【演說特稿】

歐洲法院與歐洲人權公約

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這篇文章是由 Judge Georg Ress 2001 年 10 月拜訪東吳大學張佛泉人權研究中心時所發表的演說稿修訂而成。身爲一名學者及法官，Georg Ress 以他廣博的學識及豐富的經歷講述歐洲法院及歐洲人權公約，尤其對歐洲人權公約自 1998 年十一月一日第十一號議定書後的發展著墨甚多，根據 Georg Ress 極富權威性的闡釋，本公約是歐洲整合的基礎，而第十一號議定書實際上形塑了一個新的法院；特別值得一提的是，Georg Ress 在文章中以十分淺顯的語言去詮釋許多在他法庭內的重大訴案，以支持他的論點。

--------編者

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The European Court and the European Convention of Human Rights

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This article is based on a lecture Judge Georg Ress gave during his visit to the Chang Fo-chuan Center for the Study of Human Rights in Soochow University in October last year. Drawing upon his vast learning and extensive experience as a scholar and a sitting judge, Judge Gerog Ress discoursed on the European Court and the European Convention on Human Rights. In particular, Judge Georg Ress emphasized the development of European Convention on Human Rights after coming into force of the 11th Protocol on 1 November 1998. In his authoritative interpretation, the Convention was the basis of European integration and the 11th Protocol for all practical purposes created a new court. What is especially valuable is that Judge Georg Ress has used most effectively and in easy language some of the most important cases decided in his court in making his arguments.

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I. The development of the ECHR after coming into force of the 11th Protocol on 1 November 1998

The European Convention of Human Rights of 3rd November 1950, largely inspired by the UN Declaration of Human Rights of 1948, is an expression of the human rights and fundamental freedoms in Europe. It is a result of a long development dating back to the values of the human being in the stoa and Christian philosophy and the writings of humanistic philosophers in the 15th and 16th century. To a great extent the French Revolution, which produced the catalogue of human rights of the declaration of 1798 parallel to similar declaration in the first constitutions of the different states of North America, are examples of a rational and voluntaristic view of those rights and duties, which human beings should enjoy and observe within a human society. That this idea of rights (and duties), which are born with every human being, is a very old idea and expressed not only the stoa but also in the letters of St. Paul. The rights and duties are enshrined in the hearts of each human being. This idea is the very basis of the universality of human rights, which does not exclude that some fundamental rights may change according to time and location and geographical conditions, if only the very essence is preserved as a human right.

In customary international law, i.e. outside of regulations of international treaties, are recognized as human rights — and some of them with peremptory character-only a very limited number: the prohibition of slavery and the recognition of the human being as a “person”, the prohibition of piracy, the prohibition of torture and inhuman treatment, the prohibition of genocide and what is called crimes against humanity. Our modern constitutions and international human rights treaties go far beyond, so that it is till justified to make the distinction between human rights and fundamental freedoms as in the European Convention of 1950.

In European the Convention of 1950 was the basis for the European integration, the

treaties of Paris and Rome, and they now form an integral part via the recognized principles of Community law of the European Union. Such a process of European integration would not have been possible without the basis of the Human Rights Convention of 1950, which preceded the treaties of 1953 and 1957. Integration of states is only possible on the basis of common values.

1. The new Convention of Human Rights introduced a system of protection by a Commission and a non-permanent Court, which exercise their jurisdiction in interstate cases (obligatory competencies of the Commission) and in cases of individual application, but there only on the formal exception of such possibility of individual applications by a submission of the respondent state. So the system of individual applications was until 1998 (11th Protocol) a system of facultatory jurisdiction of the Commission and the Court in the field of individual applications, even if by and by most European states accepted individual applications by formal declarations.
2. The 11th Protocol has created a new court in 1998, which is the largest international court of a permanent nature. This court is now composed of 41 (in the near future 43) European States including East European States like Ukraine, Russia, Bulgaria, Moldavia, Romania and some of the former Yugoslavian States like Croatia, Macedonia, Slovenia and Albania. The admission of Bosnia and Herzegovina, Serbia and Montenegro is to be expected and Azerbaïjan and Armenia have already been admitted to the Council of Europe. It may be well possible that in the near future also Belarus will be admitted. The conditions for admission are the acceptance of the basic principles of democracy and the rule of law, which are also criteria underlying the European Convention of Human Rights (for instance in the procedures relating to the free creation of political parties, court proceedings against the prohibition of political parties in Turkey). Each contracting State has its national judge in the Court, who is elected by the Parliamentary Assembly on proposal of the State from a list of

three candidates. The Court decides on cases in committees of three judges (inadmissible cases), chambers and grand chambers for the most important and difficult legal questions, the judgments state when there has been a violation of the Convention or the annexed protocols and the States have to undertake to abide by the final judgment of the Court in any case to which they are parties. The Committee of Ministers is supervising the execution of the judgments. Normally a State has to try to make reparation of the violation (*restitutio in integrum*) and if this is not possible, the Court shall, if necessary, in a judgment state how to grant just satisfaction to the injured party. So most of the judgments contain a condemnation of the State that has been found guilty to violate the Convention to provide for reparation of pecuniary or non pecuniary damage. The organization of the New Court, which has a jurisdiction all over Europe from Vladivostoc to Iceland with nearly 800 million individuals, has resulted in a steady increase of individual applications (inter-sate applications are rather rare; take the case of *Cyprus v. Turkey* about the treatment of Greek Cypriots in the area occupied by Turkey or the case of *Ireland v. UK* on the treatment of people in police custody in Northern Ireland). This increase is a question of continuous concern and of a permanent reorganization, if not extension, of personnel of the Court.

3. The new elements of this Court are: the obligatory jurisdiction; each Contracting State is now without any limitation (if not expressed in a reservation on the moment of ratification—but these reservations under Art. 57 are limited and controlled as to their legality); this submission of the Contracting States to an international jurisdiction is really a step forward for human civilization. Never in the past have states submitted themselves to such an international jurisdiction, because in the past there was the prevailing doctrine of national sovereignty. It is not only an expression of the view that human rights are no longer an internal matter of the States but also that States accept rather to be treated in this field on common ground under an

international supervision. Never in the past an individual could address himself to an international jurisdiction of such wide range competency, and it can only to be compared to the creation of tribunals with compulsory obligatory jurisdiction in the states of Europe after the end of the medieval time, i.e. with the creation of the modern state in the 15th century. Now we are used to have a right to a tribunal in our different states and to have access to jurisdiction in our civil and criminal and administrative matters, but that is only a development of the last 500 years. On the international level in the relation between the states such an access to international tribunals is not even an obligatory basis established by the International Court in The Hauge. It is therefore a major step forward that with the European Court of Human Rights such an obligatory jurisdiction has been created in Europe not only for States but also for each human being. The Court has been compared to a European constitutional court similar to the highest constitutional courts like the Bundesverfassungsgerich in Germany with its possibility of constitutional complaints. It is a major fact of integration and adjustment, in particular of Easter European States, in the process of future integration into the European Union. The jurisprudence of the Court brings about a harmonization of basic requirements on the interpretation of application of the most fundamental rights.

4. The Convention speaks in Art. 1 of the " obligations of the States to respect human rights"—they shall secure to everybody within their jurisdiction the rights and freedoms defined in the Convention. The States have not only the (negative) duty to refrain from unjustified infringements but also the duty (positive obligation) to take the necessary steps that everybody can enjoy these human rights. This includes positive measures to provide legislation protecting life, family, private life and so on and is the basis for quite a number of judgments in the field of the protection of the environment (right to information), of health and in particular in expulsion cases not to expose somebody to the actual risk of being tortured or put to inhuman treatment

(*Soering* case). This obligation also extends to situations of a transfer of competencies to international organizations.

Some new important cases relate to the protection of life (Art. 2) and the prohibition of torture and inhuman treatment (Art. 3). The Court has expressed in the *McCann* case the opinion that there is a duty of the State to take all necessary steps also during police actions to safeguard life. If there is disappearance of persons who allegedly have been in the hands of public authorities, like in many cases against Turkey, and the Court cannot establish whether the person has died in police custody, the State is under a positive obligation to make effective investigations as to the destiny of such persons. In the *Salmouni v. France* case, a case that was related to serve ill—treatment in a Paris police custody, the Court has newly established the threshold for torture as severe bodily harm, in particular with the aim of extracting confessions. The Court has developed in the *Ribisch v. Austria* case the rule for the burden of proof that when a person is in the hands of public authorities, for instance in prison, and suffered bodily harm, it is for the State to prove that this bodily harm has had natural causes and was not inflicted by any police offer. The prohibition of slavery and forced labor (Art. 4) does not play a major role, even if there are quite a number of cases where prisoners complained about the low level of paying for their work performed in prison. But since Art. 4 § 3a provides that the term "forced or compulsory labour" shall include any work required to be done in the ordinary course of detention these complaints have obviously been without success. Art. 5 protects the right to liberty and security, a kind of *magna charta libertatum*, against unlawful detention and arrest and provides for everybody the right to be informed promptly in a language which he understands the reasons for his arrest and of any charge against him; in particular he shall be brought promptly before a judge, an obligation that is not yet fulfilled by a number of East European States, which still provide rules that an arrested person is first to be brought before the prosecutor who has the power to

decide on his detention. All these legal situations, which date from the former communist times, are considered as being contrary to the Convention.

Another very important provision is Art. 5 § 4 according to which everybody who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided *speedily* by a court and his release ordered if the detention is not lawful. If the internal courts function regularly, this provision will play no role but in fact in quite a number of States the very notion of *speedily* poses quite a number of problems. The right to a fair trial according to Art. 6 extends to all civil and criminal procedures, but according to the interpretation of the Court also to proceedings that have a pecuniary interest, even if they are of a public law nature. In the *Pellegrin* judgment the Court has taken the same criteria as the Court of the European Communities in Luxembourg according to which the notion of " public authority" only extend to the exercise of the hard core of public authority. Therefore all other cases involving public officials may come under the jurisdiction of Art. 6. Tax matters are excluded (still according to the recent *Ferrazzi* judement) the right that everybody is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law gives the individual also a right to access to court (*Golder* case), which has recently been a problem in cases involving:

-sovereign immunities (*Al-Adsani v. UK*)

-immunities of international organizations (*Waite and Kennedy and Beer and Regan*)

-exclusion by an international treaty (the so-called Uberleitungsvertrag that Germany has concluded with the three Western powers in 1954/55 in order to regain sovereignty; in this treaty it has considered that no claim or action shall be admissible against persons who shall have acquired or transferred titles to property on the basis of measures which have been carried out with regard to

German external assets or other property seized for the purpose of reparation or restitution (so-called property seized under the enemy legislation). Germany had to exclude the jurisdiction of German courts for that type of expropriation or confiscation measures after 1945, an exclusion that has been confirmed within the treaty of German unification. The Court in its judgment *Prince Hans-Adam von Liechtenstein v. Germany* came to the conclusion that such a restriction to the access to the Court is still a proportional in view of the aim to regain sovereignty.

Art.6 is really the hard core of the guarantees of the defense in any courts procedure (hearing, equality of arms, translation into a language the accused understands etc.). It also contains a guarantee against excessive length of proceedings, which has become a burdensome guarantee in relation to quite a number of States including Italy, countries in which the length of normal judicial proceedings is a problem and where the lawyers try to get redress and compensation by the Strasbourg Court. Italy now has tried by the Pinto law to overcome this situation.

One of the most interesting recent cases concern the question whether a trial against the former responsible person in the German Democratic Republic (*Streleltz, Kessler* and *Krenz v. Germany*) for the killings by border guards on the wall—they have been tried as co-authors in manslaughter—would violate the principle of non-retroactivity. They have been sentenced on the basis of the existing law of the East German State but they argued that according to the internal practice that prevailed in that state at the time of the communist regime they would have never been tried and put to court. That happened only after unification. The Court came to the conclusion that there was no violation of the rule *nulla crimen sine lege* because the law in force at the time of the criminal actions was really applied. What was not applied was the so-called internal practice , i.e. specific orders given to the border guards by the Politburo of which all the accused were members. These orders went

far beyond the existing law and also the provisions of international treaties like the UN Convenant on Civil and Political Rights to which the GDR was the party since 1947. The internal practice was not considered as coming under the notion of law in Art. 7 because such a practice had no basis in law and was prefabricated by the accused themselves. So the Court concluded:

"That the applicants, who, as leaders of the GDR, had created the appearance of legality emanating from the GDR's legal system, but then implemented or continued a practice which frequently disregarded the very principle of that system cannot invoke the protection of Art. 7 § 1 of the Convention. To reason otherwise would run counter to the object in purpose of that provision, which is to ensure that no one is subjected to arbitrary prosecution, conviction or punishment."

The Court considered also, "that a State practice such as the GDR's border-policing policy, which flagrantly infringes human rights and above all the right to life, the supreme value in the international hierarchy of human rights, cannot be covered by the protection of Art.7 § 1 of the Convention. That practice, which emptied of its substance the legislation on which it was supposed to be based, and which was imposed on all organs of the GDR, including its judicial bodies, cannot be described as " law" within the meaning or Art. 7 of the Convention." (§ § 87 and 88 of the judgment)

The Court also did not see an infringement into the principle of foreseeability of the convictions. The broad devoid between the GDR's legislation and its practice was to a great extent the work of the applicants themselves. They evidently could not have been ignorant of the GDR's constitution and legislation or of its international obligations and the criticisms of its border-policing regime that has been made internationally, in particular in relation to the UN Human Rights Covenant. From that Covenant the Court draw the conclusion that by installing anti-personnel mines and automatic fire systems along the border by ordering border guards to " annihilate

border violators and protect the borders at all costs", the GDR has set up a border-policing regime that clearly disregarded the need to preserve human life, which was enshrined in the GDR's Constitution and legislation, and the right to life protected by the international instruments; that regime likewise infringed the right to the freedom of movement mentioned in Art. 12 of the International Covenant on Civil Political Rights.

The judgment is only binding between the parties but one can easily draw the conclusion that the same responsibility goes with all the other Easter-European States that had installed the same border regime.

The right to respect for private and family life (Art. 8) encompassed an autonomous notion of family which extend to all more or less durable personal relations even without having created a family in the sense of civil marriage. It includes that the right of fathers and mothers for access to their children, even born out of wedlock, and, as it was stressed in the *Marckx v. Belgium* case, the right to inherit from the respective parent of the mother or the father. The Court has recently established that any measures of public custody of children must be guided by the principle to reunite the family so that the placing of children into foster families may be restricted (F. and K v. Finland).

A recent case concerning the prohibition of the *Turkish Islamistic Party of Public Welfare* is a good example for the combination of considerations of Art.9—Freedom of thought, conscience and religion—, Art. 10-Freedom of expression—, and Art.11-Freedom of assembly and association. In the past the Court had considered in cases of the *Communist and Socialist and Other Parties* that this prohibition and prosecution of the party leaders for separatism, because their action and programme of the parties contained positive references to the Kurdish minority and ideas for protecting and preserving their identity. In these cases this prohibition was considered as being not necessary in a democratic society and disproportionate

in relation to the aim pursued. In the case of the *Political Party of Erbakan*, who in the recent time had been Prime Minister before his party had been dissolved by decision of the Turkish Constitutional Court, the Strasbourg Court found justification for such a measure in the fact that this party pursued the aim of introducing the Sharia, the Islamic legal code, into Turkey and did not expressly exclude measures of force to remain in power. Therefore, the prohibition by a four to three vote decision of the chamber was considered as justified under Art. 11 § 2.

The freedom of press and the freedom of broadcast and television have played an enormous role. The Court in its jurisprudence has developed a rather liberal attitude to press publications, even if they infringe personal feelings. Take along the *Fressoz* and *Roire v. France* case where the Court was confronted with a situation of a publication of tax declarations by a French satirical newspaper (Le canard enchaine), which got hold of this information from an anonymous informant. The French courts considered this publication as a breach of confidentiality which also a newspaper had to respect. The Strasbourg Court on the other hand considered the right to information of the public (the right to " receive and impart information and ideas without interference by public authority"), regarded the special position of the free press in a democratic society as an important element and took into account that information itself, i.e. the income of the board members, was not such a secret to the relevant circles and those who wanted to be informed. Therefore the Court concluded that there was not violation.

In the case of *Lentia v. Austria* the Court considered that a system of a public monopoly of television, which excluded any private access to television and any private license, was against the very notion of the right to freedom of expression. The possibility of requiring the licensing of broadcasting television or cinema enterprises (Art. 10, section 2of § 1) did only relate to a technical requirement and did not exclude the necessary justification under § 2. For such a limitation (the total

exclusion of private licensing of television), there was no justification in a democratic society. As a consequence most, if not all, of the European States now have introduced a system of public and private television.

5. The Convention has been interpreted as part of the European public order. This means that is has to be interpreted in a broad sense of the freedoms, the limitations rather restrictively and excluding recourse to the will of the parties of the treaty. This objective interpretation excludes also a recourse to a bilateralisation of the treaty, i.e. the idea that the parties have at any moment to be bilaterally bound by the treaty (see the *Loizidou* case and *Pfunders* case).

   The execution of judgments necessitates that the States found in violation of the Convention takes all measures of *restitutio in integrum*, i.e. to annual acts or judgments or change legal provisions (statutes). So the States have changed their legislation in many cases as a consequence of the judgments since the judgments do not have an immediate direct effect in the legal order of the contracting States and the Convention does not have supremacy over national law. Both are elements of the European Community Law, but not of the law of the Convention. Turkey for instance had changed its constitution after the *Incal* judgment, which declared that the participation of a military judge in normal civil or criminal procedures against private persons may infringe the independence and impartiality of the court. To have proceedings against the leader of the PKK movement, Mr Öcalan, introduced in a way, which is in accordance with the Convention, Turkey has immediately changed its constitution. For the possible infringements of independent or impartiality of judges, see Art.6 and see also the case of *Sovtransavto Holding c. Ukarine*, in which an order of the Urkrainian President to the President of the Supreme Court was invoked to take care of the Ukrainian interests. The execution of judgments takes time and the Committee of Ministers with the help of a rather large human rights directorate prepares very careful resolutions after the report of the respective State on

how this State has executed the judgment. There are some cases where the execution is still pending, in particular the *Loisidou* case (*Cyprus v. Turkey*), where Turkey has not yet paid the damage. In other cases, like the case of *Stangad v. Greece*, the execution of the decision on pecuniar damage had to wait for two years. In the *Matthews v. UK* case the Court found that Mrs. Matthews in Gibraltar was deprived of her voting right because she could not vote for election to the European Parliament. The execution of this judgment (redress of the violation) necessitates a reform of the European Communities, which is not easy to achieve. But all in all the balance of the execution of judgments of the Court is far from being negative. Most of the judgments have rather promptly been executed.

II. The subsidiary character of the ECHR

Subsidiarity is the principle of the European Human Rights protection system. One element of this subsidiary character is the necessity to exhaust the domestic remedies (Art. 35). If an applicant does not exhaust domestic remedies, the application is inadmissible. The necessity to exhaust domestic remedies shall give the State the opportunity to redress alleged human rights violations via its own legal system. One of the difficult questions of the Court is what domestic remedies have to be exhausted. If there are different domestic remedies, only one branch of domestic remedies have to be exhausted. The State is under the obligation (Art. 13) to organize an effective remedy. Art.13 states that everyone whose rights and freedoms are violated shall have an effective remedy before a national authority. This national authority must not in any case be a tribunal but an effective remedy must nevertheless exist in relation to every right of the Convention. In the *Kudla v. Poland* case, the Court found recently that a violation of Art. 13 may even occur independently from Art.6 if there has been a violation of the right to a fair and public hearing.

III. The experience of the contracting States with the incorporation of the ECHR

The Convention has been incorporated into the domestic law of the Contracting States according to their respective constitutional system, i.e. either as ordinary law like in Germany or as a law with a rank between constitution and ordinary law like in Switzerland and France or even as a part of the constitution like in Austria. The way how the States incorporate the European Convention of Human Rights into their domestic legal system is up to the discretion of the States. There is no binding requirement as to the necessary level of incorporation of the Convention. I have always advocated like many other lawyers, the actual President Wildhaber included, that Art. 13 makes it obligatory to incorporate the Convention into the domestic legal system because otherwise it would not be possible to invoke a violation of the Convention in the domestic legal system. But Art.13 has been interpreted in a way that it is only necessary to invoke the substance of law itself. That has led to the peculiar situation that not only for a long time the Scandinavian States, in particular Sweden, but also the anglophone States like Britain and Ireland had not incorporated the Convention at all. So reference to the obligations resulting from the Convention were only made indirectly in the practice of the British tribunals stating that British tribunals would proceed from the presumption that her Majesty's Government and Parliament would not enact any legal provisions which would be contrary to the Convention. But in case of an obvious conflict the internal legal provisions would prevail. This very situation related to the doctrine of parliamentary supremacy in Britain has already been changed rather dramatically in relation with the Community Law may supersede any act of the British legislator. Whether the same can already be said from the recent Human Rights Act is not yet to answered but the British courts (English and Scottish) have now applied directly the European Convention of Human Rights which has precedence over common law principles and therefore makes the interpretation of the Court in many cases so to say directly applicable. The same is

true for Ireland. Even if the Court decisions are only binding between the parties, i.e. the State and the individual or in interstate cases between the States for the specific case, these rulings have nevertheless on the interpretation of the articles the value of authoritative orientation. There is not a strict system of precedence, but nevertheless if such decisions are an authoritative interpretation of the duties of the member States, they will of course try to avoid cases in the future by abiding to these decisions. Also the former communist Easter European countries have to a certain extent already incorporated the European Convention of Human Rights to their domestic legal system. But it may well be said that the domestic courts are not yet accustomed to apply the Convention. Even if the Convention has only the status of an ordinary statute and thus is to be applied within the *lex posterior rule*, some constitutional courts, for instance in Germany, Switzerland (and of course France, the Conseil d'Etat) have taken into account provisions of the Convention as being more elaborate explanation of the rule of law itself, which is part of most of the Convention. One of the major problems of the immediate application by domestic courts is for instance that sanctions for the excessive length of proceedings are missing. What is the answer if in a criminal procedure it appears that the procedure as such has already passed an appropriate length of time? If this is true for detention then the person who has to be released. If the criminal proceedings are ongoing, the German courts have lowered the tariff of the sentence in a considerable way.

IV. The Problem of distinct legal cultures

The application of the Convention and its interpretation is not meant to lead to uniform legal orders. The different legal solutions to situations may result in different concepts, which reflect a distinct legal culture. The Court has taken into account these specific legal situations not only by inventing the notion of *margin of appreciation*, which is the expression of a certain freedom of States when they consider what limitations to fundamental rights and freedom are really necessary (Art. 8-11 § 2). They

must correspond to a pressing need but the answer what is a " pressing need " in a given society may vary not only from place to place but also under the specific conditions. So it may be possible to take into account the specific conditions of the religious sentiment of the local population (Art. 10 § 2 in the case of the film of the life of Jesus, which would provoke unrest in a very catholic Tyrolean atmosphere). Or the specific post-communist situation in Hungary, which in the *Reykeveny* case led to the conclusion that the exclusion of military and police forces from the membership in political parties and from the right to vote is justified in relation to the experience under the communist regime. In other cases the Court has referred to the specific circumstances of the German unification, allowing some deviations from the rule of length of procedure in constitutional courts to which Art. 6 § 1 also applies.

The Court has oriented itself also in relations to other international instruments, such as the jurisprudence of the European Court of Justice (interpretation of Art. 6, functional approach, *Pellegrin v. France* judgment). And there is a certain circulation between the national constitutional courts when they apply the jurisprudence of the Strasbourg Court (*Pacchelli* judgment of the Karlsruhe Court), the ECJ in Luxembourg and the ECHR in Strasbourg. There are now many cases pending in the Strasbourg Court related to the responsibility of the States for acts of the European Communities (collective responsibility or individual responsibility). These questions may come up in the follow-up of the *Kress* judgment (position of the advocate general who delivers his opinion independently of the ECJ but to which the parties of the procedure do not have any possibility to respond. In the light of the Strasbourg Court's decision this would be a violation of the equality of arms in a contradictory proceeding. In the *Kress* judgment the Court did not find a violation in relation to the Commissaire du Gouvernment of the Conseil d'Etat because the parties have the possibility to give a kind of a note *délibérée* for the deliberation of judges to the Conseil d'Eata. Other questions are pending in relation to the *Sentorline* case (application of Art.6 to sanctions by the Commission and

the possibility to have them suspended before execution) and a case *Bankovic v. all NATO* States that are at the same time members of the Convention for their responsibility for bombing the Serbian radio and television station and thereby killing and injuring a number of persons, who are now applicants. The responsibility of the Contracting States for public acts outside their own territory is well established in the *Loizidou* judgment concerning the responsibility of Turkey for acts done in Northern Cyprus (even by the local authorities). The same question is pending relating to the responsibility of Russia for acts committed in a part of Moldova (Transnistria), which has split apart and was allegedly under the control of the 13th Russian Army.

V. The application by domestic courts without an international supervision

The European States within the system of " control" or better "supervision" by the European Court of Human Rights is different from those which-by one reason or another-introduce provisions relating to human rights as for instance the Convention of Human rights without such an international supervision. In such a case only the supervision by the highest constitutional court is available. As we can see from the different practices of national constitutional courts in Europe, which come under the scrutiny of our Court in Strasbourg, quite different practices and interpretation of the Convention might develop and it is useful to have a certain unity of interpretation of application in such a situation. If the East European States would like to become members of the European Union, they have course to integrate into such harmonized interpretation of the European Convention, but a unilateral application of the Convention without any international court supervision is useful and in such a case the highest national courts may orientate themselves on the jurisprudence of the European Court of Human Rights. I would call this kind of indirect orientation. The same is true for those States having ratified the UN Covenant on Civil and Political Rights, but not the additional protocol, which is facultative. They may and should nevertheless orientate

themselves in relation to the interpretation by the UN Human Rights Committee.

VI. Final remarks

One crucial point is the internal consequences of judgments of the ECHR. In many member States there are not possibilities for the re-opening of domestic procedures in cases where the court has found a violation of Art.6 or other related to the domestic court procedure. For criminal convictions the German criminal code and the criminal code of other States envisage the possibility of re-opening the domestic procedures if the sentence has been caused by this violation. What is meant by "caused" is of course open to interpretation. The causality test can in many cases only be an adequate speculation and not a logical causal link. I would say such a link exists if it cannot be excluded (negative test) that the criminal procedures would have resulted in another sentence without such a violation. The same possibilities for re-opening should exist in all domestic procedures, civil and administrative law and even constitutional law procedures, if for instance a political party has been prohibited.

The development of the legal protection by the ECHR as a " living instrument" has to be adopted to the 21th century to problems of cloning, of bioethics in general, of problems of transsexualism, of different family structures, of the increasing need for environmental protection (the recent *Neuss-Heathrow Airport* judgment), protection of property (King of Greece case, Bayerler case, East German expropriation cases). The Convention is intended to guarantee no rights that are theoretical or illusionary but rights that are practical and effective. And this is particularly so of the rights of the defense in view of the prominent place held in a democratic society by the right to a fair trial from which they derive. The Court has often stressed that the Convention is a living instrument which must be interpreted in the light of present-day conditions. In the case of *Tyrer v. UK* this led to modern tendency in the execution of penal sentences (prohibition of corporal punishment), and in the *Marcks* case to considerations of the modern position of

children born out of wedlock. In the *Salmouni v. France* case the Court considered that "certain acts which were classified in the past as inhuman and degrading treatment as opposed to torture would be classified differently in future". The Court takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic society. In the *Matthews* case the Court considered the position of the European Parliament in the light of Art. 3 of the 1st Protocol (legislature) and stated that the mere fact that the body was not envisaged by the drafters of the Convention cannot prevent that body from falling within the scope of the Convention. To the extent that Contracting States organize common constitutional or parliamentary structures of international treaties, the Court must take this mutually…structural changes into account in interpreting the Convention and its protocols. The Court has therefore developed a specific evolutive or dynamic interpretation to be able to cope with the requirements of the developing societies. This is possible by referring to the notice of society in many of the provisions.

The reform of the actual system is probable needed in relation to the election of judges (no second term but a longer term) to a filtering system to dispose of many manifestly ill-founded cases, and even to introduce a kind of …system, if the number of cases is growing up in the future as in the past. There is no question that such a Court is able to give leading decisions for the European States and even contribute to the transformation of the East European States in relation to the basic requirements of democracy, the rule of law and fundamental freedoms, even if not all individual applications of minor importance or which have not caused substantial harm cannot be dealt with in the future.