CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

COUR EUROPÉENNE DES DROITS DE L'HOMME
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, 19 January 2007

Speech by Jean-Paul Costa
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[#1908995]

Mr Chairman of the Committee of Ministers,
Minister,
Presidents,
Excellencies,
Monsieur le Préfet,
Secretary General,
Deputy Secretary General,
Dear colleagues,
Ladies and gentlemen,

I wish to thank you all, on behalf of the Court, for attending in such numbers today this official opening of the judicial year at the European Court of Human Rights. The presence of such a large audience, and the high offices held by its individual members, honour my colleagues and myself. They reflect the respect and esteem in which our Court is held, throughout Europe and even beyond our continent, and they encourage and reassure us at a delicate moment in its already fifty year-old history.

Today's ceremony has special significance, first of all because it coincides with the departure of my predecessor, President Luzius Wildhaber, who reached at midnight last night the age-limit fixed for judges by the Convention which governs our institution.

To begin with, and I perform this duty with pleasure and sincerity, I wish to pay the homage he deserves to Luzius Wildhaber. He was elected judge in respect of Switzerland in 1991 and became the Court's president in 1998, thanks to the confidence placed in him by his peers, as expressed by very comfortable majorities then and on two subsequent occasions. Luzius Wildhaber's accession to the presidency coincided with the entry into force of Protocol No. 11, which effected a thorough-going reform of our system. During his successive terms of office it has undergone an increase which some have described as exponential. The number of new applications has been multiplied by six in eight years, and is now running at around 40,000 per year. Thanks to the untiring efforts of the judges and Registry staff, and also to the additional resources provided to the Court by the member States of the Council of Europe, the Court has been able to cope, even though the current number of pending cases – nearly 90,000 – has reached a level beyond which growth threatens to become unmanageable. I will return to that point.

Luzius Wildhaber has presided over and directed this Court with competence and wisdom, with firmness and humanity, with brio and efficiency. In particular, he has done everything he could, personally, and with no little success to make our institution better known among all national judicial systems and all State authorities, including those in the countries which have entered the European human rights protection system most recently. By his action he has considerably increased awareness throughout Europe of exactly what is at stake behind such protection. For that, and for many other aspects of his activity during his time in Strasbourg I wish to

thank him and give him the credit which is his due. Luzius Wildhaber will leave behind him in history the memory not only of an eminent judge and jurist but also of a great president. I know, or rather am beginning to appreciate even more, that to succeed him is an honour and will not be an easy task.

Ladies and gentlemen, according to our tradition, this ceremony provides an opportunity to retrace the activity of the Court over the previous year. I will do that fairly briefly, in order to devote most of my remarks to the prospects for the future.

I know that statistics can be tedious. Therefore, I shall limit myself to giving you some figures in order to provide a picture of the considerable judicial activity carried out during the year 2006. More than 39,000 applications were registered or, to be more precise, were allocated to a decision body, in other words required a judicial decision. Nearly 30,000 were finally disposed of by a decision or a judgment. The difference shows an unfortunate "deficit", amounting to almost 10,000 applications. The number of pending cases, at the beginning of 2007, is practically 90,000, over 65,000 of which have been allocated to a decision body. A comparison with the year 2005 shows a growth in the overall number of new applications of 11%. The number of cases pending at the end of the year increased by 12%. Those figures are alarming, the more so because there is a persistent pattern of growth over the years, even if some progress has been made in reducing the deficit.

Faced with such a situation, the Court, of course, has not remained inactive. In 2006 the number of cases terminated rose by 4%, but the number of judgments delivered increased by around 40%, reflecting the Court's policy of concentrating more resources on meritorious cases. In the last two years, the total number of terminated applications has risen by 40%, whilst, obviously, the financial and human resources provided to the Court, even if growing, have not been increased in anything like the same proportion.

In reality, our Court endeavours to increase continuously its efficiency, by rationalising and modernising its functioning. The Registry has carried out a restructuring of the divisions, and has started the implementation of some of the steps recommended by Lord Woolf of Barnes in his report made at the end of his management study of the Court in 2005. A specialised unit has been set up within the Registry in order to deal with the backlog, which consists of the oldest applications. Finally, on 1st April 2006 we established a fifth Section of the Court, the creation of which has reduced the number of Judges in each Section, and the number of Judges who are sitting as substitutes in each case, and has naturally increased the number of cases dealt with by every Judge. I should add that very significant efforts have been made by Judges and the staff in order to ensure that the Court is ready to operate within the context of Protocol 14 as soon as it enters into force. Those efforts have targeted the working methods and the Rules of Court. According to a provisional assessment, without any increase in resources, the application of Protocol 14 will enable the Court to increase its productivity by at least 25%. This already shows that, although it cannot suffice by itself, the Protocol is indispensable to us. I will come back to it later.

Activity of such intensity as regards the quantitative aspects of our work has not, I believe, diminished the quality of the judgments given by the Court. Even if, as with any court, some decisions may be criticised (and of course our judgments are not all unanimous), it seems to me that observers all concur that the quality and the impact of the rulings given in Strasbourg deserve respect. Some of our judgments, again in 2006, have settled new issues or concerned a wide range of member States.

I am going to mention just a few examples of our recent case-law.

The case of *Sorensen and Rasmussen v. Denmark* gave the Court the opportunity of considering social rights. The Court held that clauses in employment contracts providing for a trade union monopoly, in other words clauses providing for a "closed shop", were in breach of the negative freedom of association, specifically applied to trade unions, violating Article 11 of the Convention.

In the case of *Giniewski v. France*, the Court found a violation of freedom of expression, insofar as the author of an article in a daily newspaper had been convicted of defamation, even if the sanctions were very moderate. The article expressed the opinion that the doctrine of the Catholic Church on Judaism might have led to the contemporary anti-Semitism, thus indirectly resulting in the concentration camps.

In its judgment in *Sejdovic v. Italy*, the Court found to be contrary to the principles of a fair trial the fact that an accused person had been judged *in absentia*, although it had not been shown that he had been attempting to evade justice or had unequivocally waived his right to defend himself in person, no possibility having been offered to him to have a court decide again on the criminal charge against him.

In *Stec v. United Kingdom*, after having considered that the creation of social allowances, even without contributions by the beneficiary, conferred a patrimonial interest falling within the ambit of Article 1 of Protocol n° 1, concerning protection of property, the Court found that the advantage given to women by the British legislation was not contrary to the prohibition of discrimination under Article 14, taken in conjunction with Protocol 1. In reaching that conclusion, the Court made reference in particular to a ruling by the European Court of Justice, deeming it necessary to give "a specific weight to the highly persuasive value of the conclusion reached by the ECJ".

Like the earlier case of *Broniowski*, the case of *Hutten-Czapska v. Poland* gave the Court the occasion to deliver a pilot-judgment. This procedure, which in my opinion is hopeful for the future, consists of finding the existence of a systemic violation (in the instant case of Article 1 of Protocol 1), then of holding that the State, while retaining the choice of the means, must secure in its legal order a mechanism which will redress the systemic violation. In *Hutten-Czapska*, the problem concerned the rent-control system, and the operative paragraphs of the Court's judgment held that Poland had to maintain a fair balance between the interests of landlords and the general interests of the community, in accordance with the standards of protection of property rights under the Convention.

Finally, in *Jalloh v. Germany*, the Court – very divided in its votes – gave a judgment whereby it held that Article 3 had been breached. A public prosecutor had ordered that emetics be administered by a doctor to the applicant, suspected of having

swallowed a tiny bag containing drugs. The effect of the medicine was that the applicant vomited, regurgitated the bag, and was eventually convicted of drug-trafficking. The Court found that the applicant had been subjected to inhuman and degrading treatment contrary to Article 3.

Those examples, among many others which I could have mentioned, show that the huge quantity of cases that the Court must cope with does not prevent it from giving very important and carefully drafted rulings. Despite the absence of an *erga omnes* effect of its judgments, they influence judges and lawmakers in all States parties; they do contribute to harmonizing European standards in the field of rights and freedom. In this respect, I would like to pay tribute to domestic courts, which apply more and more readily – and sometimes even anticipate – the Strasbourg case-law, thus making judicial cooperation a reality.

I now turn to what I regard as the essential question: What role does our Court play? What are its future prospects?

To my mind the European Court of Human Rights has a crucial place, through the fact that it exists, and thanks to its case-law, in the slow, gradual improvement in human rights protection. For me, the most important Convention Article is the first: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention". The High Contracting Parties are the 46 member States; but I hope that in the near future the European Union will also become a High Contracting Party. The fact that progress has broken down on the Treaty establishing a Constitution for Europe is a regrettable historical accident, but as a firm believer in the European ideal I am well aware that progress in European construction sometimes stalls or stands still. But as Galileo said about our planet, *"eppur, si muove"* – "yet it does turn", and so Europe keeps turning and always ends up moving forwards, and not only judicial Europe.

It is primarily for the member States of the Council of Europe to secure respect for the rights and freedoms of persons, whether nationals or aliens, within their jurisdiction for the purposes of Article 1, in the phrase which I have just cited. Might I be accused of optimism, of fastidiously ignoring brutal reality perhaps, if I say that on the whole, since the signature of the Convention in 1950, this obligation to respect human rights has been discharged more and more satisfactorily? Dictatorships have disappeared and given way to democratic regimes in the south of our continent; the Berlin Wall has fallen and the Iron Curtain has been lifted, more than fifteen years ago already. Despite serious conflicts such as the war in the former Yugoslavia, the Kurdish and Chechen problems, despite terrorism, which as long ago as 1978 the Court described as a serious violation of human rights against which States have a duty to contend, in the long term and on the whole barbarism is in retreat, democracy is moving forwards, human rights are flourishing.

This process is largely due to the States themselves and their peoples. But, without forgetting the contribution of public opinion, which is more and more international, non-governmental organisations, the press and Bar associations, how can the essential contribution of our Court be denied? The Court did not spring into

existence spontaneously; it was called into being by the Convention (and therefore by the States), whose Article 19 is the echo or mirror of Article 1 – "To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention …, there shall be set up a European Court of Human Rights".

Its judgments, whether dismissing an application or finding against a State, are authoritative and trace the demarcation line between what is tolerable and what is not. We – and my colleagues and I are proud of this – are the institution which has the duty and the power to cry "stop!", and we do so by virtue of the solemn undertaking freely given by the States. I find it admirable incidentally that they have given such an undertaking, inasmuch as in doing so they are accepting that justice must take precedence over State interest.

Pascal said: "justice without force is powerless: force without justice is tyrannical", but he went on to say: "justice and force must therefore be brought together; and to that end let what is just be strong or let what is strong be just". It seems to me that the text signed in Rome on 3 November 1950, the Convention, constitutes a wager which I hesitate to call Pascalian, and it is this: to ensure, by abandoning sovereignty, that European justice in the field of human rights is strong, which means respected.

But before being strong, justice still has to be just. And I sometimes hear it said that our Court is not just, that its judgments are not legal but political. I myself have heard this accusation on the occasion of various official visits, and experience has taught me that when one explains the true state of affairs calmly the accusation tends to fade away – the accusers desist. I vigorously maintain my innocence, and I believe all my colleagues would also plead not guilty. In a world that is itself politicised as much as it is mediatised, the men and women who make up our Court give justice through their arduous but very honest labours, justice which is based on Law, which is not an exact science, and on fairness, which is an essentially subjective concept. I deny that they give political judgments, or that they practise I know not what double or triple standards, because that is quite simply untrue. Our judgments, as I have said, are open to criticism. We may make mistakes, but we do not give way to any kind of politicisation.

Lastly, I turn to the future of the Strasbourg Court. I note first of all that it is now universally known and respected, even far from the shores of Europe, "old Europe". But its future depends on its effectiveness. If it lacked effectiveness, it would lose its credibility, its moral and legal authority and ultimately its raison d'être. That effectiveness certainly depends on us, who are doing everything that ingeniousness and energy can accomplish to find pragmatic ways of cutting down our lengthening list. But it also depends on you. It depends on national courts and authorities, which are primarily responsible for application of the European Convention on Human Rights. The more remedies are applied at national level the less the flood of applications to Strasbourg will be justified, not to mention the indispensable prevention of violations by amending legislation and changing practices.

Let us not be under any illusions: the spring will not run dry anytime soon. But between a spring running dry and a tsunami there is plenty of room for the principle of subsidiarity to make effective progress.

The future of our Court also depends on you, the representatives of the States. I do not intend to speak here and now – for this is neither the time nor the place – of the budgetary and human resources which are indispensable for the Council of Europe and the Court alike, which are both, together – though I am sure there is no need to remind you of this – pillars of greater Europe, and of a still greater Europe. But I am thinking of Protocol No. 14, and in the longer term of the follow-up to the Wise Persons' report.

It was the member States who decided that Protocol No. 14 was needed. It followed on from the work of the Evaluation Group set up by the Rome Interministerial Conference as far back as November 2000, whose report was produced in September 2001. These initiatives formed part of a process that President Wildhaber called a "reform of the reform", because it rapidly became clear that Protocol No. 11 would no longer be sufficient to ensure the effectiveness of the system.

Protocol No. 14 was drawn up as a result of intergovernmental work. It was finished and opened for signature as long ago as 13 May 2004. Since then the 46 member States have signed it and 45 have ratified it. Only one name is still missing, and that is all the more surprising because the highest authorities of the State in question have declared themselves in favour of our Court and its reinforcement. I will not repeat Cato's phrase "*delenda est Carthago*", as it is not a question of destroying but of consolidating and building, but I will repeat – and go on repeating – "Protocol No. 14 must be brought into force". And the sooner the better. I firmly believe that this categorical imperative, as Kant might have called it, is also a decision based on practical reason, to mention another concept he discussed. And so I hope – I am sure – that reason will prevail.

Rapid ratification would be all the more logical because at the Third Council of Europe Summit, in May 2005 in Warsaw, the Heads of State and Government decided to set up a Committee of Wise Persons, charged with making proposals on the medium and long-term future of the Court and the European human rights protection system. The Committee's terms of reference even required the Wise Persons to examine in their report the initial effects of the application of Protocol No. 14! But their report has already been produced, and was officially submitted, two days ago, by its chairman Mr Gil Carlos Rodriguez-Iglesias, former President of the Court of Justice of the European Communities, to the Committee of Ministers of the Council of Europe, and the Ministers' Deputies unanimously praised its quality and breadth. I myself thank the eleven Wise Persons for their work and their proposals, on which our Court will give its opinion. But at the risk of repeating myself I would point out that the Wise Persons' report presupposes Protocol No. 14; it is in no way a substitute for Protocol No. 14, still less a "Plan B" (if I may use such a term).

As you can see then, the Court is confronted with difficult problems, particularly in terms of managing its timetable, which are creating regrettable uncertainty, including uncertainty about the personal situation of my colleagues.

That being said, over and above these technical difficulties, which are soluble, especially if Protocol No. 14 quickly enters into force, it is the future of the system which is at stake. This system is based on a unique mechanism, namely direct access for 800 million people to an international court charged with ensuring as a last resort the protection of their most fundamental rights.

I personally am in favour of the right of individual petition, for which a hard battle had to be fought, and am therefore in favour of retaining it.

But let us not shrink from the truth. I have laid too much emphasis in the past on the principle of reality, looking beyond appearances, not to realise now that, without far-reaching reforms – some would say radical reforms – the flood of applications reaching a drowning court threatens to kill off individual petition *de facto*. In that case, individual petition will become a kind of catoblepas, the animal which, according to ancient fable, used to feed on its own flesh!

In 2006 the Court gave more than 1,500 judgments on the merits, which is almost twice as many in a single year as all the judgments delivered by the former Court in nearly forty years, from 1960 to 1998! But that high number must not hide from view the fact that nearly 95% of adjudications in 2006 took the form not of judgments on the merits but of decisions in which the Court ruled applications inadmissible or struck them out of its list. Does it redound to the glory of a court which has high ambitions and heavy responsibilities to dismiss so many applications as being entirely without foundation? Does ruling on the merits of only one out of every twenty complaints constitute effective defence of human rights? As things stand at present, our Court cannot do otherwise. Let us all strive to make sure that in the future things will be different. And let us start by giving the instruments we need the requisite legal force for them to be able to produce their positive effects.

Ladies and gentlemen, I know that I have spoken at some length. But since January is the month for good wishes, allow me, before I conclude, first to present to all of you on behalf of all my colleagues and myself my best wishes for 2007, and second to express the fervent hope that the greatest system for the protection of rights and freedoms which exists in the world can find a new lease of life and emerge from its present difficulties – with your assistance, I repeat –composed and strengthened.

One of the slogans in May 1968 in France was: “Be realistic, demand the impossible!” It is, on the contrary, because I believe it is possible that I consider my wish to be realistic.

Thank you for your attention.