Luzius Wildhaber

President of the European Court of Human Rights

Presidents, Secretary General, Excellencies, friends and colleagues, ladies and gentlemen, as always, it is a great pleasure for me to welcome you here today to our traditional ceremony to mark the opening of the judicial year. Many guests, including around fifty Presidents and other judges from Supreme and Constitutional Courts, are honouring us with their presence this afternoon. Among them, I should like to welcome in particular our distinguished guest of honour, Mrs Tülay Tuğcu, President of the Constitutional Court of Turkey, and the three rapporteurs for this afternoon's seminar, Mr Egidijus Kūris, President of the Lithuanian Constitutional Court, Mr Hans-Jürgen Papier, President of the Federal Constitutional Court of Germany, and Lord Justice Sedley, from the Court of Appeal of England and Wales, to whom I would like to express our sincere gratitude for their most stimulating contributions.

There are far too many distinguished guests here this evening to name them all, but just let me mention that we are happy to welcome the mayor of our host city, Mrs Fabienne Keller. On a personal note, I am delighted to say that my own family is represented by my daughter Anne.

I would also wish to greet two members of the Group of Wise Persons, Professor Rona Aybay and President Veniamin Yakovlev.

Since the entry into force in 1998 of Protocol No. 11, which established the fully judicial character of the European Convention machinery, the importance and relevance of the European Court of Human Rights has continually increased. As I put it in my address to the Council of Europe Summit in Warsaw in May 2005, it is more than just another European institution, it is a symbol. It harmonises law and justice and tries to secure, as impartially and as objectively as is humanly possible, fundamental rights, democracy and the rule of law so as to guarantee long-lasting international stability, peace and prosperity. It strives to establish the kind of good governance that Ambrogio Lorenzetti depicted in the town hall of Sienna some 665 years ago. The European Convention on Human Rights has brought into being the most effective international system of human rights protection ever developed. As the most successful attempt to implement the United Nations Universal Declaration of Human Rights of 1948 in a legally binding way, it is part of the heritage of international law; it constitutes a shining example in those parts of the world where human rights protection, whether national or international, remains an aspiration rather than a reality; it is both a symbol of, and a catalyst for, the victory of democracy over totalitarian government; it is the ultimate expression of the capacity, indeed the necessity, for democracy and the rule of law to transcend frontiers.

It is a privilege for us judges to be at this Court. We may have workload problems, but the avalanche of applications that reaches us simply reflects the importance the Court has acquired in the minds and hearts of all Europeans. We may be confronted by a lack of

understanding in some quarters as to what an independent court is, but since our arguments are principled, we trust that they will prevail. We may be criticised for certain judgments, but this is quite legitimate and indeed inevitable in the pluralistic democracy we describe in these very judgments and of which we ourselves are a part. All in all, our mission is a deeply enriching one.

Sometimes one feels like one is wandering in a blossoming garden, where one is constantly discovering new colours and new shades. And so we have the exciting, sometimes exhilarating and sometimes very demanding and challenging task of making human rights a reality across Europe. And since human rights come as a package, we have in essence the task of giving a tangible content to such elementary notions as the principles of democracy, the rule of law and minority rights through decisions we give on a daily basis which define the content of human rights in a modern, democratic society.

In the first years of the new Court, some critics expressed concern about what they called politically motivated double standards, reflected in a more flexible interpretation of the Convention in cases concerning the new member States. Remember that? There have been no double standards. The Court rightly showed understanding for the transitional period of consolidation of democracy in cases such as *Rekvényi v. Hungary*[1] or for the need to protect the essence of democracy against subversion in cases such as *Refah Partisi (the Welfare Party) and Others v. Turkey*[2]. However, these cases did no more than express the need to confirm and consolidate democracy and the rule of law and to prevent them being undermined.

The leitmotiv of the Court's case-law has been continuity in the framework of an evolutive jurisprudence. Thus, the dynamic interpretation of the Convention, initiated by our predecessor institutions, has been pursued by the Court, as can be seen in cases such as *Selmouni v. France*[3], *Matthews v. the United Kingdom*[4], *Lustig-Prean and Beckett v. the United Kingdom*[5], *Immobiliare Saffi v. Italy*[6], *Thlimmenos v. Greece*[7], *Rotaru v. Romania*[8], *Brumărescu v. Romania*[9], *Kudła v. Poland*[10], *Cyprus v. Turkey*[11], *Christine Goodwin v. the United Kingdom*[12], *Stafford v. the United Kingdom*[13], *Sovtransavto Holding v. Ukraine*[14], *Kalashnikov v. Russia*[15], *Öcalan v. Turkey*[16], *Maestri v. Italy*[17], *Assanidze v. Georgia*[18],

1 [GC], no. 25390/94, ECHR 1999-III.
2 [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, ECHR 2003-II.
3 [GC], no. 25803/94, ECHR 1999-V.
4 [GC], no. 24833/94, ECHR 1999-I.
5 Nos. 31417/96 and 32377/96, 27 September 1999.
6 [GC], no. 22774/93, ECHR 1999-V.
7 [GC], no. 34369/97, ECHR 2000-IV.
8 [GC], no. 28341/95, ECHR 2000-V.
9 [GC], no. 28342/95, ECHR 1999-VII.
10 [GC], no. 30210/96, ECHR 2000-XI.
11 [GC], no. 25781/94, ECHR 2001-IV.
12 [GC], no. 28957/95, ECHR 2002-VI.
13 [GC], no. 46295/99, ECHR 2002-IV.
14 No. 48553/99, ECHR 2002-VII.
15 No. 47095/99, ECHR 2002-VI.
16 [GC], no. 46221/99, to be reported in ECHR 2005-IV.
17 [GC], no. 39748/98, ECHR 2004-I.
18 [GC], no. 71503/01, ECHR 2004-II.

Broniowski v. Poland[19], *Nachova and Others v. Bulgaria*[20], *Hirst v. the United Kingdom* (no. 2)[21], or *Sørensen and Rasmussen v. Denmark*[22], and I could cite many more. Of course, our case-law also evolves through inadmissibility decisions and findings of no violation. As examples, I might mention, apart from the cases I have already cited of *Rekvényi and Refah Partisi (the Welfare Party) and Others, those of Gratzinger and Gratzingerova v. the Czech Republic*[23], *Streletz, Kessler and Krenz v. Germany*[24] *(the so-called "Mauerschützenfälle"), Al- Adsani v. the United Kingdom*[25], *Z and Others v. the United Kingdom*[26], *Banković and Others v. Belgium and Others*[27], *Şahin v. Turkey*[28], *or Jahn and Others v. Germany*[29], *as well as Von Maltzan and Others v. Germany*[30]. What I am saying is that our Court has continued to offer guidance to national courts on the development and evolution of human rights protection. Yet at the same time it has followed precedent, except where cogent reasons impelled it to adjust the interpretation of the Convention to changes in societal values or in present-day conditions. And it has followed precedent not only in respect of judgments concerning particular respondent States, but also in recognising that the same European minimal standards should be observed in all member States. It is indeed in the interests of legal certainty, of a coherent development of the Convention case-law, of equality before the law, of the rule of law and of the separation of powers for the Court to have in principle a flexible approach to the doctrine of precedent.

Obviously in describing our tasks in this way, I espouse a certain view of what the role of a European quasi- constitutional judge should be. Our Court is to a certain extent a law-making body. How could it be otherwise? How is it possible to give shape to Convention guarantees such as the prohibition of torture, equality of arms, freedom of expression or respect for private and family life, if – like Montesquieu – you see in the judge only the mouthpiece of the law? Such guarantees are programmatic formulations, open to the future, to be unfolded and developed in the light of changing conditions. My personal philosophy of the task of judges is that they should find their way gradually, in a way experimentally, inspired by the facts of the cases that reach a court. As you will realise, I do not believe in closed theoretical systems that are presented as sacrosanct on the basis of speculative hypotheses or ideologies. Such monocausal explanations ignore the complex and often contradictory manner in which societies and international relations (and incidentally also individual human beings) evolve. Conversely, it has to be acknowledged that in developing the law it is difficult to avoid value judgments, whether on domestic or on international law. This applies especially to human rights, which, anchored as they are in the concepts of constitutionalism, democracy and the rule of law, are value judgments *par excellence*.

Let me emphasise that I do not plead for a "*gouvernement des juges*". To give broad answers which are in no way called for by the facts of the case is to confuse a judicial mandate with that of the legislature or of the executive, and cannot and should not be the

19 [GC], no. 31443/96, ECHR 2004-V.
20 [GC], nos. 43577/98 and 43579/98, to be reported in ECHR 2005-VII.
21 [GC], no. 74025/01, to be reported in ECHR 2005-IX.
22 [GC], nos. 52562/99 and 52620/99, 11 January 2006.
23 (dec.) [GC], no. 39794/98, ECHR 2002-VII.
24 [GC], nos. 34044/96, 35532/97 and 44801/98, ECHR 2001-II.
25 [GC], no. 35763/97, ECHR 2001-XI.
26 [GC], no. 29392/95, ECHR 2001-V.
27 [GC], no. 52207/99, ECHR 2001-XII.
28 No. 31961/96, 25 September 2001.
29 [GC], nos. 46720/99, 72203/01 and 72552/01, to be reported in ECHR 2005-VI.
30 (dec.) [GC], nos. 71916/01, 71917/01 and 10260/02, to be reported in ECHR 2005-V.

role of courts. I agree with Jutta Limbach, the former President of the German Constitutional Court, who stated: "The tighter the Court ties the net of constitutional conditions, the more it restricts the potential of Parliament to act and the more it paralyses its political creativity."

The courts are not instruments of power. In the famous *Federalist Papers*, Alexander Hamilton, the great theoretician of the American Constitution, wrote that the government holds the sword, the legislature holds the money box and the only thing the courts hold for themselves is their independence. It is that independence which puts us in a position to watch over fairness and justice within governments.

The *Sachsenspiegel* – the oldest written record of customary law in Germany going back, in its earliest version, to the years 1220-35 – defined what and how a judge should be as follows: "Each judge should have four virtues … The first one is justice, the second one wisdom, the third one fortitude, the fourth one moderation." I would venture to suggest that this is still a helpful way of looking at what a judge is and does. Judges might also be inspired by the motto of the Puritans, "Do what is fair and do not fear anyone". I would like to add that whereas international human rights judges should indeed do what is fair and should fear no one, they should at the same time have regard for the context in which they live and for the aims they are serving. Human rights are our common responsibility. First and foremost they must be respected by the national parliaments, governments, courts and civil society at large. Only if they fail does our Court come in. The subsidiarity I describe and advocate here is more than pragmatic realism, it is also a way of paying respect to democratic processes (always provided they are indeed democratic), and I am firmly convinced that it is the best means of translating the "human rights law in law books" not only into a "human rights law in courts", but also into a "human rights law in action" and – hopefully – in reality in all of our member States.

I should now like to describe some of the more important cases the Court decided in 2005 which, once again, provide an illustration of what lies at the heart of our activities and reflection.

The judgment in *Leyla Şahin v. Turkey*[31] is one of that rare breed of pivotal judgments that can be said to develop a real theory of democratic society. The case concerned a Turkish student who was refused access to university for wearing the Islamic headscarf. On the merits, the Grand Chamber endorsed the earlier decisions of the Fourth Section and the Turkish Constitutional Court, holding that there had been no violation of her right to freedom of religion. After reiterating that pluralism and tolerance were among the fundamental principles of any democratic society, the Grand Chamber said that it also had to take into account the need for the public authorities to protect the rights and freedoms of others, to preserve public order and to secure civil peace and true religious pluralism, which was vital to the survival of democratic society. In this case, it found that, in a context in which the values of pluralism and respect for the rights of others and, in particular, equality before the law of men and women were being taught and applied in practice, it was understandable that the relevant authorities should wish to preserve the secular nature of the institutions concerned and so consider it contrary to such values to allow religious attire, including the Islamic headscarf, to be worn.

There have been new developments on Article 14, which prohibits discrimination in the enjoyment of the Convention rights. In *Nachova and Others*, cited above, the Grand Chamber was the first formation of the Court to apply this provision in conjunction with Article 2, which protects the right to life. The case originated in a military operation in which two young deserters of Roma origin were shot and killed by members of the military police

31 [GC], no. 44774/98, to be reported in ECHR 2005-XI.

who had received orders to track them down. The applicants, who were members of the victims' families, alleged among other things that prejudice and hostile attitudes of a racist nature had played a role in their deaths. On the merits, the Court found that it had not been established that the men had been killed as a result of racism. However, it went on to find that the domestic authorities should have examined, in the course of their investigation, whether racist motives had played a role in the men's deaths and, if so, they should have brought those responsible to justice.

In addition to reiterating certain basic principles governing Articles 5 and 6, the Grand Chamber's judgment in *Öcalan v. Turkey*[32] offered the Court an opportunity to examine two important issues. With regard to the death penalty, it found under Article 3 that imposing a death sentence after an unfair trial wrongfully subjected the person concerned to the fear that he or she would be executed. In circumstances where there existed a real possibility that the sentence would be enforced, the fear and uncertainty as to the future the death penalty generated meant that it infringed Article 3. As to the consequences of a violation of Article 6, the Court considered that where an individual, as in the instant case, had been convicted by a court that did not meet the Convention requirements of independence and impartiality, a retrial or a reopening of the case, if requested, represented in principle an appropriate way of redressing the violation. However, the specific remedial measures, if any, required of a respondent State in order to discharge its obligations had to depend on the particular circumstances of the individual case and be determined in the light of the terms of the Court's judgment in that case.

In *Mamatkulov and Askarov v. Turkey*[33], the Court reviewed its *Cruz Varas and Others v. Sweden*[34] jurisprudence in the light of developments in international law concerning interim measures. Referring to recent decisions of other international tribunals such as the International Court of Justice, the Inter-American Court of Human Rights and the Human Rights Committee of the United Nations, it said that henceforth "[a] failure by a Contracting State to comply with interim measures is to be regarded as preventing the Court from effectively examining the applicant's complaint and as hindering the effective exercise of his or her right and, accordingly, as a violation of Article 34 of the Convention".

Lastly, in *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*[35], the Court made an important and much-awaited contribution to clarification of the relationship between the Convention and Community law. It found that the protection of fundamental rights by Community law, unless manifestly deficient, could be considered "equivalent" to that of the Convention system. Consequently, there was a presumption that a State would not depart from the requirements of the Convention when it was merely implementing legal obligations flowing from its membership of the European Union.

The striking-out judgment in *Broniowski v. Poland*[36], marked a satisfactory conclusion to proceedings that had produced the first so-called "pilot" judgment which the Court had delivered on the merits in June 2004. It concerned the case of an applicant who had been unable to secure, through a lack of funds, the payment of a debt owed to him by the Polish State as compensation for expropriation following changes made to the international borders after the Second World War. In its judgment on the merits, the Court had found a violation of the right of property and reserved the question of just satisfaction while inviting the

32 [GC], no. 46221/99, to be reported in ECHR 2005-IV.

33 [GC], nos. 46827/99 and 46951/99, to be reported in ECHR 2005-I.

34 Judgment of 20 March 1991, Series A no. 201.

35 [GC], no. 45036/98, to be reported in ECHR 2005-VI.

36 (friendly settlement) [GC], no. 31443/96, to be reported in ECHR 2005-IX.

respondent State to take, in addition to individual measures in the applicant's case, general measures capable of remedying the situation of the 80,000 or so potential applicants in the same situation as Mr Broniowski. I should like to pay tribute to the Polish Government for complying with the judgment so expeditiously and for their constructive attitude throughout the negotiations that led to the conclusion of a friendly settlement that enabled the Court to strike the case out of the list.

I now come to the third part of my speech, devoted to the reform of the Convention system, as part of which we must consider measures that will make it possible for the Court to continue to fulfil its crucial and unique role in the coming years and decades, in the present and future European institutional framework.

Our Court, the so-called new Court of Protocol No. 11, began its activity in 1998 with a substantial backlog of some 7,000 applications, many of which were complicated cases requiring detailed judgments on the merits. As early as mid-2000, the Court drew attention to the danger that the workload would become uncontrollable. It organised a reflection day on possible reform avenues. As part of the follow-up to the Rome Conference marking the 50th anniversary of the Convention, the Ministers' Deputies set up an Evaluation Group to consider guarantees for "the continued effectiveness of the Court, with a view, if appropriate, to making proposals for reform".

The Group's recommendations, submitted in September 2001, as well as the continuing and apparently inexorable rise in the number of cases, led to the preparation of Protocol No. 14. The Court submitted a position paper in September 2003 and proposed a separate filtering system and a new pilot-judgment procedure for repetitive cases. Neither of the proposals was adopted, but the pilot- judgment procedure found support in Resolution Res(2004)3 of the Committee of Ministers and was successfully implemented by the Court in *Broniowski*.

Protocol No. 14 brings about four main procedural changes. The single-judge formation for clearly inadmissible applications; the extended competence of the three-judge Committees instead of seven-judge Chambers for applications which are "already the subject of well-established case-law of the Court"; the joint examination of admissibility and merits of applications; and the "significant disadvantage" as a new admissibility criterion. The Court urges all member States to ratify Protocol No. 14 forthwith. It will be ready to apply the Protocol as soon as it comes into force.

Two extensive audits by the Internal Auditor and by a British external auditor carried out in 2004 gave a full picture of a good many aspects of the Court's internal workings. Briefly put, the Internal Auditor stated, and the external auditor confirmed, that the Court would need, on top of the 530 persons it currently employs, another 660 persons in order to cope with all incoming applications, leaving aside the backlog.

In addition to the two audit reports, the former Lord Chief Justice of England and Wales, Lord Woolf of Barnes, carried out a management report on the Court. Let me quote from his report:

"The Court has been extensively audited and reviewed, but despite possible 'audit fatigue' we found everyone we met to be open, welcoming and helpful. We were struck throughout by the dedication of the staff, and their positive and pro-active attitude in the face of an ever- growing workload which would, in many situations, lead to low morale and apathy. The lawyers and judges of the Court are all extremely committed, and are constantly looking to innovate and improve, and try out new working methods. It is, in my view, to their credit that the Court continues to function in the face of its enormous and often overwhelming workload."

As we see it, the Court has been amply vindicated by the various reports. We now wish to concentrate on our real work, of which we have plenty. Last year, in 2005, some 45,500 applications were lodged with the Court, and at the end of 2005, 81,000 applications were pending before the Court, of which a still too high proportion constitutes backlog. We are the first to recognise how high these figures are. But the true miracle lies in the fact that the backlog figures are not much higher. It is only thanks to the constant, tireless efforts of the Court – of the judges and the Registry, to all of whom I pay a richly deserved tribute – to streamline, reconsider, improve and simplify existing procedures and working methods that we have survived as successfully as we have.

The Court's methods have continually evolved and it has constantly reinvented itself and its procedures. The most recent result has been that it delivered 1,105 judgments in 2005, which constitutes an increase of around 54% as compared to 2004.

We will of course continue to review our working methods and procedures. In doing so, we will be responding to the recommendations made by Lord Woolf, many of which are indeed already under way or envisaged. I note with satisfaction the Secretary General's willingness to implement quickly those recommendations for which his assistance will be required. I would also wish to pay tribute to the member States of the Council of Europe, and their representatives here in Strasbourg, for the financial effort they have made in approving the Court's budget for 2006. True, the Court would have preferred to have had a three-year programme adopted with an annual increase of 75 staff. But member States have accepted an increase of 46 staff members in difficult financial circumstances. We do appreciate this special effort, which will make it possible to implement one of Lord Woolf's recommendations, based on a proposal that was already on the table, that is, to set up a secretariat with the specific task of dealing with backlog cases.

The eleven Wise Persons, appointed in the aftermath of the Warsaw Summit of May 2005, have begun their work under the chairmanship of Gil Carlos Rodríguez Iglesias, the former long-time President of the Court of Justice of the European Communities. We await their proposals with optimism, given the high competence and the excellent qualifications of the members of the Group. We expect that full attention shall be given to their future views, and that their proposals will be implemented promptly.

Ladies and gentlemen, as you will have understood from what I said earlier, my time as President has been and continues to be an immensely rewarding one, in terms both of the colleagues that I have, and have had, the pleasure of working with and of what we feel we have accomplished over that period. However, I find it very hard to understand or accept the difficulties the Court has encountered in establishing its institutional position in accordance with the text and spirit of Protocol No. 11 as a fully independent judicial organ. These matters may also be addressed by the Wise Persons in the course of their work, as they go to the effectiveness of the Convention system, but I wish to mention them here. There are three principal problems.

1. The first point concerns the Court's budget. The fact that our budget is part of the budget of the Council of Europe is not objectionable as such. However, the Court's budget should be voted on the basis of a request and explanations that stem directly from the Court. Moreover, the Court should manage autonomously the budget that has been voted. The necessary arrangements for this could be implemented easily and rapidly, and it would also increase efficiency.

2. The second point concerns the appointment of the Court's staff. All other international courts appoint, promote and exercise disciplinary powers over their staff, either on the basis of a specific legal rule (for example, at the International Criminal Court) or on the basis of a specific agreement with the respective Secretary General (for example, at the United Nations for the ad hoc international criminal courts or at the Organisation of

American States for the Inter-American Court of Human Rights). The Court's Rules Committee has submitted proposals to guarantee such operational independence. Opposition to these proposals purports to rely on the Council of Europe's staff regulations, which are of course based on the Statute of the Council of Europe, which itself pre-dates the Convention. The staff regulations should have been amended long ago to bring them into conformity with the Convention, and certainly since Protocol No. 11 amended Article 25 of the Convention, which now states that "the Court shall have a registry, the functions and organisation of which shall be laid down in the rules of the Court". Let me just add that it would cost nothing to do this and that, in addition to the principle of judicial independence, sound management and plain common sense suggest that the body that has authority in practice over the Registry staff should also be empowered to appoint, promote and, if necessary, discipline them.

3. The third point concerns the total lack of a scheme of pensions and social security for judges. The approach adopted to this problem by the Council of Europe last year entirely failed to address the matter of principle that lies at the heart of this question. The present situation is incompatible with the notion of an independent judiciary under the rule of law, as well as being contrary to the Council of Europe's own Social Charter. It is high time for the Council of Europe to address the matter of principle at stake and assume the responsibilities flowing from it.

Ladies and gentlemen, let me finish by quoting the ambassador of one of the member States of the Council of Europe who recently paid me a courtesy visit. Somewhere in the course of our conversation, he said: "Mr President, this Court is the ultimate expression of justice." And he added: "It represents justice accessible to everyone." One could hardly better summarise the essence of the Court's role and its two basic components: justice and accessibility. And that is probably how we would like to describe our role: being accessible to help to realise law and justice in order to contribute to building a freer and more just society.

It is time now for me to turn to our guest of honour, Mrs Tuğcu, President of the Turkish Constitutional Court. Mrs Tuğcu, let me assure you that we are very pleased to have you here today. Your court has done a lot recently for human rights in your country. We are all keen to hear more about it. Mrs Tuğcu, you have the floor.