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The Monitoring of Fundamental Rights in the Union as a Contribution to the European Legal Space (III): The role of the European Court of Human Rights.

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The Monitoring of Fundamental Rights in the Union as a Contribution to the European legal space (III): The role of the European Court of Human Rights,

by R. Lawson^{*}

1. Introduction: Lost in Space?

It was very dark when professor Meijer woke up. He recalled that it was already late in the evening when he boarded the Aeroflot flight that would bring him from Vladivostok to Moscow, and, looking at his watch, he decided that the aircraft should by now be somewhere near Omsk. What he did not understand was where the noise came from. He stood up, careful not to disturb the other passengers who, perhaps due to the generous supply of vodka, were vast asleep.

Professor Meijer made his way to the front of the aircraft, and found the co-pilot just as the axe came down. With an impressive swing the co-pilot hit the door leading to the cockpit. Despite the enormous noise nobody woke up, and professor Meijer pondered for a second about the quality of Russian vodka. The quality of the cockpit door was apparently as good, because the door did not give an inch. Another strike followed with a similar lack of result. When the co-pilot paused, professor Meijer took the opportunity and informed what he was doing. The co-pilot explained that he had slept the first part of the flight, and that he had woken up half an hour ago as his shift was about to begin. However, when he tried to enter the cockpit, he found that the door was locked. The pilot had refused to let him in: he was reading Pushkin, he said, and he did not wish to be disturbed. The co-pilot thought that he was very drunk. This in itself was not a problem, he said, nor was it exceptional. The problem was, however, that the pilot had fallen asleep and that, actually, there was nobody else around in the cockpit.

The Soviet Union – yes, this is an old story – was a big country and its air space was relatively empty. But it was still a disconcerting idea to be aboard of a plane that travelled at a speed of 600 mph, without anybody taking care of things. Professor Meijer therefore offered his assistance, and after a while the two men managed to make their way into the cockpit. There they found a sleeping pilot, and a stewardess – no trace of Pushkin, though.

This is a story with a happy end: the Aeroflot plane made it to Moscow, professor Meijer continued to be a leading expert in Russian law, and Pushkin is still widely read.

But the story of the aircraft also presents us with an interesting image – perhaps an appropriate metaphor when we analyse the significance of the European Convention of Human Rights (ECHR) in the present stage of the process of European integration. Could it be that we are cruising a vast and fairly desolated legal space – *l'espace juridique européen* – without a pilot in control? Maybe not, maybe the Aeroflot story is just another urban legend that, even if it were true, has no meaning for us today. But it cannot be excluded that the image is justified in whole or in part. After all the ECHR, being conceived shortly after the Second World War, was intended to restrain the exercise of State power. But Europe has changed. Within the EU the establishment of the Internal Market and the subsequent creation of an Area of Freedom, Security and Justice have paved the way for a new legal space. In this 'European Legal Space' persons, goods and services move freely. Law-making is no longer the prerogative of the State. Domestic authorities may feel tempted to isolate their polities from foreign influences but at the same time they cannot avoid international co-operation and co-ordination if they wish to

^{*} Prof.dr. R.A. Lawson, *Europa Instituut*, Department of Public Law, Faculty of Law, University of Leiden, The Netherlands, r.a.lawson@law.leidenuniv.nl.

respond effectively to increased mobility. To what extent did the ECHR adapt to this changing environment? One cannot take for granted that the pilot is in his cockpit, and even if he is, he might be reading 19th century literature (which is certainly interesting) or enjoying a drink (which is also nice but tends to distract from other activities).

This paper will address the question if the European Court of Human Rights is still in the cockpit as the ‘European Legal Space’ unfolds. Just to avoid misunderstanding: the Strasbourg Court is in no way reminiscent of drunken Russian pilots, or even of pilots who prefer Pushkin above work – if only because the Court has taken a firm stance against alcoholism,¹ and it does not like poetry either.²

We will try to find an answer by taking a number of small steps. First we will briefly repeat a number of guiding principles of Strasbourg case-law (§ 2). These principles will be fairly familiar to anyone who has studied the ECHR in any detail, but they will play a role when, at the end of this paper, we will evaluate the present state of the law. After all it seems legitimate to ask if the Strasbourg Court remained true to its own principles when confronting the particularities of the ‘European Legal Space’.

Secondly we will examine if the European Convention in itself can be seen as establishing a ‘legal space’ of its own (§ 3). Did the Strasbourg Court attempt to establish a “new legal order” in the way that the ECJ did in *Van Gend & Loos* and *Costa v. ENEL*? Is there pressure, for instance, to achieve uniform application of Convention standards? Next we will briefly review the position that the Strasbourg Court has assumed vis-à-vis the European Communities as such (§ 4). In § 5 we will try to examine the consequences of the emergence of a European Legal Space from the perspective of the ECHR. What is the impact of the fact that the EU Member States belong to the Internal Market and the Area of Freedom, Security and Justice? Does it influence their obligations under the ECHR? In other words: is the interpretation and application of the Convention affected by the disappearance of internal borders, by the availability of alternative locations within the EU where activities can be carried out? Finally, in § 6, some tentative conclusions will follow.

In order to keep the paper within digestible proportions, a number of related issues will *not* be addressed: the extent to which EU Member States may be held responsible for the conduct of EU bodies,³ or the potential responsibility for implementing specific EU measures which are said to be incompatible with the ECHR.⁴

2. Cruising the European Legal Space: Four Guiding Principles

It may be useful, before we engage in an analysis of our central question, to briefly recall a number of general principles that emanate from the Strasbourg case-law. They may serve as a yardstick when, at the end of this paper, we will evaluate the way in which the European Court of Human Rights approaches the European Legal Space.

¹ See ECtHR, 4 April 2000, *Witold Litwa v. Poland* (Appl. No. 26629/95), § 62: “the Court observes that there can be no doubt that the harmful use of alcohol poses a danger to society and that a person who is in a state of intoxication may pose a danger to himself and others, regardless of whether or not he is addicted to alcohol”.

All ECtHR cases cited are judgments unless indicated otherwise. For the sake of convenience, only reference is made to the application numbers of cases, and not to their official publication in *Series A* (until 1996) or the *Reports* (thereafter). All cases cited are easily accessible, in full text, at www.echr.coe.int by using the ‘HUDOC’ search engine.

² See ECtHR, 8 July 1999, *Karatas v. Turley* (Appl. No. 23168/94), § 49: “the medium used by the applicant was poetry, a form of artistic expression that appeals to only a minority of readers”.

³ On this issue, see ECtHR, 10 March 2004, *Senator Lines v. 15 EU Member States* (Appl. No. 56672/00; adm. dec.) and ECtHR, 25 January 2005, *Emesa Sugar v. Netherlands* (Appl. No. 62023/00, adm. dec.).

⁴ However brief attention will be paid to the *Bosphorus* case: see § 4 below.

- A “living instrument”

First of all, ever since Tyrer (1978) the Court has underlined that the Convention is a “living instrument” which must be interpreted in accordance with “present day conditions”.⁵ In order to determine what these “conditions” are, the Court follows a comparative approach, seeking to identify common standards and developments in the laws and practices of the States Parties to the Convention. It should be added that the Court is increasingly prepared to take into account international trends.⁶ Especially the Canadian Charter of Rights and Freedoms and the jurisprudence of the Canadian Supreme Court have inspired the Strasbourg Court on more than one occasion.⁷ Admittedly this process is not always very transparent – the Court only rarely indicates the factual basis when asserting that common standards exist – nor is it applied consistently: the Court may or may not refer to developments in Europe or abroad. This makes the Court vulnerable for the critique that judges simply impose their own views under the guise of common standards. Yet the “living instrument” doctrine continues to be applied and most critics seem to agree that, whatever the drawbacks, it has greatly contributed to the effectiveness and continued relevance of the European Convention.

In 1999 the Court added that its dynamic interpretation is a ‘one way street’. It will not lead to a lowering of standards – quite to the contrary “the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies”.⁸ The potential relevance of the living instrument doctrine for our topic is obvious: one might expect the Court to interpret the Convention in such a way that it continues to be relevant in the face of an unfolding European Legal Space.

- Rights that are “practical and effective”

Another longstanding principle is that the Convention is “intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective”.⁹ This teleological approach offers a powerful argument for the Court to go beyond appearances and to examine if an individual has really been able to enjoy his rights in practice. It was essentially this approach that inspired the famous ruling in *Loizidou* that the Convention has a certain degree of extra-territorial effect. Under Article 1 ECHR, the Court observed, a Contracting Party is obliged to secure the rights and freedoms of the Convention beyond its borders when it exercises effective control of an area.¹⁰ The background of the case was that Turkey, following its military intervention in Cyprus in 1974, exercised effective control over the northern part of the island. Ms Loizidou owned a plot of land in the north, but was in the circumstances unable to gain access to it. The Court found that Turkey was responsible. “Any other finding would result in a regrettable vacuum in the system of human-rights protection”, as the Court put it in the later case of *Cyprus v. Turkey*.¹¹ Although the term “regrettable” is intriguing, the potential significance for our purposes is clear: a European Legal Space should not end up in being a European Legal Vacuum.

- Alignment with general international law and practice

⁵ ECtHR, 25 April 1978, *Tyrer v. UK* (Appl. No. 5658/72), § 31. This was repeated on countless occasions, from ECtHR, 22 October 1981, *Dudgeon v. UK* (Appl. No. 7525/76), § 60, to ECtHR, 4 February 2005, *Mamatkulov a.o. v. Turkey* (Appl. No. 46827/99), § 121.

⁶ ECtHR, 11 July 2002, *Goodwin v. UK* (Appl. No. 28957/95), § 74.

⁷ See for instance ECtHR, 5 Nov. 2002, *Allan v. UK* (Appl. No. 48539/99), and ECtHR, 4 Dec. 2003, *M.C. v. Bulgaria* (Appl. No. 39372/98).

⁸ ECtHR, 28 July 1999, *Selmouni v. France* (Appl. No. 25803/94), § 100.

⁹ ECtHR, 9 October 1979, *Airey v. Ireland* (Appl. No. 6289/73), § 24.

¹⁰ ECtHR, 23 March 1995, *Loizidou v. Turkey* (Preliminary Objections) (Appl. No. 15318/89), § 62.

¹¹ ECtHR, 10 May 2001, *Cyprus v. Turkey* (Appl. no. 25781/94), § 78.

This horror vacui manifests itself more often in Strasbourg: in 2001 the Court stressed that the Convention “cannot be interpreted in a vacuum”.¹² The ECHR should as far as possible be interpreted in harmony with other rules of international law, without losing sight of its nature as a human rights instrument. This brings us to a third general principle. Already in 1975 the Court accepted that it should be guided by the Vienna Convention on the Law of Treaties when ascertaining the Convention meaning.¹³ In recent years great efforts were made to interpret the Convention in line with generally accepted international concepts of State jurisdiction, State responsibility, State immunity, and so on.¹⁴ The Court has also long recognised the growing importance of international cooperation and of the consequent need to secure the proper functioning of international organisations.¹⁵ Several judgments reflect a desire not to stand in the way of international cooperation,¹⁶ and indeed to support it.¹⁷ Against that background one might expect the Court to be sympathetic to arrangements in the context of European integration, even if they entail, to a certain degree at least, negative consequences for the individual.

- The State as ultimate guarantor of rights and freedoms

The last general principle to be mentioned here is again closely related to the effet utile of the Convention. The State, as a contracting party to the Convention, is the ultimate “guarantor” of the rights and freedoms enshrined in it: “the State has a positive obligation to ensure that everyone within its jurisdiction enjoys in full, and without being able to waive them, the rights and freedoms guaranteed by the Convention”.¹⁸ Thus the State cannot absolve itself from the obligation to secure the rights and freedoms of the Convention by delegating tasks to private bodies or individuals.¹⁹ Nor can it do so by transferring competences to international organisations.²⁰ Along similar lines the Court noted in a fairly laconic fashion that States may encounter practical difficulties in securing compliance with the rights guaranteed by the Convention in all parts of their territory, “but each State Party to the Convention nonetheless remains responsible for events occurring anywhere within its national territory”.²¹

Against this background it will come as no surprise that the State is responsible for all acts and omissions of its organs, regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations. No distinction is made as to the type of rule or measure concerned and no part of

¹² ECtHR, 21 November 2001, *Al-Adsani v. UK* (Appl. no. 35763/97), § 55.

¹³ ECtHR, 21 February 1975, *Golder v. UK* (Appl. no. 4451/70), § 29.

¹⁴ See e.g. ECtHR, 12 December 2001, *Bankovic a.o. v. 17 NATO Member States* (Appl. no. 52207/99, adm. dec.), § 55; ECtHR, 8 July 2004, *Ilascu a.o. v. Georgia and Russia* (Appl. no. 48787/99), § 320; ECtHR, 3 March 2005, *Manoilescu a.o. v. Romania and Russia* (Appl. No. 60861/00), § 70 et seq.

¹⁵ See e.g. ECtHR, 18 February 1999, *Waite & Kennedy v. FRG* (Appl. no. 26083/94), §§ 63 and 72.

¹⁶ See e.g. ECtHR, 26 February 1998, *Pafitis v. Greece* (Appl. no. 20323/92), § 95: to take into account the period needed by the ECJ to deliver a preliminary ruling (in this case more than 2½ years) in the assessment of the length of proceedings “would adversely affect the system instituted by Article 177 of the EEC Treaty and work against the aim pursued in substance in that Article”.

¹⁷ See e.g. ECtHR, 16 April 2002, *S.A. Dangeville v. France* (Appl. no. 36677/97), §§ 47 and 55.

¹⁸ ECtHR, 31 July 2001, *Refah Partisi v. Turkey* (Appl. no. 41340/98), § 70, confirmed by the Grand Chamber in its judgment of 13 February 2003 in the same case, § 119.

¹⁹ ECtHR, 25 March 1993, *Costello-Roberts v. UK* (Appl. No. 13134/87), § 27.

²⁰ ECtHR, 18 February 1999, *Matthews v. UK* (Appl. No. 24833/94), § 32, and ECtHR, 30 June 2005, *Bosphorus Airlines v. Ireland* (Appl. No. 45036/98), § 154.

²¹ ECtHR, 8 April 2004, *Assanidze v. Georgia* (Appl. No. 71503/01), § 146. See also *Ilascu*, cited above (footnote 14), § 313.

a Contracting Party's "jurisdiction" is excluded from scrutiny under the Convention.²² For the purpose of the present paper this means that one would expect the Court not to distinguish between 'classic' autonomous State conduct and State action in an area covered by EU law.

3. A Convention Legal Space?

Given the universal vocation that is inherent in the concept of human rights, one could very well conceive of an area where Convention rights are uniformly applied, and where individuals derive entitlements directly from the Convention. If indeed something like a 'Convention Legal Space' exists, the Court might, for instance, react with suspicion or even hostility when confronted with attempts by a number of Contracting Parties to set up a legal space *inter se*. It seems sensible, therefore, to examine if the Convention itself has established an "*espace juridique*" before we embark on an analysis of the way in which the Strasbourg Court approaches the European Legal Space that has been created within the European Union. As a matter of fact the Court addressed on a number of occasions its own role in maintaining "the public order (*ordre public*) in Europe". Not so long ago it referred to the concept of "the legal space (*espace juridique*) of the Contracting States". It is always good to pay extra attention when the Court starts to use French terms – what exactly did it mean?

- "Greater unity", not uniformity

A convenient starting point to find an answer is the Preamble to the Convention. Here the founding fathers referred expressly to the aim of the Council of Europe, which they describe as "the achievement of greater unity between its members". They continued to note that "one of the methods by which that aim is to be pursued is the maintenance and further realisation of human rights and fundamental freedoms". The protection of human rights is not merely an end in itself; it is also set in the key of achieving "greater unity". The drafters of the Convention believed that the foundations were already in place, as they referred to themselves as "the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law".

This passage contains a measure of ambiguity. On the one hand the Preamble emphasises the similarities and common values of the participating States. On the other hand the aim is only "greater unity" – not "unity" as such. This is of course in keeping with the relatively modest political ambitions of the Council of Europe: not a supranational organisation but a forum for intergovernmental cooperation. Moreover, it seems likely that the term "unity" was inspired by the political circumstances of the time (i.e. against the background of the Cold War) – and not by the wish to hint at a united legal order. What the Convention guarantees are minimum standards, and, as Article 53 confirms, States are free to protect additional rights and/or to maintain a higher level of protection than is required by the Convention itself. Likewise the additional protocols to the Convention may or may not be ratified by the Contracting States, and the possibility of reservations has been provided for. Even if there is some political pressure on States to accede to the protocols and to withdraw reservations,²³ uniformity is not required in the same way as it is under Community law.

²² ECtHR, 30 January 1998, *United Communist Party of Turkey a.o. v. Turkey* (Appl. No. 19392/92), § 29.

²³ See in this respect Recommendation 1671 (*Ratification of protocols and withdrawal of reservations and derogations made in respect of the European Convention on Human Rights*) of the CoE Parliamentary Assembly, adopted on 7 September 2004: "it is also important to make sure that the entire body of Convention law – comprising the Convention and all the additional protocols – is ratified by all member states and applied throughout all parts of their territory without exception" (§ 2). In its reply of 10 June 2005, the Committee of Ministers stated that it agreed (doc. 10575).

A similar restraint has always been present in the Strasbourg case-law. In 1976 the Court acknowledged that “it is not possible to find ... a uniform European conception of morals” as “morals vary from time to time and from place to place”.²⁴ By reason of their “direct and continuous contact with the vital forces of their countries”, the Court continued, “State authorities are in principle in a better position than the international judge” to give an opinion on the exact content of the requirements of morals as well as on the necessity to restrict fundamental rights in order to protect morals. Consequently, the Court left the domestic authorities a “margin of appreciation”.

Very little has changed in the 30 years that followed. The Court accepts the cultural diversity of Europe, especially in the fields of morals and religion, and tends to leave the State a wide margin of appreciation when it regulates these areas.²⁵ It should be added that the margin of appreciation is particularly relevant in respect of the rights that can be restricted under the Convention, such as the right to privacy and the freedom of religion. As a rule it has less, if any, significance for the application of the absolute rights (Articles 2, 3 and 4 ECHR). But even in that area the Court may exercise restraint when confronted with opposing views. The case of *Vo* illustrates this:

At European level, the Court observes that there is no consensus on the nature and status of the embryo and/or foetus (...) At best, it may be regarded as common ground between States that the embryo/foetus belongs to the human race. (...) Having regard to the foregoing, the Court is convinced that it is neither desirable, nor even possible as matters stand, to answer in the abstract the question whether the unborn child is a “person” for the purposes of Article 2 of the Convention (...).²⁶

In a way this case-law represents the reverse side of the *Tyrer* coin, as described in the previous paragraph. If there appears to be consensus among the Contracting Parties, the Court will feel confident to impose ‘European’ standards on a single dissident State.²⁷ On the other hand the Court will avoid taking a clear position in controversial matters. Of course it is difficult to reconcile this deference with the basic presumption of human rights, i.e. that all human beings are born free and equal in dignity and rights. Why should *The Little Red School Book* be freely available in Denmark, but prohibited in the UK? Why should the unborn be protected in Poland, but not in the Ukraine?

- *Towards a ‘cross border equal treatment’ principle?*

Indeed there are a few cases where the Court applied a sort of ‘cross border equal treatment’ principle. Thus in the case of *Pellegrin* – which raised the question whether the right to a fair trial (Article 6 § 1 ECHR) applies to labour disputes raised by employees in the public sector – the Court considered:

The parties in the present case derived argument from the distinction which exists in France, as in some other Contracting States, between two categories of staff at the service of the State, namely officials under contract and established civil servants (...). It is true that in some States officials under contract are governed by private law, unlike established civil servants,

²⁴ ECtHR, 12 December 1976, *Handyside v. UK* (Appl. no. 5493/72), § 49.

²⁵ See e.g. ECtHR, 10 July 2003, *Murphy v. Ireland* (Appl. no. 44179/98), § 67, and ECtHR, 10 November 2005, *Leyla Sahin v. Turkey* (Appl. no. 44774/98), § 109 (where the Grand Chamber confirmed the Chamber judgment in this case).

²⁶ ECtHR, 8 July 2004, *Vo v. France* (Appl. No. 53924/00), §§ 84-85, confirmed in ECtHR, 7 March 2006, *Evans v. UK* (Appl. No. 6339/05), § 46.

²⁷ For an exceptional caveat, see ECtHR, 18 December 1987, *F. v. Switzerland* (Appl. No. 11329/85), § 33: “the fact that, at the end of a gradual evolution, a country finds itself in an isolated position as regards one aspect of its legislation does not necessarily imply that that aspect offends the Convention, particularly in a field - matrimony - which is so closely bound up with the cultural and historical traditions of each society and its deep-rooted ideas about the family unit”.

who are governed by public law. The Court notes, however, that in the current practice of the Contracting States established civil servants and officials under contract frequently perform equivalent or similar duties. Whether the applicable legal provisions form part of domestic public or private law cannot, according to the Court's established case-law, be decisive in itself, and it would in any event lead to *inequality of treatment from one State to another* and between persons in State service performing equivalent duties.

The Court accordingly considers that it is important, with a view to applying Article 6 § 1, to establish an autonomous interpretation of the term "civil service" which would make it possible to afford *equal treatment to public servants performing equivalent or similar duties in the States Parties to the Convention, irrespective of the domestic system of employment* and, in particular, whatever the nature of the legal relation between the official and the administrative authority (whether stipulated in a contract or governed by statutory and regulatory conditions of service).²⁸

So *Pellegrin* reflects a clear attempt to avoid inequality of treatment of similar cases in different States. This may be distinguished from cases where the 'consensus principle' is applied. In *Tyrer* the Court observed that practically all European States had abolished judicial corporal punishment, and *therefore* it interpreted Article 3 ECHR as prohibiting this kind of treatment. By contrast *no* consensus among the European States existed in *Pellegrin*; that was exactly why the Court developed its own interpretation of the term "civil service". It is an interesting approach that seems to point to the existence of an independent 'Convention legal order' – but this aspect of *Pellegrin* has, so far, remained fairly isolated.²⁹

A 'cross border equal treatment' principle has also been applied in a different context. In the case of *Loizidou*, which was already mentioned in § 2, the Turkish Government pointed out that it had only accepted the right of individual petition and the Court's jurisdiction (which at the time were conditional on each state's consent) within certain limits. Essentially, Turkey argued, its recognition extended only to the conduct of public authorities on its own territory. Cases involving incidents in northern Cyprus would therefore be excluded from Strasbourg review. The Court rejected that argument for a number of reasons, one of which is interesting for present purposes:

The inequality between Contracting States which the permissibility of such qualified acceptances might create would run counter to the aim, as expressed in the Preamble to the Convention, to achieve greater unity in the maintenance and further realisation of human rights.³⁰

The Court's position is understandable. To accept the Turkish argument would leave the Contracting Parties free to subscribe to separate regimes of enforcement of their Convention obligations. This would obviously weaken the role of the Court and diminish the effectiveness of the Convention. But the argument relating to the *inequality* between the Contracting States is somewhat different: it presupposes that all States should be subject to the same scope of scrutiny. It is an interesting approach but again it has only been applied in very few cases.³¹ Nor has it, for instance, affected in any way the reservations which States Parties have been able to make under Article 57 ECHR.

²⁸ ECtHR, 8 December 1999, *Pellegrin v. France* (Appl. No. 28541/92), §§ 62-63, emphasis added.

²⁹ For early examples see ECtHR, 21 February 1984, *Öztürk v. Germany* (Appl. No. 8544/79), § 49; ECtHR, 24 June 1993, *Schuler-Zraggen v. Switzerland* (Appl. No. 14518/89), § 46. For a recent application by the Grand Chamber see ECtHR, 6 July 2005, *Stec a.o. v. UK* (Appl. no. 65731/01, adm. dec.), § 49.

³⁰ ECtHR, 23 March 1995, *Loizidou v. Turkey* (Preliminary Objections) (Appl. No. 15318/89), § 77.

³¹ See e.g. ECtHR, 8 April 2004, *Assanidze v. Georgia* (Appl. No. 71503/01), § 142.

- *A network, a family, a community, a zone?*

Our first conclusion might therefore be that *even if* the Convention has established its own legal order, than at least it is not a rigid order that systematically compels its component parts to adhere to uniform standards. But the question remains if a separate legal order has been created at all. An affirmative answer was suggested by the famous case of *Ireland v. the UK* (1978), in which the Court considered:

Unlike international treaties of the classic kind, the Convention comprises *more than mere reciprocal engagements between contracting States*. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a ‘collective enforcement’.³²

The Court did not explain what exactly is “above” this “network”. But the quote seems to echo the seminal *Van Gend & Loos* judgment of the ECJ, delivered 15 years before:

The objective of the EEC Treaty, which is to establish a common market, the functioning of which is of direct concern to interested parties in the Community, implies that this Treaty is *more than an agreement which merely creates mutual obligations between the Contracting States*. This view is confirmed by the Preamble which refers not only to Governments but to Peoples. (...) The conclusion to be drawn from this is that the Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals, but is also intended to confer upon them rights which become part of their legal heritage.³³

A comparison of *Ireland v. UK* with *Van Gend & Loos* immediately shows the differences between Strasbourg and Luxembourg. The Strasbourg Court did *not* speak of “a new legal order”, although the precedent was there. It did *not* oblige Contracting Parties to incorporate its provisions into national law.³⁴ Only in 2006 – i.e. at the time that the ECHR had finally been incorporated by all Contracting States – did the Court state that the Convention “directly creates rights for private individuals within their jurisdiction”.³⁵ Only in one case the Court stated that Article 10 ECHR is “directly applicable” in Greece, but this was probably a slip of the pen.³⁶

So what is the European Convention? If it did not establish “a new legal order” in the *Van Gend & Loos* sense, then what did it create? In the case-law we do not find a straightforward answer. Instead we come across poetic expressions such as the “European family of nations”. In *Tyrer* the argument was made that local public opinion was in favour of retaining judicial corporal punishment. The Court noted that this type of punishment was not used elsewhere in Europe:

³² ECtHR, 18 January 1978, *Ireland v. UK* (Appl. No. 5310/71), § 239, emphasis added.

³³ ECJ, 5 February 1963, *Van Gend & Loos* (case 26/62), emphasis added.

³⁴ See, e.g., ECtHR, 27 September 1995, *McCann v. UK* (Appl. No. 18984/91), § 153.

³⁵ ECtHR, 8 March 2006, *Blečić v. Croatia* (Appl. No. 59532/00), § 90. As an authority for this statement the Grand Chamber referred to “*inter alia*” *Ireland v. UK*, cited above, § 239, but there the Court was actually more cautious: “the drafters of the Convention also intended to make it clear that the rights and freedoms set out in Section I would be directly secured to anyone within the jurisdiction of the Contracting States [...]. That intention finds a particularly faithful reflection in those instances where the Convention has been incorporated into domestic law [...]”.

³⁶ ECtHR, 15 November 1996, *Ahmet Sadik v. Greece* (Appl. No. 18877/91), § 31.

If nothing else, this casts doubt on whether the availability of this penalty is a requirement for the maintenance of law and order in a European country. The Isle of Man not only enjoys long-established and highly-developed political, social and cultural traditions but is an up-to-date society. Historically, geographically and culturally, the Island has always been included in the European family of nations and must be regarded as sharing fully that "common heritage of political traditions, ideals, freedom and the rule of law" to which the Preamble to the Convention refers.³⁷

It is great from a rhetorical point of view, but it is hard to maintain that the "European family of nations" is a clearly defined legal notion.

To make matters worse, the Court is not very consistent in its poetry. In its 1971 *Vagrancy* judgment the Court observed that scrupulous scrutiny is necessary "when the matter is one which concerns *ordre public* within the Council of Europe"³⁸ – without explaining what this *ordre public* is. But only a few years later the Court, referring back to the *Vagrancy* case, mentioned "the public order (*ordre public*) of the member States of the Council of Europe".³⁹ So to whom does the public order belong? To the Council of Europe, to its Member States, to the Member States collectively?

In *Loizidou* the Court elaborated upon this theme and described the Convention as "a constitutional instrument of European public order (*ordre public*)".⁴⁰ The expression "European public order" is a clever way to avoid the difference between the *Vagrancy* formula and subsequent variations. In addition *Loizidou* was the first time that the Court referred to the Convention as a "constitutional" instrument. But it was, again, unclear what the Court actually meant. The fact that the *same* judgment also described the Convention as "an instrument of European public order (*ordre public*)"⁴¹ (i.e. without the adjective "constitutional") only served to increase the confusion.

Yet another concept entered the stage in the final phase of the *Loizidou* case, when the Court gave a separate judgment on just satisfaction. The Government of Cyprus, which had intervened in the case, had asked for reimbursement of its costs. The Court dismissed that request with the following consideration:

The Court recalls the general principle that States must bear their own costs in contentious proceedings before international tribunals (...). It considers that this rule has even greater application when, in keeping with the special character of the Convention as an instrument of European public order (*ordre public*), High Contracting Parties bring cases before the Convention institutions (...). In principle, it is not appropriate, in the Court's view, that States which act, *inter alia*, in pursuit of the interests of the Convention community as a whole, even where this coincides with their own interests, be reimbursed their costs and expenses for doing so. Accordingly the Court dismisses the Cypriot Government's claim for costs and expenses.⁴²

On the one hand it is interesting to note that the adjective "constitutional" was again left aside. On the other hand, a new concept was introduced: "the Convention community as a whole". The credit for the discovery of this notion – the contents of which is yet to be revealed – goes to former Bulgarian judge Dimitar Gotchev, who mentioned it in a dissenting opinion in 1997.⁴³ It is somewhat peculiar that, since *Loizidou*, "the Convention community" has only featured in cases involving Norway, a country which is, coincidentally, *not* an EU member.⁴⁴

³⁷ ECtHR, 25 April 1978, *Tyrer v. UK* (Appl. No. 5658/72), § 38.

³⁸ ECtHR, 18 Juni 1971, *De Wilde, Ooms & Versyp v. Belgium* (Appl. No. 2832/66), § 65.

³⁹ ECtHR, 18 Juni 1980, *De Weer v. Belgium* (Appl. No. 6903/75), § 49.

⁴⁰ ECtHR, 23 March 1995, *Loizidou v. Turkey* (Preliminary Objections) (Appl. No. 15318/89), § 75. This expression was repeated by the Grand Chamber in *Bosphorus*, cited above, § 156.

⁴¹ *Loizidou*, § 93.

⁴² ECtHR, 28 July 1998, *Loizidou v. Turkey* (Just satisfaction) (Appl. No. 15318/89), § 48.

⁴³ Judge Gotchev dissenting in ECtHR, 28 November 1997, *Mentes v. Turkey* (Appl. No. 23186/94): "The above considerations have gained particular importance in the light of the recent expansion of the Convention community and the resultant need to establish a relation-

Evasive expressions continue to pop up. In 2003 the Court, when dealing with the death penalty, observed that “*the territories encompassed by the member States of the Council of Europe have become a zone free of capital punishment*”.⁴⁵ This cautious language may be contrasted with the more confident assertions of other Council of Europe organs, which do not hesitate to speak of a “death penalty-free continent”.⁴⁶

- *Bankovic: a legal space, but whose?*

The most recent, and most outspoken, passage to date can be found in the *Bankovic* case. The case originated in an attack, in April 1999, on a building of *Radio Televizije Srbije (RTS)* in Belgrade, Federal Republic of Yugoslavia (FRY). The television station was hit by a cruise missile launched from a NATO forces’ aircraft in the context of ‘Operation Allied Force’. Sixteen people were killed and another sixteen were seriously injured. Five relatives of the deceased and a survivor of the bombing brought a complaint before the Strasbourg Court against the NATO member states, in so far as they were bound by the ECHR. The applicants argued that the television station had not been a legitimate target; they alleged breaches of notably Article 2 (the right to life) and Article 10 (the freedom to impart information). The respondent states primarily contended that the applicants and their deceased relatives were not, at the relevant time, within their ‘jurisdiction’ and hence did not enjoy the guarantees offered by the Convention.

As it happened the hearing in this case took place in October 2001, i.e. weeks after the terrorist attacks on the United States. It was clear at the time that military reactions, notably in Afghanistan, were bound to follow. The applicants realised the potential impact on their case: if the Court were to accept the *Bankovic* claim, then possibly the next person to lodge an application might be Osama bin-Laden. This might not be an incentive for the Court to accept *Bankovic*. In an attempt to convince the Court that it should ignore recent events and concentrate on the issue at hand – an attack in the very heart of Europe (and not in some remote corner of the world) – the applicants reminded the Court of its earlier statement in *Cyprus v. Turkey* that a vacuum in the system of human-rights protection should be avoided. Any failure to accept that the applicants fell within the jurisdiction of the respondent states, they argued, would defeat the *public ordre* mission of the Convention. The Court did not agree:

In short, the Convention is a multi-lateral treaty operating (...) in an essentially regional context and notably in the legal space (*espace juridique*) of the Contracting States. The FRY clearly does not fall within this legal space. The Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States. Accordingly, the desirability of avoiding a gap or vacuum in human rights’ protection has so far been relied on

ship of cooperation between the Strasbourg Court and the courts in the Contracting States which have recently acceded to the Convention”).

⁴⁴ Judges Palm, Fuhrmann and Baka dissenting in ECtHR, 20 May 1999, *Bladet Tromsø v. Norway* (Appl. No. 21980/93) (“the Court has played an important role in laying the foundations for the principles which govern a free press within the Convention community and beyond”). And see: ECtHR, 11 February 2003, *Ringvold v. Norway* (Appl. No. 34964/97), § 38 (“Such an extensive interpretation would not be supported either by the wording of Article 6 § 2 or any common ground in the national legal systems within the Convention community. On the contrary, in a significant number of Contracting States, an acquittal does not preclude the establishment of civil liability in relation to the same facts.”). A similar passage was included in ECtHR, 11 February 2003, *Y v. Norway* (Appl. No. 56568/00), § 41.

⁴⁵ ECtHR, 12 March 2003, *Öcalan v. Turkey* (Appl. No.46221/99, Chamber judgment), § 195 (emphasis added), confirmed by the Grand Chamber in its judgment of 12 May 2005 in the same case, § 163.

⁴⁶ See Recommendation 1187 (*Europe: a death penalty-free continent*) of the CoE Parliamentary Assembly, adopted on 26 May 1999. “The Council of Europe is a death penalty free area”, the CoE website asserts (<http://www.coe.int/T/E/Com/Files/Themes/Death-penalty/>, accessed 22 Sept. 2005).

by the Court in favour of establishing jurisdiction only when the territory in question was one that, but for the specific circumstances, would normally be covered by the Convention.⁴⁷

Two conclusions may be drawn. The first time that the Court came close to circumscribing a legal order of its own, it primarily defined it by stating what it was *not*: the ECHR was not designed to be applied throughout the world. Secondly, the Court did not actually refer to the legal space of the Convention: it spoke about the legal space *of the Contracting States*.

- *Conclusion*

This paragraph made clear that the Convention seeks to achieve greater unity, but not uniformity. Apart from the fact that the Convention is meant to guarantee a minimum level of protection and not to harmonise human rights, States may or may not ratify additional protocols, they may enter reservations, and they enjoy a margin of appreciation, especially when restricting the exercise of certain rights in order to protect morals. There are a few attempts in the case-law to achieve equality of treatment across all 46 participating States, but these remain isolated. The question whether the Convention has established a 'legal order' of its own is difficult to answer. The Court's language is evasive, oscillating from the assertion that there *is* a Convention Community and that there *is* a public order of the Council of Europe as such, to the more modest position that there is a legal order of the Contracting States. And of course dozens of judgments suggest that there actually are as many legal orders as there are States – for instance all the cases where the Court referred to the existence, or non-existence, of "common ground in the legal and social orders of the member States of the Council of Europe".⁴⁸ The very least one can say is that the Strasbourg Court never developed a consistent and purposive theory of its own legal order in the way that its Luxembourg counter-part did.

Having mapped the way in which the Court perceives its own constitutional setting, it is now high time to examine the way in which Strasbourg looks at the developments within the EU.

4. *Strasbourg and the European Communities*

This is not the place to recount the way in which the European Court of Human Rights and, when still existed, the European Commission of Human Rights have dealt with complaints about the European Communities. The story of *CFDT* and *M. & Co.* has been told before on many occasions and in great detail. There are only two points that I wish to highlight here, one very new and the other quite old (but still intriguing). I will start with the latter one.

- *From Moustaquim to Koua Poirrez: discrimination on nationality*

In 1991 the Strasbourg Court decided the *Moustaquim* case.⁴⁹ It is best known as one of the first immigration cases in which the Court confirmed that the deportation of an alien for public order reasons may interfere with his right to respect for family life (Article 8 ECHR). Despite the considerable number of offences committed by the applicant, the Court found that it was disproportionate to send him back to Morocco.

Less known is the second argument that Mr Moustaquim raised in Strasbourg. He claimed to be the victim of discrimination on the ground of nationality vis-à-vis juvenile delinquents of two categories: those who possessed Belgian nationality (since they could not be

⁴⁷ ECtHR, 12 December 2001, *Bankovic a.o. v. 17 NATO Member States* (Appl. no. 52207/99, adm. dec.), § 80. It should be noted that the present author acted as legal advisor to the applicants in this case.

⁴⁸ See, e.g., ECtHR, 25 November 1996, *Wingrove v. UK* (Appl. no. 17419/90), § 57.

⁴⁹ ECtHR, 18 February 1991, *Moustaquim v. Belgium* (Appl. no. 12313/86).

deported), and those who were citizens of another member State of the European Communities (as a criminal conviction was not sufficient to render them liable to deportation). It is of course the second leg of the submission that is relevant for us. Can one treat EU citizens differently from third country nationals? The Court apparently had no doubts. Without giving any further reasons, it rejected the claim:

As for the preferential treatment given to nationals of the other member States of the Communities, there is objective and reasonable justification for it as Belgium belongs, together with those States, to a special legal order.⁵⁰

If not a circular line of reasoning, then at least this is a badly drafted judgment. It is somewhat remarkable to see the ease with which the Court – that we have seen struggling with its own legal order – accepts that the Communities are “a special legal order”.

But whatever our evaluation of *Moustaquim*, it is important to note that the Court took a markedly different approach in the later cases of *Gaygusuz* and *Koua Poirrez*.⁵¹ In *Gaygusuz* the applicant was not eligible for an Austrian social security benefit *because* he had Turkish nationality; in *Koua Poirrez* a French disability benefit was withheld on similar grounds from a national of Ivory Coast. The Court found in both cases that a distinction on the basis of nationality had been made without a reasonable and objective justification. In reaching that conclusion, the Court considered:

... the Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. However, very weighty reasons would have to be put forward before the Court could regard a difference of treatment based exclusively on the ground of nationality as compatible with the Convention.⁵²

It will be noted that the Court did not confine this statement to social security issues, but rather used very general terms. It might be a slip of the pen, but this is somewhat unlikely as the same formulation was used twice and there were seven years between the two instances. If indeed there was a purpose behind the general formulation of *Gaygusuz* and *Koua Poirrez*, then the consequences might be far-reaching: experience shows that whenever “very weighty reasons” are required to justify a situation, States inevitably⁵³ fail to convince the Court. On the other hand, difference of treatment based on nationality is at the very foundation of immigration law, and the Court is unlikely to strike that down. In short: it remains to be seen where this branch of case-law will lead to. It is therefore still an open question if third country nationals can continue to be granted less privileges than EU citizens.

- *Bosphorus: the Communities offer “equivalent protection” of rights*

It would be strange if this paper were to ignore the *Bosphorus* judgment which was delivered on 30 June 2005.⁵⁴ Without wishing to analyse the case in great detail, it is worthwhile to

⁵⁰ *Ibidem*, § 49. Confirmed in ECtHR, 6 August 1996, *C. v. Belgium* (Appl. No. 21794/93), § 38, where the Court added that this “special legal order” had, in addition, “established its own citizenship”.

⁵¹ See ECtHR, 16 September 1996, *Gaygusuz v. Austria* (Appl. No. 17371/90), and ECtHR, 30 September 2003, *Koua Poirrez v. France* (Appl. No. 40892/98).

⁵² See *Gaygusuz* § 42 and *Koua Poirrez* § 46.

⁵³ The only – possible – exception might be ECtHR, 6 July 2005, *Stec a.o. v. UK* (Appl. no. 65731/01) (the judgment, not the adm. dec. referred to above), where the Court found that the distinction made was justified. However, the Court was ambiguous as to whether it actually applied a “very weighty reasons” test in the instant case (§ 52).

⁵⁴ ECtHR, 30 June 2005, *Bosphorus Airlines v. Ireland* (Appl. No. 45036/98).

summarise the Court's main findings: the case gives a very detailed and up-to-date picture of the way in which Strasbourg looks at the process of European integration.

The case concerns the seizure by the Irish authorities of an aircraft which Bosphorus had leased from Yugoslav Airlines JAT. When the aircraft was in Ireland for maintenance, in 1993, it was seized under an EC Regulation which implemented UN sanctions against the Federal Republic of Yugoslavia. Bosphorus challenged the retention of the aircraft. During the proceedings, the Irish Supreme Court referred a preliminary question to the ECJ on whether the aircraft was covered by the relevant Regulation. The answer was in the affirmative: although everyone agreed that Bosphorus had acted *bona fide* at all times, the ECJ considered that its individual rights were outweighed by the general interest.⁵⁵ Subsequently, the Supreme Court had little choice but to apply the decision of the ECJ and reject Bosphorus's appeal. The aircraft was the only one ever seized under the relevant EC and UN regulations.

Bosphorus then brought a complaint in Strasbourg under Article 1 of Protocol No. 1 (protection of property), arguing that it had to bear an excessive burden resulting from the manner in which the Irish State applied the sanctions regime and that it suffered significant financial loss. An unusually long procedure followed, which suggests that the case was considered as highly sensitive.⁵⁶

In *Bosphorus* the Court accepted at the outset that the Irish measures were adopted in order to comply with legal obligations flowing from EC membership. That in itself, the Court found, was "a legitimate interest of considerable weight". The Court recalled that it had always recognised the importance of international co-operation and of the consequent need to secure the proper functioning of international organisations. Such considerations, the Court added "are critical for a supranational organisation such as the EC". This in itself was not decisive, however, as the Court was aware that it would be incompatible with the purpose and object of the Convention if Contracting States were completely absolved from their responsibility after transferring powers to an international organisation. In order to strike the right balance between two competing interests, the Court developed the following test:

155. In the Court's view, State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides (...). By "equivalent" the Court means "comparable": any requirement that the organisation's protection be "identical" could run counter to the interest of international co-operation pursued (...). However, any such finding of equivalence could not be final and would be susceptible to review in the light of any relevant change in fundamental rights' protection.

156. If such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation. However, any such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient. In such cases, the interest of international co-operation would be outweighed by the Convention's role as a "constitutional instrument of European public order" in the field of human rights (*Loizidou v. Turkey* (preliminary objections), judgment of 23 March 1995, Series A no. 310, § 75).

157. It remains the case that a State would be fully responsible under the Convention for all acts falling outside its strict international legal obligations.

⁵⁵ ECJ, 30 July 1996, *Bosphorus* (case C-84/95), [1996] ECR I-3953.

⁵⁶ During this period the Court rejected, on procedural grounds that did not quite convince the present author, two cases which also raised the position of the EU: ECtHR, 10 March 2004, *Senator Lines v. 15 EU Member States* (Appl. No. 56672/00; adm. dec.) and ECtHR, 25 January 2005, *Emesa Sugar v. Netherlands* (Appl. No. 62023/00, adm. dec.).

The Court then continued to examine the extent to which human rights are protected in the Community⁵⁷ legal order. The Court found that the protection of fundamental rights by EC law could indeed be considered to be “equivalent” to that of the Convention system. Since there had been “no dysfunction of the mechanisms of control of the observance of Convention rights” in the case of *Bosphorus*, the Court found that the presumption of Convention compliance by Ireland had not been rebutted. The application of *Bosphorus* was therefore dismissed.

What lessons can be drawn from *Bosphorus*? For the purposes of the present paper the most important message seems to be that Strasbourg does not wish to stand in the way of the Communities – on the one hand because it recognises the importance of international co-operation and it wishes to protect the proper functioning of the Communities (a sentiment that was apparently also present in *Moustaquim*); on the other hand because the Community legal order offers an adequate protection of fundamental rights.

5. *Floating in Space: Strasbourg and the consequences of a European Legal Space*

We will now try to assess the consequences of the emergence of a European Legal Space, as seen from the Strasbourg perspective. What is the impact of the fact that the EU Member States belong to the Internal Market and the Area of Freedom, Security and Justice? Does it influence their obligations under the ECHR? In other words: is the interpretation and application of the Convention affected by the disappearance of internal borders, by the increase of cross-border activities, or by the availability of alternative locations within the EU where activities can be carried out? Strasbourg case-law on this issue is surprisingly scarce, and we will have to include some ‘cross-border’ cases that involve third countries such as the USA and the Ukraine.

- *Open Door*

Open Door is a convenient point of departure. The on-going controversy surrounding abortion (see also the *Vo* judgment discussed in § 3 above) offers an obvious example of diverging human rights standards, also within the European Union. Moreover, the protection offered by the Irish constitution to the unborn child, in conjunction with the availability of abortion facilities in Great Britain, has given rise to considerable litigation, both before Irish jurisdictions and before the European courts.⁵⁸ Actually a case involving these very issues is currently pending before the Strasbourg Court.⁵⁹

The case of *Open Door Counselling and Dublin Well Woman* is well known. Two health centres in Dublin informed Irish women about possibilities of obtaining abortions in Great Britain. At the request a ‘pro-life organisation’, an injunction was imposed upon the two centres so as to restrain them from assisting women in obtaining abortions. The centres, two of their employees and two women complained that the injunction violated the freedom to impart and to receive information as guaranteed by Article 10 ECHR. In finding a violation, the Strasbourg Court observed *inter alia*:

it is recalled that it is not a criminal offence under Irish law for a pregnant woman to travel abroad in order to have an abortion. Furthermore, the injunction limited the freedom to receive and impart information with respect to services which are lawful in other Convention countries and may be crucial to a woman's health and well-being. Limitations on information concerning

⁵⁷ Note that the ECtHR expressly limited its findings to the Communities: *Bosphorus* § 72. The Court did not express a view on the quality of human rights protection in the 2nd and 3rd pillar of the Union.

⁵⁸ See, e.g., ECJ, 4 October 1991, *Grogan* (case C-159/90), [1991] *ECR* p. I-4733.

⁵⁹ Case of *D. v. Ireland* (Appl. No. 26499/02). A hearing on the admissibility and merits of the case took place on 6 September 2005; at the time of writing (May 2006) no decision had been adopted yet.

activities which, notwithstanding their moral implications, have been and continue to be tolerated by national authorities, call for careful scrutiny by the Convention institutions as to their conformity with the tenets of a democratic society.⁶⁰

As was recently confirmed by *Vo*, the European Court of Human Rights is unlikely – for the time being at least – to prohibit or to require the availability of abortion facilities. Essentially Strasbourg has confined itself to tolerating the national systems as they are. In *Open Door* the Court expressly declined to review the Irish prohibition of abortion, just as it did not question the British legal regime allowing for abortions. In this situation it is the freedom of movement that allows individuals to choose (Irish women who wish to procure an abortion at least have the possibility of travelling to Britain), and the freedom of information is important in making the exercise of this right a realistic option. It is against this background that the Court did not accept the Irish limitations on counselling. In other words: *Open Door* contributed to mutual acceptance – or at least ‘peaceful coexistence’ – among the Irish and British abortion regimes.

Having said that, one should realise that the Court’s finding of a violation in *Open Door* was also prompted by a number of additional factors which had nothing to do with the free movement of persons as such. First, Irish law did not prohibit pregnant women to leave the country and have an abortion abroad. It is uncertain how the Strasbourg Court would have decided the case had Irish law been different on this point. Secondly, both public opinion and the case-law in Ireland changed radically in the period immediately before the Strasbourg Court ruled in *Open Door*. This was caused by the case of *X*, a 14-year old girl who, being pregnant after rape, was initially prohibited from leaving Ireland for the duration of her pregnancy. This case – luckily – never made it to the European courts as the Irish Supreme Court found in her favour. But *if* the *X* case had been submitted either to the Luxembourg or to the Strasbourg Court, then it would have forced these courts to go to the heart of the matter: how to organise the *cohabitation* of radically opposed legal regimes.

- *Tokarczyk*

The latter question actually played a role, but was left undecided, in a fairly recent and less known Polish case. Mr Tokarczyk provided assistance, for a fee, to women who wished to have an abortion. He organised their travels from Lublin (in Poland) to Lviv (in Ukraine), where they had abortion in a public hospital. Mr Tokarczyk was convicted of aiding and abetting abortion, which was an offence under the provisions of the *Family Planning, Protection of the Human Foetus, and Conditions Permitting Pregnancy Termination Act*.

In Strasbourg Mr Tokarczyk complained that his conviction was politically motivated. He pointed out that the Polish laws concerning abortion were changed in 1993; the conditions of abortion were now so severely restrained that abortion became practically illegal. He invoked Article 10 ECHR. The Court considered, however, that Mr Tokarczyk was convicted of a criminal offence – and not because he expressed his views concerning the ethical and practical problems associated with reproductive rights, and the social and legal issues related to the availability of abortion. Consequently, the Court found that the protection afforded by Article 10 of the Convention could not be invoked in respect of the acts of which he was convicted.⁶¹

Again the key question how to deal with differing levels of protection among Council of Europe Member States was avoided. The Court did not address the fact that Polish law apparently penalises the provision of assistance to women who wish to make use of “services which are lawful in other Convention countries and may be crucial to a woman's health and well-being”, as the Court itself had put it in *Open Door*. That might be different if a case were brought by a Polish woman who wished to make use of services of the kind

⁶⁰ ECtHR, 29 October 1992, *Open Door a.o. v. Ireland* (Appl. No. 14234/88), § 72.

⁶¹ ECtHR, 31 January 2002, *Tokarczyk v. Poland* (Appl. No. 51792/99, adm. dec.).

offered by Mr Tokarczyk, and who invoked a right to self-determination under Article 8 ECHR.⁶²

- *Spycatcher*

One of the elements that played a role in *Open Door*, was that information on British abortion services was also included in magazines and telephone directories. The Strasbourg Court noted that the very information that the injunction sought to restrict was already available elsewhere, “although in a manner which was not supervised by qualified personnel and thus less protective of women’s health”. A similar argument played an important role in the *Spycatcher* case.

The case derives its name from a book written by Peter Wright, a former member of the British Security Service (MI5). After his resignation he wrote his memoirs, which dealt with the operational organisation, methods and personnel of MI5 and also included an account of alleged illegal activities by the Security Service. In 1986 Mr. Wright made arrangements for publication of his book in Australia, where he was then living. The UK Government brought court proceedings in Australia to prevent the publication of the book. This prompted a number of British newspapers to report on the case and to give details of some of the contents of the manuscript of *Spycatcher*. The Attorney General then sought and obtained injunctions restraining the newspapers from making any publication of *Spycatcher* material.

The attempts of the British Government to prevent the publication of the book were not successful. In 1988 they lost the court proceedings in Australia. In the meantime publication and dissemination of *Spycatcher* and its contents took place worldwide, not only in the United States (around 715,000 copies were printed and nearly all were sold by October 1987) and in Canada (around 100,000 copies printed), but also in Australia (145,000 copies printed, of which half were sold within a month) and Ireland (30,000 copies printed and distributed). Nearly 100,000 copies were sent to various European countries other than the UK and copies were distributed from Australia in Asian countries. Radio broadcasts in English about the book were made in Denmark and Sweden and it was translated into twelve other languages, including ten European.

When the British newspapers complained of a violation of Article 10 of the Convention, the Court distinguished between two periods. It accepted that during the first period the injunction could be regarded as necessary in the interests of national security. The situation changed, however, when *Spycatcher* was actually published in the United States. The Court observed that by then the contents of the book ceased to be a matter of speculation and their confidentiality was destroyed. Furthermore, the book became obtainable from abroad by residents of the UK, the British Government having made no attempt to impose a ban on importation. The Court was prepared to accept “that there is some difference between the casual importation of copies of *Spycatcher* into the United Kingdom and mass publication of its contents in the press”, but it still found it disproportionate that the injunction was continued.⁶³

The lesson of *Spycatcher* is of course all the more relevant today, as it is virtually impossible to prevent dissemination of information via internet. It does not solve all questions, though: what to do with publications such as *Mein Kampf*, which is prohibited in Austria but freely available in Ireland? Surprisingly, that question does not appear to have been raised in Strasbourg.⁶⁴

⁶² A legal basis for that claim might be found in ECtHR, 29 April 2002, *Pretty v. UK* (Appl. No. 2346/02), § 61: “Although no previous case has established as such any right to self-determination as being contained in Article 8 of the Convention, the Court considers that the notion of personal autonomy is an important principle underlying the interpretation of its guarantees”.

⁶³ ECtHR, 26 November 1991, *Observer & Guardian v. UK* (Appl. No. 13585/88), §§ 69-70.

⁶⁴ The book only played a marginal role in a British case where the prison authorities did not allow a detainee to receive certain issues of the journal *Gothic Ripples* because of its anti-Semitic contents. When reviewing the case, the Commission noted that the journal contained, among many other things, advertisements for *Mein Kampf*. The Commission found that “the

- *Cha'are Shalom ve Tsedek*

The free market favoured the applicants in *Spycatcher*, but it may also work against the individual applicant. In the case of *Cha'are Shalom ve Tsedek*, an association of ultra-orthodox Jews complained of a refusal by the French authorities to allow it access to slaughterhouses. The association wished to be able to perform ritual slaughter in accordance with the religious prescriptions of its members. It submitted that it was obliged, in order to be able to make “*glatt*” kosher meat available to its adherents, to slaughter illegally and to obtain supplies from Belgium. The latter remark, however, backfired on the applicant, as the Court observed:

there would be interference with the freedom to manifest one's religion only if the illegality of performing ritual slaughter made it impossible for ultra-orthodox Jews to eat meat from animals slaughtered in accordance with the religious prescriptions they considered applicable. But that is not the case. It is not contested that the applicant association can easily obtain supplies of “*glatt*” meat in Belgium.⁶⁵

The Court's line of reasoning is certainly strange – if one accepts, as the Court does, that ritual slaughter is covered by the freedom to manifest one's religion, then it is difficult to deny that the refusal to grant a permit constitutes an interference with the exercise of that right. The interference may be justified, for instance out of considerations of animal welfare and because no serious disadvantage is suffered, but that is another matter.

Having said that, for present purposes the import thing of *Cha'Are Shalom ve Tsedek* is of course that it illustrates that the Court may take into account the realities of the Internal Market. *Glatt* kosher meat is also available in Belgium, so why should the association be allowed to produce its own? On second thought, however, that line of reasoning is as strange as the previous one. It seems to imply that the prohibition of local authorities to celebrate a catholic mass does not restrict the freedom of religion, since Catholics can go to church in a nearby municipality. Certainly that proposition is at odds with the essence of Article 9!

In a more abstract way, the judgment does raise the question if an EU Member State can diminish its obligation to secure Convention rights and freedoms by referring individuals to services available in other Member States. An affirmative answer is of course conceivable in theory, but then other questions come up. Does this approach apply to all rights and freedoms (“although your life was at stake you could not procure an abortion here, but you could have gone to another country”)? Which additional burden may be expected from the individual who has to rely on foreign ‘rights providers’? Of course if one goes down this road, one should be ready to question the basic premise that *the State* is the “guarantor” of Convention rights and freedoms.

- *Calabro*

A similar sense of unease results from the case of *Calabro*.⁶⁶ Here the applicant was arrested *in flagrante delicto* for importing a large quantity of cocaine. According to the police report, the drugs had been imported into Italy by an “infiltrator” called “Jürgen”, as part of a joint operation by the Italian and German police. Mr Calabro, who was convicted to a long-term prison sentence, complained in Strasbourg under Article 6 § 3 (d) of the Convention that he had not been given an opportunity to examine Jürgen.

fact that the prison administration do not impose a blanket prohibition on this publication and the literature which it advertises, but rather review each item separately, shows commendable restraint, well within the margin of appreciation afforded to the High Contracting Parties by Article 10 of the Convention” (ECommHR, 9 December 1988, *Lowes v. UK* (Appl. No. 13214/87, adm. dec.)).

⁶⁵ ECtHR, 27 June 2000, *Cha'are Shalom ve Tsedek v. France* (Appl. No. 27417/95), §§ 80-81.

⁶⁶ ECtHR, 21 March 2002, *Calabro v. Italy and Germany* (Appl. No. 59895/00, adm. dec.).

The Court did not find a violation. It noted that the Italian authorities made “considerable efforts” to obtain oral testimony from Jürgen, having made several orders requiring him to attend court to give evidence, and issued a request for evidence on commission. However, despite those efforts, “they were unable to secure his presence at the hearing as, according to the information received from Germany, he could not be found”. The Court then went on to consider that

it was not for the Italian authorities to make enquiries to establish the whereabouts of a person residing on the territory of a foreign State. By making an order for Jürgen’s attendance and issuing an international request for evidence on commission, the Criminal Court and the Court of Appeal used the means at their disposal under domestic law to secure the presence of the witness concerned. Moreover, they had no alternative but to rely on the information received from qualified sources based in Germany, and in particular the Wiesbaden district judge and the BKA. Under these circumstances, the Italian authorities cannot be accused of a lack of diligence engaging their responsibility before the Convention institutions.

The Court continued to note that it would have been preferable for Jürgen to have been heard in person, but his unavailability could not be allowed to block the prosecution; Jürgen’s statements were not the only evidence on which the trial courts relied to convict the applicant, and so on.

Most of the arguments have been used more often in the Court’s case-law on the hearing of witnesses. But one cannot escape the impression that something is wrong in this case. If the Italian and German police are capable of organising a joint operation, then why are the Italian and German authorities unable to secure the presence of an infiltrator during trial? Did they fail to make the necessary arrangements before the operation was carried out? It would be a worrying development if multinational police operations – which are of course likely to occur more often in the Area of Freedom, Security and Justice – effectively result in a substantial decrease of the power of the trial courts to verify the reliability of evidence and the lawfulness of prosecution activities. In that case the European Legal Space does run the risk of developing into a European Legal Vacuum.

- *Pellegrino*

The Area of Freedom, Security and Justice is based on the proposition that all EU Member States comply with adequate human rights standards: only on that basis can one achieve, for instance, a sustainable system of mutual recognition of judicial decisions. Is this an acceptable proposition from the point of view of Strasbourg? Are States entitled to assume, for instance for the purposes of an extradition, that the other Contracting States honour their obligations under the ECHR?

A convenient starting point is *Pellegrini*. The facts of this case are somewhat unusual. Ms Pellegrini, who had been married since 1962, petitioned for a judicial separation in 1987. While the proceedings before the Italian civil courts were pending, she was summoned, to her surprise, to appear before an ecclesiastical court. There she was informed that her husband had petitioned for a decree that the marriage was a nullity on the ground that they were too closely related. Indeed a decree of nullity was issued by the ecclesiastical court, and this was subsequently declared enforceable by the Italian civil courts. For Ms Pellegrini this meant effectively that she was not entitled to any maintenance from the person whom she believed to be her former husband – since they were considered to have never been married in the first place.

Stating that she had not had the benefit of an adversarial trial in the proceedings before the ecclesiastical courts, Ms Pellegrini brought a complaint in Strasbourg – not against the Vatican, which is not a party to the ECHR, but against Italy. In finding a violation of Article 6 ECHR, the Strasbourg Court observed:

The Court’s task therefore consists not in examining whether the proceedings before the ecclesiastical courts complied with Article 6 of the Convention, but whether the Italian courts,

before authorising enforcement of the decision annulling the marriage, duly satisfied themselves that the relevant proceedings fulfilled the guarantees of Article 6. *A review of that kind is required where a decision in respect of which enforcement is requested emanates from the courts of a country which does not apply the Convention.* Such a review is especially necessary where the implications of a declaration of enforceability are of capital importance for the parties.⁶⁷

The conclusion is clear: when granting *exequatur* to foreign judgments, courts must verify that the proceedings leading up to that judgment complied with the requirements of the Convention – unless the foreign judgment comes from one of the High Contracting Parties. In the latter case, it seems, courts may assume that the Convention has been complied with. There may be several explanations behind this distinction: one may assume that States will honour their treaty obligations under the ECHR in good faith; if coincidentally something has gone wrong, the individual could lodge a petition in Strasbourg against the State which was responsible for the initial judgment.⁶⁸ And finally, and most importantly from the perspective of the EU, it would thwart judicial co-operation between European States if each and every foreign-but-European judgment had to be reviewed for compliance with the Convention before being enforced.

- *K.K.C and Shamayev*

A similar approach was traditionally followed in cases relating to extradition or expulsion. When a person is about to be deported to a third country, which is not a party to the Convention, the authorities must ensure that there is no real risk of him being ill-treated in the receiving country.⁶⁹ One would expect that an exception would be made when the deportation was to a Contracting Party to the Convention – but the application of the principle of trust has come under pressure in recent cases.

A number of cases involve the anticipated deportation of Chechen nationals to the Russian Federation. One of the cases, *K.K.C.*, which was brought against the Netherlands, was settled: the Dutch authorities granted the applicant a residence permit.⁷⁰ Had the ‘trust principle’ applied in full, the case would not have been declared admissible, and the Dutch authorities would not have felt the need to negotiate a settlement. A plausible explanation is that there existed a fear that, despite the Russian Federation being bound by the Convention, the applicant would be ill-treated upon arrival. In that scenario the possibility of lodging a complaint in Strasbourg would be of little help.

This explanation was confirmed in the later case of *Shamayev and others*. Here a group of 13 Chechen nationals were arrested on the Georgian border under circumstances which suggested that they had taken part in hostilities with the Russian army. At the request of the Russian authorities, a number of them were handed over to Russia; the others remained, for the time being at least, in Georgia. With respect to Mr Gelogayev, who belonged to the latter group, an extradition decision had been taken but it was not yet enforced. In that connection the Strasbourg Court noted a new extremely alarming phenomenon of persecution and killings of persons of Chechen origin who had lodged applications with it. According to reports by human rights organisations, there had been a sudden rise in 2003 and 2004 in the number of cases of persecution of persons who had lodged applications with the Court, in the form of threats, harassment, detention, enforced disappearances and killings. Consequently, the Court considered that if the decision to extradite Mr Gelogayev were to be enforced on the basis of the assessments made in 2005, there would be a violation of Article 3 of the Convention.⁷¹

⁶⁷ ECtHR, 20 July 2001, *Pellegrini v. Italy* (Appl. No. 30882/96), § 40, emphasis added.

⁶⁸ This argument was recently used in connection to transfer of convicted persons: ECtHR, 15 March 2005, *Veemäe v. Finland* (Appl. No. 38704/03, adm. dec.), p. 10.

⁶⁹ ECtHR, 7 July 1989, *Soering v. UK* (Appl. No. 14038/88), § 91.

⁷⁰ ECtHR, 21 December 2001, *K.K.C. v. the Netherlands* (Appl. No. 58964/00).

⁷¹ ECtHR, 12 April 2005, *Shamayev a.o. v. Georgia and Russia* (Appl. No. 36378/02) §§ 366-368; the judgment is only available in French (under the name *Chamaiev*).

Shamayev is the first case in which the Court has expressly accepted the possibility that the Convention may be opposed to the extradition of an individual to another Contracting Party. Of course the situation in and around Chechnya is exceptional in many ways, but *Shamayev* shows the principle of trust is not unlimited.

- *Sejdovic*

That was Chechnya – is it conceivable that a similar scenario would occur among EU Member States?! An affirmative answer could have serious repercussions for the judicial co-operation in the Area of Freedom, Security and Justice. Yet that is the outcome of the case of *Sejdovic*.

Mr Sejdovic, a national of former Yugoslavia born in 1972, was suspected of involvement in the killing of a person at a travellers' encampment in Rome in September 1992. In October 1992 an investigating judge made an order for his detention pending trial. However, as Mr Sejdovic was untraceable, the authorities considered that he had deliberately sought to evade justice and declared him to be a "fugitive". In 1996 the Rome Assize Court sentenced him to more than 21 years' imprisonment for murder and illegally carrying a weapon.

In September 1999, Mr Sejdovic was arrested by the German police in Hamburg under an arrest warrant issued by the Italian authorities. Indeed the Italian Minister of Justice requested his extradition. The request was refused by the German authorities, however, on the ground that Italian law did not guarantee with sufficient certainty that he would have the opportunity of having his trial reopened. Meanwhile Mr Sejdovic, who claimed that he was innocent and had been completely unaware of the criminal proceedings against him, lodged a complaint in Strasbourg about his conviction *in absentia*.

The Court agreed with him – in two instances: first a Chamber of seven judges, and then, in March 2006, the Grand Chamber of 17 judges.⁷² On both occasions it was found, unanimously, that Mr Sejdovic had not been shown to have sought to escape trial or to have unequivocally waived his right to appear in court. Since he had not had the opportunity to obtain a fresh determination of the merits of the charge against him by a court which had heard him in accordance with his defence rights, a violation of Article 6 ECHR was found – which implicitly confirmed that Germany had been right in its refusal to hand over Mr Sejdovic.

Unequivocal as this judgment is, it remains to be seen what it means for the European Arrest Warrant (EAW) and other forms of co-operation within the EU. One thing is clear: the issue should not be taken lightly, or categorised as an incident. On the contrary, the Court expressly noted that the violation found in *Sejdovic* had originated in a problem deriving from the Italian legislation on trial *in absentia*. "This might suggest", the Court continued with a sense of understatement, "that there was a defect in the Italian legal system such that anyone convicted *in absentia* who had not been effectively informed of the proceedings against him could be denied a retrial".⁷³

So it seems safe to conclude that EU Member States cannot take it for granted that human rights will be protected in the other Member States. Structural problems were found to exist in Italy, and clearly such problems are not limited to that country alone. Admittedly the Strasbourg Court limited its analysis of *Sejdovic* to the obligations of Italy. Whilst it is clear that the German authorities were *right* in their refusal to hand over Mr Sejdovic, it remains to be seen if they were *obliged* under the Convention to do so. In *Sejdovic* there was no need for the Court to pronounce on that matter. But it will only be a matter of time before a case is brought in Strasbourg were a State *does* comply with a EAW and surrenders an individual to another EU Member State, where subsequently a violation of the Convention occurs. Especially if structural problems are known to exist in the receiving country, there is an argument to be made that the requested country should think, and preferably twice, before it surrenders individuals.

⁷² ECtHR, 1 March 2006, *Sejdovic v. Italy* (Appl. No. 56581/00).

⁷³ *Ibidem*, § 131.

6. *Some tentative conclusions*

There are contradictory trends in the case-law of the European Court of Human Rights. On the one hand the Court is well-known for its progressive interpretation of the Convention, its efforts to ensure that rights are practical and effective, and its concern that the State, as ultimate guarantor of human rights, cannot escape from its obligations, for instance by delegating tasks to other bodies or citing practical difficulties. The Court's contribution to the development of international human rights law and to the strengthening of the rule of law in Europe cannot be overestimated.

On the other hand the Court – itself a product of international cooperation – has always recognised to need to secure the proper functioning of international organisations, and it has clearly followed a 'hands off' approach vis-à-vis the European Communities. This may have to do with a degree of uncertainty: the Convention seeks to achieve "greater unity", not uniformity, and that is not very specific in terms of a *finalité politique*, to borrow some EU jargon. Whilst the Court often feels confident to impose 'European' standards on a single dissident State if there appears to be consensus among the Contracting Parties, Strasbourg tends to avoid taking sides in controversial matters. This means that different levels of human rights protection co-exist in the Council of Europe Member States. There are a few attempts in the Strasbourg case-law to achieve equality of treatment across all 46 participating States, but these remain isolated. The question whether the Convention has established a 'legal order' of its own is difficult to answer as the case-law is evasive and inconsistent. But at any rate it is clear that the Court never developed a consistent and purposive doctrine in the way that the ECJ did.

When confronted with cross-border cases, the Court does not seem to have a well-defined approach. There are cases, such as *Open Door* and *Spycatcher*, where the Court appeared to protect those individuals who wish to make use of existing differences in domestic human rights regimes. Here the Court could be seen as promoting 'peaceful coexistence' as the leading principle when organising the *cohabitation* of different legal regimes. But there are also cases that point in the opposite direction, such as *Tokarczyk* (where the Court simply avoided the issue) and *Calabro* (where the Court failed to protect the applicant from the consequences of international police cooperation). And in *Cha'are Shalom ve Tsedek* the applicant association was *forced* to turn to another country in order to exercise its fundamental rights. The latter case effectively raised the question whether the State can delegate its Convention obligations to the Internal Market. Yet a very different picture emerges from *Sejdovic*: EU Member States cannot take it for granted that human rights will be protected in the other Member States.

All in all, a mixed picture emerges. It would not be fair to compare the Strasbourg Court with a sleeping pilot. Nor can we say that the cockpit is full of 19th century literature or hard liquor. But it is equally true that the development of a European Legal Space offers an excellent opportunity for Strasbourg to show once again that the Convention is a living instrument. Let's not forget that the Aeroflot flight from Vladivostok arrived safely in Moscow, thanks to the co-pilot who woke up just in time.