

CommDH/Speech(2022)3

European Court of Human Rights Solemn Hearing for the Opening of the Judicial Year

At the crossroads – Democracy, Human Rights and the Rule of Law

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Strasbourg, 24 June 2022

President Spano,
President of the Hellenic Republic,
Distinguished Judges, excellencies, ladies and gentlemen,

As Commissioner for Human Rights, I attach crucial importance to dialogue with the Court. There have been many occasions on which I have had the honour to come to this room (but also to address this Court remotely by taking part in the first digital hearing in the history of this institution). It is always a special feeling to be present in the place where decisions are taken on matters which not only bear great importance for the individuals concerned but also reflect topical issues with which democratic societies are confronted, and that is why it is an immense honour to have been invited to deliver an address at today's Solemn Hearing. I see this invitation as a sign of particular attention to the current human rights challenges, but also as a result of the continuous dialogue that has been established between our institutions. I consider it a good example of synergies that, each within its own mandate, contribute to the good functioning and sustainability of the Convention system.

It is perhaps not an exaggeration to say that the need for this system today is as pressing as it was when it was established more than 70 years ago. Back then, the leaders of European countries took the foresighted decision to create a system for the collective enforcement of human rights with the aim of safeguarding individuals from state abuse and newly established democracies from the risks of backsliding into totalitarianism. We should not forget this.

When the Convention was adopted, our continent looked very different. The death penalty was widely legal and operative. Hundreds of thousands of Europeans were still waiting to be repatriated or resettled after WWII, while thousands of new refugees were escaping through the Iron Curtain. In several countries homosexuality was criminalised.

If today's picture looks much better, it is largely thanks to the Convention system and the Court's dynamic and evolutive interpretation doctrine that has been instrumental in applying a text adopted in 1950 in light of major societal changes which happened along the past seven decades. No wonder then that the Convention, its Protocols, the Court and the whole human rights protection system that the Council of Europe has established have become a lodestar for those pursuing justice, dignity and equality.

But success stories, too, come with obstacles to overcome: the Convention system has been repeatedly attacked and delegitimised in some European countries; key judgments of this Court have still not been implemented; and states often fail or do not even try to address the structural problems that deprive people of their Convention rights.

In the long run, the non-enforcement of the Convention rights and the disregard of basic principles of international law can lead to deleterious consequences.

The case of the Russian Federation stands out in Europe as one of the worst examples of disregard for human rights. Today's hearing takes place in extraordinary circumstances for the values our Organisation represents. Exactly four months ago, Russia started a brutal military attack on Ukraine, which has caused terrible human suffering to millions of people. Many thousands were ruthlessly killed, including hundreds of children, and millions of people saw their lives turned upside down.

I could see for myself the traces of the atrocities committed in Ukraine during my visit at the beginning of May. In Kyiv, Irpin, Bucha and Borodyanka I listened to shocking stories of extrajudicial executions, violence and destruction.

The current situation is the tragic epilogue of years of departing from agreed human rights standards. For years, the government of the Russian Federation has ignored judgments of this Court and recommendations from our Organisation, including my Office. The unresolved impunity for the grave human rights violations stemming from the war in Chechnya, the brutal internal repression of dissent and free expression and now this ruthless aggression against Ukraine and its people are painful illustrations of what can happen when a state disregards international law and order and ignores human rights standards and the common rules established to guarantee international peace.

It is an extreme case, hardly comparable with other situations in our member states. There are, however, signs of an increasing lack of compliance with the most basic human rights standards of our Organisation in member states, which requires serious attention and more resolute action on the part of states within the collective system of our Organisation.

One worrying trend I have observed during my mandate as Commissioner is the erosion of the rule of law in a growing number of our member states. I think we all agree that without full respect of the rule of law, it is not possible to protect human rights.

The erosion of the rule of law manifests itself when governments refuse to abide by court decisions, undermine public confidence in the judiciary, violate judicial independence, weaken judicial bodies, pressure individual judges, and reduce parliaments to a rubber-stamp.

Invariably, it goes hand in hand with a hardening of governments against the standards set in the Convention and by the institutions of the Council of Europe.

Standards on freedom of expression, freedom of association and freedom of assembly are a case in point. As part of my mandate, I work constantly with human rights defenders, civil society and the press. Their reality is far from reassuring.

The case of Osman Kavala is emblematic. He has been in detention in Türkiye for almost the past 56 months despite a judgment of this Court from 2019, as well as nine decisions and one interim resolution by the Council of Europe Committee of Ministers. His case shows the wrongs and unfair treatment that individuals may face when the judiciary provides tools for repression instead of remedies against it. It also shows the limits of what an international system can achieve. In the end, the ultimate responsibility for upholding human rights norms lies with states.

Just last week this Court issued its judgment in the case of *Ecodefence and Others v. Russia* -- a long awaited one which is also very important for civil society.

Non-execution of judgments sometimes affects not only individual applicants, including human rights defenders, but also the broader democratic fabric of a society. For almost thirteen years now, the judgment of this Court in the case of *Sejdic and Finci* against Bosnia and Herzegovina has remained a dead letter, mainly because of a lack of political will. The non-implementation of that judgment and of others like *Zornić, Šlaku and Pilav* dealing with the discriminatory nature of the country's electoral system is one of the factors that sustain a status quo based on the ethnic divisions that represent a constant threat to peace and stability in Bosnia and Herzegovina.

Judgments of this Court on individual complaints as well as more broadly those which reveal systemic problems set the record straight and give visibility and recognition to victims. These judgments are also

an authoritative counterweight to the forces that seek to evade justice by discrediting the international system of human rights protection and by adopting laws that stifle dissent as well as individual and associative rights.

I have observed other systemic problems that illustrate the hardening of certain governments against the spirit and the letter of the Convention: fixing these problems is primarily the member states' responsibility. Everyone should be able to seek and receive justice at home, in line with the subsidiarity principle. Recourse to an international court should be seen for what it is – essentially a failure by a state to provide proper national remedies.

But we all have our role to play. As an institution enshrined in the Convention since the entry into force of Protocol No. 14 in 2010, I share the responsibility to help make Convention rights a reality for all.

The Convention has been a permanent reference point in my work, be it in my country monitoring, thematic work or third-party interventions before this Court. As *amicus curiae*, my role is obviously not to provide this Court with a specific assessment of a case before it. However, as stressed in the explanatory report to Protocol No. 14, the Commissioner's work and experience may "help enlighten the Court on certain questions, particularly in cases which highlight structural or systemic weaknesses in the respondent or other High Contracting Parties". These elements, and the protection of the "general interest" to which the explanatory report to Protocol No. 14 also refers, are my compass while selecting the cases on which, as a friend of this Court, I submit observations. So far, I have made 16 *amicus curiae* interventions. Most of them have dealt with harassment of human rights defenders, the denial of migrants' rights, gender inequality and limitations to women's rights. They have also covered several countries, including Azerbaijan, Croatia, Denmark, France, Italy, Moldova, Poland, Portugal, Romania, the Russian Federation, Spain, Sweden and Türkiye.

Much has been said about the Convention as a living instrument. Therefore, I will not dwell on this aspect. Suffice here to say that this Court's dynamic and evolutive interpretation has made the Convention system a source of inspiration within Europe and beyond.

Such a dynamic and evolutive interpretation has brought a contemporary reading of the rights protected and of the obligations of the High Contracting Parties, also in the face of new challenges emerging in society. Particularly noteworthy in this context is the role of this Court in assessing the compliance of measures adopted during the COVID-19 pandemic by several High Contracting Parties which was discussed at your seminar this afternoon.

If new challenges in society put the evolutive interpretation of the Convention to the test, old ones pose a more existential threat to the Convention system. I refer here to situations in which a High Contracting Party violates the right to individual applications or refuses to recognise the binding nature of judgments and the obligation to execute them.

Here too the Court has been able to adapt and defend foundational principles. I consider of particular importance for example the Court's principled case-law in terrorism-related cases where it reaffirmed the duty states have to comply with their Convention obligations even when this may lead to unpopular decisions. In the same line, the Court's role in the protracted non-compliance of its judgments by states represents a bulwark against arbitrariness.

The Court has also been innovative in addressing emerging challenges and exploring new avenues, like the reinforcement of the dialogue between courts, including the Supreme Courts Network, and in giving a voice to NGOs and civil society, which are often the first in bringing human rights violations to light.

This is all important and has already been stressed.

What I think should be stressed more is the role of the Convention as a life-saving instrument. Here I would like to provide a few examples from my field work that show the impact that the Convention system can have on people's lives.

In November 2021 I was in Poland to assess the human rights situation of asylum-seekers and migrants on the border with Belarus. Late one night, I accompanied human rights defenders in the border areas and witnessed how a group of asylum-seekers, who had been stranded in the cold and wet woods for many weeks and pushed back to Belarus many times, could finally safely leave the woods thanks to the

protective guarantee of the Court's interim measures. It is evident to me – and has also been stressed by many activists and lawyers helping asylum-seekers that I have spoken with – that for many of these people, the Court's interim measures were the only protection from an immediate return across the border. These people would have otherwise been left in freezing conditions and without access to even the most basic humanitarian assistance, and possibly subjected to severe ill-treatment at the hands of the Belarusian authorities.

Several of the interim measures addressed to the Government of Greece urging the protection of the health, life and physical integrity of asylum seekers held in several reception facilities were equally life-saving. Having been in such reception facilities in Lesbos, Samos, and Corinth, I cannot but attest to the importance of your decisions.

I do not have the slightest doubt that interim measures have saved many human lives across our continent.

These are some examples that speak for the ability of this Court to interpret the Convention in the light of emerging problems and the potential of the Convention system to remain a life-saving instrument. These aspects must be protected. We all have a role in that: the Court, monitoring bodies, my Office. But the primary responsibility rests on the shoulders of all state Parties' institutions: the executive, the legislative and the judiciary.

I think this message resonates with the President of the Republic of Greece, Ms Katerina Sakellariopoulou, whom I am happy to see among us today. Madam President, you took a clear stance on several occasions on the need to protect human rights and the rule of law to ensure a healthy democracy. Such messages coming from high level state officials are crucial to influence the commitment of state authorities to render the Convention rights practical and effective at national level. Because for all the international mechanisms that we may have to protect human rights, the reality is that the best human rights protection is one which happens at national level.

To their credit, member states have been foresighted in establishing the Convention and its mechanisms over the past 73 years. They have enriched the Convention with additional Protocols, they have created a unique mechanism in the world where individuals, NGOs or groups of individuals can hold states accountable. Thanks to Protocol 14 and the adoption of Rule 9 by the Committee of Ministers, states gave my office *motu proprio* access to the Court and the possibility to intervene in the process of the execution of judgments. With Protocol 16, they laid down the basis for a more harmonised integration of human rights law at national level through the possibility for the Court to give advisory opinions to the highest courts and tribunals of Contracting Parties. This has a huge potential to reinforce both the principle of subsidiarity and the role of national judges in protecting the rights of the Convention.

The challenge now is how to enforce this unique system of collective responsibility to improve human rights protection. I think that one of the main steps that member states should take is to remove obstacles which impede or slow down the implementation of judgments.

The problem of non-implementation or cherry-picking Court judgments is one stark illustration of the faltering commitment to upholding human rights standards in many of our member states. The failure to implement some of the interim measures ordered by this Court is also part of this trend. At the root of this problem lies a misplaced belief by politicians that they enjoy a higher democratic legitimacy than the judiciary. This often results in the adoption of legislation which is not aligned with international or even national jurisprudence, the dismantling or the control of democratic institutions and the subordination of human rights standards to a state's interest. Such trends undermine the democratic fabric of our societies, and must be reversed.

I have said this on other occasions, and I think it is worth repeating it in this room of justice: states should no longer procrastinate in realising human rights for all.

They should recommit to the values and norms of our Organisation. State authorities - and I include here the three branches of power – should become more robust defenders of human rights and of the collective system put in place to protect, promote and fulfil them.

I see in particular four areas where states should intervene.

One crucial step is to embed the standards of our Organisation and the case-law of this Court into national legislation, jurisprudence and practice.

The prevention of violations and the provision of effective remedies at national level is another key area of intervention. To this end, the independence and impartiality of the judiciary should be respected and reinforced and cooperation with National Human Rights Institutions, NGOs and civil society improved.

National judges should be frontline actors in giving effect to Convention rights. They should be supported – not constrained – in this endeavour. In this sense, following the tabling of the Bill of Rights Bill by the United Kingdom government earlier this week, I cannot but feel concerned at the restrictions it appears to entail on the national judges' ability to interpret the Convention rights as ordinary judges, and to take this Court's case-law fully into account while preserving it as a living instrument. The adverse impact of this on individual access to Convention rights, and on the principle of subsidiarity must also be mentioned in this context.

Third, I see the need for increased awareness and education about the standards of the Convention system, both among the public and legal practitioners. This is particularly important at the present juncture because the shorter time available to lodge a complaint introduced by Protocol 15 may complicate the exercise of the right to individual applications, which carries the risk of reducing the effectiveness of the Convention system.

Lastly, I think that member states should make better use of the tools of the Organisation to exert the necessary pressure to ensure respect for democracy, human rights and the rule of law by their peers.

Mr President,

Reaching the conclusion of my intervention, I would like to quote you when, in a recent speech given in Oslo, you said that: "Bringing rights home is an integral part of the system itself and we should embrace it and attempt to make this transformative change as smooth as possible."

This is the key to giving effective meaning to the Convention system.

Mr President, ladies and gentlemen,

The key principles of the Convention system, in particular respect for human rights for all and the guarantees provided by a solid rule of law, are the lifeblood of our democracy. They are not an abstract concept, but indispensable nutrients of just and thriving societies.

The Council of Europe and its Court are the main protectors and promoters of this system. It is therefore necessary that member states, both within their borders and as part of a community, strengthen their commitment to the founding values and institutions of our Organisation and to the universal protection of human rights.

The Convention system stems from the vision and courage of leaders who understood that defining common European norms and applying them at national level was the best antidote for oppression.

The times of those leaders were not easier than ours. Our task is not bigger than theirs. It is now our turn to give renewed impetus to the ambition of safeguarding a system "based upon justice and international co-operation".