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THE COURT OF HUMAN RIGHTS VERSUS THE *"COURT OF PUBLIC OPINION"*

President Bratza, members of the Court, excellencies, ladies and gentlemen,

Thank you for inviting me to this event today, marking the opening of the Court's judicial year.

The last time I had the honour to speak in this very room was during a hearing before the Grand Chamber on the case of *M.S.S. v. Belgium and Greece*[1]. That was in fact my first oral intervention here.

In that case the Court delivered a judgment a few months later which had wide-ranging consequences for the protection of the human rights of asylum-seekers in Europe: it recognised that the living conditions asylum-seekers had to endure in Greece amounted to degrading treatment.

In response several member States then suspended returns of asylum-seekers to Greece. The findings of the Court also prompted more calls within the European Union for a rethink of the *"Dublin Regulation"* itself.

The significance of the Court

I have now served as Commissioner for Human Rights for almost six years. I have travelled all over the European continent. I have visited police stations, courts, penitentiary institutions, refugee camps, Roma settlements, shelters for battered women and care institutions for both disabled children and adults.

At the same time I have had discussions with active civil society groups, ombudsmen, equality commissions, prosecutors, judges and other representatives of the judicial system as well as with local politicians, parliamentarians and, of course, government leaders, ministers and other governmental representatives.

Based on these experiences I can testify to the enormous importance of this Court.

– One. The Court is certainly important for *individual victims* who are given an opportunity to obtain justice when this is denied at home. This is also a relief for the families of the actual victims, who are in many cases victimised themselves.

– Two. The fact that such Court decisions *oblige national authorities themselves to take concrete action to remedy the violations committed against individual victims* is crucial. An example is set when a mistake is corrected by the same authorities which previously failed.

– Three. There is, moreover, an essential preventive dimension in the way the system works. Court decisions remind governments about the *need for changes to laws and procedures* to avoid future violations of the European Convention. I can testify that this dimension is in fact taken seriously by decision-makers in most member States.

1. [GC], no. 30696/09, to be reported in ECHR 2011.

– Four. The *interpretative authority (res interpretata)* of the Court's judgments is also important. National legislators and courts must take into account the Convention as interpreted by your Court – even in judgments concerning violations that have occurred in other countries. In all European States, law, policy and practice are now heavily influenced by the Court's decisions.

– Five. There is one more dimension to highlight, which is somewhat difficult to define but no less important. The fact that an individual can appeal to an international court when he or she feels let down by the domestic justice system and that governments will have to listen to the response of this body – on the case itself and on the system at the origin of the case – has a broader psychological effect. In short, it gives *hope* to quite a number of people – not only to those who file complaints or want to do so, but to many others as well.

The mere existence of such an international court – principled, impartial and fair in its procedures and rulings – is an encouragement for people working for human rights throughout the continent. I have noticed that this Court is an inspiration for people and courts outside Europe as well. Indeed, its judgments are looked upon by superior courts all over the world.

Essential features of the European system

I hope these aspects of the system will not be forgotten in the ongoing discussion about the need to reform the Court. In spite of my enthusiasm I do agree that changes are needed – in order for the Court to be able to cope with its workload and for it to play its role as the supreme interpreter of the European Convention in a truly competent manner.

However, everything that I have learned has made me believe that there are some features of the system which definitely must be protected through the reform process. One is the possibility of individual petition. Another is the principle of collective guarantee. A third one is the notion of the Convention as a *"living instrument"*, allowing the Court to make dynamic interpretations of the rights set forth in the Convention.

The right of *individual petition* – giving an individual the right to seek justice, as a last resort, at supranational level – should in my opinion remain a key characteristic of the system of protecting European human rights.

There is deep concern among human rights organisations that this right will be undermined by the reform process. Even the less dramatic proposals such as introducing a fee or requiring communications via a professional attorney have met their opposition. This is understandable, as the individuals most in need of protection may lack financial resources or access to lawyers.

The dilemma is of course how to combine the principle of individual petition with an effective *"filtering"* mechanism which would make it possible for the Court to focus on the key problems – and with limited delays. This is clearly one of the major issues for the reform process and I notice that positive steps are already being taken by the Court itself to square this circle.

Another essential feature of the system which should be protected is the inter-State dimension. The Convention is built on the notion of a *collective guarantee*. This could be described as a reciprocal agreement between the State Parties based on the understanding that they – and their people – all have an interest in the protection of human rights, including in other States, and an interest in safeguarding the rights of individuals throughout Europe.

I am convinced that this idea that we will all benefit when human rights are respected all over the continent has become even more important with time. Nation States are less and less isolated from their neighbours – I do not need to mention the obvious link between human rights and peace; or the relationship between human rights and migration; or the simple fact that each and every State nowadays has citizens in other countries.

The principle of collective guarantee is also reflected in the peer approach to the monitoring of the execution of Court decisions – by the member States, together, in the Committee of Ministers. The possibility in the Convention for inter-State complaints is another reflection. However, most important in my view is the very idea that we are in this together.

A consequence of this attitude is that all member States should be concerned when the Convention is violated in another country and, also, that every member State should accept that they themselves may be subject to the Court's procedures. No government is given immunity and member States are not divided into categories; they must all, as a matter of principle, be treated equally, according to the same standards. Those with better systems at home will have fewer problems in Strasbourg.

I mentioned the notion of the Convention as a *"living instrument"* and argued that this approach should also be protected. The fact that the Court has established a practice of *dynamic interpretations* is indeed crucial to its relevance.

After all, our societies have developed enormously in the past six decades. One example is the revolutionary changes caused by new information technologies. In other areas too, totally new human rights issues have emerged since the Convention was first drafted – problems which were unknown at the time.

The Court has of course received complaints through the years on human rights violations which are not specifically mentioned in the Convention and its response has been to apply the principles of the Convention to these new situations. Any other approach would have limited the usefulness of the Convention and the Court's procedures.

It should, however, be admitted that this is a difficult task and a genuine challenge to the wisdom of the judges. This is particularly the case when it comes to the development of attitudes in society which may, to complicate the matter further, also differ considerably between member States. Of course, the possibility of having additional Protocols drafted, adopted and ratified does exist but would not meaningfully address this problem in all its depth.

However, I do consider that the Court on the whole has handled this challenge in a proper manner. Criticisms about *"judicial activism"* or arbitrariness have really not been fair. The approach has been serious. The judges have not introduced just personal ideas; they explore whether there is a consensus on such cases in the superior courts in the member States; they analyse decisions of other international jurisdictions; and they take into account, when relevant, treaty developments in the United Nations.

Rulings of particular interest and relevance

The image and reputation of the Court is of course primarily influenced by its actual rulings on controversial issues – and media reactions to these decisions. The British newspaper *The Guardian* carried the other day an editorial with the headline: *"European court of human rights: judgment day"*. Yes, the article did describe two Court decisions, but the word *"judgment"* referred to something else.

The editorial started with these words: *"In the dock at the court of public opinion was Europe's human rights framework"*. It turned out that the paper in this particular case felt that the Court had in fact passed the test. It even wrote that the judges showed themselves to have been hard-headed, principled and pragmatic. Not every institution manages to be praised in the media for being, at the same time, both principled and pragmatic...

The *"court of public opinion"* is indeed a challenge – and primarily for responsible politicians in member States. It may be tempting to exploit populist media reactions against inopportune, though principled, Court decisions; but I think that those who know better should instead seek to clarify the role of the Court and the legal issues at stake.

The Court itself should not be forced to enter into discussions on this level.

Let me refer to some decisions of the Court which may have been controversial but have had a particular significance for the promotion of justice on our continent. I already mentioned the landmark decision on the *"Dublin Regulation"*. There have been other key decisions preventing the deportation of people to countries where they are at risk of torture or other ill-treatment.

Decisions on cases of *discrimination against Roma people* have been particularly helpful in my own efforts to promote the rights of individuals within this heavily abused and disadvantaged minority. One example is the Court's positions on the rights of Roma children to enjoy education without discrimination.

The fact is that Roma children in a number of countries are disproportionately represented in schools for children with intellectual disabilities. They can also be sent to mainstream schools which are Roma only, or to Roma-only classes in mixed schools. In all cases, the tendency is that they receive substandard education.

The Court has addressed these aspects in three important judgments: against Greece, for non-enrolment; against Croatia, for separate classes; and against the Czech Republic, for routinely putting Roma children in schools for people with intellectual disabilities. The standards these decisions have set are binding on all States: they should all make sure that their practices are in line with these judgments.

The judgment in *A. v. the United Kingdom*[2] was in my view another landmark decision. It was the first ruling on parental corporal punishment and one of the relatively few cases brought before the Court by a child applicant. The judgment required the State to provide children, as vulnerable individuals, with adequate protection, including effective deterrence, against degrading punishment. The conclusion in this case was that repeated, forceful hitting of a child was in breach of Article 3 of the Convention.

During the last two decades the Court has also taken steady steps to address problems related to homophobia and transphobia. A major result is that homosexuality is now decriminalised across Europe and there is a new awareness of the situation of transgender people.

Article 14 of the Convention has rightly been interpreted to cover discrimination on grounds of *sexual orientation and gender identity*. The Court has acknowledged that the right to respect for family life under Article 8 of the Convention also covers same-sex couples. This opens up new perspectives for the recognition of the human rights enjoyed by members of LGBT families, including children.

Another area in which particularly crucial decisions have been made is the human rights of persons with disabilities. The Court has made the point that persons with mental health problems or intellectual

2. 23 September 1998, *Reports of Judgments and Decisions* 1998-VI.

disabilities tend to be vulnerable and have in many cases suffered considerable discrimination throughout their lives. In view of the long-standing prejudices against them, it is particularly important to avoid further social exclusion.

In 2010 the Court examined the banning in Hungary of such individuals from taking part in general elections. The Court found such a blanket, automatic ban to be inadmissible. An indiscriminate removal of voting rights based solely on a mental disability requiring partial guardianship was found not compatible with the European Convention and the fundamental democratic principle of universal suffrage.

The blanket denial of *voting rights for prisoners* is another important issue which the Court has dealt with – and thereby provoked a judgment by the *"court of public opinion"*, or at least by the tabloid press in one particular member State.

In fact, the Court has given a wide margin of appreciation to member States on this issue: it has left it to them to determine which categories of prisoners, if any, could be deprived of the right to vote and how to apply the agreed criteria for such decisions. I am aware that a case on this issue is still pending before the Grand Chamber.

It is very useful that this issue has come up for Europe-wide discussion. The matter itself is of great principal importance and practices vary widely between the member States.

My own opinion is that if the deprivation of voting rights is to be introduced as a punishment, there should be a logical connection between the offence and this particular sanction. Furthermore, such decisions should be individual, for the duration of the imprisonment only and be based on a judicial procedure.

The principle of universal suffrage is, after all, a cornerstone of democracy; there should be extremely strong reasons for depriving anyone of the right to vote. This right symbolises belonging to the human community. We are no longer excommunicating from our societies people who are *"unwanted"*.

This is also a question of purpose. It can hardly be argued that disenfranchising prisoners would deter crime or facilitate the reintegration of convicts after release into a normal, law-abiding life in society.

In fact, a large number of member States do indeed allow imprisoned citizens to vote and I have noticed that there is no public pressure in those countries to change this policy.

Non-implementation of judgments – and the consequences

Of course, some judgments are not welcomed by the governments concerned. This is obviously one reason why Court decisions are implemented slowly or not at all. Non-execution is indeed a major problem in the current system.

Though the majority of member States do comply with the Court's decisions, there are some which are strikingly slow to abide by their obligation to execute the judgments. Some important Court decisions have remained unimplemented after several years despite guidance given by the Committee of Ministers.
This is unacceptable. It is another injustice against the individual whose rights had been endorsed by the Court. It undermines the credibility of the protection system as such.

It is also one of the roots of a very concrete problem for the Court itself: it tends to cause so-called *"repetitive applications"* – new applications coming in on issues which have already been the subject of Court decisions and therefore should have been resolved by the respondent member States.

These *"repetitive applications"* contribute to the overloading of the Court, which in turn creates the risk of delayed decisions in general. This is a situation which produces a number of negative chain-effects.

I am sad to report that I have met people who have declared that they have decided not to bring their urgent case to the Court because they felt they could not wait so long for a judgment. This is particularly problematic in cases where the potential applicant fears harassment after having filed his or her complaint.

I have in fact received information about threats against applicants because of their complaints to Strasbourg. This is intolerable. As the Court has stated, applicants or potential applicants should be able to communicate with it freely, without being subjected to any form of pressure from the authorities to withdraw or modify their complaints.

Violations should be remedied at home

The Court is overloaded. As you know, more than 60,000 new applications were filed last year and the number of pending cases is now over 150,000.

It must be stressed that the problem is not that people complain, but that many of them have reasons to do so.

In more than 80% of the judgments delivered since 1959, the Court has found at least one violation of the Convention by the respondent State. The main reason why the Court is overloaded is that people have found that justice could not be obtained at home.

The obvious answer is that much more must be done to protect human rights at home, at the domestic level.

The European system was never intended to act as a long-term substitute for national mechanisms – quite the reverse. Each individual should be able to seek and receive justice at home, in line with the principle of subsidiarity. Recourse to an international court should be seen for what it is – essentially a failure to provide proper national remedies.

The problem is that the judicial processes in European countries are far from perfect. In fact, many of the complaints to the Strasbourg Court relate to excessively slow proceedings and to the failure of member States to enforce domestic court decisions. In several European countries, court decisions are often enforced only partly, after long delays, or sometimes not at all. Flawed execution of final court decisions must be seen as a failure to uphold the rule of law.

Domestic courts themselves are not functioning as they should in a great number of States, and former communist countries in particular have been slow to develop a truly independent and competent judiciary. Corruption and political interference are undermining public trust in the system.

In several European countries there is a widespread belief that the judiciary is corrupt and that the courts tend to favour people with money and contacts. Though this perception may sometimes be exaggerated, it should be taken seriously. No system of justice is effective if it is not trusted by the population.

While there has also been some progress, I have observed that the independence of judges is still not fully protected in some of the countries I have visited. Political and economic pressures still appear to influence the courts in some cases. Ministers and other leading politicians do not always respect the independence of the judiciary and instead signal to prosecutors or judges on what is expected of them.

In other words, more needs to be done in order to implement the Convention through the national courts. After all, the Convention is part of the law of the land in all member States. This is expressed in different manners, an interesting model being the Human Rights Act in the United Kingdom.

On a positive note, let me also mention the significant impact of the various national human rights structures such as parliamentary ombudsmen, equality bodies, data protection commissioners, children's ombudsmen, police complaints commissions and other similar mechanisms. When they are allowed to act truly independently, they have the potential to improve the human rights situation considerably.

Building a human rights culture also requires governments to introduce policies which favour freedom and pluralism of the media and the emergence of active civil society groups.

For me the problems of the Court are primarily symptoms of a deeper crisis: human rights principles are still not taken sufficiently seriously in our member States. This, in turn, underlines the essential linkage between the Court and other parts of the Council of Europe.

What future for the Court?

However, this is not an excuse to slow down the reform process of the Court itself.

In fact, this process is ongoing and the Court is self-reforming. As President Bratza pointed out, it has adopted a prioritisation policy to concentrate resources on the cases which will have the most impact on securing the goals of the Convention. The adoption of Protocol No. 14 has made it possible to decide on admissibility through a single-judge procedure and this has already helped to speed up the process.

It is also important to avoid any outside pressure to reform turning into a numbers game. The focus must be on quality rather than on quantity. Well-reasoned judgments on key issues are the particular strength of this Court. High quality interpretations of the Convention should be the highest priority.

My emphasis on the need for reforms at national level means that the further development of contacts and dialogues with the national courts is essential and will certainly have positive chain effects – including on the workload.

Improved information on the Court and its proceedings is essential and the new guide and video on admissibility are welcome developments. Such information should be a preoccupation for the whole of the Council of Europe – including its field offices – but of course also for the domestic structures in member States. With time this may well reduce the number of ill-founded applications. But more importantly it will contribute to the building of a more solid human rights culture in our Europe.

What about the judgment of the *"court of public opinion"*?

We should not be nervous. That *"court"* has "judges" other than the tabloid press – and these *"judges"* rule in favour of our Court.
In fact, they regard it as invaluable; they want it to have sufficient resources and they are ready to provide constructive advice for its future work.

Thank you.