there is a difference in the formulation, for the French text of Article 6 § 1 of the Convention, as well as those of Article 2 § 3 of Protocol No. 4 and Article 1 § 2 of Protocol No. 7, refer to “*ordre public*”. (...)

149. Under Article 31 § 1 of the 1969 Vienna Convention on the Law of Treaties, treaties are to 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”. Under Article 33 § 3 of that Convention, which deals with the interpretation of treaties which, like the Convention, are authenticated in two or more languages, the terms of a treaty are “presumed to have the same meaning in each authentic text”. Article 33 § 4 of that Convention states that when a comparison of the authentic texts discloses a difference of meaning that the application of the other rules of interpretation does not remove, the meaning that must be adopted is the one that “best reconciles the texts, having regard to the object and purpose of the treaty”. These latter rules must be read as elements of the general rule of interpretation laid down in Article 31 § 1 of that Convention (...).

150. The Court has already had occasion to state that these rules – which reflect generally accepted principles of international law (...) that have already acquired the status of customary law (...) – require it to interpret the relevant texts in a way that reconciles them as far as possible and is most appropriate to realise the object and purpose of the Convention (...).

151. Bearing in mind that the context in which the terms in issue were used is a treaty for the effective protection of individual human rights (...), that clauses, such as Article 10 § 2, that permit interference with Convention rights must be interpreted restrictively (...), and that, more generally, exceptions to a general rule cannot be given a broad interpretation (...), the Court finds that, since the words used in the English text appear to be only capable of a narrower meaning, the expressions “the prevention of disorder” and “*la défense de l’ordre*” in the English and French texts of Article 10 § 2 can best be reconciled by being read as having the narrower meaning. ***Perinçek v. Switzerland* [GC], no. 27510/08, 15 October 2015**

Finally, the Court will not interpret particular provisions in isolation as it recognises that the provisions in the Convention – including those in the Protocols adopted subsequently – must be **read as a whole**.

37. In the Government's submission, the detention complained of was justified under sub-paragraph (c) (...) too, as there had been a "reasonable suspicion" that the applicant had "committed an offence" and it had also been "reasonably considered necessary to prevent his committing [one]".

38. The Court points out that sub-paragraph (c) (...) permits deprivation of liberty only in connection with criminal proceedings. This is apparent from its wording, which must be read in conjunction both with sub-paragraph (a) and with paragraph 3 (...), which forms a whole with it (...).

39. The Government submitted, firstly, that there were affinities between criminal proceedings and the preventive procedure provided for in the 1956 Law (...); they based their argument on the fact - denied by Mr Ciulla - that the Milan District Court made the compulsory residence order because of Mafia-type behaviour, which was a criminal offence in itself under Article 416 bis of the Criminal Code. The measure so ordered could be equated with a penalty, and Mr Ciulla's detention from 8 to 25 May 1984 was accordingly in response to a person suspected of an offence. It therefore corresponded to the first of the eventualities referred to in sub-paragraph (c) (...).

In the Court's view, the preventive procedure provided for in the 1956 Law was designed for purposes different from those of criminal proceedings. The compulsory residence order authorised by section 3 may, unlike a conviction and prison sentence, be based on suspicion rather than proof, and the deprivation of liberty under section 6 which sometimes precedes it (as in the instant case) accordingly cannot be equated with pre-trial detention as governed by Article 5 para. 1 (c) (...) of the Convention. ***Ciulla v. Italy*** [P], no. 11152/84, 22 February 1989

48. The Convention must also be read as a whole, and interpreted in such a way as to promote internal consistency and harmony between its various provisions (...). It is noteworthy in this respect that, in its case-law on the applicability of Article 6 § 1, the Court originally held that claims regarding only welfare benefits which formed part of contributory schemes were, because of the similarity to private insurance schemes, sufficiently personal and economic to constitute the subject matter of disputes for "the determination of civil rights" (...). However, in *Salesi v. Italy* (...), Article 6 § 1 was held also to apply to a dispute over entitlement to a non-contributory welfare benefit, the Court emphasising that the applicant had an assertable right, of an individual and economic nature, to social benefits. It thus abandoned the comparison with private insurance schemes and the requirement for a form of "contract" between the individual and the State. In *Schuler-Zgraggen v. Switzerland* (...), the Court held that "... the development in the law ... and the principle of equality of treatment warrant taking the view that today the general rule is that Article 6 § 1 does apply in the field of social insurance, including even welfare assistance".

49. It is in the interests of the coherence of the Convention as a whole that the autonomous concept of "possessions" in Article 1 of Protocol No. 1 should be interpreted in a way which is consistent with the concept of pecuniary rights under Article 6 § 1 of the Convention. It is moreover important to adopt an interpretation of Article 1 of Protocol No. 1 which avoids inequalities of treatment based on distinctions which, nowadays, appear illogical or unsustainable. ***Stec and Others v. United Kingdom*** (dec.) [GC], no. 39692/09, 15 March 2012

136. (...) The two sentences of Article 2 of Protocol No. 1 must therefore be read not only in the light of each other but also, in particular, of Articles 8, 9 and 10 of the Convention which proclaim the right of everyone, including parents and children, "to respect for his private and family life", to "freedom of thought, conscience and religion", and to "freedom ... to receive and impart information and ideas". ***Catan and Others v. Republic of Moldova and Russia*** [GC], no. 43370/04, 19 October 2012



90. As Switzerland has not ratified Protocol No. 1 to the Convention, the applicants rely in this case on Article 9 of the Convention to challenge the refusal by the authorities to exempt their daughters from compulsory mixed swimming lessons. It is therefore the principles arising from this latter provision that the Court is called upon to apply. For the sake of completeness (...), the Court nevertheless considers it useful to summarise the relevant principles applicable under Article 2 of Protocol No. 1, given that the Convention must be read as a whole and that this latter provision, at least with regard to its second sentence, is in principle the *lex specialis* in relation to Article 9 in the area of education and teaching, with which the present case is concerned (...).

91. The first sentence of Article 2 of Protocol No. 1 provides that everyone has the right to education. The right set out in the second sentence of the Article is an adjunct of the right to education set out in the first sentence. Parents are primarily responsible for the education and teaching of their children; it is in the discharge of this duty that parents may require the State to respect their religious and philosophical convictions (...). The second sentence of Article 2 of Protocol No. 1 aims at safeguarding the possibility of pluralism in education, which possibility is essential for the preservation of the “democratic society” as conceived by the Convention. It implies that the State must take care that information included in the curriculum is conveyed in an objective, critical and pluralistic manner. The State is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents’ religious and philosophical convictions (...).

92. The word “respect” in Article 2 of Protocol No. 1 means more than “acknowledge” or “take into account”; in addition to a primarily negative undertaking, it implies some positive obligation on the part of the State (...). Nevertheless, the requirements of the notion of “respect” imply that the States enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals. In the context of Article 2 of Protocol No. 1, that concept implies in particular that this provision cannot be interpreted to mean that parents can require the State to provide a particular form of teaching (...).  
***Osmanoğlu and Kocabaş v. Switzerland*, no. 29086/12, 10 January 2017**

### III. Law as a Basis for Limiting Rights and Freedoms

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Law is a term, together with the adjectives “lawful” and “unlawful”, used in most of the rights and freedoms guaranteed by the Convention and undoubtedly implicit in the remainder.

Law is crucial for the implementation of the Convention and thus the enjoyment of its rights and freedoms.

Moreover, insofar as any limitations can be imposed on these rights and freedoms, these must always have a basis in law. In the absence of such a basis, any such limitation will be considered by the Court to be a violation of the right or freedom concerned, even if the interest being pursued would otherwise be regarded as a justified one.

However, the Court has its own “autonomous” understanding of what is meant by “law”.

This understanding is built upon the concept of “**the rule of law**” found in the preamble to the Convention and certain **quality requirements**.

Furthermore, it is complemented by an emphasis that observance of formality is not enough for compliance with the Convention;

the way in which a rule is used or the purpose underlying its use can also be seen as rendering an act or omission as inadmissible. This approach stems from the notion of **arbitrariness** that is treated by the Court as a limit on the reliance that can be placed on the law, deriving from the rule of law.

For the Court, **the rule of law** requires, in particular:

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- **rules of general application** (i.e., ones applicable to classes of persons and behaviours as opposed to ones applicable just to individuals)

117. Indeed, the Court would emphasise that, in order for national legislation excluding access to a court to have any effect under Article 6 § 1 in a particular case, it should be compatible with the rule of law. This concept, which is expressly mentioned in the Preamble to the Convention and is inherent in all the Articles of the Convention, requires, *inter alia*, that any interference must in principle be based on an instrument of general application (...). ***Baka v. Hungary* [GC], no. 20261/12, 23 June 2016**

- **observance of the rules in practice**

129. The Court reiterates that restrictions on access to a lawyer for “compelling reasons” are permitted only in exceptional circumstances, must be of a temporary nature and must be based on an individual assessment of the particular circumstances of the case (...).

130. However, the Government mentioned no such exceptional circumstances, and it is not the Court’s task to assess of its own motion whether they existed in the present case. It therefore sees no “compelling reason” which could have justified restricting the applicant’s access to a lawyer while he was in police custody: there were no allegations of imminent danger to the lives, physical integrity or security of other persons (...).

Furthermore, domestic legislation on access to a lawyer during detention in police custody did not explicitly lay down any exceptions to the application of that right (...). It would appear that the events in the instant case correspond to a practice on the part of the authorities which has also been severely criticised by the CPT (...).

131. The Court observes in that connection that such a practice on the part of the authorities would be difficult to reconcile with the rule of law, which is expressly mentioned in the Preamble to the Convention and is inherent in all its Articles (...). ***Simeonovi v. Bulgaria* [GC], no. 21980/04, 12 May 2017**

148. In the Court’s view, the time has come to review its case-law in the light of the continuing accumulation of applications before it in which the only, or principal, allegation is that of a failure to ensure a hearing within a reasonable time in breach of Article 6 § 1.

The growing frequency with which violations in this regard are being found has recently led the Court to draw attention to “the important danger” that exists for the rule of law within national legal orders when “excessive delays in the administration of justice” occur “in respect of which litigants have no domestic remedy” (...). ***Kudla v. Poland* [GC], no. 30210/96, 26 October 2000**

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- **effective supervision over the application of the rules.**

59. The Court must also be satisfied that there exist adequate and effective safeguards against abuse, since a system of secret surveillance designed to protect national security entails the risk of undermining or even destroying democracy on the ground of defending it (...).

In order for systems of secret surveillance to be compatible with Article 8 of the Convention, they must contain safeguards established by law which apply to the supervision of the relevant services' activities. Supervision procedures must follow the values of a democratic society as faithfully as possible, in particular the rule of law, which is expressly referred to in the Preamble to the Convention. The rule of law implies, *inter alia*, that interference by the executive authorities with an individual's rights should be subject to effective supervision, which should normally be carried out by the judiciary, at least in the last resort, since judicial control affords the best guarantees of independence, impartiality and a proper procedure (...). **Rotaru v. Romania [GC], no. 28341/95, 4 May 2000**

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Moreover, the Court will not consider a rule to be law for the purpose of the Convention if it does not meet certain **quality requirements**.

87. A second principle is that "the law must be adequately accessible: the citizen must be able to have an indication that is adequate, in the circumstances, of the legal rules applicable to a given case" (...). Clearly, the Prison Act and the Rules met this criterion, but the Orders and Instructions were not published. **Silver v. United Kingdom, no. 5947/72, 25 March 1983**

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The first of these concerns **accessibility**, i.e., the ability to establish the content of the rules

239. It is common ground between the parties that almost all legal provisions governing secret surveillance – including the CCrP, the OSAA, the Communications Act and the majority of the Orders issued by the Ministry of Communications – have been officially published and are accessible to the public. The parties disputed, however, whether the addendums to Order no. 70 by the Ministry of Communications met the requirements of accessibility.

240. The Court observes that the addendums to Order no. 70 have never been published in a generally accessible official publication, as they were considered to be technical in nature (...).

241. The Court accepts that the addendums to Order no. 70 mainly describe the technical requirements for the interception equipment to be installed by communications service providers. At the same time, by requiring that the equipment in issue must ensure that the law-enforcement authorities have direct access to all mobile-telephone communications of all users and must not log or record information about interceptions initiated by the law-enforcement authorities (...), the addendums to Order no. 70 are capable of affecting the users' right to respect for their private life and correspondence. The Court therefore considers that they must be accessible to the public.

242. The publication of the Order of the Ministry of Communications' official magazine *SvyazInform*, distributed through subscription, made it available only to communications specialists rather than to the public at large. At the same time, the Court notes that the text of the Order, with the addendums can be accessed through a privately maintained online legal database, which reproduced it from the publication in *SvyazInform* (...). The Court finds the lack of a generally accessible official publication of Order no. 70 regrettable. However, taking into account the fact that it has been published in an official ministerial magazine, combined with the fact that it can be accessed by the general public through an online legal database, the Court does not find it necessary to pursue further the issue of the accessibility of the domestic law. **Roman Zakharov v. Russia [GC], no. 47143/06, 4 December 2015**

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The second is **foreseeability**, i.e., the ability to establish the consequences flowing from the rule

34. According to the Court's well-established case-law, one of the requirements flowing from the expression "prescribed by law" is foreseeability. Thus, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable

with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice (...). The role of adjudication vested in the courts is precisely to dissipate such interpretational doubts as remain (...). The level of precision required of domestic legislation – which cannot in any case provide for every eventuality – depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed (...). Because of the general nature of constitutional provisions, the level of precision required of them may be lower than for other legislation. (...)

36. As to the wording of these provisions, it is inevitable, in the Court's opinion, that conduct which may entail involvement in political activities cannot be defined with absolute precision. It seems, therefore, acceptable for the 1990 Regulations (...) – as for the 1994 Police Act and the 1995 Regulations (...) – to lay down the conditions for undertaking types of conduct and activities with potential political aspects, such as participation in peaceful assemblies, making statements to the press, participating in radio or television programmes, publications or joining trade unions, associations or other organisations representing and protecting police officers' interests.

37. The Court is satisfied that in the circumstances these provisions were clear enough to enable the applicant to regulate his conduct accordingly. Even accepting that it might not be possible on occasions for police officers to determine with certainty whether a given action would or would not – against the background of the 1990 Regulations – fall foul of Article 40/B § 4 of the Constitution, it was nevertheless open to them to seek advice beforehand from their superior or clarification of the law by means of a court judgment. ***Rekvényi v. Hungary* [GC], no. 25390/94, 20 May 1999**

37. With regard to the first period, the Court considers that Article 18 of the decree on its own did not contain sufficient information to satisfy the condition of foreseeability. The fact that Italy passed a law in 1982 on the right of association – which also ordered the dissolution of the secret P2 lodge (...) and prohibited membership of secret associations – could not have enabled the applicant to foresee that a judge's membership of a legal Masonic lodge could give rise to a disciplinary issue.

38. With regard to the second period, the Court must determine whether Article 18, combined with the 1990 directive (...), supports the proposition that the sanction in question was foreseeable.

39. It notes in that connection that the directive in question was issued in the context of an examination of the specific question of judges' membership of the Freemasons.

Furthermore, the title of the report was clear: "Report on the incompatibility of judicial office with membership of the Freemasons."

However, although the title was unambiguous and the directive was primarily concerned with membership of the Freemasons, the debate held on 22 March 1990 before the National Council of the Judiciary sought to formulate, rather than solve, a problem.

That is demonstrated by the fact that the directive was adopted after the major debate in Italy on the unlawfulness of the secret P2 lodge. Furthermore, the directive merely stated: "Naturally, members of the judiciary are prohibited by law from joining the associations proscribed by Law no. 17 of 1982." With regard to other associations, the directive contained the following passage: "the [National] Council [of the

Judiciary] considers it necessary to suggest to the Minister of Justice that consideration be given to the advisability of proposing restrictions on judges' freedom of association, to include a reference to all associations which – on account of their organisation and ends – entail for their members particularly strong bonds of hierarchy and solidarity" (...).

40. Lastly, the Court considers it important to emphasise that the debate of 22 March 1990 did not take place in the context of disciplinary supervision of judges, as was the case for the directive of 14 July 1993, but in the context of their career progression (...). It is therefore clear from an overall examination of the debate that the National Council of the Judiciary was questioning whether it was advisable for a judge to be a Freemason, but there was no indication in the debate that membership of the Freemasons could constitute a disciplinary offence in every case.

41. Accordingly, the wording of the directive of 22 March 1990 was not sufficiently clear to enable the applicant, who, being a judge, was nonetheless informed and well-versed in the law, to realise – even in the light of the preceding debate and of developments since 1982 – that his membership of a Masonic lodge could lead to sanctions being imposed on him. *Maestri v. Italy* [GC], no. 39748/98, 17 February 2004

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The third is ***precision in the scope of powers***, i.e., the absence of any unfettered discretion allowing arbitrary interference with rights and freedoms

57. The Court notes in this connection that section 8 of Law no. 14/1992 provides that information affecting national security may be gathered, recorded and archived in secret files.

No provision of domestic law, however, lays down any limits on the exercise of those powers. Thus, for instance, the aforesaid Law does not define the kind of information that may be recorded, the categories of people against whom surveillance measures such as gathering and keeping information may be taken, the circumstances in which such measures may be taken or the procedure to be followed. Similarly, the Law does not lay down limits on the age of information held or the length of time for which it may be kept.

Section 45 of the Law empowers the RIS to take over for storage and use the archives that belonged to the former intelligence services operating on Romanian territory and allows inspection of RIS documents with the Director's consent.

The Court notes that this section contains no explicit, detailed provision concerning the persons authorised to consult the files, the nature of the files, the procedure to be followed or the use that may be made of the information thus obtained.

58. It also notes that although section 2 of the Law empowers the relevant authorities to permit interferences necessary to prevent and counteract threats to national security, the ground allowing such interferences is not laid down with sufficient precision.

59. The Court must also be satisfied that there exist adequate and effective safeguards against abuse, since a system of secret surveillance designed to protect national security entails the risk of undermining or even destroying democracy on the ground of defending it (...).

In order for systems of secret surveillance to be compatible with Article 8 of the Convention, they must contain safeguards established by law which apply to the supervision of the relevant services' activities. Supervision procedures must follow the values of a democratic society as faithfully as possible, in particular the rule of law, which is expressly referred to in the Preamble to the Convention. The rule of law implies, *inter alia*, that interference by the executive authorities with an individual's rights should be subject to effective supervision, which should normally be carried out by the judiciary, at least in the last resort, since judicial control affords the best guarantees of independence, impartiality and a proper procedure (...).

60. In the instant case the Court notes that the Romanian system for gathering and archiving information does not provide such safeguards, no supervision procedure being provided by Law no. 14/1992, whether while the measure ordered is in force or afterwards.

61. That being so, the Court considers that domestic law does not indicate with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities.

62. The Court concludes that the holding and use by the RIS of information on the applicant's private life were not "in accordance with the law", a fact that suffices to constitute a violation of Article 8 (...). **Rotaru v. Romania [GC], no. 28341/95, 4 May 2000**

However, the Court's concern about the arbitrary exercise of power is not limited to the conferment in laws of unfettered discretions.

It has also elaborated at some length the other factors that can lead it to regard an act or omission that might be formally lawful as nonetheless tainted by **arbitrariness**.

145. (...) One of the fundamental components of European public order is the principle of the rule of law, and arbitrariness constitutes the negation of that principle. Even in the context of interpreting and applying domestic law, where the Court leaves the national authorities very wide discretion, it always does so, expressly or implicitly, subject to a prohibition of arbitrariness. **Al-Dulimi and Montana Management Inc. v. Switzerland [GC], no. 5809/08, 21 June 2016**

67. It is well established in the Court's case-law under the sub-paragraphs of Article 5 § 1 that any deprivation of liberty must, in addition to falling within one of the exceptions set out in sub-paragraphs (a) to (f), be "lawful". (...) Compliance with national law is not, however, sufficient: Article 5 § 1 requires in addition that any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness (...). It is a fundamental principle that no detention which is arbitrary can be compatible with Article 5 § 1 and the notion of "arbitrariness" in Article 5 § 1 extends beyond lack of conformity with national law, so that a deprivation of liberty may be lawful in terms of domestic law but still arbitrary and thus contrary to the Convention.

69. One general principle established in the case-law is that detention will be "arbitrary" where, despite complying with the letter of national law, there has been an element of bad faith or deception on the part of the authorities (...). The condition that there be no arbitrariness further demands that both the order to detain and the execution of the detention must genuinely conform with the purpose of the restrictions permitted by the relevant sub-paragraph of Article 5 § 1 (...). There must in addition be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention (...).

70. The notion of arbitrariness in the contexts of sub-paragraphs (b), (d) and (e) also includes an assessment whether detention was necessary to achieve the stated aim. The detention of an individual is such a serious measure that it is justified only as a last resort where other, less severe measures have been considered and found to be insufficient to safeguard the individual or public interest which might require that the person concerned be detained (...). The principle of proportionality further dictates that where detention is to secure the fulfilment of an obligation provided by law, a balance must be struck between the importance in a democratic society of securing the immediate fulfilment of the obligation in question, and the importance of the right to liberty (...). **Saadi v. the United Kingdom [GC], no. 13229/03, 29 January 2008**

92. Finally, in the context of sub-paragraph (c) of Article 5 § 1, the reasoning of the decision ordering a person's detention is a relevant factor in determining whether the detention must be deemed arbitrary. In respect of the first limb of sub-paragraph (c) the Court has found that the absence of any grounds in the judicial authorities' decisions authorising detention for a prolonged period of time was incompatible with the principle of

protection from arbitrariness enshrined in Article 5 § 1 (...). Conversely, it has found that an applicant's detention on remand could not be said to have been arbitrary if the domestic court gave certain grounds justifying the continued detention, unless the reasons given were extremely laconic and did not refer to any legal provision which would have permitted the applicant's detention (...). ***S., V. and A. v. Denmark* [G], no. 35553/12, 22 October 2018**

Although the concern about arbitrary use of powers given by the law has been particularly in the context of interference with the right to liberty and security of the person under Article 5, it is clear that the approach is also relevant to action taken that affects other rights and freedoms.

86. The Court further notes that neither the third warning of the Ministry of Justice, in which the above allegations were made, nor the Ministry's submissions to the domestic courts in connection with its request to dissolve the Association contained any specific evidence proving these allegations. Moreover, the allegations themselves were extremely vague, briefly worded and offered little insight into the details of the alleged illegal activities.

87. The domestic courts accepted the above allegations as true, without any independent judicial inquiry and without examining any direct evidence of the misconduct alleged. The Yasamal District Court had regard only to the content of the Ministry's third warning letter, heard evidence from the head of the Ministry's Department of State Registration of Legal Entities (who merely reiterated the content of the third warning letter), and examined an internal inspection report of a Ministry of Justice official, which mentioned, in very brief terms, that the Association's branch in the Tovuz region engaged in some illegal activities (...).

88. However, neither the submissions of the Ministry of Justice officials nor the Yasamal District Court's judgment itself ever mentioned who specifically (that is, which person affiliated to the Association) had attempted to unlawfully collect money in the guise of membership fees. It was never mentioned when exactly these attempts were made, and from which specific State organ or commercial organisation the money was unlawfully collected. No direct victims or other witnesses of this misconduct were examined in court, no written complaints were examined, and no other direct evidence was produced. Likewise, no evidence was produced or examined as to when exactly, by which directly responsible individuals, and in which specific organisations the alleged "unlawful inspections" had been carried out. Lastly, there was no explanation at all as to what was specifically meant by "other illegal acts interfering with the rights of entrepreneurs".

89. Put simply, the fact of the Association's alleged engagement "in activities prohibited by law" was unproven. In such circumstances, the domestic courts' decision to dissolve the Association on this ground is, in the Court's view, nothing short of arbitrary. ***Tebieti Mühafize Cemiyeti and Israfilov v. Azerbaijan*, no. 37083/03, 8 October 2009**





## IV. The Nature of the Rights and Duties

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In understanding the nature of the rights and duties under the Convention, it is important to note that they fall into four broad categories.

In addition, some are subject to implied limitations. There are also implied rights and duties, both negative and positive obligations, as well as some procedural obligations. Some rights may be derogated from in an emergency but there is no reciprocity in the application of rights and freedoms. The Convention does not have retroactive effect but events occurring before its entry into force can sometimes be relevant for the application of its provisions.

There are four categories into which the rights and freedoms set out in the text of the Convention can be broadly grouped:

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- those which are **absolute**

127. Article 3, which prohibits in absolute terms torture and inhuman or degrading treatment or punishment, enshrines one of the fundamental values of democratic societies. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15, even in the event of a public emergency threatening the life of the nation (...). As the prohibition of torture and of inhuman or degrading treatment or punishment is absolute, irrespective of the victim's conduct (...), the nature of the offence allegedly committed by the applicant is therefore irrelevant for the purposes of Article 3 (...). ***Saadi v. Italy* [GC], no. 37201/06, 28 February 2008**

- those which are subject to a range of more broadly stated **competing interests**, such as national security, the prevention of crime and the protection of health or morals (e.g., Articles 8-11)

55. The Court considers that these principles apply regardless of whether an alien entered the host country as an adult or at a very young age, or was perhaps even born there. In this context the Court refers to Recommendation 1504 (2001) on the nonexpulsion of long-term immigrants, in which the Parliamentary Assembly of the Council of Europe recommended that the Committee of Ministers invite member States, *inter alia*, to guarantee that long-term migrants who were born or raised in the host country cannot be expelled under any circumstances (...). While a number of Contracting States have enacted legislation or adopted policy rules to the effect that long-term immigrants who were born in those States or who arrived there during early childhood cannot be expelled on the basis of their criminal record (...), such an absolute right not to be expelled cannot, however, be derived from Article 8 of the Convention, couched, as paragraph 2 of that provision is, in terms which clearly allow for exceptions to be made to the general rights guaranteed in the first paragraph. **Üner v. the Netherlands [GC], no. 46410/99, 18 October 2006**

- those which are subject to very **specific limitations** (e.g., Articles 2, 4, 5 and 6); and

80. It follows from this recapitulation of the case-law that in the circumstances examined to date by the Convention institutions – that is, in the various laws on abortion – the unborn child is not regarded as a “person” directly protected by Article 2 of the Convention and that if the unborn do have a “right” to “life”, it is implicitly limited by the mother’s rights and interests. The Convention institutions have not, however, ruled out the possibility that in certain circumstances safeguards may be extended to the unborn child. That is what appears to have been contemplated by the Commission in considering that “Article 8 § 1 cannot be interpreted as meaning that pregnancy and its termination are, as a principle, solely a matter of the private life of the mother” (...) and by the Court in the above-mentioned *Boso* decision. It is also clear from an examination of these cases that the issue has always been determined by weighing up various, and sometimes conflicting, rights or freedoms claimed by a woman, a mother or a father in relation to one another or *vis-à-vis* an unborn child. **Vo v. France [GC], no. 53924/00, 8 July 2004**

- those for which **no limitations are specified** (e.g., Article 12 and 13).

The Court has recognised that the latter two categories may be subject to some **implied limitations**

37. Since the impediment to access to the courts, mentioned in paragraph 26 above, affected a right guaranteed by Article 6 para. 1 (...), it remains to determine whether it was nonetheless justifiable by virtue of some legitimate limitation on the enjoyment or exercise of that right.

38. The Court considers, accepting the views of the Commission and the alternative submission of the Government, that the right of access to the courts is not absolute. As this is a right which the Convention sets forth (see Articles 13, 14, 17 and 25) (...) without, in the narrower sense of the term, defining, there is room, apart from the bounds delimiting the very content of any right, for limitations permitted by implication.

The first sentence of Article 2 of the Protocol (...) of 20 March 1952, which is limited to providing that “no person shall be denied the right to education”, raises a comparable problem. In its judgment of 23 July 1968 on the merits of the case relating to certain aspects of the laws on the use of languages in education in Belgium, the Court ruled that:

“The right to education ... by its very nature calls for regulation by the State, regulation which may vary in time and place according to the needs and resources of the community and of individuals. It goes without saying that such regulation must never injure the substance of the right to education nor conflict with other rights enshrined in the Convention.” (Series A no. 6, p. 32, para. 5).

These considerations are all the more valid in regard to a right which, unlike the right to education, is not mentioned in express terms. **Golder v. United Kingdom [P], no. 4451/70, 21 February 1975**

61. However, as the applicants recognised (...), the entitlement to disclosure of relevant evidence is not an absolute. In any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime, which must be weighed against the rights of the accused (...). In some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest. However, only such measures restricting the rights of the defence which are strictly necessary are permissible under Article 6 § 1 (...). Moreover, in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities (...). **Rowe and Davis v. United Kingdom [GC], no. 28901/95, 16 February 2000**

32. The Court (...) observes that where a violation of the Convention is alleged to have been committed by the highest court or authority, the application of Article 13 is subject to an implied limitation since it cannot be construed as requiring that special bodies be set up for the purpose of examining complaints against decisions by the highest courts (...). **StoyanovaTsakova v. Bulgaria, no. 17967/03, 25 June 2009**

75. The Court recalls that Article 3 of Protocol No. 1 implies subjective rights to vote and to stand for election. As important as those rights are, they are not, however, absolute. Since Article 3 recognises them without setting them forth in express terms, let alone defining them, there is room for implied limitations. In their internal legal orders the Contracting States make the rights to vote and to stand for election subject to conditions which are not in principle precluded under Article 3. The Court considers that the restrictions imposed on the applicants' right to contest seats at elections must be seen in the context of the aim pursued by the legislature in enacting the Regulations, namely, to secure their political impartiality. That aim must be considered legitimate for the purposes of restricting the exercise of the applicants' subjective right to stand for election under Article 3 of Protocol No. 1; nor can it be maintained that the restrictions limit the very essence of their rights under that provision having regard to the fact that they only operate for as long as the applicants occupy politically restricted posts; furthermore, any of the applicants wishing to run for elected office is at liberty to resign from his post. **Ahmed and Others v. United Kingdom, no. 22954/93, 2 September 1998**

Equally, the Court has also recognised that there may be **implied rights** in addition to those expressly stated in a particular provision of the Convention.

36. Taking all the preceding considerations together, it follows that the right of access constitutes an element which is inherent in the right stated by Article 6 para. 1 (...). This is not an extensive interpretation forcing new obligations on the Contracting States: it is based on the very terms of the first sentence of Article 6 para. 1 (...) read in its context and having regard to the object and purpose of the Convention, a lawmaking treaty (...), and to general principles of law.

The Court thus reaches the conclusion, without needing to resort to "supplementary means of interpretation" as envisaged at Article 32 of the Vienna Convention, that Article 6 para. 1 (...) secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way the Article embodies the "right to a court", of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect only. To this are added the guarantees laid down by Article 6 para. 1 (...) as regards both the organisation and composition of the court, and the conduct of the proceedings. In sum, the whole makes up the right to a fair hearing. The Court has no need to ascertain in the present case whether and to what extent Article 6 para. 1 (...) further requires a decision on the very substance of the dispute (English "determination", French "décidera"). **Golder v. United Kingdom [P], no. 4451/70, 21 February 1975**

68. The Court recalls that, although not specifically mentioned in Article 6 of the Convention (...), the right to silence and the right not to incriminate oneself are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6 (...). Their rationale lies, inter alia, in the protection of the accused against improper compulsion by the authorities thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6 (...). The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. In this sense the right is closely linked to the presumption of innocence contained in Article 6 para. 2 of the Convention (...). ***Saunders v. United Kingdom* [GC], no. 19187/91, 17 December 1996**

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Furthermore, it may conclude that a right may give rise to an **implied duty**.

Moreover, the Court recognises that the nature of the rights and freedoms guaranteed by the European Convention can go beyond the **negative obligation** not to interfere with their exercise. In addition, rights and freedoms may entail **positive obligations** for the State (e.g., to provide protection against inhuman or degrading treatment by private individuals).

50. An examination of the Court's case-law indicates that Article 3 has been most commonly applied in contexts in which the risk to the individual of being subjected to any of the proscribed forms of treatment emanated from intentionally inflicted acts of State agents or public authorities (...). It may be described in general terms as imposing a primarily negative obligation on States to refrain from inflicting serious harm on persons within their jurisdiction. However, in light of the fundamental importance of Article 3, the Court has reserved to itself sufficient flexibility to address the application of that Article in other situations that might arise (...).

51. In particular, the Court has held that the obligation on the High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken in conjunction with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman and degrading treatment or punishment, including such treatment administered by private individuals (...). A positive obligation on the State to provide protection against inhuman or degrading treatment has been found to arise in a number of cases: (...) see, for example, *A. v. the United Kingdom* (...) where the child applicant had been caned by his stepfather, and *Z and Others v. the United Kingdom* (...), where four child applicants were severely abused and neglected by their parents. Article 3 also imposes requirements on State authorities to protect the health of persons deprived of liberty (...). ***Pretty v. United Kingdom* [GC], no. 2346/02, 29 April 2002**

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There are various considerations relevant to finding that **positive obligations** exist.

66. The notion of "respect" is not clear cut, especially as far as positive obligations are concerned: having regard to the diversity of the practices followed and the situations obtaining in the Contracting States, the notion's requirements will vary considerably from case to case (...). Nonetheless, certain factors have been considered relevant for the assessment of the content of those positive obligations on States. Some of them relate to the applicant. They concern the importance of the interest at stake and whether "fundamental values" or "essential aspects" of private life are in issue (...), or the impact on an applicant of a discordance between the social reality and the law, the coherence of the administrative and legal practices within the domestic system being regarded as an important factor in the assessment carried out under Article 8 (...). Other factors relate to the impact of the alleged positive obligation at stake on the State concerned. The question here is whether the alleged obligation is narrow and precise or broad and indeterminate (...), or about the extent of any burden the obligation would impose on the State (...). ***Hämäläinen v. Finland* [GC], no. 37359/09, 16 July 2014**

Moreover, they can arise in a wide variety of situations, including those where persons are at risk of harm, property may be damaged and pluralism needs to be safeguarded.

148. As to the content of the positive obligation to protect, the Court observes that effective measures of deterrence against grave acts, such as those in issue in the present case, can only be achieved by the existence of effective criminal-law provisions backed up by law-enforcement machinery (...). Importantly, the nature of child sexual abuse is such, particularly when the abuser is in a position of authority over the child, that the existence of useful detection and reporting mechanisms are fundamental to the effective implementation of the relevant criminal laws (...). ***O’Keeffe v. Ireland* [GC], no. 35810/09, 28 January 2014**

107. (...) the Court would emphasise that no Article 3 issue could arise if, for instance, a life prisoner had the right under domestic law to be considered for release but was refused on the ground that he or she continued to pose a danger to society. This is because States have a duty under the Convention to take measures for the protection of the public from violent crime and the Convention does not prohibit States from subjecting a person convicted of a serious crime to an indeterminate sentence allowing for the offender’s continued detention where necessary for the protection of the public (...). Indeed, preventing a criminal from re-offending is one of the “essential functions” of a prison sentence (...). This is particularly so for those convicted of murder or other serious offences against the person. The mere fact that such prisoners may have already served a long period of imprisonment does not weaken the State’s positive obligation to protect the public; States may fulfil that obligation by continuing to detain such life sentenced prisoners for as long as they remain dangerous (...). ***Vinter and Others v. United Kingdom* [GC], no. 66069/09, 9 July 2013**

63. The Court has previously found that Article 8 imposes on States a positive obligation to secure to their citizens the right to effective respect for their physical and psychological integrity (...). In addition, this obligation may involve the adoption of specific measures, including the provision of an effective and accessible means of protecting the right to respect for private life (...). Such measures may include both the provision of a regulatory framework of adjudicatory and enforcement machinery protecting individuals’ rights and the implementation, where appropriate, of these measures in different contexts (...). ***Hämäläinen v. Finland* [GC], no. 37359/09, 16 July 2014**

143. The essential object of Article 1 of Protocol No. 1 is to protect a person against unjustified interference by the State with the peaceful enjoyment of his or her possessions.

However, by virtue of Article 1 of the Convention, each Contracting Party “shall secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention”. The discharge of this general duty may entail positive obligations inherent in ensuring the effective exercise of the rights guaranteed by the Convention. In the context of Article 1 of Protocol No. 1, those positive obligations may require the State to take the measures necessary to protect the right of property (...). ***Broniowski v. Poland* [GC], no. 31443/96, 22 June 2004**

61. The word “respect” in Article 2 of Protocol No. 1 means more than “acknowledge” or “take into account”; in addition to a primarily negative undertaking, it implies some positive obligation on the part of the State (...).

Nevertheless, the requirements of the notion of “respect”, which appears also in Article 8 of the Convention, vary considerably from case to case, given the diversity of the practices followed and the situations obtaining in the Contracting States. As a result, the Contracting States enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals. In the context of Article 2 of Protocol No. 1 that concept implies in particular that this

provision cannot be interpreted to mean that parents can require the State to provide a particular form of teaching (...).

62. (...) the setting and planning of the curriculum fall within the competence of the Contracting States. In principle it is not for the Court to rule on such questions, as the solutions may legitimately vary according to the country and the era.

In particular, the second sentence of Article 2 of Protocol No. 1 does not prevent States from imparting through teaching or education information or knowledge of a directly or indirectly religious or philosophical kind. It does not even permit parents to object to the integration of such teaching or education in the school curriculum.

On the other hand, as its aim is to safeguard the possibility of pluralism in education, it requires the State, in exercising its functions with regard to education and teaching, to take care that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner, enabling pupils to develop a critical mind particularly with regard to religion in a calm atmosphere free of any proselytism. The State is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions. That is the limit that the States must not exceed (...). *Lautsi and Others v. Italy* [GC], no. 30814/06, 18 March 2011

In addition, the Court has found that there are certain **procedural obligations** contained within particular rights and freedoms, namely, as regards the effective investigation of complaints as to alleged violations of them.

86. In view of the above, the Court considers that the applicant's first category of complaints concerns his procedural rights and/or the procedural obligations incumbent on State authorities in the context of negligent actions resulting in very serious physical or life-threatening consequences. Moreover, given the specific context of the case, the Court considers that such procedural rights and corresponding State obligations may, under certain circumstances, be enshrined not only in Articles 3, 6 § 1 and 13, to which the applicant referred, but also in Articles 2 and 8 of the Convention. Although he did not expressly invoke the latter two provisions, the Court, having regard to the factual basis of his complaints (...), finds it appropriate to examine the present case also from the angle of Articles 2 and 8.

87. Consequently, the Court takes the view that it should examine the applicant's complaints relating to the conduct of the criminal investigation from the angle of the procedural rights and corresponding obligations enshrined in each of the above-mentioned provisions. It also considers that it should take the opportunity offered by the present case to elucidate the scope of the procedural guarantees embodied in each of these provisions in the area under review.

88. With regard to the applicant's second category of complaints, the Court notes that this category concerns his allegations of having been subjected to humiliation and ill-treatment by the authorities involved in the investigation.

89. Given the specific nature of the applicant's allegation in this regard, the Court is unable to accept the Government's argument that this complaint could be sufficiently addressed by examining it in the above-mentioned context of the respondent State's procedural obligations (...). Consequently, the Court takes the view that the complaint relating to the applicant's treatment by the authorities involved in the investigation warrants a separate examination, to be carried out under the substantive limb of Article 3 of the Convention.

90. In the light of the foregoing considerations, the Court will proceed to examine, first, the applicant's complaints relating to the conduct of the criminal investigation, and subsequently the complaint about his treatment by the authorities involved in the investigation. *Nicolae Virgiliu Tănase v. Romania* [GC], no. 41720/13, 25 June 2019

56. The Court has previously examined complaints raising issues of police incitement under the substantive and procedural limbs of Article 6 (...). Under the substantive limb, the Court has assessed whether the investigative activity of the police officers went beyond that of undercover agents (...), in other words, whether the offence would have been committed without the authorities' intervention. In this regard the Court has in previous cases examined, *inter alia*, whether the investigating authorities had good reasons to suspect the applicant of prior involvement in particular unlawful activities (...), at what stage of the offence the undercover agents carried out the undercover operation (...), and whether the conduct of the undercover agent was essentially passive (...).

57. Under the procedural limb, the Court has assessed the procedure whereby a plea of incitement was determined in the particular case by the domestic courts, to ensure that the rights of the defence were adequately protected (...). The Court has also noted that where the reliability of evidence is in dispute the existence of fair procedures to examine the admissibility of the evidence takes on an even greater importance (...). In this regard the Court has emphasised that it falls to the prosecution to prove that there was no incitement, provided that the defendant's allegations are not wholly improbable. If an arguable claim in this respect has been raised, the Court must ascertain whether the applicant was able to argue the incitement plea effectively and whether the domestic courts took the necessary steps to establish that no police incitement had taken place (...). For the national courts this entails establishing, *inter alia*, the reasons why the operation was mounted, the extent of the police's involvement in the offence and the nature of the activities to which the applicant was subjected (...). ***Baltiņš v. Latvia*, no. 25282/07, 8 January 2013**

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The Court has to take account of the possibility that many rights and freedoms can be subject to additional limitations where a **derogation** has been submitted pursuant to Article 15 of the Convention in response to a state of emergency.

However, there are also certain rights that are **non-derogable**, namely, the right to life, the prohibition of torture and inhuman and degrading treatment or punishment, the prohibition of slavery and servitude and of punishment without law, the abolition of the death penalty and the right not to be tried or punished twice.

126. The Court is acutely conscious of the difficulties faced by States in protecting their populations from terrorist violence. This makes it all the more important to stress that Article 3 enshrines one of the most fundamental values of democratic societies. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 § 2 notwithstanding the existence of a public emergency threatening the life of the nation. Even in the most difficult of circumstances, such as the fight against terrorism, and irrespective of the conduct of the person concerned, the Convention prohibits in absolute terms torture and inhuman or degrading treatment and punishment (...). ***A. and Others v. United Kingdom* [GC], no. 3455/05, 19 February 2009**

99. The Court emphasises at the outset that Article 5 enshrines a fundamental human right, namely the protection of the individual against arbitrary interference by the State with his or her right to liberty. The text of Article 5 makes it clear that the guarantees it contains apply to "everyone". Sub-paragraphs (a) to (f) of Article 5 § 1 contain an exhaustive list of permissible grounds on which persons may be deprived of their liberty. No deprivation of liberty will be compatible with Article 5 § 1 unless it falls within one of those grounds or unless it is provided for by a lawful derogation under Article 15 of the Convention, which allows for a State "in time of war or other public emergency threatening the life of the nation" to take measures derogating from its obligations under Article 5 "to the extent strictly required by the exigencies of the situation" (...). ***Al-Jedda v. United Kingdom* [GC], no. 27021/08, 7 July 2011**

202. The Court reiterates that the guarantee enshrined in Article 7, which is an essential element of the rule of law, occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is permissible under Article 15 of the Convention in time of war or other public emergency. ***Ilseher v. Germany* [GC], no. 10211/12, 4 December 2018**



73. The Court reiterates that it falls to each Contracting State, with its responsibility for “the life of [its] nation”, to determine whether that life is threatened by a “public emergency” and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle better placed than the international judge to decide both on the presence of such an emergency and on the nature and scope of the derogations necessary to avert it. Accordingly, in this matter a wide margin of appreciation should be left to the national authorities.

Nonetheless, Contracting Parties do not enjoy an unlimited discretion. It is for the Court to rule whether, *inter alia*, the States have gone beyond the “extent strictly required by the exigencies” of the crisis. The domestic margin of appreciation is thus accompanied by a European supervision. In exercising this supervision, the Court must give appropriate weight to such relevant factors as the nature of the rights affected by the derogation and the circumstances leading to, and the duration of, the emergency situation (...).

174. The object and purpose underlying the Convention, as set out in Article 1, is that the rights and freedoms should be secured by the Contracting State within its jurisdiction. It is fundamental to the machinery of protection established by the Convention that the national systems themselves provide redress for breaches of its provisions, with the Court exercising a supervisory role subject to the principle of subsidiarity (...). Moreover, the domestic courts are part of the “national authorities” to which the Court affords a wide margin of appreciation under Article 15. In the unusual circumstances of the present case, where the highest domestic court has examined the issues relating to the State’s derogation and concluded that there was a public emergency threatening the life of the nation but that the measures taken in response were not strictly required by the exigencies of the situation, the Court considers that it would be justified in reaching a contrary conclusion only if satisfied that the national court had misinterpreted or misapplied Article 15 or the Court’s jurisprudence under that Article or reached a conclusion which was manifestly unreasonable. **A. and Others v. United Kingdom [GC], no. 3455/05, 19 February 2009**

88. Finally, the Court must address the Government’s argument that by ordering the applicant’s release they would have breached their positive obligations under Article 3 of the Convention to protect potential victims from further violent sexual offences the applicant would most likely commit. The Court acknowledges that they thus acted in order to protect the public from physical and psychological harm amounting to inhuman or degrading treatment which might be caused by the applicant. However, the Court cannot but reiterate that the Convention neither obliges nor authorises State authorities to protect individuals from criminal acts of a person by such measures which are in breach of that person’s right under Article 7 § 1 not to have imposed upon him a heavier penalty than the one applicable at the time he committed his criminal offence. No derogation is allowed from that provision even in time of public emergency threatening the life of the nation (Article 15 §§ 1 and 2 of the Convention) (...). **K. v. Germany, no. 61827/09, 7 June 2012**

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The Court has established that the rights and freedoms are not subject to any principle of **reciprocity**.

239. (...) Unlike international treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a “collective enforcement”. By virtue of Article 24 (...), the Convention allows Contracting States to require the observance of those obligations without having to justify an interest deriving, for example, from the fact that a measure they complain of has prejudiced one of their own nationals. **Ireland v. United Kingdom [P], no. 5310/71, 18 January 1978**

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Furthermore, the Convention has **no retrospective effect** so that the rights and freedoms in it cannot generally be invoked with respect to acts or situations occurring before it was ratified.

38. (...) the Court reiterates that the Convention imposes no specific obligation on the Contracting States to provide redress for wrongs or damage caused prior to their ratification of the Convention. ***Kopecký v. Slovakia* [GC], no. 44912/98, 28 September 2004**

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However, they will apply to:

- a continuation of a situation that existed before the entry into force of the Convention and Protocols in respect of the Party concerned

195. (...) the Court considered that the applicant's lack of access to his alleged property, home and the graves of his relatives in Gulistan had to be considered as a continuing situation which the Court had competence to examine since 15 April 2002. However, (...), it still has to determine whether or not the house was destroyed prior to the entry into force of the Convention and, consequently, whether there is a factual basis for the Government's objection *ratione temporis* in respect of the house. Should the house have been destroyed before the entry into force of the Convention, this would indeed constitute an instantaneous act falling outside the Court's competence *ratione temporis* (...)

197. Having regard to the evidence before the Court, (...) the Court observes that Gulistan has been deserted since mid-1992 and most buildings in the village are dilapidated, meaning that the outer and inner walls are still standing while roofs have fallen in. In the absence of conclusive evidence that the applicant's house was completely destroyed before the entry into force of the Convention, the Court proceeds from the assumption that it still exists, though in a badly damaged state. In conclusion, there is no factual basis for the Government's objection *ratione temporis*. (...) ***Sargsyan v. Azerbaijan* [GC], no. 40167/06, 16 June 2015**

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- a sanction imposed after the date of entry into force in respect of conduct before that date

42. The Court points out that Turkey accepted its jurisdiction only in respect of facts and events subsequent to 22 January 1990, when it deposited its declaration ... In the instant case, however, the Court considers, like the Delegate of the Commission, that the principal fact lay not in Mr Zana's statement to the journalists but in the Diyarbakir National Security Court's judgment of 26 March 1991, whereby the applicant was sentenced to twelve months' imprisonment for having "defended an act punishable by law as a serious crime" under Turkish legislation ..., a judgment that was upheld by the Court of Cassation on 26 June 1991 ... It was that conviction and sentence, subsequent to Turkey's recognition of the Court's compulsory jurisdiction, which constituted the "interference" within the meaning of Article 10 of the Convention and whose justification under that Article the Court must determine. This preliminary objection must accordingly be dismissed. ***Zana v. Turkey* [GC], no. 18954/91, 25 November 1997**

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- can be understood only by taking account of facts occurring prior to the date of entry into force (including the reasonableness of the length of proceedings or pre-trial detention)

96. In the present case, the Court notes that the applicant was held in the Magadan detention facility IZ47/1 from 29 June 1995 to 20 October 1999, and from 9 December 1999 to 26 June 2000. It recalls that, according to the generally recognised principles of international law, the Convention is binding on the Contracting States only in respect of facts occurring after its entry into force. The Convention entered into force in respect of Russia on 5 May 1998. However, in assessing the effect on the applicant of his conditions of detention, which were generally the same throughout his period of detention, both on remand and following his conviction, the Court may also have regard to the overall period during which he was detained, including the period prior to 5 May 1998. ***Kalashnikov v. Russia*, no. 47095/99, 15 July 2002**

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*- relates to the non-fulfilment - after the date of entry into force - of the procedural obligation to account for a person's death (if unlawful or suspicious) or disappearance where that death or disappearance occurred before that date*

141. The criteria laid down in (...) the *Šilih* judgment (...) can be summarised in the following manner. Firstly, where the death occurred before the critical date, the Court's temporal jurisdiction will extend only to the procedural acts or omissions in the period subsequent to that date. Secondly, the procedural obligation will come into effect only if there was a "genuine connection" between the death as the triggering event and the entry into force of the Convention. Thirdly, a connection which is not "genuine" may nonetheless be sufficient to establish the Court's jurisdiction if it is needed to ensure that the guarantees and the underlying values of the Convention are protected in a real and effective way. ***Janowiec and Others v. Russia* [GC], no. 55508/07, 21 October 2013** [this judgment gave guidance on the application of these criteria]

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*- involves only the stage of judicial proceedings held after the date of entry into force and not those occurring before that date*

The Court observes that the proceedings in the Yasamal District Court and the Court of Appeal were concluded prior to the Convention's entry into force with respect to Azerbaijan on 15 April 2002. Therefore, the Court finds that the part of the complaint relating to the first-instance and appellate proceedings falls outside the scope of its competence *ratione temporis*.

On the other hand, the Court has competence to examine the part of the complaint relating to the cassation proceedings in the Supreme Court, which were instituted after 15 April 2002 and ended with the final decision of 31 July 2002. ***Kerimov v. Azerbaijan* (dec.), no. 151/03, 28 September 2006**

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*- involves a refusal of compensation when a wrongful conviction was quashed after the date of entry into force*

38. The Court will first determine whether it has temporal jurisdiction to examine the circumstances relating to the applicant's complaint under Article 3 of Protocol No. 7. The Court observes that the aim of this provision is to confer the right to compensation on persons convicted as a result of a miscarriage of justice, where such conviction has been reversed by the domestic courts. Therefore, Article 3 of Protocol No. 7 does not apply before the conviction has been reversed. In the present case, inasmuch as the applicant's conviction was quashed after 1 August 1998, the date of entry into force of Protocol No. 7 in respect of Russia, the conditions for jurisdiction *ratione temporis* are satisfied. ***Matveyev v. Russia*, no. 26601/02, 3 July 2008**

## V. The Approach to Interpretation

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In interpreting the Convention, the Court looks for ordinary meaning of the words in their context and in the light of the object and purpose of a provision while seeking to ensure that its interpretation is practical and effective.

At the same time, it will give a **dynamic interpretation** to provisions, informed by the existence or absence of a **European consensus**. In addition, the Court will have regard to the preparatory work that led to the adoption of the Convention and other international instruments, judgments and rulings. The Court will generally follow its case law but there is no rigid adherence to precedent.

The starting point for the interpretation of the Convention is the **ordinary meaning** of the words used in it

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However, this will not always be straightforward.

119. Thus, in accordance with the Vienna Convention, the Court is required to ascertain the ordinary meaning to be given to the words in their context and in the light of the object and purpose of the provision from which they are drawn (...). *Magyar Helsinki Bizottság v. Hungary* [GC], no. 18030/11, 8 November 2016

172. The Government submitted that there was a logical obstacle to the applicability of Article 4 of Protocol No. 4 in the instant case, namely the fact that the applicants were not on Italian territory at the time of their transfer to Libya so that measure, in the Government's view, could not be considered to be an "expulsion" within the ordinary meaning of the term.

173. The Court does not share the Government's opinion on this point. It notes, firstly, that, while the cases thus far examined have concerned individuals who were already, in various forms, on the territory of the country concerned, the wording of Article 4 of Protocol No. 4 does not in itself pose an obstacle to its extraterritorial application. It must be noted that Article 4 of Protocol No. 4 contains no reference to the notion of

“territory”, whereas the wording of Article 3 of the same Protocol, on the contrary, specifically refers to the territorial scope of the prohibition on the expulsion of nationals. Likewise, Article 1 of Protocol No. 7 explicitly refers to the notion of territory regarding procedural safeguards relating to the expulsion of aliens lawfully resident in the territory of a State. In the Court’s view, that wording cannot be ignored. *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, 23 February 2012

In considering the **object and purpose** of the Convention, the starting point of the Court is its recognition that the primary responsibility for the implementation of the rights and freedoms that it guarantees lies with the High Contracting Parties.

174. The object and purpose underlying the Convention, as set out in Article 1, is that the rights and freedoms should be secured by the Contracting State within its jurisdiction. It is fundamental to the machinery of protection established by the Convention that the national systems themselves provide redress for breaches of its provisions, with the Court exercising a supervisory role subject to the principle of subsidiarity. *A. and Others v. United Kingdom* [GC], no. 3455/05, 19 February 2009

At the same time, in considering the object and purpose of the Convention, the Court has underlined both its role in **protecting human beings**

87. (...) the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective. *Soering v. United Kingdom* [P], no. 14038/88, 7 July 1989

and in **maintaining and promoting democracy**

53. (...) The second sentence of Article 2 (...) implies on the other hand that the State, in fulfilling the functions assumed by it in regard to education and teaching, must take care that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner. The State is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents’ religious and philosophical convictions. That is the limit that must not be exceeded.

Such an interpretation is consistent at one and the same time with the first sentence of Article 2 of the Protocol (...), with Articles 8 to 10 (...) of the Convention and with the general spirit of the Convention itself, an instrument designed to maintain and promote the ideals and values of a democratic society. *Kjeldsen, Busk Madsen and Pedersen*, no. 5095/71, 7 December 1976

The emphasis on rights and freedoms being **practical and effective** is designed to ensure that their **object and purpose** is realised

100. (...) If Contracting States were able, at their discretion, by classifying an association as “public” or “para-administrative”, to remove it from the scope of Article 11, that would give them such latitude that it might lead to results incompatible with the object and purpose of the Convention, which is to protect rights that are not theoretical or illusory but practical and effective (...). *Chassagnou and Others v. France* [GC], no. 25088/94, 29 April 1999

138. Regardless of the concrete circumstances in the present case, the Court reiterates that the very essence of the Convention is respect for human dignity and that the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective. It is therefore of the view that holding a person in a metal cage during a trial constitutes in itself – having regard to its objectively degrading nature which is incompatible with the standards of civilised behaviour that are the hallmark of a democratic society – an affront to human dignity in breach of Article 3. *Svinarenko and Slyadnev v. Russia* [GC], no. 32541/08, 17 July 2014

155. The object and purpose of the Convention, as an instrument for the

protection of human rights, requires that its provisions must be interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory (...). As is clearly illustrated by the Court's recent case-law and the rulings of other human-rights bodies, to hold that the right of access to information may under no circumstances fall within the ambit of Article 10 of the Convention would lead to situations where the freedom to "receive and impart" information is impaired in such a manner and to such a degree that it would strike at the very substance of freedom of expression. For the Court, in circumstances where access to information is instrumental for the exercise of the applicant's right to receive and impart information, its denial may constitute an interference with that right. The principle of securing Convention rights in a practical and effective manner requires an applicant in such a situation to be able to rely on the protection of Article 10 of the Convention. **Magyar Helsinki Bizottság v. Hungary [GC], no. 18030/11, 8 November 2016**

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and this may also make it essential to be prepared to look **beyond the text** of individual provisions in order to establish their meaning.

35. (...) Were Article 6 para. 1 (...) to be understood as concerning exclusively the conduct of an action which had already been initiated before a court, a Contracting State could, without acting in breach of that text, do away with its courts, or take away their jurisdiction to determine certain classes of civil actions and entrust it to organs dependent on the Government. Such assumptions, indissociable from a danger of arbitrary power, would have serious consequences which are repugnant to the aforementioned principles and which the Court cannot overlook (...).

It would be inconceivable, in the opinion of the Court, that Article 6 para. 1 (...) should describe in detail the procedural guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court. The fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings.

36. Taking all the preceding considerations together, it follows that the right of access constitutes an element which is inherent in the right stated by Article 6 para. 1 (...). This is not an extensive interpretation forcing new obligations on the Contracting States: it is based on the very terms of the first sentence of Article 6 para. 1 (...) read in its context and having regard to the object and purpose of the Convention, a lawmaking treaty (...), and to general principles of law. **Golder v. United Kingdom [P], no. 4451/70, 21 February 1975**

61. This *ratio legis* indicates how the term "alcoholics" should be understood in the light of the object and purpose of Article 5 § 1 (e) of the Convention. It indicates that the object and purpose of this provision cannot be interpreted as only allowing the detention of "alcoholics" in the limited sense of persons in a clinical state of "alcoholism". The Court considers that, under Article 5 § 1 (e) of the Convention, persons who are not medically diagnosed as "alcoholics", but whose conduct and behaviour under the influence of alcohol pose a threat to public order or themselves, can be taken into custody for the protection of the public or their own interests, such as their health or personal safety. **Witold Litwa v. Poland, no. 26629/95, 4 April 2000**

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In addition, giving effect to the object and purpose of a provision can lead the Court to decline to give its text a literal interpretation.

25. The terms used in the second sentence of Article 6 § 1 (...) - "judgment shall be pronounced publicly" (...) might suggest that a reading out aloud of the judgment is required. (...)

26. However, many member States of the Council of Europe have a long-standing tradition of recourse to other means, besides reading out aloud, for making public the decisions of all or some of their courts, and especially of their courts of cassation, for example deposit in a registry accessible to the public. (...)

The Court therefore does not feel bound to adopt a literal interpretation. It considers that in each case the form of publicity to be given to the “judgment” under the domestic law of the respondent State must be assessed in the light of the special features of the proceedings in question and by reference to the object and purpose of Article 6 § 1 (...). **Preto v. Italy [P], no. 7984/77, 8 December 1983**

107. Admittedly, Article 7 of the Convention does not expressly mention an obligation for Contracting States to grant an accused the benefit of a change in the law subsequent to the commission of the offence. (...) it observes that prohibiting the imposition of “a heavier penalty ... than the one that was applicable at the time the criminal offence was committed”, paragraph 1 *in fine* of Article 7 does not exclude granting the accused the benefit of a more lenient sentence, prescribed by legislation subsequent to the offence.

108. In the Court’s opinion, it is consistent with the principle of the rule of law, of which Article 7 forms an essential part, to expect a trial court to apply to each punishable act the penalty which the legislator considers proportionate. Inflicting a heavier penalty for the sole reason that it was prescribed at the time of the commission of the offence would mean applying to the defendant’s detriment the rules governing the succession of criminal laws in time. In addition, it would amount to disregarding any legislative change favourable to the accused which might have come in before the conviction and continuing to impose penalties which the State – and the community it represents – now consider excessive. The Court notes that the obligation to apply, from among several criminal laws, the one whose provisions are the most favourable to the accused is a clarification of the rules on the succession of criminal laws, which is in accord with another essential element of Article 7, namely the foreseeability of penalties. **Scoppola v. Italy (No. 2) [GC], no. 10249/03, 17 September 2009**

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The importance attached to ***maintaining and promoting democracy*** will necessarily affect the view taken of how specific rights and freedoms must be interpreted.

89. The Court considers that there can be no democracy without pluralism. It is for that reason that freedom of expression as enshrined in Article 10 is applicable, subject to paragraph 2, not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb (...). Inasmuch as their activities form part of a collective exercise of the freedom of expression, political parties are also entitled to seek the protection of Article 10 of the Convention (...).

90. (...) It reiterates that, as protected by Article 9, freedom of thought, conscience and religion is one of the foundations of a “democratic society” within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it. That freedom entails, *inter alia*, freedom to hold or not to hold religious beliefs and to practise or not to practise a religion (...).

91. Moreover, in democratic societies, in which several religions coexist within one and the same population, it may be necessary to place restrictions on this freedom in order to reconcile the interests of the various groups and ensure that everyone’s beliefs are respected (...). The Court has frequently emphasised the State’s role as the neutral and impartial organiser of the exercise of various religions, faiths and beliefs, and stated that this role is conducive to public order, religious harmony and tolerance in a democratic society. It also considers that the State’s duty of neutrality and impartiality is incompatible with any power on the State’s part to assess the legitimacy of religious beliefs (...).

98. (...) the Court considers that a political party may promote a change

in the law or the legal and constitutional structures of the State on two conditions: firstly, the means used to that end must be legal and democratic; secondly, the change proposed must itself be compatible with fundamental democratic principles. It necessarily follows that a political party whose leaders incite to violence or put forward a policy which fails to respect democracy or which is aimed at the destruction of democracy and the flouting of the rights and freedoms recognised in a democracy cannot lay claim to the Convention's protection against penalties imposed on those grounds (...).

99. The possibility cannot be excluded that a political party, in pleading the rights enshrined in Article 11 and also in Articles 9 and 10 of the Convention, might attempt to derive therefrom the right to conduct what amounts in practice to activities intended to destroy the rights or freedoms set forth in the Convention and thus bring about the destruction of democracy (...). In view of the very clear link between the Convention and democracy (...), no one must be authorised to rely on the Convention's provisions in order to weaken or destroy the ideals and values of a democratic society. Pluralism and democracy are based on a compromise that requires various concessions by individuals or groups of individuals, who must sometimes agree to limit some of the freedoms they enjoy in order to guarantee greater stability of the country as a whole (...).

In that context, the Court considers that it is not at all improbable that totalitarian movements, organised in the form of political parties, might do away with democracy, after prospering under the democratic regime, there being examples of this in modern European history. ***Refah Partisi (the Welfare Party) and Others v. Turkey [GC], no. 41340/98, 13 February 2003***

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The Court views the Convention as a **living instrument** and thus considers it appropriate to give it a **dynamic interpretation** that takes account of changing circumstances and attitudes, i.e., in the light of present-day conditions.

39. That the Convention is a living instrument which must be interpreted in the light of present-day conditions is firmly rooted in the Court's case-law (...). The mere fact that a body was not envisaged by the drafters of the Convention cannot prevent that body from falling within the scope of the Convention. To the extent that Contracting States organise common constitutional or parliamentary structures by international treaties, the Court must take these mutually agreed structural changes into account in interpreting the Convention and its Protocols.

The question remains whether an organ such as the European Parliament nevertheless falls outside the ambit of Article 3 of Protocol No. 1. ***Matthews v. the United Kingdom [GC], no. 24833/94, 18 February 1999***

26. The Convention is, however, a living instrument to be interpreted in the light of present-day conditions (...), and it is incumbent on the Court to review whether, in the light of changed attitudes in society as to the legal protection that falls to be accorded to individuals in their relations with the State, the scope of Article 6 § 1 should not be extended to cover disputes between citizens and public authorities as to the lawfulness under domestic law of the tax authorities' decisions.

27. Relations between the individual and the State have clearly evolved in many spheres during the fifty years which have elapsed since the Convention was adopted, with State regulation increasingly intervening in private-law relations. This has led the Court to find that procedures classified under national law as being part of "public law" could come within the purview of Article 6 under its "civil" head if the outcome was decisive for private rights and obligations, in regard to such matters as, to give some examples, the sale of land, the running of a private clinic, property interests, the granting of administrative authorisations relating to the conditions of professional practice or of a licence to serve alcoholic beverages (...). Moreover, the State's increasing intervention in the individual's day-to-day life, in terms of welfare protection for example, has required the Court to evaluate features of public law and private law



before concluding that the asserted right could be classified as “civil” (...). ***Ferrazzini v. Italy* [GC], no. 44759/98, 12 July 2001**

102. The Court reiterates in this connection that the Convention is a living instrument which must be interpreted in the light of present-day conditions and of the ideas prevailing in democratic States today (...). ***Bayatyan v. Armenia* [GC], no. 23459/03, 7 July 2011**

139. The Court reiterates the principles developed in its case-law. The aim of protecting the family in the traditional sense is rather abstract and a broad variety of concrete measures may be used to implement it (...). Also, given that the Convention is a living instrument, to be interpreted in present-day conditions, the State, in its choice of means designed to protect the family and secure respect for family life as required by Article 8, must necessarily take into account developments in society and changes in the perception of social, civil-status and relational issues, including the fact that there is not just one way or one choice when it comes to leading one's family or private life (...). ***X and Others v. Austria* [GC], no. 19010/07, 10 February 2013**

115. The Court has already had occasion to note that, while punishment remains one of the aims of imprisonment, the emphasis in European penal policy is now on the rehabilitative aim of imprisonment, particularly towards the end of a long prison sentence (...).

119. For the foregoing reasons, the Court considers that, in the context of a life sentence, Article 3 must be interpreted as requiring reducibility of the sentence, in the sense of a review which allows the domestic authorities to consider whether any changes in the life prisoner are so significant, and such progress towards rehabilitation has been made in the course of the sentence, as to mean that continued detention can no longer be justified on legitimate penological grounds. ***Vinter and Others v. United Kingdom* [GC], no. 66069/09, 9 July 2013**

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Nonetheless, the specific terms of the text of the Convention cannot be ignored

30. The principle according to which the autonomous concepts contained in the Convention must be interpreted in the light of present-day conditions in democratic societies does not give the Court power to interpret Article 6 § 1 as though the adjective “civil” (with the restriction that that adjective necessarily places on the category of “rights and obligations” to which that Article applies) were not present in the text.

31. Accordingly, Article 6 § 1 of the Convention does not apply in the instant case. ***Ferrazzini v. Italy* [GC], no. 44759/98, 12 July 2001**

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and account must be taken of deliberate omissions from its scope.

53. The applicants set considerable store on the social developments that have occurred since the Convention was drafted, notably an alleged substantial increase in marriage breakdown.

It is true that the Convention and its Protocols must be interpreted in the light of present-day conditions (...). However, the Court cannot, by means of an evolutive interpretation, derive from these instruments a right that was not included therein at the outset. This is particularly so here, where the omission was deliberate.

It should also be mentioned that the right to divorce is not included in Protocol No. 7 (... to the Convention, which was opened to signature on 22 November 1984. The opportunity was not taken to deal with this question in Article 5 of the Protocol (...), which guarantees certain additional rights to spouses, notably in the event of dissolution of marriage. Indeed, paragraph 39 of the explanatory report to the Protocol states that the words “in the event of its dissolution” found in Article 5 (...) “do not imply any obligation on a State to provide for dissolution of marriage or to provide any special forms of dissolution.”

54. The Court thus concludes that the applicants cannot derive a right to divorce from Article 12 (...). That provision is therefore inapplicable in the present case, either on its own or in conjunction with Article 14 (...). ***Johnston and Others v. Ireland [P], no. 9697/82, 18 December 1986***

At the same time, the Court will also be alert to the possibility that a change in approach might become necessary.

56. There has been a developing awareness in recent years of the range of problems caused by child abuse and its psychological effects on victims, and it is possible that the rules on limitation of actions applying in member States of the Council of Europe may have to be amended to make special provision for this group of claimants in the near future. ***Stubbings and Others v. United Kingdom, no. 22083/93, 22 October 1996***

118. (...), the Court reiterates that the Convention has always been interpreted and applied in the light of current circumstances (...). Even if it finds no breach of Article 8 in the present case, the Court considers that this area, in which the law appears to be continuously evolving and which is subject to a particularly dynamic development in science and law, needs to be kept under review by the Contracting States (...). ***S.H. and Others v. Austria [GC], no. 57813/00, 3 November 2011***

The emergence of a common approach to dealing with a particular issue by the majority of High Contracting Parties – a **European consensus** – can contribute to the evolution in the way a particular right or freedom is understood by the Court.

60. (...) As compared with the era when that legislation was enacted, there is now a better understanding, and in consequence an increased tolerance, of homosexual behaviour to the extent that in the great majority of the member States of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied; the Court cannot overlook the marked changes which have occurred in this regard in the domestic law of the member States (...). In Northern Ireland itself, the authorities have refrained in recent years from enforcing the law in respect of private homosexual acts between consenting males over the age of 21 years capable of valid consent (...). No evidence has been adduced to show that this has been injurious to moral standards in Northern Ireland or that there has been any public demand for stricter enforcement of the law.

It cannot be maintained in these circumstances that there is a “pressing social need” to make such acts criminal offences, there being no sufficient justification provided by the risk of harm to vulnerable sections of society requiring protection or by the effects on the public. On the issue of proportionality, the Court considers that such justifications as there are for retaining the law in force unamended are outweighed by the detrimental effects which the very existence of the legislative provisions in question can have on the life of a person of homosexual orientation like the applicant. Although members of the public who regard homosexuality as immoral may be shocked, offended or disturbed by the commission by others of private homosexual acts, this cannot on its own warrant the application of penal sanctions when it is consenting adults alone who are involved. ***Dudgeon v. United Kingdom [P], no. 7525/76, 22 October 1981***

108. The Court therefore concludes that since the Commission's decision in *Grandrath* (...), and its follow-up decisions the domestic law of the overwhelming majority of Council of Europe member States, along with the relevant international instruments, has evolved to the effect that at the material time there was already a virtually general consensus on the question in Europe and beyond. In the light of these developments, it cannot be said that a shift in the interpretation of Article 9 in relation to events which occurred in 2002-03 was not foreseeable. This is all the more the case considering that Armenia itself was a party to the ICCPR and had, moreover, pledged when joining the Council of Europe to introduce a law recognising the right to conscientious objection.

109. In the light of the foregoing and in line with the “living instrument”

approach, the Court therefore takes the view that it is not possible to confirm the case-law established by the Commission, and that Article 9 should no longer be read in conjunction with Article 4 § 3 (b). Consequently, the applicant's complaint is to be assessed solely under Article 9.

110. In this respect, the Court notes that Article 9 does not explicitly refer to a right to conscientious objection. However, it considers that opposition to military service, where it is motivated by a serious and insurmountable conflict between the obligation to serve in the army and a person's conscience or his deeply and genuinely held religious or other beliefs, constitutes a conviction or belief of sufficient cogency, seriousness, cohesion and importance to attract the guarantees of Article 9 (...). Whether and to what extent objection to military service falls within the ambit of that provision must be assessed in the light of the particular circumstances of the case. ***Bayatyan v. Armenia* [GC], no. 23459/03, 7 July 2011**

At the same time, the general approach of High Contracting Parties to dealing with a particular matter can reinforce the Court's view that there was no violation of the Convention where this has been followed by one of them.

47. (...) Furthermore, even if the applicant had sought to pursue his appeal under ground (b), the Court notes that, while the High Court could not have substituted its own findings of fact for those of the inspector, it would have had the power to satisfy itself that the inspector's findings of fact or the inferences based on them were neither perverse nor irrational (...).

Such an approach by an appeal tribunal on questions of fact can reasonably be expected in specialised areas of the law such as the one at issue, particularly where the facts have already been established in the course of a quasi-judicial procedure governed by many of the safeguards required by Article 6 para. 1 (...). It is also frequently a feature in the systems of judicial control of administrative decisions found throughout the Council of Europe member States. Indeed, in the instant case, the subject-matter of the contested decision by the inspector was a typical example of the exercise of discretionary judgment in the regulation of citizens' conduct in the sphere of town and country planning.

The scope of review of the High Court was therefore sufficient to comply with Article 6 para. 1 (...). ***Bryan v. United Kingdom*, no. 19178/91, 22 November 1995**

However, such a **consensus** will not necessarily be sufficient to displace the solution chosen by a High Contracting Party as to how to resolve a particular issue involving competing rights where the Court considers that a wide margin of appreciation is still appropriate.

35. In the present case, and contrary to the Government's submission, the Court considers that there is indeed a consensus amongst a substantial majority of the Contracting States of the Council of Europe towards allowing abortion on broader grounds than accorded under Irish law (...)

236. However, the Court does not consider that this consensus decisively narrows the broad margin of appreciation of the State.

237. (...) Since the rights claimed on behalf of the foetus and those of the mother are inextricably interconnected (..), the margin of appreciation accorded to a State's protection of the unborn necessarily translates into a margin of appreciation for that State as to how it balances the conflicting rights of the mother. It follows that, even if it appears from the national laws referred to that most Contracting Parties may in their legislation have resolved those conflicting rights and interests in favour of greater legal access to abortion, this consensus cannot be a decisive factor in the Court's examination of whether the impugned prohibition on abortion in Ireland for health and well-being reasons struck a fair balance between the conflicting rights and interests, notwithstanding an evolutive interpretation of the Convention (...).

239. From the lengthy, complex and sensitive debate in Ireland (...) as regards the content of its abortion laws, a choice has emerged. Irish law prohibits abortion in Ireland for health and well-being reasons but allows women, in the first and second applicants' position who wish to have an

abortion for those reasons (...), the option of lawfully travelling to another State to do so.

241. (...), having regard to the right to travel abroad lawfully for an abortion with access to appropriate information and medical care in Ireland, the Court does not consider that the prohibition in Ireland of abortion for health and well-being reasons, based as it is on the profound moral views of the Irish people as to the nature of life (...) and as to the consequent protection to be accorded to the right to life of the unborn, exceeds the margin of appreciation accorded in that respect to the Irish State. In such circumstances, the Court finds that the impugned prohibition in Ireland struck a fair balance between the right of the first and second applicants to respect for their private lives and the rights invoked on behalf of the unborn. **A., B. and C. v. Ireland [GC], no. 25579/05, 16 November 2010**

Moreover, where there is yet to be such a **European consensus**, the Court will not be willing to conclude that a particular approach is required by the Convention.

74. The Court does not consider that there is at this stage any clear common standard amongst the member States of the Council of Europe as to the minimum age of criminal responsibility. Even if England and Wales is among the few European jurisdictions to retain a low age of criminal responsibility, the age of ten cannot be said to be so young as to differ disproportionately from the age-limit followed by other European States. The Court concludes that the attribution of criminal responsibility to the applicant does not in itself give rise to a breach of Article 3 of the Convention. **V. v. United Kingdom [GC], no. 24888/94, 16 December 1999**

82. (...) It follows that the issue of when the right to life begins comes within the margin of appreciation which the Court generally considers that States should enjoy in this sphere, notwithstanding an evolutive interpretation of the Convention, a "living instrument which must be interpreted in the light of present-day conditions" (...). The reasons for that conclusion are, firstly, that the issue of such protection has not been resolved within the majority of the Contracting States themselves, in France in particular, where it is the subject of debate (...) and, secondly, that there is no European consensus on the scientific and legal definition of the beginning of life (...). **Vo v. France [GC], no. 53924/00, 8 July 2004**

96. The Court would conclude that there is now a clear trend in the legislation of the Contracting States towards allowing gamete donation for the purpose of *in vitro* fertilisation, which reflects an emerging European consensus. That emerging consensus is not, however, based on settled and long-standing principles established in the law of the member States but rather reflects a stage of development within a particularly dynamic field of law and does not decisively narrow the margin of appreciation of the State (...)

106. The Court accepts that the Austrian legislature could have devised a different legal framework for regulating artificial procreation that would have made ovum donation permissible. It notes in this regard that this latter solution has been adopted in a number of member States of the Council of Europe. However, the central question in terms of Article 8 of the Convention is not whether a different solution might have been adopted by the legislature that would arguably have struck a fairer balance, but whether, in striking the balance at the point at which it did, the Austrian legislature exceeded the margin of appreciation afforded to it under that Article (...). In determining this question, the Court attaches some importance to the fact that, as noted above, there is no sufficiently established European consensus as to whether ovum donation for *in vitro* fertilisation should be allowed. **S.H. and Others v. Austria [GC], no. 57813/00, 3 November 2011**

74. Thus, it cannot be said that there exists any European consensus on allowing same-sex marriages. Nor is there any consensus in those States which do not allow same-sex marriages as to how to

deal with gender recognition in the case of a pre-existing marriage. The majority of the member States do not have any kind of legislation on gender recognition in place. In addition to Finland, such legislation appears to exist in only six other States. The exceptions afforded to married transsexuals are even fewer. Thus, there are no signs that the situation in the Council of Europe member States has changed significantly since the Court delivered its latest rulings on these issues.

75. In the absence of a European consensus and taking into account that the case at stake undoubtedly raises sensitive moral or ethical issues, the Court considers that the margin of appreciation to be afforded to the respondent State must still be a wide one (...). This margin must in principle extend both to the State's decision whether or not to enact legislation concerning legal recognition of the new gender of post-operative transsexuals and, having intervened, to the rules it lays down in order to achieve a balance between the competing public and private interests. **Hämäläinen v. Finland [GC], no. 37359/09, 16 July 2014**

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Also taken into account by the Court in interpreting the Convention are the preparatory work or **travaux préparatoires** leading to its adoption

99. The Court notes that prior to this case it has never ruled on the question of the applicability of Article 9 to conscientious objectors, unlike the Commission, which refused to apply that Article to such persons. In doing so, the Commission drew a link between Article 9 and Article 4 § 3 (b) of the Convention, finding that the latter left the choice of recognising a right to conscientious objection to the Contracting Parties. Consequently, conscientious objectors were excluded from the scope of protection of Article 9, which could not be read as guaranteeing freedom from prosecution for refusal to serve in the army.

100. The Court, however, is not convinced that this interpretation of Article 4 § 3 (b) reflects the true purpose and meaning of this provision. It notes that Article 4 § 3 (b) excludes from the scope of "forced or compulsory labour" prohibited by Article 4 § 2 "any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service". The Court further notes in this respect the *travaux préparatoires* on Article 4, whose paragraph 23 states: "In sub-paragraph [(b)], the clause relating to conscientious objectors was intended to indicate that any national service required of them by law would not fall within the scope of forced or compulsory labour. As the concept of conscientious objection was not recognised in many countries, the phrase 'in countries where conscientious objection is recognised' was inserted". In the Court's opinion, the *travaux préparatoires* confirm that the sole purpose of sub-paragraph (b) of Article 4 § 3 is to provide a further elucidation of the notion "forced or compulsory labour". In itself it neither recognises nor excludes a right to conscientious objection and should therefore not have a delimiting effect on the rights guaranteed by Article 9. **Bayatyan v. Armenia [GC], no. 23459/03, 7 July 2011**

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and other international instruments and judgments or rulings by international and regional human rights bodies.

134. The Court observes in this context that, when interpreting the provisions of the Convention, it has had regard, on a number of occasions, to the Views adopted by the HRC and its interpretation of the provisions of the ICCPR (...). The Convention, including Article 6, cannot be interpreted in a vacuum and should as far as possible be interpreted in harmony with other rules of international law concerning the international protection of human rights (...). Indeed, as follows from Article 31 § 3 (c) of the 1969 Vienna Convention on the Law of Treaties, the Convention should as far as possible be interpreted in harmony with other rules of international law of which it forms part, including those relating to the international protection of human rights. **Correia de Matos v. Portugal [GC], no. 56402/12, 4 April 2018**

79. An analysis of the international instruments incorporating the *non bis in idem* principle in one or another form reveals the variety

of terms in which it is couched. Thus, Article 4 of Protocol No. 7 to the Convention, Article 14 § 7 of the United Nations Covenant on Civil and Political Rights and Article 50 of the Charter of Fundamental Rights of the European Union refer to the “[same] offence” (“[même] infraction”), the American Convention on Human Rights speaks of the “same cause” (“*mêmes faits*”), the Convention Implementing the Schengen Agreement prohibits prosecution for the “same acts” (“*mêmes faits*”), and the Statute of the International Criminal Court employs the term “[same] conduct” (“*mêmes actes constitutifs*”). The difference between the terms “same acts” or “same cause” (“*mêmes faits*”) on the one hand and the term “[same] offence” (“[même] infraction”) on the other was held by the Court of Justice of the European Union and the Inter-American Court of Human Rights to be an important element in favour of adopting the approach based strictly on the identity of the material acts and rejecting the legal classification of such acts as irrelevant. In so finding, both tribunals emphasised that such an approach would favour the perpetrator, who would know that, once he had been found guilty and served his sentence or had been acquitted, he need not fear further prosecution for the same act (...).

80. The Court considers that the use of the word “offence” in the text of Article 4 of Protocol No. 7 cannot justify adhering to a more restrictive approach. (...)

82. Accordingly, the Court takes the view that Article 4 of Protocol No. 7 must be understood as prohibiting the prosecution or trial of a second “offence” in so far as it arises from identical facts or facts which are substantially the same. ***Sergey Zolotukhin v. Russia* [GC], no. 14939/03, 10 February 2009**

118. The same commitment to the rehabilitation of life sentence prisoners and to the prospect of their eventual release can be found in international law.

The United Nations Standard Minimum Rules for the Treatment of Prisoners direct prison authorities to use all available resources to ensure the return of offenders to society (...) Additional, express references to rehabilitation run through the Rules (...).

Equally, Article 10 § 3 of the International Covenant on Civil and Political Rights specifically provides that the essential aim of the penitentiary system shall be the reformation and social rehabilitation of prisoners. This is emphasised in the Human Rights Committee’s General Comment on Article 10, which stresses that no penitentiary system should be only retributory (...).

Finally, the Court notes the relevant provisions of the Rome Statute of the International Criminal Court, to which 121 States, including the vast majority of Council of Europe member States, are parties. Article 110(3) of the Statute provides for review of a life sentence after twenty-five years, followed by periodic reviews thereafter. The significance of Article 110(3) is underscored by the fact that Article 110(4) and (5) of the Statute and Rules 223 and 224 of the ICC’s Rules of Procedure and Evidence set out detailed procedural and substantives guarantees which should govern that review. The criteria for reduction include, *inter alia*, whether the sentenced person’s conduct in detention shows a genuine dissociation from his or her crime and his or her prospect of resocialisation (...). ***Vinter and Others v. United Kingdom* [GC], no. 66069/09, 9 July 2013**

121. (...), the Court cannot but note the growing importance which international and Council of Europe instruments, as well as the case-law of international courts and the practice of other international bodies, are attaching to procedural fairness in cases involving the removal or dismissal of judges, including the intervention of an authority independent of the executive and legislative powers in respect of every decision affecting

the termination of office of a judge (...). Bearing this in mind, the Court considers that the respondent State impaired the very essence of the applicant's right of access to a court. ***Baka v. Hungary* [GC], no. 20261/12, 23 June 2016**

However, these will not always be found to be helpful.

135. As regards the preparatory work on Article 10, the Court observes that it is true that the wording of the preliminary draft Convention, prepared by the Committee of Experts at its first meeting on 2-8 February 1950, was identical to Article 19 of the Universal Declaration and contained the right to seek information. However, in later versions of the text, the right to seek information no longer appeared (...). There is no record of any discussions entailing this change or indeed on any debate on the particular elements which constituted freedom of expression (...).

The Court is not therefore persuaded that any conclusive relevance can be attributed to the *travaux préparatoires* as regards the possibility of interpreting Article 10 § 1 as including a right of access to information in the present context. ***Magyar Helsinki Bizottság v. Hungary* [GC], no. 18030/11, 8 November 2016**

73. (...). Moreover, no clear tendency can be ascertained from examination of the relevant international texts and instruments (...). Rule 4 of the Beijing Rules which, although not legally binding, might provide some indication of the existence of an international consensus, does not specify the age at which criminal responsibility should be fixed but merely invites States not to fix it too low, and Article 40 § 3 (a) of the UN Convention requires States Parties to establish a minimum age below which children shall be presumed not to have the capacity to infringe the criminal law, but contains no provision as to what that age should be. ***V. v. United Kingdom* [GC], no. 24888/94, 16 December 1999**

135. However, even where the provisions of the Convention and those of the ICCPR are almost identical, the interpretation of the same fundamental right by the HRC and by this Court may not always correspond. This is illustrated, for instance, by the interpretation of the scope of the right of access to court by the HRC and by this Court. The HRC considers that the right of access to court under Article 14 § 1 ICCPR concerns access to first-instance procedures and does not address the issue of the right to appeal (...). In its well-established case-law, the Court, for its part, has held that while Article 6 of the Convention does not compel the Contracting States to set up courts of appeal or of cassation, where such courts exist, the guarantees of Article 6 must be complied with, for instance by guaranteeing litigants an effective right of access to court (...). ***Correia de Matos v. Portugal* [GC], no. 56402/12, 4 April 2018**

The Court will generally follow its own **case law**.

35. The applicant argued that, in any event, the issues arising under Articles 8 and 12 (...) deserved reconsideration.

It is true that, as she submitted, the Court is not bound by its previous judgments; indeed, this is borne out by Rule 51 para. 1 of the Rules of Court. However, 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. ***Cossey v. United Kingdom* [P], no. 10843/84, 27 September 1990**

68. This is, however, the first time that the Court has had occasion to consider a general and automatic disenfranchisement of convicted prisoners. It would note that in *Patrick Holland* (cited above), the case closest to the facts of the present application, the Commission confined itself to the question of whether the bar was arbitrary and omitted to give attention to other elements of the test laid down by the Court in *Mathieu-Mohin and Clerfayt* (...), namely, the legitimacy of the aim and the proportionality of the measure. In consequence, the Court cannot attach

decisive weight to the decision. The Chamber's finding of a violation did not, therefore, contradict a previous judgment of the Court; on the contrary, the Chamber sought to apply the precedent of *Mathieu-Mohin and Clerfayt* to the facts before it. ***Hirst v. United Kingdom (No. 2)* [GC], no. 74025/01, 6 October 2005**

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However, this does not mean that the specific facts of a case before the Court will not lead it to conclude that a different approach is required.

64. The Court has already examined several cases concerning the immunity from legal proceedings granted to members of national parliaments in relation to the right to a fair trial (...). The cases it has examined all concerned the right of persons who considered they had been wronged by the words or deeds of an MP to take court action. They complained before the Court that parliamentary immunity obstructed the work of the national courts, preventing civil complaints from being brought before a judge. Article 6 was therefore applicable.

65. Through this jurisprudence the Court, acknowledging the applicability of Article 6, verified the conformity of parliamentary immunities with the Convention, against the benchmark of the right to a court guaranteed by the Convention. It was an opportunity for the Court to temper the effects of the immunity from legal proceedings enjoyed by MPs by establishing the principle that it would not be consistent with the rule of law in a democratic society if a State could remove from the jurisdiction of the courts a whole range of civil claims or confer immunities from civil liability on large groups or categories of persons (...).

66. There is no denying, however, that the facts of the instant case differ considerably from those in the above-mentioned cases. For the first time the Court is faced with a case where the beneficiary of the parliamentary inviolability has complained that his inviolability prevented him from being tried. The nature of the rights at issue and the complaint the Court must judge are thus substantially distinct from those it has examined to date. It is no longer a matter of the "civil" rights or claims of third parties, but of the right of an MP accused of a criminal offence to have his case heard by a court. This application therefore raises a new legal issue. ***Kart v. Turkey* [GC], no. 8917/05, 3 December 2009**

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Moreover, the need for a **dynamic interpretation** of the Convention may lead the Court to depart from its previous case law, which does not therefore amount to **binding precedent**.

153. In the light of these developments, the Court considers that its caselaw to the effect that the right to bargain collectively and to enter into collective agreements does not constitute an inherent element of Article 11 (...) should be reconsidered, so as to take account of the perceptible evolution in such matters, in both international law and domestic legal systems. While it is in the interests of legal certainty, foreseeability and equality before the law that the Court should not depart, without good reason, from precedents established in previous cases, a failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement (...).

154. Consequently, the Court considers that, having regard to the developments in labour law, both international and national, and to the practice of Contracting States in such matters, the right to bargain collectively with the employer has, in principle, become one of the essential elements of the "right to form and to join trade unions for the protection of [one's] interests" set forth in Article 11 of the Convention, it being understood that States remain free to organise their system so as, if appropriate, to grant special status to representative trade unions. Like other workers, civil servants, except in very specific cases, should enjoy such rights, but without prejudice to the effects of any "lawful restrictions" that may have to be imposed on "members of the administration of the State" within the meaning of Article 11 § 2 – a category to which the applicants in the present case do not, however, belong (...). ***Demir and Baykara v. Turkey* [GC], no. 34503/97, 12 November 2008**



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In addition, the Court may find a need to clarify a particular aspect of its ruling in a case where its own subsequent rulings have led to some uncertainty as to what was intended.

110. The Court considers that the application of the principles developed in *Al-Khawaja and Tahery* in its subsequent case-law discloses a need to clarify the relationship between the above-mentioned three steps of the *AlKhawaja and Tahery* test when it comes to the examination of the compliance with the Convention of a trial in which untested incriminating witness evidence was admitted. It is clear that each of the three steps of the test must be examined if – as in *Al-Khawaja and Tahery* – the questions in steps one (whether there was a good reason for the non-attendance of the witness) and two (whether the evidence of the absent witness was the sole or decisive basis for the defendant’s conviction) are answered in the affirmative (...). The Court is, however, called upon to clarify whether all three steps of the test must likewise be examined in cases in which either the question in step one or that in step two is answered in the negative, as well as the order in which the steps are to be examined. ***Schatschaschwili v. Germany* [GC], no. 9154/10, 15 December 2015**

## VI. A Matter of Balance

Apart from the few rights that are absolute, the application of the Convention entails the striking of a **fair balance** between the rights and freedoms guaranteed by it and other competing rights and interests.

The concern for a fair balance is relevant when judging both the admissibility of an interference with a right or freedom and what **positive obligation** might be required under such a right or freedom.

In determining whether there is such a balance where there is a restriction on a right or freedom, the Court considers whether:

- a **legitimate aim** is being pursued,
- there are **relevant and sufficient reasons** for the restrictions and
- there is **proportionality** in the means being used to pursue.

In assessing compliance with the latter two requirements, **the margin of appreciation** will be a relevant consideration. These two requirements may also be collectively referred to by the Court as a **pressing social need**.

Wherever both those requirements are satisfied, it can be concluded that the restriction is **necessary in a democratic society**.

69. It remains to be determined whether the interference in question can be considered “necessary in a democratic society”, which means that it must answer a “pressing social need” and, in particular, be proportionate to the legitimate aim pursued, and that the reasons adduced by the national authorities to justify it must be “relevant and sufficient” (...). **P.N. v. Germany, no. 74440/17, 11 June 2020**

In those cases where there is no lawful basis for a restriction imposed on a right or freedom (or the supposed lawful basis does not meet the quality requirements), there will be no need to undertake this balancing exercise, as that automatically means that there has been a violation of the Convention.

43. Having reached the conclusion that the interference was not prescribed by law, the Court does not consider it necessary to ascertain whether the other requirements of paragraph 2 of Article 11 of the Convention were complied with in the instant case – namely, whether the interference pursued a legitimate aim and whether it was necessary in a democratic society. ***Maestri v. Italy* [GC], no. 39748/98, 17 February 2004**

Demonstrating that there is a **legitimate aim** for a restriction is not normally difficult.

294. The lists of legitimate aims for the pursuit of which Articles 8 to 11 of the Convention permit interferences with the rights guaranteed by them are exhaustive (...).

295. Yet, in cases under those provisions – as well as under Articles 1, 2 and 3 of Protocol No. 1, or Article 2 §§ 3 and 4 of Protocol No. 4 – respondent Governments normally have a relatively easy task in persuading the Court that the interference pursued a legitimate aim, even when the applicants cogently argue that it actually pursued an unavowed ulterior purpose (...).

296. The cases in which the Court has voiced doubts about the cited aim without ruling on the issue (...), left the issue open (...), or has rejected one or more of the cited aims (...), are few and far between. The cases in which it has found a breach of the respective Article purely owing to the lack of a legitimate aim are rarer still (...), although in a recent case the Grand Chamber found an absence of legitimate aim and yet went on to examine whether the interference had been necessary (...).

297. The Court has indeed itself recognised that in most cases it deals with the point summarily (...). Even when it excludes some of the cited aims, if it accepts that an interference pursues at least one, it does not delve further into the question and goes on to assess whether it was necessary in a democratic society to attain that aim (...). ***Merabishvili v. Georgia* [GC], no. 72508/13, 28 November 2017**

However, there are situations in which the Court has found none to exist.

17. As regards the justification for the interference, the Court observes that none has been put forward by the Government. The Court considers that where a photograph published in the context of reporting on pending criminal proceedings has no information value in itself, there must be compelling reasons to justify an interference with the defendant's right to respect for his private life (...). Even assuming that Article 139 of the RSFSR Code of Criminal Procedure could be a lawful basis for granting the press access to the case file, in the instant case the Court does not see any legitimate aim for the interference with the first applicant's right to respect for his private life. Being in custody at the material time, he was not a fugitive from justice and the showing of his photograph could not have been necessary for enlisting public support to determine his whereabouts. Nor could it be said to have bolstered the public character of judicial proceedings because at the time of the recording and the first airing of the television show the trial had not yet begun. Accordingly, the Court finds that in the circumstances of the present case the release of the first applicant's photograph from the criminal file to the press did not pursue any of the legitimate aims enumerated in paragraph 2 of Article 8.

118. There has therefore been a violation of Article 8 of the Convention in respect of the first applicant. ***Khuzhin and Others v. Russia*, no. 13470/02, 23 October 2008**

75. The Government submitted that the publication of such information

ensured greater transparency, public access to documents in the applicant's file and public scrutiny of the Commission's decision-making. The Court does not consider that either purpose can be subsumed under any of the aims listed in Article 8 § 2 of the Convention. Furthermore, it does not see how making a non-final Commission decision publicly accessible can be reconciled with the general aims of lustration that the Court has accepted as legitimate (...). In that connection, it is to be noted that the applicant was seventy-seven years old when the Commission delivered its decision and held no public office. Furthermore, it was not alleged, in the domestic proceedings or before the Court, that he was a candidate for any such office at the time. (...)

76. The Court considers that the lack of a legitimate aim suffices to constitute a violation of Article 8. ***Karajanov v. "the former Yugoslav Republic of Macedonia", no. 2229/15, 6 April 2017***

Greater attention is paid, however, to whether the reasons for the particular restriction are **relevant and sufficient** and, in particular, the latter – which is an aspect of **proportionality** - may not always be considered to exist.

39. The Government also cited friction in the Schwarzenberg barracks, for which, they claimed, the publications of the applicant association and Mr Gubi's activities were essentially responsible (...). This situation had led to a large number of complaints from the conscripts.

In the Court's view, this situation, peculiar to a single barracks, was not sufficiently serious to justify a decision whose effects extended to all the military premises on the national territory. On this point the facts may be distinguished from the Engel and Others case. In that case the banned journal had been distributed solely in the place where the unrest cited by the authorities had occurred (...). ***Vereinigung demokratischer Soldaten Österreichs and Gubi v. Austria, no. 15153/89, 19 December 1994***

8. Turning to the Prince's reaction, the Court observes that he announced his intention not to appoint the applicant to public office again, should the applicant be proposed by the Diet or any other body. The Prince considered that the above-mentioned statement by the applicant clearly infringed the Liechtenstein Constitution. In this context, he also made reference to a political controversy with the Liechtenstein government in October 1992 and, in conclusion, he reproached the applicant, who had been a member of the government at that time and President of the Liechtenstein Administrative Court since 1993, with regarding himself as not being bound by the Constitution. In the Prince's view, the applicant's attitude towards the Constitution made him unsuitable for public office (...).

69. The Prince's reaction was based on general inferences drawn from the applicant's previous conduct in his position as a member of the government, in particular on the occasion of the political controversy in 1992, and his brief statement, as reported in the press, on a particular, though controversial, constitutional issue of judicial competence. No reference was made to any incident suggesting that the applicant's view, as expressed at the lecture in question, had a bearing on his performance as President of the Administrative Court or on any other pending or imminent proceedings. Also the Government did not refer to any instance where the applicant, in the pursuit of his judicial duties or otherwise, had acted in an objectionable way.

70. On the facts of the present case, the Court finds that, while relevant, the reasons relied on by the Government in order to justify the interference with the applicant's right to freedom of expression are not sufficient to show that the interference complained of was "necessary in a democratic society". Even allowing for a certain margin of appreciation, the Prince's action appears disproportionate to the aim pursued. Accordingly the Court holds that there has been a violation of Article 10 of the Convention. ***Wille v. Liechtenstein [GC], no. 28396/95, 28 October 1999***

50. The Court further recalls that a fair balance must be struck between

the interests of the child and those of the parent (...) and that in doing so particular importance must be attached to the best interests of the child which, depending on their nature and seriousness, may override those of the parent. In particular, the parent cannot be entitled under Article 8 of the Convention to have such measures taken as would harm the child's health and development (...).

51. In the present case the Court notes that the competent national courts, when refusing the applicant's request for a visiting arrangement, relied on the statements made by the child, questioned by the District Court at the age of about five and six years respectively, took into account the strained relations between the parents, considering that it did not matter who was responsible for the tension, and found that any further contact would negatively affect the child.

52. The Court does not doubt that these reasons were relevant. However, it must be determined whether, having regard to the particular circumstances of the case and notably the importance of the decisions to be taken, the applicant has been involved in the decision-making process, seen as a whole, to a degree sufficient to provide him with the requisite protection of his interests (...). It recalls that in the present case the District Court considered it unnecessary to obtain an expert opinion on the ground that the facts had been clearly and completely established for the purposes of Article 1711 of the Civil Code (...). In this connection, the District Court referred to the strained relations between the parents and in particular to the mother's objections to the applicant which she imparted to the child. The Court considers that the reasons given by the District Court are insufficient to explain why, in the particular circumstances of the case, expert advice was not considered necessary, as recommended by the Erkrath Youth Office. Moreover, taking into account the importance of the subject matter, namely, the relations between a father and his child, the Regional Court should not have been satisfied, in the circumstances, with relying on the file and the written appeal submissions without having at its disposal psychological expert evidence in order to evaluate the child's statements. The Court notes in this context that the applicant, in his appeal, challenged the findings of the District Court and requested that an expert opinion be prepared to explore the true wishes of his child and to solve the question of access accordingly, and that the Regional Court had full power to review all issues relating to the request for access. ***Elsholz v. Germany* [GC], no. 25735/94, 13 July 2000**

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Nonetheless, there may be the necessary substantiation to satisfy the Court.

74. As concerns the measure taken to remove the second applicant into care, the Court considers that this was supported by relevant and sufficient reasons, namely, the strong suspicions that she had been abused and the doubts which existed as to the first applicant's ability to protect her (...). In that latter context, it may be noted that the abuse had taken place in the first applicant's home without her apparently being aware and that the first applicant's reaction, however natural in the circumstances, tended towards a denial of the allegations. It also appears from the interview that while at one point the second applicant had described the abuser as having been thrown out of the house, at another point she referred to X as coming to the house the next day (...). ***T.P. and K.M. v. United Kingdom* [GC], no. 28945/95, 10 May 2001**

51. According to the Supreme Court's judgment in the present case, the injured person had the choice of bringing a claim against the applicant company or the authors of the comments. The Court considers that the uncertain effectiveness of measures allowing the identity of the authors of the comments to be established, coupled with the lack of instruments put in place by the applicant company for the same purpose with a view to making it possible for a victim of hate speech to bring a claim effectively against the authors of the comments, are factors that support a finding that the Supreme Court based its judgment on relevant and sufficient grounds. ***Delfi AS v. Estonia* [GC], no. 64569/09, 16 June 2015**

111. The District Court raised the question whether the applicant as a journalist had the right not to obey the orders given to him by the police. It found that, in the circumstances of the case, the conditions for restricting the applicant's right to freedom of expression were fulfilled. In reaching that conclusion the District Court referred to the judgment in *Dammann* (...), arguing that the applicant's case had to be distinguished from it. The reasons given by the District Court for the applicant's conviction for contumacy towards the police are succinct. However, having regard to the particular nature of the interference with the applicant's right to freedom of expression at stake in the present case (...), the Court is satisfied that they are relevant and sufficient. Moreover, the District Court had regard to the conflict of interests faced by the applicant when it decided not to impose any penalty on him. ***Pentikäinen v. Finland* [GC], no. 11882/10, 20 October 2015**

198. In the light of the aforementioned considerations, the Court considers that, in assessing the circumstances submitted for their appreciation, the competent domestic authorities and, in particular, the Supreme Administrative Court gave due consideration to the principles and criteria as laid down by the Court's case-law for balancing the right to respect for private life and the right to freedom of expression. In so doing, the Supreme Administrative Court attached particular weight to its finding that the publication of the taxation data in the manner and to the extent described did not contribute to a debate of public interest and that the applicants could not in substance claim that it had been done solely for a journalistic purpose within the meaning of domestic and EU law. The Court discerns no strong reasons which would require it to substitute its view for that of the domestic courts and to set aside the balancing done by them (...). It is satisfied that the reasons relied upon were both relevant and sufficient to show that the interference complained of was "necessary in a democratic society" and that the authorities of the respondent State acted within their margin of appreciation in striking a fair balance between the competing interests at stake.

199. The Court therefore concludes that there has been no violation of Article 10 of the Convention. ***Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* [GC], no. 931/13, 27 June 2017**

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In considering whether a particular restriction satisfies the requirement of **proportionality**, the Court will also take account of a number of specific considerations:

- *does it actually extinguish the right or freedom concerned or leave some scope for its exercise*

29. Lastly, it should be emphasised that the impugned court order went no further than to prohibit distribution of the circular; the Düsseldorf Court of Appeal refused the ddp's application for an injunction prohibiting Mr Jacobowski from systematically criticising the ddp (...). He thus retained the right to voice his opinions and to defend himself by any other means. The interference complained of therefore cannot be regarded as disproportionate. *Jacobowski v. Germany*, no. 15088/89, 23 June 1994

50. It will be seen from the foregoing that Mr Hertel played no part in the choice of the illustration for issue no. 19 of the *Journal Franz Weber*, that those statements that were definitely attributable to him were on the whole qualified and that there is nothing to suggest that they had any substantial impact on the interests of the members of the MHEA. In spite of all that, the Swiss courts prohibited the applicant from stating that food prepared in microwave ovens was a danger to health and led to changes in the blood of those consuming it that indicated a pathological disorder and presented a pattern that could be seen as the beginning of a carcinogenic process, and from using the image of death in association with microwave ovens.

The Court cannot help but note a disparity between that measure and the behaviour it was intended to rectify. That disparity creates an impression of imbalance that is materialised by the scope of the injunction in question. In that regard, although it is true that the injunction applies only to specific statements, it nonetheless remains the case that those statements related to the very substance of the applicant's views. The effect of the injunction was thus partly to censor the applicant's work and substantially to reduce

his ability to put forward in public views which have their place in a public debate whose existence cannot be denied. It matters little that his opinion is a minority one and may appear to be devoid of merit since, in a sphere in which it is unlikely that any certainty exists, it would be particularly unreasonable to restrict freedom of expression only to generally accepted ideas.

The fact that the Swiss courts expressly reserved Mr Hertel's freedom to pursue his research does not in any way alter that finding. As to presenting the results outside the "economic sphere", it is not transparently obvious from the courts' decisions that he was given such a possibility; it may be that the wide scope of the UCA would prevent those reservations being seen as providing a significant reduction in the extent of the interference in question. *Hertel v. Switzerland*, no. 25181/94, 25 August 1998

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- the proportionality of the behaviour being restricted

48. Although Mr De Haes and Mr Gijssels' comments were without doubt severely critical, they nevertheless appear proportionate to the stir and indignation caused by the matters alleged in their articles. As to the journalists' polemical and even aggressive tone, which the Court should not be taken to approve, it must be remembered that Article 10 (art. 10) protects not only the substance of the ideas and information expressed but also the form in which they are conveyed (...). ***De Haes and Gijssels v. Belgium*, no. 19983/92, 24 February 1997**

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- the possibility of using a less restrictive measure

57. Lastly, the Court notes the seriousness of a criminal conviction for publicly defending the crimes of collaboration, having regard to the existence of other means of intervention and rebuttal, particularly through civil remedies. ***Lehideux and Isorni v. France* [GC], no. 24662/94, 23 September 1998**

46. (...). Moreover, it should be noted that, for the purposes of the present case, a less restrictive measure for the applicant would certainly not have had the same effectiveness in terms of preserving the credibility of the Church. It thus does not appear that the consequences of the decision not to renew his contract were excessive in the circumstances of the case, having regard in particular to the fact that the applicant had knowingly placed himself in a situation that was completely in opposition to the Church's precepts. ***Fernández Martínez v. Spain* [GC], no. 56030/07, 12 June 2014**

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-the burden being thrown on a particular individual

48. The Court considers that the question of proportionality must also be looked at from the point of view of the risk run by any purchaser that he will be subject to pre-emption and therefore penalised by the loss of his property solely in the interests of deterring possible underestimations of price. The exercise of the right of pre-emption entails sufficiently serious consequences for the measure to attain a definite level of severity. Merely reimbursing the price paid - increased by 10% - and the costs and fair expenses of the contract cannot suffice to compensate for the loss of a property acquired without any fraudulent intent. ***Hentrich v. France*, no. 13616/88, 22 September 1994**

59. In the light of the foregoing, the Court agrees with the Commission that the system of staggering the enforcement of orders for possession, coupled with what had already been a six-year wait because of the statutory suspension of the enforcement of such orders, imposed an excessive burden on the applicant company and accordingly upset the balance that must be struck between the protection of the right of property and the requirements of the general interest.

Consequently, there has been a violation of Article 1 of Protocol No. 1. ***Immobiliare Saffi v. Italy* [GC], no. 22774/93, 28 July 1999**

- *the severity of any sanction involved*

37. The Court also notes the severity of the penalty imposed on the applicant – one year and eight months’ imprisonment plus a fine of 100,000 Turkish liras (...). It is mindful, further, of the fact that, as a result of his conviction, the applicant lost his office as president of the petroleum workers’ union as well as a number of political and civil rights (...).

In this connection, the Court points out that the nature and severity of the penalty imposed are also factors to be taken into account when assessing the proportionality of the interference. ***Ceylan v. Turkey* [GC], no. 23556/94, 8 July 1999**

156. In the instant case it should be observed that the penalty imposed on the applicant could hardly be said to have prevented him from expressing his views, coming as it did after the articles had been published (...).

157. In addition, the amount of the fine (CHF 800, or approximately EUR 476 at the current exchange rate) was relatively small. Moreover, it was imposed for an offence coming under the head of “minor offences” within the meaning of Article 101 of the Criminal Code as in force at the relevant time, which constituted the lowest category of acts punishable under the Swiss Criminal Code. More severe sanctions, even going as far as a custodial sentence, apply to the same offence both under Article 293 of the Criminal Code and in the laws of other Council of Europe member States (...).

158. The Zürich District Court, in its judgment of 22 January 1999, also accepted the existence of extenuating circumstances and took the view that the disclosure of the confidential paper had not undermined the very foundations of the State.

159. It is true that no action was taken to prosecute the journalists who, the day after the applicant’s articles appeared, published the report in part and even in full, and therefore, on the face of it, revealed much more information considered to be confidential. However, that fact in itself does not make the sanction imposed on the applicant discriminatory or disproportionate. Firstly, the applicant was the first to disclose the information in question. Secondly, the principle of discretionary prosecution leaves States considerable room for manoeuvre in deciding whether or not to institute proceedings against someone thought to have committed an offence. In a case such as the present one they have the right, in particular, to take account of considerations of professional ethics.

160. Lastly, as regards the possible deterrent effect of the fine, the Court takes the view that, while this danger is inherent in any criminal penalty, the relatively modest amount of the fine must be borne in mind in the instant case.

161. In view of all the above factors, the Court does not consider the fine imposed in the present case to have been disproportionate to the aim pursued. ***Stoll v. Switzerland* [GC], no. 69698/01, 10 December 2007**

272. In two recent cases under Article 10 of the Convention, the Court upheld the proportionality of interferences which consisted in regulatory schemes limiting the technical means through which freedom of expression may be exercised in the public sphere (...). By contrast, the form of interference in issue in this case – a criminal conviction that could even result in a term of imprisonment – was much more serious in terms of its consequences for the applicant, and calls for stricter scrutiny.

273. In *Lehideux and Isorni* (...), the Court noted, as it has done in many other cases under Article 10 of the Convention, that a criminal conviction was a serious sanction, having regard to the existence of other means of intervention and rebuttal, particularly through civil remedies. The same applies here: what matters is not so much the severity of the applicant’s



sentence but the very fact that he was criminally convicted, which is one of the most serious forms of interference with the right to freedom of expression. **Perinçek v. Switzerland [GC], no. 27510/08, 15 October 2015**

101. In particular, in the court proceedings relating to the applicant's disbarment the domestic courts failed to sufficiently assess the proportionality of the interference, keeping in mind that the disbarment sanction constituted the harshest disciplinary sanction in the legal profession, having irreversible consequences on the professional life of a lawyer. (...) The domestic courts did not explain why the applicant's statement in the courtroom was such a serious misconduct that it justified the harshest disciplinary sanction. **Bagirov v. Azerbaijan, no. 81024/12, 25 June 2020**

A **fair balance** is also important when determining the nature of any **positive obligations** that may need to be observed in implementing a right or freedom.

As a result, the Court will consider whether – and possibly find that – certain obligations that have been claimed to be required would impose a disproportionate burden on the High Contracting Party concerned.

115. The Court notes that the first sentence of Article 2 § 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (...). It is common ground that the State's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. It is thus accepted by those appearing before the Court that Article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual. The scope of this obligation is a matter of dispute between the parties.

116. For the Court, and bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. **Osman v. United Kingdom [GC], no. 23452/94, 28 October 1998**

35. In the instant case, however, the right asserted by Mr Botta, namely the right to gain access to the beach and the sea at a place distant from his normal place of residence during his holidays, concerns interpersonal relations of such broad and indeterminate scope that there can be no conceivable direct link between the measures the State was urged to take in order to make good the omissions of the private bathing establishments and the applicant's private life.

Accordingly, Article 8 is not applicable. **Botta v. Italy, no. 21439/93, 24 February 1998**

89. While the applicant criticised the national rules on consent for the fact that they could not be disapplied in any circumstances, the Court does not find that the absolute nature of the Act is, in itself, necessarily inconsistent with Article 8 (...). Respect for human dignity and free will, as well as a desire to ensure a fair balance between the parties to IVF treatment, underlay the legislature's decision to enact provisions permitting of no exception to ensure that every person donating gametes for the purpose of IVF treatment would know in advance that no use could be made of his or her genetic material without his or her continuing consent. In addition to the principle at stake, the absolute nature of the rule served to promote legal certainty and to avoid the problems of arbitrariness and inconsistency inherent in weighing, on a case-by-case basis, what the Court of Appeal described as "entirely incommensurable" interests (...). In the Court's view, these general interests pursued by the legislation are legitimate and consistent with Article 8.

90. As regards the balance struck between the conflicting Article 8 rights of the parties to the IVF treatment, the Grand Chamber, in common with every other court which has examined this case, has great sympathy for the applicant, who clearly desires a genetically related child above all else. However, given the above considerations, including the lack of any European consensus on this point (...), it does not consider that the applicant's right to respect for the decision to become a parent in the genetic sense should be accorded greater weight than J's right to respect for his decision not to have a genetically related child with her.

91. The Court accepts that it would have been possible for Parliament to regulate the situation differently. However, as the Chamber observed, the central question under Article 8 is not whether different rules might have been adopted by the legislature, but whether, in striking the balance at the point at which it did, Parliament exceeded the margin of appreciation afforded to it under that Article.

92. The Grand Chamber considers that, given the lack of European consensus on this point, the fact that the domestic rules were clear and brought to the attention of the applicant and that they struck a fair balance between the competing interests, there has been no violation of Article 8 of the Convention. ***Evans v. United Kingdom [GC], no. 6339/05, 10 April 2007***

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However, what may once have been seen as **disproportionate** may subsequently be regarded as unproblematic.

86. In the Rees case, the Court allowed that great importance could be placed by the Government on the historical nature of the birth record system. The argument that allowing exceptions to this system would undermine its function weighed heavily in the assessment.

87. It may be noted however that exceptions are already made to the historic basis of the birth register system, namely, in the case of legitimisation or adoptions, where there is a possibility of issuing updated certificates to reflect a change in status after birth. To make a further exception in the case of transsexuals (a category estimated as including some 2,000-5,000 persons in the United Kingdom according to the Interdepartmental Working Group Report, p. 26) would not, in the Court's view, pose the threat of overturning the entire system. Though previous reference has been made to detriment suffered by third parties who might be unable to obtain access to the original entries and to complications occurring in the field of family and succession law (...), these assertions are framed in general terms and the Court does not find, on the basis of the material before it at this time, that any real prospect of prejudice has been identified as likely to arise if changes were made to the current system.

88. Furthermore, the Court notes that the Government have recently issued proposals for reform which would allow ongoing amendment to civil status data (...). It is not convinced therefore that the need to uphold rigidly the integrity of the historic basis of the birth registration system takes on the same importance in the current climate as it did in 1986. ***Christine Goodwin v. United Kingdom [GC], no. 28957/95, 11 July 2002***



## VII. Issues of Application

When required to consider the applicability of the Convention to the particular situation, the Court has to take account of both the burden of proof and the standard of proof when evaluating the facts. At the same time, it has to consider whether those facts fall within the jurisdiction of the High Contracting Party concerned.

Where a violation has been established, the finding that it involves a systemic problem will have implications for the remedial measures required. However, as far as concerns the individual whose rights and freedoms have been violated, the primary goal is to secure a *restitutio in integrum*, insofar as that is possible.

The burden of proof that a Convention right or freedom has been violated will generally lie on the person alleging that this has occurred. However, there may be circumstances where the Court will consider that it is for the High Contracting Party to show that this has not occurred.

This may be where

*- a difference in treatment has been established*

*- there is prima facie evidence of a causal link between a measure taken and the alleged restriction*

31. The Court observes that the respondent State has sought to justify the difference in treatment between tenants renting State-owned property such as the applicant and other private tenants renting from private landlords by pointing to the duties which the Constitution imposes on the authorities as regards the administration of the property of the State. While the Court accepts that a measure which has the effect of treating differently persons in a relevantly similar situation may be justified on public-interest grounds, it considers that in the instant case the Government have not provided any convincing explanation of how the general interest will be served by evicting the applicant. They have not pointed to any preponderant interest which would warrant the withdrawal from the applicant of the protection accorded to other tenants under the Rent Control Law 1983. As to the Government's argument that the lease of State-owned dwellings is not primarily motivated by profit-based considerations and for that reason they cannot be compared to private landlords (...), the Court would observe that there is nothing to prevent the authorities from requiring their tenants to pay a market rate and, as already noted, it has not been argued in the instant case that the applicant's rent was set at a preferential rate. Indeed, it must be recalled that the State assigned the property to the applicant acting not in a public-law capacity and with the interests of the community in mind but as a party to a private-law transaction (...). **Larkos v. Cyprus [GC], no. 29515/95, 18 February 1999**

140. In cases in which the margin of appreciation is narrow, as is the position where there is a difference in treatment based on sex or sexual orientation, the principle of proportionality does not merely require the measure chosen to be suitable in principle for achievement of the aim sought. It must also be shown that it was necessary, in order to achieve that aim, to exclude certain categories of people, in this instance persons living in a homosexual relationship, from the scope of application of the provisions in issue (...).

141. Applying the case-law cited above, the Court notes that the burden of proof is on the Government. It is for the Government to show that the protection of the family in the traditional sense and, more specifically, the protection of the child's interests require the exclusion of same-sex couples from second-parent adoption, which is open to unmarried heterosexual couples. **X. and Others v. Austria [GC], no. 19010/07, 10 February 2013**

149. The Court is of the view that once there is prima facie evidence in favour of the applicant's version of the events and the existence of a causal link, the burden of proof should shift to the Government. This is particularly important in the case at hand, since the reasons behind the termination of the applicant's mandate lie within the knowledge of the

Government and were never established or reviewed by an independent court or body, in contrast to the case of the former Vice-President of the Supreme Court. The Court notes that the explanations given at the relevant time in the bills introducing the amendments on the termination of the applicant's mandate were not very detailed. The bills referred in general terms to the new Fundamental Law of Hungary, the secession of the Supreme Court and the modifications to the court system resulting from that Law, without explaining the changes that prompted the premature termination of the applicant's mandate as President. This cannot be considered sufficient in the circumstances of the present case, in view of the fact that the previous bills submitted during the legislative process had not mentioned the termination of the applicant's mandate (...), and that previous declarations by the Government and members of the parliamentary majority had indicated precisely the opposite, namely that the applicant's mandate would not be terminated upon the entry into force of the Fundamental Law (...). Furthermore, neither the applicant's ability to exercise his functions as president of the supreme judicial body nor his professional conduct were called into question by the domestic authorities (...). ***Baka v. Hungary* [GC], no. 20261/12, 23 June 2016**

- *the circumstances in which the alleged violation occurred were to a great extent within the exclusive knowledge of the authorities*

100. In assessing evidence, the Court has generally applied the standard of proof "beyond reasonable doubt" (...). However, such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries and death occurring during such detention. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation. ***Salman v. Turkey* [GC], no. 21986/93, 27 June 2000**

In determining whether there is an evidential basis to support a finding that a particular right or freedom, the Court follows its own **standard of proof**.

147. (...), in assessing evidence, the Court has adopted the standard of proof "beyond reasonable doubt". However, it has never been its purpose to borrow the approach of the national legal systems that use that standard. Its role is not to rule on criminal guilt or civil liability but on Contracting States' responsibility under the Convention. The specificity of its task under Article 19 of the Convention – to ensure the observance by the Contracting States of their engagement to secure the fundamental rights enshrined in the Convention – conditions its approach to the issues of evidence and proof. In the proceedings before the Court, there are no procedural barriers to the admissibility of evidence or pre-determined formulae for its assessment. It adopts the conclusions that are, in its view, supported by the free evaluation of all evidence, including such inferences as may flow from the facts and the parties' submissions. According to its established case-law, proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. Moreover, the level of persuasion necessary for reaching a particular conclusion and, in this connection, the distribution of the burden of proof are intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake. The Court is also attentive to the seriousness that attaches to a ruling that a Contracting State has violated fundamental rights (...). ***Nachova and Others v. Bulgaria* [GC], no. 43577/98, 6 July 2005**

123. Accordingly, the Court's assessment whether there has been a violation of Article 3 cannot be reduced to a numerical calculation of square metres allocated to a detainee. Such an approach would, moreover, disregard the fact that, in practical terms, only a comprehensive approach to the particular conditions of detention can provide an accurate picture of the reality for detainees (...).

124. Nevertheless, having analysed its case-law and in view of the importance attaching to the space factor in the overall assessment of

prison conditions, the Court considers that a strong presumption of a violation of Article 3 arises when the personal space available to a detainee falls below 3 sq. m in multi-occupancy accommodation.

125. The “strong presumption” test should operate as a weighty but not irrebuttable presumption of a violation of Article 3. This in particular means that, in the circumstances, the cumulative effects of detention may rebut that presumption. It will, of course, be difficult to rebut it in the context of flagrant or prolonged lack of personal space below 3 sq. m. The circumstances in which the presumption may be rebutted will be set out below (...).

126. It follows that, when it has been conclusively established that a detainee disposed of less than 3 sq. m of floor surface in multi-occupancy accommodation, the starting point for the Court’s assessment is a strong presumption of a violation of Article 3. It then remains for the respondent Government to demonstrate convincingly that there were factors capable of adequately compensating for the scarce allocation of personal space. The cumulative effect of those conditions should inform the Court’s decision whether, in the circumstances, the presumption of a violation is rebutted or not.

127. With regard to the methodology for that assessment, the Court refers to its well-established standard of proof in conditions-of-detention cases (...). In this context the Court is particularly mindful of the objective difficulties experienced by applicants in collecting evidence to substantiate their claims about conditions of their detention. Still, in such cases applicants must provide a detailed and consistent account of the facts complained of (...). In certain cases applicants are able to provide at least some evidence in support of their complaints. The Court has considered as evidence, for example, written statements by fellow inmates or if possible photographs provided by applicants in support of their allegations (...).

128. Once a credible and reasonably detailed description of the allegedly degrading conditions of detention, constituting a *prima facie* case of ill-treatment, has been made, the burden of proof is shifted to the respondent Government who alone have access to information capable of corroborating or refuting these allegations. They are required, in particular, to collect and produce relevant documents and provide a detailed account of an applicant’s conditions of detention. Relevant information from other international bodies, such as the CPT, on the conditions of detention, as well as the competent national authorities and institutions, should also inform the Court’s decision on the matter (...). **Muršić v. Croatia [GC], no. 7334/13, 20 October 2016**

Furthermore, the Court must be satisfied that an act or omission alleged to constitute a violation of the Convention has occurred within the **jurisdiction** of a High Contracting Party as it only there that it will have responsibility to secure the rights and freedoms guaranteed by it.

This jurisdiction is primarily **territorial** – i.e., within its boundaries – but not exclusively so.

131. A State’s jurisdictional competence under Article 1 is primarily territorial (...). Jurisdiction is presumed to be exercised normally throughout the State’s territory (...). Conversely, acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction within the meaning of Article 1 only in exceptional cases (...).

132. To date, the Court in its case-law has recognised a number of exceptional circumstances capable of giving rise to the exercise of jurisdiction by a Contracting State outside its own territorial boundaries. In each case, the question whether exceptional circumstances exist which require and justify a finding by the Court that the State was exercising jurisdiction extraterritorially must be determined with reference to the particular facts.

133. The Court has recognised in its case-law that, as an exception to the principle of territoriality, a Contracting State’s jurisdiction under Article 1 may extend to acts of its authorities which produce effects outside its own territory (...).

134. Firstly, it is clear that the acts of diplomatic and consular agents, who are present on foreign territory in accordance with provisions of international law, may amount to an exercise of jurisdiction when these agents exert authority and control over others (...).

135. Secondly, the Court has recognised the exercise of extraterritorial jurisdiction by a Contracting State when, through the consent, invitation or acquiescence of the Government of that territory, it exercises all or some of the public powers normally to be exercised by that Government (...).

136. In addition, the Court's case-law demonstrates that, in certain circumstances, the use of force by a State's agents operating outside its territory may bring the individual thereby brought under the control of the State's authorities into the State's Article 1 jurisdiction. This principle has been applied where an individual is taken into the custody of State agents abroad. (...)

138. Another exception to the principle that jurisdiction under Article 1 is limited to a State's own territory occurs when, as a consequence of lawful or unlawful military action, a Contracting State exercises effective control of an area outside that national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control, whether it be exercised directly, through the Contracting State's own armed forces, or through a subordinate local administration (...). ***Al-Skeini and Others v. the United Kingdom [GC], no. 55721/07, 7 July 2011***

177. The Court has already found that, according to the established caselaw of the Commission and of the Court, the purpose of Article 4 of Protocol No. 4 is to prevent States being able to remove certain aliens without examining their personal circumstances and, consequently, without enabling them to put forward their arguments against the measure taken by the relevant authority. If, therefore, Article 4 of Protocol No. 4 were to apply only to collective expulsions from the national territory of the States Parties to the Convention, a significant component of contemporary migratory patterns would not fall within the ambit of that provision, notwithstanding the fact that the conduct it is intended to prohibit can occur outside national territory and in particular, as in the instant case, on the high seas. Article 4 would thus be ineffective in practice with regard to such situations, which, however, are on the increase. The consequence of that would be that migrants having taken to the sea, often risking their lives, and not having managed to reach the borders of a State, would not be entitled to an examination of their personal circumstances before being expelled, unlike those travelling by land.

178. It is therefore clear that, while the notion of "jurisdiction" is principally territorial and is presumed to be exercised on the national territory of States (...), the notion of expulsion is also principally territorial in the sense that expulsions are most often conducted from national territory. Where, however, as in the instant case, the Court has found that a Contracting State has, exceptionally, exercised its jurisdiction outside its national territory, it does not see any obstacle to accepting that the exercise of extraterritorial jurisdiction by that State took the form of collective expulsion. To conclude otherwise, and to afford that last notion a strictly territorial scope, would result in a discrepancy between the scope of application of the Convention as such and that of Article 4 of Protocol No. 4, which would go against the principle that the Convention must be interpreted as a whole. Furthermore, as regards the exercise by a State of its jurisdiction on the high seas, the Court has already stated that the special nature of the maritime environment cannot justify an area outside the law where individuals are covered by no legal system capable of affording them enjoyment of the rights and guarantees protected by the Convention which the States have undertaken to secure to everyone within their jurisdiction (...). ***Hirsi Jamaa and Others v. Italy [GC], no. 27765/09, 23 February 2012***

The fact that a High Contracting Party does not have control over its territory will not necessarily mean that violations of Convention rights and freedoms will not be considered to fall within its **jurisdiction**, even if directly imputable to entities within it.

145. The applicant in the instant case is a person who, despite being acquitted by the Supreme Court of Georgia (...), nonetheless remains in the custody of the local Ajarian authorities (...). While attributing his continued detention to arbitrariness on the part of the local authorities, the applicant also complains that the measures taken by the central authority to secure his release have been ineffective.

As the case file shows, the central authorities have taken all the procedural steps possible under domestic law to secure compliance with the judgment acquitting the applicant, have sought to resolve the dispute by various political means and have repeatedly urged the Ajarian authorities to release him. However, no response has been received to any of their requests (...).

Thus, the Court is led to the conclusion that, under the domestic system, the matters complained of by the applicant were directly imputable to the local Ajarian authorities. (...)

147. Despite the malfunctioning of parts of the State machinery in Georgia and the existence of territories with special status, the Ajarian Autonomous Republic is in law subject to the control of the Georgian State. The relationship existing between the local Ajarian authorities and the central government is such that only a failing on the part of the latter could make the continued breach of the provisions of the Convention at the local level possible. The general duty imposed on the State by Article 1 of the Convention entails and requires the implementation of a national system capable of securing compliance with the Convention throughout the territory of the State for everyone. (...)

149. The Court thus emphasises that the higher authorities of the Georgian State are strictly liable under the Convention for the conduct of their subordinates (...). It is only the responsibility of the Georgian State itself – not that of a domestic authority or organ – that is in issue before the Court. It is not the Court's role to deal with a multiplicity of national authorities or courts or to examine disputes between institutions or over internal politics. (...) **Assanidze v. Georgia [GC], no. 71503/01, 8 April 2004**

Moreover, the responsibility to secure Convention rights and freedoms will remain – at least to some extent – within the **jurisdiction** of a High Contracting Party which has lost loss of **control** over some of its territory is to another State.

333. The Court considers that where a Contracting State is prevented from exercising its authority over the whole of its territory by a constraining *de facto* situation, such as obtains when a separatist regime is set up, whether or not this is accompanied by military occupation by another State, it does not thereby cease to have jurisdiction within the meaning of Article 1 of the Convention over that part of its territory temporarily subject to a local authority sustained by rebel forces or by another State.

Nevertheless, such a factual situation reduces the scope of that jurisdiction in that the undertaking given by the State under Article 1 must be considered by the Court only in the light of the Contracting State's positive obligations towards persons within its territory. The State in question must endeavour, with all the legal and diplomatic means available to it *vis-à-vis* foreign States and international organisations, to continue to guarantee the enjoyment of the rights and freedoms defined in the Convention. **Ilasçu and Others v. Moldova and Russia [GC], no. 48787/99, 8 July 2004**

317. A State's responsibility may also be engaged on account of acts which have sufficiently proximate repercussions on rights guaranteed by the Convention, even if those repercussions occur outside its jurisdiction. Thus, with reference to extradition to a non-Contracting State, the Court has held that a Contracting State would be acting in a manner incompatible with the underlying values of the Convention, "that common heritage of political traditions, ideals, freedom and the rule of law" to which the



Preamble refers, if it were knowingly to hand over a fugitive to another State where there are substantial grounds for believing that the person concerned faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment (...). ***Ilasçu and Others v. Moldova and Russia [GC], no. 48787/99, 8 July 2004***

319. A State may also be held responsible even where its agents are acting *ultra vires* or contrary to instructions. Under the Convention, a State's authorities are strictly liable for the conduct of their subordinates; they are under a duty to impose their will and cannot shelter behind their inability to ensure that it is respected (...). ***Ilasçu and Others v. Moldova and Russia [GC], no. 48787/99, 8 July 2004***

22. It remains to be determined whether the State should be held responsible, under Article 3, for the beating of the applicant by his stepfather.

The Court considers that the obligation on the High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals (...). Children and other vulnerable individuals, in particular, are entitled to State protection, in the form of effective deterrence, against such serious breaches of personal integrity (...).

23. The Court recalls that under English law it is a defence to a charge of assault on a child that the treatment in question amounted to "reasonable chastisement" (...). The burden of proof is on the prosecution to establish beyond reasonable doubt that the assault went beyond the limits of lawful punishment. In the present case, despite the fact that the applicant had been subjected to treatment of sufficient severity to fall within the scope of Article 3, the jury acquitted his stepfather, who had administered the treatment (...).

24. In the Court's view, the law did not provide adequate protection to the applicant against treatment or punishment contrary to Article 3. Indeed, the Government have accepted that this law currently fails to provide adequate protection to children and should be amended.

In the circumstances of the present case, the failure to provide adequate protection constitutes a violation of Article 3 of the Convention. ***A. v. United Kingdom, no. 25599/94, 23 September 1998***

66. Article 1 of the Convention, taken in conjunction with Article 3, imposes on the States positive obligations to ensure that individuals within their jurisdiction are protected against all forms of ill-treatment prohibited under Article 3, including where such treatment is administered by private individuals (...). This obligation should include effective protection of, *inter alia*, an identified individual or individuals from the criminal acts of a third party, as well as reasonable steps to prevent ill-treatment of which the authorities knew or ought to have known (...). Furthermore, Article 3 requires that the authorities conduct an effective official investigation into the alleged ill-treatment, even if such treatment has been inflicted by private individuals (...). For the investigation to be regarded as "effective", it should in principle be capable of leading to the establishment of the facts of the case and to the identification and punishment of those responsible. This is not an obligation of result, but one of means. In this connection, the Court has often assessed whether the authorities reacted promptly to the incidents reported at the relevant time. Consideration has been given to the opening of investigations, delays in taking statements and to the length of time taken for the initial investigation (...). ***Identoba and Others v. Georgia, no. 73235/12, 12 May 2015***

In some cases, the Court may consider that the violation of a Convention right or freedom found in the case before it is representative of a more fundamental failure to implement the Convention effectively, namely, a **systemic problem**.

93. It is intrinsic to the Court's findings that the violation of the applicant's right to a trial within a reasonable time is not an isolated incident, but rather a systemic problem that has resulted from inadequate legislation and inefficiency in the administration of justice. The problem continues to present a danger affecting every person seeking judicial protection of their rights. **Lukenda v. Slovenia, no. 23032/02, 6 October 2005**

237. (...) the Grand Chamber sees the underlying systemic problem as a combination of restrictions on landlords' rights, including defective provisions on the determination of rent, which was and still is exacerbated by the lack of any legal ways and means enabling them at least to recover losses incurred in connection with property maintenance, rather than as an issue solely related to the State's failure to secure to landlords a level of rent reasonably commensurate with the costs of property maintenance. **Hutten-Czapska v. Poland [GC], no. 35014/97, 19 June 2006**

This will have implications for the remedial measures that will be required to address such a problem.

280. The breach of Article 3 of the Convention found in the present case in relation to the regime and conditions of the applicants' detention flows in large part from the relevant provisions of the 2009 Execution of Punishments and Pre-Trial Detention Act and its implementing regulations (...). It discloses a systemic problem that has already given rise to similar applications (...), and may give rise to more such applications. The nature of the breach suggests that to execute this judgment properly, the respondent State would be required to reform, preferably by means of legislation, the legal framework governing the prison regime applicable to persons sentenced to life imprisonment with or without parole. That reform, invariably recommended by the CPT since 1999 (...), should entail (a) removing the automatic application of the highly restrictive prison regime currently applicable to all life prisoners for an initial period of at least five years, and (b) putting in place provisions envisaging that a special security regime can only be imposed – and maintained – on the basis of an individual risk assessment of each life prisoner, and applied for no longer than strictly necessary. **Harakchiev and Tolumov v. Bulgaria, no. 15018/11, 8 July 2014**

Where Convention rights and freedoms have been violated, there is a need to provide redress to those affected, with the primary aim being to put them, as far as possible, in the position that they would have been had the requirements of the Convention not been disregarded, i.e., to achieve **restitutio in integrum**.

89. (...) where an individual has been convicted following proceedings that have entailed breaches of the requirements of Article 6 of the Convention, the Court may indicate that a retrial or the reopening of the case, if requested, represents in principle an appropriate way of redressing the violation (...). This is in keeping with the guidelines of the Committee of Ministers, which in Recommendation No. R (2000) 2 called on the States Parties to the Convention to introduce mechanisms for re-examining the case and reopening the proceedings at domestic level, finding that such measures represented "the most efficient, if not the only, means of achieving *restitutio in integrum*" (...). **Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2) [GC], no. 32772/02, 30 June 2009**

This may take various forms, including the return of property taken, the reopening of legal proceedings and the removal of any disqualifications imposed.

However, achieving **restitutio in integrum** may not always be possible – e.g., confiscated property may have been sold to an innocent third party - and the payment of compensation may then be the only remedy possible.

246. The Court reiterates that a judgment in which it finds a breach imposes on the respondent State a legal obligation 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 (...).

247. The Contracting States that are parties to a case are in principle free to choose the means whereby they will comply with a judgment in which the Court has found a breach. This discretion as to the manner of execution of a judgment reflects the freedom of choice attached to the primary obligation of the Contracting States under the Convention to secure the rights and freedoms guaranteed (Article 1). If the nature of the breach allows of *restitutio in integrum*, it is for the respondent State to effect it, the Court having neither the power nor the practical possibility to do so itself. If, on the other hand, national law does not allow – or allows only partial – reparation to be made for the consequences of the breach, Article 41 empowers the Court to afford the injured party such satisfaction as appears to it to be appropriate (...).

248. The Court has held that the interference in question satisfied the condition of lawfulness and was not arbitrary (...). The act of the Italian government which the Court held to be contrary to the Convention was an expropriation that would have been legitimate but for the failure to pay fair compensation (...). Furthermore, the Court has found that the retrospective application of section 5 *bis* of Law no. 359/1992 deprived the applicants of the possibility afforded by section 39 of Law no. 2359/1865, applicable to the present case, of obtaining compensation at the market value of the property (...).

249. In the present case the Court considers that the nature of the violations found does not allow it to assume that *restitutio in integrum* can be made (...). An award of equivalent compensation must therefore be made.

250. The lawfulness of such a dispossession inevitably affects the criteria to be used for determining the reparation owed by the respondent State, since the pecuniary consequences of a lawful expropriation cannot be assimilated to those of an unlawful dispossession (...).

251. The Court adopted a very similar position in *Papamichalopoulos and Others* (...). It found a violation in that case on account of a *de facto* unlawful expropriation (occupation of land by the Greek Navy since 1967) which had lasted for more than twenty-five years on the date of the principal judgment delivered on 24 June 1993. The Court accordingly ordered the Greek State to pay the applicants, for damage and loss of enjoyment since the authorities had taken possession of the land, an amount corresponding to the current value of the land, increased by the appreciation brought about by the existence of buildings which had been erected since the land had been occupied. ***Scordino v. Italy (No. 1)* [GC], no. 36813/97, 29 March 2006**

## VIII. Glossary

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**A**nswers to many questions about the application of the European Convention on Human Rights can often be found by referring to the case law of the European Court of Human Rights. This case law is very much the flesh on the bare bones found in the text of the Convention itself. Certainly, without this case law, it can be hard to fully appreciate what is required by the various rights and freedoms in the Convention.

However, there will not always be a case dealing exactly with the particular situation that is of concern and for which it is thought or suggested that the Convention is relevant. Moreover, even if there are cases that do seem relevant for that situation, certain features in them might mean that it would be inappropriate to follow their approach or that this should only be done in some modified form.

This brochure cannot provide an answer to specific problems of this kind. Rather it seeks to shed light on the considerations that inform the interpretation and application of Convention provisions by the Court – its doctrines and methodology – so that it is possible to work out how to resolve such problems where there is no case with absolutely identical facts which can be applicable.

ENG

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The Council of Europe is the continent's leading human rights organisation. It comprises 47 member states, including all members of the European Union. All Council of Europe member states have signed up to the European Convention on Human Rights, a treaty designed to protect human rights, democracy and the rule of law. The European Court of Human Rights oversees the implementation of the Convention in the member states.

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