EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Solemn Hearing

Speech by Síofra O'Leary

President of the European Court of Human Rights

Strasbourg, 27 January 2023

Presidents of the Constitutional Courts and Supreme Courts,
President of the Ministers' Deputies,
Deputy Secretary General of the Council of Europe,
Secretary General of the Parliamentary Assembly,
Commissioner for Human Rights,
Excellencies,
Ladies and gentlemen,

I should like to thank you, personally and on behalf of all of my colleagues, for honouring us with your presence at this solemn hearing to mark the opening of the judicial year at the European Court of Human Rights.

By your presence, you demonstrate not only your commitment to our Court, but also, in this tragic period that Europe is living through, your commitment to the European mechanism for the protection of human rights. As we seek, together and collectively, to safeguard democracy and the rule of law and to protect human rights, your presence each year at this event goes well beyond the ceremonial.

Today I am speaking on this occasion for the first time. While I am very conscious of the honour that has been bestowed upon me, I feel above all the heavy responsibility that is entailed by this office, namely that of bequeathing the Convention edifice intact to future generations.

Fortunately, it is a responsibility that I share with judges of high quality and great dedication, and I take this opportunity to thank both my colleagues and the members of the Registry who support us in carrying out our judicial work.

Historians looking back on 2022 will have available a wealth of terms to describe the times that we are living though. The concept of "*Zeitenwende*" used by the German Chancellor strikes me as very apt - a change of era; the end of an era.

In 2022 we experienced the aftershocks of the pandemic and witnessed disputed but perceptible environmental damage, an energy crisis and the return of inflation – not forgetting the fears always raised by migratory phenomena and the frequently anarchical development of social media.

However, the major and tragic event of 2022 was the return of what had seemed unthinkable: once again a war on the European continent between two member States of the Council of Europe, and the expulsion of the Russian Federation.

Given the origins of the Convention and the objectives it pursues, the European Court of Human Rights could not escape this cataclysm.

As you know, Russia was expelled from the Council of Europe on 16 March 2022.[1]

The Court, sitting in plenary session, immediately adopted a resolution whereby it remained competent to deal with applications directed against the Russian Federation in relation to acts or omissions capable of constituting a violation of the Convention provided that they occurred up to 16 September 2022.[2]

This so-called "residual" jurisdiction of the Court derives from Article 58 of the Convention.

There are currently 16,800 cases against the Russian Federation pending before the Court.

Since Russia's expulsion, various judicial formations of the Court have continued to process Russian cases and several important judgments have been delivered. I am thinking, for example, of the Grand Chamber judgment in *Fedotova and Others*, delivered a week ago, finding a violation of Article 8 on account of the absence of any possibility under Russian law to obtain formal recognition of a same-sex relationship.[3]

The Court will continue to deal with Russian applications over the coming months. In line with the impact strategy, the processing of these cases will be differentiated, taking into account the importance of the legal issues in issue and whether there exists a well-established case-law applicable in the given area.

I should like to stress that there are currently eight pending inter-State cases concerning Russia. Processing of these cases remains a top priority for the Court, as demonstrated by the admissibility decision delivered two days ago in the case of *Ukraine and the Netherlands v. Russia*. Reiterating the essential character of the Convention as a constitutional instrument of European public order, the Grand Chamber emphasised that:

> "the purpose of the High Contracting Parties in concluding the Convention was not to concede to each other reciprocal rights and obligations in pursuance of their individual national interests but to realise the aims and ideals of the Council of Europe, as expressed in its Statute, and "to establish a common public order of the free democracies of Europe with the object of safeguarding their common heritage of political traditions, ideals, freedom and the rule of law'." [4]

[1] Resolution CM/Res(2022)2 on the cessation of the membership of the Russian Federation to the Council of Europe (Adopted by the Committee of Ministers on 16 March 2022 at the 1428ter meeting of the Ministers' Deputies).
[2] Resolution of the European Court of Human Rights on the consequences of the cessation of membership of the Russian Federation to the Council of Europe in light of Article 58 of the European Convention on Human Rights.
[3] *Fedotova and Others v. Russia*, nos. 40792/10 and 2 others, 13 July 2021.
[4] *Ukraine and the Netherlands v. Russia*, no. 8019/16, 43800/14 and 28525/20, § 385, 25 January 2023.

More than anything, the Court's exercise of its residual jurisdiction reflects the fact that a State cannot take advantage of its expulsion from the Council of Europe to avoid responsibility for violations of the Convention. This is all the more vital given that some of the cases in question are of great significance in terms of Russia's responsibility under international law.

Despite the challenges posed in 2022, the Court sought to fulfil its mission faithfully, and ruled on 39,570 applications, of which 4,168 gave rise to a judgment.

There are now 74,650 applications pending before the Court, compared to around 70,000 a year ago. Approximately 10,000 applications are related to ongoing conflicts, a situation which is also reflected in the 19 inter-State applications now before the Court.

As in previous years, three-quarters of the pending cases concern five States. First, Türkiye, with 20,300 applications, followed by the Russian Federation, Ukraine (10,600), Romania (5,900) and Italy (3,700).

Several of my predecessors have emphasised the need for greater awareness by the authorities of the lack of resources available to the Court. In view of the role we are called upon to play and the situation I have just described, I have no choice but to do the same.

Throughout the Interlaken reform process and even beyond, the Court has worked relentlessly to improve its efficiency. It will continue to do so [under my presidency].

In terms of organisation, however, there is no leeway for further improvement. We as a Court are currently dealing with multiple complex inter-State cases, while simultaneously processing tens of thousands of individual applications lodged in some 40 languages. Case management depends not only on the judges, but on the availability of experienced lawyers capable of mastering these languages and who are familiar with the legal systems of 46 member States.

Political support for the Council of Europe's values and for the Convention system itself will no doubt be at the heart of the 4th Summit in Reykjavik in May.

However, this support must imperatively be translated into the provision of appropriate material resources and more sustainable funding to further the implementation of a Convention which, for over 70 years, has contributed to stability, security and peace in Europe.

****

Ladies and Gentlemen,

Given the theme of this afternoon’s judicial seminar, it is natural that questions relating to the consolidation of democracy and means to counter democratic backsliding feature in my intervention this evening.

Much ink has rightly been devoted in recent years to the European Convention’s rule of law guarantees and to the frontal challenges to judicial independence which Europe has been witnessing. In contrast, a misplaced complacency may have installed itself in certain States over the last decades regarding the Convention’s success in supporting and preserving democracy itself.

However, in recent years our Court has witnessed first-hand efforts to dismantle democracy, the only political model envisaged by the Convention. Democratic backsliding, aptly described as “death

by a thousand cuts", takes many different forms, from the adoption of measures to undermine the judiciary, muzzle the press, stifle political pluralism, dispense with institutional checks and balances, to the elimination of political competition or the turning of a blind eye to curruption.

Had it been forgotten that the maintenance and further realisation of human rights and fundamental freedoms are best ensured by an effective political democracy, underpinned by the rule of law, and by a common understanding and observance of human rights? If so, the tragic events unfolding in Ukraine since February last, and the forces which gave rise to those events, have surely reminded us of the importance of what our forebearers fought so hard for.

Democracy, just like human rights and the rule of law, is not acquired once and for all. It must be fought for every day.

Through its protection of key civil and political rights the Convention plays a vital role in ensuring that the elements we need for a peaceful society - democracy, tolerance and pluralism - are in place. Constant vigilance is required to ensure that they are not dismantled. The European Convention is a product, in the words of one of my predecessors, Luzius Wildhaber, of "idealistic realism". It is anchored in the belief that democratic regimes, respectful of fundamental rights, do not go to war with one another, such that it is not an issue of purely domestic jurisdiction whether democracies relapse into dictatorships.[5] The purpose of the Convention, according to those who drafted it, was to ensure that Council of Europe States are democratic and that they remain so.

In its recent case-law on freedom of expression, long been regarded as the lifeblood of democracy, the Court has been sensitive to the form, nature and quality of information received by voters, present and future.

I am particularly struck by an extract from a recent German case on Article 10, in which the Court emphasised:

> "the enormous importance, from a public-policy perspective, of teaching and educating children, in a credible manner, about freedom, democracy, human rights and the rule of law".[6]

In dangerous times, when the values hitherto taken for granted in post-war Europe are increasingly challenged, it is on the young and their future that we must concentrate.

****

In keeping with tradition, I will mention some cases from the last year which are emblematic, at this turning point in history, of the essential role played by the Convention.

In the first case, *H.F. and Others v. France*, delivered by the Grand Chamber on 14 September 2022, the applicants applied unsuccessfully at national level for emergency repatriation of their daughters and grandchildren, held in camps in north-eastern Syria.[7]

The Court emphasised that Article 3 § 2 of Protocol No. 4 does not give rise to a general right to repatriation.

[5] Luzius Wildhaber, 'Rethinking the European Court of Human Rights' in Jonas Christoffersen and Mikael Rask Madsen (eds), *The European Court of Human Rights between Law and Politics* (Oxford University Press 2011), pp. 204-230.
[6] *Godenau v. Germany*, no. 80450/17, § 54, 29 November 2022.
[7] *H.F. and Others v. France* [GC], nos. 24384/19 and 44234/20, 14 September 2022.

However, the right to enter national territory may give rise to a positive obligation on the part of the State where the refusal to take any steps would lead to the national concerned being placed in a situation comparable, de facto, to that of an exile.

A refusal to repatriate must be accompanied by appropriate safeguards. This presupposes a review mechanism before an independent body – not necessarily of a judicial nature – which makes it possible to verify that the reasons for the contested decision are free of arbitrariness. Applicants must be able to acquaint themselves, albeit summarily, with the grounds relied upon and it must be possible to verify that the best interests of any children involved have been taken into account.

Given the absence of a formal decision and the refusal of the domestic courts to entertain jurisdiction, the Court found a violation of Article 3 § 2 of Protocol No. 4 to the Convention.

The second judgment I wish to mention is *NIT S.R.L. v. the Republic of Moldova*, delivered by the Grand Chamber in April 2022.[8] The case concerned the freedom of expression of a television channel which, following elections, became a platform for criticism of the new government. It was sanctioned for serious and repeated breaches of the legal obligation to ensure political balance and pluralism. Its broadcasting licence was eventually revoked. Before the Court, the company relied on Article 10 and on Article 1 of Protocol No. 1 to the Convention. The Court found no violation of either provision in the particular circumstances of the case.

The case raised novel issues relating to the internal dimension of media pluralism, the openness of discourse in European democracies and the right balance to be struck between safeguarding political pluralism in the media and respecting editorial freedom.

When States, such as Moldova, opt for a regulatory model requiring internal pluralism, designed to guarantee balanced political coverage, this falls within their margin of appreciation and often reflects their political culture and the historical development of their broadcasting sector. Article 10 does not impose a particular model of internal pluralism as long as overall programme diversity in the sector as a whole is guaranteed at national level. The role of the Court is to ensure that the effects of the regulatory regime a State choses are compatible with the guarantees afforded by Article 10 and the scrutiny it exercises will be more or less strict scrutiny depending on the degree of restriction on editorial freedom which the model chosen entails.

The existence of procedural safeguards was considered of particular importance by the Court when it came to the revocation of a broadcasting licence as in this case, so too was the role of the regulatory authority, whose independence has to be verified given the delicate and complex nature of that role.

The *NIT* judgment reminds us that media freedom and pluralism are enablers of the rule of law and democratic accountability. It showcases the important role played by the Council of Europe, setting standards regarding responsible journalism, media pluralism and the essential independence of regulatory authorities in this field.

Altogether the Grand Chamber adopted nine judgments in 2022, including one within the context of infringement proceedings under Article 46 § 4 of the Convention.[9] Moreover, three advisory opinions were handed down following requests made by the Lithuanian Supreme Administrative

[8] *NIT S.R.L. v. the Republic of Moldova* [GC], no. 28470/12, 5 April 2022.
[9] *Kavala v. Türkiye* (infringement proceedings) [GC], no. 28749/18, 11 July 2022.

Court,[10] the Armenian Court of Cassation[11] and the French Council of State.[12] A seventh request for an advisory opinion, this time from the Finnish Supreme Court, is pending.[13]

While the judgments of the Grand Chamber may attract the greatest attention, the judgments delivered by Chambers of seven judges, in line with our "impact strategy", increasingly concern important and complex legal and societal questions. As you know the strategy seeks to ensure rapid identification and expeditious processing of such cases.

This is well-illustrated in a series of four judgments handed down in 2022 in relation to the rule of law crisis in Poland: [*Grzęda*, *Advance Pharma*, *Żurek and Juszczyszyn*,[14]] only one of which hails from the Grand Chamber.

At issue in both *Grzęda* and *Żurek* was the unjustifiable limitation of the applicants' access to court to challenge the premature termination of their terms of office as members of the National Council of the Judiciary (NCJ), while both were serving judges. Finding Article 6 § 1 both applicable and violated, the Court emphasised that where judicial councils are established, States must ensure their independence from the executive and legislative powers in order to safeguard the integrity of the judicial appointment process. The fundamental change in the manner of electing the NCJ's judicial members, considered jointly with the early termination of the mandate of previous judicial members like the applicant judges, meant that its independence was no longer guaranteed.

In *Żurek* the Chamber also found a violation of Article 10 of the Convention as a result of a series of measures applied to the applicant, who was a spokesperson of the NCJ and critic of the judicial reforms. According to the Court:

> "the general right to freedom of expression of judges to address matters concerning the functioning of the justice system may be transformed into a corresponding duty to speak out in defence of the rule of law and judicial independence when those fundamental values come under threat".[15]

These cases are noteworthy for a number of reasons. Firstly, the Court stressed that in the light of the principles of subsidiarity and shared responsibility, the Contracting Parties' obligation to ensure judicial independence is crucially important for the Convention system itself. The latter cannot function properly without independent judges. Secondly, all Contracting Parties must abide by rule of law standards and respect their obligations under international law, including those voluntarily undertaken when they ratified the Convention. Domestic law, including national constitutions, cannot be invoked as justification for failure to respect those obligations. Finally, these judgments, in which the Court referred extensively to the parallel rule of law jurisprudence of the Court of Justice of the European Union reflect further the synergy between the two European courts in defence of judicial independence and the values which underpin the Convention.

---

[10] *Advisory opinion on the assessment, under Article 3 of Protocol No. 1 to the Convention, of the proportionality of a general prohibition on standing for election after removal from office in impeachment proceedings* [GC], request no. P16-2020-002, Lithuanian Supreme Administrative Court, 8 April 2022.

[11] *Advisory opinion on the applicability of statutes of limitation to prosecution, conviction and punishment in respect of an offence constituting, in substance, an act of torture* [GC], request no. P16-2021-001, Armenian Court of Cassation, 26 April 2022.

[12] *Advisory opinion on the difference in treatment between landowners' associations "having a recognised existence on the date of the creation of an approved municipal hunters' association" and landowners' associations set up after that date* [GC], request no. P16-2021-002, French Conseil d'État, 13 July 2022.

[13] The European Court of Human Rights has accepted a request (no. P16-2022-001) for an advisory opinion under Protocol No. 16 to the Convention received from the Supreme Court of Finland on 10 October 2022. In its request, the Supreme Court of Finland has asked the ECHR to provide an advisory opinion on the procedural rights of a biological mother in proceedings concerning the adoption of her adult child.

[14] *Grzęda v. Poland* [GC], no. 43572/18, 15 March 2022; *Advance Pharma sp. z o.o v. Poland*, no. 1469/20, 3 February 2022; *Żurek v. Poland*, no. 39650/18, 16 June 2022; *Juszczyszyn v. Poland*, no. 35599/20, 6 October 2022.

[15] *Żurek v. Poland*, no. 39650/18, § 222, 16 June 2022.

In *Ecodefence and Others v. Russia*, the final judgment I will reference, the applicants were non-governmental organisations involved in civil-society issues who were placed on a register of so-called "foreign agents" funded by "foreign sources".[16] This resulted in the imposition of administrative fines, financial expenditure and severe restrictions on their activities. One organisation, Memorial, joint winner of the Nobel Peace Prize in 2022, was liquidated, declared illegal and forcibly dissolved the same year.

In a judgment delivered in June 2022 the Court found a violation of Article 11, interpreted in the light of Article 10 of the Convention, due to key concepts in the Foreign Agents Act which fell short of the Convention's foreseeability requirement. In addition, judicial review had failed to provide adequate and effective safeguards against the arbitrary and discriminatory exercise of the wide discretion left to the executive by the law.

In *Ecodefence* the Court emphasised that:

> "the democratic process is an ongoing one which needs to be continuously supported by free and pluralistic public debate and carried forward by many actors of civil society".[17]

The impugned Russian regulation reflected the notion that external scrutiny of matters relating to human rights and the rule of law was suspect and a potential threat to national interests. The Court, in response, emphasised that the rights of all persons within the legal space of the Convention are a matter of concern to all member States of the Council of Europe.

Ladies and Gentlemen,

The *Ecodefence* judgment also reminds us that by virtue of Article 34 of the Convention, Contracting States undertake to refrain from hindering the effective exercise of the right of individual application. That right is the cornerstone of the Convention system. In *Ecodefence* and in three other cases decided in 2022, the Court has found respondent States' disregard of interim measures to be in violation of their Article 34 obligations.

In view of the vital role played by interim measures in the Convention system, it should be a cause of grave concern that some Contracting States are prepared to flout international rule of law requirements in this manner.

Finally, as regards this case, like any court worth its salt, we too must be open and self-critical. This Court took too long to decide the *Ecodefence* case; a fact which underlines the need to consolidate the impact strategy and the expeditious handling of key cases which I referred to previously, a fact which also underlines the need for us to have the resources to do so.

Before turning to our guest of honour, let me remind you that today is the international day of commemoration in the memory of victims of the Holocaust.

Let us not forget why the Convention was conceived.
Let us not forget what, through the work of this Court and your work as national judges, the Convention has achieved.
And let us not forget what remains to be done.

[16] *Ecodefence and Others v. Russia*, nos. 9988/13 and 60 others, 14 June 2022.
[17] ibid, § 139.

****

Ladies and gentlemen,

This is the first time that a leading Italian figure has honoured us by delivering the traditional speech at the start of our Solemn Hearing.

A leading figure indeed, as Silvana Sciarra has been a judge at the Italian Constitutional Court since 2014 - a court she has presided over since last September.

Ms Sciarra, President of the Constitutional Court,

Our professional paths, devoted to European law and the construction of a Europe of rights and freedoms, have crossed on several occasions.

You are an acknowledged specialist in labour law and have trained generations of students at the University Institute in Florence – students who enthusiastically welcomed your recent election as President.

While social rights are your preferred field, you have long been passionate about human rights, and have written extensively on the rule of law and pluralism. These subjects, which are at the heart of our mission, are more topical than ever.

We are therefore looking forward to hearing from you, and it is with great pleasure that I invite you to take the floor.