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THE EUROPEAN CONVENTION ON HUMAN RIGHTS AT 70: THE DYNAMIC OF A UNIQUE INTERNATIONAL INSTRUMENT

-Keynote speech-

First of all, let me warmly thank the organizers for their kind invitation and congratulate them on the excellent organization of this important event, marking the 70th anniversary of the European Convention of Human Rights ("ECHR"). The celebration of this anniversary is important in order to highlight the significance of the Convention as one of the key international and European instruments.

This is true for a number of reasons. Firstly, the Convention constitutes one of the greatest peace projects in human history. As stressed in its Preamble, human rights and fundamental freedoms "are the foundation of justice and peace in the world". Peace is not just the absence of war. As it has been accepted long ago by the UN Security Council, gross, massive or systematic violations of human rights constitute a threat to international peace and security. Therefore, by ensuring the observance of human rights by way of a strong mechanism of judicial control is a factor of stability, security and peace.

Furthermore, the ECHR reflects the fundamental values of European civilization of the 21st century: democracy, rule of law, liberty and human dignity. As I shall try to demonstrate below, the Convention has greatly contributed to creating a common legal and political culture throughout Europe. Europe's reunification and peaceful coexistence has been based on these values and traditions.

At the same time, the Convention is an inspiring instrument not only because it protects a series of rights, but also because it embraces an anthropocentric approach by recognizing the right to individual application. The empowerment of the human being is at the epicenter of the whole system instituted by the Convention.

Finally and perhaps most importantly, the Convention has developed an unparalleled dynamic. There are many important human rights instruments at the universal and regional levels. Many of them recognize, nowadays, the right to an individual petition or "communication". But none of them has ever created this extraordinary impetus for an effective protection of human rights.

How can this phenomenon be explained? What are the relevant elements in this respect? The answer to this question is much more complex that it may seem at first sight. It has two dimensions: an institutional and a normative one.

I. Institutional elements

A. The right to individual application.- The right to individual application is undoubtedly the most important institutional element explaining the dynamic development of the Convention. As amended by Protocol No 11, Article 34 of the Convention recognises an unconditional right to lodge an individual application. Its exercise is no longer subject to a declaration confirming that it has been accepted by the States Parties. The unconditional character of this right distinguishes the ECHR, as amended in 1998, from all other universal or

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regional instruments recognizing individual petitions. Under the European Convention this is a procedural right in the true sense, unique at the international level and available to the 830 million people who fall within the jurisdiction of the Contracting Parties. The recognition of a right of this kind, combined with the substantial enlargement of the Council of Europe, has led to the exponential growth in the number of individual applications.

This evolution rendered the individual a real *subject* of the system. Not a mere user of it. He or she has exactly the same procedural rights as the respondent government. In *Mamatkulov and Askarov v. Turkey* the Grand Chamber held that the right of individual application "is one of the fundamental guarantees of the effectiveness of the Convention system of human rights protection". It is on that basis that the Grand Chamber acknowledged for the first time in this case the binding character of provisional measures. As it is well-known, provisional measures became over the years an essential feature of the functioning of the Court.

B. The permanent character of the Court.- The second element explaining the dynamic of the Convention is the permanent character of the Court. It is well-known that the European Court became permanent after the entry into force of the 11th Protocol in 1998. Before that, during the forty first years of its functioning (1959-1998) the "old" Court had adopted less than 850 judgments. During the last 20 years, the "new", permanent Court has rendered about 22,000 judgments and has examined more than 850,000 cases. These figures speak for themselves. It is quite evident that the permanent character of the Court creates an *esprit de corps.* It involves a shift of paradigm; it implies continuous exchange of views among judges; a continuous improvement of working methods, etc.

C. Execution of judgments.- Another important element concerns the execution of the Court's judgments. The role of the Committee of Ministers in supervising the execution process is extremely important and unique. The CM is assisted in the performance of its supervisory duties by the Department of the Execution of judgments of the ECHR which is part of the Secretariat of the CoE. No other international or regional human rights system has the benefit of an analogous mechanism. The Committee of Ministers is the guarantor of the credibility and the effectiveness of the Convention system. Its supervisory activities have evolved significantly, leading to the adoption of various individual measures in favour of applicants and general measures whether legislative or other.

The Parliamentary Assembly is yet another important actor in the field of execution, especially through its influence on national parliaments. The Commissioner for Human Rights of the CoE, as well as other monitoring bodies also contribute to the execution process. At the national level, the execution of judgments of the Court may involve not only the executive power but also the Parliament, the judiciary, the office of the Government Agent as well as Ombudspersons and other independent national human rights institutions. The complexity of the execution process may require in some cases a combined action of a number of those national stakeholders. It becomes, thus, quite clear that the execution of ECHR judgments entails a significant mobilization both at the international and national levels thereby contributing to the dynamics of the whole system.

D. Continuous evolution of working methods.- The forth institutional element I would like to stress is the continuous evolution of working methods. The decade between 2010 and 2019 was the reform decade. This important process was initiated by the Interlaken high-level conference and was pursued with other analogous events held in Ismir, Brighton, Brussels and Copenhagen. The whole process was completed only months ago.

At the same time, the Court has invested in continuously improving and refining its working methods. It has thus given full effect to the potential of the 14th Protocol and has undertaken a number of other reforms related to the high level governmental conferences. The backlog of cases has significantly dropped from around 160,000 pending cases in 2011 to around 60,000 cases today. The Committees of three judges have been more and more productive. IT has enormously supported the functioning of the Court with significant results, especially during the current sanitary crisis. The Directorate of the Jurisconsult has greatly contributed to the coherence and consistency of our case-law. The non-contentious dedicated phase, introduced more than a year ago, has begun to produce its effects.

The whole system has proven to be very flexible and adaptable to changing and evolving circumstances, including during the period of the first confinement due to COVID-19. During this period, that is from the 16th of March up to the 11th of May, the Court has been in a position to apply strictly the necessary security measures while at the same time having examined about 5.400 applications and more than 200 requests for provisional measures.

E. Dialogue.- A fifth institutional element explaining the dynamism of the Convention system is the will of the Court to engage in a dialogue with national authorities and especially with national judiciary. Since 2015, the Court has created a Superior Courts Network. Nowadays, 89 courts from 40 countries participate in this network which is the biggest judicial network in the world. The network gives the possibility of exchanges of information both vertically -that is between the ECtHR and national courts- and horizontally. It promotes easier access to the case-law of the Strasbourg Court including through the so-called Knowledge Sharing Platform.

Furthermore, the European Court receives every year a number of delegations from national judiciaries at all levels. I would like to mention, by way of example, the visit of an important delegation from the UK, led by the President of the Supreme Court, Lord Reed, on 6th February. It gave the opportunity to affirm the commitment of the British judiciary to the Convention system 6 days after Brexit.

The 16th Protocol to the ECHR is yet another parameter of this dialogue. The 1st Advisory Opinion has been adopted in April 2019 further to a request by the French Court of Cassation. A second Advisory Opinion has been adopted in May 2020, further to a request by the Armenian Constitutional Court The new Advisory Opinion procedure presents a great potential and could lead to an important evolution of the role of the Court.

Regular dialogue with the Court of Justice of the EU has promoted the harmonization of the interpretation of Human Rights provisions by the two European Courts. In the same vein, a series of recent meetings with other CoE monitoring bodies aims at promoting the coherence of the European human rights system. All these forms of dialogue have contributed to the emergence of a distinct European legal identity. This brings me to the second part of my speech related to the normative elements.

II. Normative elements

A. ECHR and Domestic Law. – My first point in this respect is that the ECHR, as interpreted and applied by the Court, permeates most branches of domestic law in the States Parties: private law and civil procedure, criminal law and criminal procedure, penitentiary law, constitutional and administrative law, refugee law, etc. The Convention is perhaps the only international instrument which impacts domestic law to such an extent. The ECHR is a case study from the viewpoint of the relations between international and domestic law. The relationship between the Convention and national law is fusional. Not only is the Convention an integral part of domestic law, but national law may also, in certain cases, become an integral

part of the Convention. Take Article 5 on the right to liberty and security, for instance. Any arrest and detention must be in conformity with national law. A violation of the applicable domestic rules amounts *ipso facto* to a violation of article 5 of the Convention.

B. Evolutive Interpretation.- The ECHR is seventy years' old but at the same time is incredibly modern. This is due to the so-called evolutive interpretation of the Convention. This method of interpretation was invented in 1978 in the case of *Tyrer v. the UK*. It means that the Convention should be interpreted taking into account present day conditions. Quite revolutionary at that time, this method of interpretation has been endorsed by most international tribunals including the International Court of Justice. According to the Hague Court, if a treaty is not concluded for a given period of time and contains generic terms, it is the presumed will of the Parties that the treaty in question be interpreted in an evolutive manner.

Evolutive interpretation has its limits though. It cannot go against the letter of the Convention. It cannot be *contra legem*. At the same time, it should be in conformity with the object and purpose of the treaty and reflect present day and not future conditions.

On the basis of the evolutive interpretation the Court has dealt with a number of new issues concerning, for instance, new technologies, scientific developments or the environment. It has also dealt with vulnerable groups, such as minorities, refugees, unaccompanied minors or with violence against women.

C. Harmonisation of principles and practices.- Using its interpretative methodology, the Court has strived towards harmonising human rights standards throughout Europe. Given the diversity of legal systems and traditions in our continent, this is one of the major achievements of the Court. It constitutes, at the same time, a real challenge for individual judges and the Court as a whole.

Harmonisation does not mean complete uniformity, though. The margin of appreciation doctrine has greatly contributed to striking a balance between harmonization on the one hand and the specificities of different societies and legal systems on the other. Depending upon the nature of the rights involved and the relevant context, the margin can be wide or narrow. When dealing, for instance, with a major political decision in the context of an economic crisis affecting the right to property, the Court recognizes a broad margin. When it comes to a difference of treatment based on sex or sexual orientation, the margin of appreciation becomes very narrow.

The so-called European consensus is yet another methodological tool in order to achieve the harmonization of human rights standards. When the Court finds that such a consensus (or at least a clear trend) exists indeed, the margin of appreciation of States usually shrinks.

All this brings me to my last point, namely the creation of a distinct European legal and political identity.

D. European legal and political identity.- This seems to be the major achievement of the Court and the Convention system. What emerges after more than 60 years of case-law is a common body of rules at the pan-European level based on fundamental values.

Genuine democracy constitutes the core of such values. In the words of the Court "democracy appears to be the only political model contemplated by the Convention and, accordingly, the only one compatible with it". The Court is the only international body which has defined in such a clear manner the relationship between democracy and human rights. Human rights are not politically neutral. As it resulted from the well-known *Greek case*, more than 50 years ago, the ECHR cannot be correctly applied and effectively respected by a

dictatorial or an illiberal regime. Only a genuinely democratic regime is compatible with the philosophy and the spirit of the Convention.

Since the beginning of 2018, the Court has applied Article 18 of the Convention concerning abuse of power eight times. In this way, the Court has recently reacted to the democratic deficit that may be observed even today in some European States.

The *rule of law* is another fundamental value which characterizes European legal identity. In a number of cases, the Court has said that the rule of law underpins the whole Convention system (*Micalef v. Malta*). It is inherent in almost all provisions of the Convention. One should bear in mind, however, that the rule of law is not the rule of just any law. Law should reflect the fundamental values and the rights enshrined in the Convention.

The right to a fair trial constitutes the quintessence of the rule of law. It reflects the ideal of justice and of fair balance which irrigates the Convention. The independence of the judiciary is of paramount importance in this context. The Grand Chamber judgment in *Baka v. Hungary* is emblematic in this respect. The principles of the Court's case law have been recently recalled by the CJUE. The Court has communicated relevant cases to a number of States. Judges in those countries are currently facing challenges to their independence. This situation calls for continuous vigilance by the Court and other relevant European institutions.

Freedom, tolerance and broadmindedness form a triptych which appears as a leitmotiv in a long series of judgments relating to freedom of religion, freedom of expression and freedom of association. This triptych is inherent to any democratic regime and forms part of the distinct European identity. Any form of exclusion, segregation, discrimination, indoctrination and related intolerance has systematically been condemned by the ECHR.

Furthermore, when examining cases related to terrorism, the Court has always combined *freedom* and *security* and tried to ensure a balance between those values. The Court has shown understanding when faced with the sometimes quite extreme difficulties of the combat against terrorism. At the same time, it has not abandoned the principles of its case-law, which have, on the contrary, been restated and strengthened. It has even succeeded in adopting a more in-depth and focused approach through its dynamic interpretation of the Convention.

The value of freedom cannot be separated from that of *human dignity*. Being the lynchpin of the international and European conception of human rights, dignity is the prism through which all rights are protected. Human dignity is inherent in all the substantive provisions of the Convention and its Protocols. It carries particular weight when it comes to the right to life and the prohibition of the death penalty; the protection of physical and mental integrity and, accordingly, the prohibition of torture and inhuman or degrading treatment; together with the prohibition of slavery, servitude, forced labour and human trafficking.

From the quasi-total abolition of the death penalty across the European continent, to the extension of the scope of Article 4 of the Convention to encompass trafficking, while not forgetting the volume of case-law on ill-treatment, the history of the Court's success in preserving human dignity has been outstanding.

The Convention, drafted as it was in the aftermath of the atrocities of the Second World War, gives pride of place to *peace*. Peace is related to the concept of security at national and international levels. Tensions and conflicts between the member States of the Council of Europe, which have given rise to a number of inter-state applications, together with an upsurge in terrorism and a flow of migrants and asylum seekers which is unprecedented in the history of humanity, raise considerable challenges for human rights. The Court is often called to deal with them.

To conclude, I would say that the parameters which explain the unique character and dynamic of the European Convention are at *the institutional level*: the unconditional right of individual application; the permanent character of the Court; the unique execution mechanism; the continuous adaptation of the working methods of the Court; the dialogue with national

authorities; *and at the normative level*: the penetration of the Convention into all branches of domestic law; the evolutive interpretation which guarantees the modernity of the text; the harmonisation of human rights standards at pan-European level and the progressive creation of a European legal and political identity.

The current circumstances facing Europe, and indeed the world, are challenging. Many of the fundamental values of the Convention are threatened. I believe, however, that the Court has created the necessary conditions and the framework permitting it to confront those challenges with determination and prudence.