From Europe to the World: the Role of the Council of Europe[1]

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Q1.

Please tell us about yourself and your current job. What is the reason why you joined the Council of Europe, especially in the field of public international law? Please let us know your story and passion towards the issue.

I studied law in Berlin and Geneva and joined the Max Planck Institute for Comparative Public and Public International Law in 1987. Initially I intended to pursue an academic career. Although I had written my PhD on the European Convention on Human Rights, under the supervision of Jochen Abr. Frowein, a former vice-president of the European Commission of Human Rights, and done a traineeship in the Council of Europe, I initially did not intend to work for the Organisation. However, when the Council of Europe organised in 1992 a competition for German nationals, I seized this opportunity. This was in fact the first such competition after Germany's reunification. The fact that I had done my thesis on the execution of ECHR judgments undoubtedly helped me succeeding in this competition.

I joined the Council of Europe in 1993, shortly after the Vienna summit of heads of state and government. The summit had launched important new initiatives such as the drafting of a convention for the protection of national minorities or the creation of a European Commission Against Racism and Intolerance. At the same time the Organisation was engaged in an unprecedented enlargement process which almost doubled its membership.

I had the privilege to be recruited by Gianni Buquicchio, an excellent lawyer and diplomat, secretary to the European Commission for Democracy through Law (Venice Commission) who should later become its president (until 2021). Working for the secretariat of the Venice Commission gave me the opportunity to meet many fascinating personalities. I was able to witness the process of constitutional transformation in Eastern and Central Europe, in particular in Armenia, Bosnia and Herzegovina and Georgia, and to create the 'Bulletin on Constitutional Case-Law' (CODICES).

At the same time, I had to put my knowledge of public international law to the test when dealing with reservations to the European Convention on Human Rights by acceding states or cases of state succession in Council of Europe treaties following the dissolution of the Soviet Union, Yugoslavia and Czechoslovakia. I vividly remember a trip to Moscow to discuss with Duma officials the draft reservations to the ECHR that the Russian Federation intended to formulate.

The 1990ties were a fascinating time which convinced me to abandon my initial idea to return to academia in Germany. Instead, I pursued my career in the Council of Europe, working in the fields of human rights protection, judicial cooperation in criminal matters, cybercrime and data protection before returning to the legal service, in 2013, as the Director of Legal Advice and Public International Law.

In my current job I deal with all legal issues arising in the Council of Europe. The variety of subjects with which I am confronted is both enriching and challenging. There is a saying that in the Council of Europe one staff member works on 20 files while in the European Union 20 officials work on one file. This is certainly an

[1] All views expressed in this publication are personal and do not necessarily represent the official views of the Council of Europe.

exaggeration, but not entirely wrong. In the Council of Europe's legal service we are only a dozen lawyers providing legal advice not only on issues of public international or institutional law of the Council of Europe, but also on private law issues such as contracts, copyright law or internal staff regulations. We are representing the Secretary General in appeals which staff members bring before the Administrative Tribunal of the Council of Europe. From time to time, I plead in front of this Tribunal which can be an enriching exercise even if I have to plead against my own colleagues with some of whom I may have worked together in the past. It is not without reason that I put the motto 'practice as you preach' on the website of our directorate. We are a human rights organisation and yet I have sometimes to recall basic principles of procedural fairness when it comes to internal proceedings.

Apart from being the Organisation's legal service, my directorate also services the Committee of Legal Advisers of Public International law (CAHDI). In this committee, I regularly meet my counterparts, the legal advisers in ministries of foreign affairs and legal counsellors of international organisations. Japan, like the other observer states to the Council of Europe (USA, Canada and Mexico), is actively participating in the CAHDI. Impressive is not only the number of states and organisations allowed to attend the CAHDI meetings or their global distribution, but also the actual number of participants at each meeting. Indeed, we welcomed a total of 123 participants (38 physically in the room and 85 connected online) at our last hybrid meeting in September 2021 in Strasbourg. It is also worth stressing that most heads of delegations participating in the CAHDI meetings are the Legal Advisers of the respective Ministries of Foreign Affairs themselves, on the level of directors general or directors of international law departments, ensuring thus representation of States at the highest possible rank.

We are living in networked world. The CAHDI constitutes the perfect example of such a network of dedicated professionals some of whom have become real friends. With its global and transversal vision of international relations, the CAHDI is ideally placed to contribute to the evolution of international law. Europe may count nowadays less in terms of population or military and economic power, but it remains exemplary as a region of the world where international relations are based on the rule of law and an increasingly closely knit net of international conventions and agreements.

Q2.

It is well-known that the Council of Europe has contributed to the development of international public law worldwide. However, it is not easy to understand how exactly CoE has contributed and how the contribution is linked to our everyday life. For those who are not very familiar with the process, could you explain briefly the role of CoE as a standard setter in international law?

The Council of Europe is neither rich nor particularly powerful. In 2021, the Council of Europe's budget totalled some € 500 million. If divided between every single European citizen, this would amount to some 40 cents per person. The Council does not embody one particular political or governmental vision but draws upon the experiences, skills and knowhow of the national experts from 47 member States. Somehow, almost paradoxically, its comparative weakness as a political actor provides legitimacy in relation to the formulation of legal standards and recommendations and thus the Council is perceived as a more neutral political actor than for example, the European Union. These attributes allow the Council to engage in a dialogue with its member States and to openly and constructively address emerging issues in order to avoid division. The Council's main working asset is its credibility and trust acquired through 70 years of successful cooperation.

It has become increasingly difficult to carry out new standard-setting activities in the United Nations. In certain cases, it is advantageous to work with a more restricted circle of states that share a common understanding of human rights, democracy and the rule of law. This was for example the case when the G7 launched the idea of a new treaty to combat cybercrime. The US chose to start the drafting process in the Council of Europe because of its track record in the field of judicial cooperation in criminal matters. The Council had notably prepared the European Conventions on Extradition and on Mutual Assistance in Criminal Matters which still today constitute the basis for legal cooperation in criminal matters in Europe. Over the years, also non-European states such as Chile, Israel and Korea have become parties to the latter convention.

Even though Council of Europe treaties are eventually adopted by the Committee of Ministers, they are strictly speaking not legal instruments of the Organisations. While certain functions are in principle reserved to the Committee of Ministers which is composed of representatives of member states (e.g. the adoption of amendments), it is possible to associate non-member states on an equal footing. In practice, the Committee of Ministers will not take its decisions, for example on amendments or the invitation of new countries to accede, without consulting all parties to the convention in question and taking into account their views.

Q3.

You joined the Council of Europe in 1993 when many ex-Soviet countries started to become part of the Member States to the Organization. Some of those Eastern European countries are integrating into the Council of Europe's standards very smoothly and are nowadays recognized as fully democratic States, whereas others are struggling to or even seemingly placing their traditional values over CoE's fundamental values. In your opinion backed by the first-hand experience of seeing these countries integrating into the Council of Europe, what are these gaps lingering between Eastern and Western Europe? And will these gaps be embodied in different attitudes towards the EU accession to the European Convention on Human Rights?

I do not think that attitudes of Eastern and Western Europe differ so profoundly. In general, thinking in terms of Eastern and Western Europe tends to oversimplify matters. Individuals are shaped by education, experience and tradition, which may differ tremendously within a given country. It is however true that there has been a certain backsliding regarding democracy and the rule of law in some Eastern European countries. As Ivan Krastev & Stephen Holmes have explained quite well in 'The Light that Failed' (2020), for countries emerging from communism, the post-1989 imperative to 'be like the West' generated discontent and even a 'return of the repressed'. The origins of the region's current illiberalism are sometimes emotional and preideological, often related to preoccupation with demographic collapse - resulting from aging populations, low birth rates, and massive emigration. All this generates fear that the arrival of unassimilable foreigners will dilute national identities and weaken national cohesion.

Many people in Western Europe take respect for human rights and individual freedoms for granted. They also have a longer experience of membership in the Council of Europe and, at least many of them, in the European Union. Legal traditions in Eastern Europe are however not less developed than in Western countries. In the accession negotiations, experts from Eastern Europe make as important a contribution as experts from Western Europe.

It is true that people in Eastern Europe had a long experience of living under totalitarian regimes which had an impact on their understanding of individual freedoms. At the same time, I do not think that all this has had a decisive impact on the questions related to EU accession to the ECHR. The issues at stake in the negotiations which are still ongoing concern primarily the relationship between the courts in Luxembourg and Strasbourg and the specific characteristics of EU law, in particular its autonomy and primacy.

We certainly need more Europe to confront common challenges and globalisation. At the same time, we need a discussion about the finality of European integration. Do we want the United States of Europe or a Union of member states which simply deals with issues that can be better dealt with collectively? Many politicians also in my own country Germany try to avoid this discussion. They argue all will be solved going simply forward with integration. This is the famous 'bicycle analogy', unless you continue cycling, you will fall down. But this is precisely what creates so much frustration among citizens. With each crisis, we create more Europe without treaty change and, incrementally we reach a situation that has never been the subject of a genuine democratic debate among the citizens of the EU. When they question certain excesses or dysfunctions, citizens are told that it is too late, there is no alternative. This is in my view not the most appropriate way to create ownership and legitimacy.

Q4.

The Council of Europe has a well-established role as a standard setter in human rights law in Europe and its standard is in general more progressive than those created in other multilateral organizations. On the other hand, the signatories of CoE treaties are mostly only European countries except for some specific treaties like Medicrime Convention. What is the Council of Europe doing to make CoE standards into a globally accepted standard, or what more should be done in your opinion?

I already explained in reply to Q2 that the Council of Europe is internationally recognised because of its expertise and how its comparative weakness as a political actor provides legitimacy when it comes to formulating concrete legal standards.

The procedure for the conclusion of Council of Europe conventions which must be negotiated, signed and ratified is sometimes seen as rather time consuming, complicated and thus ineffective, especially when compared to EU legislation which can have immediate and direct effects. They have, however, also important comparative advantages. Multilateral treaties are better suited for participation of countries from other parts of the world. The Budapest Convention on Cybercrime (CETS 185, 2001), Data Protection Convention 108, the Istanbul Convention on preventing and combating violence against women and domestic violence (CETS 210, 2011), the Convention on Action against Trafficking in Human Beings (CETS 197, 2004) or the Convention on the counterfeiting of medical products and similar crimes involving threats to public health (CETS 211, 2011) provide good examples, because they are open not only to the members of the Council of Europe, but also to non-European countries. When dealing with global phenomena such as cybercrime, privacy on the internet, the falsification of medicines or trafficking in human beings, the possibility of bringing together like-minded countries from all over the world is a valuable comparative advantage.

The Council of Europe has only limited means to promote its instruments and standards worldwide. For many years, the Organisation was simply a factory of recommendations and treaties and it was basically left to individual member states to implement them, often in purely bilateral relations, such as the conventions on extradition or mutual assistance in criminal matters. Only over the last twenty years, the Council of Europe developed a certain capacity to mobilize extrabudgetary resources and implement cooperation and capacity-building activities on a larger scale. In most cases, these activities are limited to the immediate neighbourhood of the Council of Europe. Exceptions are projects related to the fight against cybercrime, the manipulations of sport competitions or the falsification of medicines which have from the beginning been conceived as being extended well beyond Europe and its near neighbourhood. However, even in these fields the financial and personal resources are limited.

The European Union is the most important donor for Council of Europe assistance and cooperation projects. The Council of Europe and the EU are sharing the same values. It is in the interest of the EU to promote Council of Europe standards worldwide. Many of our standards are complementary to EU law, for example in the field of cybercrime or data protection. Unlike the Council of Europe, the EU possesses a diplomatic service (the European External Action Service) and a worldwide network of diplomatic missions. The EU has thus a much greater capacity to promote standards internationally. I think the role of the EU could be further enhanced. It is clearly in the interest of the Union to promote at least a certain number of Council of Europe treaties instead of relying on bilateral agreements. Multilateral conventions are much more powerful instruments.

Q5.

It is now undeniable that the concepts of human rights, democracy and the rule of law are already a global norm and more and more countries are indeed applying these concepts into their national system. However, it is also true that these concepts are historically of European origin, and therefore, are hugely influenced by philosophy and other historical views of Europe. Some historical incidents show that applying these originally European concepts directly to countries with completely different backgrounds (e.g. history, religion, social structure) does not always work well and a drastic approach may result in a huge backlash or repercussion. In your opinion, can or should these fundamental concepts be adjusted or tailored when applying to non-European countries?

Most Council of Europe standards have been drafted by European experts. They undoubtedly embody European thinking. However, many of these instruments contain only minimum standards or rather general principles that in any case require national implementation through more detailed legislation or administrative practices. It will therefore be perfectly possible to adapt the standards to the historic, social, economic or religious realities of non-European countries.

Our human rights instruments often embody universal values which have only been further elaborated in the framework of the Council of Europe. They are not typically European. In recent times, it has also become more common to immediately associate experts from non-European countries to the elaboration of new standards, in particular in the field of cybercrime, data protection or artificial intelligence. Experts from more than 60 countries participated in the drafting of the second additional protocol to the Budapest Cybercrime Convention that will be opened for signature in March 2022.

Take privacy and data protection as an example. The standards of article 8 ECHR are quite similar to those of article 17 ICPPR, especially as regards electronic surveillance and interception of data. The UN Human Rights Committee and UN Special Rapporteurs on privacy and on countering terrorism have taken very similar approaches. Constitutional and supreme courts all over the world have developed strict conditions for the collection and processing of personal data. The 1988 Brazilian constitution was the first to introduce the right to an effective remedy in this respect (habeas data), Uruguay the first non-European country to accede to Convention 108.

The situation in Asia is not very different, even though it is sometimes pretended that the human rights discourse would be Western and irreconcilable with traditional values. In 'Identity and Violence', Amartya Sen argued that human rights have been articulated no less often in Asia than in Europe. Courts in that regions use increasingly the notions of necessity and proportionality, for example the Constitutional Court of the Republic of Korea when it declared the country's 'real name' policy in 2012 unconstitutional. Privacy in the sense of the right to be left alone may not be understood in the same way by individuals living in places as diverse as Dakar, Montevideo, New York, or Tokyo. However, in spite of widely differing cultural and legal traditions, we should be able to agree on one essential dimension of privacy, the right to the protection of personal data.

One of the big challenges in the field of the protection of fundamental rights in Europe is handling the tension between liberty and security. It is an illusion to think that we can have complete privacy and total security. However, a balance can – and must – be struck. Forfeiting citizen protection in favour of secret surveillance undermines the very essence of the democratic values which we seek to defend. In particular following some heinous terrorist attacks, the temptation to reinforce surveillance and police control is great. This is what is actually happening in many countries. As long as such measures are taken while respecting fundamental rights, there is nothing wrong about them. What is wrong is to think that human rights are an obstacle in the fight against crime or terrorism. Experience in many countries has shown that curtailing for example the right of access to a lawyer or judicial oversight will only foster ill-treatment and abuses. On the contrary, the presence of a lawyer and having a

video registration of an interrogation of a suspect are guarantees against him or her later pretending that statements had been obtained using under duress.