

www.grocjusz.edu.pl

International Protection Of Human Rights.

I. European Convention Of Human Rights And Fundamental Freedoms. Character of obligations:

The Convention was drafted by the Council of Europe after World War II. Sir David Maxwell-Fyfe was the Chair of the Council's legal and administrative division from 1949 to 1952, and oversaw the drafting of Convention. It was designed to incorporate a traditional civil liberties approach to securing "effective political democracy", from the strongest traditions in the United Kingdom, France and other member states of Europe. The Convention was opened for signature on 4 November 1950 in Rome.

Council of Europe:

Parliamentary Assembly (NOT European Parliament)

Committee of Ministers.

Statute of Council of Europe. Article 1: “the aim of the Council of Europe is to **achieve a greater unity** between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and **facilitating their economic and social progress**”.

Art. 1:

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

Convention is:

- a) a network of mutual obligations between Member States;
- b) standard of objective character guaranteeing respecting human rights;
- c) an instrument allowing enforcement of the rights enumerated in the ECHR against the States (**vertical effect**);

PCIJ, advisory opinion on jurisdiction of the Courts of Danzig (Pecuniary Claims of Danzig Railway Officials who have Passed into the Polish Service, against the Polish Railways

Administration; 1928): „according to a well established principle of international law, (...) an international agreement, cannot, as such, create direct rights and obligations for private individuals. But it cannot be disputed that the very object of an international agreement, according to the intention of the contracting Parties, may be the adoption by the Parties of some definite rules creating individual rights and obligations and enforceable by the national courts”.

Article 34 – Individual applications

The Court may receive applications from:

- a) any person,
- b) non-governmental organisation or
- c) group of individuals,

claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto.

The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.

1. *Dispute between individual and sovereign state;*
2. *Dispute decided by an international court;*
3. *International court applying international law to this dispute;*
4. *International court enforcing international responsibility of states*

d) *erga omnes* character of Convention obligations.

Obligations *inter partes* vs. obligations *erga omnes* in international law.

International Court of Justice, *Belgium v. Spain* (Barcelona Traction) 1970:

*"In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations **erga omnes**. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression,*

and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination".

Article 33 – Inter-State cases

Any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the protocols thereto by another High Contracting Party.

Austria v. Italy (European Commission of Human Rights), 1961: "A High Contracting Party, when referring an alleged breach of the Convention to the Commission under Article 24, "is not to be regarded as exercising a right of action for the purpose of enforcing **its own rights**, but rather as bringing before the Commission an alleged violation **of the public order of Europe**".

Ireland v. United Kingdom (1978): "Unlike international treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a "collective enforcement". By virtue of Article 24, the Convention allows Contracting States to require the observance of those obligations without having to justify an interest deriving, for example, from the fact that a measure they complain of has prejudiced one of their own nationals".

Conclusion: ECHR creates erga-omnes obligations.

II. Applicability of ECHR (*ratione personae, ratione loci, ratione temporis and ratione materiae*).

a) applicability *ratione personae* (personal application)

plaintiff v. Member State

Passive standing: when defendant State may be held responsible for violations of the Convention?

1. The State must be party to the ECHR (the complaint must be lodged against Member State of the Council of Europe);

2. The alleged violation of the ECHR must be **attributable** to this State.

Principles of responsibility in international law:

1) violation of international obligation;

2) attribution of violation:

- the State is not responsible for acts and omissions of its citizens (national);

- the State is responsible for:

- its organs (legislative, executive, judicial) and;

- persons acting on behalf of that State (military, police, officials).

In other words, the State is responsible for acts and omissions of its organs and persons acting in official capacity.

- the State however may be responsible for individuals if:

1) it delegated public functions to private organization (Costello Roberts v. United Kingdom, 1993: "*The State cannot absolve itself from responsibility by **delegating its obligations to private bodies or individuals**. Accordingly, in the present case, which relates to the particular domain of school discipline, the treatment complained of although it was the act of a headmaster of an independent school, is none the less such as may engage the responsibility of the United Kingdom under the Convention if it proves to be incompatible with Article 3 or Article 8 or both".*

whipped

First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms

Article 2 . Right to education

No person shall be denied the right to education. **In the exercise of any functions which it assumes in relation to education and to teaching**, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

2) the State was under obligation to act in order to refrain an individual from violating rights of other individual and failed to do so (A. v. United Kingdom, 1998: "*The Court recalls that the applicant, who was then nine years old, has been beaten by his step-father with a garden cane which had been applied with considerable force on more than one occasion. It remains to be determined whether the State should be held responsible, under Article 3, for the beating of the applicant by his stepfather. The Court considers that the obligation on the High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, **including such ill-treatment administered by private individuals**. In the Court's view, the law did not provide adequate protection to the applicant against treatment or punishment contrary to Article 3. In the circumstances of the present case, the failure to provide adequate protection constitutes a violation of Article 3 of the Convention"*).

but: Drozd and Janousek v. France and Spain (1992): *Whilst it is true that judges from France and Spain sit as members of Andorran courts, they do not do so in their capacity as French or Spanish judges. Those courts, in particular the Tribunal de Corts, exercise their functions in an autonomous manner; their judgments are not subject to supervision by the*

*authorities of France or Spain. Moreover, there is nothing in the case-file which suggests that the French or Spanish authorities attempted to interfere with the applicants' trial. Finally, it should be recalled that the secondment of judges or their placing at the disposal of foreign countries is also practised between member States of the Council of Europe, as is demonstrated by the presence of Austrian and Swiss jurists in Liechtenstein. In short, the objection of lack of jurisdiction *ratione personae* must also be upheld".*

Who may lodge the complaint? (**active standing**) who may be the plaintiff?

a) the applicant must be a "victim"

b) minors and persons who have lost their legal capacity may apply to the Court:

Scozzari and Giunta v. Italy (2000): "The Court points out that in principle a person who is not entitled under domestic law to represent another may nevertheless, in certain circumstances, act before the Court in the name of the other person. In particular, minors can apply to the Court even, or indeed especially, if they are represented by a mother who is in conflict with the authorities and criticises their

decisions and conduct as not being consistent with the rights guaranteed by the Convention. **In the event of a conflict over a minor's interests between a natural parent and the person appointed by the authorities to act as the child's guardian, there is a danger that some of those interests will never be brought to the Court's attention and that the minor will be deprived of effective protection of his rights under the Convention".**

c) corporate persons may apply to the Court, however only when it is conceivable that right guaranteed by the Convention potentially can be violated by the State (for example right to fair trial, protection of property but not right to life or prohibition of torture).

natural persons

corporate person (legal person)

Municipalities and governmental organizations have no active standing (on the contrary, their acts and omissions are attributable to the State and may result in State liability under Convention).

d) the applicant must be deemed as an **actual** (not potential) **victim** of violation of the Convention. Applicant must be personally affected by the alleged violation. *Actio popularis* (abstract complaint, application in general interest are not allowed).

e) concept of potential victim: *Dudgeon v. United Kingdom* (1981): "The maintenance in force of the impugned legislation constitutes a continuing interference with the applicant's right to respect for his private life (which includes his sexual life) within the meaning of Article 8 par. 1. In the personal circumstances of the applicant, the very existence of this legislation continuously and directly affects his private life: either he respects the law and refrains from engaging – even in private with consenting male partners - in prohibited sexual acts to which he is disposed by reason of his homosexual tendencies, or he commits such acts and thereby becomes liable to criminal prosecution".

f) concept of future victim: *Soering v. United Kingdom* (1989): "The decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country".

Loss of legal personality when the case is pending:

OAO Neftyanaya kompaniya YUKOS v. Rosja (2009): On 26 December 2007 the Government informed the Court that by decision of the City Court of 12 November 2007 the applicant company had been liquidated. The Government submitted that accordingly the Court had lost jurisdiction *ratione personae* in respect of the application and relying on Article 35 § 3 of the Convention requested to discontinue the examination of the case. In addition, they contested the authority of Mr J. P. Gardner to act continuously on behalf of the applicant company. While under Article 34 of the Convention the existence of a "victim of a violation" is indispensable for putting the protection mechanism of the Convention into motion, this criterion cannot be applied in a **rigid, mechanical and inflexible way throughout the whole proceedings**. As a rule, and in particular in cases which, as the one at hand, primarily involve pecuniary, and, for this reason, transferable claims, the existence of other persons to whom that claim is transferred is an important criterion, but cannot be the only one. Human rights cases before the Court generally also have a moral dimension, which it must take into account when considering whether to continue with the examination of an application after the applicant has ceased to exist. All the more so if the issues raised by the case transcend the person and the interests of the applicant. The Court has repeatedly stated that its judgments in fact serve not only to decide those cases brought before it but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties. Although 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. The Court notes that the various alleged breaches of Articles 6, 7, 13, 14 and 18 of the Convention and Article 1 of Protocol No. 1 in the present case concern the tax assessment and enforcement proceedings in respect of the applicant company which eventually resulted in its bankruptcy and ceasing to exist as a legal person. **Striking the application out of the list under such circumstances would undermine the very essence of the right of individual applications by legal persons, as it would encourage governments to deprive such entities of the possibility to pursue an application lodged at a time when they enjoyed legal**

personality. This issue in itself transcends the interests of the applicant company and therefore the Court rejects the Government's request. **The Court also accepts Mr Gardner as the valid representative of the applicant company.**

b) applicability *ratione loci* (territorial application)

ECHR:

Article 1 – Obligation to respect human rights

The High Contracting Parties shall secure to everyone **within their jurisdiction** the rights and freedoms defined in Section I of this Convention.

Vienna Convention on the Law of Treaties

Article 29 Territorial scope of treaties

Unless a **different intention appears** from the treaty or is otherwise established, a treaty is binding upon each party in respect of its **entire territory**.

1982 Law of the Sea

ECHR:

*Loizidou v. Turkey (1997): "The responsibility of a Contracting Party may also arise when as a consequence of military action - whether lawful or unlawful - it exercises **effective control** of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration. In this connection the respondent Government have acknowledged that the applicant's loss of control of her property stems from the occupation of the northern part of Cyprus by Turkish troops and the establishment there of the "TRNC". Furthermore, it has not been disputed that the applicant was prevented by Turkish troops from gaining access to her property. It follows that such acts are capable of falling within Turkish "jurisdiction" within the meaning of Article 1 (art. 1) of the Convention".*

TRNC

Operation Allied Force – a large-scale **air** campaign to destroy Serbian military infrastructure, conducted by NATO **air forces** (USA, UK, Germany, Italy, Netherlands) in April 1999. Strategic targets, such as bridges and factories, were bombed. Long-range cruise missiles were used to hit heavily defended targets, such as strategic installations in Belgrade and Priština.

Bankovic v. Belgium (2001):

*"The case-law of the Court demonstrates that its recognition of the exercise of extra-territorial jurisdiction by a Contracting State is exceptional: it has done so when the respondent State, through the effective control of the relevant **territory** and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, **exercises all or some of the public powers normally to be exercised by that Government.***

*The Convention is a multi-lateral treaty operating, subject to Article 56 of the Convention, in an essentially regional context and notably in the legal space (espace juridique) of the Contracting States. The FRY clearly does not fall within this legal space. **The Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States.** Accordingly, the desirability of avoiding a gap or vacuum in human rights' protection has so far been relied on by the Court in favour of establishing jurisdiction only when the territory in question was one that, but for the specific circumstances, would normally be covered by the Convention.*

*The Court is not therefore persuaded that there was any **jurisdictional link** between the persons who were victims of the act complained of and the respondent States. Accordingly, it is not satisfied that the applicants and their deceased relatives were capable of coming within the jurisdiction of the respondent States on account of the extra-territorial act in question".*

United States Supreme Court, Rasul v. Bush:

„The District Court has jurisdiction to hear petitioners' habeas challenges under 28 U. S. C. §2241, which authorizes district courts, "within their respective jurisdictions," to entertain habeas applications by persons claiming to be held "in custody in violation of the ... laws ... of the United States," §§2241(a), (c)(3). Such jurisdiction extends to aliens held in a

territory over which the United States exercises plenary and exclusive jurisdiction, but not "ultimate sovereignty."

Boumediene v. Bush (2008)

Petitioners have the constitutional privilege of habeas corpus. They are not barred from seeking the writ or invoking the Suspension Clause's protections because they have been designated as enemy combatants or because of their presence at Guantanamo.

In considering both the procedural and substantive standards used to impose detention to prevent acts of terrorism, the courts must accord proper deference to the political branches. However, security subsists, too, in fidelity to freedom's first principles, chief among them being freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers

Al-Skeini v. UK (ECHR) 2011

c) applicability *ratione temporis* (temporal application).

ECHR:

Article 58 - Denunciation

1. A High Contracting Party may denounce the present Convention only after the expiry of five years from the date on which it became a party to it and after six months' notice contained in a notification addressed to the Secretary General of the Council of Europe, who shall inform the other High Contracting Parties.

2. Such a denunciation shall not have the effect of releasing the High Contracting Party concerned from its obligations under this Convention in respect of any act which, being

capable of constituting a violation of such obligations, may have been performed by it before the date at which the denunciation became effective.

3. Any High Contracting Party which shall cease to be a member of the Council of Europe shall cease to be a Party to this Convention under the same conditions.

Lex retro non agit principle.

Vienna Convention on the Law of Treaties

Article 28

Non-retroactivity of treaties

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party 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 treaty with respect to that party.**

Poland: May 1st, 1993

Concept of continuous violations (situation which originated before the entry into force of the Convention but continues after this date).

Loizidou v. Turkey (1997):

1990

"The Court recalls that it has endorsed the notion of a continuing violation of the Convention and its effects as to temporal limitations of the competence of Convention organs.

Accordingly, the present case concerns alleged violations of a continuing nature if the applicant, for purposes of Article 1 of Protocol No. 1 and Article 8 of the Convention, can still be regarded - as remains to be examined by the Court - as the legal owner of the land.

The Court has had regard to the Turkish Government's allegation that "the process of 'the taking' of property in northern Cyprus started in 1974 and ripened into an irreversible expropriation by virtue of Article 159 of the 'TRNC' Constitution of 7 May 1985".

*In this respect it is evident from international practice and the various, strongly worded resolutions referred to above (see paragraph 42) that the international community does not regard the "TRNC" as a State under international law and that the Republic of Cyprus has remained the sole legitimate Government of Cyprus - itself, bound to respect international standards in the field of the protection of human and minority rights. **Against this background the Court cannot attribute legal validity for purposes of the Convention to such provisions as Article 159 of the fundamental law on which the Turkish Government rely.***

Accordingly, the applicant cannot be deemed to have lost title to her property as a result of Article 159 of the 1985 Constitution of the "TRNC".

*It follows that the applicant, for the purposes of Article 1 of Protocol No. 1 and Article 8 of the Convention, must still be regarded to be the legal owner of the land. The objection *ratione temporis* therefore fails".*

ius possidendi

ius utendi

ius fruendi

ius alienandi

1945-1952

Preussische Treuhand GmbH v. Poland (2008): "The Court's jurisdiction ratione temporis covers only the period after the date of ratification of the Convention or its Protocols by the respondent State. From the ratification date 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. Accordingly, the Court is competent to examine the facts of the present case for their compatibility with the Convention only in so far as they occurred after 10 October 1994, the date of ratification of Protocol No. 1 by Poland. It may, however, have regard to the facts prior to ratification inasmuch as they could be considered to have created a situation extending beyond that date or may be relevant for the understanding of facts occurring after that date. A continuing violation of the Convention – a situation which originates before the entry into force of the Convention but continues after this date – has effects on the temporal limitations of the Court's jurisdiction. In particular, such situations as a continuing and total denial of access to and control, use and enjoyment of property as well as any compensation for taking property may fall within this notion, even if they stemmed from events or laws that occurred before the ratification of the Convention or the Protocol (see, inter alia, Loizidou v. Turkey).

However, as 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". In

the circumstances, there is no continuing violation of the Convention which could be imputable to Poland and which could have consequences for the Court's temporal jurisdiction as defined above. It thus follows that this part of the application is incompatible ratione temporis with the provisions of the Convention and the Protocols thereto".

August 23th 1939: Ribbentrop-Molotov Treaty.

Sept. 1st 1939: invasion of German troops;

Sept. 17th: invasion of Soviet troops.

The Soviets captured 250.000 Polish POW, including 22.000 officers.

The Soviet Union was not a party to Geneva Convention of 1929 on Treatment of Prisoners of War.

However:

Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the **belligerents** remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among **civilized peoples**, from the **laws of humanity**, and the dictates of the **public conscience**.

— *Laws and Customs of War on Land (Hague IV), 18 October, 1907*

(Martens Clause)

2006: Application against Russia concerning Katyn massacre (Janowiec and Others v. Russia; 2011 – decision on admissibility).

Grand Chamber, 2009, *Silih v. Slovenia*:

The case of *Silih* concerned the death of a patient due to alleged medical negligence and delays and procedural failings in the subsequent criminal and civil actions. The death of the patient occurred in 1994, approximately a year before the Convention became effective in Slovenia, whereas the resulting investigations and litigation took place after that date. The parents of the deceased brought proceedings in Strasbourg on the grounds that the procedural obligation under article 2 to ensure that there was an effective and independent judicial system to determine responsibility for their son's death had been violated.

Art. 2 (protection of human life):

- a) substantive aspect (duty to refrain from killing);
- b) procedural aspect (duty to conduct independent investigation whenever death occurs)

The Court: the procedural obligation to carry out an effective investigation under article 2 **has evolved into a separate and autonomous duty**. Although it is triggered by the acts concerning the substantive aspects of article 2 it can give rise to a finding of a separate and independent 'interference' within the meaning of Art. 2. In this sense it can be considered a **detachable obligation** arising out of article 2 capable of binding the state even when the death took place before the critical date [i.e. the date when the Convention

became effective within a signatory state]. The investigative obligation in respect of deaths before the “critical date” is “*not open-ended*”: 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. However, the Court **would not exclude** that in certain circumstances the connection could also be based on the need to ensure that the guarantees and the underlying values of the Convention are protected in a real and effective manner.

d) *ratione materiae*.

ECHR:

Art. 57.

1. Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this article.

2. Any reservation made under this article shall contain a brief statement of the law concerned.

III. Derogation clause.

ECHR:

Article 15 – Derogation in time of emergency (derogation clause) martial law

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

IRA

State Parties to the Convention that invoked Article 15 so far:

Turkey (1990)

Greece (1969)

Ireland (1957, 1978)

United Kingdom (1988, 1989, 2001)

Brannigan and McBride v. the United Kingdom (1993): "*The Court recalls that it falls to each Contracting State, with its responsibility for "the life of [its] nation", to determine whether that life is threatened by a "public emergency" and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the **national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it.** Accordingly, in this matter a wide margin of appreciation should be left to the national authorities. Nevertheless, Contracting Parties **do not enjoy an unlimited power of appreciation.** It is for the Court to rule on whether inter alia the States have gone beyond the "extent strictly required by the exigencies" of the crisis. **The domestic margin of appreciation is thus accompanied by a European supervision** (ibid.). At the same time, in exercising its supervision the Court must give appropriate weight to such relevant factors as the nature of the rights affected by the derogation, the circumstances leading to, and the duration of, the emergency situation".*

IV. Abuse of rights.

ECHR:

Article 17 – Prohibition of abuse of rights

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

Nationaldemokratische Partei Deutschlands v. Germany (1995): *"The applicant organisation was ordered to take the appropriate steps to ensure that, on the occasion of the meeting, the persecution of Jews under the Nazi regime was not denied or called into question. In particular, it was ordered to remind the participants, at the beginning of the meeting, of the criminal liability which such statements could incur under the relevant provisions of the Penal Code (Strafgesetzbuch) relating to incitement to hatred, insult or defiling the memory of the dead. The German administrative courts and the Federal Constitutional Court, in detailed decisions, confirmed that the statements at issue were commonly known **untrue factual allegations and not protected by the freedom of expression.** The Constitutional Court also considered the whole of the intended discussion at the meeting in question and found that the obligations imposed were lawful and met the stricter requirements as regards preventive measures.*

The Commission finds that statements denying or calling into question the persecution of Jews under the Nazi regime in the context of a discussion of "anti-German atrocity

propaganda" run counter one of the basic ideas of the Convention, as expressed in its preamble, namely the foundation of justice and peace.

The public interests in the prevention of crime and disorder in the German population due to incriminating statements denying the persecution of Jews under the Nazi regime, and the requirements of protecting the reputation and rights of Jews, outweigh, in a democratic society, the freedom of the applicant organisation to hold a meeting without being obliged to take steps in order to prevent such statements".

V. Right to Life.

Article 2 . Right to life

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally *save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.*

2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the **use of force** which is no more than **absolutely necessary**:

a) in defense of any person from unlawful violence;

b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

c) in action lawfully taken for the purpose of quelling a riot or insurrection.

limitation clause

Protocol No. 6 to the ECHR (1983):

Article 1 . Abolition of the death penalty

The death penalty shall be abolished. No-one shall be condemned to such penalty or executed.

Article 2 . Death penalty in time of war

A State may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war; such penalty shall be applied only in the instances laid down in the law and in accordance with its provisions. The State shall communicate to the Secretary General of the Council of Europe the relevant provisions of that law.

Protocol No. 13 to the ECHR:

(...) Noting that Protocol No. 6 to the Convention, concerning the Abolition of the Death Penalty, signed at Strasbourg on 28 April 1983, does not exclude the death penalty in respect of acts committed in time of war or of imminent threat of war; Being resolved to take the final step in order to abolish the death penalty in all circumstances, Have agreed as follows:

Article 1 . Abolition of the death penalty

The death penalty shall be abolished. No one shall be condemned to such penalty or executed.

Right to life as the most important right protected by the Convention. *Pretty v. UK* (2002): "*The Court's case-law accords pre-eminence to Article 2 as one of the most fundamental provisions of the Convention (...). It safeguards the right to life, without which enjoyment of any of the other rights and freedoms in the Convention is rendered nugatory*".

Construction of Article 2:

1. **Negative obligations:** the state should refrain from taking lives unless one of the exceptions (strictly interpreted) occurs.

McCann v. UK (1995) - has a state any right to fault?: "In determining whether the force used was compatible with Article 2 (art. 2), the Court must carefully scrutinise, as noted above, not only whether the force used by the soldiers was strictly proportionate to the aim of protecting persons against unlawful violence but also whether the anti-terrorist operation was planned and controlled by the authorities so as to minimise, to the greatest extent possible, recourse to lethal force.

The soldiers who carried out the shooting (A, B, C and D) were informed by their superiors, in essence, that there was a car bomb in place which could be detonated by any of the three suspects by means of a radio-control device which might have been concealed on their persons; that the device could be activated by pressing a button; that they would be likely to detonate the bomb if challenged, thereby causing heavy loss of life and serious injuries, and were also likely to be armed and to resist arrest

The Court accepts that the soldiers honestly believed, in the light of the information that they had been given, as set out above, that it was necessary to shoot the suspects in order to prevent them from detonating a bomb and causing serious loss of life (see paragraph 195 above). The actions which they took, in obedience to superior orders, were thus perceived by them as absolutely necessary in order to safeguard innocent lives.

In sum, having regard to the decision not to prevent the suspects from travelling into Gibraltar, to the failure of the authorities to make sufficient allowances for the possibility

that their intelligence assessments might, in some respects at least, be erroneous and to the automatic recourse to lethal force when the soldiers opened fire, the Court is not persuaded that the killing of the three terrorists constituted the use of force which was no more than absolutely necessary in defence of persons from unlawful violence within the meaning of Article 2 para. 2 (a) (art. 2-2-a) of the Convention".

*Isayeva v. Russia (2005): "Article 2 covers not only intentional killing but also the situations in which it is permitted to "use force" which may result, as an unintended outcome, in the deprivation of life. However, the deliberate or intended use of lethal force is only one factor to be taken into account in assessing its necessity. Any use of force must be no more than "absolutely necessary" for the achievement of one or more of the purposes set out in subparagraphs (a) to (c). (...). Consequently, the force used must be strictly proportionate to the achievement of the permitted aims (...). It is necessary to examine whether the operation was planned and controlled by the authorities so as to **minimize, to the greatest extent possible, recourse to lethal force.** The authorities must take appropriate care to ensure that any risk to life is minimized. The Court must also examine whether the authorities were not negligent in their choice of action (...). Similarly, the State's responsibility is not confined to circumstances where there is significant evidence that misdirected fire from agents of the state has killed a civilian. **It may also be engaged where they fail to take all feasible precautions in the choice of means and methods of a security operation mounted against an opposing group with a view to avoiding and, in any event, minimizing, incidental loss of civilian life"**.*

2. Positive obligations:

a) conducting necessary investigation in each case of use of lethal weapon by the state agent (*Isayeva v. Russia*); there should be some form of effective official investigation when individuals have been killed as a result of the use of force by agents of the State (*McCann v. UK*).

b) putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions (*Osman v. UK, Vo v. France*);

c) in exceptional situations - ensuring protection for persons whose life is endangered by non-state actors (*Osman v. UK*) provided that threat is:

- imminent and

- real.

Euthanasia problem.

Article 293 of the Dutch Penal Code:

1. Any person who terminates another person's life at that person's express and earnest request shall be liable to a term of imprisonment not exceeding twelve years or a fifth-category fine.

2. The act referred to in the first paragraph **shall not be an offence** if it committed by a physician who fulfils the **due care criteria** set out in Article 2 of the Termination of Life on Request and Assisted Suicide (Review Procedures) Act, and if the physician notifies the municipal pathologist of this act in accordance with the provisions of Article 7, paragraph 2 of the Burial and Cremation Act.

Termination of Life on Request and Assisted Suicide (Review Procedures) Act

Chapter II. Requirements of Due Care

Article 2

The requirements of due care, referred to in Article 293 second paragraph Penal Code mean that the physician:

a. holds the conviction that the request by the patient was voluntary and well-considered,

b. holds the conviction that the patient's suffering was lasting and unbearable,

c. has informed the patient about the situation he was in and about his prospects,

d. and the patient holds the conviction that there was no other reasonable solution for the situation he was in,

e. has consulted at least one other, independent physician who has seen the patient and has given his written opinion on the requirements of due care, referred to in parts a - d, and

f. has terminated a life or assisted in a suicide with due care.

Pretty v. UK (2002):

*"The consistent emphasis in all the cases before the Court has been the obligation of the State to protect life. The Court is not persuaded that "the right to life" guaranteed in Article 2 can be interpreted as involving a negative aspect. While, for example, in the context of Article 11 of the Convention, the freedom of association was found to involve not only a right to join an association but a corresponding right not to be forced to join an association, the Court observes that the notion of a freedom implies some measure of choice as to its exercise. Article 2 of the Convention is phrased in different terms. It is unconcerned with issues to do with the quality of living or what a person chooses to do with his or her life. To the extent that these aspects are recognised as so fundamental to the human condition that they require protection from State interference, they may be reflected in the rights guaranteed by other Articles of the Convention, or in other international human rights instruments. **Article 2 cannot, without a distortion of language, be interpreted as conferring the diametrically opposite right, namely a right to die; nor can it create a right to self-determination in the sense of conferring on an individual the entitlement to choose death rather than life.***

The Court accordingly finds that no right to die, whether at the hands of a third person or with the assistance of a public authority, can be derived from Article 2 of the Convention".

Beginning of "human life".

*Vo v. France (2005): "The Court is convinced that it is neither desirable, nor even possible as matters stand, to answer in the abstract the question whether the unborn child is a person for the purposes of Article 2 of the Convention ("personne" in the French text). Unborn child's lack of a clear legal status does not necessarily deprive it of all protection under French law. An effective judicial system, as required by Article 2, may, and under certain circumstances must, include recourse to the criminal law. However, if the infringement of the right to life or to physical integrity is not caused intentionally, the positive obligation imposed by Article 2 to set up an effective judicial system does not necessarily require the **provision of a criminal-law remedy in every case**. In conclusion, the Court considers that in the circumstances of the case, an action for damages in the administrative courts could be regarded as an **effective remedy that was available to the applicant**. Such an action, which she failed to use, would have enabled her to prove the medical negligence she alleged and to obtain full redress for the damage resulting from the doctor's negligence, and there was therefore no need to institute criminal proceedings in the instant case. The Court accordingly concludes that, even assuming that Article 2 was applicable in the instant case (see paragraph 85 above), there has been no violation of Article 2 of the Convention".*

Bundesverfassungsgericht (2006)

§ 14.3 of the Aviation Security Act which authorises the armed forces to shoot down aircraft that are intended to be used as weapons in crimes against human lives, is incompatible with

the Basic Law and hence void. Moreover, § 14.3 of the Aviation Security Act is incompatible with the fundamental right to life and with the guarantee of human dignity to the extent that the use of armed force affects persons on board the aircraft **who are not participants in the crime**. By the state's using their killing as a means to save others, they are treated as mere objects, which denies them the value that is due to a human being for his or her own sake.

Article 3 – Prohibition of torture

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

inhuman treatment

degrading treatment

inhuman punishment

degrading punishment

ius cogens obligation.

Character of obligations resulting from Art. 3:

- prohibition of derogation, even in state of war or any danger to the state (art. 15);
- non-justiciable under any circumstances (even combat with terrorism, even necessity to save other person life);
- positive obligations (necessity to protect from behavior of non-state actors);
- procedural obligations;
- extradition and deportation issues.

Elements of “torture” (UN Convention 1984):

- a) any act which causes **severe** pain or suffering, whether physical or mental,
- b) this pain is intentionally inflicted on a person;
- c) because of a specific purpose:
 - obtaining from him or a third person information or a confession,
 - punishing him for an act he or a third person has committed or is suspected of having committed
 - or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind,
- d) this pain or suffering is inflicted by a **public official** or other person acting in an **official capacity**.

Gafgen v. Germany (2010):

The case concerned his complaint that he was threatened with ill-treatment by the police in order to make him confess to the whereabouts of J., the youngest son of a well-known

banking family in Frankfurt am Main, and that the ensuing trial against him was not fair. In July 2003, Mr Gäfgen was sentenced to life imprisonment for the abduction and murder of J. The court found that his guilt was of a particular gravity, meaning that the remainder of his prison sentence cannot be suspended on probation after 15 years of detention.

One of the police officers responsible for questioning Mr Gäfgen, on the instructions of the Deputy Chief of Frankfurt Police, warned the applicant that he would face considerable suffering if he persisted in refusing to disclose the child's whereabouts. They considered that threat necessary as they assumed J.'s life to be in great danger from lack of food and the cold. As a result of those threats, the applicant disclosed where he had hidden the child's body. Following that confession, the police drove to the pond together with the applicant and secured further evidence, notably the tyre tracks of the applicant's car at the pond and the corpse.

ECHR:

It had been established by the German courts that a police officer, acting on the instructions of the Deputy Chief of Frankfurt Police, had threatened the applicant with being subjected to intolerable pain in order to make him disclose J.'s whereabouts. The Court considered that these immediate threats of deliberate and imminent ill-treatment had to have caused the applicant considerable fear and mental suffering. It observed that, as established by the domestic courts, the deputy police chief had ordered his subordinates on several occasions to use force against the applicant, his order could therefore not be regarded as a spontaneous act, but had been calculated in a deliberate manner.

The Court accepted that the police officers had been motivated by the attempt to save a child's life. However, the prohibition on ill-treatment applied irrespective of the conduct of the victim or the motivation of the authorities; it allowed no exception, not even where the life of an individual was at risk. The Court considered that in the present case the immediate threats against the applicant for the purpose of extracting information from him were sufficiently serious to be qualified as **inhuman treatment** falling within the scope of Article 3. Having regard to its case-law and to the views taken by other international human rights monitoring bodies, it found, however, that the method of interrogation to which the

applicant had been subjected **had not reached the level of cruelty to attain the threshold of torture.**

The alleged behavior in order to fall within Art. 3 scope must attain a "**minimum threshold**" (Costello Roberts v. UK, 1993).

Difference between "torture" and "inhuman treatment"

Ireland v. UK (1978):

Five techniques:

(a) wall-standing: forcing the detainees to remain for periods of some hours in a "stress position", described by those who underwent it as being "spread eagled against the wall, with their fingers put high above the head against the wall, the legs spread apart and the feet back, causing them to stand on their toes with the weight of the body mainly on the fingers";

(b) hooding: putting a black or navy coloured bag over the detainees' heads and, at least initially, keeping it there all the time except during interrogation;

(c) subjection to noise: pending their interrogations, holding the detainees in a room where there was a continuous loud and hissing noise;

(d) deprivation of sleep: pending their interrogations, depriving the detainees of sleep;

(e) deprivation of food and drink: subjecting the detainees to a reduced diet during their stay at the centre and pending interrogations.

The Court: it was the intention that the Convention, with its distinction between "torture" and "inhuman or degrading treatment", should by the first of these terms attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering.

Although the five techniques, as applied in combination, undoubtedly amounted to inhuman and degrading treatment, although their object was the extraction of confessions, the naming of others and/or information and although they were used systematically, **they did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood.**

The Court concludes that recourse to the five techniques amounted to a **practice of inhuman and degrading treatment**, which practice was in breach of Article 3 (art. 3).

Factor to be taken into consideration while distinguishing between torture and inhuman treatment:

a) age of the victim;

b) sex of the victim;

c) state of health of the victim;

d) effects of prohibited treatment;

e) how long the prohibited treatment lasted.

Aydin v. Turkey (1997):

The applicant on arrival at the gendarmerie headquarters was separated from her father and her sister-in-law. At some stage she was taken upstairs to a room which she later referred to as the “torture room”. There she was stripped of her clothes, put into a car tyre and spun round and round. She was beaten and sprayed with cold water from high-pressure jets. At a later stage she was taken clothed but blindfolded to an interrogation room. With the door of the room locked, an individual in military clothing forcibly removed her clothes, laid her on her back and raped her. By the time he had finished she was in severe pain and covered in blood. She was ordered to get dressed and subsequently taken to another room.

The Court: Evidence adduced proved beyond reasonable doubt that applicant was raped and ill-treated in custody. The rape of a detainee by an official of the State is an especially grave and abhorrent form of ill-treatment (applicant 17 years old at the time); the applicant was also subjected to other forms of physical and mental suffering, sustained terrifying and humiliating experiences. **Accumulation of acts of violence, especially act of rape, amounted to torture.** The Court would have reached this conclusion on either ground taken separately.

Article 4 – Prohibition of slavery and forced labour

1. No one shall be held in slavery or servitude.

Distinction between “slavery” (treating human being as mere object; exercising all property rights in relation to a human being: *ius possidendi*, *ius fruendi*, *ius abutendi*, *ius alienandi*) and “servitude” (obligation to work for another without remuneration in a concrete place and time, no possibility to change this situation).

2. No one shall be required to perform forced or compulsory labour.

Limitation clause:

3. For the purpose of this article the term “forced or compulsory labour” shall not include:

a. any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;

b. any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;

c. any service exacted in case of an emergency or calamity threatening the life or well-being of the community;

d. any work or service which forms part of normal civic obligations.

Siliadin v. France (2005):

The applicant agreed that she would work at Mrs D.'s home until the cost of her air ticket had been reimbursed and that Mrs D. would attend to her immigration status and find her a place at school. In reality, the applicant became an unpaid housemaid for Mr and Mrs D. and her passport was taken from her. The applicant subsequently became a general housemaid for Mr and Mrs B. She worked seven days a week, without a day off, and was occasionally and exceptionally authorised to go out on Sundays to attend mass. Her working day began at

7.30 a.m., when she had to get up and prepare breakfast, dress the children, take them to nursery school or their recreational activities, look after the baby, do the housework and wash and iron clothes. In the evening she prepared dinner, looked after the older children, did the washing up and went to bed at about 10.30 p.m. In addition, she had to clean a studio flat, in the same building, which Mr B. had made into an office. The applicant slept on a mattress on the floor in the baby's room; she had to look after him if he woke up. She was never paid, except by Mrs B.'s mother, who gave her one or two 500 French franc (FRF) notes. In December 1995 the applicant was able to escape. Subsequently, in obedience to her paternal uncle, who had been in contact with Mr and Mrs B., she returned to the couple, who had undertaken to put her immigration status in order. However, the situation remained unchanged: the applicant continued to carry out household tasks and look after the couple's children. She slept on a mattress on the floor of the children's bedroom, then on a folding bed, and wore second-hand clothes.

The Court: Article 4 enshrines one of the fundamental values of democratic societies. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 4 makes no provision for exceptions and no derogation from it is permissible under Article 15 § 2 even in the event of a public emergency threatening the life of the nation. In those circumstances, the Court considers that, in accordance with contemporary norms and trends in this field, the member States' positive obligations under **Article 4 of the Convention must be seen as requiring the penalisation and effective prosecution of any act aimed at maintaining a person in such a situation.** Accordingly, the applicant's situation falls within Article 4 of the Convention.

Article 5 – Right to liberty and security

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the **following cases** and in **accordance with a procedure prescribed by law**:

a. the lawful detention of a person after conviction by a competent court;

b. the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfillment of any obligation prescribed by law;

c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

d. the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

e. the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

W. Litwa v. Poland (2000)

f. the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

De Wilde, Ooms, Versyp v. Belgium (1971; Vagrancy case): the Government stressed that the applicants had reported voluntarily to the police and that their admission to Wortel and Merksplas had been the result "of an express or implicit request" on their part, express for Versyp and Ooms, implicit for De Wilde. According to the Government, such a "voluntary reporting" can scarcely amount to being "deprived of liberty" within the meaning of Article 5. The Court is not persuaded by this line of argument. Temporary distress or misery may drive a person to give himself up to the police to be detained.

Finally and above all, **the right to liberty is too important in a "democratic society" within the meaning of the Convention for a person to lose the benefit of the protection of the Convention for the single reason that he gives himself up to be taken into detention.**

Detention might violate Article 5 even although the person concerned might have agreed to it.

Article 6 – Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing **within a reasonable time** by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. **Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.**

3. Everyone charged with a criminal offence has the **following minimum rights**:

a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

b. to have adequate time and facilities for the preparation of his defence;

c. to defend himself in person or through legal assistance of his own choosing or, **if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require**;

d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Airey v. Ireland 1979

Greek Stran Refineries v. Greece (1994): Art. 6 secures in particular the right to a fair trial. As regards disputes concerning civil rights and obligations, the Court has laid down in its case-law the requirement of equality of arms in the sense of a fair balance between the parties. In litigation involving opposing private interests, that equality implies that each party must be afforded a reasonable opportunity to present his case - under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent. In this connection, the Court has had regard to both the timing and manner of the adoption of Article 12 of Law no. 1701/1987. Shortly before the hearing in the Court of Cassation, which had initially been set down for 4 May 1987, and after the parties had received the opinion of the judge-rapporteur recommending the dismissal of the State's appeal, the State sought the adjournment of the hearing on the ground that a draft law concerning the case was before Parliament. This draft law was adopted on 22 May 1987 and entered into force on 25 May after its publication in the Official Gazette. The hearing was held on 1 June 1987. Article 12 was an additional provision to that law and was in reality aimed at the applicant company - although the latter was not mentioned by name. **It is an inescapable fact that the legislature's intervention in the present case took place at a time when judicial proceedings in which the State was a party were pending.** The principle of the rule of law and the notion of fair trial enshrined in Article 6 preclude any interference by the legislature with the administration of justice designed to influence the judicial determination of the dispute. In conclusion, the State infringed the applicants' rights under Article 6 para. 1 by intervening in a manner which was decisive to ensure that the - imminent - outcome of proceedings in which it was a party was favourable to it. There has therefore been a violation of that Article.

Ramanauskas v. Lithuania (2008):

The applicant formerly worked as a prosecutor in the Kaišiadorys region. The applicant submitted that in late 1998 and early 1999 he had been approached by AZ, a person previously unknown to him, through VS, a private acquaintance. AZ had asked him to secure the acquittal of a third person and had offered him a bribe of 3,000 United States dollars (USD) in return. The applicant had initially refused but had later agreed after AZ had reiterated the offer a number of times. The Government submitted that VS and AZ had approached the applicant and negotiated the bribe with him on their own private initiative, without having first informed the authorities. They alleged that AZ had suspected the applicant of having accepted bribes in the past. On an unspecified date AZ, who was in fact an officer of a special anti-corruption police unit of the Ministry of the Interior (*Specialiųjų tyrimų tarnyba* – “the STT”), informed his employers that the applicant had agreed to accept a bribe.

doctrine of entrapment

The Court: the Police incitement occurs where the officers involved – whether members of the security forces or persons acting on their instructions – **do not confine themselves to investigating criminal activity in an essentially passive manner**, but **exert such an influence** on the subject as to **incite the commission** of an offence that would otherwise not have been committed, in order to make it possible to establish the offence, that is, to provide evidence and institute a prosecution.

Article 7 – No punishment without law – nullum crimen sine lege

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

Streletz, Kessler, Krenz v. Germany (2001).

Gesetzliches Unrecht (“Legal Injustice”) doctrine: *the conflict between justice and the reliability of the law should be solved in favour of the positive law, law enacted by proper authority and power, even in cases where it is unjust in terms of content and purpose, **except for cases where the discrepancy between the positive law and justice reaches a level so unbearable that the statute has to make way for justice because it has to be considered***

"erroneous law". It is impossible to draw a sharper line of demarcation between cases of legal injustice and statutes that are applicable despite their erroneous content; however, another line of demarcation can be drawn with rigidity: Where justice is not even strived for, where equality, which is the core of justice, is renounced in the process of legislation, there a statute is not just 'erroneous law', **in fact is not of legal nature at all. That is because law, also positive law, cannot be defined otherwise as a rule, that is precisely intended to serve justice.**

Radbruch doctrine

Article 8 – Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be **no interference** by a public authority with the exercise of this right except such as is in **accordance with the law** and is **necessary in a democratic society in the interests of** national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 9 – Freedom of thought, conscience and religion

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be **subject only to such limitations** as are **prescribed by law** and are **necessary in a democratic society in the interests of** public

safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Article 10 – Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such **formalities, conditions, restrictions or penalties** as are **prescribed by law** and are **necessary in a democratic society, in the interests of** national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, **for the protection of the reputation or rights of others**, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 11 – Freedom of assembly and association

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. **No restrictions** shall be placed on the exercise of these rights other than such as are **prescribed by law** and are **necessary in a democratic society in the interests of** national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

Common pattern:

- a) protected right;
- b) limitation clause.

Elements of limitation clause:

- a) legality (“prescribed by law”);
- b) aim (“in the interest of”);
- c) necessity (“necessary in democratic society”).
 - 1) pressing social need of restriction;
 - 2) proportionality principle

Doctrine of margin of appreciation.

Oberchlick v. Austria (1997): “freedom of expression is applicable not only to "information" and "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. These principles are of particular importance with regard to the press. While it must not overstep the bounds set, inter alia, for "the protection of the reputation of others", its task is nevertheless to impart information and ideas on political issues and on other matters of general interest. **As to the limits of acceptable criticism, they are wider with regard to a politician acting in his public capacity than in relation to a private individual. A politician inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must display a greater degree of tolerance, especially when he himself makes public statements that are susceptible of criticism.** He is certainly entitled to have his reputation protected, even when he is not acting in his private capacity, but the

requirements of that protection have to be weighed against the interests of open discussion of political issues, since exceptions to freedom of expression must be interpreted narrowly”.

Von Hannover v. Germany (2004): “The Court reiterates the fundamental importance of protecting private life from the point of view of the development of every human being's personality. That protection - as stated above - extends beyond the private family circle and also includes a social dimension. The Court considers that anyone, even if they are known to the general public, must be able to enjoy a "legitimate expectation" of protection of and respect for their private life. As the Court has stated above, it considers that the decisive factor in balancing the protection of private life against freedom of expression should lie in the contribution that the published photos and articles make to a debate of general interest. It is clear in the instant case that they made no such contribution since the applicant

exercises no official function and the photos and articles related exclusively to details of her private life. Furthermore, **the Court considers that the public does not have a legitimate interest in knowing where the applicant is and how she behaves generally in her private life even if she appears in places that cannot always be described as secluded and despite the fact that she is well known to the public.** Even if such a public interest exists, as does a commercial interest of the magazines in publishing these photos and these articles, in the instant case those interests must, in the Court's view, yield to the applicant's right to the effective protection of her private life. Lastly, in the Court's opinion the criteria established by the domestic courts were not sufficient to ensure the effective protection of the applicant's private life and she should, in the circumstances of the case, have had a "legitimate expectation" of protection of her private life. Having regard to all the foregoing factors, and **despite the margin of appreciation** afforded to the State in this area, the Court considers that the German courts did not strike a fair balance between the competing interests".

Open Door, Well Women Center v. Ireland (1992): "It has not been seriously contested by the Government that information concerning abortion facilities abroad can be obtained from other sources in Ireland such as magazines and telephone directories or by persons with contacts in Great Britain. Accordingly, information that the injunction sought to restrict was already available elsewhere although in a manner which was not supervised by qualified personnel and thus less protective of women's health. Furthermore, the injunction appears to have been largely ineffective in protecting the right to life of the unborn since it did not prevent large numbers of Irish women from continuing to obtain abortions in Great Britain".

Article 12 – Right to marry

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

Article 13 – Right to an effective remedy

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

Article 14 – Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.