

# Address by Louise Arbour, United Nations High Commissioner for Human Rights, at the Opening of the Judicial Year 2008 of the European Court of Human Rights, Strasbourg, 25 January 2008<sup>1</sup>

*The ERRC reprints this important address here, having not changed any part of the original text.*

Président Costa, Membres de la Cour,  
Mesdames, Messieurs, Chers amis et Collègues,

C'est un immense honneur pour moi de participer à l'audience de rentrée de la Cour européenne des droits de l'homme. J'ai toujours porté un grand intérêt aux travaux de la Cour et au rôle institutionnel clé qu'elle joue dans l'interprétation et le développement du droit international ayant trait aux droits humains, non seulement dans le cadre de mes fonctions actuelles de Haut-Commissaire aux droits de l'homme mais également quand j'étais Juge à la Cour Suprême du Canada.

Monsieur le Président,

Le système régional européen de protection des droits humains a souvent valeur de modèle pour le reste du monde. Assurément, le système de protection établi sous l'égide de la Convention européenne des Droits de l'Homme et des Libertés Fondamentales fournit la preuve qu'un mécanisme régional peut, voire doit, être le garant de la protection des droits humains lorsque les systèmes nationaux – même les plus performants – manquent à leurs obligations. L'expérience européenne démontre qu'un système régional peut – avec le temps et un engagement soutenu – développer sa propre culture de protection, en s'inspirant de ce que

les différents systèmes juridiques nationaux et les différentes cultures offrent de meilleur. Le bien-fondé de cette approche a été confirmé tant en Amérique, par la Cour interaméricaine des droits de l'homme que sur le continent africain, avec la création encore plus ambitieuse d'un mécanisme de protection régional, comprenant maintenant une Cour et associant l'intégralité des Etats africains.



En tant que Haut-Commissaire aux droits de l'homme, je déplore depuis longtemps le fait que l'Asie ne bénéficie d'aucun système similaire. Certains doutent de la viabilité d'un tel système au vu de la taille et de la diversité du continent asiatique. L'exemple Africain servira peut être à démontrer le contraire. Un premier engagement politique a récemment vu le jour au niveau sous-régional: les Etats de l'ASEAN ont convenu en novembre dernier de l'établissement – en vertu de la Charte fondatrice – d'un système régional de droits humains pour les Etats appartenant à l'ASEAN. Je suis

persuadé qu'à mesure que ce système se mettra en place, les leçons de l'histoire et les enseignements tirés des expériences européenne, américaine et africaine permettront de développer un système de protection régionale efficace doté d'une architecture solide, qui saura gagner la confiance des principaux intéressés. J'espère qu'un jour, toute personne, partout au monde, pourra avoir recours à un mécanisme régional de ce type en cas de

<sup>1</sup> Ms Louise Arbour was, until 30 June 2008, United Nations High Commissioner for Human Rights. The text of this speech is available on the Internet at: <http://www.unhchr.ch/hurricane/hurricane.nsf/view01/96475D3D6D044429C12573DE007107F9?opendocument>.

défaillance de son propre système national. Les mécanismes régionaux étant plus proches des réalités locales, ils seront inévitablement sollicités en premier lieu, alors que la protection internationale offerte dans le cadre des Nations unies demeurera plus souvent un dernier recours.

Monsieur le Président,

Plusieurs prétendent que la Cour Européenne des Droits de l'Homme est devenue victime de son propre succès, vu le nombre déjà important et toujours croissant de dossiers dont elle est saisie. Ses procédures élaborées, il y a plusieurs années, ne permettent pas à la Cour de traiter un tel volume d'affaires dans des délais raisonnables. Je regrette ainsi que le Protocole 14, qui prévoit des procédures plus efficaces en amendant le système de contrôle de la Cour, n'ait pas été ratifié par tous les Etats parties à la Convention. J'espère sincèrement qu'un tel mécanisme entrera en vigueur rapidement afin de permettre à la Cour de gérer de façon plus efficace le volume de plaintes qui lui est présenté.

Il est même possible que ces réformes ne décongestionnent que temporairement la Cour et qu'au final, celle-ci doive s'écarter du concept d'accès personnel universel pour créer plutôt un système d'appels sélectifs, ce qui est déjà bien sûr pratique courante devant les cours d'appel au niveau national. Cela permettrait d'utiliser les effectifs judiciaires limités de la Cour de façon plus opportune, pour cibler les dossiers qui concernent de vrais débats de droit international et de droits humains, et offrirait par là même la possibilité d'intensifier la réflexion sur les questions juridiques hautement complexes ayant des implications sociétales profondes.

Mr President, Members of the Court,

The system of Grand Chamber review that has already been introduced is, in my opinion, very much proving its worth. A second tier of review, by an expanded chamber, increases overall conceptual clarity and doctrinal rigour in the law. It gives the voluminous body of law emerging from the Sections at first instance a coherence which could not otherwise easily be achieved. The Grand

Chamber's decisions over this last year certainly confirm this. In particular, Eskelinen v Finland has brought fresh conceptual clarity to access to justice issues in the public sector arising under article 6 of the Convention.

In other cases, the Court has made very thoughtful contributions on issues that are sensitive across the Council of Europe space and on which there is little European consensus. Examples such as Evans v the United Kingdom, on the use of embryos without consent, will guide further discussion on these issues by policy makers as well as the general public on complex social questions that do not come with easy answers. Other cases – such as Ramsahai v The Netherlands and Lindon et al. v France – have dealt with fact-specific incidents of use of force and defamation that have been very controversial in the countries in which they have arisen, but where the Court's judgment has been important in bringing finality to the discussion. These cases very much demonstrate the varied positive impact of the international judicial function.

In a review of the Court's jurisprudence from the United Nations human rights perspective, one decision over the last year stands out particularly, and raises both complex and challenging issues. In Behrami v France and its companion case of Saramati v France, Germany and Norway, the Grand Chamber of the Court was called upon to decide the admissibility of cases as against those participating Member States arising from the activities in Kosovo of the United Nations Mission in Kosovo (UNMIK) and the Kosovo Force security presence (KFOR). In the former case, a child died and another was seriously wounded by a cluster bomb that, it was alleged, UNMIK and KFOR were responsible for not having removed. The second case concerned arrest and detention of an individual by UNMIK and KFOR.

Highlighting the degree to which human rights and classic international law have now become closely interwoven, the case required the Court to assess a particularly complex web of international legal materials, ranging from the UN Charter to the International Law Commission's Draft Articles on the Responsibility of International Organisations

and on State Responsibility, respectively, as well as the Military-Technical Agreement, the relevant UN Security Council Resolutions, the Regulations on KFOR/UNMIK status, privileges and immunities, KFOR Standard Operating Procedures, and so on. The United Nations Office of Legal Affairs itself submitted a third party brief to the Court, set out in the judgment, delineating the legal differences between UNMIK and KFOR. It also argued, in respect of the cluster bomblet accident, that in the absence of necessary location information being passed on from KFOR, “the impugned inaction could not be attributed to UNMIK”.

The Grand Chamber unanimously took a different approach holding that both in respect of KFOR – as an entity exercising lawfully delegated Chapter VII powers of the Security Council – and UNMIK – as a subsidiary organ of the UN created under Chapter VII – the impugned acts and failure to act were “in principle, attributable to the UN”. At another point, the Court states that the actions in question were “directly attributable to the UN”. That being said, the Court went on to see whether it was appropriate to identify behind this veil the Member States whose forces had actually engaged in the relevant action or failure to act. Perhaps unsurprisingly, the Court found that in light of the UN’s objectives and the need for effectiveness of its operations, it was without jurisdiction *ratione personae* as against individual States. Accordingly, the case was declared inadmissible.

This leaves, of course, many unanswered questions, in particular as to what the consequences are – or should be – for acts or omissions “in principle attributable to the UN”. If only as a matter of sound policy, I would suggest that the UN should ensure that its own operations and processes subscribe to the same standards of rights protection which are applicable to individual States. How to ensure that this is so, and the setting up of appropriate remedial measures in cases of default, would benefit immensely from the inputs of legal scholars and policy makers, if not of the jurisprudential insight of the courts. In areas of counter-terrorism, notably the UN’s sanctions regimes, similar problems have become apparent, and, in that area, decisions of the European Court of Justice, in particular, have highlighted both the

problems and possible solutions. I do look forward to following the contribution that this Court will offer to resolving these jurisprudentially very challenging but vitally important issues.

Mr President,

Within any system of law, national as well as regional, it can be tempting to confine one’s view to the sources of law within the parameters of that system. As a former national judge, I am very much aware of how readily this can occur. That temptation can rise as the internal volume of jurisprudence grows and the perceived need to look elsewhere for guidance and inspiration can wane. In that context, allow me to say how particularly important it is to see the Court’s frequent explicit reference to external legal materials, notably – from my point of view – the United Nations human rights treaties, and the concluding observations, general comments and decisions on individual communications emanating from the United Nations treaty monitoring bodies.

To cite but one recent example of wide reference to such sources, the Grand Chamber’s decision in *D.H. v Czech Republic* made extensive reference to provisions of the International Covenant on Civil and Political Rights, of the International Convention on the Elimination of All Forms of Racial Discrimination and of the Convention on the Rights of the Child, as well as citing General Comments by the UN Human Rights Committee on non-discrimination and a relevant decision by the Committee on an individual communication against the same State party. The Court also referred to General Recommendations of the Committee on the Elimination of Racial Discrimination on the definition of discrimination, on racial segregation and apartheid, and on discrimination against Roma. I find this open and generous approach exemplary as it recognizes the commonality of rights problems, as well as the inter-connectedness of regional and international regimes.

In international law, there is a real risk of unnecessary fragmentation of the law, with different interpretative bodies taking either inconsistent, or worst, flatly contradictory views of the law, without proper acknowledgment of differing views,

and proper analysis in support of the stated better position. In the field of human rights, these effects can be particularly damaging, especially when differing views are taken of the scope of the same State's obligations. Given the wide degree of overlap of substantive protection between the European Convention and, in particular, the International Covenant on Civil and Political Rights, the Court's use of UN materials diminishes the risk of inconsistent jurisprudence and enhances the likelihood of a better result in both venues.

Of course, there are some variations of substance between certain provisions of the two sets of treaties, and there may on occasion be justified differences in interpretative approach between the two systems on points of law. I would however hope that contrasting conclusions of law between the Court and, for example, the Human Rights Committee on essentially the same questions of law would be rare and exceptional. I think it correct in principle, let alone as a matter of prudential use of scarce international judicial resources and comity between international rights institutions, that plaintiffs should have one opportunity to litigate thoroughly a question of international human rights law before an international forum, rather than routinely engaging to different international fora on essentially the same legal issue. To that end, in circumstances where a substantive legal issue comes before an international body that has already been carefully resolved by another, in my view adequate reasons should be expressed before any contrary conclusion of law is reached. Ultimately, the systems of law are complementary rather than in competition with each other, and with sensitive interpretation there is plentiful scope for the regimes to work in their own spheres but in mutually-reinforcing fashion. I would certainly welcome opportunities for a number of judges of the Court and treaty body members to meet and share perspectives on some of these legal questions.

Allow me to add how encouraged I have been with the dramatic expansion in the Court's practice of amicus curiae third party briefs, which put before the Court broader views and other legal approaches, and which can be beneficial in giving the Court's interpretations of the Convention

the richest possible basis. As High Commissioner for Human Rights, over the last two years I have begun myself to use this tool, putting briefs to the Special Court for Sierra Leone, the International Criminal Court, the Iraqi High Tribunal and the United States Supreme Court, in instances where I have felt that the court might be assisted by my input on a particular point of international human rights law. I am sure that in due course similar opportunities before this Court will present themselves, and I hope to be in a position to make useful contributions to your work in this fashion.

Mr President,

A final issue that has long been close to my heart is the effort to bring economic, social and cultural rights back into what should be their natural environment – the courts. The unnatural cleavage that took place decades ago when the full, inter-connected span of rights set out in the Universal Declaration of Human Rights were split into supposedly separate collections of civil and political rights, on the one hand, and economic, social and cultural rights, on the other, has done great damage in erecting quite false perceptions of hierarchies of rights. In the area of justiciability of rights, particularly, the notion of economic, social and cultural rights as essentially aspirational, in contrast to the “hard law” civil and political rights has proven especially difficult to undo. At the national level, some judiciaries have been bolder than others in this area, while at the international level, discussions continue to proceed slowly on the elaboration of an Optional Protocol permitting individual complaints for violations of the International Covenant on Economic, Social and Cultural Rights.

Against this background, this Court's jurisprudence has been very constructive in setting the stage for progress on these issues. Although the Convention's articulation of rights is essentially civil and political in character, the Court has not hesitated to draw upon the inter-connected nature of all rights to address many economic, social and cultural issues through the lens of - nominally – civil rights. The Court's approach, for example, to health issues through the perspective of the right to security of the person – in the

absence of a right to health as such - shows how rights issues can be effectively approached from various perspectives. These techniques are of real value to national judiciaries, whose constitutional documents are also often limited to listings of civil and political rights, which nevertheless seek to address issues of broader community concern in rights-sensitive fashion.

The very first Additional Protocol to the European Convention, of course, does explicitly set out a classic social right, the right to education. As is well known, article 2 of that Protocol sets out explicitly that: "No person shall be denied the right to education." The Court's jurisprudence in elaborating the contours of this right with judicial rigour is, in my view, particularly important in elaborating how these rights can be subjected to just the same judicial treatment as the more familiar catalogues of civil and political rights. In this respect, I particularly welcomed the recent decision in November of this year of the Grand Chamber of the Court in *D.H. v. Czech Republic*, which held that the system of Roma schools established in that country breached the right to education, read in conjunction with the prohibition of discrimination.

The course marked by the Court in this landmark case will be of great importance to national judiciaries and regional courts increasingly dealing with economic, social and cultural issues.

Monsieur le Président,

Permettez-moi de conclure mon allocution en félicitant la Cour pour la vitalité et l'énergie de sa jurisprudence, et de souligner l'importance que revêt son travail par rapport au système plus général de protection internationale des droits humains avec lequel le système européen a tant de similitudes. Aussi rigoureuses que soient les normes déjà établies, il me semble qu'il est encore possible de raffiner les approches et d'améliorer les complémentarités naturelles existantes.

En terminant, je tiens à vous remercier de m'avoir accordé le droit d'audience et à vous souhaiter une année judiciaire productive. Je vous assure que c'est avec beaucoup d'enthousiasme que je suivrai les résultats de vos délibérations cette année et bien au-delà.

Je vous remercie.