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A RIGHT TO LIFE AND
PROHIBITION OF
TORTURE AS BASIC
VALUES IN
DEMOCRATIC
SOCIETIES IN EUROPE
(Unauthorized version)

It was a great honor for me to participate in the symposium at the occasion of the eleventh year after the fall of Vukovar, in order to commemorate the existence of concentration camps and also to reflect on human rights. When I was driven through the city I was, of course, shocked by what I saw. The ruins of the houses, now abandoned, that once were homes of families, brought back to me, to my mind, the images of the war. And just before we started I saw again these images.

We in Western Europe, we were confronted with these images in painful and often shameful way, and it made us realize that human rights are not just something that you can simply take for granted. You, of course, know better than we do that this, indeed, is a sad reality. It was undoubtedly with similar images in their minds, a few years after the Second World War, that representatives of the member states of the United Nations drafted the *Universal Declaration of Human Rights*, declaration that was adopted by the *General Assembly of the United Nations* in 1948. That declaration proclaimed a number of fundamental rights. It was not a binding text, however, merely a solemn declaration. But the tone was definitely set.

Immediately after the adoption of the declaration, the work started in order to come to human rights treaties, international treaties, containing binding obligations for the states that would agree to ratify these treaties. And it was in this context that the *European Convention on Human Rights* was adopted in 1950. It was and is a treaty that consists of two parts, one part containing substantive provisions, guaranteeing a number of fundamental, civil and political rights. The other part perhaps is even more important, because it sets up an international control mechanism, which nowadays includes the *European Court of Human Rights* in Strasbourg.

In my presentation, I would like to go deeper into some aspects of the mentioned *European Convention on*

Human Rights. I would like to look at two kinds of fundamental rights that are likely to be violated in cases where persons are deprived of their liberty – the right to life and the prohibition of torture and inhuman or degrading treatment or punishment. My presentation will be divided in three parts. First, I will take a look at these rights in a general way – what do these rights mean, what do they protect, are they protected and what is the scope of protection. This will be, as I said, the general part. Then, secondly, I will look at some concrete cases as they have been brought before the *European Court of Human Rights*, involving alleged or real violations of these fundamental rights. And finally, at the end, in the third part, I will take a look at the European human rights approach to prevention of human rights violations, especially considering persons deprived of their liberty.

So, let us first have a look at the human rights standards, as they are enframed in Articles 2 and 3 of the *European Convention*. The Article 2 deals with the right to life and the Article 3 deals with the prohibition of torture and inhuman or degrading treatment or punishment. According to the *European Court of Human Rights*, these articles are the most fundamental provisions of the *Convention* and they enframe some of the basic values of democratic societies that constitute the *Council of Europe*. Well, is that true?

Let's have a look at what the *European Convention* says. First of all, what is the scope of application of these articles? What is protected and what is prohibited? Regarding the right to life, it is not so difficult – it is life, physical life that is the object of protection. There have not been that many problems to figure out what life is. There have been some problems dealing with the beginning of life and the end of life and the question whether the unborn fetus can already be protected by the right to life. And this is a very difficult question, which the *European Court* has not answered yet; it has left the question open.

Recently, the *European Court* had to answer the question whether the right to life implies also, at the end of life, the right to die, for persons, for instance, who are incurably sick, who are paralyzed, who can not do anything anymore and who think that they do not have a decent life anymore. And in the mentioned case, involving an English woman, the *Court*, some months ago, said that the right to life does not imply the right to die.

The Article 3 brings us to more difficult problems of interpretation. What is prohibited by Article 3, when it prohibits torture and other inhuman or degrading treat-

ment or punishment? There is no definition in the *European Convention Treaty* of what inhuman or degrading treatment is, or what torture is. The *European Court* has said that, in order to be prohibited, the ill-treatment must attain a minimum level of severity. But that, of course, is relative. It depends on all the circumstances, such as the duration of the treatment, its physical or mental effects, and in some cases sex, age and state of health of the victim.

A further distinction can be made between different sorts of ill-treatment. On one hand, there is inhuman treatment, degrading treatment, and on the other hand, there is torture. Inhuman treatment, according to the *European Court*, is a treatment, which causes, if not an actual bodily injury, then at least an intense physical or mental suffering.

Degrading treatment is a treatment that arouses in the victim feelings of fear, anguish and inferiority, capable of humiliating the person, and possibly of breaking his or her physical or moral resistance. A specific form of such inhuman or degrading treatment is torture and it sometimes is important to say that something is not only inhuman or degrading treatment, but that it is torture, because the notion of torture attaches a very special stigma to the ill-treatment. What is then the difference between ordinary inhuman or degrading treatment and torture? International law has developed this question. In the beginning of the seventies the *European Court of Human Rights* considered only the intensity of the effect on the victim. And of course, the effect on the victim is very important. But, the result of this case-law was that only very, very severe punishments or inflictions of pain would amount to torture. Since then, conceptions have changed and developed, and more attention has been paid to the intention, intention with which acts of ill-treatment are being preformed on victims.

The United Nations Convention against Torture, adopted in 1984, defines torture as ill-treatment characterized by two aspects: on one hand, by severe pain or suffering and on the other hand, by intention, purpose of the perpetrator – purpose, like, for example, obtaining information or obtaining a confession, punishment of the victim, intimidation of the victim, or discrimination of the victim or the group he belongs to. And since then the *European Court* has followed this new definition of torture according to the *United Nations* and has changed its own case-law, so it now also holds that torture is characterized by these two elements – the effect on the victim, which

should be a very serious and cruel suffering, and on the other hand, the intention on the part of the perpetrator to inflict severe pain or suffering with certain intention.

Now that we know what is prohibited, let us see what is the scope of the protection. How far does this protection go?

Generally speaking, when we speak of human rights, we do not consider that human rights are absolute. Human rights can be limited for a good cause. If there is good justification, international law accepts that there may be limitations to human rights. And that is what I would like to reflect on now: how far does the protection go, where can limitations be set? And I would like to take a look at different obligations that states have. On one hand, they have a negative obligation, an obligation not to interfere with fundamental rights of individuals. A state that does nothing is in this respect a state that fully respects human rights. But on the other hand, a state may also have a positive obligation, an obligation to take measures, to protect human rights, to make sure that people enjoy their human rights in an effective way.

Let us first take a look at the negative obligation, obligation not to interfere, obligation to respect fundamental rights. When we look at the right to life, the obligation then is clear. It is an obligation not to kill individuals. But you may be surprized; this is not an absolute obligation. There are possible exceptions to the prohibition to kill people. There are, under certain circumstances, possibilities to use force, even lethal force, which may lead to death of individuals. And the *European Convention* names three of such situations where force may be used. The most important one is probably defense of any person from unlawful violence, and that can be a citizen, but also a policeman himself. Self-defense might also be the justification for the use of force. That does not mean that whenever you are in such situation you can kill people. To the contrary, use of force, even in those situations, should never be less than absolutely necessary, and on this point the *European Court of Human Rights* is controlling in a very strict way whether this proportionality principle has been respected by those who use force and by those who plan actions in which force will be used.

Another exception to the obligation to respect the life of individuals was, I am not saying that it still is, but was the death penalty. In the original text of the *European Convention* the death penalty imposed by an independent court was considered to be a lawful exception to the obligation to respect life. But now, international law has devel-

oped in such way that the situation is completely different. There are all kinds of new treaties, additional treaties and the newest treaty outlaws the death penalty in all circumstances, so I can not say that the death penalty is still an exception to the obligation to respect life.

Regarding the prohibition of torture and prohibition of inhuman or degrading treatment or punishment, there is something very striking about the scope of protection. This is an absolute prohibition. It is the only right where no limitations are accepted, even not if the victim upon whom torture or any other ill-treatment would be practiced is a victim which, in the eyes of many, would deserve it. And, of course, in these days, when there is a number of terrorists and suspects of terrorist acts detained in prisons or in police offices, very often there is a feeling that one might use torture in order to get some confessions or some useful information, but according to the international human rights law, torture can never be used, not even when you are dealing with terrorists.

Let me turn briefly to the positive obligations, to what can be required from the state, what positive actions can be expected from the state. It is not only that the state has to refrain from interfering with lives and integrity of individuals. Sometimes, or in most cases, states are required to take preventive measures. Preventive measures, in the first place, of course, are: an effective criminal law system and an effective law enforcement machinery of such nature that people who are thinking of killing individuals or ill-treating them, would be efficiently deterred from doing that.

Sometimes even more is required - when the risks for the given individual are very clear, operational measures may be required.

Recently, the *European Court of Human Rights* has reminded the Italian state of its obligation to be very careful, because prison authorities decided to release somebody who was convicted for murder, to release him conditionally before the end of his prison term. Authorities had to take into account whether or not there was a real risk that this person would commit a new murder. And, in fact, he has committed it, and that was then the case brought before the *European Court*, regarding the question whether the Italian authorities have been sufficiently careful.

If, unfortunately, violations happen, if the right to life is violated or if there has been torture or inhuman treatment, there is also an obligation for the state to offer regrets. In the first place, to start an official investigation,

an independent and effective investigation, in order to find out what had really happened and in order to be able to prosecute and punish the individuals who are responsible for it. And for the victims, some kind of reparation is also needed. On this point, the case-law of the *European Court* is still developing. It is clear that the *European Court* is becoming much more demanding on this point, but it is still unclear what may effectively be required from the state on this issue regarding reparation for victims.

After this general introduction, I would like to reflect on human rights law in action. That is my second part, *European Court of Human Rights* – a look at the control of respect for human rights it has. And first of all, I would like to say a few words about this *European Court of Human Rights*. It is an international court, established by the *European Convention on Human Rights*, with its seat in Strasbourg in France. Working languages of the *Court* are English and French, but anyone, any citizen of Europe can use his or her own language to bring a complaint before that *European Court*.

There are, however, some very important conditions of admissibility. A complaint can only be brought against a state, no individual can complain about violations of human rights committed by other individuals. That may be something for the *International Criminal Tribunal* in The Hague, but certainly not for the *European Court* in Strasbourg. And the second important condition is that before going to the *European Court* in Strasbourg, domestic remedies have to be exhausted all the way up to the supreme court, which is something applicants often forget. This court is a real court, it hands down judgments and these judgments are binding for governments. And it is not simply a piece of paper; control of the implementation of judgment is secured by the *Committee of Ministers of the Council of Europe*.

I would like to mention several examples from the case-law of the *European Court*, dealing with three issues: firstly – disappearance of persons; secondly – ill-treatments by the police and security forces; and thirdly – conditions of detention in prisons.

Regarding forced disappearances, there has been a whole line of cases that have been brought before the *European Court* in the last couple of years. Incidentally, all these cases have been directed against Turkey and involved complaints brought by Kurds living in Turkey. In the first of these cases the *Court* has been very careful and said that it is not enough to see that somebody was taken away one day that you can conclude, even after a number of years,

that that person has disappeared. More has to be shown as evidence. This, however, has been only the decision in the very first case. In all the later cases, the *Court* was satisfied by the fact that an individual had disappeared if for six or more years nobody had heard of that individual; that, to the contrary, there was a situation where people who sympathized for the Kurdish movement were at risk; and that taken all these circumstances, there can be a presumption that after so many years, a person was indeed dead, although his body was never found. And then, responsibility of the state would generally be to explain what happened and to justify what happened. But in cases of missing persons, the essence is that the state does not give any explanation at all, and so this inevitably must lead to the conclusion that the right to life has then been violated.

Ill-treatment of persons by the police or security forces presents a second line of decisions. There are many cases brought before the *European Court* involving such kind of ill-treatment. It is very typical for such ill-treatment to happen in the first days after the arrest of an individual, when the police or the security forces are trying to get all the information possible from the person who is suspected of being involved in a movement or is suspected of having committed some crimes. But there are limits to the power of police authorities when interrogating suspects.

There has been a leading case decided a few years ago against France, involving a person who was suspected of being a drug trafficker. He was arrested and brought to the unity specialized in drug crimes and they wanted to have a confession no matter how they get it. In the judgment it is explained that this person was subjected to various forms of ill-treatment, he was punched, he was kicked, he was hit several times, he was humiliated, an officer urinated over him, he was threatened with burns etc. Perhaps you will consider these are not altogether that serious forms of ill-treatment, but the *European Court* found that in this case the ill-treatment was serious enough to be prohibited by the *European Convention on Human Rights*.

And because in this case the ill-treatment was inflicted with the clear intention, intention to obtain a confession, the *Court* concluded, to the surprise of many, that this was not merely inhuman treatment, but that this was torture. There are other cases where ill-treatment of persons in police custody has been considered to be the act of torture. I am just referring to two examples: in a case where a person was subjected to *Palestinian banging*, a torture technique that is well known, the *Court* concluded that indeed this

was torture; and on another decision the *Court* also said that rape constituted an act of torture.

Prison conditions, my third set of examples, are also something that very often brings about applications before the *European Court of Human Rights*. The *Court* had to stress, for instance, that prisoners are in need of adequate medical treatment; that prison authorities have the responsibility to take care of prisoners, to take care of their well being; that if a prisoner presents a risk to himself or to others, a strict scrutiny of that prisoner is necessary. You can not simply leave such prisoner alone or with others in the cell. Authorities have to treat such prisoner and to make sure that he is not going to kill others or kill himself.

Prisoners also have to be treated with respect for their human dignity. There have been recently a few cases before the *European Court*, where the *Court* found that unnecessary body searches, where people had to undress for routine controls, when there was no need to go that far, constituted a degrading treatment.

A recent case that I would like to mention, decided in July this year, concerned Russia. I would like to mention this case because it is probably going to have some consequences for the case-law of the *European Court of Human Rights*. This was not such a terrible case. Principle complaint of the applicant, Mr. Kalashnikov, was that he was in the cell with too many cellmates. And indeed, it strikes the imagination. It was a cell of about twenty square meters, normally for eight prisoners, but where, generally speaking, there were about twenty persons in the cell. That is about one square meter per prisoner. Lying all on beds, they could not sleep all at the same time, they had to share beds, there was no proper toilets facility, and there was a lot of infection by insects.

This was a situation that certainly did not meet the ordinary prison standards as they are promulgated by European control organs. And in this case, the *European Court* also found that this situation constituted degrading treatment of Mr. Kalashnikov. Why am I mentioning this? Because the first argument of the Russian government was that Mr. Kalashnikov should not complain, because his conditions were not so much different from those of all the other prisoners in Russia, and that there was certainly no intention to humiliate him, but that Russia simply did not have economic resources to take proper care of all its detainees. The *European Court* was not impressed by this argument, but after this judgment, I have heard that in Strasbourg they are very afraid that now they will get thou-

sands, if not ten thousands of complaints of the colleagues of Mr. Kalashnikov, who will read or hear that Mr. Kalashnikov's situation was not much different from the one they are in.

I will quickly turn to the third point – prevention of violations of human rights. In Europe there is now the *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*. This *Convention* sets up an independent committee, a committee that can visit places where persons are detained. It takes up the role that in older years was fulfilled by the *International Red Cross*. Now it is an independent organ, official organ, which announces that it will visit a country, but does not announce which places it is going to visit.

And after the visit it drafts a report, a long report on what it has seen, then sends the report to the government and invites the government to reply to the report and to announce what it will do about the shortcomings. This is a whole dialogue that is set up between this committee and national governments. Initially it was intended to be a confidential dialogue, but by now most governments have agreed to publish reports of the *Committee* and to publish their own replies. And I found on the web-site the report of the *Committee* after its visit to Croatia in 1998, and also the reply of the Croatian government.

Sometimes, in exceptional circumstances, the *Committee* can issue a public statement about the country, which is a kind of sanction, and until now this has happened twice with respect to Turkey, and once with respect to Russia, concerning the situation in the Chechen Republic. There is also a link with the *European Convention on Human Rights*. When the *European Court* has to examine complaints about ill-treatment, it may have a look at these reports of the *Committee* for the Prevention of Torture.

Very recently, last week, there was a case handed down against Croatia, which was an illustration of such situation. The applicant, Mr. Benzon, complained about conditions in the *Lepoglava State Prison*. This was a prison that had been visited by the *European Committee for the Prevention of Torture*, and in its report the *Committee* has described conditions of the detention as unsatisfactory. The complaint later brought before the *European Court* was declared admissible, but before the *European Court* came to its judgment, the Croatian government entered into a friendly settlement with the applicant and promised, I quote from its undertaking, “to renovate, before the end of September 2003, the B wing (wing B) of the Lepoglava

State Prison”. On the basis of that friendly settlement the *European Court* closed the case.

Let me come to my conclusion. One may wonder after this survey of human rights standards, but also of human rights violations, whether human rights are effectively protected. Of course, texts alone will not suffice. Even treaties, binding treaties, will not be sufficient. And especially in the times of war, forces are at work, which are much stronger than texts, unfortunately. Nevertheless, I am convinced that a treaty like the *European Convention on Human Rights* can contribute, in the short term and in the long term, to ensure an effective respect for human rights. In solid democracies there is a tradition to abide by judgments handed down by independent courts, and so in Western Europe many legislators have been forced already by the *European Court of Human Rights* to change their national laws. This is something that is part of the democratic gain in European societies.

In new democracies, international protection systems can help build a culture of human rights that is so much needed, a culture in which there is genuinely room for respect for each other’s human rights. A culture also where there is respect for diverse opinions, where there is tolerance. This, too, is a human rights message. Once the violation of human rights has been acknowledged, and once there has been some kind of regrets, people and peoples have to move on and build the future in respect and in tolerance for each other. This, indeed, is a difficult task and I wish you all the good luck in this task.