

**THE “ANTI-DEFERENCE” DEVICE:
ARTICLE 18 OF THE EUROPEAN CONVENTION ON
HUMAN RIGHTS***

JEFFREY KAHN**

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Frequently an issue of this sort will come before the Court clad, so to speak, in sheep's clothing: the potential of the asserted principle to effect important change in the equilibrium of power is not immediately evident, and must be discerned by a careful and perceptive analysis. But this wolf comes as a wolf.

—Antonin Scalia¹

* As this article was in the final stage of pre-publication review, Russia launched a war of aggression against Ukraine. This clear violation of public international law, serious breach of Article 3 of the Statute of Europe, and the horror it unleashed on millions of Ukrainians, led the Committee of Ministers to decide “in the context of the procedure launched under Article 8 of the Statute of the Council of Europe, that the Russian Federation ceases to be a member of the Council of Europe as from 16 March 2022.” See Resolution CM/Res (2022)2 on the cessation of the membership of the Russian Federation to the Council of Europe (Mar. 16, 2022). That same day, the European Court of Human Rights decided to suspend the examination of all Russian cases pending before the Court. See Communiqué de presse, *La Cour européenne des droits de l’Homme décide de suspendre l’examen de toutes les requêtes contre la Fédération de Russie*, CEDH 092 (2022) 16.03.2022. As a matter of law, Russia’s departure should not prevent eventual adjudication of these cases (numbering over 17,000, see EUR. CT. OF HUM. RTS., ANNUAL REPORT 2021 180 (2022)), although meaningful prospects for enforcement of such judgments in Russia now appear very dim. Nevertheless, it is the opinion of the author and the editorial board that the argument and legal history presented in this article, and the particular experience of Russia presented in Part V, remains an important contribution about the mechanisms of an international human rights organization that is more important than ever.

** University Distinguished Professor of Law, SMU Dedman School of Law. For their comments and criticisms, I thank the conveners and participants at the XIII Annual Development of Russian Law Conference, University of Helsinki, and at the Concepts and Methods Workshop: When International Courts and Tribunals Defer to States, organized by PluriCourts at the University of Oslo (both via Zoom). All errors are my own.

1. Morrison v. Olson, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting). Cf. Matthew, 7:15 (NIV) (“They come to you in sheep’s clothing, but inwardly they are ferocious wolves.”).

The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.

—Article 18²

I. INTRODUCTION

This article makes two principal arguments. First, the limitation on restricting rights that is established by Article 18 of the European Convention on Human Rights is the mirror image of the margin of appreciation doctrine created by the European Court of Human Rights. As such, exploring the metes and bounds of Article 18 aids our understanding of that judicially created doctrine. Parts II and III explore this connection and the origins of this limitation on Member States.

The second argument is a practical application of the first one. Russian accession to the Convention and membership in the Council of Europe provides a case study on the importance of Article 18 and the need to overcome a natural reluctance to find that a state has violated it. The deference accorded by the margin of appreciation is the by-product of an assumption of good faith accorded to Member States. When that assumption no longer holds, the Strasbourg Court may be presented not with a case of deserved deference, but of defiance. Article 18 provides the Court with the tool that the drafters of the Convention thought essential to preserve this extraordinary system for protecting human rights.

Some of the Court's critics complain about miserly applications of the margin of appreciation. They assert that a failure to give Member States the respect they are due as sovereigns undermines the Convention. But reluctance to call out restrictions on rights made in bad faith is just as dangerous to the system as underappreciation of legitimate differences in the good faith application of Convention requirements. A failure to sanction Member States that restrict rights in bad faith threatens the Convention not by a deficit of respect but by an unwarranted surfeit of it.

II. THE PRESUMPTION OF GOOD FAITH AND THE MARGIN OF APPRECIATION DOCTRINE

The European Court of Human Rights grants Member States some discretion in the implementation of the European Convention

2. Article 18, Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Europ.T.S. No. 5; 213 U.N.T.S. 221.

on Human Rights. The Court's "margin of appreciation" doctrine is often cited as a leading example of this deference. Along with the principle of subsidiarity, it was explicitly added to the preamble of the European Convention upon the entry into force of Protocol 15 on August 1, 2021.³

That judicially created doctrine applies a bedrock assumption on which the Convention is built: States are presumed to act in good faith. As the Court itself has noted when examining a complaint alleging violation of Article 18, "the whole structure of the Convention rests on the general assumption that public authorities in the member States act in good faith."⁴ That assumption is also a foundation of public international law. As the International Court of Justice observed:

One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential. Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration.⁵

Members of the United Nations are required to "fulfill in good faith the obligations assumed by them" in the organization's charter.⁶ The Vienna Convention on the Law of Treaties begins by noting that the principle of good faith is "universally recognized" in international law.⁷ Article 26 states categorically: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."⁸ What is more, the general rule of interpretation starts with the premise that treaties shall be interpreted in good faith.⁹

The alternative, a presumption that states act in bad faith, would be quicksand for international agreements and organizations. Signature and ratification of agreements would be meaningless exercises. A world in which the starting assumption is distrust of

3. Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms, Aug. 1, 2021, Europ.T.S. No. 213.

4. *Merabishvili v. Georgia*, No. 72508/13, June 14, 2016, at ¶ 100.

5. *Nuclear Tests (Australia v. France)*, Judgment, I.C.J. REPORTS 1974, p. 253, 268 at ¶ 46.

6. U.N. Charter art. 2, ¶ 2.

7. Vienna Convention on the Law of Treaties preamble, opened for signature May 23, 1969, 1155 U.N.T.S. 331.

8. *Id.* at art. 26.

9. *Id.* at art. 31, ¶ 1. The term "good faith" also appears at Article 46(2) and Article 69(2)(b), regarding the grounds for, and consequences of, the invalidity of treaties.

legally binding promises cannot rise above the chaos of an eternal present in order to build a future in which predictive judgments can be made.¹⁰ Few would wish to live in a world in which, as Jacques Chirac said (in jest): “My promises only bind those who believe them.”¹¹ Indeed, in the world of international relations, “states resent as a slur on their honor the slightest doubt about their good faith.”¹²

Closer to the subject of this article, the Statute of the Council of Europe requires its members to “collaborate *sincerely* and effectively” in pursuit of the organization’s human rights aims.¹³ There is, thus, a connection between this presumption of good faith and the Court’s doctrine of a margin of appreciation. “The doctrine of the margin of appreciation has always been meant as a tool to define relations between the domestic authorities and the Court.”¹⁴ As Luzius Wildhaber observed when President of the Court, the “essence” of the margin of appreciation doctrine is that Strasbourg should recognize “limits on its own power of assessment or appreciation either on practical grounds (for example the remoteness, physical or otherwise, of the material events) or on what one might call deferential grounds (that is the deference owed to the policy decisions of democratic national institutions).”¹⁵

Wildhaber was quick to point out the limits of this deference. The Court should not substitute its own view “unless the conclusions that have actually been drawn are plainly unreasonable or arbitrary, or unless the measures in question are in conflict with the normal exercise of democratic rights.”¹⁶ The Court always retains its supervisory jurisdiction. And it is worth noting that this deference has nothing to do with how such conclusions are cloaked, or what reasons are offered for them. The Court finds no margin of

10. To be sure, good faith is not naïveté. Even nuclear superpowers recognized that the process of drawing down their armaments could only proceed under the belief that such respect is possible. Hence Ronald Reagan’s frequent invocation of a Russian proverb during negotiations with his counterpart Mikhail Gorbachev: Доверяй, но проверяй (Trust, but verify). See Signing of the Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Elimination of Their Intermediate-Range and Shorter-Range Missiles (INF Treaty), Dec. 8, 1987, Washington D.C., <https://www.youtube.com/watch?v=DXWbqOqtv-0>.

11. Paul Taylor, *Jacques Chirac, France’s Lovable Failure*, POLITICO, Sept. 27, 2019.

12. Michel Virally, *Review Essay: Good Faith in Public International Law*, 77 AMER. J. INT’L L. 130, 131 (Jan. 1983).

13. Statute of the Council of Europe art. 3, opened for signature May 5, 1949, CETS No. 1 (emphasis added).

14. A & Others v. United Kingdom, No. 3455/05, Feb. 19, 2009, at ¶ 184.

15. Luzius Wildhaber, Address on the “Journée de Réflexion” on Reform of the Convention System,” Strasbourg, June 8, 2000, reprinted in LUZIUS WILDHABER, THE EUROPEAN COURT OF HUMAN RIGHTS, 1998–2006: HISTORY, ACHIEVEMENTS, REFORM 108–09 (Engel, 2006).

16. *Id.*

appreciation upon a conclusion that what has “actually” occurred differs from a pretextual conclusion. That is because, as Wildhaber stated elsewhere, “This area of discretion is a necessary element inherent in the nature of international jurisdiction *when applied to democratic States that respect the rule of law.*”¹⁷ Further, “just as democracy furnishes the *raison d’être* and the justification for the margin of appreciation, it also establishes its limits. In other words, as we approach the core operation of democracy . . . so the margin of appreciation contracts almost to vanishing point.”¹⁸

Protocol 15 adds a reference to both that doctrine and the principle of subsidiarity to the Convention’s preamble.¹⁹ The connection between the margin of appreciation doctrine and Article 18 remains clear there as well. As reflected in the Explanatory Report to the protocol, these concepts recognize that the Member States are “in principle better placed” than Strasbourg to determine how the Convention applies and should be implemented in their own unique and local circumstances.²⁰ The margin of appreciation “goes hand in hand with supervision under the Convention system. In this respect, the role of the Court is to review whether decisions taken by national authorities are compatible with the Convention, having due regard to the State’s margin of appreciation.”²¹

When such a review reveals bad faith in the restriction of rights protected by the Convention, Article 18 is triggered. That this tool was intended to be used against authoritarian revanchism with more vigor than the Court has undertaken to use it is the argument of the next two sections, respectively.

III. THE TRAVAUX PRÉPARATOIRES: GUARDING AGAINST “REASONS OF STATE”

This section recounts the drafting of, and debates over, what became Article 18. The history is short but packed with evidence of

17. Luzius Wildhaber, A Constitutional Future for the European Court of Human Rights, 23 HUMAN RIGHTS L. J. 161, 162 (2002) (emphasis added).

18. Luzius Wildhaber, Address to the Danish Section of the International Commission of Jurists and Danish PEN, Louisiana Museum, Humlebæk, Mar. 18, 2006, reprinted in WILDHABER, *supra* note 15, at 231.

19. Art. 1, Protocol No. 15 amending the Convention on the Protection of Human Rights and Fundamental Freedoms, Strasbourg, June 24, 2013 (inserting at the end of the preamble: “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.”).

20. Explanatory Report, Protocol No. 15, amending the Convention for the Protection of Human Rights and Fundamental Freedoms, ¶ 9, https://www.echr.coe.int/Documents/Protocol_15_explanatory_report_ENG.pdf.

21. *Id.*

the link between what became the doctrine of a margin of appreciation and the prohibition on pretextual restriction of rights established in Article 18. It also provides evidence that Article 18 was intended to prevent backsliding by states into dangerously authoritarian practices violating rights for “reasons of state.”

Pierre-Henri Teitgen was chairman of the International Juridical Section of the (unofficial) European Movement that drafted a first version of the Convention. (He would soon become the rapporteur to the Committee on Legal and Administrative Questions that helped prepare what became its final text.)²² In the general debate on that *avant-projet*, held August 19, 1949 at the first session of the newly created Consultative Assembly (the original name of the Parliamentary Assembly), Teitgen observed that the first threat to freedom “is the eternal reason of State.” He explained:

Behind the State, whatever its form, were it even democratic, there ever lurks as a permanent temptation, this reason of State.

Montesquieu said: Whoever has power, is tempted to abuse it. Even parliamentary majorities are in fact sometimes tempted to abuse their power. Even in our democratic countries we must be on guard against this temptation of succumbing to reasons of State.²³

In his peroration, Teitgen described a gate at Buchenwald inscribed “Just or unjust, the Fatherland,” before summoning his ultimate point:

I think that from our first Session we can unanimously proclaim that in Europe there will henceforth only be *just* fatherlands. I think we can now unanimously confront ‘reasons of State’ with the only sovereignty worth dying for, worthy in all circumstances of being defended, respected and safeguarded—the sovereignty of justice and of law.²⁴

Most of those following after Teitgen echoed his sentiments. The Italian politician Mario Cingolani, with the European Movement’s draft Convention in hand, observed “that it is easy for one who has experienced the horrors of a dictatorship, wallowing in blood and filth, to appreciate the importance of such a plan,” before listing the

22. FIRST SITTING OF THE COMMITTEE ON LEGAL AND ADMINISTRATIVE QUESTIONS, COLLECTED EDITION OF THE “TRAVAUX PRÉPARATOIRES” OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS / COUNCIL OF EUROPE = RECUEIL DES TRAVAUX PRÉPARATOIRES DE LA CONVENTION EUROPÉENNE DES DROITS DE L’HOMME / CONSEIL LE L’EUROPE Vol. I, p. 154 (Martinus Nijhoff 1975) [hereinafter, *Travaux préparatoires*, Vol. ____, p. ____].

23. Remarks of M. Teitgen, Aug. 19, 1949. *Travaux préparatoires*, Vol. I, p. 40.

24. *Id.* at 50.

many “unbelievable encroachments on our rights” of which such regimes were capable.²⁵ He was followed by Bjorn Kraft of Denmark, who put the point, and the danger, in terms that looked backward in time as well as forward:

We should not forget also that in States where the fundamental rights of freedom were thought to be secured to man, those rights were first undermined and then brutally trampled down. Therefore, the rights of man in Western Europe must be not just an empty confession, but a real guardian for the individual human being against a decline which might very well set in without this protection, even though the external form of democracy is preserved.²⁶

Karl Wistrand, of Sweden, warned against future threats of a quietly creeping totalitarianism, akin to the arbitrary measures of Nazism, that merited a well-functioning human rights court: “I feel that such a plan would for a long time restrict any attempts [sic] to create, in a freely governed State, a situation which might lead towards a totalitarian régime, it may be by processes whose danger had not at first been realised by public opinion.”²⁷ The words of former Nuremburg prosecutor Sir David Maxwell-Fyfe carried weight as he argued for “a system of collective security against tyranny and oppression. It is not enough to possess freedom: positive action must be taken to defend it.”²⁸

These remarks, and others like them in these early debates, draw our attention to the principle behind what became Article 18 of the Convention: the need for state signatories to guard, and be guarded against, themselves. Put more succinctly and more recently by the late Brian Simpson, the fundamental problem is that human rights treaties, if they are any good, “are trouble to governments. Their very reason for existence is the belief that governments are the major delinquents.”²⁹

Maxwell-Fyfe (one of the rapporteurs key to the drafting of the first version of the Convention and widely regarded as the primary author, and later chair of the Committee on Legal and Administrative Questions that took up the draft Convention in the

25. Remarks of M. Cingolani, Aug. 19, 1949, *Travaux préparatoires*, Vol. I, p. 62.

26. Remarks of M. Kraft, Aug. 19, 1949, *Travaux préparatoires*, Vol. I, p. 66.

27. Remarks of M. Wistrand, Aug. 19, 1949, *Travaux préparatoires*, Vol. I, p. 84.

28. Remarks of Sir David Maxwell-Fyfe, Aug. 19, 1949, *Travaux préparatoires*, Vol. I, p. 120.

29. A. W. BRIAN SIMPSON, *HUMAN RIGHTS AND THE END OF EMPIRE* 12 (OUP, 2001). See also Andrew Moravcsik, *The Origins of Human Rights Regimes*, 54 *INT'L ORG.* 217 (Spring 2000) (“Unlike international institutions governing trade, monetary, environmental, or security policy, international human rights institutions are not designed primarily to regulate policy externalities arising from societal interactions across borders, but to hold governments accountable for purely internal activities.”).

Consultative Assembly) explained: "We do not desire by sentimentality in drafting to give evilly disposed persons the opportunity to create a totalitarian Government which will destroy human rights altogether".³⁰ This, he further explained, was hardly a theoretical concern. Noting the shadow of the coup d'état accomplished the prior year in Czechoslovakia, Maxwell-Fyfe recalled "the retrogressive steps by which a democratic constitution may be overthrown: by this Convention we give a warning, a challenge and a first counter-stroke to the intending tyrant."³¹ At the annual dinner of the Grotius Society, he arrogated for himself the words of Brutus in Shakespeare's *Julius Caesar* to comment on the draft Convention "which I recently piloted through the European Assembly," Sir David observed:

Anyone who has had to study the onset of totalitarianism would agree that there is a tide in the affairs of States which taken at the flood sweeps on its people and leaves them high and dry on the rocks of tyranny. Nevertheless, there is always a moment when the guiding lights of democracy and reason, though burning low, are not extinguished. The problem is how these lights can be tended in time. We believe that an impartial and objective examination by an international body of the alleged infringements of a generally accepted code of individual freedom would illuminate the dangers for all good democrats to see. We believe, further, that when the true implications of the situation are seen, a stand against the encroachments of tyranny would be made.³²

The ur-text for Article 18, in which awareness of the need to guard against Teitgen's first threat to freedom, can be found in the July 1949 draft Convention presented by the European Movement. Its Article 3 provided:

The rights specified in Articles 1 and 2 shall be subject only to such limitations as are in conformity with the general principles of law recognized by civilized nations and as are prescribed by law for:

a) Protecting the legal rights of others;

30. Remarks of M. Maxwell-Fyfe, Aug. 19, 1949, *Travaux préparatoires*, Vol. I, p. 118.

31. *Id.* at 120.

32. Hartley Shawcross et al., *Grotius Dinner*, in 36 *TRANSACTIONS OF THE GROTIUS SOCIETY* 56 (1950).

b) Meeting the just requirements of morality, public order (including the safety of the community), and the general welfare.³³

A month later, the Committee on Legal and Administrative Questions built on this draft provision. On Teitgen's motion, the Committee unanimously approved language that became the basis for Article 6 of the resolution presented in his report to the Consultative Assembly on September 5:

In the exercise of these rights, and in the enjoyment of the freedoms guaranteed by the Convention, no limitations shall be imposed except those established by the law, with the sole object of ensuring the recognition and respect for the rights and freedoms of others, or with the purpose of satisfying the just requirements of public morality, order and security in a democratic society.³⁴

An information document compiled by the Court's Registry concluded that this "constitutes all that can be regarded as a precursor of the present Article 18."³⁵

Even at this early stage, one can see a connection between what would become a judicially created doctrine of a margin of appreciation and the beginnings of Article 18. Subject to three conditions, the resolution provided that every Member State "shall be entitled to establish the rules by which the guaranteed rights and freedoms shall be organised and protected within its territory."³⁶ Those conditions were a prohibition on various forms of discrimination, adherence to "the general principles of law as recognized by civilised nations," and the restriction found in this incipient Article 18.³⁷ In other words, the entitlement to deference that a state deserved in protecting these human rights was contingent on its continued good faith in doing so within these express parameters.

Here we see the return of Teitgen's categorical rejection of pretextual "reasons of state" as a basis to restrict these rights. It is, again, twinned with an appreciation of what might be called the

33. Draft European Convention on Human Rights, Travaux préparatoires, Vol. I, Appendix, p. 298.

34. Compare Minutes of the Sitting of the Committee for Legal and Administrative Affairs, Aug. 30, 1949, Travaux préparatoires, Vol. I, p. 178-80 with Article 6, Resolution of the Committee on Legal and Administrative Affairs, in Report presented by M. Pierre-Henri Teitgen, Doc. 77, Sept. 5, 1949, Travaux préparatoires, Vol. I, p. 230.

35. Information document prepared by the Registry, Preparatory Work on Article 18 of the European Convention on Human Rights, CDH (75) 11 (Mar. 10, 1975), p. 2, n.6.

36. Article 4, Resolution of the Committee on Legal and Administrative Affairs, in Report presented by M. Pierre-Henri Teitgen, Doc. 77, Sept. 5, 1949, Travaux préparatoires, Vol. I, p. 230.

37. *Id.* Art. 5-7.

seed of a margin of appreciation doctrine. Recognizing “the principle of international law according to which each State reserves the right to organise the exercise within its territories of the guaranteed freedoms,” the Committee expressed its view that “any restriction on a guaranteed freedom for motives based, not on the common good or general interest, but on reasons of State (Article 6)” be prohibited.³⁸

In presenting his report to the Consultative Assembly on September 7, 1949, Teitgen maintained this connection between respect for what we would today call subsidiarity or a margin of appreciation and the need to be wary of pretextual restrictions on rights:

Thus, an international Convention shall establish and give a general definition of a list of guaranteed freedoms. Each country shall, through its own legislation, determine the conditions in which these guaranteed liberties shall be exercised within its territory, and, in defining the practical conditions for the operation of these guaranteed liberties, each country shall have a very wide freedom of action.

But—and this is the essential point—the international collective guarantee will have, as its purpose, to ensure that no State shall in fact aim at suppressing the guaranteed freedoms by means of minor measures which, while made with the pretext of organising the exercise of these freedoms on its territory, or of safeguarding the letter of the law, have the opposite effect. That is the reason for Articles 5, 6, and 7 of the draft Resolution submitted to you.³⁹

Teitgen said Article 6 was “of capital importance” in this trio, “a fundamental principle.” A state fulfilled its duty when it limits rights in pursuit of the common good; this was not only permissible and legitimate, he said, but necessary. The danger arose, Teitgen warned, when the state legislated in bad faith:

But when it intervenes to suppress, to restrain and to limit these freedoms for, this time, reasons of state; to protect itself according to the political tendency which it represents, against an opposition which it considers dangerous; to destroy fundamental freedoms which it ought to make itself responsible for co-ordinating and guaranteeing, then it is

38. Report presented by M. Pierre-Henri Teitgen, Doc. A 290, Sept. 5, 1949, at ¶ 14, *Travaux préparatoires*, Vol. I, p. 222.

39. Debate on Report No. 77, Remarks of M. Pierre-Henri Teitgen, Rapporteur of the Committee on Legal and Administrative Questions, Sept. 7, 1949, *Travaux préparatoires*, Vol. I, p. 276.

against public interest if it intervenes. Then the laws which it passes are contrary to the principle of the international guarantee.⁴⁰

Teitgen's remarks, from beginning to end, are speckled by his concern for "reasons of State." This was clearly a concern recalling past experience. But his eyes were also on the future. As the Iron Curtain divided Europe, he nevertheless imagined a future Council of Europe expanded beyond that artificial border:

This international European guarantee will give us also a protection against a possible return of those aggressions, made for reasons of State. . . . Other countries will come to join us; the doors are wide open and we are ready to receive them.

If some of us sometimes raise certain questions, it is not indeed from hate nor reproach of the unhappy peoples of those countries, but from anxiety. We ask ourselves if they are sufficiently sure of themselves, sufficiently armed so that, if one day misfortune should once more overwhelm us, they will be able to resist.⁴¹

Teitgen perhaps imagined a future for then Czechoslovakia, overcome by Communist coup the year before. Or countries further east. It is unlikely that he could have extended his imagination to include the then Soviet Union. But he recognized the problem: legislation in bad faith, disguising "reasons of State." Or, to put the same issue the opposite way, Teitgen posited that States had no reason to fear the jurisdiction over them of a Commission or a Court: "what danger will they be running in accepting this, if they are really resolved to keep to this undertaking in good faith?"⁴²

By spring 1950, a committee of experts meeting in Strasbourg was hard at work drafting a Convention, in compliance with a recommendation by the Assembly and a decision by the Committee of Ministers. Its work retained the essential concept that Teitgen and others advanced in the preceding debates, though in forms that sometimes changed the breadth of limitations legitimately established by law the way an accordion player changes the size of the instrument's bellows.⁴³ Charting the course of those expansions

40. *Id.* at 278.

41. *Id.* at 292.

42. Remarks of M. Pierre-Henri Teitgen, Sept. 8, 1949, *Travaux préparatoires*, Vol. II, p. 178.

43. For example, Article 6 of the preliminary draft convention (Doc. A 833) completed 15 Feb. 1950 states: "In the exercise of these rights and in the enjoyment of the freedoms secured by the Convention, no limitation shall be imposed except those established by the law,

and contractions is of limited utility to the argument of this paper. By June 1950, a conference of senior officials had produced a draft that shifted some of these particular justifications for restriction to certain rights while also incorporating a general clause, Article 13(2) that approaches the more general sentiment we recognize today: "The restrictions to the said [later "these"] rights and freedoms shall not be applied for any purpose other than those for which they have been adopted [later "prescribed"]."⁴⁴ By August 4, 1950, both the numeration and text acquired the form they have today.⁴⁵

The draft convention was returned to the Consultative Assembly for debate. The end result is well known. But it is worth concluding with one last reference to Teitgen's linkage between the protection of fundamental rights and the nature of the political regime, argued before the Assembly in mid-August 1950, two months before the final draft of the Convention was opened for signature:

The State, in a democracy, may limit an individual freedom in the interests of the freedom of all, in order to allow the collective exercise of all the freedoms, in the general interest of a superior freedom or right, in the public interest of the nation. The restriction which it imposes is a legitimate one precisely by reason of the fact that this is the goal which is aimed at: it sets a limit upon freedom in the general interest, in the interest of the freedom of all.

In a totalitarian regime, reasons of State are supposed to justify any State intervention. The State arrogates to itself the right to limit individual freedom, not in the sole name of a higher freedom, not in order to permit the exercise of the freedom of all, but simply to defend its own dictatorship, its totalitarian grip. Reasons of State alone are considered sufficient justification for its interference.

. . . .

Individual freedom, in our democratic countries, is protected by our democratic institutions. Consequently, the safeguards required, too, are inseparable from these institutions.⁴⁶

If a state were to pretend to legitimate reasons that were not in fact the true basis for a restriction of rights, this was a sign of

with the sole object of ensuring the recognition and respect for the rights and freedoms of others, or with the purpose of satisfying the just requirements of public morality and order and national security and integrity (and solidarity) as well as the functioning of administration and justice in a democratic society." *Travaux préparatoires*, Vol. III, p. 238.

44. *Travaux préparatoires*, Vol. IV, p.190; *id.* at 226.

45. *Travaux préparatoires*, Vol. V, p. 84.

46. *Travaux préparatoires*, Vol. V, p. 290–92.

democratic slippage. Perhaps some dangers to the protection of human rights came as wolves in sheep's clothing. For Teitgen, a pretextual claim to protect rights that really only furthered the interests of a non-democratic regime was a wolf that came as a wolf.

IV. THE DIFFICULT TASK OF OVERCOMING THE PRESUMPTION OF GOOD FAITH

Former President Raimondi opened the Court in January 2019 noting “one of the indicators of the decline in the rule of law is undoubtedly the application of Article 18” and that its violation is on the rise: “[it] has been breached only twelve times, but five times during the year 2018 alone.”⁴⁷

There is a loss of historical memory in President Raimondi's remarks. Its theme is contrary to the stark evidence in the Travaux that the drafters of the Convention feared that their work could be undone by the intrinsic tendency of governments of all types—including consolidated democracies—to accumulate and abuse their powers.⁴⁸ Instead, President Raimondi lamented “Men and women of my generation had, for a long time, taken the view that once democracy was established it could not be undone. We were sure that democracy was here to stay.”⁴⁹ If his generation indeed harbored such ahistorical and unempirical beliefs, these were certainly not shared by the generation that preceded his own. All of the evidence of at-risk democracies that he cited were forewarned by the post-War generation that drafted the Convention:

There is a risk of democracy being dismantled: first by undermining the rights of the opposition and the independence of the justice system, then by suppressing the media, and even by imprisoning opponents. Political leaders whose intention it is to dispense with the checks and balances, will seek to weaken, or even to eliminate, those institutional actors which nevertheless remain essential to

47. Solemn hearing for the opening of the judicial year of the European Court of Human Rights Opening speech by President Guido Raimondi Strasbourg, Jan. 25, 2019, at 5–6, available at: https://www.echr.coe.int/Documents/Speech_20190125_Raimondi_JY_ENG.pdf.

48. Even before discussion of the European Movement/Maxwell-Fyfe drafts and Teitgen Report, this sentiment was clear. *See, e.g.*, Remarks of Lord (Walter) Layton, Aug. 16, 1949 (“Purely paper declarations, however, are rightly discredited. Our statement will have force only if it is converted into action and the most immediate and practical way of doing this is by the adoption of a Charter of Human Rights, coupled with a definite method of enforcement. . . . I only impress its importance . . . as a means of strengthening the resistance in all our countries against insidious attempts to undermine our democratic way of life from within or without, and thus to give to Western Europe as a whole greater political stability; . . .”). Travaux préparatoires, Vol. I, p. 30.

49. Speech by President Guido Raimondi Strasbourg, Jan. 25, 2019, *supra* note 47, at page 5.

the democratic process. They see the justice system, the press, the opposition as “enemies of the people.”⁵⁰

If President Raimondi’s view represents the view of the Court, it is no surprise that the test for applying Article 18 is an exceedingly difficult one to pass. The Court describes this as “a very exacting standard of proof.”⁵¹ What this means in practice can be discerned from the small number of cases in which the Court has found Article 18 to be violated.

In terms of the scope of its applicability, the Court has limited the reach of Article 18 only to those Convention rights explicitly or impliedly permitting some restriction. Complaints seeking to apply Article 18 beyond those rights have been declared incompatible with the Convention *ratione materiae*. There has been some pushback within the Court on this restrictive interpretation. But so far, the Court has only found a violation of Article 18 in conjunction with Article 5.⁵² This article does not focus on the limitations the Court has perceived in applying Article 18, though that is certainly a related issue.⁵³

This article *does* take issue with the extreme reluctance to evaluate a case under Article 18 and the cramped notion of what counts as evidence of an Article 18 violation even in those circumstances when the Court is willing to consider a complaint on its merits. The Court will only consider whether a complaint raises an issue under Article 18 when the allegation that ulterior motives are being disguised by pretextual claims “appears to be a fundamental aspect of the case.”⁵⁴ If there exist claims of a plurality of purposes behind a restriction, some legitimate and some not, the Court will seek alternatives to calling the state out, asking “whether the prescribed purpose invariably expunges the ulterior one, whether the mere presence of an ulterior purpose contravenes Article 18, or whether there is some intermediary answer.”⁵⁵

The Court has shifted its approach over time with regard to acceptable evidence and burdens of proof. Initially, even if a *prima facie* case were to be made by the applicant that the State had pretextually restricted rights to cover its true, improper purpose,

50. *Id.*

51. *Merabishvili v. Georgia*, *supra* note 4, at ¶ 101.

52. Directorate of the Jurisconsult, Guide on Article 18 of the European Convention on Human Rights (Aug. 31, 2020), at 8.

53. An argument that the Court should interpret Article 18 purposively, not restrictively, and apply it broadly to cover all Convention rights and freedoms is found in Part II of the Third Party Intervention of the European Human Rights Advocacy Centre (EHRAC) and Professor Jeffrey Kahn in *Navalnyy and Ofitserov v. Russia* (Application No. 78193/17), pending now before the Court.

54. *Merabishvili v. Georgia*, No. 72508/13, Nov. 28, 2017 [Grand Chamber], at ¶ 291.

55. *Id.* at ¶ 292.

there was no “burden-shifting” to the State to prove otherwise. The burden of proof *always* remained with the applicant.⁵⁶ Thus, for example, the Court accepted in *Khodorkovskiy and Lebedev v. Russia* that “the circumstances surrounding the applicants’ criminal case may be interpreted as supporting the applicants’ claim of improper motives.”⁵⁷ And the Court expressed sympathy for the fact that not every case would have “direct proof of improper motives.” Nevertheless, the Court rejected outright, without any suggestion that Russia shoulder any heightened pleading burden, a case built on “contextual evidence” because “even where the appearances speak in favour of the applicant’s claim of improper motives, the burden of proof must remain with him or her.”⁵⁸

According to the Jurisconsult of the Court, this approach has changed.⁵⁹ In connection with Article 18, the Court “no longer applies the general presumption of good faith on the part of national authorities or any special rules with regard to proof.”⁶⁰ Rather than the “stricter standard” described above, the Court asserts its rule of decision not to place the burden of proof on any party but to examine “all the material before it irrespective of its origin.”⁶¹ This is, perhaps, a recognition that the very nature of such a claim against a Member State presents (as the Jurisconsult euphemistically phrases it) “specific evidentiary difficulties.”⁶²

It is surely a welcome development that the Court should no longer single out Article 18 for more difficult pleading requirements, applying instead “its usual approach to proof.”⁶³ But this concession is hardly game-changing. What the Court has characterized as its “very exacting standard of proof,” appears to require “incontrovertible and direct proof.”⁶⁴ And although here, too, the Court has subsequently insisted that it will not “restrict itself to

56. *Khodorkovskiy v. Russia*, No. 5829/04, Nov. 28, 2011, at ¶ 256.

57. *Khodorkovskiy and Lebedev v. Russia*, Nos. 11082/06 and 13772/05, Oct. 25, 2013, ¶ 901 (“Thus, it is clear that the authorities were trying to reduce political influence of “oligarchs”, that business projects of Yukos ran counter to the petroleum policy of the State, and that the State was one of the main beneficiaries of the dismantlement of Yukos.”) (internal citations omitted).

58. *Id.* at ¶¶ 902–03.

59. The Jurisconsult, a member of the Court’s Registry, is tasked with “ensuring the quality and consistency” of the Court’s case-law. See Rule 18B, Rules of Court (Oct. 18, 2021), available at: https://www.echr.coe.int/Documents/Rules_Court_ENG.pdf.

60. Directorate of the Jurisconsult, *supra* note 52, at 20.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Khodorkovskiy v. Russia*, *supra* note 56, at ¶ 260. See also *OAO Neftyanaya Kompaniya Yukos v. Russia*, Case No. 14902/04 (Sept. 20, 2011) at ¶ 663 (“The Court further notes that in order to hold a member State liable under this provision an applicant should be able to furnish the Court with an incontrovertible and direct proof in support of his or her allegations.”).

direct proof in relation to complaints under Article 18,”⁶⁵ in practice and with limited exception, only where the State was quite literally caught in the act has the Court been willing to categorize such actions as an Article 18 violation.⁶⁶

Why such strictures, followed by reversals, feints, and weaves? These high hurdles and evidentiary standards evince a hesitancy by the Court to deploy the powerful anti-deference device that Article 18 is. It is perhaps extraordinary enough that States would be willing to expose themselves to judgment by an international judicial body on a topic as sensitive as human rights. A violation of Article 18 goes a step further still. In essence, such a finding accuses the state of a cover-up, a lie about what it has really done. And as noted before, “states resent as a slur on their honor the slightest doubt about their good faith.”⁶⁷

That is all perfectly understandable. One can see in these cases a real reluctance to advance the final step from the factual determination that “the authorities have not been able to demonstrate that they acted in good faith”⁶⁸ (or, even more delicately, “the conclusion to be drawn from this finding is that the assumption that the authorities acted in good faith was undermined”)⁶⁹ to the legal conclusion that there has been a violation of Article 18. In both cases just cited, the Court observed “that conclusion in itself is not sufficient to assume that Article 18 was breached, and it remains to be seen whether there is proof that the authorities’ actions were actually driven by improper reasons.”⁷⁰ But reluctance to deploy the tool devised for just such situations does not justify avoidance of such judgment in cases that merit it.

It is to one such case, Russia, that this article now turns in conclusion.

65. Merabishvili v. Georgia, Case No. 72508/13, Grand Chamber, ¶ 316 (Nov. 28, 2017).

66. In two cases concerning Azerbaijan, the Court accepted contextual evidence, relaxing the Khodorovskiy “direct and incontrovertible proof” standard. Rasul Jafarov v. Azerbaijan, Case No. 69981/14, ¶ 158 (Mar. 17, 2016); and Ilgar Mammadov v. Azerbaijan, Case No. 15172/13, ¶ 142 (May 22, 2014). However, this alternative approach has never been applied when Russia is the State responding to the complaint. Likewise, two other cases were analyzed by the Court without reference to the “direct and incontrovertible proof” standard. Lutsenko v. Ukraine, Case No. 6492/11, ¶¶ 107–10 (July 3, 2012), and Tymoshenko v. Ukraine, Case No. 49872/11, ¶¶ 295–301 (Apr. 30, 2013). But in both cases, the Article 18 violation was nevertheless based on explicit written documents by high officials.

67. Virally, *supra* note 12.

68. Ilgar Mammadov v. Azerbaijan, Case No. 15172/13, ¶ 141 (May 22, 2014).

69. Rasul Jafarov v. Azerbaijan, Case No. 69981/14, ¶ 157 (Mar. 17, 2016).

70. *Id.* at ¶ 157; and Mammadov, *supra* note 68, at ¶ 141.

V. RUSSIA AND ARTICLE 18

President Raimondi emphasized one statistic in particular: “the high number of applications lodged against the Russian Federation (almost 12,000).”⁷¹ Reflecting on this fact while the political institutions of the Council of Europe wrestled with the question of Russia’s continued membership, Judge Raimondi observed that “the significant volume reflects, in my view, the degree of trust shown by Russian nationals in the European mechanism for the protection of human rights and the importance it represents for them.”⁷² A less politic, but more direct way of stating this reflection would have been to emphasize its flip side: the degree of distrust that Russians had for their own governmental mechanisms to protect their rights.

Raimondi took the volume of petitions to Strasbourg from a particular country to be “an indicator of the effectiveness of Convention implementation in that country.”⁷³ The same might be said of the narrower statistic of Article 18 claims. Only Azerbaijan has been found to violate Article 18 more than Russia, though Russia holds the undesirable distinction of being the Member State that, starting with the first violation, has most significantly shaped the Court’s caselaw on the topic. What does that indicate about Moscow’s relationship to Strasbourg?

This section argues that the Court has weakened the important role of Article 18 in the Convention system by establishing too high a standard for reaching justifiable conclusions that it has been violated by bad-faith restrictions on rights. This is the mirror image of the complaint that the Court applies its margin of appreciation doctrine too narrowly when Member States interpret the Convention in good faith. There are several mechanisms that the Court might change to restore Article 18 to its proper place in the Convention. For example, it might require less than a hand caught in the cookie jar, *in flagrante delicto*, to conclude that a violation has occurred.

Another option might be more willing to accept as evidence the cumulative effect of cases in which the Court has either found an Article 18 violation. Russian violations of Article 18, as well as those cases that come closest but pulled back from the brink, have all occurred under Vladimir Putin’s dominion, with increasing frequency and increasingly similar *modus operandi*. One must work

71. Speech by President Guido Raimondi Strasbourg, Jan. 25, 2019, *supra* note 47.

72. *Id.*

73. *Id.* at 2.

hard not to see a pattern and practice in the cases that accumulate. Why should the Court shield its eyes, beginning each case anew on a blank slate?

Future cases should be considered *contextually*, not as “fresh starts” with the record wiped clean. Tentatively, the Court has expressed its willingness to consider the repetitive nature of similar state action against a single applicant or applicants, but only in a tightly confined timeframe and landscape. But, as this article demonstrates, the history of Article 18 supports a broadening of this approach. One of the earliest assertions of the importance of a human rights convention to prevent democratic backsliding also heralded it “as the acid test of whether countries should be admitted to this Council of a democratic Europe.”⁷⁴ The increasing applicability of Article 18 to confront what Teitgen called “Reasons of State,” including those hidden behind pretextual reasons like a wolf in sheep’s clothing, is another acid test. This one, however, concerns not whether to admit a state, but whether to continue to presume its good faith in the maintenance of its international legal obligations under the Convention.

What does this much broader contextual reading look like?⁷⁵ Starting with the first case in the history of the Convention to find a violation of Article 18, *Gusinskiy v. Russia*, Russia has tracked a steady departure from the norms and standards of a rule-of-law, democratic state that are enshrined in both its Constitution and the international treaties it signed to become a member of the Council of Europe. The Court should take this recent history into account—despite the non-repetitive nature of the applicants, though not the Member States’s *modus operandi* (as noted below)—as relevant context in determining whether Russia has violated Article 18 in future cases. Russia has a track record that is relevant in cases that depend so much on ascertaining good or bad faith conduct.

Months into Vladimir Putin’s first term as President of Russia, mass media oligarch Vladimir Gusinskiy was coerced by the Russian Minister for Press and Mass Communications to sign away the flagship of his media empire in exchange for his freedom from criminal custody. A few years later, oil oligarch Mikhail Khodorkovskiy was arrested on the tarmac of a Siberian airstrip and brought to Moscow to be stripped of his Yukos oil company on highly dubious embezzlement charges. Two years later, Russia’s leading opposition activist, Alexei Navalnyy, was convicted on the

74. See, *supra* note 48 (remarks of Lord Layton), Aug. 16, 1949.

75. This section draws from Part I of the Third Party Intervention of the European Human Rights Advocacy Centre and Professor Jeffrey Kahn, *Navalnyy and Ofitserov v. Russia*, Case No. 78193/17 (Eur. Ct. H.R. Jan. 14, 2020).

same embezzlement theory to strip him of his right to seek elected office. In between and after these events, these and other opposition figures in Russia brought numerous cases to Strasbourg, winning most of them.

All three of these men brought Article 18 claims to Strasbourg. Gusinskiy could point to the sale agreement he was forced to sign in a jail cell in the inexplicable presence of the Press Minister.⁷⁶ Caught *in flagrante delicto*, Russia became the first state found to be in violation of Article 18—just six years after having ratified the Convention. By the time of Khodorkovskiy’s and Navalnyy’s cases, Russian authorities had learned to hide the smoking gun. The *Strasbourg* Court acknowledged as “probably the strongest argument in favour of [Khodorkovskiy’s] complaint under Article 18” the findings of numerous European courts that his prosecution was politically motivated, even going so far as to admit

that the applicant’s case may raise a certain suspicion as to the real intent of the authorities, and that this state of suspicion might be sufficient for the domestic courts to refuse extradition, deny legal assistance, issue injunctions against the Russian Government, make pecuniary awards, etc.⁷⁷

Nevertheless, the Court stopped short of finding a violation, because:

[Such suspicion] is not sufficient for this Court to conclude that the whole legal machinery of the respondent State in the present case was *ab initio* [sic] misused, that from the beginning to the end the authorities were acting with bad faith and in blatant disregard of the Convention. This is a very serious claim which requires an incontrovertible and direct proof.⁷⁸

This conclusion was perhaps all the more astonishing given that the Court acknowledged that *in this very case* it had already found that the authorities had pretextually claimed to arrest Khodorkovskiy as a witness when their real reason was to arrest him as a suspect, thus undermining the exercise of his rights *ab*

76. Gusinskiy v. Russia, App. No. 70276/01, ¶¶ 27–31, 75 (Nov. 10, 2004), <https://hudoc.echr.coe.int/fre?i=001-61767>.

77. Khodorkovskiy v. Russia, App. No. 5829/04, ¶ 260 (Nov. 28, 2011), <https://hudoc.echr.coe.int/eng?i=001-104983>.

78. *Id.*; see also OAO Neftyanaya Kompaniya Yukos v. Russia, App. No. 14902/04, ¶665 (Sept. 20, 2011), <https://hudoc.echr.coe.int/eng?i=001-106308> (“Apart from the findings already made earlier, the Court finds no indication of any further issues or defects in the proceedings against the applicant company which would enable it conclude [sic] that there has been a breach of Article 18 of the Convention on account of the applicant company’s claim that the State had misused those proceedings with a view to destroying the company and taking control of its assets.”).

initio.⁷⁹ This had the effect of assuring the State's preferred venue for trial, the highly suspect Basmanniy District Court that had already earned a deserved reputation for operating at the end of puppet strings and telephone lines to the political authorities.⁸⁰

Navalnyy could not even get that far. The Court concluded that Articles 6 and 7 of the Convention (under which Navalnyy alleged that conviction under this embezzlement theory was unforeseeable and the criminal proceedings were arbitrary and unfair) lacked "express or implied restrictions that may form the subject of the Court's examination under Article 18 of the Convention."⁸¹ His complaint in that regard was therefore rejected as incompatible *ratione materiae* with the Convention.⁸² His case was preceded by many others that shared both its dismissive outcome as well as the mounting suspicions that deference to Russia's presumed good faith in complying with its treaty obligations was not fully warranted.⁸³

None of these cases should have been surprising to anyone familiar with Russia. Judicial independence is the exception, not the rule, in Russian history. Its Soviet era low point is well documented. In the words of a former Commissar of Justice, "our judge is above all a politician, a worker in the political field," whose courtroom

is, and still remains, the only thing it can be by its nature as an organ of the government power—a weapon for the safeguarding of the interests of a given ruling class . . . A club is a primitive weapon, a rifle is a more efficient one, the most efficient is the court . . .⁸⁴

79. *Khodorkovskiy v. Russia*, App. No. 5829/04 at ¶¶ 142, 254.

80. БАСМАННОЕ ПРАВОСУДИЕ: УРОКИ САМООБОРОНЫ: ПОСОБИЕ ДЛЯ АДВОКАТОВ: ПРОЧТИ И ПЕРЕДАЙ ДРУГОМУ [BASMANNY JUSTICE: LESSONS IN SELF-DEFENSE: A HANDBOOK FOR LAWYERS TO READ AND PASS TO OTHERS] 77 (Karinna Moskalenko & Leonid Nikitinskii eds., 2004).

81. *Navalnyy and Ofitserov v. Russia*, App. Nos. 46632/13 & 28671/14, ¶ 129 (July 4, 2016), <https://hudoc.echr.coe.int/fre?i=001-161060>.

82. *Id.* at ¶ 130.

83. *Nemtsov v. Russia*, App. No. 1774/11, ¶¶ 129–30 (July 31, 2014), <https://hudoc.echr.coe.int/eng?i=001-145784> ("Having regard to those findings [viz. that the applicant had been arrested, detained and convicted of an administrative offence arbitrarily and unlawfully and that this had had an effect of preventing or discouraging him and others from participating in protest rallies and engaging actively in opposition politics], the Court considers that the complaint under Article 18 of the Convention raises no separate issue and it is not necessary to examine whether, in this case, there has been a violation of that provision."); *Navalnyy and Yashin v. Russia*, App. No. 76204/11, ¶¶ 116–17 (Dec. 4, 2014), <https://hudoc.echr.coe.int/rus?i=001-148286> (same); *Frumkin v. Russia*, App. No. 74568/12, ¶¶ 172–73 (Jan. 5, 2016), <https://hudoc.echr.coe.int/eng?i=001-159762> (same); *Kasparov v. Russia*, App. No. 53659/07, ¶¶ 73–74 (Oct. 11, 2016), <https://hudoc.echr.coe.int/eng?i=001-167094> (same); *Kasparov and Others v. Russia*, App. No. 51988/07, ¶ 55 (Dec. 13, 2016), <https://hudoc.echr.coe.int/eng?i=001-169473> (same).

84. VLADIMIR GSOVSKI, SOVIET CIVIL LAW 241 (Hesell E. Ynetema ed., 1948) (quoting НИКОЛАЙ ВАСИЛЬЕВИЧ КРЫЛЕНКО, СУДОУСТРОЙСТВО РСФСР – ЛЕКЦИИ ПО ТЕОРИИ И ИСТОРИИ СУДОУСТРОЙСТВА 206 (1923)).

A persistent theme, varying only in degree, has been political control of judicial institutions. In the Soviet Union, “there was no such thing as an independent court of law, especially in political cases. The verdict was determined not by the judiciary but by the executive—the party-state authorities.”⁸⁵

The hope poured into Boris Yeltsin’s short, tumultuous decade could not easily overcome seventy years of Soviet rule and centuries of Tsarist autocracy. Substantial legal reforms were catalyzed by Russia’s quest for Council of Europe membership, which was granted notwithstanding Russian noncompliance *ab initio*.⁸⁶ But welcome statutory improvements do not always become entrenched practice, especially with regard to judicial independence.⁸⁷ In the words of the 19th-century Russian satirist Saltykov-Shchedrin: “The severity of the laws is compensated by the non-obligatory nature of their observance.”⁸⁸

As in the past, courts in Russia today serve a dual purpose. In ordinary cases, they accommodate individual rights and public needs in a modern and often sophisticated way. But in political cases, the judiciary remain susceptible to instrumental use as political weapons. The distinction between “ordinary” and “political” cases is an unwritten one, knowable *ex post* and determined by exercise of power. This “dual-state” phenomenon has been well documented as a feature of authoritarian regimes in general, and of the post-Soviet Russian state in particular.⁸⁹ Concern over political

85. ARCHIE BROWN, *THE RISE AND FALL OF COMMUNISM* 577 (2009).

86. Eur. Parl. Ass., *Report on the Conformity of the Legal Order of the Russian Federation with Council of Europe Standards*, Doc. AS/Bur/Russia (1994); Eur. Parl. Ass., *Report of the Political Affairs Committee on Russia’s Request for Membership of the Council of Europe*, 1st Sess., Doc. No. 7443, (1996); Eur. Parl. Ass., *Opinion of the Committee on Legal Affairs and Human Rights on Russia’s application for membership of the Council of Europe*, 1st Sess., Doc. No. 7463, (1996); Peter Leuprecht, *Innovations in the European System of Human Rights Protection: Is Enlargement Compatible with Reinforcement*, 8 *TRANSNAT’L L. & CONTEMP. PROBS.* 313, 329 (1998) (“It is not without significance that, in its Opinion on Russia’s request for membership, the Parliamentary Assembly, while referring to Article 4 of the Statute, actually departs from its wording by using the future tense[.]”) (internal footnote omitted).

87. See, e.g., Leutheusser-Schnarrenberger, *Report and Draft Resolution of the Committee on Legal Affairs and Human Rights on Allegations of Politically-Motivated Abuses of the Criminal Justice System in Council of Europe Member States*, EUR. PARL. ASS., 4th Sess., Doc. No. 11993, (2009), at 4.3.4 & 4.3.5; Bill Bowring, *Russia’s Accession to the Council of Europe and Human Rights: Compliance or Cross-Purposes?*, 6 *E.H.R.L.R.* 628–43 (1997); Jeffrey Kahn, *The Rule of Law Under Pressure: Russia and the European Human Rights System*, 44 *REV. OF CENT. & E. EUR. L.* 275–95 (2019).

88. STEPHEN WHITE, *UNDERSTANDING RUSSIAN POLITICS* 106 (2011).

89. See e.g., ERNST FRAENKEL, *THE DUAL STATE: A CONTRIBUTION TO THE THEORY OF DICTATORSHIP* (1941); Kathryn Hendley, *Are Russian Judges Still Soviet?* 23 *POST-SOVIET AFFAIRS* 240, 267 (2007); Kathryn Hendley *Varieties of Legal Dualism: Making Sense of the Role of Law in Contemporary Russia* 29 *WISC. INT’L L. J.* 234, 258 (2011); Kathryn Hendley, *To Go to Court or Not? The Evolution of Disputes in Russia*, in *A SOCIOLOGY OF JUSTICE IN*

control of judicial proceedings in Russia leads courts in other countries to refuse requests for extradition, unfreezing assets, or other legal assistance.⁹⁰

The crudest manifestation of the dual state, the infamous Soviet practice of “telephone justice” («телефонное право» [telefonnoe pravo]), is only one *modus operandi* of Russia’s dual state. Scholars provide evidence of political interference both in categories of cases and specific trials. For example, defamation lawsuits are filed in Russia at a per capita rate that is 100 times that found in the United Kingdom, but “the largest share of defamation lawsuits is filed by plaintiffs who hold state office” who both “win more often and they receive larger moral compensation awards than ordinary citizens, even including rich private business actors who probably have access to the best legal representation that money can buy.”⁹¹ The Court frequently notes how defamation suits are used by Russian officials to suppress criticism on matters of public concern.⁹² The manipulation is almost always the same: a veneer of formal compliance with Convention requirements issues from higher judicial instances while lower judicial bodies nevertheless continue to award damages to official plaintiffs without elaboration or reasoning and in summary fashion.⁹³

Similarly, the most politically sensitive criminal cases in Russia share the application of identical theories of culpability. Article 160 of the RF Criminal Code, embezzlement, has been the central criminal charge in the prosecutions, *inter alia*, of both Alexei

RUSSIA 63–64 (Marina Kurkchian & Agnieszka Kubal eds., 2018). *See also* ANDERS ÅSLUND, RUSSIA’S CRONY CAPITALISM 51–52 (2019); KAREN DAWISHA, PUTIN’S KLEPTOCRACY: WHO OWNS RUSSIA? 317 (2014); VLADIMIR GEL’MAN, AUTHORITARIAN RUSSIA: ANALYZING POST-SOVIET REGIME CHANGES 81 (2015); ALENA V. LEDENEVA, CAN RUSSIA MODERNISE? SISTEMA, POWER NETWORKS AND INFORMAL GOVERNANCE 161–62 (2013); B. ВОЛКОВ [V. VOLKOV], А. ДМИТРИЕВА [A. DMITRIEVA], М. ПОЗДНЯКОВ [M. POZDNAKOV], К. ТИТАЕВ [K. TITAEV], РОССИЙСКИЕ СУДЬИ: СОЦИОЛОГИЧЕСКОЕ ИССЛЕДОВАНИЕ ПРОФЕССИИ [RUSSIAN JUDGES: A SOCIOLOGICAL STUDY OF THE PROFESSION] 210 (Норма [Norma] 2015) (“The judge becomes a bureaucrat, part of a large machine that limits his independence. The judge, in order to continue to work in this system, assumes this role and agrees to it. This creates a unique professional situation for the Russian judge. Beyond a purely academic discussion, *i.e.*, on specific legal issues, they turn out to be the most qualified of lawyers, but are outside the legal discussion, outside the legal community.”) [Translation by J. Kahn].

90. *See, e.g.*, Leutheusser-Schnarrenberger, *supra* note 87, at 37–38 n.159 (listing decisions of courts in the U.K., Czech Republic, Lithuania, Switzerland, the Netherlands, Estonia, Germany, Cyprus & Israel).

91. Maria Popova, *Journalists, Judges and State Officials*, in A SOCIOLOGY OF JUSTICE IN RUSSIA 141–42 (Marina Kurkchian & Agnieszka Kubal eds., 2018).

92. *Margulev v. Russia*, No. 15449/09, Oct. 8, 2019, ¶ 50 (citing five cases). *See also* *Skudayeva v. Russia*, No. 24014/07, June 5, 2019; *Kharlamov v. Russia*, No. 27447/07, Jan. 8, 2016; *Krasulya v. Russia*, No. 12365/03, May 22, 2007.

93. *See, e.g.*, *Margulev*, at ¶ 52; *Skudayeva*, at ¶ 37; *Krasulya*, at ¶ 42.

Navalnyy and Mikhail Khodorkovskiy.⁹⁴ Article 160 is one of what Jordan Gans-Morse calls “favored charges used to apply pressure” on private enterprises targeted by predatory state officials:

Unlike crimes such as murder or theft, which are reported to the police by citizens, these economic crimes require proactive investigation by legal authorities, providing officials with significant discretion to probe a wide range of firms . . . [A]fter 2003, the initial year of the Khodorkovsky Affair, there was a notable increase in the number of economic crimes uncovered by Ministry of Internal Affairs investigators: Between 2003 and 2004, fraud- and embezzlement-related cases, which since the late 1990s had remained relatively constant, increased nearly 15 percent.⁹⁵

The *seriatim* criminal trials of Mikhail Khodorkovskiy present the dualist state at its apogee. Richard Sakwa, one of the UK’s leading Russia experts, concluded “the judicial system manifestly engaged in a political trial” that “not only damaged state development but also strengthened the arbitrariness of the administrative regime.”⁹⁶

The state’s peculiar theory of embezzlement—the recurrent criminal charge against the top two leaders of the political opposition in the last twenty years—was the subject, inter alia, of analysis by independent experts convened by the Presidential Council of the Russian Federation for Civil Society and Human Rights, which submitted a report on December 21, 2011.⁹⁷ (Full disclosure: the author was one of the independent experts.) These reports, along with the Presidential Council’s own observations and recommendations, were personally delivered to President Medvedev by Mikhail Fedotov, Chairman of the Council, on December 27, 2011.⁹⁸ As summarized by the *Strasbourg* Court:

94. Compare *Navalnyy and Ofitserov v. Russia*, Nos. 46632/13 & 28671/14, July 4, 2016, at ¶¶ 61–65 and Statement of Facts, *Navalnyy and Ofitserov v. Russia*, No. 78193/17, communicated on Dec. 21, 2017, with Statement of Facts, *Khodorkovskiy and Lebedev v. Russia*, Nos. 51111/07 and 42757/07, communicated Mar. 24, 2014, ¶¶ 210–12.

95. JORDAN GANS-MORSE, PROPERTY RIGHTS IN POST-SOVIET RUSSIA: VIOLENCE, CORRUPTION, AND THE DEMAND FOR LAW 88–89 (Cambridge Univ. Press, 2017).

96. RICHARD SAKWA, PUTIN AND THE OLIGARCH: THE KHODORKOVSKY – YUKOS AFFAIR 51 (Tauris, 2014).

97. REPORT PREPARED FOR THE PRESIDENTIAL COUNCIL OF THE RUSSIAN FEDERATION FOR CIVIL SOCIETY AND HUMAN RIGHTS REGARDING THE VERDICT OF THE KHAMOVNICHESKY DISTRICT COURT OF THE CITY OF MOSCOW AGAINST M.B. KHODORKOVSKIY AND P.L. LEBEDEV, CRIMINAL CASE NO. 1-23/10 (Dec. 27, 2010). A Russian translation of this report is available at: <http://www.president-sovet.ru/documents/read/58/>. It is available in English in Vol. 4, No. 3 JOURNAL OF EURASIAN LAW (2011).

98. *Рабочая Встреча С Советником Президента, Председателем Совета По Развитию Гражданского Общества И Правам Человека Михаилом Федотовым*

The report contained contributions from a group of Russian, European and American experts and scholars. None of the expert group found any support for the allegations of embezzlement or money laundering. Having considered the expert reports, the Presidential Council for Civil Society and Human Rights issued a series of recommendations in which, amongst other things, it called for the judgment to be repealed and describing the second case as ‘a miscarriage of justice’: in particular, the report held that the applicants were convicted for acts that were not directly prescribed by the criminal law and did not contain features of a *corpus delicti*, as well as without due process.⁹⁹

The application of Article 160 in Khodorkovskiy’s and Lebedev’s case was found to be at variance with traditional elements of embezzlement in Russian law and was inconsistent with the Russian Supreme Court’s interpretation of relevant provisions of the Criminal Code. It is revealing that this strained theory was preferred to more straightforward theories of culpability available under other provisions of the Criminal Code but eschewed in the Russian state’s prosecution of Khodorkovskiy.

Following the applicants’ success in *Navalnyy & Ofitserov v. Russia* (No. 1), Navalnyy requested that the criminal proceedings against him be reopened and terminated.¹⁰⁰ Strasbourg had found that the Russian courts had applied the criminal law (regarding embezzlement) arbitrarily against him and concluded that, in principle, such a reopening of the proceedings would be appropriate redress.¹⁰¹ The Russian district court nevertheless found the applicants guilty of the same embezzlement offenses, a judgment

[*Working Meeting with Presidential Advisor, Chairman of the Council for the Development of Civil Society and Human Rights, Mikhail Fedotov*], АДМИНИСТРАЦИЯ: ПРЕЗИДЕНТА РОССИИ [ADMINISTRATION: PRESIDENT OF RUSSIA], (Dec. 27 2011), <http://kremlin.ru/events/president/news/14153>.

99. Khodorkovskiy & Lebedev v. Russia, Nos. 11082/06 & 13772/05, Eur. Ct. H.R., ¶ 362 (2013). See also Khodorkovskiy & Lebedev v. Russia (No. 2), No. 5111/07, Eur. Ct. H.R. ¶ 364 (2020). Following Putin’s third inauguration, several experts as well as the head of the Council’s working group responsible for their organization, retired Constitutional Court Justice Tamara Morshchakova, were subject to criminal investigation including searches of homes and offices, seizure of property, and interrogation. See, e.g., Jeffrey Kahn, *In Putin’s Russia, Shooting the Messenger*, N.Y. TIMES, Feb. 25, 2013; Jeffrey Kahn, *The Richelieu Effect: The Khodorkovsky Case and Political Interference with Justice*, in A SOCIOLOGY OF JUSTICE IN RUSSIA, *supra* note 89, at 231–58. The investigation was ultimately closed for lack of a *corpus delicti*. One Russian expert, Sergei Guriev, entered self-imposed exile. See Sergei Guriev, *Why I Am Not Returning to Russia*, N.Y. TIMES, June 5, 2013. The Council of Europe’s Commissioner for Human Rights criticized this pressure against the experts. See Report by Nils Muižnieks, CommDH (2013) 21, ¶ 178 (Nov. 12, 2013).

100. Statement of Facts, *Navalnyy & Ofitserov v. Russia* (No. 2), No. 78193/17, Eur. Ct. H.R. 3 (2017).

101. *Navalnyy & Ofitserov v. Russia* (No. 1), *supra* note 82, ¶ 136.

upheld by the regional court. The applicants were again fined and given suspended prison sentences, effectively excluding them from seeking elected office as a result.

Unsurprisingly, the case is back in Strasbourg. In *Navalnyy & Ofitserov* (No. 1), the Court dismissed *ratione materiae* the alleged violation of Article 18 taken in conjunction with Articles 6 and 7 of the Convention because the relevant provisions of those articles “do not contain any express or implied restrictions that may form the subject of the Court’s examination under Article 18 of the Convention.”¹⁰² The Court might be reconsidering that view of Article 18’s application, an important and welcome change.¹⁰³

Regardless of that outcome, the Court should adopt a greater willingness to see links between Navalnyy’s many cases, a context that is itself evidence of a lack of good faith in the application of restrictions on rights protected by the Convention. In the years between *Navalnyy & Ofitserov* (No. 1) and *Navalnyy & Ofitserov* (No. 2), the European Court has found violations of Navalnyy’s rights three times.¹⁰⁴ In two of these, violations of Article 18 were found. In those cases, concerning serial arrests, the Court did apply a contextual analysis of the accumulating effect of these *seriatim* detentions. The Grand Chamber observed: “Against this background, the applicant’s claim that his exercise of freedom of assembly has become a particular object for targeted suppression appears coherent within the broader context of the Russian authorities’ attempts at the material time to bring the opposition’s political activity under control.”¹⁰⁵

And in the most recent judgment, concerning Navalnyy’s pre-trial house arrest, the Court’s Third Section noted its previous reliance: “On the converging contextual evidence that at the material time the authorities were becoming increasingly severe in their response to the conduct of the applicant and other political activists and, more generally, to their approach to public assemblies of a political nature.”¹⁰⁶

There is no logical reason why that contextual recognition cannot transcend an applicant’s cases or even the cases of different but similarly situated applicants. As noted above, the Court may have taken its first steps toward this approach. This article argues that there are good historical reasons to understand that doing so—

102. *Id.* at ¶ 129.

103. See EHRAC & Jeffrey Kahn, *supra* note 53.

104. *Navalnyy v. Russia*, No. 32963/16, Eur. Ct. H.R. (2018); *Navalnyy v. Russia*, Nos. 29580/12 and four others, Eur. Ct. H.R. (2018); *Navalnyy v. Russia* (No. 2), No. 43734/14, Eur. Ct. H.R. (2019).

105. *Navalnyy v. Russia*, Nos. 29580/12 and four others, *supra* note 104, ¶ 173.

106. *Navalnyy v. Russia* (No. 2), No. 43734/14, ¶ 96.

even more boldly if not with alacrity given the somber truth such findings reveal—achieves precisely the objective that Article 18 was intended to secure: a warning to and about member States backsliding in their commitments to protect human rights.

VI. A CAUTIONARY NOTE IN CONCLUSION

The European Convention emerged at a time of great pain after global war, mass suffering, and totalitarianism. Its drafters hoped to prevent the recurrence of what they had lived through. Committing their states to respect human rights was insufficient; an enforcement mechanism was needed, as were devices to test the legitimacy of assertions that rights required restriction in the interests of a democratic, rule-of-law society. Article 18 was one such device, embedded in an international treaty between sovereign states. That treaty assumes the good faith of those who have undertaken legal obligations through its ratification. The conclusion that a state has violated Article 18 essentially rejects that assumption in the adjudged case.

There are grave risks to lowering the evidentiary standard or shifting burdens of proof in Article 18 cases. Likewise, diminishing the deference accorded to states as similar violations accumulate may lead a State to refuse to countenance such treatment. In such a circumstance, States may consider renouncing its treaty obligations rather than continuing to tolerate the “slur on their honor” by such persistent doubts about its good faith.¹⁰⁷

Loss of a member State would be a terrible price to pay for that State’s citizens as well as the Council of Europe. But the alternative is not costless. Article 18 violations are a bellwether of a State’s regression into authoritarianism. Put another way, it is a sign that the State is abandoning the fundamental principles on which both the Convention system, and the Council of Europe, are based. Continuing to afford a backsliding Member State the presumption of good faith when its restrictions on rights are pretextual ones is inconsistent with the object and purpose of Article 18 as understood from the travaux préparatoires. Worse, a disinclination to hold such a state to account sends a signal to would-be autocrats in other member States to demand a margin of appreciation for practices that are nothing more than ruses covering repression.

The work of the European Court of Human Rights is not easy. Its position as an arbiter of human rights obligations with which States, perhaps surprisingly, have agreed to burden themselves is a

107. Virally, *supra* note 12.

precarious one. Assessing the proper balance in interpreting the Convention in light of the many different circumstances in member States may sometimes present issues with institutional risks clad in sheep's clothing. But this wolf comes as a wolf: pretending a state deserves an assumption of good faith when it does not presents a serious danger to the integrity of this extraordinary international system for the protection of human rights.

