Dean Spielmann

President of the European Court of Human Rights

Opening Speech

Presidents of Constitutional Courts and Supreme Courts, Chairman of the Ministers' Deputies, President of the Parliamentary Assembly, my compatriot and friend Anne Brasseur – with my congratulations for your election, Secretary General of the Council of Europe, Excellencies, Ladies and Gentlemen,

I would first like to thank you, personally and on behalf of all my colleagues, for honouring us with your presence at this solemn hearing for the opening of the judicial year of the European Court of Human Rights. By responding to our invitation you have, once again, confirmed the strength of the connections between us. As there are still a few hours left before we reach the end of January, I will keep to the tradition and wish you an excellent and happy new year 2014.

Again following our tradition at these solemn hearings, I would now like to look back at some of the events which have marked the past year in the life of the Court.

As you will no doubt recall, last year I announced in this very place the fact that in 2012, for the first time in its history, the Court had managed to stem the rising backlog of new applications.

That positive trend, which I commended by saying that the Court was no longer a victim of its own success, was confirmed in 2013. The number of applications disposed of by a judgment amounted to 3,659, up from 1,678 the previous year. In total, the Court ruled in over 93,000 cases, representing a 6% increase in relation to 2012. At the end of 2012, there were 128,000 pending applications. That figure dropped to 99,900 at the end of 2013, representing a 22% decrease and, above all, pushing the backlog below the symbolic threshold of 100,000 applications.

But there are other reasons why, in my opinion, the year 2013 deserves to be celebrated: developments which should bring us even closer together in the future, and I am thinking here in particular about those of you who are representing a supreme or constitutional court. For in the past year the European Convention on Human Rights, an instrument that is now sixty years old, has been complemented by two new protocols.

It is the second one, Protocol No. 16, that I wish to emphasise, as its aim is to bring about a new dialogue between the highest domestic courts and our Court. I thus like to refer to it as the "Protocol of dialogue".

This instrument, which will enter into force after ten ratifications, will enable your highest courts, should they so wish, to refer requests to the Court for advisory opinions on questions of principle concerning the interpretation or application of the rights and freedoms defined by the Convention. Such requests will be made in the context of cases that are pending before the domestic court. Our Court's advisory opinion will provide reasoning and will not be binding. As an additional means of judicial dialogue between the Court and national courts, it will have the effect of enlightening the highest domestic courts but they will not be compelled to follow it. I am convinced that, when they do choose to rule in accordance with our opinion, their authority will be strengthened for the greater benefit of all. Cases may thus be resolved at national level rather than being brought before our Court, even thought that option will remain open to the parties after the final domestic decision. By

providing our Court and national supreme courts with a partnership-based tool, Protocol No. 16 will fulfil what Professors Ost and van de Kerchove referred to as the transition "from pyramid to network".

The mechanism will serve to institutionalise an already longstanding dialogue between our courts that is manifested not only on the occasion of this annual event, but also through the visits paid to Strasbourg by delegations from supreme courts or my own official visits to member States. It is a dialogue which is also, and most importantly, maintained through the interaction between our respective case-law.

For some years now the law of the Convention has indeed been a source of inspiration for both the courts and the legislatures of the member States. We have thus witnessed – and this is what subsidiarity means – a "*tendency to bring the protection of fundamental rights back to the States*", to use the expression of the Vice-President of the French *Conseil d'État*, Jean-Marc Sauvé, in a speech that he gave here at a previous solemn hearing. Such a tendency is most welcome, in my view, provided that it does not conflict with our case-law, by diminishing its importance. Our case-law inspires both judges and law-makers. It permeates and guides the law of the member States and thus gives rise to an almost permanent dialogue between Strasbourg and the domestic courts, which are continuously and quite naturally asking themselves, in a given dispute, what the European Court would decide if it were to hear the case. Above all – and this a recent, but most noteworthy, phenomenon – domestic courts do not hesitate to go beyond our case-law and the standards set by the Court. As to the legislatures, they follow suit when it comes to amending national legislation.

This is neither the place nor the time to enumerate all the supreme court decisions based on our case-law. It would not be an easy task as those decisions are so numerous, and occur on a daily basis, in our 47 member States. I would refer to just one example of a national decision which is part of a broader picture. It is the non-judicial decision delivered on 27 June 2013 by the plenary bench of the Supreme Court of the Russian Federation, reminding all Russian courts of their obligation to follow the Strasbourg case-law and observing that, to ensure the effective protection of human rights and freedoms, they had to take into account the judgments of our Court, including those against other States parties to the Convention. That decision thus enshrines the principle of the *erga omnes* value of our case-law.

As to Russian legislation on rights and freedoms, that decision emphasises that laws have to be implemented in the light of our Court's judgments. I believe that we can all appreciate the significance of that decision, especially as it comes from a country which remains the source of the highest number of applications.

By giving prominence to our own interpretation of the rights guaranteed by the Convention, the Supreme Court of the Russian Federation has proclaimed the importance of Strasbourg as guarantor of a common area of protection of rights and freedoms. We can be proud of this, especially as we know how far we have come. But that decision also imposes a heavy responsibility on our Court and gives rise to certain duties, in the same way that it creates duties for the national courts. Our system, which has become a source of inspiration for domestic courts, must strive to seek a consensus, while respecting cultural identities and traditions, without ever turning its back on the principles which have guided it from the outset. This is the dilemma constantly facing our Court.

To maintain the quality and authority of our case-law is for us a permanent goal, for that is what has made our human rights protection system successful. In 2013, despite the considerable efforts made to increase our productivity and the positive results obtained, we have indeed endeavoured to maintain the quality of our judgments.

It is never an easy task to select, from all the decisions over the past year, those that warrant particular consideration on the occasion of this solemn hearing. I have chosen just two.

The first is the case of *X. and Others v. Austria*, delivered on 19 February 2013, concerning the sensitive question of the legal status of families with parents of the same sex. The applicants were two women in a stable relationship and the son of one of those women. They complained about discriminatory treatment, on account of the fact that under Austrian law same-sex couples were

excluded from second-parent adoption whereas it was open to unmarried heterosexual couples. Our Court found against Austria for discrimination in the right to respect for family life. In our view the discrimination stemmed from the fact that the courts had no opportunity to examine in any meaningful manner whether the requested adoption was in the child's interest, given that such adoption was legally impossible under the Austrian Civil Code. It was not the actual prohibition of adoption that led to our finding of a violation, but the discriminatory conditions of its availability to unmarried different-sex couples. It was thus through the prism of the prohibition of discrimination that our Court intervened. For us it was clear – and I quote – that "*same-sex couples could in principle be as suitable or unsuitable for adoption, including second-parent adoption, as different-sex couples*" and, even though there was no right to adopt a child, such discrimination was incompatible with the Convention.

Going beyond the actual significance of the judgment in terms of the Court's position on this sensitive issue, attention should also be drawn to its execution by the Austrian authorities for the good example that they have set. On the very day our judgment was delivered, the Austrian Ministry of Justice announced that a bill would be tabled before the summer in order to bring Austrian legislation into conformity with our case-law, adding that the necessary legislative amendments would be adopted before the end of the parliamentary term. Thus, on 1 August 2013, a law entered into force amending the provisions of the Civil Code to make second-parent adoption available to same-sex couples.

The second case I wish to mention was equally delicate, albeit in a very different domain: the *Del Rio Prada* judgment, delivered on 21 October 2013. That case concerned the postponement of the date of final release of a person convicted of terrorism. This postponement was the result of new case-law of the Spanish Supreme Court – referred to as the "Parot doctrine" – which had been given effect after the applicant's conviction.

The applicant had been given numerous prison sentences for various offences linked to terrorist attacks. The sentences totalled over 3,000 years but, under the Criminal Code in force at the time when the offences were committed, the applicant was to serve a maximum term of thirty years. She had also been granted almost nine years' remission for work done in prison and was due to be released in 2008.

In the meantime, the Spanish Supreme Court had departed from its previous case-law and had extended her imprisonment until 2017.

Before our Court, the applicant complained first that what she considered to be the retroactive application of a departure from case-law by the Supreme Court had extended her detention by almost nine years, in violation of the "no punishment without law" principle in Article 7 of the Convention. Secondly, under Article 5 § 1, she alleged that she had been kept in detention in breach of the requirement of "lawfulness" and without "a procedure prescribed by law".

Our Court took the view that the application of the "Parot doctrine" to the applicant's situation had deprived of any useful effect the remissions of sentence to which she was meant to be entitled. It had not been foreseeable, at the time of her conviction, that the Supreme Court would depart from its case-law in February 2006. The application of the new case-law to the applicant's case had postponed her release by about nine years. She had thus had to serve a sentence of a longer term than that which should have been imposed under the Spanish legal system as it stood at the time of her conviction, taking into account the remissions granted to her in accordance with the law. As regards both the legality of the sentence and the lawfulness of the detention, the Court thus found a violation of the Convention. It also held that it was incumbent on the Spanish Government to ensure that the applicant was released at the earliest possible date.

On the very day that the judgment was delivered, the Spanish Government drew attention to the binding nature of the Court's judgments. The next day, the Spanish judicial authorities decided to release the applicant, followed by other prisoners in the same situation. It is no doubt rare for one of our judgments to be executed so quickly.

Those two cases, although very different, contain similarities which have led me to choose them from among all those of 2013 that would also have been worthy of mention this evening.

In legal terms, the two cases raise new, and even quite novel, questions. They illustrate the huge variety of subjects that our Court is called upon to examine. They have also been followed with particular attention in the countries concerned, both by the national authorities and by the media. Our Court – and this brings me back to the point I made just now – was aware of the responsibility that it had to assume. But that responsibility goes hand in hand with its duty to ensure compliance with the European Convention on Human Rights throughout Europe. The role of a Court such as ours, unless it were to depart from its intended mission, is not to be popular. Sometimes it is even necessary to cause displeasure. In the Europe of the Council of Europe, of which you are all representatives this evening, the rule of law must prevail and any discrimination must be excluded. Those two cases must serve as examples. It is noteworthy that those two judgments, in spite of their highly sensitive nature and any misunderstanding to which they may have given rise in public opinion, were executed so quickly. Is this not an illustration of that dialogue with States and with the highest national courts which goes to the heart of my message this evening? There is no question of pointing the finger at States which are not so rapid in their execution of our judgments. I would simply like to remind them that this system belongs to them; that it is our common system and that if we wish to preserve this common area of freedom, then the execution of judgments is an absolute necessity.

When looking back at the year 2013 to see what has been achieved in terms of dialogue, we should not forget our on-going dialogue with the European Union. On the one hand, it continues to be seen on the occasion of our various, and always constructive, meetings with the Court of Justice of the European Union, and for the first time in 2013 with the General Court, from which we were pleased to receive a delegation. But above all, we expect this dialogue to develop significantly with the European Union's accession to the European Convention on Human Rights. One year ago, in this very forum, I referred to this project with its aim of completing the European legal area of fundamental rights. I mentioned the technical difficulties which had arisen in the negotiations, stressing that they should not serve as a pretext for calling this noble endeavour into question.

I am therefore delighted that the agreement on the accession was finalised on 5 April 2013. Admittedly, before entering into force, a certain number of hurdles will still have to be overcome. The draft agreement nevertheless represents a milestone on the road to the European Union's accession to our Convention. It will one day make it possible for the acts of European Union institutions to be subjected to the same external scrutiny as that which is already exercised by the European Court of Human Rights in relation to the acts of State institutions. By acceding to the Convention and thus allowing external judicial review of its action, the European Union will be showing that, like its member States, it accepts that its acts should be bound by the same requirements of respect for fundamental rights as those which apply to the acts of each European State.

The accession cannot go ahead without a certain number of adjustments to the Convention in order to take account of the specific non-State nature of the European Union. However, it is apparent from the draft Accession Agreement that the negotiators have succeeded in maintaining the delicate balance between the specificities of the Convention and those of European Union law. Among the necessary adjustments there are two of particular importance: the creation of the so-called "co-respondent" mechanism and the possibility of the "prior involvement" of the Court of Justice of the European Union. A new dialogue with the European Union institutions will evolve once the accession has taken place. One of the next steps in the process is the opinion to be given by the Court of Justice on the subject of the accession. I look forward with optimism to reading that opinion.

At this point of my remarks I cannot refrain from expressing my genuine anxiety and burning concern in respect of the tragic events that are unfolding before our eyes in one of our Member States.

Let me express, in the most solemn manner possible, my sincere hope that peace will be restored to Ukraine and that it will be based on the principles of democracy, human rights and the rule of law to which all Council of Europe nations have committed themselves.

As I was saying a moment ago, it was virtually impossible to select any particular Constitutional Court or Supreme Court decision referring to our case-law, as you have delivered so many.

Allow me, however, as I draw to a close, to cite one example in honour of our guest this evening. In 2009 the Federal Constitutional Court in Karlsruhe was called upon to examine the constitutionality of a new law on "Lebenspartnerschaft" (civil union of same-sex couples). That legislation did not provide for a survivor's pension. The Constitutional Court thus found it incompatible with the German Constitution, referring to our *Karner v. Austria* judgment, on the grounds of unjustified discrimination based on sexual orientation.

President Voßkuhle,

That is one example of the dialogue that has been maintained between your prestigious Court and our own for several years now. We often deal with similar, or even identical, subject matter. Just last year, it was rather a coincidence that on the very day we were delivering our *X v. Austria* judgment, your Court was ruling on an almost identical question. I should also mention the well-known *Von Hannover* judgments on the protection of the right to one's image, emanating both from our Court and from yours. Initially we found a violation of the Convention because, in our view, the public did not have a legitimate interest in knowing where public figures were or how they behaved generally in their private lives. We considered that the German courts had not struck a fair balance between the competing interests. You subsequently modified your case-law in order to bring it into line with our own and, on two occasions in judgments concerning the same applicant, we then endorsed the position of the German courts.

If you would allow me to draw a comparison, I sometimes see our courts as the soloists in the Concerto for Two Violins in D minor of Johann Sebastian Bach. In that Concerto the two soloists are intertwined, sometimes alternating the melodic line, carrying different tunes and rhythms, yet ultimately – and this is the important point – joining together and combining to produce a particularly harmonious piece. What a splendid example of musical dialogue!

President Voßkuhle, of the Federal Constitutional Court of Germany,

Your presence here among us this evening is a great honour and indeed confirms the harmonious relationship that exists between our courts.

We would now invite you to take the floor.