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SOLEMN HEARING
OF THE EUROPEAN COURT OF HUMAN RIGHTS
ON THE OCCASION OF THE OPENING OF THE JUDICIAL YEAR

Ladies and gentlemen,

On behalf of my colleagues and all the members of the European Court of Human Rights, I should like to thank you for honouring us with your presence at the official opening of our Court's judicial year. This is a sign of your attachment to human rights, which are our common heritage, and your loyalty to our Court, whose *raison d'être* is to ensure that they are respected and developed across the whole continent.

Before sharing a few thoughts with you, I should like to welcome our guest of honour, Mr António Guterres, United Nations High Commissioner for Refugees and former Prime Minister of Portugal. I am grateful to you, High Commissioner, for accepting our invitation. Your presence highlights the universal and topical nature of refugee protection, and also the practical links we are seeking to develop with the United Nations bodies and institutions working in the field of justice and fundamental rights. We will listen very attentively to what you have to say, especially in view of the delicate and important task of the High Commissioner's Office in assisting asylum-seekers, refugees and stateless persons.

I have a further preliminary announcement to make. It concerns the launch of a quite exceptional book about the European Court of Human Rights, published to celebrate its 50th anniversary and the 60th anniversary of the Convention by which it came into being. This is an important occasion. Never before have we had a high-quality reference book charting developments over the past few decades while looking firmly towards the future. This fine book is a collective effort. It was planned and produced under the guidance of an editorial board chaired by my colleague Egbert Myjer, with the assistance of several other judges and members of the Registry. The publication coordinator was Mr Jonathan Sharpe, a former member of the Registry. The book is published by Third Millennium Publishing in London, in English and French. Lastly, a very substantial contribution towards the funding of the book came from the Ministry of Foreign Affairs of the Grand Duchy of Luxembourg, to which I should like to place on record our gratitude; the Ministry is represented here by Mr Georges Friden, Director of Political Affairs. Without its contribution, the project could not have been completed. More broadly, I wish to thank everyone involved in producing the book, which is entitled *The Conscience of Europe*.

Lastly, I should mention, with a sense of collective pride, that on 29 May 2010 in Middelburg, in the presence of the Queen of the Netherlands, I received the Franklin D. Roosevelt Four Freedoms Award on behalf of the Court. More than just a reward, this high distinction is an encouragement for us.

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Ladies and gentlemen,

I would like to structure my thoughts this year around our Court's recent developments and future plans, before looking at the present state and the future of human rights in Europe.

The European Court of Human Rights, which became a permanent institution in 1998, has been undergoing reforms ever since, both through internal measures and as a result of institutional changes brought about by the States Parties. Emphasis should also be laid on the efforts made by States at national level that have facilitated the Court's task. I do not need to remind you that the Convention was established on the principle of shared responsibility. The member States undertook to guarantee the rights and freedoms set forth in the Convention. They collectively renewed this promise at Interlaken; I shall come back to this. In examining disputes brought before it, the Court determines whether these undertakings have been honoured; where this has not been the case, it reaches a finding of a violation of the Convention or the Protocols thereto. It will then be for the States concerned to execute the judgment, under the supervision of the Committee of Ministers of the Council of Europe; this requires them to take individual as well as general measures. Often, they will have to change their laws or practice, or the approach taken by their courts. When you think about it, this is a rather unusual process! It is understandable that there is sometimes resistance; I am happy to note that it fades over time.

This mechanism, an impressively bold innovation in 1950, has been constantly enriched over the years, first of all in terms of the nature and scope of the rights protected. There are now six additional Protocols in force complementing the substantive provisions of the Convention. Two of them have the supremely emblematic purpose of abolishing the death penalty, which now no longer exists in Europe. In addition, the case-law, which treats the Convention as a "living instrument", has favoured a dynamic interpretation of the rights it safeguards. This afternoon's seminar raised the question of the limits to this form of interpretation; in my view, an evolutive approach seems essential, otherwise the text of the 1950 Convention would have been rendered obsolete or ineffective as a result of changes in society and morals and technological innovations. Who at the time could have imagined computers, the Internet, social networks, medically assisted procreation, gamete donation, transsexuality, or indeed the increasing importance of the environment and ecology?

Judicial protection of rights also requires procedures, which themselves have been amended several times. In the recent past, Protocol No. 11 abolished the European Commission of Human Rights, turned our Court into a permanent body and made the right of individual application and acceptance of the Court's jurisdiction automatic and compulsory aspects of procedure. As regards the long-awaited Protocol No. 14, which finally came into force on 1 June last year, it has created single-judge formations, assigned new powers to the three-judge Committees, made it possible to reduce the number of judges in a Chamber from seven to five, introduced a new admissibility criterion, empowered the Committee of Ministers to institute interpretation and infringement proceedings, and afforded the Commissioner for Human Rights the right to intervene as a third party.

The end of History as announced by Hegel, or more recently by Francis Fukuyama, does not appear imminent to me. Similarly, the history of the Convention seems far from complete. The fourteenth Protocol will certainly not be the last one. There are two main reasons for this, which are partly linked.

Firstly, the new procedures established by the Protocol, while necessary or even indispensable, are not sufficient. As was foreseeable and indeed foreseen, they do not in themselves make it possible to bridge the gap between the number of decisions delivered by the Court and the influx of applications lodged with it. I shall not overwhelm you with statistics. A single example will suffice: in 2010, the number of applications

disposed of increased by 16% from 2009, without any additional resources, which is encouraging; however, alongside this, the number of new applications increased by 7%. At this rate, and bearing in mind the size of the backlog, it would still take many years to be wiped out. Although the effects of the single-judge procedure were only felt over a period of seven months in 2010, even over a full year they will not keep pace with the immensity of the task: we will need to go further. In any event, our Court, whose resources are scarcely increasing if at all, cannot devote most of its efforts and means to rejecting applications with no prospects of success; otherwise, the handling of serious and urgent cases would be delayed indefinitely. The Court has therefore set up a priority policy. There will be no immediate gains in purely statistical terms, but the cause of human rights and their effective protection will, on the other hand, benefit. We have to be clear on this point, so that all interested parties are aware and are not surprised over the next few years.

Secondly, the medium- and long-term future will involve changes that cannot take effect without amending the Convention, even if, as the Wise Persons' Report recommended in 2006, the amendment procedure needs to be simplified in future. As you know, a very important occasion in 2010 was the Ministerial Conference on the future of the Court, held in Interlaken, Switzerland, which I announced to you here a year ago, having suggested the idea the year before that. The conference was, in itself, a political success. In particular, it reaffirmed the States' attachment to the Convention and recognised "the extraordinary contribution of the Court to the protection of human rights in Europe", which is no mean tribute. It also adopted a Declaration, together with an Action Plan. I shall not go into the details of the measures recommended or envisaged in the two instruments. They make provision for decisions to be taken at various levels, stretching over a period of several years, from 2010 to 2019, and involving a range of different entities: the Court itself – and we have begun without delay; the States, which are responsible in the first place for protecting rights and freedoms at national level; and the bodies of the Council of Europe, in particular the Secretary General, the Committee of Ministers and the Parliamentary Assembly.

Several key words are particularly significant in the Declaration and Action Plan, illustrating the scale and variety of this pluriannual programme of reforms: subsidiarity; shared responsibility; clarity and consistency of the case-law; reduction in the number of clearly inadmissible applications; full and rapid execution of judgments; a Statute for the Court; greater autonomy for the Court within the Council of Europe (in the interests of efficiency); the crucial importance of its independence and impartiality; and systematic use of procedural tools (such as pilot judgments or friendly settlements). I wish to emphasise two aspects which I consider urgent: the setting up of a mechanism for effective *filtering* of applications – the vast majority of which, I would remind you, are rejected as inadmissible, a considerable and abnormal problem – and a radical reduction of the number of *repetitive applications*. Such applications are usually well-founded because they reflect systemic defects that should be remedied and eradicated at national level, so that clone cases of this kind would no longer be brought to Strasbourg in future. This would solve part of our problems regarding delays and processing times, and above all the principle of shared responsibility would be applied more fairly and effectively.

Since Interlaken, our Court has already taken steps, either alone or with the assistance of others, to increase its efficiency, despite the financial crisis which has deprived it of the additional resources it requires.

Without giving an exhaustive list, I would mention the development of *pilot judgments,* which are having an increasingly satisfactory effect, and clarification of the implications of such judgments; the adoption of the priority policy referred to earlier; new criteria and scales for the calculation of just-satisfaction awards under Article 41 of the Convention; and the adoption of a Practical Guide on Admissibility Criteria, designed to provide all interested parties with information about the conditions that must be satisfied for an application to have any chance of success.

Recently, on my initiative, the Committee of Ministers set up a Panel of Experts and appointed its seven members, several of whom are present, and I am pleased to welcome them; drawing inspiration from the panel established under the Lisbon Treaty for the appointment of judges and advocates-general of the Court of Justice, this panel, which has just met for the first time, is to advise States when drawing up lists of candidates submitted to the Parliamentary Assembly for election as judges of the Court. I can assure you that this is by no means a minor reform.

Short-term projects also include the enhancement of the tools at our disposal, in particular the HUDOC database, an essential resource not only for our own productivity and for maximum consistency of our case-law, but also for all practitioners, especially as a means of ensuring that national courts are familiar with our decisions and draw on them in their own rulings. I should point out that many States have provided the Court with valuable voluntary contributions, for which I thank them. Some are financial in nature and have, for example, enabled us to make webcasts of hearings available and to improve the Court's IT system – in particular, we will be able to develop the HUDOC case-law database thanks to contributions of this kind; others take the form of the secondment to the Registry of legal officers who come to help us and, when they leave, take back to their own countries' legal systems an extremely useful knowledge of the European Convention, based not on textbooks but on practice. This is a good example of *collaboration*, naturally on a wholly independent basis since we select the candidates, who are then overseen by experienced Registry lawyers, under the supervision of our judges.

This is perhaps the time to mention a serious obstacle to the Court's functioning, a problem which has recently worsened and which cannot be avoided without just such collaboration between all those involved in the system, whether State authorities or other entities. I am referring to the urgent measures provided for in Rule 39 of the Rules of Court, which are designed to avoid violations of the Convention that would be irreversible, and take the form of orders to the respondent State to take or to refrain from taking particular actions. The pre-eminent field in which these interim measures are applied is that of the expulsion of aliens or the refusal of asylum requests, a subject which Mr Guterres will tell us about. It is not an exaggeration to say that the application of Rule 39 has preserved the physical integrity, the liberty and even the lives of many people who by definition are vulnerable. Rule 39 proceedings have developed considerably in the past few years; often, however, they confront the Court with a difficult or indeed impossible task. Decisions have to be taken as a matter of urgency, on the basis of a rudimentary case file, on whether to allow or refuse the expulsion or extradition of people to countries where they are at risk of serious violations of their rights. It is clear, as is confirmed by the Interlaken Declaration, that our Court cannot, without infringing the subsidiarity principle, assume the role of a third- or fourth-instance court; however, recourse to Rule 39, vital though it may be for the effectiveness of the rights at stake, is threatening to transform it into a first-instance immigration tribunal, while also taking up an excessive portion of its time and human resources, to the detriment of the examination of cases on the merits. It is time to come together to discuss these problems, which, it must be admitted, are a reflection of the state of fundamental freedoms in Europe and beyond; but to carry on as before without reviewing the situation would be irresponsible and harmful.

I cannot think about the future of our Court without emphasising the great importance of the European Union's accession to the European Convention on Human Rights. Envisaged in Brussels since the late 1970s, the Union's accession has been called for by its twenty-seven member States. This political decision was expressed in the Lisbon Treaty, which came into force on 1 December 2009, while Protocol No. 14 to the Convention made accession possible thanks to the unanimous consent of the forty-seven States Parties. Since last summer, the Council of Europe and the European Union have begun negotiations, in which the Court is taking part as an observer, on implementing this major decision in procedural terms. The issues to be resolved are not easy, since the Convention, which was drafted with States in mind, will apply to an

organisation of twenty-seven States. But solutions will be found, I am sure. We discussed the matter very recently in Luxembourg at one of our regular meetings with our colleagues from the Court of Justice of the European Union; the meeting resulted in a joint communication by the Presidents of the two Courts, my friend Mr Vassilios Skouris, who is here today, and myself, with the aim of providing some guidance for the negotiators, who have received a copy of the document.

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Ladies and gentlemen,

Having undergone a series of additions and amendments, the European Convention on Human Rights has stood the test of time. The twelve States who signed it on 4 November 1950 have been joined by thirty-five others over the years, covering practically the entire continent, which constitutes an exceptional success. It forms part of the legal system of all member States. Litigants and their counsel rely on it, and the national courts interpret and apply it, under the ultimate supervision of our Court. Executives and legislatures take it into account and draw inspiration from it, at any rate much more than they did twelve years ago; this date serves as a useful reference point for me as an observer, since it coincides with my taking office as a judge in Strasbourg. The Convention is taught in the countries we cover, and not only as part of courses in law. Its 60th anniversary was celebrated in style at the Council of Europe last October, in the presence of the Secretary General of the United Nations, Mr Ban Ki-Moon.

As for our Court, everyone is aware of its difficulties, largely arising from the hope it represents for eight hundred million Europeans, a hope which may, however, be too great because of a lack of sufficiently thorough information; hence the excessive number of applications with no prospects of success. We are trying to remedy this situation. Despite the Court's problems, it has unparalleled influence, authority and prestige. I am convinced that the process launched at Interlaken will be successfully pursued, thus preserving the future of the Court and hence of the protection system. At this juncture I wish to pay tribute to some 700 men and women – our forty-seven judges and the members of the Registry who assist them – for their dedication and the high quality of their work. Of course, to quote the poem by Aragon, "Man never truly possesses anything, neither his strength, nor his weakness ...". All of us, therefore, must constantly strive to do better; it is only natural that we should be committed to this task.

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Ladies and gentlemen, I promised – and this may come as a surprise – to reflect on *human rights*. A Convention and a Court, certainly; European – that goes without saying. But what about human rights? What does that mean? Or rather: what does it *still* mean, at the start of the twenty-first century?

We have come a long way since the Age of the Enlightenment, when, one hundred years after the British Bill of Rights and thirteen years after the American Declaration of Independence, the Constituent Assembly adopted the Declaration of the Rights of Man and of the Citizen. We have even moved on from the Universal Declaration, the fundamental instrument that inspired our Convention and, later on, the American Convention on Human Rights and the African Charter on Human and Peoples' Rights. What are today's human rights, and those of the decades to come? What threats do they face, and what protective or preventive measures must be taken to counter those threats?
Answering these questions is no easy matter, and I do not claim to be giving anything other than a few outline replies, or even mere observations. I would note in passing that such questions have been asked by

major writers, for example Mr Amartya Sen, Nobel Laureate in Economics, notably in a recent essay, *The Idea of Justice*.

First of all, an examination of the applications reaching Strasbourg indicates certain changes which are not insignificant. By way of example, since we are marking the opening of the judicial year, let us look at some important judgments delivered over the past year. I shall not always mention the conclusions reached by the Court, especially as some of the judgments are not final. But the subjects they concern are interesting.

Several recent cases have concerned general public international law, humanitarian law or the law of the sea. We had to adjudicate between an embassy employee's access to a court and the employer State's plea of immunity from jurisdiction (another case of the same type is pending). A person's conviction for war crimes committed in 1944 was challenged by him, mainly on the basis of the prohibition of retrospective application of the law; a case decided two years ago involved a similar complaint by a person convicted of crimes against humanity committed in 1956. As regards the law of the sea, two judgments delivered in 2010 concerned, in one case, the consequences of the arrest on the high seas of the crew of a ship engaged in drug trafficking and, in the other case, the arrest of the master of a ship that had caused an ecological disaster, who was deprived of his liberty and later released on bail. Human rights law has thus ventured beyond its traditional limits.

Private life, in the broad sense, has given rise to a large number of applications raising social issues. The applicants' contention that the State had a positive obligation to grant a same-sex couple the right to marry was rejected by the Court (the judgment is final). The Grand Chamber, without recognising a general right to abortion and while finding against two of the applicants, found that the third had suffered a violation of Article 8 because she had been unable to undergo a legal abortion in her country. The Grand Chamber also held that there would be a breach of Article 8 in the event of the enforcement of an order for a child to be returned to another country from which his mother had wrongfully removed him within the meaning of the Hague Convention. An applicant argued that the uncertainty of the law had deprived her of the right to home birth, and that her country should have enacted specific, comprehensive legislation. Very recently, another applicant contended that his country was under an obligation to supply him with medication enabling him to commit suicide in a safe and dignified manner. An application pending before the Grand Chamber concerns sperm and ova donation for *in vitro* fertilisation.

Several recent judgments have concerned the right to stand in elections under Article 3 of Protocol No. 1, or the right for a member of parliament to have his parliamentary immunity lifted, and a pending case raises the issue of the voting rights of a country's nationals living abroad.

Thus, besides the more typical disputes, many cases coming to Strasbourg, often important ones, relate either to other branches of international law, or to social issues relating to life, death, the family or sexual orientation, or to aspects of political and democratic life. Other recent or pending applications concern the delicate relations between religions, society and the State; and there are still large numbers of cases dealing with the balance to be struck between liberties and security, either in a general criminal context, or in the context of countering the dreadful scourge of terrorism. I shall not go into disputes concerning aliens, and more specifically the right to asylum – the specialist field of Mr Guterres, who will be talking about it with the particular authority deriving from his functions – other than to note that the Grand Chamber judgment in *M.S.S. v. Belgium and Greece*[1], concerning a case brought by an asylum-seeker, was delivered a few days ago. It has and will have significant consequences.

1. [GC], no. 30696/09, 21 January 2011.

What conclusions can be drawn from the changes in the cases brought before the European Court of Human Rights, and more generally from the social observations to which such cases give rise? I can identify four main points.

Firstly, the State's duty to refrain from arbitrary interference in the exercise of rights and freedoms is increasingly being accompanied by *positive obligations*: the State must take the necessary steps to organise and facilitate the exercise of these rights and freedoms. Contrary to what is sometimes said, positive obligations are not a concept deriving purely from judicial interpretation. Significant traces of them can be found in the Convention itself. The law, and hence the State, has a duty to protect the right to respect for life; the right to a fair hearing – to which René Cassin attached vital importance, in relation to both the Universal Declaration and the Convention (Articles 10 and 6 respectively) – requires the public authorities to make a whole series of judicial and procedural arrangements; Article 13 of our Convention, of such great importance in the light of Interlaken, enshrines the right to an effective remedy, and thus an obligation for States to provide for means of redress in their own systems. It is true, however, that the case-law has developed the sphere of positive obligations, rightly so in my opinion, and this has certainly provided a source of arguments for our applicants.

Secondly, the relationship that existed in the minds of the Founding Fathers, and that can be found in the wording of the Preamble, between peace and democracy on the one hand, and justice and human rights on the other hand, is increasingly reflected in the applications being registered – and, more generally, in the state of rights and freedoms in Europe. However, this relationship often appears in a negative light. Conflicts at international level (or within nations) have either not ended, or their after-effects are still being felt, in several regions of our continent. Sometimes latent or dormant, they are at risk of resurfacing. They have given rise to a large number of actual or potential cases. For example, there are two inter-State applications pending before the Court, against a background of conflict, and there may well be others to come, which is certainly not a desirable state of affairs. Europe sometimes has trouble overcoming its past. We must hope that in the future, the "closer unity" set forth as an aim of the Council of Europe will be achieved by overcoming competing interests and passions. This will, of course, take time.

Thirdly, human rights violations, whether alleged or established, are nowadays often attributed not to the respondent State but to other individuals or groups. Of course, unfortunately, the public authorities and their officials continue to commit direct, and sometimes serious, violations of the Convention. But they no longer have a monopoly on them. The States' positive obligations, which I have just mentioned, do not arise solely because the failure to take action may render freedoms more theoretical than practical. They may also come into being because the State, in guaranteeing collective security and social peace, has a legal and moral duty to protect everyone's rights from anyone's actions. Violence in all its forms, racism, xenophobia, domestic or professional exploitation, and discrimination of any kind cannot be tolerated by the authorities, and at all events require them to intervene, to protect the victims. This is not an entirely new idea: "Between the strong and the weak, it is freedom that oppresses and the law that sets free", as Lacordaire said back in the nineteenth century. However, it is taking on renewed relevance: paradoxically, as a result of the financial and social crisis, the model of the welfare State is becoming weaker, while that of the nightwatchman State is re-emerging, not only as the mere regulator and overseer of economic life, but as the protector of fundamental freedoms. Is this not another form of welfare? At any rate, it is no surprise that political and social trends should have an impact on the system of rights and on the foundations and applicability of State responsibility under our Convention. It is true that the "horizontal effect" resulting from our case-law has extended State responsibility, but is that really surprising? Such a development is entailed by the need to make rights effective and to afford them better protection.

The perception that may thus emerge of the new face of human rights calls, in my view, for two further and final observations.

Firstly, the Convention rightly calls not only for the protection of human rights but for their *development*. The first aim is crucial, and yet is not self-evident, since – despite the undeniable progress of democracy in Europe – rights and freedoms are never permanently secured; it thus remains essential to safeguard them. As to their development, or "further realisation" as the English version of the Convention puts it, this seems an equally desirable aim. It is an ideal that forms part of the "progress of the human mind", as in the subject of Condorcet's *Sketch for a Historical Picture*. Interpreting the Convention in a manner that is not static but dynamic contributes, as I have said, to this progress. However, I believe that the best way of achieving this aim lies in *deepening* rights. In this context, it is useful to bear in mind the adjective "*fundamental*". It is found in the very title of our Convention, which is concerned with human rights and fundamental freedoms. Similarly, the European Union now has its own Charter of Fundamental Rights. Deepening rights will indisputably entail an increasingly exacting, rigorous approach to the setting of thresholds and standards, and to judicial review of their observance. On the other hand, the inflation or dilution of rights would result in weakening rather than actually developing them. Do we really need to be reminded that *not all rights of humans are human rights?* Or, as Sir Thomas Gresham said in the sixteenth century, in a different context, "bad money drives out good"; we must not become "counterfeiters"!

Secondly, the increasingly diverse nature of human rights violations should result in correspondingly diverse solutions to preventing and countering them. I attach importance to the role assigned by the Interlaken Conference to *civil society*. It called on the Committee of Ministers and the States Parties to consult with civil society "on effective means to implement the Action Plan". This is necessary. Alongside the Council of Europe, the Court and the States Parties, non-institutional entities have extremely important tasks to perform. They can contribute to teaching citizenship and tolerance and providing legal training to potential applicants; they can display vigilance and solidarity in the face of threats to our liberties from whatever source; and they can remind people that the Convention and the Court, despite their considerable power of attraction, cannot resolve all problems in life. It is therefore above all at national level that civil society must be active, but the Court is naturally open to dialogue.

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Ladies and gentlemen, human rights are not "a new idea in Europe", as Saint-Just said of happiness. Nor are they, thankfully, an idea belonging to the past. They must be preserved and developed. Let us all help each other to achieve that aim! Thank you.