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20TH BERLIN CONFERENCE ON REFUGEE RIGHTS Europe, Coronavirus and Human Rights - The Significance of the European Convention on Human Rights (ECHR) for the Protection of Refugees

Protecting refugees in Europe: the ECHR and beyond
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Ladies and gentlemen,

Over the past 70 years, the European Convention on Human Rights has become a crucial instrument to protect the rights of hundreds of millions of people in Europe. Even though the Convention does not mention refugees specifically, important protections have arisen from the Court's case law, including in the areas of non-return, family reunification and limits on detention.

This notwithstanding, the rights of refugees under the Convention are all too often violated: they are left risking their lives at sea, returned to dangerous countries, subjected to ill-treatment or arbitrary detention, kept separated from their families, or placed in overcrowded camps in appalling conditions.

Today, you will hear from excellent experts about the role the Convention plays in protecting refugees, and perhaps even some of its limits. In my short comments, I want to look a little bit **beyond** the Convention in the strict sense. Rather, my focus will be on how member states' actions are challenging the important protections it provides to refugees.

First, I believe there is a shift in how member states are responding to the case law of the Court in this area. It is not a new phenomenon that Council of Europe member states sometimes try to circumvent their obligations under the Convention. However, when it comes to the arrival of refugees and migrants, this is becoming a recurrent feature. Increasingly, when designing asylum and migration policies, the focus of member states does not seem to be on ensuring compliance with the Convention. Rather, the focus is on finding new ways to prevent such obligations from becoming applicable in the first place.

This is particularly evident in the Mediterranean. When the Court found, in the *Hirsi Jamaa* case, that the interception and return of migrants to Libya violated Article 3 of the Convention, it gave a clear signal to member states. Although direct returns to Libya largely stopped, the *Hirsi Jamaa* judgment has been used as a blueprint to develop new practices to try and avoid effective control of those at sea. This has included outsourcing rescue to the Libyan authorities, without any human rights safeguards in place. While this puts Council of Europe member states at arms' length from events, it does nothing to stop people from being exposed to torture or inhuman or degrading treatment. Even if member states argue that this conforms to the letter of the Convention, a matter that remains to be seen, I believe this approach is hugely damaging to its spirit.

Conversely, when the Court does **not** find a violation in specific situations, member states are more than willing to extrapolate from that a broad justification for their practices to keep those in need of international protection out. The Grand Chamber judgment in the case of *ND and NT v. Spain*, for example, has been welcomed by several member states as a *carte blanche* for their pushback practices. This is despite the fact that the judgment leaves their obligations under Article 3 both with regard to non-*refoulement* and the prohibition of ill-treatment intact. And that the judgment deals with a highly specific context on the ground which is in many cases very different in other member states.

Second, lurking in the background of the discussion today is the political context in which violations of the Convention occur. Years and sometimes decades of inadequate implementation and lack of investment in reception and asylum systems have transformed a manageable issue into political chaos. Strong anti-migrant rhetoric is on the increase in many European countries, including in regions where very few or no migrants have settled. The Court has been clear that states have the right to control their borders, but this must be done in compliance with obligations under the Convention. However, politicians increasingly feed the suggestion that human rights are not an essential element of border control, but a hindrance to it. And that human rights must thus be sacrificed for the sake of protecting national or European borders. This narrative has an important European dimension. It is not rare for government officials from one member state to implicitly condone unlawful practices, such as pushbacks, in another. Or even to explicitly praise states for carrying these out.

While specific legal obligations under the Convention address individual member states, collective political action is necessary to ensure that its protections remain at the forefront of asylum and migration policies in the long run. This means that our political leaders must hold their colleagues to account for actions that damage human rights protection overall. And challenge the deeply damaging idea that governments can decide whether or not to uphold the Convention's standards and the Court's judgments on the basis of the political, electoral and sometimes personal interest of those in charge.

Seeing that this conference is held in Berlin, I will close by saying that Germany, as an influential actor in European politics, has an important role to play in this. It can play this role bilaterally, but also within the context of its presidency of the Council of the EU and its chairmanship of the Committee of Ministers of the Council of Europe, both of which will start this year. I hope this will provide a positive impulse to the upcoming discussions about the future of asylum and migration policy in Europe, and the strengthening of human rights protection more broadly, including regarding the accession of the EU to the Convention.

I wish you a fruitful conference and hope to have a chance to exchange thoughts on this important issue with many of you in the future.