Berber Bevernage · Nico Wouters
Editors

The Palgrave Handbook of State-Sponsored History After 1945

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Editors
Berber Bevernage
Department of History
Ghent University
Ghent, Belgium

Nico Wouters
CEGESOMA (Belgian State Archives)
Brussels, Belgium

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CHAPTER 5

History Watch by the European Court of Human Rights

Pierre-Olivier de Broux and Dorothea Staes

Abbreviations

ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
NGO	Nongovernmental organisation
UN	United Nations
WWII	Second World War

It is a fact that state-sponsored history is also written by judges and their judgments (Favreau 2012, Sarat and Kearns 2002).[1] Particularly on a European level, the sentences of the European Court of Human Rights (hereinafter: ECtHR) can offer two angles to understand the dynamics of state-sponsored history. Its jurisprudence can illustrate how judges are confronted with history, and think they have to protect it or interfere with it. On the other hand, the ECtHR imposes on its member states binding frameworks on how to deal with history in order to respect fundamental human rights.

The ECtHR uses at least four instruments to do this. The first instrument is *freedom of expression* (Article 10 of the European Convention on Human Rights, hereinafter: ECHR), as a tool to expand the freedom to investigate historical facts and events but also to verify and ensure the research's reliability (Chapter X.1). The second instrument is the *right to respect for private life* (Article 8 ECHR), as a limitation for research and for the right to

P.-O. de Broux (✉) · D. Staes
Université Saint-Louis (USL-B), Brussels, Belgium

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access historical documents and archives (Chapter X.2). In using these two—sometimes conflicting—fundamental rights, the Court is constructing a broad deontological framework of historical research. However, the ECtHR is more prudent in recognizing another important emerging right, the third potential instrument of the Court: the ***right to the truth***, which could or should belong to (the family of) victims whose fundamental rights were violated (Chapter X.3). Finally, through different cases, the ECtHR has sometimes asserted certain historical facts, playing a larger political role than planned or expected. About this fourth instrument, one could argue that history is not so much "protected" but on the contrary instrumentalized by the Court (Chapter X.4).

This chapter does not pretend to be exhaustive about the ways in which the ECtHR handles history. The first aim here is to update the existing works of, among others, Flauss (2006, 2012), Kaminski (2010), Puéchavy (2012) and Vivant (2007). These authors already discussed numerous cases and situations in which the ECtHR took a position relating to historical debates and we want to reassess their work with regard to the important recent ECtHR cases. A second aim is to assess the reciprocal influence of historical debates on the Court, and of the Court on the historical debates, and in doing so to evaluate the role of the ECtHR in protecting or guiding history and historical research.

Freedom of Expression to Protect Historical Research and Historical Truth

Article 10 ECHR protects freedom of expression. This protection can be invoked in three different ways for the benefit of history and of historical research. Firstly, and most prominently, the ECtHR has ruled several times that "[I]t is an integral part of freedom of expression to seek historical truth," and it has done so with regard to a wide variety of contemporary historical facts and events, among others: the Resistance movements in France during WWII (case of *Chauvy and others v. France*–29 June 2004, §69); the role played by Switzerland during WWII (case of *Monnat v. Switzerland*–21 September 2006, §57); the role played by Azerbaijani fighters during the Khojaly Massacre in Nagorno-Karabakh in 1992 (case of *Fatullayev v. Azerbaijan*–22 April 2010, §87); the Armenian genocide (case of *Dink v. Turkey*–14 September 2010, §135); or the role of the state security service under the communist regime of Hungary (case of *Ungvary and Irodalom KFT v. Hungary*–3 December 2013, §63).[2] Although most of these cases were introduced by journalists—only the last one was brought to the fore by a professional historian—all these cases involved the investigation of certain past events within (recent) national history. The essential arguments for the Court's protection of historical research were probably most clearly expressed by German judge Nussberger in her partly concurring and partly dissenting opinion in the second case of *Perincek v. Switzerland* (15 October 2015):

> Assessing, evaluating and commenting on historical events are prerequisites for living peacefully together in society, being conscious of what has happened in the past and assuming responsibility where necessary. There is not one historical truth that could remain permanently immutable. On the contrary, new research and new discoveries of documents and evidence may shed new light on what has been deemed to be an uncontested view. Therefore, debate and discussion about history is an essential part of freedom of expression and should in principle never be curtailed in a democratic society, especially not by defining taboos on what events have to be excluded from free assessment in public debate or by establishing certain "official views" that must not be contested.

This particular aspect of the freedom of expression has its roots in democracy and the aim for a peaceful society. Any legal provision preventing a debate on historical truths must be dismissed. This issue was especially at stake in the Swiss case (*Monnat v. Switzerland*). Journalist Daniel Monnat had broadcast a documentary entitled "Switzerland's Lost Honour," about "the attitude of Switzerland and its leaders, emphasising their alleged affinity with the far right and their inclination towards rapprochement with Germany," about their anti-Semitism and about their role in the appropriation of unclaimed Jewish assets (§6). Swiss tribunals judged "that journalism of that nature was subject to particularly stringent rules of diligence, which the programme had not observed. The journalist should have informed viewers that the report was not presenting an indisputable truth but rather one possible interpretation of relations between Switzerland and Germany" (§14). In addition to a judicial blame for the broadcasting company, any purchase of a copy of the disputed program was prohibited. For the ECtHR, this national ruling was not acceptable. The attitude of Switzerland during WWII was undoubtedly an "ongoing debate among historians" (§57) that was profoundly dividing Swiss public opinion, but nevertheless a debate without any alleged damages to personal reputations nor to the State's democratic foundations, and, moreover, it concerned events that took place more than fifty years ago. In this context, tolerance and freedom of expression "[form] part of the efforts that every country must make to debate its own history openly and dispassionately" (§64).

The tolerance for open discussions about history is particularly crucial in cases where researchers have been sued following defamation provisions. The ECtHR's jurisprudence tells us that it's not a good solution to officialize one or the other historical interpretation. This is demonstrated in the *Dink* and *Fatullayev* cases. Turkish journalist Dink's oral and written opinion about the Armenian genocide was considered as a denigration of the *Türklük* (Turkish identity/Turkishness), penalized in Turkish legislation. Russian journalist Fatullayev's opinion about a responsibility of Azerbaijani political and military authorities for the Khojaly Massacre in Nagorno-Karabakh was perceived as an act of defamation. Both journalists were subjected to criminal prosecution and condemned. Extremists assassinated Dink and Fatullayev was put in jail.

Distancing itself from the national emotions both cases created, the ECtHR ruled that a violation of the freedom of expression had occurred. In the second case, after reiterating that "[I]t is not the Court's role to arbitrate the underlying historical issues which are part of a continuing debate between historians that shapes opinion as to the events which took place and their interpretation," the ECtHR continued that, based on "independent sources," "various matters related to the Khojaly events still appear to be open to ongoing debate among historians, and as such should be a matter of general interest in modern Azerbaijani society" (*Fatullayev v. Azerbaijan*, §87). In both cases, the Court ruled that "[I]t is essential in a democratic society that a debate on the causes of acts of particular gravity which may amount to war crimes or crimes against humanity should be able to take place freely" (ibid. and *Dink v. Turkey*, §135). The first obligation the ECtHR imposes thus is the following: the member states have to allow debates on history.

However, the ECtHR has also stipulated several restrictions to the freedom of expression relating to historical facts. The freedom to discuss and investigate history does not imply that one can say whatever one wants, and restrictions are considered acceptable when they are prescribed by law, are "necessary in a democratic society," and pursue a legitimate aim (Article 10, §2 ECHR).[3] The Court even engaged in a deep analysis of its own jurisprudence in the recent *Perincek v. Switzerland* case (15 October 2015). Here, the ECtHR distinguished four reasons to interfere duly with the freedom of historical research or debate:

- An unnecessary breach of privacy (see below; and *Perincek v. Switzerland*, §200–203);
- Calls to violence and "hate speech" (§204–208), although the referenced cases did not rely on instrumentalized historical facts (but see §231 in fine);
- Denial of the Shoah or Holocaust, referring to no less than 17 different cases (§209–212)[4]. This restriction has already been studied by many authors, all of them supporting the protection offered by the ECtHR and by European States' legislation against those kinds of negationist discourses (Lobba 2015; Gliszczyńska-Grabias 2013; Pučhavy 2012; Dubuisson 2007; Bertrams and de Broux 2007). What is at stake, however, are the characteristics of the term "denial" targeted by this restriction, beyond the specific denial of the Holocaust. At the moment, the jurisprudence of the ECtHR on this matter remains unclear because it gave conflicting signs: on the one hand, there are signs in favor of the enlargement of the powers of restriction of the freedom of expression in case of "clearly established historical facts" (reading "a contrario" *Fatullayev v. Azerbaijan*, §81). However, some signs seem to go in a different direction. In *Perincek v. Switzerland*—a severely criticized arrest (Daniele 2016; Garibian 2016)—the Court asserted about the Holocaust that "the justification for making its denial a criminal offence lies not so much in that it is a clearly established historical fact but in that, in view of the historical context in the States concerned ... its denial, even if dressed up as impartial historical research, must invariably be seen as connoting an antidemocratic ideology and anti-Semitism" (§243). The latter statement permits differentiating the denial of the Holocaust with the denial of the Armenian genocide, even if they both are "established historical facts." This therefore led the ECtHR to reject the restriction and to rule that the rights to freedom of expression of a Turkish politician were violated, after this man's conviction for denying the Armenian genocide, however, in a way that lacked any call for violence, hatred or intolerance. If we put this together, a denial violates the Convention when it fulfills three conditions: the denial has (i) to concern "clearly established historical facts," (ii) to denounce democratic ideology, and (iii) to entail a call for violence, hatred or intolerance.
- Finally, a theoretical restriction to the freedom of expression in a context of a presentation of historical facts could depend on: (i) the manner in which the impugned statements were phrased and the way in which they could be construed; (ii) the specific interest or the rights affected by the statements; (iii) the statements' impact and (iv) the lapse of time since the historical events to which the statements relate (§213–220). In most of the cases, however, the ECtHR has rejected the possibility of a restriction on that basis, as in the *Monnat v. Switzerland* case (see also, in the same sense, arrest *Orban and others v. France*, 15 January 2009, about the use of torture during the Algerian war; arrest *Lehideux and Isorni v. France*, 23 September 1998, about the role of Marshal Pétain during WWII). Only in rare cases, for instance, when there is a voluntary and conscious distortion of the truth or when there is a manifest absence of care and moderation regarding the professional duties of the author, the Court argued that a restriction to the freedom of expression was a legitimate sanction (see, for instance, *Radio France and others v. France*, 30 March 2004, about the responsibility of a French official in the Jewish deportation during WWII).

Against this background, a second obligation that the Court imposes on its member states is to prevent the use of history to infringe others' fundamental rights, and, therefore, particularly to ensure the respect for one's reputation and the prohibition of violence or (racial) discrimination, especially when partial or untruthful facts are presented.

Finally, the Court has slowly and very recently evolved to a consecration of a right to access public information, deduced from the right to freedom of expression. The key case in that matter is *Kenedi v. Hungary* (26 May

2009). Hungarian historian Janos Kenedi, specialist in the functioning of the secret services of totalitarian regimes, in particular in Soviet-type states, demanded access to classified documents (considered as state secrets until 2048) for the purposes of his ongoing historical research. The national courts had always rejected the historian's requests. In its judgment the ECtHR considers this as an interference with the freedom of expression and holds that "access to original documentary sources for legitimate historical research was an essential element of the exercise of the applicant's right to freedom of expression" (§43), opening the way for a more universal right of access to state-held information.[5] This consecration has recently been confirmed in the case of *Magyar Helsinki Bizottsag v. Hungary* (8 November 2016, about a human rights survey conducted by an NGO) in which the Court enumerates the threshold criteria to achieve such access, namely (§157–170): (i) the purpose of the information request (ideally a public debate on issues with a general interest); (ii) the nature of the information sought (especially original documentary sources for legitimate historical research, as set out in *Kenedi*); (iii) the role of the applicant (relying on the special position of journalists, NGOs and other watchdogs, civil society or academic researchers among others); and (iv) ready and available information. On these conditions, the ECtHR imposes its third obligation to the states: to give access to information they hold, in particular to any historical archives. This evolution in the Court's case law will certainly lead to new statements relating to this right, especially about the possible restrictions when this is "necessary in a democratic society" (based on Article 10, §2 ECHR). Nearly all international and national rules on the right to access to documents provide exceptions (see, for instance, in Belgium: infringements to fundamental rights, national security, economic interests of the state, secrets imposed by law, privacy; etc.; see de Broux et al. 2014), whose compatibility with the ECHR still has to be examined. Nevertheless, these Strasbourg cases mark a very important step in the evolution of the scope of freedom of expression, and one that should offer stronger support to the needs of historians in their search for historical truth.

Access to Documents, Freedom of Research and Privacy

The respect for one's private life, protected under Article 8 of the ECHR, encompasses a solid potential restriction for access to documents and freedom of research. First, as mentioned above, a state's interference with historical research or debate under Article 10 of the ECHR (freedom of expression) may be justified when there is an unnecessary breach of Article 8 of the ECHR (right to privacy). Second, cases about access to historical documents pertaining to one's personal privacy and about public expression of historical facts affecting this privacy may be based directly on an alleged breach of Article 8 of the ECHR. In both situations, the Court accepts that personal

privacy also includes an individual's reputation, and even the reputation of one's ancestors.

The *first* potential restriction is inherent to finding a balance between freedom of expression and respect for private life. It touches on the question of whether the states' interference with historical research was proportionate in the light of protecting the right to privacy. In the context of such an examination by the ECtHR, several criteria are relevant: (i) contribution to a debate of general interest; (ii) how well known the person concerned [i.e., the person whose privacy is affected] is and what the subject of the publication was; (iii) prior conduct of the person concerned; (iv) method of obtaining the information and its veracity; (v) content, form and consequences of the publication; and (vi) severity of the sanction imposed. The Court summarized these criteria in *Ungváry and Irodalom Kft. v. Hungary* (3 December 2013, §45), a case that established a violation of Article 10 of the ECHR because of an award of damages against a historian and a publisher for their allegations that a public official had collaborated with the state security services during the communist regime. The protection of the official's private life was not capable of justifying the state's interference with the freedom of expression. The Court, when assessing the justification of the impugned statements, considered particularly relevant the distinction between statements of fact and value judgments, by holding that "the requirements to prove the truth of a value judgment is impossible to fulfil and infringes freedom of opinion itself" (§46). However, it continued that "[W]here a statement amounts to a value judgment, there must exist a sufficient factual basis to support it, failing which it will be excessive" (ibid.). Thus, the difference lies "in the degree of factual proof which has to be established" (ibid.).

The case of *Karsai v. Hungary* (1 December 2009, §32 and §35) demonstrates the importance the Court attaches to distinguishing between statements of facts and value judgments, as well as to criteria such as the contribution to debates of public interest and the nature and severity of the sanction. The judgment establishes a violation of the freedom of expression because of a national civil court's finding that an article of utmost public interest, written by a Hungarian historian and university professor, was defamatory. That this article criticized the right-wing press, including a specific author who claimed that his reputation was harmed, did not alter the ECtHR's conclusions. In the decision of *Dzhugashvili v. Russia* (9 December 2014, §32), balancing the right to private life against the right to freedom of expression in respect to an article about the Katyn massacre and the USSR's responsibility, the Court confirmed the importance of "public interest" once again:

> The Court notes that historical events of great importance which affected the destinies of multitudes of people, as well as the historical figures involved therein and responsible for them, inevitably remain open to public historical scrutiny and criticism, as they present a matter of general interest for society.

Although Article 8 of the ECHR offers a potential restriction to the freedom of expression, the Court does not always include it as a counterbalancing factor. In the case of *Magyar Helsinki Bizottsag v. Hungary* (8 November 2016), about a human rights survey conducted by an NGO, the ECtHR held that Article 8 of the ECHR was not applicable in relation to the right to data protection (§196, and concurring opinion of Judges Nussberger and Keller, §3). Here, the Court introduced a threshold for applying Article 8 of the ECHR to data protection based on the following criteria: (i) the foreseeability of the use of the personal data, (ii) the connection of the data with private or professional life, and (iii) the accessibility of the data (concurring opinion of Judges Nussberger and Keller, §4). This case was criticized for offering insufficient data protection (especially in relation to data that are already in the public domain), and for being at odds with the approach of the Court of Justice of the European Union (ibid., §5–9).

The second potential obstacle for access to documents and freedom of research follows from complaints directly based on Article 8 of the ECHR. Indeed, in line with this provision, a state is required to take action to secure respect for private life in relations between individuals (*Putistin v. Ukraine*, 21 November 2013, §34). "Private life" is a broad concept and includes a person's reputation as a part of his or her personal identity (ibid., §32). In the Court's recent case law, even damages to the reputation of a deceased person can affect the private life and identity of that person's surviving family members, however, only in relatively exceptional circumstances (ibid., §33 and the concurring opinion of Judge Lemmens to this case; see also: *Dzhugashvili v. Russia*, 9 December 2014, § 27).

In addition, the application of Article 8 ECHR may establish a hurdle for certain practical measures taken on the basis of historical evidence, and consequently refrain from doing historical research on the same basis. This is illustrated by *Ivanovski v. "the former Yugoslav Republic of Macedonia"* (January 21, 2016), a case about a removal from public office of the president of the constitutional court as a result of a national Lustration Act (of 2008), which made collaboration with the state security services between 1944 and 2008 an impediment to holding public office (about lustration policies: David 2003). The evidence of the Court president's collaboration in 1964 was found in the state archives. However, according to the ECtHR, the lustration measure created an unnecessary interference with the right to privacy, *inter alia* because "[I]t should in some manner be a qualifying condition for the imposition of such a measure that the person being lustrated was not acting under compulsion" (§182). This condition "constitutes an essential factor in the exercise of balancing the interests of national security and the protection of the affected individual's rights" (ibid.) and had been inspired by an instrument other than the ECHR, namely by the Council of Europe "Guidelines to ensure that lustration laws and similar administrative measures comply with the requirements of a state based on the rule of law." In addition to the

aspect of "compulsion," the time aspect was relevant too: "any threat those being lustrated could initially pose to the newly created democracy must have considerably decreased with the passage of time" (§185, and see also: *Sõro v. Estonia*, 3 September 2015, § 62).

Although Article 8 of the ECHR may provide a direct lawful basis for a state's interference with historical research and publications, the ECtHR does not always conclude the complaint with a violation of that provision. For instance, in *Putistin v. Ukraine*, the alleged failure to secure the right to reputation of an applicant whose father was allegedly defamed by a newspaper article as having been a collaborator with the Gestapo, did—given the particular circumstances of the case—not amount to a breach of the right to privacy (§36–41). This was even more evident for "legitimate criticism of public figures who, by taking up leadership roles, expose themselves to outside scrutiny" (about the figure of Stalin, *Dzhugashvili v. Russia*, 9 December 2014, § 30).

The Right to the Truth

The "right to the truth" may encourage historical research and stimulate access to historical information. In practice, it encompasses the obligation of states to establish institutions, mechanisms and procedures to enable the revelation of the truth, for instance, through following up on requests for state-held information, and through archives, truth and fact-finding commissions, courts and the like (Groome 2015, p. 1 and pp. 5–6; de Greiff 2013).

In international law, the right to the truth has been developing over the last 30 years. It moved beyond its initial links to disappeared persons (encompassing the right to know the fate and whereabouts of the victim; see Article 24(2) UN International Convention for the Protection of All Persons from Enforced Disappearance) and now covers a right of individuals to know the truth about gross violations of human rights affecting them (Navi Pillay, UN High Commissioner for Human Rights, 13th Session of the UN Human Rights Council; Groome 2011, 2015). Accordingly, "[A]mnesties or similar measures and restrictions to the right to seek information must never be used to limit, deny or impair the right to the truth" ("Study on the right to the truth," E/CN.4/2006/91, 8 February 2006). In 2009, the UN Human Rights Council adopted a resolution on the right to the truth ("Right to the Truth," A/HRC/12/L.27, 25 September 2009), stressing the importance of victims, families and societies as a whole of knowing the truth regarding gross violations of human rights (ibid., p. 3) and of "preserving historic memory" related to such violations (ibid., p. 4), which states should ensure by "access, to the fullest extent practicable, to information regarding the actions and decision-making processes of their Government" (ibid.). In 2013, the UN General Assembly adopted a resolution on the right to the truth ("Right to the Truth," A/RES/68/165, 18 December 2013) encouraging states to establish national archival policies.

In the context of supranational human rights supervision, the right to truth—as an autonomous and independent right—developed first and foremost under the case law of the Inter-American Court of Human Rights (see Inter-American Commission of Human Rights, OEA.Ser.L/V/II.152, 2014; Ferrer Mac-Gregor Poisot 2016; Groome 2011). The ECtHR, to the contrary, does not explicitly protect a right to the truth. Nevertheless, it protects its underlying principles in a more implicit manner (Groome 2011, p. 177 & 2015, p. 4 and pp. 7–8; Fabbrini 2013) by invoking Article 2 of the ECHR (right to life), Article 3 of the ECHR (prohibition of torture and degrading and inhuman treatment), and Article 38 of the ECHR (covering an obligation to furnish all necessary facilities in order to enable the Court to examine a case). Overall, however, the right to the truth does not flourish to its full potential under the ECtHR's case law, not only due to some procedural impediments but also because of refraining from protecting it more strongly under Article 13 of the ECHR (right to an effective remedy) or Article 8 of the ECHR (right to family life).

First, in respect to Article 2 of the ECHR, the Court has ruled that the procedural aspect of this right "requires that there should be some form of effective official investigation when individuals have been killed as a result of the use of force, either by State officials or private individuals" and, as a consequence, that the authorities "must take the reasonable steps available to them to secure the evidence concerning the incident" (see, e.g., *Branko Tomašić and Others v. Croatia*, 15 January 2009, §62, and *Treskavica v. Croatia*, 12 January 2016, §59–60). The ECtHR even affords itself temporal jurisdiction in relation to the investigation of deaths or disappearances that occurred prior to the entry into force of the ECHR (see *Šilih v. Slovenia*, 9 April 2009, §159–160, in which the Court considered the procedural aspect of Article 2 ECHR as a separate and autonomous duty that continued after the death took place; and see *Varnava and Others v. Turkey*, 18 September 2009, §147, in which the Court held that the procedural obligation under Article 2 ECHR arising from disappearances operates independently of the substantive obligation under that same provision, setting a precedent for temporal jurisdiction in disappearance cases; see also: Heri 2014, pp. 4–6).

However, the Court's temporal jurisdiction is not unconditional: the procedural aspect of Article 2 of the ECHR can be faced with impediments. This was demonstrated by *Janowiec and Others v. Russia* (21 October 2013), a case brought by relatives of the Polish officers and officials who were detained in Soviet prisons after the Red Army's invasion in 1939 of the Republic of Poland and who were, in 1940, killed by the Soviet secret police and buried in mass graves in the Katyń forest (Kozheurov 2013). Although investigations into these murders were started in 1990, the Russian authorities decided in 2004 to discontinue them. The document containing the decision of the Russian authorities to stop the investigations was classified as top-secret and the Russian courts had denied any request to gain access to it. The

ECtHR held that it had no temporal jurisdiction to consider the procedural aspect of Article 2 of the ECHR because there was no "genuine connection" between the deaths (as the triggering event) and the entry into force of the ECHR (§141 and 159–161). For a "genuine connection" to be established, the period between the death and the entry into force needed to be reasonably short and a major part of the investigation had or ought to have been carried out after the Convention's entry date (§148). Therefore, in *Janowiec and Others*, the Court held that a bridge was lacking from the distant past into the recent post-entry-into-force period and that it had no competence to examine the complaint under Article 2 of the ECHR (§160–161). In the absence of this genuine connection, "a Contracting Party cannot be held responsible under the Convention for not investigating even the most serious crimes under international law if they predated the Convention" (§151). This argumentation was criticized by Judges Ziemele, De Gaetano, Lafranque and Keller in their partly dissenting opinion (§33–34), stressing that the Court, by declaring itself incompetent, denied the role of the Convention system in "provid[ing] a Court that would act as a 'conscience' for Europe." A similar criticism appeared in legal doctrine: Heri argued that "the judgment has shown a lack of sensitivity for the special nature of disappearance cases" and missed "the opportunity to process a collective traumatic experience" (Heri 2014, p. 11 *et seq.* and p. 17) and Schabas (2013) said that the case missed a chance "to heal a wound in Europe's legal history" and reflects "amnesia about dark episodes in the continent's history."

Second, some aspects of the right to the truth are protected under Article 3 of the ECHR. The Court accepts that the suffering of family members of a disappeared person might amount to inhuman treatment on account of the particularly callous attitude of the authorities towards their requests for information. Here, Article 3 of the ECHR focuses on the state's dismissive reactions to the efforts of the family to obtain information, and not as much on the actual disappearances or deaths (*Janowiec and Others v. Russia*, §178 and §186–189; Groome 2011, p. 180). For example, in *Cyprus v. Turkey* (10 May 2001), the Court decided that the continued failure of Turkey to account for persons last seen in the custody of the Turkish troops during its military operations in Northern Cyprus in 1974 violated Article 3 of the ECHR in respect to the relatives of the missing persons (§158 and see also: *Varnava and Others v. Turkey*, 18 September 2009, §200–202). In addition, as follows from *El-Masri v. the Former Yugoslav Republic of Macedonia* (12 December 2012), the Court has pronounced a violation of Article 3 of the ECHR in respect to victims of torture and inhuman and degrading treatment when they had been deprived of "being informed of what happened, including of getting an accurate account of the suffering ... allegedly endured and the role of those responsible ..." (§192). In this case, the victim (Mr. El-Masri) had been seized by the Macedonian authorities as a terrorist suspect and handed over to the US Central Intelligence Agency operatives who secretly transferred him to Afghanistan for the purpose of interrogation. After these events, Mr. El-Masri asked the Macedonian prosecutors to open criminal investigations. Because the domestic inquiry was discontinued, the ECtHR noted a lack of effective investigation and a violation of the procedural aspect of Article 3 of the ECHR (§182). Here, albeit cautiously, the Court acknowledged two dimensions of a right to the truth: a right for the *victim* to know the truth and a *societal* dimension including the interest of the public at large to know the truth about serious human rights violations in order to maintain public confidence in the government (see §191–192 and Fabbrini 2013, p. 3 and p. 18).

Third, Article 38 of the ECHR may protect some aspects of the right to the truth. This provision covers an obligation of the member states to furnish all necessary facilities to the Court. In the proceedings of *Janowiec and Others*, Russia, because of the classification of the document as "top-secret," had refused to give the ECtHR a copy of a domestic court decision about the discontinuance of the criminal investigations into the Katyń massacre. Therefore, the Court held that Russia failed to comply with Article 38 of the ECHR. It argued that "even where national security is at stake, the concepts of lawfulness and the rule of law in a democratic society require that measures affecting fundamental human rights must be subject to some form of adversarial proceedings before an independent body competent to review the reasons for the decision and the relevant evidence" (§213). In that light, the national authorities failed to carry out "a balancing exercise between the alleged need to protect the information … and the public interest in a transparent investigation … and the private interest of the victims' relatives in uncovering the circumstances of their death" (§214).

Although the Court, as clarified by the aforementioned cases, recognizes aspects of the right to the truth, thus keeping up with a trend in international (human rights) law to increasingly protect this right, it also misses some opportunities. For instance, the Court could have highlighted more firmly the link between Article 13 of the ECHR (right to an effective remedy) and the right to the truth (see Fabbrini 2013, pp. 19–21). This had been a point of criticism in the case of *El-Masri* in which the concurrent judges, although applauding the decision for placing the right to truth in the context of Article 3 of the ECHR, criticized the Court for failing to offer "[a] more explicit acknowledgment of the right to the truth in the context of Article 13 of the Convention" which "would in a sense cast renewed light on a well-established reality" (concurring opinion of Judges Tulkens, Spielmann, Sicilianos and Keller, §7). Moreover, as far as we know, the Court does not connect a right to the truth to Article 8 of the ECHR in its protection of family life. This contrasts with the approach of the Human Rights Chamber of Bosnia and Herzegovina, arguing that Article 8 of the ECHR offers family members a right to seek information about missing family members (*Unković v. Bosnia and Herzegovina*, Case No. CH/99/2150, 10 May 2002, Decision on Review, §126), and the African Commission on Human and Peoples Rights, holding that the protection of family life includes a right of the family to know what happened to a relative (*Article 19 v. Eritrea*, Communication 275/2003, May 2007) (Groome 2015, p. 9).

The Court Acting as an Historian?

The ECtHR insists on not pronouncing itself as to what the "historical truth" is, but it sometimes accepts some "historical truths" and takes them into account. In the recent case of *İzzettin Doğan and Others v. Turkey* (26 April 2016), for instance, the Court confirmed its previous case law that it "must abstain, as far as possible, from pronouncing on matters of purely historical fact," and added that it may "take account of the "historical context" and "accept certain well-known historical truths and base its reasoning on them" (§175). Some recent examples of the judges asserting that some facts are "historical facts," as such not available for discussion, are found in the cases of *Perinçek v. Switzerland* (15 October 2015), *Janowiec and Others v. Russia* (21 October 2013) and *Epstein and Others v. Belgium* (8 January 2008).

The case of *Perinçek v. Switzerland* established a violation of the right to freedom of expression in the light of a criminal conviction of an academic rejecting the legal characterization as "genocide" of the atrocities committed by the Ottoman Empire against the Armenian people in 1915. Although the Court held that it has "no authority to make legally binding pronouncements" to determine whether "the massacres and mass deportations suffered by the Armenian people … can be characterised as genocide within the meaning of that term under international law" (§101–102), nonetheless, in the further examination of the case, the Court seems implicitly to endorse that genocide against the Armenian people took place (§261–268). In addition, some of the separate judges considered it "self-evident" that "the massacres and deportations suffered by the Armenian people constituted genocide," which is "a clearly established historical fact" that cannot be denied (see dissenting opinion of Judges Spielmann, Casadevall, Berro, De Gaetano, Sicilianos, Silvis and Kuris, §2). They supported this conclusion by the citation of a book chapter of historians Hans-Lukas Kieser and Donald Bloxham in *The Cambridge History of the First World War* (Cambridge University Press, 2015, Vol. I, "Global War", Ch. 22 (Genocide), pp. 585–614). This contradicted the assertions of some (third) parties to the case, including the applicant who held that "historical research on the events of 1915 and the following years was ongoing and that no consensus among scholars existed in relation to them" (§160) and the Turkish Government, that alleged the following: "[t]he applicant had not called into question the reality of the massacres and deportations, simply their legal characterisation, on which there was no international consensus. They were still the subject of a heated debate" (§106).

In the case of *Janowiec and Others v. Russia*, which concerned the criminal investigations into the Katyń massacre, the Court held that "[e]ven though not all of the bodies have been recovered, their death was publicly acknowledged by the Soviet and Russian authorities and has become an established historical fact" (§186) and, as a consequence, the case had to be treated as a "confirmed death" case (§187). For that matter, the Court did not explicitly refer to historical sources. In addition, the separate judges held that "[t]here is no doubt that the Katyń massacre must be qualified as a war crime" (partly dissenting opinion of Judges Ziemele, De Gaetano, Lafranque and Keller, §22). To support that conclusion, the judges cited an article of William Schabas, a professor who specialized in human rights law and international criminal law.

In the case of *Epstein and Others*, the Court did not explicitly speak of an "historical fact" but a closer reading of this case suggests that the ECtHR took for granted some historical observations, *in casu* that Belgium did not carry responsibility in the context of WWII. This case concerned a law passed by the Belgian authorities in 2003 introducing new measures on pensions in favor of Jewish and Roma victims of WWII. Because this law specified that only people who had Belgian nationality on January 1, 2003 and had resided in Belgium during the German occupation were entitled to the benefits, some individuals who could not benefit from the measure (because they had not, or no longer, been Belgian citizens on January 1, 2003), lodged a complaint before the ECtHR alleging an infringement of the national law with the principles of equality and nondiscrimination (Article 14 ECHR). The Court declared the case inadmissible, arguing that if a state decided to make amends for damage for which it bore no responsibility, it had a wide margin of appreciation to determine the forms and beneficiaries of the reparation. The Court accepted, without any further explanation, that Belgium was a state that had decided to award compensation to war victims for damage for which it was not responsible (*Epstein and Others v. Belgium*, 8 January 2008, p. 15, §3).

In the aforementioned cases, the issue we raise is not about whether the circumstances actually constitute historical truths. The concern is that the Court, although larger debates about the historical assessment of the facts may still run, is ready to accept facts as historical facts based solely on a scarce amount of sources or with no reference to historical materials at all. The Court's reasoning would become more persuasive if it would develop some guidelines as to when, why and with what kind of documentation the Court can establish "historical facts." Thereby, a diversification of the sources of documentation is recommendable.

In addition to examples of the Court taking account of facts as "historical facts," there are also occasions on which the Court itself actively unfolds aspects of the "historical truth" on the basis of its own assessment of the case and its underlying circumstances. For instance, in the particular context of Article 7 of the ECHR (*nullum crimen sine lege*, no punishment without law),

the Court must prevent domestic courts from imposing criminal penalties that were unforeseeable and retrospective. Therefore, the Court might have to examine whether, at a certain point in history, certain acts amounted to some specific criminal offences. This can be illustrated by the cases of *Kononov v. Latvia* (17 May 2010) and *Vasiliauskas v. Lithuania* (20 October 2015) (see also Liivoja 2013, Mälksoo 2011 and Zilinskas 2011).

The case of *Kononov v. Latvia* concerned a conviction under national legislation introduced in 1993 for war crimes committed during the Second World War. Because Article 7 of the ECHR on the prohibition of retroactive criminal laws does not affect the punishment of "war crimes," the Court had to address the definition of this notion and, as a part of that exercise, assess whether the affected villagers were "combatants" or "civilians." Because the factual evidence regarding the extent to which the deceased villagers participated in hostilities was disputed between Latvia, the Chamber, the applicant and the Russian authorities (see §193), the Grand Chamber "[h]aving regard to the above-described dispute," said that it will "begin its analysis on the basis of a hypothesis most favourable to the applicant: that the deceased villagers fall into the category of 'civilians who had participated in hostilities' … or that they had the legal status of 'combatants'" (§194; see also §201). In addition, the Court had to assess whether the applicants' conviction for "war crimes" had a sufficiently clear legal basis under international law in 1944. To reflect on the definition of that crime at that point in history, the Court made use mainly of international conventions, field manuals and codes, international case law (of military tribunals) and academic publications (see §199 *et seq.*). Against that background, the ECtHR decided that "at the time when they were committed, the applicant's acts constituted offences defined with sufficient accessibility and foreseeability by the laws and customs of war" (§244).

Several concurring judges to this case criticized this conclusion by pointing at the complexity of the question of foreseeability of the penalty at the time the acts took place. Unlike the majority, they were not persuaded that in 1944 there was a "sufficiently sound and acknowledged legal basis for war crimes to be regarded as having been precisely defined at that time, and for their definition to have been foreseeable," and they argued that "[t]he applicant was prosecuted, tried and convicted more than half a century after the events in question, on the basis of a criminal law alleged to have existed at that time—a state of affairs that is clearly problematic" (concurring opinion of Judges Rozakis, Tulkens, Spielmann and Jebens, §10). Thus, the "historical" conclusion of the separate judges differed from the one of the majority as they held that "at the material time, neither domestic nor international law was sufficiently clear in relation to war crimes" (§ 16).

Vasiliauskas v. Lithuania offers another example of a case giving meaning to a notion at a certain point in history. Here, because of the applicant's conviction in 2004 for alleged genocide of Lithuanian partisans in 1953, the Court made use of several instruments other than the ECHR (including, *inter alia*, the Nuremberg Charter, UN resolutions, international conventions, case law of the International Court of Justice, academic publications, etc.; §170–178) to put the circumstances into their historical perspective and to clarify the understanding of the notion of "genocide," now and historically. It concluded that the interpretation of the domestic courts of the notion of "genocide" (that led to the conviction of the applicant) did not accord with the definition of this crime as it stood at the relevant time (in 1953) and that therefore, the conviction was not foreseeable (§166 and §183).

Conclusions

The aforementioned "historical" affairs offer proof of what we announced in the introduction to this chapter: the ECtHR has an influence on historical research. The Court's case law also shows us what kind of influence. Powerful tools to stimulate historical research are offered by Article 10 of the ECHR on the freedom of expression and by the right to the truth, which is, albeit cautiously, tied to several provisions of the Convention. The Court seems on the other hand to lack the knowledge or the will to put historians in full capacity to investigate the past, particularly to give them access to public information or to enforce inquiries on past infringements of fundamental rights. Article 8 of the ECHR on respect for one's private life operates as a boundary to access to historical documents and the development of historical research. Admittedly, one may argue that the other aspect of Article 8 of the ECHR, that protects the family life, may stimulate the recognition of a right to the historical truth but, thus far, the Court did not use it in that context. Finally, although the ECtHR insists on not pronouncing itself on what the historical truth is, the Court "writes" history by acknowledging certain facts as historical facts, by historically interpreting certain events and by assessing the meaning of notions at a certain time in history. In doing it, the Court stays extremely weak in its reasoning and its references, and should develop guidelines or collaborations to escape further criticism.

By using all these tools, the Court has not only created a legal framework for historical research, but it has also interfered with it by contributing to historical observations. Doing so, the ECtHR offers no exception to other public authorities acting as powerful actors in "watching history."

Notes

1. Dorothea Staes' research has been funded by the Interuniversity Attraction Poles Programme initiated by the Belgian Science Policy Office, more specifically the IAP "The Global Challenge of Human Rights Integration: Towards a Users' Perspective" (www.hrintegration.be).
2. Each arrest and decision of the ECtHR is referenced hereinafter by its name and, for the first reference, also by its date. They can all be consulted on the Court's online database: http://hudoc.echr.coe.int.

3. Article 10 §2 ECHR: "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 for disorder or crime, for the protection of health or morals, for the protection of the reputation of the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."
4. "In some of those cases the Commission relied on Article 17 as an aid in the interpretation of Article 10 §2 of the ECHR, and used it to reinforce its conclusion on the necessity of the interference"; sometimes Article 17 was even used alone, the denial of the Holocaust being considered as incompatible with democracy and human rights. But this use of Article 17 has been criticized by Cannie and Voorhoof (2011, reiterated in Voorhoof 2016), accurately arguing that such an application overestimates effects of genocide denial on democracy and could by itself harm the values of the ECHR.
5. It can be noted that, before this extension of the Court's jurisprudence, others ways had been used to claim access to historical documents, in particular relying on Article 8 ECHR (see below) or on Article 38 ECHR (concerning obligation for the State to cooperate with the ECtHR; see, for instance, arrest *Janowiec and Others vs. Russia*, 21 October 2013, §209, a case also commented below).

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