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President of the European Court of Human Rights

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

Presidents, Excellencies,
Monsieur le Président du Conseil Général du Bas-Rhin,
Monsieur le Sénateur Maire,
Deputy Secretary General, colleagues, ladies and gentlemen,

It is always a great pleasure to welcome our distinguished guests to this ceremony, with which we mark the opening of the judicial year. It is course for us particularly pleasing to see so many senior representatives from national courts.

I must also welcome former colleagues and in particular my predecessors, Jean-Paul Costa and Luzius Wildhaber.

I must greet too the representatives of the local community and the host State who do us the honour of joining us this evening. Finally, those who represent our parent institution, the Council of Europe, parliamentarians, permanent representatives and senior officers, also have their role and their stake in the Convention system. The Court needs their support and I thank those of you who are with us today for this ceremony. The protection of human rights is too important and too complex a business to be monopolised by one institution or body; it requires a collective effort as the authors of the Convention recognised.

The omens for 2012 are hardly auspicious. The economic crisis with its potential for generating political instability seems to spiral further and further out of control. All our societies are experiencing difficulties that few of us can have foreseen only a short time ago. In this environment the vulnerable are more exposed and minority interests struggle to express themselves. The temptation is to be inward-looking and defensive, for States as well as individuals. Human rights, the rule of law, justice seem to slip further down the political agenda as governments look for quick solutions or simply find themselves faced with difficult choices as funds become scarce. It is in times like these that democratic society is tested. In this climate we must remember that human rights are not a luxury.

And yet at the same time events in North Africa and part of the Middle East and more recently in Burma remind us that the aspiration for fundamental rights and democratic freedoms is universal. The humbling courage of ordinary people in Cairo, Tripoli and Homs brings home to us the true value of ideas and principles which we too often take for granted. It also reminds those of us who have the privilege of working within this system why we are here.

Looking at these different contexts I draw what is for me an inescapable conclusion. That is that the argument for effective international action to secure human rights and democracy is as compelling as it has ever been. Council of Europe countries which already have the benefit of what is incontestably the leading

mechanism for international human rights protection have a responsibility to themselves but also to the wider international community to preserve and indeed build on their extraordinary achievement in giving concrete expression to the ideals and hopes expressed in the Universal Declaration.

I make no apologies for beginning this evening by addressing the broader picture because I do not believe that what we do here in Strasbourg can be seen in isolation – but also because it helps us put into perspective the difficulties confronting us, while placing them in a context which perhaps makes it easier to focus on priorities. For several years now the Court has been treated as a patient whose sickness if not terminal is all but incurable, or at least the eminent physicians summoned to diagnose the disease have seemed unable to agree on the cure to be prescribed. The reform process leading up to Protocol No. 14, the Wise Persons' Report, the Conferences of Interlaken and Izmir and a new conference to be held under the United Kingdom Chairmanship of the Committee of Ministers this year: these are all evidence of the efforts made to adapt the Convention system to the situation of massive caseload which was the inevitable consequence of the enlargement of the Council of Europe to include post-communist States as they embraced democracy.

While I do not underestimate the challenges which still face us and while I am grateful for the different initiatives taken by governments chairing the Committee of Ministers, I think we have sometimes lost sight of more healthy signs of life. Firstly throughout this period of intense activity on the reform front, the Court has continued to deliver a substantial number of judgments on important issues of human rights jurisprudence. A glance at the short case-law survey in the provisional version of the Annual Report for 2011 which is available today indicates the range of cases dealt with and how the Court has steadily continued to apply the Convention and its own case-law across a wide spectrum of issues. In doing so it fulfils its Convention mission of maintaining and strengthening human rights at national level. These cases which commonly require a delicate balancing of sometimes multiple competing interests are the essence of the Court's work. They are perhaps the most important yardstick by which the effectiveness of the Convention machinery should be measured.

But the Court has also taken a number of decisive and rather bold steps designed to enhance the effectiveness of the Convention system. Without going into details, as many of you will be aware, it developed the pilot-judgment procedure in response to the proliferation of structural and systemic violations capable of generating large numbers of applications from different countries. It has also adopted a prioritisation policy under which it aims to concentrate its resources, and particularly those of the Registry, on the cases whose adjudication will have the most impact in securing the goals of the Convention, as well as those raising the most serious allegations of human rights violations. Finally, in implementing Protocol No. 14 the Court has sought to achieve the maximum effect for the single-judge mechanism, under which a single judge assisted by a Registry rapporteur carries out the filtering function. The results obtained using this new procedure have been spectacular, with an increase of over 30% of applications disposed of in this way.

In direct response to the Interlaken and Izmir Conferences, the Court has also made a considerable effort to increase the information available on its procedure and particularly on admissibility conditions. Thus the Court has published a detailed admissibility guide now available in fourteen languages, notably thanks to contributions from different States. At the end of last year it put an admissibility checklist on its website, with a progressive sequence of questions aimed at helping potential applicants understand the reason why their application might be declared inadmissible. Just yesterday we launched a short admissibility video produced with the support of the authorities of Monaco which aims to get across the message in a simple, graphic way that 90% of applications fail to meet the admissibility conditions and what those conditions are.

Another example of responding to concerns expressed at these conferences is the reorganisation in 2011 of the Court's internal set-up for dealing with urgent requests for interim measures under Rule 39 of the Rules of Court. Having been nearly submerged by such requests just over a year ago, the Court changed its procedures at the judicial and administrative level, revised its practice direction, and, through its President, made a public statement on the situation. These measures have produced their effects quickly, returning this aspect of proceedings to a more normal rhythm.

I think that it is therefore fair to say that the Court has done broadly what it was asked to do under the different declarations and action plans. We now await proposals to be brought forward under the United Kingdom Chair in preparation for a conference to be held in Brighton in April, as announced by the Prime Minister this week in his speech to the Parliamentary Assembly. Before leaving the topic of the Court's input to the reform process, I should like to take up one claim that has been repeated in different quarters and comes back at regular intervals. This is that the Court and its Registry are in some way inefficient and that that is why a backlog has been allowed to build up. I categorically refute that suggestion which is indeed offensive to the many highly committed and hard-working judges and officials who make up the Court and its Registry. What may be considered to be inefficient is the system, which was not designed to cope with the massive case-load with which it is now confronted. Within the means available to it, the Court has done everything it can to rationalise and streamline its processes and with remarkable success, as has been confirmed by a number of outside observers and by a consistent increase in its overall productivity. This year our working methods will be scrutinised by the French Court of Auditors, who are the Council of Europe's external auditors and while there is always something to learn from these exercises I have no doubt that they will recognise that much has already been achieved.

But as was acknowledged at both Interlaken and İzmir, the Convention is a shared responsibility. The Court self-evidently cannot shoulder the whole burden of its implementation. As is clear from the terms of the Convention and as the Court has consistently stressed, the primary responsibility for securing the Convention rights and freedoms falls on the Contracting States themselves. This means in particular acting to prevent violations and establishing remedies to afford redress where breaches are committed. Where States do this seriously, where national courts apply the Convention and its case-law convincingly, the Strasbourg Court's task is made considerably easier. The importance of effective action at domestic level has been recognised at every stage in the reform process, notably in the package of Resolutions accompanying Protocol No. 14 and in the Interlaken and İzmir Declarations.

One crucial area in this respect is the proper execution of judgments. The taking of timely and appropriate general measures to eliminate the causes of the violation found is a key component of the Convention system, among other things, because it reduces the risk of future applications brought on the same basis. Where the Court finds that the violation is of a structural, systemic or endemic character, speedy remedial action at national level is even more critical. Failure to take such action in good time results in what we refer to as repetitive cases. The Court currently has over 30,000 such cases on its docket. This phenomenon represents a significant obstacle to the smooth functioning of the Convention system as a whole and serious efforts must be made to identify effective solutions. Ultimately these are cases which should not be before the Court; there is typically a clear breach and the Court's only role is to establish the amount of compensation to be awarded. The only effective response to these situations lies with the Contracting States themselves. So far we would say that the responsibility for these cases has not been shared equitably.

Another important aspect of effective Convention implementation is the role of the national courts and the necessary dialogue between Strasbourg and its national counterparts, as I mentioned earlier. Despite what is sometimes heard, the Court is highly respectful of national courts and their place in the Convention

system. National courts applying themselves the Convention can be influential in the way in which the Court's own interpretation evolves. In pursuit of this dialogue we have regular working meetings with national superior courts, just this week for instance with the German Federal Constitutional Court.

But there is also scope for judicial dialogue through judgments and decided cases. I would cite one recent example in relation to my own country – the Grand Chamber's judgment in *Al-Khawaja and Tahery v. the United Kingdom*¹. The Supreme Court of the United Kingdom conveyed to Strasbourg its misgivings over what it perceived as an inflexible application of the Court's case-law on the fairness of relying on hearsay evidence, with no proper regard to the specific features of the country's rules of criminal procedure. This view was considered carefully by our Court, and responded to at length in the Grand Chamber's judgment. It was, in my view, a very valuable exchange, conducted in a constructive spirit on both sides.

There is, of course, as things stand, no formal, direct channel permitting such communication or exchange within the Convention system. Whether there should be a new, purpose-made procedure for dialogue between national courts and the European Court is a question now under consideration in the broader reflection on future reforms.

Ladies and gentlemen, the notion of shared responsibility runs through the Convention, responsibility shared between the Court and the Contracting States, but also between the Contracting States themselves. It relates firstly to implementation of the Convention and particularly to the execution of judgments, the clearest expression of the principle of the collective guarantee. States are responsible for their own and each others' respect for human rights. But they are also responsible for the Convention machinery and its proper functioning. This includes ensuring that the Court is properly resourced. I am of course aware of the budgetary constraints imposed on the Council of Europe and the very real economic difficulties facing member States. I am also conscious of the special efforts that have been made until recently to increase, or at least to protect, the Court's budget. I would simply say that if the innovative measures taken by the Court are to be fully exploited, as long as the volume of incoming cases continues to increase, some additional financial support will be necessary.

But support for the Court should be more than just financial. As judges we are responsible for ensuring that the Court's judgments continue to be of appropriate quality to carry sufficient weight. I do not expect governments to agree with all the Court's judgments and decisions and they are naturally free to express that disagreement. Where they feel the need to do so, I would urge them to use terms which do not undermine the independence and authority of the Court and which seek to rely on reasoned argument rather than emotion and exaggeration. Democracy cannot function effectively without the rule of law; there can be no rule of law without respect for an independent judiciary, and that is true at European as well as domestic level.

One important issue for the future of the Convention system is the European Union accession. Last October a draft accession treaty was submitted by the Steering Committee for Human Rights (CDDH) to the Committee of Ministers of the Council of Europe for consideration and further guidance. However, since then the process seems to have stalled. Without accession the European Union is left in the anomalous position of not being subject to the same external scrutiny as its member States. Moreover accession is now urgently needed for the sake of preserving legal certainty in the field of European fundamental rights protection. The increasing number of binding legal instruments laying down fundamental rights within the European Union legal system – and the risk of confusion which goes with it – only reinforces the need

1. [GC], nos. 26766/05 and 22228/06, to be reported in ECHR 2011.

for an external mechanism capable of providing legal certainty as to the minimum protection standard applicable in the field. This was recognised in the Lisbon Treaty which provides that this anomaly is to be removed. After some thirty years of discussion, all that now appears to be lacking is the political will to overcome the last obstacles. I would therefore urge the member States to make every possible effort to reach a compromise allowing the completion of the process.

Ladies and gentlemen, this is the first time that I have been called upon to address this gathering, but as it is also the last time, since my term of office comes to an end next autumn, I hope you will forgive me a personal reflection as someone who has been involved with the Convention for over forty years, as counsel, member of the Commission and a judge of the Court itself. Looking back over the first fifty years of its existence, the achievements of the Court in setting standards throughout Europe and giving practical effect to each of the fundamental rights in the Convention have been truly remarkable.

Any process of selection is inevitably subjective. But certain of its achievements stand out: for example, the Court's protection of the right to life by its repeated insistence on a prompt, independent, effective and transparent investigation into killings and sudden deaths, whether at the hands of the agents of the State or otherwise, and the Court's implacable opposition to the use of the death penalty, whether in member States or elsewhere; the increasing firmness shown by the Court in outlawing acts of ill-treatment of those in custody, in requiring an effective investigation into allegations of ill-treatment and in condemning unacceptable conditions of detention; the Court's continuing emphasis on the fundamental importance of prompt judicial control of all forms of detention; the Court's insistence on the independence and impartiality of national tribunals and its development of the principle of legal certainty to prevent the arbitrary quashing of final and binding judgments of the domestic courts; the strong protection given by the Court to private sexual relations, in particular private homosexual relations, whether in civilian life or in the armed forces; the Court's insistence that any system of covert surveillance should have effective statutory safeguards against abuse, and the increased attention shown to affording protection against media intrusion into the private life of individuals; the Court's strong defence of the freedom of the press, particularly when fulfilling their watchdog role and of the rights of journalists to protect their sources; and last, but not least, the increasing attention attached by the Court to the protection of minorities and the prohibition of discrimination on grounds of race, ethnic origin and gender.

What of the future? There are as I have indicated grounds for real optimism, but there are also major challenges. What is indispensable is to ensure that the Court remains strong, independent and courageous in its defence of Convention rights. But, of equal importance is that the Court should be able to assume the supervisory role for which it was designed. This it can only do with the help of the member States themselves and their willingness to assume their primary responsibility not only of protecting and giving effect to fundamental rights but of remedying breaches of those rights as and when they occur.

The British Prime Minister, David Cameron, in his speech to the Parliamentary Assembly this week acknowledged the importance of Contracting States, as he put it, *"getting better at implementing the Convention at national level"*. He also recognised the strategic importance of fundamental rights protection over and above purely national interests. The Prime Minister finished his speech by promising us that the reform proposals put forward by his government would, to use his own words again, be *"built on the noble intentions of the Convention"* and *"driven by a belief in fundamental human rights and a passion to advance them"*. I think that aspiration is something that we can all subscribe to. Thank you.

I turn now to our invited speaker this evening, Mr Thomas Hammarberg, Council of Europe Commissioner for Human Rights.

Commissioner, by inviting you to speak this evening as your term of office draws to a close we wished both to recognise the important role that other Council of Europe actors play within the Convention system and to pay tribute to your own tireless work for human rights throughout the Council of Europe States. You have built successfully on the foundations laid by your predecessor to make the office of Commissioner an essential point of reference on the landscape of European human rights protection. Your personal authority on an impressive range of human rights issues is acknowledged throughout Europe. You have also been an effective advocate for the European Court of Human Rights throughout your time in Strasbourg. We welcome you this evening as our honoured guest, and I invite you to take the floor.