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## The Role of the European Court of Human Rights as a Developer of International Human Rights Law

### I. INTRODUCTION

The role of the European Court of Human Rights [hereinafter, ECtHR] as a developer of legal doctrines on human rights has been based on the object and purpose of the Convention.<sup>1</sup> As the Strasbourg Court has reiterated in interpreting the Convention, regard must be given to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms. The Court is also speaking about the general spirit of the Convention. Therefore its interpretation has to be connected to maintaining and promoting the ideals and values of a democratic society.<sup>2</sup>

The European Convention on Human Rights is grounded both on a universal and a regional inspiration. In the Preamble of the Convention the links to the Universal Declaration of Human Rights (1948) are openly stated, since the Convention was meant to be the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration. But the Convention was also fulfilling the aim of Council of Europe of achieving a greater unity between the Member States, since the maintenance and further realisation of human rights and fundamental freedoms were methods to achieve this aim.

The European Court of Human Rights has been in the avant-garde of human rights law, especially in the field of civil and political rights. The universal link, materialized in its connection to other treaties, is an increasingly significant element of the Court's operation. When J. G. Merrills wrote his analysis of the Court's role in the development of International law, he found that in Strasbourg other treaties had been used for three types of interpretation: 1) amplifying the Convention, 2) indicating omissions and 3) providing evidence of contemporary

<sup>1</sup> See generally about the ECHR's interpretation e.g. David John Harris, Michael O'Boyle, & Colin Warbrick: *Law of the European Convention on Human Rights* (2<sup>nd</sup>. ed.), Oxford University Press, Oxford, 2009, pp. 5-21 and Robin C. A. White & Clare Ovey: *Jacobs, White and Ovey: The European Court of Human Rights* (5<sup>th</sup> ed.), Oxford University Press, Oxford, 2010, pp. 64-81.

<sup>2</sup> See *Soering v. the United Kingdom*, 7 July 1989, § 87.

developments.<sup>3</sup> Fifteen years after Merrills' major contribution to the academic discourse we can talk about a real network of international human rights courts, with references to each others jurisprudence. There are several examples of this co-operation between human rights instruments and their supervisory mechanisms which seems to become an everyday phenomenon in the field of civil and political rights.

The ECtHR's interpretation related to non-derogable rights, like the right to life and the prohibition of torture, has been followed by other supervisory organs at the international level. The Court itself has often linked its own analysis to wider trends of international human rights law, as has been in the case with the prohibition of death penalty in *Öcalan v. Turkey* (2005). In the question over forced disappearances (*Kurt v. Turkey*, 1998) the Court followed interpretative line chosen by the Inter-American Court of Human Rights and the UN Human Rights Committee.

The protection of the rights of sexual minorities has been a theme where the Court has been speaking about international trends and their support to its reasoning. The change of interpretation regarding the rights of transsexuals was based partly on the international trend argumentation exemplified in the case *Christine Goodwin v. the United Kingdom* (2002). The less discussed fields in which development of international human rights law is taking small steps are the environmental rights (*Lopez Ostra & Guerra v. Spain*), the minority rights (*D.H. and Others v. the Czech Republic*), or the economic, social and cultural rights and the right to health (*D. v. the United Kingdom*).

What kind of a role does the Court have in exploring new frontiers of human rights law? In this paper I will endeavour to examine the current doctrines and their relationship towards international human rights law. I also imply new openings where the ECtHR, in co-operation with other actors, could in the future achieve improvements in the contemporary human rights law. I will also continue the discourse over the network of international human rights instruments<sup>4</sup> and its role not just regionally but at the universal level, emphasising an evolutive approach to human rights interpretation. The Court itself reaffirmed this dynamic approach in the landmark *Christine Goodwin* case, sustaining that:

«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».<sup>5</sup>

<sup>3</sup> See. J. G. Merrills: *The Development of International Law by the European Court of Human Rights* (2<sup>nd</sup> ed.), Manchester, 1993, pp. 218-226.

<sup>4</sup> See e.g. Jukka Viljanen: «Comparative Approach to Limitations: From European Standard to International Trends», in Peter Wahlgren (ed.): «Human Rights, Their Limitations and Proliferation», [Special Issue of] *Scandinavian Studies in Law* Vol. 55 (2010), pp. 285-306, in pp. 304-306.

<sup>5</sup> *Christine Goodwin v. the United Kingdom*, 11 July 2002, § 74.

This dynamic and evolutive approach is the necessary element of any human rights interpretation, either in the European context, or universally applied. But any evolutive interpretation requires an interpretative support from other actors at the national, regional and international levels. It is important to ask whether there are methods that could strengthen a dynamic approach and improve human rights protection not just inside, but also outside, the community of Member States of the Council of Europe.

## **2. THE EMPHASIS ON INTERNATIONAL TRENDS**

The Court's road to its current interpretative doctrine and its universalism can be traced to certain important cases and problems that have been discussed widely by the global human rights community. It is quite logical that many of the questions brought before the Court have been already under extensive discussion. The Court is not working in isolation. One of the factors to be taken into account before analysing the development of doctrines is the on-going human rights discussion happening at the national, regional and universal levels.

The application before the Court has to be admissible and one of the central conditions is the exhaustion of domestic remedies. If the domestic process has been done properly, the question before the Court has been comprehensively reviewed by the domestic judicial system. For that reason, the Court is often seeking support from the domestic proceedings and arguments presented at that stage. The situation where there is no consensus among the national authorities or no legislative measure to correct the situation has been taken, gives the Court more options. The Court is also trying to place the interpretation into a regional continuum formed by existing interpretations at the European level. An essential part of the process is making a comparison amongst the solutions adopted by the different European States, and finding out whether there is a consensus or not concerning certain issues. At the same time there is also an international continuum to be taken into account, and a search for international trends. The coherence and consistency of international human rights law are necessary elements in the interpretative equation of the Court.

The approach to comparison also beyond the European context is part of natural process towards globalisation of human rights law. The Strasbourg stage is unlikely to hold the debut of a particular human rights problem. The contemporary human rights questions are not discussed exclusively by the European countries and in the European legal arenas. Before coming up to the Strasbourg supervisory system, every contemporary human rights issue has been subject to an intensive discourse within both non-governmental and inter-governmental organisations. The discourse is often to be described as non-judicial referring to the non-judicial forums where it is taking place. This gradual development process starts from recommendations and declarations and other type of soft-law documents. Then the process is frequently extended into treaty negotiations and the drafting of new international instruments focusing on the

problem. If we look at the newest European instrument, the European Union Charter of Fundamental Rights, the diversity of international and European sources and their influence on the interpretation of a particular right can be easily found.

The Court's approach is often very cautious and coloured with strong emphasis on the self-restraining mind-set. There are different views even inside the Court's judiciary on the limits of interpretation and judicial activism and this is also true in relation to using international sources. The Court has followed the international trends and focused on issues that have been on the international human rights agenda, but the conclusions taken from these trends have always been kept under a certain restraints.<sup>6</sup> It has been easy to broaden the scope of treaty provisions in order to include new internationally approved elements when failures concerning procedural safeguards have been detected. However, the interpretation has been conservative when the national authorities have acted carefully taking into consideration proper administrative and judicial safeguards and the decision has affected the substantive protection of human rights.

This variation concerning judicial activism between procedural and substantive protection can be illustrated in the field of environmental rights. The Court made landmark decisions in *Lopez Ostra v. Spain* (1994) and *Guerra and others v. Italy* (1998). These judgments introduced a dynamic continuum of environmental rights under the Convention regime (Article 8) and closely followed the international focus on the environmental protection in the aftermath of the Chernobyl disaster. The problems in both cases were related to the failures of sufficient domestic proceedings to protect the rights of the applicants.

The Court was challenged to maintain this environmentally friendly continuum in the case lodged by the residents near the Heathrow Airport in the case of *Hatton and Others v. the United Kingdom* (2003). The question over airport noise, and especially the night flight regime, was placed on public policy category allowing a wide margin of appreciation to national authorities. The *Hatton* case was distinguishable because there was no failure within the domestic proceedings. In this case the environmental rights orientation was left in the minority, although the importance of environmental rights was strongly supported by the human rights community worldwide. The joint dissenting opinion said that the Court was turning against the current.<sup>7</sup> I think this outcome was disappointing but not

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<sup>6</sup> See e.g. *Chapman v. the United Kingdom* (2001), §§ 93-94. The Court observed that there could be said to be an emerging international consensus amongst the Contracting States of the Council of Europe recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle, not only for the purpose of safeguarding the interests of the minorities themselves but to preserve a cultural diversity of value to the whole community. However, the Court was not persuaded that the consensus was sufficiently concrete for it to derive any guidance as to the conduct or standards which Contracting States consider desirable in any particular situation.

<sup>7</sup> See *Hatton and Others* [GC], Joint dissenting opinion of Judges Costa, Ress, Türmen, Zupancic and Steiner

surprising to those following the Court. The threshold to go beyond procedural safeguard exists in all substantive fields: it is part of judicial self-restraint policy.<sup>8</sup>

The doctrinal development in relation to the question of the abolition of the death penalty is slightly more affirmative. In the *Öcalan* case (2005), the Court concluded that the imposition of the death sentence on the applicant following an unfair trial by a court whose independence and impartiality were open to doubt amounted to inhuman treatment in violation of Article 3. The judgment was a compromise, because it did not broaden the death penalty discussion to Article 2 (right to life), nor did it provide a ban of death penalties in all circumstances under Article 3. However, the judgment made a step forward on the way of abolishing the death penalty.

The applicant made an argument that «developments in international and comparative law showed that the death penalty could also be seen to be contrary to international law». The Court was not ready to go beyond the existing scope of the treaty. One of the reasons was that the Council of Europe had introduced a new Protocol No. 13 concerning the abolition of the death penalty in all circumstances. According to the Court, the Contracting States had chosen the traditional method of amendment of the text of the Convention in pursuit of their policy of abolition. This choice meant that there was no room for extending the scope of Article 3 to include the abolition of death penalty. The Court spoke merely about the abolitionist trend in the practice of the Contracting States.<sup>9</sup>

It is reasonable to conclude that the Court was taking into account also the international development, although it did not react transparently to the applicant's claims about developments in international and comparative law. The Court considered, reading between the lines, that the international law, especially case law, did not provide necessary interpretative support for a more radical view. This is clearly a question that will have to be considered in light of the present-day conditions. If a similar application would be lodged today, it is quite sure that the abolitionist argument could be more persuasive before the Court and the *Öcalan* doctrine could be reviewed.

The best illustration of the importance of international trends can be found in the cases related to sexual minorities. The development of international and comparative law was one of the solutions in the evolutive deficit of transsexual rights. The solid continuum meant that the approach to legal status of transsexuals had become obsolete. Finally, the existing doctrine was revoked, which led to a finding of violation under Articles 8 (right to private life) and 12 (right to marry) in the cases of *Christine Goodwin v. the United Kingdom* and *I v. the United Kingdom* in 2002. The Court had stated in its numerous cases (*Rees*, *Cossey*, *Sheffield* and *Horsham*) that there was no European consensus on the issue, but the question should be kept under review. Finally, in the *Christine Goodwin* case, the Court

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<sup>8</sup> See more on the activism vs. self-restraint in Paul Mahoney: «Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two sides of the same coin», *Human Rights Law Journal* Vol. 11, No. 1-2 (1990), pp. 57-88.

<sup>9</sup> See *Öcalan v. Turkey* [GC] (2005), § 164.

opted for a different approach and did not put so much emphasis on the lack of common European approach on the problems related to transsexuals. According to the Court, the emphasis was on

«the clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals.»<sup>10</sup>

The Court's material was collected by Liberty. It had updated its earlier survey that was transmitted in the *Sheffield and Horsham* case. However, instead of international instruments the report relied on the practice of countries around the world. The Court referred to «statutory recognition of gender re-assignment in Singapore, and a similar pattern of recognition in Canada, South Africa, Israel, Australia, New Zealand and all except two of the States of the United States of America». There was also reference to the judgment of the European Court of Justice in the case of *P. v. S. and Cornwall County Council* (30 April 1996). Thus, the ECtHR could not rely on the support of other international human rights actors, but could rely on the more advanced views by domestic courts and the EU Court. There were relevant factors that were sufficient to change the earlier doctrine together with strong emphasis on the effectiveness principle and the spirit of the Convention.

The European Court of Human Rights has not made a clear turning point towards internationalism. The international trends and comparative support from different supervisory organs are still interpretative tools that are used mainly in hard cases. The Court is more and more realising that it is not working in isolation and that its practice is closely followed by the international human rights community and the academia as well. The Court's limited resources to do wide comparative researches are partly explaining the infrequent references. In the landmark cases the comparative material has been collected by the third-party interventions e.g. the Liberty in the *Christine Goodwin* case. This co-operation between NGOs seems to be the necessary key to the more dynamic use of international material.

### **3. THE DIVISION BETWEEN CIVIL AND POLITICAL RIGHTS VERSUS ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN THE STRASBOURG CASE-LAW**

Within the Council of Europe, like the United Nations Covenants, the treaty system is divided in order to separate instruments concerning civil and political rights and economic, social and cultural rights. The European Convention on Human Rights (1950) and the Protocols provide protection primarily in the field of civil and political rights. The European Social Charter (1961) and the

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<sup>10</sup> See *Christine Goodwin v. the United Kingdom*, § 85.

revised Charter provide protection in the field of economic, social and cultural rights.

Despite this division to different instruments the Court has tried to avoid an exclusion of economic, social and cultural rights from the scope of the Convention.<sup>11</sup> There is no clear-cut division to be made according to the Court. In the *Airey* case (1979) the Court considered that whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature and

«the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention.»<sup>12</sup>

The interpretation has been reiterated in the cases like *Sidabras and Dziautas* (2004).

The inclusion of social rights is related to the effectiveness principle. The Convention should afford protection that is not theoretic or illusory but practical and effective. In the *Airey* case, the effective right of access to the courts required free legal aid. The Court pointed that hindrance of this right in fact can contravene the Convention just like a legal impediment. And fulfilment of a duty under the Convention on occasion necessitates some positive action on the part of the State; in such circumstances, the State cannot simply remain passive and «there is [...] no room to distinguish between acts and omissions».<sup>13</sup>

At the international level, and especially concerning the UN system of two Covenants, the main element that has narrowed the gap between civil and political rights and economic, social and cultural rights is the prohibition of discrimination (Art. 26 of the CP-Covenant).<sup>14</sup> And concerning the European Convention the relevant provisions are Article 6 of the European Convention (right to a fair trial) and also right to life (Art. 2), and the prohibition of torture and inhuman and degrading treatment (Art. 3),<sup>15</sup> and right to private life (Art. 8). These provisions illustrate that there is no watertight division, but there is a possibility of an

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<sup>11</sup> See about ESC-rights and the ECHR see Matti Pellonpää: «Economic, Social and Cultural Rights», in R. St. J. Macdonald, F. Matscher & H. Petzold (eds.): *European System for the Protection of Human Rights*, Martinus Nijhoff Publishers, Dordrecht, 1993, pp. 855-874. See also Frédéric Sudre: «La protection des droits sociaux par la Cour européenne des droits l'homme: un exercice de "jurisprudence fiction"», in *Revue trimestrielle des droits de l'homme* No. 55 (2003), pp. 755-788.

<sup>12</sup> See *Airey v. Ireland*, 9 October 1979, § 26.

<sup>13</sup> See *Airey v. Ireland*, § 25.

<sup>14</sup> See two cases against Netherlands; communication No. 182/1984, *F. H. Zwaan-De Vries v. the Netherlands*, 09.04.1987 and communication No. 172/1984, *S. W. M. Broeks v. the Netherlands*, 09.04.1987.

<sup>15</sup> See, e.g. the case of *Berktaş v. Turkey*, 1 March 2001, § 154 and *Z and Others v. the United Kingdom*, 10 May 2001, § 73-74. See also detailed review of the cases in Frédéric Sudre: «La protection des droits sociaux...», cit, in pp. 766-767.

integrated approach. Also academics –e.g. Martin Scheinin– have spoken for an integrated approach, where the protection of economic and social rights is accomplished through the convention related to civil and political rights.<sup>16</sup>

Concerning the European Convention, the prohibition of discrimination has not yet strengthened the status of ESC-rights in a similar manner. The latest step to this direction was taken when the 12th Protocol establishing general prohibition of discrimination was introduced in 2000 (CETS 177). The problem with Article 14 of the Convention is the fact that, unlike provisions in other instruments (e.g. CP 26 art.), the provision does not contain an independent prohibition of discrimination, that is, it prohibits discrimination only with regard to the «enjoyment of the rights and freedoms» set forth in the Convention. There has been strong consensus that this limited scope prevents broadening scope of the non-discrimination outside of civil and political rights through expansion of case law.<sup>17</sup>

The lack of case law under the 12th Protocol means that it is still undecided whether the Court's approach to non-discrimination would change radically from the present one.<sup>18</sup> The Court would be more likely to continue reasonably cautious interpretation than review exhaustively its approach. A cautioned approach would be the logical choice, because a considerable divergence and incoherence in the case law according to the status of ratification of the 12th Protocol would be problematic. At the moment there are still many countries which are skeptical over the Protocol and its possible consequences in the field of social policy.

The real development towards a stronger position for non-discrimination can be identified concerning indirect discrimination. The European system has extensively tried to deal with the Roma question, and not just in the traditional issues like racially motivated violence. The Court has taken a wider perspective and included discrimination that is deep in the European social structures. The landmark case has been *D. H. and Others v. the Czech Republic* (2007). The Czech school system was based on the separation of Roma children into special schools. This national school structure was examined under Article 14 together with

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<sup>16</sup> See Martin Scheinin «Economic, Social and Cultural Rights as Legal Rights», in Asbjörn Eide, Catarina Krause & Allan Rosas (eds.): *Economic, Social and Cultural Rights, A Textbook*. Martinus Nijhoff Publishers, Dordrecht, 1995, pp. 44-52.

<sup>17</sup> The Explanatory report of the 12th Protocol refers to the 7th International Colloquium on the European Convention on Human Rights (Copenhagen, Oslo and Lund, from 30 May to 2 June 1990). With regard to the possibility of broadening, through the development of the Strasbourg case law, the protection offered by Article 14 of the Convention beyond the above-mentioned limit (see paragraph 1 above), participants recognised that there was little scope for further expansion of the case law on this score since the prohibition in Article 14 is clearly accessory to the other, substantive guarantees in the Convention.

<sup>18</sup> The only ECHR judgment thus far under Protocol 12 is the case of *Sejdic and Finci v. Bosnia and Herzegovina* (22 December 2009). The Court found that there has been a violation of Article 1 of Protocol No. 12 as regards the applicants' ineligibility to stand for election to the Presidency of Bosnia and Herzegovina.



Article 2 of the Protocol 1, and the Court found that the special schools discriminated the Roma children's right to education.

The Court made an important decision that less strict evidentiary rules should apply in cases of alleged indirect discrimination. The applicants were permitted to rely on statistics as the *prima facie* evidence. After the applicant has established a rebuttable presumption that the effect of a measure or practice is discriminatory, the burden then shifts to the respondent State, which must show that the difference in treatment is not discriminatory.<sup>19</sup> The statistical evidence was clear, since 56% of all pupils placed in special schools in Ostrava were Roma. Conversely, Roma represented only 2.26% of the total number of pupils attending primary school in Ostrava. According to the Court, the evidence submitted by the applicants can be regarded as sufficiently reliable and significant to give rise to a strong presumption of indirect discrimination.<sup>20</sup>

In its conclusions the Court is emphasizing the negative social impact of the special schooling system on the Roma population. The applicants followed a more basic curriculum than in ordinary schools and they were isolated from pupils from the wider population. The Court found that this led to further problems and difficulties after the school finding job opportunities. The Court stated:

«As a result, they received an education which compounded their difficulties and compromised their subsequent personal development instead of tackling their real problems or helping them to integrate into the ordinary schools and develop the skills that would facilitate life among the majority population. Indeed, the Government have implicitly admitted that job opportunities are more limited for pupils from special schools.»<sup>21</sup>

The Court took a significant step to include minority rights to its agenda and follow the international human rights discourse in a number of issues that are outside of the traditional scope of civil and political rights. Other instruments were invaluable for the Court's reasoning. It is clear that the judgment would be different, if there were not previous jurisprudence pointing to right direction. There were the EU indirect discrimination case law (ECJ), reports from other Council of Europe institutions (ECRI, the Commissioner for Human Rights of the Council of Europe) and UN material (HRC, CERD, CRC, UNESCO).

However, it is clear that there is a lot of unused potential in interpreting ESC-rights under the ECHR. Somehow the minimum standard approach that the Court has used is not convincing those who doubt the stronger enforcement on social rights and the Strasbourg Court involvement. The Court is also pressured by the discussion concerning the European Union Charter of Fundamental Rights. The Lisbon Treaty strengthened the status of the Charter. However, due to its broad scope (including also social rights) there are two major absentees among the EU States. The United Kingdom and Poland negotiated an *opting out clause* to

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<sup>19</sup> See *D. H. and Others v. the Czech Republic*, §§ 186-189.

<sup>20</sup> See *D. H. and Others v. the Czech Republic*, §§ 190-195.

<sup>21</sup> See *D. H. and Others v. the Czech Republic*, § 197.

their obligation to the Charter. The implied element of the Court's judicial policy is to take into account dissenting opinions among the influential Member States.

#### 4. THE RESPONSIBILITY OF STATES BEYOND THE EUROPEAN BORDERS: THE RIGHT TO HEALTH UNDER THE ECHR

The Court has extended its positive obligations doctrine to a number of different provisions. One of the most interesting is the application of Article 3 of the Convention. The Court has extended the concept of the victim. For example, in the case of expulsion or extradition the responsibility of the respondent State becomes extended also to the situation of the individual in the future. The possibility of torture and inhuman or degrading treatment violates rights of the individual. This was confirmed, among other, by cases like *Chahal v. the United Kingdom* (15 November 1996) and *Saadi v. Italy* (26 February 2008, GC) where the deportation was related to combating international terrorism.

One of the relevant questions discussed under the same provision is whether the poor living conditions in the receiving country could be warranting consideration under Article 3 of the Convention. According to the ECtHR, an inadequate health care or lack thereof could be considered to lead to a violation of Article 3 of the Convention. This was found to be the case in *D. v. the United Kingdom* (2 May 1997). The applicant complained that his removal to St. Kitts would violate his rights under several provision of the Convention, since he had been diagnosed with AIDS and he claimed that his removal would expose him to inhuman and degrading treatment. The Court found in favour of the applicant. Although the Court noted that

«it cannot be said that the conditions which would confront him in the receiving country are themselves a breach of the standards of Article 3 (art. 3), his removal would expose him to a real risk of dying under most distressing circumstances and would thus amount to inhuman treatment.»<sup>22</sup>

The circumstances in the case of *D.* were exceptional, since the applicant was terminally ill and in the final stage of his illness. Therefore, the Court has been reluctant to reiterate the finding in other circumstances. Recently in the case of *N. v. the United Kingdom* (27 May 2008) the treatment of HIV patient was once again before the Court, but the finding was now in favour of the respondent State. The Court referred to its subsequent case law and reminded that since the *St. Kitts* case, the Court has never found a proposed removal of an alien from a Contracting State to give rise to a violation of Article 3 on grounds of the applicant's ill-health.<sup>23</sup>

<sup>22</sup> See *D. v. the United Kingdom*, 2 May 1997, § 53.

<sup>23</sup> See *N. v. the United Kingdom*, 27 May .2008, § 34.

The Court stated that principles which can be drawn from the existing case law are that the decision to remove an alien who is suffering from a serious mental or physical illness to a country where the facilities for the treatment of that illness are inferior to those available in the Contracting State may raise an issue under Article 3, but only in a very exceptional case, where the humanitarian grounds against the removal are compelling.<sup>24</sup> Thus, the threshold of the application of Article 3 of the Convention in the case of expulsion of an individual is extremely high. The minority of judges made in their joint dissenting opinion important critical points against the chosen approach. Judges Tulkens, Bonello and Spielmann reiterated the absolute nature of the rights protected under Article 3.

One of their main arguments was that in the field of non-derogable rights there is no room for the balancing exercise, i.e.: to try find a balance between the general interest and individual's rights. The Court used the paragraph in the *Soering* judgment, despite the Court had afterwards in the *Chahal* case distanced from the interpretation.<sup>25</sup> According to the dissenting judges, the majority had also wrongly made the focus of the claim to be the obligation on the Contracting State to alleviate the above mentioned disparities through the provision of free and unlimited health care to all aliens without a right to stay within its jurisdiction.

What is notable in the joint dissenting opinion is that there are dangerous considerations in the view chosen by the majority that run counter to the absolute nature of Article 3 of the Convention and the very nature of the rights guaranteed by the Convention that would be completely negated if their enjoyment were to be restricted on the basis of policy considerations such as budgetary constraints.<sup>26</sup> The dissenting judges refer in their opinion to the interim measures statistics and consider that these dismiss the opening of flood gates argument that was implicitly behind the judgment.

There are very few other references to the health care system and its possible connection to the non-derogable rights protected under the Convention. The denial of medical assistance or giving inappropriate medical treatment have appeared in cases related to prison conditions e.g. *Khudobin v. Russia* (2006), *Dybeku v. Albania* (2007) and *Slawomir Musial v. Poland* (2009). Outside these special circumstances the issue of denial of health care has been discussed extensively only in the case of *Cyprus v. Turkey* (2001). On that occasion the Court stated that:

«The Court observes that an issue may arise under Article 2 of the Convention where it is shown that the authorities of a Contracting State put an individual's life at risk through

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<sup>24</sup> See *N. v. the United Kingdom*, § 42.

<sup>25</sup> See *Chahal* case, § 81. Paragraph 88 of the Court's above-mentioned *Soering* judgment, which concerned extradition to the United States, clearly and forcefully expresses the above view. It should not be inferred from the Court's remarks concerning the risk of undermining the foundations of extradition, as set out in paragraph 89 of the same judgment, that there is any room for balancing the risk of ill-treatment against the reasons for expulsion in determining whether a State's responsibility under Article 3 (art. 3) is engaged.

<sup>26</sup> See *N. v. the United Kingdom*, Joint Dissenting Opinion of Judges Tulkens, Bonello and Spielmann.

the denial of health care which they have undertaken to make available to the population generally. It notes in this connection that Article 2 § 1 of the Convention enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction.»<sup>27</sup>

This quotation gives a reason to forecast that the question of positive obligations has the potential to be reconsidered and improve the standard of protection. However, a dramatic transformation of doctrines is not to be expected. The widening of the scope of the Convention in the field of the right to health develops probably casuistically rather than taking a major decision. I think that many academic observers would agree with the joint dissenting opinion and consider that the Court's approach is at the moment too far from the object and purpose of the Convention. It gives budgetary constraints excessive emphasis within the interpretative equation.

## 5. PROTECTING VULNERABLE GROUPS THROUGH THE STRASBOURG CASE-LAW

The Court has developed its case law in many fields of human rights. A particular source of concern has been the situation of minorities and other vulnerable groups. In recent times, the minority question has been focused on the Roma minority. The case law started with controversies affecting the Western European Roma people and their problems of living traditional life-style in caravans, like in *Buckley* (1996) and *Chapman* (2001). More recently the focus has turned into the Central and Eastern European Roma and the complaints have taken a serious turn, when the Court found a violation of Article 14 in conjunction with Article 2 of the Convention regarding a failure to investigate possible racist motives behind the events that led to the deaths in *Nachova and Others v. Bulgaria* (2005, GC).<sup>28</sup> The social problems of the Roma minority and the poor living conditions have not been directly under the Court's scrutiny. However, the Ostrava special schools case (*D.H. and Others v. Czech Republic*) has a broader contribution to the minority discourse. It is critical to indirect discrimination which on the long term prevents the Roma people to integrate into the society.

In the case of *Moldovan and Others v. Romania (No. 2)* (12 July 2005), the Court found that the applicants' living conditions and the racial discrimination to which they had been publicly subjected amounted to «degrading treatment» within the meaning of Article 3 of the Convention. The Court observed that the authorities had acted in a manner which had caused the applicants considerable

<sup>27</sup> See *Cyprus v. Turkey*, 10 May 2001, § 219.

<sup>28</sup> The Chamber judgment in the *Nachova* case (26 February 2004) went even further. It did not divide procedural and substantive aspects, but found violations of the procedural and substantive aspects of Article 14, taken together with Article 2, of the Convention.

mental suffering, thus diminishing their human dignity and arousing in them such feelings as to cause humiliation and debasement.

In *Moldovan (No. 2)* case, the Court could not examine the main question of destruction of applicants' houses and belongings, as well as their forceful expulsion from the village, because the events took place in September 1993, before the ratification of the Convention by Romania in June 1994. However, the Court took a task to determine whether the national authorities took adequate steps to put a stop to breaches of the applicants' rights. In this regard the Court found hindrance and failure of the authorities to put stop to breaches of applicants' rights. Once again there was a negative attitude of authorities towards the Roma minority.<sup>29</sup>

Detainees and their rights pose questions considered not just in the special treaties like the Convention against Torture or the European Convention for the Prevention of Torture. The prisoner's rights have been on the Court's agenda already since the *Golder* (1975) and *Silver* (1983) cases. If the original cases were considered under Article 6 (access to court) and 8 (freedom of correspondence), nowadays the Court has often found treatment and conditions of prisoners that raises concerns under Article 3 (inhuman or degrading treatment) e.g. in the *Kalashnikov* case (15.7.2002). The Court has applied standards established by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment.

The obsolete nature of inherent restrictions has required extending and updating the scope of the treaty provisions in numerous cases. One of the reviewed practices has been the additional measures that convicted prisoners have to endure. In many countries the conviction will also include taking away certain civil rights that other individuals would have. One of the important cases from recent years was *Hirst no. 2 v. the United Kingdom* (2005). In this case, the Court had to make a decision whether restrictions related to convicted prisoners were compatible with Article 3 of Protocol No. 1. The Court found that automatic disenfranchisement of prisoners was not compatible with the Convention provisions. The comparative analysis did not give any affirmative result. It was a minority of Contracting States in which a blanket restriction on the right of convicted prisoners to vote is imposed or in which there is no provision allowing prisoners to vote. The Court determined that the margin of appreciation was wide, but it was not all-embracing.<sup>30</sup>

The trafficking of human beings into Europe and their abuse has been one of the main issues in the global human rights community. The European Court has also dealt the situation and updated the scope of slavery. In the case of *Siliadin v. France* (2005), the Court extended Article 4 to prohibit domestic slavery. The Court considered that limiting the scope of the provision would be inconsistent with the international instruments specifically concerned with this issue and would amount to rendering it ineffective. The Court referred to UN, ILO, Council of Europe treaties and also to Parliamentary Assembly findings that that «today's

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<sup>29</sup> See *Moldovan and Others v. Romania*, No. 2, 12 July 2005, §§ 102-114.

<sup>30</sup> See *Hirst (no. 2) v. the United Kingdom*, 6 October 2005, §§ 81-82.

slaves are predominantly female and usually work in private households, starting out as migrant domestic workers...». <sup>31</sup>

The Court noted that although slavery was officially abolished more than 150 years ago, «domestic slavery» persists in Europe and concerns thousands of people, the majority of whom are women. The Court referred to «contemporary norms and trends» which require from the member States' positive obligations under Article 4 of the Convention. These obligations must be seen as requiring the penalisation and effective prosecution of any act aimed at maintaining a person in domestic slavery. <sup>32</sup> More recently, the Court has concluded that human trafficking, 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. <sup>33</sup>

One of the major questions in the contemporary human rights law is the question of *Drittwirkung* and how human rights obligations can be extended to corporations. The Convention obligations influence relationships between individuals only indirectly, i.e. through positive obligations enacting legislation which prohibits discrimination or penalising domestic slavery as in the *Siliadin* case. The Court has not made significant development regarding interpretation related privatisation or transferring public powers to private actors. One of the cases worth to be mentioned is *Wos v. Poland* (2005). The Court had to determine whether Poland was responsible for the acts of the Polish-German Reconciliation Foundation. In general terms the Court considered that the exercise of State powers which affects Convention rights and freedoms raises an issue of State responsibility regardless of the form in which these powers happen to be exercised, be it for instance by a body whose activities are regulated by private law.

These examples provide a certain perspective to the Court's ability to deal with systematic and larger scale human rights problems. They show that the Court can protect also vulnerable groups and require states to take positive obligations. These obligations start from the procedural safeguards and requirements to investigate possible abuse of public power. They also require that the national legislator actively extends the protection to the relationship between individuals. The Court is developing an approach to international human rights law concerning vulnerable groups with close co-operation to the special mechanisms and NGOs. This is one the best examples of dialogue and dynamism that the parallel human rights actors can provide for the Strasbourg Court's interpretation.

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<sup>31</sup> See *Siliadin v. France*, §§ 85-89.

<sup>32</sup> See *Siliadin v. France*, § 111.

<sup>33</sup> See *Rantsev v. Cyprus and Russia* (7 January 2010) § 282.

## 6. CONCLUSIONS: THE ECtHR AS A PART OF THE NETWORK OF HUMAN RIGHTS INSTRUMENTS

The European Court of Human Rights has different roles in the international network of human rights instruments, but it has not always been in the forefront of these developments. In some cases there has been a clearly conservative approach to the new trends, and the Court has tried to find compromises rather than new radical and comprehensive turns. It is following whether there are new treaties under way or whether a different emphasis should be made regarding international and comparative law material. The new types of human rights violations within the European soil –e.g. forced disappearances– made it necessary to use material from the Inter-American Court, while the Court's task in updating the new forms of slavery has required references to the ILO documents.

The process of updating the Convention interpretation is easier than extending the Convention rules to new fields of human rights. This can be noticed in the environmental rights and their restricted role in the jurisprudence. However, even in other interpretative contexts it is easier for the Court to require procedural safeguards in comparison to substantive protection. It might be too hasty to say that the Court has turned against the current with the above mentioned *Hatton* case. It has made important environmentally oriented decisions under Article 8 (*Lopez Ostra, Guerra et al*) and more recently under Article 2. The established case law in *Öneryildiz v. Turkey* (2004) and *Budayeva and others v. Russia* (2008) give out detailed requirements on the substantive and procedural aspects of the Article 2.

The case of *D. H. and Others v. the Czech Republic* concerning the Ostrava Roma children illustrates most vividly the network aspect in the development of human rights law. The Court does not operate isolated from other actors in the field of human rights and the European Convention on Human Rights is not an isolated instrument.<sup>34</sup> Especially, when the Court is faced with new and innovative human rights problem, it is extremely important to have other mechanisms already dealing with analogous situations (ECJ) or examining same situations from non-judicial approach (CERD, ECRI). The new problems may need new methods and these methods are sometimes uncommon to the judicial institutions, like using statistics as evidence. The Ostrava case shows that the Court needs also consistent facts to rely on against the information gathered by national authorities. This means that the non-governmental organisations have a major role in so-called

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<sup>34</sup> See e.g. Treaties: Framework Convention for the Protection of National Minorities; Soft-law: The Committee of Ministers Recommendation No. R (2000) 4 of the Committee of Ministers to member states on the education of Roma/Gypsy children in Europe (adopted by the Committee of Ministers on 3 February 2000 at the 696th meeting of the Ministers' Deputies). Committee on the Elimination of Racial Discrimination: General Recommendation No. 27 of 16 August 2000 on Discrimination against Roma.

hard-cases (Observation by the International Step by Step Association, the Roma Education Fund and the European Early Childhood Research Association and Minority Rights Group International, European Network against Racism and European Roma Information Office).

The European Court of Human Rights does not have an ability to combat major human rights problems on its own. The Court's case law is developed case-by-case basis with the strict interpretation against the expansion of the Convention rules outside of the text of the Convention. However, after the international human rights network has reacted to a particular problem through treaties and soft-law, the Court's role becomes important in the development process, transforming itself into the most authoritative source of human rights case law. In comparison to UN treaty bodies through its binding judgments the Court has a standard setting role not just in the 47 Member States of the Council of Europe, but also within the global human rights community.

It is obvious that the Court is not starting the discourse on a particular human rights problem, and it is not the final stage of the development of any human rights law in that question. The Court is not adapted to take a widespread role in the network of human rights instruments; its mission is to pass the torch to another actor and let the dialogue to continue; and maybe to return to the discourse in a later stage of the development process. We can hope that this will happen in the examples that have illustrated the Court's participation on the development of human rights law. So the Court could, for example, review its position on the issue of death penalty towards finding a concrete trend for the abolition. Similarly the Court could go further in the field of discrimination and use extensively statistical evidence and change the burden of proof towards national authorities. The Court could include new case law to the right to health doctrine under Article 3 of the Convention and perhaps require more concrete efforts to improve health care outside of the territorial scope of the Convention.

The *Siliadin* case illustrated that the Court cannot escape from the harsh realities of the modern world. The question of domestic slavery reminds us that even the most fundamental human rights violations –like slavery– are re-establishing themselves although in a different form than originally. The European Human Rights system is based on the almost 60 year old text, but the evolutive and dynamic interpretation by the Strasbourg Court keeps it valid –and that is in my mind the fundamental message to the human rights law in general.

The necessary element of development of the international human rights in any context and by any actors, whether nationally, regionally or universally, is the interpretation in light of present-day conditions and requiring the increasingly high standard in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requiring greater firmness in assessing breaches of the fundamental values of democratic societies.<sup>35</sup> There is a key role for the academic community to challenge the international, regional and national human

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<sup>35</sup> See *Selmouni v. France*, 1999, § 101.



rights systems to achieve this increasingly high standard with constructive criticism.