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

Solemn hearing for the opening of the Judicial Year

27 January 2017

Speech by President Guido Raimondi

Presidents of Constitutional Courts and Supreme Courts, President of the Parliamentary Assembly, Secretary General of the Council of Europe, Excellencies, ladies and gentlemen,

I should like to thank you, personally and on behalf of all of my colleagues, for honouring us with your presence at this solemn hearing to mark the opening of the judicial year at the European Court of Human Rights. Since we are still, for a few days yet, in the month of January, I shall follow tradition and wish you a happy and successful year in 2017.

New judges joined us in the course of 2016, and I welcome them most particularly, since they are taking part in this solemn hearing for the first time as judges of the Court.

As is usual on this occasion, I shall begin by providing some statistical information about our Court's activity.

In 2016 the Court ruled in more than 38,000 cases. At the end of 2015 there were some 65,000 applications pending. This figure rose to 80,000 at the end of 2016, which represents an increase of 23%.

After a two-year reduction in the number of incoming cases, in 2016 we saw for the first time in several years a 32% increase in the number of new cases. This influx is to be explained by the situation in three countries: Hungary, Romania and Turkey.

Firstly, with regard to Hungary and Romania, for which the number of cases increased by 95% and 108% respectively in 2016, these essentially concern issues related to conditions of detention. Admittedly, these are priority cases, since they come under Article 3 of the Convention, but they are repetitive cases which reflect systemic or structural difficulties and require that solutions be found at domestic level.

Yet we are all aware that no immediate miracle cure exists for these situations, either in the country concerned, for which resolving this issue implies considerable political and budgetary measures, or in Strasbourg.

In the prison field, the Court admittedly defines principles, which, moreover, were clearly set out in 2016 in the *Muršić* judgment. On the basis of these principles it diagnoses a given situation in

a member State. Nevertheless, and I repeat, it is at national level that the solutions must be found. This is possible, as is demonstrated by the example of Italy, for which the number of cases has been more than halved in two and a half years. This is the result of the Italian Government's policy, firstly in response to the *Torreggiani* pilot judgment, which concerned prison overcrowding, and secondly, with regard to the length of proceedings. This shows that where a Government has the will to resolve a situation and takes the necessary measures, the results quickly follow.

Then we come to Turkey. Recent years had seen a significant reduction in the number of pending cases from that country, essentially as a result of the existence of a direct appeal to the Constitutional Court, a remedy that we had considered effective. Indeed, I welcome the presence among us this evening of a large delegation from that Court.

Since last July's tragic attempted *coup d'état*, Turkey has climbed back up to second position, with a very significant increase in the number of cases.

Whatever the follow-up that will be given to these cases, this is a striking example of the direct impact of a major political crisis in a member State on the work of our Court.

To close this point, I would note that this week's developments in Turkey are encouraging. The creation, by legislative decree, of a commission with responsibility for examining the appeals lodged in response to the decisions taken since the attempted *coup d'état* is an excellent initiative, particularly since a judicial appeal will lie against the decisions taken by that commission.

In any event, whatever the country concerned, it is essential to adopt specific and targeted strategies if we really wish to attack the backlog of cases.

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A year ago, in this same room, I was discussing the numerous challenges that the Court would have to face in 2016. Little did I imagine at that point the major threats that Europe would have to confront over the year. I have already mentioned the attempted *coup d'état* in Turkey, but of course I am also thinking of the terrorist attacks which have continued to plunge our continent into mourning, whether in Nice, Brussels, Berlin or Istanbul.

Terrorism, economic crisis, the mass arrival of migrants: Europe must square up to all of these challenges simultaneously. And as though this tragic context were not enough, an identity crisis is causing some States to turn inward, Brexit being the apogee of this trend. We are also seeing a re-assessment of the rule of law. As Emmanuel Decaux has noted, the law has become "an unbearable constraint" in some quarters.

Yet the rule of law is what sets Europe apart: it is one of the achievements of our civilisation, a rampart against tyranny. This is what Europe represents: a part of the world where the rules of the democratic game have been laid down, and where compliance with these rules is guaranteed by the Constitutional and Supreme Courts.

For its part, the European Court of Human Rights has contributed for almost sixty years to establishing a community of values in Europe and, in so doing, has helped to consolidate the rule of law. It is the guarantor of a common area of protection for rights and freedoms. In doing battle with arbitrariness, it too oversees compliance with the rules of the democratic game.

The Court continued to play this role to the full in 2016, by maintaining the quality of its case-law. From this perspective, it cannot be disputed that the past year was a particularly rich one, making it all the more difficult to select the cases that I wish to refer to this evening.

I have mentioned the rule of law: it was one of its fundamental principles, the independence of the judiciary, which was at stake in the case of *Baka v. Hungary*. The applicant, Mr Baka, President of the Hungarian Supreme Court, alleged that his mandate had been prematurely terminated as a result of the views he had expressed publicly, in his capacity as President of the Supreme Court, in respect of legislative reforms affecting the courts. Our Court found in his favour, and held that there had been an interference with the exercise of his right to freedom of expression. Such a measure could not serve the aim of increasing the independence of the judiciary. Yet the independence of the judiciary remains a marker for a State governed by the rule of law.

Presidents of Constitutional Courts and Supreme Courts,

If judges end up afraid to express their opinions in the exercise of their functions, this will inevitably lead to a weakening, or even the disappearance, of one of the foundations of democracy.

This is what makes *Baka* a landmark judgment.

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For several years we have been powerless spectators to these images of human beings launching themselves onto the seas and along the highways in an attempt to reach Europe: "When Humans become Migrants", to repeat the very apt title of Marie-Bénédicte Dembour's book.

It is precisely this tragedy that lies at the heart of the *Khlaifia v. Italy* judgment, delivered at the end of 2016. It concerned the holding, in the well-known Lampedusa reception centre, then on ships in Palermo harbour, of irregular migrants who had arrived on the Italian coasts following the events of the "Arab Spring".

We held that their deprivation of liberty, without any clear and accessible legal, basis did not satisfy the general principle of legal certainty, and that they had been unable to enjoy the fundamental safeguards of habeas corpus, as laid down in the Italian Constitution.

In fact, the refusal-of-entry orders issued by the Italian authorities contained **no** reference to the applicants' detention, or to the legal and factual reasons for such a measure, and they had not been notified of them "promptly". Nor did they have any remedy by which they could have obtained a judicial decision on the lawfulness of their detention.

Protection against arbitrariness, the necessity of a remedy to challenge a judicial decision – these are the **essential** elements in a State governed by the rule of law, and they were absent in the *Khlaifia* case.

The mass arrival of migrants places national authorities in a very difficult situation. However, although this judgment reiterates that there are principles from which States cannot derogate, it did not find a violation of Article 3 of the Convention on account of the conditions in which the

applicants were held. Nor did it consider that there had been a collective expulsion of aliens, which is prohibited by a Protocol to the Convention.

The judgment thus provided balanced and reasonable responses to these difficult questions – but it did so with due respect for our values.

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The judgment in *Paposhvili v. Belgium*, delivered last December, has already received widespread coverage. It is noteworthy in several respects. Firstly in its content, and secondly, from the perspective of our relationships with the national supreme courts.

The background to this case is relevant. You will remember that in 2008 the Court had held, in the case of *N. v. the United Kingdom*, that it was possible to expel a Ugandan national suffering from Aids to her country of origin, without this entailing a violation of Article 3. It had found at that time that a State could only be prevented from expelling a sick alien "in very exceptional cases, where the humanitarian grounds against removal" were compelling. This case-law attracted criticism. The Court's approach was subsequently reaffirmed in several Chamber judgments. Nonetheless, the judges who had expressed their views in a separate opinion, like the legal theorists, voiced the hope that the Grand Chamber would one day return to this question.

This has now been done, and the *Paposhvili* judgment departs from the *N. v. the United Kingdom* case-law, clarifying it in a manner that is more favourable for applicants. The applicant in this case, who was suffering from a very serious illness and whose condition was life-threatening, did not wish to be deported to Georgia. The Court considered that in the absence of any assessment by the domestic authorities of the risk facing him in Georgia, with due regard to his state of health and of whether or not there existed appropriate treatment in the destination country, the Belgian domestic authorities did not have available to them sufficient information to conclude that the applicant, if returned to Georgia, would not run a real and concrete risk of treatment contrary to Article 3 of the Convention.

The *Paposhvili* judgment provides important explanations and clarifies the approach followed to date. Admittedly, the threshold of severity for preventing the deportation of an alien suffering from an illness remains high. However, the work of assessment is primarily for the national authorities, who must put in place adequate procedures in order to evaluate the risks run in the event of deportation. This is proper implementation of the principle of subsidiarity. The assessment must take account both of the general situation in the receiving State and of the alien's particular case. It is necessary to obtain assurances that medical treatment will be available and accessible to the person concerned.

However, this case also warrants examination in terms of our relationship with the Supreme Courts. In practice, the *N. v. the United Kingdom* judgment had led the Belgian authorities to grant leave to remain only in really very exceptional circumstances, where the individual concerned was close to death. Yet the Belgian supreme courts considered that wider protection ought to be provided. We see here a very interesting dialogue between the domestic court and our Court, in which it is the national court which, as it were, asks us to adopt a less restrictive position, one that is more protective of the rights of applicants.

The voices raised in Brussels have thus been heard in Strasbourg.

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A little more than a year ago, together with the French supreme courts, the *Conseil d'Etat* and the Court of Cassation, we launched a trial phase for our Network for the exchange of information on the case-law of the European Convention on Human Rights. It has proved highly productive, and I should like to thank Jean-Marc Sauvé, Bertrand Louvel and Jean-Claude Marin, senior figures from these courts who have honoured us with their presence this evening, for agreeing to be our first partners in this project. They have been joined by 28 superior courts from 21 countries. I applaud the great success of this initiative. I should also like to extend a particular welcome to Francisco Pérez de los Cobos, President of the Spanish Constitutional Court, who is here with us this evening and who signed up to the Superior Courts Network this very morning.

Generally speaking, the dialogue with other national and international courts was very intense in 2016. This is not the moment to list all of the meetings which took place. Of the delegations which came to study about our Court, I will mention only those which travelled from another continent, namely those from South Africa, Brazil and Japan. It is always a source of pride and satisfaction on such occasions to note that the courts in these distant lands follow our case-law and take it into account in their own decisions.

Mr Bertrand Louvel, President, I felt this pride in a particular manner when hearing you, at the opening of the Court of Cassation's judicial year, utter words that I should like to repeat here: in ratifying the European Convention on Human Rights, "France voluntarily placed itself under the judicial authority of the Strasbourg Court. The genius of this Court is that it lies at the confluence of the various European legal traditions, of which it proposes a synthesis, judgment after judgment. Striving to make discerning use of the national margin of appreciation available to it, the Court of Cassation has loyally followed the approach taken by European Court, of which it has become an active partner through its working groups and the judgments which result from these deliberations, reflecting little by little a renewed conception of the traditional legalistic method".

Please accept our solemn thanks.

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One of the undoubted highlights of 2016 was the fact that the German-speaking Constitutional Courts of Germany, Austria, Switzerland and Liechtenstein chose to hold their two-yearly meeting at the European Court of Human Rights. I consider it a symbol of our proximity that this meeting, traditionally held at the seat of one of these Constitutional Courts, took place here in Strasbourg.

Among the attendees were the German-speaking judges of the Court of Justice, and foremost among them its President, my friend Koen Lenaerts. I welcome him most particularly this evening, since he is attending the opening of our judicial year for the first time in his capacity as President of the Court of Justice of the European Union.

The ties which exist between our two Courts are much stronger than is generally thought. Indeed, our meeting in 2016 was particularly useful and warm.

Laurence Burgorgue-Larsen, the renowned observer of our respective case-laws, is correct in pointing out that "the necessary requirement of maintaining coherence between the two European systems leads the Strasbourg Court to ally itself with EU law by drawing attention to possible shortcomings in European Union law, particularly in the judgments of the Court of Justice". She is referring, of course, to our judgments in *M.S.S. v. Belgium and Greece* and *V.M. v. Belgium*.

I cannot cite the Court of Justice this year without mentioning the judgment in *Avotiņš v. Latvia*. Our Court was required to analyse the mutual recognition of foreign judgments. The judgment upheld the doctrine of equivalent protection in respect of the European Union, a concept which originated in the *Bosphorus* case-law. Nonetheless, the Court specified that, where the conditions for application of the presumption of equivalent protection are met, it must satisfy itself that "the mutual recognition mechanisms do not leave any gap or particular situation which would render the protection of the human rights guaranteed by the Convention manifestly deficient".

In terms of the relationship between the international legal systems, this judgment is consistent with our permanent quest for coherence and, above all, clarity for European citizens.

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Without wishing to be exhaustive, it would be remiss of me not to mention the great honour bestowed by the Municipality of Nijmegen in awarding us the Treaties of Nijmegen Medal. It will be recalled that the Nijmegen Treaties put an end to several European wars. In awarding us this Medal, the organisers wished to emphasise the work carried out by our Court in the service of peace and tolerance. This prestigious distinction is a spur to pursue our mission.

Ladies and Gentlemen,

Of all the distinguished individuals whom I had the great honour of meeting in the course of 2016, there is one who left a particular impression: I refer to Silvia Fernández de Gurmendi, President of the International Criminal Court. It was my wish that she be the guest of honour at the solemn opening of our judicial year.

Madame,

You come from a country, Argentina, whose very name fires the imagination, one which is both geographically distant and yet culturally so close to Europe.

A distinguished lawyer and high-level diplomat, you played a major role in the negotiations leading to the adoption of the Rome Statute, the international treaty which set up the International Criminal Court. You have been a judge at that Court since 2009 and its President since 2015.

The International Criminal Court is the fruit of a dream that seemed unachievable at the beginning of the 20th century: the creation of a permanent international court responsible for promoting human rights and international humanitarian law at the global level, and for bringing to account those who breach these rights in the most serious way.

Your court has much in common with ours. Admittedly, almost all of the cases that we judge would be inadmissible before your Court.

But, like us, you defend the same hard core of fundamental rights and, in particular, the right to life.

Like us, you accept the idea that it is necessary to create an international order based on human rights.

Like our Court, you are sometimes criticised. But you continue to plough your furrow, with a view to ensuring that the perpetrators of war crimes, genocide or crimes against humanity do not go unpunished.

Madame President of the International Criminal Court, dear Silvia Fernández de Gurmendi,

We serve the same universal values and your presence among us today is a great joy and an immense honour.

I would now kindly invite you to take the floor.