It is a great honour to be here – I suppose that, for the time being, this is as close to the Court as one can get. My time is limited, so I will keep it short; a more elaborate text will be published soon.

We all know by heart the famous passage of the Court’s judgment in the *Tyrer* case (1978):

“The Court must also recall that the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions”.

This statement was the starting-point for an impressive body of case-law, as set out in the excellent Background Document that was prepared by the Registry for our seminar today.

But before we start exploring the jurisprudence that builds on *Tyrer*, it is worthwhile to pause for a second. It is remarkable that all those who were involved in the *Tyrer* case agreed on the characterisation of the Convention as a “living instrument”: the Court, the Commission. And also the UK government had no difficulty in accepting, during the pleadings in the *Tyrer* case, that the Convention had to be construed in the light of present-day thinking.

Truth be told: when *Tyrer* was discussed by the Commission, an objection was raised by its Irish member, Mr. Kevin Mangan. In a dissenting opinion, he referred to the “concerns which moved the framers of the Convention in the post World-War-Two era”. In his view “[t]he practices and views ... in the various communities involved in the preparation of the Convention, at the time it was concluded, and the really great evils against which it was mainly directed, must be considered in determining what it was, that the parties agreed to curb”.

There we have, in a nutshell, the two main arguments levelled against the “evolutive doctrine” as introduced in *Tyrer*. The High Contracting Parties were entitled to expect that the Court would only apply the obligations which they had agreed upon in 1950, and the Court should limit itself to dealing with the “really great evils”.

The first argument quickly lost much of its force. In April 1978, when the *Tyrer* judgment was delivered, there were 18 Contracting Parties. Even if they might have claimed that they were ‘taken by surprise’ by *Tyrer*, this does not apply to the 29 States that joined the Convention afterwards. They knew full well that they acceded to a living instrument. And *all* Council of Europe Member States, old and new, expressed their support for the Court and its case-law on countless occasions.
This does not mean, of course, that the limits of the evolutive interpretation will never be the subject of discussion. On the contrary. A judgment that is welcomed by NGOs as a progressive step ahead, may be criticised by governments as legislation from the bench, an illegitimate limitation of their freedom to manoeuvre. And, conversely, a judgment that will be perceived by some as a missed opportunity to develop the case-law, will be seen by others as proper application of the principle of subsidiarity, needed to retain the Court’s credibility amongst the High Contracting Parties. Within the Court, too, there will always be those who argue that “one Salduz judgment per year is enough”, and those who emphasise the need to move boundaries and enhance the protection of individual freedom and human dignity.

There are various situations in which the evolutive doctrine is applied. The first category is modelled after Tyrer: the Court responds to what it perceives as a positive trend in the Member States. It may observe, for instance, that the rights of the child receive wider recognition. The Court may then find that there is sufficient common ground to allow the Convention to evolve.

The second scenario is triggered by the emergence of new threats to human dignity. As technology advances, a stronger protection of private life may be required, for instance in view of the possibilities of mass surveillance.

Much can be said here, but I suppose that the other presentations of today will address developments that fall within these two categories.

This allows me to focus on a third dimension, one that I believe is crucial. The Court’s evolutive approach may also extend to procedural matters and lead to institutional adaptation. There are many examples. When confronted with problems of a systemic nature, the Court developed the practice of pilot-judgments. In 2003 it started to accept unilateral declarations. Sometimes, when introducing innovations, the Court will expressly refer to the Tyrer case – as it did in Mamatkulov, where it held that a failure to comply with interim measures will amount to a violation of Article 34 ECHR. And what about the countless measures to cope with the case-load: don’t they reflect the living character of the Convention? These procedural innovations illustrate that the capacity to adapt is crucial for the Court’s effectiveness – and, indeed, survival.

It is important to keep this in mind, because the Convention’s environment does not just offer opportunities for the Court to happily move on and enhance its standards. It also presents challenges. Indeed, today we experience a genuine ‘climate change’ that cannot be ignored. Pluralism, tolerance and broadmindedness – to use the famous expression from Handyside – are in decline. The Secretary-General, the Parliamentary Assembly, the Commissioner for Human Rights, the Venice Commission: they have all stated, and deplored, time and again, that the rule of law is under pressure.

So we face new “present-day conditions”, that may have a direct impact on the very foundations of the Council of Europe: human rights, democracy and the rule of law. I am not saying that each and any of these developments involve violations of the Convention. This is for the Court to decide. But that is the very problem. Virtually all the organs of the Council of Europe continue to express their views about measures that allegedly affect our common values. They are joined by the EU, the OSCE, the UN. But the voice that, if I may say so, matters most to us is rather muted. In the current rule of law debate we hear relatively little from the ‘Conscience of Europe’ – the Court, that is.

But there is an urgent need to hear from the Court. There are tough debates in a number of countries about the independence of the judiciary, the position of civil society, human rights defenders, academic freedom. Controversial measures are adopted, creating facts on the ground: systemic changes that – if found to be in breach of the Convention – cannot easily be reversed.
Justice delayed has always meant justice denied, but now the ramifications of delays may extend beyond the individual applicant and affect the entire system for the domestic protection of human rights. What does this mean for the Convention as a living instrument?

(10) The well-known case of *Baka* illustrates the point. The President of the Hungarian Supreme Court complained about the premature termination of his mandate, which occurred in the context of a reorganisation of the judiciary. He brought his application in March 2012 and obtained a favourable Grand Chamber judgment – in June 2016. But this did not bring about his reinstatement in his original position: a *fait accompli* had been created.

Of course, this is inherent in the *ex post* review exercised by the Court. A violation of the right to life cannot be undone either. However, there is a difference: what happened to Mr Baka was, because of his function, part of a much wider picture. The judiciary has a central place in the ‘human rights eco-system’. This means that a measure affecting the position of the judiciary is necessarily capable of affecting the State’s institutional capacity to secure effective protection of the rights and freedoms protected by the Convention. If *in this context* a breach of the Convention occurs, one might say: an attack on one is an attack on all.

(11) To take another example. Everyone in the room will be familiar with the widespread concern that has been voiced, since the end of 2015, about the series of measures concerning the position of the Polish judiciary. The government seeks to defend its reforms; critics claim that judicial independence is undermined. In this situation it is crucial to know the Court’s position on the various measures taken. A speedy and authoritative Court judgment is in the interest of all: the applicant who claims that his rights have been violated, and the respondent government which claims that its policies are fully justified. A speedy and authoritative judgment provides legal certainty and guidance.

And it can be done! One only has to think of the speed and diligence with which the case of *Astradsson v. Iceland* was dealt with (and is still being dealt with). The case was communicated within a month, a judgment was delivered well within a year. Next week there will be a Grand Chamber hearing in this case, 20 months after the case was introduced in Strasbourg.

And so it is difficult for an outsider to understand why this has not happened in the case of Poland. It is clear that the Court depends on applications being lodged, but the fact remains that a relevant case, brought in January 2018, was only communicated in September 2019. That is 20 months. Of course, the Court faces an enormous case-load and, despite all efforts, it has a significant backlog. But that raises the question if the Court should not reflect on its priorities. European judicial intervention is a scarce commodity, and it should be applied where and when it is most needed.

(12) Again, it is not my aim today to express a substantive opinion on these cases, or to start a discussion about the situation in several other countries that come to mind. The point I wish to make is a different one. I would argue that, in cases where it is stated, *prima facie* on arguable grounds, that the rule of law is under pressure, that structural changes affect judicial independence, and that as a result the integrity, indeed the very core of the system for the protection of human rights is at issue, the Court ought to respond immediately. This entails to my mind that the Court should review its priority policy as well as its practice concerning interim measures.

(13) In this respect, inspiration may be taken from the Court of Justice of the European Union. The Luxembourg Court has had to rule on a whole series of cases involving the rule of law in various EU Member States. In doing so it has been in a position to develop its case-law considerably, and to influence the course of events.

Time does not permit us to go into detail. But two elements stand out.
One is **substance**: the ECJ has developed its interpretation of the Member States’ obligation to ensure effective judicial protection in the fields covered by EU law, linking it to judicial independence and the principle of irremovability of judges.

The other is **procedure**. The Luxembourg Court has been able to play its role through the use of expedited procedures and, where necessary, the adoption of interim measures. There is nothing that could prevent the Strasbourg Court from doing exactly the same thing.

(14) This year we will celebrate that the Convention was adopted 70 years ago. More than 40 years ago the **Tyrer** judgment was delivered. It opened the door for the Court to respond to the changing environment that it is part of. Many have applauded the “living instrument” doctrine and the benefits it has brought. Others are more cautious. But all will agree that the Court was set up as the ‘Conscience of Europe’. It must act decisively to protect what is really precious – decisively and quickly.