

The European Court of Human Rights and Its Recent Case Law

JEAN-PAUL COSTA[†]

SUMMARY

I. INTRODUCTION.....	455
II. GUIDING PRINCIPLES OF THE COURT.....	456
III. RECENT CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS.....	461
IV. CONCLUSION.....	466

I. INTRODUCTION

It is a great honor for me to participate in this Symposium on behalf of the European Court of Human Rights. Judge Luzius Wildhaber, the President of our Court, was unable to attend the meeting and has asked me to convey his best greetings to all of the participants and organizers.

The European Court of Human Rights (ECHR) is the oldest international court in the field of the protection of human rights. The Court was created under the Convention for the Protection of Human Rights and Fundamental Freedoms, better known as the European Convention on Human Rights,¹ which was signed in Rome in November 1950 under the aegis and within the framework of the then-new Council of Europe. It was the first international tribunal established, within certain limits, to settle disputes between individuals and defending States. The drafters also envisioned that the Convention would apply to disputes between Member States.²

The activity of the Court itself has progressively increased. During the first twenty years starting from 1960,³ most cases were settled by the European Commission of Human Rights and the Committee of Ministers of the Council of Europe.⁴

Protocol No. 11 to the Convention,⁵ which entered into force at the end of 1998, represents an important step toward strengthening the judicial character of the Convention machinery. In a few words, the new system has consisted of abolishing the European

[†] Vice-President of the European Court of Human Rights, Strasbourg.

1. European Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR].

2. There have been a few interstate cases, but in spite of their legal and political importance, they have represented a very small percentage of the overall case law.

3. The year 1960 was the date of the Court's first judgment. *Lawless v. Ireland*, App. No. 332/57, 1958–1959 Y.B. Eur. Conv. on H.R. 308 (Eur. Comm'n. of H.R. 1959).

4. Only forty-three judgments were issued during those first two decades, an average of two judgments each year.

5. Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, May, 11, 1994, Europ. T.S. No. 155 (entered into force Nov. 1, 1998).

Commission of Human Rights and the quasi-judicial role of the Committee of Ministers, while transforming the Court into a permanent, full-time judicial body, merging the secretariat of the former Commission and the Registry of the “old” Court. Since the fall of the Berlin Wall, the number of Contracting States has nearly doubled due to the inclusion of East European countries and Russia. The Court is now a very important tribunal with a jurisdiction covering forty-three Contracting States with thirty-seven languages (even if the Court’s official languages are only English and French), an area stretching from the Atlantic to the Pacific and from Norway to Malta, and embracing a population of 800 million. The full-time Court, which has forty-one judges and about 120 permanent lawyers, is the largest international Court dealing with human rights in the world.

One of the main challenges that the Court faces is dealing with an ever-growing case load while at the same time keeping the high standard of quality set by the “old” Court. Regarding the workload, I can give a few figures: in 2001, about 800 judgments were delivered, and 8000 to 9000 decisions were adopted that turned down applications as inadmissible or struck them out of the docket. However, during the same year, more than 13,000 new applications were registered. Put simply, the backlog has continued to grow. Our hope is first to stop this increase and, then, in the long run, to reduce the backlog. I will come back to the problems of the future, and the ways of solving them, at the end of my presentation.

II. GUIDING PRINCIPLES OF THE COURT

I would now like to explain more precisely the rights and freedoms that the Court is in charge of protecting before giving some examples of important recent judgments.

The role of the Court is dedicated to the protection of a number of rights that are listed in the Convention and its Protocols. Being a system based on a set of international treaties, the Contracting States themselves have undertaken commitments, and the scope of the Court is to ensure the observance of those commitments, as is clear from Article 19 of the Convention.⁶ In other words, the well-known principle of subsidiarity applies insofar as the Court has always considered its role as subsidiary. I quote the *Handyside* judgment of 1976 (§ 48):

The Court points out that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights (judgment of 23 July 1968 on the merits of the ‘*Belgian Linguistic*’ case, Series A n.º 6, p. 35, § 10 *in fine*). The Convention leaves to each Contracting State, in the first place, the task of securing the rights and freedoms it enshrines. The institutions created by it make their own contribution to this task but they become involved only through contentious proceedings and once all domestic remedies have been exhausted⁷

Moreover, in many fields, the Court has developed the theory of the so-called margin of appreciation. This margin—left to the Contracting States—“is given both to the domestic legislator . . . and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force”⁸

6. ECHR, *supra* note 1, art. 19 (“To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights . . .”).

7. *Handyside v. United Kingdom*, App. No. 5493/72, 1 Eur. H.R. Rep. 737, 753 (1976).

8. *Id.* at 738.

This being said, I must make it clear that, in spite of the principle of subsidiarity and the margin of appreciation recognized by the defending states,⁹ the Court does review the interpretation and application of the Convention carried out by the national authorities. Ultimately, the Court has the final say, and Article 32 of the Convention provides:

The jurisdiction of the Court shall extend to all matters concerning the interpretation and the application of the Convention and the Protocols thereto which are referred to it¹⁰

I must insist on the fact that the ECHR attaches great importance to its relationship and even cooperation with national judicial authorities, in particular with national supreme and constitutional courts. This is also true for some other international courts, especially the European Court of Justice (ECJ) insofar as the case law of the Luxembourg court often deals with human rights issues and refers to the principles of the ECHR and our own case law. That is also correct regarding the European Free Trade Association (EFTA) Court, the International Court of Justice, the International Criminal Tribunal for the former Yugoslavia, and the Inter-American Court of Human Rights. Our Court is particularly careful in observing the case law of the ECJ and follows it whenever it is necessary. A good example is our *Pellegrin v. France*¹¹ judgment. President Wildhaber uses the term “partnership” for such cooperation within the system of the European Convention, and I fully endorse this term. To explain this partnership more concretely, I would like to point out that an international court, which has jurisdiction over a geographical area stretching from Reykjavik to Vladivostock, cannot and should not operate as a court of appeals for decisions of domestic courts.

Our Court cannot rehear cases in the same way as a national court; it cannot examine facts, evidence, and legal issues in the same sort of detail as a national court.¹² In addition to the volume of work of the Strasbourg Court, it is evident that national authorities and the judiciary are in a better position—because of their local knowledge, expertise, and the relative rapidity with which they can intervene—to make accurate assessments of facts and law and guarantee the most effective protection of individual rights. Our Court is not and should not be a “fourth instance” court. As we said in the *Edwards* judgment of 1992:

[I]t is not within the province of the European Court to substitute its own assessment of the facts for that of the domestic courts and, as a general rule, it is for these courts to assess the evidence before them. The Court’s task is to ascertain whether the proceedings in their entirety, including the way in which evidence was taken, were fair¹³

One aspect of the “self-restraint” practiced by the Strasbourg Court is that the Court regards the domestic judicial systems with respect and sympathy. On the other hand, it expects that the national courts and/or the national legislators transpose the ECHR’s case law into national law, in particular that the supreme and constitutional courts look to our own case law to inform themselves of developing principles in areas central to the rule of law. As a Judge elected by France, which has taken a long time to accept the need to abide

9. A margin which is broader or narrower, according to the nature of the rights at stake.

10. ECHR, *supra* note 1, art. 32.

11. *Pellegrin v. France*, App. No. 28541/95, 31 Eur. Ct. H.R. 651 (1999).

12. Our Court, in exceptional circumstances, does undertake factfinding missions when it is absolutely necessary, but this remains exceptional.

13. *Edwards v. United Kingdom*, App. No. 13071/87, 15 Eur. Ct. H.R. (ser. A) 417, 431 (1992).

by international courts' decisions, I observe that times are changing: our French supreme courts are more and more observing the Strasbourg jurisprudence and are increasingly implementing it within their own system. And it is of particular interest to point out that the judicial systems of the "new" states of Central and Eastern Europe do their best to fulfill the obligations prescribed by the Convention and by our Court's case law.

With respect to the exact list of rights and freedoms protected under the Convention and the Protocols thereto, it should not be forgotten that a list of this kind would be impossible to establish *in abstracto*. It greatly varies depending on the time, place, and circumstances. I will give three examples. First, the Universal Declaration¹⁴ and the International Covenants¹⁵ clearly distinguish between civil and political rights on the one hand, and economic, social, and cultural rights on the other hand. Put simply, the European Convention encompasses the first category only with very few exceptions. Second, the protocols have completed and extended the list contained in the Convention itself. For instance, the death penalty was abolished within the European system only in 1983, thirty-three years after opening the Convention for signature, by Protocol No. 6.¹⁶ The recent Protocol No. 13¹⁷ (not yet in force) extends the abolition to all circumstances, including time of war. Third, the case law of our Court has, on some occasions, recognized new rights, which were not defined by the Convention and not even known at the time of its opening for signature. For example, it is the case law, widely interpreting Article 8 with respect to private and family life, that decided that this Article may be applicable whenever there is a possible breach of environmental rights, such as protection against excessive noise or severe air pollution.¹⁸ Finally, there is no possible exhaustive or ideal list of human rights and freedoms. But the Convention and its Protocols, as interpreted by the ECHR, do provide the framework of the protection which has to be ensured by the Contracting States, under the control exercised by the Court itself. As I already observed, even if broad, such a field is essentially limited to the sphere of civil and political rights. Why is it so?

My eminent predecessor, Pierre-Henri Teitgen, often referred to as one of the fathers of the European Convention on Human Rights, described the objective of that instrument as "defining the seven, eight or ten fundamental freedoms that are essential for a democratic way of life."¹⁹ Indeed, we can only fully understand the Convention if we see it from that perspective—in other words, as a means of preserving the core value of democracy. The essence of human rights protection under the Convention is to be found in the principles of democracy and the rule of law. The rule of law provides the framework for the effective operation of democracy. Democracy without the rule of law is no democracy; the rule of law without democracy is no rule of law, at least as understood in the European Convention and the case law of the ECHR.

14. Universal Declaration of Human Rights, G.A. Res. 217(III)A, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948).

15. International Covenant on Civil and Political Rights, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 56, U.N. Doc. A/6316 (1966); International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 19, 1966, 993 U.N.T.S. 3.

16. Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, *opened for signature* Apr. 28, 1983, Europ. T.S. No. 114.

17. Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Concerning the Abolition of the Death Penalty in All Circumstances, *opened for signature* May 3, 2002, Europ. T.S. No. 187.

18. See *Powell & Rayner v. United Kingdom*, App. No. 9310/81, 12 Eur. H.R. Rep. 355 (1990) (Eur. Ct. H.R.) (dealing with excessive noise levels in connection with the operation of Heathrow airport); *Lopez Ostra v. Spain*, App. No. 16798/90, 20 Eur. H.R. Rep. 277 (1994) (Eur. Ct. H.R.) (dealing with air pollution from a waste treatment plant).

19. COUNCIL OF EUROPE, 1 COLLECTED EDITION OF THE "TRAVAUX PRÉPARATOIRES," OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 44 (1975).

However, the authors of the ECHR (and even of the Protocols) restricted themselves to a political notion of democracy, probably because it is very difficult to effectively protect economic and social rights, especially through judicial review. It is also difficult to protect these rights, due to the strong financial differences between the Contracting States, some of them being very poor and thus hardly able to set up any welfare system.

There are a few exceptions to the Convention's confinement to the purely political notion of democracy. The following rights are also recognized in the Convention:

- (1) the right to form trade unions (ECHR, Article 11);²⁰
- (2) the protection of property (Protocol No. 1, Article 1);²¹
- (3) the right to education (Protocol No. 1, Article 2);²² and
- (4) equality between spouses (which is both civil and socio-economic) (Protocol No. 5, Article 7).²³

In addition to these above rights, a certain economic and social notion democracy has been introduced by the Court's case law.

Let me quote from the *Airey v. Ireland* judgment of 1979 (Section 26):

The Court is aware that the further realisation of social and economic rights is largely dependent on the situation—notably financial—reigning in the State in question. On the other hand, the Convention must be interpreted in the light of present-day conditions and it is designed to safeguard the individual in a real and practical way as regards those areas with which it deals. Whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature. The Court therefore considers, like the Commission, that the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; *there is no water-tight division separating that sphere from the field covered by the Convention*.²⁴

Similarly, while many articles of the Convention prohibit limitations and restrictions by public authorities on freedoms and rights or submit them to strict legal and factual conditions (i.e., define negative obligations incumbent upon the States), the Court's case law has gone further: it has admitted the existence of positive obligations or duties, which the State has to fulfill in order to enable the effective respect of those freedoms and rights.²⁵ That said, those human rights protected under the Convention by the Court are and remain essentially of a civil and political nature.

I would also add that there is an important international legal instrument, also prepared within the framework of the Council of Europe, which specifically deals with social and economic rights, namely the European Social Charter.²⁶ But our Court has no jurisdiction under the Charter, which is not protected by a fully judicial machinery. Nor

20. ECHR, *supra* note 1, art. 11.

21. Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Mar. 20, 1952, art. 1, 213 U.N.T.S. 262.

22. *Id.* art. 2.

23. Protocol No. 5 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Jan. 1, 1966, art. 7, Europ. T.S. No. 55.

24. *Airey v. Ireland*, 2 Eur. Ct. H.R. (ser. A) 305, 316–17 (1979) (emphasis added).

25. *See, e.g., Marckx v. Belgium*, 31 Eur. Ct. H.R. (ser. A) (1979).

26. European Social Charter, Oct. 18, 1961, Europ. T.S. No. 35, 529 U.N.T.S. 89.

does it have jurisdiction under the new Charter of Fundamental Rights of the European Union,²⁷ adopted in Nice in December 2000 (which for the time being has no binding effect).

Of course, I will not inflict on you the full list of the provisions of the Convention and its Protocols. I will rather provide you with a “short-list” of the rights which appear to me to be the most essential in the Court’s case law and give you some explanations about the procedural guarantees that the Convention requires.

As to the substantive rights, I would like to emphasize the right to life, the prohibition of torture and of inhuman or degrading treatment or punishment, the respect for private and family life, freedom of thought, conscience, and religion, freedom of expression, freedom of assembly and association, protection of property, the right to free elections, freedom of movement, and the abolition of the death penalty.

As to the procedural rights, let me mention the right to liberty and security, the right to a fair trial (provided for by the most often invoked article of the Convention, Article 6),²⁸ and the “*nullum crimen, nulla poena sine lege*” rule, under Article 7.²⁹

As regards the procedural guarantees required, if not by the Convention itself, at least by our case law, it is clear that subsidiarity cannot mean giving a blank check to the domestic authorities. Subsidiarity operates effectively only when the appropriate procedures are available within domestic legal systems. If the Court is going to base its determination of whether or not there has been a violation of the Convention on the assessment of the facts made by the national judicial authorities, there must have been proceedings at a national level capable of producing such an assessment. That is why the Court in several cases has found violations of Article 2 of the Convention (the right to life) not on the substantive issue, but rather on the procedural aspect. Thus, the obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the state’s general duty under Article 1 of the Convention to “secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention,”³⁰ requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force. The mere fact that the authorities are informed of a violent death or an unexplained disappearance in suspicious circumstances gives rise ipso facto to an obligation under Article 2 to carry out an effective investigation into the circumstances surrounding the death or disappearance.³¹

The Court has repeatedly held that where an individual makes a credible assertion that he has suffered treatment that violates Article 3, which prohibits torture and inhuman or degrading treatment at the hands of the police or other similar agents of the state, that provision, again read in conjunction with the state’s general duty under Article 1 of the Convention, likewise requires by implication that there should be an effective official investigation. As with the duty to carry out an investigation under Articles 2 or 3, this investigation should be capable of leading to the identification and punishment of those responsible.³² In other cases, the Court decided not to apply the usual rules governing the burden of proof because of the human rights nature of the dispute before it. Normally, according to the principle “*actori incumbit probatio*,” the applicant would have to

27. Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364) 1.

28. ECHR, *supra* note 1, art. 6.

29. *Id.* art. 7.

30. ECHR, *supra* note 1, art. 2.

31. *See, e.g.,* McCann & Others v. United Kingdom, App. No. 18984/91, 21 Eur. Ct. H.R. (ser. A) 97 (1995); Tanrikulu v. Turkey, App. No. 23763/94, 30 Eur. Ct. H.R. 950 (1999).

32. *See, e.g.,* Assenov v. Bulgaria, App. No. 24760/94, 28 Eur. Ct. H.R. 652 (1998); Labita v. Italy, App. No. 26772/95 (2001), available at <http://www.echr.coe.int> (last visited Feb. 19, 2001).

demonstrate the breach of the rights that he or she is complaining of, but there are circumstances where this is very difficult, if not impossible. Therefore, the Court cannot confine itself to such a mechanical application of the evidence rules. For instance, in many judgments, the Court considers that where an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent upon the state to provide a plausible explanation of how those injuries were caused, regardless whether a clear issue arises under Article 3 of the Convention.³³

Finally, I would like to point out that, while some articles of the Convention deal with rights which are inviolable—such as the prohibition of torture or of slavery—most rights are subject to limitation only under three conditions: that the interference with the right be (1) prescribed by law, (2) in furtherance of a legitimate aim, and (3) necessary in a democratic society. If the first two conditions are fulfilled, the Court must assess whether the last one was satisfied—i.e., if according to the values of democracy and of the rule of the law, the measure was necessary.³⁴ In making such an assessment, the Court bases its judicial review on the so-called “proportionality principle”: any disproportionate or excessive measure is deemed to be in breach of the relevant article of the Convention. This method is often utilized by the Court, not only in cases concerning freedom of speech.³⁵

III. RECENT CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

I will now turn to the recent case law of the Strasbourg Court, referring to the cases adjudicated since the entry into force of Protocol No. 11 (November 1, 1998). It would be impossible to give a full account of all the judgments and decisions adopted in those three-and-a-half years. Between January 1999 and the end of July 2002, the European Court of Human Rights has delivered nearly 2400 judgments and many thousands of inadmissibility decisions (some of which are of great interest). I shall therefore limit myself to giving you a few examples of some important judgments and decisions.

In matters dealing with respect for life and prohibition of inhuman and degrading treatment, the Court has both raised its standards and exercised a thorough review of the exact circumstances of each case. For instance, in *Selmouni v. France*,³⁶ the Court found a breach of Article 3 in a case of ill treatment during police custody, not on the grounds of inhuman and degrading treatment, but on the grounds of torture because

having regard to the fact that the Convention is a “living instrument which must be interpreted in the light of present-day conditions,” the Court considers that certain acts which were classified in the past as “inhuman and degrading treatment” as opposed to “torture” could be classified differently in [the] future. It takes the view that the increasingly high standard being required in the area of the protection of human rights . . . correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.³⁷

33. See, e.g., *Ribitsch v. Austria*, App. No. 18896/91, 21 Eur. Ct. H.R. (ser. A) 573 (1995) (Comm’n Rep.), *aff’d*, 336 Eur. Ct. H.R. (ser. A) (1995); *Selmouni v. France*, App. No. 25803/94, 1999-V Eur. Ct. H.R. 149.

34. For some matters, the case law demands the existence of a “pressing social need.”

35. See cases cited *infra* note 54.

36. *Selmouni v. France*, App. No. 25803/94, 1999-V Eur. Ct. H.R. 149.

37. *Id.* para. 101 (quoting *Tyrer v. United Kingdom*, App. No. 5856/72, 2 Eur. Ct. H.R. (ser. A) 1 (1978)).

This judgment offers a remarkable example of the so-called “evolutive” method of interpretation of the Convention by the Court.

An issue related to inhuman treatment was raised in the *Einhorn v. France*³⁸ case. The applicant had been tried in absentia in Pennsylvania in 1993 after having left the United States and was sentenced to life imprisonment for first-degree murder. He was arrested in France in 1997. The U.S. Government submitted a request for the applicant’s extradition, which was granted by a decree of July 2000 of the French Prime Minister. Mr. Einhorn applied to the Conseil d’Etat to quash the decision. His application was dismissed; he then applied to the Strasbourg Court, claiming that he faced a risk of being sentenced to death and hence of being exposed to the “death-row phenomenon.” Contrary to the famous *Soering*³⁹ case, the Court in 2001 declared the application inadmissible on the grounds that the assurances obtained by the French Government removed the risk of the applicant’s being sentenced to death in Pennsylvania.

In the 2001 *Keenan v. United Kingdom*⁴⁰ judgment, the applicant complained under Articles 2 and 3 of the Convention on account of the suicide of her son who was serving a sentence of four months’ imprisonment. Assessing the circumstances of the case, the Court found that there had been no violation of Article 2 because it would have been speculative to conclude that the care given to the applicant’s son made him commit suicide. However, the significant defects in the medical care provided to this mentally ill person, known to be a suicide risk, combined with the imposition on him of a serious disciplinary punishment, constituted inhuman and degrading treatment, in breach of Article 3.

The controversial case of *Pretty v. United Kingdom*⁴¹ was settled by a 2002 judgment. Diane Pretty, suffering from motor neurone disease, strongly wished to commit suicide with her husband’s assistance, which is unlawful under British law. She claimed that the refusal by the national authorities to allow her assisted suicide was in breach of many articles of the Convention, especially Articles 2 and 3. Her application was dismissed by the Court. The Court found that no right to die, whether at the hands of a third person or with the assistance of a public authority, could be derived from Article 2, which protects the right to life. Regarding Article 3, the Court concluded that no positive obligation arose under that Article to require the Government either not to prosecute the applicant’s husband if he assisted her to commit suicide or to provide a lawful opportunity for any other form of assisted suicide.⁴²

Finally, the *Bankovic*⁴³ case also raised an Article 2 complaint, among others complaints. However, the Article 2 complaint was in a very specific context: The applicants complained about the bombing of the Radiotelevision of Serbia (RTS) building on April 23, 1999, by NATO forces. They sued the seventeen countries (all NATO members) that were responsible for the bombing. These countries were also signatories to the Convention. By a decision of December 2001, the Court rejected their application as inadmissible. The reasoning is quite interesting:

38. *Einhorn v. France*, App. No. 71555/01 (2001) (Eur. Ct. H.R.), available at <http://www.echr.coe.int> (last visited Feb. 19, 2003).

39. *Soering v. United Kingdom*, App. No. 14038/88, 11 Eur. Ct. H.R. (ser. A) 439 (1989).

40. *Keenan v. United Kingdom*, App. No. 27229/95, 33 Eur. H.R. Rep. 38 (2001). While I agreed with the result in the case, I disagreed with the reasoning of the case—namely that Article 3 is a “fall back” when no Article 2 violation can be found. As I expressed in my concurring opinion, I believe that Articles 2 and 3 are autonomous and that there is no logical hierarchy between them. While it is common practice to first examine whether an Article 2 violation exists based on the order of the Convention, this practice is by no means obligatory.

41. *Pretty v. United Kingdom*, App. No. 2346/02, 35 Eur. Ct. H.R. 1 (2002).

42. A few weeks after the judgment, Diane Pretty died naturally.

43. *Bankovic v. Belgium & 16 Other Contracting States*, App. No. 52207/99, 41 I.L.M. 517 (2002), available at <http://www.echr.coe.int> (last visited Feb. 19, 2003).

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

The Court is not therefore persuaded that there was any jurisdictional link between the persons who were victims of the act complained of and the respondent States. Accordingly, it is not satisfied that the applicants and their deceased relatives were capable of coming within the jurisdiction of the respondent States on account of the extra-territorial act in question.⁴⁴

As you see, this highly important decision emphasizes the regional nature of the ECHR, the impossibility of extending universally the responsibility of its Contracting States as well as the Court's jurisdiction.

Turning now to Article 6(1) of the Convention (the right to a fair trial), I would like to mention five significant judgments. First, the *Waite & Kennedy v. Germany*⁴⁵ judgment addressed an employment dispute between the applicants, employed by a British company, and the European Space Agency (ESA), an international organization, at whose disposal they had been placed to perform service at its center in Germany. The German courts declared the actions of the applicants against ESA inadmissible on the grounds of the immunity of jurisdiction invoked by ESA under the UN Convention by which it had been established. The Court found that there had been no breach of Article 6(1) on the grounds of (1) the legitimate aim served by immunities of international organizations and (2) the existence of alternative means of legal process available to the applicants, who could and should have had recourse to the ESA Appeals Board, independent from the Agency itself.

A second example is the *Brumărescu v. Romania*⁴⁶ case, decided in 1999. In that case, the Supreme Court of Justice intervened to annul a judgment, which was *res judicata* and had in fact been enforced. The Strasbourg Court found that Article 6(1) had thereby been violated on the grounds that the Article protects the right to a fair trial. Moreover, one of the fundamental features of the rule of law is respect for the principle of legal certainty, a principle which, among other things, requires that when a court has given a final decision in a dispute, that decision should not be capable of being later called into question. Thus, the *Brumărescu* judgment is of importance from the standpoint of ensuring respect for these principles. It is also important insofar as the Court held that there was a violation of Article 1 of Protocol No. 1 (protection of property): the applicant had property, which he had been deprived of without any public interest justification.

Third, the *McGonnell v. United Kingdom*⁴⁷ case, decided in 2000, provides an example of the lack of impartiality of a tribunal that gives rise to a breach of Article 6 of the Convention. The *McGonnell* case concerned the functions of the Bailiff of Guernsey. Although the Bailiff's subjective impartiality was not in issue, the Court considered that there was a problem with his objective impartiality. According to the Court, viewed

44. *Id.* paras. 81–82.

45. *Waite & Kennedy v. Germany*, App. No. 26083/94, 30 Eur. Ct. H.R. 261 (1999).

46. *Brumărescu v. Romania*, App. No. 28342/95, 33 Eur. Ct. H.R. 862 (1999).

47. *McGonnell v. United Kingdom*, App. No. 28488/95, 30 Eur. Ct. H.R. 289 (2000).

objectively, the applicant could be considered to have had legitimate grounds for fearing a lack of impartiality on the part of the Bailiff. The Bailiff had previously participated in the adoption of a development plan for Guernsey and the applicant's appeal against the decision to refuse him planning permission with reference to that plan was heard by the Royal Court, which was in fact presided by the Bailiff.

Fourth, I would like to highlight a significant and interesting judgment of our Court, which raises the issue of whether a Contracting State's responsibility under the Convention is engaged by a decision taken by a court in that state with respect to a judgment handed down by a court in a third state. In the *Pellegrini v. Italy*⁴⁸ case of 2001, the applicant challenged Italy before the Strasbourg Court on the grounds that the Italian courts had granted recognition (*exaequatur*) to a nullity of marriage decree. This decree had been pronounced, under canon law, by an ecclesiastical court within the jurisdiction of the Vatican. The Vatican is not a party to the Convention. For that reason, the Court considered that it could not rule on whether the ecclesiastical proceedings before the Vatican court complied with the fairness guarantees under Article 6. On the other hand, the Court considered that, if the Italian courts failed in their duty to verify whether the fairness of the procedures before the ecclesiastical court complied with Article 6 requirements, the responsibility of the Italian State could thereby be engaged. In fact, that was precisely the conclusion reached by the Strasbourg Court since the rights of the defense as well as the assessment of the evidence in the proceedings before the Vatican court had not been conducted in a manner that was in conformity with the requirements of Article 6(1). In recognizing the validity of the judgment of the Vatican court for the purpose of its enforcement in Italy, the Court of Appeal and the Court of Cassation overlooked their duty to ensure that the fairness requirements of Article 6(1) had been met in the ecclesiastical court proceedings. On that account, the Strasbourg Court found that *Italy* had violated Article 6(1) of the Convention.

Lastly, the *Fogarty*⁴⁹ case, decided at the end of 2001, concerned the question of state immunity in circumstances of interest to the United States. The applicant, who had been employed by the American Embassy in London, claimed that the refusal of the Embassy to reemploy her constituted victimization and discrimination. She applied to the Industrial Tribunal, but the British courts could not accept jurisdiction as a consequence of state immunity invoked by the U.S. Government. The applicant then challenged the United Kingdom before the Strasbourg Court. The Court found no violation of Article 6. It considered that, in conferring immunity on the United States by virtue of the provisions of a 1978 Act,⁵⁰ the United Kingdom had not exceeded the margin of appreciation allowed to States in limiting an individual's access to court.

One of the most important cases regarding the respect for private and family life is a recent judgment, *Goodwin v. United Kingdom*⁵¹ of July 2002. The applicant had undergone male-to-female gender reassignment surgery provided by the national health service. The applicant remained for legal purposes a male; the Court, changing its previous case law, found the policy of the national authorities in breach of Article 8 of the Convention. The Court also found no justification for barring the applicant transsexual from enjoying the right to marry under any circumstances and concluded that there had also been a breach of Article 12.

48. *Pellegrini v. Italy*, App. No. 30882/96, 35 Eur. Ct. H.R. 44 (2001).

49. *Fogarty v. United Kingdom*, App. No. 37112/97, 34 Eur. Ct. H.R. 302 (2001).

50. State Immunity Act, 1978, c. 33 (Eng.).

51. *Goodwin v. United Kingdom*, App. No. 28957/95, 366 Eur. Ct. H.R. (2002); *see also* *I. v. United Kingdom*, App. No. 25680/94 (2002).

The Court had earlier reached the conclusion that a blanket ban on homosexuals, leading to their discharge from the armed forces, constituted a breach of the homosexual applicants' right to respect for their private life under Article 8.⁵² As regards freedom of speech and freedom of expression, the recent case law maintains the general approach of the Court to give an extensive interpretation to those liberties and to take a restrictive view of their limitations. At the same time, the case law still enables the Contracting States to enjoy a certain margin of appreciation. The freedom of expression cases under Article 10 of the Convention show that as the expression gets closer to the core operation of democracy, so the margin of appreciation narrows. Thus, it can hardly ever, if at all, be necessary in a democratic society to restrict speech that amounts in effect to participation in public debate on a matter of general interest, even if couched in excessive terms and directed at private individuals.⁵³ The right to express political ideas, as with the right to engage in political activities, is so fundamental to democratic society that democratic legitimacy cannot normally be invoked against them.

On the other hand, where the speech concerned threatens to undermine democracy by, for instance, inciting violence, the margin of appreciation accorded to states will be much wider. In a group of thirteen cases concerning Turkey,⁵⁴ the applicants had all been convicted and sentenced to a term of imprisonment and/or a fine after publishing statements or making public declarations linked to the situation in southeast Turkey and in particular the Kurdish problem. The charges included disseminating separatist propaganda and encouraging violence against the state. The Court had to consider whether the expression in question really did involve a threat to society, in which case a wide margin of appreciation would have operated in the Government's favor. If the court failed to find a sufficient link between the words used and a real possibility of resulting violence, the protection offered by the Convention to political speech would prevail.

Looking at the facts and all the circumstances, the Court took the view that the statements in the majority of the cases which were then before it did not, despite the aggressive language sometimes employed, amount to incitement to violence or armed revolt. The Court concluded in eleven out of the thirteen cases that the State's interference had been disproportionate and that there had accordingly been a breach of Article 10. In two cases, on the other hand, the expressions used, which included a reference to "the fascist Turkish army" and the "hired killers of imperialism," were found by the Court to amount to an appeal for bloody revenge by stirring up base emotions and hardening already embedded prejudices which had manifested themselves in deadly violence. This was "hate speech" and the "glorification of violence," and the interference complained of, in this instance accompanied by a fairly modest fine, was found to be proportionate to the legitimate aim pursued.

Another case worth mentioning in this context, and which regards freedom of expression and freedom of association, concerned an amendment to the Hungarian

52. See *Smith & Grady v. United Kingdom*, App. Nos. 33985/96 & 33986/96, 29 Eur. Ct. H.R. 493, 535–37 (1999).

53. See *Bladet Tromso & Stensaas v. Norway*, App. No. 21980/93, 29 Eur. Ct. H.R. 125 (1999).

54. *Ceylan v. Turkey*, App. No. 23556/94, 30 Eur. Ct. H.R. 73 (1999); *Arslan v. Turkey*, App. No. 23462/94, 31 Eur. Ct. H.R. 264 (1999); *Gerger v. Turkey*, App. No. 24919/94 (1999); *Polat v. Turkey*, App. No. 23500/94 (1999); *Karatas v. Turkey*, App. No. 23168/94 (1999); *Erdogdu & Ince v. Turkey*, App. Nos. 25067/94 & 25068/94 (1999); *Baskaya & Okcuoglu v. Turkey*, App. Nos. 23536/94 & 24408/94, 31 Eur. Ct. H.R. 292 (1999); *Okcuoglu v. Turkey*, App. No. 24246/94 (1999); *Sürek & Özdemir v. Turkey*, App. Nos. 23927/94 & 24277/94 (1999); *Sürek v. Turkey (No.1)*, App. No. 26682/95 (1999); *Sürek v. Turkey (No.2)*, App. No. 24122/94 (1999); *Sürek v. Turkey (No. 3)*, App. No. 24735/94 (1999); *Sürek v. Turkey (No. 4)*, App. No. 24762/94 (1999). The full text of these cases is available at <http://www.echr.coe.int> (last visited Mar. 26, 2003).

Constitution dating from 1994.⁵⁵ The amendment prohibited, among other things, members of the police from engaging in political activities and joining a political party. The Court found that the restriction was prescribed by law and pursued the legitimate aims of the protection of national security and public safety and the prevention of disorder. Seen against Hungary's historical background and the fact that, under the previous regime, police officers were required to be members of the Community party, the Court further concluded that measures taken in that country in order to protect the police force from the direct influence of party politics could be seen as answering a "pressing social need" in a democratic society.⁵⁶

A last example of our recent case law which I would like to mention is the case of *Matthews v. United Kingdom*⁵⁷ decided in 1999. It concerned the right to vote in elections to the European Parliament. A British national resident in Gibraltar applied to register for the European Parliament elections and was informed that, under the terms of the European Community Act on Direct Elections, Gibraltar was not included in the franchise for the European Parliament elections. The applicant complained of a violation of her right to free elections under Article 3 of Protocol No. 1 to the Convention. The Government had argued that the activities of the European Parliament as a supranational institution, rather than a purely domestic representational organ, fell outside the scope of Article 3. The Court looked at the reality of the democratic process in Gibraltar. It accepted that states had a wide margin of appreciation in the choice of their electoral system—for example, whether to opt for proportional representation or a "first-past-the-post" system. However, in this case the applicant had been denied any opportunity to express her opinion in the choice of members of the European Parliament, although legislation emanating from the European Community formed part of the legislation of Gibraltar, thus directly affecting her. There had accordingly been a violation. *Matthews* reaffirms the fundamental importance of effective political democracy as one of the underlying principles of the Convention.

IV. CONCLUSION

Having been a judge of the European Court of Human Rights only since 1998, I can say that the case law of the "old" Court, between 1960 and 1998, is globally outstanding. Even if some of its judgments may, of course, be criticized, it seems to me that as a whole this case law has made a very positive contribution to the protection of human rights in Europe, not only by offering remedies to the persons who are victims of violation of their rights and freedoms, but also by encouraging the Contracting States to modify their legislation or their own case law. Many examples could be given of the improvement of the situation in various countries, including "old" democracies, considered to have good records. For example, many East European states, as well as Turkey, adopted impressive new steps towards democracy and the rule of law in 2001–2002, in significant part under the influence of our Court's judgments and decisions.

From 1998 on, the judges and the Registry of the Strasbourg Court have done their best to maintain a high standard of quality in protecting human rights and to increase the internal productivity of the body. I do not think it is too immodest to claim that they have succeeded in doing so.

However, it is also evident that more must be done. Let me give some figures. At the end of 2001, the Court had some 23,000 applications pending before its decision-making

55. *Rekvenyi v. Hungary*, App. No. 25390/94, 30 Eur. Ct. H.R. 423 (1999).

56. *Id.* at 519.

57. *Matthews v. United Kingdom*, App. No. 24833/94, 28 Eur. Ct. H.R. 361 (1999).

bodies. An audit carried out in 2001 by the Council of Europe Internal Auditor predicted over 20,000 applications annually by 2005. Our own figures suggest an even steeper rise. In 2001 we registered some 13,000 to 14,000 applications. Applications have increased by around 130% since the present Court took office in November 1998 and by about 1400% since 1988. The potential for growth is almost unlimited as a result of the expansion of the Council of Europe over the last decade, and this situation will be compounded when new Member States ratify. Moreover, the evolution of the case load is not merely quantitative. The nature of the cases coming before the Court inevitably reflects the changed composition of the Council of Europe with a significant number of states that are still in transition in many respects, and particularly with regard to their judicial systems, even if considerable progress has been made in some of them. In such states, there are likely to be structural problems, which cannot be resolved overnight.

Like our President, Judge Wildhaber, I am convinced that the system is in further need of a major overhaul. This view has been confirmed by an Evaluation Group set up by the Council of Europe's Committee of Ministers with the directive to identify means of ensuring the continued effectiveness of the Court. The Group's report made two main recommendations: first, it called for an amending Protocol to the Convention which would "empower the Court to decline to examine in detail applications that raise no substantial issue under the Convention."⁵⁸ Its second recommendation was that "a study should be carried out . . . into the creation within the Court of a new and separate division for the preliminary examination of applications."⁵⁹ These recommendations address the two principal problems facing the Convention system: how to absorb and filter out the mass of unmeritorious applications without taking up valuable time of senior judges and how to preserve the coherence and quality of the leading judgments, the judgments that contribute to the Europe-wide human rights jurisprudence and that help to build up the European "public order." It is these judgments that place the Court in its true "constitutional" role, deciding what are essentially public policy issues.

I would not like to be too optimistic, but I am confident that, like our "cousin," the European Court of Justice, the European Court of Human Rights will continue to build a judicial Europe in its own field—i.e., the protection of human rights and fundamental freedoms. But this requires by implication that the European countries undertake the structural measures indispensable for ensuring the efficiency and effectiveness of a system which, in a certain sense, is running the risk of becoming a victim of its own success.

58. Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights, Executive Summary, EG Court (2001)1 (Sept. 27, 2001).

59. *Id.*

