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The Interaction between the European Court of Human Rights and the Other Courts

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It is a great honour for me to represent today the European Court of Human Rights in this impressive gathering of high courts judges coming from all parts of our world; and my presence here witnesses, to my mind, the increasing significance of our court in the development of our common values on the protection of human dignity. So, before starting my presentation, allow me to congratulate the organisers of this conference for having conceived the idea to convene it and the successful way with which they have dealt with the multiple problems that such a wide gathering entails.

Coming now to the theme of my presentation that of the interaction of our court with other courts. I should start by saying that this is not a unique phenomenon. It is a common place in today's world that frequently judges open a dialogue with laws and legal practices developed outside their jurisdictional confines in their effort to draw inspiration from them, and, as a consequence, to enrich, where appropriate, their administration of justice on the basis, *inter alia*, of principles and values which presumably have acquired ecumenical dimensions, or reflect societal or other changes which their own legal system is also ripe to undergo.

This phenomenon of interaction of national law with foreign law through the intermediary of judges is not, of course, a novel one, seen from a historical perspective. Yet it is becoming increasingly frequent in certain legal systems, owing to the evolution of interdependence of legal acts and situations, the close relationships of domestic societies between them, and the curtailment of national boundaries for certain human activities. All these matters have brought forward the acceptance of common values, morals and aspirations easily applicable to all of them.

International justice is also supposed to follow the same patterns: an international judge is bound to apply the law – most of the time international law, customary or conventional, general or particular – and not to create it. Yet the now long history of international justice – which has entered its second century of existence – has witnessed a substantial departure of the role of an international judge from the stereotypical approaches just described. International justice has acted, and is still

acting, with formidable leeway, which many times has transgressed judicial restraint and has produced real, fresh law almost *ex nihilo*. The most characteristic examples of a "law-making" pattern of an international judicial body can be found in the work of the International Court of Justice and its predecessor, the Permanent Court of International Justice. In certain fields of international law, such as the law of the sea, this international court has not only contributed to clarifying the law, but has also genuinely moulded legal rules which, in the end, have been adopted by States as part of their law.

There is, of course, a plausible explanation to this practice of the ICJ which may equally apply to other international courts as well: the international legal order is still heavily decentralised, lacking both a central legislature and a central executive power. It is also suffering (less than in the not so remote past, but still suffering) from considerable lacunae in its legal fabric, in the sense that, although international relations have become extremely complex and multifarious, legal rules have not always followed suit to cover in an effective manner all the legal exigencies of the new international realities. Hence the courts – and not only the ICJ – are almost obliged to assume the role of a legislator in situations where the law itself is incapable of providing adequate answers to the problems that they face when they deal with particular disputes.

The European Court of Human Rights, unlike the ICJ, works on the basis of a conventional instrument, the European Convention on Human Rights, which not only establishes it and determines the means of its functioning, but also provides the substantive legal rules on which its jurisdiction is founded: together with its additional Protocols, the Convention contains a number of protected human rights which must be enjoyed without exception by all those who are under the jurisdiction of the European States which are parties to it.

Still the ECHR faces the same dilemmas and the same uncertainties that are common to most international courts, regardless of whether they work within the slippery field of general – or particular – international law, or are governed by conventional instruments providing them with substantive rules of law. The Convention with which the Court works has now reached an age approaching 60 years, and that, having been conceived by the founding fathers to form a rudimentary text, it has proved – because of its rudimentary character – a long-living instrument, which has never been modified in its substantive clauses through legislative intervention. These two factors, namely the rudimentary nature of its provisions and the age of the instrument, have acted as the main driving forces for an evolutive interpretation of its clauses by the Court. The very text of the Convention requires a specification of the concepts and notions contained therein, while the passing of time in a rapidly evolving world (and, with it, a rapidly evolving Europe) requires such specification in each instance to be given its current meaning, the one which is acceptable in European societies at the time of the application of a rule by the Court. To give but one example, it is clear that the concept of "family life" contained in Article 8 of the Convention cannot be interpreted today by the Court as it was originally conceived by the drafters of its text in the late 1940s. Hence, in order to keep abreast of new developments in societal habits and morals, the Court is obliged to detect the new mentalities that have emerged, and to adapt the relevant concepts accordingly. It seems that the paramount concept which permeates the whole case-law of the Court and conceptually determines the evolution of the interpretation of the clauses of the Convention is that of the Convention as a "living instrument", enunciated for the first time in the case of *Tyrer v. the United Kingdom*.

Following the "living instrument" approach, among a great number of the Court's judgments, we can indicatively cite two recent ones, showing how the judicial body has changed its own case-law and conceded that its past decisions are no longer consistent with new developments which have occurred, on the one hand, in European social life, and, on the other, in the law applicable in the circumstances of a case. The first is the case of *Christine Goodwin v. the United Kingdom*, which concerns the right of a post-operative transsexual applicant to enjoy her private life, and her right to marry. The settled case-law of the Court, prior to this judgment, had been to refuse to secure to post-operative transsexuals the right, under Article 8, to regularise their new gender by asking the Government to alter the official register of births or to issue birth certificates whose content and nature differed from those of the original entries concerning the recorded gender of an individual at the time of his/her birth.

In the case of *Christine Goodwin* the Court reversed its previous position, on the basis of a number of developments which have occurred in societal habits and morals, the evolution of science, and the approach taken by a more recent text (than the Convention) for the protection of human rights - the Charter of Fundamental Rights of the European Union - and by the European Court of Justice. In another case, *Mamatkulov and Askarov v. Turkey*, there is likewise a change in the case-law, but this time the main incentive which persuaded the Court to change its approach was based on international law developments which had occurred between the time of its previous judgments and the new case before it.

In the case of *Mamatkulov and Askarov* the main issue of interest in terms of case-law was whether the respondent Government had failed to comply with the interim measures indicated by the Court under Rule 39 of the Rules of Court. Previous case-law had widely accepted that States parties to the Convention were not obliged to apply a request under Rule 39 since that request was only an indication, and had as its sole legal basis the Rules of the Court, and not the binding text of the Convention. This time the Court considered that it had enough material before it to reverse that position. Through a comparative study of different international procedures, such as those followed by the United Nations Human Rights Committee, the United Nations Committee against Torture, the Inter-American Court of Human Rights, and the International Court of Justice (more particularly with reference to the latter's change of case-law in the *La Grand* case) it observed:

> "the International Court of Justice [and the other bodies referred to above], although operating under different treaty provisions to those of the Court, have confirmed in their reasoning in recent decisions that the preservation of the asserted rights of the parties in the face of the risk of irreparable damage represent an essential objective of interim measures in international law. Indeed it can be said that, whatever the legal system in question, the proper administration of justice requires that no irreparable action be taken while proceedings are pending."

It clearly transpires from these examples that the legal system of the Convention is not a watertight, self-sufficient system. It is in constant dialogue with other legal systems, including, of course, with other courts, both domestic, international or, more particularly, regional. This dialogue basically serves two distinct purposes. The first, inherent in the function of the ECHR as determined by the Convention, is to detect the domestic legal parameters of a case before it - in other words, to have a close look at the legal system governing the facts of a case in order to be able to decide whether an

applicant has exhausted domestic remedies, whether he/she has complied with the six-month rule, whether an interference by the State with an individual's right was duly provided for ("established") by domestic law, and, more generally, whether the legal treatment of an application by the bodies exercising power over him/her was consistent with the legal precepts of the State concerned. The second, of more importance for the discussion in this presentation, is to construe the Convention taking into account its "natural" legal environment, namely, first and foremost, the European legal order. At this juncture, it should be pointed out that the ECHR has recurrently referred in its case-law to the Convention as an instrument of the European *ordre public*. Moreover, the international legal order also constitutes part of its environment. The Convention is an international treaty and, as such, is bound to follow those rules of international law which determine the life of international conventions.

The most interesting aspect of the ECHR's dialogue with judicial bodies and their case-law (other than the domestic courts or tribunals which have ruled on the legal issues concerning a case submitted to it) is the interaction with high courts lying outside Europe and working under different legal systems – and, probably, different societal conditions from the ones existing in the majority of European States parties to the Convention. We say "the most interesting aspect" because this dialogue is contributing, more than the dialogue with the European or international legal orders, to a real "globalisation" of the ECHR's functions, in the sense that it brings within the ECHR's consideration laws and experiences relating directly to societies other than European ones, and, consequently, to mentalities, customs and morals which are linked with conceptions not necessarily intended in the conscience of those applying them to operate as ecumenical principles or values.

In this situation, the most frequent interlocutor of the ECHR has been the United States Supreme Court. In sharp contrast to the attitude of the latter, which had never mentioned the case-law of the Court until 26 June 2003 (when the first express reference to it was made in the case of *Lawrence and Garner v. Texas*), the Strasbourg institutions have a tradition, however sparsely it may have been used, of resorting to dialogue with the highest court of the United States. As early as May 1980 the European Commission of Human Rights made reference to the famous decision of *Roe v. Wade* to justify its position that the right to life under Article 2 of the Convention does not cover an unborn child. Some years later, in 1988, in the case of *James and Others v. the United Kingdom*, the Court accepted certain arguments of the parties before it, based on their reference to a United States Supreme Court decision in the case of *Hawaii Housing Authority v. Midkliff*. Since then, and with increasing frequency, the Court has many times sought enlightenment from the American court, by relating its case-law to the facts of a case before it, or by referring to its case-law in the part of a judgment covering the relevant law and domestic and international practice. In some cases reference to the American case-law has also been made in the very reasoning of the Court's judgment, in support of its own position on certain matters. It should also be noted that in a considerable number of cases, individual judges have appended separate (concurring or dissenting) opinions to the judgment of the majority, in which they have wholly or partly relied on certain decisions of the United States Supreme Court.

The United States Supreme Court is not, however, the only foreign court with which the ECHR has developed a dialogue. In some instances – a more limited number, it is true – the ECHR has sought advice from the highest courts of South Africa, New Zealand and Canada. South Africa appears in the already cited cases of *Christine Goodwin v. the United Kingdom* and *Öcalan v. Turkey*, New Zealand appears in the

former case, while in the case of Canada, reference to its case-law is more extensive: in the recent cases of *Morris*, *Pretty , Appleby, Allan* and *Hirst* (all against the United Kingdom) the Court has made extensive reference to the Canadian Supreme Court's case-law, and in some of them it has relied on it to support its own reasoning and conclusions. In the case of *Pretty*, for instance, the Court held that its conclusion that States have the right to control, through their criminal laws, activities prejudicing the life and security of a third person, found support*, inter alia,* in the decision of the Canadian Supreme Court in the case of *Rodriguez v. the Prosecutor General.*

The endeavour of this modest presentation was to demonstrate that the European Court of Human Rights and its judges do not operate in the splendid isolation of an ivory tower, built with materials originating solely from the ECHR's interpretative inventions or those of the States parties to the Convention. The nature of the ECHR as an international court, working in a regional environment, and aiming simultaneously to protect, provide for and integrate human rights in Europe is undoubtedly the main reason behind its cosmopolitan tendencies, which are gradually becoming a solid feature of its way of functioning, and which seem to be influenced by the more general evolution of the protection of human rights around the world, at national and international level, the universal character of most of the protected rights enshrined in the Convention, and (why not?) the security that the ECHR now feels as far as its place in the protection of human rights in Europe – and beyond that – is concerned.

We should, however, put a damper on this idyllic picture of the ECHR's cosmopolitanism. It would be an exaggeration to argue that the ECHR is working with constant vigilance to observe possible developments which may occur every day in its surrounding landscapes. Most of its cases are decided with reference to its established case-law, which is impressively extensive after half a century of judicial accomplishments, and which is not lightly abandoned by a judicial body eager to prove that legal security and certainty is one of its merits. It should also be underscored that when the ECHR opens a dialogue with the "external world" this dialogue does not automatically and indiscriminately lead to an adoption of "foreign" preferences or choices in the ECHR's decisions. When we speak of a dialogue we mean a dialogue.

The ECHR may discuss "foreign" law or experiences in analysing the facts of a case, in the "relevant law" part of its judgment, or in its reasoning as well, but such a matter does not necessarily mean that its final conclusions will rely solely or even partly on them. It still retains sovereign power to use all the evidentiary material before it freely, and to assess them accordingly. Still, the fact remains that law extraneous to its own case-law has gained ground, and is increasingly gaining ground, in the ECHR's mode of operating before it reaches a decision. This is a good sign for the founders of a court of law protecting values which by their nature are inherently indivisible and global.