

# Human Rights as a Living Concept

## Case-law overview

J.Silvis

*"The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to "the primordial necessity of order in the social life."*

Justice Benjamin N. Cardozo, *The Nature of the Judicial Process*, 1921

*A treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose; each of these elements guides the interpreter in establishing the common intention of the parties. That is what the principle of evolutive interpretation is essentially means. The principle of interpreting human rights in light of present-day circumstances is firmly rooted in the case-law of the European Court of Human Rights, ever since the case of **TYRER v. THE UNITED KINGDOM**, no. 5856/72, 25 April 1978. The European Court of Human Rights considers the Convention to be a "living instrument". The Court of Justice of the European Union, though not referring to the 'living instrument' doctrine, is also following a principle of 'evolutive interpretation' of rights. Both Courts refer to the in the Vienna Convention on the Law of Treaties ("the Vienna Convention"), when addressing the issue of interpretation.*

*The living instrument doctrine not only finds its legitimation but also its constraints in the Vienna convention. See the rules of interpretation provided for in Articles 31 to 33 of the Vienna Convention (see, for example, *Golder v. the United Kingdom*, 21 February 1975, § 29, Series A no. 18; *Johnston and Others v. Ireland*, 18 December 1986, §§ 51 et seq., Series A no. 112; *Lithgow and Others v. the United Kingdom*, 8 July 1986, §§ 114 and 117, Series A no. 102; and *Witold Litwa v. Poland*, no. 26629/95, §§ 57-59, ECHR 2000-III). The principles of this guidance are summarized in the **CASE OF DEMİR AND BAYKARA v. TURKEY** (Application no. 34503/97); the relevant paragraphs of this judgment are cited in this document.*

*The following ECtHR case-law overview, in which the most relevant paragraphs of a selection of judgments using the doctrine of the living instrument are collected, is meant to show its broadness of application and may be of use preparing a reflection on this subject.*

## Interpreting the Convention as an international treaty

### CASE OF DEMİR AND BAYKARA v. TURKEY

(Application no. 34503/97)

JUDGMENT

STRASBOURG

12 November 2008

#### A. Interpretation of the Convention in the light of other international instruments

60. The Court decided above to examine at the merits stage the Government's submission to the effect that, in adjudicating a case, it was impossible to rely against Turkey on international instruments other than the Convention, particularly instruments that Turkey had not ratified. As it relates more to the methodology to be adopted in an examination of the merits of the complaints submitted under Article 11 of the Convention, the Court considers it necessary to dispose of this submission before turning to any other question.

##### 1. The parties' submissions

###### (a) The Government

61. The Government argued that the Court was not entitled to create, by way of interpretation, any new obligations not already provided for in the Convention. They contended, among other submissions, that an international treaty to which the party concerned had not acceded, could not be relied on against it. While the Government accepted that the Court had always taken into account, where necessary, "any relevant rules of international law applicable in the relations between the parties" (see *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, § 55, ECHR 2001-XI), they considered that this approach was only legitimate if it complied with the criteria set out in Article 31 § 3 of the Vienna Convention on the Law of Treaties ("the Vienna Convention"), and, in particular, if account was taken only of those instruments by which the State concerned was bound.

62. Turkey was not a party to Article 5 (the right to organise) or Article 6 (the right to bargain collectively) of the European Social Charter, which it ratified in 1989. An interpretation that rendered these provisions binding on an indirect basis was even more problematic where, as in the present case, the absence in the Convention of an express provision guaranteeing the right to enter into collective agreements was counterbalanced by consideration of other instruments to which the State concerned was not a party.

###### (b) The applicants

63. The applicants criticised the manner in which the Government had raised the question concerning interpretation of the Convention. They pointed out that the Chamber had not applied the above-mentioned provisions of the European Social Charter in the present case, but that it had taken into account, in its interpretation of Article 11 of the Convention, an opinion of the Committee of Independent Experts (now called the European Committee of Social Rights) concerning the connection between the right to organise and collective bargaining.

##### 2. The Chamber

64. The Chamber did not have cause to rule on the objection in question. It referred, as a supplementary argument, to the opinion of the European Social Charter's Committee of Independent Experts when pointing out the organic link between freedom of association and

freedom to bargain collectively (see *Demir and Baykara v. Turkey*, no. 34503/97, § 35, 21 November 2006). In its judgment, the Chamber used references to conventions of the International Labour Organisation (ILO) in assessing whether the impugned measure was necessary in a democratic society, and, in particular, whether the trade union *Tüm Bel Sen* had been acting in good faith when it chose collective bargaining as a means to defend its members' interests (*ibid.*, § 46).

### 3. The practice of interpreting Convention provisions in the light of other international texts and instruments

#### (a) Basis

65. In order to determine the meaning of the terms and phrases used in the Convention, the Court is guided mainly by the rules of interpretation provided for in Articles 31 to 33 of the Vienna Convention (see, for example, *Golder v. the United Kingdom*, 21 February 1975, § 29, Series A no. 18; *Johnston and Others v. Ireland*, 18 December 1986, §§ 51 et seq., Series A no. 112; *Lithgow and Others v. the United Kingdom*, 8 July 1986, §§ 114 and 117, Series A no. 102; and *Witold Litwa v. Poland*, no. 26629/95, §§ 57-59, ECHR 2000-III). In accordance with the Vienna Convention, the Court is required to ascertain the ordinary meaning to be given to the words in their context and in the light of the object and purpose of the provision from which they are drawn (see *Golder*, cited above, § 29; *Johnston and Others*, cited above, § 51; and Article 31 § 1 of the Vienna Convention). Recourse may also be had to supplementary means of interpretation, either to confirm a meaning determined in accordance with the above steps, or to establish the meaning where it would otherwise be ambiguous, obscure, or manifestly absurd or unreasonable (see Article 32 of the Vienna Convention, and *Saadi v. the United Kingdom* [GC], no. 13229/03, § 62, ECHR 2008-I).

66. Since the Convention is first and foremost a system for the protection of human rights, the Court must interpret and apply it in a manner which renders its rights practical and effective, not theoretical and illusory. The Convention must also be read as a whole, and interpreted in such a way as to promote internal consistency and harmony between its various provisions (see, among other authorities, *Stec and Others v. the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, §§ 47-48, ECHR 2005-X).

67. In addition, the Court has never considered the provisions of the Convention as the sole framework of reference for the interpretation of the rights and freedoms enshrined therein. On the contrary, it must also take into account any relevant rules and principles of international law applicable in relations between the Contracting Parties (see *Saadi*, cited above, § 62; *Al-Adsani*, cited above, § 55; *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, § 150, ECHR 2005-VI; and Article 31 § 3 (c) of the Vienna Convention).

68. The Court further observes that it has always referred to the "living" nature of the Convention, which must be interpreted in the light of present-day conditions, and that it has taken account of evolving norms of national and international law in its interpretation of Convention provisions (see *Soering v. the United Kingdom*, 7 July 1989, § 102, Series A no. 161; *Vo v. France* [GC], no. 53924/00, § 82, ECHR 2004-VIII; and *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, § 121, ECHR 2005-I).

#### (b) Diversity of international texts and instruments used for the interpretation of the Convention

##### (i) General international law

69. The precise obligations that the substantive provisions of the Convention impose on Contracting States may be interpreted, firstly, in the light of relevant international treaties that are applicable in the particular sphere (thus, for example, the Court has interpreted Article 8 of the Convention in the light of the United Nations Convention on the Rights of the Child of 20 November 1989 and the European Convention on the Adoption of Children of 24 April 1967 – see *Pini and Others v. Romania*,

nos. 78028/01 and 78030/01, §§ 139 and 144, ECHR 2004-V, and *Emonet and Others v. Switzerland*, no. 39051/03, §§ 65-66, 13 December 2007).

70. In another case where reference was made to international treaties other than the Convention, the Court, in order to establish the State's positive obligation concerning "the prohibition on domestic slavery" took into account the provisions of universal international conventions (the ILO Forced Labour Convention; the United Nations Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery; and the United Nations Convention on the Rights of the Child – see *Siliadin v. France*, no. 73316/01, §§ 85-87, ECHR 2005-VII). After referring to the relevant provisions of these international instruments, the Court considered that limiting the question of compliance with Article 4 of the Convention only to direct action by the State authorities would be inconsistent with the international instruments specifically concerned with this issue and would amount to rendering it ineffective (*ibid.*, § 89).

71. Moreover, as the Court indicated in the *Golder* case (cited above, § 35), the relevant rules of international law applicable in the relations between the parties also include "general principles of law recognised by civilized nations" (see Article 38 § 1 (c) of the Statute of the International Court of Justice). The Legal Committee of the Consultative Assembly of the Council of Europe foresaw in August 1950 that "the Commission and the Court [would] necessarily [have to] apply such principles" in the execution of their duties and thus considered it to be "unnecessary" to insert a specific clause to this effect in the Convention (Documents of the Consultative Assembly, working papers of the 1950 session, vol. III, no. 93, p. 982, paragraph 5).

72. In the *Soering* judgment (cited above), the Court took into consideration the principles laid down by texts of universal scope in developing its case-law concerning Article 3 of the Convention in respect of extradition to third countries. Firstly, it considered, with reference to the 1966 International Covenant on Civil and Political Rights and the 1969 American Convention on Human Rights, that the prohibition of treatment contrary to Article 3 of the Convention had become an internationally accepted standard. Secondly, it considered that the fact that the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment prohibited the extradition of a person to another State where he would be in danger of being subjected to torture did not mean that an essentially similar obligation was not already inherent in the general terms of Article 3 of the European Convention.

73. Furthermore, the Court found in its *Al-Adsani* judgment, with reference to universal instruments (Article 5 of the Universal Declaration of Human Rights, Article 7 of the International Covenant on Civil and Political Rights, Articles 2 and 4 of the United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment) and their interpretation by international criminal courts (judgment of the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor v. Furundzija*, 10 December 1998) and domestic courts (judgment of the House of Lords in *Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet (No. 3)*), that the prohibition of torture had attained the status of a peremptory norm of international law, or *jus cogens*, which it incorporated into its case-law in this sphere (see *Al-Adsani*, cited above, § 60).

(ii) Council of Europe instruments

74. In a number of judgments the Court has used, for the purpose of interpreting the Convention, intrinsically non-binding instruments of Council of Europe organs, in particular recommendations and resolutions of the Committee of Ministers and the Parliamentary Assembly (see, among other authorities, *Öneryıldız v. Turkey* [GC], no. 48939/99, §§ 59, 71, 90 and 93, ECHR 2004-XII).

75. These methods of interpretation have also led the Court to support its reasoning by reference to norms emanating from other Council of Europe organs, even though those organs have no function of representing States Parties to the Convention, whether supervisory mechanisms or expert bodies. In order to interpret the exact scope of the rights and freedoms guaranteed by the Convention, the Court has, for example, made use of the work of the European Commission for Democracy through

Law (“the Venice Commission”) (see, among other authorities, Russian Conservative Party of Entrepreneurs and Others v. Russia, nos. 55066/00 and 55638/00, §§ 70-73, 11 January 2007; Basque Nationalist Party – Iparralde Regional Organisation v. France, no. 71251/01, §§ 45-52, ECHR 2007-II; and Çiloğlu and Others v. Turkey, no. 73333/01, § 17, 6 March 2007), of that of the European Commission against Racism and Intolerance (see, for example, Bekos and Koutropoulos v. Greece, no. 15250/02, §§ 33-36, ECHR 2005-XIII; Ivanova v. Bulgaria, no. 52435/99, §§ 65-66, 12 April 2007; Cobzaru v. Romania, no. 48254/99, §§ 49-50, 26 July 2007; and D.H. and Others v. the Czech Republic [GC], no. 57325/00, §§ 59-65, 184, 192, 200 and 205, ECHR 2007-IV) and of the reports of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (see, for example, Aerts v. Belgium, 30 July 1998, § 42, Reports of Judgments and Decisions 1998-V; Slimani v. France, no. 57671/00, §§ 22 et seq., ECHR 2004-IX; Nazarenko v. Ukraine, no. 39483/98, §§ 94-102, 29 April 2003; Kalashnikov v. Russia, no. 47095/99, § 97, ECHR 2002-VI; and Kadiķis v. Latvia (no. 2), no. 62393/00, § 52, 4 May 2006).

(iii) Consideration by the Court

76. The Court recently confirmed, in its Saadi judgment (cited above, § 63), that when it considers the object and purpose of the Convention provisions, it also takes into account the international law background to the legal question before it. Being made up of a set of rules and principles that are accepted by the vast majority of States, the common international or domestic law standards of European States reflect a reality that the Court cannot disregard when it is called upon to clarify the scope of a Convention provision that more conventional means of interpretation have not enabled it to establish with a sufficient degree of certainty.

77. By way of example, in finding that the right to organise had a negative aspect which excluded closed-shop agreements, the Court considered, largely on the basis of the European Social Charter and the case-law of its supervisory organs, together with other European or universal instruments, that there was a growing measure of agreement on the subject at international level (see Sigurður A. Sigurjónsson v. Iceland, 30 June 1993, § 35, Series A no. 264, and Sørensen and Rasmussen v. Denmark [GC], nos. 52562/99 and 52620/99, §§ 72-75, ECHR 2006-I).

78. The Court observes in this connection that in searching for common ground among the norms of international law it has never distinguished between sources of law according to whether or not they have been signed or ratified by the respondent State.

79. Thus, in the Marckx v. Belgium case, concerning the legal status of children born out of wedlock, the Court based its interpretation on two international conventions of 1962 and 1975 that Belgium, like other States Parties to the Convention, had not yet ratified at the time (see Marckx v. Belgium, 13 June 1979, §§ 20 and 41, Series A no. 31). The Court considered that the small number of ratifications of these instruments could not be relied on in opposition to the continuing evolution of the domestic law of the great majority of the member States, together with the relevant international instruments, towards full juridical recognition of the maxim “mater semper certa est”.

80. Moreover, in the cases of Christine Goodwin v. the United Kingdom ([GC], no. 28957/95, ECHR 2002-VI), Vilho Eskelinen and Others v. Finland ([GC], no. 63235/00, ECHR 2007-II) and Sørensen and Rasmussen (cited above), the Court was guided by the European Union’s Charter of Fundamental Rights, even though this instrument was not binding. Furthermore, in the cases of McElhinney v. Ireland ([GC], no. 31253/96, ECHR 2001-XI), Al-Adsani (cited above) and Fogarty v. the United Kingdom ([GC], no. 37112/97, ECHR 2001-XI), the Court took note of the European Convention on State Immunity, which had only been ratified at the time by eight member States.

81. In addition, in its Glass v. the United Kingdom judgment, the Court took account, in interpreting Article 8 of the Convention, of the standards enshrined in the Oviedo Convention on Human Rights and Biomedicine of 4 April 1997, even though that instrument had not been ratified by all the States Parties to the Convention (see Glass v. the United Kingdom, no. 61827/00, § 75, ECHR 2004-II).

82. In order to determine the criteria for State responsibility under Article 2 of the Convention in respect of dangerous activities, the Court, in the Öneriyıldız judgment, referred among other texts to the Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment (ETS no. 150 – Lugano, 21 June 1993) and the Convention on the Protection of the Environment through Criminal Law (ETS no. 172 – Strasbourg, 4 November 1998). The majority of member States, including Turkey, had neither signed nor ratified these two conventions (see Öneriyıldız, cited above, § 59).

83. In the Taşkın and Others v. Turkey case, the Court built on its case-law concerning Article 8 of the Convention in matters of environmental protection (an aspect regarded as forming part of the individual's private life) largely on the basis of principles enshrined in the United Nations Economic Commission for Europe's Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (ECE/CEP/43) (see Taşkın and Others v. Turkey, no. 49517/99, §§ 99 and 119, 4 December 2003). Turkey had not signed the Aarhus Convention.

84. The Court notes that the Government further invoked the absence of political support on the part of member States, in the context of the work of the Steering Committee for Human Rights, for the creation of an additional protocol to extend the Convention system to certain economic and social rights. The Court observes, however, that this attitude of member States was accompanied, as acknowledged by the Government, by a wish to strengthen the mechanism of the European Social Charter. The Court regards this as an argument in support of the existence of a consensus among Contracting States to promote economic and social rights. It is not precluded from taking this general wish of Contracting States into consideration when interpreting the provisions of the Convention.

#### 4. Conclusion

85. The Court, in defining the meaning of terms and notions in the text of the Convention, can and must take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their common values. The consensus emerging from specialised international instruments and from the practice of Contracting States may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases.

86. In this context, it is not necessary for the respondent State to have ratified the entire collection of instruments that are applicable in respect of the precise subject matter of the case concerned. It will be sufficient for the Court that the relevant international instruments denote a continuous evolution in the norms and principles applied in international law or in the domestic law of the majority of member States of the Council of Europe and show, in a precise area, that there is common ground in modern societies (see, *mutatis mutandis*, Marckx, cited above, § 41).

## Most cited case on the “living instrument” doctrine

### CASE OF TYRER v. THE UNITED KINGDOM

(Application no. 5856/72)

JUDGMENT

STRASBOURG

25 April 1978

The Court must also recall that the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions. In the case now before it the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field. Indeed, the Attorney-General for the Isle of Man mentioned that, for many years, the provisions of Manx legislation concerning judicial corporal punishment had been under review.

32. As regards the manner and method of execution of the birching inflicted on Mr. Tyrer, the Attorney-General for the Isle of Man drew particular attention to the fact that the punishment was carried out in private and without publication of the name of the offender.

Publicity may be a relevant factor in assessing whether a punishment is "degrading" within the meaning of Article 3 (art. 3), but the Court does not consider that absence of publicity will necessarily prevent a given punishment from falling into that category: it may well suffice that the victim is humiliated in his own eyes, even if not in the eyes of others.

The Court notes that the relevant Isle of Man legislation, as well as giving the offender a right of appeal against sentence, provides for certain safeguards. Thus, there is a prior medical examination; the number of strokes and dimensions of the birch are regulated in detail; a doctor is present and may order the punishment to be stopped; in the case of a child or young person, the parent may attend if he so desires; the birching is carried out by a police constable in the presence of a more senior colleague.

33. Nevertheless, the Court must consider whether the other circumstances of the applicant's punishment were such as to make it "degrading" within the meaning of Article 3 (art. 3).

The very nature of judicial corporal punishment is that it involves one human being inflicting physical violence on another human being. Furthermore, it is institutionalised violence that is in the present case violence permitted by the law, ordered by the judicial authorities of the State and carried out by the police authorities of the State (see paragraph 10 above). Thus, although the applicant did not suffer any severe or long-lasting physical effects, his punishment - whereby he was treated as an object in the power of the authorities - constituted an assault on precisely that which it is one of the main purposes of Article 3 (art. 3) to protect, namely a person's dignity and physical integrity. Neither can it be excluded that the punishment may have had adverse psychological effects.

The institutionalised character of this violence is further compounded by the whole aura of official procedure attending the punishment and by the fact that those inflicting it were total strangers to the offender.

Admittedly, the relevant legislation provides that in any event birching shall not take place later than six months after the passing of sentence. However, this does not alter the fact that there had been an interval of several weeks since the applicant's conviction by the juvenile court and a considerable delay in the police station where the punishment was carried out. Accordingly, in addition to the physical pain he experienced, Mr. Tyrer was subjected to the mental anguish of anticipating the violence he was to have inflicted on him.

## ECtHR Case-law concerning the 'living instrument' doctrine

### Article 1

#### **CASE OF OSMAN v. THE UNITED KINGDOM**

(87/1997/871/1083)

28 October 1998

In the opinion of the Court where there is an allegation that the authorities have violated their positive obligation to protect the right to life in the context of their above-mentioned duty to prevent and suppress offences against the person (see paragraph 115 above), it must be established to its satisfaction 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. The Court does not accept the Government's view that the failure to perceive the risk to life in the circumstances known at the time or to take preventive measures to avoid that risk must be tantamount to gross negligence or wilful disregard of the duty to protect life (see paragraph 107 above). Such a rigid standard must be considered to be incompatible with the requirements of Article 1 of the Convention and the obligations of Contracting States under that Article to secure the practical and effective protection of the rights and freedoms laid down therein, including Article 2 (see, *mutatis mutandis*, the above-mentioned McCann and Others judgment, p. 45, § 146). For the Court, and having regard to the nature of the right protected by Article 2, a right fundamental in the scheme of the Convention, it is sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge. This is a question which can only be answered in the light of all the circumstances of any particular case.

On the above understanding the Court will examine the particular circumstances of this case.

### Article 2

#### **CASE OF VAN COLLE v. THE UNITED KINGDOM**

(Application no. 7678/09)

JUDGMENT

STRASBOURG

13 November 2012

Van Colle v. the United Kingdom - [7678/09](#)

Judgment 13.11.2012 [Section IV]

Positive obligations

Article 2-1

Life

Fatal shooting of a prosecution witness by accused in theft proceedings: no violation

Facts – The applicants’ son was a witness for the prosecution in criminal proceedings against a former employee who was charged with theft. While the case was pending, he received threatening and/or aggressive telephone calls and his car was damaged by fire (although he did not report it to the police as he believed the fire to have been accidental). He was shot dead by the accused just before the trial. A police disciplinary panel later found that the officer in charge of the investigation had not performed his duties diligently. The High Court and Court of Appeal found a violation of Article 2. However, applying the Osman\* test the House of Lords found that there had been no breach of the positive obligation to protect life.

Law – Article 2: The Court did not accept the applicants’ submission that the Osman test should be adapted by lowering the threshold for State responsibility when the State created the relevant risk for the deceased such as by calling him as a witness in criminal proceedings. The fact that the deceased may have been in a category of person who may have been particularly vulnerable was but one of the relevant circumstances to be assessed, in the light of all the circumstances, in order to answer the first of the two questions making up the Osman test of responsibility. The House of Lord had identified the correct Osman test.

The first question to be addressed was then whether there had been any decisive stage in the sequence of events leading up to the fatal shooting when it could have been said the authorities had known or ought to have known of a real and immediate risk to the life of the applicants’ son. In this connection, the Court noted that the prosecution had not been noteworthy: the accused was a petty offender charged with minor theft offences and the risk of a custodial sentence was low. The applicants’ son was not the only or even the main witness in the proceedings. The accused’s record did not indicate a propensity to serious violence against the person or any unpredictability in that respect. There had been nothing to suggest he had used weapons before and he had had no recorded history of mental illness or instability. This absence of violent antecedents had contributed to the unforeseeability of later acts of grave violence. Accordingly, the fact that the applicants’ son had been a witness in the prosecution had not, of itself, given reason to fear for his life and this had been an important factor against which the additional risk factors had been examined. Moreover, facts that might have constituted an escalating situation of intimidation either had not been reported to the police officer concerned or had not amounted to a pattern of violence. Even if the question of whether the police “ought to have known” would have required the officer in charge of the investigation to make some further enquiries, this additional knowledge would not have led him to perceive the accused’s activities as life-threatening. Accordingly, while his failure to enquire further than he had done had been criticised by the police disciplinary panel as lacking in diligence, it could not be impugned from the standpoint of Article 2. Finally, the risk factors in the present case could not be said to have been greater than those in Osman in which no violation of Article 2 had been found. Accordingly, while the officer in charge of the investigation ought to have been aware that there was an escalating situation of intimidation of a number of witnesses, including the applicants’ son, it could not be said that there had been a decisive stage in the sequence of events leading up to the shooting when the officer had known or ought to have known of a real and immediate risk to the life of the applicants’ son from the accused.

Conclusion: no violation (unanimously).

The Court also found no violation of Article 8 of the Convention.

\* Osman v. the United Kingdom, no. [23452/94](#), 28 October 1998

## CONCURRING OPINION OF JUDGE GARLICKI

In any case, as the Convention is a living instrument, the *Osman* test should also be applied in the light of present day conditions. This means that the threshold of what should be required from the authorities cannot remain at the same level as in 1998. Over the last 14 years, the Court has produced a vast body of jurisprudence on positive obligations, in general, and on the obligation to protect human life, in particular. Taking into account the present nature of those obligations, it would be illogical to apply the *Osman* test in its historical form. In short, more can be expected from the authorities today than in 1998.

### Article 3

#### CASE OF SOERING v. THE UNITED KINGDOM

(Application no. 14038/88)

JUDGMENT

STRASBOURG

07 July 1989

102. Certainly, "the Convention is a living instrument which ... must be interpreted in the light of present-day conditions"; and, in assessing whether a given treatment or punishment is to be regarded as inhuman or degrading for the purposes of Article 3 (art. 3), "the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field" (see the above-mentioned *Tyrer* judgment, Series A no. 26, pp. 15-16, § 31). De facto the death penalty no longer exists in time of peace in the Contracting States to the Convention. In the few Contracting States which retain the death penalty in law for some peacetime offences, death sentences, if ever imposed, are nowadays not carried out. This "virtual consensus in Western European legal systems that the death penalty is, under current circumstances, no longer consistent with regional standards of justice", to use the words of Amnesty International, is reflected in Protocol No. 6 (P6) to the Convention, which provides for the abolition of the death penalty in time of peace. Protocol No. 6 (P6) was opened for signature in April 1983, which in the practice of the Council of Europe indicates the absence of objection on the part of any of the Member States of the Organisation; it came into force in March 1985 and to date has been ratified by thirteen Contracting States to the Convention, not however including the United Kingdom.

Whether these marked changes have the effect of bringing the death penalty per se within the prohibition of ill-treatment under Article 3 (art. 3) must be determined on the principles governing the interpretation of the Convention.

103. The Convention is to be read as a whole and Article 3 (art. 3) should therefore be construed in harmony with the provisions of Article 2 (art. 2) (see, *mutatis mutandis*, the *Klass and Others* judgment of 6 September 1978, Series A no. 28, p. 31, § 68). On this basis Article 3 (art. 3) evidently cannot have been intended by the drafters of the Convention to include a general prohibition of the death penalty since that would nullify the clear wording of Article 2 § 1 (art. 2-1).

Subsequent practice in national penal policy, in the form of a generalised abolition of capital punishment, could be taken as establishing the agreement of the Contracting States to abrogate the exception provided for under Article 2 § 1 (art. 2-1) and hence to remove a textual limit on the scope for evolutive interpretation of Article 3 (art. 3). However, Protocol No. 6 (P6), as a subsequent written agreement, shows that the intention of the Contracting Parties as recently as 1983 was to

adopt the normal method of amendment of the text in order to introduce a new obligation to abolish capital punishment in time of peace and, what is more, to do so by an optional instrument allowing each State to choose the moment when to undertake such an engagement. In these conditions, notwithstanding the special character of the Convention (see paragraph 87 above), Article 3 (art. 3) cannot be interpreted as generally prohibiting the death penalty.

104. That does not mean however that circumstances relating to a death sentence can never give rise to an issue under Article 3 (art. 3). The manner in which it is imposed or executed, the personal circumstances of the condemned person and a disproportionality to the gravity of the crime committed, as well as the conditions of detention awaiting execution, are examples of factors capable of bringing the treatment or punishment received by the condemned person within the proscription under Article 3 (art. 3). Present-day attitudes in the Contracting States to capital punishment are relevant for the assessment whether the acceptable threshold of suffering or degradation has been exceeded.

### **CASE OF ÖCALAN v. TURKEY**

(Application no. 46221/99)

JUDGMENT

STRASBOURG

12 May 2005

#### **ÖCALAN v. TURKEY JUDGMENT – PARTLY CONCURRING, PARTLY DISSENTING OPINION OF JUDGE GARLICKI**

Thus, today, in 2005, condemnation of the death penalty has become absolute and even fairness of the highest order at trial cannot legitimate the imposition of such a penalty. In other words, it is possible to conclude that the member States have agreed through their practice to modify the second sentence of Article 2 § 1. The only problem is: who shall have the power to declare, in a binding manner, that such modification has taken place? So, this is a problem not of substance, but of jurisdiction (competence). In consequence, the only question that remains is whether the Court has the power to state the obvious truth, namely that capital punishment has now become an inhuman and degrading punishment *per se*.

4. In answering this question, it is necessary to bear in mind that the Convention, as an international treaty, should be applied and interpreted in accordance with general rules of international law, in particular Article 39 of the Vienna Convention. This suggests that the only way to modify the Convention is to follow the “normal procedure of amendment” (see paragraphs 103-04 of *Soering*, cited above, and paragraphs 164-65 of the present judgment).

But the Convention represents a very distinct form of international instrument and – in many respects – its substance and process of application are more akin to those of national constitutions than to those of “typical” international treaties. The Court has always accepted that the Convention is a living instrument and must be interpreted in the light of present-day conditions. This may result (and, in fact, has on numerous occasions resulted) in judicial modifications of the original meaning of the Convention. From this perspective, the role of our Court is not very different from the role of national Constitutional Courts, whose mandate is not only to defend constitutional provisions on human rights, but also to develop them. The Strasbourg Court has demonstrated such a creative approach to the text of the Convention many times, holding that the Convention rights and freedoms are applicable to situations which were not envisaged by the original drafters. Thus, it is legitimate to assume that, as long as the member States have not clearly rejected a particular judicial interpretation of the Convention (as occurred in relation to the expulsion of aliens, which

became the subject of regulation by Protocols Nos. 4 and 7), the Court has the power to determine the actual meaning of words and phrases which were inserted into the text of the Convention more than fifty years ago. In any event, and this seems to be the situation with regard to the death penalty, the Court may so proceed when its interpretation remains in harmony with the values and standards that have been endorsed by the member States.

5. This Court has never denied that the “living-instrument approach” may lead to a judicial imposition of new, higher standards of human rights protection. However, with respect to capital punishment, it adopted – in *Soering* – “a doctrine of pre-emption”. As I have mentioned above, the Court found that, since the member States had decided to address the problem of capital punishment by way of formal amendments to the Convention, this matter became the “preserve” of the States and the Court was prevented from applying its living-instrument doctrine.

I am not sure whether such an interpretation was correct in *Soering* or applicable to the present judgment.

The judgment in *Soering* was based on the fact that, although Protocol No. 6 had provided for the abolition of the death penalty, several member States had yet to ratify it in 1989. Thus, it would have been premature for the Court to take any general position as to the compatibility of capital punishment with the Convention. Now, the majority raises basically the same argument with respect to Protocol No. 13, which, it is true, remains in the process of ratification.

But this may only demonstrate a hesitation on the part of certain member States over the best moment to irrevocably abolish the death penalty. At the same time, it can no longer be disputed that – on the European level – there is a consensus as to the inhuman nature of the death penalty. Therefore, the fact that governments and politicians are preparing a formal amendment to the Convention may be understood more as a signal that capital punishment should no longer exist than as a decision pre-empting the Court from acting on its own initiative.

That is why I am not convinced by the majority's replication of the *Soering* approach. I do not think that there are any legal obstacles to this Court taking a decision with respect to the nature of capital punishment.

## **CASE OF V. v. THE UNITED KINGDOM**

(Application no. 24888/94)

JUDGMENT

STRASBOURG

16 December 1999

72. The Court has considered first whether the attribution to the applicant of criminal responsibility in respect of acts committed when he was ten years old could, in itself, give rise to a violation of Article 3. In doing so, it has regard to the principle, well established in its case-law that, since the Convention is a living instrument, it is legitimate when deciding whether a certain measure is acceptable under one of its provisions to take account of the standards prevailing amongst the member States of the Council of Europe (see the *Soering* judgment cited above, p. 40, § 102; and also the *Dudgeon v. the United Kingdom* judgment of 22 October 1981, Series A no. 45, and the *X, Y and Z v. the United Kingdom* judgment of 22 April 1997, *Reports* 1997-II).

73. In this connection, the Court observes that, at the present time, there is not yet a commonly accepted minimum age for the attribution of criminal responsibility in Europe. While most of the Contracting States have adopted an age-limit which is higher than that in force in England and Wales, other States, such as Cyprus, Ireland, Liechtenstein and Switzerland, attribute criminal responsibility from a younger age. Moreover, no clear tendency can be ascertained from

examination of the relevant international texts and instruments (see paragraphs 45-46 above). Rule 4 of the Beijing Rules which, although not legally binding, might provide some indication of the existence of an international consensus, does not specify the age at which criminal responsibility should be fixed but merely invites States not to fix it too low, and Article 40 § 3 (a) of the UN Convention requires States Parties to establish a minimum age below which children shall be presumed not to have the capacity to infringe the criminal law, but contains no provision as to what that age should be.

74. The Court does not consider that there is at this stage any clear common standard amongst the member States of the Council of Europe as to the minimum age of criminal responsibility. Even if England and Wales is among the few European jurisdictions to retain a low age of criminal responsibility, the age of ten cannot be said to be so young as to differ disproportionately from the age-limit followed by other European States. The Court concludes that the attribution of criminal responsibility to the applicant does not in itself give rise to a breach of Article 3 of the Convention.

### **CASE OF PRETTY v. THE UNITED KINGDOM**

*(Application no. 2346/02)*

JUDGMENT

STRASBOURG

29 April 2002

54. The applicant has claimed rather that the refusal of the DPP to give an undertaking not to prosecute her husband if he assisted her to commit suicide and the criminal-law prohibition on assisted suicide disclose inhuman and degrading treatment for which the State is responsible as it will thereby be failing to protect her from the suffering which awaits her as her illness reaches its ultimate stages. This claim, however, places a new and extended construction on the concept of treatment, which, as found by the House of Lords, goes beyond the ordinary meaning of the word. While the Court must take a dynamic and flexible approach to the interpretation of the Convention, which is a living instrument, any interpretation must also accord with the fundamental objectives of the Convention and its coherence as a system of human rights protection. Article 3 must be construed in harmony with Article 2, which hitherto has been associated with it as reflecting basic values respected by democratic societies. As found above, Article 2 of the Convention is first and foremost a prohibition on the use of lethal force or other conduct which might lead to the death of a human being and does not confer any right on an individual to require a State to permit or facilitate his or her death.

55. The Court cannot but be sympathetic to the applicant's apprehension that without the possibility of ending her life she faces the prospect of a distressing death. It is true that she is unable to commit suicide herself due to physical incapacity and that the state of law is such that her husband faces the risk of prosecution if he renders her assistance. Nonetheless, the positive obligation on the part of the State which is relied on in the present case would not involve the removal or mitigation of harm by, for instance, preventing any ill-treatment by public bodies or private individuals or providing improved conditions or care. It would require that the State sanction actions intended to terminate life, an obligation that cannot be derived from Article 3 of the Convention.

56. The Court therefore concludes that no positive obligation arises under Article 3 of the Convention to require the respondent State either to give an undertaking 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. There has, accordingly, been no violation of this provision.

## Article 4

### CASE OF RANTSEV v. CYPRUS AND RUSSIA

(Application no. 25965/04)

JUDGMENT

STRASBOURG

7 January 2010

Facts – The applicant’s daughter Ms Rantseva, a Russian national, died in unexplained circumstances after falling from a window of a private property in Cyprus in March 2001. She had arrived in Cyprus a few days earlier on a “cabaret-artiste” visa, but had abandoned her work and lodging shortly after starting and had left a note to say she wanted to return to Russia. After locating her in a discotheque some days later, the manager of the cabaret had taken her to the central police station at around 4 a.m. and asked them to detain her as an illegal immigrant. The police had contacted the immigration authorities, who gave instructions that Ms Rantseva was not to be detained and that her employer, who was responsible for her, was to pick her up and bring her to the immigration office at 7 a.m. The manager had collected Ms Rantseva at around 5.20 a.m. and taken her to private premises, where he had also remained. Her body had been found in the street below the apartment at about 6.30 a.m. A bedspread had been looped through the railing of the balcony.

An inquest held in Cyprus concluded that Ms Rantseva had died in circumstances resembling an accident while attempting to escape from an apartment in which she was a guest, but that there was no evidence of foul play. Although the Russian authorities considered, in the light of a further autopsy that was carried out following the repatriation of the body to Russia, that the verdict of the inquest was unsatisfactory, the Cypriot authorities stated that it was final and refused to carry out any additional investigations unless the Russian authorities had evidence of criminal activity. No steps were taken by either the Russian or Cypriot authorities to interview two young women living in Russia whom the applicant said had worked with his daughter at the cabaret and could testify to sexual exploitation taking place there.

In April 2009 the Cypriot authorities made a unilateral declaration acknowledging violations of Articles 2, 3, 4, 5 and 6 of the Convention, offering to pay compensation to the applicant and advising that independent experts had been appointed to investigate the circumstances of Ms Rantseva’s death, employment and stay in Cyprus.

The Cypriot Ombudsman, the Council of Europe Commissioner for Human Rights and the United States State Department have published reports which refer to the prevalence of trafficking in human beings for commercial sexual exploitation in Cyprus and the role of the cabaret industry and “artiste” visas in facilitating trafficking in Cyprus.

277. The absence of an express reference to trafficking in the Convention is unsurprising. The Convention was inspired by the Universal Declaration of Human Rights, proclaimed by the General Assembly of the United Nations in 1948, which itself made no express mention of trafficking. In its Article 4, the Declaration prohibited “slavery and the slave trade in all their forms”. However, in assessing the scope of Article 4 of the Convention, sight should not be lost of the Convention’s special features or of the fact that it is a living instrument which must be interpreted in the light of present-day conditions. The increasingly high standards required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably require greater firmness in assessing breaches of the fundamental values of democratic societies (see, among many other

authorities, *Selmouni v. France* [GC], no. 25803/94, § 101, ECHR 1999-V; *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 71, ECHR 2002-VI; and *Siliadin*, cited above, § 121).

278. The Court notes that trafficking in human beings as a global phenomenon has increased significantly in recent years (see paragraphs 89, 100, 103 and 269 above). In Europe, its growth has been facilitated in part by the collapse of former Communist blocs. The conclusion of the Palermo Protocol in 2000 and the Anti-Trafficking Convention in 2005 demonstrate the increasing recognition at international level of the prevalence of trafficking and the need for measures to combat it.

(...)

282. There can be no doubt that trafficking threatens the human dignity and fundamental freedoms of its victims and cannot be considered compatible with a democratic society and the values expounded in the Convention. In view of its obligation to interpret the Convention in light of present-day conditions, the Court considers it unnecessary to identify whether the treatment about which the applicant complains constitutes “slavery”, “servitude” or “forced and compulsory labour”. Instead, the Court concludes that trafficking itself, within the meaning of Article 3(a) of the Palermo Protocol and Article 4(a) of the Anti-Trafficking Convention, falls within the scope of Article 4 of the Convention. The Russian Government’s objection of incompatibility *ratione materiae* is accordingly dismissed.

## Article 5

### CASE OF AUSTIN AND OTHERS v. THE UNITED KINGDOM

(Applications nos. 39692/09, 40713/09 and 41008/09)

15 March 2012

#### Article 5-1

##### Deprivation of liberty

Containment of peaceful demonstrators within a police cordon for over seven hours: Article 5 not applicable; no violation

Facts – On 1 May 2001 a large demonstration against capitalism and globalisation took place in London. The organisers gave no notice to the police of their intentions and publicity material they distributed beforehand included incitement to looting, violence and multiple protests all over London. The intelligence available to the police indicated that, in addition to peaceful demonstrators, between 500 and 1,000 violent and confrontational individuals were likely to attend. In the early afternoon a large crowd made its way to Oxford Circus, so that by the time of the events in question some 3,000 people were within the Circus and several thousand more were gathered in the streets outside. In order to prevent injury to people and property, the police decided that it was necessary to contain the crowd by forming a cordon blocking all exit routes from the area. Because of violence and the risk of violence from individuals inside and outside the cordon, and because of a policy of searching and establishing the identity of those within the cordon suspected of causing trouble, many peaceful demonstrators and passers-by, including the applicants, were not released for several hours.

Following these events, the first applicant brought a test case in the High Court for damages for false imprisonment and a breach of her Convention rights. Her claim was dismissed and that decision was upheld on appeal. In a unanimous ruling\*, the House of Lords found that there had been no

deprivation of liberty within the meaning of Article 5 of the Convention since the intention of the police had been to protect both demonstrators and property from violence, and the containment had continued only as long as had been necessary to meet that aim. In its view, the purpose of the confinement or restriction of movement and the intentions of those responsible for imposing it were relevant to the question of whether there had been deprivation of liberty, and measures of crowd control that were proportionate and undertaken in good faith in the interests of the community did not infringe the Article 5 rights of individual members of the crowd whose freedom of movement was restricted.

52. It is true, as the parties point out, that this is the first time that the Court has considered the application of Article 5 § 1 of the Convention in respect of the “kettling” or containment of a group of people carried out by the police on public-order grounds. In interpreting Article 5 § 1 in these circumstances, and in particular in determining whether there has been a deprivation of liberty, the Court draws guidance from the following general principles.

53. Firstly, as the Court has underlined on many occasions, the Convention is a living instrument which must be interpreted in the light of present-day conditions and of the ideas prevailing in democratic States today (see, among other authorities, *Tyrer v. the United Kingdom*, 25 April 1978, § 31, Series A no. 26; *Kress v. France* [GC], no. 39594/98, § 70, ECHR 2001-VI; *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 75, ECHR 2002-VI; and, most recently, *Bayatyan v. Armenia* [GC], no. 23459/03, § 102, ECHR 2011). This does not, however, mean that to respond to present-day needs, conditions, views or standards the Court can create a new right apart from those recognised by the Convention (see *Johnston and Others v. Ireland*, 18 December 1986, §§ 51-54, Series A no. 112) or that it can whittle down an existing right or create a new “exception” or “justification” which is not expressly recognised in the Convention (see, for example, *Engel and Others*, cited above, § 57, and *Ciulla v. Italy*, 22 February 1989, § 41, Series A no. 148).

54. Secondly, the Convention must be read as a whole, and interpreted in such a way as to promote internal consistency and harmony between its various provisions (see *Stec and Others v. the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, § 48, ECHR 2005-X).

55. Given the context in which this containment measure took place in the instant case, the Court considers it appropriate to note, for the sake of completeness, that Article 2 of Protocol No. 4 to the Convention guarantees the right to liberty of movement. It is true that the applicants did not rely upon this provision, since the United Kingdom has not ratified Protocol No. 4 and is thus not bound by it. In the Court’s view, however, taking into account the importance and purport of the distinct provisions of Article 5 and of Article 2 of Protocol No. 4, it is helpful to make the following reflections. Firstly, Article 5 should not, in principle, be interpreted in such a way as to incorporate the requirements of Protocol No. 4 in respect of States which have not ratified it, including the United Kingdom. At the same time, Article 2 § 3 of the said Protocol permits restrictions to be placed on the right to liberty of movement where necessary, inter alia, for the maintenance of public order, the prevention of crime or the protection of the rights and freedoms of others. In connection with Article 11 of the Convention, the Court has held that interferences with the right of freedom of assembly are in principle justified for the prevention of disorder or crime and for the protection of the rights and freedoms of others where demonstrators engage in acts of violence (see *Giuliani and Gaggio v. Italy* [GC], no. 23458/02, § 251, ECHR 2011). It has also held that, in certain well-defined circumstances, Articles 2 and 3 may imply positive obligations on the authorities to take preventive operational measures to protect individuals at risk of serious harm from the criminal acts of other individuals (see *Giuliani and Gaggio*, cited above, § 244, and *P.F. and E.F. v. the United Kingdom* (dec.), no. 28326/09, § 36, 23 November 2010). When considering whether the domestic authorities have complied with such positive obligations, the Court has held that account must be taken of the difficulties involved in policing modern societies, the unpredictability of human conduct and the

operational choices which must be made in terms of priorities and resources (see Giuliani and Gaggio, cited above, § 245, and P.F. and E.F. v. the United Kingdom, cited above, § 40).

56. As the Court has previously stated, the police must be afforded a degree of discretion in taking operational decisions. Such decisions are almost always complicated and the police, who have access to information and intelligence not available to the general public, will usually be in the best position to make them (see P.F. and E.F. v. the United Kingdom, cited above, § 41). Moreover, even by 2001, advances in communications technology had made it possible to mobilise protesters rapidly and covertly on a hitherto unknown scale. Police forces in the Contracting States face new challenges, perhaps unforeseen when the Convention was drafted, and have developed new policing techniques to deal with them, including containment or “kettling”. Article 5 cannot be interpreted in such a way as to make it impracticable for the police to fulfil their duties of maintaining order and protecting the public, provided that they comply with the underlying principle of Article 5, which is to protect the individual from arbitrariness (see Saadi v. the United Kingdom [GC], no. 13229/03, §§ 67-74, ECHR 2008).

57. As mentioned above, Article 5 § 1 is not concerned with mere restrictions on liberty of movement, which are governed by Article 2 of Protocol No. 4. In order to determine whether someone has been “deprived of his liberty” within the meaning of Article 5 § 1, the starting-point must be his concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question. The difference between deprivation of and restriction upon liberty is one of degree or intensity, and not of nature or substance (see Engel and Others, § 59; Guzzardi, §§ 92-93; Storck, § 71, all cited above; and also, more recently, Medvedyev and Others v. France [GC], no. 3394/03, § 73, ECHR 2010).

58. As Lord Walker pointed out (see paragraph 37 above), the purpose behind the measure in question is not mentioned in the above judgments as a factor to be taken into account when deciding whether there has been a deprivation of liberty. Indeed, it is clear from the Court’s case-law that an underlying public-interest motive, for example to protect the community against a perceived threat emanating from an individual, has no bearing on the question whether that person has been deprived of his liberty, although it might be relevant to the subsequent inquiry whether the deprivation of liberty was justified under one of the sub-paragraphs of Article 5 § 1 (see, among many examples, A. and Others v. the United Kingdom [GC], no. 3455/05, § 166, ECHR 2009; Enhorn v. Sweden, no. 56529/00, § 33, ECHR 2005-I; and M. v. Germany, no. 19359/04, ECHR 2009). The same is true where the object is to protect, treat or care in some way for the person taken into confinement, unless that person has validly consented to what would otherwise be a deprivation of liberty (see Storck, cited above, §§ 74-78, and the cases cited therein and, most recently, Stanev v. Bulgaria [GC], no. 36760/06, § 117, ECHR 2012; see also, as regards validity of consent, Amuur v. France, 25 June 1996, § 48, Reports of Judgments and Decisions 1996-III).

59. However, the Court is of the view that the requirement to take account of the “type” and “manner of implementation” of the measure in question (see Engel and Others, § 59 and Guzzardi, § 92, both cited above) enables it to have regard to the specific context and circumstances surrounding types of restriction other than the paradigm of confinement in a cell (see, for example, Engel and Others, cited above, § 59, and Amuur, cited above, § 43). Indeed, the context in which action is taken is an important factor to be taken into account, since situations commonly occur in modern society where the public may be called upon to endure restrictions on freedom of movement or liberty in the interests of the common good. As the judges in the Court of Appeal and House of Lords observed, members of the public generally accept that temporary restrictions may be placed on their freedom of movement in certain contexts, such as travel by public transport or on the motorway, or attendance at a football match (see paragraphs 35 and 37 above). The Court does not consider that such commonly occurring restrictions on movement, so long as they are rendered unavoidable as a result of circumstances beyond the control of the authorities and are necessary to

avert a real risk of serious injury or damage, and are kept to the minimum required for that purpose, can properly be described as “deprivations of liberty” within the meaning of Article 5 § 1.

60. Article 5 enshrines a fundamental human right, namely the protection of the individual against arbitrary interference by the State with his or her right to liberty. Sub-paragraphs (a) to (f) of Article 5 § 1 contain an exhaustive list of permissible grounds on which persons may be deprived of their liberty and no deprivation of liberty will be compatible with Article 5 § 1 unless it falls within one of those grounds (see, amongst many other authorities, *Al-Jedda v. the United Kingdom* [GC], no. 27021/08, § 99, ECHR 2011). It cannot be excluded that the use of containment and crowd-control techniques could, in particular circumstances, give rise to an unjustified deprivation of liberty in breach of Article 5 § 1. In each case, Article 5 § 1 must be interpreted in a manner which takes into account the specific context in which the techniques are deployed, as well as the responsibilities of the police to fulfil their duties of maintaining order and protecting the public, as they are required to do under both national and Convention law.

## Article 6

### CASE OF KRESS V. FRANCE

(Application no. 39594/98)

Judgment

Strasbourg, 7 June 2001

70. However, the mere fact that the administrative courts, and the Government Commissioner in particular, have existed for more than a century and, according to the Government, function to everyone’s satisfaction cannot justify a failure to comply with the present requirements of European law (see *Delcourt v. Belgium*, judgment of 17 January 1970, Series A no. 11, p. 19, § 36). The Court reiterates in this connection that the Convention is a living instrument to be interpreted in the light of current conditions and of the ideas prevailing in democratic States today (see, among other authorities, *Burghartz v. Switzerland*, judgment of 22 February 1994, Series A no. 280-B, p. 29, § 28).

71. No one has ever cast doubt on the independence or impartiality of the Government Commissioner, and the Court considers that his existence and institutional status are not in question under the Convention. However, the Court is of the view that the Commissioner’s independence and the fact that he is not responsible to any hierarchical superior, which is not disputed, are not in themselves sufficient to justify the assertion that the non-disclosure of his submissions to the parties and the fact that it is impossible for the parties to reply to them are not capable of offending against the principle of a fair trial.

Indeed, great importance must be attached to the part actually played in the proceedings by the Government Commissioner, and more particularly to the content and effects of his submissions (see, by analogy, among many other authorities, *Van Orshoven*, cited above, p. 1051, § 39).

(...)

85. In the Court’s opinion, the benefit for the trial bench of this purely technical assistance is to be weighed against the higher interest of the litigant, who must have a guarantee that the Government Commissioner will not be able, through his presence at the deliberations, to influence their outcome. That guarantee is not afforded by the current French system.

86. The Court is confirmed in this approach by the fact that at the Court of Justice of the European Communities the Advocate General, whose role is closely modelled on that of the Government

Commissioner, does not attend the deliberations (Article 27 of the Rules of Procedure of the Court of Justice).

87. In conclusion, there has been a violation of Article 6 § 1 of the Convention on account of the Government Commissioner's participation in the deliberations of the trial bench.

### **CASE OF FERRAZZINI v. ITALY**

(Application no. 44759/98)

JUDGMENT

STRASBOURG

12 July 2001

26. The Convention is, however, a living instrument to be interpreted in the light of present-day conditions (see, among other authorities, *Johnston and Others v. Ireland*, judgment of 18 December 1986, Series A no. 112, pp. 24-25, § 53), and it is incumbent on the Court to review whether, in the light of changed attitudes in society as to the legal protection that falls to be accorded to individuals in their relations with the State, the scope of Article 6 § 1 should not be extended to cover disputes between citizens and public authorities as to the lawfulness under domestic law of the tax authorities' decisions.

27. Relations between the individual and the State have clearly evolved in many spheres during the fifty years which have elapsed since the Convention was adopted, with State regulation increasingly intervening in private-law relations. This has led the Court to find that procedures classified under national law as being part of "public law" could come within the purview of Article 6 under its "civil" head if the outcome was decisive for private rights and obligations, in regard to such matters as, to give some examples, the sale of land, the running of a private clinic, property interests, the granting of administrative authorisations relating to the conditions of professional practice or of a licence to serve alcoholic beverages (see, among other authorities, *Ringeisen v. Austria*, judgment of 16 July 1971, Series A no. 13, p. 39, § 94; *König*, cited above, p. 32, §§ 94-95; *Sporrong and Lönnroth v. Sweden*, judgment of 23 September 1982, Series A no. 52, p. 29, § 79; *Allan Jacobsson v. Sweden (no. 1)*, judgment of 25 October 1989, Series A no. 163, pp. 20-21, § 73; *Bentham v. the Netherlands*, judgment of 23 October 1985, Series A no. 97, p. 16, § 36; and *Tre Traktörer AB v. Sweden*, judgment of 7 July 1989, Series A no. 159, p. 19, § 43). Moreover, the State's increasing intervention in the individual's day-to-day life, in terms of welfare protection for example, has required the Court to evaluate features of public law and private law before concluding that the asserted right could be classified as "civil" (see, among other authorities, *Feldbrugge v. the Netherlands*, judgment of 29 May 1986, Series A no. 99, p. 16, § 40; *Deumeland v. Germany*, judgment of 29 May 1986, Series A no. 100, p. 25, § 74; *Salesi v. Italy*, judgment of 26 February 1993, Series A no. 257-E, pp. 59-60, § 19; and *Schouten and Meldrum*, cited above, p. 24, § 60).

28. However, rights and obligations existing for an individual are not necessarily civil in nature. Thus, political rights and obligations, such as the right to stand for election to the National Assembly (see *Pierre-Bloch*, cited above, p. 2223, § 50), even though in those proceedings the applicant's pecuniary interests were at stake (*ibid.*, § 51), are not civil in nature, with the consequence that Article 6 § 1 does not apply. Neither does that provision apply to disputes between administrative authorities and those of their employees who occupy posts involving participation in the exercise of powers conferred by public law (see *Pellegrin*, cited above, §§ 66-67). Similarly, the expulsion of aliens does not give rise to disputes (*contestations*) over civil rights for the purposes of Article 6 § 1 of the Convention, which accordingly does not apply (see *Maaouia*, cited above, §§ 37-38).

29. In the tax field, developments which might have occurred in democratic societies do not, however, affect the fundamental nature of the obligation on individuals or companies to pay tax. In comparison with the position when the Convention was adopted, those developments have not entailed a further intervention by the State into the “civil” sphere of the individual’s life. The Court considers that tax matters still form part of the hard core of public-authority prerogatives, with the public nature of the relationship between the taxpayer and the community remaining predominant. Bearing in mind that the Convention and its Protocols must be interpreted as a whole, the Court also observes that Article 1 of Protocol No. 1, which concerns the protection of property, reserves the right of States to enact such laws as they deem necessary for the purpose of securing the payment of taxes (see, *mutatis mutandis*, *Gasus Dosier- und Fördertechnik GmbH v. the Netherlands*, judgment of 23 February 1995, Series A no. 306-B, pp. 48-49, § 60). Although the Court does not attach decisive importance to that factor, it does take it into account. It considers that tax disputes fall outside the scope of civil rights and obligations, despite the pecuniary effects which they necessarily produce for the taxpayer.

30. The principle according to which the autonomous concepts contained in the Convention must be interpreted in the light of present-day conditions in democratic societies does not give the Court power to interpret Article 6 § 1 as though the adjective “civil” (with the restriction that that 8 adjective necessarily places on the category of “rights and obligations” to which that Article applies) were not present in the text.

31. Accordingly, Article 6 § 1 of the Convention does not apply in the instant case.

## Article 7

### CASE OF SCOPPOLA v. ITALY (No. 2)

(Application no. 10249/03)

JUDGMENT

STRASBOURG

17 September 2009

107. 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.

108. In the Court's opinion, it is consistent with the principle of the rule of law, of which Article 7 forms an essential part, to expect a trial court to apply to each punishable act the penalty which the legislator considers proportionate. Inflicting a heavier penalty for the sole reason that it was prescribed at the time of the commission of the offence would mean applying to the defendant's detriment the rules governing the succession of criminal laws in time. In addition, it would amount to disregarding any legislative change favourable to the accused which might have come in before the conviction and continuing to impose penalties which the State – and the community it represents – now consider excessive. The Court notes that the obligation to apply, from among several criminal laws, the one whose provisions are the most favourable to the accused is a

clarification of the rules on the succession of criminal laws, which is in accord with another essential element of Article 7, namely the foreseeability of penalties.

PARTLY DISSENTING OPINION OF JUDGE NICOLAOU, JOINED BY JUDGES BRATZA, LORENZEN,  
JOČIENÉ, VILLIGER AND SAJÓ

The decision in *X. v. the Federal Republic of Germany* (above) was, relatively recently, followed by the Court in *Ian Le Petit v. the United Kingdom* (dec.), no. 35574/97, 5 December 2000, and in *Zaprianov v. Bulgaria*, (dec.), no. 41171/98, 6 March 2003, where it was categorically stated that:

“Article 7 does not guarantee the right to have a subsequent and favourable change in the law applicable to an earlier offence”.

The conflict of opinion in the present case should not be attributed to a difference in our interpretative approach to Article 7 § 1 of the Convention. We all profess adherence to the relevant international rules embodied in Articles 31 and 32 of the Vienna Convention on the Law of Treaties 1969 and the view that we, as minority, take of Article 7 § 1 does not call in question the Court's case-law, to which the majority briefly refer, either on reversing previous decisions, where necessary, or of adapting to changing conditions and responding to some emerging consensus on new standards since, as is often emphasised, the Convention is a living instrument requiring a dynamic and evolutive approach that renders rights practical and effective, not theoretical and illusory. But no judicial interpretation, however creative, can be entirely free of constraints. Most importantly it is necessary to keep within the limits set by Convention provisions. As the Court pointed out in *Johnston and Others v. Ireland* (18 December 1986, § 53, Series A no.112):

“It is true that the Convention and its Protocols must be interpreted in the light of present- day conditions (see, amongst several authorities the above-mentioned *Marckx judgment*, Series A no. 31, p. 26, para. 58). However, the Court cannot, by means of an evolutive interpretation, derive from these instruments a right which was not included therein at the outset. This is particularly so here, where the omission was deliberate.”

This is a matter on which the Court should be particularly sensitive. And yet, although the present case does not require it, the majority has gone on to examine the case under Article 7 § 1 and, in order to apply it, has had it re-written in order to accord with what they consider it ought to have been. This, with respect, oversteps the limits.

## Article 8

### CASE OF CHRISTINE GOODWIN v. THE UNITED KINGDOM

(Application no. 28957/95)

JUDGMENT

STRASBOURG

11 July 2002

#### 1. Preliminary considerations

71. This case raises the issue whether or not the respondent State has failed to comply with a positive obligation to ensure the right of the applicant, a post-operative male to female transsexual, to respect for her private life, in particular through the lack of legal recognition given to her gender re-assignment.

72. The Court recalls that the notion of “respect” as understood in Article 8 is not clear cut, especially as far as the positive obligations inherent in that concept are concerned: having regard to the diversity of practices followed and the situations obtaining in the Contracting States, the notion's requirements will vary considerably from case to case and the margin of appreciation to be accorded to the authorities may be wider than that applied in other areas under the Convention. In determining whether or not a positive obligation exists, regard must also be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which balance is inherent in the whole of the Convention (*Cossey v. the United Kingdom* judgment of 27 September 1990, Series A no. 184, p. 15, § 37).

73. The Court recalls that it has already examined complaints about the position of transsexuals in the United Kingdom (see the *Rees v. the United Kingdom* judgment of 17 October 1986, Series A no. 106, the *Cossey v. the United Kingdom* judgment, cited above; the *X., Y. and Z. v. the United Kingdom* judgment of 22 April 1997, Reports of Judgments and Decisions 1997-II, and the *Sheffield and Horsham v. the United Kingdom* judgment of 30 July 1998, Reports 1998-V, p. 2011). In those cases, it held that the refusal of the United Kingdom Government to alter the register of births or to issue birth certificates whose contents and nature differed from those of the original entries concerning the recorded gender of the individual could not be considered as an interference with the right to respect for private life (the above-mentioned *Rees* judgment, p. 14, § 35, and *Cossey* judgment, p. 15, § 36). It also held that there was no positive obligation on the Government to alter their existing system for the registration of births by establishing a new system or type of documentation to provide proof of current civil status. Similarly, there was no duty on the Government to permit annotations to the existing register of births, or to keep any such annotation secret from third parties (the above-mentioned *Rees* judgment, p. 17, § 42, and *Cossey* judgment, p. 15, §§ 38-39). It was found in those cases that the authorities had taken steps to minimise intrusive enquiries (for example, by allowing transsexuals to be issued with driving licences, passports and other types of documents in their new name and gender). Nor had it been shown that the failure to accord general legal recognition of the change of gender had given rise in the applicants' own case histories to detriment of sufficient seriousness to override the respondent State's margin of appreciation in this area (the *Sheffield and Horsham* judgment cited above, p. 2028-29, § 59).

74. While the Court is not formally bound to follow its previous judgments, it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases (see, for example, *Chapman v. the United Kingdom* [GC], no. 27238/95, ECHR 2001-I, § 70). However, since the Convention is first and foremost a system for the protection of human rights, the Court must have regard to the changing conditions within the respondent State and within Contracting States generally and respond, for example, to any evolving convergence as to the standards to be achieved (see, amongst other authorities, the *Cossey* judgment, p. 14, § 35, and *Stafford v. the United Kingdom* [GC], no. 46295/99, judgment of 28 May 2002, to be published in ECHR 2002-, §§ 67-68). It is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. A failure by the Court to maintain a dynamic and evolutive approach would indeed risk rendering it a bar to reform or improvement (see the above-cited *Stafford v. the United Kingdom* judgment, § 68). In the present context the Court has, on several occasions since 1986, signalled its consciousness of the serious problems facing transsexuals and stressed the importance of keeping the need for appropriate legal measures in this area under review (see the *Rees* judgment, § 47; the *Cossey* judgment, § 42; the *Sheffield and Horsham* judgment, § 60).

75. The Court proposes therefore to look at the situation within and outside the Contracting State to assess “in the light of present-day conditions” what is now the appropriate interpretation and application of the Convention (see the *Tyrer v. the United Kingdom* judgment of 25 April 1978, Series A no. 26, § 31, and subsequent case-law).

## Article 14 in relation with Article 8

### CASE OF X AND OTHERS v. AUSTRIA

*(Application no. 19010/07)*

JUDGMENT

STRASBOURG

19 February 2013

Facts – The first and third applicants are two women living in a stable homosexual relationship. The second applicant is the third applicant's minor son. He was born out of wedlock. His father had acknowledged paternity but the third applicant had sole custody. The first applicant wished to adopt the second applicant in order to create a legal relationship between them without severing the boy's relationship with his mother and an adoption agreement was concluded to that end. However, the domestic courts refused to approve the agreement after finding that under domestic law adoption by one person had the effect of severing the family-law relationship with the biological parent of the same sex, so that the boy's adoption by the first applicant would sever his relationship with his mother, the third applicant, not his father.

139. The Court reiterates the principles developed in its case-law. The aim of protecting the family in the traditional sense is rather abstract and a broad variety of concrete measures may be used to implement it (see Karner, cited above, § 41, and Kozak, cited above, § 98). Also, given that the Convention is a living instrument, to be interpreted in present-day conditions, the State, in its choice of means designed to protect the family and secure respect for family life as required by Article 8, must necessarily take into account developments in society and changes in the perception of social, civil-status and relational issues, including the fact that there is not just one way or one choice when it comes to leading one's family or private life (see Kozak, cited above, § 98).

140. In cases in which the margin of appreciation is narrow, as is the position where there is a difference in treatment based on sex or sexual orientation, the principle of proportionality does not merely require the measure chosen to be suitable in principle for achievement of the aim sought. It must also be shown that it was necessary, in order to achieve that aim, to exclude certain categories of people, in this instance persons living in a homosexual relationship, from the scope of application of the provisions at issue (see Karner, cited above, § 41, and Kozak, cited above, § 99).

141. Applying the case-law cited above, the Court notes that the burden of proof is on the Government. It is for the Government to show that the protection of the family in the traditional sense and, more specifically, the protection of the child's interests, require the exclusion of same-sex couples from second-parent adoption, which is open to unmarried heterosexual couples.

142. The Court would repeat that Article 182 § 2 of the Civil Code contains an absolute, albeit implicit, prohibition on second-parent adoption for same-sex couples. The Government did not adduce any specific argument, any scientific studies or any other item of evidence to show that a family with two parents of the same sex could in no circumstances adequately provide for a child's needs. On the contrary, they conceded that, in personal terms, same-sex couples could be as suitable or unsuitable as different-sex couples when it came to adopting children. Furthermore, the Government stated that the Civil Code was not aimed at excluding same-sex partners from second-parent adoption. Nonetheless, they stressed that the legislature had wished to avoid a situation in which a child had two mothers or two fathers for legal purposes. The explicit exclusion of second-parent adoption in same-sex couples had only been introduced by the Registered Partnership Act in 2010, which had not been in force when the present case was determined by the domestic courts and was therefore not relevant in the present case.

143. The Court has already dealt with the argument that the Civil Code does not aim specifically to exclude same-sex partners (see paragraphs 128 and 129 above). Regarding the Registered Partnership Act, the Court agrees that it is not directly at issue in the present case. It may nevertheless be of relevance in so far as it may shed light on the reasons underlying the prohibition of second-parent adoption in same-sex couples. However, the explanatory report on the draft law (see paragraph 42 above) only states that section 8(4) of the Act was included as a result of repeated requests made during the consultation procedure. In other words, it merely reflects the position of those sectors of society which are opposed to the idea of opening up second-parent adoption to same-sex couples.

144. The Court would add that the Austrian legislation appears to lack coherence. Adoption by one person, including one homosexual, is possible. If he or she has a registered partner, the latter has to consent, in accordance with the amendment to Article 181 § 1, sub-paragraph 2, of the Civil Code, which was introduced together with the Registered Partnership Act (see paragraph 40 above). The legislature therefore accepts that a child may grow up in a family based on a same-sex couple, thus accepting that this is not detrimental to the child. Nevertheless, Austrian law insists that a child should not have two mothers or two fathers (see, *mutatis mutandis*, *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 78, ECHR 2002-VI, where the Court also took into consideration the lack of coherence of the domestic legal system).

145. The Court finds force in the applicants' argument that *de facto* families based on a same-sex couple exist but are refused the possibility of obtaining legal recognition and protection. The Court observes that in contrast to individual adoption or joint adoption, which are usually aimed at creating a relationship with a child previously unrelated to the adopter, second-parent adoption serves to confer rights *vis-à-vis* the child on the partner of one of the child's parents. The Court itself has often stressed the importance of granting legal recognition to *de facto* family life (see *Wagner and J.M.W.L. v. Luxembourg*, no. 76240/01, § 119, 28 June 2007; see also, in the context of second-parent adoption, *Eski*, cited above, § 39, and *Emonet and Others*, cited above, §§ 63-64).

146. All the above considerations – the existence of *de facto* family life between the applicants, the importance of having the possibility of obtaining legal recognition thereof, the lack of evidence adduced by the Government in order to show that it would be detrimental to the child to be brought up by a same-sex couple or to have two mothers and two fathers for legal purposes, and especially their admission that same-sex couples may be as suited for second-parent adoption as different-sex couples – cast considerable doubt on the proportionality of the absolute prohibition on second-parent adoption in same-sex couples arising out of Article 182 § 2 of the Civil Code. Unless any other particularly convincing and weighty reasons militate in favour of such an absolute prohibition, the considerations adduced so far would seem rather to weigh in favour of allowing the courts to carry out an examination of each individual case. This would also appear to be more in keeping with the best interests of the child, which is a key notion in the relevant international instruments (see, in particular, paragraph 49 above, and *E.B. v. France*, cited above, § 95).

(...)

148. The Court observes that the breadth of the State's margin of appreciation under Article 8 of the Convention depends on a number of factors. Where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will normally be restricted. Where, however, there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider (see, as recent examples, *S. H. and Others v. Austria*, cited above, § 94, and *A, B and C v. Ireland* [GC], no. 25579/05, § 232, ECHR 2010). However, the Court reaffirms that when it comes to issues of discrimination on the grounds of sex or sexual orientation to be examined under Article 14, the State's margin of appreciation is narrow (see paragraph 99 above).

149. Furthermore, and solely in order to respond to the Government's assertion that no European consensus exists, it has to be borne in mind that the issue before the Court is not the general question of same-sex couples' access to second-parent adoption, but the difference in treatment between unmarried different-sex couples and same-sex couples in respect of this type of adoption (see paragraph 134 above). Consequently, only those ten Council of Europe member States which allow second-parent adoption in unmarried couples may be regarded as a basis for comparison. Within that group, six States treat heterosexual couples and same-sex couples in the same manner, while four adopt the same position as Austria (see the comparative-law information at paragraph 57 above). The Court considers that the narrowness of this sample is such that no conclusions can be drawn as to the existence of a possible consensus among Council of Europe member States.

150. In the Court's view, the same holds true for the 2008 Convention on the Adoption of Children. Firstly, it notes that this Convention has not been ratified by Austria. Secondly, given the low number of ratifications so far, it may be open to doubt whether the Convention reflects common ground among European States at present. In any event, the Court notes that Article 7 § 1 of the 2008 Convention on the Adoption of Children provides that States are to permit adoption by two persons of different sex (who are married or, where that institution exists, are registered partners) or by one person. Under Article 7 § 2, States are free to extend the scope of the Convention to same-sex couples who are married or have entered into a registered partnership, as well as "to different-sex couples and same-sex couples who are living together in a stable relationship". This indicates that Article 7 § 2 does not mean that States are free to treat heterosexual and same-sex couples who live in a stable relationship differently. The Committee of Ministers' Recommendation of 31 March 2010 (CM/Rec (2010)5) appears to point in the same direction: paragraph 23 calls on member States to ensure that the rights and obligations conferred on unmarried couples apply in a non-discriminatory way to both same-sex and different-sex couples. In any event, even if the interpretation of Article 7 § 2 of the 2008 Convention were to lead to another result, the Court reiterates that States retain Convention liability in respect of treaty commitments subsequent to the entry into force of the Convention (see *Al-Saadoon and Mufdhi v. the United Kingdom*, no. 61498/08, § 128, ECHR 2010 (extracts)).

151. The Court is aware that striking a balance between the protection of the family in the traditional sense and the Convention rights of sexual minorities is in the nature of things a difficult and delicate exercise, which may require the State to reconcile conflicting views and interests perceived by the parties concerned as being in fundamental opposition (see *Kozak*, cited above, § 99). However, having regard to the considerations set out above, the Court finds that the Government have failed to adduce particularly weighty and convincing reasons to show that excluding second-parent adoption in a same-sex couple, while allowing that possibility in an unmarried different-sex couple, was necessary for the protection of the family in the traditional sense or for the protection of the interests of the child. The distinction is therefore incompatible with the Convention.

JOINT PARTLY DISSENTING OPINION OF JUDGES CASADEVALL, ZIEMELE, KOVLER, JOČIENĚ, ŠIKUTA,  
DE GAETANO AND SICILIANOS

*International law and the trend towards a laissez-faire approach*

16. The lack of any "consensus" and the variety of approaches to the subject of second-parent adoption in unmarried couples are reflected clearly in Article 7 § 2 of the European Convention on the Adoption of Children, which was revised in 2008 and entered into force in 2011. According to that provision: "States are free to extend the scope of this Convention to same-sex couples who are married to each other or who have entered into a registered partnership together. They are also free to extend the scope of this Convention to different-sex couples and same-sex couples who are living

together in a stable relationship.” In other words, this provision leaves States free to legislate as they see fit.

17. The Convention in question is dealt with in a rather ambivalent manner in the judgment. Some of its provisions – including the one cited above – and the corresponding passages of the explanatory report are reproduced in paragraphs 51 to 53 of the judgment, under the heading “International conventions and Council of Europe materials”. This suggests that this Convention is an instrument to be taken into consideration, in line with what has become the usual practice of the Court. We know that the Court frequently refers to Article 31 § 3 (c) of the Vienna Convention on the Law of Treaties in order to draw on other international instruments which are of relevance for the purpose of interpreting the Convention (see I. Ziemele, “Other Rules of International Law and the European Court of Human Rights: A Question of a Simple Collateral Benefit?” in D. Spielmann, M. Tsirli, P. Voyatzis (eds.), *The European Convention on Human Rights, a living instrument. Essays in Honour of Christos L. Rozakis*, Brussels, Bruylant, 2011, pp. 741-758).

18. However, in paragraph 150 of the judgment the Court seems suddenly to distance itself from this practice. At first, it seems to want to dismiss the 2008 Convention from the outset because it “has not been ratified by Austria”. This argument seems strange bearing in mind that it is the Court’s usual practice to take inspiration from a number of international instruments, whether or not they have been ratified by the respondent State, on the basis that they reflect the current state of general international law (see, among many other authorities, *Cudak v. Lithuania* [GC], no. 15869/02, § 66, ECHR 2010). In order to justify this change of tack, the Court hastens to state, precisely, that “given the low number of ratifications so far, it may be open to doubt whether the [2008] Convention reflects common ground among European States at present”. This argument, while it may at first glance appear pertinent from an international law perspective, amounts in reality to a sort of *petitio principii*. In fact, the only provision of the 2008 Convention which might be relevant in the context of the present case is Article 7 § 2 (cited above). However, this provision simply brings into sharper focus, we would repeat, the lack of “common ground among European States at present”. In other words, the drafters of the 2008 Convention sought, by means of this provision, to express implicitly but clearly their disagreement on the subject of second-parent adoption outside marriage and to leave themselves completely free when it came to enacting legislation on the subject. Rather than acknowledge this situation – and, hence, the Austrian Government’s argument concerning the lack of consensus – the Court chose instead to cast doubt on the relevance of the 2008 Convention overall.

## Article 9

### **CASE OF BAYATYAN v. ARMENIA**

(Application no. 23459/03)

JUDGMENT

STRASBOURG

7 July 2011

73. The applicant submitted that, by refusing to apply the “living instrument” doctrine, the Chamber had crystallised the interpretation made by the European Commission of Human Rights to the effect that Article 4 § 3 (b) limited the applicability of Article 9 to conscientious objectors without justification or explanation. However, Article 4 § 3 (b) could not be legitimately used to deny the right to conscientious objection under Article 9, especially in case of Armenia which had legally committed itself since 2000 to recognise conscientious objectors. Relying on the *Travaux*

préparatoires, the applicant claimed that Article 4 § 3 (b) had never been meant to be read in conjunction with Article 9.

79. The Government agreed that the Convention was a “living instrument”. However, the question of whether Article 9 of the Convention was applicable to the present case was to be considered from the point of view of the interpretation of the Convention existing at the material time.

(...)

91. In conclusion, the intervening organisation (The European Association of Jehovah’s Christian Witnesses; added JS) called upon the Grand Chamber to apply the living instrument doctrine and to bring the case-law in line with present-day conditions. It argued that the imperatives of defence of member States were no longer applicable at the level prevailing at the time of earlier decisions on this matter and the need to make arrangements for national service could be met by member States without overriding the rights guaranteed by Article 9.

(...)

101. At the same time, the Court is mindful of the fact that the restrictive interpretation of Article 9 applied by the Commission was a reflection of the ideas prevailing at the material time. It considers, however, that many years have elapsed since the Commission first set out its reasoning excluding the right to conscientious objection from the scope of Article 9 in the cases of *Grandrath v. the Federal Republic of Germany* and *X. v. Austria*. Even though that reasoning was later confirmed by the Commission on several occasions, its last decision to that effect was adopted as long ago as 1995. In the meantime there have been important developments both in the domestic legal systems of Council of Europe member States and internationally.

102. The Court reiterates in this connection that the Convention is a living instrument which must be interpreted in the light of present-day conditions and of the ideas prevailing in democratic States today (see, among other authorities, *Tyrer v. the United Kingdom*, 25 April 1978, § 31, Series A no. 26; *Kress v. France* [GC], no. 39594/98, § 70, ECHR 2001-VI; and *Christine Goodwin*, cited above, § 75). Since it is first and foremost a system for the protection of human rights, the Court must have regard to the changing conditions in Contracting States and respond, for example, to any emerging consensus as to the standards to be achieved (see *Stafford*, cited above, § 68, and *Scoppola v. Italy* (no. 2) [GC], no. 10249/03, § 104, ECHR 2009-...). Furthermore, in defining the meaning of terms and notions in the text of the Convention, the Court can and must take into account elements of international law other than the Convention and the interpretation of such elements by competent organs. The consensus emerging from specialised international instruments may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases (see *Demir and Baykara v. Turkey* [GC], no. 34503/97, § 85, 12 November 2008).

103. The Court notes that in the late 1980s and the 1990s there was an obvious trend among European countries, both existing Council of Europe member States and those which joined the organisation later, to recognise the right to conscientious objection (see paragraph 47 above). All in all, nineteen of those States which had not yet recognised the right to conscientious objection introduced such a right into their domestic legal systems around the time when the Commission took its last decisions on the matter. Hence, at the time when the alleged interference with the applicant’s rights under Article 9 occurred, namely in 2002-2003, only four other member States, in addition to Armenia, did not provide for the possibility of claiming conscientious objector status, although three of those had already incorporated that right into their Constitutions but had not yet introduced implementing laws (see paragraph 48 above). Thus, already at the material time there was nearly a consensus among all Council of Europe member States, the overwhelming majority of which had already recognised in their law and practice the right to conscientious objection.

104. Moreover, the Court notes that, subsequent to the facts of the present case, two more member States passed laws fully implementing the right to conscientious objection, thereby leaving Azerbaijan and Turkey as the only two member States not to have done so yet. Furthermore, the

Court notes that Armenia itself also recognised that right after the applicant's release from prison and the introduction of the present application.

105. The Court would further point out the equally important developments concerning recognition of the right to conscientious objection in various international fora. The most notable is the interpretation by the UNHRC of the provisions of the ICCPR (Articles 8 and 18), which are similar to those of the Convention (Articles 4 and 9). Initially the UNHRC adopted the same approach as the European Commission, excluding the right of conscientious objection from the scope of Article 18 of the ICCPR. However, in 1993, in its General Comment No. 22, it modified its initial approach and considered that a right to conscientious objection could be derived from Article 18 of the ICCPR inasmuch as the obligation to use lethal force might seriously conflict with the freedom of conscience and the right to manifest one's religion or belief. In 2006 the UNHRC explicitly refused to apply Article 8 of the ICCPR in two cases against South Korea concerning conscientious objectors and examined their complaints solely under Article 18 of the ICCPR, finding a violation of that provision on account of the applicants' conviction for refusal to serve in the army for reasons of conscience (see paragraphs 59-64 above).

106. In Europe, mention should be made of the proclamation in 2000 of the Charter of Fundamental Rights of the European Union, which entered into force in 2009. While the first paragraph of Article 10 of the Charter reproduces Article 9 § 1 of the Convention almost literally, its second paragraph explicitly states that "[t]he right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right" (see paragraph 57 above). Such explicit addition is no doubt deliberate (see, *mutatis mutandis*, Christine Goodwin, cited above, § 100, and Scoppola, cited above, § 105) and reflects the unanimous recognition of the right to conscientious objection by the member States of the European Union, as well as the weight attached to that right in modern European society.

## **Article 10**

### **CASE OF STOLL v. SWITZERLAND**

(Application no. 69698/01)

JUDGMENT

STRASBOURG

10 December 2007

## **Article 10-1**

### Freedom of expression

Conviction of a journalist for the publication of a diplomatic document on strategy classified as confidential: no violation

Facts: The case relates to the sentencing of the applicant, a journalist by profession, to payment of a fine for having disclosed in the press a confidential report by the Swiss ambassador to the United States concerning the strategy to be adopted by the Swiss Government in negotiations between, among others, the World Jewish Congress and Swiss banks on the subject of compensation due to Holocaust victims for unclaimed assets deposited in Swiss bank accounts.

In December 1996 the Swiss ambassador to the United States drew up a “strategy paper”, classified as “confidential”, in the context of the negotiations in question. The paper was sent to the official dealing with the matter in the Federal Department of Foreign Affairs in Berne. Copies were sent to nineteen other individuals in the Swiss Government and the federal authorities and to Swiss diplomatic missions abroad. The applicant obtained a copy, probably as the result of a breach of official secrecy by a person whose identity remains unknown.

A Zurich Sunday newspaper published, among other things, two articles by the applicant entitled “Ambassador Jagmetti insults the Jews” and “The ambassador in bathrobe and climbing boots puts his foot in it”. The following day a Zurich daily newspaper printed extensive extracts from the strategy paper; subsequently, another newspaper also published extracts.

The court ordered the applicant to pay a fine of 800 Swiss francs (approximately 476 euros) for having published “secret official deliberations” within the meaning of Article 293 of the Criminal Code. The applicant’s appeals were dismissed at final instance by the Federal Court.

The Swiss Press Council, while accepting that publication had been legitimate on account in particular of the importance at the time of the public debate concerning the assets of Holocaust victims, took the view that the applicant had, in irresponsible fashion, made the ambassador’s remarks appear shocking and scandalous by printing the strategy paper in truncated form and failing to make the timing of the events sufficiently clear. The Press Council added that the other newspapers, by contrast, had placed the affair in its proper context by publishing the strategy paper in its near-entirety.

#### (d) The Court’s assessment

##### (i) Principles developed by the Court

101. The main issue to be determined is whether the interference was “necessary in a democratic society”. The fundamental principles in that regard are well established in the Court’s case-law and have been summed up as follows (see, for example, *Hertel v. Switzerland*, 25 August 1998, § 46, Reports of Judgments and Decisions 1998-VI, and *Steel and Morris v. the United Kingdom*, no. 68416/01, § 87, ECHR 2005-II):

“(i) Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual’s self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no ‘democratic society’. As set forth in Article 10, this freedom is subject to exceptions, which ... must, however, be construed strictly, and the need for any restrictions must be established convincingly ...

(ii) The adjective ‘necessary’, within the meaning of Article 10 § 2, implies the existence of a ‘pressing social need’. The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a ‘restriction’ is reconcilable with freedom of expression as protected by Article 10.

(iii) The Court’s task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as

a whole and determine whether it was ‘proportionate to the legitimate aim pursued’ and whether the reasons adduced by the national authorities to justify it are ‘relevant and sufficient’ ... In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they relied on an acceptable assessment of the relevant facts ...”

102. The Court further reiterates that all persons, including journalists, who exercise their freedom of expression undertake “duties and responsibilities”, the scope of which depends on their situation and the technical means they use (see, for example, *Handyside v. the United Kingdom*, 7 December 1976, § 49 in fine, Series A no. 24). Thus, notwithstanding the vital role played by the press in a democratic society, journalists cannot, in principle, be released from their duty to obey the ordinary criminal law on the basis that Article 10 affords them protection. Paragraph 2 of Article 10 does not, moreover, guarantee a wholly unrestricted freedom of expression even with respect to press coverage of matters of serious public concern (see, for example, *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, § 65, ECHR 1999-III, and *Monnat v. Switzerland*, no. 73604/01, § 66, ECHR 2006-X).

103. Hence, the safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they are acting in good faith and on an accurate factual basis and provide “reliable and precise” information in accordance with the ethics of journalism (see, for example, *Fressoz and Roire v. France* [GC], no. 29183/95, § 54, ECHR 1999-I; *Monnat*, cited above, § 67; and *Pedersen and Baadsgaard v. Denmark* [GC], no. 49017/99, § 78, ECHR 2004-XI).

104. These considerations play a particularly important role nowadays, given the influence wielded by the media in contemporary society: not only do they inform, they can also suggest by the way in which they present the information how it is to be assessed. In a world in which the individual is confronted with vast quantities of information circulated via traditional and electronic media and involving an ever-growing number of players, monitoring compliance with journalistic ethics takes on added importance. (As regards the principle, well established in the Court’s case-law, whereby the Convention must be interpreted in the light of present-day conditions, see, for example, *Tyrer v. the United Kingdom*, 25 April 1978, § 31, Series A no. 26; *Airey v. Ireland*, 9 October 1979, § 26, Series A no. 32; *Vo v. France* [GC], no. 53924/00, § 82, ECHR 2004-VIII; and *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, § 121, ECHR 2005-I.)

105. Where freedom of the “press” is at stake, the authorities have only a limited margin of appreciation to decide whether a “pressing social need” exists (see, by way of example, *Editions Plon v. France*, no. 58148/00, § 44, third sub-paragraph, ECHR 2004-IV).

106. Furthermore, there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate of questions of public interest (see, for example, *Wingrove v. the United Kingdom*, 25 November 1996, § 58, Reports 1996-V). The most careful scrutiny on the part of the Court is called for when, as in the present case, the measures taken or sanctions imposed by the national authority are capable of discouraging the participation of the press in debates over matters of legitimate public concern (see, for example, *Bladet Tromsø and Stensaas*, cited above, § 64, and *Jersild v. Denmark*, 23 September 1994, § 35, Series A no. 298).

107. However, while it appears that all the member States of the Council of Europe have adopted rules aimed at preserving the confidential or secret nature of certain sensitive items of information and at prosecuting acts which run counter to that aim, the rules vary considerably not just in terms of how secrecy is defined and how the sensitive areas to which the rules relate are managed, but also in terms of the practical arrangements and conditions for prosecuting persons who disclose information illegally (see the comparative study by Mr Christos Pourgourides, paragraph 44 above). States can therefore claim a certain margin of appreciation in this sphere.

## CONCURRING OPINION OF JUDGE ZIEMELE

I voted with the majority in favour of finding that there has been no violation of Article 10 in the circumstances of this case. However, I do not share the reasoning of the majority on one specific point.

Beginning in paragraph 125 of the judgment, the Court looks in great detail at the interests which the domestic authorities sought to protect in this case. The first interest is the protection of the confidentiality of information within diplomatic services so as to ensure the smooth functioning of international relations. The Court takes the opportunity to articulate a very important principle as regards the role that Article 10 plays in international relations and foreign policy decisions of States Parties, namely, that “preventing all public debate on matters relating to foreign affairs by invoking the need to protect diplomatic correspondence is unacceptable” (see paragraph 128). Certain well-known foreign policy decisions of the last few years, for example those which led to complex international events and developments, demonstrate the importance of debate and transparency in this field.

Subsequently, the majority of the Court addresses the question of the repercussions that the published articles concerning Ambassador Jagmetti and his confidential report had on the negotiations between Switzerland and the World Jewish Congress and the other interested parties on the subject of compensation due to Holocaust victims for unclaimed assets deposited in Swiss bank accounts (see paragraphs 130-36). The majority of the Court firstly notes that the Government did not show that the published articles had actually prevented Switzerland and the banks in question from finding a solution to the problem (see paragraph 130). Nevertheless, the majority decides to assess whether, at the moment of their publication, the articles were such as to damage the interests of the State. It comes to the conclusion that “... the disclosure – albeit partial – of the content of the ambassador’s report was capable of undermining the climate of discretion necessary to the successful conduct of diplomatic relations in general and of having negative repercussions on the negotiations being conducted by Switzerland in particular. Hence, given that they were published at a particularly delicate juncture, the articles written by the applicant were liable to cause considerable damage to the interests of the respondent party in the present case” (see paragraph 136).

I disagree that the Court of Human Rights should single out the interests of the respondent party in these negotiations.

### Article 11

## CASE OF SIGURDUR A. SIGURJÓNSSON v. ICELAND

(Application no. 16130/90)

JUDGMENT

STRASBOURG

30 June 1993

35. (...)Furthermore, according to the practice of the Freedom of Association Committee of the Governing Body of the International Labour Office (ILO), union security measures imposed by law, notably by making union membership compulsory, would be incompatible with Conventions Nos. 87 and 98 (the first concerning freedom of association and the right to organise and the second the application of the principles of the right to organise and to bargain collectively; see Digest of decisions and principles of the said committee, 1985, paragraph 248).

In this connection, it should be recalled that the Convention is a living instrument which must be interpreted in the light of present-day conditions (see, amongst other authorities, the *Soering v. the United Kingdom* judgment of 7 July 1989, Series A no. 161, p. 40, para. 102). Accordingly, Article 11 (art. 11) must be viewed as encompassing a negative right of association. It is not necessary for the Court to determine in this instance whether this right is to be considered on an equal footing with the positive right.

36. As to the specific circumstances of the case, the Court is not persuaded by the Government's argument that an obligation to join Frami already existed when the applicant obtained his licence in 1984. No significant weight can be attached to the fact that, before being granted the licence, he agreed to become a member; it is a matter of speculation whether he would have done so in the absence of the membership condition laid down in the 1983 Regulation (see paragraph 8 above), which was later held by the Supreme Court to lack a statutory basis (see paragraph 15 above), though his conduct since August 1985 suggests that he would not (see paragraphs 9 to 17 above). Nor has it been established that an obligation of membership arose for any other reason. In fact, only when the 1989 Law entered into force on 1 July 1989 did it become clear that membership was a requirement. The applicant has since been compelled to remain a member of Frami and would otherwise, as was amply illustrated by the revocation of his licence in 1986 (see paragraph 10 above), run the risk of losing his licence again. Such a form of compulsion, in the circumstances of the case, strikes at the very substance of the right guaranteed by Article 11 (art. 11) and itself amounts to an interference with that right (see the above-mentioned *Young, James and Webster* judgment, pp. 22-23, paras. 55 and 57, and the *Sibson v. the United Kingdom* judgment of 20 April 1993, Series A no. 258-A, p. 14, para. 29).

37. What is more, Mr Sigurdur A. Sigurjónsson objected to being a member of the association in question partly because he disagreed with its policy in favour of limiting the number of taxicabs and, thus, access to the occupation; in his opinion the interests of his country were better served by extensive personal freedoms, including freedom of occupation, than State regulation. Therefore, the Court is of the view that Article 11 (art. 11) can, in the circumstances, be considered in the light of Articles 9 and 10 (art. 9, art. 10), the protection of personal opinion being also one of the purposes of the freedom of association guaranteed by Article 11 (art. 11) (see the above-mentioned *Young, James and Webster* judgment, pp. 23-24, para. 57). The pressure exerted on the applicant in order to compel him to remain a member of Frami contrary to his wishes was a further aspect going to the very essence of an Article 11 (art. 11) right; there was interference too in this respect. The Government's argument that Frami was a non-political association is not relevant in this regard.

## Article 12

### CASE OF SCHALK AND KOPF v. AUSTRIA

(Application no. 30141/04)

JUDGMENT

STRASBOURG

24 June 2010

45. The Government of the United Kingdom asserted that the Court's case-law as it stood considered Article 12 to refer to the "traditional marriage between persons of the opposite biological sex" (see *Sheffield and Horsham v. the United Kingdom*, 30 July 1998, § 66, *Reports of Judgments and Decisions* 1998-V). In their view there were no reasons to depart from that position.

46. While the Court had often underlined that the Convention was a living instrument which had to be interpreted in present-day conditions, it had only used that approach to develop its jurisprudence where it had perceived a convergence of standards among member States. In *Christine Goodwin v. the United Kingdom* [GC] (no. 28957/95, ECHR 2002-VI), for instance, the Court had reviewed its position regarding the possibility of post-operative transsexuals to marry a person of the sex opposite to their acquired gender, having regard to the fact that a majority of Contracting States permitted such marriages. In contrast there was no convergence of standards as regards same-sex marriage. At the time when the third-party Government submitted their observations only three member States permitted same-sex marriage, and in two others proposals to this effect were under consideration. The issue of same-sex marriage concerned a sensitive area of social, political and religious controversy. In the absence of consensus, the State enjoyed a particularly wide margin of appreciation.

(...)

57. In any case, the applicants did not rely mainly on the textual interpretation of Article 12. In essence they relied on the Court's case-law according to which the Convention is a living instrument which is to be interpreted in present-day conditions (see *E.B. v. France* [GC], no. 43546/02, § 92, ECHR 2008-..., and *Christine Goodwin*, cited above, §§ 74-75). In the applicants' contention Article 12 should in present-day conditions be read as granting same-sex couples access to marriage or, in other words, as obliging member States to provide for such access in their national laws.

58. The Court is not persuaded by the applicants' argument. Although, as it noted in *Christine Goodwin*, the institution of marriage has undergone major social changes since the adoption of the Convention, the Court notes that there is no European consensus regarding same-sex marriage. At present no more than six out of forty-seven Convention States allow same-sex marriage (see paragraph 27 above).

(...)

[Article 14 combined with Article 8]

105. The Court cannot but note that there is an emerging European consensus towards legal recognition of same-sex couples. Moreover, this tendency has developed rapidly over the past decade. Nevertheless, there is not yet a majority of States providing for legal recognition of same-sex couples. The area in question must therefore still be regarded as one of evolving rights with no established consensus, where States must also enjoy a margin of appreciation in the timing of the introduction of legislative changes (see *Courten*, cited above; see also *M.W. v. the United Kingdom* (dec.), no. 11313/02, 23 June 2009, both relating to the introduction of the Civil Partnership Act in the United Kingdom).

## Article 13

### CASE OF HATTON AND OTHERS v. THE UNITED KINGDOM

(Application no. 36022/97)

GRAND CHAMBER

JUDGMENT

STRASBOURG

8 July 2003

138. The Court would first reiterate that Article 13 does not go so far as to guarantee a remedy allowing a Contracting State's laws to be challenged before a national authority on the ground of being contrary to the Convention (see *Costello-Roberts v. the United Kingdom*, judgment of 25 March 1993, Series A no. 247-C, p. 62, § 40). Similarly, it does not allow a challenge to a general policy as such. Where an applicant has an arguable claim to a violation of a Convention right, however, the domestic regime must afford an effective remedy (*ibid.*, p. 62, § 39).

139. As the Chamber found, section 76 of the 1982 Act prevents actions in nuisance in respect of excessive noise caused by aircraft at night. The applicants complain about the flights which were permitted by the 1993 Scheme, and which were in accordance with the relevant regulations. No action therefore lay in trespass or nuisance in respect of lawful night flights.

140. The question which the Court must address is whether the applicants had a remedy at national level to “enforce the substance of the Convention rights ... in whatever form they may happen to be secured in the domestic legal order” (see *Vilvarajah and Others v. the United Kingdom*, judgment of 30 October 1991, Series A no. 215, pp. 38-40, §§ 117-27). The scope of the domestic review in *Vilvarajah*, which concerned immigration, was relatively broad because of the importance domestic law attached to the matter of physical integrity. It was on this basis that judicial review was held to comply with the requirements of Article 13. In contrast, in *Smith and Grady v. the United Kingdom* (nos. 33985/96 and 33986/96, §§ 135-39, ECHR 1999-VI), the Court concluded that judicial review was not an effective remedy on the ground that the domestic courts defined policy issues so broadly that it was not possible for the applicants to make their Convention points regarding their rights under Article 8 in the domestic courts.

141. The Court observes that judicial review proceedings were capable of establishing that the 1993 Scheme was unlawful because the gap between government policy and practice was too wide (see *R. v. Secretary of State for Transport, ex parte Richmond LBC* (no. 2) [1995] Environmental Law Reports 390). However, it is clear, as noted by the Chamber, that the scope of review by the domestic courts was limited to the classic English public-law concepts, such as irrationality, unlawfulness and patent unreasonableness, and did not at the time (that is, prior to the entry into force of the Human Rights Act 1998) allow consideration of whether the claimed increase in night flights under the 1993 Scheme represented a justifiable limitation on the right to respect for the private and family lives or the homes of those who live in the vicinity of Heathrow Airport.

142. In these circumstances, the Court considers that the scope of review by the domestic courts in the present case was not sufficient to comply with Article 13.

There has therefore been a violation of Article 13 of the Convention.

#### JOINT DISSENTING OPINION OF JUDGES COSTA, RESS, TÜRMEŒEN, ZUPANČIČ AND STEINER

The European Union's Charter of Fundamental Rights (even though it does not at present have binding legal force) provides an interesting illustration of the point. Article 37 of the Charter provides:

“A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.”

These recommendations show clearly that the member States of the European Union want a high level of protection and better protection, and expect the Union to develop policies aimed at those objectives. On a broader plane the Kyoto Protocol makes it patent that the question of environmental pollution is a supra-national one, as it knows no respect for the boundaries of national sovereignty<sup>5</sup>. This makes it an issue par excellence for international law – and a fortiori for international jurisdiction. In the meanwhile, many supreme and constitutional courts have invoked

constitutional vindication of various aspects of environmental protection – on these precise grounds<sup>6</sup>. We believe that this concern for environmental protection shares common ground with the general concern for human rights.

## II. Development of the case-law

2. As the Court has often underlined: “The Convention is a living instrument, to be interpreted in the light of present-day conditions” (see, among many other authorities, *Airey v. Ireland*, judgment of 9 October 1979, Series A no. 32, pp. 14-16, § 26, and *Loizidou v. Turkey* (preliminary objections), judgment of 23 March 1995, Series A no. 310, pp. 26-27, § 71). This “evolutive” interpretation by the Commission and the Court of various Convention requirements has generally been “progressive”, in the sense that they have gradually extended and raised the level of protection afforded to the rights and freedoms guaranteed by the Convention to develop the “European public order”. In the field of environmental human rights, which was practically unknown in 1950, the Commission and the Court have increasingly taken the view that Article 8 embraces the right to a healthy environment, and therefore to protection against pollution and nuisances caused by harmful chemicals, offensive smells, agents which precipitate respiratory ailments, noise and so on.

### Article 14

#### **CASE OF MIZZI v. MALTA**

(Application no. 26111/02)

JUDGMENT

STRASBOURG

12 January 2006

3. The applicant alleged that he had been denied access to a court with regard to his action for disavowal, that the irrebuttable presumption of paternity applied in his case amounted to a disproportionate interference with his right to respect for his private and family life and that he had been discriminated against in the enjoyment of his rights under Article 8 and/or Article 6 § 1 of the Convention

132. According to the Court’s case-law, a difference in treatment is discriminatory for the purposes of Article 14 if it “has no objective and reasonable justification”, that is if it does not pursue a “legitimate aim” or if there is not a “reasonable relationship of proportionality between the means employed and the aim sought to be realised” (see, among other authorities, *Pla and Puncernau v. Andorra*, no. 69498/01, § 61, ECHR 2004-VIII). In this connection, the Court observes that the Convention is a living instrument, to be interpreted in the light of present-day conditions (see, among other authorities, *Fretté v. France*, no. 36515/97, § 34, ECHR 2002-I, and *Johnston and Others v. Ireland*, judgment of 18 December 1986, Series A no. 112, pp. 24-25, § 53).

133. In the *Rasmussen* case, the Court, having regard to the lack of common ground in the Contracting States’ legislation and to the margin of appreciation enjoyed by the domestic authorities, held that the institution of different time-limits between husbands and wives could be justified by the desire to ensure legal certainty and to protect the interests of the child, and that it did not exceed a reasonable relationship of proportionality (*Rasmussen*, cited above, pp. 15-16, §§ 41-42).

134. The present case is, however, distinguishable from that of *Rasmussen*, in which the applicant had an opportunity to disavow the child during the five years subsequent to the birth and within twelve months after he had become cognisant of the circumstances affording grounds for contesting

paternity. As noted above (see paragraphs 80, 87 and 108), Mr Mizzi never had such an opportunity. The rigid application of the time-limit, coupled with the Constitutional Court's refusal to allow an exception, deprived him of the possibility of exercising the rights guaranteed by Articles 6 and 8 of the Convention, which, on the contrary, were and still are enjoyed by the other interested parties.

135. Under these circumstances, the Court cannot conclude that the difference in treatment complained of was proportionate to the aims sought to be achieved.

136. It follows that there has been a violation of Article 14, read in conjunction with Article 6 § 1 and Article 8 of the Convention.

59. As the respondent Government as well as the third-party Government have rightly pointed out, the present case has to be distinguished from *Christine Goodwin*. In that case (cited above, § 103) the Court perceived a convergence of standards regarding marriage of transsexuals in their assigned gender. Moreover, *Christine Goodwin* is concerned with marriage of partners who are of different gender, if gender is defined not by purely biological criteria but by taking other factors including gender reassignment of one of the partners into account.

60. Turning to the comparison between Article 12 of the Convention and Article 9 of the Charter of Fundamental Rights of the European Union (the Charter), the Court has already noted that the latter has deliberately dropped the reference to men and women (see *Christine Goodwin*, cited above, § 100). The commentary to the Charter, which became legally binding in December 2009, confirms that Article 9 is meant to be broader in scope than the corresponding articles in other human rights instruments (see paragraph 25 above). At the same time the reference to domestic law reflects the diversity of national regulations, which range from allowing same-sex marriage to explicitly forbidding it. By referring to national law, Article 9 of the Charter leaves the decision whether or not to allow same-sex marriage to the States. In the words of the commentary: "... it may be argued that there is no obstacle to recognize same-sex relationships in the context of marriage. There is however, no explicit requirement that domestic laws should facilitate such marriages."

61. Regard being had to Article 9 of the Charter, therefore, the Court would no longer consider that the right to marry enshrined in Article 12 must in all circumstances be limited to marriage between two persons of the opposite sex. Consequently, it cannot be said that Article 12 is inapplicable to the applicants' complaint. However, as matters stand, the question whether or not to allow same-sex marriage is left to regulation by the national law of the Contracting State.

62. In that connection the Court observes that marriage has deep-rooted social and cultural connotations which may differ largely from one society to another. The Court reiterates that it must not rush to substitute its own judgment in place of that of the national authorities, who are best placed to assess and respond to the needs of society (see *B. and L. v. the United Kingdom*, cited above, § 36).

63. In conclusion, the Court finds that Article 12 of the Convention does not impose an obligation on the respondent Government to grant a same-sex couple like the applicants access to marriage.

64. Consequently, there has been no violation of Article 12 of the Convention.

## **Protocol 1, Article 1**

### **CASE OF STEC AND OTHERS v. THE UNITED KINGDOM**

(Applications nos. 65731/01 and 65900/01)

JUDGMENT

STRASBOURG

12 April 2006

(...)

66. In conclusion, the Court finds that the difference in State pensionable age between men and women in the United Kingdom was originally intended to correct the disadvantaged economic position of women. It continued to be reasonably and objectively justified on this ground until such time as social and economic changes removed the need for special treatment for women. The respondent State's decisions as to the precise timing and means of putting right the inequality were not so manifestly unreasonable as to exceed the wide margin of appreciation allowed it in such a field (see paragraph 52 above). Similarly, the decision to link eligibility for REA to the pension system was reasonably and objectively justified, given that this benefit is intended to compensate for reduced earning capacity during a person's working life. There has not, therefore, been a violation of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1 in this case.

67. The above finding renders it unnecessary for the Court to consider separately the issues relating to the victim status of the third, fourth and fifth applicants (see paragraph 11 above).

## **Protocol 1, Article 2**

### **CASE OF LEYLA ŞAHİN v. TURKEY**

(Application no. 44774/98)

JUDGMENT

STRASBOURG

10 November 2005

#### **I. THE CIRCUMSTANCES OF THE CASE**

14. The applicant was born in 1973 and has lived in Vienna since 1999, when she left Istanbul to pursue her medical studies at the Faculty of Medicine at Vienna University. She comes from a traditional family of practising Muslims and considers it her religious duty to wear the Islamic headscarf.

A. The circular of 23 February 1998

15. On 26 August 1997 the applicant, then in her fifth year at the Faculty of Medicine at Bursa University, enrolled at the Cerrahpaşa Faculty of Medicine at Istanbul University. She says she wore the Islamic headscarf during the four years she spent studying medicine at the University of Bursa and continued to do so until February 1998.

16. On 23 February 1998 the Vice-Chancellor of Istanbul University issued a circular, the relevant part of which provides:

“By virtue of the Constitution, the law and regulations, and in accordance with the case-law of the Supreme Administrative Court and the European Commission of Human Rights and the resolutions adopted by the university administrative boards, students whose ‘heads are covered’ (who wear the Islamic headscarf) and students (including overseas students) with beards must not be admitted to lectures, courses or tutorials. Consequently, the name and number of any student with a beard or wearing the Islamic headscarf must not be added to the lists of registered students. However, students who insist on attending tutorials and entering lecture theatres although their names and numbers are not on the lists must be advised of the position and, should they refuse to leave, their names and numbers must be taken and they must be informed that they are not entitled to attend lectures. If they refuse to leave the lecture theatre, the teacher shall record the incident in a report explaining why it was not possible to give the lecture and shall bring the incident to the attention of the university authorities as a matter of urgency so that disciplinary measures can be taken.”

(...)

136. The Court does not lose sight of the fact that the development of the right to education, whose content varies from one time or place to another according to economic and social circumstances, mainly depends on the needs and resources of the community. However, it is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. Moreover, the Convention is a living instrument which must be interpreted in the light of present-day conditions (see *Marckx v. Belgium*, judgment of 13 June 1979, Series A no. 31, p. 19, § 41; *Airey v. Ireland*, judgment of 9 October 1979, Series A no. 32, pp. 14-15, § 26; and, as the most recent authority, *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, § 121, ECHR 2005-I). While the first sentence of Article 2 essentially establishes access to primary and secondary education, there is no watertight division separating higher education from other forms of education. In a number of recently adopted instruments, the Council of Europe has stressed the key role and importance of higher education in the promotion of human rights and fundamental freedoms and the strengthening of democracy (see, *inter alia*, Recommendation No. R (98) 3 and Recommendation 1353 (1998) – cited in paragraphs 68 and 69 above). As the Convention on the Recognition of Qualifications concerning Higher Education in the European Region (see paragraph 67 above) states, higher education “is instrumental in the pursuit and advancement of knowledge” and “constitutes an exceptionally rich cultural and scientific asset for both individuals and society”.

137. Consequently, it would be hard to imagine that institutions of higher education existing at a given time do not come within the scope of the first sentence of Article 2 of Protocol No 1. Although that Article does not impose a duty on the Contracting States to set up institutions of higher education, any State doing so will be under an obligation to afford an effective right of access to them. In a democratic society, the right to education, which is indispensable to the furtherance of human rights, plays such a fundamental role that a restrictive interpretation of the first sentence of Article 2 of Protocol No. 1 would not be consistent with the aim or purpose of that provision (see, *mutatis mutandis*, the Belgian linguistic case, cited above, pp. 33-34, § 9, and *Delcourt v. Belgium*, judgment of 17 January 1970, Series A no. 11, pp. 13-15, § 25).

(...)

160. It would, furthermore, be unrealistic to imagine that the applicant, a medical student, was unaware of Istanbul University’s internal regulations restricting the places where religious dress could be worn or had not been sufficiently informed about the reasons for their introduction. She could reasonably have foreseen that she ran the risk of being refused access to lectures and examinations if, as subsequently happened, she continued to wear the Islamic headscarf after 23 February 1998.

161. Consequently, the restriction in question did not impair the very essence of the applicant’s right to education. In addition, in the light of its findings with respect to the other Articles relied on by the

applicant (see paragraphs 122 above and 166 below), the Court observes that the restriction did not conflict with other rights enshrined in the Convention or its Protocols either.

162. In conclusion, there has been no violation of the first sentence of Article 2 of Protocol No. 1.

## **Article 2 of Protocol No. 1**

### **CASE OF CATAN AND OTHERS v. MOLDOVA AND RUSSIA**

(Applications nos. 43370/04, 8252/05 and 18454/06)

JUDGMENT

STRASBOURG

19 October 2012

Article 1

Jurisdiction of states

Jurisdiction of Moldovan and Russian Governments in relation to educational policy within separatist region of the Republic of Moldova

Respect for parents' philosophical convictions

Right to education

Closure of schools teaching in Latin script and harassment of pupils wishing to be educated in their national language: violation

Facts – The applicants were children and parents from the Moldovan community in Transdnistria, a region in the eastern part of the territory of the Republic of Moldova over which the Moldovan Government do not exercise control. This area is governed by the “Moldavian Republic of Transdnistria” (the “MRT”), a separatist movement. The “MRT” has not been recognised by the international community. The applicants complained about the effects on their and their children’s education and family lives brought about by the language policy of the separatist authorities. The core of their complaints relate to measures taken by the “MRT” authorities in 2002 and 2004 which forbade the use of the Latin alphabet in schools and required all schools to register and start using an “MRT”-approved curriculum and the Cyrillic script. These actions involved the forcible eviction of pupils and teachers from their schools, and the subsequent closure and relocation of the schools to distant and poorly equipped premises. The applicants further contended that they were subjected to a systematic campaign of harassment and intimidation by representatives of the “MRT” regime and private individuals. They claimed that children were verbally abused on their way to school and stopped and searched by the “MRT” police and border guards, who confiscated Latin script books when they found them and that in addition the two schools located in “MRT”-controlled territory were the target of repeated acts of vandalism. The applicants alleged that the events in question fell within the jurisdiction of both of the respondent States.

### **PARTLY DISSENTING OPINION OF JUDGE KOVLER**

In its admissibility decision the Court reiterated the position of the Moldovan Government in that connection: “According to the information available to the Moldovan Government, education in the three schools which were the subject of the present applications was currently being carried out in

the official Moldovan language, using the Latin script, and based on curricula approved by the Moldovan Ministry of Education and Youth (MEY). The applicants had not provided any evidence to prove that the “MRT” authorities had been successful in their attempts to impose the Cyrillic script and an “MRT” curriculum... Thus, despite the attempts of the “MRT” authorities, the children were receiving an education in their own language and according to the convictions of their parents” (see *Catan and Others v. Moldova and Russia* (dec.), nos. 43370/04, 8252/05 and 18454/06, § 117, 15 June 2010).

In my view, the schooling issue as such and the language-alphabet aspect stops there. Regard must of course be had to Article 32 of the Convention, and also the notion that the Convention is a living instrument, but it should not be forgotten that the Convention is an international treaty to which the Vienna Convention on the Law of Treaties applies: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose” (Article 31 “General rule of interpretation”). In my view, the Court should not examine the complaint under Article 2 of Protocol No. 1 on the merits because this complaint goes well beyond the ordinary meaning given to the right to education.

However, the Court follows a slippery slope proposed by the applicants: “education should be directed to the ‘full development of the human personality’” (see paragraph 125 of the judgment). In its examination of this application, the Court seeks to develop its case-law on Article 2 of Protocol No. 1... while refraining, by a majority, from replacing the problem within the context of the provisions of Article 8. The magic wand consisting in an “evolutive interpretation” of the Convention is applied only to Article 2 of Protocol No. 1, giving it a meaning hitherto unseen... The task that the Court sets itself at the beginning of its analysis of the context of this Article (see paragraph 136 of the judgment) conflicts with the *ratione materiae* criterion. I fear that, in taking this approach, the Court is setting a bad example of what is called “judicial activism”. In my view, the case is too sensitive to be used as a trial ground for judicial activism.

### **Protocol 3, Article 1**

## **CASE OF MATTHEWS v. THE UNITED KINGDOM**

**(Application no. 24833/94)**

JUDGMENT

STRASBOURG

18 February 1999

### **I. THE CIRCUMSTANCES OF THE CASE**

7. On 12 April 1994 the applicant applied to the Electoral Registration Officer for Gibraltar to be registered as a voter at the elections to the European Parliament. The Electoral Registration Officer replied on 25 April 1994:

“The provisions of Annex II of the EC Act on Direct Elections of 1976 limit the franchise for European parliamentary elections to the United Kingdom [see paragraph 18 below]. This Act was agreed by all member States and has treaty status. This means that Gibraltar will not be included in the franchise for the European parliamentary elections.”

(...)

**B. Whether Article 3 of Protocol No. 1 is applicable to an organ such as the European Parliament**

(...)

39. That the Convention is a living instrument which must be interpreted in the light of present-day conditions is firmly rooted in the Court's case-law (see, inter alia, the *Loizidou v. Turkey* judgment of 23 March 1995 (preliminary objections), Series A no. 310, pp. 26-27, § 71, with further reference). The mere fact that a body was not envisaged by the drafters of the Convention cannot prevent that body from falling within the scope of the Convention. To the extent that Contracting States organise common constitutional or parliamentary structures by international treaties, the Court must take these mutually agreed structural changes into account in interpreting the Convention and its Protocols.

The question remains whether an organ such as the European Parliament nevertheless falls outside the ambit of Article 3 of Protocol No. 1.

40. The Court recalls that the word "legislature" in Article 3 of Protocol No. 1 does not necessarily mean the national parliament: the word has to be interpreted in the light of the constitutional structure of the State in question. In the case of *Mathieu-Mohin and Clerfayt v. Belgium*, the 1980 constitutional reform had vested in the Flemish Council sufficient competence and powers to make it, alongside the French Community Council and the Walloon Regional Council, a constituent part of the Belgian "legislature", in addition to the House of Representatives and the Senate (see the *Mathieu-Mohin and Clerfayt v. Belgium* judgment of 2 March 1987, Series A no. 113, p. 23, § 53; see also the Commission's decisions on the application of Article 3 of Protocol No. 1 to regional parliaments in Austria (application no. 7008/75, decision of 12 July 1976, DR 6, p. 120) and in Germany (application no. 27311/95, decision of 11 September 1995, DR 82-A, p. 158)).

41. According to the case-law of the European Court of Justice, it is an inherent aspect of EC law that such law sits alongside, and indeed has precedence over, domestic law (see, for example, *Costa v. ENEL*, 6/64 [1964] ECR 585, and *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*, 106/77 [1978] ECR 629). In this regard, Gibraltar is in the same position as other parts of the European Union.

42. The Court reiterates that Article 3 of Protocol No. 1 enshrines a characteristic of an effective political democracy (see the above-mentioned *Mathieu-Mohin and Clerfayt* judgment, p. 22, § 47, and the above-mentioned *United Communist Party of Turkey and Others* judgment, pp. 21-22, § 45). In the present case, there has been no submission that there exist alternative means of providing for electoral representation of the population of Gibraltar in the European Parliament, and the Court finds no indication of any.

43. The Court thus considers that to accept the Government's contention that the sphere of activities of the European Parliament falls outside the scope of Article 3 of Protocol No. 1 would risk undermining one of the fundamental tools by which "effective political democracy" can be maintained.

44. It follows that no reason has been made out which could justify excluding the European Parliament from the ambit of the elections referred to in Article 3 of Protocol No. 1 on the ground that it is a supranational, rather than a purely domestic, representative organ.

(...)

64. The Court makes it clear at the outset that the choice of electoral system by which the free expression of the opinion of the people in the choice of the legislature is ensured – whether it be based on proportional representation, the "first-past-the-post" system or some other arrangement – is a matter in which the State enjoys a wide margin of appreciation. However, in the present case the applicant, as a resident of Gibraltar, was completely denied any opportunity to express her opinion in the choice of the members of the European Parliament. The position is not analogous to that of persons who are unable to take part in elections because they live outside the jurisdiction, as such individuals have weakened the link between themselves and the jurisdiction. In the present case, as the Court has found (see paragraph 34 above), the legislation which emanates from the

European Community forms part of the legislation in Gibraltar, and the applicant is directly affected by it.

65. In the circumstances of the present case, the very essence of the applicant's right to vote, as guaranteed by Article 3 of Protocol No. 1, was denied.

It follows that there has been a violation of that provision.

#### **Protocol 4, Article 4**

### **CASE OF HIRSI JAMAA AND OTHERS v. ITALY**

(Application no. 27765/09)

JUDGMENT

Strasbourg

23 February 2012

Prohibition of collective expulsion of aliens

Return of migrants intercepted on the high seas to country of departure: Article 4 of Protocol No. 4 applicable; violation

Facts – The applicants, eleven Somali nationals and thirteen Eritrean nationals, were part of a group of about two hundred individuals who left Libya in 2009 aboard three vessels with the aim of reaching the Italian coast. On 6 May 2009, when the vessels were within the Maltese Search and Rescue Region of responsibility, they were intercepted by ships from the Italian Revenue Police (Guardia di finanza) and the Coastguard. The occupants of the intercepted vessels were transferred onto Italian military ships and returned to Tripoli. The applicants stated that during that voyage the Italian authorities did not inform them of their destination and took no steps to identify them. On arrival in the Port of Tripoli, following a ten-hour voyage, the migrants were handed over to the Libyan authorities. According to the applicants' version of events, they objected to being handed over to the Libyan authorities but were forced to leave the Italian ships. At a press conference held on the following day, the Italian Minister of the Interior stated that the operations to intercept vessels on the high seas and to push migrants back to Libya were the consequence of the entry into force, in February 2009, of bilateral agreements concluded with Libya, and represented an important turning point in the fight against clandestine immigration. Two of the applicants died in unknown circumstances after the events in question. Fourteen of the applicants were granted refugee status by the Office of the High Commissioner for Refugees (UNHCR) in Tripoli between June and October 2009. Following the revolution which broke out in Libya in February 2011 the quality of contact between the applicants and their representatives deteriorated. The lawyers are currently in contact with six of the applicants, four of whom reside in Benin, Malta or Switzerland, where some are awaiting a response to their request for international protection. One of the applicants is in a refugee camp in Tunisia and plans to return to Italy. In June 2011 one of the applicants was awarded refugee status in Italy, which he had entered unlawfully.

166. The Court must first examine the question of the applicability of Article 4 of Protocol No. 4. In *Becker v. Denmark* (no. 7011/75, Commission decision of 3 October 1975, Decisions and Reports (DR) 4, p. 236) concerning the repatriation of a group of approximately two hundred Vietnamese children by the Danish authorities, the Commission defined, for the first time, the "collective expulsion of aliens" as being "any measure of the competent authority compelling aliens as a group

to leave the country, except where such a measure is taken after and on the basis of a reasonable and objective examination of the particular cases of each individual alien of the group”.

175. It remains to be seen, however, whether such an application is justified. To reply to that question, account must be taken of the purpose and meaning of the provision in issue, which must themselves be analysed in the light of the principle, firmly rooted in the Court’s case-law, that the Convention is a living instrument which must be interpreted in the light of present-day conditions (see, for example, *Soering*, cited above, § 102; *Dudgeon v. the United Kingdom*, 22 October 1981, Series A no. 45; *X, Y and Z v. the United Kingdom*, 22 April 1997, Reports 1997-II; *V. v. the United Kingdom* [GC], no. 24888/94, § 72, ECHR 1999-IX; and *Matthews v. the United Kingdom* [GC], no. 24833/94, § 39, ECHR 1999-I). Furthermore, it is essential that the Convention is interpreted and applied in a manner which renders the guarantees practical and effective and not theoretical and illusory (see *Airey v. Ireland*, 9 October 1979, § 26, Series A no. 32; *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, § 121, ECHR 2005-I; and *Leyla Şahin v. Turkey* [GC], no. 44774/98, § 136, ECHR 2005-XI).

176. A long time has passed since Protocol No. 4 was drafted. Since that time, migratory flows in Europe have continued to intensify, with increasing use being made of the sea, although the interception of migrants on the high seas and their removal to countries of transit or origin are now a means of migratory control in so far as they constitute tools for States to combat irregular immigration.

The economic crisis and recent social and political changes have had a particular impact on certain regions of Africa and the Middle East, throwing up new challenges for European States in terms of immigration control.

177. The Court has already found that, according to the established case-law of the Commission and of the Court, the purpose of Article 4 of Protocol No. 4 is to prevent States being able to remove certain aliens without examining their personal circumstances and, consequently, without enabling them to put forward their arguments against the measure taken by the relevant authority. If, therefore, Article 4 of Protocol No. 4 were to apply only to collective expulsions from the national territory of the States Parties to the Convention, a significant component of contemporary migratory patterns would not fall within the ambit of that provision, notwithstanding the fact that the conduct it is intended to prohibit can occur outside national territory and in particular, as in the instant case, on the high seas. Article 4 would thus be ineffective in practice with regard to such situations, which, however, are on the increase. The consequence of that would be that migrants having taken to the sea, often risking their lives, and not having managed to reach the borders of a State, would not be entitled to an examination of their personal circumstances before being expelled, unlike those travelling by land.

178. It is therefore clear that, while the notion of “jurisdiction” is principally territorial and is presumed to be exercised on the national territory of States (see paragraph 71 above), the notion of expulsion is also principally territorial in the sense that expulsions are most often conducted from national territory. Where, however, as in the instant case, the Court has found that a Contracting State has, exceptionally, exercised its jurisdiction outside its national territory, it does not see any obstacle to accepting that the exercise of extraterritorial jurisdiction by that State took the form of collective expulsion. To conclude otherwise, and to afford that last notion a strictly territorial scope, would result in a discrepancy between the scope of application of the Convention as such and that of Article 4 of Protocol No. 4, which would go against the principle that the Convention must be interpreted as a whole. Furthermore, as regards the exercise by a State of its jurisdiction on the high seas, the Court has already stated that the special nature of the maritime environment cannot justify an area outside the law where individuals are covered by no legal system capable of affording them enjoyment of the rights and guarantees protected by the Convention which the States have undertaken to secure to everyone within their jurisdiction (see *Medvedyev and Others*, cited above, § 81).