

# Is the Universal Declaration of Human Rights obsolete? Recent trends in the case-law of the European Court of Human Rights\*

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## 1. The spirit of the Universal Declaration of Human Rights as underlying the case-law of the European Court of Human Rights

### a) Introductory remarks

It is for me a great honour to address this distinguished assembly here at University College London. It is also a great pleasure for me to return to London and in particular to this University and especially its Law faculty, genuinely dedicated to the study of Human Rights Law.

The launch of the *UCL Human Rights Law Review* coincides more or less with the 60<sup>th</sup> anniversary of the Universal Declaration of Human Rights.<sup>1</sup> This anniversary will offer the occasion to reflect once again on this important document which has inspired many international treaties and changed the status of the individual in international law.

The international concern about Human Rights has its roots in the horrors experienced during the Second World War. It has been hailed during the final session of the General Assembly sitting in Paris in December 1948 '*as an historic event of profound significance and as one of the greatest achievements of the United Nations*' and by the rapporteur<sup>2</sup> as '*the greatest effort yet made by mankind to give society new legal and moral foundations*' and as thus marking '*a decisive stage in the process of uniting a divided world*.'<sup>3</sup>

Although the Members of the United Nations were almost unanimous in stressing the importance of the Declaration they equally repudiated the idea that the Declaration imposed upon them a legal obligation to respect human rights and fundamental freedoms which it proclaimed. Almost all delegations stressed the absence of any element of legal obligation in order to draw attention to the necessity of the

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<sup>1</sup> See R. Cassin, 'La déclaration universelle et la mise en œuvre des Droits de l'homme', *Hague Recueil*, vol. 79 (1951-II), 237-368.

<sup>2</sup> The representative of Haiti.

<sup>3</sup> H. Lauterpacht, *International Law and Human Rights*, London, Stevens & Sons, 1950, pp. 394 et seq.

Declaration being followed by a legally binding instrument – a covenant – provided with means of international supervision and enforcement.<sup>4</sup>

But as Sir Hersch Lauterpacht has pointed out in his famous book on *International Law and Human Rights*, '[t]he fact that the Universal Declaration of Human Rights is not a legal instrument expressive of legally binding obligations is not in itself a measure of its importance.'<sup>5</sup> He continued by calling for much care not to infuse an artificial legal existence in a document which was never intended to have that character by saying that '[i]t is possible that, if divested of any pretence to legal authority, it may yet prove to, by dint of a clear realisation of that very fact, a significant landmark in the evolution of a vital part of international law. Undoubtedly, extreme care must be taken, in respect of a document of this nature, not to gauge by rigid legalistic standards what was intended by many States to be an historic demonstration of loyalty to the ideals of the Charter. Nor would even a suspicion of sterile scepticism or lack of reverence be appropriate in relation to a document which is the result of much faith, patient labour, and devotion.'<sup>6</sup>

My Belgian colleague, Judge Françoise Tulkens, whilst explaining human rights instruments to children who recently visited the Court, compared the Universal Declaration with international human rights treaties by saying that the Declaration is like a '*declaration of love*', whereas the treaties are like '*contracts of marriage*'. This beautiful image is self-explanatory. Nothing needs to be added.

The Preamble of the European Convention on Human Rights refers explicitly to the Universal Declaration of Human Rights by '*[c]onsidering that this declaration aims at securing the universal and effective recognition and observance of the Rights therein declared.*' The Preamble also states that '*[b]eing resolved, as the Governments of European countries which are likeminded and have a common heritage of political traditions, ideals, freedom and the rule of law to take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration.*'

This link between the Universal Declaration and the European Convention is highlighted by Alexander Orakhelashvili (Oxford University) who rightly emphasises that '*as the preamble of the European Convention suggests, the aim of the Convention is to create a mechanism for the collective enforcement of certain rights enshrined in the Universal Declaration of Human Rights of 1948. The Universal Declaration is referred to in the Preamble as a starting-point and guideline for the European human rights protection. The likemindedness and common heritage of traditions is invoked only as a reason for establishment of the enforcement machinery. This fact clearly indicates that the rights and freedoms as such are universal, supplemented by the European enforcement machinery. Thus, it must be reiterated that the basis of the public order of Europe is the nature, legal force and place in the international legal hierarchy of the right and freedoms enshrined in the European Convention.*'<sup>7</sup>

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<sup>4</sup> Lauterpacht, *op. cit.* at p. 399.

<sup>5</sup> at p. 417.

<sup>6</sup> *Ibidem.*

<sup>7</sup> A. Orakhelashvili, 'The European Convention on Human Rights and International Public Order,' (2002-2003) 5 *Cambridge Yearbook of European Legal Studies*, 237-270, at 242-243, footnote omitted.

The jurisprudence of the European Court of Human Rights, either *explicitly* or *implicitly*, reflects the importance of the principles enounced by the Universal Declaration.

### **b) The Universal Declaration and absolute rights**

In many cases, the Court referred *explicitly* to the Declaration as a means of interpretation. For example, in *Streletz, Kessler and Krenz v. Germany*<sup>8</sup> the Court explained in the case concerning the conviction of leaders of the GDR after German reunification on account of their responsibility for the deaths of East Germans attempting to flee to the West that

‘93. Article 3 of the Universal Declaration of Human Rights of 10 December 1948, for example, provides: “Everyone has the right to life.” That right was confirmed by the International Covenant on Civil and Political Rights of 16 December 1966, ratified by the GDR on 8 November 1974, Article 6 of which provides: “Every human being has the inherent right to life” and “No one shall be arbitrarily deprived of his life” (see paragraph 40 above). It is also included in the Convention, Article 2 § 1 of which provides:

‘Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.’

94. The convergence of the above-mentioned instruments is significant: it indicates that the right to life is an inalienable attribute of human beings and forms the supreme value in the hierarchy of human rights.’

In *Al-Adsani v. the United Kingdom*<sup>9</sup> the Court emphasised the prohibition of torture by stating that,

‘60. Other areas of public international law bear witness to a growing recognition of the overriding importance of the prohibition of torture. Thus, torture is forbidden by Article 5 of the Universal Declaration of Human Rights and Article 7 of the International Covenant on Civil and Political Rights. The United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment requires, by Article 2, that each State Party should take effective legislative, administrative, judicial or other measures to prevent torture in any territory under its jurisdiction, and, by Article 4, that all acts of torture should be made offences under the State Party’s criminal law (see paragraphs 25-29 above). In addition, there have been a number of judicial statements to the effect that the prohibition of torture has attained the status of a peremptory norm or *jus cogens*. For example, in its judgment of 10 December 1998 in *Furundzija* (see paragraph 30 above), the International Criminal Tribunal for the Former Yugoslavia referred, inter alia, to the foregoing body of treaty rules and held that ‘[b]ecause of the importance of the values it protects, this principle [proscribing torture] has evolved into a peremptory norm or *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even ‘ordinary’ customary rules’. Similar statements have been made in other cases

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<sup>8</sup> *Streletz, Kessler and Krenz v. Germany* [GC], nos. 34044/96, 35532/97 and 44801/98, ECHR 2001-II.

<sup>9</sup> *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, ECHR 2001-XI. On this case see, A. Orakhelashvili, ‘State Immunity in National and International Law: Three Recent Cases Before the European Court of Human Rights’, (2002) 15 *Leiden Journal of International Law*, 703-714 and by the same author, ‘Restrictive Interpretation of Human Rights treaties in the Recent Jurisprudence of the European Court of Human Rights’, (2003) 14 *European Journal of International Law*, 529-568, esp. 551 et seq.

before that tribunal and in national courts, including the House of Lords in the case of *ex parte Pinochet* (No. 3).’

The recent *Saadi v. Italy* judgment<sup>10</sup>, hailed by one commentator as ‘*the great judgment Europe needed to show to the rest of the world that her essential values will resist to the 9/11 attacks*’<sup>11</sup> clearly reflects the *spirit* of the Universal Declaration in the context of fight against terrorism.

## 2. Embarking in unchartered waters

I think that it is indeed more the spirit than the letter of the Declaration that underlies our recent case-law.

Especially, the Court’s judgments embarking in unchartered waters are relevant.

The fascinating articles in your new *UCL Human Rights Review* that I had the privilege to consult in advance, deal with subjects which are at the cutting edge of modern human rights adjudication. These major contributions, - and this is their main merit -, are not only descriptive but contain a thorough legal theoretical analysis of the recent Strasbourg trends.

### a) Adjudicating Socio-Economic Rights

Adjudication of Socio-Economic Rights is currently a matter of great concern.<sup>12</sup>

Article 25 of the Universal Declaration refers to certain socio-economic rights:

‘Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

Motherhood and childhood are entitled to special care and assistance. All children, whether born or out of wedlock, shall enjoy the same social protection.’

The Court is introducing, albeit timidly, a socio-economic dimension in the scope of Article 8.<sup>13</sup> Certainly, the Court is conscious of the danger of the inflation of human rights claims<sup>14</sup> but it has at the same time already accepted the permeability of rights or the integrated approach.<sup>15</sup> Already in the *Airey* judgment<sup>16</sup>, the Court held that

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<sup>10</sup> *Saadi v. Italy* [GC], no. 37201/06, ECHR 2008-...

<sup>11</sup> J.-P. Marguénaud, ‘Droits de l’homme – Jurisprudence de la Cour européenne des droits de l’homme’, (2008) *Revue de science criminelle et de droit comparé*, at 694.

<sup>12</sup> See on that, E. Palmer, *Judicial Review, Socio-Economic Rights and the Human Rights Act*, (Oxford and Portland, Oregon, Hart, 2007).

<sup>13</sup> Article 8 of the Convention reads as follows:

‘1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.’

<sup>14</sup> G. Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, (Oxford, Oxford University Press, 2007).

<sup>15</sup> Virginia Mantouvalou, (2005) 30 *European Law Review*, 573-585, commenting *Sidabras and Džiautas v. Lithuania*, nos. 55480/00 and 59330/00, ECHR 2004-VIII. For an earlier view, see F. Sudre, ‘La ‘perméabilité’ de la Convention européenne des droits de l’homme aux droits sociaux’, in *Pouvoir et liberté. Etudes offertes à*

'26. (...) the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention.'

## **b) Fight against poverty**

Fight against poverty might become an issue.<sup>17</sup> The House of Lords ruling in *Limbuela*,<sup>18</sup> concerning destitution, contains interesting developments in respect of Article 3 of the Convention<sup>19</sup> and the Strasbourg Court has recently (12 February 2008) communicated the *Budina v. Russia* case<sup>20</sup>, under the same provision. So maybe the scope of ECHR rights to found socio-economic claims is not so 'extremely limited' as feared by Tara Usher who rightly points out that 'there will always be some measure of subjectivity in deciding precisely what level of provision (of housing, education or healthcare etc) constitutes a minimum core necessary for human dignity.'<sup>21</sup>

Article 1 of the Universal Declaration of Human Rights states that 'all human beings are born free and equal in dignity and rights.'

As Riza Turmen points out 'freedom and equality are two essential conditions to ensure human dignity and human rights.'<sup>22</sup> He quotes Ronald Dworkin who argues that 'anyone who professes to take rights seriously ... must accept ... two important ideas. The first is human dignity. This idea ...supposes that there are ways of treating a man that are inconsistent with recognizing him as a full member of the human community, and holds that such treatment is profoundly unjust. The second is the idea of political equality. This supposes that the weaker members of a political community are entitled to the same concern and respect of their government as the

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Jacques Mourgeon, (Brussels, Bruylant, 1998), 468-478. For an analysis of the moral justification for protection of socio-economic rights, see J. Waldron, "Liberal Rights: Two Sides of the Coin", in Waldron, *Liberal Rights – Collected Papers 1981-1991* (Cambridge, Cambridge University Press), 1993, p. 1 at 4-17.

<sup>16</sup> *Airey v. Ireland*, 9 October 1979, Series A no. 32. See also the joint dissenting opinion by judges Tulkens, Bonello and Spielmann in *N. v. the United Kingdom* [GC], no. 26565/05, 27 May 2008 and the critical case-note of *N. v. the United Kingdom* by J.-P. Marguénaud: 'La trahison des étrangers sidéens', *Revue trimestrielle de droit civil*, forthcoming. Adde, the case-note on *N.* by the same author in (2008) *Revue de science criminelle et de droit comparé*, at 694.

<sup>17</sup> See R. Turmen, 'Human Rights and Poverty', *Human rights – Strasbourg Views, Liber Amicorum Luzius Wildhaber*, (Kehl, Strasbourg, Arlington, 2007), 447-469.

<sup>18</sup> *Regina v. Secretary of State for the Home Department, ex parte Limbuela*, [2005] UKHL 66.

<sup>19</sup> Article 3 of the Convention reads as follows:

'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'

<sup>20</sup> *Budina v. Russia*, no. 45603/05, (dec.), 12 February 2008.

In 2002, a Russian case, *Larioshina v. Russia* (no. 56869/00, (dec.), 23 April 2002, has been examined by a Chamber and found inadmissible, given *inter alia*, that the total amount of the applicant's pension and other social benefits, albeit very small (also about 25 euros), has not been demonstrated to raise issues under the Convention. The Court noted, however, that a complaint about a wholly insufficient amount of pension and the other benefits may, in principle, raise issue under Article 3 of the Convention.

On this case, see, F. Sudre, 'La protection des droits sociaux par la Cour européenne des droits de l'homme: Un exercice de 'jurisprudence fiction'?' (2003) 15 *Revue trimestrielle des droits de l'homme*, 755-779, at 761, mentioning also Recommendation R (2000) 3 of the Committee of Ministers of the Council of Europe.

<sup>21</sup> T. Usher, 'Adjudication of Socio-Economic Rights : One Size Does Not Fit All', (2008) 1 *UCLHRR*, pp.154 et seq. esp. at p.164.

<sup>22</sup> R. Turmen, *op. cit.*, p. 451.

more powerful members have secured for themselves.<sup>23</sup> In a recent article Christopher Mc Crudden argues that the basic minimum content of 'human dignity' seems to include as an element that every human being possesses an intrinsic worth, merely by being human.<sup>24</sup> And as Pierre-Henri Imbert has eloquently put it: 'Poverty is not only a denial of economic and social rights, but also a violation of civil and political rights.'<sup>25</sup>

The Court might have a closer look at poverty and its impact on the human rights safeguarded in the Convention. Admittedly the relationship between poverty and human rights is not readily accepted by the Court. However, poverty is often assessed by a modern society as the main impediment in the fulfilment of human rights. Today, poverty is usually defined in terms of lack of basic capabilities to live in dignity; 'deprivation of basic capability rather than merely a lowness of incomes'<sup>26</sup>, as well as 'denial of a whole range of rights pertaining to the human being, based on each individual's dignity and worth.'<sup>27</sup> Although it is true that there is no specific right not to be poor or to a higher standard of living safeguarded, as such, in the Convention, one cannot but agree that effective protection of human rights requires giving closer consideration to the level of satisfaction of certain very basic and fundamental need of individuals.

During the past decades the Court tended to interpret the Convention so as encompassing protection at times linked with certain economic and social rights. Although arguments expressing concern about poverty and denial of an individual's most basic needs have been submitted to the Court, primarily under Articles 2, 3, and 8 of the Convention, the Court has treated them with caution. No violation has been found in this respect so far.<sup>28</sup>

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<sup>23</sup> R. Dworkin, *Taking Rights Seriously*, (Cambridge, Harvard University Press, 1977), pp. 198-199.

<sup>24</sup> C. McCrudden, 'Human Dignity and judicial Interpretation of Human Rights', (2008) 19 *European Journal of International Law*, 655 at 679.

<sup>25</sup> P.-H. Imbert, 'Rights of the Poor, Poor Rights?', Reflections of Economic, Social and Cultural Rights', in *The Review, International Commission of Jurists*, special issue, no. 55 – Bangalore Conference (December 1995), p. 93, quoted by R. Turmen, *op. cit.*, p. 450.

<sup>26</sup> Amartya Sen, *Development as Freedom*, (London, Oxford University Press, 2006), at p.87, quoted by R. Turmen, *op. cit.*, p. 447.

<sup>27</sup> UN Commission on Human Rights, Summary Records, 41<sup>st</sup> meeting, 'Economic, Social and Cultural Rights', May 2000, paragraph 2.

<sup>28</sup> In *Van Volsem v. Belgium* (no. 14641/89, (1990) 2 *Revue Universelle des Droits de l'Homme*, 349, critical case-note by F. Sudre, 'La première décision quart-monde de la Commission européenne des droits de l'homme: Une bavure dans une jurisprudence dynamique', 349-353) the first explicit 'poverty case', the Commission rejected the complaint under Article 3 (allegations of a degrading treatment) as inadmissible, having found that the complaint of a single mother having three minor children, concerning the electricity cut-off due to the failure to pay for it did not attain the minimum level of severity in order to fall under the scope of Article 3 of the Convention. The Commission, however, did not make any in-depth analysis of this complaint in its decision. In *O'Rourke v United Kingdom* (no. 39022/97, decision of 26 June 2001) the Court held that the applicant's suffering, notwithstanding that he had remained on the streets for 14 months to the detriment of his health, had not attained the requisite level of severity to engage Article 3. However, had the applicant's predicament been the result of State action rather than his own volition (he was unwilling to accept temporary accommodation and refused two offers of permanent accommodation), and had he been ineligible for public support (which he was not), the Court's conclusion could be different. In *Nitecki v. Poland*, (no. 65653/01, decision of 21 March 2002) the Court found the applicant's complaint concerning the State's refusal to refund him the full price of a life-saving drug inadmissible under Article 2 of the Convention. However, it stated with respect to the scope of the State's positive obligations in the provision of health care, that an issue may arise under Article 2 where it is shown that the authorities of a Contracting State put an individual's life at risk through the denial of health care which they have undertaken to make available to the population generally (see *Cyprus v. Turkey* [GC], no.

In *Jane Smith v the United Kingdom*<sup>29</sup>, the Court emphasised the objective of eradication of poverty by recalling that on 21 April 1994, the European Parliament passed a Resolution on the situation of Gypsies in the Community, calling on the governments of member states 'to introduce legal, administrative and social measures to improve the social situation of Gypsies and Travelling People in Europe'; and recommending that 'the Commission, the Council and the governments of Member States should do everything in their power to assist in the economic, social and political integration of Gypsies, with the objective of eliminating the deprivation and poverty in which the great majority of Europe's Gypsy population still lives at the present time.'<sup>30</sup>

The Court nevertheless concluded:

'118. Moreover, given that there are many caravan sites with planning permission, whether suitable sites were available to the applicant during the long period of grace given to her was dependent upon what was required of a site to make it suitable. In this context, the cost of a site compared with the applicant's assets, and its location compared with the applicant's desires are clearly relevant. Since how much the applicant has by way of assets, what outgoings need to be met by her, what locational requirements are essential for her and why they are essential are factors exclusively within the knowledge of the applicant it is for the applicant to adduce evidence on these matters. She has not placed before the Court any information as to her financial situation, or as to the qualities a site must have before it will be locationally suitable for her. The Court is therefore not persuaded that there were no alternatives available to the applicant besides remaining in occupation on land without planning permission in a Green Belt area. As stated in the Buckley case, Article 8 does not necessarily go so far as to allow individuals' preferences as to their place of residence to override the general interest (judgment cited above, p. 1294, § 81). If the applicant's problem arises through lack of money, then she is in the same unfortunate position as many others who are not able to afford to continue to reside on sites or in houses attractive to them.

119. In the circumstances, the Court considers that proper regard was had to the applicant's predicament both under the terms of the regulatory framework, which contained adequate procedural safeguards protecting her interest under Article 8 and, by the responsible planning authorities when exercising their discretion in relation to the particular circumstances of her case. The decisions were reached by those authorities after weighing in the balance the various competing interests. It is not for this Court to sit in appeal on the merits of those decisions, which were based on reasons which were relevant and sufficient, for the

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25781/94, § 219, ECHR 2001-IV). In the *Nitecki* case 70% of the drug price was compensated by the State and the applicant only had to stand for the outstanding 30%. The Court came to the conclusion that the State had complied with its positive obligation under Article 2 in this respect. In *Goudswaard-Van der Lans v. The Netherlands*, the Court accepted that the introduction of the ANW has had effects on the applicant's disposable income. However, although the Convention, supplemented by its Protocols, binds Contracting Parties to respect lifestyle choices to the extent that it does not specifically admit of restrictions, it does not place Contracting Parties under a positive obligation to support a given individual's chosen lifestyle out of funds which are entrusted to them as agents of the public weal. (*Goudswaard-Van der Lans v. the Netherlands* (dec.), no. 75255/01, ECHR 2005-XI).

<sup>29</sup> *Jane Smith v. the United Kingdom* [GC], no. 25154/94, 18 January 2001.

<sup>30</sup> Para 67.

purposes of Article 8, to justify the interferences with the exercise of the applicant's rights.

120. The humanitarian considerations which might have supported another outcome at national level cannot be used as the basis of a finding by the Court which would be tantamount to exempting the applicant from the implementation of the national planning laws and obliging governments to ensure that every gypsy family has available for its use accommodation appropriate to its needs. Furthermore, the effect of these decisions cannot in the circumstances of the case be regarded as disproportionate to the legitimate aim being pursued.<sup>31</sup>

The Court will have a new opportunity to examine this issue and it has recently communicated under Articles 8 and 14 the alleged claim that public authorities did not fulfil their duties leaving gypsies in a precarious situation.<sup>32</sup>

### **c) Racial discrimination**

This brings me to the protection of Roma under the Convention.

The Declaration on Race and Racial Prejudice adopted by the UNESCO General Conference on 27 November 1978 recalling in its Article 6.2 inter alia the principles embodied in the Universal Declaration of Human Rights has been used by the Court in its important *D.H. v. Czech Republic* judgment<sup>33</sup> setting out the principles on indirect indiscriminate and rightly praised by Colm O'Cinneide as '*marking a distinct shift away from the relatively tame and formalistic nature of the Court's previous Article 14 jurisprudence*' and '*linking the decision with the seminal impact of the US Supreme Court's judgment in Brown v. Board of Education.*' '*The Court*', the author says, '*appears to have nailed its colours in a conscious and deliberate manner to the mast of the post-Brown Anglo-American equality jurisprudence.*'<sup>34</sup>

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<sup>31</sup> Compare with *Dogan v. Turkey*, in the context of internally displaced persons. *Doğan and Others v. Turkey*, nos. 8803-8811/02, 8813/02 and 8815-8819/02, ECHR 2004-VI (extracts). On this case, see J.-F. Flauss, 'Le double standard dans la jurisprudence de la Cour européenne des droits de l'homme, fiction ou réalité?', in *Les droits de l'homme et la constitution, Etudes en l'honneur du Professeur Giorgio Malinverni*, (Geneva, Zurich, Basel, Schulthess, 2007), at p. 148.

<sup>32</sup> '154. While the Court acknowledges the Government's efforts to remedy the situation of the internally displaced persons generally, for the purposes of the present case it considers them inadequate and ineffective. In this connection, it points out that the return to village and rehabilitation project referred to by the Government has not been converted into practical steps to facilitate the return of the applicants to their village. According to the visual records of 29 December 2003, Boydaş village seems to be in ruins and without any infrastructure (see paragraph 38 above). Besides the failure of the authorities to facilitate return to Boydaş, the applicants have not been provided with alternative housing or employment. Furthermore, apart from the aid given to Mr Kazım Balık and Mr Müslüm Yılmaz by the Social Aid and Solidarity Fund, which in the Court's opinion is insufficient to live on, the applicants have not been supplied with any funding which would ensure an adequate standard of living or a sustainable return process. For the Court, however, the authorities have the primary duty and responsibility to establish conditions, as well as provide the means, which allow the applicants to return voluntarily, in safety and with dignity, to their homes or places of habitual residence, or to resettle voluntarily in another part of the country (see in this respect Principles 18 and 28 of the United Nations Guiding Principles on Internal Displacement, E/CN.4/1998/53/Add.2, dated 11 February 1998).'

<sup>33</sup> *Laetitia Winterstein and others v. France*, no. 27013/07.

<sup>34</sup> *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, ECHR 2007-... See on this case, Leto Cariolou, 'Recent Case-Law of the European Court of Human Rights Concerning the Protection of Minorities (August 2006-December 2007)', (2006/7) 6 *European Yearbook of Minority Issues*, 409-427, esp. at 410-415.

<sup>34</sup> C. O'Cinneide, 'The Right to Equality : A Substantive legal Norm or Vacuous Rhetoric ?', (2008) 1 *UCLHRR*, 78-101.

If it is true that until 2000, as Judge Bonello pointed out in his dissenting opinion in *Anguelova*<sup>35</sup>, ‘the Court, in over fifty years of pertinacious judicial scrutiny has not, to that date, found one single instance of violation of the right to life (Article 2) or the right not to be subjected to torture or to other degrading or inhuman treatment or punishment (Article 3) induced by race, colour or place of origin of the victim’, the Court in the Grand Chamber judgment of 2005 in *Nachova*<sup>36</sup>, finding a violation of Article 14 of the Convention<sup>37</sup> taken in conjunction with Article 2<sup>38</sup> in that the authorities failed to investigate possible racist motives behind the events that led to the deaths of Mr Angelov and Mr Petkov, took the opportunity to state in para 145 that

‘145. Discrimination is treating differently, without an objective and reasonable justification, persons in relevantly similar situations (see *Willis v. the United Kingdom*, no. 36042/97, § 48, ECHR 2002-IV). Racial violence is a particular affront to human dignity and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction. It is for this reason that the authorities must use all available means to combat racism and racist violence, thereby reinforcing democracy's vision of a society in which diversity is not perceived as a threat but as a source of enrichment.’

#### **d) Family life and privacy**

Dr. Letsas, in his article<sup>39</sup> indicates that the European Court may be retreating from its arguably over-heavy reliance on the use of the margin of appreciation and the idea of consensus<sup>40</sup> claiming that in *E.B.*,<sup>41</sup> the European Court made no reference to the margin of appreciation and to the lack of consensus among Contracting States on whether homosexuals should be given authorization to adopt, as it had done in *Fretté*.<sup>42</sup> You understand that it is difficult for me to comment on Dr. Letsas suggestion that this would amount to ‘... a positive development that should be welcomed and that hopefully be applied by the Court across the board in the future.’<sup>43</sup>

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<sup>35</sup> *Anguelova v. Bulgaria*, no. 38361/97, ECHR 2002-IV.

<sup>36</sup> *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, ECHR 2005-VII.

<sup>37</sup> Article 14 of the Convention reads as follows:

‘The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.’

<sup>38</sup> Article 2 of the Convention reads as follows:

‘1. Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;  
(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;  
(c) in action lawfully taken for the purpose of quelling a riot or insurrection.’

<sup>39</sup> G. Letsas, ‘No human right to adopt?’, (2008) 1 *UCLHRR*, 134-153.

<sup>40</sup> See also G. Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, (Oxford, Oxford University Press, 2007).

<sup>41</sup> *E.B. v. France* [GC], n<sup>o</sup>/no. 43546/02, ECHR 2008-...

<sup>42</sup> *Fretté v. France*, no. 36515/97, ECHR 2002-I.

<sup>43</sup> G. Letsas, ‘No human right to adopt?’, *UCLHRR*, 2008, 134-153.

Be that as it may, I would like to emphasise that in *Dickson*,<sup>44</sup> the Court found *‘that the absence of proportionality assessment as regards a matter of significant importance for the applicants must be seen as falling outside any acceptable margin of appreciation so that a fair balance was not struck between the competing public and private interests involved and that there has, accordingly, been a violation of Article 8 of the Convention.*<sup>45</sup> Of course there have been many other outcomes pointing to a different direction and maintaining the role of the margin of appreciation.<sup>46</sup>

For example in *Evans*<sup>47</sup>, the Court considered that since the use of *in vitro* fertilisation (‘IVF’) treatment gave rise to sensitive moral and ethical issues against a background of fast-moving medical and scientific developments, and since the questions raised by the case touched on areas where there was no clear common ground amongst member States, the margin of appreciation to be afforded to the respondent State had to be a wide one.<sup>48</sup> This margin of appreciation must, according to the Court, in principle extend both to the State’s decision whether or not to enact legislation governing the use of IVF treatment and, once having intervened, to the detailed rules it lay down in order to achieve a balance between the competing public and private interests.<sup>49</sup>

And in the recent inadmissibility decision in *Pay*, concerning the dismissal of a probation officer, the Court held that given the sensitive nature of the applicant’s work with sex offenders, it did not consider that the national authorities exceeded the margin of appreciation available to them in adopting a cautious approach as regards the extent to which public knowledge of the applicant’s sexual activities could impair his ability effectively to carry out his duties.<sup>50</sup>

### **e) Freedom of expression and the right to reputation**

To strike a balance in freedom of expression cases is particularly difficult. As David Norris points out a number of jurisdictions *‘have long recognised that it is a legitimate curtailment of free expression to proscribe hate speech targeted at racial distinctions.*<sup>51</sup>

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<sup>44</sup> *Dickson v. the United Kingdom* [GC], no. 44362/04, ECHR 2007-...

<sup>45</sup> Para 85.

<sup>46</sup> R. St. J. Macdonald, ‘The Margin of Appreciation’, in R. St. J. Macdonald, F. Matscher and H. Petzold [eds.], *The European System for the Protection of Human Rights* (Dordrecht, Boston, London, Martinus Nijhoff Publishers, 1993), pp. 83 et seq., esp. at pp. 84 and 124, quoted by E. Brems, ‘The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights’, (1996) 56 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, at p. 313. See also the critical appraisal of the ‘margin of appreciation’ theory by M. R. Hutchinson, ‘The Margin of Appreciation Doctrine in the European Court of Human Rights’, (1999) 48 *International and Comparative Law Quarterly*, 638-50 and G. Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, (Oxford, Oxford University Press, 2007) and by the same author, ‘Two Concepts of the Margin of Appreciation’, (2006) 26 *Oxford Journal of Legal Studies*, 705-732.

<sup>47</sup> *Evans v. the United Kingdom* [GC], no. 6339/05, ECHR 2007-...

<sup>48</sup> Para 81.

<sup>49</sup> Para 82. For a critique see the joint dissenting opinion of judges Turmen, Tsatsa-Nikolovska, Spielmann and Ziemele.

<sup>50</sup> *Pay v. the United Kingdom*, no. 32792/05 (dec.), 16 September 2008.

<sup>51</sup> D. Norris, ‘Are Laws Proscribing Incitement to Religious Hatred Compatible with Freedom of Speech?’, (2008) 1 *UCLHRR*, 102-117.

The recent judgment delivered by the Court on 10 July 2008 in the case of *Soulas and others v. France*<sup>52</sup>, albeit not applying the abuse of rights article 17<sup>53</sup>, is very clear on that.

The complementary, but different approach offered by Professor Guest is equally challenging. If respect is due to all human beings and that respect is a form of transmitted self-respect, self-initiating freedom of thought marks out a fundamental identifying criterion of what it is to be human. And the author claims that respect for humanity requires that I must be free to have whatever thoughts I please to have and where those thoughts manifest themselves in actions that do not unjustifiably interfere with the freedom of others we must respect the right to these actions as well.<sup>54</sup>

This brings me to the question of balancing freedom of expression against other rights. Our case-law on the right to reputation has been recently developed.<sup>55</sup>

Article 12 of the Universal Declaration of Human Rights expressly states that

‘no one shall be subjected to arbitrary interference with his privacy, ...nor to attacks upon his honour and reputation.’

The Convention does not explicitly refer to the right of reputation.<sup>56</sup>

Until recently, the Court has paid tribute to the protection of reputation by applying the limitation clause under Article 10<sup>57</sup>.

For example, as mentioned in our study dedicated to Judge Pranas Kūris,<sup>58</sup> in the case of *Lindon, Otchakovsky-Laurens and July v. France*<sup>59</sup>, the Court found justified

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<sup>52</sup> *Soulas and Others v. France*, no. 15948/03, 10 July 2008.

<sup>53</sup> Article 17 of the Convention reads as follows:

‘Nothing in [the] Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.’

<sup>54</sup> S. Guest, ‘Respect for Bad Thoughts’, (2008) 1 *UCLHRR*, 118-133.

<sup>55</sup> See Dean Spielmann and Leto Cariolou, ‘The right to Protection of reputation under the European Convention on Human Rights’, in *Law in the Changing Europe, Liber Amicorum Pranas Kūris*, (2008), 401-424.

<sup>56</sup> By contrast other international human rights instruments like, for example, the International Covenant on Civil and Political Rights contain a specific reference to protection of reputation.

Article 17 of the International Covenant reads as follows:

‘1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.’

<sup>57</sup> Article 10 of the Convention reads as follows:

‘1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.’

<sup>58</sup> See Spielmann and Cariolou, *op. cit.*

the criminal conviction of defamation for publication of a novel which presented a well known politician as the ‘chief of a gang of killers’ and to whom responsibility for a fictional murder was attributed. The politician had been described as a ‘vampire who thrives on the bitterness of his electorate, but sometimes also on their blood.’ The majority of the Grand Chamber of the Court believed that the publication had overstepped the applicable limits and considered that ‘regardless of the forcefulness of political struggles, it is legitimate to try to ensure that they abide by a minimum degree of moderation and propriety, especially as the reputation of a politician, even a controversial one, must benefit from the protection afforded by the Convention.’<sup>60</sup>

But the mere fact that there is no explicit reference to the right to reputation in the Convention, save in the limitation clause of Article 10, is not decisive to deny the independent existence of this right. As we have emphasised in the article published in the book dedicated to Judge Pranas Kūris, ‘the Convention does not explicitly refer to the right of reputation unlike other International human rights instruments like, for example, the International Covenant on Civil and Political Rights. Arguing, however, that the rights to protection of individual reputation is not guaranteed by the Convention on such a basis would amount to a call for interpretation of the Convention on the basis of its framers’ intent; a suggestion that clearly contradicts the Court’s principle of dynamic and evolutive interpretation of the Convention.’<sup>61</sup>

It has also been emphasised in the same study that ‘[a]lthough much has been written about the right to freedom of expression, the protection of the right to individual reputation has been somewhat neglected. However, protection of reputation is based on the same notion of respect for human dignity that underpins all of the substantive rights of the Convention and has been consistently protected by the Court by its acknowledgement of the limits of the right to freedom of expression and recognition that it falls part of the general rights of personality protected by Article 8 of the Convention. This is hardly surprising given the value attached to good reputation by most people, which is linked to the innate worthiness and ability to lead a normal life as a social being of each person.’<sup>62</sup>

It is therefore ‘difficult to sustain an argument that the interest of an individual to be protected from unjustified and calumnious attacks on his personal integrity falls outside the scope of the personality rights guaranteed by Article 8 of the Convention. The Court has often reiterated that the Convention must be interpreted in a way that guarantees rights which are practical and effective as opposed to theoretical and illusory.’<sup>63</sup>

As we have pointed out in the already quoted article dedicated to Judge Pranas Kūris, ‘[a]n explicit recognition of the right to reputation under Article 8 of the Convention’<sup>64</sup> has been provided by the Court in its recent judgment of 15 November 2007 in the case of *Pfeifer v. Austria*<sup>65</sup> concerning the failure by the domestic courts

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<sup>59</sup> *Lindon, Otchakovsky-Laurens and July v. France* [GC], nos. 21279/02 and 36448/02, ECHR 2007-...

<sup>60</sup> Para 57. Spielmann and Cariolou, *op.cit.*, p. 405.

<sup>61</sup> Spielmann and Cariolou, *op.cit.*, p. 412.

<sup>62</sup> Spielmann and Cariolou, *op. cit.*, pp. 411-412.

<sup>63</sup> *Ibidem*, footnotes omitted.

<sup>64</sup> Spielmann and Cariolou, *op. cit.*, p. 422.

<sup>65</sup> *Pfeifer v. Austria*, no. 12556/03, ECHR 2007-... On this case, see T. Hochmann, ‘La protection de la réputation’, (2008) 19 *Revue trimestrielle des droits de l’homme*, 1171-1190.

to protect the applicant's reputation in defamation proceedings following the publication of a letter accusing him of acts tantamount to a criminal offence.

The applicant published a commentary that was strongly critical of a professor who had written an article alleging that the Jews had declared war on Germany in 1933 and trivialising the crimes of the Nazi regime. Some five years later, the professor was prosecuted on account of his article under the National Socialism Prohibition Act. He committed suicide shortly before his trial. Subsequently, the chief editor of a right-wing magazine, *Zur Zeit*, addressed a letter to subscribers asking for financial support and claiming that a group of anti-fascists was trying to damage it by means of disinformation in the media and by instituting criminal proceedings and civil actions. The letter repeated an allegation the magazine had already made in an earlier article that the applicant was a member of a 'hunting association' that had driven the professor to his death. The domestic courts acquitted the chief editor of defamation charges on the grounds that the letter contained a value judgment which had a sufficient factual basis. The complaint was that the State had failed to protect the applicant's reputation from interference by third parties.

In its judgment of 15 November 2007 the Court elaborated first on the question of applicability of Article 8 summing up the relevant case-law and concluded that a person's reputation, even if that person is criticised in the context of a public debate, forms part of his or her personal identity and psychological integrity and therefore also falls within the scope of his or her 'private life'.

As to the merits, the Court examined whether the respondent State had achieved a fair balance between the applicant's right to protection of his reputation, as an element of his "private life" and the competing right to freedom of expression guaranteed by Article 10 of the Convention. It went on to examine whether the Austrian courts had adequately protected the applicant from excessive criticism. It concluded that

[e]ven if the statement were to be understood as a value judgment in so far as it implied that the applicant and others were morally responsible for P.'s death, the Court considers that it lacked a sufficient factual basis. The use of the term 'member of a hunting society' implies that the applicant was acting in cooperation with others with the aim of persecuting and attacking P. There is no indication, however, that the applicant, who merely wrote one article at the very beginning of a series of events and did not take any further action thereafter, acted in such a manner or with such an intention. Furthermore, it needs to be taken into account that the article written by the applicant, for its part, did not transgress the limits of acceptable criticism.

In those circumstances the Court is not convinced that the reasons advanced by the domestic courts for protecting freedom of expression outweighed the right of the applicant to have his reputation safeguarded. The Court therefore considers that the domestic courts failed to strike a fair balance between the competing interests involved.<sup>66</sup>

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<sup>66</sup> Para 49. See also for the procedural aspect of Article 8, protecting the right to reputation *Taliadorou and Stylianou v. Cyprus*, nos. 39627/05 and 39631/05, 16 October 2008 and *Kyriakides v. Cyprus*, no. 39058/05, 16 October 2008.

## Concluding remarks

I share the view expressed by Judge Cançado-Trindade in his 2005 Hague Lectures that *'[d]espite the recurrence of atrocities in the last decades, human conscience has reacted in fostering the current process of humanization of International Law.'*<sup>67</sup> After all, and to quote Sir Hersch Lauterpacht again, *'the individual is the final subject of all law'*.<sup>68</sup> One of the fathers of the Universal Declaration, René Cassin, President of the European Court of Human Rights, justified the Declaration in these terms: *'Protéger tout l'homme et protéger les droits de tous les hommes'* ('Protect wholly the human being and protect the rights of all human beings'). Freedom and equality are the two basic ideas that ground the universality of human rights.<sup>69</sup> There can therefore be no hierarchy of fundamental rights and the balancing exercise is therefore of utmost importance. As several judges have pointed out in one of their separate opinions, *'...the Court must examine whether a fair balance has been struck between competing interests. It is not, therefore, a question of determining which interest must, in a given case, take absolute precedence over others.'*<sup>70</sup> This is in my view the spirit of the Universal Declaration and therefore I think that this Declaration is far from being obsolete.

London, 29 October 2008

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<sup>67</sup> A.A. Cançado Trindade, 'International Law for Humankind. Towards a new Jus Gentium', *Hague Recueil*, vol. 317, (2005), at 27.

<sup>68</sup> *Op.cit.*, pp. 69, 61 and 51. See also, A.A. Cançado Trindade, *op. cit.*, Vol. 316, p. 269.

<sup>69</sup> G. Cohen-Jonathan, 'Déclaration Universelle des Droits de l'Homme', in J. Andriantsimbazovina, H. Gaudin, J.-P. Marguénaud, S. Rials and F. Sudre (dir.), *Dictionnaire des Droits de l'Homme*, Paris, PUF, 2008, pp. 249 et seq.

<sup>70</sup> Joint dissenting opinion of judges Wildhaber, Sir Nicolas Bratza, Bonello, Loucaides, Cabral Barreto, Tulkens and Pellonpää in *Odièvre v. France* [GC], no. 42326/98, ECHR 2003-III.