University of Zagreb Faculty of Law

Lecture

Speech by Mattias Guyomar

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It is a great honour and a pleasure for me to be at the University of Zagreb, and to give a lecture before such a distinguished audience during this historic year.

I am especially pleased to be here as the Faculty of Law celebrates its 250th anniversary, marking two and a half centuries of outstanding contribution to legal education and scholarship.

Allow me to thank very sincerely the organisers of this evening's event, Professor Romana Matanovac Vučković, Dean of the University of Zagreb Faculty of Law, as well as my dear friend and colleague, Davor Davor Derenčinović, judge elected in respect of your country, Croatia.

Yesterday, I had the privilege of participating in the conference marking the 30th anniversary of Croatia's membership in the Council of Europe and the ratification of the European Convention on Human Rights. On that occasion, I spoke about the principle of shared responsibility, which lies at the heart of the Convention system and serves as a fundamental guarantee for the effective protection of the rights and freedoms enshrined therein.

Today, I would like to continue by addressing the contemporary challenges facing the European Court of Human Rights.

At a time when the ideals of peace and justice are once again being shattered on the European continent, when the rule of law is being criticised and attacked from all sides, new emerging challenges are also rearing their heads: climate change, new technologies, mass migration, as well as a proliferation of armed conflicts, notably with the full-scale invasion of Ukraine in 2022.

The temptation, in such circumstances is to regard the human rights protected by international law as obstacles to security, to efficiency or to national identity or interests but this would misunderstand their purpose.

The three challenges to the European Court I have identified for the purposes of my intervention are:

- Armed conflicts;

- Threats to democracy and the rule of law;

and

- The living instrument doctrine in a context of political pressure.

Of course, there are other important issues that deserve attention such as the Court's autonomy, which is a prerequisite for its authority and legitimacy. Like any international court, the European Court of Human Rights can fulfil its mission effectively only if its institutional independence is matched by sufficient and sustainable financial resources.

Other challenges arise from the rapid development of new technologies, particularly AI. This is currently being used to support a range of internal functions, including document searches,

cybersecurity, machine translation, video production and programming. But this entail costs and require enhanced security safeguards. AI is not only transforming the Court's work but increasingly affecting the Court's judicial activity - the Court is already receiving applications prepared with AI assistance and is likely to be called upon to examine cases concerning the impact of these technologies on the rights and freedoms protected by the Convention.

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Before I turn to the three substantive challenges I wish to highlight for the purposes of this talk, I would like to look back at the origins of the Convention in order to highlight its continued relevance today and tomorrow – a "return to our roots" that is also "back to the future". In my view, we cannot address the subject before us without returning to the vision of the founding drafters.

The European Convention on Human Rights was born in a Europe that had recently experienced the tragedy of a world war, the collapse of democracy and the denial of human dignity leading to the worst atrocities the century had known.

The Convention was conceived by its drafters not merely as a catalogue of rights which would remain on paper, but rather as a promise. A promise that whatever the circumstances, the individual would benefit from rights which are practical and effective both before domestic courts as well as before the European Court of Human Rights.

Within the framework of the Convention – a legal expression of humanism – it is therefore the individual who holds the rights and States who are bound by them, under the supervision of an international court established nine years after the Convention was signed. The system thus established a unique form of protection which, to this day, remains virtually without parallel.

The right of individual application, the cornerstone of the Convention system, and the binding force of the Court's judgments give European protection of fundamental rights unparalleled effectiveness.

Many of today's challenges are reminiscent of those our predecessors faced during the interwar period: economic and social crises, the rise of nationalism and populism, the escalation of conflicts. My point is that the European Convention was drafted more than 75 years ago precisely to deal with the type of challenges we are facing today and those we will face tomorrow.

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The first of the major contemporary challenges facing the Court is that of armed conflicts.

According to the Preamble to the Convention, human rights and fundamental freedoms "constitute the very foundations of justice and peace in the world."

Both the Council of Europe and the European Union's projects look towards a shared and 'peaceful future'[1] based on fundamental rights and freedoms which are "the foundation of justice and peace in the world'[2]. This is more important than ever with an active war within Europe's borders. A war that is getting ever closer.

The narrowing of the Convention's territorial scope following Russia's expulsion has nevertheless been mitigated by the Court's historic Plenary decision to retain residual jurisdiction over cases brought against that State prior to 16 September 2022.

The Court is thus the only international tribunal before which the Russian Federation can be held accountable for its violations of the rights and freedoms protected by the Convention.

With the inter-state judgment *Ukraine and the Netherlands v. Russia*, the Court underscored the vital relevance of the Convention by addressing applications involving major geopolitical issues. In

[1] Preamble to the Charter
[2] Preamble to the Convention

finding serious and systematic human rights violations committed in Ukraine since 2014 and following the invasion in February 2022, the Court affirmed that:

"These actions, which curtail individual freedoms, repress political freedoms, and demonstrate a flagrant disregard for the rule of law, are aimed at undermining the very fabric of democracy upon which the Council of Europe and its member states are founded. (…)" (§ 177).

By finding violations of individuals' fundamental rights, the Court, in a sense, upheld Ukraine's sovereignty in the face of the massive and prolonged violations it has suffered. By recognizing that persons affected by Russian military operations fell within the jurisdiction of the Russian Federation, the Court not only held the respondent State liable but also affirmed, in the name of protecting European public order, that the Convention system cannot tolerate the erasure of a Member State's legal identity under duress.

Over the past few decades, the Court has been called upon to address numerous conflict situations in Europe, in the context of various inter-state and individual cases concerning human rights during armed conflict.

Since 1953, 46 interstate applications have been assigned to a judicial formation (total number of applications assigned during the same period: approximately 1.18 million).

In addition to these inter-state cases, the Court has, throughout its history, received more than 18,000 individual applications concerning various international armed conflicts between different member states. Currently, 7,500 of these individual applications are pending before the Court, and the vast majority of them relate to the armed conflict between Russia and Ukraine.

The individual and interstate cases arising from three major conflicts between Member States (between Ukraine and Russia, between Georgia and Russia, and between Armenia and Azerbaijan)—handled by a dedicated unit at the Court—contain allegations of widespread violations of the Convention and illustrate how disputes involving unprecedented geopolitical stakes have reached the Court's bench.

Without being too pessimistic, it seems likely that in the future the Court will continue to deal with an increasing number of inter-State cases, as well as individual ones which relate to conflicts in Europe.

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The second challenge I wish to highlight concerns threats to the rule of law.

The rule of law is fundamental constitutional principle in the European system of human rights protection. It is part of the common heritage of European countries, together with political traditions and ideals, as set out in the preamble to the European Convention.

The role played by the European Court of Human Rights in defending the principle of the rule of law, has constituted, since the *Golder v. the United Kingdom judgment* of 21 February 1975, "one of the characteristics of the common spiritual heritage of the member States of the Council of Europe" [3], and which precisely ensures that everyone's rights are protected against the risk of arbitrariness.

While there is no abstract definition of the rule of law as such in the Court's case-law, the Court has developed various substantive guarantees which may be inferred from this notion.

These include the principle of legality or foreseeability, the principle of legal certainty, the principle of equality before the law, the principle of the control of the executive whenever a freedom is at stake, the possibility of remedy before a court and the right to a fair trial.[4] Finally, judicial independence is cornerstone of the rule of law.

[3] ECHR, Full Court, *Golder v. the United Kingdom*, no. 4451/70, 21 February 1975, § 34.
[4] R. Spano in *The Companion to the European Convention on Human Rights*, 2025, Brill/Nijhoff

In the current climate, where structural attacks are being levelled at our judicial institutions and where individual threats are being made against those working within the judicial system, we must constantly ask ourselves how we can ensure that the independence of the judiciary is preserved.

Last month, I paid an official visit to President Akane at the International Criminal Court in the Hague. I expressed in person and on behalf of the judges of the European Court, our judicial solidarity with the ICC at a time when it has been subject to sanctions both on an institutional and personal level.

I stressed the importance of standing with judges who face attacks and pressure because of their judicial work and I underlined that such attacks strike at the very foundations of the international legal order. As ICC President Akane herself has emphasised, when judges are subjected to pressure, threatened or discredited, it is, ultimately, "the credibility of international law itself that is undermined".[5] It is this consideration that led the Court to choose judicial unity and solidarity as its guiding theme for this year.

In this context, the existence of judges who are independent both institutionally and as individuals is an essential guarantee of democracy and the rule of law.

The crisis of the rule of law in Poland, as you are aware, has been the subject of a significant number of landmark judgments handed down by the Court in recent years, owing to legislative reforms that have undermined the independence of the judiciary as a whole and the legality of the newly created judicial bodies.

The Court has had to rule on disputes concerning irregular appointments to the Constitutional Tribunal[6], the lack of independence of judges of the Polish Supreme Court due to the appointment procedure[7], disciplinary proceedings involving the lifting of immunity and suspension which undermined the independence of judges[8], and the premature termination, *ex lege*, of a judicial term of office in the absence of judicial review[9]. Current events in Poland demonstrate that reestablishing the rule of law once destroyed is a particularly difficult (and painful) exercise.

In recent years, a particularly effective symmetry and synergy have been observed in case law concerning the rule of law from the two European Courts, and more specifically the protection of judicial independence. Here I am particularly thinking of examples in relation to Poland and Hungary.

I wish just to mention one recent judgment of our Court which illustrates well the role played by the Court in defending the rule of law.

It is last year's case of *Danileţ v. Romania*,[10] a judgment in which the Grand Chamber recalled that 'the impartiality and independence of judges [...] are essential conditions for the rule of law'.

This case illustrated that our Court's role is not merely in guaranteeing individual rights but also ensuring that judges can fully exercise their role as guardians of democracy.

Without judges, there can be no rule of law, and without the rule of law, there can be no democracy.

I take these examples to demonstrate that in the face of threats to democracy and the rule of law the Court has shown it is able to do its part.

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The third challenge I have chosen is the future of the living instrument doctrine.

[5] See PACE speech
[6] *Xero Flor w Polsce sp. z o.o. v. Poland*, no. 4907/18, §§ 252–291, 7 May 2021
[7] *Advance Pharma sp. z o.o. v. Poland*, no. 1469/20, §§ 294–351, 3 February 2022
[8] *Tuleya v. Poland*, nos. 21181/19 and 51751/20, §§ 333–345, 6 July 2023
[9] *Grzęda v. Poland* [GC], no. 43572/18, § 257 et seq., 15 March 2022
[10] *Danileţ v. Romania* [GC], no. 16915/21, 15 December 2025.

I have chosen to frame this as a challenge because it is usually the application of this doctrine which is pinpointed by some as an example of judicial overreach from Strasbourg – an example of unwarranted interference with other democratic processes.

The text of the Convention as we know contains broad statements, based on the idea that fundamental rights should not be set out in the form of a detailed catalogue of duties and obligations, but rather defined in general and inclusive terms, so as to enable the Convention to keep pace with the times and fulfil its role as a 'living instrument'. This ensures that the Convention system is supple to adapt to present day circumstances.

The drafters of the Convention chose to allow the judges of the Court not only to safeguard rights but also to develop them, within the framework of the collective and mutual guarantee entrusted to them of respect for human rights and subsidiary supervision. In order to develop human rights, the Convention must be interpreted in a dynamic and contextualised manner.

We do this when we deal with issues such as new technologies, bioethics, mass surveillance and climate justice: issues which, of course, were not on the agenda in 1950.

But it was expected, from the outset, that the Convention system, and the Court in particular, would be able to provide appropriate responses to future challenges. This dynamic interpretation is the first part of the doctrine of the living instrument. The second part refers to the Court's ability to deliver justice in a given context.

Far from being an expression of political or judicial activism, the living instrument doctrine thus consists in anchoring the Court's activity in the present moment. Judges must be able to take into account the state of the world, Europe and society, even if it is their responsibility to decide the case before them solely on the basis of the law. Justice is situated in time and space, and judges must accept this to find the "best answer" to quote Ronald Dworkin.

The "originalists" intend to stick to the letter of the Convention as it was drafted 75 years ago. Conversely, the pragmatists claim to be guided by judicial realism and attempt to respond to the questions submitted to them by the applicants in an effective manner and without any preconceptions. Those who contest the doctrine of the living instrument are wrong on two counts.

Firstly, because they accuse pragmatists of being dogmatic, when in fact the opposite is true.

Secondly, because they accuse pragmatists of being out of touch, when in fact they are striving to place their judicial mission in the current context.

Judicial pragmatism allows the Court to embrace the member states' constitutional identities, while the margin of appreciation doctrine helps it to reconcile the universalism of human rights with national specificities.

Indeed, there is no single, uniform way of protecting human rights. In the words of the 2018 Copenhagen Declaration, "*a range of different yet equally legitimate solutions may each be compatible with the Convention*"[11].

Accordingly, while there are political pressures placed on the Court, and some would like to see a backtracking of the living instrument doctrine, I see its continued application in a contextualised way, as assisting the Court to stay relevant and capable of adapting to modern-day challenges: technology, climate change litigation and others.

Conclusion

[11] Declaration of the High-Level Conference meeting in Copenhagen at the initiative of the Danish Chairmanship of the Committee of Ministers of the Council of Europe, 12-13 April 2018, §28(c).

What are the distinctive characteristics of the Convention system that, in addition to its robustness and agility, enable it to address these contemporary challenges appropriately and effectively?

-Its inclusive nature, which goes beyond the principle of subsidiarity and "shared responsibility":

- through the role of the network of superior courts, which serves as a functional tool for knowledge-sharing and cross-fertilization;

- through the dialogue among judges, which creates personal relations that reinforces and extends the dialogue on case law;

- through the role of the national judge at the Court, serving as an interface between the Court and the context of each of the 46 Member States;

Its unifying dimension centered on the definition of common and minimum standards, which constitute both a common framework for all of Europe and the baseline of minimum safeguards to be respected.

Its evolving dimension, which allows the Convention to be updated and transformed into a living instrument whose practical scope contributes to the effective respect for fundamental rights and the values they protect.

In conclusion, I can do no better than to return to the preparatory work to the Convention.

"*We must therefore create, in advance, within Europe, a consciousness that sounds the alarm. This awareness can only be a European-specific jurisdiction (…) In truth, what we want to prevent is the restoration or establishment, in certain countries, of totalitarian dictatorships of the kind we experienced in Italy and Germany before the war. It is from this horror that we wish to protect ourselves*" (P.H. Teitgen);

May these words inspire us for the future, whatever it may bring. Their power will nourish the optimism of our resolve.

Thank you.