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

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Ladies and gentlemen,

It is a pleasure for me to take part in this event, which is impressive in its scale and in its scope.

I appreciate greatly that a part of the proceedings has been dedicated to European human rights law. In the company of my learned colleague, and good friend, Judge Julia Laffranque, it is my task today to speak about the European Convention on Human Rights, which was ratified by Estonia 20 years ago this year. And to speak about the European Court of Human Rights.

I begin with a backward glance to the Convention as it was when Estonia ratified it.

That was an historic era at Strasbourg. The number of Convention States increased year after year as the new democracies of Europe accepted the international obligation to protect human rights. The great difference with today is, of course, the changed Convention architecture. Estonia became part of an international system of supervision based on two Convention organs – the European Commission on Human Rights and the Court. Two years later, the eleventh Protocol entered into force, fundamentally transforming the system by making it an entirely judicial one. This metamorphosis was a landmark event for Europe, consolidating the place of the Strasbourg Court as the ultimate authority in the field of human rights for our continent.

These past twenty years have also seen five protocols come into being. Two of these are of a substantive nature:
Protocol no. 12 laying down a general prohibition on discrimination. So far, it has been accepted by 19 States.

Then there is Protocol No. 13 on the abolition of the death penalty in all circumstances. With 44 out of 47 States having ratified it, it has signalled the formal and final abolition of capital punishment for the great majority of European countries. But its legal effects are

wider than that. In a case decided last year involving the Russian Federation[1], the question was whether that country, which is not party to Protocol No. 13 or to the earlier Protocol No. 6, was nevertheless bound not to send a person back to a country where they would be at real risk of the death penalty. The Court took note of the position in Russian law against capital punishment – the Constitutional Court ruled in 2009 that a "constitutional regime" had been formed in Russia safeguarding against the sentence of death in any circumstances. It concluded from this that Russia must now be regarded as bound by the new interpretation of Article 2, which no longer admits the death penalty. That is an important, and not unexpected, finding by the European Court – an example of a strong interpretation of the Convention for the sake of more effective protection of human rights in all of the 47 States.

The other recent protocols are of mostly a procedural nature – numbers 14, 15 and 16. I will refer to them at the relevant points in my presentation.

A moment ago I described the European Court as the ultimate arbiter in matters of human rights. The Court's unique and central place is set by the text of the Convention. **Article 19** is its establishment clause, providing very succinctly that there shall be a Court "to ensure the observance of the engagements undertaken by the High Contracting Parties".

The second cardinal provision for the Court is **Article 32** of the Convention. This sets the jurisdiction of the Court in broad terms – it extends to all matters concerning the interpretation and application of the Convention and the Protocols as referred to it under the different forms of proceeding – contentious proceedings, advisory proceedings and the as-yet-unused procedures in Article 46.

So these two articles – 19 and 32 – lay down the role and jurisdiction of the Court.

From this we can infer what the Court is not for.

It is not part of its function to resolve or review questions of domestic law, or EU law, or of any other order of law. Such matters are not generally within the competence of the Court. That said, it is of course necessary for the Court to take cognisance of, and to evaluate, legal rules and provisions that interfere with Convention rights. It is in this way that disputes over the content of domestic law or the quality of domestic law may require analysis and answer as part of the Court determination of the case. For instance, the Court will scrutinise domestic law and practice for the purpose of the exhaustion of remedies rule. I give that as an example since it is an issue that goes to the very important question of subsidiarity, which I will come to a little later on.

The core and the mass of proceedings before the Court is composed of individual applications, filed with the Court under **Article 34** of the Convention. The direct access of the individual to the international judicial machinery is the cornerstone of the Convention mechanism – it is the centrepiece, or the keystone, that was inserted into it by Protocol 11. The Article lays down a wide personal scope, applying to "any person, non-governmental organisation or group of individuals". But it also lays down a basic requirement of standing – the applicant has to complain of an actual (or in some cases potential) interference with

[1] *A.L. (X.W.) v. Russia*, no. 44095/14, 29 October 2015.

their rights. There is no possibility to bring an *actio popularis.* The Court cannot entertain an abstract or hypothetical question of human rights law. This limitation has been preserved in the new advisory opinion procedure in Protocol No. 16.
The second mode of contentious procedure is the inter-State application, set out in **Article 33**. Such cases have been very few, although there are a number of them currently pending before the Court. By their nature, inter-State cases are likely to have political overtones, sometimes very strong. Yet the same can be said of many individual cases, which have raised for decision at Strasbourg certain matters that are both sensitive and controversial for many European states. This is inevitable where fundamental freedoms are at stake.

Let me indicate briefly the functioning of the Court.

Protocol No. 14 established the Court's current system of filtering. This is entrusted to the single judge formation, assisted by Registry lawyers acting as non-judicial rapporteurs. The cardinal rule here is that the single judge cannot be the judge who sits in respect of the country concerned by the case. It must always be another judge, who can draw on the legal and linguistic knowledge of the Registry's legal staff. Starting in mid-2010, the filtering system has become a very efficient operation in the years since then, making extensive use of simplified working methods and excellent IT tools. By these means the Court succeeded in reducing the number of cases pending before it from more than 160,000 five years ago to the level it is today, which is just above 76,000.

The 14th Protocol also provided a procedural solution for dealing with repetitive cases – of which there are more than 30,000 now pending - by transferring jurisdiction from Chambers of seven judges to Committees of three. Here too the Court has streamlined its procedures and methods, so that it can decide these very routine cases with maximum procedural economy.

Now I come to the great pressure point on the system, and that is the number of cases – now over 28,000 – that are currently awaiting examination at Chamber level. This means cases that are neither very simple or merely repetitive, so they call for further judicial examination.
The burden at Chamber level is out of proportion to the present the capacity of the Court's. To put it in perspective, in 2015 the Court delivered about 850 judgments and about 420 decisions at this level of jurisdiction. The overload of the Court's docket inevitably means that applicants have to wait many years to get a decision on their case. Even in 2016, the Court delivered judgments on cases filed ten or more years ago. We try to improve things by operating a system of prioritisation, but for many cases we are far from meeting the targets defined by the Brighton conference in 2012. Those targets are that cases should either be filtered out in the first year (this target is actually met) or communicated to the respondent Government. Where this happens, the case should be dealt with within the next two years.

This year a new procedure has been introduced which involves the immediate and simplified communication of new Chamber cases to the respondent State. We are testing this with twelve States at the moment, and will evaluate the impact after a year. There is definitely a saving of time at the beginning of the procedure. We hope that the positive effects will go further than that.

To sum up on this point, the present decade has been called the decade of reform, beginning in 2010 with the important Interlaken conference, and the entry into force of Protocol No. 14. The Court's situation was extremely worrying at that time. Since then there has been major improvement in important respects. But more solutions are needed so that, at the European level, the Convention system can deal in an effective way with the cases that reach it.

However, the decade of reform is not only about increasing capacity at Strasbourg. It is hard to think that changes and improvements at the European level will ever catch up with the strong demand that exists for the protection of human rights throughout Europe. This brings me back to a point I mentioned earlier – subsidiarity.

In the context of the Convention, this can be regarded as a basic organising principle. It holds that the primary responsibility for safeguarding human rights lies with the States. This follows from **Article 1** of the Convention, which places the Parties under an obligation to respect the rights defined in the subsequent articles. The Contracting States are the actors in the first instance – it is for them in the first place to give concrete effect to Convention guarantees. Along with this general obligation there is the more precise one of ensuring the availability of effective remedies at national level, required by **Article 13**. The model is therefore premised on a self-correcting domestic legal order. That is the primary locus of the Convention system. Following that logic, applicants are under a duty to exhaust domestic remedies. They must make use of the remedy that is closest to them in space and in time. That is a reality today in many European States – indeed, in most of them. The great reform of the Convention mechanism in 1998 coincided with a movement – now complete – towards the incorporation of the substance of the Convention into domestic law. Achieved in different ways, Convention rights are actionable and justiciable in all of the 47 States.

The other side of the subsidiarity coin is the Court's place in the system, as the common instrument that is tasked with ensuring that Convention guarantees are ultimately upheld. Its role is to maintain, if not uniformity, then consistency and coherence in the implementation and respect of the same set of rights across the European continent. To take the words of the Preamble to the Convention, the Court, and its case-law, is necessary for "a common observance and understanding of human rights" among the member States of the Council of Europe.

Here I will refer to Protocol 15, since the most prominent reform it contains is to add a new paragraph to the Preamble, formulated as follows:

> "Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention".

I have already talked about two of the three elements of that sentence – the principle of subsidiarity and the jurisdiction of the Court. I come to the third, the margin of appreciation. They form a natural trio. The margin of appreciation, which is a creation of the Strasbourg

case-law going back four decades, is granted to the State (depending on the case, to the legislative, executive or judicial authorities) under certain conditions and within certain limits. The margin arises in the Convention system, since – and here I draw the contrast with EU law – it is not the vocation of the Convention to hold European state to a uniform standard. Rather, it is often said that the Convention defines a minimum standard that must be attained in all of the Contracting States. There is a harmonising aspect to this, which echoes in the Preamble, which refers to the ideal of "greater unity" among States through the maintenance and further realisation of human rights, and invokes a "common heritage of political traditions, ideals, freedom and the rule of law".

One view on the margin of appreciation is that it is a safeguard of State sovereignty against too-close scrutiny by the European Court. On this view, it is a sort of concession to the domestic level, an act of self-restraint by the Strasbourg judge, who stops short of a full review of the acts or omissions of the respondent State. It means the Court deferring to judgments made by others.

Another view - a more positive one - is that the margin of appreciation does not signify a lower, looser degree of protection. Rather it makes for a better degree of protection, since it is an incentive from Strasbourg to the national authorities to take full account of Convention rights and principles, whether it is the legislature, the executive or the judiciary. This is at its clearest when the issue is one that calls for the balancing of individual rights against other rights or important aspects of public interest. Out of a great many cases I will take as my example *Parrillo v. Italy*, decided by the Grand Chamber last year. The applicant argued that there was a violation of her right to respect for private life in that Italian law did not permit the donation of unused embryos created by *in vitro* fertilisation for scientific research. The core of the case was the question whether this legislative restriction could be deemed "necessary in a democratic society", or whether it represented an unjustified interference in the applicant's human rights.

The Court stated that the solutions reached by the legislature are not beyond its scrutiny. And so it "must examine carefully the arguments taken into consideration during the legislative process and leading to the choices that have been made by the legislature and to determine whether a fair balance has been struck between the competing interests of the State and those directly affected by those legislative choices" (at paragraph 170).

That is a clear message, I believe. There is strong encouragement to the legislature to direct its mind to the human rights implications of the laws enacted. And this applies whether the margin is a narrow one or, as in the *Parrillo* case, a wide one. The Grand Chamber went on to review, although not in a very detailed way, the legislative process behind the Act in question. It was satisfied that different perspectives had been listened to, and the requisite balancing exercise performed by lawmakers.

In other cases, where it was not shown that parliament had specific regard to Convention considerations, this may lead to a finding of a violation – for example, this is one of the elements in the Court's reasoning on prisoner voting in the United Kingdom.

The Court's stance in relation to domestic courts is comparable. Here too the finding that the domestic court remained within the appropriate margin depends to a large degree on

the manner in which it conducted the balancing exercise. A perfect illustration of this is the *Delfi* judgment, where before the Supreme Court, competing rights Convention rights were at issue – the right to reputation, protected by Article 8, and the right to freedom of expression under Article 10.

Our Court said:

> "Where the balancing exercise between those two rights has been undertaken by the national authorities in conformity with the criteria laid down in the Court's case-law, the Court would require strong reasons to substitute its view for that of the domestic courts".

This statement makes demands on both sides of course.

The national court must structure its analysis in the light of Convention principles as developed in the Strasbourg jurisprudence, and must apply a method in keeping with the European approach. That requires from the European Court a body of case-law that is clear, consistent and sufficiently stable. This explains the particular style of reasoning of our Court, especially at the level of the Grand Chamber, where great efforts are made in each case to lay out the applicable principles and to demonstrate an appropriate analytical approach.

This interaction is correctly described as a judicial dialogue, and it is fundamental to the effective application of the Convention. It is a prime manifestation of subsidiarity in the Convention system, capable of moving its centre of gravity downwards towards a broad and base. It is plain to me that this is, for the most part, a phenomenon that is continuously developing across Europe – even if there are also some reversals. Compared to the time of Estonia's ratification, nowadays the Convention and the Strasbourg case-law are widely applied with diligence and confidence by courts in every State and at every level.

This promising state of affairs will be enhanced by the introduction of the advisory opinion procedure when Protocol No. 16 takes effect. Intended by the drafters to create a dedicated channel of dialogue between the highest national courts and the European Court, I have no doubt that it will prove its worth in the years to come. The protocol was prepared with the strong encouragement of the Court, and we look forward to its entry into force when the tenth ratification has been obtained – there have been six so far. In this time of waiting, our Court is in the process of drafting the rules that will govern the procedure. These will be adopted and published in the near future, and will provide a clearer idea of how it will work in practice. Of course there will still be questions, both of principle and of a practice. Will the procedure be able to avoid delay? We may only find the answers in future practice.

In my speech I have referred to the great prominence that is given today to subsidiarity in the Convention system. It can be truly said that the idea of creating the new advisory jurisdiction for the European Court is one whose time has come.

Furthermore, without daring to predict the future with any certainty, I am convinced that the best future for the European Court of Human Rights is one in which subsidiarity completes its evolution from idea and wish to concrete reality. It is a process already well underway, but we need to also recognize that the there is still a long way to go. The

concerns we have in Strasbourg about the Court's backlog of cases will not be quick to dissolve. But I am firm in my belief that our community of States, and the institutions that serve them, will not fail in their determination to make good on the promise that the Convention embodies to protect the human rights in Europe.

Ladies and Gentlemen,

I will conclude my remarks at this point so that there remains time for discussion. My thanks once again for the opportunity to address you, and for your attention.