Louise Arbour

United nations High Commissioner for Human Rights

Speech given on the occasion of the opening of the judicial year, 25 January 2008

President Costa, members of the Court, ladies and gentlemen, dear friends and colleagues,

It is an immense honour for me to take part in the ceremony marking the opening of the European Court of Human Rights' judicial year. I have always taken a great interest in the Court's work and the key institutional role it plays in the interpretation and development of international law in the human rights field, not only in my current position as High Commissioner for Human Rights, but also when I was a judge at the Canadian Supreme Court.

Mr President, the European regional human rights protection system often serves as a model for the rest of the world. The protection system established under the Convention for the Protection of Human Rights and Fundamental Freedoms provides clear proof that a regional mechanism can, indeed must, guarantee the protection of human rights where national systems – even the most efficient ones – fall short of their obligations. Europe's experience shows that a regional system can – with time and sustained commitment – develop its own culture of protection, drawing inspiration from the best things the various national legal systems and different cultures have to offer. The validity of this approach has been confirmed both in the Americas, through the Inter-American Court of Human Rights, and in Africa, with the creation of an even more ambitious regional protection mechanism, which now includes a court and involves all States across the African continent.

As High Commissioner for Human Rights, I have long deplored the fact that Asia does not have any system of this kind. Some doubt the viability of such a system in view of the size and diversity of the Asian continent. The example of Africa will perhaps serve to prove the contrary. Recently, there were the first signs of political commitment at sub-regional level: last November the ASEAN States agreed to set up, by virtue of its founding charter, a regional human rights system for the countries belonging to ASEAN. I am convinced that, as this system takes shape, lessons drawn from history and from the experiences of Europe, the Americas and Africa will enable an effective regional protection system to be developed on solid foundations, gaining the trust of the main parties concerned. I hope that one day everyone throughout the world will have access to a regional mechanism of this kind should the national system prove deficient. Since regional mechanisms are closer to local realities, they will inevitably be called upon in the first instance, while the international protection offered at United Nations level will more usually remain a last resort.

Mr President, some people argue that the European Court of Human Rights has become a victim of its own success, in view of the already high and still increasing number of cases before it. The Court's procedures, which were established some years ago, do not allow it to deal with such a volume of cases within a reasonable time. I therefore find it regrettable that Protocol No. 14, which provides for more effective procedures by amending the Court's control system, has not been ratified by all the States Parties to the Convention. I sincerely hope that this additional instrument will come into force quickly, so that the Court can deal more efficiently with the volume of complaints brought before it.

It remains possible that these reforms will relieve the pressure on the Court only temporarily and that it will ultimately have to move away from the concept of universal individual access towards a system of selective appeals, a practice that is, of course, already common in courts of appeal at national level. This would allow more appropriate use of the Court's limited judicial resources, targeting cases that arouse genuine debate of international law and human rights, and would at the same time provide an opportunity for more thorough consideration of highly complex legal issues with profound implications for society.

Mr President, members of the Court, the system of Grand Chamber review that has already been introduced is, in my opinion, very much proving its worth. A second tier of review, by an expanded chamber, increases overall conceptual clarity and doctrinal rigour in the law. It gives the voluminous body of law emerging from the Sections at first instance a coherence which could not otherwise easily be achieved. The Grand Chamber's decisions over this last year certainly confirm this. In particular, *Vilho Eskelinen and Others v. Finland*[1] has brought fresh conceptual clarity to access to justice issues in the public sector arising under Article 6 of the Convention.

In other cases, the Court has made very thoughtful contributions on issues that are sensitive across the Council of Europe space and on which there is little European consensus. Examples such as *Evans v. the United Kingdom*[2], on the use of embryos without consent, will guide further discussion on these issues by policy-makers, as well as the general public, and on complex social questions that do not come with easy answers. Other cases – such as *Ramsahai v. the Netherlands*[3] and *Lindon and Others v. France*[4] – have dealt with fact-specific incidents of use of force and defamation that have been very controversial in the countries in which

1 [GC], no. 63235/00, 19 April 2007.
2 [GC], no. 6339/05, 10 April 2007.
3 [GC], no. 52391/99, 15 May 2007.
4 [GC], nos. 21279/02 and 36448/02, 2 October 2007.

they have arisen, but where the Court's judgment has been important in bringing finality to the discussion. These cases very much demonstrate the varied positive impact of the international judicial function.

In a review of the Court's jurisprudence from the United Nations human rights perspective, one decision over the last year stands out particularly, and raises both complex and challenging issues. In *Behrami v. France* and its companion case of *Saramati v. France, Germany and Norway*[5], the Grand Chamber of the Court was called upon to decide the admissibility of cases against those participating member States arising from the activities in Kosovo of the United Nations Mission in Kosovo (UNMIK) and the Kosovo Force security presence (KFOR). In the first case, a child died and another was seriously wounded by a cluster bomblet that, it was alleged, UNMIK and KFOR were responsible for not having removed. The second case concerned the arrest and detention of an individual by UNMIK and KFOR.

Highlighting the degree to which human rights and classic international law have now become closely interwoven, the case required the Court to assess a particularly complex web of international legal materials, ranging from the United Nations Charter to the International Law Commission's Draft Articles on the Responsibility of International Organisations and on State Responsibility, respectively, as well as the Military Technical Agreement, the relevant United Nations Security Council Resolutions, the Regulations on KFOR/UNMIK status, privileges and immunities, KFOR Standard Operating Procedures, and so on. The United Nations Office of Legal Affairs itself submitted a third-party brief to the Court, set out in the judgment, delineating the legal differences between UNMIK and KFOR. It also argued, in respect of the cluster-bomblet accident, that in the absence of necessary location information being passed on from KFOR, "the impugned inaction could not be attributed to UNMIK".

The Grand Chamber unanimously took a different approach, holding that both in respect of KFOR – as an entity exercising lawfully delegated Chapter VII powers of the Security Council – and UNMIK – as a subsidiary organ of the United Nations created under Chapter VII – the impugned acts and failure to act were "in principle, attributable to the United Nations". At another point, the Court stated that the actions in question were "directly attributable to the United Nations". That being said, the Court went on to see whether it was appropriate to identify behind this veil the member States whose forces had actually engaged in the relevant action or failure to act. Perhaps unsurprisingly, the Court found that in light of the United Nations' objectives and the need for effectiveness of its operations, it was without jurisdiction *ratione personae* against individual States. Accordingly, the case was declared inadmissible.

This leaves, of course, many unanswered questions, in particular as to what the consequences are – or should be – for acts or omissions "in principle attributable to the United Nations". If only as a matter of sound policy, I would suggest that the United Nations should ensure that its own operations and processes subscribe to the same standards of rights protection which are applicable to individual States. How to ensure that this is so, and the setting up of appropriate remedial measures in cases of default, would benefit immensely from the input of legal scholars and policy-makers, if not from the jurisprudential insight of the courts. In areas of

5 (dec.) [GC], nos. 71412/01 and 78166/01, 2 May 2007.

counterterrorism, notably the United Nations' sanctions regimes, similar problems have become apparent, and, in that area, decisions of the European Court of Justice, in particular, have highlighted both the problems and possible solutions. I do look forward to following the contribution that this Court will offer to resolving these jurisprudentially very challenging but vitally important issues.

Mr President, within any system of law, national as well as regional, it can be tempting to confine one's view to the sources of law within the parameters of that system. As a former national judge, I am very much aware of how readily this can occur. That temptation can rise as the internal volume of jurisprudence grows and the perceived need to look elsewhere for guidance and inspiration can wane. In that context, allow me to say how particularly important it is to see the Court's frequent explicit reference to external legal materials, notably – from my point of view – the United Nations human rights treaties, and the concluding observations, general comments and decisions on individual communications emanating from the United Nations treaty-monitoring bodies.

To cite but one recent example of wide reference to such sources, the Grand Chamber's decision in *D.H. and Others v. the Czech Republic*[6] made extensive reference to provisions of the International Covenant on Civil and Political Rights, of the International Convention on the Elimination of All Forms of Racial Discrimination and of the Convention on the Rights of the Child, as well as citing General Comments by the United Nations Human Rights Committee on non-discrimination and a relevant decision by the Committee on an individual communication against the same State Party. The Court also referred to General Recommendations of the Committee on the Elimination of Racial Discrimination on the definition of discrimination, on racial segregation and apartheid, and on discrimination against Roma. I find this open and generous approach exemplary as it recognises the commonality of rights problems, as well as the interconnectedness of regional and international regimes.

In international law, there is a real risk of unnecessary fragmentation of the law, with different interpretative bodies taking either inconsistent, or worse, flatly contradictory views of the law, without proper acknowledgment of differing views, and proper analysis in support of the stated better position. In the field of human rights, these effects can be particularly damaging, especially when differing views are taken of the scope of the same State's obligations. Given the wide degree of overlap of substantive protection between the European Convention and, in particular, the International Covenant on Civil and Political Rights, the Court's use of United Nations materials diminishes the risk of inconsistent jurisprudence and enhances the likelihood of a better result in both venues.

Of course, there are some variations of substance between certain provisions of the two sets of treaties, and there may on occasion be justified differences in interpretative approach between the two systems on points of law. I would, however, hope that contrasting conclusions of law between the Court and, for example, the Human Rights Committee on essentially the same questions of law would be rare and exceptional. I think it correct in principle, let alone as a matter of prudential use of scarce international judicial resources and comity between international rights institutions, that plaintiffs should have one opportunity to litigate thoroughly a question of international human rights law before an international forum, rather

6 [GC], no. 57325/00, 13 November 2007.

than routinely engaging different international fora on essentially the same legal issue. To that end, in circumstances where a substantive legal issue comes before an international body that has already been carefully resolved by another, in my view special attention should be paid to the reasoning and adequate reasons should be expressed in support of any contrary views of the other body before a contrary conclusion of law is reached. Ultimately, the systems of law are complementary rather than in competition with each other, and with sensitive interpretation there is plentiful scope for the regimes to work in their own spheres but in a mutually reinforcing fashion. I would certainly welcome opportunities for a number of judges of the Court and treaty body members to meet and share perspectives on some of these legal questions.

Allow me to add how encouraged I have been by the dramatic expansion in the Court's practice of *amicus curiae* third-party briefs, which put before the Court broader views and other legal approaches, and which can be beneficial in giving the Court's interpretations of the Convention the richest possible basis. As High Commissioner for Human Rights, over the last two years I have begun myself to use this tool, putting briefs to the Special Court for Sierra Leone, the International Criminal Court, the Iraqi High Tribunal and the United States Supreme Court, in instances where I have felt that the court might be assisted by my input on a particular point of international human rights law. I am sure that in due course similar opportunities before this Court will present themselves, and I hope to be in a position to make useful contributions to your work in this fashion.

Mr President, a final issue that has long been close to my heart is the effort to bring economic, social and cultural rights back into what should be their natural environment – the courts. The unnatural cleavage that took place decades ago when the full, interconnected span of rights set out in the Universal Declaration of Human Rights were split into supposedly separate collections of civil and political rights on the one hand and economic, social and cultural rights on the other has done great damage in erecting quite false perceptions of hierarchies of rights. In the area of justiciability of rights, particularly, the notion of economic, social and cultural rights as essentially aspirational, in contrast to the "hard law" civil and political rights, has proved especially difficult to undo. At the national level, some judiciaries have been bolder than others in this area, while at the international level, discussions continue to proceed slowly on the elaboration of an Optional Protocol permitting individual complaints for violations of the International Covenant on Economic, Social and Cultural Rights.

Against this background, this Court's jurisprudence has been very constructive in setting the stage for progress on these issues. Although the Convention's articulation of rights is essentially civil and political in character, the Court has not hesitated to draw upon the interconnected nature of all rights to address many economic, social and cultural issues through the lens of – nominally – civil rights. The Court's approach, for example, to health issues through the perspective of the right to security of the person – in the absence of a right to health as such – shows how rights issues can be effectively approached from various perspectives. These techniques are of real value to national judiciaries, whose constitutional documents are also often limited to listings of civil and political rights, which nevertheless seek to address issues of broader community concern in rights-sensitive fashion.

The very first Protocol to the European Convention, of course, does explicitly set out a classic social right, the right to education. As is well known, Article 2 of that Protocol sets out explicitly that: "No person shall be denied the right to education." The Court's jurisprudence in elaborating the contours of this right with judicial rigour is, in my view, particularly important in elaborating how these rights can be subjected to just the same judicial treatment as the more familiar catalogues of civil and political rights. In this respect, I particularly welcomed the recent decision in November last year of the Grand Chamber of the Court in *D.H. and Others v. the Czech Republic*, cited above, which held that the system of Roma schools established in that country breached the right to education, read in conjunction with the prohibition of discrimination. The course marked by the Court in this landmark case will be of great importance to national judiciaries and regional courts increasingly dealing with economic, social and cultural issues.

Mr President, please allow me to conclude my address by congratulating the Court on the vitality and energy of its decisions, and to underline the importance of its work in relation to the more general international human rights protection system with which the European system has so many similarities. Rigorous though the standards already established may be, I believe that it is still possible to refine approaches and to enhance the existing natural complementarities.

I should now like to thank you for giving me the opportunity to speak on this occasion and I wish you a productive judicial year. I can assure you that I shall be following the results of your deliberations with great enthusiasm this year and well beyond.

Thank you.