European Convention for the Protection of Human Rights and Fundamental Freedoms (1950)

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A. History

1. Drafting History

1 The European Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR') was signed in Rome on 4 November 1950 after a comparatively short drafting history. It is clearly influenced by the → *Universal Declaration of Human Rights (1948)* (GAOR 3rd Session Part I Resolutions 71) adopted by the United Nations General Assembly on 10 December 1948 on the basis of a draft for which René Cassin of France was mainly responsible. Even before the Declaration was adopted, proposals for a European Charter of Human Rights were presented to the Congress of the European Movement in The Hague in May 1948 (→ *European Integration*). The Statute of the → *Council of Europe (COE)* of 5 May 1949 (CETS No 1) expressly recognizes the obligation of each Member State to respect human rights and fundamental freedoms. After the COE Statute had come into force, the Consultative Assembly of the Council of Europe adopted, on 9 September 1949, a draft prepared by its legal committee on the basis of a report by Pierre-Henri Teitgen, formerly French Minister of Justice. The Committee of Ministers of the COE created a Committee of Experts and later called a Conference of Senior Officials in June 1950, which annexed a draft convention to its report. The Committee of Ministers adopted a revised text, which was then submitted to the Consultative Assembly. Several amendments proposed by the Assembly were not accepted by the Ministers, and the Convention was signed substantially in its earlier version. The Assembly's proposed amendments concerned the addition of the rights to property, to education, and to vote, which were referred for further study by the Ministers and were later included in the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms signed on 20 March 1952 (→ *Property, Right to, International Protection*; → *Education, Right to, International Protection*; → *Elections, Right to Participate in, International Protection*).

2. Ratification

2 The ECHR came into force on 3 September 1953, after ratification by ten States: the United Kingdom in 1951; Norway, Sweden, and the Federal Republic of Germany in 1952; the Saar (an associated member of the COE at the time; → *Saar Territory*), Ireland, Greece, Denmark, Iceland, and Luxembourg in 1953. After the fall of the Berlin Wall many formerly communist countries ratified the ECHR. In 2009 the Convention had 47 Member States. Several protocols have amended the ECHR adding new rights or amending the procedure laid down in the Convention. Protocols No 1, 4, 6, 7, 12, and 13 add substantial new guarantees to the Convention rights. Protocols 2, 3, 5, 8, 9, and 10 concerned the procedure before the Convention organs. They are now derogated by Protocol No 11 of 11 May 1994 which created the permanent → *European Court of Human Rights (ECtHR)* and terminated the mandate of the European Commission of Human Rights.

3. The Convention Organs

3 The European Commission of Human Rights was established on 18 May 1954, the ECtHR on 21 January 1959. Declarations under Art. 25 ECHR, recognizing the right to individual application which was necessary for the jurisdiction of the Commission concerning individual applications, were in force for six countries as provided for in Art. 25 (4) ECHR on 5 July 1955 (Sweden, Ireland, Denmark, Iceland, Belgium, Federal Republic of Germany). The jurisdiction of the Court had to be recognized by a special declaration under the old Art. 46 ECHR. It took a long time until all Member States of the ECHR at that time had recognized the jurisdiction of the Court before the new system came into force. With Protocol No 11 the Court has now automatic jurisdiction for individual applications and inter-State applications with the ratification of the ECHR by a Member State (→ *International Courts and Tribunals, Jurisdiction and Admissibility of Inter-State*

Applications). Under the old system only the inter-State application before the Commission according to Art. 24 ECHR was automatically applicable with the ratification of the Convention. Cases which could not be referred to the Court were decided by the Committee of Ministers under Art. 32 ECHR before the permanent Court was established. This was a clear deficiency in judicial protection of Convention rights.

B. Status of the ECHR in International and Municipal Law

1. The ECHR as a Treaty

4 The ECHR is a treaty concluded under the rules of international law and thus creates obligations between the different Member States. Except by special agreement, State Parties undertake not to avail themselves of treaties, conventions or declarations in force between them for the purpose of submitting, by way of petition, a dispute arising out of the interpretation or application of this Convention to a means of settlement other than those provided for in this Convention (Art. 55, formerly 62 ECHR). The machinery of collective enforcement through the Convention organs was, from the very beginning, a peculiar feature of the ECHR. During the first 45 years Commission and Court interpreted the Convention. Since 1998 it is only the permanent ECtHR. The Court held already in 1978 that the ECHR 'creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a "collective enforcement"' (*Ireland v United Kingdom* [ECtHR] Series A No 25 90). The Commission recognized as early as 1962 that the Convention establishes the 'public order of Europe' (*Austria v Italy* [ECommHR App 788/60] [1961] 4 YECommHR 116 140). Good examples of inter-State applications in which the States introducing the application lacked any individual interest and defended the public order of Europe are the proceedings brought by Denmark, the Netherlands, Norway, and Sweden against Greece in 1967 ([ECommHR App 3321-3323/67 and 3344/67] [1968] 11 YECommHR 690) and the applications brought by the same States and France against Turkey in 1982 ([ECommHR App 9940–9944/82] [1984] 35 DR 143; friendly settlement [1985] 5 HRLJ 331). Both complaints were related to certain practices of the military governments in countries against which the applications were filed. The finding of grave violations by the Commission against Greece led to Greece leaving the COE and denouncing the Convention until the Greek military government was replaced in 1974 and Greece again ratified the ECHR.

2. The Nature of the Treaty Obligations as to Individual Rights

5 Art. 1 ECHR makes it clear that the rights guaranteed to individuals under the treaty are individual rights created by public international law. The wording 'shall secure' ('*reconnaissent*') as opposed to the earlier draft 'undertake to secure' ('*s'engagent à reconnaître*') shows that these rights are created by the ratification of the ECHR and must be respected by the State immediately without any additional act of implementation (*Ireland v United Kingdom* 91). Without the recognition of the right to individual application, the rights guaranteed by the ECHR could not be enforced by the individual before the Convention organs. By the amendment of 1994, the right to individual application before the Court is now automatically guaranteed with the ratification of the ECHR. It is a different matter, however, whether the ECHR creates an obligation under public international law to make it as such applicable in the internal law of the Member State. Such an obligation may well be created by a treaty (→ *International Law and Domestic [Municipal] Law*). While Arts 1 and 13 ECHR could at first sight be interpreted as also containing such an obligation, the practice of States showed that many of them, in particular the United Kingdom and the Scandinavian States, did not interpret the Convention as going that far. The Court has stressed that the intention of the drafters finds a particularly faithful reflection in those instances where the Convention has been incorporated into domestic law, but the Court has rejected the argument that a formal

obligation to that effect exists (*Silver and others v United Kingdom* [ECtHR] Series A No 61 42).

3. Status of the ECHR in Municipal Law

6 This means that the way in which the rights guaranteed in the ECHR are secured in national law is left to the Member States. For a long time there existed important differences as to the internal applicability of the text of the ECHR. While the treaty provisions were applied as municipal law in most Member States, this was not true for the Scandinavian States, the United Kingdom, and Ireland. The situation changed after 1992 when Denmark was the first Scandinavian country to adopt the ECHR as internal law. It was of great importance that the United Kingdom followed with the Human Rights Act 1998 ([UK] c 42). As of 2009, the Convention is internally applicable in all Member States. In Austria it has the rank of constitutional law. In Belgium, Luxembourg, the Netherlands, France, and many of the new Member States of Central and Eastern Europe it has a rank higher than legislation. In Germany, Italy, and Turkey the rank of the ECHR is equal to national legislation. This is also true for the Scandinavian States and the United Kingdom. In Switzerland, the Convention has a rank similar to constitutional law as far as a constitutional complaint against cantonal acts can be based on the ECHR.

C. Interpretation of the ECHR

1. General Principles

7 From early on, it was established that the ECHR must be interpreted 'objectively' and not by reference to what may have been the understanding at the time of its ratification. Therefore, in the famous case *Golder v United Kingdom* the Commission interpreted Art. 6 ECHR as including a right of access to a court in the matters falling under the provision ([ECtHR] Series A No 18 18). The Court followed the Commission in underlining that this 'is not an extensive interpretation' (at para. 36) but one 'based on the very terms of the first sentence of Article 6…read in its context and having regard to the object and purpose of the Convention, a lawmaking treaty…and to general principles of law' (ibid). The case of *Tyrer v United Kingdom*, concerning the issue of corporal punishment (birching) ordered by judicial authority, gave the Commission and the Court the occasion to underline 'that the Convention is a living instrument which…must be interpreted in the light of present-day conditions' ([ECtHR] Series A No 26 15). Commission and Court reached the conclusion that birching was degrading punishment in the sense of Art. 3 ECHR. Commission and Court referred to the commonly accepted standards of the penal policy of the Member States. The same approach was taken in the case of *Dudgeon v United Kingdom* in which Commission and Court found that criminal law of Northern Ireland making homosexual acts of adults in private an offence was in violation of Art. 8 ECHR ([ECtHR] Series A No 45 23). The general approach taken by the Commission and Court has sometimes been criticized because the Convention would be used as a vehicle for legislative reform for which it was not intended (*Tyrer v United Kingdom* [Separate Opinion of Judge Sir Gerald Fitzmaurice] 31–32). However, a treaty containing a Bill of Rights and providing for a judicial machinery to implement it is, by its very nature, bound to develop with changing social conditions as does a constitutional Bill of Rights. This is now clearly the accepted standard in the jurisprudence of the European Court of Human Rights.

2. The Nature of the States' Obligations

8 The obligations of the Member States under the ECHR are primarily to respect the individual rights guaranteed therein. The rights are in the first instance 'negative rights' against the State, as is typical for fundamental rights in the liberal tradition. However, the wording of the Convention shows that some rights carry with them a positive obligation for the State. According to Art. 2 ECHR, 'everyone's right to life shall be protected by law'. It follows that the legislature is under an obligation to protect the right to life. The Court has recognized that Art. 8 ECHR requires positive action by the State to regulate and protect family life (*Marckx v Belgium* [ECtHR] Series A No 31 15; → *Marckx Case*). In *Airey v Ireland* it was held that Ireland had violated its obligation to make existing court remedies in matters of family law effectively available either through a legal aid system or by other means ([ECtHR] Series A No 32 15, 17). It is evident that several rights concerning judicial procedures guaranteed in Art. 6 (3) ECHR create positive obligations to act on the part of State organs, for example to provide for an effective defence counsel. When three British workers brought an application alleging the violation of Art. 11 ECHR because of their dismissal on the basis of a closed shop agreement and their refusal to join a specific trade union, the Commission and Court had to clarify the obligations of the State in that context. The Commission held that the State is under an obligation to protect trade union freedom against this sort of interference by private employers. The Court stated that it was the domestic law in force at the relevant time that made lawful the situation against which the applicants complained. The responsibility of the respondent State for any resulting breach of the ECHR rests on this basis (*Young and others v United Kingdom* [ECtHR] Series A No 44 20). It follows from this decision that legislation which makes legal the interference with Convention rights by private individuals may well constitute a violation by the State concerned.

3. Interpretation of Restrictions

9 Where the ECHR contains specific restrictive clauses, as in paras 2 of Arts 8–11, there is no room for any implied limitations. According to paras 2 of Arts 8–11, restrictions or limitations must be 'in accordance with the law' or 'prescribed by law' ('*prévues par la loi*') and 'necessary in a democratic society' for the protection of certain interests. When the Commission was first confronted with a system of secret surveillance, it held that the phrase 'in accordance with the law' must be taken to mean that the law sets up the conditions and procedures for interference (*Klass and others v Germany* [ECtHR] Series A No 28 22). In its case-law the Court identified two requirements under the 'prescribed by law' criterion. The law must be accessible, and the norm must be formulated with sufficient precision to enable the citizen to regulate his conduct accordingly. He must be able to foresee, to a degree that is reasonable under the circumstances, the consequences which a given action may entail. The Court recognized, however, that absolute certainty is unattainable and that the law must be able to keep pace with changing circumstances and that vague terms which need interpretation cannot be avoided (*Sunday Times v United Kingdom* [ECtHR] Series A No 30 30–33). The requirement is, however, of considerable importance because it excludes restrictions which find no basis in law. The second condition for limitations of the rights according to para. 2 of Arts 8–11 is that they are 'necessary in a democratic society' for the specific aims mentioned there. The aims are broadly formulated and have not given rise to problems in the interpretation. What is 'necessary' may, however, frequently be open to doubt. Commission and Court have recognized that national organs enjoy a certain → *margin of appreciation* as to the necessity in question. This does not mean that supervision by the Convention organs is limited to ascertaining whether a State exercised its discretion 'reasonably, carefully and in good faith' (ibid 35–36). Even a State so acting remains subject to the control as to the compatibility of the conduct with the ECHR. The Court asked whether there is a 'pressing social need' for the restriction

(*Dudgeon v United Kingdom* 24). Of great importance in judging the necessity for the interference is whether a standard of → *proportionality* has been respected by the national organs (ibid 23–24). The principle that restrictions of fundamental rights are only lawful if they meet the standards of proportionality is a very important development of Convention law which has influenced the legal orders of many European States.

D. Exceptional Restrictions

1. Emergency

10 Art. 15 ECHR gives States the right to take measures derogating from the Convention when they are strictly required by war or by other emergency threatening the life of the nation. The Commission and Court have, from the very beginning, underlined that they have jurisdiction to test the compatibility of the measures with Art. 15 ECHR, again leaving a certain margin of appreciation to the national organs (*Ireland v United Kingdom* 77–85). No derogation is possible from the articles protecting the most elementary human rights (Art. 15 (2) ECHR). The Secretary-General of the COE must be kept fully informed of any derogation.

2. No Freedom for the Destruction of Rights

11 Art. 17 ECHR lays down the principle that nothing in the Convention may be interpreted as implying any right to engage in any activity aimed at the destruction of any of the rights and freedoms of the Convention. The Commission applied Art. 17 ECHR for the first time when the German Communist Party brought an application against its prohibition in 1957 (*German Communist Party v Germany* [ECommHR App 250/57] [1957] 1 YECommHR 222). The article was again used when, in 1979, Dutch applicants complained against their conviction for inciting racial hatred, and against the prohibition of their association participating in local elections (*Glimmerveen and Hagenbeek v Netherlands* [ECommHR App 8348/78 and 8406/78] [1979] 18 DR 187). The Court confirmed this jurisprudence when it decided that the conviction for Holocaust denial is justified by the principles of Art. 17 ECHR (*Witzsch v Germany* [ECtHR] App 7485/03 [13 December 2005]). The Court has also underlined that the democratic system may not be destroyed on the basis of Convention rights, and the restriction of the right to stand for elections is compatible with the Convention where reasons of that sort apply (*Zdanoka v Latvia* [ECtHR] App 58278/00 [16 March 2006]). However, the ECtHR also clarified very early on, in *Lawless v Ireland*, that Art. 17 ECHR cannot be construed as depriving an individual of the rights guaranteed by Arts 5 and 6 ECHR even if he has been involved in activities which may be considered as aimed at the destruction of the rights in question ([ECtHR] Series A No 3. 45–46). This is of great importance for the measures taken against terrorists which can never disregard the guarantees of the ECHR on the basis of Art. 17 ECHR (see eg *Ensslin, Baader and Raspe v Germany* [ECommHR App 7572/76 and 7587/76] [1978] 14 DR 64).

E. Evolution of the Convention Rights in the Jurisprudence of the Commission and the Court

1. Elementary Human Rights

12 The right to life has been the subject of judgments by the ECtHR only after 1990 (→ *Life, Right to, International Protection*). Since then, the Court has clarified that the principle of proportionality is of great importance concerning the use of deadly force by security personnel. Where people die in police custody the State is under an obligation to prove that the right to life has been protected by the authorities (*Taïs v France* [ECtHR] App 39922/03 [1 June 2006]). The Court deduced from Art. 2 ECHR the obligation of the State to conduct a sufficient investigation where people have died through State action. The Court

underlined that this investigation may not be led by police authorities of the same unit as the one responsible for the action (*Ramsahai and others v Netherlands* [ECtHR] App 52391/99 [15 May 2007]). In a case concerning a death caused by a working accident the Court found a violation because no expert opinion had been requested (*Pereira Henriques v Luxembourg* [ECtHR] App 60255/00 [9 May 2006]). This case-law has considerable importance for many Member States.

13 The prohibition of torture has been at issue in several important cases (→ *Torture, Prohibition of*). In the Greek case as well as in the case of *Ireland v UK*, the notions of inhuman treatment and of torture became relevant. The Commission found cases of torture on a large scale in the case against Greece ([ECommHR] App 3321–3323/67 and 3344/67 [1968] 11 YECommHR 690). In *Ireland v United Kingdom* the Commission found that the application of specific 'disorientation' or 'sensory deprivation techniques' over many hours constituted torture ([ECommHR] [1976] 19 YECommHR 512 788–94). The Court, however, was of the opinion that they did not occasion suffering of the particular intensity and cruelty implied by the word 'torture' and concluded that they amounted only to inhuman treatment ([ECtHR] Series A No 25 66–67). The ECtHR later indicated in 1999 that acts which it had qualified only as inhuman might be seen as torture in the future. This may also refer to the qualification in *Ireland v United Kingdom* (see *Selmouni v France* [ECtHR] Reports 1999-V 149). Of great importance is the jurisprudence developed first by the Commission and then confirmed by the Court that → *extradition* or deportation to a country where there is a substantial danger that the person may be subject to torture or inhuman treatment is prohibited by Art. 3 ECHR. This was first confirmed by the Court in 1989 when it held that extradition from the United Kingdom to the United States would be a violation where the danger of the so-called death row phenomenon existed (*Soering v United Kingdom* [ECtHR] Series A No 161; → *Soering Case*).

2. The Right to Liberty and Judicial Guarantees

14 Art. 5 ECHR protects personal liberty and Art. 6 ECHR contains judicial guarantees (→ *Liberty, Right to, International Protection*; → *Fair Trial, Right to, International Protection*). Art. 5 (4) ECHR includes the *habeas corpus* remedy (see also → *Detention, Arbitrary*). The Court has held that this guarantee was violated when under English law the substantial reasons for detaining a mentally ill person could not be reviewed by courts in habeas corpus proceedings (*X v United Kingdom* [ECtHR] Series A No 55 25). Art. 6 ECHR contains important judicial safeguards. The provision is applicable in criminal cases and Art. 6 (3) ECHR contains specific minimum rights for the criminal trial. Art. 6 (1) ECHR also applies to the determination of civil rights and obligations. This means that lawsuits between private persons are covered but also those procedures before administrative courts and tribunals which are decisive for civil rights. The Court has developed this case-law to the extent that Art. 6 ECHR is applicable for judicial proceedings except in some very special areas (tax law, electoral law etc). Art. 6 ECHR guarantees access to a court and a judgment 'within a reasonable time'. Unfortunately, the length of judicial proceedings has been at issue in many cases brought before the Court and violations have been found in many of them.

3. Private and Family Life

15 Art. 8 ECHR protects private and family life, home, and correspondence (→ *Privacy, Right to, International Protection*; → *Family, Right to, International Protection*). Measures of surveillance by State organs must be justified on the basis of Art. 8 (2) ECHR. The penalization of homosexual acts between consenting adults in private was considered to be

a violation of Art. 8 ECHR. Separation of children from their parents must be controlled on the basis of the justification laid down in Art. 8 (2) ECHR.

4. Fundamental Freedoms

16 The case-law of Commission and Court has been of great importance for freedom of expression, freedom of the press, freedom of assembly, freedom of association including trade union freedom, and freedom of religion (→ *Opinion and Expression, Freedom of, International Protection*; → *Information and Communication, Freedom of, International Protection*; → *Assembly, Freedom of, International Protection*; → *Association, Freedom of, International Protection*; → *Religion or Belief, Freedom of, International Protection*).

F. Evaluation

17 The system created by the ECHR is the best example of judicial protection of human rights and fundamental freedoms by international law which may be compared with constitutional procedures of the same sort known in several countries. The protection of human rights in the United Nations is of a very different nature. The development under the → *American Convention on Human Rights (1969)* can be partly compared with the European system but is clearly much less advanced. It is, however, correct that the European system is under extreme difficulties after the accession of many of the former communist countries, in particular, Russia. In 2007, the Court gave 1,735 judgments and 27,057 decisions declaring a case inadmissible or striking it off. However, at the end of 2007, 79,400 cases were pending before a Chamber or a Committee and there were 24,450 applications at a prejudicial stage. This means that at the beginning of 2008 there were more than 100,000 cases pending. More than 20,000 cases were pending against Russia, almost 10,000 against Turkey, and almost 6,000 against the Ukraine. It is not clear by what procedure the problems may be solved. Protocol 14 which has not been ratified by Russia and has therefore not come into force would create a single judge formation and would amend the competence of Committees. However, it is difficult to see how this could lead to a solution. It seems clear that only with a radical procedure limiting access to the European Court of Human Rights can the problem be solved.

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