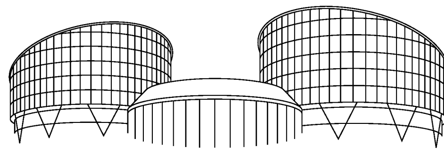

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

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2023 HELP NETWORK CONFERENCE

Keynote speech – the Reykjavik Summit and its impact on human rights protection in Europe

Strasbourg, 7 July 2023

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President of the European Court of Human Rights

Dear Chair,
Ladies and gentlemen,

It is my great pleasure, as President of the European Court of Human Rights, to deliver this year's keynote speech.

Let me begin by thanking Ambassador Kārklinš and the Latvian presidency of the Committee of Ministers for their support for this hybrid conference, as well as the dynamic HELP team who have put together a rich two-day agenda.

Successive Court Presidents have addressed HELP Network conferences, underlining the important nexus between the case-law of the European Court of Human Rights (which forms the core element of HELP courses), development of those courses by the HELP team, and the Convention expertise within the Registry.

The breadth of courses published in the last year or so demonstrates the ever further reach of HELP Programmes. New courses are now available on Human Rights in the Armed Forces; Human Rights in Sport; Corruption Prevention and Judicial Reasoning and Human Rights. The course on Ill-treatment now includes a new module dealing with ill-treatment during Armed Conflict as you saw from Kresimir Kamber yesterday. I am pleased that my colleague, Judge Gnatovskyy, presented another course under preparation, namely international humanitarian law and human rights, demonstrating that HELP responds quickly to new, and tragic, realities on the ground.

As the European Convention is a living instrument and the Court's jurisprudence develops on a regular basis at Chamber and Grand Chamber level, it goes without saying that up-to-date

training courses for judges, prosecutors, lawyers and law students are essential.

Of course, the Court itself has understood the importance of developing and sharing knowledge about the Convention and the Court's case-law. That is why we externalised our Knowledge Sharing platform in October last year. The platform provides a "one-stop shop" where case-law analysis is rendered easily accessible as it is organised by Convention article and theme.

Through our Superior Courts Network we also offer training sessions on the HUDOC search engine and on the Knowledge Sharing platform. We also organise webinars on substantive topics of interest, such as, for example, the reopening of proceedings aired last November.

Finally, our informal exchanges with superior court professionals have been structured recently into a Visiting Professionals Scheme. The new scheme enables national court professionals (both judges and registry staff) to visit the Court and exchange with their Strasbourg counterparts on case-processing systems, document management solutions and IT systems and development. This autumn we will receive groups from the

Supreme Court of Cyprus, the Curia in Hungary, the Supreme Administrative Court of Lithuania and the Supreme Court of Ireland.

My intervention today draws inspiration from the Reykjavik Declaration, adopted just over two months ago at the 4th Summit of Heads of State and Government. I was fortunate to attend this historic Summit as representative of the Court.

In Reykjavik, the Member States reaffirmed their deep and abiding commitment to the Convention and the Court as the ultimate guarantors of human rights across our continent.

As we know, the Convention system is based on shared responsibility. The European Court of Human Rights plays its external, supervisory role alongside domestic democratic and judicial systems. In order to shoulder their shared responsibility, national judges, prosecutors and lawyers need access to high quality and up-to-date training.

I will focus this morning on four key themes from the Reykjavik Declaration and appendix IV which is devoted to the Convention system and the Court, namely accountability; execution of Court

judgments; EU accession to the European Convention and safeguarding democracy.

I. Accountability

It is only natural that your conference began yesterday by focusing on the Council of Europe's response to the war in Ukraine.

The war is a tragedy first and foremost for Ukraine and its people. But it is also a tragedy for Europe and for our rules-based system of international law. The very fact that the 4th Summit took place is testimony to this.

The Reykjavik Declaration makes clear that without accountability there can be no lasting peace.

This is why two of my priorities as President of the Court are related to accountability, namely rolling out the tools designed to deal with our stock of pending Russian cases post-expulsion and accelerating and coordinating the pending Inter-state cases which concern, in particular, the situation in Ukraine.

Let me deal with each point in turn.

Following Russia's expulsion from the Council of Europe in March 2022, the Court reacted promptly with two Plenary Resolutions.

In a series of Grand Chamber and Chamber judgments delivered from January this year onwards, we have explained what is meant by and the legal basis for our residual jurisdiction pursuant to Article 58 of the Convention; the choice of *ad hoc* judges from amongst sitting judges in the absence of a judge elected in respect of Russia or a valid *ad hoc* list; and the possibility for the Court to proceed with the examination of applications even when a respondent State, and former High Contracting Party, refuses to cooperate.

In *Pivkina and Others v. Russia*, a decision delivered just last week, a Chamber explained that a State which ceases to be a Party to the Convention cannot, through its domestic legislation, determine or diminish the scope of the Court's jurisdiction. It also clarified the Court's temporal jurisdiction with regard to alleged violations

which spanned the date on which the respondent State ceased to be a party to the Convention.[1]

In Grand Chamber and Chamber judgments, we have also clarified what is, in essence, a default judgment procedure. Firstly, Articles 34 and 38 of the Convention impose an obligation on respondent States to furnish all necessary facilities to make possible a proper and effective examination of applications.

Secondly, in accordance with the Rules of Court – notably Rule 44A and C – we have made clear that the failure or refusal by a respondent State to participate effectively in the proceedings shall not, in itself, be a reason for the Court to discontinue the examination of an application. This provision acts as an enabling clause for the Court, making it impossible for a party unilaterally to delay or obstruct the conduct of proceedings.

Finally, we have made clear that the failure of a respondent State to participate effectively in the proceedings does not automatically lead to acceptance of an applicant's claims. The

[1] *Pivkina and Others v. Russia* (dec), no. 2134/23 and 6 other applications, 6 June 2023.

Court must be satisfied by the available evidence that a claim is well-founded in fact and law.[2]

Out of our current docket of 76,750 pending applications, approximately 15,300 are individual applications pending against the Russian Federation.

Over 7,000 applications have been processed against Russia in 2023. This figure is made up of about 4,800 communicated applications, 532 which resulted in a decision and 1,739 in a judgment.

Where applications are repetitive or relate to well-established case-law we are dealing with them at Committee level. Important impact cases are also decided by the Grand Chamber and by Chambers of 7 judges. I'm thinking, for example, of *Fedotova* on the recognition of same-sex couples,[3] *Navalnyy*, concerning the absence of an effective investigation following the poisoning of the applicant,[4] or *Bryan and Others* on the Articles 5 and 10 rights

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[2] See, for example, *Fedotova and Others v. Russia [GC],* nos. 40792/10 and 2 others, 17 January 2023; *Ukraine and the Netherlands v. Russia [GC],* nos. 8019/16, 43800/14 and 28525/20), 30 November 2022; *Kutayev v. Russia,* no. 17912/20, 24 January 2023; and *Svetova and Others v. Russia*, no. 54714/17, 24 January 2023; and *Georgia v. Russia (II)* (just satisfaction) [GC], no. 38263/08, 28 April 2023.

[3] *Fedotova and Others v. Russia* [GC], nos. 40792/10, 30538/14 and 43439/14, 17 January 2023.

[4] *Navalnyy v. Russia (no. 3) v. Russia*, no. 36418/20, 6 June 2023.

of Greenpeace activists at a Russian offshore oil-drilling platform.[5]

Of course, the next challenge for the Council of Europe will be ensuring the execution of the Court's judgments, a point explicitly made in Appendix IV.

As regards inter-State cases, 14 are pending before the Court – a record high. Six of these concern Russia. All except one have been introduced by Ukraine since 2014. The Court has sought to prioritise those relating to the conflict in Ukraine. For example, the 2022 case, in which 26 Member States have been granted leave to intervene as third parties, has been joined to the case concerning eastern Ukraine and the downing of flight MH17, in relation to which we published an admissibility decision in January this year. The objective is to organise a rolled-up hearing on admissibility and merits when possible.

In *Ukraine v Russia (Crimea)* we will hold a hearing on the admissibility and merits on 8 November together with other applications on political prisoners[6] and the transfer of prisoners[7].

[5] *Bryan and Others v. Russia*, no. 22515/14, 27 June 2023.
[6] no. 38334/18.
[7] no. 20958/14.

It is worth reiterating that the European Court of Human Rights is the only international tribunal dealing with human rights issues related to the ongoing war in Ukraine. It is also the only international court which is, for the time being, examining at the merits stage events in Ukraine dating back to 2014 and up to the invasion in February 2022.

II. Execution of Court judgments

Turning to my second point, execution, it is not surprising that successive chairmanships of the Committee of Ministers, including now Latvia, have singled out the execution of Court judgments as a priority theme.

The existence of a link between deficient execution of the Court's judgments and the influx of repetitive applications is evidenced by the evolution in our caseload and has been the subject of the attention of successive Court Presidents all the way back to Luzius Wildhaber.

Close to 80 % of our present docket is composed of applications concerning questions in relation to which the Court has well-

established case-law or repetitive cases. The latter are cases where Contracting Parties have failed to take effective steps to remedy the underlying systemic or structural problems previously, and often repeatedly, identified by the Court.

Unexecuted judgments undermine the authority and functioning of the Convention system. Where the root cause of a systemic problem at national level remains untreated, the Court continues to receive applications – often in their hundreds and thousands – and continues to find violations which stem from that systemic or structural problem.

Think, for example, in relation to Ukraine, of the sheer volume of applications previously lodged and decided on the subject of non-enforcement of domestic judgments resulting in a violation of Article 6. After rendering 14,000 judgments and faced with 12,000 further applications, the Grand Chamber passed the baton in relation to this systemic problem to the Committee of Ministers in its judgment in *Burmych*.[8]

[8] *Burmych and Others v. Ukraine* (striking out) [GC], nos. 46852/13 et al., 12 October 2017.

A Court encumbered with repetitive applications is not a Court allowed to perform the vital role which is ours in guaranteeing that European societies are, and remain, democratic societies underpinned by the rule of law.

Taking the necessary corrective measures at national level is essential and in this regard one must underline how training through HELP courses can play an important preventive role.

If we take one of the latest HELP courses, namely prohibition of ill-treatment, the course looks at effective procedural responses to ill-treatment and combatting impunity which can be of great use in preventing Article 3 violations from taking place.

Moreover, many HELP courses are available in national languages which enables a more accessible focus on particular issues which affect specific countries.

In Reykjavik the Heads of State and Government called for new thinking to resolve blockages in relation to execution. Appropriate training should undoubtedly be part of both prevention and cure.

III. EU accession to the ECHR

As you may know, in March this year, the Council of Europe and its EU negotiating partner reached a unanimous provisional agreement on solutions to the majority of the issues raised by Opinion 2/13 on accession to the Convention of the Court of Justice of the European Union. Only one "basket" of issues, basket number 4, remains to be resolved internally by the EU relating to EU acts in the area of the common foreign and security policy excluded from the jurisdiction of the CJEU.[9]

The Reykjavik Declaration welcomed the unanimous provisional agreement reached in Strasbourg and expressed commitment to its timely adoption. Council of Europe member States considered that accession would enhance coherence in human rights protection in Europe and set relations between the Council of Europe and the EU on a new path.

As I mentioned, one important outstanding issue is being examined in Brussels and Luxembourg. Therefore, you appreciate that it is not for me, as the Strasbourg Court President, to weigh

[9] https://rm.coe.int/report-to-the-cddh/1680aa9816 (Final report of CDDH ad hoc negotiation group ("46+1) on accession of the European Union to the European Convention on Human Rights to the CDDH).

in on outstanding political and legal questions the subject of continued reflection in the negotiating phase.

Leaving aside the prospect of accession, another of my priorities as President of the Court is, to the extent possible, to ensure that the Strasbourg Court is prepared for EU accession to the Convention if or when it occurs.

We already see many cases, in a variety of fields, not least asylum and immigration (see *J.K. and Others v Sweden*[10] or *Jeunesse v the Netherlands*[11]); the functioning of the European Arrest Warrant (*Bivolaru and Moldovan v France*[12]) or data protection (*Big Brother Watch and Others v the UK*[13] or the *Satakunnan case*[14]) where EU law is an important component of the case pending before us. As regards rule of law backsliding, the complementarity and extensive cross referencing in the respective Luxembourg and Strasbourg case-law is well-known.[15]

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[10] *J.K. and Others v. Sweden* [GC], no. 59166/12, 23 August 2016

[11] *Jeunesse v. the Netherlands* [GC], no. 12738/10, 3 October 2014

[12] *Bivolaru and Moldovan v. France*, nos. 40324/16 and 12623/17, 25 March 2021

[13] *Big Brother Watch and Others v. the United Kingdom* [GC], nos. 58170/13 and 2 others, 25 May 2021

[14] *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* [GC], no. 931/13, 27 June 2017

[15] See, for example, *Tuleya v. Poland*, nos. 21181/19 and 51751/20, 6 July 2023; *Xero Flor w Polsce sp. z o.o. v. Poland*, no. 4907/18, 7 May 2021; *Broda and Bojara v. Poland*, nos. 26691/18 and 27367/18, 29 June 2021; and *Reczkowicz v. Poland*, no. 43447/19, 22 July 2021.

One of the great advantages of the HELP courses has always been their overview of both EU and ECHR standards on a particular topic. In this way they help judges, prosecutors and legal professions navigate the sometimes complicated waters of European human rights protection, understanding how these two European protection mechanisms interact. That is why I was particularly happy to provide a welcome video to the recent HELP course on the interplay between the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union. It is essential for judges and practitioners to have a global overview of the mechanisms for human rights protection in Europe faced with a complex mix of national, international and supranational mechanisms for the protection of human rights.

IV. Democracy

Finally, I'd like to say a few words on the other focus of the 4th Summit – the health and security of our democracies.

It is clear from the Reykjavik Declaration that the Council of Europe, as a symbol of peace and reconciliation, has a unique role to play:

> "*to bring together, on an equal footing, all countries of Europe to protect democratic security and to counter the undermining of human rights, democracy and the rule of law.*"[16]

It is for this reason that appendix III contains 10 Principles for Democracy; each one seeking to counteract the fact that Europe's democratic environment and its democratic institutions are, in the words of the Secretary General "in mutually reinforcing decline."[17]

As I stated in my keynote speech at the opening of the Court's Judicial Year in January, democratic erosion and backsliding, aptly described as "death by a thousand cuts", takes many different forms, from the adoption of measures to undermine the judiciary, muzzle the press, stifle political pluralism, dispense with institutional checks and balances, to the elimination of political competition or the turning of a blind eye to corruption. I reminded the audience that democracy, just like human rights and the rule of law, is not acquired once and for all. It must be fought for every day.

[16] https://rm.coe.int/4th-summit-of-heads-of-state-and-government-of-the-council-of-europe/1680ab40c1
[17] https://rm.coe.int/annual-report-sg-2021/1680a264a2

While the Reykjavik Principles of Democracy do not expressly mention the case-law of the European Court of Human Rights, it is clear that the European Convention and the Court's case-law play a vital role in ensuring that the elements we need for a peaceful society – democracy, tolerance and pluralism - are in place.

It is through the judgments and decisions of the Court in supervising compliance with the European Convention that the values underpinning the Council of Europe, including effective and pluralist democracy are defended.

It was for this reason that our annual judicial seminar, which took place in January, focused on judges preserving democracy through the protection of human rights.[18]

In its case-law on Articles 10 and 3 of Protocol n° 1, the Court has emphasised that:

[18] See the Seminar's Background Paper:
https://www.echr.coe.int/documents/d/echr/seminar_background_paper_2023_eng-1?download=true

> "*free speech is essential in ensuring 'the free expression of the opinion of the people in the choice of the legislature'* [and that it is] *particularly important in the period preceding an election that opinions and information of all kinds be permitted to circulate freely (see Orlovskaya Iskra v. Russia, no. 42911/08, § 110, 21 February 2017). This is especially true when the freedom of expression at stake is that of a political party."*[19]

The latter play an essential role in ensuring pluralism and the proper functioning of democracy such that restrictions on their freedom of expression have to be subject to rigorous supervision.[20]

The importance the Court attaches to freedom of expression, and in particular its role in a democracy, is reflected in the heighted protection it affords to those tasked with upholding democratic values namely journalists, academics and opposition politicians.

However, bodies which exercise a public watchdog function and enjoy this heightened protection as a result also bear important duties and responsibilities.

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[19] *Magyar Kétfarkú Kutya Párt v. Hungary* [GC], no. 201/17, § 100, 20 January 2020.

[20] Idem.

In *Sanchez v France*[21], a judgment handed down in May this year, the Grand Chamber addressed the duties and responsibilities of politicians using social media for political and election-related purposes.

The applicant, who at the time was a locally elected councillor and a candidate in the legislative elections, was found guilty of inciting hatred and violence against Muslims. He was sentenced to a fine for not having deleted, from his Facebook "wall", which was accessible to the public and used during the election campaign, Islamophobic comments, the authors of which were also convicted (as accomplices).

The case is interesting for a number of reasons, not least because it deals with the phenomenon of online hate speech within an electoral context. The decision turned on whether or not the interference with the applicant politician's right to freedom of expression was necessary in a democratic society within the means of paragraph 2 of Article 10.

[21] *Sanchez v. France* [GC], no. 45581/15, 15 May 2023

The Court acknowledged that the promotion of free political debate was "*a very important feature of a democratic society*". Nevertheless, while political speech calls for an elevated level of protection, the freedom of political debate was not absolute in nature and political figures also had duties and responsibilities. This was because tolerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society. It follows that it may be considered necessary in certain democratic societies to penalise or even prevent all forms of expression that propagate, encourage, promote or justify hatred based on intolerance, provided that any restrictions are proportionate to the aim pursued.

The right to freedom of peaceful assembly is also a fundamental right in a democratic society and, like the right to freedom of expression, is one of the foundations of such a society and should not be interpreted restrictively.[22]

In *Ecodefence and Others v. Russia*, decided in June 2022, the applicants were non-governmental organisations involved in civil-society issues who were placed on a register of so-called "foreign

[22] *Djavit An v. Turkey*, 2003, § 56; *Kudrevičius and Others v. Lithuania* [GC], 2015, § 91.

agents" funded by "foreign sources".[23] This resulted in the imposition of administrative fines, financial expenditure and severe restrictions on their activities. One organisation, Memorial, joint winner of the Nobel Peace Prize in 2022, was liquidated, declared illegal and forcibly dissolved the same year.

The Court found a violation of Article 11, interpreted in the light of Article 10 of the Convention, due to key concepts in the Foreign Agents Act which fell short of the Convention's foreseeability requirement. In addition, judicial review had failed to provide adequate and effective safeguards against the arbitrary and discriminatory exercise of the wide discretion left to the executive by the law.

The Court emphasised in *Ecodefence* that:

"*the democratic process is an ongoing one which needs to be continuously supported by free and pluralistic public debate and carried forward by many actors of civil society*".[24]

[23] *Ecodefence and Others v. Russia*, nos. 9988/13 and 60 others, 14 June 2022.
[24] ibid, § 139.

The tragic events in Ukraine, the expulsion of Russia from the Council of Europe, the crippling of dissent and civil society in that former Member State and the forces which gave rise to these events, remind us what happens when democracies break down or when its roots are so fragile that they can easily be upended.

Dear participants,

While training and education is not specifically referred in the Reykjavik Declaration, it is clear that safeguarding a system based on subsidiarity and shared responsibility rests on ensuring that the Convention is thoroughly understood and applied at the domestic level.

I mentioned earlier that “prevention is better than cure”.
Upstream work in the form of training and education is crucial for the protection of human rights. In a German case last year on Article 10 and expression rights of teachers, the Court emphasised:

“*the enormous importance, from a public-policy perspective, of teaching and educating children, in a credible manner, about freedom, democracy, human rights and the rule of law*”.[25]

Given the challenges which Europe faces and which the 4th summit was convened to address, this statement is one of far broader application than school students.

Ensuring effective protection of human rights in Europe requires the creation of a fully-informed community of judges, prosecutors, practicing lawyers, and students.

That is precisely what the HELP programme seeks to do and I strongly commend your work and congratulate those who have committed to human rights education whether by preparing or taking HELP courses.

Many thanks for the invitation to address you this morning.

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[25] *Godenau v. Germany*, no. 80450/17, § 54, 29 November 2022.