The Role of History in the ECHR Case Law

Paulo Pinto de Albuquerque*

Amnesty; European Court of Human Rights; History; Jurisprudence; Travaux preparatoires

Abstract

This article examines the way in which history is approached by the European Court of Human Rights, both by reference to the Court's usage of historical documents as an aid to its interpretative role over the Convention and by reference to cases involving complainants who assert historical wrongs. The limited extent to which travaux préparatoires *are relied upon by the Court is assessed together with a range of procedural and substantive barriers that must be overcome by applicants who seek to bring historical claims to the Court. The article concludes that while the Court is clearly cautious in its approach to historical claims, the impact of history on its work is undoubtedly meaningful and impressive.*

Dedication

This text is the speech delivered in the ceremony of my doctorate honoris causa by the Yaroslav Mudryi National Law University, Kharkiv, Ukraine, on 23 September 2021. It is dedicated to the memory of Jonathan Cooper OBE, a true believer in Europe and a committed human rights jurist. May his legacy remain as an example for all those striving for a greater unity between European nations and for the maintenance and further realisation of Human Rights everywhere.

A. Issues of interpretation

1. The principles of interpretation

The European Court of Human Rights (the Court) has traditionally focused on the objective and declared intention of the founding fathers and has seldom appealed to historical texts to uncover the meaning of the European Convention on Human Rights (the Convention). The reading of the Convention remains open to current interpretation as informed by developments in international law.[1]

As early as 1968, in the *Belgian Linguistic* case,[2] the Court asserted that the Convention and Protocol No.1 must be read as a whole and the decision it had to take essentially turned on the content and scope

* Full Professor at the Catholic University (Lisbon) and adjunct professor at the Universities of Paris II and Florence (2021), former judge at the European Court of Human Rights (2011–2020) and Doctor *honoris causa* by Edge Hill University, UK (2019).

[1] J. Gerards, "The scope of ECHR rights and institutional concerns: the relationship between proliferation of rights and the case load of the ECtHR", in E. Brems and J. Gerards (eds), *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (Cambridge University Press, 2013); G. Letsas, "Strasbourg's Interpretive Ethic: Lessons for the International Lawyer" (2010) 21 E.J.I.L. 509; G. Letsas, "The ECHR as a living instrument: its meaning and legitimacy" in A. Føllesdal, B. Peters and G. Ulfstein (eds), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (Cambridge University Press, 2013); A. Mowbray, "Between the Will of the Contracting Parties and the Needs of Today: Extending the Scope of Convention Rights and Freedoms beyond Could Have Been Foreseen by the Drafters of the ECHR" in E. Brems and J. Gerards (eds), *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (Cambridge University Press, 2013).

[2] The official title of the case is: *Case "Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium" v Belgium (Merits)* (App. Nos 1474/62 et al.), judgment of 23 July 1968 (*The Belgian linguistic case*).

of the pertinent articles.[3] The formulation of art.2 of Protocol No.1 indicated, as is confirmed by the "preparatory work", that the Contracting Parties did not recognise a right to education that would require them to "establish at their own expense, or to subsidise, education of any particular type or at any particular level", and did not require of states that they should, "in the sphere of education or teaching, respect parents' linguistic preferences, but only their religious and philosophical convictions" which implied the right to be educated in the national language or in one of the national languages.[4] Hence, the state has a positive obligation to ensure respect for such a right. Furthermore, the Court rejected an extensive interpretation of art.14, according to which it prohibits the establishment of legitimate "differentiation" in the enjoyment of the rights and freedoms guaranteed because "certain legal inequalities tend only to correct factual inequalities".[5] Similarly, in *Wemhoff v Germany*,[6] the Court asserted that the Convention is a law-making treaty that creates rights and obligations. The Court should 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".[7]

Where the text of the Convention leaves gaps, the Court has provided a rule to fill the gaps in the Convention by using other rules of international law, such as general principles of law recognised by civilised nations. In *Golder v United Kingdom*, although the Vienna Convention on the Law of Treaties had not entered into force at the time, the Court looked towards arts 31 and 33 of that Convention partly because they "enunciate[d] in essence generally accepted principles of international law to which the Court has already referred on occasion"[8] which may be used to interpret unclear parts of the Convention. The International Court of Justice (ICJ) similarly uses a combination of international conventions, international custom, and general principles of law to decide disputes submitted to it.[9]

In *Engel v Netherlands*, the Court expressed its views of the Convention as a treaty with autonomous concepts, arguing that if viewed as anything else, European supervision would become an illusory concept.[10] Although the Court accepted that there will be some deviations in interpretations based on the context of the complaint, including the state in which it took place, context and unique circumstances cannot be used to escape the responsibilities laid out under the Convention.[11]

The Court has also asserted a "principle of effectiveness" when interpreting the Convention. What this principle broadly holds is that the Convention's protections must be practical. The rights declared in the Constitution must not just be given a theoretical or virtual effect. The best example of the "principle of effectiveness" is asserted in the case of *Airey v Ireland*.[12] There, the Court held that the lack of legal aid for the applicant implied a lack of access to the Court. The Court cites the *Golder* case mentioned above, where the Court held that art.6(1) "embodies the right of access to a court for the determination of civil rights and obligations".[13] The Court further asserted that, as art.6(1) "secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal",[14] this article also includes a right for the applicant to have access to the High Court in order to petition for judicial separation. The applicant had claimed that the high cost of bringing such an appeal was preventing her from enjoying the rights implied in the Convention.[15] The Government, in response, argued that legal counsel is not,

[3] *Belgian linguistic case* (App. Nos 1474/62 et al.), judgment of 23 July 1968 at [1] (The Law, B).
[4] *Belgian linguistic case* (App. Nos1474/62 et. al.), judgment of 23 July 1968 at [3], [4], and [6] (The Law, B).
[5] *Belgian linguistic case* (App. Nos 1474/62 et al.), judgment of 23 July 1968 at [10] (The Law, B).
[6] *Wemhoff v Germany* (App. No.2122/64), judgment of 27 June 1968.
[7] *Wemhoff v Germany* (App. No.2122/64), judgment of 27 June 1968 at [8] (As to the law, A).
[8] *Golder v United Kingdom* (App. No.4451/70), judgment of 21 February 1975 at [29].
[9] ICJ Statute art.38(I)(c).
[10] *Engel v Netherlands* (App. Nos 5100/71 et al.), judgment of 8 June 1976 at [81]–[82].
[11] *Engel v Netherlands* (App. Nos 5100/71 et al.), judgment of 8 June 1976 at [82].
[12] *Airey v Ireland* (App. No.6289/73), judgment of 9 October 1979.
[13] *Airey v Ireland* (App. No.6289/73), judgment of 9 October 1979 at [20].
[14] *Golder v United Kingdom* (App. No.4451/70), judgment of 21 February 1975 at [36].
[15] *Airey v Ireland* (App. No.6289/73), judgment of 9 October 1979 at [20].

technically, necessary in order to appeal to the High Court and thus the applicant remained free to appeal her case without legal assistance, if she could not afford it.[16]

The Court did not accept the Government's contention, and reasserted that "[t]he Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective".[17] The Court emphasised that this was particularly the case when the right at issue was access to a court, since the right to a fair trial occupies such a prominent role in a democratic society. Thus, the Court must ascertain whether the applicant's "appearance before the High Court without the assistance of a lawyer would be effective, in the sense of whether she would be able to present her case properly and satisfactorily".[18] The Court concluded that, practically, the ability to self-represent before the High Court was not sufficient to guarantee an effective right of access to a court. In certain situations, it found the state has positive obligations to ensure guarantee of a right: in this case, the state must provide the applicant with legal counsel if her right of access to court should be respected. Although the Court was aware that the realisation of social and economic rights is largely dependent on a State's financial situation, it also asserted that the Convention "must be interpreted in the light of present-day conditions" and safeguard individuals in a real and practical way.[19]

The Court's evolutive interpretation of the Convention is evident by the Court's reference to the Convention as a "living instrument", to be read in the context of the time and with attention given to the present-day conditions. This notion was introduced in *Tyrer v United Kingdom*[20] in 1978, where the Court had to assess whether a form of criminal punishment amounted to "degrading treatment" in breach of art.3 of the Convention. The applicant, a juvenile at the time, had been sentenced to three strokes of the birch after being found guilty of assault. Even though such punishment may not have outraged public opinion on the Isle of Man, where the events took place, the Court stressed the need to interpret the punishment in light of present-day conditions and developments and commonly accepted standards in the penal policy of the Member States of the Council of Europe.[21] Ultimately, the Court found that judicial corporal punishment amounted to degrading punishment within the meaning of art.3 of the Convention.[22]

The Court has looked to European consensus on various issues in other cases. For example in *Marckx v Belgium*,[23] the Court recalled the principle from *Tyrer*, that the Convention must be interpreted in the light of present-day conditions, and noted that "the domestic law of the great majority of the member States of the Council of Europe has evolved and is continuing to evolve, in company with the relevant international instruments, towards full juridical recognition of the *maxim mater semper certa est*, thus erasing the distinction between 'illegitimate' and 'legitimate' children".[24] The Court also took into account instruments of soft law, such as a 1962 convention signed by Belgium and a 1975 convention not signed by Belgium, both with a small number of parties.

The progressive interpretation of the Convention was also stressed in *Ireland v United Kingdom*[25] in 1978. In assessing Ireland's claims under art.15, the Court stressed that:

> "when a State is struggling against a public emergency threatening the life of the nation, it would be rendered defenceless if it were required to accomplish everything at once, to furnish from the outset each of its chosen means of action with each of the safeguards reconcilable with the priority

[16] *Airey v Ireland* (App. No.6289/73), judgment of 9 October 1979 at [24].
[17] *Airey v Ireland* (App. No.6289/73), judgment of 9 October 1979 at [24] (citing the *Belgian linguistic case* (App. Nos 1474/62 et al.), judgment of 23 July 1968 at [3] and [4]; *Golder v United Kingdom* (App. No.4451/70), judgment of 21 February 1975 at [35]; *Luedicke v Germany* (1979–1980) 2 E.H.R.R. 149 at [42]; and the *Marckx v Belgium* (1979–1980) 2 E.H.R.R. 330 at [31]).
[18] *Airey v Ireland* (App. No.6289/73), judgment of 9 October 1979 at [24].
[19] *Airey v Ireland* (App. No.6289/73), judgment of 9 October 1979 at [26].
[20] *Tyrer v United Kingdom* (App. No.5856/72), judgment of 25 April 1978.
[21] *Tyrer v United Kingdom* (App. No.5856/72), judgment of 25 April 1978 at [31].
[22] *Tyrer v United Kingdom* (App. No.5856/72), judgment of 25 April 1978 at [35].
[23] *Marckx v Belgium* (App. No.6833/74), judgment of 13 June 1979.
[24] *Marckx v Belgium* (App. No.6833/74), judgment of 13 June 1979 at [41].
[25] *Ireland v United Kingdom* (App. No. 5310/71), judgment of 18 January 1978.

> requirements for the proper functioning of the authorities and for restoring peace within the community."[26]

Thus, the Court held, the interpretation of art.15 must leave a place for progressive adaptations.[27]

In *Karner v Austria*, a case decided in 2003, the Court expanded on this notion and its role in the progressive protection of human rights and held that:

> "[a]lthough the primary purpose of the Convention system is to provide individual relief, its mission is also to determine issues on public-policy grounds in the common interest, thereby raising the general standards of protection of human rights and extending human rights jurisprudence throughout the community of Convention States."[28]

More recently, in the 2008 case of *Demir and Baykara v Turkey*, the Court noted a consensus among Member States based on a treaty that had not yet been ratified by Turkey. In defining the meaning of terms and notions in the text of the Convention, the Court held that it "can and must take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their common values".[29] The Court added that "it is not necessary for the respondent State to have ratified the entire collection of instruments that are applicable in respect of the precise subject matter of the case concerned", if there is a continuous evolution in the norms and principles applied in international law or in the domestic law of the majority of Member States of the Council of Europe that show a common understanding.[30] This view is further confirmed by the Preamble of the Convention, which states that fundamental freedoms encompassed in the Convention are best maintained by "a common understanding and observance" of human rights.[31]

A progressive interpretation of the Convention is in line with the presumed intention of the founding fathers, evident in the Preamble's reference to the "further realisation of Human Rights and Fundamental Freedoms". Some scholars have supported this view. For example, Waldock has stated that "[t]he meaning and content of the provisions of the Convention will be understood as intended to evolve in response to changes in legal or social concepts".[32] Finally, art.31 of the Vienna Convention on the Law of Treaties calls upon signatories to consider the object and purpose of a treaty, as well as to take into account subsequent agreements, subsequent practice and any relevant rules of international law "applicable in the relations between the parties".[33]

2. The value of travaux préparatoires

The Court's preference for an evolutive construction of the Convention, as well as the well-established view of the Convention as a "living instrument", has decreased the value of the preparatory work (*travaux préparatoires*) for the Court. However, their application has not been consistent, and the Court has sometimes utilised them to clarify uncertainties.

Traditionally, the Court has neglected *travaux préparatoires* as a technical tool for the interpretation of international and domestic texts. For example, in *Young, James and Webster v United Kingdom*,[34] the Court held that there was a negative freedom of association, even though this finding was against the drafter's intention, which was not to enshrine such a right. The principle of a "living instrument" pushed

[26] *Ireland v United Kingdom* (App. No.5310/71), judgment of 18 January 1978 at [220].
[27] *Ireland v United Kingdom* (App. No.5310/71), judgment of 18 January 1978 at [220].
[28] *Karner v Austria* (App. No.40016/98), judgment of 24 October 2003 at [26].
[29] *Demir and Baykara* [GC] (App. No.34503/97), judgment of 12 November 2008 at [85].
[30] *Demir and Baykara* [GC] (App. No.34503/97), judgment of 12 November 2008 at [86].
[31] Preamble, European Convention on Human Rights.
[32] H.M. Waldock, "The Evolution of Human Rights Concepts and the Application of the European Convention on Human Rights" in *Mélanges Reuter* (Pedone, 1981) 547.
[33] Vienna Convention on the Law of Treaties art.31(3)(c).
[34] *Young, James and Webster* (App. Nos 7601/76 and 7806/77), judgment of 13 August 1981.

the Court to hold that, despite the evident intention of the drafters as seen in the *travaux préparatoires*, the rights protected within the Convention had evolved and expanded to now include a negative freedom of association—implied by art.11's right to freedom of association.[35]

Sometimes the *travaux préparatoires* prevail and the Court takes notes of what they say. For example, in *Banković v Belgium*,[36] a case from 2001 concerning the bombing by the North Atlantic Treaty Organisation (NATO) of the Radio Televizije Srbije (Radio-Television Serbia) headquarters in Belgrade as part of NATO's campaign of air strikes against the Former Republic of Yugoslavia during the Kosovo conflict. In that case, the Grand Chamber consulted the *travaux préparatoires* to assess the scope of the Court's jurisdiction, and ultimately limit the Court's reach.[37]

Ultimately, the *travaux préparatoires* are a "supplementary means" of interpretation and are used by the Court to confirm the meaning resulting from the means of interpretation referred to in art.31 of the Vienna Convention. The fragmentary or cursory nature of these elements weakens their probative value. When they are clear and thorough, however, they may be persuasive to the Court.

The Court's adoption of an "objective" interpretation is ultimately not favourable to the pre-eminence of the *travaux préparatoires* as a reflection of the real intention of the founding fathers. The "declared intention of the founding fathers" and subsequent developments are much more valuable to the Court's analysis. The Court grants some flexibility to the interpretation of the "declared intention of the founding fathers" as it is subsequently understood by parties. Such an interpretation is purposeful; it looks for the purpose of each provision within the Convention. The Court has simultaneously rejected a subjective interpretation that seeks to find the "real intention of founding fathers", a linguistic meaning of an uncertain term at the time of the Convention's conclusion, or a self-contained, *in dubio mitius* interpretation.

Most recently, the Court assessed the utility of the *travaux préparatoires* in the case of *Magyar Helsinki Bizottság v Hungary*.[38] The Court emphasised that, "as an international treaty, the Convention must be interpreted in the light of the rules of interpretation provided for in Articles 31–33 of the Vienna Convention of 23 May 1969 on the Law of Treaties".[39] To interpret the Convention, the Court held, "recourse may also be had to supplementary means of interpretation, including the preparatory work (*travaux préparatoires*) of the treaty, either to confirm a meaning determined in accordance with the above steps, or to establish the meaning where it would otherwise be ambiguous, obscure, or manifestly absurd or unreasonable".[40] The Court takes into account the preparatory work on art.10, although it is not "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".[41] On the other hand, the Court considers it noteworthy that the drafting history of Protocol No.6 "reveals a common understanding between the bodies and institutions of the Council of Europe that Article 10, paragraph 1

[35] *Young, James and Webster* (App. Nos 7601/76 and 7806/77), judgment of 13 August 1981 at [52]. "Assuming for the sake of argument that, for the reasons given in the above-cited passage from the travaux préparatoires, a general rule such as that in Article 20 par. 2 of the Universal Declaration of Human Rights was deliberately omitted from, and so cannot be regarded as itself enshrined in, the Convention, it does not follow that the negative aspect of a person's freedom of association falls completely outside the ambit of Article 11 (art.11) and that each and every compulsion to join a particular trade union is compatible with the intention of that provision. To construe Article 11 (art.11) as permitting every kind of compulsion in the field of trade union membership would strike at the very substance of the freedom it is designed to guarantee (see, mutatis mutandis, the judgment of 23 July 1968 on the merits of the 'Belgian Linguistic' case, Series A no. 6, p. 32, par. 5, the Golder judgment of 21 February 1975, Series A no. 18, p. 19, par. 38, and the Winterwerp judgment of 24 October 1979, Series A no. 33, p. 24, par. 60)."

[36] *Banković v Belgium* [GC] (App. No.52207/99), decision of 12 December 2001.

[37] *Banković v Belgium* [GC] (App. No.52207/99), decision of 12 December 2001 at [58]. "It is further recalled that the *travaux préparatoires* can also be consulted with a view to confirming any meaning resulting from the application of Article 31 of the Vienna Convention 1969 or to determining the meaning when the interpretation under Article 31 of the Vienna Convention 1969 leaves the meaning 'ambiguous or obscure' or leads to a result which is 'manifestly absurd or unreasonable' (Article 32)."

[38] *Magyar Helsinki Bizottság* [GC] (App. No.18030/11), judgment of 8 November 2016.

[39] *Magyar Helsinki Bizottság* [GC] (App. No.18030/11), judgment of 8 November 2016 at [118].

[40] *Magyar Helsinki Bizottság* [GC] (App. No.18030/11), judgment of 8 November 2016 at [125].

[41] *Magyar Helsinki Bizottság* [GC] (App. No.18030/11), judgment of 8 November 2016 at [135].

of the Convention, in its wording as originally drafted, could reasonably be considered as already comprising the 'freedom to seek information'".[42]

B. Issues of procedural nature

1. Ratione temporis limits to the compensation of historical wrongs

i. In general terms

The provisions of the Convention do not bind Contracting Parties "in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the Convention with respect to that Party or, as the case may be, prior to the entry into force of Protocol No. 11, before the date on which the respondent Party recognized the right of individual petition, when this recognition was still optional".[43] The date on which the state either ratified the Convention or recognised the right of individual petition is known as "the critical date".[44] As the Court found in *Preussische Treuhand GmbH & Co KG a.A. v Poland*, from the date of ratification onwards, "all the State's alleged acts and omissions must conform to the Convention or its Protocols and subsequent facts fall within the Court's jurisdiction even where they are merely extensions of an already existing situation".[45] What this means, in practical terms, is that individuals may assert their rights under the Convention even for wrongs that began before the "critical date" (i.e. the state's ratification of the Convention), if such wrongs extend beyond the critical date.

Most common complaints dealing with historical events have fallen under arts 2 and 3 of the Convention and under art.1 of Protocol 1. Over the years, the Court has developed and established a way to deal with such complaints. The issue of compensation for historical wrongs has often come before the Court and has been dealt with in a few different ways.

In 1996, in the *Loizidou v Turkey*[46] case, applicants brought a case before the Court claiming they had lost their right to return to their former homes in Cyprus after the conflict that occurred on the island. The Court held that there had been a continuing violation of right to property since 1974 and until after the critical date of 22 January 1990, when Turkey recognised the jurisdiction of the Court. As a result of the continued violation, the Court found in favour of the applicants and declared the international illegality of using art.159 of the TRNC Constitution as legal basis for expropriation.

In 2001, in the case *Almeida Garrett, Mascarenhas Falcao v Portugal*,[47] the Court held that there had been an "instantaneous act" before the critical date (i.e. before Portugal ratified the Convention). The Government argued that the expropriation measure at the centre of this case took place before Portugal ratified the Convention; thus the Court did not have jurisdiction *ratione temporis* to examine the applicants' complaints. The applicant's complaints did not, however, concern the expropriation of their land *per se*; rather they argued there had been an unreasonable delay in the payment of the final compensation. The adoption of Legislative Decree No.199/88, which laid out the criteria for assessing the value of nationalised or expropriated property and, consequently, for identifying the information needed to assess the final compensation in issue, was not passed until 1988, well after the critical date. As such, since the situation the applicants were confronted was a continuing one, the Court held it could exercise jurisdiction.

[42] *Magyar Helsinki Bizottság* [GC] (App. No.18030/11), judgment of 8 November 2016 at [136].
[43] *Šilih v Slovenia* [GC] (App. No.71463/01), judgment of 9 April 2009 at [140].
[44] *Šilih v Slovenia* [GC] (App. No.71463/01), judgment of 9 April 2009 at [140].
[45] *Preussische Treuhand GmbH & Co KG a.A. v Poland* (App. No.47550/06), decision of 7 October 2008 at [55].
[46] *Loizidou v Turkey* (App. No.15318/89), judgment of 18 December 1996.
[47] *Almeida Garrett, Mascarenhas Falcao v Portugal* (App. Nos 29813/96 and 30229/96), judgment of 11 January 2000.

In 2002, in *Pincova and Pinc v Czech Republic*,[48] the Court extended the protection of new bona fide owners. In that case, the Government asserted that the objective of the Land Act, the law at issue in the case, "was to 'attenuate the consequences of certain infringements of property rights suffered by the owners of real property used in agriculture and forestry between 1948 and 1989'", through the process of "restitution".[49] Although the Court accepted that the law was generally "in the public interest", since it attempted to compensate individuals who had lost their land during the Soviet regime, such public interest must be weighed against the rights of those individuals who now owned the land. In the end, the Court found that the applicants, bona fide purchasers who had lived on the land for decades, "had to bear an individual and excessive burden which has upset the fair balance that should be maintained between the demands of the general interest on the one hand and protection of the right to the peaceful enjoyment of possessions on the other", thus there had been a violation of art.1 of Protocol No.1.[50]

In 2005, in *Jahn v Germany*,[51] the Court held that important public interest may justify reduction or even an extinction of the lawful right to restitution. But, in 2006, the Court held in *Blečić v Croatia*[52] that an instantaneous interference before the critical date, coupled with a denial of reparation afterwards, as per art.28 of the Vienna Convention, could amount to a violation and thus warrant reparations from the state.

The Court held there was no obligation to redress wrongs caused prior to the critical date in *Kopecký v Slovakia*[53] in 2004. The Court held that "Article 1 of Protocol No. 1 cannot be interpreted as imposing any general obligation on the Contracting States to restore property which was transferred to them before they ratified the Convention".[54] Furthermore, the Court found that art.1 of Protocol No.1 does not require states to "determine the scope of property restitution and to choose the conditions under which they agree to restore property rights of former owners". [55] This illustrates that the Court has actually provided states with quite a wide margin for exclusion of categories of former owners and to choose entitlement conditions.

In fact, as held in the admissibility decision of *Woś v Poland*, "there is no general obligation for States to compensate wrongs inflicted in the past under the general cover of State authority".[56] As a result, "substantive regulations which determine the eligibility criteria for any such compensation would, in principle, fall outside the Court's jurisdiction, unless the relevant criteria were established in a manner which was manifestly arbitrary or blatantly inconsistent with the fundamental principles of the Convention".[57]

ii. The compensation of Nazi wrongs

In some cases, the Court has gone very far in assessing the protection of the Convention for historical wrongs. For example, the Court has gone as far as to assess the compatibility of domestic laws regarding compensation, which had entered into force after the critical date, with the provisions of the Convention. The Court has tried to ensure that the new laws do not discriminate, treat groups differently, or unreasonably limit access to court. The best examples of these cases are those that deal with compensation owed as a result of Nazi wrongs committed during the Second World War.

[48] *Pincova and Pinc v Czech Republic* (App. No.36548/97), judgment of 5 November 2002.
[49] *Pincova and Pinc v Czech Republic* (App. No.36548/97), judgment of 5 November 2002 at [49].
[50] *Pincova and Pinc v Czech Republic* (App. No.36548/97), judgment of 5 November 2002 at [64].
[51] *Jahn v Germany* (App. Nos 46720/99, 72203/01 and 72552/01), judgment of 30 June 2005.
[52] *Blečić v Croatia* [GC] (App. No.59532/00), judgment of 8 March 2006.
[53] *Kopecký v Poland* (App. No.44912/98), judgment of 28 September 2004.
[54] *Kopecký v Poland* (App. No.44912/98), judgment of 28 September 2004 at [35].
[55] *Kopecký v Poland* (App. No.44912/98), judgment of 28 September 2004 at [35].
[56] *Woś v Poland* (App. No.22860/02), decision of 1 March 2005 at [80].
[57] *Woś v Poland* (App. No.22860/02), decision of 1 March 2005 at [80].

The Court assessed a domestic law providing for compensation of past wrongs in its judgment on the merits of *Woś v Poland*.[58] The Court explained that, although the right of access to a court is not absolute, the limitations applied must not "restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired".[59] Additionally, the Court reasserted that "a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is no reasonable relationship of proportionality between the means employed and the aim sought to be achieved".[60] In this case, the Court found that the absolute exclusion of judicial review in respect of the decisions issued by the Polish-German Reconciliation Foundation for former forced labourers under a compensation scheme was disproportionate to the legitimate aim pursued and impaired the very essence of the applicant's "right of access to a court" within the meaning of art.6(1) of the Convention.

In other cases, the Court has allowed states much more discretion with regard to their national laws offering compensations. For example, in *Associazione Nazionale Reduci v Germany*,[61] the Court held that the applicants did not meet entitlement requirements of the 2000 Gesetz zur Errichtung einer Stiftung "Erinnerung, Verantwortung und Zukunft" (or "the Foundation Law") and thus could not benefit from the compensation provided under the law. At the time the Foundation Law entered into force, neither international public law nor any other domestic law recognised claims for compensation for forced labour that happened during the Second World War. The applicants were excluded from the provisions regarding claims for forced labour established by the Foundation Law. The Court distinguished this case from the case of *Woś*, discussed above, as the applicants in this case were clearly excluded from the benefits of the Foundation Law and could not claim to have had a right to compensation, "even on arguable grounds".[62]

Again, in *Poznanski v Germany*,[63] the Court concluded that the "interference with the applicants' right of property in the framework of an overall settlement of questions relating to compensation for forced labour under the Nazi regime did not upset the 'fair balance' which has to be struck between the protection of property and the requirements of the general interest".[64] In 2008, in *Epstein v Belgium*,[65] the Court found that Belgium compensation law for German wrongs not discriminatory. And finally, in *Ernewein v Germany*,[66] the Court held that orphans of the "*malgré-nous*" were not covered by the 1981 *Fondation Entente Franco-Allemande*, and thus their application before the Court was inadmissible.

iii. The compensation of Stalinistic wrongs

In 2008, in the case *Preussische Treuhand GmbH & Co KG a.A. v Poland*,[67] the Court held that the confiscation of German-owned property in Germany's former eastern territories by Poland was not in contradiction to the Convention. The Court found that the *Loizidou* principle of continued wrongs did not apply, because the property was lawfully entrusted to the Polish state under the provisions of the Potsdam Agreement. Additionally, while the Court has assessed continued wrongs, even if they began before the critical date, "the Court has consistently held, in particular in the context of expropriation measures effected in connection with the post-war regulation of ownership relations, the deprivation of ownership or another right in rem is in principle an instantaneous act and does not produce a continuing situation of 'deprivation of a right'".[68]

[58] *Woś v Poland* (App. No.22860/02), decision of 1 March 2005.
[59] *Woś v Poland* (App. No.22860/02), decision of 1 March 2005 at [98].
[60] *Woś v Poland* (App. No.22860/02), decision of 1 March 2005 at [98].
[61] *Associazione Nazionale Reduci v Germany* (App. No.45563/04), decision of 4 September 2007.
[62] *Associazione Nazionale Reduci v Germany* (App. No.45563/04), decision of 4 September 2007 at [4].
[63] *Poznanski* (App. No.25101/05), decision of 3 July 2007.
[64] *Poznanski* (App. No.25101/05), decision of 3 July 2007.
[65] *Epstein v Belgium* (App. No.9717/05), judgment of 8 January 2008.
[66] *Ernewein v Germany* (App. No.14849/08), decision of 12 May 2009.
[67] *Preussische Treuhand GmbH & Co KG a.A. v Poland* (App. No.47550/06), decision of 7 October 2008.
[68] *Preussische Treuhand GmbH & Co. KG a.A. v Poland* (App. No.47550/06), decision of 7 October 2008 at [57].

The Court has also upheld time-limits. In *Zebrowski v Poland*, the Court found that a one-year time-limit to bring a claim from the date of a law's entry into force was not in contravention of the Convention.[69] The Court thus upheld a policy whereby individuals who did not exercise their rights within a certain amount of time lost the ability to bring a claim.

2. Ratione temporis limits to the investigation of historical crimes

States' obligation to carry out effective investigations is well established. However, there are limits of the Court's jurisdiction *ratione temporis* "in situations where the facts relied on in the application fell partly within and partly outside the relevant period",[70] which the Court first addressed in the case of *Blečić v Croatia*.[71]

Two other significant cases dealing with this issue are also the 2009 *Šilih v Slovenia*[72] case, which concerned a medical malpractice claim brought by the parents of a child who they claimed died as a result of medical negligence in 1993, and the 2003 *Janowiec v Russia*[73] case, which dealt with the 1940s massacre of 21,000 Polish prisoners of war. The questions are: do the same rules apply to both of these cases? What is the Court's competence in these two instances?

In *Šilih* the Court differentiated between "instantaneous", "continuing" and "continued substantive violation". In cases where the harm "occurred before the critical date", the Court held that "only procedural acts and/or omissions occurring after that date can fall within the Court's temporal jurisdiction".[74] Additionally, "there must exist a genuine connection between the death and the entry into force of the Convention in respect of the respondent State for the procedural obligations imposed by Article 2 to come into effect".[75]

In *Janowiec*, the Court amended the criteria established in *Šilih* in three ways. First, the Court asserted that the lapse of time between the triggering event and the critical date must remain reasonably short if it is to comply with the "genuine connection" standard.[76] Secondly, although there are no legal criteria by which the absolute limit of the period may be defined, the Court held that the period should not exceed 10 years.[77] Additionally, a "major part of the investigation" must have taken place after the critical date.[78] In restricting the *Šilih* criteria in this way, the Court failed to take into account the potential that, for many years before the critical date (and perhaps even after), the context in which the events took place was not one friendly to an investigation. The Court does not consider those situations where requiring an investigation would be impossible. What this means is that genuine complaints may not be heard because of the adverse context in which they took place. Further concerning is that many complains, especially historical ones, did unfold in exactly that type of atmosphere where investigations were simply not possible. The third way the Court amended the criteria established in *Šilih* was by accepting that the requirements of protection of the Convention values may require acceptance of a longer time-limit, but simultaneously setting the time-limit for retroactive application of the Convention at 4 November 1950 (the date the Convention entered into force).[79]

There are several issues with the *Janowiec* holding. For one, is this then the involuntary obliteration of the Nuremberg clause enshrined in art.7(2)? The Convention itself refers to acts before its ratification.

[69] *Zebrowski v Poland* (App. No.34736/06), judgment of 3 November 2011 at [65].
[70] *Šilih v Slovenia* [GC] (App. No.71463/01), judgment of 9 April 2009 at [146].
[71] *Blečić v Croatia* [GC] (App. No.59532/00), judgment of 8 March 2006.
[72] *Šilih v Slovenia* [GC] (App. No.71463/01), judgment of 9 April 2009.
[73] *Janowiec v Russia* [GC] (App. Nos 55508/07 and 29520/09), judgment of 21 October 2013.
[74] *Šilih v Slovenia* [GC] (App. No.71463/01), judgment of 9 April 2009 at [162].
[75] *Šilih v Slovenia* [GC] (App. No.71463/01), judgment of 9 April 2009 at [162].
[76] *Janowiec v Russia* [GC] (App. Nos 55508/07 and 29520/09), judgment of 21 October 2013 at [146].
[77] *Janowiec v Russia* [GC] (App. Nos 55508/07 and 29520/09), judgment of 21 October 2013 at [146].
[78] *Janowiec v Russia* [GC] (App. Nos 55508/07 and 29520/09), judgment of 21 October 2013 at [148].
[79] *Janowiec v Russia* [GC] (App. Nos 55508/07 and 29520/09), judgment of 21 October 2013 at [151].

And secondly, how does this survive in light of the 2012 *El Masri* case, where the Court has established a right to the truth? [80] Does all of this lead to the establishment of a Grand Chamber reformation *in pejus*? Ultimately, in *Janowiec*, after the decision of the Chamber, the applicants were put in a worse situation than before they brought their case before the Grand Chamber.

Introduced in *Hackett v United Kingdom*,[81] applied in *Brecknell v United Kingdom*,[82] and later further developed in *Janowiec*,[83] the Court further held that, although there is no absolute right to obtain a prosecution, when new material emerges that purportedly casts new light on the circumstances of the original investigation, there is a fresh and renewed obligation to reopen investigations in light of the new material. The procedural obligation to investigate is not bound by any time limit; rather it is detached from the event in question. In short, the prosecution does not have to abide by strict time limits but must take into account new facts that may emerge along the way.[84]

3. Immunities as a bar to historical justice

If an applicant is able to meet all the requirements set out by the Court as discussed above, they may also have to deal with the issue of immunities. The Court has been very deferential to high-ranking officials' immunities with regard to state responsibility and acts of individuals as representatives of states. For example, in the case of *Al-Adsani v United Kingdom*,[85] the Court reasserted the principle that the right to court was not absolute, and states enjoy a certain margin of appreciation in regulating an individual's right to access to a court.[86] The Court has the final decision as to whether such limitations comply with the Convention, and must ensure "that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired".[87] The Court stated that the Convention must be read in harmony with other rules of international law,[88] and thus, "measures taken by a High Contracting Party which reflect generally recognised rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to a court as embodied in Article 6 § 1".[89] The Court thus confirmed that state immunity trumps an applicant's torture-based civil claim against foreign states.

In *Kalogeropoulou v Greece and Germany*,[90] the Court hinted that it might be willing to open the door to the possibility that civil torture claims may one day prevail over immunities. However, in *Jones v United Kingdom*,[91] the Court noted that on the topic of immunities, the ICJ had concluded in *Germany v Italy* that under customary international law as it stands, a state was *not* deprived of immunity by reason of the fact that it was accused of serious violations of international human rights law or the international law of armed conflict.[92] The promise of *Kalogeropoulou* was not yet ready to be fulfilled.

Al-Adsani also touched upon immunity *ratione materiae*, and using the same rationale, the Court extended immunity to acts of named state officials in the course of their service, of their official duties or in an official capacity or context.[93] The natural question that arises as a result of this holding is: how can torture, for example, ever be considered a state act? Is state practice in a state of flux? What this means,

[80] *El-Masri v "The Former Yugoslav Republic of Macedonia"* [GC] (App. No.39630/09), judgment of 13 December 2012 at [191].
[81] *Hackett v United Kingdom* (App. No.34698/04), decision of 10 May 2005.
[82] *Brecknell v United Kingdom* (App. No.32457/04), judgment of 27 November 2007 at [66]–[72].
[83] *Janowiec v Russia* [GC] (App. Nos 55508/07 and 29520/09), judgment of 21 October 2013 at [144].
[84] *Hackett v United Kingdom* (App. No.34698/04), decision of 10 May 2005 at [72].
[85] *Al-Adsani v United Kingdom* [GC] (App. No.35763/97), judgment of 21 November 2001.
[86] *Al-Adsani v United Kingdom* [GC] (App. No.35763/97), judgment of 21 November 2001 at [53].
[87] *Al-Adsani v United Kingdom* [GC] (App. No.35763/97), judgment of 21 November 2001 at [53].
[88] *Al-Adsani v United Kingdom* [GC] (App. No.35763/97), judgment of 21 November 2001 at [55].
[89] *Al-Adsani v United Kingdom* [GC] (App. No.35763/97), judgment of 21 November 2001 at [56].
[90] *Kalogeropoulou v Greece and Germany* (App. No.59021/00), decision of 12 December 2002.
[91] *Jones v United Kingdom* (App. Nos 34356/06 and 40528/06), judgment of 14 January 2014.
[92] Jurisdictional Immunities of the State, *Germany v Italy*, Judgment, ICGJ 434 (ICJ 2012), 3 February 2012 at [198].
[93] *Al-Adsani v United Kingdom* [GC] (App. No.35763/97), judgment of 21 November 2001 at [61]–[67].

as was illustrated in *Naït-Liman v Switzerland*, a very recent case decided by the Court in 2018, is that the Convention does not impose universal jurisdiction for torture-based civil claims, and if the torture was a state policy, immunities may bar a civil claim against the state.[94] Although the Court reiterated the glimmer of hope put forth in *Kalogeropoulou* by commending states for facilitating torture victims' access to courts and noting the dynamic nature of the relevant law, it remained deferential to states' margin of appreciation.[95] Effectively, this is a denial of justice or access to a court for an individual claiming torture.

C. Issues of substantive nature

1. Principle of legality (lex praevia) and genocide

In the case of *Vasiliauskas v Lithuania*,[96] the applicants complained, among others, that his conviction for genocide could not have been foreseen at the time of the killing of Lithuanian partisans. The Court held that the term genocide did not include a "political group", like the Lithuanian partisans, thus killings perpetrated towards this group could not have amounted to genocide.[97] The argument that defendants could not have known their actions amounted to crimes is a well-known and often used one in the Court's case law.

For instance, in the case of *Streletz, Kessler and Krenz v Germany*,[98] soldiers from the DDR that shot and killed individuals trying to cross over the Berlin wall argued that they were fulfilling their duty and could not have known that their actions amounted to a crime. It is worth noting that the soldiers stationed on the Berlin Wall had volunteered for the post and were thus considered to be especially trustworthy. Their arguments, although common among many defendants, were flawed for two main reasons: (1) to shoot and kill an unarmed civilian attempting to cross the border was already a crime under the Constitution of the DDR; and (2) the DDR had international obligations at the time, including freedom of movement.[99]

The majority in *Vasiliauskas* claimed they did not want to dive too deep into a historical investigation. They relied on the fact that the national authority had done a poor job in demonstrating that the partisans had been a protected group.[100] In a dissenting opinion, I argued that it was clear that the Lithuanian partisans had suffered and died because they were part of a group that was not only a political, but also a national group. Such a group would have been protected under the genocide definition.[101]

2. Freedom of expression regarding historical facts and abuse of Convention rights

Freedom of expression is guaranteed by the Convention, but it has been used to excuse or protect abuses of other Convention rights. For example, is it possible to talk about genocide freely? Can an individual whose rights are protected under the Convention freely deny, glorify or trivialise genocide? This question has been answered differently at the national level. The Court has heard several cases on this topic and asserted a few principles. However, the Court's approach to art.17 remains unclear in general and with respect to expressions concerning historical matters.

In the early years of the Convention, the ECHR organs occasionally referred to art.17 in relation to Communism and Neo-Nazi ideology.[102] The Court has held that the main purpose of art.17 is to protect

[94] *Naït-Liman v Switzerland* [GC] (App. No.51357/07), judgment of 15 March 2018 at [203].
[95] *Naït-Liman v Switzerland* [GC] (App. No.51357/07), judgment of 15 March 2018 at [219]–[220].
[96] *Vasiliauskas v Lithuania* [GC] (App. No.35343/05), judgment of 20 October 2015.
[97] *Vasiliauskas v Lithuania* [GC] (App. No.35343/05), judgment of 20 October 2015 at [175].
[98] *Streletz, Kessler and Krenz v Germany* [GC] (App. Nos 34044/96, 35532/97 and 44801/98), judgment of 22 March 2001.
[99] *Streletz, Kessler and Krenz v Germany* [GC] (App. Nos 34044/96, 35532/97 and 44801/98), judgment of 22 March 2001 at [73]–[75].
[100] *Vasiliauskas v Lithuania* [GC] (App. No.35343/05), judgment of 20 October 2015 at [185].
[101] See Joint Dissenting Opinion of Judges Villiger, Power-Forde, Pinto de Albuquerque and Kuris in *Vasiliauskas v Lithuania* [GC] (App. No.35343/05), judgment of 20 October 2015.
[102] For an overview see P. de Morree, *Rights and Wrongs under the ECHR: The prohibition of abuse of rights in Article 17 of the European Convention on Human Rights* (Intersentia, 2016), pp.23–66.

the Convention from being exploited for totalitarian motives.[103] The Court has found art.17 relevant to several cases concerning memory laws but has found it applicable only in exceptional and extreme cases.[104] Holocaust denial cases have been frequently examined either directly under or in relation to art.17. However, the Court has taken a lighter approach to memory laws relating to former Communist regimes.[105]

In *Lehideux and Isorni v France*, the Court held that favourable statements made by the applicants towards Philippe Pétain's record during the Second World War were not sufficient to justify the applicants' criminal conviction for publicly defending the crimes of collaboration.[106] The Grand Chamber did not find art.17 directly applicable but opted to assess compliance with art.10 in light of that article.[107] This was because the Court deemed the applicant's statements regarding Pétain's policy part of an ongoing debate which did not belong to a category of clearly established historical facts. The recognition of "category of clearly established historical facts" was key in the Court's refusal to apply art.17; only statements negating and revising such facts would be devoid of the protection of art.10.[108]

Five years after *Lehideux and Isorni*, the French Government successfully invoked art.17 with respect to Holocaust denial. In *Garaudy v France*, the Court found art.17 applicable and subsequently declared the application incompatible *rationae materiae* under the Convention.[109] Applying the principle set out in *Lehideux and Isorni*, the Court held that an individual cannot deny or justify genocide or crimes against humanity if they have become an established fact, such as the Holocaust. The Court deemed the "denial or rewriting" of such a historical fact would undermine the fight against racism while constituting "a serious threat to public order".[110] Accordingly, this would amount to an abuse of right; thus, imposing criminal penalties would not raise any issues under the Convention.[111] In short, denial of genocide is an abuse of free speech and individuals cannot hide behind art.10 to deny established historical facts.

After *Garaudy*, the Court has applied the "clearly established historical fact" rule to find art.17 applicable in cases concerning negation of the Holocaust.[112] Pursuant to this rule, the Court has held in *Witzsch v Germany (No.1)*, that expressions of contempt for victims of a totalitarian regime would constitute an abuse of Convention rights under art.17.[113] The Court has resorted to the "clearly established historical fact" rule to assess compliance with art.10 in some cases not related to Holocaust denial.[114] This rule is rather significant given that the Court has made it clear that it would not arbitrate debates surrounding historical events, while noting that art.10 protects the right to seek historical truth.[115] Accordingly, the Court has made a distinction between statements relating to clearly established historical facts and those relating to ongoing debates. In *Fatullayev v Azerbaijan*, the Court refused to apply art.17 as it deemed that events surrounding the Khojaly massacre were not "clearly established historical facts such as the Holocaust" but "the subject of an ongoing debate".[116] However, the Court's more recent approach demonstrates that the "clearly established historical fact" rule is not actually that decisive.

In *Perinçek v Switzerland*, the Court assessed whether the applicant's conviction for his expressions concerning the rejection of the events of 1915 that occurred in the Ottoman state as genocide. When

[103] *Norwood v United Kingdom* (App. No.23131/03), judgment of 16 November 2004.
[104] *Paksas v Lithuania* [GC] (App. No.34932/04), judgment of 6 January 2011 at [87].
[105] See A. Gliszczynska-Grabias, "Coping with the Past in a Multicultural Europe: the European Court of Human Rights on Memory and Law" in D. Gozdecka and M. Kmak (eds), *Europe at the Edge of Pluralism* (Intersentia, 2015), pp.184–185.
[106] *Lehideux and Isorni v France* [GC] (App. No.24662/94), judgment of 23 September 1998 at [55]–[56].
[107] *Lehideux and Isorni v France* [GC] (App. No.24662/94), judgment of 23 September 1998 at [48].
[108] *Lehideux and Isorni v France* [GC] (App. No.24662/94), judgment of 23 September 1998 at [47].
[109] *Garaudy v France* (App. No.65831/01), decision of 24 June 2003.
[110] *Garaudy v France* (App. No.65831/01), decision of 24 June 2003.
[111] *Garaudy v France* (App. No.65831/01), decision of 24 June 2003.
[112] *Witzsch v Germany (No.1)* (App. No.41448/98), judgment of 20 April 1999; *M'Bala M'Bala v France* (App. No.25239/13), decision of 20 October 2015 at [36].
[113] *Witzsch v Germany (No.1)* (App. No.41448/98), judgment of 20 April 1999
[114] *Chauvy v France* (App. No.64915/01), judgment of 29 June 2004 at [69]; *Giniewski v France* (App. No.64016/00), judgment of 31 January 2006 at [52].
[115] *Chauvy v France* (App. No.64915/01), judgment of 29 June 2004 at [69].
[116] *Fatullayev v Azerbaijan* (App. No.40984/07), judgment of 22 April 2010 at [81] and [87].

assessing the applicability of art.17, the Grand Chamber did not resort to the "clearly established historical fact" rule or refer to an "ongoing debate" surrounding the events of 1915; it refrained from addressing facts of the events. Instead, the Grand Chamber held that the applicability of art.17 revolved around "whether the applicant's statements sought to stir up hatred or violence, and whether by making them he attempted to rely on the Convention to engage in an activity or perform acts aimed at the destruction of the rights and freedoms laid down in it".[117] Remarkably, the Court departed from its case-law by holding that criminalising Holocaust denial is actually justified by historical context, rather than the status of the Holocaust as a clearly established historical fact. The Grand Chamber deemed that the relevant states (Austria, Belgium, Germany and France) had endured Nazi horrors and therefore had a "special moral responsibility" to combat anti-Semitism, which included outlawing Holocaust denial.[118]

The Grand Chamber sought to strike a balance between the applicant's right to freedom of expression under art.10 and the rights of Armenians to respect for their ethnic identity and the reputation of their ancestors under art.8.[119] In light of the above-mentioned principles, the Court considered the nature of the applicant's statements, the context of the interference, the extent to which the statements affected the art.8 rights of Armenians, whether there was a consensus among Member States on the criminalisation of historical events, compliance with international law, the assessment of domestic courts, and the severity of the interference. Accordingly, the Court found that the applicant's statements were of public interest and did not call for "hatred or intolerance". Given the lack of "heightened tension" and "special historical overtones" of the context of the statements, they did not affect the dignity of members of the Armenian community. Accordingly, the applicant's conviction amounted to censure for voicing a divergent opinion and therefore was not necessary in a democratic society.[120]

The Court elaborated on this shift to focus on the historical context of the criminalisation of Holocaust denial and the applicability of art.17 in *Pastörs v Germany*.[121] Accordingly, whether the Court would directly apply art.17 or refer to it in its examination under art.10 required a case-by-case basis analysis and hinged on the specific conditions of the case.[122] Although the Court considered the applicant's "disdain" for victims of the Holocaust as a factor in favour of incompatibility *rationae materiae* under art.17, the applicant's status as an elected Member of Parliament as well as the fact that the speech was given during a Parliamentary sessions called for the "closest scrutiny"; thus, the application would be examined under art.10.[123]

The Court's approach stands in contrast to German[124] and Canadian[125] cases, which have held the opposite. In Germany, for example, the Constitutional Court has upheld a decision by the German Constitutional Court that criminalised false statement about the Auschwitz concentration camp, finding that an established historical fact had been put into question.[126]

Despite instances where states have been permitted to limit freedom of speech and impose criminal penalties in certain cases, the Court grants states a narrow margin of appreciation with regard to tragic events in the history of mankind. In *Vajnai v Hungary* and *Fratanoló v Hungary*, the Court did not find that a criminal conviction for merely displaying the five-pointed red star was justified since it wasn't sufficient to revive a totalitarian regime on its own.[127] Furthermore, in the illustrative example of *Fáber v*

[117] *Perinçek v Switzerland* [GC] (App. No.27510/08), judgment of 15 October 2015 at [115].
[118] *Perinçek v Switzerland* [GC] (App. No.27510/08), judgment of 15 October 2015 at [243].
[119] *Perinçek v Switzerland* [GC] (App. No.27510/08), judgment of 15 October 2015 at [228].
[120] *Perinçek v Switzerland* [GC] (App. No.27510/08), judgment of 15 October 2015 at [280].
[121] *Pastörs v Germany* (App. No.55225/14), judgment of 3 October 2019.
[122] *Pastörs v Germany* (App. No.55225/14), judgment of 3 October 2019 at [37].
[123] *Pastörs v Germany* (App. No.55225/14), judgment of 3 October 2019 at [39].
[124] See German Federal Constitutional Court judgments of 13 April 1994 (1 BvR 23/94 at [34]), 25 March 2008 (1 BvR 1753/03 at [43]), and 9 November 2011 (1 BvR 461/08 at [22]).
[125] Canadian Supreme Court, *R. v Keegstra* (1996), 3 S.C.R. 667.
[126] German Constitutional Court judgment of 13 April 1994, BvR 23/94.
[127] *Vajnai v Hungary* (App. No.33629/06), judgment of 8 July 2008 at [54]–[55]; *Fratanoló v Hungary* (App. No.29459/10), judgment of 3 November 2011 at [26]–[27].

Hungary, the Court held that a state is permitted to limit freedom of speech only when it is likely to lead to a "clear threat or present danger of violence" by inciting hatred, disturbance of public order or hampering others' right to assembly.[128] The US Supreme Court has also taken a similar approach by narrowing the "fighting words" doctrine[129] and requiring that speech can only be curtailed when it "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action".[130]

The United Nations Human Rights Committee (UNHRC), on the other hand, has had a contradictory approach to this issue. The UNHRC in *Faurisson v France* (1996) found that the Gayssot Act which makes it an offence to deny the Holocaust does not violate the right to freedom of expression.[131] In 2007, the UN General Assembly passed a resolution on Holocaust denial and urged Member States to "reject any denial of the Holocaust as a historical event, either in full or in part, or any activities to this end".[132] To this end, Recommendation No.35 2013 of the Committee on the Elimination of Racial Discrimination,[133]Additional Protocol to the Council of Europe Convention on Cybercrime,[134] and the European Union Framework Decision of 2008[135] require the criminalisation of genocide denial. However, UNHRC General Comment No.34 interprets precedent in such a way that does not equate denial of genocide and advocacy of hatred that incites discrimination, hostility or violence, creating a dissonance within the Committee.[136]

3. Access to personal and historical information

Just as accessing information about one's past is central to the individual's identity; it can also play a significant role in societies transitioning from totalitarian regimes to pluralist democracies. In Resolution 1096 on *Measures to dismantle the heritage of former communist totalitarian systems*, the Parliamentary Assembly of the Council of Europe recognised this necessity and advised that states formerly ruled by Communist regimes open their secret service files to public examination, as well as allow all affected persons to examine files kept on them by these services.[137] The Court has also dealt with some relevant cases and laid down principles under arts 8 and 10.

The Court has acknowledged the concern of former Soviet states to avoid repeating past experiences and the legitimacy of corresponding preventive measures against persons who had been engaged in activities incompatible with the Convention. In the founding case of *Sidabras and Džiautas v Lithuania*, while recognising the need to impose employment restrictions on former KGB employees, the Court still assessed the proportionality of the ban and considered various factors such as the timing of the relevant law, nature of employment, and the particular circumstances of the individuals.[138] The passage of time (since the dissolution of the former regime), although not considered decisive by the Court in this case,[139] is nevertheless a significant factor.[140]

[128] *Fáber v Hungary* (App. No.40721/08), judgment of 24 July 2012 at [44] and [56].
[129] *Chaplinsky v New Hampshire*, 315 US 568 (1942).
[130] *Brandenburg v Ohio*, 395 US 444, 447 (1969).
[131] *Robert Faurisson v France* , Communication No.550/1993, UN Doc.CCPR/C/58/D/550/1993 (1996), para.10.
[132] UN General Assembly, *Holocaust denial*, 22 March 2007, A/RES/61/255, para.2.
[133] UN Committee on the Elimination of Racial Discrimination, *General Recommendation No.35: Combating racist hate speech*, 26 September 2013, CERD/C/GC/35, para.14.
[134] Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems, art.6.
[135] Council Framework Decision 2008/913/JHA of 28 November 2008 on Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law, art.1.
[136] UN Human Rights Committee, *General Comment No.34: Article 19: Freedoms of opinion and expression*, 12 September 2011, CCPR/C/GC/34, para.49.
[137] Parliamentary Assembly of the Council of Europe, *Measures to dismantle the heritage of former communist totalitarian systems*, Resolution 1096 (1996), para.6.
[138] *Sidabras and Džiautas v Lithuania* (App. Nos 55480/00 and 59330/00), judgment of 27 July 2004 at [60] and [69]–[70].
[139] *Sidabras and Džiautas v Lithuania* (App. Nos 55480/00 and 59330/00), judgment of 27 July 2004 at [60].
[140] See, e.g. *Ivanovski v "the former Yugoslav Republic of Macedonia"* (App. No.29908/11), judgment of 21 January 2016 at [185]; *Polyakh v Ukraine* (App. Nos 58812/15, 53217/16, 59099/16 et al.), judgment of 17 October 2019 at [320].

For instance, in *Sõro v Estonia*,[141] the Court examined the Disclosure Act which required the publicising of individuals who had, in any capacity, worked for the security or intelligence services (i.e. KGB) of the Soviet communist regime. In addition to the indiscriminate nature of the publication in terms of level of involvement with these services,[142] the fact that publicising continued for several years despite the decreasing threats posed by former KGB employees (in the applicant's case, 13 years after Estonia's independence) demonstrated that the measures foreseen by the Disclosure Act were not compatible with art.8.[143]

The Court has been less lenient with access to information requests when employment restrictions have not been imposed by law. In *Brinks v Netherlands*,[144] the applicant had lived in East Germany from 1987 to 1990 and suspected that the Netherlands National Security Service had put him under surveillance during that period. The applicant, an academic, also believed that his Dutch colleagues suspected he was a communist and consequently he was unable to find a job upon his return to the Netherlands. Mr Brinks successfully sought access to information collected on him by the National Security Service, except for one file. Unsatisfied with the state's reasoning that information collected during the Cold War could expose the operation of that service, he claimed violations of arts 8 and 10, stressing that the relevant information was outdated. The Court held that the state's interests of national security outweighed the applicant's interest in accessing (possible) personal information held on him and declared the application manifestly ill-founded under art.35(3) of the Convention. In this case, the Court did not consider any of the factors laid out in *Sidabras and Džiautas*.

Notwithstanding the Court's conclusion in *Brinks*, the case-law demonstrates that the approach to accessing personal information in relation to Communist regimes is nuanced. In *Turek v Slovenia*, the Court distinguished lustration proceedings from operations of security agencies. Recognising that limiting access to information regarding the latter may be justified, the Court held that it is much less so when lustration is concerned.[145] When reaching this conclusion, the Court noted that lustration proceedings depend on examining operations of Soviet security agencies and denying such access would effectively render the process meaningless. Accordingly, denying access would be presumed in violation of art.8 unless a "continuing and actual public interest" could be shown in a specific case.[146]

The Court has reiterated this nuanced stance in similar cases against other former Soviet states.[147] As I discussed in my concurring opinion in *Sõro v Estonia* and as adopted by the Court,[148] the procedural guarantees under the criminal limb of art.6 are applicable to lustration proceedings.[149] A similar point has been made by the Office of the United Nations High Commissioner for Human Rights in the 2006 guidelines, which state that lustration mechanisms "should provide for … access to relevant data".[150] Accordingly, lustration proceedings that do not provide sufficient access to classified materials relating to an individual's case may violate human rights law.[151]

Finally, it must be noted that in *Kenedi v Hungary*[152] a historian had requested access information on the activities of the Hungarian State Security Service in the 1960s for purposes of writing a book. His request was not fully granted by the authorities. Although the Court concluded that the refusal of authorities

[141] *Sõro v Estonia* (App. No.22588/08), judgment of 3 September 2015.
[142] *Sõro v Estonia* (App. No.22588/08), judgment of 3 September 2015 at [61].
[143] *Sõro v Estonia* (App. No.22588/08), judgment of 3 September 2015 at [62].
[144] *Brinks v Netherlands* (App. No.9940/04), decision of 5 April 2005.
[145] *Turek v Slovakia* (App. No.57986/00), judgment of 14 February 2006 at [115].
[146] *Turek v Slovakia* (App. No.57986/00), judgment of 14 February 2006 at [115].
[147] See Concurring Opinion of Judge Pinto de Albuquerque in *Sõro v Estonia* (App. No.22588/08), judgment of 3 September 2015 at [10].
[148] *Matyjek v Poland* (App. No.38184/03), decision of 24 April 2007; *Bobek v Poland* (App. No.68761/01), decision of 24 October 2006.
[149] Concurring Opinion of Judge Pinto de Albuquerque in *Sõro v Estonia* (App. No.22588/08), judgment of 3 September 2015 at [10].
[150] Office of the United Nations High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States—Vetting: an operational Framework*, 2006, p.26.
[151] Concurring Opinion of Judge Pinto de Albuquerque in *Sõro v Estonia* (App. No.22588/08), judgment of 3 September 2015 at [10].
[152] *Kenedi v Hungary* (App. No.31475/05), 26 May 2009.

lacked a legal basis, it is nevertheless significant that it found the application admissible under art.10,[153] which may open the door to truth-finding efforts in states with past totalitarian experiences.[154]

4. Amnesties, pardons and the statute of limitations: domestic hurdles to historical justice

If an application survives all of the above-mentioned tests and challenges, the final hurdle it must overcome is the presence of amnesties and pardons. In the illustrative case pertaining to this issue, the case of *Marguš v Croatia*[155] decided in 2014, the Amnesty law applied to murder, but individuals were later convicted for war crimes against civilians. The Court held that the principle of *non bis in idem* cannot be used to cover guarantees of arts 2 and 3. Additionally, it stated that there can be no time bar, amnesty or pardon that prevents a prosecution of torture.[156] The Court noted that "no international treaty explicitly prohibits the granting of amnesty in respect of grave breaches of fundamental human rights".[157] In addition, the Court stressed that there must be an internal coherence to the Convention, which must be read and applied as a whole. Certain elements cannot be used to cover up major breaches of the Convention. The guarantees under arts 2 and 3 of the Convention and art.4 of Protocol 7 must be read and interpreted together.[158]

The Court followed reasoning similar to what the Inter-American Court of Human Rights (IACHR) held in *Barrios Altos v Peru*,[159] decided by that court in 2001. The court in that case found that the state violated the American Convention on Human Rights by not prosecuting members of the Peruvian Army who carried out indiscriminate killings, pursuant to an amnesty agreement. However, in a departure from this decision, in the *Massacres of El Mozote v El Salvador*,[160] the IACHR found there was a right to peace and reconciliation. This is a departure from the *Barrios Altos* case, carving a place for amnesties in some unique cases.

The International Criminal Court Statute, for its part, proscribes fraudulent res judicata.[161] This means that individuals cannot be tried for lesser crimes if they might be found guilty of more serious crimes just to avoid a serious conviction.

Yet another hurdle applicants must clear before bringing a case to the Court is the statute of limitations. The Court has permitted states to impose limitations on the timeframe for bringing a case before the Court, but has also asserted that a statute of limitations cannot be manipulated by the state. Such was the case in *Mocanu v Romania*,[162] where the state requalified an offence in order to apply a more favourable statute of limitations.

The ability to criminally punish crimes against humanity without any time-limit can be considered a principle of customary international law, binding on all states, as it is most notably set out in art.29 of the Rome Statute of the International Criminal Court (1998). This provision follows principles established by the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, which entered into force on 11 November 1970.

Mr Stoica, one of the applicants, complained that events that occurred in Bucharest in 1990 were part of a government plot and amounted to crimes against humanity. Subsequent to the acts in question, the

[153] *Kenedi v Hungary* (App. No.31475/05), 26 May 2009 at [45].

[154] A. Buyse, "The truth, the past and the present" in A. Buyse and M. Hamilton (eds), *Transitional Jurisprudence and the European Convention on Human Rights: Justice, Politics and Rights* (Cambridge University Press, 2013), p.147.

[155] *Marguš v Croatia* [GC] (App. No.4455/10), judgment of 27 May 2014.

[156] *Marguš v Croatia* [GC] (App. No.4455/10), judgment of 27 May 2014 at [126].

[157] *Marguš v Croatia* [GC] (App. No.4455/10), judgment of 27 May 2014 at [131].

[158] *Marguš v Croatia* [GC] (App. No.4455/10), judgment of 27 May 2014 at [128].

[159] *Barrios Altos v Peru* (merits), judgment of 14 March 2001, Series C No.75. The Court held at [41]: "all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law."

[160] *Massacres of El Mozote and nearby places v El Salvador* (merits, reparations and costs), judgment of 25 October 2012, Series C No.252.

[161] Rome Statute of the International Criminal Court, art.20(3)(a).

[162] *Mocanu v Romania* [GC] (App. Nos.10865/09, 45886/07 and 32431/08), judgment of 17 September 2014.

Government reclassified the acts Mr Stoica complained of as "inhuman treatment", rather than "crimes against humanity". Inhuman treatment crimes, unlike crimes against humanity, are time-barred and thus can be excluded from the Court's jurisdiction if they were not brought within the designated time period. Such a move was evidently favourable to the regime and detrimental to the applicant who had suffered the ill-treatment. Ultimately, citing the 2009 case *Abdülsamet Yaman v Turkey*,[163] the Court held that in cases concerning torture or ill-treatment inflicted by state agents, criminal proceedings ought not to be discontinued on account of a limitation period, and also that amnesties and pardons should not be tolerated in such cases. Additionally, the Court cannot accept inflexible limitation periods admitting of no exceptions.[164]

D. Conclusion

The Court's evolutive construction of the Convention has not allowed much room for history to play a role in the Court's jurisprudence. But despite treating the Convention as a "living document", accounting for the developments in the world and the present day context, history has nevertheless often played a key role in many of the Court's important cases, both when dealing with complaints that assert historical wrongs and by often turning to historical documents, such as the *travaux préparatoires* to clarify inconsistencies or uncertainties in the interpretation of the Convention. Traditionally, historical material has been of limited value to the Court, but as was evident in *Magyar Helsinki Bizottság*, some divergent cases show that the Court has become more willing to look to the *travaux préparatoires* when the meaning or application of a provision is unclear. As to the individual applicants who bring historical claims to the Court, they face an almost insurmountable number of both substantive and procedural challenges. The court has been cautious in extending its jurisdiction to hearing complaints asserting historical wrongs and has done so only on a few occasions. What the cases discussed above have shown, nevertheless, is that the Court cannot ignore the impact history has had both on how it interprets and applies the Convention, and on what complaints are raised by applicants before the Court. The impact of history is evident and meaningful, and will continue to shape the Court's jurisprudence.

[163] *Abdülsamet Yaman v Turkey* (App. No.32446/96), judgment of 2 November 2004.
[164] *Abdülsamet Yaman v Turkey* (App. No.32446/96), judgment of 2 November 2004 at [326].