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THE EUROPEAN COURT OF HUMAN RIGHTS IS FIFTY RECENT TRENDS IN THE COURT'S JURISPRUDENCE[1]

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The European Convention on Human Rights (ECHR) is more than ever our common heritage ("patrimoine") and in this respect we share a common responsibility at national and international level. As René Cassin noted in 1950, the Convention rights are the seeds of peace. They are also the "essential bridges to building the future" as defined by the President at the inauguration of the new Court of Human Rights on the 3rd of November 1998. Nowadays, accession to the Convention is a prerequisite for joining the Council of Europe, formed in 1949 (in circumstances that warrant recall) in the aftermath of the Second World War. It has now opened its doors to an enlarged Europe stretching from Vladivostock to Coimbra so that it is important to hold fast to the "principles of pluralism, tolerance and broadmindedness without which there is no democratic society".

Today, perhaps the real issue here is how rights – especially human rights – are to be taken "seriously" to borrow Dworkin's expression[3]. Human rights are neither an ideology nor a system of thought. If they are to have any meaningful bearing on the life of individuals and communities, they must be translated into action. This means that the recognition of human rights is inseparable from the machinery used to ensure their respect and protection. Against this background, the text of the Convention operates at two levels: the rights

[1] The judgments and decisions of the European Court of Human Rights referred to in the text are available on the Court's internet website, in the *Hudoc* database, at: www.echr.coe.int/echr/en/hudoc/

[2] This reflects my personal view, and not that of the Court.

[3] R. Dworkin, *Taking rights seriously*, Cambridge, Harvard University Press, 1977.

guaranteed and the guarantee of the rights. In addition to laying down a catalogue of civil and political rights and freedoms, the Convention sets up a mechanism for the enforcement of the obligations entered into by Contracting States. These two levels will form the two parts of my contribution. Through the question of effectiveness, I will refer in the first part to the substantial rights contained in the European Convention on Human Rights and Fundamental Freedoms and to the main issues at stake today. In the second part, I will highlight several procedural issues which are significant in the enforcement of these rights by the European Court of Human Rights.

I. THE RIGHTS GUARANTEED: THE CONVENTION AS A LIVING INSTRUMENT

The rights guaranteed are contained in section 1 of The European Convention the Preamble to which traces the outlines of a European *ordre public*. These rights and freedoms "are the foundation of justice and peace in the world" and are best maintained "by an effective political democracy". Democratic society is the focal point of human rights, the unifying force within a Europe of human rights in which the Convention acts as a basic law. Democracy is the central value of European *ordre public*. It would be a mistake to see these references in the Preamble as merely rhetorical. In interpreting and applying the Convention, the institutions of the Convention's supervisory machinery have given more concrete form to the role of the principle in a democratic society. Yet much remains to be done for, as C. Lefort has said, democracy is "*ce régime inouï qui fait l'expérience historique de l'indétermination de ses repères*"[4].

If human rights constitute a "bedrock of principles" on which democratic political regimes are built, what form do they take? We have at our disposal the range of rights enumerated in Articles 2 to 12 of the Convention, with which everyone is familiar. The provision of an effective remedy for violations of the rights and freedoms thus guaranteed (Art. 13) and the *prohibition on any discrimination* in their enjoyment on any ground (Art. 14) provide the natural complements to the recognition of civil and political rights.

As legal theorists have observed, the law must be stable yet it cannot stand still[5]. Adaptation and modification have been constant features of the Convention since 1950 and continue to be so today. Furthermore, the Court's reaffirmation of the dynamic principle of

[4] Cl. Lefort, *Essai sur la politique*, Paris, Seuil, 1986, p. 29.

[5] Attributed to Roscoe Pound in his book *Interpretations of legal history*, New York, MacMillan, 1923.

interpretation has ensured that issues are considered in the context of our contemporary society and this has lead to many pioneering judgments.

A. As far as **general principles** ("principes directeurs") are concerned, there are two major trends in the recent case-law of the Court, namely the development of positive obligations (**1**), and the application of the Convention in the private sphere (**2**).

1. POSITIVE OBLIGATIONS

Increasingly, a requirement that States take action is now being added to the traditional requirement that they be passive. This requirement takes the form of **positive obligations** for the State to adopt practical or legal (legislative, administrative or judicial) measures which are aimed at guaranteeing the effective protection of the rights and freedoms recognised. We have numerous examples of this development.

a. As regards the *typology*, positive obligations can be *substantive* or *procedural*.

The first obligations require States to take *substantive measures*, such as for example providing medical care in prison, legally recognizing the status of transsexuals[6], or establishing the biological paternity of a stillborn child[7]. It is probably the right to private and family life which has most benefited from this growth of positive obligations[8].

In certain circumstances, positive obligations do include obligations to take preventive action up to and including inter-individual relations. The *Osman v. the United Kingdom* judgment of 28 October 1998 is the seminal decision which first sought to define the extent of the positive duty on the authorities to protect potential victims of crime: "it must be established (…) that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk"[9]. Nevertheless, the Court has always emphasised that such a principle should not be interpreted in

[6] ECtHR (GC), *Christine Goodwin v. the United Kingdom*, judgment of 11 July 2002.

[7] ECtHR, *Znamenskaya v. Russia*, judgment of 2 June 2005.

[8] F. Sudre, *Droit européen et international des droits de l'homme*, Paris, PUF, 8th edition, 2006, p. 241, no. 166.

[9] ECtHR, *Osman v. the United Kingdom*, judgment of 28 October 1998, § 116.

a way which creates an impossible or disproportionate burden on the authorities. In this respect, the major interest of the judgment *Z and Others v. the United Kingdom* pronounced by the Grand Chamber on 10 May 2001 is to confirm once again that Article 3 imposes on the State a positive obligation to protect the people within their jurisdiction – through the appropriate action of the social services – against inhuman treatment administered by private individuals (in casu by the father-in-law on his children). This leads us to the vertical application of the Convention.

Another recent example of the obligation to take preventive measures can be found in the *Renolde v. France* judgment of 16 October 2008 concerning the suicide of a prisoner.

b. The second set of obligations require States to establish internal procedures, in order to provide for protection and / or redress by the Convention. The European Court, in its recent case-law, increasingly emphasises the *procedural requirements of human rights*, which are moving towards new directions.

Procedural fairness. In the *McMichael v. the United Kingdom* judgment of 24 February 1995, the Court established the important principle that the decision-making process in childcare matters must afford sufficient procedural protection of the parties' interests. Therefore, particular attention should be paid to the *procedural fairness* of the decision-making process regarding parents and other members of the family, whose relationship with a child has been subject to interference. In some cases, this procedural obligation is concerned with the necessity, at domestic level, to *involve the parties in the proceedings*, and in particular in the legal proceedings, where fundamental rights are at stake. So, for example, as regards children's placement, the Court, before turning to the State's margin of appreciation, will make sure that the judicial authorities have taken care to accompany their decision with all the possible guarantees, particularly by enabling the parties to play an effective part in the decision-making process (communication of the reports, attendance at the hearing, assistance by a lawyer, and so on)[10].

The procedural aspect of Article 2 was also at issue in the *Slimani v. France* judgment of 27 July 2004. The applicant's partner had died in a detention centre while awaiting deportation. Although the Court found that the applicant had failed to exhaust domestic remedies with regard to her substantive complaints under Articles 2 and 3, it held that there had been a procedural violation in so far as she had not had automatic *access to the inquiry* into the cause of death. It was insufficient, in the Court's view, that the applicant could have lodged a criminal complaint and joined those proceedings. Thus, whenever there was a suspicious death in custody, the deceased's next-of-kin should not be obliged to take the

[10] ECtHR, *Moser v. Austria*, judgment of 21 September 2006, § 72.

initiative in lodging a formal complaint or assuming responsibility for investigation proceedings. Article 2 required that the next-of-kin be automatically involved with the official investigation opened by the authorities into the cause of death.

What are the *major* benefits of the procedural approach taken by the Court? To my mind, the benefits lie in the objectivity and credibility accorded to the control of the Court. Today more than ever, the Court is involved in very sensitive cases and its distance from them and the facts renders it less able to resolve them. Whether or not to place a child outside his family or arbitrating between economics and the environment in the night flights problem are both questions that, to be resolved, assume a proximity with the facts and the social reality. In this regard, the proceduralization movement is able to give meaning to the margin of appreciation in adding a condition: before accepting the assessment of the State, the Court will check that the State has taken every opportunity to reach the right decision. In a certain way, the development of the procedural requirement could appear as the natural and fruitful corollary of the margin of appreciation doctrine.

In this respect, positive obligations extend the scope of control by the European judge, particularly towards economic, social and cultural rights. In the field of environment, in the *Fadeyeva v. Russia* judgment of 9 June 2005, the Court was required to scrutinize the extent of the positive obligations on the authorities to prevent environmental damage. The Court defined the test to be applied in this way: "(…) it is not the Court's task to determine what exactly should have been done in the present situation to reduce pollution in a more efficient way. However, it is certainly in the Court's jurisdiction to assess whether the Government approached the problem with due diligence and gave consideration to all the competing interests. In this respect the Court reiterates that the onus is on the State to justify a situation in which certain individuals bear a heavy burden on behalf of the rest of the community, using detailed and rigorous data"[11].

Institute proceedings. In other cases, the procedural positive obligation consists in the obligation, particularly in the absence of evidence (such as, for instance, in the applications against Russia concerning extra-judicial killings in Chechnya[12]), to *open an investigation and to institute proceedings* that can lead to the identification and, possibly, punishment of those responsible[13]. As regards Article 2 protecting the right to life, the leading case is the *McCann and Others v. the United Kingdom* judgment of 27 September 1995 since which the Court now imposes a duty to investigate suspicious deaths in many other cases. As regards Article 3, in the *Labita v. Italy* judgment of 6 April 2000, where the applicant complained *inter alia* of ill-treatments which were of a psychological nature and thus not leaving marks

[11] ECtHR, *Fadeyeva v. Russia*, judgment of 9 June 2005, § 128. See also, ECtHR, *Giacomelli v. Italy*, judgment of 2 November 2006, §§ 81, 82, 83, 84.

[12] ECtHR, *Khachiev and Akaïeva v. Russia*, judgment of 24 February 2005 (extra-judicial executions); ECtHR, *Issaïeva, Youssoupova and Bazaïeva v. Russia*, judgment of 24 February 2005 (aerial attacks); ECtHR, *Issaïeva v. Russia* (application no. 57950/00), judgment of 24 February 2005 (missile in the humanitarian corridor).

[13] ECtHR, *Matko v. Slovenia*, judgment of 2 November 2006.

on the body, the Court found that there had been a violation of this provision in that no effective official investigation into the allegations had been held. The *Paul & Audrey Edwards v. the United Kingdom* judgment of 14 March 2002 – where the applicant alleged that the authorities had failed to protect the life of their son who had been killed by another detainee while held in prison on remand – is of particular interest since the Court found both a substantial violation of Article 2 concerning the positive obligation to protect life and a procedural violation of Article 2 concerning the obligation to carry out effective investigation and explained what an effective investigation should be (independent, prompt, complete, involvement of all the parties, and so on).

In some recent cases, such as the *Okkali v. Turkey* judgment of 17 October 2006 concerning the ill-treatment of a twelve-year-old boy while in police custody and the *Zeynep Özcan v. Turkey* judgment of 20 February 2007 concerning the ill-treatment of a young woman at the police station, the Court considered that the criminal-law system, as applied in the applicant's case, had proved to be *far from rigorous* and had had no dissuasive effect capable of ensuring the effective prevention of unlawful acts such as those complained of by the applicant. The Court accordingly found that the impugned criminal proceedings, in view of their outcome, had failed to provide appropriate redress for an infringement of the principle enshrined in Article 3[14]. Here there is, in my view, a substantial problem: in principle or, better, historically, human rights are supposed to protect against the machinery of criminal law; today, the protection of human rights seems to require the intervention of criminal control. We have numerous examples of that. This said, one cannot fail to underline the profound effects of this movement within the general theory of human rights. In a word, rights would appear today to present both a *defensive* and an *offensive* facet. From that perspective, it is no longer the use of criminal proceedings that should be justified by the State but the absence of that use.

Finally, more generally, the duty of member States to set in place procedures at national level derives not only from their obligation under Article 1 of the Convention to secure the rights and freedoms set out in the Convention, but also from the underlying subsidiary character of the Convention system. States ratifying the Convention are not only undertaking to refrain from certain conduct and in some cases to take positive action to protect rights and freedoms, they are also undertaking to provide the legal framework to allow prevention of or redress for Convention violations at national level.

[14] ECtHR, *Okkali v. Turkey*, judgment of 17 October 2006; ECtHR, *Zeynep Özcan v. Turkey*, judgment of 20 February 2007.

2. HORIZONTAL APPLICATION OF THE CONVENTION

Today, with the redefinition of the role of the State, human rights are being increasingly relied on in disputes between **private individuals** or **groups** – non-state actors – with the result that their **horizontal application** – individual against individual – is developing alongside their vertical application – individual against State[15].

We have **numerous examples** of this development such as the case of *Hatton and Others v. the United Kingdom* of 8 July 2003 concerning night noise disturbances emanating from the activities of private operators suffered by residents living near Heathrow airport: "the State's responsibility in environmental cases may also arise from a failure to regulate private industry in a manner securing proper respect for the rights enshrined in Article 8 of the Convention"[16].

It is the same thing in the inadmissibility decision in the case of *T.I. v. the United Kingdom* of 7 March 2000 where the applicant "submits in particular that there are substantial grounds for believing that, if returned to Sri Lanka, there is a real risk of facing treatment contrary to Article 3 of the Convention at the hands of [among others] Tamil militant organisations"[17]. Here, the Court "indicates that the existence of [an] obligation [not to expel a person to a country where substantial grounds have been shown for believing that he would face a real risk of being subjected to treatment contrary to Article 3] is not dependent on whether the source of the risk of the treatment stems from factors which involve the responsibility, direct or indirect, of the authorities of the receiving country. Having regard to the absolute character of the right guaranteed, Article 3 may extend to situations where the danger emanates from persons or groups of persons who are not public officials (…). In any such contexts, the Court must subject all the circumstances surrounding the case to a rigorous scrutiny"[18].

The most extreme example of vertical application of the Convention can be seen in the *Pla and Puncernau v. Andorra* judgment of 13 July 2004 where the Court was faced, under Article 14 of the Convention, with the interpretation of an eminently private instrument such as a clause in a person's will which prohibits the applicant, an adopted child, to inherit from his grandmother's estate because he was not a child "of a lawful and canonical marriage". Admittedly, the Court was not in theory required to settle disputes of a purely private nature. That being said, in exercising its European supervisory role, the Court could

[15] A. Clapham, *Human rights in the private sphere*, Oxford, Clarendon Press, 1993; Ph. Alston (ed.), *Non-state actors and human rights*, Oxford, Oxford University Press, Collected Courses of the Academy of European Law, 2005; A. Clapham, *Human rights. Obligations of Non-state actors*, Oxford, Oxford University Press, Collected Courses of the Academy of European Law, 2006, pp. 349 et seq.

[16] ECtHR (GC), *Hatton and Others v. the United Kingdom*, judgment of 8 July 2003, § 119.

[17] ECtHR, *T.I. v. the United Kingdom*, decision (inadmissible) of 7 March 2000, p. 11.

[18] *Ibid*., p. 14.

not remain passive where a national court's interpretation of a legal act appeared unreasonable, arbitrary or, as in the applicants' case, blatantly inconsistent with the prohibition of discrimination established by Article 14 of the Convention and more broadly with principles underlying the Convention. The Court did not discern any legitimate aim pursued by the decision in question or any objective and reasonable justification on which the distinction made by the domestic court might be based. In the Court's view, an adopted child was in the same legal position as a biological child of his or her parents in all respects. The Court had stated on many occasions that very weighty reasons needed to be put forward before a difference in treatment on the ground of birth out of wedlock could be regarded as compatible with the Convention. It reiterated that the Convention was a living instrument, to be interpreted in the light of present-day conditions and that great importance was currently attached in the member States of the Council of Europe to the question of equality between children born in and out of wedlock regarding their civil rights. The Court therefore found that there had been a violation of Article 14 read in conjunction with Article 8.

Furthermore the intervention of the State within individual relations very often raises, a **conflict between rights and freedoms:** one person's freedom vs. the protection of the right to life of others[19]; right to respect of family life of parents vs. protection of the physical integrity of their children[20]; right to respect of private life of the mother vs. right of the child to know his origins[21]; right of freedom of expression of journalists vs. right of private life of citizens[22]. But, the most fundamental rights are not arranged in order of priority and there is no hierarchy among human rights. Therefore, such conflicts are among the most difficult since in the balance are ("plateaux de la balance"), are rights and freedoms which, a priori, deserve equal respect. Seductive as it may seem, 'balancing' may be closer to a slogan than to a methodology. It consists of weighing the rights in conflict against one another, and affording a priority to the right which is considered to be of greater 'value'. But the problems with this metaphor are well documented. The very image of having to 'weigh' one right against another presupposes that there would exist some common scale according to which their respective importance (or 'weight') could be measured, which we know is not available in fact. Balancing the right to privacy, say, against freedom of expression, or the freedom of religion of a church against the freedom of expression of its employees, it has been said, "is more like judging whether a particular line is longer than a particular rock is heavy"[23]. This is the problem known among legal theorists as the problem of incommensurability[24].

[19] ECtHR, *Osman v. the United Kingdom*, judgment of 28 October 1998, § 116.

[20] ECtHR (GC), *Z. and Others v. the United Kingdom*, judgment of 10 May 2001, § 74.

[21] ECtHR (GC), *Odièvre v. France*, judgment of 13 February 2003 (secret delivery).

[22] ECtHR, *Von Hannover v. Germany*, judgment of 24 June 2004.

[23] *Bendix Autolite Cort. V. Midwesco Enterprises, Inc., et al.*, 486 U.S. 888, 897 (1988) (Scalia, J., diss.).

[24] See, *inter alia*, R. Chang (ed), *Incommensurability, incomparability and practical reason*, Cambridge, Harvard University Press, 1997; and B. Frydman, *Le sens des Lois*, Brussels / Paris, Bruylant / L.G.D.J., 2005, p. 436; as well as the authors cited in the remainder of this section.

So, today, conflicts of rights require original methods of resolution – but the structures for these are still to be built. We could go along the lines suggested by the German constitutional lawyer K. Hesse, of the "practical compromise" ("concordance pratique")[25] which appear in a number of decisions of the *Bundesverfassungsgericht*. When we are confronted with conflicting rights, it is not appropriate to turn immediately to the scales in order to determine which right is the "most weighty" and deserves to be sacrificed to the other rights. It seems better to see if some compromises, from both sides, could be reached in order to avoid sacrifice on either side. The originality of this approach is to encourage solutions which preserve, as far as possible, the two conflicting rights instead of trying to find a point of balance between them[26].

That is the meaning of the *Öllinger v. Austria* judgment of 29 June 2006. On 30 October 1998 the applicant notified the Salzburg Federal Police Authority that, on All Saints' Day (1 November) 1998 from 9 a.m. until 1 p.m., he would be holding a meeting at the Salzburg municipal cemetery in front of the war memorial in commemoration of the Salzburg Jews killed by the SS during the Second World War. He noted that the meeting would coincide with the gathering of Comradeship IV (Kameradschaft IV), in memory of the SS soldiers killed in the Second World War. On 31 October 1998 the Salzburg Federal Police Authority prohibited the meeting and, on 17 August 1999, the Salzburg Public Security Authority dismissed an appeal against that decision by the applicant. The police authority and public security authority considered the prohibition of the applicant's assembly necessary in order to prevent disturbances of the Comradeship IV commemoration meeting, which was considered a popular ceremony not requiring authorisation. "In [the] circumstances [of the case], the Court is not convinced by the Government's argument that allowing both meetings while taking preventive measures, such as ensuring police presence in order to keep the two assemblies apart, was not a viable alternative which would have preserved the applicant's right to freedom of assembly while at the same time offering a sufficient degree of protection as regards the rights of the cemetery's visitors"[27].

B. As far as the **substantive provisions** of the Convention are concerned – the rights and freedoms themselves as they are enshrined in Part I of the Convention, Articles 2 to 18 – I will very briefly highlight the most significant developments for some articles[28]while showing how we are confronted with a number of new issues.

[25] K. Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland*, Heidelberg, C.F. Müller, 1984, 14th ed., nos. 71 et seq. On this "practical concordance", see also, F. Müller, *Discours de la méthode juridique,* transl. from German by O. Jouanjan, Paris, PUF, 1996, pp. 285-287, and S. Van Drooghenbroeck, *La proportionnalité dans le droit de la Convention européenne des droits de l'homme. Prendre l'idée simple au sérieux*, Brussels, Publications des Facultés Universitaires Saint-Louis / Bruylant, 2001, p. 212 and pp. 709-710.

[26] See O. De Schutter and Fr. Tulkens, "Rights in Conflict: the European Court of Human Rights as a Pragmatic Institution", in E. Brems (ed.), *Conflicts between Fundamental Rights*, Antwerp, Intersentia, 2008, pp. 169-216.

[27] ECtHR, *Öllinger v. Austria*, judgment of 29 June 2006, § 48.

[28] For a general overview, see K. Reid, *A Practitioner's Guide to the European Convention on Human Rights*, London, Sweet & Maxwell, 3rd edition, 2008.

1. LIBERTY RIGHTS

Article 2. Right to life

Here, the main issues facing the Court are the **beginning** and the **end** of life.

The Court has been faced with the difficult ethical, moral and social problems relating to the termination of life. A recent controversial case in Italy, involving the removal, at her parents' request, of the feeding tube from Eluana Englaro, who had been in an irreversible vegetative state since a serious accident in 1992, reached the Court with a request coming from some pro-life associations to apply interim measures to prevent the removal. The request, however, failed, because the applicant associations do not have the status of victim[29].

Equally controversial was the case of *Diane Pretty v. the United Kingdom* which resulted in a unanimous judgment on the merits. At the time of applying to the Court, Mrs Pretty was in the advanced stages of motor neurone disease. She claimed that the blanket prohibition on assisted suicide in English law violated her right to life under Article 2 of the Convention, a right which she unsuccessfully argued included the correlative right to choose when and how to end her life. She claimed also that the right to respect for private life under Article 8 encompassed a right to personal autonomy in the sense of a right to make choices concerning one's own body and to take action to avoid an undignified and distressing end to life. As to Article 2, the Court held that it "is not persuaded that the right to life guaranteed by Article 2 can be interpreted as involving a negative aspect" and that "Article 2 cannot, without a distortion of language, be interpreted as conferring the diametrically opposite right, namely a right to die"[30]. The Court accordingly "finds that no right to die, whether at the hands of a third person or with the assistance of a public authority, can be derived from Article 2 of the Convention"[31]. Regarding Article 8, while the Court did not exclude that the law had interfered with the applicant's rights of personal autonomy, it found the interference to be justified in the interest of protecting the weak and vulnerable, who were not able to take informed decisions against action intended to end life[32].

As far as the beginning of life is concerned, in the *Evans v. the United Kingdom* judgment of 10 April 2007, the applicant complained that the provisions of English law requiring the embryos to be destroyed once her former partner withdrew his consent to their continued storage violated the embryos' right to life, contrary to Article 2 of the Convention. Endors-

[29] ECtHR, *Ada Rossi and Others v. Italy*, decision (inadmissible) of 16 December 2008.

[30] ECtHR, *Pretty v. the United Kingdom*, judgment of 29 April 2002, § 39.

[31] *Ibid*., § 40.

[32] *Ibid*., § 74.

ing the reasons given by the Chamber in its judgment of 7 March 2006, "the Grand Chamber finds that the embryos (…) do not have a right to life within the meaning of Article 2, and that there has not, therefore, been a violation of that provision"[33]. This case also raised the question of consent to artificial insemination: "the Court finds that, in adopting in the 1990 Act a clear and principled rule, which was explained to the parties and clearly set out in the forms they both signed, whereby the consent of either party might be withdrawn at any stage up to the point of implantation of an embryo, the United Kingdom did not exceed the margin of appreciation afforded to it or upset the fair balance required under Article 8 of the Convention"[34].

The issue of the adequacy of the legal system in protecting the foetus which had been destroyed as a result of negligence by a doctor, was examined by the Court in the case of *Vo v. France*[35], the Court noting the sensitive problem of weighing up the various, and sometimes conflicting, rights and freedoms claimed by a woman, a mother or a father in relation to one another and vis-à-vis an unborn child.

In the case of *Tyşiac v. Poland*, it was the procedural guarantees offered to a woman seeking to enforce her right to a therapeutic abortion under domestic law which were at the heart of the case[36].

Article 3. Prohibition of torture and inhuman or degrading treatment

We know the strength of this provision is that it can produce the knock-on effect ("un effet par ricochet") of incorporating some other fields into the Convention. So this right may be used, indirectly, to deal with situations in which, with the turning away of people in despair (for instance, aliens), human dignity is at stake.

First of all, the new Court, at its very beginning, sent out a **strong message**. In the *Selmouni v. France* judgment of 28 July 1999, in the context of a torture complaint involving the police, the Court emphasised that: "certain acts which were classified in the past as 'inhuman and degrading treatment' as opposed to 'torture' could be classified differently in future. It takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies"[37].

[33] ECtHR (GC), *Evans v. the United Kingdom*, judgment of 10 April 2007, § 56.

[34] ECtHR, *Evans v. the United Kingdom*, judgment of 7 March 2006, § 69.

[35] ECtHR (GC), *Vo v. France*, judgment of 8 July 2004.

[36] ECtHR, *Tyşiac v. Poland*, judgment of 20 March 2007.

[37] ECtHR (GC), *Selmouni v. France*, judgment of 28 July 1999, § 101.

In my view, this provision plays an increasing role in all **detention situations** where people are **deprived of liberty**.

In cases involving **police custody**, an example of the "greater firmness" of the Court, is the *Sheydayev v. Russia* judgment of 7 December 2006, where the Court found that a situation where, during his stay in the police station the applicant was continuously beaten by up to five police officers who were trying to coerce him to confess to having committed an offence, amounted to torture[38].

However, since the Court decided for the first time, in the *V. and T. v. the United Kingdom* judgments of 16 December 1999, that "t]he question whether the purpose of the treatment was to humiliate or debase the victim is a further factor to be taken into account (…) but the absence of any such purpose cannot conclusively rule out a finding of a violation of Article 3"[39], it opens the door to addressing the treatments in **prison** which are objectively inhuman or degrading: overpopulation, size of cells, poor condition and facilities, sanitary and hygienic conditions, health, poverty, and so on. In my view, the leading case is the *Kudla v. Poland* judgment of 26 October 2000 where the Court held that: "under this provision the State must ensure that a person is detained in conditions which are compatible with respect for his *human dignity*, (…) and that, given the practical demands of imprisonment, his health and *well-being* are adequately secured (…)"[40].

And so, under Article 3 of the Convention, there were a number of cases concerning ill-treatment[41] and conditions of detention[42]. In several judgments, the Court concluded that the treatment to which the applicants had been subjected amounted to torture[43]. The problem of keeping in detention individuals who were in poor health, elderly or very frail, had been addressed in *Mouisel v. France*[44] and *Hénaf v. France*[45]. The *Farbtuhs v. Latvia* judgment of 2 December 2004 concerned an 83-year-old paraplegic convicted of crimes against humanity and genocide who had remained in prison for over a year after the prison authorities had acknowledged that they had neither the equipment nor the

[38] ECtHR, *Sheydayev v. Russia*, judgment of 7 December 2006. See also ECrtHR, *Ölmez v. Turkey*, judgment of 20 February 2007.

[39] ECtHR (GC), *V. v. the United Kingdom*, judgment of 16 December 1999 § 71 in fine; ECtHR (GC), *T. v. the United Kingdom*, judgment of 16 December 1999, § 69 *in fine*.

[40] ECtHR (GC), *Kudla v. Poland*, judgment of 26 October 2000, § 94.

[41] With regard to ill-treatment of detainees, see, for example, ECtHR, *Çolak and Filizer v. Turkey*, judgment of 8 January 2004, and ECrtHR, *Balogh v. Hungary*, judgment of 20 July 2004. See also ECtHR, *Martinez Sala and Others v. Spain*, judgment of 2 November 2004, in which the Court held that there had been a procedural violation but not a substantive violation. Several cases concerned ill-treatment during arrest: ECtHR, *R.L. and M.-J.D. v. France*, judgment of 19 May 2004; ECtHR, *Toteva v. Bulgaria*, judgment of 19 May 2004; ECrtHR, *Krastanov v. Bulgaria*, judgment of 30 September 2004; ECrtHR, *Barbu Anghelescu v. Romania*, judgment of 5 October 2004.

[42] See, for example, ECtHR, *Iorgov v. Bulgaria* and ECtHR, *B. v. Bulgaria*, judgments of 11 March 2004, concerning prisoners sentenced to death.

[43] See ECtHR, *Batı and Others v. Turkey*, judgment of 3 June 2004; ECtHR (GC), *Ilaşcu and Others v. Moldova and Russia*, judgment of 8 July 2004; ECtHR, *Bursuc v. Romania*, judgment of 12 October 2004; and ECtHR, *Abdülsamet Yaman v. Turkey*, judgment of 2 November 2004.

[44] ECtHR, *Mouisel v. France*, judgment of 14 November 2002. The case concerned a prisoner undergoing treatment for cancer. The Court found a violation of Article 3

[45] ECtHR, *Hénaf v. France*, judgment of 27 November 2003. The case concerned the conditions in which an elderly detainee was hospitalised. The Court found a violation of Article 3.

staff to provide appropriate care. Despite medical reports recommending release, the domestic courts had refused to order it. The European Court held that there had been a violation of Article 3. In the *Vincent v. France* judgment of 24 October 2006, the Court found a violation of Article 3 of the Convention concerning the conditions of detention of a **handicapped** prisoner.

The *Jalloh v. Germany* judgment of 11 July 2006 is of great interest as regards the problem of **forcible medical interventions**. The applicant (a drug-trafficker) claimed that he had been subjected to inhuman and degrading treatment as a result of having been forcibly administered emetics by police officers, the aim being not therapeutic but legal (to obtain evidence of a crime). The Court considers that "any recourse to a forcible medical intervention in order to obtain evidence of a crime must be convincingly justified on the facts of a particular case. This is especially true where the procedure is intended to retrieve from inside the individual's body real evidence of the very crime of which he is suspected. The particularly intrusive nature of such an act requires a strict scrutiny of all the surrounding circumstances. In this connection, due regard must be had to the seriousness of the offence at issue. The authorities must also demonstrate that they took into consideration alternative methods of recovering the evidence. Furthermore, the procedure must not entail any risk of lasting detriment to a suspect's health"[46]. In the present case, "the Court finds that the impugned measure attained the minimum level of severity required to bring it within the scope of Article 3. The authorities subjected the applicant to a grave interference with his physical and mental integrity against his will. They forced him to regurgitate, not for therapeutic reasons, but in order to retrieve evidence they could equally have obtained by less intrusive methods. The manner in which the impugned measure was carried out was liable to arouse in the applicant feelings of fear, anguish and inferiority that were capable of humiliating and debasing him. Furthermore, the procedure entailed risks to the applicant's health, not least because of the failure to obtain a proper anamnesis beforehand. Although this was not the intention, the measure was implemented in a way which caused the applicant both physical pain and mental suffering. He therefore has been subjected to inhuman and degrading treatment contrary to Article 3"[47].

Finally, the impetus of the right to health in prison, combined with the evolutive interpretation of Article 3 will raise new questions, particularly in terms of the dialogue which already exists between Article 3 and Articles 2 and 8 of the Convention. Thus, it may be asked whether application of the *Makaratzis*[48] case-law will enable the Court to conclude in future that there has been a violation of Article 2 in cases where the deterioration of a prisoner's health reaches such a stage that his or her survival is in doubt. Equally, the judg-

[46] ECtHR (GC), *Jalloh v. Germany*, judgment of 11 July 2006, § 71.

[47] *Ibid*., § 82.

[48] ECtHR (GC), *Makaratzis v. Greece*, judgment of 20 December 2004, § 49: the text of the Article, read as a whole, "demonstrates that it covers not only intentional killing but also the situations where it is permitted to "use force" which may result, as an unintended outcome, in the deprivation of life".

ments in *Jalloh v. Germany*[49] and *Wainwright v. the United Kingdom*[50] show the increasingly close interaction between Articles 3 and 8 of the Convention in respect of the individual's physical and psychological integrity. One can imagine that in the future the right to health in prison will move towards Articles 2 and 8 of the Convention. More generally, the question arises as to the extent to which the case-law's achievements in terms of the right to health in prison will, in years to come, influence other Convention provisions. In the future, will the European Court construct a simple "right to health" on the basis of the "right to health in prison"? Time will tell. What is certain is that "health" is already part of the Convention landscape, and will stay there.

Another field is **asylum and expulsion procedures** related to terrorism, among other things. . We are faced with the following paradox. It is obvious and widely accepted that terrorism in itself poses a threat to the enjoyment of some of the most fundamental human rights and values. In this respect, it is worth recalling that already in the *Ireland v. the United Kingdom* judgment of 18 January 1978, the Court pointed out that terrorist activities "are in clear disregard of human rights"[51]. The same is true in 2006: as J.-P. Costa recalls, "the Court has always considered terrorism as a flagrant violation of human rights"[52]. But the fight against terrorism, for its part, is also liable to erode a significant number of individual rights and freedoms. Some describe this paradox as the *direct* and *indirect* link between human rights and terrorism: the link is seen directly when terrorists kill or injure innocent civilians, deprive them of their freedom and damage their property or jeopardize collective goods such as national security and public order; the link is seen indirectly when a State's response to terrorism leads to the adoption of policies and practices that could undermine fundamental rights[53]. It follows that States are confronted with a *dual responsibility* under the European Convention on Human Rights. On the one hand, they are under the obligation to combat terrorism effectively; on the other hand, they are under the obligation to respect human rights in the enforcement of anti- or counter-terrorism measures[54]. This is the gist of the *Saadi v. Italy* judgment of 28 February 2008: while the United Kingdom, which had exercised its right to intervene as third-

[49] ECtHR (GC), *Jalloh v. Germany*, judgment of 11 July 2006.

[50] ECtHR, *Wainwright v. the United Kingdom*, judgment of 26 September 2006. The case concerns searches of prison visitors in which they were not touched by prison staff. The Court preferred to apply Article 8 rather than Article 3, on the ground that there had been no physical contact between the staff and the applicants. The judgment implies that an infringement of physical and/or psychological integrity which does not attain the minimum threshold to entail a violation of Article 3 will give rise to the application of Article 8. Thus, Article 8 "serves as a substitute for Article 3" (see F. Sudre, « Droit de la Convention européenne des droits de l'homme », *La Semaine juridique*, no. 4 (2007), p. 21).

[51] ECtHR, I*reland v. the United Kingdom* judgment of 18 January 1978, § 149.

[52] J.-P. Costa, "Placing human rights at the centre of the fight against terrorism – The viewpoint of a judge at the European Court of Human Rights", in Directorate General of Human Rights, *Proceedings of the high level seminar "Protecting human rights while fighting terrorism" (Strasbourg, 13-14 June 2005)*, Strasbourg, Council of Europe, 2006, p. 28.

[53] S. Sottiaux, *Terrorism and the Limitations of Rights. The European Convention on Human Rights and the United States Constitution*, Hart Publishing, Oxford-Portland, 2008, p. 2.

[54] See O. De Schutter and Fr. Tulkens, "Rights in Conflict: the European Court of Human Rights as a Pragmatic Institution", *op. cit.*, pp. 184-186.

party, was urging the Court to abandon the *Chahal* case-law, the Court (Grand Chamber) unanimously reaffirmed that the expulsion of the applicant, suspected but not convicted of terrorist activities, to Tunisia, where he faces a substantive risk of being subjected to torture, would constitute a violation of Article 3.

Article 4. Prohibition of slavery and forced labour

In the landmark *Siliadin v. France* judgment of 26 July 2005, the Court for the first time applied this provision in a situation of domestic servitude – a young Togolese woman employed by a French couple in a situation that, in the Court's eyes, amounted to servitude (she worked in their house for about fifteen hours each day, without a day off, for several years, without being paid, with no identity papers and immigration status). In this case, the Court confirms that States have positive obligations to adopt a criminal legislation that penalises the practices prohibited by Article 4 and to apply it in practice – this means effective prosecutions. A decisive factor was that neither slavery nor servitude were classified as offences as such under French criminal law.

Article 5. Right to liberty and security

In the case of *Gusinskiy v. Russia*[55], the Court found not only a violation of Article 5 of the Convention but also a violation of Article 18 of the Convention, which provides that the **restrictions** permitted under the Convention "shall not be applied for any purpose other than those for which they have been prescribed". An agreement which had been signed by an Acting Minister linked the dropping of certain charges against the applicant to the sale of his media company to a State-controlled company. The Court pointed out that "it is not the purpose of such public law matters as criminal proceedings and detention on remand to be used as part of commercial bargaining strategies" and found that the proposal for the agreement while the applicant was in detention strongly suggested that the prosecution was being used to intimidate him. Thus, although the detention was for the purpose of bringing the applicant before a competent court under Article 5 § 1 (c), it was also applied for other reasons.

Concerning the specific situation of **psychiatric detention** (Art. 5 § 1), the *Storck v. Germany* judgment of 16 June 2005 is a leading case. At her father's request, the applicant was confined in a locked ward at a private psychiatric institution, for more than twenty months. Noting that the applicant, who had attained the age of majority at the time of the acts, had not been placed under guardianship, had neither consented to her stay in the clinic nor to her medical treatment and had been brought back to the clinic by force by the police

[55] ECtHR, *Gusinskiy v. Russia*, judgment of 19 May 2004.

after she had attempted to escape, the Court concludes, given the circumstances of this case, that the applicant was deprived of her liberty within the meaning of Article 5 § 1[56]. The major contribution of this judgment is the extension of the scope of application of positive obligations to the right to liberty and security and meeting the necessity of providing an effective and complete protection of personal liberty in a democratic society. The national authorities thus bear the obligation to take positive measures in order to ensure the protection of vulnerable people and, in particular, to prevent deprivation of liberty of someone who would have had or should have had knowledge of the situation. Moreover, by the interplay of the "horizontal effect", such an obligation applies also when interferences with an individual's right to liberty are the result of acts by private persons, such as in the present case. The Court, furthermore, considers that, in the field of health as in that of education, the State Party cannot absolve itself of its responsibility by delegating its obligations in this sphere to private bodies or individuals but remains under a duty to exercise supervision and control over the latter.

Article 6. Right to a fair trial

Today, the main question is perhaps the **applicability** of Article 6 concerning the determination, on the one hand, of civil rights and obligations and, on the other hand, of any criminal charges. The case-law of the Court is experiencing an evolution in this respect.

As far as *criminal charges* are concerned, two recent different decisions are worth quoting. In the *Dogmoch v. Germany* decision of 8 September 2006, concerning the freezing of assets, the Court noted that the attachment order was a provisional measure taken in the context of criminal investigations and primarily aimed at safeguarding claims which might later on be brought out by aggrieved third parties. If such claims did not exist, the order could, furthermore, safeguard the later forfeiture of the assets. Such forfeiture would, however, have to be determined in separate proceedings following a criminal conviction. There was no indication that the attachment order as such had had any impact on the applicant's criminal record. In these circumstances, the impugned decisions as such could not be regarded as a "determination of a criminal charge" against the applicant. Therefore, Article 6 § 1 under its criminal head did not apply[57].

By comparison, the admissiblity decision *Matyjek v. Poland* of 30 May 2006 is an original one since the Court decided that Article 6 was applicable to a lustration procedure. In the present case, this procedure aims only at punishing those who have failed to comply with the obligation to disclose to the public their past collaboration with the communist-era secret services. As regards the degree of severity of the penalty, the Court notes that

[56] ECtHR, *Storck v. Germany*, judgment of 16 June 2005, §§ 76-77.

[57] ECtHR, *Dogmoch v. Germany,* decision of 8 September 2006, p. 7.

a judgment finding a lie in the lustration procedure leads to the dismissal of the person subject to lustration from the public function exercised by him or her and prevents this person from applying for a large number of public posts for a period of ten years. "It is true that neither imprisonment nor a fine can be imposed on someone who has been found to have submitted a false declaration. Nevertheless, the Court notes that the prohibition on practising certain professions (political or legal) for a long period of time may have a very serious impact on a person, depriving him or her of the possibility of continuing professional life. This may be well deserved, having regard to the historical context in Poland, but it does not alter the assessment of the seriousness of the imposed sanction. This sanction should thus be regarded as having at least partly punitive and deterrent character"[58].

The Ezeh and *Connors v. the United Kingdom* judgment of 9 October 2003 paved the way, in many countries, for the guarantees of the due process in disciplinary proceedings in prison. The *Ganci v. Italy* jugdment of 30 October 2003 completed the movement by extending the application of Article 6 to disputes over restrictions imposed on a prisoner, as some of them clearly fell within the scope of civil rights and obligations[59].

As to *civil rights and obligations*, concerning the applicability of Article 6 to **civil servants**, the *Vilho Eskelinen and Others v. Finland* judgment of the Grand Chamber of 19 April 2007 is of high importance since the Court "finds that the functional criterion adopted in the case of *Pellegrin* must be further developed. While it is in the interests of legal certainty, foreseeability and equality before the law that the Court should not depart, without good reason, from precedents laid down in previous cases, a failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement"[60]. Now, the Court held that "there will, in effect, be a presumption that Article 6 applies. It will be for the respondent Government to demonstrate, first, that a civil-servant applicant does not have a right of access to a court under national law and, second, that the exclusion of the rights under Article 6 for the civil servant is justified"[61].

Turning now to the **guarantees** of Article 6, particularly the principle of due hearing of the parties ("le principe du contradictoire"), videoconference is becoming a sensitive issue, notably in large countries, where considerable distances separate the courts and tribunals. The *Marcello Viola v. Italy* judgment of 5 October 2006 is the leading judgment today. If the accused's participation at the hearing by videoconference is not, in itself, in breach of the Convention, it is up to the Court to ensure that its use, in each individual case, pursues a legitimate aim, and that the arrangements for the conduct of the pro-

[58] ECtHR, *Matyjek v. Poland*, decision of 30 May 2006, § 55.

[59] ECtHR, *Ganci v. Italy*, judgment of 30 October 2003, § 25.

[60] ECtHR (GC), *Vilho Eskelinen and Others v. Finland*, judgment of 19 April 2007, § 56.

[61] *Ibid.*, § 62 *in fine*.

ceedings respect the rights of the defence as set out in Article 6 of the Convention[62]. Furthermore, the Svarc and *Kavnik v. Slovenia* judgment of 8 February 2007 is interesting since the Court held that there had been a violation of Article 6 § 1 of the Convention as regards the impartiality of the Constitutional Court finding that a judge's previous involvement in the first-instance proceedings, albeit in a quite different role as a professional expert, put in doubt the impartiality of the tribunal. But maybe the most important judgment is *Salduz v. Turkey* of 27 November 2008 (Grand Chamber) concerning legal assistance in police custody.

Article 7. No punishment without law

As regards Article 7 of the Convention, and particularly Article 7 § 2, the *Kolk and Kislyiy v. Estonia* decision of 17 January 2006 is worth quoting. The Court held that the punishment of two persons in 2003 in Estonia for the deportation of civilians to the Soviet Union in 1949 classified as a crime against humanity was not contrary to the principle of non retroactivity of criminal law. According to the Court, in 1949, crimes against humanity were already proscribed and criminalized; responsibility for such crimes could not be limited only to the nationals of certain countries and solely to acts committed within the specific time frame of the Second World War.

The *Scoppola v. Italy* judgment of 17 September 2009 is a recent example of a reversal of the case-law. It concerns the "retroactivity in mitius". The Court observed "that since the *X v. Germany* decision a consensus has gradually emerged in Europe and internationally around the view that application of a criminal law providing for a more lenient penalty, even one enacted after the commission of the offence, has become a fundamental principle of criminal law. (…) Admittedly, Article 7 of the Convention does not expressly mention an obligation for Contracting States to grant an accused the benefit of a change in the law subsequent to the commission of the offence. It was precisely on the basis of that argument relating to the wording of the Convention that the Commission rejected the applicant's complaint in the case of *X v. Germany*. However, taking into account the developments mentioned above, the Court cannot regard that argument as decisive. Moreover, it observes that in prohibiting the imposition of "a heavier penalty (...) than the one that was applicable at the time the criminal offence was committed", paragraph 1 *in fine* of Article 7 does not exclude granting the accused the benefit of a more lenient sentence, prescribed by legislation subsequent to the offence. (…) In the light of the foregoing considerations, the Court takes the view that it is necessary to depart from the case-law established by the Commission in the case of *X v. Germany* and affirm that Article 7 § 1 of the Convention guarantees not only the principle of non-retrospectiveness of more stringent criminal laws but also, and implicitly, the principle of retrospectiveness of the more lenient criminal law.

[62] ECtHR, *Marcello Viola v. Italy*, judgment of 5 October 2006, § 67.

That principle is embodied in the rule that where there are differences between the criminal law in force at the time of the commission of the offence and subsequent criminal laws enacted before a final judgment is rendered, the courts must apply the law whose provisions are most favourable to the defendant"[63].

Article 8. Right to respect for private and family life

This right has thrown up complex problems of a social and ethical nature.

Several novel issues arose in judgments dealing with the right to respect for *private life*.

With regard to the right to *personal integrity*, certainly our Court has been confronted with problems in the field of medical law and practice which have involved those key concepts – the dignity and distinct identity of all human beings; respect for the physical and moral integrity of every person; and the fundamental requirement of free and informed consent to any medical intervention. The case of *Glass v. the United Kingdom*[64] is an example, raising as it did the question under Article 8 of the Convention of the circumstances in which a hospital could impose medical treatment on a child or withhold that treatment in the sense of deciding not to resuscitate the child in defiance of the objections of his parents.

With regard to *personal identity*, the *Pretty* judgment is remarkable in the sense that it has for the first time and very explicitly emphasised *personal autonomy*. "Although no previous case has established as such any right to self-determination as being contained in Article 8 of the Convention, the Court considers that the notion of personal autonomy is an important principle underlying the interpretation of its guarantees"[65]. Since "[t]he applicant in this case is prevented by law from exercising her choice to avoid what she considers will be an undignified and distressing end to her life", the Court "is not prepared to exclude that this constitutes an interference with her right to respect for private life as guaranteed under Article 8 § 1 of the Convention"[66]. It remains however to be established "whether this interference conforms with the requirements of the second paragraph of Article 8"[67], which was the case.

Furthermore, today the right to identity extends to the right to *access to information about one's personal origins* and to *know of one's filiation*, as an element of the right to *self-fulfilment and personal development*. In the *Odièvre v. France* judgment of 13 February

[63] ECtHR (GC), *Scoppola v. Italy (no.2)*, judgment of 17 September 2009, §§ 106, 107 and 109.

[64] ECtHR, *Glass v. the United Kingdom*, judgment of 9 March 2004.

[65] ECtHR, *Pretty v. the United Kingdom*, judgment of 29 April 2002, § 61 in fine.

[66] *Ibid*., § 67.

[67] *Ibid*., § 67 in fine.

2003, which concerns the issue of "births by an unidentified person" (*accouchement sous X*), the Court considers that "birth, and in particular the circumstances in which a child is born, forms part of a child's, and subsequently the adult's, private life guaranteed by Article 8 of the Convention. That provision is therefore applicable in [this] case"[68].

This judgment will pave the way for others, where the Court will take into account or, more exactly, give effect to the technological developments in this field and, in particular, to DNA tests. In the *Jäggi v. Switzerland* judgment of 13 July 2006, for instance, the applicant complained that he had been unable to have a DNA test carried out on a deceased person with the aim of establishing whether that person was his biological father. The Court recalls that the right to identity, of which the right to know one's ancestry is an important aspect, is an integral part of the notion of private life[69]. It further notes that an individual's interest in discovering his parentage does not disappear with age, on the contrary[70]. In this case, as regards the respect of private life of the deceased person, the Court refers to its case-law in *The Estate of Kresten Filtenborg Mortensen v. Denmark* decision of 15 May 2006, where it observed that the private life of a deceased person from whom it was proposed to take a DNA sample could not be impaired by such a request since it was made after his death[71]. Lastly, it noted that the protection of legal certainty alone could not suffice as grounds to deprive the applicant of the right to discover his parentage[72]. Conversely, the right to identity in the field of filiation extends also to the right to rebut the *presumption of paternity*. So, in the *Mizzi v. Malta* judgment of 12 January 2006, the Court considers that "the potential interest of Y in enjoying the 'social reality' ("possession d'état") of being the daughter of the applicant cannot outweigh the latter's legitimate right to have at least the opportunity to deny paternity of a child who, according to scientific evidence, was not his own"[73]. The Court adopts the same position in the *Paulik v. Slovakia* judgment of 10 October 2006 as well as in the *Tavlic v. Turkey* judgment of 9 November 2006.

As far as *personal intimacy* is concerned, while recently considering the compatibility with Article 8 of the retention by the police of cellular samples of persons charged with but acquitted of crimes, when finding a violation of the Convention the Court emphasised the legitimate concerns about the potential use of those samples, containing as they do a unique genetic code of a vital relevance to the individual[74].

On a more general level, in the field of bioethics, despite the obvious and growing importance of the subject in the context of the protection of fundamental human rights, it is

[68] ECtHR (GC), *Odièvre v. France*, judgment of 13 February 2003, § 29.

[69] ECtHR, *Jäggi v. Switzerland*, judgment of 13 July 2006, § 37.

[70] *Ibid*., § 40.

[71] *Ibid.*, § 42.

[72] *Ibid*., § 43.

[73] ECtHR, *Mizzi v. Malta*, judgment of 12 January 2006, § 112.

[74] ECtHR (GC), *S. and Marper v. the United Kingdom* judgment of 4 December 2008, § 72.

a surprising fact that of the many thousands of applications which are lodged every year with the European Court of Human Rights, very few touch on the subject of bioethics. In fact, the cases before the Court, with one possible exception, do not touch on what many would see as being the core of the bioethical problems envisaged in the Oviedo Convention and its accompanying Protocols, namely the use and misuse of scientific developments in biology and medecine and, in particular, human genetic testing, cloning, organ and tissue transplantation and biomedical research including research on foetuses and embryos. Nor has the Court ever been requested to give an advisory opinion on the Article 29 of the landmark Oviedo Convention on Human Rights and Biomedecine which itself dates back more than ten years, and this despite the close kinship with the Human Rights Convention from which it borrowed several key concepts and terms with the aim of preserving the coherence of the European legal system.

Lastly, as regards *personal privacy*, the Court applied the new concept of personal autonomy in the *K.A. & A.D. v. Belgium* judgment of 17 February 2005 concerning sadomasochistic practices. The right to engage in sexual relations derived from the right of autonomy over one's own body, an integral part of the notion of personal autonomy, which could be construed in the sense of the right to make choices about one's own body. It followed that the criminal law could not in principle be applied in the case of consensual sexual practices, which were a matter of individual free will. Accordingly, there had to be "particularly serious reasons" for an interference by the public authorities in matters of sexuality to be justified for the purposes of Article 8 § 2 of the Convention[75]. Nonetheless, in the present case, the Court considered that on account of the nature of the acts in question, the applicants' conviction did not appear to have constituted disproportionate interference with their right to respect for their private life. Although individuals could claim the right to engage in sexual practices as freely as possible, the need to respect the wishes of the "victims" of such practices – whose own right to free choice in expressing their sexuality likewise had to be safeguarded – placed a limit on that freedom. However, no such respect had been shown in the present case[76].

As far as **family life** is concerned, the particular disputes continue to be the same: prisoners and their family life in prison; children's placement measures in cases of divorce and separation or of intervention by social services; the entry, residence and expulsion of foreigners[77].

[75] ECtHR, *K.A. & A.D. v. Belgium*, judgment of 17 February 2005, § 84.

[76] *Ibid.,* § 85.

[77] See Fr. Tulkens, "Migrants and their right to a family and private life under Article 8 of the European Convention on Human Rights", *Athens Bar Journal*, Special issue on the occasion of the 50th anniversary of the European Court of Human Rights, forthcoming.

Article 9. Freedom of thought, conscience and religion

I prefer not to comment on the *Leyla Sahin v. Turkey* judgment of 10 November 2005[78] (where the applicant complained under Article 9 that she had been prohibited from wearing the Islamic headscarf at university), with due respect, since I wrote a dissenting opinion in this case.

Article 10. Freedom of expression

Freedom of expression has a fundamental significance for the well-functioning of the democratic process. According to the Court's well-established case-law, freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress[79]. This affirmation of the social function of freedom of expression has two consequences: freedom of expression is not only a subjective right against the State, it is also an objective fundamental principle for life in a democracy; freedom of expression is not an end in itself but a means for the establishment of a democratic society. But, even in democratic societies – indeed, I might say above all in democratic societies – freedom of expression, as enshrined in Article 10 of the Convention, is liable to be affected by certain limitations: those laid down in Article 10, paragraph 2 of the Convention but these *limitations* should be *strictly construed.*

I will refer to three specific situations.

Investigative journalism. Here a sensitive question is the protection of journalists' sources. In the judgment *Roemen and Schmit v. Luxemburg* of 25 February 2003, the Court recalls that "the protection of journalistic sources is one of the cornerstones of freedom of the press. Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society, an interference cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest"[80].

In the *Nordisk Film & TV A/S v. Denmark* inadmissibility decision of 8 December 2005, the applicant company complained that the Supreme Court's decision of 29 August 2002, which compelled it to hand over to the public prosecution service unpublished programme material – relating to alleged paedophiles' activities in Denmark and India –, breached its

[78] ECtHR (GC), *Leyla Sahin v. Turkey*, judgment of 10 November 2005

[79] ECtHR, *Handyside v. the United Kingdom* judgment of 7 December 1976, § 49; ECtHR, *United Communist Party of Turkey and Others v. Turkey* judgment of 30 January 1998, § 45; ECtHR, *Özgür Gündem v. Turkey* judgment of 16 March 2000, § 57.

[80] ECtHR, *Roemen and Schmit v. Luxemburg* judgment of 25 February 2003, § 46.

rights under Article 10 of the Convention. "In the Court's opinion, however, there is a difference between the case before it and previous case-law. In [this] case, (…) the journalist JB worked undercover [and] the people talking to him were unaware that he was a journalist. Also, owing to the use of a hidden camera, the participants were unaware that they were being recorded. (…). Consequently, those participants cannot be regarded as sources of journalistic information in the traditional sense (…). Seen in this light, the applicant company was not ordered to disclose its journalistic source of information. Rather, it was ordered to hand over part of its own research material. The Court does not dispute that Article 10 of the Convention may be applicable in such a situation and that a compulsory hand over of research material may have a chilling effect on the exercise of journalistic freedom of expression (…). However, (…) [t]he Court is not convinced that *the degree of protection* under Article 10 of the Convention to be applied in a situation like the present one can reach the same level as that afforded to journalists, when it comes to their right to keep their sources confidential, notably because the latter protection is two fold, relating not only to the journalist, but also and in particular to the source who volunteers to assist the press in informing the public about matters of public interest (…)"[81].

Anti-democratic expression. In this respect, for instance in the *Erbakan v. Turkey* judgment of 6 July 2006, the Court stated that there is "no doubt that actual expressions amounting to a discourse of hatred do not enjoy the protection of Article 10 of the Convention"[82] and "it is of crucial importance for politicians to avoid disseminating statements likely to feed intolerance in their public discourse"[83]. Conversely, in the *Gündüz v. Turkey* judgment of 4 December 2003 the Court took the view that the violently critical statements about "infidels" and secularism could not amount to a discourse of hatred in the circumstances of the case – a televised debate on the role of religion in society[84].

Issues under Article 10 have often arisen out of **defamation cases** and some recent judgments involved balancing freedom of expression with the right to protection of reputation. *Cumpănă and Mazăre v. Romania*[85] was particularly interesting in that respect. It involved the criminal conviction of a journalist and an editor for defaming two public figures by imputing wrong-doing to them, in words and in a cartoon. On the substance of the question of the justification for the interference with the right to freedom of expression, the Court found that the domestic courts had given relevant and sufficient reasons for the convictions, which corresponded to a "pressing social need", since the applicants had made serious allegations of activity amounting to a criminal offence, for which they had been unable to provide any sufficient factual basis in the court proceedings. However, it nevertheless found that there had been a violation of Article 10, on account of *the severity of the penal-*

[81] ECtHR, *Nordisk Film & TV A/S v. Denmark*, decision (inadmissible) of 8 December 2005, p. 11.

[82] ECtHR, *Erbakan v. Turkey* judgment of 6 July 2006, §§ 56 and 57.

[83] *Ibid.*, § 64.

[84] ECtHR, *Gündüz v. Turkey* judgment of 4 December 2003, § 51.

[85] ECtHR (GC), *Cumpănă and Mazăre v. Romania*, judgment of 17 December 2004.

ties imposed, namely seven months' imprisonment, temporary prohibition on the exercise of certain civic rights and a prohibition on working as journalists for one year, in addition to payment of damages to the plaintiffs. Although the applicants had not served their sentences, having been pardoned by the President, and had continued to work as journalists, the Court made it clear that both these penalties were quite inappropriate in pursuing the legitimate aim of protecting the reputation of others, given the inhibiting effect which they would have on the role of the press.

Article 11. Freedom of assembly and association

In the case of *Baczkowski & Others v. Poland*, which was declared admissible on 5 December 2006, the applicants, a group of individuals, asked Warsaw Town Hall for permission to organise a march in the framework of Equality Days. The request was refused due to lack of technical details submitted when making the request. They claim the refusal was unjustified and that they were treated in a discriminatory manner due to their homosexuality. In its judgment of 3 May 2007, the Court concluded that it could be reasonably surmised that the Mayors opinions affected the decision-making process and, as a result, infringed the applicant's right to freedom of assembly in a discriminatory manner. Accordingly, the Court was of the view that there had been a violation of Article 14 in conjunction with Article 11[86].

In the *Sørensen and Rasmussen v. Denmark* judgment of 11 January 2006, the applicants had been obliged to join a union and they claimed that this obligation was striking at the very substance of their negative right not to be forced to join an association. The Court expressly refers to Article 12 of the Charter of Fundamental Rights of the European Union[87].

Article 12. Right to marry

Here I have to quote the *Grant v. the United Kingdom* judgment of 23 May 2006, which is a follow-up to the *Christine Goodwin* and *I. v. the United Kingdom* judgments of 11 July 2002[88]. The applicant, a male-to-female transsexual complains of the ongoing failure of the United Kingdom government to enact legislation guaranteeing legal recognition of a transsexual's acquired gender. Her complaint centred on not being eligible for a pension at age 60.

[86] ECtHR, *Baczkowski & Others v. Poland*, judgment of 3 May 2007, § 100.

[87] ECtHR (GC), *Sørensen et Rasmussen v. Denmark*, judgment of 11 January 2006, § 74.

[88] ECtHR, *Grant v. the United Kingdom*, judgment of 23 May 2006; ECtHR (GC), *Christine Goodwin v. the United Kingdom* and *I. v. the United Kingdom*, judgments of 11 July 2002.

Article 13. Right to an effective remedy

Giving direct expression to the States' obligation to protect human rights first and foremost within their own legal system, Article 13 establishes an additional guarantee for an individual in order to ensure that he or she effectively enjoys those rights. The object of Article 13 is to provide a means whereby individuals can obtain relief at national level for violations of their Convention rights before having to set in motion the international machinery of complaint before the Court. This provision was revived by the *Kudła v. Poland* judgment of 26 October 2000[89]. This judgment thus gives Article 13 its rightful, prominent place in the Convention system. It is, in my view, a line entirely consistent with the fundamental aim of the Convention, namely to strengthen human rights protection at national level. It is also essential for the survival of the Convention and its enforcement machinery that wherever possible Convention issues be "repatriated" to the national authorities. I do therefore think that *Kudła* points to the future, with the Court being prepared to take a more expansive approach in respect of Article 13.

Article 14. Prohibition of discrimination

With so many judgments, it is exceedingly difficult to make a selection; there are many others which merit attention. Let me just mention one final case because again it seemed to take the Court's case-law in a slightly new direction. This is the case of T*hlimmenos v. Greece*, where the Court accepted for the first time explicitly that the guarantee under Article 14 prohibiting discrimination in the enjoyment of the rights and freedoms enshrined in the Convention encompassed not only treating similarly people in similar situations but also treating people in significantly different situations differently. In that case a Jehovah's witness had been denied access to the profession of chartered accountant because of a previous criminal conviction. His conviction had resulted from his refusal to wear a uniform as being contrary to his religious beliefs. The Court considered that a conviction for refusing to wear a military uniform on religious or philosophical grounds could not imply any dishonesty or moral turpitude likely to undermine the offender's ability to exercise the profession of chartered accountant. There was no objective and reasonable justification for not treating the applicant differently from other persons convicted of a felony and consequently the State should have introduced appropriate exceptions to the rule barring persons convicted of a felony from the profession[90].

The *Nachova and Others v. Bulgaria* judgment of 6 July 2005 is the first in which the Court joined Article 2, under its procedural limb, with Article 14, in a case concerning a so-called hate crime. "The Grand Chamber considers (…) that any evidence of racist

[89] ECtHR (GC), *Kudla v. Poland*, judgment of 26 October 2000.

[90] ECtHR (GC), *Thlimmenos v. Greece*, judgment of 6 April 2000, §§ 47-48.

verbal abuse being uttered by law enforcement agents in connection with an operation involving the use of force against persons from an ethnic or other minority is highly relevant to the question whether or not unlawful, hatred-induced violence has taken place. Where such evidence comes to light in the investigation, it must be verified and – if confirmed – a thorough examination of all the facts should be undertaken in order to uncover any possible racist motives"[91]. Here, the Court finds "that the authorities failed in their duty under Article 14 of the Convention taken together with Article 2 to take all possible steps to investigate whether or not discrimination may have played a role in the events"[92]. Furthermore, as far as racism is concerned, the Court set out the nature of its requirements in a formula of principle: "Racial violence is a particular affront to human dignity and (…) requires from the authorities special vigilance and a vigorous reaction. It is for this reason that the authorities must use all available means to combat racism and racist violence, thereby reinforcing democracy's vision of a society in which diversity is not perceived as a threat but as a source of its enrichment"[93]. I can also see another advantage in this judgment – and it is useful to note that its reasoning has been adopted since[94] – that of opening up Article 14 to the positive obligations, long recognised by the Court, which require States to take measures, in particular preventive measures, to ensure that the rights guaranteed by the Convention are upheld, up to and including in relations between private individuals, a frequently occurring situation in racism. There is potential here that could be exploited in combating racism.

In the *Timishev v. Russia* judgment of 13 December 2005 concerning a provision in the Republic of Kabardino-Balkaria preventing Chechens from obtaining a residence permit, the Court found that Article 2 of Protocol No. 4 on freedom of movement combined with Article 14 had been violated and delivered a strong message. It stated that "no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures"[95]. In this way, the Court has in a sense placed racial discrimination outside the framework of ordinary evaluation of discrimination cases in which by tradition a difference in treatment between comparable situations can be objectively justified when it involves a proportionate measure serving a legitimate purpose. Rather than a suspect criterion, racial discrimination now becomes an excluded criterion[96].

[91] ECtHR (GC), *Nachova and Others v. Bulgaria*, judgment of 6 July 2005, § 164.

[92] *Ibid.,* § 168.

[93] *Ibid.,* § 145.

[94] ECtHR, *Bekos and Koutropoulos v. Greece*, judgment of 13 December 2005; ECtHR, *Ognyanova and Choban v. Bulgaria*, judgment of 23 February 2006.

[95] ECtHR, *Timishev v. Russia*, judgment of 13 December 2005, § 58. See also ECtHR, *Sečić v. Croatia*, judgment of 31 May 2007.

[96] S. Van Drooghenbroeck, *La Convention européenne des droits de l'homme. Trois années de jurisprudence de la Cour européenne des droits de l'homme, 2002-2004, Volume 2, Articles 7 à 59 de la Convention. Protocoles additionnels*, Brussels, Larcier, Les dossiers du Journal des tribunaux, No. 57, 2006, p. 131, No. 483.

In all these judgments the Court has established a clear link between combating racism and the furtherance of a vision of society based on respect for diversity. Starting from the principle that "racial discrimination is a particularly odious form of discrimination"[97] and that "racial violence is a particular affront to human dignity"[98] it clearly states that in view of its perilous consequences it "requires from the authorities special vigilance and a vigorous reaction"[99].

Furthermore, geared towards securing a better recognition of equality, the 12th Protocol to the European Convention on Human Rights, opened to the signature of the States, in Rome, in November 2000, on the occasion of the anniversary of the Convention, is in itself symbolic. This new protocol contains a general equality and non-discrimination clause. It came into force on 1st April 2005 and now applies for the 17 countries which have ratified it.

Article 17. Prohibition of abuse of rights

Saint-Just proclaimed "no freedom for the enemies of freedom", or again, to take up the comment by J. Rawls, "justice does not require that men must stand idly by while others destroy the basis of their existence"[100]. In this respect, Article 17 is aimed at "withdrawing from those who wish to use the Convention's guarantees the benefit of those rights because their aim is to challenge the values that the Convention is protecting".

The Court has given its opinion on the dangers that threaten democracy. Here I am thinking about decisions and judgments in which the protection of the Convention has been refused, in matters such as racist, negationist or revisionist speeches, or appeals to uprising or violence. In a couple of cases the Court applied Article 17 of the Convention, finding that the applicants could not rely on, respectively, Articles 10 and 11.

The Court used Article 17 boldly for the first time in the inadmissibility decision of 24 June 2003 in *Garaudy v. France*[101]. Where the French philosopher (formerly with Marxist leanings) had made revisionist statements, the Court took the view that the applicant was using "his right to freedom of expression for ends which are contrary to the text and spirit of the Convention". In the *Norwood v. the United Kingdom* decision of 16 November 2004, in which the applicant complained that he had been compelled to remove from his window a flag with the words "Islam out of Britain" inscribed on it, the Court applied Article 17 for the first time in a case of anti-Muslim racism. The *W.P.* and *Others v. Poland* inadmissibil-

[97] ECtHR, *Timishev v. Russia*, judgment of 13 December 2005. § 56.

[98] ECtHR (GC), *Nachova and Others v. Bulgaria*, judgment of 6 July 2005, § 145.

[99] ECtHR, *Timishev v. Russia*, judgment of 13 December 2005, § 56; ECtHR (GC), *Nachova and Others v. Bulgaria*, judgment of 6 July 2005, § 145.

[100] J. Rawls, *A Theory of Justice*, Oxford, Oxford University Press, 1971, p. 218.

[101] *Garaudy v. France,* 24 June 2003, D., 2004, p. 239, note by D. Roets; *Rev. trim. dr. h.,* 2004, p. 653, obs. M. Levinet.

ity decision of 2 September 2004 concerned a prohibition on the formation of associations with anti-Semitic objectives[102].

Article 2 of Protocol no. 1. Right to education

In the Leyla *Sahin v. Turkey* judgment of 10 November 2005, the Court confirms that this provision is applicable to higher and university education. The judgment rightly points out that "there is no watertight division separating higher education from other forms of education" and joins the Council of Europe in reiterating "the key role and importance of higher education in the promotion of human rights and fundamental freedoms and the strengthening of democracy"[103]. Moreover, since the right to education means a right for everyone to benefit from educational facilities, the Grand Chamber notes that a State which has set up higher-education institutions "will be under an obligation to afford an effective right of access to [such facilities]", without discrimination[104].

Article 3 of Protocol no. 1. Right to free elections

The *Hirst (no. 2) v. the United Kingdom* judgment of 6 October 2005, where the Court addressed the question of the right of convicted prisoners to vote, is in my view of particular importance since the Court very clearly recalls that: "[i]t is well established that prisoners do not forfeit their Convention rights following conviction and sentence and continue to enjoy all the fundamental rights and freedoms guaranteed under the Convention, save for the right to liberty (...)"[105].

2. EQUALITY RIGHTS

Rights and freedoms are not exercised in a vacuum. They necessarily relate to a particular person in a particular situation within a community, a player ("un acteur") in the social relations through which he establishes or destroys his identity, through which he lives or merely subsists. Education, health, employment protection, housing, work, and culture all become right entitlements that require action or intervention if the necessary conditions for their fulfilment are to be created. As A.

[102] ECtHR, *W.P. and Others v. Poland*, decision (inadmissible) of 2 September 2004.

[103] ECtHR (GC), *Leyla Sahin v. Turkey*, judgment of 10 November 2005, § 136.

[104] *Ibid.,* § 137.

[105] ECtHR (GC), *Hirst (no. 2) v. the United Kingdom*, judgment of 6 October 2005, § 69.

Touraine has said: "the recognition of fundamental rights would be devoid of substance unless it helped to provide security for everyone and continually enlarged the domain of legal guarantees and State intervention that protect the weakest"[106]. That is precisely why at times talk about human rights becomes intolerable, if not insulting, for some.

As the European Court of Human Rights has often stated, it is important to give the rights their full scope since the Convention is a living instrument whose interpretation forms one body with the text and whose aim is to "guarantee rights that are not theoretical or illusory, but practical and effective". In other words, the rights enshrined in the Convention cannot remain purely theoretical or virtual because "the Convention must be interpreted and applied in such a way as to guarantee rights that are practical and effective". In the famous *Airey v. Ireland* judgment of 9 October 1979 (which concerned a woman's inability, through lack of funds, to seek a divorce), the Court acknowledged that there was no water-tight division separating the sphere of economic and social rights from the field of rights covered by the Convention and that "hindrance in fact can contravene the Convention just like a legal impediment".

Thus, some judgments of the European Court of Human Rights can be analyzed as going into the field of social rights. As regards the **right to have a home ("droit au logement")**, the *Hutten-Czapska v. Poland* judgment of 19 June 2006 occurs in the framework of a rent freezing policy and it is worth quoting. "It is true that (…) the Polish State, which inherited from the communist regime the acute shortage of flats available for lease at an affordable level of rent, had to balance the exceptionally difficult and socially sensitive issues involved in reconciling the conflicting interests of landlords and tenants. *It had, on the one hand, to secure the protection of the property rights of the former and, on the other, to respect the social rights of the latter, often vulnerable individuals*"[107]. Moreover, in the sight of Article 46 of the Convention, the Court adopts the pilot-judgment procedure which "is primarily designed to assist the Contracting States in fulfilling their role in the Convention system by resolving such problems at national level"[108] and consequently it paves the – dangerous? – way for general measures to be applied by the Polish State in order to put an end to the systemic violation of the right of property identified in the present case. "[H]aving regard to its social and economic dimension, including the State's duties in relation to the social rights of other persons (…), the Court considers that the respondent State must above all, through appropriate legal and/or other measures, secure in its domestic legal order a mechanism maintaining *a fair balance between the interests of landlords, including their entitlement to derive profit from their property, and the general interest of the community – including the availability of sufficient accommodation for the less well-off* – in accordance with the principles of the protection of property rights under the Convention"[109].

[106] A. Touraine, *Qu'est-ce que la démocratie?*, Paris, Fayard,1994, p. 52.

[107] ECtHR (GC), *Hutten-Czapska v. Poland*, judgment of 19 June 2006, § 225.

[108] *Ibid.,* § 234.

[109] *Ibid.,* § 239.

In the same vein but on a different topic – **the right to work** –, we should also mention the *Sidabras and Džiautas v. Lithuania* judgment of 27 July 2004 where the Court concludes that in the application of section 2 of the KGB Act, the ban on the applicants seeking employment in various branches of the private sector, because of their previous KGB activities, constituted a disproportionate measure, affecting to a significant degree the applicants' ability to pursue various professional activities and having consequential effects on the enjoyment of their right to respect for their private life within the meaning of Article 8, even having regard to the legitimacy of the aims pursued by that ban[110].

Finally, questions of **health** are a good indicator of the progressive development of the Court's case-law towards the responsibility of States in this field. So, for instance, in the *Nitecki v. Poland* inadmissibility decision of 21 March 2002, the Court addressed a more general obligation of the State. It recalled that "it cannot be excluded that the acts and omissions of the authorities in the field of health care policy may in certain circumstances engage their responsibility under Article 2" and "an issue may arise under Article 2 where it is shown that the authorities of a Contracting State put an individual's life at risk through the denial of health care which they have undertaken to make available to the population generally".

3. SOLIDARITY RIGHTS

Lastly, the subject of the interdependence and indivisibility of fundamental human rights is now more than ever on the agenda. Viewed from one angle, it suggests a deepening, a widening of the rights: the third-generation rights – solidarity rights concerning the right to peace, the right to development, the right to a sound environment and the right to respect for mankind's common heritage – are already on the horizon. Admittedly, there has yet to be devised a means of protecting them through the technique of human rights, but our grasp of them is now far beyond the purely imaginary.

Here, I would like to quote two recent and relevant cases where **environmental issues** were at stake. In *Taşkın and Others v. Turkey*[111], the authorities had failed to comply with a court decision annulling a permit to operate a gold mine using a particular technique, on the ground of the adverse effect on the environment, and had subsequently granted a new permit. In *Moreno Gómez v. Spain*[112], the authorities had repeatedly failed to respect

[110] ECtHR, *Sidabras and Džiautas v. Lithuania*, judgment of 27 July 2004, §§ 61 and 50.

[111] ECtHR, *Taşkın and Others v. Turkey,* judgment of 10 November 2004.

[112] ECtHR, *Moreno Gómez v. Spain*, judgment of 16 November 2004.

regulations relating to the control of noise, granting permits for discotheques and bars despite being aware that the area was zoned as "noise saturated". In view of the volume of the noise, at night and beyond permitted levels, and the fact that it had continued over a number of years, the Court found that there had been a breach of the rights protected by Article 8. The Court found that the applicant had suffered a serious infringement of her right to respect for her home as a result of the authorities' failure to take action to deal with the night-time disturbances and held that the respondent State had failed to discharge its obligation to guarantee her right to respect for her home and her private life, in breach of Article 8 of the Convention.

As far as **cultural heritage** is concerned, it is worth quoting the *SCEA Ferme de Fresnoy v. France* inadmissibility decision of 1 December 2005 (listed building) and the *Kozacioglu v. Turkey* judgment of 19 February 2009 (historical value of a property).

II. GUARANTEEING RIGHTS

Here we are at the heart of the question of effectiveness. But what do we mean by effectiveness? When the objective of a norm is compared with the degree to which that objective is attained, it is the norm's efficiency which is measured: whether it has adequately produced the desired effects. On the other hand, when the effect of a norm is compared with the intended effect, it is the norm's effectiveness which is measured: whether it has succeeded in putting the new rule into everyday practice. In the study of the sociology of law, the value of the concept of effectiveness in terms of what it explains is that it enables the gap separating law from the social reality which law is supposed to regulate to be measured: effectiveness is a tool for measuring the gaps.

Where human rights are concerned, effectiveness is a complex issue as it is linked, positively, to the manner in which human rights are recognised and implemented and, negatively, to the manner in which forms of resistance are organised. Effectiveness is thus inseparable from its converse, ineffectiveness[113]. "When it comes to human rights", Judge Pettiti used to say, "there is only one valid criterion to apply and that is the effectiveness of the protective measures. All the rest is but diplomatic language, comparative-law academicism, proclamation, self-satisfaction, keeping up the appearance of the rule of law".

[113] J. Carbonnier, « Effectivité et ineffectivité de la règle de droit », *Année sociologique,* 1958, pp. 3 et seq.

A. The national level

At the outset, it should be recalled that: "notwithstanding the vital role played by international mechanisms, the effective protection of human rights begins and ends at the national level"[114]. Here it is important to take action at several levels.

This takes us to the double theme of the cooperation between the European Court of Human Rights and the national judge and the subsidiarity of the European control which explains and gives meaning to the rule of exhaustion of domestic remedies. When we are saying that the system operates under the principle of subsidiarity it means that the primary responsibility for securing the rights and freedoms set out in the European Convention on Human Rights lies with the domestic authorities and particularly the judicial authorities. Courts throughout the Contracting States can and should apply the Convention and afford redress for breaches of it.

First of all, concerning the **legislative power:** as far as the texts are concerned, it is essential that national parliaments examine carefully their acts or legislations during their preparation before adopting them and, afterwards, abolish those which are incompatible with the Convention. The *Recommendation Rec(2004)5* of the Committee of Ministers to the Member States on 12 May 2004 concerns precisely that: the verification of the compatibility of draft laws, existing laws and administrative practice with the standards laid down in the European Convention on Human Rights.

Secondly, on the **judicial level:** the question here is the incorporation or the integration of the Convention in the national legal order of States and the way these States apply it[115]. The national courts are therefore entrusted with the initial chief role of giving meaning and effect to the norms of the Convention in concrete cases through the right solution by correction and redress and by bringing domestic law in harmony with such norms. Between the national and the international judge, in the field of human rights, there is clearly a **common responsibility:** the national authorities assume the *first responsibility* of the respect of human rights, by all the organs of State; the European Court, which exercises the control of the third, assumes the *last responsibility*. In fact today it is accepted that in order to have credibility, the protection of human rights must accept scrutiny from the outside, an international view which serves as an objective oversight.

Human rights invite us to reverse the perspective and, particularly, to abandon the Kelsenian model of the hierarchy of norms. In fact, the advent of European human rights law today presents a major and fundamental challenge to traditional legal thinking, since it actually makes this "pyramidal" way of thinking more fragile, less fair, less appropriate.

[114] Council of Europe, *In our hands. The effectiveness of human rights protection 50 years after the Universal Declaration*, Strasbourg, Council of Europe Publishing, 1999.

[115] See, in this respect, the research project by H. Keller, *The reception of the ECHR in the Member States*, http://www.rwi.unizh.ch/keller/Reception/home.htm (University of Zurich, 2006).

Couldn't we, perhaps shouldn't we, forget it? as M. van de Kerchove and F. Ost rightly ask themselves in *From the pyramid to the network? Towards a new way of establishing the law.*[116]

B. The international level

The European Convention on Human Rights and Fundamental Freedoms is not only the first instrument, but is also the most fundamental since, in terms of effectiveness, the Convention offers the fullest protection, the rights it guarantees being actionable ("justiciable"), that is to say they may form the subject-matter of recourse before a wholly judicial body, the new European Court of Human Rights established on 1 November 1998. In more general terms, the ability to assert human rights before a court is the primary prerequisite for their effectiveness.

As far as the mechanism of the European Court is concerned, I will highlight five recent trends.

1.THE SCOPE OF JURISDICTION

The European Court receives more and more cases directly involving European Community and European Union Law and acts of European institutions. The case of *"Bosphorus Airways" v. Ireland* concerns an aircraft leased by the applicant company from Yugoslav Airlines and seized by the Irish authorities under an EC Council Regulation which, in turn, had implemented the UN sanctions regime against the Federal Republic of Yugoslavia (Serbia and Montenegro). The applicant's challenge to the retention of the aircraft was initially successful in the High Court, which held in June 1994 that the relevant Council Regulation was not applicable to the aircraft. However, on appeal, the Supreme Court referred a preliminary question under Article 177 of the EEC Treaty to the European Court of Justice on whether the applicant's aircraft was covered by the relevant Council Regulation. The answer was in the affirmative and by a judgment dated November 1996 the Supreme Court applied the decision of the European Court of Justice and allowed the State's appeal. The applicant complains under Article 1 of Protocol no. 1 (protection of property) to the Euro-

[116] M. van de Kerchove and F. Ost, "De la pyramide au réseau ? Vers un nouveau mode de production du droit", *Revue interdisciplinaire d'études juridiques, 2000, pp. 1-82 ; M. van de Kerchove and F. Ost, De la pyramide au réseau. Pour une théorie dialectique du droi*t, Brussels, Publications des Facultés universitaires Saint-Louis, 2002.

pean Convention on Human Rights that it has had to bear an excessive burden resulting from the manner in which the Irish State applied the sanctions regime and that it has suffered significant financial loss.

In the judgment of 30 June 2005, the Court seeks to ensure in particular that the Convention will not constitute an obstacle to further European integration by the creation of a supranational organisation among the Member States of the Union– a development which, as the representatives of the European Commission argued in their submissions to the Court, would be seriously impeded if the Member States were to verify the compatibility with the European Convention on Human Rights of the acts of Union law before agreeing to apply them, even in situations where they have no margin of appreciation to exercise. But the Court stops short of stating that, as the Member States have transferred certain powers to a supranational organisation, the European Community, the situations resulting directly from the application of the European Community acts would escape their "jurisdiction" in the meaning of Article 1 of the Convention. Instead, while the Convention remains applicable to such situations *(ratione loci, materiae and personae)*, and while the States Parties remain fully answerable to the supervisory bodies it sets up, it is only the *level of scrutiny* exercised by the European Court of Human Rights which is influenced by the circumstance that the alleged violation has its source in the application of an act adopted within the European Community: the Court considers that, insofar as the legal order of the European Union ensures an adequate level of protection of fundamental rights, and unless it is confronted with a "dysfunction of the mechanisms of control of the observance of Convention rights" or with a "manifest deficiency"[117], it may *presume* that, by complying with the legal obligations under this legal order, the EU Member States are not violating their obligations under the European Convention on Human Rights.

Finally, since the beginning of the 1980s, and at a more sustained rate in the 1990s, the European Court of Human Rights has been receiving applications questioning the individual or collective responsibility of States party to the ECHR on account of acts or omissions attributable to institutions or organs of international organisations of which they are members, be it, for example, the European Union[118] or NATO. This question has not yet been determined by the Grand Chamber.

[117] ECtHR (GC), B*osphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland,* judgment of 30 June 2005, § 166.

[118] See ECtHR, *Garzilli v. The Member States of the European Union*, decision (inadmissible) of 22 October 1998, and ECtHR, *Société Automobiles Guérin v. The 15 Member States of the European Union*, decision (inadmissible) of 4 July 2000.

2. INTERIM MEASURES

The *Mamatkulov and Askarov v. Turkey* judgment of 4 February 2005 is, clearly, a reversal of case-law (revirement de jurisprudence). The applicants' representatives maintained that, by extraditing their clients despite the interim measure indicated by the Court under Rule 39 of the Court, Turkey failed to comply with its obligation under Article 34 – not to hinder in any way the effective exercise of the right of individual application. In casu, the Court indicated to the Turkish Government that the extradition should not take place until it had had an opportunity to examine the validity of the applicants' fears. After having reminded them that the right of *individual application* is "one of the fundamental guarantees of the effectiveness of the Convention system" and the philosophy that lies behind this provision[119], the Court underlines that it is of the utmost importance that the applicants or potential applicants should be able to communicate freely with the Court: "for the present purposes, it [the Court] concludes that the obligation set out in article 34 *in fine* requires the Contracting States to refrain not only from exerting pressure on applicants, but also from any act or omission which, by destroying or removing the subject matter of an application, would make it pointless or otherwise prevent the Court from considering it under its normal procedure"[120].

As far as interim measures are concerned, these are granted by the Court "*in order* to facilitate the "effective exercise" of the right of individual petition in the sense of preserving the subject-matter of the application when that is judged to be at risk of *irreparable* damage through the acts or omissions of the respondent State"[121]. To put it positively: "interim measures […] play a vital role in avoiding irreversible situations that would prevent the Court from properly examining the application and […] securing to the applicant the practical and effective benefit of the Convention rights asserted"[122]. In the *Mamatkulov and Askarov* case, because of the extradition of the applicants, it was clear that the level of the protection which the Court should have been able to afford was irreversibly reduced. Having regard to the general principles of international law and the views expressed on this subject by other international bodies, the Court decided – for the first time – that "a failure by a respondent State to comply with interim measures will undermine the effectiveness of the right of individual application guaranteed by Article 34 and the State's formal undertaking in Article 1 to protect the rights and freedoms set forth in the Convention"[123].

[119] ECtHR (GC), *Mamatkulov and Askarov v. Turkey*, judgment of 4 February 2005, § 100.

[120] *Ibid.,* § 102 in fine.

[121] *Ibid.,* § 108.

[122] I*bid.,* § 125.

[123] *Ibidem*.

In the *Aoulmi v. France* judgment of 17 January 2006, the Court concluded that by not complying with the interim measures indicated under Rule 39 of its Rules and deporting the applicant to Algeria, France had prevented the Court from affording him the necessary protection from any potential violations of the Convention. As a result, France had failed to honour its obligations under Article 34 of the Convention[124].

Lastly, the *Evans v. the United Kingdom* case, about artificial insemination, is worth mentioning since the Court applied Rule 39 in a very specific situation. When the case was brought in 2005, the Court indicated to the Government that "is was desirable in the interests of the proper conduct of the proceedings that the Government take appropriate measures to ensure that the embryos, the destruction of which formed the subject-matter of the applicant's complaints, were preserved until the Court had completed its examination of the case. On the same day, the President decided that the application should be given priority treatment, under Rule 41"[125]. In the judgment of 7 March 2006, the Court considers "that the indication made to the Government under Rule 39 of the Rules of Court (…) must continue in force until the present judgment becomes final or until the Panel of the Grand Chamber of the Court accepts any request by one or both of the parties to refer the case to the Grand Chamber under Article 43 of the Convention"[126]. So, in the operative part, the Court "[d]ecides to continue to indicate to the Government under Rule 39 of the Rules of Court that it is desirable in the interests of the proper conduct of the proceedings that the Government take appropriate measures to ensure that the embryos are preserved until such time as the present judgment becomes final or further order".

3. REMEDIES AND EXECUTION OF JUDGMENTS: BRINGING RIGHTS HOME

A judgment of the European Court of Human Rights is not an end in itself, but a promise of future change, the starting-point of a process which should enable rights and freedoms to be made effective. Remedies under Article 41 and the execution of judgments under Article 46 have recently prompted some extraordinary developments in the case-law of the Court. The Court thus significantly extended its role in indicating appropriate measures from *individual measures* to *general measures* required to remedy a systemic problem.

[124] ECtHR, *Aoulmi c. France*, judgment of 17 January 2006, § 110.

[125] ECtHR, *Evans v. the United Kingdom*, judgment of 7 March 2006, § 3. The case was referred to the Grand Chamber, which delivered judgment in the case on 10 April 2007 *(see supra).*

[126] *Ibid.*, § 77.

INDIVIDUAL MEASURES

The Court is moving towards a practice of indicating to the State concerned specific measures aimed at remedying a violation both in a particular case and in other identical cases which are pending before it[127]. In some judgments, the Court, in addition to finding a violation of Article 6 § 1, has indicated that the most appropriate means of remedying the violation would be to have the case retried.[128] In other cases, such as *Assanidze v. Georgia*, the Court requested the immediate release of the applicant in the operative part of its judgment[129]. Requests of this kind which, in a sense, "push against the boundaries of the declaratory model of relief"[130], are often addressed, at least indirectly, to the domestic courts, as they entail the adoption by the latter of certain measures.

In the *Assanidze v. Georgia* judgment of 8 April 2004, the applicant complained that he was still being held by the authorities of the Adjarian Autonomous Republic despite having received a presidential pardon in 1999 for an offence and having been acquitted of another by the Supreme Court of Georgia in 2001. Having concluded that there had been violations of Articles 5 and 6 of the Convention on account of the failure of the authorities of the Adjarian Autonomous Republic to release the applicant despite his acquittal by the Georgian Supreme Court, the Court held in the operative part of the judgment that "the respondent State must secure the applicant's release at the earliest possible date"[131]. While reiterating that it is primarily for the State to choose the means of discharging its obligation to execute a judgment, the Court took the view that "by its very nature, the violation found in the instant case does not leave any real choice as to the measures required to remedy it"[132].

Ilaşcu and Others v. Moldova and Russia concerned the responsibility of Moldova and Russia under Article 1 of the Convention and in particular the positive obligations of the State with regard to parts of its territory over which it has no control, i.e. the "Moldovan Republic of Transdniestria". The case was about ill-treatment of detainees and conditions of detention. In its judgment of 8 July 2004, the Grand Chamber of the Court held that the applicants came within the jurisdiction of Moldova within the meaning of Article 1 of the Convention (State jurisdiction) as regards its positive obligations; and that the applicants came within the jurisdiction of Russia within the meaning of Article 1 of the Convention. Without going into details the Court found violations of both Articles 3 and 5 of the Con-

[127] ECtHR, *Tekin Yildiz v.Turkey*, judgment of 10 November 2005, §§ 91 et seq., and *Xenides-Arestis v. Turkey*, judgment of 22 December 2005, § 40 and point 5 of the operative provisions.

[128] ECtHR (GC), *Öcalan v. Turkey*, judgment of 12 May 2005, and *Claes and Others v. Belgium*, judgment of 2 June 2005, § 53 and point 5 of the operative provisions.

[129] ECtHR (GC), *Assanidze v. Georgia*, judgment of 8 April 2004.

[130] Ph. Leach, "Beyond the Bug River – A new dawn for redress before the European Court of Human Rights", *European Human Rights Law Review*, 2005, no. 2, p. 159.

[131] ECtHR (GC), *Assanidze v. Georgia*, judgment of 8 April 2004, § 203.

[132] *Ibid.,* § 202 in fine.

vention and further held, unanimously, that Moldova and Russia were to take all the necessary steps to put an end to the arbitrary detention of the applicants still imprisoned and secure their immediate release.

GENERAL MEASURES

Here the Court is faced with what we call *repetitive applications*, which cover systemic situations (for instance the restitution of property nationalised in Eastern Europe between the end of the Second World War and the fall of the Berlin Wall or problems related to the post-communist transition) or endemic situations. This latter problem is most acute in Russia, Ukraine, Poland and Bulgaria, often as a result of chronic overcrowding and outdated prisons in a poor state of repair.

A further major development took place with the delivery of the Grand Chamber's judgment in *Broniowski v. Poland* on 22 June 2004 which is designated a **pilot judgment**. The case concerned successive undertakings by the Polish authorities to provide compensation, in the form of discounted entitlement to property, in respect of land "beyond the Bug river" which had ceased to be Polish territory after the Second World War. The European Court not only found that there had been a violation of Article 1 of Protocol No. 1 but also concluded that "the violation ha[d] originated in a systemic problem connected with the malfunctioning of domestic legislation and practice caused by the failure to set up an effective mechanism to implement the 'right to credit' of Bug River claimants". The Court defined a systemic problem as a situation "where the facts of the case disclose the existence, within the [national] legal order, of a shortcoming as a consequence of which a whole class of individuals have been or are still denied [their Convention rights]" and "where the deficiencies in national law and practice identified (...) may give rise to numerous subsequent well-founded applications".

On that basis, the Court went on to say that, in executing the judgment, "general measures should either remove any hindrance to the implementation of the right of the numerous persons affected by the situation found to have been in breach of the Convention or provide equivalent redress in lieu". In the operative part of its judgment, the Court stated that "the respondent State must, through appropriate legal measures and administrative practices, secure the implementation of the property right in question in respect of the remaining Bug River claimants or provide them with equivalent redress in lieu, in accordance with the principles of protection of property rights under Article 1 of Protocol No. 1". As far as Article 46 is concerned, the *Broniowski* case ended in a friendly settlement judgment of 28 September 2005.

The *Hutten-Czapska v. Poland* judgment of the Grand Chamber of 19 June 2006 raised the same issues as to when a case is to be considered a pilot case for the purposes of ruling whether successive rent-control schemes were compatible with Article 1 of Protocol No. 1[133]. This method of adopting a "pilot" judgment in which a systemic problem is identified has an important practical consequence for the work of the Court, which will in such circumstances adjourn consideration of other applications arising out of the same problem, pending adoption of the necessary remedial measures.

REOPENING THE PROCEDURE

The first concerns the reopening of proceedings in cases where the Court has found a violation without indicating the need to hold a new trial or reopen the proceedings. While most of the Contracting States make provision for criminal proceedings to be reopened, there appears to be no uniform practice in civil and administrative matters. Moreover, the passage of time may be significant in such cases, as the domestic courts may in some instances have to examine whether the European Court's assessment of past situations remains valid in the current circumstances of the case. Possible damage to the interests of third parties might also be a problem.

4. WORKING IN SYNERGY

The multiplication of the instruments now guaranteeing human rights has, both in terms of quantity and of quality, been considerable – some see this as frenzied proliferation, others as constructive progression towards a "general law of human rights". This situation, which may produce both positive and negative effects, is also reflected by the number of NGOs specialising in the defence of human rights, thus explaining the need for coordination and common platforms. One fundamental problem is the risk of a reciprocal lack of awareness, of compartmentalization, of divergences, of inconsistencies and even of instruments cancelling each other out. Instead, I advocate **synergy between all these instruments** at national and international level.

[133] *The Hutten-Czapska v. Poland* judgment of the Grand Chamber has been delivered on 19 June 2006.

It is worth noting that in the course of these leading judgments the Court often refers to the case-law from other national and international jurisdictions. Recourse to a comparative perspective in human rights adjudication does not give rise to controversy before the European Court of Human Rights[134]. It is something that is taken for granted. The Court considers that there is every reason to study decisions in other jurisdictions dealing with similar issues. It recognises that while it is not in any sense bound by what national or other international courts say the Court's own understanding of the governing principles will inevitably be enriched by examining how other courts have approached the same question. With modern advances in technology it is no longer difficult to have immediate access to leading decisions from, for example, the Supreme Courts of The United Kingdom, Canada and the United States and the Constitutional Court of South Africa.

Moreover, we should not neglect the contribution to the development and application of these standards of other Council of Europe human rights bodies, in particular, the work of the Commission for the Prevention of Torture (CPT), the Commissioner for Human Rights, the European Committee of Social Rights, the European Commission against Racism and Intolerance (ECRI) and the Advisory Committee for the Protection of National Minorities under the Framework Convention. These bodies will often rely on the case-law of the Court in their work but it also works the other way around. For example, today, it is quite a common occurrence for the Court to rely heavily on the work of the CPT in judging whether prison conditions amount to inhuman and degrading treatment in particular cases[135]. Reference has also been made to ECRI reports[136] and to reports prepared under the European Social Charter[137].

5. THE REFORM

Since 1990 the enlargement of the Council of Europe has created a new dimension for the operation of the Convention system. While the underlying purpose of the system remained the same, the Court now had a further role to play in the consolidation of democracy and the rule of law in the wider Europe. This is a process which continues today. In this sense its significance has arguably never been greater. The Court, through its case-law

[134] See, for example, the references to Canadian and United States judgments in ECtHR (GC), *Hirst (no. 2) v. the United Kingdom*, judgment of 6 October 2005; ECtHR, *Appleby v. the United Kingdom*, judgment of 6 May 2003; ECtHR, *Allan v. the United Kingdom*, judgment of 5 November 2002. The issue has become a controversial one in the United States – see Justice Ruth Bader Ginsburg's remarks to the Constitutional Court of South Africa – "A decent respect to the Opinions of [human]kind" (7 February 2006).

[135] Amongst numerous cases see ECrtHR, *Van der Ven v. the Netherlands*, judgment of 4 February 2003.

[136] See ECtHR (GC), *Nachova and Others v. Bulgaria* judgment of 6 July 2005 (reference to ECRI's 2000 and 2004 reports on Bulgaria).

[137] See ECtHR (GC), *Sørensen and Rasmussen v. Denmark* judgment of 11 January 2006 (reference to reports of the European Social Committee).

and in partnership with national Supreme and Constitutional Courts, serves to infuse national legal systems with the democratic values and the legal principles of the Convention and helps to ensure that Convention standards are implemented in everyday practice. The major challenge for the Court today is not only to maintain and develop the Convention standards but also to ensure that the Europe of human rights remains a single entity with common values.

In response to this problem, the Committee of Ministers of the Council of Europe adopted Protocol No. 14 to the ECHR in May 2004, together with a number of recommendations and resolutions designed to increase its effectiveness. The aim of this reform is to allow the Court to devote more attention to meritorious applications, in particular those disclosing serious human rights violations, by increasing its filtering capacity and improving the implementation of the ECHR at national level. I will mention some of the most important changes encompassed by Protocol no. 14 which will enter into force on 1 June 2010.

The Court will be competent to sit in a single judge formation to declare cases inadmissible or strike them out of the Court's list of cases, where such a decision can be taken without further examination (Art. 4 and 5). In principle the decisions on admissibility and the merits will be taken at the same time (Art. 9).

The competence of the Committee of three judges is enlarged. It can declare cases admissible and also render a judgment on the merits, if the underlining question in the case, concerning the interpretation or the application of the Convention or the Protocols thereto, is already the subject of well-established case-law of the Court (Art. 8).

At the request of the Plenary Court, the Committee of Ministers may, by unanimous decision, and for a fixed period, reduce to five the number of judges of the Chambers (Art. 5).

A new admissibility criteria is added (Art. 12), changing Article 35 § 3, in that a case is declared inadmissible if the applicant had not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal.

A new paragraph 4 will be added to Article 46 of the Convention (Art. 16) which allows the Committee of Ministers, if it considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is a party, to refer to the Court the question whether that Party has failed to fullfill its obligation under paragraph 1, after serving formal notice on that Party and by decision adopted by a majority vote of two thirds of the representatives entitled to sit on the Committee.

Furthermore, some Recommendations to the Member states were adopted by the Committee of Ministers on 12 May 2004, such as Recommendation Rec(2004) 5, to ensure that there are appropriate and effective mechanisms for systematically verifying the compatibility of draft laws with the Convention in the light of the case-law of the Court; there

are such mechanisms for verifying, whenever necessary, the compatibility of existing laws and administrative practice, including as expressed in regulations, orders and circulars; the adaptation, as quickly as possible, of laws and administrative practice in order to prevent violations of the Convention.

The perennial problem with reform of the Convention is that it has always suffered from **a time lag**. This is mainly due to the complexity involved in the drafting of new Protocols that must be ratified by all the Contracting Parties when procedural or structural changes are involved. Protocol No. 11, for example, took more than three years to be ratified by all Contracting Parties. The problem of time lag for a beleaguered international court is that by the time the much-needed reform enters into force the parameters and dimensions of the problem will have changed.