

The European Convention on Human Rights: pillars, shifts, and challenges

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ABSTRACT

On the 75th anniversary of the European Convention on Human Rights, the author, a judge of the Strasbourg Court, shares some general thoughts on the system set up by this international treaty, assessing the progress made since 1950 and putting contemporary issues into perspective. To that end, he looks back at the origin of the Convention, by way of a reminder of its *raison d'être* and specificity. He focuses on its underlying values, the rule of law and democracy, closely scrutinizing their relevance. The role of the European Court of Human Rights, an international court responsible for a subsidiary review of Convention compliance by the States Parties, is then discussed in depth. The author explains the essence of this subsidiarity and emphasizes the need to see it in its positive dimension, in the sense of ensuring the effectiveness of rights. After tracing the evolution of the Convention mechanism from its inception until the recent reforms, he lastly identifies the major challenges that it is facing today. The author concludes by pointing to the Convention's crucial importance in a difficult context. He highlights the historic responsibility that falls to the Court to ensure that the promises of justice and freedom remain a reality for future generations.

KEYWORDS: European Convention on Human Rights, European Court of Human Rights, rule of law, subsidiarity, effectiveness of rights

I. INTRODUCTION

The European Convention on Human Rights (the 'Convention') was signed on 4 November 1950 in Rome. The year 2025 marks the Convention's 75th anniversary—an occasion to celebrate its significance as the first international treaty to give binding effect to the 1948 Universal Declaration of Human Rights. The Convention was conceived as a response to the Second World War, with the aim of preventing the repetition of the worst atrocities ever to be seen on the European continent.¹ It provides for a regional protection mechanism that is the most advanced system of its kind in the world today. With its role of guaranteeing an area of democracy underpinned by the rule of law and respect for human dignity, it forms the

¹ See, on the origins of the Convention, Teitgen, *Aux sources de la Cour et la Convention européenne des droits de l'homme* (2000); Bates, *The Evolution of the European Convention on Human Rights—From its Inception to the Creation of a Permanent Court of Human Rights* (2010).

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foundation of human rights protection in Europe.² The area to which it currently applies, since the exclusion of the Russian Federation from the Council of Europe in 2022, is home to more than 700 million Europeans.

This Article will look back at the origin of the Convention, to emphasize its singularity and virtues. It will then engage in an analysis—both conceptual and practical—of the system thus set up, putting its development into perspective and contemplating its present and future challenges.

II. THE SINGULARITY OF THE CONVENTION

The Convention is an international treaty, but it is no ordinary treaty. It is singular in the sense that it places the individual at the heart of its provisions and scheme. It confers on the individual a corpus of human rights that the States are required to respect and protect.³ It then provides individuals whose rights have been infringed by a State with a remedy before an international court, the European Court of Human Rights (the ‘Court’), which is empowered to find a violation in a judgment that will be legally binding on the State found responsible.⁴ This fully fledged protection system was thus put in place not only by the proclamation of a heritage of rights but also with the recognition of a right of individual action before an international court entrusted with the external supervision of compliance by the States Parties. This system was certainly revolutionary, as it raised the individual to the status of a subject of international law, whereas this area of law had previously been primarily the realm of inter-State relations.

Two consequences flow from the above. First, the obligations undertaken by the States in the Convention ‘are essentially of an objective character, being designed rather to protect the fundamental rights of individual human beings from infringement by any of the High Contracting Parties than to create subjective and reciprocal rights for the High Contracting Parties themselves’.⁵ Second, the Convention has a hybrid nature. It is an international treaty, an integral part of international law from which it derives its existence, its validity, and its effects. But in conferring human rights on individuals, the Convention pursues a specific object and purpose that call for an interpretation that is framed around the effectiveness of the rights guaranteed.

III. THE VALUES UNDERLYING THE CONVENTION

In guaranteeing rights to individuals solely by virtue of their existence, the Convention enshrines a democratic ideal that is underpinned by the rule of law. At a time when ‘rule of law backsliding’⁶ and ‘democratic erosion’⁷ are on the increase, it is important to dwell on those concepts of ‘rule of law’ and ‘democracy’ as they are fundamental, embodying the Convention’s foremost aspirations and primary goals.

A. The rule of law

In its most classical conception, the rule of law implies that those who govern are, like those who are governed, bound by an obligation to abide by the law. Essentially, the rule of law rests

² See Krenc, *Une Convention et une Cour pour les droits fondamentaux, la démocratie et l’État de droit en Europe* (2023).

³ Articles 1–18 of the Convention.

⁴ Articles 19, 34, and 46 of the Convention.

⁵ *Austria v Italy* Application No 788/60, Commission decision, 11 January 1961. This objective character is reflected in the right for a State Party to lodge an application against another State Party, without having to demonstrate any other interest beyond ensuring compliance with the Convention (article 33 of the Convention).

⁶ See Abu Hussein, Buyse and Fortin, ‘Exploring Linkages Between Rule of Law Backsliding and Human Rights: How to Find the Brakes on a Slippery Slope?’ (2024) 20(3) *Utrecht Law Review* 1.

⁷ See Harutyunyan, ‘Erosion of democracy and adequacy of the Strasbourg court’s response’ (2025) 12 *Int. J. Human Rights and Constitutional Studies* 85.

on two core components, the right to law and the right to a court.⁸ The rule of law is based on the premise that there is a *right to law*. State action must be taken within the framework of the law, and any limitation imposed on the rights and freedoms of individuals must be permitted by a norm that is accessible and sufficiently foreseeable.⁹

The rule of law further supposes the *right to a court*, which is indispensable to ensuring the application of the law and the subsequent protection of rights and freedoms. As the Court declared in its celebrated judgment of 21 February 1975 in *Golder v the United Kingdom*: ‘one can scarcely conceive of the rule of law without there being a possibility of having access to the courts’.¹⁰ Such access must prove effective, not theoretical or illusory. This implies, in particular, as the Court was later to find in *Airey v Ireland*, that there must be access to a lawyer in cases where legal assistance proves indispensable for effective access to a court.¹¹

However, access to justice in itself does not suffice. Justice must also be independent. Indeed, judicial independence is truly at the heart of the rule of law. It is a prerequisite for the legitimacy of judicial authority; it underpins the authority of the judge’s decisions, at the same time as ensuring trust on the part of the citizen, who sees this independence as a safeguard against arbitrariness and a guarantee of equal treatment. The judge’s independence is much more than a procedural safeguard under Article 6 of the Convention. It contributes more broadly to the substantive guarantee of the whole gamut of human rights, as it is a precondition of their effectiveness. To be sure, human rights are only genuinely protected if an independent court is in a position to prevent or redress a violation.¹² Over the past few years, growing concerns have been voiced over the erosion of the independence of justice systems, since cases in which it has been undermined have been increasingly frequent.¹³ Such breaches, which are not confined to one or two specific States, seriously undermine the rule of law.

Equally important is that justice should be delivered ‘within a reasonable time’. A justice that is delayed is a justice that loses both effectiveness and credibility.¹⁴ In certain circumstances, excessive delays amount to a ‘denial of justice’.¹⁵ Lastly, and certainly not least, judgments are to be enforced once delivered. The rule of law requires that ‘where the courts have finally determined an issue, their ruling should not be called into question’.¹⁶ It notably implies that judicial decisions must be complied with by the authorities to whom they are addressed.¹⁷

⁸ See Krenc, ‘L’État de droit, une exigence à clarifier, un édifice à préserver’ (2021) 128 *Revue trimestrielle des droits de l’homme* 775.

⁹ See *Demirtas v Turkey* (no. 2) Application No 14305/17, Merits and Just Satisfaction, 22 December 2020, at paras 249–254; *Lekić v Slovenia* Application No 36480/07, Merits and Just Satisfaction, 11 December 2018, at para 95; *Maestri v Italy* Application No 39748/98, Merits and Just Satisfaction, 17 February 2004, at para 30.

¹⁰ *Golder v the United Kingdom* Application No 4451/70, Merits and Just Satisfaction, 21 February 1975, at para 34.

¹¹ *Airey v Ireland* Application No 6289/73, Merits, 9 October 1979, at para 26.

¹² See Krenc and Tulkens, ‘L’indépendance du juge. Retour aux fondements d’une garantie essentielle d’une société démocratique’, in *Regards croisés sur la protection nationale et internationale des droits de l’homme. Mélanges en l’honneur de Guido Raimondi* (2019) 377.

¹³ *Baka v Hungary* Application No 20261/12, Merits and Just Satisfaction, 23 June 2016; *Grzęda v Poland* Application No 43572/18, Merits and Just Satisfaction, 15 March 2022. See also *Wałęsa v Poland* Application No S0849/21, Merits and Just Satisfaction, 23 November 2023; *Gumenyuk and Others v Ukraine* Application No 11423/19, Merits and Just Satisfaction, 22 July 2021.

¹⁴ *Bottazzi v Italy* Application No 34884/97, Merits and Just Satisfaction, 28 July 1999, at para 22; *Van den Kerkhof v Belgium* Application No 13630/19, Merits and Just Satisfaction, 5 September 2023, at para 97.

¹⁵ *Sailing Club of Halkidiki ‘I Kelyfos’ v Greece* Applications Nos 6978/18 and 8547/18, Merits and Just Satisfaction, 21 November 2019, at para 60.

¹⁶ *Brumarescu v Romania* Application No 28342/95, Merits, 28 October 1999, at para 61.

¹⁷ See *Camara v Belgium* Application No 49255/22, Merits and Just Satisfaction, 18 July 2023.

B. Democracy

Democracy is ‘the only political model contemplated by the Convention and, accordingly, the only one compatible with it’.¹⁸ It is traditionally founded on a principle of collective autonomy, whereby the rules governing the community can stem only from the sovereign will of its members. It therefore requires the organization of free elections, which presupposes the integrity of the electoral process,¹⁹ as well as effective remedies for contesting the results.²⁰

Nevertheless, democracy cannot be reduced to the mere holding of free elections and to the expression of the majority will of the people. To use the Court’s own words, ‘[a]lthough individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position’.²¹ Democracy, within the meaning of the Convention, is therefore premised on values, at the forefront of which are ‘pluralism, tolerance and broadmindedness’.²² The equal dignity of all individuals—which forms part of the ‘very essence of the Convention’—²³ sits at the apex of these values. Concretely, a democratic society is one that upholds the freedom to believe or not to believe.²⁴ It protects the expression of discordant views and ideas that ‘offend, shock or disturb’.²⁵ It affords protection to minorities, whether they be political, philosophical, religious, linguistic, or sexual, if necessary against the majority will of public opinion and even sometimes against the law itself, even legislation faithfully reflecting the wishes of that majority.²⁶ In sum, a democratic society is one in which everyone feels at home, regardless of one’s origins, status, wealth, beliefs, or sexual orientation. It is a society that perceives diversity ‘not as a threat but as a source of enrichment’.²⁷

IV. THE COURT, INTERNATIONAL COURT OF HUMAN RIGHTS

In order to ensure, at last instance, that the rule of law is secured and that this democratic ideal is permanently sustained through the rights enshrined in the Convention, the European Court of Human Rights was created. It is an international court, exercising a subsidiary supervision of the States Parties’ compliance with the Convention.

A. The ECtHR is an international court

First of all, the Court is an *international court*. It is international by the very nature of its inception—the Court was created by an international treaty—and by its function—it supervises compliance with an international treaty. It is also international on account of its composition: it is made up of 46 judges of different nationalities, thus rendering its bench extraordinarily diverse and making it so unique. As an international court, the Court is not a national court of first instance or indeed a fourth-instance court. Its role is not to hand down a decision from

¹⁸ *United Communist Party of Turkey and Others v Turkey* Application No 19392/92, Merits and Just Satisfaction, 30 January 1998, at para 45.

¹⁹ *Tahirov v Azerbaijan* Application No 31953/11, Merits and Just Satisfaction, 11 June 2015, at paras 54 and 70.

²⁰ *Mugemangango v Belgium* Application No 310/15, Merits and Just Satisfaction, 10 July 2020.

²¹ *Young, James and Webster v the United Kingdom* Applications Nos 7601/76 and 7806/77, Merits, 13 August 1981, at para 63.

²² *Navalnyy v Russia* Applications Nos 29,580/12 et al., Merits and Just Satisfaction, 15 November 2018, at para 175; *Macatė v Lithuania* Application No 61435/19, Merits and Just Satisfaction, 23 January 2023, at paras 214 and 215.

²³ *Bouyid v Belgium* Application No 23380/09, Merits and Just Satisfaction, 28 September 2015, at para 101.

²⁴ *Kokkinakis v Greece* Application No 14307/88, Merits and Just Satisfaction, 25 May 1993, at para 31.

²⁵ *Handyside v the United Kingdom* Application No 5493/72, Merits, 7 December 1976, at para 49.

²⁶ *Fedotova and Others v Russia* Applications Nos 40,792/10 et al., Merits and Just Satisfaction, 17 January 2023, at paras 216–218.

²⁷ *Ibid.*, at para 180.

Strasbourg as if it were ruling in the place of the domestic courts.²⁸ It is not for the Court to ascertain whether the domestic law was properly applied by the national authorities or courts, nor to adjudicate on mistakes of fact or of law in domestic proceedings, unless and to the extent that they entail a violation of the Convention. The Court's mission, as an international court, is circumscribed by Article 19 of the Convention: 'to ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention', no more and no less.

B. The ECtHR is an international court with a subsidiary role

The key feature of this international court is the *subsidiary supervision* that it exercises. Subsidiarity is the defining principle of the Convention. Much has been said and written about it, but I wish to dwell on the essence of this principle before considering its practical implications. In a nutshell, *subsidiarity* means that the protection of Convention rights is first and foremost for the national authorities to secure and that the Court only intervenes if they fail to do so. The responsibility of States comes first in the Convention's scheme of implementation, while the Court's supervision is secondary, by way of ultimate recourse. By proclaiming in Article 1 that '[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention', the Convention clearly positions the States and their organs as the main Convention actors. As the Court has repeated on many occasions: 'the primary responsibility for implementing and enforcing the guaranteed rights and freedoms is laid on the national authorities'.²⁹ That being so, this subsidiarity is both procedural and substantive.

On the procedural level, subsidiarity entails an obligation to exhaust domestic remedies before bringing a case to the Court (Article 35 § 1 of the Convention). This requires (as is well known) not only the prior exhaustion of remedies that are available and appropriate in the domestic legal order³⁰ but also (something that is quite neglected in practice) an obligation to invoke the Convention, expressly or in substance, when using those remedies.³¹ The idea behind this prerequisite for bringing a case to an international court is simple: a State can only answer, before the Court, for its acts or omissions under the Convention if it has first been given the opportunity to apply it in its domestic legal order. This necessarily means that the same domestic legal order must make available an 'effective' remedy in accordance with Article 13 of the Convention.³²

In its substantive dimension, subsidiarity means that the Convention constitutes a minimum threshold of protection that leaves the States to go further, by supplementing or enhancing that protection in accordance with their domestic rules and constitutional traditions. The Court has already had occasion to state that '[t]hrough its system of collective enforcement of the rights it establishes . . . , the Convention reinforces, in accordance with the principle of subsidiarity, the protection afforded at national level, but never limits it',³³ such limitation being precluded

²⁸ I attempted to delineate the consequences of the Court's international function in my separate opinion appended to the judgment in *Hurbain v Belgium* (Application No 57292/16, 4 July 2023) in order to identify the contours of the supervision within its remit (see at para 12 of my opinion). As an international judge at the Court, it is not for me to say what I would have decided in place of the national authorities. The question is whether the decision adopted by the national authorities is compatible with the Convention.

²⁹ *Kudla v Poland* Application No 30210/96, Merits and Just Satisfaction, 26 October 2000, at para 152; *Paposhvili v Belgium* Application No 41738/10, Merits and Just Satisfaction, 13 December 2016, at para 184.

³⁰ *Gherghina v Romania* Application No 42219/07, Admissibility, 9 July 2015.

³¹ *Vuckovic and Others v Serbia* Applications Nos 17,153/11 et al., Preliminary Objection, 25 March 2014.

³² *Kudla v Poland*, supra 29 at para 152.

³³ *United Communist Party of Turkey and Others v Turkey*, supra 18 at para 28.

by Article 53.³⁴ In other words, the Convention is not an instrument for the uniformization of domestic legal systems. While preserving national autonomy and respecting diversity in this Europe of 46 States, the Convention seeks to preserve a common standard of human rights, underpinned by shared values. It promotes unity in diversity.

In its procedural dimension, as in its substantive dimension, subsidiarity is the expression of a single idea: the European system of human rights protection operates with the sole aim of remedying the shortcomings of national systems. It was not set up to overtake national systems or to overshadow them. Inherently, subsidiarity has an eminently democratic virtue: to reaffirm the primary role of the States and their organs in securing Convention protection. It would be illusory to believe that the rights enshrined in the Convention could be secured if there were no support from the States themselves. There can be no effective protection of those rights without the States.³⁵ The consequence of this subsidiarity is the comprehensive entrenchment of the Convention in the domestic legal orders. From being an instrument of international law, the Convention has thus gradually become a national norm through its incorporation and application by national authorities.

As an integral feature of the subsidiarity principle, the national *margin of appreciation* stems from a longstanding doctrine of jurisprudential creation,³⁶ which has been much debated since its inception. It serves to regulate the intensity of the Court's scrutiny. It has a two-fold premise: the democratic legitimacy of the national authorities—which the Court cannot call into question—and their geographical proximity to domestic realities—which the Court cannot overlook. To use the Court's own words, '[t]he national authorities have direct democratic legitimation in so far as the protection of human rights is concerned and, by reason of their direct and continuous contact with the vital forces of their countries, they are in principle better placed than an international court to evaluate local needs and conditions'.³⁷

When it comes into play, the margin of appreciation, far from being uniform, is variable in scope. It depends on the Convention right concerned, the question at stake and the degree of consensus that can be observed within the community of States Parties. Thus, the margin of appreciation will be greater when the Court is called upon to assess sensitive moral or ethical questions³⁸ or when it is confronted with general measures in economic, tax, or social matters³⁹. The margin will, however, be narrower⁴⁰ or even nonexistent⁴¹ where essential aspects of individual integrity or identity are at issue.

The focus on the national margin of appreciation has led to the development of a 'procedural' review by the Court. This means that, where the national authorities are evidently better placed than the Court to weigh the competing interests in the balance (this is the case, for example, in child custody disputes), the Court will find it less important to scrutinize the merits of the

³⁴ *Vera Fernandez-Huidobro v Spain* Application No 74181/01, Merits and Just Satisfaction, 6 January 2010, at para 112. On this point, let me refer, for a concrete example, to my separate opinion appended to the judgment in *Cangi and Others v Türkiye* of 14 November 2023 (Application 48,173/18).

³⁵ See Dumont and Hachez 'Repenser la souveraineté à la lumière du droit international des droits de l'homme' in *Liber amicorum Rusen Ergec* (2017) 105.

³⁶ See *Handyside v the United Kingdom*, supra 25 at paras 48–49.

³⁷ *Vavříčka and Others v the Czech Republic* Applications Nos 47,621/13 et al., Merits and Just Satisfaction, 8 April 2021, at para 273.

³⁸ *S.H. and Others v Austria* Application No 57813/00, Merits and Just Satisfaction, 3 November 2011, at paras 94–97; *Lambert and Others v France* Application No 46043/14, Merits and Just Satisfaction, 5 June 2015, at paras 144–148 and 181; *Karsai v Hungary* Application No 32312/23, Merits and Just Satisfaction, 13 June 2024, at para 144.

³⁹ *James and Others v the United Kingdom* Application No 8793/79, Merits, 21 February 1986, at para 46; *Savickis and Others v Latvia* Application No 49270/11, Merits and Just Satisfaction, 9 June 2022, at paras 184, 205, 206, 213, and 218.

⁴⁰ *Fedotova and Others v Russia*, supra 26 at paras 183–185.

⁴¹ *Christine Goodwin v the United Kingdom* Application No 28957/95, Merits and Just Satisfaction, 11 July 2002, at para 93.

impugned measure than the process that led to its adoption. It will thus focus its attention on the quality of the ‘decision-making process’. It therefore has to ascertain as a priority whether the measure was adopted in compliance with the basic procedural requirements (a hearing of those concerned, adversarial examination of competing interests, reasoning given for the measure, independence and impartiality of competent authorities, etc.). In other words, it looks at whether all the conditions were met for the ‘right decision’ to be taken.⁴² This has led to the progressive incorporation of the procedural safeguards of Article 6 of the Convention into virtually all of the substantive provisions of the Convention.

The judgment of 17 May 2016 in *Karacsony v Hungary* provides a pertinent illustration of this approach. That case concerned disciplinary sanctions imposed on members of parliament on account of their conduct in the chamber. The Court did not engage in substantive scrutiny of the proportionality of the sanctions. In its view, national parliaments are better placed to assess the facts and decide whether they justify a sanction. Thus, the Court considered it more appropriate to concentrate its review on whether the restriction to the applicants’ right to freedom of expression was accompanied by adequate safeguards against abuse. In that perspective, the Court concluded that two essential procedural safeguards had been absent in the applicants’ case: the right to be heard before the sanction was imposed and the principle of a reasoned decision.⁴³ On account of a breach of those two guarantees, the Court found a violation of Article 10 of the Convention. Obviously, this procedural review exercised by the Court has its virtues. However, it also has its limits and cannot be sufficient in all cases. We cannot overlook the fact that a profoundly unjust and liberty-infringing decision may still arise from a process that strictly adheres to procedural fairness.

The merits of this procedural approach are particularly evident when it comes to Articles 2 and 3 of the Convention, which are part of the ‘core’ human rights. The facts of a given case will inevitably have taken place at a certain distance from Strasbourg, and it is not the Court’s task, as an international court, to carry out its own investigations in order to establish what happened. In any event, it does not have the means to do so. Accordingly, the Court has developed a case-law that is heavily based on the obligation of the national authorities to proceed with an effective investigation.⁴⁴ It is the Court’s task to ascertain, in a ‘procedural’ approach, whether the authorities have investigated independently and diligently and whether the investigation has been sufficiently comprehensive.⁴⁵ This approach has the advantage of avoiding the rejection of complaints, together with a sense of impunity, in circumstances where it is difficult for applicants to prove the facts and where it is equally difficult for the Court to rule on the substance of the complaint.⁴⁶

V. THE COURT’S DUAL MISSION: ‘TO DELIVER JUSTICE’ AND ‘TO STATE THE LAW’

The Court pursues a dual mission: ‘to deliver justice’ in respect of the applicant who brings a case and ‘to state the law’ of the Convention for the benefit of the whole community of States Parties.⁴⁷ As the Court has clearly declared: ‘[its] judgments in fact serve not only to decide

⁴² See in that sense the concurring opinion of Judges Tulkens and Keller appended to the judgment in *B. v Belgium* (Application No 4320/11, Merits and Just Satisfaction, 10 July 2012).

⁴³ *Karacsony and Others v Hungary* Applications Nos 42,461/13 and 44,357/13, Merits and Just Satisfaction, 17 May 2016, at paras 143 and 148–162.

⁴⁴ See *Šilih v Slovenia* Application No 71463/01, Merits and Just Satisfaction, 9 April 2009, at para 153.

⁴⁵ See *Bouyid v Belgium*, supra 23 at paras 114–123, about police violence.

⁴⁶ See *Labita v Italy* Application No 26772/95, Merits and Just Satisfaction, 6 April 2000, at para 131. See also, concerning allegations of discrimination, *Basu v Germany* Application No 215/19, Merits and Just Satisfaction, 18 October 2022, at para 38.

⁴⁷ See Krenc, ‘Dire le droit, rendre la justice. Quelle Cour européenne des droits de l’homme?’ (2018) 114 *Revue trimestrielle des droits de l’homme* 311.

those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties'.⁴⁸ On the one hand, the Court performs a mission of individual justice with a concrete and remedial aim; on the other, it plays an interpretative role of a 'constitutional' and preventive nature. In this way, the Court 'delivers justice' when, for example, it decides that to keep an individual in prison in spite of an acquittal has breached Article 5 of the Convention and when it indicates in the very operative part of a judgment that 'the respondent State must secure the applicant's release at the earliest possible date'.⁴⁹ The Court 'states the law' when it finds that Article 6 §§ 1 and 3 (c) of the Convention guarantees the right of access to a lawyer at the earliest stages of criminal proceedings.⁵⁰

Some years ago, an existential debate broke out about the Court's future. Certain authoritative views were expressed to the effect that, in order to ensure its sustainability, the Court should focus on its 'constitutional' role.⁵¹ Personally, I do not share a vision that would involve abandoning the *raison d'être* of the system put in place by the Convention. The role of 'delivering justice' is and must remain the Court's primary function. It is intrinsically linked to the right of individual application, which is the 'cornerstone' of the Convention system, as the States were keen to emphasize most recently at the Reykjavik summit in 2023.⁵² The Court was indeed set up to adjudicate upon concrete cases referred to it by application and not to proclaim the Convention law *in abstracto*. The right of individual application has the virtue of allowing the Court to clarify the real-life meaning of the Convention rights, a meaning that is not necessarily visible at first sight when reading the text. It is only by examining actual cases that one can truly perceive the significance of a human right that is defined in very abstract terms in a legal instrument. In reality, far from being contradictory, the Court's two missions ('to deliver justice' and 'to state the law') are fundamentally complementary; for it is when an individual case is examined that the Court is prompted to 'state the law'—a law that is intended to apply to all States Parties.

This dual mission of the Court is reflected in the two-tier authority with which the Court's judgments are vested. Pursuant to Article 46 § 1 of the Convention, the respondent State must abide by the Court's final judgment. Its judgments carry the authority of *res judicata*, which remains relative in nature: a judgment of the Court is binding only on the parties to the case (applicant and State), within the confines of what the Court has actually and finally determined. However, while that authority of *res judicata* is not absolute (*erga omnes*), the judgments do have a broader kind of authority that transcends the boundaries of the case at hand. This authority is referred to as '*res interpretata* effect' or '*de facto erga omnes* effect' of the Court's judgments.⁵³ This is the authority that is attached to the case-law of the Court, since it gives the final authoritative interpretation and 'states the law' of the Convention. Such authority derives its binding nature from the risk of a Convention violation being found against any State Party if one of its national bodies fails to take adequate account of the Court's rulings. As a result, the Convention cannot be dissociated from the Court's interpretative work, which goes hand in hand with the text

⁴⁸ *Ireland v the United Kingdom* Application No 5310/71, Merits and Just Satisfaction, 18 January 1978, at para 154. See also *Karner v Austria* Application No 40016/98, Merits and Just Satisfaction, 24 July 2003, at para 26; *Paposhvili v Belgium*, supra 29 at para 130.

⁴⁹ *Assanidze v Georgia* Application No 71503/01, Merits and Just Satisfaction, 8 April 2004, at para 203 and point 14 of the operative provisions.

⁵⁰ *Salduz v Turkey* Application No 36391/02, Merits and Just Satisfaction, 27 November 2008, at para 55.

⁵¹ See Wildhaber, 'A Constitutional Future for the European Court of Human Rights?' (2002) 23 *Human Rights Law Journal* 161; Greer and Wildhaber, 'Revisiting the debate about "constitutionalising" the European Court of Human Rights' (2012) 12 *Human Rights Law Review* 655.

⁵² Declaration adopted at Reykjavik following the fourth summit of Heads of State and Government of the Council of Europe, 16 and 17 May 2023. See also *Mamatkulov and Askarov v Turkey* Applications Nos 46,827/99 and 46,951/99, Merits and Just Satisfaction, 4 February 2005, at para 122.

⁵³ See Giannopoulos, *L'autorité de la chose interprétée des arrêts de la Cour européenne des droits de l'homme* (2019).

itself. Thus, when hearing a case against a given respondent State, ‘the Court will consider whether the national authorities have sufficiently taken into account the principles flowing from its judgments on similar issues, *even when they concern other States*’.⁵⁴

This authority of the Court’s judgments, extending as it does beyond the case at hand, tends to be called into question, sometimes explicitly, sometimes more insidiously. This authority explains, nevertheless, the growing inclination of States to act as third-party interveners in Strasbourg cases. A recent example of this tendency is illustrated by the numerous interventions before the Grand Chamber by various Governments in the ‘climate’ cases⁵⁵ and the so-called ‘push back’ cases.⁵⁶

VI. THE EVOLUTION OF THE SYSTEM

Before addressing the challenges with which the Convention system is confronted, it is necessary to give an overview of the system’s evolution. Indeed, it does not suffice to say that the system has evolved considerably since the Convention was adopted in 1950. This overview will help provide a better understanding of the current challenges. Four different periods can be identified in my view.

A. The foundational era

The Court was set up in 1959 and held its first session from 23 to 28 February 1959. It gave its first judgment on 14 November 1960 in the case of *Lawless v Ireland*. It is noteworthy that, at the time, the right of individual petition was not compulsory. It depended on a formal and prior declaration of acceptance by the Contracting States. In addition, even where the State had accepted the right of individual petition, the individual had no right of action before the Court. Only the Contracting States and the former European Commission of Human Rights were entitled to bring a case before it. Protocol No. 9, which entered into force on 1 October 1994, subsequently enabled applicants whose applications had been the subject of a Commission report to request referral to the Court. However, this protocol was not ratified by all States.

In the first four decades of its operation, the Court embarked upon the process, case after case, of building up its jurisprudential edifice.⁵⁷ In so doing, it laid down a number of principles of Convention interpretation, namely, teleological interpretation, autonomous interpretation, and evolutive interpretation. Teleological interpretation was highlighted as early as the *Wemhoff v Germany* judgment, where the Court indicated that it had to ‘seek the interpretation that is most appropriate in order to realise the aim and achieve the object of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the Parties’.⁵⁸ The celebrated judgment in *Golder v the United Kingdom* confirmed that method of interpretation. There, the Court inferred from Article 6 of the Convention a right of access to a court in civil matters, even though such a right did not appear, as such, in the text of Article 6: ‘It would be inconceivable, in the opinion of the Court, that Article 6 para. 1 should describe in detail the procedural guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court. The fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings’. As the Court went on to clarify, ‘[t]his is not an extensive

⁵⁴ *Opuz v Turkey* Application No 33401/02, Merits and Just Satisfaction, 9 June 2009, at para 163, emphasis added.

⁵⁵ In the case of *Verein KlimaSeniorinnen Schweiz and Others v Switzerland* (Application No 53600/20), eight States intervened as third parties before the Grand Chamber.

⁵⁶ These cases are currently pending before the Grand Chamber: *R.A. and Others v Poland* (Application no. 42120/21), *H.M.M. and Others v Latvia* (Application no. 42165/21) and *C.O.C.G. and Others v Lithuania* (Application no. 17764/22). Eleven States Parties have intervened in the Polish case, nine in the Latvian case, and eight in the Lithuanian case.

⁵⁷ See Spano, ‘The future of the European Court of Human Rights—Subsidiarity, Process-Based Review and the Rule of Law’ (2018) 18 *Human Rights Law Review* at 476.

⁵⁸ *Wemhoff v Germany* Application No 2122/64, Merits, 27 June 1968, at para 8 of the law part.

interpretation forcing new obligations on the Contracting States: it is based on the very terms of the first sentence of Article 6 para. 1 read in its context and having regard to the object and purpose of the Convention, a lawmaking treaty . . . and to general principles of law'.⁵⁹

Autonomous interpretation seeks to give the Convention's own terms a specific meaning, independent of any meaning those terms may have in the legal systems of the States Parties. Thus, the Convention's concepts 'cannot be interpreted solely by reference to the respondent State's domestic law'.⁶⁰ The application of the Convention and its Protocols are not subordinated to the 'sovereign will' of the States, which would otherwise be able to reduce, as they see fit, the scope of their undertakings by freely circumscribing them on a unilateral basis.⁶¹ Through such interpretation, the Court, for example, decided that the scope of protection under Article 8 of the Convention would extend to the offices of a lawyer, considering them to fall within the meaning of 'home'.⁶²

Last but not least, the Court has developed the 'living instrument' doctrine as a means of ensuring the effectiveness of the Convention rights. Since the judgment in *Tyrer v the United Kingdom*, this doctrine has become firmly established in the Court's case-law.⁶³ Thus, to take just one example, the Court considered that, having regard to the evolution of new technologies, the 'correspondence' protected by Article 8 of the Convention had to include e-mails.⁶⁴

Each of these three methods of interpretation serves to ensure the effectiveness of rights,⁶⁵ a principle that is enshrined in the repeated finding that the Convention 'is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective'.⁶⁶ It is on that basis that the Court has laid down the obligations of States under the Convention—not being confined to negative obligations to refrain from taking certain action. Throughout its case-law, the Court has identified positive obligations to take measures with the aim of ensuring effective respect for Convention rights,⁶⁷ including in relations between individuals.⁶⁸ This expansion of positive obligations, coupled with the horizontalization of the Convention rights, has contributed to considerably extending the scope of the Convention,⁶⁹ notably by encompassing violence and abuse perpetrated in a family or marital context.⁷⁰ To this extent, it can be said that the Convention has also become indirectly a norm of conduct of individuals.⁷¹

B. The golden age

The fall of the Berlin Wall in 1989 was a key event in the history of the Convention. It symbolized the reunification of Europe around common values, bringing in its train the enlargement of the Council of Europe to States of Eastern and Central Europe. During that period, there was a real wind of optimism surrounding the Convention and the internationalization of human rights.

⁵⁹ *Golder v the United Kingdom*, supra 10 at paras 35–36.

⁶⁰ *Nait-Liman v Switzerland* Application No 51357/07, Merits and Just Satisfaction, 15 March 2018, at para 106.

⁶¹ *Öztürk v Germany* Application No 8544/79, Merits, 21 February 1984, at para 49.

⁶² *Niemietz v Germany* Application No 13710/88, Merits and Just Satisfaction, 16 December 1992, at paras 27–33.

⁶³ *Tyrer v the United Kingdom* Application No 5856/72, Merits, 25 April 1978, at para 31.

⁶⁴ *Copland v the United Kingdom* Application No 62617/00, Merits and Just Satisfaction, 3 April 2007, at para 41.

⁶⁵ Serghides, *The Principle of Effectiveness and its Overarching Role in the Interpretation and Application of the ECHR* (2022).

⁶⁶ *Airey v Ireland*, supra 11 at para 24.

⁶⁷ See *Marckx v Belgium* Application No 6833/74, Merits and Just Satisfaction, 13 June 1979, at para 31.

⁶⁸ See *X. and Y. v the Netherlands* Application No 8978/80, Merits and Just Satisfaction, 26 March 1985, at para 23.

⁶⁹ See Lavrysen, *Human Rights in a Positive State—Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights* (2016).

⁷⁰ See, for instance, *A v the United Kingdom* Application No 25599/94, Merits and Just Satisfaction, 23 September 1998. The Court has subsequently developed an extensive case law on domestic violence (see, among other authorities, *Talpis v Italy* Application No 41237/14, Merits and Just Satisfaction, 2 March 2017; *Vieru v the Republic of Moldova* Application No 17106/18, Merits and Just Satisfaction, 19 November 2024).

⁷¹ Van Drooghenbroeck, 'L'horizontalisation des droits de l'homme' in Dumont, Ost and Van Drooghenbroeck (eds), *La responsabilité, face cachée des droits de l'homme* (2005) 355.

Protocol No. 11 represented the high point of that golden age. As a result of that Protocol, which entered into force on 1 November 1998, the Court began to sit on a full-time basis, whereas it had previously sat only for the duration of its sessions. What is more, Protocol 11 fully established the right of individual application before the Court by rendering it compulsory, at the same time as abolishing the former Commission of Human Rights, which had hitherto performed a task of filtering and investigation. It was a preliminary avenue that had to be pursued by anyone wishing to bring a case to the Court. With the changes made by Protocol 11, the individual was granted a direct right of action before the Court itself.⁷² This enhanced both the judicial nature of the system and the ‘justiciability’ of the Convention rights for the benefit of individuals.

C. The quest for survival

The situation then, very quickly, saw a considerable evolution. The number of applications lodged in Strasbourg rose exponentially to reach a critical level, to the point that the Court’s very ‘survival’ seemed to be at stake. The Court became a victim of its own success, but this case-load explosion was also the result—and primarily so—of the accession of new States, those of Central and Eastern Europe. No less than 18 States had joined the Council of Europe in the nineties, including Hungary (1990), Poland (1991), Romania (1993), Ukraine (1995), and Russia (1996).

With a view to preventing the system from becoming asphyxiated—for this was indeed the risk at the time—and to ‘guarantee the long-term effectiveness of the European Court of Human Rights . . . so that it can continue to play its pre-eminent role in protecting human rights in Europe’,⁷³ Protocol No. 14 was adopted in 2004. With its entry into force in 2010 following the deposit of the last instrument of ratification by the Russian Federation, it contained two key measures that aimed to resolve the backlog problem. The first consisted in the introduction of the single judge, for the purpose of disposing more quickly of applications that manifestly failed to comply with the admissibility criteria.⁷⁴ The second sought to optimize the handling of repetitive applications by conferring on three-judge committees the task of giving judgments on the merits where there was ‘well-established case-law of the Court’⁷⁵ on the matter. Protocol 14 was thus aimed at action on two fronts: to deal both with applications that were manifestly inadmissible and those that were manifestly ill-founded.

D. The age of subsidiarity

In the decade following 2010, there was a change of narrative. Whereas the processing of the backlog had been the main concern at the start of the millennium, it was the redefinition of the Court’s mission that became the focus from the entry into force of Protocol No. 14. The intergovernmental conference at Interlaken, which was held in early 2010, initiated a decade-long process of discussions and reforms concerning the future of the Court (the ‘Interlaken process’). Following Interlaken, other conferences were held successively in Izmir (2011), Brighton (2012), Oslo (2014), Brussels (2015), and Copenhagen (2018). Among them, the Brighton Conference certainly represented a turning point, in that it decisively paved the way for the adoption, in 2013, of Protocols 15 and 16, whose purposes were respectively to reaffirm the subsidiary role of the Court and to grant the Court a new advisory jurisdiction.

⁷² See *Mamatkulov and Askarov v Turkey*, supra S2, at para 122.

⁷³ Explanatory report in respect of Protocol No. 14, at para 2.

⁷⁴ Article 27 of the Convention.

⁷⁵ Article 28 § 1 (b) of the Convention.

Protocol No. 15, which entered into force on 1 August 2021, had the effect of incorporating the principles of subsidiarity and margin of appreciation into the Convention's Preamble.⁷⁶ Having entered into force 3 years earlier (1 August 2018), Protocol No. 16 enables the highest courts of a State Party to the Convention to request from the Court 'advisory opinions' concerning 'questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto'. Unlike Protocol No. 15, which is an additional protocol, Protocol 16 is an optional protocol.

These texts are the reflection of a new era, that of a subsidiarity⁷⁷ marked by the concept of 'shared responsibility' between the Court and the States. The Brussels declaration of 27 March 2015 gave clear expression to this concept. It 'recalls the primary responsibility of the States Parties to ensure the application and effective implementation of the Convention and, in this regard, reaffirms that the national authorities and, in particular, the courts are the first guardians of human rights ensuring the full, effective and direct application of the Convention – in the light of the Court's case law – in their national legal system, in accordance with the principle of subsidiarity'.

This emphasis on 'shared responsibility' has become embodied, in the Court's case-law, by the increasing prevalence of what has been called 'process-based review'.⁷⁸ In order to give effect to subsidiarity and the national margin of appreciation, attention is increasingly given to the quality of the adjudication process conducted at domestic level in the light of the Convention. The idea is to underscore the role of the national courts, whose action comes first and which are better placed than an international court to assess the rights and interests at stake.⁷⁹ The national judge is indeed the natural—and most important—judge of the Convention. Such an approach is also justified by the fact that the Convention is now widely incorporated into the domestic legal orders of the States Parties and the Court has provided a vast body of case-law that can be applied by national courts.

In that context, where the national court has dealt with the question by taking into consideration all the rights and interests at stake under the Convention, as interpreted by the Court, the Court will consider that it would require 'serious' reasons to substitute its own assessment. Having originally been developed for cases of conflict between rights, more specifically the conflict between the right to respect for one's private life and the right to freedom of expression,⁸⁰ this approach is now commonly adopted in a number of major areas of the Court's case-law.⁸¹ In this context, crucial weight is attached to the condition of the exhaustion of domestic remedies.⁸² It

⁷⁶ The Preamble was complemented by the following wording: 'Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention'.

⁷⁷ See the celebrated article of Robert Spano 'Universality or diversity of Human Rights? Strasbourg in the age of subsidiarity' (2014) 14 *Human Rights Law Review* 487.

⁷⁸ See, among an extensive literature, Spano, 'The future of the European Court of Human Rights—Subsidiarity, Process-Based Review and the Rule of Law', supra 57; Arnardóttir, 'The "Procedural Turn" under the European Convention on Human Rights and Presumptions of Convention Compliance' (2017) 15 *International Journal of Constitutional Law* 9; Brems and Gerards (eds), *Procedural Review in European Fundamental Rights Cases* (2017); Popelier and Van de Heyning, 'Subsidiarity post-Brighton: procedural rationality as answer?' (2017) 30 *Leiden Journal of International Law* 5.

⁷⁹ See Prebensen, 'Importance of the national courts' having duly considered the Convention matter' (2016) 36 *H.R.L.J.* 367.

⁸⁰ *Von Hannover v Germany* (no. 2) Applications Nos 40,660/08, 60641/08, Merits and Just Satisfaction, 7 February 2012, at para 107; *Axel Springer AG v Germany* Application No 39954/08, Merits and Just Satisfaction, 7 February 2012, at para 88.

⁸¹ *Halet v Luxembourg* Application No 21884/18, Merits and Just Satisfaction, 14 February 2023, at paras 159–162; *M.A. v Denmark* Application No 6697/18, Merits and Just Satisfaction, 9 July 2021, at para 149, with further references.

⁸² *Communauté genevoise d'action syndicale (CGAS) v Switzerland* Application No 21881/20, Merits, 27 November 2023; *Mansouri v Italy* Application No 63386/16, Decision, 29 April 2025.

is necessary for the Court to ‘have the benefit’ of the review carried out by domestic courts under the Convention.⁸³

Furthermore, where it is confronted with a legislative norm and called upon to review its proportionality, the Court ascertains whether the adoption of the measure has been preceded, at the domestic level, by an in-depth examination of the relevant questions under the Convention, as interpreted by the Court.⁸⁴ The judgment in *Animal Defenders International*, delivered in 2013 by the Grand Chamber, formalized this approach by emphasising that ‘the quality of the parliamentary and judicial review of the necessity of the measure is of particular importance in this respect, including to the operation of the relevant margin of appreciation’.⁸⁵ The more stringent the legislative scrutiny, the greater the latitude that may be afforded to the State concerned.

The judgment of 13 February 2024 in *Executief van de Moslims van België* confirms this approach as regards the ban on ritual slaughter of animals without prior stunning in the Flemish and Walloon Regions of Belgium. The Court paid particular attention to the quality of the parliamentary work and to the substance of the judicial scrutiny exercised thereafter. This does not, however, mean to say that the Court waived its supervisory role under Article 19 of the Convention. It carried out its own proportionality review of the measure at issue, taking into account the prior examination by the Court of Justice of the European Union and the Belgian Constitutional Court.⁸⁶

Today, the principal concern, in my view, is to maintain a positive and credible conception of subsidiarity. Subsidiarity is aimed less at restricting the Court’s supervision than at emphasizing the primary role of national authorities in relation to the Convention. I will return to this point after examining the current challenges.

As regards Protocol No. 16, it should be observed that, since its entry into force,⁸⁷ the Court has received 11 requests⁸⁸ and has given seven opinions, a volume which to date is, admittedly, hardly colossal. As much as I believe that Protocol No. 16 should not divert the Court’s attention away from its adjudicatory role in ruling on individual applications, which must remain its primary function, I also believe that the Protocol provides a mechanism that has been shown to be useful and whose benefits are undeniable if it is used properly.⁸⁹ I readily acknowledge that my position has evolved on this subject.

VII. THE CURRENT CHALLENGES

After the above reminder of the system’s origins and an overview of its evolution, it is appropriate to assess the challenges faced by the Court today. I will begin with the *internal challenges* for

⁸³ *Burden v the United Kingdom* Application No 13378/05, Merits, 29 April 2008, at para 42. See also *Missaoui and Akhandaf v Belgium* Application No 54795/21, Decision, 3 September 2024.

⁸⁴ *Animal Defenders International v the United Kingdom* Application No 48876/08, Merits and Just Satisfaction, 22 April 2013, at para 114, where the Court commended the ‘exceptional examination by parliamentary bodies of the cultural, political and legal aspects’ of the prohibition of paid political advertising on television. By contrast see *Hirst v the United Kingdom (no. 2)* Application No 74025/01, Merits and Just Satisfaction, 6 October 2005, at para 79: ‘it cannot be said that there was any substantive debate by members of the legislature on the continued justification in light of modern-day penal policy and of current human rights standards for maintaining such a general restriction on the right of prisoners to vote’.

⁸⁵ *Animal Defenders International v the United Kingdom*, supra 84 at para 108.

⁸⁶ *Executief van de Moslims van België v Belgium* Application No 16760/22, Merits and Just Satisfaction, 13 February 2024, in particular paras 115–123.

⁸⁷ Twenty-four States have ratified this Protocol to date.

⁸⁸ Four requests for advisory opinions have been rejected by the panel of five judges convened to decide on such requests (Art. 2 § 1 of Protocol No. 16).

⁸⁹ See Advisory opinion as to whether an individual may be denied authorisation to work as a security guard or officer on account of being close to or belonging to a religious movement, Grand Chamber, request no. P16-2023-001, 14 December 2023.

the Court's work, before considering the *external challenges* that concern more broadly the protection of Convention rights.

A. Internal challenges

1. Handling the huge volume of cases

Since its creation, the Court has ruled on more than one million applications. Today, there are 60,350 applications pending.⁹⁰ We are far from the peak reached in 2011 with 161,000 pending applications. Fortunately, the Court's 'survival' is no longer in question. Nevertheless, the caseload remains substantial. The highest volume of pending applications concerns, in descending order, Türkiye, Russia,⁹¹ Ukraine, Romania, and Greece. These five States account for about three-quarters of all pending applications.

In order to achieve the best possible management of this huge volume of applications, the Court has endeavoured to make use of all the means at its disposal since the entry into force of Protocol No. 14. Thus, the single judge rejects applications that are manifestly inadmissible and do not call for further examination. In 2024, the single-judge formations ruled on 22,210 applications. Moreover, the role of three-judge Committees has gained in importance as they are empowered to give a judgment on the merits where there is 'well-established case-law' of the Court.⁹² In this connection, a change of paradigm can be observed. The three-judge Committees are becoming the ordinary formations of judgment (the majority of judgments are currently given by Committees), while the seven-judge Chambers are increasingly appearing as 'mini-Grand Chambers', hearing cases that raise new and complex questions. The Grand Chamber, for its part, has retained its function of regulating case-law.

In addition to the measures under Protocol No. 14, the Court has taken a number of initiatives to ensure the efficient handling of applications. It has put in place, since 2009, a policy of prioritization by establishing seven categories of application in order to speed up the processing and resolution of the most urgent and serious cases. This policy was complemented in 2021 by a new strategy aimed at identifying 'impact' cases, ie cases that do not concern the core Convention rights (Articles 2 and 3) but that raise new questions regarding the interpretation and application of the Convention that are important, either for the respondent State or for the community of States Parties to the Convention. Impact cases can include matters such as the independence of justice or the protection of the environment, to mention just two examples.

It is quite clear that the Court must be in a position to rule within a 'reasonable time' because, behind all applications, there are individuals who have turned to the Court as their last resort and are waiting for justice to be done in their cases. The Court has redoubled its efforts to achieve this, by adjusting its working methods. Those efforts have borne fruit and must be pursued.

2. Promoting a 'positive subsidiarity'

As already mentioned, since 1 August 2021 and the entry into force of Protocol No. 15, the principles of subsidiarity and the national margin of appreciation have been proclaimed explicitly in the Preamble to the Convention. In itself, this insertion is not particularly revolutionary.

⁹⁰ Statistics as of 31 March 2025.

⁹¹ Even though Russia is no longer a member of the Council of Europe, as from 16 March 2022, and no longer a party to the Convention with effect from 16 September 2022, the Court retains a residual jurisdiction in respect of acts and omissions of this State that occurred before the latter date and may engage its responsibility. See the Resolution of the European Court of Human Rights of 22 March 2022 'on the consequences of the cessation of membership of the Russian Federation to the Council of Europe in light of Article 58 of the European Convention on Human Rights'.

⁹² The Court has 'well-established case-law' in numerous areas: for example, conditions of detention, length of proceedings, or access to a lawyer in criminal proceedings.

It merely confirms both the underlying principle of the Convention (subsidiarity) and a well-established doctrine of the Court (national margin of appreciation). It is nevertheless important to ensure that these principles are not diverted away from their intended purpose.⁹³

Three points of clarification are essential to ensure that subsidiarity remains a credible principle. Firstly, subsidiarity is not synonymous with regression. On the contrary, its premise is the flourishing of human rights in the local context, at the level of individuals and domestic realities. It is a functional principle that promotes a decentralized application of the Convention in the national legal orders, where the text is intended to be applied. Consequently, far from representing a weakening of protection, subsidiarity drives not only the ‘maintenance’ but also the ‘further realisation of human rights and fundamental freedoms’ in the States Parties, in full accordance with the intention expressed in the Convention’s Preamble.

Secondly, subsidiarity hinges upon the existence, within those same States, of a judicial system that is both independent and apt to deliver justice within a reasonable time, in response to complaints of Convention violations. The independence⁹⁴ and the diligence⁹⁵ of justice are crucial conditions for subsidiarity to be deployed to the full.

Thirdly, while it enhances the action of domestic courts, as the primary judges of the Convention, subsidiarity implies a heightened accountability on their part since ‘where an applicant’s pleas relate to the ‘rights and freedoms’ guaranteed by the Convention’, it is their responsibility ‘to examine them with particular rigour and care’.⁹⁶ The courts have a specific duty to give reasons, and this will later enable the Court to exercise its supervision under the Convention.

The challenge for the Court, therefore, is to move on from the Brighton era by cultivating a positive and credible conception of subsidiarity that serves to ensure the effectiveness of Convention rights. This concept of ‘positive subsidiarity’ is one that I have personally taken to heart. Subsidiarity is not intended for regressive purposes. It is intrinsically linked to the objective of protecting rights.

Turning now to the national margin of appreciation, its aim is certainly not to give a blank cheque to the States. It consists of acknowledging their freedom of action within the limits circumscribed by the Convention, under the ultimate supervision of the Court. In practical terms, it leaves to the States the ‘choice of means’⁹⁷ by which to attain the goals prescribed by the Convention.

The judgment in *Fedotova and Others v Russia* illustrates this freedom as to the means to be used, after indicating the aim to be achieved. Sitting as a Grand Chamber, the Court found that Article 8 of the Convention required the States Parties ‘to provide a legal framework allowing same-sex couples to be granted adequate recognition and protection of their relationship’.⁹⁸ While it lays down a positive obligation of legal recognition and protection, the Court leaves to the national authorities the ‘choice of means’ by which to achieve this result. The authorities have a margin of appreciation as to the form of this recognition and as to the content of that

⁹³ See also Spielmann and Voyatzis, ‘Age de la subsidiarité ou ère de la retraite ordonnée? Pour la subsidiarité bien comprise’, in *Liber Amicorum Robert Spano* (2022) 671.

⁹⁴ *Grzegda v Poland*, supra 13 at para 324: ‘[T]he principle of subsidiarity imposes a shared responsibility between the States Parties and the Court, and that national authorities and courts must interpret and apply domestic law in a manner that gives full effect to the Convention ... In this connection, the Court would emphasise that the Convention system cannot function properly without independent judges ...’.

⁹⁵ *Van den Kerkhof v Belgium*, supra 14 at para 98, where the Court emphasized that ‘the system for the protection of Convention rights is based on the principle of subsidiarity and, by virtue of that principle, it is primarily for the national courts to ensure respect for those rights ... This system cannot function properly without a domestic justice that is given within a reasonable time for the purposes of Article 6 § 1 of the Convention’ (free translation from French).

⁹⁶ *Fabris v France* Application No 16574/08, Merits, 7 February 2023, at para 72.

⁹⁷ *Marckx v Belgium*, supra 67 at paras 31, 53, and 61.

⁹⁸ *Fedotova and Others v Russia*, supra 26 at para 178.

protection, provided they both remain adequate. In particular, recognition ‘does not necessarily have to take the form of marriage’.⁹⁹

It is also worth noting that the margin of appreciation can be referred to by the Court not to protect the interests of the State but rather to ensure the protection of individuals’ rights. For instance, in *Pindo Mulla v Spain* concerning blood transfusions administered to a Jehovah’s Witness despite her expressed refusal to undergo any, the Grand Chamber held that when a State establishes a system of advance medical directives and decides to give them binding force—‘which is a choice falling within the State’s margin of appreciation’—‘it is important that it functions effectively to achieve its purpose’.¹⁰⁰ This freely made choice can then be invoked by the individual against the State.

3. Assisting the states in implementing judgments

However wonderful it may be, a judgment of the court will be purely platonic—just sheets of paper—if it remains a dead letter. Only its execution will render practical and effective the protection required by the Convention. In the Convention system, the Court is not empowered to supervise the execution of its own judgments.¹⁰¹ That task falls to the Council of Europe’s Committee of Ministers, in accordance with Article 46 § 2 of the Convention. In addition, the Court’s judgments are only declaratory in nature and it is in principle for the State concerned to choose, under the supervision of the Committee of Ministers, the means to be used in order to comply with a judgment.

Without encroaching on the powers vested in the Committee of Ministers, the Court should, in my view, continue on the path that it has been following for two decades now,¹⁰² which consists in identifying as precisely as possible the source of the violation found and in indicating as clearly as possible what is expected of the national authorities by way of remedial follow-up. Let me highlight in that regard that the aim of the Court’s judgments is less to ‘punish’ a State than to help it give full effect to the Convention in accordance with Article 1 of the Convention. To this end, the Court may take the initiative to state the general measures required of the respondent State to put an end to the problem that has led to the finding of a violation.¹⁰³ Particular attention must be paid to pilot judgments,¹⁰⁴ the purpose of which is to identify a systemic issue in a respondent State and to prescribe general measures with a view to resolving it while setting a time limit for their adoption.¹⁰⁵ In more exceptional cases, where the very nature of the violation found does not really leave any choice among different sorts of measures capable of providing redress, the Court may indicate an individual measure regarding the applicant.¹⁰⁶

It cannot be emphasized enough that the execution phase of judgments is the most crucial stage. The Court, in keeping with the distribution of powers intended by the Convention, has an important role to play by supporting States in fulfilling their obligations.

⁹⁹ Ibid., at para 188.

¹⁰⁰ *Pindo Mulla v Spain* Application No 15541/20, Merits and Just Satisfaction, 17 September 2024, at para 156.

¹⁰¹ See, however, the ‘infringement’ procedure laid down in Article 46 §§ 4 and 5 of the Convention. This procedure is used in very exceptional circumstances and has been applied in two cases so far (*Ilgar Mammadov v Azerbaijan*—Application No 15172/13—and *Kavala v Türkiye*—Application No 28749/18).

¹⁰² The year 2004 was clearly a turning point with the Resolution of the Committee of Ministers (2004) 3 of 12 May 2004 on judgments revealing an underlying systemic problem and the case-law initiated in the *Assanidze* (indication of individual measures) and *Broniowski* (indication of general measures) cases, mentioned below.

¹⁰³ See *Broniowski v Poland* Application No 31443/96, Merits, 22 June 2004. See also *Tunikova and Others v Russia* Application Nos 55,974/16 et al., Merits and Just Satisfaction, 14 December 2021.

¹⁰⁴ Rule 61 of the Rules of Court.

¹⁰⁵ See, for recent illustrations, *Cannavacciuolo and Others v Italy* Application No 51567/14, Merits, 30 January 2025, at paras 487–503; *Wałęsa v Poland*, supra 13 at paras 314–335.

¹⁰⁶ See *Assanidze v Georgia*, supra 49. See also *Del Rio Prada v Spain* Application No 42750/09, Merits and Just Satisfaction, 21 October 2013. In these cases, the Court considered it incumbent on the respondent State to ensure that the applicant was released.

4. Resisting in a climate of mistrust

The Court has often been the target of criticism, sometimes even fierce attacks. Some commentators consider certain judgments to reflect a 'government of judges', while others complain of the confiscation of national sovereignty by 'foreign' judges.¹⁰⁷ I personally tend to see these criticisms in perspective. The Court has, in fact, been criticized since its very first judgments. Some have castigated it for its 'activism', others for its 'conservatism' or 'restraint'¹⁰⁸. In my view, the significance of such criticisms should not therefore be overestimated or exaggerated, especially as they are often expressed for diametrically opposite reasons. The Court's strength lies in its independence and in its capacity for resistance.

In performing its judicial duties, the Court can neither be arrogant nor spineless. It is required to show prudence. But this prudence must be properly understood. It is not a sign of fear of assuming its responsibilities. Prudence consists in giving thoughtful judgment after carefully weighing up the competing interests and lucidly assessing the relevant stakes. The Court cannot renounce its mission on the ground that its ruling might displease those to whom it is addressed or a significant portion of public opinion. It is there to exercise the mandate conferred on it by the States, without revelling in a sense of omnipotence or, on the contrary, being fearful of adverse reactions.

It should indeed be remembered that the Court did not create itself. It was desired and put in place by the States. It derives its legitimacy directly from the sovereignty of the States, of which it is the pure product.¹⁰⁹ The States decided to create the Court by giving it the power to hear cases brought against them¹¹⁰ and conferred on it the task of interpreting the Convention¹¹¹ in order to ensure 'the maintenance and further realisation of human rights and fundamental freedoms' as stated in the Preamble.

In light of the above, one cannot speak of a 'government of judges' when those judges derive from an international convention, of which they are the custodians, the meaning that is the most apt to fulfil its purpose and give effect to its object, in accordance with Article 31 § 1 of the Vienna Convention on the Law of Treaties. A finding in the *Golder* judgment speaks to this point when it declares that '[i]t would be inconceivable . . . that Article 6 para. 1 should describe in detail the procedural guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court', adding that '[t]he fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings'.¹¹² It is not a matter of creating new obligations for the States against their will but of ensuring the effectiveness of the provisions to which they have consented. We should never overlook the fact that the right of access to a court is the cornerstone of the rule of law, as it allows individuals to challenge violations of the law and their rights. Nor can one speak of 'government by judges' when, guided by the same logic of effectiveness, the Court is called upon to interpret the requirements of the Convention in the

¹⁰⁷ See Sumption, *Trials of the State: Law and the Decline of Politics* (2019); Elchardus, *Reset. Over identiteit, gemeenschap en democratie* (2021); Schoettl, *La démocratie au péril des prétroires—De l'État de droit au gouvernement des juges* (2022); Bossuyt, *Right to Asylum—Between Demagoguery and Hypocrisy* (2025).

¹⁰⁸ See, on this debate between judicial activism and judicial restraint, Bošnjak and Zajac, 'Judicial Activism and Judge-Made Law at the ECtHR' (2023) 23 *Human Rights Law Review* 1.

¹⁰⁹ It is not without relevance to add that the Court's judges are elected judges. They are elected by the Council of Europe's Parliamentary Assembly from a list of three candidates nominated by the States Parties (Article 22 of the Convention).

¹¹⁰ Articles 33 and 34 of the Convention.

¹¹¹ Article 32 of the Convention.

¹¹² *Golder v the United Kingdom*, supra 10 at para 35.

light of current living conditions, so as to address situations that were unknown at the time of its drafting.¹¹³

5. *Engaging in ongoing dialogue and communication to counter misinformation*

Even though it is an independent and international court, the Court does not rule from the top of an ivory tower, cut off from the world around it and constrained by the rigidity of its dogmas. It is committed to fostering dialogue with all the Convention's stakeholders and does not hesitate to meet with them. This dialogue must include national authorities, domestic judges, lawyers, scholars, but also citizens, who stand at the heart of the Convention and its system of protection.

One of the main challenges for the Court today is communication. While the Court expresses itself through its judgments and decisions, it would be illusory to believe that they are systematically read in full before they are commented upon at length on social media and subsequently influence public opinion. The Court thus attaches particular importance to its communication. In order to make its action accessible and visible, it regularly issues press releases, which sum up in a simple format the substance of its judgments and decisions as soon as they are delivered. At a time when misinformation is of increasing concern, and when it is becoming more difficult to distinguish between 'true' and 'false', communication takes on an importance that is all the more crucial, even strategic. The Court may, in certain cases, publish a series of questions and answers intended to prevent or contradict the propagation of misleading information about its judgments and decisions. A recent example of the need for heightened communication was seen in the case of *Călin Georgescu v Romania*.¹¹⁴ Generally speaking, I believe it is essential for the Court to communicate proactively rather than enduring the harmful effects of 'fake news'.

B. External challenges

Going beyond the challenges that are specific to the work of the Court, there are some challenges that concern, more broadly, the protection of the Convention rights and freedoms.

1. *Guaranteeing an area of democracy founded on the rule of law*

The aim of the Convention is first and foremost to guarantee an area of democracy based on the rule of law. This is proving all the more crucial as today we are witnessing an alarming re-emergence of conflicts and a worrying proliferation of crisis situations.

i. The return of war

The Council of Europe was marked in 2022 by the return of what was once quite inconceivable: the armed invasion of one State Party by another State Party, which led to the exclusion of the Russian Federation, the first time such an event has taken place in the history of the Organization. This shows that our edifice, built as it was on an ideal of peace, remains fragile.

Currently, the Court has on its docket several inter-State applications and thousands of individual applications against Russia concerning military operations on Ukrainian territory since early 2014. While Russia has not been a State Party since 16 September 2022, it continues to be accountable before the Court for acts and omissions prior to that date, which might engage its international responsibility under the Convention.¹¹⁵ The Grand Chamber thus delivered its judgment on 25 June 2024 in the case of *Ukraine v Russia*. It found a pattern ('administrative practice') of violations of the Convention by the Russian Federation in Crimea from February 2014 onwards.¹¹⁶ As President O'Leary once emphasized, the Court has shown itself to be

¹¹³ See, for instance, *Bărbulescu v Romania* Application No 61496/08, Merits and Just Satisfaction, 5 September 2017, concerning the monitoring of an employee's emails by his employer.

¹¹⁴ *Călin Georgescu v Romania* Application No 37327/24, Decision, 11 February 2025.

¹¹⁵ See Resolution of 22 March 2022, *supra* 91.

¹¹⁶ Applications Nos 20,958/1438334/18, Merits.

determined that ‘any Council of Europe member State – current or former – should be held to account in respect of its international legal obligations, not only before the international community but also before its own people’.¹¹⁷

ii. The proliferation of crisis situations

Just about all over Europe—and for a number of years now—the democratic ideal founded on the rule of law has been under pressure. It has been considerably put to the test by the various ‘crises’ that have disrupted our daily lives. Taking various shapes, the state of crisis seems to be here to stay. We have seen the proliferation of states of emergency and a normalization of special regimes. Whether it is the migration crisis, the health crisis or the terrorist threat, the same phenomena are continually being repeated: crises that generally go together with a trend towards national retreat, the reinforcing of borders, a strengthening of the role of the executive, and a compression of rights and freedoms.

In actual fact, all these crises put our democracies to the test and allow their ‘resilience’ to be measured. A crisis does not call for a change of paradigm; it provides an opportunity to re-emphasize the importance of the rule of law and renders human rights even more relevant. The Convention is not an option. It is not a luxury reserved for times of peace. It is also—and above all—to be applied in the most difficult and critical situations. In truth, it was for such situations that the Convention was designed.

In the fight against terrorism, for example, it is a fundamental mistake to say that security competes with the right to liberty under the Convention. The text provides for both.¹¹⁸ States are obliged to guarantee the life and physical integrity of the individuals within their jurisdiction. A breach of this obligation engages the international responsibility of the State before the Court.¹¹⁹ However, strict boundaries must be observed in matters such as: the prohibition of torture and inhuman or degrading punishment or treatment, the requirement of a legal basis for any deprivation of liberty, respect for defence rights and the right to a fair hearing, and the proportionality of measures that impose restrictions on the private life of individuals or their freedom of assembly.

The questions revealed by the health crisis can be treated in a similar manner. On the one hand, the Contracting States are under a positive obligation, resulting from Articles 2 and 8 of the Convention, to take appropriate measures to protect the life and health of those within their jurisdiction.¹²⁰ On the other hand, unless a derogation is notified under Article 15 of the Convention, those same States, in order to fulfil that positive obligation, can only apply restrictions to the rights under Articles 8–11 of the Convention when those restrictions are part of an accessible and foreseeable legal framework and prove proportionate. It follows that ‘the Convention must be read as a whole and interpreted in such a way as to promote internal consistency and harmony between its various provisions’.¹²¹

¹¹⁷ Speech by President O’Leary at the opening of the Annual Forum of the Superior Courts Network, 6 June 2024 (free translation from French).

¹¹⁸ See also in that sense Tulkens, ‘Droits humains et sécurité: des alliés inséparables’ in *Les droits de l’homme à la croisée des droits—Mélanges en l’honneur de Frédéric Sudre* (2018) 791.

¹¹⁹ See *Tagayeva and Others v Russia* Applications Nos 26,562/07 et al., Merits and Just Satisfaction, 13 April 2017, in particular paras 481–493.

¹²⁰ *Vavříčka and Others v the Czech Republic*, supra 37 at para 282.

¹²¹ *Mihalache v Romania* Application No 54012/10, Merits and Just Satisfaction, 8 July 2019, at para 92. See also *Pagerie v France* Application No 24203/16, Merits and Just Satisfaction, 19 January 2023, at para 149.

2. Making the Convention a 'living instrument' tailored to contemporary realities and capable of rising to future challenges

Another immense challenge is to ensure that the text of the Convention, adopted in 1950, remains meaningful in 2025 in our present-day society. The Convention is not a lifeless text whose meaning was frozen in the society of the mid-20th century. As the Court has continually repeated: 'the Convention is a living instrument which must be interpreted in the light of present-day conditions and of the ideas prevailing in democratic States today'.¹²² In this respect, the Court seeks to verify the existence of a 'consensus'¹²³ or a 'trend'¹²⁴ within the community of States Parties. However, while consensus is enlightening, it cannot be decisive. Moreover, in a globalized world characterized by jurisprudential cross-fertilization, the Court refers to instruments other than the Convention and to the positions expressed by other international bodies.¹²⁵

Such evolutive interpretation¹²⁶ naturally has certain limits: the Court 'cannot, by means of an evolutive interpretation [of the Convention], derive ... a right that was not included therein at the outset ... particularly so ... where the omission was deliberate'.¹²⁷ Therefore its dynamic reading of the Convention requires the Court to follow a methodologically rigorous and consistent approach in its interpretative choices.

i. Evolution in 'living conditions'

The Court primarily takes into consideration the 'present-day living conditions', in particular the extraordinary developments that have taken place in technological and scientific fields. It has thus had occasion to consider the developments brought about by digital technology. This was the case for example in *Barbulescu v Romania* concerning electronic surveillance in the workplace,¹²⁸ in *Sanchez v France* on the conviction of a politician for comments left by third parties on his Facebook account,¹²⁹ in *L.B. v Hungary* about the publication on the tax authorities' website of taxpayers' personal data,¹³⁰ or in *Hurbain v Belgium* concerning the right to be forgotten.¹³¹ The Court has also examined disputes concerning mass surveillance,¹³² and there is no doubt that, in the near future, it will be confronted with issues raised by artificial intelligence—the question is not *if* but rather *when* it will be. In parallel, the Court

¹²² *Bayatyan v Armenia* Application No 23,459/03, Merits and Just Satisfaction, 7 July 2011, at para 102.

¹²³ See *Konstantin Markin v Russia*, Application No 30078/06, Merits and Just Satisfaction, 22 March 2012, at para 126; *Scoppola v Italy* (n°2), Application No 10249/03, Merits and Just Satisfaction, 17 September 2009, at para 104.

¹²⁴ See *Vallianatos and others v Greece* Applications Nos 29,381/09 and 32,684/09, Merits and Just Satisfaction, 7 November 2013, at para 91.

¹²⁵ *Demir and Baykara v Turkey* Application No 34503/97, Merits and Just Satisfaction, 12 November 2008, at para 85. Compare *Muršić v Croatia* Application No 7334/13, Merits and Just Satisfaction, 20 October 2016, at paras 111–113 and *Humpert and Others v Germany* Applications Nos 59,433/18 et al., Merits and Just Satisfaction, 14 December 2023, at paras 125–127. In truth, the Court has to consider the international legal framework and practice, though not necessarily to align with it in every case. What matters above all is that, when the Court elects to depart from it, it does so with a reasoned and transparent justification.

¹²⁶ See Sicilianos, 'Adapting international instruments over time: remarks on the evolutive interpretation of the European Convention on Human Rights' in Gattini (eds), *Time and International Adjudication* (2024) 473.

¹²⁷ *Johnston and Others v Ireland* Application No 9697/82, Merits and Just Satisfaction, 18 December 1986, at para 53.

¹²⁸ *Bărbulescu v Romania*, supra 113.

¹²⁹ *Sanchez v France* Application No 45581/15, Merits and Just Satisfaction, 15 May 2023.

¹³⁰ *L.B. v Hungary* Application No 36345/16, Merits and Just Satisfaction, 9 March 2023.

¹³¹ *Hurbain v Belgium* Application No 57292/16, Merits and Just Satisfaction, 4 July 2023.

¹³² See *Big Brother Watch and Others v the United Kingdom* Application Nos 58,170/13 et al., Merits and Just Satisfaction, 25 May 2021; *Centrum för Rättvisa v Sweden* Application No 35252/08, Merits and Just Satisfaction, 25 May 2021.

has increasingly had to examine sensitive questions of bioethics, raised in particular in relation to medically assisted reproduction techniques¹³³ and surrogate motherhood.¹³⁴

ii. Evolution in ‘ideas prevailing in democratic States’

In addition to ‘present-day living conditions’, the Court takes account of the ‘ideas prevailing in democratic States today’. As was stated in *Marckx*, something that could be regarded as ‘permissible and normal’ at the time when the Convention was drafted may subsequently have turned out to be incompatible with it.¹³⁵ In that *Marckx* judgment of 1979, the Court found fault with the distinction in the Belgian Civil Code between ‘legitimate’ children and children born to an unmarried mother. Those who criticized the judgment at the time would be hard pressed today to claim that the Court was mistaken.

An outstanding illustration of this evolving interpretation concerns the death penalty, which was not originally prohibited by Article 2 of the Convention. However, in light of new legal developments and State practice, the Court has considered that ‘Article 2 has been amended so as to prohibit the death penalty in all circumstances’.¹³⁶

There are many areas where the Court’s dynamic interpretation has led to timely progress. This is true, for example, when it comes to the protection of sexual minorities. I have already mentioned *Fedotova*, where the Court found that same-sex couples were entitled, under Article 8 of the Convention, to have their relationships recognized and protected adequately by the law. When it is recalled that in the 1980s the Court was having to deal with the criminalization of homosexual relations between consenting adults,¹³⁷ it is clear that we have come a long way. Concerning questions of gender identity, mention should be made of the judgments in *Christine Goodwin* and *I. v the United Kingdom*, which laid down the obligation for States Parties to grant full legal recognition to sex changes by transsexuals.¹³⁸ However, the Court more recently considered in the case of *Y v France* that the refusal to indicate ‘neutral’ or ‘intersex’ on the birth certificate of an intersex person instead of ‘male’ had not breached Article 8 of the Convention. The Court considered that it was ‘required to exercise restraint’, emphasizing ‘the absence of a European consensus in this area’. It nevertheless reiterated the point that ‘the Convention is a living instrument’ and stressed that ‘the need for appropriate legal measures should ... be kept under review having regard particularly to changes in society and attitudes’.¹³⁹

This evolution in attitudes led the Court in 2025, in its *H.W. v France* judgment, to find that a divorce granted on the basis of the exclusive fault of the wife for failure to fulfil her ‘marital duty’ (on the grounds that she had ceased to have sexual relations with her husband) had entailed a violation of the right to respect for her private life. In the Court’s view, the very existence of such a marital obligation ‘ran counter to sexual freedom, the right to bodily autonomy and the Contracting States’ positive obligation of prevention in the context of combating domestic and sexual violence’.¹⁴⁰

¹³³ See *Evans v the United Kingdom* Application No 6339/05, Merits, 10 April 2007; *S.H. and Others v Austria*, supra 38; *Baret and Caballero v France* Application Nos 22,296/20 et 37,138/20, Merits and Just Satisfaction, 14 September 2023; *R.F. and Others v Germany* Application No 46808/16, Merits and Just Satisfaction, 12 November 2024.

¹³⁴ See *Mennesson v France* Application No 65192/11, Merits and Just Satisfaction, 26 June 2014. See also *Advisory opinion concerning the recognition in domestic law of a legal parent–child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother*, 10 April 2019, P16-2018-001.

¹³⁵ *Marckx v Belgium*, supra 67 at para 41.

¹³⁶ *Al-Saadoon and Mufdhi v the United Kingdom* Application No 61498/08, Merits and Just Satisfaction, 2 March 2010, in particular para 120.

¹³⁷ *Dudgeon v the United Kingdom* Application No 7525/76, Merits, 22 October 1981.

¹³⁸ *Christine Goodwin v the United Kingdom* Application No 28957/95, Merits and Just Satisfaction, 11 July 2002; *I. v the United Kingdom* Application No 25680/94, Merits and Just Satisfaction, 11 July 2002.

¹³⁹ *Y. v France* Application No 76888/17, Merits and Just Satisfaction, 31 January 2023, at paras 90–91.

¹⁴⁰ *H.W. v France* Application No 13805/21, Merits and Just Satisfaction, 23 January 2025, at para 89.

Another noteworthy and recent illustration of this evolutive interpretation of the Convention concerns the protection of animal welfare. In the case of *Executief van de Moslims van België*, after emphasising that ‘the concept of “morals” was inherently evolutive’ and that ‘what could have been considered morally acceptable in the past may cease to be so with the passage of time’, the Court accepted, like the Court of Justice of the European Union and the Belgian Constitutional Court, that the protection of animal welfare could be attached to the aim of ‘public morals’ and might justify certain restrictions on the freedom to manifest one’s religion under Article 9 of the Convention.¹⁴¹ In contrast to an exclusively ‘anthropocentric’ reading of the Convention, the Court emphasized that ‘the Convention is not indifferent to the living environment of individuals covered by its protection’ and that it ‘cannot ... be interpreted as promoting the absolute upholding of the rights and freedoms it enshrined without regard to animal suffering, on the ground that the Convention recognises, under Article 1, rights and freedoms for the benefit of individuals alone’.¹⁴²

iii. Indivisibility and interdependence of human rights

The text of the Convention enshrines, in the main, civil and political rights (the so-called first-generation rights). The Convention is rooted in a liberal conception, with the action of national authorities being perceived as a potential threat that must be reined in. Economic and social rights (the so-called second-generation rights) fall, within the Council of Europe, under a different mechanism: that put in place by the European Social Charter signed in Turin in 1961 and revised in 1996, whose implementation by the Contracting States is subject to nonjudicial monitoring by the European Committee of Social Rights. The Court nevertheless indicated fairly quickly that there was ‘no water-tight division’ between the two sets of rights, explaining that ‘[w]hilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature’.¹⁴³ Cultural rights, which are rarely addressed, also deserve particular attention. Protecting cultural heritage enables individuals and communities to preserve their history and identity. In this respect, the Court recently explicitly recognized the legitimacy under the Convention of measures taken by national authorities to protect cultural objects from unlawful exportation and to return them to their country of origin.¹⁴⁴

In addition to the rights of the first and second generations, there are so-called ‘solidarity’ rights (third-generation rights) that have been brought to the fore in recent years. One such right in particular is the right to a healthy and sustainable environment. It is well known that, unless and until a new additional protocol is ever adopted,¹⁴⁵ the Convention does not guarantee such a right per se. The Court has nevertheless developed a significant body of environmental jurisprudence by having recourse to what is known as ‘indirect protection’ (or ‘ricochet protection’), meaning that the Court examines instances of harm to the environment whenever Convention rights are affected by such harm.¹⁴⁶ The Court has, to this extent, acted as an ‘environmental judge’.

¹⁴¹ *Executief van de Moslims van België and Others v Belgium*, supra 86 at paras 90–101. See on this judgment McGoldrick and DeCock, ‘Assessing public morality and the necessity of restrictions on ECHR rights’ (2025) *E.H.R.L.R.* 34.

¹⁴² *Ibid.*, at para 95 (free translation from French).

¹⁴³ *Airey v Ireland*, supra 11 at para 26.

¹⁴⁴ *The J. Paul Getty Trust and Others v Italy* Application No 35271/19, Merits and Just Satisfaction, 2 May 2024.

¹⁴⁵ See Recommendation 2211 (2021) of the Council of Europe’s Parliamentary Assembly ‘Anchoring the right to a healthy environment: need for enhanced action by the Council of Europe’, and Recommendation 2272 (2024) ‘Mainstreaming the human right to a safe, clean, healthy and sustainable environment with the Reykjavik process’.

¹⁴⁶ See, under Article 2 of the Convention, *Öneriyıldız v Turkey* Application No 48939/99, Merits and Just Satisfaction, 30 November 2004; under Article 8 of the Convention, *Tătar v Romania* Application No 67021/01, Merits and Just Satisfaction, 27 January 2009; *Cordella and Others v Italy* Applications Nos 54,414/13 and 54,264/15, Merits and Just Satisfaction, 24 January 2019.

More recently, it has taken on the role of a ‘climate judge’ insofar as climate issues intersect with the Convention’s rights. On 9 April 2024, the Court found for the first time, in the case of *Verein KlimaSeniorinnen Schweiz*, that there had been a violation of the Convention on account of the inadequacy of the measures taken by a State Party to combat climate change. In a novel and explicit manner, this judgment derives from Article 8 of the Convention ‘a right for individuals to enjoy effective protection by the State authorities from serious adverse effects on their life, health, well-being and quality of life arising from the harmful effects and risks caused by climate change’.¹⁴⁷ The judgment provoked a plethora of comment both in the media and in academia.¹⁴⁸ In my view, if one were to choose a single highlight, it would be the confirmation by the Court that there is an indissociable link between the adverse effects of climate change and the enjoyment of the human rights guaranteed by the Convention.¹⁴⁹ To be sure, there cannot be any effective protection of these rights without an environment that is conducive to their realization.

The decisions given by the Court on the same day in the cases of *Carême* and *Duarte Agostinho* remind us that, in parallel, the Court is an international court operating within a legal framework by which it is bound. The Court thus reiterated in *Carême* that it could not entertain applications brought by way of *actio popularis*.¹⁵⁰ Then, in the *Duarte Agostinho* decision, the Court rejected the applicants’ argument that the Court could address the matter before the courts of the respondent State had been given the opportunity to examine it.¹⁵¹ The Court has once again pointed out that it is not a court of first instance. In this respect, the *KlimaSeniorinnen* judgment emphasizes ‘the key role which domestic courts have played and will play in climate-change litigation’.¹⁵² As is known, the impetus in this field came from the *Hoge Raad* of the Netherlands with the *Urgenda* judgment of 20 December 2019, which directly relied on the Convention.

That judgment and those two decisions delivered by the Court on 9 April 2024 should be read together as a trilogy and seen as a whole. The Court has thus shown that it is a court of human rights that supervises their effective application having regard to present-day living conditions (*KlimaSeniorinnen*), but at the same time emphasizing that it is an international court whose judicial operation is confined within Convention-based rules that cannot be circumvented (*Carême* and *Duarte Agostinho*).

3. Preserving the conditions of ‘living together’

In the *KlimaSeniorinnen* judgment, the Court appealed to the concept of ‘intergenerational burden-sharing’.¹⁵³ This reflects the idea that the choices made today must not compromise the capacity of future generations to satisfy their own needs in their turn. This concerns not only the protection of our planet but also the state of public debt, social security, and the preservation of our cultural heritage. On that point, I would like to dispel a misconception and to emphasize that the Convention does not uphold an absolute sovereignty of the individual to the detriment of the collective good. Indeed, the Convention does not confer rights on individuals that are

¹⁴⁷ *Verein KlimaSeniorinnen Schweiz and Others v Switzerland* Application No 53600/20, Merits and Just Satisfaction, 9 April 2024, at paras 519 and 544.

¹⁴⁸ See Jelić and Fritz, ‘The “Living Instrument” at the Service of Climate Action: The ECtHR Long-Standing Doctrine Confronted to the Climate Emergency’ (2024) 36 *Journal of Environmental Law* 141; Burgorgue-Larsen, ‘Les trois visages du juge européen dans les affaires climatiques: pédagogue, prudent et audacieux’ (2024) 10 *Energie-Environnement-Infrastructures* 23; Lavrysen, ‘KlimaSeniorinnen, Urgenda et Klimaatzaak: l’union dans la diversité?’ (2024) 10 *Energie-Environnement-Infrastructures* 33; Van Drooghenbroeck, ‘Le réchauffement climatique et ses remèdes strasbourgeois: au cœur d’une politique judiciaire’ (2024) 140 *Revue trimestrielle des droits de l’homme* 867.

¹⁴⁹ *Verein KlimaSeniorinnen Schweiz and Others v Switzerland*, supra 147 paras 431–436.

¹⁵⁰ *Carême v France* Application No 7189/21, Decision, 9 April 2024.

¹⁵¹ *Duarte Agostinho and Others v Portugal and 32 others* Application No 39371/20 Decision, 9 April 2024, in particular para 228.

¹⁵² *Verein KlimaSeniorinnen Schweiz and Others v Switzerland*, supra 147 at para 639.

¹⁵³ *Ibid.*, at para 420.

detached from the society in which they live. In its case-law, the Court has had occasion to recognize notions such as ‘living together’ (derived from the French ‘*vivre ensemble*’)¹⁵⁴ or ‘social solidarity’,¹⁵⁵ for the purposes of justifying interference with Convention rights. These concepts have admittedly been relied upon in different and specific contexts, and any generalization should of course be avoided. Nevertheless, they confirm something that is quite obvious: the Convention does not promote the maximizing of personal desires without any concern for others or for the community at large. The Convention is, on the contrary, a source of obligations and responsibilities, including for individuals, with a view to ensuring the equal enjoyment by everyone of the rights that it guarantees.

VIII. CONCLUSION

Whilst it was little known in its early days, the Convention has become, over the years since its adoption in 1950, an instrument of crucial importance for the protection of human rights, democracy, and the rule of law in Europe. It has undoubtedly improved the daily lives of individuals. It has led to many positive reforms, triggering the abolition of certain legislations and practices that were discriminatory or that infringed upon the most basic human dignity.

The Convention owes its extraordinary development to the European Court of Human Rights, which serves as its authoritative interpreter and ensures compliance through a subsidiary review. As a result of the Court’s dynamic case-law—aimed at ensuring the practical effectiveness of rights and striking a fair balance between competing interests—the Convention has been adapted to the numerous and profound changes in society and has demonstrated its capacity to provide an adequate legal response to the major challenges of our age.

Today, the Convention is all the more vital in view of the ongoing state of upheaval. We are living in troubling times, marked by the return of war, an alarming resurgence of conflicts, recurrent crises, contested elections, and unprecedented disinformation campaigns. In such circumstances, and in its capacity as ultimate custodian of this international convention, the Court is vested with a historic responsibility. Its role is to supervise compliance with an instrument which, drafted on the ashes of the Second World War, affirms the promises of freedom and justice for not only current but also for future generations, pursuing the goal of a peaceful and sustainable society. This mission is strictly judicial. The Court is not meant to substitute itself for the States, nor to deprive them of their sovereignty. It must fulfil the mandate entrusted to it by the States themselves by safeguarding our common heritage. The Convention constitutes both a legacy from the past and a hope for the future.

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¹⁵⁴ *S.A.S. v France* Application No 43835/11, Merits and Just Satisfaction, 1 July 2014, at paras 141–142.

¹⁵⁵ *Vavříčka and Others v the Czech Republic*, supra 37 at paras 279 and 306.