Conclusions

on the Effectiveness of the European Convention on Human Rights

in Areas of Conflict and Contestation

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Contents

I. Introduction

The Irish Centre for Human Rights and the School of Law at the University of Galway convened the Conference "***Lighting the Shade*: Effective Application of ECHR in Areas of Conflict in Europe**" on 1 September 2022. The Conference considered the practice of the Council of Europe's (CoE) human rights system with regard to European territories subject of conflict or contestation where CoE mechanisms cannot currently function freely and/or effectively, and sought to advance proposals on how the system might better serve rights-holders in those territories. The Conference adopted a standards and systems focus, and expressly did not examine underlying political conflicts.

The event was held in the framework of Ireland's Presidency of the Council of Europe Committee of Ministers and received a financial contribution from Ireland's Department of Foreign Affairs, but was designed and delivered in accordance with the University of Galway's independent ethos, traditions and the traditional principles of academic freedom as per the Universities Act, 1997. The primary intention of the Irish Centre for Human Rights in hosting this event was to use this freedom in a manner consistent with a responsible and honest search for and dissemination of knowledge, truth and the advancement of the public good.

These Conclusions do not purport to represent the views of all Speakers, Delegates or supporters. Rather they are an attempt to distil, in good faith, the salient messages from the discussion and are designed to serve as a constructive basis for further reflection, research, and follow-up action. The Conclusions may contribute to the ongoing considerations regarding the future of the Council of Europe and the preparatory work towards the convening of a 4th Council of Europe Summit of Heads of State and Government.

The Irish Centre for Human Rights stands ready to contribute to any initiative designed to maximise the effectiveness of the Council of Europe's human rights system for all.

II. General Conclusions

The Conference noted:

a. Currently an estimated 10 million people live in areas of conflict and contestation right across Europe. The contexts vary dramatically and should not be conflated. Current examples exist in Eastern Europe (Transnistria and currently occupied parts of Ukraine), the South Caucasus (the Karabakh region/Nagorno-Karabakh, Abkhazia and South Ossetia), and the Eastern Mediterranean (Northern Cyprus). Kosovo is a *sui generis* case under international law and so incomparable to other contexts, however it too is unable to access the full range of CoE monitoring and advisory supports and the population currently cannot benefit from access to the European Court of Human Rights. Other cases are likely to emerge, hence the necessity to examine Council of Europe practice with regard to these regions as a matter of concerted urgency.

b. Although there is significant diversity across affected regions, human rights issues of concern in areas of conflict and contestation are wide ranging and often acute, including torture and ill-treatment, enforced disappearances, sexual and gender-based violence, domestic violence, displacement, discrimination, impunity and lack of access to justice, impossibility of securing reparations, limitations on access to education or the protection of minority rights. Millions of people have been internally displaced or sought asylum as a direct consequence of these conflicts, which has given rise to or has exacerbated other risks, including the risk of trafficking.

c. In these regions of conflict and contestation, Council of Europe (CoE) monitoring and advisory mechanisms, and/or the control mechanism of the European Convention on Human Rights (ECHR), are unable to function in a fully free, regular and unrestricted manner, or are unable to function at all. This situation severely diminishes the effectiveness of the Council of Europe, the ECHR system and the broader institutional and treaty framework. Despite having existed for a protracted period of time – approaching four decades in some cases - this issue has yet to receive appropriate prioritisation and follow-up by member States, Statutory and non-Statutory bodies of the Council of Europe.

d. As such, unresolved conflicts represent a serious, ongoing and growing risk for the Council of Europe and for the longer-term future of the Convention system. The suggestion the CoE

has no role to play in times of conflict was comprehensively rejected; recalling in particular the preambular reference in the Statute of the Council of Europe to the 'pursuit of peace based upon justice and international co-operation', and noting the continued validity of the notion of democratic security established by the 2005 Warsaw Declaration. The CoE, and its Statutory or subsidiary bodies, has a legitimate statutory interest in the protection of human rights in all areas of conflict and contestation in Europe, or in any other form of excluded region. This issue is linked directly to the object and purpose of the Council of Europe.

e. The issue of the effectiveness of the Council of Europe's human rights system in areas of conflict and contestation must be prioritised by member States, Statutory and Non-Statutory actors in the Council of Europe system, and by civil society. Ongoing aggression and increasing tensions in several parts of Europe is a cause of significant concern, and serve as a daily reminder of the urgency of this matter. The Conference agreed that the time is right to prioritise this issue with the prospect of a 4th Summit of Heads of State / Government on the horizon and as the Council of Europe looks towards its 75th Anniversary.

f. At the very least, affected territorial states should cooperate more systematically and in good faith to ensure monitoring mechanisms have full access to all relevant territories, and to the maximum extent within their control. Far be it from undermining territorial states sovereignty, the Conference noted this as the ultimate expression of territorial integrity, sovereignty and commitment of CoE member States to human rights standards.

g. De facto authorities also bear human rights responsibilities under international human rights law. The European Court of Human Rights has noted in certain instances that their functions could constitute domestic remedies. For these reasons, any effort to raise awareness of international human rights standards or to seek to build the capacities of such authorities, independent human rights institutions, civil society organisations, journalists, human rights defenders, and academia in affected regions stands to potentially benefit rights-holders on the ground. Such standards focussed work in no way contradicts the impartiality/non-recognition principle, and any suggestion that this work is akin to recognition must be dismissed.

h. Council of Europe member States as well as Statutory and non-Statutory bodies should examine current practice and adopt a more proactive, decisive, and consistent approach to the protection of human rights in regions affected by conflict and contestation, deploying maximum openness, flexibility and innovation in accordance with their complementary mandates and drawing on the full range of opportunities provided for under international law. Monitoring mechanisms, Confidence Building Measures, cooperation programmes and other forms of cooperation, including appropriate political engagement by competent authorities should be pursued with the explicit purpose of enhancing human rights protection for affected populations. Social rights should not be forgotten when the different CoE bodies consider their responses including when addressing the causes of the conflict, the resolution of conflict and the post-conflict situation.

i. The Conference noted the critical and complementary roles of independent civil society, human rights defenders, independent human rights institutions, free media and academia in areas of conflict and contestation and stressed the importance of enhancing support, dialogue and cooperation with them.

j. The scale and special character of challenges facing the European Court of Human Rights in dealing with cases related to contested or conflict-affected regions was acknowledged, including related to the establishment of jurisdiction, the apportionment of attribution, and the many complexities associated with the execution of judgments. Whilst it was noted that the Court's reasoning is evolutive, it was acknowledged that the over-emphasis on the role of the Court when it comes to areas of conflict and contestation potentially risks eclipsing other actors in the system, and the important contribution they can make. Furthermore, the largely unattainable expectations on the Court could serve to undermine its own legitimacy. When it comes to the organisation's approach to human rights protection in areas of conflict and contestation, all Council of Europe organs have a role to play and a complementary, System-wide approach is essential.

k. Conference panellists universally expressed grave concern about instances of aggression and violations of the territorial integrity of states within the Council of Europe region. The Conference further noted that international human rights law applies in parallel with international humanitarian law in times of armed conflict, and the latter does not substitute for the former.

l. The Conference acknowledged the ongoing severe humanitarian and human rights consequences of the aggression by the Russian Federation on Ukraine, stressing the importance of a strong and unequivocal international legal response, permitting no place for impunity for serious violations of international law, emphasising that legal responsibility of the perpetrators of such violations is of utmost importance. The deliberate misuse of the Donetsk and Luhansk regions of Ukraine by the Russian Federation as a pretext for the unjustifiable aggression serves to underscore the potency of the risk such regions face for the democratic security of Europe. Rights-holders in these regions are most vulnerable to any potential systemic, deliberate and incidental violations of their Convention rights and face the prospect of limited international oversight or accountability which is unacceptable. The circumstances in any territories occupied by the Russian Federation represent a particularly grave risk to human rights in particular as Russia ceases to be bound by the ECHR.

m. The fact that many – but not all - conflict affected areas in Europe are occupied by a currently belligerent third party, non-member State is a significant complication, but adds to the importance of this matter being engaged with anew, and without further delay. It is also noted however, that hostile and aggressive rhetoric and actions are becoming more common between current member States which is itself a matter of serious concern.

n. It was accepted that despite the egregious breaches of the ECHR being witnessed in Ukraine at present due to Russia's aggression, and the significant political, financial and practical challenges this situation has brought to the Council of Europe, it has also created an opportunity to progress issues which have been held in abeyance or stasis for too long and for the Council of Europe to assert a renewed commitment to its values.

o. The Conference strongly supports the Secretary General's commitment to working with human rights defenders, democratic forces, free media and independent civil society in the Russian Federation, and with the sentiment of openness to *all* European citizens to be able to enjoy the protection of European Convention on Human Rights.

p. In light of the discussions in Galway, the following Principles and Action Areas may be considered as a basis for further reflection, academic consideration and possible action by the Council of Europe's Committee of Ministers and its Statutory and non-Statutory bodies.

III. Principles on the Effectiveness of Council of Europe Human Rights Standards in Areas of Conflict and Contestation in Europe

Principle 1: Universality

No-one should be deprived of protection under the European Convention on Human Rights (ECHR) and other relevant Council of Europe treaties and concern for rights-holders must be primordial. States are bound to secure to everyone within their jurisdiction ECHR rights and freedoms, which includes, both in principle and in law, areas subject to conflict or contestation. No European territory should be deprived of the standards, monitoring and cooperation supports of the Council of Europe, and proactive efforts should be taken to address any and all operational limitations.

Principle 2: Effectiveness

Effectiveness is both an interpretive principle, guiding the European Court of Human Rights and a stand-alone norm of international law governing relationships between member States, between member States and individuals coming within their jurisdictions, and between the Council of Europe's statutory bodies. The principle is inextricably linked to the object and purpose of the Council of Europe and so encompasses a System perspective, to ensure rights protections are practical and effective, not theoretical and illusory. Effectiveness must guide all actions, reactions and interventions pertaining to the protection of human rights in areas of conflict and contestation, and their impact should be assessed on the basis of effectiveness.

Principle 3: Pacta Sunt Servanda

The basic principle underpinning the Statute of the Council of Europe, the European Convention on Human Rights and all treaty obligations within the Council of Europe system is *pacta sunt servanda*, such that all obligations, rights and duties must be fulfilled in good faith by all subjects of international law. This principle, based on Article 26 of the Vienna Convention on the Law of Treaties, is rooted in the consent of states to establish and empower the Council of Europe and to be bound by the provisions of relevant treaties. The effective functioning of the system, and in particular its functioning in areas of conflict or contestation, is entirely dependent on the *pacta sunt servanda* principle.

Principle 4: Impartiality

The territorial integrity of states is a fundamental principle of international law. When it comes to engagement with areas of conflict or contestation, the political position of member States should be considered as separate to the independent approach of the CoE Secretariat and its institutions. The most effective way to avoid the weaponization or politicisation of human rights is for member States to fully support and empower the Secretariat to engage in an standards-based, independent manner. On the one hand, impartiality must not diminish the CoE's firm rejection of violations of the territorial integrity and sovereignty of member States, whilst on the other hand it should not jeopardise the strictly status-neutral (i.e. neither status-positive, nor status-negative) approach of the CoE in any *sui generis* case.

Principle 5: Statutory Interest

The Preamble to the ECHR makes the direct connection between human rights protection and peace by stating the 'profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend.' Territorial conflict is typically recognised as a sovereign or bilateral issue, but the Conference noted that the protection of human rights everywhere is a legitimate Statutory interest of the Council of Europe and that its role, in complementarity to the roles of others, should be guided by this principle. Furthermore, the Conference firmly noted that efforts designed to improve human rights protection must never be conflated with political recognition or legitimisation of non-territorial state actors. Human rights, rule of law and democracy standards are central, not incidental, to achieving sustainable peace, so member States should support and empower the Secretariat to adopt approaches consistent with the principle of Statutory Interest.

IV. Possible Action Areas

The Conference noted that the CoE possess unique range of institutions, standards and tools which can be deployed to improve human rights, rule of law and democratic conditions in any affected region, as it has done on many occasions in the past. These resources can contribute to all stages of peacebuilding and conflict resolution.

The following Possible Action Areas emerged as initial proposals for follow-up or for further consideration:

1) Member States and CoE Statutory and non-Statutory bodies should prioritise the protection of human rights in areas of conflict and contestation by adopting a more proactive, determined, innovative and system-wide approach to engagement. Annual Reports of the Secretary General should maintain a dedicated focus on the issue of human rights protection in areas of conflict and contestation in Europe to track progress in this regard.
2) The 4th Summit Declaration of Heads of State and Government should explicitly acknowledge the human rights risk unresolved conflicts pose to the broader Council of Europe system in order to establish the necessary political basis for further action.
3) Council of Europe bodies, including monitoring bodies such as the Commissioner for Human Rights, Committee for the Prevention of Torture (CPT), Advisory Committee of the Framework Convention for the Protection of National Minorities (AC FCNM), Group of Experts on Action against Trafficking in Human Beings (GRETA), Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), European Committee of Social Rights, European Commission against Racism and Intolerance (ECRI), and others should carry out an audit of their own practice vis-à-vis contested or conflict-affected areas to clarify current practices, limitations and opportunities.
4) Systematic and good faith cooperation between territorial states, the Committee of Ministers and the Secretariat should be maintained to ensure monitoring mechanisms have full access to all relevant territories to the maximum extent possible.
5) Based on the presumption of consent principle, a Committee of Ministers procedure to examine the issue of access by monitoring mechanisms including routinely debating any limitations on access as cases occur should be considered.
6) The link between the Monitoring and Cooperation structures of the Council of Europe should be strengthened to ensure appropriate assistance is being provided to the appropriate authorities to act on the findings of monitoring bodies.

7) A structured Quadrilateral Human Rights Dialogue on the issue of human rights protection in areas of conflict and contestation between the CoE, OSCE (inc. ODIHR), UN (inc. OHCHR) and the EU (inc. FRA) should be established to coordinate more actively, substantively and effectively on issues related to human rights protection in contested or conflict affected areas with a view to enhancing complementarity and effectiveness.
8) Significantly enhance opportunities for civil society, human rights defenders, journalists, academia and others to engage and cooperate directly, regularly and meaningfully with the Council of Europe's statutory and non-statutory actors on issues related to human rights protection in areas of conflict and contestation.
9) SG should consider replicating the well-established principle of engagement on the basis of *functional capacity* in other regions of conflict and contestation, given the convincing statutory and treaty-based reasons to do so.
10) Examine whether monitoring-like processes – such as those which have proven so successful in Kosovo – could be replicated elsewhere, subject to the consent of the territorial state and subject to securing the necessary local access and engagement.
11) Consider establishment of an Office under the control of the SG, the Assembly or CM (e.g. a Special Representative of the Secretary General for Human Rights Protection in Areas of Conflict and Contestation) whose task it is to keep the institutions 'au fait' with human rights issues in affected areas on an ongoing basis.
12) Steering Committee for Human Rights (the CDDH) and subordinate bodies could be tasked to examine the range of issues associated to the applicability and application of the CoE treaties in conflict affected and contested territories.
13) Invite Group of Rapporteurs on Democracy (GR-DEM) and on Human Rights (GR-H) or other relevant Committee of Ministers subcommittees to engage in this matter and hold periodic debates on progress made in improving quality and intensity of engagement.
14) Significantly increase resources for technical co-operation projects to assist with the implementation of relevant judgements of the European Court of Human Rights arising from or related to areas of conflict and contestation. Also, enhance co-operation programmes with relevant international organisations, National Human Rights Institutions and NGOs to, inter alia, assess the effectiveness of domestic mechanisms for the implementation of judgments.
15) Consider dedicating sessions of the Committee of Ministers to scrutinizing the overall implementation record in conflict-related human rights judgments with the highest possible

level of political representation from member States, and ensure a specific information note on progress is tabled at every Ministerial session.

16) Significantly increase resources available to the Secretariat to support human rights programmes to benefit rights-holders in affected areas and consider bespoke programming documents for affected regions, as has been done for many member States and also in Kosovo and the Southern Neighbourhood. Consideration could be given to following the Human Rights Trust Fund model by establishing a dedicated and flexible resource stream for standards-based work of CBMs and others in these regions.
17) The Confidence Building Measures (CBM) Programme could be reformed and significantly strengthened and resourced to become the CoE's central avenue for cooperation on human rights issues in affected areas. The Programme should be appropriately endorsed by the CM, situated and resourced under the human rights programme of the Programme and Budget and extended, insofar as possible, to all conflict-affected areas. Additionally, consideration could be given to situating the CBM Programme within the direct responsibility of the SG/Deputy SG or as an operational wing of the Commissioner for Human Rights.
18) "Conflict-proof" cooperation programmes or other forms of cooperation in order to explore how they might be deployed more widely in areas of conflict and contestation, including through strategic partnerships with other international organisations. Some programmes may already present opportunities, such as the European Programme for Human Rights Education for Legal Professionals (HELP), the Platform for the Protection of Journalists, and the new Open Council of Europe Academic Networks (OCEAN) programme.
19) Develop programmes, drawing on monitoring and cooperation assets, to strengthen the role of women in all stages of conflict resolution and peace building in line with PACE Resolution 2450 (2022) on Justice and security for women in peace reconciliation and UN Security Council Resolution 1325 (2000) on women, peace and security.
20) PACE should maintain and enhance its focus on the issue of human rights protection in conflict-affected areas including through enhanced parliamentary dialogue. It could also consider establishing a new form of ongoing dialogue with the Committee of Ministers on these matters.

Appendix I – Conference Agenda

09h Welcome Prof. Siobhán Mullally,

Director, Irish Centre for Human Rights

0910h Prof Ciarán Ó hOgartaigh, President of NUI Galway

0920h Opening remarks

Thomas Byrne, Minister of State for European Affairs, Department of Foreign Affairs [Video Message]

Bjørn Berge, Deputy Secretary General, Council of Europe

0950h Special Guest Video Message

Mary Robinson, Former President of Ireland /
Former United Nations High Commissioner for Human Rights /
Chair of the High-Level Reflection Group to advise on the future role of the Council of Europe

10h **Context-setting: Maximising the Effectiveness of the ECHR System in Areas of Conflict and Contestation in Europe**
Dr Andrew Forde, Visiting Fellow, Irish Centre for Human Rights

1025h **Establishing 'Jurisdiction' in times of conflict and transition under the European Convention on Human Rights**
Dr Stuart Wallace, University of Leeds

11h – 12h **Panel Discussion: ECHR Challenges in Areas of Conflict in Europe**

Moderator: Prof Siobhán Mullally, Director of Irish Centre for Human Rights / United Nations Special Rapporteur on Trafficking in Persons

- Prof Philip Leach, University of Middlesex, UK
- Dr Isabella Risini, Ruhr University Bochum, Germany
- Prof Başak Çalı, Hertie School, Germany

1215 -1230h **The Role of the Parliamentary Assembly of the Council of Europe in relation to Conflicts in Europe**

- Mr Claude Kern, Parliamentary Assembly of the Council of Europe (PACE) President of the Sub-Committee on Conflicts concerning Council of Europe member States

14h – 1415h Maximising the Effectiveness of the ECHR: A Perspective from the Constitutional Court of Kosovo

- Gresa Caka-Nimani, President of the Constitutional Court of Kosovo

1430h – 1530h Panel Discussion: Ensuring Unrestricted Human Rights Monitoring and Advisory Access to European territories

Moderator: Prof Aoife Nolan, Vice-President, European Committee on Social Rights

- Claudia Lam, Deputy Director, Office of Council of Europe Commissioner for Human Rights, Council of Europe
- Clare Ovey, Head of Department for the Execution of Judgments, Council of Europe
- Mark Kelly, Member, Committee for the Prevention of Torture (CPT)
- Olena Ivantsiv, Protection Manager / Europe and Central Asia, Frontline Defenders

15.45h – 17h Towards a more practical and effective European human rights system

Moderator: Dr Ed Bates, University of Leicester

- Nils Muižnieks, European Director - Amnesty International, former CoE Commissioner for Human Rights
- Nino Lomjaria, Public Defender of Georgia
- Jörg Polakiewicz, Director of Legal Advice and Public International Law (Legal Adviser) of the Council of Europe
- Pavel Cazacu, Lawyer, Promo-LEX NGO Association, Republic of Moldova

1710h Closing Remarks

Appendix II – Opening Remarks, Thomas Byrne TD, Minister for European Affairs

A Chairde, Friends,

Allow me to extend to you a virtual *céad míle fáilte* – one hundred thousand welcomes – to Galway.

I wish I could be there in person with you.

As I know does Minister Coveney.

But while other Government demands preclude our presence, I'm pleased to join my friend, Deputy Secretary General Bjørn Berge (**Be-yorn Ber-yeh)**, in opening today's discussions.

And to thank all who are contributing to them.

It's fitting that a conference on the Council of Europe should convene in Galway.

For this, in many respects, is the most European of Irish cities.

A European Capital of Culture, it was Ireland's medieval gateway to maritime Europe.

And, along Europe's western edge, no forum is better placed to host such a conference than the Irish Centre for Human Rights.

For almost a quarter century, it has been amongst the preeminent academic houses for human rights research on this continent.

And, under the stewardship of Professor Siobhan Mullally, its work has never been more vital.

Like Galway, the European Convention on Human Rights holds a special place in Ireland's European story.

In 1949, Ireland was a founding member of the Council of Europe.

And, a year later, one of the original signatories to the Convention.

The very first decision made by the European Court of Human Rights concerned an application against Ireland.

We were the first state to accept the Court's jurisdiction as binding.

And in the decades since, we've seen its rulings serve as a catalyst for positive social change within our country.

Today, as Presidency of the Committee of Ministers, Ireland is a proud custodian of all the Court and Convention stand for.

Supporting their effective functioning across Europe is one of the priorities of our six-month term – and one of the reasons we so welcome this conference.

Our President, Michael D. Higgins, an Adjunct Professor of this Centre, has described the Council as the conscience of Europe.

It's in times of conflict, perhaps, that our conscience can be most sorely tested - and badly needed.

Ireland's experience attests to this.

Through the Troubles, our island has known what it is to suffer protracted conflict.

And, in the Good Friday Agreement, adopted not long before this Centre was founded, we've known also the privilege of a hard-won peace.

The European Convention on Human Rights was no small part of this.

Its full incorporation into Northern Ireland law was - and remains - integral to the Good Friday Agreement.

It has helped to build and maintain confidence in Northern Ireland's political, policing, and judicial structures.

Protecting the human rights of all communities.

The Agreement, of course, was the result of long negotiation and difficult compromise.

As Senator George Mitchell recalled, Good Friday was one day of success following seven hundred days of failure.

Alongside remarkable patience, the Agreement demanded profound political courage from parties to the negotiations.

Two men, lately lost to us, epitomised those qualities.

I've spoken often of the great John Hume, who frequented Strasbourg as a Member of the European Parliament. And who championed the role of the Convention in the Agreement.

But it's his fellow Nobel Laureate, David Trimble, who passed just over a month ago, that I wish to recall today.

Delivering his Nobel lecture alongside Hume, Trimble observed that:

> *"The dark shadow we seem to see in the distance is not really a mountain ahead, but the shadow of the mountain behind – a shadow from the past thrown forward into our future."*

The goal of today's conference, as Dr Andrew Forde has framed it, is to reflect on how we might "*light the shade*".

How we can ensure the full protections the Convention affords are shared across this continent, above all in areas of conflict.

In this task, we could do well to recall Trimble's words.

Recognising that we must engage honestly with our history.

But that we cannot allow our futures to be prisoners of our pasts.

A chairde,

It was on Ireland's initiative in 1949 that the Council of Europe committed itself to ''the pursuit of peace''.

And it's that ''pursuit of peace'' - and accountability for its violation - that occupies our minds most today.

The Russian Federation's unprovoked invasion of Ukraine six months ago has underscored just how vital the Council's standards are.

And just how much protection they need.

The violations of human rights and international humanitarian law perpetrated by Russian forces are, as Commissioner Mijatović **[Mee-yat-o-vich]** noted, ''*staggering*''.

How we respond to these outrages is a test to the credibility of the Council of Europe.

The result will resonate far beyond Ukraine. And far beyond this time.

Determining how the Convention – and the rights it enshrines – are viewed and applied across other conflicts for years to come.

Since February, Ireland has welcomed over 50,000 Ukrainians to our shores.

As Presidency of the Committee of Ministers, our highest priority has been to address their nation's plight.

To that end, we've strongly backed Secretary General Buric's revised Action Plan for Ukraine, and invested significantly in it. We've fast tracked Ukraine's admission to the Council's Development Bank, establishing a new donor fund to aid those displaced by the war.

And we're striving in Strasbourg - as in New York, Geneva, and the Hague - to ensure accountability for the crimes perpetrated on Ukrainian soil.

In all of this, our first and most essential goal has been to aid a fellow Council of Europe member and her people.

But we are investing also in the future of the Council system.

And in the values it underpins across our continent.

Today's conference is part of that investment.

Building on reflections on Interstate Cases organised under last year's German Presidency, it addresses a key challenge facing the Council:

How to leverage the full range of the institution's tools to reinforce the Convention where it is currently most curtailed.

This is a challenge of first principles – the protections the Council system provides should be available to all Europeans.

We all recognise the political sensitives at play.

But, by design, I know, this conference is not a platform to pronounce on status. Rather, it's an occasion to consider standards and systems – and how we can maximise their effectiveness.

While supported by our Presidency, today's conference has been independently organised by the Centre – above all by Dr Andrew Forde.

It is innovative in focus and design.

And, as the High Level Group our former President Mary Robinson chairs reflects on the Council's future, it is very timely.

Importantly, it is also inclusive.

Drawing on expertise from across Europe. And the breadth of the Council's core institutions.

In this approach, it reflects the wisdom of one of the seanfhocails - or proverbs - for which Galway is renowned:

''Ní neart go chur le chéile.'' We are stronger together.

Let me end on that sentiment.

Wishing you stimulating and successful discussions today.

Hoping that, through your efforts, even as summer ends and the days begin to darken, we might find new ways of casting light across this continent.

Go raibh maith agaibh.

Appendix III – Opening Remarks, Deputy Secretary General, Bjørn Berge

Dear Professor Mullally, director of the Irish Centre for Human Rights, Distinguished participants, Dear friends,

“And now I'm drinking wine in France,

The helpless child of circumstance.

Tomorrow will be loud with war,

How will I be accounted for?

It is too late now to retrieve,

A fallen dream, too late to grieve.

A name unmade, but not too late

To thank the gods for what is great;

A keen-edged sword, a soldier's heart,

Is greater than a poet's art.

And greater than a poet's fame,

A little grave that has no name.”

These were the telling words of the Irish poet, Francis Ledwidge, over a hundred years ago, during the First World War.

Often referred to as the Great War. This war was anything but great. What was great – bordering incomprehensible – was the scale of people’s suffering, the outrageous number of people killed, and the many more who suffered injuries that they then carried with them throughout their lives. From Ireland alone, if I am not mistaken, nearly 37,000 soldiers were killed.

Today, Europe is sadly suffering from a major war in the midst of our Continent.

Some of us thought, maybe naively, that conquest of other countries by military means was something from the distant past. Something that had no place in a developed and modern Europe. Our hope was that through trade, investment and co-operation we would all gain. Europe would flourish. And that this would be a “win-win” situation for everyone. Evidently, we were wrong.

The old ghosts of previous world wars – of aggressive nationalism, flavoured with populism, hatred and manipulation – are again haunting Europe.

It is a paradox, in particular for the Council of Europe, since after two bloody world wars, our Organisation was established in 1949 to help ensure that such violent political forces should never again dominate European countries, but to no avail, it regretfully seems.

The Russian invasion of Ukraine has cast a dark shadow over all of Europe, causing pain and suffering, affecting millions of people. Here, let me quickly add that, immediately after the Russian invasion of Ukraine, the Council of Europe and its member States took firm and resolute action. Within 24 hours the Russian Federation was suspended as a member. It only took a few more weeks before the Russian Federation was expelled from the Organisation. The Italian Presidency of the Committee of Ministers, the President of the Parliamentary Assembly and the Secretary General all provided leadership in that process.

Our thoughts are first and foremost with the brave Ukrainian people and their leaders, but this war affects us all in some way or another.

Parts of Eastern and Southern Ukraine have now been occupied, in addition to the illegal occupation of Crimea in 2014. In a sense, these are not "grey zones", but illegally occupied areas that must warrant our concern, including with regard to the human rights situation of the people that live there.

More broadly, over the years, if not decades, we – as an Organisation, as well as our member States – have struggled to cope with the failure to fully implement the European Convention on Human Rights in several parts of Europe, whether we call them "grey zones," "frozen conflicts" or "disputed areas."

Certainly, Ministerial meeting after Ministerial meeting has emphasised over and over again the importance of securing access to these areas and of protecting the people who live there – be that Transnistria, Nagorno-Karabakh, Abkhazia and South Ossetia, or elsewhere.

At the Ministerial meeting in Helsinki just three years ago, member States underlined that they remained "concerned about unresolved conflicts that still affect certain parts of the continent, putting at risk the security, unity and democratic stability of member States, and threatening the human rights of populations concerned."

But still, very little progress has been achieved.

Why is that so?

Why is this so complicated?

And why is it close to impossible to have any real progress?

I will try to point out a few possible considerations that might be relevant in this regard.

But let me first of all state what may seem obvious to many – but which is regrettably not always evident for all.

As parties and member States of the Council of Europe, there is a clear responsibility to ensure that the European Convention on Human Rights and the judgements of the Court are respected and implemented throughout the European continent. This is an undisputable, legal obligation –not a kind or gentle request.

Which brings me to my first point – political will.

The Russian Federation has been and is central to several of Europe's current "frozen conflicts," and during its membership in the Council of Europe it did not play a particularly helpful role when it came to improving the human rights situation, whether in South Ossetia and Abkhazia in Georgia, or Transnistria in Moldova.

Following Russia's expulsion from the Council of Europe and in light of the ongoing war in Ukraine, is it likely that we will see a more constructive and pragmatic Russian role in this regard?

Probably not. But this should not be an excuse for us to do less.

On the contrary, we should see how we can support Ukraine and other countries directly affected - such as Georgia and the Republic of Moldova - even more.

Secondly, it would be a mistake to generalise too much about the various "grey zones" or "frozen conflicts".

Each has its own particular and unique characteristics.

And on this I think that we can all agree – both governments and international organisations, including those with a special role in trying to negotiate political settlements – the OSCE and its Minsk Group among them.

Equally, that same group of countries and organisations – and all of us here today – could probably agree that the populations living in these areas are – as a matter of principle – under the protection of the Convention and our Court.

But, regrettably, our experience is that in nearly all of these areas of conflict, we have far too often seen a deterioration of the human rights situation, including a persistent lack of effective access to our monitoring mechanisms.

It remains essential that we are able to be on the ground, to observe, assess and monitor – as required and in line with our mandate.

Our presence in such situations should never be seen as any form of endorsement of any parties, in particular the de-facto authorities, but simply the implementation of the Convention to help verify the human rights situation – and, in some cases, give a voice to the voiceless.

There have however been some positive developments.

Our Human Rights Commissioner's visits to Abkhazia and South Ossetia, and more recently to Transnistria, were very important.

And our Secretary General's consolidated reports on the conflict in Georgia, as well as the human rights situation in Crimea and the City of Sevastopol, serve as a basis for our Committee of Ministers to adopt relevant decisions.

Further, and importantly, we have worked on Confidence Building Measures (CBMs) that help divided communities to come together and build trust through dialogue on issues of common importance.

In doing so, they also aim to promote human rights standards in post-conflict or frozen-conflict regions, and hopefully can be seen as constructive in paving the way to political progress.

A case in point is the meeting that we organised in May between civil society representatives from Armenia and Azerbaijan to discuss peace-building and reconciliation in light of a conflict that has affected both countries. This was a good exchange during which participants agreed to continue their dialogue and to work on possible joint initiatives.

Other relevant activities include registering attacks on media workers, including in areas of conflict, via the Platform to Promote the Protection of Journalism and Safety of Journalists.

And I also want to highlight the importance of the various reports, resolutions and recommendations by our Parliamentary Assembly – and in particular the emphasis that it has placed the "presumption of access principle." The principle that our monitoring mechanisms should assume that they have access to all European territories, and that where access is denied, the reasons for that decision must be made explicit to the Committee of Ministers.

Overall, all of the things I have mentioned have in some way made a positive difference, and we can build upon it to go even further.

And we must, because they still fall short of providing the standard of protection that should be assured in the territory of our member States. Something that we are obliged to ensure in the interests of all their people.

Thirdly, I must also mention the crucial role of our Court, as it deals both with individual cases, as well as inter-state applications, linked to areas of conflict.

From these applications, the Court has developed case law on the application of the Convention in regions outside the control of the territorial State.

These cases certainly involve many complex legal problems – including whether jurisdiction can be presumed and how such a presumption can be rebutted – or for that matter – whether jurisdiction can be limited to certain positive obligations under the Convention. And how the concept of jurisdiction interacts with the notion of accountability and the substantive obligations under the Convention.

In some instances, there have been rulings that if one state has effective control or decisive influence over part of another's territory, it is responsible for violations there. Such cases have arisen from situations in Northern Cyprus, Transnistria, Nagorno-Karabakh, Abkhazia and South Ossetia, and other territories.

And there are currently many cases concerning Crimea and Eastern Ukraine pending before the Strasbourg Court.

All of these examples do have legal and political significance. But it is important to be clear: the Court's process does not imply international recognition of de facto regimes or occupying powers.

Fourthly, we must start to put citizens' rights above politics and conflict, as the Convention always intended – and ensure that these rights are a reality for people who live in these territories.

Throughout our Organisation, and over the years, we have tried to take a proactive and pragmatic approach to achieving this.

But, as I have already stated, it has not been enough.

In practical terms, our monitoring activities could be further expanded and replicated where possible, and the role of our Human Rights Commissioner could also be very important.

And here, I could also mention that our Steering Committee for Human Rights (CDDH) will present a report to the Committee of Ministers, this autumn, with proposals on the effective processing and resolution of inter-state cases by the Court.

And at last year's Ministerial Session in Hamburg, our member States restated the importance of examining how to enhance the Committee's tools for supervising cases of non-execution, including the persistent delay to execute the Court's final judgments – as well as questions arising from the execution of judgments in cases relating to inter-state disputes.

Moving forward with these and other measures will of course require political will – and, ultimately, it is for member States themselves to help us push for progress.

Last, but not least, I have no doubt that this issue will be on the radar of our Organisation's High-level Reflection Group, under the able leadership of the former President of Ireland; Ms Mary Robinson, and the group will no doubt reflect on the Council of Europe's future in light of the current political situation.

I also believe that these matters will be relevant to a possible 4th Council of Europe Summit of Heads of State and Government, though its agenda will of course be set by the member States themselves, and the priorities and action will be theirs to decide.

Dear friends,

What is certain and unchanging are the words of the European Convention itself.

So, at this crucial – and very challenging – moment in European history, where the task of ensuring fundamental rights in areas of conflict in Europe threatens to become even more complex – we very much need conferences like this, that provide for an open and frank exchange of views on what more we can and should do. And I very much look forward to reading the conclusions from your deliberations.

But already now, I congratulate the Irish Centre for Human Rights at the National University of Ireland, Galway, for organising this important event, and I salute the Irish Presidency of the Committee of Ministers for its leadership, vision and determination.

I may add, that it is also highly relevant that the European Convention on Human Rights has played a very significant part in Northern Ireland's pathway to peace, in particular through its privileged status in the Good Friday Agreement.

Dear friends,

Yes, a major war is taking place in the midst of Europe.

Yes, we have suffered a major set-back.

And yes, the situation in which we now find ourselves will be demanding, difficult and tough for quite some time.

We must never compromise on the fact that the European Convention on Human Rights remains the ultimate benchmark for protecting human rights in Europe – throughout all of our member States, without any exception.

But let us never forget that Europe is a source of immense hope, which must not be destroyed by territorial ambitions, or the resurgence of aggressive nationalism, or the perpetuation of spheres of influence, intolerance or totalitarian ideologies.

With unity, will and determination – and the ability to discuss and negotiate - we will no doubt succeed in our joint efforts.

Thank you for your attention.

Appendix IV – Address by Prof. Mary Robinson

I am very pleased to address this timely conference on such an important theme and especially pleased that the conference has been organised by the Irish Centre for Human Rights under the auspices of the University of Galway.

'Lighting the shade' is an appropriate metaphor for protecting the rights of those who live in the shadows because of political circumstances beyond their control. This is a conference about protecting the rights of the 'inaccessible', the vulnerable and the forgotten. Its focus is how can this be done better? Hopefully you will be better equipped to give some answers to this interrogation as the light fades this evening on a day punctuated by insights and inspiration.

As you all know the problem with the shade is that it provides cover for often egregious human rights violations, compounded by a total lack of accountability.

It is a frequently observed paradox of international human rights law that it often lacks effectiveness in areas where it is needed most - in situations of national emergency, for example, where judicial responses come many years after the event, if indeed at all; and in times of war when principles of basic humanitarian law are invariably cast aside with impunity; and in areas where conflicts have 'frozen' or been left unresolved (the so-called grey zones or legal vacuums) - opening up a series of 'black holes' that defy the probing light of accountability.

In these areas the press is frequently muzzled to ensure that light does not escape to bring attention to what is going on and, where legal remedies are the inevitable casualty of the suppression of the rule of law. There may even be a fabricated patina of democracy to pay lip-service to the concerns of the international community; but underneath there is likely to be an empty shell from which the rule of law has been scooped out or eviscerated.

Many complex legal issues also arise. What principles govern the extraterritorial reach of human rights treaties? What are the human rights obligations of the states involved in disputed territories? Is there scope for non-judicial mechanisms to promote and protect right in these zones?

And, of course, it is in such zones of darkness that key judgments of the European Court of Human Rights are not likely to be enforced.

The Court is necessarily limited in what it can achieve through its judgments concerning these areas. It has interpreted the notion of 'jurisdiction' creatively to ensure that the rights and freedoms of the Convention remain relevant, for example, in Transnistria and Nagorno Karabakh, not to mention military operations abroad.

It has courageously based itself on the dictum that international human rights law does not like a vacuum.

Yet many of these key cases are not enforced by the respondent states because of a certain inertia or sentiment of perceived helplessness or futility that limits the action of the Committee of Ministers. In other words, our institutions have developed over the years an unfortunate tendency to acquiesce in situations whose very abnormality demands a sterner and more hard-headed response.

The time has undoubtedly come for the development of new approaches, and I have little doubt that many creative suggestions will be made in today's discussions.

There is certainly a good case, as I have already hinted, for rethinking the role of the enforcement procedures before the Committee of Ministers to make them more insistent when faced with brazen non-compliance and more resistant to the creeping ethos of powerlessness when confronted with delinquent behaviour. Simply put, more needs to be done despite the inherent difficulties.

For we are all witness to the calamities and catastrophes that can occur when Europe stands back and tolerates the persistent thwarting of the rule of law. There is always a price to pay at some stage for allowing 'dark areas' to develop inside the territories covered by our treaty arrangements.

It seems to me that in such zones that are within the pale of the Convention but in reality outside its effective embrace, there is more scope for immediate action by monitoring bodies such as the CPT and the Council of Europe's Commissioner for Human Rights - both of whom have understood that inaction is not an option compatible with European values and carried out visits in such territories, in situations fraught with political and diplomatic difficulties, in order to perform their vital missions. Their terms of reference give them a much greater degree of flexibility than lengthy and uncertain judicial procedures.

The multi-pronged fact-gathering capacities of the Council of Europe's monitoring bodies, including national offices, can be harnessed with even greater effect to harvest vital information concerning the protection of human rights on the ground in these areas, to be channelled, in a timely manner, to the CM, the PACE (Parliamentary Assembly) and the office of the Secretary General, in order to shed light on the human rights problems on the ground and assist in the formulation of policy.

I ask the question – is there not a case to be made for creating an office under the control of the SG or the Assembly or CM whose task it is to keep the institutions 'au fait' with human rights issues in these areas? Or are present arrangements sufficient? Does the plight of the second- and third-class citizens who inhabit these areas not merit some degree of special attention?

Undoubtedly monitoring bodies such as the CPT and the Commissioner (and others) have a crucial role to play and need greater practical and political support to perform their role. To ensure that they have proper accessibility to regions - even those that may have recently fallen outside their remit should this be possible.

Ladies and gentlemen, this is a difficult time to talk about human rights when brutal war is being waged today on Europe's doorstep. Yet it is certainly the right time because history shows us that difficult times can be a catalyst for important change. European states and all their institutions, working in concert, need to come together as a whole to assert their values vociferously and develop new approaches to these problems and perhaps new methods and agencies to assist in their resolution.

This is no time for technical quibbles about whether and how the EU should become a party to the Convention system. This issue HAS already been decided. What is needed is the political will to follow it through. And why not a member State of the Council of Europe at the same time?

It is in the very nature of such problems that they can only be overcome by the combined skills and expertise of the EU and the Council of Europe functioning together. Nothing less.

We must not overlook that it was out of the maelstrom of recent European history that the Convention was brought into being. And it is ultimately the legacy of the Convention that should spur us into action in assuring that human rights accountability is brought to bear in areas of frozen conflicts in the most creative and imaginative manner possible with proper political support and harnessing all the synergies at our disposal. It is not right that the human beings who live and suffer in such zones be deprived of remedies and the public concern that they deserve.

Ladies and gentlemen – the concluding words of Amanda Gorman's acclaimed poem 'The Hill We Climb' provides a fitting end to my remarks and strikes the right note for what lies ahead.

'*When day comes we step out of the shade, aflame and unafraid/ The new day blooms as we free it / For there is always light / if only we're brave enough to see it / if only we're brave enough to be it'*

Appendix V – Context-Setting, Dr. Andrew Forde

President Ó hOgartaigh, Deputy Secretary General, President Caka-Nimani, Senator Kern, Ms Lomjaria, Distinguished panellists and guests, Ladies and Gentlemen,

Good morning to you all, and you're very welcome to Galway. Your presence is greatly appreciated. I would like to also welcome the many people following proceedings online.

Our topic today is one of first principles for the Council of Europe, and which for too long has not received the attention it deserves.

The task we set ourselves is to consider how to maximise the effectiveness of the European Convention on Human Rights and Europe's human rights protection architecture in areas experiencing conflict or contestation. We will do so from a system and standards – if you like, a normative - perspective, not a political one. We are not here to relitigate cases or to prejudice ongoing processes. Our interest is in individual human rights, regardless of where people reside, and the integrity of the world's most advanced regional human rights system.

My interest stems from having had the privilege of working for the Council of Europe for 10 years, five of which I spent in Kosovo. Less than a week after arriving in Kosovo, someone said to me "Andrew, what are you doing here? We're not party to the ECHR (yet), the international community only sees political risk here and doesn't really care about human rights in Kosovo!" It's something that has always stayed with me.

Of course, every day we are reminded of why this topic is so important. Russia's aggressive and unjustifiable war in Ukraine, in flagrant violation of the Council of Europe Statute, challenges the very basis upon which the Council of Europe and the rules-based international order operates. This is why, of course, the Committee of Ministers so decisively expelled Russia from the Council of Europe in March.

Ukraine is not the only case of conflict in Europe, but it is certainly of a scale and intensity not witnessed by many Europeans in living memory.

Peace and democratic stability cannot be taken for granted. The fundamental principles of pacta sunt servanda and good faith are called into question. It is not unreasonable to have concerns about the future of the European human rights order. The future of the system depends on the commitment of the member States and the Council of Europe's Statutory organs to have courage of conviction to articulate a renewed, realistic and ambitious vision for the future.

Any vision, must start with a reflection on the legacy of the past, which is why our discussion today is so timely.

My task is to try to set a broad context for our discussion. My presentation will focus on three main points:

1. Firstly, I will briefly outline Council of Europe practice regarding with these regions.
2. Secondly, I will explore the effectiveness and consistency challenges facing the CoE.
3. And finally, I will highlight possible areas where the Council of Europe could do more.

I will argue that the operational 'grey zones' which have persisted due to the existence of unresolved conflict now represent a serious, ongoing and growing risk for the Council of Europe and Europe's human rights protection architecture. Now is the time to engage with this matter in good faith and with convicted, values-based leadership and a sense of urgency.

Member States of the Council of Europe have pledged to pursue peace and collaborate sincerely and effectively for the purpose of safeguarding the ideals and principles which are their common heritage, notably through the promotion of human rights, democracy and the rule of law.

Yet, there are numerous areas of conflict and contestation right across Europe: in Eastern Europe (Transnistria and parts of Ukraine), the Western Balkans (Kosovo), the South Caucasus (Nagorno-Karabakh and the wider Karabakh region, Abkhazia and South Ossetia), the Eastern Mediterranean (Northern Cyprus). Collectively, more than 10 million people live in these regions.

The affected regions vary widely. Whilst there are some similarities in some cases, no two are identical and we must avoid conflating them. Historical, social, cultural, legal and political nuances profoundly influence the reality on the ground and, consequently, the opportunities to engage. Indeed, the legacy of conflict endures even on this island, with the effectiveness of the ECHR still relevant in terms of dealing with the past.

Kosovo for instance, is a *sui generis case*, distinct from all others. It has deeply embedded the European Convention on Human Rights into its domestic legal order and since 1999 has retained an open, pro-European stance, often voluntarily subscribing to CoE standards such as the Istanbul Convention and consenting to ad hoc monitoring arrangements or monitoring-like programmes. Its cooperation with the Council of Europe is an interesting example. However, individuals in Kosovo still do not have recourse to the European Court of Human Rights, which is difficult to countenance. This amplifies the importance of domestic mechanisms such as the Constitutional Court, especially for minority communities, which we will hear more about later.

What all of these regions, including Kosovo, have in common is that Council of Europe monitoring and advisory mechanisms, or the control mechanism of the ECHR, are unable to function in a fully free, regular and unrestricted manner, or are unable to function at all. This has resulted in millions of people inadvertently falling outside the Council of Europe's sphere of influence.

Some describe these areas as "temporary technical errors within the system of international law", though most have existed in a relative international vacuum for anything up to four decades, more than half of the lifetime of the CoE itself.

Over time, these 'grey zones' have become a normalised exception in the Council of Europe region with their existence largely accepted as a matter of fact, rather than as problem of first principles which critically challenges the integrity of the ECHR.

Operational blind spots of any kind do not automatically imply rights violations exist, but they do create space for impunity and generate a risk of human rights violations occurring without effective and independent review or access to effective remedies. This risk is sharpest for vulnerable populations such as those in detention, minority communities and so on.

Rights-holders deserve maximum access to and support of the European human rights system.

The mere fact that a conflict exists is not sufficient reason to close the door to engagement. On the contrary.

It would be wrong to suggest the CoE has closed the door – It certainly has not. But much more can be done. Council of Europe action in relation to areas of conflict often tends to be seen through the narrow prism of the European Court of Human Rights; but there is much more to the Council of Europe System than the Court.

Article 1 of the ECHR requires States to 'secure to everyone within their jurisdiction the rights and freedoms defined' in the Convention. So, the ECHR normally applies in the whole territory of state parties even in areas that states do not effectively control. This presumption of jurisdiction is our starting point, though as Dr Wallace and others will discuss shortly, the Court's Article 1 jurisprudence is riddled with exceptions. Indeed, exceptionalism has almost become the rule.

Judge Bonello's general assessment that the Court has been "bedevilled by an inability or an unwillingness to establish a coherent and axiomatic regime, grounded in essential basics and even-handedly applicable across the widest spectrum of jurisdictional controversies" may not be particularly flattering to the Court, but it does still seem to bear some validity.

And it is for that reason, I suggest we look beyond the Court for responses to the situation of human rights protection in conflict affected regions. Not to ignore it of course, but to recognise its place, and the place of others, in the interdependent Council of Europe human rights system. So what has the CoE done thus far?

In its decision on "Securing the long-term effectiveness of the system of the European Convention on Human Rights", the Committee of Ministers noted the challenge of unresolved conflict zones. The first major acknowledgement of the challenge of unresolved conflicts appeared in the 2005 Warsaw Declaration. A year earlier, in 2004, the CM had noted that the main problem of human rights protection in such situations is not one of lack of norms but rather of lack of implementation of those norms.

Since 2014 in particular, the CoE Secretary General has emphasised the importance of Council of Europe standards in unresolved conflict zones, though there is equally an acknowledgement that efforts taken to date had proven largely ineffective.

The Parliamentary Assembly of the Council of Europe (PACE) issued its first Recommendation on areas where the European Convention on Human Rights cannot be implemented, almost 20 years ago, in 2003 and it has maintained a watching brief across most affected areas since. Then in its landmark 2018 Resolution on 'grey zones', the PACE noted the principle of "presumed consent" in terms of access to affected territories by monitoring bodies.

The CoE operates on the basis of the interdependent trinity of Standard-setting, Monitoring and Cooperation. One does not function without the other. However, monitoring and cooperation activities when they do operate in the affected regions, tend to be ad hoc and irregular. Any kind of political dialogue is, for obvious reasons, even less regular.

The Committee for the Prevention of Torture has visited many conflict-affected or contested regions over the years. For example, it succeeded in visiting Transnistria on numerous occasions with the consent of the Moldovan Government up to 2010 when a visit was interrupted as access was restricted by the de facto authorities. There is no public information on what follow-up, if any, has taken place since then.

Similarly, the Commissioner for Human Rights, under its unique Resolution (99) 50 Mandate, has visited many conflict-affected areas over the years, some on multiple occasions, including Kosovo, Abkhazia, the Karabakh region, Northern Cyprus and Transnistria, but again these visits have often been quite ad hoc and sensitive. To the best of my knowledge no Commissioner has ever physically visited South Ossetia (Tskhinvali region), despite of course having a significant focus on the conflict in Georgia.

Other monitoring mechanisms have had even less success in engaging with grey zones though some have taken initiatives where they could. For example, in 2021, the European Commission against Racism and Intolerance ECRI issued a Statement for the first time, on Preventing and Combating Ultra-Nationalistic and Racist Hate Speech and Violence in Relation to Confrontations and Unresolved Conflicts in Europe.

The CoE has also shown innovation in other ways too:

For instance, in Kosovo in 2004, two ad hoc agreements were reached with the UN Mission in Kosovo to allow the CPT and the Advisory Committee of the Framework Convention on National Minorities (FCNM) to operate. Then in 2012, the Secretary General informed the CM of the intention to engage directly with the Kosovo authorities on the basis of their "functional capacity". This allowed meaningful engagement on CoE standards and paved the way for monitoring-like activities to be carried out such as the GRECO, MONEYVAL and GRETA in cooperation with the Kosovo authorities.

The Confidence Building Measures Programme (CBM) has identified areas where parties to a conflict come together on a topic of mutual interest. It has operated in Transnistria, Abkhazia Kosovo and elsewhere.

Various parts of the systems also increasingly work together, for example we see the Court citing Commissioner and CPT Reports, so their input facilitates the work of the ECtHR.

Some other initiatives were somewhat less successful, such as the January 2016 ad hoc visit to Crimea by Ambassador Gérard Stoudmann to objectively assess the human rights and rule of law situation on the peninsula.

What can we say about the nature of the challenge facing the Council of Europe?

Turning first to the practical impact of conflict and contestation on effectiveness, it is important to distinguish general challenges of effectiveness from those specific to areas affected by conflict or contestation.

Effectiveness challenges have become pervasive in recent years. There has been an increasing tendency for the Convention to be challenged or its legitimacy questioned in member States. Delays in ensuring the full and timely execution of judgments of the European Court of Human Rights, is a major challenge which is undermining the credibility of the Convention System. Of the 'leading' cases handed down by the ECtHR in the last ten years, almost half are awaiting implementation.

The Council of Europe also faces the perennial challenge of resourcing, with a growing reliance on extra-budgetary resources, which also impacts effectiveness.

I observe three aspects to the specific challenge of the effectiveness of the ECHR in unresolved conflict zones:

1) Qualifying the problem

2) Determining the Strategic direction

3) Exercising what I call "the Normative Will"

The Statute establishes the Committee of Ministers, Parliamentary Assembly and the Secretariat General as the key institutions of the Council of Europe, with other institutions developing by virtue of treaty commitments (such as the Court) or CM Resolution (such as the Commissioner).

There is (or ought to be) a symbiotic relationship between Statutory and non-Statutory actors. None function fully autonomously, and only by operating cohesively can effectiveness be maximised. When it comes to the organisation's approach to human rights protection in grey zones, all organs have a role to play. The over-emphasis of the supremacy of the Court runs the risk of disempowering actors in the system. The unrealistic expectations placed on the Court also undermines its overall legitimacy.

I would therefore suggest that when it comes to qualifying this challenge, we should recognise the Council of Europe System as a matrix of mutually reinforcing judicial and non-judicial components for which member States have a collective responsibility, rather than a hierarchy of autonomous institutions.

Additionally, I think the suggestion the CoE has no role to play in times of conflict needs to be comprehensively rejected. Territorial conflict is typically treated as a sovereign or bilateral issue, but the protection of human rights everywhere is a legitimate statutory interest of the organisation. Working to improve human rights protection should never be conflated with recognition – It is status neutral in its very essence.

The Second aspect of the challenge is a strategic one. Although unresolved conflicts have been acknowledged for several years by various actors, follow-up has generally been piecemeal and extremely inconsistent. The 2020 reply by the CM to the PACE in which it notes the important roles of the Court, the Secretary General, the Commissioner for Human Rights as well as the relevant Council of Europe monitoring bodies in relation to grey zones is helpful, but insufficient in itself.

If the system is to have a meaningful impact, we need to move to a place where efforts are prioritised and sustained. The Secretariat has significant expertise, but to translate this into action requires a clearer

mandate, or at least endorsement, from the Committee of Ministers. This also would allow for the identification and allocation of the necessary resources.

Finally, the challenge is a practical one.

What can the CoE do in practice, to serve as a force for good in regions affected by conflict and contestation to a large extent, depends on the political support of member States and the resources available to the CoE, but it also depends on the "normative will" of the Secretariat under the leadership of the Secretary General.

A more consistent focus on this issue is a policy choice, not only a resource one, and can change tomorrow, if the desire to do so is there. In human rights discourse, we often refer to the "political will" of member States. Perhaps we should pay more attention to the "normative will" of standards-based organisations derived from their founding statute.

So what then, can be done – or done better? The first thing to note is that Human rights, rule of law and democracy standards are central, not incidental, to achieving sustainable peace.

The CoE's unique arsenal of standards and tools can contribute to all stages of peacebuilding, in a status-neutral manner, as it has done on many occasions in the past. It seems to me that we need more determination, innovation, and affirmative action.

This could begin, as I have mentioned already, with an explicit acknowledgement of the risk unresolved conflicts pose to the broader Council of Europe system in the 4th Summit Declaration as a means of establishing the necessary basis for further action.

The minimum that can be expected is that CoE bodies and the relevant territorial states cooperate systematically to ensure monitoring mechanisms have full access to all relevant territories, to the maximum extent within their control. Far be it from undermining territorial states sovereignty, this would be the ultimate expression of territorial integrity, sovereignty and commitment to human rights standards.

Concern for human rights in areas of conflict should not be misrepresented as recognition of legitimacy under international law. This is both incorrect and has a chilling effect on the CoE. The rights-holder needs to be the central consideration.

The appointment of a Special Representative of the SG for Areas of Unresolved Conflict in Europe would allow an authoritative and legitimate direct reporting structure to the SG and allowing dialogue with the CM, with a specific standards-based mandate.

Drawing on the presumption of consent principle, the CM could consider a practice of examining the issue of access by monitoring mechanisms or routinely debating any limitations on access as cases occur.

The Steering Committee for Human Rights (the CDDH) and subordinate bodies should be tasked to examine issues associated to the applicability of the CoE treaties in conflict affected and contested territories.

Council of Europe bodies should also reflect on their own practice, and seek to somehow "conflict-proof" cooperation programmes in order to explore how they might be deployed more widely and in an appropriate, impartial or status-neutral manner. Some programmes are already fit-for-purpose, such as the CoE HELP Programme, the Platform for the Protection of Journalists and so on.

The SG could also consider the possibility to replicate the principle of engagement on the basis of "functional capacity" in other regions. There are convincing statutory and treaty-based reasons to do so.

This would potentially allow for "monitoring-like" processes – such as those which have proven so successful in Kosovo - to potentially be replicated elsewhere.

The Confidence Building Measures Programme should be the CoE's central avenue for cooperation on human rights issues. The Programme could be strengthened by appropriate endorsement of the CM, resourced and extended to explore opportunities in all conflict affected areas. Whether the Programme should come within the direct responsibility of the Secretary General or Deputy Secretary General, or situated as an operational wing of the Commissioner for Human Rights under Resolution 99 50, is also worth considering.

The Directorate of Programmes has developed extremely useful programming documents, including for the Southern Neighbourhood. Should a similar document be considered for these regions?

Member States could consider building on the Human Rights Trust Fund model to establish a dedicated resource for standards-based work with willing partners in these regions.

The PACE too might consider further enhancing its focus on the issue of conflict-affected areas.

More generally, there is an opportunity for the CoE, OSCE/ODIHR, UN/OHCHR and the EU to seek to coordinate more on these issues.

I have not referred to the Court, as I will leave this to subsequent speakers. However, clearly there are many open questions regarding its practice and reasoning in relation to these regions, and of course there is the issue of the effectiveness of execution of relevant judgments.

A more proactive, judicious approach is required by all actors to make engagement more coherent, predictable and, ultimately, effective.

All of this though, requires the political support of the member States, and their acceptance of the legitimate interest and role for the CoE in seeking to achieve democratic security, even in regions beyond their effective control.

Isolation from Europe's human rights system can leave local populations, administrations and civil society feeling alienated. Areas bereft of engagement are at risk of either turning inward and becoming fertile ground for ethno-nationalism, intolerance, discrimination or repression of minority communities. The lack of international scrutiny creates ripe conditions for corruption and organised crime to flourish. We also have seen recently how Donetsk and Luhansk have been deliberately misused as a pretext for the invasion of Ukraine.

Over time, operational grey zones have become a normalised exception in the Council of Europe region with their existence largely accepted as a matter of fact, rather than as problem of first principles which critically challenges the integrity of the ECHR.

In resolving conflicts, human rights must not be left sequentially to follow political solutions; human rights, democracy and the rule of law should form part of the very path to achieving those solutions. I am inviting you to consider whether a more judicious approach based on the normative will of the Secretary General could be pursued.

The CoE is not a fair-weather vessel, designed only for calm waters. It is the bastion of human rights in Europe, whose raison d'etre is to deal with the critical human rights challenges facing European society. If it is unable or unwilling to mobilise when it comes to such situations, it risks failing on its central object and purpose.

The words of former Prime Minister of France Edouard Herriot on occasion of the establishment of the Council of Europe in the aftermath of a devastating war that raged on our continent and cost many lives come to mind:

This is an event of cardinal historical importance. Your task is to succeed, through the efforts of all, in a field where so many half- hearted efforts have failed.

Thank you very much indeed / Go raibh mile maith agaibh.

Appendix VI – Establishing Jurisdiction, Dr. Stuart Wallace

I've been asked to speak about "establishing" jurisdiction in times of conflict and transition. So to begin it is probably helpful if I define what we mean by jurisdiction, because it can have many different meanings in different contexts. Article 1 of the European Convention demands that States secure the rights and freedoms in the Convention "to everyone within their jurisdiction". The term jurisdiction here refers to the jurisdiction of a contracting State, but what does that mean?

When we think of State jurisdiction, we often think of it in territorial terms - that state X is responsible for this bit of land while State Y is responsible for this other bit. This is mirrored, to an extent, in the eyes of the European Court of Human Rights who have observed that state jurisdiction is "primarily territorial". When we look at the activities of States, we should view territory as the medium, the space in which the State exercises its sovereignty and control. But that is not the limit of the State's capacity to act. It may be "primarily" territorial, but it is not exclusively so.

The world is a very different place compared to when the treaties of Westphalia were signed. The idea of sovereign states existing within their own territorial bubbles and sealed off from one another was perhaps a little fanciful then, but in an age of cyberspace, international organisations and inter-continental, hyper sonic missiles – the idea of territory serving as any kind of limitation to States seems absurd. And as the arms of the State begin to reach increasingly outside their territory, an important question arises over whether they leave their obligations stuck in the cold earth behind them?

Because against this primarily territorial, dare I say old-fashioned(?) view of jurisdiction, we must set the idea that human rights are supposed to be different. The Universal Declaration of Human Rights, as the title suggests, proclaims rights that are supposed to be universal, the "equal and inalienable rights of all members of the human family". They should not, in principle, only apply within a specific territory, they should transcend territorial limitations, applying to everyone, everywhere.

Yet a consequence of protecting rights through international treaties and in particular the regionalisation of human rights protections is that we end up with imbalances and disparities in human rights protection. If human rights protections were truly universal, the question of "establishing" jurisdiction would never arise. But in any system of human rights protection based on treaties, state consent and filtered through concepts like jurisdiction, the achievement of universal human rights protection will always be beyond our reach.

This is what makes this subject so troubling for many people because it runs so heavily against the fundamental ideas of human rights protection. As soon as we start to question whether jurisdiction can be "established" for the purposes of the European Convention, we implicitly accept that human rights protections are not universal – that there are the haves and have nots. That there is no such thing as universal human rights protection. We begin to draw arbitrary distinctions between people based on the lines of a map, distinctions which conflict deeply with the entire idea of "human" rights.

With these challenges in mind, let's dig a little deeper into this subject by exploring a few key questions. Firstly, before we can really discuss the issue of jurisdiction in times of conflict and transition, we should first consider whether the Convention should apply at all in times of conflict and transition?

Because there are many people who would claim that it shouldn't. Many people have argued that the law of armed conflict was specifically designed to cover conflicts and that it should take precedence in these situations. That treaties like the European Convention on Human Rights have no business applying to conflicts and transitions.

You may be aware, for example, that the UK is currently trying to pass legislation to prevent victims from bringing human rights cases arising from overseas military operations. Indeed the European Court of Human Rights has itself acknowledged that both the law of armed conflict and the Convention should be applied in the case of Hassan v UK and more recently, in the case of Georgia v Russia (II), determined that the Convention should not apply during "active hostilities" – whatever that means.

Of course, arguments that the law of armed conflict should take precedence overlook inadequacies in that body of law. Many violations of the law of armed conflict go unpunished and it is an area of law characterised by weak enforcement. When violations are addressed, the focus has been on punishing perpetrators with criminal sanctions, rather than compensating victims and addressing institutional failings that gave rise to violations. Indeed I have argued in my book that it is these very deficiencies in the law of armed conflict that have driven victims of conflict to approach Strasbourg in the first place. And you can clearly see the appeal. The Convention system offers obvious benefits over the law of armed conflict. The violations of human rights that arise during conflicts are usually similar in substance to violations of the law of armed conflict. The Convention system offers domestic and international forums in which to raise complaints. It offers clear procedures, a developed jurisprudence and, perhaps crucially, a means of securing compensation for victims and the prospect of institutional reform to prevent the same problems happening again.

Which brings us to the other side of the argument, where people claim that States must be bound by their human rights obligations when they engage in military operations. Giovanni Bonello, the great Maltese judge of the court once said

”that those who export war ought to see to the parallel export of guarantees against the atrocities of war”. (including the protection of the European Convention on Human Rights).

This speaks to the desire for universal human rights protection, with states required to protect the rights of all humans regardless of where the state’s actions are felt.

The counter-argument here is that the protection and enforcement of human rights laws, in the vast majority of cases, requires a functioning nation State, with institutions, like police and courts, at its disposal to guarantee human rights. These pre-conditions for effective human rights protections are rarely present during situations of conflict and are often weakened in times of transition, making the protection of many rights unworkable. Others argue that the application of the Convention to conflicts would compromise the operational effectiveness of troops in the field. I have argued previously that the application of the Convention to military operations in the past has compromised the unity and coherency of the Convention’s obligations such as it is.

The most important lesson we can learn from these arguments about whether the Convention should apply or not, is perhaps to recognise the impossible position it places the court in. It is where the rubber hits the road in human rights protection, where ideals give way to pragmatism, utopia to apology. The court is torn between a desire to fulfil its mandate by protecting vulnerable people in dire circumstances, while also trying to

- avoid imposing burdens on States which are impossible to fulfil
- to reconcile the interaction between the law of armed conflict and human rights.

The cases emerging from conflict and transition often draw the Court into ruling on extremely controversial and sensitive issues, which border on impossible to resolve in a court of law.

Can the European Court of Human Rights wave its magic wand and resolve the hundreds of issues in the Turkish Republic of Northern Cyprus?

Can it determine the status of Nagorno Karabakh or the Moldovan Republic of Transdniestria?

Probably not and perhaps it shouldn’t be expected to.

And yet we still turn to it again and again with these cases - And the fulcrum on which all these cases hinge is jurisdiction – it is the mediator, the dividing line between the haves and have nots. Which leads us to our next key question

how has the European Court of Human Rights handled this huge issue of establishing jurisdiction during times of conflict and transition?

Unfortunately – not very well. When preparing for this, I thought – if a State asked me for legal advice on whether they were exercising jurisdiction in a given case of conflict or transition, would I be able to give them a clear answer?

I realised I couldn't.

Despite researching this area of law for almost 13 years now, i do not have confidence in my ability to answer questions of jurisdiction, because the case law on jurisdiction has given rise to such a variety of different qualifying factors to consider that it is almost impossible to know what way the court will rule on a given case. And i started to go through them -

- Was the State exercising control over people or the territory where the incident took place?

- Does the State claim the territory where the incident occurred as its own?

- Is it occupied territory?

- Did the State exercise any public powers within the territory?

- Did it occur on the territory of another council of Europe state or a third country?

- Was it a single isolated incident of using force like a missile strike or a continuing situation like detention?

- Was it a situation of "active hostilities"?

- Was it inside a building controlled by the State or outside?

- Did it occur at a checkpoint manned by the State?

- Is the victim alleging a procedural or substantive violation of the Convention?

- Was the State serving under a mandate from an international organisation?

- Did it occur near the State's border?

I could go on, but you get the idea - Each of these factors would alter the court's assessment of whether jurisdiction existed or not. It is a deeply complex, meandering hodgepodge of cases from Bankovic, to Medvedyev, to Al-Skeini, to Pisari. A torrent of caveats, implicit contradictions and repeated attempts to clarify the concept of jurisdiction that have, in truth, only succeeded in further muddying the waters. And if I can't give a clear answer – having literally wrote a book on it– what hope does a military lawyer in the field have of providing clear advice to their commanders on the law? OR a soldier responding to situation in front of them?

Of course there are many things that we can do to smooth the process of applying the Convention to conflicts and transitions:

- We can encourage States to derogate from the obligations which they cannot uphold.

- We can explore how the law of armed conflict and human rights law can interact and complement each other to improve the circumstances of people during conflicts and transitions.

- We should be exploring every avenue of accountability for atrocities including the unjustifiable invasion of another council of europe state.

But if this brief run down of jurisdiction tells us anything, it is that we must start to recognise both the benefits and limitations of human rights courts and human rights law more generally. We must accept that while the Convention and the Court does have a role to play in these contexts, it cannot be a panacea. Above all, we need to explore the other avenues of conflict resolution and monitoring that we have available to us, which is exactly what I hope we can do today and I sincerely look forward to hearing all of your thoughts on this fascinating and complex subject.

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