



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

Solemn Hearing

Speech by Robert Spano

President of the European Court of Human Rights

24 June 2022

Madame la Présidente de la République hellénique,
Mesdames et Messieurs les Présidents des Cours constitutionnelles et des Cours suprêmes,
Monsieur le Président des Délégués des Ministres, Cher ambassadeur d'Irlande,
Monsieur le Président de l'Assemblée parlementaire,
Excellences,
Mesdames, Messieurs,

Je vous remercie d'avoir bien voulu assister à cette audience solennelle de la Cour européenne des droits de l'homme.

Pour la deuxième fois, nous nous retrouvons à un moment inhabituel de l'année, en raison de la situation sanitaire qui prévalait à la fin du mois de janvier et qui nous a empêchés de nous réunir.

Mais mes collègues et moi-même tenions absolument à ce que la tradition soit respectée et qu'une audience se tienne en 2022.

Dans un instant, je prononcerai le discours d'usage et notre oratrice pour l'année 2022, Mme Dunja Mijatović, Commissaire aux droits de l'homme du Conseil de l'Europe, prendra la parole. Mais auparavant, je tiens à m'adresser à notre invitée d'honneur.

Madame la Présidente de la République,

Votre présence parmi nous ce soir confère à cette audience un caractère exceptionnel. Pour de nombreuses raisons, vous compter parmi nous est comme une évidence.

D'abord, vous venez du pays qui a inventé la démocratie, unique modèle politique envisagé par la Convention européenne des droits de l'homme et que nous ne cessons de défendre dans notre jurisprudence. Je reviendrai sur le thème de la démocratie plus tard dans mon discours.

Ensuite, vous êtes ici parmi vos pairs, puisqu'avant d'exercer les hautes fonctions de Chef de l'État, vous avez été la première femme à présider le Conseil d'État grec.

Ce fut la reconnaissance d'une carrière prestigieuse de juriste au cours de laquelle vous vous êtes notamment illustrée par vos combats pour la protection de l'environnement et la lutte contre les discriminations, par exemple celles qui touchent les enfants.

Ce sont donc vos anciens collègues, présidents des cours supérieures des États membres du Conseil de l'Europe, qui vous entourent aujourd'hui.

Enfin, apogée de votre carrière, vous êtes la première femme de l'histoire de la Grèce à accéder aux fonctions de Présidente de la République.

Votre élection a certes consacré vos qualités de juriste remarquable, mais elle a aussi marqué une avancée vers une nouvelle ère d'égalité.

Vous avez alors déclaré « *aspire à une société qui respecte les droits, en vertu de [la] Constitution, de la Charte européenne des droits fondamentaux et de la Convention européenne des droits de l'homme* ». Notre Cour y a été particulièrement sensible.

Madame la Présidente de la République,

Le moment que nous vivons est historique. Nous en sommes tous conscients.

En vous exprimant dans cette enceinte, vous marquez de la manière la plus solennelle le soutien de la Grèce au système européen de protection des droits de l'homme.

Votre présence parmi nous est un immense honneur et une grande joie. Nous nous réjouissons de pouvoir maintenant vous entendre.

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Esteemed guests,

Your presence here this evening demonstrates your commitment to our joint European human-rights project. A project which is needed now more than ever.

We meet here in Strasbourg at a transformative moment in our European history, a moment when the relative peace and security which we have taken for granted on our continent has been shattered by Russia's war in Ukraine.

When we celebrated the 70th anniversary of the European Convention in Athens in November 2020 we highlighted that the Convention constituted one of the greatest peace projects in human history.

I firmly believe that the work of the Council of Europe and its judicial control mechanism, the European Court of Human Rights, has contributed to stability, security and peace in Europe and will continue to do so. Whilst it is often said that the Court is the "jewel in the Crown", the Crown must remain strong for the jewel to continue to shine.

It was therefore of immense importance that the Council of Europe reacted with speed, determination and clarity from the beginning of the war. Moreover, the Court has not remained a powerless witness to the shocking events.

Indeed, the Court immediately granted a number of important interim measures against the Russian Federation in the days and weeks following the invasion.

Furthermore, the Plenary Court, having regard to the decisions of the Committee of Ministers and the Parliamentary Assembly and in unison with those bodies, drew the consequences of the Russian Federation's expulsion from the organisation and declared in its Resolution of 22 March this year

that, as from 16 September 2022, the Russian Federation would cease to be a High Contracting Party to the Convention.

It flows from this Resolution that the Court will continue to have jurisdiction to deal with applications concerning actions and omissions by the Russian Federation which may constitute a violation of the Convention, provided they occurred before that date.

It should be made clear that the Resolution states that it is without prejudice to the consideration of any legal issue, related to the expulsion, which may arise in the exercise by the Court of its competence under the Convention to consider cases brought before it.

In the coming months the Court will have to determine the most appropriate course of action for processing the approximately 17,000 cases against Russia which remain on the Court's docket, as well as possibly numerous other cases lodged as a result of the war in Ukraine. This will take time, and expectations need to be realistic. The challenge for the Court's work is unprecedented. Continued political and financial support from all stakeholders is vital.

As for the Court's statistics more generally, we currently have approximately 72,000 pending applications, which represents an 11% increase from this time last year. The three high case-count countries which account for almost 64% of these applications are, in this order: Russia, Türkiye and Ukraine.

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Dear guests,

It is customary for the President of the Court at the solemn hearing to highlight some of the most important judgments delivered by the Court during the previous year.

In 2021 the Grand Chamber of the Court delivered twelve judgments and one decision. It also ruled for the first time on a request for an advisory opinion under the Council of Europe Convention on Human Rights and Biomedicine (the Oviedo Convention).

Let me begin by saying a few words about the inter-State rulings delivered by the Grand Chamber in 2021.

The judgment in *Georgia v. Russia (II)* concerned the jurisdiction of the attacking or invading State during the active combat phase of hostilities; the relationship between Convention law and international humanitarian law in the context of an armed conflict; the duty to investigate deaths occurring during the active combat phase; the definition of administrative practice; and the application of Article 2 of Protocol No. 4 to internally displaced persons.

In this inter-State application, the Georgian Government made a series of complaints concerning the armed conflict between Russia and Georgia in August 2008. The Court examined two phases of the impugned events separately, namely those before and after the ceasefire agreement of 12 August 2008. It held that the events which had occurred during the active phase of the hostilities (8-12 August) did not fall within the jurisdiction of the Russian Federation for the purposes of Article 1 of the Convention, whereas the events which occurred after the ceasefire and the cessation of the hostilities did fall within its jurisdiction. On the merits, the Court found that there had been an administrative practice, contrary to Articles 2, 3, 5 and 8 of the Convention, Article 1 of Protocol No.

1 and Article 2 of Protocol No. 4; a violation of the procedural limb of Article 2; as well as a failure to comply with the obligation to cooperate with the Court under Article 38 of the Convention.

In the inter-State application *Ukraine v. Russia (re Crimea)* the Ukrainian Government made a series of complaints about the events of 27 February 2014 to 16 August 2015, in the course of which the region of Crimea, including the city of Sevastopol, was purportedly integrated into the Russian Federation.

In its decision, the Grand Chamber held that the impugned facts fell within the “jurisdiction” of the Russian Federation within the meaning of Article 1. It also addressed the “jurisdiction” of a respondent State in the context of a purported “annexation” of territory from one Contracting State to another and clarified the standard of proof applicable at the admissibility stage to the question of jurisdiction.

With 15 pending inter-State cases and approximately 10,500 associated individual applications, inter-State work remains a very challenging part of the Court’s work and has implications for our authority and legitimacy moving forward. Indeed, at the beginning of this year, the Court held a hearing on admissibility in still another important inter-State case, that of *Ukraine and the Netherlands v. Russia*, concerning events in eastern Ukraine, including the downing of flight MH17.

The next two Grand Chamber cases I would like to highlight are the landmark judgments in *Big Brother Watch and Others v. United Kingdom* and *Centrum för rättvisa v. Sweden*. Both cases concerned the bulk interception of cross-border communications and safeguards against abuse, and in addition *Big Brother Watch and Others* concerned the receipt of intelligence from foreign intelligence services.

In both judgments, delivered on the same day, the Court importantly concluded that bulk interception regimes were, in principle, permissible under the Convention. However, it set out the fundamental safeguards required of these regimes under the “private life” provision of the Convention. In particular, the Court found that at the domestic level, the supervision and review process had to be subject to “end-to-end” safeguards. In the *Big Brother and Others* case, the Court also developed Convention requirements for the protection of confidential journalistic material. Moreover, the Court defined the safeguards to ensure compliance with the Convention in respect of the receipt of intelligence from foreign intelligence services.

It is of importance to highlight the fact that in its judgments the Court paid a great deal of attention to the work and specific findings of the national authorities and the domestic courts engaged in intelligence work. These cross-references are an important part of our dialogue and the best way in which we can understand and balance the competing concerns at play.

To conclude this overview of cases in 2021, I will mention two particularly important Chamber cases, as they concern one of the most fundamental aspects of the rule of law, namely the independence of the judiciary and, more specifically, the conditions of appointment of judges and the development of their careers.

In *Xero Flor v. Poland*, the Court dealt with a complaint concerning the alleged invalidity of the appointment of a Constitutional Court judge. It held that there had been a violation of Article 6 § 1 as regards the applicant company’s right to a “tribunal established by law” on account of the presence on the bench of the Constitutional Court of the Judge in question, whose election it found to have been vitiated by grave irregularities.

In *Reczkowicz v. Poland* the Court found that the procedure for appointing judges had been unduly influenced by the legislative and executive powers. This amounted to a fundamental irregularity which adversely affected the whole process and compromised the legitimacy of the Disciplinary Chamber of the Supreme Court, which had examined the applicant's case. This Chamber was not therefore a "tribunal established by law" within the meaning of the European Convention.

More recently, I should also note that the Court delivered its first Grand Chamber judgment on the judicial reforms in Poland in the case of *Grzęda v. Poland*, which I am sure will be elaborated upon further by my successor in office in next year's speech at the Court's solemn hearing to mark the opening of the judicial year.

All of these cases follow on from the very important Grand Chamber judgment in the case of *Guðmundur Andri Ástráðsson v. Iceland* from 2020.

These judgments on the independence of the judiciary, which concern a growing number of countries, alert us to a worrying regression in the rule of law. It bears repeating that sometimes courts, whether at the domestic or the international level, find themselves in the spotlight, praised by some quarters and criticised by others. The European Court of Human Rights is no exception and recent events have provided clear examples.

Let us be clear. The rule of law is based on a very simple and important premise: those who are entrusted with wielding governmental power must themselves be circumscribed by the law and it is the role of the courts to state what the law is if a dispute arises. When it comes to the European Court of Human Rights, this is the logic of the system to which the Member States have signed up, based on their own sovereign choice. The Court has demonstrated in recent years an acute awareness of the role of national authorities under the principle of subsidiarity, but sometimes the Court's rulings must draw a line in the sand. Indeed, that is the whole point of why the system was put in place more than 70 years ago. This role can be unpopular with the government in question or even sometimes with the majority of a country's population, if the outcome is not to their liking.

But this is inherent in the work of a Human Rights Court which is tasked with verifying the Convention-compliance of the use of governmental power.

Ladies and gentlemen,

A Europe in which the separation of powers has been eroded by those in power;

A Europe where sustained public expressions of hostility or outright refusal to abide by court judgments are commonplace;

A Europe where judges are simply unable to do their jobs independently and impartially for fear of reprisals or attacks resulting in unfettered governmental power:

This is a Europe in which the rule of law is at risk of disappearing. This is a Europe in which we will no longer be free, as recent events have once again shown us.

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Dear guests,

As has been said, dialogue between the Court and national courts is part of our DNA. Today I would like to update you briefly on two pillars of that dialogue: our Superior Courts Network and requests for advisory opinions under Protocol No. 16.

We have a truly outstanding figure of 102 courts from 45 States which are now active members of our network. I am particularly pleased to have welcomed the Court of Justice of the European Union, which recently joined as an observer.

The other pillar of dialogue with national courts is Protocol No. 16. This Protocol, which entered into force in 2018, extended the jurisdiction of the Court to give advisory opinions at the request of the highest national courts.

What is the state of play so far in relation to these advisory requests?

The Court has adjudicated four such requests so far: one on the question of surrogacy and legal recognition,¹ another on the interpretation of a provision of a domestic Criminal Code in the light of Article 7 of the Convention², the third concerning legislation on impeachment³, and the fourth on the statute of limitations and torture⁴. One request was not accepted by the Grand Chamber Panel, and one is currently pending, having been submitted by the French *Conseil d'État*.

The advisory opinion procedure under Protocol No. 16 is still at the development stage within the Court, as well as within the relevant national superior courts already participating in the procedure. It will take some time for the system to become fully efficient and operational in all its essential elements. The Court is committed to being able to process these requests in a sufficiently quick manner so as to enable you, the highest domestic courts, to resume your own decision-making on the cases in question.

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Dear guests,

The time has come for me to hand over to our guest of honour. This evening we welcome Ms Dunja Mijatović, the Council of Europe's Commissioner for Human Rights.

Her mandate goes to the heart of the functioning of the Convention system. Her country work, thematic monitoring and awareness-raising assist member States on their own journey towards human-rights compliance.

Her insights following country visits are sometimes translated into third-party observations which provide a precious contribution to the work of the Court.

I would like to commend her courage, dynamism and energy in defending our common European values. Commissioner Mijatović, dear Dunja, the floor is yours.

¹ Request no. P16-2018-001.

² Request no. P16-2019-001

³ Request no. P16-2020-002

⁴ Request no. P16-2021-001