1 The Basics of the Convention System

1.1 Introduction

The European Convention on Human Rights ('Convention' or 'ECHR') was opened for signature in Rome on 4 November 1950 and it entered into force in 1953. It is a unique document which has had tremendous impact on the theory and practice of protecting fundamental rights in Europe. One of the main explanations for this impact is that the drafters of the Convention did not only lay down a well-considered list of human rights, but also designed a system to monitor compliance. Originally, the system was intended as a kind of alarm bell, which could signify the risk that a State would fall into totalitarianism and which could be rung by both States and individuals.[1] The main role in this system is played by the European Court of Human Rights ('Court' or 'ECtHR'), which was established in 1959. This Court was set up 'to ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto' (Article 19 ECHR). Its jurisdiction extends 'to all matters concerning the interpretation and application of the Convention and the Protocols thereto' (Article 32(1) ECHR).

Over the past seven decades, the Convention system has developed considerably. Currently, the Court is generally regarded as one of the world's most influential and effective international institutions.[2] The Court receives about 40,000 to 60,000 applications each year, which indicates the trust which individuals have in the ability of the Court to provide protection and offer redress if Convention rights have been violated. Moreover, many of the judgments of the European Court of Human Rights are eventually complied with, even if it occasionally takes a long time to achieve this.[3] In addition, these judgments appear to have a great impact on

[1] On this objective of the Convention, see further e.g. E. Bates, *The Evolution of the European Convention on Human Rights: From its Inception to the Creation of a Permanent Court of Human Rights* (Oxford University Press, 2010).

[2] H. Keller and A. Stone Sweet, 'Introduction: The Reception of the ECHR in National Legal Orders' in H. Keller and A. Stone Sweet (eds.), *A Europe of Rights. The Impact of the ECHR on National Legal Systems* (Oxford University Press, 2008), pp. 3–28 at 3.

[3] Individual judgments are usually executed, if only by paying a certain amount of compensation to the victim; this is not to say, however, that structural or systemic problems causing these individual cases to be brought are actually solved; see further e.g. L.R. Glas, *The Theory, Potential and Practice of*

national law.[4] In the Netherlands, for example, the entire system for legal protection against administrative decisions was overhauled after just one judgment of the Court made clear that the old system offered individuals too little access to court.[5] The Nordic countries have changed their age-old 'closed-shop' systems, which compelled workers to become members of trade unions, after the Court had found that this was contrary to the freedom of association.[6] In Italy, efforts are being made to make court procedures more efficient.[7] Central and Eastern European States try to comply with the Court's judgments when restoring property that has been nationalised under communist regimes and, more generally, to model their legal systems to the standards set in the Convention.[8] In Russia, the Constitutional Court has based numerous decisions on the case law of the ECtHR.[9] Indeed, a 2016 study has shown that at some point, every single State has made at least some fundamental, structural or systemic change in national law and policy in response to a judgment of the Court.[10]

These examples show the great impact of the Convention. However, they equally show the challenges confronting the Court. Each year, the Court is asked to hand

Procedural Dialogue in the European Convention on Human Rights System (Antwerp: Intersentia, 2016) at 45–8.

[4] See e.g. L.R. Helfer, 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights regime', *European Journal of International Law*, 19 (2008), 125–9; P. Popelier, C. Van de Heyning and P. van Nuffel (eds.), *Human Rights Protection in the European Legal Order: The Interaction between the European and the National Courts* (Antwerp: Intersentia, 2011); J.H. Gerards and J.W.A. Fleuren (eds.), *Implementation of the European Convention on Human Rights and of the Judgments of the ECtHR in National Case Law. A comparative analysis* (Antwerp: Intersentia, 2014); I. Motoc and I. Ziemele (eds.), *The Impact of the ECHR on Democratic Change in Central and Eastern Europe* (Cambridge University Press, 2016).

[5] *Benthem v. the Netherlands*, ECtHR 23 October 1985, 8848/80.

[6] In particular *Sørensen and Rasmussen v. Denmark*, ECtHR (GC) 11 January 2006, 52562/99 and 52620/99.

[7] This has been attempted in response to *Bottazzi v. Italy*, ECtHR (GC) 28 July 1999, 34884/97, but without much success; see *Gaglione and Others v. Italy*, ECtHR 21 December 2010, 45867/07; for the efforts made, see www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases_en.asp, last accessed 30 November 2018.

[8] See *Broniowski v. Poland*, ECtHR (GC) 22 June 2004, 31443/96 and the follow-up decision in *Wolkenberg and Others v. Poland*, ECtHR 4 December 2007 (dec.), 50003/99. More generally, for the impact on the national law in these states, see Motoc and Ziemele, *supra* n. 4.

[9] A. Matta and A. Mazmanyan, 'Russia: In Quest for a European Identity' in P. Popelier, S. Lambrecht and K. Lemmens (eds.), *Criticism of the European Court of Human Rights. Shifting the Convention System: Counter-dynamics at the National and EU Level* (Antwerp: Intersentia, 2016), pp. 481–502 at 499 and A.I. Kovler, 'European Convention on Human Rights in Russia: Fifteen Years Later', in Motoc and Ziemele, *supra* n. 4, pp. 351–71 at 356.

[10] See the report by the Legal Affairs and Human Rights Department of the Parliamentary Assembly of the Council of Europe, *Impact of the European Convention on Human Rights in States Parties: Selected Examples* (Strasbourg, 8 January 2016) AS/Jur/Inf (2016) 04. Moreover, such changes are made in response both to judgments against that particular State and to judgments against other States, as is clear from Gerards and Fleuren, *supra* n. 4. See further K.J. Alter, L.R. Helfer and M.R. Madsen, 'How Context Shapes the Authority of International Courts', *Law and Contemporary Problems*, 79 (2016), 1–36 at 10–11 and 16.

down judgments in thousands of cases brought by individuals from all over Europe – the States Parties to the Convention range from Iceland to Azerbaijan and from Monaco to Georgia. Cases relate to such wide-ranging topics as racial violence,[11] the loss of a social security benefit[12] or a prohibition of pre-natal screening of embryos.[13] They may be about important matters such as inhumane prison conditions or torture, but they may also concern relatively minor issues such as administrative fines for speeding or a minor shortcoming in judicial proceedings. They also often concern highly divisive and contested matters such as abortion, the reducibility of lifelong prison sentences, expulsion of terrorism suspects or rights for religious minorities. In all of these cases, the Court must determine which restrictions amount to genuine violations of fundamental rights that cannot be condoned. In doing so, the Court must also take account of its position as an international court that has to judge cases coming from sovereign States, which may have very different constitutional systems and traditions from each other, and which may harbour significantly different values and opinions on contested fundamental rights issues.

The objective of this book is to explain in detail how the Court protects the Convention rights while working within a complex context. This can only be done if the basic principles governing the Court's work are well understood. This first chapter therefore first explains two main principles underlying the Convention system as a whole: the principles of effective protection of fundamental rights, and of subsidiarity (Section 1.2). Thereafter, the double role of the Court within the Convention system is set out: offering individual redress and clarifying Convention rights standards (Section 1.3). To comprehend how the Convention system works, it is further necessary to gain a sound understanding of the structure of the Convention rights. For that reason, Section 1.4 sets out the three main stages of the Court's review, which correspond to the structure of most of the Convention rights. Finally, Section 1.5 provides for a typology of Convention rights according to the possibilities for regulating the exercise of these rights.

1.2 Main Principles Underlying the Convention: Effectiveness and Subsidiarity

1.2.1 Effective Protection of Convention Rights

According to the Convention's Preamble, one of the primary objectives of the Convention is 'the maintenance and further realisation of Human Rights and Fundamental Freedoms'. According to the same Preamble, the one reason to draft

[11] E.g. *Fedorchenko and Lozenko v. Ukraine*, ECtHR 20 September 2012, 387/03.
[12] E.g. *Czaja v. Poland*, ECtHR 2 October 2012, 5744/05.
[13] E.g. *Costa and Pavan v. Italy*, ECtHR 28 August 2012, 54270/10.

the Convention was to provide the protection of those rights which were considered the most important within 'like-minded European countries', which have 'a common heritage of political traditions, ideals, freedom and the rule of law'.[14] The Court has referred to this objective of effective protection of fundamental rights as constantly informing its interpretation and application of the Convention. In one of its very first judgments, the *Belgian Linguistics* case of 1968, the Court emphasised that 'the general aim set for themselves by the Contracting Parties through the medium of the European Convention on Human Rights, was to provide effective protection of fundamental human rights'.[15] In 1979, in *Airey*, the Court rephrased the principle of effectiveness in a formula that it still uses today in many of its judgments: 'The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective.'[16] In its *Soering* judgment of 1989, the Court connected this principle of effectiveness to the nature and objectives of the Convention and to its own work in interpreting its provisions:

> In interpreting the Convention regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms . . . Thus, the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective . . . In addition, any interpretation of the rights and freedoms guaranteed has to be consistent with the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society.[17]

Thus, the notion of effectiveness provides the Court with important guidance in interpreting the Convention and in assessing the reasonableness and acceptability of interferences with the Convention rights.

The Court has also connected the principle of effectiveness to the obligation in Article 1 of the Convention to 'secure to everyone within their jurisdiction the rights and freedoms defined in the Convention and its Protocols'. In *Osman*, for example, the Court rejected the limited interpretation which the respondent government had suggested of its duty to protect the right to life (Article 2 of the Convention) against interferences by third parties: 'Such a rigid standard must be considered to be incompatible with the requirements of Article 1 of the Convention and the obligations of Contracting States under that Article to secure the practical and effective protection of the rights and freedoms laid down therein, including Article 2.'[18] By means of this connection, the principle of effectiveness also forms an important basis for the development and recognition of so-called 'positive' obligations of the

[14] Preamble ECHR. [15] *Belgian Linguistics Case*, ECtHR 23 July 1968, 1474/62, para. I.B.5.
[16] *Airey v. Ireland*, ECtHR 9 October 1979, 6289/73, para. 24.
[17] *Soering v. the United Kingdom*, ECtHR 7 July 1989, 14038/88, para. 87.
[18] *Osman v. the United Kingdom*, ECtHR 28 October 1998, 23452/94, para. 116.

States to protect Convention rights. In many cases, the Court has accepted that national authorities must act to make sure that individuals can genuinely and effectively enjoy the rights granted to them. To guarantee the right to life, for example, it is not only necessary that State agents refrain from killing citizens without there being a compelling justification for this, but that the State must also take adequate legal and practical measures to avoid a known, real and immediate risk that a person will be harmed.[19] Chapters 5 and 6 further discuss this notion of positive obligations and its connection to the notion of effective protection.

1.2.2 Subsidiarity and Primarity

According to Article 1 of the Convention, the primary responsibility for offering effective protection of the Convention rights lies with the national authorities, who must 'secure the Convention rights to everyone within their jurisdiction'.[20] This can be called the principle of 'primarity'.[21] The Court's task is mainly one of checking whether the national authorities have complied with the obligations they have undertaken under the Convention. Very roughly, this is what is called 'subsidiarity'.[22]

Originally, the notions of primarity and subsidiarity did not have a place in the text of the Convention,[23] but the Court has developed them as principles in its case law. It did so for the first time in the *Belgian Linguistics* case, which was decided in 1968. In its judgment, the Court focused on its own subsidiary role:

> [T]he Court cannot disregard those legal and factual features which characterise the life of the society in the State which, as a Contracting Party, has to answer for the measure in dispute. In so doing it cannot assume the rôle of the competent national authorities, for it would thereby lose sight of the subsidiary nature of the international machinery of collective enforcement established by the Convention. The national authorities remain free to choose the measures which they consider appropriate in those matters which are

[19] *Osman*, para. 116.

[20] See e.g. F. Tulkens, *How Can We Ensure Greater Involvement of National Courts in the Convention System? Dialogue Between Judges* (European Court of Human Rights, Council of Europe, 2012), pp. 6–10 at 6–7.

[21] J. Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (Leiden/Boston: Martinus Nijhoff Publishers, 2009).

[22] Much more has been written on subsidiarity and there are various different theoretical understandings of this notion. See e.g. R. Spano, 'Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity', *Human Rights Law Review*, 14 (2014), 487; A. Mowbray, 'Subsidiarity and the European Convention on Human Rights', *Human Rights Law Review*, 15 (2015), 313; O.M. Arnardóttir, 'The Brighton Aftermath and the Changing Role of the European Court of Human Rights', *Journal of International Dispute Settlement*, 9 (2018), 223–39.

[23] They will be laid down in the Convention's Preamble once Protocol No. 15 enters into force; see CETS No. 213. In Summer 2018, the Protocol was ratified by forty-three of the forty-seven Member States of the Council of Europe.

> governed by the Convention. Review by the Court concerns only the conformity of these measures with the requirements of the Convention.[24]

In the later *Handyside* case, the Court addressed subsidiarity in relation to the primary responsibilities of the States Parties in greater depth.[25] This case concerned the 'Little Red Schoolbook', a booklet for teenagers which contained (allegedly rather subversive) information on – among others – matters of sexuality. The British authorities had chosen to prohibit the distribution of the booklet in schools because it would endanger 'good morals'. This evoked the question of whether such a prohibition was compatible with the freedom of expression, protected by Article 10 ECHR.[26] Before answering this question, the Court discussed the division of tasks within the Convention system. First, it explained the rationale for primarity and the consequences of this concept:

> The Convention leaves to each Contracting State, in the first place, the task of securing the rights and liberties it enshrines. The institutions created by it make their own contribution to this task but they become involved only through contentious proceedings and once all domestic remedies have been exhausted . . . In particular, it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterised by a rapid and far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them . . . [I]t is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of 'necessity' in this context.[27]

Subsequently, the Court defined its own role and, in doing so, gave shape to the notion of 'subsidiarity':

> Nevertheless, [the Convention] does not give the Contracting States an unlimited power of appreciation. The Court, which . . . is responsible for ensuring the observance of those States' engagements (Article 19), is empowered to give the final ruling on whether a 'restriction' or 'penalty' is reconcilable with freedom of expression as protected by Article 10. The domestic margin of appreciation thus goes hand in hand with a European supervision. Such supervision concerns both the aim of the measure challenged and its 'necessity'; it covers not only the basic legislation but also the decision applying it, even one given by an independent court.[28]

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[24] *Belgian Linguistics case*, ECtHR 23 July 1968, 1474/62, para. I.B.10. See also Christoffersen, *supra* n. 21, at 248.
[25] *Handyside v. the United Kingdom*, ECtHR 7 December 1976, 5493/72. [26] *Ibid.*
[27] *Ibid.*, para. 48. [28] *Ibid.*, para. 49.

Thus, in the Court's view, the subsidiarity principle means that the States have some leeway to regulate and restrict the exercise of Convention rights in the way they think is best suited to national views and national (legal and constitutional) traditions. Such leeway exists especially in controversial cases where there is no European consensus on how a right can best be regulated, or where the national authorities are clearly better placed than the Court to decide how national sensitivities or national constitutional traditions can be heeded, or where a balance needs to be struck in regulating complex socio-economic matters. This leeway is often expressed in terms of granting a 'margin of appreciation' to the State.[29] However, the quoted considerations also show that such a margin of appreciation, even if it is wide, is far from equal to the possibility of exercising full and unhampered discretion. The Court's task may be subsidiary, but the Court is still competent to supervise national compliance with the Convention. In other words, subsidiarity means that the Court can and will police the borders of the exercise of national discretion. This is significant because, in line with Articles 19 and 32 of the Convention, it is up to the Court to define the minimum level of protection that the States must guarantee in exercising its primary role. This means that there is little subsidiarity involved in the Court's task to provide definitions of core Convention terms and concepts, set and refine relevant standards and criteria for review, and clarify how these can be applied in case of doubt.[30] In fact, the notion of subsidiarity mainly comes into play with regard to the application of such definitions or standards in individual cases. How the Court has given effect to this in practice, and when there may still be an effect on interpretation and standard-setting in general terms, is the subject of discussions in subsequent chapters.

In addition to the effect of subsidiarity on the Court's review in individual cases, the Court has explained that 'subsidiarity' means that the national authorities must have sufficient room to detect and correct mistakes, flaws or omissions in their protection of Convention rights. This explanation constitutes the rationale for its interpretation of several admissibility requirements in the Convention, such as the requirement that all (effective) domestic remedies are exhausted before an applicant can bring a complaint before the Strasbourg Court.[31] In *Demopoulos*, the Court explained how its interpretation of this requirement can be linked to the principle of subsidiarity:

> It is primordial that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights. This Court is concerned with the supervision of the implementation by Contracting States of their obligations under the

[29] See in more detail Chapter 7.
[30] This is also recognised by the States Parties, in particular in the High Level Declarations of Interlaken (2010) and Brighton (2013).
[31] Article 35(1) ECHR.

> Convention. It cannot, and must not, usurp the role of Contracting States whose responsibility it is to ensure that the fundamental rights and freedoms enshrined therein are respected and protected on a domestic level. The rule of exhaustion of domestic remedies is therefore an indispensable part of the functioning of this system of protection. States are dispensed from answering before an international body for their acts before they have had an opportunity to put matters right through their own legal system and those who wish to invoke the supervisory jurisdiction of the Court as concerns complaints against a State are thus obliged to use first the remedies provided by the national legal system . . . The Court cannot emphasise enough that it is not a court of first instance; it does not have the capacity, nor is it appropriate to its function as an international court, to adjudicate on large numbers of cases which require the finding of basic facts or the calculation of monetary compensation – both of which should, as a matter of principle and effective practice, be the domain of domestic jurisdictions.[32]

Consequently, subsidiarity is an important notion in the procedural choices made by the Court, such as in deciding on the admissibility of individual complaints or in giving advice to States as to how they could implement certain judgments. Since this book concentrates on the substantive principles of Convention law, such procedural consequences are not specifically discussed here, but they are mentioned throughout the book where relevant.[33]

Although the principles of subsidiarity and primarity have been developed in the case law of the Court, in recent years, the States Parties have agreed that they are so important that they deserve to be expressly mentioned in the Convention. Following the entry into force of Protocol No. 15 (which was signed in 2013 and has yet to be ratified by a few States),[34] the final paragraph of the Preamble will read as follows: 'Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention.' This codification of these principles is not intended to make any difference to the way they have been developed in the Court's case law, however, and the Court will retain the competence to interpret these notions as it thinks fit.[35]

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[32] *Demopoulos and Others v. Turkey*, ECtHR (GC) 1 March 2010 (dec.), 46113/99, para. 69.

[33] In more detail on the procedural effects of the notions of primarity and subsidiarity (as well as of effectiveness), see e.g. Glas, *supra* n. 3.

[34] In November 2018, the Protocol was ratified by forty-five States. It has to be ratified by all forty-seven States in order to enter into force.

[35] Explanatory Memorandum to Protocol No. 15, ETS-no. 213, paras. 7–9 and Opinion of the Court on Draft Protocol No. 15 to the European Convention on Human Rights, 6 February 2013, www.echr.coe.int/Documents/2013_Protocol_15_Court_Opinion_ENG.pdf, last accessed 30 November 2018.

1.3 The Double Role of the European Court of Human Rights

As explained above, the main objective of the Convention system is to protect the fundamental rights guaranteed in the Convention text and Protocols to everyone within the jurisdiction of the States Parties. The States have undertaken to guarantee these rights and they have thereby accepted an obligation to do so in an effective manner. However, due to national oversights, mistakes or even structural problems in upholding rule of law principles, there may be shortcomings in the domestic protection of Convention rights. It is then the Court's task to step in and offer subsidiary protection of the Convention. In offering this subsidiary protection, two major roles or functions for the Court can be distinguished.[36]

Based on Article 19 ECHR, the Court's first and main function is that of supervising the compliance by the States with their obligations under the Convention in concrete cases and of offering individual redress if need be. It is generally accepted that these tasks form the cornerstone of the Convention system.[37] As a completely external, independent and uninvolved institution, the Court is well placed to decide whether a State has failed to comply with its obligations under the Convention in individual cases. It does so by assessing the facts of the case and reviewing the reasonableness of the arguments brought forward by parties. The Court may also offer individual redress if it finds that persons or legal entities have been harmed by violations of their Convention rights by national governments or government agents.[38] Such redress may consist of obliging the State to pay just satisfaction to a victim to compensate for pecuniary or non-pecuniary damage, but the Court may also suggest individual or general measures to be taken to solve systemic problems in Convention protection on a national level.[39]

[36] See also F. de Londras, 'Dual Functionality and the Persistent Frailty of the European Court of Human Rights', *European Human Rights Law Review*, 1 (2013), 38–46, and J.H. Gerards and L.R. Glas, 'Access to Justice in the European Convention on Human Rights System', *Netherlands Quarterly of Human Rights*, 35 (2017), 11–30.

[37] See e.g. *Report of the Committee of Minister's Steering Committee for Human Rights (CDDH) on Measures Requiring Amendment of the European Convention on Human Rights* (Strasbourg, February 2012, CDDH(2012)R74 Addendum I). For more elaboration, see Gerards and Glas, *supra* n. 36.

[38] This is often regarded as the most important function of the Court; see e.g. P. Leach, 'On Reform of the European Court of Human Rights', *European Human Rights Law Review*, 6 (2009), 725–35; H. Keller, A. Fischer and D. Kühne, 'Debating the Future of the European Court of Human Rights after the Interlaken Conference: Two Innovative Proposals', *European Journal of International Law*, 21 (2010), 1025–48; *Report of the Committee of Minister's Steering Committee for Human Rights (CDDH) on Measures Requiring Amendment of the European Convention on Human Rights* (Strasbourg, February 2012, CDDH(2012)R74 Addendum I).

[39] For the various possibilities of offering redress and the shifts visible in the Court's case law, see e.g. L.R. Glas, 'Changes in the Procedural Practice of the European Court of Human Rights: Consequences

When exercising this role of supervision and offering individual redress, the Court will assess each admissible individual case on its merits, and it will look into the particular circumstances of the case in evaluating the reasonableness of restrictions. As phrased in its *Sunday Times* judgment, 'the Court has to be satisfied that the interference was necessary having regard to the facts and circumstances prevailing in the specific case before it'.[40] As is further explained in Chapter 2, the central importance of the individual assessment of each case on the merits has led to an often strongly case-based and contextualised case law.

The second main function of the Court is of a more constitutional nature, namely to clarify the minimum level of protection of fundamental rights that should be guaranteed in all Convention States.[41] This function is expressed in the text of the Convention where the Preamble stresses the importance of a system of *collective* enforcement of fundamental rights.[42] Given the fundamental character of the Convention rights, it would be unacceptable if the exercise of those rights were to depend on where the individual happened to live. Someone living in Germany should enjoy the equal right to remain free of torture or discrimination and to express himself freely as someone living in Russia.[43] Only a central institution such as the Court can uniformly establish the meaning of fundamental rights and define a minimum level of fundamental rights protection that must be guaranteed in all the States of the Council of Europe.[44] This means that the Court has an essential role to play in standard-setting, even if States may always provide additional protection (Article 53 ECHR).[45] The Court has explained this in *Soering*, connecting this constitutional function to the principle of effectiveness:

> [T]he object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective . . . In addition, any interpretation of the rights and freedoms guaranteed

for the Convention System and Lessons to be Drawn', *Human Rights Law Review*, 14 (2014), 671–99, and Gerards and Glas, *supra* n. 36.

[40] *Sunday Times v. the United Kingdom*, ECtHR 26 April 1979, 6538/74, para. 65.

[41] Cf. S. Greer and L. Wildhaber, 'Revisiting the Debate about "Constitutionalising" the European Court of Human Rights', *Human Rights Law Review*, 12 (2012), 655–87; de Londras, *supra* n. 36, at 38.

[42] See also T. Hammarberg, 'The Court of Human Rights versus the "*Court of Public Opinion*"' in *How Can We Ensure Greater Involvement of National Courts in the Convention System?* Dialogue between judges (European Court of Human Rights, Council of Europe 2012), pp. 30–6 at 31; Gerards and Glas, *supra* n. 36.

[43] Cf. D. Galligan and D. Sandler, 'Implementing Human Rights' in S. Halliday and P. Schmidt (eds.), *Human Rights Brought Home. Socio-legal Studies of Human Rights in the National Context* (Oxford: Hart, 2004) at 31.

[44] See further J.H. Gerards, 'Uniformity and the European Court of Human Rights', in K. Lemmens, S. Parmentier and L. Reyntjens (eds.), *Liber Amicorum Paul Lemmens* (in press).

[45] A. Stone Sweet, 'The European Convention on Human Rights and National Constitutional Reordering', *Cardozo Law Review*, 33 (2012), 1859–68, calling this the Court's 'oracular' or 'law-making' function.