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EUROPEAN COURT OF HUMAN RIGHTS

Solemn hearing of the European Court of Human Rights
on the occasion of the opening of the judicial year
Friday 29 January 2010

Speech by Mr Jean-Paul Costa
President of the European Court of Human Rights

Ladies and gentlemen,

It gives me and my colleagues great pleasure to welcome you to the official opening of the Court's judicial year. Your presence here today encourages us to pursue our work and build on our achievements. I should also like to take this opportunity to wish you all a very happy and successful year in 2010.

Last year several of you were present here in this same room for a special solemn hearing marking the Court's fiftieth anniversary.

2010 is also a special year as we will be commemorating the sixtieth anniversary of the European Convention on Human Rights.

We are delighted to see here, today, so many representatives of various authorities, members of government, parliamentarians, senior officials of the Council of Europe, Ambassadors, and permanent representatives to the Council. I am also pleased to welcome the heads of national and international courts with which the Court cooperates closely. One of them, my friend Jean-Marc Sauvé, Vice-President of the French *Conseil d'Etat*, has kindly accepted the invitation to be our guest of honour, for which I am most grateful to him, and I have no doubt that what he has to say to us later on will be of the greatest interest. The seminar this afternoon was entitled "The Convention is yours". This theme reflects the important role of domestic courts, which are the first to apply and interpret the Convention. Their essential share of the responsibility for protecting fundamental rights is constantly increasing.

I should like to extend a particularly personal welcome to Mr Thorbjørn Jagland, the new Secretary General of the Council of Europe. It is the first time that he has attended the opening of the Court's judicial year. He took office only a few months ago, after serving his own country at high levels of responsibility. Our first contacts have been excellent and most promising for our future cooperation. Since his arrival Thorbjørn Jagland has taken some initiatives that I find very positive, in terms of reforming the Council and strengthening the Court. Last week the Committee of Ministers of the Council of Europe gave him their backing. I would like to thank him for his endeavours and encourage him to bring them to fruition. I will certainly give him my support. The Council of Europe and the Court, whose destinies have always been closely connected, must move forward together.

I also extend a warm welcome to Mr Jean-Marie Bockel, State Secretary for Justice to the Minister for Justice and Liberties, the *Garde des Sceaux*, representing the Government of France, the Court's host State.

Mr Bockel, you are well-acquainted with the Council of Europe as you have sat in its Parliamentary Assembly and are a leading elected representative in Alsace. I greatly appreciated the fact that one of your first official visits was to the Court, last July. Your support for our work will help us succeed.

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Celebrations are a time for looking back but they are also an opportunity to think about the long term. After fifty years our institution should be looking firmly to the future – its own future and that of human rights on our continent.

We had great expectations for 2009, but at the same time certain concerns. I believe that 2009 lived up to those expectations and we have been reassured and stimulated by a number of positive developments over the past year.

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I. Positive developments

One year ago the situation was not very healthy: for ten years the various attempts to reform the system had proved unsuccessful. Protocol 14 was still to enter into force and this was blocking the reform process, including the implementation of the recommendations by the Group of Wise Persons; the situation of the judges, having no pension scheme or social protection, was anomalous.

Solutions have since been found.

For Protocol 14, the first hurdle was crossed in Madrid on 12 May 2009, when the High Contracting Parties to the European Convention on Human Rights decided, by consensus, to implement on a provisional basis, in respect of those States that gave their consent, the procedural provisions of Protocol 14: the new single-judge formation and the new powers of the three-judge committees. To date, nineteen States have already accepted these new procedures, and since their introduction in the early summer of 2009 they have proved very promising in terms of efficiency.

The Court has already adopted, for example, over 2,000 decisions using the single-judge procedure; the first judgments by three-judge committees were delivered on 1 December.

Even more important was the vote by the State Duma of the Russian Federation on 15 January, then by the Federation Council the day before yesterday, in favour of the ratification of Protocol 14, thus clearing the way for all its provisions to be implemented in respect of the 47 member States. That was a decision that we had been hoping for, even though it was still far from certain only a few months ago. It must be commended and it bodes well for the future of our system, which is shortly to be addressed by the Ministerial Conference at Interlaken, about which I will say a few words later.

As to the judges' social-security situation – a question which, since the beginning of the "new" Court, had been raised by my predecessor Luzius Wildhaber, who is present today and whom I delighted to greet, and then by myself – a Resolution was adopted by the Committee of Ministers on 23 September 2009 approving a retirement pension and appropriate social protection arrangements for our judges. I would like to thank the Secretariat and the Committee of Ministers, through the Ambassadors present here today, for at last putting an end to an anomaly: we were the only court which did not have an institutional social protection scheme. The new provisions will

also contribute to the independence of the judges, this being indispensable for the independence of the Court itself.

Another major event – delayed by the vicissitudes of European construction – was the entry into force, on 1 December, of the Lisbon Treaty. The Treaty provides for the European Union's accession to the European Convention on Human Rights, which is made possible by Article 17 of Protocol 14. This accession will complete the foundations of a common European legal area of fundamental rights. The European Union Court of Justice in Luxembourg and our Court, in working together closely and faithfully, have largely contributed to this endeavour through their respective case-law. However, it is now time, as the drafters of the Lisbon Treaty and Protocol 14 intended, to ensure consolidation of the Europe of 27 and the Europe of 47 in matters of human rights, thus avoiding any discrepancy between the standards of protection and strengthening ties between the Council of Europe and the European Union. This clear expression of political will is certainly something to be welcomed and should allow us to finalise the arrangements for the accession without delay.

At the same time, the European Union's Charter of Fundamental Rights has become legally binding under the Lisbon Treaty. The Charter took the Convention as its basis, whilst complementing and modernising its guarantees; indeed, it cites the Convention as a specific source, in line with the original intention. Accession of the Union to the Convention, binding force of the Charter of Fundamental Rights: we are only just beginning to realise what these two innovations, which had for a long time been on the back burner, are going to bring for the "citizen's Europe" after half a century of European legal construction. For its part, the Court is prepared to take forward this new development and to play a full part in it from the outset. The European Union's accession to the Convention will also open up new horizons, not only for the Court but also for the Council of Europe as a whole.

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2009 was also positive for the Court's judicial activity: the total number of applications decided by decision or judgment rose significantly, by about 11%; the increase was as high as 27% for those decided by judgment (some 2,400).

Whilst there is no room for complacency, it can be said that this increase in productivity has not been at the expense of the quality or authority of our judgments, which may sometimes be criticised – as is inevitable – but which are always regarded as important. The Court should not relax its efforts, however, because it is confronted with an ever-increasing number of complaints concerning a variety of issues, some of them in new or very sensitive fields. There is even a temptation to use "Strasbourg" as an ultimate adjudicator whenever actors in the political, social or international arenas find themselves in a predicament or are unable to settle a dispute. In my opinion, the Court was probably not created to solve <u>all</u> problems and I leave you to reflect on the excessive recognition that is shown to us; even if this respect may not always be a welcome gift, it is a gift we cannot refuse, otherwise we would be accused of shirking responsibility or denying justice... And admittedly, to paraphrase Racine's *Britannicus*, an excess of honour is preferable to an affront.

Some gifts are, however, more welcome and honour us unreservedly. The Court is proud to have received an international award, for the first time as an institution: the Four Freedoms Award, under the auspices of the Roosevelt Stichting. I will be going to Middelburg in the Netherlands in May to receive this prestigious award, on behalf of the Court, in the presence of Her Majesty Queen Beatrix.

Another good sign is the increasing number of visitors to the Court – over 17,000 in 2009: judges from courts at all levels, including supreme and constitutional courts, together with prosecutors, lawyers, academics and students. It is gratifying to receive them because it is important to be open to Europe and the rest of the world. I am delighted that we continue to develop close working relations with the other regional human rights courts: in America, in Africa – and the one now in gestation in Asia. The fact of being regarded – as is increasingly the case – not as a model but as a source of inspiration, is something we can be proud of. Mr Roland Ries, Mayor of Strasbourg, who is present here today, also takes a particular interest, I believe, in the international outreach of the "Strasbourg Court" and he supports that cooperation. The City and the Court themselves enjoy close and cordial relations.

This year, mainly for reasons of time, I will not give an overview of last year's case-law. I should like, however, to emphasise that some very important judgments and decisions have been given on highly varied subjects: from police custody to the conservation of DNA profiles, from nationality-dependent pension rights to special detention regimes, from the disappearance of individuals in conflicts to questions of parliamentary immunity and eligibility to stand for election – to mention but a few examples.

I would also point out the importance – admittedly not exclusive – of the Grand Chamber, which examines serious questions affecting the interpretation or application of the Convention or serious issues of general importance. The Grand Chamber delivered eighteen judgments in 2009. They represent less than 1% of the Court's judgments but have a particularly strong impact.

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There were many positive developments in 2009. However, there are still some concerns and it would be disingenuous not to mention them as well.

II. Concerns

The first concern is the expanding gap between the number of applications arriving in the Registry and the number of decisions rendered. In 2009 over 57,000 new applications were registered. This considerable figure exceeds by about 22,000 the number – already unprecedented – of decisions and judgments delivered in the same year. In other words, every month the gap between what comes in and what goes out has increased by over 1,800 cases. As to the number of pending cases, the situation is no less alarming. At the end of 2009 almost 120,000 cases were pending. That figure had increased by 23% in one year and by 50% in two years. All the senior members of the judiciary here today will have a clear idea of what such a figure represents. To go into more detail, 55% of applications come from four countries, which represent – I should say *only* represent – 35% of the population of Council of Europe States. If the

applications against those four States were in proportion to the number of their inhabitants, our case-load would be reduced by 25,000. This illustrates the point that specific efforts would significantly help to reduce our backlog.

The total number of cases pending is – I must repeat – substantial. Even if we were to consider a "moratorium" and stop registering new applications, it would take many years, at the current rate, to finish off all the existing cases. The waiting time for cases to be decided is often unreasonable, within the meaning of Article 6 of the Convention, and the Court is thus hardly able to comply with the relevant provision of that Article. This is a criticism we often hear, especially from domestic courts. We are well aware of the issue and our aim is obviously to ensure that this situation does not last.

The Court's extremely high case-load has already had certain negative consequences.

Firstly, as the number of judges is limited under the Convention to one for each High Contracting Party, the "output" as such cannot be increased indefinitely. In spite of the valuable assistance of the Registry's staff, my colleagues cannot reasonably handle many more cases than they do already.

Secondly, an increase in the number of cases adjudicated carries, in spite of all our precautions, a greater risk of inconsistent case-law.

Lastly, this increase also makes the prompt execution of judgments more difficult. The workload of the department which assists the Committee of Ministers in supervising execution grows in proportion to the number of judgments, in a difficult budgetary context. That department is also verging on saturation.

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The Court now finds itself in a paradoxical situation. We have to deal with an extremely large number of applications that have no chance of succeeding – many of which (about 90 in every 100) are rejected after a full examination, but on the basis of brief reasoning that applicants are not always willing to accept. It is true that no blame would appear to attach to the respondent States in respect of these numerous cases, as the applications are declared inadmissible.

However, this does raise a question: how is it possible that tens of thousands of cases come before the Court each year when they are bound to fail? There is certainly a lack of information about the Convention and the rights that it guarantees, about the rules of procedure, and about the few basic formal requirements for bringing a case. Should we not be informing applicants better? If so, how? We have often encouraged lawyers to give better advice to their clients. But what happens when there is no lawyer? What role can the State play without being suspected of impeding the exercise of the right of individual petition? Practical solutions that are easy to implement can be found at national level to help reduce the excessive number of applications coming our way. Civil society can, of course, also play a useful role in this connection.

Citizens – potential parties – need to know, if they have a complaint concerning the protection of their rights under the Convention – and those rights alone –, that they

have six months to take their case to the Strasbourg Court after exhausting all domestic remedies, but that it is not a court of fourth instance and therefore cannot hold a retrial or quash a judgment.
Efforts have to be made by all, including NGOs, Bar Associations and academia, to point out continually that whilst everyone has a right of petition, it cannot meet all expectations or cover all activities and all aspects of life which we as human beings seek to secure. Such efforts should be organised in liaison with the Court itself.

We have to be creative because we are hampered by two major constraints: one is the need to preserve the right of individual petition, to which we are all attached and which remains the cornerstone of a collective protection mechanism applying to 800 million Europeans; the other is the difficulty of obtaining additional financial and human resources, at this time of economic crisis.

However, there is a second category of applications that should logically have been dealt with at national level. These are complaints that, by contrast, are bound to succeed, on the basis of well-established case-law that the Court has simply to apply, reiterating its previous findings.

The fact that repetitive cases have to be dealt with in Strasbourg shows that national systems are not well-adapted and that, quite often, judgments are not properly executed by States. It is for the States to uphold complaints by victims of manifest violations of the Convention. It is for the States to protect human rights and make reparation for the consequences of violations. The Court must ensure that States observe their engagements but cannot substitute itself for them. It cannot be a fourth-instance court, of course, but still less a court of first instance or a mere compensation board.

The commitment of States is precisely one of the key issues for the Interlaken Conference which will be taking place in just under three weeks – and this will be my last subject.

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III. The future: Interlaken and its follow-up

A year ago I expressed the wish that the States Parties to the Convention should engage in a collective reflection on the rights and freedoms that they sought to guarantee to their citizens, without reneging on the existing rights. I called for a major political conference that would articulate a new commitment and would be the best way of giving the Court a reaffirmed legitimacy and a clarified mandate. I announced that in due course I would be sending a memorandum to States: this was done on 3 July.

I should like to pay tribute to the authorities of Switzerland, the country that has chaired the Committee of Ministers since 18 November 2009, for their decision to organise a high-level conference on the future of the European Court of Human Rights in Interlaken on 18 and 19 February 2010. It is generous of them to do so and I feel that this reflects a clarity of political vision.

Switzerland's response to the appeal made last year is very timely for enhancing the Court's effectiveness in the short and long term. The Court clearly needs States to take decisions on the regulatory and structural reforms that have to be undertaken. All the stakeholders in the system thus have great hopes for the Interlaken Conference. The Court expects it to produce the clear roadmap that is essential.

Ladies and gentlemen, I have already spoken at some length. In any event, I am unable to go into the details of the conference and must certainly not prejudge the decisions that will be taken at Interlaken. However, a few guiding principles are worthy of mention.

We have to reaffirm the right of individual petition whilst attempting to regulate the increase in the number of new applications, which is seven times higher today than it was ten years ago and twice as high as it was six years ago. In addition to the beneficial effects of Protocol 14, filtering mechanisms will need to be set up in the Court to ensure efficient sorting and allow the Court to devote most of its energy to dealing with new problems and the most serious violations. We need to build on procedures that have already been introduced – pilot judgments, friendly settlements, unilateral declarations – so the Court can deal expediently and fairly with similar complaints from large numbers of applicants. We also need to forestall disputes and execute judgments more effectively. Perhaps we should also be developing the Court's advisory role. It is really important.

More fundamentally, Interlaken should help us go "back to basics", as they say in sport or political parlance. The Convention, to which a number of Protocols have been added, was conceived in the middle of last century as a multilateral treaty for the collective protection of rights. Its drafters never intended to shift responsibility, exclusively or even predominantly, to the Court. On the contrary, the Convention laid emphasis on the obligations of States: an obligation to secure Convention rights to everyone within their jurisdiction; a duty to provide effective remedies before domestic courts and in particular to set up judicial systems that are independent, impartial, transparent, fair and reasonably quick; an undertaking to comply with the Court's judgments, at least in those disputes to which the State in question is a party – and increasingly where judgments identify similar shortcomings in other States; and lastly, a need to respect the Court's institutional independence and contribute to its efficiency, especially by covering its operating costs. All these duties are implicitly – and even explicitly – assigned by the European Convention on Human Rights to the States Parties. It is only at that price, and under those conditions, that the Court – a creation of the States – can play the role that they themselves conferred on it: it must ensure the observance of their engagements, in other words monitor them and if necessary find against them, but not substitute itself for them.

Once again, ladies and gentlemen, the Convention is yours. But the rights and freedoms belong to everyone and it is primarily your task to ensure that all can enjoy them.

Basically, the Convention is more than just an ordinary treaty, it is a Covenant, and a particularly bold one when you think about it. It is a founding Covenant, because it created what the Court itself has had occasion to describe as a "constitutional public order for the protection of human rights". Interlaken must give us the opportunity for

a solemn confirmation – not to say "rebuilding" – of this Covenant, sixty years on. *Pacta sunt servanda* – Covenants should not only be observed, they may sometimes have to be confirmed.

However, even though the conference in three weeks' time and the decisions taken there will be important, we will not achieve everything all at once. Interlaken will provide the venue and time for raising new awareness and for setting a process in motion. There will be an after-Interlaken. But first we must be able to seize this great opportunity. I would reiterate my call for a large number of political leaders to represent their States at the conference. The issues at stake are important enough to merit – even to require – their attendance.

Ladies and gentlemen, before handing over to my colleague and friend, Jean-Marc Sauvé, allow me to finish as I began, on an optimistic note.

It is my belief that the European human rights protection system, as it was first set up and has been enhanced by fifty years of case-law, has all the necessary characteristics to guarantee it a promising future. As Saint-Exupéry said, "the future is always about putting the present in order". Is it impossible to put things in order? I do not believe so. And if it is possible, it is also necessary. So it will be done if we all work together to that end.

Thank you for your attention.